

Part II

The employment relationship

69. The COVID-19 pandemic is accentuating uncertainties that already existed in many countries in relation to the determination of whether or not a worker is in fact in an employment relationship. Given the impact of the pandemic on the structure and organization of work, a number of legal issues are emerging with regard to contractual obligations and labour law.

70. As the Committee noted in Chapter 2 of its 2020 General Survey on the application of Recommendation No. 198, it is the existence of an employment relationship that gives rise to reciprocal rights and obligations between the employer and the employee and it is primarily through the vehicle of this relationship that a worker may secure access to employment-related rights and benefits.¹²² The pandemic has drastically changed the situation in labour markets across the world in various respects. In addition to the lockdown measures that have stopped work and production, other measures intended to increase flexibility and adaptability to the crisis are affecting the working conditions of millions, in many cases modifying the employment relationship. For example, due to a decline in business, an employer may seek out of necessity to move a worker from full- to part-time work, albeit temporarily, with a corresponding loss of income for the worker.

71. Reductions in working hours and wages may be related to situations in which workers are required to share the same job, or where companies decide to share workers. Such measures have been taken by employers to overcome unprecedented challenges, ensure the continued viability of their businesses and retain their workers. Nonetheless, the measures may not be sufficient to achieve their objectives, or employers and workers may not be able to reach agreement on the actions to be taken. In such cases, enterprises may have no other option than to lay off or terminate the employment of workers, even though that will mean that they face greater difficulties in resuming operations once they are able to do so. One difficulty is the potentially significant loss of skilled and experienced workers who, faced with a loss of income, may find employment in other less affected sectors or occupations and no longer wish to return once circumstances permit.

72. The Committee observes that flexibility will no doubt be needed to ensure sustainable recovery; however, the challenge lies in ensuring that flexibility measures do not erode existing decent working conditions or contribute to increased informalization of the world of work. Moreover, while the pandemic has significantly changed the nature and organization of work for millions of workers, these effects have been greater for certain workers, primarily for those whose employment status is not clear, who are in alternative working arrangements, or who belong to one or more groups that are vulnerable to exclusion and discrimination in employment.

73. This Part of the Addendum therefore examines whether and to what extent the various elements of the employment relationship addressed in the 2020 General Survey have been affected by the pandemic and the urgent measures taken to prevent the spread of the virus.

¹²² Para. 157.

► 1. Ensuring the legal protection applicable to all appropriate contractual arrangements within the context of COVID-19

Force majeure and state of necessity

74. During the pandemic, enterprises and employers have in general experienced substantial disruptions of business and operations, including the closure of workplaces and ports, disruptions to supply and distribution chains, a shortage of labour and a considerable decline in demand. These disruptions may also have an impact on employment contracts. Employers may be forced to make difficult decisions concerning hiring, lay-offs, furlough and the payment of compensation.¹²³ In many countries, governments and social partners have considered the impact of the pandemic to be a situation in which force majeure could be invoked. The concept of force majeure is derived from Romano-Germanic law and is an implied legal doctrine in many legal systems, including in the civil and common law systems. The concept of force majeure¹²⁴ translates roughly as “a superior force” and refers to the occurrence of an event that is outside the reasonable control of the parties. Force majeure may apply to a situation that effectively prevents one party from performing obligations under a contract. The ability to claim the existence of force majeure depends on the applicable law and the wording of the force majeure clause itself.

75. While force majeure was initially referred to in commercial and civil contracts, many labour laws and codes now also explicitly envisage the possibility that force majeure may prevent the performance of a labour contract. The law may provide for the suspension or termination of the contract or for the suspension or modification of certain of its conditions.¹²⁵ Both employment contracts and collective agreements may contain clauses concerning situations of force majeure.¹²⁶ When such provision is made in the contract, it is easier to evaluate changes in the relationship during the occurrence of the event or situation that constitutes force majeure. However, it is often difficult to examine the circumstances in which force majeure occurs. For example, in the context of the pandemic, a situation of force majeure may arise out of the pandemic itself, or from the measures taken by a government to limit and mitigate its effects. This can occur in any form of employment relationship or work arrangement, and may affect employers and employees, as well as self-employed workers. Force majeure may be invoked in cases where, due to events, the performance of the contract has become extremely difficult, or impossible. One or both parties may seek to modify the terms of the contract to adapt them to the changed circumstances. If modification is impossible, then the party may request to be relieved of its obligations under one or more clauses of the contract, or for the contract as a whole to be rescinded due to the impossibility of its performance.

¹²³ Peter A. Steinmeyer and Amy Bharj, “You Are Excused: Force Majeure and the Workplace in the COVID-19 Era”, *The National Law Review*, 31 March 2020.

¹²⁴ Also sometimes referred to as “vis major” or “Act of God”, referring to a “loss that results immediately from a natural cause without the intervention of man, and which could not have been prevented by the exercise of prudence, diligence and care”, *Black’s Law Dictionary*, fifth ed., 1981. The International Law Commission defines force majeure as “the occurrence of an irresistible force or of an unforeseen event, beyond the control of the State, making it materially impossible in the circumstances to perform the obligation” and which excuses non-compliance with an obligation. These circumstances “do not annul or terminate the obligation; rather they provide a justification or excuse for non-performance while the circumstance in question subsists” and entail that compliance must resume as “soon as the factors causing and justifying the non-performance are no longer present”. United Nations, *Yearbook of the International Law Commission*, 2001, 71.

¹²⁵ For example: *Cambodia* (Labour Law, section 71 “act of God”), *Colombia* (Substantive Labour Code, section 51 et al.), *Costa Rica* (Labour Code, section 74(b)), *Ecuador* (Labour Code, section 169) and *France* (Labour Code, sections L1234-12 and 13).

¹²⁶ Defined generally as an event that is unforeseeable, unavoidable and impossible to overcome, although the definition may differ in national legislation. Moreover, circumstances differ and cases of pandemic or epidemics may often be excluded. Furthermore, the national law in each country specifies the requirements to effectively claim force majeure as a justification for non-performance.

Spain – Section 22 of Royal Legislative Decree No. 8/2020 defines temporary force majeure due to COVID-19¹²⁷ as those suspensions and reductions in working hours that have their direct cause in losses of activity caused by COVID-19, including the declaration of the state of alert, which imply the suspension or cancellation of activities, the temporary closure of premises open to the public, restrictions on public transport and, in general, on the mobility of people and/or goods, lack of supplies that seriously impede the ordinary performance of the activity, or in urgent and extraordinary situations resulting from the infection of the workforce or the adoption of preventive isolation measures ordered by the health authority, which are duly accredited.

Section 2 of Royal Legislative Decree No. 9/2020 of 27 March provides that force majeure may not be understood as justification for dismissal or termination of employment.

76. In many countries, the national authorities first declared a “state of necessity” or public health emergency,¹²⁸ subsequently declaring an economic and social emergency due to COVID-19.¹²⁹ This is manifested by the imposition of various measures on the basis of national security and public health. The Committee recalls that, while limitations on rights and freedoms are understandable to a large extent, they still need to comply with various parameters of international law, particularly the principle of legality so that those constraints must not be arbitrary and must be based on law; the principle of necessity requiring the Executive branch to prove that limitations are genuinely necessary according to the circumstances; and the principle of proportionality positing the need to test constraining measures as proportionate to the risks and exigencies of the situation. The Committee observes that checks and balances are being eroded in several settings, with a slippery slide into abuse of power, impacting upon constitutional rights under the international rule of law.

Guatemala – Ministerial Decision No. 140-2020 provides in section 1 that the public state of calamity declared by the President constitutes force majeure and therefore has the effect of temporarily suspending employment contracts pursuant to section 65 of the Labour Code. The suspension may be individual or collective, total or partial. The Decision calls on the social partners to reach agreement on the terms and conditions of the suspension.¹³⁰

77. The Committee notes that the authorities in a number of countries have explicitly declared that the COVID-19 pandemic constitutes a situation of force majeure. The consequences of the acceptance of a situation of force majeure also vary according to national law and the specific circumstances of each case. Generally, the result is that a change in the employment relationship is considered not to be attributable to any of the parties to the contract and that, therefore, it should not give rise to sanctions or damages. In practice, in the great majority of

¹²⁷ As provided in sections 47.3 and 51.7 of the Workers’ Statute.

¹²⁸ It has been declared a health emergency, or a similar denomination, for example, in: *Brazil* (Legislative Decree No. 6 of 20 March 2020); *Chile* (Act No. 21227 on the protection of employment); *Colombia* (Decision No. 386 of 2020 of the Ministry of Health and Social Protection); *Liberia* (declaration of the health emergency by the Ministry of Health on 22 March 2020); *Peru* (Decreto Supremo No. 044-2020-PCM and Decreto Supremo No. 046-2020-PCM); and *Spain* (Royal Decree No. 463/2020, of 14 March, declaring the state of alert).

¹²⁹ For example: *Colombia* (Decree No. 417 of 17 March 2020); *El Salvador* (Legislative Decree No. 593 of 2020); and *Luxembourg* (the Grand Ducal Regulation of 18 March 2020 declaring a state of emergency).

¹³⁰ *Guatemala*, Ministry of Labour and Social Welfare, [Ministerial Decision No. 140-2020](#), of 23 March 2020.

cases, it is incumbent on the courts or the labour authority to determine on a case-by-case basis whether or not the exceptional circumstances have prevented the performance of the contract.¹³¹ In some cases, in view of the profound and widespread impact of the pandemic, the mere invocation of force majeure is sufficient to be able to claim unemployment protection.

Belgium – Any temporary unemployment as a result of the pandemic may be deemed to constitute temporary unemployment due to force majeure. The procedures for claiming unemployment benefit have been simplified.¹³²

78. One country has explicitly stipulated that any dismissal, either individual or collective, must be subject to specific authorization by the national authority, including in cases considered to be covered by force majeure.¹³³

79. Other countries have, however, taken a different approach, adopting measures to prevent the application of the doctrine of force majeure, even where it is provided for in labour law, primarily with a view to avoiding massive redundancies and lay-offs that could deeply affect the national labour market and economy.¹³⁴ In other instances, the right to claim force majeure as a justification for collective dismissal has been limited to extreme cases involving the closure of the enterprise.

Ecuador – The Humanitarian Support Act contains an interpretative clause providing that section 169.6 of the Labour Code on impossibility of performance due to force majeure may only be invoked in the event of the total and definitive closure of the enterprise. The force majeure claim must be based on the fact that the work cannot be carried out by any means, including telework.

Netherlands – Workers who are isolating and cannot work from home may be covered by short-time work schemes introduced in situations of force majeure.¹³⁵

¹³¹ For example: *Spain* (Royal Legislative Decree No. 8/2020, section 22(2)(b)).

¹³² *Belgium*, National Employment Office, “[Chômage temporaire à la suite de l'épidémie de CORONAVIRUS COVID-19 – Simplification de la procédure](#)”, 20 March 2020.

¹³³ For example: *Argentina*.

¹³⁴ For example, *Costa Rica* (Act 21227 of 2020, section 26 prohibits the dismissal of workers based on force majeure, at least for six months after the declaration of the State of Catastrophe); *Peru*.

¹³⁵ OECD, OECD Policy Responses to Coronavirus (COVID-19), “[Supporting people and companies to deal with the COVID-19 virus: Options for an immediate employment and social-policy response](#)”, updated on 20 March 2020.

► 2. A modified employment relationship

80. A range of measures have been envisaged or implemented at the national level by governments and enterprises to cope with the adverse economic effects of the pandemic and reduce job uncertainty and the risk of dismissal. The first and most evident measure that prevents fulfilment of the labour contract is lockdown. If an activity is not considered essential, employers have not been allowed to open the workplace and workers have been unable to go to work. However, many such measures have had a direct impact on the employment relationship and the rights of workers. The measures that are proposed in some cases, and imposed in others, have the clear objective of avoiding individual and collective dismissals.

Colombia – Circular No. 22 issued by the Ministry of Labour in March 2020 indicates that the various measures made available to employers are intended to help them address difficulties. It calls on employers to maintain solidarity and support for workers and their families during the pandemic, irrespective of their contractual status, by exploring such measures as: working from home (teleworking); flexible working hours; accumulated, early and collective holidays; paid leave; and the payment of wages during periods when workers are unable to work during the crisis.

81. Some jobs can be broken down into separate tasks that can be measured easily and performed anywhere, thereby expanding the range of jobs suitable for telework. Many jobs can be standardized and, with the help of digitalization and artificial intelligence, performed very efficiently at home. For example, accounting, insurance and call-centre work are some of the many functions that can now be carried out at home. Limited and agreed means of communication, control and monitoring can help to improve productivity and the quality of the services provided.

The *IOE* highlights that a more agile and flexible working environment can also bring about productivity growth. Measuring employee performance less on the number of hours worked each day, and more on achieving key deliverables or performance indicators is proving to be not just popular both with business and employees but a critical contributor to rises in productivity.

82. To ensure productivity, some enterprises and public institutions have shifted the focus from measuring the hours worked to the achievement of objectives or the measurement of performance indicators.¹³⁶ Nevertheless, the Committee highlights the importance of ensuring that those performance indicators and productivity objectives do not result in the deterioration of working conditions, in particular in the imposition of excessive working hours.

(a) Suspension of the employment relationship

83. In some countries, the measures adopted include the temporary suspension of the effects of labour contracts. In such instances, careful attention should be given to the legal consequences of these suspensions. In some cases, the mere declaration of a state of emergency or necessity allows the employer to suspend employment contracts. In such cases, workers do not in principle receive their wages or, in some cases, their wages are covered by specific COVID funds established by governments or by unemployment benefit.¹³⁷

¹³⁶ Michael Schrage, “Rethinking Performance Management for Post-Pandemic Success”, *MIT Sloan Management Review*, 1 June 2020; Mdwaba Mthunzi, “What the pandemic has taught us about labour productivity”, International Organisation of Employers, 22 June 2020.

¹³⁷ For example, *Chile*, under Act No. 21227 on the protection of employment, for the suspension to start, with the workers affected having access to benefits, the local authority has to declare a health emergency.

Brazil – Act No. 14020 of 6 July 2020 provides, in section 8, that, during the state of public emergency, employers may negotiate the temporary suspension of the employment contracts of their employees at the sectoral or departmental levels, partially or wholly, for a maximum of 60 days. During the period of temporary suspension of the employment relationship, the employee is entitled to all benefits provided by the employer to employees and is authorized to contribute to the General Social Security Scheme as an optional insured worker. The employment agreement must be re-established within two days of the termination of the state of public emergency, the end of the agreed suspension period, or the date of the notification of the employee by the employer of the decision to bring forward the end of the agreed suspension period.

Costa Rica – Decree No. 42248 of the Ministry of Labour issues regulations governing the procedure for the temporary suspension of labour contracts due to force majeure and fortuitous events, as provided for in section 74(a) and (b) of the Labour Code. Applications for the temporary suspension of employment contracts have to be made to the labour inspectorate, indicating the period for which the contract will be suspended and the workers affected.

(b) Suspension of acquired contractual rights

84. In some countries, the measures adopted to cope with the crisis unilaterally reduced or suspended workers' acquired contractual rights. For example, in some instances, where the employee was unable to work as a result of lockdown, and the worker was neither ill nor infected with the virus, the employer unilaterally required the worker to use his or her annual leave.¹³⁸ In other countries, employers have treated days on which the enterprise was closed and its employees could not work due to lockdown as *de facto* leave days.

In *Australia*, the Fair Work Commission has adopted a number of awards that allow employees to take annual leave at half pay to mitigate the impact of coronavirus the pandemic on the businesses that employ them. Employees are allowed to take twice as much annual leave at half their normal pay, if the employer agrees.¹³⁹

Republic of Korea – The Government has increased the amount of the 'Employment Retention Subsidy' for employers who have taken employment retention measures, such as temporary shutdown or placed workers on unpaid leave. From 1 July 2020, the Government has adopted the "Swift Support Program (SSP) for unpaid leave of absence". The SSP shortens the requirement for employers to cover 3 months of paid shutdown, reducing this period to one month before the subsidy of 500,000 won (USD\$ 454,000) per month will kick in. On the other hand, the SSP also halves the period during which the workers placed on unpaid leave will receive their wages from the subsidy, reducing this benefit from 180 days to 90 days.

¹³⁸ For example, in *Poland*, employers can impose annual leave entitlements to be used. There is also a limit on the amount of severance pay, and non-competition arrangements that require the employer to provide compensation can be unilaterally terminated by the latter (see [EU, Flash Reports on Labour Law June 2020 Summary and country reports](#). Cases were recorded in the *United Kingdom* (https://www.huffingtonpost.co.uk/entry/coronavirus-holiday-annual-leave-workers_). On the other hand, in *Australia*, the Fair Work Ombudsman clearly explains that COVID is not a reason to impose annual leave on employees. See "[Direction to Take Annual Leave during a Shutdown](#)".

¹³⁹ See *Australia*, Fair Work Ombudsman, "[Annual leave](#)", updated 14 August 2020. Similarly, in *Saudi Arabia*, para. 1B of section 41(1B) of Ministerial Resolution No. 142906 dated 13.8.1441(H) of 6 April 2020 provides that employers have the right to grant annual leave to employees. Employees cannot refuse to take leave on the dates set by the employer. This leave is paid.

► 3. The employment relationship and alternative working arrangements during the pandemic

85. In its 2020 General Survey, the Committee examined the use of various types of contractual arrangements that are distinguishable from “regular” open ended, full-time contracts between workers and a single employer. It explored the issue of temporary work, including fixed-term, project or task-based contracts, as well as seasonal or casual work. It also examined part-time work, in particular the situation of on-call and zero-hour contracts. The Committee also delved into multi-party employment relationships including temporary agency work and subcontracting as well as new forms of organization of work such as platform work.¹⁴⁰

The *IOE* considers that, as the health and lockdown measures are still in place, the world will see an even bigger differentiation between diverse forms of work. Employment instruments should not legislate against these changes but instead make full opportunity of these developments and facilitate access to all forms of work to accelerate quick COVID-19 recovery, increase employment creation and income generation opportunities, and maximize full productivity of the labour workforce. COVID-19 revealed the weaknesses of the existing social protection systems in place in both developed and developing countries, as they are no longer fit for purpose in the current labour market and new forms of employment relationships. Employment policies need to promote sustainable social protection systems that guarantee a minimum living income for all. The ILO Recommendation 202, discussed in last year’s General Survey is of particular relevance, especially given that there was a global tripartite consensus that the social protection floors be implemented according to national realities.

The Korea Employers Federation (KEF) expresses its concern about the growing tendency for an employment relationship to be determined by a third party such as the government and courts, rather than employers and employees themselves.

86. In this context, the Committee wishes to recall the principles and guidance provided by Recommendation No. 198, which stipulates that the determination of the existence of an employment relationship should be guided primarily by the facts relating to the performance of work and the remuneration of the worker, notwithstanding the manner in which the relationship is characterized in any arrangement, contractual or otherwise, that may have been agreed between the parties. The Recommendation provides explicitly that the settlement of disputes concerning the existence and terms of an employment relationship should be a matter for industrial or other tribunals or arbitration authorities to which workers and employers have effective access in accordance with national law and practice.¹⁴¹

Slovenia – In its report, the Government indicates that the Ministry of Labour, Family, Social Affairs and Equal Opportunities has undertaken the co-financing of the project “MAPA” (Multidisciplinary analysis of precarious work: legal, economic, social and healthcare aspects). This multidisciplinary project aims at achieving a synthesis in the definition of the concept of precarious work and reduce the negative effects of these forms of work to ensure better working conditions.

¹⁴⁰ See 2020 General Survey, paragraphs 273 to 326.

¹⁴¹ Paragraphs 9 and 14 of Recommendation No. 198.

Netherlands – In its report, the Government indicates that on 22 June 2020, the [Temporary Bridging Measure for Flex Workers](#) (TOFA) was introduced for flex workers that have been laid off after 1 March 2020 due to the Coronavirus crisis, with a substantial loss of income (more than 50 per cent in April compared to February and who cannot claim other benefits). The scheme consists of a one-off payment of €1,650 in total for the period of March, April and May 2020.

(a) Temporary work

87. The situation of workers with temporary contracts is clearly more precarious than that of permanent employees, and in the context of the pandemic they have been the first to be dismissed. Moreover, their employment status means that they are not eligible for the same benefits and protection as permanent workers.

Brazil – The Government indicates in its report that Law No. 13,429 of 2017 strengthens protections for temporary employees.

The *BDA* indicates that flexible forms of employment often help enterprises to create new jobs for the first time, tailors work volumes to individual needs and reduces obstacles to employment growth. They are a way to provide employment for low-skilled workers. Flexible forms of work, including part-time work, also reflect employees' ambitions and circumstances.

The *FNV* and the *CNV* from the Netherlands highlighted that "The large number of workers with flexible contracts (temporary agency workers and workers with a fixed term contract) who have lost their jobs due to the COVID-19 crisis are usually the workers with a limited duration of their unemployment insurance (WW). This means that for a large number of workers who lost their jobs during the first two months of the crisis, the insurance period has expired, since it is only three months for workers who do not have a long employment history."

88. In some countries, measures have been taken to ensure that benefits are extended to this category of workers.¹⁴² In other countries, limits on the maximum duration of temporary contracts have been suspended during the emergency to protect employment and prevent job destruction.

¹⁴² For example, in *Germany*, the possibility of short-time working has been extended to temporary agency workers. In *Spain*, employees can receive support irrespective of the period for which they have paid unemployment insurance contributions. See European Parliament, "At a glance: European added value in action, [EU-27 support for national short-time work schemes](#)", April 2020. Similarly, in *Switzerland*, the Federal Council decided on 21 March 2020 that temporary agency workers (*intérimaires*) could also have access to partial unemployment benefit. *Brazil* indicates in its report that, according to the labour law (CLT) "Whenever one or more companies, even when each one of them has its own legal personality, is/are under the direction, control or administration of another company, or even when each one preserves its autonomy while being part of an economic group, they shall be jointly liable for the employment relationship obligations".

Germany – All workers who pay social security contributions are entitled to short-time work allowances, including temporary agency workers and workers on fixed-term contracts. However, workers engaged in “mini jobs” are not covered, as they are exempt from social security contributions.

Spain – Under the terms of Royal Legislative Decrees Nos 9/2020 and 24/2020, the limits on the duration of temporary contracts were suspended until 30 September 2020.

United Kingdom – Workers with fixed-term contracts have been entitled to benefits under the Job Retention Scheme since 1 July 2020. Employers can bring back employees on reduced hours or any shift pattern, and still claim support for the hours not worked.¹⁴³

89. The economic and financial shocks caused by the sudden outbreak of COVID-19 and the ensuing lockdown have forced enterprises to reduce their operational expenditures, including labour costs. Workers with temporary contracts, including fixed-term and short-term contracts, tend to be the worst affected by economic downturns, as their contracts are more likely than those of permanent employees to be terminated or not renewed.¹⁴⁴

90. In some countries, measures have been adopted to facilitate the conclusion of temporary contracts during the pandemic as a means of mitigating the economic impact of the crisis on enterprises and at the same time reactivating the labour market. In particular, measures were adopted to enable the extension of fixed term contracts, in some cases for periods longer than the previous contract.

Ecuador – The Humanitarian Support Act provides, in section 19, for an “emergent special contract” for a fixed period (a maximum of one year, renewable once) to ensure the sustainability of production. Once the initial period has ended, the contract is considered to be permanent if it is extended.¹⁴⁵

Indonesia – On 5 October 2020, Indonesia’s Parliament passed the Omnibus Law (2020 Job Creation Law), introducing significant amendments in a range of areas, including on fixed-term employment. Previously, fixed-term employment contracts could only last up to two years and be extended once for up to one year. Then, after a one-month gap, these contracts could be renewed once for up to two more years. If these requirements were not followed, the contract would be deemed permanent.

The 2020 Job Creation Law removes all of these restrictions on the duration, extension and renewal of fixed-term employment contracts. However, the restrictions on the type of work for which fixed-term employment contracts may be used have generally been retained, but with some adjustments.

¹⁴³ Government of the *United Kingdom*, Coronavirus (COVID-19), Guidance and Support, “[Check if your employer can use the Coronavirus Job Retention Scheme](#)”, updated on 7 August 2020.

¹⁴⁴ For example, in *Switzerland*, in July 2020, between 80 and 90 per cent of workers in Swiss Romande and Ticino had been affected by the non-renewal or expiry of employment contracts. Nouvelle Agence Economique et Financière SA (AGEFI), “[Près de 20.000 postes temporaires sont menacés en Suisse](#)”, 29 July 2020.

¹⁴⁵ *Ecuador*, [Ley Orgánica de Apoyo Humanitario](#), 19 June 2020.

Italy – Under the “Re-launch” Decree No. 34 of 19 May 2020, fixed-term contracts may be extended. By derogation from section 21 of Legislative Decree No. 81 of 15 June 2015, to promote the restart of activities, fixed-term employment contracts concluded prior to 23 February 2020 can be renewed or extended until 30 August 2020. Until 31 December 2020, it was possible to extend and renew fixed-term contracts once without the need for a justification. However, their extension must not exceed the 24-month limit, unless otherwise provided in a collective agreement.

(b) Part-time work, on-call work and zero-hours contracts

91. In many countries, recovery has translated into a rise in part-time work while the percentage of full-time employment has fallen below rates of full-time employment seen during previous crises such as in the economic and financial crisis of 2008.¹⁴⁶

92. As noted in the 2020 General Survey, on-call work is an increasingly common form of part-time work that consists of working-time arrangements involving highly variable and unpredictable hours of work. Zero-hours contracts are similar to on-call work in that they do not establish a fixed or guaranteed number of hours of work.¹⁴⁷

The *BDA* of Germany indicates that under German law, employers and employees agree on a specific number of hours during which the employer may call upon the employees, subject to the agreed or statutory time limits. Where the employer does not make a call during the on-call period, he/she nevertheless has a payment obligation.

United Kingdom – The self-employed income support scheme also covers workers with zero-hours contracts.¹⁴⁸ However, as indicated by the Trades Union Congress (TUC), many zero-hours contract workers do not earn enough to be eligible for sick pay. Workers on zero-hours contracts are entitled to statutory sick pay, but only if they have done at least some work for the company and have been ill for at least four days in a row, including on their days off. Such workers must also have earned an average of at least £118 a week before tax over the past eight weeks. These requirements mean that many workers on zero-hours contracts, despite their low income, nevertheless fall outside the scope of the income support scheme.

¹⁴⁶ See for example: Greg Jericho, “Australia’s Post-Covid Jobs Snapback is All About Part-Time Work”, *The Guardian*, 19 October 2020.

¹⁴⁷ Paras 290 and 291.

¹⁴⁸ <https://petition.parliament.uk/petitions/301328>.

(c) Platform work

93. As the Committee noted in its 2020 General Survey, platform work has always involved an asymmetry of risk between the worker and the platform, with workers bearing most of the risk. These asymmetric relations have become more pronounced during the pandemic. Many platform workers have had to face the risk of losing their jobs, as well as the risk (and the serious potential consequences) of exposure to the virus and loss of income, while continuing to provide essential services for society.¹⁴⁹

94. During the early days of the pandemic, the question arose of whether these workers should continue working, with the response depending mainly on the sector concerned.

Demand for the services provided by digital labour platforms initially declined in March 2020, before picking up again by the end of April 2020. The decline during that period was quite steep compared with previous years, possibly because firms were postponing the outsourcing of work or projects due to the uncertain situation. It has been suggested that this decline may have been due to firms reducing non-essential costs, including outsourcing, due to declining revenue.¹⁵⁰

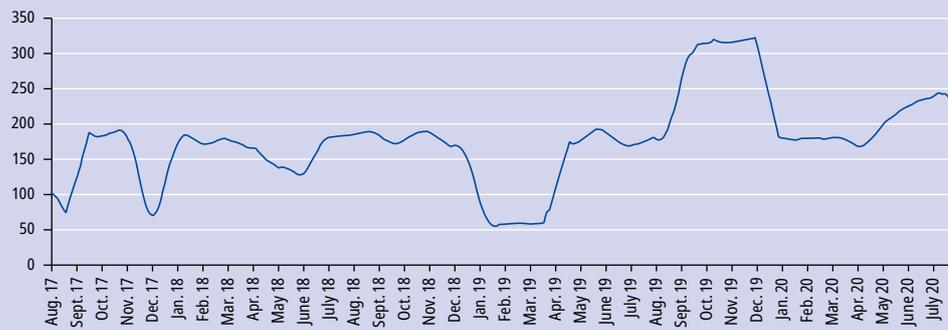
**Online labour demand and supply of labour
on major online labour platforms, 2016–20**

(a) Online labour demand (100 = 1 January)



¹⁴⁹ Funda Ustek-Spilda, Richard Heeks and Mark Graham, "Covid-19: Who will protect gig workers, if not platforms?", Social Europe, 28 May 2020.

¹⁵⁰ Stephany Fabian, Michael Dunn, Steven Sawyer and Vili Lehdonvirta, "Distancing Bonus or Downscaling Loss? The Changing Livelihood of US Online Workers in Times of COVID-19", *Tijdschrift voor economische en sociale geografie* 111(3), 28 June 2020.

(b) Online supply of labour (100 = 1 August)

Note: Data for online labour supply has only been collected since August 2017.

Source: Online Labour Index (OLI).

The supply of labour on digital platforms has been gradually increasing globally since 2017, with the largest increases from April to September 2019. There was a small dip in the supply of labour in March 2020, which may have been associated with the pandemic. However, from April 2020, the supply of labour on such platforms rose steadily until June, at a higher rate than in 2018 and 2019.¹⁵¹

95. In some cases, platform work was completely interrupted, as enterprises engaged in such areas as ride-hailing, domestic work and beautician services were forced to halt their operations. However, the situation was very different for delivery services, as demand grew under lockdown for home delivery. In many countries, this type of work was considered to be an essential service¹⁵² and was therefore authorized to continue.

96. For delivery workers, although they experienced a reduced risk of accidents due to less congested traffic conditions during lockdown, they faced an increased risk of infection without having access to PPE, social distancing measures, or even health care and social protection in the event of illness. At the same time, due to high demand, they were required to work longer and longer hours. In some countries, workers resorted to legal action and protests, expressing their urgent need for health and safety measures, including access to PPE and paid sick leave.¹⁵³

97. For those who could not work, questions arose regarding the type of income support, if any, to which they might be entitled, whether they had other sources of income and the type of protection to which they should be entitled in case of illness, or if the platform were to close down for reasons related to the pandemic.

¹⁵¹ ILO (2021), *World Economic and Social Outlook 2021: The role of digital labour platforms in transforming the world of work*, Geneva.

¹⁵² For example, *France and Italy*.

¹⁵³ For example, in *Brazil*, delivery drivers for UBER, Rappi and others protest amid pandemic, (see [Reuters, July 2020](#)) or in *China*, ([Couriers in China protest late wages during an e-commerce boom resulting from the Covid-19 pandemic](#)) See Jennifer Venis, "[Covid-19: Pandemic highlights holes in workers' rights](#)", International Bar Association, 7 May 2020.

98. As platform workers are considered by law in many countries to be self-employed workers, they do not have the same entitlements as other workers to sick pay or sick leave, holiday pay, the minimum wage, unemployment insurance and other benefits.¹⁵⁴ Moreover, they are generally not eligible to apply for many of the support measures provided by governments during the pandemic. As emphasized by the European Parliament, the pandemic has highlighted the manner in which platform workers are systematically underemployed, underpaid, under-protected and lack basic social protection.¹⁵⁵ These workers are often concentrated in the informal economy. To stop working is not even an option for them, forcing them to assume the risk of continuing to work, even if they become ill, with the danger of transmitting the virus to others.

The *CUT* and the *CTC* refer to various draft laws aimed at establishing certain guarantees for persons who receive income through platforms, including: (i) Draft Law No. 085 of 2020, which regulates the hiring of persons by labour platforms and their contribution to the social security;¹⁵⁶ and (ii) Draft Law No. 221 of 2020, which establishes social guarantees for persons who generate income through the use of technological platforms.¹⁵⁷ The workers' organizations claim that such drafts, for which they were not consulted, consider workers as independent workers, despite the fact that in reality they depend economically on the platform company. Draft Law No. 085 of 2020 provides that workers are under a civil or commercial relationship and as such are covered by the special social security regime for independent workers. The *CUT* and the *CTC* also indicated that these workers are mainly Venezuelan migrants in an irregular situation and therefore cannot join the social security system. Furthermore, Draft Law No. 085 of 2020 makes the right of association of these workers dependent on the adoption of some regulations by the Ministry of Labour.

99. Some platforms had to adapt rapidly to a sharp fall in demand for their services. In response, many platforms began providing additional or alternative services.

Slovakia – Following the ban on taxis transporting people, a taxi platform began delivering meals.¹⁵⁸

¹⁵⁴ European Foundation for the Improvement of Living and Working Conditions (Eurofound), "[Platform economy: Developments in the COVID-19 crisis](#)", 3 July 2020.

¹⁵⁵ European Parliament, Parliamentary questions, "[Platform work in the context of the Covid-19 crisis](#)", Kim Van Sparrentak, Leila Chailbi and Petra De Sutter, 6 April 2020; J. Venis, "Covid-19: Pandemic highlights holes". In the *Republic of Korea*, delivery workers have been facing an increase of work pushing them to extreme fatigue and even death by overwork (14 cases have been denounced) <https://www.bbc.com/news/world-asia-54775719>.

¹⁵⁶ <http://leyes.senado.gov.co/proyectos/index.php/textos-radicados-senado/p-ley-2020-2021/1866-proyecto-de-ley-085-de-2020>.

¹⁵⁷ <http://leyes.senado.gov.co/proyectos/images/documentos/Textos%20Radicados/proyectos%20de%20ley/2020%20-%202021/PL%20221-20%20Plataformas%20Tecnologicas.pdf>.

¹⁵⁸ Eurofound, "Platform economy"; and *The Slovak Spectator*, "[Alternative taxi services deliver food instead of people](#)", 2 April 2020.

100. A range of initiatives have been implemented in the platform economy to address certain of these issues, and there has been some recognition of the importance of the services provided by delivery workers during the pandemic.

101. Declines in demand have in some instances resulted in a reduction in the number of platform workers.¹⁵⁹ In some cases, enterprises have decided to provide platform workers with some form of income support (additional months or weeks of payment). Some platforms have applied for government assistance to avoid dismissals and help them manage their operational costs.¹⁶⁰ In other instances, measures taken to support self-employed workers have been extended to cover platform workers.

Denmark – A temporary compensation scheme for the self-employed has been introduced that also covers platform workers.

United Kingdom – The self-employed income support scheme has been made accessible to platform workers, who may apply to receive a grant of 80 per cent of their average monthly earnings over the past three years, up to a maximum of £2,500 a month. Recipients of the grant can continue to work.

102. Governments have taken measures to inform enterprises, workers and clients in retail food stores, restaurants and pick-up and delivery services of the practices to be followed during the pandemic to protect workers and clients.

United States – The Food and Drug Administration (FDA) has issued information on best practices for employee health, cleaning and sanitizing, as well as on the correct use of PPE.¹⁶¹

103. Many platforms have provided information to workers on how to protect themselves and make deliveries safely. In some cases, platforms indicate on their websites that they have provided or reimbursed the cost of PPE to workers.¹⁶² The pandemic has also pushed many platform enterprises to explore the possibility of moving towards automation, with certain delivery platforms testing the use of robots to carry out delivery services so as to reduce reliance on human workers during the pandemic.¹⁶³

¹⁵⁹ See, for example, James Cook, “[Deliveroo to axe over 300 staff as virus hits demand](#)”, *The Telegraph*, 28 April 2020.

¹⁶⁰ For example, financial support for up to 14 days for drivers or delivery workers who test positive with COVID-19 or are required to isolate by a public health authority. Uber, “[Notre approche face au COVID-19](#)”.

¹⁶¹ FDA, “[Best practices for retail food stores, restaurants, and food pick-up/delivery services during the COVID-19 pandemic](#)”.

¹⁶² Uber, “[Notre approche](#)”. See also *Switzerland*, Republic and Canton of Geneva, “[COVID-19: économie et emploi](#)”, updated on 17 September 2020.

¹⁶³ See, for example, the Rappi delivery enterprise in *Colombia*. Mary Meisenzahl, “[Softbank-backed delivery startup Rappi is testing out robots for contactless delivery – take a look](#)”, *Business Insider*, 9 May 2020.

India – The Code on Social Security, 2020 (No. 36 of 2020), provides a definition of “gig worker” (“a person who performs work or participates in a work arrangement and earns from such activities outside of traditional employer-employee relationship”) and “platform work” (“a work arrangement outside of a traditional employer-employee relationship in which organisations or individuals use an online platform to access other organisations or individuals to solve specific problems or to provide specific services or any such other activities which may be notified by the Central Government, in exchange for payment”). The Code is intended to make social protection schemes available to both gig and platform workers.¹⁶⁴

104. These issues are currently being reviewed in a number of countries, and courts in several countries have issued decisions holding that riders and even crowdworkers are in fact employees.¹⁶⁵

The European Commission has launched a process to address this issue of collective bargaining for self-employed. The initiative seeks to ensure that working conditions can be improved through collective agreements not only for employees but also for those self-employed who need protection.¹⁶⁶ This concerns in particular platform workers, many of which are considered as self-employed workers.

¹⁶⁴ *India*, [The Code on Social Security, 2020](#) (No. 36 of 2020).

¹⁶⁵ For example, the Geneva State Council in *Switzerland* has ordered Uber to classify workers as employees and ensure adequate social protection for them. Similarly, the Administrative Tribunal found that the enterprise Uber Eats is an employer and as such should apply the Labour Code and the collective agreement in the sector. In the *United States*, a court in California ruled in August 2020 that Uber and Lyft are not required to immediately reclassify their drivers as employees rather than independent contractors, which allows the ride-hailing services to continue operating in the state after they had threatened to pull out while the appeals court considers the question of driver status following the entry into force in January 2020 of California Assembly Bill 5 (AB5 law), which extends employee status to platform workers. Companies must use a three-pronged test to prove that workers are independent. See, in this regard, the 2020 General Survey, paras 306–327. Following the California legislative action, there has been a referendum in California in November 2020 which exempted Uber and Lyft from the new state law. In *Germany*, the Federal Labour Court ruled that the execution of micro-jobs by a crowdworker on the basis of a framework agreement concluded with a platform operator can result in the legal relationship qualifying as an employment relationship (Federal Labour Court. Ruling of 01.12.2020 – 9 AZR 102/20).

¹⁶⁶ European Commission, [“Competition: The European Commission launches a process to address the issue of collective bargaining for the self-employed”](#), Press release, 30 June 2020.