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The IBA Global Employment Institute

The On-Demand Economy



Prepared by

The International Bar Association Global Employment Institute

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Contents

| | |
|--|----|
| Foreword | 5 |
| Introduction | 6 |
| What is the on-demand economy? | 6 |
| Organisational perspective | 7 |
| Worker issues | 7 |
| Research objective, topics and methodology of the report | 8 |
| Executive Summary | 11 |
| Nature of relationships | 11 |
| Legal framework | 13 |
| Discrimination claims | 14 |
| Termination claims | 14 |
| Health and safety and liability issues | 14 |
| IP protection and confidentiality | 15 |
| Social security and taxes | 16 |
| Market trends and emerging issues | 16 |
| Survey of Jurisdictions | 18 |
| Argentina | 18 |
| Australia | 21 |
| Belgium | 24 |
| Brazil | 30 |
| Canada | 33 |
| China | 39 |
| France | 42 |
| Germany | 47 |

| | |
|--|-----------|
| India | 50 |
| Ireland | 53 |
| Italy | 56 |
| Mexico | 59 |
| The Netherlands | 61 |
| Spain | 65 |
| United Kingdom | 68 |
| United States | 73 |
| Conclusions | 77 |
| Annex: List of contributors and law firms according to jurisdiction | 81 |

Foreword

The on-demand economy (ODE) has risen to become one of the most debated subjects of recent years in governmental, legal and academic circles. The main reason concerns the fact that the ODE is undermining the traditional distinction in the nature of work relationships between employees and self-employed workers. Although it is not the first time that the world of work has experienced a transformation away from standard employment towards more flexibility, the rapid emergence of technology as a tool to distribute goods and services has challenged most legislators and courts in their ability to give adequate answers to the needs of the very flexible nature of ODE work. Nevertheless, the jurisdictions included have attempted to formulate (mostly) preliminary solutions to adapt the employment and workplace legislation or, in contrast, to apply traditional methods to a new phenomenon. For this reason, the IBA Global Employment Institute has deemed it appropriate to provide an overview of the different reactions towards the employment issues related to the ODE and to highlight the findings in a comparative summary and concluding recommendations.

As coordinators of this report, we could like to express our sincere thanks and appreciation to all contributors for their valuable input to the survey. Their contributions allowed us to form a general image of the different options chosen by jurisdictions to find answers to the challenges (and opportunities) that the ODE poses to employment law.

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Introduction

What is the on-demand economy?

For the purposes of this report, the on-demand economy (ODE) is defined as economic activity created by technology or other companies or providers that fulfil consumer demand via the immediate and flexible provisioning of goods and services. Other commonly used names for the on-demand economy are the ‘gig economy’, the ‘platform economy’ or the ‘sharing economy’. While it can take numerous forms, the ODE typically involves commercial arrangements and technology platforms, which allow independent sellers to offer goods and services to customers on a dynamic basis. This model has extended across a wide range of economic activity, including online peer-to-peer marketplaces, transportation, food and grocery delivery, home renovations, freelancing and other services.

The ODE is advantageous to many. It has opened a wide range of opportunities for entrepreneurs who strive after innovation. Furthermore, the ODE is beneficial to customers as services are often made available for a lower price than their counterparts in a traditional economy. From a consumer perspective, the ODE has brought along an increased accessibility of services, thanks to the widespread availability of fast internet and smartphones. Finally, on a macro level, the advantages of the ODE include asset-sharing and efficient use of resources; for example, the ability to better utilise housing property that is unoccupied, cars that are only infrequently used by a single person and so on.

Most readers will of course be aware that the aforementioned opportunities have led to an explosion of the ODE in recent years. The ODE is large, and getting larger. The fact is that ODE businesses are expanding both in terms of size and scope. The number of providers is growing, and the range of offerings is expanding. This growth shows few signs of abating, and there are a number of indications that the scope of ODE activity is likely to continue to increase, namely:

- the value of expenditures via ODE transactions continues to increase;
- the level of user participation in the ODE is highly skewed towards millennials, who will have increasing disposable income in the coming years;
- the world is becoming increasingly urbanised; the need to deliver goods and services in short order will not only increase, it will also become easier, as consumers are more centralised than ever;
- a number of traditional companies have made significant investments and public commitments to move to an increased use of the ODE model; and
- to varying degrees, legal regimes throughout the world have shown at least some level of flexibility in adapting to the various issues arising with ODE work.

Organisational perspective

The rise of the ODE is a function of corporate and organisational initiatives. In this regard, it is the organisations formerly known as employers that are either creating new ODE organisations or related models of work or shifting towards the use of the ODE model within their existing businesses.

Organisations in various industries are eager to use the ODE model within their operations irrespective of the nature of their business. It is notable that we refer here to 'organisations', since the ODE is not limited to companies. Indeed, a number of institutions and non-profit organisations may actually be among the most significant beneficiaries of flexible work models. Regardless of the type of service provided, on-demand businesses do not generally consider themselves to be employers in the traditional sense. Instead, they often define themselves as intermediaries, whether acting online or in person, providing platforms to match existing or new demands for goods and services with a flexible supply.

As such, the ODE model purports or aspires to involve offering deliverables without being a traditional employer, and without those performing the work being anyone's employee. The inference is that the ODE model offers all of the benefits of traditional work models without the associated costs or potential liabilities, so providing organisations with additional flexibility in the use of workers, which is enticing from a business and cost perspective.

The approach that ODE companies or organisations using the model adopt to engaging their workforce can take a number of forms. As an example, a number of ODE businesses in India engage their workforce through third-party contractors (staffing service agencies), together with additional independent contractors. These individuals will be in addition to having a 'core' team, which is engaged directly, working for the business, typically at management level.

Actual work assignments will often have an impact on operational and corporate structures. In many cases, ODE activities do not involve fixed working hours and schedules. As a result, independent or flexible contract arrangements are common. In some cases, the nature of the activity will encourage the use of a standalone subsidiary for the relevant activity. Common examples of this are warehousing, logistics and delivery, which, in many jurisdictions, require special licences and regulatory compliance.

Worker issues

Many workers only have the opportunity or availability to work in today's economy if they are able to do so on a flexible basis. This can be for a variety of reasons, such as family life, difficulty in finding full-time permanent employment or scheduling or travel conflicts. While flexible work arrangements do not necessarily need to be implemented through the ODE model, they may very well be. Some ODE companies are quite vocal in proclaiming that flexible work arrangements are actually advantageous to workers, particularly those who have personal or family commitments, which may conflict with the traditional concept of dedicated full-time employment working in an office.

While there may be advantages for ODE workers, such as the aforementioned flexibility, there are also certain disadvantages. One of the main challenges for ODE workers arises when there is a termination. In the ODE model, simply ceasing to provide assignment opportunities may or may

not be a termination. The assumption that this is a termination (or, at the very least, a deemed termination) of the worker creates a potential dispute about the nature of the working relationship and the consequences that may arise from the legal characterisation of that relationship. Workers who are no longer being assigned work will often understandably seek to claim that their status is that which is the most advantageous.

From a workforce perspective, the ‘categorisation’ of the worker is generally the biggest challenge when applying the ODE model, in particular, how to legally characterise a person who provides services on demand. Most are familiar with the ‘traditional employee’ versus ‘independent contractor’ distinction that applies in many jurisdictions. However, the issue is often much more complicated, as many jurisdictions also have other categories of workers, many of which overlap, and use of the ODE model does not necessarily make clear which of the traditional or emerging categories a worker would fall into. Further, the characterisation issue may vary within a jurisdiction based on different statutes and regulatory regimes.

Research objective, topics and methodology of the report

This report focuses on the implications associated with moving towards an ODE model from an employment perspective. It is important to note that this is the first report in a series of two. This first report is intended to provide a technical and objective (mostly black-letter) overview of the current situation of the ODE with regard to employment, without restricting the research to cataloguing all applicable legislation and case law. The contributors were also asked to give their view on market trends and emerging issues and the conclusions contain certain recommendations or options for governments, highlighting potential future law reforms. In the second report, we will continue and broaden our research by including the views of certain stakeholders, including ODE companies, commercial partners and other involved organisations, which will lead to a more evaluative and normative approach.

A particular area of emphasis in this report is how ‘gig’ or ODE workers are treated under the current approach in various legal systems in 16 countries across five continents. It includes contributions from: Argentina, Australia, Belgium, Brazil, Canada, China, France, Germany, India, Ireland, Italy, Mexico, the Netherlands, Spain, the United Kingdom and the United States. Combined, these countries account for more than half of the global population.

A survey was sent to various contributors to review and analyse the relevant issues in their respective jurisdictions. Their responses have been converted into narratives on the basis of which this report has been prepared. Given the dynamic nature of ODE work and the related legal issues, which are very much a moving target, we recognise that content needs to be reviewed regularly to be sure that it is current.

Also for the purpose of this report, it was necessary to make a selection of the most relevant employment law-related topics that should be addressed by every country contribution. More specifically, this report addresses the following topics:

Nature of relationships

How does a jurisdiction classify or characterise the relationship between the ODE company and the ODE worker? Is it an employment relationship, an agreement with an independent self-employed or contractor

(potentially with a minimum protection of employment rights) or does the legal system apply a (new) third category to ODE workers?

Legal framework

What are the most important applicable legislation and case law on the issue of ODE workers? Are there legislative reforms expected to address the issue?

Discrimination claims

Does discrimination legislation apply to ODE workers? Are they able to file a claim alleging discrimination?

Termination claims

What happens if the relationship or contract between the ODE company and the ODE worker is terminated by the ODE company? Are ODE workers protected? Or is such a protection only provided for workers with an employment contract?

Health and safety and liability issues

Is the health and safety legislation applicable to ODE workers? Does the employer/ODE company need to take safety and prevention measures for ODE workers? Are ODE companies responsible for the fault or injuries that ODE workers afflict to customers/users/third parties? Should they cover the insurance of ODE workers or should these workers insure themselves?

IP protection and confidentiality

Are ODE companies owners of the intellectual property in cases where ODE workers discover new information or ideas? Are ODE workers bound by a legal obligation with respect to confidentiality? Or should these issues be regulated by specific agreements or clauses?

Social security and tax issues

Should ODE companies pay social security contributions and taxes on the services of the ODE workers who use their platform or are these workers themselves responsible? Does the tax system provide thresholds under which no taxes are required?

Market trends and emerging issues

What are the main sectors, services or companies that make use of the ODE today? Is ODE limited to technology companies or are traditional companies also shifting towards the use of ODE workers? What are the foreseeable issues that are expected to emerge in the near future in relation to ODE? Will it take over traditional forms of work or is it expected to play a marginal role in the country's economy?

In the following section, we provide an executive summary of these key issues, using a comparative legal method by pointing out the most important similarities and differences between the 16 countries, from

which we were able to deduct the main positions and trends. This comparative summary is based on the survey of jurisdictions in section III. In the conclusion, the report lists some recommendations and points of interest that governments should consider addressing while tackling the issues that accompany the rise of the ODE.

Executive summary

Nature of relationships

The importance of the ODE model will depend largely on the approach to characterisation adopted in a specific jurisdiction. The vast majority of the included countries still have laws based on the classic dichotomy between workers with an employment contract and independent contractors. These legal systems usually look at the nature of the work relationship, based on the characteristics of an employment situation. The elements used for qualification by the different jurisdictions vary, but usually focus on the exclusive nature of the relationship and the elements of subordination and control. Other regular elements are remuneration, ownership of tools, profit, risk, integration into the business and working time (free choice). In almost all of the relevant countries, the courts or tribunals have to investigate the different elements on a case-by-case basis and the actual circumstances prevail over written agreements.

Some countries are rather orthodox in their view on the dichotomy between employees and independent contractors, which results in a refusal to adapt legislation to provide additional protection for workers who do not completely fall into the traditional employment relationship. For example, Argentina, Belgium, China, India, Mexico and the United States provide little-to-no flexibility for organisations. They currently retain the traditional characterisation of an ‘employment versus independent contractor’ relationship and have not yet seen the creation of any additional category of workers. In these countries, the main focus is on whether a relationship of subordination or control exists, which will dictate whether an individual is an employee. If the worker is an employee, they will benefit from all related protections. On the contrary, any independent contractors in these jurisdictions, unless improperly classified, will not be protected from an employment-law perspective under relevant statutes or employee-related rules. The questions associated with using ODE workers therefore become very much an ‘either/or’ issue – the worker is either in business on their own account, or most of the traditional employment law protections apply.

Other jurisdictions, such as Australia and Ireland, have taken the approach that while they have yet to formally deviate from the traditional employment/independent contractor relationship there are at least certain (limited) legislative protections for independent contractors. In Germany and Italy, there is a sort of quasi-employee statute for economically dependent contractors, which gives them some minimum protection. However, these statutes are not well defined and mostly depend on case law. In Spain, a similar economically dependent self-employed worker exists, with the rules for the trade category of workers being laid down by legislation. There are also jurisdictions such as Brazil and France that have not yet deviated from the traditional characterisation, but have adopted legislative reform that will likely cause the eventual emergence of a third category of workers (see by example the introduction of the ‘intermittent employee’ in Brazil). These moves represent at least some recognition that economies and forms of work are changing, and so the law will need to be adopted to address emerging issues such as the ODE model.

In the United Kingdom, there are three categories of worker: employee, worker and genuinely self-employed. The distinction is important because employees benefit from greater protection in law than ‘self-employed’ or ‘workers’. Workers, on the other hand, have more employment rights than self-employed workers, though self-employed workers still benefit from certain limited protections. The UK also has ‘zero-hour’

contracts, which provide the worker with very limited protection. In the same vein, Canada (or at least some Canadian provinces) takes a nuanced approach to the traditional ‘employee versus independent contractor’ characterisation and has created or recognised a third category of workers: the ‘dependent contractor’. In both of these jurisdictions there has been either some legislated reform or at least discussions of legislative reform, which would provide additional protections for ODE workers. This approach of providing ‘employment-light’ protections may well increase the likelihood that the ODE model will continue to grow in these jurisdictions.

On the other side of the spectrum, there are jurisdictions such as the Netherlands that have made a significant number of legal modifications. These changes provide for distinctions with respect to many types of flexible workers, such as self-employed workers with no employees (freelancers), on-call employees, temporary agency workers who are employed with an employment agency and employees with a fixed-term contract. Many of these flexible workers will nonetheless be characterised as employees and thus benefit from certain legal protections. Spain also takes a similar approach by providing several different categories of workers (such as employees, autonomous workers, trade and temporary agency workers). However, while there is some scope for slightly more flexible arrangements, ultimately many of these workers will be deemed employees and their ‘employers’ will be subject to some or all of the ordinarily applicable employment, tax and social security obligations.

One important point bears consideration: just because the workplace rules in a particular jurisdiction have been substantially amended does not automatically mean that an ‘ODE-friendly’ environment has been created. Indeed, one of the hallmarks of the creation of the ‘third category’ of workers is that there will be obligations with respect to engaging workers, compensating them and following a proper process for termination. Put differently, it is often the case that law reform implemented to facilitate the ODE model is intended to move away from the ‘either/or’ distinction to an ‘in between’ status that has ‘some’ legal rules applying – which often means there is ‘no’ applicable employment law for independent contractors.

The reader should also take note that there will likely be less of a need for the ODE model in countries, such as Mexico and India, where service arrangements and the use of contract workers through staffing agencies are more common and these structures are legally endorsed. The legal difficulties surrounding the ODE in most countries are therefore less relevant in Mexico and India.

When the dichotomy between employees and independent contracts is more or less maintained, the majority of case law (until now) in Australia, France, Germany, Mexico and the US has classified ODE workers as independent contractors. In Argentina, however, they will be more likely seen as employees. The ABC-test in California also seems to make a qualification as employee more prevalent there. However, in most countries it is difficult to predict what decision a court or tribunal might make, mostly due to the lack of relevant case law. Only in the UK and the US does there seem to be an abundance of case law on the matter.

Legal framework

Many countries have, until now, not taken any legislative action to adapt their legal framework to the needs of ODE workers or ODE companies. In ‘orthodox’ Argentina, a proposed bill regarding Uber was unsuccessful and instead the legislator is producing rules that would label certain specific work relations (eg, vendors of Herbalife) as an employment relationship. Also, in Belgium, Germany, India, Italy, Mexico and the US there are no imminent plans to change the existing legislation.

However, in some countries there have been or are planned important changes to extend certain parts of employment law protections to ODE workers. Australia introduced some minimum protections for independent contractors through the Fair Work Act. Some trade unions also have sought to enter into agreements with ODE companies, in an effort to provide some form of minimum entitlements that do not undercut wages and provide a mechanism for dispute resolution. There are also examples of large retailers entering into memorandums of understanding with transport workers’ unions in the retailer’s supply chain and ODE workers.

In Canada (or at least, Ontario), in 2017 the government introduced a standard employment protection for contract workers and access to collective bargaining has been improved. Even individual ‘ODE work’ forms of contract agreements are on the rise in Canada, and these often include contract terms that require notice in cases of dismissal.

France has introduced some protections for ODE workers with the Act of 8 August 2016, which fixes a specific status for digital platform workers and lays down certain obligations for the platforms with regard to insurance and vocational training. The Act also introduces a right to strike and a right to join trade unions for ODE workers.

In Ireland, a similar move towards a better access to collective bargaining has been provided by the Competition Act of 2017, which has altered the traditional interpretation of (small) independent contractors as companies to halt the application of the competition law. After all, if seen as an enterprise, a contractor entering into collective bargaining could be seen as an illegal cartel formation. Next, Ireland is working on legislation to protect workers who work fewer hours and are low paid, which could have an impact on ODE workers.

Though Spain currently has no future plans to change the legislation, the introduction of the trade category of workers in 2007 is still noteworthy, as this category could also be applied to ODE workers.

In the Netherlands, the government is currently proposing to amend the existing legislation on flexible work to provide better protection to ODE workers and other forms of flexible employment.

Reforms have been less extensive in Brazil, where the labour reform of 2017 introduced the concept of an ‘intermittent employee’, which is defined as an employee whose activities and payments are on demand. However, it is not yet clear if ODE workers and companies will make use of this status. Further, it is possible that the Brazilian courts will adapt their interpretation of subordination in characterisation cases to extend employment law protections to ODE workers.

In China, the only legislative intervention worth mentioning is the Interim Measures for the Administration of Online Taxi-Hailing Business Operations, which forces ODE companies to make a

clear choice between employment contracts and contracts for independent contractors when they enter into an agreement with ODE workers.

Discrimination claims

Most of the jurisdictions are generous with regard to the rules on the application of their discrimination legislation, which makes it possible for ODE workers to file discrimination claims. This is the case in Argentina, Australia, Brazil, Belgium, Canada, France, Ireland, Italy, the Netherlands, Spain, the UK and the US. However, there seems to be a general problem of awareness in many countries, meaning that ODE workers do not necessarily know their rights (not to be discriminated against) and options (to potentially file claims). This leads to a lack of discrimination claims filed by ODE workers (most claims are about the qualification of the employment relationship). By contrast, discrimination claims are not really open to ODE workers in China as they are only mentioned in the employment legislation. In Germany, anti-discrimination legislation is only conditionally applicable to non-employees: individuals are only entitled to proceed with claims insofar as they relate to access to gainful employment or professional advancement. Finally, in Mexico discrimination claims are not common as discrimination laws in employment and labour matters have not been extensively developed.

Termination claims

In the vast majority of jurisdictions, the eligibility to proceed with termination claims is restricted to employees and these claims are not open to ODE workers when they are seen as independent contractors. Therefore, access to termination claims will depend on the question of whether an ODE would be seen as an employee or as an independent contractor. A judge will only allow termination claims to proceed if the employment legislation applies (which is often only the case for real employees). In countries such as Argentina, an ODE worker would probably be qualified as an employee and therefore they can file termination claims. However, in most countries this would not automatically be the case and the ODE worker would have to resort to contractual claims or damages (typically based on common law). It is clear that new legislation would be necessary to give ODE workers some (minimum) statutory protection against termination, as is already the case in certain provinces of Canada. Also, Spain has provided some dismissal protection for the trade category of workers. This is one of the main reasons why some ODE companies would like to avoid the application of the trade system to the ODE workers, however. Thanks to the 'at will' doctrine, the US sets itself apart with regards to termination claims, as the 'at will' doctrine allows for summary termination of employment contracts without reason, notice or compensation.

Health and safety and liability issues

Health and safety

Two main models have been adopted in relation to the application of health and safety legislation to ODE workers. In the first, the application of health and safety legislation is rather broad, and this means that a company or employer will also have health and safety obligations towards ODE workers and independent contractors who work for or in their organisation. This is the case in Australia, Canada, Italy and the Netherlands. However, in most countries in which this model is the norm, health and safety regulations are

less strict for ODE workers than for employees (in cases where ODE workers are not seen as employees), or health and safety obligations for companies/employers are limited. This applies in Belgium, Canada and Ireland, where it is possible to require the contractor to comply with relevant health and safety obligations.

The second model excludes non-employees from health and safety legislation. In this case, organisations seeking to avoid health and safety obligations have ODE workers qualified as employees. This approach is followed in Argentina, Brazil, France, Germany, Mexico, Spain and the US (federal standards). If the ODE workers are seen as independent workers, they have to resort to civil law rules, damages and penal law.

In India, general health and safety legislation is absent, so workers have to look to very diverse industry-specific rules.

Liability for occupational accidents, injury or damages to third parties

Another issue is liability for occupational accidents, injury or damages caused by the ODE worker to a third party or customer. In some jurisdictions (Argentina, Australia, Brazil, Canada and Ireland) the ODE companies will be liable for the actions of the ODE workers (even if they are not employees) and therefore will have to cover these workers through insurance or be liable themselves. Also, in the Netherlands, a third party can still claim damages against both the organisation and the freelancer.

Other legal systems, however, only provide for employer liability (worker coverage insurance) in cases where workers are employees. In these cases, the independent ODE workers will have to arrange their own insurance, which is sometimes also specified in ODE contracts with this platform (as in Belgium, India, Mexico and Spain). Sometimes ODE companies voluntarily offer some form of liability insurance to their ODE workers (eg, in Spain). In Italy, entities that facilitate work arrangements in the ODE often have insurance available to cover risks to third parties while also requiring the ODE workers to take out individual insurance. In cases of ‘quasi-subordinate’ workers, there is an obligation for the company to be insured against accidents. China and France use more specific systems. In China, ODE companies will be liable generally for the actions of ODE workers, but only if the company was negligent in arranging, instructing or selecting the workers to provide services. France adopted legislation in 2016 that stipulates that the digital platform must cover part of the insurance costs if the independent worker voluntarily takes out private insurance to cover sickness and occupational accidents.

IP protection and confidentiality

In the majority of jurisdictions, the intellectual property of ODE companies will likely not be automatically protected in cases where the ODE workers are independent workers. The application of obligations regarding IP protection is usually limited to employees. Therefore, it will be necessary to conclude specific IP protection contracts with ODE workers or to include specific clauses in general ODE agreements. In practice, the current nature of ODE work means that the opportunity for ODE workers to discover new ideas or information that could be of importance for the ODE companies arises infrequently. Put differently, ODE workers will likely rarely be creating any IP that organisations using the ODE model will want to be protected. In some jurisdictions, the legislation concerning IP protection is also applicable to independent workers (and thus in all cases to ODE workers). This is the case in Brazil, China and (with limited application) in Italy and the Netherlands.

The same principles apply to confidentiality. It is best practice to conclude a confidentiality agreement (or to insert a confidentiality clause in the relevant service agreement) in cases in which the ODE worker is not an employee. Applicable law in Brazil and Italy provides legal confidentiality obligations for independent workers, though in Italy a specific agreement is still recommended. Confidentiality can also arise from certain working procedures, though again this has little relevance to ODE workers due to the nature of the work they perform. Moreover, strict privacy legislation (such as the European Union General Data Protection Regulation (GDPR)), restricts access to the information that the ODE worker receives from the platform, which may result in their qualification as a subordinate (employee). In some jurisdictions, such as Canada and the US, there may also be legal rights for which ODE organisations have to obtain legal relief against alleged misuse of confidential information by any person, be they a current or former employee or contractor, or otherwise.

Social security and tax issues

Where an ODE worker is seen as an independent worker, in most jurisdictions, they will bear the sole responsibility to register and pay social security contributions and (income and other) taxes. Sometimes, as in Brazil, France and Germany, ODE workers have the option to register themselves as a private individual for social security insurance purposes. In Canada, social security contributions do not apply to ODE workers who are independent contractors, but the tax authorities have, in the past, successfully re-qualified assumed independent ODE workers as actual employees. In Italy, social security contributions are required for ‘quasi-subordinate’ workers, payment of which is split between the company (two-thirds) and the quasi-subordinate worker (one-third). These contributions are lower than in the case of employees. In some countries, there are important income thresholds under which no taxes should be paid. In Italy, for example, the income threshold for ODE workers is €5000 and in Belgium it is €6130.

Market trends and emerging issues

In most jurisdictions, the ODE is mainly restricted to so-called technology companies and digital platforms used to deliver services. International platforms, such as Uber, Airbnb, Deliveroo and Foodora, are the most frequently cited (Uber often as a somewhat distinct ODE company, as the platform often conflicts with strict taxi regulations and it is alleged by some to cause unfair competition – another problem distinct from employment law issues). The US, as the unofficial birthplace of the ODE, is a market that has many more ODE companies than most. China also has many fast-growing ODE companies for the internal market, which consists of more than 100 million users (eg, Didi and Meituan).

Most traditional, mainstream companies have not yet started to use ODE workers on a large scale, with the exception of Australia, which has shown a real trend in this direction. However, such a move is to be expected in the future as more startups are looking to ODE workers instead of employees as their companies grow. For now, the use of ODE workers by traditional companies, which also employ standard employees, is a perilous undertaking, as ODE workers can easily be reclassified as employees. As a result, the trend at this stage is more about having properly documented forms of contingent employment or relevant term contracts as opposed to any new legal approach.

In some countries (eg, Mexico and India) the ODE is of relatively little importance and new legislation is deemed unnecessary given the fact that the ODE is still only a small part of the national economy (as in Germany). In many jurisdictions, there is limited case law on the nature of ODE work or other employment disputes connected to ODE workers, though the rise of ODE companies and platforms will bring about more. (The UK and the US are the exception, as there is an abundance of relevant case law already in these jurisdictions.) Elsewhere, where legislative action has yet to be taken, the pressure for new legislation is already being felt (eg, in Argentina and Italy).

How might jurisdictions adapt to cope with ODE workers in the future? Several options have been considered, including: (1) preserving the status quo, giving most of the decision-making power to the courts, where the courts continue to decide qualification disputes on the traditional dichotomy between employees and independent workers; (2) the creation of a true third category of workers; (3) perhaps the most likely option, countries will apply certain parts (minimum standards) of their employment legislation to ODE workers, and an ODE worker would, in principle, likely be seen as an independent contractor, nonetheless entitled to a minimum protection because of their dependent characteristics; (4) the use of company collective bargaining agreements and individual agreements, rather than national or sectoral legislation and collective bargaining agreements, in order to find more service-specific solutions for the workers (the rationale being that the variety of services which are delivered through the digital platforms is immense). This trend to ‘contractualisation’ could lead to a heavily differentiated landscape of statutes or related arrangements for ODE workers. Lastly, (5) by adding greater flexibility to employment legislation such as exists in the Netherlands, where certain categories of employment contracts are of such a flexible nature (on call, zero-hour contracts), that the need for independent workers decreases. The Netherlands, however, already has a significant number of freelance workers, who are still seen as independent. It is thus not certain if enhanced flexibility of employment law is attainable or commendable in other jurisdictions. In this regard, the Netherlands itself is seeking to improve the protection of flexible workers.

As these options are considered and developed, there are other emerging issues to be taken into account, such as: the difficulty in providing ODE workers with the necessary training; the emergence of blockchain technology, which might end the need for intermittent brokers and platforms; and, notably in the US, the stronger emergence of local regulations to offer better employment protection in more progressive cities (eg, Seattle).

III. Survey of Jurisdictions

Argentina

The interesting political and economic changes under way in Argentina are yet to be matched by legal rules that will easily accommodate the ODE model. In particular, existing laws in relation to employment and workplace issues, as well as issues of taxation, continue to be based on the traditional ‘either/or’ model, which contemplates issues being determined based on the traditional employee/contractor distinction.

Nature of relationships

In Argentina, there is either an employment relationship or the engagement of an independent contractor. There is no ‘in-between’ status, such as that of dependent workers. Under Argentina’s labour laws, the rendering of services by an individual to a third party on a personal and regular basis leads to a presumption that an employment relationship exists, unless proof to the contrary is provided. In other words, the beneficiary of the services has the burden to prove that no employment relationship existed. In the event that this burden is not satisfied, the worker will be considered an employee.

To determine the existence of a labour relationship under Argentinean law, the actual terms and conditions under which the services are rendered must be considered in each particular case, regardless of the documents signed by the parties. This is the result of the application of the principle that substance prevails over form. The current practice in Argentina is that certain companies are entering into independent contractor agreements. There is a high risk that those independent contractors will actually be considered unregistered employees, however, thus triggering labour, tax and social security obligations and liabilities.

Legal framework

Traditionally, subordination is the most relevant criterion used by Argentinean labour courts to determine the existence of an employment relationship. However, while subordination is referred to in Argentina’s labour laws, the term is not specifically defined. The courts have ruled that the existence of an employment relationship depends on the particular circumstances of each case. In this regard, there should be some flexibility at the time of verifying whether or not subordination actually exists. One potential area that is helpful to the ODE model being accepted in Argentina is that subordination must be determined based on recent historical, economic and social changes, including globalisation, technological advances and new economic models. In other words, the concept of subordination could evolve so as to allow for ‘gigs’ that are not considered to be employment.

In light of this approach, the traditional definition of subordination is changing and adapting to new technologies. Presently, the key factors used to identify subordination are the provider’s obligation to render services personally (and not through third parties) and the employer’s ability to apply disciplinary measures. In other words, the worker is subordinate if their obligation is personal, and if they would be subject to disciplinary measures for performance issues. Additionally, labour courts analyse whether the provider (and their services) is engaged in a business structure that does not belong to them but to the employer. This approach is similar to the concept of integration used in other jurisdictions.

In early 2017, a minority party in Argentina proposed legislation regarding Uber, in which Argentinian Uber workers not in an employment relationship would be allowed to be considered contractors. Though not a definitive position about the characterisation of a particular structure or worker, it is interesting to note that for the purposes of ODE relationships more generally, this Bill was deemed necessary to overcome potential findings about subordination and employment relationships. Even if the legal test is still evolving, this legislation was considered to be a requirement to facilitate the ODE model. Irrespective of the need for this new law, however, it is not currently under discussion. On the contrary, several bills are in the pipeline that attempt to rule that vendors of certain products such as Herbalife or Tupperware should be found to be in an employment relationship. All of this suggests that the current law will continue to be based on the ‘either/or’ model described above.

Discrimination claims

The likelihood of avoiding discrimination claims is very low. Given the existing legal framework in Argentina, coupled with the fact that local labour laws and labour courts are pro employee, it is highly likely that the labour courts will consider ODE workers to be operating under an unregistered employment relationship. This will be the likely outcome irrespective of any commercial or other kind of agreement executed between the parties. Under that scenario, the ODE worker can claim or submit registration of their employment at any time. As a consequence, all of the applicable employee-related protections will apply. This will result in being able to insist that the (deemed) employer must provide appropriate notice or warning of termination. This will also include access to relevant anti-discrimination protections.

Termination claims

ODE workers who are not registered as employees are likely to succeed if they claim severance compensation and labour fines in their favour (which may triple severance compensation) plus tax and social security amounts. This highlights the significant risks of the approach followed by some ODE businesses, which is to disregard regulatory obligations. To avoid the costs and consequences previously noted, any dispatcher should register ODE workers as employees with the local tax authorities and in the local labour registry. In addition, there is a requirement to pay local taxes and social security contributions. Irrespective of the approach taken to registration and tax, labour laws in Argentina mandate payment of severance compensation in favour of the employee who is dismissed without just cause.

In the case of ODE companies who are not willing to hire ODE workers under employment relationships and bear the labour, tax and social security consequences, the main measures that can be taken to mitigate those consequences are as follows: (1) contract a provider with a business of their own (offices, other clients, employees, tools and so on); (2) avoid exclusivity (provider should simultaneously perform services for other clients); (3) avoid giving instructions to the provider in relation to how to perform the services, avoid having the provider report to client, and avoid supervising or exercising any disciplinary authority; (4) avoid the provider performing services at the client’s premises; (5) avoid the client supplying the provider with tools (such as a computer, wardrobe, mobile phone, corporate email or corporate cards); (6) rotate between different providers performing the services; and (7) avoid stipulated work schedules or minimum working hours (provider should have total freedom to decide when and how long to work). These measures do not eliminate the consequences previously referred to and need to be assessed as a whole when determining whether subordination exists.

It is important to note that many ODE companies will find a number of the aforementioned measures difficult to accommodate: there is usually at least some form of branding and standard of service expected from providers, particular since part of what ODE companies offer is some form of filter or check on standards. This may mean that ODE companies will have difficulty in having truly independent contractors under current legislation in Argentina and instead will likely need to assume that ODE workers are employees.

There is no flexibility in Argentina. There is either an employment relationship or an independent contractor. In the event that an ODE worker is considered to be working under an employment relationship, minimum wages under the applicable collective bargaining agreement must be paid, health and safety regulations will apply, and all of the other outlined termination risks exist.

Health and safety and liability issues

In a scenario in which an ODE worker is seen as an employee, the ODE company will be responsible by way of civil liability for any harm caused by the ODE worker during performance of services. In other words, from a risk perspective the acts or omissions of the ODE worker in Argentina will be the same as if the worker was under an employment relationship, thus making them the responsibility of the company.

IP protection and confidentiality

Argentina's laws provide protection of IP and confidentiality obligations in respect of employees. In an ODE arrangement where an independent contractor agreement is executed, the inclusion of IP and confidentiality provisions in the agreement is recommended.

Social security and tax issues

As in termination claims, there is no flexibility in Argentina with respect to tax and social security issues, so there exists either an employment relationship or an engagement of an independent contractor. There is no 'in-between' status such as that of workers or dependent contractors. Therefore, local taxes and social security obligations should be paid if the ODE worker is considered to be in an employment relationship. For the reasons outlined above, regardless of what documentation indicates, it is very likely that workers will be able to register the relationship in Argentina as an employment relationship.

Market trends and emerging issues

The ODE model has not yet emerged to any great extent in Argentina. Technology companies are including software developers as independent contractors, but not to any significant degree. The authors have no knowledge of traditional companies that have adopted the ODE model, though a number have indicated at least some interest in the possibility of doing so.

The existing legal framework in Argentina, which is based on labour laws and the approach taken by the courts, restricts the ability to use ODE workers who are not employees. The result is that any arrangement that attempts to use contractors runs the risk of being characterised as an employer/employee relationship. For the ODE model to emerge more broadly, there will likely need to be a combination of a more flexible view of subordination, and express legislative changes allowing for temporary engagement of contractors who will not have full employment law rights.

Australia

Discussions to date with regards to ODE workers in Australia have been focused on the characterisation of relevant relationships and whether workers doing on-demand tasks are considered to be employees for the purposes of relevant legislative provisions.

Nature of relationships

The types of work arrangements emerging in the ODE in Australia tend to be characterised as contractor relationships, rather than employment relationships. In some circumstances a worker/service provider may be engaged under a fixed-term contract for a designated period, which might be regarded as a form of casual employment, but this has not been the prevailing view of such relationships thus far. Part of the reasoning is that once there is ‘employment’ as opposed to a contracting relationship, there are a number of implications that flow from this characterisation, especially various statutory protections. Hence, most platforms involved in facilitating the provisions of services in the ODE assert that the relationship is not one of dependent labour, but that providers of services are independent contractors.

There has been no test case in Australia that definitively determines the question of employment status for ODE workers. The applicable test for employment is a multiple indicia test that includes considering the economic reality of the situation, and whether or not the person is genuinely running a business on their own account. There have been a number of unfair dismissal cases involving ODE workers, such as Uber drivers, where they have not been found to be employees protected from unfair dismissal under the 2009 Fair Work Act (Cth). Ultimately, the resolution of this question requires a decision by the courts, as most commentators regard the issue as not being settled by these dismissal cases.

Legal framework

A legislative solution appears unlikely in Australia, although the Australian Greens political party has recently proposed amendments to the Fair Work Act, which would allow workers to seek protection either under the Act or through private agreements/awards.

There are some existing protections for independent contractors under the Fair Work Act. However, these are limited when compared to the protections provided to employees through the minimum entitlements set by the national employment standards and the terms of industrial awards and agreements.

Another avenue in which the issue may be aired is if a sham-contracting claim is brought against a business. Under the Fair Work Act, an employer is prohibited from misrepresenting to an individual that the contract of employment under which the individual is, or would be, employed is a contract for services under which the individual performs, or would perform, work as an independent contractor (Fair Work Act Part 3-1–Div 6). A test case of this nature has been foreshadowed, but has yet not come to pass.

Some unions have also sought to enter into agreements with the creators of digital platforms (Airtasker being an example) that facilitate ODE types of work arrangements. The goal of these arrangements is to provide some form of minimum entitlements that do not undercut wages and provide a mechanism for dispute resolution. There are also examples of large retailers entering into memorandums of understanding with unions covering transport workers in retailer supply chains and ODE workers.

Discrimination claims

A wider range of workers are covered under Australian anti-discrimination legislation than under the labour law framework. The legislative scheme does not rely on an employee/independent contractor dichotomy, and includes apprentices or trainees, workers on probation, part-time and full-time workers, casual workers, labour hire workers, contract workers and workers on a work visa. Thus, although the authors are not aware of any claims or sanctions that have arisen to date, it is likely that ODE workers would be considered as being entitled to anti-discrimination protections.

Termination claims

As recent case law suggests, workers engaged as independent contractors, and whose services are no longer 'in demand', are unlikely to be eligible to bring an unfair dismissal claim. As aforementioned, there have been a number of unfair dismissal cases involving ODE workers, where they have not been found to be employees protected from unfair dismissal under the 2009 Fair Work Act (Cth). This unfair dismissal procedure is only available to those in employment relationships. The legislative entitlement to challenge a termination of employment is reliant on establishing status as an employee, the completion of a minimum employment period and a termination at the initiative of the employer, all of which could be problematic for those engaged under the ODE model. So, if an ODE worker does not satisfy all of these conditions, then their rights upon termination will be limited to contractual claims.

Health and safety and liability issues

Most Australian entities that facilitate work arrangements in the ODE have insurance to cover risks to third parties, but require the worker/service provider to carry their own insurance for personal injury or damage to their property.

Work health and safety laws in Australia do not rely on an approach that is dependent on being an employee. Instead, these legislative schemes apply broadly to the provision of work and obligations are imposed on the person conducting a business or undertaking (PCBU), contractors and workers themselves.

The issue of workers' compensation insurance has been the subject of debate in Australia and there are some proposals being considered. One such proposal is to have insurance provided through the digital platform, but at the workers'/service providers' expense. The best operating assumption at this point is that ODE workers are performing work that is subject to the workers' compensation insurance scheme, and any illness or injuries arising while performing ODE work will be compensable.

IP protection and confidentiality

The nature of most commonly commissioned ODE work (eg, transport services, food delivery, home-based tasks such as cleaning) has not, to date, raised significant concerns about IP and confidentiality. However, the issues are similar to those that could arise through the use of labour hire workers, fixed term/temporary employees and contracting out. Therefore, similar contractual provisions could be utilised, where necessary.

Social security and tax issues

Service providers or workers engaged to independently perform task must make their own contributions to superannuation (which is a national contribution-based pension scheme) and are responsible for payment of the Goods and Services Tax (a form of consumption tax), where the relevant income threshold is met. The authors are not aware at this time of any Australian decisions that have specifically addressed how these rules might apply to the ODE model.

Market trends and emerging issues

The companies most concerned about ODE issues in Australia appear to be the companies that utilise ODE relationships extensively (Uber, Deliveroo and comparable offerings). Several ‘traditional’ companies (eg, taxi firms), which are now in competition with companies using ODE relationships, are also interested in the regulation of these relationships due to their competing commercial interests.

If legal rules are adopted to regulate ODE relationships, we consider that it is unlikely that the application of these rules would be based on the type of company that is engaging the worker. We note that a leading Australian legal academic has proposed a scheme that would apply on the basis of the industry in which the company operates.¹ This has not been broadly discussed or accepted.

In Australia, the discussion on ODE issues has largely concerned the ‘status’ of ODE relationships (ie, whether or not the worker is an employee or an independent contractor). This is because the current regulatory system is based on a binary distinction between employment relationships (which give rise to a range of protections for the employee) and independent contractor relationships (which are characterised by a very limited range of protections). However, recent developments, such as proposed amendments to the legislative framework, test case challenges and the pursuit of memorandums of understanding, point to an increasing pressure to move away from this binary approach towards a minimum-entitlements approach attaching to the undertaking of the ‘work’.

¹ Joellen Riley, ‘Regulating Work in the “Gig” Economy’ in Mia Ronnmar and Jenny Julen Votinius, *Festschrift Till Ann Numhauser-Henning* (Jurisforlaget I Lund, Sweden, 2017) 669–83.

Belgium

The ODE model poses challenges under Belgian law, in part because current legal rules are premised on the traditional divide between the employees on the one hand and independent contractors on the other.

Nature of relationships

Belgium's Employment Act of 3 July 1978 defines the employment contract as a contract through which a worker commits to provide a service, principally manual (blue collar) or intellectual (white collar) work, for remuneration and under the authority of an employer. The main difference between a worker and an independent contractor is the authority of the employer. In other words, the link of subordination between the worker and the employer is the key to the worker and contractor distinction. This approach is broadly similar to how the issue is assessed in many other jurisdictions.

The Employment Relation Act provides four general criteria to assess the existence (or not) of a link of subordination: (1) the will of the parties as expressed in the contract, as long as the concrete execution of the contract conforms to this expressed will; (2) the freedom to organise working time; (3) the freedom of work organisation; and (4) the possibility of exercising hierarchical control. If the execution of the contract has incompatible elements, then, in accordance with the expressed preferences of the parties there will be a requalification into an employment contract or an independent service agreement and application of the corresponding social security regime.

In addition to the four general criteria, specific criteria have been prescribed by royal decree in certain sectors sensitive to bogus or non-genuine arrangements of self-employment. The specific sectors include: construction, surveillance and protection, transportation of goods or people, cleaning, agriculture and horticultural enterprises. In these sectors, if more than half of the specific criteria are fulfilled there is an irrefutable presumption of an employment agreement.

With respect to relationships and a detailed review thereof, there are nine specific criteria, as follows:

(1) no economic or financial risk for the service provider, as is the case if there is no substantial and personal investment with personal share capital in the company or no participation in the losses and profits of the company; (2) no responsibility or decision-making powers for the service provider regarding the financial resources of the company; (3) no authority for the service provider regarding the purchasing policy of the company; (4) no authority for the service provider regarding the pricing policy of the company; (5) no obligation for results regarding the agreed work to be performed; (6) fixed compensation for the service provider independent of the results of the company or the volume of services provided; (7) no possibility for the service provider personally to be the employer of other workers and to be freely recruited or for the service provider to hire its own staff or to substitute someone else to provide the agreed work; (8) the service provider does not appear as a company towards other persons or the counterparty, nor do they work, principally or usually, for only one counterparty; and (9) the service provider works in premises of which they are not the owner or the tenant (or, in the transportation sector, with a car that is not their property) or with equipment made available, financed or guaranteed by the counterparty.

In practice, most of the ODE service providers in Belgium act as independent contractors because of the flexibility this status provides (no overtime, no minimum number of working hours, no (or reduced) notice period, among others) and a favourable tax and social security regime for independent contractors.

As in the past with other independent contractor arrangements, neither taxes nor social security contributions are usually paid on revenue generated by ODE work (based on the lack of information submitted to the tax authorities on the ODE services performed). The law has foreseen a kind of recognition of this economy, assuming that service providers are independent contractors.

In cases of reclassification, where the relationship is later found to be an employment contract, the employer is liable to pay arrears for the employer and employee's social security contributions (about 30 per cent and 13.07 per cent respectively), plus fines (ten per cent) and interest (seven per cent per year) on late payments. The employer can also be held liable for not having withheld personal income taxes. Tax increases and fines can also be imposed in these circumstances.

The ODE worker found to be an employee will be entitled to all of the benefits linked to an employment contract. This will include an indemnity in lieu of notice, together with holiday pay, minimum wage, arrears of remuneration for overtime and other employment provisions.

Legal framework

There is currently no initiative in Belgium to adapt the employment legislation to be more accommodating of the ODE model. In May 2018, a resolution 'for a regulated development of the platform economy' was introduced in the Chamber of Representatives by Members of Parliament of the Francophone social-democratic party. This (non-binding) resolution urged the federal government to take a stance on the applicability of employment legislation to service providers in the ODE. To date, the resolution has not resulted in any legislative action.

Legislation adopted to date, which is relevant to ODE companies, is limited to the tax and social security regime. There are also discussions about reforming the regulatory framework for taxi companies in order to allow Uber to work in the Brussels Capital Region and to address allegedly unfair competition with existing taxi drivers. That, however, is more a matter of regulatory law relating to transportation and competition than employment law.

In 2018 there were two social rulings issued by Belgium's Administrative Commission for the Regulation of Working Relationships (the 'Commission') involving ODE service providers. The Commission is an administrative body that determines the nature of a working relationship after referral from one of the parties in that working relationship. Its decisions bind the social security administration, but can be challenged before the labour courts and may, however, have an indirect influence on the courts.

The applicants were couriers for Deliveroo, an online food-delivery company. After assessing the general criteria and the specific sectorial criteria for transportation of goods, the Commission found that the nature of the working relationship was that of an employer–employee relationship. The Commission pointed out, among other things, that the freedom of Deliveroo couriers to organise their working time is relative. Company rules regarding courier availability and the booking process for working periods are, for example, very restrictive. Next, the couriers' freedom to organise their work is limited, that is, the possibility of calling on a replacement is restricted. Further, the decision highlighted that the monitoring opportunities through GPS tracking are incompatible with self-employment.

Deliveroo appealed the decision of the Commission before the labour courts in April 2018. In July 2019, the Labour Court of Brussels declared the decisions of the Commission void, as the investigation by the

Social Inspectorate was (and is) ongoing. The Labour Court also declared itself competent to investigate the working relationships of the Deliveroo riders. However, a decision is not expected before 2021.

At the other hand, the Tribunal d'Entreprise of Brussels ruled on 16 January 2019 that Uber drivers are self-employed. However, its decision is heavily criticised and up for appeal.

Discrimination claims

In Belgium, independent contractors are entitled to protection against discrimination.

However, it is quite unlikely that a service provider in the ODE would challenge, from a discrimination point of view, their status in comparison to a worker. The working assumption is that the provider would prefer to claim the requalification of the independent service agreement in an employment relationship, which would grant all the advantages linked to this status, without having to prove discrimination.

Termination claims

The nature of the relationship between the service provider and the dispatcher can be challenged by the service provider after the termination of the contract. This is the case in Belgium (similar to many other jurisdictions) regardless of what written agreements are made between the parties. The service provider could claim that they were in fact working under an employment contract and ask for the requalification. The assessment of the relationship will occur on the basis of the four aforementioned general criteria and the additional specific criteria, if the service was provided in a sector for which the specific criteria apply.

To protect the ODE organisation from the risk of a requalification claim, the dispatcher has to construct the relationship in such a way that the legal criteria are met to qualify the relationship as an independent service agreement. This is not particularly easy, because to ensure the quality of the service provided, the dispatcher tends to have certain control over the way the service is delivered. In other words, the consistent delivery of the relevant service, which the ODE model usually aspires to, often involves a degree of organisation and control, which gives rise to the risk of qualification as an employment relationship.

Health and safety issues

As service providers are independent, they normally have to (personally) arrange for their own liability insurance, which applies in the event they cause harm or injury to their clients or to third parties. Some dispatchers foresee the possibility that the client can take out extra insurance to cover any harm or injury occurring while the service is provided, but the client has to pay for it on top of the price of the service itself. In the event that the service provider suffers harm or loss, they cannot normally claim an indemnification from the dispatcher, unless they can prove fault on the part of the dispatcher.

The Health and Safety Act also applies to independent contractors, but only to the extent that independent contractors have an obligation to observe it. The Act does not grant independent contractors an extra protection towards the dispatcher.

Liability issues

The employer is responsible for the worker in the case of occasional minor negligence caused in the course of work. The worker remains (personally) responsible in cases of repeated minor negligence, gross negligence or fraud. In the event that the worker is injured during the performance of work, they can also use the insurance of the employer for occupational accidents or diseases sustained. This may give rise to circumstances where the independent service provider has an interest in claiming the requalification of the relationship into an employment contract.

IP protection and confidentiality

Under Belgium's Employment Act, workers have a general obligation of confidentiality regarding the sensitive information they become privilege to during performance of their work. Usually, in cases where the function of workers gives them access to sensitive information, a confidentiality clause will also be foreseen in the employment contract.

In the same way, employment contracts normally include a clause that provides for the transfer of all intellectual property rights, to or for, the benefit of the employer, for the work realised in the framework of and in the course of performing the employment contract.

In the case of the ODE model, dispatchers are generally dealing with independent contractors, so it is important to include in the service agreement a clause for the transfer of intellectual property rights and to ensure the confidentiality of the service provider for any sensitive information accessed during the course of work.

Social security and tax issues

To avoid the revenues generated by the ODE not being taxed (because the tax authorities lack information on who is currently working in the ODE) and to promote ODE as a limited additional activity for people already engaged in another activity, the Act of 1 July 2016 provided for a limited framework, which included favourable taxation and no social security contributions. The framework was amended by the Act of 18 July 2018, which introduced a threshold for all income taxes and social security contributions.

To benefit from this framework, conditions are: (1) the revenues may not exceed €6,130 per annum (applicable to revenues generated in 2018); (2) the services must only be provided to private persons, not to legal entities or natural persons in a professional context; (3) the services must only be provided by the intermediary of an electronic platform, certified by Royal Decree or organised by a public authority; and (4) all the payments must be made to or via the electronic platform.

The purpose of these conditions is to avoid unfair competition with regular businesses working outside the ODE. If the ceiling of €6,130 per annum is exceeded, all revenues will be considered as professional revenues and will be taxed on that basis. Further, this special exempt legal framework only applies to the provisions of services, and is not available, for example, to the rental of goods or real estate.

The use of specific terms to describe types of work or activities is of course difficult to compare across jurisdictions. Subject to that caveat, this special arrangement in Belgium is a very novel approach, which attempts to allow for work that is more in the nature of a ‘gig’ or a ‘side job’ to be treated more like an independent contractor or business arrangement. The premise of the arrangement is of course that workers already have a ‘real job’ in respect of which they are paying (a less favourable rate) income tax and social security contributions.

It is too early at this juncture to say whether this form of tax relief will result in an expanded use of ODE platforms.

Market trends and emerging issues

The impact of the ODE on regular or traditional business depends on the sector.

In the transportation sector, taxis suffer from the competition of Uber, which they view as unfair because Uber is not subject to the same legal constraints. Discussions are under way in Belgium to reform the legal framework of taxi transportation to alleviate it and to make space for Uber’s drivers.

In other businesses, the ODE is not necessarily seen as a competitor, but more as a partner or as a new market opportunity that can also be implemented selectively by traditional businesses. For example, certain supermarkets are working with cycling couriers to bring groceries to the homes of their customers. The historical Belgian postal service has developed a platform that allows individuals to carry goods for other individuals. Despite these initiatives, traditional companies are not incorporating ODE workers into their own structure. Some have, however, backed down from the confrontational perspective that resists the ODE model and have concluded agreements with ODE companies or even set up their own platform.

Most of the companies using ODE workers are startups that appreciate the flexibility of obtaining services using this model. Traditional companies continue to work with regular employment contracts, trying to have more flexibility via interim or fixed-term contracts. However, traditional companies generally do not implement the ODE model into their own organisation for two main reasons: (1) ODE work is only possible in Belgium if the counterparty is an independent contractor. The constraints linked to the minimal working hours, the minimum salary, the formalities for employment contracts and so on do not allow for salaried ODE workers; (2) employees working in traditional companies and their representatives are reluctant to accept this new form of work as it means less social protection for the workers. There is also an implicit fear that the addition of ODE workers may eventually result in a reduction of the ‘mainstream’ workforce.

Both traditional companies and technology companies are interested in ODE issues, but for different reasons. For traditional companies, the ODE is often seen as unfair competition or at least a threat in the face of which they have to adapt. For technology companies, the ODE is an opportunity providing them with flexibility and space to grow. Given the uncertainties about the requalification of the independent relationship and related taxation and social security issues, however, all types of companies hope for legal clarification to reduce current uncertainties.

The first legal initiatives detailed here intended to avoid a situation in which ODE revenues would not be taxed because of the lack of information being provided to the tax authorities on the individuals working in the ODE. The legislature has therefore organised a framework ensuring that the information will be collected via certification of the platforms, the necessity of processing payments only via the platforms and the obligation to provide an annual factsheet on the amounts processed. In exchange, the occasional service providers can benefit from favourable taxation rules and tax authorities can focus on the other actors using the ODE more substantially. In parallel to the tax framework, the law has also clarified the social security status of occasional ODE workers.

At a second stage, the legislature will try to adapt the current legal framework applicable to traditional companies to regulate ODE and to avoid unfair competition.

From an employment law perspective, the specific criteria to determine if a relationship is considered an employment contract or an independent service agreement may change for the ODE or for specific types of work. The existing specific criteria have been set on the basis of feedback from relevant sectors, focusing on sectors where bogus self-employment was considered to be widespread. The authors expect that the legislature will likely wait for feedback on the ODE from relevant sectors before intervening. A reasonable expectation is that the specific criteria for ODE work would vary from sector to sector, even if the guidelines will be the same.

In Belgium, the social net is widespread, which means that persons working in the ODE will likely be able to find one form or another of social assistance after a termination of an ODE contract. However, it is certain that the Belgian courts will continue to rule on ODE status issues. Given that the Labour Court of Brussels has revoked the social rulings of the Commission on Working Relationships, the current legal uncertainty will continue, as the Court will only take a decision on the status of Deliveroo riders in 2021 and the legal procedures against Uber are also still ongoing. It is possible that Belgian case law will be influenced by recent Dutch, French and other EU case law.

The overall consequence of the flexibility offered by the ODE is that the ODE workers have less social protection. If the social net reduces because of the development of the ODE model, it will be necessary to consider a different kind of social protection. This is all the more important when considering that some tasks currently performed by ODE workers will be replaced in the future by automation. One prospect discussed in various other jurisdictions is the concept of a guaranteed minimum annual income. However, it is unlikely that this will be accepted in Belgium, with detractors arguing that there is no budget to finance it and that it aims to help people 'who do not need help'; that is, working people as opposed in receipt of unemployment or sickness benefits.

Brazil

From a labour perspective, the main focus of interest is whether ODE workers should be considered employees. An employment relationship in Brazil is strongly regulated by federal legislation, which establishes numerous mandatory labour rights and protections.

Nature of relationships

ODE work arrangements are established mostly as independent contractor relationships rather than employment relationships. By law, in an independent contractor relationship the parties are free to establish terms and conditions; in other words, it is a contractual relationship.

The Brazilian Labour Code, however, stipulates that an employment relationship is constituted by the simultaneous presence of four prerequisites: (1) services rendered on a personal basis by an individual; (2) on a permanent/habitual basis; (3) with subordination; that is, the services are rendered under the direction of a supervisor; and (4) on an onerous basis; that is, the individual receives remuneration in consideration for the services rendered, so it is not voluntary work.

If these elements are not present in a relationship, the parties are free to structure it in a way that differs from a formal employment agreement. However, whenever the prerequisites of an employment relationship are present, the individual may petition labour courts for reclassification into an employment relationship, with the consequential payment of all labour and social security contributions. The actual circumstances prevail over documents and formalities for employment purposes in Brazil.

There are no solid precedents in labour courts for assessing the status of ODE workers. Uber drivers seeking recognition of an employment relationship in Brazilian labour courts may be the predominant type of case, but there have been no final decisions. As a labour claim is usually based on actual circumstances; that is, whether the prerequisites of an employment relationship are present, each case may result in different conclusions.

Labour reforms came into effect in November 2017, bringing important changes to labour legislation, including the concept of intermittent employee, which is an employee whose activities and payments are on demand, depending exclusively on the needs of the employer. It is similar to the concept of a 'zero hours' contract permitted in some jurisdictions.

An intermittent employee might be considered as part of an ODE-worker arrangement. Since it is a very new concept, and due to the lack of precedents in the Brazilian territory, it is not yet possible to predict if it will be broadly used by ODE organisations.

Legal framework

When ruling in cases of recognition of an employment relationship, Brazilian labour courts have been taking into account the actual facts surrounding the relationship and, principally, the existence of subordination. Subordination is the most relevant requirement of an employment relationship and it differentiates an employment relationship from the other types of relationship.

While a claim requesting recognition of an employment relationship is quite common in Brazil, it is necessary to closely observe the interpretation of the concept of subordination by the courts as related to the ODE. Due to the innovative environment surrounding it, the courts may adapt the traditional concept of subordination to the new economic phase that is the ODE.

There are no current initiatives to change labour legislation to adapt it to ODE work arrangements and as aforementioned, it is too soon to predict if the intermittent employee category introduced by the 2017 Labour Reform will be frequently used by ODE organisations.

Discrimination claims

The Brazilian Federal Constitution broadly grants to any citizen protection against discrimination on the basis of race, colour, gender, age or any other form of discrimination. Any violation of such protections may lead to a payment of indemnification for moral damages and material damages. These rules are applicable to all categories of workers, employees or independent contractors. From a practical standpoint, claims are more focused on seeking reclassification as an employment relationship rather than a discrimination claim.

Termination claims

Most labour claims filed by independent contractors are to request recognition of an employment relationship and correspondent payment of statutory labour rights. From an employment perspective, a termination leads to mandatory minimum severance payments, which differ depending on the type of termination. If a termination is by the employer's initiative, without any justification, an employee is entitled to a specific severance package, which includes prior notice and indemnification. Therefore, if an ODE worker is recognised as an employee, the mandatory severance rights for the termination would be part of the indemnification.

In an independent relationship, however, the termination rights will depend on the terms and conditions of the contract executed by the parties, and it is regulated by the Civil Code, which establishes that the parties are allowed to terminate the agreement upon a minimum prior notice of eight days.

Health and safety and liability issues

Employers must provide a healthy and safe workplace for their employees. Health and safety regulations concerning the workplace are very detailed, and include mandatory and periodical medical examinations, monitoring of the work environment and the issuance of protective equipment to employees against any chemical, physical, mechanical or ergonomic adverse or potentially adverse environmental conditions. The regulations do not apply to independent contractors, who act on the general principles established by the Civil Code; that is, anyone is liable for acts, or acts of omission, committed against third parties.

Companies are liable to third parties for acts committed by their employees in the course of an employment relationship. In an independent contractor relationship, the contracting party is also liable to third parties for any act or act of omission committed by an independent contractor during the execution of the work for which they were retained.

ODE companies may seek remedies against the independent contractor who has caused damage to a third party. This may be reinforced through contractual provisions executed by an ODE company and an independent contractor.

IP protection and confidentiality

Rights and obligations regarding intellectual property and confidentiality are regulated in Brazil under Law No 9.279/96. Confidential information and commercial secrets obtained during a relationship, either employment or an independent contractor relationship, cannot be disclosed without authority. Doing so constitutes a crime of unfair competition.

Social security and tax issues

The social security system in Brazil is regulated by federal legislation and it is quite broad. It covers all types of individuals and workers, including independent contractors and any individual who may enroll as a voluntary contributor. It aims to provide income for retirement and disability and is funded by contributions from employers, contracting companies and individuals.

Employers pay approximately 28 per cent on top of the total remuneration of their employees; and contracting companies pay 20 per cent on top of the total remuneration paid to the independent contractors. Individuals are required to contribute 11 per cent of their income, capped at approximately US\$180 per month.

The benefit to be paid to individuals upon retirement or leave is capped at approximately US\$1,500 per month.

A person can also incorporate a company to provide specialised services; in this situation, the person will contribute to the social security system as an individual/partner. The contracting company will not be required to pay any social security contribution on the fees to be paid for the specialised services.

As a result, independent contractors engaged by ODE companies are able to enroll themselves in the social security system regardless of the existence of an employment relationship.

Market trends and emerging issues

The Brazilian labour market is underpinned by the existent legal framework for hiring workers and by the decisions of the labour courts. There are some alternatives for engaging personnel, but an employment relationship (and the mandatory labour rights that flow from it) will be triggered whenever the actual conditions of the relationship are based on subordination, habitualness, remuneration and personal basis.

Traditional companies may not be able to incorporate ODE relationships into their current operations. Relationships based on the ODE concept is an innovative approach in Brazil and it has been used mostly by start-up entrepreneurs inspired by successful businesses, such as Uber and Airbnb.

Canada

Canada is an example of a jurisdiction that has started to take a more nuanced approach to the employee-versus-contractor issue, together with related ODE issues. In particular, many jurisdictions in Canada have begun incorporating different and more flexible notions such as the concept of ‘dependent contractor’ or ‘intermediary’ into applicable statutes and case law, thus resulting in situations where an individual who performs work is not necessarily classed as either an employee or an independent contractor. These different categorisations have been emerging with increasing frequency and offer an opportunity for ODE companies and those using the ODE model to diverge from the typical employer/employee or contractor relationships. Equally, however, the emergence of these different types of relationships mean companies may face additional compliance obligations.

Nature of relationships

Traditionally, relationships have been assessed as being either an employment relationship or an independent contractor relationship. This assessment is made using tests developed either under tax law or workplace laws. The exact test has varied depending on whether it was from a tax or workplace perspective and in some cases also differed between statutes as well as among the Canadian provinces. That being said, irrespective of the test being applied and the Canadian province where the work is performed, the common focus has been on:

- the amount of control exercised over the worker;
- ownership of tools and equipment;
- the opportunity for profit and risk of loss; and
- integration into the business.

One of the difficulties with ODE workers and the model of having ‘just in time’ and ‘always on demand’ workers is that traditional employment relationships have shifted. As is the case in other economies, Canada has seen an increase in flexible work arrangements and remote work arrangements. This has resulted in a corresponding increase in the use of temporary, fixed-term or part-time employees. In addition, a number of organisations engage individuals using long-term (independent or employment) contractor arrangements. This change makes the use of long-established tests increasingly difficult to apply with any certainty. Indeed, one of the consistent outcomes of contentious disputes is that these matters are quite fact specific.

Moreover, while various Canadian legal regimes – especially with reference to contract law – continue to recognise a distinction between an employment relationship and an independent contractor relationship, the lines are becoming increasingly blurred. This move away from the traditional ‘either/or’ analysis has resulted in further support for the concept that even those who are not ‘classic employees’ (ie, in employment in the traditional sense) have some form of legal protection. That may include protections afforded in various workplace-related statutes such as health and safety and discrimination legislation, which apply while working, and also cover some form of right to notice upon termination of the relationship.

The law of contract in Canada has also recently become more open to the concept of ‘good faith’ in contract performance, which means that some of the due process that was historically not available to commercial parties is now available more generally, including to this third category of worker which sits somewhere between employee and contractor. All of this imposes a requirement that ODE companies deal with their workers (be they employees, contractors or ‘other’) with a level of honesty and candour. This will include an obligation that the ODE ‘employer’ explains to the worker the nature of the work relationship and the approach to providing work. The same will likely also apply to ceasing to provide work.

ODE workers in Canada can be engaged properly as contractors. This will, however, be subject to challenges under specific legislation, such as the federal and provincial Income Tax Acts, employment standards legislation (which governs topics such as wages, hours of work, statutory holidays and vacation) and labour relations legislation. In all cases, the substance of the relationship will be examined as opposed to the legal form. To date, the authors are not aware of a test case in which ODE workers in Canada have challenged their legal status and been found to be employees. We are aware, however, of certain ODE organisations that have engaged contractors using the ODE model and where the status of workers as contractors has been accepted. One reason for this may be that certain Canadian workplace statutes and related case law have provided rights to contractors (as will be outlined in more detail).

Legal framework

In Canada, there are various law reform efforts either under way or recently completed that are supportive of transient or tenuous work relationships such as the ODE model. The most notable of these projects is the Changing Workplaces Review, which was completed by special advisers to the Ministry of Labour in Ontario at the end of May 2017. This was soon followed by legislation from Ontario’s provincial government in the form of the 2017 Fair Workplaces, Better Jobs Act, which contemplates an extensive overhaul of employment and labour relations statutes. While not entirely focused on emerging categories of workers, one substantial thrust of these amendments is contract workers and ensuring that protections for employment standards rules (which are often called hours of work or employment rights in other jurisdictions) will extend to the ‘dependent contractor’ category. It is also notable that Canadian labour law has long allowed for this category of ‘dependent contractor’ to be able to access collective bargaining through a certification process which is available to all others who are employees.

There has been a similar effort in the province of Alberta, resulting in legislative changes that came into effect there in June 2017. These amendments, introduced in the Fair and Family Friendly Workplaces Act, have the stated purpose of introducing a more worker-friendly statutory regime for various categories of leave and to provide better access to statutory rights. While these amendments involve what Alberta’s current government describes as ‘modernising’ employment and labour relations statutes, there is a strong likelihood that ODE workers and the organisations that engage them may benefit from these amendments.

It is notable that the Ontario legislative changes were also accompanied by a very public and committed drive to enforcement. In particular, the government has encouraged the Ministry of Labour to actively enforce potential violations, including those relating to protections that have been extended to contractors. One potential issue to flag is that a new provincial government was elected in Ontario in mid-2018, and they have a stated position that they will adopt more business-friendly laws, including those

governing the engagement of workers. It is therefore quite possible that further legislation may soon be adopted that supports the use of ODE workers.

In addition to the aforementioned legislative reforms, there have been court and tribunal decisions that involve similar legal support for workers engaged under the ODE model. In this regard, one of the interesting observations with respect to Canadian workplace law, as decided both by the courts and the various tribunals, is that decision-makers have been adapting their approach to worker status issues to address the new reality. In particular, since legislation is not necessarily being adopted or amended rapidly enough to address the increasing number of contractors, more arrangements are being found to resemble a typical employment relationship. In other words, the fact that a worker is stipulated as being an independent contractor is not determinative of the issue. Instead, certain protections, including compensation in the event of termination and discrimination protections, are more likely to be available. In practice, this has resulted in many contractor arrangements being negotiated with notice provisions included.

Discrimination claims

Canadian courts and tribunals across the country have consistently taken the position that any worker is entitled to protection against discrimination, and this legislated protection is not limited to ‘employees’ in the narrow sense. In other words, discrimination protections cover all workers, including contractors. As a result, an on-demand worker in Canada will almost certainly have a right to protection against discrimination. One related development is that Ontario’s Human Rights Code was changed fairly recently, so that court claims, including those relating to termination (of an employee or contractor) and claims of discrimination pursuant to the Human Rights Code, can be heard together. The result is that cases can arguably now be dealt with more efficiently. This route may be attractive for a dismissed ODE worker.

Termination claims

Termination claims for those who work ‘on demand’ is one of the most contentious issues. While in theory an ODE worker does not benefit from any statutory or contractual protection upon termination, in practice there is frequently a viable claim for some form of notice. One of the ideas often discussed among practitioners is that the idea of an ‘intermediary’ arrangement for this ‘third category’ of worker is, in part, to describe the form of notice required.

If someone is a ‘true contractor’, meaning that they are what historically would have been called an independent contractor, then they often can be terminated immediately without notice. Conversely, if someone is a ‘classic employee’, then they will have a right to claim statutory or common law notice of termination or pay in lieu of notice, all based on the terms of the relevant contract and applicable law. For the ‘intermediary’, some have noted that the amount of notice to be provided to the person in this category is somewhere in between the contractor and the employee. One potential trend that might emerge is to consider some of the historic factors used to characterise the relationship as an indication of the notice to be provided. As an example, if someone who was declared a contractor was terminated and was not particularly integrated in the client’s business and was working on a non-exclusive basis, the amount of notice to which that person would be entitled would be quite short. However, this concept has not yet been fully developed under Canadian law.

With the increase of on-demand workers, an additional issue that may arise is the nature of the notice obligations upon termination of the relationship between ODE workers and the organisation, and whether these notice obligations are reciprocal. If the law continues to develop to the point that all contractors are entitled to at least some notice of termination, then it is important to understand the legal theory behind that requirement and what related reciprocal obligations might arise. In particular, if someone is truly an independent worker, but they nonetheless claim that they are entitled to notice of termination, then this notice is ostensibly payable on the basis that this is what is required to compensate them for the damage arising from the fact that they are no longer able to perform the work as a contractor. If that theory is accepted, then the contractor themselves presumably should have a reciprocal obligation to the organisation/dispatcher to advise them if they will no longer be able to provide services to the organisation/dispatcher. In practice, this type of claim is unlikely to be pursued. This, in fact, highlights a fundamental asymmetry between the rights of organisations and workers – while the idea of a ‘wrongful resignation’ claim by an employee or contractor is theoretically available under Canadian law, and there are certainly cases where this concept has succeeded, this type of claim is very rarely pursued and usually when someone ‘quits on the spot’, that is the end of the relationship without further debate.

ODE work models are entirely premised on the workers having complete flexibility to advise when they are available, and workers are only ‘required’, at their election, to take the work that they want, when they want it. If a claim by an on-demand worker for lack of or denial of work (for non-discriminatory reasons) is something that can succeed, then presumably the organisation can start stipulating rules regarding availability. This can become problematic since it begins to take on attributes of being integrated, dependant and controlled. One successful approach that some contract labour companies in Canada have utilised to address this problem is to prepare agreements that stipulate that minimum statutory notice requirements will be the entirety of what is required, but only if the worker is found to be subject to relevant employment statutes. In other words, the worker is stated to be an independent contractor with both the worker and the organisation having the right to terminate upon immediate notice. However, if there is a finding that the worker is an employee (or dependent contractor, as appropriate), then the worker will only be entitled to the minimum statutory notice of termination. While this approach has been successful in many instances, it does arguably resemble traditional employment and is less than that which would typically be provided for a contractor. In particular, an ODE worker who has this type of provision in a contract might, upon termination, point to this type of clause as evidence of recognition that the relationship may actually be one of employment or, at the very least, a dependent contractor relationship.

Health and safety and liability issues

In some cases, ODE workers may be subject to health and safety legislation regardless of their characterisation. In addition, the organisation/dispatcher may be liable for workers’ compensation coverage, which is typically something that an organisation must have in place, both for its employees and its contractors. The workers’ compensation coverage requirement is subject to contractors being able to have their own coverage, which must be verified by the party engaging the contractor. In practice, if an ODE worker is only doing small amounts of periodic work, they are unlikely to have their own coverage.

Even when relevant workplace health and safety or workers’ compensation legislation is not utilised, the dispatcher may be held liable for an accident or injury occurring on its premises. The reason is that an employer cannot have it both ways: either a location is a ‘workplace’ and relevant legislation is applicable,

which entails all of the compliance obligations associated with being an employer, or the premises or location of work is not a ‘workplace’ and is simply a public space where there may be either liability directly for relevant actions or vicarious liability for the authorised acts of an agent. Given this framework, it is very important for organisations to have either workers’ compensation coverage in place (this can often be achieved by paying relevant premiums for the work performed) or to verify that the workers have their own coverage. In addition, relevant health and safety training should be undertaken. The exact scope of training and related compliance obligations will of course depend on the nature of the premises and the type of work being performed. However, given the potential for directors’ liability in this area, it is generally ill advised to consider individuals who are stated to be independent contractors as being persons who do not have to be trained and supervised with respect to relevant health and safety risks.

IP protection and confidentiality

In many cases, a company will seek to protect its intellectual property and confidential information using relevant agreements. In the case of intellectual property, Canadian law provides protection for works created in the course of employment (it is notable that this is not exactly the same as the US concept of a ‘work for hire’). The protections applicable to works created in employment will of course not apply in the absence of an employer–employee relationship. In other words, IP protection can be a key business reason why the ODE organisation might be more interested in having an employment relationship. In the alternative, it will be very important when using ODE workers who are engaged on a contract basis to have written agreements in place that expressly provide that IP rights are the property of the organisation. Similar issues can arise with respect to confidential information. In all cases, the need for any agreements with ODE workers will of course depend on the nature of the work performed and the organisation. Employees generally owe a legal duty of confidentiality to their employer. While there can be such a duty between independent contractors and those they work for, such protections are far less robust and not as easy to assume. As a result, it is always prudent to have confidentiality protections in the contractor agreement or to use a standalone document that addresses these issues.

Social security and tax issues

Canada’s social security system (which takes the form of Employment Insurance and the Canada/Quebec Pension Plan) and income tax legislation still do not exactly align with ODE working relationships. In particular, there remain situations where workers who are performing work outside traditional employment will not be subject to or eligible for participation in state pension or Employment Insurance protections. In other words, if a party is proceeding as though they are not an employee and are instead a contractor, they may not be directly participating in eligible employment. In some cases, there can be participation on a voluntary basis. When examining whether a worker is considered an employee for the purposes of taxes and similar statutory obligations, the analysis under Canadian law involves a substantive review of the actual relationship. Put differently, the terms of the agreements entered into between the parties do not determine the issue. Relevant factors will be similar to what applies for characterisation of the relationship from an employment law (contractual and notice) perspective. In particular, control and integration will be key points to review.

There have been a number of high-profile cases involving Canadian organisations where the contractor model has been used and the Canada Revenue Agency has successfully pursued income tax

and relevant source deductions on the basis of a mischaracterisation of this relationship. A common approach is to stipulate with a contractor that the organisation will be indemnified for any relevant tax and other statutory obligations arising from the work. In practice, these provisions do not absolve organisations of potential liability since the withholding and remittance obligations are essentially duties that are owed jointly between the company and contractor, and the company cannot contract out of these obligations. In other words, compliance is likely to remain a contentious issue as the ODE model becomes more broadly adopted.

Market trends and emerging issues

The impact of the ODE on organisations more broadly is starting to emerge. As a result, many 'mainstream' employers, meaning those who are outside the technology industry, are seeing the need to compete by modifying their traditional framework and incorporating ODE relationships into their structure. This is accompanied by an increase in the use of temporary workers. In potential conflict against the need to compete is the desire to attract and retain talented people who have the necessary skills. To a certain degree, some of these changes are happening slowly since companies may well be hiring fewer 'permanent long-term' employees and hiring more contractors. In many cases, the 'contractors' being used are actually employees engaged on a fixed-term employment contract. The trend will continue to be that there will be greater use of contingent or ODE workers at the expense of more traditional relationships.

While it is obvious that technology companies and other organisations are more focused on ODE work models at this stage, with time there will likely be more traditional companies that will realise that they can benefit from using the ODE model. What is not yet clear is the extent to which legal rules will be completely transformed or whether it will be a combination of a transformation of the work and some changes to interpretation of the relevant laws. One obvious question that emerges is the capacity for existing legal rules to accommodate the required adjustments. The idea of providing a clearer 'third option' in the form of dependent contractors, who will have certain employment rights, may very well be a partial solution.

There are obviously a variety of issues that will emerge with ODE work models and will need to be more closely considered. One problem likely to emerge as the ODE expands is the need to have more 'employee-type' training offered to all workers. Traditionally, employers recognise the importance of investing time, money and effort into training and shaping their employees. In the past, this was done partly because of the expectation that this was considered the best way eventually to train and develop new leaders. However, the increasing use of temporary and fixed-term employees and contractors means that these individuals will not receive the same type of attention and training from the dispatcher/employer. As a result, there may eventually be an entire generation of workers who have never received the necessary training to perform their functions, so organisations may lack future leaders. It is not yet clear whether this will have an adverse impact on the quality of the workers and thus the organisation's effectiveness or external profile.

China

The on-demand economy, also known as the peer-to-peer economy, aims to share resources of people who are 'in demand'. The discussion concerning the on-demand economy in the People's Republic of China (PRC) focuses on the relationship between on-demand workers and the ODE service companies.

Nature of relationships

The legal character of relationships between on-demand workers and ODE service companies is mainly divided into two kinds: the employment relationship and the contractual relationship. For those subject to an employment relationship, workers' rights and interests are governed under the labour law domain; under a contractual relationship, workers' rights and interests are governed under civil and contract law. The distinction between the on-demand workers' status as employee and contractor is vital for the ODE service companies in terms of whether full protection and treatment under labour laws applies, such as restrictions on termination, the obligation to contribute social insurance and payment for overtime. In practice, to lower human resources (HR) costs and mitigate legal liability arising from employment-related disputes, ODE service companies are actively seeking out and making use of the contractual relationship with on-demand workers.

Under the PRC labour law regime, the trend to use ODE workers will unavoidably face the challenge posed by the legal principle of de facto employment relationships. On-demand workers and ODE service companies will be determined to have a de facto employment relationship under certain circumstances regardless of what the companies and workers have agreed in writing to establish the contractual relationship in the first place.

The Department of Labour and Social Insurance has issued the Notice with regard to Identification of the Employment Relationship, which provides three elements to be taken into account when determining whether a de facto employment relationship has been established: (1) companies are qualified to employ individuals in accordance with relevant laws or regulations; (2) companies establish internal policies based on the law and apply the policies to workers, and workers comply with companies' regulation and get paid by finishing work arranged by the companies; and (3) work finished by workers constitute part of the companies' business.

Where disputes on the existence of de facto employment relationship arise, the Labour Arbitration Commission and People's Court in China will undertake a comprehensive review of workers' working status and arrangements with ODE service companies and determine whether all the aforementioned criteria are met in each individual case and review de facto employment relationships on a case-by-case basis.

The labour arbitration commission in China has recently refused to determine a de facto employment relationship in a representative case concerning on-demand workers. In that case, the worker served as a freelance cook, who had established a contractual relationship with an online ODE service company by signing a Business Cooperation Contract. This particular ODE service company runs a website and mobile app to connect freelance cooks with users who need a tailored cooking service. In an effort to access the social insurance entitlement under labour laws, the cook filed a case with the Labour Arbitration Commission and sought a determination of a de facto employment relationship with the ODE service company. The Labour Arbitration Commission dismissed the cook's claim, on the grounds that the end

user rather than the ODE service company pays for the cook's service and the cooking service provided to the end user did not constitute part of the ODE service company's business, which is identified as an internet operation and e-commerce. This finding may have broad application to other ODE companies.

Legal framework

There has been a legislative survey and an academic discussion in recent years on the provision of more flexibility to the traditional employment relationship and the introduction of various alternative contractual relationships with workers. Industries such as online taxi-hailing have also managed to provide an 'industry-guiding opinion' to regulate 'on-demand' drivers.

As pioneers in the Chinese ODE market, online taxi-hailing businesses have survived an initial period during which governmental regulation was non-existent and now emerged into a new era in which the relationship between on-demand drivers and taxi-hailing companies is being more closely scrutinised. According to the Interim Measures for the Administration of Online Taxi-Hailing Business Operations and Services issued by the Ministry of Transport and six other departments of the State Council, taxi-hailing companies are obligated to either establish an employment relationship or a contractual relationship with on-demand drivers.

These exceptions aside, there are currently no other national laws and regulations that clearly recognise the legal status of on-demand workers and exclude these workers from being determined as having a de facto employment relationship with ODE service companies.

Discrimination claims

The general principle of equal employment in China has been established in the PRC Labour Contract. The PRC Employment Promotion Law elaborates on equal employment and prohibits companies from making discriminative employment decisions based on grounds such as gender, ethnicity, household registration, disability and medical conditions. As the ODE is a relatively new phenomenon, these statutes do not make direct reference to discrimination based on status as an on-demand worker. Moreover, as on-demand workers begin to establish a contractual relationship with the ODE service companies on an equal footing and gain no less commercial bargaining power than individuals recruited under an employment relationship, the scope for any discrimination claim raised by on-demand workers under the PRC labour law regime will likely become limited.

Termination claims

As the employment relationship is governed by PRC labour laws, the companies' right to unilaterally terminate employee is highly regulated and restricted to very limited scenarios. Where companies terminate employees on a non-statutory basis, they will likely incur liabilities for wrongful termination, being either the payment of a double statutory severance to the employee or the reinstatement of the employee with back pay.

By contrast, ODE workers who establish contractual relationships with ODE service companies will have more flexible rules relating to termination. In particular, the corresponding rule on termination will

be determined by an agreement. When workers and companies do not explicitly prescribe the rules of termination, the general rules existing in civil and contract law will fill the gap.

Health and safety and liability issues

The PRC Tort Liability Law and the Supreme Court's judicial interpretation prescribe different levels of vicarious liability for those companies making use of the employment relationship and those using a contractual relationship. The vicarious liability borne by companies using an employment relationship is much weightier compared to those in a contractual relationship.

In an employment relationship, in the event that a third party has suffered bodily injury or economic loss due to the actions of an employee, the company shall incur vicarious liability for all employee actions if said actions have arisen in connection with the employees' performance of their work duties. The situation is different under a contractual relationship: companies only need incur vicarious liability if the companies are negligent in arranging, instructing or selecting the workers responsible for providing the service.

IP protection and confidentiality

The PRC Labour Contract Law provides that a confidentiality agreement with workers may be arranged when forming an employment or contractual relationship. Once a confidentiality agreement is executed and takes effect, any information that the company regards as confidential will be protected by the workers' performance of the confidential obligation. This is the most widely used approach among ODE service companies to prevent their data or information being disclosed by workers.

With respect to IP protection, it is usual for ODE service companies and on-demand workers to agree that any invention or innovation accomplished during the service period and by using companies' resources will belong to the companies. This arrangement is compliant with PRC copyright law, patent law and generally accepted by the judiciaries in China.

Social security and tax issues

Whether the relationship with workers is identified as employment or contractual, the ODE service companies are obligated to withhold and pay individual income tax for and on behalf of workers pursuant to PRC tax laws. Due to the difference in the legal relationships, payments to workers under the employment relationship will be deemed as a salary or remuneration and a progressive tax rate will apply; while payment to workers under a contractual relationship will be deemed as service compensation and a flat tax rate will apply.

Under a contractual relationship, ODE service companies do not need to contribute to the social security system, which is not the case with an employment relationship where ODE service companies are liable to contribute. The social security burden for companies in China is increasing annually, which goes some way to explain why ODE service companies expect to arrange workers under a contractual relationship rather than under an employment relationship.

Market trends and emerging issues

With the support of mobile apps, the concept of ODE has become widely known and accepted by consumers in China. Within the past few years, ODE service companies in China, such as Didi and Meituan, have expanded their businesses into hundreds of cities and accumulated millions of registered users. In addition, different ODE service companies are emerging and can be seen operating in various service areas, including tailored cooking, after-school education, manicures and package deliveries. The ODE model has greatly changed the traditional service market and will continue to promote the economic development of China. From a legal perspective, disputes between on-demand workers and ODE service companies regarding the determination of a de facto employment relationship are continually on the rise. As direct national rules and regulations on ODE are currently absent in China, more disputes concerning the legal status of on-demand workers are expected for the foreseeable future.

France

The ODE model is of increasing interest in France. Though the law has not yet fully developed in this area, legislative changes within the past two years may signify further changes to come.

Nature of relationships

The ODE is still relatively new in France, with insufficient and uncertain case law existing to help determine how to tackle issues arising from this new form of doing business. How the relationship between the worker or provider and the digital platform is qualified is a crucial question.

Workers using digital platforms to carry out their activity are usually registered as independent workers or as managers of a company they have created for this purpose. In such cases, they are presumed not to be salaried employees of the digital platform. This presumption can, however, be overturned and they can be reclassified as salaried employees if it can be proven that they are in fact in a subordinate relationship with the digital platform.

In a vast majority of reclassification cases up to the end of 2018, the courts have considered that ODE workers were indeed independent workers (these decisions notably concerned the following apps: LeCab,² Take Eat Easy,³ Deliveroo,⁴ Tok Tok Tok⁵ and Uber⁶). However, these decisions were criticised by some legal scholars, who took the view that this kind of work falls within the qualification of an employment contract.

The tendency recently shifted since the Supreme Court ruled, in November 2018, that a courier working with the app Take Eat Easy under a status of independent worker was in fact a salaried employee.⁷ A few weeks later, the Paris Court of Appeals considered that a driver working with Uber under a status of independent worker was a salaried employee.⁸ An appeal has been lodged by Uber before the Supreme

2 *Mr X v SAS Voxtur*, Paris Court of Appeals, 7 January 2016, No 15/06489.

3 *Mr DUBOST v Take Eat Easy (liquidator)*, Paris Court of Appeals, 20 April 2017, No 17/00511; *M RENAULDON v Take Eat Easy (liquidator)*, Paris Court of Appeals, 12 October 2017 No 17/03088; *Mr CECILLE v Take Eat Easy (liquidator)*, Paris Court of Appeals, 14 December 2017, No 17/04607.

4 *Mr Z v SAS Deliveroo France*, Paris Court of Appeals, 9 November 2017, No 16/12875.

5 *Mr PIMOT v Tok Tok Tok*, Paris Labour Court, 1 February 2018.

6 *Mr MENARD v Uber France SAS and Uber BV*, Paris Labour Court, 29 January 2018; *Mr PETROVIC v Uber France SAS and Uber BV*, Paris Labour Court, 28 June 2018.

7 *Mr DUBOST v Take Eat Easy (liquidator)*, French Supreme Court, Social Chamber, 28 November 2018, No 17-20.079.

8 *Mr PETROVIC v Uber France SAS and Uber BV*, Paris Court of Appeals, 10 January 2019, No 18-08.357.

Court and is currently pending. The principal issue for the courts is to determine whether the ODE workers are indeed free to organise their activity the same way as a ‘traditional’ independent worker. The main criteria applied when determining whether they enjoy such independence (in addition to being registered in the Commercial Register) is whether they can: (1) decide when they want to work; (2) choose not to log on to the app; and (3) look for their own clients. The courts also scrutinise the possibility for the digital platform to take disciplinary sanctions against the worker.

The first recommendation to support a contractor characterisation is to ensure there is no exclusivity. In this regard, it must be noted that in the sector of passenger transportation (ie, services offered by apps such as Uber and its numerous competitors), a recent law has strictly prohibited imposing any exclusivity obligation to workers.⁹ A second recommendation is that payment must always be made for a specific service and never for a specific number of hours. In other words, the relationship is task-based as opposed to time-based. Finally, and this is where most problems generally occur, the workers can work and stop when they want, with no orders given by the app and the absence of any form of subordination whatsoever (such as checks, directives, orders or sanctions). This of course can create practical challenges, since many ODE companies will facilitate business on the basis of their ability to deliver consistently reliable and prompt service. To do so, ODE companies often set out rules in a ‘user guide’ or relevant agreement that applies to ODE workers. These workers often rely on these rules in an attempt to show that they are in a subordinate employee–employer relationship.

Legal framework

Two new laws have been passed to address certain issues of the ODE. The French Law of 8 August 2016, which amended and modernised labour law generally, included some elements concerning the ODE. The status of ‘independent workers using a digital platform’ was created and certain obligations applicable to the platforms were introduced (notably in the fields of professional training, occupational accidents and union rights).

Another new law was passed in the special field of transport on 29 December 2016. It provides that platforms must check that drivers meet certain specific obligations linked to safety. For example, from now on, applications such as Uber must check that its drivers have a driving licence.

It is important to note that the latest workplace law reforms, such as the so-called Macron reform of 22 September 2017 or the Pacte Law voted on 11 April 2019, do not affect the specific rules concerning the ODE.

Nevertheless, President Emmanuel Macron seems to be in favour of diversifying ways of working. As a result, changes are, once again, on the agenda: a draft bill concerning different types of mobility that is currently under discussion provides that some digital platforms (those that act as intermediaries in the field of passenger transportation and delivery of goods) may adopt charters on social responsibility and guarantee certain rights to ODE workers (such as the non-exclusive nature of the relationship between the workers and the digital platform and the freedom for workers to use the platform whenever they want). The bill provides that these charters would be subject to the approval of the labour authorities.

⁹ Law No 2016-1920 dated 29 December 2016.

In case of approval, the existence and content of the charter may not characterise the existence of a subordinate relationship. Legal scholars are of the opinion that this provision will significantly reinforce the presumption that these workers are independent and not salaried employees.

Discrimination claims

While it is certainly possible that discrimination issues may arise in relation to ODE workers, the authors have not yet seen any claims. The crucial point remains the qualification of the relationship. The 2008 Discrimination Act is also applicable to independent workers, yet the specific articles it introduced in the Code du Travail are only applicable to employees in the strictest sense.

Termination claims

If the ODE worker wants to stop working (for any reason), they should be totally free to do so, as an independent worker. If it were not the case, it would be highly probable that the relationship would be qualified as a contract of employment.

The situation is more complex if the digital platform no longer wants to work with a particular worker and, for example, excludes the worker from the network either as a final termination of the relationship or as a temporary sanction. As an independent worker, in theory, the only consequence of a lack of assignments would be the loss of clients. However, because of the huge number of workers and the random nature of their selection by the digital platform, client ratings are very important. This means, therefore, that a platform may be able to use bad reviews given by clients to sanction the ODE workers, according to a general rule accepted by users. However, it is also possible that these sanctions might be seen as the exercise of an employer's disciplinary power. For example, if the ODE suddenly stopped giving assignments, this could be viewed by the worker as a termination of employment situation. The approach to be adopted to deal with this type of situation and related termination claims is not yet clear.

Health and safety and liability issues

Almost all of the Labour Code's provisions are not applicable to independent workers. Unlike traditional employers, therefore, digital platforms are not likely to be found liable for any breach of safety obligations applicable to employers unless the relationship has been qualified as a contract of employment. From the standpoint of compliance, an ODE organisation will obviously want an 'all-or-nothing' approach – if some, working via a digital platform, are employees, then all of the associated employment law obligations related to being an employer arise with respect to those workers. In most cases, it would therefore make little sense that others in the same situation remain as independent workers.

Nevertheless, the Law of 8 August 2016 introduced the following obligations applicable to digital platforms: (1) if the independent worker voluntarily takes out private insurance to cover sickness and occupational accidents, the digital platform must take on part of the costs; (2) the independent worker is entitled to take part in continuous vocational training financed through a contribution from the platform; and (3) independent workers enjoy a modified right to strike as well as the general right to form and join trade unions. This approach is at least a small indication of the possible emergence in France of a 'third category' of worker as provided for in other jurisdictions.

Intellectual property protection and confidentiality

It appears that there are no specific risks relating to the ODE as workers do not, in principle, produce anything and only provide services to clients. That may of course change if there are products or development made by ODE workers.

Given the current scope of ODE activity, questions are more likely to arise in the field of the ODE workers' private lives, as an application cannot monitor them through their mobile phone when they are not working. As an example, it would be prohibited to check if they work for other applications or how much time they work. The protection of individual's private lives is also at stake: what do the digital platforms do with the private data they collect when a client uses the application? Following the enactment of the GDPR on 25 May 2018, France, in turn, passed a new law on data protection on 20 June 2018. ODE companies, as well as all other companies, agencies and individuals, are now subject to very strict conditions regarding the processing and use of personal data. The need to obtain the consent of individuals has been reinforced and this consent is fundamental for the processing and use of their data.

As a result of these changes, Uber, for example, has decided to improve the way it protects the data of its users (eg, drivers no longer have access to the personal data of users, such as their home address). The only information that can be processed is that information strictly necessary to achieve the objective that is sought, and it must be destroyed once this is done. These changes may potentially be a cause for concern, as the fact that an ODE worker has access to clients' key information is arguably one element that shows they are truly independent.

Social security and tax issues

Being an independent worker is a choice. Independent workers choose not to have a contract of employment. They therefore also avoid the social security affiliation of employees. However, the qualification of the relationship dictates the statutory obligations, and when matters of public policy are at issue, even the common intention of the parties is not always taken into account.

The situation is evolving. Since the Law of 18 February 2016 was passed, settlement agreements with the state are possible in the case of reassessments (except in some circumstances such as situations of undeclared work), in relation to social security contributions. In the case of ODE workers, they now have the option of taking out private insurance, which is financed in part by the platform (as aforementioned).

Market trends and emerging issues

In a traditional company, the degree of independence enjoyed by its staff depends on the functions of each employee. Employing the services of workers who are apparently independent will not prevent a judge from determining that there is an employment contract. This can be the case even if the worker is, for example, on a commercial register. That is why traditional companies that contractually employ employees, but which also regularly use independent workers, place themselves in a high-risk situation.

In 2016, there was pressure on the government from taxi drivers concerning Uber. The Law of 29 December 2016 represents a compromise, in trying to avoid an 'economic war', by harmonising most of

the obligations applicable to both taxi drivers and private drivers (eg, Uber and other similar companies with the same economic model, such as Allocab, Chauffeur-Privé, Cinq-S, Marcel and others).

In other economic sectors, traditional companies sometimes try to adapt in various ways. As an example, in the food and hospitality sector, restaurants have integrated with the ODE (eg, Deliveroo) and the sector has been supportive of or created new social networks, such as ‘La Fourchette’, to match new clients’ behaviour (the reflex to check on the internet if a restaurant is good). These types of platforms may well evolve to something closer to an entity that has many of the characteristics of an employer.

An increasing number of applications provide different kind of services: transport, home delivery, food, housing and more. All these applications provide services on demand but these services are sometimes provided by professional independent workers (eg, Uber, Deliveroo) and sometimes by private individuals (Blablacar, Airbnb), two different models of the ODE.

The ODE may mark the end of classic labour law as France has known for the past 50 years, with labour law being split into two different facets: one applicable to employees and the other to independent workers.

It may be that the European social model is one of the key reasons why most people working in Europe prefer to be employees. The creation of some protection for ODE workers could ease tensions between these two worlds and allow a better development of the ODE model and all other forms of alternatives to an employment contract.

Traditional companies will not disappear, but some will change profoundly. ODE legal and business issues fall within the context of new technologies and will have a further impact on the labour market. In the near future, one-third of jobs currently requiring a university degree could be carried out by machines or programs with artificial intelligence.

The ODE goes hand-in-hand with the gradual digitisation of the economy and will probably result in professional and private life being increasingly intertwined. The phenomena of ‘Bring Your Own Device’ (BYOD), teleworking or virtual working groups (allowing experts from all corners of the world to work together) are clear examples. A revision of the working time regulations should be considered in view of this new configuration.

Employees’ collective representation is also a big challenge. Staff representatives and trade unions will have to adapt to a decline in the number of employees due to the inversely proportional increase in the number of self-employed and ODE workers. A related pressure is the increase in the geographical distance between employees and their place of work. If staff representatives are to keep their current role, the public authorities will have to introduce and support new forms of representation of ‘workers’ in the broader sense.

To face all the changes resulting from both the ODE and digitisation, certain commentators are calling on national legislators to legislate, taking into account the impact of new technologies on the world of work, and question whether the establishment of international standards setting uniform principles throughout the world could be an alternative solution.¹⁰

10 V De Stefano, ‘Labour is not a technology – Reasserting the Declaration of Philadelphia in Times of Platform-Work and Gig-Economy’, *IUSLabor* 2017, No 2, 1–17; Jeremias Prassl, *Humans As A Service* (Oxford University Press 2018), 119–129.

In conclusion, three major changes are to be underlined. First of all, French labour law will no longer be limited to the existing labour laws relating to employees but will also extend to include labour laws relating to independent workers. Second, and in parallel to the rise of the ODE, there is a general shift towards ‘contractualisation’ of the economy in France, reflected in a reduction of mandatory laws in favour of collective bargaining agreements, especially at a company level, with the aim of being as close as possible to the economic realities of the company concerned. Third and last, the involvement of blockchain technology in the ODE arena, which eliminates the need for brokers (whether banks or platforms), is creating a new type of environment. The ‘revolution’ of the workplace that has been brought about by the ODE may itself be ‘revolutionised’ by blockchain methods of doing business.

Germany

Nature of relationships

A classification of contractual relationships has to take place on the basis of the common distinction between self-employed and employees. This is done according to the principle of ‘all or nothing’. Nevertheless, there is an intermediate category known as an ‘*arbeitnehmerähnliche Person*’ (person comparable to an employee), determined as such by their economic dependence on the purchaser of their services. The consequence of such a qualification is the applicability of some regulations that are normally just applicable to employment relationships.

German law states that an employee is a person who, in an overall view of all the circumstances of the individual case and based on the private-law contract in service of another person, is obliged to perform work that is subject to instructions and determined by a third party in personal dependence. The most important criteria to determine dependence are the determination of working hours and workplace.

Taking these criteria into account, the ODE-service provider’s activity usually appears to be self-employed. However, the boundary to employee status is sometimes fluid, so that even slight modifications to the relationship with the agent – especially in the case of more far-reaching specifications for work performance and the provision of work equipment – may indicate a different assessment.

In addition, under German law the recipient of the service also runs the risk of becoming an employer, together with the associated obligations, if they permanently employs a certain person in accordance with precise specifications.

To eliminate continuing uncertainties, it may be advisable for intermediaries and service recipients to submit an application to the social security authorities to determine whether they are employed or self-employed. While this does involve further administration, it does have the advantage that costly back payments can be avoided.

The question of the relationship between intermediaries and service providers is of considerable importance and, to a very large extent, dictates the rights and obligations in almost all relevant areas detailed below.

Legal framework

Despite the increasing number of offers from on-demand service companies, there have been no legislative changes enacted to deal with resulting issues, justified by the responsible Federal Ministry of Labour and Social Affairs by the still manageable and practical relevance of the existing legal regime.

The courts are also yet to make much of a contribution to the law in this developing area. It is predicted that in the near future 50 per cent of the workforce will be self-employed in an on-demand economy, yet it remains to be seen to what extent the legislature and judiciary will play a more active role.

Discrimination claims

Under German law, discrimination claims may arise in particular from the *Allgemeines Gleichbehandlungsgesetz* (AGG or General Equal Treatment Act). It provides employees with extensive protection against unequal treatment on the basis of various distinctive features (race, gender, religion, etc). However, this law is only conditionally applicable to non-employees. According to section 6 paragraph 3, self-employed individuals are entitled to initiate claims insofar as they relate to conditions for access to gainful employment or professional advancement. Whether such claims actually arise during a one-time self-employment has yet to be established and so remains uncertain.

Termination claims

The question of claims arising from the termination of the contractual relationship is also closely linked to the classification of the service provider as an employee or self-employed person. Only for the former does there exist a large number of legal requirements that, by international standards, provide a high level of protection against dismissal and, as a result, are highly likely to give rise to claims for compensation upon termination of the contract. A self-employed person employed under an enforceable employment contract, on the other hand, is only entitled to the contractually agreed demands.

Health and safety and liability issues

The relevance of the distinction between self-employed and employees continues in this context: the Occupational Safety and Health Act, for example, is only applicable to employees. For self-employed persons, claims for damages can only arise after damage has occurred. Criminal sanctions for negligence do not distinguish between the two forms of occupational activity.

A similar distinction also applies to liability issues: if, as intended by the parties, no employment contract is concluded between the service recipient and the operator of the intermediary platform, the service recipient is not entitled to proceed with a claim against the usually much more solvent broker in the event of a claim. For claims, the beneficiary must therefore adhere to the self-employed provider. However, they are in some cases insured via the agent, which guarantees the customer a minimum level of security.

IP protection and confidentiality

In Germany, due to the typical nature of on-demand services (food deliveries, cleaning, taxi rides, etc), no considerable problems arise in the area of copyright law. In general, however, the following can be said:

if an employment relationship actually exists, copyrights are transferred to the employer to the extent to which they are provided in fulfilment of the work obligation. When concluding a contract with a self-employed person, a corresponding transfer can be included in the contract.

Employees are obliged to maintain confidentiality as an ancillary obligation under the employment contract. For the self-employed, such an obligation will be much less likely to be derived from the contract concluded. This does not affect the possibility of concluding special confidentiality agreements.

Social security and tax issues

For insurance and tax issues, the classification of service providers as employees or self-employed is of decisive importance.

The statutory accident and health insurance covers only very few self-employed persons, who have the option of taking out private insurance and paying membership fees independently and at full cost.

If the service providers are employees of the intermediary platform operator, this operator is required to pay taxes and social security contributions as the sole contributory debtor. It is particularly advantageous for employees that the contributions to social insurance must be paid (almost) equally by employer and employee.

An incorrect assessment of an employee's activities leads to at least an additional claim for social insurance contributions and can give rise to criminal liability on the part of the employer with regard to tax and social security liabilities.

Market trends and emerging issues

Unlike in other countries, Uber is not a driving force behind the ODE in Germany. This is due to the restrictive policy of German courts, according to which it would be an inadmissible competitive advantage if Uber drivers could circumvent the strict legal requirements for passenger transport. The procedure of the courts was recently confirmed by the Court of Justice of the European Union, so any change is also not expected for the foreseeable future (and, as a result, Uber discontinued its services in large parts of the country).

Despite this, a large number of on-demand platforms already exist, specialising in the placement of cleaning staff for private households. Even if these have recently been judged by the renowned Stiftung Warentest (a German consumer organisation) as immature and faulty, a considerable potential is assumed here.

At the same time, restaurants in major cities in Germany have in many places entered into cooperation with delivery services (eg, Foodora or Deliveroo), organised in accordance with the ODE. The work processes of the restaurants remain largely unaffected; due to the delivery and resulting loss of on-site catering, however, a larger circle of customers can be reached.

These exceptions aside, few long-established companies (to the authors' knowledge) have yet discovered or adopted the ODE model to any great extent.

India

Nature of relationships

In contrast to a number of other jurisdictions, India has yet to witness significant litigation regarding characterisation issues of ODE workers. In any misclassification disputes based on the classic employee versus independent contractor question, the focus is on control by the organisation and the worker's degree of economic dependence.

The current nature of workforce engagement in the ODE sector in India has potential for creating co-employment risks. This is because, in practice, organisations (known as principal employers) usually engage their ODE workers for their core activities and continue to exercise material control over them. The use of an ODE platform may not necessarily change the level of control exercised by the organisations over their workers. In addition, contract labourers and independent contractors are frequently economically reliant on the employers. Consequently, if there is litigation in these situations, the co-employment exposure and misclassification risk is relatively high.

While ODE-specific cases have not yet emerged, there have been a number of cases in which independent contractors have been regarded as employees in view of the amount of control exercised. It is not yet clear whether the use of an ODE platform (as opposed to 'direct direction' from the organisation) might change the legal analysis.

In addition to re-characterisation cases, there are instances in India in which contract labourers have claimed permanency of employment with the principal employer. Specifically, Indian tax and social security authorities have been relatively more aggressive in scrutinising these arrangements. Organisations that wish to engage independent contractors should ensure differentiation between the terms and conditions provided to such workers and to their employees in terms of the nature the activities performed, their work profile and their compensation and benefits. It is important that organisations using independent contractors refrain from exercising control over them, not just on paper but also in practice. It is necessary to ensure that there is a clear demarcation in the functioning of employees and independent contractors on almost all parameters. This approach is based on the principle, applicable in other jurisdictions as well, that the characterisation of a working relationship will be based on what occurs in fact as opposed to theoretically.

Legal framework

One potential reason that ODE classification issues have yet to be extensively litigated in India is that the country has a unique law, the 1970 Contract Labour (Regulation and Abolition) Act. This statute regulates the engagement of contract labourers through third-party staffing service agencies and arguably guides practices for established on-demand and contract workers. To the extent that third-party staffing service agencies employ ODE workers and take care of the employment-related obligations, misclassification disputes are less likely to arise.

Termination claims

Indian courts (especially at the lower levels) tend to beneficially interpret laws in favour of workers. Therefore, there is a likelihood that ODE workers would succeed with claims in relation to wrongful termination. The 1947 Industrial Disputes Act requires employers to, inter alia, provide notice and pay severance upon termination. Workers in the ODE can potentially argue that they would be protected by the labour legislation and consequently seek payment of severance or otherwise demand reinstatement of their services.

Dispatchers/employers would have to defend the claims that these ODE workers are independent contractors and not employees by proving that no control was exercised, among the other factors of differentiation outlined. Further, those alleged to be employers would have to prove that the nature of the relationship itself was only to provide services on demand and that the worker was free to accept or reject the work, and also had the ability to take on other activities. This creates potential tensions for effective use of the ODE model, since the 'always available' level of service, which the ODE is based on, may not sit comfortably with the defence upon which organisations claiming to be 'non-employers' would want to rely. More specifically, if all workers are offered too much flexibility about when and how to work, the consumer may not be able to receive prompt or proper service.

Health and safety and liability issues

India has not yet enacted comprehensive or codified legislation addressing occupational health and safety issues and the employer's related 'duty of care' for commercial establishments. Indian laws on occupational health and safety acknowledging the diverse challenges faced by different sectors are mostly scattered and industry specific.

The Employees' Compensation Act makes the employer liable to pay compensation to the employee if he or she suffers personal injury or certain occupational diseases by reason of an accident arising out of or in the course of employment.

The application of this legislation extending to ODE workers seems unlikely, although it has not yet been thoroughly considered, and as such we have not come across any substantive cases where courts have held the employer liable for any health and safety issues relating to ODE workers.

IP protection and confidentiality

As in other jurisdictions, there are IP issues that arise in India when engaging workers as independent contractors. In particular, copyright law in India deems the employer to be the owner of copyright (in certain works, such as literary works, as well as other recorded forms) created by its employees, unless there is a contract to the contrary. However, any IP created by independent contractors/contract workers would have to be specifically assigned to the employer or party engaging the worker. This could potentially become an issue based on the amount of IP created by these workers and reinforces the need for appropriate contract wording in applicable cases.

With respect to confidentiality, apart from contractual measures to impose confidentiality obligations on workers, the best way to ensure confidentiality is to have working procedures that restrict the flow

of information and monitor employee or contractor use of company property. With the ODE model, however, it can be difficult practically to implement these measures as ODE workers typically work outside the employer's premises and are often subject to less control and supervision.

Social security and tax issues

Social security obligations in India vary, based on the nature of the engaged workforce. Employers are not currently required to make social security contributions for their independent contractors. However, the government has proposed a Code on Social Security which would ensure that all persons working, including independent contractors, are covered by social security. At this stage, this law is still in draft form and has yet to be enacted.

Market trends and emerging issues

Mainstream employers in India have yet to fully incorporate ODE relationships into their operations. These employers still typically use traditional methods of engaging their workforce, such as direct employment or through a third-party contractor agency. The use of contractor agencies remains predominant in India, especially in traditional sectors. The differences that have arisen between traditional employers and employers or organisations that work with the ODE system are that the former continue to follow practices such as fixed working hours (such as a nine to six schedule) and provide minimal flexibility to their employees in the manner in which they function. By contrast, the latter (organisations and employers engaging ODE workers) allow flexibility to their employees in their work, and in certain instances have got rid of fixed working hours and formal leave policies.

It has largely been service companies in India that are most focused on the issues related to the ODE sector. Traditional companies use predominantly the contract labour model. This is perhaps in part because the established use of staffing agencies has a degree of certainty that the ODE model does not yet provide. In this regard, while the government has proposed a number of changes in employment law, none of them are directed towards or relate to the ODE sector.

One prospect for market change in India arises because of the thriving startup economy. In this regard, the initial wave of Indian information technology (IT) work related mainly to outsourcing. This has since transformed to focus on a variety of technology work, based on a large number of substantial investments, both by established blue chip companies and venture funding. These billions are no longer solely directed at low-level support or processing. Instead, there is an ecosystem in India focused on early-stage growth companies. It is likely that these startups will generally avoid direct employment and as a result, it is expected that there will be an increasing number of workers engaged either indirectly through staffing services agencies or through the ODE model.

Ireland

Nature of relationships

The ODE in Ireland is much less developed than in some other jurisdictions. In Ireland, there is no 'other' category to describe on-demand workers; they are either employees or independent contractors. If a worker is needed on an on-demand basis, this will be referred to as an 'If-and-when' contract, which is used to describe the relationship between an employer and an on-demand worker. However, in all cases the worker will either be employed or engaged as a contractor for the specific period required.

Legal framework

The Competition (Amendment) Act 2017 has been enacted to end the application of competition law restrictions to collective bargaining by self-employed contractors. This has been achieved by providing that certain categories of workers will no longer be considered as 'undertakings'. Accordingly, self-employed workers are now subject to fewer restrictions from a competition law perspective.

Separately, the Employment (Miscellaneous Provision) Act 2018, commenced on 4 March 2019 and protects workers who are working shorter hours or who are lower paid. Specifically, this legislation aims to:

- ensure that workers are better informed about the nature of their employment arrangements and in particular their basic terms at an early stage of their employment;
- strengthen the provisions around minimum payments to low-paid, vulnerable workers who may be called in to work but not provided with work during that period;
- prohibit zero-hours contracts, except in cases of genuine casual work or emergency cover or short-term relief work for that employer;
- ensure that workers on low-hour contracts, who consistently work more hours each week than provided for in their contracts of employment, are entitled to be placed in a band of hours that reflects the reality of the hours they have worked over an extended period; and
- strengthen 'anti-victimisation' provisions (bullying, harassment and so on) for employees who try to invoke a right under these provisions.

Discrimination claims

Equality law in Ireland covers both employees and independent contractors. All workers, however classified, enjoy full protection against discrimination in the workplace. Undoubtedly, fewer contractors bring discrimination claims, probably because of a lack of awareness.

Termination claims

Termination claims for ODE workers are a grey area in Irish employment law. In relation to on-demand workers hired as employees (effectively for fixed-term contracts), because there is no mutuality of obligations in an on-demand worker relationship, it can be that there is no obligation to provide work or

indeed for the on-demand worker to accept work, in between the periods of work. However, a third party may determine that an employment relationship does exist, for example, if there has been a consistent pattern of re-employment. Clearly, the on-demand worker is employed for the duration of the contract, and so the employee is protected under Irish employment law for that duration.

The key question will be whether the periods in between (or gaps in) employment should still count towards an on-demand workers' continuous service or whether they terminate at the end of every employment until subsequently re-employed. Some adjudicators may be willing to count the periods in between contracts, which may give rise to employment rights such as unfair dismissal (after a year of service), or statutory redundancy (after two years' service). This may lead to the perverse situation that it may be less attractive to engage an ODE worker than an employee.

A further issue involves the risk that an on-demand worker engaged as a self-employed contractor may be reclassified as an employee, if the features of the relationship warrant such a reclassification.

In terms of protections for the employer or client, the employer/client can put in place various measures to reduce (but not eliminate) the aforementioned risks. For example, for self-employed contractors, although one of the main tests will be 'substance over form', the contract wording is important. Also, 'clients' can put in place measures to reduce the risk of a de facto employee claim. For on-demand workers with employment contracts, an employer should keep the duration of all combined periods of employment to under one year and issue a P45 (a form regarding the details of an employee leaving the work) at the end of the last assignment.

Health and safety and liability issues

In relation to vicarious liability, an employer is likely to be vicariously liable for the actions of an on-demand worker (either employed or independent contractor). However, the client can secure an indemnity for liability incurred for the duration of the contract from any on-demand worker who is a contractor.

Health and safety laws apply to both on-demand contractors and employees. However, there are more rigorous legislative requirements for an employer of an on-demand employee than of a client of an on-demand independent contractor.

There is no worker compensation in Ireland. In the event of injury of an on-demand worker, the worker can pursue a claim under common law or statute against the negligent party, who might be the employer/client/third party.

IP protection and confidentiality

At common law, an on-demand employee owes a duty of confidentiality to the employer. However, a lesser duty arises for an on-demand independent contractor. For both on-demand employees and contractors, there is no protection for confidentiality post-employment/post-engagement, unless expressly provided for in the contract or a related agreement.

Similarly, at common law, IP vests in the employer of an on-demand employee. Conversely, IP does not automatically vest in the client in an on-demand independent contractor situation. It is therefore recommended that the contract should expressly set out what confidentiality and IP provisions the

company wishes to protect. For both the on-demand employee and contractor, there is no protection for IP post-employment/post-engagement, unless provided for in the contract.

Social security and tax issues

In terms of social security, an employer that hires an on-demand employee must deduct at source all relevant social security of the employee. There is no flexibility in this regard. However, an on-demand contractor is liable to pay all of their own social security contributions.

In relation to tax, the employer that hires an on-demand employee must also deduct all relevant tax at source with respect to amounts payable to the employee. There is no flexibility regarding these obligations. However, tax liabilities fall on an on-demand contractor to pay. The client may request an indemnity to this effect from the on-demand independent contractor.

If an on-demand independent contractor has been incorrectly classified when in actual fact they are a de facto on-demand employee, they may be subsequently reclassified as an employee and the employer will be liable for any underpayment of tax/social security liabilities and penalties.

Market trends and emerging issues

Traditional employers have always used 'seasonal' workers. These workers are effectively on temporary part-time or full-time contracts for a period of time and are very popular within the retail, hospitality and restaurant and pub sector. In the hotel sector, for example, a hotel can determine whether it requires staff, depending on the demand of customers throughout the week.

With the rise of the ODE, there has been a move away from consistent seasonal staff, whereby the client/ employer engages in a much looser arrangement with on-demand workers. An important consequence of this is greater negative publicity towards perceived abuses of the on-demand worker. Many on-demand workers are given consistently low hours over many years and may never have security of tenure.

Companies using the on-demand worker model benefit from greater flexibility and are seen to be modern or forward-thinking by exploring new ways of working. For on-demand workers providing professional services, negative perceptions are less likely than for employers engaging on-demand workers on a minimum wage, which are increasingly viewed negatively and met with skepticism.

It is mostly technology companies that are seen as important users of on-demand workers, because it is they who currently attract scrutiny in the news. Technology companies view their relationship with the workers as being with a self-employed person that uses their platform to engage in their own employment. The platforms are, in their opinion, a service provider as opposed to an employer.

Traditional companies that have tended to veer towards seasonal staff and thus create an employee/ employer relationship are, however, seeing and understanding the options and benefits relating to on-demand workers, and are increasingly engaging them. As the use of on-demand workers has become much more prevalent, we anticipate changes to the legal system, to protect on-demand workers in general, regardless of sector. That being said, the Uber model is somewhat unique and may be treated differently and result in sector-specific, new legislation.

Italy

The ODE model involves new changes to work modalities because it involves a platform offering deliverables without being the traditional employer and without those performing the work being proper employees. This provides an organisation with additional flexibility in the use of workers. At the present time in Italy, however, the ODE model cannot be used to determine the high level of protection that is typical for employees, at least according to the decisions of its courts. The approach under existing Italian laws with respect to employment and workplace issues, as well as issues related to taxation, continue to be based on the traditional either/or model. The current principles and rules, based on the traditional employee/contractor distinction, seem inadequate to properly manage the new models of working.

Nature of relationships

In Italy, work may be rendered either independently or as an employee. In the first case, the focus is on the 'performance of a service' or the supply of work rendered independently by the worker, without any relationship of subordination with regard to the enterprise. In the second case, the law defines an employee as 'a provider of subordinate work, who undertakes to work in the enterprise for consideration, providing his/her intellectual or manual work in the employment of and under the management of the enterprise'. An employment relationship is defined as the personal subjection of the worker to the executive, organisational and disciplinary power of the employer.

Case law has provided some guidance on how to identify, in some specific cases, the features that identify an employment relationship as a subordinate one. The main factors are: (1) work of an exclusive nature for the benefit of a single principal/employer, which results in the insertion of the worker in the organisation of the enterprise and in the ongoing performance of work. This is an important condition for ascertaining the existence of subordination, as it indicates the employer's power to manage the work of the employee; (2) compliance with obligatory working hours is usually an indicator of subordination. As a matter of fact, it is under the employer's prerogative to establish the times when work is to be performed; (3) remuneration at fixed intervals for work activity and methods of calculation and payment, are usually considered circumstantial evidence for showing the existence of an employment relationship; it is believed that a pre-determined salary paid at fixed intervals, regardless of the results achieved, is a sign of subordinate employment. In contrast, a self-employed worker is committed to achieving a result, and therefore the failure to achieve targets is fully at their own risk, also from an economic standpoint; and (4) ownership by the principal/employer of the working equipment and instruments has also been deemed indicative for defining the nature of the work.

Within the scope of the distinction between subordinate employment and self-employment, over time legislators have also identified (without defining it) a category of activities (so-called quasi-subordinate work), which are borderline cases. This is despite the fact that the intrinsic nature and mode of their performance are typical of self-employment. The qualification of quasi-subordinate workers brings with it the requirement to pay (low) social security contributions, the obligation to get insurance against accidents, and it also entitles the workers to access to the labour courts in case of disputes. However, it does not give them other rights associated with being employees. What characterises these working relationships is the presence of: (1) collaboration between the employee and the customer (this differs from the constraint of subordination to the employer and the consequent integration of workers in the company organisation that characterises subordinate employment);

(2) coordination, which is understood as a functional connection with the organisational structure of the principal or, more generally, with the aims pursued by the latter. Coordination assumes decisive importance for the purposes of classifying the working relationship in terms of the interaction between the parties (and in particular the intervention of the principal) to achieve the agreed outcome; (3) the continuity of the provision of work, which occurs when the performance is expected to continue over an appreciably long period of time and implies recurring performance (ie, not merely occasional); and (4) the personal nature of the performance, or at least the prevalence of the personal contribution of the worker compared to the use of material means or of other subjects of whom the worker may however avail themselves.

Legal framework

The inadequacy of the legal framework towards the new ODE model is highlighted in a recent judgment of the Court of Turin (7 May 2018, No 778). The Court of First Instance was appealed by six food deliverers claiming, on the basis of the alleged modalities of their work activities and despite the contract entered into, the existence of an employment relationship with Foodora. As a consequence of the alleged existence of an employment relationship, further claims were brought against the company (application of collective bargaining agreements, protection in case of dismissal, due remuneration, damages compensation connected to the breach of data protection rules, lack of control of the work activity and accident prevention). The judgment therefore focused on the way the Foodora deliverers performed their working activity. It took into consideration: the use of one's own bike; the option available to the riders to refuse a ride or to revoke it through a digital application; the option available to the company to refuse availability of the worker; and above all, the absence of a specific submission and of any control, executive and disciplinary power on the involved workers, accorded to the traditional employment relationship principals. These factors lead the Court to deny the existence of an employment relationship. Innovation and new digital methods are not covered by proper rules. The case has been examined and decided on the basis of the principles that the courts traditionally apply to ascertain a (real) employment relationship to distinguish employees, self-employees and quasi-subordinate workers.

This case suggests that the current legal framework is no longer adequate to fulfil the needs of worker protection and the need for extreme flexibility by the companies in the digital world and ODE. This forms a challenge for the new government, which, for other reasons, is being pressured to both relax employment law restrictions and tighten up on legal and tax compliance more generally.

Discrimination claims

ODE workers in Italy can benefit from the general rules (and penalties) concerning the prohibition of direct and indirect discrimination. Direct discrimination occurs when a person is treated less favourably than another person in a comparable situation on one of the prohibited grounds. Indirect discrimination occurs when an apparently neutral provision, criterion, practice, agreement or conduct would put someone at a particular disadvantage compared with other persons on one of the prohibited grounds.

The basis for the prohibition of discrimination is enshrined in the Italian Constitution and in the affirmation of the general principle of equality under Article 3 of the Constitution.

The primary intent of the Constitution has been applied to laws aimed at acknowledging certain prerogatives afforded to working mothers and disabled employees, as well as providing protection

against discrimination on the grounds of gender, political opinion, religion, race, language, age, sexual orientation, personal belief, or union-related activity. Eventually, it was deemed appropriate to introduce a more structured system. This was done both through the provision of more specific prohibitions aimed at restricting (and punishing) all forms of discrimination (direct or indirect) in access to employment and working conditions, and through sectoral legislation aimed at promoting greater equality at work.

Termination claims

When ODE workers are engaged as independent contractors, it is unlikely they would be eligible to bring an unfair dismissal claim, a procedure only available to those in employment relationships. If an ODE worker does not satisfy all of the conditions to qualify as an employee, their rights upon termination as an independent worker should be limited to damages and contractual claims.

Health and safety and liability issues

Organisations are generally required to adopt measures that, according to the peculiarities of the work, experience and technology, are necessary to protect the physical integrity and moral personality of workers.

The health and safety obligations have a preventive function and therefore the employer or organisation is liable if they fail to take all the appropriate measures to protect all the workers (independent workers and employees) in their organisation, regardless of the occurrence of the harmful event. In many cases, entities that facilitate work arrangements in the ODE have insurance to cover risks to third parties and require the worker/service provider to carry their own insurance for personal injury or damages. In the case of quasi-subordinate workers, the company is obliged to take out insurance against accidents.

IP protection and confidentiality

Italian laws provide protection of IP and confidentiality obligations in respect of employees and independent workers. Where an independent contractor agreement is executed in an ODE arrangement, it is recommended that IP and confidentiality provisions are included in the agreement.

Notwithstanding the fact that the nature of the work commonly commissioned in this form (transport services, food delivery) has to date not raised significant concerns about IP and confidentiality, the issues are similar to those that could arise in an employment relationship or when engaging a contractor in more traditional sectors.

Social security and tax issues

Service providers or ODE workers engaged as independent workers are obliged to pay their own contributions to social security bodies and are responsible to pay taxes to the tax department on the basis of their income derived from the independent work which meets the relevant gross income threshold (currently €5,000). Under this income threshold, occasional independent workers are not obliged to register with the social security bodies and the tax department.

In the case of quasi-subordinate workers, lower social security contributions (compared to that of employees) have to be paid by the company (two-thirds of the contribution) and the worker (one-third).

Market trends and emerging issues

A number of factors give rise to changes in labour law, including changes in the employment relationship, and increasing opportunities available to work anywhere and at any time. It is also necessary to establish new rules for new types of jobs arising from the digital economy. Prevailing legislation and the absence of applicable case law in Italy means ODE methods of performing work activities cannot, at this stage, provide the same high level of protection as is available to employees.

In the transportation sector, taxis are subject to competition from the likes of Uber, which they view as unfair because Uber is not subject to the same legal and administrative constraints. Some of this debate raises issues that are not entirely confined to employment law. Discussions are under way in Italy to render labour and employment rules adequate for the ODE model, as the current regulatory system is still based strictly on the distinction between employment relationships (which give rise to a range of protections for the employee) and independent contractor relationships (which are characterised by a lack of such protections, even in the form of quasi-subordinate workers). The ODE model gives companies new opportunities for flexibility, but, at the same time, operators are aware of the risks inherent in having flexibility without rules. The main focus should be to adapt the current legal framework to the ODE model and so lay down a framework of rules from which to govern all the changes that the ODE model will allow.

Mexico

The legal regime in Mexico is an interesting mix of long-standing pro-employee protections, with some flexibility in relation to the use of service arrangements. Theoretically this offers potential advantages to ODE companies, but there has been only a limited adoption of the model across the Mexican economy to date and, as a result, potential issues for ODE workers have not been tested to any significant degree by the relevant courts.

Nature of relationships

In general terms, individuals in Mexico providing the service in an ODE structure are not hired directly as employees, but as independent contractors and, in some cases, not even as that. We have seen cases where a service agreement is entered into, whereby individuals are given access to a database of potential clients simply by using an app.

Ultimately, it depends mainly on whether the individual would be hired to render exclusive services on behalf of a legal entity or whether the individual is a true independent contractor who renders services to the public in general.

The specific matter of assessing the legal status of ODE workers has not been formally addressed by lawmakers and there is no pending or proposed bill on the matter.

It is important to understand that an employment relationship only exists under Mexican law when a person renders a subordinated personal service in exchange for the payment of remuneration. Subordination is the main characteristic of an employment relationship. ODE workers are neither subordinated nor paid a wage in exchange for rendering a service. As a result, the operating assumption is that such workers will not be deemed to be employees.

Discrimination claims

There is no information or legal precedent relating to the scope of discrimination protection in Mexico. In fact, discrimination claims or actions are not common in Mexico. In any event, a refusal to engage anyone as an employee or independent contractor must be based on actual and real incapacity to perform certain activities. This could, in theory, form the basis for an ODE worker to proceed with such a claim.

Termination claims

There are no actual precedents as to claims being filed by ODE workers. In any event, there are no special protections against termination claims for the dispatcher/employer, if it is considered ultimately that they are indeed direct employers.

ODE workers who cannot establish subordination (and thus employment) will not be able to file a claim for termination of their contract.

Health and safety and liability issues

For health and safety obligations to apply, an actual employment relationship should exist. If this is not the case, then no health and safety issues would arise.

Some agreements for ODE workers are characterised as service agreements. Under this arrangement, the individual almost always has an obligation to have some kind of insurance or at least a representation in which they acknowledge that the sole liable lies with them.

Social security and tax issues

As aforementioned, an employment relationship only exists when a person renders a subordinated personal service in exchange for the payment of remuneration.

In Mexico, there is established recognition of a category of individuals who are truly independent of the 'employer'; and even more so if they render services to the public in general and if they derive income from different sources. A true independent contractor is not entitled to employment-related benefits or to social security.

Market trends and emerging issues

No significant market trends have developed to date, partly because there has not yet been any significant rollout of the ODE model in Mexico. Further, traditional employers or those using service agreements have not changed their corporate structure or their employment arrangements to any great degree. This is, in part, because the use of labour brokers (companies that employ workers and provide services on demand to customers), outsourcing and service arrangements are already established and recognised practices in Mexico. As a result, the use of ODE workers is essentially limited to technology companies.

It is anticipated that there will be few, if any, amendments to the law in the near future in relation to ODE workers. Mexico's incoming federal administration has indicated that it has other priorities. Even if there are amendments, it is unlikely that there would be any differentiation between the type of company or organisation.

The Netherlands

There have been a number of legal modifications in the Netherlands, which, as a whole, make it easier to engage ODE workers. As a result, in the past ten years there has been an increase in the use of flexible and ODE workers. Despite recent case law developments, however, there is still no absolute certainty on the status of the worker.

Nature of relationships

The legal regime provides for distinctions with respect to the following flexible workers: (1) self-employed workers with no employees (freelancers); (2) on-call employees; (3) temporary agency workers who are employed with an employment agency; and (4) employees with a fixed term contract. All of these distinctions have been reinforced by the legal modifications outlined here.

Engaging fixed-term or on-call employees offers the most certainty for an employer regarding the status of the employment relationship. With this certainty, however, also comes resulting obligations with respect to employment laws. Hiring freelancers has the benefit of potentially avoiding some of these obligations, but this approach often raises questions about the nature of the relationship, including in particular whether the freelancer should actually be classified as an employee working under an employment agreement. In the event of a misclassification of a freelancer, the individual is entitled to all statutory employment rights and the employer is liable for taxes and social premiums.

Legal framework

Since 2015, there have been several changes under Dutch law to strengthen the legal position of organisations wishing to engage flexible workers. Specific examples of this flexibility, which helps to facilitate ODE arrangements, include the introduction of the Work and Security Act (WWZ), the Flexible Working Act (FWA) and the Labour Market Fraud (Bogus Schemes) Act (WAS).

Some important changes that have emerged as a result of the WWZ, FWA and the WAS are as follows: (1) there is a new sequential employment system, which allows employees to become permanent employees sooner; (2) it is no longer possible to include a probationary period when concluding a fixed-term employment contract of six months or less; (3) for all fixed-term employment contracts of six months or more, there is an obligation to notify the employee whether or not the organisation wishes to continue the employment contract; (4) employees are now permitted to have more flexibility with respect to working hours and working from home; and (5) there is civil chain liability for wages if an employee carries out work in the Netherlands when performing services under an agreement for services or a works contract.

This legislation allows organisations to engage ODE workers on a flexible basis, at least initially. In particular, for the first six months of the term of an on-demand employment contract, the employer and employee/worker may come to an agreement that the employer does not have to pay any wages insofar as the employee is no longer in demand (eg, not working). This is effectively the same type of approach as the zero-hours contract currently in use in jurisdictions such as the UK. In the Netherlands, however, legislation provides that this permissive approach is not available after six months, and after this initial period, an employee is able to claim payment of salary from the employer for the average hours worked on demand, even if the employee is no longer in demand. If an employer wishes to terminate such an on-demand employment contract, there is an obligation to pay statutory severance. New legislation will make

working with on-demand contracts more complicated. For example, if the work is not (unequivocally) defined, the employer will have to offer employment after one year for the number of hours the on-call worker has worked on average in the preceding year.

The Dutch government also enacted the Assessment of Employment Relationships (Deregulation) Act in 2016. This Act regulates the (new) conditions under which a contract is qualified by the Tax Authorities as a freelance contract instead of an employment contract. Enforcement by the tax authorities is suspended until 1 January 2021 (except in the case of parties with malicious intent: enforcement measures can be taken in respect of such parties with immediate effect). The government has also announced new legislation in this area.

The WWZ was implemented in 2015, and the employment laws continue to change, as recently a bill was accepted that will enter into effect per 1 January 2020. This will again have great impact on the position of the employee. For example, the new legislation includes a change to the sequential system of fixed term employment contracts from a maximum of three contracts in two years to a maximum of three contracts in three years and a minimum of three hours per on-call shift.

With regards to case law, it is worthwhile to note the judgments of the Cantonal Court of Amsterdam of 23 July 2018 and 15 January 2019. In the first judgment, the Court ruled that a particular Deliveroo rider qualified as an independent contractor. Several months later the trade union FNV started legal proceedings against Deliveroo asking the Court for a declaratory decision that the riders of Deliveroo are working on the basis of an employment agreement and that the collective bargaining agreement 'Road Haulage' is applicable. The trade union won both cases. Deliveroo announced that it will appeal to the court ruling, which is still pending.

Discrimination claims

ODE workers who qualify as employees are subject to various legal regulations protecting them from discrimination. This may include protection against discrimination when concluding/terminating an employment relationship. Freelancers also enjoy protection against discrimination. A person who suspects that they are being discriminated against can submit a complaint to the Dutch Institute for Human Rights. The Institute will then deal with the complaint and issue a non-binding decision. In addition, they can start proceedings before a court.

Termination claims

If the ODE worker qualifies as an employee, the employee dismissal protection applies. An employee with an indefinite employment agreement enjoys legal protection against dismissal, as does the ODE worker who qualifies as an employee. Dismissal can only take place after permission from the Employee Insurance Agency or after a rescission by the court. Notice of termination is not possible in the event of a prohibition to give notice, such as in the case of illness. An employee who has been employed for more than two years is entitled to the statutory transition fee. If the employer acts in a manner that is seriously imputable, the employee may also claim fair compensation from the employer. Self-employed workers are not entitled to protection against dismissal, with the exception of the obligation to observe a reasonable notice period. When taken together, these rules mean that it may be legitimate for ODE workers to initiate a variety of termination claims.

Health and safety and liability issues

The employer is responsible for compliance with the Working Conditions Act. It follows from this that the employer must fulfil a range of obligations to create/improve a safe and healthy working environment. The employer is under this obligation both towards self-employed workers and employees. Self-employed workers (who work alone) must also comply with certain occupational health and safety regulations. They must, for instance, prevent hazards to third parties, ensure their own safety and that of other individuals concerned by behaving safely and responsibly and avoid mortal danger or serious injury to health.

Dutch law permits organisations to make enforceable arrangements with freelancers regarding the scope of liability for harm caused by the freelancer during the course of the engagement. However, a third party can still claim damages against both the organisation and the freelancer. In all cases, an employer is liable for the harm caused by employees. As aforementioned, even in the case of the zero-hours ODE worker, their status is as an employee. As a result, the employer/dispatcher will be liable for the acts of ODE workers. The same will apply to fixed-term employees.

IP protection and confidentiality

Although there is legislation on IP protection and confidentiality, it is wise to conclude an agreement that defines the obligations. IP protection can be agreed by the parties themselves in an agreement, and such agreement can also be concluded with a self-employed worker. The risk here is that this may give rise to the appearance of a relationship of authority, which might imply that there is an employment agreement. An employer/client may agree on confidentiality with the ODE worker and can attach a penalty clause to this. Both are common.

Social security and tax issues

Social security and tax questions are often quite contentious. Based on the Assessment of Employment Relationships (Deregulation) Act, there has been extensive discussion in the Netherlands about the status of freelancers. In many situations, it is arguable whether or not a freelancer is truly independent. The tax authorities do not have any flexibility in this: the individual is either a freelancer or an employee (with the relevant consequences for tax and social premiums). This means that the current legal regime offers no scope for any intermediate category.

Market trends and emerging issues

The ODE has become popular in the Netherlands as a means to provide people with what they want, where they want it and when they want it. ODE organisations require a flexible workforce and, arguably, the same has become the case for all companies in general. In practice, many companies are moving slowly towards a flexible workforce, to be able to deliver their goods or services. Specific examples include: introducing a 24-hour helpdesk which requires a flexible workforce; engaging ODE workers for social media support; outsourcing of work to temporary agency workers instead of using permanent employees; and the introduction of the so-called 'flexible pools', which is a pool of flexible employees who are working for different organisations. This type of flexible pool arrangement is often used in the healthcare sector.

Naturally, technology companies, startups and companies like Uber and Airbnb are more obvious adopters of the ODE model than traditional companies. However, increased flexibility at work has also been on the agendas of traditional companies in the Netherlands over the past few years. In addition, as a result of the new legislation, the ODE has the attention of the Dutch government as well as traditional (and less traditional) companies. At this stage, the expectation is that rules will not differ based on the type of company. In the Netherlands, there are already different rules regarding flexibility for employees in different sectors; these are included in collective labour agreements or via decisions rendered by the Ministry of Social Affairs and Employment. This existing divergence of approach by sector arguably already addresses industry-specific needs.

There is a significant increase in the use of flexible workers through freelancers and temporary agency workers. Apparently, there is a significant need for the worker to work independently while the client still retains influence on hours of work and the place of work. At the same time, the current Dutch government supports more protection for ODE employees and fixed-term employees. Arguably, this new legislation is based more on a traditional way of working (ie, as many permanent employment contracts as possible) instead of the ODE concept of independent contracts with limited regulation. The greater the protection provided to workers, the less attractive it will be for companies to hire employees. Instead, they will hire freelancers or temporary agency workers to avoid being subject to certain legal protections applicable to employees. The approach taken to date in the Netherlands highlights an important future discussion which may be applicable elsewhere. Given that the current rules provide a benefit to using freelancers or temporary agency workers, at least from a cost and flexibility standpoint, there may be a disincentive to use employees. The ODE model might therefore reinforce how traditional companies act. In particular, there might be a push to give workers of all categories some protection and rights with respect to terms and conditions of employment (particularly wages), and a process which they can use to challenge decisions applicable upon termination.

Spain

Nature of relationships

Spanish law focuses on classification issues in relation to determining the rights of workers. This approach involves an analysis that is quite similar to other jurisdictions. There is some scope for differentiation among different types of workers, however, which may provide opportunities for ODE organisations.

The following categories of workers are recognised in Spain:

EMPLOYEE

An employee is classed as an individual who render personal services to an organisation in exchange for remuneration. The work performed is under the management and direction of an organisation. Spanish law allows for employees to be engaged under either indefinite or temporary contracts. In all qualification cases, the main focus is on the level of control and integration.

AUTONOMOUS WORKER

This category applies to individuals who regularly work on their own account. These workers do so outside of the management of others and are not integrated into the relevant organisation. One strong indicator of this type of work is when individuals do not receive regular wages or have anyone dictating to them when or how to provide a service.

TRADE

There is legislation in Spain that provides rules with respect to a category known as an economically dependent autonomous employee (TRADE). This is a category for individuals who meet the following criteria:

- the worker regularly performs their professional work for profit;
- the work activity is performed personally and directly for one natural or legal person (ie, a dedicated client); and
- the worker depends on this client to receive at least 75 per cent of their income.

A special legislative regime applies to any worker classified as TRADE.

TEMPORARY AGENCY WORKER

Workers in this category are those hired on an indefinite or fixed-term basis through a temporary work agency. To be properly categorised as such an agency, certain financial, legal and registration requirements must be met. Under this type of arrangement, there must be a contract in place between the agency and the business that uses the workers.

If workers are misclassified, companies face a number of legal and financial risks. The potential consequences include being liable for employee-related costs and termination obligations.

Legal framework

TRADE was introduced as a special regime within the law governing the self-employment statute in 2007 (Law 20/2007, of 11 July, on the Statute for Self-Employment). Most important is the obligation to conclude and register a written contract between the TRADE worker and the client/company, which includes annual holidays and maximum working hours.

Aside from this, and despite increasing discussion on the subject matter, no legal changes have yet been implemented to deal with market developments and the emergence of the ODE.

The courts, on the other hand, are approaching the issue mainly from the classification route, applying the usual tests. So far this has been done in a creative way, as is the existing view, to protect employees from potentially abusive situations.

Discrimination claims

ODE workers can benefit from the general rules (and penalties) concerning the prohibition of direct and indirect discrimination. To date, however, the crucial discussion has been around classification of the relationship.

Termination claims

The viability of worker termination claims in Spain very much depends on the (re)classification issue, which depends on the particular facts of the case. This means the success of a claim by a terminated worker almost invariably needs to be reviewed on a case-by-case basis, since the implications of being an employee are both uniquely determined and will lead to an individual result. If the worker successfully claims employee status, they will then be able to claim severance for unfair dismissal based on the termination of the (deemed) employment relationship. There will also be related implications with respect to social security.

A number of organisations in Spain, including but not limited to ODE businesses, have been using independent contractor arrangements quite frequently. Based on the traditional approaches to labour law, these workers are unlikely to be always classed as truly independent. This may mean that the workers are really workers in disguise. As a result, the ODE model does not neatly fit within the existing legislative framework. While the TRADE category offers some assistance (particularly with respect to social security contributions) for a new category of self-employed workers, there are still potential implications which most ODE businesses would likely rather avoid.

Health and safety issues and liability issues

Most of the health and safety regulations in Spain apply to employees, so digital platforms are not likely to be found liable for breach of any such rules unless there is a reclassification of the relationship.

In terms of liability, the issue of whether we are dealing with employees or with self-employed individuals will also be crucial. Even in the case of contractors, quite often the contract itself and the parties to the contract will determine who is liable for what.

Notwithstanding the aforementioned, some digital platforms are starting to provide additional benefits to the providers of services, including some sort of insurance, but this is on a voluntary basis.

IP protection and confidentiality

Taking into account the usual nature of on-demand services, few IP or confidentiality problems arise. Generally speaking, the law provides for certain protection of IP rights and confidentiality in cases of an employment relationship. In cases of self-employed individuals, the company needs to be careful when drafting the services agreements, as this will be key in determining its ability to claim IP rights and/or confidentiality.

Social security and tax issues

Spanish law provides that social security and tax contributions must be made for persons engaged as employees. Self-employed individuals must make their own social security contributions. The rules with respect to withholding on account of taxes apply to employment income (salaries) on a sliding scale. By contrast, the tax with regard to payments made to self-employed workers is applied at a fixed rate. This usually means that it is beneficial to have a self-employment arrangement in place. In cases involving an improper characterisation, there can be penalties both on account for failing to register for relevant contributions and for not paying relevant amounts. In addition to these penalties, there can also be surcharges applicable because of the delayed contributions.

Market trends

As a result of the protections granted under Spanish law to employees, all organisations, whether ODE or mainstream, often look at ways to reduce costs and increase flexibility. Potentially, these objectives can be achieved by using fixed-term employment or by engaging independent contractors. These classic considerations are very important for ODE employers today. To a certain extent, the availability of technology might be helpful in supporting the independence argument. In particular, the existence of a platform between the parties might provide further support that the workers themselves are in business on their own account. This issue ultimately reverts back to the key question of characterisation: the requirement for decision-makers to assess whether a particular relationship can be qualified as employment or not will continue. This is particularly so in Spain as ODE-related regime changes are not anticipated at this time. Recent judgments are also starting to redefine the classification tests, so that elements that would traditionally support independent status may no longer do so.

Emerging issues

Working time and the approach to recording time worked continue to be contentious issues. This is especially the case within employment relationships (whether agreed or deemed to be so). It is interesting that traditional businesses have often been the ones driving the move towards more flexible work arrangements. At the same time, the ability to always be working has led to challenges with managing the risks associated with controlling working time. In other words, being able to have tools that allow for remote or distributed work is positive for flexibility and effectiveness. However, it creates the risk of a characterisation as employment if the organisation exerts control and direction over how the work is performed.

United Kingdom

Nature of relationships

ODE businesses do not generally consider themselves to be employers. Instead, they define themselves as online intermediaries providing a platform to match the demand for goods and services with the supply. As such, we are increasingly seeing moves by these businesses to characterise their workers as independent contractors with self-employed status to escape the statutory protections given to workers and save on the costs to their business.

In the UK, there is a tripartite taxonomy of work: employee, worker and genuinely self-employed. The distinction is important because employees benefit from greater protection in law than the self-employed or workers. These protections include, for example, the right not to be unfairly dismissed, the right to redundancy pay and the right to maternity leave, paternity leave and shared parental leave. Employers and employees are also under certain duties and have rights under health and safety legislation. Workers, on the other hand, have more employment rights than independent contractors, such as the right to holiday pay, the right to rest breaks, the right not to suffer deductions from wages and the right to be paid the national minimum wage.

The tests to determine employment/worker and self-employed status have been developed by statute and by the courts. There are a number of criteria that have been developed by the courts to determine employment status and recently the courts have been further developing the criteria to determine worker status.

Very broadly, the advice given by lawyers is that if an individual is providing personal services to the employer and is in a position of subordination, the individual may fall under the category of workers (and will be given certain employment protections as aforementioned) and, separately, they may be considered in employment for the purposes of bringing a discrimination claim under the Equality Act 2010. The key question is whether the individual is acting totally independently and autonomously as a self-employed contractor would. The contract entered into with the individual should be drafted carefully to demonstrate the contractor's autonomy. However, often the courts will look behind the agreement between the parties to observe the reality of the working relationship. In other words, as is the case in other jurisdictions, substance will prevail over form.

One way used by these businesses to try to evade responsibility or limit liability is to change the language used to describe the workings of their business. For instance, by using the term 'invoice' rather than 'pay', and 'log in' times rather than 'start times'.

The rise in the gig economy has increased significantly the importance of worker status, as distinct from that of employee or self-employed status. Recent cases involving, for example, *Uber BV and others v Aslam and others* [2018, EWCA Civ 2748], *Dewhurst v CitySprint UK Ltd* [ET220512/2016], and *Pimlico Plumbers Limited v Smith* [2018, UKSC 29] highlight the importance of worker status to the rising numbers of ODE workers. Defining the individuals who work for these ODE businesses as self-employed, both for tax purposes and employment rights purposes, brings tax advantages for the employer and the independent contractor, but affords the individual fewer employment rights. Evidence shows that many gig economy workers choose to work as independent contractors, enjoying the flexibility, control and advantageous tax status that such independence brings. However, many individuals (or the unions representing them), dissatisfied with their lack of employment rights, have brought claims against the businesses arguing that the nature of the relationship between the business and the individual is often more of worker status, rather than self-employed or employee status.

These individuals are often engaged on zero-hour contracts; which, in December 2017, was estimated to be the case for approximately 901,000 workers in the UK. News stories about exploitation of workers, including failure to pay the national minimum wage, failure to give adequate work breaks, poor working conditions and the general lack of job security, have raised questions about employment status and the alleged lack of worker rights, leading to a number of official reviews of employment status which are discussed here.

Legal framework

Between 2016 and 2018, a number of official inquiries in the UK have looked into the implications of the ODE model. Starting in October 2016, the Business, Energy and Industrial Strategy (BEIS) Committee launched an inquiry into the future of the world at work, focusing on the rapidly changing nature of work, the status and rights of agency workers, the self-employed and those working in the gig economy. In November 2016, BEIS launched the Independent Review of Employment Practices in the Modern Economy, led by Matthew Taylor. Taylor published its findings and recommendations in July 2017.¹¹ Then, on 7 February 2018, the government published the *Good Work Report: a response to the Taylor Review of modern working practices*, announcing its intention to either adopt or consult on most of Taylor's recommendations, with the stated purpose to ensure all work in the UK economy is 'fair and decent, with the realistic scope for development and fulfillment'. Four separate public consultations were published as a result of the report to explore Taylor's proposals in more detail and decide how best to take them forward. The consultations covered enforcement of employment rights recommendations; agency workers recommendations; measures to increase transparency in the UK labour market; and employment status. Further inquiries, including, for example, the inquiry by the Work and Pensions Committee into the implications on the welfare system, including state pensions, and the inquiry into the tax issues associated with the ODE by the Office of Tax Simplification, were launched in December 2016.

Preceding these inquiries was an inquiry into the working practices at Sports Direct and the BEIS Committee's inquiry on the digital economy, which recommended that workers using digital platforms have reasonable employment conditions and not be vulnerable to exploitation. Also relevant are the recent news stories and cases concerning the status of individuals working for Uber, CitySprint and Deliveroo.

This is not the first time that employment status has been considered by the UK government. In 2014, the coalition government launched a review to improve the clarity and status of the British workforce. Spurred by the concern over exploitation of zero-hours workers and agency workers, the government sought a better understanding of the issues to consider a potential extension of employment rights to certain groups of workers and to add clarity and transparency in employment law. After the change of government in 2015, the review made no further progress.

In 2018, with Brexit on top of the agenda and the current climate of change and uncertainty, perhaps it is unsurprising that the government's proposals in its 2018 Good Work Report are more in the nature of incremental enhancements of employment protections and steps to stop vulnerable workers being denied their basic workplace rights than wholesale reforms. Some of the trickier issues to resolve, such as the lack of certainty around how you decide who is an employee, a worker or self-employed, which hit the headlines again in November 2017 in the Uber and Deliveroo cases, will be looked at in more detail through consultation before any changes are announced. No doubt individuals and employers will welcome more clarity and certainty on employment status and we will have to watch this space to see how this issue is addressed.

11 UK Government, *Good work: the Taylor review of modern working practices*, July 2017, available at www.gov.uk/government/publications/good-work-the-taylor-review-of-modern-working-practices accessed 10 September 2019.

Since 2016, there have been a number of claims by individuals employed in the ODE, such as drivers who work for Uber and couriers working for Deliveroo and CitySprint. The highly publicised preliminary hearing in the case of *Mr Y Aslam, Mr J Farrar and Others v Uber* (ET2202551/2015) made the headlines when the tribunal held that the claimants, who were drivers that contracted with Uber, were workers. Since then, the tribunal's decision in the *Uber* case has been confirmed by the Employment Appeal Tribunal and the Court of Appeal in December 2018. A further appeal is now pending to the Supreme Court.

In another important case, the Supreme Court decided that a so-called self-employed plumber who worked exclusively for Pimlico Plumbers for nearly six years was also a worker and was therefore entitled to basic workers' rights, despite being self-employed for income tax purposes (and being VAT registered). Bucking the trend, a surprising decision by the Central Arbitration Committee (CAC) at the end of 2017 in the case of *Independent Workers' Union of Great Britain v RooFoods Limited t/a Deliveroo* [TUR1/985(2016)] found that Deliveroo riders were not workers and were therefore not entitled to union recognition. The CAC found that there was no obligation of personal service on the part of the riders because there was a genuine right to 'substitution', meaning that the riders were allowed to get anyone else to deliver food on their behalf. The CAC concluded that this right to substitute was not a sham and accepted evidence that riders had used it in practice; this was fatal to the union's claim that the riders were workers. The CAC noted that the factual situation in this case was very different to that of the Uber drivers, Excel or CitySprint. The union that sought recognition applied for judicial review of the CAC's decision, which it subsequently lost [2018 EWHC 3342 (Admin)]. Deliveroo also faced a number of employment tribunal claims by riders who say they are workers and are thereby entitled to certain employment rights, such as the national minimum wage. The claims were subsequently settled without admission of liability.

The reasoning in these decisions highlights the current approach in deciding employment status; making it clear that the reality of the arrangements between the business, the individual and the customer will be closely scrutinised and the form of the contract will be disregarded if it does not reflect the reality of the arrangement.

Discrimination claims

The aforementioned claims filed by ODE workers in relation to worker status rights have included claims for holiday pay, national minimum wage and discrimination claims.

The Equality Act of 2010 (the UK's principal anti-discrimination legislation) is also applicable to (independent) contract workers who are not strictly employees. As a result, the assumption is that those ODE workers who can claim worker status may also have the right to advance discrimination claims.

Termination claims

Employees under UK law benefit from a range of statutory protections including, for example:

- statutory minimum periods of notice;
- the right to a written statement of reasons for dismissal;
- the right not to be unfairly dismissed;
- statutory redundancy payment; and
- rights on employer's insolvency and to benefit from the state guarantee fund.

Workers, on the other hand, do not benefit from any of these protections on termination. However, there are some indirect protections available through statute on termination of a worker's contract, for either:

- a discriminatory reason (such as a reason relating to gender, race, sexual orientation, religion or belief, age); or
- by reason of having made a protected disclosure (whistleblowing).

An ODE worker who can establish worker status (such as an Uber driver), therefore, will not have the full protections on termination afforded to employees, but will be able to benefit from these limited rights.

The dispatcher/employer's rights will depend on the terms of the contract with the individual if that individual has worker or self-employed status. This reinforces the benefit of having some form of contractual termination provision in place.

Health and safety and liability issues

Employers have certain duties under health and safety legislation to both employees and persons not in their employment, which can include independent contractors and visitors.

Companies will generally be liable for acts done by employees or workers in the course of employment. The general rule for independent contractors is that the company will not be liable for negligent or tortious acts committed by an independent contractor in the execution of the work for which they were engaged.

A business may be liable, however, for any loss suffered as a result of a breach of a 'non-delegable duty' by an independent contractor. These non-delegable duties may arise either under statute or at common law. To avoid liability, the client must show that it engaged a reasonably competent individual to perform the work and ensured that the individual adhered to a reasonable standard of care. This may give rise to interesting issues with ODE workers, since one method of avoiding liability might be to supervise or train the worker, which is potentially an indication of employee or worker status.

IP protection and confidentiality

Confidentiality obligations for workers and self-employed contractors will be regulated by the contractual terms agreed upon between them and the common law duty of confidentiality. It is always important, therefore, to include appropriate and adequate terms relating to the protection of confidential information in any contractual documentation that might include a Confidentiality Deed. Employees are bound by the implied duty of confidence during their employment, which requires the employee to keep confidential any of the employer's trade secrets and confidential information while the employment subsists. After the employment ends, the implied duty only applies to trade secrets, so express provisions are needed to fully protect confidential information. Trade secrets are also protected under the Trade Secrets (Enforcement, etc) Regulations 2018, which implement the EU Trade Secrets Directive. Those regulations define trade secrets as information that is secret, has commercial value because it is secret, and has been subject to reasonable steps to keep it secret. As a result, the ODE model does not necessarily raise any particularly novel issues relating to IP and confidentiality.

Social security and tax issues

For UK tax purposes, the law does not recognise worker status: it distinguishes between self-employed labour (independent contractors who are genuinely pursuing any profession or business activity on their own account) and employees. The test applied by HM Revenue & Customs (HMRC), the UK tax authority, to determine self-employed/employed status is similar to the test applied by the Employment Tribunal when determining employment status for employment protection purposes; but, confusingly, neither is determinative of the other.

Further, because UK tax rules do not recognise worker status, an individual can be classed as a worker for employment protection purposes but still retain self-employed status for tax purposes. Hence it is possible for Uber drivers who claim worker status in order to receive holiday pay, to continue to be self-employed for tax purposes. That said, HMRC have reportedly started to investigate the self-employed status of certain individuals who have claimed they are workers for the purpose of gaining employment rights.

There is an argument that ODE businesses are displacing traditional employers because they are using superior technology and thus providing an improved service that can be done more economically by avoiding paying full employee taxes and National Insurance Contributions (UK social security contributions), and providing fewer employee benefits such as sick pay and holiday pay. As a result, there has been a backlash against them, with established businesses pressurising unions and regulators in the US and the UK to take them to task under employment law. For some individuals working for these businesses, they are an attractive choice in that they can provide a high degree of freedom (for instance, an individual can work for many apps at the same time) and permit people to work when they want. ODE businesses would argue that they help people to top up and stabilise otherwise low incomes to meet unexpected costs. Loyalty to a mainstream employer is undermined by the possibility of gaining many jobs from more than one middleman. A reaction from mainstream businesses has been to contract out their more routine work.

Market trends and emerging issues

Employers that require a supply of flexible labour may engage agency workers, casual workers and, frequently, independent contractors. For the individual, there are certainly tax advantages in being an independent contractor rather than an employee. The UK government is keen to ensure businesses retain this flexibility to remain competitive, but is also concerned about protecting individuals from abuse from unscrupulous companies. The courts have demonstrated a willingness to preserve this balance by looking behind the company-drafted documentation that purports to preserve self-employed status, to the practical reality of the situation (which may indicate otherwise). The lure of better rights set against the lack of job security for independent contractors sometimes means that an independent contractor will challenge their employment status in an employment tribunal, even if this might risk their self-employed tax status. There are a number of criteria that have been developed by the courts to determine employment status and although recent case law has emphasised the importance of looking at the reality of the relationship, it still remains of the utmost importance that the relationship is properly documented. While this will not be decisive in determining status, it can tip the balance if the situation is marginal.

In the authors' view, the tripartite distinction between self-employed, worker and employment status is confusing and unsatisfactory, both for the individual and for businesses. Until now, many businesses in the ODE have been trying to take advantage of the self-employed status to save costs and therefore operate more competitively than traditional businesses. This is also detrimental to the country's tax base

since these businesses are avoiding paying National Insurance contributions (NICS) and Pay As You Earn (PAYE). While the government tried to correct this in its Spring Budget in 2017 by increasing NICS for the self-employed, they were forced to reverse this decision very quickly because this went against a manifesto promise made in 2015. Whether they revisit this in the future remains to be seen.

United States

Despite the fact that the ODE is, in many ways, a product of the US economy and technology industry, the applicable legal rules are quite contentious. This is, in part, because existing US legal rules vary both among the 50 states, but also across the different government agencies enforcing the law. These agencies include state unemployment insurance agencies, which determine whether or not an individual worker is entitled to unemployment insurance benefit after termination of the relationship. Currently, no consistency exists in the approach of the various state agencies and courts – some have held that ODE workers are employees and entitled to protection under various statutes, while others have held that the workers are independent contractors who therefore cannot access statutory rights. It appears, however, that a trend is emerging in the US, with ODE workers being viewed as independent contractors.

Nature of relationships

Unlike some countries, such as the UK, no third category of worker is yet recognised in the US and the basic distinction is the either/or between an employment relationship and an independent contractor relationship. There is not yet any clear trend in determining whether ODE workers may be treated any differently from other types of workers. Rather, courts continue to apply the same traditional tests to determine whether an employment relationship exists. Once such issues are determined, a claim takes on the traditional characteristics and related risk and liability (or lack thereof), depending on how the worker is classified.

The developing law on worker classification issues for ODE workers is dependent on the particular state in which the individual or group of workers perform services. In most states, the degree of control exercised over the worker is a determinative factor of whether an employment relationship exists. Increasingly, state courts have held that ODE workers are independent contractors. For example, in *Vega v Postmates*, the New York Appellate Division (Third Department)¹² held that a delivery driver was an independent contractor and not entitled to unemployment insurance benefits. The Appellate Division determined that several factors suggested Vega was an independent contractor who worked without much oversight from Postmates, including the fact that he did not have to apply for the job, that he set his own hours and could work for competitors at the same time as he delivered for Postmates, and that he chose his own means of delivering customer orders. ‘The fact that Postmates determines the fee to be charged, determines the rate to be paid, tracks the subject deliveries in real time and handles customer complaints... does not constitute substantial evidence of an employer–employee relationship,’ the majority held.¹³

The approach taken in the *Postmates* case is not universal. As a prominent example, in California case *Dynamex Operations West, Inc v Superior Court of Los Angeles*, the court held that a substantially stricter test – the ABC test – applies.¹⁴ This test makes it quite challenging to prove independent contractor status.

¹² *Matter of the Claim of Luis A Vega*, No 525233 (21 June 2018).

¹³ *Ibid.*, 3.

¹⁴ 4 Cal 5th 903 (2018).

The ABC standard presumes that all workers are employees, unless a business can show the worker is free from its supervision, performs work that is outside the usual course or place of the employer's business and works 'in an independently established trade, occupation, or business of the same nature' as the work they do for the entity that is hiring them. Earlier, in February 2018, a federal district court in California held that a driver for GrubHub was an independent contractor because GrubHub exercised little control over the details of his work.¹⁵ In the relevant part of the decision, the judge held as follows: 'GrubHub did not control how he made the deliveries – whether by car, motorcycle, scooter or bicycle... GrubHub also did not control Mr. Lawson's appearance while he was making GrubHub deliveries,' and 'Mr. Lawson was not required to have any GrubHub signage on his car and in fact did not have any such signage... GrubHub did not require Mr. Lawson to undergo any particular training or orientation.'¹⁶ Mr Lawson has appealed the decision.

Various US federal employment laws, in addition, such as Title VII of the Civil Rights Act¹⁷ and the Fair Labor Standards Act,¹⁸ have differing tests for evaluating a particular worker's classification.

Legal framework

Generally, if a worker is properly classified as an independent contractor, they are not entitled to working time and minimum wage protections, workers' compensation benefits (notably workers' (injury) compensation or unemployment insurance benefits) or other health plan benefits provided by employers.

The state agencies administering unemployment insurance claims have held for both the workers (finding that they are employees under the state law) and for employers (holding the workers are independent contractors). At this time, there is no consistency among the US states. In these circumstances, a detailed review of the current law in each particular state where work is being performed is required to assess relevant risk.

State courts are examining whether ODE workers who are on call and waiting for assignments are on paid time if they are classified as employees. For example, a federal district court judge in Pennsylvania, during a motion application, commented, but did not decide, that Uber drivers 'have only 15 seconds to respond to a given trip request', and said they are, in effect, 'tethered to their phones while online', and that such on-call time may be compensable under the Fair Labor Standards Act's minimum wage and overtime requirements.¹⁹ In contrast, federal district courts in California and Oklahoma have found to the contrary in earlier decisions.²⁰ In April 2018, the same federal judge in Pennsylvania finally held that UberBlack limo drivers failed to show that they are employees under the Fair Labor Standards Act.²¹ The judge relied upon the fact that the drivers are entitled to make their own hours, work as much or little as they want and largely invest in their own equipment. The drivers have since appealed the decision, so the legal position arguably remains ambiguous.

15 *Lawson v Grubhub, Inc*, 302 F Supp 3d 1071 (ND Cal 2018).

16 *Ibid*, 1084.

17 42 USC § 2000e *et seq*.

18 29 USC § 201 *et seq*.

19 *Razak v Uber Techs, Inc*, 2017 WH Cases2d 321984 (ED Pa 13 September 2017), 18.

20 *See Yucesoy v Uber Technologies Inc*, 2016 WL 493189, *5-6 (ND Cal 2016) and *Bradshaw v Uber Technologies Inc*, 2017 WH Cases2d 190580 (WD Okla 2017).

21 *Razak v Uber Techs, Inc*, 2018 WH Cases2d 127756 (ED Pa 2018), 15–22.

Discrimination claims

US discrimination laws may apply to ODE workers. The main risk for ODE companies is the possibility of claims under Title VII of the Civil Rights Act, which prohibits discrimination in employment. There are also various federal and state laws that allow for claims when there is an alleged discrimination in the provision of services to the public. These could apply to contractors, who could claim that the denial of ODE work was based on discriminatory reasons.

Termination claims

In the US, ODE workers are generally the same as those who work in other industries or sectors and do not file termination claims when their relationship ends. Except for the state of Montana, employees are not by law protected against ‘unjust’, ‘unfair’ or ‘wrongful’ dismissal. Instead, the doctrine of at will employment applies in all states (except Montana). The at will framework allows for summary termination without reason, notice or compensation. To a certain extent, the prevalence of the at will doctrine has allowed ODE companies to avoid contested issues about worker classification – even if ODE workers are employees, there may be no underlying termination claim to pursue because of the ability of companies to terminate at will and without notice, compensation or other obligation.

Frequently, independent contractor agreements with ODE workers include pre-dispute arbitration clauses. As a result, ODE companies have had considerable success in compelling arbitration of disputes filed by ODE workers. When this approach succeeds, the dispute cannot be heard in the courts and must proceed through private arbitration as stipulated in the contract. A number of companies that operate in the US have combined this approach with class action waivers, which prevent workers from attempting to file collective actions or proceedings over so-called common issues. If a court concludes that workers were or are independent contractors, no public policy considerations apply against the enforcement of the arbitration clause.

Health and safety and liability issues

The Federal Occupational Safety and Health Act of 1970 only applies to employees. State health and safety standards may apply to ODE workers, if they can fall under the particular definition of worker.

IP protection and confidentiality

Protection of IP and other issues related to the protection of an employer’s confidential information are always at the forefront of worker classification issues. Generally, ODE workers in the task-based services industry accept the work and take the positions due to the flexibility the schedule provides. ODE workers are typically not privy to the company’s IP and confidential business information. Instead, they often work alone and take the tasks as they are assigned to them from the company’s technology platform. As a result, there are often no practical issues in this area. In some case, companies will require workers to sign an appropriate form of agreement.

Social security and tax issues

A determination of whether a worker is truly independent of the employer, whether for tax purposes or other employment-related purposes, is very fact specific. In the US, there is no blanket rule on this issue.

Market trends and emerging issues

The growth of ODE work and the gig economy has led to increasing numbers of industries utilising independent contractors to render task-based services. This varies across a range of industries, including: transport (such as Uber, Lyft); food delivery (such as GrubHub and Postmates); repair services (such as Safelite auto-windscreen repairs and replacements); and house-cleaning services (such as Handy).

Because of their legal status as independent contractors, rideshare drivers do not have a right to collectively bargain as employees under the National Labor Relations Act.²² In some cities, notably Seattle, local lawmakers have attempted to regulate ODE workers in the transport industry and to facilitate collective bargaining on behalf of those workers with the support of trade unions.

In 2016, the City of Seattle published an Ordinance Relating to Taxicab, Transportation Network Company, and For-Hire Vehicle Drivers (the 'Ordinance').²³ The Ordinance applies to all drivers who are paid to give rides to customers in Seattle, whether they drive for a taxi company, a for-hire company or a transportation network company (meaning app-based dispatch companies, such as Uber and Lyft). The Ordinance requires that taxi, for-hire or app-based vehicle-dispatch companies provide the City with a list of its Seattle drivers with names and contact details. The City then certifies non-profit organisations as eligible Driver Representative Organisations (DROs). Not surprisingly, the first certified DRO was a trade union, Teamsters Local 117. The City provides the list of drivers to the eligible DRO to contact the drivers and gain majority support within 120 days. This provides the trade union with a powerful organising tool. Companies must then seek an agreement with the eligible DRO and the City has the right to review any final collective bargaining agreements to ensure compliance with the City Code.

In a series of cases, the US Chamber of Commerce challenged the Seattle City Ordinance arguing, among others, that the Ordinance was pre-empted by the federal NLRA. The California federal courts rejected the argument, because the Ordinance expressly disclaims the need to determine the legal status of drivers.²⁴ At the beginning of 2019, the City Council amended the Ordinance to remove driver earnings from the collective bargaining topics.²⁵

As a result, even though the ride share drivers are not employees covered by US labour law, the Seattle City Ordinance validly requires some level of collective bargaining with the drivers.

22 29 USC subsection 151–169.

23 Seattle, Washington, Municipal Code a 6.310.735 (2015), Ordinance 124968, at www.seattle.gov/business-regulations/taxis-for-hires-and-tncs/for-hire-driver-collective-bargaining accessed 10 September 2019.

24 *Chamber of Commerce of the US v City of Seattle*, 274 F Supp 3d 1155, 1159 (WD Wash 2017) and the appeal *Chamber of Commerce of the US v City of Seattle*, 890 F.3d 769 (9th Cir 2018). See also 'Sherman Act – State Action Exemption – Ninth Circuit Holds Collective Bargaining Ordinance Not Entitled To State Action Immunity – *Chamber of Commerce v City of Seattle*, 890 F.3d 769 (9th Cir 2018),' 132 Harv L Rev 2360 (1 June 2019).

25 Seattle, Washington, Municipal Code s 6.310.735 (2015) (amended 2019).

Conclusions

The current legal uncertainty facing ODE organisations and workers causes inefficiencies in the labour market and may prove counterproductive to innovation. Many ODE workers are also confronted with a lack of legal protection or insecurity about their rights and obligations, which might lead to potential exploitation of ODE workers by the ODE companies. To keep up with the ongoing and increasing presence of the ODE model and the appetite of many organisations to engage ODE workers, virtually all jurisdictions, including those that have already made some legislative changes, will need to contemplate a review of their workplace laws and tax rules. One outcome of any such review might be that ODE organisations no longer have incentives to organise themselves to fit a certain status to gain an unfair advantage over traditional employers. In addition, ODE workers should no longer have to resort to qualification disputes in the courts or tribunals to gain a satisfactory level of clarity.

While the scope can vary quite widely, governments might consider a review of the following:

Creation of a third category of worker

Governments could consider the creation of a special category of worker. This third category would be situated between the existing categories of employee and independent contractor/self-employed, potentially based on the concept of worker in the UK. There may be similarities also to the Spanish TRADE concept or the dependent contractor category used in Canada. The access to such a third category could depend on certain conditions, such as a specific threshold for time worked, the remuneration/income or the number of clients. This might mean in practice that the ODE worker would fall under such a category if the main part of their income is obtained from the performance of ODE services. Persons who only perform ODE services as a small or additional source of income may have no need for employment protections. Such a third category would allow some scope for certain workplace rules (such as minimum wage, overtime, vacation or holiday pay) to apply, but with some relaxation of other aspects of standard employment legislation (such as working time, unemployment insurance, or social security). In this respect, the list of core aspects of national employment protection in the EU Posting of Workers Directive or other accepted international standards may be considered as a guiding text.

Minimum entitlements to employment protection

Governments should consider that there are also less radical alternatives than the legislated creation of a third category, to give more protection to ODE workers, without risking the benefits of the flexibility of the ODE-model. As certain jurisdictions have done (Canada, France, the Netherlands and, to a lesser extent, the quasi-subordinate workers in Italy), it is also possible to give certain self-employed workers or independent workers, who act as ODE workers, certain minimum entitlements to employment protection. National legislation could impose these minimum standards, while sectoral and company-level collective bargaining agreements and individual agreements could extend employment rights in favour of the ODE workers.

More flexibility

The opposite is also an option. Instead of giving (quasi) self-employed workers more protection, the governments could also create more flexibility for certain employment contracts, which would allow more ODE workers to enter such employment contracts with ODE companies as employers, with a corresponding reduction in the compliance and financial obligations of employers. Governments could create more flexible rules for short-time or term employment to meet the needs of the digital economy and the high expectations of online customers with regard to flexible services (anytime, anywhere). However, this flexibility will typically need to include some level of protections with respect to working conditions and against other alleged abuses. Certain employment contracts in the Netherlands, which have lots of flexibility, but only for a period of six months, could be used as an example. The main benefit of this option is that governments would not necessarily be forced to create an actual or quasi-third category and could instead continue to rely on the traditional dichotomy. In addition, ODE workers in such flexible employment contracts would still be seen as employees and therefore they could be protected by certain minimum standards.

Collective bargaining agreements

There are other possible options, but all of them seem currently to have some major downsides. Keeping the status quo of a dichotomy between employment and self-employed relationships without any changes to the existing employment law will likely enforce the current all-or-nothing approach. This will also lead to an increase in qualification disputes since it maintains legal uncertainty. The option to allow company-level collective bargaining agreements or individual agreements to regulate the employment protection instead of national legislation has the ability to provide answers to the diverse nature of the ODE services. However, this route may also result in a chaotic set of rules under different agreements and statutes, and the employment protection will essentially depend on the strength of the ODE workers (or their representatives) in the negotiation process.

To strengthen the position of ODE workers and to make sectoral and company level agreements possible, governments should review the extent to which the right to collective bargaining for ODE workers is compatible with the principles of competition law. In this light, the case law of the Court of Justice of the European Union, which viewed collective bargaining by freelancers to be potentially in conflict with EU competition legislation (CJEU 4 December 2014, C-413/13, FNV Kunsten Informatie en Media), is potentially problematic. However, the European Committee for Social Rights has ruled in its decision on the merits of 18 September 2018 that the Irish Competition Act of 2002 has violated the right to collective bargaining in Article 6 Section 2 European Social Charter, as the Irish Competition Authority stated that voice-over actors, session musicians and freelance journalists who negotiate collective bargaining agreements are illegal cartels. Also the supervisory institutions of the ILO are clearly in favour of collective bargaining rights for economically dependent workers and even self-employed (See ILO Committee on Freedom of Association, Compilation of Decisions, 2018, Section 1285 and ILO Committee of Experts, General Survey 2012, Section 209).

Limit to termination claims

If ODE workers are merely using their platform work to gain additional income, governments should allow for little or no process for unjust dismissal or other similar mechanisms to challenge termination (with the

obvious exception of discrimination claims). This approach would be adopted to give enough flexibility to platforms to ban ODE workers from their platforms if they do not meet required standards.

Application of discrimination legislation

In any case, discrimination legislation should be applicable to ODE workers. This does not mean that there should be a new protected discrimination ground with regard to the particular status of ODE workers. Instead, to the extent there is a legal gap, ODE workers should be protected against discrimination on the ground of age, race, gender, religion and other protected grounds.

Health and safety protections

Health and safety regulations are recognised as being important rules applicable to all workplaces and workers. While it may not be necessary to render the full spectrum of health and safety or wellbeing legislation applicable to ODE workers, the rules and measures that seem necessary or that could have an important impact on the prevention of (occupational) accidents (and diseases) should be applied to all workers, no matter their employment or contract relationship. In many jurisdictions, employers are already responsible for taking certain prevention measures with regard to contractors, so in many cases this is more a question of clarifying relevant requirements.

Liability issues

It is usually in everyone's interest that ODE workers have some insurance against accidents or third-party damages. If ODE workers are not seen as employees, governments could impose an obligation on the ODE worker to take out liability insurance (potentially combined with a partial contribution from the ODE company).

IP protection and confidentiality

The survey responses that form the basis of this report confirm that in the majority of countries there are only specific legal obligations concerning IP protection and confidentiality with regard to employees. For ODE workers who are not seen as employees, only usual civil or common law principles are applicable and therefore most contributors have noted the 'necessity' for ODE companies to conclude specific IP protection and confidentiality agreements or to include relevant clauses in their contracts with the ODE workers. This necessity is rather relative, as many contributors have also noticed that it is not common for ODE workers, who in general are doing rather simple tasks, to discover new ideas or come into contact with important or secret information.

Social security and tax issues

Governments could adopt an approach to tax and social security rules that matches that of self-employed workers or independent contractors (likely subject to companies having an obligation to ensure that ODE workers complete any required registration). Some countries, such as Belgium, have introduced an income threshold for ODE work, under which no income taxes or social security contributions need be paid. This could have a major impact on the increase in ODE work as an additional source of income. However, it could be argued that such a system may give ODE companies (and workers) unfair advantages

to the detriment of traditional employers, and if this ODE model is used very broadly there may be negative consequences for the Treasury and social security system.

'Pooling'

Governments could provide a legal framework and fiscal stimulus for 'pooling'. Such a policy would enable ODE companies to provide ODE workers several (employee-like) benefits at a lower cost than these workers could obtain individually in the private sector. Such benefits could include health insurance, liability insurance, assistance for tax preparation, car insurance, pension savings and related items. ODE organisations are currently unwilling to provide these benefits due to the risk of courts qualifying their workers as employees.²⁶ In terms of the substantive benefits that might be offered, this approach has at least some similarities to certain trade union arrangements in the US where a 'hiring hall' system is used, with the union being the conduit for worker dispatch and the administrator or sponsor of certain benefits. There is potentially a disconnect between what many ODE companies aspire to and the legacy associated with unions who operate this type of system.

These recommendations and options are not the end of our research. A second report will include the views of the stakeholders (ODE companies, partners and other involved organisations) and will further broaden our research for this report.

²⁶ EU DG for internal policies, 'The social protection of workers in the platform economy', study for the EMPL Committee of the European Parliament, 2017, 54–66; YStevens, 'Social security and the platform economy in Belgium: dilemma and paradox' in B Devolder (ed), *The Platform Economy* (Cambridge, Intersentia, 2018), 259–266.

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