

## THE CASE FOR SOCIAL SECURITY BENEFITS TO GIG WORKERS IN INDIA

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Recently, the Indian Federation of App Based Transport Workers, a registered trade union federation representing app-based transport and delivery workers, filed a public interest litigation (“PIL”) in India’s Supreme Court (the “SC”) seeking social security benefits for delivery partners of food delivery apps, Zomato and Swiggy, and drivers of taxi aggregator apps, such as Ola and Uber.

### Legal Classification of Ola/Uber drivers and Zomato/Swiggy delivery partners

At present, drivers for app-based ride-hailing and food delivery services are not recognized under any labour legislation, except the Code of Social Security, 2020 (the “Code”) which has not been implemented yet.

As per the Code a “gig worker,” is a person who participates and earns from a work arrangement outside of the traditional employer-employee relationships. Further, a “platform worker” is a person who engages in a work arrangement outside of a traditional employer-employee relationship in which organisations or individuals use an online platform to access other organisations or individuals to solve specific problems or to provide specific services in exchange for payment.

App-based ride-hailing and food delivery service platforms do not usually execute formal employment contracts with the drivers and delivery personnel but instead enter into partnership arrangements with them. Thus, such drivers and delivery personnel fall within the categories of gig workers and platform workers.

### Objective of the PIL

The primary social security legislation for workers in the unorganised sector is the Unorganised Workers Social Welfare Security Act, 2008 (the “Unorganised Workers Act”), which provides for the social security and welfare of unorganised workers through various social security schemes.

As the Code is yet to be implemented, the PIL seeks recognition of gig workers and app-based workers, such as drivers and delivery personnel, as unorganised workers within the ambit of the Unorganised Workers Act. The PIL contends that the failure of the State to provide these workers social security is violation of their rights under Article 21 of the Constitution of India, namely, the right to work, the right to livelihood and the right to decent and fair conditions of work.

The PIL seeks the formulation of specific schemes such as health insurance, maternity benefits, pension, old age assistance and disability under the Unorganised Workers Act, including cash-based economic relief and the extension of distribution of food grains under the Pradhan Mantri Garib Kalyan Yojana. Further, the PIL also seeks directions to be issued to financial institutions to not seize and/or auction vehicles of app-based workers for default

in payment of equal monthly instalments of their loans until the Covid-19 pandemic continues.

### **Prior attempts to give legal recognition to gig workers**

The PIL argues that while formally there is no contract of employment and the gig workers are bound by partnership agreements, the degree of supervision and control by taxi aggregator and food delivery companies is similar to an employer-employee relationship. Such companies avoid creating a formal employer-employee relationship in order to circumvent the applicability of extensive labour legislations, thereby depriving the gig workers of benefits applicable to employees.

In 2017, a writ petition was filed before the Delhi High Court in *Delhi Commercial Driver Union v. Union of India* (W.P.(C) 12422/2018) for determining if taxi aggregators were merely playing the role of online conduits connecting drivers to customers through a mobile app and whether the drivers associated with these platforms came under the legal category of “employees” qualifying for benefits under labour laws. However, the petitioner withdrew the writ petition to approach the appropriate government for making a reference under the Industrial Disputes Act, 1947.

In 2018, in a matter before the Competition Commission of India on anti-competitive practices by Ola and Uber, the Competition Commission of India observed that while the drivers offer the service of transportation to the riders and are legally independent entities, they are effectively extensions or agents of Ola/Uber when they operate through the Ola/Uber platforms.

Thus, the issue of whether gig workers can be considered employees remains pending in judicial and legislative examination. As Ola/Uber are multinational companies, it is worthy looking at the legal status of the gig workers in other jurisdictions.

### **Position in United Kingdom**

In February 2021, in the matter of *Uber BV v. Aslam* ([2021] UKSC 5), the UK Supreme Court upheld that Uber drivers are “workers” within the meaning of the statutory definition under labour laws (which includes anyone employed under a contract of employment but also extends to some individuals who are self-employed) and directed that Uber must pay its drivers the national living wage, paid annual leave and other benefits provided to employees, from the time that drivers log onto the Uber app, and are willing and able to work.

In this regard, the PIL argues that Uber drivers around the world work in similar conditions, and thus, this rationale should apply in the Indian context as well.

### **Position in California**

In the landmark case of *Dynamex Operations W. v. Superior Court and Charles Lee, Real Party in Interest* (4 Cal.5th 903 (Cal. 2018)), a class of drivers for a delivery company called

Dynamex claimed that they were misclassified as independent contractors and thus unlawfully deprived of employment protection under California's wage orders. The California Supreme Court held that the drivers are employees and the burden is on the hiring entity to establish that a worker is an independent contractor not subject to wage order protections.

Thereafter, in 2019, the State of California passed the California Assembly Bill 5 which entitles some gig workers to be classified as employees with labour protections, such as minimum wage laws, sick leave, and unemployment and workers' compensation benefits. However, some aggregator companies, such as Uber, Lyft and DoorDash initiated a ballot measure, known as Proposition 22, to exempt ride-hailing and delivery companies from the requirements under the California Assembly Bill 5 and instead allow drivers to remain independent contractors, albeit with limited benefits, including minimum wage and per-mile expense reimbursement. Proposition 22 was approved with a 59% vote.

However, in August 2021, the Superior Court of California ruled that Proposition 22 "*limits the power of a future legislature to define app-based drivers as workers subject to workers' compensation law*" and is, therefore, unconstitutional.

### **What does the Code promise gig workers and platform workers?**

The Code provides that the Central Government will frame and notify relevant welfare schemes for gig workers and platform workers, such as schemes for life and disability cover, accident insurance, health and maternity benefits, and old age protection. It recommends that schemes should be funded through a combination of contributions from the Central and State Governments, gig platform aggregators and under the corporate social responsibility provisions of India's Companies Act, 2013. Further, the Code provides for a registration mechanism for the workers as well as helplines to aid access to social security schemes.

The Code envisages the establishment of a National Social Security Board which will recommend to the Central Government welfare schemes for gig workers and platform workers and monitor these schemes. It also mandates the Central Government to establish a social security fund for gig workers and platform workers, which is to be used for their social security and welfare.

### **Our Comments**

While the Code recognizes gig workers and platform workers and provides for social security measures, it does not elaborate on the exact scope, nature or funding mechanism for gig workers and platform workers. Therefore, the eventual rights that gig workers and platform workers get will only be determined once the schemes/rules under the Code are formulated and implemented.

Further, the Indian government has consolidated all erstwhile labour laws into four codes which apart from the Code, include the Code on Wages 2019, Occupational Safety, Health and Working Conditions Code 2020, and the Industrial Relations Code 2020. There is no

mention of gig workers or platform workers in the other codes. Therefore, at this point, it cannot be ascertained with clarity whether the Indian government is in favour of providing extensive labour law protection to gig workers or platform workers.

Lastly, there is no clarity when the Code will be implemented. On account of this, the petitioners have asked for social security benefits under the Unorganised Workers Act already in place. As more jurisdictions have started classifying gig workers as employees and extended labour welfare provisions to gig workers, it will be crucial to see what the SC upholds in this PIL.