

# IBA Webinar

Covid-19 has catapulted us into the future

*June 4, 2020*

## **Employment and Industrial Relations Law Committee**

*Is travelling still necessary? Do companies really need to meet their customers? Recent events have trained consumers from every demographic to shop on-line. The retail industry is concerned that customers will never come back to a bricks and mortar shopping experience. Is the retail industry changed forever?*

*Gig workers may be in demand now more than ever to fill the void created by all of the above, largely by being the bridge that will connect people. Food delivery will be the new restaurant experience for a while. Will the importance of the local workforce increase or decrease? Will the work of crowdworkers and freelancers increase? What are the opportunities and risks of an increasingly globalised workforce? Is retraining imperative to deal with new technologies that have been thrust into the workplace.*





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# 1. Is working remotely becoming the norm? Is a fixed workplace a discontinued model?

- Depends on business sector + employees' duties within companies.
- **BUT** obvious that remote working has known its time of glory during the past few weeks, even if often been put in place very quickly and sometimes in a degraded mode.
- It seems to have shown good results anyway, as many organizations have understood that they could continue to run their business at least partly in such a way, like Facebook or Google, who have announced that they would continue to operate like this until early 2121 at least.
  - **Facebook's** CEO, Mark Zuckerberg, announced a few days ago that all the new positions in the United States will now be offered in remote work, and that permanent telework will be gradually offered to its existing employees. Ultimately, he estimates that almost half of the 48.000 Facebook employees could work from home.
  - In France, **PSA** automotive group (Peugeot, Citroen, Opel...) has announced that remote work would become the norm for its non-production activities : *"office work is aimed to represent only 1 or 1,5 day per week in average"*, said the group HR manager. It would concern not only 18.000 employees like today, but 80.000 in commercial, administrative or research functions among the 200.000 people the group employs in the world.
- However hard to believe that a fixed workplace could become a discontinued model.
  - A few years ago, IBM has noticed a loss of innovation by generalizing telework and asked their employees to return to the office: work psychologists underline the fact that collective intelligence is born from exchanges and interactions.
  - Gitlab, which is 100% remote with 1.200 employees spread in 67 countries without any single office would then remain probably an exception, like some other

# 1. Is working remotely becoming norm? Is a fixed workplace a discontinued model?

## Advantages

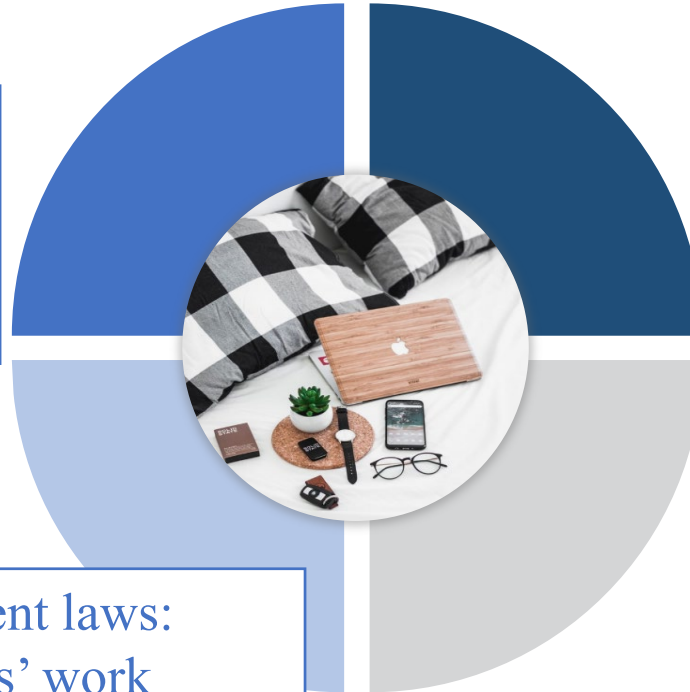
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Experience accumulation; tremendous development in software applications; cut down costs significantly.

## Challenges

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Raises challenges to Chinese employment laws: how can employers to ensure employees' work conditions and safety? Whether it could be identified as work-related injury if employees are accidentally injured at home?



## Disadvantages

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Lower work productivity; problematic team cohesion; feel of isolation; blurs boundary of work and life.

## Outlook

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In the short run, remote work cannot reverse traditional work in China. Employees attempts to apply remote work should carefully distinguish jobs applicable to remote work

## 2. Are there differences between remote work and work in a home office from a labor law point of view?

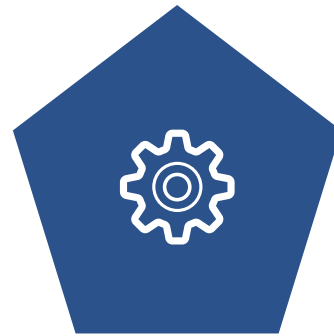
- No single definitions of remote work and work in a home office, but remote work is more flexible while work in a home office is subject to several restrictions
- **Italy:**
  - **Smart working**
    - Employees in smart working may carry out their activity partly within the company premises and partly outside, from where they chose.
    - The employer must provide the employee with working tools and bear their maintenance costs. Also, it must inform the employee on the risk to carry out the work activity outside the company's premises.
    - The Italian smart working appears to be very close to the **French** concept of teleworking.
  - «**Teleworking**»
    - the employee must decide which will be his/her place of work (usually the home) and the employer will have to verify that it is compliant with H&S rules. So rules are stricter than in case of smart-working (which is the reason why this work modality , although older than smart working, never had a great success).
- **France: Teleworking**
  - *any form of work organization in which work, which could also have been performed on the employer's premises, is carried out by an employee outside these premises on a voluntary basis using information and communication technologies.*
- **China:**
  - **Remote Work** is a type of work through which employees use technology of computer, Internet, and telecommunication, to carry out their work activity; it doesn't entirely exclude work in an office.
  - "**Small Office Home Office**" refers to employees using family residence as their place of work while using Internet and other IT tools to connect with the employer.
- In the **USA** there is no specific definition for remote work, which usually just means "flexible working", to which the general labor laws of each state + applicable federal laws apply.

### 3. Are the boundaries between work and private life blurred? Are government measures required in this respect, e.g. for working time regulation, employee data protection or the protection of employee health?



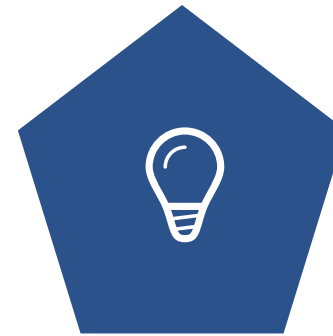
#### Break the Boundary

Working in home blurs boundary of work and private life.



#### Working Hours

Employers shall pay overtime salary to employees applying to standard working hour system.



#### Employees' Data Protection

Latest rules provided by PRC Civil Code -principle of legitimacy, justification and necessity, obtain consent of employees, publicize rules for data collection and process, clarify objective, method and scope of data collection and process.



#### Employees' health protection

Identification of work-related injury.

### **3. Are the boundaries between work and private life blurred? Are government measures required in this respect, e.g. for working time regulation, employee data protection or the protection of employee health?**

- The employer's power of management or supervision must still be exercised remotely, while respecting the teleworker's privacy. It is the reason why the collective agreement or the charter drawn up by the employer to organize telework must determine the time periods during which the employer can usually contact the teleworker.
- However, it is necessary and important to adapt the management style to this way of working, which implies less control and more interaction with the employee. More than ever, the manager must guarantee the cohesion of the team by inventing new sociability rituals, by communicating more and better and by establishing a solid relationship of trust.
- Boundaries between work and private life are undoubtedly blurred for teleworkers. That is the reason why, since 2016, French employees have a “right to disconnect” and companies have to include this topic in the annual mandatory negotiation as well as regulating the use of digital tools, in order to ensure respect for rest and leave times as well than personal and family life.

## 4. How do works councils and union react to the increasing importance of remote work?

- Staff representatives (works councils and unions, as the case may be) must obviously be involved in building terms and conditions of remote work. As previously mentioned, telework and right to disconnect are already topics of negotiation and may give raise to collective agreements or charters.
  - Within companies where remote work has been spontaneously implemented because of the Covid-19, a negotiation is now necessary to organize it better.
  - A survey conducted by a French HR national association released on April 30<sup>th</sup> showed that 46% of HR managers anticipated a negotiation or re-negotiation about this topic and 36% of HR managers wanted to put in place or update a policy or charter.
  - Back to PSA example, the last in-house agreement about telework had been signed on January 2020 only, which is not so far away, and reactions from unions are diverse : *“remote work should be organized on a voluntary basis”* or *“let’s see how it actually worked during the confinement before generalizing it”* to *“remote work is not the hottest topic, we should work on business recovery plan first”*.
- Unions have also raised several concerns as remote work
  - breaks the social ties, the collective relationship that exists within a company.
  - may create anxiety and a sense of isolation: it is harder to struggle against work pressure when you are alone at home.
  - may break integration of new employees: it is more difficult to create a real company culture.
  - may create a genuine split between white and blue collars.



## 5. Will remote work improve diversity at the workplace (by integrating male employees into the homework)?

- It is not clear whether remote work will improve diversity
- Risk of discrimination
- Support measure still necessary (e.g. states' economic support for child care)
- Mindset change

## 5. Will remote work improve diversity at the workplace (by integrating male employees into the homework)?

- There is a **big debate**, not only in Italy but also in other countries, on the opportunities deriving from remote work.
- **Italy:**
  - the legislator expressly provided that one of smart working's aims was to allow a better work-life balance
  - however, the massive use of smart working during the Covid-19 emergency has shown a different result.
- **France:** researches have shown that it is not sure that remote work will improve diversity at the workplace
- Remote work is a tool that may help work life balance **but** parents (and unfortunately particularly women) still need other measures to help them balancing work and home duties.

## 6. What are the most important criteria to differ between employees and freelancers?

- Types of contractual relationships & environments
  - Commercial Contract for Professional Services
  - Employment Agreement or Offer Letter with benefits
  - Underlying reasons:
    - Lack of legal entity
    - Business model
    - cost
    - Flexibility for worker
- What law governs the relationship & how does it end?
  - Reality principle/subordination test
  - National legal structure – permit independent workers?
  - Protections available at termination of the relationship
    - Statutory payments
    - Unemployment benefits
- Entitlement to benefits during periods of economic disruption
  - Government programs to protect employment
  - Are free-lancers entitled to any benefit programs?
- Tempered by freedom of choice

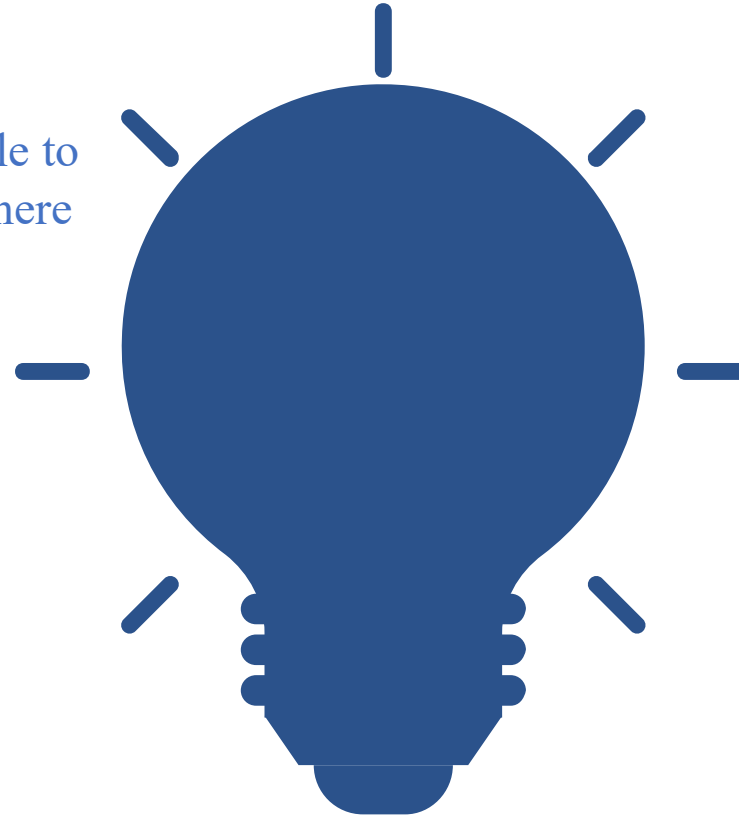
## 7. How can fair incomes and social security be guaranteed for freelancers?

### Weaker Protection 01

Freelancers are not applicable to PRC employment laws, so there are weaker mandatory protections for them.

### Resort to PRC civil laws 02

Freelancers may resort to PRC civil laws, especially the last issued PRC Civil Code: principle of fair, judge may rule in favor of freelancers as for obviously unfair clause.



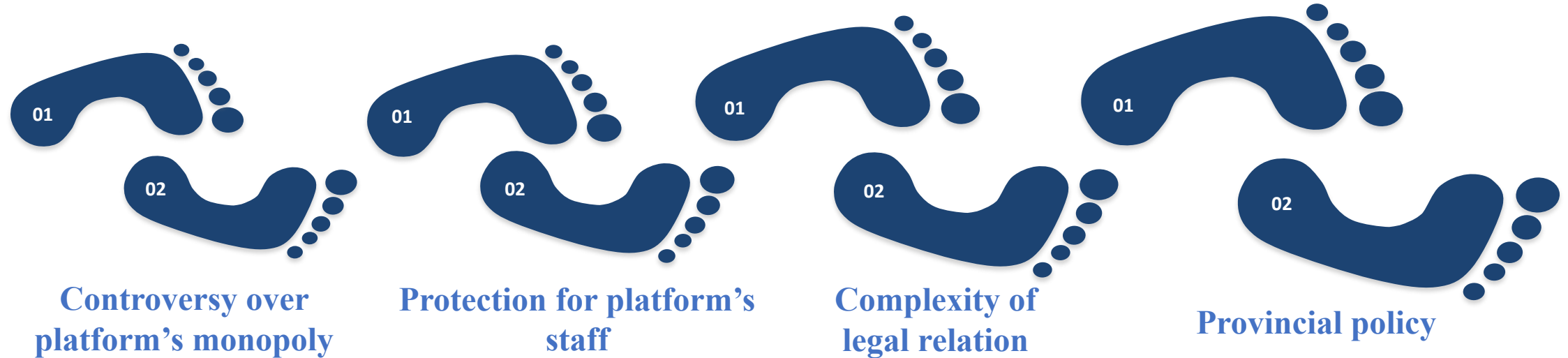
03 Industrial Association  
Establish own industrial association to gain bargain chips.

04 Voluntary Social Security  
Contribute social security fund as individuals of freelancers.

# 7. How can fair incomes and social security be guaranteed for freelancers?

- only **2 statuses** under French law: **employee** and **self-employed** (freelancer).
- status of self-employed worker often challenged before courts with some success ➡ It is indeed argued that the service agreement should be reclassified as an employment contract. The question that arises here is whether the existence of a link of subordination (“lien de subordination”) can be recognized between freelancers, on the one hand, and companies using them (like the ones operating platforms), on the other hand. Decisions rendered in the context of these requests for reclassification are based on the classic criteria allowing to characterize or not the existence of a link of subordination.
  - A reclassification of the service agreement into an employment contract will occur if freelancers are able to prove by a bundle of evidence that they are actually working under the authority of the company using them, that the latter has the power to give them orders and directives, to control execution of their work and to sanction their shortcomings (Cass. Soc., 13 Nov. 1996, n° 94-13. 187, "Société Générale").
  - All the decisions we have had in France regarding this topic (including Deliveroo in February 2020 or Uber in March 2020) are based on these same criteria.
- In parallel with this case law tending to reclassify service agreements into employment contracts, the legislator seems to want to favour, on the contrary, the track of the status of self-employed workers.
  - A Law dated 8 August 2016, known as “Loi Travail”, granted a first series of minimum guarantees to “workers using an electronic contact platform”. For example, workers can benefit from protection against occupational accidents, access to vocational training, recognition of the concerted refusal to provide services and freedom to form and to join trade unions.
  - With the “General Mobility Law” dated 24 December 2019, the legislator went further and proposed, by means of a Charter, that specific digital platforms (drivers and delivery riders) offer additional social rights to the freelancers in a charter setting forth the terms and conditions for the exercise of their social responsibility. While this charter is not mandatory, if it is established, it will have to address eight topics.
  - In addition, the law confers new rights on workers: the right to disconnect without risk of being sanctioned, the right to know the guaranteed minimum price for a ride, the right to refuse a ride and the right to know how long they have been working and the income they have earned from their activity. It also strengthens freelancer’s right to training.
- However, the risk of having the contractual relationship between a platform and its contractors be reclassified as an employment relationship still remains. The judge will indeed retain full discretion to order reclassification based on elements other than those included in the eight topics to be addressed by the charter. As such, if a judge determines that there exists a relationship of subordination between the worker and the platform, the judge will be entitled to order reclassification, notwithstanding the existence of a charter.

## 8. How can dominant online platforms be prevented from abusing their monopoly position?



Different from traditional enterprises-platforms do not sell products, but they operate or even create market; economically, a unified market bring advantages outweigh disadvantages.

Put emphasis on protection of staff hired by dominant online platforms drives of car-hailing apps, food deliveryman, couriers, etc.

Platforms avoid employer's responsibility?  
Employment relation or civil relation?

Provincial policy promotes rights protection for platform staff:  
Zhejiang Province stressed reasonableness of obligation and rights and introduced industrial association.

## 9. How can employees/self-employed persons learn the skills required in the context of digitization? Who is responsible for this? State, employer or individual?

- Legal and national educational systems – differences in approach
  - Required apprenticeships in some countries
- Occupational training and trade schools
  - Strong systems in EU
  - Not sufficiently leveraged in US
- Employer-initiated innovation
  - Amazon retraining initiative
- Individual responsibility

## 10. Do you think that COVID-19 will reduce the level of cross border work processes?

- "Reshoring" (i.e. return to companies' home country (back reshoring) or to neighboring countries (near reshoring)) an increasing trend VS "offshoring" (i.e. the delocalization of processes mainly in Asia and Eastern Europe of the last 20 years)
- Factors to be considered:
  - workforce and production costs
  - development of technologies
- The Covid-19 epidemic may have accelerated this trend
- Possible support of state funding to companies that intend to set their business in their "home country"
- The Italian measure to limit relocation outside of the Italian territory of 2018





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Thanks a lot,  
take care &  
Good bye!



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