Do Labour & Employment Laws Protect Gig Workers?

As many as 20% to 30% of all Canadian workers engage in some form of “gig work,” like driving, freelance writing, developing websites and even pet-sittting. So, it’s only a matter of time before your company partakes in the new gig economy, if it doesn’t already. As HR director, it’s incumbent on you to ensure that your employment relationships with gig workers comply with applicable legal requirements. The stakes are high. **Exhibit A:** The massive lawsuits filed by Uber driver and Foodora couriers. But ensuring HR compliance in a gig economy will be challenging. Here’s a briefing on the current state of the law on gig employment in Canada.

Current Employment Laws Don’t Cover Gig Workers

Because economic and social trends move faster than laws, businesses often have to do the best they can to apply old requirements to novel situations. Such is the case with the gig economy. Current employment and labour laws were designed with 2 basic work arrangements in mind: employment and independent contracting. Gig work falls somewhere in the middle of these classifications. Gig workers generally have the freedom to make their own schedules or even decide not to work at all the way independent contractors; they’re also financially dependent on their employers the way employees are.

Without a classification of their own, gig workers are vulnerable to exploitation. “In general, workers in non-standard work are more likely to be in precarious work or work that is low-paid, insecure, with little worker control and without the protections provided by law or collective agreements,” according to the International Labour Organization (ILO).

Thus, the reason Uber and Foodora got sued is that they opted to treat their own gig workers as independent contractors, rather than employees. **Result:** Uber didn’t pay its drivers the overtime to which they would have been entitled under employment standards laws and Foodora wouldn’t allow its couriers to unionize the way employees can under labour relations laws (after shuttering, Foodora settled all claims with its workers for $3.46 million). Misclassifying employees as independent contractors also exposes employers to liability under income tax, CPP, EI, workers comp and a host of other laws.

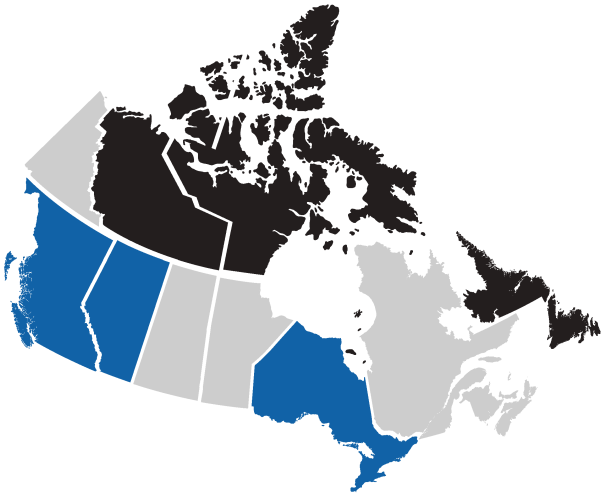
Current Legal Protections for Gig Workers

While non-standard employment relationships are nothing new, the gig worker phenomenon is clearly no passing fad. Consequently, provinces and the federal government have started to rework their employment laws to address gig work. There are 3 key laws:

1. Labour Relations Laws

So far, laws governing trade unions and collective bargaining have exhibited the most progress. The labour laws of 8 jurisdictions (all but MB, NB, NS, PEI, QC and SK) now include a new class of worker with unionization rights called a "dependent contractor," as opposed to an independent contractor that can't unionize. While definitions vary, a "dependent contractor" basically includes a person who may or may not have an employment contract and who may or may not furnish their tools, equipment, machinery or material who work for an employer under terms and conditions that make economically dependent on the employer under a relationship that's more like an employment than an independent contractor relationship. Alberta, BC and Ontario also provide a special certification process for dependent contractors.

Gig Worker Unionization Rights Across Canada



- Recognize and provide for dependent contractor certification
- Recognize dependent contractors
- Don't recognize dependent contractor

- The **federal jurisdiction** recognizes dependent contractors
- **All 3 territories** follow federal labour relations law
- Gig workers also have employment standards rights in jurisdictions: **Ontario, Québec and Yukon**
- **Nova Scotia** is the only province whose OHS laws expressly cover gig workers
- **Saskatchewan** OHS laws protect and require gig workers to refrain from workplace harassment

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2. Employment Standards Laws

While gig workers have limited labour relations rights in some jurisdictions, the laws governing minimum wages, work hours, vacations and other basic employment protections leave them out in the cold. But that's starting to

change. Gig workers enjoy some protection under the employment standards laws of 2 jurisdictions:

- Québec, where the definition of “employee” protected by the *Labour Standards Act* is broadly defined to include any person who works for a wage under a contract enabling them to determine the “methods and means” of work, or who supplies the material, equipment or raw material involved; and
- Yukon, whose *Employment Standards Act* covers “contract workers” who are financially dependent on the employer and whose relationship is more like that of an employee than an independent contractor.

A pivotal moment occurred on April 11, 2022, when Ontario became the first jurisdiction to adopt legislation protecting the employment rights of gig workers. Specifically, Bill 88, the *Working for Workers Act*, amends the ESA to give persons who are paid to provide “digital platform work” (defined as “ride share, delivery, courier or other prescribed services by workers who are offered work assignments by an operator through the use of a digital platform”) the right to:

- Be paid at least the minimum wage;
- A recurring pay period and pay day;
- Receive the amounts they earn without unauthorized deductions;
- Receive written information about their pay, tips and work assignments;
- Be notified in writing before their access to the digital platform is removed; and
- Be free from reprisal and retaliation.

3. OHS Laws

Gig workers have also demanded protection against workplace hazards under OHS laws. But so far, those calls have fallen on deaf ears. The 2 exceptions:

- Nova Scotia’s OHS Act defines “employees” protected by the law as including “dependent contractors;” and
- Saskatchewan where both workplace harassment rights and duties extend to both “independent and dependent contractors.”