

Ambiguities and Absences: Regulating Occupational Health And Safety In The Platform Environment

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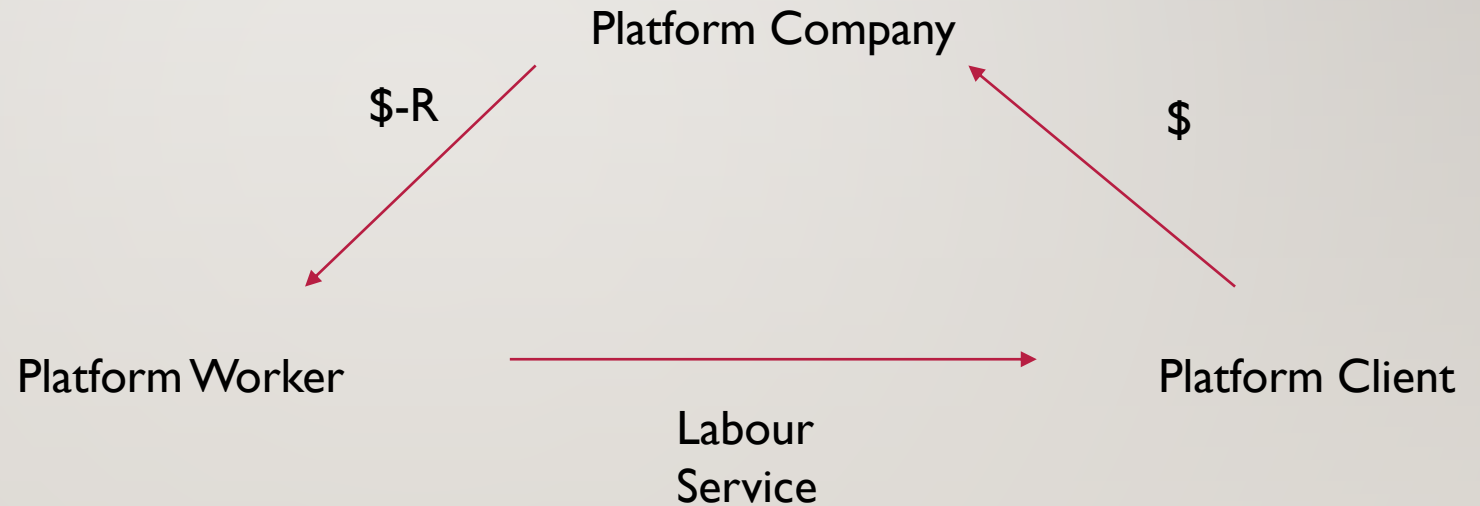
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PRESENTATION OUTLINE

- What is Platform Mediated Work (PMW)
- Its Incidence in Canada
- OHS Hazards of PMW
- Challenges PMW Poses to Existing OHS Regulation
- Regulatory Responses and Options

WHAT IS PLATFORM MEDIATED WORK?

- Formal Structure (Platform Owners' View – but Contested)



TWO TYPES OF PMW

Local Service Work (Groundwork) – e.g. Uber, DoorDash

- Performed by local workers
- Clients are typically local consumers and business

Online Work (Cloudwork) – e.g. Amazon Mechanical Turk

- Performed by workers anywhere with internet connection (but mostly in Global South)
- Clients are typically businesses anywhere in the world (but mostly in Global North)

INCIDENCE OF PMW IN CANADA

- Limited data available
- GigWork (all short-term work for multiple clients)
 - 2022 Study: 5.5% of Canadian Labour Force in 2005; increasing to 8.2% in 2016
- Participation in the 'Sharing Economy' (includes those renting or selling on platforms)
 - 2016 Study: 9% of respondents in GTA
- Online Labour Index (projects posted on 5 major online labour platforms)
 - 2022: Canadian employers increased their job postings by 11% since 2016

OHS HAZARDS OF PMW

- Limited research on OHS hazards in PMW
- Work performed through platforms is generally not different from work performed through other contractual arrangements
 - E.g., Uber driver/Taxi driver; Doordash /pizza delivery; data entry on Mechanical Turk/data entry by employee working from home
- But features of the platform environment may exacerbate physical and psycho-social hazards

- GROUND WORK

- Intensity of algorithmic controls, pervasive customer reviews and piecework payment may encourage risky behaviours (e.g. violating traffic laws; use of phones while driving/riding)
- Adjusting hours of work to peak demand periods may result in long days and irregular hours
- Lack of transparency about algorithmic controls may produce anxiety and loss of sense of agency ('epistemic risks')

- CLOUD WORK

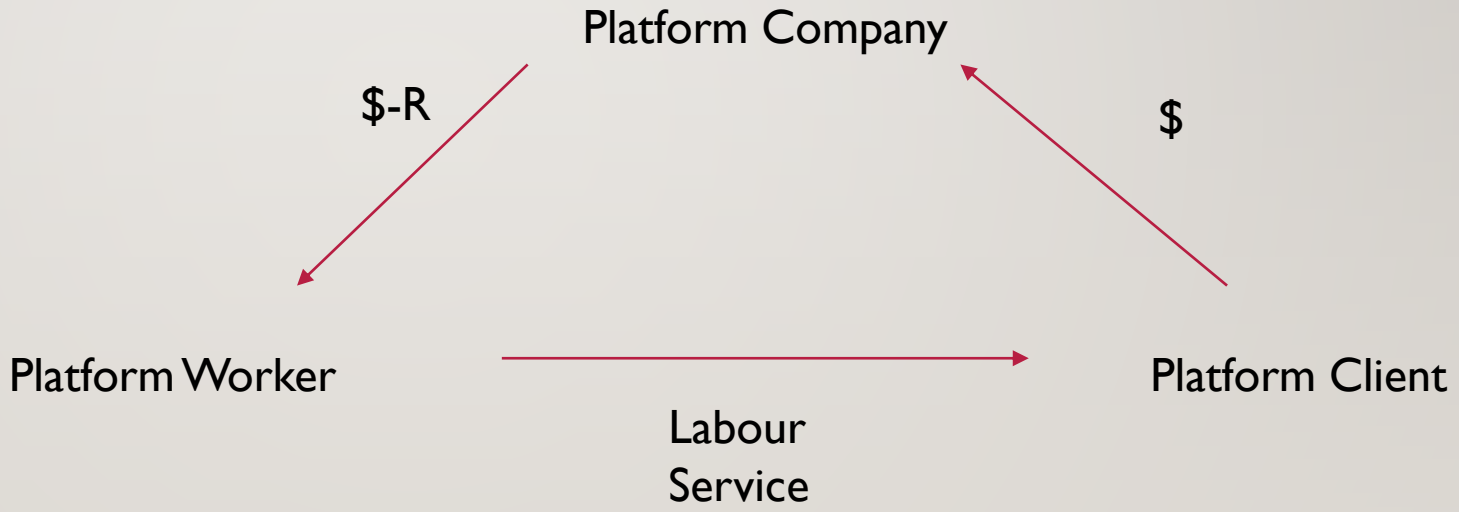
- Irregular and unsocial hours to coordinate with client demands/postings; exacerbating work/caregiving conflicts
- Poor ergonomics in home offices
- Epistemic risks

EXACERBATING FEATURES

REGULATORY CHALLENGES: SOME BASIC LEGAL FEATURES OF OHS REGULATION IN ONTARIO

- Most protective labour and employment law built on the platform of employment: duties are only imposed on employers in regard to workers whom they hire as employees
- OHS regulation is broader
 - Employers owe duties to **workers**, which includes any **employees and self-employed workers** they hire
 - The law imposes obligations on **multiple duty holders**, not just employers (e.g., constructors, licensees, supervisors, owners, suppliers)
- But OHSA mostly assumes worker is performing work in an employer provided workplace, using employer provided equipment and being supervised directly by the employer
- Also, ambiguity about the legal relationships in the platform environment adds complexity

PLATFORM OWNERS AS TECHNOLOGY COMPANIES/RENTIERS



- **Platforms Are Not Employers under OHSA** Do not hire workers (either as employees or independent contractors)
- Do platforms owe duties as **'Owners'**? Unlikely
 - **Owner** defined to include owner or occupier of 'any lands or premises used as a **workplace**'.
 - **'Workplace'** means 'any land, premises location or thing at, upon, in or near which a worker works'
 - Platform owners provide an App, which are unlikely to fit the definition of lands or premises used as a workplace
 - **Duties of owners** are to ensure prescribed facilities are provided and maintained as prescribed and that the workplace complies with the regulations
- Do platforms owe duties as **'Suppliers'**? Unlikely
 - **Suppliers** defined as persons who supply machines, devices, tools or equipment for use in or about a workplace.
 - Platform owners only supply App – unlikely to be defined as a machine etc.
 - Duties of suppliers are to ensure that equipment supplied is in good condition and complies with the Act and regulations

OHS DUTIES OF PLATFORMS COMPANIES (AS TECH PROVIDERS)

- In principle, clients hire platform workers to provide services and therefore **may owe duties as employers**
- Where worker provides services at a client's **business premises (workplace)**, then client has duty as **employer** to take all reasonable precautions for the health and safety of the worker; also duties as **owner of a workplace**.
- Where worker provides services at client's **private home**, then **OHSA does not apply**
- Where worker provides **transportation or delivery services**, client may arguably be an employer (in sense of hiring an independent contractor), but unlikely to generate meaning OHS obligations (what precautions ought the client take for the health and safety of the work in this context?)
- Clients as employers also unlikely to owe any OHS duties to self employed **cloud workers**.
 - Act likely only applies to work performed in Ontario
 - Most cloud workers work from home (Act does not apply to work performed in private home by home owner)
 - Client does not provide equipment

DO CLIENTS
HAVE DUTIES
UNDER
OHSA?

PLATFORMS AS EMPLOYERS

- Legal classification of relationship is a question of law; not something that platforms can unilaterally assert
- Legal status is contested: **Foodora** workers successfully claimed ‘**dependent contractor**’ status under the LRA, which made them employees of platform company for the purposes of the Act
- No determination of status of platform workers for purposes of OHSA
- OHSA protects workers, not just employees, so **key question is whether platform is employer of platform workers, not whether platform workers are employees**
- Employer includes “person...who contracts for the services of one or more workers”
- Worker include “person who performs work or supplies services for monetary compensation”
- Strong argument that platforms are employers of groundworkers; less likely they are employers of cloudworkers

IF PLATFORMS ARE EMPLOYERS...

External Responsibility System

- S. 25(1) duties related to employer-provided equipment and materials – not applicable in platform environment where workers provide own equipment
- S. 25(2)(h) duty to take every precaution reasonable in the circumstances for the protection of the worker, but unclear what those duties would be in relation to work that is not performed in employer's workplace or with employer provided equipment or under direct employer supervision
 - Is there a duty to supervise remote work to detect unsafe work environment or practices?
 - Do Apps that promote unsafe work practices violate the general duty clause?
 - Hours of work? (typically regulated through employment standards legislation, not OHS)
- There are no regulations specific to work most commonly performed on platforms (even though when identified as a dangerous occupation – e.g. passenger transportation)
- Many specific employer duties framed on the assumption that workers are at an employer provided workplace (e.g. duty to have and annually review a *workplace* OHS policy; duty to have a policy with respect to *workplace* violence and harassment etc.)

IF PLATFORMS ARE EMPLOYERS...

Internal Responsibility System

- **Employer Duty** to manage OHS, including provision of instruction
 - Could require active OHS management by platforms but also more intrusive surveillance of work performance etc.
- **Worker Rights**
 - **Right to Know:** partially linked to employer duties above, but also to rights below
 - **Right to Participate**
 - **Health and Safety Representatives** (in smaller **workplaces** 5 to 19 workers regularly employed)
 - **Joint Health and Safety Committees** (in larger **workplaces** - 20+ workers regularly employed)
- **Right to Refuse Unsafe Work**

- Unlikely statute requires HSRs or JHSCs in platform environment
 - Requirement based on whether stipulated number of workers are regularly employed “at a workplace”
Platforms unlikely to be “workplaces”? (“any land, premises, location or thing at, upon, in or near which a worker works”)
- Even if applies, doubtful that worker health and safety reps are entitled to conduct “workplace inspections”
 - SCC limited inspections to areas employer control
- Efficacy of worker participation linked to employer predisposition toward participatory approaches to management, a supportive union organization and proactive worker reps – unlikely to be found in platform environment

Right To Participate

- Arises when worker has reason to believe:
 - Any equipment etc the worker is to use or operate is likely to endanger the worker
 - Physical condition of the *workplace* is likely to endanger
 - *Workplace* violence is likely to endanger
 - Equipment or physical condition of the *workplace* contravenes the Act or regulations and contravention is likely to endanger
- Unclear that much of this is meaningful in a context in which platforms don't provide equipment and work is not performed in employer controlled workplaces

Right To Refuse Unsafe Work

WHAT IS TO BE DONE?

- Deem platform companies to be employers for the purpose of the OHSA
- Address the “workplace” centric conception of OHS regulation as needed
- Consider whether platform companies should owe duties to ensure that worker-provided equipment or locations are safe
- Require algorithmic transparency to reduce ‘epistemic risks’
 - *E.g. Digital Platform Workers Rights Act 2022* (not declared in force) requires transparency regarding how pay is calculated, factors used in allocating work and the operation of performance rating systems.
- Require platforms to establish joint health and safety committees
- Provide platform workers with meaningful access to collective bargaining