DISPATCH NO.45 – CHILE

CHILE'S LEGISLATIVE SOLUTION FOR PLATFORM WORK: DOES IT FIT THE BILL?

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On September 1st, 2022, Chile will become one of the few countries with a legislative answer to the dilemmas that platform work has presented to the field of labor law. In this dispatch, we flesh out the main coordinates of this new legislation and provide some comments on its adequacy for the challenges it purports to confront, arguing that the approach taken risks making its protections ineffective.[1]

THE CONTENT

The new legislation introduces a chapter on platform work within Chile's Labor Code. At its core is the answer to the problem of employment status: it creates two categories of platform workers: "dependent platform workers" who will have employee status, and "independent platform workers.", a *sui generis* figure that will remain an independent contractor but will be granted certain protections on matters like working time, pay, and discrimination, among others. Because of this, this legislation founds itself in the strange position of regulating what appears to be a contract *of* services – we borrow here the concept used in common law jurisdictions – within a

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1. Jorge Leyton García & Rodrigo Azócar Simonet, *Análisis crítico de la regulación del trabajo en plataformas en Chile, introducida al Código del Trabajo por la Ley Nro. 21.431*, 3 REVISTA JURÍDICA TRABAJO [LAB. L. REV.] 162–195 (2022). This dispatch is partly based on the analysis provided in the article.

labor statute, i.e., to create and regulate a category of agreement supposedly outside its protective mantle.

BASIC DEFINITIONS

The new norms state that they apply to the relations between "Workers of Digital Platforms," both "dependent and independent," and "Digital Services Platform Companies" ("Platform Companies"). The companies are described in broad terms–covering most of the services identified with on-demand platforms–albeit qualified in terms of the platform's goals, excluding not-for-profit enterprises that otherwise fit the general definitions.

The concept of Digital Platform Worker is adapted from the general rule contained in the Labor Code[2] to integrate the particularities of this form of work (their services are requested through an app) and the two employment categories created for it: workers, here, can provide services "on their account or for others.". Crucially, the final part of this provision states that the key to distinguishing between "dependent" and "independent" platform workers will be in the presence of the elements contained in article 7 of the Labor Code, that is, subordination and dependence.

DEPENDENT PLATFORM WORKERS: PREMIUM PROTECTION?

The chapter then regulates the contract of dependent platform workers, envisaged as a special contract. The first thing we find is a detailed list of the mandatory mentions to be included in the written agreement between the parties, following a general formula established in article 10 of the Labor Code while adding some specific elements related to platform work. For example, it includes an obligation to designate an official channel—always serviced by a person—on which the worker can contact the company and present complaints.

Recognizing the flexible nature of work for platform companies, some provisions depart from the general rules on working time and pay. First, it authorizes workers to distribute freely their working hours, subject to the daily (ten hours) and weekly (forty–five hours) limits established in the general rules. The rules specifically include within its definition the time in which the worker puts herself at the employer's disposal, from the moment she connects until she voluntarily disconnects, thus including waiting times between assignments. The last bit is reinforced by the obligation imposed on employers to consign waiting times ("passive" working time) within the time

2. Worker is "any natural person who performs personal intellectual or material services, under dependence or subordination, and by virtue of an employment contract". The term "worker" used by Chilean legislation is equivalent to the term "employee" traditionally used in the United States and the United Kingdom.

register they must keep. The new chapter opens the possibility of subjecting pay to the general rules or agreeing on a payment system for services effectively rendered. A minimum amount per hour (over the minimum wage) is established, designed to cover for pay for waiting times and any other form of "passive" working time.

The creation of a special contract of employment is not an alien technique for Chilean legislators. Examples of special contracts regulated in the Labor Code include agricultural workers (articles 87–95), workers in sea vessels (96–132), casual dock workers (133–145), and domestic workers (146–152 bis), among others. The logic behind them is to adapt general rules to certain services provided in distinctive and sometimes complex circumstances. Some adaptations are derogations from the general rules, like giving the employer the power to fire without cause (domestic workers) or denying the right to strike during collective bargaining procedures (as with seasonal agricultural workers and others). The justification and proportionality of these derogations are, in many cases, quite dubious, but that is a matter for a different publication.

This new special contract has an analogous logic and can be subject to similar scrutiny. What stands out is that it is paired with a category technically outside the purview of labor law, which has a lower level of protection. In this sense, the dependent platform worker would be provided with a "premium" protection, compared with the second option, to which we turn now.

INDEPENDENT PLATFORM WORKERS: SECOND-ORDER WORKERS?

As we have mentioned, the new legislation creates a special contract category defined as "independent," i.e., a contract whose characteristics are antithetical to the tenets of employment regulation. This *sui generis* type of contract applies to situations in which the platform's role is merely to coordinate the contact between the independent platform worker and the platform's users, even if the platform establishes general terms and conditions to allow persons to work using the company's technological infrastructure.

Despite the independent status of these workers, the chapter includes a series of "employment type" regulations on some relevant matters. It requires minimum terms to be included in the written agreement between the parties, some basic obligations regarding the worker's agreement, and essential formalities. Then, it turns to matters like pay and off-work time. On the former, it includes a series of norms aimed at making the payment arrangements accessible and transparent for the worker while requiring that tax law is followed. It puts these workers under the protection of general

social security, where applicable. On the latter, it creates an obligation for platform companies to enforce a minimum "disconnection time" of twelve hours within every twenty-four hours.

In what could have been an exciting development, article 152 quinquies B makes the special procedure for protecting fundamental rights in the workplace[3] applicable to independent platform workers, potentially providing them with a valuable tool so far only available for persons in an employment relationship. The catch is that only independent workers that have worked for an average of 30 hours per week in the last three months will be able to access this procedure. This arbitrary bar does not have a clear justification and creates an odious distinction within an already watered-down set of protections.

COMMON RULES AND THE PROBLEM OF COLLECTIVE BARGAINING

The new chapter incorporates a series of rules applicable to both dependent and independent platform workers. We want to mention four elements of note.

The first one is a rule on transparency and access to information. The chapter establishes a right to access the personal data that the company holds, particularly those related to their rating and performance, as well as a right to data portability. These are welcome developments in terms of individual rights. However, there is no mention of perhaps the most crucial source of disparity in this field: information related to the algorithms used by the platform to make decisions that affect workers. A rule like the one adopted by the Spanish legislator would have provided more robust protection.[4]

The second aspect is the prohibition of discrimination by automated decision-making systems. Here, companies must uphold equality and non-discrimination in implementing their algorithms and inform workers of the measures taken to comply. The norm includes a form of indirect discrimination, something not seen previously in Chilean Labor Law. Its inclusion as a specific rule for platform works appears odd, but it is certainly welcome.

On matters of health and safety, rules on protecting gear and training are included for both categories, including an obligation for companies to obtain insurance on the workers' personal items. This is certainly an improvement for independent workers.

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3. Incorporated in 2006, the rules contained in article 485 and subsequent allow workers to present claims arguing that one or more rights mentioned in the article (life, privacy, freedom of expression, among others) have been breached by their employer.

4. Under the "Rider Law", Spain's Workers' Statute [Estatuto de los Trabajadores] now includes a right for organized workers to be informed by platform companies on the parameters, rules, and instructions on which their algorithms or AI are based.

Finally, it recognizes the right of both dependent and independent platform workers to organize in trade unions and bargain collectively with their employers (this is hardly a novelty in the case of dependent workers). What looks at first sight as a relevant innovation is the inclusion of independent platform workers: this could have been a game-changer. However, the norm threatens this by dictating that unions representing dependent or independent platform workers will be able to bargain with their employers within the rules of the so-called "unregulated" procedure, which includes only basic rules and gives flexibility to the parties to conduct the negotiations. The problem? It does not include the norms that make it possible to strike nor the protections against dismissal applicable in the general "regulated" procedure. In a system of industrial relations characterized by highly regulated procedures and a very limited legal implementation of the right to strike, this regulatory option leaves platform workers in a weaker position than other workers.

COMMENTS: ON THE (NON) ANSWER AND THE PROBLEM OF INEQUALITY OF BARGAINING POWER.

This legislation represents progress in certain aspects by creating protections for platform workers where none existed. Issues like algorithmic discrimination, data protection, and flexible working time arrangements will provide a basic layer of protection.

The problem is the lack of consideration for an essential aspect of employment relations, a critical concern for labor law: the existence of inequalities of bargaining power[5] Contrary to the discourse of platform companies, the "gig" economy does not escape this reality and, in many ways, reproduces situations present since the dawn of labor regulation.[6]

By creating a dual system in which a category with complete employment protection sits next to one that provides lighter—cheaper—protection, the drafters were oblivious to the fact that workers are not the ones who decide the conditions in which they will provide services: employers do. It is not fanciful to presume that companies that have so far refused to comply with labor regulations and continually classify their workers as independents will opt for the cheaper version of protection. On the one hand, this system risks not changing the current situation, or at least not essentially: workers will still have to fight to be recognized as workers. Conversely, the regulatory pattern created here risks creating "lesser" forms of employment that will

5. OTTO KAHN-FREUND, P. L. DAVIES & M. R. FREEDLAND, KAHN-FREUND'S LABOUR AND THE LAW 18 (3rd ed. 1983).

6. JEREMIAS PRASSL, HUMANS AS A SERVICE: THE PROMISE AND PERILS OF WORK IN THE GIG ECONOMY 5, 130 (2018).

diminish protections and deregulate in sectors where precarity is prevalent. It may give rise to what Freedland has called the "paradox of precarity," where protections associated with employment law are carved out and eroded in sectors where they are most needed.[7]

7. Mark R. Freedland, *The Contract of Employment and the Paradoxes of Precarity* 16 (2016), https://papers.ssrn.com/abstract=2794877 (last visited Apr. 27, 2021).