The Platform Work: The Perspectives for Regulation by Russian Labor Law

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ABSTRACT
Due to the restrictions imposed because of the coronavirus infection, work through online platforms has become the focus of public attention and resonant public discussion. The article analyzes the prospects for the extension of labor law norms in this rapidly growing sector of employment. It is proposed to enshrine in the Labor Code a direct rule that work through online platforms, in which the platform sets the requirements for exactly how the work should be performed, should be qualified as labor under an employment contract. In addition, the author comes to the conclusion that it is necessary to adopt norms on the joint responsibility of the company owning the online platform and intermediary companies on which behalf the contracts are concluded with online workers. Longer-term and more fundamental decisions regarding new forms of employment should include a revision of the entire employment relations paradigm as well as the notion of actor of labor law. The employment relationship notion should be expanded and include the actors with currently transitional legal statuses in relation to contractors who do not have all the characteristics of an employee working under an employment contract, but are in need of legal protection due to economic dependence.
Keywords*: labor law, new forms of employment, gig-economy, platform work, digital work, digital economy*

1. INTRODUCTION

The massive introduction of information technologies into everyday life and work, the development of the digital economy (gig-economy) [1] has led to such a wide spread of the so-called new forms of employment [2], in which the interaction between the parties depends to a very significant extent on electronic communications, that specialists in the field of comparative labor law raise the question of the need to revise the traditional concept of the employment relationship [3, 4].

The most discussed “new” form of employment in the labor law of different states in the last few years is work through Internet platforms. Labor through Internet platforms in everyday perception is associated with high technologies, although mass employment in this segment is used for professions that do not require high qualifications: drivers, couriers, performers of small household services, au pair, care workers, etc.

This form of labor organization has a tendency to a rapid growth in its share among other forms of employment. According to the Oxford University [5], only since May 2016, when this form of employment has already become very popular and discussed and has managed to largely replace the “traditional” employment in fairly mass professions, by June 2020, has additionally increased by more than 60% [6].

Russia ranks fifth in the world (after the United States, India, the Philippines, and Ukraine) in terms of the number of people working through online platforms [7]. At the same time, in Russia, discussions about the legal status of online platform workers are so far less visible than in the EU or the USA.

Most of the spheres of modern employment are subject to a tendency of increasing instability (the so-called "precarization") [8]: instability of relations, a weakening of protection against dismissal, a forced transition to part-time work, the avoidance of employers from the correct registration of employment relations, etc. Platform employment is one of forms of labor the most prone to precarization [9, 10].

To a large extent, this is due to the fact that platform workers are not subject to labor legislation and, accordingly, labor rights that are entrusted to employees in the framework of employment relations. It is not surprising that this has already led to spontaneous protests of workers' platforms, carried out outside the legal framework.

During the period of the introduction of protective measures in connection with the spread of the COVID-19 coronavirus, unlike most "classical" forms of work, work based on online platforms has sharply increased its importance, and legal problems and conflicts associated with it have come to the fore.

2. WORK THROUGH ONLINE PLATFORMS IN THE WORLD

When classifying platform employment, the European Fund for the Improvement of Working and Living Conditions (Eurofound) has identified ten types of it, depending on whether the work is initiated by a client or a performer, what kind of work is in question, and also on the place of work [11]. At the same time, for a more detailed study, the Eurofound experts chose work through platforms carried out within three large types:

a) work defined by the platform (for example, a courier service delivering food);

b) work initiated by the performer (performers through the platform offer a wide range of services, including plumbing work, gardening work, child and elderly care, tutoring, etc. As a rule, such work is carried out in a limited area of residence);

c) platform work of a competitive type, when clients of the platform hold contests for performers to make various creative tasks.

The rest of this article deals primarily with platform work of the first type, which is most similar to employment relations. There are other approaches to the classification of platform employment [12].

Companies operating online platforms tend to position themselves exclusively as information providers connecting the user of the service and the worker. Most often, legal relations with the participation of an online platform include three parties (customer–platform–worker), but there are also more complex schemes when additional actors are involved in the legal relationship, and then they can be four- and even five-sided [13].

Companies operating online platforms distance themselves as much as possible from the status of employers in relations with platform workers. J. Prassl, a well-known specialist in labor regulation in the digital economy, points out that in order to consider an online platform as an employer, and not just a information service provider, one must be guided by such signs as the ability to fire a worker (disconnect from the platform), use labor and its results, provide work and pay for it, control sales [14].

In the case when a platform worker does not have the status of an employee under an employment contract, the platform itself determines the rules according to which they can be disconnected from the platform (i.e., in fact, dismissed), such a performer can be fined for improper performance of their duties, which is prohibited in labor law. The norms on the minimum wage, limitation of working hours, the right to collective bargaining and strikes [15, 16] and other essential labor rights do not apply to such workers. Their status as subjects of social security also depends on the legal status of platform workers [17, 18].

The largest number of disputes and protests in various countries in relation to platform employment are currently associated with the work of taxi drivers. The most widespread and best-known online taxi-related platform in the world is Uber. The influence of the form of employment implemented by this company in the world on the world of work turned out to be so great that the term "uberization" entered the modern circulation in different languages of the world.

Uber has become the subject of not only academic discussions, and the addressee of protests, but also a defendant, in most of the countries where it began to operate, in numerous lawsuits from drivers, "traditional" companies and states in connection with the controversial status of the work of its drivers. In virtually all of the countries where Uber began its operations, disputes regarding the determination of the status of drivers as independent contractors or as employees were considered.

For example, in France in 2019, the Paris Court of Appeal recognized a contract that had been previously concluded between Uber and a driver who had worked for the company for two years and completed four thousand trips, but was subsequently disconnected from the platform by Uber's decision, as an employment contract.

The court motivated the decision by the fact that the driver was economically dependent and subordinate to the company, could not choose clients on his own and set his own tariff. A similar approach has been developed in Switzerland, Belgium and some other European countries. In the United States, the situation regarding the legal status of taxi drivers using online platforms varies from state to state and is also associated with a significant amount of litigations.

3. USE OF LABOR BY INTERNET PLATFORMS IN RUSSIA

In Russia, after Internet aggregators entered the taxi market in 2012, according to the researchers from High School of Economics [19], only in Moscow, the number of trips and the volume of the taxi market by 2019 increased approximately eight times, taxi trips became much more affordable, and the income of drivers decreased several times. Falling incomes, as well as difficult working conditions associated primarily with the extremely long working hours, led to the fact that the protests of taxi drivers working through aggregators dramatically changed the sectoral structure of workers' protests in Russia at the end of 2019 [20].

The problematic nature of this type of service has led to the fact that several bills on this issue are currently under consideration in the State Duma of the Russian Federation. Nevertheless, none of the projects even touches on the issue of social and labor rights of people performing work through online platforms, despite the fact that the absence of the necessary legal guarantees in the labor sphere of such “contractors” has been repeatedly noted by experts [21, 22].

In Russia, most of the discussion regarding the status of taxi drivers working on digital platforms is related to the Yandex.Taxi service. It is already known about two lawsuits against Yandex Taxi LLC on recognizing relations with drivers as labor (decision of the Tushinsky District Court of Moscow dated June 26, 2019 in case No. 2-2238/19 and the decision of the Zamoskvoretsky District Court of Moscow

dated 14 May 2019 in case No. 2-2792/2019). In both cases, the courts refused to recognize the existence of an employment relationship based on how the parties documented their relationship.

In both cases, information related to the tax status of the driver, an indication of the civil law nature of the relationship in the agreement between the platform and the driver, the mention in the agreement that the platform was an intermediary between the driver and the passenger, and also that the driver has the right to refuse to accept orders, which, from the point of view of the courts, indicates his freedom to make decisions. In addition, the courts argued their refusal to recognize the existence of an employment relationship between the parties by the fact that the driver rented a car to provide services from a third party, and not from a platform.

At the same time, the courts in both decisions did not take into account the factual situation regarding the relationship between the driver and the company, despite the fact that the Plenum of the Supreme Court, in its Resolution No. 15 dated May 29, 2018, explained to the courts the need to give the higher priority to the factual circumstances compared to the formal aspect of the relationship. This approach is based on Clause 9 of the 2006 ILO Employment Relationship Recommendation (No. 198) which indicates the principle of the priority of facts, which must be applied when qualifying employment relations.

Meanwhile, there is a number of arguments indicating the signs of employment relations described in the ILO Recommendation No. 198 reflected in the practice of Yandex.taxi and other Internet taxi aggregators. A ride offer is automatically sent by the online platform to a specific driver, rather than being offered to multiple drivers; refusal to order reduces the driver's "rating", as a result of which the platform offers the driver orders less often, or disconnects him or her from orders altogether.

The platform gives instructions on how exactly the carriage should be carried out; the online platform fixes the maximum duration of the "shift"—sixteen hours(!)—after which the platform "takes a break" and does not provide the driver with orders.

In the Yandex.Taxi application, in the “Getting started” section, the platform indicates that the driver needs to submit an application, complete a survey, “register at the taxi company”, after which he or she can “go online” to earn money, i.e. we are talking about the actual admission to work. In the “What are bonuses” section, it is said that the platform gives bonuses “for excellent work”, but gives them not directly to the driver, but through the “Taxi Park”, i.e. we are talking about incentive payments. Drivers are subject to qualification, seniority and age (age-discriminatory) requirements.

Taxi drivers are one of the most striking, but far from the only examples of problems related to the protection of labor rights and the legal status of online platform workers. Another notable segment of the labor market is delivery work. During the period of restrictive measures to combat coronavirus infection, work in some professions through mobile applications was suspended, but some work, primarily the work of delivery services, on the contrary, turned out to be the subject of rush demand.

In Russia, at the moment, the most notable online platforms for the work of couriers are Yandex.Food and Delivery Club. Both companies actively use intermediary organizations on behalf of which contracts with couriers are concluded, as well as the tax status of self-employed (in those regions where it is applied by law). This is done to "minimize risks" and recognize the couriers as employees in the claims of tax authorities.

4. PROTEST ACTIONS OF PLATFORM WORKERS

Traditionally, it is believed that the exercise of collective labor rights by platform workers is impossible or extremely difficult, since platform workers are not workers in terms of labor law. Nevertheless, empirical studies in European countries show that it is the harsh working conditions and the situation discriminated against in comparison with ordinary employees that force platform workers to carry out joint actions even outside the legal field [23].

The Russian experience also confirms these conclusions. Even before the pandemic-related restrictions spread, protests by platform drivers and couriers have been discussed repeatedly in the past few years. After the introduction of coronavirus restrictions, the use of platform delivery services has increased significantly.

As a result, in June 2020, Delivery Club couriers, outraged by the growth of fines imposed on them by the company (which would be deliberately illegal if these couriers worked under employment contracts), went on strike to which they are not entitled, again, not being employees under employment contracts. In response to the actions of platform workers, the company yielded and canceled the imposed fines and declared them an "experiment", and the prosecutor's office promised to verify the legality of the company's actions.

Towards the end of June 2020, Delivery Club platform workers established their union Courier, which announced its intention to go on strike for couriers who had not been paid by the company's “logistics partner” for several months, which put them in an extremely difficult situation. According to the Delivery Club company, we are talking about three dozen couriers, according to the trade unions they are about three hundred.

The company terminated the contract with the "logistics partner", which was supposed to make payments and promised to pay off debts on its own, however, a courier strike was scheduled for July 9, and the first of their demands was the conclusion of employment contracts, instead of fictitious contracts for the provision of services, and the end of the practice of forcing couriers to register as self-employed persons.

5. PROSPECTS FOR CHANGING LEGAL STANDARDS IN RUSSIA

The lack of any labor rights and guarantees for the growing sector of platform workers [13, 24] is not only their problem, but also a threat to the entire socio-political system of the state as a whole.

These difficulties and risks have already made domestic specialists reflect about the legal status of those working through the platforms in terms of their labor rights. For instance, A.V. Grebenshchikov, N.I. Diveeva and A.V. Kuzmenko point out that "... in principle there are no obstacles" for the extension of labor law norms to such persons, but at the same time they cautiously point out that in order for the special labor law norms for digital workers to be effective, "serious theoretical understanding and normative study" of the relevant norms are required [25].

L.V. Zaitsev and A.S. Mitryasova believe that with regard to taxi drivers working through online platforms, it is appropriate to talk about the presence of "some signs of employment relations" and "some signs of atypical employment relations". In addition, they point out that the experience of countries that extend certain protective norms traditionally addressed to employees is noteworthy without assigning them the status of workers in the framework of employment relations [26].

It seems that O.V. Chesalina makes a right point stating that the nature of labor through online platforms is too different to be able to use a unified legal approach to any of its types [27]. She also formulates the most detailed proposals regarding the prospects for protecting the labor rights of platform workers [13]. She proposes to revise the concept of an employee in such a way as to extend the norms on teleworkers (Chapter 49.1 of the Labor Code) and temporary employment agency workers (Chapter 53.1 of the Labor Code) to some of the platform workers. In addition, O.V. Chesalina proposes to shift the burden of proof [27] of the existence of an employment relationship in labor disputes from the employee to the employer.

As an alternative, she proposes to regulate the labor of economically dependent contractors in the norms of the Labor Code, which should include platform workers.

It can be agreed that economically dependent contractors are a promising field for expanding the scope of protective labor law norms, as well as understanding the prospects for introducing intermediate legal statuses existing in a number of countries, which implies the granting of dependent contractors or "employee-like persons" by separate labor rights, as is done in Germany, Austria and some other countries.

Nevertheless, it seems that tectonic shifts in Russian labor law, which require a rethinking of the very approach to the employment relationship, is a process that requires a rather long and complex discussion not only in the academic environment, but also with the participation of social partners. This discussion will take significant time.

The most problematic and conflict situations that arise now between the online platform workers, intermediary companies and the platforms themselves are most often associated with relationships that are quite suitable for the concept of labor even under the current legislation. The classic difference between employment relations and civil law relations related to labor, both in Russian [29, 30] and in Western European [31, 32], legal doctrine is the presence or absence of subordination. The key question that arises in relation to the employment relationship is: "how should the work be done?", while in civil law it is "what should be done as a result?"

The work of platform taxi drivers, couriers and in other similar professions is clearly dependent and subordinated. Such relations are not qualified by Russian courts as employment relations solely due to a formal approach and ignorance of the factual circumstances of the case, which do not coincide with the legal formalization of the relationship by online platforms.

The participation of several legal entities on the employer's side or the problem of the corporate plurality of the employer is a separate problem that needs to be addressed in Russian labor law and concerns not only platform workers, but any employees in general. However, since labor relations with the participation of platform workers always include more than two parties, the problem of the so-called shifting of the corporate veil of the employer in such cases is even more urgent.

6. CONCLUSION

It seems that in the short term, before the global issues of rethinking the employment legal relationship [33] are resolved, the problems of taxi drivers, couriers and platform workers of other similar professions can be solved by including another new chapter in the Labor Code concerning the work of persons working through online platforms.

The main purpose of the new rules should be to indicate to judges that if an online platform formulates requirements for how the work is done, then such a relationship should be classified as an employment relationship with corresponding consequences for the parties. If the activity of the platform really comes down to information mediation between the parties, and the platform does not participate in any way in determining the nature of the work performed, then the main body of labor law is inapplicable. In such cases, it is possible to attract the platform to participate in the social insurance of the performers.

In the proposed regulations, it is necessary to pay attention to intermediary companies, which are often used by online platforms. These companies should not become the only employers for platform workers, and the online platforms themselves must necessarily be connected to the legal relationship, at least in terms of liability to the employee.

More fundamental and long-term decisions in connection with the "new" forms of employment imply an assessment of the prospects for revising the very classical concept of an employment relationship, the inclusion of the criterion of economic dependence, an assessment of the prospects for establishing intermediate legal statuses, when work

performers are not endowed with full labor personality, but with separate labor rights.

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