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Labour law in the future of work

Introduction paper

Nordic future of work project 2017–2020

Fafo-paper
2019:06

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Nordic future of work project 2017–2020: Working paper 1

Fafo paper 2019:06

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ISSN 0804-5135

Contents

Preface **5**
Presentation, structure and aim **6**
A Nordic and functional approach **9**
Part 1: Key concepts and changing labour relations **11**
Introduction 11
Challenging characteristics 12
A common Nordic conceptual tradition? 13
Research questions *in abstracto* 14
Research questions *in concreto* 16
Part 2: Protection of platform workers **18**
Introduction 18
Typology of labour relations 19
Key elements of Nordic labour law and regulation 19
Research questions 20
Project plan and timeline **23**

Preface

The cross-disciplinary project “The future of work: Opportunities and challenges for the Nordic models” studies how the ongoing transformations of production and labour markets associated with, amongst other, digitalisation, demographic change, and new forms of employment will influence the future of work in the Nordic countries. The project is funded by the Nordic Council of Ministers and coordinated by Fafo. It is conducted by a team of more than 30 Nordic scholars from universities and research institutes in Denmark, Finland, Iceland, Norway, and Sweden.

The project is divided into seven pillars, and this paper gives an introduction to the research in Pillar VI Labour law & regulations.

Marianne Jenum Hotvedt is author of the publication in cooperation with Natalie Videbæk Munkholm, who contributed in particular with the theoretic approach and structure of part 2. We thank the other participants in Pillar VI for their comments on earlier drafts.

Oslo, February 2019
Marianne Jenum Hotvedt

Presentation, structure and aim

This paper gives an introduction to the research in Pillar VI: Labour law & regulations. Pillar VI is part of the cross-disciplinary project *The future of work: Opportunities and challenges for the Nordic models*, funded by the Nordic Council of Ministers and coordinated by Fafo.[1]

A team of legal scientists from four Nordic countries will conduct the research in Pillar VI. Coordinators are Marianne Jenum Hotvedt (University of Oslo, Norway) and Kristin Alsos (Fafo, Norway). Other participants are Annamaria Westregård (Lund University, Sweden), Natalie Videbæk Munkholm (Aarhus University, Denmark) and Marjo Ylhäinen (University of Eastern Finland, Finland).

Pillar VI is a study of how changes in the labour market in the Nordic countries will affect labour laws and regulations in the future. It is a legal study, using legal methodology. The study is cross-cutting, as it is related to the areas of change described and discussed in the thematic pillars of the project (Pillars II, III and IV). Consequently, Pillar VI has the same medium-term time perspective – 15-20 years – as the rest of the project.

The trends of change discussed in Pillars III and IV have a particular relevance for labour laws and regulations. Self-employment, independent work, new forms of externalised and flexible contracts (Pillar III) and new labour market agents – platforms and crowds as mediators, managers, and those taking on work (Pillar IV) – all concern *change in types and prevalence of labour relations*. Such change may affect the scope and applicability of labour laws and regulations. The rights of the person who earns her living by working are attached to certain types of work. Traditionally, the purpose and object of labour law have been related to a specific type of labour relation: the contractual relation between an employer and an employee. Other important norms regulating labour market issues – such as tax, social security and non-discrimination regulations – are also related to this specific relation, and to the existing legal binary divide between employees and self-employed. Hence, change in labour relations is a fundamental phenomenon that challenges the *structure and foundations* of labour law and regulations.

The digitalization of traditional forms of work (Pillar II) presents a challenge of a somewhat different nature. Such change has the potential to alter working practices and conceptions of the workplace and the working environment. A pressing question is whether digitalization of work may cause exposure to new hazards detrimental to workers' health and well-being. The consequences and challenges of new forms of work for occupational health will be studied in another part of the project (Pillar V). Exposure to new occupational health hazards may in turn lead to a need for changes in the legal framework. However, this does not seem to pose a fundamental challenge to labour law and regulations. Rather, it may trigger a need to update the specifics of working environment regulations. In order to focus on the most pressing challenge,

[1] https://www.fafo.no/index.php/forskningstema/prosjekter/aktive-prosjekter/item/the-future-of-work-2.

we therefore have chosen to concentrate the study in Pillar VI on the changes in labour relations discussed in Pillars III and IV.

One main aim of the study is to determine whether and how changing labour relations challenge the *structure and foundations* of labour law and regulation in a Nordic context. A related aim is to determine whether and how changing labour relations challenge the main *function and purpose* of labour laws and regulations, which, as we see it, is to counteract the power asymmetries between providers and engagers of labour. In a Nordic context, this entails striking a balance between businesses and individual workers in a societal perspective as well as providing legal protection for the individual. The study also seeks to suggest avenues for *legal development and reform*, responding to the identified challenges.

The study will consist of the present introduction, national reports in two parts and a concluding analysis.

This *introduction* will give reasons for the Nordic approach, explain the rationale behind the national reports more in detail and present a project plan and timeline.

The *national reports* will cover the four Nordic countries Sweden, Denmark, Norway and Finland. The analysis is structured; the national rapporteur will address specified research questions in two subsequent reports. The national report should cover all issues addressed in the research questions. The rapporteur, however, decides how the answers are structured and is free to include other issues that appear relevant in light of the aim of the study.

Part 1 of the report will address the interplay between key legal concepts and changing labour relations. The overarching question is, How do changing labour relations affect the interpretation and application of the key concepts of ‘employee’, ‘employer’, and ‘employment contract’ in a Nordic context?

The main aim of Part 1 is to identify if and how key concepts adapt or may adapt to labour relations with challenging characteristics. By doing so, we hope to gain a deeper understanding of the characteristics that cause legal uncertainty regarding employment status and the allocation of responsibility for labour law and employment protection. Thus, this part of the study seeks to identify weaknesses in the regulatory framework of Nordic labour law: Will there be ‘cracks’ in the Nordic systems when faced with changing labour relations?

Part 2 of the report will address the legal implications of unclear employment status. The overarching question is, How does an unclear and unresolved employment status affect the legal protection of the individual in a Nordic context? Here, the situation of the platform worker – a typical example of unclear employment status – is compared to the classic binary categories of the traditional employee and the genuinely self-employed. The study will focus on norms that protect the individual, reflect societal interests and are hallmarks of a Nordic welfare system, see further below.

The main aim of Part 2 is to identify how key elements of Nordic labour law and regulations apply to workers who apparently do not fit the classic binary divide. By doing so, we hope to gain a deeper understanding of the consequences of an unclear employment status in the Nordic systems. Thus, this part of the study seeks to identify risks related to the weaknesses of the regulatory framework discussed in Part 1: What is at stake when the Nordic systems are faced with changing labour relations?

The analysis in Part 1 and Part 2 is explained in more detail below.

The *concluding analysis* will provide comparative perspectives and discuss avenues for legal development and reform. Based on the national reports, we will address the big questions for the future of work, such as, What are the common challenges –

weaknesses and risks – confronting Nordic labour law and regulations? How can uncertainty regarding employment status be resolved, and how can key elements of labour law and welfare protection be ensured if uncertainty prevails?

We hope this study will be relevant and perhaps provide inspiration beyond a Nordic context.

A Nordic and functional approach

The study applies a *Nordic and functional approach* to the challenges created by changing labour relations.

We will study these challenges from the perspective of *national law*. As the national rapporteurs cover their own jurisdiction, the 'Nordic' approach is more precisely an approach based on the commonalities and conflicts found in national reports from Sweden, Denmark, Norway and Finland.

International law provides an important framework for national labour laws and regulations. The Nordic countries are legally committed to many of the same instruments of human rights and international labour standards, such as the European Convention of Human Rights, the European Social Charter and the core conventions of the ILO. Sweden, Denmark and Finland are all members of the European Union. Norway is not a member, but is committed to the main principles of EU law by its accession to the EEA agreement.[2] Consequently, the relevant international framework is more or less the same for all of the Nordic countries.

EU/EEA regulations are particularly relevant to the issues addressed in this study. Minimum labour standards in EU/EEA law set a 'floor' for labour law protections in the Nordic countries, with numerous detailed requirements. Principles of EU/EEA market law, on the other hand, represent certain limitations on national labour law. For instance, EU/EEA competition law affects the scope of collective bargaining and collective agreements.[3] In recent years, the Court of Justice of the EU (the CJEU) has developed and expanded the requirements pertaining to the *scope* of national law implementing EU minimum labour standards.[4] First, the CJEU has applied an EU concept of worker when interpreting directives protecting health and safety.[5] Second, the CJEU has seemingly reversed its position in *Danmols*, where it was left to national law to decide the concept of employee with reference to the purpose of *partial* harmonization.[6] Throughout a series of cases, the CJEU has developed requirements related to the scope of protection in national law.[7] In sum, the significance of an *EU concept* of worker seems to be growing at the expense of national control over the key

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[2] Iceland is in the same position as Norway.
[3] TFEU article 101 prohibits cartels and prohibits and other agreements that could disrupt free competition. Restriction of competition is 'inherent' in collective agreements between organizations representing employers and workers. Still, under certain conditions, such agreements are exempt from the scope of TFEU article 101, see case C-67/96 *Albany,* EU:C:1999:430. The 'Albany-exception', however, is related to the concept of worker. Although the ECJ has accepted that the exception applies to 'false self-employed', the scope of the exception is a matter of EU law and not left to national law, see case C-413/13 FNV *Kunsten Informatie en Media*, EU:C:2014:2411. See further, Annamaria Westregård, 'The Notion of 'employee' in Swedish and European Union Law. An Exercise in Harmony or Disharmony?', in Laura Carlson, Örjan Edström and Birgitta Nyström (eds.), *Globalisation, Fragmentation, Labour and Employment Law – A Swedish Perspective*, Uppsala 2017 pp. 185–206.
[4] Marianne Jenum Hotvedt, "Arbeidstaker – quo vadis? Den nyere utviklingen av arbeidstakerbegrepet", *Tidsskrift for Rettsvitenskap*, 1/2018 pp. 42–103 (Hotvedt 2018a).
[5] *Ibid*. pp. 81–84.
[6] Case 105/84 *Danmols*, EU:C:1985:331. The case concerned the original directive 77/187/EEC on the transfer of undertakings. The positions are codified in the current directive, 2001/23/EC.
[7] Hotvedt 2018a pp. 84–90.

concepts and scope of protection.[8] EU/EEA law may therefore play a more important role in the interpretation and application of the key concepts in national law in the future.

Still, an approach focusing on national law has clear relevance. The labour standards in EU/EEA law are not comprehensive. Requirements related to the scope of EU/EEA labour standards are not very precise. Even an EU concept of worker/employee seems to provide some leeway for national law in grey area cases.[9] Thus, the key concepts in national law may play an important role when addressing changing labour relations.

For the same reasons, one might argue that an approach focusing on variations in the conceptual traditions in national law is particularly interesting. Such an approach could highlight the potential of national law to overcome the challenges facing labour laws and regulations. This, again, could feed into the debate on whether national initiatives are preferable to those at the EU level or whether the two kinds of initiatives could supplement each other.

A common trait of the Nordic countries is that important labour market issues are left to collective bargaining. Assigning regulatory (and political) power to labour market actors is an institutional arrangement that makes the cooperation between the state and labour market actors an essential part of the societal model.[10] Still, there are significant differences regarding the *degree* of regulatory powers conferred to labour market actors. Notwithstanding the common framework of EU/EEA law, the implementation mechanisms therefore vary in the Nordic countries.

The issues relevant for this study may be governed by different types of regulations, in legislation or collective agreements. Furthermore, challenging labour relations may have different 'labels' in different national contexts. We therefore have chosen a *functional approach*. This approach entails a focus on how the legal material responds to the *substantive issues* instead of discussing types of regulation or formal categories. This approach will not only help us overcome existing differences in the legal systems, but it will also facilitate discussions on the challenges labour laws and regulations face on an aggregate level and with a view to the future, responding to the main aims of the study.

The functional approach in Parts 1 and 2 of the study is described in more detail below.

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[8] *Ibid*. p. 90. See also, Jens Kristiansen, "På vej mod et fælleseuropæisk arbejdstagerbegrep?", in Bernard Johann Mulder mfl. (ed.) *Sui Generis. Festskrift til Stein Evju*, Oslo 2016 pp. 389–398.
[9] Hotvedt 2018a pp. 96–97.
[10] Stein Evju, "Kollektiv autonomi, den 'nordiske modell' og den fremtid", in Arbeidsrett 1–2/2010 pp. 1–29, see in particular pp. 3, 5–6.

Part 1: Key concepts and changing labour relations

Introduction

Part 1 is a study of the interplay between key legal concepts and changing labour relations.

The *key legal concepts* are the concepts of ‘employee’ and ‘employer’ and the relation between them: namely, the employment relationship. These concepts are the key to – or building blocks of –labour law. They have interrelated justifying, delimiting, and regulatory functions: They legitimise and explain the need for labour law norms, they determine the scope of most labour law norms, and they provide the structure for these norms. Most labour law norms are phrased as duties of the strong party of the employment relationship (the employer) to protect the weaker party (the employee). Statutory acts of worker protection usually use these terms to define the personal scope and the responsible party. We therefore consider challenges to the key concepts to be fundamental challenges to labour law and regulations.

The relevant *change in labour relations* is identified in light of the empirical work in the other pillars (in particular Pillars III and IV).

As regards the *interplay*, the overarching question is, How do changing labour relations affect the interpretation and application of these key concepts? The specific research questions are elaborated below.

The aim at this stage is twofold. First, we hope to determine *whether* and *how* changing labour relations *challenge* the key concepts in national law. Second, we hope to provide insight as to *what unites* and *what separates* the Nordic legal traditions as regards the interpretation and application of the key concepts. The findings will form the basis for the concluding analysis, where we will consider possible avenues for legal development and reform in a Nordic context, responding to the identified challenges.

In line with the *functional* approach, we will discuss the characteristics of changing labour relations and not focus solely on how work relations are labelled in a national context (e.g. ‘egenanställning’, ‘tilkallingsvikar’, ‘gig work’ etc.). The functional approach entails a focus on certain *types* of characteristics and on *how* they challenge the key concepts.

In an attempt to balance the need to discuss issues in principle and on a specific level, we have phrased the research questions guiding the study on both levels, both *in abstracto* and *in concreto.*

Before we present the research questions, we will briefly describe the characteristics on which we choose to focus and the challenges they represent, as well as address whether there are common traits in the Nordic conceptual traditions.

Challenging characteristics

Labour relations may challenge the key concepts in different ways. Our chosen point of departure is certain characteristics of labour relations that are present in today's Nordic labour markets.[11] We consider these characteristics to be potential challenges to the key concepts.

- *Sham or pro forma self-employment*: contracts formally framed as contracts for (independent) services, but which in reality are contracts of employment. Such arrangements challenge – or rather circumvent – the protected status of an employee. As long as the 'real' legal status as an employment contract is clear, this is however mainly an enforcement issue.
- *Grey area-contracts*: work relations with both dependent and independent features, when the realities (and not just formalities) of the working relationship are considered. These contracts challenge predictability and the need for a clear legal status, and – in situations where the person is an employee – the protection and rights conferred on employees.
- *Fragmented contracts*: work performed in a series of short term-contracts instead of an open-ended contract. These contracts may affect the classification of the relation. If the relation is not considered an employment contract, it challenges the protection and rights conferred on employees. Even if the relation is considered an employment contract, it challenges the predictability of work and pay.
- *Empty or marginal contracts*: where the main obligations of employment – the duty to provide/perform work and to provide/receive pay – are not defined or are very limited in scope. Examples are marginal part time, zero hour contracts, 'ansettelse uten garantilønn' etc. The challenge posed by this type of contract is similar to the challenge posed by fragmented contracts, see above.
- *Triparty contracts*: contracts *formally* dividing and spreading key employer functions, such as contracts stipulating a duty to work under subordination and control of a third party. The typical example is agency work . This may affect the classification of the relation, and therefore challenge the protected status. Even if there is an employment contract, this arrangement it challenges the allocation of employer duties and may have implications for the level of protection.
- *Triangular relations:* work relations where employer functions *in reality* are divided or spread, such as relations where entities other than the formal employer exercise key employer functions, either directly or indirectly, by decisive influence.[12] These relations pose challenges similar to those posed by triparty contracts, although the former do not necessarily constitute a triparty contract in a strict sense.
- *Artificial employment contracts:* contracts where the formal 'employer' only undertakes certain administrative employer obligations, deducting taxes and reporting to the government, but not key employer functions, such as the obligation to provide work and pay or managerial prerogatives. The typical example is 'egenanställning'. One might ask whether they are an employment contract at all.

[11] Pillar III studies self-employment, independent work, and new forms of externalized and flexible contracts. Pillar IV focuses on new labour market agents – platforms and crowds as mediators, managers and those taking on work. Reports from Pillars III and IV will be published on the project website, see: https://www.fafo.no/index.php/forskningstema/prosjekter/aktive-prosjekter/item/the-future-of-work-2.

[12] In Norway, this concerns the doctrine of the "real employer".

These contracts pose a different challenge to the classification of the work relation and the issue of formalities vs. reality. From the formal perspective of the employment contract, it challenges the predictability of work and pay. The person may, however, in reality be operating as an independent contractor. From this perspective, it challenges the connection between 'real' employment status and rights/obligations vis-à-vis the government. It also challenges a notion of coherence between employment law and tax/social security law.

This list is not exhaustive. For instance, one could add an international aspect: work relations may have a cross-border or global character.[13] This raises jurisdictional issues and questions related to the choice of law. In light of the Nordic context of this study, we leave those issues aside.

Some of the characteristics overlap, and they may appear in different combinations. For example, both fragmented contracts and empty or marginal contracts can be considered grey area contracts.

Platform work combines most of the characteristics.[14] The problem of sham self-employment is highly relevant, as most platforms contract workers as independent contractors. Platform work typically has both autonomous and subordinated features, partly – and perhaps mainly – because of the fragmented, empty, or marginal character of the platform–worker relation. In the typical platform model, the worker is formally free to choose the time, place, and amount of work. Nevertheless, the model can leave the worker economically dependent and allows new types of control, namely by algorithms and customer ratings. In addition, platform work has a triparty structure involving platform, worker, and customer. Further complexity is introduced where 'the platform' is in fact a group of companies. Consequently, platform work can be considered an extreme case of legal uncertainty, affecting the applicability and effectiveness of labour laws and regulations. This is one reason why we consider platform work a suitable case for a more in-depth study, see part 2.

A common Nordic conceptual tradition?

One might ask whether there is a *common* conceptual tradition in Nordic labour law. Some common features can be identified and serve as a point of departure.[15]

The *regulatory approach* to the key concepts is mainly jurisprudential. There are no explicit general legal definitions of employer/employee. Legislative definitions, however, occur in the different legal frameworks. However, the wording varies and provides limited guidance. Instead, jurisprudence has played the largest part in defining the employment relation. Thus, a jurisprudential approach seems to permit a flexible and variable understanding of the key concepts.

As regards the *concept of 'employee'*, the interpretation hinges on access to protection or rights in a specific legal instrument. There are several common features. The

[13] Some examples are international transport and digital work performed online in a global market.
[14] From a Norwegian context, see Kristin Alsos et. al, *Når sjefen er en app*, Fafo-rapport 2017:41.
[15] The reflections in the following paragraphs build on previous work, see Marianne Jenum Hotvedt, 'The contract-of-employment test renewed. A Scandinavian approach to platform work', *Spanish Labour Law and Employment Relations Journal,* Vol. 7, 1–2 (2018) pp. 56–74, see in particular pp. 60–67 (Hotvedt 2018b). The multi-factor test in Finland is, however, used in a slightly different context; the evaluation of characteristics is attached to the employment relation and contributes only indirectly to the concepts of 'employee' and 'employer'. As regards the Finnish system, the research question developed below will therefore be examined by studying the concept of the employment relation.

legal test that governs the classification is a *multi-factor test*, requiring a broad assessment of the *realities* of the parties' relations, guided by a list of indicators or criteria that are largely similar. The Nordic countries share the doctrinal basis for this approach.[16] The employment contract is regarded a social form of cooperation. This has prepared the ground for the broad assessment of the circumstances in the individual case. The concept tends to be described as 'wide' in case law and legal doctrine, and the purpose of the rules in question may affect how the concept is interpreted or applied.[17]

Thus, as a point of departure, the concept of employee in a Nordic context seems to entail a certain flexibility that may serve to safeguard the purpose of the relevant rules when faced with changing labour relations. There may, however, be variations in the different national contexts that need further examination.

The common features of the *concept of 'employer'* are not quite as evident.[18] The concept has the same common core in the Nordic countries as elsewhere; the employer is the stronger party of an employment relationship, typically a contractual relation. Still, it varies among the Nordic countries whether entities other than the formal contractual party may be regarded as the employer in a specific legal context. First, whether or not specific employer obligations may apply to relations other than the contract of employment depends on the country. Second, the Nordic countries take somewhat different approaches to identifying who is the responsible party in such a relation. Both types of variation reflect different nuances in the concept of employer.

However, contract law may provide some basic common features. Contract law in the Nordic countries builds on the same principles when establishing contractual obligations. Compared to the common law tradition, Nordic contract law provides a more flexible framework. A contractual obligation is not solely based on the expressed will of the parties; it can be based on the justified expectations ('berettigede forventninger') of one party.[19] This requires a broad assessment that may be adaptable to the type of contract in question. Consequently, even the general framework of contract law might allow flexible and perhaps purposive interpretations of the employer concept.

Again, as a point of departure, the concept of employer in a Nordic context seems to entail at least some flexibility that may serve to safeguard the purpose of the relevant rules. There also seem to be important variations in the different national contexts that need to be mapped and discussed.

Research questions *in abstracto*

These questions will focus on the extent to which the key concepts have a flexible and *purposive* character. The aim is to describe the inherent *general potential* of national law to adapt to the challenges of new forms of employment. It is difficult to assess flexibility and purposiveness as such. However, indicators can be identified and discussed.

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[16] *Ibid*. p. 61 with further references.
[17] *Ibid*. pp. 62 –63 with further references.
[18] *Ibid*. pp. 66–67 with further references.
[19] *Ibid*. p. 64. See further Marianne Jenum Hotvedt, *Arbeidsgiverbegrepet. En analyse av grunnlaget for arbeidsgiverplikter*, Gyldendal Juridisk 2016, pp. 299 ff. with further references to Norwegian, Swedish and Danish law.

One indicator of a purposive and flexible approach could be the use of a principle of 'primacy of the facts' – giving preference to realities of the working relationship as opposed to formal contractual arrangements. Scrutiny of possible attempts at circumvention is another.

As regards the concept of employee, we furthermore emphasise the willingness to consider individual circumstances and different kinds of dependency (organizational and/or economic). As regards the concept of employer, a key issue is the willingness to look beyond the corporate veil and consider employer obligations for entities other than the formal contractual party.

Against this backdrop, we plan to address the following questions:

General/methodological:

- Is there an explicit methodological approach (in case law or elsewhere) to the interpretation and application of the key concepts, i.e. 'a purposive approach'?
- Is circumvention explicitly addressed (in case law or elsewhere) when applying the key concepts?

Concept of employee:

- How are tensions between contractual formalities and realities of the working relation solved? Do contractual formalities have some importance, little importance, or none?
- What are the relevant criteria when assessing the realities of the working relation? Have certain criteria been regarded as essential or typically decisive?
- Can different kinds of dependency justify status as an employee? Are there examples of economically dependent workers classified as employees without clear indications of subordination by management and control?
- Is the potential business setup – or lack thereof – relevant when applying the concept of employee?
- Are individual circumstances (such as age, competence, financial/family situation etc.) relevant when applying the concept of employee? Are there examples where individual circumstances have been important or decisive?

Concept of employer:

- How are tensions between contractual formalities and realities of the working relation solved? How important is the formal status as a contract party when identifying the employer?
- Is a contractual bond between employer and employee essential?
- Are there examples where entities other than the formal employer have been held liable as employer instead of, or in addition to, the formal employer? If so, for what rights or what type of protection?
- Is there a distinctive 'labour law' approach to the allocation of employer responsibility that can be distinguished from the general principles of contractual and corporate law (general principles of identifying the contract party, general principles of 'piercing the corporate veil' etc.)?

The questions are comprehensive. Some of them might be difficult or impossible to answer. A realistic ambition is to present the established doctrine, convey findings in

relevant research and provide interesting examples from case law. We should also highlight which questions remain unanswered and where there are conflicting views.

Research questions *in concreto*

Subsequent discussion will focus on *specific responses* to the challenging characteristics listed above in national law. The questions seek to address the main challenges – to the protected status of the employee, to the allocation of employer responsibility and predictability (of work and pay) within an employment relation. Specific types of work relations from a national context may serve as examples or illustrations.

Against this backdrop, we plan to address the following questions:

Addressing *triparty contracts* such as, but not limited to, agency work:

- Can triparty contracts be classified as employment contracts? Is agency work classified as an employment contract, and are there other examples of triparty contracts classified as such?
- If a triparty contract is an employment contract, has this affected the classification of other types of triparty contracts?
- If a triparty contract is an employment contract, is the formal contract party the sole employer, or can the third party be held responsible for (some) employer obligations? In the case of agency work, which employer obligations rest on the agency and which rest on the user entity?
- How does subordination under a third party affect the classification? Can control exercised by a third party justify an employment contract? Why/how?

Addressing *fragmented and empty or marginal contracts*, such as, but not limited to, 'tilkallingsvikarer', 'zero hour contracts', 'marginal part time':

- Are empty or marginal contracts classified as employment contracts? How does fragmentation affect the classification? Is there a minimum duration or amount of work required to establish an employment contract?
- If a fragmented work relation is an employment contract, is it considered one open ended contract (with a flexible duty to provide/perform work and to provide/receive pay) or a series of temporary contracts? If both approaches apply, when is it one or the other, and what are the implications?
- Under what circumstances is the employer responsible for providing *future* work and pay? Under what circumstances is the employer responsible for providing *more*/a larger amount of work and pay?

Addressing *formal employment contracts* such as, but not limited to, 'egenanställning':

- Does national law recognise such arrangements? Have the legislators, courts or other authorities (welfare/tax/labour inspection) assessed the classification of such contracts?

Addressing *sham self-employment* – the enforcement issue:

- What are the available remedies to clarify employment status? Can this only be decided by a court, and are supportive measure available?

Addressing *platform work* specifically:

- Have platform–worker relations (relations between the platform and the worker) been classified in an employment context, by a court, by public authorities or by the social partners? If so, how are they classified?
- If there are examples of platform–worker relations classified as employment: What is the legal reasoning behind such classification?

Part 2: Protection of platform workers

Introduction

Part 2 is a closer study of the legal implications of unclear employment status.

Unclear employment status will be discussed by using the platform worker as a typical example, or archetype. Platform work typically combines several of the characteristics described in Part 1. Platform work therefore poses a multi-faceted challenge to the key concepts, related to the individual's protected status as an employee, predictability of work and pay, as well as the allocation of employer duties and the mere enforcement issue. In sum, there is a fundamental uncertainty related to the employment status of the typical platform–worker relation. This makes the platform worker an interesting case to study the implications of such uncertainty. Furthermore, platform work is a new type of labour relation, closely related to technological change. As technological change is one of the megatrends shaping the future of work, and a central premise of the future of work debate, it underpins the main research questions in the project.[20] A focus on platform work in Pillar VI therefore seems suitable to link our study to the work in other pillars and to the overall aim of the project.

Platform work, however, is not *one* distinctive labour relation. It is dynamic and heterogeneous, and platform models differ and evolve.[21] Our archetype is therefore a *typical* platform worker, defined in order to address the legal challenges described above and in light of the work in Pillar IV (and III).

The *legal norms* in focus are the key elements of Nordic labour law and welfare protection. We regard norms that protect the individual, reflect societal interests, and are hallmarks of a Nordic labour market model to be the key elements of Nordic labour law and welfare protection. More specifically, we focus on norms underpinning three characteristics of the Nordic labour market model: a healthy and productive work force, strong labour market actors, and a high level of social security. By using this approach, we seek to address the legal implications both for the protection of the individual and for the societal interests inherent in the Nordic labour market model.

As regards the *implications*, the overarching question is, how does an unclear employment status affect key elements of Nordic labour laws and regulations? We will address the question by mapping how certain norms described above apply to a typology of labour relations: the traditional employee, the genuinely self-employed, and the typical platform worker. Highlighting the differences in key elements of legal protection for these three categories will help identify the main effects of an unclear status in a system based on binary categories.

[20] Jon Erik Dølvik and Johan Røed Steen, *The Nordic future of work. Drivers, institutions, and politics*, TemaNord 2018:555 (Dølvik/Steen 2018).

[21] From a Nordic perspective, see Jon Erik Dølvik and Kristin Jesnes, *Nordic labour markets and the sharing economy: Report from a pilot project*, TemaNord 2017:508, pp. 22–26.

The aim at this stage is twofold. First, we hope to identify the main *effects* on the regulatory system of challenges to the binary divide, including the *risk of a lack of protection* from an individual perspective. Second, as in Part 1, we hope to provide insight as to *what unites* and *what separates* the Nordic systems. Like the findings in Part 1, this will contribute to the concluding analysis of avenues for legal development and reform in a Nordic context.

Again, the analytical approach is *functional*. The choice of norms for analysis is based on the norms' functions: protection of the individual, reflection of societal interests, and hallmarks of a Nordic labour market model, see further below. Furthermore, in order to overcome existing differences in the legal frameworks of the Nordic countries, we will focus on the *scope* of these norms. Rather than discussing the specifics of the substantive protection, the idea is to map differences in how the relevant norms apply to the three categories.

Before we present the research questions, we will first specify the typology of labour relations and briefly describe the key elements of protection.

Typology of labour relations

The analysis in this part of the study is based on a typology of three types of labour relations. Here, we will specify the characteristics of each type or category.

1: The traditional employee: a person performing work under an open-ended employment contract with one employing entity, providing full time employment and with a clear obligation for the employer to provide work and pay.

2: The genuinely self-employed: a person performing work in the capacity of a legal entity owned and controlled by the same person. The legal entity is a registered company, it services several customers, it charges its services with VAT, deducts the relevant taxes and has signed (voluntary) insurance policies providing i.e. work injury and sickness coverage for this person.

3: The typical platform worker: a person performing work for different customers, mediated or provided by a digital platform. The person is not party to a formal contract of employment, neither with the platform nor with the customers. The person has on the other hand not made arrangements required or available for self-employed, such as registering a company, charging VAT, deducting taxes, signing insurance policies providing i.e. work injury and sickness coverage, or hiring his or her own employees. The person has no formal obligation to continue working for the platform, and the platform has no clear obligation to provide work and/or pay. Thus, formally, the person has considerable freedom to decide the amount of work, what tasks to perform, and to choose the time and place of work. However, the person is subject to a rating mechanism where customers can rate the work performance, and the platform presents the ratings to potential customers.

Key elements of Nordic labour law and regulation

The analysis will focus on certain norms regarded as key elements of Nordic labour laws and regulations. Here, we will explain what norms are regarded as key elements and why.

From a comparative perspective, a distinctive feature of the Nordic labour market models is the combination of high productivity and, comparatively speaking, a high

level of social equality.[22] At least three characteristics are considered particularly important in this regard: a healthy and productive work force, strong labour market actors, and basic social security.

All three characteristics reflect societal interests deeply rooted and institutionalised in the Nordic countries: Protecting the health and safety of the individual is an undisputed value. Strong labour market actors are vital for close and coordinated cooperation with the states on economic policy, providing stable and competitive economies. Collective bargaining serves important regulatory functions, and the bargained outcomes (i.e. levels of pay) contribute to social equality. The means of providing social security and levels of benefits are continually debated. Nevertheless, basic social security – such as benefits ensuring income for out-of-work individuals – is a fundamental part of the Nordic welfare systems.

Consequently, we consider the norms underpinning these three characteristics as key elements of Nordic labour law and regulation.

As regards *a healthy and productive work force*, regulations on health and safety and working time are clearly important. Essential norms are the requirements of a safe working environment, in particular regulations on working time, including what is considered full-time work, rights to breaks and rest periods, and paid annual leave.

High union density and broad coverage of collective agreements are factors contributing to *strong labour market actors*. These factors, in turn, depend on legal norms allowing (and encouraging) membership in labour market organizations and collective bargaining mechanisms and recognising and enforcing the outcomes of such bargaining.[23] In this perspective, the criteria for membership in trade unions and employer organizations are important, as is the scope of collective bargaining and legal recognition of collectively bargained outcomes. With respect to the latter two, the intersection between collective bargaining and competition law plays a vital part.

As already suggested, benefits ensuring income for out-of-work individuals are a key element of *basic social security*. Thus, we find it natural to focus mainly on rights to benefits related to unemployment, parental leave, and sickness leave and only describe briefly the right to pensions.

Analysing how such norms apply to the traditional employee, the genuinely self-employed and the typical platform worker, respectively, will shed light on the legal implications of an unclear employment status. As the selected norms both provide protection for the individual and underpin societal interests, the study addresses the legal implications on two levels, the individual and the societal.

Research questions

There are relevant norms in all key areas of the Nordic legal systems. The substantive norms, however, vary. The main task is to map differences in how the relevant norms apply to the three categories of labour relations: (1) the traditional employee, (2) the genuinely self-employed and (3) the platform worker. A brief description of the relevant norms may be necessary, but an in-depth analysis of the substantive norms is

[22] For more information, see Dølvik/Steen 2018, pp. 41–63 with further references.

[23] Union participation rates are assumed to be related to the type of labour relation. In Norway the rates are higher for workers in standard employment than for workers in non-standard employment, see Kristine Nergaard, *Organisasjonsgrader, tariffavtaledekning og arbeidskonflikter* 2014, Fafo-notat 2016:07 p. 15. Research also suggests that changing labour relation might be the reason for declining union participation in Finland, see https://www.hs.fi/politiikka/art-2000005913804.html.

not a priority. The research questions therefore focus primarily on scope and allocation of responsibilities. The answers to the questions may overlap, depending on the national context.

A healthy and productive work force – regulations on health and safety and working time:

Legal basis:
- What is the national legal basis for regulating a safe working environment? How is the Directive on Occupational Health and Safety implemented? Are there additional national regulations?
- What is the national legal basis for regulating working time? How is the Working Time Directive implemented? Are there additional national regulations?

Scope/allocation of responsibilities:
- Do regulations of the working environment and working time apply to persons in categories 2 and/or 3, in addition to 1? Completely or partly?
- Are certain groups exempt, and what are the criteria for exemptions? (i.e. 'independent positions', marginal part time, working from home, etc.)
- When the regulations apply, who is the responsible party (the 'employer')? Regarding category 3, can a platform be responsible?

Enforcement:
- What are the mechanisms for enforcement for breach of the regulations?

Strong labour market actors – labour market organization, collective bargaining and collective agreements:

Membership of labour market organizations:
- What are the criteria (if any) for membership in trade unions that may hinder persons in categories 2 and/or 3 from entering? Are there examples of unions targeting persons in category 2 and/or 3?
- What are the criteria (if any) for membership in employers' organization that may hinder platform companies from entering? Are there examples of platforms entering employers' organizations?

Collective bargaining mechanisms and recognition of collective agreements:
- What are the legal requirements under national law to constitute a collective agreement?
- Can collective bargaining and collective agreements (in principle) cover persons in categories 2 and/or 3? Are there examples of collective agreements covering persons in categories 2 and/or 3?

The intersection of collective agreements and competition law:
- What is the legal basis in national law for exempting collective agreements from competition law? Does the exemption explicitly deviate from the exemption under EU/EEA competition law?
- Are collective agreements for persons in categories 2 and/or 3 accepted under competition law for certain trades (i.e. journalists or photographers) or certain types

of contractual relations (i.e. freelancer, 'honorar-modtager')? What is the legal basis and the legal reasoning for allowing such agreements?

Basic social security – benefits related to unemployment, parental leave, sickness, injury and retirement/old age:

Legal basis and scope:

- What is the legal basis for benefits related to unemployment, parental leave, sickness, injury and retirement/old age? If the benefits are regulated in collective agreements, who falls outside their scope?
- What are the eligibility criteria for each benefit, and are the criteria differentiated with respect to categories 1, 2 and 3? How will affiliation with category 1, 2 or 3 affect the levels of the different benefits?
- Are there alternative social security benefits available for persons who do not meet the requirements?

Allocation of responsibilities:

- Who is responsible to fund and/or to pay the different benefits?
- What legal duties rest on the 'employer' in this regard? Do duties for the 'employer' apply to benefits for persons in category 3?

Project plan and timeline

A preliminary project plan and timeline for Pillar VI was presented in the project proposal:

Phase	Aim	Activity	Output
2018 Inception	- Develop and specify research questions - Plan further work - Decide on a detailed project plan	- A constitutive workshop for the research group - Participate at the FoW conference in Stockholm, May 2018	- Paper on research questions and a detailed project plan
2019 Groundwork	- Map and discuss challenges related to the research questions in each country comparatively	- 2 workshops for the research group or 1 workshop and 1 seminar - Participate at the ILO 2019 Conference?	- Working papers on each country / specific research questions comparatively
2020 Comparative and finalising work	- Synthesise comparative perspectives - Suggest and discuss possibilities for development and change	- 1 workshop	- Final report

The work planned in the *inception phase* (2018) has been completed. The output is this introduction paper. The plan and timeline of the next phase of *groundwork* (2019) is specified below:

2019 Ground work	Aim	Activities /deadlines	Output
Part 1 Key concepts and changing labour relations	- Map and discuss the interplay between key concepts and labour relations with challenging characteristics in the Nordic countries	- April 4–5: FoW-conference in Reykjavik - April 12: Draft reports - June 3: Workshop - June 30: Final reports	- National reports from Sweden, Denmark, Norway and Finland
Part 2 Protection of platform workers	- Map and discuss the implications of unclear employment status for key elements of labour laws and regulation in the Nordic countries	- October 15: Draft reports - November 11–12: Workshop - December 1: Final reports	- National reports from Sweden, Denmark, Norway and Finland

In the November 2019 workshop, the research team will specify the plan and timeline of the *final phase* (2020) of comparative analysis and discussions of future development and reform. However, the output – a paper with analysis and recommendations – will be finalised in September 2020.

Labour law in the future of work

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, and this paper gives an introduction to the research in Pillar VI Labour law & regulations.

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Fafo-paper 2019:06
ISSN 0804-5135
Order no. 10296