



PRECARIOUS WORK

SUMMARY

As part of its work on human capital management, LAPFF has produced a paper on precarious work. This topic is timely as reports of record numbers of zero hour contracts, modern slavery victims, last year's release of the Taylor Review of Modern Working Practices, and a proposal of increased national insurance contributions for self-employed workers make headlines. This paper assesses the context, frequency, and implications of precarious work for employers and those people performing work on their behalf. It then suggests why responsible investors should be concerned about this phenomenon. The paper concludes with suggestions and recommendations for investors to encourage companies to contract responsibly with people and entities conducting work on their behalf.

There is a huge amount of information on this topic, so representative selections of the literature have been used; it is therefore not a comprehensive analysis. The research approach taken was to present a multi-stakeholder understanding of the problem, including views from employers, employees, unions, lawyers, policy-makers and academics. There are currently almost no investor views on this issue in the press or literature.



The Local Authority Pension Fund Forum (LAPFF) is a voluntary association of 72 local government pension scheme fund members, based in the UK, with combined assets of approximately £200 billion. LAPFF exists to protect the long-term investment interests of its members and to maximise their influence as shareholders by promoting the highest standards of corporate governance and corporate responsibility amongst investee companies.

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CONTEXT

In March 2017, the Guardian reported that a record 910,000 UK workers were on zero hour contracts (ZHCs).¹ Although the article, citing the Resolution Foundation, suggested that Brexit might mean this type of contract has peaked, the latest trends suggest otherwise.

Following in short suit, Phillip Hammond, Chancellor of the Exchequer, announced in his budget statement that self-employed workers would be subject to higher national insurance payments than they have made thus far.² This commitment was retracted³, but the furore caused by the proposal demonstrated how contentious this debate has become at the national level. The government has also committed to an 'employment status discussion paper' to review the employment status tests for employment and tax in the wake of this recommendation from the Taylor Review.⁴

The BBC reported in August 2017 that '[m]odern slavery and human trafficking is "far more prevalent than previously thought"' with estimates of tens of thousands of victims nationwide in a range of sectors, including agriculture, construction, and care work.⁵

A Financial Times article also from August 2017 suggested that, at least in London, companies are taking on temporary staff rather than employees, and that employers country-wide are hiring staff through recruitment agencies at the fastest pace in two years to deal with post-Brexit uncertainty.⁶

In September 2017, Uber had its licence to operate in London revoked after Transportation for London found it was not a "fit and proper" private car hire operator and demonstrated a lack of corporate responsibility.⁷ The primary concern was ostensibly around reporting criminal offenses and medical certificates and background checks for drivers. However, Uber has been severely criticised for its labour practices, and Uber's recently appointed CEO, Dara Khosrowshahi, acknowledged that the Company's transgressions in a range of areas – including worker rights – have laid the groundwork for this suspension ("The truth is there is a high cost to a bad reputation").⁸ Subsequently, Uber has agreed to reconsider its position and "run our business with humility, integrity and passion".⁹ Uber's Head of Northern Europe has now resigned,¹⁰ and Japanese tech company, Softbank, looks set to take significant control of the Uber board.¹¹

In October 2017, Bloomberg reported that in the space of a few weeks RyanAir cancelled flights affecting 700,000 customers which reduced the Company's growth plans

by six million passengers. These developments stemmed from a failure to schedule pilot holidays properly. The Chief Operating Officer resigned and pilots made moves to form an informal union,¹² and in December 2017, the Company stated that it would recognise pilot and cabin crew unions.¹³

During 2017, Tesla started to face allegations of health and safety problems and anti-trade union practices as it failed to meet its Model 3 production targets.¹⁴

ZHCs have become notorious through Sports Direct, whose high-profile workplace problems have been linked to, among other things, the unfair contract terms set forth in ZHCs. Likewise, self-employment contracts have received publicity through Uber's public wrangling over the right to classify its drivers as self-employed rather than workers.

However, modern slavery, temporary work, ZHCs and self-employment are just a few examples of a broader phenomenon that has been termed 'precarious work'.

There is, to date, no accepted definition of precarious work, and therefore it is difficult to measure this phenomenon. As a result, this paper mainly sets out the definition and measurement problems, along with setting out employer and employee perspectives on the issue to help clarify the tensions in the debate about what work is considered precarious, when it is or is not appropriate, and what this means for investors.

Notwithstanding the definition and measurement problems, there are some conclusions that can be drawn about ways forward on employment policy and engagement priorities for investors.



LEGAL DEFINITION AND INCENTIVE PROBLEMS

Although there is no agreed definition of precarious work, there are some definitions that are helpful. For example, the International Labor Organization (ILO) has defined precarious work this way:

It is work performed in the formal and informal economy and is characterized by variable levels and degrees of objective (legal status) and subjective (feeling) characteristics of uncertainty and insecurity. Although a precarious job can have many faces, it is usually defined by uncertainty as to the duration of employment, multiple possible employers or a disguised or ambiguous employment relationship, a lack of access to social protection and benefits usually associated with employment, low pay, and substantial legal and practical obstacles to joining a trade union and bargaining collectively.¹⁵ (p. 27)

More simply, precarious work is often understood to occur when many risks traditionally borne by employers are transferred to the people who conduct work on the employers' behalf.

In contrast, the ILO has defined 'decent work' as

...opportunities for work that is productive and delivers a fair income, security in the workplace and social protection for families, better prospects for personal development and social integration, freedom for people to express their concerns, organize and participate in the decisions that affect their lives and equality of opportunity and treatment for all women and men.¹⁶

Legal Definitions

Legal definitions of work classifications in the UK are not helpful. They lack clarity, and classification of people in work according to existing legal categories can be very difficult.

Worker Classifications

In the UK, people who work are expected to fall under one of three main legal categories: employee, worker and self-employed.

However, it is often unclear which category applies in any given situation.¹⁷

This inability to categorise people for working purposes is problematic not least because each category has different work place and social protections attached, and therefore different costs and benefits for employers and employees. Employees have the best social protections. Workers have fewer, and self-employed still fewer.¹⁸

Therefore, as the number of worker and self-employed positions has increased¹⁹, the number of people with permanent, open-ended employment and social protections has dropped. The rate of in-work poverty has also increased in two out of three EU Member States in the past four years.²⁰

Additional problems arise when employers abuse the lack of clarity surrounding legal work classifications.²¹

Uber has been the most high-profile company accused of abusing this lack of clarity, but it is certainly not the only one.²² Uber tried to classify its drivers as self-employed, allegedly in order to avoid paying work and social costs associated with classifying them as workers. However, a court ultimately ruled (in rather disparaging terms) that the drivers are, in fact, workers who had been misclassified.²³ This ruling is consistent with other similar rulings in relation to other companies using technology platforms to provide services. The notable exception is Deliveroo, where drivers were deemed self-employed because they were allowed to choose people to substitute for them. However, the Deliveroo ruling is particular to the facts and seems to be an outlier.²⁴

This potential for abuse is exacerbated by the fact that many people who work are not aware of their own work categories.²⁵

Another looming uncertainty is that many of the UK's legal labour protections currently in place have been driven by EU directives. The standards set through these directives are thought to be ripe for review in a post-Brexit UK.²⁶ Therefore, it is as yet unclear what these revisions will mean for the proliferation or reduction of precarious work.

So-called 'posted workers', or workers posted abroad, face an even greater legal predicament. This group of workers is often comprised of migrants who can fall through legal gaps in two different ways. First, within the UK they might be misclassified as workers rather than employees, thus missing out on certain labour law protections. Second, it is not always clear whether UK law or the law of the home country applies, so these confusions also provide an opportunity for gaps in social and labour protections.²⁷

Special Problems with Temporary Work Agencies (TWAs) and 'Triangular' Work Relationships

In the UK, agency workers account for around 1.27% of total employment.²⁸

Agency workers do not fall under either the employee or workers classification.²⁹

There is a special set of Agency Worker Regulations from 2010 that defines agency workers as follows:

'... supplied by a temporary work agency to work temporarily for and under the supervision and direction of a hirer and has a contract with the temporary work agency which is a contract of employment with the agency or any other contract with the agency to perform work or services personally.'³⁰



In short, the agency is the employer and the entity that benefits from the work of the agency worker (the hirer) is essentially a third-party beneficiary.

However, the legal test to distinguish a worker from an employee in this triangular relationship tends to be the same as that used for a standard worker. This includes assessing employer control over the work being performed. Therefore, because the TWA is generally the technical employer but is not found to control the agency worker's work, employee status is almost never found through court proceedings.³¹

According to the Chartered Institute of Personnel and Development (CIPD), around 14% of agency workers are on zero-hour contracts³², which means they have two layers of precariousness in their work situation.

Tax Implications for Independent Contractors

The Taylor Review of Modern Working Practices, issued in July 2017, has highlighted the lack of consistency in legal definitions of employment at employment law and tax law.

Specifically, an employee as defined at tax law is not necessarily an employee under employment law, which creates a possible opportunity for employers to avoid their employment responsibilities to staff.³³

However, another troubling trend in relation to tax arrangements has emerged and highlights the danger of shifting risks traditionally borne by employers to those people who are self-employed.

In some cases, workers who often know little about tax obligations are being asked to incorporate as limited companies, with the workers themselves as directors, which makes them liable for tax risks. The workers then hire themselves out as independent contractors to agencies supplying companies with workers. These workers are required to use accountants from the companies that contract with them in establishing their own companies.³⁴

This arrangement has led to some workers being investigated by tax authorities for tax evasion.³⁵

Employment Tribunal Fees

In 2013, a fee system was introduced as a condition for working people to use the employment tribunal system.³⁶

Since this fee system was introduced, CIPD reports that individual claims to employment tribunals has dropped by over 70%.³⁷

While this approach might have been designed to promote efficiency and reduce frivolous claims, it is obviously problematic in a context where employers have an opportunity, and at times even an incentive, to misclassify the people conducting work on their behalf and to avoid standard employment and social protections.

The UK Supreme Court has recognised this problem and has found the 2013 fee arrangement illegal on the grounds that it prevents access to justice.³⁸ For example, lower value claims such as those for unpaid wages and unpaid annual leave did not even amount to the cost of filing a claim, and therefore these claims were not being filed in the first place. According to the Court, this was not a proportional approach to setting fees.

One Supreme Court Justice further raised the issue that the fees regime has indirectly had a discriminatory impact on women (and other protected groups) because women tend to file a type of claim under the regime that is more costly and puts them at a disadvantage in comparison with their male counterparts.

Notwithstanding the tribunal fees regime, the CIPD feels that the current legal framework for employment in the UK is adequate in content but not adequately enforced.³⁹ Other commentators are not so sure.⁴⁰

A table of some existing laws applicable to the employment relationship are presented in Appendix 1.

TYPES OF PRECARIOUS WORK

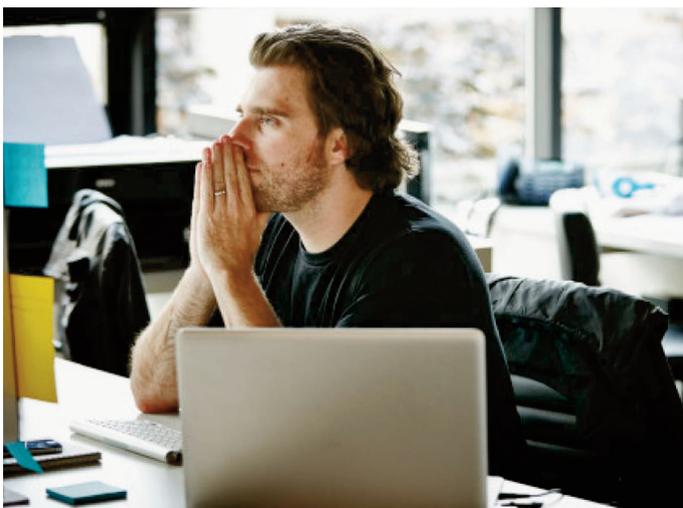
Perhaps due to the difficulty in defining precarious work, both socially and legally, researchers tend to define it by type of employment relationship.

For example, a 2016 report commissioned by the European Parliament⁴¹ lists various types of employment relationship and ranks them from low to high risk in terms of their precarious nature. This assessment is included here in Appendix 2.

The report points out that any type of contract or employment relationship can lead to precariousness in one way or another. However, in practice certain types of contracts and relationships tend to be riskier than others. The main employment relationship types identified in the report in order from lowest risk to highest risk are:

- Open-ended, full-time contracts
- Part-time work (including involuntary and marginal)
- Freelancers, self-employment, bogus self-employment
- Fixed-term contracts
- Temporary agency work
- Posted work (as in people being posted abroad)
- Zero hours contracts
- Internships
- Informal/undeclared work

As these employment relationships seem to be widely addressed in the literature, they will be deemed the precarious work relationships of primary concern for the purposes of this paper. However, this list of precarious employment relationships is not exhaustive.



INDICATORS OF PRECARIOUS WORK

Based on the European Parliament study's assessment of precarious employment relationships, open-ended contracts are considered the lowest risk, and those roles with low pay and no or reduced protection for social security and employment rights are considered medium and high risk positions.

This gradation largely matches the ILO's 'four dimensions' of precarious work:

- Degree of certainty of continuing employment
- Control over the labour process, which is linked to the presence or absence of trade unions and relates to control over working conditions, wages and the pace of work
- Degree of regulatory protection
- Low income level⁴²

These means of distinguishing high and low risk working relationships and conditions raises an important point: context matters.

In other words, people who work in precarious situations are not undertaking precarious work solely because of the nature of their employment relationship; they are in precarious work because they have inadequate legal and social protections as a context for their jobs.⁴³

This issue of contextual considerations means that any measures to alleviate precarious work, especially in the UK post-Brexit, will be country-specific.

For example, Denmark has been held up as an example of best practice in balancing employer needs for flexibility in hiring with work force needs for job security (this balance is often referred to as 'flexicurity'). The country has done so in part by maintaining robust labour protections and social security/welfare provisions at the state level for everyone in the work force. Therefore, although employers have flexibility in choosing contracts that meet their business needs, more flexible contracts are less likely to leave any members of the work force in a precarious position because they have other protections in place if they lose their jobs.⁴⁴

In contrast, the UK is known for its relaxed employment protections and regulation in favour of employer flexibility. Therefore, a contract that in Denmark would not leave anyone in a precarious work or social position might well create a precarious situation in the UK.⁴⁵

OTHER CHARACTERISTICS OF PRECARIOUS WORK RELATIONSHIPS

Given the contextual considerations mentioned above, it is not surprising that most people in precarious work are from vulnerable groups, such as women, young people, minorities and migrants.⁴⁶

Precarious work is also characterised by low pay in relation to open-ended, full-time employment relationships. For example, a TUC report from 2016 suggests that:

- 'Self-employed people now earn an average of 60 per cent of the median annual rate of an employee per year, down from around 70 per cent a decade ago.
- Median hourly pay for those on zero-hours contracts in 2016 was worth just 66 per cent of the median for all employees.
- Median hourly pay for those working for an employment agency was worth just 80 per cent that of the average employee; for those in casual or seasonal work, pay was worth just 60 per cent of the employee average.⁴⁷

A subsequent TUC report estimates that the net loss to public finances is between £5.3 billion and £5.6 billion over the last decade, an amount equal to over one-third of the social care budget for England.⁴⁸

Employment contracting trends suggest that precarious employment relationships of all types are increasing in number⁴⁹, although often the absolute numbers are not then translated into a comparison of these contracts as a percentage of the working population over time. This omission could be due to either a desire to frame the numbers in a certain way or the aforementioned difficulties in measuring precarious work levels, especially as various contract forms have developed over time.

This phenomenon is exacerbated by a decreased possibility of transitioning from temporary to permanent work⁵⁰ and, in the UK, by an increased proportion of people taking jobs on an involuntary basis.⁵¹

Sectoral considerations are important in relation to precarious work. For example, in the metal industry precarious workers constitute over half of the work force at an increasing number of work places.⁵² Retail, health and social services, transport and food and accommodation work also consists of a high number of precarious work positions.⁵³

THE SCALE OF PRECARIOUS WORK: MEASUREMENT PROBLEMS

The difficulties in defining and categorising precarious work and the generally poor state of labour statistics mean that measuring the scope and scale of the problem is very challenging.⁵⁴

Because precarious work is not clearly defined, it is impossible to determine with any certainty what percentage of the work force holds a job that qualifies as precarious work.

The TUC estimates that one in ten workers, (3.2 million people) are in insecure work in the UK. This research also cites a Social Market Foundation study suggesting that 45 per cent of self-employed workers are paid below the government's National Living Wage.⁵⁵

CIPD has pointed out that depending on the methodology, the percentage of the UK population in the 'gig economy' (or "a labour market characterised by the prevalence of short-term contracts or freelance work, as opposed to permanent jobs")⁵⁶ has been estimated at between 0.4 per cent and 40 per cent of the work force.⁵⁷

According to the CIPD, there are actually two gig economies, one consisting of professional and skilled workers and a second consisting of less skilled workers. The latter group is more at risk of precarious employment.⁵⁸

Although CIPD has dismissed the latter figure, apparently because it does not consider certain 'gig economy' jobs to be precarious, the 40 per cent figure has been put forth by the European Union and Eurofound as the estimate of workers in precarious employment relationships in the UK.⁵⁹

Similarly, because legal categories of workers are not clear, it is hard to quantify how many workers are currently employees versus workers versus agency workers versus independent contractors, and so on.

To make the situation worse, a CIPD survey suggests that only 58 per cent of employers have a process in place to determine when agency staff is qualified for the same rights as permanent staff.⁶⁰

Add to this the difficulty of some employers, such as Uber, misclassifying drivers along with the contextual issues that factor into determining whether a position is precarious work or not and it becomes abundantly clear that any accurate assessment of the level of precarious work is impossible.

Quality of work is another concern that is relevant to precarious employment but is difficult to measure.⁶¹ This is an issue addressed in some detail by the Taylor Review, which concludes that although the UK is doing well by maintaining a good employment rate, the jobs people hold need to be of an adequate standard.⁶² The report's finding meets the ILO requirement of 'good work', not just 'work'.

PRECARIOUS WORK: THE EMPLOYER PERSPECTIVE

A 2014 report from KPMG sought to uncover the employer perspective on precarious employment.⁶³

For employers, the main drivers of this phenomenon appear to be:

- Financial pressures
- Fluctuating business needs
- Quick adaptation
- Labour relations
- Legislation and regulatory requirements
- Revenue and tax requirements
- Labour market demands

Internal drivers for employers are:

- Full-time employment budgets; and
- An opportunity to evaluate talent

Benefits that employers identified from precarious work arrangements include:

- Short-term cost savings
- Reduced long-term liabilities
- Flexibility
- The ability to meet unforeseen demand
- The ability to attract talent that asked for flexibility
- The ability to make more informed staffing decisions

However, it is important to note that the employers interviewed also recognised risks associated with precarious work. These risks include:

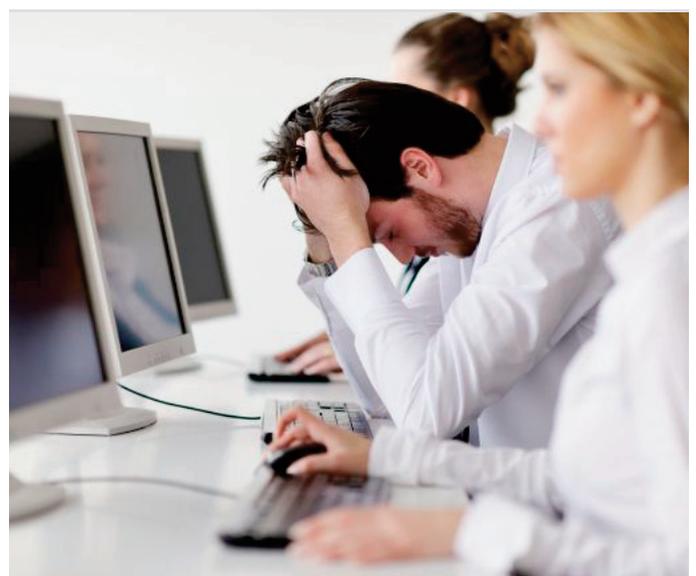
- Higher turnover
- Reduced worker engagement
- Reduced customer services
- General reduction in organisational performance
- Increasing health and safety risks

In fact, many of the employers interviewed seemed to agree that the risks of precarious employment outweighed any potential benefits.

One important finding from this study is that while employers are generally aware that precarious work exists, they are far less aware of the scope of its effects on other stakeholders.

The CIPD has been clear in its view that no contract type will inherently lead to precarious work and that it is incumbent on employers to set up employment relationships that are fair and respectful of rights.⁶⁴ However, given the lack of awareness cited in the KPMG study, there seems to be a high risk that these sorts of supportive conditions and protection of rights will not occur in many cases.

Employers also sometimes cite the benefits of flexible arrangements for workers with family commitments, who are studying, or just generally need a non-traditional work-life balance.⁶⁵ However, this position does not tend to gel with worker testimonials and statistics on the realities of precarious work relationships.



PRECARIOUS WORK: THE EMPLOYEE PERSPECTIVE

While it is clear that workers would like some degree of flexibility, it is less clear that they appreciate the type of flexibility offered by some of the higher risk employment relationships. ZHCs and fixed-term contracts offer some examples of why this is the case.

Zero Hours Contracts

The TUC and Resolution Foundation have estimated that three per cent of everyone in work is on a zero hours contract,⁶⁶ with a 13% rise from 2015 to 2016,⁶⁷ while Standard Life has reported that in 2015 '13% of all employers used 'some' zero-hour contract workers.'⁶⁸

Many of the workers on ZHCs are students under the age of 25 who need flexibility to accommodate both working and studying.⁶⁹ These contracts offer employers the right to determine the number of hours a worker can work, but are also meant to guarantee workers the right to refuse hours, as well as the right to work for other employers.⁷⁰

However, many ZHC workers say that they would prefer to have more hours.⁷¹

Second, it is not clear whether workers on ZHCs truly have the right to refuse work without consequence.⁷² This right appears to depend on the individual employer in question, and enforcement of these contract terms does not seem to be particularly diligent.

This lack of mutuality in precarious work contracts is a concern raised by the Taylor Review of Modern Working Practices.⁷³

Fixed-Term Contracts

Fixed-term contracts can also be problematic from a worker perspective. Interestingly, the TUC has left these contracts out of its precarious work assessment on the basis that fixed-contract workers usually have full labour rights coverage.⁷⁴ However, there are other issues for workers on fixed contracts that could place them in precarious work situations.

Most workers on fixed contracts, including those in agency work, state that they would prefer to have permanent, full-time work and are on their current contracts because they could not find more secure alternatives.⁷⁵

This reality becomes even more problematic when coupled with the fact that fewer and fewer fixed contracts are leading to permanent work (though in the UK, this seems not to be the case outside of London at the moment).⁷⁶

Overall, the position of the TUC is that there should be no trade-off between employment rights and good employment practices.⁷⁷



WHY DID PRECARIOUS WORK DEVELOP?

According to Arne Kalleberg, a professor at the University of North Carolina, Chapel Hill, "Ideological shifts centering on individualism and personal responsibility for work and family life reinforced these [neoliberal] structural changes; the slogan 'you're on your own' replaced the notion of 'we're all in this together' (citing Bernstein 2006)."⁷⁸

Harvard anthropologists, John and Jean Comaroff, agree with this assessment, stating, "Rather than being employees, then, laborers are 'autonomous entrepreneurs' endeavouring to accumulate surplus value. They are, from this perspective, 'entrepreneurs of themselves' (citing Foucault 2004 and Lemke 200:199)."⁷⁹

Given this context, it is not a big step to viewing people who work as wholly responsible for their own work, including social and rights protections. In fact, this phenomenon has developed to the extent that unions worry 'what we used to call atypical work is fast becoming typical.'⁸⁰ This phenomenon has been driven in part by outsourcing and subcontracting.⁸¹

PRECARIOUS WORK FROM AN INVESTOR PERSPECTIVE

While it might not be readily evident that precarious work has a direct impact on shareholder value, there is some fairly compelling evidence that it has an impact on work place performance and production capacities, which in turn could affect shareholder value.

Therefore, it is worth assessing the consequences of precarious work in terms of operational, legal, reputational and financial risk to investors.

Operational Risks: A Health and Safety Example

A significant amount of the literature surveyed suggests that precarious work impacts negatively on workers' physical and mental health.⁸²

On the flip side, a 2014 [then] BIS study suggested that, 'Employee job satisfaction was found to be positively associated with workplace financial performance, labour productivity and the quality of output and service.'⁸³

The BIS study concluded, therefore, that while there is no causal link between worker wellbeing and workplace performance, there is a 'prima facie case for employers to invest in employee well-being on the basis of likely performance benefits...'⁸⁴ In other words, it makes sense that happier workers would be more productive.

Presumably, such investment would include working to ensure staff are not in precarious work, especially when it contributes negatively to their health and wellbeing as has been the case, for example, at Sports Direct's Shirebrook warehouse.

Such productivity and performance considerations could affect business performance, and by extension, shareholder value. This impact has been seen most recently with RyanAir where failure to work well with pilots, cabin crew and regulators has led to significant and on-going flight cancellations and reduced passenger numbers⁸⁵. It is also evident at Tesla, where allegations of poor health and safety practices and anti-union conduct have been linked to production problems with the Company's Model 3 roll out.⁸⁶

Legal Risks: Misclassification of Workers and Contingent Costs

The current difficulty in accurately classifying work status could have costs and considerations for investors too.

For example, whereas Uber might have planned for a work force made up of self-employed drivers, after the work classification ruling against it, the Company must now budget for a work force of workers, including all of the labour rights and social security costs that come with that work status.

If the Company had classified the drivers correctly in the first place, investors would have had a more accurate assessment of costs, budgets and strategy considerations for the Company.

Therefore, because of the existing misclassification concerns, as well as some employers' manipulation of legal standards for their perceived benefit, there is a lack of clarity for investors regarding investee companies' legal and cost liabilities.

This problem highlights in part Arne Kalleberg's observation that there has been a 'spread of employer practices that use layoffs as a business strategy rather than as a last resort during downturns in the business cycle.'⁸⁷ It appears that some employers are exploiting lack of clarity in employment relationships as an element of their business strategies rather than using precarious employment relationships as contracts of last resort. This approach could have legal, financial, operational and reputational consequences that could impact on shareholder value.

Indeed, one of Uber's largest investors – Benchmark – has recognised this problem and has initiated a lawsuit against former CEO, Travis Kalanick, for fraud, breach of contract and breach of fiduciary duty.⁸⁸

The essence of the litigation is that Mr Kalanick's "overarching objective is to pack Uber's board with loyal allies in an effort to insulate his prior conduct from scrutiny and clear the path for his eventual return as C.E.O. – all to the detriment of Uber's stockholders, employees, driver-partners, and customers."⁸⁹

As mentioned above, Uber's problems appear to have contributed to the Company losing its license to operate in London.⁹⁰

Forum shopping for litigation is another problem. RyanAir recently lost a case heard by the European Court of Justice (ECJ) in which the ECJ ruled that the airline cannot force staff to bring a case in jurisdictions that suit the airline's interests.⁹¹ Instead, workers can bring claims and complaints in the countries in which they work, including those countries with better labour protections. Playing with rules and regulations in this way also has the potential to create unforeseen costs and uncertainties for investors.

Tesla too has faced National Labour Relations Board cases in relation to allegations of anti-trade union practices.⁹² In conjunction with Tesla's production problems and concerns about appropriate board representation, this issue should raise alarm bells for investors about the Company's governance and business model.

Reputational Risks: The Uber Case

Uber sparked much excitement for its new business model and easy, cheap access to a taxi service. However, as the years go by and rumblings about the business model undermining labour protections continue,⁹³ there is increased reputational risk associated with its business model and strategy.

Instead of listening to and working to address critics' concerns, Uber dug its heels in to defend its approach.⁹⁴

The monetary effects of the legal cases are just one cost of the Company's intransigence. It is now becoming clearer what the reputational damage has done to the brand. Since the legal proceedings on work classification concluded in late 2016, the Company has been chastised for sexist behaviour by its management⁹⁵, and some political campaigners have called for a boycott of Uber because the Company has been seen as supporting the Trump agenda, including having its CEO on Trump's now defunct business advisory council.⁹⁶

CEO Travis Kalanick was forced to resign after pressure from investors due to workplace culture concerns and allegations of sexism. A number of other executives have left for similar reasons. Although Mr Kalanick will remain on the Uber Board, the reputational hit continues to mount with all of Uber's scandals,⁹⁷ and there is investor litigation around these issues (as above).

Uber's new CEO, Dara Khosrowshahi, has recognised the reputational consequences of poor business conduct stating, "The truth is that there is a high cost to a bad reputation" and "... it really matters what people think of us..."⁹⁸

Ryanair boss, Michael O'Leary, is also re-thinking his motto that there is no such thing as bad publicity in the wake of his Company's flight cancellation ordeal. Mr O'Leary was quoted recently as saying, "Clearly there's a large reputational impact for which again I apologise. We will try to do better in future."⁹⁹ This has been true both in relation to pilots and in relation to cabin crew, with the latter dispute resulting in two parliamentary committees asking the Company to explain itself publicly.

There is also a likely financial hit with CNBC reporting that share prices of Uber's private stock have dropped around 15% in the wake of bad press, which would likely knock \$10 billion of its value, negatively affecting any initial public offering of the Company.¹⁰¹

While some of the negative publicity might not be linked exclusively to the work classification lawsuit, it does beg the question to what extent cases like this open the door to brand damage and negative financial impacts. Additionally, poor ESG practices can sometimes be an indicator of deeper systemic problems at a company that do directly threaten shareholder value.

Financial Risks: The Sports Direct Case

The Sports Direct case is a more concrete example of the proxy phenomenon.

The Company has faced criticism for a number of years for poor work place practices, including allegedly rampant use of ZHCs¹⁰², before its share price fell drastically at the end of 2015 and the Company dropped out of the FTSE 100.¹⁰³

Some commentators attributed the drop in company value directly to Sports Direct's poor labour practices.¹⁰⁴ While this direct link is not clear, it does appear that the work place allegations were, at the very least, a good proxy for poor corporate governance, including a lack of appropriate leadership both at the Board and at the operational level. The Company's poor corporate governance clearly has affected shareholder value.

Furthermore, it appears that when employers such as Sports Direct consider using precarious employment relationships, they often do not conduct an appropriate cost-benefit analysis.

In other words, although they consider costs and benefits, they do not consider the flip side of the argument. For example, Sports Direct might consider the reduction of costs in hiring a short-term employee a benefit, but it is not clear that the Company considers the costs of not hiring a permanent employee.

There needs to be a shift 'to change the narrative from workers as a cost, to workers as a driver of value.'¹⁰⁵ This is because, as Standard Life has said, '[c]ompanies with resilient workforces are better placed to achieve long-term business success.'¹⁰⁶

If employers do not consider trade-offs appropriately, they are likely to come to skewed or irrational positions on this and other issues. Many investors agree with this position as evidenced by their vote at the 2016 Sports Direct AGM where 53% of independent investors supported an independent review of the Company's human capital management practices.

Therefore, it could be argued that overall precarious work relationships create social risks that drive a race to the bottom and reduce the pool of sustainable and responsible investment opportunities for responsible investors.

As SHARE has said of precarious work, 'There are two principal areas of concern for investors: impacts on the economy, and impacts on the firm. Too often investors are narrowly focused on the firm, and not on the portfolio as a whole. But weak economies drag down performance across the board.'¹⁰⁷

CONCLUSIONS

There are currently legal, social, and financial incentives for employers to engage in precarious work.

Most UK studies look at a single aspect of precarious work, such as agency workers, ZHCs, and so on, but these employment relationships are inter-dependent and overlapping phenomena that need to be considered in a broader political, economic, legal, and social context. For example, even though each individual type of work relationship makes up a very small percentage of the working population, together they combine to account for around 40 per cent of the UK work force (bearing in mind that classifications and measurements for this type of work are not reliable).¹⁰⁸ Furthermore, that 40% seems to be heading toward more and more precarious work conditions.

To an extent, though, it does not matter what the exact numbers on precarious work are. The very fact that it exists in any capacity drives the threat of a 'race to the bottom'.

At the same time, it is not clear that the much lauded flexibility of the employment relationships considered precarious work actually translate to improved financial performance for businesses. In fact, there is evidence to suggest that employers take individual business model decisions regarding how to use this type of employment relationship, which in turn suggests that the drivers are often internal, not external. This use of precarious relationships implies, instead, poor, short-term business planning.¹⁰⁹

Therefore, we might think about precarious work in another way.

First, although employers might be responding to internal rather than external pressures in using precarious work, the very existence and increased use of these employment relationships logically must put pressure on employers' ability to maintain standard permanent, open-ended contracts and their associated benefits, especially in times of financial challenge or distress. This pressure could explain why there appears to have been an increase in the use of precarious work over the last few decades.

Second, the fact that these employment relationships are sanctioned, socially or legally, provides employers with an easy, quick, short-term 'out' in relation to their business models and business strategies. As a result, it is possible they do not feel they need to sit down and work out a sustainable growth strategy and appropriate business model that accommodates full-time, permanent, open-ended employment contracts. In short, as Kalleberg has suggested with layoffs, these employment relationships are being used as a business strategy rather than as a last resort.

From a long-term perspective, this approach is unlikely to create value for companies and shareholders. Even in sectors heavily reliant on precarious employment relationships, there is varying use and frequency of use of precarious employment relationships.¹¹⁰ Therefore, it is not clear that these employment relationships are necessarily linked to business performance in the medium or long-term.¹¹¹ The KPMG report¹¹² implicitly suggests through the risks of precarious work it identifies that the value of institutional memory and loyalty provided by long-term workforces can help to build systems and knowledge within the organisation. The 2014 BIS report also points to increased contentment of staff which, as we have seen above, can contribute to improved loyalty and productivity.¹¹³ This building of value is far less likely through precarious work than it is through permanent, open-ended, full-time work.

There are times when the work force will need flexibility in their work arrangements. Even the International Metalworkers' Federation (IMF)¹¹⁴ has said it does not intend to get rid of flexible contracts entirely; it just wants the rapid expansion of precarious work to cease.¹¹⁵

The overriding problem seems to be that, in the UK, there is not currently an appropriate balance in the 'flexicurity' model. Nor is there adequate enforcement of existing laws. As a result, employers appear to dictate the bulk of the employment relationships and how employment standards are put into practice. While this does not appear to be to the benefit of the working population, it is also not necessarily to the employers' own benefit, nor to that of investors.

Therefore, amendments to the existing legislative and labour relations frameworks in the UK that move away from creating incentives for precarious work seem to be in order.



RECOMMENDATIONS

Policy Reforms

*The Taylor Review of Modern Working Practices*¹¹⁶

Prime Minister May gave Matthew Taylor, former British public policy specialist and Chief Executive of the Royal Society of the Arts, the unenviable task of making recommendations to improve modern working practices in the UK. The 'Taylor Review' was issued in July 2017.

This review is a comprehensive assessment of complicated practices, laws and policies relating to the quality of work and opportunities provided to UK employees, workers and the self-employed.

Seven primary recommendations emerged from the Review process. These recommendations focus on a 'fair balance of rights responsibilities' for employers and employees; 'genuine two way flexibility' for both parties; appropriate legal incentives for good work; responsible corporate governance, good management and strong employment relations; 'attainable ways to strengthen future work prospects'; good health and well-being at work; and the development of sectoral strategies to improve working conditions and work quality.'

The role of technology in changing work relationships and dynamics also figures prominently in the Review's assessment and recommendations.

Not surprisingly, many of the Review's recommendations hinge on employment status and categorisation. While some commentators recommend reducing the number of work categories, the Taylor Review recommends retaining the current three-tier employment status structure but renaming the 'worker' category 'dependent contractor'.

Therefore, while the Review suggests over fifty concrete ideas for improving legal and work structure incentives for improved work quality and opportunity, it is clear that much more discussion and debate is needed before a workable way forward is established.

The CIPD has also suggested a number of legislative reforms in line with the findings of the Taylor Review that investors may wish to promote or support. These include:

- Having the Government develop stronger guidance outlining employment status and associated rights.
- Clarifying the legal definition of 'worker' and making it consistent across all areas of law (including tax, as also recommended by the Taylor Review).
- Additionally, conducting a review of the statutory framework affecting agency workers, including the 12 week qualifying period.
- Supporting an amendment to the Employment Relations Act 1996 requiring employers to provide all workers with a written copy of their terms and conditions after two months of employment (presently, only employees have this right).
- Automatically classifying workers as employees after two years of continuous work for one organisation.
- Providing agency workers on ZHCs with the right to request regular hours after 12 months working for one organisation in which they have been working a consistent pattern of hours each week.
- Improving the enforcement framework to end precarious work, including improved resources for relevant roles and authorities. For example, HMRC should be allocated additional resources to enforce minimum wage compliance to prevent workers from being exploited and responsible employers from being undercut. Additionally, the Low Pay Commission should have a remit to consider the impact of inflation on the value of the National Minimum Wage and the National Living Wage.

While CIPD agrees with the Taylor Review and recommends keeping the 'employee', 'worker' and 'self-employed' categories, Thompsons Solicitors recommend that there be a 'new and single definition to describe the employment relationship.'¹¹⁷ The latter approach makes more sense in that any incentive to use employment contracts with lower worker protections is then erased. Thompsons make the further point that the existing legal framework of employment protection does not fit the modern world of work. Additionally, existing legal tests are neither consistent nor predictable. Therefore, a complete review of the legal framework around work relationships appears to be in order.

Instead, their proposed definition of worker is based on a definition from the Private Members' Bill on ZHCs from 2014; it states:

A worker is a person who is employed. A person is employed for the purposes of this Act if he or she is engaged by another party under a contract, arrangement or other relationship, to perform personally any work or services for that other party, save where that other party proves that those services are provided to her or him under a commercial business contract or arrangement as client or customer of any professional or business undertaking carried on by that individual.'

According to Thompsons, the structure of this definition creates a rebuttable presumption of employment, so the onus is on the employer to prove the individual is self-employed, rather than placing the onus on the individual to prove that he or she is an employee.

The idea behind this reversal of presumptions is to help encourage a better balance of power between employers and workers.

Thompsons has also recommended looking at New Zealand, which has voted to reduce the disadvantages to workers caused by zero hours contracts by banning ZHCs.

The European Parliament report has made a number of policy recommendations by employment relationship type.¹¹⁸ These are presented in Appendix 3. The thrust of these recommendations is to create a legal and policy environment that promotes open-ended, permanent employment and adequate social protections for workers of all description.

Trade unions agree that working toward permanent work with guaranteed legal and social protections is the goal. The IMF's efforts include:

- Using collective bargaining to convert precarious jobs to permanent work with guaranteed equal pay (most precarious workers are excluded from collective agreements)
- Helping workers to organise
- Pushing for legislative and political change in relation to social security and protection against dismissal.¹¹⁹

Policy Recommendations

Although there is some disagreement about proposed ways forward in relation to legal and economic policy around precarious work, there is also a fair amount of agreement. The points of agreement are presented here:

- moving toward permanent, open-ended employment relationships and away from temporary and fixed arrangements, except where these are strictly necessary;
- ensuring greater transparency for all parties of terms, conditions and rights associated with various employment contracts and relationships;
- shutting down opportunities for employers to abuse existing legal categories;
- creating an enabling legal and policy environment to facilitate the first three points.

A final recommendation for investors is that it should encourage employers not to use precarious employment relationships as part of their human capital management and business strategies.

Engagement Recommendations

Ask companies

- If they are doing a comprehensive, long-term cost-benefit analysis in assessing when and how to use employment relationships considered precarious.
- If/how they are communicating with workers in deciding which contracts and employment relationships to use.
- If employment relationships considered precarious are considered as part of the Company's business strategy or as a contract of last resort.
- How employment relationships and contracts fit as part of overall human capital management considerations, and business model and strategy more broadly.
- What proportion of temporary and/or fixed contract workers are transitioned into permanent positions and how this transitioning happens. For those not on open-ended contracts, ask if they have the same level of labour rights and social protections as permanent staff.
- How the proportion of permanent to fixed-contract or temporary staff is determined.
- What kind of due diligence is conducted in relation to contracting with Temporary Work Agencies to ensure that their contracts with agency workers provide adequate security and protection.
- What strategy will exist post-Brexit to ensure that no precarious employment relationships exist at the Company if the EU labour protections are repealed.

APPENDIX 1

Some Examples of Laws Applicable to Precarious Employment Relationships

International	European	UK
Employment Policy Convention	Working Time Directive	Working Time Regulations
Termination of Employment Convention	Fixed Term Contracts Directive	Employment Rights Act
Part-Time Working Convention	Part-Time Work Directive	Part-Time Workers Regulations
Collective Bargaining Convention	Temporary Agency Work Directive	Trade Union and Labour Relations Act
Minimum Wage Fixing Convention	Posted Workers Directive	National Minimum Wage Act
Migration for Employment Convention	Posted Workers Enforcement Directive	Equality Act
Home Work Convention	Acquired Rights Directive	Agency Worker Regulations

APPENDIX 2

Type of employment relationship	Magnitude	Main risks	Overall level of risk	Countries/sectors most affected
Open-ended full-time contracts	59% of the share of EU employment. Decreasing trend.	Low pay and in-work poverty Stress and health Career development and training	Low	Greece, Poland, Hungary, Latvia, Lithuania Personal service workers, sales personnel, plant and machine operators and elementary occupations
Part-time work, involuntary part-time work, marginal part-time work	7% of EU employment. Involuntary part-time work account for around 25 % of part-time work.	Low pay and in-work poverty Social security Career development and training	Low (open-ended part-time work) Medium (marginal part-time work) Medium (involuntary part-time work)	Involuntary part-time working high in Greece, Spain, Italy, Bulgaria, Portugal and Cyprus in particular Marginal part-time work highest in the Netherlands, Germany, Denmark, Ireland, UK and Austria
Freelancers, self-employment, bogus self-employment	Freelancers account for 10% of employment. Stable trend. Self-employed persons with at least one employee = 4% of total employment in Europe.	Low pay and in-work poverty Social security Labour rights Career development and training	Medium	Romania Risk for bogus self-employment and social security risks for artistic workers
Fixed-term contracts	7% of employment of the EU. Stable trend.	Low pay and in-work poverty Social security Labour rights	Medium	Casual and seasonal work, agriculture and tourism Labour rights risk UK and Ireland

APPENDIX 2

Type of employment relationship	Magnitude	Main risks	Overall level of risk	Countries/sectors most affected
Temporary agency work	1.5 % of total employment in the EU.	Low pay and in-work poverty Labour rights Career development and training Low level of collective rights	Medium/high	Outsourcing, especially in cleaning, catering, services and ICT Netherlands and Slovenia Countries where collective bargaining coverage and union density is now.
Posted work	There were 1.92 million postings in Europe in 2014. Increasing trend.	Low pay and in-work poverty Social security Labour rights Career development and training	Medium/high	Those affected by abusive practices Construction In absolute terms, the three main sending Member States were Poland, Germany and France. The three main receiving Member States were Germany, France and Belgium
Zero hours contracts	About 5% of the workforce in UK and Austria, 2.6% in Estonia and the Czech Republic and 1% in Malta and Norway.	Low pay and in-work poverty Social security Labour rights	High	Austria, Netherlands, UK Retail and hospitality
Internships	46% of 18 to 35-year olds have completed at least one internship.	Low pay and in-work poverty Social security Labour rights Career development and training	Medium	Young people
Informal/ undeclared work	4% of people in the EU admit to carrying out undeclared work in the previous 12 months (Eurobarometer). Stable trend.	Low pay and in-work poverty Social security Career development and training Low level of collective rights	High	Estonia, Latvia, Netherlands, Malta Care and domestic services Women and migrant workers

Source: European Parliament, *Precarious Employment in Europe*, 2016, pp. 16-18.

APPENDIX 3

Possible measures to address risk of precariousness by employment relationship type

Employment	Risk of precariousness	Possible measures to address risk relationship of precariousness
Open-ended permanent contracts	Low	Policy focus on sectors and occupations that are at risk of multiple disadvantage, particularly in terms of being at risk of low pay and in-work poverty.
Part-time work	Low	Encourage employers to ensure that part-time workers are offered the same training and development opportunities as full-time workers and that working conditions are not disadvantaged.
Marginal and involuntary part-time work	Medium	Labour market policy should encourage the transition from involuntary part-time work to full-time work. Policy focus should be on benefit coverage and pay thresholds in the case of marginal part-time work.
Fixed-term work	Medium	Policy focus should be on ensuring equal treatment in the workplace and preventing abuses. Transitions into open-ended contracts should also be encouraged.
Self-employment	Medium	Labour market inspection measures should be targeted at curbing bogus self-employment, possibly focusing on specific sectors where there is a greater prevalence of this.
Temporary agency work	Medium/high	Collective bargaining provides good protection for temporary agency workers in some countries. In countries without this, governments should work with agencies and employers to ensure that the Temporary Agency Work Directive is implemented correctly and that the transition to permanent employment is encouraged.
Posted work	Medium/high	Labour market inspection measures should focus on uncovering abuse of vulnerable workers, targeting key sectors. Policy focus should also ensure that the Posted Workers Enforcement Directive is implemented at national level.
Zero hours contracts	High	In those countries where these contracts are permitted, policy focus should ensure that there is adequate protection for these workers, which may include a minimum hours floor.
Informal or undeclared work	High	Labour market inspection measures should target this type of work. Provision of information to individuals and incentives to formalise work, such as vouchers, may be effective.

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