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Eric Tucker

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Occupational Health and Safety Regulation of Platform-Mediated Work in Ontario, Canada

Eric TUCKER*

Abstract: Platform-mediated work, whether location-based, as in the case of Uber, or cloud-based, as in the case of Amazon Mechanical Turk, poses severe challenges to effective occupational health and safety (OHS) regulation. While the work performed in the platform environment is not usually very different from work performed in more traditional employment settings, the platform environment often exacerbates those risks by, for example, increasing stress and incentivizing long hours and work intensification. Regulating these hazards is impeded by ambiguities surrounding the legal relationship between platform operators and platform workers that make it uncertain whether the OHS regime even applies. As well the regime itself was not designed to address the conditions of platform work or many of the risks and exacerbating factors it produces. Drawing on existing studies, this article explores the structure of platform-mediated work, examines its incidence in Ontario, Canada, summarizes its associated OHS risks, and provides a detailed analysis of the obstacles to effective regulation under Ontario’s OHS regime.

Key words: Occupational Health and Safety, Regulation, Canada, Ontario, Gig Work, Platform-mediated Work, Cloud Work, Uber

1. INTRODUCTION

Platform-mediated work (PMW), meaning work that is provided through or mediated by online platforms, creates challenges for protective labor and employment laws built on the foundation of a contract of employment. Platform owners construct themselves as technology companies which sell or rent a product or service to other risk-bearing entrepreneurs who operate their own businesses from their own locations. According to this construction, platform owners do not hire platform workers either as employees or even as independent contractors, and thus are relieved of any responsibility that the law imposes on employers to have regard for these workers’ economic well-being or health and safety. Responsibility for these matters is shifted entirely onto the shoulders of those performing the work.

While avoiding protective labor and employment laws is not the only reason why businesses adopt the platform model, undoubtedly it is one of its attractions. Indeed, put in historical context, the rise of PMW can be understood in part as an effort to return to a market-centered approach to labor regulation that began to be overladen with protective laws over two centuries ago in response to the horrific conditions and worker discontent it produced. The early English factory acts required factory owners to take some measures...
to protect the health and safety of women and children otherwise subject to the tender mercies of the labor market. The subject of this article might be summarized as the extent to which platform owners in Ontario have succeeded in avoiding responsibility for the health and safety of platform workers, leaving them to those tender mercies.

While platform owners present themselves as technology companies whose relations with platform workers are outside the ambit of protective labor and employment law, including occupational health and safety, their assertions about the legal character of this relationship are being challenged. However, as long as the legal status of platform workers is unresolved, the resulting ambiguity itself undermines the efficacy of the law (Johnstone and Quinlan 2006). But that is not all. Even if platform workers are successful in claiming coverage by occupational health and safety (OHS) acts, there remain many ambiguities and absences in the law that would undermine its efficacy in the platform environment. These ambiguities and absences will be discussed in more detail in the body of the article, but by way of example much of Ontario’s Occupational Health and Safety Act (OHSA)\(^1\) is written on the assumption that workers perform their work on premises under their employers’ direct control. What is the meaning of a “workplace” in the context of the platform environment and how does its interpretation affect the legal obligations of platform owners even if they are covered by the act?

In addition to ambiguities in the law, there are also absences. For example, OHS law in Ontario often poorly regulates the kinds of work most commonly performed in the platform environment even when it is performed outside that environment. For example, the OHSA does not have regulations designed to protect mobile workers, like taxi drivers and food delivery workers, and does little to address psychosocial hazards, whether the work is platform mediated or not (Lippel and Walters 2019; Popple et al. 2021). Put simply, the combination of ambiguities and absences creates formidable challenges to making OHS regulation effective for PMW. Moreover, there is a paucity of research on OHS in the context of PMW, which adds to the difficulty of devising strategies to identify and address regulatory gaps (European Agency for Safety & Health at Work [EASHW] 2021).

This article makes a modest contribution to filling this gap by providing a preliminary assessment of the problems PMW presents for the OHS regime in Ontario, Canada.\(^2\) It begins with a brief discussion of the structure and typologies of PMW, followed by a review of the limited data available on the incidence of PMW in Canada and of the sparse literature on the OHS challenges related to and arising from PMW. The main part of the article provides an exploratory legal analysis of the application of Ontario’s OHS law in the platform context under two scenarios: 1) the platform owner/operator as rentier (Christophers 2020) who merely provides an intermediation service used by buyers and sellers of labor service and 2) the platform owner/operator as employer who hires workers. As I argue, while treating platform owners/operators as employers for the

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2) Under the Canadian constitution, OHS regulation is primarily a matter of provincial and territorial jurisdiction. Ontario is Canada’s most populous province and its OHS laws are generally representative of those in Canada.
purposes of OHS regulation would improve its efficacy by reducing some ambiguities, much more would need to be done to address remaining ambiguities and absences. In the final part, I consider possible reforms, including legislation enacted in Ontario at the time of writing (but not declared in force) to provide digital platform workers with some basic rights, but argue that more fundamental reforms are needed.

2. PLATFORM-MEDIATED WORK: STRUCTURE AND TYPOLOGY

On its surface, PMW is constructed as if the platform owner provides an intermediation service that enables the platform worker to connect with platform clients seeking to purchase their services. Understood in this way, the platform owner merely rents an asset to the platform worker, who then enters into contracts for service with clients. While there are a variety of structures (Howcroft and Bergvall-Kåreborn 2019; Tucker 2020), the Uber model, illustrated in Figure 1 is arguably the most common.

![Figure 1 Formal Structure of Platform-Mediated Work](image)

If we accept the platform’s legal construction of the relations between the parties, the worker is not the platform owner’s employee, nor has the platform owner contracted for the service of the worker. Rather, it is the client who has contracted for the labor service (and typically pays the worker through the platform). Of course, this characterization is often sharply contested by platform workers, unions, and worker advocacy groups who claim that the platform owner is the legal employer of the worker. For now, however, we can put that issue aside and turn to typologies of PMW.

There are many varieties of PMW that can be mapped along the dimensions of the format or location of labor provision, skill level, and level of control, among others. The location of labor provision differentiates between work that is location based, or what I previously labelled “groundwork,” and work that is performed online, which I previously labelled “cloud work” but which is now more commonly called “online work” (Tucker 2020). Skill level and control are fairly self-explanatory, and while we do not have empirical data on the most common types of PMW, it is generally accepted that a significant proportion of PMW is lower skilled and highly controlled,\(^3\) which of course is extremely important for the purposes of protective labor and employment law generally and for OHS regulation in particular. Elsewhere I have emphasized the importance of location of labor provision in thinking about worker resistance but as we shall see it is also important in the context of OHS regulation (Tucker 2020; Wood and Lehdonvirta 2021).

3. THE INCIDENCE OF PMW IN CANADA

There is remarkably little research on the incidence of PMW in Canada. Indeed, it is fair to conclude that there are no studies designed

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\(^3\) Research on the distribution of PMW by skill level is surprisingly thin. For work that provides some evidence, see Pesole et al. (2018, 36–44) and De Groen et al. (2018).
to specifically capture the extent or intensity of Canadian workers in PMW. What we have instead are a few studies that look more broadly at gig work or the “sharing” economy, or more narrowly at online work.

Gig work is defined as short-term work for multiple entities. As such, it includes PMW but also a much broader range of informal and temporary work arrangements. A recent study found that the share of gig workers in Canada rose from 5.5 percent in 2005 to 8.2 percent in 2016 (Jeon, Liu, and Ostovsky 2022). However, the share of gig work that is platform mediated is unknown, although the authors suggest that the growth of gig work after 2012/2013 may be related to the proliferation of online platforms. Another study of participation in “informal” work, broadly defined to include everything from babysitting to selling goods online to PMW, found that 30 percent of respondents to a 2018 survey had engaged in one or more forms of it, but again there was no separate measurement of PMW (Kostyshyna and Luu 2019). Finally, a 2016 study of the so-called “sharing economy” found that 9 percent of respondents in the Greater Toronto Area had participated in it. However, the survey did not differentiate between providing labor service and home sharing online (Block and Hennessy 2017).

While the above studies are overly broad for our purposes, in the sense that they include both platform-mediated sales of labor and non-labor assets, there is one study that is too narrow. The Online Labour Observatory4 publishes the Online Labour Index 2020 (Stephany et al. 2020) that measures online gig work only. Using a measure of projects and tasks posted by employers on five major English-language platforms starting in May 2016, it shows that Canadian employers increased their use of online labor by 11.1 percent as of February 21, 2022. However, the index does not show the country in which the online work was performed, and it does not capture platform mediated location-based or groundwork.

In sum, not only do we lack data on the percentage of the Canadian workforce participating in PMW, but we also know little about the intensity of their work, meaning the extent to which workers are performing PMW as their main job or as a supplement to other income earning activities; nor do we have data on the distribution of PMW between online and location-based work generally or on the kinds of work performed in each category. The lack of data makes it very difficult to assess the impact of the presumed growth of PMW on the health and safety of Canadian workers generally or whether this growth of PMW is occurring in sectors historically more hazardous, such as transportation. In the next part, we turn to the existing literature on the OHS hazards of PMW before returning to the question of the problems this structure creates for the effective regulation of occupational hazards under Ontario OHS law.

4. THE OHS HAZARDS OF PMW

Given the variety of work performed through platforms and the absence of data about the kinds of platform work being performed by Canadian workers, it is difficult to know where to focus, especially when work that is performed through platforms is or was historically done through other contract

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4) Online Labour Observatory: http://onlinelabourobservatory.org/.
arrangements, such as employment or “independent” contracting. Transportation services such as Uber are a prime example.\(^5\) As such, it is fair to say that the work performed through platforms is similar to work performed in employment or in contracting arrangements outside of platforms and shares many of the same OHS risks (Samant 2019). We therefore need to disaggregate the OHS hazards created or exacerbated by the platform-mediated context from the hazards generally associated with the type of work being performed.\(^6\) This is a challenging task, especially given the limited research on safety and health in PMW in general (EASHW 2021, 1).

One feature of PMW that exacerbates OHS hazards is that it is less well-regulated than work performed in the context of employment or even, arguably, through direct independent contracting. We will return to this issue in the next part of this article. Here the focus is on features of the platform environment that exacerbate the physical and psychosocial hazards that exist for workers performing equivalent tasks in employment or outside the platform environment. It is also important to remember that the line between physical and psychosocial hazards often cannot be sharply drawn because the most common exacerbating factors identified in the literature relate to work intensification and social isolation, which have both physical and psychosocial dimensions (Bérastégui 2021; Bérastégui and Garben 2021).

Transportation and delivery work are perhaps the two most studied forms of platform-mediated groundwork, both characterized by high levels of algorithmic control and isolation (De Stefano 2019). While these are not unique to PMW, the totality of control and isolation, in conjunction with the pervasiveness of customer ratings, exacerbate the incentives to violate traffic laws, use phones while driving or riding, or otherwise behave in ways that increase the risk of injury (Bluff, Johnstone, and Quinlan this special issue; Christie and Ward 2018; Government of New South Wales 2020; Lachapelle et al. 2021; MacEachen et al. 2019). In addition to increasing work intensity, workers also have an incentive to make themselves available when demand is high, which may result in long hours stretched over the course of a day resulting in fatigue, which has negative physical and psychosocial consequences (Bartel et al. 2019; Christie and Ward 2019; EASHW 2022a). An additional feature of platform-mediated delivery work is that algorithmic controls lack transparency, leaving workers uncertain about the rules governing their work, which itself produces anxiety and undermines their sense of agency. Gregory (2021) has characterized these as “epistemic risks” that should be recognized for their negative impact on worker’s health and safety.

Studies of the OHS hazards of platform-mediated groundwork outside the delivery context are rare, but a study of platform mediated-handiwork performed in people’s homes reaches similar conclusions about the ways in which the platform environment aggravates hazards experienced in a non-platform environment (EASHW 2022b).

Online platform-mediated work can

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6) For an overview of these hazards, see EASHW (2021, ch. 3.1). For Canadian studies, see Bartel et al. (2019) and Reid-Musson et al. (2020).
be varied but a significant component of it consists of low-skill microtasks or crowdwork performed by a globalized workforce (Berg et al. 2018). This work largely involves desk-based tasks using a computer and presents hazards similar to those experienced by workers performing similar tasks outside the platform context. These include poor ergonomic arrangements that can lead to musculoskeletal disorders, visual strain, and adverse health consequences associated with sedentary work, including cardiovascular disease and diabetes.\(^7\) However, the platform environment exacerbates these risks and introduces new ones. As in groundwork, algorithmic controls, including platform-based rating and ranking systems, as well as an oversupply of globalized labor, create a highly stressful environment resulting from work intensification, long, irregular, and unsocial hours, a lack of job and income security, epistemic risks arising from the black box of algorithmic controls, and the risk of non-payment if the client rejects the work. Additionally, the work is commonly performed in workers’ homes, without ergonomic workspaces and with equipment, and where there is likely to be significant work-life conflict, particularly for women who are disproportionately responsible for caregiving. To cope, women online workers often work during the night, putting them at greater risk for physical and psychosocial injuries. Moreover, the work is performed in isolation, limiting access to co-worker and social support (EASHW 2022c; Gray and Suri 2019, 67–93; Moore 2018; Wood et al. 2019).

5. REGULATORY CHALLENGES

The very brief discussion above highlights some of the principal ways the platform context exacerbates the physical and psychosocial hazards of work that are also present outside of it. The legal environment is another way in which the platform context exacerbates the OHS hazards experienced by platform workers by disrupting or making uncertain the operation of OHS regulation. In addition, we also consider ways in which the OHS regime, even if it applies, inadequately regulates the kinds of work most commonly performed in a platform environment.

In thinking about the regulatory challenges, it is helpful to consider two scenarios. The first is the platform-as-rentier based on the legal structure of PMW asserted by the platform owner described earlier in part 2, according to which the platform is a technology purchased by independent contractors as a tool for their business. The second is the platform as employer of the workers who secure work through it. This approach is necessary because the status of platform workers in Ontario for the purposes of OHS regulation is unresolved.

A. The Platform Owner as Rentier

Most Canadian protective labor and employment law is built on the platform of the contract of employment. That is, the law imposes duties on employers that are owed exclusively to employees. Workers who are not in an employment relation are outside the protective ambit of the law.\(^8\) Ontario’s OHSA is different in two significant ways. First, duties

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\(^7\) For a pioneering study of these hazards, see Stellman and Henifin (1984).

\(^8\) For example, see the Employment Standards Act (ESA), S.O. 2000, c. 41. It should be noted that this Act, like many protective employment laws, imposes personal liability on the directors of the corporate employer in certain situations.
are owed to workers, not just employees and second, the Act applies to multiple duty holders who are responsible in different ways for the protection of workers. The implications of these differences are fleshed out below.

Under the OHSA a worker is defined as a person “who performs work or supplies services for monetary compensation” (section 1(1)). This section makes it clear that the Act applies both to employees and to independent contractors. 9) As a result, the coverage of the OHSA is broader than other protective employment laws and so the significance of being classified as an employee is much reduced. Correspondingly, an employer is defined as a person “who employs one or more workers or contracts for the services of one or more workers and includes a contractor or subcontractor who performs work or supplies services and a contractor or subcontractor who undertakes with an owner, constructor, or contractor or subcontractor to perform work or supply services” (section 1(1)). Leaving aside the nuances of this definition for the moment, it is clear that a person who hires employees or who hires persons to perform services for monetary compensation is an employer for the purposes of the OHSA.

Second, unlike most Canadian protective employment law, which only imposes legal obligations on employers, the OHSA imposes legal duties to protect the health and safety of workers on a number of actors, including employers (sections 25 & 26), supervisors (section 27), owners (section 29), constructors (section 23), licensees (section 24), and suppliers (section 31). The OHSA also imposes duties on workers (section 28) and some sections apply to self-employed persons (section 4).

If we accept platform owners’ characterization of the platform’s legal architecture, the platform owner is not an “employer” of platform workers as the workers are neither the platform’s employees, nor are they hired to perform services for the platform. Rather, the platform owner is a rentier who sells an intermediation service for a fee. Platform owners are unlikely to have obligations as “owners” under the OHSA since an owner is defined as a person who owns, leases, occupies, etc. lands or premises to be used as a workplace and a “workplace” is defined as “land, premises, location or thing at, upon, in or near which a worker works” (section 1(1)). Thus, while platform owners may have physical premises where employees directly hired by them perform work, platform workers do not work at a workplace owned by platform. They may never step foot onto or work near lands or premises owned by the platform owner in order to perform work. Moreover, it seems quite unlikely that an app would be considered a “location” or “thing” on which a worker works. It is also unlikely that platform owners have duties as “suppliers.” First, it would be difficult to characterize the platform owner as a supplier, which is defined in the OHSA as a person who “supplies any machine, device, tool or equipment … for use in or about a workplace” (section 31(1)). But even if it could be argued that a platform is a device

Platform owners, like Uber, have fought extended battles to resist the classification of platform workers as employees. The extent of Uber’s global efforts was recently revealed in a leaked trove of confidential documents (Davies et al. 2022).

used in a workplace, the supplier’s obligations are to ensure that the tool, equipment, etc. is in good condition and complies with the Act and regulations (section 31(1)(a)(b)). The likelihood of successfully arguing that the platform itself is not in good condition and fails to comply with the OHSA and its regulations seems remote.

What, then, about the clients? Do they have duties under OHSA to the platform workers who, under the platform-as-rentier scenario, they hire to provide services? The answer to that question is, “it depends.” If the services are to be provided at the client’s premises, then the client who hires a platform worker could owe duties under the OHSA both as an “owner” of a premises used as a workplace and as an “employer” of a platform worker. First, considering the client as owner, there is an important exception in the case of homeowners. Section 3 of the Act provides that the Act does not apply to work performed by “a servant” of the owner in or about a private residence or the lands used in connection with that residence. There is no definition of the term “servant” in the Act, but servant is usually considered by courts to mean employee. That being the case, it is arguable that the work-in-the-home exception only applies to employees, not to workers under a contract for services, but there is no case law so holding and the Ontario OHSA Policy Manual (Government of Ontario 2021) does not draw that distinction. However, if work is being performed at the client’s business premises, then the client clearly has duties as the employer of a worker (sections 25 & 26), including a general duty to take every precaution reasonable in the circumstances for the protection of the worker. The client would also have duties as an owner (section 29), which require the owner to ensure that the workplace complies with applicable regulations and that prescribed facilities are provided and maintained (section 29). As well, if the workplace is a construction site, then the client would have the obligations of a constructor (section 23), which include a duty to comply with the OHSA and applicable construction regulations, to ensure that every worker performing work on the project complies with the Act and regulations, and to protect the health and safety of workers on the project.

On the other hand, a person who hires a driver to take them from point A to point B or to deliver food to their home would certainly not fit within the category of an owner under the OHSA, since the work is not being performed on their premises. Could they be an employer and, if so, what obligations would they have? There is no case law that clarifies this question. It is exceedingly unlikely that the platform worker is an employee of the client in this scenario. The most common test for determining employee status in Canada is the multi-factor test established by the Supreme Court of Canada in Sagaz Industries:

The central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account. In making this determination, the level of control the employer has over the worker’s activities will always be a factor. However, other factors to consider include whether the worker provides his or her own equipment, whether the worker hires his or her

own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker’s opportunity for profit in the performance of his or her tasks.

It bears repeating that the above factors constitute a non-exhaustive list, and there is no set formula as to their application. The relative weight of each will depend on the particular facts and circumstances of the case.

Under this test, a person who drives a taxi does not become the passenger’s employee for the duration of the trip, nor does the person delivering food become the employee of the client who ordered the food during the time of delivery. The platform context does not change this arrangement.

However, it is quite possible that the client could be the employer of the driver or delivery worker qua independent contractor, but it is doubtful this would result in any meaningful OHS duties. What duties could arise from such a transient relationship? None of the prescribed duties in sections 25 and 26 of the OHSA are likely to impose a significant obligation on the client. For example, the general duty of the employer to take every precaution reasonable in the circumstances likely imposes no duties because there are unlikely to be any reasonable precautions that the passenger or person ordering food should take in the circumstances, other than perhaps not to physically interfere with the driver or to pressure them to drive unsafely. The client does not provide any equipment and is not responsible for providing information, instruction, or supervision to a worker to protect the worker’s health and safety.

Finally, if we turn to online services, it is even clearer that the online worker is not the employee of the client requesting services. However, the client could potentially be found to be the employer of the online platform worker qua independent contractor, but no OHSA duties may flow from this characterization. There are three reasons for this. First, there is the question of the location of the platform worker and the client. If the client is located inside Ontario, but the worker outside, and the worker has no other connection to the province, then it is unlikely the OHSA applies to that relationship. Alternatively, if the worker is located in the province but the client is located outside, even if in theory Ontario law applied, there is no practical way it can be enforced. Second, most online PMW is performed in the worker’s home where the Act does not apply. Finally, even assuming provincial law applied and could be enforced, few legislated employer duties would be applicable. The client provides no equipment or materials, and no protective devices are required for online work. What remains is the duty to take all precautions reasonable in the circumstances for the health and safety of the worker, but, as we shall see below, OHS regulation in Ontario, and most of Canada, imposes few if any specific duties on employers to protect workers against the hazards associated with online work.

Finally, there is almost no possibility that the client or requester of an online worker

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12) The OHSA does not refer to the location where work is performed, but it can be safely assumed that it only applies to work performed in the province or which is a continuation of that work outside the province. This is made explicit in the recently enacted Digital Platform Workers’ Right Act, 2022, S.O. 2022, c. 7, as it is in the Workplace Safety and Insurance Act, 1997, S.O. 1997, c. 16, Sched. A, s. 13(3).
would be found to be an “owner” under the OHSA, since the work is not being performed on the client’s premises.

Another way that the OHSA can apply to platform workers, again accepting the platform owner-as-rentier scenario, is through section 4, which provides that specified sections of the Act “apply with necessary modifications to a self-employed person.” In other words, self-employed persons are obliged to comply with provisions of the Act that apply to them, but no meaningful obligations arise in the platform environment. A platform worker, for example, must comply with section 25(1), which requires the worker to use prescribed equipment, materials, and protective devices and maintain them in good condition and to use them as prescribed. Other applicable provisions relate to matters such as the use and handling of hazardous materials, notification obligations, and being subject to inspection and enforcement actions.

Basically, then, apart from that slice of platform work that is performed on a client’s or employer’s premises, platform workers have a duty to look after their own health and safety and are subject to inspection and enforcement actions if they fail to do so in accordance with the applicable sections of the OHSA and its regulations (unless they are working from home where the Act does not apply). Apart from the obvious point that an OHS regulatory regime should not be built on the foundation of making workers chiefly responsible for their own safety without meaningful OHS obligations on other duty holders, the responsibilization approach is unlikely to provide much protection: prescriptive regulations for the most part do not address the kinds of work performed by platform workers and there is little risk that platform workers will be inspected. The exception is where platform work is performed on a client’s or employer’s premises, where there is a risk of inspection and enforcement action being taken. For example, a platform worker working on a client’s construction site without a hard hat or safety shoes might be subject to a small on-the-spot fine, as would the immediate supervisor for failing to ensure that workers were wearing prescribed protective equipment (section 27(1)) (Gray 2009).

B. The Platform Owner as Employer

The above discussion assumed the validity of platform owners’ claim that they are rentiers, not employers, but whether they are employers is a question of law or mixed law and fact and the legal structure of PMW has been the subject of multiple challenges. This is not the place to review this litigation (De Stefano et al. 2021) but numerous courts and tribunals have found that platform owners are the employers of platform workers, whether categorized as workers, employees, dependent contractors, or even contractors. For example, in Ontario, Foodora delivery workers were held to be dependent contractors for the purposes of the province’s collective bargaining statute and, therefore, were employees entitled to bargain collectively under the Act.\(^\text{13}\) Here we want to examine the implications of treating platform owners as employers of platform workers for the purposes of OHS regulation, whether they be employees, dependent contractors, or independent contractors.

\(^{13}\) Canadian Union of Postal Workers v Foodora Inc. d.b.a. Foodora, 2020 CanLII 16750 (ON LRB), https://canlii.ca/t/j5nj1, retrieved on March 18, 2022.
First, with regard to the so-called external responsibility system that imposes and enforces duties on employers to protect the health and safety of their workers, platform owners as employers would owe a general duty to take every precaution reasonable in the circumstances for the protection of the worker (section 25(2)(h)). However, it is unclear what that duty might entail. In the context of groundwork, such as ridesharing or food delivery, traditional dispatchers have escaped scrutiny from OHS regulators, despite the fact that they have sometimes been found to be the drivers’ employers for some purposes (Reid-Musson et al. 2020; Tucker 2018). In part, this is because there are no OHS regulations specific to these industries that specify the employers’ obligations, despite the fact that in 2010 an expert report prepared for the Ontario Ministry of Labour identified taxi driving as the most dangerous job in Canada and called upon the Ministry to explore options for improved OHS protection (Dean et al. 2010, 50). Rather, taxi regulations, including requirements for driver training and vehicle safety, are primarily established by municipal bylaws, which platform owners, acting as regulatory entrepreneurs, have weakened in recent years (Coiquaud and Morissette 2020; Reid-Musson et al. 2020). As well, because groundworkers provide their own equipment, platform owners are relieved of any duty to provide or maintain equipment in a safe condition. At best, platform owners may have a duty to require their workers to use and maintain roadworthy vehicles and other equipment, an obligation that platform owners may already meet.

There is also the question of whether platforms, as employers, have obligations that are “workplace” based. As discussed above, OHSA defines a workplace as a physical location or thing upon, in, or near which a worker works. Platform workers arguably never work on or near their employers’ workplace, unless a digital platform is a “thing.” If it is found that platform operators do not have workplaces, their obligations under the OHSA would be severely limited, for both the ERS (discussed here) and the internal responsibility system (IRS) (discussed below).

With regard to the ERS, several of the obligations in section 25 impose workplace-related duties, such as the duty to post in the workplace a copy of the OHSA and any explanatory materials prepared by the ministry (section 25(2)(i)). As well, while the Act requires employers to prepare and review at least annually a written OHS policy and develop a plan to implement it, the section does not apply to a workplace at which five or fewer workers are regularly employed (sections 25(2)(j) & 25(4)). If platform employers do not have a workplace, are they exempt from the obligation to prepare a written OHS policy or to post it “at a conspicuous location in the workplace” (section 25(2)(k))? The issue of workplace-relatedness also arises in relation to the more recently imposed duties regarding violence and harassment (OHSA, Part III.O.1), hazards that are well-documented in taxi and delivery work (Burgel, Gillen, and White 2014; Ma et al. 2022; Moore 2018). The law requires employers to prepare policies with respect to workplace violence and workplace harassment and to post those policies at a conspicuous place in the workplace (OHSA, section 32.0.1(1)). As well, the mandatory content of these policies is framed in relation to workplace violence and...
harassment, as is the duty to assess the risk of workplace violence (OHSA, sections 32.0.2, 32.03 & 32.0.6).

Of course, not all employer duties are framed in relation to workplaces. The general duty to take every precaution reasonable in the circumstances, for example, applies to all work performed for the employer, not just work performed in the employer’s workplace. However, the fact that the work is not performed in the employer’s workplace may limit the scope of what is held to be reasonable in the circumstances. That said, if the workplace-based duties do not apply, it might be possible to argue that at least some of these obligations arise under the general duty clause.

The general duty clause might also require platform owners as employers to monitor the performance of platform workers to ensure they are performing it safely, which may include monitoring workers’ driving, requiring them to take necessary breaks, and limiting their time on the app, although these are not matters OHS regulators generally address. However, if employers were required to manage these matters as OHS concerns, algorithmic controls would provide the necessary technology, potentially increasing the already high level of surveillance and control platforms currently exercise (Aloisi and De Stefano 2022; Wood and Monahan 2019).

This leads to the question of whether OHS regulation could require platforms to address the epistemic risks created by the platform environment. In general, OHS regulation in Ontario does not deal with psychosocial hazards. First, apart from harassment, Ontario does not impose any specific duties on employers to protect workers from psychosocial risks. Of course, the general duty clause should apply to psychosocial hazards, but in Ontario this has not translated into any attempt to regulate them. No Ontario employer has ever been prosecuted for failing to take reasonable measures to protect the psychosocial health of a worker.14) OHS regulation has also largely ignored the adverse health effects of work intensification outside the platform environment, whether through assembly line speed-ups or managerial supervision. Indeed, even when it comes to harassment, the Act is careful to exclude “a reasonable action taken by an employer or supervisor relating to the management and direction of workers of the workplace” (section 1(4)) from the definition, making it very unclear where to draw the line between what is a “reasonable action” aimed at work intensification or discipline. Moreover, the OHSA merely provides that the employer must have a harassment policy but does not impose a duty to provide a harassment-free workplace (Sobat 2022).

Long hours are also related to poor OHS outcomes, a fact that was recognized and central to the first factory acts, especially as they related to women and children (Fudge and Tucker 2020; Tucker 1990). More recently, these issues have migrated from OHS regulation to employment standards laws, which only apply to employees, not all workers, so that platform workers would

14) The situation in Quebec is different and specifically requires employers to “take the necessary measures to protect the health and ensure the safety and physical and mental well-being of his worker”: Act respecting occupational health and safety, CQLR c S-2.1, s. 51. For a critical discussion of the situation in Quebec prior to the more recent amendments to the law, see Lippel, Vezina, and Cox (2011).
have to overcome their (mis)classification as self-employed in order to secure the benefit of hours of work laws. As discussed earlier, platform operators have invested heavily in resisting these claims, often asserting that employee status would interfere with the freedom of workers to select their own hours. However, claims about scope of choice exercised by online workers have been heavily criticized and as discussed below the struggle for employment status in Ontario is ongoing, so it is possible that some platform workers may qualify for employment standards protections (Athreya 2021; Katsabian and Davidov 2022; Stanford 2022).

The OHS regulation of online platform work is also problematic. In addition to the difficulties noted above, the likelihood of platform owner being found to be the online platform worker’s employer is lower than in the case of groundworkers (Howcroft and Bergvall-Kårebron 2019). As well, there is a question of whether the OHSA applies when either the worker or the platform owner is located outside the province. Finally, assuming Ontario law applies, there is the question of what duties would be imposed on platform owners in this context.

A helpful analogy might be telework, which involves employees working remotely. While teleworkers often reported benefitting from this arrangement, they also reported OHS concerns about work-station design, long hours, and isolation. A study by Montreuil and Lippel (2003) found that while most Canadian OHS legislation theoretically applied to teleworkers, it was doubtful that it effectively addressed their OHS concerns both because of legal ambiguities regarding employer obligations to teleworkers and because of the absence of inspections and enforcement. In 2021, Quebec amended its health and safety legislation to better cover teleworkers by providing that the Act applies, “[s]ubject to any incompatible provision, in particular with respect to the workplace.” With regard to enforcement, the amendment barred inspectors from entering teleworkers’ homes without their consent unless they obtained a court order, which is available if there are reasonable grounds to believe that the worker or another person at the home is exposed to a danger threatening life, health, safety, or physical or mental well-being.15 Oddly, the Act does not define telework and so it remains to be seen whether it applies to PMW. If it does, the scope of workplace-based obligations will need to be determined. For example, do employers have any OHS obligations in relation to the design of home workspaces and worker-owned equipment? In Ontario, the OHSA does not apply to work performed by the owner or occupant in or about their private residence, effectively excluding online work performed at home from its ambit (OHSA, section 3(1)), so the question does not even arise.

There is also the issue of long and unsocial hours of work, which as mentioned, have fallen outside of OHS regulation and are now addressed by employment standards law. Ontario recently enacted “right to disconnect” legislation that requires employers with 25 or more employees to prepare a written policy with respect to disconnecting from work. However, the law fails to stipulate any mandatory elements that must be contained

15) Act respecting …, sd. 5.1, 179.1.
in such a policy. Moreover, because the right is located in the ESA, it only applies to employees, and so can only benefit online workers who can establish that they are employees.16)

Finally, there is the issue of enforcement. This is not the place to engage in an extended discussion of the efficacy of OHS enforcement in Ontario, but research has shown that while Ontario prosecutes employers more frequently than other Canadian jurisdictions, it still relies primarily on the IRS to secure compliance, resulting in significant enforcement gaps, particularly for non-unionized and precarious workers (Tucker 2013). More recently, the Ontario Auditor General expressed concern that the Ministry of Labour, Training and Skills Development, which is responsible for enforcing the OHSA, only has about one-quarter of all Ontario employers registered in its system and does not effectively target high-hazard workplaces or workplaces in which vulnerable workers are employed (Auditor General of Ontario 2019, ch. 3.07). We turn to the IRS in the platform context below, but there is little doubt that enforcement challenges would abound in the platform environment where workers often do not have a fixed workplace and, if working from home, are not covered by the OHSA, even if the worker was prepared to allow the inspector to enter the home (OHSA, section 54(2)).

(ii) The Internal Responsibility System (IRS)
So far, we have considered the substantive duties of an employer, but there is also the question of whether employer status would require platform employers to create occupational health and safety management systems that comply with OHSA requirements. Presumably, the answer to that question must be yes, but that leaves open the question of what the law would require in the platform environment. There are two elements to the mandated IRS. One is the management responsibilities of employers and the other is the rights of workers to participate in the employer’s management system. This article cannot provide a complete review of all the required elements of management systems in Ontario, but it will highlight a few that seem to have the greatest potential and likelihood of being found to apply.

Perhaps the most important mandated elements are the employer’s duty to provide information, instruction, and supervision to protect the health and safety of workers, to appoint competent supervisors, and to acquaint a worker or supervisor with any hazard in the work (OHSA, section 25(2)(a)(c)(d)). In the platform environment, the imposition of these duties could be significant insofar as it would require platform employers to more actively manage the OHS hazards associated with platform work. For groundworkers, this might involve a duty to provide warnings about the use of cell phones while driving or biking as well as reminders to obey traffic rules or to comply with applicable OHS laws such as wearing prescribed protective equipment. For online platform workers, it might require training in regard to ergonomic hazards. However, these management duties are unlikely to require better management of psychosocial and epistemic risks as long as they are not recognized as occupational hazards.

16) ESA, s. 21.1.
While the imposition of a duty to manage occupational hazards in the platform environment can have a positive effect, there is also a risk that platform employers will respond by imposing more intense surveillance and by adopting punitive behavior-based management systems that ignore the systemic pressures workers face that often promote unsafe actions. For example, platform employers can use GPS to monitor the speed of drivers and suspend them from the app for driving above the speed limit while ignoring the features of algorithmic management that promote unsafe behaviors. In general, it is easier to impose management duties than to ensure that they are exercised fairly and in ways that best address the root causes of workplace hazards.

Ontario workers enjoy three major rights in the employer’s IRS: the right to know, the right to participate, and the right to refuse unsafe work. The right to know closely intersects with the employer’s duty to provide information and instruction but gives workers more agency by allowing worker health and safety representatives (HSRs) to obtain information from the employer regarding conditions that they identify as potentially hazardous. As well, HSRs are required to periodically inspect the physical condition of the workplace so that they have the opportunity to identify hazards (OHSA, sections 8 & 9). However, because this dimension of the right to know is assigned to HSRs, its existence is contingent on the requirement to have them in the first place, which leads us to the second right, the right to participate.

The right to participate has a number of dimensions but it is most strongly institutionalized through the obligation to appoint individual HSRs in smaller workplaces or to establish a joint health and safety committee (JHSC) in larger (20+ employees) ones. HSRs and worker representatives on JHSCs (who we will also call HSRs) collectively represent workers and are involved in the identification of hazardous work condition, making recommendations for their improvement, securing information, and representing workers’ OHS concerns generally (sections 8 & 9).

The first hurdle to securing this form of collective representation is to determine whether the OHSA requires an HSR or a JHSC in the platform environment. Section 9 of the OHSA provides that a JHSC is required “at a workplace at which twenty or more workers are regularly employed” (section 9(2)(a)). In Ontario (Ministry of Labour) v United Independent Operators Ltd. (UIOL), the Ontario Court of Appeal considered whether independent contractors should be counted when determining whether there were 20 or more workers regularly employed. The court rejected an earlier decision of the Labour Relations Board and held that on a purposive interpretation independent operators should be counted as workers “regularly employed.” Therefore, even if platform workers were found to be independent contractors employed by platform owners rather than employees, this would not exclude them from the possibility of claiming a right to have a JHSC. However, they would still have to establish that they were “regularly” employed “at a workplace.”

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17) The literature on behavior-based systems is vast. For a somewhat dated, but insightful assessments of the limits of this approach and the broader context of employee responsibilization strategies, see Hopkins (2006) and Gray (2009).

18) Ontario (Ministry of Labour) v United Independent Operators Ltd. 2011 ONCA 33.
In the UIOL case, the employer conceded that its office was a workplace, but disputed that it was a place the drivers regularly attended. In a previous case, involving delivery workers, a tribunal held that dispersed workers should be counted as being regularly employed at the workplace, but that was in the context where the drivers had a home base to which they regularly returned.  

In the context of PMW, it may be difficult to establish that there is a “workplace,” defined in the Act as “any land, premises, location or thing at, upon, in or near a worker works” (section 1(1)), which seems to presuppose a physical space. It is possible that the ambiguity surrounding the meaning of a workplace in the platform environment could be resolved in favor of finding that the platform is a workplace, but that is uncertain given the definition that seems grounded in an understanding of a workplace as a physical, not a virtual space. The linking of collective representation to the existence of a physical workplace at which a specified number of workers are employed thus may deprive platform workers of this right.

Even assuming platform workers enjoyed a right to collective representation, there is the question of how or whether HSRs could conduct workplace inspections. The issue of the scope of the duty to inspect arose in a recent Supreme Court of Canada judgment addressing the question of whether it applied to remote locations not under the control of the employer. In Canada Post Corp. v Canadian Union of Postal Workers, the majority of the court upheld a determination that workplace inspections only had to be conducted over work areas that the employer controls. Therefore, postal worker HSRs did not have the authority to inspect delivery routes to identify hazardous conditions.  

While the case was interpreting federal OHS regulation, it is quite possible that a similar interpretation would be applied to the OHSA.

There is clearly a lot of ambiguity about whether collective worker representation is required in the platform environment, whether for ground or online work, and if required whether HSRs are empowered to fulfill one of their key responsibilities. However, even if these ambiguities were resolved favorably to require collective worker participation, there would still be the obstacle of making these arrangements effective in the platform environment. Again, this is not the place to delve deeply into the literature on the effectiveness of collective representation, but Walters (2021) recently summarized the factors associated with its efficacy: strong legislative steering for worker representation; employer commitment to participatory approaches to OHS management; supportive worker and union organization inside and


20) If the platform is held to be a workplace, there still may be problems determining whether the number of workers regularly present exceeds the threshold, particularly in the online environment where some workers may not be in Ontario. I have not found case law on whether workers outside of Ontario are counted for the purposes of determining whether the threshold has been met, but it is notable that recently the Ontario government advised that when determining whether an employer meets the twenty-five-employee threshold for being required to post a right to disconnect policy only employees in Ontario were to be counted. See: https://www.ontario.ca/document/your-guide-employment-standards-act-0/written-policy-disconnecting-from-work#section-1.

21) 2019 SCC 67 (CanLII).
outside establishments; and well-trained and well-informed worker representatives using autonomous worker-centered approaches to OHS. In an environment in which the preconditions for effective worker participation are generally eroding (Walters 2021, 129–138), the obstacles to establishing effective collective worker representation in the platform environment are formidable, but perhaps not insurmountable as demonstrated by the 2022 agreement between the United Food and Commercial Workers (UFCW) and Uber to provide some representational services to Uber drivers that includes periodic meetings between UFCW and Uber to discuss driver concerns and to discuss health, safety, and other issues related to the quality of platform work (UFCW Canada 2022). The agreement, however, is quite controversial given its limits and potential to impede efforts by other unions to secure collective bargaining rights for Uber drivers and other platform workers (Doorey 2022a; Mojtehedzadeh 2022). In any event, it remains to be seen whether this form of non-statutory collective representation on OHS matters yields positive improvements.

The right to refuse unsafe work is the third worker right in the IRS. Under the OHSA, workers have a right to refuse when they have reason to believe:

(a) any equipment, machine, device or thing the worker is to use or operate is likely to endanger himself, herself or another worker;
(b) the physical condition of the workplace or the part thereof in which he or she works or is to work is likely to endanger himself or herself;
(b.1) workplace violence is likely to endanger himself or herself; or
(c) any equipment, machine, device or thing he or she is to use or operate or the physical condition of the workplace or the part thereof in which he or she works or is to work is in contravention of this Act or the regulations and such contravention is likely to endanger himself, herself or another worker (OHSA, section 43(3)).

Workers who exercise their right to refuse are protected against employer reprisals (section 50).

Again, assuming that platform owners are employers of platform workers, would a right to refuse unsafe work be meaningful in this environment? First, we have the problem that the right to refuse is typically exercised by workers concerned about hazards arising from employer-provided equipment on employer premises. This is not the situation in which platform workers find themselves and so most of the enumerated circumstances in the Act for when workers can refuse do not apply. The only one that clearly does is paragraph b.1 regarding violence. This circumstance is faced by many location-based platform workers such as drivers and delivery workers and it does occur within a physical workplace, albeit one outside of the platform employer’s immediate control. Nevertheless, such a work refusal should trigger an employer investigation in the presence of an HSR or another worker and, if after the inspection the worker continues to have reasonable grounds to believe the risk of workplace violence continues, then an inspector would be called to investigate the refusal and if they uphold it, they may issue an order to address the hazard.

Having said all this, given the structures of platform work and the sources of the risk of
violence (presumably from clients or from the
times and places of rides and deliveries), it is
unclear that many platform workers would be
willing to invoke their statutory right to refuse
and trigger its process for dispute resolution.
We know that even in the best of circumstances
workers are extremely reluctant to exercise the
right to refuse, notwithstanding that the OHSA
protects them against retaliation for exercising
their rights under the Act (Foster, Barnetson,
and Matsunaga-Turnbull 2018; Lewchuk
2013). However, the extension of a protected
statutory right to refuse unsafe work might
provide some encouragement to platform
workers to informally exercise their right to
refuse by not accepting jobs offered on the app
and potentially challenging adverse actions
taken by the platform, such as suspensions
from the app.

In sum, even if we deem platform owners
and operators to be employers and thereby
remove or reduce legal status ambiguities in
PMW, existing OHS regulation is not well
designed for the platform environment. There
are many ambiguities related to matters such as
the meaning of a workplace, absences such as
the lack of regulation of psychosocial hazards
and epistemic risks, enforcement challenges
when workers are widely dispersed, and the
general problem of making rights real for
vulnerable workers.

6. WHAT IS TO BE DONE?
A recent survey by the EASHW of measures to
address OHS concerns in platform work found
that the issue has been largely overlooked by
policy makers and by platform owners and

that “few regulations, policies, strategies,
programmes, initiatives and actions are
directly related to OSH” in the platform work
environment (EASHW 2022d, 4).

On the other hand, there have been
more indirect measures that could lead to
some amelioration. One of the more common
proposals is to overcome the legal ambiguity
regarding the relationship between platform
owners and platform workers by either
declaring platform workers to be employees
or adopting a test that would make it easier
for them to secure this status. However,
in the Ontario context, it is important to
remember that an employment relationship
is not necessary for the OHSA to apply. It is
sufficient to show that the platform operator
hires workers, who may either be employees
or contractors. So, the more salient ambiguity
in Ontario is with respect to whether platform
owners hire workers at all or, as they claim, are
merely rentiers selling intermediation services
that permit clients and entrepreneurs to find
and contract with each other.

There is no case law in Ontario on the
status of platform workers for the purposes of
the OHSA, but there is case law that platform
owners hire workers for the purposes of
Ontario’s Labour Relations Act (LRA).22) As
discussed earlier, the Labour Relations Board
found that Foodora delivery workers were
dependent contractors and thus Foodora’s
employees for the purposes of collective
bargaining. More recently, an Employment
Standards Officer held that Uber Eats delivery
workers are employees for the purposes of
employment standards legislation.23) While

23) Uber Portier B.V., Claim ID# 0014666-CL000, Order ID# 0014666-COOO2 (February 22, 2022). For a summary of
the decision, see Doorey (2022b).
these decisions are helpful, they are fact-specific and leave other platform workers, especially those outside the food delivery sector, without clarity as to their status for the purposes of these laws, let alone the OHSA. Thus, legislation clarifying the legal status of platform owners as employers of “workers” for the purposes of OHSA would remove any ambiguity about whether the Act applies. The government could go even further and deem platform workers to be the “employees” of platform owners in order to give them protection under Ontario’s collective bargaining and minimum standards laws that require employment status.

Currently, the Government of Ontario is seemingly unwilling to enact such sweeping legislation. Earlier this year, it enacted the Digital Platform Workers’ Rights Act, 2022 (DPWRA), which defines worker as “an individual who performs digital platform work.” However, the Act does not define the legal relation between platform operators and platform workers for the purposes of this Act or for other statutes, although it does specify that the DPWRA applies regardless of whether the platform worker is an employee or not (section 2). As a result, legal ambiguity about whether platform operators are employers of digital platform workers, either as employees or independent contractors, remains.

A second indirect measure to improve health and safety outside the OHSA is to address some of the underlying conditions of platform work that contribute to the creation of hazardous conditions. Here, the DPWRA is much more successful. It provides covered digital workers with a right to information, including how pay for digital work is calculated, factors used in allocating work assignments, and the operation of performance rating systems. It also guarantees a minimum wage for work assignments performed (not including time seeking work on the app), a right to retain tips, a right not to be denied access to the platform in the absence of written reasons and, for longer denial of access, notice, and a right to dispute resolution in Ontario, among others (sections 7–14). These provisions go some way to address the epistemic risks arising from the uncertainty that often surrounds the algorithm’s operations and that have been identified as an OHS hazard (EASHW 2022d; Gregory 2021).

A third indirect means of improving OHS outcomes is to provide platform workers with meaningful access to collective bargaining or representation. If platform workers remain outside the OHSA, they lose access to collective representation in the IRS, which currently is the only area of law where collective representation is mandated. Conceivably, the DPWRA might be amended to provide that all digital workers or, better yet, all platform workers, are entitled to collective representation with regard to OHS matters and provide platform workers with an opportunity to select their representatives. An even stronger measure would be to give platform workers meaningful access to collective bargaining.

24) Digital Platform Workers’ Rights Act, 2022, S.O. 2022, c. 7, Sched. 1, s. 1(1). At the time of writing, the Act was not yet in force. The Act does not apply to all digital platform work, but only to ride share, delivery, and courier services performed in the province of Ontario (s. 1(1)). Ontario is not unique in limiting the regulation of digital platform work to transportation and delivery. The Spanish Rider Law (Royal Decree Law 9/2021 of May 11, 2021, ratified by Law 12/21 of September 28, 2021) is similarly limited.
whether through the LRA or an alternative arrangement. With respect to the former, while some platform workers have unionized under the LRA, they had to be recognized as dependent contractors in order to do so, but it will be a fact driven exercise in each case and many may not qualify under the existing law. Hence the need to amend the Act to bring them in. But, the LRA’s enterprise bargaining model has become less effective in providing private sector workers with meaningful access to collective bargaining and is even less well-suited to the challenging conditions that face platform workers (Doherty and Valentina 2020; Gebert 2021; Johnston and Land-Kazlauskas 2018). Hence a sectoral bargaining model is especially apposite for this group of workers.

The other way to gain collective representation (or bargaining) is through voluntary recognition. As noted earlier, Uber and the UFCW in Canada reached an agreement early in 2022 that gives the UFCW limited representation rights, including consultations with Uber over OHS issues, but it remains to be seen how well this model will work in practice. Uber has also entered into a more extensive agreement in Australia (Goods, Veen, and Barratt 2022). While, these non-state actions could potentially produce some amelioration, experience with voluntary recognition for collective bargaining purposes suggests that it is unlikely to become widespread.

These indirect measures may be helpful, but ultimately legislative changes are needed that directly address OHS in the platform environment. As the recent EASHW policy brief (2022d) indicated, we are just beginning to come to grips with the issue and much work remains to be done. However, it seems clear that priority must be given to rethinking how we regulate OHS risks in the kinds of work commonly performed through platforms, including taxi services, food delivery, and office ergonomics. Imposing a general duty on platform workers to take every precaution reasonable in the circumstances for the protection of platform workers is a starting point but given the paucity of measures taken to date by platform operators (EASHW 2022d, 11–12), there is also a need to identify the hazards faced by platform workers and require platform employers to address them or face penalties if they fail to do so.

In conclusion, while most platform work is not dissimilar from work performed in other environments, the conditions under which it is performed introduce new epistemic risks and exacerbate existing ones while creating ambiguities about the application of health and safety regulation and revealing absences that leave certain risks poorly regulated. There are some incipient developments that are beginning to address these deficiencies, but many hurdles remain.

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