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Key concepts and changing labour relations in Denmark
Part 1 Country report

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Preface

In the future of work project funded by the Nordic Council of Ministers, more than 30 researchers from the five Nordic countries study:

- What are the main drivers and consequences of the changing future of work in the Nordic countries?
- In what ways will digitalisation, new forms of employment, and platform work influence the Nordic models?
- What kind of renewal in the regulation of labour rights, health and safety, and collective bargaining is warranted to make the Nordic model fit for the future?

Through action and policy oriented studies and dialogue with stakeholders, the objective is to enhance research-based knowledge dissemination, experience exchange and mutual learning across the Nordic boundaries. The project runs from 2017 to 2020, and is organised by Fafo Institute for Labour and Social Research, Oslo.

The project is divided into seven pillars. This paper is part of Pillar VI Labour law & regulations, and this paper presents the labour law framework in Denmark and discusses the concepts of employer and employee. The aim is to provide a basis for an analysis of whether and how changing labour relations pose a challenge to Nordic labour law.

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1 Introduction and legal basis

This paper presents and discusses the legal framework for the concepts of employer and employee in Danish labour law.[1] The purpose is to provide a basis for further analysis on the changes to the labour market, and in particular whether persons performing work in new forms of work situations would have rights as employees under statutory acts or collective agreements providing substantial rights and protections to employees.

In Denmark, there is no universal legal definition of what constitutes an 'employment contract'.[2] Likewise, there is no universal legal definition of 'employer' (arbejdsgiver) or 'employee' (ansat, lønmodtager) or 'worker' (arbejder, arbejdstager). Each statutory act has it its own scope of application, some refer merely to 'employee', others contribute with a definition of the concept. Statutory acts as well as collective agreements are the legal basis for substantial or procedural rights and protections to employees. In Denmark, the primary source for providing rights at work is collective agreements.

Denmark has a unionization rate of 67,7%[3] and a collective bargaining coverage of 83% (74% in the private sector and 100% in the public sector).[4] To a large extent, legislation acts only as a supplement to the collective agreements, for those employees not covered by a collective agreement. This mechanism is now most prevalent in legislation implementing EU directives, e.g. the Act on an Employment Certificate. Also before Denmark's membership of the EU in 1973, legislation was provided to give certain groups, who were traditionally not unionized, employment rights, such as e.g. the Salaried Employees Act.

There are very few statutory rules on industrial relations in Denmark. Collective agreements are the main source of regulation at the labour market. There is no statutory framework defining what constitutes a collective agreement. It is defined by the social partners and is recognized as a collective agreement by the sole jurisdiction of the Labour Court. The Labour Court has defined, that in order to be a collective agreement, an agreement must relate either to wages and working conditions, or to the relationship between the parties to the agreement, and must be concluded between on the one hand an association of employees and on the other hand an association of employers or a single employer. Even a vaguely described and informal collective of employees can be recognised as concluding a collective agreement by the Labour Court. When a collective agreement is recognized by the Labour Court, the agreement will be subject to all the unwritten principles of the industrial relations

[1] The study design is presented in Marianne Jenum Hotvedt and Natalie Videbæk Munkholm, «Labour law in the future of work. Introduction paper», *Fafo-paper 2019:06*.
[2] See also Jens Kristiansen, *The Concept of Employee: The Position in Denmark,* in Bernd Waas and Guus Heerma van Voss (eds.), *Restatement of Labour Law in Europe, Volume 1, The Concept of Employee*, Hart 2017, pp. 133-148; Ole Hasselbalch, *Afsnit III Det lønnede arbejdsforhold*, i samme, *Arbejdsretten*, Schultz Arbejdsretsportal (online); Ruth Nielsen, *Dansk Arbejdsret, Kapitel 10*, DJØF 2016; Jens Kristiansen, *Grundlæggende arbejdsret, kapitel 1*, DJØF 2016.
[3] FAOS, https://faos.ku.dk/pdf/temasider/Fald_i_organisatinsgrad_igen__igen.pdf/Fald_i_organisatinsgrad_igen__igen.pdf/Fald_i_organisatinsgrad_igen__igen.pdf.
[4] DA Analyse, https://www.da.dk/politik-og-analyser/overenskomst-og-arbejdsret/2018/hoej-overenskomstdaekning-i-danmark.

system, including dispute resolution mechanisms.[5] Collective agreements can be concluded at all levels. National Main Agreements are concluded between the national confederations and cover many industries. Industry agreements are often concluded by a trade union and cover a specific type of work, performed by workers with a specific – or no –educational or skilled background, and are often national or regional. Company level agreements ('lokalaftaler') are concluded at shop level. The hierarchy provides, that lower level agreement cannot derogate from higher-level agreements and must operate within a specific delegation of competencies.

The collective agreements define their own scope of application. For industry agreements, the scope is most often defined as a specific type of work performed by 'workers' or 'employees' of the employer. In case of disagreement on whether a specific person engaged in the relevant type of work is an 'employee', the matter will be referred to judicial review.

Collective agreements have binding effect on the signatories and their members, and are enforceable in end by the Labour Court and industrial arbitration. Disagreements concerning the content of or the administration of provisions in the agreements are resolved by participation in industrial dispute resolution procedures starting with shop level dialogue,[6] and ending with judicial review either by Industrial Arbitration or by the Labour Court.[7] Disputes on interpretation of provisions in collective agreements, are assessed by industrial arbitration, whereas disputes relating to breach of agreement, the lawfulness of industrial action, etc. are referred to the Labour Court.[8] The sanction for breach of agreement is a penalty ('bod') payable to the opposing party. It is for example breach of agreement by the employer to deviate from the scope of or the application of a collective agreement by concluding *individual* agreements with employees with the aim of circumventing the collective agreement.

Statutory rules aimed at the labour market are more fragmented. In legislation the scope of application varies, and there is not one common definition of 'worker' or 'employee'. The definition most often used, is in the Act on an Employment Certificate, defining an employee as *'a person, receiving remuneration for personal work performed in a contract of service'.*[9] This definition is found also in the Holiday Act,[10] the Working Time Act,[11] and the Part Time Act.[12] Other legislative acts can simply be addressed to '*employees'* without a specific definition, this is the case for the Act on Sick Leave Benefits,[13] the Act on Supplementing Occupational Pensions (Arbejdsmarkedets Tillægspension)[14] and the Act on Equal Pay.[15] The Salaried Employees Act applies to persons performing specific types of work and in *"a relationship of service and as such subject to the employers instructions"*.[16] For other health and safety issues

[5] Ibid., p. 43.
[6] Normen, agreement between the LO (now FH) and the DA on resolution on disputes arising from collective agreements, http://www.arbejdsretten.dk/arbejdsretten/regler/normen.aspx.
[7] Statutory Act no. 1003 24 August 2017 on the Labour Court and Industrial Arbitration, § 9.
[8] The Labour Court Act, § 21.
[9] Statutory act no. 240 17 March 2010 on an Employer's Obligation to Inform Employees of the Conditions Applicable to the Employment Relationship (Ansættelsesbevisloven). § 1.
[10] Statutory act no 1077 of 9 October 2015, § 1, 2.
[11] Statutory act no 896 of 24 august 2004, § 2.
[12] Statutory act no 1142 of 14 September 2018, § 1, 2.
[13] Statutory act no. 68 25 January 2019 on Sickness Benefits, § 2.
[14] Statutory act no. 1110 10 October 2014 on Labour Market Pensions, §§ 2-3.
[15] Statutory act no. 156 22 February 2019 on Equal Pay for Men and Women, § 2.
[16] Stautory act no 1002 of 24 august 2017, § 1, 2.

at work, the Working Environment Act in Denmark applies to '*work performed for an employer'*, and obliges employers to ensure a safe and healthy physical and mental working environment.[17] Compensation and damages for work injuries are ensured through the Act on Occupational Injury Insurance,[18] which applies to *"persons, employed to perform work for an employer",* and is specifically extended to a number of situations where there is no employment relation.

Some legislation is aimed at the employer.[19] Most often, the employer is identified as 'the other party' to an employment relationship, when the judiciary has assessed, that a person performs work as an employee under certain legislation and therefor has certain rights and protections. The Act on Employment Certificates, for example, does not define an employer but merely refers to one. Traditionally, the employer was identified by simply pointing to the other party of the employment contract.

The concept of employee as well as who is the employer are interpreted by the courts. The ordinary courts have jurisdiction in matters of individual claims, whereas the Labour Court and industrial arbitration has exclusive jurisdiction in matters concerning collective agreements.[20]

The lack of strict definitions allows for an adaptive and reflexive application of the concepts, with a view to adjust the interpretation to the specific circumstances of each case as well as to the more overall developments in society.

[17] In Denmark, the Working Environment Act does not provide other substantial rights for workers such as equal treatment, unlike e.g. the Working Environment Act in Norway.
[18] Statutory act no 216 of 27 february 2017, § 2 cf. § 4.
[19] Statutory act no 1084 of 10 September 2017.
[20] Statutory act no. 1003 24 August 2017 on the Labour Court and industrial arbitration.

2 The concept of employee

2.1 Introduction

The judiciary interprets and applies the definitions found in statutory acts and collective agreements. Over time certain indicators, which are often used when categorizing whether a specific relationship is one of employment or one of independent contracting, have evolved.

Each situation is individual and based on the specific circumstances of the case. The court is not bound by the parties' own categorization of their relationship, as many provisions in statutory acts and collective agreements cannot be derogated from by individual agreement. The parties' own categorization function as an indicator of the parties' intent, but is not given effect to circumvent mandatory employment rights found in either statutory acts or collective agreements.

In caselaw, it is possible to point out five often used 'indicators' guiding the assessment of a relationship as either one of employment or one of independent contracting:

1. The degree of the employer's right of instruction and control
2. The nature of the financial arrangement
3. Any obligation to perform the work personally
4. The degree of connectedness (dependency) in the relationship
5. The social perception or presentation of the relationship

The indicators are cumulative and non-exhaustive, and other specific circumstances may also be given consideration. Although some of the indicators are used more often than others, all criteria are generally taken into consideration. Assessments are made according to each source of law. Some indicators can be more important in some cases, such as being subject to the employer's instruction as this is a defining element in the definition in the Salaried Employees' Act. Below, each indicator is further illustrated, then the primacy of facts principle, and the role of the purpose of the statutory act.

2.2 The indicators

The employer's right to instruct and control the work is central to the traditional perception of an employment relationship. The effect of such powers is that the employee is presumed integrated into the employer's organisation, i.e. the employee acts on orders from and on behalf of the employer. An employee has an obligation to subordinate to instructions from the principal, whereas self-employed individuals can choose to refuse tasks. Identifying the level of right of instruction and control is not always straightforward, especially as now employees have more extensive freedom and self-management of tasks and working time. The Courts nevertheless assess the specific circumstances with a view to ascertain whether the employer exerts a level of instruction (direct or indirect) or control over the person performing work.

As illustrative see e.g. Western High Court ruling U.1996.1232 V, where the court found, that for a sales agent who performed work in different stores giving out food-samples, the element of being expected to undertake assignments at a short notice

in itself established the sufficient level of instruction, for the sales agent to be an employee.[21] In an older case, the Maritime and Commercial Court, F 101/1984, reached the opposite conclusion for a sales agent, due to extensive freedom to perform tasks for other agencies, work without reporting to the employer and plan holidays at his own discretion.[22] A duty to subordinate is indicative even if the power is not de facto exercised. In a Maritime and Commercial Court ruling, U.1971.731,[23] a sales representative on commission, had the terms and conditions of the sales so thoroughly regulated that no further instructions were necessary, and weekly visits to the publisher were agreed to but not carried out in practice. The court ruled, that this indicated a theoretical duty to comply with instructions from the employer. The fact, that the employee was in reality not subjected to instructions and enjoyed vast freedoms was attributable to his skills and experience, not that the employment relationship was independent contracting or self-employment.

The *financial arrangement* emphasises that certain ways of organising the finances indicate employment status and other ways of organising the finances indicate self-employment. Indicative is who takes the risk and the benefits of the work performed. Indicative is who provides the tools, materials, workshop, transportation, additional running costs, who pays for (unforeseen) costs. Also, who takes the risk or the benefit for the quality of the result.

The sales agent in case F 101/1984 mentioned above, paid all expenses himself, consequently indicating that he was not an employee. Remuneration paid out in regular intervals and at set amounts may indicate an employment relationship. Irregular payments, simulating the entrepreneurial risks of self-employed contractors, may on the other hand point towards self-employment. The sales representative in case U.1971.731, also paid his own costs, but the regularity and stability of his payments, similar to “a stable annual gross salary”, did not rule out employment status.

The *personal obligation* contains two separate assessments. First, whether an obligation to perform a certain task exists, second whether the employee is obliged to perform it personally or it may be delegated.

In the case U.1996.1232 V, the expectation was that the agent did not refuse tasks, thus implying an obligation.[24] The Court emphasised this in their assessment, which ultimately lead to her being awarded employment status. In a case, also from the Western High Court, U.2015.197 V, a person working as a liaison between refugees and the Danish Refugee Council was free to refuse tasks and had no duty to attend.[25] The Court consequently stated, that he was self-employed. The possibility of hiring help and/or delegating tasks is indicative of self-employment, as concluded by the Eastern High Court, U.1991.786 Ø, where a commission salaried sales representative,

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[21] The ruling of the High Court of Western Denmark of 14 June 1996 in case B-0830-95, U.1996.1232.V.

[22] The ruling of the Maritime and Commercial High Court of Denmark of 10 August 1987 in case F 101/1984. The ruling is not published but summarised on Arbejdsretsportalen, http://arbejdsretu.lovportaler.dk.

[23] The ruling of the Maritime and Commercial High Court of 6 May 1970 in case F. 81/69, U.1971.731.S.

[24] Supra n 8.

[25] The ruling of the High Court of Western Denmark of 17 September 2014 in case B-0438-13, U.2015.197.V.

within a certain area, was tasked with organising the work.[26] Even though the principal had retained some powers in terms of instruction, the sales representative was considered a self-employed contractor, partly as a result of the possibility of delegating tasks, at his own expense.

The *close connectedness criterion*, broadly, assesses the intimacy or dependency of the working relationship. The most prevalent factors are the extent to which the worker puts his performance at on single principal's disposal, and the length of the relationship between the parties. If an individual works solely in the service of a single principal, it indicates a close connection, which is indicative of employment.

The sales representative, in U.1971.731, devoted all his working time to the publisher, which indicated employment. The converse presumption surfaced in U.2015.197, where the sales representative was engaged elsewhere to the same extent. Periodic full-time attention to one principal does not necessarily rule out self-employment if the person retains the right to take on other tasks. In a ruling from the Maritime and Commercial Court, U.1978.958 SH, a sales agent with the right to take on other agencies was considered self-employed, also during periods where he devoted the greater part of his working time to the principal.[27]

The *social perception* assesses the relationship from a social and occupational perspective. The categorisation is influenced by the status his or her working situation resembles most from a social perspective.

In a case from the Eastern High Court, B-1845-04/2006, the Court ruled that a self-employed worker, who subsequently was hired by an emergency services company, was, in fact, an employee in relation to the Act on Workers' Compensation.[28] The Court emphasised that the worker represented the emergency services company, wore a uniform, was not allowed to compete, was obliged to perform tasks, had a duty to report and almost exclusively worked for that one company. When the worker decided to liquidate his own company, the services company bought his service vehicle and employed him to continue performing the same tasks. The court ruled, that the person had in fact been an employee before as well as after the liquidation of this own company.

2.3 Primacy of the facts and circumvention prevention

As employment contracts are subject to general contract law principles, the basic principle when interpreting the implications of a contract is freedom of contract. The parties are free to contract on what they want, with who they want and how they want. However, if the actual social situation does not reflect the contents or wording of the contract, the contract may be disregarded, partly or fully. This principle applies specifically to the concept of employee, due to the protective nature of labour law and the risk of circumvention. This principle prevails both at the individual level and the collective level.

[26] The ruling of the High Court of Eastern Denmark of 27 June 1991 in case 6-415/1989, U.1991.786/2.Ø.
[27] The ruling of the Maritime and Commercial High Court of 29 September 1978 in case LP. 17/1977, U.1978.958.S.
[28] The ruling of the High Court of Eastern Denmark 23 January 2006 in case B-1845-04, Arbejdsretsportalen.

In a case from the Maritime and Commercial Court, U.1996.946 SH, the court ruled that even though a temporary agency worker was not employed per se, the fact that the working relationship with a specific company, the Danish State Railways, was lengthy and regular (3 years), in reality it resembled 'regular employment'.[29] This reality, with a view to counteract abuse and circumvention of the mandatory provisions in the Salaried Employees' Act, overruled the formalities of not being permanently employed per se.

At the collective level, the Labour Court carry out the same assessment taking into consideration potential abuse and circumvention of the provisions in collective agreements. In the case A.2005.022, two painters were not viewed as subcontractors, as the contracts proposed, but as employees, as the employer in reality exercised managerial powers over the painters, including supervising and controlling the work performance. The employer was then obliged to pay salaries under the collective agreement in force at the work place.[30]

The realities of the working relationships are given weight in the assessment when they diverge from the formalities in the contract. The judiciary furthermore takes into consideration if there is potential attempts of circumvention and abuse.

The assessment under the specific circumstances does not stand alone. Also, the purpose of the specific legislative act or collective agreement plays a role.

2.4 Purposive approaches

Different legal acts have different purposes. The interpretation of Danish courts more very often refer specifically to the preliminary works of Danish statutory acts.[31] In the preliminary works, the intention and the purpose of the act and the individual provisions are explained. Referring to the preliminary works can be understood as a manner of referring to the purpose of the act. This could, from a Danish angle, be considered a purposive approach. The assessment of whether a given situation falls within the scope of an employment act therefore relies not only on an assessment of the five indicators, but must also take into consideration the overall purpose and content of the specific act, often found in the preliminary works, the 'relative flexibility' of the concept.[32] The reasoning of Danish courts can vary significantly in detail, and not all specifically refer to the 'purpose' of a provision or an act. This would be understood from reference to preliminary works or from interpretation of the (short) rulings in their context.

The social purpose of the act can be seen in rulings on the Holiday Act, the Occupational Injuries Insurance Act, Sick Leave Benefits Act and the Supplementing Labour Market Pension Act. The reasoning of the courts is not always very specific in this regard. However, the same factual circumstances lead to two different categorisations in this case from 1986, Maritime and Commercial Court, U1986.744SH: an assistant at an advertising agency worked on an ad hoc basis and was remunerated per hour with an hourly rate significantly above permanent employees' and on the same level as other ad hoc assistants, who were considered self-employed. He was free to decline work. The advertising agency at the request of the assistant deducted

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[29] The ruling of the Maritime and Commercial High Court 11 April 1996 in case F 15/94, U.1996.946.S.

[30] The ruling of the Labour Court 31 August 2006 in case A2005.022, Arbejdsretsportalen.

[31] R. Nielsen and C. Tvarnø, Retskilder og retsteorier, 4th ed., DJØF, p. 256-261.

[32] Hasselbalch above n 2, section III, 1.1.

Pension payments and deposited Holiday Payments on his salary. The assistant was not registered as a company paying sales taxes. The court ruled, that the assistant was after an overall assessment not considered an employee under the Salaried Employees' Act, and was not eligible for salaries during sick-leave, provided by section 5. The assistant was considered an employee under the Act on Sick Leave Benefits (Sygedagpengeloven),[33] because he was not registered for sales tax, the agency had paid the first days of sick leave benefits, and his main income was from the advertising agency. The same situation surfaced in rulings concerning the Act on Supplementing Labour Market Pension, the ATP-Act (ATP-loven),[34] where the Board on ATP have ruled, that persons who are not employees in the understanding of the Holiday Act or the Act on Unemploymency Benefits, were considered employees under the ATP-Act .[35] Also in early caselaw on the Holiday Act, certain atypical workers were considered employees under the Holiday Act, despite the relationship would be considered an independent service provider as the services were provided ad hoc, outside normal working hours and using the tools and machines of the service provider,[36] and in another case regardless of whether the worker was in 'a position of service' under the Act on Salaried Employees.[37]

A more recent example specifically takes into consideration the purpose of the underlying EU Directive 91/533 on the duty to issue an employment certificate. In Maritime and Commercial Court ruling U1999.1870SH, a temporary agency worker was considered an employee at the temporary work agency in the understanding of the Danish implementing Act on an Employment Certificate.[38] The court took into account that 'the purpose of the Directive was to provide improved protection against possible infringements', and that according to the preliminary works of the Danish implementation act, the Act should aim for 'a wide concept of employee'.

A strong reference to the purpose of the Act is recognised in the Act on Occupational Health and Safety, which in the preliminary works define 'work performed for an employer' with several examples, e.g. specifically including un-remunerated work (thus diverging from the traditional indication of employment status).[39] Examples include U2011.2425V, where a ship dock had hired-in workers from an agency and according to the court had taken over the safety responsibilities and was liable for the injuries of the workers, and U2007.2478V mentioned below at 3.2.

Another example is the Equal Treatment Act,[40] which prohibits direct and indirect discrimination in employment on grounds of gender. The Act applies to "any employer employing men and women". The personal scope is interpreted in accordance with Directive 2006/54/EC on equal treatment of women and men in employment and Directive 2010/41/EU on equal treatment of women and men in a self-employed capacity, and employed as well as self-employed are covered by the scope of the act.[41] The Act applies 'any employer'. The courts have interpreted that a disabled person

[33] Now Statutory act no. 68 of 25 January 2019 on Sick Leave Benefits.
[34] Statutory act no. 1110 of 10 October 2014 on Supplementing Labour Market Pension.
[35] Eg. rulings AT1986.187 and AT1986.186.
[36] Article in Juristen 1950, p. 119.
[37] Supreme Court ruling U1957.1074H
[38] Above n. 9.
[39] Preparatory works to the Act on Occupational Health and Safety, comments to section 2.
[40] Statutory act no. 645 8 June 2011 on Equal Treatment of Men and Women in Matters of Occupation and more, §§ 2, 3 and 4.
[41] Cf. the remarks in the preparatory works, FT 1977-78, Appendix A, 3087.

under the BPA arrangement was an employer under the Equal Treatment Act, cf. U2009.1700 ØL, U2008.844 VL and U2014.2546V, opposite in Eastern High Court ruling of 5 July 2019 (not yet published), where the personal assistant was formally and in reality considered employed by the local municipality, which then was liable for the disabled citizen's sexual harassment of the assistant, which in the end resulted in the dismissal of the assistant.

The courts will always take into consideration the underlying purpose of the act. Especially in the case of non-discrimination and health and safety at work, the social context and the specific purpose of the acts clearly plays a role in the interpretation of the scope of the acts.

2.5 Appointment by collective agreement

In Denmark, two collective agreements have been concluded for non-standard work performed via digital platforms.

One agreement is with the platform Hilfr, who provides cleaning services in private homes. Hilfr in May 2018 entered into a collective agreement with the largest trade union in Denmark, 3F.[42] This agreement offered a novel take on the issue of classification. The collective agreement applies to cleaning assistants who perform cleaning work in private households facilitated by the digital platform Hilfr ApS. The personal scope is cleaning assistants who are employees, not freelancers.[43] Cleaning assistants become employees by default, when they have worked 100 hours via the platform. The agreement has an opt-out mechanism, and the service providers may opt to be covered by the agreement as employee before having worked 100 hours, and may opt to not be covered by the agreement and continue as a freelancer after having worked 100 hours. The classification of the service providers as employees or freelancers in the case of Hilfr depend not on an assessment of all the circumstances but on freedom of contract of the collective parties as well as at the individual level. Having obtained status of employee the platform is obliged to provide a better hourly rate, paid holidays, a pension, and just cause for deleting or otherwise making the profile inaccessible. The agreement has been in force since august 2018, and so far no cases have been heard (July 2019).

The second agreement is with the platform Voocali, who provides interpretation services. Voocali in October 2018 entered into a collective agreement with the Danish union HK, and took a different approach.[44] The purpose of the agreement is to ensure proper payment and good working conditions.[45] The agreement applies to all work that is either performed at Voocali's platform, or which Voocali provides for performance for a User business, as long as it is not covered by the collective agreement for

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[42] Fagbladet 3F, Historisk overenskomst: Rengøringsplatform indgår aftale med 3F, 10 April 2018, https://fagbladet3f.dk/artikel/rengoeringsplatform-indgaar-aftale-med-3f.
[43] Collective agreement between Hilfr and 3F, section 1, https://www.3f.dk/~/media/files/mainsite/forside/fagforening/privat%20service/overenskomster/hilfr%20collective%20agreement%202018.pdf.
[44] Agreement between Voocali and HK Privat, https://www.hk.dk/-/media/dokumenter/raad-og-stoette-v2/freelancer/agreementvoocali-hkprivat.pdf?la=da&hash=59B0822A6225832782BC8A8CB61761EA.
[45] Ibid., section 2.2.

salaried employees in trade, knowledge and service.[46] This agreement bypasses the classification issue by agreeing, that the terms and conditions apply to all work performed on the platform, unless it is covered by another collective agreement. Also, no cases have emerged concerning this agreement (July 2019).

The two approaches differ greatly, but present new takes on the dilemma of classifying new forms of contracts of work, that do not resemble the classic setup of permanent full-time work for one employer.

[46] Ibid., 3.2.

3 Concept of employer

3.1 Contractual appointment

There is no universal definition of an employer in Danish law. As mentioned, the starting point is general contract law and the principle of freedom of contract. The parties are free to contract on what they want, with who they want and how they want. This is also the starting point, when determining who is the employer. The starting point is, that the employer, as the party with a right to exercise the managerial powers, and the party responsible for the rights and duties of the employees, is the party that concluded the contract.

The contract as the clear starting point can be illustrated with a case from the Labour Court, where two carpenters, following the bankruptcy of their contractual employer, claimed that they were in reality employed by a different undertaking, which was owned by the same person and where they had formerly been employed.[47] After the bankruptcy, the carpenters were both re-employed by one of the owner's other companies. The carpenters claimed salaries in the intermittent period from bankruptcy to re-employment. The Labour Court emphasised that the contractual employer was with the bankrupt company, and this was also where the salaries were paid out. The fact that both companies were owned by the same person and had the same address was not significant. The court concluded that it had consistently been clear that the carpenters were employed by the bankrupt company, and moreover the two companies were sufficiently separate and independent entities.

3.2 Appointment by conduct

The employment contract is different from other contracts (of work), as it provides legal basis for exercising the managerial prerogative. The managerial prerogative is a privilege assigned to the employer, but can also be used as indicative of who is in reality the employer. The courts will in disputes about where employees can direct their claims look at the conduct of the parties and specifically who is exercising the managerial prerogative.

In a case from the Supreme Court, U.2001.987 H, the question before the court was who was the employer liable for outstanding salaries for a dismissal period of 6 months after the closure of a bureau. The employee, a then medical student, was recruited by a bureau that assisted private caring facilities with recruitment of medical students to care for patients on life support. The question was whether the recruitment to work with one patient was on behalf of the caring facility or was with the bureau itself. After several years of working for the same patient, in the beginning as a medical student and after stopping the studies as full time work for the same patient, the bureau stopped the services and the assistant was dismissed. The bureau paid out salaries to the assistants and was reimbursed by the caring facility based on the registrations and work schedules of the bureau, the bureau recruited and instructed the caretakers, organised the working time schedules, met monthly with all the medical students/assistants, and the assistants had to report to the bureau regarding abnormal incidences during the shifts, emergencies as well as sick leave. The

[47] The ruling of the Labour Court 28 October 2014 in case AR2013.0577.

caring facility was not involved in organising or instructing the assistants. The bureau was the real employer and not the caring facility, as the agency had placed him, remunerated him and instructed him.[48] In this case, the contractual relationship was unclear, and the court let the realities of the managerial prerogatives decide who was the real employer.

Supreme Court ruling U.2015.3687 H, involved a professional boxer and his promotor. The boxer and the promoter concluded an agreement involving managing, representation and promotion, through the promotor's company. The question was whether the promotor was liable under the Act on Workers' Compensation for the long-term injuries of the boxer. The Court took into account the number of managerial prerogatives exercised by the promotor, as well as her economic interests.[49] The promoter, as a result of the contract and despite the company structure, had a personal economic and commercial interests in the relationship. The promotor had the power to decide how and where the boxer should train, which matches he should participate in, as well as which other promotional contracts he was allowed to conclude. The court ruled, that she was the employer, according to the Act on Workers' Compensation, hence liable for the payments in relation to the boxers' injuries. In this situation, the contractual relationship was clear, and the Supreme Court allowed the realities of the situation to 'pierce the veil' of the contractual setup in favour of securing compensation to the injured boxer.

The court will disregard the parties' classification in the individual contract, as well as allow (at least) liability for occupational injuries to pierce the corporate veil as in U 2015.3687 H.

3.3 Statutory and purposive interpretation

The Working Environment Act applies to 'work performed for an employer'. This is a very broad definition, and refers to the practical situation of being able to ensure the safety of the workers performing work (for the employer). In the Working Environment Act, the employer with the competency and opportunity to ensure the safety of the workers, can be held responsible regardless of who is the contractual employer.

In the Supreme Court ruling U.1990.619, the renter of an excavator was held liable for the safety of the employee of the owner of the excavator.[50] The excavator was rented with a driver. During the work at the renter's workplace and accident happened. The Court ruled, that since the owner and the contractual employer of the driver of the rented out excavator did not have the authority nor the possibility to take the necessary precautions, the renter was the employer in relation to the Working Environment Act, and liable for injuries to the driver.

In an opposite situation in the Western High Court ruling U.2007.2478 V, the owner of a leased crane was found to be the employer responsible for the safety of his employee at a building site, where the employer was not overall responsible.[51] The leased crane was to be extended, and the owner sent one of his own employees to carry out the task, during which an accident happened. Although two of the leaseholder's employees were present, the task was performed in the service of the owner,

[48] The ruling of the Supreme Court 7 February 2001 in the joined cases II 221/1999 and II 276/1999, U.2001.987.H.

[49] The ruling of the Supreme Court 6 July 2015 in the case 43/2014, U.2015.3687.H.

[50] The ruling of the Supreme Court 25 June 1990 in case 56/1990, U.1990.619.H.

[51] The ruling of the High Court of Western Denmark 4 June 2007 in case S-0018-07, U.2007.2478.V.

he had managerial powers and the competence to ensure, that the work was carried out safely.

The assessment under the Working Environment Act prescribing duties on 'the employer' to whom work is being performed, emphasises the opportunity of providing safety for the specific work concerned rather than the formal status as employer. The employer with opportunity, knowledge and power to ensure the safety of the workers, will be held responsible for injuries, regardless of who is the contractual employer.

The same principle of purposive protection in favour of the employee can be found in the Salaried Employees Act.[52]

One of the purposes of the Act, inter alia by instituting long notice periods regarding dismissals, is to safeguard the accrual of employees' seniority. This underlying purpose was considered by the Supreme Court in a ruling from 2015.[53] The question before the court was, whether a school teacher who resigned from one municipal school in order to work at another school in the same municipality, could transfer with the accrued seniority, including having fulfilled the probationary period with reduced notice periods in case of dismissal, or would have to start again with a new probationary period. The contractual employer was the local municipality with the school as the place of work. The interviews and the agreements to start work were made with the individual schools. The Supreme Court ruled, that in relation to the Salaried Workers Act, the municipality was the overall employer of all teachers employed at the 28 public schools in the municipality, even though the managerial prerogatives were performed locally at each school. The teacher's move from one school to another school was thus considered a transfer within the organisation and the teacher's seniority was intact.

[52] Statutory act no. 1002 24 August 2017 on Salaried Employees.
[53] The ruling of the Supreme Court of Denmark 11 December 2014 in case 147/2013, U.2015.936.H.

4 Examples of challenges and their legal outcome

4.1 Introduction

In Denmark, the former government initiated a Disruption Council in 2017, which had as its focus to analyse, discuss and suggest ways to seize the opportunities of the technological developments to the benefit of society. Of special importance to the Council was maintaining the balance of power, as well as the high standards of wages and working conditions, on the labour market. In accordance with its mandate,[54] the Council through a series of meetings with different themes, examined the possibilities of utilizing new technologies to continuously integrate international markets for goods, labour and capital in the growth plans for Denmark. The Council's work resulted in a report identifying four themes as the main objectives for 'the future Denmark'.[55] The themes are (1) new and higher requirements for the education system of the future, (2) productive and responsible companies in a digital world, (3) a modern and flexible labour market and (4) globalisation, foreign labour and free trade.

The second theme has resulted in a variety of initiatives, including a cooperation agreement between Airbnb and the Danish tax authorities, as well as a Digital Platforms Division within the Danish Competition and Consumer Authority. The cooperation agreement requires Airbnb to report the earnings of the homeowners to the tax authorities, and in return awards the homeowners increased tax free earnings.[56] The Digital Platforms Division (CDP) is tasked with, inter alia, enforcing the competition rules against digital platforms.[57]

The third theme includes initiatives on the reform of the active labour market policy, in the light of e.g. digital work platforms (see below 4.3). In addition, the collective agreement concluded between 3F and Hilfr is partly accredited as one of the successes of the Council (see above 2.5 and below 4.5).

The Council's work offers no substantive initiatives or solutions to the specific challenges of platforms providing work, and there has been no legislative developments. The topic of digital platforms providing work is so far left to the forces of the market, including any collective agreements.

[54] Kommissiorum for Disruptionrådet – Partnerskab for Danmarks fremtid, https://www.regeringen.dk/media/3334/kommissorium.pdf.
[55] The Danish Government, Prepared for the future of work – Follow-up on the Danish Disruption Council, February 2019.
[56] Skatteministeriet, 'Historisk aftale med Airbnb træder i kraft fra 1. juli 2019', 4 April 2019, https://www.skm.dk/aktuelt/presse/pressemeddelelser/2019/april/historisk-aftale-med-airbnb-traeder-i-kraft-fra-1-juli-2019.
[57] Konkurrence- og Forbrugerstyrelsen, 'Konkurrence- og Forbrugerstyrelsen øger fokus på digitale platforme', 1 May 2019, https://www.kfst.dk/pressemeddelelser/kfst/2019/20190501-konkurrence-og-forbrugerstyrelsen-oeger-fokus-paa-digitale-platforme.

4.2 Agency work and other triparty contracts

One version of non-standard employment is agency work and other tripartite relationships.

In 2015, temporary agency work accounted for 1.3 % of the total Danish employment.[58] This rate has remained stable for a decade, with a small decline since 2008.[59]

In Denmark, agency work is governed by the Act on Temporary Agency Work (Vikarloven),[60] implementing Directive 2008/104/EC.[61] The Act applies only to temporary agency workers, that have concluded a work agreement or an employment relationship with a temporary work agency, and is sent to user entities in Denmark to temporarily perform work there under the instruction and management of the user entity. A temporary work agency is defined as a physical or legal person, that concludes agreements with temporary agency workers with the purpose of sending them to user entities to temporarily perform work. The application of the scope of the Act is very strict and only situations that fall within the definitions are governed by the act. Formally, the temporary agency worker is employed by the temporary work agency, whereas the user entity takes on certain managerial responsibilities, such as instruction and control of the work, and ensuring a safe and healthy work environment.

The Act promotes equal treatment as the guiding principle for temporary agency workers,[62] performing work at different user entities. The temporary agency work is ensured the salary and working conditions applicable to the same type of work at the user entity. In the context of platform work, the source of rights is important, and thus the equal treatment principle can be an important principle. This is seen with the platform Chabber, mentioned below. Workers deployed from Chabber to work at restaurants and hotels, would be entitled to the rights of the workers at the working place. If the user has a collective agreement, then Chabber personnel must be awarded the rights of the collective agreement, including remuneration rates. If the user does not have a collective agreement, the Chabber personnel are remunerated at individual rates.

According to the Act, the temporary work agency as well as the user undertaking carry obligations in relation to the temporary agency worker. The agency is responsible for ensuring working time, overtime, break and rest periods, remuneration and more.[63] The agency must ensure, that the temporary agency workers receives the same basic working and employment conditions at the user undertaking, as if employed by the user undertaking, including the Act on Equal Treatment and the Act on Equal Pay.[64] The user undertaking, must inform the worker of any vacant permanent

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[58] Stine Rasmussen et al, Nonstandard employment in the Nordics – Toward Precarious Work?, Nordic Journal of Working Life Studies, Vol. 9, No. S6, May 2019, p. 21.
[59] Mikkel Mailand and Trine P. Larsen, Hybrid work – social protection of atypical employment in Denmark, WSI Study, No. 11, March 2018 (Mailand and Larsen 2018), p. 33.
[60] Statutory act no. 595 12 June 2013 on the Legal Status of Temporary Agency Workers (TAW), § 2(2).
[61] Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work, OJ L 327, 5.12.2008, p. 9–14.
[62] The Act as proposed specifically refers to the purpose of the underlying Directive, see Folketingstidende 2012-2013, Appendix A, L 209, p. 3, cf. article 2 of the Directive.
[63] TAW, § 3(1).
[64] TAW § 3(2), cf. the Act on Equal Pay (n 6) and the Act on Equal Treatment (n 17).

positions within the undertaking, and must allow equal access to and use of benefits available to the permanently employed staff, unless objectively justified not to do so.

The user undertaking must secure the health and safety of the workers from day to day.[65] The act prohibits successive assignments to the same user entity without objectively justifiable reasons, in order to counteract abuse and circumvention of collective agreements and employment legislation.

One platform in Denmark has aligned their model with the principles promoted by the Act on Temporary Agency Work. The Danish company Chabber, provide waiters, bartenders and kitchen personnel (as service providers) for private and business customers through a digital platform. In Chabber's terms and conditions, all customers are obliged to offer the hired service providers the same working conditions as the permanent staff employed by the customer, including payment of wages, pensions and holiday benefits. The user is made responsible for compliance with any relevant collective agreements, local agreements or customs for the hired service providers. Chabber contractually introduces a principle of equal treatment. Chabber is the formal employer of the service provider, but the customer/user both have the right and the duty to instruct and control the work at the place of work.[66] The responsibility for safeguarding the principle of equal treatment is shifted to the customer/user.[67] The risk of pursuing and enforcing the rights of the service providers are left with the individual service provider. No cases have emerged where Chabber service providers filing claims against customers/users, and no cases have emerged claiming that Chabber is in breach of the Act on Temporary Agency Work by not ensuring the service providers their rights (July 2019).

Similarly, no other platform workers have tested whether the setup would fall under the definition of Temporary Agency Work as provided in the Act with a view to make claims against either the platform as a temporary work agency or against the user, as a user entity.

Triparty work relationships occur not only as temporary agency work, but in other relations as well.

In relation to social and occupational programmes and schemes involving public entities, one such example is the BPA programme ('borgerstyret personlig assistance'). The programme is regulated by the Act on Social Services,[68] and is governed by and managed by the local municipality. The programme in essence provides, that persons with a need of personal care and assistance employ their own carer of choice, and get reimbursed by the local municipality. In a ruling from the Western High Court U.2014.2546 V, a carer for a disabled person was formally employed by the citizen, whereas the municipality issued the employment contract, disbursed remuneration and had power of attorney in most matters regarding the employment relationship. The claim concerned compensations for breach of inter alia the Act on Employment Certificate. The Court ruled, that the citizen was the employer, and liable to pay compensation to the carer for deficiencies in the employment certificate under the Act. However, as the local municipality had de facto issued the certificate, and as the citizen had no influence in this regard, the local municipality was obliged to reimburse

[65] See section 3.2 above in relation to the concept of employer in the Working Environment Act.
[66] Chabber, Terms and conditions, sections 4.9 and 4.10, see https://www.chabber.com/info/termsandconditions.
[67] Ibid., sections 4.1 and 4.2.
[68] The ruling of the High Court of Western Denmark 20 May 2014 in case B-0690-12, U.2014.2546.V.

the citizen the expenses for the compensation to the employed carer. In this situation, the formal employment contract situation between the citizen and the carer was upheld as real. The administrative managerial tasks de facto exercised of the local municipality did not change this setup.

In summary, triparty arrangements are used in different setups. One new form of work platform, Chabber, although presumably not formally governed by the Act on Temporary Agency Work, has aligned their business model with the principles expressed in the Act. Also in social programmes, triparty arrangements are well-known and are used as real contractual bases for employment relationships, also when the public authority assists significantly with the administrative tasks.

4.3 Fragmented, marginal and zero-hour contracts

There are no statutory requirements for what constitutes an employment contract in Danish law. Employment contracts regarding a single task or a few hours or minutes of work could technically be lawful.

A study from 2014 showed that the prevalence of 'atypical employment', including temporary agency work, fixed-term employment, part-time work of no more than 15 hours per week and solo self-employment, on the Danish labour market had varied over the course of the last 15 years, but that no specific tendencies could be demonstrated.[69] In 2015, 29 % of all employment in Denmark was 'non-standard' employment, a small increase from 2000 (26 %).[70]

Some legislative acts have a minimum threshold of weekly working time in order to apply. The Salaried Employees' Act applies only when work of the relevant character is performed 8 hours per week on average.[71] The Act does apply to both fixed-term[72] and part-time work (averaging minimum 8 hours per week).

Regarding fixed-term work in Denmark, the most recent OECD data show that 12.9 % of employees in Denmark have a predetermined termination date.[73] Fixed-term contracts are governed by the Fixed-term Work Act,[74] implementing Directive 1999/70/EC.[75] The Act introduces a prohibition against discrimination on grounds of the fixed-term nature of the work, as well as a requirement of objective reasons for successive fixed-term contracts. Discrimination in relation to the working conditions and remuneration of a comparable permanent employee, on the grounds of the time-limitation itself, is prohibited. A number of cases have been heard regarding compensation for breach of the prohibition to discriminate, and in particular breach of the requirement of objective reasons for successive fixed-term employments. In a few cases, the employees have received compensations for lack of objective reasons. In no cases have the employee been awarded compensation for unequal treatment, as the employee fails to provide a 'comparable' permanently employed worker. Access to the rights in the Fixed-Term Act depends on status as employee, and the act uses

[69] Trine P. Larsen and Mikkel Mailand, Bargaining for Social Rights in Sectors (BARSORIS), FAOS Research Paper No. 141, November 2014.
[70] Stine Rasmussen et al, Atypical labour markets in Denmark, Nordic future of work Brief 5, March 2019.
[71] Supra n 9, § 2(2).
[72] Ibid., § 2 (4)
[73] OECD (2019), Temporary employment (indicator). doi: 10.1787/75589b8a-en.
[74] Statutory act no. 907 11 September 2008 on Time-limited Employment.
[75] Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, OJ L 175, 10.7.1999, p. 43–48.

the most common definition of employee, as ‘a person, receiving remuneration for personal work performed in a contract of service’.

Regarding part-time work in Denmark, the most recent Labour Force Survey 2018 showed that 24.47 % of the workforce was working part-time,[76] with 11 % of the workforce worked less than 15 hours per week.[77] In general, the use of marginal part-time contracts have increased since the mid-1990s and has accelerated since 2008.[78] There is no universal definition of part-time work in Denmark. Full-time work is defined in most collective agreements at 37 hours per week, which is the de facto standard but considerable variations are often seen. The threshold for when an employment relationship in Denmark becomes *marginal* compared to the standard weekly working hours is therefore difficult to establish. What constitutes part-time work could be viewed as any amount of agreed working time less than 37 hours per week. The Act on Unemployment Insurance[79] considers an average of 30 hours per week or less part-time.[80] The Act on Part-time Work[81] provides, that discrimination based on the part-time character of the work is prohibited. There have been quite a number of cases claiming compensation for pay and working conditions being discriminatory based on the part-time character of the work, so far all unsuccessful (July 2019), as the claimant fails to establish a ‘comparable’ work situation to full-time employees. The entry point is status as employee, and the Act uses the most used definition in the Act on an Employment Certificate.

Concerning zero-hour contracts, there is no available data on their prevalence in Denmark. Similar forms of contracts are often defined and covered by collective agreements as ‘on-call temps’ (tilkaldevikarer), reserves or replacements.[82] No general regulation targets this type of contract specifically, but the Act on Part-time Work aims to provide protection against discrimination for less than full-time work, which would apply also to zero-hour-contracts. The contracts would be assessed on their own terms, including with a view to ensure mandatory substantial rights in statutory acts or in collective agreements, and with a view to counteract abuse and circumvention. Zero-hour-contracts have already been used in Denmark for a long time and on terms, that have been agreed to by the social partners. New types of positions or industries starting to use zero-hour-contracts would therefor constitute an increase in the use of the contracts, whereas if the social partners are invited to negotiate the terms for new positions or industries, this could align with the existing practice. However, if zero-hour-contracts are starting to be offered on terms, which deviate from the negotiated terms to the detriment of the employee in existing as well as in new positions, this would be a case for concern. There is no evidence yet of a tendency to increase the use of zero-hour-contracts in Denmark, also not in the surveys provided by the Future of Work project pillar III.

Regarding fragmented contracts, i.e. contracts limited to one specific task at one specific time, no specific rules apply and there is no available data on the number of

[76] Statistics Denmark, Labour Force Survey 2018, https://www.dst.dk/en/Statistik/emner/arbejde-indkomst-og-formue/beskaeftigelse/arbejdskraftundersoegelsen.

[77] Mailand and Larsen 2018, p. 25f.

[78] Stine Rasmussen et al, Nonstandard employment in the Nordics – Toward Precarious Work?, Nordic Journal of Working Life Studies, Vol. 9, No. S6, May 2019, p. 16.

[79] Statutory act no. 1213 of 11 October 2018.

[80] Statutory act no. 1213 11 October 2018 on Unemployment Insurance, § 67.

[81] Statutory act no. 1142 14 September 2018 on Part-time Employment.

[82] Mailand and Larsen 2018, p. 34.

persons working fragmented. The Ministry of Employment, as a response to doubts expressed by the municipalities and the unemployment benefit associations, have communicated to the caseworkers. The Ministry states, that for the purpose of being entitled to receive Unemployment Benefits (dagpenge) and Social Benefits (kontanthjælp), sporadic work performed via digital platforms are to be included, when counting the number of working hours necessary to be eligible for the benefits.[83]

4.4 Artificial employment contracts

Danish labour law does not, officially, have an artificial employment construct similar to 'egenanställning' in Sweden.

The Danish union HK, Denmark's largest union for salaried employees have started a service agency for freelancers.[84] The agency is a non-profit organisation, available to everybody, including non-members. It is marketed to individuals wanting to try out freelancing, but who at the same time are concerned about company registration, payment of VAT, invoicing and insurance. The agency looks after these administrative tasks and charges 8 % of an invoice for this service. The freelancers find the customers and negotiate the terms of the agreement, and then the agency takes over the order and temporarily employs the freelancer to perform the task. The agency sends an invoice to the customer, handles payments and taxation. There are obvious issues, such as whether the freelancers would indeed be considered self-employed rather than formally employment by the agency in the fragmented contracts performing the specific task. Other challenges pertain to taxation, as self-employed workers have different tax rates and available deductions, as well as social security law, as the unemployment insurance scheme for self-employed workers is different from the employee scheme. No cases have surfaced concerning this setup (July 2019).

4.5 Platform work

A study shows that 1 % of Danes, aged 15-74 years (42,367 people), in 2017 offered their labour on a digital platform.[85] 61 % of those people earned less than 25,000 DKK (3,400 EUR) by doing so and the group for whom platform work could be considered the primary source of income was so marginal that the report did not include the result.

Platform work seems, almost by default, to be fragmented and marginal or zero hour, and the avenue of offering the most predictable and transparent form of employment rights in and protections in Denmark seems to be via collective agreement, as in the cases of Hilfr and Voocali mentioned above.

The Danish courts have not had the opportunity to assess claims from platform workers against the platform on any matter relating to employment rights.

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[83] See the Minister's briefing to the Parliament's Employment Committee, https://www.ft.dk/samling/20171/almdel/BEU/bilag/378/1911149.pdf, and the associated letters to the relevant actors, on unemployment benefits, https://www.ft.dk/samling/20171/almdel/BEU/bilag/378/1911150.pdf, and social benefits, https://www.ft.dk/samling/20171/almdel/BEU/bilag/378/1911151.pdf.

[84] Servicebureau for Freelancere, HK, https://www.hk.dk/raadogstoette/freelancer/bureau.

[85] Kristin Jesnes and Fabian Braesemann, Measuring online labour: A subcategory of platform work, Fafo, Nordic future of work Brief 2, March 2019, cf. Anna Ilsøe and Louise Weber Madsen, FAOS, Digitalisering af arbejdsmarkedet, Research Paper 157, p. 40.

A survey from the Danish Business Authority showed that 75 % of the workers on selected platforms worked less than 8 hours per week and only 12 % more than 15 hours per week.[86]

Pillar IV-research,[87] as well as the The Disruption Council, [88] indicates, that the most prevalent type of work platform in Denmark is one that facilitates labour on-demand and on-location, such as cleaning, smaller manual tasks or transportation services. The business model for such platforms is characterised by several common denominators. The platforms establish a connection between the worker and the recipient of the service, communication and payment is handled via the platform, but the transaction or performance itself takes place via some form of direct contact between the worker and the recipient.[89]

The classification of the working relationship presents challenges. Most platforms contract the service providers as self-employed and do not assume any form of employer responsibility. As mentioned, in Denmark, the classification of a work relationship is not limited to the contractual classification but is carried out taking all the specific circumstances of the relationship between the parties into consideration. The Disruption Council acknowledges, that many platform workers do not have access to the 'employment rights usually awarded to workers covered by a collective agreement' and equals it to the conditions of 'regular' self-employed workers in Denmark.[90] As such, the Council presupposes that most platform workers are self-employed, thus themselves responsible for saving for holidays, sick days and pension, as well as occupational insurance and more.

First of all, this assessment seems a little fast and performed on the surface of the relationship between the platform and the service providers. Instruction and control can be carried out by the platform via the setup of the algorithm, which can place providers higher up or lower down on the list according to a number of factors, that the service providers have no control over and are not made aware of. The rating system from customers is only one element, and the lists on the website or app do not necessarily correspond 1-1 to the ratings. Furthermore, the contractual setup and the pricing systems needs a deep and realistic assessment, as some platforms make the hourly payments higher in some time-slots in order to motivate service providers to work in these timeslots, in reality making work-life-balance very difficult. In addition, many platforms undertake courses for the service providers, training them in basic skills for cleaning or interaction with the users. Furthermore, also on the issue of the algorithm is sensitive to user conduct on the webpage and optimises user traffic and hits without a view to consider whether such optimisation could place service providers of a certain skin colour or religious appearance in a less optimal position on the webpage, which could not only be viewed as conducting managerial prerogatives towards the service providers, but could also in itself constitute indirect discrimination of the specific persons (the Act on Equal Treatment has a broad scope and could apply also to self-employed persons). Further, the service providers may

[86] Supra n 64, p. 9.
[87] Stine Rasmussen & Per Kongshøj Madsen, Platformsøkonomien og prekariatet, Tidsskrift for Arbejdsliv, 19(1), 2017, p. 53.
[88] Disruptionrådet, Kortlægning af arbejdsplatforme i Danmark, January 2018, https://deleoekonomien.dk/sites/default/files/media/kortlaegning_af_arbejdsplatforme_i_danmark_pdf.pdf.
[89] Ibid., p. 4f.
[90] Ibid., p. 5f.

be in a position of dependency, as the work for some is the main income. Albeit much platform work is carried out as an additional source of income, some already have platform work as their main source of income. An assessment of the status of the service providers as self-employed or employed persons, would indeed depend on such in-depth analysis of each case, taking into consideration all the specific circumstances of the situation, including a good understanding of how algorithms influence access to employment, the quality of work, the indirect exercise of influence on the financial arrangement, the duty to perform the work personally inter alia by posting a photo of the service provider on the platform or by approving the service provider, etc. etc.

Second of all, if the service providers are indeed assessed as self-employed, there is no available data on how many of the self-employed platform workers who are in reality saving up for paid holidays, sick leave pay and old-age pension. There is no evidence of platforms providing access to an occupational injury insurance, or has concluded an occupational injury insurance as employers.

Some platforms are based on models that vary from the standard of contracting with self-employed service providers and not assuming any employer responsibilities. Some platforms employ the workers on an hourly basis and manage payment of taxes.[91] Some add a 'welfare allowance' to the hourly base price to compensate for the lack of social protection, and some have mandatory insurance schemes covering each transaction.[92]

The insurance schemes are very varied, and the few platforms that cover personal injuries on the service providers is capped quite low. The platform Mover,[93] providing on-demand transportation of goods, offers a business liability insurance, covering damages to third party persons and goods caused by the driver. The platform Happy Helper, providing private cleaning services, offers an occupational injury insurance covering the service provider as well as any third party, with a maximum coverage of DKK 500.000 (EURO 70.000). The platform Hilfr, also offering private cleaning services, offers the same with a maximum coverage of DKK 700.000 (EURO 100.000). The platform Chabber, providing restaurant- bar- and catering personnel, refers the service provider to the coverage of the user entity, meaning that the service providers are covered only for the working timer at the user entities. The platform Voocali, providing interpretation services, provide a collective occupational injuries insurance for the service providers covering working time and transportation, with a maximum limitation of DKK 500.000 (EURO 70.000), and in addition has a business liability insurance for damages to any third party.

Also, the platform relationship is a triparty relationship resembling temporary agency work, but the managerial powers, including risks and benefits, are not similarly distributed on all platforms, unless intentionally chosen, such as by Chabber mentioned above. Some platforms have couriers or other workers *at their disposal* and decide which tasks to allocate to which worker, whereas other platforms let the workers choose entirely at will which tasks to accept. Some platforms require that the

[91] Such as LegalHero, https://legalhero.dk, an online platform offering legal services to small and medium enterprises, and Hilfr, https://hilfr.dk, a cleaning platform, which offers the option between Super Hilfrs employed on a collectively bargained zero-hour contract and Hilfrs, self-employed service providers receiving a 'welfare allowance'.
[92] Supra n 64, p. 6.
[93] https://www.mover.dk/

workers wear uniforms and perform the tasks in certain ways, whereas other platforms leave this entirely to the user and the service provider's agreement.

The tax authority has, in a report submitted to the parliament's Tax Committee in January 2018,[94] considered that the Uber drivers, who were active in Denmark in 2014 and 2015, were self-employed and had run either commercial or non-commercial businesses in relation to the rules on taxation.[95]

The work of the Disruption Council did not result in any material achievements on the employment status and social protection issues of work performed via digital platforms or apps, but concluded that the vendors on digital labour platforms are typically not protected by the standard employee rights.[96] The ongoing objective being to maintain and build a labour market that can exist within the framework of the Danish model in terms of taxation and proper working conditions. As of yet, no substantive legislative intervention initiatives have emerged.

In 2016, LO (now FH) in a report called for an examination of the statutory definitions of employment relationships and self-employment and the possible need for a revision.[97] The unions have made progress on two platforms with collective agreements. The market waits for further developments from the stakeholders – in particular from the social partners.

[94] SKAT, Rapport vedrørende kontrol af Uber-chauffører, Indkomstårene 2014 og 2015, January 2018, p. 8, https://www.ft.dk/samling/20171/almdel/sau/spm/345/svar/1480213/1879198.pdf.
[95] Ibid, p. 8.
[96] The Ministry of Employment, Prepared for the future of work – Follow-up in the Danish Disruption Council, 2018/19:14, February 2019, p. 43.
[97] LO, Platformsøkonomi – lovgivningsmæssige udfordringer og fagbevægelsens løsningsforslag, 15-2096, 3 May 2016.