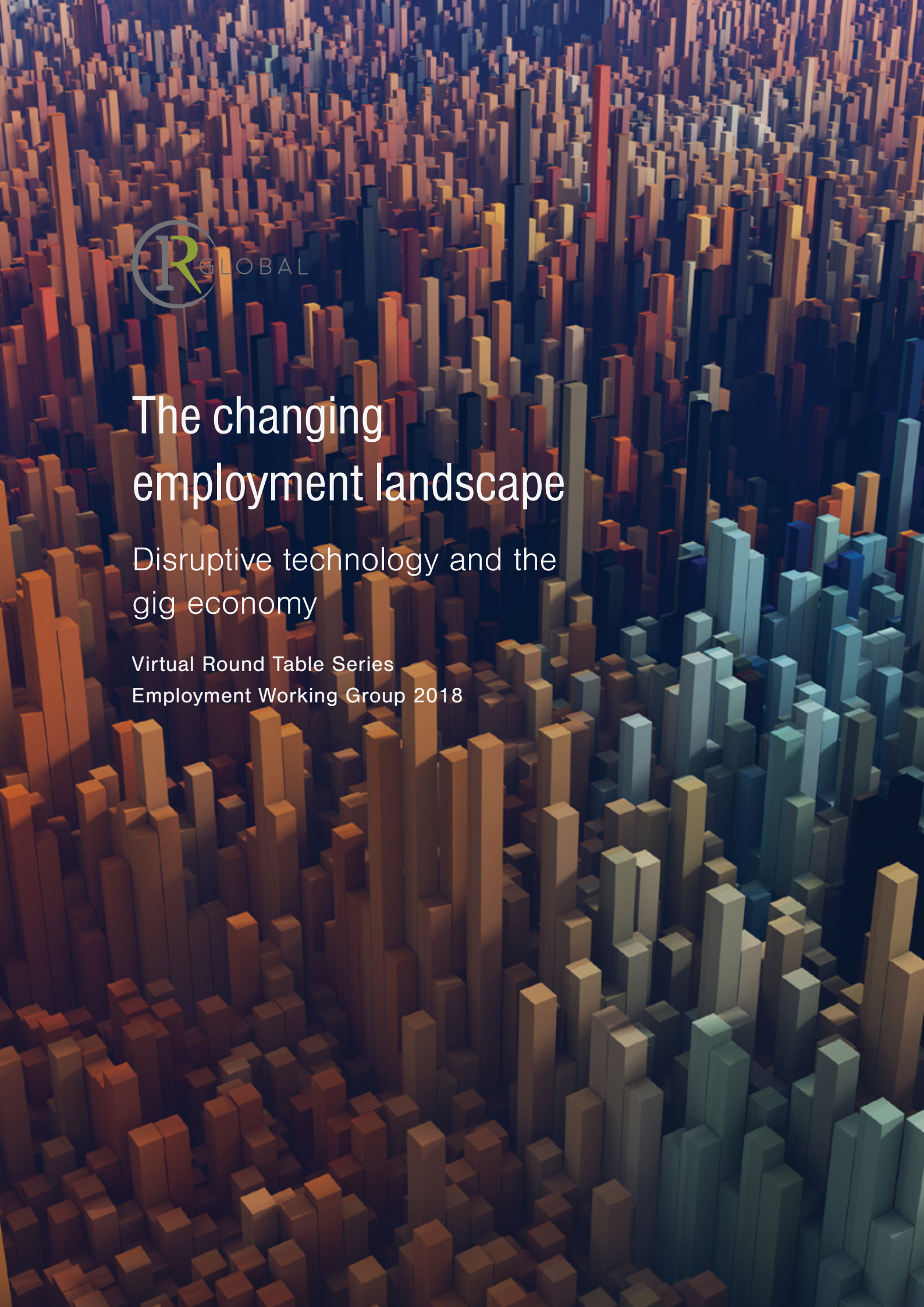

The changing employment landscape

Disruptive technology and the gig economy

Virtual Round Table Series
Employment Working Group 2018

The changing employment landscape

Disruptive technology and the gig economy

The idea of a job for life is little more than an anachronism, and has been for some time. It is accepted that most people will work for multiple organisations during the course of their careers, a way of thinking confirmed by the rise of applications such as LinkedIn.

What is new though, is the changing concept of 'a career'. We tend to assume that workers will map out their careers in terms of permanent positions, but, increasingly, more people are operating independently, by choice or necessity. They are contracting out their skills to the market for piecemeal payment, rather than in exchange for a salary from an employer.

The idea of the freelancer is established in the professional white collar consciousness, but technology has begun to reshape the employment landscape for a much larger group of people than ever before. The boundaries between traditional employment and contracted labour have become blurred everywhere, from parcel delivery to web design.

A 2016 study by the McKinsey Global Institute found that up to 162 million people in Europe and the United States (20-30 per cent of the working age population) engage in some form of independent work. The report splits those people into four groups; the free agents (30 per cent), the casual earners (40 per cent), the reluctants (14 per cent) and the financially strapped (16 per cent).

While it is clear that the rise of the flexible workforce offers significant advantages to an economy, including labour force participation, increased productivity and (in some cases) a more contented workforce; the McKinsey data does hint at hidden problems.

In many cases workers would prefer permanent jobs, with all inherent benefits and job security, but the new employment landscape forces them to accept independent roles. The rise of the gig (or digital platform) economy is partly responsible for this, altering traditional services such as taxis (Uber) or fast food deliveries (Deliveroo) and drawing labour on a 'per gig' basis.

A number of high profile litigation cases have found in favour of more rights for contractors using digital platforms. A recent Employment Appeal Tribunal in the United Kingdom, upheld a ruling that drivers engaged with Uber in London were categorised as 'workers' not self-employed, giving them access to rights such as holiday pay.

The lack of responsibility taken for employees by companies such as Uber is also beginning to concern governments at a high level, and has fed into a wider social debate about who will pay for the social benefits system when the traditional contributions made by companies on behalf of employees are no longer forthcoming.

In this discussion, IR Global draws on the expertise of six of its members, specialising in employment law. We will discuss some of the specific challenges and opportunities presented by the gig economy and look at how this is shaping employment law litigation. We assess what this means for the traditional employment contract and how legislation might need to adapt to keep pace. Finally, we ask what employee organisations and trade unions are doing to combat the erosion of workers' rights.

The View from IR

Ross Nicholls

BUSINESS DEVELOPMENT DIRECTOR

Our Virtual Series publications bring together a number of the network's members to discuss a different practice area-related topic. The participants share their expertise and offer a unique perspective from the jurisdiction they operate in.

This initiative highlights the emphasis we place on collaboration within the IR Global community and the need for effective knowledge sharing.

Each discussion features just one representative per jurisdiction, with the subject matter chosen by the steering committee of the relevant working group. The goal is to provide insight into challenges and opportunities identified by specialist practitioners.

We firmly believe the power of a global network comes from sharing ideas and expertise, enabling our members to better serve their clients' international needs.

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Admitted to the Bar in 1997, Lionel Paraire founded Galion in 2008, a boutique law firm focused on labour and employment law.

Lionel has lectured at the University of Paris XII in Labour Law and European Labour Law. He is currently Senior lecturer at the University of Montpellier I (DJCE and Certificate of Special Studies in Labour Law), where he teaches employment litigation. He is a member of various national and international organisations including Avosial (Association of French Employment Lawyers Association), EELA (European Employment Lawyers Association) and IBA (International Bar Association). He is an active member of IR Global.

Lionel has developed an acknowledged expertise in the area of individual employment relations and (high risk) litigation and dispute resolution. He regularly assists companies with restructuring and the labour and employment law aspects of corporate transactions, extending his activity towards Alternative Dispute Resolution (ADR), notably as a mediator.

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Shilpen provides day-to-day employment law and practical troubleshooting advice to the senior management of high profile corporate clients, including the London arm of a leading multi-billion dollar US private equity house and one of the world's foremost and best recognised designer fashion brands.

Gunnercooke is a full service corporate and commercial law firm comprised solely of senior lawyers. There are 100 partners, operating nationally and internationally via offices in London and Manchester.

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Edmundo founded Escobar y Gorostieta in 1993 as a response to the needs of different customers to have comprehensive advice provided by experts in the various branches of law and disciplines related to the business.

It has grown into prestigious Mexican firm known for providing a high quality of service attached to professional ethics.

Based in Mexico City, the firm specialises in corporate and foreign investment, providing comprehensive advice to domestic and foreign investors operating in Mexico, assessing the legal affairs of foreigners in Mexico and their operations abroad.

Edmundo prides himself on responding immediately to legislative, social, commercial and professional changes both in Mexico and abroad, helping to maintain a flexibility that is reflected in his services.

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Rebecca Torrey is a partner at Elkins Kalt Weintraub Reuben Gartside LLP in Los Angeles and head of the firm's employment practice.

She is experienced in all aspects of employment law, with an emphasis on defending employers in 'bet the company' class action and multi-plaintiff state and federal court trials and arbitrations. Rebecca is committed to developing an employer's understanding of the law to reduce the sting of litigation.

Her clients include healthcare companies, professional services firms, entertainment, digital media and technology innovators, manufacturers and recyclers and tax-exempt organisations operating both internationally or domestically.

Rebecca is a frequent speaker and writer on key developments and cutting edge legal issues, including the current proliferation of employment regulation at state and local levels and the challenge to compliance and litigation risk.

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Fredrik Nordlöf is one of the best known and respected practitioners in Swedish labour law. Fredrik has consulted with the majority of trade unions in order to agree on adequately and specially-made solutions for his clients; often including agreements concerning the applicable order of priority and the establishment of reasons for termination.

Fredrik has also taken part in the establishments of various businesses assisting with structures and contract drafting. Further, Fredrik has great experience in general court proceedings and arbitration. These cases have for example concerned interpretation of contractual wordings, transfers of undertaking and unfair dismissals.

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Gerd Müller-Volbehr is partner at ACURIS since 2002 and is mainly focused on employment law. He counsels international and national mid-cap and DAX listed companies especially in the law of works constitution, law concerning collective bargaining, restructuring and reorganization of enterprises and individual labour law.

Gerd is also experienced in the legal support of managers and board members, such as managing directors, officers and members of supervisory boards, in all questions relating to corporate law and service / consultancy agreements.

Shilpen Savani, Lionel Paraire and Rebecca L. Torrey pictured at the 2017 IR Annual Conference in Berlin

QUESTION 1

What specific challenges/opportunities are companies in your jurisdiction experiencing as a result of the gig economy and zero hour contracts?

France – Lionel Paraire (LP) This topic is not brand new in France, since we have already had some litigation cases related to the requalification of independent workers into employment relationships some decades ago.

The challenge that our clients and companies are faced with as a result of the gig economy and zero hour contracts, is the risk that independent contractors will be requalified as employees. This pressure comes, not only from the individuals who are working on these sorts of contracts, but also from social security bodies who want contributions.

Another struggle is the idea that it could be considered a criminal offence to engage with undeclared workers. This comes with criminal sanctions of imprisonment of three years and a fine of 45,000 euros for individuals and 225,000 euros for companies. Using these independent worker contracts is clearly an opportunity, but it does present a financial risk.

Mexico – Edmundo Escobar (EE) Embracing any new model of commerce is not the issue, the real issue is how the coded legal system in Mexico deals with such a flexible system. In many Latin American countries, the concepts of subordination and dependence determine the existence of a labour relationship. Clients must look to avoid any unclear risk that is assumed by not providing employment benefits to a worker. The courts can disregard contract language, if one exists, because this doesn't solely define the relationship.

England – Shilpen Savani (SS) In the UK the test is similar, whether it's an employment tribunal or the tax authorities, they don't take the label the parties attach as being definitive. It's a matter of fact and individual circumstance.

This subject is not new, though it has evolved. Once self-employed workers were mainly tradespeople who would be engaged on individual contracts that were easy to identify, but technology has changed things so dramatically that there are now very many workers who might appear to be employees but are not employees. There are also those who could be contractors but are actually employees. This has posed searching questions about employment status.

US – Rebecca Torrey (RT) There are no new legal challenges or opportunities, but an impetus for change is being driven by Silicon Valley and Silicon Beach here in California, in terms of start-ups. Business is going in that direction and the laws in the US haven't yet caught up.

The basic challenge for most businesses moving in that direction is the problem of whether a worker is properly classified. There are only two buckets, namely employee and independent contractor, and many compliance issues occur with the employment bucket when people are classified as contractors not employees. There can be protracted litigation about classification, when employers haven't complied with legal requirements.

Rebecca L. Torrey pictured at the 2016 'On the Road Conference in San Francisco

England – SS I've had the same experience in England, although it seems an important difference between England and California is that we have an additional bucket called 'worker'. It's a hybrid but gives the individual worker extra rights they wouldn't have if they were self-employed contractors in the classical sense.

US – RT That may develop in the US, but it hasn't yet. The only initiatives in development have been to assign rights to employed contractors. That process is moving slowly on the local and state levels and hardly at all on the federal level.

France – LP We are also experiencing problems with the social security model in our country, because almost all of the contributions are based on employment relationships. The individual contractor model doesn't work properly with the financing costs of this system. Companies aren't contributing to the social security model on behalf of contractors, and that's what the government is struggling against.

The biggest litigation case we have in France on this issue has been launched by the social security administration regarding social security contributions.

Germany – Gerd Müller-Volbehr (GMV) Whereas gig economy and zero-hour contracts may already be established models in other countries, these instruments of flexible employment are still developing in Germany.

The gig economy is no different here than in other countries (i.e. flexible working conditions, reduction of labour costs, eventually better work-life balance), but the main challenge for us is the compatibility of these instruments with applicable labour law, which of course does not deal with the special circumstances of the gig economy. Legal framework conditions, ordinances or other regulations do not exist that incorporate zero-hour contracts, crowd working or any other digital placement of workers.

Sweden – Fredrik Nordlöf (FN) In order to attract the right employees, especially among young individuals, we see a strong need for companies to adapt their view on how to recruit and attract employees. Of course, it is easier for private companies compared to government agencies to conduct such changes and follow the trends on the labour market, since private companies are more flexible.

As we see it, individuals today are, to a larger extent, looking for more flexible ways to be engaged and perform work. We see a trend among young individuals to be engaged as independent contractors rather than employed. The aim is no longer to receive a golden watch for long and faithful service but to have a flexible work situation adapted to the individual's need.

Swedish employment and labour law provides employees with strong protection; the possibility to engage individuals as contractors entitles companies to be more flexible regarding personnel.

QUESTION 2

What litigation trends are you seeing with your clients as a result of changing employment relationships? Any examples.

England – SS The status of employer or contractor is relatively well defined in England, but the newer category of worker has attracted a lot of attention. The trend in our employment tribunals is to recognise self- employed contractors engaged in the on-demand economy as workers.

Sweden – FN We have experienced an increased number of disputes regarding the definition of the engagement, i.e. if a consultant is to be regarded as an employee. If the engagement is to be regarded as an employment, it can have both employment law and tax law consequences.

Mexico – EE The so-called platform economy is disruptive, because it tries to avoid recognising the dependence of workers. They don't want to classify the individual as one obligated to perform, but one who is willing to perform. This is a legal subtlety used to circumvent the principal of dependence and subordination which defines an employee.

Germany – GMV There is currently little to none jurisprudence on the legal issues that arise in this context in Germany. Courts will have to deal with the question of whether the parties are employer-employee or company-freelancer and what that means for the protection and rights of the worker.

Traditionally, employees are those who work on the basis of an employment contract, bound by the instructions of the employer. In a gig economy, however, there are other criteria to consider. For example, can a rating system replace employer directives, or can communication with various clients and the intense exchange of information with other crowd workers lead to efficient operational cooperation?

Workers who are recruited through digital platforms can mostly decide for themselves, if, when and how they work, and therefore will likely be qualified as freelancers, responsible for their social protection, insurance, taxation etc. In contrast to that, zero-hour contracts should be part of classical employment law, as long as the worker does not have the right to reject the contractor's orders.

Legislation in Germany is very 'case-related', meaning all circumstances and facts in question are evaluated and subsumed under the applicable rules and principles. These tend more towards protection for workers, rather than flexibility in favour of the contractor.

In 2014, the Federal Labour Court decided that the non-stipulation of weekly or daily working hours leads to the qualification of the contract as a part-time employment contract, meaning that the contractor, among others, is committed to employ and pay at least 10 hours a week.

US – RT Up until a few years ago, I was getting calls from corporate lawyers who were interested in this concept of engaging with workers on a temporary and part-time basis, classifying them as independent contractors. They were copying the Uber model, which they believed meant lower payroll cost, more flexibility, more profit and less trouble.

At the beginning, when Uber set up the model it was an open question, but from an employment point of view, being cautious about liability, I advised against it.

History has shown that Uber and other similar companies have had their profits consumed by excessive class action litigation. Businesses are resolved to the fact that, with the option of just two classifications (employed and independent contractors) they need to set workers up quickly as employees to avoid litigation down the road.

People saw it as an opportunity to save money, and people are still using it, but most have encountered so much litigation, that it's not seen as a viable opportunity any more. I don't get that question any longer.

England – SS The same cycle is evident in England. This model was attractive for a while, especially for tech-based businesses that were reluctant to take responsibility for their workers, but the English employment tribunals are going out of their way to make that less and less attractive. They seem to be opting increasingly for worker status now, rather than full employee status.

France – LP This is also true in France, we have had taxi drivers and hotel managers requalify to employment contracts a few decades ago, and this old case law is still used by the courts in present cases, to see if there is an employment relationship.

QUESTION 3

How are disruptive technology firms affecting employment contracts? Are they being drawn up differently and are specific clauses now required for employees versus 'contractors'?

England – SS From the English perspective, it's not so much that contracts are different, but more that there is an increased need for certainty. More care and thought needs to go into drafting the contract at inception than was required in the past.

We are concentrating on questions of control, how payments are dealt with and handled and the issue of whether personal service is required by an individual worker. The contract should also identify the specific services a worker is obliged to provide, and how regular those services need to be.

The question of tax treatment is also important, since if you are self-employed, tax is going to be your responsibility.

France – LP Contracts don't really change anything. The conditions for an employment relationship do not depend on the wishes expressed by the parties, or the name they have given to the contract, but the actual conditions the individual is working in.

As a consequence, the judge needs to check the working conditions and determine whether it's a working relationship.

England – SS Yes, it's a matter of fact and individual circumstance.

US – RT The tests for employee versus contractor are similar in the US. On a federal and state level, we have slightly different tests depending on the agency or context, but they all use the same factors to varying degrees. The amount of control the company has over the work process, is most significant.

The difference between the US and other jurisdictions, is that virtually no employees have contracts, with the exception of executives (less than 1 per cent of the population).

There is more focus on contractors having written contracts now, reflecting this debate. If there is no contract for a contractor, courts and agencies will assume it is an employment relationship. If there is a written contract with a contractor, the court will look carefully to assess the working conditions.

For instance, New York City now requires freelancers to have written contracts under the Freelance Isn't Free Act (FIFA). This law was developed on a local level and gives freelancers certain rights, such as payment for services within 30 days.

England – SS A contract does give you a starting point in terms of assessing the relationship.

Mexico – EE They're starting to provide certain protections to contractors when they are not employers that is very interesting.

US – RT New York has a big influence on California, which often follows its initiatives, so it may be a trend that develops in urban areas around the country.

England – SS None of these jurisdictions seem intent on shutting down self-employment, but it's a matter of regulating it to avoid abuses. The aim is to provide increased security and clarity for workers.

Germany – GMV As long as digital platforms can choose if the crowd-workers are employees or freelancers, they will usually choose freelancer status. Besides the agreement on the respective work task, the remuneration and the time frame, the parties should also agree on the transfer of rights of use and exploitation of the work results and the designations as author, data protection and eventually social protection.

Regarding zero hour contracts, we have to assume that the frame contract will probably not be qualified as an employment contract, since the parties are not obliged to any commitments yet. As soon as the employer accepts an order, however, we will speak about a fixed-term employment contract. Contracting parties will have to keep in mind that disregarding the formal requirement will lead to a permanent employment.

Shilpen Savani pictured at the 2016 IR Annual Conference in Amsterdam

QUESTION 4

Does the gig economy warrant more progressive employment legislation in your opinion?

Germany – GMV Whether a more progressive employment legislation is justified or not, is a very political issue. When working time and free time become fluid and the place of work is no longer an issue, a more 'relaxed' legislation seems more contemporary. The same facts, in contrary, might warrant a tightening of the existing laws – always depending on the perspective. Companies and contractors will focus on increasing and improving competition, which requires more flexibility. Employees and their organisations will emphasise the needs of the workers.

As long as we do not have new legislation for the gig economy, the jurisdiction will have to make sure that the current labour law is not undermined by assigning work tasks that were hitherto carried out by employees in the context of employment relationships, to contractors. In this case, protection such as minimum wage, vacation, dismissal protection and continued pay in case of illness, would not apply.

France – LP France introduced some legislation in August 2016 relating to collaborative digital platforms. There were three areas covered, namely an obligation for those platforms to ensure the independent workers against work accidents, to take charge of training and authorise a union to represent members on collective rights.

The legislation also reinforces the social responsibility owed by collaborative platforms, without prohibiting any business activity. The idea is to emphasise the responsibility and obligations they have towards their users.

England – SS We received an eagerly awaited report last summer commissioned by the UK government. The Taylor Review was intended as a precursor to changes in legislation that could eventually come into force. It made wide-ranging recommendations, but offered no commitments, although it is hoped we will eventually see changes as a result.

The report recommended, for example, that workers who are not employees should be given a new categorisation of "dependent contractors", while agency workers should be able to claim employment status after being engaged for a year.

The UK government has just very recently published a response to the Taylor Review. This provides very little in terms of tangible change for now, but there is another round of focused consultation with various business sectors to come. It is possible that this could eventually result in a statutory definition (and test) to determine employment status. There may also be tax reforms to come, increased penalties for employers who commit aggravated and repeated breaches of employment right and also a higher rate of national minimum wage applicable to zero hours' workers. So although there are no dramatic changes just yet, the government is alive to the changing world of work and trying to deal with these proactively.

Mexico – EE Agency work was not regulated in Mexico until 2012, and there have been plenty of comments on those regulations, including a request from congress to review them. The tax authorities have been more progressive,

IR Members pictured at the 2017 IR Annual Conference in Berlin

and established that companies hiring via agencies should guarantee social benefits to the employee, otherwise, any expense is non-deductible for tax purposes. This progressive law started to come into effect in January 2018, and has benefited the formal labour market with the introduction of almost one million people to the Social Security system in Mexico.

England – SS Each jurisdiction seems to be trying to respond to the huge changes driven by these innovative young companies, many originating in Silicon Valley.

US – RT There have been scattered attempts in different jurisdictions to extend protections to contractors in the US. Efforts will largely be unsuccessful on the Federal level while the current administration remains in power.

In the State of Washington, a proposal for a portable benefits system has been made, which involves a fee being collected from an entity when a contractor works for them. The system would allow contractors to gather funds from different businesses and buy benefits.

California has also done a few things, including a bill to extend the insurance system for work-related injuries to contractors. The law is slowly moving and people are recognising that there needs to be more progressive employment legislation, or legislation that helps people who are working in a non-employment capacity, to have the benefit of full employment.

England – SS Do you think the eventual outcome will be an improved position for workers in the US?

US – RT I don't know if it will improve soon enough, but there is a desire for people to have the flexibility that comes with contract work. Millennials especially feel that way, although I am not sure if they will feel the same when they have mortgages, families and education expenses.

England – SS As they say, the more that reality imposes, the more traditional one's expectations become! It will be interesting to see how this area develops.

Sweden – FN In order to follow developments on the labour market, there is also a need for the legislation to progress and adapt.

As mentioned above, the engagement as independent contractor is not governed by mandatory protective employment related laws. In order to prevent social dumping, and to stop companies engaging independent contractors instead of employees, to evade employment law regulations; there is potentially a need for the employment legislation to extend its area of application.

QUESTION 5

How are trade unions / worker bodies and employee organisations reacting to the gig economy in your jurisdiction? Are they recognising independent contractors as workers?

France – LP In France, the trade unions say they are also in charge of independent contractors. Elsewhere we see Deliveroo bikers and Uber drivers, for example, forming collective groups to discuss and negotiate with these platforms. They are trying to organise themselves like unions, but with representatives to negotiate more protection.

Mexico – EE It is the tax authorities in Mexico who have anticipated what the unions were doing. Companies that engage with workers who are not considered employees are not entitled to deduct those expenses for tax purposes, regardless of whether the worker is covered by a union.

US – RT Unions are on the decline in the US, except in certain industries. They have traditionally reached out and included freelancers, although most commonly in the entertainment industry.

If the gig economy continues to exist, then it's likely unions will do whatever they need to do to organise workers who are not traditional employees.

Sweden – FN Trade unions are usually very conservative and regard any change as something very suspicious. Trade unions are, for example, entitled to veto, should a company, which is bound by a Collective Bargaining Agreement, wish to hire a contractor instead of employing. The legislation might need to progress and develop in order to provide protection for individuals who are self-employed.

We also see a trend among the trade unions to offer membership to individuals who are self-employed. The membership often includes different insurances (e.g. income protection insurance and health insurance) and business coaching.

England – SS England has always had a strong trade union presence, but it seems to have been declining in recent years. The unions have assumed an active role in the on-demand economy though, and the whole question of worker status.

One of the litigation claims brought by a union went against them, when an employment tribunal found that Deliveroo riders were in fact self-employed. But they didn't use the unsuccessful argument made by Uber, who said they were simply an agent and the drivers were their professional clients.

Unions seem to be carefully choosing the claims they pursue in terms of what is relevant to the majority of their members. It is a targeted and selective approach, using limited resources pretty well.

Germany – GMV The trade unions have already created and established platforms with information for workers, advice, the possibility for mutual exchange and public relations. Thus, an independent evaluation of platforms is possible, since some have already been recognised as fair working platforms, which gives some protection, or orientation, for workers. Crowd workers can exchange information and good or bad experiences, creating bonds.

Whereas freelancers do not usually belong to trade unions, employees and employee-like workers could be protected by collective agreements.

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