SURVEY EWL

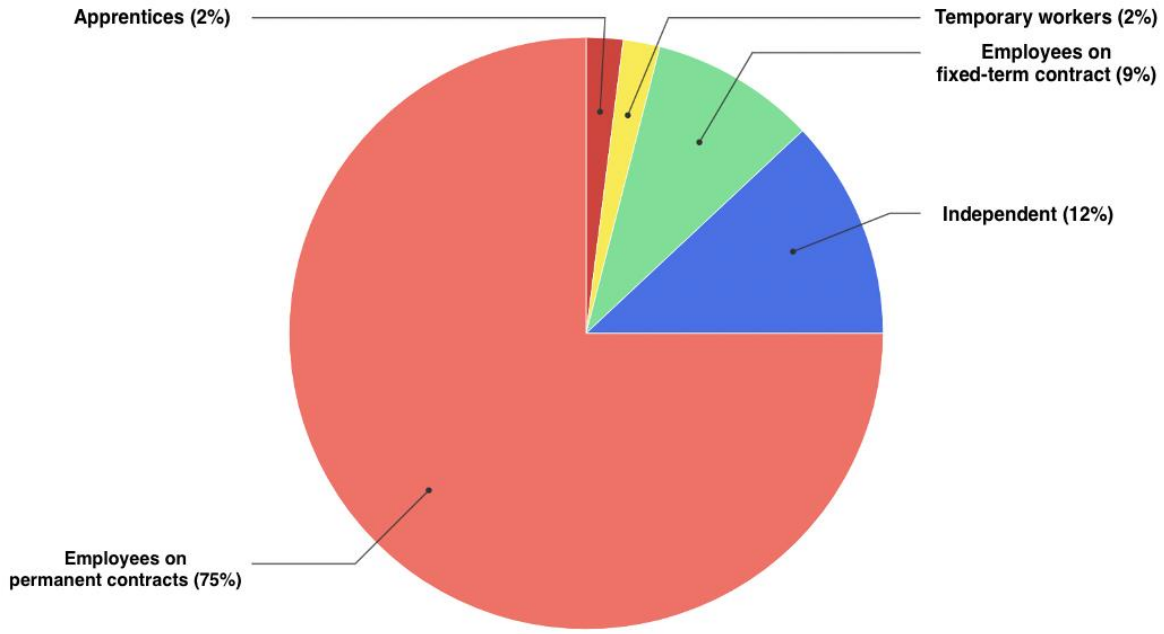
Describe what kind of casual or precarious working exists in your country (for example zero-hour contract; platform workers or on demand) and how widespread it is.

In France, precarious working is uncommon. The French model is indeed based on one type of employment contract, which is the full-time permanent contract (unlimited duration). It represents the majority of employment relationships.

The employer must resort to this type of contract, unless he can justify a situation that authorizes the use of another type of contract (such as fixed-term contracts or temporary employment contracts).

While precarious working is not widespread, there are still exceptional cases of casual working in the country such as part-time contracts, fixed-term contracts, platform workers and crowdworkers. However, zero-hour contracts and on-demand contracts are almost nonexistent.

Types of employment contracts in France in 2019



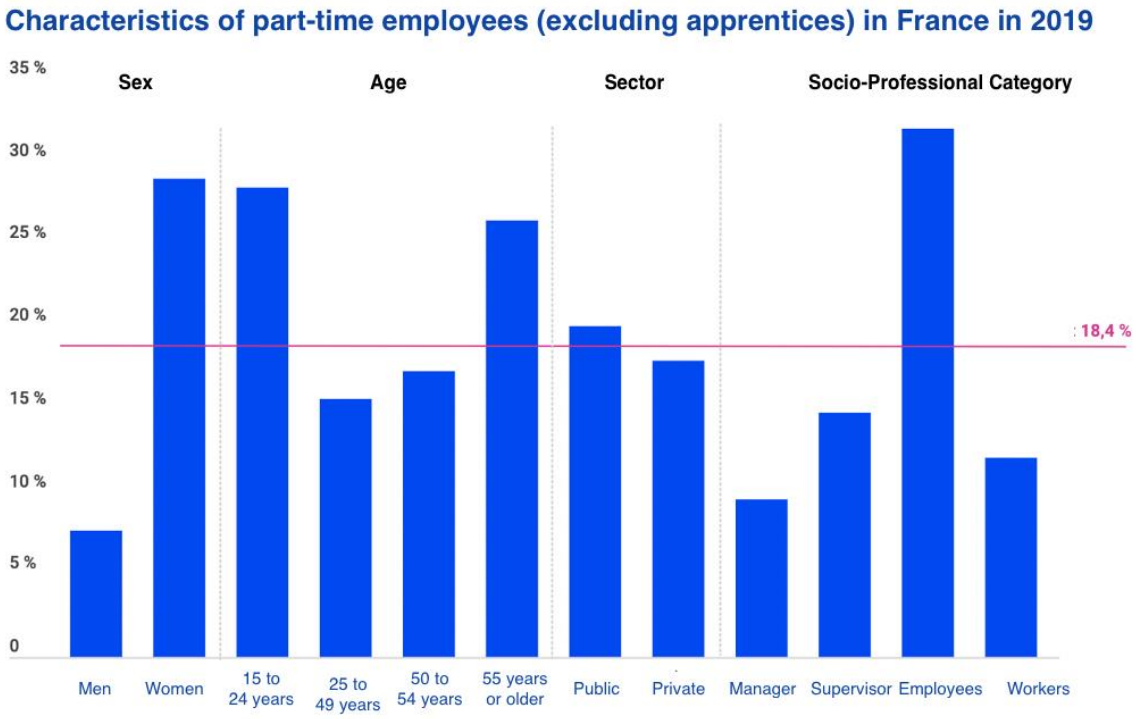
Platform workers and crowdworkers are part of the independent workers category, though there are instances when the type of work contract for these casual workers is questioned. In fact, judges can decide to requalify their contract with the platform into a permanent contract when they find clues about a subordinate relationship (cf. question 2).

Precarious/Casual working in France and its characteristics:

PART-TIME EMPLOYMENT

A part-time employee is someone who works fewer hours than full-time employees. What is considered « full-time » may vary between employers and companies. It is generally admitted that part-time employees work less than 35 hours per week.

Here are some characteristics of part-time employees in France:



FIXED-TERM EMPLOYMENT

Fixed-term contracts represent around 9% of the employment contracts in France.

A fixed-term contract is an employment contract by which an employer recruits an employee for a limited period. Such a contract is only possible for the performance of a specific, temporary task and only in cases provided for by law.

Thus, this type of contract is concluded in the event of the replacement of an employee who is absent, the replacement of an employee who has not yet taken up his duties. It may also be used in the event of a temporary increase in the employer's activity, seasonal work or contracts concluded as part of the employment policy.

Nonetheless, most companies use fixed-term contracts because their need is limited in time, as a way of testing the employee's skills before hiring them on a long-term basis, or most of the time, to limit the risks in the event of a slowdown in their activity.

The whole term of a fixed-term contract (possibly renewed once) is generally 18 months (24 months in some cases).

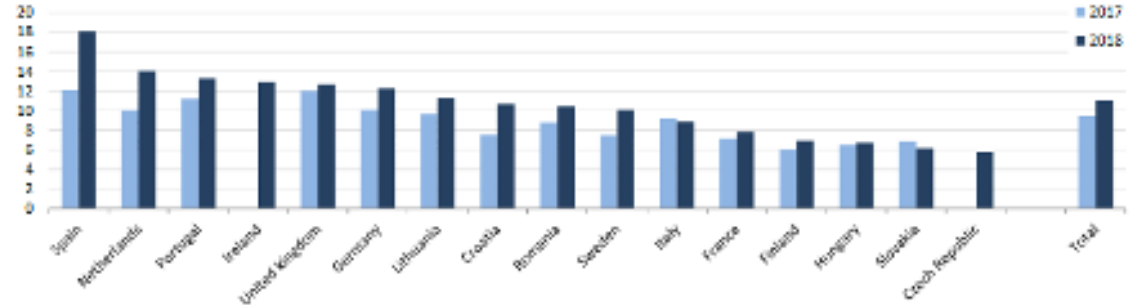
PLATFORM WORKERS

It is generally admitted that platform workers are self-employed, independent workers. It is difficult to estimate their number because of the singular nature of their activity.

They are individuals who use an app or a website to match themselves with customers to provide a service in return for money. As of right now, the most popular platforms in France are Deliveroo (food delivery) and Uber (passenger transport).

This type of precarious working is not very widespread in France, as shown in the graph down below:

Figure 1: How many people have ever provided services via digital labour platforms?



Source: authors' elaborations using COLLEEM 2017-2018 data. Data are adjusted for frequency of internet use using the ICT survey (isoc_ci_ifp_fu).

CROWDWORKERS

Just like platform workers, we cannot estimate the number of crowdworkers in France.

Crowdworking represents activities that were originally performed by individual contractual partners but are no longer performed, as they have been outsourced by being offered to more people through an internet crowdsourcing platform.

Crowdworking platforms are essential for this form of work execution: they provide the infrastructure for order processing. Work often needs to be done through their interface to be efficient. It transmits the completed work and takes care of the workers' payment.

Crowdworkers can work anywhere. There are several crowdworking apps such as AppJobber, Workhub, Clickworker, Crowdtap, Streetspotr, etc.

Which type of legal relationship exist in your national law ("employee", "worker", self-employed, other)? Explain whether these national categories fit with the definition of worker given by the Court of the European Union (see preamble 8 of the Directive). Can you name typical instances of precarious working in which the type of work contract has been questioned and/or created conflicts (zero-hour contract, platform worker)?

There are two main categories of legal relationship in our national law: one can be either an employee or a self-employed worker.

There is no legal definition of an employee in French employment law. We can still give a definition based on the Court of Cassation's interpretation.

An employee is someone who works under a contract (written or not) and for an employer who has the power to control and direct the employee. In exchange for his work, the employee receives a salary. Employees benefit from the labour code and its protective rules, as well as a social protection.

On the other hand, a self-employed worker is someone who works on his own account, is autonomous in his choices regarding his clients, his work-organization and his prices. A self-employed worker accomplishes a piece of work for a client according to his own methods and is subject to his client's control on the sole aspect of the result of his work. They do not benefit from the Labour Code and they do not have any kind of social protection.

In addition, there are also a few « hybrid categories ». A presumption of employment exists for some categories of independent workers, such as VRP or journalists. Even though they have a lot of independence and freedom in their work, they are still under a contract (considered as a work contract) and benefit from this status.

We can also use the example of branch managers. They are self-employed workers who benefit from the labour code.

Do these national categories fit with the definition of worker given by the Court of the European Union?

The definition of worker according to the Court of the EU can be found in a ruling handed down on May 31st 1989 known as « Bettray » (344/87). A worker is a person that, for a certain period of time, performs services for and under the direction of another person in return for remuneration. It can be any kind of service, but it must be real and effective. It can also be any kind of professional category or remuneration.

We can conclude that **GENUINELY** self-employed workers do not fit with this definition, contrary to employees. According to paragraph 8 of the Directive's Preamble, the definition given by the text also includes domestic workers, temporary agency workers, on-demand workers, intermittent workers, voucher-based workers and platform workers.

In our national law, there are a few instances of precarious working in which the type of work contract has been questioned and created conflicts.
It revolves essentially around platform workers, crowd-workers, taxi drivers, delivery drivers. There is a debate whether this kind of workers falls under the category of self-employed workers or employees.

The « Madelin » Act (February 11th 1994) has established a presumption according to which an entrepreneur is automatically self-employed and cannot be an employee. This presumption is now written in article L.8221-6 Labour Code. However, this presumption is not irrefutable and can be proven wrong if judges manage to find clues showing that there is a subordinate relationship.

In fact, judges consider that the determination of the existence of an employment relationship should be guided by facts related to the actual performance of the work and not by the parties' description of the relationship.

For some platform workers, it seems that the platform acts as an employer. This means that the worker is not really a bridge between the platform and the client (as it is supposed to be) but an employee who offers his services to the platform. This happens when the platform has the power to control and direct the worker. These workers are self-employed only in appearance.

We can name a few examples. The Court of Cassation's position has evolved within the past few years and there are some important rulings that we can talk about. The first notable one is the Labbane case (December 19th 2000). The Court has judged that the contract of those taxi drivers was an employment-contract and that there was a subordinate relationship between the drivers and the company. In fact, the company was compelling them to do numerous tasks such as the vehicle safety inspection.

The second notable one is the Take-Eat-Easy case (November 28th 2018). The same decision was handed down about delivery drivers using bicycles. The clues to the subordinate relationship were the geo-localization system and disciplinary power. Last but not least, the most recent one is the Uber case (March 4th 2020). The same decision was handed down about Uber drivers.

These decisions have opened the door for platform workers. For those who find themselves in a situation where the platform is acting as an employer: they can ask for the requalification of their contract so that they will officially and legally become employees and benefit from all the rights and protections given by the labour code. However, to this day, there is still no proper regulation.

We must also underline the fact that some platform workers are genuinely self-employed. It is a case-to-case matter.

The Directive requires in articles 4 and 5 that specific information is provided to the workers within a specific period of time. To what extent does your national law already comply with those requirements? If the employer does not provide the relevant information or not on time, what are the remedies available to the worker or other actors? Would the workers described in question 1 qualify to receive this information?

In France, it is required for the employer to provide a certain amount of information to his employees, related to their working conditions. This information can be found each month on the remuneration statement and on what we call "la déclaration préalable à l'embauche", which is a procedure that automatically compel you to report to the administration the fact that you hired an employee.

Amongst other things, it will include:

The name and the address of the employer and the employee

The number of working hours with a distinction between overtime hours and "normal hours"

The amount of the employee's gross compensation

The payment date

The job title and the conventional classification

Etc.

To what extent do they comply?

The 2019 directive being almost identical to the 1991 one on this subject, the statement done by the French administration on the 25th of April 1994 might still apply: delivering a remuneration statement might be enough to satisfy those requirements.

But some authors beg to differ. The French transposition appear insufficient: the article R3243-1 of the Labor Code does not require for the employer to provide this information to an employee who is already working is this company. And if the contract is concluded for an indefinite period, the employer is not entitled to specify on the remuneration statement the contract date or the workplace, which makes it lacking.

As of right now, it is very unlikely that France's national law comply with those requirements.

If the employer does not provide the relevant information or not on time, what are the remedies available to the worker or other actors?

An employer who does not provide the relevant information to his employee will be sanctioned. It might be:

A civil penalty: if it causes harm to employees, they might seek legal redress from the "Conseil de Prud'hommes" (Labor Relations Court). The conciliation board will also be able to ensure the employer comply and deliver the remuneration statement.

A criminal penalty: the employer might face a class 3 offence (up to 450€).

Would the workers described in question 1 qualify to receive this information?

This kind of information will be conveyed to any worker linked by a working contract, regardless of its nature, its form, or the amount of remuneration. This includes the employee we have studied on the first question.

Does your national law (statutes or collective agreements) have rules on probation? If yes, what are they and is there a maximum? Is it possible to deviate from that by collective agreement or individual contracts? (see article 8 of the Directive)

French law provides the possibility to include a probationary period in employment contracts. This is a period that allows the employer to check the skills of the newly hired employee, especially with regard to his experience. For his part, the employee can assess whether the position held suit him. (L1221-20 of the Labour Code).

Prior to the law of June 25, 2008 governing the probationary period regime, its duration could be freely defined by the employer for fixed-term contracts. This freedom was however tempered by the judge of cassation who exercised control over the length of the probationary period by explicitly relying on the C158 convention of the ILO which stipulates that the length of the probationary period should « be fixed in advance and be reasonable. »

Since then, the law provides for the duration and, if applicable, the conditions for renewing this trial period but also the terms of termination

THE DURATION OF THE PROBATIONARY PERIOD AND THE CONDITIONS FOR RENEWAL

For the two main contracts (permanent contract and fixed term contract), the law defines the length of the probationary period. The duration rules can be adapted to some extent by collective agreement.

For permanent contracts, the maximum duration is set by professional category (Art L1221-21 of the Labour code):

Two months for workers and employees.
Three months for supervisors and technicians.
Four months for executives.

This probationary period can be renewed once, only if an extended collective agreement organizes this possibility. It sets the conditions and duration of renewal. These durations, including renewal, cannot exceed (art L1221-21 of the Labour code):

Four months for workers and employees.
Six months for supervisors and technicians.
Eight months for executives.

These periods are mandatory, with three exceptions (art L1221-22 of the Labour code):

longer periods fixed by collective agreements concluded before the publication date of Law No. 2008-596 of June 25, 2008 on the modernization of the labour market

shorter durations set by collective agreements concluded after the publication date of the aforementioned Law No. 2008-596 of June 25, 2008

shorter periods fixed in […] the employment contract

The probationary period and the possibility of renewing it cannot be assumed. Both have to be expressly stipulated […] in the employment contract (Art L1221-23 Labour code)

For fixed-term contracts, the duration of the probationary period varies according to the duration of the contract initially signed and cannot be more than 2 weeks when the initial duration of the contract is equal to at most 6 months and 1 month in other cases. Uses or conventional stipulations may provide for shorter durations. (art L1242-10 Labour Code). It is not possible to renew the probationary period for fixed-term contracts.

TERMS OF TERMINATION

The probationary period can be terminated at any time by either party. It is not necessary to respect the rules of dismissal for permanent contracts, nor the rules concerning the early termination of the CDD.

A certain formality is planned because the employer must respect a notice period for permanent contracts or fixed-term contracts with a probationary period of at least one week (Art L1221-25 Labour Code):

Twenty-four hours within eight days of presence; Forty-eight hours between eight days and one month of presence; Two weeks after one month of presence; One month after three months of presence.

Failure to comply with this deadline may give the right to compensatory indemnity, except for serious misconduct on the part of the employee (Art L1221-25 Labour code.)

Shorter deadlines are provided for when it is the employee who ends the probationary period: 48 hours and even 24 hours if the duration of the presence in the company is less than 8 days (Art. L1221-26 code work).

The Labour law does not provide for any conventional exemption concerning the terms of termination of notice.

Are there rules in your national law preventing employees from having more than one job in the context of precarious work? If yes, on what grounds? (see article 9 of the Directive)

In France, the principle is that every employee has a right to get more than one job. However, the employer can introduce an exclusivity clause in the contract of employment. It prevents the employee from working for another employer.

To be valid, it must fulfil different conditions:

It must be stated in the contract

Indispensable for the protection of the company's legitimate interests

Proportionate to the aim sought: In the case of part-time contracts, such a clause is hardly justifiable but has not been forbidden if it fulfils the following conditions: justified by the nature of the task and proportionate to the aim sought.

The High Court in France, the Cassation Court, has considered that it would contravene the freedom to get a professional activity. Regarding article 9 of the Directive, the exclusivity clause seems to be almost forbidden. However, the second paragraph of the article gives some exceptions and allows the use of this clause based on objective grounds such as the protection of the business confidentiality, the avoidance of conflict of interests, etc.

When workers have fluctuating hours, is there a time limit whereby they should be made aware of their shifts or working hours? If this is not done, is the employee allowed to refuse to work or entitled to compensation? (see article 10 of the Directive)

In France, article L. 3121-47 of the Labour Code states that in the absence of a collective agreement, the notice period in the event of a change in working hours/shift is 7 days for a part-time contract.

The employee's refusal to accept this modification constitutes neither a fault nor a reason for dismissal (L. 3123-11).

These national rules fit with the proposal written in the Directive. Article 10 of the Directive states that : « *If the work pattern is entirely or mostly unpredictable, the employer shall inform the worker of the minimum notice period to which the worker is entitled before the start of a work assignment and, where applicable, the deadline for cancellation referred to in Article 10. In fact, the worker is informed by his or her employer of a work assignment within a reasonable notice period established in accordance with national law, collective agreements or practice. Where one or both of the requirements is not fulfilled, a worker shall have the right to refuse a work assignment without adverse consequences* ».

If your country allows on demand contract. is there legislation which specifically tries to avoid abuse of this form of casual working (such as limitation on the use and duration of on demand contract or presumption that there is an employee relationship / contract of employment) ? (see article 11 of the Directive)

This form of casual working does not exist in France.

Do the rules on probation, having more than one job, time limit for changing working hours and avoid abuse of on demand contracts address the core problems of the atypical workers?

The challenge of the adaptation of Labour law to this digital revolution requires considering the economic dependence of the digital workers in order to promote a better Labour protection. As it stands, the Labour Code does not include them in its scope because it is admitted that they are self-employed workers. Therefore they are exposed to difficult working conditions without any kind of protection such as the social minima, or the guarantee of a maximum weekly working time (48 hours) without excess.

In December 2020, Jean-Yves FROUIN presented his report entitled: "*Regulating digital labour platforms*" to the Prime Minister. He was entrusted with the mission of formulating proposals in terms of status and social rights for platform workers. The aim is to secure legal relationships and workers without compromising the flexibility provided by the self-employed status.

The report advocates that, after 6 to 12 months of activity and achieving a certain turnover, platform workers should be affiliated with a third party (such as a cooperative) to secure their situation. The report also suggests the creation of a platform regulator, supervision of driving time and minimum remuneration.

9. Can temporary, on demand or casual workers request a transfer to a more secure or permanent form of working? If yes, what are the conditions and types of contracts available? (see article 12 of the Directive).

The French model is based on one type of employment contract, which is the full-time permanent contract according to the article L. 1221-2 of the Labour Code. The Article 12 of the Directive deals with the transition to another form of employment: "*Member States shall ensure that a worker with at least six months' service with the same employer, who has completed his or her probationary period, if any, may request a form of employment with more predictable and secure working conditions where available and receive a reasoned written reply*".

In France, if nothing has been planned at the end of the contract, the fixed-term contract automatically switches to permanent contract, with the same employment conditions: salary, position, hours, etc. To hire his employee on a permanent contract, the employer does not have to wait for the end of the fixed-term contract. He can indeed suggest to his employee to break his fixed-term contract to hire him on a permanent contract.

There is, however, a particular case when the salary requires the reclassification of the fixed-term contract into permanent contract in the event of non-compliance with the legal framework of fixed-term contracts by the employer. The employee can assert his rights by reclassifying his fixed-term contract as a permanent contract with the industrial tribunal. At the end of the judgment, the employer may be ordered to pay re-qualification compensation, or severance compensation

In addition, part-time employee can also switch to a full-time contract. In fact, the employee can speak to his employer at any time, orally, by e-mail or by post. When the employer accepts, the change from part-time to full-time constitutes a modification of an essential

element of the employment contract. This modification is materialized by an amendment to the employment contract which must be signed by both parties.

What changes do you anticipate from your national legislator in order to comply with the Directive?

For now, the transparency of working conditions is not a big debate in France. The information provided to workers in general is lacking. To implement this Directive, there is a need of a big change. It would be revolutionary to apply workers' rights to platform worker for instance, because as of today, these workers are self-employed and do not benefit from the employees' advantages.

State members have now 3 years to transpose the Directive in their domestic legal order and French labour law will need a few adjustments. Articles L.1221-21 and L.1221-22 of the Labour Code, which allow probation periods longer than 6 months for executive managers and for collective bargaining agreements signed before June 25th 2008, should be revised. Admittedly, the Directive allows contractual exemptions, but provided that the global degree of workers' protection is not leveled down and this condition is not provided by the Labour Code. More broadly, it will be necessary to verify that equivalent rights already existing in French Law are well admitted for every worker. The Directive's content should not be minimized to assure its full transposition in our domestic legal order.