The Gig Is Up: New Rules for Platform Work and the Digital Boss

27 November 2024

After a prolonged and controversial journey through the EU legislative process, on 11 November 2024 the Directive on improving working conditions in platform work ("Platform Work Directive") was published in the Official Journal. EU member states will have until 2 December 2026 to transpose its provisions into national law.

In the latest instalment in our AI series, we explain which employers and workers come within the scope of the Platform Work Directive as well as the requirements the Directive imposes and offer some suggestions for employers grappling with these difficult issues.

What is platform work?

Platform work is commonly referred to as the "gig economy" or "crowd work", the rise of which in recent years has transformed traditional employment models enabling people to work flexibility . The Directive defines platform work as any work organised through a digital labour platform and performed in the EU by an individual on the basis of contractual relationship between the digital labour platform or an intermediary and the individual.

Which employers come within the scope of the Directive?

The Platform Work Directive applies to "digital labour platforms", which are legal or natural persons providing a service meeting the following four requirements:

- The service must be provided, at least in part, at a distance by electronic means (such as via an app);
- It must be provided at the request of a recipient of the service;
- The service must have, as a key component, the organisation of work performed by individuals in return for payment (whether online or in a particular location) and;
- The service must involve the use of automated monitoring or decision-making systems.

Therefore, employers that come within the scope of the Directive largely include those which operate in the gig economy (such as a food delivery service or taxi service), however it is not restricted to these cases. As such, employers who provide a mixture of gig economy services and ordinary services should

take note of the requirements of the Directive and a consideration made on whether they come within scope should be made on a case by case basis.

Which workers come within the scope of the Directive?

The Directive sets out a presumption of an employment relationship between a digital labour platform and a person performing platform work that is triggered when there are facts indicating that "direction and control" are present, taking into account national law, collective agreements and EU case law.

The presumption aims to address the imbalance of power between the platform and persons who perform platform work. The burden of proof lies with the platform. Therefore, it is up to the platform to prove that there is no employment relationship.

The focus on "direction and control" aligns to the factors set out in *The Revenue Commissioners v Karshan (Midlands) Limited t/a Domino's Pizza* case in determining employment status in Ireland. In the *Karshan* case, the Supreme Court set out a five step test in determining an individual employment status, which has been dealt with here. This test has been reflected in the recently updated Irish Code of Practice on Determining Employment Status which was published earlier this month.

The Directive distinguishes between "platform workers", who are employees, and "persons performing platform work", a broader category including employees and non-employees. Whilst not all persons performing platform work may meet the threshold of a platform worker, certain provisions of the Directive, such as the restrictions on forms of data processing, will apply to all individuals who carry out platform work.

The Directive also provides that attempts to avoid its provisions by way of intermediaries (such as subcontracting arrangements) should not be permitted by member states.

Obligations on digital labour platforms

- The Directive introduces a number of new obligations in relation to the use of automated monitoring and decision making, in addition to safeguards for platform workers. These include:
- **Declaration of work:** Digital labour platforms will be required to declare work performed by platform workers to the competent authorities of member states, and to make certain information regarding their use of platform work available to these authorities;
- **Health and safety assessments:** Health and safety assessments will be required to be carried out in respect of platform workers;
- **Human oversight and review**: The Directive requires digital labour platforms to subject their algorithmic management systems to human oversight and review. Suspensions, dismissals, or equally significant decisions must be taken by a human in light of the potential for discrimination;
- **Challenge to AI decisions:** Platforms workers and recruitment candidates will have a right to obtain an explanation for any decision taken or supported by an automated decision making system without undue delay;
- **Enhancement of data protection rights:** Digital labour platforms may not process data on workers' emotional or psychological state, their private conversations, the exercise of their fundamental rights, any protected characteristics, and biometric identification, or collect data while

a person is not performing platform work; these prohibitions apply from the start of the recruitment procedure. There is an express prohibition against relying on platform workers' consent when processing their personal data. Employers must also seek the views of workers' representatives while carrying out any data protection impact assessments regarding these automated systems;

- **Information and consultation requirements:** The Directive imposes information and consultation requirements on digital labour platforms seeking to introduce or make substantial changes to algorithmic management systems. There is also an obligation on digital labour platforms to set up confidential communication channels for persons performing platform work on their platform and;
- **Protection from penalisation / dismissa**l: The Directive provides that people performing platform work, including those whose employment or other contractual relationship has ended, should have access to timely, effective and impartial dispute resolution and a right to redress, including adequate compensation and that people performing platform work should be protected from being penalised for attempting to enforce their rights.

How can employers prepare?

In preparation for the implementation of the Directive, employers should take the following steps:

1. **Scope:** Employers should consider whether they come within the scope of the Directive or if they have purchased or hired software from specialised companies that may include algorithmic or AI-powered tools that come within the scope of the Directive.
2. **Review work practices**: Conduct a thorough review of their contractual documents and work practices to determine whether any workers could be deemed employees.
3. **Data privacy compliance:** Consider updating their existing GDPR compliance policies in accordance with the Directive.
4. **Human intervention and oversight:** Pre-emptively address forthcoming obligations related to algorithmic oversight by ensuring there is human oversight when using automated systems particularly in higher risk circumstances.
5. **Risk assessments:** Conduct risk assessments in relation to the use of automated decision making in the workplace.

Matheson's Employment, Pensions and Benefits Group is available to guide you through the complexities of navigating the ever increasing use of AI in the workplace, the gig economy and new legislation being introduced in this area, so please do reach out to Employment partner Alice Duffy or your usual Matheson contact.