

Policy Insight

Adopting Miller's First Principles for Online Food Delivery Platforms' Labor Regulation in the Philippines

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“Labor is not a mere employee of capital but its active and equal partner.” Although this legal doctrine has become a staple in labor and employment cases, experiences of delivery riders associated with online food delivery platforms, such as Grab and Foodpanda, say otherwise. For instance, the shutdown of LalaFood in February 2021 left delivery riders—who platforms call as *partners* instead of employees—without any form of separation assistance or any opportunity to transition to another job.² This is the reality presented by *disruptive innovation* (Christensen 1997 cited in Miller 2016) to which society, including the law, must respond. Philippine legal jurisprudence is clear however, as stated above, that labor is an *equal partner* of capital, not a *nominal partner* just because it is convenient for capital.³

Stephen R. Miller, in his article “First Principles for Regulating the Sharing Economy,” introduces the *first principles*, or building blocks on which any future regulation of any sharing economy industry must rest. Although Miller used the first principles in examining the regulation of short-term rental markets, such as Airbnb in USA, this present paper adopts such first principles to the online food delivery market's labor and employment regulation in the Philippine setting, particularly that of “delivery riders.”⁵ It is conceded that the whole online food delivery market's regulation must be comprehensively developed, including licenses, permits, taxation, labor, consumer protection, and so on. However, because of the limited space for

discussion and intended impact as a directed policy insight, labor and employment regulation, as an aspect that directly and immediately affects the vulnerable workers in the sharing economy, is given focus. Without such regulation in a growing market now worth USD 1.2 billion domestically (Momentum Works 2021; Legaspi 2021), it is only a matter of time before delivery riders are left behind.

I. Sharing Economy and Labor

One of the most evasive and unsettled aspects of labor in the sharing economy is the nature and extent of relationship among the actors therein: the worker who performs the service (e.g., delivery rider), the intermediary who most often provides a digital platform (e.g., Grab, Foodpanda), and the end-user who seeks such a particular service to be done. Stewart and Stanford (2017) illustrate it as a *triangular relationship* (Figure 1). To note, an analysis of labor and employment issues that goes beyond a bilateral (two-party) view is not unusual, as seen through tailor-fit regulations implemented for legitimate contracting or subcontracting and migrant workers.

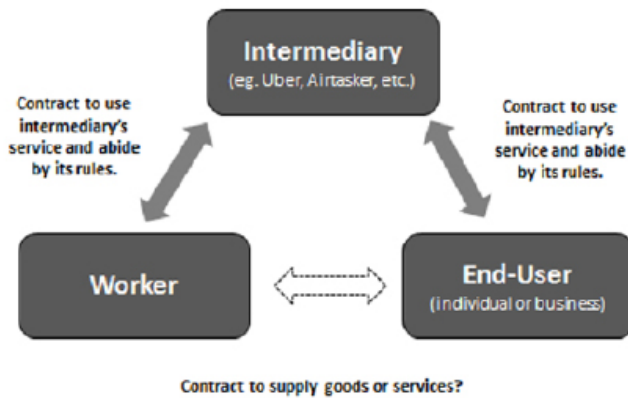


Figure 1. Triangular relationship of the sharing economy

In this characterization, the worker and the intermediary are governed by a contract setting the terms and conditions of the worker's access and continued use of the intermediary's platform. Such contract is usually drafted by the intermediary only for the worker to accept, which in legal parlance may be called as a *contract*

of adhesion.⁶ If the worker does not agree by its terms, then he has no chance of using the platform for his services.

Another contract governs the relationship between the intermediary and the end-user, which is usually agreed to by the end-user upon signing up to become a member of, or generally to have access to, the digital platform. Like the contract described above, an end-user has no choice but to accept the *pro forma* terms and conditions to be able to use the platform. According to Stewart and Stanford, such a contract contains limitations and a waiver of the intermediary's liability, for instance, when an end-user incurs injury as a result of using the platform.

The two previously mentioned contracts are not as contentious as the contract, if there is any to begin with, between the worker and the end-user. The intermediaries have often used the argument that they merely provide the platform for these two market players to meet; thus, the nomenclature of "intermediary." *Is there a service contract? Or even a contract of employment?* However, as of writing, there remains no universal consensus on this relationship. Instead, this just proves the complexity of completely grasping the triangular relationship present in the sharing economy.

To provide an example in the Philippine setting, suppose Juan wants to have food delivered for lunch from one of the many stores listed in Foodpanda, as an intermediary. Juan, as an end-user, signs up as a Foodpanda member by accepting the terms and conditions provided to him. As a member, he can now choose a store as well as his order by "adding to cart" and choosing a mode of payment, whether through credit card, GCash, or cash on delivery—all of these done through the digital platform or application of Foodpanda. This shows the relationship between the intermediary and the end-user.

On the other hand, Pedro, having discovered the income he can make from being a delivery rider for the online food delivery platform at his own chosen time of the day, applies with Foodpanda. Once he successfully submits the requirements and hurdles the screening process of Foodpanda, he is then officially a delivery rider. From thereon, he can receive orders from time to time, which he needs to pick up from the store and deliver to the designated address, as indicated by the end-user. Depending on the earlier terms and

conditions, he may receive a portion of the delivery fee and an incentive as a factor of distance travelled or number of orders completed. This shows the relationship between the worker and the intermediary.

Suppose Pedro, due to natural elements such as rain, caused Juan's order to be drenched in transit. Will Pedro be liable as the person responsible to deliver such in good condition? Will Foodpanda be liable as the platform? Will Foodpanda be vicariously liable for its rider's alleged negligence? Or will Pedro be left alone to shoulder such damages?

In another situation, suppose Pedro, in transit, found himself in a vehicular accident that results to disability. Whether partial or total, can he claim compensation as a matter of right for work-related disability? What if he is not in actual transit, but waiting for bookings when the accident occurred? Can Foodpanda be released from liability because it merely acts as a platform to let the worker and the end-user "meet?"

Moreover, in this example, there is a fourth party in the already complicated relationship: the store or vendor. Definitely, the intermediary and the store has a separate contract. However, this paper will refrain from focusing on it because of the lack of possible implication to the labor and employment regulation that is sought to be examined herein.

There are endless questions, such as those mentioned above, that are yet to be decided from either legal, policy, or regulatory perspective. Defining the relationship between the parties, especially those that concern the workers, is crucial because the corresponding rights and obligations are dictated by such relationship. Are delivery riders employees, independent contractors, or partners?

II. Gaps in Philippine Law

The real significance of pinning down the nature of relationship that governs the worker in a sharing economy, specifically the delivery riders of online food delivery platforms, can only be appreciated by examining the extent of rights a worker may be entitled to under the laws currently in place.

The 1987 Constitution declares “[t]he State shall afford full protection to labor.”⁷ The Constitution also enumerates rights guaranteed in favor of workers: right to self-organization, collective bargaining and negotiations, and peaceful concerted activities, including the right to strike in accordance with law; right to security of tenure; right to humane conditions of work; right to a living wage; and right to just share in the fruits of production.⁸ However, although these are guaranteed by the Constitution as broadly as one can imagine, the enabling laws almost unanimously qualify such rights as only arising from an employer–employee relationship.

The Philippine Supreme Court has already settled the test in determining the existence of an employer–employee relationship, or the *four-fold test*. Courts examine the following factors on a case-to-case basis: “(1) the selection and engagement of the employee; (2) the payment of wages; (3) the power of dismissal; and (4) the employer’s power to control the employee’s conduct.” It has been consistently ruled that the most important element is the employer’s control of the employee’s conduct, not only as to the result of the work to be done, but also as to the means and methods to accomplish it. Further, the power of control is met by the mere existence of power, and not its actual exercise.⁹

Except those specifically exempted by law or not qualified under the law, employees—those who satisfy the four-fold test above—are entitled to minimum regulations as to security of tenure,¹⁰ normal hours of work,¹¹ rest period,¹² meal period,¹³ rest day,¹⁴ holidays,¹⁵ leaves,¹⁶ minimum wage,¹⁷ holiday pay,¹⁸ premium pay,¹⁹ overtime pay,²⁰ night shift differential pay,²¹ service charges,²² 13th month pay,²³ separation pay,²⁴ retirement pay,²⁵ safe and healthful conditions of work,²⁶ self-organization and collective bargaining,²⁷ peaceful concerted activities,²⁸ employee’s compensation,²⁹ social security,³⁰ and health insurance,³¹ among others. In addition, the Anti-Sexual Harassment Act provides a wide and liberal protection to an employee from harassments made by an employer or superior in the workplace.³²

With employer–employee relationship as a precondition to nearly all of the protections afforded by the current laws, independent contractors, under which the delivery riders are forcibly categorized, are left without recourse, except from rights and obligations under their engagement contracts.

In addition, the government has recognized by legislation certain classes of workers that must have a specialized range of protections, such as Overseas Filipino Workers (OFWs),³³ *kasambahay* (domestic workers),³⁴ women,³⁵ children,³⁶ and solo parents,³⁷ among others. Unfortunately, no legislation of this kind has been enacted yet for delivery riders of online food delivery platforms.

It was only in the past few years, when the sharing economy proliferated at a rate beyond anyone's expectation, that the gaps in regulation, especially in terms of labor and employment, are brought to light. Like in any innovation or disruption, regulation seldom comes first. Instead, regulation is often thought of after the fact, for instance, of abuse or of working around what is legal and regulated to maximize the returns of the innovation. It is in these very gaps of the legal system where abuses lie and which regulations and government policy seek to bridge.

III. Assessing Proposed Regulations

At this point of the paper, Miller's first principles are used to examine whether the current proposed regulations on labor and employment of delivery riders in the Philippines, despite their being at the early stages of legislation, are consistent with such first principles. Considering the constraints of this paper, only proposed legislations filed in the 18th Congress (2019-2022) will be assessed. In so doing, the ten first principles are translated into question format, which can then be used as a "quasi-checklist" for this paper's purposes.

Miller's First Principles	Questions Does the regulation ...	Yes	No
Principle 1: The Sharing Economy Is Differentiated and Requires a Differentiated Regulatory Response	provide different response to each industry?		
Principle 2: The Sharing Economy Must Be Daylighted	consider the industry as legitimate?		
Principle 3: Regulating the Sharing Economy Requires (the Right Kind of) Information	provide for information or data sharing measures?		
Principle 4: The Sharing Economy Is Here to Stay (and That Is a Good Thing)	provide a long-term perspective?		
Principle 5: The Sharing Economy Disrupts and Reimagines Established Markets	consider other market players?		
Principle 6: The Sharing Economy Establishes New Markets (That Established Markets Want To Take Over)	consider undeveloped or underdeveloped future market?		
Principle 7: The Sharing Economy Disrupts and Reimagines Established Regulatory Structures	consider existing regulations?		
Principle 8: The Sharing Economy Requires a Response beyond Traditional Regulation	provide a creative and innovative solution?		
Principle 9: The Harm and the Remedy Are Uniquely Challenging To Determine in the Sharing Economy	consider current and possible future harm to be prevented?		
Principle 10: The Sharing Economy Implicates Diverse Parties, Each of Whom Should Be Considered in Establishing a Regulatory Response	consider multi-sectoral stakeholders?		

Figure 2. Miller's First Principles as Checklist

House Bill No. 9279 or Mandatory Statutory Benefits for Delivery Riders Act of 2021

The Bill filed by Quezon City 2nd District Rep. Precious Hipolito Castelo intends “to provide [delivery riders, messengers, and couriers] with tangible and direct benefits in recognition of their important role in the fight against the global pandemic.”³⁸ There are only two main provisions contained in the Bill, which pertain to the coverage and range of benefits sought to be legislated. First, the Bill covers “[i]ndependent contractors [...] who are not otherwise eligible to receive mandatory statutory benefits under the Labor Code [...] and other relevant laws[.]”³⁹ Second, the Department of Labor and Employment (DOLE) is tasked to “identify the specific benefits and the computation of said benefits” and promulgate Implementing Rules and Regulations for such.”⁴⁰

A preliminary assessment would show that, in fact, such a Bill may even regress the welfare of delivery riders because it specifically legislates and validates their legal characterization as “independent contractors,” instead of “employees” or other relevant category. The danger of legislating it in this manner would only surface when the issue is brought before the courts, and such courts would have no option but to apply the law as it is written. “[W]hen the law speaks in clear and categorical language, there is no reason for interpretation or construction, but only for application.”⁴¹ Should this Bill be enacted as it is, delivery riders cannot anymore seek or argue that they are protected by the Labor Code. Contrary to **Principles 4 and 9**, this path merely offers a band-aid solution to the lack of benefits and protections as currently experienced, but ignores the long-term effects and future unintended consequence of this provision. This move is similar with the Land Transportation Franchising and Regulatory Board’s earlier action on the case of Uber and Grab drivers, where the agency stated that drivers “are independent contractors who provide the transportation services directly to passengers,”⁴² which was later omitted by the agency in the amended version of the regulation.⁴³

Further, the blanket authority delegated to DOLE to craft the benefits to be granted exhibits a violation of **Principle 7** for failure to find how the current problems arising from online food delivery platforms can fit within the existing regulations, or within a reimagined one. It seems that the Bill assumes that there is an *absolute* void in the

current law. Moreover, it also passes the responsibility of defining the metes and bounds of the regulation to the administrative agency, which may even lead to legal issues on the permissible delegation of legislative authority to DOLE in compliance with (1) the completeness test and (2) the sufficient standards test, which have been applied by courts.⁴⁴

House Bill No. 7805 or Internet Transactions Act

Similar to R.A. No. 7394, or the Consumer Act of the Philippines, the Bill sponsored by Valenzuela 1st District Rep. Wes Gatchalian, and which was already adopted by the House, highlights consumer protection in transactions involving online platforms by enumerating rights and obligations of consumers, online merchants, and eCommerce platform operators, among others, and by creating an eCommerce Bureau under the Department of Trade and Industry (DTI). Delivery riders are covered by the law under the name “ride hailing service partner,” which refers to “third-parties who offer their services to transport or deliver food, parcels or any other item, on behalf of ride hailing service providers[.]”⁴⁵ Section 22 of the Bill protects delivery riders by punishing consumers who “[c]ancel confirmed orders [...] [that] have already been paid by or is already in the possession of the ride hailing service partner,”⁴⁶ except for some circumstances; and who “unreasonably shame, demean, embarrass, or humiliate ride hailing service partners”⁴⁷ with a maximum fine of PHP 50,000.

Although consumer protection and the specific protections afforded to delivery riders are laudable regulatory initiatives that meet most of the Principles, especially **Principle 8** for a creative and innovative solution, this paper argues that the nomenclature of delivery riders as “ride hailing service partner” is contrary to **Principles 7** and **10**. Instead of making progress on delivery riders’ labor rights, it seems to disregard the gap in labor protection and favor the status quo, where delivery riders are relegated into the status of independent contractors. In effect, the Bill legislates what delivery riders and the labor movement have been fighting against. To prevent such effect, a provision that states “Nothing in this Act shall be construed to prevent a finding of employer-employee relationship consistent with jurisprudence in favor of ride hailing service partners as herein defined” must be inserted to preclude a

premature and unintended categorization of delivery riders as mere independent contractors.

Senate Bill No. 1677 or Food and Grocery Delivery Services Protection Act

In the Upper Chamber, Senator Lito Lapid filed a Bill specifically responding to the instances of “unjustified cancellation of orders” and “no-show customers.” The Bill mandates Service Providers, or online food delivery platforms for the purposes of this paper, to “establish a reimbursement scheme in favor of delivery riders/drivers covering the entire amount of money advanced to purchase the ordered items, in case of cancellation of confirmed orders.”⁴⁸ In this system, the delivery riders’ money used to advance payment shall be immediately returned to them, which recognizes the limited capital that these riders have in reality. Further, customers who commit “unjustified cancellation of confirmed orders [...] for at least three (3) times in a period of one (1) month” shall be penalized with imprisonment and/or fined.⁴⁹

Comparing the three bills mentioned in this paper, this Bill presents the *least harmful* regulation for delivery riders and their labor rights. It does not unduly relegate delivery riders to mere independent contractors; thus, not precluding a finding of the proper judicial/quasi-judicial bodies on the employment relationship present between the parties. However, while it offers a direct and straightforward solution to the problem of unjustified cancellations to the detriment of delivery riders, the Bill misses an opportunity to craft a holistic labor regulation for delivery riders as prescribed in **Principles 4, 6, and 9**, which would go beyond the short-term intervention sought to be enacted.

The assessment made herein does not intend to emphasize the loopholes in the proposed bills. It must be noted that these bills are still in their infancy, which means that by the time they have gone through the scrutiny of both Houses and the Bicameral Conference Committee, they hopefully would be in a better shape. Instead, the essential takeaway must be the difficulty of regulating an innovation, such as online food delivery platforms, in a way that is mutually beneficial to most—if not all—stakeholders, especially the vulnerable.

IV. Observations and Space for Further Research

Preliminarily, although it is ideal for a paper, which assesses a framework's efficacy to a given state of facts, to finally use said framework and propose a more viable alternative, it is premature for this paper to attempt to propose an "ideal" regulation. If such will be forced herein, it might as well be added to the laundry list of unripe regulations that this paper sought to assess in the first place. Instead, an entry point for further research on a possible regulation is one that is mainly grounded on legal relationships between and among various parties in the online food delivery market. This would allow a regulation that considers the intricate web and blurred lines of relationships in the sharing economy.

As a model, one could refer to the relationships in overseas employment (migrant worker, recruitment/placement agency, and foreign principal/employer) and in legitimate contracting or subcontracting (worker, contractor, and principal).⁵⁰ Of course, as a contract imbued with public interest, the State is also deemed an implied party to any contract of employment. If the place of delivery riders of online food delivery platforms are successfully mapped in a similar manner, whether they are eventually considered as employees or as independent contractors, then their rights will consequently arise.

To end, this paper draws key observations on how the current proposed regulations stand against the standards established by Miller's first principles. First, there is lack of long-term perspective (*Principle 4*). Understandably, legislators would want to solve present problems as demanded by the affected sector, but a narrow approach to a systemic problem would only bear unintended consequences in the near future. This may be tied as well to the *second* observation, which is the lack of consideration for current or possible future harm to be prevented (*Principle 9*). Third, there is lack of consideration or appreciation of existing regulations (*Principle 7*). Without saying that there is no need for new regulation at all, it must be emphasized that not all innovations call for a totally new set of regulations or a new administrative body, which by the way can overburden the administrative capacity of the government. As proposed above, there may be current laws in place that could cover the case of delivery riders.

As it now stands, while the online food delivery platforms are persistent in their view that delivery riders are mere partners, Philippine law clearly states that the factual situations of the engagement prevail over contractual stipulations that prevent or waive an employer-employee relationship to the detriment, most of the time, of the worker.⁵¹ However, unless there is a government policy or regulation, whether through a law or a Supreme Court decision, that expressly provides for an employment relationship, then the status quo of an unprotected and unregulated sector of the market prevails.

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Notes

1. *Baron v. EPE Transport, Inc.*, G.R. No. 202645, Aug. 5, 2015, *citing* *Eastern Shipping Lines, Inc. v. POEA*, G.R. No. 76633, Oct. 18, 1988.

2. See Roy Stephen C. Canivel, "Delivery Riders are Employees, Too," *Philippine Daily Inquirer*, May 11, 2021, last visited June 11, 2021, <https://newsinfo.inquirer.net/1430072/delivery-riders-are-employees-too>. See also Roy Stephen C. Canivel, "Lockdown 'Heroes' Face Long Ride to Basic Pay, Safety Nets," *Philippine Daily Inquirer*, May 12, 2021, last visited June 11, 2021, <https://newsinfo.inquirer.net/1430610/lockdown-heroes-face-long-ride-to-basic-pay-safety-nets>; Roy Stephen C. Canivel, "Riders and Rights: What a Scattered Workforce Can Do," *Philippine Daily Inquirer*, May 13, 2021, last visited June 11, 2021, <https://newsinfo.inquirer.net/1431113/riders-and-rights-what-a-scattered-workforce-can-do>.

3. See, e.g., "Ride," Grab Philippines, last visited June 11, 2021, <https://www.grab.com/ph/driver/ride/>, for use of *partner* when referring to delivery riders.

4. Stephen R. Miller, "First Principles for Regulating the Sharing Economy," *Harvard Journal on Legislation* 53: 147–202, 150. Miller defines sharing economy as an "economic model where people are creating and sharing goods, services, space and money with each other."

5. See Charlene Li, Miranda Miroso, and Phil Bremer, "Review of Online Food Delivery Platforms and their Impacts on Sustainability," *Sustainability* 2020 12 (14): 5528, 1–17. The article discusses a further distinction between two types of food delivery providers as Restaurant-to-Consumer Delivery and Platform-to-Consumer Delivery, each having their own professional delivery riders and independent delivery riders.

6. See *Sweet Line, Inc. v. Teves*, G.R. No. L-37750, May 19, 1978. "[I]n a contract of adhesion [...], all its provisions have been drafted only by one party, usually a corporation, and the only participation of the other party is the signing of his signature or his adhesion thereto."

7. CONST. art. XIII, § 3.

8. CONST. art. XIII, § 3.

9. *Dusol v. Lazo*, G.R. No. 200555, Jan. 20, 2021, *citing* *Mendiola v. CA*, G.R. No. 159333, July 31, 2006.

10. LAB. CODE, art. 294. Labor Code of the Philippines or Pres. Dec. No. 442 (1974), as amended.

11. Art. 83.

12. Art. 84.

13. Art. 85.

14. Art. 91.
15. Rep. Act No. 9492 (2007); Rep. Act No. 9849 (2009); Rep. Act No. 10966 (2017).
16. LAB. CODE, art. 95.
17. Art. 99.
18. Art. 94.
19. Art. 93.
20. Art. 87.
21. Art. 86.
22. Art. 96.
23. Pres. Dec. No. 851 (1975).
24. LAB. CODE, art. 298-299.
25. Art. 302.
26. Art. 168.
27. Art. 253.
28. Art. 278.
29. Art. 174.
30. Rep. Act No. 11199 (2018). Social Security Act of 2018.
31. Rep. Act No. 7875 (1995), as amended. National Health Insurance Act of 1995. Rep. Act No. 11223 (2019). Universal Healthcare Act.
32. Rep. Act No. 7877 (1995), § 3. Anti-Sexual Harassment Act of 1995.
33. Rep. Act No. 8042 (1995), as amended by Rep. Act No. 10022 (2010). Migrant Workers and Overseas Filipinos Act of 1995.
34. Rep. Act No. 10361 (2013). Batas Kasambahay.
35. Rep. Act No. 9710 (2009). The Magna Carta of Women. Rep. Act No. 11210 (2019). 105-Day Expanded Maternity Law.
36. Rep. Act No. 7610 (1992), as amended by Rep. Act No. 7658 (1993). Special Protection of Children Against Abuse, Exploitation and Discrimination Act.
37. Rep. Act No. 8972 (2000). Solo Parents' Welfare Act of 2000.
38. H. No. 9279, 18th Cong., 2nd Sess., Explanatory Note (2021). Mandatory Statutory Benefits for Delivery Riders Act of 2021.
39. § 4.
40. § 6.
41. Republic v. Court of Appeals, G.R. No. 103882, Nov. 25, 1998.

42. Land Transportation Franchising and Regulatory Board (LTFRB) Mem. Circ. No. 2015-015 (2015), VI. Liability. Rules and Regulations to Govern the Accreditation of Transportation Network Companies.

43. See LTFRB Mem. Circ. No. 2015-015-A (2017). Rules and Regulations to Govern the Accreditation of Transportation Network Companies. See also LTFRB Mem. Circ. 2015-016-A (2017). Terms and Conditions of a Certificate of Transportation Network Company Accreditation. See further LTFRB Mem. Circ. 2015-018 (2015). Terms and Conditions of a Certificate of Public Convenience to Operate a Transportation Network Vehicle Service. These Memorandum Circulars provide for terms and conditions imposed on Transportation Network Companies (TNCs) as to the training, screening, behavior, and conduct of their drivers. See further Jennidy S. Tambor, "Uber/GrabCar Drivers: Independent Contractors or Employees?," *Business World Online*, September 7, 2016, last visited June 11, 2021, <https://www.bworldonline.com/content.php?section=Opinion&title=ubergGrabcar-drivers-independent-contractors-or-employees&id=133085>.

44. *Abakada v. Ermita*, G.R. No. 168056, Sept. 1, 2005. "In every case of permissible delegation, there must be a showing that the delegation itself is valid. It is valid only if the law (a) is complete in itself, setting forth therein the policy to be executed, carried out, or implemented by the delegate; and (b) fixes a standard—the limits of which are sufficiently determinate and determinable—to which the delegate must conform in the performance of his functions."

45. H. No. 7805, 18th Cong., 2nd Sess. § 3 (x) (2020). Internet Transactions Act.

46. § 22 (a).

47. § 22 (b).

48. S. No. 1677, 18th Cong., 2nd Sess. § 3 (2020). Food and Grocery Delivery Services Protection Act.

49. § 5.

50. See Rep. Act No. 8042 (1995), as amended by Rep. Act No. 10022 (2010); Department of Labor and Employment (DOLE) Dep't Order No. 18-A (2011). Rules Implementing Articles 106 to 109 of the Labor Code, as amended.

51. *Paguio v. NLRC*, G.R. No. 147816, May 9, 2003, "The law, in defining their contractual relationship, does so, not necessarily or exclusively upon the terms of their written or oral contract, but also on the basis of the nature of the work petitioner has been called upon to perform. The law affords protection to an employee, and it will not countenance any attempt to subvert its spirit and intent. [...] The sheer inequality that characterizes employer–employee relations, where the scales generally tip against the employee, often scarcely provides him real and better options."

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