REMOTE WORK AND PLATFORM WORK: THE PROSPECTS FOR LEGAL REGULATION IN RUSSIA

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The restrictions imposed to limit the spread of the coronavirus have intensified public debate about the proper legal format for two kinds of labour – working remotely and working via online platforms. The burden on workers in these two kinds of jobs has increased dramatically during quarantine, as many defects in the legislation and in enforcement practices for remote work and employment through online platforms have come to light. The State Duma is at present considering several legislative initiatives pertaining to remote work. This article analyses those initiatives and the outlook for modifying Chapter 49.1 of the Labour Code, specifically by clearly classifying types of remote work and simplifying electronic interaction between workers and employers, by entitling workers to time when they are not in continuous contact with their employers, by restricting dismissal of remote workers, and through other promising provisions. Certain other important gaps in the law, which will remain even after adoption of these new regulations for remote work, are also identified. The article analyses the feasibility of extending labour law to the rapidly growing sector of employment through online platforms. The proposal is that an explicit norm be included in the Labour Code to the effect that working via online applications through which the platform sets requirements for how the job is to be performed must be considered equivalent to working under an employment contract. In addition, the article concludes that it is necessary to adopt standards concerning the overall liability of a company – the owner of the online platform together with any intermediary companies through which agreements are concluded with online workers. Any more durable and fundamental solution for this new form of employment must include review of all the paradigms of employment and its subjects.

Keywords: labour law; new forms of employment; gig-economy; telework; remote work; right to be offline; platform work; digital work; digital economy.

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Table of Contents

Introduction

The worldwide transition from manufacturing to providing services[1] along with financial and legal globalization[2] have substantially transformed the classical model

[1] From 1991 through 2019 the worldwide share of total employment provided in the service sector grew from 34.5% to 50.1% according to ILO statistics. *Cited in* Employment in services (% of total employment) (modelled ILO estimate), World Bank (Nov. 1, 2020), available at https://data.worldbank.org/indicator/SL.SRV.EMPL.ZS.

[2] Werner Sengenberger, *International Labour Standards in the Globalized Economy: Obstacles and Opportunities for Achieving Progress* in *Globalization and the Future of Labour Law* 331, 355 (John D.R. Craig & S. Michael Lynk eds., 2006); *Захарова М.В., Воронин М.В.* Юридическая наука в вызовах

of relations between workers and employers, a model which had been used in the industrial era to construct the labour law system in nearly every state.

One of the most notable trends in world labour law over recent decades has been the increasing differentiation in legal regulation of labour or, in other words, the increase in atypical and non-standard employment, i.e. more kinds of employment that do not fit into the customary understanding of the employment relationship because of one feature or another and that requires special legal standards for its proper regulation.

Two important factors are influencing this trend. The first is increased flexibility in legal regulation to accommodate the growth of precarious forms of employment.[3] This increased regulatory flexibility is contributing to the spread of fixed-term employment agreements, part-time employment, casual employment and other precarious types of employment in which guarantees for workers are minimal and job security has eroded.[4]

That first factor is coupled with the second: the massive penetration into everyday life and work by information technology[5] as well as the growth of the gig economy.[6] This change has brought about forms of employment, said to be new, in which the participants are extremely dependent upon electronic connection. Remote work or telework are among these forms along with employment via internet platforms and several others.[7]

внешней среды: от национального прошлого к столкновению с парадигмами глобализации // Вестник Пермского университета. Юридические науки. 2019. Вып. 43. С. 19–45 [Maria V. Zakharova & Maksim V. Voronin, *Legal Studies Fact Challenged by Externalities: From the National Past to a Clash with Paradigms of Globalization*, 43 Perm University Herald. Juridical Sciences 19 (2019)].

3 Arne L. Kalleberg, *Precarious Work, Insecure Workers: Employment Relations in Transition*, 74(1) Am. Sociol. Rev. 1 (2009); Izabela Florczak & Marta Otto, *Precarious Work and Labour Regulation in the EU: Current Reality and Perspectives* in *Precarious Work: The Challenge for Labour Law in Europe* 2, 21 (Jeff Kenner et al. eds., 2019).

4 For more on this *see* International Labour Office, Non-Standard Employment Around the World: Understanding Challenges, Shaping Prospects (2016) (Nov. 1, 2020), available at https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_534326.pdf; Arne L. Kalleberg, *Nonstandard Employment Relations: Part-time, Temporary and Contract Work*, 26(1) Annu. Rev. Sociol. 341 (2000); *Лушников А.М.* Нетипичные трудовые правоотношения в контексте современных социально-экономических процессов: новации и традиции // Вестник трудового права и права социального обеспечения. 2007. Вып. 11. С. 7–23 [Andrei M. Lushnikov, *Atypical Employment in the Context of Current Socio-Economic Processes: Innovation and Tradition*, 11 Bulletin of Labour Law and Social Security Law 7 (2017)]; Larisa S. Kirillova et al., *The Realization of the Concept of Flexicurity in Atypical Employment Relationships*, 19(Special Issue) J. Leg. Ethical Regul. Issues 69 (2016).

5 For the effects of information technology on employment, *see* Irmgard Nübler, International Labour Office, *New Technologies: A Jobless Future or Golden Age of Job Creation?*, Research Department Working Paper No. 13 (2016) (Nov. 1, 2020), available at https://www.ilo.org/wcmsp5/groups/public/---dgreports/---inst/documents/publication/wcms_544189.pdf.

6 Valerio De Stefano, *The Rise of the "Just-in-Time Workforce": On-Demand Work, Crowdwork, and Labor Protection in the "Gig Economy,"* 37(3) Comp. Lab. L. & Pol'y J. 619 (2017).

7 *See* Eurofound, New Forms of Employment (2015) (Nov. 1, 2020), available at https://www.eurofound.europa.eu/sites/default/files/ef_publication/field_ef_document/ef1461en.pdf.

Both factors have caused such an increase in atypical employment that specialists have been forced to consider completely revamping the concepts of labour relations and of what it means to be an employee in the twenty-first century.[8] These "new" forms of atypical employment tend to be precarious for the most part, as is particularly evident in the case of platform employment.[9]

Russia is no exception to the trend. In 2001 for the first time in any Russian labour legislation, the Labour Code of the Russian Federation (hereinafter "LC")[10] incorporated a separate section devoted to legal regulations of particular categories of workers. This acknowledged the existence of a substantial number of special regulations for specific forms of labour relations that did not fit into the overall framework of a conventional legal arrangement. That segment of law has approximately doubled in size since the LC was adopted, and most of the increase came from "bloating" the section on particular categories of workers with all kinds of new special rules.[11]

A special chapter to cover remote work was inserted into the LC in 2013 as Chapter 49.1, but in practice only a small fraction of employment in remote work has actually been arranged between the parties in accordance with that chapter. Russia has become one of the leaders in digital employment,[12] but so far those relations have been formalized under civil law, which means that platform workers lack most of the legal guarantees that apply to employees under employment contracts. This has been protested by platform workers (*see* section 3 below).

The Roadmap for the Digital Economy of the Russian Federation Programme[13] approved by the Government of the RF in 2017 stipulated that by the end of 2019

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[8] Nicola Kountouris, *The Concept of "Worker" in European Labour Law: Fragmentation, Autonomy and Scope*, 47(2) Ind. Law J. 192 (2018); Adalberto Perulli, *The Notion of Employee in Need of Redefinition* in *Festschrift Franz Marhold* 703 (Elisabeth Brameshuber et al. eds., 2020); Jeremias Prassl, *Humans as a Service: The Promise and Perils of Work in the Gig Economy* (2018).

[9] Harald Hauben et al., *Platform Economy and Precarious Work: Mitigating Risks*, Briefing Requested by the EMPL Committee of the European Parliament (June 2020) (Nov. 1, 2020), available at https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/652721/IPOL_BRI(2020)652721_EN.pdf?fbclid=IwAR2Kq0NNAoj2mMw4qKTvdOLVeET4XqthE7NHBrf1Xu0qJxSlMZx1UK2gVYw.

[10] Трудовой кодекс Российской Федерации // Собрание законодательства РФ. 2002. № 1 (ч. 1). Ст. 3 [Labour Code of the Russian Federation, Legislation Bulletin of the Russian Federation, 2002, No. 1 (Part 1), Art. 3].

[11] For more detail, *see* among others Svetlana Yu. Golovina, *Enhancing the Differentiation of the Russian Labour Legislation*, 2 Russian Law: Theory and Practice 86 (2014); *Нуртдинова А.Ф., Чиканова Л.А.* Дифференциация регулирования трудовых отношений как закономерность развития трудового права // Журнал российского права. 2015. № 6(222). С. 68–82 [Aliya F. Nurtdinova & Lyudmila A. Chikanova, *Differentiation in Regulating Labour Relations as a Pattern in the Development of Labour Law*, 6(222) Journal of Russian Law 68 (2015)] and others.

[12] *See* section 3 below for more detail.

[13] Программа «Цифровая экономика Российской Федерации», утв. распоряжением Правительства Российской Федерации от 28 июля 2017 г. № 1632-р «Об утверждении программы «Цифровая

a normative basis would be introduced for regulating remote work and that it would also identify obstacles and complications in flexible employment.[14] The wording in the Roadmap stresses increased flexibility in legal regulation without any recognition that observing the labour rights of workers in those flexible employment relations is a priority.[15]

The standards referred to in the Programme had not been enacted by 2019, however at the end of 2019, the State Duma commissioned the Kutafin Moscow State Law University (MSAL) to study and prepare draft legal standards pertaining to non-standard employment.[16] The expert analytical study from MSAL emphasized proposals that were applicable precisely to the new types of employment.

As measures to combat the spread of COVID-19 were introduced, most "traditional" kinds of employment suffered setbacks while remote work and work via online platforms became much more prominent, and this brought the legal problems connected with them to the fore.

The proposals concerning remote employment that MSAL made early in 2020 were noted by lawmakers, and substantial revisions are expected by the end of 2020 in the existing regulations for remote work.

The fundamental legal approaches to platform employment and devising standards for it are matters still under review and are the subject of a tender announced in summer of 2020.[17]

экономика Российской Федерации»» // Собрание законодательства РФ. 2017. № 32. Ст. 5138 [Digital Economy of the Russian Federation Programme, approved by the Government of the Russian Federation of 28 July 2017 No. 1632-FZ "On Approval of the Digital Economy of the Russian Federation Programme," Legislation Bulletin of the Russian Federation, 2017, No. 32, Art. 5138].

14 *Id.* Point 2.9.

15 On balancing flexible legal regulation and protection of labour rights, *see* Mariya Aleksynska & Sandrine Cazes, *Composite Indicators of Labour Market Regulations in a Comparative Perspective*, 5(3) IZA J. Labor Econ. 3 (2016); Zoe Adams et al., *Labour Regulation Over Time: New Leximetric Evidence*, Paper prepared for the 4th Conference of the Regulating for Decent Work Network, Developing and Implementing Policies for a Better Future for Work (2015) (Nov. 1, 2020), available at http://www.rdw2015.org/uploads/submission/full_paper/382/labour_regulation_over_time_rdw.pdf; *Лютов Н.Л.* Влияние нетипичных форм занятости на социально-экономическое развитие // Уровень жизни населения регионов России. 2020. Т. 16. № 1. С. 43–50 [Nikita L. Lyutov, *The Effect of Atypical Employment on Socio-Economic Development*, 16(1) Standard of Living in Russian Regions 43 (2020)].

16 Экспертно-аналитическое исследование «Направления совершенствования правового регулирования трудовых отношений в условиях развития нестандартных форм занятости» (государственный контракт № 01731000096190001410001 от 15 октября 2019 г.) [Expert analysis, "Ways to Improve Legal Regulation of Labour Relations in the Development of Non-Standard Employment" (State contract No. 01731000096190001410001 of 15 October 2019)].

17 Открытый конкурс в электронной форме № 0173100009620000026 на проведение экспертно-аналитического исследования «Развитие правового регулирования трудовых и связанных с ними экономических отношений в условиях цифровизации экономики и повышения гибкости рынка труда» [Open tender in electronic form No. 0173100009620000026 for an expert analytical study "Development of Legal Regulations for Labour Relations and Other Relations Connected with Them concerning Conditions in the Digital Economy and Increased Flexibility in the Labour Market"].

The remainder of this article examines both of the most discussed new types of employment in Russia with attention given to the comparative legal context and an appraisal of the prospects for optimizing their legal regulation.

1. Remote Work: Situation Prior to the Coronavirus

In its classifications of new forms of employment,[18] the European Foundation for the Improvement of Living and Working Conditions (Eurofound) has defined *ICT-based mobile work* as employment carried out at least in part, but regularly, outside any "main office" that belongs to the employer or any specially equipped "home office" through use of ICT technology to connect to the company's shared computer network. Eurofound makes a distinction between this type of employment and traditional telework[19] because telework is tied to a definite place where work is performed away from the employer (for example, in the employee's home) while ICT-based mobile work does not involve any kind of fixed workplace.[20]

Eurofound's schema allows for differing degrees of workplace mobility:[21] *full mobility*, which implies frequent change of workplace and type of work, such as journalists, engineers servicing equipment, managers at different sites, etc. have (the Russian term for this translates as work of a travelling nature); and *partial mobility* with frequent change of workplace but confined to a particular geographical area or tied to certain facilities (hospitals, schools, campuses, etc.) so that work is distributed over several locations or over a network of them.

It would seem, however, that legal regulation of workplaces should be more concerned with how fixed they are rather than with how frequently they change or what their geographic range may be.

Russia's labour legislation, even in Soviet times, had standards for *nadomnyi trud* (home work or work in the home), but these were intended for workers with disabilities who performed some sort of job (usually manual) in their homes.

Standards for these home workers were part of the Labour Code from its original adoption in three articles of its Chapter 49,[22] which basically state that such workers are to perform their jobs at home. The main difference in the legal regulation of

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[18] Eurofound, *supra* note 7, at 77, 82; and Eurofound, Overview of New Forms of Employment – 2018 Update (2018), at 11–12 (Nov. 1, 2020), available at https://www.eurofound.europa.eu/sites/default/files/ef_publication/field_ef_document/ef18050en.pdf.

[19] Eurofound, Telework in the European Union (2010) (Nov. 1, 2020), available at https://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1433&context=intl.

[20] Eurofound, *supra* note 7, at 73.

[21] Based on the study: *The Future Workspace: Mobile and Collaborative Working Perspectives* (Hans Schaffers et al. eds., 2006).

[22] Arts. 310 to 312 of the LC.

these home workers compared to ordinary workers is that the Labour Code allows for home workers to procure the materials and equipment for their work at their own expense. Also, home workers, unlike other workers, are not required to do the work themselves, but may be assisted by family members who are not then considered employed in that capacity. The grounds for terminating an employment agreement with home workers are to be established by the agreement's text rather than stipulated explicitly by law as is the case for the vast majority of other types of workers.

The spread of cellular communication networks and the internet has allowed a very significant portion of work to be done away from an employer's location. This in turn has led to rapidly increasing new forms of employment all across the globe – remote work and telework.[23] For example, in a 2004 survey of workers in the USA, 15% said that they work partly from home or another place, and only 3% said that they worked entirely from home at least once in two weeks. By 2017–2018 one worker in four completed at least part of their job away from their employer's premises, and by 2019 13% of workers were working from home or another place all day at least once in two weeks; 3.6% worked entirely away from their employer's location for at least half of their workdays.[24] Regular remote employment for those not self-employed is estimated to have increased by 173% from 2005 to 2020.[25]

Russia is no exception to the growth of remote employment.[26] Immediately after passage of the LC, it became obvious that the standards for home workers were in fact not suited to remote workers because of the mobility they had. A few years after enactment of the LC, experts were discussing the need to introduce legal standards applicable to remote work, or to "computer home workers"[27] as they were more often termed at the time. Those standards might have some points of correspondence with those for home workers, but they would be fundamentally different from them.[28]

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23 *Telework in the 21st Century: An Evolutionary Perspective* 352 (Jon C. Messenger ed., 2019).

24 All figures are from: Sabrina W. Pabilonia & Victoria Vernon, *Telework and Time Use in the United States*, preprint May 2020 (Nov. 1, 2020), available at https://www.researchgate.net/publication/341341709_Telework_and_Time_Use_in_the_United_States.

25 Remote Work Trends for 2020: The Present & Future of Remote Work, Remoters, 13 June 2020 (Nov. 1, 2020), available at https://remoters.net/remote-work-trends-future-insights/.

26 *Гебриаль В.Н.* Социальные аспекты феномена дистанционной работы как нового вида трудовых отношений // Государственное управление. 2008. № 17. С. 1–10 [Veronica N. Gebrial, *Social Aspects of the Phenomenon of Remote Work as a New Type of Labour Relations*, 17 Public Administration 1 (2008)].

27 *Томашевский К.Л.* Компьютерное надомничество (телеработа) как одна из гибких форм занятости в XXI в. // Трудовое право в России и за рубежом. 2011. № 3. С. 32–35 [Kirill L. Tomashevsky, *Computer Home Workers (Telework) as One of the Flexible Forms of Employment in the 21st Century*, 3 Labour Law in Russia and Abroad 32 (2011)].

28 On the distinctions between home and remote work in current Russian labour law, *see Герасимова Е.С.* Дистанционная и надомная работа: отличия // Кадровик. 2013. № 10. С. 16–21 [Elena S. Gerasimova, *Remote and Home Work: The Differences*, 10 Kadrovik 16 (2013)].

This led in 2013 to the enactment of Chapter 49.1 of the Labour Code in order to regulate remote work. It first provides a concept of remote work, from which it follows that the important characteristics of this kind of employment are that it takes place away from the employer's location or from a place under the control of the employer and that communication between the employer and the employee is through electronic connection. The chapter also covers how employment agreements with remote employees are to be concluded, amended and terminated, how the parties are to maintain contact with each other, and the specifics of arranging occupational safety and health, work schedules and time off for this class of employees.

Nevertheless, a good many all aspects of this type of employment are not properly regulated by this legislation. Some of these defects in legal regulation of remote work have the potential to infringe workers' labour rights and to make remote work excessively precarious. Other defects make implementing official employment so burdensome that the parties would prefer to make a standard employment agreement or to work without any official employment status at all.

In the six years since the chapter devoted to remote work was inserted into the LC, Rosstat counted only 30,000 workers under remote employment agreements as of December 2019 out of the country's 67.1 million employed.[29] This means that there were 2,200 "stationary" employees for every remote one. Comparing that figure with the statistics presented above for the spread of remote work in other countries makes it clear that the standards in Chapter 49.1 of the LC are very rarely used by those actually involved in remote employment.

Because this situation became obvious both to those involved in remote employment and also to the government, discussions about modifying the legislation on remote work have been in place for several years. As of 2020, however, those discussions have not had any practical results.

2. Remote Work during the Pandemic

2.1. Discussion of Initiatives on Remote Work

Under the coronavirus restrictions, remote work has received heightened attention from both the authorities and the social partners.

Soon after those restrictions were in place, the transition to remote work in Russia became an immense phenomenon. Many employers had their operations suspended by the introduction of "non-working days" that were never prescribed by labour law but were imposed by decrees of the President on 25 March and again

[29] Итоги выборочного обследования рабочей силы // Федеральная служба государственной статистики (Росстат). 2019 [Federal State Statistic Service (Rosstat), Results of Workforce Sampling Research (2019)] (Nov. 1, 2020), available at https://rosstat.gov.ru/compendium/document/13265.

on 2 and 28 April 2020.[30] Wherever possible, the employers still allowed to operate resorted *en masse* to "distance" work, which meant that employees would carry out their usual work functions but from home.

The Federal Service for Labour and Employment in its communication of 9 April 2020 provided the clarification that transferring employees to distance work would require an additional employment agreement with them to include terms and conditions specifying what the distance work consists of.[31] This explanation was rather controversial as a point of law. According to current labour law, employment agreements for distance work and for the "stationary" kind are of different categories, and the possibility of amending an employment agreement so that the agreement itself changes its category has been much debated by specialists.[32] Despite this legal ambiguity, whole sectors of the economy converted to distance work of some kind without ever concluding employment agreements based on Chapter 49.1 of the Labour Code.

The State Duma is now considering three draft laws on distance or remote work that were brought forward in June 2020. In early June the Moscow City Duma took up a draft law proposing amendments to Article 57 of the Labour Code (on the content

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30 Указ Президента РФ от 25 марта 2020 г. № 206 «Об объявлении в Российской Федерации нерабочих дней» // Собрание законодательства РФ. 2020. № 13. Ст. 1898 [Decree of the President of the Russian Federation No. 206 of 25 March 2020. On the Announcement of Non-Working Days in the Russian Federation, Legislation Bulletin of the Russian Federation, 2020, No. 13, Art. 1898]; Указ Президента РФ от 2 апреля 2020 г. № 239 «О мерах по обеспечению санитарно-эпидемиологического благополучия населения на территории Российской Федерации в связи с распространением новой коронавирусной инфекции (COVID-19)» // Собрание законодательства РФ. 2020. № 14 (ч. 1). Ст. 2081 [Decree of the President of the Russian Federation No. 239 of 2 April 2020. On Measures to Ensure the Health and Epidemiological Well-Being of the Population in the Territory of the Russian Federation With Regard to the Spread of the New Coronavirus (COVID-19), Legislation Bulletin of the Russian Federation, 2020, No. 14 (Part 1), Art. 2081]; Указ Президента РФ от 28 апреля 2020 г. № 294 «О продлении действия мер по обеспечению санитарно-эпидемиологического благополучия населения на территории Российской Федерации в связи с распространением новой коронавирусной инфекции (COVID-19)» // СЗ РФ. 2020. №18. Ст. 2875 [Decree of the President of the Russian Federation No. 294 of 28 April 2020. On Prolongation of Measures to Ensure the Health and Epidemiological Well-Being of the Population in the Territory of the Russian Federation With Regard to the Spread of the New Coronavirus (COVID-19), Legislation Bulletin of the Russian Federation, 2020, No. 18, Art. 2875].

31 Письмо Федеральной службы по труду и занятости от 9 апреля 2020 г. № 0147-03-5 «О направлении ответов на наиболее часто поступающие вопросы на горячую линию Роструда, касающиеся соблюдения трудовых прав работников в условиях распространения коронавирусной инфекции» // СПС «КонсультантПлюс» [Communication of the Federal Service for Labour and Employment No. 0147-OZ-5 of 9 April 2020. On Providing Answers to the Questions Most Frequently Asked over the Rostrud Hotline with Regard to Adherence to Employees' Labour Rights During Spread of the Coronavirus, SPS "ConsultantPlus"], p. 21 (Nov. 1, 2020), available at http://www.consultant.ru/document/cons_doc_LAW_351187/96c60c11ee5b73882df84a7de3c4fb18f1a01961/.

32 For more on the topic, *see Коршунова Т.Ю.* Договор о дистанционной работе как способ оформления нетипичных трудовых отношений // Журнал российского права. 2020. № 2. С. 118–120 [Tatyana Yu. Korshunova, *Remote Employment Agreements as a Way to Formulate Atypical Employment*, 2 Journal of Russian Law 118 (2020)] (in Russian); Elena S. Gerasimova et al., *New Russian Legislation on Employment of Teleworkers: Comparative Assessment and Implications for Future Development*, 2 Law Journal of the Higher School of Economics 124 (2017).

of an employment agreement) which would allow "temporary or partial performance of work in a remote form."[33] Two days later on 4 June 2020, P.V. Krasheninnikov and several other State Duma deputies reintroduced a draft law on electronic exchange of messages and concluding employment agreements with remote workers.[34]

Alongside these draft laws, the Federation of Independent Trade Unions of Russia (FNPR)[35] and the All-Russia People's Front (ONF)[36] came forward with initiatives concerning a mixed form of remote and stationary work. Similar initiatives came from the Ministry of Labour and Social Protection.[37]

Even before these initiatives were issued, there was public discussion of a regulatory concept for remote work that had been prepared by the Moscow State Law University for the United Russia party faction in the State Duma. The concept was under consideration from early May to June through an online gathering led by the party's chair, Dmitry Medvedev. The technical aspects were discussed by representatives from trade unions, employers' associations, the Ministry of Labour and Social Protection of the RF, specialized committees of the State Duma and experts in the field. These discussions led to presentation of a draft law on 16 June 2020 (hereinafter "June Draft Law") for a first reading and its official introduction to

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[33] Законопроект № 966659-7 от 2 июня 2020 г. «О внесении изменений в статью 57 Трудового кодекса Российской Федерации» внесен Московской городской думой» // Государственная Дума ФС РФ. Система обеспечения законодательной деятельности [Draft Law No. 966659-7 of 2 June 2020. On Introducing Amendments to Article 57 of the Labour Code of the Russian Federation, State Duma of the Federal Assembly of the Russian Federation] (Nov. 1, 2020), available at https://sozd.duma.gov.ru/bill/966659-7.

[34] Законопроект № 967986-7 от 4 июня 2020 г. «О внесении изменений в Трудовой кодекс Российской Федерации (о юридически значимых сообщениях сторон трудового договора)» // Государственная Дума ФС РФ. Система обеспечения законодательной деятельности [Draft Law No. 967986-7 of 4 June 2020. On Introducing Amendments to the Labour Code of the Russian Federation (on Legally Significant Communications Between the Parties to an Employment Agreement), State Duma of the Federal Assembly of the Russian Federation] (Nov. 1, 2020), available at https://sozd.duma.gov.ru/bill/967986-7.

[35] *Рыженкова Ю.* Профсоюзы предлагают ввести рекомендации по организации труда в условиях пандемии // Солидарность. 20 марта 2020 г. [Yulia Ryzhenikova, *Trade Unions Offer Recommendations for Arranging Work During the Pandemic*, Solidarnost, 20 March 2020] (Nov. 1, 2020), available at https://www.solidarnost.org/news/profsoyuzy-predlagayut-vvesti-rekomendatsii-po-organizacii-truda-v-usloviyah-pandemii.html.

[36] Эксперты ОНФ предложили закрепить в Трудовом кодексе право совмещать работу в офисе и дистанционно // Общероссийский народный фронт. 19 марта 2020 г. [ONF Experts Proposed Including the Right to Work Remotely or in an Office in the Labour Code, All-Russian People's Front, 19 March 2020] (Nov. 1, 2020), available at https://onf.ru/2020/03/19/eksperty-onf-predlozhili-zakrepit-v-trudovom-kodekse-pravo-sovmeshchat-rabotu-v-ofise-i/.

[37] *Замахина Т.* Минтруд предложил закрепить удаленную и комбинированную занятость в ТК // Российская газета. 27 мая 2020 г. [Tatiana Zamakhina, *The Ministry of Labour Proposed Including Distance and Combined Employment in the Labour Code*, Rossiyskaya Gazeta, 27 May 2020] (Nov. 1, 2020), available at https://rg.ru/2020/05/27/mintrud-predlozhil-zakrepit-udalennuiu-i-kombinirovannuiu-zaniatost-v-tk.html.

the two chairs of the Federation Assembly's chambers and to a series of State Duma deputies and members of the Federation Assembly.[38]

The June Draft Law is quite comprehensive, and the expectation is that by autumn it will incorporate the groundwork laid by the first two draft laws that were introduced to address remote work. The subsequent developments are outlined in what follows.

2.2. Anticipated changes in the regulations for remote work

2.2.1. Differentiation of Remote Work

The June Draft Law allows in general for three types of remote work:

a) *Remote (distance) work*, which is remote work as already defined in Chapter 49.1 of the Labour Code;

b) *Temporary remote (distance) work*, which applies to a work schedule that allows employees working under a "typical" employment contract to perform their jobs away from a stationary workplace that is under control of the employer. The need for this concept arose directly from the measures to combat the spread of the epidemic when great numbers of typical employees without any remote work were thrust into distance work[39] that had not been covered by current legislation or their employment agreements;

c) *Combined remote (distance) work* has job functions performed partly in a stationary workplace and partly carried out remotely. Most remote employees at present are required in certain situations to come to their employer's location to do some of their work. Then too, a good many typical "stationary" employees perform some of their job remotely. Teachers, for example, usually check their students' written assignments at home or in other locations away from their employer. As the legislation currently stands, both these categories of employees are outside the scope of the law.

2.2.2. Electronic Interaction between Employees and Employers

Another important innovation in the June Draft Law is simplified electronic interaction between the parties to an employment agreement for remote work. The only current alternative to the usual paper-based way of arranging employment allowed by the LC for remote employees is an exchange of electronic documents with an enhanced qualified digital signature (EQDS) (Chapter 4, Art. 312.1 of the LC),

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[38] Законопроект № 973264-7 от 16 июня 2020 г. «О внесении изменений в Трудовой кодекс Российской Федерации в части регулирования дистанционной и удаленной работы» // Государственная Дума ФС РФ. Система обеспечения законодательной деятельности [Draft Law No. 973264-7 of 16 June 2020. On Amendments to the Labour Code of the Russian Federation and in Particular for Regulation of Remote and Distance Work, State Duma of the Federal Assembly of the Russian Federation] (Nov. 1, 2020), available at https://sozd.duma.gov.ru/bill/973264-7.

[39] The distance work not covered by current labour legislation is mentioned in the communications of 31 March 2020 No. 90-TZ and 9 April 2020 0147-OZ-5 of the Federal Service for Labour and Employment (Rostrud) (*supra* note 31) concerning the "non-working" days that were also not envisaged by labour law.

but special procedures and costs are involved before the signatories are able to use these digital signatures.[40]

Unless employees have already registered an EQDS for some other purpose, it would be easier for them to visit the employer and sign the required documents on paper; and this renders the simplified standards for electronic interaction between employees and employers useless. In addition, judicial practice has begun to supersede legislation on this matter. Electronic signatures have been regarded in several cases as proof that an employment relationship exists.[41] Furthermore, the Plenum of the Supreme Court explicitly referred to an electronic signature as proof of the existence of an employment relationship in micro enterprises in its Decree of 29 May 2018.[42] Nevertheless, the courts are at present reluctant to give precedence to factual circumstances over the formal aspects of a case.

The draft law therefore rejects mandatory use of an EQDS in favour of allowing the employee and employer to independently determine the method for exchanging legally significant communications.

2.2.3. Right of Employees to be Offline

An even more significant passage of the June Draft Law establishes standards which regulate communications between an employer and a remote employee outside the regular work schedule.

It should be noted that remote employees and workers for online platforms are especially vulnerable to infringements of the maximum duration of work schedules and to unfavourable work-life balance.[43] The standards proposed in the June Draft Law come across as a version of what has been called the right to be offline, which has been established in France and other economically and socially developed countries.[44]

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[40] According to Федеральный закон от 6 апреля 2011 г. № 63-ФЗ «Об электронной подписи» // Собрание законодательства РФ. 2011. № 15. Ст. 2036 [Federal Law No. 63-FZ of 6 April 2011. On Electronic Signatures, Legislation Bulletin of the Russian Federation, 2011, No. 15, Art. 2036].

[41] For example, решение Кировского районного суда г. Екатеринбурга Свердловской области от 6 июля 2016 г. по делу № 2-4775/2016 // СПС «Гарант» [Decision of the Kirov regional court in Yekaterinburg, Sverdlovsk oblast of 6 July 2016 in case No. 2-4775/2016, SPS "Garant"].

[42] Постановление Пленума Верховного Суда Российской Федерации от 29 мая 2018 г. № 15 «О применении судами законодательства, регулирующего труд работников, работающих у работодателей – физических лиц и у работодателей – субъектов малого предпринимательства, которые отнесены к микропредприятиям» // Бюллетень Верховного Суда РФ. 2018. № 7 [Decree of the Plenum of the Supreme Court of the Russian Federation No. 15 of 29 May 2018. On Judicial Implementation of the Legislation Regulating Employment of Those Working for Individual Persons and Those Employed by Small Businesses Classified as Micro Enterprises, Bulletin of the Supreme Court of the Russian Federation, 2018, No. 7], p. 18.

[43] For more on this topic *see* Oscar Vargas Llave & Tina Weber, Eurofound, *Regulations to Address Work–life Balance in Digital Flexible Working Arrangements* (2020), at 46 (Nov. 1, 2020), available at https://www.eurofound.europa.eu/sites/default/files/ef_publication/field_ef_document/ef19046en.pdf?fbclid=IwAR0UT638BKARIBd9AscS32IwR23GeULOMhXg5cIkS1Y_BGQ56kvvminifF0.

[44] For more on this topic *see* Caterina Timellini, *Disconnection: A Right in a Phase of Progressive Definition* in *New Forms of Employment: Current Problems and Future Challenges* 119 (Jerzy Wratny & Agata Ludera-Ruszel eds., 2020).

The onset of new kinds of labour, and in particular the spread of remote work and other forms of employment in which the employee and employer rely heavily on electronic interactions, may be blurring the traditional boundary between an employee's work schedule and time off. The typical employee in the industrial era in most cases could leave all their work-related problems at the office after work and direct all their attention to their family and leisure pursuits. But the typical office worker in today's society will often bring home all the problems from their job and keep responding to calls and messages about work (sometimes at any time of day or night).

This practice deprives workers of the full benefit from being at home and of the sense that their homes and time off are zones free from work concerns. As a result, emotional burnout and work-related stress have become more urgent problems than ever before. In 2016 the ILO marked World Day for Safety and Health at Work with a featured report on work-related stress, which had already been recognized as a major threat to workers' health.[45]

Concern about how to set work time apart and limit the employer's ability to pursue work issues with their employees after the workday is over have already prompted new legislation in economically developed countries. The clearest example of this concern is in France, which in 2012 concluded a social partnership agreement that established the right of remote workers to at least one day a week free from communications with their employer. In early 2017 the French Labour Code was amended to compel employers with 50 or more employees to establish rules for contacting them after their regular workday ends.[46] Several major employers, such as Volkswagen, chose to turn off their email servers after working hours so that supervisors and co-workers in principle cannot disrupt employees' time off.[47]

At present the right to be offline or right to disconnect is a concept under consideration in the more socially developed countries of the European Union. Specialists have already put forward a version of the worker's right not to be continually in contact with their employer for consideration by the governments of the Eurasian Economic Union, including Russia.[48]

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[45] ILO, Workplace Stress: A Collective Challenge (2016) (Nov. 1, 2020), available at https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---safework/documents/publication/wcms_466547.pdf.

[46] French Workers Win Legal Right to Avoid Checking Work Email Out-of-hours, The Guardian, 31 December 2016 (Nov. 1, 2020), available at https://www.theguardian.com/money/2016/dec/31/french-workers-win-legal-right-to-avoid-checking-work-email-out-of-hours.

[47] Lorenzo Migliorato, *Culturing Boundaries: The Right to be Offline*, The Tecnoskeptic, 22 March 2017 (Nov. 1, 2020), available at https://thetechnoskeptic.com/culturing-boundaries/.

[48] *Томашевский К.Л.* Цифровизация и ее влияние на рынок труда и трудовые отношения (теоретический и сравнительно-правовой аспекты) // Вестник Санкт-Петербургского университета. 2020. Право. № 11(2). С. 407–408 [Kirill L. Tomashevsky, *Digitalization and its Influence on the Labour Market and Labour Relations (Theoretical and Comparative Legal Aspects)*, 11(2) Law Journal of Saint Petersburg University 407 (2020)]; Nikita Lyutov & Svetlana Golovina, *Development of Labor Law in the EU and EAEU: How Comparable?*, 6(2) Russian L.J. 93 (2018).

The June Draft Law does not completely preclude disturbing employees outside of work hours. However it does govern the procedure for interaction between remote employees and the employer. The basic approach is that, if the employer must contact an employee outside of regular work hours, then wages, as well as the maximum length of contact with and being accessible to the employer, should be treated as overtime.

The rule that employees have a right to certain limitations and a degree of orderliness in communications from their employer should properly apply to any employees, not only to remote ones. However, remote workers may serve as a test group for a legal experiment which, if successful, should be extended to dealings with any employees whom an employer contacts by electronic means during their time off work.

2.2.4. Inclusion of Grounds for Dismissal in Employment Agreements

Article 312.5 (1) of the Labour Code, which is currently in force, provides for dismissal of employees on grounds to be specified in employment agreements. This norm replicates the content of the previously enacted rule for home workers (Art. 312 of the Labour Code). In practice, however, employers resort to completely arbitrary reasons for dismissing remote employees, such as "lack of work for a given employee" (i.e. which essentially would relieve the employer of the obligation under Article 22 of the Labour Code to provide work and, if it is lacking, to pay for time on suspension for which the employee is not at fault), "uselessness of further cooperation" or "operational necessity."[49]

No matter how far-fetched it seems to incorporate these grounds for dismissal in employment agreements, employees usually fail when contesting their legality in court.[50]

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[49] *See Черных Н.В.* Влияние нетипичных форм занятости на теоретические представления о трудовом отношении (на примере норм о дистанционном труде) // Актуальные проблемы российского права. 2019. № 8(105). С. 108–117 [Nadezhda V. Chernykh, *The Influence of Atypical Employment on Theories of Labour Relations (Standards for Remote Work)*, 8(105) Actual Problems of Russian Law 108 (2019)].

[50] Решение Замоскворецкого районного суда г. Москвы от 2 октября 2019 г. по делу № 02-4456/2019 (оставлено без изменения Апелляционным определением судебной коллегии по гражданским делам Московского городского суда от 20 мая 2020 г. по делу № 33-13707/2020) [Decision of the Zamoskvoretsky District Court of Moscow of 2 October 2019 in case No. 02-4456/2019 (affirmed without changes by the ruling upon appeal to the Judicial College for Civil Cases of the Moscow City Court of 20 May 2020 in case No. 33-13707/3030)]; решение Тукаевского районного суда Республики Татарстан от 20 января 2020 г. по делу № 2-189/2020 (оставлено без изменения Апелляционным определением Верховного суда Республики Татарстан от 11 июня 2020 г. по делу № 33-7400/2020) [Decision of the Tukaevo District Court of the Republic of Tatarstan of 20 January 2020 in case No. 2-189/2020 (affirmed without changes by the ruling upon appeal to the Supreme Court of the Republic of Tatarstan of 11 June 2020 in case No. 33-7400/2020); решение Новгородского районного суда Новгородской области от 9 октября 2019 г. по делу № 2-4741/2019 [Decision of the Novgorod District Court of Novgorod Oblast of 9 October 2020 in case No. 2-4741/2019] and others. Refer to the Sudact.ru online database (subscription required).

In the great majority of cases, an employment agreement as it is being signed functions in effect as a kind of accession agreement, i.e. employers offer whatever terms and conditions suit them, and usually no real negotiation takes place because the employee has a far weaker bargaining position. Even when remote employees realize that the grounds for dismissal are obviously unfair, they almost never have a chance to object to them. This means that remote employees are subject to discrimination compared to other employees whose agreements may contain only the grounds for dismissal explicitly permitted by law.

Thus, remote employees are discriminated against compared to the vast majority of other employees, and their right to protection from unfair dismissal is minimal.

The June Draft Law now under consideration would prohibit adding any grounds for dismissal "invented" by the parties (in reality, by employers) to an agreement.

When employers represented by the Russian Union of Industrialists and Entrepreneurs (RSPP) were considering the draft law, they objected to this new feature because the law leaves unclear the procedure for dismissal on grounds of absenteeism (Article 81(1)(6)(a) of the LC) in the case of dismissing a remote employee on the initiative of the employer. To date, however, employers have not put forward any suggestions such as adding specific grounds for dismissal of remote employees directly to the LC rather than in employment agreements.

This question will probably be taken up in subsequent discussions among the social partners as drafting the law continues.

2.3. Problems in Regulating Remote Work

Although the June Draft Law offers solutions to a substantial class of problems pertaining to remote work, it should be acknowledged that other problems with its legal regulation would remain both as the law now stands and even after making the changes proposed.

One of the legal gaps that should be pointed out is the absence of legal regulation for remote work when any foreign element is involved.

The law makes no provision for Russian employers to employ foreign citizens remotely, or conversely for Russian workers residing in Russia to be employed by employers located abroad. Nor are there any rules applicable to Russian workers residing abroad but in the employ of Russian employers.

The Ministry of Labour and Social Protection in clarifications that are inconsistent with the law has declared that work of those kinds is ruled out by the principle that "whatever is not explicitly permitted is prohibited", a principle which does not exist in labour law.[51] Even though these clarifications do not have the status of regulatory

[51] Письмо Минтруда России от 16 января 2017 г. № 14-2/ООГ-245 // СПС «КонсультантПлюс» [Communication of the Ministry of Labour of Russia of 16 January 2017 No. 14-2/OOG-245, SPS "ConsultantPlus"]; письмо Минтруда России от 7 декабря 2016 г. № 14-2/ООГ-10811 // СПС «КонсультантПлюс» [Communication of the Ministry of Labour of Russia of 7 December 2016 No. 14-2/OOG-10811, SPS "ConsultantPlus"].

legal acts and have been rightly criticised by specialists,[52] employees and employers who want to work together across borders in practice have been forced to improvise and hope that their arrangements are still within the law.

Another deficiency in the approach to remote workers is the obstacles they face in exercising their collective labour rights and in the absence of legal regulations to provide explicit entitlement of these workers to take part in trade unions and collective bargaining. To eliminate this gap in the law, proposals to create special "digital" trade unions are being advanced.[53]

These problems still await legislative solutions.

3. Working via an Online Platform

3.1. Conceptual Apparatus and Social and Labour Problems in Platform Employment

A second much discussed new form of employment made possible by telecommunications is digital work or platform work, terms which are often regarded as synonymous. Digital work can be carried out with the help of electronic technology to send or deliver the results to the client, but it can also apply to work performed offline, for example, when a courier or driver gets a job through an online platform.[54]

The difference between this form of employment and the remote kind considered in the previous section lies in the involvement of an online platform that connects the parties to employment. This technical difference gives rise to significant factual and legal distinctions such as in the application of labour or civil law and, consequently, in determining the number of parties to the legal relationship, their legal status, and the duration and procedure for beginning and ending the relationships, etc.

Because platform employment is a very recent phenomenon, theoretical understanding of it is rapidly developing and changing. As recently as 2015 Eurofound regarded work arranged via online platforms as crowd employment,[55] i.e. as employment in which an online platform is used to provide options to legal entities

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[52] *See Васильева Ю.В., Шуралева С.В.* Дистанционная работа в России: вопросы правоприменения // Вестник Пермского университета. Юридические науки. 2016. Вып. 32. С. 216–225 [Yulia V. Vasilieva & Svetlana V. Shuraleva, *Remote Work in Russia: Issues in Legal Implementation*, 32 Perm University Herald. Juridical Sciences 216 (2016)]; Korshunova 2020, at 115–116; Chernykh 2019, at 110–111.

[53] *Котова С.И.* Концепция трудовой занятости: цифровые профсоюзы, право на трудоустройство, абсолютное социально-обеспечительное отношение // Трудовое право в России и за рубежом. 2018. № 2. С. 10–13 [Svetlana I. Kotova, *The Concept of Employment: Digital Trade Unions, the Right to Employment and the Absolute Social Security Relationship*, 2 Labour Law in Russia and Abroad 10 (2018)].

[54] Cristiano Codagnone et al., *The Future of Work in the "Sharing Economy." Market Efficiency and Equitable Opportunities or Unfair Precarisation?*, JRC Science for Policy Report (2016) (Nov. 1, 2020), available at https://ec.europa.eu/jrc/en/publication/eur-scientific-and-technical-research-reports/future-work-sharing-economy-market-efficiency-and-equitable-opportunities-or-unfair.

[55] Eurofound, *supra* note 20, at 107.

or individual persons for reaching out to an unrestricted and unidentified group of other legal entities or individual persons in order to solve particular problems or have them provide specialized services in return for payment. This kind of employment has sometimes been called crowdsourcing or crowd work.

Crowdsourcing as a term was formed as an analogue of another neologism: outsourcing, which is the use of labour from outside sources to replace that of permanent employees with employment agreements. Crowdsourcing also involves recruiting outside workers but with the implication that a call goes out to a crowd, to a large group of potential "virtual workers" (in the sense that whoever employs them may even never see them in person).[56] Crowdsourcing usually proceeds by dividing a major task into smaller components that are independent of each other. It seems unlikely that crowdsourcing could be used to execute every kind of task, but it could be used for some portion of nearly any job.

The concept of working through an online platform is broader than that of crowdsourcing because it can be applied not only to portions of larger assignments but also to independent one-time tasks without any permanent employer (this is usually termed "work on demand via apps").

By 2018 Eurofound's classification of new forms of employment, instead of focussing on crowd employment, highlighted the problem of working through online platforms because the platform had become definitive of this way of arranging work.[57] Eurofound divided platform work into ten types depending on whether the client or the worker initiates the job, on what qualifications are involved and on where the job will be performed.[58] The specialists at Eurofound selected three main types of platform work for examination in detail: a) platform-determined work (for example, courier service for food delivery); b) worker-initiated work (workers employ the platform to offer a wide variety of services including plumbing, landscaping, care for children and the elderly, tutoring, etc. with workers typically doing these jobs in a certain residential area); c) contestant platform work (Eurofound's example is a French company offering "co-creation" whose clients, usually major well-known brands, commission creative work through competitions with prizes going to the winners).[59] Most of the types of platform work dealt by Eurofound have many similarities with employment. In the following sections of this article, platform-

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[56] On this topic *see* Valerio De Stefano, *Introduction: Crowdsourcing, the Gig-Economy, and the Law*, 37(3) Comp. Lab. L. & Pol'y J. 461 (2017); *Филипова И.А.* Трансформация правового регулирования труда в цифровом обществе. Искусственный интеллект и трудовое право [Irina A. Filipova, *The Transformation of Legal Regulation of Labour in a Digital Society: Artificial Intelligence and Labour Law*] (2019).

[57] Eurofound, Overview of New Forms of Employment (2018), *supra* note 18, at 15.

[58] Eurofound, Employment and Working Conditions of Selected Types of Platform Work (2018), at 5 (Nov. 1, 2020), available at https://www.eurofound.europa.eu/sites/default/files/ef_publication/field_ef_document/ef18001en.pdf/.

[59] *Id.* at 7.

determined work, which is the type most similar to employment relations, will be the principal topic of discussion.

Platform work has been much debated in recent years and is regarded as problematic in a great many countries.[60] Working via online platforms is a rapidly increasing segment of employment. Statistics from Oxford University and the Oxford Internet Institute show that since May 2016 platform work has become quite widespread and to a considerable extent has replaced traditional employment in many occupations.[61] By June 2020 it had grown by over 60%.[62]

Russia ranks fifth worldwide (after the USA, India, the Philippines and Ukraine) in its number of online platform workers.[63] Discussion of the legal status of online platform workers, however, is much less common in Russia than in EU countries and the USA.

Even though telecommunication technology is understood as a branch of IT, platform employment mostly involves work for which no special preparation or qualifications are required: couriers, housekeepers, drivers, one-time services, etc.[64]

The companies that manage online platforms try to present themselves merely as intermediaries for the exchange of information between consumers of services and workers. The legal relations involving online platforms typically encompass three parties (the consumer, the platform itself, and the worker), but there are more complex arrangements with additional entities, sometimes as many as five.[65] These companies distance themselves as much as possible from the role of employer of their platform workers. The well-known expert in labour regulation and the digital economy, Jeremias Prassl, maintains that judging whether an online platform is an employer rather than a client should turn on such factors as the power to dismiss workers (ban them from the platform), to benefit from their work and its results, to offer work and pay for it, and to monitor sales.[66]

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60 For assessment of the global scale of this phenomenon and its effect on the economy and labour, *see* Nick Srnicek, *Platform Capitalism* (2016); Martin Risak, *Fair Working Conditions for Platform Workers: Possible Regulatory Approaches at the EU Level* (2018) (Nov. 1, 2020), available at https://library.fes.de/pdf-files/id/ipa/14055.pdf.

61 For the methodology and processing of the statistics, *see* Otto Kässi & Vili Lehdonvirta, *Online Labour Index: Measuring the Online Gig Economy for Policy and Research*, 137 Technol. Forecast. Soc. Change 241 (2018).

62 The Online Labour Index (Nov. 1, 2020), available at https://ilabour.oii.ox.ac.uk/online-labour-index/.

63 Mark Graham et al., *Digital Labour and Development: Impacts of Global Digital Labour Platforms and the Gig Economy on Worker Livelihoods*, 23(2) Transfer 135 (2017); Kateryna Bozhkova, *The Growing Freelance Market in Ukraine: A Global Tendency or a Local Phenomenon?*, Forbes Ukraine (2015) (Nov. 1, 2020), available at http://forbes.net.ua/opinions/1406741-rastushchij-rynok-frilansa-v-ukraine-globalnaya-tendenciya-ili-mestnyj-fenomen; The Online Labour Index, *supra* note 62.

64 Maria Aleksynska, *Digital Work in Eastern Europe: Overview of Trends, Outcomes, and Policy Responses*, ILO Research Department Working Paper (2020) (forthcoming).

65 Olga Chesalina, *Social and Labour Rights of "New" Self-Employed Persons (and in Particular Self-Employed Platform Workers) in Russia*, 8(2) Russian L.J. 52 (2020).

66 Jeremias Prassl, *The Concept of the Employer* 18 (2015).

Because online platforms are as yet not necessarily classified as employers, a great many occupations may fall outside regulation by labour law, and the online platform workers in them will be relegated to civil law status as self-employed, individual entrepreneurs, independent contractors, etc. Hence, identifying the sector to which an online platform worker's job belongs is not merely an abstract, theoretical intellectual exercise. The answer will determine whether millions of people will be granted the labour rights that an employee with an employment agreement has.

Working via an online platform is usually lacking in security,[67] and this has contributed to protests that mostly centre on the low wages for platform workers.[68] When an online platform worker does not have the status of an employee, the platform may unilaterally set the rules for their exclusion from the platform (in effect, for their dismissal). Such workers may be penalized for improper performance of a job or otherwise treated in ways that would be prohibited by labour law and by standards for minimum wage, for length of workdays, and for occupational safety and health. They may also be denied the right to collective bargaining, to strike and to exercise some other extremely important labour rights.

3.2. "Uberisation" of the Labour Market and Disputes about the Legal Status of Contractors

Taxi drivers' platform employment is at present the cause of most of the disputes and protests in a great variety of countries, and Uber is the most widespread and well-known online platform for taxi services.

Uber's worldwide influence on employment has been so great that the term "Uberisation" has been coined in many languages.[69] Another popular term, "sharing economy" is also connected with the business of internet platforms and is sometimes conflated with "Uberisation."[70]

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[67] For more on the intermittent nature of online platform employment in Eastern Europe *see* Agnieszka Piasna & Jan Drahokoupil, *Digital Labour in Central and Eastern Europe: Evidence from the ETUI Internet and Platform Work Survey*, European Trade Union Institute Working Paper (2019), at 43–45 (Nov. 1, 2020), available at https://www.etui.org/Publications2/Working-Papers/Digital-labour-in-central-and-eastern-Europe-evidence-from-the-ETUI-Internet-and-Platform-Work-Survey.

[68] *See* Simon Joyce et al., *A Global Struggle: Worker Protest in the Platform Economy*, ETUI Policy Brief No. 2 (2020) (Nov. 1, 2020), available at https://www.etui.org/publications/policy-briefs/european-economic-employment-and-social-policy/a-global-struggle-worker-protest-in-the-platform-economy.

[69] Juha-Pekka Nurvala, *"Uberisation" Is the Future of the Digitalised Labour Market*, 14(2) Eur. View 231 (2015); Denis Pennel, *The "Uberisation" of the Workplace Is a New Revolution*, Euractiv, 1 July 2015 (Nov. 1, 2020), available at https://www.euractiv.com/section/social-europe-jobs/opinion/the-uberisation-of-the-workplace-is-a-new-revolution/; Pierre Pichère, *Les artisans face au choc de l'ubérisation*, Le Moniteur, 29 April 2016 (Nov. 1, 2020), available at https://www.lemoniteur.fr/article/les-artisans-face-au-choc-de-l-uberisation.1165484.

[70] *See, e.g.*, Le Chen et al., *Peeking Beneath the Hood of Uber*, Proceedings of the 2015 ACM Conference on Internet Measurement (2015), at 495–508 (Nov. 1, 2020), available at https://www.ftc.gov/es/system/files/documents/public_comments/2015/09/00011-97592.pdf; Johanna Mair & Georg Reischauer,

Although there is no official definition of "sharing economy", using it to describe the commercial activities of such companies as Uber, Yandex and others of the kind would probably not be correct. The sharing economy is a movement aimed at saving resources by distributing them among users in the most efficient way. An example of the sharing economy applied to automobile trips would be a platform that allows several users to connect in order to travel together in one automobile and share the expense of fuel, rather than a company that is operating as an alternative to traditional taxis. That is, the goal of the sharing economy is not to maximize the owner's profit, as it would be for a business of the Uberisation type, but to save resources through their optimal use.[71]

Uber's use of taxi drivers is more than a topic of academic studies and target of protests. In most of the countries where it operates, Uber is a defendant in lawsuits brought by drivers, traditional taxi companies and governments based on the unresolved inconsistencies in the employment status of its drivers. In nearly every country where Uber has launched, disputes are under way about whether drivers are independent contractors or employees.

In France, for example, drivers employed via platforms were the object of several judicial proceedings. Even before the appearance of platform employment, the Court of Cassation in France had ruled in 2000 that there were indications that drivers were subordinates by reason of the many obligations and instructions that Uber had the right to impose according to the agreement it had concluded with its drivers.[72] In 2016 Uber France was compelled to cease operations according to a ruling of the government made under pressure from licenced taxi drivers who had accused the company of unfair competition.[73]

In 2019 the Court of Appeal of Paris ruled that the contract that had been concluded between Uber and a driver who had made four thousand trips for the company during two years but was then banned from the platform at Uber's direction constituted an employment contract. The court justified its decision on the grounds that Uber's worker was economically dependent upon and subordinate to the company and could not independently choose clients or set their own tariffs.[74]

Capturing the Dynamics of the Sharing Economy: Institutional Research on the Plural Forms and Practices of Sharing Economy Organizations, 125 Technol. Forecast. Soc. Change 11 (2017) (Nov. 1, 2020).

71 *See, e.g.*, Juho Hamari et al., *The Sharing Economy: Why People Participate in Collaborative Consumption*, 67(9) J. Assoc. Inf. Sci. Technol. 2047 (2015).

72 Decision of the Court of Cassation of France of 19 December 2000 No. 98-40572.

73 Chine Labbé, *French Court Fines Uber, Execs for Illegal Taxi Service*, Reuters, 9 June 2016 (Nov. 1, 2020), available at https://www.reuters.com/article/us-france-ubertech-court-idUSKCN0YV1DQ.

74 French Court Reaches "Landmark Decision" Against Uber over Drivers' Rights, The Local, 11 January 2019 (Nov. 1, 2020), available at https://www.thelocal.fr/20190111/french-court-reaches-landmark-decision-against-uber-over-drivers-rights.

Uber stated its intention to contest that decision,[75] but in March 2020 the driver finally won the status of employee.[76]

An inquiry at the Swiss National Accident Insurance Fund about whether Uber's Swiss branch was obliged to pay for mandatory accident insurance resulted in a finding that Uber Switzerland is an employer in the sense of public law.[77] A similar situation arose in France where it was asserted that the provisions in Uber's contract with its drivers entails that the company's provision of drivers' services gives it complete control over the trip. Among the arguments adduced for the presence of subordination, it was shown that Uber determines what information about a trip is available to the driver and passenger, what the price of each trip is, and what requirements and technical conditions apply to the automobile. Uber also tracks the movement of drivers with a geolocation system, forbids them to stop or take on an additional passenger, and operates on its own behalf rather than on the driver's in commissioning and paying for their service, etc.

In several countries the determination of the legal status of taxi drivers as employees with an employment agreement or independent contractors has turned upon whether Uber identifies itself as a transportation company that hires drivers or a telecommunications company that amounts to an intermediary for information transfer between a driver and a passenger.

Belgium provides a case in which the state Social Security Agency took the position that Uber drivers are self-employed, and in 2016 the Brussels Commercial Court declared that Uber is a transportation company.[78] Because of the particular features of Belgium's law on transportation services, self-employed status requires that drivers obtain licences and consequently lose the social guarantees that apply by law to employees.[79]

The European Union as a whole found through a decision of the European Court of Justice dated 20 December 2017 that Uber is a provider of taxi services. In analysing the legal relations between Uber and its drivers the authorities concerned must be guided by four fundamental and nine specific criteria in identifying the nature of the legal relations.[80] Uber drivers meet only two of the specific criteria: they have no

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75 Lucile Malandain, *French Uber Driver in Key Gig-Economy Case*, Phys.org, 11 January 2019 (Nov. 1, 2020), available at https://phys.org/news/2019-01-french-court-uber-employment-case.html.

76 Romain Dillet, *Uber Driver Reclassified as Employee in France*, Techcrunch, 4 March 2020 (Nov. 1, 2020), available at https://techcrunch.com/2020/03/04/uber-driver-reclassified-as-employee-in-france/.

77 University of Oxford, The Employment Status of Uber Drivers: A Comparative Report Prepared for the Social Law Project, Oxford Pro Bono Publico (October 2017), at 25–27 (Nov. 1, 2020), available at http://ohrh.law.ox.ac.uk/wordpress/wp-content/uploads/2017/10/OPBP-Uber-Project-Final-.pdf.

78 Procedural Order of the Dutch Chamber of the Commercial Court of Brussels of 9 June 2016 No. 1/15/03011 – A/15/03239.

79 University of Oxford, *supra* note 77, at 41.

80 Has the Self-Employed Status of Uber-Drivers in Belgium Been Prejudiced by the Recent European Court of Justice Ruling?, ALTIUS (2017) (Nov. 1, 2020), available at https://www.altius.com/newsroom/

influence on the company's procurement policy, and they work primarily for single clients. Furthermore, Uber's taxi drivers who own their automobiles and have a taxi licence do not qualify as employees for social security purposes.

The legal status of drivers providing services through online platforms in the USA varies from state to state and has also been subject to considerable litigation. In the State of New York judicial proceedings in 2017 found that Uber drivers were employees who qualify for unemployment benefits and consequently that they are covered by the related social guarantees.[81] The New York State Unemployment Insurance Appeal Board considered an appeal by Uber and affirmed that Uber drivers are eligible for unemployment insurance on the grounds that their status as contractors according to their contract with Uber was invalid. The Appeal Board found further that Uber is in fact a transportation company which exercises substantial control over its employees as opposed to the "arm's length" interactions of relationships with contractors.[82] The Appeal Board drew particular attention to the fact that drivers do not discover a passenger's destination until they are in the automobile, that Uber imposes technical requirements for the automobiles; that drivers are a key component of Uber's business model and, furthermore, that Uber maintained a pool of drivers in order to preserve the reputation of its services in the event that a particular driver should refuse to take a fare; that Uber made attempts to ascertain the behaviour of drivers, established rules for their behaviour, and applied sanctions to them up to and including banning from the platform, etc. All these findings led the Board to the conclusion that Uber drivers are not independent contractors in the sense of New York State's law of 2010 concerning equal pay in the construction industry.[83]

3.3. Platform Employment in Russia: How Things Stand

Statistics from researchers at the Higher School of Economics after internet aggregators first appeared in the taxi market in 2012[84] indicate that in Moscow alone the number of trips and the size of the taxi market has increased by about eight times through 2019 and that drivers' incomes decreased several times as taxi fares became much more affordable. Reduced income combined with onerous work conditions

news/320/has-the-self-employed-status-of-ub.er-drivers-in-belgium-been-prejudiced-by-the-recent-european-court-of-justice-ruling.

81 *Aleksanian et al. v. Cuomo et al.*, No. 1:2016cv04183 (E.D.N.Y. 2017).

82 Decision of the New York State Unemployment Insurance Appeal Board, A.L.J. Case No. 016-23858.

83 Article 25-B - (861 - 861-G) The New York State Construction Industry Fair Play Act, 2010 N.Y.

84 Презентация «Оценка эффектов от внедрения цифровых платформ на рынке такси (г. Москва)» // Национальный исследовательский университет «Высшая школа экономики» [Higher School of Economics, Presentation in Moscow entitled "Assessing the Effects of Introducing Digital Platforms into the Taxi Market"] (Nov. 1, 2020), available at https://icef.hse.ru/data/2020/02/26/1562115109/%D0%A6%D0%9F%20%D1%82%D0%B0%D0%BA%D1%81%D0%B8%20%D0%9D%D0%98%D0%A3%20%D0%92%D0%A8%D0%AD%20(1).pdf.

due mostly to the need to work extremely long hours brought about protests by the aggregators' taxi drivers, and those protests had abruptly changed the sectoral structure of protests by the end of 2019.[85]

The problems with this kind of service have prompted the State Duma of the Federation Assembly of the RF to consider several draft laws that address these issues.[86] It must nevertheless be acknowledged that none of these draft laws even tangentially addresses the question of the social and labour rights of people working via online platforms, although the absence of legal guarantees similar to those for employees has frequently been pointed out by experts.[87]

In Russia most of the discussion of the status of taxi drivers working via digital platforms centres around the Yandex.Taxi service. There are already two lawsuits against Yandex.Taxi LLC concerning whether its relations with drivers amount to employment.[88] In both instances the courts declined to recognize the existence

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[85] *See Бизюков П.В.* Трудовые протесты в России в 2019 г. Часть 2 // Мониторинг трудовых протестов. 21 февраля 2020 г. [Peter V. Bizyukov, *Labour Protests in Russia in 2019, Part 2*, Monitoring Labour Protests, 21 February 2020] (Nov. 1, 2020), available at http://www.trudprotest.org/2020/02/20/трудовые-протесты-в-россии-в-2019-г-часть-2/?fbclid=IwAR1Mq2JhwZ5_hhOOx5jNolS391GYWBAHybIkJlayfJbrhYvqCCScqGpdJec.

[86] Законопроект № 219116-7 «О внесении изменений в Федеральный закон «Устав автомобильного транспорта и городского наземного электрического транспорта» и Федеральный закон «О внесении изменений в отдельные законодательные акты Российской Федерации» (о регулировании деятельности интернет-агрегаторов)» // Государственная Дума ФС РФ. Система обеспечения законодательной деятельности [Draft Law No. 219116-7 "On Amending the Federal Law 'Charter of Vehicular Transport and Urban Surface Electric Train Transport' and the Federal Law 'on Amending Certain Legislative Acts of the Russian Federation' (Concerning Regulation of Internet Aggregators)," State Duma of the Federal Assembly of the Russian Federation] (Nov. 1, 2020), available at https://sozd.duma.gov.ru/bill/219116-7. *See also* Законопроект № 213801-7 «О внесении изменений в Федеральный закон «Устав автомобильного транспорта и городского наземного электрического транспорта» (о регулировании деятельности агрегаторов)» // Государственная Дума ФС РФ. Система обеспечения законодательной деятельности [Draft Law No. 213801-7 "On Amending the Federal Law 'Charter of Vehicular Transport and Urban Surface Electric Train Transport' (Concerning Regulation of Internet Aggregators)," State Duma of the Federal Assembly of the Russian Federation] (Nov. 1, 2020), available at https://sozd.duma.gov.ru/bill/213801-7.

[87] *Зайцева Л.В.* Экономически зависимые самозанятые: различия национальных подходов к определению правового статуса // Вестник Томского государственного университета. 2019. № 446. С. 212–222 [Larisa V. Zaitseva, *The Economically Dependent Self-Employed: Differences in National Approaches to Defining Legal Status*, 46 Tomsk State University Journal 212 (2019)]. *See also Лютов Н.Л.* Трансформация трудового правоотношения и новые формы занятости в условиях цифровой экономики // Журнал российского права. 2019. № 7. С. 115–130 [Nikita L. Lyutov, *The Transformation of Employment Relations and New Forms of Employment in the Digital Economy*, 7 Journal of Russian Law 115 (2019)].

[88] Решение Тушинского районного суда г. Москвы от 26 июня 2019 г. по делу № 2-2238/19 по иску Я.И. Щербинина к ООО «Яндекс Такси» (оставлено без изменения апелляционным определением Московского городского суда от 22 ноября 2019 г. по делу № 33-53437/2019) [Decision of the Tushino District Court of Moscow of 26 June 2019 in case No. 2-2238/19, *Ya.I. Shcherbinin v. Yandex.Taxi LLC* (affirmed without changes by the Appellate Division of the Moscow City Court of 22 November 2019 in case No. 33-53437/2019)]; решение Замоскворецкого районного суда г. Москвы от 14 мая 2019 г. по делу № 2-2792/2019 по иску В.Ю. Голованова к ООО «Яндекс Такси» [Decision of the Zamoskvorechye District Court of Moscow of 14 May 2019 in case No. 2-2792/2019, *V.Yu. Golovanov v. Yandex.Taxi LLC*]. Both published on the website for the courts of general jurisdiction of the City of Moscow: https://www.mos-gorsud.ru.

of employment relations on the grounds that the parties had documented their relationship otherwise.

The actual circumstances that prompted these lawsuits are barely mentioned in the decisions. The information that both courts in these cases found decisive concerned the tax status of the driver, the indication in the contract of a civil law relation between the platform and the driver, the statement in the contract that the platform serves as an intermediary between the driver and the passenger and also that the driver has the right to refuse a ride, a fact which the courts interpreted as the driver's having freedom of choice. The courts also argued that finding the existence of employment relations between the parties is precluded by the fact that the driver rents the automobile used as a taxi from a third party rather than from the platform.

Neither court's decision went into a description of the factual relationship between the driver and the company, even though the Plenum of the Supreme Court in a recent ruling pertaining to small businesses and micro enterprises[89] has explained the need for courts to consider factual circumstances and not only the formal aspects of relations. Likewise, the ILO Employment Relationship Recommendation, 2006 (No. 198) refers to the priority which must be accorded to facts in the classification of relations connected with labour.[90]

The courts did not examine the following issues:

1) Was the choice of the driver to register as a tax payer with occupational income or as an individual entrepreneur required by the platform?

2) Did the driver independently establish the rules for providing rides and the tariffs, or were these rules "dictated" by the platform and the driver required to follow them?

3) Did the driver have the ability to agree upon the means of payment with the passenger, or was the form of payment in essence agreed upon between the passenger and the platform?

4) Was the driver obligated to provide a ride personally, or could they have notified the platform and transferred the ride to a third party, as would be characteristic for contractor agreements?

5) What consequences would a driver anticipate from refusal to provide rides over a long period?

6) What consequences for drivers were stipulated for refusal to provide a ride during the process of offering services?

7) Did the platform require any qualifications before becoming drivers, or were they required to obtain specific documents for providing taxi services (such as a more comprehensive insurance policy)?

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89 Decree of the Plenum of the Supreme Court of the Russian Federation No. 15, *supra* note 42, p. 17.

90 International Labour Organisation, Employment Relation Recommendation, 2006 (No. 198), para. 9 (Nov. 1, 2020), available at https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/normativeinstrument/wcms_r198_ru.htm.

8) Did the platform limit the number of rides per day or after a certain number of hours providing rides?

9) Did the platform impose any sort of liability on the driver for improper service to the passenger?

10) Did the platform choose to offer rides to certain drivers, or would all drivers see a request and compete for a passenger?

11) Did the platform exercise control over the process of providing a ride: track the movements of the automobile, track the evaluations of passengers and the rise or fall of a driver's ratings, ban drivers from the platform, determine the route to be followed, or establish a rule to prohibit picking up additional passengers during a ride?

12) Did the platform provide the driver with any equipment for carrying out rides?

Surveys of the drivers indicate that most of these questions would have positive answers, which would support the argument that employment relations exist. Personal surveys of the company's drivers reveal the following information about their relationship with the platform:

1) offers for rides are automatically directed by the platform to a single driver (and not offered to several drivers) who meets criteria in the Yandex system (driver rating, class of automobile, proximity to the passenger);

2) the driver learns the price of a ride from an offer but has no information on what principles govern the tariffs, and Yandex issues the check for provision of the service;

3) a driver has the right to refuse an offer; however refusal will reduce their rating and result in fewer offers from the platform or exclusion from any offers (to maintain a favourable rating drivers must accept 90% of offers);

4) the platform prohibits drivers from picking up passengers without entering the ride as an offer through Yandex and from transferring the automobile or giving account access to third parties (that is, the driver must personally provide each trip);

5) the online platform sets the maximum length of a "shift" at sixteen hours, after which the platform provides a break during which it will send no offers to a driver;

6) the check for carrying passengers and baggage is issued by Yandex.Taxi LLC and not by the driver;

7) drivers are required to register as individual entrepreneurs or as self-employed in the event that they provide their own automobiles or else lease an automobile from the fleet of a licenced taxi service, which before each working day issues the driver certificates verifying that the automobile has passed technical inspection and the driver has passed a medical examination. It is also relevant that this taxi service is an official partner of Yandex.Taxi.

Another relevant question is how Yandex portrays itself at the moment when it is offering its services to a driver who is a potential "contractor." The interface drivers use to become part of the Yandex.Taxi system gives the impression that the company is functioning much the way an employer would. The Yandex.Taxi app has a section entitled "Become a driver" that says being a driver is convenient and

profitable because of the "convenient schedule" which offers "working several hours a days or for a whole shift". In the "Can I chose the work conditions?" section, the platform states that "you can moonlight by taking offers only during peak hours or stay online the entire workday," i.e. full-time and part-time schedules are offered in keeping with a specific regime.

In the "How to begin work" section, the platform says that drivers must submit an application, be interviewed and "sign up with the taxi service," after which they may "go online" to begin earning money, i.e. permission to work is being described. "What are bonuses?" talks about how the platform pays bonuses "for exceptional work," although it does not pay them directly to the driver but through the taxi service, i.e. these are incentive payments. The platform also states there that drivers may qualify for a higher tariff if they pass a "test." In the section called "I'm not a professional driver. Can I drive a taxi?" the platform indicates the qualifications drivers must meet: be over 21 years of age, have at least three years driving experience and a driver's licence. This means that the qualifications of the "contractors" and the quality of the work they perform are being evaluated, and requirements for their age (possibly age-discriminatory) and experience are being imposed.

In addition, before drivers start to work via the platform, they are subjected to a questionnaire and sometimes a "survey" that would justifiably be seen as interviewing the drivers (inasmuch as the platform decides whether to connect a driver or not based on the questionnaire and survey results).[91]

Taxi drivers provide one of the clearest examples – but certainly not the only one – of the problems in protecting the labour rights and establishing the legal status of online platform workers. Another prominent segment of the labour market is delivery services; although several kinds of work via mobile apps have been curtailed by the restrictions imposed to counteract the coronavirus, some other kinds, mostly courier services, have been much in demand.

Yandex.Eda and Delivery Club are two high-profile courier services currently operating in Russia. Both use intermediary organisations[92] through which they conclude contracts with the couriers as well as establish their tax status as self-employed (in the regions where that status is legally legitimate).[93] This minimizes the risk that tax authorities would classify the couriers as employees.

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[91] Условия использования сервиса по формированию Карточки Водителя // Яндекс. 20 января 2020 г. [Terms of Use for the Service of Establishing a Driver Account, Yandex, 20 January 2020], paras. 2.4 & 2.5 (Nov. 1, 2020), available at https://yandex.ru/legal/drivers_termsofuse.

[92] For more on this topic, *see Puna B.* На кого на самом деле работают курьеры «Яндекс.Еды» и Delivery Club // VC.ru. 13 августа 2019 г. [Viktoriya Ripa, *How Do Yandex.Eda and Delivery Club Actually Operate?*, VC.ru, 13 August 2019] (Nov. 1, 2020), available at https://vc.ru/food/78214-na-kogo-na-samom-dele-rabotayut-kurery-yandeks-edy-i-delivery-club?fbclid=IwAR1YlMipToqVBsXFL5YCqEIC_td7CJaCCHVvwA_nEXUL_ZWp6PpAy5RpHGw.

[93] Федеральный закон от 27 ноября 2018 г. № 422-ФЗ «О проведении эксперимента по установлению специального налогового режима «Налог на профессиональный доход» в городе федерального

Delivery Club's couriers in June 2020 were incensed by fines that the company extracted from them (which would have been illegal if the couriers had employment agreements)[94] and mounted a strike, which they had no right to do because – once again – they were not employees with employment agreements. In response to the platform workers' resort to these technically illegal measures, the company backed down and stated that the fines were an "experiment", but the prosecutor's office promised to look into the legality of the company's actions.[95]

By late June 2020, Delivery Club's platform workers had formed a union called Courier,[96] which announced its intention to mount a strike by couriers in protest against the company's "logistical partner" which had not paid them for several months, a delay which caused them great hardship. Delivery Club maintained that this is a concern for about thirty couriers,[97] but the trade unions report that it affects almost three hundred.[98] The company terminated its contracts with the logistical partner that was to make the payments and promised to make the payments on its own. On 9 July, however, the couriers were still intending to strike, and the first

значения Москве, в Московской и Калужской областях, а также в Республике Татарстан (Татарстан)» // Собрание законодательства РФ. 2018. № 49 (ч. 1). Ст. 7494 [Federal Law No. 422-FZ of 27 November 2018. On Experimentally Establishing a Special the Special Tax Regime Taxation on Occupational Income in Moscow as a City of Federal Significance, in Moscow and Kaluga Oblasts, and also in the Republic of Tatarstan (Tatarstan), Legislation Bulletin of the Russian Federation, 2018, No. 49 (Part 1), Art. 7494].

94 Article 192 of the Labour Code provides for only three kinds of disciplinary penalties: warnings, reprimands and dismissal. Other kinds of penalties may be allowed for certain categories of employees by federal law, but none of them allows fining employees for disciplinary infractions.

95 Прокуратура проверит Delivery Club после конфликта с курьерами. Ранее они устроили забастовку из-за условий труда // Новая газета. 5 июня 2020 г. [The Prosecutor Is Examining Delivery Club After Conflict with Couriers. Earlier They Struck over Work Conditions, Novaya Gazeta, 5 June 2020] (Nov. 1, 2020), available at https://novayagazeta.ru/news/2020/06/05/162095-prokuratura-proverit-delivery-club-posle-konflikta-s-kurierami; *Кондратьева Т.* В России переворот устроят курьеры. Работники Delivery Club объявили о забастовке из-за штрафов, и люди – за // Medialeaks. 5 июня 2020 г. [Tatyana Kondratieva, Couriers Stage a Coup in Russia. Delivery Club Workers Announce a Strike Because of Fines and People Approve, Medialeaks, 5 June 2020] (Nov. 1, 2020), available at https://medialeaks.ru/0506tat-couriers-strike/; *Боржонов А.* Delivery Club заявил об отмене штрафов курьерам в Москве после сообщений о готовящейся забастовке // TJ. 5 июня 2020 г. [Alexey Borzhonov, Delivery Club Announces Fines of Moscow Couriers are Cancelled After Reports of Readiness to Strike, TJ, 5 June 2020] (Nov. 1, 2020), available at https://tjournal.ru/news/175609-delivery-club-zayavil-ob-otmene-shtrafov-kureram-v-moskve-posle-soobshcheniy-o-gotovyashcheysya-zabastovke.

96 *See* the trade union's social network page on VKontakte (Nov. 1, 2020), available at https://m.vk.com/courier_fight?from=post&fbclid=IwAR1YPWKrnRGkAkUL2hmSvQwCIv0BfG_2EPVgQzwKjH-0K9poozVXFgfB1os.

97 Delivery Club расторг договор с логистическим партнером после долгов по зарплате курьерам // ТАСС. 5 июля 2020 г. [Delivery Club Terminates Contract with Logistical Partners After Courier Pay Arrears, TASS, 5 June 2020] (Nov. 1, 2020), available at https://tass.ru/ekonomika/8889197/.

98 *Шамардина Л.* Курьеры Delivery Club пожаловались на невыплаченные с мая зарплаты // The Bell. 5 июля 2020 г. [Lada Shamardina, *Delivery Club Couriers Complain About Salaries Unpaid Since May*, The Bell, 5 July 2020] (Nov. 1, 2020), available at https://thebell.io/kurery-delivery-club-pozhalovalis-na-nevyplachennye-s-maya-zarplaty.

demands they put forward were to have employment agreements instead of fictitious contracts for services and to stop requiring couriers to register as self-employed.[99]

3.4. What Should Be the Legal Status of Platform Workers?

The current situation with platform workers is duplicating some of the precursors of revolts during the onset of industrialization. Then too, workers who had no labour rights or guarantees and worked under harsh conditions for long hours with low pay rose up in collective self-defence through illegal strikes that frequently ended in violence and disorder. As a result, workers and employers, as well as the governmental authorities, in economically developed countries all realized that robust social dialogue and labour rights established for workers by law were justified not only by humanitarian considerations but also by the contribution they make to preserving stability and the social order in general.

Lack of a "safety valve" in the form of effective labour law was arguably a primary cause of Russia's 1917 Revolution. This is only one example of a correlation between weak guarantees for workers and general social unrest, but it tends to show that the lack of any labour rights and guarantees whatsoever for the rapidly growing category of platform workers[100] may not be their problem alone. It threatens the entire social and political system of the state.

These difficulties and risks have already prompted Russia's specialists to examine the legal status of platform workers with respect to their labour rights. For example, A.V. Grebenshchikov, N.I. Diveeva and A.V. Kuzmenko maintain that extending the standards of labour legislation to these workers "… in principle would encounter no obstacles." However, care should be taken to ensure that special legal standards for labour of digital workers are effective, a "thorough theoretical grounding and regulatory adaptation" must be provided for any such standards.[101] L.V. Zaitseva and A.S. Mitryasova find that, for taxi drivers working via online platforms, it is reasonable to consider the presence of "several indicators of employment relations" and "separate indicators of atypical employment relations." In addition, they believe that the experience of other countries in extending specific protective standards

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[99] Объявление о забастовке профсоюза «Курьер» в социальной сети «Вконтакте» от 7 июля 2020 г. [Announcement of a strike by the Courier trade union on the VKontakte social network of 7 July 2020] (Nov. 1, 2020), available at https://vk.com/feed?w=wall-107386155_590.

[100] For more detail, *see Чиканова Л.А., Серегина Л.В.* Правовая защита граждан от безработицы в условиях информационных технологических новаций в сфере труда и занятости // Право. Журнал Высшей школы экономики. 2018. № 3. С. 149–171 [Lyudmila A. Chikanova & Larisa V. Seregina, *Legal Protection from Unemployment as IT Innovations Affect Labour and Employment*, 3 Law. Journal of the Higher School of Economics 149 (2018)]; Chesalina, *supra* note 65.

[101] *Гребенщиков А.В., Дивеева Н.И., Кузьменко А.В.* Трудовые отношения с интернет-агрегатором: завтрашняя реальность? // Российский ежегодник трудового права. Вып. 10 [Anatoly V. Grebenshchikov et al., *Labour Relations in Internet Aggregators: Reality of Tomorrow?* in 10 *Russian Labour Law Annual*] 64 (Evgeny B. Khokhlov ed., 2020).

which have traditionally been directed to workers and self-employed persons, but that fall short of granting them the full status of employees in terms of labour relations, should be studied.[102]

O. Chesalina rightly judges that the nature of online platform work varies so much that no single legal approach would serve for all types of it.[103] She has put forward the most comprehensive proposals so far to protect platform workers' labour rights.[104] She suggests three ways to optimize the legal status of platform workers. The first, which she acknowledges is only a partial solution, would be to designate companies like Yandex.Taxi, Uber, Gett and so on as transportation companies rather than mediators of information (and a similar approach could probably serve for logistics platforms like Delivery Club, Yandex.Eda, etc.). This approach is aimed at preventing exploitive competition among platforms by degrading the condition of their workers, but a question remains about whether the legal status as employer of the drivers belongs to the platform as such or to the intermediate company that enters into a legal relationship with the driver. This much is certain: unless the status of platforms as employers is made clear, any ambiguity will be resolved by both the platforms and intermediary companies, and by the courts as well, in ways that will exclude attribution of employment status. The current practices will continue unabated.

The second suggestion is to revise the concept of being an employee (and consequently of the concepts of employment and employment agreements) in such a way that the standards for remote workers (Chapter 49.1 of the Labour Code) and for workers employed under personnel contracts (Chapter 53.1) extend to certain kinds of platform workers.

In addition, Chesalina proposes shifting the burden of proof for the presence of employment relations in labour disputes from the worker to the employer. In principle, the Labour Code already does this. In 2013 a rule to the effect that "insurmountable doubts surrounding the court's consideration of disputes concerning recognition of relations based on a civil law contract as employment relations shall be resolved in favour of the presence of employment relations."[105] This is not a complete transfer of the burden of proof, but it provides some relief in difficult and doubtful cases. In practice, however, the courts rarely rely on this standard.

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[102] *Зайцева Л.В., Митрясова А.С.* Труд водителей такси на основе интернет-платформ: отдельные вопросы правового регулирования // Вестник Томского государственного университета. 2018. № 435. С. 239–245 [Larisa V. Zaitseva & Angelina S. Mitryasova, *Taxi Drivers Working Based on Internet Platforms: Specific Issues in Legal Regulation*, 435 Tomsk State University Journal 239 (2018)].

[103] Olga Chesalina, *Platform Work as a New Form of Employment: Implications for Labour and Social Law* in *New Forms of Employment: Current Problems and Future Challenges* 153 (Jerzy Wratny & Agata Ludera-Ruszel eds., 2020). *See also* Jeremias Prassl & Martin Risak, *Uber, Taskrabbit, and Co.: Platforms as Employers? Rethinking the Legal Analysis of Crowdwork*, 37(3) Comp. Lab. L. & Pol'y J. 619 (2017).

[104] Chesalina, *supra* note 65, at 59–63.

[105] Art. 19.1, para. 4 of the LC.

The third and final way proposed by Chesalina is to regulate the labour of economically dependent contractors through the LC, and platform workers should be in that category. It is reasonable to think that economically dependent contractors would be a fruitful area for expansion of protective labour law standards, as well as for judging the feasibility of introducing an intermediate legal status such as exists in a number of countries. This would mean establishing certain labour rights for dependent contractors or employee-like persons as is the case in Germany, Austria and some other countries.[106] However, it appears that a tectonic shift in Russian labour law in order to rethink its entire approach to the employment relationship and its subjects will be a very lengthy process with fraught discussions not only in academic circles but also involving the social partners. Those are discussions that will take some time.

The most problematic and conflicted situations that are now cropping up between online platform workers, intermediary companies and the platforms themselves usually relate to relationships that easily fit into the concept of employment under current labour law. The main and definitive difference between employment and a civil law relationship connected with labour in both Russian[107] and Western European[108] legal doctrine is the presence or absence of subordination or obedience to the employer. The key question in an employment relation is "How should the job be done?" The corresponding question for civil law relations is "What should the result be?"

Platform taxi drivers, couriers and the like are clearly in the first category. That those relationships are not classified by Russian courts as employment is purely because of a formal approach that discounts any factual circumstances of cases which are inconsistent with the formal relations. The legal contortions of the companies that own platforms are aimed at "optimizing" tax burdens and evading responsibility for ensuring labour rights, and so far they have been successful because the courts apply a bureaucratic approach rather than a legal one to the problem.

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[106] For example, in Germany the Ruling of the Federal Labour Court of 15 November 2005 provided for a special category of "persons resembling employees" (Arbeitnehmerähnliche Person) or quasi-employees (Rechtsprechung BAG, 15.11.2005 – 9 AZR 626/04) (Nov. 1, 2020), available at http://dejure.org/dienste/vernetzung/rechtsprechung?Gericht=BAG&Datum=15.11.2005&Aktenzeichen=9%20AZR%20626%2F04. There are also persons who are not "personally dependent" or "subordinate" like "employees" but are merely "economically dependent." People in those categories are regarded as needing more protection than the majority of self-employed persons.

[107] Among others *see Бугров Л.Ю.* Трудовой договор в России и за рубежом [Leonid Yu. Bugrov, *Labour Contracts in Russia and Abroad*] 29–66 (2013); Курс российского трудового права. Т. 3 [3 *Course in Russian Labour Law*] 87–116 (Evgeny B. Khokhlov ed., 2007); *Тарусина Н.Н., Лушников А.М., Лушникова М.В.* Социальные договоры в праве: монография [Nadezhda N. Tarusina et al., *Social Contracts in Law: Monograph*] 191–270 (2017).

[108] Among others *see* Mark Freedland, *The Personal Employment Contract* 26–35 (2006); 1 *Restatement of Labour Law in Europe* (Bernd Waas & Guus H. van Voss eds., 2017); Alain Supiot, *Beyond Employment: Changes in Work and the Future of Labour Law in Europe* 10–17 (2001).

Until there is a global rethinking of employment,[109] the problems with taxi drivers, couriers and platform workers in similar jobs may be settled in the near term by inserting another chapter into the LC to cover online platform workers. The principal goal of any new standards should be to ensure that the courts classify as employment any relationship in which an online platform makes demands about *how* a job is to be performed, and they should then apply to the parties involved all the consequences that follow from its being employment. If a platform in fact operates exclusively as a conduit of information between parties and if it takes no part in determining the nature of the job performed, then the main body of labour law does not apply. In that case, it should be possible to provide incentives for the platform to participate in social insurance for its contractors.

Any standards introduced should pay attention to the intermediate companies that are frequently used by online platforms. These companies must not remain as the sole employers for platform workers; the online platform itself must certainly be included in the employment relationship, at least to the extent of bearing material liability with respect to its workers.

The involvement of several legal entities as employer or the problem of corporate shields for an employer is a separate issue that requires its own solution in Russian labour law and concerns employees of all kinds along with platform workers. However, because platform workers' relations always include more than two parties, "lifting the corporate veil" is a more pressing need.[110]

Conclusion

The spread of the coronavirus has certainly been a powerful catalyst in Russia for discussion of standards for remote work and platform employment. However, the problems that became more prominent because of the COVID-19 pandemic had been under discussion by experts much earlier. Both of the most discussed new or digital types of employment have been much more intensely used during the quarantine restrictions, and this has called more attention to the legal problems and social implications of those relationships.

Remote work has certainly received its share of attention from both the public and experts, but it is also spurring on a radical revision of the legal standards governing it. The expectation is that, after some intense public debate, amendments to Chapter 49.1 of the Labour Code will be introduced in autumn and that they will differentiate between three types of remote work: "ordinary," mixed and temporary. Electronic

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[109] For approaches to a theoretical understanding of employment taking into account the rise of labour via online platforms, *see, e.g.*, Vincenzo Pietrogiovanni, *Between Sein and Sollen of Labour Law: Civil (and Constitutional) Law Perspectives on Platform Workers*, 31(2) King's L.J. 313 (2020).

[110] Julia López López & Alexandre de le Court, *When the Corporate Veil Is Lifted: Synergies of Public Labour Institutions and Platform Workers*, 2 King's L.J. 324 (2020).

contacts between remote employees and their employers will be streamlined, and there will be a regulated schedule for contacts between employers and remote employees based on the employee's right not to be always available to the employer. In addition, it is likely that the legally established employers' right to incorporate additional grounds for dismissal of remote employees on the employer's initiative in an employment agreement will be rescinded.

Introducing these standards for remote work into the legislation should ameliorate a good many, but certainly not all, of the problems in the legal regulation of it. Transnational remote work and the mechanisms for exercising collective labour rights by remote workers will be lingering issues.

The second new type of employment – through online platforms – so far falls outside the coverage of labour law standards, although indicators of employment are clearly present in the most prominent forms of platform employment, the taxi drivers and couriers. This area of employment has already come under protest because of the illegal masking of employment relations by the platforms. The basic goal of platform workers' protest is to have their status as employees grounded in an employment agreement and, as a result, to have their labour rights acknowledged.

One effective step toward solving the very urgent current problems in defending the labour rights of platform workers would be to have an explicit standard in the LC stipulating that work via an online platform is to be classified as employment under an employment agreement whenever that work is subject to requirements from the platform as to how the specific job is to be carried out. In addition, there should be standards that govern the joint responsibility of the company that owns the platform and any intermediary company with which online workers have concluded a contract.

More fundamental and durable solutions applicable to these new forms of employment must await a thorough re-examination of the classical paradigm of employment by including criteria of economic dependency and will require establishing a spectrum of legal statuses in which workers who perform a job do not have full status as employees but nevertheless qualify for certain labour rights.

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