Policy Brief

ALIGNING LABOUR REFORMS WITH INDIA'S DIGITAL ASPIRATIONS

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ABOUT THE AUTHOR

Sidharth Deb is a Fellow at the Esya Centre. Mohit Chawdhry is a Junior Fellow at the Esya Centre.

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The Esya Centre is a New Delhi based technology policy think tank. The Centre's mission is to generate empirical research and inform thought leadership to catalyse new policy constructs for the future. It aims to build institutional capacities for generating ideas that will connect the triad of people, innovation, and value to help reimagine the public policy discourse in India. More details can be found at www.esyacentre.org.

BACKGROUND

In September 2020, approximately a year after the Code of Wages, 2019 (Wages Code) was passed, India's Parliament enacted three new labour laws.[1] These were

- the Industrial Relations Code, 2020 (IR Code)
- the Code on Social Security, 2020 (Social Security Code) and
- the Occupational Safety, Health and Working Conditions Code, 2020 (OSHWC Code).

These labour codes are part of wider reform to consolidate and update Indian labour law, which has historically struggled with scattered legislation, centre-state inconsistencies, rigid compliance norms and technological obsolescence.

For technology markets the reform can be described as one step forward, two steps back. Its progressiveness is seen with the introduction of protections for new forms of labour arising from the digital economy. The Social Security Code explicitly addresses workers in non-traditional arrangements with platform aggregators.[2] The Code defines "aggregators" as digital intermediaries or online marketplaces connecting buyers and sellers[3]— and its Seventh Schedule classifies these aggregators in expansive terms.[4] These legislative machinations empower the Union Government to design social security schemes for gig and platform workers.[5]

The code contemplates various schemes for digital economy workers which span life and disability cover, accident insurance, health and maternity benefits, old-age protections, creche facilities and other benefits deemed appropriate.[6]

In the last category the Government, while exercising discretion, must develop interventions to safeguard healthcare and provide income support for people in vulnerable situations as defined in the Code.[7]

The Code also conceives diverse mechanisms and sources to fund worker welfare programs. These include flexible combinations of funding from the central and state governments, online aggregators, beneficiaries, and corporate social responsibility mechanisms under Indian company laws.[8]

These social security schemes will be formulated and administered by a purpose-specific National Social Security Board representing aggregators, gig/platform workers and relevant government bodies.[9] This demonstrates the framework is designed to facilitate appropriate dialogue and consultation before implementing policy.

With these steps India exceeds advanced jurisdictions where governments are failing to act with similar foresight. In the United Kingdom for example, the tendency of technology markets to outpace policymaking left it to the Supreme Court to decide whether gig workers on a ride-sharing platform fit within one of three industrial era classes of workers.[10] The court based its decision on a London-specific factual matrix, and its ramifications for the wider gig ecosystem remain unclear.[11]

Conversely, in California the legal fate of platform workers was determined through a statewide ballot referendum, an even more inequitable mechanism.[12] Voters were asked to decide whether gig/platform workers should be categorised as one of two legacy classes of workers as defined in local laws. Either outcome in such a setup is likely to be unfair to one side. Affected workers subsequently challenged the legality of the vote in court.[13]

In typical regulatory paradigms for technology markets, it is common for decision makers to fit square pegs into round holes. So it is encouraging that India has proactively created novel classes of workers, demonstrating a willingness to adapt to a digital economy that is disrupting traditional labour-enterprise relationships and work dynamics. It is a first step in developing a responsive, balanced framework attuned to new markets in technology. In fact India is one of the first jurisdictions to define specialised statutory mechanisms for social security support to this class of workers.[14]

However, the overall texture of these reforms remains inadequate in critical respects. This is unsurprising given the complex considerations lawmakers must balance in this domain. Indian central and state authorities are currently working to finalise draft rules to implement the new framework.[15] The states, which largely define working conditions on the ground, must facilitate consultations before the final rules come into force.[16]

This issue brief offers analysis and recommendations for stakeholders to consider in the runup to this process—for nationally important digital markets.[17]

1/ PROPORTIONATE AND BALANCED REFORM

Agnostic of market specificities, successful labour regulations are able to balance workers' rights with business interests. Policymakers would benefit from leaning on principles and observations of institutions like the World Bank, International Labour Organisation (ILO) and the Parliamentary Standing Committee on Labour (Standing Committee) to achieve a balance. It would also facilitate interventions consistent with international standards, India's own international commitments and constitutional imperatives.[18]

In this context, the Standing Committee which studied each of the labour codes before their enactment has stated consistently that ease of doing business is a key objective of the reform.[19] Other objectives include ease of compliance, a predictable policy regime, growth in overall employment, and support for flexible models of labour.[20]

A framework to manage these competing interests must establish holistic and agile systems of governance that would

- prevent workforce informalisation,
- reduce wealth and income inequalities,
- increase overall employment,
- ensure humane working conditions, and
- afford enterprises sufficient flexibility to optimise their productivity and efficiency.

Such systems must be robust enough to withstand ongoing and future socio economic crises. To do this it must identify those most vulnerable to economic shocks, and protect them from falling into joblessness, hunger and informal jobs.

Informal job roles typically include work as casual or contract labour,[21] though there are hierarchies within these classes. In the COVID-19 pandemic's early days for instance, workers in construction and agriculture were most deeply affected,[22] while the digital economy (especially e-commerce) proved especially resilient.[23]

A balanced regime must develop a hierarchy of vulnerable segments of workers and ensure that the burden of support is assigned evenly between governments and businesses. For example, It is a well-established principle that it is disproportionate if governments force businesses to retain workers at the cost of an enterprise's economic efficiency and productivity.[24] Asymmetric responsibility yields poor economic outcomes, greater informalisation, and has negative impacts on minority worker groups.[25]

Rigid or restrictive labour regulations can also harm the economy's ability to adjust to fast-changing markets.[26] The digital economy is even more complex, as it upends physical and jurisdictional paradigms, adding a layer of tension. As labour laws are predominantly administered by state governments, local interventions without appropriate central guidance may fail to balance the varying considerations mentioned above.

As an example, local attempts at ensuring labour flexibility famously went awry last year. Several state governments unilaterally suspended various labour laws, freezing workers' ability to collectively bargain, undoing health and safety guarantees, suspending on-site inspections and undercutting the local implementation of labour laws.[27] The ILO warned India about its compliance with ratified international commitments on tripartite consultation—where interventions must follow appropriate social dialogue between representatives of the government, workers and employers.[28]

The Union Government must steer the states toward more appropriate interventions that balance worker protections with business flexibility. This requires smart interventions since studies by institutions like the World Bank find that restrictive labour regulations have led to a 35 percent increase in the unit labour cost for Indian businesses.[29] Other studies establish how labour market rigidity contributes to higher youth unemployment.[30]

On the other hand, flexible labour regulation benefits all stakeholders. For employers it drives operational efficiency, labour and enterprise productivity, and correlates positively with firm innovation.[31] For workers it increases labour market participation among students, women and other underrepresented groups.[32] Together these lead to a more productive economy.

2/ FEATURES OF THE DIGITAL ECONOMY

India must strike a balance between prescription and compliance in the online gig economy. Its labour reforms must respond to certain characteristics native to the digital ecosystem, where most organisations are enabled by information and communication technologies (ICT). In contemporary ICT systems, which are data-driven and managed by algorithms, most multi-sided online ecosystems operate with the following underlying features:

- *Economies of scale* : Most successful or viable digital platforms are defined by large scale. This is because the digital economy is characterised by high fixed costs upfront for building digital infrastructures or networks, and low marginal costs for servicing each new customer, since distribution takes place inexpensively over the internet.
- *Network effects :* As more participants join a multi-sided network, its utility for all participants increases. This spurs more participation, creating a virtuous cycle of growth in production and consumption. It also yields an environment where transaction volumes are shaped by demand-driven externalities.
- *Momentum :* Demand-side sentiments play a significant role online. These are partly shaped by network design, such as the use of platform algorithms, but network externalities are also important factors. Consumer mobilisation can occur in unrelated corners of the internet. Recently, discussions on an online forum dedicated to stock market trading (WallStreetBets) fuelled a large number of trades for specific stocks through an investment app called Robinhood. The unprecedented transaction volumes caused ripples of instability across the US financial markets.

Businesses which allocate and deploy resources, most efficiently towards harnessing such environments are the ones which optimise productivity and, in turn, create job opportunities. Proportionate labour regulations in digital markets would let enterprises navigate market conditions efficiently, optimally allocating resources to process unpredictable transaction volumes or circumstances. This would mean giving them sufficient leeway to adjust the size of their workforce, and optimise the available human resources in a manner consistent with unpredictable work hours. Such factors explain why many workers in the gig economy operate outside the traditional employer-employee setup. This new model of labour also gives workers greater flexibility to decide the schedule, duration and nature of their work.

Aside from this, digital markets offer Indian workers novel opportunities for improved life quality. First, they bring people with less sophisticated skill sets into formalised work streams. This is possible because of the innate data-ingesting model of digital markets, where optimisation, real-time processing and monitoring are core components of operation. Second, some companies offer workers vocational training to help them acquire new skills, raising their employability.

Third, these skills are not rooted or locked into the concerned business alone, but are transferable across different platform models for gig or platform work. This transferability/fungibility is beneficial especially when there is market competition, as it lets workers pick and choose which establishment they would like to work with. In this context the ILO recently observed that from 2010 to 2020 there was a fivefold increase in the number of online platforms offering work to people worldwide—with India achieving the second highest numbers after the United States.[33]

Fourth, flexibility gives workers a greater chance of employment at more than one type of enterprise, optimising their earning potential. And finally, greater formalisation of low-skilled workers is needed to enhance the country's gross domestic product ("GDP"). Digital markets create new opportunities to capture value generated by labour force participants, in turn augmenting the GDP.

3/ DIGITAL PLATFORMS ARE DRIVING OPPORTUNITIES FOR INDIAN LABOUR

A 2021 ILO flagship report studies the role of digital platforms in transforming the world of work.[34] It finds that software development and related tasks account for the largest share of online gig work, and continue to increase its overall share of online labour tasks.[35] Other segments that grew marginally from 2018 to 2020 were professional services, and sales and marketing support.[36] From a national perspective, despite a global decline, India saw a 3% increase in work opportunities in the online creative and multimedia domains.[37]

Much of the demand for online services originates from employers in Australia, Canada, Germany, New Zealand, the UK and USA. Here the globalised nature of ICT value chains gives India an advantage, as it is viewed as a global leader in services. The ILO estimates that India currently has a 20% share of the online market and the jobs that come with it.[38] There was an 8% increase between 2018 and 2020 in India's share of total online labour supply.[39] While India maintains its leadership in the global outsourcing and IT services segment, it is crucial to remember that just as in manufacturing, it is in close competition with jurisdictions like Vietnam.[40]

Nonetheless, the ILO report clearly establishes, India's labour supply is best positioned within emerging markets to service the growing employer demand for online/gig work. The authorities would do well to keep in mind that much of this demand is not local (although that share continues to increase)[41] and emerges mostly from international employers.[42] It is in national interest therefore to attract investment from these jurisdictions through fair but favourable labour laws.

Strategically, India's developmental programmes will benefit if its labour market interventions are aligned with emerging or established comparative advantages. Traditional regulatory assumptions must be replaced with fresh and agile approaches adapted to the features inherent in new markets. Some low-hanging fruit for smart governance pertain to hiring, work hours, labour management and redundancies, as discussed below.

4/ PATHWAYS TO A BETTER FRAMEWORK

1. Flexible hiring

Rigid labour laws perpetuate inequalities in the job market. This is especially true of the online arena. The ILO notes that India had the lowest participation of women in internet-led job roles, at 21 percent.[43] The latest labour reform constrains hiring flexibility by limiting the ability of enterprises to contract labour. The OSHWC Code outlines restrictions on hiring without considering their implications for the digital economy. Ambiguous drafting and mechanisms for discretionary decision making by non-specialised labour authorities will lead to problems as these bodies are unlikely to have sufficient expertise in digital markets.

Specifically, the OSHWC Code stipulates that establishments engage contract labour only in limited circumstances. Businesses are generally prohibited from engaging contract labour for any activity deemed part of their "core activity".[44] The Code carves out three discrete exceptions, based on fact-based determinations made by the firm which are based on one or more of the following considerations:[45]

- Is the activity ordinarily done through a contractor in the normal functioning of the establishment?
- Are the activities such that they do not require full-time workers for the major portion of the working hours in a day or for longer periods?
- Are there any sudden increases in the volume of work in the core activity that needs to be accomplished within specific time periods?

The law therefore forces establishments into making two distinct fact-based determinations before employing contract labour.

First, is a particular activity the core activity of an establishment? This determination must follow an evaluation benchmarked against the OSHWC Code's definition of "core activity of an establishment".[46]

The Code defines this as any activity for which the establishment was "set up", and would include any activity "necessary or essential" to the establishment's core activity. The provision contains an illustrative list of activities which would **ORDINARILY** not be considered essential or necessary activities.

However, the law states that if an establishment is set up specifically for a purpose referenced in this illustrative list of non-core activities, it is prohibited from contracting labour for the concerned activity—as in that circumstance it would be treated as a "core activity".[47]

If, after sufficient fact based assessments, the answer to the above question is **NO**, then the establishment is free to use contract labour for designated non-core activities. **If the answer is YES, the establishment must undertake a second order assessment**, to evaluate whether its core activities fall within any of the three exceptions listed earlier.

If this second order evaluation yields a yes, then in those narrow instances an establishment may hire contract labour for core activities which fall squarely under the exceptions listed in the OSHWC Code.Even after these assessments, **the framework adds another layer of complexity**, since businesses still face the looming risk of discretion by state authorities at a later stage.

Appropriate central and state labour authorities along with designated labour advisory bodies may make ex-post determinations (reacting to complaints, or through suo motu interventions) of whether an activity is core or non-core.[48] These bodies' interpretations would dictate how a firm can use contract labour. Such a mechanism exposes establishments to the risk of being assigned new institutional compliance requirements, within potentially arbitrary timelines, and the threat of punitive action as well.

Within this framework design, here are some of the law's indicative list of non-core activities:[49]

- sanitation work, including sweeping, cleaning, dusting and collection and disposal of all kinds of waste,
- canteen and catering services,
- loading and unloading operations,
- running hospitals, educational or training institutions, guesthouses, clubs and the like that are in the nature of support services for an establishment,
- courier services in the nature of support services of an establishment,
- housekeeping and laundry services, and other like activities in the nature of support services of an establishment, and
- transport services, including ambulance services.

Here the framework's restrictions on contract labour begin to unravel with respect to digital establishments. Labour authorities and advisory bodies are unlikely to be equipped with experts on the digital economy. They may stumble into interpretation miscues in the digital markets. Non-specialised labour authorities may hold that the core activities of many online platforms are in fact activities which fall in the above list.

Imagine a scenario where gig/platform workers in online markets are determined to be performing "core activities" for digital establishments, and are not within the scope of exceptions for contract labour in core activities. This would erode contract labour flexibility and reduce efficiencies for businesses executing online transactions.

Therefore, the entire ecosystem will benefit if authorities consult with stakeholders to develop a nuanced and consistent position on core activities for the digital economy. This must marry the business model underlying business models in platform economies and the native characteristics of the digital economy discussed earlier.

First, such determinations of core or non-core activities for digital establishments could consider the definition of aggregators prescribed in the Social Security Code. Section 2(2) of the Code defines them as digital intermediaries or online marketplaces. Second, authorities must also weigh that such establishments are primarily concerned with developing robust digital infrastructure and networks, which connect and build value for parties in multi-sided markets. Their work is centred on optimising digital infrastructures and focusing on technical reliability. Thus they facilitate transactions or interactions between parties connected through systems of matching supply and demand.

Seen through this lens, it becomes apparent that gig/platform workers are not core to the central operation of a digital establishment. Instead, what they do is provide complementary support services to improve the transaction experience for consumers. Gig or platform workers on the payrolls of a digital infrastructure or platform establishment also help alleviate the burden of smaller establishments, by creating auxiliary capacities to execute sales over the internet. This provides small firms with the support facilities needed to expedite their digital transformation. This can occur while smaller establishments focus on their specialised skills, of producing or procuring the goods and services demanded by consumers.

To retain flexibility, it would be beneficial if the government worked with all stakeholders to designate gig/platform work as a non-core activity for digital establishments.

Alternatively, given that the framework permits partial exemptions to contract labour in core activities, the government should consider mechanisms to create proportionate exemptions for firms in the information technology and information technology enabled services (IT/ITeS) sector. Naturally, such exemptions would be accompanied by complementary income support safeguards for workers.

2. Flexible work hours

The limits on working hours in the current OSHWC Code lack flexibility. This is underscored by Section 25(1)(a) of the Code, which prescribes that workers are not allowed, or cannot be required to work for more than eight hours a day by any establishment or class of establishments. Section 27 of the Code further empowers government authorities to prescribe limits on an establishment's ability to seek overtime work.

The Code is clearly a rigid inclusion of India's international commitments to the ILO's convention on hours of work in industrial settings.[50] That convention established the international "application of the principle of 8-hours day or the 48-hours week", but a closer look shows that it was designed for industrial undertakings. For this purpose, the Convention defines "industrial undertakings" to include sites like mines, quarries, manufacturing industries, shipbuilding sites, construction sites, docks, etc.[51] This underlying disposition naturally makes the Code's prescriptions ill-suited to working hour dynamics in the digital economy. In this context, we find several issues.

First, the OSHWC Code fails to provide definitional clarity on what constitutes "hours of work". Here, some guidance may be taken from the ILO's Convention on hours of work in offices and commercial space.[52] The Convention defines "hours of work", as the time during which a worker is at the disposal of an establishment/employer. It also clarifies that rest periods are not included within the scope of "hours of work".[53] Although not ratified by India, authorities may use it as an international baseline on which working conditions for the digital economy can be built on top of.

Second, the Code's prescribed eight hours a day threshold must be reimagined. The ILO convention on working hours for commercial offices states that ordinarily, workers should not work more than eight hours a day and more than 48 hours a week. Unlike the OSHWC Code, however, the convention makes room for flexibility and exemptions.[54] It states that the regular hours in a workweek can be arranged so they do not exceed ten hours a day.[55]

Such flexibility is essential to new markets. The Code's failure to engender sufficient flexibility will harm businesses and workers. It perpetuates legacy ideas of six-day work weeks, contrary to emerging trends on flexible fewer-day work weeks which are helpful in improving worker productivity and quality of life.[56]

Moreover the reforms coincide with a time of remote work. Research conducted before the pandemic already suggested that job flexibility in remote settings engages workers and drives performance.[57] It would be a missed opportunity not to replicate this in other appropriate settings.

For digital businesses the Code imposes disproportionate fetters on productivity and efficiency. To resolve this its implementation must adopt a consolidated approach.

First, authorities must use appropriate tools like notifications or amendments to ensure a clear definition of "hours of work". For the digital economy it would help if the Code were to clarify, consistent with ILO standards for commercial offices, that lull periods, rest slots and periods of inactivity are outside the scope of the definition.

Traditionally, ILO standards were a means to protect industrial workers from the duress of working constantly in difficult settings like the factory floor, mines, farms, construction sites and ports. In modern technology-based services economies, the stresses are less physical.

Moreover, good labour regulations must converge with a country's economic features. Through this perspective,India must establish standards for work-hour limits that reflect the digital and services ecosystem. Otherwise, any framework will limit its own potential. Policymakers must consider that the

demand for workers in digital markets is defined by workers' availability to service transactions as and when they arrive. Workers are not typically expected to undergo continuous exertion, vastly different from the conditions that prevail in industrial settings.

To bring these distinctions into law, the authorities may use unratified ILO conventions as an initial starting point to define "hours of work". Although not analogous, the upper limit for regular working hours in digital markets could reflect the ILO working hours convention for offices and commercial establishments. Regular working hour limits could therefore be a combination of 10 hour daily limits along with a 48 hour weekly threshold, with a clear understanding of what constitutes "work" in the digital economy.

Finally, the framework's restrictions on overtime work are flawed. They make room for improper state discretion which will create rigidity and increase the risk of arbitrary standards for compliance, to the detriment of job flexibility. Overtime limits should not be left to the discretion of various state authorities. At the same time, as the World Bank observes, flexibility must be balanced with the risks of excessive overtime leading to fatigue and reduced productivity.[58]

The Indian approach could learn from other jurisdictions. In the UK, which follows the ILO-mandated 48 hour weekly threshold, there is no legislative prohibition or mandate on overtime.[59] Overtime has been left to terms agreed by a workplace and its workers.[60] The British government does state that workers' overall pay should not fall below the minimum hourly wage for the number of hours worked.[61] It also administers a maximum weekly working hour directive, mandating that no one can work more than 48 hours a week, measured over periods of seventeen weeks.[62]

In the US the Federal Labor Standards Act does not prescribe any upper limit on overtime. Instead, all employees who work for more than the jurisdiction's weekly upper limit[63] must be paid a wage at least one and a half times their regular rate of pay.[64] The Contract Work Hours and Safety Standards Act provides similar overtime standards for mechanics, labourers, construction workers, etc. operating on federal service contracts.[65] Independent contractors are not provided the same overtime benefits or protections—a glaring flaw in the US federal framework.[66]

In European countries like Germany and Denmark, governments supervise overtime standards by facilitating collective bargaining between establishments and workers.[67]

India can learn from these experiences for a more progressive outlook on overtime and work-hour thresholds in the online gig economy. This will require clear definitions, transparency, mechanisms for dialogue, and sophisticated standards to ease the burden of compliance.

3. Labour management and firing costs

Existing prescriptions in the Industrial Relations Code (IR Code) on standing orders and redundancies fail to sufficiently ease compliance. Instead they perpetuate impediments to growth in digital markets.

Standing orders

Chapter IV of the IR Code sets out prescriptions for designing and implementing model standing orders for industrial establishments with three hundred or more employed workers. Standing orders are mechanisms through which large industrial establishments (as determined by the law) set out working conditions for its workers. Establishments must have these standing orders certified by the relevant authorities. Standing order frameworks empower certifying authorities to issue modifications to an establishment's working conditions. Through standing orders, governments can issue prescriptions to establishments on matters, *inter alia*, relating to:[68]

- Classifying workers as permanent, temporary, fixed term etc.

- Manner through which workers are to be notified about working hours, holidays, wage rates etc.
- Assigning shifts, recording work etc.
- Conditions and procedures for workers to apply for leave
- Prescriptions on entry and exit into facilities
- Termination of employment and misconduct proceedings
- Grievance management to redress worker complaints of unfair treatment or wrongful exactions
- And other matters as notified by government authorities.

Standing orders focus largely on the working conditions and grievance management frameworks in industrial settings. Unfortunately, the new reform's attempt to update requirements under the Industrial Employment (Standing Orders) Act of 1946 (IESO Act) does not reflect new markets.

By and large the reform only raises the threshold for defining a large business, which must comply with the standing order framework. It largely retains the legacy framework's procedural and institutional prescriptiveness. It continues to subject large businesses that fall under the law's conception of industrial establishments to the discretion and directives of certifying authorities.

This approach runs counter to the agility and flexibility necessary to succeed in digital economies. Prior exemptions by states like Karnataka for IT/ITeS businesses under the erstwhile framework may serve as a template to revisit the IR Code's prescriptions. Among other things, Karnataka exempted startups, establishments in gaming, animation, telecom, BPO/KPOs, computer graphics, etc. from the IESO framework.[69] To qualify for exemption these establishments were required to adhere to certain conditional safeguards.[70]

At a fundamental level, it is counterintuitive to classify establishments in the digital economy as "industrial establishments". The IR Code appears to extend this legacy issue, as its broad definition of "industrial establishment or undertaking" would easily bring digital economy participants into the fold.[71]

The implementation arms of government must use the tools available to mitigate this risk. Section 39 of the IR Code empowers the relevant government authorities to conditionally or unconditionally exempt an industrial establishment or classes of industrial establishments from provisions under Chapter IV.

Authorities should also consider establishing mechanisms for tripartite dialogue where stakeholders develop conditional exemptions for the digital economy. Large firms may choose to commit to a best-in-class grievance management systems, and make periodic transparency disclosures to authorities.

While the above is a practical suggestion, a legislative amendment—through which digital establishments are legislated out of industrial era compliances—will have a more profound ecosystem impact..

Restrictions on retrenchment

The IR Code does not remove legacy prescriptions on retrenchment. It retains procedural hurdles to large firms' ability to unilaterally terminate worker tenure. Section 78 of the Code requires establishments with three hundred or more workers to apply for government permission before they can lay off workers. Such an approach imposes undue firing costs on businesses, hurting domestic regulatory competitiveness.

According to the World Bank, ease of redundancy and redundancy costs are critical indicators in assessing the proportionality of labour market regulatory competitiveness.[72] Studies find that flexibility in redundancy reduces the incentives for large businesses to use informal workers.[73] In this context, requiring government permission for redundancy or retrenchment is identified as unfavourable, with only 16 percent of 190 jurisdictions imposing such a requirement.[74]

Representatives from the ILO have agreed that member states need not impose permission requirements for collective redundancies.[75] As is the case in most other countries, the government must ensure it is in a position to react swiftly when large-scale income support is needed for a particular class of workers.

Therefore, large businesses in the digital economy would benefit if the law promotes seamlessness. Instead of seeking government permission, they should only be required to inform the relevant authorities when undertaking redundancies above a certain scale. Such transparency mechanisms will equip authorities to mitigate welfare losses at an early stage.

Disincentives to Scale Reduce Digital Competitiveness

The IR Code's position on retrenchment and standing orders prolongs India's chequered history of harmfully rigid labour laws. Studies of the previous legal regime demonstrate a significant pooling of firms at the threshold of 99 employees in order to avoid the obligations activated at the 100 employee threshold.[76] The authorities would do well to heed the Standing Committee's observation that "governance of the industrial relations system is not about framing good laws, but also designing adequate and effective mechanism for their efficient implementation."[77] Arbitrary compliance thresholds are especially harmful to the digital economy. The current provisions on retrenchment and grievance management disincentivise growth. Specifically, it erodes incentives for entrepreneurs from entering the digital economy, as survival (let alone success) requires scale.

5/ RECOMMENDATIONS

In addition to the analysis presented in this issue brief the following measures are proposed.

1. *Improve income support*

Given that success in digital economies is defined by agility and flexibility, the authorities must place emphasis on income support for workers in the online ecosystem. These systems must be targeted and beneficiaries should receive assistance in a timely manner—especially in times of need/crises.

To achieve this the authorities will need to adopt regulatory and mission mode interventions. First, policymakers must streamline the regulatory standards and processes through which eligible workers are identified and can register for benefits.

Second, the Social Security Code must widen the scope of digital economy participants contributing to social security schemes, to ensure an effective pool of funds to provide various kinds of assistance to gig workers.

Third, in mission mode, players in the digital ecosystem must work together with governments to help online workers organise themselves to effectively participate in equitable tripartite dialogue. This will help give workers sufficient voice in institutions like the National Social Security Board for gig workers.

Fourth, the government must consider effective infrastructures and solutions to authenticate and deliver benefits to eligible workers in a timely manner. It should consider suitable public-private projects for the purpose. As many online market participants already have a robust digital payment and settlement infrastructure, the government may consider a distributed approach, where both public and private channels are used to disburse funds.

The creation of robust support systems will also foster a more flexible operating environment for digital businesses in India, and help maximise the potential employability of India's labour force.

2. *Promote self-certification*

The government must explore exemptions for digital businesses on mandates linked to contract labour and standing orders. This can be done with a combination of self-certification, conditional eligibility, strong oversight, and appropriate steps for social dialogue.

Self-certification must be consistent with the ILO position that it is a complementary tool, and cannot substitute on-site labour inspection systems.[78] Appropriate self-certification can create better systems of voluntary and simpler compliance. It will also help businesses hedge against unexpected adverse findings when inspections do take place.

Digital businesses should self-assess what their core activities are, for which they will not use contract labour. Such clarity is important as the contract labour restrictions in the OSHWC Code leave wide scope for interpretation in digital markets.

Self-certification combined with strong transparency and disclosure mechanisms for improved oversight will help reassure workers, employers, and governments. It will also give workers surer footing on their rights when working with a particular establishment. In competitive online ecosystems, self-certification can help reduce information asymmetries and inform workers' choice in deciding their place(s) of work.

In the short term, self-certification may be combined with conditional exemptions to the standing order prescriptions contained in the IR Code. Authorities may use Karnataka's conditional exemptions to the IT/ITeS sectors to requirements under the IESO Act, 1946, as an initial template.

As argued earlier, it is inappropriate to transpose industrial factory-floor prescriptions to digital businesses. Instead the legal framework should leave businesses to deal with these issues internally, based on certain high level inviolable conditions.
These exemptions should be combined with a time bound onus on digital businesses to raise internal worker capacities. This may take the shape of formalised processes to foster dialogue between workers and the management to shape standards for grievance and labour management.

3. Reduce regulatory discretion

The labour regime must not extend industrial era working hour prescriptions and regulatory systems to digital and services markets. India may look at the standards contained in the ILO convention on working hours for commercial offices, along with jurisdictional practices in countries like the UK, USA, Germany and Denmark.

There should be an emphasis on standards to help define work in the new gig markets, the number of hours that constitute regularised work, and standards on overtime (either in terms of upper limit or remuneration). These standards should not be left to regulatory discretion.

Defining hours of work in the digital and services economy requires clarification through an appropriate legislative or regulatory mechanism. Policymakers may deliberate with the relevant stakeholders to establish bright lines on working hours and overtime, as seen in jurisdictions like the UK and USA.

In the longer term, the government should work with businesses to build collective systems of workplace standardisation on working hours and overtime, as seen in Germany and Denmark.

Other areas where regulatory discretion in digital markets must be limited are:

- the certification and modification powers in standing order commitments, and
- the determination of "core" or "non-core" activities in digital markets.

ENDNOTES

1 Lok Sabha passes 3 historic and path breaking labour codes, Ministry of Labour & Employment, September 2020, pib.gov.in/PressReleasePage.aspx?PRID=1657898.

2 Madhu Damodaran and Animay Singh, The Impact of the Code on Social Security, 2020 on Aggregators, Simpliance, October 2020, simpliance.in/blog/impact-of-the-code-on-social-security-2020-on-aggregators.

3 The Code on Social Security 2020, read generally Section 2(2).

4 These include: 1) ride sharing services, 2) food and grocery delivery services, 3) logistical services, 4) e-marketplaces (both the marketplace and inventory models) at the wholesale and retail levels (i.e. the B2B and B2C models), 5) professional service providers, 6) healthcare, 7) travel and hospitality, 8) content and media services, and 9) a discretionary provision which swallows other goods and service platform providers.

5 The Code on Social Security 2020, Section 45.

6 Id. Section 114(1).

7 Id. Section 2(78) defines "social security" as "measures of protection afforded to employees, unorganised workers, gig workers and platform workers to ensure access to health care and to provide income security, particularly in cases of old age, unemployment, sickness, invalidity, work injury, maternity or loss of a breadwinner by means of rights conferred on them and schemes framed, under this Code."

8 Id. Read generally Section 114(3).

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For any further contact, please get in touch with us at:

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