

The Contemporary Challenge and Government Responses on Delivery Platform Worker Rights and Benefits in Taiwan: The “MOL Guidance 2019” and the “Taipei City Ordinance 2019”

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The traditional dichotomy of employee and independent contractor is no longer a practical test to properly decide the modern workers' legal status and the surrounded labor rights. It is particularly true when facing the diversity of the gig economy work styles. It has been a well-known but unsolved issue for years in Taiwan, and the Ministry of Labor and the Taipei City initiated some preliminary steps to intervene in the dilemma by guidance and ordinance in 2019.

This article aims to discuss the worker classification issue on Taiwan's delivery platform and the most current government guidance and local city ordinance. By introducing the government guidance, the city ordinance, and the gig platform's responses, this article strives to provide an image of the current power dynamic among the government, the platform, and the labor.

I. The delivery platform worker and its controversy in Taiwan

The classification of delivery platform workers and the labor rights and benefits upon their legal status are among the most controversial issues in Taiwan. Like other states' universal experiences on platform workers, the traditional dichotomy test did not seem to be a tailored approach to determine the platform workers' appropriate classification. This legal deficiency has long been on the need-to-solve problem list and was lifted to the top priority in October 2019, after the two tragic car accidents that took away two delivery agents' life within three days. The media's intense attention urged the Ministry of Labor (hereafter MOL) and Taipei City Government (the city with the highest number of delivery agents) to actively respond and prevent the same accident from occurring again.

The high public awareness, however, did not make finding a solution for this particular problem any easier. It is an issue caused, although with some different arguments, by the developing technology and the social change, which is the future trend that has no return. Discussions that believe it is a positive change usually focus on the flexibility and employee autonomy that these platforms can provide. It also creates the chance for workers to have multiple jobs and extra income by granting them access to customers who need their service through the platform. For those workers who want to utilize their free time better, the platform job is definitely a plus.

The counter-arguments, on the contrary, are applying a more critical lens on these jobs. They raise the concern of willful misclassification to avoid the mandated labor right and benefits. From their perspective, the digital delivery platform is abusing a loophole, and that legal vacancy needs to be covered. The fact that people are working hard for the company without having appropriate labor rights and benefits is the symbol of

exploitation, and the new technology is just the sugarcoat on it.

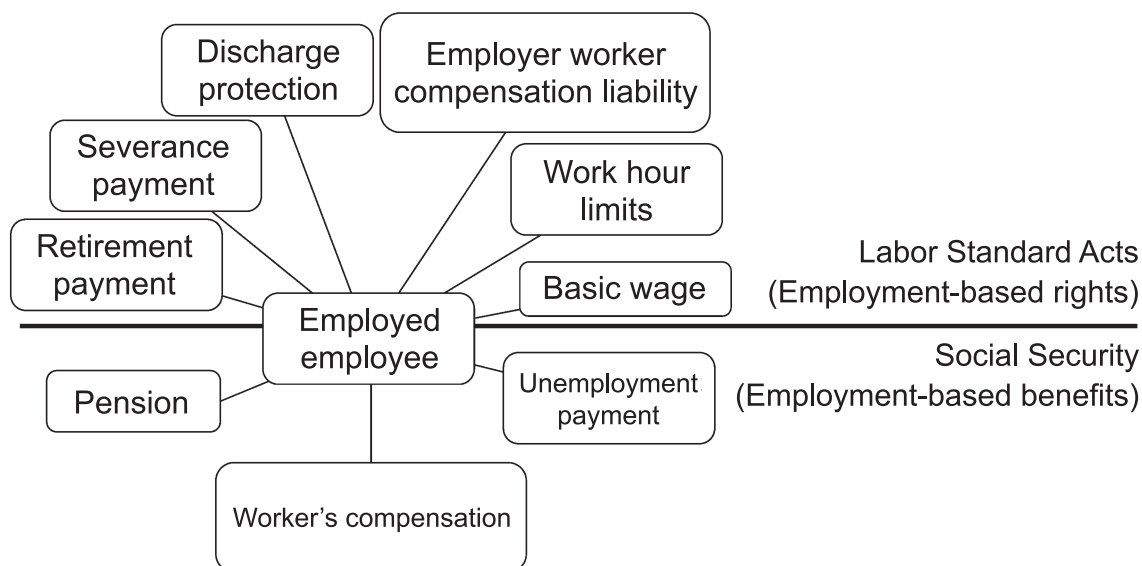
A statistic report generated by one of the major job banks may provide more information to think about this issue. Among 300 delivery agents, 70% work as a full-time worker, and in these full-timers, their monthly salary can range from NT\$ 20,000 (USD 650) to NT\$ 180,000 (USD 6,000). Moreover, the average monthly salary for all 300 agents is NT\$ 42,000 (USD 1,400). In the meantime, the average of college-graduate workers is only NT\$ 30,000 (USD 1,000).¹ From the income standpoint, no matter working full-time or part-time, choosing to be the platform worker may be a reasonable choice.

To further reveal the controversy and provide a better solution for delivery platform workers' rights and benefits, this article will first introduce the basic legal framework of Taiwan's employment law, the MOL guidance, and the Taipei City ordinance in Chapter 2 and Chapter 3. The platform's responses to those rules above and how it reacts to specific regulations will be introduced in Chapter 4.

II. The differences between an employee and an independent contractor in Taiwan: Eligibility of employment-based labor rights and social security benefits

Taiwan has a whole set of labor statutes that provide protective rights and social security benefits to employees. The Labor Standards Act mandates the floor of labor conditions as protective rights, included but not limited to, e.g., discharge protection, working hour limits, basic wage, severance payment, retirement payment, and worker compensation. The social security benefits that an employee may enjoy are mainly provided by the Labor Insurance Act, which established a government-operated labor insurance policy that provides, including but not limited to, accident payment, maternity payment, worker compensation, pensions... etc.

These major protective labor laws and policies have one in common: they are both operated on the employment-based presumption, generally speaking. A worker needs to be employed as an employee to trigger



Prepared by the author.

Figure 1. Major employment-based labor rights and social security benefits

1. Replacing life by salary! Job Bank statistics: Delivery agent salary range from NT\$ 20,000 to NT\$ 180,000, The Storm Media, <https://www.storm.mg/article/1834982> (last checked Feb.14, 2020).

the employer's legal obligation to maintain basic labor conditions and sign the labor into the labor insurance policy. If the worker is an independent contractor, the worker is not considered employed and the rights and benefits² mentioned above are not active options for the worker. The "employment-based" rights and benefits reflect the ideology that employers are obligated to a person who works under their instruction and control for their business interests. To be more specific, the traditional employee and non-employee dichotomy was a tool to determine whether the employer is responsible for the cost of these employment-based labor rights and benefits.

Since the cost differences between hiring an employee and an independent contractor can be huge, it creates an illegal incentive to misclassify workers to reduce business expenses. That is why a red flag is pinpointed when the platform claims its delivery agents are all independent contractors. The platform company puts itself in the center of the debate on whether the gig economy business model is actually sugarcoating its intentional misclassification by the digital application. To further address this controversy, the Ministry of Labor and the Taipei City have both responded with guidance and ordinance, respectively.

III. The Ministry of Labor Guidance and Taipei City Ordinance

A. MOL Guidance on determination of labor contract

Right after the deadly accident on food delivery agents in October 2019, the newspaper revealed that the deceased workers were not eligible for worker's compensation under the labor insurance act. Labor insurance is a mandatory social insurance policy, and employers must sign up all the employees they hired, although with limited exceptions, through labor contracts. The two deceased delivery agents, however, according to the platform, signed into an independent contractor agreement with the platform, resulting in their ineligibility for worker's compensation. The fact that workers deceased while working hard on the delivery assignment does not eligible for worker's compensation shocked the general public. It pushed the issue of gig economy worker misclassification to the top of public focus.

In the meantime, the MOL swiftly issued the "Guidance on Determination of Labor Contract." This guidance included previous court decisions and administrative interpretations on determining the legal status of workers. It also provided the "Checklist for Subordination under the Labor Contract as the reference for the employer and workers."³ The guidance emphasizes that the worker's actual legal status shall be determined under consideration for all circumstances, and the type of the contract signed by parties is not a decisive factor. It includes lots of landmark court precedents regarding this issue and turns the rationales into indicators. (Please refer to Chart 1 below). This guidance shows an exact position that the MOL sticks with the employee-nonemployee dichotomy, and what of the essence in the classification is the worker's level of subordination in the actual working background. The checklist serves as an indicator to assist the employer and the worker in pinpointing their subordination level among the aggregated court decisions on related cases. Fulfilling more than 50% of the checklist indicators does not promise the status as a labor contract, but the chances are high since the court is likely to defer to their own precedents in future lawsuits.

In the classic labor contract relationship, the employee is likely to be recognized with three kinds of

2. With regard to the labor insurance and the payments, the Labor Insurance Act requires employers with more than 5 employees to sign in their laborers into the labor insurance policy. For those employers with less than 5 employees, they are not obligated to sign their workers into the policy. It will be the workers own discretions on whether to participate in the social insurance policy. It should be noticed that, however, the issues mentioned in this article applied the old "Labor Insurance Act," which was the governing law when this article was submitted. It is no longer the outstanding law after May 2021, when the Taiwan legislative branch enacted the "Act for Protecting Worker of Occupational Accidents." The new law mandates a different worker compensation insurance with broader coverage.

3. Taiwan Ministry of Labor website announcement: <https://www.mol.gov.tw/announcement/2099/42678/>; the Guidance and the Checklist can be found here (last checked Feb 5, 2020).

Chart 1. Checklist for subordination under the labor contract

Items	Characters of Subordination	Yes or No
a.	The INDIVIDUAL SUBORDINATION can be revealed if ⁴	
(a)	The work time is under the instruction or control of the company.	
	1. The worker has no discretion regards to work time and rest time.	
	2. The worker will face disadvantageous treatment if absent without prior notice.	
(b)	The way to perform the duty is under the instruction or control of the company.	
	1. The worker will face disadvantageous treatment if they disobey the instructed way of performing the duty.	
(c)	The place to perform the duty is under the instruction or control of the company.	
	1. The worker has no discretion over the place, route, and area of performing the duty.	
(d)	The worker cannot reject job assignments from the company.	
	1. Rejection of job assignments will face disadvantageous treatment.	
(e)	The worker is under performance evaluation from the company regards to the quality of the work.	
	1. The worker is obligated to be evaluated by the company.	
(f)	The worker must perform the duty personally. An agent cannot be used without the employer's prior consent.	
	1. The worker is required to perform job duty personally.	
b.	The ECONOMY SUBORDINATION can be revealed if ⁵	
(a)	The necessary equipment, tools, materials, and machines to perform job duty is not prepared, managed, and maintained by the worker.	
	1. The worker must use the equipment provided or instructed by the company to perform the job duty.	
c.	The ORGANIZATIONAL SUBORDINATION can be revealed if ⁶	
(a)	The worker is included in the company's inner structure and performs the job duty as a team.	
	1. The worker is required by the company to have a routine work schedule, shift, and on-call assignment.	

Source: Abstract from "DOL Guidance on Determination of Labor Contract 2019."⁷

subordinations: individual subordination, economy subordination, and organizational subordination. The guidance applies these categories of subordination to lay out its checklist below. It hopes to shed light on ambiguous employment relationships that may cause difficulties in determining the labor status.

B. Taipei City Governance and Self-Regulatory Ordinance on delivery platform business⁸

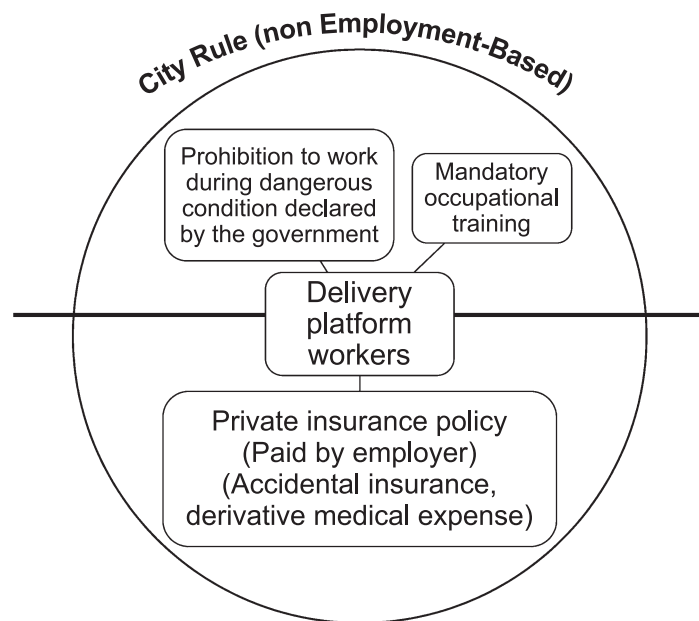
Taipei City legislation recognizes the urgent need to protect gig workers and also acknowledges that a straightforward test to distinguish legal labor status does not exist yet. To avoid labor rights protection

4. Due to the word limits, this report only lists part of the individual subordination as an example.

5. Due to the word limits, this report only lists part of the economy subordination as an example.

6. Due to the word limits, this report only lists part of the organizational subordination as an example.

7. Taiwan Ministry of Labor website announcement: <https://www.mol.gov.tw/announcement/2099/42678/> (last checked Feb 5, 2020).



Prepared by the author.

Figure 2. Partial employer responsibility and workers' rights mandated by the City Rule

contingent upon legal uncertainty, the city legislation adopts a regulatory regime that applies a sub-category for platform workers. Different from the traditional dichotomy of employee and non-employee which result in workers face full or zero labor rights and social insurance protections upon the status, the ideology of this city ordinance is to set aside the dispute over the labor status and request partial labor rights and minimum private insurance protections⁹ instead. According to the gig worker's special working conditions, Taipei City legislation focused on particular practical rights and protections. Due to the word limits, this article will partly introduce measures regarding compulsory private insurance, dangerous working condition, and occupational training and accident report.

(a) Compulsory private insurance

To avoid the independent contractor agent decease during delivery assignment without worker compensation eligibility, Article 4 of the ordinance requires the company to purchase a private accidental insurance policy on the employer's expenses. This approach can bypass the impasse on worker classification and still provide the worker some insurance payments while an accident happens.

This compulsory private insurance purchase by the employer needs to cover accidents and derivative medical expenses. The amount insured for accidental disability or death shall not be less than NT\$ 2 million (approximately to USD 66,666). For accident derivative medical expense insurance, the insured amount shall not be less than NT\$ 30 thousand by proof or NT\$ 1 thousand per day.

8. Taipei City Governance and Self-Regulatory Ordinance on Delivery Platform Business, <http://www.tcc.gov.tw/Upload/act/870/%E4%B8%89%E8%AE%80%E9%80%9A%E9%81%8E%E6%A2%9D%E6%96%87.pdf> (last checked Jan.30, 2020).

9. General introduction of the draft of Taipei City Governance and Self-Regulatory Ordinance on Delivery Platform Business, <https://www-ws.gov.taipei/Download.ashx?u=LzAwMS9VcGxvYWQvMzA3L3JlbGZpbGUvMTAxNzMvODEwMDk5My85OWFkMTdlZS1kOTA2LTQ0NWEtODQxOC0xMDFiM2Y5ZGMxNWUucGRm&n=44CM61e65YyX5biC5aSW6YCB5bmz5Y%2Bw5qWt6lCF566h55CG61eq5rK75qKd5L6L44CN5Yi25a6a6I2J5qG157i96Kqq5piO5pqq5qKd5paH5bCN54Wn6KGoLnBkZg%3D%3D&icon=..pdf> (last checked Feb. 2020).

(b) Prohibition to work under dangerous condition

Most of the food delivery agents in Taipei City use motorcycles as their delivery vehicles. This transportation approach is notorious for its lack of protection in transportation accidents, especially while riding under dangerous conditions. Article 5 of the ordinance thus prohibits the platform from continuing its service when the local government declares a “day-off because of natural disaster,” e.g., Typhons. This measure tries to lower the risk of deadly accidents for the delivery agent in a risky environment.

(c) Mandatory occupational training and accident report

Acknowledging the risky nature of outdoor delivery and its high potentiality of encountering accidents on their duty, Article 8 of the ordinance requires the employer to provide at least 3 hours of the pre-duty training program on occupational safety, food sanitation, and transportation safety. This measure intends to raise the awareness of safety for delivery agents before they devote themselves to the business. These measurements used to be part of the on-the-job training for employees, but the ordinance requests the platform provides it to the delivery agent regardless of their labor status.

Moreover, Article 6 of the ordinance also requires the employer to report any accident that causes death or more than one worker hospitalized for treatment. The platform is obligated to report the accident to the Taipei City Division of Labor Inspection within 8 hours, starting from the time when the employer acknowledges or should have known of the accident.

IV. The swift responses from the platform business

Coincidentally, not long after the MOL guidance and the Taipei City ordinance, one of the biggest food delivery platforms in Taiwan—Foodpanda, substantially remodel its related work rules and contract terms.

While the platform application’s substantial control over the worker can be observed through App rating and monitoring, Foodpanda seems to reconstruct its application to emphasize delivery agents’ autonomy by lifting several restrictions. It can be interpreted as the symbolic efforts to disconnect from individual subordination. (Please refer to Chart 1, a. (a) (1), a. (a) (2)). For example, according to the new “Rule of Conduct for Contract Delivery Partner,” absent from the scheduled shift will no longer face assignment suspension. Moreover, the application creates a new function to pre-declare detailed delivery address information to the agent and enable them to decide to take or reject the assignment freely. The right to reject assignment was considered one of the key factors to distinguish employees and independent contractors. (Please refer to Chart 1, a. (d) (1)).

To further emphasize the delivery agent autonomous on performing duty, the new rule also allows agents to sub-contract the assignment or work for other food delivery platforms simultaneously. (Please refer to Chart 1, a. (f) (1)). Moreover, the performance evaluation system regulating work behaviors or outfits is also lifted to lower the level of control that will be considered as the existence of subordination. (Please refer to Chart 1, a. (e) (1)).

The new “advertisement agreement” is another attempt to disproof economy subordination. The agents used to require the agent to wear a Foodpanda outfit and use a Foodpanda delivery box. In response, the platform will match them with a rate of NT\$ 70 per assignment. This requirement had been lifted, and the rate per task has dropped to NT\$ 60. The NT\$ 10 difference is now contingent upon the voluntary advertisement. If the agent is willing to wear the Foodpanda outfit and carry its brand box as a moving advertisement board, the extra premium will be granted. Wearing company uniform and using Foodpanda equipment is no longer an obligation but a free choice for extra income (Please refer to Chart 1, b. (a) (1)).

Simultaneously, the amendment of the “contractor agreement” clearly states that the agent is not under the company’s instruction and control. Foodpanda will only have a reasonable mandate over the agent, and will

not implement a full set of conduct rules.

Foodpanda's efforts above show its intention to keep its delivery agents as independent contractors with autonomy, not employees with strong employer subordination.

V. Conclusion

While the legislative debates over the gig economy platform's proper solution are still unsolved, the expansion of the new economy does not slow down and will not be held back. The academia must keep up with the changes and discuss the possible strategy and adjustments. In the meantime, the administrative policy and the local legislation can also initiate proactive measures to handle the dispute preliminarily.

The central MOL and the Taipei City apply different regulatory models on this matter. The MOL holds its ground for the employee-independent contractor dichotomy. Its attempts to clear the misunderstanding of labor status by reemphasizing the differences between the employee and the independent contractor in the guidance to prevent the abusive use of independent contractor status. The indicators in the guidance also represent the current court precedents and rationales on the matter. To some extent, it predicts the possible result if related cases go to the court for adjudication, and provides legal instructions for both the employer and labor.

The Taipei City ordinance seems to go further on this matter by setting aside the legal status controversy and focusing on the platform worker's need. It recognizes that having a safe working environment, proper skill to perform the work, and some sort of insurance coverages on worker compensation are universal needs as a working human being, not just for employed employees. Therefore, the city legislation requires the platform to provide these training and safety preconditions with partial private insurance coverage to their delivery agents, no matter their actual labor status. It can be seen as a temporary solution for now, and it may be the new law if the central legislation adopts this model in the future.

It is still too early to tell which model will be the best regulatory regime for the gig economy platform, and the platform will continue to change its contract terms and policies per its business necessity. More discussions and debates need to be triggered until we can strike a proper balance between labor rights protection and the new economic development. The MOL guidance and Taipei City ordinance can be seen as experimental approaches to this dilemma, and hopefully, more ideas for this contemporary challenge can be inspired.



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