

# Employee or Independent Contractor?

## A global perspective

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# Welcome

## Today's speakers:



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# What will we cover?

1. Test for employment status



2. Risks and exposure

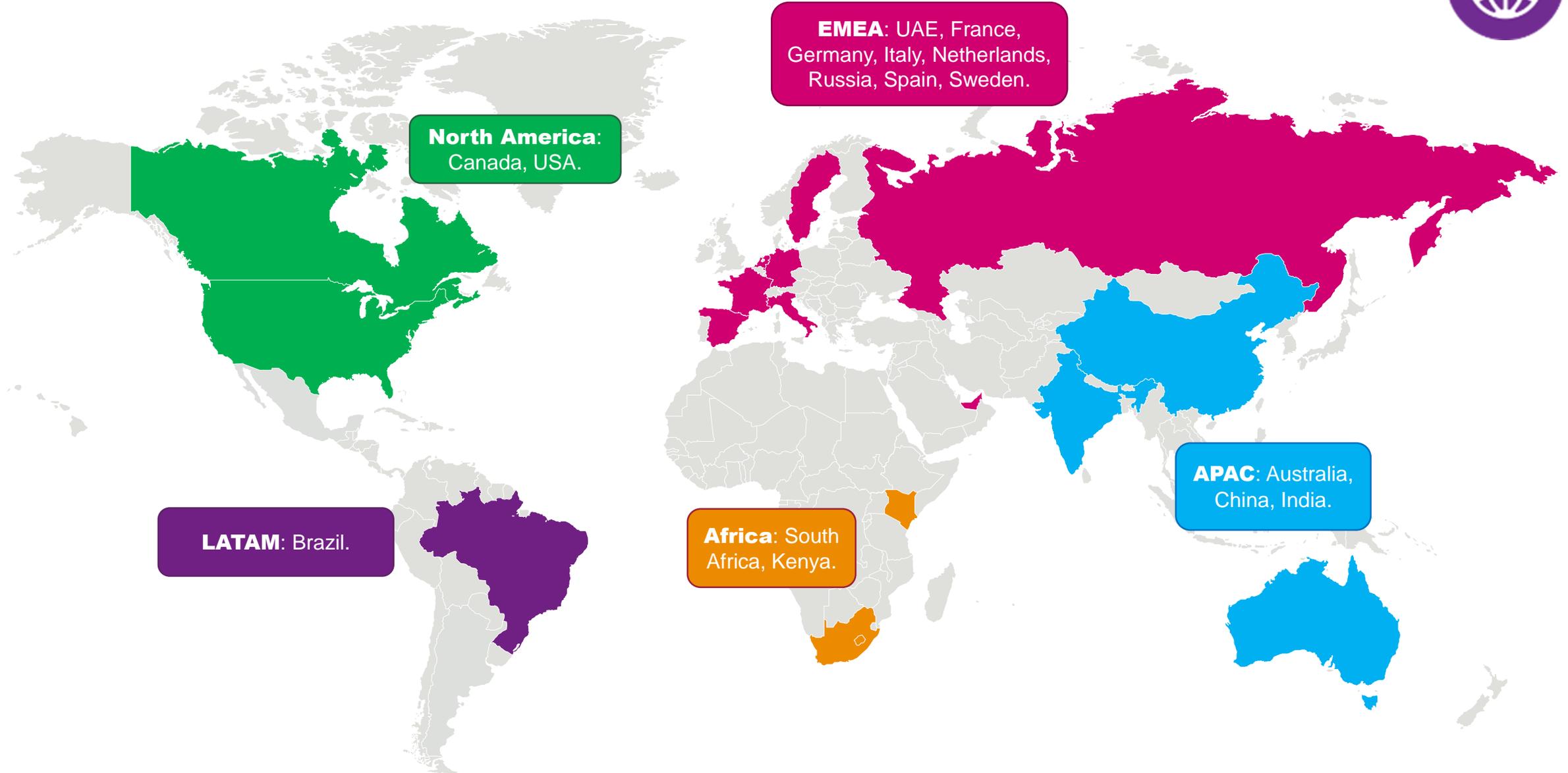


3. A look ahead



4. Practical tips

# Countries



# Tests for employment status

## Global themes



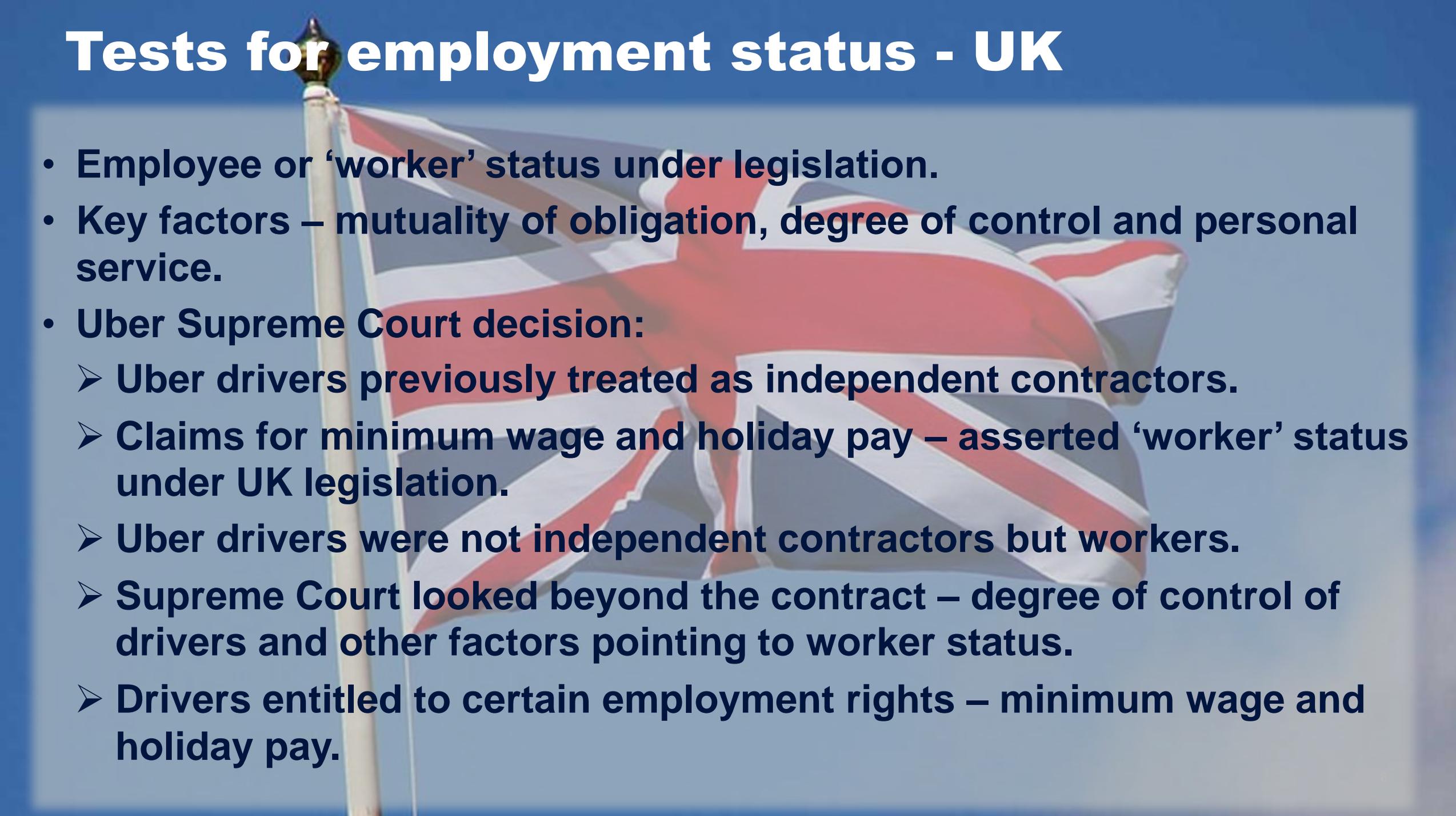
No “worker” category  
(exceptions - Canada,  
Spain and Italy).

Similar factors to UK.

Difference - weight  
placed on factors.

What is happening in  
practice?

# Tests for employment status - UK



- Employee or ‘worker’ status under legislation.
- Key factors – mutuality of obligation, degree of control and personal service.
- Uber Supreme Court decision:
  - Uber drivers previously treated as independent contractors.
  - Claims for minimum wage and holiday pay – asserted ‘worker’ status under UK legislation.
  - Uber drivers were not independent contractors but workers.
  - Supreme Court looked beyond the contract – degree of control of drivers and other factors pointing to worker status.
  - Drivers entitled to certain employment rights – minimum wage and holiday pay.

# Tests for employment status

## California

- Assembly Bill 5 came into force on 1 January 2020.
- Individual an employee unless company can prove 3 requirements.
- Bill does not apply to a number of industries.
- In November 2020, California passed Proposition 22 which exempts app-based gig workers. However, in August 2021, a trial court ruled that Proposition 22 is unconstitutional and unenforceable.



## South Africa

- Individual presumed to be an employee if any of 7 set criteria exist.
- Company to show satisfactory evidence to rebut presumption.
- Only applies if individual earns less than c. £11,000.



# Tests for employment status

## Germany

- Employee defined in statute.
- Determining factors of status governed by case law.
- Overall assessment taking into account various criteria.
- Factors similar to UK.



## India

- Courts apply the “control and integration” test.
- Prima facie test is control - to determine whether master-servant relationship exists.
- Integration test is whether an individual is fully integrated into a company’s organisation.
- Although these tests are decisive, they are not the only factors, and all circumstances are considered.

# Tests for employment status

## UAE

- Independent contractors are rare.
- Visa applications require copy of employment contract.
- Illegal for contractor to “do business” without a licence and without setting up a legal entity.
- “Fly in and fly out basis” used but not in compliance with local law.
- Use of agencies common.



## China

- Courts will take into account different factors.
- Most important factors are requirement to follow company policy and payment of social security contributions.
- Tax for contractors is higher, so misclassification generally not an issue from a tax perspective.

# Risks and exposure – global themes



## Similar risks

- Back payment of unpaid employment benefits and salary.
- Back payment of social security contributions and fines.
- Penalties for deliberate misclassification of employment status.
- Reputational damage.

## Claims

- Brought by individuals and the tax or labour authorities.

## Differences

- Level of fines and penalties – sometimes criminal sanctions.
- Look back period for compensation.
- Ability of labour authorities to instigate investigations.

# Risks and exposure

## Australia



### Sanctions

- Individuals – Compensation for unpaid statutory benefits plus interest (from start of employment).
- Fair Work Inspectors – Penalties (maximum \$13,320 (c. £7,070) for individuals and \$66,600 (c. £35,400) for companies).
- Taxation Office – Penalties for non-payment of superannuation and non-withholding of tax.

### Case study (2019)

- Easttrac / Klemtrac - misclassification of 4 individuals.
- Both companies and 2 individuals fined for sham contracting.
- Easttrac - AUS\$125,874 (c. £66,800).
- Klemtrac - AUS\$77,112 (c. £40,900).
- Director - AUS\$7,711 (c. £4,090).
- Manager - AUS\$5,783 (c. £3,070).

# Risks and exposure - Brazil

## Sanctions

- Individual – backdated employee benefits for 5 years.
- Public civil action – labour prosecutor investigation.
- Ministry of Labor audit – fine per misclassification.
- Federal Tax Revenue inspection – social security contributions for past 5 years and penalty.



## Case study (2019)

- Public civil action against Loggi.
- First instance decision that motorbike drivers for Loggi were employees.
- Court ordered Loggi to formalise relationships with drivers.
- Compensation of 30 million reais (c. £5.5 million).
- Loggi appealed and appeal court did not uphold the first instance decision.

# Risks and exposure

## France

### Sanctions

- Individual – back payment of overtime, salary and benefit arrears (for previous 3 years).
- Tax – payment of social security contributions.
- Deliberate misclassification – more significant penalties e.g. 3 years in prison for company's legal representative, individual fine of €45,000 (c. £38,400) and company fine of €225,000 (c. £191,900).

### Case study (2017)

- Employment relationship between Le Cab and taxi driver.
- Court decided Le Cab had deliberately “hidden employment”.
- Various fines, including:
  - €8,890 deliberate misclassification;
  - €1,037.26 holiday pay;
  - €4,513.74 compensatory rest;
  - €1,759.84 meal compensation;
  - €965 uniform allowance;
  - €1,500 discretionary award.

# A look ahead

## Global themes



More legislation

Move towards  
third category of  
worker

Misclassification  
taken seriously

# A look ahead

## Legislation

### USA

- US-wide PRO Act passed by the House of Representatives.

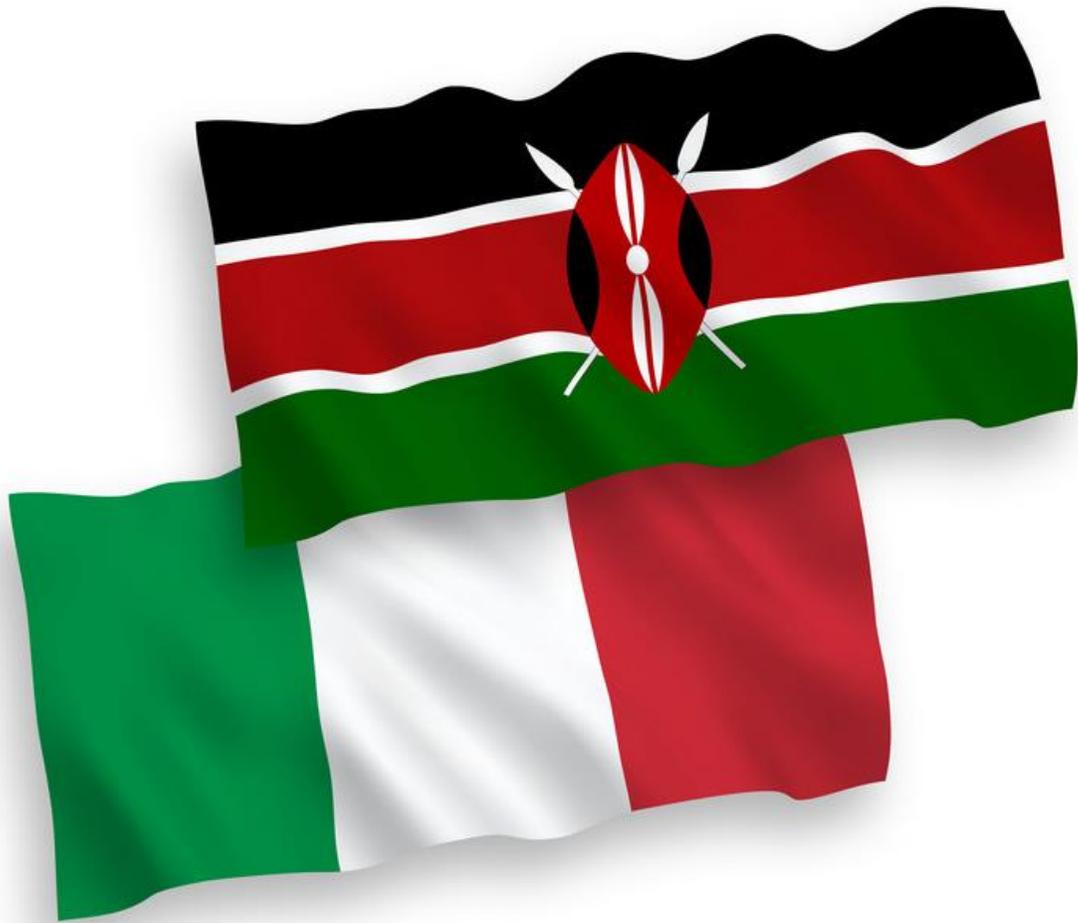
### Spain

- New law requires food delivery and courier companies to hire their couriers as employees.



# A look ahead

## Cases



Italy

4 food delivery platforms fined and forced to hire 60,000 couriers.

Kenya

Gig economy increasing so likely to be cases over next 5 years.

# Practical tips

## Global themes

Consider short fixed term contracts rather than open ended contracts.

Clear written contracts.

Use of personal service companies.

Emphasis on reality of relationship.

# Practical tips

## Global themes



- 1. Avoid email addresses or business cards.
- 2. Supply of own equipment where possible.
- 3. Permit work for third parties.
- 4. Avoid contractors performing same work as employees.
- 5. Tax clearance in some countries – only protected if contracts reflect reality.

# Practical tips

## Tax authorities

### Netherlands

- Model contractor agreements published by tax authorities (will expire in 2021).
- Launch of online questionnaire for employment status.

### Germany

- Apply to relevant authority (DRB) to validate contractor agreements.

### Sweden

- Ask to see a contractor's "F-tax certificate" – proof contractor responsible for paying their own taxes.



# Practical tips

## Use of agencies

### Issues

- Using an agency to engage workers can reduce (but not eliminate) risk of employment.
- Agency work is often heavily regulated.
- Important to seek legal advice on whether agency work appropriate.

### Examples

- Russia - Accredited staff agency and only in limited situations.
- Italy - Agency worker cannot be used for over 2 years. If used for over 1 year, company to justify use over employee. No more than 20% of workforce can be agency staff.
- South Africa – Agency workers become permanent employees if they work at a company for longer than 3 months.

# Practical tips

## Other points



- Training sessions for HR on the risks of misclassification.
- Consider global business guidelines on using contractors.
- Keep up-to-date with the law– this area is constantly changing.
- Conversions / amnesty.

**Q&A**



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## Global Employment & Labor webinar series

Worker misclassification and independent contractors – a look at the UK, US and Canada

WEDNESDAY 20 OCTOBER 2021  
4.00PM BST, 5.00PM CEST, 11.00AM ET



Dan Beale  
Partner, Atlanta



Alison Weatherhead  
Partner, Glasgow



Catherine Coulter  
Counsel, Ottawa

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## Worker misclassification and independent contractors

## Global Employment & Labor webinar series

Worker misclassification and independent contractors – a look at Germany, Italy and Poland

WEDNESDAY 10 NOVEMBER 2021  
4.00PM BST, 5.00PM CEST, 11.00AM ET



Davide Boffi  
Partner, Milan



Sascha Grosjean  
Partner, Düsseldorf



Aleksandra  
Minkowicz-Flanek  
Partner, Warsaw

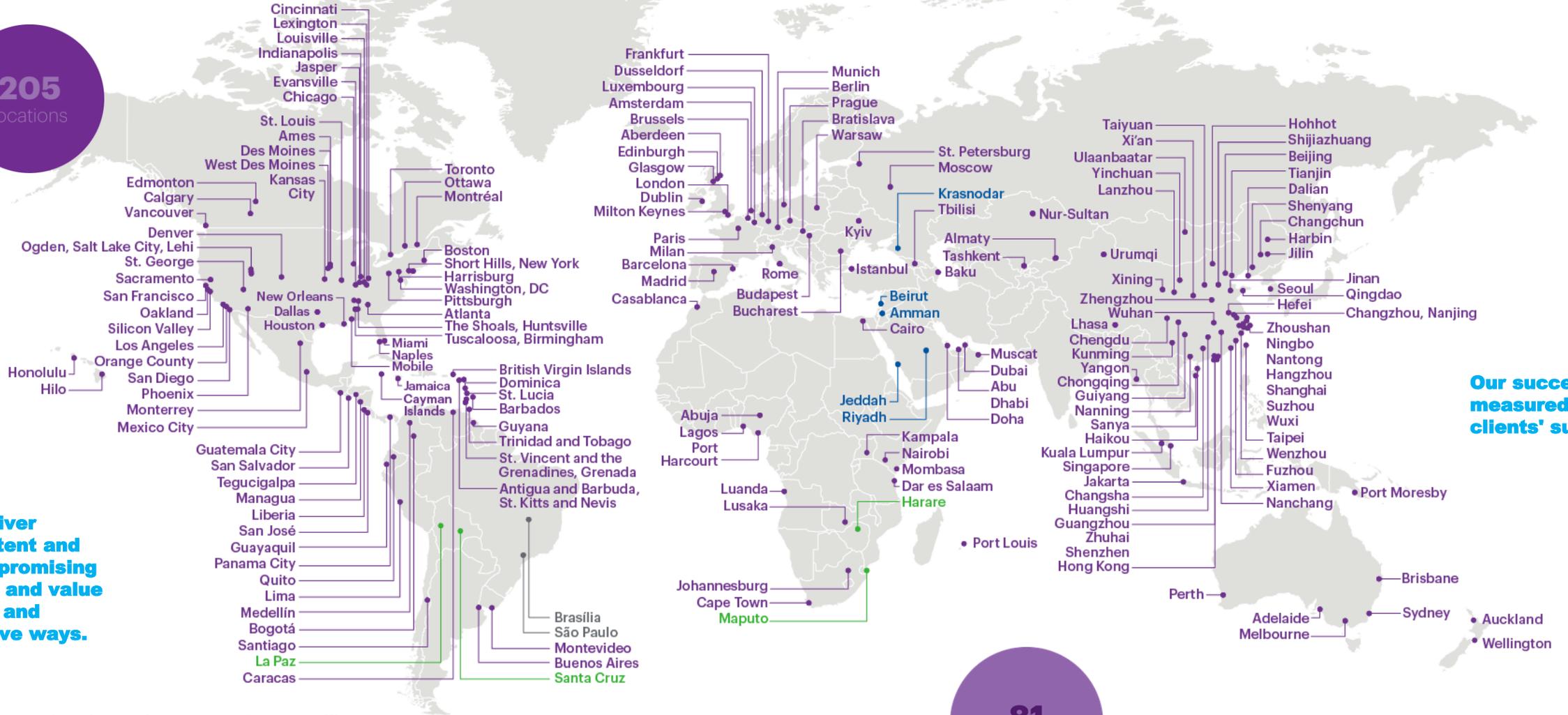
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July 2021

# Thank you



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