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Protection of platform workers in Denmark
Part 2 Country report

Nordic future of work project 2017–2020: Working paper 10. Pillar VI

Fafo

Contents

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 aims to highlight the effect of an unclear employment status on key elements of Nordic labour law and regulation, by using a typology of workers. The paper will map and discuss how the relevant legal norms apply to the traditional employee and the genuinely self-employed worker compared to a type of worker whose employment status is fundamentally unclear – the typical platform worker.

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1 Introduction

This paper reflects on the possible impact of the changing relations on the labour law framework in Denmark and the fundamental values on which it is built. The purpose of this is to highlight the legal implications of the uncertain employment status brought about by these changes with the platform worker in mind.[1] Where does platform work fit into a regulatory framework primarily founded in the binary divide?

The Nordic labour market model excels through its structural integrity reflecting societal interests deeply rooted and institutionalized in the Nordic countries founded in three main objectives: a healthy and productive workforce, strong labour market actors and a basic social security. These objectives provide the structure for the paper, and each section will present the legal norms supporting the objective.

The implications of the legal vacuum and uncertain protective measures are illustrated by means of a *comparison* between the traditional subjects of the binary divide, an employee and a genuinely self-employed, to a platform worker whose employment status is unclear.[2]

The purpose of the comparison is to analyze the legal protection of different types of workers, and in the following sections the analysis will focus on the legal basis, the personal scope and the allocation of responsibilities. The material content of the legal norm is therefore only described sparingly.[3]

Platform work often takes place in shape of a triparty structure with both autonomous and subordinated features depending on the level and type of control incorporated into the structure on behalf of the platform. This naturally raises the question, if the platform worker can be deemed as an employee of either the platform or the customer. According to the analysis of the concept of employee,[4] the criterion of connectedness is highly indicative of an employment relationship, and when applied to platform work, the factor of connectedness almost exclusively will point towards the platform as the only possible employer given the ongoing contractual relationship between the parties. The customer as the employer will be addressed only where this is relevant and/or sheds light on interesting aspects.

The Danish approach of not using a strict definition of an employee provides a flexible jurisprudential framework for the judiciary to adjust the interpretation according to new societal developments and changing labour relations. This allows for an adaptive application of the concepts of the employment relationship and adaptive development of the protections provided by labour law.[5]

[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* [Hotvedt/Munkholm 2019].
[2] The typology of labour relations is part of the study design, and for more on the topology see Hotvedt/Munkholm 2019 p. 19.
[3] The research questions of this study (Part 2) are described in more detail in Hotvedt/Munkholm 2019 p. 20–22.
[4] See Report Part 1, Denmark, part 1 for the analysis on the concept of employee.
[5] The flexible definition is a part of the labour law framework in Denmark presented in Natalie Videbæk Munkholm and Asger Lund-Sørensen, «Key concepts and changing labour relations in Denmark: Part 1 Country report», Nordic future of work project 2017–2020: Working paper 4. Pillar VI [Report Part 1, Denmark].

One major question is how new forms of work, such as work for digital platforms, affects the role of collective agreements as the primary regulatory tool to ensure coherence in society and in the welfare system.[6]

[6] For an in-depth discussion of the applicability of collective agreements on platform work see Natalie Videbæk Munkholm and Christian Højer Schjøler, "Platform Work and the Danish Model – Legal Perspectives", *Nordic Journal of Commercial Law NJCL 1/2018.*

2 Strong labour market actors

2.1 The legal framework of collective bargaining

The Danish labour market is characterized by very strong social partners, a high unionisation rate of approx. 66% (OECD 2018) across all employee groups, and a collective agreement coverage of 84% with 100% in the public sector and approx. 67% in the private sector. Industrial relations are to a large degree self-regulatory, as there is no statutory law on what is a trade union or employer's confederation, what is a collective agreement, and who can negotiate on behalf of the workers/employers. Regulation of industrial relations are agreed to in collective agreements, in particular the Main Agreements at confederation level, most notably the LO/DA Main Agreement,[7] and is developed in the caselaw of the Labour Court.

Collective agreements provide the legal framework for pay and working conditions. Collective agreements are the sole regulator of pay, and the primary regulator of general working conditions in Denmark. By tacit agreement, the Danish parliament is hesitant to pass legislation in areas regulated by collective agreement. There is no generally applicable statutory regulation on working conditions including dismissal protection, minimum wages, normal daily or weekly working hours, sick leave pay, maternity leave pay, pensions, or the right to continuing education. Legislation supplements the collective agreements providing certain rights to certain groups of workers, such as Salaried Employees. When possible, collective agreements are also used to implement EU Directives. In this case, Parliament passes supplementing minimum legislation in order to ensure that the minimum rights provided by the EU, are available to all workers, also those not covered by a collective agreement.

Collective agreements do not have *erga omnes* effect. Collective agreements are binding only to signatories and their members,[8] and there is no legal mechanism to extend the provisions of agreements to employers, who are not bound by a Collective Agreement.[9] Employers can be bound by a collective agreement, if they are a member of an employers' association.[10] In this situation, an employer becomes bound because they are a member of a signatory to a collective agreement. In this case, employers are automatically bound by any agreement, the employer's association concludes covering work performed at the employer. This applies to pre-existing agreements as well as new agreements entered into by the association for work performed at the employer's workplace,[11] for as long as the employer is a member of the association.

[7] Hovedaftalen mellem LO og DA med ændringer per 1. januar 1993, http://www.arbejdsretten.dk/arbejdsretten/regler/hovedaftalen.aspx

[8] This is well-established in caselaw, cf. Hasselbalch, Den Danske Arbejdsret, XXII, 1.3, and e.g. Supreme Court Ruling U 2009.3048 H.

[9] In 2019, the social partners as a novelty proposed that the government legislated to extend minimum pay and working conditions in collective agreements to certain parts of the transportation sector, due to severe problems in the sector with demeaning and inhumane working conditions for truck-drivers of foreign origin.

[10] This is well-established in caselaw, cf. Hasselbalch, Den Danske Arbejdsret, XXII, 4.2.4. and e.g. Labour Court ruling number 5108 and Industrial Arbitration ruling FV of 5/9 1989.

[11] This is well-established in caselaw, cf. Hasselbalch, Den Danske Arbejdsret, XXII, 4.2.4. and 4.1. on the material scope of application of a collective agreement.

Un-organised employers can be bound as individual signatories to a collective agreement concluded directly with a trade union,[12] or as signatory to an 'accession agreement'. Accession agreements provide, that the un-organised employer agrees to follow an existing collective agreement in the industry for all employees performing the relevant type of work at the workplace.[13] Collective Agreements in Denmark are most often concluded as area agreements, obliging employers to apply the provisions to all employees performing work within the area of work covered by the agreement. In a Labour Court ruling from 2008, an employer had to pay a penalty of DKK 100.000 for providing differing pay- and working conditions to employees, that were who were perceived as being under the organisational framework and under the instruction of the employer, although technically employed in a separate entity. The employees in the other entity were viewed as employees of the employer, and therefor the employer was in breach of the collective agreement by not extending the pay and working conditions to the alternatively employed workers.[14] It applies to the work actually performed, regardless of the skills or educational background of the worker.[15] The agreement also applies regardless of the union membership status of the employees. The employer must apply the provisions to all workers performing work covered by the collective agreement notwithstanding membership of the signatory trade union, membership of another trade union, or no trade union membership at all.[16] If the employer on the other hand is not a member of an employers' organization or has not entered into a collective agreement, pay and general working conditions are regulated only in the individual employment contract and the sporadic and piecemeal statutory legislation. Most notably, there is no general regulation on minimum pay, remuneration schemes, pensions, maximum weekly working hours less than 48 hours per week, or dismissal protection.

A platform company who is a member of an employers' association will be obliged to follow any new and existing collective agreements, that cover work performed at the platform company by any employee. The Labour Court assesses whether a platform company would be in breach of agreement by not following the collective agreement, also for employees that have special arrangements or contracts, as long as the Labour Court assesses that they are employees, i.e. under the organisational framework of and under the instruction of the platform company. A platform company can also be bound by a collective agreement entered into individually or as an accession agreement. In this case, the terms of the agreement must be applied to all 'employees' performing the work covered, with breach of agreement if persons performing work are in reality employees but are not provide with the benefits of the agreement.

The lack of *erga omnes* effects or mechanisms places a strong interest on the trade unions to force un-covered employers to sign a collective agreement, in order to en-

[12] This used to be expressly stipulated in the Main Agreement between the LO and DA, and is well-established in caselaw. The Act on a Labour Court and Industrial Arbitration also presupposes, that an employer can be an individual party to a collective agreement, cf. section 13.
[13] This is well-established in caselaw, cf. Hasselblach, Den Danske Arbejdsret, XX, 2.2.9. and numerous examples in caselaw.
[14] Labour Court ruling AR 2008476 and AR 2008698.
[15] Labour Court ruling AR 2195.
[16] Hasselbalch, Den Danske Arbejdsret, XXII, 4.2.1. and e.g. from very early caselaw clearly established in Labour Court rulings AR 613 and AR 1548 that unless clearly stated otherwise in the agreement, the collective agreement must be applied also to non-unionised workers. The same is the case for alternatively organised workers, e.g in Industrial Arbitration ruling FV 27/1 1968.

sure the best possible rights for their members. Trade unions will engage in negotiations with uncovered employees, including industrial actions. Danish law recognises a wide right to engage in collective action with a view to obtain the best pay and working conditions possible for the workers.[17] Industrial actions are subject to very few restrictions, all of them developed by caselaw of the Labour Court and many of them expressed the Main Agreements of the large confederations.[18] Most importantly, the material requirement is, that the interest of the trade union in concluding a collective agreement with the specific employer must be sufficiently strong.[19] This refers to the type of work performed at the undertaking. The trade union has a sufficiently strong interest, when work performed is the type of work which is usually carried out by members of the trade union.[20] There is no requirement that any member is currently employed at the undertaking in question. This is expressed e.g. in the 2012-ruling *Restaurant Vejlegården*,[21] that

> "in the assessment of whether work falls under the natural, occupations of the trade union it plays no role wither the organisation currently has any members at the undertaking in question. The central assessment is whether the organisation has the necessary and current interest in covering the undertaking in question with an agreement."[22]

If the material condition is met, the trade union is entitled to engage in industrial action against any employer with a view to cover the work at the undertaking with a collective agreement. All types of industrial actions are allowed, including strikes and blockades.[23] The actions must follow the general rules of conduct in society, such as refraining from harming persons or assets.[24] Likewise, the contents of the collective agreement must be lawful. To increase the pressure on the employer, secondary action is lawful in Denmark. Secondary action breaches the duty of peace of workers, covered by collective agreements in other undertakings, so there are some requirements for the lawfulness of secondary action. First, the main conflict must be lawful and in force.[25] Next, the parties in the main conflict and in the supporting secondary

[17] This is well-established in caselaw, cf. Hasselbalch, Den Danske Arbejdsret, XXI, 1. and e.g. Labour Court ruling A2007.831 Nørrebro Bryghus, and Labour Court ruling AR2012.0341 Restaurant Vejlegården, the Labour Court expressly states, that the right to engage in industrial action is essential for the development of pay and other central working conditions,

[18] See also DA and LO Report on the right to engage in conflict with a view to support a demand for a collective agreement, *Hovedorganisationerns redegørelse om retten til at iværksætte konflikt til større for krav om overenskomst*, 17 June 2003, http://arbejdsretten.dk/media/1112912/endeligredegorelsevedr.konfl.pdf

[19] This is well-established in caselaw, cf Hasselbalch, Den Danske Arbejdsret, XXI, 2.4., Lovligt formål, and the numerous examples there.

[20] E.g. AR 2007.831 Nørrebro Bryghus and AR2012.0341 Restaurant Vejlegården.

[21] AR2012.0341 Restaurant Vejlegården

[22] Author's translation to English. Likewise in AR 2016.0633 concerning a farmer with no current members in employment, and in AR 2015.0083 concerning Ryanair establishing a base in Copenhagen.

[23] Employers can use lockouts and boykots.

[24] Well-established in caselaw, expressed in e.g. AR2012.0341 Restaurant Vejlegården, cf. Hasselbalch, Den Danske Arbejdsret, XXI, 2.2.

[25] This is well-established in caselaw, cf. Hasselbalch, Den Danske Arbejdsret, XXIII, 3.2.2., and e.g. the Labour Court case AR 10.092 La Cabana, where the Labour Court reiterates the current state of law for the lawfulness of secondary actions, reiterated again in the Labour Court rulings Nørrebro Bryghus and Restaurant Vejlegården above.

actions must have common interests, such as being organised in the same trade union or main confederation. Further, the secondary action must be suitable to influence the main conflict.[26] Finally, both secondary action and the main conflict are limited by the degree of pressure, which may not be disproportionate to the purpose of the main conflict.[27] The limit for the pressure to the business itself is, that the secondary actions must not completely hinder the undertaking from carrying out its business. This outer limit for the pressure in reality gives a very wide right to engage in secondary action.[28]

For platform workers, the degree of unionisation among platform workers could be low or even non-existent. As there is no requirement that a trade union has members currently employed by the platform company, this in itself would not make industrial action unlawful. If the platform company engages in work, that is the type of work typical for the members of the trade union, and if the work could potentially be performed by 'employees', the trade union would have a material interest in seeking to cover the work with a collective agreement.

The effect of the main conflict against a platform company would in itself be limited, as only members of trade unions are obliged to participate in a strike. If there are no members working for the platform company, a strike and blockade would have very limited effect. However, as seconday action is allowed and welcomed to a large degree with the purpose of covering as much of the labour market with collective agreement, this could paralyse the services delivered to the platform company and in this way be a potent means to force a platform company to sign an agreement. The Danish model has several times demonstrated, that the threat and impact of secondary actions against employers with few or no unionised workers, is effective.

2.2 Enforcement of collective agreements

Rights and duties in collective agreements are enforced by industrial dispute resolution. For the duration of a collective agreement, the parties are bound by a duty of

[26] E.g. in AR 10.096 La Cabana, where the individual notification periods should be observed, when there were no rules on notification of secondary action, in order for a secondary action to be lawful.

[27] This is well-established in numerous cases, cf. Hasselbalch, Den Danske Arbejdsret, XXI, 2.2.5 and XXIII, 3.2.2., *Betingelse 6. Pressionens styrke*, and e.g. AR 10.092, where the main conflict was aimed a a number of restaurants and secondary actions included conflicts against three beverage depots in the area, which were supplying all restaurants in the area. As the influence on the main conflict of paralysing the beverage depots was very limited and the effects on the owners and the staff in the beverage depots were considerable, this secondary actions was found to be disproportionate compared to the aim of the main conflict.

[28] Cf. Hasselbalch, Den Danske Arbejdsret, XXI, 2.2.5 and XXIII, 3.2.2., *Betingelse 6. Pressionens styrke* and Kristiansen, Den Kollektive Arbejdsret, 2014, p. 533 ff. In AR 2017.0285 the main conflict against a farmer, and the secondary actions were not found to be disproportionate, as they did not ompletely hinder the undertakings in question from selling their milk production. Likewise in AR 2012.0341 Restaurant Vejlegården, where hindering garbage collection was disproportionate with a view to the risks to public health. The labour court stated, that the limit for the weight of the secondary action is, that it completely hinders the employer from carrying out business. In the case, handing out flyers and sending out emails to potential customers with a view to boykot the restaurant was unlawful.

peace.[29] During the course of a collective agreement, disagreements about the administration of collective agreements, including breaches, are settled by judicial review, not by industrial actions.[30] Enforcement is fast, efficient and fierce.

Monitoring at the workplace is carried out by the elected shop steward, *tillidsmand*. There is no general statutory rule on shop stewards. Rules for the election of, functioning of and dismissal protection of shop stewards are found only in collective agreements [31] This is the primary source for ensuring that the collective agreement is administered within the framework intended. Shop stewards, elected and protected according to collective agreements, are the central element in monitoring and enforcing correct administration.

If a company is not covered by a collective agreement, workers can at their own initiative appoint an employee to act on behalf of the others in matter relating to their working conditions, but this representative would not enjoy any special rights or protections.[32]

Finally, the Statutory Act on Information and Hearing, implementing the EU Directive on Information and Consultation,[33] provides, that a company with more than 35 employees must arrange for employee representatives to be informed and consulted on central topics relating to the conduct of business and the employment situation, also in those companies without shop stewards.[34]

Disputes about breach of collective agreement by an employer are solved by industrial dispute resolution mechanisms.

First step is the non-judicial measures mandated in *the Norm*, Rules Governing the Hearing of Industrial Disputes.[35] This includes mandatory negotiations at shop level, conciliation proceedings and meetings between the organisations, with a view to reach a negotiated agreement, before engaging in judicial review. The mechanisms of *the Norm* are by statutory act extended as default measures for all industrial disputes, cf. the Act on a Labour Court and Industrial Arbitration, section 33(2).

If disputes are not resolved by non-judicial negotiations, *the Norm* and the Act on a Labour Court and Industrial Arbitration provides, the disputes are settled by judicial review either by the Labour Court or by Industrial Arbitration, depending in the question at hand.[36]

For breach of agreements, penalties are imposed by the Labour Court, or, if the parties agree, by Industrial Arbitration.[37] Penalties are a fundamental part of industrial dispute resolution and can be issued regardless of any economic losses. The Labour Court will, in the absence of agreements from the parties, set a penalty taking

[29] Expressly stated in the Basic Agreement of LO and DA, section 2, and implied as a general binding principle for all industrial relations in Denmark, cf. Hasselbalch, Den Danske Arbejdsret, XXIII, and Jens Kristiansen, Den Kollektive Arbejdsret, 2014, chapter 13.
[30] Expressly stated in the Basic Agreement of LO and DA, section 2, and implied as a general binding principle for all industrial relations in Denmark, cf. Hasselbalch, Den Danske Arbejdsret, XXIII, and Jens Kristiansen, Den Kollektive Arbejdsret, 2014, chapter 13.
[31] Hasselbalch, Den Danske Arbejdsret, XXIV, 6.2.1.
[32] Hasselbalch, Den Danske Arbejdsret, XXIV, 6.2.1.
[33] Directive 2002/14/EC of 11 March 2002 on a general framework for information and consultation of employees in the European Community.
[34] The Act on Information and Hearing, no. 303 of 2 May 2005, sections 1, 2 and 4.
[35] Norm of 27 October 2006, Rules for the Hearing of Industrial Disputes. The Confederation of Danish Employers (DA) and the Danish Trade Union Confederation (LO). http://www.arbejdsretten.dk/generelt/labour-court/norm-of-27-october-2006.aspx
[36] The Norm section 10, the Act on a Labour Court sections 9 and 21.
[37] The Act on a Labour Court sections 12 and 24 (2).

into account all the circumstances of the case. Such circumstances include e.g. the degree of fault of the parties, any back payment of salaries, other economic losses, and the financial capabilities of the party at fault.

The parties to an industrial dispute are the signatories to the agreement, i.e. the trade union on the one side, and an employers' association or an individual employer on the other side.[38] Individual employees are not party to disputes before the Labour Court or Industrial Arbitration. Trade unions register claims against an employer for breach of agreement for not providing the rights in the agreement to any employee covered by the agreement. This is the case if freelance workers are covered by the collective agreement, and this is the case regardless of the union membership or non-membership of the worker in question. Members of the trade union, party to the collective agreement, can expect their trade union to make a complaint against the employer on their behalf, and can under certain circumstances receive part of a penalty as back payment. An individual worker, who is not a member of the specific trade union, can have a claim for breach of collective agreement assessed by the ordinary courts, if the provisions in the collective agreement are considered and express or implied part of the individual contract. The trade union, party to the agreement, can have a claim assessed by the Labour Court regardless of an individual claim by the un-organized worker before the ordinary court.

The industrial dispute resolution system enforcing collective agreements is very efficient and speedy, it ensures that collective agreements and industrial relations are upheld on a long-term basis.

The enforcement of pay and working conditions provided by collective agreement is carried out at shop level inter alia by the central role of elected shop stewards. Shop stewards are elected only when companies are covered by a collective agreement.

Platform companies, who are party to a collective agreement, can have claims brought against them for breach of agreement, regardless of the union membership of employees. The decisive element is, whether the worker is covered by the agreement mandating the employer to extend the rights to this specific worker. Platform workers, who are performing work covered by a collective agreement, and who are not genuinely self-employed, can expect the signatory trade union to file claims against the platform company for any breach of agreement, regardless of the union-membership of the platform worker. Platform workers, who are members of the signatory trade union can under certain circumstances receive part of the penalty, if any, as back payment for outstanding payments. Platform workers, who are not members of the signatory trade union, cannot receive back payments for outstanding payments from the trade union, unless the trade union have made a specific agreement with the un-organised worker in this respect. The platform company will have the penalty calculated on the basis of all outstanding payments including outstanding payments to un-organised workers. This principle of calculation, the differential principle, is a deterring and an equalising measure against employers who save money on breach of collective agreements, and is well-established in case law of the Labour Court and Industrial Arbitration.[39]

[38] The Act on a Labour Court section 13.

[39] See on this principle, Natalie Videbaek Munkholm, *Posting of workers before Danish courts*, Chapter 2, in Ransaca, Zane and Bernaciak, Magdalena (eds), *Posting of workers before national courts*, ETUI, Brussels 2020.

2.3 Membership in labour market associations and confederations

The right to form associations, which have a lawful purpose, is a fundamental right protected by section 78 of the Danish Constitution.[40] This provision is the legal basis for the right of the formation and existence of trade unions and employers' confederations. This right can only be withdrawn only if the activities of an association are deemed unlawful by judicial review.[41]

There is no statutory provisions or criteria for establishing or approving an association, including trade unions.[42] This is left to the members. Likewise, there is no statutory right to membership of any association, including trade unions. Criteria for membership are set out in the bylaws of the individual association by its members. The criteria for membership must not be in breach of statutory legislation. Membership must not e.g. discriminate unlawfully,[43] or depend on criminal actions. Furthermore, early case law has established, that an undertaking or a person, which fulfils the lawful conditions for membership of an association, has a right to become a member.[44] This right to membership, is particularly important regarding membership of trade unions and employers' organizations, as membership gives access to representation in obtaining and enforcing rights under collective agreements and statutory acts.

Lawful criteria for membership of a trade union includes specific educations, students/apprentices in those educations, or actual performance of work within the types of work covered by the trade union.[45] It is for the trade union to decide on the criteria, and many trade unions also allow retired persons to become members. It would be unusual for membership to depend on the person having been employed for or having worked for a certain number of hours within the trade in question. The degree of interest connected to membership in many cases also influences the assessment of the lawfulness of specific excluding membership criteria.[46]

Platform workers, would on these grounds be eligible for membership in a trade union, on the grounds of performing work within the area of work covered by the trade union. Membership is not likely to be hindered by a requirement of a minimum number of hours per week. The decisive element is the degree of interest connected with membership, where caselaw establishes that the interest of representation in

[40] The Constitutional Act of Denmark of 1849 as amended in June 1953, https://www.ft.dk/-/media/sites/ft/pdf/publikationer/engelske-publikationer-pdf/grundloven_samlet_2018_uk_web.ashx

[41] The only time this has taken place was the Municipal Court in Copenhagen of 24 January 2020 dissolving the associtation of Loyal to Familia, as they were found to be using violence and other criminal means to obtain criminal purposes, cf. The Constitutional Act of Denmark section 78(2). The ruling has been appealed, and appeal is pending (March 2020).

[42] Hasselbalch, Foreningsretten, 1. *Introduktion til foreningsretten*

[43] Act on Non-Discrimination section 3(4) regarding race, colour, age, disability, religion, sexual orientation, political view, social or ethnic origin, Act on Equal Treatment section 5a regarding gender, and Act on Ethnic Equality section 2(1) regarding race and ethnicity.

[44] E.g. Supreme Court ruling U 1946.246 H, on right to membership of a hauliers' guild, a decision for rejection of membership could not be exempt from judicial review, and the rejection could not be upheld in view of the considerable economic and business interests depending on being part of the guild, cf. Hasselbalch, Foreningsretten, 1., 3.1.2.

[45] Hasselbalch, Foreningsretten, III, 1.2.3., b. Særlige kvalifikationer

[46] Numerous cases illustrate this, along the lines of the reasoning in Supreme Court ruling U 1946.246 H and Hasselbalch, Foreningsretten, III, 1.2.3.

obtaining and enforcing rights on collective agreements and statutory acts are a weighty interest.

A number of trade unions allows membership for the self-employed, or have established separate branches catering to self-employed. This is the case for the trade unions for dentists, doctors and pharmacists, that often provide their services as self-employed. A more generic example is Denmark's largest trade union for salaried employees, HK.[47] Their 275,000 members work in the retail industry and as administrative staff in both the public and the private sector. Several of the members of HK work as so-called *freelancers*. The term 'freelancer' does not have a legal definition in Danish labour law. It is often used referring to individuals taking on a number of separate assignments, by one or more undertaking, rather than having regular permanent employment with one employer. Freelancers often formally appear to be self-employed, as they can be registered with a CVR-number. The assessment of their status under labour law is less obviouse, as they often perform work on terms in part characteristic of self-employment and in part characteristic of employment. In addition to accepting memberships and negotiating agreements for freelancers working as 'false' self-employed, HK accepts also genuinely self-employed persons as members. For this group of members, HK has established a separate service bureau with the purpose of supporting freelancers of all kinds. HK has furthermore concluded three collective agreements for the media, *medieaftalerne,* for journalistic, photographic and graphical work performed as freelancers.[48] Some media-agreements specifically cover work performed by freelancers working on employee-like terms, i.e. freelancers that are not genuinely self-employed, as they are in a comparable situation to employees.[49] Some agreements are guiding documents for all freelancers, including genuinely self-employed.[50]

It is possible within the Danish industrial relations system for self-employed, even genuinely self-employed, to be members of trade unions, when the bylaws of the trade unions allow this. The genuinely self-employed are in this case entitled to representation and support of their interests, and the compromise of 'guiding' agreements with recommendations for prices for freelancers has so far been accepted in industrial relations as not being in breach of competition law. For freelancers, who are not genuinely self-employed, membership also entitle to collective bargaining on their behalf with a view to conclude collective agreements.

There are currently no examples of employers' organisations having platform companies as members, or representing platform companies in collective negotiations. Platform companies maintain their role as being purely intermediary and not an employer, and this activity does not create a need for membership of an employer's association. Perhaps, membership would also accentuate an assessment of whether any of the platform workers were in reality employees performing work covered by a collective agreement of the employers' organisation.

Depending on the by-laws of the trade union in question, platform workers and platform freelancers can be members. Whether self-employed platform workers could be members, likewise depend in whether the bylaws exclude genuinely self-

[47] https://www.hk.dk/
[48] https://journalistforbundet.dk/medieaftalerne
[49] E.g. the agreement with Aller for freelance journalists, https://journalistforbundet.dk/sites/default/files/inline-files/Aller%20Freelanceaftale%202017-2020_0.pdf
[50] https://journalistforbundet.dk/overenskomster-og-kollektive-aftaler-freelancere

employed persons. There is no statutory act or general principle of law if industrial relations hindering trade unions in granting membership, including being eligible for certain membership rights and benefits, also to genuinely self-employed. The question of whether the services include the right to conclude collective agreements for all members depend on the status of the members in relation also to competition law, see below at section 2.5.

2.4 Scope of the collective bargaining mechanism

Trade unions can enter into collective negotiations on behalf of their members with a view to obtain the best possible pay and working conditions. As mentioned, there is no statutory regulation on what constitutes a trade union, or what the limits of the activities of the trade union is. If disputed, the Labour Court has the prerogatory to assess whether a specific agreement is a 'collective agreement',[51] with all the ensuing legal consequences of being a recognised agreement in the collective bargaining system.[52] This entails that the party on the employee side is a collectivity. The party on the employee side is not restricted to 'trade unions' per se.[53] The concept of trade union is not imperative to an agreement being recognized as a collective agreement. The criteria of a collectivity on the side of the workers, and in this respect the exact boundaries of what constitutes a 'worker', is fluid,[54] and follows the general concept of worker under Danish labour law,[55] cf. Report Part 1, Denmark.

The trade union defines the personal scope of the collective agreement on a case by case basis, and in this can adjust the wording to best suit the real circumstances at the company in question. A good example from caselaw includes AR 2007.293, where the lawfulness of industrial action with a view to obtain a collective agreement for freelance journalists was deemed lawful, as the freelancers in question, performed work of the same character as the permanently employed journalists in the same company, and the fact that they performed work as individual assignments did not in itself render them self-employed. The collective agreement expressly stated, that it did not include freelancers, that were genuinely self-employed.

Limitations to the personal scope of bargaining of the trade unions, other than those imposed by competition law, would be found in the bylaws of the trade union. The trade union members decide the aims and functioning of the trade union, including who the trade union is mandated to negotiate agreements on behalf of. This mandate can be unlimited, in which case limitations would be found in general law, or can be limited to certain groups or trades in the bylaws. The collective agreement for medical doctors covers also genuinely self-employed doctors providing medical services to the public as general practitioners. General medical services are paid by the Regions, and the prices are negotiated collectively on behalf of the self-employed medical doctors.[56] This collective agreement is viewed as 'a contract' between the medical doctors and the regions.

The social partners have freedom to negotiate on behalf of their members, subject to the general limitation to negotiate only for 'employees', which by the Labour Court

[51] The Act on a Labour Court, section 9(1)4).
[52] Hasselbalch, Den Danske Arbejdsret, XXII, 1.1.
[53] Hasselbalch, Den Danske Arbejdsret, XXII, 1.1.
[54] Hasselbalch, Den Danske Arbejdsret, XXII, 1.1.
[55] See e.g. AR 2007.293 H
[56] https://www.laeger.dk/sites/default/files/ok18-overenskomst-almen-praksis-010318.pdf

is interpreted as including self-employed working on terms characteristic of employment. Limitations can also be found in the bylaws of the trade unions. The trade unions have already concluded agreements for self-employed freelancers working on terms characteristic of employees in the same firm, and has concluded agreements even for genuinely self-employed in a specific public service position, naming the agreement a 'contract' as well as 'collective agreement'. The trade union defines the personal scope of the collective agreement on a case by case basis, and in this can adjust the wording to best suit the real circumstances at the company in question. This was the case for the freelancer journalists, where the collective agreement expressly stated, that it did not include freelancers, that were genuinely self-employed. In this view, trade unions, with bylaws that does not hinder negotiations for self-employed, can negotiate agreements on behalf of platform workers, who are not genuinely self-employed. The assessment of the lawfulness of an ensuing industrial action, including the personal scope of the pursued agreement, will be carried out by the Labour Court.

As described in the Report Part 1, Denmark, Danish Trade Unions have concluded agreements with two platform companies. In august 2018, Hilfr, a platform company providing cleaning services to private users, concluded a collective agreement with the largest trade union in Denmark, 3F - the United Federation of Danish Workers. The agreement applies to 'employed cleaning assistants', but not to 'freelancers' associated with the platform. Freelancers are in the agreement understood as genuinely self-employed freelancers. Cleaners are assigned a default status as 'freelancer' for the first 100 hours of services, and a default status of 'employee' after having performed 100 hours of service. Cleaners can choose 'employee'-status before performing 100 hours of services, and can choose to retain 'freelancer'-status after performing 100 hours of services. The individual's free choice of their employment status under the collective agreement is new, and has been criticized, as it does not sit well with the general principles for assessing employee status, as mentioned in Report Part 1, Denmark. The agreement gives 'employed cleaners' right to salaries, payment in case of cancellation of tasks, just cause for sanctions such as annulling or making a profile inaccessible, pensions, holiday pay. Disputes are resolved by the mechanisms in the Main Agreement between LO and DA, and the Norm concluded between DA and LO.[57] In the event of dispute solved by industrial arbitration, the parties can only seek back-payment and not a penalty. Dispute resolution under the agreement is only available, if the platform worker is an 'employee' under the agreement by default or by choice. For platform workers, who are not employees under the agreement, complaints about breach of terms of contract must instead be filed with the ordinary courts. The parties are not bound by the provisions after the expiry or termination of the agreement. This is novel in Danish industrial relations, as the general principle is that an employer must continue to apply the provisions of a terminated agreement until a new agreement has been concluded by the same parties, or until the parties have endured a collective dispute of a certain length and severity.[58] The trade union gave up this protective measure, is likely because of the overall trial character of the agreement. The legal binding nature of the agreement or its general legal status has

[57] http://www.arbejdsretten.dk/generelt/labour-court/norm-of-27-october-2006.aspx
[58] E.g. Basic Agreement between DA and LO, *Hovedaftalen mellem DA og LO,* section 7(2), http://www.arbejdsretten.dk/arbejdsretten/regler/hovedaftalen.aspx

not been subject to judicial review, not in the Industrial Dispute Resolution system nor in ordinary courts.

In September 2018,[59] Voocali, providing translation services, concluded an agreement with the trade union HK. The agreement was an adjusted accession agreement, stipulating that all work performed by Voocali freelancers and by Voocali employees, must follow the Collective Agreement for Salaried Employees between HK and the Danish Chamber of Commerce, Dansk Erhverv. In July 2019, the Voocali agreement was extended to cover Police translation services for a period until later in 2019m when the next tender for translation services was finalised.[60] The Voocali agreement applies to employees as well as freelancers. Unlike the Hilfr agreement, the platform workers cannot choose their own status. A genuinely self-employed translator can claim payment according to the rates mentioned in appendix 7.4. of the Collective Agreement for Salaried Employees. The terms on dispute resolution prescribe private arbitration as the means to resolve disputes, unless the dispute concerns indisputable genuinely self-employed in which case the dispute is brought before the civil courts. Penalties are explicitly allowed for disputes referred to private arbitration tribunals. Cases concerning genuine self-employed are referred to the ordinary courts. There is no explicit provision on penalties in ordinary court proceedings. The agreement applies to 'freelancers'. Many freelancers offering their services through the Voocali platform are registered with the Central Business Register. Having a business registration number does not in itself preclude a freelancer from having status as an employee, as the assessment is made on the basis of the reality of the relationship, as described in Report Part 1, Denmark. Some Voocali freelancers will however provide their services as genuinely self-employed. As the agreement does not distinguish between false or genuinely self-employed freelancers, the question of personal scope for these persons is unresolved. The parties in the agreement acknowledge, that a number of questions on the distinction between employee and self-employed remain unanswered, and the agreements can and should be altered accordingly, once the distinction becomes clearer.

The two agreements have been concluded after negotiations between a trade union and the specific platform companies. Industrial actions have not been necessary.

Novel approaches include first, that Hilfr platform workers under the collective agreement can choose their own status as employed or as freelancers/self-employed. Second novelty, is the provision that the agreement does not obligate the platform company after its expiry. Third novelty is, that the Voocali agreement covers all freelancers, regardless of them being self-employed or not. The novelties have not been tested by judicial review, nor is there any public information about breaches having been subject of dispute resolution. The status and future of the agreements is for now uncertain.

There is an increased focus on platform work in Denmark, from researchers and stakeholders. Although the topic has been debated in international and regional fora, the debate from a labour law perspective in Denmark has been very limited. The focus from a policy perspective has been more apparent, e.g. from legislators the former

[59] https://www.hk.dk/-/media/dokumenter/raad-og-stoette-v2/freelancer/erklringvoocalihkprivatendelig.pdf?la=da&hash=F220F50F58285F3F4681F9AE6A81E2E716EF953C
[60] https://www.hk.dk/aktuelt/nyheder/2019/07/29/ny-aftale-for-polititolke-skal-sikre-fair-vilkaar-i-nyt-udbud

government's Disruption Council,[61] from academia a newly established privately funded research center on platform work,[62] and broad initiatives funded by large trade unions with a view to develop policy recommendations on platform work.[63]

2.5 Exemption from competition law

Using industrial action against platform companies could be a breach of competition law, if industrial action aims to conclude binding price agreements for genuinely self-employed persons. Agreeing on wages for genuinely self-employed is equal to agreed pricing between undertakings, a so-called hard-core violation of the competition rules. Collective agreements can restrict competition directly by fixating the labour costs of the employer, as well as indirectly by appointing a specific financial institution as the sole provider of e.g. compulsory occupational pension.[64]

Agreements concerning wages or working conditions for employees are explicitly exempt from the Competition Act, cf. section 3,[65] and has been since 1936.[66] According to the preparatory works to the (then Price Agreement) Act in 1936, collective agreements do not constitute unilateral price fixing, but are the result of negotiations between two parties pursuing opposing interests and the process of negotiation ensures well-balanced provisions.[67]

The scope of the exemption in section 3 is based on a qualitative assessment of, whether the collective agreement regulates salaries and working conditions or not. If it does, it is exempt from competition law irrespective of the formal classification of the agreement.[68]

As established in case law from the Danish competition authorities, it is possible for collective agreements to meet the conditions in section 3 even when the agreements cover self-employed persons, as long as the material content of the agreement concerns persons under working conditions similar to those of regular employees.

In a 1994-ruling,[69] the Competition Appeals Tribunal (CAT) stipulated that the use of the term 'freelance' indicated that the agreement did not concern 'pay and working conditions'. The formal setup of the self-employed company was assessed, noting that the freelance photographers in question had registered their businesses with the Central Business Register and was under a duty to pay sales taxes. The material content of the relationship with the undertaking was assessed, comparing these to the characteristics of those working in traditional employment or in traditional commercial relations, cf the assessment mentioned in Report Part 1, Denmark. It was assessed whether the relationship provides pay and working conditions typical for the industry, and whether mandatory social security payments were made on behalf of

[61] https://bm.dk/nyheder-presse/pressemeddelelser/2019/02/regeringen-offentliggoer-rapport-om-disruptionraadets-arbejde/
[62] https://faos.ku.dk/nyheder/forskere-faar-6-millioner-til-kortlaegning-af-digitalt-platformsarbejde/
[63] https://via.ritzau.dk/data/attachments/00374/5bfbff04-04f6-41cf-8dc0-fddf4fcf3876.pdf and https://fagbladet3f.dk/artikel/anbefaler-feriepenge-og-pension-til-loestansatte
[64] Ruth Nielsen, 'Samspillet mellem konkurrenceretten og arbejdsretten', in Jens Hartig Danielsen and others (eds.), Festskrift Til Jens Fejø (DJØF 2012), p. 324
[65] Statutory Act on Competition, no 155 of 1 March 2018, section 3.
[66] Statutory Act on Price Agreements, *Prisaftaleloven*, Rigsdagstidende 1936-37, p. 4948
[67] Rigsdagstidende 1936-37, 4948.
[68] Hasselbalch, Den Danske Arbejdsret, XXI, 2.2
[69] The ruling is described in sections 70-76 of Competition Appeals Tribunal Ruling of 10 September 2003.

the freelancers. The relationship with the media house did not differ significantly from comparable commercial relations with regard to power of instruction and loyalty obligations, and in this situation, the freelancers were assessed as genuinely self-employed. The determining factor was whether the self-employed workers performed services under the same material terms as regular employees, at the same entity and under the instruction of the employer, whilst performing the tasks.

In a 1998-ruling,[70] CAT carried out the same assessment, and reached the opposite result concerning a 'Guideline' for pay and working conditions for freelance journalists. The 'Guideline' used the term 'freelance' for any contract lasting less than 6 months, including casual contracts. According to the tribunal, freelance journalists providing services on casual contracts cannot be classified as self-employed solely because the work is performed as assignments and not as permanent work. As the services of casual freelance journalists had the same characteristics as the services of the permanent employees at the same media houses, the 'Guideline' was comparable to collective agreement provisions concerning casual work and was exempt from the Competition Act.

In 2005,[71] the CAT ruled inter alia on fixed prices for veterinary services. A collective agreement between the employer organisation for practitioner veterinarians and the Danish Veterinary and Food Administration set hourly rates for meat quality controls for employed as well as for substitute veterinarians. The substitute veterinarians providing the services in question could be employed elsewhere and could be self-employed with their own clinics. The tribunal found that the distinction between pay and working conditions on the one side, and terms for conducting trade between businesses on the other side, was to be assessed through comparing the circumstances of the situation to the characteristics of either employment status or self-employed services. The cornerstone of the assessment is whether the person is under the instruction of the other party, including a right to dismiss. A duty to pay mandatory contributions to social security measures, such as social pensions, sick leave payments and occupational injury insurance, contributes to the characteristic of employment status. The tribunal found the veterinarians to be under the instruction of the public authority whilst providing the services as temporary substitutes. It was significant that during the contracts, the substitute veterinarians provided services under the same working conditions as permanently employed veterinarians. The Tribunal also took into consideration, that payments were paid out as ordinary remuneration, the veterinarians accrued holidays with pay and social security contributions, and that the work as substitutes was a supplement to the main occupation. The Tribunal considered the veterinarians to be employees under the substitute contracts, regardless of their main occupation as self-employed, and the agreements were therefore exempt from the Competition Act.

The Danish case law on competition law and collective bargaining for self-employed or freelancers shows, that the competition law authorities assess the relationship on a case by case basis, assess the formal setup of the self-employed and assess the relationship with the undertaking in question. In assessing the relationship with the undertaking in question, the characteristics of the relationship are compared to

[70] Competition Appeals Tribunal, ruling of 7 April 1999, j. no. 97-218.349.

[71] Ruling of 26 October 2005, j.nr. 3/1120-0301-0374/SEK/LOB, <https://www.kfst.dk/media/13665/20051026-afgoerelse-praktiserende-dyrlaegersarbejdsgiver-forenings-vedtaegter.pdf>.

on the one hand the permanent employees at the undertaking, and on the other hand the characteristics typical for independent commercial relations. The relationship furthermore is assessed on a contract by contract basis, and does not place a general tag on the self-employed as being generally self-employed in all relationships. This was clear from the ruling concerning veterinarians, who in their daily full-time work were genuinely self-employed, but under the contracts as substitutes were seen as having most characteristics in common with employees.

The Competition tribunal assesses in particular, whether the self-employed, after having signed a contract, are free to organise their own working hours, their own quality of work, as well as the characteristics of the economic relationship. This approach is fully in line with recent EU-case law on price agreements and competition law for substitute musicians, in the CJEU ruling *FNV Kunsten Informatie*.[72]

For platform workers, this means, that the CAT would assess a collective agreement in light of these principles – and view the formal business setup of the platform worker, as well as the relationship with the platform company under each contract for work. The assessment will therefor vary across platform companies depending on their setup, and will even vary for each platform company as some platform workers may be genuinely self-employed due to their commercial setup, and others may be viewed 'false' self-employed.

2.6 Overall comparison

Platform workers would have a right to minimum pay and central working conditions only if negotiated by a trade union.

There is no statutory act extending the rights in collective agreements to all companies, and no mechanism by which to extend collective agreements to a specific industry. A platform company can be bound by a collective agreement either by membership of an employers' association or by individual agreement with a trade union.

Coverage of collective agreements for work performed in platform companies relies on the initiative of the social partners to institute negotiations including industrial action against platform companies with a view to cover work performed by employees by a collective agreement.

The social partners can engage in negotiations and industrial action against platform companies if work, which is typically performed by members of the trade union, is carried out by employees at the undertaking. There is no requirement of current members at the platform company, the assessment is on the character of work alone. Furthermore, negotiations must pursue a collective agreement, and must follow the general rules of conduct in society. Strikes as well as blockades are allowed, as well as secondary action. The limit for industrial action is, that the weight of the pressure on the company must be balanced against the overall purpose of the negotiations. The Labour Court has disallowed specific actions, such as contacting customers, but very rarely is the overall weight of the main action and secondary actions as strikes deemed disproportionate. It is an essential and important purpose to cover as many employees with good pay and working conditions as possible, and in this light of an overall societal interest, even pressure that in the end results in the bankruptcy of undertakings have been accepted.

[72] Case C-413/13, EU:C:2014:2411.

Platform workers who are self-employed can be members of trade unions, depending on their bylaws. Typically, right to membership follows specific criteria relating to the type of work performed or education.

The trade union cannot negotiate binding pay and working conditions for the genuinely self-employed, as they are considered undertakings under competition law. Some trade unions produce guideline pricelists, that are available as recommendations for genuinely self-employed freelancers. Genuinely self-employed, are not covered by collective agreements and are left to make claims for breach of individual contract in the ordinary courts, like other commercial entities.

Trade unions can negotiate collective agreements for self-employed platform workers, subject only to the requirement that they can negotiate binding agreements only for self-employed persons performing work under employee-like terms. It would be up to the Labour Court to in this respect assess the lawfulness of the industrial action.

Trade unions in Denmark have been innovative in seeking to adjust the personal scope of collective agreements to the special working conditions of platform workers. Two approaches have been tested for 1 year or more. The ensuing result is unclear as the agreements have not immediately been extended or re-negotiated.

A collective agreement in force at a platform company binds the employer to apply the provisions to all employees performing work at the undertaking – regardless of the union membership status of the employees.

Whether each worker is covered or not by an agreement in place – either as an agreement with the individual platform company, or as an accession agreement referring to an existing collective agreement for the type of work performed - will be assessed by the Labour Court or Industrial Arbitration. The status of each platform worker will be assessed based on the formal commercial setup of the person, and the relationship between the platform company and the platform worker. A registration in the Central Business Registry is one element in the assessment of the formal setup, but is in itself not decisive or sufficient. This element can be counterweighed by the other factual circumstances of the business setup of the individual or of the relationship with the platform company. Speculative pro forma arrangements to not have their own 'employees' will not be endorsed, if they are in reality working as employees. The assessment would be made specifically on each platform company, as their contractual and algorithmic setup varies significantly, and the assessment would most likely take into consideration the circumstances per contract.

Although not yet assessed in any court, the industrial relations in Denmark would have existing

Enforcement and monitoring of the administration of collective agreements at the workplace relies strongly on the shop stewards. Enforcement is carried out in the well-functioning and efficient industrial dispute resolution system, starting with negotiations and in the end resolved by judicial review. Breach of agreement, including not adhering to rights of platform workers in reality viewed as employees, incurs heavy penalties in excess of the actual damages.

measures which could be used and developed to accommodate the special situation also of platform workers with an unclear status. The decisive element is however, whether the trade union decides to initiate negotiations including industrial action against the platforms. Although negotiations have been successful twice, the social partners are still hesitant to engage in industrial action at this point in time.

3 A healthy and productive work force

3.1 3.1 Health and safety

A historical view

Regulating health and safety at work has traditionally been a matter of statutory legislation, as the topic is not suited for bargaining - it should not be possible for the workers to risk their health and safety in return for a higher pay.[73]

Regulation ensuring a healthy and productive workforce was early on a vital component in the development of the Nordic labour market model. In 1873 the first regulation on worker protection, the Factory Act, was passed, which regulated occupational safety and health. The Factory Act also established an inspectorate to supervise protection of children and young people in factories and workshops.[74] Since then the national regulation on occupational health and safety has expanded in both depth and range and the surrounding institutional apparatus has grown. In 1954 three Acts on Worker Protection were passed, which to a certain extent widened the coverage of worker protection.[75] In 1977 the Working Environment Act was passed, which promoted a different approach to occupational health and safety; instead of dictating precise requirements to the workplace as in former statutory acts, the Working Environment Act provided a legal framework which left a margin for the inspectorate to determine if a workplace arrangement was hazardous or not. The present Working Environment Act continues that approach.

The Working Environment Act[76] (WEA)

The WEA implements the Framework Directive on occupational health (directive 89/391/EEC).

The purpose of the WEA is to create a safe and healthy working environment which is always in accordance with the technical and social development of society, cf. WEA section 1(1). The WEA aims to ensure physically as well as psychologically healthy and safe working environments.

The WEA serves as the basis on which enterprises themselves will be able to solve issues relating to health and safety under the guidance of the employers' and workers' associations/confederations, and under the guidance and supervision of the Danish Working Environment Authority, cf. WEA section 1(2). It is the obligation of the employer to ensure safe and healthy working conditions, cf. WEA section 5, which inter alia requires the employer to maintain an effective supervision monitoring that work is performed safely and without risks to health, cf. WEA section 16. The employees are under a duty to cooperate to ensure that the working conditions are safe and without risks to health within their field of activity.

The Danish Working Environment Authority is responsible for monitoring and enforcing the WEA and inspects companies in order to prevent accidents and sickness and to ensure safe working places, cf. WEA section 71(1).

[73] Jens Kristiansen, *The growing conflict between European Univormity and national felxibility, p. 61.*
[74] Statutory act no. 74 of 23 May 1873.
[75] Statutory acts no 226, 227 and 228 of 11 June 1954.
[76] Statutory consolidated act no. 1084 of 19 September 2017 on the working environment.

Health and safety – scope and allocation of responsibility

The WEA applies to 'work performed for an employer', cf. section 2. The scope of the Working Environment Act is wider than the scope of traditional employment acts, as it applies regardless of remuneration. The scope and application of the WEA for platform workers is the subject of a new research project [77] as this topic really is very uncertain due to exactly the scope of application of the WEA to 'work performed for an employer'.

The duties under the Act rests on 'the employer', cf. WEA section 1(3). The WEA does not have a definition of worker, and aims solely to define the duties resting on the employer. The main principle is, that all work performed in the public or private sector, privately, commercially or for one's own benefit, during working hours or outside of working hours is or can be regulated by the WEA and its executive orders.

The employer is obliged to establish a system of internal monitoring, involving the employees.

External enforcement mechanisms for provisions in the WEA primarily consist of planned inspections by the Danish Working Environment Authority, cf. WEA section 72 a. Breaches of the WEA can be sanctioned by the Danish Working Environment Authority depending on the severity of the breach. The Authority can e.g. issue improvement orders and administrative fines, cf. WEA sections 77 and 82a.

The concept of employer under the WEA is interpreted in a very broad purposive sense as to ensure the protection of all work performed. This is discussed in detail in subsection 3.3. in Report Part 1, Denmark.

Many of the duties stipulated in the act rests on any employer for any work performed under the supervision or control of the employer, also work performed by suppliers and other contractors that are clearly not employees. This is the case for the protective rules on the use of hazardous or toxic substances, cf. WEA section 48, which an employer must ensure for all work performed, irrespective of whether the user is an employee or self-employed. This is also the case for the overall obligation to plan, organise and carry out work in such a way as to ensure health and safety, cf. WEA section 38(1), *inter alia* to avoid collapses, falls, subsidence, vibration, radiation, noise, or risks of explosion, fire, or to health from gases, fumes, vapours, dust and smoke, heat, cold, odours, infections, or incorrect working postures, movements or strains, cf. WEA § 39(2)1). The responsibility is allocated to the employer with the competency and opportunity to ensure the safety of the work performed, regardless of the status of the person performing the work.

Private persons have been found in breach of the WEA, when having work performed at their private house, although there is no employment relationship. One case from 2008,[78] where a house owner was penalised for having work performed which did not follow the rules for safety at work. The house owner was seen as the employer in relation to the WEA, as the foreign workers was under his instruction, and he provided them with room and board. In another case from 2000,[79] a man was fined DKK 25.000 in breach of the WEA by having a bricklayer friend fix his chimney without central safety measures such as a lifeline and handrailings to the scaffolding.

[77] A new research project analyses platform workers and possible challenges concerning working environment, https://amid.dk/om-os/arbejdsmiljoeforskningsfonden/projekter-og-rapporter/virkemidler-i-arbejdsmiljoeet/

[78] Western High Court ruling of 1 september 2008, case s-1781-08.

[79] Eastern High Court ruling of 20 November 200, case s-3302-00

Employers other than the contractual employer have been found responsible. In a ruling from 1999, a digging company was responsible for the injuries incurred by the employee of a pipelaying company. The employee was inspecting the work site of the digging company, and fell and injured his back. The digging company was found to be at fault for not having secured the site sufficiently according to the rules under the WEA, and as a breach of this duty as employer was liable for the injuries of the employee of the pipelaying company.

The main purpose of the WEA is to ensure safe and healthy working conditions for all work performed and to place the responsibility on the employer.

If perceived as genuinely self-employed, platform workers are their own employer. In this situation, platform workers are responsible for adhering to the WEA for their own work performed.

If perceived as employees, or 'false' self-employed, the platform company as well as the end user can be the employer in the view of the WEA. The platform company would be the first employer responsible for adhering to the WEA for the work performed by the platform workers. This includes everything from physical to psychological health and safety at work, as well as being responsible for organising a work environment safety organisation.

The end user may in both instances have the responsibility and opportunity to ensure health and safety for the platform worker, if the work is performed at a place where the end user is in charge, e.g. a private house, the offices or premises, or a specific workplace under the instruction and control of the end user. Work performed in an employer's private household is exempt from the WEA, cf. section 2(1)1), this however does not include work performed in the private house of an employer, as long as the work performed does not have the character of being part of the household.

The issue for genuinely self-employed persons and the WEA is one of enforcement. Although covered by many of the provisions of the WEA, genuinely self-employed persons are not a priority with the Working Environment Authority due to political priorities. In 2013 the Working Environment Authority publicly expressed that it did not perform inspections with self-employed enterprises.[80] In March 2015 the Danish government entered into an agreement with several political parties on the topic of an improved effort on occupational health and safety, which stressed risk-based planned inspections by the Working Environment Authority. According to the agreement, 80% of all inspections should be carried out only in enterprises with at least one employee. In the remaining 20 percent of the inspections, the undertaking of the inspection is chosen by random.[81] This leaves very little opportunity for self-employed to become the subject of inspections.

In the context of the WEA, if the platform worker is regarded as an employee, the other party, most likely the platform and in some instances the end user, will be regarded as an employer and therefore be responsible for the health and safety of the platform worker. If the platform worker is regarded as genuinely self-employed, the platform worker is eligible for their own health and safety. In both situations, the end

[80] According to an article, which can be found here: https://ekstrabladet.dk/nyheder/samfund/article4556024.ece.

[81] See the political agreement here: https://www.ft.dk/samling/20141/almdel/liu/bilag/35/1514847.pdf.

user can be held responsible for ensuring a healthy work environment, if the end user has the opportunity being in charge of the workplace.

The WEA as a main rule covers all types of employees and does not exclude marginalized employees or genuinely self-employed from protection. The limitation of external inspections to undertakings with minimum one full time employee, may indirectly lead to marginalization.

3.2 Working time

Overview

The Working Time Directive 2003/88/EU is implemented through three statutory acts and collective agreements, each implementing different elements of the working time directive.

The Working Environment Act and collective agreements implement the rules on daily and weekly rest periods.

The Working Time Act implement the right to maximum weekly working hours, daily breaks, and restrictions on night work. The Working Time Act can be derogated by collective agreements that guarantee the minimum rights in Directive 2003/88

The Holiday Act implements the right to paid annual leave (below at 3.4.)

The implementation in different acts and agreements results in a difference in scope as well as in enforcement, and supervision.

Scope and allocation of responsibilities

The Working Environment Act:

Daily rest periods of 11 hours and weekly rest periods of 24 hours are provided in the WEA, cf. WEA section 50 (2). The right is also reflected in the working time elements of many collective agreements.

The responsibility of monitoring daily and weekly rest periods lies with the employer, cf. WEA section 15 (1), as the other duties of the employer under the WEA. The obligation is inspected by the Danish Working Environment Authority.

If the platform worker is genuinely self-employed, the requirements concerning daily and weekly rest periods must be adhered to, and the platform worker is obliged to meet those requirements for themselves. . The WEA in that regard provides protection for the platform worker from a self-inflicted unsafe working environment. In theory, a genuinely self-employed platform worker could be held liable by the Danish Working Environment Authority for willingly working seven days a week, but as mentioned above the question is one of lack of inspections to undertakings with no employees.

If the platform worker is not genuinely self-employed, the platform company is the most likely employer, and in this must ensure, that the platform worker are provided with the required rest periods. This duty sits with the employer, who has the opportunity to organise the working time. Adherence to this duty can be inspected and enforced by the Working Environment Authority and the platform company can be issued with orders and fines in this respect.

According to article 17, cf. articles 3 and 5 of Directive 2003/88, member states can derogate the rules for daily and weekly rest periods when the duration of the working

time is not measured and/or predetermined or can be determined by the workers themselves. Article 17 gives non-exhaustive examples on the types of workers. This provision has not been implemented directly in the WEA, but may be found in some collective agreements.

Platform workers are not covered by this exemption, if their work is regulated only by the provisions in the WEA.

The WEA operates with a sanction regime encompassing a variety of measures depending on the severity of the breach. The Danish Working Environment Authority can issue orders of improvement, administrative fines or even request the Prosecution Service to begin criminal proceedings resulting in imprisonment up to a year or even two years, cf. WEA sections 77 and 82 (1) and (2). There have been no official cases in which an employer has been sentenced to imprisonment concerning violations of the WEA.

Any platform worker, considered as performing work for an employer under the WEA, would therefor have the right to daily and weekly rest periods. The enforcement would be against either the platform worker as genuinely self-employed, or against the platform company if the platform worker is perceived as an employee, a 'false' self-employed. This is so far untested in Danish law.

The Working Time Act

The right to daily breaks and maximum weekly working hours of 48 hours per week in average over 4 months are prescribed in the Working Time Act, cf. sections 3 and 4, as well as in some collective agreements. The Working Time Act is a private law act, just as the Holiday Act. There is no external public enforcement mechanism, this is left to the individual employees.

The Working Time Act refers solely to a limitation of working hours as opposed to resting hours. The Act provides no 'normal' weekly working hours, this is established only in collective agreements. The Act likewise does not address the question of remuneration for working hours, overtime hours, or such. Questions about remuneration for working hours, including overtime hours in excess of 'normal' weekly working hours or in excess of the maximum weekly working hours provided by Directive 2003/88, are found only in collective agreements. So, for the purpose of the Working Time Act the limitation to weekly working hours purely relates to the health and safety of the workers, not to remuneration.

The Working Time Act applies to 'persons, receiving remuneration for personal work performed in a contract of service', discussed in part 1 of Report Part 1, Denmark. The Working Time Act does not apply to genuinely self-employed. The scope of the act must be interpreted in conformity with the underlying Directive 2003/88 and the ensuing CJEU caselaw.

Exceptions apply to certain mobile workers, cf. section 1(3). Other exemptions do not apply. The Minister of Employment is after negotiatinos with the social partners authorised to establish rules for further exemptions found in Directive 2003/88, cf. section 9. This option to give further exemptions has not yet been used. The exemption in article 17, cf. articles 4 and 6 of Directive 2003/88, has not been implemented directly in the Working Time Act or ensuing executive orders, but may be found in some collective agreements.

The protections apply, even if working more than 48 hours per week has been accepted or requested by the employer, and even of all the working hours have been properly remunerated.[82]

The question with regard to working time and resting time often revolves around what counts as working time. In particularly on-call time has been discussed in Denmark and the EU, as the duty to respond quickly significantly limits the worker's possibility to enjoy the recreational objective of enjoying their own free time. Platform work often involves being on-call in order to respond quickly to offers from the platform. This raises the question of whether time spent on-call awaiting possible requests for platform work from the platform, would be considered working time.

A recent ruling by the Western High Court addressed this issue in the case of a flex driver, whose shift typically began by logging on to a driver's portal at 6.30 am and logging out at 23.55 pm. He was allowed to spend the on-call time at home during the hours he was logged on, but had to be ready to accept the rides appointed by the portal, and was under an obligation to respond to the requests form the portal quickly, from 3 to 18 minutes. The driver likewise had to remain in his driver's uniform while being logged on. If the on-call time was deemed working time, the driver had worked an average of 55 hours a week, in breach of the Working Time Act. The Western High Court ruled, that as the unknown response time limited his freedom to pursue recreational activities, the entire on-call time was considered working time. The employee was awarded a compensation of 25.000 DKK for breach of the Working Time Act.[83] Compensation for breach of the Working Time Act is not calculated as damages or lost payment for overtime. The compensation is a penalty imposed on the employer solely for having breaching the Working Time Act limitations to maximum weekly working hours. The compensation is provided to the employee as a compensatory measure for having endured a restriction to his leisure time, where he can pursue The amount of compensation is set at the discretion of the courts, the Supreme Court in U 2018.763 H provided guidelines for calculating the amount.

The flex driver in this case worked on terms comparable to platform workers. Had the flex driver been a platform worker, and had he been perceived as genuinely self-employed, he would not have been covered by the Working Time Act, and would not have been entitled to a compensation.

Platform workers are covered by the Working Time Act or by collective agreements, if assessed as 'employees' following the traditional assessment described in Report Part 1, Denmark.

If assessed as employees, the platform company would be responsible for ensuring that the platform worker takes daily breaks, and does not work more than 48 hours per week in average over a period of 4 months. The question of how to count working time would present a separate issue, as some platforms work on the basis that platform workers check-in to be on-call for tasks, which they can then accept or decline, e.g. Wolt. The outstanding question in this situation is, whether working time is counted from the time of checking-in and ends at the time of checking-out, or if working time is calculated per task. This has not yet been assessed by the courts in Denmark, but has been the subject of review by courts in the UK.

[82] See Supreme Court ruling U.2018.763H

[83] Western High Court ruling of 26 August 2019, case BS-28224/2018-VLR.

A platform worker, who is assessed as genuinely self-employed, has no right to daily breaks and maximum weekly working hours under the Working Time Act or under collective agreement.

The Working Time Act operates with sanctions in the form of a compensation to the employee, cf. Working Time Act section 8. There are no fines or other penalties payable towards public authorities.

The duty to monitor compliance with the Working Time Act does not rest with a public authority. The worker, potentially supported by a trade union, pursues any breach of the Working Time Act. Claims under the Working Time Act are assessed by ordinary courts.

If protection of minimum daily breaks or maximum weekly working hours are provided in collective agreements, the trade union pursues breaches of these provisions. In this case, a claim would be reviewed by the mechanisms of industrial dispute resolution.

3.3 Paid annual leave – scope and allocation of responsibility

The right to paid annual leave is provided in the Holiday Act.[84] A number of elements of the Holiday Act can be derogated from by collective agreements, which are in correspondence with the EU directives on the organisation of working time, and are concluded by or approved by the most representative social partners, cf. section 1(3). Most rules on paid annual leave are found as much in collective agreements as in the Holiday Act.

The Holiday Act provides, that any employee has the right to 5 weeks of paid annual leave, cf. sections 7 and 8. The employer has the obligation of ensuring employees the right to annual paid holidays. The same right, often extended with 5 extra days of paid annual leave, is provided in most collective agreements.

The right to paid annual leave cannot be exchanged to extra remunerations. The system of payments in the Holiday Act cannot be derogated by individual or collective agreement to the detriment of the employee, cf. section 3(2) and (6). Paid annual leave can be paid out to the employee, only when the employee is in reality taking leave.[85] As the purpose of the Holiday Act is to ensure that employees take annual leave to embark on leisurely and recreational activities, it is well-established in caselaw, that employers cannot discharge their duty to pay annual leave periods by

[84] The new Holiday Act, Statutory Act on Holidays no. 1025 of 4 October 2019, comes into force on 1 September 2020, and this report will be based on the new Act. The new Holiday Act was a result of the work of a committee established by the Ministry of Employment with the purpose of proposing a new Holiday Act and transition of the Danish holiday system to concurrent right to paid holidays. The report of the Holiday Commission, Report 1568 of 2017, is available at https://www.regeringen.dk/media/3803/ferielovsudvalgets-betaenkning.pdf

[85] A strict system entails, that employers are unable to discharge their duty to ensure paid annual leave by e.g. providing the holiday payments directly to the employee. The system entails two ways of having paid holidays either as the normal remuneration during annual leave, cf. section 16(1), or as holiday compensation during annual leave, cf. section 16(2). The employer is obliged to deposit holiday compensation to the publicly managed Holiday Account, *FerieKonto,* for each employee cf. section 31, which then in turn pays out the holiday compensation to the employee during their leave, cf. section 32. Employers failing to deposit the holiday compensation correctly or timely pays penalty interests of 1,5% per month, cf. section 31(3). Employers are alternatively obliged to provide annual leave to the employees, and during this leave to continue to pay out the normal remuneration, cf. section 16(1).

other arrangements of payment with the employee.[86] In cases, where the employer has paid out holiday payments to the employee as part of the remuneration, the employee has retained the right to claim paid annual leave regardless of any earlier payments.[87]

There is an exhaustive list of the few situations, where holiday payments can be made to the employee without the employee taking leave, cf. sections 23-27.

The Holiday Act is a private law act and is not enforced by public authorities. It provides rights and obligations between employer and employee, not between employer and the state. The right to annual leave under the Holiday Act is enforced by the individual employee, potentially supported by their trade union. An employer who fails to pay holiday pay to eligible employees is obliged to make back-payments and can be imposed a fine, cf. section 47.[88] The size of the fine is increased in the new Holiday Act. According to the preparatory works, the new Holiday Act by this intends to align the size of the fines imposed by the ordinary courts for breach of the right to paid annual leave with the size of the fines imposed by the Labour Court for breach of right to paid annual leave provided in collective agreements.[89]

Right to paid annual lave provided in collective agreements, is monitored and enforced by the trade union. Breach of agreement, such as breach of provisions concerning paid annual leave, is assessed by the Labour Court, who can issue fines for breach of agreement as well as any outstanding back-payments to employees.

The Holiday Act applies to 'employees' meaning 'a person receiving remuneration for personal work performed in a relationship of service', cf. section 1(2).

Part of the major revision of the Holiday Act was to align the Act with the duties provided in the Working Time Directive, ensuing CJEU case law, and the EU Charter of Fundamental Rights. The preliminary works takes a very careful discussion of the scope of the Act and its application to persons in 'atypical employment'.[90] The legislators expressly state, that the scope of application of the Act must continue to be interpreted in line with the development of the underlying EU Directive and its interpretation by the CJEU. In addition, the preliminary works state, that the working group behind the proposal has discussed the scope of application for persons in atypical employment. This group of employees is expected to continue to develop, is not homogenous and cannot be uniformly defined. This lead the Commission to propose a new approach to the assessment of employee status under the Holiday Act. Taking as a starting point the protective purpose of the Holiday Act, this would create a presumption of employment status, which could then be rebutted by proof of genuine self-employment.[91] The proposal states:

[86] Hasselbalch, Den Danske Arbejdsret, XIX, 3.3.1 and 3.9.
[87] E.g. Supreme Court Ruling U 1987.898 H where holiday compensation was not perceived as paid out even though it was included in the monthly salaries to some teachers, and Commercial Court Ruling U 1958.233 SH, where an agreement stated that salaries included holiday pay, the court found the agreement to be invalid and the employee had a right to be awarded holiday pay.
[88] Consolidated statutory act no. 1052 of 4 October 2019.
[89] At present the fines imposed typically range from 1100 Danish Krones and upwards, whereas the proposal suggests a minimum level of 3500 Danish Krones.
[90] Preliminary works to Proposal L116 of new Holiday Act, section 2.2. pp. 15 and 39, available at https://www.ft.dk/ripdf/samling/20171/lovforslag/l116/20171_l116_som_fremsat.pdf
[91] Ibid.

> "... for self-employed (who are not employees), freelancers, external consultants and fee-earners,[92] it will be a specific and individual assessment in each case. It is most congruent with the protective purposes of the Act, that status as employee is only lost, when there is a basis for constituting independence in the performance of work for another person. Decisive is, whether the person in reality is self-employed."[93]

The legislators foresee situations, where the terms of work are so uncharacteristic to employee status as well as status as genuinely self-employed, and that in these situations the default status is, that the person is covered by the Holiday Act, unless a basis is provided that the person is in reality genuinely self-employed. Albeit an individual assessment is still a prerequisite, the approach to assessing employee status starting with an express presumption is none the less perhaps a shift in the employment law approach.

This approach taking as a starting point a presumption of employee status also self-employed persons is in line with the approach to platform workers taken by the California legislature in Assembly Bill 5.[94] Assembly Bill 5 codifies a ruling of the Supreme Court of California, *Dynamic Operations West, Inc., v. Superior Court*,[95] in which the court held that most workers are employees and ought to be classified as such, and the burden for proof for classifying individuals as independent contractors belongs to the hiring entity. Assembly Bill 5 entitles workers classified as employees to greater labour protections such as minimum wage laws, sick leave and unemployment and workers' compensation benefits, which do not apply to independent contractors.

For platform workers, who are self-employed, the amended starting point would mean, that he or she is assumed to be an employee and covered by the Holiday Act with a right to 5 weeks of paid annual leave. Only if the platform company provides a basis for an assessment as genuinely self-employed, would this assumption be overruled and the platform worker would fall outside the scope of the Holiday Act.

As the new Holiday Act comes into force in September 2020, so far there is no caselaw on the amended approach to scope of application.

3.4 Overall comparison between the typology of workers

The analysis above show significant differences in the coverage of platform workers with regards to health and safety.

The right to occupational health and safety

The right to occupational health and safety with regards to physical and psychologically healthy and safe workplaces is covered by the Working Environment Act. The WEA places obligations on employers. The notion of 'employer' is understood as the entity, which has the opportunity to ensure health and safety for the work performed.

[92] In Danish 'honorarlønnede'
[93] Author's translation.
[94] AB-5 Worker status: employees and independent contrators (2019-2020). Assembly Bill No. 5, Chapter 296, amending section 3351 of ,and to add section 2750.3 to, the Labor Code https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200AB5
[95] Dynamic Operations West Inc v Superior Court of Los Angeles, (2018) 4 cal. 5th 903 (April 30, 2018)

The duty applies to employers, who are obliged to ensure health and safety for their own traditional employees and 'false self-employed', as well as for employees of other entities, and self-employed persons, when the work is carried out under the instruction of the employer in question. The duty applies to genuinely self-employed to ensure their own health and safety. As the responsibilities for duties as 'employer' rests on the de facto employer with the opportunity to ensure healthy and safe working conditions, both the platform company as well as the end user can be seen as 'employer' for platform workers, depending on the location in which the work is carried out.

The Danish Working Environment Authority monitors and inspects working conditions in all workplaces in Denmark. As 80% of inspections are carried out only in workplaces with minimum one full-time employee, the enforcement for genuinely self-employed platform workers is very weak. Enforcement for 'false' self-employed platform workers depends on an assessment to this end by the Danish Working Environment Authority and a choice to inspect workplaces of platform workers who are not genuinely self-employed. This would include de facto workplaces, including the private homes or offices of the end user. The initiative would be at the account of either the Danish Working Environment Authority or at the request of the platform workers themselves.

The right to daily and weekly rest periods

The right to daily and weekly rest periods is likewise provided in the Working Environment Act, with the implications outlined above.

In addition, daily and weekly rest periods is very often provided in collective agreements on the organisation of working time. Enforcement of collective agreements rests on the trade unions and is solved by industrial dispute resolution. If a platform company is covered by a collective agreement, this would then improve the enforcement of the right to daily and weekly rest periods for the platform workers, who are not genuinely self-employed.

Maximum of 48 hours of work per week in average, and the right to daily breaks

Maximum of 48 hours of work per week in average, and the right to daily breaks is a right extended to employees by the Working Time Act. Weekly working hours and daily breaks, as well as remuneration for overtime work, is in addition provided for in many collective agreements.

Genuinely self-employed platform workers are not covered by the Working Time Act. Platform workers, who are viewed as working on terms more characteristic of employment than of genuinely self-employment could be viewed as 'employees' under the Act, as outlined in Report Part 1, Denmark. The scope of application of the Act must be interpreted in line with EU Directive 2003/88 and ensuing case law of the CJEU. If platform workers are viewed as employees the issue of which hours count as working hours is next. A recent Danish ruling assessed on-call hours in the private home as working time, in correspondence with the CJEU ruling *Matzak,* as the requirements for response time significantly reduced the opportunity to engage in the recreational activities. This could have implications for the platform workers, who are logging-in to be available for tasks that are offered by the platform, where working time could potentially be viewed as commencing when logging in and ending

when logging off, as opposed to commencing when starting on an individual task and stopping when ending the individual task. Enforcement of the Working Time Act is individual enforcement before ordinary courts. The Working Time Act provides rules solely on the right to not work and do not provide rules on remuneration for overtime work. Employers in breach of the Working Time Act can be fined for allowing employees to work more than 48 hours per week in average, regardless of the employee agreeing to perform the extra work and regardless of whether the extra work has been correctly remunerated.

Collective agreements likewise provide rules on weekly working hours, including remuneration for overtime work. Collective agreements can apply to non-standard employees including platform workers, who are not genuinely self-employed. Enforcement of working time provisions in collective agreement, including lack of payments and overtime payment, is carried out by the trade unions in the industrial dispute resolution system. Breach of agreement can be penalised in addition to any outstanding back-payments.

The right to annual paid holidays

The right to annual paid holidays is provided by the Holiday Act, and in collective agreements concluded by the most representative social partners. The new Holiday Act applies to employees. The method of assessment has changed so 'atypical' employees, including self-employed platform workers, are presumed to be covered until status as genuinely self-employed is documented. For platform workers this would entail, that most platform workers are presumed to be covered by the Holiday Act, and that in order to avoid obligations as employer, the platform company must prove the platform worker has status as genuinely self-employed. Platform workers, who are genuinely self-employed are still outside the scope of the Holiday Act.

Enforcement is left to the individual employee by way of complaints assessed by the ordinary courts.

Collective agreements can provide rights to paid annual leave, and can apply to employees as well as platform workers, who are not genuinely self-employed. If covered by a collective agreement, enforcement is carried out by the parties to the agreement by way of industrial dispute resolution.

4 Basic social security

4.1 The legal framework

In Denmark, the flexibility for employers in having a fluctuating work force, is counterbalanced by a safety net ensuring an income for employees, when out of work, i.e. flexicurity. The social security system consists of a range of benefits awarded in case of unemployment, parental leave, sickness, work injuries and retirement, which is co-financed by social security contributions by the employers.

The regulation on the benefits is scattered in several different statutory acts. The binary divide described in the sections above is also important in the context of social security.

4.2 Unemployment

Payments during periods of unemployment can be divided into two separate sources. Unemployment Insurance, *Arbejdsløshedsdagpenge,* which is an insurance-based source for those who are members of unemployment benefit associations (independent from trade unions), and Basic Social Assistance, *Kontanthjælp,* provided by the local municipality, for those who are not members and hence not insured. More than 70% of employees are members of an unemployment insurance fund.[96]

Unemployment insurance

The rules on Unemployment Insurance Benefits (UIB) are provided in the Act on Unemployment Insurance.[97]

The unemployment insurance system underwent a reform in early 2018,[98] focusing on the activities of a person, rather than on the employment status of a person. The amendment was a response to recommendations by the Disruption Council, that pointed to the rigidity of the existing categorization of persons as either employees or as self-employed in two separate pillars in the system, which was not reflecting the modern pattern of fragmented or atypical employments.[99] The reform entailed, that all hours worked as employee as well as hours worked as self-employed can be accrued towards being eligible for unemployment benefits. This adapts the system of unemployment insurance for persons in atypical employment and in self-employment.

Self-employment is defined in the Act on Unemployment Insurance, cf. section 57a, which aligns the definition with the tax definition. Any activity with the purpose of generating finances and where the persons has or has had personal work with the activity can be viewed as self-employment, if one of 5 additional conditions are met. One of these conditions are that the activity is registered with the Central Business Registry, unless the tax authorities tax the income as personal salaries, cf. section 57a(1)1). The Tax authorities assess the reality of the status of self-employed versus

[96] Mailand and Larsen, *Hybrid work – social protection of atypical employment in Denmark*, 2018, p. 5.
[97] Act on Unemployment Insurance, no 199 of 11 March 2020.
[98] Statutory amendment act no. 1670 of 20 December 2017
[99] See proposal for amendment to the Act on Unemployment Insurance, L88, 2017-18, available at https://www.ft.dk/samling/20171/lovforslag/l88/index.htm

employees which very much resembles the assessment in labour and employment law, cf. guidelines from the tax authorities.[100] This means, that having registered a business with the Central Business Registry is not in itself decisive for status as genuinely self-employed in relation to unemployment benefits, but an individual assessment must be carried out.

In order to be eligible for Unemployment Insurance Benefits (hereafter UIB), the person must have been a member of a UIB for one year.[101] All three groups can become members of an unemployment insurance fund.

Another requirement is, that the person is unemployed and at the disposal for possible job offerings with one days' notice. If a person is genuinely self-employed, and the activities as self-employed have been the primary or sole source of income for the person, the person must terminate the company, close down its activities, and terminate the registration at the Central Business Register.[102] This is not the case, if the work as genuinely self-employed is purely a secondary or supplementing income to another primary employment.

In order to be entitled to full-time UIB's the person must document a level of income, currently DKK 233.376, earned within the last three years. All hours worked as an employee as well as hours worked as self-employed are accrued towards being eligible for unemployment benefits, cf. section 53(3) and (15). Supplementing secondary work, e.g. as genuinely self-employed, also counts.[103] Income from employment must be performed in a traditional employment relationship, understood as aligned with the terms of pay and working conditions in collective agreements for the type of work performed, cf. section 53(6).

Once becoming eligible to UIB's, the person is entitled to benefits which are calculated as hourly rates, cf. section 46(1) on the basis of former income, cf. section 49(2). All types of registered income are accrued to form the basis for calculating the rate of benefits, cf. section 53(15).[104]

In regards to unemployment insurance, platform workers can be members of unemployment insurance funds, and can accrue working hours on the basis of their work as self-employed. If perceived as employees, the income can only count, if it is performed on terms similar to the terms of pay and working conditions in collective agreements. Platform workers who are not genuinely self-employed, cannot count working hours or income unless the work is performed on terms similar to those in collective agreements. In this regard, platform workers would themselves have an interest in being acknowledged as genuinely self-employed, in order to be able to include all hours and income from the work performed via the platform company.

For platform workers, who are genuinely self-employed, and where the work as self-employed is the main or primary income, eligibility for unemployment benefits would in addition require, that the company is unregistered and all activities are ceased. This means, that platform workers, who are genuinely self-employed, and has the platform work as their main or sole income, would not be eligible for full unem-

[100] Legal guidelines 2020-21, C.C.1.2.1 Self-employed work, delimitation towards employees, https://skat.dk/skat.aspx?oID=2048530&chk=216701

[101] Statutory act no. 1213 11 October 2018 on Unemployment Insurance.

[102] sections 13 and 20 of the administrative order on self-employment in the social security system Administrative order no. 1182 of 26 September 2018

[103] Ibid, p. 24.

[104] Preparatory works to the amendment act no. 88 of 17 November 2017, p. 13.

ployment benefits unless they close down their company and cease providing services also via the platform company. This means, that unemployment insurance benefits between assignments would not be possible.

Unemployment benefits can be granted as supplementing unemployment benefits for work, that is less than full-time work, cf. section 59. This applies to work in employment and to genuine self-employed work as a secondary or supplementing source of income.

Platform workers, who are genuinely self-employed, but not has this work as their sole or primary income, and platform workers who are not genuinely self-employed but work in terms similar to those in collective agreements, can receive supplementing unemployment benefits for a period of up to 30 weeks, cf. section 60. Platform workers, who are genuinely self-employed and where the work as self-employed is the main or sole income, cannot receive supplementing unemployment benefits.

If all the weeks of full-time or supplementing unemployment insurance benefits have been used, a person must re-earn the right to be eligible for unemployment benefits. This requires new working hours to be performed as employment on terms that are similar to collective agreements or in genuine self-employment, cf. section 53(8). This element is left out of the report for the sake of simplicity.

Basic Social Assistance

If a person is not a member of an unemployment insurance fund, the person can apply for Basic Social Assistance from the local municipality. The rules on Basic Social Assistance (BSA) are provided in the Act on an Active Social Policy.[105]

The Act on and Active Social Policy was not amended as part of the reform, and the Act continues to categorize the persons as either an employee or as a self-employed person.

BSA is offered to persons in unemployment who are unable to provide for themselves, who are not provided for by a family member, and who does not receive other benefits, cf. section 11(2).

In order to be eligible, the person must have had ordinary full-time employment for 2 years and 6 months within the last 10 years, cf. section 11(8). For persons genuinely self-employed, their working hours are calculated on the basis of their income from their business in the preceding calendar years, cf. section 11(9).

Furthermore, the person must be at the disposal for possible job offerings, and actively pursue employment, cf. section 13(1) and 13a. For genuinely self-employed persons, where this is their main income, this requires the person to close and liquidate all activities as self-employed.

If the person is married, the person is not perceived as pursuing employment, if he or she has not worked at least 225 hours within the last year, cf. section 13f(6). In this case, the person receives a reduced BSA, cf. section 13f(2). The same is the case for unmarried persons after having received BSA for one year, cf. section 13f(6) and (7). The necessary working hours can be accrued via employment on terms similar to those in collective agreements, cf. section 13f(14), or through income via secondary self-employment, cf. section 13f(15), or through genuine self-employment where the

[105] Act on Active Social Policy no. 981 of 23 September 2019.

level of activity is similar to ordinary employment for 20 hours per week, cf. section 13f(16).[106]

For platform workers, access to BSA requires, that the applicant has had ordinary employment for 2 years and 6 months within the last 10 years. Hours worked via platform companies only count, if the hours are performed as employees on terms similar to those in collective agreements.

Access to BSA furthermore requires, that the applicant is unemployed and available for work. For platform workers, who are genuinely self-employed, this means that the company has to be shut down completely. For platform workers, who are self-employed but not genuinely self-employed, this most likely also would require that the company would have to be shut down.

The platform worker must in addition document work of 225 hours, if the platform worker is married or when the platform worker has received BSA for one year. The 225 hours of work must be performed in employment on terms similar to those in collective agreements, i.e. not by providing platform work, or must be performed in genuine self-employment in which case the work must be carried out with at least 20 hours of documented work per week. This would give married platform workers the opportunity to be eligible for BSA on the basis of platform work, but only if the work was performed as genuine self-employment. This would give unmarried platform workers the opportunity to remain eligible for BSA on the basis of platform work, but only if the work was performed as genuine self-employment, in which case the company would have to be shut down again if the platform worker was to apply for BSA again.

4.3 Sickness and injury

Sick leave benefits

The right to sick leave benefits is provided in the Act on Sick Leave benefits.[107] The right to sick leave benefits differ for employed and self-employed persons.

According to section 30 in the Act on Sick Leave Benefits, an employee, who is not entitled to paid sick leave, is entitled to receive the first 30 days of sick leave benefits from the employer, if the employee has been employed with the employer in the last 8 weeks prior to their sickness and has worked a minimum of 74 hours with the employer during those 8 weeks.

Employees can have a right to paid sick leave in statutory acts in collective agreements. In this case, the employee is entitled to the normal salaries during sick leave, and the employer will receive sick leave benefits from the municipality after the first 30 days of sick leave, as a reduction of the costs.

After the first 30 days of sick leave, an employee, who is not entitled to pay during sick leave, will receive sick leave benefits from the local Municipality.

Sick leave benefits compensate for the loss of income during sick leave, and is therefore conditional on the employee being employed and having missed work due to sickness. This presupposes normal mandatory working hours for the employee.

[106] Ministry of Employment Statement in collaborative economy and the basic social assistance system, Statement no. 9433 of 14 June 2018, https://www.ft.dk/samling/20171/almdel/BEU/bilag/378/1911151.pdf

[107] Statutory Act on Sick Leave Benefits no 68 of 25 January 2019.

Sick leave benefits are calculated at a certain rate, depending on the income level of the employee before the sick leave.

Platform workers, who are not genuinely self-employed, and who have worked for 8 weeks for the platform company and during those 8 weeks have worked at least 74 hours, would be eligible to receive sick leave benefits from the platform company during the first 30 days of sick leave. Sick leave benefits however presuppose planned or expected working hours during the sick leave. This element is very uncertain for platform workers, who are not obliged to work or guaranteed a minimum number of working hours per day or per week. Perhaps platform workers, who have worked regularly over a longer period of time, and have worked a considerable amount of hours, and where there are e.g. a number of assignment lined up for the future days, could be considered eligible for sick leave benefits from the platform company and the local municipality.

Genuinely self-employed persons are entitled to sick leave benefits from the municipality after two weeks of self-financed sick leave, cf. section 42 of the Act. Sick leave benefits from the municipality require, that the self-employed person has been conducting business to a substantial degree in at least 6 months out of the last 12 months, including in the last month prior to the sick leave period and that the person has worked in the business for at least 18, 5 hours per week, i.e. at least half of a normal working week.

The self-employed person can take out a private insurance for sick leave benefits granting a right to sick leave benefits from day one or day three of the sick leave period, instead of the standard two weeks of self-financed sick leave for self-employed.

Platform workers, who are genuinely self-employed, would as a starting point have to finance their own sick leave periods. The genuinely self-employed platform worker can receive sick leave benefits from the local municipality if having conducted work as self-employed for at least for 18,5 hours of work per week, i.e. via the platform, and if having conducted work as a business to a substantial degree for at least 6 of the preceding 12 months. If the self-employed person takes out private insurance, sick leave benefits from the municipality can be acquired from day one or day three. This means, that platform workers, who have worked less intensively with their business, i.e. for less than 18,5 hours per week, or who have worked intensively for less than 6 months, are not eligible for sick leave benefits from the municipality.

In reality this means, that most platform workers would be at a high risk of being ineligible for sick leave benefits from the platform company as employees, or from the local municipality as genuinely self-employed. Periods of being indisposed for providing work via platform work would to a large extent be at risk of having to be self-financed by the platform worker, regardless of their employment status.

Industrial injuries insurance

Liability for industrial injuries are regulated by the Workers' Compensation Act.[108]

The Worker´s Compensation Act covers persons engaged to perform work for an employer in Denmark, cf. section 2(1). The work can be paid or unpaid and may be permanent, temporary, or casual.

The employer is under a duty to take out occupational accident insurance for all employees, cf. sections 48 and 50.

[108] Act on Worker´s Compensation no. 977 of 9 September 2019.

The Act grants the employee a right to a number of compensatory benefits in case of injuries incurred when performing work, *inter alia* compensation for loss of ability to work and compensation for permanent injuries.

If an employee becomes injured at work and the employer has not taken out an insurance as prescribed, the public authority, the Labour Market Insurance makes advance payments of the benefits indicated in the act, cf. section 52, which ensures the employee the compensatory benefits irrespective of the violation by the employer. The funds are then retrieved by the Labour Market Insurance from the employer.

The notion of employee in the Workers' Compensation Act is wider than in the traditional employment law, as there is no requirement for remuneration or for the work to be of a permanent character. Most characteristic is, that an employer is viewed as the entity with an economic interest in the work as well as having the right to instruct and control the work. If this is not the case, an entity can be viewed as the responsible employer under the act according an overall assessment of the social and occupational status of the parties, as was established in early case law under the Act.[109] In the overall assessment of the status of the parties, the formal setup of the self-employed company is assessed as well as the relationship between the self-employed and the alleged employer, with a view to pursue the social purposes of the Act in the interest of general society.

For platform workers this entails, that the platform company can be viewed as the employer, due to a traditional assessment of the relationship between the platform worker and the platform company, including an assessment of the degree of instruction and control of the platform company. Likewise, the overall social and occupational assessment will include the formal company setup of the platform worker. This is likely to make a difference, so that platform companies would in reality be obliged under the Workers' Compensation Act for many of the platform workers providing services as self-employed but without a formal setup of their own company apart from in relation to the platform company.

Genuinely self-employed are not covered by the definition of employee in the Act, and are not automatically insured by an employer. Instead genuinely self-employed has the option of voluntarily taking out an insurance on themselves, cf. section 48 (2). If the genuine self-employed has not taken out insurance against occupational injury, the costs must be borne by themselves unless a third party is liable for the injury according to personal injury law.

4.4 Parental leave

The right to take parental leave and to receive benefits during parental leave is governed by the Act on Entitlement to Leave and Benefits.[110]

The purpose of the act is to ensure all parents a right to take leave in case of pregnancy, childbirth and adoption, and that parents, who are connected to the labour market, are entitled to receive benefits during these periods of leave, cf. section 1.

[109] E.g. Supreme Court ruling U.1920.529 H, cf. detailed analysis in Magnus Nørgaard Sørensen, *Platformsøkonomien og arbejdsskadesikringsloven,* which won the Ministry of Employment award for best Master thesis in 2018, available at https://law.au.dk/fileadmin/Jura/dokumenter/forskning/rettid/Afh_2018/afh27-2018.pdf

[110] Consolidated act no. 67 of 25 January on Entitlement to Leave and Benefits in the Event of Childbirth

The Act applies to all parents, cf. section 2, and both employees and self-employed have a right under the Act to receive benefits, cf. section 2(2). Employees and genuinely self-employed persons are in most aspects treated equally under the act.

One difference is, that the Act grants employees a right to take parental leave, which can be enforced vis-à-vis the employer. Self-employed persons must plan their own work schedules and their own periods of leave.

Criteria on work activity

Another difference is the system for being eligible to receive benefits under the Act, i.e. having a connection to the labour market.

For employees, this requires that the person concerned is employed on the day before the leave, has been working at least 160 hours within the last four months, and in at least three of these months has been working a minimum of 40 hours per month, cf. section 27 (1)(1). Being employed on the day before the leave is to be taken very literally, cf. Guidelines on the Requirement of Employment for Maternity and Parental Leave Benefits, section 2.1.[111] Being employed means being in an employment relationship in a traditional labour law sense If employment ends just before the leave commences, the end date is decisive. Assessment of the end date for atypical employment patterns can be determined *inter alia* from a work schedule.[112] Hours are counted on the basis of the income and working hours in a normal employment relationship registered with the tax-authorities, cf. section 27(2). If the hours are not registered with the income in the tax-registry (unknown working hours), the number of working hours are calculated on the basis of the registered income divided by an hourly income rate, set each year in January by the tax authorities, cf. Executive Order on Calculation of the Employment Requirement section 2(2).[113] The rate of calculation for 2020 is an average DKK 202 per hour.[114]

A self-employed person is entitled to parental benefits if the person for at least 6 months out of the last 12 months has had activities at a level similar to at least half of the normal weekly working hours, including during the last month before the leave, cf. section 28(1) of the Act. If the self-employed has had activities for less than six months as self-employed, periods of employment as an employee prior to commencing work as self-employed can be included. The authorities take as a starting point the information provided by the self-employed person for the number of hours in activities as self-employed, cf. Guideline section 3.1.[115] If specific circumstances give rise to doubt, the authority can ask for further information in order to convine the authority that the registered hours are correct. This can be in the form of financial reports from the prior years in the company, sales tax registrations, or other information where it is likely that there has been a significant activity in the company.

[111] Guideline no 9510 of 26 June 2018 on the Employment Requirement for the right to Maternity or Parental Leave Benefits, *Vejledning om beskæftigelseskravet for ret til barselsdagpenge*.
[112] Guideline 9510 of 26 June 2018, section 2.1.1.
[113] Executive Order no 953 of 17 September 2019, on the calculation of the employment requirement and calculation of the rate of benefits for maternity and parental leave, section 2(2), *Bekendtgørelse om opgørelse af beskæftigelseskrav og beregning af barselsdagpenge mv.*
[114] Executive Order no 953 of 17 September 2019, section 2(2), Executive Order on Supplemental Occupational Pension, Bekendtgørelse om Arbejdsmarkedets Tillægspension, no 1385 of 25 November 2015, section 2(8). The level in section 2(8) is amended each year, and in 2020 is set at DKK 211,93 for men and DKK 191,39 for women, cf. https://indberet.virk.dk/sites/default/files/ukendt_arbejdstid_timeloenssatser.pdf,
[115] Guideline 9510 of 26 June 2018, section 3.1.

The assessment of being employee or self-employed is based on the labour law assessment of the status, cf. section 4(1) in Executive Order.[116]

If platform workers are assessed as employees, or 'false' self-employed according to a traditional labour law assessment, they must be 'in employment' on the last day before the leave. An administrative ruling has assessed how to handle casual workers in this respect, cf. the Guideline section 2.1.2.10. and ruling 100-15.[117] The ruling stated, that casual workers are only viewed as in employment in the periods, where the worker is actually currently working for the employer. If the casual work on the other hand has ended on a day earlier than the day before the leave, the criterion of being 'in employment' is not met. It must be assessed whether the worker is in a current employment relationship or not. Elements such as having agreed to an average working time, a notice of termination, how and for how far ahead the work is planned, whether the employer is obliged to offer assignments, and whether the worker is obliged to accept offers of assignments can indicate a current employment relationship. If the employment is assessed as current, it is of less influence that the worker is not performing work specifically on the day before the leave. If the worker on the other hand is not viewed as in current employment and is not working on the day before the leave, this criterion cannot be fulfilled for casual workers. In this case, there is no need to go on to assess whether the requirement of working hours has been met.

For platform workers, being 'in employment' is difficult to state, as mentioned in Report Part 1, Denmark. Likewise, the element of being in 'current' employment on the day before the leave. The typical contract of work for platform workers, that has none of the elements mentioned in the ruling indicating that the work is current. Most platform workers would most likely be assessed as not in current employment, if they did not perform assignments the day before the leave. The practice or reality of the relationship with the platform company could perhaps establish, that the employment relationship has not ceased, but is current even though work is not performed on the last day before the leave. An assessment could be made from a consistent work pattern of the platform worker, such as working a minimum number of hours over the last months or weeks, or working on specific days or every day. This is uncertain under the current legislation.

If the criterion of being 'in current employment' is met, then the platform worker must have performed work for at least 160 hours during the last 4 months, and for at least 40 hours during the last month. This would be calculated on the basis of income and working hours registered with the tax authorities, based in work in an employment relationship. If the hours are not registered the income will be used as the basis to calculate a number of working hours performed, using a calculation rate of average DKK 202 per hour. As most hourly rates for the platform worker is less than DKK 202 per hour, this means that the hours calculated for meeting the requirement of connection are less than the actual hours performed.

Platform workers, who are genuinely self-employed, must inform that authority that they have worked as self-employed for at least 18,5 hours per week during the last month prior to commencement of leave, and that they have worked with this

[116] Executive order no. 953 of 17 September 2019.
[117] Guideline 9510 of 26 June 2018, section 2.1.2.10, cf. Appeal Committee Ruling 100-15 on the right to sick leave benefits, https://www.retsinformation.dk/Forms/R0710.aspx?id=176826

level of intensity for at least 6 months during the last 12 months prior to commencement of leave. If the genuinely self-employed has not had activities for 6 months, hours in employment can be included. All hours with activities as self-employed can be included, and this is not limited to hours in assignments, cf. Executive Order section 5. Further documentation for the amount of working hours can be required, and in this the platform worker must provide any documentation that can give a convincing basis for the amount of working hours. This could be a number of assignments, transportation time, logging on time, before and between assignments would perhaps be included, whereas purely passive logging on time would probably not be convincing as 'activities'.

Platform workers, who are genuinely self-employed and work 18,5 hours per week or more, is in this sense in a better starting point with regard to establishing a connection to the employment market as they can include all working hours. Platform workers, who are assessed as employees, will have trouble establishing that they are 'in current employment' the day before the leave, and the calculation of their working hours are also made in a manner where fewer of their working hours count towards being eligible.

Calculation of benefits

The calculation of the rate of benefits depends on the level of registered and otherwise documented income before taking leave, cf. section 32 of the Act.[118] The income level can be calculated either on the basis of income in employment or on income as self-employed. The tax authorities' assessment is the starting point for categorizing the income, unless this would be in breach of a labour law assessment, cf. section 4 of the Executive Order.

For employees, the benefits are paid out in the basis of the weekly hours during the leave, and the average hourly income earned during the 3 months just prior to the commencement of the leave, cf. section 33(1). The total income is the income registered with the tax-authorities. The working hours can be registered with the income, in which case the registered working hours are used as the average weekly working hours. For employees, with varying weekly working hours, the number of hours will be calculated from the average working hours per week during the last 4 weeks before commencement of leave, cf. the Executive Order section 11. For employees, with unknown working hours, the number of hours are calculated using the total income and dividing it by the hourly rate set in the Executive Order on ATP, mentioned above, in 2020 in average DKK 202 per hour. For employees, where the employer has not registered working hours, the working hours will likewise be calculated with the rate set in the Executive Order in ATP. These calculations then arrive at a number of average weekly working hours, and an average payment per working hour, which is then the basis for the number of hours per week and the rate per hour for receiving benefits.

For self-employed, the rate is calculated on the basis of the yearly income as self-employed, regardless of the hours worked, cf. Executive Order 953 section 6(1). The

[118] The manner of calculation is provided in chapter 8 and 9 of the Act, in sections 6-21 of the Executive Order 953 of 17 September 2019, and further explained in the Guideline of calculating rates of benefits for maternity and parental leave, no 9829 of 27 September 2019, *Vejledning om beregning af barselsdagpenge*.

yearly income is based on the annual income calculation, *Årsopgørelsen,* from the tax-authorities.

The Act sets a maximum level of benefits per week for employees and self-employed alike, cf. sections 35(1) and 37. The maximum level in 2019 is set at DKK 4355 per week.

For platform workers, who are employees, the benefits are paid out as a number of hours per week absent due to the leave, and at a rate per hour, that reflects the level of income before commencing the leave. Assessing the number of hours would most likely be based on 'unknown' working hours per week, i.e. calculated on the basis of the overall income from the work and divided by DKK 202 to reach a number of working hours per week. This would then be the same for the hourly income rate, meaning that in essence, platform workers would be eligible for fewer hours per week, at the highest rate of benefit. The highest rate of benefits DKK 4.355 per week, i.e. DKK 117,70 per hour. The platform workers would receive a considerably lower benefit per week, compared to if the actual weekly or monthly working hours was registered by the employer.

Platform workers who are genuinely self-employed, can receive benefits to the level of income earned in the year before commencing leave. The level of income is based on the registered profit with the tax-authorities in the year before the leave, cf. Executive Order section 6(2) and 7(1). The benefits will match the income, regardless of working hours, but cannot exceed the maximum amount set out in section 35(1) of the Act.

Benefits for leave due to pregnancy, childbirth and adoption are for all parents paid out from the public authority for payments, *Udbetaling Danmark.*

A right to obtain salaries from the employer during leave periods due to pregnancy, material or parental leave depends on legal basis elsewhere. Many employees have a statutory or agreed right to pay during parts of or the entirety of maternal or parental leave. Specific legal basis for part of full salaries are provided in the Act in Salaried Employees, section 7, in some collective agreements, and can in addition be part of shop level regulations and individual employment contracts.

A right to obtain salaries during leave due to pregnancy, maternity or parental leave for platform workers would depend on having status as employees, as well as being covered by either the Salaried Employees Act, i.e. performing work covered by the Act, or being covered by a collective agreement. This assessment follows the principles set out in Report Part 1, Denmark.

4.5 Retirement and old age pension

Pensions in Denmark consists of a different pension programs, both private and public, which form a three-pillar pension system. The three pillars are public old-age pension, occupational pensions, and voluntary private pension plans.

Public old-age pension

The public old-age pension scheme is regulated in the Act on Social Pensions.[119]

The public old-age pension is a universal, residence-based and non-contributory, statutory old-age pension scheme. The pension is paid out to everyone who resides

[119] Act on Social Pensions no. 983 of 23 September 2019.

in Denmark, and who has lived in Denmark for a significant part of their working life between the age of 15 and retirement age, cf. section 2 and 3. The question of residence of number of years required varies, and the moment starts at 30 years, cf. section 3(2).

A right to full pensions depends on having permanent residency in Denmark for a significant period of time, cf. section 5.

The public old age pension scheme is designed to secure a decent minimum standard of living for all citizens from the variable pension age starting from age 65. The pension scheme is the same for employees and genuinely self-employed, once they retire, and is irrespective of any earlier income levels.

The public old age pension scheme consists of a flate-rate benefit and a supplement that depends on the marital status and the household income whilst receiving public old age pension, cf. section 12 and 15. The pension rate is reduced with income earned whilst receiving pensions, cf. section 15 and 27.

For platform workers, regardless of whether they are classified as self-employed or employees, the right to public old-age pension depends on whether they have resided in Denmark for a considerable time of their adult life. The rate of pension payments can be reduced, if the recipient or his/her spouse, has additional income whilst receiving pensions. This includes work performed as platform work.

About 90 percent of all workers have a supplementary occupational pension plan, either as a Labour market pensions, labour market supplement pensions (SAP) or as an individual pension saving.

Occupational pensions

Occupational pension schemes, which obligates the employer to make pension contributions in addition to wages, are provided out in collective agreements only. Contributions are typically set at an additional 12 percent of the wage in the private labour market and an additional 16 percent of the wage in the public labour market. The employer typically contributes two-thirds of the pension payments, while the employee contributes one-third out of the salaries.

The contributions must be deposited directly by the employer into the employee's account at an occupational pension provider. The employer is obliged to deposit the pension into the agreed to pension fund, and is not entitled to pay out the pension amount directly to the employee. This would be a breach of the collective agreement.

These binding occupational pension schemes are applicable only to employees, who work in a company that is bound by a collective agreement. The collective agreement in questions dictates, which groups of employees are covered. This could include traditional employees as well as freelancer, working on terms similar to employees. The collective agreements cannot give binding obligations to pay pension contributions for genuinely self-employed.

Regular binding deposits made into occupational pension schemes, with a lifelong pension plan, *livslange ydelser,* are tax-deductable. Ad hoc deposits made into occupational pension schemes with a set number of payments upon retirement, *kapital- og ratepensioner*, are tax-deductable up to a certain maximum amount per year.

Genuinely self-employed do not have access to the occupational pension schemes.

Platform workers, who are genuinely self-employed, are not covered by occupational pension schemes.

Platform workers, who are employees, but work in a company without binding collective agreement with pension payments, are not covered by occupations pension schemes.

Platform workers, who are employees or 'false self-employed' can be covered by a collective agreement, which provides a duty for the platform company to make payments to an occupational pension scheme of the platform worker in addition to the wages earned for assignments.

Private personal pensions

Anybody, employees and self-employed alike, can set up a private personal pension fund with a pension supplier. This depends entirely on the terms set by the private pension fund.

In this case, deposits to the pension fund would be made at the personal initiative of the platform worker, and would be taken out of the wages earned for assignments.

Deposits into regular pension plans, with life-long payments, are tax-deductible. Ad hoc deposits into pension savings with one time payments or a set number of payments are tax-deductible up to a certain maximum amount each year.

The platform worker, who is an employee and not covered by an occupational pension plan, and the genuinely self-employed platform worker, must establish their own pension plan with a pension fund at their own choice. Regular pension plans with a requirement of monthly or yearly deposits, and with life-long pension payments, are covered by the tax deduction scheme. Pension accounts, where the platform worker makes ad hoc deposits are also tax-deductable but only up to a certain maximum amount each year.

Engaging with additional pension schemes, as 90% of the workforce in Denmark, requires that the platform worker themselves take action to establish a pension plan with a private pension fund. Furthermore, the requirement of full tax-deductions for all deposits is perhaps difficult for the platform workers to adhere to, as the income may fluctuate considerably over the weeks and months.

A separate issue is, the question of earning interests on the pension deposits, where there could be a difference between the big occupational pension schemes, and the privately established pension schemes. This issue is not addressed in this report.

4.6 Overall comparison

With regards to unemployment insurance, platform workers can be members of unemployment insurance funds. Eligibility for unemployment insurance requires working hours to be performed on terms similar to those in collective agreements. Platform workers, who are assessed as employees, would on this basis not be able to count hours worked for the platform company. Hours worked as genuinely self-employed can be counted towards being eligible for unemployment insurance. However, platform workers who are genuinely self-employed and where the work as self-employed is the main or primary income, must close down their company and cease providing services before receiving benefits. Unemployment insurance is highly unlikely for platform workers of both categories. If the platform worker would be eligible for unemployment insurance, supplementing unemployment benefits can be given to employees, including self-employed as a secondary income, who work less than full-

time and who are available for full-time work. Supplementing unemployment benefits can only be given for a period of up to 30 weeks. Platform workers, who are genuinely self-employed and where the work as self-employed is the main or sole income, cannot receive supplementing unemployment benefits.

Platform workers who are genuinely self-employed are most likely to be eligible to receive unemployment insurance, but the system foresees a full closure of the activities in the company.

For platform workers, access to Basic Social Assistance requires, that the applicant has had ordinary employment for 2 years and 6 months within the last 10 years. Hours worked via platform companies only count, if the hours are performed as employees on terms similar to those in collective agreements. For platform workers, who are genuinely self-employed, the company has to be shut down completely. If the platform worker is married, or if the platform worker has received BSA for 1 year, the platform worker must in addition document 225 hours of work on terms similar to those in collective agreements, i.e. not by providing platform work. If the working hours are performed as self-employment, the work must be carried out with at least 20 hours of documented work per week.

Access to BSA is difficult and complicated for both types of platform workers, but slightly more accessible for genuinely self-employed. They however have to close down the company completely..

Regarding sick leave; platform workers, who are not genuinely self-employed, and who have worked a certain amount of hours for the platform company, would have a right to receive sick leave benefits from the platform company during the first 30 days of sick leave, only if 'employed' the day before the sick leave. This element is very uncertain for platform workers, who are not obliged to work or guaranteed a minimum number of working hours per day or per week. Genuinely self-employed persons are entitled to sick leave benefits from the municipality after two weeks of self-financed sick leave. Sick leave benefits from the municipality require, that the self-employed person has been conducting business to a substantial degree in at least 6 months out of the last 12 months, including in the last month prior to the sick leave period and that the person has worked in the business for at least 18, 5 hours per week, i.e. at least half of a normal working week. The information provided by the self-employed platform worker is as a starting point used.

The system for sick leave is difficult for platform workers as employees, due to the assessment of being in 'current' employment. Genuinely self-employed are more likely to be eligible for sick leave benefits, but this is only after the first two weeks if sick leave.

With regards to liability and insurance for occupational injuries, the platform company can be viewed as the employer in more situations than in the traditional sense, due to the protective purpose of the regulation. Platform companies could be obliged under the Workers' Compensation Act for many of the platform workers providing services as self-employed and without a formal setup of their own company apart from in relation to the platform company. Genuinely self-employed are not covered by the definition of employee in the Act, and are not automatically insured by an employer. Instead genuinely self-employed can out voluntary occupational injury insurance for themselves.

The system for occupational injury insurance is a little more accessible for platform workers, as the platform company is likely to be assessed as the employer with

liabilities and the duty to take out insurance. For genuinely self-employed platform workers, there is no obligation to take out insurance, and they take the financial risk of occupational injuries on themselves.

Concerning benefits whilst on leave due to pregnancy, childbirth and adoption, platform workers will have problems with the connetion to the labour market, similar to that of being eligible for sick leave benefits. The problem lies in the 'current' employment status, where the employment must not have ceased prior to commencing the leave. This can be a problem for platform workers, who are viewed as employees as they would be assessed as casual workers rather than in a current employment relationship. If this criteria is met, platform workers who are employees will meet problems with calculating the working hours per week, and the hourly wages, that set the standard for receiving the benefits. Platform workers, who are genuinely self-employed must meet a level of activities in their own company for at least 6 months and for at least equalling half time. The hours can be stated on their own behalf. Platform workers, who are genuinely self-employed and work 18,5 hours per week or more, is in this sense in a better starting point with regard to establishing a connection to the employment market. The rate of benefits are calculated on the basis of registered income with the tax-authorities.

Platform workers, who are assessed as employees, have difficulties having right to benefits during maternity and parental leave, due to the assessment of the employment as 'current'. Genuinely self-employed platform workers, who have worked a significant amount of hours over at least 6 months have better access to these benefits from the local municiapality.

Finally, with regard to pension and retirement, all platform workers who have resided in Denmark for the most of their adult lives are entitled to receive the basic public occupational pension. 90% of the work market have additional occupational or private pension schemes which is funded by employer contributions or by their own contributions. Very few platform workers are covered by collective agreements, and very few platform workers have occupational pensions funded by employer contribution in addition to their salaries. In reality platform workers are left to establish their own supplementing pension funds, based on their own contributions taken out of their normal salaries or earnings. As the pension is established at their own initiative, it is likely that this takes place at a later stage in their career, if at all, compared to the occupational pensions which start from the beginning of the career.

Platform workers, employees and self-employed alike, are in reality left to establish their own retirement pension funds, and take contributions out of their own earnings. Employer contributions depend on being covered by collective agreements, or on an individual agreement of the same stature – which is unlikely. Platform workers, who have platform work as their main income over a large portion of their lives, are left with considerably less in pension income compared to the average of workers in Denmark.