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Fairwork Policy Brief:
New regulation of platform work in Chile: a missed opportunity?

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Fairwork Chile

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Background

The Chilean Congress will finish reviewing a bill that regulates the legal and labour aspects of the so-called "platform work" in the coming days. The bill, presented by a group of senators and later modified after an agreement with the Government, adds a chapter to the Chilean Labour Code, which regulates the rights to which these workers are entitled.

If the proposed rules are approved, Chile will be one of the first countries to have a legislative answer to the question that has been debated in every corner of the world where this industry has developed: are these services provided under conditions that merit the intervention of labour law? In simple terms, are the thousands of people who work for platform companies workers, in the legal sense? The question is far from a matter of mere labels, since - whatever we may think about the relevance of the concepts on which the distinction rests - what is at stake are the conditions workers have to endure daily. To talk about the classification of work is to talk about working hours that do not take up all the time a person has available, remuneration that allows them to subsist in dignity, and clarity about what can be demanded of them, among other things.

Working conditions in the platform economy are far from ideal. Analyses carried out in Chile and abroad reveal the precarity hidden under the apparent autonomy promised by these platform companies. Among other problems, platform workers in Chile face:

- Long working hours: according to a recent study carried out in Santiago, the average working week for a group of more than 200 workers is 62 hours per week (Asenjo Cruz and Coddou Mc Manus 2021, 45–46).
- Low and insecure salaries and a lack of job security: in the Fairwork (https://fair.work) Chile 2021 report, none of the companies surveyed could demonstrate that their workers were paid at least the minimum monthly income after costs (Fairwork 2021) .
- Poor health and safety conditions: almost half of the workers surveyed in the Fairwork study reported not having health insurance (Asenjo Cruz and Coddou Mc Manus 2021, 57–58)

These conditions point to an issue that neither technology nor the flexibility of the platform labour model have eliminated: the disparity in the bargaining power between the company, which sets the working conditions unilaterally, and the worker, who needs a job to survive. In turn, this inequality creates subordinate and dependent forms of work, where the company exercises a significant level of control over how the worker provides their services. The platform economy is not exempt from this reality (Prassl 2018, 5,130). In many cases, this gap is augmented by technology, giving the company more profound and intrusive forms of control over the worker.

Given this context, it is worth asking whether the regulation to be approved in Chile will contribute to overcoming the problems identified above. To this end, the paper will summarise the most relevant elements of the bill that is about to be approved and then develop a critical analysis of how they attempt to resolve the problems associated with working conditions in the sector. Finally, the paper concludes with a general reflection on what these regulations could represent, if approved.

The text of the draft

Let us look, then, at the content of the future rules. The bill attempts to respond to the challenges mentioned above by creating a special legal regime for platform work. It attempts this in two ways. Firstly, it contains special protections for this form of work. Secondly, it extends - to a certain level - the protection afforded by the general rules of the Labour Code in matters such as working hours and remuneration.

The rules start by defining the basic concepts. First, it contains a definition of "digital service platform companies", of which two elements are worth highlighting. First, the definition is broad in terms of the types of service, including delivery of goods (so-called delivery) and small passenger transport (including, then, companies such as Uber or Cabify), among others. This breadth, however, is qualified by the second part of the definition, which excludes platforms that act as digital marketplaces, thus circumscribing the application of these rules to what we know as on-demand service platforms. These are platforms in which a set of people, in the form of a group of individuals or companies, provide services on demand (Prassl 2018, 13). Platforms where a group of people are at the company's disposal to provide the service requested by the user. The second relevant concept is that of "digital platform worker". Here, the text adapts the definition of worker contained in article 3, letter b) of the Labour Code, adding the elements specific to this form of labour organisation (personal services are requested here through the corresponding application). It also does so by creating a novel addition: it speaks of workers who provide services "for their own account or for the account of others".

Indeed, this new regime distinguishes two types of platform workers: dependent digital platform workers and independent digital platform workers. While the former is governed by the special rules created by the bill and by the general rules of the Labour Code, the latter are in the strange situation of being subject to a contract of a non-labour nature that will be regulated by the principal labour-related statute of the Chilean legal system.

The text assigns specific rights to each category and some general protections applicable to both, which we will review below. To distinguish between these two types of workers, the draft law resorts to the general principles set out in articles 7 and 8 of the Labour Code, i.e., the existence of subordinate, dependent and employed work. In the case of self-employed workers, the rules add that the platform's role should be limited to coordinating

contact between the user and the company, "without prejudice to establishing the general terms and conditions that allow it to operate through its computer or technological systems". As we will explain below, in these last two considerations lies one of the problems with the proposed rules.

For the category of dependent workers, the draft law generally applies a set of rights already applicable to other workers, to the extent that these are not incompatible with the specific rules of these special contracts. The special rules include, among others, the following:

- Stipulations of the employment contract: along with applying the general rules in this area, a set of special mentions associated with how services are provided through platforms are added. Examples of this are the establishment of a method for determining remuneration (alongside the traditional period and form of payment), the creation of a channel for submitting objections or complaints (which must be handled by a person), and the application (or not) of a special form of working time distribution.

- Working time: the bill defines what will be considered working time, with a definition that adapts the traditional notion to the reality of digital platforms. The worker will be at the company's disposal from the moment it "connects to the digital infrastructure and until he or she voluntarily disconnects". The "passive" working time figure is also considered as working time (albeit with reduced pay), and the norms contain an obligation to keep a record of working time following the requirements established in the general rules. The main novelty in this area is the possibility for workers to freely distribute their working time according to their needs while respecting the daily and weekly limits set in the general rules.

- Concerning remuneration, the bill contemplates the possibility that workers who freely distribute their working hours may agree on a remuneration system per unit of time (e.g., per hour) or through a percentage of the tariff charged to users (or some similar mechanism). Whatever mechanism is chosen, the bill sets a minimum amount to be paid equivalent to the minimum monthly income, increased by 20%. The latter amount aims to cover waiting periods or other non-effective working time. Finally, when the remuneration is paid for services rendered, there is an obligation to specify the operations that gave rise to it in the corresponding payslip.

About independent platform workers, the bill, along with creating this sui generis figure, sets specific minimum standards that seek to protect those who provide services without being subject to the rest of the rules in the Labour Code. In what could be described as a "light version" of the regulation of dependent workers, the rules require the inclusion of particular mentions in the contract, including how the rates for the services provided will be determined, the criteria to be used to establish contact and coordination mechanisms, the geographical area in which the services will be provided, rules on personal data protection,

norms on termination of the contract and maximum times of continuous connection, among others. Another relevant innovation concerns the fees that these independent providers will receive, including rules on payment periods, the provision of information on the services to which they correspond, compliance with tax regulations and the establishment of a minimum amount per hour for the fees paid. The veto introduced by the Government also clarified that they would be entitled to access social security benefits, subject to the rules on self-employed contributions.

Three innovations introduced for this category are particularly striking because of their similarity - partial, we could say - with rules applicable to dependent workers. The first is the introduction of the right to disconnect, which companies must comply with. According to this rule, the platform company must ensure compliance with a minimum disconnection time of 12 hours within 24 hours. Secondly, an obligation of prior notice to terminate the contract is established, which is similar in length (30 days) to that specified in the general rules on the termination of an employment contract by companies. Finally, norms relating to the protection of workers' fundamental rights apply to these independent providers . However, these protections are only available to those workers who "during the last three months have provided services through a given platform for at least 30 hours on average each week". Therefore, those who do not meet this minimum number of hours will not be able to use the fundamental rights protection procedure created by the Labour Code.

- Finally, the draft includes some general rules applicable to both types of platform workers. These include:

- The obligation for the company to inform about the details of the services offered, including the place where they are to be performed (delivery address in the case of delivery and the starting and destination points in the case of passenger transport), the identity of the user, and the means of payment to be used.

- Rules on transparency and the right to information, including protection of workers' personal data: workers will be able to ask the platform for access to this data, and there is a rule on its portability. To enforce these rules, companies must allow access to the algorithm and provide complete and sufficient explanations of how they make decisions based on the algorithm, the data collected, and all other relevant information.

- Anti-discrimination rules for automated decision-making mechanisms: here, the bill creates an obligation for companies to take "all necessary measures and safeguards to avoid any kind of discrimination among workers, particularly in the allocation of work, the offer of bonuses and incentives, the calculation of pay, among others". It also creates a figure of indirect discrimination, banning even apparently neutral employer conducts which may end up disproportionately affecting one or more workers.

- Rules on training and personal protection elements: companies must provide adequate health and safety training, provide certain protective elements set out in the standard, and take out damage insurance for personal property used by the worker in the provision of services.

- Rules on the calculation of severance pay, taking as a basis the average remuneration of the last year worked, excluding months not worked and considering years of service.

The veto subsequently introduced by the Government rescues an element lost in the legislative process: the rules on collective rights. Along with recognising that platform workers will have the right to form trade unions following the legal guarantee of article 216 of the Labour Code (it could not be otherwise), the regulation states that platform workers will be able to bargain collectively per the rules contained in article 314 of the same Code. This is the so-called "unregulated collective bargaining". Here, as we will see below, we find another serious problem of the bill.

The elephant in the room: the disparities in bargaining power

Specific reporting on platform labour. Platforms are extremely reluctant to share information about the size and profile of their workforces. To develop adequate policy responses, we need much better data on the number of people in the UK wholly or partially dependent on platforms.

Undoubtedly, the proposed rules contain some advances and establish some minimum standards analogous to those set in the general rules of the Labour Code. The establishment of standards in areas such as working hours, remuneration and personal data protection are certainly improvements for a sector of the economy where the lack of regulation allows defined by precarious working conditions, as we pointed out at the beginning of this analysis. Something similar can be said of rules on non-discrimination through automated decision-making systems, which is an area of particular concern in the platform economy and beyond.

However, the draft suffers from structural problems that could affect its ability to establish rules that effectively protect platform workers. In our view, these problems arise from not taking into consideration the main issue that any form of labour regulation must have among its central concerns. That is the existence of unequal bargaining power between workers and employers; between the one who runs the business, and sets the terms and conditions, and the one who offers their labour, and can only accept the terms imposed. This is one of the central concerns of the discipline of labour law - its primary objective, according to one of its major exponents (Kahn-Freund, Davies, and Freedland 1983, 18). It is the very reason why labour law intervenes in the autonomy of the contracting parties: to

protect the weaker contracting party (the worker). Although this inequality of power is not exclusive to the labour relationship - consumer law has a similar concern at its core - the relationship between worker and employer has a permanent and personal character and is marked - given this inequality - by the existence of particular vulnerabilities, which labour lawyers refer to as subordination and dependence (Davidov 2016, 35–36).

Why would anyone claim that this fundamental problem has not been adequately considered in the text of this law? We have already pointed out how the draft includes several welcomed protections. The problem lies in the assumptions on which the bill rests. We have already seen how it creates two parallel figures: one of them fully incorporated within the protection that the Chilean Labour Code grants to those who are considered dependent workers -that is, subject to subordination and dependence- and the other in a sui generis regime in which, by being independent providers, some platform workers will receive certain levels of protection lower than those assigned to dependent platform workers. The rationale for these categories is simple: it preserves the possibility for those who wish to take advantage of the benefits of flexible working to do so while maintaining their self-employed status, and for those who consider themselves to be subject to a subordinate and dependent relationship to demand the corresponding legal recognition. When disagreements arise, they should be solved by resorting to the general rules of Articles 7 and 8 of the Labour Code, which allow the courts to identify the existence (or not) of a subordinate and dependent relationship.

The problem with this idea is that it rests on some tenuous assumptions. The first is the apparent incompatibility between flexibility and the recognition of an employment relationship. Although labour legislation limits the parties' alternatives in different ways, it leaves significant space for flexible working hours and remuneration. This bill goes further by granting the worker greater freedom to distribute his working hours. But what is the point of giving more flexibility if this is incompatible with the employment relationship? The second, and most important, is the supposed freedom platform workers could have to make this choice. Considering the inequalities of power, it is not difficult to imagine that, faced with the possibility of choosing between a regime with more labour protections and one with less, companies would opt for the latter without giving the worker a choice. The inclusion of a reference to the general rules to settle the matter, besides being redundant, leaves us in the same position: workers without protection who have to go to court to prove their status. To this, we must add what we have already pointed out: the technology used by platform companies allows much more intensive mechanisms of control than traditional ones, and even allows them to hide it under incentive and evaluation systems.

The issue of collective rights compounds this problem. Platform workers can form unions and bargain collectively, opening this possibility even for independent platform workers. This opening could represent a step forward, but it requires further analysis. The text informs us that they will only be able to negotiate under the figure of so-called "unregulated collective bargaining", contained in article 314 of the Labour Code. In simple terms, this means bargaining without labour law protection and without the possibility of

strike action as regulated in the Labour Code. These elements are two of the most relevant protections of collective labour law, allowing workers to articulate freely and without fear of reprisals to counter the employer's power. By removing them, the bill again ignores this obvious disparity.

Missed opportunity?

Considering all the above, the question arises as to whether the new rules represent some form of progress in this area. Partly yes, as we have already pointed out. But it is a missed opportunity. Not only because of the mistakes we have already described, but also because of the lack of a deeper reflection on the future of labour regulation, one that goes beyond the propaganda used by some companies in the field. Both in Chile and abroad , platform workers have shown a great capacity to organise and respond to the adversities they face in their work. A starting point for any regulation that recognises the existence of disparities in bargaining power must be to recognise and empower these organised workers. It is a big challenge and involves rethinking many of the ideas surrounding this debate. But perhaps it is worth a try, even if it has not been possible this time

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