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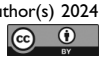

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# Coverage for platform workers and the self-employed in case of unemployment in Switzerland: Access to protection and ways of improvement

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**Abstract**

Whether they are self-employed, atypical employees, or self-employed using an umbrella company, there is still almost no social protection against unemployment or partial loss of activity in Switzerland for platform workers. The same can be said for the self-employed in general. This contribution shows that platform workers, irrespective of their exact legal status, and the self-employed in general, risk sanctions for taking on unsuitable work, for being insufficiently available for decent work or unable to prove a loss of income. However hard they try, they cannot even contribute to a voluntary unemployment insurance scheme. We show that the Swiss social protection scheme, a product of years of federal direct democracy, is hardly able to adapt to the fast-moving platform work environment, thus increasing the risks of precariousness and the burden on the cantons' social assistance for the next generation.

**Keywords**

Platform work, independent, unemployment insurance, social protection, social security, self-employed, loss of activity, solo self-employed, atypical work

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## Introduction

On 30 May 2022[1] and 16 February 2023,[2] the Swiss Federal Court ruled on how to classify the contracts of Uber Eats, Uber Drive and Uber POP, defining the workers as employees with regard to labour law and social security (Magoga-Sabatier, 2022a, 2023a). These decisions were supposed to end the uncertainty concerning the status of these platform workers. However, a definitive categorisation is unrealistic: the circumstances of each case are important, as platforms' business patterns and functionalities vary. And indeed, Uber claims to have adapted its own business conditions since these decisions were handed down, and now offers a choice between employee and self-employed status for its workers in Switzerland (Brehman, 2022). These cases show that the labour status of platform workers remains an ongoing discussion in Switzerland.

When looking at the social protection available to platform workers and those in other forms of atypical work, such as the solo self-employed, some challenges arise. The functioning of the Swiss social security regime has been strongly impacted by its history. For instance, the Swiss democratic process, including the use of referendums, hampered the development of a unified social security regime and encouraged private insurance schemes. Social demands and needs guided its implementation, with no overall concept or true harmonisation.[3] Even today, gaps and overlapping persist despite a Coordination Act,[4] which results in a situation where atypical work forms have inadequate social security coverage. For instance, the self-employed have no compulsory occupational pensions or insurance against loss of income in case of accident, sickness or maternity. As in other countries, providing protection through short-term income replacement schemes is particularly challenging for such atypical workers.

More precisely, the Swiss unemployment insurance[5] scheme covers total or partial loss of work in case of unemployment, reduced working hours, bad weather or employer insolvency. Unlike the universal sickness and minimum old age pensions in the country, the unemployment scheme is a Bismarck-type system mainly financed through contributions equally divided between employees and employers.[6] The coverage available, in terms of the level of the allowances and their duration, is very high compared to other European countries.[7] It is, however, almost non-existent for the self-employed and extremely low for atypical workers. Platform workers often receive only the lowest possible protection from both systems (Magoga-Sabatier and Dupont, 2021). This contribution aims to map the coverage problem that exists under Swiss law for two types of atypical workers – the solo self-employed, legally treated as self-employed, and platform workers. It will be structured as follows. First, we will discuss the personal scope of Swiss unemployment protection, and the extent to which protection is provided to the self-employed in general and to platform workers. For platform work, this contribution reviews the different legal forms under which platform work occurs in Switzerland and what this means for coverage of these workers by unemployment benefits.

1. Tribunal Fédéral (TF/ATF) [Federal Court] 2C_575/2020/ATF 148[2022] II 426 and 2C_34/2021.
2. TF 9C_70/2022, 9C_71/2022, 9C_75/2022, 9C_76/2022.
3. It took 22 years and two failed attempts in 2004 and 2017 to adopt a reform of women's retirement age. Available at: https://www.dw.com/en/swiss-voters-support-increase-in-womens-retirement-age/a-63233177 (accessed 12 May 2023).
4. Coordination Act (LPGA) 2000 RS (systematic federal compilation) 830.1.
5. Federal Act on compulsory unemployment insurance and insolvency compensation (LACI) 1982 RS 837.0.
6. The State contribution is the only exception. In 2019, before Covid-19, it amounted to 1.2% of the financing of unemployment contributions, and in 2021 it represented 45.7%. Available at: https://www.bsv.admin.ch/bsv/en/home/social-insurance/alv/finanzen.html (accessed 12 May 2023).
7. Only France sets an upper limit on income compensation.

As the self-employed are to a large extent excluded from coverage, we also examine the reasons for this exclusion. Secondly, we discuss the protection in place for some self-employed and platform workers, considering the diversity of platform work in Switzerland. The contribution concludes by looking ahead at future possibilities to strengthen the position in Switzerland of atypical workers, such as the solo self-employed and platform workers.

## Personal scope of unemployment protection and entitlement conditions

The Swiss Constitution (SC) states that '[t]he Confederation and Cantons shall, as a complement to personal responsibility and private initiative, endeavour to ensure that every person has access to social security; (…) every person who is fit to work can earn their living by working under fair conditions (…). (…) [E]very person is protected against the economic consequences of old age, invalidity, illness, accident, unemployment, maternity, being orphaned and being widowed.'[8] Art. 114 instructs the parliament to 'legislate on unemployment insurance. In doing so, it shall adhere to the following principles: a. the insurance guarantees appropriate compensation for loss of earnings and supports measures to prevent and combat unemployment; b. the insurance is compulsory for employees; the law may provide for exceptions; c. self-employed may be voluntarily insured.' This mandate was introduced in June 1976,[9] but its last part was never implemented (Greber, 1993; Greber et al., 2010). We will first study the situation of the self-employed, then that of atypical workers.

### *Historical reasons for denying the self-employed access to unemployment insurance*

*Self-employed.* Several reasons prevented the government from implementing a voluntary insurance system for the self-employed.[10] Economic freedom, a Swiss fundamental right, is a principle governing self-employment. As a consequence, individuals are responsible for their economic situation, and the unemployment insurance does not provide coverage against economic risk.[11] This also explains why most of the types of social insurance are optional for the self-employed. Their income had to and still must provide for their social protection. This can be dangerous for solo self-employed people who rely on physical fitness in their work.[12] A minimum guaranteed income was out of the question for the self-employed. To receive social security benefits, they needed to be able to prove a loss of activity, give up their self-employed activity definitively and be willing to accept a job as an employee (Bonny, 1976). From the other perspective, the self-employed themselves wanted to escape social security contributions and the shackles of wage employment (Greber, 1993).[13] According to a Message from the Federal Council (2001), the cost of voluntary insurance

8. Art. 41 para. 3 Swiss Federal Constitution 1999 RS 101.
9. FF [Federal bulletin] 1975 II 1573, FF 1976 II 1522.
10. Art. 31 of the 1874 Federal Constitution was accepted in 1947 after a referendum, FF 1937 II 829, FF 1944 154, FF 1945 I 877.
11. Revue du Droit du Travail et de l'Assurance-chômage (1978) p.59.
12. Other types of insurance cover lack of income due to illness or accident. Their cost and their non-mandatory nature mean that they are seldom implemented (Magoga-Sabatier, 2022c).
13. Quoting Bonny, Director of the Federal Office of Industry and Labour (OFIAMT): 'Applying social measures is difficult in a liberal country, but applying them to the self-employed, the very actors of liberalism, seemingly uninterested, is political suicide for the government.'

would have been so high that only people with a low risk of unemployment could have afforded it. As these people would not have taken out insurance, the social contributions would have increased for the others (bad risks), who would also rather avoid insurance.[14] In other words, they were too rich or too poor to contribute.[15] Private insurers showed no interest either, because their actuarial techniques were unsuited to these risks.

Aside from liberalism, the principles guiding social security are subsidiarity of State intervention and private responsibility. Indeed, according to the Swiss Constitution '[a]ll individuals shall take responsibility for themselves'.[16] One of the consequences is that individuals must take care to reduce the damage to the social insurance. Fault-based responsibility impacts all social insurance benefits.[17] For a long time, unemployment was considered the consequence of personal fault rather than of economic mechanisms.[18] This was even more true for the self-employed than for employees, as the former were responsible for their economic risk. The notion of fault is still very prominent.[19] Therefore, there is no unemployment insurance for self-employed workers.[20]

However, self-employment can be one solution to unemployment. In 1996 the government introduced support to start a self-employed activity, as a frail implementation of the constitutional mandate. Art. 71a LACI provides the unemployed with 90 days compensation to prepare and plan their business before launching. But those who quit cannot receive this support.[21] If they decide not to start the activity after receiving support, they may lose up to 25 days of benefits out of the 90 days received and must repay them.[22] There could also be a backlash in case of failure of the business.

Neither the self-employed nor those who can influence the company's decisions – with employer-like status – can receive short-time work indemnities to prevent redundancies in the event of economic difficulties.[23] This does not mean that they cannot access the insurance, but entry will be harder, and the protection will be lower due to the lack of contributions (see the later section on unemployment protection). For this reason, the self-employed often decide to make use of umbrella or payroll companies to receive social coverage in case of unemployment.

*Self-employment through umbrella companies and company ownership.* Umbrella companies invoice and collect payments from the clients with whom the self-employed work, then pay them after deducting a percentage for social security and their administrative services. According to the Federal Act on Hiring of Services, umbrella companies are hiring services involved in personnel leasing:[24] the client company is the service hirer (the lessee) and the umbrella, the service lessor. Lessors need a professional licence to carry out their activity. Umbrellas are not responsible for the acquisition of clients, do not give instructions regarding the work and do not assume any

14. Federal Council Message, FF 2001 2123, p.2132.
15. Which demonstrates the need for compulsory social insurance.
16. Art. 6, 41, 111-117 SC.
17. Art. 21 LPGA, RS 830.1.
18. FF 1904 VI 553–663, p.645.
19. Art. 30 and 55 LACI.
20. Unemployed people are not defined in LACI. Art. 2 para. 1 defines the contributors: employees (cf. Art. 10 LPGA) and employers (cf. Art. 11 LPGA) and people exempted from contributions.
21. Art. 95a Ordinance to LACI (OACI) 1983 RS 837.02.
22. Art. 30 para. 3 LACI.
23. Art. 31 and 32 para. 1 let. a) LACI.
24. Federal Act on Employment Services and the Hiring of Services (Act on Hiring of Services/LSE) 1989 RS 823.11.

liability. Self-employed persons are not integrated into the organisation of the umbrellas, and the umbrellas do not promise to give them work, so that the self-employed bear the full entrepreneurial risk. If they fail to obtain contracts, they earn no income, but they still pay some of the costs of the premises, maintenance and equipment. Despite their established existence, the unemployment authorities consider this status as fictitious. It infringes Swiss social insurance legislation. Therefore, if employees hired by umbrella companies become unemployed, they are categorised as self-employed and denied benefits, despite the contributions they have paid.[25]

Those who decide to create their own company, to hire and pay themselves, contribute to the insurance scheme as employees, but are denied unemployment benefits (Rubin, 2014; SECO, 2023). Indeed, in case of unemployment, the unemployment insurance refuses indemnities to people who own their company or control its decisions, because they are in an employer-like position. A parliamentary initiative is currently being studied, which is designed to change the law and improve the situation; a dissenting minority have proposed to suppress unemployment contributions for this group of people.[26]

Last but not least, in the case of social insurance, there is no presumption of employee status. In cases of bogus self-employment and illicit – undeclared – work, the self-employed usually bear the burden of proof that they were employees and the employer had to pay the social contributions.

## *Restricted access to unemployment insurance for atypical workers*

The International Labour Office (ILO) classifies non-standard forms of employment into six areas: digital platform work, home-based work, fixed-term employment, part-time and on-call work (also called on-demand work or zero-hour contracts), multi-party employment relationships (hiring of services) and economically dependent self-employed (ILO, 2016). In Switzerland, there are three types of wage-labour platform work: on-call work, multi-party employment relationships and part-time work. After the Federal Court decisions reclassified drivers and deliverers as employees,[27] Uber allowed its workers to choose between the statuses of waged employee and self-employed.[28] For the employees, the payroll is outsourced to subcontractors either acting as hiring services – excluded by the labour authorities in Geneva and Vaud, thus prohibiting on-call work[29] – or as on-call workers (Pärli, 2022). We will therefore focus on both hiring services and on-call work when considering access to unemployment insurance. A few platforms, such as Batmaid.ch, allow part-time permanent open-ended contracts.

*Proper and improper on-call contracts.* On-call work is atypical because it involves irregular hours, variable workloads or reduced rates of work.[30] The main concern is the absence of minimum

25. Federal Social Insurance Office (OFAS), 'Portage salarial'. Available at: (https://www.bsv.admin.ch/bsv/fr/home/assurances-sociales/ueberblick/lohntraegerschaft.html (accessed 12 May 2023).
26. Parliamentary initiative 20.406, 12 March 2020 https://www.parlament.ch/fr/ratsbetrieb/suche-curia-vista/geschaeft?AffairId=20200406 (accessed 8 September 2023).
27. See notes 1 and 2.
28. Because no clear classification has been given, it should not be possible to choose between employed or self-employed unless it corresponds to an economic reality.
29. Art. 19 LSE.
30. On-call workers are available when there is an increase in the normal workload, unlike other peak service reserves for permanent employees to help with extraordinary, urgent work or unexpected faults.

wages, because no minimum working hours are guaranteed.[31] The Swiss code of obligations (CO) does not contain specific rules on on-call work. In 1998, the Swiss Federal Court ruled that flexible working hours are legitimate, and it is not illegal to pay employees according to their workload. When each assignment requires mutual agreement, it is called improper on-call work, as opposed to proper on-call work, or capacity-oriented variable working time, when the employer can call up the employee unilaterally (also known as on-demand work or zero-hour contracts).[32] The main characteristic of improper on-call work is that the employee can freely refuse the offer of work; thus, there is no working time between two offers and no minimum guaranteed occupation.[33] For proper on-call work, the required availability and the time factor are of the essence. If the notice given of work is so short that the employee cannot have another activity, then the working hours include the waiting period. Both proper and improper on-call work have to respect the CO. So, the employer cannot 'unilaterally' substantially reduce work regularly performed over a long period. Otherwise, the reduction would not respect the statutory notice requirement and the workers should be paid their average wage until the end of the contract.[34] Improper on-call workers must *de facto* accept calls: otherwise, their employer would soon stop calling them. So, there is a thin line between proper and improper on-call work. When analysing loss of work, the legislation on unemployment applies the same criteria to proper and improper on-call[35] (see the section below on unemployment protection).

Smood.ch was the first platform in Switzerland to hire its employees. The employees perform their work according to the platform's 'à la carte' or 'guaranteed' schedule. Each assignment lasts at least two hours. The employer guarantees at least four hours of work per week to employees who undertake to accept the work. The schedule is communicated 14 days in advance. The platform implements the 'guaranteed working hours' model (at sites with a particularly high volume of work and depending on the company's possibilities) if the employee commits him or herself for at least 12 months and has accepted an average employment rate of 70% over the last 12 months. The company's decision is final. Afterwards the system is opened up to all employees 'à la carte', and a first-come-first-served rule applies. This is proper on-call work. However, the conditions of the unemployment insurance will not be met because of the irregular working time of platform workers and their ability to choose whether, when and how long they work. As a consequence, the employee bears the economic risk of lack of work.

*Hiring service status.* In 1989, the authorities adopted the Federal Act on Hiring of Services, to limit irregular work and help the economy by establishing a flexible status in times of crisis and high unemployment. Hiring services are subject to cantonal or federal licences as umbrella companies.[36] The personnel leasing company (the lessor), an intermediary, hires the employees and transfers its power of instruction to its client (the lessee), but the latter is not an employer. The lessor concludes a framework contract with the employees, followed by assignments, which they can refuse. A leasing

31. The work schedule may vary, which considerably limits the worker's availability for placement, FF 1994 I 357.
32. ATF 124[1998] III 249. On-call hours are not necessarily compensated at the same rate as standard hours. The less free an employee is to perform other duties during on-call hours, the higher the compensation, even during the notice period for termination.
33. Federal Employment Act 1964 RS 822.11.
34. ATF 125[1999] III 65, TF 8C_318/2014.
35. Art. 8 para. 1, let. B and Art. 11 LACI.
36. Art. 12 LSE.

contract is concluded between the lessor and the lessee to provide the employees' wages. A collective labour agreement regulates the wages and working hours of the employees unless a more favourable collective agreement is enforceable in the client company. According to Art. 19 LSE, the wage and working hours must be stated, so on-call work is excluded. For this reason, hiring of service status protects platform workers, despite its precariousness.

In 2019, the Genevan authorities banned Uber Eats, as a hiring services company without a licence. To avoid the ban, Uber transferred its deliverers to an authorised umbrella company. The Swiss Federal Court ruled against this decision on 30 May 2022[37]: despite the employment relationship between Uber and the deliverer, Uber is not a hiring/recruitment company for the restaurants. In 2023 the cantonal authorities reversed the analysis and considered Uber as the client of the umbrella company in a hiring services relationship (Zaïbi, 2023). Indeed, if the platform has the power to give instructions, as stated by the Federal Court, and an umbrella company hires the deliverers, then the umbrella is a lessor and the platform a lessee. As a consequence, on-call work should be prohibited and the deliverers must know in advance the time and quantity of work. Uber challenged this decision.

In the following section, we will describe the unemployment protection available for each of the above-mentioned arrangements.

## Unemployment protection

### *Entitlement conditions to open a right and gain access to unemployment benefits*

*Self-employed.* To be eligible, a person must complete the waiting period and contribute – this is not possible for the self-employed because they cannot be insured. In 2003, the Swiss Parliament introduced provisions to facilitate re-entry into working life for self-employed people who were formerly employed, without a previous contribution period. Art. 9a LACI extends the period of receipt of benefits from two to four years, to better reflect the increased risk of self-employment, and extends the contribution period beyond the regular 24 months to include the period of self-employment, with this additional period capped at 24 months. If the self-employed person, therefore, contributes for 12 months in the 48 months prior to launching their activity and it then fails, they can request benefits under Art. 27 LACI for four years following the start of this activity.

When it comes to benefits, the authorities are particularly strict with self-employed persons, as non-insured and non-contributing members. First, the self-employed must stop their activity and sever all links with it.[38] They should therefore be ready to fall back on their previous employee status or to become an employee. The same condition applies to people with employer-like status who seek unemployment benefits.[39] Second, the unemployment system, unlike other types of social insurance, may penalise people who become unemployed through their own fault, not only an intentional fault but even slight negligence.[40] The list of 'faults'[41] is not exhaustive. Consequently, people who register after choosing to stop a self-employed activity when they were not obliged to are at fault, or voluntarily unemployed, although this situation is not mentioned in Art. 44 para. 1 OACI. Such self-inflicted unemployment results in withholding of benefits for up

37. See note 1.
38. TF 8C_191/2008.
39. ATF 123[1997] V 234 and TF 8C_660/2011.
40. Art. 30 para. 1 LACI.
41. Art. 44 para. 1 OACI.

to 60 days. The activity must therefore cease definitely, completely and involuntarily, to open a right to benefits. Partial or temporary unemployment in combination with self-employed activity is not possible.

Temporary self-employment can be accepted as intermediate earnings during unemployment.[42] The activity must be suitable, in terms of wages, and require few investments. Solo self-employed platform work, such as work as a cab driver, deliverer or security guard, which requires little investment, may be considered intermediate earnings (Rubin, 2014). The unemployed person can deduct, from their gross income, proven professional expenses for equipment and a 20% flat rate for other business expenses,[43] but the investment costs cannot be deducted. High investment costs mean that the activity is not temporary and is thus incompatible with availability for work and therefore with benefits. The person can lose up to 60 days of benefits in case of permanent activity, or benefits may be stopped in case of recurrence. The problem is that the insurance assesses the situation *a posteriori* and readjusts the benefits retroactively by offsetting them against earlier periods, since the periods of activity and the expenses must correspond.[44]

Even if temporary earnings are accepted, the search for a permanent waged job must always take priority. An insured person cannot look for self-employed work or a part-time job. If they find one, they must seek to replace it as soon as possible with a full-time job or supplement it with another part-time job; they must also be willing to terminate their activity rapidly to take up full-time employment. If they fail to do so, they will be assessed as unavailable for work and sanctioned.[45] Employees who plan to become or are already self-employed might be seen as insufficiently available for work to meet the unemployment insurance's requirements. This can be for various reasons: because of the extent of preparations, the scope of the activity, the duration of commitments entered into or a desire to give priority to self-employment over a permanent waged activity. In addition, the unemployment insurance does not cover business risks of people who have chosen to become self-employed and abandon their employee status over the medium or long term (Rubin, 2014).[46] Because business risk is not covered, once a person becomes definitively self-employed, they are no longer eligible for benefits compensating lack of work, even temporary.[47] The fact that they earn little or no income at the beginning of their activity or afterwards is typically a business risk that is not insured. This loss of earnings is not accepted as such by the insurance and does not constitute a loss of work within the meaning of Art. 11 LACI.[48]

It is therefore clear that entitlement conditions are very tough for the self-employed and unwise decisions can result in a cutting off of benefits. The lack of transparency due to the system's complexity is also problematic. For these reasons, self-employment is often a one-way ticket, with few ways back to receive unemployment coverage under the scheme for workers.

42. Art. 24 and 40 (3) LACI. Intermediate earnings express the duty to minimise damages to the insurance regime and to act in good faith. Such activity also means that the individual avoids marginalisation. To prevent wage and social dumping, intermediate earnings must respect the professional and local wage. When a person's income is lower than the unemployment benefits, the insurance makes up the difference for 12 months, which makes intermediate earnings financially attractive. During this period, the person must remain available for a permanent job. After 12 months, the activity is deemed permanent (Rubin, 2014, and Art. 24 LACI).
43. Art. 41a para. 5 OACI.
44. Art. 41a para. 5 OACI, first sentence.
45. Art. 30 para. 1 let. d LACI, ATF 112[1986] V 326; 8C_662/2009.
46. TF 8C_853/2009; TF C7/01; TF C421/00.
47. ATF 126[2000] V 212 para. 3a.
48. Revue du Droit du Travail et de l'Assurance-chômage (2010) p.297 para 3.3.2.

*On-call work, hiring services and umbrella companies.* According to Art. 8 LACI, to access unemployment benefits, insured people must be unemployed,[49] have completed their training and must not have reached retirement age. They must be looking for a suitable job.[50] They must meet the contribution conditions[51] and the supervision requirements.[52] But above all, the workers must have suffered an involuntary loss of work – including a partial loss resulting from a reduction of at least 20% of their working time[53] – and must be available to be assigned to a job (hereafter 'availability for placement').[54]

Regarding the contribution period condition, workers must have worked for at least 12 months in the two years prior to unemployment. No distinction is made between part-time and full-time work.[55] In case of several concomitant part-time jobs, the contribution period is counted only once. The decisive factor when calculating the contribution period is whether the work was under a single employment contract or whether each assignment had a separate contract. Hiring services provide a separate contract for each assignment. Although work performed via hiring services involves a framework contract, the lessor is not obliged to provide work and the workers are deemed unemployed between two assignments. This means that people working via a hiring service only contribute when they work. The Swiss authorities add up the various working days to reach a full month (SECO, 2023). This is different for on-call work: these workers also sign a framework contract which extends over several months. For them, each calendar month in which they have worked – even for only one day – represents one month's contribution (Perrenoud, 2023). Comparing hiring services and on-call employees, we can therefore say that regarding the contribution period requirement, accessing unemployment benefits is more difficult for those providing irregular hired services than for on-call workers. However, we will see that once this condition is met, it is more difficult for on-call workers to access benefits.

Involuntary loss of work and availability for placement are major obstacles for on-call workers. To be eligible for unemployment compensation, on-call workers must suffer a significant reduction in their volume of work. In principle, the unemployment insurance does not recognise a loss of work when the on-call worker is not called. Indeed, a change in the number of days for which work is offered is considered normal, even if the volume of work and the remuneration are low. Their access to unemployment benefits depends on a loss of work and the determination of a regular income. The volume of work before the reduction must have been relatively constant. To assess this criterion, a reference period is used, of either 12 or 6 months. If the volume of work has varied considerably during the reference period, it will be impossible to determine a normal work schedule. The variation will be considered inherent to the nature of the contract, preventing any unemployment benefit (Rubin, 2014). With employment relationships shorter than six months, unemployment benefits are refused.[56] When the reference period is six months, the fluctuations should not exceed 10% (either upwards or downwards) to be considered regular working time. Higher fluctuations, even during only one month in the reference period, will render the person ineligible for any unemployment benefit. When the relationship extends

49. Art. 10 LACI.
50. Art. 16 LACI.
51. Art. 13-14 LACI.
52. Art. 17 LACI.
53. Art. 11 LACI.
54. Art. 15 LACI.
55. Art. 8 para. 1 let. e and Art. 13 LACI and art. 11 para. 4 OACI.
56. SECO 2023 para. B 97.

over a year, variations must not exceed 20% per month, and above two years the accepted fluctuation is in the average annual working hours.[57]

The above shows the following. On one hand, the less the work assignments fluctuate each month, the shorter the period required for an assumption of normal working hours.[58] In other words, the longer the reference period, the higher the permitted fluctuations and the easier it will be to access benefits. On the other hand, the longer the on-call contract lasts, the more the employees will be deemed to have accepted their precarious situation. According to the Swiss Federal Court, unemployed workers who choose to accept temporary work assignments must shoulder the risk of loss of work between calls.[59] As the principle of a lack of work is accepted, there is a presumption that it is voluntary, which undermines availability for placement. This precarious situation is deemed to be voluntary even if the person has received unemployment benefits during part of the said on-call contract (Rubin, 2014).[60] In conclusion, while on-call workers contribute to the unemployment scheme, they cannot usually access these benefits. This can be explained by the fact that short-term contracts, temporary, seasonal as well as on-call work, unlike permanent work, are not considered sustainable work under Swiss legislation. Acceptance of on-call work must be limited, to reduce damage to a person's insurance situation when he or she is not in a longer-term job (Rubin, 2014).

Interestingly, in professions with frequent changes of employer or contracts of a limited duration, for example in artistic professions, Art. 12a OACI states that the first 60 days of contributions count twice.[61] In such cases, there is no presumption of the voluntary nature of precariousness.

## *Unemployment benefits and financing*

Unemployment protection consists in financial benefits (see next section) to compensate for loss of income, and other measures to shorten the duration of unemployment (training and employment measures, reimbursement of expenses or of social contributions). This study will only address financial benefits. These are mainly financed by companies' and employees' contributions, according to Bismarckian principles (see the section on financing).

*Unemployment benefits: a cap on income-related revenue.* Swiss law recognises the right to full and partial benefits for people who are fully or partially unemployed.[62] The 'partially unemployed' are those looking for part-time employment, or working part time but looking for full-time work[63], or seeking to supplement their part-time work.[64] Part-time and full-time unemployment is treated in the same way because benefits take into account the lost income. A full allowance is 80% of the insured income, but workers with no dependent children under 25 years old are only entitled to 70% if the full daily allowance exceeds CHF 140, unless they are in receipt of a disability

57. TF C_8/06, Revue du Droit du Travail et de l'Assurance-chômage (2011) p.149.
58. ATF 107[1981] V 59 para. 1.
59. ATF 120[1994] V 385 para. 3b.
60. ATF 139[2013] V 259.
61. TF 8C_592/2019, para. 3.2.3 and 4.1.
62. Art. 10 para. 2 LACI.
63. They can be forced to increase their activity according to art. 14 para. 2 LACI.
64. Art. 10 LACI.

pension.[65] Workers can receive up to 260 daily allowances for a period of two years after becoming unemployed, based on a 12-month contribution period; up to 400 daily allowances for an 18-month contribution period; and 520 daily allowances for a 22-month contribution period, if they are 55 or older or unable to work.

For part-time workers, the percentage of work lost will determine the compensation. The loss must be of at least 20% (SECO, 2023). The person's residual part-time availability must be regular and consistent – for example, they must be available every morning (Rubin, 2014) – which may not be the case for most platform workers. Small losses are not compensated because they do not jeopardise the economic survival of the unemployed person and would generate too much paperwork (Rubin, 2014). Workers can obtain unemployment benefits if they earn at least an average of CHF 500 per month, whatever time-percentage they work. Pursuant to Art. 40 OACI, the earnings resulting from several jobs are added together.

According to Art. 23 para. 3 LACI, accessory income – i.e. dependent activities falling outside normal working hours or outside the ordinary framework of a self-employed activity – is not insured. So, workers who lose an accessory activity are not deemed partially unemployed within the meaning of Art. 10 para. 2 LACI, and are not eligible for unemployment benefit. This is very hard for the working poor, who can legally perform several jobs working 130% time, but if they lose one will not receive unemployment benefits.

It is therefore clear that occasional, unimportant or accessory activities do not open rights to benefits, despite the payment of social security contributions. These situations are often encountered by employees of platforms.

*Contribution-based shared Bismarckian financing.* Contributions make up 2.2% of the maximum insured annual income of the accident-insurance scheme[66], CHF 148,200. This amount is paid equally between employers and employees. Contributions cover all the daily allowances. The government can increase these contributions if the expenses of the insurance scheme increase. The contributions from the Confederation and the Cantons are marginal. Exceptionally, for instance during the Covid-19 pandemic, the State may lend money for cash flow purposes. As already mentioned, the self-employed do not pay contributions.

In conclusion, while there is some recognition of self-employed status and atypical work, many forms of discrimination persist with regard to contributions and protection (Perrenoud, 2023).

## Policy debate on unemployment for platform workers

### *Minimum wage and universal income*

By claiming self-employed status for their workers, platform work introduced a new situation into the Swiss flexible labour market. The new features are the market-based price calculation and the crowdsourcing practice, which can stand in the way of fair income for these workers. In two referendums, the Swiss people have rejected the idea of a minimum universal social income provided

65. Art. 22 LACI.
66. Art. 22 para. 1 Ordinance on the Act on Accident-insurance (OLAA) 1982 RS 832.202.

by the State.[67] This means that such income is not available to the self-employed, including to solo self-employed platform workers, when they suffer a loss of income. Self-employed people in need of assistance can obtain social assistance benefits.[68] Pensioners or disabled people who do not have the minimum to cover their vital needs receive supplementary pensions.[69] In both cases, Federal Acts specify the minimum benefits to be paid by the Cantons, which may increase the level of these. For employees, there are no minimum wages – only conventional and cantonal possibilities. Neuchâtel, Jura, Ticino, Geneva and Basel – all of which border on European countries – have implemented cantonal minimum wages to guarantee a decent standard of living, which are applicable to platform work if these workers are considered as employees. Otherwise, collective labour contracts (CLC) should set out such minimum wages. In the event of serious wage dumping in a profession without an extended CLC, cantonal or federal authorities may specify a minimum salary for a period or extend the CLC.[70] Platform work and its price calculations undermine this fragile balance. Smood.ch is the first platform in the food delivery sector to have signed a collective labour agreement including a minimum wage.[71] Other courier services or bike delivery platform services, such as Uber Eats' partner Chaskis, have also signed a CLC. The government can extend a CLC to all companies if a majority of employers and employees have signed it. In the case of Uber Eats, it has not been decided it is are a delivery service falling under a national CLC or a hiring service.[72]

### *Authorities' analysis and new developments*

Digitalisation and platform work have been the focus of several government studies since 2017, but the conclusions of these differ. The Federal Council considers that platform work is still a small sector in the Swiss labour market and that social insurance schemes are flexible enough to accommodate these new forms of work (Federal Council, 2021b; Federal Council, 2017/2022, 2022). The Swiss Federal Audit Office has concluded, however, that the platform economy is growing very fast and that the platform providers provide insufficient information to their workers on their tax and social insurance obligations. The authorities lack the tools and resources to carry out effective checks, especially for undeclared work. There is distortion of competition due to the slow decision-making process on the status of platforms (Federal Control of Finances' transversal audit, 2022).

Platform work is part of a global flexibilisation trend becoming ever stronger since the 1980s. On the one hand, the Swiss authorities increasingly consider platform work as a new employment opportunity or as vocational retraining for people with a disability, for whom getting a permanent job is an unachievable goal.[73] On the other hand, several MPs have

67. The popular initiative *For an unconditional basic income* (2013 FF 2015 8727) was rejected in a referendum on 5 June 2016 by 76.9% of voters (FF 2016 6559) and *Living with dignity, for an unconditional affordable basic income* did not obtain the required minimum number of signatures to be registered (2021 FF 2023 751).
68. Federal Act on the Competence to assist people in need of assistance 1977 RS 851.1
69. Federal Act on Supplementary Benefits for Old Age Pensions and Disability 2006 RS 831.30.
70. Art. 360a CO.
71. Collective labour agreement between Smood and Syndicom, for members of Syndicom or if provided in the labour contract, as of 1 October 2022 https://syndicom.ch/fileadmin/user_upload/Web/Website/Landingpage/Dokumente/220517_Smood_CCT__f.pdf (accessed 12 May 2023).
72. Postcom vs. Uber Portier BV 25 August 2022. Available at: https://www.postcom.admin.ch/inhalte/PDF/Verfuegungen/VFG_13_2022_PostCom_Meldepflicht_Uber_Portier_BV_20220825_r.pdf (accessed 12 May 2023).
73. Creating one's own source of income generates professional integration on the labour market, by developing general skills in addition to technical skills (FlexiTest 2021 para. 3.5.2, p. 38).

called on the government to improve the legislation applicable to on-call work and working hours, and the social protection for platform workers (Cramer, 2019; Dandres, 2022; Nantermod, 2022).

## Innovative solutions

The economic shock of Covid-19 in the spring of 2020 showed that the Swiss system does not protect the poorest against the vicissitudes of life. It took only 10 days after the lockdown for the Federal Council to realise the blatant inequality of the situation of on-call workers, those on fixed-term contracts, apprentices and managers who did not receive the short-time work unemployment insurance protection. Yet since their contributions are identical to those of permanent workers, so should their rights be. Similarly, it was unthinkable not to provide some support to those self-employed without social security. It took more than a month for the Federal Council to provide extraordinary funds to help those who had to close down their activity. Based on the principle of economic freedom, those only indirectly affected by the Covid-19 measures were not always compensated (Magoga-Sabatier, 2022b). As a consequence, cantonal social assistance financed by taxpayers sustained those who were not eligible for such support, which was both wrong and insufficient.

There are several possible ways to improve the Swiss unemployment insurance system. The first modification would be to make the unemployment insurance mandatory. This would broaden solidarity (Dupont, 2022; Magoga-Sabatier, 2023b). When the self-employed have several clients, they represent a 'good' insurance risk – which explains the past general agreement not to introduce insurance. This logic would justify a limited contribution compared to that of employees/employers. Objective external criteria could replace the involuntary aspect, similarly to the compensations for reduced working hours and bad weather.[74] The loss of activity could be due to a loss of contracts, payment defaults, or any other factor demonstrated by the self-employed person. Alternatively, access could be denied when the activity is profitable and generates sufficient income. As for private insurance, a bonus-malus system could mitigate the risks for the unemployment insurance and incentivise the self-employed. The condition of permanent activity loss is largely incompatible with the instantaneous relationships created by the platforms. This criterion could be made more flexible, to include time-limited or partial loss of activity, as for temporary workers. A threshold could be applied, beyond which the loss of activity requires the implementation of palliative solutions, as for the loss of work for on-call workers.

The other Swiss social insurance regimes could also improve how they deal with multiple part-time activities (Federal Council, 2021a). The administrative reasons given for excluding marginal incomes cannot really be justified in our digital age. When added together, these multiple sources of income can result in a stable taxable income. This would require a reorganisation of how contributions are collected. The platforms could be asked to contribute on behalf of their workers, with or without their financial participation.

The problem, however, is the diversity of economic situations in which the self-employed find themselves, and their unwillingness to contribute to an insurance regime. Increased solidarity is the only way to cover societal risks, but this is not the liberal way.

74. Art. 31 ff LACI.

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