



## 1. Introduction

1.1 In the past decade or so, the advance in technology and the corresponding changes in the operation model of businesses around the world have led to the emergence of the so-called "gig economy". The term "gig economy" does not have a single agreed-upon definition. It is often used to refer to a practice of working where an individual uses a digital platform provided by a company,<sup>1</sup> accessed via an app or a website, to find and perform temporary, freelance, on-demand or gig work as a primary or supplementary source of income.

1.2 Depending on the operation models of the platform companies, the "gig economy" working practice may involve on-demand local delivery of on-site services such as transport, food delivery, domestic cleaning, courier or other professional services; or remote delivery of administrative or professional services such as consulting, design or data entry through the Internet. It was estimated that about 1.5% of the global workforce had been involved in the "gig economy" between 2014 and 2016.<sup>2</sup>

1.3 In the "gig economy", instead of a regular wage, workers get paid for the "gigs" they do. Gig workers do not have formal employment relationship with the platform companies and have flexibility in the choice, location and hours of work. Yet, gig workers in some sectors may be under the control or supervision of the platform companies. In light of the diversity in work arrangements of gig workers and their ambiguous employment relationship with the platform companies, the classification of gig workers and the protection of their labour rights have been a contentious issue in Hong Kong

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<sup>1</sup> The platform companies act as intermediaries, matching service providers to consumers (final consumers or businesses) on a per-service (gig) basis, shaping how the parties transact with one another, providing necessary information to maintain the quality of services, and coordinating payments. In return, the platform companies charge a fee or commission when the services are paid for or completed.

<sup>2</sup> See Overseas Development Institute (2019).

and many other developed economies where the "gig economy" is growing. For example, gig workers are commonly classified as "self-employed persons" under the labour protection regime in most places including Hong Kong, and they cannot benefit from the employee protection provided by labour law as a result. Besides, gig workers in many places are not entitled to form unions and bargain collectively under labour law.

1.4 Against the above, there have been growing concerns around the world about the vulnerability of gig workers to exploitation such as low pay and adverse treatments, and the inadequate protection of their labour rights. Indeed, gig workers globally have been fighting for their rights through litigation over the past few years. It was not until recently that some overseas places such as the United States ("US"), France and the Netherlands have introduced/planned to introduce their respective new legislation to enhance the protection of gig workers.

1.5 At the request of Hon HO Kai-ming, the Research Office has prepared this information note to study the legislative initiatives introduced in selected places for enhancing the protection of labour rights of local gig workers. The information note will first study the labour right issues faced by gig workers in Hong Kong, and then review the approaches or initiatives commonly adopted in overseas places for enhancing the protection of gig workers. This is followed by a detailed study on the relevant legislative initiatives introduced in the US and the European Union ("EU"). California, the New York City and the Washington State of the US, as well as France and the Netherlands of the EU, are specifically covered to highlight the implementation of those legislative initiatives at the city/state or member country level. The salient features of the legislative initiatives adopted in the places studied are summarized in the **Appendix**.

## **2. Hong Kong**

2.1 In recent years, the growth of platform businesses in sectors such as food delivery<sup>3</sup> and ride-hailing services<sup>4</sup> in Hong Kong has led to the engagement of an increasing number of on-demand gig workers on full-time or

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<sup>3</sup> It was reported that the penetration rate of platform-to-consumer food delivery services in Hong Kong stood at 22.8% in 2019. See Statista (2020).

<sup>4</sup> According to Uber (2019), the number of Uber riders in Hong Kong grew by about 40 times between 2014 and 2019. Uber is one of the major ride-hailing platform companies in Hong Kong.

part-time basis. Besides, conventional business sectors such as banking and finance, retail and information technology have increased their hiring of gig workers to complement their permanent workforce so as to increase the adaptability of their business operations.<sup>5</sup> The above employment trends, coupled with increasing acceptance of flexible employment among the local working population,<sup>6, 7</sup> have contributed to the growth of the gig workforce in Hong Kong.

2.2 In Hong Kong, statistics specifically on gig workers are relatively limited. Reference can only be drawn from statistics on self-employed persons<sup>8</sup> to provide an indication on the size of local gig workforce.<sup>9</sup> According to the Census and Statistics Department, the number of self-employed persons totalled 224 100 in 2019, representing 6.4% of the total employed population.<sup>10</sup>

2.3 In accordance with the Employment Ordinance (Cap. 57),<sup>11</sup> every employee engaged under a contract of employment, irrespective of their hours of work, are entitled to basic protection including payment of wages, restrictions on wages deductions and granting of statutory holidays. Employees who are employed under a continuous contract<sup>12</sup> are further entitled under the Employment Ordinance to benefits such as rest days, paid

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<sup>5</sup> See Human Resources (2018).

<sup>6</sup> In 2016, the Hong Kong Federation of Youth Groups conducted a survey on 528 young workers aged between 15 and 34 about their working status and attitude towards flexible employment. It was found that 51% of the respondents had engaged in flexible employment including freelance, part-time or temporary works, or working as an independent contractor in the 12 months before enumeration. About 44% of the respondents accepted flexible employment. See 青年創研庫(2016).

<sup>7</sup> A multinational recruitment company conducted a survey on the gig economy in the Asia-Pacific region in 2017. According to the survey, 55% of the hiring managers and candidates surveyed in Hong Kong agreed that job seekers nowadays had been more likely to seek flexible contract-based jobs than traditional permanent full-time jobs. The percentage share was the highest among the nine Asia-Pacific economies surveyed. See Persolkelly (2018).

<sup>8</sup> Self-employed persons refer to those persons working for profit or fees in his or her own business/profession, neither employed by someone nor employing others.

<sup>9</sup> As the self-employment ratio relates to employed persons whose main job is in self-employment, it may not be able to capture gig workers who take up digital platform work only occasionally or as a side job to supplement their income. See Office of the Government Economist (2020).

<sup>10</sup> For comparison, the corresponding figures for 2015 were 213 400 persons and 6.1%.

<sup>11</sup> The Employment Ordinance is the main piece of legislation governing the conditions of employment in Hong Kong. It covers a comprehensive range of employment protection and benefits for employees.

<sup>12</sup> An employee who has been employed continuously by the same employer for four weeks or more, with at least 18 hours worked in each week is regarded as being employed under a continuous contract.

annual leave, sickness allowance, severance payment and long service payment. However, gig workers in Hong Kong are generally classified as self-employed persons or independent contractors, and they are thus not entitled to employee benefits provided under the Employment Ordinance.<sup>13</sup> Besides, self-employed persons or independent contractors are not entitled to protection under other relevant labour legislation such as the Employees' Compensation Ordinance, the Minimum Wage Ordinance, and the Mandatory Provident Fund Schemes Ordinance.

2.4 Amidst the increased prevalence of gig workers in Hong Kong, there has been rising concern about the inadequacy of protection of their labour rights under the current labour protection regime. Stakeholders are particularly concerned about the classification of the employment status of gig workers, a grey area of which the platform companies may take advantage to deprive gig workers of basic labour protection. The lack of compensation coverage for work injuries among gig workers is another major area of concern. In this connection, there have been calls for the Government to review the existing labour legislation with a view to enhancing the protection of gig workers.<sup>14</sup> In response, the Government has stated that it has no plan to expand the scope of the Employment Ordinance to cover self-employed persons.<sup>15</sup>

### **3. Recent global developments in enhancing protection of gig workers**

3.1 In most developed economies, the emergence of the "gig economy" has posed challenges to the conventional labour protection system initially aiming at protecting workers under the traditional form of employment

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<sup>13</sup> According to the Labour Department, there is no single conclusive test to distinguish an "employee" from a "contractor or self-employed person" and all the relevant factors will be considered on a case-by-case basis in court cases. The common important factors include: (a) control over work procedures, working time and method; (b) ownership and provision of work equipment, tools and materials; (c) whether the person is carrying on business on his own account with investment and management responsibilities; (d) whether the person is properly regarded as part of the employer's organization; and (e) whether the person is free to hire helpers to assist in the work.

<sup>14</sup> See 大公報 (2019), 香港 01 (2019) and 香港經濟日報 (2019).

<sup>15</sup> The reply was in response to a question raised by a Member during the Legislative Council meeting of 13 June 2018. The Member asked the Government whether it would make reference to the practices of overseas places to amend its Employment Ordinance and other relevant legislation to enhance the protection for flexible workers. See GovHK (2018).

("traditional employees"). In particular, gig workers, who have been engaged under new form of employment, do not neatly fit with the conventional dichotomous worker classification scheme of "employees" versus "self-employed persons". The usual classification of gig workers as self-employed persons/independent contractors and the resulting lack of legal labour protection have been major issues of concern among the gig workers.

3.2 In many developed economies, an increasing number of gig workers have attempted to assert their labour rights through litigation, suing platform companies on misclassification<sup>16</sup> of their employment status as self-employed persons/independent contractors.<sup>17</sup> These lawsuits provide opportunities for the courts to clarify and interpret new labour relationships, and develop new employment standards through case law.

3.3 In trial of cases against platform companies, courts in different jurisdictions had come to different conclusions about whether workers had been misclassified by the companies they were suing, based on the local labour legislation and legal definition of an "employee" stipulated therein. When determining a worker's status, the courts had commonly considered, among other criteria, (a) the degree of control that the company had over the worker; and (b) the level of independence that the worker had in performing the job. The gig companies often defended that gig workers did not match the standard legal definition of employees since the way they performed their jobs often combines elements of conventional employment and individual entrepreneurship.<sup>18</sup>

3.4 The recent years have seen some overseas success cases of gig workers winning lawsuits in seeking reclassification of their employment status and remedies for previously denied employee benefits. Nevertheless, some gig worker groups and pro-labour legislators have continued lobbying for legislative reforms to (a) instil greater labour protection; and (b) set out established rules that save the efforts to fight for their labour rights on a

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<sup>16</sup> "Misclassification" involves purposefully treating individuals providing services to businesses as nonemployees in order to avoid coverage of workplace laws. The most common method of employee misclassification is to treat individuals as self-employed persons or independent contractors, although they are employees in reality.

<sup>17</sup> See Business & Human Rights Resource Centre (2019).

<sup>18</sup> According to Business & Human Rights Resource Centre (2019), many cases against platform companies were settled outside of court while other lawsuits were vigorously challenged in appeals to higher courts. The platform companies' objective was to prevent courts from creating binding legal precedents which might encourage other gig workers to bring similar claims.

case-by-case basis. Amid the above, the places studied in this information note have adopted, or consider adopting, one or more of the following approaches in their legislative reforms to enhance the protection of gig workers:<sup>19</sup>

- (a) **addressing the gig worker misclassification issue** with more stringent criteria to ascertain the employment status of a worker as a self-employed person or an independent contractor;
- (b) **establishing a set of minimum/basic rights for gig workers** under the general worker or independent contractor status, such as more predictable working conditions, compensation for cancelled work, and work insurance coverage; and
- (c) **providing certain rights of traditional employees to gig workers** under the self-employed persons/independent contractor status, e.g. minimum pay rate and portable benefits, and right to reject job requests without consequences (e.g. deduction of bonus).

3.5 There are also other variants of the above three commonly adopted approaches. For example, the United Kingdom has improved the rights of gig workers with the creation of a third employment status category of "workers", which is differentiated from "employees" (i.e. workers who work under the contract of employment) and "self-employed persons". The classification is to protect workers in non-standard forms of employment such as agency work and casual work. "Workers" are provided with some basic rights such as minimum wage, working time regulation and annual leave.<sup>20</sup>

## 4. The United States

4.1 In the US, the "gig economy" has been expanding in the past decade amidst the flourishing development of platform businesses.<sup>21</sup> Also contributing is the increasing trend for large corporations to shift their non-core jobs such as human resources and procurement to gig workers,

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<sup>19</sup> See Harvard Business Review (2019), Legislative Council Secretariat (2019) and Mexi, M. (2019).

<sup>20</sup> See Legislative Council Secretariat (2019) for details.

<sup>21</sup> For example, due to the expansion of ride-hailing platform companies like Uber and Lyft in the US, the number of people stating their primary occupation as being a taxi driver or chauffeur almost doubled from 202 000 in 2013 to 400 000 in 2018. See World Economic Forum (2020).

thereby achieving operational efficiency and cost reduction goals.<sup>22</sup> According to the estimate by the Staffing Industry Analysts,<sup>23</sup> a global consultancy on staffing and workforce solutions headquartered in the US, about 7.9 million US workers had engaged in work mediated through electronic platforms in 2018, accounting for about 4.8% of total labour force. Another 45 million workers were independent contractors or temporary workers engaged by businesses directly or through third party agencies or consultancies.

4.2 With regard to the protection of labour rights of gig workers, the most disputable issue is about the classification of their employment status as "employees" or "independent contractors" under the current binary classification scheme. Employment status impacts on the rights and benefits the hiring entity is required to provide under the federal and state labour laws.

4.3 In general, only "employees" are protected by the federal and state labour laws. They are entitled to labour rights such as minimum wage, overtime pay, unemployment insurance benefits, workers' compensation benefits, anti-discrimination protection and the right to form labour unions.<sup>24</sup> In contrast, the rights of independent contractors are largely governed by the contract law of individual states. Nevertheless, some states in the US, especially those with a booming platform business sector and a large gig workforce, have introduced specific legislative initiatives to enhance the protection of gig workers. These initiatives aim to (a) address the gig worker misclassification issue as in California; and/or (b) enhance the benefits of gig workers under the independent contractor status as in the New York City and the Washington State.

#### [Legislation to prevent misclassification of gig workers in California](#)

4.4 In the US, the employment status of a worker is generally determined by the federal Fair Labor Standards Act. It is also governed by state labour law which varies from state to state. Some states have taken a pro-platform

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<sup>22</sup> See CNBC (2018).

<sup>23</sup> The estimation was based on data collected from a survey conducted by the Staffing Industry Analysts, and data of the US Census Bureau, the US Bureau of Labor Statistics and other relevant studies.

<sup>24</sup> See The Lunt Group LLC (2018).



businesses stance in classifying gig workers as independent contractors.<sup>25</sup> On the other hand, there are some others which have been progressive in taking legislative initiatives to classify gig workers as employees. Among them, California took the lead in September 2019 with the passage of the Assembly Bill 5 which extends employee classification status to gig workers.

### *Passage of the Assembly Bill 5 in California*

4.5 The Assembly Bill 5 was introduced to the California State Legislature in December 2018, amid increased cases of misclassification of workers as independent contractors in the state, especially among growing industries such as home care, janitorial, trucking and the app-based on-demand sectors.<sup>26</sup> The bill codifies the landmark decision of the California Supreme Court in *Dynamex Operations West, Inc. v. Superior Court of Los Angeles County* (2018) that presumes a worker to be an employee unless a hiring entity satisfies a three-factor test or the "ABC test". The ABC test ensures consistency in the statutory definition of employees under labour law, as well as setting out a high-threshold test for classifying a worker as an independent contractor that might deprive him or her of legal labour rights and benefits.

#### (A) The ABC test for classifying employment status

4.6 Under **the ABC test**, a worker may only be classified as an independent contractor if the hiring entity can prove that the person: (a) is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact; (b) performs work that is outside the usual course of the hiring entity's business; and (c) is customarily engaged in an independently established trade, occupation or business of the same nature as that involved in the work performed. **All three prongs of the ABC test must be satisfied** for a worker to be classified as an independent contractor.

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<sup>25</sup> Between 2017 and 2018, some states such as Florida, Indiana and Iowa passed legislation classifying all workers on "marketplace platforms" as independent "marketplace contractors" instead of company employees. As such, platform companies in the respective states are exempted from providing their workers with the rights and benefits that company employees are entitled to. See National Employment Law Project (2018).

<sup>26</sup> Based on some 8 000 audits and investigations conducted in 2017 under the tax audit programme of the Employment Development Department, about half a million unreported employees were identified. See California Legislative Information (2019a).



4.7 The Assembly Bill 5 has far-reaching implications for California businesses. It extends the scope of the Dynamex ruling from applying only to rules governing minimum wage, overtime, and meal and rest breaks, to covering claims for other benefits such as unemployment insurance and workers' compensation benefits.<sup>27</sup> The ABC test is considered to be more stringent and easier to apply than the previous **Borello test**,<sup>28</sup> which is a requirement list containing 11 factors to classify whether a worker is an independent contractor or an employee. The Borello test was the standard for classifying workers in California before the ABC test.

4.8 Nonetheless, the Assembly Bill 5 provides **exemption** for certain occupations and industries such as doctors, dentists, real-estate agents, lawyers and engineers, considering that these workers set their own compensation rates, communicate directly with their customers and earn higher than the minimum wage. For most of the exempt job categories, a worker's employment status is still required to be determined according to the Borello test, and some other specified criteria if appropriate.

4.9 There have been concerns that the list of exempt job categories or industries have left out many small businesses or self-employed workers such as truck drivers.<sup>29</sup> The trucking industry, which is dominated by independent owner-operators, has temporarily been exempted from compliance with the Assembly Bill 5. The exemption is due to a court ruling which has decided that the law is preempted by a federal law that invalidates any state law that would have impacts on the prices, routes and services of any motor carriers.

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<sup>27</sup> The ABC test has been adopted in some other states in the US for determining employment status but with more limited application, such as for determining unemployment insurance eligibility.

<sup>28</sup> The Borello test is based on the California Supreme Court's decision in *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989). It consists of 11 factors which determine whether a worker is an independent contractor. The primary factor under the Borello test is whether the hiring entity has a "right to control" over a worker's manner and means in performing his or her duties. Other factors include (a) who supplies the instrumentalities, tools and the place of work for the worker; and (b) whether or not the work is part of the hiring entity's regular business. All relevant factors are considered on a case-by-case basis to determine the employment status of the workers.

<sup>29</sup> See Wired (2020).

## (B) Impact of the Assembly Bill 5 on gig workers

4.10 The Assembly Bill 5 took effect on 1 January 2020. It has been estimated that 64% of workers who worked as an independent contractor as their main job before then would be classified as an employee under the ABC test,<sup>30</sup> and would be provided with legal labour benefits accordingly. However, the Assembly Bill 5 has met with strong opposition from platform companies whose costs were reportedly to increase by an estimated 30%, should they reclassify the status of their workers from "independent contractors" to "employees".<sup>31</sup>

4.11 The new law also poses challenge to those workers who see flexibility and control as the top benefits of doing gig work. It may risk pushing those who want more autonomy and control over their work out of the labour market. For example, the stringent ABC test will prevent true independent contractors or freelance workers from keeping their status and servicing multiple businesses if their services are integral to a hiring company's business.<sup>32</sup>

4.12 In late 2019, major platform companies in California including Uber and Lyft in the transport sector, and DoorDash and Postmates in the food delivery sector have jointly sponsored a ballot initiative<sup>33</sup> for the November 2020 General Election. The ballot initiative is to introduce a new law enhancing the benefits of their workers such as minimum wage, healthcare subsidies, and compensation for vehicle expenses and on-the-job injuries. The intent of those major platform companies is to introduce an alternative to the Assembly Bill 5 such that platform companies can maintain the status quo of their workers as independent contractors while providing them with more worker protection. It was reported that the platform companies had obtained the required number of signatures from registered voters to further proceed with the initiative.<sup>34</sup>

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<sup>30</sup> See Economic Policy Institute (2019).

<sup>31</sup> See BBC (2019).

<sup>32</sup> See California Legislative Information (2019a).

<sup>33</sup> California citizens can propose laws and constitutional amendments without the support of the governor or the legislature through the ballot initiative process. The proponents are required to file their proposed ballot initiative with the attorney general and collect the required number of signatures from registered voters to be qualified for the ballot.

<sup>34</sup> See CNET (2020).

## Measures to enhance the benefits of gig workers in New York City

4.13 In the US, there are also cities and states which have introduced reforms to **close the gaps in benefit coverage** between gig workers and traditional employees arising from the classification issue. For example, the **New York City**<sup>35</sup> has extended the coverage of the New York Black Car Operators' Injury Compensation Fund ("Black Car Fund") to include drivers who work for ride-hailing platform companies such as Uber and Lyft ("ride-hailing drivers") since the early 2010s.

4.14 The Black Car Fund is a non-profit organization established by the New York State in 1999 to **provide workers' compensation coverage and other benefits** to for-hire car drivers (including "Black Car" drivers),<sup>36</sup> who are classified as independent contractors under the labour protection regime. The Black Car Fund is financed through a **2.5% surcharge** on the fare collected by the drivers. By joining the Black Car Fund, ride-hailing drivers are provided with a host of benefits including workers' compensation insurance, death benefit, and health benefits such as vision care.

4.15 In order to ensure ride-hailing drivers can earn a fair and livable pay rate, the New York City Council passed a law in August 2018 allowing the Taxi and Limousine Commission<sup>37</sup> to establish a minimum per-trip payment formula for drivers offering for-hire services. The law, with effect from 1 February 2019, ensures for-hire drivers a minimum take-home pay of US\$17.22 (HK\$134) per hour<sup>38</sup> after deduction of expenses. According to the Taxi and Limousine Commission, the new initiative would raise the earnings of the ride-hailing drivers by an average of US\$10,000 (HK\$77,700) per year.<sup>39</sup>

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<sup>35</sup> New York City is one of the largest markets of the ride-hailing platform companies in the US. It was reported that there were 18 million app-based rides in the City in May 2018, up by more than six times compared to the same period three years ago. As of July 2018, more than 78 000 cars were affiliated with the four main ride-hailing platforms, up from 12 500 cars in January 2015. See Vox (2018).

<sup>36</sup> Black Car is a segment of the for-hire vehicle industry, primarily serving business clientele with luxury cars.

<sup>37</sup> The Taxi and Limousine Commission is the agency responsible for licensing and regulating taxi cabs, for-hire vehicles, commuter vans and paratransit vehicles in the New York City.

<sup>38</sup> The minimum pay rate for ride-hailing drivers was set taking into consideration the minimum hourly wage for local employees (i.e. US\$15 (HK\$116) as at December 2018) as well as extra provision to cover payroll taxes and some paid time off.

<sup>39</sup> See NYC Taxi & Limousine Commission (2018).

## Proposed introduction of a portable benefit system for gig workers in Washington State

4.16 The Black Car Fund in the New York State represents a form of portable benefits which enables workers in a **specific industry** to access labour benefits outside a traditional employer-employee relationship. The Washington State has proposed introducing a portable benefit system that covers gig workers in a **wider spectrum of industries**.<sup>40, 41</sup> The bill for establishing a portable benefit system was first introduced in the Washington State House of Representatives in 2017 with a view to promoting financial security for gig workers. Revised versions of the bill were reintroduced in 2018 and 2019 respectively, and the bill is under consideration in the state legislature. Leaders in the platform businesses have displayed an open attitude towards establishing a portable benefit system in the state to meet the protection needs of workers in non-traditional work arrangements.<sup>42</sup>

4.17 According to the portable benefit system proposed under the latest version of the bill<sup>43</sup> introduced in 2019, business entities that facilitate the provision of services by "intermediary employees"<sup>44</sup> to consumers are required to contribute (a) 5% of the total charge collected from the consumers for each service transaction; or (b) US\$1 (HK\$7.77) for every hour that the worker provided services, whichever is less, to "benefit providers". Benefit providers, which are qualified non-profit entities, will make use of the contributions to provide benefits to the eligible "intermediary employees" including health insurance, paid time off and retirement benefits. Eligible "intermediary employees" must select a benefit provider and can accrue benefits based on contributions from more than one hiring entity.

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<sup>40</sup> Business entities that facilitate the provision of services by "intermediary employees" to consumers are covered under the proposal, including ride-hailing, domestic cleaning and courier services companies.

<sup>41</sup> At the federal level, a legislative proposal was introduced in the US Congress in 2017 to explore the feasibility of introducing a portable benefit system for gig workers. However, limited progress has been achieved since then.

<sup>42</sup> See Aspen Institute (2018).

<sup>43</sup> The latest bill also covers other initiatives to enhance the protection of gig workers, including (a) establishing workers' boards for specific industries for setting minimum pay rates and other labour standards for workers in the respective industries; (b) providing certain rights to workers such as the right to organize labour organizations; and (c) requiring business entities to disclose information related to the workers such as payment rates and benefits.

<sup>44</sup> An "intermediary employee" is any worker who is not an employee and who provides services for financial compensation through the business entity concerned.

## Recent developments

4.18 The enactment of the Assembly Bill 5 in California has been considered an important step forward for protecting workers against employee misclassification and safeguarding their entitlement to legal labour benefits. The enforcement outcome of the new law has yet to be seen as the law has just been in effect lately. Yet, the Assembly Bill 5 may be subject to review amidst strong challenge from those platform businesses and other key stakeholders being affected by the new law.

4.19 The alternative approach of introducing a portable benefit system for gig workers in specific sectors or across the board has attracted much attention at the federal and individual state levels recently. The portable benefit system fits in the flexible and fluid labour relationship in the "gig economy", as portable benefits are connected to an individual worker who can take the contributions made by multiple hiring entities from job to job without interruption in coverage. The platform businesses in the New York City and the Washington State have been receptive to the approach of enhancing the protection of gig workers through the introduction of a portable benefit system for them.

## **5. The European Union**

5.1 During the past two decades, the increase in digitalization and emergence of new business models have facilitated the creation of "non-standard" forms of employment in the EU. According to the European Commission, about a quarter of all employment contracts in 2016 were for non-standard forms of employment, such as on-call, casual and platform work.<sup>45</sup> As for platform work, a survey commissioned by the European Commission in 2017 estimated that on average 10% of the adult population in the 14 EU member states covered in the survey<sup>46</sup> had ever used online platforms for the provision of certain labour services. Among them, an estimated 20% were main platform workers who had earned 50% or more of their income via platforms and/or worked via platforms more than 20 hours a week.<sup>47</sup>

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<sup>45</sup> See European Commission (2017b).

<sup>46</sup> The 14 EU member states covered in the survey were Croatia, Finland, France, Germany, Hungary, Italy, Lithuania, Portugal, Romania, Slovakia, Spain, Sweden, the Netherlands and the United Kingdom.

<sup>47</sup> See European Commission (2018).

5.2 In the EU, protection of workers against uncertainty and insecurity about the terms of employment relationships has been governed by the Written Statement Directive adopted since 1991. The Directive stipulates that every employee must be provided by his or her employer with a document containing information on the essential elements of his or her employment contract.<sup>48</sup> Nonetheless, the Directive has been considered inadequate in protecting workers in the "gig economy", since it does not cover workers employed under a contract for less than eight hours per week (or 32 hours per four weeks) or shorter than one month. Exemptions are also possible for employment of a casual and/or specific nature, provided there are objective reasons for making an exception.

5.3 Furthermore, the information requirements stated in the Written Statement Directive are initially designed for traditional employer-employee relationships. They might not fit for the purposes of guaranteeing basic protection for gig workers who work on flexible conditions. As such, there have been concerns about the vulnerability of gig workers to exploitation such as low pay, job insecurity and inadequate labour rights.

5.4 In December 2017, the European Commission presented an ambitious and far-reaching proposal for a Directive on transparent and predictable working conditions in the EU. The new Directive is intended to **update and modernize** the Written Statement Directive, which mandates only that employees have the right to be notified in writing of the essential aspects of their employment relationship, with a more expansive list of rights applicable to a wider variety of employees and employment relationships.

### [New Directive on Transparent and Predictable Working Conditions](#)

5.5 The new Directive proposed by the European Commission in 2017 has two main objectives: to improve employee protections against possible infringement of their employment rights and to increase labour market transparency regarding categories or types of employment. Among others, the Directive would provide support for individuals in non-standard employment arrangements (including gig workers).

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<sup>48</sup> The information to be provided in the employment contract includes the place of work, length of working day or week, amount and components of remuneration, paid leave and notice period for termination of contract.

5.6 The European Commission has conducted two rounds of consultation with stakeholders on the proposed changes to the Written Statement Directive in 2017. In finalizing the Directive, the European Commission has strived to balance the essential protection for workers with the adaptability for job creation and labour market innovation, after taking into consideration workers' protection needs as well as employers' need to maintain flexibility for its operation. The finalized Directive also provides **basic protection** across different types of employment, instead of putting in place separate legislative initiatives targeting at specific forms of employment. Such provision is considered to be more **effective and adaptive** in protection of labour rights, as specific legislative measures are liable to be obsolete in today's fast-changing labour market.

5.7 The finalized Directive, the Directive on Transparent and Predictable Working Conditions, was adopted by the European Council in June 2019. The new Directive will be put into effect by the member states in three years' time. Nevertheless, until its adoption and entry into force, the Written Statement Directive remains applicable.

#### *Workers covered under the new Directive*

5.8 The Directive on Transparent and Predictable Working Conditions will cover eligible workers as defined by each member state's national law with reference to the rulings by the Court of Justice of the European Union.<sup>49</sup> It will generally include workers engaging in various forms of employment, including permanent full-time and part-time workers, temporary full-time and part-time workers, paid trainees and apprentices, as well as on-demand, casual and platform workers. Workers in bogus self-employment status<sup>50</sup> will also fall within the scope of the Directive. However, the new Directive will exclude workers who work less than three hours per week or 12 hours per four weeks on average. Workers who are genuinely self-employed will also

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<sup>49</sup> According to the case law on the free movement of workers within the EU, "the essential feature of an employment relationship is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration". Besides, it is provided that "any person who pursues employment activities which are effective and genuine, to the exclusion of the activities on such a small scale as to be regarded as solely marginal and ancillary, must be regarded as a worker". See EU Law Analysis (2019).

<sup>50</sup> Bogus self-employment occurs when workers are told they are self-employed when the legal tests would likely define them as employees. This phenomenon is made more common by the lack of consistency and clarity around the definition of self-employment.



be excluded as they do not fulfil the criteria of workers laid down in the case law. It was estimated that about 200 million workers in the EU, including gig workers, would be covered under the new Directive.

### *Minimum labour rights provided under the new Directive*

5.9 To ensure **higher predictability and transparency of the working conditions** for workers, the Directive on Transparent and Predictable Working Conditions stipulates that employers should provide workers with essential information of their employment contracts within the first seventh calendar days of work, rather than up to two months as under the Written Statement Directive. The information to be covered includes the specification of work, a starting date, the duration (for temporary contracts), remuneration, length of working day or week, or more precise working time for workers with variable work schedules, and training to be provided by the employer.

5.10 Under the new Directive, protection for gig workers is also enhanced through the specification of **a set of minimum rights** for eligible workers including:

- (a) right to a limit to the length of probationary period at the beginning of the job: limiting to six months unless a longer period is justified;
- (b) right to seek additional employment: exclusivity clauses in employment contracts are banned and incompatibility clauses are restricted;
- (c) right to predictability of work: workers with on-demand contracts or similar forms of employment can determine in advance when they can be requested to work. They should also be able to refuse, without consequences, an assignment outside predetermined hours or be compensated if the assignment is not cancelled in time;
- (d) right to be protected from abusive practices regarding the use of on-demand or similar contracts;

- (e) right to request a more stable form of employment and receive a justified written reply; and
- (f) right to receive cost-free mandatory training.

### *Expected impact of the legislative initiative*

5.11 According to the impact assessment study commissioned by the European Commission,<sup>51</sup> the implementation of the new Directive will bring at least 2 to 3 million non-standard workers under protection. Without exclusivity clauses, up to some 364 000 on-demand workers may seek additional work and earn up to €1,424 million (HK\$12.2 billion) per year extra. On the other hand, employers will benefit from increased legal certainty, improved transparency on the labour markets, and enhanced productivity due to higher employee retention and better working relations. For the member states, the new Directive will bring to the governments additional tax revenues generated from the additional incomes of employers and employees.

5.12 Nonetheless, adoption of the new Directive will bring some administrative and human resources management costs to businesses. For a small proportion of businesses that rely heavily on on-demand or casual workers, their flexibility in human resources management may be affected by implementing provisions that improve predictability for workers such as predetermining the reference hours and days when the workers can be requested to work. In order to minimize the negative impact on limiting flexibility on employment, the European Commission has not set any restrictions on the reference working periods other than what have already been provided in existing legislation.

### *Feedback of the stakeholders*

5.13 The adoption of the Directive on Transparent and Predictable Working Conditions has been welcomed by the stakeholders, since it provides a basic level of protection to gig workers which have been vulnerable to abusive treatments of employers. However, there has been criticism that the Directive does not provide for a uniform, EU-wide definition of "workers". Worker classification is still subject to interpretation of the national law of the

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<sup>51</sup> See European Commission (2017a).

member states with reference to the case law of the Court of Justice of the European Union. Certain groups of gig workers may still have to seek reclassification from a "self-employed" status to a "worker" status at the member state level for the entitlement to the protection under the new Directive.<sup>52</sup>

### Initiative to promote access to benefits among gig workers

5.14 The European Commission has strived to address the issue about inadequate benefit coverage among non-standard workers and self-employed persons<sup>53</sup> in the EU by proposing a non-legally binding Recommendation in 2018 to encourage the member states to extend the coverage of their social benefit schemes such as unemployment benefit and sickness and healthcare benefit schemes to non-standard workers and self-employed persons. The Recommendation was adopted by the European Council in November 2019. The European Commission has planned to support member states and stakeholders in achieving the objectives of the Recommendation through activities such as conducting experience sharing workshops and implementing a monitoring framework.

### Legislative initiatives taken by selected EU member states

5.15 In addition to the EU Directives and in response to the Recommendation, some member states such as France and the Netherlands have developed their own legislative initiatives to enhance the rights and benefits of gig workers.

#### *France*

5.16 Among the EU member states, **France**<sup>54</sup> is notable for adopting a pragmatic and balanced approach in addressing the lack of protection of gig workers without touching on the controversial employment status

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<sup>52</sup> See EU Law Analysis (2019).

<sup>53</sup> Depending on the labour law of individual member states, non-standard workers and self-employed persons may not have the right to participate in certain social benefit schemes due to their employment status.

<sup>54</sup> It was estimated that about 7% of the adult population in France had ever performed platform work in 2017. See European Commission (2018).

reclassification issue. In 2016, France passed a law providing self-employed platform workers with **basic rights**, such as the rights to (a) have work insurance coverage; (b) receive continuing professional training; (c) be provided with a validation of their working experience upon request; (d) establish and join a trade union; and (e) take collective action to defend their interests.<sup>55</sup> The law came into effect in January 2018.

5.17 Upon passage of the Mobility Orientation Law<sup>56</sup> in December 2019, platform workers in the transport sector, including ride-hailing drivers and couriers, are provided with **additional rights** such as (a) the right to disconnect from the service app without retaliation or refuse to take a ride without penalty; and (b) the right to be provided with information on the distance of a proposed ride and the net minimal payment to the driver before each ride. Platform companies are also encouraged to establish a charter on voluntary terms, providing details on working conditions for drivers, quality control measures, and additional benefits for drivers if there are any. However, the charter cannot be used to qualify an employment relationship between the platform companies and the workers.

5.18 The passage of the Mobility Orientation Law has been accepted by platform companies in the transport sector as it is a less costly solution compared against reclassification of the workers as "employees". It was reported that the French government had also considered establishing a legal framework to further enhance the protection of gig workers across various business sectors.<sup>57</sup>

### *The Netherlands*

5.19 In the **Netherlands**, the growth of the "gig economy"<sup>58</sup> has precipitated intense debate about the classification of employment status of gig workers, as well as arousing concerns about increasing bogus

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<sup>55</sup> See European Agency for Safety and Health at Work (2017).

<sup>56</sup> The new law provides the framework for reforming various aspects of the transport sector in France, including ride-hailing and courier service platform businesses.

<sup>57</sup> See Freshfields Bruckhaus Deringer (2019) and The Society for Human Resource Management (2019).

<sup>58</sup> Reflecting the growth of "gig economy", it was estimated that about 9.7% of the adult population in the Netherlands had ever performed platform work in 2017. Furthermore, there were some 1.1 million self-employed persons, including platform workers, in the Netherlands in 2018. See European Commission (2018) and DPG Media B. V. (2019).

self-employment in the country. Platform workers, who are generally hired as self-employed persons, are in a weak position to bargain for decent compensation for their work. In June 2019, the Dutch government announced its plan to introduce a **minimum wage rate** of €16 (HK\$138) per hour **for self-employed persons** in 2021.

5.20 The government's announcement represents part of the Dutch government's efforts to (a) provide protection for self-employed persons (including platform workers); and (b) prevent employers from hiring workers under bogus self-employment contracts to cut costs. The minimum wage rate is set at a level to ensure a subsistence level of living for self-employed persons and cover their insurance payments such as unemployment insurance payments.<sup>59</sup> The initiative has been welcomed by stakeholders as a first step towards enhancing the protection of self-employed persons.<sup>60</sup>

## 6. Concluding remarks

6.1 The emergence of the "gig economy" has brought new job opportunities and flexibility to workers. However, the new non-standard form of employment under the "gig economy" has challenged the conventional labour protection system on two fronts. **Firstly**, gig workers do not fit with the dichotomous worker classification scheme of "employees" versus "self-employed persons/independent contractors" under the conventional labour protection system. **Secondly**, gig workers in many places are commonly classified as self-employed persons, and they cannot benefit from the protection provided by labour law for "employees".

6.2 Notwithstanding the increased prevalence of gig workers in Hong Kong, the Government has stated that it has no plan to expand the scope of the Employment Ordinance to cover self-employed persons. In contrast, the overseas places studied in this information note have adopted various approaches to enhance the legal labour rights of gig workers, in response to the lobbying from gig worker groups and pro-labour legislators for gig workers to receive the same benefits provided by traditional employment.

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<sup>59</sup> The current statutory minimum wage for workers aged 21 and above in the Netherlands is €76.32 (HK\$656) per day (or €9.5 (HK\$82) per hour assuming eight hours of work per day).

<sup>60</sup> See DPG Media B. V. (2019).

6.3 In the US, California has addressed the gig worker classification issue by introducing a more stringent and easier to apply test (i.e. the "ABC test") to determine workers' employment status. This is to make it harder for businesses to misclassify workers as independent contractors, thereby avoiding providing their workers with legal rights and benefits. Nonetheless, the legislative reform has been resisted by the platform companies and some gig workers. The former are concerned about a marked increase in their operating cost consequential to the reclassification of their workers as employees, while the latter see flexibility and control as the top benefits of doing gig work.

6.4 The New York City, the Washington State and the EU have adopted an alternative approach in protection of gig workers. They have provided gig workers in specific sectors or across the board with a set of labour rights through legislative and/or administrative measures, while keeping their self-employed or independent contractor status unchanged. In so doing, they have addressed the lack of protection of gig workers without touching on the controversial employment status reclassification issue and affecting the innovative and flexible nature of platform businesses. As a result of the balance so achieved, platform businesses have been receptive to the legislative and/or administrative measures introduced to enhance the protection of gig workers.

6.5 In adopting the above alternative approach to labour protection, the New York City has introduced reforms to close the gaps in benefit coverage between gig workers and traditional employees. Specifically, it provides ride-hailing drivers with workers' compensation, minimum pay and other benefits. Similarly, the Washington State has proposed to introduce a portable benefit system that covers gig workers in a wide spectrum of industries. Enabling portability of benefits allows gig workers to carry benefits with them from one job to another, which fits in the flexible and fluid labour relationship in the "gig economy".

6.6 The EU likewise adopted a new Directive in 2019 establishing a set of minimum rights for workers engaging in various forms of employment, including permanent full time and part time workers, as well as on-demand, casual and platform workers. At the EU member state level, France passed a law in 2016 providing a set of basic rights to self-employed platform workers. It passed another law in 2019 to provide platform workers in the transport sector with additional labour rights. In the Netherlands, the Dutch government

announced in 2019 to introduce a minimum wage rate for self-employed persons (including platform workers) in 2021. The minimum wage rate is set at a level which can both ensure a subsistence level of living and cover their work insurance payments.

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## Protection of labour rights of "gig workers" in selected places

	Hong Kong	The United States	The European Union
<b>A. Background information</b>			
Number of gig workers	<ul style="list-style-type: none"> <li>Statistics specifically on gig workers are not available.</li> <li>As an indication, there were 224 100 self-employed persons in 2019.</li> </ul>	<ul style="list-style-type: none"> <li>About 7.9 million workers had engaged in work mediated through electronic platforms in 2018.</li> </ul>	<ul style="list-style-type: none"> <li>Information not available.</li> </ul>
Share in total employment/total adult population	<ul style="list-style-type: none"> <li>Self-employed persons accounted for 6.4% of total employment in 2019.</li> </ul>	<ul style="list-style-type: none"> <li>4.8% of total labour force in 2018.</li> </ul>	<ul style="list-style-type: none"> <li>On average, about 10% of the adult population in 14 EU member states had ever used online platforms for provision of labour services in 2017. Among them, some 20% were main platform workers.</li> </ul>
Employment status of gig workers	<ul style="list-style-type: none"> <li>Gig workers are generally hired as self-employed persons not entitled to legal protection under the labour legislation.</li> </ul>	<ul style="list-style-type: none"> <li>Classification varies among states depending on the provisions and/or classification criteria laid down in state labour law, as well as case law.</li> </ul>	<ul style="list-style-type: none"> <li>Classification varies among member states depending on their respective national labour law, as well as case law. Nonetheless, gig workers are generally classified as independent contractors.</li> </ul>

## Protection of labour rights of "gig workers" in selected places

	Hong Kong	The United States	The European Union
<b>B. Approaches to enhance the legal labour rights of gig workers</b>			
Overview	<ul style="list-style-type: none"> <li>The Government has no plan to expand the scope of the Employment Ordinance to cover self-employed persons.</li> </ul>	<ul style="list-style-type: none"> <li>Some states or cities in the US have been progressive in adopting legislative initiatives to enhance the protection of gig workers either by addressing the employment status classification issue or providing certain rights to gig workers under the independent contractor status.</li> </ul>	<ul style="list-style-type: none"> <li>The EU at large and some member states in particular have focused on ensuring gig workers are entitled to basic labour rights or certain rights instead of addressing the employment status classification issue of gig workers.</li> </ul>
Addressing the gig worker misclassification issue	<ul style="list-style-type: none"> <li>Not applicable.</li> </ul>	<u>California</u> <ul style="list-style-type: none"> <li>Adopting the ABC test which is a more stringent and easier to apply test to determine workers' employment status, making it harder for hiring entities to misclassify workers as independent contractors.</li> </ul>	<ul style="list-style-type: none"> <li>Not applicable.</li> </ul>
Establishing a set of minimum/basic labour rights for gig workers	<ul style="list-style-type: none"> <li>Not applicable.</li> </ul>	<ul style="list-style-type: none"> <li>Not applicable.</li> </ul>	<u>The EU</u> <ul style="list-style-type: none"> <li>Establishing a new set of minimum rights under a new Directive adopted in 2019 to cover all EU workers, including gig workers.</li> </ul> <u>France</u> <ul style="list-style-type: none"> <li>Providing basic rights to platform workers across sectors such as the right to have work insurance coverage and the right to organize labour organizations under the status as independent contractors.</li> </ul>

## Protection of labour rights of "gig workers" in selected places

	Hong Kong	The United States	The European Union
<b>B. Approaches to enhance the legal labour rights of gig workers (cont'd)</b>			
Providing certain rights of traditional employees to gig workers in a specific sector	<ul style="list-style-type: none"> <li>Not applicable.</li> </ul>	<u>New York City</u> <ul style="list-style-type: none"> <li>Providing workers' compensation, health and other benefits to ride-hailing drivers under the Black Car Fund which is financed through a 2.5% surcharge of the fare collected by the drivers.</li> <li>Setting a minimum per-trip payment formula to ensure ride-hailing drivers can earn a decent living.</li> </ul>	<u>France</u> <ul style="list-style-type: none"> <li>Providing platform workers in the transport sector with the rights to (a) disconnect from the service app without retaliation or refuse to take a ride without penalty; and (b) be informed about distance of the ride and the net minimum payment before each ride.</li> </ul>
Providing certain rights of traditional employees to gig workers across sectors	<ul style="list-style-type: none"> <li>Not applicable.</li> </ul>	<u>Washington State</u> <ul style="list-style-type: none"> <li>Has proposed to establish a portable benefit system for gig workers across sectors, enabling contributions from multiple hiring entities and allowing workers to take their benefits from job to job.</li> </ul>	<u>The Netherlands</u> <ul style="list-style-type: none"> <li>Has planned to introduce a statutory minimum wage rate for self-employed persons in 2021 to enhance their financial stability and prevent employers from hiring workers under bogus self-employment contracts.</li> </ul>

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