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**Article**

## New Work Forms: How to Integrate Them in Our Social Insurances

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# New Work Forms: How to Integrate Them in Our Social Insurances

The increase in the group of atypical workers means that their social security protection needs reviewing. How far should we go in approaching social security for self-employed workers, flex workers, crowd workers and all new employment relationships differently? This will depend on the number of elements in respect to which the atypical employment relationship differs from the established standard: the full-time employee with a permanent employment contract. What we propose is a social security system that is sufficiently flexible in its implementation to give the different groups of workers an equal place and at the same time maintain a financially sustainable social security system providing sufficient social security protection for typical and atypical workers.

Atypical work is (once again) in the ascendant partly as a result of the flexibilisation of the labour market. Self-employment and part-time work are on the up. 'Newer' forms of atypical work are also visible in the ever-growing sharing economy, such as platform work (portfolio work, crowd work), unpaid work forms (sharing activities, internship work) or activities that do not follow a fixed pattern of work, but that do, nonetheless, create regular income (owner-manager activities that yield capital).

In this article, we seek to answer several questions from the perspective of social security law. Is there such a thing as a standard employment relationship? And if so, how does it work? What does it mean for social protection in terms of content? Work-related social security schemes are designed based on the typical 'default' situation of

the employee.<sup>1</sup> However, when the work is organised in a non-typical form, legal problems arise in the application of social security law. As a result, in many countries self-employed workers are not eligible for unemployment benefits. It appears that European systems are finding it increasingly difficult to bring the new forms of work within the scope of social security law. We examine the issue from a transnational, comparative legal perspective. As a basis for this contribution, we use the comparative research on atypical work in social security that is currently running at the University of Tilburg.<sup>2</sup>

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\* The authors are involved in the same project at Tilburg University (see footnote 2). This text is based upon an earlier publication presented at the occasion of the seminar "Automation. Jobs and the Future of Work" (Riga, 23 January 2019 – New Direction): "Digitalisation of work and its impact on social security. Platform work as an emerging atypical work form".

1 For an (historical) overview of this see K. Vleminckx, J. Berghman: Labour Market Deregulation, Non-Standard Employment and the Reform of Social Security, in: Secretaría de Estado de Seguridad Social (ed.): Social Security and the New Work Patterns: Atypical Insurance Careers, Ministerio de Trabajo y Asuntos Sociales, Madrid 2003, pp. 31-44.

2 Project 'Grenzen aan atypische arbeid: flexwerk en zelfstandige arbeid getoetst aan Europese beginselen van het socialezekerheidsrecht', runs until 29 February 2020, financed by Instituut Gak. The following countries are included in the comparison: France, Spain, the United Kingdom, Germany and the Netherlands. The initial findings are published in A. Barrio, P. Schoukens: The changing concept of work: when does typical work become atypical?, in: European Labour Law Journal, Vol. 8, No. 4, 2017, pp. 306-332; A. Barrio, S. Montebovi, P. Schoukens: The EU social pillar: an answer to the challenge of the social protection of platform workers?, in: European Journal of Social Security, Vol. 20, No. 3, 2018, pp. 219-241.

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## Definition of standard or typical work

In order to better understand the problems associated with atypical work, we must first define the concept of 'standard' or 'typical' work. The 'standard' social security law for work-related schemes has been developed with this in mind. The 'typical' worker was the model for this. If we can clearly define the elements in respect to which the atypical employment relationship deviates from the 'standard', then we can take these into account when deciding on the content of social security law. This was one of the conclusions of a comparative study of social security for self-employed workers in the European Union conducted.<sup>3</sup> It suggested that in order to be able to apply social security in an adequate manner to the group of self-employed workers, attention should first be paid to the specificity of the group with regard to their work organisation. In what respects does the employment relationship differ from that of standard workers? Only then can social security be satisfactorily adjusted to this specificity. We started from the assumption that work-related social security is neutral with regard to its basic principles (the neutrality of the working status), but that these principles need an adapted application for specific forms of employment (work status-specific application). This means that social security for atypical workers aspires to similar protection objectives as those on which the social protection of employees is based, but that in practice it can have its own specific application when applied to the various atypical groups.

In order to be able to define the atypical form of work, we first need to know who the typical employee is and what is so typical about the employment relationship between the employee and the employer. Following an extensive study of the literature,<sup>4</sup> we used the definitions applied in Eurostat<sup>5</sup> and at the International Labour Organization<sup>6</sup> as a basis. The 'standard' refers here both to the regulatory model<sup>7</sup> that forms the basis for the regulation of social law and to the labour market model that is regarded as 'standard' in all existing employment relationships. Employment relationships that differ from this are regarded as 'atypical'.

- 3 See P. Schoukens: De sociale zekerheid van de zelfstandige en het Europese Gemeenschapsrecht: de impact van het vrij verkeer van zelfstandigen, Leuven 2000.
- 4 See A. Barrio, P. Schoukens: The changing concept of work..., op. cit.
- 5 Alzo wat bedoeld met 'Alzo'? in de European Union Labour Force Survey – Annual Results.
- 6 International Labour Organization: Recommendation 198: Employment Relationship Recommendation in 95th Session International Labour Conference, Genève 2006.
- 7 In contrast to the deregulating model that is now gradually being used as a standard, for instance, flexicurity. See S. Deakin: Addressing labour market segmentation: the role of labour law, International Labour Office, Genève 2013, p. 4.

From this point of view, perhaps Walton provides the most complete description of the typical standard employment relationship.<sup>8</sup> This can be defined as the "stable, open-ended and direct arrangement between a dependent, full-time employee and their unitary employer". The definition not only contains the traditional elements of the employment relationship (the personal subordination, the bilateral nature of the relationship, the wage as a source of income, the economic dependency, the reciprocity of the commitments and the place where work is carried out – all together the first characteristic), but also qualitatively implies the job security and income security, which are the objective of the permanent employment relationship.

### The elements of the standard employment relationship

*Personal subordination:* The first, and perhaps most important, element is the personal subordination of the employee to the employer. Legally, subordination traditionally refers to as the control and supervision that the employer has over the employee.<sup>9</sup> As the work becomes more intellectual in nature (for example, with highly educated employees), the nature of the instruction and control also changes. For example, the functional coordination of the work and the degree of integration of the work gradually dominates in the labour organisation of the employer. Control over the duration, the formal organisation and the scope of the work prevail over the substantive control by the employer.<sup>10</sup>

*Bilateral employment relationship:* An unequal bargaining position lies at the (normative) basis of the labour law aimed at protecting employees. According to Freedland and Kountouris, this is the result of the bilateral contractual nature of the standard employment relationship whereby one of the parties, the employee, is in an economically weaker position and therefore needs more protection.<sup>11</sup>

- 8 M.J. Walton: The shifting nature of work and its implications, in: Industrial Law Journal, Vol. 45, No. 2, 2016, pp. 111-121 with reference to K.V.W. Stone, H. Arthurs: The Transformation of Employment Regimes: A Worldwide Challenge, in: K.V.W. Stone, H. Arthurs (eds.): Rethinking Workplace Regulation: Beyond the Standard Contract of Employment, Russell Sage Foundation, New York 2013, pp. 1-20; M. Freeland: Burying Caesar: What Was the Standard Employment Contract?, in: K.V.W. Stone, H. Arthurs (eds.): Rethinking workplace regulation: Beyond the standard contract of employment, Russell Sage Foundation, New York 2013, p. 82.
- 9 B. Veneziani: The employment relationship, in: B. Hepple, B. Veneziani (eds.): The transformation of labour law in Europe: A comparative study of 15 countries 1945-2004, London 2009, p. 109.
- 10 Eurofound: Time Constraints and Autonomy at Work in the European Union, Publications Office of the European Union, Luxembourg 1998. Applied to the increasing autonomy of translators see J. Fraser, M. Gold: Portfolio workers: Autonomy and Control amongst Freelance Translators, in: Work, Employment and Society, Vol. 15, No. 4, 2001, pp. 676-697.
- 11 M. Freedland, N. Kountouris: The Legal Construction of Personal Work Relations, Oxford 2011, Oxford University Press, p. 370.

*Reciprocity of the commitments:* The contractual relationship between employee and employer in turn leads to a reciprocal relationship. Employers pay wages in exchange for the work delivered by employees and are therefore obliged to provide (sufficient) work so that employees can obtain sufficient income security and can further develop their skills (to strengthen their position in the labour market and to earn more). On the employee's side, this implies being available to perform the work on offer.

*Salary (remuneration):* An essential component in the (regulation of the) employment relationship is the salary that is paid to the employee in exchange for the work done. In view of the intended (income) security, the salary is extensively protected.<sup>12</sup> After all, it must enable employees to generate an income that leads to sufficient social security for them and their family. And that income offers companies (employers) – and the economy in a broader sense – consumption assurance. Therefore there is a reciprocal interest in income.

*Economic subordination:* Salary dependency leads to the economic subordination of employees towards their employer. The employment relationship is the most important – sometimes even the only – source of income for employees. This means they are not in a position to sufficiently spread the economic risks of earning income.<sup>13</sup>

*At the employer's workplace:* Finally, work is generally done at the employer's workplace. This is an element that follows from a traditional Fordism,<sup>14</sup> but that has become relatively less important in light of the increasing possibilities to spread the work geographically.<sup>15</sup> Some argue that the workplace is not an essential part of the traditional standard employment relationship.

### Work stability

The traditional employment relationship leads to work and income security (the social function of the employment relationship). Work stability covers two elements.

- 12 R. Knegt: The Employment Contract as an Exclusionary Device, in: R. Knegt (ed.): The Employment Contract as an Exclusionary Device: An Analysis on the Basis of 25 Years of Developments in the Netherlands, Antwerp 2008, p. 3.
- 13 G. Davidov: Freelancers: An Intermediate Group in Labour Law?, in: J. Fudge, S. McCrystal, K. Sankaran (eds.): Challenging the Legal Boundaries of Work Regulation, London 2012, pp. 171-185.
- 14 Reflecting the work organization introduced by Ford and referring to stable employment based upon an open ended, full time and direct arrangement with a unitary employer leading to the necessary job-security allowing in its turn to the necessary amount of consumerism and economic activities affording the (further) development of our welfare states.
- 15 J.E. Vleminckx, J. Rojot: The Fissured Workplace in France, in: Comparative Labor Law & Policy Journal, Vol. 37, No. 1, 2015, p. 165.

The employment relationship is permanent. It can only be terminated under certain conditions or for certain reasons such as incompetence, bad behaviour or economic reasons. This long-term solidarity between employees and employers can manifest further into permanent training facilities that might create an increasing autonomy on the part of employees within the company.<sup>16</sup> Mutual trust and loyalty in this sense therefore become important elements in the employment relationship between both parties. In addition, work stability refers to the full-time nature of work that translates into a working week established in advance (standardised working hours).

### Income security

Work stability, in turn, creates the intended income security for employees. Income security relates to earning a salary that is sufficient to provide for livelihood security, but also to the expectation of sufficient social protection when there is a risk of loss of income due to unemployment or incapacity to work (role of social security as income replacement). Income security allows people to consume and plan in the long(er) term, making long-term investments once again possible.<sup>17</sup> The government also assumes (macro) income security since it guarantees stable income through taxation. It enabled Europe to develop the welfare state after World War.<sup>18</sup>

### Atypical forms of work

Generally speaking, atypical work involves the disappearance of one or more of these typical characteristics, such as economic subordination, at the employer's workplace or work or income security. We refer to these as the external challenges. Nevertheless, it may happen that all the characteristics are present, but that the characteristics themselves are subject to developments; these are the internal challenges.

### Internal developments

The traditional characteristics of the standard employment relationship can themselves be subject to evolution. The employment relationship retains its traditional characteristics, but the content-specific interpretation of the element evolves. For example, work is no longer

- 16 N. Zekic: Job Security or Employment Security: What's in a Name?, in: European Labour Law Journal, Vol. 7, No. 4, 2016, p. 568.
- 17 G. Bosch: Towards a New Standard Employment Relationship in Western Europe, in: British Journal of Industrial Relations, Vol. 42, No. 4, 2004, p. 619-620.
- 18 H. Gottfried: Insecure Employment: Diversity and Change, in: A. Wilkinson, G. Wood, R. Deeg: (eds.): The Oxford Handbook of Employment Relations: Comparative Employment Systems, Oxford University Press, Oxford 2014, pp. 541-570.

necessarily done at the employer's workplace, but it can be spread out geographically or done at the employee's home (home work or more recently teleworking). The working conditions that relate to the workplace will necessarily have to be adapted to this situation (consider, for example, the establishment of working hours, rest times, as well as the suspension of the employment contract in the event of a technical defect at the workplace).

Similarly, the interpretation of legal (personal) subordination has also evolved. For example, the service economy is increasingly characterised by more complex forms of work that require a high level of education on the part of employees. The employer depends on the intellectual autonomy of the employee. Consequently, the assessment of legal subordination will focus more on the functional context within which the employee is active (and the possible freedom that the employee has: working hours, use of equipment, use of rooms made available by the employer, etc.). The characteristics of standard work therefore also comes under pressure from 'from within' and must, where necessary, be given a new interpretation, adapted to social and/or technological evolutions.

### External developments

More important for this contribution is the evolution in which the traditional elements of the standard employment relationship come under external pressure. Atypical work can also be regarded as an external development of typical work caused by the absence of one or more characteristics. Atypical work is not a recent phenomenon. In a certain sense, it has always been there and it is precisely in the standard employment relationship that it finds its rationale. After all, as soon as work is done in which one or more elements typical of the standard relationship are absent, we are dealing with atypical work.

Originally, these atypical forms developed around the absence of a legal subordination (independent work) and/or because of the absence of a stable employment relationship (fixed-term work) or income security (part-time work). It is also these atypical forms of work that are still the most prevalent in Europe. Roughly speaking, 60 % of the working population in the European Union is still employed on the basis of a permanent contract<sup>19</sup> and employment in the form of temporary and/or part-time work is 'limited' to 14 % and 19 % respectively of the workforce (combined or not), while self-employed work still only oc-

cupies a modest share of 4.5 %. However behind these figures there are some interesting trends to be observed. For example, these three main forms of atypical work account for one third of all employment relationships in the OECD countries and account for half of the net employment growth since the 1990s.<sup>20</sup> In Italy, France and Germany the percentage of professional activity in the age group between 15 and 24 years on the basis of a standard employment relationship has dropped by 30 % to 40 % in the period 1985-2015.<sup>21</sup> In the Netherlands, half of the workforce is employed part-time.<sup>22</sup> These figures indicate that atypical forms of employment are (again) on the rise. But perhaps more important than the bare figures is the increasing variety of atypical work.

New forms of atypical work come to the fore, deviating from the other elements of standard work, including for example (the lack of) salary, reciprocity or economic subordination. For example, non-paid forms of work such as internships, apprenticeships or doctoral fellowships are increasingly being used, whereby the doctoral student is qualified as a student for the application of employment and social security law. Employment forms in which the employee is increasingly paid on the basis of the return of the operating capital and less in proportion (or 'reciprocity') to the work done are also on the rise.<sup>23</sup> Similarly, the remuneration of 'popular' participants in social networking sites is increasing; people with many followers or friends are regarded by companies as (potential) trendsetters and paid in proportion to success – and not to the work done.

Furthermore, it is striking that new forms of work increasingly contain more different atypical work elements at the same time. Atypical work has generally developed into a combination of temporary, part-time and self-employed work, possibly even further supplemented by other atypical elements, including for example the lack of reciprocity, bilateral legal relationship or economic subordination. Crowd work is a good illustration of this.

19 Eurostat: European Union Labour Force Survey – Annual Results 2014, retrieved August 2016, [http://ec.europa.eu/eurostat/statistics-explained/index.php/Labour\\_market\\_and\\_Labour\\_force\\_survey\\_\(LFS\)\\_statistics](http://ec.europa.eu/eurostat/statistics-explained/index.php/Labour_market_and_Labour_force_survey_(LFS)_statistics).

20 OECD: In It Together: Why Less Inequality Benefits All, Paris, OECD Publishing, Paris 2015, pp. 137-139.

21 K.V.W. Stone: The Decline in the Standard Employment Contract: A Review of the Evidence, in: K.V.W. Stone, H. Arthurs (eds.): Rethinking Workplace Regulation: Beyond the Standard Contract of Employment, Russell Sage Foundation, New York 2013 p. 374.

22 Eurostat: Part-time Employment as Percentage of the Total Employment, by Sex and Age, retrieved August 2016, [http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=lfsa\\_eppga&lang=en](http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=lfsa_eppga&lang=en).

23 In 2013, the Employee Shareholder Status was introduced in the UK, where the employee opts for a share in working capital in exchange for a loss of employment protection against dismissal and severance pay. Likewise, the large numbers of self-employed workers in Belgium that are organised in company form and that pay themselves an income that is fixed at a fixed rate independently of the work done.



Crowd work is when a client offers work on an online platform, that is done by an individual. The work can be performed off-line (Uber, Deliveroo, TaskRabbit, etc.) or (immediately) online (Amazon Mechanical Turk). Depending on the platform, there are different levels of control carried out on the established legal relationship and/or the delivered result. For example, the high level of control and pricing exercised by Uber is increasingly becoming an element that is taken into account in the case law to nevertheless qualify the 'atypical' employment relationship as paid employment.<sup>24</sup>

### Consequences for social security

What exactly are the elements that deviate from the standard employment relationship which should be taken into account when drawing up the (work-related) social security schemes? The typical employment relationship of the 'full-time employee' is the basis for this standard.<sup>25</sup> A unique, specific solution must be found in the social security system for forms of work that deviate from the standard employment relationship. For example, earlier research has shown that unemployment insurance can be organised for the group of self-employed workers.<sup>26</sup> The uniqueness of the group will, however, need to form the basis from which the fundamental principles of social security can be translated correctly: the fact is that unemployment insurance for self-employed workers will be different because there is no subordinate relationship with the employer. The conditions for the granting of a benefit will first and foremost have to relate to the discontinuation of the self-employment and not to dismissal.

Thus, for atypical forms of work, it will be appropriate to examine where the specificity (deviation from the standard) lies and how this uniqueness can be translated into an adapted application of social security protection. Due to the increase in atypical forms of work and the simultaneous application of several atypical work characteristics in each of these types, more and more challenges arise. Given the limited structure of this contribution, we cannot here examine each atypical group individually. Without being exhaustive, we list a number of atypical elements that require a review of social security, at least if we want to keep the atypical workforce in the system.

Many atypical work forms no longer entail (full-time) work activities that are performed in exchange for wages (reciprocal commitments). The relationship between work activity and income is called into question (see above examples of the employee shareholder, the non-work-related activities on social networking sites that generate income, etc.). It will become increasingly difficult to determine when the 'activity' can be taken into account for the application of work-related social security schemes. Conditions that are determined in terms of the number of hours worked or other work volumes in social security law (access conditions, contribution provisions in respect of which the amount is related to the number of hours worked) are harder to apply to atypical forms of work. It can be expected that as work becomes more flexible, the income factor will play a greater role in determining the (scope of) social security rights and obligations and that this will be at the expense of the work (volume) element.

What is more, many atypical forms of work appear to be based on work that is not paid or is paid only marginally (reduction of the income security and salary elements). It becomes more difficult to determine whether the activity performed has the underlying objective of generating income (livelihood security), or focuses rather on a different (non-mercantile) objective, such as learning more during an internship. To what extent can these forms of work (still) be included in work-related social security? What minimum thresholds will we apply for considering work for accruing entitlements to social security?<sup>27</sup> How far can we go in financially supporting these types of (non-economic) activities (role subsidies, in-work benefits)? Thresholds are exclusive and therefore less desirable as work flexibility increases. It might be necessary to switch to more transparency, with every euro earned from an activity creating entitlement to social security. There is also the observation that the Nordic two-pillar system has fewer problems protecting atypical forms of work (in particular non-economic activities) due to the general protective function of the first universal pillar. Yet, here attention should be given to the financing side, as atypical work forms such as platform work may not yet be well enough incited to pay in proper taxes/contributions for social security purposes. Arrangements meet the first protection needs of the growing group of atypical workers.

Atypical forms of employment deviate more from the bilateral relationship with one employer. For example, multiple clients can be considered to be the employer (see

24 In this sense, for example Federal District Court San Francisco 11 March 2015 and London Central Employment Tribunal Aslam and Farar v Uber, 28 October 2016.

25 K. Vleminckx, J. Berghman: Labour Market Deregulation ..., op. cit., pp. 31-44.

26 P. Schoukens: De sociale zekerheid van de zelfstandige en het Europese Gemeenschapsrecht, op. cit.

27 An initial comparative study shows us that Member States deal very differently with the definition of 'marginal' work and that the minimum thresholds for accessing social security schemes in Europe vary widely.

platform work, temporary work, etc.). In traditional social security, the employer still has an important (administrative) position, for example with regard to collecting the contributions or regarding the final conditions for of benefits during illness and unemployment. Who will take on this role or duty with regard to the non-traditional work forms: the client, the customer, the platform at the centre of the sharing economy, the state? When there are multiple clients (see crowd work), the question arises as to how this client responsibility can be spread. Alternative forms will have to be thought up to accommodate the declining role of the employer. With regard to this, inspiration can be drawn from the solutions implemented in numerous systems for agency workers in Europe.

Atypical forms of work are at risk of presenting an increasing qualification problem (absence of traditional legal subordination). In a derived form, this qualification conflict threatens to culminate in a growing number of sham employees who can be deployed more 'cheaply' (because they are less protected). To prevent this, efforts must be made to guarantee full social protection for all forms of work, taking into account the uniqueness of the form of work in each of the work groups. For this purpose, a link can be sought with the aforementioned distinction between work status neutrality and specificity as refined and applied for self-employed workers.

## Conclusion

The increase in the group of atypical workers means that their social security protection needs reviewing. How far should we go in approaching social security for self-employed workers, flex workers, crowd workers and all new employment relationships differently? This will depend on the number of elements in respect to which the atypical employment relationship differs from the established standard: the full-time employee with a permanent employment contract. But first it must be clear, from the perspective of social security, what the universal core el-

ements of the employment relationship are and what internal and external deviations from this exist. Once this has been done, atypical elements can be examined with regard to their discordant relationship with current social security law. And then, if necessary, they can be tailored within national social security law.

What we propose is a social security system that is sufficiently flexible in its implementation to give the different groups of workers an equal place and at the same time maintain a financially sustainable social security system providing sufficient social security protection for typical and atypical workers. In essence, this constitutes the theory of work status specificity: the underlying objective of social security is in principle neutral with regard to the various forms of work, but when implementing these objectives they should be adapted to the specificity of activities that the different types of work entail.

However, the platform economy, and the digitalisation of work in general, show us that our social security is facing an additional challenge. While for many years, working 9 to 5 was the standard earning model in our welfare state, today there are a variety of different ways to generate income. Each individual (whether or not in a family context) will continue to feel the need to generate income to build their life and to improve their standard of living or to find meaning in work. If social security wants to safeguard its role with regard to income protection, it will have to accommodate this evolution of possibly multiple forms of income acquisition in existing or new protection systems. In doing so, a balance must be found between general protection (for all workers) and adapted protection (taking into account differences in the underlying earning models of families and individuals). The economy 4.0 is therefore an invitation to review social security, to go back to the essence while at the same time thinking out of the box. Not responding to the challenges fundamentally is not a policy option, at least not if the social security system is to be preserved.

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### Title: *New Work Forms: How to Integrate Them in Our Social Insurances*

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