Nordic Council of Ministers

THE FUTURE OF NORDIC LABOUR LAW

FACING THE CHALLENGES OF CHANGING LABOUR RELATIONS

Report from

THE FUTURE OF WORK:
OPPORTUNITIES AND CHALLENGES FOR THE NORDIC MODELS

The future of Nordic labour law

Facing the challenges of changing labour relations

Report from The future of work: *Opportunities and Challenges for the Nordic Models*

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Preface from project managers

Major changes in technology, economic contexts, workforces and the institutions of work have ebbed and flowed since well before the first industrial revolution in the 18th century. However, many argue that the changes we are currently facing are different, and that the rise of digitalized production in particular will entirely transform our ways and views of working. In this collaborative project, funded by the Nordic Council of Ministers, researchers from the five Nordic countries have studied how the ongoing transformations of production and labour markets associated with digitalization, demographic change and new forms of employment will influence the future of work in the Nordic countries.

Through action- and policy-oriented studies and dialogue with stakeholders, the objective has been to enhance research-based knowledge dissemination, and experience exchange and mutual learning across the Nordic borders. Results from the project have informed, and will hopefully continue to inform, Nordic debates on how to contribute to the Future of Work Agenda that was adopted at the ILO's centenary anniversary in 2019.

The project has been conducted by a team of more than 30 Nordic scholars from universities and research institutes in Denmark, Finland, Iceland, Norway and Sweden. The project started in late 2017 and will be completed with a synthesizing report in 2020.

In order to address the main aspects of change in working life, the project has been organized into seven pillars with pan-Nordic research teams:

I. Main drivers of change.
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II. Digitalization and robotization of traditional forms of work.
   Coordinator: Bertil Rolandsson, University of Gothenburg, bertil.rolandsson@socav.gu.se
III. Self-employed, independent and atypical work.
   Coordinator: Anna Ilsøe, University of Copenhagen/FAOS, ai@faos.dk
IV. New labour market agents: platform companies.
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V. Occupational health—consequences and challenges.
   Coordinator: Jan Olav Christensen, National Institute of Occupational Health, Oslo, jan.o.christensen@stami.no
VI. Renewal of labour law and regulations.
   Coordinator: Marianne J. Hotvedt, University of Oslo, m.j.hotvedt@jus.uio.no; and Kristin Alsos, Fafo, kal@fafo.no
VII. Final synthesizing report: the Nordic model of labour market governance.
   Coordinator: Jon Erik Dølvik, Fafo, jed@fafo.no

For Fafo, which has coordinated the project, the work has been both challenging and rewarding. In the final phase of the project, all the Nordic economies were hit hard by the measures taken to slow the spread of Covid-19. This effectively illustrates how

predicting the future of work is a difficult exercise. As our data collection had ended before the virus brought the Nordic economies almost to a halt, we have unfortunately been unable to address the effects of the pandemic and the vigorous countermeasures taken by Nordic governments.

We are very grateful for all the work done by the cooperating scholars, and we would also like to thank our contact persons in the Nordic Council of Ministries, namely Tryggvi Haraldsson, Jens Oldgard and Cecilie Bekker Zober, for their enthusiastic support. Many thanks also to all the members of the NCM committees that have contributed to this work through workshops and commenting on different drafts, and to the numerous interviewees in Nordic working life organizations and companies who shared their time and insights with us.

Oslo, 2020

Kristin Alsos, Jon Erik Dølvik and Kristin Jesnes

Project managers

Preface from the pillar coordinators

How will the ongoing transformation of work influence the need for legal reform in the field of labour law? Is labour law in the Nordic countries prepared to meet future challenges, or is there a need for adjustments and renewal? These questions form the backdrop for the analysis in this report. The report is the concluding analysis of Pillar VI in the project *Future of Work: Opportunities and Challenges for the Nordic Models* (NFoW), funded by the Nordic Council of Ministers. In Pillar VI, *Renewal of Labour Law and Regulation*s, researchers from all the Nordic countries have examined how new, emerging labour relations may affect the foundations and structure of Nordic labour law in the future.

The Nordic team of researchers consists of Natalie Videbæk Munkholm (University of Aarhus), Annamaria Westregard (University of Lund), Marjo Ylhäinen (University of Eastern Finland), Dagný Aradóttir Pind (BSRB), Marianne Jenum Hotvedt (University of Oslo) and Kristin Alsos (Fafo). The work in the research group has been conducted in three phases. First, an introductory paper was drafted by Hotvedt and Munkholm, in which more detailed research questions were developed. Second, the researchers drafted two subsequent country reports addressing these research questions. Based on these country reports, this final report compares national regulations, identifies weaknesses and strengths, and suggests avenues for the future of labour law in the Nordic countries.

The final report has been drafted by Hotvedt, and has benefitted from valuable input and comments from all the researchers in the pillar team. The introductory paper, country reports and this final report have been regularly discussed in workshops throughout the project period (2018–2020).

We would like to thank the Nordic Council of Ministers for financing the project and for helping us finalize this report, and to the members of the Industrial Relations Committee of the Nordic Council of Ministers for their input. We would also like to thank Jon Erik Dølvik at Fafo for initiating and organising the project, as well as for valuable comments to this report.

Oslo, 2020

Marianne Jenum Hotvedt and Kristin Alsos

Pillar coordinators

Summary

Is Nordic labour law fit to meet future challenges? This TemaNord report addresses this question by studying whether the legal framework is adequate for dealing with the labour relations of the future. The Nordic systems of labour law build on a *binary divide* between employees and the self-employed. The contract of employment is the main object of labour law, while contracts for independent work mainly fall under general contract law. The legal concepts of *employee* and *employer* are therefore the building blocks of labour law. If future labour relations make it difficult to apply these concepts, it will blur the binary divide and destabilise the foundation of labour law. This may affect the scope of application and undermine the effectiveness of the legal regulation of the labour market.

This is the reason why this study examines the challenges of future labour relations and whether the labour law framework will be able to meet them. The focus is on non-standard work, including self-employment, independent work and new forms of flexible contracts. Platform work – work mediated by online platforms – is a new type of labour relation that combines several of the challenges of non-standard work. Platform work is thus used as a lens through which the future challenges can be explored. The study will also discuss opportunities for legal development and reform. In short, the study seeks to identify *if* there is a need to adapt Nordic labour law to the labour relations of the future, and – if so – *how* to adapt it while maintaining its purpose and societal function.

A Nordic, functional and comparative approach is applied in the study. The issues are explored from the perspective of national law in the five Nordic countries: Sweden, Denmark, Finland, Norway and Iceland. The focus is on the legal solutions to the substantive issues. Comparing the Nordic systems allows us to shed light on common strengths and weaknesses. Furthermore, by identifying differences in the national systems, we are able to highlight the potential for adapting the current law. The study was conducted as a three-step analysis.

Part I is the introduction and forms the basis for the three-step analysis. In **chapter 1,** we explain the aims of the study and present the study design and structure.

Chapter 2 gives a brief presentation of the framework of Nordic labour law. Due to the key function of collective agreements in the Nordic labour market model, the presentation concentrates on collective agreements as a regulatory tool. Collective agreements are legally binding for organisations and their members, and have a normative (regulatory) effect in individual employment relations in all the Nordic countries. In addition, the collective agreements have – somewhat varying – *indirect* legal effects. For example, some Nordic countries have statutory mechanisms for the general application of collectively agreed provisions on pay etc. We identify some variations in the interplay between collective agreements and statutory regulations: while none of the countries have a statutory minimum wage, terms of employment are regulated by collective agreements in a larger extent in Denmark and Sweden compared to Finland, Norway and Iceland. There is also a structural difference in the statutory framework: statutory labour law is fairly unified in Finland and Norway,

and more fragmented in Sweden, Denmark and Iceland.

Part II is the first step of the analysis. This part addresses the *adaptability and inclusiveness* of the key concepts of labour law. Are the concepts applicable and/or adaptable enough to be able to deal with future labour relations? If not, future labour relations could entail an unclear legal status or even fall outside the scope of labour law. Lack of adaptability and inclusiveness can therefore be viewed as weaknesses or 'cracks' in the labour law systems.

Chapter 3 addresses the issue by analysing the inherent adaptability of the key concepts *employee* and *employer*. Firstly, the challenges of future labour relations are explained. Several characteristics of non-standard work make it difficult to apply these concepts. This blurs both the personal scope of labour law and the allocation of responsibility, and may undermine the legal predictability. Platform work combines several of these characteristics and thus represents a particularly difficult challenge. *The first* concept under scrutiny is that of 'employee'. The concept has an inherent adaptability in all the Nordic countries. Definitions in legislation are phrased in general and rather vague terms. Defining the concept in more detail is mainly left to the courts, which make overall assessments on a case-by-case basis, based on a range of criteria or indicators. The substantive facts of the case – the realities – are generally the determining factor due to the mandatory and protective nature of labour law standards. However, the degree of adaptability varies between the different countries. The substantive facts are given more weight in Norway than in Sweden, Denmark and Finland. While the Swedish, Danish, Norwegian and Icelandic concepts can be regarded as broad, inclusive and/or purposive, the Finnish concept appears to be more rigid. *Second,* the concept of 'employer' is analysed. This concept mainly refers to the contractual employer and has no clear or general adaptability in relation to changing labour relations in any of the Nordic countries. When identifying the contractual employer, all jurisdictions rely on general principles of contract (and corporate) law, and thus emphasise formal contractual arrangements and corporate structures. Conceptual nuances and functional approaches nevertheless represent some degree of adaptability. Here too, the degree of adaptability varies between the Nordic countries. There are some differences in how the contractual employer is identified, and the legal basis for extending employer responsibility to other relations varies. Overall, the analysis suggests that the concept of employer is more adaptable in Denmark and Norway than in Sweden, Finland and Iceland. When comparing the two key concepts, the overall impression is that the concept of employee is more adaptable than the concept of employer in all countries. The chapter therefore concludes that the legal framework is better equipped to adapt to new labour relations that blur the personal scope of labour law than to those that obscure the allocation of employer responsibility.

Chapter 4 addresses the same issue from another angle. To shed further light on the adaptability of the legal framework, this chapter looks at the specific responses in national law to different types of non-standard work. This includes part-time work, fixed-term work, temporary agency work and platform work. The analysis shows that the Nordic labour law frameworks generally encompass non-standard work. Part-time, fixed-term and temporary agency work is recognised as constituting a contract of employment in all the Nordic countries. Even very fragmented or marginal contracts of employment are considered to be contracts of employment.

New labour relations – like platform work – may very well be regarded as constituting a contract of employment, depending on the case-by-case assessment. This supports the conclusion that the key concepts in the Nordic countries are relatively inclusive and adaptable. However, the analysis reveals certain weaknesses. The legal classification of labour relations found in the grey area between employee and self-employed is often unclear and hard to predict. As an overall assessment is necessary and will ultimately have to be decided by the courts, the legal classification typically lags behind the developments in the labour market, potentially creating an unpredictable situation. There are also some indications that the legal classification can turn out differently in the Nordic countries, despite the similarities in the concepts. Another interesting finding relates to which of the main actors in the area of labour law has the lead role in regulating non-standard work – the legislatures, the social partners or the courts. The social partners have a more important role in Sweden and Denmark than in Finland, Norway and Iceland.

Part III contains the second step of the analysis. This part addresses the legal *implications* of an unclear employment status: how will key elements of labour law and welfare protection in the Nordic model apply to workers in the grey area between employee and self-employed? This analysis sheds light on the consequences and what is at stake in the future if an increasing number of workers cannot be easily categorised under either side of the binary divide.

Chapter 5 explains the structure of the analysis. A typology of three types of workers is used: traditional employees, genuinely self-employed and platform workers, the latter of which is a typical example of workers with an unclear employment status. The legal protection of (typical) platform workers is compared to that of the two others in three areas: (1) access to collective bargaining, (2) regulations protecting health and safety and (3) benefits ensuring income when out of work. The three sets of legal norms are selected as they represent key elements of labour law and welfare protection *and* underpin important characteristics of the Nordic labour market models. Analysing how these norms apply to workers who cannot be easily categorised under either side of the binary divide sheds light on the legal implications, both for the individual and at a societal level.

Chapter 6 identifies and discusses the implications of an unclear employment status as regards access to *collective bargaining*. The collective bargaining mechanisms in the Nordic countries are based on the binary divide: traditional employees have undisputed access, while the genuinely self-employed are excluded. The binary divide is, however, neither absolute nor clear. Particularly in Sweden, but also in Denmark, the social partners have a certain leeway to include workers with an unclear employment status in collective bargaining. EU/EEA law allows for both traditional employees and the 'false' self-employed to be exempt from competition law and covered by collective bargaining. Legal insecurity on who can be considered 'false' self-employed can represent a potential for allowing wider access to collective bargaining in national law. Therefore, as long as the workers are not *genuinely* self-employed, it can be argued that workers with an unclear employment status should have the same access to collective bargaining as traditional employees. Workers with an unclear status can be members of a trade union that can pursue their interests in this regard. Membership criteria may, however, be a barrier to joining some organisations. Nonetheless, the chapter provides examples of bargaining

efforts, industrial action and concluded agreements for platform workers, which illustrate the potential for collective bargaining beyond traditional employment relations.

Chapter 7 focuses on the implications of unclear employment status for the legal protection of *health and safety*. This includes regulations on health and safety at work, limits on working hours and paid annual leave. Only workers who are recognised as employees are covered by clear and broad legal protection. Unclear status and legal uncertainty are both therefore an obstacle to effective protection. Workers are covered by *some* degree of health and safety protection in all countries regardless of employment status, but the scope and level of protection vary considerably. Protection of health and safety at work apply more broadly than the limits on working hours and paid annual leave. Even if the workers are recognised as employees, there are 'gaps' in the legal protection, particularly in relation to the limits on working hours, where exemptions often apply to workers who can determine their own working hours. The fact that workers are covered by some protective standards regardless of employment status indicates that the protective rationale for the health and safety of workers overrides the binary divide.

Chapter 8 looks into the implications for various welfare and social security benefits providing *income protection when out of work*. This includes benefits related to unemployment, sickness and injury, parental leave and retirement. The Nordic welfare and social security systems are generally based on the categorisation of workers as either self-employed or employees, and are thus based on the binary divide. However, many of the benefits are available for both employees and the self-employed. Therefore, the divide does not have the same delimiting function in the field of social security law as in labour law. Nevertheless, the criteria for eligibility and the principles applied in the calculation of benefits are often differentiated for the two categories. Workers with an unclear employment status are at a greater risk of *not* meeting the requirements to qualify for benefits than traditional employees and the genuinely self-employed. This risk mainly stems from the fact that work activity requirements for the various benefits are hard to meet for workers doing *occasional work*. Their legal protection is therefore inferior to the protection of both employees in traditional employment and the genuinely self-employed with regular and planned work activity. Furthermore, access to important additional rights and insurance schemes, e.g. in collective agreements, depends on being recognised as employees.

Chapter 9 consists of an overall discussion and summarises this part of the analysis: collective bargaining as a tool to regulate the labour market is vulnerable when faced with future labour relations, but shows potential for adaptation. Protection of health and safety of workers with an unclear employment status is inconsistent and has a number of 'gaps', but is shown to have a broad relevance that can be adapted further. The welfare and social security systems are there to provide income protection for all types of workers when they are out of work. However, as occasional workers are at risk of not qualifying for important benefits, this purpose is only partly fulfilled.

Part IV is the third and final step of the analysis. Based on the discussions in the previous parts, this part reflects on the opportunities for legal development and reform.

Chapter 10 discusses developments that can address the weaknesses identified. The strengths we have pointed out in the Nordic labour law systems serve as a basis to build on. As regards the issue of *the unclear employment status* of workers, there are a number of promising possibilities for resolving unclear issues, improving predictability and ensuring that workers in new forms of dependent labour relationships are covered by labour law. There are also possibilities for developing a more consistent and clear approach to *allocating employer responsibilities* in the future. The identified *gaps in the legal protection of workers* with an unclear employment status can be remedied. We present a number of specific suggestions as to what the different labour law actors – the legislatures, the social partners and the courts – can do to remedy the problems discussed. The report ends with a reminder that the future of Nordic labour law is mainly a political issue. Whether the values and protective rationales established in the Nordic systems will be preserved, depends on future policy

PART I:

Introduction and legal framework

1 Introduction

1.1 The focus and aims of the study

The future of work and its consequences have been widely debated internationally over the last few years, not least fuelled by the ILO Global Commission on the future of work.[1] This report is part of the project *The Future of Work: Opportunities and Challenges for the Nordic Models* (NFoW), commissioned by the Nordic Council of Ministers. While the overriding question in the project is how work and working life will change in the Nordic countries in the future,[2] this report aims to address future challenges for *labour law and regulations*: Are the Nordic systems of labour law and regulations fit for the future of work?

As described by Dølvik and Steen, several trends can be expected to shape the future of work. The main drivers mentioned include demographic trends, climate change, globalization and technological change. How these drivers will affect Nordic labour markets depends both on the state of the national markets and on actor responses. Technological change in particular – more precisely, digitalization – seems to spur the fragmentation of employment relationships and will likely bring more non-standard work in the future. This type of change affects a fundamental issue: the legal scope of labour law and regulations.

The chosen focus of this study is therefore on the legal implications of *new and changing types of labour relations.* This entails a focus on non-standard work, including self-employment, independent work and new forms of externalized and flexible contracts.[3] It also includes – and focuses specifically – on labour relations in platform work, where workers are matched with customers by a digital platform. These trends of change are mapped and discussed in other parts of the project – Pillar III[4] and Pillar IV,[5] respectively.

There are several reasons for our particular focus on platform work. Technological change and digitalization have paved the way for organizing and mediating work though digital platforms. At the moment, platform work is a marginal phenomenon in the Nordics, but has been expected to grow in the future. Other drivers for change, such as globalization and demographic trends, may spur digitalization and further growth.[6] Platform work is also interesting as it combines many of the challenges of non-standard work.[7] We therefore consider platform work a suitable lens through which to study the challenges of future labour relations.

A central aim of the study is to assess whether and how changing labour relations challenge the *structure and foundations* of labour law and regulations in the Nordic context.

The Nordic systems of labour law and regulations are built on a *binary divide*

1. *Work for a brighter future*, Report from the Global Commission on the future of work, ILO 2018.
2. J.E. Dølvik and J.R. Steen, *The Nordic future of work: Drivers, institutions, and politics*, TemaNord 2018:555 [Dølvik/Steen 2018].
3. Eurofound, *New forms of employment*, 2015.
4. A. Ilsøe (ed.), *Old and new tendencies of non-standard work: Troubled waters under the still surface*, TemaNord 2020 pending.
5. K. Jesnes and S.K.M. Oppegaard (ed.), *Platform work in the Nordic models: Issues, cases and responses*, TemaNord 2020:513 [Jesnes/Oppegaard (ed.) 2020].
6. Dølvik/Steen 2018 p. 28.
7. See further in section 3.2.

between employees and the self-employed.[8] Traditionally, the contract of employment is the main object of labour law. Contracts for independent work, as a starting point, are not covered by labour law regulations, whether the regulations are based in statutory acts or collective agreements. Other legal norms regulating labour market issues (e.g. tax, social security and non-discrimination regulations) are also often related to this specific relation. The distinction or divide between contracts of employment and contracts for services (contracts of independent work) therefore forms a basis for the legal framework: The status of the worker as an *employee* is fundamental to deciding whether labour law and regulations apply. The responsibility of complying with labour law and regulations usually rests on the opposing party, the *employer*.

The legal concepts of *employee*, *employer* and the relation between them – the *employment relationship* – are therefore the building blocks of labour law. The concepts have interrelated justifying, delimiting, and regulatory functions: They legitimize and explain the need for a distinct labour law (separate from regular contract law), they determine the scope of most labour law regulations, and they provide the structure upon which these legal norms are based.

Change in labour relations may challenge this structure. The legal framework builds on an assumption that dependent work is performed in a two-party contractual relation that can be clearly distinguished from independent work relations. However, new forms of flexible and fragmented labour relations represent a growing grey area between traditional employees, in permanent employment, and the genuinely independent self-employed. Work relations can be more complex, involving several entities and distributing the power and functions that traditionally rest on one employer. In other words, both the assessment of the worker's employment status and the allocation of employer responsibility may be obscured.

When the assessments of the key concepts are obscured, it affects the scope, applicability and effectiveness of the legal regulation of the labour market. Change in labour relations may thus blur the binary divide and rock the structure of labour law.

Consequently, we see a need to discuss the *adaptability of the legal framework*: Are the key concepts of labour law applicable to new, emerging types of labour relations? Or will increasing uncertainty in employment status reveal weaknesses or 'cracks' in the system?

Furthermore, we want to look into the *implications of an unclear employment status* in systems based on a binary divide: How will key elements of labour law and welfare protection in the Nordic model apply to workers whose employment status is unclear? This will give us a picture of the consequences, for the individual and for society, if an increasing number of workers do not fit into the classic binary divide. In other words: What is at stake if the legal framework cracks?

The study will also address how the identified challenges can be addressed, by discussing avenues for *legal development and reform*. How can the legal framework be adapted within a Nordic tradition to face these challenges? Can weaknesses, cracks and risks be prevented or remedied? What are the advantages and disadvantages of development led by different actors – legislatures, courts and social partners?

An underlying aim is to discuss how the main *functions and purposes* of the labour

8. See further on the binary divide in chapter 3.

law framework can be preserved in the future of work. The purpose of labour law can be viewed from different perspectives.[9] As we see it, one fundamental purpose of labour law is to counteract the power asymmetries between suppliers and purchasers of labour at the individual level.[10] Labour law thus builds on the recognition of the need for legal protection for individual workers, and for legal norms limiting the freedom of contract and restricting managerial powers.[11] From a Nordic and pragmatic perspective, a key function of labour law is to strike a balance between the interests of enterprises – whether private or public – and individual workers.[12] Facilitating cooperation and trust between management and labour can be considered another important function, very relevant in the Nordic context.[13] These core purposes and functions, in a Nordic context, are considered to go hand-in-hand with the overall societal interests.[14] As a legal framework more generally, labour law also serves to protect general legal values such as predictability and consistency.

The substantive labour law standards will have a number of more precise and defined purposes and functions. In sum, they reflect the fact that different rights, interests and values are protected and weighed by the labour law framework. This includes not only fundamental rights and freedoms – such as the right to organize, equal treatment and free speech – but also the economic and social interests in having work and receiving decent pay. Predictability of work and pay is therefore one of the central interests protected and weighed by the labour law framework in the Nordic countries.

A *Nordic approach* to these issues is highly interesting in our view. As this report will show, the Nordic systems of labour law share important distinctions. The involvement of the social partners and the key role of collective agreements as regulatory tools are essential. Nordic labour law is in many aspects the result of negotiations between the social partners. This report, however, will reveal significant differences: some in the basic structures of the legal frameworks, and others in the details of the regulations and in the legal responses to specific challenges. A Nordic comparison, on the one hand, sheds light on common strengths to preserve and common weaknesses to address; the differences, on the other hand, can highlight potentials to explore and pitfalls to avoid.

In short, the study seeks to identify *if* there is a need to adapt Nordic labour law to the changing labour relations of the future, and, if so, *how* to adapt while maintaining its purpose and societal functions.

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9. There is a rich international literature discussing the purposes and functions of labour law, see e.g. from recent years the contributions in G. Davidov and B. Langille (ed.) *The Idea of Labour Law*, 2011, R. Dukes, *The Labour Constitution: The Enduring Idea of Labour Law*, 2014, A. Bogg, C. Costello, ACL Davies and J. Prassl, *The Autonomy of Labour Law*, 2015 and G. Davidov, *A Purposive Approach to Labour Law*, 2016.
10. E.g. O. Kahn-Freund, *Kahn-Freund's Labour and the Law* (3.ed. by P. Davies and M. Freedland), 1983 p. 18.
11. This was explicitly recognized in the Nordics both by direct state intervention – the adoption of statutory protective labour law standards – around the beginning of the 19th century, and by the formation of labour market organizations and the recognition of their autonomy and role in regulating employment in roughly the same period.
12. Early and ground-breaking expressions of labour law as a reconciliation of opposite interests are the settlements between employers' associations and trade unions in the Nordics, recognizing both the managerial powers of the employers *and* trade unions as their rightful counterparts, such as Septemberforliget in Denmark (1899), Verkstedsoverenskomsten in Norway (1907) and Saltsjöbadavtalet in Sweden (1938).
13. E.g. J. Malmberg, *Vad handlar arbetsrättslig reglering om?*, Uppsala Faculty of Law Working Paper 2010:9 pp. 25–29.
14. We therefore do not see a need to embark on a further discussion on the justification of labour law.

1.2 Terminology and types of non-standard work

As different types of labour relations and non-standard work are in focus, there is a need to clarify the terminology in this report. The more precise legal definitions, however, are discussed later.

Employee refers to the legal classification of the performing party of a contract of employment. *Genuinely self-employed* refers to the legal classification of the performing party of a contract for independent services. These terms thus refer to *legal* concepts and the two opposite sides of the (legal) binary divide.[15]

Worker is used as a neutral term for a person performing work, without deciding on the person's legal status. *Self-employed* refers to a person formally performing work under a contract for services, without deciding on the correct legal classification. The term may include both 'false' and genuinely self-employed. Therefore, these terms do *not* refer to legal concepts and classifications.

Platform worker is used as the more precise term for a worker who is matched with customers by a digital platform to conduct small tasks or jobs. 'Platform worker' is thus a neutral term for a particular form of performing work or tasks. As platform workers are typically performing work under a formal contract for services, they are also a particular type of self-employed worker. Consequently, the term 'platform worker' does not refer to a specific legal concept. This is a deliberate choice. The report will show that the legal classification of platform workers will vary depending on the platform model and other circumstances.

The report will also address various types of non-standard work, such as *part-time*, *fixed-term*, *agency work* etc. The terms as such are neutral. They refer to different aspects of how the work is organized and do not necessarily imply a particular legal status. However, the report will show that part-time, fixed-term and agency work are generally recognized as contracts of employment in the Nordic countries.[16] In practice, the terms therefore refer to types of employees in the legal sense.

1.3 Study design and groundwork

This study is a legal study, using legal methodology. The study is cross-cutting, as it is related to the areas of change described and discussed in the thematic pillars of the project, particularly Pillars III and IV. It has the same medium-term time perspective – 15 to 20 years – as the rest of the project. The study applies a *Nordic and functional approach* to the challenges created by changing labour relations.

A Nordic approach means studying the relevant challenges from the perspective of *national law* in the five Nordic countries: Sweden, Denmark, Finland, Norway and Iceland. The report is centred on selected legal topics, and the discussions address commonalities and differences, opportunities and obstacles in the legal framework in the Nordic countries. International law – in particular, human rights instruments and EU/EEA regulations – provides an important framework for national labour laws and regulations. As such, national interpretations and application of relevant international law will be addressed to a certain extent.

15. See further on the legal classification of the contract of employment as opposed to a contract for services in chapter 3.
16. See further on the legal responses to non-standard work in chapter 4.

A functional approach entails a focus on how the legal material responds to the *substantive issues* rather than types of regulations or formal categories. This approach is helpful for overcoming existing differences in the legal systems. It can also facilitate discussions of challenges at an aggregate level and with a view to the future, responding to the main aims of the study.

The analysis in this report builds on a separate paper developing the study design.[17] The groundwork was performed in 2019 and has been published in two subsequent sets of country reports, Part 1[18] and Part 2.[19] The outbreak of the Covid-19 pandemic in the early spring of 2020 has led to a wide range of labour market measures in all Nordic countries. Some of the measures affect the legal norms discussed here. The measures are mainly of a temporary nature, and it is unclear whether any of them will result in permanent changes in the legal systems. The changes caused by the Covid-19 outbreak are therefore not specifically addressed in this report.

1.4 Structure of the report

The report is structured in four parts, where the analysis in each part builds on the former. As we aim to make our work accessible for readers with a variety of interests, the report is written so that each part can be read separately, as can each chapter. As a result, reading the report from start to finish will necessarily entail some repetition. We find this difficult to avoid in such a comprehensive comparative analysis.

Part I is an introduction to the following analysis. Apart from presenting the study design in *chapter 1*, *chapter 2* gives a brief presentation of the framework of Nordic labour law and regulations with particular importance for this study.

Part II analyses the adaptability and inclusiveness of the key concepts of labour law, when faced with changing labour relations.

Chapter 3 discuss the key concepts of labour law – employee, employer and employment relationship – in the Nordic countries. The concepts are presented and compared, and their potential for adaption is discussed. To shed further light on how adaptive and responsive the legal framework is, *chapter 4* looks more closely at the specific responses in national law to different types of non-standard work, including

17. M. J. Hotvedt and N. V. Munkholm, *Labour law in the future of work: Introduction paper*, Nordic future of work project 2017–2020: Fafo-paper 2019:06 [Hotvedt/Munkholm 2019].
18. A. Lund-Sørensen and N. V. Munkholm, *Key concepts and changing labour relations in Denmark: Part 1 Country report*, Nordic future of work project 2017–2020: Working paper 4. Pillar VI [Country Report Denmark Part 1]; M. Ylhäinen, *Key concepts and changing labour relations in Finland: Part 1 Country report*, Nordic future of work project 2017–2020: Working paper 5. Pillar VI [Country Report Finland Part 1]; D. A. Pind, *Key concepts and changing labour relations in Iceland: Part 1 Country Report*, Nordic future of work project 2017–2020: Working paper 6. Pillar VI [Country Report Iceland Part 1]; M. J. Hotvedt, *Key concepts and changing labour relations in Norway: Part 1 Country report*, Nordic future of work project 2017–2020: Working paper 7. Pillar VI [Country Report Norway Part 1] and A. Westregård, *Key concepts and changing labour relations in Sweden: Part 1 Country report*, Nordic future of work project 2017–2020: Working paper 8. Pillar VI [Country Report Sweden Part 1].
19. M. J. Hotvedt, *Protection of platform workers in Norway: Part 2 Country report*, Nordic future of work project 2017–2020: Working paper 9. Pillar VI [Country Report Norway Part 2]; N. V. Munkholm and C. H. Schjøler, *Protection of platform workers in Denmark: Part 2 Country report*, Nordic future of work project 2017–2020: Working paper 10. Pillar VI [Country Report Denmark Part 2]; D. A. Pind, *Protection of platform workers in Iceland: Part 2 Country report*, Nordic future of work project 2017–2020: Working paper 11. Pillar VI. [Country Report Iceland Part 2]; A. Westregård, *Protection of platform workers in Sweden: Part 2 Country report*, Nordic future of work project 2017–2020: Working paper 12. Pillar VI I [Country Report Sweden Part 2] and M. Ylhäinen, *Protection of platform workers in Finland: Part 2 Country report*, Nordic future of work project 2017–2020: Working paper Pillar VI, pending [Country Report Finland Part 2].

part-time work, fixed-term work, agency work and platform work.

Part III analyses the legal implications of having an unclear employment status in three selected areas.

The structure of this analysis is explained in more detail in *chapter 5*. *Chapter 6* maps and discusses the implications for access to collective bargaining mechanisms, *chapter 7* focuses on the implications for protection of health and safety, and *chapter 8* looks into the implications for various social security benefits providing income protection when out of work. *Chapter 9* is an overall discussion based on the conclusions from the three areas.

Part IV presents our overall conclusions and recommendations. The final chapter, *chapter 10*, addresses the fundamental question as to whether the Nordic labour law framework is fit for the future. Here, reflections on avenues for legal development and reform are included.

2 The framework of Nordic labour law and regulations

2.1 Introduction

In order to establish a base for the analysis, we begin by giving a brief presentation of the labour law framework in the Nordic countries. The presentation is limited to the aspects we find most relevant for our further analysis.

A common characteristic of the Nordic labour market model is the important role of the social partners and the key function of collective agreements as a tool to regulate the labour market.

Trade union density in the Nordic countries is generally high, and large parts of the labour markets are covered by collective agreements at the industry level. There are, however, significant variations between the countries as regards both trade union density and coverage of collective agreements (see table 1).

Table 1: Trade union density and collective bargaining coverage in the Nordic countries

	Trade union density	Collective bargaining coverage	
		Whole economy	Private sector
Denmark	67	83	74
Finland	60	88.8	65.2/83.8*
Iceland	91	92	
Norway	49	69	52
Sweden	68	89	83

Note: *Numbers for the latest available year. Trade union density numbers are from 2018, collective bargaining coverage from 2015 and 2017. *Number without and with the effect of general applicable collective agreements.*
Sources: *K. Nergaard, Organisasjonsgrader, tariffavtaledekning og arbeidskonflikter 2017/2018, with further references to national sources.*

Despite the variations, this gives a picture of the central role of collective agreements. Labour market issues are regulated through a close interplay between collective agreements and statutory law.

We will therefore explain the role of collective agreements as a direct regulatory tool in the Nordics (section 2.2), present other (indirect) effects of collective agreements (section 2.3) and briefly describe some main variations in the Nordic countries regarding the interplay between collective agreements and statutory regulations

(section 2.4). This will provide some starting points for the ensuing discussions.

The substantive labour law standards in the respective countries vary considerably and are not presented further here. Some standards will be discussed in more detail later in the report.[20] As regards enforcement, all the Nordic countries have labour inspection authorities enforcing public law regulations, although with somewhat varying competences. Furthermore, there are specialized labour courts in all five countries. The types of disputes considered by the labour courts, as opposed to ordinary courts, vary.[21] Trade unions play an important role when it comes to the enforcement of private law regulations. The discussions in this report will only touch on some selected enforcement issues.

One fundamental feature, however, is common across the countries. The Nordic systems of labour law and regulation all build on the binary divide: The employment relation is the main object for labour law. Most statutory labour law regulations are phrased as duties of the stronger party of the employment relationship (the employer) vis-à-vis the weaker party (the employee). Regulations by collective agreements are also closely related to the contractual relation between employers and employees. The significance of the binary divide is still an open question. This report will further examine exceptions and nuances, in order to obtain a more precise picture.

Some key characteristics of the Nordic labour market:

- Union density is high.
- Industry level collective agreements cover large parts of the labour market.
- The labour market is regulated by a close interplay between collective agreements and statutory law.
- Labour market regulations generally build on the binary divide.

2.2 Collective agreements as regulatory tools

Collective agreements serve key functions in Nordic working life. The agreements are important tools to regulate the labour market. Essential rights such as pay and working time are mainly – or largely – regulated by collective agreements. Collective agreements set a framework for dialogue between management and labour, both at the industry and the company level. Furthermore, the social partners commonly engage with the states in a tripartite cooperation on issues such as wage development, income policy and social and fiscal policies more broadly.

The regulatory functions of collective agreements are inextricably linked to their distinct legal effects. Sweden, Finland, Norway and Iceland have a statutory framework defining a collective agreement and explicitly recognizing its main legal effects. In Denmark, there is no statutory law on these issues. The legal basis is derived from the main agreements concluded at the confederate level and from case law. However, some main principles on the legal effects of collective agreements are common in all the Nordic countries.

20. Regulations on different types of non-standard work are presented in chapter 4, and regulations on health and safety, working time and annual leave are presented in chapter 7. (See also on income protection when out of work in chapter 8.)
21. The competence of the labour courts vis-à-vis ordinary courts is presented in the country reports. The role of the labour inspection authorities in the context of health and safety at work is further addressed in chapter 7.

First, collective agreements are *legally binding*, both for the parties having concluded the agreements and for the members covered by the agreement, whether they are individuals or organizations.[22] Employers may therefore be bound by collective agreements through membership in employers' organizations or through entering into a direct agreement with a trade union. Exactly who is bound by a specific collective agreement depends on the scope of the agreement, and whether the relevant work is covered.

Second, collective agreements have *normative effects* in individual employment relationships where both the employer and the employee are bound by the agreement. Terms and conditions in a collective agreement cannot be derogated by individual employers and employees bound by the agreement unless the agreement allows for such derogations. A practical example is conditions of pay. If the agreement sets minimum rates of pay, the parties may agree on higher rates, while agreements on lower rates are invalid. If the agreement sets standard rates, agreements on both lower and higher rates are invalid.

Due to their binding and normative effects, collective agreements serve direct regulatory functions similar to statutory regulations.

The right to industrial action underpins the key role and regulatory functions of collective agreements. The strong right to (various types of) industrial action provides workers with instruments of power when bargaining to obtain binding agreements and improve working conditions. The right to industrial action is restricted by the peace obligation (*fredsplikt/fredspligt*). Industrial action is forbidden in disputes of rights, and restricted in disputes of interests on issues regulated by a collective agreement in the agreement period.[23] The peace obligation thus supports the regulatory functions of collective agreements and ensures the stability of collectively agreed norms. Nordic variations in the rights to industrial action and in the peace obligation are not further discussed here.[24]

Common key aspects of collective agreements in the Nordic countries are:

- Collective agreements are legally binding for organizations and members.
- Collective agreements have normative (regulatory) effect in individual employment relations.
- Collective agreements have direct regulatory functions similar to statutory law.

2.3 Other effects of regulation by collective agreements

Only Finland, Norway and Iceland have statutory *extension mechanisms* related to collective agreements. The mechanisms all serve to ensure minimum conditions of work for all employees who perform similar tasks in the same sectors, irrespective of whether workers and employers are bound by collective agreements. The

22. In Iceland, however, collective agreements are de facto legally binding for *all* employers and employees due to the general extension rule, see section 2.3 and further in Country Report Part 1 Iceland p. 5.
23. A *dispute of rights* is a dispute between a trade union and an employer or an employers' organization concerning the validity, interpretation of existence of a collective agreement, or claims based on a collective agreement. A *dispute of interests* is a dispute between the same parties concerning future regulation of conditions of work and pay or other working conditions not covered by a collective agreement or are replacing a former collective agreement.
24. The right to industrial action and the peace obligation in each country are presented in more depth in the country reports Part 2.

mechanisms are still quite different, and their scope varies substantially.

Icelandic law has the most far-reaching and general statutory extension rule. Pay and other conditions of work set in collective agreements are to be considered minimum terms for all employees in the relevant occupation within the area covered by the collective agreement, without requiring a specific decision.[25] Finland has a statutory mechanism where a separate council can make collective agreements generally applicable (*kollektivavtals allmänt bindande verkan*).[26] The agreement must be nation-wide and representative.[27] In practice, this means that it must apply to about half of the employees in the relevant sector. In Norway, public law regulations can be set by a separate body on minimum terms and conditions for individual employment relationships (*allmenngjøringsforskrifter*), with reference to provisions in a relevant collective agreement.[28] The mechanism can only be invoked if there is documentation of inferior working conditions for foreign workers. Sweden and Denmark have no such mechanisms, as the issue is left to the legislatures.

Collective agreements can also affect employment conditions *indirectly*, beyond their scope and normative effect and irrespective of specific extension mechanisms.

In all the Nordic countries, an employer bound by a collective agreement is obliged to abide by its provisions in relation to all workers falling within the scope of work, including 'outsiders' – both non-unionised and alternatively unionised employees. The obligation applies in relation to the opposing party to the agreement, the trade union. How the basis of this obligation is perceived varies between the different national traditions. For example, in Denmark, it follows from the negotiated scope of the collective agreements, and is almost never limited to unionised workers. In Norway, by comparison, the obligation to abide by the provision in relation to 'outsiders' is considered a fundamental precondition of collective agreements.

The 'outsider' employee cannot derive individual rights from this obligation for the employer. The collective regulation *may* still lead to corresponding rights for the 'outsider' employee. Again, the legal basis and perspectives vary. Provisions in the collective agreement can be perceived as implied terms of the individual employment contract of the 'outsider' worker. In Norway, there is arguably a legal presumption that the employer would not violate the collective agreement.[29] The individual employment contract may therefore, as a starting point, be interpreted in line with the collective agreement. In Sweden, collective agreements are considered customary in the workplace. The agreement is not binding vis-à-vis the 'outsider' employee, but is applied unless there is another agreement with this employee.

Furthermore, a collective agreement may have indirect effects even if the employer is not bound by the agreement. The strong normative effect of collective agreements can lead to a status as customary practice in the relevant industry. In Sweden, this is developed to a principle of complementary effect: On issues where statutory regulation is lacking, the industry-wide collective agreement can be

25. The Act on Workers' Wages and Terms of Employment and Obligatory Insurance of Pension Rights, 55/1980 (Lög um starfskjör launafólks og skyldutryggingu lífeyrisréttina) § 1. This provision is regarded as the most important legal provision in Icelandic labour law.
26. The Employment Contract Act, 55/2001 (Työsopimuslaki, Arbetsavtalslag) chapter 2 § 7 and the Act on Confirmation of the General Applicability of Collective Agreements, 56/2001 (Laki työehtosopimuksen yleissitovuuden vahvistamisesta, Lag om fastställande av kollektivavtals allmänt bindande verkan).
27. The Finnish Employment Contract Act chapter 2 § 7 (1).
28. The Extention Act, 4 June 1993 no. 58 (Lov om allmenngjøring av tariffavtaler m.v.). The mechanism is thus not an extension mechanism in the strict sense.
29. A. N. Skjønberg, "Tariffavtalers virkning for utenforstående arbeidstakere", *Arbeidsrett* 2011 pp. 1–80, pp. 12–14. See further Country Report Part 2 Norway p. 7.

applied as a complementary norm in the individual employment contract.[30] The same is the case for Denmark, where standards in collective agreements in some situations can be used to complete the individual employment agreement, when this is imprecise or silent. This is based on the assumption that the intention of the parties is to align the contract with the most normal practices for the relevant type of work, which is often represented by the terms agreed in the collective agreements.[31]

Some indirect effects of regulation by collective agreements:

- Collectively agreed provisions of pay etc. are extended by various statutory mechanisms in Iceland, Finland and Norway.
- Employers bound by a collective agreement are obliged to apply the collectively agreed provisions of pay etc. to 'outsider' employees.
- Collectively agreed provisions can affect the interpretation of individual employment contracts.

2.4 The interplay between collective agreements and statutory law

As already indicated, regulations by collective agreements and statutory law are intertwined in the Nordic countries. However, the interplay still differs.

There is a strong common tradition to leave pay to collective bargaining, and none of the countries have a general statutory minimum wage. From there, the freedom of the social partners to regulate employment conditions varies considerably. While collective agreements are considered the *main* regulatory tool in Sweden and Denmark, their role is not quite as dominant in Finland, Norway and Iceland.

In Denmark, the parliament is by tacit agreement hesitant to pass legislation in areas regulated by collective agreement.[32] There is no *generally* applicable statutory regulation on working conditions such as minimum wage, dismissal protection, normal working hours or overtime pay. These topics are generally regulated by collective agreements. Statutory law supplements the collective agreements providing certain rights to certain groups of workers.[33] Likewise, EU directives are preferably implemented by collective agreements, with statutory acts supplementing with minimum standards for those not covered by collective agreements. Statutory acts provide specific rights to all workers, such as maximum weekly working hours, paid annual holidays, protection against discrimination and harassment at work, health and safety at work and freedom of association. Statutory regulations are most often non-derogable by individual agreement to the detriment of the worker, but can more often be derogated by collective agreements fulfilling certain criteria. As a consequence, legislation in Denmark is rather fragmented, and with no statutory law regulating collective employment relations.

30. R. Fahlbeck *Praktisk arbetsrätt*, 1989 p. 93 and Supreme Court ruling NJA 1968 p. 570. See further Country Report Part 2 Sweden p. 9.
31. O. Hasselbalch, *Den Danske Arbejdsret,* Arbejdsretsportalen, online, section X, 4.2.2.1.2. 'Overenskomsten som retsgrundlag i relation til udenforstående'. This is used as a basis in relation to 'outsiders', often with regard to notice periods (e.g. Supreme Court ruling U 1988.122 H) but rarely with regard to remuneration and pensions (e.g. Eastern High Court Ruling U 2004.1682 Ø).
32. E.g. J. Kristiansen, *Grundlæggende arbejdsret*, 2016, p. 20–21; O. Hasselbalch, *Den Danske Arbejdsret*, Arbejdsretsportalen, online, section I.
33. Such regulations apply to inter alia salaried employees, seafarers and agricultural workers.

In Sweden, statutory law is somewhat more comprehensive than in Denmark, and includes for instance general dismissal protection. There is also a statutory framework for collective employment relations.[34] Still, there is no statutory regulation on issues such as overtime pay or guaranteed minimum working hours. Statutory labour law is mainly *semi-dispositive*, including for instance regulations on fixed-term and dismissal protection.[35] These regulations can be derogated – also to the detriment of the employee – by collective agreements concluded at the industry level.[36] Only some mandatory standards, usually with an origin in EU law, are not semi-dispositive. The social partners at the industry level thus have a substantial influence on the legal regulation of the Swedish labour market.

In Finland and Norway, the statutory framework is comparably more unified, comprehensive and less open for derogations by collective agreements. Although collective agreements play a vital role, they are traditionally not considered as the *main* regulatory tool.

In Finland, both statutory law and collective agreements are considered central. Collective employment relations are regulated by the Collective Agreement Act.[37] The Employment Contract Act constitutes the main regulation of individual employment relations. This act stipulates the scope of labour law, regulates the extension of collective agreements and covers the main rights and duties of individual employment relations. There are supplementary, more detailed, regulations on important issues (such as health and safety and working time), and separate acts on annual leave and discrimination.[38] Statutory regulations set mandatory minimum conditions and cannot, as a starting point, be derogated to the detriment of the worker – but certain provisions are semi-dispositive and can be derogated by collective agreements concluded at the industry level.[39] However, regulations on fixed-term employment and dismissal protection are not semi-dispositive as in Sweden.

Labour law in Norway is characterized by the close interplay between statutory regulation and collective agreements. The Labour Disputes Act sets the main statutory framework of collective employment relations.[40] The main legislative instrument in individual employment relations is the Working Environment Act. This act covers a broad range of issues, such as health and safety, working time and dismissal protection.[41] There is supplementing legislation on some issues, such as annual leave and discrimination. Statutory regulations set minimum standards that cannot be derogated to the detriment of the worker, neither by individual nor collective agreement, unless explicitly stated in the act.[42] Provisions on working time are, to a large extent, specifically made derogable by collective agreement at a central level.[43]

In Iceland, the interplay between collective agreements and statutory law is distinctly different from the other Nordic countries. Collective labour relations are

34. The Co-Determination Act, 1976:580 (Lag om medbestämmande i arbetslivet).
35. The Employment Protection Act, 1982:80 (Lag om anställningsskydd) 3 § (2).
36. Derogation by individual employment contract or collective agreement at the company level is not allowed.
37. The Collective Agreement Act, 436/1946 (Työehtosopimuslaki).
38. See further in Country Report Part 1 Finland pp. 7–9.
39. E.g. The Finnish Employment Contract Act chapter 13 § 7.
40. The Labour Disputes Act, 27 January 2012 no. 9 (Lov om arbeidstvister). A separate act regulates collective labour relations in the state sector.
41. The Working Environment Act, June 17 2005 no. 62 (Lov om arbeidsmiljø, arbeidstid og stillingsvern mv.). There are specific regulations for certain sectors, such as the maritime sector and the state sector.
42. E.g. the Norwegian Working Environment Act § 1-9.
43. See in particular the Norwegian Working Environment Act § 10-12 (4).

regulated by two separate acts, one for the private sector and one for the public sector.[44] Collective agreements set the minimum terms for wages and other working conditions, according to the general statutory extension rule. Collective agreements are therefore applicable to all employees, irrespective of employees' or employers' membership.[45] EU directives are implemented in statutory acts or collective agreements, and sometimes both. There is no statutory minimum wage. Different acts regulate different aspects of the employment relationship, such as dismissal protection, working time and annual leave.[46] The legislation may therefore seem fragmented, as in Denmark. However, the acts set minimum terms and do not allow derogation by collective agreements to the detriment of the employee.[47] The interplay between statutory rules and collective agreements therefore also resembles that in Norway.

Important aspects of the interplay between collective agreements and statutory law:

- There is no general statutory minimum wage, pay is left to collective agreements.
- More employment conditions are left to collective agreements in Denmark and Sweden compared to Finland and Norway (and Iceland).
- Labour law legislation is rather unified in Finland and Norway, while more fragmented in Sweden, Denmark and Iceland.

44. The Act on Trade Unions and Industrial Disputes, no. 80/1938 (Lög um stéttarfélög og vinnudeilur) and the Civil Servants' Collective Agreements Act, no. 94/1986 (Lög um kjarasamninga opinberra starfsmanna).
45. See section 2.3 and further in Country Report Iceland Part 1 p. 5.
46. Dismissal protection in Iceland is very limited in the private sector, and basically only covers certain groups of employees, such as employees on paternity/maternity leave, shop stewards etc.
47. Country Report Iceland Part 2 p. 7.

PART II:

Key concepts of labour law and changing labour relations

3 Adaptability of key concepts

3.1 Key concepts—core content and regulatory approach

The legal concepts under scrutiny are the concepts of *employee*, *employer* and the relation between them: the *employment relationship*. As explained in the introduction, these concepts are the key to – or the building blocks of – labour law in the Nordic countries. In most labour law regulations, these concepts define the personal scope and identify the responsible party. There is no general intermediate category between employees and self-employed, similar to the 'worker' concept in Britain.[48]

The core content of the key concepts is basically common across the Nordic countries. The defining characteristic of the employment relationship is that the employee works *in the service of* the employer. Traditionally, a contractual basis is also an essential feature. There is thus a shared notion of the employment relationship in the Nordic countries: It is a contractual relation characterized by the *subordination and dependency* of the employee vis-à-vis the employer.

This characterization distinguishes the contract of employment from contracts for services – contracts for *in*dependent work. Consequently, this strikes the binary divide between employees (dependent workers) and the genuinely self-employed (independent contractors).

The regulatory approach to the key concepts is common: There is not one unitary and precise legal definition of the key concepts. Statutory definitions are generally phrased – typically with reference to work *in service of* another or similar – as rather vague expressions of subordination and dependency. The approach is therefore mainly *jurisprudential*: Case law has been allowed a vital role in defining the key concepts in more detail, often in a close interplay with legal doctrine. The regulatory technique still differs somewhat in the Nordic countries.

In Sweden, Denmark, Norway and Iceland, the employment relation is defined by the definition of the parties. Here, the *employee* and the *employer* are the central concepts. There are no unitary or general statutory definitions, however. The concepts are defined in different legal frameworks, and there are variations in wording, interpretation and classification practices.[49] Remuneration or salary is for example an explicit requirement in some contexts, but not in others. It furthermore varies as to whether both concepts are defined, and whether there are explicit definitions at all. This regulatory technique may facilitate nuances in the key concepts across the different legal frameworks in each country, as well as across the Nordic jurisdictions.

In Finland, the *employment relationship* is the central legal concept, and defined in the main statutory act: the Employment Contracts Act. This definition is also significant for other labour regulations: To apply other statutory acts, the first requirement is the existence of an employment relationship according to this

48. However, the Swedish Co-Determination Act has specific extensions to 'dependent contractors', see further in section 6.3. In the context of social security, Norwegian law has a third category – freelancers, see further in section 8.2.
49. See further below on each concept in sections 3.3 and 3.4.

definition.[50] When the scope of a particular statutory act is conditioned upon further requirements, these are secondary. Consequently, the notion of a *unitary* key concept is strongly anchored in Finland.

Regardless of different techniques, the jurisprudential approach allows for nuanced and flexible concepts. The interpretation and application may vary in different legal and factual contexts. There is thus not one simple answer as to whether the concepts can include new types of labour relations.

The concepts may develop gradually, responding – or not responding – to changes in the labour market. Thus, as a point of departure, there is the potential for adaptive and reflexive key concepts in the Nordic context: The more precise distinctions may change as a response to changes in the labour market. The question is *to what extent* the concepts are adaptive and reflexive. This may vary in the different national contexts. Furthermore, the adaptability of the concept of employee may differ from the concept of employer.

The concept of employee has traditionally been under closer scrutiny in legal doctrine than the concept of employer. However, in Finland and Iceland, there is a general lack of comprehensive and systematic analysis of the key concepts.[51] In Iceland, in particular, case law on the interpretation and application of the key concepts is scarce. Most cases are from the field of tax and bankruptcy law and do not concern labour law issues as such. The analysis below is therefore based on legal material with varying breadth and depth from the different countries.

In the following, the inclusiveness and adaptability of each concept will be examined further (sections 3.3 and 3.4) before some conclusions are presented (section 3.5). First, we will try to specify which characteristics we consider challenging in labour relations (section 3.2).

Some starting points for the following discussions of the key concepts:

- There is no general intermediate category between employee and self-employed.
- The defining characteristic of the employment relationship is subordination and dependency.
- There is no unitary and precise legal definition of the employment relationship.
- The regulatory approach is jurisprudential – case law plays a vital role in defining the key concepts in more detail.

3.2 Challenging characteristics of labour relations

Permanent, full-time, direct employment is considered the standard labour relation in all the Nordic countries. As will be discussed in chapter 4, the legal framework safeguards this type of employment as a main rule, while also allowing for different types of non-standard employment contracts (fixed-term, part-time, agency work etc.) due to the need for flexibility.

A key issue centres around which aspects of non-standard work obscure the assessment of the key concepts and blur the binary divide. Here, we will present the characteristics we find particularly challenging and briefly explain the challenge(s)

50. Country Report Finland Part 1 p. 9.
51. Country Report Finland Part 1 p. 12 and 17, Country Report Iceland Part 1 p. 12.

they represent. Some of the characteristics overlap, and they may appear in different combinations.

- *Sham or pro forma self-employment*: contracts formally framed as contracts for independent services, but which in reality are contracts of employment. Such arrangements challenge – or rather circumvent – the protected status of an employee as well as employer responsibility.
- *Grey area contracts*: work relationships with both dependent and independent features, when the realities of the work relations are considered. In these relations, the assessment of the key concepts is complicated and the 'real' employment status is hard to predict, challenging the need for a clear and predictable employment status.
- *Fragmented contracts*: work performed in a series of short fixed-term contracts instead of a permanent, open-ended contract. Fragmentation may obscure the assessment of the key concepts, challenging the need for a clear employment status. Regardless of employment status, fragmentation threatens the predictability of employment, future work and pay.
- *Empty or marginal contracts*: work relationships in which the main rights and obligations of employment – the obligation to provide/perform work and to provide/receive pay – are not defined, vary, or are very limited in scope. Examples are marginal part-time, zero-hour contracts etc. With regard to fragmented contracts, these can be a challenge both to employment status and to the predictability of work and pay.
- *Triparty contracts*: contracts formally dividing and allocating key employer functions to several entities, such as contracts stipulating an obligation to work under the supervision and control of a third party. The typical example is agency work. A triparty structure may complicate the assessment of the key concepts and thus challenge the employment status. Where there is an employment contract, the arrangement may blur the allocation of employer responsibility.
- *Complex structures on the employer side:* work relations with several integrated entities on the employer side influencing employment conditions directly or indirectly. The typical example is a corporate group structure. Such structures particularly blur the allocation of employer responsibility.
- *Artificial employment contracts:* contracts formally framed as contracts of employment, while the formal employer mainly fulfils administrative employer duties and not the obligation to provide work and pay. The typical example is the phenomena referred to as umbrella companies,[52] which are particularly prevalent in Sweden (*egenanställning*). This can be seen as an opposite challenge to employment status. There is doubt as to whether the arrangement is in reality one of independent work.

Platform work entails a new type of labour relation, where work is organized in a model that seems closer to a market than a firm: Workers are matched with customers by a digital platform to conduct small tasks or jobs.[53] Platform work may represent a positive potential for growth, while enhancing worker autonomy and freedom. As a model for organizing work, however, platform work combines several challenging characteristics.

52. The term 'umbrella companies' is used by Eurofound, see Eurofound, *New forms of employment*, Publications Office of the European Union (2015). They are described further in section 4.4.
53. The novel aspect is the use of technology rather than the fragmentation of work the model represents, see further J. Prassl, *Humans as a service*, 2018, pp. 71–85.

The problem of sham self-employment is highly relevant, as most platform companies contract workers as independent contractors.[54] Platform work typically has both dependent and independent features, partly – or even mainly – because of the fragmented, empty or marginal character of the platform company–worker relation. In the typical platform model, the worker is formally free to choose the time, place and amount of work. Nevertheless, the model can leave the worker economically dependent and allow new types of control, namely by algorithms and customer ratings. In addition, platform work has a triparty structure involving the platform company, the worker and the customers. Further complexity is introduced when the platform is in fact a group of companies. In sum, platform work fundamentally obscures the key concepts and the binary divide.

From the perspective of the legal framework, platform work therefore represents legal uncertainty, and has the potential to negatively affect the applicability and effectiveness of labour laws and regulations.[55]

- Several types of labour relations present in today's Nordic labour markets entail characteristics that challenge the key concepts.
- This can affect the personal scope of labour law, the allocation of responsibility and the need for legal predictability.
- Platform work combines several of these characteristics and thus represents a particularly serious challenge.

3.3 Concept of employee

3.3.1 Introduction, common features and legislative basis

The concept of employee is vital, as it determines the personal scope of most labour law regulations. The concept is interpreted and applied in a similar manner in all the Nordic countries. The assessment is made on a case-by-case basis. Whether a person performing work is an employee depends on a broad and overall assessment of the particular case, based on a range of criteria or indicators of subordination and dependency. As the lists of criteria or indicators are non-exhaustive, other factors may be taken into consideration. The formal contractual arrangement of the parties is not decisive; the assessment focuses on the reality of the work relation. This principle of the primacy of the facts is related to the need to counteract circumvention.

The question addressed here is how the concepts of employee in the Nordic countries interplay with emerging labour relations with challenging characteristics.

A common underlying problem is that the relevant criteria or indicators were developed in a different time, in a labour market dominated by industrial production. In the Nordic labour market today, production, workers and labour relations have changed. The production of services is more dominant, more workers are highly skilled, and individual autonomy seems to be more in focus when organizing work. In other words, subordination and dependency may take different forms today. The traditional criteria or indicators may thus be less suited to guiding the legal

54. Jesnes/Oppegaard (red.) 2020.
55. This is one of the main reasons we have chosen to focus specifically on platform workers in our study, see section 4.5 and further in Part III.

assessment and providing a clear binary divide. The criteria can be more difficult both to apply to the facts of the case and to weigh in an overall assessment.

Several issues therefore need to be addressed. One is the general ability of the concept of employee to include work relations with challenging features. This will depend on how *wide or inclusive* the concept is, and on how grey areas or dubious cases are solved. A more specific issue is whether a worker can be classified as an employee if the main traditional characteristics of an employment contract – an obligation to stay at service, under supervision of and control over one's work – are not clearly present.

A related issue is whether the concept is *adaptable* to changes in the labour market. Purposive approaches may be suited to safeguarding the intended protective and power-balancing functions of labour law even if work relations change. Dynamic interpretations and sensitivity to developments in society will also facilitate adjustments to new forms of work.

In the following, we will map and discuss the variations in the Nordic countries.[56] First, the relevant criteria or indicators for deciding employment status and their significance are not altogether alike (section 3.3.2). The closer assessment of the realities as opposed to the formal contractual arrangement also differs to some extent (section 3.3.3). Furthermore, the general approaches show some variations, especially whether the concept is perceived as purposive and/or inclusive (section 3.3.4). On this basis, some conclusions are suggested (section 3.3.5).

Certain differences in the legislative basis can be highlighted. In Finland, the concept of employee is derived from the definition of the employment relation in the Employment Contract Act, and practically applies to all labour law acts.[57] In Norway, the statutory definitions of 'employee' in *two* acts determine the concept for most labour law areas: the Working Environment Act and the Labour Disputes Act. In both acts, an employee is defined as 'anyone who performs work in the service of another'.[58] The legislative basis, by comparison, is more fragmented in Denmark and Iceland. Both countries have a number of separate labour law acts, each with its own scope of application, and the definitions of 'employee' may vary substantially.[59] The most used definition in Denmark is 'a person, receiving remuneration for personal work performed in a contract of service'.[60] Sweden also has a number of separate labour law acts, but the conceptual tradition still appears to be more unified.[61]

Some starting points for the discussion of the concept of employee:

- Who an employee is depends on an overall case-by-case assessment guided by certain criteria or indicators.
- Statutory definitions of 'employee' vary to some extent.
- The statutory approach to the concept of employee in labour law appears more unified in Finland, Norway and Sweden than in Iceland and Denmark.

56. The issues and questions addressed are presented in more detail in Hotvedt/Munkholm 2019 pp. 14–15.
57. Most (but not all) Finnish labour law acts refer explicitly to the definition in the Finnish Employment Contracts Act.
58. The Norwegian Working Environment Act § 1-8 (1) and the Norwegian Labour Disputes Act § 1 a.
59. For an overview, see Country Report Denmark Part 1 p. 5–7 and Country Report Iceland Part 1 p. 5.
60. This definition is found in several acts, e.g. the Holiday Act, no. 60 of 30 January 2018 (Lov om ferie, ferieloven) § 2, the Act on the Employer's Obligation to Inform Employees of the Conditions Applicable to the Employment Relationship, no. 240 of 17 March 2010 (Ansættelsesbevisloven), § 1.
61. On the tradition of distinguishing the civil law concept in labour from the social law concept, see Country Report Sweden Part 1 pp. 13 ff.

3.3.2 Criteria or indicators – relevance and significance

In all the Nordic countries, whether a person is an employee depends on a broad and overall assessment of a range of criteria or indicators.

In Finland, the approach is rather rigid and the list of criteria is short. Four characteristics of an employment relationship are listed in the Employment Contract Act. The characteristics are considered legal *requirements* that must *all* be present for the worker to be an employee. The characteristics are:

- a contractual relation;
- remuneration;
- personal engagement to work on behalf of the employer;
- work under supervision and direction.

The characteristics are evaluated one by one. However, in borderline cases, the situation as a whole should be considered in an overall assessment.[62] The contract does not have to be in writing: oral and tacit contracts are accepted. Remuneration of some kind is required, but the Employment Contract Act sets a presumption that the parties have agreed on remuneration.[63]

The two last characteristics are essential for distinguishing employees from independent workers. The most important borderline cases concern this distinction. Several supplementing criteria in such cases have been developed in case law and legal literature. Whether work is performed on behalf of the employer depends inter alia on whether the remuneration is paid for the work itself or the result, who carries the economic risks and who makes business decisions. Work under supervision and direction is considered the most important characteristic. This requires a broad assessment of whether the employer has a right to give orders regarding place, time and manner of work. The more freedom and choice for the worker, the less likely to be considered an employee. Consequently, the main focus is on the traditional form of subordination. The criteria provide no clear invitation to consider actual economic dependency or social factors, as in Denmark and Norway, see below.

In Sweden, the doctrinal basis for employee status is rather well developed. The approach seems somewhat less rigid than in Finland.[64] Swedish law is set apart from the other jurisdictions by an explicit *hierarchy* of criteria. In doctrinal work, specific criteria are considered basic necessary prerequisites that must be present.[65] These core criteria are:

- a contract relation where the performing party must personally perform work on behalf of another party.

In addition, supplementing criteria or circumstances are to be considered in the

62. To the following, see Country Report Finland Part 1 pp. 12–16 and a government proposal for Employment Contract Act (HE 157/2000 vp), p. 55–58. See also M. Äimälä and J. Hollmén, Jyrki, *Finnish labour law in practice* 2012, pp. 15–17.
63. A contractual relation with intent to make a profit from working separates the employment relation from hobbies and voluntary activities.
64. To the following, see Country Report Sweden Part 1 pp. 9–12.
65. A. Adlercreutz, *Arbetstagarbegreppet*, 1964 pp. 186, 276 ff, legislative inquiry Ds. 2002:56 *Hållfast arbetsrätt för ett föränderligt arbetsliv*, p. 111 and A. Westregård, "The Notion of 'employee' in Swedish and European Union Law. An Exercise in Harmony or Disharmony?", in L. Carson, Ö. Edström and B. Nyström, *Globalisation, Fragmentation, Labour and Employment Law – a Swedish perspective*, 2016 p. 185–204 [Westregård 2016].

overall assessment. The list of relevant criteria is formulated a bit differently in doctrinal works, but typically includes the following:[66]

- whether work is performed under the principal's leadership and control (employment);
- whether there is a question of duration and not specific duties (employment);
- whether the performing party only has one principal (employment);
- who provides machinery and equipment (a self-employed provides their own equipment);
- the form of payment (an employee is paid a salary);
- the social criteria and practices in the industry;
- the intention of the parties;
- whether the contracting party is a company (self-employment).

The significance of the criteria varies depending on the legal framework. In the labour law context, having one principal is a strong indication of being an employee, but is clearly less relevant in the tax law context. Here, on the other hand, the intention of the parties is a more important criterion. The organization of work also affects which criteria are most significant. Workers doing high-skilled work or work independent of place and time may be classified as employees even if they work without clear indications of subordination by management and control.

The approaches in Denmark and Norway seem to be the most similar.[67] As in Sweden, the doctrinal basis is quite well developed in these countries. The approach appears to be flexible: Indicators of an employment relation have evolved in case law and guide the assessment, without any set of required criteria or defined core as in Finland and Sweden.

In Denmark, doctrinal work has pointed out five indicators:[68]

- the degree of the employer's right of instruction and control;
- the nature of the financial arrangement;
- any obligation to perform the work personally;
- the degree of connectedness (dependency) in the relationship;
- the social perception or presentation of the relationship.

All indicators are generally taken into consideration in an overall assessment. The assessment is made according to the relevant legal framework, and which indicator is most important can vary. Being subject to instruction and control is often decisive. For instance, being subject to the employer's instruction is not only an indicator but an express prerequisite in the context of the Salaried Employees' Act.[69]

When considering the employer's right of instruction and control, the court takes account of both direct and indirect instructions and control. A right of instruction and control is indicative even if it is not de facto exercised, e.g. when the employee independently organizes work without instructions due to the nature of the work or the skills and experience of the employee.[70] The nature of the financial arrangement

66. K. Källström and J. Malmberg, *Anställningsförhållandet–inledning till den individuella arbetsrätten*, 2016 [Källström/Malmberg 2016] p. 26 and Swedish Country Report Part 1 footnote 26.
67. To the following, see Country Report Denmark Part 1 pp. 8–14 and Country Report Norway Part 1 pp. 9–14.
68. O. Hasselbalch, *Den Danske Arbejdsret*, Arbejdsretsportalen, online, section III, 1.1. "De vejledende kriterier". The indicators are reiterated in the preparatory works for the new Holiday Act, "Proposal LF 116 2017/18, remarks to § 2.
69. The Salaried Employees' Act, no. 1002 of 24 august 2017 (Lov om funktionærers retsstilling, Funktionærloven), § 1 (2).
70. E.g. Commercial and Maritime High Court Ruling U 2007.2251 SH (dentist); Eastern High Court Ruling of 26/5

emphasizes who takes on the economic risks and benefits for the work (including the quality of the result), who provides tools, materials, running costs etc. An obligation to perform personal work points to whether there is a personal obligation, and whether work must be performed personally. A freedom to refuse tasks and a lack of obligation to be available for work is therefore indicative of self-employment. The two latter indicators point beyond a traditional notion of subordination and the classic employment relationship. The degree of connectedness assesses the intimacy or dependency of the specific relation, such as work predominantly carried out for only one principal, or the length of the relationship. However, the number of working hours is of no relevance.[71] The social perception is an indicator taking into account the immediate understanding of the relationship in society, as well as making a societal perspective relevant.

In Norway, an explicit list is formulated in the preparatory works of statutory labour regulations and is somewhat more detailed. This may make the assessment somewhat more rigid than in Denmark. The main indicators of employee status are[72]:

- the worker is obliged to stay at service to perform personal work and cannot use substitutes on his or her own account;
- the worker is obliged to submit to the employer's supervision and control of the work;
- the employer provides the work location, machines, tools, work materials or other equipment necessary to perform the work;
- the employer bears the risk for the work result;
- the worker is remunerated by some form of wage;
- the parties' relation is relatively stable and is terminable with notice;
- the worker mainly works for one employer.

In recent case law, the courts have considered these indicators one by one, while also emphasizing that the assessment should not be a mechanical consideration of the criteria.[73] As already indicated, the list is non-exhaustive, and supplementing factors can be taken into account. The combination of indicators determining the specific case may therefore vary from case to case. However, the first two indicators are generally considered most important, and the Norwegian Supreme Court has recently emphasized the significance of these two criteria.[74] When assessing the central criteria of supervision and control, the courts take into account both a legal right to control and de facto control of work, see further below in 3.3.3.

The next two indicators (on who provides the location, tools etc. and bears the risk for the work result) mirror the criteria of 'financial arrangement' in Denmark. Similarly, the final two indicators (on stability and amount of work for one principal) seem to correspond with the 'degree of connectedness' in Denmark. As in Denmark, these last two indicators in particular point beyond a traditional notion of subordination and refer to an economic form of dependency.

In Iceland, the basis for classifying a worker as an employee is less clear than in the

1992, case nr 82/1991 (medical doctor); Commercial and Maritime Court Ruling U 1971.731 SH (sales representative); Western High Court Ruling U 1968.643 VL (physiotherapist).

71. Expressly stated in the preparatory works of the new Holiday Act, Proposal LF 116 2017/18, remarks to §2.
72. Government white paper for the Working Environment Act, Ot.prp. nr. 49 (2004–2005) p. 73, see also the preparatory works for legislation on tax and social security.
73. Supreme Court rulings Rt. 2013 s. 354 (para. 57) and Rt. 2013 s. 342 (para. 46).
74. Supreme Court ruling HR-2016-1366 (para. 63, 64, 70, 73).

other countries.[75] In the overall assessment, several factors are typically considered:

- whether the person has one or more principals;
- the control of the employer;
- who provides tools, machines and offices or place of work;
- the nature of the payment;
- whether holiday pay or sick pay is paid;
- whether there is a need for personal contribution of work;
- whether there is an obligation to work;
- how taxes are handled.

It is not evident from case law whether some factors are more important than others. The courts will usually consider all the facts and evidence of the case as a whole. The factors mentioned are mainly parallel to the criteria relevant in Sweden, Denmark and Norway. There are also examples in case law of diverging approaches. The lack of case law from the labour law context and the lack of systematic analysis however leave more uncertainty on the decisive factors in borderline cases.

The basis for assessing who is an employee is therefore not altogether the same in the Nordics:

- The criteria in Finland are the most rigid, as they form necessary requirements.
- The criteria in Sweden are well developed and form a hierarchy, a defined core and supplementing circumstances.
- The criteria in Denmark and Norway are largely similar and appear to be quite flexible.
- The criteria in Iceland are not much discussed and their relative significance is less clear.
- Both Denmark and Norway have criteria explicitly referring to other forms of dependency than classic subordination.

3.3.3 The primacy of the facts and circumvention

The principle of *the primacy of the facts* is deeply rooted in Nordic labour law. When assessing whether a person is an employee, the reality of the work relation is generally prioritized over formal contractual arrangements. This is due to the mandatory and often protective nature of labour law and the need to counteract circumvention of both statutory regulations and collective agreements. It still varies between the countries as to whether circumvention is explicitly addressed. This approach can also be seen in light of the Nordic legal tradition of legal realism.

First, a focus on the reality of the work relation is reflected in the range of relevant criteria or indicators in each country. Some of the criteria refer to legal rights and obligations, while others point to mere facts. For example, in both Denmark and Norway, the employer's *right* of instruction and control and the worker's *obligation* to perform work personally are central indicators, while the criteria referring to connectedness/economic dependency point directly to the facts. Interestingly, in both Sweden, Finland and Iceland, the central criterion of supervision and control is phrased as a fact – i.e. whether the work is in fact performed under supervision and control.

75. To the following, see Country Report Iceland Part 1 pp. 8–12.

Second, the principle of the primacy of the facts may affect the assessment of criteria. The issue here is how discrepancies between the formal contractual arrangement and the reality of the work relation are solved: To what extent do the courts rely on interpretations of the contract or the expressed intention of the parties as opposed to considering mere facts and practices? Here, some differences can be noted. In addition, it also varies as to how clearly and explicitly circumvention is addressed.

This focus on the reality of the work relation seems the strongest and most developed in Norwegian law. The preparatory works of the main statutory act – the Working Environment Act – clearly presuppose that the courts will 'cut through' the formal arrangements to hinder circumvention if the relation in reality is one of subordination and/or dependency.[76] The Supreme Court has recently stated that it has *no* significance if the individual contract is formally classified as a contract of independent work.[77] Furthermore, case law provides important guidance for the assessment of the criterion of supervision and control. Being exposed to supervision and control is sufficient to consider the worker 'obliged' to subordination. On the other hand, a formal legal basis for supervision and control is also sufficient, regardless of whether this is exercised. Case law has furthermore addressed the assessment of supervision and control in triangular work arrangements.[78] However, in the context of the Labour Disputes Act as a framework for collective agreements, case law has acknowledged the intention of the social partners as a relevant factor in the overall assessment.[79] The scope of the collective agreement may therefore indirectly affect the legal assessment of who is an employee.

In Denmark, too, there is a clear and strong preference for the realities as opposed to formal contractual arrangements. The courts explicitly address potential attempts at circumvention and abuse.[80] The formal arrangement, however, can serve as an indication of the intention of the parties, and thereby have some significance. This is a result of basic contractual law principles and their role in the labour law context.[81] Employment contracts are subject to general contract law principles, and the basic principle when interpreting the implications of a contract is freedom of contract. However, if the actual facts of the situation do not reflect the contents or wording of the contract, the contract can be disregarded, partly or fully. This principle applies specifically to the concept of employee, due to the protective nature of labour law standards and the risk of circumvention of mandatory employment rights in statutory acts and collective agreements.[82] In the assessment of the courts, the reality of the work relation is therefore decisive in situations where this diverges from the formalities in the contract. Here, as in Norway, case law guides the assessment of the criterion of instruction and control. As mentioned above, both direct and indirect control are taken into consideration.

In Sweden, the supplementing criteria or circumstances to be considered are generally phrased as mere facts. The assessment thus focuses on the reality and not on formalities. The formal contractual arrangement still carries some weight. The

76. Government white paper Ot.prp. nr. 49 (2004–2005) p. 74 and Governmental report NOU 2004: 5 p. 163.
77. Supreme Court ruling Rt. 2013 s. 354 (para. 37).
78. See further in section 4.3.3.
79. Labour Court ruling ARD 1991 s. 140, see further in section 6.3.
80. E.g. Labour Court Ruling AR 2005.022 of 31 August 2006 and Maritime and Commercial High Court ruling U 1996.946 SH.
81. To the following, see Country Report Denmark Part 1 p. 10–11.
82. Expressly stated in the preparatory works for the new Holiday Act, LF 116 FT 2017/18, introduction 2.1. and remarks for § 2.

'intention of the parties' is recognized as a supplementary criterion in the overall assessment, and this is considered by looking at the formal contract type. Whether or not the contracting party is a company is also a criterion that carries some weight in the labour law context. The formal arrangement and the intent of the parties are, however, considerably less important in the labour law context compared to e.g. a tax law context.[83] In sum, the actual circumstance between the parties matters more in the overall assessment than the intention of the parties or the written contract.

In Finland, formal features are clearly not decisive if the factual situation indicates that the worker is a dependent employee.[84] The doctrine of the overall assessment implies that the agreed conditions should be reflected in the factual circumstances. The central requirement that work is subject to supervision and control is often evaluated by looking at the factual circumstances. An abstract right to control is enough to establish an employment relationship, although the application of many provisions, such as working time regulations, requires concrete control. The more the factual circumstances resemble the ideal way of organizing work, the more likely it is that this element of the legal definition will be met. Still, formal contractual conditions may affect this assessment indirectly, for example if the contract does not stipulate a right to supervision and control. The parties can therefore, at least to a certain extent, determine the legal status. However, one must be able to conclude that there is no intention to circumvent the mandatory legislation.

In Icelandic law, the principle of the primacy of the facts is influential, but comparably less developed.[85] Legal doctrine maintains that the reality of the work relation is more important than the contractual formalities in the overall assessment of each case. Further guidance on how this affects the assessment of the relevant factors seems to be lacking. Case law appears to be somewhat inconsistent. In most cases, the courts will explicitly consider the facts as whole.[86] Still, there are examples where the formal contract type has been decisive. In a bankruptcy case, the deciding factor was that the worker was aware of, and had accepted, the status of being self-employed.[87]

The significance of the reality of the work relation as opposed to formal contractual arrangements in the overall assessments in the Nordic countries can be summarized as follows:

- The facts and realities are generally given preference due to the mandatory and protective nature of labour law standards.
- The focus on the realities seems to be the strongest in Norwegian law, as it has *no* significance if the individual contract is formally classified as independent work.
- In Sweden, Denmark and Finland, the formal contract type has *some* significance, as an indication of the will of the parties.
- In Iceland, the approach is less developed and case law somewhat inconsistent.
- It varies as to what extent circumvention is explicitly addressed by the legislatures and the courts.

83. See from the tax law context, Government Bill 2008/09:62 p. 26 and from the labour law context in AD 2005 no. 16 and AD 2012 no. 24.
84. To the following, see Country Report Finland Part 1 pp. 16–17.
85. To the following, see Country Report Iceland Part 1 pp. 10–11.
86. E.g. Supreme Court rulings in cases 255/1997 and 286/1998.
87. Supreme Court ruling 58/2002.

3.3.4 A purposive or inclusive concept?

An important question is whether the purpose of the legal rules affects the interpretation and application of the concept of employee. Some purposive elements in the Nordic conceptual traditions are indicated above. Nuances in statutory definitions are often justified – explicitly or implicitly – by reference to the purpose of the relevant rules. Differences in the weighing of criteria in the labour law context compared to other legal contexts may also be explained by the purpose of the relevant rules.

Here, the issue is whether the purpose of labour law standards may serve as an argument when determining employment status in the labour law context. This *could* imply looking beyond whether there is a traditional form of subordination and considering the worker's need to be included in the relevant legal framework in light of other forms of dependency. A purposive approach *may* thus imply a concept sensitive to the need for the relevant labour law standards.[88]

A similar question is whether the concept is perceived as broad or generally inclusive toward borderline cases. Both questions address the general adaptability of the concept of employee when faced with future work relations with challenging characteristics. Here, each country has its own approach and some differences are striking.

In Norway, there is an explicit purposive approach. The concept of employee is traditionally characterized as broad, with reference to the protective purpose of labour law.[89] The Supreme Court considers the legislatures' intention to be that those in *need* of statutory labour protection are protected.[90] In recent case law, the Supreme Court emphasized the purposive aspect of the assessment, and described this as the 'methodological approach' to the concept of employee.[91] In the reasoning of the Supreme Court, the purposive approach affects the assessment of the relevant criteria and guides the overall assessment.[92] There are examples in case law where a purposive assessment has been decisive. A worker may therefore be classified as an employee even if the main indications of subordinate work (personal obligation to work and supervision and control of one's work) are not clearly present. Furthermore, the need to adapt the concept to reflect changes in the labour market is acknowledged. In the preparatory works of the main statutory act, it is explicitly stated that the courts are expected to consider the developments in the labour market when assessing employment status.[93]

In Denmark, there is a distinct purposive approach, albeit in an indirect manner. The overall interpretational approach in the Danish court system is the rule of law, understood as legal realism or legal positivism, largely as presented by the legal theorist Alf Ross in the 1950s.[94] This entails a strict interpretational approach of the

88. See further on the purposes and functions of labour law in section 1.1.
89. Supreme Court ruling Rt. 1984 s. 1044 (p. 1048). This statement is repeated in later cases.
90. Supreme Court ruling Rt. 2013 s. 354 (para. 39).
91. Supreme Court ruling Rt. 2015 s. 475 (para. 65), with reference to Rt. 2013 s. 354 (para. 39), see also Supreme Court ruling HR-2016-1344-A (para. 60).
92. See further M. J. Hotvedt, "Arbeidstaker – quo vadis? Den nyere utviklingen av arbeidstakerbegrepet", *Tidsskrift for Rettsvitenskap* nr. 1 2018 pp. 42–103 [Hotvedt 2018], pp. 59–64.
93. NOU 2004: 5 *Arbeidslivslovutvalget*, p. 163.
94. Alf Ross, *om ret og retfærdighed,* 1953, in English *On Law and Justice,* Oxford University Press, 2019 (new translation), also explicitly the starting point in labour law cf. O. Hasselbalch, *Den Danske Arbejdsret,* Arbejdsretsportalen, online, section 1, 3.1.

courts based on what is exactly provided in law, rather than a pragmatic or dynamic interpretational approach. The reasoning of the Danish courts varies significantly in detail, and does not always explicitly refer to the purpose of a provision or an act. Reference to the purpose is made when several outcomes of applying a rule to a specific situation are possible. In this case, the purpose is referred to for guidance, as the courts will choose the solution best aligned with the overall purpose of the act. The purpose is provided either specifically in each act or in preparatory works. References to preparatory works, when made, are a manner of referring to the specified purpose of the act. This could, from a Danish perspective, be considered a purposive approach within the boundaries of the positivistic view of law.[95] Especially in the case of non-discrimination and health and safety at work, including paid holidays, the social context and the specific purpose of the acts clearly play a role when the courts determine the personal scope of the acts.[96] Most notably, in the preparatory works for the new Danish Holiday Act, the health and safety purpose of the act is used as a guiding element when assessing whether workers in atypical employment – such as freelancers, gig-workers and self-employed – are covered by the act. The preparatory works explicitly elaborate on the significance of the purpose of the act: It means that the starting point for assessing the status of workers in atypical work situations is the presumption that they are covered by the act. This presumption can, however, be overruled by facts documenting their status as genuinely self-employed.[97] In reality, this shifts the assessment of the status of employee to a starting point based on a presumption, which can be counter-proved by the opposing party. The purpose of the act is specifically used as the reason for this shift.

In Sweden, the purposive aspect is less clear compared to Norway and Denmark.[98] It is recognized that the somewhat diverging classification practices in different fields of law can be justified by the different purposes of the relevant legal framework.[99] However in the labour law context, it is not evident that the need for protection is a relevant argument. Rather, it is argued that the assessment should be the same within a labour law context, irrespective of the rules in question. Yet, the concept is flexible toward this purpose in the sense that supplementary criteria could be added and weighed differently depending on the situation and the legal rules in question. The concept of employee is generally regarded as broad and inclusive, and has expanded over time.

In Iceland, there is no tradition in case law of referring to the purpose of labour law when determining employment status.[100] Still, there are cases where an inclusive interpretive method is applied.[101] The courts have stated that doubt concerning employment status must favour the worker. Unless the employer can prove that there was a contract for service, the worker is considered an employee. This clearly resembles the presumption of employee status in the new Danish Holiday Act.

In contrast, the Finnish concept of employee cannot be considered broad or inclusive. The idea of standard employment is strongly reflected in the interpretation of the

95. To the following, see Country Report Denmark Part 1 pp. 11–13.
96. Preparatory works for the Holiday Act, LF 116 FT 2017/18 Introduction 2.1 and remarks to § 2; Preparatory works for the Working Environment Act (Arbejdsmiljøloven), remarks to § 2; and preparatory works for the Statutory Act no. 645 8 June 2011 on Equal Treatment of Men and Women in Matters of Occupation and more (Ligebehandlingsloven), FT 1977-78, Appendix A, p. 3087.
97. Preparatory works for the new Holiday Act, LF 116, FT 2017/18, remarks to § 2.
98. To the following, see Country Report Sweden Part 1 pp. 11–13.
99. Legislative Inquiry Ds. 2002:56 p. 110 and 116, Källström/Malmberg 2016 p. 29 ff.
100. To the following, see Country Report Iceland Part 1 pp. 9–10.
101. Supreme Court Rulings 3/1987 and 1988 p. 157.

employment relationship, and the growing diversity of work relations has not yet been truly acknowledged.[102] Consequently, in doctrinal work, Finnish law is regarded as carrying a certain reluctance toward new forms of work.[103] Similarly to Sweden, there is no clear purposive aspect in interpreting the employment relationship and e.g. the status of the employee.[104]

Consequently, it varies as to whether the Nordic concepts of employee are purposive and/or inclusive and thus generally adaptable when faced with new types of work relations:

- The Norwegian concept is generally considered to be broad and the approach is explicitly purposive.
- The Danish concept is sensitive to the relevant legal framework and thus implicitly purposive.
- The Swedish concept is generally considered to be wide and inclusive, but with a less clear and less explicit purposive aspect.
- The Icelandic concept can be considered inclusive, as doubts concerning employment status favour the worker according to the inclusive interpretive method.
- The Finnish concept is considered neither broad nor inclusive, and there is no clear purposive approach.

3.3.5 Conclusions: Adaptability of the concept of employee in the Nordics

The common features of the concept of employee in the Nordic countries is the approach with an overall assessment focused on the reality of the specific work relation. This enables a flexible, inclusive and adaptable application of the concept. There are, however, notable national differences affecting how flexible, inclusive and adaptable the concept is in the face of grey area cases or new work relations.

First, there seem to be differences regarding flexibility and the general ability to include work relations with challenging features in the concept of employee.

Although the lists of criteria or indicators vary to some degree, the main focus of the assessment is the same or largely similar: namely, whether there is a contractual relation of personal work for another party and the work is subject to supervision and control. Work relations with these characteristics clearly present will generally be considered contracts of employment in all Nordic countries. What differs is the opening to be classified as contracts of employment *without* these characteristics clearly present. The wide range of indicators listed in Denmark and Norway, combined with the lack of explicit requirements of core criteria, suggest a wider opening here – i.e. more flexibility in the assessment – compared to Finland especially, and perhaps also Iceland and Sweden.

Both the Swedish and the Norwegian concepts are clearly recognized as broad, and the need to adapt to changes in the labour market is explicitly acknowledged. In both Denmark and Norway, purposive approaches are applied. In Iceland, the approach is less developed and case law somewhat inconsistent, but an inclusive interpretive method is applied to the concept of employee. The Finnish concept, by

102. N. Bruun and A. von Koskull, *Työoikeuden perusteet*, 2012.
103. Country Report Finland Part 1 p. 6.
104. The purposive aspects have relevance when interpreting the rights and duties of employer and employee, see Government proposal for Employment Contract Act (HE 157/2000 vp), pp. 55–58.

contrast, is considered neither as broad or purposive, nor as particularly adaptable to change; to a certain extent, it is perceived as inhibiting the inclusion of new forms of work. These differences also clearly suggest varying degrees of adaptability when faced with new labour relations.

Furthermore, there are some interesting differences regarding the assessment of the realities and facts of a work relation as opposed to formal contractual arrangements. The somewhat diverging approaches to the 'intention of the parties' as a criterion or indicator may have an effect in this regard. In Sweden, Denmark and Finland, the intention of the parties is a more integrated part of the overall assessment than in Norway. One the one hand, this could possibly leave the legal framework more vulnerable to attempts of circumvention. The 'intention of the parties', on the other hand, may represent some leeway for the contractual partners at the collective level. This could allow the social partners to influence the concept, by concluding collective agreements for workers in the grey area. As such, this could also indicate adaptability and potential for development. This will be further discussed in chapters 6 and 10.

We therefore suggest some general conclusions regarding the concept of employee in the Nordic countries:

- Defining the concept of employee in detail is mainly left to the courts due to the jurisprudential approach.
- The concept is generally adaptable to changing labour relations due to the tradition of a case-by-case overall assessment.
- The degree of adaptability seems to vary due to different lists of relevant criteria or indicators; some differences in the assessments of realities vs. formal contractual arrangements; the varying significance of the purpose of relevant legal rule(s); and the concepts' varying breadth and inclusiveness.
- The inclusion of new forms of work relations can be achieved with several techniques apart from statutory regulations, such as guidance in preparatory works and purposive and/or inclusive interpretation methods.
- Adaption of the concept is led by different actors: the legislatures, the courts, and – to some extent – social actors.

3.4 Concept of employer

3.4.1 Introduction, common features and legislative basis

The concept of employer is central, as it determines who has the legal responsibility to comply with most labour law regulations. The concept has a common core in the Nordic countries. It is mainly perceived as a reflection of the concept of employee. The employer is the stronger party of an employment relationship, typically a contractual relation. This serves as the common starting point when identifying the employer: The employer is the party that concluded the contract. The employer may therefore be a legal entity or a physical person, depending on the circumstances.

Despite this common point of departure, the concept of employer is neither unitary nor fully clear in any of the Nordic countries. There are different conceptual nuances and solutions to unclear issues in the Nordic countries.

In this section, we discuss how the concept of employer in the Nordic countries interplay with labour relations with challenging characteristics.

Being the contractual employer has several legal implications. This entity has managerial powers vis-à-vis the employee and is responsible for the rights of the employee based on the contract. The contractual employer is also – as a starting point – responsible for the statutory rights of the employee, as these rights are related to the contractual relation.

The legal framework thus builds on an assumption that the contractual party and the entity that exercises employer functions are one and the same. This assumption fails if the factual circumstances change: if the formal contractual arrangements do not correspond with the actual power structures, or if other entities than the formal contractual party exercise employer functions or otherwise shape employment conditions. Complex organization of work and fragmented and volatile labour relations thus obscure the identification of the employer and the allocation of legal responsibility.

The allocation of employer responsibility raises different questions with relevance for non-standard labour relations. An overarching question is whether and to what extent the employer concept is *functional* – i.e. whether and to what extent exercising employer functions triggers employer responsibilities.

More specifically, a first question is how to identify the contractual employer. A second question is whether there might be more than one employer. This leads to a number of other questions: Can employer responsibilities shift from one to another and under what circumstances? Can several entities share the responsibilities that rest on the 'employer' vis-à-vis the same employee? If so, is the *full* responsibility shared – i.e. joint employer status – or is it instead an extension of specific employer duties leading to a *partially* shared responsibility? Furthermore, specific employer duties can rest on several entities in different ways. Are the duties *shared* in the sense that both entities are responsible for the same duty, or are they *divided*, so that each duty rests on one entity?

In the following, we will map and discuss commonalities and differences in the Nordic countries on these issues.[105] We first discuss the general perception of the employer concept: whether the concept is perceived as functional and/or nuanced

105. The issues and questions addressed are presented in more detail in Hotvedt/Munkholm 2019 pp. 14–15.

(section 3.4.2). Next, we look at the approach to identifying the contractual employer (section 3.4.3). We then present an overview of (different types of) extensions of employer responsibility beyond the contract of employment relation (section 3.4.4). These discussions lead up to some tentative conclusions (section 3.4.5).

Some points of departure for the discussion of the concept of employer:

- The concept of employer is not fully clear or unitary in any of the Nordic countries.
- The employer is – as a starting point – the stronger party in an employment relationship, reflecting the concept of employee.
- The responsibility to comply with labour law regulations vis-à-vis employees rests mainly on their contractual employer.
- Employer responsibilities may rest on several entities; it may be shifted, shared or divided, fully or partially.
- The allocation of employer responsibilities includes both identifying the contractual employer and considering extensions of employer responsibilities beyond the contract of the employment relation.

3.4.2 A nuanced or functional concept?

Although the concept of employer is mainly perceived as a reflection of the concept of employee in all five countries, there are some differences worth noting at the outset. The first is that it differs as to how the core content of the concept is described. The second is that it varies as to what extent challenges are recognized and discussed, and whether conceptual nuances and/or functional elements are addressed.

Functional elements and conceptual nuances are most evident in Denmark and Norway.

In Denmark, general contract law and principles of freedom of contract form the starting point when defining and identifying the employer. However, the contractual framework allows for functional elements and conceptual nuances: Actual conduct is emphasized when identifying the contractual employer, and interpretations of statutory regulations vary depending on the purpose of the relevant framework.

In Norway, the main statutory definition of 'employer' reflects the definition of employee. The two main acts define the employer as 'anyone who has engaged an employee to perform work in his service'.[106] The preparatory works for the Working Environment Act state that the concept is functional, and recognizes a doctrine of joint employer responsibility.[107] There are also a number of explicit extensions of statutory employer duties, see further in section 3.4.4. The concept is therefore conceived as relative or nuanced in doctrinal work, and it is acknowledged that employer responsibilities may rest on several entities.[108]

Functional elements and conceptual nuances are less evident in the other Nordic countries.

106. The Norwegian Working Environment Act § 1-8 (2) and the Norwegian Labour Disputes Act § 1 b.
107. Government white paper Ot.prp. nr. 49 (2004–2005) pp. 76–77, see further on the doctrine in section 3.4.4.
108. See for example H. Jakhelln, *Oversikt over arbeidsretten*, 4. ed 2007 pp. 36–43, and J. Fougner, *Arbeidsavtalen—utvalgte emner*, 1999 p. 138. Nuances and relativity of the concept of employer are further analysed in M. J. Hotvedt, *Arbeidsgiverbegrepet. En analyse av grunnlaget for arbeidsgiverplikter*, 2016 [Hotvedt 2016].

In Sweden, the concept of employer mirrors the concept of employee. In the Co-Determination Act, the employer is defined as 'the party on whose behalf the employee performs work'.[109] The Labour Court has further defined the employer as 'the physical or legal person that have concluded a contract with another (physical) person that this person must perform work under such circumstances that an employment contract is at hand'.[110] Apart from a recent analysis of challenges caused by complex organizations, the concept of employer has not been much discussed in doctrinal work.[111]

Similarly, in Finland, the concept of employer is derived from the definition of the employment relationship. The employer is identified using the same characteristics that are requirements to be an employee. On this basis, the employer is the contractual partner that profits from a contract of work, is responsible to pay remuneration and has at least the possibility to supervise and direct work.[112] The issue of shared or divided employer responsibilities is not much discussed. The Employment Contract Act stipulates that neither of the parties of the employment contract may transfer the rights and duties deriving from that contract to a third party without the consent of the other party unless otherwise stipulated.[113] This explicit regulation may create less leeway for functional and nuanced approaches.

In Iceland, only a few acts include a definition of 'employer'. In legal writings, the employer is generally presented as the party in the employment relationship that purchases work.[114] Challenges of allocating employer responsibility are not much discussed, and there is no case law explicitly addressing how to identify the employer.

However, nuances and functional elements may be revealed by a closer look at both how the contractual employer is identified, and when and how employer responsibility is extended beyond the contractual relation.

A few preliminary findings concerning the concept of employer in the Nordics can be highlighted:

- The Norwegian concept is described as functional, relative and nuanced.
- The Danish concept allows functional and nuanced approaches within the framework of contractual law.
- The conceptual tradition in Sweden, Finland and Iceland seems comparably less open for functional and nuanced approaches.

3.4.3 Identifying the contractual employer

The identification of the contractual employer in all five countries follows general principles of contract (and corporate) law as a starting point. As the employer is the stronger party of an employment contract with a right to exercise managerial power, the party that concluded the contract will, at the outset, be regarded as the employer. The formal contractual arrangement will thus serve as a starting point when identifying the employer.

109. The Swedish Co-Determination Act 1 § 2 st.
110. Labour Court ruling 1984 no. 141 and L. Lunning and G. Toijer, *Anställningsskydd: En lagkommentar,* 2016 p. 41.
111. N. Selberg, *Arbetsgivarbegreppet och arbetsrättsligt ansvar i komplexa organisationer*, 2017.
112. The Finnish Employment Contract Act chapter 1 § 1 is significant here, see further the Government proposal (HE 157/2000 vp) and Country Report Finland Part 1 pp. 16–17.
113. The Finnish Employment Contracts Act chapter 1 § 7 (1).
114. E. Blöndal and R. M. Sigurðardóttir, *Labour law in Iceland*, 2014 p. 25.

Normally, a legal entity – often a limited company or a public entity – will be party to the employment contract, but the contractual employer may also be an individual. The legal person as such is the contractual employer, although corporate organs or specific persons exercise various employer functions. Delegating employer functions within a large organization does not release the legal entity of its responsibility as contractual employer.[115]

The contractual employer may be integrated with other entities, for instance in a group corporate structure. This will allow the parent company to influence employment conditions in the subsidiary through corporate governance. The main rule in all the Nordic countries is still that each separate company is responsible for its own employees.[116]

Identifying the 'real' contractual employer can cause problems in some cases. One issue is if the contractual arrangement is unclear. Another issue is if one entity clearly is the formal contract party, while key employer functions – such as managerial powers and providing pay – are exercised by another entity or person(s).

Denmark and Norway stand out from the other Nordic countries with more case law and doctrinal discussion on how to identify the 'real' employer. This can be regarded as a distinctive labour law approach.

In Denmark, the exercise of the managerial prerogative is seen as indicative of who in reality is the employer.[117] In disputes on where employees can direct their claims, courts will consider the conduct of the parties, and specifically who is exercising the managerial prerogative. Case law considers who exercised key employer functions – such as instruction, control and remuneration – to be important where the contractual relationship is unclear.[118] However, there are also examples of diverging realities being decisive even though the contractual relationship was clear. This tendency is stronger in cases involving working environment, social security or occupational injury matters, as the social purposes of these rules are more prevalent.[119]

In Norway, the formal arrangement serves as a starting point as well, but it is not necessarily decisive when identifying the employer.[120] Even if the employer is indisputably identified in the contract, the courts will usually consider whether this is reflected in reality. Case law indicates that exercising some – not all – employer functions are sufficient in this regard.[121] Furthermore, there is a low threshold for regarding the contract as unclear. In such cases of contractual obscurity, the employer will be identified by considering the realities, focusing directly on who has exercised employer functions. Case law gives examples of this approach leading to *two* responsible employers.[122] A common trait in case law seems to be that the Court considers how the allocation of responsibility affects the protection of the employees. This indicates that the protective purpose of labour law has some influence when identifying the contractual employer: that the courts take the

115. E.g. from Norway, Supreme Court ruling Rt. 1998 s. 1357 and from Denmark, Eastern High Court ruling U 2019.3302 Ø.
116. E.g. from Norway, Government white paper Ot.prp. nr. 49 (2004–2005) p. 74.
117. To the following, see Country Report Denmark Part 1 pp. 15–17.
118. E.g. Supreme Court Ruling U 2001.987 H.
119. O. Hasselbalch, *Den Danske Arbejdsret*, Arbejdsretsportalen, online, section III, 1.2.1.1) and 2).
120. To the following, see Country Report Norway Part 1 pp. 16–17.
121. Supreme Court rulings Rt. 1993 s. 1428, Rt. 1997 s. 623 and Rt. 2003 s. 1593, see further Hotvedt 2016 pp. 436–438.
122. Supreme Court ruling Rt. 1993 s. 954.

implications for employees into account.[123]

In the other Nordic countries, it is less clear whether there is a distinct labour law approach to the identification of the contractual employer.

In Sweden, there are some traces of a similar approach as in Denmark and Norway. According to the principle of the legal subject, the legal entity or person who concluded the employment contract is regarded as the employer. However, if it is dubious as to whether a physical person or a company is party to the contract, it is the employers' responsibility to clarify who the contractual employer is.[124]

In Iceland, the lack of case law makes the issue uncertain. However, the inclusive interpretation commonly applied in labour law contexts would imply that doubts concerning who is the contractual employer would favour the employee.

In Finland, the factual circumstances – of which the contract is one – are decisive when identifying the contractual employer. Still, if this is unclear, the impression is that the contract plays the central role.

The approach to identifying the contractual employer is thus not altogether alike in the Nordics:

- As a common starting point, the contractual employer is the legal entity that concluded the contract.
- In group corporate structures etc., as well, each entity (company) is the employer for its own employees, as a clear point of departure.
- Denmark and Norway have signs of a distinct approach aiming at identifying the 'real' employer.
- In Sweden and Iceland, the approach and aim is less evident, but it is considered the employers' responsibility to clarify who the contractual employer is.
- In Finland, there are no clear signs of a distinctive approach.

3.4.4 Employer responsibilities beyond the contract of employment relationship

Introduction

The discussion thus far has shown that the contractual employer, as a clear point of departure, is responsible for complying with labour law regulations vis-à-vis their own employees. As indicated in section 3.4.1, employer responsibilities may apply beyond the contract of employment relation. As explained in greater detail there, this can lead to employer responsibilities for *several* entities: Legal responsibilities may be shifted, shared or divided, fully or partially. Here, we refer to all types of departures from the contractual employer as the sole responsible entity as *extensions of employer responsibilities*.

Such extensions of employer responsibilities can be found in all the Nordic countries, but they vary substantially.

First, the legal basis varies. Extensions can be made explicitly in statutory regulation, or may be the results of nuanced and/or purposive interpretations. A particular type of non-statutory extension is a distinct doctrine – generally phrased principles on when and how to extend employer responsibilities. Non-statutory extensions may be difficult to separate from a functional approach to identifying the contractual

123. See further Hotvedt 2016 pp. 438–440.
124. See Lunning 2016 p. 49 ff and e.g. Labour Court rulings 1976 no. 128 and 1995 no. 84.

employer.

Second, the background differs. As this discussion will show, many extensions are results of the implementation of EU/EEA law and other international standards in Nordic labour law. Other extensions have a national background and thus a different justification.

Furthermore, there are variations both in *when* extensions apply, and their *implications* (i.e. full or partial responsibility, shared or divided responsibilities).

A full comparison of extensions in the Nordic countries would thus be too extensive for the scope of this report. The discussions here are therefore limited, to provide a rather brief overview of three perspectives[125]: First, we look at which *type of labour law standards* is typically extended. Then we address the *factual contexts* where extensions typically apply. Lastly, we discuss whether there are *general principles* or discussions in some countries on how to allocate employer responsibilities.

Together, these intersecting perspectives can shed important light on what justifies extensions of employer responsibilities beyond the contract of employment in the Nordic countries. This, again, can serve as a basis for assessing how adaptable the Nordic concepts of employer are when faced with the complex and shifting work relations of the future.

Extensions of specific labour law standards

Extensions of employer responsibilities are mainly related to two types of labour law standards: duties to protect workers' health and safety and protection against discrimination.

All the Nordic countries extend employer responsibilities concerning *health and safety* beyond the contract of employment relation. Some of the extensions are related to the somewhat broader definition of 'employer' in the Framework Directive on the working environment, while others have a national background.[126] The personal scope of these extensions – which types of workers are covered by protective standards – is discussed in more detail in chapter 7.

In Iceland, the Working Environment Act has a separate definition of 'employer' as 'whoever runs a business or an establishment'.[127] This definition corresponds with the definition in the Framework Directive. It is broader than the general definition of 'employer' in Icelandic law and may permit employer responsibilities beyond the contractual relation.

Denmark, too, has a broader concept of employer in the Working Environment Act and the Workers' Compensation Act. The Working Environment Act applies to 'work performed for an employer'.[128] Certain duties to secure safe work are also extended to work performed in other situations than employment. This means that all work performed at a workplace, public or private, in commercial relations or not, during hours of work or hours of leisure, salaried or unsalaried, can fall within the scope of certain protections in the Working Environment Act. Only specific duties are

125. For more in-depth presentations of the extensions in each country, see the Country Reports Part 1 with further references.
126. Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work.
127. The Working Environment Act, 46/1980 (Lög um aðbúnað, hollustuhætti og öryggi á vinnustöðum) § 12-1, see also further in § 90-1.
128. The Working Environment Act, no. 1084 of 19 September 2017 (Lov om arbejdsmiljø, arbejdsmiljøloven) § 2, 1.

reserved for 'employers' in a more traditional sense, and even in this case, the concept of employer is extended in case law. Based on a purposive interpretation and the clear guidelines in the preparatory works, the employer responsible for ensuring health and safety is the one who has the opportunity, knowledge and power to ensure the health and safety of the workers, rather than the one who is the contractual employer.[129] The concept of employer is also broadened in the Workers' Compensation Act. This act applies to 'persons employed to do work for an employer' and 'the work can be salaried or unsalaried, permanent, temporary or interim'. Here, the assessment is that the employer liable for compensation for injuries is the one in whose interest the work is being performed, regardless of a contractual or lack of a contractual relationship.[130] This extends the concept of employer to relations that are not formally employment relationships.[131]

In Sweden, employer responsibility for health and safety measures is also extended. The main rule in the Working Environment Act is that the employer must take all necessary measures to prevent the employee from being exposed to illness or accidents.[132] This refers to the responsibility vis-à-vis their own employees. In addition, the person in control of the workplace must ensure that the workplace is safe for any person who works there, and any person who engages contract labour to perform work in his or her business must take safety measures required by this work.[133] Consequently, duties to ensure health and safety include other workers than one's own employees, and other entities than the contractual employer can thus be held responsible. This is referred to as 'the double or shared responsibility'.[134]

In Norway, the responsibility to ensure health and safety is extended, first by purposive interpretations, and more recently by statutory extensions. In earlier case law, the employer concept has been interpreted rather broadly in the context of health and safety. The reasoning is similar to the purposive interpretation in Denmark and has led to responsibilities for persons and entities able to control the working environment by supervising and controlling work.[135] Today, there are a number of explicit extensions of employer duties. The extensions are specific to the protection of health and safety within the Working Environment Act and do not generally apply to other labour law standards (working time, dismissal protection etc.) in the same act. The explicit extensions are related to the employer function of having the operational responsibility for a business or enterprise, similar to the purposive reasoning in case law.[136]

Furthermore, there are extensions in the context of *discrimination* in all the Nordic countries. Here, the relevant EU/EEA directives require protection of workers beyond the regular contract of employment relation.[137] Extensions of employer

129. E.g. Western High Court ruling U 2011.2425 V (ship dock was found liable as an employer for the safety of hired-in temporary agency workers), Western High Court ruling U 2007.2478 V (owner of a leased crane was responsible for the safety of the users, although he was not the employer of the users).
130. The Act on Workers' Compensation, no. 376 of 31 March 2020 (Lov om arbejdsskadesikring), § 2.
131. E.g. Supreme Court Ruling U 2015.3687 H (boxing promoter and manager was found liable for the injuries of a professional boxer, although there was no formal employment relationship)
132. The Working Environment Act, 1977:1060, (Arbetsmiljölagen) chapter 2 § 2.
133. The Swedish Working Environment Act chapter 3, 12 § 1 and 2.
134. E.g. Governmental report, SOU 2017:24 *Ett arbetsliv i förändring – Hur påverkas ansvaret för arbetsmiljön?*, p 55.
135. See in particular Supreme Court rulings Rt. 1985 s. 941 and Rt. 1990 s. 419. In addition, the Norwegian Working Environment Act § 1-8 (2) 2. p. is a basis for holding persons in charge *personally* responsible for working environment standards, see Supreme Court rulings Rt. 1982 s. 878, Rt. 1983 s. 196, Rt. 1984 s. 773, Rt. 1985 s. 185 and Rt. 1988 s. 692.
136. See further Hotvedt 2016 p. 198 ff.
137. See in particular Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of

responsibilities are one way of implementing these standards.

In Norway, protection against worker discrimination is phrased as duties for the 'employer', and the employer's duties are explicitly extended beyond contracts of employment. The duties apply in relation to agency workers (despite another contractual employer) *and* to workers operating as independent contractors, when they perform work in connection to the enterprise.[138] The duties also apply to entities when considering persons seeking work, whether as employees, as agency workers or as independent contractors.

Sweden, Denmark and Finland have similar extensions providing protection against discrimination for agency workers and persons seeking work. In Iceland, extension beyond the contract of employment is not explicit, but there are recent examples of extensions by interpretation in case law.[139] Extensions in the context of agency work are discussed further below.

Only Norway and Iceland have explicit extensions concerning the obligation to provide *pay*. The Norwegian Extension Act provides a basis for public law regulations on minimum terms of employment, typically rates of pay (*allmenngjøringsforskrifter*).[140] Contractors have joint liability for the payment of wages, holiday pay etc. pursuant to these regulations.[141] There is a similar provision on joint liability for wages etc. for the user entity in agency work.[142] In Iceland, there is a legal basis for joint liability for contractors both in agency work and in public tenders.[143] In Denmark, by contrast, joint liability for contractors and subcontractors (chain liability) is very rarely used, as it is perceived as incompatible with the Danish model of negotiating.[144]

Specific situations where extensions are more likely

A common trait of the extensions discussed this far is that they all apply in the context of *agency work*. Consequently, all Nordic countries recognize a partial employer responsibility – some specific employer duties – for the user entity vis-à-vis agency workers. The responsibility for the user entity supplements the main responsibility of the agency as the contractual employer. The allocation of employer responsibilities in agency work is discussed in more detail in section 4.3.2.

As explained above, both Norway and Iceland have extensions concerning pay. These extensions are not only related to agency work, they also apply in *public tenders* (Iceland) and *contracting chains* more broadly (Norway).

Transfer of undertakings is another context in which extensions of employer responsibilities can occur. In both Finland and Norway, this regulation is discussed as an example of shared employer responsibilities. As all the Nordic countries are bound by the relevant EU/EEA Directive, this should have a more general relevance.[145] Case

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employment and occupation (recast); Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin; and Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

138. The Norwegian Working Environment Act § 13-2 (2) and the Equality and Anti-Discrimination Act, 16 June 2017 no. 51 (Lov om likestilling og forbud mot diskriminering) § 29 (2).
139. Decision from the Gender Equality Complaints Committee in case 4/2019.
140. This is the Norwegian model for extending regulations by collective agreements, see also section 2.3.
141. The Norwegian Extension Act § 13 (1).
142. The Norwegian Working Environment Act § 14-12 c.
143. The Act on Posted Workers and Duties of Temporary Service Providers, no. 45/2007 (Lög um útsenda starfsmenn og skyldur erlendra þjónustuveitenda) § 11.a and Act on Public Procurement no. 120/2016 (Lög um opinber innkaup) § 88.a.
144. E.g. the preliminary works for the implementation of article 12 of the EU Enforcement Directive 2014/67 on joint liability for payments, proposal LF 177 2015/16, Introduction 2. and 3.
145. Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States

law of the Court of Justice of the European Union (CJEU) shows that the right to be transferred may apply to employees *temporarily* assigned to work for the transferor.[146] The reasoning of the Court implies that there may be several employers as potential transferors – contractual *and* non-contractual – in this context. In Norway, the reasoning of the CJEU is explicitly applied and developed further by the Supreme Court, and also bears resemblance to the doctrine on joint employer responsibilities, see more below.[147] Recent case law from the CJEU furthermore shows that when there are several transferees, the rights and obligations of the employee may be transferred to several transferees pro rata, in proportion to the tasks performed by the worker concerned.[148] Consequently, there might also be several employers as transferees in the meaning of the Directive.

Denmark has not used the option in the Directive to create joint liability for the transferor and the transferee.[149] The Danish Act on transfer of undertakings § 2 states that the transferee is bound by the rights and duties of the employees at the date of transfer.[150] Complaints must be directed only toward the transferee.[151] Only in a recent case has the Supreme Court ruled that a claim for unlawful dismissal of a shop steward just before the transfer date could be directed toward the transferor.[152] The implications of this ruling with regard to joint liability in the transfer of undertakings in Denmark is discussed.[153]

There are also examples of different types of extensions in the context of *redundancies*. In Finland, the duty of the employer to consider replacement – i.e. offering available tasks that fit the capabilities of the employee – is interpreted as a broad obligation that may extend the limits that judicially form the employer: The contractual employer must consider possible vacancies within a group of companies that share functions or have the same owner, and the starting point is the functional and economic independence of the unit, not the formal judicial construction.[154]

In Norway, there are examples in case law of a similar reasoning in cases concerning protection against dismissals, and these cases are part of the basis for the doctrine of joint employer responsibilities.[155] There is also an explicit extension concerning notice periods. Length of employment affects the length of the notice period. When calculating the length of employment, employment by certain other entities than the contractual employer can be taken into account. This includes for instance employment by other undertakings within the same corporate group and also employment by undertakings affiliated through ownership or joint management in a way that makes it natural to regard the employment as being consecutive.[156]

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relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses.

146. CJEU ruling in case C-242/09 *Albron,* EU:C:2010:625.
147. Supreme Court ruling Rt. 2012 s. 983 (in particular para. 101–104).
148. CJEU ruling in case C-344/18 *ISS Facility Services*, EU:C:2020:239.
149. Directive 2001/23/EC Article 3 no. 1 (2).
150. The Act on Employee Rights in the event of Transfer of Undertakings, no. 710 of 20 August 2002 (Lov om lønmodtageres retsstilling ved virksomhedsoverdragelse, virksomhedsoverdragelsesloven).
151. K. Sommer, *Virksomhedsoverdragelse i konkurs,* ET, 2018.112; S. Andersen et al, *Lov om lønmodtageres retsstilling ved virksomhedsoverdragelse,* 2009 p. 151 ff., M. Klingsten, *Ansættelsesretlige aspekter af virksomhedsoverdragelse,* 2016, p. 244.
152. Supreme Court ruling U 2018.471 H (regarding a transfer from a bankrupt company, the claim was allowed to be directed at the estate as well as at the transferee).
153. E.g. K. Sommer, *Virksomhedsoverdragelse i konkurs,* ET, 2018.112.
154. Supreme Court ruling KKO:2010:43, see also KKO:1998:77 and KKO 2015:7.
155. Supreme Court rulings Rt. 1990 s. 1126 and Rt. 1993 s. 345.
156. The Norwegian Working Environment Act § 15-3 (6).

General principles concerning the allocation of employer responsibilities?

Our impression is that there is more case law concerning the allocation of employer responsibilities in Denmark and Norway than in the other Nordic countries. Accordingly, it is mainly in these two countries that there have been discussions and attempts to articulate general principles on the allocation of employer responsibilities.

In Norway, a generally phrased doctrine on joint employer responsibilities is derived from an analysis of case law and is explicitly recognized both by the legislatures (in preparatory works) and by the courts.

According to the doctrine, several entities can be held responsible for duties that rest on the employer. The preparatory works outline that joint employer responsibilities require 'special grounds' (særskilt grunnlag), and three main types are highlighted:

- several employers by contractual agreement;
- several employers in reality due to several entities exercising employer functions;
- several employers as a result of contractual obscurity.[157]

The first and the third type overlap with the approach to identify the contractual employer(s), as discussed above in section 3.4.3. The second type is therefore central, and requires a closer assessment of whether several entities have exercised employer functions. As explained above, extensions by interpretation have typically been applied in the context of health and safety regulations, but explicit extensions are later introduced.

In a recent ruling, the Supreme Court clarified the doctrine, especially the second type of special grounds.[158] The Court referred to the concept of employer as 'functional', while reaffirming sole responsibility for the formal contractual employer as a starting point and main rule. Joint employer responsibilities were considered to be 'a narrow exemption rule' with a high threshold for application, and the doctrine was described as 'a rule on lifting the corporate veil based on labour law concerns'.[159] The concrete assessment, with a relatively strong emphasis on the formal contractual arrangement, led the court to conclude that the doctrine could not be applied. This line of reasoning seems to represent a somewhat stricter interpretation of the scope of the doctrine than before.[160]

Furthermore, it has not been fully clear whether the doctrine is a basis for assigning full employer status or only specific aspects of employer responsibilities.[161] The Supreme Court referred to 'limited joint employer's responsibilities' as 'the most accurate description' of the doctrine and thereby suggested that the doctrine only concerns specific aspects of employer responsibilities.[162] In sum, the doctrine is a distinct labour law doctrine with a rather narrow scope, where contractual and corporate law arguments are merged with the protective purpose of labour law.[163]

In Denmark, the purposive interpretation method may lead to deliberations on whether or not to extend the employer concept. In other areas than health and

157. Government white paper Ot.prp. nr. 49 (2004–2005) p. 75, emphasis added.
158. Supreme Court ruling HR-2018-2371-A.
159. Supreme Court ruling HR-2018-2018-2371-A (para. 110 and 121).
160. M. J. Hotvedt, "Plassering av arbeidsgiveransvar i konsern – HR-2018-2371-A Norwegian", *Nytt i privatretten* nr. 1 2019 pp. 1–3.
161. See inter alia Rt. 2012 s. 983, Rt. 1990 s. 1126 and Rt. 1989 s. 231, cf. e.g. J. Fougner mfl. *Arbeidsmiljøloven. Lovkommentar*, 3. ed. 2018 p. 88.
162. HR-2018-2371-A (para. 123).
163. For a closer analysis of the doctrine, see Hotvedt 2016 p. 401 ff.

safety, the Supreme Court is reluctant to extend the concept of employer, when this counteracts the purpose of the relevant statutory act. The reluctance to extend liability for payments is particularly clear: This is considered to require a specific legal basis.[164]

Two cases illustrate how the purposive interpretation method is applied in other areas than health and safety.

The first case concerned probation periods and notice periods according to the Salaried Employees Act.[165] In this case, the purpose spoke against interpreting the concept of employer as another entity than the formal employer.[166] One purpose of the act is to safeguard the accrual of seniority by instituting long notice periods, and the issue concerned the lawfulness of introducing new probation periods with reduced notice periods when changing employment from one school to another in the same municipality. The municipality was the formal employing entity, but argued that the schools had organizational and managerial independence, and all employer functions were exercised by the local schools. In addition, when changing employment from one school to another, formal notice of termination had to be submitted to the former school, and a new employment contract as well as salary negotiation had to be finalized with the new school. The court ruled that the delegation of authority did not remove the municipality as the real employer, and the new school could not introduce a new probation period with reduced notice periods for the teacher. The interpretation aligned with the solution that best protected the rights of the teacher and placed the contractual employer as the real employer, not the entity de facto exercising managerial powers by delegation.

The second ruling concerned protection from sexual harassment in the Equal Treatment Act.[167] A personal assistant was employed by a company that had a contract with the local municipality to provide assistance to a person with disabilities. The personal assistant complained about sexual harassment from the disabled person and was dismissed in breach of the victimization provision in the act. In this case, the court did not extend the concept of employer to the user (the disabled person), although the user independently organized the working time and the tasks to be performed. The company was considered the employer and was responsible for ensuring a harassment-free working environment; as such, it was in violation of the act and thus liable for the dismissal. The interpretation aligned with the solution that best protected the rights of the assistant and placed liabilities with the contractual employer, not the person de facto carrying out managerial tasks.

164. E.g. the Act on Temporary Agency Workers, no. 595 of 12 June 2013 (Lov om vikarers retsstilling ved udsendelse af et vikarbureau, Vikarloven), § 3 (1).
165. Supreme Court ruling U 2015.936 H.
166. Although schools could be viewed as separate entities for other purposes, with their own boards, budgets, economy, managerial powers etc., they were not seen as separate entities in this respect – where the employment rights of the teacher were at stake. The case therefore illustrates that the purpose hindered a limitation of employer responsibilities to an 'entity' within the formal legal entity (the municipality).
167. Eastern High Court ruling U 2019.3302 Ø.

Summary of justifications for extending employer responsibilities beyond the contract of employment

The perspectives discussed here shed some light on extensions of employer responsibilities beyond the contract of employment in the Nordic countries:

- Certain labour law standards are more easily extended than others.
- All countries extend health and safety standards and protection of discrimination, while only Norway and Iceland have explicit extensions resulting in joint liability for pay.
- Certain factual situations spur shifts and/or extensions.
- All countries extend responsibilities in agency work, while only Norway and Iceland have explicit extensions in contracting chains.
- Only Norway has a distinct doctrine on joint employer responsibilities with general guidance on when and how responsibilities are extended. The purposive interpretation method in Denmark also provides some general guidance.
- The legal basis for extensions varies and includes statutory provisions, interpretation methods and practices of the courts as well as a general doctrine.
- Extensions are most commonly related to specific employer responsibilities.

3.4.5 Conclusions: Adaptability of the concept of employer in the Nordics

When identifying the employer, the common point of departure is the party who concluded the contract, according to general principles of contract law. The identification of the responsible employer in a specific context still varies quite substantially in the Nordic countries. This reflects the varying significance of functional approaches in the Nordics: Acting as an employer by exercising different employer functions may trigger responsibilities. Conceptual nuances and functional approaches represent the potential to adapt the allocation of employer responsibilities to complex and shifting labour relations.

Functional elements and nuances in the concept of employer are more explicitly acknowledged in Denmark and Norway compared to Sweden, Finland and Iceland. This can be seen in the more comprehensive case law and doctrinal discussion on how to identify the 'real' contractual employer in Denmark and Norway than in the other countries. Although general principles of contract law serve as the legal basis, there are signs of a distinct labour law approach to the identification of the contractual employer, particularly in these two countries.

Furthermore, there are various examples of extended employer responsibility beyond the contract of employment relation in the Nordic countries.

A clear common trait is that employer responsibilities in the context of health and safety (and discrimination) are extended, although the details vary. The extensions reflect the fact that responsibility for health and safety does not need to hinge on the contractual relation, but is perhaps more closely connected to the employer function of managing the workplace and controlling the risks. Furthermore, agency work is a factual context that triggers extensions in all jurisdictions, see further below in section 4.3.2. This reflects the fact that splitting the main employer function of managing the daily work from the contractual relation has consequences for the

allocation of responsibilities.

Only Norway and Iceland have explicit extensions concerning the obligation to provide pay. The employer function of providing pay is therefore, not surprisingly, closely related to the contractual relation. The fact that even this employer duty is extended by statutory regulation, however, illustrates that allocation of employer responsibility does not have to be limited by the framework of contractual law or formal corporate structures.

Only Norwegian law has a general doctrine of joint employer responsibility – 'a rule on lifting the corporate veil based on employment concerns'. Although the scope of the doctrine is rather narrow, this allows a discretionary allocation of employer responsibilities, specifically emphasizing who exercises the managerial powers.

In sum, the concepts of employer include functional elements in all five countries. However, it differs substantially as to which specific employer duties are triggered and in what contexts. The analysis suggests that the functional elements are most evident and developed in Denmark and Norway compared to in Sweden, Finland and Iceland.

The different types of functional approaches and mechanisms for extending responsibilities are worth noting. In Denmark, this is mainly achieved via purposive and nuanced interpretations, facilitated by the rather fragmented legal framework. In Norway, a tradition of purposive interpretations has, over time, been supplemented – and perhaps to some extent replaced – by both a specific doctrine of joint employer responsibility and a number of extensions of specific statutory employer duties.

Regardless of the differences, extensions and variations illustrate that the concept of employer in the Nordics is not inextricably linked to a contract of employment. Some employer duties may apply to other types of work relations and serve to align other positions of power. Herein lies a potential to adapt the concept further.

It seems that, overall, the most important element across the Nordics is the purpose of the legislation, in particular the purposes of protecting health and safety. If the purpose is missed by a strict interpretation of the concept of employer, the concept can be extended to apply to other entities that exercise employer functions. Conversely, if an extension of the employer concept would not further the purpose of the legislation, the concept is not extended even if another entity is exercising functions as employer. This, too, represents a potential to adapt the concept further.

Based on this, we suggest some general conclusions regarding the concept of employer in the Nordic countries:

- The concept is not clearly and generally adaptable to changing labour relations, as it mainly refers to the contractual employer. The contractual employer is identified according to general principles of contract (and corporate) law, thus emphasizing formal contractual arrangements and corporate structures.
- Varying conceptual nuances and functional approaches still represent some degree of adaptability.
- The degree of adaptability seems to vary due to differences in how the contractual employer is identified and different mechanisms and types of extensions of employer responsibilities.

- Extensions of employer responsibilities vary significantly, and the most evident common traits concern standards of health and safety and the context of agency work.
- Functional approaches and purposive interpretations seem more developed in Denmark and Norway than in the other Nordic countries.
- Functional elements and conceptual nuances can be achieved via several techniques, such as statutory extensions and purposive or functional interpretations.
- Adaption of the concept is led by different actors: particularly the legislatures and the courts.

3.5 Adaptability of key concepts: Main weaknesses and strengths

This discussion of the key concepts – employee and employer – has revealed that the adaptability of both concepts varies between the different Nordic countries. As regards the concept of employee, the analysis suggests a more adaptable and/or inclusive concept in Sweden, Denmark and Norway, and perhaps also in Iceland, compared to in Finland. As regards the concept of employer, the analysis suggests a more functional and purposive – and thus more adaptable – concept in Denmark and Norway compared to the other countries.

The overall impression is that the concept of employee is more adaptable than the concept of employer in all countries. The approaches to the two concepts are similar across the Nordics: The lack of unified and precise legal definitions gives the courts an important role in developing the concepts in greater detail. The concepts are linked to the same relation: the (contractual) employment relation. Still, there are distinctly different approaches to each concept. The reality of the work relation as opposed to formal contractual arrangements are clearly more important when the courts interpret and apply the concept of employee than the concept of employer. Purposive approaches and inclusive interpretive methods seem to have a stronger impact when assessing who is an employee than when allocating employer responsibilities.

The ability of the legal framework to handle future challenges therefore varies. The legal framework is generally better equipped to adapt to new work relations that obscure the personal scope of labour law than to relations that obscure the allocation of employer responsibilities.

The explicit statutory extensions of employer responsibilities in a number of contexts reflect the fact that the legislatures often take the lead in adapting the allocation of responsibilities to changed realities. This role for the legislatures can affirm – and may further enhance – a reluctance of the courts to explore the adaptability of the concept of employer.

However, the wide range of extensions of responsibilities in the Nordic countries show that the concept of employer is not inextricably linked to a contract of employment. Responsibilities traditionally conferred to the contractual employer may well apply to other types of work relations and align other positions of power. Exercising employer functions and a change in factual circumstances can justify

responsibilities.

These nuances in the allocation of employer responsibility also reflect back on the concept of employee: Employer responsibilities are not solely justified by a classic form of contractual subordination. Protected status in labour law therefore does not rest solely on a contractual obligation to work under instruction and control.

On the basis of the discussions in this chapter, we see some main weaknesses and strengths in the Nordic labour law framework:

- The concept of employee is generally quite inclusive and adaptable in most Nordic countries, although with some variations and Finland as a possible exception.
- The concept of employer is generally less adaptable in all the Nordic countries, although there are important variations, and Denmark and Norway appear to have the most adaptable concepts.
- The courts seem generally more willing and able to develop the concept of employee than the concept of employer, where adaptation to a larger degree is led by the legislatures.
- The legal framework is generally better equipped to adapt to new labour relations that obscure the personal scope of labour law than to relations where the allocation of employer responsibilities is obscured.

4 Legal responses to non-standard work

4.1 Introduction, common features and prevalence of non-standard work

Non-standard work may challenge the key concepts of labour law. Certain characteristics of non-standard work have the potential to obscure the assessment of the protected status as an employee, complicate allocation of employer responsibility, and threaten the predictability of work and pay within an employment relation.[168]

This chapter looks more specifically at responses in national law to challenging characteristics of non-standard work.[169] First, we address the more general challenges of fragmented, empty or marginal contracts (section 4.2) and triparty arrangements (section 4.3). From there, we move to two more specific challenges that have left their marks in recent debates on non-standard work in the Nordic countries: umbrella companies (section 4.4) and platform work (section 4.5).

The aim is not to give a full and detailed description of the relevant rules and responses, but to highlight how the legal framework has dealt with the main challenges to the key concepts. The discussions will therefore focus on the effect on protected status (concept of employee), and allocation of responsibility (concept of employer). We will also touch on effects on predictability of work and pay.

The specific responses are interesting as they indicate the general *adaptability* of the legal framework, and can reveal how *responsive* the framework has been to changes in the labour market. Furthermore, the different responses can highlight possible avenues for development relevant for the future. Some conclusions in this regard will be suggested (section 4.6).

The prevalence of non-standard work in the Nordic countries is 26 to 31 per cent in all countries, solo self-employed workers included. However, it varies between the countries as to what kind of non-standard work is most common, see table 2. Platform work is still marginal in all countries.

168. The challenges are presented in more detail in section 3.2.
169. The issues and questions addressed are presented in more detail in Hotvedt/Munkholm 2019 pp. 16–17.

Table 2: Non-standard work in the Nordic countries; per cent of all persons in employment (15–74 years) in 2015

	Denmark	Finland	Iceland	Norway	Sweden
Part-time*	20 (11)	14 (5)	17 (7)	20 (8)	12 (4)
Fixed-term*	8	13	13	8	15
Agency work*	< 1	1	--	1.5–2	1.5
Platform work**	1	0.3–0.9	--	0.5–1	2.5

Note: **Part-time shares include all part-time, both long (15–29 hours per week) and marginal part-time—the share of marginal part-time is specified in brackets. Categories are overlapping. Share of all persons in employment in the reference week; thus share of persons working in temporary work agencies annually will be higher. For instance, according to Styrelsen for Arbejdsmarked og Rekruttering, four per cent of wage earners in Denmark were employed in agency work during 2017, equivalent to one per cent of the total employment. **For platform work, numbers are based on several different methods and are not fully comparable. Numbers primarily represent the share of working-age population that had performed platform work occasionally in the previous 12 months, see Jesnes/Oppegaard (red.) 2020, 1.4 for details.*

Source: *T. P. Larsen and A. Ilsøe,* Atypical labour markets in the Nordics: Troubled waters under the still surface, *Nordic future of work Brief 4, March 2019 based on LFS data analysed in national country reports for Pillar III; K. Jesnes and S.M.N. Oppegaard (ed.). Platform work in the Nordic models: Issues, cases and responses. TemaNord 2020:513.*

4.2 Fragmented and marginal contracts or work

4.2.1 Introduction

Permanent, full-time employment is the standard form of employment in the Nordics. If work relations are fragmented, marginal or empty, they clearly deviate from the notion of a standard employment relationship. The work relation is fragmented when work is performed in a series of short fixed-term contracts. The work relation is marginal or empty if the obligation to work (and the corresponding right to pay) is not defined or very limited in scope, as in marginal part-time contracts, on-call contracts, zero-hour contracts etc.

Both a very short duration and a marginal amount of work may obscure the assessment of protected status for the worker (concept of employee). A personal obligation to stay at service, as opposed to producing a specific work result, characterizes the contract of employment. The more the obligation to work is split into specific tasks of short duration, the harder this assessment may become. This challenge is closely related to a key aspect of employment protection: the predictability of work and pay.

In the following, we first describe the general approach to this challenge (section

4.2.2). We then, briefly, look for insight from the responses to the more familiar challenges of fixed-term and part-time work (section 4.2.3 and 4.2.4), before examining specific responses to the very fragmented or marginal relations, such as on-call or zero-hour contracts (section 4.2.5). Based on these discussions, we provide a brief summary (section 4.2.6).

4.2.2 General response

The general response in the Nordic countries is to include fragmented and marginal contracts in the labour law framework. In none of the Nordic countries is the concept of employee generally conditioned upon a minimum duration or amount of work. Both fixed-term and part-time contracts are clearly and generally recognized as contracts of employment. In addition, the very fragmented, marginal or empty contracts of work may well be considered contracts of employment.

The duration and amount of work may still indirectly affect the classification of employment status. Stability of the relation and the amount of work for one employer are relevant criteria in most of the countries.[170] Still, as long as the obligation to work is personal and the work is performed under supervision and control, it is unlikely that the protected status will be affected, as a classic form of subordination will be present. The real challenge therefore is when fragmented and marginal contracts of work also lack a classic form of subordination.

It is widely acknowledged that even contracts concerning a few hours of work can be employment contracts. There are, however, some exemptions to the main rule. In some contexts, protected status requires a minimum amount of work per week and/or a minimum seniority. The rights and protections in the Danish Salaried Employees' Act only apply when the relevant work is performed for eight hours per week on average.[171] Protection against *unreasonable* dismissals, found in this act and many collective agreements, apply only to employees with a certain seniority.[172] On the other hand, a number of other types of dismissal protections apply instantly, such as the *anti-discrimination* regulation. In the other Nordic countries, statutory dismissal protection is *not* conditioned upon a certain seniority or duration of employment.[173] Basic predictability of work and pay thus applies. Other labour law standards may still be conditioned upon minimum requirements. For example, in Sweden, there is a qualification period for re-hiring and transformation to permanent employment for fixed-term contracts.[174] In Finland, employers are allowed to set qualifying periods for some benefits, such as voluntary occupational health care and medical treatment. In Norway, minimum requirements apply to the right to occupational pension and work injury insurance.[175]

The main regulatory approach in the Nordic countries is to set restrictions and confer specific rights to fixed-term and part-time workers in order to compensate for their precarious position compared to workers in standard employment. National regulations thereby implement – and supplement – the protection in EU/EEA

170. See further in section 3.3.2.
171. The Danish Salaried Employees' Act § 2 (2).
172. The requirement is 12 months in the Danish Salaried Employees' Act § 2b, and 9 months in the Main Agreement between the Confederation of Trade Unions (LO) and the Danish Employers' Confederation (DA) § 4, 3.
173. he dismissal protection in Iceland only applies to certain groups, see also section 2.4. For the groups that are covered, the protection applies irrespective of seniority.
174. The Swedish Employment Protection Act 5a and 25 §§, see further below in section 4.2.3.
175. Country Report Norway Part 1 p. 23.

directives on fixed-term and part-time work.[176] However, the type and level of protection varies between the countries and for different kinds of non-standard work, see below.

A general difference concerns the extent to which the statutory regulations may be derogated by collective agreements. The Swedish and Danish regulations on fixed-term and part-time employment are semi-discretionary and allow collective agreements to strike a different balance between the interests of employers and employees, as long as they at a minimum provide the protections in the underlying EU directives. In Finland, Norway and Iceland, by comparison, the social partners have no or very limited possibilities to derogate from the statutory standards.[177]

4.2.3 Responses to fixed-term work

All the Nordic countries set statutory restrictions on justification etc. for fixed-term work, aimed at protecting permanent employment as the main rule. The level of protection and sanctions on non-compliance vary.

In both Finland and Norway, the clear main rule is that unjustified fixed-term contracts are considered to be permanent employment.[178] In Norway, there are also time limits in which fixed-term contracts convert to permanent employment.[179]

Similarly, in Swedish law, fixed-term contracts can convert into permanent employment, but only when the *total* amount of work reaches a certain threshold.[180] This regulatory technique leaves workers with fixed *part-time* contracts less protected. Swedish law, however, provides stronger protection against dismissals for fixed-term workers during the employment period, compared to permanent employees.

In both Sweden and Norway, fixed-term workers have a preferential right to be rehired when certain conditions are met. Denmark, Finland and Iceland stand out in this context, due to the absence of similar regulations.

In Denmark, the protection is against the *abuse* of fixed-term contracts, and the sanction for breach of the protection is a compensation provided to the worker. Only *if* the fixed-term character of the contract was not sufficiently clear to the worker, or *if* the circumstances resemble malicious attempts to circumvent rights accrued on the basis of seniority – such as long notice periods in the Salaried Employees Act – will permanent employment be considered as the consequence.

4.2.4 Responses to part-time work

There are fewer statutory restrictions on part-time work than on fixed-term work in the Nordics. Full-time employment may be an explicit aim, but it can hardly be said to be the main *legal* rule. Justification for concluding part-time contracts is not

176. Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC; and Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP.
177. See further in section 2.4.
178. The Finnish Employment Contract Act chapter 1 § 3.2 and the Norwegian Working Environment Act § 14-11, cf. § 14-9. In the Finnish act, there is a special provision (in chapter 1 § 3a) that stipulates fixed-term contracts when the employed person has been unemployed for one year or more. In this case there is no requirement for justified reason if the duration of the contract (or subsequent contracts) is under one year.
179. The Norwegian Working Environment Act § 14-9 (7).
180. According to the Swedish Employment Protection Act 5 (a) §, a general fixed-term employment contract converts automatically into permanent employment once it totals more than two years over a five-year period.

generally required.

Still, there are examples of statutory regulations safeguarding the workers' interest in full-time employment and requiring some type of justification from the employer. Only some of the Nordic countries have regulations allowing the worker to claim expansion of working hours. As the details vary, it also varies under which circumstances the worker is entitled to more working hours or even full-time employment.

In Sweden, Finland and Norway, a part-time worker has a preferential right to an extended position or full-time employment when there is a vacancy, rather than the employer creating a new appointment.[181] In Norway, this is further supplemented by a right for part-time workers to working hours corresponding with their actual working hours, unless the employer documents that additional work is no longer needed.[182] Finland has a similar duty for employers to provide extra work if there is a general need for more working hours relevant for the employee in question.[183]

Denmark and Iceland lack this type of substantial right for part-time workers with regard to available work and working hours.

4.2.5 Responses to on-call contracts, zero-hour contracts and similar arrangements

As regards the very marginal or empty contracts, a range of different types are found in the Nordic countries, such as on-call contracts, contracts for hourly work, permanent contracts without a stipulated work amount etc.

There is not one common approach to these work relations. The regulations and responses in the Nordic countries vary substantially. As a result, it also varies as to whether the relation is regarded as permanent employment (with a variable or flexible number of working hours) or as (a series of) fixed-term employments. An important common trait, however, is that a very fragmented or marginal obligation of work and pay does not preclude a contract of employment.

The main approach seems to be to leave the regulations to the social partners. Denmark, Sweden and Iceland have collective agreements regulating various types of such contracts. In Denmark, zero-hour contracts have long been used, e.g. for substitute teachers, on terms agreed to by the social partners.[184] In Sweden, too, there are examples of collectively agreed conditions for short fixed-term contracts, on call-contracts etc.[185] In Iceland, collective agreements in the public sector allow hourly workers in certain instances.[186] Statutory regulation of these types of contracts is not on the agenda in these countries.

In contrast, both Finland and Norway have recently legislated specifically on these types of arrangements. The regulations in the two countries strike a somewhat different balance between the interests of employees (predictability of work and pay) and employer (flexibility).

In Norway, the Working Environment Act was recently amended with an aim to enhance predictability in 'empty' contracts, by introducing minimum requirements to

181. The Swedish Employment Protection Act 4 § and 25 (a) §, the Norwegian Working Environment Act § 14-3, and the Finnish Employment Contracts Act chapter 2 § 5, respectively.
182. The Norwegian Working Environment § 14-4a.
183. The Finnish Employment Contract Act chapter 2 § 5.
184. Country Report Denmark Part 1 pp. 22–23.
185. Country Report Sweden Part 1 pp. 22–23.
186. Country Report Iceland Part 1 pp. 16–17.

qualify as a permanent employment contract.[187] The main new requirement is that the employee must be ensured predictability of employment in the form of a clearly specified amount of paid working hours.[188] The minimum requirements regarding a written contract of employment were also amended. In relations where work is performed periodically, the contract must now state *when* the work is to be performed or provide a basis for calculating this.[189] These requirements relate to permanent employment, but interact with the relatively strict regulations on fixed-term employment: If the requirements to be a lawful fixed-term contract are not met, the employment is considered permanent and must fulfil these new requirements.

Finland has introduced statutory regulation on clauses of variable working hours.[190] These are clauses in which the working hours are set to vary between a minimum and maximum within a specified period, or in which the employee undertakes to perform work when asked to do so. Here, the purpose of the regulations is to enable flexible arrangements when employers' need for labour is difficult to stipulate while also safeguarding the rights of employees with little predictability for future work and pay. The clauses are not allowed at the employers' initiative if the need for labour is in fact fixed, and the minimum hours cannot be set lower than the fixed need. The employee has a right to negotiate an amendment if the actual working hours do not correspond, and if no new agreement is reached, the employer must present justifying grounds in writing on why the clause still corresponds to the need. There are, however, no specific sanctions related to these provisions. A question has been raised as to whether the provisions instead represent a detriment to employees' rights.[191]

4.2.6 Summary of responses

Based on these discussions, the main responses to the challenges of fragmented, marginal and empty contracts in the Nordics can be summarized as follows:

- Permanent, full-time employment is the most 'standard' employment relationship.
- The legal framework is generally inclusive to fragmented and marginal contracts, as a minimum duration or amount of work is not required to be an employee.
- The main regulatory approach is to set restrictions and confer specific rights to workers in non-standard employment to compensate for a more precarious position.
- The type and level of protection vary between countries and types of non-standard work.
- Sweden, Finland and Norway have more restrictions on non-standard work than Denmark and Iceland. The restrictions on fixed-term work are stricter than on part-time work in all the Nordic countries.
- In Sweden and Denmark, statutory regulations on fixed-term and part-time work can be derogated by collective agreements, while in Finland, Norway and Iceland, the social partners have no or very limited opportunities to derogate.

187. Amendment to the Norwegian Working Environment Act 22 July 2018 no. 46, effective from 1 January 2019.
188. The Norwegian Working Environment § 14-9 (1).
189. The Norwegian Working Environment § 14-6 (1) j.
190. Amendment to the Finnish Employment Contracts Act (377/2018), cf. chapter 1 § 7.
191. Country Report Finland Part 1 p. 22–23.

- On-call contracts, zero-hour contracts etc. are mainly regulated by collective agreements – only Finland and Norway have specific statutory regulations.
- Responses to fragmented, marginal or empty contracts of work are led by the legislatures and social partners, and – to some extent – by the courts.

4.3 Agency work and triparty arrangements

4.3.1 Introduction

The legal framework builds on an assumption that dependent work is performed in a two-party relation, where the contractual party exercises the employer functions. The assumption fails if employer functions are spread across more than one entity.

The typical example is *agency work*. In agency work, the work contract stipulates that the worker can be hired by user entities to perform work under the supervision and control of this entity. Employer functions are therefore split: The agency is the employing entity and contractual party, while the user entity has the right to manage the work during each placement.

Agency work is the only type of triparty contract that is generally regulated in the Nordic countries. All the Nordic countries have specific regulation of agency work implementing the EU/EEA Directive on agency work, which applies to relationships that fulfil the definitions in the legislations and the Directive.[192] The Directive sets a principle of equal treatment, which aims to ensure that the main terms of employment of agency workers are equal to workers directly employed by the user entity.[193] The following discussions therefore focus on agency work (section 4.3.2), supplemented by some comments on other triparty arrangements, such as subcontracting etc. (section 4.3.3), before the discussions are briefly summarized (section 4.3.4).

4.3.2 Responses to agency work

The regulatory approach to agency work in the Nordics varies, despite a common basis in the Directive. In Sweden, the labour market partners included this type of work in the system of collective agreements before the legislatures acted.[194] Working conditions for agency workers are therefore mainly regulated by collective agreements.[195] In the other Nordic countries, statutory regulation has played a more dominant role, although supplemented and sometimes triggered by collective agreements. In Denmark and Iceland, where the statutory framework is rather fragmented, agency work is regulated by separate acts.[196] In Finland and Norway, there are specific provisions on agency work within the more unified statutory

192. Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work.
193. Directive 2008/104/EC Article 5.
194. See further A. Westregård and J. Milton, *Recent trends in collective bargaining structures in the Swedish model*, conference paper published at the 11th European Conference of the International Labour and Employment Relations Association (ILERA), Milano, 2016. See also K. Alsos and C. Evans, 'Temporary work agencies: Triangular disorganization or multilevel regulation?' *European Journal of Industrial Relations* 2018.
195. Full-coverage agreements have been concluded both for blue-collar and white-collar workers, see further Country Report Sweden Part 1 p. 17.
196. The Act on the Legal Status of Temporary Agency Workers no. 595 12 June 2013 (Vikarloven) and the Act on temporary work agencies. no. 139/2005 (Lög um starfsmannaleigur), respectively.

framework.[197]

All the Nordic countries acknowledge agency work as contracts of employment. Agency work is therefore mainly a challenge to the allocation of employer responsibilities (concept of employer).

The general approach to the allocation of employer responsibilities in agency work is basically similar in the Nordic countries. The formal contractual party – the agency – is considered the contractual employer and has the main employer responsibility vis-à-vis the agency workers.

However, as already indicated, the Nordic countries recognize a partial employer responsibility for the user entity by extension of certain employer duties. The details differ considerably: It varies as to which specific duties are extended to the user entity, and whether the agency and user entity have divided or shared responsibilities. Here, some main aspects will be highlighted.

Two common traits are identified above in section 3.4.4. In all five countries, the user entity has responsibilities to ensure the *health and safety* of agency workers. Protection against *discrimination* also applies in the user entity – agency worker relation. From here, the approaches and regulations diverge.

Finland has a principled approach for allocating responsibility: The right to direct and supervise work is 'transferred' to the user entity, as well as the employer duties directly related to the performance of work and its arrangement.[198] This is the basis for joint responsibility as regards health and safety and discrimination, while contractual obligations – including the obligation to provide pay – rest with the agency. If the work in question is not covered by the agency's collective agreement, the agency is obliged to apply the collective agreement applied by the user company.

The approach and regulation in Denmark is quite similar, perhaps due to the role of general principles of contract law.[199] Here, the agency is the formal employer, and is responsible for all employer duties, including complying with regulations on working time, rest periods, remuneration and other rights of the worker. The user undertaking, however, must secure the daily health and safety of the workers. In Denmark, the platform companies Chabber and MePloy have chosen to align their business models with agency work. This aligns the rights of the platform worker with the rights of other workers at the user entity, including regarding remuneration. The agency is still the employer.

Norway has a comparably more pragmatic and needs-oriented approach. Here, a broader range of statutory employer duties are extended to the user entity.[200] The responsibility of the user entity includes not only a duty to provide a safe and healthy working environment and to respect provisions on discrimination, but also a duty to comply with working time regulations. There is furthermore joint liability for the payment of wages, holiday pay and any other remuneration pursuant to the principle of equal treatment.

In Iceland, there is a construction of joint liability in agency work, similar to in Norway. This, too, seems to be the result of a pragmatic approach. Joint liability was

197. The Finnish Employment Contract Act chapter 1 § 7.3 and chapter 2 §§ 9 and 9a, and the Norwegian Working Environment Act §§ 14-12 – 14-14.
198. See further Country Report Finland Part 1 pp. 19–21.
199. See further Country Report Denmark Part 1 pp. 19–21.
200. See further Country Report Norway Part 1 pp. 21–23.

first agreed by the social partners and regulated by a collective agreement.[201] The statutory act on agency work was then amended according to the agreement, resulting in a general rule on joint liability for the user undertaking.

As already mentioned, the social partners have been central in deciding the approach to agency work in Sweden. This has not resulted in a broad range of extension or joint liability for wages. The employer responsibilities rest on the agency with only a few exemptions in statutory law, like the double responsibility for health and safety standards and discrimination.[202]

These regulations on agency work in the Nordic countries reflect the fact that direct employment is – and should be – the main rule. However, it varies as to what extent regulations aim to limit the use of agency work, and thus safeguard direct employment as a main *legal* rule.

Restrictions and sanctions on agency work seem to be strictest in Norway. Here, restrictions are parallel to the rather strict restrictions on fixed-term work. The consequence of an unlawful hiring of an agency worker is a right for the worker to claim a direct and permanent employment relationship with the user entity.[203] Attempts to circumvent the main rule of direct employment as well as other situations of non-compliance can therefore *make* the user entity the contractual employer and *shift* the main employer responsibility from the agency to the user entity.

The other countries lack similar restrictions and direct sanctions. Other types of restrictions occur, though, and might promote direct employment in an indirect manner. For example, in Finland, where there are no statutory restrictions on the use of agency work, employers are obliged to inform employee representatives about their intentions to use agency work, and the representatives may require that this is negotiated in co-determination negotiations.[204] In Sweden, the agency is prohibited from preventing an agency worker from accepting direct employment with the user entity for which he or she has worked, and the user entity is obliged to inform the workers of vacant positions.[205]

4.3.3 Responses to other triparty arrangements

Other types of triparty arrangements can also challenge the allocation of employer responsibility as well as the protected status of the worker. Two examples – umbrella companies and platform work – are discussed separately later, in sections 4.4 and 4.5. The extensions of employer responsibilities discussed in section 3.4.4 may apply, depending on the circumstances. However, it is hard to identify any general or shared approach in the Nordic countries. On the contrary, case law illustrates that the allocation of employer responsibilities may vary in rather similar triparty arrangements. Both Denmark and Norway have case law concerning triparty

201. See further Country Report Iceland Part 1 pp. 13–15.
202. See further Country Report Sweden Part 1 pp. 17-18.
203. The Norwegian Working Environment Act § 14-14. The right prevails unless this is clearly unreasonable. For more on this assessment, see Supreme Court ruling HR-2018-2371-A.
204. Act on Co-operation within Undertakings 334/2007 (Laki yhteistoiminnasta yrityksissä, Lag om samarbete inom företag) chapter 4 § 17. A similar obligation to consult employees' representatives on the use of agency work is stipulated in the Norwegian Working Environment Act § 14-12 (3). There are provisions in some collective agreements that regulate the use of agency work and e.g. limit the use of agency work in case there is a threat of collective redundancies.
205. The Agency Work Act, 2012:854, (Lag om uthyrning av arbetstagare) 9 and 11 §§. Similar provisions apply in Norway, cf. the Act on Labour Market Services, 10 December 2004 no. 76 (Lov om arbeidsmarkedstjenester) § 27 (1) and the Norwegian Working Environment Act § 14-1.

arrangements within social services.

In Denmark, the rulings largely confirm the contractual employer, rather than the de facto employer, as the entity responsible for employer duties. A Danish High Court ruling concerned the BPA programme (*borgerstyret personlig assistance*), in which the worker is formally employed by the citizen in need of care, but the local municipality de facto manages the administrative aspects.[206] Although the municipality issued the employment contract, disbursed remuneration and had power of attorney in most matters, the Court found the citizen – as the contractual employer – to also be the real employer, and thus liable for compensations for breach of the Act on an Employment Certificate and other regulations. In a more recent BPA ruling, the local municipality had delegated the services to provide care for disabled persons to a private company, which was the formal employer of a personal assistant.[207] The company was the real manager of the assistant, including employing and terminating contracts. The fact that the citizen organized the working time was not enough to establish that the citizen was the real employer. The private company was considered the employer in regard to the Equal Treatment Act, and was responsible for ensuring a work environment free from sexual harassment, even when the harassment was performed by persons not employed by the company. In both cases, the assessment of who should be the employer – the formal contractual employer or another entity – resulted in stronger employment protection for the worker.

In the case of a similar BPA programme in Norway, responsibility for the municipality was not the issue.[208] The question was whether an organization contractually appointed as the 'legal employer' or the citizen who recruited the worker and managed the work was the employer according to the Working Environment Act. The Supreme Court concluded in accordance with the contractual arrangement and held the organization responsible, resulting in a stronger level of employment protection for the worker. The issue of employer responsibility for the municipality, however, was central in two recent cases concerning support services. Here, the Supreme Court concluded that the contracts with the municipality were in fact contracts of employment.[209] Although the workers had agreements with the families who received the support, they were not considered relevant employers.

The two latter cases from Norway illustrate that triparty arrangements may also challenge the protected status for the worker (concept of employee). The support workers in question were independent contractors according to the formal contract with the municipality, who argued that it did not exercise managerial powers. Still, the Supreme Court took a comprehensive approach, chose the worker's perspective and took supervision and control from the families into account. The approach was justified by reference to the protective purpose: A worker should not be left in 'a labour law void' as a result of the contracting party leaving supervision and control to a third party.[210] This line of reasoning corresponds to the approach to agency work, and can also have relevance for other triparty arrangements.[211]

Despite the variations, this may suggest a common tendency – at least in Denmark and Norway – to allocate employer responsibilities in triparty arrangements in light

206. Western High Court ruling U 2014.2546 V.
207. Eastern High Court ruling U 2019.3302 Ø.
208. Supreme Court ruling Rt. 2003 s. 1593.
209. Supreme Court rulings Rt. 2013 s. 354 and HR-2016-1366-A.
210. Supreme Court rulings Rt. 2013 s. 354 (para. 49).
211. Hotvedt 2018 p. 69.

of what provides the necessary level of protection of the worker.

4.3.4 Summary of responses

The discussion sheds some light on the responses to agency work and triparty arrangements in the Nordic countries:

- Direct employment is the standard employment relationship.
- Agency work is the only triparty arrangement in which all Nordic countries have specific regulations.
- The agency is the contractual employer, while the user entity has a partial employer responsibility.
- All countries extend responsibilities to the user entity concerning health and safety and discrimination, while joint liability for wages only applies in Norway and Iceland.
- Only Norway sets clear restrictions on the use of agency work sanctioned by a right to claim direct employment with the user entity.
- Agency workers are generally recognized as employees, whereas other types of triparty arrangements may challenge the protected status of the worker.
- The allocation of employer responsibilities in other types of triparty arrangements varies between different countries and factual contexts, with some signs of a common tendency in the courts to consider what will provide the best protection of the worker.
- Responses to triparty arrangements are led by the legislatures and the social partners, and –to some extent – by the courts.

4.4 Umbrella companies and similar artificial employment contracts

The term 'umbrella company' refers to a new type of labour relation that has emerged in the Nordic countries in recent years, particularly in Sweden (where it is called *egenanställning*). The arrangement resembles the phenomena called *professional employer organization* and *employee leasing* in the United States and Germany. The expression *hiring of an employer* is also used.

In this type of arrangement, the worker is formally employed by a company who mainly takes on administrative employer responsibilities. The company (the umbrella company) charges the clients for whom the worker performs work, deducts their own commission as well as taxes, social security fees etc. and then pays the worker. In this model, however, it is the worker's own responsibility to find work. A contract of employment is usually concluded for the duration of each work period. The model is therefore marketed as a model for working independently without having to register a company or handle the administrative tasks related to self-employment.

Although the work is formally framed as a contract of employment with the company, the relation in reality lacks important characteristics of employment contracts: a personal obligation to stay at service and to perform work under the supervision and control of the employer.[212] This marks a difference from agency work:

212. This is the reason for our characterization of these as 'artificial' employment contracts.

In agency work the daily management of work is also exercised by another entity than the contractual employer. Still, the agency worker (an employee) works when the agency so decides. In the umbrella model, by contrast, the worker decides what tasks to undertake and then 'hires' the company as the employer. The model therefore poses a challenge to the predictability of work and pay. It is also an issue as to whether the model undermines the 'real' content of the key concepts of employee and employer. The arrangement may therefore be considered a circumvention of tax and social security regulations that build on the binary divide.[213]

The situation in the Nordics is quite diverse, and responses vary accordingly.[214]

As indicated, umbrella companies (*egenanställning*) have grown rapidly in Sweden. Here, the model seems to be recognized in principle as a type of employment relationship[215]: Umbrella companies have a separate trade organization. Case law offers examples where the worker–umbrella company relation has been classified as a contract of employment. It is also discussed under what circumstances the regulations on agency work will apply to the model. The generous possibility for fixed-term employment in Sweden is essential for the business model, as the workers have short fixed-term contracts for the duration of each assignment.

In Denmark, Finland and Norway, there are examples of similar models, but the arrangement does not seem to be nearly as widespread as in Sweden. In Denmark, the largest union for salaried employees, HK, has started a non-profit service agency for freelancers.[216] The agency handles administrative tasks and charges a percentage on the invoice, while the freelancers themselves find clients and negotiate the terms for work. In Norway, there are a few examples of commercial companies offering formal employment contracts to freelancers, claiming to combine the benefits of being an employee with the independence of being a freelancer.[217] In Finland, there are also companies providing this kind of service, usually marketed as 'light entrepreneurship'. In Iceland, on the other hand, there are at present no known examples of this type of model.

The legal classification and the legal implications have not yet been scrutinized by the legislatures or the courts in any of these countries. The model is, however, likely to meet different obstacles in the Nordic countries.

In Denmark, the model is used so sporadically that it is too soon to say whether it will expand, and whether the relationship will challenge standard employment protections. The fact that the actor is a trade union extending the model as a service to its members is expected to play a role in the assessment of the relationship in this regard.

In Finland, recognition as an employment contract seems to be one of the main obstacles. In most cases, the model is not likely to fulfil the requirements for an

213. The implications of the workers' employment status in the social security context is further discussed in chapter 8.
214. See Governmental report SOU 2017:24 *Ett arbetsliv i förändring – Hur påverkas ansvaret för arbetsmiljön?* p. 167. According to the branch organization, the number of umbrella company employees grew from 4,000 in 2011 to 44,000 in 2017, and increased by 31 per cent in 2016, http://www.egenanstallning.org/index/news > accessed May 25, 2020. See also Eurofound, *New forms of employment*, Publications Office of the European Union (2015).
215. Country Report Sweden Part 1 pp. 18–19 and 20. A Westregård, "Looking for the (fictitious) Employer – Umbrella companies: The Swedish Example", O. Chesalina and U. Becker (ed.), *Social Law 4.0: New Approaches to Ensuring and Financing Social Security for Digital Age*, pending 2020.
216. Servicebureau for Freelancere, HK, https://www.hk.dk/raadogstoette/freelancer/bureau.
217. E.g. Employ and Cool Company, see https://employ.no/ and https://coolcompany.com/no/.

employment relationship.[218] The rather rigid assessment may therefore serve to protect the legal framework from this particular challenge.

In Norway, the legal implications represent one of the main obstacles. The rather strict regulations on fixed-term work combined with recent regulations on the minimum requirements of permanent employment will make it difficult to explore the model without ensuring some predictability of work and pay.

A short summary of the Nordic responses to the particular challenge of umbrella companies is as follows:

- Umbrella companies are most widespread in Sweden, while there are examples of similar models in Denmark, Finland and Norway.
- The model appears to be recognized as a type of employment relationship in Sweden, while this is unresolved in the other countries.
- The model is likely to face different legal obstacles in these countries, as regards both recognition as an employment contract (Finland) and the legal implications (Norway).

4.5 Platform work

In this report, the term 'platform work' is used to describe a model in which workers (the platform workers) are matched with customers (consumers or user companies), to conduct small tasks or jobs, by a company (the platform company) using digital technology – more precisely, an application or software and algorithm.[219] Platform models vary; however, the distinctive elements still seem to be the role of digital technology in mediating tasks, and the predominant use of solo self-employed workers and other forms of non-standard labour contracts. Most platform companies treat the workers as self-employed or independent contractors, and thus normally deny employer responsibilities. Yet, some hire workers on (marginal part-time) employment contracts and engage in collective bargaining, see further below.[220] The term 'platform worker' thus refers to persons who work via platform companies, regardless of employment status.

Platform work poses a particular challenge to the framework of labour law, as the model combines several challenging characteristics. Whether a platform worker has a protected status (concept of employee) is unclear, as platform work typically has both dependent/subordinated and independent features. Furthermore, platform work has a triparty structure, thus obscuring the allocation of responsibilities (concept of employer). The model provides little predictability of work and pay, as work is treated as separate tasks or jobs.[221] In addition, platform companies are constantly changing their business models.

Platform work is therefore typically in a grey area: Labour relations are fragmented, marginal, complex and shifting. The legal uncertainty this entails can represent a serious threat to the labour law framework and to legal predictability more generally.

218. Country Report Finland Part 1 p. 24.
219. For a discussion of how to define the platform economy, see Jesnes/Oppegaard (ed.) 2020, chapter 1.3.
220. See also further in Jesnes/Oppegaard (ed.) 2020.
221. From a Norwegian context, see K. Alsos et. al, *Når sjefen er en app*, Fafo-rapport 2017:41.

How the platform economy is evolving in the Nordic countries, and how the social partners and other actors are responding, is discussed in depth in Pillar IV of the Nordic Future of Work project.[222] Here, the focus is on *legal* responses, specifically regarding the *classification* of platform work relations.

It is widely recognized in the Nordic countries that the legal classification of platform work is uncertain. None of the countries have passed legislation on the classification of platform work, and the regulatory approach thus far is best described as 'wait and see'.[223] There is no case law from the labour law context determining the legal status of platform workers. There is furthermore no general legal clarification of whether the platform company or the different customers will be the relevant employer(s).

The dominating view in the Nordic legal debate is that platform work as such cannot be classified as either/or. Whether a platform worker is an employee must be assessed on a case-by-case basis. Protected status may differ depending on the variations in the business model and other circumstances. Who the relevant employer is can also be affected by the model and other circumstances.[224]

As the two concepts are closely related, the question of protected status and the issue of allocating responsibilities can serve as *two* supplementing perspectives on how to classify the platform work relation(s). A broad and purposive concept of employee can allow encompassing indicators of subordination and dependency from both platform company and customers.[225] A more nuanced and functional concept of employer, on the other hand, can facilitate this broader assessment *and* allow an allocation of responsibilities adapted to the triparty structure of platform work.[226]

The Nordic discussions reflect some nuances between the different countries. The nuances are illustrated by the considerations of various committees etc. appointed by the governments in the Nordic countries to investigate the challenges and opportunities related to platform work.

In Sweden and Norway, the need for a case-by-case assessment is acknowledged in governmental inquiries. For example, in a Swedish investigation on working environment issues, the committee stated that the classification was unclear, and depends inter alia on the level of control the platform company has over the worker and the work performance.[227] The Norwegian committee appointed to investigate the so-called 'sharing economy' had a similar view.[228]

In Norway, the view that platform workers can be employees depending on the circumstances is supported by enforcement practices. The practices here however reveal diverging assessments of the relevant employer(s). The Norwegian Labour Inspection Authority has conducted inspections of several platform companies, and has issued orders based on a classification of the platform company–worker relations as contracts of employment.[229] However, in a previous case concerning an internet-based company mediating cleaning services (VaskerHvitt), the Authority

222. See further the final report of Pillar IV, Jesnes/Oppegaard (ed.) 2020.
223. Jesnes/Oppegaard (ed.) 2020, chapter 7.
224. In our discussions in Part III, however, we consider the platform company to be the most relevant employer, see more in chapter 5.
225. This is e.g. the Norwegian approach to the assessment of employee status in triparty arrangements, see further in section 4.3.
226. This perspective is discussed in e.g. J. Prassl and M. Risak, "Uber, Taskrabbit, and Co.: Platforms as employers? Rethinking the legal analysis of crowdwork", *Comparative Labor Law & Policy Journal*, 37, 2016 p. 619–651.
227. Governmental report SOU 2017: 24 *Ett arbetsliv i förändring – Hur påverkas ansvaret för arbetsmiljön?* p. 222.
228. Governmental report NOU 2017: 4 *Delingsøkonomiutvalget* pp. 53–54.
229. Decision by the Labour Inspection Authority, July 19. 2016, no. 2016/20783.

considered the customers – not the company – to be the 'employer' as regards specific statutory requirements for cleaning services.[230]

By contrast, the Danish Disruption Council has presupposed that most platform workers are self-employed, and typically *not* considered employees.[231] In a report to the parliament's Tax Committee, Danish tax authorities considered Uber drivers to be self-employed.[232] This assessment, however, can be criticized as hasty and questionable from a labour law perspective. It neither considers the variations in the specific circumstances nor constitutes a realistic assessment of the level of dependency, such as the issue of supervision and control by the platform's algorithms and the specific terms of service.

As a more recent development, the Danish Competition and Consumer Authority has issued a notice stating that two cleaning platforms, Hilfr and HappyHelper, were in breach of the competition regulation by displaying minimum hourly fees for the (independent) platform workers.[233] The Authority did not consider the cleaners covered by the collective agreement at Hilfr (see more below) to be employees in the understanding of the Danish Competition Act.

Perhaps more importantly, the practices of the social partners in the Nordic countries support the view that the platform–worker relation may well be considered – and regulated – as contracts of employment. Collective agreements have been concluded in the context of platform work in several Nordic countries. These developments are discussed further in the Pillar IV report.[234] Here, we briefly present the three different types of agreements concluded.

First, there are examples of *existing collective agreements* applied to platform work. In Sweden, the white-collar union Unionen has concluded collective agreements with three platform companies.[235] In two of the companies, the industry collective agreement for Temporary Work Agencies was applied and in one company the industry collective agreement for Media was applied.[236] In Denmark, the trade union HK has concluded accession agreements with the translators' platform Voocali, aligning pay and working conditions for Voocali translators with the pay and working conditions in the existing collective agreement for translators in HK.[237]

Second, there are examples of *novel agreements* specially adapted to the platform context, such as in the case of Foodora in Norway. Here, a trade union concluded a new company-level agreement with Foodora, with regulations adapted to the situation of platform couriers.[238]

Finally – and most interestingly – there are examples of collective agreements explicitly *regulating the employment status* of the platform workers.

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230. Decision by the Labour Inspection Authority, July 16. 2015, no. 2014/58106. The requirements are set in regulations May 8. 2012 no. 408 pursuant to The Norwegian Working Environment Act § 1-4 and § 4-1.
231. Disruptionrådet, Kortlægning af arbejdsplatforme i Danmark, January 2018, p. 5 https://docplayer.dk/71060019-Kortlaegning-af-arbejdsplatforme-i-danmark.html
232. SKAT, *Rapport vedrørende kontrol af Uber-chauffører*, Indkomstårene 2014 og 2015, January 2018, p. 8, https://www.ft.dk/samling/20171/almdel/sau/spm/345/svar/1480213/1879198.pdf.
233. Press release in Danish (for Happy Helper and Hilfr) https://www.kfst.dk/pressemeddelelser/kfst/2020/20200826-rengoringsplatforme-fjerner-minimumspriser/, ruling in Danish (Hilfr) https://www.kfst.dk/media/qv5hoinx/20200826-minimumspriser-p%C3%A5-hilfrs-platform.pdf.
234. For further discussions, see Jesnes/Oppegaard (ed) 2020, chapter 5.
235. F. Söderqvist and V. Bernhardtz; Union Working Paper 2019:57, *Labor Platforms with Unions Discussing the Law and Economics of a Swedish collective bargaining framework used to regulate gig work*, p. 4.
236. See also Country Report Sweden Part 2 p. 16.
237. See also Country Report Denmark Part 1 pp. 13, 23 and 25, and e.g. https://www.hk.dk/aktuelt/nyheder/2018/10/01/hk-indgaar-overenskomst-med-platformsvirksomhed/.
238. The union was a federation of transport workers who merged with a large union for blue collar workers; Fellesforbundet. See also Country Report Norway Part 1 pp. 9 and 12.

In Denmark, the collective agreement for Hilfr was an attempt to adapt a collective agreement to the special circumstances of platform work. The agreement covered rights such as minimum remuneration aligned with the cleaning industry, paid holidays, and sick leave pay. In the Hilfr agreement, a person providing services can be a freelancer not covered by the agreement, or an employee covered by the agreement. The agreement stipulates that after having worked for 100 hours or more via the Hilfr platform, a freelancer becomes an employee ('Superhilfr') and thus covered by the agreement. However, the parties were provided with full freedom to opt in before having reached 100 hours of work, and to opt out after having worked for 100 hours.[239] The Hilfr agreement was a pilot agreement on a one-year trial basis, and the parties are currently renegotiating (June 2020).[240] The ruling of the Competition and Consumer Authority (August 2020) has left Hilfr with the task of ensuring that its 'SuperHilfrs' are properly employed in the understanding of the Competition Act.[241]

The collective agreement for Voocali used a different route, by aligning the salaries and working conditions for interpreters providing services via the Voocali platform with the conditions for interpreting services in the industry in general. The agreement was an accession agreement, and applied to freelance interpreters. The agreement did not define which freelancers are covered by the agreement and which are outside the agreement as genuine undertakings.[242] Both agreements were intended to apply to platform workers and provide them certain rights as employees, and both agreements placed the platform company in the position of employer responsible for extending the rights to the platform worker.[243]

Thus far, all of the collective agreement that specifically regulate platform work are company-level agreements. It is still an open question as to whether industry-level agreements with more general regulatory potential will be concluded.[244]

A brief summary of responses to the challenge of platform work in the Nordics is as follows:

- The legal classification of platform work is uncertain, as thus far it is not addressed by the legislatures and will require case-by-case assessments by the courts. As of yet, no cases have been assessed by the courts.
- Collective agreements for platform work in several Nordic countries support the claim that platform work can be contracts of employment.
- The agreements vary, but are all at a company level and include both existing and novel agreements, and some explicitly regulate the employment status of platform workers.
- Responses to platform work are led by the social partners rather than the legislatures or the courts.

239. This element was heavily criticized by social partners and labour law academics as being against basic principles of collective bargaining.
240. See more about the Hilfr agreement in the Country Report Denmark Part 1 p. 13.
241. https://www.kfst.dk/media/qv5hoinx/20200826-minimumspriser-p%C3%A5-hilfrs-platform.
242. This element was heavily criticized in particular by competition law lawyers and authorities.
243. For more data on the agreements, see Jesnes/Oppegaard (ed.) 2020 and also Country Report Denmark Part 1 p. 14.
244. Jesnes/Oppegaard (ed.) 2020, chapter 5.

4.6 Responsiveness in the legal framework: Main weaknesses and strengths

The discussions of legal responses to non-standard work have revealed general but varying adaptability and responsiveness in the legal frameworks of the Nordic countries.

The Nordic labour law frameworks are generally inclusive to non-standard work. Fixed-term, part-time and agency work are clearly recognized as contracts of employment in all the Nordic countries. Even the very fragmented or marginal contracts of work, such as on-call contracts, zero-hour contracts etc., can be contracts of employment. New types of labour relations – like platform work – may well be contracts of employment, depending on a case-by-case assessment of the platform model and other circumstances. This confirms and underpins one of the conclusions in section 3.5, namely that the key concepts in the Nordic countries are quite inclusive and adaptable.

Yet, this discussion has illustrated weaknesses in the labour law framework when faced with new types of labour relations. In relations with both subordinate and independent features, the legal classification is unclear and difficult to predict. Furthermore, new relations in the grey area between traditional employees and the genuinely self-employed can appear and gain momentum while the legal employment status remains unresolved. As an overall assessment is necessary and ultimately decided by the courts, the legal classification typically lags behind the developments in the labour market. The classification of one grey area case does not necessarily clarify other grey area cases, as the assessment is made on a case-by-case basis. Umbrella companies and platform work illustrate this. Both models are present in the Nordic labour markets today, while the legal classification remains rather unclear and unresolved. Moreover, there are indications that the legal classification can turn out differently across the Nordic countries, despite the similar key concepts.

As such, we see the case-by-case assessment of employment status – i.e. adaptability led by the courts – as both a main strength and a weakness.

The main regulatory approach to non-standard employment in the Nordic countries is to confer specific rights to the workers to compensate for their precarious position compared to workers in standard employment. This thus reflects a responsiveness to protect and preserve standard employment as the dominant form of work.

The responses to triparty arrangements such as agency work imply that specific measures may be necessary and appropriate to counteract power asymmetries in other relations than the two-party contract of employment relation. The responses to other types of non-standard work, such as fixed-term and part-time work, on-call and zero-hour contracts etc., furthermore imply a need to balance the workers' need for predictability of work and pay against the employers' need for a flexible use of labour. We see this responsiveness as an important strength: It serves to protect – and support – important purposes of labour law.

The specific responses still vary substantially in the Nordics. The type and level of protection for different kinds of non-standard work vary within each country, and approaches and regulations in one country differ from the next. It furthermore varies

as to whether the legislatures or the social partners lead the responses. The responses can thus be perceived as rather erratic, and the lack of one consistent approach in the Nordics can be seen as a weakness.

The variations suggest some general tendencies and differences. The restrictions on fixed-term work are stricter than on part-time work in all the Nordics. The protection of the notion of *permanent* employment is thus stronger than of the notion of *full-time* employment. The varying regulations on agency work reveal different levels of protection of the notion of *direct* employment. Similarly, the varying responses to the very fragmented and marginal arrangements show varying protection of the predictability of work and pay of standard employment in the Nordics.

As to *how* responses are developed, there are at least two common features that can help sort the variations in the Nordics.

First, EU/EEA directives have clearly been a significant driver as regards both fixed-term and part-time work, as well as agency work in all the Nordic countries. Sweden, Finland and Norway have supplementing statutory regulations on such non-standard work, while Iceland has mainly implemented the EU/EEA minimum standards, and Denmark has only implemented the EU standards. This *may* suggest more national responsiveness to challenges in the first three countries than in the latter two.

Second, responses by collective agreements are important in all five countries. Statutory regulation of non-standard work is generally semi-discretionary and can be derogated by collective agreements at the industry level in Denmark and Sweden, while the social partners have no or only limited possibilities to derogate in Finland, Norway and Iceland. The role of the social partners in responding to non-standard work is therefore comparably more important in Denmark and Sweden than in Finland, Norway and Iceland.

Consequently, the main difference may instead be *who* leads the responses – the legislatures or the social partners? As described in chapter 2, the Nordic labour law framework is characterized by the key function of collective agreements and the close interplay with statutory regulations. This, in our view, is a strength in all the Nordic countries when responding to non-standard work. Our discussions in this chapter show that both types of responses can be effective tools to deal with the challenges to protected status (concept of employee), allocation of responsibilities (concept of employer) and predictability of work and pay.

The developments also show that when responses from the labour law actors are absent or appear hesitant, other public authorities may take the lead on assessing the employment status of non-standard workers. This has two potential effects. First, the classification of employment status carried out by other actors may begin to form a pathway of administrative decisions, slowly cementing a perception of the legal status that is not necessarily based on labour law's key concepts and considerations. Second, the classifications within different areas of law risk being unsynchronized and creating unnecessary tensions between authorities and/or labour actors, and further pave the way for legal uncertainty for the parties involved.

In the next part – Part III – we address the implications of an unclear or unresolved employment status, both for the collective bargaining mechanism and other important elements of labour and social security law. These discussions will further explore the potential of statutory law and collective bargaining as tools to respond to – and regulate – future labour relations that deviate from standard employment.

Based on the discussions in this chapter, the Nordic responses to non-standard work reflect some weaknesses and strengths in the legal framework:

- The Nordic labour law frameworks are generally inclusive toward non-standard work.
- The specific responses vary considerably, but reveal a general ability to adapt to different types of non-standard work.
- The labour law classification of new types of work relations can remain unclear and unresolved, due to the need for case-by-case assessment by the courts.
- Classification of new types of work relations in other areas of law may further blur the assessment and enhance legal uncertainty.
- The notion of permanent employment is more strongly protected than the notion of full-time employment in all countries, while the protection of direct employment and of predictability of work and pay vary.
- While EU/EEA law has been an important driver of responses in all countries, Norway, Finland and Sweden have more supplementing statutory regulations than Iceland and Denmark.
- Responses are mainly left to the social partners in Denmark and Sweden, while the legislatures have led the responses in Finland, Norway and Iceland – though with some exceptions.

PART III:

Legal implications of an unclear employment status

5 The structure of the analysis

5.1 Comparison and typology

In this part, we discuss the legal implications of an unclear or unresolved employment status: How will key elements of labour law and welfare protection in the Nordic model apply to workers in the grey area between employee and self-employed?

In order to highlight the implications of an unclear employment status, we have conducted a *comparison* using a *typology* of three types of workers.[245] Here, we specify the characteristics of each type or category.

- *The traditional employee:* a person performing work under an employment contract with one employing entity, normally in permanent, full-time employment and with a clear obligation for the employer to provide work and pay.
- *The genuinely self-employed:* a person performing work in the capacity of an independent legal entity owned and controlled by the same person, in a business model consistent with traditional self-employment. This typically entails servicing several clients or customers, choosing the types of services offered, negotiating or setting their own contractual terms, deciding their own working time, and having the freedom to hire staff to perform the services. The administrative set-up typically includes having a registered company, charging VAT, and signing up for (voluntary) insurance schemes providing e.g. work injury and sickness coverage.
- *The platform worker:* a person performing work for several customers (consumers or user companies), matched by a platform company using digital technology – more precisely, an application or software and algorithms.[246] The platform worker undertakes work as a self-employed person and is not party to a formal contract of employment, neither with the platform company nor with the customers.[247] The platform worker may have a registered business, but most often not a limited company, to work under a contract of employment with his or her own company. There is no formal obligation to continue working for the platform, and the platform has no clear obligation to provide work and/or pay. Thus, formally, the person has considerable contractual freedom to decide which tasks to perform, and the amount, time and place of work. At the same time, the person is subject to a customer rating mechanism whereby ratings are presented to potential customers, the platform's algorithms influence the presentation of workers and allocation of assignments, and sanction mechanisms are often used in response to platform workers' unwanted actions or performance. The platform worker may not have made the arrangements available for the self-employed, such as signing insurance policies providing e.g. work injury and sickness coverage, or hiring his or her own employees.

245. Based on the findings in the country reports, the typology in this analysis is slightly altered from the one used in Hotvedt/Munkholm 2019 and the country reports. More specifically, we have altered the characteristics of the typical platform worker to include workers who have a registered company (but still exclude those who establish a limited company and work under a contract of employment with this company). We did so because this turned out to be a tipping point in the context of social security, see further in section 8.2.
246. See the definition of 'platform work', 'platform company' and 'platform worker' in the Pillar IV report, Jesnes/Oppegaard (ed.) 2020, section 1.2.
247. *Ibid.*

We have chosen the platform worker as a typical example, or archetype, of a labour relation with an unclear or unresolved employment status. As platform models and workers vary, the characteristics of this category are based on the *typical* platform worker.

As explained above in sections 3.2 and 4.5, platform work poses a particular challenge to the framework of labour law, as the model combines several challenging characteristics. Platform work typically exists in a grey area: fragmented, marginal, complex and shifting. The legal uncertainty this entails can represent a serious threat to the labour law framework, and to legal predictability more generally. This makes the platform worker an interesting case to study the implications of such uncertainty.

The legal protection of the platform worker can be compared to the protection of the traditional employee, on the one hand, and the genuinely self-employed, on the other hand. The worker with the unclear employment status can thus be compared to workers who clearly belong on each side of the binary divide. By this comparison, we seek to highlight the *effect* of an unclear status in systems based on binary categories.

Although the comparison focuses specifically on platform work, the following discussions have a broader relevance. Highlighting the legal implications of different aspects of platform work will also have relevance for other relations where the employment status is unclear due to similar aspects. For instance, if a protective legal rule does not apply to the platform worker due to the occasional nature of platform work, this is also relevant for other fragmented or marginal contracts. If the technological aspect of platform work obscures the legal protection, the implications could be similar in other types of employment affected by technological change. The following discussions therefore seek to pinpoint the more specific aspects of platform work that have implications for the legal protection of the worker.

5.2 Selected elements of labour law and welfare protection

This analysis is limited to selected elements of labour law and welfare protection. The selection has been made in an effort to identify legal norms that underpin hallmarks of the Nordic labour market model.

From a comparative perspective, a distinctive feature of the Nordic labour market models is the combination of high productivity and a comparatively high level of social equality.[248] We consider at least three characteristics important in this regard:

- strong labour market actors;
- a healthy and productive work force;
- basic social security.

These characteristics reflect societal interests deeply rooted and institutionalized in the Nordic countries. Strong labour market actors are vital for close and coordinated cooperation with the states on economic policy, providing stable and competitive economies. As described in chapter 2, the collective bargaining mechanisms have important regulatory functions, and the outcomes (i.e. levels of pay) contribute to

248. Dølvik/Steen 2018 pp. 41–63 with further references.

social equality and productivity. Protecting the health and safety of workers is an undisputed value and was historically a main premise for statutory labour law in the Nordics. The means for providing social security and the benefits are still continually debated. Nevertheless, basic social security – such as benefits ensuring income for persons out of work – is a fundamental part of the Nordic welfare systems. Basic social security is also connected to labour law, as it balances power relations and the (varying) flexibility in dismissal protection and other terms of employment.

The following discussions are therefore focused on in Part III: the collective bargaining mechanisms (chapter 6), protection of health and safety at work (chapter 7) and social security benefits providing income protection for individuals who are out of work (chapter 8). Based on these discussions, some conclusions are suggested (chapter 9). The specific norms and the legal protection they entail are presented in each chapter. The discussions will concentrate on the *structure* of the relevant norms – the legal basis, personal scope and allocation of responsibilities.[249] The substantive content of the legal norms will not be discussed in detail.

Analysing how these norms apply to the typical platform worker, compared to the traditional employee and the genuinely self-employed, will shed light on the legal implications of an unclear employment status. As the selected norms both provide protection for the individual and underpin societal interests, the legal implications are addressed on two levels, the individual and the societal.

In platform work, the allocation of responsibilities raises difficult questions. Both the platform company and the customers may be the employer(s) and/or be responsible for employer duties. Our chosen point of departure is that the platform company is the most relevant employer. Implications of customers (consumers or companies) as being employers will be addressed where this seems particularly relevant or reveals interesting aspects of the relevant norms.

249. The questions and issues addressed are described in more detail in Hotvedt/Munkholm 2019 p. 20–22.

6 Collective bargaining mechanisms

6.1 Introduction, common features and legislative basis

As described in chapter 2, collective agreements play a key role in regulating the Nordic labour markets. They provide a wide range of basic rights for employees, including pay, working time, co-determination, dismissal protection and pensions. Collective agreements have direct regulatory functions similar to statutory regulations, due to their binding and normative effect in individual employment relations between members covered by the agreement. The conditions of work set by collective agreements also have different types of indirect effects beyond this binding and normative effect, due to various extension mechanisms, principles of implied terms, complementary effects etc. Thus – though the role of collective agreements as a regulatory instrument varies – collective bargaining is a gateway to the regulation of important conditions of work in all the Nordic countries.

If new labour relations – such as platform work – are not covered by collective bargaining mechanisms, this form of labour market regulation will be less effective. This will have implications both for the working conditions of the individual and for the societal interests pursued by the role of collective agreements. The following discussions therefore focus on *access to collective bargaining mechanisms* for platform workers, compared to traditional employees and the genuinely self-employed.

The discussion is centred on the bargaining mechanism and thus on the potential of collective agreements to *directly* regulate platform work. As described in section 2.3, Finland, Norway and Iceland have mechanisms for the extension of terms and conditions set in collective agreements. These mechanisms represent the potential for regulating platform work. As the national mechanisms vary substantially, and Sweden and Denmark lack such mechanisms, their scope and potential are not further discussed here.

The collective bargaining mechanisms in all the Nordic countries build on the binary distinction between employees and self-employed. Traditional employees clearly have access to collective bargaining, while the genuinely self-employed are normally excluded. Clear and undisputed access to effective bargaining on a collective level for platform workers therefore depends on being recognized as employees. Membership in an organization is also a precondition for workers to participate in collective bargaining.

A remaining issue is whether workers with an unclear or unresolved employment status – such as platform workers – may be included in collective bargaining and covered by collective agreements.

We discuss this by addressing criteria for membership in labour market organizations (section 6.2) and the personal scope of national mechanisms for collective bargaining (section 6.3). Access to mechanisms for collective bargaining is however not solely an issue for national labour law. The scope of collective bargaining mechanisms must be aligned with national and EU/EEA competition law.

The Nordic countries are subject to the same EU/EEA law, banning different types of restrictions of competition, but acknowledging an exemption for certain types of agreements concluded collectively. We therefore discuss how the intersection between collective agreements and competition law is resolved on a national level (section 6.4). We furthermore briefly consider whether platform workers – when included in the collective bargaining mechanisms – face particular legal obstacles when they seek to obtain a collective agreement (section 6.5).

Based on this, we draw some conclusions on the implications of being a platform worker with an unclear employment status, as regards the possibility of regulating working conditions via collective agreements (section 6.6).

Some starting points for the discussion of collective bargaining mechanisms:

- Traditional employees have access to collective bargaining, while the genuinely self-employed are normally excluded.
- Clear and undisputed access to collective bargaining for platform workers depends on legal recognition as employees.

6.2 Membership in labour market organizations

All the Nordic countries except Denmark have a statutory framework for collective bargaining. This legislation defines the labour market organizations that may conclude collective agreements.

The definitions in Sweden and Norway are explicit and parallel. The relevant organizations (trade unions and employers' associations) are defined with reference both to the legal concepts of employee and employer and to the purpose of safeguarding the interests of employees and employers, respectively.[250]

In Finland, as well, the organizations concluding a collective agreement must have as their primary objective to safeguard the interests of employees or employers in employment relationships.[251] In Iceland, the relevant organizations are not explicitly defined. Still, the preparatory works reveal a similar understanding of a trade union – as an organization established to protect the interests of people who make a living by selling their labour.[252]

Neither country have set specific criteria for membership – this is left to the statutes or bylaws of each organization. However, criteria for membership must not be discriminatory or otherwise unlawful.

In Denmark, it is clearly established in case law that a worker or an undertaking that fulfils the criteria for membership set by the organization has a *right* to become a member.[253]

In Nordic *trade unions*, the criteria for membership vary. Some trade unions only offer membership to workers of specific professions or occupations, while others organize workers in a specific sector or industry. As a general rule, membership in

250. The Norwegian Labour Disputes Act § 1 c and d and the Swedish Co-Determination Act 1 § 2.
251. The Finnish Collective Agreement Act chapter 1.
252. Preparatory works for the Icelandic Act on Trade Unions and Industrial Disputes.
253. Supreme Court ruling U 1946.246 H, on the right to membership in a hauliers' guild, the decision to reject an individual's membership could not be exempt from judicial review, and the rejection could not be upheld in view of the considerable economic and business interests dependent on being part of the guild, cf. O. Hasselbalch, *Foreningsretten*, Arbejdsretsportalen, online, chapter 1, 3.1.2. See also an example from case law in Sweden in Supreme Court (NJA) 1948 p. 513. The court ruled in favour of the employee.

trade unions is not restricted to workers in *active* employment. Organizations often offer membership to students, unemployed and retired persons, typically on specific terms. The precarious nature of platform work would therefore not generally hinder a continuous membership.

Several organizations in the Nordic countries offer membership to both employees and the self-employed. Organizations of white-collar workers, including academics and artists, frequently target both groups.

In Denmark, for example, the largest trade union for salaried employees – HK – is open for membership to employees, freelancers and the genuinely self-employed.[254] The Danish trade unions for medical doctors, dentists and pharmacists all have separate branches catering to self-employed members. Similarly, in Sweden, the main organization of white-collar workers – Unionen – offers membership to the solo self-employed. This is also the case for the union for academic professionals, Akavia. Similarly, in Iceland, self-employed workers can be members of e.g. the large unions for white-collar workers and university graduates, VR and Fræðagarður.[255] Examples from Norway are associations of medical doctors (Den norske legeforening), of journalists (Norsk Journalistlag) and of workers in art and culture (Creo – forbundet for kunst og kultur).[256]

It seems that organizations of blue-collar workers, on the other hand, more seldom specifically offer membership to the self-employed. While this may largely be due to tradition and may be changing, for platform workers – who often work in these sectors – it may nevertheless represent an obstacle for membership and participation in collective bargaining.

There are trade unions in the Nordic countries that specifically address the issue of an unclear employment status or target these types of workers. These initiatives vary substantially.

The Danish union HK has established a separate service bureau with the purpose of supporting freelancers of all kinds, including the genuinely self-employed. The largest trade union – 3F – was party to the first collective agreement for platform workers on the platform Hilfr, aiming specifically to cover a group of workers with an unclear status with a collective agreement. The trade union for journalists and press photographers, Dansk Journalistforbund, also specifically invites members of any status. One Danish trade union, ASE, is a trade union for both employees and self-employed workers, with ASE Selvstændig (independent) for the self-employed and ASE Lønmodtager (employee) for employees.

Unionen in Sweden has presented a strategy for the social partners' response to platform work within the Swedish model of collective bargaining.[257] Unionen has also concluded a strategic partnership agreement with Germany's IG Metall, specifically concerning digital collaborative platforms.[258]

The largest confederation of trade unions in Norway, LO, has established a consortium: LO Selvstendig (independent). This consortium is a forum for the trade

254. See their respective websites: https://beta.legeforeningen.no/jus-og-arbeidsliv/, https://www.nj.no/om-norsk-journalistlag/ and https://creokultur.no/medlemskapicreo/.
255. See the statutes of VR, https://www.vr.is/um-vr/log-og-reglugerdir/log-vr/>, and the statutes of Fræðagarður, https://www.fraedagardur.is/is/um-felagid/log-fraedagards>.
256. See the respective websites: https://beta.legeforeningen.no/jus-og-arbeidsliv/, https://www.nj.no/om-norsk-journalistlag/ and https://creokultur.no/medlemskapicreo/.
257. See further the Union's report: *Plattformsekonomin och den svenska partsmodellen*. Unionen 2016 p. 97.
258. Joint declaration between IG Metall, Germany and Unionen, Sweden, signed 8 June 2016.

unions within LO that organize freelancers and self-employed workers, and focuses broadly on the working and living conditions of both the genuinely self-employed and workers whose employment status is less clear.[259] The consortium includes trade unions of both white-collar and blue-collar workers (such as Industri Energi, a trade union for the oil and gas industry).[260] There are also examples of traditional trade unions who specifically mobilize platform workers. An association of transport workers – Norsk Transportarbeiderforbundet, who later merged with Fellesforbundet – organized couriers employed by Foodora, one of the largest platforms operating in Norway.[261]

In Finland, the criteria for membership vary. While the collective agreements are usually agreed within an industry or by occupation, membership in a trade union is commonly organized by profession. Some trade unions require active employment as a condition for joining. Membership is also available for students of a specific profession. For example, Service Union United PAM (Servicefacket PAM) has been actively spurring discussions about the unclear status and problems of self-employed workers.[262]

In Iceland, filmmakers recently formed a union – Félag kvikmyndagerðamanna – open to the self-employed. As the film industry in Iceland is mainly comprised of self-employed workers, the formatting of this union represents an attempt to unionize the sector.

Employers' associations typically offer membership within a specific sector or industry. Membership for platform companies may raise classification issues. It can be difficult to assess whether the technological aspect or the underlying service should be the decisive with regard to membership.

Platform companies in the Nordic countries are mainly unorganized, and examples of the opposite are rare. In Denmark, the platform companies Hilfr and MePloy are members of the Confederation of Danish Industry (Dansk Industry), a large private business and employers' association representing members in a number of industries, including technology and production. In Norway, platform companies like Uber Norway and WeClean are members of the NHO-affiliated federation Abelia – an association for the knowledge and technology industry.[263] This choice of association reflects the fact that the companies see themselves as belonging to the technology sector. On the other hand, Foodora, in the spring of 2020, became a member of a service employer organization outside NHO: Virke.

This clearly shows that, in the Nordic system of industrial relations, membership in trade unions is not limited to traditional employees. Both platform workers and the genuinely self-employed can be members of trade unions, depending on the statutes or by-laws of the relevant organization. The initiatives mentioned above illustrate that the organizations may take different actions to protect the interests of their members. However, membership does not necessarily grant access to the mechanisms to conclude collective agreements with binding and normative effect. This depends on the scope of the collective bargaining mechanism and the intersection with competition law, as discussed further below.

259. See LO Selvstendig's website, https://www.lo.no/hva-vi-gjor/lo-selvstendig/om-lo-selvstendig/.
260. See the Industri Energi website, https://www.industrienergi.no/medlemsfordeler/selvstendig-naeringsdrivende/.
261. See further Country Report Norway Part 1 pp. 25–26.
262. E.g. https://www.pam.fi/en/news/there-is-a-need-for-clear-rules-for-platform-work.html and https://www.pam.fi/en/news/article/clarifying-work-in-the-platform-economy.html.
263. See Abelia's website, https://www.abelia.no/.

Concerning the criteria for membership in Nordic labour market organizations, some common traits are as follows:

- Criteria for membership in labour market organizations are mainly set by the statutes of each organization.
- Employees, platform workers and the genuinely self-employed can be members of trade unions, depending on the statutes.
- There are trade unions in the Nordic countries targeting both workers with an unclear employment status and the genuinely self-employed, and actively representing their interests.

6.3 Scope of the collective bargaining mechanism

The personal scope of the collective bargaining mechanism is determined by what constitutes a collective agreement and – more specifically – what types of workers the agreement can regulate the working conditions for with binding and normative effect.

In all the Nordic countries, the legal definition of a collective agreement is linked to the concept of employee (and the concept of employer). The scope of the collective bargaining mechanisms thus depends on the classification of the workers on whose behalf the association bargains collectively. Traditional employees are clearly covered. The genuinely self-employed will, as a clear point of departure, be excluded from the collective bargaining mechanism, also as a result of competitive law.

Grey area workers – such as platform workers – *may* be included in the national systems. The concepts of employee in all the Nordic countries depend on a broad and overall assessment of the particular case, based on a range of criteria or indicators, see further in section 3.3. The concept therefore entails a certain flexibility and *may* include platform workers, depending on the circumstances. However, as long as the formal employment contract is lacking, the employment status is unresolved, and the access to collective bargaining remains uncertain.

From here, there are notable differences concerning the personal scope, in legislation, interpretation and bargaining practices, in the Nordic countries. Sweden stands out from the other countries as the only country with an explicit extension of the scope beyond the concept of employee.

Sweden and Norway have almost identical statutory definitions of a collective agreement, explicitly linked to the concept of employee.

The Swedish Co-Determination Act defines a collective agreement as a written agreement between an employers' association or employer and an employee organization that regulates the employment conditions for employees or other conditions of work in relations between employers and employees.[264] In principle, the concept of employee is mandatory, and is not up to social partners to define in the collective agreement.[265] However, as explained in section 3.3.2, both industry practices and the intention of the parties are relevant criteria when assessing

264. The Swedish Co-Determination Act 23 §.
265. E.g. Labour Court ruling AD 1987 no. 21 and further in A. Westregård, "Delningsplattformar och crowdworkers i den digitaliserade ekonomin – en utmaning för kollektivavtalsmodellen", B. Nyström, N. Arvidsson and B. Flodgren (ed.), *Modern affärsrätt*, 2017 p. 334.

whether workers are employees. The scope agreed by the social partners can have significance as industry practice. The definition of employee in the collective agreement is assumed to create a presumption of employee status, so that anyone who do not agree has the burden of proof. The social partners' definition in the collective agreement therefore has a significant impact. A collective agreement for freelance journalists can be illustrative. The agreement covers workers in the grey area between employees and the self-employed, and the Labour Court considers them to be employees according to industry practices.[266]

Furthermore, the scope of the Swedish collective bargaining mechanism is expanded beyond the concept of employee: According to the Co-Determination Act, a worker who is a 'dependent contractor' can be *treated* as an employee in the context of this specific act, although the person is not legally an employee.[267] In order to be covered by a collective agreement, there must be a specific regulation in the relevant agreement broadening the concept of employee to also cover 'dependent contractors'. A dependent contractor is defined as someone who works for another and at that time is not employed by them, but has a position that is essentially the same as an employee. Classification as a dependent contractor is therefore contingent on the degree of dependence on the principal. In some cases, self-employed persons have been deemed too independent to be considered dependent contractors.[268] However, since the concept of dependent contractor was introduced in the 1940s, the concept of employee has expanded. This has spurred a debate of whether 'dependent contractor' is included in the concept of employee, or instead further expands the scope of collective bargaining. There are examples of new labour relations where workers are considered to be dependent contractors, such as franchising – a new business model that emerged in the 1980s.[269] This suggests that the concept of dependent contractor has considerable potential to include platform workers and thereby give access to collective bargaining mechanisms.[270]

Thus far, there are three examples of collective agreements for platform workers in Sweden.[271] The agreements are not written especially for platform work, however.[272]

In Norway, a collective agreement is defined in the Labour Disputes Act as an agreement between a trade union and an employer or employers' organization on conditions of work and pay or other conditions of work.[273] Since there is no extension, as in Sweden, the personal scope of the collective bargaining mechanism rests solely on the interpretation and application of the concept of employee in this act. The definition of employee has the same wording as the definition in the general framework, the Working Environment Act.[274] Case law gives a few examples in which the legal status of the agreement was disputed as a result of the unclear employment status of the workers covered.[275] The conclusions vary according to the

266. Labour Court ruling AD 1994 no. 104, concerning the 1994 Collective Agreement between the Swedish Media Publishers' Association and the Swedish Journalist Association for Freelance Work. See also Labour Court rulings AD 1998 no. 38 and AD 1987 no. 21.
267. The Swedish Co-Determination Act 1 § 2.
268. In Labour Court ruling 1980 no. 24, the travelling sellers of sewing machines were not considered 'dependent contractors' due to the fact that they bought the machines from the manufacturer before selling them and also sold a large assortment of other products.
269. Country Report Sweden Part 2 p. 10 ff.
270. Westregård 2016 and A. Westregård, "Collaborative economy – a new challenge for the social partners", K. Ahlberg. P.H. Olsson and J. Malmberg (ed.), *Niklas Bruun I Sverige: En vänbok*, 2017, pp. 427–438 [Westregård 2017], p. 434 ff.
271. C. F. Söderqvist and V. Bernhardtz; Union Working Paper 2019:57, *Labor Platforms with Unions Discussing the Law and Economics of a Swedish collective bargaining framework used to regulate gig work*, p. 4.
272. See more in section 4.5.
273. The Norwegian Labour Disputes Act § 1 e, cf. c and d.
274. The Norwegian Labour Disputes Act § 1 a and b.
275. Labour Court ruling ARD 1955 s. 117, see also Labour Court rulings ARD 1968 s. 36 and ARD 1991 s. 140.

different circumstances in each case. However, case law illustrates that workers who were formally self-employed and considered to be genuinely self-employed in the context of tax law etc. can be regarded as employees with access to collective bargaining.

As in Sweden, it is not for the parties to decide whether the workers are employees. In order to be a collective agreement in Norwegian law, the agreement must concern workers who are employees in the material sense of the Labour Disputes Act.[276] It is not established as clearly as in Sweden that the social partners' definition can have significant impact as industry practice. However, in one ruling, the Labour Court included a supplementary argument in the overall assessment of whether the relevant workers were employees: In light of the purpose of the act, the assumptions of the parties supported the claim that the workers were employees.[277] This has relevance for platform workers. A purposive interpretation of the concept of employee in this context may provide some leeway for the social partners; they may have some influence on whether work relations in the grey area between traditional employees and the genuinely self-employed can be regulated by a collective agreement.[278]

At the time of this writing, there is only one example in Norway of a collective agreement (at the company level) for platform workers. In September 2019, following a strike, Foodora and Fellesforbundet concluded a novel collective agreement for the couriers, adapted to the platform model. Foodora had already recognized the couriers as employees, however.[279]

In Finland, the statutory definition of a collective agreement is mainly parallel to that in Sweden and Norway. According to the Collective Agreement Act, a collective agreement is an agreement between one or several employers or registered employer organizations and one or several employee organizations about terms and conditions that must be applied in employment contracts or in employment relationships. The customary interpretation of the wording at the end of the definition is that the agreement may include provisions directly influencing the employment contract (e.g. working hours or wage) as well as provisions concerning the work environment (e.g. occupational health and safety issues and negotiations between parties).[280] There are no specific collective agreements for platform work in Finland thus far.

Denmark and Iceland have no explicit statutory definitions of collective agreements.

In Iceland, there are requirements in different parts of the legislation that resemble the definitions in Sweden, Norway and Finland.[281] The requirements reflect the fact that collective agreements must be concluded by trade unions, and that the agreement can generally only regulate the working conditions of employees. The terms used to refer to the relevant workers vary, from 'employees' (*launafólk*) to the broader terms 'workers' (*verkafólk*), 'members' (*meðlimir*) and 'the working class' (*verkalýðsstéttin*). Whether the concept of employee and/or the variations in terminology represent a potential to include grey area cases in collective bargaining

276. Labour Court ruling ARD 1991 s. 140 (p. 169).
277. Labour Court ruling ARD 1991 s. 140. In this case, collectively agreed conditions had a 40-year history, clearly showing that the parties considered the workers to be employees.
278. See further M. J. Hotvedt, "Kollektive forhandlinger for oppdragstakere? Rekkevidden av adgangen til å forhandle tariffavtaler i lys av internasjonal rettsutvikling", *Arbeidsrett* nr. 1 2020 pp. 1–44 [Hotvedt 2020].
279. See also section 4.5.
280. J. Saloheimo, *Työ- ja virkaehtosopimusoikeus*, 3.ed 2020, p. 117.
281. The Icelandic Act on Trade Unions and Industrial Disputes § 5-7 (private sector) and the Icelandic Civil Servants' Collective Agreements Act §§ 4 and 5 (public sector).

has not been much discussed. There are no known examples of collective agreements covering workers who are formally self-employed or clauses in collective agreements stipulating a wider scope than employees.

In Denmark, it is left to the Labour Court to assess whether a specific agreement is a 'collective agreement' with its distinctive legal consequences in the collective bargaining system.[282] This requires inter alia a collectivity representing the workers' side, and that the topics concerned must relate to industrial relations or working conditions.[283] There are no formal requirements: A collective agreement can be concluded as an oral agreement or even implied as a result of the practice of the parties. The personal scope of collective agreements is considered to follow the general concept of workers or employees under Danish labour law. What constitutes a 'worker' entitled to rights under the collective agreements is, in this regard, fluid. A case concerning freelance journalists illustrates the assessment made by the Labour Court. Here, industrial action to support a collective agreement for freelance journalists was deemed lawful, as the freelancers in question performed work of the same character as employed journalists in the same company.[284] This suggests a rather flexible scope of collective bargaining in Denmark, and more freedom for the social partners.

Labour market practices in Denmark also support a flexible scope. There are several examples of collective agreements specifically covering work performed by freelancers working under employee-like terms for the duration of each assignment.[285] The large white-collar union HK, for example, has concluded three collective agreements for the media (*medieaftalerne*), for journalistic, photographic and graphical work performed as freelancers.[286] The agreements specifically do not apply to freelancers working as genuine undertakings. Some collective agreements include clauses that presume a status as an employee when services are provided merely as 'arms-and-legs' to an employer.[287] In these situations, self-employed workers will be presumed to be employees, unless it can be documented that services are provided in a genuinely independent manner. The purpose of such clauses is to counteract circumvention of the collective agreement, where work by self-employed persons has been used as a set-up to avoid rights under the agreement.

It is in Denmark that we find interesting examples of collective agreements explicitly regulating the employment status of platform workers: specifically, the Hilfr and Voocali agreements.[288] These agreements illustrate different approaches to the classification issue, but also raise questions. In the Hilfr agreement, the individual worker's free choice of employment status under the collective agreement is one of several novelties. This has been criticized as not meshing well with the general principles for assessing employee status in Danish law. The lawfulness of this construction is still uncertain, as it has not yet been assessed by the courts. Still,

282. The Act on the Labour Court, no. 1003 of 24 august 2017 (Lov om arbejdsretten og faglige voldgiftsretter) § 9 (1) 4, see also O. Hasselbalch, *Den Danske Arbejdsret*, arbejdsretsportalen, online, section XXII, 1.1.
283. The requirements of a 'collectivity' are not defined in legislation, and are assessed by the Labour Court on a case-by-case basis.
284. E.g. Labour court ruling AR 2007.293 and Country Report Denmark Part 2 p. 15.
285. For a thorough analysis of platform workers and the Danish model of bargaining, see N. V. Munkholm and C. H. Schjøler, *Platform work and the Danish Model,* Nordic Journal of Commercial Law, 2018/1, pp. 115–142 [Munkholm/Schjøler 2018].
286. https://journalistforbundet.dk/medieaftalerne.
287. E.g. The collective agreement for plumbers (VVS-overenskomsten). Such provisions are subject to judicial review, in which the industrial judiciaries assess whether the evidence presented is sufficient to lift the presumption, see e.g. Industrial Arbitration ruling FV 2017.0008.
288. See more on the Hilf and Voocali agreements in section 4.5.

until a judicial assessment is made, the agreement is the state of law. In the Voocali agreement, the platform workers cannot choose their employment status. The agreement applies to 'freelancers', but payment for the genuinely self-employed is left to 'guidelines' with recommendations. As the agreement does not distinguish between freelancers working under employee-like terms and genuinely self-employed, the personal scope of the agreement is not fully resolved. The parties in the agreement acknowledge, however, that the distinction between employee and self-employed worker remains unclear and that the agreements can and should be altered accordingly, once the distinction is clarified. Regardless of the unresolved issues, the practices of the social partners suggest that they have considerable freedom to decide on the personal scope of the collective bargaining mechanism. There is, however, a recent ruling from the Danish Competition and Consumer Authority questioning the social partner's classification.[289]

These discussions illustrate both commonalities and important differences concerning the scope of the collective bargaining mechanisms in the Nordic countries:

- The scope of the collective bargaining mechanisms depends on the legal classification of the workers: Traditional employees are clearly included, the genuinely self-employed are excluded, and platform workers may be included.
- In all the Nordics, the scope of the collective bargaining mechanism is linked to the concept of employee; only Sweden expands the concept to include 'dependent contractors'.
- The social partners have varying degrees of freedom to influence the definition of employee and thus extend the scope of the mechanism. The analysis suggests that the broadest freedom is in Denmark, and that there is a more significant impact in Sweden than in Norway, Iceland and Finland.

6.4 Exemption from the scope of competition law

Collective agreements inherently restrict competition. Collectively agreed terms of employment, such as conditions of pay, restrict competition directly by fixing the labour costs of the employer.

Competition law, both on a national and an EU/EEA level, prohibits different types of competition restriction in the products and services markets, such as agreements between undertakings, decisions made by associations of undertakings and concerted practices that restrict competition.[290] Price-fixing between undertakings is considered a hard-core violation of the competition rules.

The effects of collective agreements on competition, however, are inextricably linked to their main functions and purpose: Collective agreements aim to regulate competition in the labour market by providing a unified and stable regulation of the cost of labour, by stipulating pay and other conditions of employment. It is thus widely accepted – in the Nordics, the EU and elsewhere – that general principles of competition law cannot be applied in the market of labour. All the Nordic countries

289. See more on the recent ruling in section 4.5 and below in section 6.4.
290. See in particular the Treaty of the Functioning of the European Union (TFEU) article 101 (1) and the parallel provision in the Agreement on the European Economic Area (EEA) article 53 (1).

have explicit exemptions for collective agreements in their respective statutory competition acts, although with slightly different wording. A common feature is that the exemptions concern collectively agreed working conditions for *employees*.

In the Swedish Competition Act, the regulation of working conditions and salaries for employees is explicitly excluded.[291] However, the concept of employee is linked to the Co-Determination Act and is therefore expanded to also include 'dependent contractors'.[292]

The parallel exemptions in the other Nordic countries do not refer explicitly to employees. It is still quite clear that the exemptions are related to the scope of the national mechanisms for collective bargaining. The Danish exemption applies to salaries and working conditions.[293] The Icelandic exemption concerns salaries and other terms decided by collective agreements.[294] The Finnish and Norwegian exemptions are broadly phrased[295]; however, the preparatory works clarify that the exemptions concern collective agreements and terms of employment, not other contractual relations.[296]

A similar exemption is recognized in EU/EEA law. In *Albany*, the CJEU found that agreements concluded in the context of 'collective negotiations between management and labour' that seek to improve 'conditions of work and employment' fall outside the scope of TFEU art. 101 (1)/EEA art. 53 (1) by virtue of the 'nature and purpose' of these agreements.[297] Service providers who act independently are 'undertakings' acting in the market for services, not in the market for labour. Hence, self-employed workers are not covered by the exemption since they operate independently. The ruling in *FNV Kunsten* sheds further light on where to draw the distinction according to EU/EEA law. The CJEU concluded that the exemption also applies to the 'false' self-employed meaning workers who, although formally self-employed, work under terms that are more characteristic of terms of employment than of the independence and freedoms enjoyed by genuine undertakings.[298]

The exemptions for collective agreements in national law cannot go beyond the exemption in EU/EEA law – doing so could represent a breach of EU/EEA competition law. However, the limits of the EU/EEA exemption are not fully clarified. The ruling in *FNV Kunsten* has been widely debated and there are diverging views on its implications for national law. As long as there is uncertainty, diverging approaches in national law can be expected. The different national contexts have also spurred different legal questions and debates.

In Finland, Norway and Iceland, the national exemption is not extended beyond employees and the personal scope has not been seriously challenged by the social

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291. The Competition Act, 2008:576 (Konkurrenslag), 1 chapter 2 §.
292. Government Bill 1981/82:165 p. 194 and K. Carlsson et al: *Konkurrenslagen. En lagkommentar*, 1999 p. 35. The rules have been transferred to the current Swedish Competition Act, see also Government Bill to Parliament 2007/08:135 p. 247.
293. The Competition Act, no. 155 of 1 March 2018 (Konkurrenceloven) § 3.
294. The Icelandic Competition Act, 44/2005 (Samkeppnislögum) § 2 (2).
295. In Finland, see the Competition Act, 948/2011, (Kilpailulaki, Konkurrenslag) § 2 (1) and in Norway, see the Competition Act, 5 March 2004 no. 12 (Lov om konkurranse mellom foretak og kontroll med foretakssammenslutninger) § 3.
296. For Norway, see Government white paper Ot.prp. nr. 6 (2003–2004) pp. 221–222 and for Finland, see Government Bill (148/1987) pp. 8 and 14.
297. The exemption was recognized by the CJEU in the "Albany trilogy": case C-67/96 *Albany* (EU:C:1999:430), joined cases C-115/97, C-116/97 and C-117/97 *Brentjens* (EU:C:1999:434) and case C-219/97 *Drijvende Bokken* (EU:C:1999:437).
298. CJEU ruling in case C-413/13 *FNV Kunsten Informatie en Media*, EU:C:2014:2411437. The CJEU has recently applied guidelines from this case on platform work, in a case concerning the concept of worker in the Directive on working time (2003/88/EC) and a delivery courier, see case 692/19 *Yodel Delivery Network* (EU:C:2020:288); see also section 7.3.1.

partners. Yet, there is an emerging debate in doctrinal works in both Finland and Norway arguing for the national bargaining mechanism to include self-employed workers who are not fully independent.

In Iceland, the Competition Authority has relied on textual rather than dynamic interpretations of the exemption from competition law. The personal scope of the exemption and the intersection with competition law have not been discussed in depth in doctrinal works. Trade unions have not actively been seeking to bargain collectively on behalf of self-employed workers who are in a comparable position with employees.[299]

In Norway, the national exemption is considered to be fully aligned with EU/EEA law.[300] Case law confirms that the scope of the national exemption is interpreted in light of the parallel exemption in EU/EEA law.[301] The restrictions of competition law are presented as the reason trade unions representing the self-employed usually refrain from bargaining for conditions of pay.[302] A recent doctrinal work, however, discusses whether workers in the grey area between traditional employees and the genuinely self-employed can (and should) have access to the national mechanism for collective bargaining.[303] Hotvedt acknowledges uncertainties, but argues that *FNV Kunsten* primarily implies that the *clearly* and *genuinely* self-employed must be covered by general principles of competition law. She considers this as leaving room for national law to apply the mechanism for collective bargaining in national law to workers in the grey area. The Norwegian concept of employee is flexible and interpreted in light of the purpose of the relevant legal framework.[304] In light of the scope of the right to collective bargaining in relevant human rights instruments and the main function and purpose of collective agreements, Hotvedt suggests a shift in perspective when assessing employee status in the context of collective bargaining: Instead of focusing on whether the characteristics of traditional employment are present (as the list of criteria entails), the assessment can and should focus on whether the workers are clearly and genuinely self-employed. The effect would be that only genuinely self-employed are excluded from the collective bargaining mechanism, and that workers with an unclear employment status – such as platform workers – are more likely to be classified as employees. The suggested shift in perspective resembles a presumption of employee status in grey area cases.[305]

In Finland, too, the national exemption is considered to be aligned with EU/EEA law. Self-employed workers are by established practice not covered by collective bargaining.[306] This has recently been challenged in doctrinal work. Lamponen argues, in light of the *FNV Kunsten* case, that Finnish competition law does not constitute an obstacle to collective bargaining for certain groups of self-employed workers.[307] Based on the fundamental idea of collective bargaining, she distinguishes 'real' entrepreneurs from self-employed workers who are in fact dependent on their

299. Country Report Iceland Part 2 pp. 10–11.
300. Government white paper Ot.prp. nr. 6 (2003–2004) pp. 221–222.
301. See Labour Court ruling ARD 2002 s. 90, in which the Labour Court builds on the case law of the CJEU and the EFTA Court. The EFTA Court has jurisdiction with regard to EFTA States which are parties to the EEA Agreement with the EU, e.g. Norway and Iceland. Its jurisdiction thus largely corresponds to that of the CJEU.
302. The considerations of trade unions in the cultural sector are described in K. Nergaard and B. S. Øiestad, *Fastsettelse av lønn og honorar for korttidsoppdrag på det kunstneriske feltet*, Fafo-notat 2016:19, pp. 18–19.
303. Hotvedt 2020.
304. See more in section 3.3.
305. There is also a parallel to the shift in approach in the Danish Holiday Act, see further section 7.4.
306. See further Country Report Finland Part 2 (pending).
307. H. Lamponen, "Itsensätyöllistäjien oikeudesta työehtosopimustoimintaan – edellytykset ja rajoitukset" (The self-employed's right to collective bargaining) in *Työoikeudellisen yhdistyksen vuosikirja* 2018, pp. 61–96.

principal. According to Lamponen, competition law does not apply to collective bargaining aimed at improving the working conditions of the latter groups, as their activity equates the activity of employees in the market of labour. She concludes that Finland should reform and expand the Collective Agreements Act.

The national legal context is somewhat different in Denmark and particularly in Sweden.

In Denmark, the social partners seem to actively challenge the personal scope of the collective bargaining mechanism. As described above, there are several examples of collective agreements covering self-employed workers who work under employee-like terms, and there are also agreements for platform work actively dealing with the classification issue. Danish competition authorities accept collective agreements for self-employed workers to be covered by the national exemption, as long as the agreement concerns work under working conditions similar to those of regular employees.[308] The assessment is made on a case-by-case basis, in light of criteria aligned with those presented by the CJEU in *FNV Kunsten*. The focus of the assessment of competition law is whether the self-employed are *genuinely* self-employed, based on the reality of each work relation. Even though a person may be genuinely self-employed in one work relation, the same person may be considered as not genuinely self-employed in other work relations. The authorities assess the terms of work under each contract of work: in particular, whether the self-employed are free to organize their own working hours and decide their own quality of work, as well as the specifics of the economic relationship with the employer. As mentioned earlier, there is a recent ruling from the Danish Competition and Consumer Authority questioning the classification of the social partners. The ruling recognizes that collective agreements can also be concluded for platform workers, who are genuinely employees, but not in the format presented by the current collective agreement. This questions the autonomy of the social partners in this regard, especially since the ruling promotes specific elements that need to be present in the relationship between platform worker and platform company: e.g. a specific principle for the distribution of economic risk as a condition for employment status. The responses from the Hilfr platform and the 3F union have been highly critical.[309]

In addition, the courts assess the individual business set-up of the self-employed, specifically whether the self-employed promotes his or her services elsewhere (e.g. on their own webpage), employs an accountant, deducts expenses for marketing, materials and tools, pays social insurance contributions etc. The assessment is made as an overall assessment based on all the specifics of the situation. This approach resembles what Hotvedt and Lamponen argue for in Norwegian and Finnish law.

As mentioned above, the scope of the national exemption in Sweden is extended to include 'dependent contractors'. Consequently, there is a clear legal basis to exempt self-employed workers with a certain degree of dependency on the principal. Here, the focus of the debate in the doctrinal work is whether this exemption is too broad in light of EU/EEA law and the *FNV Kunsten* case. Westregård finds that the Swedish concept of 'dependent contractor' likely has a broader meaning than 'false' self-employed in the *FNV Kunsten* ruling, and concludes that the national exemption could potentially be in conflict with EU Law.[310]

308. To the following, see the in-depth analysis of platform work, industrial relations and competition law in Denmark in Munkholm/Schjøler 2018 pp. 115–142.
309. https://fagbladet3f.dk/artikel/forbudt-kraeve-minimumspriser-rengoeringsarbejde.
310. Westregård 2017 p. 432 ff. and A. Westregård, Annamaria, "Digital collaborative platforms: A challenge for

These intersections with competition law shed further light on the scope of the collective bargaining mechanisms in the Nordic countries:

- The scope of the collective bargaining mechanisms depends on exemptions from general principles of competition law, aligned with EU/EEA law.
- EU/EEA law allows for 'false' self-employed workers to be exempt from competition law and included in collective bargaining, but leaves uncertainty as to the distinction between these workers and the genuinely self-employed.
- In Sweden, there is a clear legal basis in national law to include 'dependent contractors' in collective bargaining, but this broad scope may perhaps conflict with current EU/EEA law.
- In Denmark, it is recognized that only the genuinely self-employed are excluded from collective bargaining.
- In Norway and Finland, there are emerging doctrinal debates implying that only the genuinely self-employed should be excluded from collective bargaining.

6.5 Obstacles to obtain a collective agreement

An important question is whether platform workers, in situations where they are recognized as employees, are able to obtain a collective agreement or whether they will face legal obstacles. As mentioned earlier, collective agreements concerning platform work are few and mostly constitute company level agreements. The answer to this question depends not only on the strength of the unionized workers, but also on whether the employer is affiliated with an employer organization, and whether the employer organization is part of a collective agreement covering the work conducted by the platform workers.

If the platform company is organized, the main rule in Sweden, Denmark, Finland and Iceland is that the company will be bound by the collective agreement signed by the organization. This rule can either be based on statutory law, as in § 26 in the Swedish Co-Determination Act, or in the charter of the organization, as is common in Denmark. However, some exceptions exist. In Sweden, some agreements require the trade union to request an agreement in order for the company to be bound.[311] In Denmark, some collective agreements – for instance within retail trade – require union density in a company to be at least 50 per cent in order for the trade union to be able to conclude an agreement with a member of the employer organization.[312]

The Norwegian system stands out from the other Nordic countries, as the main rule in practice is that at least 10 per cent of the employees must be unionized in order for the trade union to ask for a collective agreement in an organized company.[313]

However, being start-ups, many of these companies have not joined an employer organization. In such cases, the demand for a collective agreement is somewhat different. The workers need to take industrial action to force an agreement upon an unwilling employer. In Finland, this is only possible as long as no generally applicable collective agreement covering the employment relationship exists; in Iceland, the

social partners in the Nordic model", *Nordic Journal of Commercial Law* 1/2018, pp. 89–112, p. 106.

311. A. Kjellberg, "Arbetsgivarstrategier i Sverige under 100 år", in C.S. Jensen, *Arbeidsgivere i Norden. En sociologisk analyse af arbejdsgiverorganisering i Norge, Sverige, Finland og Danmark*, 2000.
312. Butiksoverenskomsten 2020/2023 Dansk Erhverv og HK HANDEL, § 12 nr. 1A.
313. This is a requirement in e.g. the Basic Agreement 2018–2021 LO-NHO § 3-7 no. 2.

worker will always be covered by a generally applicable agreement.

A low number of members, if any, performing work at a platform company does not present a challenge in itself. However, the effect of industrial action could in this case be very limited, as only unionized employees are bound to strike.

In Denmark, the wide margin to engage in secondary action would increase the effects of industrial action against platform companies. Secondary action is primarily subject to the main action being lawful, the parties to the main and the secondary actions having common interests, and the secondary actions being suitable to affect the main action.[314] The main challenge for trade unions to engage in industrial action—including secondary action to generate substantial pressure on the platform company—would be (1) to define the scope of the collective agreement such that it covers the self-employed working under terms characteristic of employment, but not the genuinely self-employed, and (2) that the relevant work must be performed by 'employees'. Both of these elements, like the rest of the criteria for engaging in lawful industrial action, are ultimately assessed by the Labour Court. In earlier cases, the Labour Court has performed assessments of the lawfulness of industrial action aimed to cover non-standard workers, such as freelancers. Here, the Court has adopted a broad approach with a view to the effectiveness of industrial action and collective agreements as the main regulator of pay and working conditions for workers.[315]

In Sweden, the possibility for platform workers to take industrial action is regulated by the Co-Determination Act. If a company does not have a collective agreement, there are few restrictions. The only industrial action not allowed is against companies without any employees and against companies with only family members.[316] Thus, it is legal for employees in other companies to take part in a sympathy action to support the demand for a collective agreement in a platform company, even if none of the employees of the company are members of a trade union.

In Norway, as in Sweden, there is a considerable opportunity to take secondary action. However, there are important restrictions set by collective agreements, such as in the Basic Agreement between LO and NHO.[317] Conditional actions, like refusing to work for a specific supply company, are e.g. only allowed in support of a demand for a collective agreement in this company if at least half of the employees are organized in unions affiliated with LO. These regulations seem to make the demand for a collective agreement more difficult to meet in Norway than in Sweden. Furthermore, the regulations around 'boycotts' may apply to sympathy actions. Boycotts are regulated by a separate act and can be used in industrial disputes as well as in other conflicts.[318] However, a boycott must fulfil a number of requirements to be lawful. A central requirement is that the boycott must not serve an 'unlawful purpose'. Protecting the interests of workers is not in itself sufficient to be considered a lawful purpose – the right to boycott must also be aligned with the market freedoms protected by the EEA agreement.[319]

To sum up, when platform companies are members of an employer organization,

314. E.g. Labour Court ruling AR 10.092 and Country Report Denmark Part 2 pp. 9–10.
315. E.g. Labour Court ruling AR 2007.293 and Country Report Denmark Part 2 pp. 9–10 and 15–16.
316. The Swedish Co-Determination Act 41 b §.
317. The Basic Agreement 2018–2021 LO-NHO § 3-6 no. 3–5. There are also restrictions in other basic agreements in the private sector relevant for platform workers.
318. The Act on Boycott, 5 December 1947 no. 1 (Lov om boikott).
319. See further Supreme Court ruling HR-2016-2554-P.

obtaining a collective agreement to cover the work seems quite straightforward in most of the Nordics – at least if an appropriate collective agreement can be found. However, in Norway, and in some Danish collective agreements, the requirement regarding the share of unionized workers might represent an obstacle. For companies outside an employer organization, industrial action seems to be the only way forward – with the exception of Iceland – if the employer is reluctant to sign an agreement. Here, Norwegian trade unions have weaker means of action, as the use of conditional secondary action is limited compared to the other countries. Furthermore, although establishing company agreements will not necessarily make the way forward any easier for platform workers in other companies, it would likely be used as a base for other company agreements and could in the end lead to the establishment of industry-level agreements. Obstacles to obtaining a collective agreement for platform work can be summarized as follows:

- Membership in employer organizations is essential, as organized platform companies are normally bound by the collective agreements signed by the organization.
- The number or share of organized workers in the platform company is generally not essential as long as the platform company is organized. However, in Norway, and to some extent Denmark, collective agreements do set such requirements, raising the threshold.
- An existing collective agreement covering the relevant work is essential in order for organized platform companies to be bound by membership.
- Where platform companies are not organized or no existing collective agreement covers the relevant work (or there are not enough organized workers), the possibility and strength of industrial action is central.

6.6 Conclusions

The collective bargaining mechanisms in the Nordic countries build on the binary distinction between employees and the self-employed. Traditional employees have undisputed access to collective bargaining, while the genuinely self-employed are excluded. Access to effective mechanisms for collective bargaining for platform workers – as a clear point of departure – therefore depend on the recognition of platform workers as employees.

The binary divide, however, is neither absolute nor clear. The Swedish mechanism for collective bargaining is explicitly extended to include a particular group of self-employed workers: 'dependent contractors'. The divide is not based on the formal classification as self-employed. As discussed in section 3.3, the assessment of one's status as an employee rests on the reality of the work relation in all the Nordic countries. Therefore, platform workers may very well be recognized as employees in the context of collective bargaining, depending on the platform model and other circumstances. Case law and labour market practices in the Nordics confirm that collective bargaining is not reserved solely for traditional employees. In Denmark and Sweden, in particular, there is some leeway for the social partners to include workers in the grey area with an unclear employment status. Nonetheless, both the lack of a formal status as an employee and the uncertainty of the legal assessment represent obstacles for platform workers' access to collective bargaining.

The scope of the national mechanisms for collective bargaining must be aligned with EU/EEA competition law. EU/EEA law allows for both traditional employees and the 'false' self-employed to be exempt from competition law and covered by collective bargaining. As it is not yet fully resolved as to who can be considered 'false' self-employed, there is some uncertainty as to what extent national law can allow workers with an unclear employment status to bargain collectively. This legal insecurity can be considered a further obstacle – but perhaps also a potential – for platform workers' access to collective bargaining in national law.

Despite the binary divide, an important precondition for collective bargaining – membership in trade unions – is clearly not limited to traditional employees. Both platform workers and the genuinely self-employed may be members of trade unions, depending on the statutes or by-laws of the relevant organization, and there are mixed organizations representing both groups in all the Nordic countries. These actors and other organizations mobilizing workers in the grey area are in a position to pursue collective bargaining on behalf of platform workers and other workers with an unclear employment status. The above examples of bargaining efforts, industrial action and concluded agreements in the grey area illustrate the potential to expand the collective bargaining mechanisms beyond traditional employment relations.

In sum, we find these to be the main implications of an unclear employment status concerning access to collective bargaining:

- The workers may be members of trade unions who can represent their interests, but criteria for membership could pose an obstacle for membership in some organizations, particularly for blue-collar workers.
- The workers only have clear and undisputed access to collective bargaining if they are recognized as employees, but both unresolved employment status and legal uncertainty discourage access.
- As long as the workers are not *genuinely* self-employed, it can be argued that they are entitled to the same access to collective bargaining mechanisms as the traditional employees. However, the competition authorities play an uncertain role in this regard.

7 Protection of health and safety at work

7.1 Introduction, common features and legislative basis

A healthy and productive workforce is a hallmark of the Nordic labour market model. Regulations ensuring a healthy and productive workforce were a vital component early on in the development of this model. In the Nordic countries, legislation on occupational health and safety has a more than 100-year history.[320] Today, various legal norms aim to protect the health and safety of workers. We have chosen to focus on regulations on *health and safety at work*, *limitations on working time* and *paid annual leave*. These three sets of norms are parts of the labour law framework and have a clear and common purpose to protect the health and productivity of the workforce. The right to working conditions respecting the workers' health, safety and dignity, the right to limitations on working time, and the right to paid annual leave are protected under Article 31 of the Charter of Fundamental Rights.

If existing regulations in these three areas do not apply to – or are less efficient for – workers in new types of work relations, the health and safety of workers can be put at risk. Risks to health and safety are not only a potential threat to the life and health of the individual worker, but also represent a challenge to fundamental ethical values and risk inefficient use of the countries' human resources.[321]

This chapter looks more closely into the *personal scope* and *allocation of responsibility* of the relevant regulations. The focus is on whether and how workers with an unclear employment status – such as platform workers – are protected, compared to traditional employees and the genuinely self-employed.

In all the Nordic countries, collective agreements supplement the protective standards set in statutory regulations. The personal scope of collective bargaining mechanisms is discussed in the previous section. The discussions on scope and allocation of responsibility in this section therefore mainly concern statutory regulations.

Statutory regulations on health and safety, limitations of working time and paid annual leave in all the Nordic countries implement relevant minimum requirements in EU/EEA law. The main instruments are the Framework Directive on working environment and the Directive on working time.[322]

Despite common minimum requirements, there are substantial differences in all three areas in the Nordic countries. Commonalities and differences regarding scope and allocation of responsibility are discussed separately for regulations on health and safety at work (section 7.2), limitation of working time (section 7.3) and paid annual leave (section 7.4), followed by an overall comparison (section 7.5). Differences regarding the substantive content of standards are not specifically addressed.

320. The precursors of today's legislation on health and safety stem from around the beginning of the 19th century in all the Nordic countries. The legislation was passed last in Iceland, in 1921.
321. This broad justification for regulations protecting the health and safety of workers can be found in early doctrinal works, see e.g. P. Berg, *Arbeidsrett*, 1930 p. 18.
322. Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work and Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organization of working time.

Some comments on the legal frameworks may serve as an introduction.

Generally, the frameworks are complex, detailed and diverse. As described in chapter 2, the framework is rather unified in Norway and Finland, and comparably more fragmented in Iceland, Sweden and Denmark. The legal frameworks on health and safety, in particular, have very different structures. Regulations on health and safety are integrated with regulations on other individual employment conditions in Norway and Finland. In Iceland, Sweden and Denmark, by contrast, regulations on certain health and safety issues are detached from regulations on other employment conditions.

In Norway, regulations on health and safety at work and limitation of working time are set in the main act on individual employment conditions, the Working Environment Act. The separate Holiday Act regulates paid annual leave.[323]

Similarly, in Finland, the main duties concerning health and safety are anchored in the main act on individual employment conditions, the Employment Contract Act. The framework is still more separated than in Norway, as three separate acts provide more detailed regulations.[324]

In Iceland, regulations on health and safety and working time are set in the same statutory act – the Working Environment Act, while a separate Holiday Act regulates paid annual leave.[325] The Icelandic Working Environment Act is still not parallel to the Norwegian, as only the latter covers individual employment conditions more broadly.

The Swedish framework is more fragmented. The Working Environment Act regulates health and safety at work, the Working Hours Act sets the regulations on working time, and the Annual Leave Act stipulates the right to paid annual leave.[326]

In Denmark, the framework is also fragmented, but is structured differently than in Sweden. Here, the Working Environment Act[327] regulates health and safety at work, including the rules on daily and weekly rest periods and youth work. The Working Hours Act[328] implements the right to maximum weekly working hours, daily breaks, and restrictions on night work, while the Holiday Act[329] provides the legal framework for paid annual leave.

Consequently, the Nordic Working Environment Acts have rather different thematic scopes. The Norwegian act is the broadest, encompassing health and safety, working time and many other issues. The Icelandic act includes both health and safety and working time, while the Danish regulates health and safety and only a few aspects of working time. The Swedish Working Environment Act covers health and safety but not working time, and thus corresponds with the Finnish Occupational Health and Safety Act.

323. The Holiday Act, 29 April 1988 no. 21 (Lov om ferie).
324. The Occupational Health and Safety Act, 738/2002 (Työturvallisuuslaki, Arbetarskyddslag), the Working Hours Act, 872/2019 (Työaikalaki, Arbetstidslag) and the Annual Holidays Act, 162/2005 (Vuosilomalaki, Semesterlag).
325. The Working Environment Act, 46/1980 (Lög um aðbúnað, hollustuhætti og öryggi á vinnustöðum) and the Holiday Act, 30/1987 (Lög um orlof).
326. The Working Environment Act, 1977:1066 (Arbetsmiljölag), the Working Hours Act, 1982:673 (Arbetstidslag) and the Annual Leave Act, 1977:480 (Semesterlag).
327. The Working Environment Act, no. 1084 of 19 September 2017 (Lov om arbejdsmiljø, arbejdsmiljøloven).
328. The Holiday Act, no. 60 of 30 January 2018 (Lov om ferie, ferieloven).
329. The Working Hours Act, no. 896 of 24 August 2004 (lov om gennemførelse af dele af arbejdstidsdirektivet, arbejdstidsloven).

Table 3: Thematic scope of statutory regulations concerning health and safety

National legislation	Thematic scope			
	Health and safety regulations	Limitations on working time	Other individual employment conditions	Paid annual leave
Denmark				
The Working Environment Act (no. 1084 of 19 September 2017)	x	x		
The Working Hours Act (no. 896 of 24 August 2004)		x		
The Holiday Act (no. 60 of 30 January 2018)				x
Finland				
The Occupational Health and Safety Act (738/2002)	x			
The Working Hours Act (872/2019)		x		
The Annual Holidays Act (162/2005)				x
Iceland				
The Working Environment Act (46/1980)	x	x		
The Holiday Act (30/1987)				x
Norway				
The Working Environment Act (17 June 2005 no. 62)	x	x	x	
The Holiday Act (29 April 1988 no. 21)				x
Sweden				
The Working Environment Act (1977:1066)	x			
The Working Hours Act (1982:673)		x		
The Annual Leave Act (1977:480)				x

Despite different structures, some main principles of enforcement are common. All the Nordic countries have labour inspection authorities mandated to control and enforce compliance of health and safety and (some) working time standards. The authorities can issue binding orders, impose fines and halt dangerous activities. Criminal sanctions may also apply.

In all the Nordic countries except Finland, paid annual leave is considered a private law regulation. Labour inspection authorities thus lack the competence to control compliance with paid annual leave. In Finland, by contrast, paid annual leave has historically been part of working time regulation, as an essential part of the protection of the employee, and labour inspectors can supervise compliance.[330]

330. The Finnish Annual Holidays Act § 37.

Denmark also stands out, as only the few working time standards in the Working Environment Act are subject to public enforcement.[331] The statutory rules on daily breaks, night work and maximum weekly working hours are considered private law regulations and are not enforced by public authorities.[332]

Nonetheless, one of the main common principles is the *internal* structure for supervision and control of health and safety issues. This is facilitated in all the Nordic countries by systems of organized cooperation with employees' representatives. Employee representation in the workplace therefore plays a vital role in monitoring compliance with protective standards.

Some starting points for the discussion of health and safety at work:

- Health and safety at work is regulated by protective standards and supplemented by collective agreements, and the freedom to derogate statutory standards by collective agreements mainly concerns working time regulations.
- Labour inspection authorities control compliance with health and safety and (some) working time standards, while the right to paid annual leave is enforced by the individual worker in all countries except Finland.
- Employee representation in the workplace plays an important role in the internal structures for monitoring compliance with health and safety regulations.

7.2 Health and safety at work

7.2.1 Introduction and main issues

Regulations on health and safety at work in the Nordic countries aim to ensure a safe and satisfactory working environment. They include a wide range of standards and requirements, concerning the physical workplace and technical equipment, the psychological work environment, accessibility and accommodations etc. Regulations also concern the methods of and measures for compliance, by requiring risk assessment and prevention, internal control systems and consultation and cooperation with employee representatives. Being covered by these regulations – and the institutions that enforce them – thus concerns the protection of workers' health and safety, broadly speaking. The issue here is whether the legal protection of both physical and mental health and certain welfare aspects apply.

As explained earlier, the regulations are mainly structured as duties for an employer to protect their own employees, in line with the binary divide. Traditional employees are therefore covered by the responsibility of their employer. A strict binary divide would imply that the genuinely self-employed fall outside the scope of the regulations altogether. The genuinely self-employed would thus be free to take risks and organize their own work how they see fit. The starting point is therefore that platform workers are only covered if they are recognized as employees under the statutory acts for health and safety.

However, as the following discussions will show, health and safety regulations deviate from the binary divide in different ways. First, self-employed workers may

331. I.e. daily and weekly rest periods and working time for young workers.
332. As they are implemented in the Danish Working Hours Act.

themselves be responsible for complying with regulations concerning their own work. Second, self-employed workers may be *covered by the responsibilities of an employer*, when working or providing services for an employing entity. These types of extensions are explicitly stipulated in statutory provisions or follow from purposive interpretations of the scope of the relevant protective standards.

Whether and how workers operating as 'self-employed' but with an unclear employment status (e.g. platform workers) are protected therefore raises two main questions: Are platform workers (as self-employed) themselves responsible for compliance with (some) health and safety regulations? Are platform workers (as self-employed) covered by the responsibility of a principal (an employing entity)?

The various extensions and interpretations of health and safety regulations in the Nordics are complex and diverse. We aim to highlight some main aspects, and refer to the country reports Part 2 for more in-depth presentations of the national regulations. Our discussions follow one important difference: The regulations in Sweden, Finland and Norway clearly build on the binary divide (section 7.2.2) while regulations in Denmark and Iceland are not as clearly attached to the binary divide (section 7.2.3). The implications of being a platform worker across the Nordic countries are summarized (section 7.2.4).

7.2.2 Regulations building on the binary divide as a clear point of departure

In Sweden, Finland and Norway, the starting points are quite similar and clearly build on the binary divide.

The Swedish Working Environment Act applies to 'every activity in which employees perform work on behalf of an employer'.[333] The binary divide sets the starting point: The act is not extended to include 'dependent contractors', as in the context of collective bargaining. Being covered by health and safety protection therefore depends on classification as an employee, and the responsibility of employers mainly concerns their own employees.

In Finland, the main duties of health and safety are attached to the main statutory act on individual employment relations, and are further regulated by the Occupational Safety and Health Act. This act applies to work performed in an employment relationship, with reference to the general concept of an employment relationship. In Finland, the point of departure is also that the self-employed are not themselves obliged to comply with the act, and they are not covered by the responsibility of employers.

In Norway, the regulations on health and safety are integrated in the main statutory act, the Norwegian Working Environment Act. The general definitions of employer/employee found here therefore apply.[334] The act applies to 'undertakings that engage employees', and the responsibility to protect the employees rests on the employer. One-person undertakings fall outside the scope regardless of whether the self-employed worker is organized as a limited company (*aksjeselskap*) or by sole proprietorship (*enkeltmannsforetak*). As a point of departure, self-employed workers are not themselves obliged to comply with the act, and they are not covered by the responsibility of employers vis-à-vis employees.

333. The Swedish Working Environment Act chapter 1, 2 §.
334. The Norwegian Working Environment Act § 1-8 cf. in particular chapter 3–7. See further Country Report Norway Part 2 pp. 16–17.

Consequently, the main rule in Sweden, Finland and Norway is that platform workers operating as self-employed are *not* covered by health and safety regulations in any capacity. Clear and broad legal protection thus depends on recognition as employees. There are, however, important extensions in Sweden, Finland and Norway that to some extent dissolve the binary divide. Here, we focus on extensions with clear relevance for platform workers.[335]

Finland has some extensions with relevance for the protection of platform workers. There is a quite extensive list of other responsible entities that must comply with health and safety regulations in some situations. The most important one is the responsibility attached to a joint (shared) workplace where there are several responsible entities, among them self-employed workers (e.g. a construction site). However, these responsibilities are related to the safety of the shared workplace and the focus is on the cooperation and communication of different actors. The employers and self-employed have a general duty of concern (*omsorgsplikt*) at the joint workplace, which includes taking care that all necessary communication occurs and that all necessary information is shared. The main employer of the joint workplace has further responsibilities, including e.g. the coordination of the functions of different actors. Moreover, the responsibilities of the self-employed include the competence of employees, necessary permissions and minimum ages. The responsibilities furthermore include taking care of adequate work and personal protective equipment and other devices as well as the handling, storage and marking of dangerous substances.[336] The self-employed are also obliged to follow safety instructions given by the employer exercising the main authority at the joint workplace.

In Sweden, too, there are relevant extensions. First, self-employed workers are themselves responsible for compliance with certain regulations about technical arrangements and dangerous substances.[337] Second, employers have some duties vis-à-vis the self-employed. The so-called 'double or shared responsibility' is a duty to ensure a safe workplace for any person who works there, and to institute the safety measures required by this work.[338] This includes self-employed workers, when they are working at the premises of an employer. The Working Environment Act stipulates that the person who is in control of the workplace must also ensure that *permanent equipment* located in the workplace is safe to use, so that no persons who work there (including those who are self-employed) are exposed to risk, illness or accident.

In Norway, there are two explicit extensions with particular relevance for platform workers. First, a number of specific health and safety regulations 'apply correspondingly' to self-employed workers (one-person undertakings).[339] This implies that the self-employed him- or herself is obliged to comply with the standards as regards his or her own work. The extensions typically concern situations where risks for health and safety are elevated, or requirements set to reduce risks that are more serious than normal.[340] Both the genuinely self-employed and platform workers will

335. There are also a number of other extensions with less relevance for platform workers, such as inclusion of work by apprentices and students in connection with education, work by persons involved in employment measures or rehabilitation etc. We do not address extensions concerning agency work, as this is discussed in section 4.5.
336. The Finnish Occupational Health and Safety Act chapter 6 stipulates special situations, which include the provisions of joint workplace and provisions on joint construction sites.
337. The Swedish Working Environment Act chapter 3, 5 § (2).
338. The Swedish Working Environment Act chapter 3, 12 § (1) and (2). This also applies to agency work, where the user entity has responsibilities vis-à-vis the agency worker, see further in chapter 4.3.2.
339. Regulations pursuant to the Norwegian Working Environment Act § 1-4.
340. See further Hotvedt 2016 pp. 237–241.

be covered by these extensions, insofar as the relevant risks are present.

Second, the responsibility of the 'employer' to provide a safe and healthy working environment is extended to apply vis-à-vis other workers (i.e. not just employees) who perform tasks in connection with the employer's activities or installations.[341] The main duty is to ensure that the activities are arranged and performed in a manner that ensures 'a thoroughly sound working environment' for the workers. This extension clearly applies to platform workers as well as the genuinely self-employed, when performing work at the premises of an employer. In principle, both the platform company and the customers may be an 'employer' and responsible in this regard. The responsible party must however be an undertaking – a business engaging employees situated in Norway – for the duty to apply.[342]

These provisions are phrased with physical working environments in mind. An unresolved question is whether the duties apply to work *digitally* connected to a platform company.[343] It is therefore uncertain whether the extension provides any protection within the platform company–worker relation. Even if the extension applies, the protection is more uncertain than for traditional employees. The extended duty does not necessarily require compliance with *all* the specific provisions for regular employment relations. Thus, in comparison to traditional employees, there is a less sound legal basis for holding platform companies accountable for breach of specific health and safety requirements vis-à-vis self-employed platform workers.

In addition, extensions by interpretation might be possible in the health and safety context in Norway. The strong protective rationale underpinning these regulations *may* justify wider concepts of employee and employer. Earlier case law gives several examples of broad interpretations of the concept of employer (and employee) in the context of health and safety.[344] However, the explicit extensions of the current legislation mentioned above may have reduced the need for extensive interpretations in order to ensure health and safety.

7.2.3 Regulations not building on a binary divide as a clear point of departure

In Denmark and Iceland, the starting points are somewhat different and not as clearly attached to the binary divide.

The Danish Working Environment Act applies first of all to 'work performed for an employer'.[345] The scope is broader than the standard concept of employer. The work needs not be remunerated. The responsibility as 'employer' is allocated to the entity with the de facto competency and opportunity to ensure the safety of the work performed. A starting point is therefore that self-employed workers are covered *as employers* under the act and thus are responsible for complying with protective standards concerning their own work.[346]

Furthermore, the responsibilities of the 'employer' extends explicitly beyond the normal concept of employer. A specific number of duties to ensure a safe working

341. The Norwegian Working Environment Act § 2-2 (1) a.
342. Otherwise, the activity would fall outside the scope of the act altogether, cf. the Norwegian Working Environment Act § 1-2. See further Country Report Norway Part 2 pp. 17–19.
343. See further Marianne Jenum Hotvedt, "Arbeidsgiveransvar i formidlingsøkonomien. Tilfellet Uber, *Lov og rett* 2016 pp. 484–503.
344. See Supreme Court rulings Rt. 1982 s. 645, Rt. 1985 s. 941 and Rt. 1990 s. 419.
345. The Danish Working Environment Act § 2 (1).
346. The Danish Working Environment Act §§ 29 and 37.

environment are extended to any work, cf. § 2 (3) regardless of whether there is an employer under § 2 (1).[347] This extension of responsibilities for the working environment is de facto the starting point of the act. This means that any work performed – regardless of whether it is at the workplace of the principal or at another workplace, in public or private sectors, for commercial purposes or pro bono, during working time or leisure time, in a private home, by family members or invited guests – can be subject to duties under the working environment act. The duties to secure a safe and healthy working environment apply to *any* work performed *under the supervision and responsibility of* someone else. This broad starting point includes work by platform workers and the genuinely self-employed. The responsibility is allocated to the entity with the competency and opportunity to ensure the safety of the work performed, regardless of the employment status of the person performing the work. This is a result of the broad and purposive extension of the duties under the Working Environment Act specifically.[348] The duties that are extended to any work are most notably the overall duties to organize the work: cf. §§ 38 and 39, that work must be planned, organized and executed so that safety and health are satisfactorily protected. In addition, a number of specific duties are extended to any work.[349]

The Icelandic Working Environment Act covers all activities in which one or more persons are employed, whether they are owners of the enterprise or employees.[350] The activities of the self-employed – one-person undertakings – are therefore generally covered. The point of departure is that self-employed workers are responsible for compliance with health and safety regulations concerning their own work.

In addition, self-employed workers may be covered by the responsibility of other employing entities. In case law, the responsibility for health and safety regulation has been placed on other entities than the contractual employers, to protect workers who are not employees. This has been based on tort law reasoning. The statutory duty to work jointly toward a safe work environment when there are several employers taking part in the same activity has been interpreted as implying a duty on each employer to notify authorities independently about work accidents. Lack of notification has been used by the courts to establish negligence and responsibility in other work relations.

In both Denmark and Iceland, platform workers (as self-employed) are – as a point of departure – responsible for compliance with legal regulations concerning their own work, in line with the genuinely self-employed. Platform workers might also be covered by the responsibilities of the platform company as the employer entity.

347. The Danish Working Environment Act § 2 (3) extends specific duties to all work.
348. See section 3.3.4 and further Country Report Denmark Part 1 p. 23.
349. A number of more specific obligations are extended to any work performed: § 20 on the duty of several employers as well as anybody performing work at a workplace to cooperate in coordinating their work so as to ensure safe and healthy working conditions for everyone performing work; §§ 30-36 on the duties of persons delivering or handling machinery and technical equipment, installing or repairing technical equipment, delivering a technical project, offering services in bids on tenders, etc.; § 37 on the duties of entrepreneurs (*Bygherre*) for planning, delimiting and coordinating efforts to promote the health and safety of the employees; §§ 45-47 on handling technical equipment; §§ 48-49 c on the use of hazardous or toxic substances; and § 58 on working time regulations for any person performing road transportation, cf. the Danish Working Environment Act § 2 (3).
350. The Icelandic Working Environment Act § 2.

7.2.4 Summary of implications

The binary divide is present, but to a varying extent dissolved, in Nordic health and safety regulations.

The key concepts of employer and employee serve as important starting points, particularly in Sweden, Finland and Norway. Here, the main rule is that the genuinely self-employed fall outside the scope of the legal protection and are left to take care of their own health and safety. However, there are a number of extensions, whereby even the genuinely self-employed are covered by some health and safety standards. A clear and broad protection of health and safety at work for platform workers still depends on being classified as employees. In Denmark and Iceland, protection of health and safety at work applies more generally to self-employed workers, and therefore also to platform workers.

A first common trait is that platform workers (as self-employed) are responsible for complying with at least *some* protective standards concerning their own work. The main legal consequence is that the labour inspection authorities can supervise and control the compliance of the platform worker. Compliance may still not be ensured. For example, in Denmark, the enforcement of protective standards for self-employed workers is not a priority of the authorities.[351] In practical terms, the platform worker is still largely left to take care of his or her own health and safety.

A second common trait is that platform workers (as self-employed) are to some extent covered by the responsibility of employers when performing work on the premises of, or otherwise connected to, an employing entity. Still, this responsibility is less clear and often less specific than the responsibility vis-à-vis traditional employees.

The scope of application in Denmark – 'work performed for an employer' – combined with the purposive and wide interpretation of employer seems to provide the most general and comprehensive protection for platform workers vis-à-vis the platform company. In sum, the protection of platform workers (as self-employed) across the Nordics is still clearly weaker than for traditional employees.

Furthermore, even if recognized as employees, the protection of platform workers may be more uncertain than for traditional employees. The triangular structure of platform work may obscure the allocation of employer responsibility, and the lack of one defined physical workplace may affect the application and effectiveness of protective standards.

Consequently, we find these main implications for platform workers regarding the regulation of health and safety at work in the Nordic countries:

- In Sweden, Finland and Norway, clear and broad legal protection depends on recognition as an employee, as self-employed workers fall outside the scope of protection as a starting point, and are covered by various extensions only to a certain extent.
- In Denmark and Iceland, legal protection is less dependent on recognition as an employee, as self-employed workers are included in the scope of protection.
- In all countries, platform workers (as self-employed) are responsible for compliance with at least some protective standards concerning their own work.

351. It has been decided that 80 per cent of all inspections should be carried out in enterprises with at least one employee, and that the remaining inspections should be in undertakings chosen by random, see the political agreement here: https://www.ft.dk/samling/20141/almdel/liu/bilag/35/1514847.pdf.

- In all countries, platform workers (as self-employed) may at least to some extent be covered by the responsibility of employing entities.
- If recognized as employees, the protection of platform workers may be less certain than for traditional employees.
- The regulations in Denmark seem to provide the most adequate protection for platform workers.

7.3 Working time

7.3.1 Introduction and main issues

The statutory regulations on working time in the Nordic countries mainly aim to limit working hours, to ensure that these are satisfactory from a health and safety perspective. The health and safety aspects are closely related to the workers' interests regarding leisure time: time for family and time to pursue private interests. The statutory regulations mainly comprise the minimum requirements for daily breaks and rest periods, as well as some maximum limits in line with the requirements in the EU/EEA Directive on working time. The Directive applies to workers, and the concept of 'worker' has an autonomous meaning specific to EU law.[352]

However, some of the Nordic countries – Finland and Norway – have statutory regulations on normal working hours and overtime, including a right to overtime pay. In the other countries, these issues are regulated by collective agreements. As presented in section 7.1, the structure of the statutory regulations differs: In Norway and Iceland, working time is regulated by the Working Environment Acts. In Sweden and Finland, there are separate acts on working time. In Denmark, the Working Environment Act stipulates daily and weekly rest periods, while the Working Time Act implements the right to maximum weekly working hours, daily breaks, and restrictions on night work.

In all the Nordic countries, collective agreements play a key role in regulating working time: in particular, what constitutes full-time work, rights to daily breaks, daily and weekly resting periods, and all issues relating to remuneration for working hours and overtime.[353] The freedom of the social partners varies. In both Sweden and Denmark, the statutory working time regulations are semi-discretionary and can be derogated to the detriment of the worker by collective agreements on an industry level, as long as the minimum requirements in the Directive are upheld. In Finland and Norway, too, working hour regulations are to a large extent derogable by collective agreements on a central level. However, in Iceland, statutory minimum standards are mandatory and underogable.

Here, we concentrate on the *statutory limitations* on working time, focusing on two questions[354]: The first is whether platform workers are covered by statutory standards. This depends on their general scope and on whether relevant exemptions

352. Case law on the concept of 'worker' in other contexts of EU law guides the assessment of 'worker' in this Directive, see e.g. CJEU order in case 692/19 *Yodel Delivery Network*, EU:C:2020:288, where the CJEU referred to, amongst others, the ruling in the *FNV Kunsten* case.
353. See more on the role of collective agreements in chapter 2, and further on whether working time regulations can be derogated in section 2.3.
354. Whether regulations in collective agreements are relevant for platform workers depends on the scope of the collective bargaining mechanisms, discussed in chapter 6.

apply (section 7.3.2). Second, we address the significance of whether the platform company or the customer(s) are considered to be the employer(s) in this context. We only comment briefly on the allocation of employer responsibilities (section 7.3.3), before summarizing the implications of being a platform worker with an unclear employment status (section 7.3.4).

7.3.2 Personal scope

In all the Nordic countries, statutory working time limitations are clearly based on the binary divide. As a general rule, being covered depends on one's status as an employee: Traditional employees are clearly covered, while the genuinely self-employed fall outside the scope of protection. They are thus normally free to organize their own working time the way they want.

There are still some interesting nuances concerning personal scope. These nuances are a result of the different structures and scopes, combined with exemptions with varying relevance for platform workers.

The binary divide is quite clear in Sweden, Finland and Norway. Here, regulations on working time are governed by the general definitions of employer and employee. In Finland and Norway, the definitions are set in the general statutory framework for individual employment relations.[355] The general definitions also apply in Sweden, albeit in a separate Working Hours Act.[356] The traditional employees are covered, while the genuinely self-employed are not. As there are no extensions that include self-employed workers, the regulations only apply to platform workers when classified as employees.

Even if classified as employees, platform workers may be exempt. Both Sweden, Finland and Norway have exemptions for employees who can organize their own working time.

In Norway, the protection applies most broadly, as the exemption has the narrowest scope. Only employees in leading positions or positions with a high level of independence are exempt.[357] The latter exemption is only meant for employees who, although not in leading positions, have senior positions with specific responsibilities.[358] Flexible working hours is not sufficient: The employee must have a clear and obvious independence regarding both how tasks are organized and when tasks are performed. These requirements will only be fulfilled for some platform workers (as employees). No employees are totally exempt, although the detailed regulations do not apply. The general standard – that working time arrangements must be satisfactory from a health and safety perspective – applies to *all* employees.

In Sweden, the parallel exemptions appear to have a wider scope.[359] Employees who are entrusted to organize their own working time due to the nature of their duties are exempt. The same applies to employees who perform work under conditions in which the employer is not responsible for supervising the organization of the work. Although the exemptions are to be interpreted restrictively, they may well apply to

355. The Norwegian Working Environment Act and the Finnish Employment Contract Act.
356. The Swedish Working Hours Act 1 §.
357. The Norwegian Working Environment § 10-12 (1) and (2).
358. Government white paper Ot.prp. nr. 49 (2004–2005) p. 181.
359. The Swedish Working Hours Act 2 §. However, the act is semi-discretionary and a collective agreement at the industry level can replace the statutory regulations except for minimum regulations from EU law. Nearly all collective agreements have special regulations.

platform workers (as employees), depending on the circumstances. In contrast to Norway, the exemption is total when it applies.

Similarly, in Finland, the Working Hours Act does not apply to employees whose working hours are not defined in advance, who are not supervised and thus can decide the working hours themselves. This includes employees working at home or in conditions where it cannot be considered a duty of the employer to monitor the time spent on the work. It also includes work performed outside the employee's fixed worksite, when the work by nature or by the circumstances of its performance is so independent that the employer cannot be assumed to arrange or supervise the employee's working hours. There are exemptions concerning employees with a high level of independence and who work in leading positions or positions comparable to leading positions.[360] If the exemption applies, the total working hours act is inapplicable.[361]

Despite a clear binary divide in all three countries, platform workers (as employees) are better protected in Norway than in Sweden and Finland.

In Denmark and Iceland, the binary divide is by comparison less clear. Here, working time regulations are intertwined with regulations on health and safety at work. This dissolves the binary divide to some extent and affects the personal scope of working time regulations.

In Iceland, as described above, health and safety regulations include working time and apply to both employees and self-employed workers as a starting point. Platform workers are therefore apparently under an obligation to regulate their own working hours, regardless of employment status. However, there is a relevant exemption that narrows the scope of working time regulations considerably: senior managers and other persons who decide their own working hours fall outside the scope of working time rules altogether.[362] The latter exception is interpreted very broadly in a recent Supreme Court ruling.[363] According to this case law, platform workers – whether they are employees or genuinely self-employed – will not be covered by working time regulations unless someone else decides their working hours and they have no or limited control over when they work.

In Denmark, the scope of working time regulations is particularly complicated, as the regulations are set in *two* acts, with different scopes. The minimum requirements for daily and weekly rest periods set in the Working Environment Act apply to both employees and the self-employed and can be enforced by public authorities. However, the enforcement for the self-employed as employers is inefficient.[364] The restrictions on maximum working hours, daily breaks and night work set in the Working Hours Act only cover employees in a traditional sense, and are not enforced by a public authority.[365] There are no relevant exceptions set in statutory regulations.[366] Consequently, irrespective of their status, platform workers are

360. The Finnish Working Hours Act § 2.
361. It is possible, however, that different tasks performed by the same person are treated differently. For example, for an employee who works partially at the workplace and partially from home, the act may apply only to the work performed at the workplace.
362. The Icelandic Working Environment Act § 52a.
363. Supreme Court ruling 27/2019.
364. Country Report Denmark Part 1 pp. 23–24 cf. the Danish Working Environment Act § 2, cf. preliminary works at https://www.ft.dk/samling/20141/almdel/liu/bilag/35/1514847.pdf. The Danish Working Environment Authority may monitor and enforce compliance, but in practice, there is a lack of efficiency.
365. The exception in the Working Time Directive Article 17 is not implemented in the Danish Working Time Act. See also Country Report Denmark Part 1 p. 6 and Country Report Denmark Part 2 p. 24, cf. The Danish Working Hours Act § 1.
366. The exception for persons organizing their own working time is, however, found in some collective agreements, implementing provisions of Directive 2003/88/EC. The Working Time Act does not apply to certain mobile

entitled to daily and weekly rest periods (and to the specific limitations on working time for young workers) as set out in the Working Environment Act; the limitations on weekly working time and the right to daily breaks and protection of night work, on the other hand, depend on an assessment of the employment status of the platform worker.

Although the binary divide is to some extent dissolved in both Iceland and Denmark, the scopes of the working time regulations are rather different: In Denmark, a divide still remains with regard to maximum weekly working hours and daily breaks, as these regulations only cover platform workers recognized as employees. In Iceland, the divide has little impact, as most platform workers will be exempt regardless of employment status.

7.3.3 Allocation of employer responsibilities

If platform workers are classified as employees, the duty to comply with working time regulations rests on the employer in all the Nordic countries. In this context, it is significant as to whether the employer is the platform company or the customers. The limitations on working hours only apply to work for *one* employer. If a number of customers are considered as the employers, the total work of the platform worker may exceed the protective standards. Effective protection for platform workers therefore depends on the platform company being the employer. Otherwise, the protection will in practice be inferior to the protection of traditional employees. If the customers are regarded as the employers, this would in reality leave the platform worker in a very vulnerable position.

In Denmark, the same challenge would exist whether the platform company or the customer is viewed as the employer under the broad concept of employer in the Working Environment Act. Some responsibilities can be shifted from one to the other, depending on who has the opportunity and means to ensure a safe and healthy environment. Contrarily, the responsibility for maximum weekly working hours in the Working Hours Act is *not* shared across several employers: An employer is not responsible for registering working hours performed for other employers. The maximum weekly working time thus in reality applies *per employer*.

7.3.4 Summary of implications

Statutory working time regulations clearly build on the binary divide in most, but not all, of the Nordic countries.

In Finland, Sweden and Norway, the general concepts of employer and employee define the scope. Traditional employees are clearly covered, while the genuinely self-employed are free to organize their own working time. For platform workers to be protected by working time regulations, this therefore depends on being recognized as employees. Still, platform workers (as employees) risk being excluded due to exemptions for employees who organize their own working time. These exemptions are broader in Sweden and Finland than in Norway. Platform workers therefore seem to be better protected in Norway than in the other two countries.

In Iceland and Denmark, the binary divide is to some extent dissolved, and the scope of working time regulations may include self-employed workers. Platform workers

workers, and there is an (unused) legal basis for further exceptions by executive order.

are still not protected on an equal basis with traditional employees. In Iceland, platform workers will be exempt regardless of employment status, insofar as they can organize their own working hours. In Denmark, daily and weekly rest periods apply to all employers, including the self-employed and thus platform workers (as self-employed). Maximum weekly working hours and the right to daily breaks still depend on the classification as employees.

When platform workers are recognized as employees, working time regulations apply *per employer*. If the customer is considered the employer under the working time regulations, there will de facto be little effect on the maximum working time of platform workers. Effective protection therefore depends on the platform company being the employer.

In sum, the protection of platform workers, whether classified as employees or as genuinely self-employed, is clearly weaker than for traditional employees.

Based on these discussions, we highlight some main implications for platform workers concerning working time regulations in the Nordic countries:

- Platform workers will typically not be covered by regulations on working time in collective agreements.
- In Sweden, Finland and Norway, statutory protection for platform workers depends on recognition as an employee, but may still not apply due to exemptions. As the exemptions have varying scopes, platform workers are better protected in Norway than in Finland and Sweden.
- In Denmark, daily and weekly rest periods apply to platform workers (as self-employed), while maximum weekly work hours and daily breaks depend on classification as employee.
- In Iceland, platform workers are exempt from statutory protection regardless of employment status, insofar as they can organize their own working hours.
- If recognized as employees, effective protection of platform workers depends on the platform company being regarded as the employer.

7.4 Paid annual leave

The right to paid annual leave is not just aimed at protecting the economic interests of workers. There is also a health and safety purpose parallel to that in the working time limitations: The workers' need for leisure time – time for family and time to pursue private interests – is connected to health and safety. The right to pay enables the worker to actually take leave, and is thus also related to health and safety in this broader sense. The right to paid annual leave, as expressed in the Charter of Fundamental Rights Article 31 (2), is considered a general principle of EU law and can be given direct horizontal effect.[367]

Despite a health and safety purpose, the right to paid annual leave is considered a private law entitlement in most Nordic countries and is left to be enforced in the courts by the individual worker.[368] Only in Finland can the Labour Inspection Authority enforce compliance.

367. CJEU ruling in case C-569/16 *Bauer*, EU:C:2018:871.
368. See further in the introduction to section 7.1.

The details of the regulations vary substantively, for example the extent to which the statutory rules may be derogated by collective agreements. One difference is of a principle nature: whether the right to leave can be exchanged for money in the individual contract. This has particular relevance for platform workers, as some platform company contracts provide extra payments for 'social expenses' on top of their earnings. We therefore comment on this, but otherwise focus on the scope and allocation of responsibility.

The right to paid annual leave is clearly based on the binary divide in all the Nordics. The statutory right and the corresponding duties are related to the employment contract: Only employees are covered, and the employer is responsible to fulfil this right (both ensuring the annual leave and providing the pay).

Consequently, the genuinely self-employed are not covered and must themselves consider the need for a longer period of leave and rely on savings etc. to replace a lack of income. None of the Nordic countries have provisions extending the scope of this right to the genuinely self-employed. For platform workers, the right to paid annual leave therefore depends on being classified as employees.

However, in Denmark, the new Holiday Act represents a shift in how to classify non-standard employees.[369] This is likely to affect – i.e. clarify and perhaps expand – the personal scope of the act. The preparatory works include a careful discussion of the scope, the concept of employee, and how to apply the act to workers in non-standard employment and new labour relations, such as platform work.[370] As these groups of workers are heterogeneous, difficult to define and likely to keep developing, a new approach to the assessment of employee status has been introduced. The protective purpose of the Holiday Act is considered to create a *presumption* of employee status. This status may then be rebutted by proof of genuine self-employment:

... for self-employed (who are not employees), freelancers, external consultants and fee-earners, it will be a specific and individual assessment in each case. It corresponds best with the protective purposes of the Act, that status as employee is only lost when there is a basis for constituting independence in the performance of work for another person. Decisive is, whether the person in reality is self-employed.[371]

This presumption of employee status as a starting point represents a significant shift in the interpretation and application of the concept of employee. The effect is that only the truly 'independent' service-providers – the *genuinely* self-employed – are excluded from the scope. Workers with an unclear employment status are thus more likely to be covered. This indicates that the focus is no longer on discussing whether or not the worker is an employee, but rather on discussing whether the work in reality is performed as genuine self-employment. How the courts respond to this shift is still unknown, as the act only entered into force on 1 September 2020.

The responsibility for paid annual leave rests on the employer, as a consequence of the binary divide. In line with the dominating private law approach, the duty rests on the contractual employer as a clear main rule in all the Nordic countries. Whether the platform company can be held responsible for paid annual leave for a platform worker depends on whether the platform company–worker relation is a contract of

369. The new Holiday Act no. 60 of 30 January 2019. The act enters into force in September 2020.
370. Preliminary works for Proposal LF 116, FT 2017/18, of the new Holiday Act, section 2.2. pp. 15 and 39, available at https://www.ft.dk/ripdf/samling/20171/lovforslag/l116/20171_l116_som_fremsat.pdf.
371. *Ibid*. In Danish, fee earners are *honorar-lønnede*.

employment.

Only Norway has an explicit extension of employer responsibilities concerning the duty to provide holiday pay. There is a legal basis for joint liability (*solidaransvar*) for wages etc. for the user entity in the context of agency work, and this includes holiday pay.[372] There is also joint liability for contractors according to the Extension Act for wages, holiday pay etc. pursuant to public law regulations on minimum terms (*allmenngjøringsforskrifter*).[373]

In most Nordic countries, the right to leave cannot be exchanged for money in the individual contract. In Denmark, for example, case law clearly shows that employers cannot discharge their duty to pay annual leave periods by other payment arrangements with the employee.[374] This is related to the purpose of the Holiday Act, which is not economic but is meant to ensure that employees take annual leave to engage in leisure and recreational activities. For platform workers covered by the act, this means that they cannot waive their right to paid holidays in exchange for extra payments for 'social expenses'. Such extra payments would not free the platform company from being obliged to pay for the accrued holidays of the workers.

Neither Norway nor Iceland allow the employee to refrain from holiday leave in exchange for extra pay.[375] In Norway, the right to leave and the right to pay are regulated by separate provisions. The employee is entitled to leave although a right to pay might not have been earned.[376]

In Finland, the employee is entitled to holiday allowance instead of paid leave in two instances. If the employment ends before the leave is taken, the employee is paid an allowance when the employment ends.[377] Holiday allowance is also paid when the employee has worked fewer than 14 days or 35 hours per month. In these cases, the employee does not have the right to paid annual leave. Instead, the employee is entitled to have two days off for every month that he has worked.[378] This provision guarantees the right to have those days off, but the allowance is paid regardless of whether the right is used.

However, in Sweden, the employee may waive the right to annual leave if the period of employment is less than three months, and is instead entitled to holiday allowance (*semesterersättning*).[379] This will typically apply to platform workers (as employees), as employment will often be short-term.

To summarize, the right to paid annual leave clearly builds on the binary divide in all the Nordic countries, and platform workers are only covered if recognized as employees. However, the shift in the assessment of employee status in the new Danish Holiday Act implies that platform workers are more likely to be covered in Denmark than in the other Nordics. An interesting difference is that the right is subject to public enforcement in Finland. This could lead to more effective protection

372. The Norwegian Working Environment Act § 14-12c, see further in section 4.3.
373. The Norwegian Extension Act § 13 (1), see further section 2.3 and 3.4.4.
374. O. Hasselbalch, *Den Danske Arbejdsret*, Arbejdsretsportalen, online, section XIX, 3.3.1 and 3.9.
375. There are, however, some special provisions on *when* to disburse the pay, for example if the employment ends before leave has been taken.
376. The employee is entitled to full leave (25 days) if the work is acceded by 30 September, and to a reduced leave (6 days) if the work is acceded later, but only so far as the leave is not taken at the previous employment(s), cf. the Norwegian Holiday Act § 5 (3). Holiday pay is earned and disbursed according to §§ 10 and 11.
377. The Finnish Annual Holidays Act § 17. This means that the allowance replaces the paid leave if the employee has not had a chance to take it.
378. The Finnish Annual Holidays Act §§ 8, 16 and 19.
379. The Swedish Annual Leave Act 5 §. This means that the employee is paid an additional 12 per cent of the total pay from the employment when the employment ends.

of platform workers here, but only if they are recognized as employees. There is more freedom to exchange annual leave for money in Sweden and Finland, compared to Denmark, Norway and Iceland. This may represent a particular risk to the health and safety interests of platform workers in these countries.

We find these main implications concerning the right to paid annual leave for platform workers in the Nordics:

- The right to paid annual leave for platform workers depends on recognition as an employee.
- A new legislative 'presumption' of employee status in Denmark is likely to ease the classification of platform workers here compared to in the other countries.
- The responsible party is the contractual employer as a clear main rule; only Norway has statutory extensions resulting in joint liability for holiday pay in certain contexts.
- There are some possibilities to exchange annual leave for money in Sweden, but not in Denmark, Finland, Norway and Iceland.
- The right to paid annual leave must be enforced by the individual worker in all countries except Finland, where Labour Inspection Authorities can enforce compliance.

7.5 Conclusions

Regulations in the Nordic countries aimed at protecting the health and safety of workers are mainly structured as duties for employers to protect employees and are thus based on the binary divide.

Regulations on health and safety at work, working time and paid annual leave provide a comprehensive and detailed protection of health and safety for traditional employees, while the legal protection does *not* generally apply to the genuinely self-employed. Clear and predictable legal protection of the health and productivity of platform workers and other workers with an unclear employment status therefore depends on the recognition as employees.

The binary divide is, however, dissolved to a considerably degree by a number of extensions, exceptions and practices that affect the personal scope and allocation of responsibilities. There are significant differences both between the Nordic countries and between the three sets of norms.

In all the Nordic countries, the regulations provide *some* basic protection of self-employed, and – consequently – some basic protection of platform workers irrespective of employee status. These extensions mainly concern health and safety regulations, not working time or paid annual leave. The extensions, however, are patchy and leave considerable uncertainty as to the scope and level of protection. The typical characteristics of platform work – such as digital connection to the platform and a number of private customers – seem to enhance uncertainty. Only Denmark and Iceland have extended working time regulations, and these have limited significance: Only some standards apply to self-employed workers in Denmark, and the Icelandic regulations do not apply to workers in control of their own working hours. None of the Nordic countries extend the right to paid annual leave to the genuinely self-employed. However, a presumption of employee status in

the new Danish Holiday Act is a significant shift: It provides a clearer guide for the assessment of workers with an unclear employment status, and may broaden the concept of employee to include more workers in the grey area, and thus extend the scope of protection to persons in non-standard work.

In sum, the regulations seem to provide better protection for workers with an unclear employment status in Denmark and Norway compared to the other countries. Denmark not only has the health and safety regulations with the broadest scope, but its working time regulations are also partly extended to self-employed workers. In addition, the new Danish Holiday Act may lead to a broader application of the concept of employee. Norway has a number of explicit extensions in its regulations on health and safety at work and narrow exemptions from working time regulations, and is the only country with some extensions of the duty to provide holiday pay.

The discussions above have also revealed potential gaps in the protection of platform workers, even when recognized as employees. Especially with regard to working time, platform workers risk falling outside the scope of protective standards. The risks vary depending on the national exceptions. Iceland, in particular, but also Sweden and Finland, have broad exceptions that may often apply to platform workers. In Denmark and Norway, on the other hand, the statutory protection will apply to all or most platform workers if they are recognized as employees. Here, a pitfall may instead be that the working time regulation applies only *per employer*, which is a problem for platform workers potentially working for more than one employer.

Despite all these differences and variations, the extensions reveal a somewhat broader protective rationale: Protecting the health and safety of workers justifies some basic protection, irrespective of employment status.

However, this broader protective rationale is not consistently expressed. For example, it is not obvious why there are several extensions concerning health and safety at work and none on working time, as in Norway, when both regulations aim to protect the health and safety of workers and ensure the same protective standard. A pressing question is whether the shift in approach to the concept of employee in the Danish Holiday Act might well be applied in other labour law regulations with a similar protective purpose, e.g. health and safety at work, social or economic standing or non-discrimination.

Furthermore, a broader protective rationale needs to be reflected in enforcement mechanisms and practices to provide effective protection. The Danish situation illustrates that enforcement practices may follow the binary divide even if the protective standards have a wider scope. The Working Environment Authority in Denmark barely controls and enforces protective standards in self-employed enterprises. The Finnish situation, on the other hand, illustrates a wider potential for enforcement by public authorities: Although the right to paid annual leave is perceived as contractually based in most countries, it is subject to public enforcement in Finland.

The enforcement mechanisms for health and safety protection more generally are clearly linked to the binary divide. As described in section 7.1, internal supervision and control in *cooperation with employees' representatives* is the primary enforcement mechanism in all the Nordic countries. An enforcement regime in which employee

representation at the workplace plays a vital role is vulnerable to new labour relations. Traditional employees are covered and there are mechanisms to voice their concerns on health and safety issues. Platform workers (as self-employed) will generally *not* be represented, and the lack of a traditional physical workplace managed by the principal (the platform company) can be a further obstacle. This represents a significant risk that the concerns of platform workers will not be heard, and non-compliance not addressed, even when platform workers – based on a proper legal assessment – should be classified as employees or otherwise covered by the protective standards.

In sum, we find these to be the main implications of having an unclear employment status as regards the legal protection of health and safety in the Nordic countries:

- The workers are covered by broad legal protection of health and safety – regulating health and safety at work, working time and paid annual leave – only if they are recognized as employees. Both an unresolved employment status and legal uncertainty hinder effective protection.
- The workers are covered by some health and safety protection regardless of employment status in all countries, but the scope and level of protection vary considerably. The protection of health and safety at work applies more broadly than working time regulations and paid annual leave.
- For workers recognized as employees, there are gaps in the legal protection, particularly concerning working time, where exemptions may often apply.
- As workers are covered by some protective standards regardless of employment status, the protective rationale for the health and safety of workers overruns the binary divide.

8 Income protection when out of work

8.1 Introduction, common features and legislative basis

The Nordic social models are based on a close link between the labour and welfare models. Despite differences in structure and financing, the welfare models are founded on similar principles. They are built on universalistic principles, protecting citizens against income losses as well as providing the basis for high labour market participation and mobility.[380]

A central aspect of social security is thus to provide income for individuals who are out of work. We have chosen to focus on workers' rights to benefits related to *unemployment*, *parental leave*, *sickness*, *injury* and *retirement/old age*. We only discuss benefits *specifically* related to these situations. General social assistance benefits (*social bistand/sosialhjälp* etc.) are not addressed.

The aim of the discussion in this chapter is to shed light on how an unclear employment status affects income protection when out of work. In our groundwork, we mapped and discussed whether and how the respective benefits in each of the Nordic countries apply to the three categories of workers in our typology: the traditional employee, the genuinely self-employed and the platform worker.

There are three main steps in this analysis. First, one must consider *what legal categories of workers are covered* by the relevant benefit. Legal classification as an employee is a requirement for some benefits, while others also apply to self-employed workers or apply irrespective of employment status. There might also be intermediary categories.

Furthermore, the right to a benefit is often conditioned upon requirements of previous work activity etc. These might be easier to fulfil for a traditional employee and/or a genuinely self-employed worker than for a platform worker, for example due to the occasional nature of the latter's work. It is therefore vital to discuss the *eligibility criteria* and how these affect platform workers' possibilities to qualify for benefits. The criteria *related to labour market activity* are particularly relevant in this context.

The level of the benefit is of course essential for the individual worker, and this makes *calculation principles* relevant. Our main interest, however, is not the level of the benefit. When comparing the protection of platform workers to that of traditional employees and the genuinely self-employed, the question is instead whether the calculation principles lead to a benefit that reflects the *actual labour market activity* of a platform worker on an equal basis as the other categories.

In simple terms, this chapter aims to identify the pitfalls and gaps in the protection of platform workers: the categorizations, criteria and/or calculation principles that leave platform workers at a particular risk of having no or relatively lower income protection when out of work.

The systems of social security in the Nordic countries share some common features.

380. J.E. Dølvik, *Grunnpilarene i de nordiske modellene*, Fafo report 2013:13, 2013.

All the countries have specific rights-based benefits for all the above-mentioned situations of being out of work. The statutory framework of social security provides a basic level of benefits. There are supplementing rights and insurance schemes based on both statutory legislation and collective agreements. Here, however, the focus is on *benefits based on statutory regulations*. Supplementing schemes and the role of collective agreements will only be briefly described in relation to each type of benefit.[381]

The statutory social security systems in the Nordics are financed partly by the state and partly by mandatory contributions from labour market participants. The financing models vary considerably, not just between the Nordic countries but also within the countries. Only Norway has *one* model of national insurance covering a basic level of all the benefits discussed here.[382] In the other countries, the financing model varies between benefits. Both Denmark and Sweden have separate models for financing unemployment benefits.[383] Finland has a more complex model for financing unemployment benefits, as well as special pension funds. The financing model in Iceland includes different funds for unemployment benefits and parental leave, separate pension funds and yet another model for benefits related to sickness.

The statutory frameworks in the Nordics are substantially different both in structure and substance. The structure is rather complex and varies from the more unified (Norway) to the more fragmented (Denmark and Iceland), with Sweden and Finland falling in between. All countries have supplementing rights and insurance schemes in some areas regulated by separate acts, for example occupational benefits or insurance supplementing the statutory benefits related to sickness. This adds another level to the legislative structure for some benefits. The statutory frameworks are best presented in a table, see below.[384]

381. Whether supplementary schemes in collective agreements are relevant for platform workers depends on the scope of the collective bargaining mechanisms, discussed in chapter 6.
382. The Norwegian National Insurance system is partly financed by employers' tax (*arbeidsgiveravgift*) and national insurance tax (*trygdeavgift*), cf. the National Insurance Act, 28 February 28, 1997 no. 19 (Lov om folketrygd) § 23-1. Deficits are covered by transfers of public funds in the national budget.
383. See further in section 8.3.2.
384. The table does not include acts or schemes for particular groups of workers, such as public servants, seafarers etc.

Table 4: Statutory framework for benefits when out of work

Country	Benefit			
	Unemployment	**Sickness and injury**	**Parental leave**	**Retirement and old age**
Denmark	The Act on Unemployment Insurance (no. 199 of 11 March 2020)	The Act on Sick Leave Benefits (no. 68 of 25 January 2019)*	The Act on Entitlement to Leave and Benefits in the Event of Childbirth (no. 106 of 2 February 2020)	The Act on Social Pensions (no. 983 of 23 September 2019)
	The Act on an Active Social Policy (no. 981 of 23 September 2019	The Workers Compensation Act no. 977 of 9 September 2019)		
Finland	The Health Insurance Act (2004/1224): Basic benefits			The National Pensions Act (2007/568)
				The Guaranteed Pensions Act (2010/703)
	The Unemployment Security Act (2002/1290)	The Employment Accidents and Occupational Illness Insurance Act (2015/459)		The Entrepreneur's Pensions Act (2006/1272)
Iceland	The Unemployment Insurance Act (54/2006)	The Health Insurance Act (112/2008)	The Act on Maternity, Paternity and Parental Leave (95/2000)	The Social Security Act (100/2007)
		The Act on Respecting Labourers' Right to Advance Notice of Termination of Employment and to Wages on Account of Absence through Illness and Accidents (19/1979)		The Act on Mandatory Pension Insurance and on the Activities of Pension Funds (129/1997)
Norway	The National Insurance Act (NIA) (28 February 1997 no. 19): Basic benefits			
		The Work Injury Insurance Act (16 June 1989 no. 65)		The Mandatory Occupational Pension Act (12 December 2013 no. 106)
Sweden	The Unemployment Insurance Act (1997:238) and Unemployment Funds Act (1997:239)	The Social Insurance Code (SIC) (2010:110): Basic benefits		
		The Sickpay Act (1991:1047)		

**The Danish Act on Salaried Employees § 5 gives a right to full pay during sickness to employees covered by this act.*

As the relevant statutory regulations are very detailed and complex in each of the Nordic countries, the country reports are not fully parallel in all aspects.[385] The following discussions are therefore not strictly comparative: This chapter is instead a summary and discussion of the main risks and pitfalls identified in the country reports.[386]

Further in this chapter, we will first present the relevant legal categories of workers and discuss the classification of platform workers in the different Nordic countries (section 8.2). The following discussions are structured according to the type of benefit: unemployment (section 8.3), sickness and injury (section 8.4), parental leave (section 8.5), and retirement and old age (section 8.6). Lastly, in section 8.7, some conclusions and comparative perspectives will be suggested.

Some starting points for the discussion of income protection when out of work:

- The statutory frameworks of social security provide a basic level of benefits when out of work, financed partly by the state and partly by mandatory contributions from labour market participants.
- Social security legislation is more unified in Norway, while more fragmented in Denmark and Iceland, with Sweden and Finland in the middle.
- The statutory basic benefits are supplemented by rights and insurance schemes based on specific statutory legislation and collective agreements.
- The role of collective agreements varies between countries and for the different benefits.

8.2 Legal categories of workers

As an introduction to the discussions of each type of benefit, it is necessary to clarify the relevant legal categories of workers in the context of social security in the Nordic countries.

Most of the Nordic countries build on the binary divide, as there are *two main legal categories of workers* in the legal framework: employees and self-employed workers. However, the divide does not have a defining and delimiting function in social security law as in labour law: Some benefits apply to both categories, while some apply to employees only. Still, the criteria for being eligible and the calculation principles are often differentiated for the two categories. As the discussions will show, the significance of the divide varies considerably between the Nordic countries and also between the different benefits.

Norway seems like an exception, as Norwegian social security benefits are differentiated for *three categories of workers*: employee, freelancer and self-employed.[387] The concept of employee is defined slightly different than in the labour law context, as anyone who performs work in the service of another for remuneration.[388] A self-employed worker is anyone who runs a continuing operation

385. As indicated in the Introduction Paper, the country rapporteurs had considerable discretion as to which aspects of the regulations to highlight and discuss further, see Hotvedt/Munkholm 2019 pp. 7 and 20–22.
386. For a more detailed discussion of the relevant benefits and the overall social security system in each country, see the country reports Part 2.
387. The categories are defined in the Norwegian National Insurance Act § 1-8, § 1-9 and § 1-10.
388. Remuneration is not an explicit requirement in the definitions in Norwegian labour law legislations, see section 3.3.

or undertaking 'at own account', suitable for providing a net income.[389] A freelancer is an intermediary and *residual* category: anyone who performs work or a service for remuneration, while not being in the service of another and not being self-employed.[390] The three categories are thus clearly related to the binary divide: Employees work in the service of another, while freelancers and self-employed do not. Due to the close connection between social security benefits and tax-related duties, the definitions are relevant both for social security and a number of tax law provisions.[391] In the social security context, the regulations mainly draw a line according to the binary divide: between employees on the one hand and freelancers and self-employed workers on the other hand. Only some regulations differentiate between freelancers and self-employed workers.[392] Norwegian social security law is therefore still based on the binary divide to a large extent, although it is not as clear-cut as in the other countries.

The legal categories of employee and self-employed in the Nordic social security context may seem to correspond with the binary divide in the labour law context. There are, however, a number of nuances. The relevant definitions in social security may for example differ slightly from the labour law context, as in both Sweden and Norway.[393] In Denmark, there is a difference in unemployment insurance specifically, which builds on the categorization in tax law.[394] Even if the categories are aligned with the labour law concepts, nuances might occur due to the flexible and sometimes purposive nature of the concepts of employee.[395]

Consequently, it is not possible to determine on a general level which category the platform workers belong to in the Nordic countries. The assessment is to some extent differentiated in the relevant legal rules in each country. The assessment of employee status more generally depends on the realities and will vary with the different platform models and other circumstances.

A worker may therefore be an employee in the context of labour law regulations, and at the same time be legally classified as self-employed as regards the social security benefits discussed here. This has a particular relevance for platform workers and other workers with an unclear employment status. It is for example possible to be recognized as an employee in the context of health and safety and/or collective bargaining, and still be considered a genuinely self-employed worker in matters of social security.[396] On the other hand, a worker who is considered self-employed in labour law regulations may also be legally recognized as an employee in the social security context. The significance of these nuances varies between the Nordic countries.

In Finland and Iceland, the binary divide is clearly present in the social security context. There are two categories of workers, employed and self-employed. The

389. The definition in the Norwegian National Insurance Act § 1-10 includes a list of criteria to be assessed when deciding whether someone is self-employed.
390. Anyone who is neither an employee nor self-employed is a freelancer, even if this characterization may seem strained, see Supreme Court ruling HR-2016-589-A (para. 42), where the mayor in a municipality was considered to be a freelancer in the context of sickness pay.
391. The distinctive definitions are one reason why the concept of employee is slightly different in a tax/social security context than in a labour law context, see further Country Report Norway Part 1 pp. 7 and 11.
392. In the tax context, the main dividing line is between employees/freelancers and self-employed workers, for example the statutory obligation for the employer to pay payroll tax (and deduct income tax) applies to the salaries of both employees and freelancers, cf. the Norwegian National Insurance Act § 23-2, see also the Tax Payment Act, 17 June 2005 no. 67 (Lov om betaling av skatte- og avgiftskrav) § 5-4.
393. The definitions in Norway are presented above. The Swedish Social Insurance Code chapter 6, 2 § defines the employee as anyone who has an income from employment, see also section 3.3.2.
394. The Act on Unemployment Insurance, no. 199 of 11 March 2020 (Arbejdsløshedsforsikringsloven) §57a.
395. The concepts of employee are discussed on section 3.3.
396. The Labour Court ruling ARD 1991 s. 140 from Norway is one illustration.

classification in the field of social security does not seem to differ substantially from that in labour law.

In Iceland, the legal definitions are all very similar or the same. Those who are self-employed will generally be defined in the same way. In Finland, the self-employed are categorized as belonging to the category of 'entrepreneurs'. The pension scheme that applies to self-employed workers is the same as the one that applies to the owners of small businesses that work in a managerial position regardless of the juridical form of the company. Furthermore, the categorization of self-employed workers as 'employed at their own' often leads to rejecting the right to unemployment benefits regardless of the actual need for subsidies while out of work.

In Sweden and Norway, on the other hand, there are some significant differences in the classification in social security law compared to in labour law.

In Norway, one-person undertakings fall outside the scope of most labour law regulations, regardless of how the undertaking is formally organized.[397] However in the social security context, the formal arrangement has relevance and may be decisive. If the undertaking is a limited company (*aksjeselskap*) and the person works under a formal contract of employment, the worker may generally be recognized as an employee in the context of social security even though the person is also the sole owner.[398] Workers in other types of one-person undertakings (*enkeltmannsforetak* etc.) will at the outset be considered to be self-employed, while workers who are neither employed nor a registered undertaking will typically belong to the residual category—freelancers. The courts still assess the reality of the work relation and may reclassify it in cases concerning social security (and tax) law.[399]

Similarly, in Sweden, workers operating a close company (*fåmansaktiebolag*) are, from a social security perspective, employees in their own company. The close company must thus be separated from workers operating a company as a simple partnership (*enskild firma*), trading partnership (*handelsbolag*) or limited partnership (*kommanditbolag*), who are self-employed. Workers with no business registration whatsoever are referred to as assignment workers, but this is not a legal category as in Norway. In Sweden, assignment workers are normally classified as self-employed in social security law.

In our typology, the platform worker may have a registered business, but is unlikely to have a limited company and contract of employment with his or her own company.[400] In Sweden and Norway, platform workers are therefore more likely to be treated as self-employed (by the relevant authorities and by the platform companies) in social security law than in a labour law context. However, in Norway, platform workers with no business registration whatsoever will likely be treated as freelancers.

In Denmark, the classification may vary *within* the field of social security. The legal framework is rather fragmented, and the classification depends on the specific regulation in question. There is not one overall classification across the regulations. The rules on sick leave benefits and maternity leave/parental leave benefits are alike

397. The Norwegian Working Environment Act § 1-2. However, a number of provisions, particularly on health and safety and discrimination, are extended to cover self-employed workers, see section 3.4.4 and 7.2.
398. See further Country Report Norway Part 2 p. 25.
399. E.g. Supreme Court rulings Rt. 1985 s. 644, Rt. 1994 s. 1064, Rt. 2000 s. 198 and Rt. 2002 s. 996.
400.See further on the typology in section 5.1.

and based on objective criteria, but are ultimately aligned with the assessment in labour law. The rules on unemployment benefits on the other hand are considerably more adaptable to changes in employment status as the result of an amendment in 2017, shifting the focus from the *employment status* of a person to the *work activities* of a person.[401] When deciding if working hours count as employment or self-employment, the assessment is aligned with that of tax law.

Consequently, in Denmark, the classification of platform workers may vary for the different benefits. All platform workers (as self-employed) are required to register as a business with the Central Business Register (*CVR-registret*). Sole proprietorships (one-person operations) can be registered via a simple online declaration of information on the website of the Danish Business Authority without any test of the business substance. Having registered as a business and having a business registration number (*CVR-nummer*) is an indication that one is self-employed and creates this natural assumption; however, as it is a formal requirement for everyone, regardless of the circumstances, it is in itself not decisive. Still, in the administrative systems, platform workers have thus far been treated as self-employed workers based on this presumption.

The following discussions are based on the above assumptions. The categorization of workers can be summarized as follows:

- The frameworks of social security are influenced by the binary divide, by categorizing workers as either employees or genuinely self-employed; only Norway has a third and residual category (freelancers).
- Platform workers cannot be classified generally as employees or as genuinely self-employed; however, in all the Nordics, they are most likely to be treated as self-employed (or as freelancers in Norway).
- The right to a benefit does not necessarily depend on being an employee, but the criteria for eligibility and the calculation principles are most generally differentiated for each of the categories.
- The classification of workers in social security does not fully correspond with the classification in labour law. In Finland and Iceland, there are no notable differences. In Sweden and Norway, the formal set-up can lead to diverging classifications in the two contexts. In Denmark, the classification may vary within the field of social security.

8.3 Unemployment benefits

8.3.1 Introduction and categorizations

All the Nordic countries have specific benefits providing income protection to unemployed workers. The systems of unemployment benefits are, however, distinctively different in the Nordic countries.

Sweden, Denmark and Finland have unemployment benefits conditioned upon membership in separate unemployment funds administered by trade unions. In Sweden, the funds are the sole source of unemployment benefits. In Denmark, the unemployment funds are the primary source, as more than 70 per cent of employees

401. See further in section 8.3.

are members.[402] An alternative statutory basic social assistance scheme is available to non-members. In Finland, the unemployment funds are a more integrated part of the statutory system of benefits. The unemployment benefits in all three countries cover both employees and the self-employed, at least to some extent.

In Norway and Iceland, the unemployment benefits are part of the general system of social security, and are *not* conditioned upon memberships in separate funds. In Iceland, both employees and self-employed workers are covered by these benefits. Platform workers are therefore covered irrespective of employment status, similar to in Sweden, Denmark and Finland. Norway stands out, as the unemployment benefit covers employees and freelancers, but not self-employed workers.[403] Hence, platform workers with a registered business risk falling outside the system of income protection due to unemployment in Norway.[404]

Despite these structural differences, all the Nordic countries set requirements of work activity to qualify for (full) unemployment benefits. All countries also calculate benefits fully or partly based on previous income. As the systems are so different, we choose to discuss the national systems that rely on unemployment funds (section 8.3.2) separately from those who do not (section 8.3.3). As the discussion will show, the risks for platform workers are mainly related to criteria for eligibility. We will therefore only comment briefly on calculation principles. The implications are summarized across the different systems (section 8.3.4).

8.3.2 National systems reliant on unemployment funds

The unemployment funds in Sweden, Denmark and Finland are based on a voluntary insurance system, where the right to an unemployment benefit is earned by work activity. In both Denmark and Sweden, membership is open to both employees and self-employed workers. In Finland, there are separate funds for employees and the self-employed (entrepreneurs). The funds-based benefits are thus available to platform workers irrespective of their employment status.

In all three countries, membership is voluntary. Benefits depending on voluntary membership require workers to have information on how best to organize their work activities in a long-term perspective. This *could* leave platform workers in a vulnerable position. The occasional nature of platform work can make platform workers less likely to sign up for membership compared to the traditional employees and the genuinely self-employed. If so, the platform worker falls outside the system of income protection when out of work due to unemployment (full or partial).

Further eligibility requirements and calculation principles for unemployment benefits vary between the three countries. It also varies as to whether there are supplementing schemes or benefit components not dependent on membership.

The Swedish unemployment benefit consists of a basic insurance and a loss-of-income insurance.[405] The basic work requirement is the same for employees and self-employed workers.[406] Workers who fulfil this requirement but have been a member

402. M. Mailand and T. P. Larsen, *Hybrid work – social protection of atypical employment in Denmark*, 2018, p. 5.
403. The Norwegian National Insurance Act § 4-3 (1).
404. If the self-employed worker registers as a limited company and formally employs him or herself, the worker is however eligible for benefits as an employee, see further in section 8.2.
405. The Unemployment Insurance Act, 1997:238 (lag om arbetslöshetsförsäkring) and the Unemployment Funds Act, 1997:239, (Lag om arbetslöshetskassor). To the following, see Country Report Sweden Part 2 pp. 30–32.
406. The worker must have worked at least 80 hours a month for 6 months the previous year or 480 hours totally and at least 50 hours a month for 6 months in a row the previous year.

for fewer than 12 months only qualify for the basic insurance. After 12 months of membership, the loss-of-income insurance applies, as long as the work activity requirements are fulfilled. Many workers do not meet the work activity requirements and are not qualified for the loss-of-income insurance: Only 40 per cent of unemployed workers receive this, although ca. 70 per cent of the workforce are members of an unemployment fund. Platform workers will typically be among those who struggle to qualify, due to the occasional nature of their work.

Due to legislative changes in 2010, self-employed workers no longer have to close down their operations completely in order to receive benefits.[407] A temporary hiatus in operations is sufficient – the business owner is only required to state that he or she is not operating the company. This provides the Swedish system of unemployment insurance with more flexibility compared to the Danish system.

The loss-of-income benefit is calculated on the basis of previous income for both employees and self-employed workers, while the basic benefit is not.[408] The calculation principles do not seem to pose any particular challenges for platform workers.

In sum, platform workers in Sweden are at a high risk of not fulfilling the work activity criteria and thus not qualifying for *any* unemployment benefit.

In Denmark, eligibility for unemployment insurance can be accrued on the basis of working hours as employees as well as for self-employed workers.[409] In order to be eligible for a full-time unemployment benefit, the worker must document a certain accumulated income over the previous three years.[410] Income earned as an employee and as a self-employed worker are accumulated, and supplementing work also counts. In order to count income from 'employment', however, the work must be performed in a traditional employment relationship, i.e. under terms similar to pay and working conditions in collective agreements for the type of work performed.[411] Hours worked for a platform company would in this regard not count as 'employment'. This makes it difficult for platform workers (as employees) to qualify. If, on the other hand, the platform worker is considered to work as genuinely self-employed for the platform, all hours worked can be counted toward eligibility, as long as the work as self-employed is the main or primary income. This means that this work must take place for a substantial part of the working time over an extended period of time. It will vary as to whether platform workers fulfil these requirements. A self-employed worker must furthermore close down the company and cease providing services before receiving benefits. A right to benefits in 'slow periods' is therefore not possible. Consequently, it is highly unlikely that platform workers will qualify for unemployment insurance based on their work for the platform as employees, and work for the platform as self-employed would require a full closure of the activities before being eligible for benefits.

A supplementary unemployment benefit is available for workers who work less than full-time but are available for full-time work, both for employees and those with self-employment as a secondary income. Those who have work as self-employed as their

407. Amendment to the Swedish Unemployment Insurance Act, 2010:445, 35 §.
408. On the calculation of the loss-of-income benefit, cf. the Swedish Unemployment Insurance Act 25 §. At the moment, it is 80 per cent of a monthly income of SEK 25 025/SEK 910 per day. The basic benefit is a fixed daily rate at SEK 365 per day in the case of full-time work (2019).
409. The Act on Unemployment Insurance, no. 199 of 11 March 2020 (Lov om arbejdsløshedsforsikring) § 53 (3) and (15). To the following, see Country Report Denmark Part 2 pp. 33–36
410. The requirement was set at ca. DKK 233 000 in 2019.
411. The Danish Act on Unemployment Insurance § 53 (6).

main or sole income are excluded from receiving this benefit to mitigate 'slow periods' for their business. Platform workers in Denmark therefore have a slimmer opportunity to receive supplementing unemployment benefits than workers in traditional employment.

The unemployment benefits are set as hourly rates, calculated based on previous income.[412] All types of registered income are accrued to form the base.[413] As in Sweden, these calculation principles do not seem to represent particular risks for platform workers.

Denmark also has a statutory scheme for unemployment assistance available to workers, both employees and self-employed workers, who are not members of unemployment funds – Basic Social Assistance (*Kontanthjælp*).[414] The social assistance rate is significantly lower than the unemployment insurance rates. It is means-based, not activity-based, but is only provided to persons available for work. There are requirements of previous work activity to be eligible for both groups.[415] However, there are similar pitfalls as in the unemployment insurance: Here, too, the hours worked as an employee only count when performed on terms similar to those in collective agreements, and the self-employed must close down their company to receive social assistance.[416] Whether the worker receives a full or reduced rate of social assistance depends on several factors, including previous work activity. Platform workers may therefore also risk receiving a lower social assistance rate.

In sum, platform workers in Denmark are at a high risk of not qualifying for benefits related to unemployment, whether from unemployment funds or from the statutory scheme of basic assistance. Compared to Sweden, there are additional risks for platform workers, both as employees and as self-employed, as the work performed may not count as relevant work activity. These pitfalls and risks for platform workers are present despite a recent reform of the Danish unemployment insurance system intended to increase the focus on the work activities of a person, rather than on their employment status.[417]

In Finland, there are two types of unemployment benefits: unemployment allowance (*arbetslöshetsdagpenning*) and labour market subsidy (*arbetsmarknadsstöd*).[418] The unemployment allowance has two categories: a basic allowance paid by the Social Insurance Institution of Finland (KELA) and an earnings-related allowance, which requires membership in an unemployment fund. The labour market subsidy only applies if the worker does not qualify for either basic or earnings-related unemployment allowance. The subsidy is a discretionary benefit and requires inter alia a need for economical support.[419] It may therefore apply to platform workers, depending on their circumstances.

To qualify for both basic and earnings-related unemployment allowance,

412. The Danish Act on Unemployment Insurance § 46 (1).
413. The Danish Act on Unemployment Insurance § 49 (2) and 53 (6).
414. The Act on Active Social Policy, no. 981 of 23 September 2019 (Lov om aktiv socialpolitik).
415. An employee must have had ordinary full-time employment for 2 years and 6 months within the last 10 years. For self-employed workers, a parallel assessment of working hours is made based on the income from their business in the preceding calendar years, cf. the Danish Act on Active Social Policy § 11 (8) and (9).
416. There are also a number of supplementing criteria that make it difficult and complicated to qualify for social assistance both for employees and for self-employed workers, see further Country Report Denmark Part 2 pp. 35–36.
417. Amendment Act to the Danish Act on Unemployment Insurance, no. 1670 of 20 December 2017.
418. The Unemployment Security Act 1290/2002 (Työttömyysturvalaki, Lag om utkomstskydd för arbetslösa), chapter 1, § 2 and parts II and III of the Act. The labour market subsidy also applies if the worker has been paid an unemployment allowance for the maximum period of 300 or 400 days.
419. The Finnish Unemployment Security Act chapter 7 § 1.

requirements regarding work activity must be fulfilled. The requirements differ depending on whether previous work has been performed in an employment relationship or as a self-employed worker (entrepreneur).[420] However, for hours worked in employment to count, the working time in one or more jobs must be at least 18 hours per week and the paid salary must meet the standard minimum wage in the collective agreement that applies to the work in question.[421] For self-employed workers, only continuous working periods of at least four months are counted. As in Denmark, the work of platform workers is at a high risk of not meeting these requirements and thus not counting as relevant work activity.

Furthermore, both employees and self-employed workers must be a member of an unemployment fund while the work activity requirements are met. This represents an additional risk for platform workers. There are separate funds for employees and entrepreneurs, and the worker cannot be a member in both types of funds.[422] For platform workers receiving income both as an employee and as a self-employed worker, the full income therefore will not count.

The earnings-related unemployment allowance is calculated based on previous income for both types of workers.[423] As in Sweden and Denmark, the calculation principles do not seem to have a significantly different effect on platform workers than on other workers. However, the benefit period is reduced if the working history is less than three years. Platform workers with less stable previous activity may risk only qualifying for the reduced period.

There are additional labour policy requirements to qualify for unemployment benefits. To be qualified as an unemployed person, the worker needs a labour policy statement from the authorities assessing the requirements, inter alia whether the worker is 'at the labour market's disposal'.[424] If the authorities find the worker to be self-employed, the statement is negative. This is assessed by looking at the personal history of the person, and it is not required that 'self-employment' is likely to provide subsistence.

In sum, there is a high risk that platform workers in Finland – whether as employees or as self-employed workers – will not qualify for the unemployment allowance. Compared to Sweden, and similar to in Denmark, platform workers risk their work activity not counting. There are also additional risks compared to Denmark. Due to the system of separate funds for employees and self-employed workers, the total work activity will not count for platform workers with combined income. Platform workers furthermore risk qualifying only for a reduced period.

8.3.3 National systems not reliant on unemployment funds

In Norway and Iceland, the unemployment benefits are part of the general systems of social security, and are *not* conditioned upon memberships in separate unemployment funds. As the right to benefits is not affected by a choice to sign up,

420. Employees must have worked in an employment relationship for at least 26 weeks during the preceding 28 months before the unemployment, and self-employed workers must have worked as an entrepreneur for at least 15 months during the preceding 48 months.
421. If there is not a collective agreement, the minimum wage must be at least EUR 1236 per month in a full-time job (2020).
422. There is a regulation that guarantees some protection if the person changes from one type of unemployment fund to other.
423. The Finnish Unemployment Security Act chapter 6 § 4 (employees) and chapter 5 §§ 6 and 7 (self-employed). For self-employed workers, this is based on earnings with which the pension fees have been paid. The basic allowance is set as a daily rate (EUR 33.66) that may be increased under certain conditions.
424. The Finnish Unemployment Act chapter 2 § 1.

these systems are generally more inclusive than in Sweden, Denmark and Finland.

The two national systems are, however, rather different.

In Iceland, both employees and self-employed workers are covered by unemployment benefits provided by the social security system.[425] Work activity requirements form the thresholds for both categories. The relevant act defines an employee as someone who works for someone else for a salary in at least 25 per cent of a full position every month. Requirements for self-employed workers form a similar threshold.[426] For workers who have combined earnings from both employment and self-employment, there are provisions allowing both types of income to be taken into account.

For platform workers who work occasionally, these thresholds may often be hard to fulfil, irrespective of employment status. As a result, platform workers risk not qualifying for an unemployment benefit in Iceland. Self-employed workers also have to close down their business operations to be eligible. Furthermore, there are requirements regarding duration of work that affect both eligibility and benefit level.[427] For platform workers in occasional work, this can be an additional obstacle. The benefits are calculated based on an average of previous earnings, and these principles do not seem to pose any particular risks.[428]

In sum, platform workers in Iceland are at a particular risk of not qualifying for unemployment benefits due to the occasional nature of their work.

In Norway, the benefit covers employees and freelancers, not self-employed workers.[429] A loss of earned income caused by unemployment is required to qualify. The income previously earned must exceed a minimum level for a loss of income to be relevant.[430] A choice of assessing per the last 12 or 36 months provides important leeway for platform workers, whose income often varies. Platform workers still have a higher risk of not qualifying than traditional employees, as they typically work occasionally.

The concept of unemployment is rather broad. A person's regular working hours must be reduced by at least half compared to the working hours the person used to have, and the assessment is not limited to work performed for one employer. The unemployment benefit may thus ensure income not only when (totally) out of work, but also in 'slow periods' of fewer gigs or tasks.

The benefit is calculated based on earned income up to a maximum cap.[431] The total income earned by the individual (within a certain period) counts, irrespective of whether it comes from different sources. Platform workers will therefore not be

425. The Unemployment Insurance Act, 54/2006 (Lög um atvinnuleysistryggingar). To the following, see Country Report Iceland Part 2 pp. 18–19.
426. Self-employed must have paid all their taxes and the insurance contribution up until the unemployment, and a right to benefit is conditioned upon a contribution above a certain level: The tax authorities publish *presumptive employment income* for the various sectors and occupations each year. The taxable income of the self-employed must exceed 25 per cent of presumptive employment income in order to be eligible.
427. The minimum requirement is 3 months' work in the last 12 months, and full rights are only earned after working for 12 months, either as an employee or self-employee.
428. Both for employees and self-employed a full benefit is 70 per cent of the base for the first three months of unemployment. Thereafter, the benefit drops to a basic amount set by the Government. The basic amount is at a lower level than the relevant minimum wage according to the relevant collective agreement.
429. To the following, see Country Report Norway Part 2 pp. 26–27.
430. The Norwegian National Insurance Act § 4-4. The gross earned income from the last 12 months must exceed 1.5 G (ca. NOK 150,000) or exceed 3 G (ca. NOK 300,000) for the last 36 months.
431. The Norwegian National Insurance Act § 4-11. The benefit is set as a daily rate and on average equals 62.4 per cent of the previous gross income up to a maximum cap of 6 G (ca. NOK 600 000). The National Insurance basic amount (G) is adjusted annually and is NOK 99,858 as of 1 May 2019. (The adjustment for 2020 is delayed due to the Covid-19 outbreak.)

affected negatively by having several sources of income. If the worker is partly unemployed, the benefit is reduced proportionately. The benefit period also depends on previous income.[432] Platform workers working occasionally, often for low pay, thus risk a shorter benefit period than a traditional employee who used to be in full-time employment.

The main risk for platform workers in Norway is thus that they (as self-employed) typically fall outside the scope of the benefits. Even if they are covered (as employees or freelancers), the occasional nature of their work poses an additional risk of not qualifying. As in Finland, platform workers also risk qualifying only for a shorter period. Parallel to in the other Nordics, calculation principles do not seem to affect platform workers differently than other workers.

8.3.4 Summary of implications

The binary divide is not very significant for income protection when out of work due to unemployment in the Nordics. Most Nordic countries have statutory benefits available for both employees and self-employed workers; only Norway excludes the self-employed.

However, platform workers are at a higher risk of not having income protection when unemployed, compared to both traditional employees and the genuinely self-employed.

In Sweden, Denmark and Finland, the benefits are fully or partly dependent on voluntary membership in unemployment funds. Platform workers may be less likely to sign up for membership and thus risk not being covered by the related benefits. The implications are more severe in Sweden than in Denmark and Finland, where there are supplementing schemes and basic levels not dependent on membership. Platform workers do not face the same risk in Norway and Iceland, as the benefits here are not reliant on membership.

Despite the structural differences and diverging regulations in the Nordics, platform workers face similar risks: The unemployment benefits in all the Nordic countries are fully or partly conditioned upon work activity requirements. The occasional nature of platform work leads to a high risk of not fulfilling the requirements and thus receiving no or only basic benefits. The level of risk varies between the Nordic countries. The risks seem particularly high in Denmark and Finland, as the work activity of platform workers may not count when assessing the requirements in these countries.

The calculation principles in all the Nordic countries take account of previous earnings and do not seem to represent particular risks for platform workers. However, low levels of income will be reflected in the size of the benefits provided. The benefits period may also be related to previous work activity. Platform workers with occasional work risk receiving benefits for a shorter period, as in Finland and Norway.

The opportunities to sign up for additional insurance, through social security systems or from private insurance companies, are likely not widely used by platform workers due to the occasional or unpredictable nature of their work.

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432. The Norwegian National Insurance Act § 4-15. Where income exceeds 2 G (ca. NOK 200,000) in the last 12 months, or as an average for the last 36 months, the full period is 104 weeks. If the income is lower, the full period is 52 weeks.

In sum, platform workers and other workers with occasional work have clearly weaker income protection when out of work due to unemployment compared both to traditional employees and the genuinely self-employed. The main implications can be summarized as follows:

- Unemployment benefits in most Nordic countries apply to platform workers irrespective of employment status, while in Norway, platform workers (as self-employed) are not covered.
- Platform workers are generally better protected in Iceland and Norway than in the other countries, as benefits here are not dependent on membership in unemployment funds, which platform workers may not sign up for.
- The benefits in all countries are fully or partly dependent on previous work activity requirements, which platform workers have a high risk of not fulfilling. The risk is higher in Denmark and Finland, where platform workers risk their work activity not being counted at all.
- Low levels of income are reflected in the size of the benefit in all countries and platform workers may risk having a shorter benefit period.

8.4 Benefits related to sickness and injury

8.4.1 Introduction and categorizations

All the Nordic countries have various benefits providing income protection to workers who are out of work due to sickness or injury. Some benefits are available to employees and self-employed workers, irrespective of employment status. Certain types and periods of benefits are reserved for employees only. The binary divide therefore has more clear influence here compared to in unemployment benefits.

Again, the Nordic systems are quite different. In Sweden, Denmark, Finland and Norway, basic benefits related to sickness and injury cover all workers, irrespective of employment status. There is, however, a defined period in which the *employer* is responsible for sickness benefits for their own employees. After this period, the responsibility shifts to the social insurance authorities. These systems of benefits are therefore *partly* separate and exclusive for employees.

In Iceland, too, both employees and self-employed workers are covered, but the schemes for the two categories are fully separated. Employees are *only* covered by benefits paid by the employer. In light of these differences, the national systems with defined employer periods (section 8.4.2) are discussed separately from the system in Iceland (section 8.4.3).

However, a common trait in all the Nordic countries is that employers are responsible for insuring their employees against occupational injuries and diseases. Furthermore, many employees are covered by collective agreements that provide additional protection against occupational injuries and diseases. Occupational injury benefits and schemes are therefore discussed (section 8.4.4), but we do not discuss the *full* range of benefits related to (lasting) sickness and injury, such as work assessment benefits, rehabilitation allowance, disability benefits etc.[433] Lastly, the implications of being a platform worker in this context are summarized (section 8.4.5).

433. The country reports Part 2 provide a broader presentation of the range of relevant benefits.

8.4.2 Sickness benefits with a defined employer period

In Sweden, Denmark, Finland and Norway, employees have a right to sickness benefits from the employer during the first period of sickness. All countries have qualifying periods and income-related calculation principles, but the details vary considerably.

In Sweden, employees are entitled to sickness benefits from the employer from the first day of employment.[434] The period of sickness pay from the employer is from day 2 to day 14, and the employee is entitled to 80 per cent of their salary. The first day of sickness is thus a waiting period (*karensdag*). For employment periods shorter than 1 month, however, there are no sickness benefits from the employer until the employee has worked for 14 days.

Employees who do not meet the qualifying period are entitled to sickness benefits from the Swedish Social Insurance Agency after a one-day waiting period.[435] However, workers in short-term employment who do not have a future working period scheduled will generally be regarded as unemployed and not sick.[436] A proposed change for on-demand workers here is not likely to affect platform workers.[437] Self-employed workers are also entitled to sickness benefits from the Social Insurance Agency. The self-employed can decide the number of qualifying days and pay a correspondingly higher or lower sickness insurance contribution.[438]

The benefits for both employees and self-employed workers are calculated using predicted annual income as the basis.[439] The benefit is 80 per cent of the base for ca. one year and is then somewhat reduced.[440]

In Sweden, the risks for platform workers therefore depend on their employment status. As employees, a salient risk is that sickness benefits will not apply if future work is not scheduled. As self-employed workers, the platform workers may choose a long qualifying period and thus have no income protection in the case of short-term sickness.

In Norway, too, employees are entitled to sickness benefits from the employer in the first 16 days of sickness, the 'employer period' (*arbeidsgiverperioden*).[441] The requirement of previous work activity is stricter than in Sweden; the employee must have worked for four weeks to qualify. Once qualified, there is no waiting day as in Sweden. The benefits apply from the first day of sickness. However, the benefits only

434. The Sickpay Act, 1991:1047 (Lag om sjuklön) 6 §. To the following, see Country Report Sweden Part 2 pp. 32–35.
435. The Social Insurance Code, 2010:110 (Socialförsäkringsbalken) 25 chapter 25, 10 §.
436. If not scheduled for work, the platform worker has to prove to be too ill to take any work at all on the labour market. The worker will otherwise be regarded as unemployed and not entitled to sickness benefits.
437. The suggested change entails that on-demand workers will receive sickness benefits for 90 days under the same conditions as other employees. Platform workers, however, are not likely to be affected: Even though umbrella company workers are considered to be employees, they are not included, as their fixed-term employments are limited by their assignments for other clients, and the same will be the situation for platform workers. Solo self-employed workers are excluded since they are not employed by the principal, see Governmental report SOU 2020:26 pp. 70–71.
438. The self-employed can decide on 1–90 qualifying days, cf. the Swedish Social Insurance Code chapter 27, 29–33a §§.
439. Estimating future income for self-employed workers is more complicated than for employees: The Social Insurance Agency asks the individual to provide a prediction of future income and then compares this information with the worker's accounts and information from accountants and tax authorities.
440. The benefit is reduced to 75 per cent after 364 days. Additional and stricter requirements, however, are introduced after 180 days, and other benefits (e.g. rehabilitation allowance and permanent sickness compensation) may also be relevant in the event of lasting sickness.
441. The Norwegian National Insurance Act §§ 8-18 and 8-19. To the following, see Country Report Norway Part 2 pp. 27–30.

cover days when the employee has a *right* to pay.[442] Platform workers (as employees) with occasional work and/or hourly pay are thus at a high risk of not being covered by the benefit.

The implications of not being covered by sickness benefits from the employer are also different than in Sweden. The Norwegian National Insurance only provides sickness benefits *after* the employer period. For platform workers not qualified for benefits from the employer – whether they are employees, freelancers or self-employed – there is waiting period of 16 days.[443] Self-employed workers and freelancers may sign up for a voluntary insurance scheme to cover this period, but platform workers are less likely to take advantage of this opportunity.

Sickness benefits from the Norwegian National Insurance system are conditioned upon work activity requirements that apply to all categories.[444] As the requirement is set rather low, it does not represent a major risk for platform workers. The calculation principles are mainly common for employees, freelancers and self-employed workers.[445] Employees and freelancers, however, receive a benefit at 100 per cent of the base, while the self-employed only receive 80 per cent.[446] After approximately one year, the sickness benefits are replaced with other (considerably lower) benefits.[447]

In sum, platform workers in Norway face a particular risk of not being covered by any sickness benefits in the first 16 days of sickness, due to their status as self-employed/freelancer or as a result of not fulfilling the qualifying requirements for employees. After 16 days, platform workers (as self-employed) will have a lower level of income protection than traditional employees.

In Denmark, too, employees are entitled to sickness benefits. If they are in *current employment* and fulfil the criteria, the employer must pay the first 30 days of sickness benefits (*arbejdsgiverperioden*).[448] To be in 'current employment', the employee must have been employed on the day before the leave commences. This criterion is strictly applied and is premised on an employment relationship in a traditional labour law sense. If the employment ends just before the leave commences, the end date is decisive. It is stated in an administrative ruling that casual workers are only regarded as being in employment in the periods where the worker is actually working for the employer.[449] This requirement is generally difficult to fulfil for platform workers: Unless they have performed work the day before the leave commences, platform workers will likely not qualify. It is uncertain as to whether the relation to the platform company could be regarded as current due to

442. The Norwegian National Insurance Act § 8-18 (1) and (4).
443. Self-employed workers and freelancers are not entitled to *any* benefit during the first 16 days of sickness, cf. the Norwegian National Insurance Act § 8-34 and § 8-38, respectively.
444. The worker must have earned an income that equals an annual income of ½ G (ca. NOK 50,000), cf. the Norwegian National Insurance Act § 8-18 (1) and (4).
445. An annual income is estimated based on reported income, and the benefit base (*sykepengegrunnlaget*) is set as a daily base of 1/260 of the annual base, cf. the Norwegian National Insurance Act § 8-10 (1). For the employer period, the base however is an estimated *monthly* income, which is then converted to an annual base, cf. § 8-28 (1) and § 8-30.
446. The voluntary scheme for self-employed workers, however, may provide coverage of 100 per cents cf. the Norwegian National Insurance Act § 8-36.
447. First, work assessment benefits apply and thereafter, in the case of sickness or injury leading to a lasting disability, disability benefits, see further Country Report Norway Part 2 pp. 29–30.
448. The statutory Act on Sick Leave Benefits (lov om sygedagpenge) no. 102 of 2 February 2020, § 30. To the following see further Country Report Denmark Part 2 pp. 36–37. To qualify, the employee must have been employed by that employer in the 8 weeks prior to the sickness and worked a minimum of 74 hours during that period.
449. Guideline no 9510 of 26 June 2018 on the Requirement of Employment for Maternity and Parental Leave Benefits (Vejledning om beskæftigelseskravet for ret til barselsdagpenge), section 2.1 and ruling of the Social Appeals Board (Ankestyrelsen) no. 11322 of 21/12/2015 no. 100-15, regarding sick leave benefits for agency workers and casual workers.

practices or realities etc., if the workers did not work that particular day.

As in Norway, there is no waiting period once qualified. Sick leave benefits compensate for the loss of income during sick leave, and are therefore conditional on the employee being employed and having missed working hours/expected income due to the sickness. This condition is much harder to fulfil for platform workers in occasional work than for traditional employees in stable employment. An administrative ruling has assessed how to handle casual workers in this respect.[450] Employees who are not entitled to benefits paid by the employer during the first 30 days of sickness may instead receive sick leave benefits from the local municipalities. This benefit, too, is conditioned upon a certain work activity.[451] Income counts, whether from work in employment or work performed as self-employed to a *substantial degree*.[452]

Self-employed workers in Denmark are covered by sickness benefits from the municipalities after two weeks of self-financed sick leave.[453] Self-employed workers can take out voluntary private insurance granting a right to sick leave benefits from the municipality from day one or three, instead of financing the first two weeks of sick leave themselves. The work activity requirements are rather strict, however, as the self-employed worker must have conducted business to a *substantial degree*.[454] Platform workers with occasional work therefore risk not qualifying for sickness benefits from the local municipality.

The main calculation principles are largely common: Sick leave benefits are calculated on the basis of income from employment or self-employment within a certain cap.[455] However, for employees, the benefits are instead based on average *hourly* income, and paid in accordance with the weekly working hours during the leave. Platform workers (as employees) would likely have benefits calculated by the rules for employees with 'unknown' working hours. This leads to considerably lower benefits when compared to a situation in which the actual weekly or monthly working hours were registered by the employer.[456] The calculation principles for sickness benefits in Denmark thus represent a significant risk for platform workers (as employees).

Hence, platform workers face several risks in Denmark. As they work occasionally, platform workers are at a high risk of not being eligible for sickness benefits as employees, neither for the first 30 days from the employer nor from the local municipality. A main caveat is the requirement of being in 'current employment'. As self-employed, platform workers must finance the first 14 days themselves, and are

450. Guideline 9510 of 26 June 2018, section 2.1.2.10, cf. Appeal Committee Ruling 100-15 on the right to sick leave benefits, https://www.retsinformation.dk/Forms/R0710.aspx?id=176826.
451. Being eligible for sick leave benefits from the local municipality requires a minimum of 240 working hours within the preceding 6 months, or being eligible for unemployment insurance benefit, cf. the Danish Act on Sick Leave Benefits §§ 32 and 33.
452. The Danish Act on Sick Leave Benefits § 32 (2). The self-employed must have conducted a business to a substantial degree in at least 6 of the last 12 months including the previous month, and the person must have worked at least half of a normal working week.
453. The Danish Act on Sick Leave Benefits § 42.
454. See more in footnote above.
455. Benefits for employees are calculated on the basis of the working hours per week and the hourly rate received on average for the work performed in actual employment during the previous three months, based on the income registered to the tax authorities. Sick leave benefits for self-employed workers are calculated on the basis of annual tax statements for the last tax year, cf. the Danish Act on Sick Leave Benefits § 50 (1) and the Executive Order on Calculation of Employment Requirements and Calculation of Sickness Benefits Rates, no. 833 of 19 August 2019 (bekendtgørelse om opgørelse af beskæftigelseskrav og beregning af sygedagpenge mv.), §§ 23 and 24. Both rates are capped at DKK 4,405 per week (2020) for full-time employment, which are reduced pro rata if the current average employment is less than full time, cf. the Danish Act on Sick Leave Benefits § 47 (1).
456. The number of working hours is calculated by dividing the total income with a specific hourly rate (DKK 202 on average), leading to a lower number of hours for workers with lower pay.

thereafter at risk of not qualifying for sickness benefits from the local municipality due to the requirement of conducting business to a substantial degree. Occasional work will also reduce potential rates considerably, and reduce the number of hours of sickness benefits per week.

In Finland, both employees and self-employed workers are covered by sickness benefits from the Social Insurance Institution of Finland (KELA). The Health Insurance Act is based on the principle of residence.[457] Everyone who is covered by the act is entitled to at least the minimum daily allowance after a waiting period of nine days.[458] The act covers compensation of medical treatment and medication as well as benefits for sickness (and parenthood, see further below). Platform workers thus have the same basic income protection as traditional employees and the genuinely self-employed, albeit not for the first nine days of sickness.

The benefit is calculated based on workers' earnings if their annual income exceeds certain amounts. This could be an obstacle for platform workers in occasional work and/or with low pay. There are separate provisions concerning wages and earnings on entrepreneurship. The calculation of the latter is based on the paid entrepreneur pension fees. Self-employed workers are covered by the minimum daily allowance but must have entrepreneur pension insurance to receive an earnings-based allowance. Platform workers (as self-employed) without this insurance will not qualify for the income-based component.

A defined employer period for sickness pay provides additional protection for employees. According to the Employment Contract Act, employers are obliged to pay the workers' salary in the nine-day waiting period.[459] There is a qualifying period of one month: Payment of a full salary requires that the employment relationship has continued for at least one month before the sick leave. If the employment relationship has been shorter than 1 month, the employee is entitled to 50 per cent of the regular salary. Platform workers in occasional work are at a high risk of not qualifying for full benefits, and in that regard are less protected than traditional employees in the first period of sickness.

Platform workers in Finland therefore face several specific risks. In the first nine days of sickness, platform workers (as employees) may not be entitled to full sickness pay from the employer. After the first nine days, platform workers (whether as employees or self-employed) risk not qualifying for income-based benefit components.

8.4.3 Separate systems for employees and self-employed

The Icelandic system deviates from the other Nordics. Here, the statutory regimes for benefits related to sickness and injury are separate and distinctively different for employees and self-employed workers.[460] In the regime for employees, the requirements and benefit periods entail much more limited protection than in the other Nordic countries. Only employees who have worked for at least one year for the same employer are covered. These employees are entitled to full salary in the case of sickness, but only for one month. The period may be extended for two more months if the employment has lasted longer. Platform workers with occasional work

457. The Health Insurance Act, 2004/1224 (Sairausvakuutuslaki) chapter 1 § 2.
458. The basic allowance is EUR 26.62 per day (2019).
459. The Finnish Employment Contract Act chapter 2 § 11.
460. To the following, see Country Report Iceland Part 2 p. 20.

will seldom be able to fulfil the basic requirements and will thus have no statutory protection if viewed as employees. Most collective agreements have provisions that provide better income protection than the statutory minimum, but are not very relevant for platform workers.

The regime for the self-employed also seems to provide less income protection than in the other countries. Self-employed workers may buy their own insurance or must rely on the basic health insurance. The benefits only apply after a 21-day waiting period, and the benefits are rather small – much lower than the minimum rates of pay set by collective agreements. Platform workers in Iceland are thus left with much weaker income protection in the case of sickness compared to traditional employees (in long-term employment) and the genuinely self-employed (with good insurance coverage).

In Iceland, being out of work due to sickness represents major risks for platform workers. As employees, platform workers are highly unlikely to qualify for any sickness benefits, and the benefit they may receive as self-employed does not provide viable income protection.

8.4.4 Occupational injury benefits and insurance

All the Nordic countries have statutory rules on occupational injury benefits and insurance. A common trait in all countries except Sweden is that the schemes only provide mandatory income protection for employees.[461] In Sweden, all workers – whether employees or self-employed – are covered by a mandatory occupational injury insurance scheme.[462] Schemes regulated by collective agreements are important supplements, but primarily only cover employees.

In Denmark, Finland, Norway and Iceland, the statutory schemes only require occupational insurance to cover employees. The national systems are structured rather differently. In Denmark, Finland and Iceland, occupational injury insurance is mandatory for employers and must cover all employees.[463] In Norway, there is both a statutory duty for employers to provide occupational insurance for their employees and a set of occupational injury benefits as part of the social security system in the National Insurance Act.[464] In Finland, entrepreneurs (including those who are self-employed) who have pension insurance have a statutory right to receive insurance covering work injuries from an insurance company. However, this is optional for the self-employed.[465]

In all countries, the schemes enhance the importance of being classified as an employee for platform workers. Self-employed workers may sign up for voluntary insurance schemes, but the typical platform worker may be less inclined to do so than the genuinely self-employed, due to the occasional nature of their work and perhaps also low levels of pay.

Even if recognized as an employee, platform workers may face a particular risk that an injury or illness will not be covered as an occupational injury. For example, in Norway, an occupational injury is an injury, sickness or death caused by a work

461. Self-employed workers, however, may be obliged to comply as employers.
462. Country Report Sweden Part 2 p. 33.
463. Country Report Denmark Part 2 pp. 37–38 and Country Report Iceland Part 2 p. 20. The Finnish Employment Accidents and Occupational Illness Insurance Act (459/2015) chapter 1 § 3.
464. Country Report Norway Part 2 p. 31.
465. The Finnish Employment Accidents and Occupational Illness Insurance Act (459/2015) chapter 24.

accident that happens *while the person is covered*.[466] Employees are only covered when at work, at the workplace, during working time.[467] Traditional employees are clearly covered when working at the physical premises of the employer within regulated working hours. For platform workers, both the workplace and working time may be harder to define, thus leading to less secure coverage. Denmark has a similar state of law.[468]

8.4.5 Summary of implications

The binary divide is of varying significance in benefits related to sickness and injury in the Nordic countries. All the Nordics have some basic sickness benefits available for all workers regardless of employment status.

Still, in Sweden, Denmark, Finland and Norway, only employees are entitled to sickness benefits from the employer in the first period of sickness. The qualifying periods are harder to meet for platform workers (as employees) than for traditional employees due to the occasional nature of their work.

The implications of not being covered by benefits from the employer differ in these countries. In Norway, the self-employed (and freelancers), as well as employees who do not fulfil the qualifying criteria, have *no* benefits in the first period of sickness. Platform workers are therefore at a high risk of having no income protection during short-term sickness. In Denmark, employees can be eligible from day 1, and the platform company will finance the first 30 days if the employee fulfils the criteria. The caveat here is the occasional nature of platform work, which challenges being 'in employment', the eligibility criteria and the rates of payment. Self-employed workers must finance the first two weeks of sickness benefits, and are then only covered by benefits from the local municipality if the work has been of a substantial degree.

In Sweden, the implications for platform workers are less severe, as both employees and the self-employed are covered by benefits from the Social Insurance Agency after a one-day waiting period. The situation is similar in Finland, where employees and the self-employed are covered by benefits from the Social Insurance Institution, but only after a nine-day waiting period.

The risks for platform workers are comparably higher in Iceland, where platform workers (as employees) are highly unlikely to qualify for any sickness benefits, and the benefits they may receive as self-employed do not provide sound income protection.

The calculation principles do not seem to represent particular risks for platform workers in most Nordic countries. The exception is Denmark, where the benefits for platform workers (as employees) are likely calculated by the rules for 'unknown' working hours, resulting in a risk for considerably lower benefits than traditional employees.

Statutory rules of occupational injury benefits and insurance schemes only apply to employees in all countries except Sweden. Supplementing schemes in collective agreements are normally reserved for employees. This enhances the importance of being classified as an employee for platform workers, as platform workers (as self-

466. The Norwegian National Insurance Act § 13-3. Certain occupational diseases are also included, cf. § 13-4.
467. The Norwegian National Insurance § 13-6. The employee may be covered during travelling time on certain conditions.
468. M. N. Sørensen, *Platformsøkonomien og arbejdsskadesikringsloven*, published at Rettid.dk 2017, https://law.au.dk/fileadmin/Jura/dokumenter/forskning/rettid/Afh_2018/afh27-2018.pdf.

employed) may be less inclined to sign up for voluntary insurance schemes.

Consequently, platform workers are clearly less protected than both traditional employees and the genuinely self-employed when out of work due to sickness and injury. The main implications can be summarized as follows:

- Some benefits related to sickness and injury apply to platform workers irrespective of employment status, while others are reserved for employees.
- The benefits in all countries are conditioned upon qualifying periods that platform workers are at a high risk of not being able to fulfil. The risk is particularly high for employees in Iceland.
- All countries have benefits or benefit components conditioned upon previous work and/or income, which platform workers risk not fulfilling. The risk is particularly high in Denmark.
- Benefits are fully or partly calculated based on previous income. The calculation principles do not represent particular risks for platform workers, except in Denmark (as employees).
- In Sweden and Iceland, the more specific risks for platform workers depend on the employment status.
- In Norway, platform workers will typically have no sickness benefits in the first period of sickness, irrespective of employment status. As employees, qualifying periods are difficult to meet, and self-employed/freelancers are not covered.
- In Denmark, the risks for platform workers concern the occasional nature of their work. As employees, being in 'current employment' is hard to fulfil, as is business in a 'substantial degree' (for self-employed workers).
- In all countries except Sweden, platform workers (as self-employed) are not covered by statutory occupational injury benefits and insurance schemes.
- Platform workers are typically not covered by supplementing schemes in collective agreements.

8.5 Parental leave benefits

8.5.1 Introduction and categorizations

All the Nordic social security systems have specific benefits related to childbirth and adoption. The benefits provide income protection to parents when out of work due to childbirth or adoption.

The binary divide has little significance in this context. The benefits cover both employees and the self-employed in all the Nordic countries (including freelancers in Norway), and the regulations are mainly parallel for all categories. The benefit is available to parents, whether they are employees on parental leave or self-employed workers who choose to temporarily stop their work activities due to childbirth or adoption.[469] Platform workers are therefore covered as a starting point irrespective of employment status.

Collective agreements may provide supplementing rights, for example a right to a full salary irrespective of benefit rates and/or maximum caps. These rights will generally *not* cover platform workers, as they are unlikely to be recognized as

469. Employees' rights to parental leave are not discussed further, as the focus is on the related benefits.

employees and covered by the relevant agreement. A legal basis for supplementing rights may also be found in regulations at the company level or in individual employment contracts, but it seems unlikely that platform workers will be covered. In Denmark, there is a statutory basis for supplementing rights for certain groups of employees.[470]

Eligibility criteria and calculation principles in the different countries will be discussed in more detail (section 8.5.2) before summarizing the implications (section 8.5.3).

8.5.2 Criteria for eligibility and calculation principles

In all the Nordic countries, previous work activity or income from work are qualifying criteria. All countries have specific benefits or grants for those who do *not* qualify for work-related benefits, but these are considerably lower.[471] This still provides some type of safety net for platform workers when out of work due to childbirth or adoption. We focus the following discussions on the work-related benefits.

The criteria for work/income-related benefits vary, resulting in varying types of risks for platform workers. Most of the Nordics (Sweden, Denmark, Norway and Iceland) have criteria both for previous work activity *and* income. Calculation principles vary, but are all based on previous income.

In Iceland, the worker must have been active for six months on the labour market. The same 25 per cent thresholds as in the unemployment benefits also apply to benefits related to parental leave.[472] Platform workers with occasional work activity are therefore at a high risk of not qualifying. The benefit is calculated based on previous income, with a replacement rate at 80 per cent with certain minimums and with maximum caps.[473]

In Norway, six months of income is also required, but the minimum level of income required sets a lower threshold than in Iceland.[474] This is still a risk for platform workers with occasional work and low pay. Benefits are calculated from the same base as in sickness benefits. The worker can choose a benefit at 100 per cent or at 80 per cent for a longer period.[475]

In Sweden, too, the qualifying time for the work-based parental leave benefit is six months' work.[476] The benefit is calculated somewhat differently than in sickness benefits.[477] The benefit is at 80 per cent of the relevant income.[478]

In Denmark, the requirements for parental leave benefits are differentiated for self-employed and employees, and are parallel to those for sickness benefits.[479] Self-

470. Employees covered by the Danish Act for Salaried Employees are entitled to receive 50 per cent of their full salaries for the first 14 weeks of maternity leave from the employer, cf. § 7 (2).
471. In Norway, there is a lump sum grant (*engangsstønad*) at birth or adoption, of ca. NOK 85,000. In Iceland, there is a benefit of about 22 per cent of the lowest minimum wage for full-time unskilled workers. In Sweden, a housing-based benefit applies and has two levels: the ground level (SEK 250 per day) and the lowest level (SEK 180 per day). In Finland, there is a residence-based benefit related to childbirth, where the minimum daily allowance is EUR 26.62 per day (2019).
472. Country Report Iceland Part 2 p. 20–21. See further on the thresholds in section 8.3.3.
473. The benefit period is four months for each parent and two months that they can divide between them, cf. the Icelandic Act on Maternity, paternity and Parental Leave § 8 (1). There is a proposal to extend the period to 12 months.
474. The minimum requirement is at ½ G (ca. NOK 50 000), see further Country Report Norway Part 2 p. 31–32.
475. The choice is 100 per cent of the base for 245 days (49 weeks) or 80 per cent for 295 days (59 weeks).
476. Country Report Sweden Part 2 p. 35.
477. The limit for parental benefits is however considerably higher (10 times base price amount) than the limit for sickness benefits (8 times base price amount). For 2020, the base price amount is SEK 47 300.
478. Benefits are paid in a total of 480 days, albeit the last 90 days at a lower rate.
479. To the following, see Country Report Denmark Part 2 pp. 38–41.

employed workers must have worked to a substantial degree.[480] For employees, there is a requirement of being in 'current employment' similar to with sickness benefits.[481] This is generally hard to fulfil for platform workers, and platform workers are therefore at risk of not qualifying. Platform workers who operate as self-employed in Denmark therefore face similar risks as in Norway and Iceland, but – paradoxically – are at a particular risk of *not* qualifying if considered to be employees.

The benefits in Denmark are calculated by similar principles as with sickness benefits.[482] The calculation principles thus differ substantially for employees and the self-employed. For the self-employed, the benefits match the previous income, regardless of the number of hours worked, up to certain caps.[483] For employees, there are the same challenges as with sickness benefits: Platform workers (as employees) would likely have benefits calculated by the rules for employees with 'unknown' working hours and thus considerably lower benefits compared to traditional employees.[484] The calculation principles in Denmark thus represent a significant risk for platform workers (as employees).

Finland stands out, as the criteria are related to income, *not* work activity. Parents are eligible for benefits based on their earnings on top of the residence-based minimum allowance if their annual income exceeds a level that is not set very high.[485] Only platform workers with very occasional work risk not qualifying.

The earnings-related benefits are calculated on the basis of previous earnings, and all income as an employee or self-employed is counted.[486] The benefit is set as a daily allowance at different percentages of the relevant income.[487] Platform workers are therefore entitled to an earnings-related parental allowance regardless of the source of the income.[488] Apart from the fact that low levels of income will be reflected in the size of the benefits received, platform workers do not seem to face particular risks in Finland.

8.5.3 Summary of implications

The binary divide has little significance as regards parental leave benefits. All the Nordic countries have similar benefits available to all workers, employees and self-employed alike.

Platform workers still face some specific risks compared to traditional employees and the genuinely self-employed. Platform workers risk not qualifying for work-

480. The requirement is work activity for at least 6 months out of the last 12, at a level similar to at least half of the normal weekly working hours, including during the month before the leave commences, see also section 8.4.2.
481. See further on the requirement of 'current employment' in section 8.4.2.
482. Mothers are entitled to maternity leave benefits from four weeks before the expected birth until the actual birth, and 14 weeks after the birth. Fathers (and co-mothers) are entitled to two weeks after the birth of the child. Parents are entitled to shared additional 32 weeks of parental benefits, which can be distributed according to the wishes of the parents.
483. For self-employed workers, benefits are calculated based on annual income up to a maximum weekly benefit level of ca. DKK 4400, cf. the Danish Act on Leave and Benefits in Case of Childbirth and Adoption § 35. The cap also applies to benefits for employees.
484. This is explained further in section 8.4.2.
485. The level is EUR 1 264 (2019).
486. As a main rule, the benefits are determined by the earnings from a period of 12 months prior to the leave. The earnings of self-employed workers are linked to the earnings from which the pension fees (according to the Entrepreneur's Pensions Act) have been paid.
487. The benefit is set as a daily allowance at about 70 per cent of the relevant income up to an annual cap of EUR 32,892, and about 40 per cent up to the maximum annual income cap of EUR 50,606.
488. The benefit period consists of maternity leave (105 days), paternity leave (54 days) and parental leave (158 days).

related benefits due to the occasional nature of their work. The risk is particularly high in Denmark. As self-employed workers, the level of work activity must be at least half of normal weekly working hours, and as employees, there is a strict requirement of being in 'current employment' that platform workers will generally not meet.

The calculation principles do not seem to represent particular risks for platform workers in most Nordic countries. The exception is Denmark, where the benefits for platform workers (as employees) are likely calculated by the rules for 'unknown' working hours, resulting in a risk of considerably lower benefits than traditional employees.

There are other specific benefits or grants available in all countries except Denmark, and this represents a relevant safety net for platform workers in these countries.

Still, the binary divide has some significance, as supplementing rights and benefits related to birth and adoption in collective agreements usually only apply to employees. As platform workers are not usually covered, they have less income protection when on parental leave compared to many traditional employees.

To summarize, platform workers have less secure income protection when on parental leave compared to both traditional employees and the genuinely self-employed in all the Nordic countries, but the risks are comparably higher in Denmark than in the other countries:

- The benefits in all countries cover all workers, irrespective of employment status.
- All countries have benefits conditioned upon previous work and/or income that platform workers risk not fulfilling. The risk is particularly high in Denmark.
- Benefits are fully or partly calculated based on previous income. The calculation principles do not represent particular risks for platform workers, except in Denmark (as employees).
- All Nordic countries have some benefits or alternative grants available for platform workers who do not fulfil the requirements for work-related benefits.
- Platform workers are typically not covered by supplementing schemes in collective agreements.

8.6 Retirement and old age pensions

8.6.1 Introduction and categorizations

Old-age pension systems and schemes for early retirement aim to provide financial security for elderly people leaving employment, both through basic security and income security.

All the Nordic countries have statutory pension systems that secure a basic income for individuals independent of whether or not they have been in employment: The systems cover both employees and the self-employed. As the systems provide varying levels of both basic security and income security, platform workers may risk being left with lower levels of income protection compared to both traditional employees and the genuinely self-employed.

Although there are some similarities, there are substantial differences between the Nordic countries, for instance with regard to the level of basic protection, the earning requirements for income-based pension, whether occupational schemes are based on law or collective agreements, and whether they are mandatory. We therefore present the systems one by one (section 8.6.2), instead of focusing on criteria and calculation principles separately; we then summarize the implications of being a platform worker more generally (section 8.6.3).

8.6.2 The national pension systems

The statutory pension systems in Sweden and Norway share important features. The models combine minimum financial security for all residents and income-related protection: The benefits related to retirement and old age have a *basic* component, and a component related to *work activity* for employees, where the contributions are split between employers and employees. Both countries have changed their systems and introduced reformed schemes in recent decades.

The reformed Swedish pension system (for persons born after 1954) combines a guaranteed basic pension (*garantipension*) with an income pension and premium pension, which are both income-related.[489] In the reformed Norwegian pension system (for persons born in 1963 and onwards), the two main statutory components are a guaranteed pension (*garantipensjon*) and an income pension (*inntektspensjon*).

The right to the basic components is related to residence and not to work activity. This represents a safety net relevant for platform workers with occasional work activity. As the income-related components are based on lifelong pensionable income for both employees and self-employed, this does not seem to represent particular challenges for platform workers. Still, low levels of income will be reflected in this component of the benefits.

In both countries, occupational pension schemes supplement the statutory systems. The supplementing schemes typically only cover employees. Self-employed workers must arrange their own private solution if they want supplementing rights to occupational pensions. Pension schemes set by collective agreements often provide rights beyond the minimum requirements, but are rare in the private sector in Norway, where company schemes are more common. In Sweden, almost all

489. The contributions from the worker, however, are differentiated, and for the income pension, the pension fund is predetermined, while for the premium pension, the workers can choose between different funds.

employees are covered by some form of occupational pension scheme, whether regulated by collective agreements or by private pension schemes.

The statutory pension system in Denmark differs significantly from the Swedish and Norwegian systems. The statutory basic scheme is solely residence-based, non-contributory and partly means-tested, and employees and self-employed are treated equally.[490] Income-related benefits are regulated both by law and collective agreements. ATP is a supplementary fund, covering employees working at least nine hours per week, but benefits are low. The right to income-related benefits therefore depends on the workers being covered by either occupational pension schemes or private pension schemes. Occupational schemes are based on collective agreements and cover 90 per cent of the workforce, but typically only cover employees.

The Icelandic system is quite different. Here, the connection between work activity and pensions is more evident. The system is based on three pillars, with the first consisting of an income-tested basic pension based on residence (*Almannatryggingar*).[491] This pillar is most important for those not covered by either of the other two pillars. Second, an occupational pension is mandated by statutory regulations, covering all persons with an income, employees and self-employed alike (*Lífeyrissjóðir*).[492] The funds for employees are mainly industry-wide. The third pillar is based on individual pension savings.[493] As regards employees, the contributions are split between the employer and the employee, according to the rules set in the relevant collective agreement. The pension funds are then obliged to ensure that a person receives a certain percentage of their monthly salary after they retire.[494] Low and/or sporadic income is thus directly reflected in the pension level for all workers. The risk of a very low pension might still be somewhat higher for a platform worker than for traditional employees and the genuinely self-employed, who will typically have a more stable and higher income.

The Finnish pension system is based on two pillars: A statutory scheme based on residence secures basic income for those who have no income-related pension or with little benefits, while an income-based pension scheme is based on work and entrepreneurial activities. This last pillar is mandatory, and employers are responsible for establishing a scheme covering all employees. Contributions are partly paid by the employer, and partly deducted from the employee wages. The self-employed take care of their own contributions.

8.6.3 Summary of implications

All the Nordic countries have pension systems ensuring *some* residence-based basic income when out of work due to retirement and old age. This represents a safety net very relevant for platform workers. The Nordic systems differ, however, and the connection between previous work activity and pensions varies considerably.

The role of occupational pension schemes set by collective agreement in Sweden, Denmark and Norway put platform workers at a particular disadvantage compared to traditional employees in these countries. The typical platform worker will not be

490. C. Vesterø-Jensen. *Det tvedelte pensionssystem*. Forskningsrapport nr. 1/84. Roskilde: Institut for samfundsøkonomi og planlægning, Roskilde Universitetscenter, 1984.
491. The Social Security Act, 100/2007 (Lög um almannatryggingar).
492. The Act on Mandatory Pension Insurance and on the Activities of Pension Funds, 129/1997 (lög um skyldutryggingu lífeyrisréttinda og starfsemi lífeyrissjóða).
493. Lífeyrissjóða, 2017, https://www.lifeyrismal.is/static/files/Fundargogn/2017pensions-in-iceland.pdf.
494. The requirement is at least 56 per cent of the monthly salary, based on contributing to the fund for 40 years, cf. the Icelandic Act on Mandatory Pension Insurance and on the Activities of Pension Funds, § 4 (1).

covered by these schemes, due to the lack of recognition as an employee and/or not being covered by the collective agreement. Furthermore, a typical platform worker will likely not sign up for a supplementing private scheme the way a genuinely self-employed would, and must therefore rely on the benefits provided by the general statutory pension system. As these pensions have income-related components in Sweden and Norway, platform workers with normally lower income will receive considerably lower pensions than the traditional employees and the self-employed.

To summarize, income protection when out of work due to retirement and old age is clearly weaker for platform workers and other workers with an unclear employment status compared to traditional employees and the genuinely self-employed:

- The Nordic statutory pension systems, with some residence-based basic income, are a relevant safety net for platform workers, but only provide a limited protection.
- Occupational pensions schemes in collective agreements or company-based schemes will generally not apply to platform workers (as self-employed); this is a particular disadvantage in Sweden, Denmark and Norway.

8.7 Conclusions

The Nordic systems of social security are based on the categorization of workers as either self-employed or employees and thus build on the binary divide. Only Norway has an intermediary category – freelancer – but the legal framework of social security is still largely based on the binary divide.

However, benefits providing income protection when out of work are *not* generally reserved for employees. Many of the benefits are available for workers irrespective of employments status. Still, the criteria for eligibility and the calculation principles are often differentiated between the two (or three) categories. The binary divide therefore does not have the same defining and delimiting function in the field of social security law as it does in labour law.

As a consequence, the different benefits may well apply to platform workers despite an unclear employment status. The main general risk for platform workers and other workers in similar positions is that they are less likely to fulfil the requirements to qualify for benefits compared to traditional employees and the genuinely self-employed. This risk is mainly a result of the *work activity requirements* for the various benefits being difficult to meet for workers doing *occasional work*. Our general impression is that the Nordic social security systems are not well equipped to provide income protection for workers in unstable and unpredictable labour relations. The legal protection of these types of workers is therefore inferior to the protection of both employees in traditional employment and the genuinely self-employed with regular and planned work activity.

The more precise risks vary significantly between the Nordic countries and between different benefits. Some risks also depend on employment status – i.e. whether the worker is treated as an employee or as a self-employed worker.

As regards *unemployment*, occasional workers have a high risk of not being eligible for benefits or not being entitled to work-based benefit components. The risk is enhanced in systems where benefits rely on membership in unemployment funds. The risk seems to be particularly high in Denmark and Finland, where occasional work with low pay may not count at all in the assessment. There is also a risk that occasional work will lead to shorter benefit period, as in Norway and Finland.

A similar risk is clearly present when out of work due to *sickness or injury*. Here, however, employment status can play a more important role. Occasional workers are at a high risk of not qualifying for sickness benefits from the employer and/or not have any benefits in the first period of sickness. The workers are not covered by statutory schemes for occupational injury benefits and insurance schemes. The main risks therefore concern short-term sickness and long-term injuries etc. related to the work activity. In Denmark, occasional workers may also be affected negatively by calculation principles.

Occasional workers furthermore face some specific risks related to *parental leave*. Although the regulations are mainly parallel for employees and the self-employed, workers like platform workers may not qualify for benefits, irrespective of employment status. The risks are particularly high in Denmark, where being in 'current employment' and calculation principles affect occasional workers negatively.

Risks are not quite as evident in benefits related to *retirement and old age*, as all the statutory pensions systems in the Nordics provide some basic income protection

based on residence, irrespective of work activity. However, there are also important work-based pension components in which the low income of occasional workers will be reflected in marginal pension rights. Platform workers and others with an unclear employment status will generally not be covered by the occupational pension schemes partly financed by employers that are mandatory or common for employees. At the same time, occasional work and low levels of pay may make platform workers less inclined to invest in private pension schemes available to the self-employed.

It is important to emphasize that many of these risks are present even if platform workers are treated as employees. The implications for the protection of workers are thus not fully remedied by clarifying their employment status and/or recognizing them as employees. In order to provide basic social security for all workers in line with the fundamental values of the Nordic countries, the statutory frameworks need to adapt to work of a more occasional nature. Avenues for development are discussed further in Part IV.

Although this chapter has focused on statutory regulations, collective agreements also play an important role in providing supplementing rights and insurance schemes, most commonly concerning sickness, injury and pensions. As discussed in chapter 6, these regulations generally only cover employees. Employment status can therefore still have a major effect on the income protection of workers out of work in the Nordic countries.

Based on these discussions, we have identified some main implications of an unclear employment status as regards income protection when out of work:

- Benefits when out of work are generally available, but various work activity requirements can often leave occasional workers with no or very limited income protection.
- The workers only have access to important supplementing rights and insurance schemes if they are recognized as employees.
- Regardless of employment status, the legal protection of occasional workers is clearly weaker than for traditional employees and the genuinely self-employed.

9 Protection of workers with an unclear employment status: Main weaknesses and strengths

The discussions in Part III (chapters 6–8) address the legal implications of being a worker in the grey area between being an employee and being self-employed. The implications differ for the three areas under scrutiny, as the binary divide has different functions and varying importance.

The binary divide sets the scope of *collective bargaining mechanisms*. Only employees have clear and undisputed access to collective bargaining in all the Nordic countries. An unclear and unresolved employment status is therefore a major obstacle to achieving the legal protection gained by collective bargaining. For the workers, this means weaker legal protection and slim opportunities to represent their interests vis-à-vis employers. In the Nordic societies, an expanding grey area can undermine collective bargaining as a regulatory tool, diminish the strength of the social partners and negatively affect their cooperation with the state. The collective bargaining mechanisms are, in other words, vulnerable to new types of labour relations that obscure the assessment of employment status. This is particularly troubling in the Nordic countries, due to the key regulatory function of collective bargaining here. We see this as one main weakness.

However, there is considerable potential for collective bargaining mechanisms to adapt, most clearly in some of the Nordic countries. The Swedish system is set up to include certain workers with unclear status, as the mechanism is extended to 'dependent contractors'. In Denmark, the social partners are actively exploring collective bargaining for groups of workers in the grey area. There are emerging doctrinal debates in Norway and Finland highlighting the potential within the limits of EU/EEA law, for a more inclusive concept of employee in the context of collective bargaining. The varying statutory extension mechanisms in Finland, Norway and Iceland may have the potential to further extend rights obtained by collective agreements. These signs of the adaptability of the collective bargaining systems are in our view an important strength in the Nordic systems.

The delimiting function of the binary divide is not as clear in the legal *protection of health and safety*, including working time and annual paid leave. Although the regulations are mainly structured as duties for employers to protect their employees, the binary divide is to some extent dissolved by a variety of extensions and nuances, explicit in legislation or by means of interpretation. Moreover, all the Nordic countries provide *some* basic protection of the health and safety of workers irrespective of employment status. The protective rationale is thus not ultimately set by the binary divide. This affirms a conclusion in chapter 3, that labour law protection is not inextricably linked to a contract of employment. We find this somewhat broader and more flexible protective rationale to be a main strength in the Nordic systems.

The broader protective rationale is, however, neither consistent nor clear. We have identified a number of risks for workers with an unclear employment status in the different Nordic countries, further described above. The legal protection of the

health and safety of these workers is generally weaker and less clear than for traditional employees. These 'gaps' in the legal protection are worrying, for the individual and for the society, as they concern the fundamental issue of health and safety. The inconsistencies and gaps are thus important weaknesses.

In *social security*, the binary divide has a different function. Most benefits providing income protection when out of work apply to all types of workers. The distinction between employees and the self-employed mainly serve as a categorization, whereby criteria for eligibility and calculation principles are differentiated. This inclusive set-up of social security is a main strength in the Nordic systems.

Yet, here too, we have identified a number of specific risks in the different national systems. An overall conclusion is that requirements of work activity for different benefits make it generally hard for occasional workers to qualify. Workers in less stable labour relations can thus be left without – or with only some – income protection when out of work. The legal framework then partly fails to provide basic income security for all in line with Nordic traditions and values. We see this as a main weakness.

Based on the discussions in Part III, we summarize these main weaknesses and strengths as follows:

- The collective bargaining mechanisms are vulnerable to new types of labour relations, but show the potential to adapt.
- The protection of health and safety, including working time and paid annual leave, for workers with an unclear employment status is inconsistent and has 'gaps', but reveals a somewhat broader and flexible protective rationale that can be adapted further.
- The systems of social security are set up to provide income protection when out of work for all types of workers, but as occasional workers are at risk of not qualifying for important benefits, this purpose is only partly fulfilled.

PART IV:

Overall conclusions and recommendations

10 A Nordic labour law framework fit for the future?

10.1 A stress-test of the legal framework

Are the Nordic systems of labour law and regulations fit for the future of work? This is the question we have aimed to address in this study. Our approach has been to *stress-test* the legal framework, by examining its ability to cope with new types of labour relations. Non-standard labour relations that challenge the structure and foundations of labour law are likely to attain a more salient role in the future.

More precisely, we have first looked for *weaknesses or 'cracks'* in the labour law systems: We have discussed the adaptability of the key concepts of employee, employer and employment relationship, when faced with new types of labour relations. We have mapped and discussed specific responses to different types of non-standard work. The comparison of concepts and responses across the Nordic legal systems has revealed interesting commonalities and differences, and we have identified some main weaknesses and strengths.

Second, we have explored *what is at stake* when weaknesses and cracks appear in the legal framework: We have discussed how selected legal rules apply to workers with an unclear employment status, compared to traditional employees and the genuinely self-employed. The analysis has covered three important areas: mechanisms of collective bargaining, protection of health and safety (including working time and annual paid leave), and income protection when out of work. A full picture of the implications of an unclear employment status would require an analysis of *all* relevant labour law and social security regulations. However, we still consider our analysis a sound basis for identifying common weaknesses and strengths. The comparative perspective has also enabled us to highlight some – for us – surprising differences.

In this final chapter, we turn our attention to the future and try to combine these insights. We will concentrate on the main common weaknesses identified in the Nordic frameworks of labour law and regulations: the unclear employment status of workers in new labour relations (section 10.2); the unclear allocation of employer responsibilities in new labour relations (section 10.3); and gaps in the legal protection of workers with unclear or unresolved employment status (section 10.4).

The question we seek to answer is how these weaknesses can be remedied. The underlying premise is that the main functions and purposes of Nordic labour law should be preserved in the future. Building on the strengths identified in this report, we discuss different avenues for development. This includes discussion of opportunities for the main actors in the labour law sphere – the legislatures, the social partners and the courts – to contribute to repairing the cracks or filling the gaps. Lastly, we reflect on the previous discussions as an issue of recognizing new labour relations in the future (section 10.5).

10.2 The unclear employment status of workers

The concepts of employee in the Nordic countries are generally quite inclusive and adaptable. Still, the legal classification of new, emerging labour relations can be unclear and difficult to predict. The criteria or indicators that guide the assessment of whether a worker is an employee focus on traditional forms of subordination. The employment status of workers is therefore obscured when the classic features of an employment relationship – a personal obligation to stay at service and work under employer supervision and control – are not clearly present.

In new types of labour relations, subordination and dependency can take different forms. A key question to consider is: *How will subordination and dependency look in the future?*

Technological development has enabled companies to effectively organize work in a market model: Digital platforms use algorithms to match supply and demand for labour at a high scale with low transaction costs. In the platform model, a personal obligation to stay at service is less significant for ensuring a stable workforce. Workers may be free to accept or reject work tasks, and still in reality depend on work provided or mediated by the platform company. Workers can be managed without direct supervision and control, by the use of algorithms and customer ratings. Workers in new labour relations can therefore be in dependent positions parallel to those of traditional employees, despite the lack of classic subordination.

The uncertainty this entails is, in our view, a weakness that needs to be addressed. The employment status of workers must be *predictable* in order for the labour law framework to function effectively in the future. The report has illustrated how new labour relations can appear and gain momentum while the legal clarifications lag behind.

The Nordic legal systems have – thus far – been generally inclusive toward non-standard work. However, there is no guarantee that this will continue as emerging labour relations enhance and combine the challenges of non-standard work. The national legal responses to different types of non-standard work seem somewhat erratic and random. There is no clear common approach in the Nordics, and EU/EEA directives have been a main instigator for many of the responses. This is clearly illustrated by platform work. There is a wide consensus that the platform company–worker relation can be a contract of employment, depending on the circumstances, including in the platform model. However, there is still no authoritative guidance for the assessment of the employment status of platform workers.

One way to address this uncertainty is to *develop and clarify the legal assessment of employment status*. Clearer guidance on how to draw the distinction between dependent workers and the genuinely self-employed does not need to imply change in the deeper layers of the concept. This could be obtained by *updating the criteria or indicators* used to classify employment status.

To ensure that the main functions and purposes of labour law are preserved in the future, labour law should apply to labour relations with a clear imbalance of power, where workers have little influence on their individual working conditions. Only then can labour law continue to effectively counteract power asymmetries, provide balance between competing interests and facilitate cooperation and trust between management and labour – in line with the overall societal interests in the

Nordics.[495] This entails, in our view, that workers who in reality are personally and economically dependent on their principals should be recognized as employees. The criteria or indicators used to assess employment status should reflect this more clearly than today. For example, whether the worker is in a position to negotiate conditions of work individually may be a suitable indicator. Another indicator may be whether the work is unilaterally sanctioned.

The question is *how* the suggested developments and clarifications may be achieved – how can the legislatures, the courts and social partners contribute?

We do not recommend more precise statutory definitions. The inherent adaptability of the concepts of employee is in our opinion a fundamental strength in the Nordic legal systems. This strength could be lost with refined definitions and perhaps leave the legal framework more vulnerable to circumvention. For the same reasons, we are reluctant to recommend new *general* intermediary categories. That would be a breach of the general Nordic tradition. The explicit extension for 'dependent contractors' in Sweden – which seems to have served Sweden well – only applies within the scope of the Co-Determination Act.

However, *within* the existing concepts and definitions lies a significant potential for clarifying and developing the personal scope of labour law.

The Nordic jurisprudential approach – case-by-case assessments by the courts – is a strength and provides an avenue for development. It is, however, also a weakness. Individualized assessments in courts are not an effective way of resolving the unclear employment status of new types of labour relations more generally. When the courts assess the employment status of workers, they build on previous case law and typically rely on the traditional criteria or indicators. When faced with new labour relations, where subordination and dependency can take new forms, the courts are in unfamiliar territory and without clear guidance. Varying and even inconsistent practices may appear, and may not necessarily be grounded in labour law considerations. The latter is illustrated by the recent ruling from the Danish Competition and Consumer Authority which did not acknowledge the employee status of workers using the Hilfr platform. The courts only consider the cases brought before them, and may not be presented with relevant grey area cases. This is clearly illustrated by Iceland, where there is a lack of relevant case law. We are therefore not convinced that the courts will provide sufficient – or sufficiently timely – clarification and development in the future. Support from other actors is likely needed.

The legislatures can promote legal development without changing statutory definitions. Preparatory works are relevant legal sources. Elaborations in preparatory works can therefore encourage and facilitate developments in case law. Here, the legislatures may for example elaborate on how the scope of the relevant rules should reflect their purpose. It is also possible to include more general discussions on how criteria or indicators of employment status can be updated in light of changes in labour relations. The legislatures may also focus on methodological issues: affirming and explicitly acknowledging the purposive or inclusive interpretation methods applied by the courts and identified in doctrinal works.

An avenue we find particularly promising is to introduce a presumption of employee

495. Our understanding of the main functions and purposes of labour law is explained in section 1.1.

status. This approach is established in the preparatory works of the new Danish Holiday Act.[496] A similar approach could be applied in other legislative contexts. The approach resembles the inclusive interpretive method applied in Iceland. It has the advantage of providing both predictability and inclusiveness: A presumption provides a prima facie protected status. This is a clarification on which to rely for all the involved parties, unless the opposite is proven.

The social partners can contribute to developments and clarifications. This report has identified some leeway for the social partners to influence the personal scope of collective bargaining mechanisms. The Swedish extension for 'dependent contractors' in the Co-Determination Act provides a clear opportunity for social partners to include grey area workers in a collective agreement.[497] In the other Nordic countries, some leeway also exists.[498] In Denmark, there are a number of examples of how the scope of collective agreements can be defined in order to include these workers. The agreements that set a presumption of employment status where services are provided merely as 'arms-and-legs' to an employer are a good example.[499]

In our view, EU/EEA law permits some leeway in the grey area between traditional employees and the genuinely self-employed: General principles of competition law only clearly apply to workers who are operating as *genuinely* self-employed in the specific work relation. The European Commission has recently launched a consulting process for a Digital Services Act package.[500] In their press release, the Commission states that the initiative 'seeks to ensure that working conditions can be improved through collective agreements not only for employees, but also for those self-employed who need protection'.[501] Almost simultaneously, the recent CJEU ruling on platform couriers not having status as employees illustrates the need for the development of concepts also within the EU framework of law.[502] Although the result of the Commission initiative remains to be seen, this supports our impression that there is – or at least will be – leeway in the grey area.

Here lies a potential to adapt or extend the concept of employee in collective agreements by means of the collective bargaining mechanism itself. Developments here may have an impact on the concept of employee more broadly. We therefore encourage social partners to actively explore collective bargaining mechanisms for the regulation of new labour relations in the grey area between traditional employees and the genuinely self-employed.

The social partners – trade unions in particular – also play a key role in bringing relevant grey area cases to the courts for clarification.

Based on this, we find it feasible to develop and clarify the concepts of employee to meet the future of work: There are several promising avenues toward resolving unclear issues, enhancing predictability and ensuring that workers in new versions of dependent relationships are included in the labour law framework in the future. To

496. The approach is explained in more detail in sections 3.3.4 and 6.4. Doctrinal works in Norway argue for a similar approach to the concept of employee in the context of collective bargaining, see Hotvedt 2020.
497. The Swedish extension is explained in more detail in section 6.3.
498. The Nordic collective bargaining mechanisms and the intersection with EU/EEA competition law is discussed in section 6.3 and 6.4.
499. See further on these agreements in section 6.3.
500. See further on the Commissions website, https://ec.europa.eu/digital-single-market/en/news/consultation-digital-services-act-package.
501. Press release 30 June 2020 from the European Commission, see https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1237.
502. Order of 22 April 2020, in case C-692/19 *Yodel Delivery Network*, see also section 6.4 and 7.3.1.

summarize, we highlight these avenues for adaption:

- The courts could consider assessing employment status in light of the new modern labour market reality. This could include considering whether the worker in reality is personally and economically dependent, unilaterally sanctioned and with little influence on the conditions of work.
- The legislatures could consider promoting developments and clarifications of the concept of employee in preparatory works, for example by introducing a presumption of employee status. This could also promote aligned assessments in other areas of law, such as competition law.
- The social partners could consider active use of the collective bargaining mechanism to regulate new labour relations, by presumptions of employee status for certain workers or otherwise, and by actively bringing grey area cases to the courts for clarification.

10.3 The unclear allocation of employer responsibilities

The concept of employer in the Nordic countries is generally not as adaptable or inclusive as the concept of employee. The formal contractual party is, as a starting point, considered to be the employer and responsible for complying with labour law and regulations. Although the realities have some significance, there is clearly less room for purposive or inclusive interpretations. The legal framework builds on an assumption that the contractual party and the entity that exercises employer functions are one and the same. The assumption fails when the organization of work is more complex and shifting. As a result, the allocation of employer responsibilities is obscured.

Agency work, subcontracting and corporate group structures are clearly present in the Nordic labour markets. Consequently, functions and powers traditionally bestowed upon the contractual employer may be spread on other and sometimes several entities. How employer functions and powers will be distributed in the future is difficult to predict. New, emerging labour relations are not likely to be less complex and shifting than today. Digitalization may further speed up the tendency toward more complex, fragmented and shifting work organization. The rise of digital platforms mediating work is illustrative. Here, the platform worker engages in a number of short and shifting relations, by working for a number of customers rather than for one traditional employer.

In these types of organization of work, there is considerable legal uncertainty concerning how to allocate employer responsibilities. This is in our view a weakness that should be addressed. Where to place the legal responsibilities needs to be *predictable* in order for the labour law framework to function effectively in the future, to the benefit of both workers and employers.

In our opinion, it is important to ensure that the allocation of legal responsibilities takes account of *who in reality exercises employer functions and powers*. If not, the main functions and purposes of labour law will be negatively affected. Labour law will be less equipped to counteract power asymmetries, protect workers, balance competing interests and facilitate cooperation and trust.

As described in this report, the Nordic legal systems have varying responses to these

issues. Agency work is the only triparty arrangement specifically regulated in all the Nordic countries. There are a number of extensions of employer responsibilities beyond the contract of employment. As a result, responsibilities may be triggered by different employer functions. Some responsibilities are more commonly extended than others, particularly responsibilities concerning the health and safety of workers. In some situations, like agency work, extensions more typically apply. Despite some common traits, a consistent and comprehensive approach is lacking. This leaves considerable uncertainty as to whether and how the legal framework will adapt to the challenges.

Consequently, in our view, there is a need to *clarify and adapt the allocation of employer responsibilities to new – complex and shifting – work relations.*

Firstly, this could involve *a clarified general approach* regarding how to allocate employer responsibilities: A principled assessment of which employer functions trigger the different legal responsibilities traditionally bestowed on the contractual employer could be helpful. Can specific responsibilities be directly related to separate functions, such as the managing of the workplace, supervision and control of work, appointments and distribution of work, and the obligation to provide pay?

There is already some basis for these types of considerations. The various interpretations and extensions in the Nordic countries show that employer responsibilities are not inextricably linked to the contract of employment. Exercising employer functions may already justify responsibilities, and responsibilities may shift as factual circumstances change. Approaches to identifying the 'real' contractual employer, purposive interpretations and various extensions of responsibilities can all be seen as functional elements: They serve to align legal responsibilities with employer functions and powers. Although there is not one clear functional approach, this could be acknowledged and developed into a more general approach. The doctrine on 'joint employer responsibilities' in Norway illustrates that a general approach may be derived from fragmented material.[503] Finland already has a principled approach regarding how to allocate responsibility in agency work that may be developed to apply more generally.[504] However, the need to pin legal responsibilities on those who can influence working conditions should be balanced with the need for clear and predictable liability.

Secondly, a clarified general approach to allocating responsibilities could be *consistently implemented* in the legal framework in each country, and preferably also in the Nordic context. The report shows that interpretations vary and that extensions are patchy in the different Nordic countries. Despite some common traits, there is no clear common Nordic approach, and no obvious best practice standard.

A next question is *how* the suggested developments may be achieved and how the different actors – legislatures, courts and social partners – may contribute?

The concept of employer has less inherent adaptability compared to the concept of employee. The report has shown that the courts are generally rather reluctant to adapt the concept of employer by purposive and nuanced interpretations. Only in Norway has case law formed the basis for a distinct, general doctrine concerning the allocation of employer responsibilities. The scope of the doctrine however seems to be narrowed in recent case law. We are therefore sceptical toward relying only on

503. In this case, the material was a limited number of rulings in case law, see further on the doctrine in section 3.4.4.
504. The Finnish approach is presented in section 4.3.2. As explained here, the Danish approach is similar.

the courts to provide a general and principled approach. The judiciary interpretational traditions also vary within the Nordic countries, from more pragmatic to more dogmatic. This may influence the ability of the courts to contribute to the development of a doctrine with an overall purposive approach across the Nordic countries.

The various explicit statutory extensions of employer responsibilities illustrate that the legislatures already have an active role on how to allocate employer responsibilities. This role for the legislatures can affirm – and may further enhance – a reluctance of the courts to explore the adaptability of the concept of employer further.

Consequently, we find that a more suitable avenue for the allocation of employer responsibilities is for the legislatures to take the lead in developing and implementing a consistent approach on how to adapt the allocation of employer responsibilities to new labour relations. Developments do not necessarily imply many extensions and legislative changes. Here, too, considerations in preparatory works can be effective. Principled considerations here would provide the courts with the necessary tools to adapt the interpretation and application of both the concept of employer and specific extensions.

On the other hand, legislative changes can prove particularly effective in some instances. Statutory restrictions on the use of agency work illustrate how standard, direct employment relationships can be safeguarded in different ways. If the sanction for breach is a right to claim direct employment, as in Norway, direct employment can be enforced more effectively than by mere economic sanctions.

We have chosen to focus on the need for a general and consistent approach, and not to further specify how responsibilities may or should be allocated. Which considerations should prevail and how the competing interests should be balanced is to some extent a political issue. We emphasize, however, the importance of involving the social partners in the process.

The social partners have taken an active role in responding to specific types of non-standard work, such as agency work and on-call contracts. Yet, we have not seen a clear, general approach from the social partners regarding how employer responsibilities may or should be distributed or shared in shifting or complex organizations. This could be related to the fact that only a few platform companies are organized. Initiatives from the legislatures therefore appear to us as a more promising avenue than leaving the issues solely to negotiation among the social partners.

To summarize, we see opportunities to develop a general and consistent approach on how to allocate employer responsibilities in the future of work. This would depend on initiatives from the legislatures and a will to develop and pursue a principled approach. In other words, we recommend the following:

- The legislatures could consider taking the initiative to develop a principled and general approach on how to allocate employer responsibilities, for example by clarifying which responsibilities should rest with the contractual employer and which responsibilities should be related to various employer functions.
- The social partners could consider participating actively in developing a principled and general approach, by using the collective bargaining mechanism and by bringing cases to the courts.

- The courts could consider interpreting and applying the concept of employer and explicit extensions in light of these general considerations, more clearly and specifically in light of the purpose of the relevant regulations, and thereby contribute to consistent allocation of responsibilities.

10.4 The gaps in the legal protection of workers with an unclear employment status

We have examined the legal protection of workers with an unclear employment status in three selected areas: access to collective bargaining mechanisms, protection of health and safety at work, and income protection when out of work. We have identified gaps in the legal protection of workers in all three areas. If the gaps are not remedied, and the future brings more workers whose employment status is unclear, the gaps will expand: More workers will be affected by weaker protection or protection that is lacking. These expanding gaps may undermine societal functions and purposes deeply rooted in the Nordic labour market systems.

Collective agreements cover large parts of the Nordic labour markets. Thus, the *legal protection provided by collective bargainin*g has relevance in practically all areas of labour law. The agreements supplement (and sometimes derogate from) statutory standards, including the two areas discussed here.

Access to collective bargaining is mainly an issue of employment status. As this report shows, the Nordic systems of collective bargaining include employees – and in Sweden, 'dependent contractors' are included as well.[505] The genuinely self-employed are excluded in all Nordic countries. This is not only a result of national traditions. General principles of EU/EEA competition law restrict the possibilities to bargain collectively. An exemption is recognized for collective bargaining between management and labour that seeks to improve conditions of work and employment. The exemption does not apply to the genuinely self-employed, however.

As mentioned above, the European Commission has recently launched a process concerning the scope of collective bargaining and aims to ensure that EU competition rules do not hinder collective bargaining for those who need it, even if they are formally self-employed.[506] This shows that the same challenges and issues discussed in this report have caught the attention of legislatures at the EU level.

Workers with an unclear employment status therefore face the same problem as in labour law more generally: They *may* be included in collective bargaining, but an unclear and unresolved employment status complicates access. The collective bargaining mechanisms are, in other words, vulnerable to the changing labour relations of the future. We consider this to be a significant gap in the legal protection of workers. It is also a threat to the regulatory tradition in the Nordics. If fewer workers have access to bargaining mechanisms, regulations by collective agreement will be less effective, and the role of the social partners may be diminished. This can have further implications for their cooperation with the state and governance of wage development, income policy and social and fiscal policies

505. See further in chapter 6.
506. The initiative is presented in more detail in section 10.2.

more broadly.

The collective bargaining mechanisms are, in essence, facing new challenges from the changing labour relations of the future.

In the past, industrial relations systems have proven to have considerable adaptability toward non-standard work. More recently, the social partners have engaged in innovative solutions with a view toward covering platform workers specifically, by concluding accession agreements to existing collective agreements (as in Sweden and Denmark), negotiating novel agreements (as in Denmark and Norway), or by drafting new agreements explicitly regulating the employment status of workers (as in Denmark).

However, the gap may be addressed by the same kinds of suggestions as discussed above in section 10.2: *Development and clarification of the legal assessment of employment status*. We refer to the promising avenues discussed there.

The protection of the *health and safety of workers* is a fundamental part of labour law. The report reveals a protective rationale that goes beyond the binary divide. The legal protection is *not* strictly limited to employees. All the Nordic countries provide some basic legal protection irrespective of employment status. Still, the protection of workers with an unclear employment status is neither clear nor consistent.

We have identified a number of gaps in the legal protection of these workers: If treated as self-employed, some health and safety regulations apply, but only provide a rather basic and uncertain protection. The protections provided by working time regulations seldom apply to the self-employed, nor are they covered by a right to paid annual leave, which also protects the health and safety of workers. Even if recognized as employees, the characteristics of their work creates gaps. Working time regulations are often not applicable to workers who (formally) control their own working hours, and the regulations fail to ensure the protection of workers with several employers.

In order to protect the health and safety of workers in the future, we see three types of avenues for adjustments in the legal frameworks: first, to consider *developing and clarifying the assessment of employment status*, as elaborated above; second, to consider more *effective health and safety protection for employees in new types of labour relations*; and third, to consider developing a *clearer and more consistent basic protection of the health and safety of the genuinely self-employed*.

The two latter suggestions would require a *review of existing health and safety legislation* in each Nordic country. This would be a task for the legislatures. The broader protective rationale revealed in this report may serve as an important basis for adjustments.

We have not discussed enforcement issues at any length. Nevertheless, our discussions show a potential for development in at least two areas. The situation in Denmark illustrates that, although regulations on health and safety at work may apply to the self-employed, effective enforcement may be lacking. The situation in Finland, on the other hand, illustrates that a right to paid annual leave may well be subject to the same public enforcement system as other standards concerning health and safety. These – as well as other – enforcement issues could be included in the suggested review of existing health and safety legislation.

Income protection when out of work is a central aspect of the Nordic welfare and

labour market model. This legal protection is not limited to employees. Most statutory benefits related to unemployment, sickness and injury, parental leave and retirement and old age are available to all workers irrespective of employment status. Eligibility criteria and calculation principles are usually differentiated for employees (freelancers) and the self-employed. The systems are clearly aligned with persons working either in standard employment or in full-time self-employment. However, some supplementing benefits are reserved for employees only, and benefits based on collective agreements play an important role, particularly in some countries.

Workers with an unclear employment status face a number of specific risks and gaps in protection compared to both traditional employees and the genuinely self-employed: They are at a higher risk of not qualifying for different benefits, or of only obtaining lower benefits or a shorter benefit period. This report has revealed that most risks and gaps are related to the occasional nature of their work, regardless of whether this is performed as an employed or self-employed worker. In simple terms, occasional work or fragmented work patterns often do not count on par with traditional work in the Nordic social security systems.

To make the social security systems equipped to provide income protection when out of work in the future, we believe certain adjustments could be considered. The avenue of *developing and clarifying the legal assessment of employment status* discussed above is highly relevant in this area, as well.

The weaknesses identified, however, are not only related to employment status, but also to occasional and fragmented work patterns. Another avenue, in our opinion, is therefore to *adapt the criteria and calculation principles for all social security benefits to occasional and fragmented work patterns*.

The latter would require a *review of existing social security legislation* in each Nordic country. Initiatives from the legislatures would be necessary. The need for adaption also pertains to benefits and pension schemes regulated by collective agreements. The social partners could therefore consider reviewing these schemes with an aim toward adapting them to occasional, non-standard or fragmented work.

A broader protective rationale is already well-established in the legal framework. That rationale is both a strength to build on and a possible avenue to follow: The developments we suggest can be perceived as a more consistent realization of that rationale for workers in non-standard work relations or performing work in an occasional or fragmented manner.

Our suggestions can be summarized as follows:

- The legislatures could consider reviewing health and safety regulations (including working time and annual paid leave), with the aim of ensuring effective protection for employees in new types of labour relations and developing a clearer and more consistent basic protection for the genuinely self-employed.
- The legislatures could consider reviewing social security legislation with the aim of adapting criteria and calculation principles to occasional work.
- The social partners could consider reviewing benefit and pension schemes in collective agreements with the aim of adapting criteria and calculation principles to occasional work.

10.5 Recognizing new types of labour relations

The issue permeating this study is a problem of *recognition*. The broad and growing diversity in the labour market today suggests that the work relations of the future will depart from the standard employment relationship in various ways. The challenge is to recognize that these labour relations need be covered by labour law and regulations in the future, which may entail adapting the legal framework to regulate these relations.

To face this challenge, new types of work relations need to be discovered and described. The reality of the work relation forms the basis for the legal classification. Due to the binary divide deeply entrenched in Nordic labour law, recognition as an employee is related to subordination and dependency. These characteristics imply a need for a specific labour law, distinct from general contract law, to counteract power asymmetries, balance interests and restrict managerial powers. Recognition as a self-employed worker, on the other hand, carries with it an assumption that the worker is in a position to regulate their own conditions of work according to general principles of contract law (and competition law). The social security system aims to provide a safety net for both categories.

This report has shown that workers in new types of labour relations will not necessarily be recognized as employees. Despite some dependent features and thus some need for legal protection, they may fall outside the scope of most labour law standards. We have also shown that the systems of social security do not in all respects provide an equal safety for these workers, whether considered to be employees or genuinely self-employed. In sum, this can be seen as *a structural recognition issue*, on top of the specific challenges already discussed (the unclear employment status, the unclear allocation of responsibilities and the specific gaps in legal protection). New types of workers in similar positions as employees may not be recognized as employees in the labour law sphere, and at the same time not equally protected in the social security law sphere, compared to traditional employees or the genuinely self-employed.

If this is not addressed, it could have deeper implications. The functions of labour law and regulations include distributing responsibilities, risks and costs in society. Employers who benefit from work pay for some of the risks of having the work performed under their management, through regulations ensuring a safe working environment, providing sick pay, paying social security contributions and for various insurance schemes etc. In the context of more unclear and fragmented labour relations, the risks and costs of work – e.g. sickness, accidents and injuries – may in the end shift to society, through a less productive work force and increased need for basic social assistance. There is furthermore a potential for increased inequality in society if some groups are not equally protected by social security systems, and fall outside the scope of collective bargaining and health and safety regulations.

We have applied a *Nordic approach* to the legal issues discussed. However, the report clearly illustrates that the EU has been a major instigator of legal development in many areas concerning non-standard work. This is likely to continue

and may contribute substantially to shaping the conditions for meeting future challenges. The work with this report has reaffirmed our view that the Nordic labour law and regulations build on shared values and generally similar protective rationales. The common features of the Nordic systems therefore go deeper than commonalities in specific regulations and EU/EEA directives. As shown by our analyses, the Nordic approach has several advantages that could work well as a basis for future strategies. An active Nordic approach to future challenges could therefore, in our view, be an avenue toward preserving the distinctive features of a Nordic model of labour law and regulations within the framework of EU/EEA law.

The future of the Nordic labour law is mainly a political question. Our aim has been to point at possible ways forward that reflect the values and protective rationales already established in the Nordic systems. At the end of the day, it is a political issue as to whether and how these values will be preserved in the future.

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Sammendrag

Er nordisk arbeidsrett i stand til å møte fremtidens utfordringer? Denne TemaNord-rapporten drøfter dette spørsmålet ved å studere det rettslige rammeverkets evne til å håndtere fremtidens arbeidsrelasjoner. De arbeidsrettslige systemene i Norden bygger på et binært skille mellom arbeidstakere og selvstendige oppdragstakere. Arbeidsavtalen er arbeidsrettens primære reguleringsgjenstand, mens oppdragskontrakter i hovedsak er overlatt til alminnelig kontraktsrett. De rettslige begrepene arbeidstaker og arbeidsgiver er derfor byggesteinene for den arbeidsrettslige reguleringen. Hvis fremtidens arbeidsrelasjoner gjør det vanskelig å anvende begrepene, blir den grunnleggende skillelinjen uskarp og det arbeidsrettslige fundamentet ustabilt. Dette kan påvirke anvendelsesområdet og undergrave effektiveten av den rettslige reguleringen av arbeidsmarkedet.

Dette er grunnen til at denne studien undersøker utfordringene ved fremtidens arbeidsrelasjoner og drøfter hvorvidt det arbeidsrettslige rammeverket vil være i stand til å møte dem. Det er satt fokus på atypiske arbeidsforhold, slik som selvstendige oppdragstakere, selvstendige arbeidsformer og nye typer fleksible kontrakter. Plattformarbeid – arbeid formidlet via digitale plattformer – er en ny type arbeidsrelasjon som kombinerer flere av utfordringene ved atypisk arbeid. Plattformarbeid brukes derfor som et typeeksempel til å studere fremtidige utfordringer. Studien vil også drøfte mulighetene for rettslig utvikling og reform. Kort sagt, studien søker å avdekke *hvorvidt* det er behov for å tilpasse nordisk arbeidsrett til fremtidens arbeidsrelasjoner, og i så fall *hvordan* en slik tilpasning kan bevare reglenes formål og funksjoner.

Studien legger til grunn en nordisk, funksjonell og komparativ tilnærming. Temaene er belyst i et nasjonalrettslig perspektiv for hvert av de fem nordiske landene Sverige, Danmark, Finland, Norge og Island, med fokus på de rettslige løsningene på de substansielle spørsmålene. En sammenligning av de nordiske systemene setter oss i stand til å belyse felles styrker og svakheter, og ved å kartlegge forskjeller mellom de nasjonale systemene kan vi videre fremheve potensialet for tilpasninger av gjeldende rett. Studien er gjennomført i form av en tretrinns analyse.

Del I er introduksjonen og legger grunnlaget for analysen. I **kapittel 1** forklarer vi studiens målsettinger og presenterer opplegget og strukturen.

Kapittel 2 gir en kort presentasjon av det arbeidsrettslige rammeverket i Norden. Sett i lys av tariffavtalenes sentrale funksjon i den nordiske arbeidsmarkedsmodellen, er presentasjonen konsentrert om tariffavtalers funksjon som reguleringsinstrument. Tariffavtaler er rettslig bindende for organisasjonene og deres medlemmer, og i alle de nordiske landene har avtalene normativ (dvs. regulerende) virkning i individuelle arbeidsforhold. I tillegg har tariffavtalene på ulike måter en *indirekte* rettslig betydning. For eksempel har noen nordiske land lovfestede mekanismer for allmenngjøring av tariffavtalers bestemmelser om lønn og andre vilkår. Vi peker på noen variasjoner i samspillet mellom tariffavtalene og lovgivningen: Mens ingen av landene har lovfestet minstelønn, er ansettelsesvilkår i større grad overlatt til tariffregulering i Danmark og Sverige enn i Finland, Norge og

på Island. Det finnes også strukturelle forskjeller mellom lovgrunnlaget i de nordiske landene, ved at den arbeidsrettslige lovgivningen i Finland og Norge er nokså enhetlig, mens den er mer fragmentert i Sverige, Danmark og på Island.

Del II omhandler det første trinnet i analysen. Denne delen vurderer om de sentrale arbeidsrettslige begrepene er *fleksible og vidtfavnende*. Er begrepene tilstrekkelig anvendelige og/eller fleksible til å kunne møte fremtidens arbeidsrelasjoner? Hvis ikke, vil fremtidens relasjoner kunne få en uklar rettslig status eller falle utenfor arbeidsrettslige regler. Manglende evne til tilpasning og inkludering kan derfor betraktes som svakheter eller «sprekker» i de arbeidsrettslige systemene.

Kapittel 3 behandler temaet ved å analysere den iboende fleksibiliteten i de sentrale begrepene «arbeidstaker» og «arbeidsgiver». Det gis først en nærmere forklaring av utfordringene ved fremtidens arbeidsrelasjoner. Flere ulike trekk ved atypisk arbeid vanskeliggjør anvendelsen av disse begrepene. Dette gjør reglenes anvendelsesområde uskarpt og ansvarsplasseringen usikker, og kan dermed svekke den rettslige forutsigbarheten. Plattformarbeid kombinerer flere av disse trekkene og representerer følgelig en særlig krevende utfordring. *Det første* begrepet som undersøkes er «arbeidstaker». I alle de nordiske landene innebærer dette begrepet en grunnleggende fleksibilitet. Definisjonene i lovgivningen er generelle og relativt vagt formulert. En mer presis definisjon av dette begrepet er dermed i hovedsak overlatt til domstolene, som gjør helhetsvurderinger i hver enkelt sak ut fra en liste over momenter eller indikatorer. Realitetene i arbeidsrelasjonen er generelt sett avgjørende på grunn av de arbeidsrettslige reglenes tvingende karakter og vernehensyn. Graden av fleksibilitet varierer imidlertid noe mellom landene. Realitetene tillegges noe sterkere betydning i Norge enn i Sverige, Danmark og Finland. Mens det svenske, danske, norske og islandske begrepet kan anses som vidt, inkluderende og/eller formålsorientert, fremstår det finske begrepet som mer rigid. *Det andre* begrepet som analyseres er «arbeidsgiver». Dette begrepet refererer i hovedsak til den kontraktmessige arbeidsgiveren og har ingen klar og generell mulighet for å kunne tilpasses til endrede arbeidsrelasjoner i noen av de nordiske landene. Ved vurderingen av hvem som er kontraktmessig arbeidsgiver bygger alle rettssystemene på alminnelige avtalerettslige (og selskapsrettslige) prinsipper, og vektlegger dermed formell kontraktregulering og selskapsstrukturer. Begrepsmessige nyanser og funksjonelle tilnærmingsmåter gir likevel en viss mulighet for tilpasning. Også her varierer graden av fleksibilitet de nordiske landene imellom. Det er enkelte ulikheter i hvordan den kontraktmessige arbeidsgiveren identifiseres, og det finnes ulike rettslige grunnlag for å utvide arbeidsgiveransvaret til andre relasjoner. Samlet sett tyder analysen på at arbeidsgiverbegrepet i Danmark og Norge er mer fleksibelt enn i Sverige, Finland og på Island. Hovedinntrykket fra en sammenligning av de to sentrale begrepene er at i alle landene er arbeidstakerbegrepet mer fleksibelt enn arbeidsgiverbegrepet. Kapittelet konkluderer derfor med at det rettslige rammeverket er bedre egnet til å tilpasse seg nye relasjoner som utfordrer reglenes anvendelsesområde enn de som tilslører plasseringen av arbeidsgiveransvaret.

Kapittel 4 behandler det samme temaet fra en annen synsvinkel. For ytterligere å belyse fleksibiliteten til det rettslige rammeverket, ser dette kapitlet på spesifikke reguleringer av ulike former for atypisk arbeid. Dette omfatter deltid, tidsbegrensede arbeidskontrakter, innleie fra vikarbyråer og plattformarbeid.

Analysen viser at arbeidsrettslig regulering i Norden i stor grad omfatter atypisk arbeid. Alle de nordiske landene anerkjenner deltid, tidsbegrensede kontrakter og utleie av arbeidskraft som arbeidsavtaler. Selv svært fragmenterte og marginale kontrakter om arbeid er ansett som arbeidsavtaler. Nye arbeidsrelasjoner, som for eksempel plattformarbeid, kan godt bli betraktet som arbeidsavtaler, avhengig av en konkret helhetsvurdering. Dette understøtter konklusjonen om at de sentrale begrepene i de nordiske landene er relativt vidtfavnende og fleksible. Analysen avdekker imidlertid også enkelte svakheter. Den rettslige klassifiseringen av arbeidsforhold som befinner seg i gråsonen mellom arbeidstakere og selvstendige oppdragstakere, er ofte uklar og uforutsigbar. Ettersom en konkret helhetsvurdering er nødvendig og i siste instans vil måtte avgjøres av domstolene, vil den rettslige klassifiseringen vanligvis ligge etter utviklingen på arbeidsmarkedet, noe som kan skape en uforutsigbar situasjon. Det er også enkelte indikasjoner på at klassifiseringen kan slå ulikt ut i de nordiske landene, til tross for likhetstrekkene i begrepene. Et annet interessant funn gjelder hvilke av de sentrale aktørene på det arbeidsrettslige området som har den ledende rollen i regulering av atypisk arbeid – lovgivende myndigheter, partene i arbeidslivet eller domstolene. Partene i arbeidslivet har en mer aktiv rolle i Sverige og Danmark enn i Finland, Norge og på Island.

Del III inneholder det andre trinnet i analysen. Denne delen tar for seg de rettslige *implikasjonene* av en uklar arbeidsrettslig status: Hvordan vil sentrale arbeids- og velferdsrettslige regler i en nordisk modell kunne anvendes på personer som befinner seg i gråsonen mellom arbeidstakere og selvstendige oppdragstakere? Denne analysen belyser konsekvensene og hva som vil stå på spill i fremtiden dersom et økende antall personer ikke passer inn på noen side av denne sentrale skillelinjen.

Kapittel 5 forklarer opplegget for analysen. Det benyttes en typologi av tre typer sysselsatte: tradisjonelle arbeidstakere, genuint selvstendige næringsdrivende og plattformarbeidere, de siste som et typisk eksempel på personer med uklar arbeidsrettslig status. Den rettslige beskyttelsen av (typiske) plattformarbeidere blir sammenlignet med de to andre på tre områder: (1) mulighet til kollektive forhandlinger, (2) regler til beskyttelse av helse og sikkerhet, og (3) inntektssikring når man ikke har inntektsbringende arbeid. De tre regelsettene er valgt fordi de er sentrale elementer i arbeids- og velferdsrettslig vern *og* støtter opp under viktige trekk ved de nordiske arbeidsmarkedsmodellene. En analyse av hvordan slike regler anvendes på personer som ikke passer på noen side av den sentrale skillelinjen, belyser de rettslige implikasjonene både for den enkelte og for samfunnet generelt.

Kapittel 6 kartlegger og drøfter betydningen av en uklar arbeidsrettslig status når det gjelder tilgang til *kollektive forhandlinger*. De kollektive forhandlingsmekanismene i de nordiske landene bygger på den sentrale skillelinjen: tradisjonelle arbeidstakere har en ubestridt forhandlingsrett, mens de genuint selvstendige er utelukket. Dette skillet er imidlertid verken absolutt eller skarpt. Spesielt i Sverige, men også i Danmark, har arbeidslivets parter et visst spillerom til å inkludere personer med uklar arbeidsrettslig status i kollektive forhandlinger. EU-/EØS-retten tillater at både tradisjonelle arbeidstakere og «falske» selvstendige oppdragstakere unntas fra konkurranselovgivningen og omfattes av kollektive forhandlinger. Rettslig usikkerhet om hvem som kan anses som «falske» selvstendige kan representere en mulighet til å tillate en bredere tilgang til kollektive

forhandlinger i nasjonal rett. Så lenge de ikke er *genuint* selvstendige, kan det derfor argumenteres med at personer med uklar arbeidsrettslig status bør ha samme adgang til kollektive forhandlinger som tradisjonelle arbeidstakere. Personer med uklar arbeidsrettslig status kan være medlemmer i fagforeninger som representerer deres interesser i denne sammenhengen. I enkelte organisasjoner kan vilkårene for medlemskap imidlertid være en hindring. Kapittelet gir likevel eksempler på forhandlinger, arbeidskamp og inngåtte tariffavtaler for plattformarbeidere, noe som belyser potensialet for kollektive forhandlinger utenfor tradisjonelle arbeidstakerforhold.

Kapittel 7 fokuserer på hvilken betydning en uklar arbeidsrettslig status har for det rettslige vernet av *helse og sikkerhet*. Dette omfatter blant annet regler om helse, miljø og sikkerhet på arbeidsplassen, grenser for arbeidstid og regler om betalt ferie. Man må være anerkjent som arbeidstaker for å ha et klart og bredt rettslig vern. Uavklart status og rettslig usikkerhet er begge til hinder for et effektivt vern. I alle landene gjelder et *visst* vern av helse og sikkerhet uavhengig av arbeidsrettslig status, men omfanget av og nivået på dette vernet varierer betydelig. Vernet av helse, miljø og sikkerhet på arbeidsplassen er mer omfattende enn grensene for arbeidstid og reglene om betalt ferie. Selv for personer som er anerkjent som arbeidstakere, finnes det «hull» i den rettslige beskyttelsen. Det gjelder særlig grensene for arbeidstid, fordi personer som kan påvirke sin egen arbeidstid ofte kan unntas fra reglene. At personer i arbeid er dekket av enkelte verneregler uavhengig av arbeidsrettslig status, indikerer at hensynet til vern av helse og sikkerhet overskrider den sentrale skillelinjen.

Kapittel 8 ser nærmere på betydningen av ulike trygde- og sosialrettslige ytelser som sikrer *inntektssikring for personer som ikke er i arbeid*. Dette omfatter blant annet ytelser under arbeidsledighet, sykdom og skade, foreldrepermisjon og alderspensjon. De nordiske systemene for velferd og trygd er generelt sett basert på en kategorisering av personer i arbeid som enten arbeidstakere eller selvstendige oppdragstakere, og bygger dermed på den sentrale skillelinjen. Mange av ytelsene er imidlertid tilgjengelige for både arbeidstakere og selvstendige. Skillelinjen har dermed ikke den samme avgrensende funksjonen i trygde- og sosialrettslig sammenheng som den har i arbeidsretten. Vilkårene for å ha rett til en ytelse og prinsippene for beregning er ofte ulike for de to kategoriene. Personer med uklar arbeidsrettslig status risikerer i større grad enn tradisjonelle arbeidstakere og genuint selvstendige oppdragstakere å *ikke* oppfylle vilkårene for rett til ytelser. Risikoen er hovedsakelig et resultat av at aktivitetskravene for ulike ytelser er vanskelig å oppfylle for i *sporadisk arbeid*. Deres rettslige vern er derfor dårligere enn vernet av både tradisjonelle arbeidstakere og genuint selvstendige med regelmessig og planlagt arbeidsaktivitet. Videre er tilgangen til viktige tilleggsrettigheter og forsikringsordninger, for eksempel i tariffavtaler, avhengig av status som arbeidstaker.

Kapittel 9 gir en samlende drøftelse og oppsummerer dette trinnet i analysen. Bruken av kollektive forhandlinger som instrument til å regulere arbeidsmarkedet er sårbar for fremtidens arbeidsrelasjoner. Samtidig finnes det muligheter for en tilpasning. Vernet av helse og sikkerhet for personer med uklar arbeidsrettslig status er inkonsistent og har en rekke «hull», men viser på den annen side at vernehensyn har bred relevans. Dette kan utvikles videre. Systemene for velferd og trygd er

innrettet for å sikre inntekt når man er ute av arbeid for alle typer sysselsatte. Ettersom personer i mer sporadisk arbeid risikerer å ikke være berettiget til viktige ytelser, er dette formålet imidlertid bare delvis oppfylt.

Del IV er det tredje og siste trinnet i analysen. Basert på drøftelsene i de foregående delene reflekteres det her over mulighetene for rettslig utvikling og reform.

Kapittel 10 drøfter utviklingsmuligheter som kan møte de svakhetene som er identifisert. De styrkene vi har fremhevet i de nordiske arbeidsrettslige systemene, fungerer som utgangspunkter å bygge videre på. Når det gjelder problemet med *uklar arbeidsrettslig status*, finnes det flere lovende veier fremover for å løse ubesvarte spørsmål, øke forutsigbarheten og sikre at personer i nye varianter av avhengige arbeidsforhold omfattes av arbeidsrettslig regulering. Videre finnes det muligheter til å utvikle en mer konsistent og tydelig tilnærming til *plasseringen av arbeidsgiveransvar* i fremtiden. De kartlagte *hullene i vernet av personer med uklar arbeidsrettslig status* kan tettes. Vi presenterer en rekke spesifikke forslag til hva de ulike aktørene – lovgivende myndigheter, arbeidslivets parter og domstolene – kan foreta seg for å bøte på de problemene som er drøftet. Rapporten avsluttes med en påminnelse om at fremtiden for nordisk arbeidsrett i hovedsak er et politisk spørsmål. Hvorvidt det vernet og de verdiene som er etablert i de nordiske systemene vil bli bevart, avhenger av fremtidig politikkutforming.

About this publication

The future of Nordic labour law

Facing the challenges of changing labour relations

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