

Working through platforms is a recent but fast-growing phenomenon, with obvious implications for workers' rights. Discussions have so far focused on the status of platform-based workers, but, recently, a growing consensus is emerging by courts around the world that workers for platforms such as Uber are in fact employees. As a result, legal disputes are likely to shift, to a large extent, from status questions to working-time questions. This might seem like a very specific issue, but, in fact, it has crucial implications for the entire model of platform work, and addressing this question requires us to rethink some of the fundamental pillars of labour law, notably whether more room should be opened for flexibility and individual choice within this system. We argue that one aspect of the platform model – 'work on demand,' which allows workers to log into the app whenever they wish to do so – poses a difficulty. Workers should be compensated for the time they are 'on call' and available to work. But platforms can be expected to respond by assigning workers to pre-set shifts to avoid paying for an unknown amount of working hours, thereby dismantling the 'on-demand' model. Such a change would be welcomed by many employees, who will gain more security, but others can be expected to object to losing the flexibility which they value. We consider possible solutions that could allow workers to choose the 'on-demand' model. While rejecting the possibility of allowing employees to waive on-call compensation rights, we consider several intermediate solutions that ensure partial payments for this time or exempt employees with another full-time job. The proposed solutions are based on the understanding that more choice is preferable in labour law as long as we can protect the interests of the affected employees and eliminate the externalities that some choices might generate for other workers.

Keywords: labour law, employment law, platform economy, on-demand work, gig economy, working time, on-call time

I Introduction

Technological advancements open new opportunities for work but at the same time create new challenges. Digital online platforms like Uber claim that they allow workers to decide how much and when to work and that workers want and choose this flexibility. Their business model is based on classifying drivers as independent contractors, thus escaping all the obligations of labour and employment laws (hereinafter referred to together as 'labour laws'). This approach has now been rejected by several high courts around the world,¹ leading Uber and

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1 See subpart II.A.

its competitors and collaborators to pressure legislators to adopt some intermediate model for platform-based work. These firms argue that such a new model is necessary to allow workers to retain the flexibility which they want and choose – flexibility which the firms claim is incompatible with existing labour laws. Having succeeded in California, where a recent referendum resulted in a new model specifically for app-based transportation and delivery companies,² Uber is now pushing for similar amendments to labour laws in Canada and elsewhere.³

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

The second goal of this article is to examine whether this working-time model should be allowed and, if so, under what circumstances and which legal changes are required to allow it. The implications are not limited to app-based transportation companies like Uber. Because of developments in technology and the labour market – developments that have accelerated as a result of the COVID-19 crisis⁴ – more people in more sectors can be expected to work ‘on demand’ through apps, often on a part-time, irregular basis (so-called ‘gig’ work). Deciding how this kind of work should be regulated is therefore crucial.

In its recent judgment in the case of *Uber v Aslam*, the UK Supreme Court accepted the drivers’ claim for employment rights and ordered that all hours of being logged into the app will be considered working time.⁵ However, the working-time issue was only briefly discussed, and it left some room for case-by-case examination.⁶ Uber announced that it would accept the result with regard to status

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

3 Sara Mojtehdzadeh, ‘Uber Pitches New Provincial Rules to Keep Gig Workers as Contractors — as Workers’ Resistance Ramps Up,’ *Toronto Star* (28 April 2021), online: <www.thestar.com/news/gta/2021/04/28/uber-pitches-new-provincial-rules-to-keep-gig-workers-as-contractors-as-workers-resistance-ramps-up.html?source=newsletter>. On a similar initiative in other states, see subpart II.C.

4 See e.g. Guy Mundlak & Judy Fudge, ‘The Future of Work and the Covid-19 Crisis,’ *Futures of Work* (5 June 2020), online: <futuresofwork.co.uk/2020/06/05/the-future-of-work-and-the-covid-19-crisis/?fbclid=IwAR2ypCKDzmr9rvqvQc0Rnm_4pYk53ixVAUKoh4LWPE1e2gCMeq5xuGVSIc>.

5 *Uber BV v Aslam*, [2021] UKSC 5 [*Aslam*].

6 *Ibid* at para 134.

(only in the United Kingdom) but that it would only pay for the time drivers are actually ‘engaged’ and not for time they are ‘logged in’ and waiting for work.⁷ The next battleground for on-demand workers has thus been identified: disputes are likely to shift, at least to some extent, from status questions (whether someone is an employee) to working-time questions (what periods of time should be compensated).⁸ As we explain below, the on-demand system (at least in its current form) is not sustainable if employers need to pay workers for all the time that they make themselves available to work but are not engaged to actively work. Otherwise put, if the law requires payment for all the time a worker is logged into the app, this means, in effect, that the on-demand system is dismantled, which raises the question whether this is an option that should be preserved from the point of view of workers’ rights and, if so, under which conditions.

The current article seeks to answer these questions, thereby addressing a timely challenge regarding the future of working through platforms. At the same time, we believe that the discussion offers broader insights about the possibility of maintaining some degree of flexibility and autonomy within a system of labour and employment law. Labour laws are often considered antithetical to autonomy and free choice because they create a non-waivable floor of rights, superseding the freedom of employers and employees to contract otherwise. Labour laws have been accused of being too rigid for this reason.⁹ As a general rule, their mandatory nature is necessary to prevent coercion by the stronger party. Moreover, alongside the infringement of freedom in the sense of non-interference, non-waivable laws actually enhance the freedom of workers if freedom is understood as non-domination.¹⁰ This is the case for most employees, who benefit from a non-waivable floor of

7 Dara Khosrowshahi, ‘Uber Chief Executive Dara Khosrowshahi Says “We’re Turning the Page on Driver Rights,”’ *Evening Standard* (17 March 2021), online: <www.standard.co.uk/comment/comment/uber-chief-executive-dara-khosrowshahi-drivers-rights-turning-page-b924529.html> [Khosrowshahi, ‘Uber Chief’].

8 On May 2021, Uber has recognized the GMB trade union as the representative of Uber’s seventy thousand drivers in the United Kingdom. Negotiations between Uber and the GMB are likely to include working time issues, among other things.

9 See e.g. Juan C Botero, ‘The Regulation of Labor’ (2004) 119 *Quarterly Journal of Economics* 1339.

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

rights. But there remains a group of people (even if a minority) for whom the general laws are not optimal and perhaps not necessary. The new invention of work on demand through online platforms brings their plight to the forefront. Some of them prefer more flexibility and the ability to choose a different arrangement. The question is whether this can be made possible while protecting the goals of labour laws and avoiding harm to other employees.

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

II *Platform-based work and the claim of flexibility*

The term ‘platform-based work’ refers to various new forms of work in which an algorithm embedded in an online platform (or ‘app’) temporarily connects workers with clients.¹¹ Prime examples are transportation services provided by Uber or Lyft drivers and delivery services provided through Deliveroo, Foodora, and Instacart. Although the number of platform workers is difficult to estimate,¹² the growth has been quick, and the numbers are clearly significant.¹³ The group

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

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

13 For some estimations regarding the United States, the United Kingdom, and the European Union respectively, see Aaron Smith, ‘Gig Work, Online Selling and Home Sharing’ (17

of platform workers includes people who work full-time through a platform, alongside others who work just a few hours each week, sometimes supplementing their income from a 'regular' job.

The clients (or consumers) can obviously log into the app and book a service whenever they want. A common feature of platform-based work is that, at least in principle, the same applies to the workers as well, who can choose when to log into the app and make themselves available to work. Although this is not a necessary component of platforms – it is equally possible to schedule pre-set shifts for workers – it has developed as part of the model of many app-based platforms introduced in recent years. This flexibility is hailed by the firms operating the platforms as a major advantage for workers, a free choice of the workers, and a critical reason to consider them as independent contractors. The chief executive officer of Uber has made this clear: 'A growing number of people are choosing this type of work because of the flexibility it provides – the ability to choose if, when and how to work. That level of freedom is not available with traditional employment.'¹⁴ The same argument was made before courts around the world when Uber attempted to justify the independent contractor status of its drivers, as we discuss below.

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

A FLEXIBILITY DOES NOT MAKE YOU AN INDEPENDENT CONTRACTOR

The classification of platform workers as independent contractors has been a key component of the platform firms' business model and a highly contested

November 2016), online: *Pew Research Centre* <www.pewresearch.org/internet/2016/11/17/gig-work-online-selling-and-home-sharing/>; University of Hertfordshire, *Platform Work in the UK 2016–2019* (26 June 2019), online: *FEPS* <www.feps-europe.eu/resources/publications/682-platform-work-in-the-uk-2016-2019.html>; Urzi Brancati et al, 'New Evidence on Platform Workers in Europe: Results from the Second COLLEEM Survey' (2020) JRC Working Paper No JRC118570 at 3–4, online: <EconPapers.repec.org/RePEc:ipt:iptwpa:jrc118570>. For a recent report submitted to the Ontario government, which includes a very high estimation, see Ontario Workforce Recovery Advisory Committee, *The Future of Work in Ontario* (November 2021) at 124–5, online: <files.ontario.ca/books/mltsd-owrac-future-of-work-in-ontario-november-2021-en-2021-12-09.pdf>.

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

one.¹⁵ The status of ‘employee’ comes with numerous protections of labour law, which translate, in the eyes of some employers, into costs and reduced managerial flexibility. It is hardly surprising, then, that employers have always tried to evade these legal obligations by misclassifying some employees as independent contractors. The decision about if one is an employee is not open to the parties; rather, it is based on legal tests. If the factual circumstances suggest that one is an employee, this status is non-waivable. The tests themselves sometimes have a basis in legislation,¹⁶ but legislative definitions in this area are always open-ended and have been supplemented by tests developed by courts. Generally speaking, an employment relationship is characterized by the existence of subordination and dependency; these two general characteristics suggest that the person doing the work is an employee who is in need of labour law’s protection.¹⁷ Although both of these characteristics can be found in tests and lists of indicia adopted in different jurisdictions, it is subordination – or ‘control’ by the employer – which usually assumes more importance.¹⁸

Uber and other platforms claim that their relationship with drivers is not characterized by subordination. One of the key arguments in this regard is that workers enjoy significant autonomy – or flexibility – to choose how much to work and when to work. In this important sense, it is argued, they are not subject to control by the firm.¹⁹ However, when Uber drivers and other platform-based workers have challenged their classification in courts, they have usually succeeded. Although litigation is still ongoing in some jurisdictions, there is now a significant body of case law from different legal systems concluding that Uber drivers and other platform workers are subject to labour laws.²⁰ The first judgments were given by lower

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

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

17 *McCormick v Fasken Martineau DuMoulin LLP*, 2014 SCC 39; Guy Davidov, ‘The Three Axes of Employment Relationships: A Characterization of Workers in Need of Protection’ (2002) 52 *UTLJ* 357 [Davidov, ‘Three Axes’]; Guy Davidov, *A Purposive Approach to Labour Law* (Oxford: Oxford University Press, 2016), chs 3, 6.

18 Davidov, ‘Three Axes,’ supra note 17 at 365.

19 For discussions of this argument, see Michael Ford & Alan Bogg, ‘Between Statute and Contract: Who Is a Worker?’ (2019) 135 *Law Q Rev* 347; Cynthia Estlund, ‘What Should We Do after Work? Automation and Employment Law’ (2018) 128 *Yale LJ* 254 at 283–4; Naomi Sunshine, ‘Employees as Price-Takers’ (2018) 22 *Lewis and Clark L Rev* 105 at 113–14.

20 For an overview of these judgments, see Valerio De Stefano et al, ‘Platform Work and the Employment Relationship’ (2021) ILO Working Paper No 27 at 31–3, online: <www.ilo.org/wcmsp5/groups/public/-ed_protect/-protrav/-travail/documents/publication/wcms_777866.pdf>; Christina Hiebl, ‘Case Law on the Classification of Platform Workers: Cross-European Comparative Analysis and Tentative Conclusions,’ *Comp Lab L & Pol’y J*, online: [SSRN<ssrn.com/abstract=3839603>](https://ssrn.com/abstract=3839603) [forthcoming].

courts in California,²¹ and they were later joined by the highest courts in Spain,²² France,²³ and, most recently, the United Kingdom.²⁴ The UK Supreme Court clarified that ‘the fact that an individual is entirely free to work or not, and owes no contractual obligation to the person for whom the work is performed when not working, does not preclude a finding that the individual is a worker, or indeed an employee, at the times when he or she is working.’²⁵ Several (lower) courts in other countries similarly concluded that flexibility (and autonomy) regarding when and how much to work do not make one an independent contractor.²⁶ The European Commission has recently published a proposed directive on platform work which similarly clarifies that the freedom to choose when and how much to work is not contradictory to employee status.²⁷

There have also been some contradictory judgments – for example, in Brazil and some parts of Italy – where schedule flexibility has been used by courts ‘as

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

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

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

24 See note 5 above. The drivers sued to be recognized as ‘workers,’ an intermediate category between employees and independent contractors. Significant parts of UK labour law also apply to ‘workers.’

25 *Aslam*, supra note 5 at para 91.

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

27 *Proposal for a Directive of the European Parliament and the Council on Improving Working Conditions in Platform Work*, Doc 2021/0414 (9 December 2021), online: <ec.europa.eu/social/BlobServlet?docId=24992&langId=en>. Articles 4(1) and 4(2) of the proposed directive create a legal presumption of employment when at least two of five factors exist. One of them is when the platform company effectively restricts the freedom to organize one’s work, including the discretion to choose one’s working hours or periods of absence. But this is only one factor; two out of the remaining four are sufficient to create the presumption of employee status.

a primary ground to classify platform workers as independent contractors.²⁸ It should also be noted that, in the United States, the issue has not yet been considered by higher courts outside of California, and, in a few US states, legislation has been introduced to specifically exclude some platform workers from employee status, as we discuss below. But, as far as the judicial application of employment status tests is concerned, the global trend is clearly in the direction of rejecting the platforms' independent contractor model.

In Canada, although Uber's questionable methods have already reached the Supreme Court of Canada,²⁹ the employment status of drivers is yet to be considered. A unionization attempt by Uber Black drivers in Toronto is currently being litigated before the Ontario Labour Relations Board.³⁰ In the meantime, couriers working for Foodora, another platform, succeeded in challenging their independent contractor status for collective bargaining purposes. The Ontario Labour Relations Board accepted their claim that they are 'dependent contractors' (and, therefore, employees at least for collective bargaining purposes).³¹ It should be noted that the Foodora model was based mainly on pre-set shifts scheduled with the approval of the company.³² The level of flexibility was therefore lower compared with Uber drivers. Couriers also had some limited options to receive *ad hoc* assignments as well as the flexibility to work for additional companies at the same time.³³ It is not clear whether the analysis in this decision would apply to the Uber model as well,³⁴ but there are preliminary signs in that direction: an employment standards officer in Ontario has recently issued a compliance order maintaining that an Uber X driver is an employee.³⁵

B THE CHOICES OF PLATFORM-BASED WORKERS ARE HEAVILY CONSTRAINED

As we have seen, most courts do not consider the flexibility enjoyed by platform workers as a reason to negate employee status. When applying the regular 'who

28 De Stefano et al, *supra* note 20 at 31–2. For a critique of some of these judgments, see Valerio De Stefano, 'Platform Work and Labour Protection. Flexibility Is Not Enough,' *Regulating for Globalization* (23 May 2018), online: <regulatingforglobalization.com/2018/05/23/platform-work-labour-protection-flexibility-not-enough/>.

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

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

31 *Canadian Union of Postal Workers v Foodora Inc*, OLRB Case No 1346-19-R, (2020) CanLII 16750 (ON LRB) [*Foodora*].

32 *Ibid* at paras 18–21.

33 *Ibid* at paras 38, 40, 122.

34 Soon after the judgment of the Ontario Labour Relations Board, Foodora decided to stop its Canadian operations. The couriers' union (CUPW) filed an unfair labour practice complaint, which ended in a settlement. See Canadian Press Staff, 'Former Foodora Workers Reach \$3.46M Settlement with App's Parent Company,' *Global News* (25 August 2020), online: <globalnews.ca/news/7296738/foodora-worker-settlement/>.

35 Ontario Ministry of Labour, Order No 0014666-CO002, issued to Uber Portier BV on 22 February 2022, online: <77b90736.flowpaper.com/UBERPORTIERBVSharma/#page=2>.

is an employee' tests, they find a sufficient degree of subordination despite the flexibility concerning when and how much to work. Such judgments can be explained by the existence of many limitations on the autonomy of platform workers, both with respect to scheduling (when and how much to work) and with respect to other aspects of their work. There is no clear-cut dichotomy between being controlled by an employer and being entirely free to independently make all your choices. Rather, many real-life situations fall somewhere on a spectrum of possibilities between the two extremes, and, often, the autonomy of platform workers is more akin to the level characterizing employment. In this subpart, we examine to what extent flexibility is really a feature of platform work.

Let us start with the issue of when and how much to work. In principle, Uber drivers can choose for themselves when to log into the Uber app and make themselves available to work. They are not committed in advance to any pre-set schedule. They can decide to work more in one week and less in the following week, without coordinating this schedule with the employer.³⁶ This ability gives them, at least on the face of it, much more autonomy compared with 'regular' employees. However, the platform firms use various techniques to impact the workers' choices. Those who are more available to work will receive more profitable assignments.³⁷ On the flip side, workers who are less available to work will receive fewer calls once they log in and will get the less profitable clients. Platforms also use a 'nudging' system to control the drivers' weekly schedule by sending notifications concerning high-demand areas with surge pricing (even when the driver is offline) and by sending messages such as 'Are you sure you want to go offline? Demand is very high in your area. Make more money, don't stop now!'³⁸ As a driver explained, '[t]he initial draw to Uber was the flexibility to create my own schedule. However, earnings are slim outside the suggested time frame so I always drove within hours proposed by Uber. I couldn't earn money if I freely organized a schedule.'³⁹

All this suggests that, although workers appear to be free to choose how much to work and when to work, such choices are in fact constrained by the platform firms' use of 'choice architecture.'⁴⁰ Even more fundamentally, it is important to

36 Antonio Aloisi, 'Commoditized Workers: Case Study Research on Labour Law Issues Arising from a Set of "On-Demand/Gig Economy" Platforms' (2016) 37 *Comp Lab L & Pol'y J* 675 [Aloisi, 'Commoditized Workers'].

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

38 Alex Rosenblat & Luke Stark, 'Algorithmic Labor and Information Asymmetries: A Case Study of Uber's Drivers' (2016) 10 *International Journal of Communication* 3758 at 3768. Another example is Doordash sending a message to drivers that there will be enough 'Dashers' on the road during their preferred working time and suggesting that they reschedule to rush hours. See Tweet by Willy Solis, *Twitter* (17 July 2021), online: <twitter.com/WillySolis357/status/1416187019596865543>.

39 Quoted in Means & Seiner, *supra* note 37 at 1542.

40 See Rosenblat & Stark, *supra* note 38. On the ideas of 'nudge' and 'choice architecture,' see Richard H Thaler & Cass R Sunstein, *Nudge: Improving Decisions About Health, Wealth, and Happiness* (New Haven, CT: Yale University Press, 2008).

realize that the choice available to workers is only regarding when to log into the app and make themselves available for work. According to the existing model, they are not getting paid for such availability. There is no guarantee that they will actually have paid work during this time – this question depends on their location, the number of clients requesting services, and the number of other drivers competing with them for work.⁴¹ As we explain in the next part, this system shifts all the business risks to workers and manipulates them to make themselves available to work more than is actually needed.

Platforms are using technology to control other aspects of the work as well, limiting the autonomy that workers ostensibly have. A key mechanism for control is the ranking system. Uber ranks its drivers in accordance with their ‘rating, how many rides the driver accepts, and how many times they cancel a ride.’⁴² Drivers who cancel more than 5 per cent of the rides are at a real risk of being ‘deactivated’ (Uber’s euphemism for dismissals).⁴³ In other words, once a driver has logged into the app, in practice, she must accept most of the calls she receives, even if they are not profitable or not in the area of her choice, in order to be able to continue working. According to driver testimonials, while driving to a high-demand area, they can be asked to shift to other (less profitable) locations and would hesitate to turn these calls down for the fear of being deactivated.⁴⁴ Uber also controls the route that has to be taken with a client⁴⁵ as well as the overall ‘client experience.’⁴⁶

All in all, even though Uber drivers are formally free to choose if and for how long to be ‘logged in,’ this choice, in fact, is significantly constrained, and, once they are logged in, drivers’ entire work and rest scheduling as well as other aspects of their work are being controlled via the algorithm.⁴⁷ The same is true for

41 See also Melissa Renau Cano et al, ‘Flexibility and Freedom for Whom? Precarity, Freedom and Flexibility in on-Demand Food Delivery’ (2021) 15 *Work Organisation, Labour and Globalisation* 46 at 63; Caleb Goods et al, “‘Is Your Gig Any Good?’ Analysing Job Quality in the Australian Platform-Based Food-Delivery Sector’ (2019) 61 *Journal of Industrial Relations* 502 at 515.

42 Alex Rosenblat, ‘The Truth About How Uber’s App Manages Drivers,’ *Harvard Business Review* (6 April 2016), online: <hbr.org/2016/04/the-truth-about-how-ubers-app-manages-drivers> [Rosenblat, ‘Truth’]. See also Kathleen Griesbach et al, ‘Algorithmic Control in Platform Food Delivery Work’ (2019) 5 *Socius: Sociological Research for a Dynamic World* 1 at 7.

43 Rosenblat, ‘Truth,’ supra note 42.

44 Ibid. See also Alex Rosenblat, *Uberland: How Algorithms Are Rewriting the Rules of Work* (Oakland: University of California Press, 2018) at 95 [Rosenblat, *Uberland*].

45 Rosenblat, ‘Truth,’ supra note 42. Such control is done through the app itself.

46 Drivers who receive an average rating of less than 4.6 out of five stars are at risk of being deactivated. To receive such a high score, drivers must modify their behaviour to produce a fairly homogenous Uber experience, which includes, for instance, providing passengers with phone chargers and bottled water. See Rosenblat, *Uberland*, supra note 44 at 150–3.

47 Rosenblat, ‘Truth,’ supra note 42; Means & Seiner, supra note 37 at 1542–3; Griesbach et al, supra note 42 at 8–11; Aloisi, ‘Commoditized Workers,’ supra note 36 at 676; De Stefano, supra note 15; Tammy Katsabian, ‘Collective Action in the Digital Reality: The Case

many other platforms. This situation was recognized by the UK Supreme Court,⁴⁸ by the Spanish Supreme Court,⁴⁹ and by other judicial bodies around the world.⁵⁰ The Ontario Labour Relations Board similarly concluded with regard to Foodora that ‘much of the couriers’ work is controlled by the App using an algorithm developed, owned and controlled by Foodora for the sole purpose of advancing Foodora’s business interests.’⁵¹

C FLEXIBILITY IS NOT INCOMPATIBLE WITH LABOUR LAW

While courts have been sceptical, as we have seen, with regard to the claim of flexibility and its impact on the platform workers’ status, some US states have explicitly excluded such workers from labour law protections.⁵² Most

of Platform-Based Workers’ (2021) 84 Mod L Rev 1005 [Katsabian, ‘Collective Action’]; Valerio De Stefano, ‘Master and Servers: Collective Labour Rights and Private Government in the Contemporary World of Work’ (2020) 36 Intl J Comp Lab L & Ind Rel 425; Brishen Rogers, ‘Beyond Automation: The Law and Political Economy of Workplace Technological Change’ (2019) 55 Roosevelt Institute Working Paper No 36, online: <rooseveltinstitute.org/wp-content/uploads/2019/07/RI_Beyond-Automation_Working-Paper.pdf>; Mirela Ivanova et al, ‘The App as a Boss? Control and Autonomy in Application-Based Management’ (2018) 2 Arbeit | Grenze | Fluss, online: <opus4.kobv.de/opus4-euv/frontdoor/deliver/index/docId/388/file/ArbeitGrenzeFlussVol02.pdf>; Alex J Wood et al, ‘Good Gig, Bad Gig: Autonomy and Algorithmic Control in the Global Gig Economy in Work, Employment and Society’ (2019) 33 Work, Employment and Society 56; Zachary Kilhoffer et al, *Study to Gather Evidence on the Working Conditions of Platform Workers: Final Report* (Luxembourg: European Commission, 2019), online: <aei.pitt.edu/102657/1/KE-01-20-054-EN-N.pdf>.

48 *Aslam*, supra note 5 at para 101 (‘the transportation service performed by drivers and offered to passengers through the Uber app is very tightly defined and controlled by Uber’).

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

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

51 *Foodora*, supra note 31 at para 122.

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

notably, in California, a dramatic set of events has led to the exclusion of platform-based transportation and delivery workers from labour law – a result that is still being litigated – based to a large extent on the argument of flexibility. The chain of events started with the lower court judgments concluding that Uber and Lyft drivers are in fact employees;⁵³ followed by a California Supreme Court judgment adopting a new employee test (the ‘ABC’ test) that in all likelihood would have reaffirmed that platform workers are employees, at least for some purposes;⁵⁴ followed by legislation (the California Assembly Bill known as AB5) that codified and expanded the scope of the new test;⁵⁵ followed by judgments by California courts confirming that, according to the new legislation Uber and Lyft drivers are employees;⁵⁶ followed by a ballot initiative (‘Proposition 22’), jointly filed by Uber, Lyft, and Doordash, to exempt app-based transportation and delivery companies from the new legislation, instead giving the platform workers – as independent contractors – a small set of employment-like rights.⁵⁷ After an unprecedented campaign in which the companies – joined also by Instacart and Postmates – invested US \$205 million, they succeeded in passing the ballot initiative amending the law. Recently, the California Superior Court ruled that Proposition 22 is unconstitutional.⁵⁸ Appeals are expected, so the legal battle is ongoing. In any case, for our purposes, one of the main arguments of the firms’ campaign in support of Proposition 22 focused on the flexibility that the drivers supposedly want; the firms claimed that the drivers will have to give this flexibility up once they are considered employees.⁵⁹

Uber is already lobbying Canadian provincial governments to adopt a model of employment along the lines of Proposition 22, which they call ‘Flexible Work Plus.’ This proposal would perpetuate the drivers’ independent contractor status while giving them some minimal employment-like rights. Uber claims that this model fulfils the workers’ preference for flexibility over being classified as

53 See note 21 above.

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

55 California Assembly Bill, Cal 2019 [AB5].

56 *California v Uber Techs*, 56 Cal App 5th 266 (2020) (Cal Sup Ct, 10 August 2020), online: <www.courthousenews.com/wp-content/uploads/2020/08/UberLyftEmployees-SFRuling.pdf>; *California v Uber Techs*, Superior Court No CGC-20-584402> (CA, 22 October 2020), online: <cases.justia.com/california/court-of-appeal/2020-a160701.pdf?ts=1603409475>.

57 Proposition 22, supra note 2. See also ‘App-Based Drivers as Contractors and Labor Policies Initiative,’ online: *Ballotpedia News* <[ballotpedia.org/California_Proposition_22_App-Based_Drivers_as_Contractors_and_Labor_Policies_Initiative_\(2020\)](http://ballotpedia.org/California_Proposition_22_App-Based_Drivers_as_Contractors_and_Labor_Policies_Initiative_(2020))>.

58 *Castellanos et al v State of California and Katie Hagen*, Superior Court No RG21088725 (2 August 2021), online: <ca-times.brightspotcdn.com/c5/f5/7bba477c4a839d1edd9f5b5a75e9/prop-22-alameda-superior-ct.%208-20-21.pdf>.

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

employees.⁶⁰ Similar campaigns are ongoing in Massachusetts⁶¹ and are under consideration in other states as well.⁶²

In subpart A, we discussed the argument that because of flexibility platform workers do not fall within the definition of ‘employee.’ Here, the argument advanced by platform firms is different: that flexibility about how much and when to work is incompatible with labour laws. If drivers are deemed to be employees, they will necessarily lose this flexibility, according to the firms’ argument. But, in fact, many employees (who are subject to labour law) enjoy some flexibility about their work schedule.⁶³ Companies choose to enable their employees some schedule flexibility in order to raise employee satisfaction, to improve performance, and to reduce turnover.⁶⁴ This is not a new phenomenon, but it has become more common as a result of technological advancements, which allow many work tasks to be performed from a distance.⁶⁵ Telework (working from home or any other location through laptops or mobile phones) is often associated with relatively flexible schedules.⁶⁶ This is expected to become even more dominant

60 Mojtehdzadeh, *supra* note 3.

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

62 ‘The Fight over Prop 22 Continues,’ *New York Truckstop* (23 August 2021), online: <newyork-truckstop.com/2021/08/23/the-fight-over-prop-22-continues/>.

63 See Susan J Lambert, Anna Haley-Lock & Julia R Henly, ‘Schedule Flexibility in Hourly Jobs: Unanticipated Consequences and Promising Directions’ (2012) 15 *Community, Work & Family* 293 at 302; Lonnie Golden, ‘Flexible Work Schedules: What Are We Trading Off to Get Them’ (2001) 124 *Monthly Labour Review* 50.

64 Lambert, Haley-Lock & Henly, *supra* note 63 at 294; Rudy Fenwick & Mark Tausig, ‘Work Schedules and Stress’ in Cynthia Epstein & Arne Kalleberg, eds, *Fighting for Time: Shifting Boundaries of Work and Social Life* (New York: Russell Sage Foundation, 2005) 77; Kerry Joyce et al, ‘Flexible Working Conditions and Their Effects on Employee Health and Wellbeing,’ *Cochrane Database of Systematic Reviews* (2010).

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

66 Lonnie Golden & Jaeseung Kim, ‘Irregular Work Scheduling and Its Consequences’ in Sarah De Groof, ed, *Work–Life Balance in the Modern Workplace* (Alphen aan den Rijn: Kluwer Law International, 2017) 129 at 130; Phyllis Moen et al, ‘Does a Flexibility/Support Organizational Initiative Improve High-Tech Employees’ Well-Being?’ (2016) 81 *American Sociological Review* 134; Melissa Gregg, *Work Intimacy* (Cambridge, UK: Polity Press, 2011) 39 at 40.

in the post-COVID 19 world.⁶⁷ There are also management methods that allow employees complete freedom to decide on their working time and workload, with wages based on results rather than working time.⁶⁸ These methods have their own problems,⁶⁹ but our point here is simply to clarify that flexibility for workers is not incompatible with labour laws.

Interestingly, the AB5 law adopted in California specifically clarified that schedule flexibility does not contradict employment relations by stating: ‘Nothing in this act is intended to diminish the flexibility of employees to work part-time or intermittent schedules or to work for multiple employers.’⁷⁰ This did not prevent the platforms from making flexibility a key talking point in their campaign to exempt app-based transportation and delivery workers from this law. What explains the misleading claim of platforms that flexibility is incompatible with labour laws? To a large extent, it is simply a manifestation of the age-old attempt to evade employer responsibilities. Such attempts are sometimes based on a claim made by employers that we must protect the workers’ freedom – such as when, for example, Joseph Lochner, who owned a bakery in New York, was indicted for violating the 1897 law which prohibited the employment of bakers for more than sixty hours per week.⁷¹ Lochner famously succeeded in challenging the law as unconstitutional because of its interference in the freedom of both the employer and the employee to agree on longer hours. The majority opinion put much emphasis on protecting the freedom of the employee to work more than sixty hours per week. This view has been widely discredited with the advancement

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

68 Notably, the New Ways of Working (NWW) and the Results-Only Work Environment (ROWE). On NWW, see e.g. Lieke L ten Brummelhuis et al, ‘Do New Ways of Working Foster Work Engagement?’ (2012) 24 *Psicothema* 113; Merle M Blok et al, ‘New Ways of Working: Does Flexibility in Time and Location of Work Change Work Behavior and Affect Business Outcomes?’ (2012) 41 *Work* 2605; Evangelia Demerouti et al, ‘New Ways of Working: Impact on Working Conditions, Work-Family Balance, and Well-Being’ in Christian Korunka & Peter Hoonakker, eds, *The Impact of ICT on Quality of Working Life* (Dordrecht: Springer, 2014) 123. On ROWE, see e.g. Phyllis Moen, Erin Kelly & Kelly Chermack, ‘Learning from a Natural Experiment: Studying a Corporate Work-Time Policy Initiative’ in Ann C Crouter & Alan Booth, eds, *Work-Life Policies* (Washington, DC: Urban Institute Press, 2009) 97 at 103, 106; ‘Results-Only Work Environment’, online: <www.gorowe.com>; Cali Ressler & Jody Thompson, *Why Managing Sucks and How to Fix It* (Hoboken, NJ: John Wiley & Sons, 2013) at 6.

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

70 AB5, *supra* note 55 at para 1 (g).

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

of labour law during the twentieth century, together with the broad understanding that employment is characterized by inequality of bargaining power⁷² and that non-waivable labour laws are important also for paternalistic and societal reasons.⁷³ The platform firms' argument about drivers wanting flexibility is a reincarnation of the same disingenuous claim that *Lochner* made about his overworked bakers. These firms simply want to make more money by exploiting the drivers' 'freedom' to accept disadvantageous terms.

The fact that Uber and other platforms did not explain which specific labour law provisions are incompatible with workers' flexibility exposes their motives. The general claim was used in an effort to justify the classification of workers as independent contractors, leading to their exclusion from all labour law protections. However, it is worth asking whether there are specific labour laws that might be incompatible with the platforms' model. Benjamin Sachs, while arguing against the flexibility 'myth' in this context and maintaining that Uber drivers would not lose any flexibility if reclassified as employees, identified two minor exceptions: break times and overtime pay.⁷⁴ In states that require breaks during long shifts, the employer must ensure that a driver gets such breaks. Similarly, if an employer has to pay overtime for work of more than a certain number of daily or weekly hours, a platform would have to control the workers' maximum number of work hours. In both respects, the platform cannot leave scheduling entirely to the worker's discretion. But, as Sachs notes, the flexibility lost in these respects is only the dubious flexibility to work without breaks or to work excessive hours without overtime compensation.

We believe that there is another exception, and it is a much more significant one. While labour laws in general are certainly compatible with flexibility, once platform workers are considered employees, we have to decide how to calculate their working time. Taking Uber as an example again, the question is whether all the time of being 'logged in' and available to work is considered working time that requires pay. The UK Supreme Court recently answered affirmatively but without getting into an in-depth discussion.⁷⁵ If this is the law, then, quite obviously, Uber's business model will have to change dramatically. They can no longer allow an unknown number of people to log into the app whenever they want, unrelated to the level of demand, once they have to pay all of them for this time. In the next part, we ask whether the 'work-on-demand' model developed by platforms such as Uber is incompatible with existing working-time laws and, if

72 Paul Davies & Mark Freedland, *Kahn-Freund's Labour and the Law*, 3d ed (London: Stevens & Sons, 1983) at 18.

73 Davidov, 'Nonwaivability,' supra note 10.

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

75 See note 6 above.

so, whether we should be pleased with dismantling this model or, rather, change the law in order to make it possible.

III *The 'work-on-demand' system*

'On demand' suggests that you only work when called by the employer to do so. The 'demand' comes from the employer. Platforms that rely on the on-demand model have three main characteristics. First, the workers have to be 'on call' (also known as being 'on standby') in order to be available when the demand comes. They will not get called for work unless they make themselves available for work by logging into the platform, thereby being on call. Second, there is no commitment from the employer for any amount of work, which is something that is known, especially in the United Kingdom, as a 'zero-hours' contract. Third, the workers decide for themselves when to be on call. Although, in practice, as we have noted above, the choices of such workers are often constrained⁷⁶ – they are *de facto* expected to work at least a certain number of hours and at times that are more convenient to the employer – there is still a degree of choice giving them some flexibility.

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

A DO PLATFORMS HAVE TO PAY FOR ON-CALL TIME?

The term 'on call' is usually used when referring to workers who are engaged as employees and perform their job at the workplace but, from time to time, are also asked to be 'on call' and make themselves available to work in case the need arises. When you are on call, you are not actively working, but you are still

⁷⁶ See subpart II.B.

committed to the employer to some extent because you agree to make yourself available if the need arises, which prevents you from doing whatever you want with your time. Sometimes, people are asked to be on call at or near the workplace (in some cases, during the night, so that they are asked to sleep at the workplace). At other times, they can be at home or, alternatively, at a place that will allow them to reach the workplace within a certain number of minutes determined by the employer. In some jobs, when you are on call and the need arises for your services, there is no need to get to the workplace but, rather, you can do the work from home (through the telephone or computer). While there are many variations, they usually refer to employees who are asked to be on call on top of their regular work schedule. In contrast, the term ‘work on demand’ is generally used to describe people who do not have any regular schedule *vis-à-vis* the employer/platform. Rather, their entire work is based on being on call.⁷⁷ In this subpart, as a starting point for the discussion, we ignore this difference and ask whether, according to current laws and assuming the platform workers are employees, they should receive wages for their on-call time.

There is no doubt that, once an employee who is on call actually gets called to work, full wages are owed for the time of actively working. Also, in some jurisdictions, there are protections to ensure a minimum payment for having to come to the workplace – for example, three hours of pay, even if the employee who was called was needed for a shorter period.⁷⁸ But what about the time one is required to be on call, ready and willing to work, but is not actually called and therefore not performing active work? The question of the appropriate compensation for this commitment can be decided contractually by the parties or by a collective agreement.⁷⁹ However, as always in the context of employment rights, the crucial question is what is the minimum floor of non-waivable rights. Absent a collective agreement, and assuming an employer would prefer not to pay anything for on-call time, is this situation legal?

77 Some publications use the term ‘on call’ to describe the ‘work-on-demand’ arrangement, in which the entire job is without fixed hours and you only work when called by the employer to do so. See e.g. International Labour Organization (ILO), *Non-Standard Employment around the World* (Geneva: ILO, 2016) 83, online: <www.ilo.org/wcmsp5/groups/public/-dgreports/-dcomm/-publ/documents/publication/wcms_534326.pdf>. However, the term ‘on call’ is more commonly used as noted above. See e.g. Hugh Collins, KD Ewing & Aileen McColgan, *Labour Law*, 2d ed (Cambridge, UK: Cambridge University Press, 2019) at 302.

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

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

The answer depends on the extent of the constraints placed on the employee during this time. At one extreme, consider a store clerk waiting at the store for customers with nothing to do between customers. This scenario is obviously considered working time even if the employee is idle from active work for some of the time, because they cannot leave the store and cannot do anything that could prevent them from being immediately available to serve customers the minute they step inside the premises. At the other extreme, imagine an employee who sleeps at their home but is asked to leave the phone open during the night in case there is some emergency at work, which is rare. Imagine also that, in the case of such an emergency, they can help over the phone (that is, they can be anywhere during the night, as long as they can be reached by phone). In this scenario, while there are some constraints on the employee during the on-call time, they are very minimal, and it will not be considered working time. In between these two extremes, different jurisdictions place the line differently, taking into consideration whether the employee has to be on-call at the work site or not; whether they have to stay close by (for example, within ten or twenty minutes from the workplace); whether they can sleep without interruption; the frequency (or likelihood) of the employee being called by the employer; and the overall ability of the employee to do as they please during the on-call time.⁸⁰

In Canada, when employees are on call and have to be at their work site, they are generally considered working and entitled to full wages, sometimes with the exception of uninterrupted sleeping time.⁸¹ In contrast, being on call outside of the work site is generally not considered working time,⁸² although, in British Columbia, legislation clarifies that if an employee is asked to be on call at any location designated by the employer other than the employee's residence – including a requirement to be within a certain distance from the workplace – it is considered to be working time.⁸³ The lines are drawn somewhat differently in other countries but are based on the same considerations. In the United States, federal regulations maintain that on-call time is considered working time if the

80 See *RJ v Stadt Offenbach am Main*, C-580/19 (9 March 2021) at paras 45–52 [*Stadt Offenbach am Main*]; *Owens v Local No 169*, 971 F (2d) 347 (9th Cir 1992) [*Owens*]. See also Christopher S Miller, Steven J Whitehead & Elizabeth Clark-Morrison, 'The Impact of Electronic Paging and On-Call Policies on Overtime Pay under the FLSA' (1995) 11 *The Labour Lawyer* 231 at 235–6; Opeyemi Akanbi, 'Policing Work Boundaries on the Cloud' (2018) 127 *Yale LJ* 637 at 643–4.

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

82 See *ibid*, s 1.1(2)(b); Government of Canada, *Federal Government's Interpretation Guide: Canada Labour Code, Hours of Work – Canada Labour Code*, Part III – Division I - 802-1-IPG-002 (modified on 1 February 2022), online: <www.canada.ca/en/employment-social-development/programs/laws-regulations/labour/interpretations-policies/hours-work.html>; *Walker v Alberta Communication Cable Services Inc*, 2018 ABPC 46 (Alta Pr Ct).

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

employee's ability to use their time effectively for personal purposes is 'substantially limited.' At the same time, however, the regulations maintain that limitations on alcohol consumption, and even a requirement to remain within a reasonable call-back radius, are not a substantial limitation which justifies compensation.⁸⁴

In the US case law as well, the gap between the basic principle and its actual application is striking. Even with significant restrictions on employees' freedom during on-call time, courts usually refuse to consider it working time.⁸⁵ In contrast, the Court of Justice of the European Union (CJEU), interpreting the European Union's Working Time Directive, has ruled in several cases that being on standby at the workplace or at another location determined by the employer is considered working time.⁸⁶ With regard to being on call at home, it would only amount to working time if the employee is constrained 'objectively and very significantly' in their ability to manage their time and pursue their own interests.⁸⁷ In a case concerning a firefighter who, while being on call, had to reach the workplace within eight minutes of being called, the CJEU considered this to be working time (although leaving open to each member state the possibility to decide on the appropriate payments).⁸⁸ However, for another firefighter who had to reach the workplace within twenty minutes of being called, the CJEU did not provide a clear conclusion, noting that it depends on the overall circumstances, including the frequency of interventions.⁸⁹

What does this mean for platform workers such as Uber drivers once we assume, as noted, that they are employees? In practice, Uber drivers who log into the app – making themselves available to work (in effect, making themselves on call) – cannot stay at home and wait. They have to be in the car and wait for rides in an area of demand. In most cases, this means coming to the city centre and waiting for rides there as well as staying in the same area between rides.⁹⁰ Research has shown that the waiting time between rides constitutes a third of the

84 Code of Federal Regulations, 5 CFR § 551.431; *Time Spent on Standby Duty or in an On-Call Status*, 45 FR 85664 (30 December 1980), as amended at 64 FR 69180 (10 December 1999).

85 See e.g. *Owens*, supra note 80 (and other judgments reviewed there).

86 *Sindicato de Médicos de Asistencia Pública (Simap) v Conselleria de Sanidad y Consumo de la Generalidad Valenciana*, No C-303/98, [2000] ECR I-07963; *Landeshauptstadt Kiel v Jaeger*, No C-151/02, [2003] ECR I-08389; *Dellas v Premier Ministre*, No C-14/04, [2005] ECR I-10253. These cases interpreted the Council Directive (EC) 2003/88 Concerning Certain Aspects of the Organisation of Working Time, [2003] OJ L299/9.

87 *Ville de Nivelles v Matzak*, No C-518/15 (21 February 2018) [*Matzak*]; *DJ v Radiotelevizija Slovenija*, No C-344/19 (9 March 2021) at para 37.

88 *Matzak*, supra note 87.

89 *Stadt Offenbach am Main*, supra note 80. The issue was returned to the national court to make the decision.

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

riders' working day.⁹¹ The drivers can perhaps use some of this waiting time to do errands if they have any in the same area, but the restriction on the ability to do what they want during this time is very significant. It would be fair to say that, in practice, while waiting for rides, the drivers are on call *at the worksite* (the area of demand for rides). While Uber might say that it is their own choice where to wait and what to do with their time while waiting, such a statement would only conceal the reality: in order to make any money, the choice of where to wait is very limited. Moreover, the frequency of interventions during the on-call time is very high, further restricting the ability to do anything else. The situation might be different for other platforms, especially if one can wait at home as a matter of practice and not only in theory. But, for platforms like Uber, the conclusion of the UK Supreme Court that all the time of being logged in counts as working time seems justified and in line with existing laws. We believe that this is true for Canada and many other legal systems as well.

B FROM ON-CALL TIME TO ON-DEMAND EMPLOYMENT THROUGH PLATFORMS

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

The on-demand system relies on new technological abilities to manage the workforce through online platforms.⁹² At the same time, it is a manifestation of a broader phenomenon of employers shifting risks and costs to employees. It is a form of precarious work, leading to high levels of insecurity for the employees.⁹³ The International Labour Organization described such precarious arrangements as preventing the workers from having genuine control over when they work, with implications for the workers' income security and work-life balance as well as their health and well-being.⁹⁴ Because of the negative implications of on-call

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

92 See De Stefano, *supra* note 15.

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

94 ILO, *Non-standard Employment around the World: Understanding Challenges, Shaping Prospects* (Geneva: ILO, 2016) at 29, 226–7, online: <www.ilo.org/wcmsp5/groups/

zero-hours employment contracts, there have been attempts to restrict and even prohibit this form of employment in several countries.⁹⁵

In Canada as well, there is increasing awareness of the need to protect employees from such insecurities. In Ontario in 2017, the Liberal government passed a new law requiring employers to pay a minimum of three hours for an on-call 'shift' when it is not considered working time and the employee was not called for work.⁹⁶ However, the centre-right government that was formed a year later repealed this right before it ever came into force.⁹⁷ At the federal level, a recent expert report recommended introducing a right to compensation for on-call time, noting the implications for workers' autonomy and private life and, in particular, the increasing expectations from employees to be available (on call) outside of regular working hours in the digital age.⁹⁸ The proposal draws on the French Code du travail, which in 2016 created the notion of '*astreinte*,' referring to on-call time outside of the workplace. Employers in France must compensate employees for this time, although not necessarily to the same extent as 'regular' working time.⁹⁹ Another recent report, prepared for the (previous) Ontario government, highlighted the problematic issues of schedule irregularities and raised possible solutions.¹⁰⁰ Overall, the lack of commitment from the employer does not present any reason to avoid applying the regular laws regarding on-call time; on the contrary, such protections are needed even more with regard to zero-hours work arrangements.

The other feature of on-demand work through platforms – the apparent freedom to choose when to work – does not change the previous conclusion either. When Uber drivers are waiting for rides, they make themselves available to the employer, allowing the firm to benefit from offering customers a short reaction time. Such on-call time is spent 'primarily for the benefit of the employer'¹⁰¹ and therefore should be considered working time even according to stricter tests – notwithstanding the fact that Uber did not demand this commitment from a specific employee for a specific time. It still benefits from this commitment. Moreover, when employees are on call (waiting for rides), their autonomy and ability to choose what to do are restricted significantly, as explained in Part II, and

public/—dgreports/—dcomm/—publ/documents/publication/wcms_534326.pdf>. See also Jeremias Prassl, *Collective Voice in the Platform Economy: Challenges, Opportunities, Solutions* (2018) at 10–11, online: *ETUC* <www.etuc.org/sites/default/files/publication/file/2018-09/Prassl%20report%20maquette.pdf>; Austin Zwick, 'Welcome to the Gig Economy: Neoliberal Industrial Relations and the Case of Uber' (2018) 83 *GeoJournal* 679 at 686.

95 ILO, supra note 94 at 272–3.

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

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

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

99 *Code du travail*, JO, 9 August 2016, L3121-9.

100 C Michael Mitchell & John C Murray, *The Changing Workplaces Review: An Agenda for Workplace Rights*, report for the Ontario government (May 2017) at 187.

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

this fact remains true regardless of who decided on the exact times that they will be on call. Allowing employers to use their employees in this way without any obligation to pay them for this time seems unfair and also opens up room for abuse.

C. SHOULD PLATFORM WORKERS BE GIVEN A CHOICE TO WAIVE PAYMENT FOR ON-CALL TIME?

If we require a platform like Uber to pay for all the on-call time, it will have to change its business model. Uber will have to create pre-set shifts (like most other employers) and match the number of drivers at each shift and geographical area with the expected level of demand from customers. Rather than paying wages for an unknown number of employees who might not be needed, Uber will likely use its algorithm to create schedules for the drivers in advance.¹⁰² Because it will have to pay for the wait (on-call) time, it is also likely that Uber will demand full commitment from the drivers and prohibit them from working with other firms during the same time.¹⁰³ Similar changes can be expected in other platforms.¹⁰⁴

Limiting the number of workers that platform firms hire to match the need would make perfect sense. In fact, it will expose the platform firms' sham of recruiting too many workers and making them compete with each other in order to provide a cheap service on the back of those unsuspecting workers.¹⁰⁵ Uber has all the information about demand and how many drivers are needed at any given time to ensure a quick service that is also sustainable, in the sense of ensuring a reasonable income for the drivers. The drivers do not have this information, so they often make themselves available for work on the assumption that there is sufficient work, even when this is not the case. In this way, Uber shifts all the business risks to the drivers without compensating them for these risks. If they have to restructure in order to ensure that every driver is paid for waiting time as well, this seems like a welcome development.

At the same time, these expected changes would admittedly limit the workers' flexibility quite significantly. Drivers will no longer be free to decide when and how much to work, without coordinating this with the employer. This might seem

102 In this context, see an article by an Uber economist, Alison Stein, 'Can Employees Really Work However They Want?' *Medium* (14 August 2020), online: <medium.com/uber-under-the-hood/can-employees-really-work-however-they-want-346e8a609b98>. Interestingly, when Foodora operated in Canada, it used a combination of pre-set shifts with some flexibility of choice for the workers. See *Foodora*, supra note 31 at paras 18–21.

103 See Carmel DeAmicis, 'Despite Uber's Arguments, Flexibility for Employees Is a Company's Choice,' *Recode* (11 August 2015), online: <www.vox.com/2015/8/11/11615468/despite-ubers-arguments-flexibility-for-employees-is-a-companys-choice>.

104 Some platforms are already moving in this direction, at least partially. For example, DoorDash is alerting drivers when the number of drivers at a certain shift is already high (see note 38 above), and Foodora relies mostly on pre-set shifts, with limited options for ad hoc flexibility (see notes 32–3 above). See also Ivanova et al, supra note 47.

105 On the creation of intra-platform markets where platform workers compete with each other, see Heiner Heiland, 'Neither Timeless, Nor Placeless: Control of Food Delivery Gig Work via Place-Based Working Time Regimes,' *Human Relations* (15 June 2021); Ivanova et al, supra note 47.

like a small price to pay for having the security of regular wages even for waiting times, which many workers prefer.¹⁰⁶ But not everyone will share this view; at least some people would likely prefer the existing flexibility.¹⁰⁷ Imagine, for example, a student who wants to work just a few hours per week, without committing in advance for a specific shift. In her ethnographic study of taxi drivers in San Francisco who work as independent contractors, Veena Dubal found that many of them valued the autonomy of choosing how much and when to work, when to take a break, and for how long.¹⁰⁸ Deepa Das Acevedo came to similar findings when studying platform workers in Philadelphia.¹⁰⁹ Interviews with Deliveroo and Foodora drivers in Berlin also show that some of them value these aspects of autonomy.¹¹⁰ Moreover, it is quite possible that following the COVID 19 pandemic, the desire for work autonomy will further increase.¹¹¹ Thus, we must ask whether we should find a way to legally allow the existing model (not with regard to employee status but with regard to working time). One way to do so would be to allow platform employees to waive their right to get paid for their on-call time, thereby allowing Uber to maintain the current working time model at least for those who prefer it. In this subpart, we wish to argue against this idea. In Part IV, we raise some other possible solutions, which we consider to be ‘intermediate.’

Labour laws are for the most part non-waivable and for good reasons.¹¹² It is generally assumed that labour laws are beneficial to the large majority of employees, and there is no reason to waive them unless one is forced to do so as a result of unequal bargaining power. It is further understood that employees often lack the full information to make informed decisions or that there might be some other good reasons for a degree of paternalism to protect them. Finally, waivers could be harmful to others by creating externalities (shifting costs to the state or family members) or by creating pressure on other employees to waive their rights as well. Nonetheless, there are some exceptions – situations in which waivers are allowed by legislation, sometimes subject to certain conditions. These exceptions

106 See Agnieszka Piasna & Jan Drahokoupil, ‘Flexibility Unbound: Understanding the Heterogeneity of Preferences among Food Delivery Platform Workers’ (2021) 19 *Socio-Economic Review* 1397 at 1405.

107 Some surveys suggest that platform-based workers prefer to be perceived as independent contractors and not as employees, mainly in order to preserve flexibility. See Gemma Newlands et al, ‘Collective Action and Provider Classification in the Sharing Economy’ (2018) 33 *New Technology, Work and Employment* 250; *Spain: Supreme Court Decision*, supra note 49. This does not mean that the drivers understand all the differences and have a preference for flexibility in the sense considered here, but it is reasonable to assume that at least some of them do.

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

109 Deepa Das Acevedo, ‘Unbundling Freedom in the Sharing Economy’ (2018) 91 *S Cal L Rev* 793.

110 Ivanova et al, supra note 47.

111 See Arvind Malhotra, ‘The Postpandemic Future of Work’ (2021) 45 *Journal of Management* 1091 at 1096.

112 Davidov, ‘Nonwaivability,’ supra note 10.

appear most notably in the context of working-time laws. In Ontario, for example, although the workweek is limited to a maximum of forty-eight hours, since 2019 any employee can waive this right and agree to work more hours.¹¹³ However, importantly, there is still a non-waivable right to overtime pay (150 per cent of the hourly wage) when working more than forty-four hours per week.¹¹⁴ This rule ensures compensation for working more than the normal number of hours as set in legislation and also maintains a disincentive for employers from demanding excessive hours. In the United Kingdom, there is a more extreme version: individual waivers concerning maximum hours are allowed, and there are no legislated rights to overtime payments.¹¹⁵ Such waivers are highly controversial; most legal systems do not allow them. But given our earlier conclusion that platform employees should receive wages for on-call time, and the implication that this will likely transform the entire model of employment through platforms, we have to ask: should waivers be allowed in this particular context?

As a starting point, we believe that opening choices for employees is a good thing. It respects their autonomy.¹¹⁶ It recognizes that different people have different preferences. Where possible, we should try to avoid a crude ‘one-size-fits-all’ solution that is imposed on all employees.¹¹⁷ If the flexibility to choose when and how much to work is lost, at least some employees who value this flexibility will be worse off. We cannot assume that the existing model (in which drivers are not paid for on-call time) is necessarily inferior for all people, compared to a model in which on-call time is paid but everyone must work in pre-set shifts. Therefore, it is not possible to say that the choice of an alternative (more flexible) model is necessarily wrong/bad from the point of view of every employee. Also, while many employees might not realize the costs of choosing more flexibility in this context – raising concerns about the lack of information to make a rational decision – it is probably possible to put in place legal requirements that ensure the dissemination of this information before any waiver. Overall, it appears that the justifications for paternalism are not very strong in this context. Nonetheless, there are two other reasons to be cautious about opening the possibility to waive payments for on-call time.

First, the risk of waivers that are not truly free but rather coerced is significant. The inequality of power between a platform like Uber and its drivers is

113 *Ontario Employment Standards Act*, supra note 96, s 17. Prior to the 2019 changes, a waiver was possible but only if the employer received an approval from the director of employment standards that applies to the specific employee or a class of employees that includes them.

114 The right to overtime is non-waivable, although it is possible to agree to get paid time off in lieu of overtime pay or to calculate the hours over a longer period (‘averaging’). See *Ontario Employment Standards Act*, supra note 96, s 22(7).

115 Working Time Regulations 1998 (UK), Reg 5.

116 Hanoch Dagan & Michael Heller, *The Choice Theory of Contracts* (Cambridge, UK: Cambridge University Press, 2017) at 17–48.

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

enormous. Drivers have no real impact on the terms of the engagement. They are likely to sign whatever they are required by Uber to sign. If there is an opening for waivers, it can be expected to become very common, simply because Uber will ask all drivers to sign such waivers. It will be practically impossible to determine for each individual employee whether the choice of waiver was truly free or not. In the next part, we discuss the option of allowing a waiver by a union instead of individually, which is a possible solution to this problem.

Second, and relatedly, there is a risk of harm to others in the sense of impacting the expectations from other employees. Imagine that one employee freely chooses to waive the right for on-call wages. It is now an option that is not only legally allowed but also preferred by some employees. From the point of view of the platform, people who make this choice are 'ideal workers,' and they will be rewarded in the market. Even if we assume that everyone makes uncoerced choices, by opening the possibility of waivers we are likely to change the demands in the market. New pressures are likely to emerge on all platform employees to follow those who have chosen to waive their rights.

In light of the above discussion, we do not believe that allowing individual waivers from working-time laws is a good solution in this context. It seems fair to assume that many people who work for platforms would prefer some stability and the ability to better predict their income.¹¹⁸ While some of the platform workers surely feel differently and prefer flexibility over any degree of security, opening such options for them should not come at the expense of the others. The risk that the more vulnerable workers will find themselves worse off is too strong.

IV *Intermediate solutions*

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

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

floor of rights in a way that could be beneficial to employees as well as employers (compared with the existing legal situation as we interpreted it above).

A REDUCED PAYMENT FOR ON-CALL TIME

Existing laws classify on-call time in dichotomous terms: an employee is either entitled to full wages (when on-call time is considered working time) or no payment at all. In the latter case, there is still an option, of course, to agree with the employer on some payment, but the law does not require it. An intermediate option would be that when the employee gets to decide for herself how much to work and when to work (the on-demand model), the payment for on-call time shall be lower; say, 50 per cent of the minimum wage.¹¹⁹ The platforms will have to decide whether to continue using the on-demand model at all, and they might choose to do so only for part of their workforce. But if they choose to allow (and enjoy the benefits of) letting workers log in whenever they want, the condition would be that all the on-call time must be compensated, albeit at a reduced rate.

At first sight, this option appears to share some similarities with the California law adopted as a result of Proposition 22.¹²⁰ Leaving aside the unjustified denial of employee status for transportation and delivery platform workers, they were granted a right to 120 per cent of the minimum wage during active working hours, with an addition of thirty cents per engaged mile.¹²¹ One might see this payment as also being an indirect compensation for on-call time. However, the extra payments are designed to cover some of the expenses for gas, car maintenance, and taxes imposed on the drivers as independent contractors. There is no sufficient payment to compensate for on-call time, nor is there any requirement to count the on-call hours and connect the compensation to them.¹²² The proposal that we raise here is on top of any payments due for the time of being engaged to actively work. It refers to the right for compensation for the time of making oneself available to work, which usually requires waiting at areas of high demand for rides.

119 We previously discussed on-call periods (separately) in Guy Davidov, 'A Purposive Interpretation of the National Minimum Wage Act' (2009) 72 Mod L Rev 581 at 600–3; Katsabian, 'Collective Action,' supra note 69 at 415–16.

120 See notes 57–60 above and the accompanying text.

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

122 'Workers stand to make far less under Proposition 22 than under current law. Not only does the initiative contain no overtime protections for workers, it dramatically shortchanges them regarding mileage reimbursement, fails to fully reimburse them for other significant expenses – like cell phone plans or cleaning equipment – and pays \$0 for time spent driving without a passenger or package, which can be more than a third of the time a worker spends working on these apps.' Rey Fuentes et al, *Rigging the Gig* (Washington, DC: National Employment Law Project, July 2020) at 10, online: <www.forworkingfamilies.org/sites/default/files/publications/Rigging%20the%20Gig_Final%2007.07.2020.pdf>. Similar conclusions were also made regarding the proposed ballot initiative in Massachusetts. See Jacobs & Reich, supra note 91.

With reduced compensation for on-call time, it seems fair to assume that the on-demand system can still be efficient for the platforms, at least during the busier hours, when most workers have enough work and will be getting more than the minimum wage anyway. They might place some limit on the number of workers who can log into the app at any given time and are also likely to prefer pre-set shifts during hours and in areas with low demand. Based on these assumptions, the main advantage of this solution is that it is likely to allow the on-demand system to continue, which is something that at least some of the workers may prefer over fixed pre-determined shifts (and is almost certain to disappear if the platform is required to pay full wages for on-call time). But what about those who prefer stability and security – those that are pushed into the on-demand model rather than freely choosing it?¹²³ As noted above, an introduction of this intermediate model can be expected to push the platform firms into a combination of regular shifts alongside some degree of extra work through on-demand employment. Ideally, this would allow workers to choose whether they prefer to work in regular shifts or on demand (not only with the flexibility but also with the insecurity that comes with it). But it would be unrealistic to assume a perfect fit between the number of workers offered the on-demand model by the platform and the number of workers who actually prefer it over the more secure alternative. We should assume, then, that on-demand work could still be forced upon some of the workers. Can it still be justified under the terms proposed in this intermediate model?

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

B EXEMPTION FOR EMPLOYEES WITH ANOTHER (MAIN) JOB

Research on platform workers – and app-based drivers, in particular – has shown that a significant number of them work for the platform full time and rely on

123 Such as immigrants and workers from other vulnerable populations. See e.g. Antonio Aloise & Valerio De Stefano, 'Uber Eats Facing Criminal Charges in Italy. Here's the Story,' *Canadian Law of Work Forum* (8 June 2020), online: <lawofwork.ca/uber-eats-facing-criminal-charges-in-italy-heres-the-story/>.

the platform as their main source of income.¹²⁴ It would be wrong to generally characterize platform work as ‘gig work,’ even though there is certainly a group of people who work for a platform only a small number of hours per week to supplement their main income. When thinking about policy solutions, it is important to have both of these different groups in mind. A possible intermediate solution which we wish to explore relies on this distinction and would exempt workers who already have a full-time job from the right to on-call payments when they are doing on-demand work as an additional ‘gig.’

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

The justification for such an exemption is based on a combination of two reasonable assumptions that have recently found some support in empirical studies: first, that people who have another full-time job are somewhat less vulnerable and would not easily be forced to accept a ‘gig’ that exploits them. If there are not enough rides to make this worthwhile for them, they are more likely to stop doing this.¹²⁵ And, second, we can assume that people who do this as an irregular gig on top of another job are more likely to value the on-demand model, with the flexibility it offers.¹²⁶ Given that this is ‘extra’ work for them, they might prefer

124 Jonathan V Hall & Alan B Krueger, ‘An Analysis of the Labor Market for Uber’s Driver-Partners in the United States’ (2018) 71 *ILR Rev* 705 (showing that 33–8 per cent of Uber drivers derive all their income from one ride-sharing app; note that the first author works for Uber); James A Parrott & Michael Reich, ‘An Earnings Standard for New York City’s App-based Drivers: Economic Analysis and Policy Assessment,’ *The New School* (July 2018), online: <www.centrernyc.org/an-earnings-standard> (report for the New York City Taxi and Limousine Commission, demonstrating that 60–5 per cent of workers in ride-sharing apps work on a full-time basis, using the app as a main income to support their families); Cano et al, *supra* note 41 at 55; Qadri & Mateescu, *supra* note 118.

125 See Juliet B Schor et al, ‘Dependence and Precarity in the Platform Economy’ (2020) 49 *Theory and Society* 833 at 835 (‘[w]e find that when platform income is supplemental ... satisfaction is higher, autonomy is greater ... and conditions are better. By contrast, those who are dependent on the platform to fund basic living expenses express more dissatisfaction and experience more precarity’).

126 See Piasna & Drahoukoupil, *supra* note 106 at 1416 (finding that those who are ‘more economically dependent on platform work, are less likely to benefit from notional schedule flexibility because they have less scope to exercise it to their advantage’). This was in line

not to commit to it in advance. Therefore, this group of people might be harmed more than others by a rule requiring full payment for on-call time, which is likely to dismantle this system of employment. Accordingly, an exemption from the rule regarding on-call payments might do more good than harm for this specific group. We realize that creating a different set of rights to employees based on whether they have an additional job or not is problematic in some respects, notably by adding fragmentation. Note, however, that the proposal is limited only to the specific question of whether a specific type of on-call time should count as working time. In any case, we raise it here for consideration, which would require further exploration of the full implications.

An obvious drawback of exempting a specific type of workers from a specific employment protection is the risk that the employer would only choose employees from this group. If a platform can save money (payment for on-call time) by engaging with people who have another full-time job, it might choose to do just that, harming the many others who work for the platform as their main job. While, in principle, this is a serious concern, it does not seem likely in practice. Platforms are known to prefer workers who invest a lot of their time working for the platform rather than people who do this only for a few weekly hours.¹²⁷ Like other, more traditional employers, they prefer workers who are committed to the job and who are experienced in performing it. We therefore do not believe that the risk is real, although we acknowledge that it is possible. To alleviate such a risk, it is probably best to do this for a trial period first. It is also possible to limit the platforms in terms of the maximum number of exempted employees (as a percentage of the total number of employees), although this would admittedly be considered a rather exceptional intervention in their business practices.

Assuming this proposal is accepted, there are two practical questions that will arise regarding the boundaries of the exempted group. First, what would be considered a full-time job for another employer? We do not think that the other job has to be for 100 per cent of the normal working time necessarily. Some threshold will have to be set – for example, thirty-five hours per week. Second, what about people who choose to work only a small number of weekly hours for the platform, even though they do not have any other job? Consider students, for example. While they do not have any other job, they have other commitments in their life, which lead them to treat the work for the platform as a ‘gig.’ Looking

with the study of Schor et al, supra note 125, which found heterogeneity in worker preferences with regard to flexibility, tied to the degree of dependency on the specific job.

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

back at the two assumptions mentioned above, students probably satisfy only one of them: it is likely that many of them value the flexibility of the on-demand model, even at the expense of security. In contrast, we cannot assume that they are less vulnerable than other platform employees. The question of whether to include them in an exemption relies, therefore, on whether one believes that one of the assumptions is enough of a justification by itself.

C DEROGATION (WAIVER) BY A UNION

In the previous two subparts we have considered ideas that limit the rights of some platform employees for on-call payments. In both proposals, the limitation is based on objective criteria. Although the parties can influence these criteria to some extent, we believe that both proposals avoid the problem of individual negotiations resulting in a waiver of rights. Such waivers are difficult to accept in most labour law contexts, and the current one is no exception. However, when a decision is made by a union, rather than by an individual employee, there is potentially more room to allow derogation from the standard rules by agreement.

Unions are much better positioned, compared with an individual employee, to make an informed decision on the exact conditions in which it is preferable for employees to waive the right to be compensated for on-call time.¹²⁸ Likewise, unions are in a better position to minimize the negative externalities that such a waiver may have on some of the employees. The emergence of new technological innovations – such as platform-based work – with all the new challenges they bring to the workplace, increases the importance of involving trade unions in the decision-making process in this context.¹²⁹ In many countries, this involvement seems unrealistic, given the decline in union density and union power over the last decades. However, once union derogations from some specific legislated rights are allowed, platforms are more likely to accept trade unions and cooperate with them in order to enjoy the possibility of such derogations.¹³⁰ At the same

128 Stein Evju, 'Imperative Law, Derogation and Collective Agreements' in Horst Konzen et al, eds, *Festschrift für Rolf Birk* (Tübingen, Germany: Mohr Siebeck 2008) 61 at 68–9.

129 On the importance of including workers' representatives in decision-making processes, particularly on the background of the digital reality, see Juliet Schor, *After the Gig: How the Sharing Economy Got Hijacked and How to Win It Back* (Oakland: University of California Press, 2021); Emanuele Dagnino & Ilaria Armadori, 'A Seat at the Table: Negotiating Data Processing in the Workplace: A National Case Study and Comparative Insights' (2019) 41 *Comp Lab L & Pol'y J* 173 at 177, 186–8; Valerio De Stefano, "'Negotiating the Algorithm": Automation, Artificial Intelligence and Labour Protection' (2019) 41 *Comp Lab L & Pol'y J* 15; Matthew T Bodie et al, 'The Law and Policy of People Analytics' (2016) 88 *U Colo L Rev* 961 at 1032; Brishen Rogers, 'The Law and Political Economy of Workplace Technological Change' (2020) 55 *Harv CR-CL L Rev* 532, Part IV.B; Tammy Katsabian, 'Employees' Privacy in the Internet-Age: Towards a New Procedural Approach' (2019) 40 *BJELL* 203 at 247–50.

130 Davidov, 'Nonwaivability,' supra note 10 at 500-1. This positive side effect is particularly important due to the difficulty of unionization in platform work. See Katsabian, 'Collective Action,' supra note 47. In this context, Matthew Finkin has argued that derogations made by trade unions can empower them. Matthew W Finkin, 'Union Dispossession of Labor Protection: A Paradox, in Two Legal Systems' (2020) 36 *Intl J Comp Lab L & Ind Rel* 1 at 18.

time, the expectation from a union, unlike an individual employee, is to be able to resist such waivers unless they can be justified by securing alternative benefits and while protecting the welfare of employees.

This idea is not without difficulties and risks. Decisions by the union leadership do not always reflect what the members want.¹³¹ Moreover, unions tend to follow the interests of their ‘median members’¹³² and, as a result, may prefer to protect flexibility over security in our context – to appease those working for a small number of hours (assuming they are the majority) and not the workers who rely more on this engagement. Nonetheless, trade unions are exposed to all the different interests and types of employees and can take them into consideration.¹³³ Overall, despite the risks, the involvement of unions alleviates many of the problems with waivers and allows the possibility of opening new opportunities for workers who look for flexibility, while, at the same time, protecting their interests and especially the interests of workers who prefer security. The possibility of derogating some employee rights based on a trade union’s agreement already exists in many countries, usually only in specific contexts.¹³⁴ In Canada, this opportunity is less common;¹³⁵ however, in some provinces, trade unions are authorized to derogate some of the working-time standards.¹³⁶ The option that we raise here for consideration would provide trade unions with the authority to waive on behalf of all or some employees the right to be compensated for the waiting time between calls (the on-call time). The exact conditions and the compensation in return for such an agreement would be determined by the parties in a collective agreement.

V Conclusion

There has been a wealth of academic writing, and legal battles, concerning the status of platform workers. There is now a growing global consensus that workers for platforms such as Uber are in fact employees, notwithstanding their

131 Finkin, *supra* note 130 at 14–15.

132 *Ibid.*

133 For further elaboration on this challenge, see Richard Hyman, ‘Trade Unions and Interest Representation in the Context of Globalisation’ (1997) 3 *European Review of Labour and Research* 515; Guy Mundlak, *Fading Corporatism: Israel’s Labor Law and Industrial Relations in Transition* (Ithaca, NY: Cornell University Press, 2007) 188–224.

134 In Norway, derogations by collective agreements concerning working time regulation were common already in the late 1950s. See Evju, *supra* note 128 at 66–7, 75. Similar derogations also exist in the United States, Germany (Finkin, *supra* note 130 at 5–12), and in France (Philip Rathgeb & Arianna Tassinari, ‘How the Eurozone Disempowers Trade Unions: the Political Economy of Competitive Internal Devaluation,’ *Socio-Economic Review*, online: <academic.oup.com/ser/advance-article/doi/10.1093/ser/mwaa021/5865479?login=true> [forthcoming]). For further elaboration on other countries, see OECD, *Use and Scope of Derogations and Opt-out* (2016), online: <www.oecd.org/employment/emp/Use%20and%20scope%20of%20derogations%20and%20opt-out.pdf> [OECD, *Use and Scope*].

135 OECD, *Use and Scope*, *supra* note 134 at 4.

136 For example, in Quebec, trade unions can agree to change the working hours control method to a non-weekly basis. See *Act Respecting Labour Standards*, CQLR 2021, c N-1.1, s 53.

misclassification by the employer. This emerging reality raises some new and difficult problems, notably how to calculate the working time of platform workers, a question which has not yet been considered at length. In particular, it is not entirely clear whether the platforms will need to pay for on-call (standby) time, especially when platform workers get to decide for themselves how much and when to log into the platform and make themselves available to work (the on-demand model). This article has attempted to fill this gap.

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

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

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

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