

# The zero-hour contract in platform work Should we ban it or embrace it?\*

Anna Ginès Fabrellas

Universitat Ramon Llull, ESADE Law School

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## Abstract

The aim of the paper is to analyze the zero-hour contract in the context of platform work; specifically, the risks and opportunities of this type of provision of services. In the context of the sharing economy and gig-economy, there have emerged multiple App-based companies that have significantly altered the way in which services are provided. Companies like Uber, Lift, Taskrabbit, Deliveroo, Glovo or Amazon Mechanical Turk have introduced new forms of work that have altered the boundaries of Labor Law. The model of these companies is the division of their production into microtasks, the externalization of their entire production to a wide number of independent contractors through an App or webpage and the hiring of each service on-demand. As a result, new technologies have allowed these companies to avoid hiring workers and to provide their services entirely through self-employed workers. This hiring on-demand implies the use, *de facto*, of the zero-hour contract, as platform workers are not subject to a specific working time regime, having absolute liberty to determine, not only their schedule, but also their working time and, even, their willingness to work. In this context, the aim of the paper is to analyze the zero-hour scheme in the context of platform work. The final objective of the paper is to determine, from a *lege ferenda* perspective, if jurisdictions should introduce this type of contract to promote the business model used by digital platforms or, on the contrary, if they should ban it.

## Keywords

sharing economy, platform work, worker, self-employed worker, independent contractor, zero-hour contract

## Topic

platform work

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## El contrato de cero horas en el trabajo en plataformas digitales ¿Debe prohibirse o aceptarse?

### Resumen

*El objetivo del artículo es analizar el contrato de cero horas dentro del contexto del trabajo en plataformas digitales y, específicamente, los riesgos y oportunidades que presenta este tipo de prestación de servicios. En el contexto de la economía colaborativa y la economía de bolos han surgido múltiples empresas basadas en aplicaciones informáticas que han modificado significativamente la manera en la que se proporcionan los servicios. Compañías como Uber, Lift, TaskRabbit, Deliveroo, Glovo o Amazon Mechanical Turk han introducido nuevas formas de trabajo que han alterado los límites del derecho laboral. El modelo de trabajo de estas compañías se basa en la división de su producción en microtarefas, o bolos, en la externalización de toda su producción a un gran número de contratistas independientes a través de una aplicación o página web, y en la contratación de cada servicio bajo demanda. El resultado es que las nuevas tecnologías han permitido que estas compañías eviten contratar empleados y puedan prestar sus servicios íntegramente a través de trabajadores autónomos. La contratación bajo demanda lleva implícito, de facto, el uso del contrato de cero horas, puesto que los trabajadores de la plataforma no están sujetos a un régimen horario específico y tienen absoluta libertad para determinar no solo su calendario sino también su horario laboral e incluso su disponibilidad para trabajar. En este contexto, el objetivo del artículo es analizar el régimen de cero horas dentro del contexto del trabajo en plataformas digitales. El objetivo final del documento es determinar, desde la perspectiva de la elaboración de una futura legislación, si las jurisdicciones deberían incluir este tipo de contrato para fomentar el modelo de negocio utilizado por las plataformas digitales o si, por el contrario, deberían prohibirlo.*

### Palabras clave

*economía colaborativa, trabajo en plataformas, empleado, trabajador autónomo, contratista independiente, contrato de cero horas*

### Tema

*trabajo en plataformas*

## 1. Introduction

In the context of the sharing economy, there have emerged multiple App-based companies that have significantly altered the way in which services are provided. Companies like Uber, Lift, Taskrabbit, Deriveroo, Glovo or Amazon Mechanical Turk have introduced new forms of work that have altered the boundaries of Labor Law.

The model of these companies is the division of their production into microtasks, the externalization of their entire production to a large number of self-employed workers or independent contractors through an app or webpage and the hiring of each service on-demand. As a result, new technologies have allowed these companies to

avoid hiring workers and to provide their services entirely through self-employed workers.

The hiring on-demand model implies the use, *de facto*, of the zero-hour contract. Service providers in app-based companies are not subject to a specific working time regime. On the contrary, one of the characteristics of platform work is that service providers have the absolute liberty to determine, not only their schedule, but also their working time and, even, their willingness to work. As a result, they are hired for the specific duration of a specific service; hence, being subject to a zero-hour scheme, where they are not guaranteed a minimum number of working hours, rather being hired solely for the service provided.

The aim of this paper is to analyze the zero-hour contract in the context of platform work, and the end objective of is to determine, from a *lege ferenda* perspective, if jurisdictions should introduce this type of contract to promote the business model used by digital platforms or, on the contrary, if they should ban it to protect workers' interests.

## 2. Platform work and its consequences on labor relations

### 2.1. The platform work model

The platform work model used by app-based companies and online platforms like Uber, Lift, Taskrabbit, Deliveroo, Glovo and Amazon Mechanical Turk is based on three elements.<sup>1</sup>

The first element of this model of platform work is the subdivision of work into microtasks.<sup>2</sup> New technologies have enabled these companies to divide the service into multiple independent short-term assignments. That is, instead of providing the service as a whole, these platforms provide individual independent very short-term services, such as, for example, one car ride for Uber and Lift, one food delivery for Deliveroo or Glovo, and translation of one sentence or description of one image for Amazon Mechanical Turk.

The second element of the platform work model is the use of a new form of outsourcing: crowdsourcing.<sup>3</sup> Online platforms outsource the entire service they provide. Nevertheless, instead of outsourcing the service to a small or limited number of companies, they outsource it to a large number of self-employed workers. As a result of new technologies,<sup>4</sup> these App-based companies use the App or software developed to perform an open call to attract service providers and each microtask is outsourced to a self-employed worker or independent contractor operating on the platform.

The platform work model requires that the service is outsourced to a large crowd (hence the name 'crowdsourcing'). To a large number of self-employed workers or independent contractors that is high enough to ensure that there is sufficient supply to meet the demand at all times. Then, each microtask is outsourced to a specific self-employed worker. Consequently, these companies do not have all the necessary means and infrastructure to provide the service they offer, rather they outsource the entire production to a large number of self-employed workers.

The third element of the platform work model, which is linked to the previous one, is hiring on-demand<sup>5</sup> or just-in-time<sup>6</sup> (the term on-demand economy has been used to describe the companies that use this form of hiring). Hiring on-demand means hiring self-employed workers at the exact moment when the demand or request for the service occurs<sup>7</sup> and for the specific duration of the provision of said service. New technologies, again, enable this model of production, as they allow to the precise moment when the demand appears to be identified and are able to par this demand with supply in a matter of seconds. As a result, providers of services in the context of online platforms are not hired on a regular or permanent basis, rather they are hired solely for the duration of the provision of a specific job or gig (the term gig-economy has also been used to describe these app-based companies).

The combination of the former three elements has enabled these app-based companies to configure a business model based on the provision of services completely outsourced to a large number of independent contractors or self-employed workers, who are hired at and for the exact time the demand takes places.

This model has clear business advantages, as new technologies have improved the connection between demand and supply, it reduces transaction costs,<sup>8</sup> it enables

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1. See Ginès i Fabrellas (2017 p. 190-192).
  2. Molina (2015).
  3. Howe (2006) and later used and studies by Brabham (2013) or Epstein (2015).
  4. Todolí Signes (2015, p. 3).
  5. V.A. (2015).
  6. De Stefano (2016).
  7. Dagnino (2015, p. 4).
  8. Rogers (2015, p. 86-89) and Hidalgo (2018, p. 224-225).

the exploitation of network economies<sup>9</sup> and it offers greater flexibility in the management of working time by eliminating inactive or unproductive periods.<sup>10</sup> Nevertheless, it also entails significant social risks, as it substitutes more or less permanent or long-term relationships for very short-term hiring. Furthermore, in the analysis in the following section, it provides an escape from labor and social protection, as service providers are hired as self-employed workers or independent contractors and not workers or employees.

## 2.2. The “uberization” of labor relations and the misclassification of workers

The platform work model has led to the “uberization” of labor relations (term attributed to the form of work employed by Uber, a paradigmatic example of company acting in the gig-economy). As mentioned in the previous section, this model provides an escape from labor and social protection, as it is based on the hiring of service providers that are formally considered self-employed workers or independent contractors.

The provision of services on online platforms is based on two characteristics, which are common for the majority of online platforms acting in the gig-economy: the use of own means and infrastructure and the liberty to determine working time. First, service providers on online platforms use their own means of production and infrastructure (car, bike, motorcycle, computer, etc.) and bear the expenses related with the provision of services. Second, and furthermore, they have the liberty to determine their working time; that is, they are free to determine, not only their schedule, but their working time and, even, their willingness to work.

These two characteristics are common of self-employed workers and independent contractors, thus justifying their classification as such.

Nevertheless, the majority of judicial and administrative decisions that have analyzed platform work have concluded that there is a misclassification of workers, as well as a misclassification of other characteristics of the relationship between the platform and service providers that identify them as workers.<sup>11</sup>

According to these decisions, in spite of the liberty to manage their working time, the use of own means of production, and assumption of expenses, service providers on online platforms cannot be considered self-employed workers as (i) they do not have an authentic and autonomous business organization because they are subject to the platforms' instructions and control and (ii) there is no ownership of the real infrastructure, assumption of risk and intervention in the economic activity.

The first argument used by the referenced judicial and administrative decisions is that service providers on online platforms do not have an authentic and autonomous business organization, because they are subject to the platform's management and control. Platforms like Uber, Lift, Deliveroo or Amazon Mechanical Turk exercise management and control by determining the terms of the service, establishing instructions that must be followed by service providers<sup>12</sup> or prohibiting contract between users outside the platform. Some platforms even have a selection process prior to accessing the platform. This is the case for Uber, which requires a valid driver's license for a minimum

9. Doménech Pascual (2015, p. 6) and Hidalgo (2018, p. 224-225).

10. See Bergvall-Kåreborn and Howcroft (2014, p. 215), Prassl and Risak (2016, p. 7).

11. This is the conclusion reached by the United States District Court (Northern District of California), March 11, 2015 in the case *O'Connor et al. v. Uber Technologies, Inc.* (No. C-13-3826 EMC, March 11, 2015), the California Labor Commission in its decision of June 3, 2015 in the case *Barbara Ann Berwick v. Uber Technologies, Inc.* (Case no. 11-46739 EK (2015), the Bureau of Labor and Industries of the State of Oregon, October 14, 2015, the California Unemployment Insurance Appeals Board, June 1, 2015 (Case No. 5371509 - Reopened) or the Employment Tribunal, October 28, 2016, case *Mr. Y Aslam, Mr. J Farrar & others vs. Uber* (Case no.s: 2202550/2015 & others). In application of the Spanish legislation, see the decision of the Catalan Labor Inspection, March 9, 2015 also regarding Uber (case o.no. 8/0025767/14) or the decision of the Valencian Labor Inspection, December 19, 2017 regarding Deliveroo (case o.no. 462017008125108).

12. For example, Uber sets specific instructions regarding the provision of services, like the need to dress professionally, lower the music in the car, open the door of the car for customers or even accompany them with an umbrella when entering or exiting the car in rainy days. Although these are formally considered mere recommendations, the judicial decisions have qualified them as actual employer instructions. Since these recommendations are public, customers expect to be treated accordingly. As a result, to avoid obtaining bad reviews, drivers act accordingly, and hence they have become actual employer instructions. See the decision of the United States District Court (Northern District of California) in the case *O'Connor et al. v. Uber Technologies, Inc.*, No. C-13-3826 EMC (2015). In this sense, see Aloisi (2015, p. 18).

of 3 years, a vehicle that is less than 10 years old, insurance, geographical knowledge of the city and an interview with an Uber employee.<sup>13</sup>

Furthermore, online platforms also exercise control over working time. As mentioned previously, service providers on online platforms are free to determine, not only their schedule, but their working time and, even, their willingness to work. Nevertheless, the judicial and administrative bodies that have analyzed these platforms conclude that this freedom is only perceived or is incomplete. The platform exercises indirect forms of control over working time with economic incentives or by generating expectations to induce service providers to work during high-demand periods. For example, Uber grants economic incentives to those drivers who are logged on to the app a minimum number of hours a week or during specific days or hours,<sup>14</sup> and it reserves the right to disconnect those drivers that reject too many requests.<sup>15</sup> Similarly, Deliveroo also offers economic incentives to *riders* that connect during high-demand periods, assigns *riders* to specific schedules—sometimes modifying their preferences—and limits changes to schedules.<sup>16</sup>

Finally, online platforms also exercise indirect forms of control over work performance. Most of the online platforms have a customer rating system that allows customers to rate the quality of the service received. This rating system allows customers to share information with future and potential customers regarding the quality of the service and, specifically, of the service provider. However, this customer rating system is also used by the platform to adopt business decisions like the distribution of work or maintenance of the platform. Uber, for example, reserves the right to disconnect those drivers with low ratings and

Amazon Mechanical Turk, through the use of an algorithm, assigns tasks among *turkers* according to their personal rating,<sup>17</sup> reserving better quality tasks, in terms of duration and payment, to *turkers* with higher ratings.

The second argument used to support the misclassification of workers on online platforms is the absence of ownership of the real infrastructure of the economic activity, in terms of the assumption of risk and the capacity to intervene in the economic activity.

As mentioned previously, one common characteristic of platform work is that service providers use their own infrastructure, assume the expenses related with the provision of the service and receive payment according to the number of services provided. Nevertheless, the judicial and administrative decisions that have analyzed this matter conclude that, in spite of the former, they are not self-employed workers, as they do not assume all the risks nor receive all the returns on the economic activity. The app or software used for the provision of the service—the real infrastructure of the productive activity—is developed, maintained and owned by the platform; the expenses of the economic activity are borne by the platform—essentially, expenses related with the creation, development and maintenance of the App or webpage, marketing and strategy costs, costs of expanding to other markets, etc.; the platform, after subtracting the payment to service providers, retains the returns on the economic activity; and service providers do not act in the market as real self-employed workers or independent contractors, as the adoption of business, commercial and strategic decisions, like fixing the prices, terms of payment, terms and conditions of the service, etc. also corresponds to the platform.

13. Information obtained from the decision of the California Labor Commission, June 3, 2015 in the case Barbara Ann Berwick v. Uber Technologies, Inc. (case no. 11-46739 EK (2015)), the United States District Court (Northern District of California), March 11, 2015 in the case O'Connor et al. v. Uber Technologies, Inc. (No. C-13-3826 EMC) and the Catalan Labor Inspection, March 9, 2015.
14. In this sense, according to the decision of the Catalan Labor Inspection, March 9, 2015, Uber awards 100€ to drivers that log on minimum 15 hours a week (independent on the number of services) and €100 to those that complete 10 trips a week. Furthermore, it recognizes other economic incentives to drivers that log on during special events that take place in the city, during high demand hours and that accept trips in high demand areas of the city.
15. According to documentation analyzed by the United States District Court (Northern District of California) in the case O'Connor et al. v. Uber Technologies, Inc. (No. C-13-3826 EMC, March 11, 2015), Uber send its drivers an email stating that a "*dispatch acceptance rate [of 60%] is too low... Please work towards a dispatch acceptance rate of 80%. If you are unable to significantly improve your dispatch acceptance rate, Uber may suspend your account*".
16. Decision of the Valencian Labor Inspection, December 19, 2017 regarding Deliveroo (case no. 462017008125108).
17. Bergvall-Kåreborn and Howcroft (2014, p. 218). For a more detailed analysis of the model of production used by Amazon Mechanical Turk see Ginès i Fabrellas (2016, p. 66-85).

Nevertheless, the debate regarding the classification of service providers on online platforms is not resolved, as there are several court and administrative rulings that have excluded their nature as workers or employees.<sup>18</sup> According to these decisions, the use of own means of production to provide the service, the assumption of costs and the freedom to determine working time exclude the employment relationship of service providers in platforms, hence resulting in real self-employed workers or independent contractors.

In my opinion, as an important section of the literature,<sup>19</sup> the provision of services in the context of online platforms in the gig-economy is misclassifying workers as self-employed workers or independent contractors. Platform work must be categorized as dependent and subordinate work and, hence, the object of an employment relationship. The indirect forms of management and control used by platforms, as well as the lack of a true business organization by service providers qualifies them as workers or employees.

As concluded by the European Court of Justice in its ruling of December 20, 2017 (case *Asociación Profesional Élite Taxi v. Uber Systems Spain, S.L.*, C-434/15) and, more recently, of April 10, 2018 (case *Uber France SAS v. Nabil Bensalem*, C-320/16), Uber is a transportation service company and not a mere intermediation service.

*"[T]he intermediation service provided by the company concerned was inherently linked to the offer by that company of non-public urban transport services, in view of the fact that, in the first place, that company provided an application without which those drivers would not have been led to provide transport services, and the persons who wished to make an urban journey would not have used the services provided by those drivers and, in the second place, that company exercised decisive influence over the conditions under which services were provided by those drivers, inter alia by determining the maximum fare, by collecting that fare from the customer before*

*paying part of it to the non-professional driver of the vehicle, and by exercising a certain control over the quality of the vehicles, the drivers and their conduct, which could, in some circumstances, result in their exclusion".*<sup>20</sup>

In my opinion, the qualification of online platforms as service providers and not mere technological companies is directly linked to the nature of their relationship with service providers.<sup>21</sup> The arguments that are used to qualify Uber as a transportation service company—essentially, the intervention in the economic activity—led, in turn, to the qualification of service providers as workers or employees. The intervention in the economic activity by the platform to guarantee a uniform service of a certain minimum quality results in indirect forms of management and control of the provision of services and in the elimination of all possibility for service providers to develop, in the context of the platform, a true and autonomous business activity.

In conclusion, my position in the debate regarding the qualification of the relationship between the online platform and service providers is clear: it is an employment relationship.<sup>22</sup>

### 2.3. ...however, there is more to the "uberization" of labor relations

The misclassification of workers in the gig-economy is not, however, the only or most worrying expression of "uberization" of labor relations, in the sense of reducing job quality or increasing precarious work.<sup>23</sup> There are other characteristics of platform work that contribute to the precarization of labor relations, such as the substitution of permanent or, more or less, long-term hiring for very short-term hiring, remuneration by gig and the automatization of labor relations which reduces workers' effective collective rights.<sup>24</sup>

As mentioned previously, new technologies have enabled these companies to divide the service into multiple

18. Resolution of the Australian *Fair Work Commission*, December 8, 2017 in the case *Kaseris v Rasier Pacific V.O.F* ([2017] FWC 6610) or resolution of Paris' *Conseil des Prud'Hommes*, January 29, 2018 and, more recently in Spain, decision of the *Juzgado de lo Social* no. 39, Madrid, September 3, 2018.

19. Sprage (2015); Serrano Olivares (2017, p. 35-37); Todolí Signes (2017, p. 63-64); Sierra Benítez (2017, p. 248-249); among others.

20. Decision of the European Court of Justice, April 10, 2018 (case *Uber France SAS v. Nabil Bensalem*, C-320/16).

21. Calvo Gallego (2017, p. 360-361).

22. See Ginès i Fabrellas and Gálvez Duran (2016, p. 1-44).

23. In this sense, see Serrano García. (2017, p. 209-228)

24. Rodríguez-Piñero Royo (2017, p. 146-148).

independent short-term assignments and hire workers, misclassified as independent contractors, at the exact moment when the demand for the service occurs and for the precise time of the provision of the service. As a result, new technologies have been implemented on online platforms to substitute more or less permanent or long-term relationships for very short-term hiring. In this sense, as will be described in more detail in the next section, platform work uses, *de facto*, the zero-hour contract. This is a form of precarization as it increases labor instability and, hence, leads to more labor insecurity and lower earnings.

Related with the former, platform workers are compensated by gig or service. Although there are some differences between platforms and, even, among different countries, most platforms workers perceive compensation directly proportionate to the number of gigs or services performed. For each service provided, platform workers receive compensation, minus a percentage subtracted by the platform in terms of payment for accessing the app or software. Some platforms also use economic incentives for being logged in for a minimum number of hours or during specific period, such as the abovementioned examples of Uber and Deliveroo. Nevertheless, the main method of compensation for services is per service or gig.

Compensation per service or gig is permitted in most legal systems. This is the case, for example, in the Spanish legal system where article 26.3 of the Workers' Statute specifically states that the base salary is the "*fixed remuneration per unit of time or service*". Nevertheless, this form of remuneration can also be considered a form of work precarization when combined with the zero-hour contract, as platform workers do not receive compensation for the periods where, in spite of being logged on to the app and available, they are not providing a specific service.

Finally, as mentioned, the correct classification of platform workers as workers or employees is not enough to ensure they benefit from effective collective rights. The geographic automatization of the provision of services, the unstable nature of the work and the high turnover among platform workers hinders their organization and the exercise of collective rights,

such as union organization and collective action.<sup>25</sup> In spite of successful examples of platform workers organizations<sup>26</sup> and collective actions,<sup>27</sup> the current regulation in most legal systems is not adapted to guarantee effective forms of Workers' representation and collective action, like online participation in the election of workers' representatives or disconnection from the platform as form of collective action.<sup>28</sup>

### 3. The zero-hour contract in platform work

#### 3.1. Hiring on-demand and the *de facto* use of the zero-hour contract

Platform work, as analyzed previously, uses a model of provision of services based on crowdsourcing and hiring on-demand. One of the characteristics of platform work is that service providers on online platforms are not subject to a specific working time regime, rather they have the freedom to determine their own working time. Platform workers have the liberty to determine, not only their schedule, but the number of hours they work on a given day, week or month and, even, their willingness to work.

This model implies the use, *de facto*, of the zero-hour contract, because they are not hired for a specific number of hours, but they are hired on-demand, that is they are hired for the concrete duration of the specific service. When service providers are available they log on the App or software and wait to be contacted to provide a specific service. As a result, they are not guaranteed a minimum number of working hours nor, consequently, a minimum remuneration amount.

The working time scheme for platform workers is, in essence, the zero-hour scheme. The zero-hour contract scheme implies that workers are hired by an employer without, however, being subject to a specific working time. Workers are then called by the employer to work when there is a labor need and, evidently, paid according to the number of hours effectively worked.

25. Rodríguez-Piñero Royo (2017, p. 214).

26. For example, the Independent Drivers Guild integrated by Uber or Lyft drivers (<<https://drivingguild.org/>>) [Accessed: 28.02.2018].

27. <[http://www.eldiario.es/catalunya/trabajo/repartidores-Deliveroo-convocan-primera-economia\\_0\\_658985300.html](http://www.eldiario.es/catalunya/trabajo/repartidores-Deliveroo-convocan-primera-economia_0_658985300.html)> [Accessed: 28.02.2018].

28. Mercader Uguina (2017, p. 172-181).

As can be seen, the working time scheme for platform work is similar to the zero-hour contract scheme as platform workers are neither guaranteed a minimum working time and are called to work when there is a labor need. The difference, however, between the zero-hour contract and the working time regime in platform work is the origin of the call. While in the scenario of the zero-hour contract the employer is the one responsible for calling the worker and, hence, activating the contract and his/her obligation to provide services, in platform work it is the worker him/herself that decides when to log on the app and make him or herself available to provide services. Despite this difference, in essence, the business model employed by online platforms based on hiring on-demand implies, essentially and *de facto*, the use of the zero-hour contract.

In this context, especially since the previous section concludes the qualification of platform workers as workers or employees, it is essential to analyze the legality of the zero-hour contract. Furthermore, it is necessary to determine, from a *lege ferenda* perspective, if legal systems should introduce this type of contract to promote the business model used by digital platforms or, on the contrary, if they should ban it.

### 3.2. The illegality of the zero-hour contract in the Spanish legal system

The Spanish legal system does not recognize the legality of the zero-hour contract because, as this section analyses, the regulation requires contracts to stipulate working time and there are limits to increases above ordinary working time.

According to article 34.1 of the Spanish Workers' Statute, working time applicable to a specific employment relationship must be determined in the collective agreement or in the employment contract. Hence, the current labor regulation requires the employment relationship to specify a number of hours to be worked. Furthermore, article 8.5 of the Workers' Statute requires companies, even when contracts have not been formalized in writing, to inform the employee in writing about the essential labor conditions -including, thus, working time- when the contract has a minimum duration of four weeks.

The tacit prohibition of the zero-hour contract in the Spanish legal system is also based on the existing limitations to increases in working time beyond ordinary working time. In this sense, article 35 of the Workers' Statute limits overtime to a maximum of 80 hours per year for indefinite full-time workers. However, fixed-term full-time workers can do overtime in this case, the maximum number of hours per year of overtime is proportionate to the duration of the contract.

In the Spanish legal system, part-time workers are not entitled to overtime. Nevertheless, they are entitled to work, what are called, additional hours. Article 12.5 of the Workers' Statute allows part-time workers and employers to enter into a specific agreement for the realization of working hours above the ordinary working time. The number of additional hours cannot exceed the limit of 30% of ordinary hours, or 60% if the collective agreement has increased the maximum number of additional hours. The legislation, however, limits the possibility of additional hours to part-time workers with a minimum ordinary working time of 10 hours per week on an annual basis. The agreement regarding additional hours can be subscribed at the beginning or during the labor relation but, in any case, it has to be a specific agreement regarding additional hours and it has to be formalized in writing. When an additional hours' agreement exists, the employer can demand that the worker provide his or her services. However, the worker is entitled to a minimum notice of three days of the date and time of working the additional hours.

Furthermore, indefinite part-time workers with a minimum ordinary working time of 10 hours a week on an annual basis are also entitled, on top of the agreed additional hours, to work voluntary additional hours. Voluntary additional hours can be offered by the employer at any time and workers are free to accept—that is, their denial cannot be considered breach of contract. These voluntary additional hours can be up to 15% of ordinary working time, extendable to 30% by collective agreement.

It is true that the legal framework regarding part-time work and, specifically, the regulation regarding additional hours introduces a high level of working time flexibility which is similar to the flexibility allowed by the zero-hour contract.<sup>29</sup> In

29. Ginès i Fabrellas and Luque Parra (2016, p. 64).

this sense, the regulation regarding additional hours in part-time work allows ordinary hours to be exceeded by 45%, or 90% when extended by collective agreement. With respect to indefinite part-time workers with an ordinary working time of at least 10 hours per year on an annual basis, it is possible to increase working hours up to 45% or, even, 90%. As mentioned, this scheme, although not identical, is very similar to the zero-hour contract, as it is possible to enter into a contract with a very reduced number of ordinary hours—zero in the case of the zero-hour contract and ten in the case of part-time work in Spain—and increase working time with additional hours to adjust the labor force to productive needs.

Nevertheless, in my opinion, despite the excessive flexibility that arises from the Spanish part-time work regulation,<sup>30</sup> it cannot be fully identified with the zero-hour contract. Contrary to the zero-hour contract, in part-time work additional hours are limited (i) with respect to ordinary hours, (ii) to workers with a minimum of 10 hours a week on a yearly basis and (iii) cannot exceed the number of hours performed by full-time workers in the company.

Other legal systems, nonetheless, permit the zero-hour contract. For example, the United Kingdom allows for zero-hour contracts;<sup>31</sup> that is, contracts in which there is no certainty that work will be made available to the worker are legal. However, according to article 53 of the Small Business, Enterprise and Employment Act of 2015,<sup>32</sup> exclusivity clauses among such contracts are considered null and void. Other examples are Greece where, although there is no explicit regulation, courts have accepted the zero-hour contract,<sup>33</sup> and Italy, which does not require contracts to specify working time and allows employers to periodically fix working hours depending on the company's productive needs.<sup>34</sup>

### 3.3. Does the illegality of the zero-hour contract exclude the qualification of platform workers as workers?

The zero-hour contract is, as analyzed in the previous section, illegal in the Spanish legal system as the regulation

obliges contracts to stipulate working time and because there are limits to increases above ordinary working time.

Given the illegality of the zero-hour contract in the Spanish legal system and since platform workers provide services, *de facto*, in a zero-hour scheme, it is important to question whether it is correct to qualify platform workers as workers. In other words, it is important to question whether the illegality of the zero-hour contract excludes the qualification of service providers on online platforms as workers or employees.

In this sense, some authors have based their position on the consideration of platform workers as self-employed workers or independent contractors on the illegality of the zero-hour contract in the Spanish legal system. According to Agote "[t]he freedom to work when and if one wants, radically eliminates the dependence requirement -inherent in the employment relationship- from its premise: there is no possibility in Spain of an employment relationship that is activated or deactivated by the worker's will".<sup>35</sup>

It is true that the Spanish regulation does not allow, not only the zero-hour contract, but also an employment contract where the worker unilaterally and freely determines his or her own working time and willingness to work. As analyzed in the first section of the paper, this is a defining characteristic of self-employment that does not fit well with the traditional definition of worker or employee.

Nevertheless, in my opinion, the adoption of a specific business model cannot influence the classification of service providers. That is, the use of a zero-hour contract scheme by online platforms as a result of the phenomenon of crowdsourcing and on-demand hiring, cannot affect the qualification of service providers as workers. In other words, the breach of working time regulation by platforms cannot be used to their benefit to exclude an employment relationship with service providers.

Especially because, as analyzed previously, the liberty that platform workers have in determining their working hours

30. Sánchez Torres (2014).

31. Butler (2016, p. 73-74).

32. See <<http://www.legislation.gov.uk/ukpga/2015/26/part/11/crossheading/exclusivity-in-zero-hours-contracts/enacted>> [Accessed: 12.04.2018].

33. Angelopoulos and Boumpoucheropoulos (2016, p. 32-33).

34. Ferrante (2016, p. 42).

35. Agote (2017, p. 13-14).

is in most cases not full and, even, apparent, the platform exercises indirect forms of control over working hours by recognizing economic incentives, predetermining slots or time zones, establishing restrictions or limitations for workers to change schedules, reserving the right to exclude from the platform those service providers that do not log on a minimum number of hours, etc.

Consequently, the zero-hour scheme used in platform work, where workers are hired at the exact moment when the demand or request for the service occurs and for the specific duration of the provision of such service without guaranteeing a minimum working time is illegal in the Spanish legal system. Although it is acceptable in those legal systems that allow the zero-hour contract, such as the United Kingdom, Greece or Italy, as previously discussed, it is not legal according to Spanish regulation.

#### 4. To embrace or to preclude the zero-hour contract: a question about assuring the platform work model or protecting workers' interests

In this context, it is important to analyze, from a theoretical perspective, whether jurisdictions should introduce and regulate the zero-hour contract in platform work. That is, if legal systems should embrace or preclude the zero-hour scheme used by online platforms. In essence, the question implies deciding whether legal systems should regulate this type of contract to assure and allow the business model used by digital platforms or if, on the contrary, jurisdictions should ban the zero-hour contract with the aim of protecting workers' interests.

The platform work model based on hiring on-demand has multiple business advantages that speak in favor of regulating the zero-hour contract. The hiring on-demand and the zero-hour schemes are more efficient in terms of paring supply with demand and it allows companies to perfectly adjust their workforce to the specific productive need registered at any given time. As mentioned previously,

new technologies the exact moment when the demand for a service takes places to be identified and connect this service, practically automatically, with a service provider. As a result, it reduces transaction costs and it offers greater flexibility in the management of working time, by eliminating inactive or unproductive periods.

Note that the platform work model allows the company's workforce to be perfectly adapted to its productive needs without incurring additional management costs related to having to identify the optimal workforce needed at any given time. By completely outsourcing the provision of the service, the platform does not integrate the corresponding labor costs and, therefore, has no incentive to minimize them in order to maximize benefits. That is, platforms do not have incentives to have an optimal number of service providers available. On the contrary, they have incentives to attract the maximum number of service providers to their platform to ensure sufficient supply to respond to the demand at all times. This phenomenon has been described by Srnicek as the platform's tendency to monopoly.<sup>36</sup>

Nevertheless, as noted above, the platform work model based on the zero-hour scheme entails significant social risks, as it contributes to greater precarization of employment relationships, even when platform workers are formally considered workers or employees. By using a zero-hour contract, not only is there a substitution of, more or less, permanent or long-term relationships for very short-term hiring, but workers are accessing lesser-quality employment with no minimum guaranteed working time and, therefore, no minimum wage guarantee.

According to Adams, Freedland and Prassl, the zero-hour contract or, using the author's terminology, no-minimum-hours work arrangements are defined and characterized by the extreme precariousness they generate, by attributing to the worker all the risk associated with job insecurity and remuneration. "[T]hese work arrangements are defined and characterised by their extreme precariousness, that is to say by the complete or almost complete precarity of the situation of the workers who labor under these forms of engagement. (...) these "no-minimum-hours work arrangements" paradigmatically shift towards and locate upon the worker the whole set of risks of insecurity of work and income which,

36. Srnicek (2017, p. 45).

*we argue, it has been one of the principal functions of labor law to distribute equitably and manageably between workers and employers".<sup>37</sup>*

The zero-hour contract attributes excessive business flexibility in managing working time that shifts greater risks to workers. With this scheme of working time management, platform workers assume the risks, costs—including opportunity costs—of inactivity periods, lack of demand, delays, malfunctioning of the app or software, etc., hence, facing more penalties and job insecurity.

As a result, in my opinion zero-hour contracts should be precluded in legal systems to guarantee and protect workers' interests and, in essence, because they further allow the precarization of labor relations.

## 5. Part-time contracts in platform work

Given the conclusion reached in the previous section regarding the extreme precariousness derived from the zero-hour contract or no-minimum-hours work arrangements, my position is that legal systems should not adapt their legislation to fit the work arrangements used by digital platforms. The excessive instability and job insecurity derived from no-minimum-hour work arrangements justifies its exclusion from the Spanish legal-labor system as a way to guarantee and protect workers' rights.

In the debate regarding the need to adapt or review current labor regulation to allow the platform work model based on hiring on-demand, my opinion is contrary to a section of the literature, which argues in favor of modifying regulations regarding working time to include, within the employment contract, workers' flexibility in determining their own working time.<sup>38</sup>

Nevertheless, the intent with this position is not to prohibit platform work nor prevent technological innovations and advancements. On the contrary, the idea is to identify existing work arrangements that might suit the platform

work model; in other words, channel platform work through labor institutions already available in the legal system.

In this context, my opinion is that platform work in the Spanish legal system could be performed through the part-time contract. The Spanish regulation regarding part-time work allows a high level of flexibility regarding management of working time that, in my opinion, could fit with the business model of digital platforms. As discussed above, the part-time contract in the Spanish legal system allows for the possibility of establishing a reduced number of ordinary working hours (minimum ten hours a week on an annual basis) and increasing working time through additional hours, which can be up to 45%, or even 90%, of ordinary working time when extended by collective agreement.

This type of contract offers a high level of flexibility regarding working time which could fit well with the platform work model. The legal regime regarding additional hours in part-time work offers significant flexibility, as it allows workers with low ordinary working hours to supplement their salary by providing additional hours. It also allows companies to hire workers for a reduced number of hours and then increase them according to the company's productive and organizational needs.

The legal regime regarding part-time work in Spain has been identified by a section of the literature as providing excessive flexibility regarding working-time.<sup>39</sup> I believe that the current regulation on part-time work may fit well with the platform work model, as it entails the flexibility that this model requires.

In addition, the legal regime regarding part-time contracts in Spain is an improvement with respect to the zero-hour contract, as it also offers some stability and legal certainty to workers. As analyzed previously, additional hours can only be developed by workers with a minimum working time of ten hours per week on an annual basis. Furthermore, workers who have an indefinite contract can only accept voluntary additional hours. This regulation offers some labor stability and certainty to workers, as they know beforehand the minimum number of hours per week they

37. Adams, Freedland and Prassl (2015, p. 19).

38. In this sense, see Todolí Signes (2017, p. 74).

39. Sánchez Torres (2014).

will provide services and, hence, the minimum amount of remuneration they will receive. Additionally, only workers with a stable relationship with the platform will be able to access voluntary additional hours.

As a result, workers will not bear the entire risk of inactivity periods, lack of demand, excessive competition in the platform, malfunctioning of the platform etc., as they will be guaranteed a minimum amount of remuneration for their time.

Regarding the determination of working time and, therefore, compensation, it is important to note that the current European regulation regarding working time requires working time to be considered as the time during which workers are logged on to the app and available to receive or accept tasks or services. According to article 2.1 of Directive 2003/88/EC of the European Parliament and of the Council of November 4, 2003 concerning certain aspects of the organization of working time, working time is defined as “any period during which the worker is working, at the employer’s disposal and carrying out his activity or duties, in accordance with national laws and/or practice”. The length of time for which workers are connected to the App, not only connected and locatable, but available to receive tasks or services at any time and with the obligation to respond to them immediately must be considered, according to the EU Directive, as working time. And, as a result, this time must be calculated as working time and, hence, it must be time compensated. The former, however, without prejudice to the fact that the platform may, in accordance with the doctrine of the Court of Justice of the European Union,<sup>40</sup> establish a different remuneration figure for the period of time where workers are connected to the app and awaiting tasks or services and the period of time where workers are effectively providing services.

The use of the part-time contract in platform work offers platforms significant flexibility in the management and organization of working time. It allows the essence of their business model by which workers have a high degree of freedom in determining their working time and volume of work to be maintained without, however, shifting the entire risk of inactivity or job insecurity to the workers.

It is true, however, that the regulation of part-time work-essentially, the limits on additional hours-and the consideration of time workers are connected to the App and available as working time increase the costs of management and organization of work. It is true, that the zero-hour contract might be more beneficial for platforms, as it does not subject them to a minimum ordinary working time, limited additional hours, or management costs in terms of determining the optimal level of workers connected to the app at a given time. However, the excessive flexibility and labor instability that no-minimum-hour arrangements entail requires that platform work be channeled through an alternative labor contract or regulatory regime that offers flexibility in the management of working time and still guarantees some degree of labor stability and quality of work.

As argued by Prassl, “[e]nsuring the full application of employment law is crucial if we want to make the gig economy work for all. (...) For the industry to operate to everyone’s benefit, however, we need to ensure that platforms can no longer arbitrage around existing rules and have to bear the cost of their operations. Employment law is the key to equitable conditions for all workers, and equal competition amongst businesses new and old”.<sup>41</sup>

## 6. Final remarks

Online platforms like Uber, Lift, Taskrabbit, Deliveroo, Glovo or Amazon Mechanical Turk have significantly altered the form of work. The platform work model is based on the provision of services exclusively outsourced to a wide number of formally considered self-employed workers or independent contractors that are hired on-demand for the provision of a specific task or service.

This model, however, entails significant social risks, as it contributes to the precarization -or, in this context, “uberization”- of labor relations as a result of the substitution of employment relationships for independent contractors, the shift from permanent or, more or less, long-term relations to very short-term hiring, the increase in job insecurity as a result of the zero-hour scheme, the

40. Decision of the European Court of Justice (Third Chamber) of September 10, 2015 (c-266/14).

41. Prassl (2018, p. 133).

reduction in wages due to the remuneration by gig and the atomization of labor relations which reduces workers' effective collective rights.

From a labor law standpoint, however, the first argument regarding the platform work model is whether there is a misclassification of service providers on online platforms. In this debate, my opinion—coincident with the majority of judicial and administrative decisions that have analyzed this matter—is that platform work must be categorized as dependent and subordinate work and, hence, is the object of an employment relationship. Because of the indirect forms of management and control used by the platform and the lack of a true business organization by service providers, there is a misclassification of workers as self-employed workers or independent contractors.

The second argument is related to the zero-hour scheme used in platform work. As analyzed in this paper, online platforms acting in the gig-economy use, *de facto*, the zero-hour contract as workers are hired when there is a demand for a task or service and for the exact duration of the task or service. The zero-hour contract allows platforms to

perfectly adjust the workforce to productive needs. However, it contributes to the precarization of work as it is a working time arrangement that does not guarantee a minimum working time and, as a result, a minimum compensation, shifting all risk of job insecurity to workers. In summary, in my opinion zero-hour contracts should be precluded in legal systems in terms of guaranteeing and protecting workers' interests.

Platform work should be carried out through an employment contract and in fair working conditions in terms of working time and salary. Platform workers should have a recognized minimum and maximum working time. Despite allowing for a working time scheme that attributes greater flexibility to workers to determine the distribution of their working time, platform workers should be guaranteed a minimum and maximum working time with a corresponding guaranteed salary. In the Spanish legal system, part-time contracts with the possibility of working additional hours results as the appropriate contract for platform work, as it allows an important working time flexibility in management and the organization of working time, without shifting the entire risk of inactivity or job insecurity to workers.

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### About the author

Anna Ginès Fabrellas  
 anna.gines@esade.edu

Associate Professor, Department of Law in ESADE  
 Contracted Doctoral Professor URL  
 Universitat Ramon Llull, ESADE Law School

<http://www.esade.edu/faculty/anna.gines>

Avenida Pedralbes, 60-62  
 08034 Barcelona  
 Spain

