

Flexibility, Choice and Labour Law: The Challenge of On-Demand Platforms

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Forthcoming in the University of Toronto Law Journal

Abstract

Working through platforms is a recent but fast-growing phenomenon, with obvious implications for workers' rights. Discussions have so far focused on the status of platform-based workers, but recently a growing consensus is emerging by courts around the world that workers for platforms such as Uber are in fact employees. As a result, legal disputes are likely to shift, to a large extent, from status questions to working time questions. This might seem like a very specific issue, but in fact it has crucial implications for the entire model of platform work; and addressing this question requires us to rethink some of the fundamental pillars of labour law, notably whether more room should be opened for flexibility and individual choice within this system.

We argue that one aspect of the platform model – “work on demand” which allows workers to log into the app whenever they wish to do so – poses a difficulty. Workers should be compensated for the time they are “on call” and available to work. But platforms can be expected to respond by assigning workers to pre-set shifts to avoid paying for an unknown amount of working hours, thereby dismantling the “on demand” model. Such a change would be welcomed by many employees, who will gain more security, but others can be expected to object to losing the flexibility which they value.

We consider possible solutions that could allow workers to choose the “on-demand” model. While rejecting the possibility of allowing employees to waive on-call compensation rights, we consider several intermediate solutions that ensure partial payments for this time or exempt employees with another full-time job. The proposed solutions are based on the understanding that more choice is preferable in labour law, as long as we can protect the interests of the affected employees, and eliminate the externalities that some choices might generate for other workers.

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I. Introduction

Technological advancements open new opportunities for work, but at the same time create new challenges. Digital online platforms like Uber claim that they allow workers to decide how much and when to work, and that workers want and choose this flexibility. Their business model is based on classifying drivers as independent contractors, thus escaping all the obligations of labour and employment laws (hereinafter together “labour laws”). This approach has now been rejected by several high courts around the world,¹ leading Uber and its competitors-collaborators to pressure legislators to adopt some intermediate model for platform-based work. These firms argue that such a new model is necessary to allow workers to retain the flexibility which they want and choose – flexibility which the firms claim is incompatible with existing labour laws. Having succeeded in California – where a recent referendum resulted in a new model specifically for app-based transportation and delivery companies² – Uber is now pushing for similar amendments to labour laws in Canada and elsewhere.³

The goal of this article is two-fold: *first*, to debunk many of the arguments made by Uber and similar platforms. We will show that the claim of flexibility chosen by workers is to a large extent false; that flexibility is not in general incompatible with labour laws; and that the tactics of digital platforms are very similar to age-old, never-ending attempts by employers to evade labour law costs. At the same time, we identify one specific issue that requires further attention: the possibility for workers to choose when to make themselves available for work, and get paid only when they are actually offered and accept work – which is a key feature of what is often called “work on demand” – is crucial to the existing Uber model. The on-demand system is certainly not incompatible with employee status, as Uber claims, but it is arguably incompatible with existing working time laws, as we will show below. The *second* goal of the paper is to examine whether this working time model should be allowed, and if so, under what circumstances, and which legal changes are required to allow it. The implications are not

¹ See Part II(a) below.

² Protect App-Based Drivers and Services Act (Proposition 22), online: <<https://vig.cdn.sos.ca.gov/2020/general/pdf/top1-prop22.pdf>>.

³ Sara Mojtahedzadeh, “Uber pitches new provincial rules to keep gig workers as contractors — as workers’ resistance ramps up”, *Toronto Star* (April 28, 2021), online: <<https://www.thestar.com/news/gta/2021/04/28/uber-pitches-new-provincial-rules-to-keep-gig-workers-as-contractors-as-workers-resistance-ramps-up.html?source=newsletter>>. On a similar initiative in Massachusetts, see part II(c) below.

limited to app-based transportation companies like Uber. Because of developments in technology and the labour market – developments that have accelerated as a result of the Covid crisis⁴ – more people in more sectors can be expected to work “on demand” through apps, often on a part-time, irregular basis (so-called “gig” work). Deciding how this kind of work should be regulated is therefore crucial.

In its recent judgment in the case of *Uber v. Aslam*,⁵ the UK Supreme Court accepted the drivers claim for employment rights, and ordered that all hours of being logged into the app will be considered working time. However, the working time issue was only briefly discussed and left some room for case-by-case examination.⁶ Uber announced that it accepts the result with regard to status (only in the UK), but will only pay for the time drivers are actually “engaged” and not for time they are “logged in” and waiting for work.⁷ The next battleground for on-demand workers has thus been identified: disputes are likely to shift, at least to some extent, from status questions (whether someone is an employee) to working time questions (what periods of time should be compensated).⁸ As we explain below, the on-demand system (at least in its current form) is not sustainable if employers need to pay workers for all the time that they make themselves available to work but not engaged to actively work. Otherwise put, if the law requires payment for all the time a worker is logged into the app, in effect this means that the on-demand system is dismantled. Which raises the question, is this an option that should be preserved, from the point of view of workers’ rights? If so, under which conditions?

The current article seeks to answer these questions, thereby addressing a timely challenge regarding the future of working through platforms. At the same time, we believe that the discussion offers broader insights about the possibility to maintain some degree of flexibility and autonomy within a system of labour and employment law. Labour laws are often considered antithetical to autonomy and free choice, because they create a non-waivable floor of rights, superseding the freedom of employers and employees to contract otherwise. Labour

⁴ See e.g. Guy Mundlak & Judy Fudge, “The Future of Work and the Covid-19 Crisis”, *Futures of Work* (June 5, 2020), online: https://futuresofwork.co.uk/2020/06/05/the-future-of-work-and-the-covid-19-crisis/?fbclid=IwAR2ypCKDzmr9rvqvfQc0Rnm_4pYk53ixVAUKoh4LWPE1e2gCMeq5xuGVSIc.

⁵ *Uber BV v Aslam*, [2021] UKSC 5.

⁶ *Ibid* at par 134.

⁷ Dara Khosrowshahi, “Uber chief executive Dara Khosrowshahi says ‘we’re turning the page on driver rights’” *Evening Standard* (March 17, 2021), online: <<https://www.standard.co.uk/comment/comment/uber-chief-executive-dara-khosrowshahi-drivers-rights-turning-page-b924529.html>>.

⁸ On May 2021 Uber has recognised the GMB trade union as the representative of Uber’s 70,000 drivers in the UK. Neotiations between Uber and GMB are likely to include working time issues, among other things.

laws have been accused of being too rigid for this reason.⁹ As a general rule, their mandatory nature is necessary to prevent coercion by the stronger party. Moreover, alongside the infringement of freedom in the sense of non-interference, non-waivable laws actually enhance the freedom of workers if freedom is understood as non-domination.¹⁰ This is the case for most employees, who benefit from a non-waivable floor of rights. But there remains a group of people (even if a minority) for which the general laws are not optimal and perhaps not necessary. The new invention of work on-demand through online platforms brings their plight to the front. Some of them prefer more flexibility and the ability to choose a different arrangement. The question is whether this can be made possible while protecting the goals of labour laws and avoiding harm to other employees.

The article proceed as follows. Part II examines the claim of platforms such as Uber that platform workers enjoy a degree of flexibility that is incompatible with labour laws. We show that the flexibility enjoyed by platform workers is in fact quite limited, and more importantly, it is entirely possible to enjoy significant flexibility while being an employee. In part III we move to examine whether a specific aspect of the platform model – working on-demand – is incompatible with *specific* labour laws, those regulating working time. The problem with the on-demand model is that it relies on a significant number of unpaid “on call” time. We argue that such on-call time should be considered working time. Realizing that this will lead to dismantling the on-demand model, even though some workers are keen on preserving it, we ask whether the law should allow platform workers to waive the right for “on call” payments, and conclude that it should not. In part IV we then raise three intermediate solutions, which could potentially allow the model to continue operating while protecting the goals of labour laws. All three proposals are for different changes to working time legislation that would open possibilities for lower on-call compensation, alongside some protections to workers’ interests. We do not recommend any specific solution; our aim is to put forward these alternatives and to point out their pros and cons. Part V concludes.

⁹ See e.g. Juan C Botero, “The Regulation of Labor” (2004) 119 Q J Econ 1339.

¹⁰ See Guy Davidov, “Nonwaivability in Labour Law” (2020) 40 Oxford J Leg Stud 482, 491. On freedom as non-domination in the context of labour law, see Virginia Mantouvalou, “Human Rights and Unfair Dismissal: Private Acts in Public Spaces” (2008) 71 Modern L Rev 912, 925; Samuel R Bagenstos, “Employment Law and Social Equality” (2013) 112 Mich L Rev 225; Alan Bogg & Cynthia Estlund, “Freedom of Association and the Right to Contest: Getting Back to Basics” in Alan Bogg & Tonia Novitz, eds, *Voices at Work: Continuity and Change in the Common Law World* (Oxford: OUP, 2014) 141; Brishen Rogers, “Employment Rights in the Platform Economy: Getting Back to Basics” (2016) 10 Harv L & Pol’y Rev 479; David Cabrelli & Rebecca Zahn, “Theories of Domination and Labour Law: An Alternative Conception for Intervention?” (2017) 33 Int J Comp Lab L & Ind Rel 399; Alan Bogg, “Republican Non-Domination and Labour Law: New Normativity or Trojan Horse” (2017) 33 Int J Comp Lab L & Ind Rel 391.

II. Platform-based work and the claim of flexibility

The term “platform-based work” refers to various new forms of work in which an algorithm embedded in an online platform (or “app”) temporarily connects workers with clients.¹¹ Prime examples are transportation services provided by Uber or Lyft drivers, and delivery services provided through Deliveroo, Foodora and Instacart. Although the number of platform workers is difficult to estimate,¹² the growth has been quick and the numbers are clearly significant.¹³ The group of platform workers includes people who work full-time through a platform, alongside others who work just a few hours each week, sometimes supplementing their income from a “regular” job.

The clients (or consumers) can obviously log into the app and book a service whenever they want. A common feature of platform-based work is that, at least in principle, the same applies to the workers as well, who can choose when to log into the app and make themselves available to work. Although this is not a necessary component of platforms – it is equally possible to schedule pre-set shifts for the workers – it has developed as part of the model of many app-based platforms introduced in recent years. This flexibility is hailed by the firms operating the platforms as a major advantage for workers, a free *choice* of the workers, and a critical reason to consider them independent contractors. The CEO of Uber made this clear: “A growing number of people are choosing this type of work because of the flexibility it provides – the ability to choose if, when and how to work. That level of freedom is not available with

¹¹ Orly Lobel, “The Law of the Platform” (2016) 101 *Minn L Rev* 87; Eurofound, *Employment and Working Conditions of Selected Types of Platform Work* (2018) at 9, online: <https://www.eurofound.europa.eu/sites/default/files/ef_publication/field_ef_document/ef18001en.pdf>.

¹² OECD, *Measuring Platform Mediated Workers* (2019), online: <<https://www.oecd-ilibrary.org/docserver/170a14d9-en.pdf?expires=1557053529&id=id&accname=oid057488&checksum=748B7E0D658DB4BE6DFE88F270B72907>>; Lawrence Katz & Alan Krueger, “The Rise and Nature of Alternative Work Arrangements in the United States, 1995–2015”, (2016) NBER Working Paper No. 22667, 72 *ILR Rev* 382 at 2-3, online: <<http://www.nber.org/papers/w22667>>.

¹³ For some estimations regarding the US, the UK and the EU respectively, see Aaron Smith, “Gig Work, Online Selling and Home Sharing” *Pew Res. Ctr* (Nov. 17, 2016), online: <<https://www.pewresearch.org/internet/2016/11/17/gig-work-online-selling-and-home-sharing/>>; University of Hertfordshire, *Platform Work in the UK 2016-2019* (June 26, 2019), online: *FEPS* <<https://www.feps-europe.eu/resources/publications/682-platform-work-in-the-uk-2016-2019.html>>; Urzi Brancati et al, “New evidence on platform workers in Europe: Results from the second COLLEEM survey” (2020) JRC Working Papers (Seville site) Paper No JRC118570, at 3-4, online: <<https://EconPapers.repec.org/RePEc:ipt:iptwpa:jrc118570>>. For a recent report submitted to the Ontario government which includes a very high estimation see Ontario Workforce Recovery Advisory Committee, *The Future of Work in Ontario* (Nov 2021) at 124-5, online: <<https://files.ontario.ca/books/mltsd-owrac-future-of-work-in-ontario-november-2021-en-2021-12-09.pdf>>.

traditional employment”.¹⁴ The same argument was made before courts around the world when Uber attempted to justify the independent contractor status of its drivers, as we discuss below. In this part we elaborate on these claims about flexibility and critique them. First, we provide a brief overview of cases rejecting the claims of Uber – and other platforms – that drivers and delivery workers are independent contractors. Second, we show that the choices of platform-based workers and their flexibility are in fact heavily constrained. Third and finally, we argue that flexibility is not in general incompatible with labour laws – it is entirely possible to have flexibility while enjoying the rights of an employee. The claims by platform firms to the contrary are nothing more than a disingenuous attempt to evade labour laws. At the same time, we identify one specific aspect of platform-based work that indeed appears to create difficulty for the entire model: the on-demand feature. This aspect of the platforms’ model will be discussed in parts III and IV.

a. Flexibility does not make you an independent contractor

The classification of platform workers as independent contractors has been a key component of the platform firms’ business model, and a highly contested one.¹⁵ The status of “employee” comes with numerous protections of labour law, which translate, in the eyes of some employers, into costs and reduced managerial flexibility. It is hardly surprising, then, that employers have always tried to evade these legal obligations by misclassifying some employees as independent contractors. The decision if one is an employee is not open to the parties; rather, it is based on legal tests. If the factual circumstances suggest that one is an employee, this status is non-waivable. The tests themselves sometimes have a basis in legislation,¹⁶ but legislative definitions in this area are always open-ended, and have been supplemented by tests developed by courts. Generally speaking, an employment relationship is characterized by the existence of subordination and dependency; these two general characteristics suggest that the person doing the work is an employee, in need of labour law’s

¹⁴ Khosrowshahi, *supra* note 7. See also Dara Khosrowshahi, “I am the C.E.O. of Uber. Gig Workers Deserve Better,” *New York Times* (Aug. 10, 2020), online: <<https://www.nytimes.com/2020/08/10/opinion/uber-ceo-dara-khosrowshahi-gig-workers-deserve-better.html>>.

¹⁵ See e.g. Jeremias Prassl, *Humans as Service* (Oxford: OUP, 2018); Lobel, *supra* note 11; Valerio De Stefano, “The Rise of the Just-In-Time Workforce: On-Demand Work, Crowdwork and Labour Protection in the Gig-Economy” (2016) 37 *Comp Lab L & Pol’y J* 471; Rogers, *supra* note 10; Miriam Cherry, “Working for (Virtually) Minimum Wage: Applying the Fair Labor Standards Act in Cyberspace” (2008) 60 *Ala L Rev* 1077; Guy Davidov, “The Status of Uber Drivers: A Purposive Approach” (2017) 6 *Spanish Labour L & Employment Relations J* 6.

¹⁶ See e.g. *Ontario Employment Standards Act*, 2000, SO 2000, c 41, s 1 (definitions of “employee” and “employer”).

protection.¹⁷ Although both of these characteristics can be found in tests and lists of indicia adopted in different jurisdictions, it is subordination – or “control” by the employer – which usually assumes more importance.¹⁸

Uber and other platforms claim that their relationship with drivers is not characterized by subordination. One of the key arguments in this regard is that workers enjoy significant autonomy – or flexibility – to choose how much to work and when to work. In this important sense, it is argued, they are not subject to control by the firm.¹⁹ However, when Uber drivers and other platform-based workers challenged their classification in courts, they have usually succeeded. Although litigation is still ongoing in some jurisdictions, there is now a significant body of case-law from different legal systems concluding that Uber drivers and other platform workers are subject to labour laws.²⁰ The first judgments were given by lower courts in California,²¹ and they were later joined by the highest courts in Spain,²² France,²³ and most recently, the United Kingdom.²⁴ The UK Supreme Court clarified that “the fact that an individual is entirely free to work or not, and owes no contractual obligation to the person for

¹⁷ *McCormick v Fasken Martineau DuMoulin LLP* [2014] 2 SCR 108; Guy Davidov, “The Three Axes of Employment Relationships: A Characterization of Workers in Need of Protection” (2002) 52 UTLJ 357; Guy Davidov, *A Purposive Approach to Labour Law* (Oxford: OUP, 2016) Chs 3 & 6.

¹⁸ Davidov, *The Three Axes*, *supra* note 17 at 365.

¹⁹ For discussions of this argument see Michael Ford & Alan Bogg, “Between Statute and Contract: Who is a Worker?” (2019) 135 LQR 347; Cynthia Estlund, “What Should We Do After Work? Automation and Employment Law” (2018) 128 Yale LJ 254 at 283-284; Naomi Sunshine, “Employees as Price-Takers” (2018) 22 Lewis & Clack L Rev 105 at 113-114.

²⁰ For an overview of these judgments see De Stefano Valerio et al, “Platform work and the employment relationship” (2021) ILO Working Paper No. 27 at 31-33, online: <https://www.ilo.org/wcmsp5/groups/public/-/-ed_protect/-/-protrav/-/-travail/documents/publication/wcms_777866.pdf>; Christina Hiebl, “Case Law on the Classification of Platform Workers: Cross-European SSRN Comparative Analysis and Tentative Conclusions” (forthcoming 2021) Comp Lab L & Pol’y J, online on SSRN: <<https://ssrn.com/abstract=3839603>>.

²¹ *O’Connor v Uber Techs Inc*, 82 F Supp (3d) 1133 (ND Cal 2015); *Cotter v Lyft, Inc*, 60 F Supp (3d) 1067 (ND Cal 2015).

²² Adrián Todolí Signes, “Notes on the Spanish Supreme Court Ruling that Considers Riders to be Employees” (2020) 30 Comp Labor L & Pol’y Journal Dispatch; Daniel Pérez del Prado, “The legal Fraemwork of Platfrom work in Spain: the New Spanish “Riders” Law” (2021) 36 Comp Labor L & Pol’y Journal Dispatch (referring to the ruling of the Spanish court and the following legislation on the matter). For the decision (in Spanish), see online: <<https://www.poderjudicial.es/search/AN/openDocument/05986cd385feff03/20201001>>. It concerned a platform called Glovo, which operates somewhat differently than Uber, but it is considered as settling the issue more generally.

²³ See Barbara Palli, “Peer Review on ‘Platform Work’ Country Comments Paper – France” *European Commission – Employment, Social Affairs & Inclusion* (October 2020) at 4, online: <<https://ec.europa.eu/social/main.jsp?langId=en&catId=1047&newsId=9746&furtherNews=yes>>. For the decision (in French) see online: <https://www.courdecassation.fr/jurisprudence_2/chambre_sociale_576/374_4_44522.html>.

²⁴ See *supra* note 5. The drivers sued to be recognized as “workers” – an intermediate category between employees and independent contractors. Significant parts of UK labour law apply also to “workers”.

whom the work is performed when not working, does not preclude a finding that the individual is a worker, or indeed an employee, at the times when he or she is working”.²⁵ Several (lower) courts in other countries similarly concluded that flexibility (and autonomy) regarding when and how much to work do not make one an independent contractor.²⁶ The European Commission has recently published a proposed Directive on platform work which similarly clarifies that the freedom to choose when and how much to work is not contradictory to employee status.²⁷

There have also been some contradictory judgments, for example in Brazil and some parts of Italy – where schedule flexibility has been used by courts “as a primary ground to classify platform workers as independent contractors”.²⁸ It should also be noted that in the US the issue has not yet been considered by higher courts outside of California, and in a few US states legislation has been introduced to specifically exclude some platform workers from employee status, as we discuss below. But as far as the judicial application of employment status tests is concerned, the global trend is clearly in the direction of *rejecting* the platforms’ independent contractor model.

In Canada, although Uber’s questionable methods have already reached the Supreme Court,²⁹ the employment status of drivers is yet to be considered. A unionisation attempt by Uber Black drivers in Toronto is currently being litigated before the Ontario Labour Relations

²⁵ *Uber BV v Aslam*, [2021] UKSC 5 at par 91.

²⁶ See Antonio Aloisi, “Demystifying Flexibility, Exposing the Algorithmic Boss: A Note on the First Italian Case Classifying a (Food-Delivery) Platform Worker as an Employee” (2021) 35 *Comp Lab L & Pol’y Journal Dispatch*, discussing a judgment of the Palermo Tribunal. For similar judgements from Belgium and the Netherlands see De Stefano, et al, *supra* note 20. On the the Dutch ruling, see also Pieter Haeck, “Uber Drivers are Employees, Dutch Judge Rules” *Politico* (Sept. 13, 2021), online: <<https://www.politico.eu/article/uber-drivers-are-employees-dutch-judge-ruled/>>. See also the recent decision of the Australian Fair Work Commission, *Franco v Deliveroo Australia Pty Ltd*, [2021] FWC 2828, online: <<https://www.fwc.gov.au/documents/decisionssigned/html/pdf/2021fwc2818.pdf>>.

²⁷ Proposal for a Directive of the European Parliament and the Council on improving working conditions in platform work, 2021/0414 (COD), online: <<https://ec.europa.eu/social/BlobServlet?docId=24992&langId=en>>. Articles 4(1) and 4(2) of the proposed Directive create a legal presumption of employment when at least two of five factors exist. One of them is when the platform company effectively restricts the freedom to organise one’s work, including the discretion to choose one’s working hours or periods of absence. But this is only one factor; two out of the remaining four are sufficient to create the presumption of employee status.

²⁸ De Stefano et al, *supra* note 20 at 31-32. See also, for a critique of some of these judgments, Valerio De Stefano, “Platform Work and Labour Protection. Flexibility is not Enough” *Regulating for Globalization* (23 May 2018), online: <<http://regulatingforglobalization.com/2018/05/23/platform-work-labour-protection-flexibility-not-enough/>>.

²⁹ In *Uber Technologies Inc. v Heller*, [2020] SCC 16, the Court invalidated a clause in Uber’s standard contract with drivers, which required them to bring all disputes to arbitration in the Netherlands and to pay hefty fees.

Board.³⁰ In the meantime, couriers working for Foodora, another platform, succeeded in challenging their independent contractor status for collective bargaining purposes. The Ontario Labour Relations Board accepted their claim that they are “dependent contractors” (and therefore employees at least for collective bargaining purposes).³¹ It should be noted that the Foodora model was based mainly on pre-set shifts scheduled with the approval of the company, so the level of flexibility was lower compared with Uber drivers.³² Couriers also had some limited options to receive ad-hoc assignments, and also had the flexibility to work for additional companies at the same time,³³ but still, it is not clear whether the analysis in this decision would apply to the Uber model as well.³⁴

b. The choices of platform-based workers are heavily constrained

As we have seen, most courts do not consider the flexibility enjoyed by platform workers as a reason to negate employee status. When applying the regular “who is an employee” tests, they find a sufficient degree of subordination despite the flexibility concerning when and how much to work. Such judgments can be explained by the existence of many limitations on the autonomy of platform workers, both with respect to scheduling (when and how much to work), and with respect to other aspects of their work. There is no clear-cut dichotomy between being controlled by an employer and being entirely free to independently make all your choices. Rather, many real-life situations fall somewhere on a spectrum of possibilities between the two extremes; and often, the autonomy of platform workers is more akin to the level characterizing employment. In this section, we examine to what extent flexibility is *really* a feature of platform work.

Let us start with the issue of when and how much to work. In principle, Uber drivers can choose for themselves when to log into the Uber app and make themselves available to work. They are not committed in advance to any pre-set schedule. They can decide to work more in

³⁰ United Food and Commercial Workers International Union (UFCW Canada) v Uber Canada Inc, 2020 (ON LRB, Case No. 2845-19-R).

³¹ Canadian Union of Postal Workers v Foodora Inc., (2020) CanLII 16750 (ON LRB).

³² *Ibid* at par 18-21.

³³ *Ibid* at par 38, 40, 122.

³⁴ Soon after the judgment of the Ontario Labour Relations Board, Foodora decided to stop its Canadian operations. The couriers’ union (CUPW) filed an unfair labour practice complaint, which ended in a settlement. See The Canadian Press Staff, “Former Foodora workers reach \$3.46M settlement with app’s parent company”, *Global News* (Aug. 25, 2020), online: <<https://globalnews.ca/news/7296738/foodora-worker-settlement/>>.

one week and less in the following week, without coordinating this with the employer.³⁵ This gives them, at least on the face of it, much more autonomy compared with “regular” employees. However, the platform firms use various techniques to impact the workers’ choices. Those who are more available to work will receive more profitable assignments.³⁶ On the flip side, workers who are less available to work will receive less calls once they log in, and will get the less profitable clients. Platforms also use a “nudging” system to control the drivers’ weekly schedule, by sending notifications on high-demand areas with surge pricing (even when the driver is offline), and by messages such as “Are you sure you want to go offline? Demand is very high in your area. Make more money, don’t stop now!”³⁷ As a driver explained: “The initial draw to Uber was the flexibility to create my own schedule. However, earnings are slim outside the suggested time frame so I always drove within hours proposed by Uber. I couldn’t earn money if I freely organized a schedule”.³⁸

All this suggests that although workers appear to be free to choose how much to work and when to work, such choices are in fact constrained by the platform firms’ use of “choice architecture.”³⁹ Even more fundamentally, it is important to realize that the choice available to workers is only regarding when to log into the app and make themselves *available* for work. According to the existing model they are not getting paid for such availability. There is no guarantee that they will actually have paid work during this time – this depends on their location, the number of clients requesting services, and the number of other drivers competing with them for work.⁴⁰ As we explain in the next part, this system shifts all the business risks to workers, and manipulates them to make themselves available to work more than is actually needed.

³⁵ Antonio Aloisi, “Commoditized Workers: Case Study Research on Labour Law Issues Arising from a Set of ‘On-Demand/Gig Economy’ Platforms” (2016) 37 *Comp Lab L & Pol’y J* 675.

³⁶ De Stefano, *supra* note 15 at 492; Benjamin Means & Joseph Seiner, “Navigating the Uber Economy” (2016) 49 *UC Davis L Rev* 1511, 1542.

³⁷ Alex Rosenblat & Luke Stark, “Algorithmic Labor and Information Asymmetries: A Case Study of Uber’s Drivers” (2016) 10 *Int J of Communication* 3758, 3768. Another example is Doordash sending a message to drivers that there will be enough “Dashers” on the road during their preferred working time and suggesting that they reschedule to rush hours, see online: <<https://twitter.com/WillySolis357/status/1416187019596865543>>.

³⁸ Means & Seiner, *supra* note 36 at 1542.

³⁹ See Rosenblat & Stark, *supra* note 37. On the ideas of “nudge” and “choice architecture” see Richard H Thaler & Cass R Sunstein, *Nudge: Improving Decisions About Health, Wealth, and Happiness* (New Haven: Yale UP, 2008).

⁴⁰ See also Melissa Renau Cano et al, “Flexibility and Freedom for Whom? Precarity, Freedom and Flexibility in on-Demand Food Delivery” (2021) 15 *Work Organisation, Labour & Globalisation* 46 at 63.

Platforms are using technology to control other aspects of the work as well, limiting the autonomy that workers ostensibly have. A key mechanism for control is the ranking system. Uber ranks its drivers in accordance with their “rating, how many rides the driver accepts, and how many times they cancel a ride.”⁴¹ Drivers who cancel more than 5% of the rides are at a real risk of being “deactivated” (Uber’s euphemism for dismissals).⁴² In other words, once a driver has logged into the app, in practice she must accept most of the calls she receives, even if they are not profitable or not in the area of her choice, in order to be able to continue working. According to driver testimonials, while driving to a high-demand area they can be asked to shift to other (less profitable) locations – and would hesitate to turn these calls down for the fear of being deactivated.⁴³ Uber also controls the route that has to be taken with a client,⁴⁴ as well as the overall “client experience”.⁴⁵

All in all, even though Uber drivers are formally free to choose if and for how long to be “logged in” – in fact this choice is significantly constrained; and once they are logged in, drivers’ entire work and rest scheduling as well as other aspects of the work are being controlled via the algorithm.⁴⁶ The same is true for many other platforms. This was recognized

⁴¹ Alex Rosenblat, “The Truth About How Uber’s App Manages Drivers” (2016) Harv Bus Rev, online: <<https://hbr.org/2016/04/the-truth-about-how-ubers-app-manages-drivers>>. See also Kathleen Griesbach et al, “Algorithmic Control in Platform Food Delivery Work” (2019) 5 Socius: Sociological Research for a Dynamic World 1, 7.

⁴² *Ibid.*

⁴³ Rosenblat, *supra* note 41. See also Alex Rosenblat, *Uberland : How Algorithms Are Rewriting the Rules of Work* (Oakland: U California Press, 2018) at 95.

⁴⁴ Rosenblat, *supra* note 41. Such control is done through the app itself.

⁴⁵ Drivers who receive an average rating of less than 4.6 out of 5 stars, are at risk of being deactivated. To receive such a high score, drivers must modify their behavior to produce a fairly homogenous Uber experience, which includes, for instance, providing passengers with phone chargers and bottled water. See Rosenblat, *Uberland*, *supra* note 45 at 150-153.

⁴⁶ Rosenblat, *supra* note 41; Means & Seiner, *supra* note 36 at 1542-1543; Kathleen Griesbach et al, *supra* note 41 at 8-11; Aloisi, *supra* note 35 at 676; De Stefano, *supra* note 15; Tammy Katsabian, “Collective Action in the Digital Reality: The Case of Platform-Based Workers” (2021) 84 Modern L Rev 1005; Valerio De Stefano, “Master and Servers: Collective Labour Rights and Private Government in the Contemporary World of Work” (2020) 36 Int J Comp Lab L & Ind Rel 425; Brishen Rogers, “Beyond Automation: The Law & Political Economy of Workplace Technological Change” (2019) 55 Roosevelt Institute working paper 36, online: <https://rooseveltinstitute.org/wp-content/uploads/2019/07/RI_Beyond-Automation_Working-Paper.pdf>; Ivanova Mirela et al, “The App as a Boss? Control and Autonomy in Application-Based Management” (2018) 2 Arbeit | Grenze | Fluss (Work in Progress interdisziplinärer Arbeitsforschung), online: <<https://opus4.kobv.de/opus4-euv/frontdoor/deliver/index/docId/388/file/ArbeitGrenzeFlussVol02.pdf>>; Alex J Wood et al, “Good Gig, Bad Gig: Autonomy and Algorithmic Control in the Global Gig Economy in Work, Employment and Society” (2019) 33 Work, Employment & Society 56; Zachary Kilhoffer et al, “Study to Gather Evidence on the Working Conditions of Platform Workers: Final Report” (European Commission, 2019), online: <<http://aei.pitt.edu/102657/1/KE-01-20-054-EN-N.pdf>>.

by the UK Supreme Court,⁴⁷ by the Spanish Supreme Court,⁴⁸ and by other judicial bodies around the world.⁴⁹ The Ontario Labour Relations Board similarly concluded with regard to Foodora that “much of the couriers’ work is controlled by the App using an algorithm developed, owned and controlled by Foodora for the sole purpose of advancing Foodora’s business interests.”⁵⁰

c. Flexibility is not incompatible with labour law

While courts have been sceptical, as we have seen, with regard to the claim of flexibility and its impact on the platform workers’ status, some US states have explicitly excluded such workers from labour law protections.⁵¹ Most notably, in California, a dramatic set of events has led to the exclusion of platform-based transportation and delivery workers from labour law – a result that is still being litigated – based to a large extent on the argument of flexibility. The chain of events started with the lower court judgments concluding that Uber and Lyft drivers are in fact employees;⁵² followed by a California Supreme Court judgment adopting a new employee test (the “ABC” test) that in all likelihood would have reaffirmed that platform workers are employees, at least for some purposes;⁵³ followed by legislation (“AB5”) that codified and expanded the scope of the new test;⁵⁴ followed by judgments by California courts

⁴⁷ *Uber BV v Aslam*, [2021] UKSC 5 at par 101: “[T]he transportation service performed by drivers and offered to passengers through the Uber app is very tightly defined and controlled by Uber.”

⁴⁸ “Through the digital platform, Glovo carries out a real-time control of the provision of the service, without the delivery person being able to carry out his task unrelated to said platform. Due to this, the rider has a very limited autonomy...” (Industrial Relations & Labour Law Newsletter, *Spain: Supreme Court Decision on the Employment Status of Workers for a Delivery Company and Social Dialogue Process On a ‘Riders Law’* (October 2020), online: <https://ioewec.newsletter.ioe-emp.org/industrial-relations-and-labour-law-october-2020/news/article/spain-supreme-court-decision-on-the-employment-status-of-workers-for-a-delivery-company-and-social-dialogue-process-on-a-riders-law>>).

⁴⁹ The Palermo Court in Italy, referring to the platform Glovo, concluded that workers did not enjoy real autonomy, and that the platform’s algorithm is used to control, de facto, the activity of the workers. See Aloisi, *supra* note 26 at 3.1-3.4). The California lower courts reached similar conclusions: “This level of monitoring, where drivers are potentially observable at all times, arguably gives Uber a tremendous amount of control over the ‘manner and means’ of its drivers’ performance” (O’Connor, *supra* note 21 at 1151). The Australian Fair Work Commission similarly concluded that “[c]onsequently, what might have, superficially, appeared to be an absence of control over when, where, or how long Mr Franco performed work for Deliveroo, actually camouflaged the significant capacity for control that Deliveroo, (like other digital platform companies) possesses” (*supra* note 26 at par 112).

⁵⁰ Foodora, *supra* note 31 at par 122.

⁵¹ For a review of such laws, see Veena B Dubal, “Winning the Battle, Losing the War: Assessing the Impact of Misclassification Litigation on Workers in the Gig Economy” (2017) *Wis L Rev* 739 at 754.

⁵² See *supra* note 21.

⁵³ *Dynamex Operations West Inc. v Superior Court and Charles Lee*, 4 Cal (5th) 903 (Cal 2018).

⁵⁴ US AB 5 California Assembly Bill, Cal 2019.

confirming that according to the new legislation Uber and Lyft drivers are employees;⁵⁵ followed by a ballot initiative (“Proposition 22”), jointly filed by Uber, Lyft and DoorDash, to exempt app-based transportation and delivery companies from the new legislation, instead giving the platform workers – as independent contractors – a small set of employment-like rights.⁵⁶ After an unprecedented campaign in which the companies – joined also by Instacart and Postmates – invested US\$205 million, they succeeded in passing the ballot initiative amending the law. Recently, the California Superior Court ruled that Proposition 22 is unconstitutional.⁵⁷ Appeals are expected, so the legal battle is ongoing. In any case, for our purposes, one of the main arguments of the firms’ campaign in support of Proposition 22 focused on the flexibility that supposedly the drivers want; the firms claimed that the drivers will have to give this flexibility up once considered employees.⁵⁸

Uber is already lobbying Canadian provincial governments to adopt a model of employment along the lines of Proposition 22, which they call “Flexible Work Plus”, and would perpetuate the drivers’ independent contractor status while giving them some minimal employment-like rights. Uber claims that this model fulfills the workers’ preference for flexibility over being classified as employees.⁵⁹ Similar campaigns are ongoing in Massachusetts⁶⁰ and are under consideration in other states as well.⁶¹

⁵⁵ *California v Uber Techs*, 56 Cal App 5th 266 (2020) (Superior Ct of California, judgment of Aug. 10, 2020), online: <<https://www.courthousenews.com/wp-content/uploads/2020/08/UberLyftEmployees-SFRuling.pdf>>; *California v Uber Techs*, (California CA, judgment of Oct. 22, 2020), online: <<https://cases.justia.com/california/court-of-appeal/2020-a160701.pdf?ts=1603409475>>.

⁵⁶ California Proposition 22, *supra* note 2; and see App-Based Drivers as Contractors and Labor Policies Initiative, online: <[https://ballotpedia.org/California_Proposition_22,_App-Based_Drivers_as_Contractors_and_Labor_Policies_Initiative_\(2020\)](https://ballotpedia.org/California_Proposition_22,_App-Based_Drivers_as_Contractors_and_Labor_Policies_Initiative_(2020))>.

⁵⁷ *Castellanos et al v State of California and Katie Hagen* (judgment of Aug. 2, 2021), online: <<https://ca-times.brightspotcdn.com/c5/f5/7bba477c4a839d1edd9f5b5a75e9/prop-22-alameda-superior-ct.%208-20-21.pdf>>.

⁵⁸ Uber, *Working Together: Priorities to Enhance the Quality and Security of Independent Work in the United States* (2020) at 6-8, online: <<https://ubernewsroomapi.10upcdn.com/wp-content/uploads/2020/08/Working-Together-Priorities.pdf>>. See also Miriam A Cherry, “Proposition 22: A Vote on Gig Worker Status in California” (2021) 31 *Comp Lab L & Pol’y Journal Dispatch*.

⁵⁹ Mojtehdzadeh, *supra* note 3.

⁶⁰ In Massachusetts the rideshare companies Uber, Lyft, DoorDash and Instacart placed a proposal for the November 2022 election, which is closely based of California’s Proposition 22. See Kirsten Korosec, “Gig Companies Take Worker Classification Fight to Massachusetts through Ballot Initiative” *TC* (Aug. 4, 2021), online: <<https://techcrunch.com/2021/08/03/gig-companies-take-worker-classification-fight-to-massachusetts-through-ballot-initiative/>>; Victoria Antram, “Initiative Filed in Massachusetts to Classify App-Based Drivers as Independent Contractors”, *Ballotpedia News* (Aug. 6, 2021), online: <<https://news.ballotpedia.org/2021/08/06/initiative-filed-in-massachusetts-to-classify-app-based-drivers-as-independent-contractors/>>.

⁶¹ “The Fight Over Prop 22 Continues”, *New York Truckstop* (Aug. 23, 2021), online: <<https://newyorktruckstop.com/2021/08/23/the-fight-over-prop-22-continues/>>.

In section (a) above we discussed the argument that because of flexibility, platform workers do not fall within the definition of “employee”. Here the argument advanced by platform firms is different: that flexibility about how much and when to work is incompatible with labour laws. If drivers are deemed to be employees they will necessarily lose this flexibility, according to the firms’ argument. But in fact, many employees (who are subject to labour law) enjoy some flexibility about their work schedule.⁶² Companies choose to enable their employees some schedule flexibility in order to raise employee satisfaction, to improve performance and to reduce turnover.⁶³ This is not a new phenomenon, but it became more common as a result of technological advancements, which allow many work tasks to be performed from distance.⁶⁴ Telework (working from home or any other location through laptops or mobile phones) is often associated with relatively flexible schedules.⁶⁵ This is expected to become even more dominant in the post-Covid world.⁶⁶ There are also management methods that allow employees complete freedom to decide on their working time and work load, with wages based on results rather than working time.⁶⁷ These methods have their own

⁶² See Susan J Lambert, Anna Haley-Lock & Julia R. Henly “Schedule flexibility in hourly jobs: unanticipated consequences and promising directions” (2012) 15 *Community, Work & Family* 293 at 302; Lonnie Golden, “Flexible Work Schedules: What Are We Trading Off to Get Them” (2001) 124 *Monthly Lab Rev* 50.

⁶³ Lambert et al, *supra* note 62 at 294; Fenwick R & Tausig M “Work schedules and stress” In Cynthia Epstein & Arne Kalleberg, eds, *Fighting for time: Shifting boundaries of work and social life* (New York: Russell Sage Foundation, 2005) 77; Kerry Joyce et al, “Flexible working conditions and their effects on employee health and wellbeing” (2010) *Cochrane Database of Systematic Reviews*.

⁶⁴ Richard B Freeman, “The Labour Market in the New Information Economy” (2002) 18 *Oxford Rev of Economic Policy* 288; Erik J H Andriessen & Matti Vartiainen, eds, *Mobile Virtual Work: A New Paradigm?* (New York: Springer Berlin Heidelberg, 2006); Eurofound and the International Labour Office, *Working Anytime, Anywhere: The Effects on the World of Work* (Publications Office of the European Union, Luxembourg, and the International Labour Office, Geneva, 2017) online: < https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_544138.pdf>.

⁶⁵ Lonnie Golden & Jaeseung Kim, “Irregular Work Scheduling and Its Consequences”, in Sarah De Groof, ed, *Work–Life Balance in the Modern Workplace* (The Netherland: Kluwer L Intl B V 2017) 129 at 130; Phyllis Moen et al, “Does a Flexibility/Support Organizational Initiative Improve High-Tech Employees’ Well-Being?” (2016) 81 *Am Socio Rev* 134; Melissa Gregg, *Work Intimacy* (Cambridge: Polity Press, 2011) 39 at 40.

⁶⁶ OECD Local Economic and Employment Development, *Exploring Policy Options on Teleworking: Steering Local Economic and Employment Development in the Time of Remote Work* (2020) 7-8, online: <<https://doi.org/10.1787/5738b561-en>>; Global Workplace Analytics, “Work-at-Home After Covid-19 – Our Forecast” (2021), online: <<https://globalworkplaceanalytics.com/work-at-home-after-covid-19-our-forecast/>>.

⁶⁷ Notably, the New Ways of Working (NWW) and the Results-Only Work Environment (ROWE). On NWW see e.g. Lieke L ten Brummelhuis et al, “Do New Ways of Working Foster Work Engagement?” (2012) 24 *Psicothema* 113; Merle M Blok et al, “New Ways of Working: Does Flexibility in Time and Location of Work Change Work Behavior and Affect Business Outcomes?” (2012) 41 *Work* 2605; Evangelia Demerouti et al, “New Ways of Working: Impact on Working Conditions, Work-Family Balance, and Well-Being” in Christian Korunka & Peter Hoonakker, eds, *The Impact of ICT on Quality of Working Life* (Dordrecht: Springer, 2014) 123. On ROWE, see e.g. Phyllis Moen, Erin Kelly & Kelly Chermack, “Learning from a Natural Experiment: Studying a Corporate Work-Time Policy Initiative” in Ann C Crouter & Alan Booth, eds, *Work-Life Policies* (Washington: Urban Institute Press, 2009) 97 at 103, 106; “Results-Only Work Environment”, online: <www.gorowe.com>;

problems,⁶⁸ but our point here is simply to clarify that flexibility for workers is not incompatible with labour laws.

Interestingly, the AB5 law adopted in California specifically clarified that schedule flexibility does not contradict employment relations, by stating: “Nothing in this act is intended to diminish the flexibility of employees to work part-time or intermittent schedules or to work for multiple employers.”⁶⁹ This did not prevent the platforms from making flexibility a key talking point in their campaign to exempt app-based transportation and delivery workers from this law.

What explains the misleading claim of platforms that flexibility is incompatible with labour laws? To a large extent it is simply a manifestation of the age-old attempt to evade employer responsibilities. Such attempts are sometimes based on a claim made by employers that we must protect the workers’ freedom – as, for example, when Joseph Lochner, who owned a bakery in New York, was indicted for violating the 1897 law which prohibited the employment of bakers for more than 60 hours per week.⁷⁰ Lochner famously succeeded in challenging the law as unconstitutional, because of its interference in the freedom of both the employer and the employee to agree on longer hours. The majority opinion put much emphasis on protecting the freedom of the *employee* to work more than 60 hours per week. This view has been widely discredited with the advancement of labour law during the 20th Century, together with the broad understanding that employment is characterised by inequality of bargaining power,⁷¹ and that non-waivable labour laws are important also for paternalistic and societal reasons.⁷² The platform firms’ argument about drivers wanting flexibility is a reincarnation of the same disingenuous claim that Lochner made about his overworked bakers. These firms simply want to make more money by exploiting the drivers’ “freedom” to accept disadvantageous terms.

The fact that Uber and other platforms did not explain which specific labour law provisions are incompatible with workers’ flexibility exposes their motives. The general claim was used

Cali Ressler & Jody Thompson, *Why Managing Sucks and How to Fix It* (Hoboken: John Wiley & Sons, 2013) at 6.

⁶⁸ Research indicates that detaching work from any time setting eventually leads to an overload of work and requires the employee to be available to work all day long. For discussion see Tammy Katsabian, “It’s the End of Working Time as We Know It – New Challenges to the Concept of Working Time in the Digital reality” (2020) 65 McGill LJ 379 at 402.

⁶⁹ US AB 5, *California Assembly Bill 5*, 2019, § 1(g).

⁷⁰ *Lochner v New York*, 198 US 45 (1905).

⁷¹ Paul Davies & Mark Freedland, *Kahn-Freund’s Labour and the Law*, 3rd ed. (London: Stevens & Sons, 1983) 18.

⁷² Davidov, *supra* note 10.

in an effort to justify the classification of workers as independent contractors, leading to their exclusion from *all* labour law protections. However, it is worth asking whether there are *specific* labour laws that might be incompatible with the platforms' model. Benjamin Sachs, while arguing against the flexibility "myth" in this context, and maintaining that Uber drivers would not lose any flexibility if reclassified as employees, identified two minor exceptions: break times and overtime pay.⁷³ In states that require breaks during long shifts, the employer must ensure that a driver gets such breaks. Similarly, if an employer has to pay overtime for work of more than a certain number of daily or weekly hours, a platform would have to control the workers' maximum number of work hours. In both respects, the platform cannot leave scheduling entirely in the worker's discretion. But as Sachs notes, the flexibility lost in these respects is only the dubious flexibility to work without breaks or to work excessive hours without overtime compensation.

We believe that there is another exception, and a much more significant one. While labour laws in general are certainly compatible with flexibility, once platform workers are considered employees we have to decide how to calculate their working time. Taking Uber as an example again, the question is whether all the time of being "logged in" and available to work is considered working time that requires pay. The UK Supreme Court recently answered affirmatively, but without getting into an in-depth discussion.⁷⁴ If this is the law, then quite obviously Uber's business model will have to change dramatically. They can no longer allow an unknown number of people to log into the app whenever they want, unrelated to the level of demand, once they have to pay all of them for this time. In the next part we ask whether the "work on demand" model developed by platforms such as Uber is incompatible with existing working time laws, and if so, whether we should be pleased with dismantling this model, or rather change the law in order to make it possible.

III. The "work on demand" system

"On-demand" suggests that you only work when called by the employer to do so. The "demand" comes from the employer. Platforms that rely on the on-demand model have three main characteristics. *First*, the workers have to be "on call" (also known as being "on standby")

⁷³ Benjamin Sachs, "Uber: Employee Status and 'Flexibility'" *OnLabor* (25 September 2015), online: <<https://onlabor.org/uber-employee-status-and-flexibility/>>; Benjamin Sachs, "Enough with the Flexibility Trope" *OnLabor* (15 May 2018), online: <<https://onlabor.org/enough-with-the-flexibility-trope/>>; Benjamin Sachs, "Uber's Flexibility Myth: Reprise" *OnLabor* (19 August 2020), online: <<https://onlabor.org/ubers-flexibility-myth-reprise/>>.

⁷⁴ See *supra* note 6.

in order to be available when the demand comes. They will not get called for work unless they make themselves available for work by logging into the platform, thereby being on-call. *Second*, there is no commitment from the employer for any amount of work, something that is known, especially in the UK, as a “zero hours” contract. *Third*, the workers decide for themselves when to be on-call. Although in practice, as we have noted above, the choices of such workers are often constrained⁷⁵ – they are *de facto* expected to work at least a certain number of hours and at times more convenient to the employer – there is still a degree of choice giving them some flexibility.

One of the goals of a system built around these three characteristics, from the employers’ point of view, is to evade employee status and all the liabilities that come with it. We have seen in the previous part that there is a growing consensus around the world against this evasion attempt. The main goal of this contribution is to move beyond the status debate and consider the working time challenge of the on-demand model, and what it means for the ability to sustain it. Assuming that platform workers (such as, for example, Uber drivers) are employees, how should we calculate their working time? In this part, we start by examining the question of on-call time, and conclude that under current laws, platform employees should be compensated for on-call time. We then move to consider whether the unique features of the on-demand model, which combines on-call time with the other two characteristics noted above, should make a difference to the previous conclusion. We show that it should not. This is expected to lead to significant changes in the on-demand model, which will no longer be viable. However, we acknowledge that the existing model gives workers some flexibility (because of the third characteristic noted above), which some of them value. We therefore conclude this part by asking whether the right to compensation for on-call time should be waivable.

a. Do platforms have to pay for on-call time?

The term “on call” is usually used when referring to workers who are engaged as employees and perform their job at the workplace, but from time to time are also asked to be “on call” and make themselves available to work in case the need arises. When you are on-call you are not actively working, but you are still committed to the employer to some extent, because you agree to make yourself available if the need arises, which prevents you from doing whatever you want with your time. Sometimes people are asked to be on-call at or near the workplace (in some cases during the night, so they are asked to sleep at the workplace). At other times

⁷⁵ See part II(b) above.

they can be at home or alternatively at a place that will allow them to reach the workplace within a certain number of minutes determined by the employer. In some jobs, when you are on-call and the need arises for your services, there is no need to get to the workplace but rather you can do the work from home (through the telephone or computer). While there are many variations, they usually refer to employees who are asked to be on-call on top of their regular work schedule. In contrast, the term “work on demand” is generally used to describe people who do not have any regular schedule vis-à-vis the employer/platform. Rather, their entire work is based on being on-call.⁷⁶ In this section, as a starting point for the discussion, we ignore this difference and ask whether according to current laws, and assuming the platform workers are employees, they should receive wages for their on-call time.

There is no doubt that once an employee who is on-call actually gets called to work, full wages are owed for the time of actively working. Also, in some jurisdictions there are protections to ensure a minimum payment for having to come to the workplace; for example, three hours of pay, even if the employee who was called was needed for a shorter period.⁷⁷ But what about the time one is required to be on-call, ready and willing to work, but is not actually called and therefore not performing active work? The question of the appropriate compensation for this commitment can be decided contractually by the parties, or by a collective agreement.⁷⁸ However, as always in the context of employment rights, the crucial question is what is the minimum floor of non-waivable rights. Absent a collective agreement, and assuming an employer would prefer not to pay anything for on-call time, is this legal?

The answer depends on the extent of the constraints placed on the employee during this time. At one extreme, consider a store clerk waiting at the store for customers, with nothing to do between customers. This is obviously considered working time even if the employee is idle

⁷⁶ Some publications use the term “on call” to describe the “work on demand” arrangement, in which the entire job is without fixed hours, and you only work when called by the employer to do so. See e.g. International Labour Office, *Non-Standard Employment Around the World* (ILO 2016) 83, online: <https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_534326.pdf>. However, the term “on call” is more commonly used as noted above. See e.g. Hugh Collins, K D Ewing & Aileen McColgan, *Labour Law*, 2nd ed. (Cambridge: CUP, 2019) 302.

⁷⁷ This is sometimes called “reporting time pay”. See e.g. *Canada Labour Standards Regulations*, CRC, c 986 § 11.1, Sched IV, Can Reg 986, 1978; *Quebec Act Respecting Labour Standards*, CQLR c N-1.1. In the US, see e.g. California Industrial Welfare Commission “Regulating Wages, Hours and Working Conditions in the Manufacturing Industry”, California Industrial Welfare Commission, Order No. 1-2001 (2002) at § 5.

⁷⁸ See e.g. the collective agreement at Algonquin College, online: <<https://www.algonquincollege.com/hr/support/call-back-on-call-pay/>>, and the collective agreement at McGill University, online: <<https://www.mcgill.ca/hr/employee-relations/policies-procedures/call-policy>>. See also *Association of Justice Counsel v Canada (Attorney General)*, 2017 SCC 55, [2017] 2 SCR 456, para 37, discussing the interpretation of collective agreements which fail to regulate this question directly.

from work for some of the time, because they cannot leave the store, and cannot do anything that could prevent them from being immediately available to serve customers the minute they step in. At the other extreme, imagine an employee who sleeps at their home but is asked to leave the phone open during the night in case there is some emergency at work, which is rare. Imagine also that in case of such emergency, they can help over the phone (i.e. they can be anywhere during the night, as long as they can be reached by phone). In this scenario, while there are some constraints on the employee during the on-call time, they are very minimal, and this will not be considered working time. In between these two extremes, different jurisdictions place the line differently, taking into consideration whether the employee has to be on-call at the work site or not; whether they have to stay close by (for example, within 10 or 20 minutes from the workplace); whether they can sleep without interruption; the frequency (or likelihood) of the employee being called by the employer; and the overall ability of the employee to do as they please during the on-call time.⁷⁹

In Canada, when employees are on-call and have to be at their work site, they are generally considered working and entitled to full wages, sometimes with the exception of uninterrupted sleeping time.⁸⁰ In contrast, being on-call outside of the work site is generally *not* considered working time,⁸¹ although in British Columbia legislation clarifies that if an employee is asked to be on-call at any location designated by the employer other than the employee's residence – including a requirement to be within a certain distance from the workplace – it is considered to be working time.⁸²

The lines are drawn somewhat differently in other countries, but based on the same considerations. In the US, Federal regulations maintain that on-call time is considered working time if the employee's ability to use their time effectively for personal purposes is "substantially limited". At the same time, however, the regulations maintain that limitations on

⁷⁹ See *RJ v Stadt Offenbach am Main*, C 580/19 [2019] OJ C 372, par 45-52 (European Court of Justice); *Owens v Local No. 169*, 971 F (2d) 347 (9th Cir 1992). See also Christopher S Miller, Steven J Whitehead & Elizabeth Clark-Morrison, "The Impact of Electronic Paging and On-Call Policies on Overtime Pay Under the FLSA" (1995) 11 *The Lab Lawyer* 231 at 235-6; Opeyemi Akanbi, "Policing Work Boundaries on the Cloud" (2018) 127 *Yale LJF* 637 at 643-644.

⁸⁰ See e.g. When Work Deemed to Be Performed, Exemptions and Special Rules, Ontario Reg 285/01 s 1.1(1)(b).

⁸¹ See When Work Deemed to Be Performed, Exemptions and Special Rules, Ontario Reg 285/01 s 1.1(2)(b); Government of Canada, Federal Government's interpretation guide ,Canada Labour Code, Hours of Work – Canada Labour Code, Part III – Division I - 802-1-IPG-002, online: < <https://www.canada.ca/en/employment-social-development/programs/laws-regulations/labour/interpretations-policies/hours-work.html>> ; *Walker v Alberta Communication Cable Services Inc*, 2018 ABPC 46 (Alta Prov Ct).

⁸² *BC Employment Standards Act* RSBC 1996, c 113 § 1(2); British Columbia, Guide to Employment Standards Act and Regulations, online: < <https://www2.gov.bc.ca/gov/content/employment-business/employment-standards-advice/employment-standards/forms-resources/igm/definitions>.

alcohol consumption, and even a requirement to remain within a reasonable call-back radius, are not a substantial limitation which justifies compensation.⁸³ In the US case law as well, the gap between the basic principle and its actual application is striking. Even with significant restrictions on employees' freedom during on-call time, courts usually refuse to consider it working time.⁸⁴ In contrast, the European Court of Justice, interpreting the EU Working Time Directive, has ruled in several cases that being on standby at the workplace or at another location determined by the employer is considered working time.⁸⁵ With regard to being on-call at home, it would only amount to working time if the employee is constrained "objectively and very significantly" in their ability to manage their time and pursue their own interests.⁸⁶ In a case concerning a firefighter who, while on-call, had to reach the workplace within eight minutes of being called, the Court of Justice considered this to be working time (although leaving open to each member State the possibility to decide on the appropriate payments).⁸⁷ However, for another firefighter, who had to reach the workplace within 20 minutes of being called, the EU Court did not provide a clear conclusion, noting that it depends on the overall circumstances, including the frequency of interventions.⁸⁸

What does this mean for platform workers such as Uber drivers, once we assume, as noted, that they are employees? In practice, Uber drivers who log into the app – making themselves available to work (in effect, making themselves on-call) – cannot stay at home and wait. They have to be in the car and wait for rides in an area of demand. In most cases this means coming to the city center and waiting for rides there, and staying in the same area between rides.⁸⁹ Research has shown that the waiting time between rides constitutes a third of the riders'

⁸³ US, 5 CFR § 551.431, *Time spent on standby duty or in an on-call status* (45 FR 85664, Dec. 30, 1980, as amended at 64 FR 69180, Dec. 10, 1999).

⁸⁴ See e.g. *Owens*, *supra* note 81, and other judgments reviewed there.

⁸⁵ *Sindicato de Médicos de Asistencia Pública (Simap) v Conselleria de Sanidad y Consumo de la Generalidad Valenciana*, C-303/98 [2000] ECR I-07963; *Landeshauptstadt Kiel v Jaeger*, C-151/02 [2003] ECR I-08389; *Dellas v Premier Ministre*, C-14/04 [2005] ECR I-10253.

⁸⁶ *Ville de Nivelles v Matzak*, C-518/15, judgment of Feb, 21, 2018 (*Matzak*); *D J v Radiotelevizija Slovenija*, C-344/19, judgment of Mar. 9, 2021 at par 37.

⁸⁷ *Matzak*, *supra* note 86.

⁸⁸ *RJ v Stadt Offenbach am Main*, C-580/19, judgment of Mar. 9, 2021. The issue was returned to the national court to make the decision.

⁸⁹ For this reason, there are some grey market apps that help drivers trick the platform to think that they are waiting at a central location, see Rida Qadri, "Delivery Drivers Are Using Grey Market Apps to Make Their Jobs Suck Less" *Vice* (27 April 2021), online: <<https://www.vice.com/en/article/7kvpng/delivery-drivers-are-using-grey-market-apps-to-make-their-jobs-suck-less>>. Even with such apps, the drivers must remain close to the center, to be quickly available when called.

working day.⁹⁰ The drivers can sometimes use this waiting time to do errands if they have any in the same area, but the restriction on the ability to do what they want during this time is very significant. It would be fair to say that in practice, while waiting for rides the drivers are on-call *at the worksite* (the area of demand for rides). While Uber might say that it is their own choice where to wait and what do to with their time while waiting, this only conceals the reality: in order to make any money, the choice of where to wait is very limited. Moreover, the frequency of interventions during the on-call time is very high, further restricting the ability to do anything else. The situation might be different for other platforms, especially if one can wait at home as a matter of practice and not only in theory. But for platforms like Uber, the conclusion of the UK Supreme Court that all the time of being logged-in counts as working time seems justified, and in line with existing laws, in Canada as well.

b. From on-call time to on-demand employment through platforms

In the previous section we examined the time of being logged into the platform but not actively working by comparing it to on-call time – relying on legal solutions that have been devised for people who have a regular workday, or work shifts, and some on-call time on top of that. But the new form of work on-demand through platforms is different in two respects: there is no “regular”, guaranteed work schedule, only on-call time (i.e., a “zero hours” contract with no employer commitment); and the employees are free (at least ostensibly) to decide when to make themselves on-call and available for work. Should this make a difference to the previous conclusion?

The on-demand system relies on new technological abilities to manage the workforce through online platforms.⁹¹ At the same time it is a manifestation of a broader phenomenon of employers shifting risks and costs to employees. It is a form of precarious work, leading to high levels of insecurity for the employees.⁹² The ILO described such arrangements as preventing the workers from having genuine control over when they work, with implications

⁹⁰ Ken Jacobs & Michael Reich, “Massachusetts Uber/Lyft Ballot Proposition Would Create Subminimum Wage: Drivers Could Earn as Little as \$4.82 an Hour” (UC Berkeley Labor Center, Sept. 29, 2021), online: <https://laborcenter.berkeley.edu/mass-uber-lyft-ballot-proposition-would-create-subminimum-wage/#_edn2> (explaining how “Uber’s own data indicate that engaged time amounts to only 67 percent of the drivers’ actual working time”).

⁹¹ See De Stefano, *supra* note 15.

⁹² See Eurofound, *New Forms of Employment* (Luxembourg: European Union, 2015) at 46; O’Sullivan Michelle et al, eds, *Zero Hours and On-call Work in Anglo-Saxon Countries* (Singapore: Springer, 2019) at 7; Rebecca E Zietlow, “The New Peonage: Liberty and Precarity for Workers in the Gig Economy” (2020) 55 Wake Forest L Rev 1087.

for the workers' income security and work-life balance, as well as their health and well-being.⁹³ Because of the negative implications of on-call zero-hours employment contracts, in several countries there have been attempts to restrict and even prohibit this form of employment.⁹⁴

In Canada as well, there is increasing awareness of the need to protect employees from such insecurities. In Ontario, in 2017 the Liberal government passed a new law requiring employers to pay a minimum of three hours for an on-call "shift" when it is not considered working time and the employee was not called for work.⁹⁵ However, the center-right government that was formed a year later repealed this right before it ever came into force.⁹⁶ At the Federal level, a recent expert report recommended introducing a right to compensation for on-call time, noting the implications for workers' autonomy and private life, and in particular the increasing expectations from employees to be available (on-call) outside of regular working hours in the digital age.⁹⁷ The proposal draws on the French *Code du travail* which in 2016 created the notion of "astreinte", referring to on-call time outside of the workplace. Employers in France must compensate employees for this time, although not necessarily to the same extent as actual working time.⁹⁸ Another recent report, prepared for the (previous) Ontario government, highlighted the problematics of schedule irregularities and raised possible solutions.⁹⁹ Overall, the lack of commitment from the employer does not present any reason to avoid applying the regular laws regarding on-call time; on the contrary, such protections are needed even more with regard to zero-hours work arrangements.

The other feature of on-demand work through platforms – the apparent freedom to choose when to work – does not change the previous conclusion either. When Uber drivers are waiting for rides, they make themselves available to the employer, allowing the firm to benefit from

⁹³ ILO, *Non-standard Employment Around the World: Understanding Challenges, Shaping Prospects* (Geneva: ILO, 2016) at 29, 226-7, online: <https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_534326.pdf>. See Jeremias Prassl, *Collective Voice in the Platform Economy: Challenges, Opportunities, Solutions* (2018) at 10-11, online: *ETUC* <<https://www.etuc.org/sites/default/files/publication/file/2018-09/Prassl%20report%20maquette.pdf>>; Austin Zwick, "Welcome to the Gig Economy: Neoliberal Industrial Relations and the Case of Uber" (2018) 83 *GeoJournal* 679 at 686.

⁹⁴ ILO, *supra* note 93 at 272-273.

⁹⁵ Fair Wrokplaces, *Better Jobs Act, 2017*, adding s 21.4 to the Ontario Employment Standards Act, 2000, SO 2000, c 41.

⁹⁶ *Making Ontario Open for Business Act, 2018*, SO, 2018, c 14, s 27(5).

⁹⁷ Employment and Social Development Canada, *Report of the Expert Panel on Modern Federal Labour Standards* (June 2019) 102.

⁹⁸ *Code du travail*, France, s L3121-9.

⁹⁹ C Michael Mitchell & John C Murray, *The Changing Workplaces Review: an Agenda for Wokrplace Rights* (Report for the Ontario Government, May 2017) 187.

offering customers a short reaction time. Such on-call time is spent “primarily for the benefit of the employer”,¹⁰⁰ and therefore should be considered working time even according to stricter tests – notwithstanding the fact that Uber did not demand this commitment from a specific employee for a specific time. It still benefits from this commitment. Moreover, when employees are on-call (waiting for rides) their autonomy and ability to choose what to do are restricted significantly, as explained in the previous part, and this remains true regardless of who decided on the exact times they will be on-call. Allowing employers to use their employees in this way without any obligation to pay them for this time seems unfair, and also opens room for abuse.

c. Should platform workers be given a choice to waive payment for on-call time?

If we require a platform like Uber to pay for all the on-call time, it will have to change its business model. Uber will have to create pre-set shifts (like most other employers) and match the number of drivers at each shift and geographical area with the expected level of demand from customers. Rather than paying wages for an unknown number of employees who might not be needed, Uber will likely use its algorithm to create schedules for the drivers in advance.¹⁰¹ Because it will have to pay for the wait (on-call) time, it is also likely that Uber will demand full commitment from the drivers, and prohibit them from working with other firms during the same time.¹⁰² Similar changes can be expected in other platforms.¹⁰³

Limiting the number of workers that platform firms hire to match the need would make perfect sense. In fact, it will expose the platform firms’ sham of recruiting too many workers and making them compete with each other, to provide a cheap service on the back of those

¹⁰⁰ *Armour Co. v Wantock*, 323 US 126, 132 (1944).

¹⁰¹ See in this context an article by an Uber economist, Alison Stein, “Can Employees Really Work However They Want?” “ *Medium* (Aug. 14, 2020), online: <<https://medium.com/uber-under-the-hood/can-employees-really-work-however-they-want-346e8a609b98>>. Interestingly, when Foodora operated in Canada it has used a combination of pre-set shifts with some flexibility of choice for the workers. See *Canadian Union of Postal Workers v Foodora Inc. d.b.a. Foodora*, (2020) CanLII 16750 at par 18-21 (ON LRB).

¹⁰² See Carmel DeAmicis, “Despite Uber’s Arguments, Flexibility for Employees Is a Company’s Choice” *recode* (Aug. 11, 2015), online: <<https://www.vox.com/2015/8/11/11615468/despite-ubers-arguments-flexibility-for-employees-is-a-companys-choice>>.

¹⁰³ Some platforms are already moving in this direction, at least partially. For example, Doordash is alerting drivers when the number of drivers at a certain shift is already high (see *supra* note 37), and Foodora relies mostly on pre-set shifts, with limited options for ad-hoc flexibility (see *supra* notes 32-33). See also Ivanova et al, *supra* note 46.

unsuspecting workers.¹⁰⁴ Uber has all the information about demand and how many drivers are needed at any given time to ensure a quick service that is also sustainable, in the sense of ensuring a reasonable income for the drivers. The drivers do not have this information, so they often make themselves available for work on the assumption that there is sufficient work, even when this is not the case. In this way, Uber shifts all the business risks to the drivers without compensating them for these risks. If they have to restructure in order to ensure that every driver is paid for waiting time as well, this seems like a welcome development.

At the same time, these expected changes would admittedly limit the workers' flexibility quite significantly. Drivers will no longer be free to decide when and how much to work, without coordinating this with the employer. This might seem like a small price to pay for having the security of regular wages even for waiting times. But not everyone will share this view; at least some people would likely prefer the existing flexibility.¹⁰⁵ Imagine, for example, a student who wants to work just a few hours per week, without committing in advance for a specific shift. In her ethnographic study of taxi drivers in San Francisco who work as independent contractors, Veena Dubal found that many of them valued the autonomy of choosing how much and when to work, when to take a break and for how long.¹⁰⁶ Deepa Das Acevedo came to similar findings when studying platform workers in Philadelphia.¹⁰⁷ Interviews with Deliveroo and Foodora drivers in Berlin also show that some of them value these aspects of autonomy.¹⁰⁸ Moreover, it is quite possible that following the Covid pandemic, the desire for work autonomy will further increase.¹⁰⁹ So, we must ask – should we find a way to legally allow the existing model (not with regard to employee status, but with regard to working time)? One way to do so would be to allow platform employees to waive their right

¹⁰⁴ On the creation of intra-platform markets where platform workers compete with each other, see Heiner Heiland, “Neither timeless, nor placeless: Control of food delivery gig work via place-based working time regimes”, *Human Relations* (June 15, 2021); Ivanova et al, *supra* note 46.

¹⁰⁵ Some surveys suggest that platform-based workers prefer to be perceived as independent contractors and not as employees, mainly in order to preserve flexibility. See Gemma Newlands et al, “Collective Action and Provider Classification in the Sharing Economy” (2018) 33 *New Technology, Work & Employment* 250; “Spain: Supreme Court Decision on the Employment Status of Workers for a Delivery Company and Social Dialogue Process On a Riders Law” *Industrial Relations & Labour Law Newsletter* (October 2020). This does not mean that the drivers understand all the differences and have a preference for flexibility in the sense considered here, but it is reasonable to assume that at least some of them do.

¹⁰⁶ Veena B Dubal, “Wage Slave or Entrepreneur? Contesting the Dualism of Legal Worker Identities” (2017) 105 *Cal L Rev* 65 at 101.

¹⁰⁷ Deepa Das Acevedo, “Unbundling Freedom in the Sharing Economy” (2018) 91 *S Cal L Rev* 793.

¹⁰⁸ Ivanova et al, *supra* note 46.

¹⁰⁹ See Arvind Malhotra, “The Postpandemic Future of Work” (2021) 45 *J of Management* 1091 at 1096.

to get paid for their on-call time, thereby allowing Uber to maintain the current working time model at least for those who prefer it. In the current section we wish to argue against this idea. In the next part we raise some other possible solutions, which we consider to be “intermediate”.

Labour laws are for the most part non-waivable, and for good reasons.¹¹⁰ It is generally assumed that labour laws are beneficial to the large majority of employees, and there is no reason to waive them, unless one is forced to do so as a result of unequal bargaining power. It is further understood that employees often lack the full information to make informed decisions, or there might be some other good reasons for a degree of paternalism to protect them. Finally, waivers could be harmful to others, by creating externalities (shifting costs to the state, or family members), or by creating pressure on other employees to waive as well. Nonetheless, there are some exceptions – situations in which waivers are allowed by legislation, sometimes subject to certain conditions. These exceptions appear most notably in the context of working time laws. In Ontario, for example, although the work week is limited to a maximum of 48 hours, since 2019 any employee can agree to waive this right and agree to work more hours.¹¹¹ However, importantly, there is still a non-waivable right to overtime pay (150% of hourly wage) when working more than 44 hours per week.¹¹² This ensures compensation for working more than the normal number of hours as set in legislation, and also maintains a disincentive for employers from demanding excessive hours. In the UK there is a more extreme version: individual waivers concerning maximum hours are allowed, and there are no legislated rights to overtime payments.¹¹³ Such waivers are highly controversial; most legal systems do not allow them. But given our conclusion above that platform employees should receive wages for on-call time, and the implication that this will likely transform the entire model of employment through platforms, we have to ask: should waivers be allowed in this particular context?

As a starting point, we believe that opening choices for employees is a good thing. It respects their autonomy.¹¹⁴ It recognizes that different people have different preferences.

¹¹⁰ Davidov, *supra* note 10.

¹¹¹ *Ontario Employment Standards Act*, 2000 SO, 2000 c 41, s 17. Prior to the 2019 changes, a waiver was possible but only if the employer received an approval from the Director of Employment Standards that applies to the specific employee or a class of employees that includes them.

¹¹² The right to overtime is non-waivable, although it is possible to agree to get paid time off in lieu of overtime pay or to calculate the hours over a longer period (“averaging”). See *Ontario Employment Standards Act 2000*, SO 2000, c 41, s 22(2), 22(7).

¹¹³ Working Time Regulations 1998 (UK) Reg 5.

¹¹⁴ Hanoch Dagan & Michael Heller, *The Choice Theory of Contracts* (Cambridge: CUP, 2017) at 17-48.

Where possible, we should try to avoid a crude “one size fits all” solution that is imposed on all employees.¹¹⁵ If the flexibility to choose when and how much to work is lost, at least *some* employees who value this flexibility will be worse off. We cannot assume that the existing model (in which drivers are not paid for on-call time) is necessarily inferior, for all people, compared to a model in which on-call time is paid but everyone must work in pre-set shifts. Therefore, it is not possible to say that the choice of an alternative (more flexible) model is necessarily wrong/bad from the point of view of *every* employee. Also, while many employees might not realize the costs of choosing more flexibility in this context – raising concerns about lack of information to make a rational decision – it is probably possible to put in place legal requirements that ensure the dissemination of this information before any waiver. Overall, it appears that the justifications for paternalism are not very strong in this context. Nonetheless, there are two other reasons to be cautious about opening the possibility to waive payments for on-call time.

First, the risk of waivers that are not truly free, but rather coerced, is significant. The inequality of power between a platform like Uber and its drivers is enormous. Drivers have no real impact on the terms of the engagement. They are likely to sign whatever they are required by Uber to sign. If there is an opening for waivers, it can be expected to become very common, simply because Uber will ask all the drivers to sign such waivers. It will be practically impossible to determine for each individual employee whether the choice of waiver was truly free or not. In the next chapter we discuss the option of allowing waiver by a union instead of individually, which is a possible solution to this problem. *Second*, and relatedly, there is a risk of harm to others, in the sense of impacting the expectations from other employees. Imagine that one employee freely chooses to waive the right for on-call wages. It is now an option that is not only legally allowed, but preferred by some employees. From the point of view of the platform, people who make this choice are “ideal workers” and they will be rewarded in the market. Even if we assume that everyone makes uncoerced choices, by opening the possibility of waivers we are likely to change the demands in the market. New pressures are likely to emerge on all the platform employees to follow those who chose to waive.

In light of the above discussion, we do not believe that allowing individual waivers from working time laws is a good solution in this context. It seems fair to assume that many people who work for platforms would prefer some stability and the ability to better predict their

¹¹⁵ See e.g. Omri Ben-Shahar & Ariel Porat, “Personalizing Mandatory Rules in Contract Law” (2019) 86 U Chi L Rev 255 (proposing to use the abundance of data about consumers accumulated in the digital era to tailor the right level of protection for each one).

income.¹¹⁶ While some of the platform workers surely feel differently, and prefer flexibility over any degree of security, opening such options for them should not come at the expense of the others. The risk that the more vulnerable workers will find themselves worse off is too strong.

IV. Intermediate solutions

In the previous part we have argued that platforms such as Uber should pay for on-call time, i.e. the time workers spend waiting for assignments while being “logged in” and available to work. We acknowledged that this will lead to significant changes in the business model of these platforms. Overall, the new model is likely to be much better for workers’ rights, but some specific workers might (legitimately) feel otherwise. We have argued against giving these employees the option to choose the “old” model, i.e. an option to individually waive the right for on-call payments. But perhaps there are other options to retain an alternative with more flexibility – some revised version of the on-demand model? In the current part we consider three such options. Before we turn to discuss them, it is important to stress that these proposals do not purport to replace the contractual autonomy of the parties when deciding on pay structures beyond the legislated “floor of rights”. Rather, the idea is to propose possible changes to legislation setting the floor of rights, in a way that could be beneficial to employees as well as employers (compared with the existing legal situation as we interpreted it above).

a. Reduced payment for on-call time

Existing laws classify on-call time in dichotomous terms: an employee is either entitled to full wages (when on-call time is considered working time) or no payment at all. In the latter case, there is still an option, of course, to agree with the employer on some payment; but the law does not require it. An intermediate option would be that when the employee gets to decide for herself how much to work and when to work (the on-demand model), the payment for on-call time shall be lower; say, 50% of the minimum wage.¹¹⁷ The platforms will have to decide whether to continue using the on-demand model at all, and might choose to do so only for part

¹¹⁶ The fact that many workers work full-time in platform-based work suggests that they need stability regarding their income, see e.g. Rida Qadri & Alexandra Mateescu, “Uber and Lyft: Woo Drivers with Stable Pay, Not Short-Term Honey pots” *The Guardian* (20 June 2021), online: <<https://www.theguardian.com/commentisfree/2021/jun/20/gig-economy-companies-uber-lyft-drivers-pandemic>>.

¹¹⁷ We previously discussed on-call periods (separately) in Guy Davidov, “A Purposive Interpretation of the National Minimum Wage Act” (2009) 72 *Modern L Rev* 581 at 600–03; Katsabian, *supra* note 68 at 415-416.

of their workforce. But if they choose to allow (and enjoy the benefits of) letting workers log in whenever they want, the condition would be that all the on-call time must be compensated, albeit at a reduced rate.

At first sight, this option appears to share some similarities with the California law adopted as a result of Proposition 22.¹¹⁸ Leaving aside the unjustified denial of employee status for transportation and delivery platform workers, they were granted a right to 120% of the minimum wage during active working hours, with an addition of 30 cents per engaged mile.¹¹⁹ One might see this as indirect compensation also for on-call time. However, the extra payments are designed to cover some of the expenses for gas, car maintenance, and taxes imposed on the drivers as independent contractors. There is no sufficient payment to compensate for on-call time, nor is there any requirement to count the on-call hours and connect the compensation to them.¹²⁰ The proposal we raise here is on top of any payments due for the time of being engaged to actively work. It refers to the right for compensation for the time of making oneself available to work, which usually requires waiting at areas of high demand for rides.

With reduced compensation for on-call time, it seems fair to assume that the on-demand system can still be efficient for the platforms, at least during the busier hours, when most workers have enough work and will be getting more than the minimum wage anyway. They might place some limit on the number of workers who can log into the app at any given time, and are also likely to prefer pre-set shifts during hours and in areas with low demand. Based on these assumptions, the main advantage of this solution is that it is likely to allow the on-demand system to continue, something which at least some of the workers prefer over fixed pre-determined shifts (and is almost certain to disappear if the platform is required to pay full wages for on-call time). But what about those who prefer stability and security – those that are pushed into the on-demand model rather than freely choosing it?¹²¹ As noted above, an

¹¹⁸ See *supra* notes 56-59 and the accompanying text.

¹¹⁹ See US *California Business and Professions Code*, art 3, § 7453(d)(4) as added on November 2020 by Proposition 22, *supra* note 2.

¹²⁰ “Workers stand to make far less under Proposition 22 than under current law. Not only does the initiative contain no overtime protections for workers, it dramatically shortchanges them regarding mileage reimbursement, fails to fully reimburse them for other significant expenses – like cell phone plans or cleaning equipment – and pays \$0 for time spent driving without a passenger or package, which can be more than a third of the time a worker spends working on these apps” (Rey Fuentes et al, “Rigging the Gig” (NELP, July 2020) at 10, online: <https://www.forworkingfamilies.org/sites/default/files/publications/Rigging%20the%20Gig_Final%2007.07.2020.pdf>). Similar conclusions were also made regarding the proposed ballot initiative in Massachusetts; see Jacobs and Reich, *supra* note 90.

¹²¹ Such as immigrants and workers from other vulnerable populations. For an example, see Antonio Aloise & Valerio De Stefano, “Uber Eats Facing Criminal Charges in Italy. Here’s the Story” *Canadian Law of Work Forum* (June 8, 2020), online: < <https://lawofwork.ca/uber-eats-facing-criminal-charges-in-italy-heres-the-story/>>.

introduction of this intermediate model can be expected to push the platform firms into a combination of regular shifts alongside some degree of extra work through on-demand employment. Ideally, this would allow workers to choose whether they prefer to work in regular shifts or on-demand (with the flexibility but also the insecurity that come with it). But it would be unrealistic to assume a perfect fit between the number of workers offered the on-demand model by the platform, and the number of workers who actually prefer it over the more secure alternative. We should assume, then, that on-demand can still be forced upon some of the workers. Can it still be justified, under the terms proposed in this intermediate model?

Significant compensation for on-call time is necessary because workers are not free to do as they please during this time; they are quite significantly constrained. Nonetheless, it seems to us that a reduced rate for on-call time can be justified, because the employee is not actively working and because she has the flexibility to choose for herself how much and when to work. Moreover, a requirement of compensation (even partial) will ensure that the employer calculates the expected level of demand and the number of workers needed at a given time and place, rather than simply shifting all the risks to the employees. As a result, we can expect much less hours of being on-call without actually working. The challenge is to set the compensation for on-call time at a level that would make it efficient for the platform to continue offering the on-demand model, at least to some of the workers, and at the same time to make the compensation high enough to be fair also for people who did not freely choose this option. A rate of 50% of the minimum wage can be a good choice as a starting point, but economic data as well as policy preferences can put the line elsewhere.

b. Exemption for employees with another (main) job

Research on platform workers – and app-based drivers in particular – has shown that a significant number of them work for the platform full time and rely on the platform as their main source of income.¹²² It would be wrong to generally characterise platform work as “gig work”, even though there is certainly a group of people who work for a platform only a small number of hours per week to supplement their main income. When thinking about policy

¹²² Jonathan V Hall & Alan B Krueger, “An Analysis of the Labor Market for Uber’s Driver-Partners in the United States” (2018) 71 ILR REV 705 (showing that 33-38 percent of Uber drivers derive all their income from one ride-sharing app; note that the first author works for Uber); James A Parrott & Michael Reich, “An Earnings Standard for New York City’s App-based Drivers: Economic Analysis and Policy Assessment” *The New School* (July 2018) Report for the New York City Taxi and Limousine Commission, online: <<http://www.centernyc.org/an-earnings-standard>> (demonstrating that 60-65 percent of workers in ride-sharing apps work on a full-time basis, using the app as a main income to support their families); Cano et al, *supra* note 40 at 55; Qadri & Alexandra, *supra* note 116.

solutions it is important to have both of these different groups in mind. A possible intermediate solution which we propose to explore relies on this distinction and would exempt workers who already have a full-time job from the right to on-call payments, when doing on-demand work as an additional “gig”.

As with the previous proposal considered above, the goal would be to make the on-demand model possible, on the understanding that some workers prefer it over traditional employment in regular shifts. At the same time, the idea (as with the previous proposal) is to allow it only under certain conditions, that will ensure protection for vulnerable workers vis-à-vis the platforms. It seems to us that those working for the platform full time, or otherwise as their main job, are especially vulnerable and the platform should be prevented from shifting risks to them without compensation. In contrast, imagine someone with a full-time job as a store clerk, or a secretary, or a technician, who sometimes works during the weekend driving for Uber to supplement their income. As noted in part II above, we believe that such workers should be considered employees of the platform, just like their peers who work full time. But arguably they can be exempt just from the right to on-call compensation.

The justification for such an exemption is based on a combination of two reasonable assumptions: first, that people who have another full-time job are somewhat less vulnerable, and would not easily be forced to accept a “gig” that exploits them. If there are not enough rides to make this worthwhile for them, they are more likely to stop doing this. And second, we can assume that people who do this as an irregular gig on top of another job are more likely to value the on-demand model, with the flexibility it offers. Given that this is “extra” work for them, they might prefer not to commit to it in advance. Therefore, this group of people might be harmed more than others by a new rule requiring full payment for on-call time, which is likely to dismantle this system of employment. If these assumptions are correct, an exemption from the rule regarding on-call payments might do more good than harm, for this specific group. We realize that this is a big “if”, and more work might be needed to verify that these assumptions are empirically valid. But they seem reasonable, certainly enough to justify further exploration.

An obvious drawback of exempting a specific type of workers from a specific employment protection is the risk that the employer would only choose employees from this group. If a platform can save money (payment for on-call time) by engaging with people who have another full-time job, it might choose to do just that, harming the many others who work for the platform as their main job. While in principle this is a serious concern, in practice it does not seem likely. Platforms are known to prefer workers who invest a lot of their time working for

the platform, rather than people who do this only for a few weekly hours.¹²³ Like other, more traditional employers, they prefer workers who are committed to the job, and experienced in performing it. We therefore do not believe that the risk is real, although we acknowledge that it is possible. To alleviate such a risk, it is probably best to do this for a trial period, or otherwise on a “pilot” basis. It is also possible to limit the platforms in terms of the maximum number of exempted employees (as a percentage of the total number of employees); although this would admittedly be considered a rather exceptional intervention in their business practices.

Assuming this proposal is accepted, there are two practical questions that will arise regarding the boundaries of the exempted group. First, what would be considered a full-time job for another employer? We do not think that the other job has to be for 100% of the normal working time necessarily. Some thresholds will have to be set; for example, 35 hours per week. Second, what about people who choose to work only a small number of weekly hours for the platform, even though they do not have any other job? Consider students, for example. While they do not have any other job, they have other commitments in their life, which lead them to treat the work for the platform as a “gig”. Looking back at the two assumptions mentioned above, students probably satisfy only one of them: it is likely that many of them value the flexibility of the on-demand model, even at the expense of security. In contrast, we cannot assume that they are less vulnerable than other platform employees. The question of whether to include them in an exemption relies, therefore, on whether one believes that one of the assumptions is enough of a justification by itself.

c. Derogation (waiver) by a union

In the previous two sections we considered ideas that limit the rights of some platform employees for on-call payments. In both proposals, the limitation is based on objective criteria. Although the parties can influence these criteria, to some extent, we believe that both proposals avoid the problem of individual negotiations resulting in a waiver of rights. Such waivers are difficult to accept in most labour law contexts, and the current one is no exception. However,

¹²³ See e.g. Tyler Sonnemaker, “Uber and Lyft Say the Battle over AB-5 is about Preserving Flexibility for Part-Time Gig Workers. The Reality is their Businesses have become Dependent on Full-Time Drivers and they Can’t Afford to Pay them Like Employees” *Insider* (Aug. 22, 2020), online: <<https://www.businessinsider.com/uber-lyft-ab5-fight-reveals-dependence-full-time-drivers-2020-8>>; Lawrence Mishel, “Uber and the Labor Market” *Economic Policy Institute* (May 15, 2018), online: <<https://www.epi.org/publication/uber-and-the-labor-market-uber-drivers-compensation-wages-and-the-scale-of-uber-and-the-gig-economy/>> (showing that platform companies “have a core group who are full-time and year-round workers who provide a large share of the services to consumers provided by these platforms”).

when a decision is made by a union, rather than an individual employee, there is potentially more room to allow derogation from the standard rules by agreement.

Unions are much better positioned, compared with an individual employee, to make an informed decision on the exact conditions in which it is preferable for employees to waive the right to be compensated for on-call time.¹²⁴ Likewise, unions are in a better position to minimize the negative externalities that such a waiver may have on some of the employees. The emergence of new technological innovations – such as platform-based work – with all the new challenges they bring to the workplace, increases the importance of involving trade unions in the decision-making process in this context.¹²⁵ In many countries this seems unrealistic, given the decline in union density and union power over the last decades. However, once union derogations from legislated rights are allowed platforms are more likely to accept trade unions and cooperate with them, in order to enjoy the possibility of such derogations.¹²⁶ At the same time, the expectation from a union, unlike an individual employee, is to be able to resist such waivers unless they can be justified by securing alternative benefits, and while protecting the welfare of employees.

This idea is not without difficulties and risks. Decisions by the union leadership do not always reflect what the members want.¹²⁷ Moreover, unions tend to follow the interests of their “median members”,¹²⁸ and as a result may prefer to protect flexibility over security in our context – to appease those working for a small number of hours (assuming they are the majority) and not the workers who rely more on this engagement. Nonetheless, trade unions are exposed to all the different interests and types of employees and can take them into

¹²⁴ Stein Evju, “Imperative Law, Derogation and Collective Agreements” in Horst Konzen et al, eds, *Festschrift für Rolf Birk* (Mohr Siebeck 2008) 61 at 68-69.

¹²⁵ On the importance of including workers’ representatives in decision-making processes, particularly on the background of the digital reality, see Juliet Schor, *After the Gig: How the Sharing Economy Got Hijacked and How to Win It Back* (Oakland: U California Press, 2021); Emanuele Dagnino & Ilaria Armadori, “A Seat at the Table: Negotiating Data Processing in the Workplace: A National Case Study and Comparative Insights” (2019) 41 *Comp Lab L & Pol’y J* 173 at 177, 186–88; Valerio De Stefano, “‘Negotiating the Algorithm’: Automation, Artificial Intelligence and Labour Protection” (2019) 41 *Comp Lab L & Pol’y J* 15; Matthew T Bodie et al, “The Law and Policy of People Analytics” (2016) 88 *U Colo L Rev* 961 at 1032; Brishen Rogers, “The Law and Political Economy of Workplace Technological Change” (2020) 55 *Harv CR-CL L Rev* 532 at Part IV.B; Tammy Katsabian, “Employees’ Privacy in the Internet-Age – Towards a New Procedural Approach” (2019) 40 *Berkeley J Emp & Lab L* 203 at 247-250.

¹²⁶ Davidov, *supra* note 72 at 500-501. This positive side effect is particularly important due to the difficulty of unionization in platform work (see Katsabian, *supra* note 46). In this context, Finkin has argued that derogations made by trade unions can empower them (Matthew W Finkin, “Union Dispossession of Labor Protection: A Paradox, in Two Legal Systems” (2020) 36 *3 Int J Comp Lab L & Ind Rel* 1 at 18).

¹²⁷ Finkin, *supra* note 126 at 14-15.

¹²⁸ *Ibid.*

consideration.¹²⁹ Overall, despite the risks, the involvement of unions alleviates many of the problems with waivers and allows the possibility of opening new opportunities for workers who look for flexibility, while at the same time protecting their interests and especially the interest of workers who prefer security.

The possibility of derogating some employee rights based on a trade union's agreement already exists in many countries, usually only in specific contexts.¹³⁰ In Canada this is less common;¹³¹ however, in some provinces, trade unions are authorized to derogate some of the working time standards.¹³² The option we raise here for consideration would provide trade unions with the authority to waive on behalf of all or some employees the right to be compensated for the waiting time between calls (the on-call time). The exact conditions and the compensation in return for such an agreement shall be determined by the parties in a collective agreement.

V. Conclusion

There has been a wealth of academic writing, and legal battles, concerning the status of platform workers. There is now a growing global consensus that workers for platforms such as Uber are in fact employees, notwithstanding their misclassification by the employer. This raises some new and difficult problems, notably how to calculate the working time of platform workers, a question which has not yet been considered at length. In particular, it is not entirely clear whether the platforms will need to pay for on-call (standby) time, especially when platform workers get to decide for themselves how much and when to log into the platform and make themselves available to work (the on-demand model). The current contribution attempted to fill this gap.

¹²⁹ For further elaboration on this challenge, see Richard Hyman, "Trade Unions and Interest Representation in the Context of Globalisation" (1997) 3 *European Rev of Labour & Research* 515; Guy Mundlak, *Fading Corporatism: Israel's Labor L & Industrial Relations in Transition* (Ithaca: Cornell UP 2007) 188–224.

¹³⁰ In Norway, derogations by collective agreements concerning working time regulation were common already in the late 1950s (see Evju, *supra* note 124 at 66-67, 75). Similar derogations also exist in the U.S, Germany (Finkin, *supra* note 126 at 5-12), and in France (Philip Rathgeb, Arianna Tassinari, "How the Eurozone Disempowers Trade Unions: the Political Economy of Competitive Internal Devaluation" *Socio-Economic Rev* (2020) at 15-17, online: < <https://academic.oup.com/ser/advance-article/doi/10.1093/ser/mwaa021/5865479?login=true>>. For further elaboration on other countries, see OECD, *Use and Scope of Derogations and Opt-out* (2016), online: < <https://www.oecd.org/employment/emp/Use%20and%20scope%20of%20derogations%20and%20opt-out.pdf>>.

¹³¹ OECD, *supra* note 130 at 4.

¹³² For example, in Quebec, trade unions can agree to change the working hours counting method to a non-weekly basis. See *Act respecting labour standards*, CQLR 2021, c N-1.1, s 53.

In its landmark decision rejecting the classification of Uber drivers as independent contractors, the UK Supreme Court decided without much discussion that all the time of being logged into the app is working time. In the current article we considered this question at some length and came to the same conclusion. However, we pointed out that this conclusion is likely to lead to the end of the on-demand model, which allows workers the flexibility to choose how much and when to work. Although we rejected the claims made by platforms that they offer workers a high degree of flexibility and that this flexibility is generally incompatible with labour law, we did find incompatibility between the on-demand model and the duty to pay for on-call time, which is likely to lead to dismantling this model. We could have stopped there on the understanding that the on-demand model is exploitative and bringing an end to it is a good thing. But studies show that some platform workers genuinely value the flexibility that it offers, and we believe that such preferences need to be taken seriously. We therefore proceeded to ask whether employees should be allowed to waive the specific right to on-call compensation in such circumstances, and argued that there are good reasons to reject this idea. Most notably, there is a risk that this will negatively affect employees who prefer the stability and security of “regular” employment. Nonetheless, we continued to interrogate whether there are any other viable options to keep the on-demand model available for those workers who really want it.

Labour laws often require a balance between security and flexibility. We argued that this does not have to be an “all or nothing” solution. In the platform economy, some workers would like to preserve flexibility and be able to log into the app whenever they wish, without having any binding obligations, even at the expense of some of their rights. On the other end of the spectrum, many vulnerable workers base their primary (or even entire) income on platform work and prefer more security. An ideal solution would meet the needs of these two types of employees, without causing any harm to the most vulnerable group and the entire employees’ community.

Our discussion was based on the premise that providing more options to employees is a good idea. Not all the employees have the same needs and characteristics. This was always true, and it is even more apparent in the platform economy, which combines various types of workers. At the same time, labour law must secure the rights of workers and often this means preferring the interests of the collective over the specific preferences of an individual employee. The challenge is to find ways to open choices for employees, and respect their preferences, without undercutting the goals of labour law and without harming other employees.

With this in mind, we considered three options for intermediate solutions. The first proposal is to enable *all* platform-based workers a compensation in the rate of 50% of their basic hourly wage for the on-call time. This will ensure some protection from exploitation to all the workers. At the same time, a partial compensation for on-call time could enable the on-demand model to continue. The second proposal divides platform-based workers into two groups, who presumably have different preferences and needs. Workers who rely on the platform as their main source of income likely desire more protection and stability. In contrast, workers who have another main income, and work for the platform only occasionally, likely prefer the flexibility offered by the on-demand model, specifically the ability to log into the app whenever they wish. It is possible to exempt only the latter group from the right to on-call payments. This will allow them to continue with the same level of flexibility, while the first group can be expected to be moved by the platform into pre-set shifts. The third proposal we considered relies on trade unions and their potential to find an optimal balance between security and flexibility, while considering the interests of both types of employees. Such a potential can be materialized by allowing derogations from some specific rights when made by collective agreement.