

Foresight Brief

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Should digital labour platforms be treated as private employment agencies?

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The intermediation of employment – matching jobseekers with employers – has historically been a top priority for the International Labour Organization (ILO). This is understandable given that one of the ILO's strategic objectives is to promote employment by creating a sustainable institutional and economic environment. Both public and private employment services have a role to play in creating such an environment with the objective of achieving full, productive and freely chosen employment. This brief will specifically focus on one of the central principles of international labour standards on employment services, namely that jobseekers must not be charged any fees or costs for job-finding services, unless those fees or costs have been approved by a competent authority. This principle has served as a central tenet during the development of regulations governing private employment services. However, it is worth emphasising again because digital labour platforms frequently disregard it by offering their users (i.e. self-employed workers) the possibility of increasing their visibility or ensuring better functionality of the platform, etc. in exchange for monetary payments.

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Private employment services

According to the ILO's Private Employment Agencies Convention, 1997 (No. 181), private employment services are subdivided into three categories: (i) services for matching offers of and applications for employment, without the private employment agency becoming a party to the employment relationships which may arise therefrom; (ii) services consisting of employing workers with a view to making them available to a third party; and (iii) other services relating to jobseeking. Agencies that provide the first kind of services can be referred to as placement agencies or recruitment agencies (hereinafter: mediation agencies), while agencies providing the second kind of services are generally termed temporary work agencies.¹ The third kind of services, however, are provided by a residual category of jobseeking agencies and consist of services that are less material-intensive than those offered by mediation agencies. An example given during the drafting of the Convention was that of a company which helps jobseekers to improve their curriculum vitae. This final category of labour market services was provided for in order to render the instrument sufficiently flexible so as to be adaptable to future trends in the evolution of employment services. According to Convention No. 181, it is the role of the competent authority to determine whether these 'jobseeking services' need to be regulated. Mediation services and temporary work services, on the other hand, must always be regulated, unless a specific exemption applies.

It is interesting to note that, when Eurofound carried out its research on platform work in 2018, it focused on 'online platforms matching the supply and demand for paid labour'.² In other words, it conducted its research on the premise that platforms operate as a broker between jobseekers, platform workers and principals, or clients. We share this view in part; indeed, one of the present authors has previously described the phenomenon as 'the "instant" matching of demand and supply of labour, facilitated by digital

systems (mostly apps on smartphones and online platforms) that make it easy to manage a large and "low-cost" workforce.'³

Job-matching services have been regulated by international labour standards for over 80 years now. During this period of time, the rules governing labour market intermediation have drastically changed. The Unemployment Recommendation, 1919 (No.1), which was withdrawn in 2002, recommended

that ILO Members take measures to prohibit the establishment of private employment agencies that charge fees or which carry on their business for profit. This initial prohibition was further reinforced in the Fee-Charging Employment Agencies Conventions of 1933 and 1949. Both severely restricted private employment services, albeit the latter to a lesser extent. Preference was clearly given to a free and public employment service. Those

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1. For an article on the merits of agency work regulation, and especially rules on temporary agency work, see Ratti L. (2017) Online platforms and crowdwork in Europe: a two-step approach to expanding agency work provisions?, *Comparative Labor Law & Policy Journal*, 38 (3), 477-511.
2. Eurofound (2018) Employment and working conditions of selected types of platform work, Luxembourg, Publications Office of the European Union, 9.
3. De Stefano V. and Alois A. (2018) European legal framework for digital labour platforms, Luxembourg, Publications Office of the European Union, 10.

public employment services were granted a prominent role with regard to manpower shortages during and after the two World Wars. That experience was believed to have led to the creation of a performing public service, one that could outcompete private services and reduce the risk of abuses committed by private actors in this highly sensitive field. Furthermore, the public employment service, as conceived of in the Employment Service Convention, 1948 (No.88), became an apparatus to implement states' policies aimed at promoting full, productive and freely chosen employment, as mandated by the ILO Employment Policy Convention, 1964 (No.122).

The most recent ILO Convention on the issue, Convention No.181, struck a new balance between the role of public and private employment agencies. Although the public employment service retains the final authority to formulate a labour market policy, cooperation between it and private employment agencies would have to be promoted going forward. The Convention acknowledged a potential positive role of agencies, provided that they operate in the framework of a sound general employment policy and a good regulatory environment.

In order to ensure that agencies deal fairly with workers and user enterprises/clients, Convention No. 181 deemed it necessary to impose certain regulations aimed at protecting jobseekers and clients from abuses. In return, private employment agencies became regularised and professionalised, with the temporary work industry at the forefront. Indeed, the ILO Legal Adviser described temporary work agencies as the *raison d'être* of the new instrument.⁴ Outside the ILO, temporary work agencies also gained in importance and, as a result, received more attention than traditional mediation agencies. In the EU, for instance, as the discussion on how to protect temporary agency workers lingered on, traditional mediation services were liberalised through Directive 2006/123/EC on services in the internal market.⁵ The platform economy may, however, renew the interest of labour advocates in the protective structures of traditional mediation services.

Digital labour platforms

Platforms like LinkedIn may rightfully be perceived by the general public to be mere social networks. Underneath their sleek design, however, they also act as an employment service. A classic fee-charging employment agency acts as an intermediary for the purpose of procuring employment for a worker or supplying a worker for an employer with a view to generating profit. LinkedIn and ZipRecruiter are two examples of platforms that sometimes perform precisely these kinds of national and international mediation services. The terminology used by the platform may be different, and legal objections could be raised, but to procure jobs for a freelancer or supply a self-employed person without employees to a principal is not so different from the role played by mediation agencies in matching prospective employees and employers.

4. ILO (1997) Fourth item on the agenda: Revision of the Fee-Charging Employment Agencies Convention (Revised), 1949 (No.96), Provisional Record, International Labour Conference, 85th session, 16/5. https://ilo.userservices.exlibrisgroup.com/view/delivery/41ILO_INST/1246557480002676
5. Article 2 and recital 14 of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market provide that the Directive is not applicable to temporary agency work. *A contrario*, this exception does not extend to other forms of private employment services, and, therefore, those services are, in principle, liberalised.

As part of the registration process for a LinkedIn Premium account, users are asked to give their reasons for registering. Some may be looking for a job, or wanting to enlarge their network and build their reputation, while others may be wanting to find more clients or recruit new talent. People who use LinkedIn to find a job are charged a monthly fee of €30 after the initial 30-day trial period.

This is not uncommon. Freelancer.com offers Freelancer Membership Plans that increase freelancers' chances of securing a job by granting them more bids per month, providing them with a more appealing profile and allowing them to benefit from priority treatment through Freelancer's payment system. Meanwhile, Care.com's mission is, according to its terms

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and conditions, 'to provide an online venue for families and Carers to connect with each other, arrange care, and share advice'. Both care seekers and carers may be required to pay for certain services and offerings made available to them. 'Care.com may allow Carers to pay a fee to be featured more prominently on the Site. In addition, Care.com may give Carers the ability to purchase credits that can be

used by such Carers to exchange information with certain Care Seekers.' The freelancing website Upwork recommends suitable freelancers to clients in accordance with their requirements and highlights projects for freelancers to bid on. Upwork charges the freelancer a fee of 20% for the first \$500 billed with the client, 10% for lifetime billings between \$500.01 and \$10 000 and 5% for lifetime billings with the client that exceed \$10 000.

Other online recruitment services, such as ZipRecruiter, instead reassure jobseekers that they 'will never charge Job Seekers for anything'. The pricing scheme is clearly aimed at the potential employer. In return for a payment by the prospective employer, ZipRecruiter distributes the job vacancy to over 100 job boards. This approach, contrary to those referred to above, seems to be more in line with the spirit of international labour standards. The Fee-Charging Employment Agencies Convention (Revised), 1949, prohibited private employment agencies, in principle, from charging any fees or costs to either employers or workers. Convention No.181 now allows agencies to charge employers, but generally not workers. Workers may be charged fees or costs only if certain conditions are met.⁶ A one-sided pricing model like ZipRecruiter is the result of a conscious decision and does not undermine the potential to stand out from the competition. Indeed, com also uses a one-sided pricing model with what they brand as a 'pay-for-performance pricing model' that is unlike those used by other competitors.

6. Those conditions are: (i) the prior consultation of the most representative organisations; (ii) a sufficiently specific exception; (iii) transparency about the fees or costs that are exempted; and (iv) reporting back to the Office with information, in particular on the reasons for the exception. See: ILO (2010) General Survey concerning employment instruments in light of the 2008 Declaration on Social Justice for a Fair Globalization, International Labour Conference, 99th session, Geneva, ILO, 82.

Free-of-charge principle

The fact that many digital labour platforms do not seem to pay heed to the free-of-charge principle merits some attention. One reason is that the principle was of major importance to the constituents that were involved in drafting Convention No.181. The Committee on Private Employment Agencies, which decided that the Fee-Charging Employment Agencies Convention (Revised), 1949, had to be reviewed, made two reservations. One was that any new standard should reaffirm a crucial tenet of the Declaration of Philadelphia, namely that ‘labour is not a commodity’. Furthermore, it was emphasised by a number of governments and Workers’ members that a basic principle regarding employment services should be that **no jobseeker should have to pay to find a job**. The Employers’ Vice-Chairman, speaking on behalf of the employers, also reiterated that ‘the only mandatory measure should be that a jobseeker should not be charged to obtain a job’. The Workers’ Vice-Chairman concurred that this should be one of the main principles. It was, therefore, ‘essential to recall that, with very few exceptions such as services provided to high-level professionals and executives, the Committee remained in favour of the principle that fees should not be charged to the jobseeker.’⁷ The Committee took into consideration the advance of communications technology as a medium to provide such services, but this did not alter its assessment of the situation. When the governments of the ILO member countries were asked by means of an official questionnaire whether this principle should be included in the new instrument, 45 out of 66 Members replied affirmatively.

The free-of-charge principle has long been incorporated in international labour standards. As early as 1932, a report by the International Labour Office observed that the regulation of labour market intermediation serves three main goals: the prevention of fraudulent and immoral practices, the rational and economic organisation of labour markets, and the maintenance of a free labour-exchange service. Some of the above-mentioned possible abuses at that time were the ‘exaction of exorbitant fees, charging of fees where no service is rendered, [...] advertising of posts or requests for employment without endeavouring to satisfy the requirements of persons already registered and who have paid a fee, the creation of a rapid turnover by splitting fees with employers or foremen, [...] pawnbrokerage and money-lending on usurious terms, exaction of deposits in cash or kind, [...] signing of contracts to the effect that applicants should retain the post for a limited period or resort in future to one and the same agent [...]’⁸ At the same time, the principle remains as relevant today as it was during the last century. It is explicitly recognised, for example, in Article 6 of the EU Directive on Temporary Agency Work.⁹

This is because allowing intermediaries to charge fees or costs opens the door to a range of abusive practices, which could also lead to workers’ being

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7. ILO (1994) Sixth item on the agenda: The role of private employment agencies in the functioning of the labour markets, International Labour Conference, 81st session, 21/31. <http://www.ilo.org/public/libdoc/ilo/P/09616/09616%281994-81%29.pdf>
8. ILO (1932) Abolition of fee-charging employment agencies, International Labour Conference, 16th session, 9. https://www.ilo.org/public/libdoc/ilo/1932/32B09_5_engl.pdf
9. Article 6(3) of Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work.

trapped in debt as they struggle to repay these costs. These abusive practices will most likely not manifest themselves the way they did in the past. Digital transactions leave traces, and today's professionalised private employment services are managed differently from the establishments of the past run by shady labour brokers on the corner of every high street. However, this does not mean that platforms that charge fees or costs to jobseekers do not inflict hardship in other ways. Platforms have an incentive to retain users, and so they model their pricing schemes accordingly. When a platform charges fees indiscriminately so that workers can benefit from premium services, this may lead to unjustified restricted access to jobs and to marginalisation of vulnerable workers who cannot afford to pay the premium prices. Indirect discrimination can also be triggered by pricing those workers out of the premium services who are only able to work part-time, for instance due to family commitments. This would most probably disproportionately affect women.

All this becomes especially problematic when we consider that the principle according to which employment services should be provided free of charge is inextricably linked to the founding principle that labour is not a commodity. If labour is not a commodity, then jobseekers should not be charged by any entity that is able to move workers from one employer or client to the next, because this would give that entity a greater incentive to encourage labour turnover and commodify jobseekers. Indeed, the ILO Committee of Experts on the Application of Conventions and Recommendations emphasised 'the exceptional nature of this principle in relation to the principle of free services provided by employment agencies'.¹⁰ The principle appears to have gained in importance only since the liberalisation of private employment services.

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Points for consideration

In the light of the above arguments, we would like to offer some concluding remarks.

A first area of concern is the scope of the rules that govern what we consider to be 'the law of the labour market'.¹¹ Digital labour platforms are constantly having to defend their claim in court that workers/jobseekers using their platform perform services as self-employed workers. Litigation proceedings on the issue are certainly essential in providing clarity on the operation of these economic actors. In addition to addressing the issue of employment status, however, discussions should focus on whether the regulation of labour market intermediation services should apply to digital labour platforms.

10. Direct Request (CEACR), adopted 2004, Private Employment Agencies Convention (No. 181), Republic of Moldova. https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:2237035

11. Deakin S. and Wilkinson F. (2005) *The law of the labour market: industrialization, employment, and legal evolution*, Oxford, Oxford University Press.

An example in this connection is the recent proposal by the European Commission for a regulation on promoting fairness and transparency for business users of online intermediation services. The proposed regulation would require that providers of online intermediation services specify in their terms and conditions any differentiated treatment, including that relating to direct or indirect remuneration charged for use of the online services. The regulation would not affect employees but instead would provide protection for business users. However, if these 'business users' are freelancers, is it not possible to argue that this regulation does actually belong to the realm of 'the law of the labour market'? Freelancers may not currently be entitled to the full measure of protection provided by general labour market legislation, but that does not mean that they should also be excluded from protective measures, such as the ban on fee-charging employment services, that are aimed at ensuring a transparent, non-discriminatory and fair labour market.

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Discussions should also take into account who should be subject to the regulation governing employment services. Employment services, as originally conceived, require both a jobseeker and an employer. Should this form of mediation involve the concept of the employer in legal terms? If so, serious shortcomings may be brought to light. For instance, if a work relationship has been mediated by a platform, and the jobseeker works for the platform's client as an independent contractor but is subsequently reclassified as an employee, does this not mean that the worker has been deprived of the protection to which he or she would have been entitled under the regulation of employment mediation services?

Arguably, the purposes served by this regulation extend far beyond the area of activities that lead only to the conclusion of an employment contract *strictu sensu*. As labour markets become more fluid and a growing segment of the workforce is employed in a 'grey area' between employment and self-employment that often includes casual workers, platform workers and dependent self-employed persons, the scope of the regulation of employment services should be made applicable beyond traditional employment contracts.

Where the provision of work or services is performed by an individual and not through a substantial and independent business organisation, this regulation should apply. This would improve the coherence of labour market regulation by ensuring that some of the most vulnerable workers in the labour market are not excluded from basic protection.

Many platform workers are often excluded from employment regulation because their contractual arrangements are too short or unstable, leaving some of the workers who most need it without labour protection.¹² This is the case for domestic workers, whose employment via digital labour platforms is often neglected in the debate on platform-based work.

12. De Stefano V. (2018) Platform work and labour protection: flexibility is not enough, *Regulating for Globalization*, 23 May 2018. <http://regulatingforglobalization.com/2018/05/23/platform-work-labour-protection-flexibility-not-enough/>

This is part of a much larger problem that should be widely addressed;¹³ however, for the reasons explained above, there needs to be a specific focus on the current circumvention of employment services regulation and the free-of-charge principle as a matter of urgency. No person should be required to pay in order to work, regardless of their potential employment status, if the principle that labour is not a commodity is to be respected.

Particular attention should also be given to the issue of transparency in processing data. Article 6 of Convention No.181 provides that private employment agencies must process the personal data of workers in a manner that protects this data and ensures respect for workers' privacy in accordance

with national law and practice, and, most importantly, limits the processing of personal data to matters related to the qualifications and professional experience of the workers concerned and any other directly relevant information. Digital labour platforms have the potential to

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process data, also through the use of IT tools such as smartphones, access to social media and profiling, in a way that was unconceivable only a few short years ago. Cases have already been reported involving domestic workers such as babysitters where platforms have scanned the social media profiles of job candidates and generated racially biased results driven by flawed algorithms.¹⁴

Technological advances call for innovative regulatory approaches to ensure, once again, transparency, fairness and the principle of non-discrimination in access to job opportunities. The regulation of employment services has traditionally been adopted precisely to serve those purposes. To that end, it is even more vital than ever that this regulation be brought up to date and consolidated.

13. Countouris N. and De Stefano V. (2019) New trade union strategies for new forms of employment, Brussels, ETUC.
14. De Stefano V. (2019) Collective bargaining of platform workers: domestic work leads the way, *Regulating for Globalization*, 10 December 2019. <http://regulatingforglobalization.com/2018/12/10/collective-bargaining-of-platform-workers-domestic-work-leads-the-way/>

