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Ready, Fire, Aim

How State Regulators Are Threatening the Gig Economy and Millions of Workers and Consumers



Contents

- 06** The Historical Roots of the Gig Economy
- 10** Defining the Gig Economy
- 18** Criticisms of the Gig Economy
- 22** State Efforts to Regulate the Gig Economy
- 30** Effects of State Regulation on the Gig Economy
- 38** Options for the Gig Economy

Ready, Fire, Aim

How State Regulators Are Threatening the Gig Economy and Millions of Workers and Consumers

A White Paper Prepared for the U.S. Chamber of Commerce¹

Few workplace phenomena have captured the public's imagination like the "gig economy." In only a few short years, companies like Uber, Lyft, TaskRabbit, Postmates, Instacart, and others have remade whole industries. They have offered unprecedented flexibility to workers and unprecedented convenience to consumers. Better still, they have provided an avenue back into the workforce for millions of Americans, such as military spouses, transitioning service members, and ex-offenders who can sometimes have difficulty connecting with the traditional labor market and nine-to-five jobs. They have provided extra income for workers in traditional jobs, served in some ways as an informal safety net, provided mobility to seniors and those with disabilities, and even saved lives by reducing drunk driving.

But not everyone has welcomed the gig economy's rise. Labor advocates have criticized it for leaving workers without the job protections or benefits often associated with full-time employment. Academics have attacked it for undermining the formal social safety net and disadvantaging businesses that hire traditional employees. And legislators have accused it of misclassifying workers and starving state treasuries of much-needed funds.

What these critics miss, however, is that gig work is not a new phenomenon. People have been working independently of an "employer" and providing each other goods and services directly for centuries. Conceptually, these platforms are not so different from the historical marketplace, or even newer innovations like newspaper want-ads. They differ only in their unprecedented efficiency and scale, mediated through modern technology.

Nevertheless, lawmakers have pursued policies, such as AB 5 in California, that threaten this emerging and innovative industry along with the benefits the gig economy has brought to workers and consumers. Their efforts range from modest reforms, like putting limits on gig workers' contracts, to grand social experiments, like reclassifying all gig workers as employees.

These more radical efforts fail on their own terms. Once their rhetoric is boiled away, it becomes clear that they do not even begin to solve the problems they set out to address. They cannot, for example, guarantee that gig workers will share the same protections as full-time employees. Many of those protections kick in only once a person works for a certain period, and since many, if not most, gig workers use platforms on a part-time basis, they often work too infrequently to qualify. Other protections depend on federal law; and for federal-law purposes, gig workers will remain independent contractors for the foreseeable future.²

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² Some lawmakers, of course, have proposed changes at the federal level as well. For example, the Protecting the Right to Organize (PRO) Act, H.R. 2474, 116th Cong. (2019) would adopt an ABC-style test to determine who qualifies as an employee under the National Labor Relations Act. See *id.* § 4(a)(2) (proposing to amend 29 U.S.C. § 152(3)).

“Lawmakers can address concerns around gig workers while preserving the gig model itself. They can expand access to benefit systems like association health and retirement plans.”

Worse, even if these efforts succeed in extending employment protections to gig workers, they will do more harm than good. Today, workers value gig work most for its flexibility. They like working when they want, where they want, and as much as they want. They like being their own boss. But that flexibility evaporates when states apply their wage-and-hour laws. Those laws require companies to pay workers a minimum hourly wage, as well as overtime compensation. Once companies face these regulations and costs, they will no longer be able to let workers choose when and where to work. They will have to schedule workers at the places and times when the opportunity for revenue is greatest. They will also become more selective in whom they let onto their platforms. The flexibility and low barriers of entry that once marked the gig economy will become a thing of the past.

It doesn't have to be this way. Lawmakers can address concerns around gig workers while preserving the gig model itself. However, before doing so, especially with respect to traditional employee benefits, they must obtain data to ensure that any proposals are what gig workers

want and need and do not do more harm than good. They can expand access to benefit systems like association health and retirement plans. They can extend civil-rights protections to independent contractors. They can create workers'-compensation funds for gig workers, and all of this can be done without creating full-blown employment relationships. Any of these measures would address concerns about the gig economy while avoiding any lasting damage to this nascent industry.

Some states are moving in the right direction. More should. If we want to preserve what is good about the gig economy, we have to fashion regulatory solutions for the twenty-first century. We simply cannot continue to rely on existing employment models alone.





The Historical Roots of the Gig Economy

When we discuss the gig economy, we often treat it as a new phenomenon. But in fact, it has deep historical parallels. People have been working independently and providing goods and services to one another for centuries. Understanding this history can help us understand how the gig economy fits into the modern workplace.

The Tradition of Independent Work

The classic independent worker was the small farmer. Roman society, for one, lionized the independent farmer as the ideal citizen.³ These farmers owned the land they worked and supported themselves—and the state—through their production. They persisted into medieval Europe, where farms often operated as independent enterprises.⁴

This dynamic survived into fifteenth century England, where what we know today as master–servant law began to emerge. Contemporaries used the word *servant* in at least two senses: one broad, one narrow.⁵ Used broadly, the term denoted anyone providing services to another person.⁶ Used narrowly, it distinguished dependent workers from independent ones.⁷

In contrast to servants were laborers and artificers—the precursors of modern independent workers. They worked for multiple masters, sometimes several at a time.⁸ They supplemented their income through other activities, such as farming their own land and performing craft work.⁹ Because of this independence, they were not considered “in the service” of another person, and were thus not “servants” in the narrow sense.¹⁰

3 See Stephanie A. Nelson, *God and the Land: The Metaphysics of Farming in Hesiod and Vergil* 89 (1998) (quoting Cato the Elder, *De Agricultura* 1.1); Praecipitia in Ruinam: The Decline of the Small Roman Farmer and the Fall of the Roman Republic, 92 *Int'l Soc. Sci. Rev.* 1, 7 (2016) (noting that Roman contemporaries called farming the “most highly respected” occupation).

4 See Andrea Komlosy, *Work: The Last 1,000 Years* 57 (Jacob K. Watson & Loren Balhorn trans., Verso 2018) (describing late medieval farms as small enterprises).

5 Robert J. Steinfeld, *The Invention of Free Labor: The Employment Relation in English and American Law and Culture, 1350–1870*, at 18–19 (1991).

6 *Id.* at 20.

7 *Id.* at 19 (explaining that narrow usage applied only to dependent, live-in servants).

8 *Id.* at 35–36.

9 *Id.* at 35.

10 *Id.* at 40.

The Industrial Revolution and the Centralization of Work

In the mid-nineteenth century, the Industrial Revolution transformed the English and American economies. Increasingly, businesses produced goods in centralized and mechanized workshops—i.e., factories.¹¹ These factories changed the nature of work itself. No longer did a single worker build a product from start to finish.¹² Instead, the production process was broken down into its constituent parts, of which a given worker learned only one.¹³ Workers increasingly specialized and, in the estimation of some, degraded their skills.¹⁴

Workers also lost much of their autonomy. Industrial businesses controlled not only workers' activities, but also their time.¹⁵ Time became the new measure of labor.¹⁶ Businesses also increasingly found the local labor supply too thin and imported workers from afar.¹⁷ Unlike pre-industrial craftsmen, these imported workers owned neither the premises where they worked nor the tools they used.¹⁸ As a result, they depended more and more on a single enterprise for their livelihood.¹⁹

It is here that the modern concept of the “job” took form.²⁰ Before industrialization, people thought of work as an assignment that needed to be done.²¹ But afterward, they began to think of it as a steady supply of income generated by repeatedly performing the same or similar tasks.²² People began to see themselves not as masters, servants, or laborers, but as “employers” and “employees.”²³ Indeed, it is in this period that the word “employee” was first used in printed sources.²⁴

The trend toward centralization continued throughout the nineteenth century. The size of the average workshop exploded, and the cottage industry began to disappear.²⁵ To take one example, shoes were once made in small workshops where workers assembled the entire product.²⁶ But by the 1870s, the industry was dominated by large plants, which divided production into thirty or forty subdivisions.²⁷ These plants could employ hundreds of workers, none of whom knew how to make an entire shoe.²⁸ In this way, industrialization separated workers even further from their independent forebears.

¹¹ *Id.* at 2, 158.

¹² See Herbert Applebaum, *The Concept of Work: Ancient, Medieval, and Modern* 419 (1992).

¹³ *Id.*

¹⁴ *Id.* at 410.

¹⁵ *Id.* at 339, 419 (“[T]he informality of the small workshop was given up in favor of a time-oriented discipline, involving tighter, more systematic, and more centralized methods of management. Individual skill disappeared in the face of complex, automatic tools and machinery.”).

¹⁶ *Id.*

¹⁷ Komlosy, *supra* note 4, at 158.

¹⁸ Applebaum, *supra* note 12, at 414.

¹⁹ *Id.*

²⁰ Richard Donkin, *The History of Work* at 66–67 (Palgrave 2010).

²¹ *Id.*

²² *Id.* at 66 (“The job was changing, almost imperceptibly, from a piece of work that needed doing, to something that began to be perceived as a constant source of employment and income packaged by the parameters of time.”).

²³ *Id.*

²⁴ Employee, *Oxford English Dictionary* (marking the earliest use of the word employee in 1814) (“Baron De Reck . . . has not permitted the slightest change of persons under him, and all the Saxon employees remain in office.”).

²⁵ Applebaum, *supra* note 12, at 419.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

The Modern Workforce and the Triumph of the “Job”

In the twentieth century, paid employment outside the home—typically for a single employer—predominated over other forms of work.²⁹ Independent craft work all but disappeared.³⁰ People flooded into cities, severing family and social ties as they went.³¹ They worked in ever larger shops and offices in increasingly regimented roles.³² Employers studied their workers and applied scientific management principles, causing even office work to take on characteristics of the factory.³³ Workers everywhere began to specialize, work in shifts, and sell their labor in units of time.³⁴

Government regulation reinforced this trend.³⁵ In the United States, Congress passed three landmark laws that still shape how Americans think about work: the Social Security Act,³⁶ the National Labor Relations Act (NLRA),³⁷ and the Fair Labor Standards Act (FLSA).³⁸ Each of these laws extended new benefits to workers, but only those who qualified as “employees.”³⁹ That move reinforced the idea of work as paid employment. The FLSA in particular regimented the way employees sold their labor to employers, dictating the minimum price for labor and setting the standard units of measurement.⁴⁰ Employment became as much a matter of law as of social norms.⁴¹

As regulation increased, worker autonomy fell. As the historian Ronald Donkin wrote in his *History of Work*, the modern worker became “rooted to the spot.”⁴² He “came to work at a set time, he worked to a set pace that could be increased at the employer’s will, and if he thought at all while working, it was of other things, far beyond the workplace.”⁴³ The American worker had become, in other words, less akin to Jefferson’s yeoman farmer than to the traditional English servant.

Yet not all workers fell within these confines. Even as the modern idea of a “job” entrenched itself, much of the workforce continued to work independently. There were, of course, independent contractors. Whole industries, such as the taxi industry, remained dominated by such workers. And other workers continued to run autonomous or semi-autonomous enterprises. Indeed, many of these small-business owners were independent farmers—carrying on a tradition as old as work itself.

It is into this world that the gig economy emerged. To understand how the gig economy relates to what came before, and what may come next, we must begin by defining it.

29 Komlosy, *supra* note 4, at 176.

30 Applebaum, *supra* note 12, at 517.

31 Komlosy, *supra* note 4, at 176.

32 Applebaum, *supra* note 12, at 419.

33 *Id.* at 420; Komlosy, *supra* note 4, at 176.

34 Donkin, *supra* note 20, at 66–67.

35 See Komlosy, *supra* note 4, at 177 (discussing the role of state regulation in shaping twentieth-century conceptions of the workplace).

36 Pub. L. 74-271, 49 Stat. 620 (1935) (codified at 42 U.S.C. ch. 7),

37 49 Stat. 449 (1935) (codified at 29 U.S.C. §§ 151–69).

38 52 Stat. 1060 (1938) (codified at 29 U.S.C. § 201–19).

39 See, e.g., 29 U.S.C. § 152(3) (defining “employee”); 29 U.S.C. § 203(e)(1) (same); 42 U.S.C. § 410 (defining “employment”).

40 See, e.g., 29 U.S.C. §§ 206 (establishing a minimum hourly wage), 207 (establishing maximum hours beyond which overtime compensation must be paid).

41 See Komlosy, *supra* note 4, at 177 (explaining that the new understanding of employment was “anchored through legal definitions”);

42 Donkin, *supra* note 20, at 148.

43 *Id.*





Defining the Gig Economy

“If we want to preserve what is good about the gig economy, we have to fashion regulatory solutions for the twenty-first century. We simply cannot continue to rely on existing employment models alone.”

What do we mean by the “gig economy”?

Though much ink has been spilled over the gig economy, there is still no accepted definition. Some definitions include all person-to-person commerce: everything from Uber rides to yard sales.⁴⁴ Others focus only on digital platforms, confining their scope to transactions mediated through an app- or web-based marketplaces.⁴⁵ Yet for the purposes of studying gig workers, even this definition is too broad. It includes not only workers providing services, but also people who sell goods on eBay or rent out rooms through Airbnb.⁴⁶

While these people and marketplaces raise their share of policy questions, those questions are not the focus of this paper. This paper focuses on workers providing services through gig platforms and their relationship with the platform holders. To that end, when we use the term “gig economy,”

we mean the one-to-one exchange of goods and services between service providers and end-market customers facilitated by virtual-marketplace companies (or “platform holders”).

Of course, even within this definition, conditions may vary from virtual marketplace to virtual marketplace. The experience of a driver using Uber’s platform differs in some ways from the experience of someone using Lyft’s, just as the experience of someone using Postmates’ platform may not perfectly match that of someone using Instacart.

Even so, it is possible to describe some general features common to this type of gig work. For example, the work almost always involves a triangular relationship between the service provider, the platform holder, and the customer.⁴⁷

44 See Report on the Economic Well-Being of U.S. Households in 2018, Bd. of Governors of the Fed. Reserve Sys. (May 2019), <https://www.federalreserve.gov/publications/2019-economic-well-being-of-us-households-in-2018-employment.htm> [hereinafter “Federal Reserve Report”] (defining gig work as informal, infrequent paid activities that are personal service activities, such as child care, house cleaning, or ride sharing, as well as goods-related activities, such as selling goods online or renting out property, and including both online and offline activities).

45 See JPMorgan Chase & Co. Inst., Paychecks, Paydays, and the Online Platform Economy: Big Data on Income Volatility (2016) [hereinafter “JPMorgan Report”] (studying both digital labor platforms, like Uber, and digital capital platforms, like Airbnb and eBay).

46 Id.

47 See Deepa Das Acevedo, Who Are the Gig Economy Workers?, Regulatory Review (April 9, 2019), <https://www.theregreview.org/2019/04/09/das-acevedo-who-are-gig-economy-workers/> (describing common gig arrangements).

“The worker, on the other hand, enjoys the ability to work when and where she wants. She can choose which jobs to take and can work on her own schedule. She can even use multiple platforms simultaneously.”

The service provider starts by signing up through the platform holder’s system and conveying a willingness to provide a type of service.⁴⁸ The customer also signs up and indicates a desire to receive the service.⁴⁹ The platform holder then matches the worker to the customer, and in exchange, keeps a share of the customer’s payment.⁵⁰

This relationship benefits its participants through convenience and flexibility. The customer can quickly and easily find someone willing to perform the service she needs. The worker, on the other hand, enjoys the ability to work when and where she wants. She can choose which jobs to take and can work on her own schedule.⁵¹ She can even use multiple platforms simultaneously.⁵² She might, for example, monitor both Lyft and Uber to find the most desirable ride requests.⁵³

She might even monitor multiple platforms for different types of services: a food-delivery platform to pick up an initial gig and a ride-hailing platform to make some extra money on the way back.⁵⁴

Gig work also attracts workers through its low barriers to entry. While many platforms require workers to complete background checks, they do not strictly limit the number of workers providing services through their systems. Nor do they evaluate workers once the workers start providing services. They leave evaluations to the customers, who can rate their experiences with the workers.⁵⁵ In the aggregate, these ratings signal to other customers how good a worker’s service is.⁵⁶ The ratings therefore help good workers attract new customers. And in some cases, they help the platform holder maintain a minimum level of quality on the platform: workers with low ratings or multiple complaints may be denied access.⁵⁷

48 Id.

49 Id.

50 Id.; see also Terms of Service, Uber.com, <https://www.uber.com/legal/terms/us/> (last visited Oct. 20, 2019) (setting out terms of service for driver-partners).

51 See NLRB Office of the Gen. Counsel, Advice Memorandum, Case Nos. 13-CA-163062, 14 CA-158833, 29-CA-177483, at 7 (April 16, 2019) [hereinafter “NLRB Gen. Counsel Memo”] (describing work arrangements of Uber partner-drivers).

52 See U.S. Dep’t. of Labor, Wage & Hour Div., Op. Letter FLSA2019-6, at 2 (April 29, 2019) [hereinafter “Wage & Hour Div. Op. Letter”] (describing work arrangements at one particular gig platform).

53 Id. (explaining that workers may operate through multiple platforms at once).

54 Id.

55 NLRB Gen. Counsel Memo, supra note 51, at 11 (describing customer-rating system).

56 Id.

57 See Acevedo, supra note 47 (describing how some platforms use low ratings to remove service providers).

“Courts and agencies have generally found gig workers to be properly classified as independent contractors.”

Because the platform holders exercise little control over the work performed, most gig workers are classified as independent contractors.⁵⁸ In other words, they operate as independent contracting parties, not as employees of the platform holder.⁵⁹

As we will see, that classification has sparked much debate. But as a legal matter, it is sound. The legal test for determining who is an employee varies from statute to statute and state to state; and even within a single state, small changes in the facts can change the result. But in general, the tests have historically focused on control: if the hiring party controls not only the result of the work, but also the manner of its performance, the worker is an employee.⁶⁰ Other common considerations are whether the worker owns her tools, whether the worker has special skills, how the worker is paid, and how long the worker and business maintain their relationship.⁶¹

Because these tests are multifaceted and flexible, results can be inconsistent. But with a few exceptions, courts and agencies have generally found gig workers to be properly classified as independent contractors.

The gig economy, then, consists of independent workers providing services directly to consumers through digital marketplaces. Gig platform holders mediate that exchange, but do not provide the services themselves. We know more and more workers are providing services this way. But that raises the question: exactly how many?

How big is the gig economy?

Estimates on the gig economy’s size vary wildly—in part because of disagreements over the definition. For example, in 2018, the U.S. Department of Labor’s Bureau of Labor Statistics published its first study in thirteen years tracking “contingent and alternative employment arrangements.”⁶² The study defined “contingent workers” as “those who do not have an explicit or implicit contract for continuing employment.”⁶³ Overall, the Bureau found that these workers represented 1.3% to 3.8% of the U.S. workforce—down from 1.8% to 4.1% in February 2005.⁶⁴

58 See, e.g., NLRB Gen. Counsel Memo, supra note 51, at 13 (finding that Uber driver-partners were independent contractors); Wage & Hour Div. Op. Letter, supra note 52, at 9 (finding gig workers at unnamed gig platform were independent contractors); Razak v. Uber Techs., Inc., No. CV 16-573, 2018 WL 1744467, at *1 (E.D. Pa. Apr. 11, 2018) (finding that Uber drivers were independent contractors under federal and Pennsylvania law); McGillis v. Fla Dep’t of Econ. Opportunity, 210 So. 3d 220, 226 (Fla. Dist. Ct. App. 2017) (finding that Uber drivers were independent contractors because, among other things, the drivers “work[ed] at their own direction” and the company provided “no direct supervision”); Varsity Tutors LLC v. Indus. Claim Appeals Office, 2017 COA 104, ¶¶ 50, 62, 2017 WL 3184555, at *7–8 (Colo. Ct. App. July 27, 2017) (holding that tutors who connected to potential students through online platform were independent contractors—not employees of the company operating the platform—because the company exercised “minimal supervision over the tutors’ work”).

59 See Razak, 2018 WL 1744467, at *5 (observing that drivers effectively operated “independent transportation companies”).

60 Wage & Hour Div. Op. Letter, supra note 52, at 7–8 (examining indicia of control to determine whether the worker was an independent contractor or employee).

61 See id. at 6–8 (examining control factors); Razak, 2018 WL 1744467, at *8 (setting out eight factors); IRS Pub. 15-A, at 7–8 (2019), <https://www.irs.gov/pub/irs-pdf/p15a.pdf> (setting out factors under common-law test).

62 U.S. Dep’t of Labor, Bureau of Labor Statistics, Contingent and Alternative Employment Relationships (June 2018) [hereinafter “BLS Survey”].

63 Id. at 9.

64 Id. at 1.

The study also looked at other “alternative work arrangements,” including independent contractors.⁶⁵ This figure dropped from 2005, falling from 10.7 million to 10.1 million workers (about 6.9% of the workforce).⁶⁶

These results, however, almost surely understate the gig economy’s size. The survey asked workers only about their “primary” jobs—i.e., their primary source of income.⁶⁷ By doing so, it excluded “moonlighters”; i.e., people who use gig work as a secondary source of income.⁶⁸ And other data suggest that moonlighters may comprise most the gig workforce—perhaps the vast majority.⁶⁹ So the Bureau’s survey may have missed more gig workers than it recorded.

Still, the Bureau is not alone in estimating that only a sliver of the American workforce participates in gig work. In 2015, the economists Lawrence Katz and Alan Krueger studied survey data from multiple sources and concluded only half a percent of all workers participated in gig work.⁷⁰ Similarly, the investment bank JPMorgan estimated in 2016 that only 4% of working adults participated in gig work over a three-year period.⁷¹

But other surveys suggest that gig work is more widespread. In May 2019, the Board of Governors of the Federal Reserve System published its annual Report on the Economic Well-Being of U.S. Households.⁷² The Board found that one in three U.S. adults had engaged in at least one gig activity in the prior year.⁷³ In other words, the Board found nearly ten times the number of gig workers than the Bureau of Labor Statistics found, and sixty times the number Katz and Krueger found.

Yet for our purposes, the Board’s number likely overstates the gig economy at least as much as the Bureau understates it. Of the workers who told the Board they had done some gig work, about a third said they sold items on eBay.⁷⁴ These were not workers providing services through a digital platform; they were people disposing of surplus goods. And when the Board asked workers whether they had used a website or mobile app to connect with a customer, only 3% said yes.⁷⁵

⁶⁵ Id. at 1–2.

⁶⁶ Id.

⁶⁷ Id. at 9; but see Stephane Kasriel, The Government’s Brand-New Gig Economy Data is Already Outdated, Fast Company (June 7, 2018), <https://www.fastcompany.com/40582118/the-governments-brand-new-gig-economy-data-is-already-outdated> (criticizing the Bureau’s methodology).

⁶⁸ See Kasriel, *supra* note 67 (arguing that the Bureau’s “methodology probably undercounts the size of the freelance economy”).

⁶⁹ See, e.g., JPMorgan Report, *supra* note 45, at 24 (reporting that most workers use income from gig work to supplement their primary sources of income).

⁷⁰ Lawrence F. Katz & Alan B. Krueger, The Rise and Nature of Alternative Work Arrangements in the United States, 1995–2015 (RAND & Princeton Univ., March 29, 2016).

⁷¹ See JPMorgan Report, *supra* note 45, at 5.

⁷² Federal Reserve Report, *supra* note 44.

⁷³ Id.

⁷⁴ Id.

⁷⁵ Id.

Even more bullish than the Board, the firm UpWork has estimated that 36% of the U.S. workforce has engaged in some type of freelancing—and that more than half of working millennials have done so.⁷⁶ UpWork also expects freelancing to make up more than half of the total workforce by 2027.⁷⁷ The survey defines freelancers as any individual who has engaged in supplemental, temporary, project or contract-based work within the past 12 months. For our purposes, however, it is impossible to say how many of these freelancers will be gig workers because UpWork's report does not segregate gig workers into a separate category.⁷⁸

Other researchers have approached the issue by tracking IRS form 1099s.⁷⁹ Individuals use Form 1099-MISC to report income outside traditional employment.⁸⁰ Gig workers often use it to report their earnings from gig work.⁸¹ Perhaps unsurprisingly, then, the number of 1099s filed since 2000 has risen by more than 22%.⁸² And over the same period, taxpayers filed about 3.5% fewer Form W-2s—the form used to report income from traditional employment.⁸³ From this data, researchers at the George Mason University Mercatus Center concluded that freelancing and other forms of independent contracting have accounted for nearly a third of all jobs added in the new century.⁸⁴

The researchers also found, however, that this trend began before the gig economy truly took off. The companies commonly thought to embody the gig economy—Uber Lyft, DoorDash, and the like—launched between 2009 and 2013.⁸⁵ But 1099 filings began to rise as early as 2000.⁸⁶ So it's impossible to attribute the entire increase in 1099s to gig companies alone.⁸⁷ Indeed, the researchers speculate that these companies may be less a cause of the increase in 1099s than a symptom.⁸⁸ That is, the companies grew so quickly because there was already a large independent labor force ready to provide services through their platforms.⁸⁹ They did not create this workforce; they merely absorbed it.⁹⁰

Ultimately, although the data offer no clear answer on the gig economy's size, they offer a few modest conclusions. First, they suggest that the gig economy likely falls somewhere between the 1.8% suggested by the Bureau of Labor Statistics and the 36% suggested by UpWork.

76 Freelancers Predicted to Become the U.S. Workforce Majority within a Decade, with Nearly 50% of Millennial Workers Already Freelancing, Annual "Freelancing in America" Study Finds, UpWork.com (Oct. 17, 2017), <https://www.upwork.com/press/2017/10/17/freelancing-in-america-2017/> [hereinafter "UpWork Survey"].

77 *Id.*

78 *Id.*

79 See Eli Dourado & Christopher Koopman, Evaluating the Growth of the 1099 Workforce, Mercatus Ctr., George Mason Univ. (Dec. 10, 2015), <https://www.mercatus.org/publication/evaluating-growth-1099-workforce>.

80 *Id.*

81 *Id.*; see also Katz & Krueger, *supra* note 70, at 10.

82 Dourado & Koopman, *supra* note 79.

83 *Id.*

84 *Id.*

85 *Id.* (reporting that Uber launched in 2009); Katie Warren, How Lyft's Cofounders, Logan Green and John Zimmer, Went from Organizing Carpools on College Campuses to Running a Ride-Hailing Company Worth \$29 Billion, Business Insider (March 29, 2019), <https://www.businessinsider.com/lyft-cofounders-logan-green-john-zimmer-career-path-success-2019-3> (reporting that Lyft launched in 2012); The DoorDash Story, Medium.com (Oct. 4, 2013), <https://medium.com/@DoorDash/the-doordash-story-b370c2bb1e5f> (reporting that DoorDash was founded in 2013).

86 Dourado & Koopman, *supra* note 79.

87 *Id.*

88 *Id.*

89 *Id.*

90 *Id.* ("Insofar as sharing-economy firms provide innovative and efficient ways to implement and manage those nontraditional arrangements, they are promoting economic inclusion for workers who now find fewer opportunities in the traditional labor market.")

“Gig workers are also more likely to work part time. According to the Board of Governors survey, the most common reason people do gig work is to supplement an existing income source.”

The Bureau’s survey excluded all moonlighters and therefore missed a large part of the gig workforce;⁹¹ but if more than a third of working adults were doing gig work, we would see a more significant rise in 1099 filings.⁹² Second, whatever its size, we know the gig economy is growing.⁹³

The JPMorgan survey showed a near fifty-fold increase in gig work over three years;⁹⁴ and anecdotally, we have learned that companies like Uber and Lyft continue to grow exponentially.⁹⁵ Every month, they add thousands of service providers as more and more people use their platforms.⁹⁶ Yet the question remains: Who are these individuals?

Who are the gig workers?

To date, no comprehensive survey has captured all gig workers. As a result, no consensus exists on their economic, demographic, or social profiles. The data do, however, show certain trends.

First, gig workers tend to be younger than the average worker. The Bureau of Labor Statistics found that workers in contingent and alternative working relationships were twice as likely to be under age 25 as other workers.⁹⁷ Similarly, the Board of Governors of the Federal Reserve found that workers in younger age cohorts were much more likely to have done some gig work.⁹⁸ While 37% of workers ages 18 to 29 reported some gig work in the prior year, only 27% of workers 45 to 59 did so.⁹⁹ Workers over 60 were even less likely to report doing gig work, with only 21% saying they had.¹⁰⁰

Gig workers are also more likely to work part time. According to the Board of Governors survey, the most common reason people do gig work is to supplement an existing income source.¹⁰¹ About 37% of respondents gave supplemental income as their top reason for using gig platforms.¹⁰² By comparison, only 18% said they used gig work as their primary source of income.¹⁰³ And nearly two-thirds of gig workers under age 30 said they were in school, suggesting that they gravitated toward gig work to accommodate their class schedules.¹⁰⁴

91 See Kasriel, *supra* note 67.

92 See Dourado & Koopman, *supra* note 79 (reporting a 22% rise in 1099 filings, some of which predated major gig companies).

93 See Charles Colby & Kelly Bell, *The On-Demand Economy Continues to Grow*, Rockbridge (April 5, 2018), <https://rockresearch.com/on-demand-economy-continues-to-grow> (reporting that gig economy attracted 41.5 million customers who spent \$75.7 billion for on-demand products and services in 2017, a 66% increase in consumers and 55% increase in spending over the prior year); Charles Colby & Kelly Bell, *The On-Demand Economy Is Growing, and Not Just for the Young and Wealthy*, *Harvard Business Rev.* (April 14, 2016), <https://hbr.org/2016/04/the-on-demand-economy-is-growing-and-not-just-for-the-young-and-wealthy> (citing the 2016 National Technology Readiness Survey finding more than 22.4 million consumers spent about \$57.6 billion for on-demand products and services).

94 JPMorgan Report, *supra* note 45, at 21.

95 See Keith Cunningham-Parmeter, *From Amazon to Uber: Defining Employment in the Modern Economy*, 96 *Boston Univ. L. Rev.* 1673, 1686 (2016) (citing Ellen Huet, *Uber Is Adding “Hundreds of Thousands” of New Drivers Every Month*, *Forbes* (June 3, 2015), <http://www.forbes.com/sites/ellen3huet/2015/06/03/uber-addinghundreds-of-thousands-of-new-drivers-every-month/#1f94f5df4212> [<https://perma.cc/5ZGN-W87D>]).

96 *Id.*

97 BLS Survey, *supra* note 62, at 3.

98 Federal Reserve Report, *supra* note 44.

99 *Id.*

100 *Id.*

101 *Id.*

102 *Id.*

103 *Id.*

104 Federal Reserve Report, *supra* note 44.

“The data show that gig workers are, by and large, happy with their working arrangements.”

The Board also found that few respondents turned to gig work consistently.¹⁰⁵ Only a third said they had performed gig work in all or most months in the past year.¹⁰⁶ They described their compensation from gig work as only a “modest” percentage of their total income.¹⁰⁷ The median amount of hours spent on gig work per month was five.¹⁰⁸

Similar data can be seen in particular regions or industries. For example, the New York City Taxi and Limousine Commission tracks the daily trips taken by for-hire drivers.¹⁰⁹ In 2018, it reported that while taxi drivers were taking on average 91 trips per week, drivers using Uber were taking only 44—less than half.¹¹⁰ That disparity suggests that unlike taxi drivers, drivers using Uber were working mostly part time.

On earnings, reliable data are scarce. The Bureau of Labor Statistics found that independent contractors earned “roughly similar” compensation to that of workers in “traditional” employment relationships: traditional employees earned \$884 per week, while independent contractors earned \$851 per week.¹¹¹ But again, that comparison omits most gig workers, as it includes only “primary”

jobs, not secondary sources of income.¹¹² It also includes all independent contractors, not just those who use online gig platforms.¹¹³

In its own survey, JPMorgan found that income from gig work typically rose and fell in negative correlation with income from other sources.¹¹⁴ That finding suggests that people turn to gig work to smooth out fluctuations in their primary incomes.¹¹⁵ JPMorgan also found that the median gig worker earned \$533 per month from gig work—about a third of the worker’s total income.¹¹⁶

The data show that gig workers are, by and large, happy with their working arrangements. The Bureau of Labor Statistics found that eight in ten independent contractors preferred their gig work to “traditional” employment.¹¹⁷ Only one in ten said they would prefer a traditional job.¹¹⁸ Similarly, UpWork found that 69% of freelancers viewed their work positively.¹¹⁹ These workers valued above all the flexibility to choose their own projects as well as their place and time of work.¹²⁰ They enjoyed the additional income gig work brought and felt a sense of entrepreneurial pride: they liked being their “own boss.”¹²¹

¹⁰⁵ Id. (reporting that “[m]any adults who engage in gig work use it to supplement their income”).

¹⁰⁶ Id.

¹⁰⁷ Id.

¹⁰⁸ Id.

¹⁰⁹ See Committee on For-Hire Vehicles, Council of the City of New York, Report on Int. Nos. 144, 634, 838, 854, 855 & 856 (April 30, 2018).

¹¹⁰ Id. at 7, 10.

¹¹¹ BLS Survey, *supra* note 62, at 8.

¹¹² See Kasriel, *supra* note 67.

¹¹³ See BLS Survey, *supra* note 62, at 8.

¹¹⁴ JPMorgan Report, *supra* note 45, at 23–26.

¹¹⁵ Id.

¹¹⁶ Id. at 24.

¹¹⁷ BLS Survey, *supra* note 62, at 3.

¹¹⁸ Id.

¹¹⁹ UpWork Survey, *supra* note 76.

¹²⁰ See *id.*; see also James Sherk, The Rise of the “Gig” Economy: Good for Workers and Consumers, The Heritage Foundation Backgrounder No. 3143, at 4 (Oct. 7, 2016) (reporting that 87% of Uber driver-partners said they worked with Uber “to be my own boss and set my own schedule”).

¹²¹ See Sherk, *supra* note 120, at 4.





Criticisms of the Gig Economy

As the gig economy has grown, platform holders have become some of the most visible companies in the country, if not the world. But this rise has not been welcomed by everyone. Labor advocates, academics, and some legislators have all criticized the gig business model—most vociferously for its perceived effects on gig workers. They claim that gig companies are exploiting workers, undermining traditional employment, and even profiting at the expense of “good actors” who classify their workers as employees.

Looking past the hyperbole, however, the criticisms largely boil down to three concerns: misclassification, instability, and a lack of benefits.

Misclassification

First, the critics claim that the gig economy is built on “misclassification.”¹²² Again, most gig workers are classified as independent contractors. Critics often claim that this classification is incorrect: under existing legal standards, they say, gig workers should be considered the employees of gig platform holders.¹²³ They assume—data notwithstanding¹²⁴—that gig workers earn most or all of their income from gig work; and as a result, the workers are effectively beholden to platform holders. The critics argue that this dependence should result in an employment relationship, even if the relationship hasn’t qualified under traditional legal tests.¹²⁵

¹²² See, e.g., Seth F. Harris & Alan B. Krueger, A Proposal for Modernizing Labor Laws for Twenty-First Century Work: The “Independent Worker,” *The Hamilton Project* 7 (2015) (arguing that businesses may try to misclassify their gig workers to cover their costs); A.B. 5, 2019–20 Sess., preamble (Cal 2019) (arguing that reform efforts were necessary because of widespread misclassification).

¹²³ See Cunningham-Parmeter, *supra* note 95, at 1677 (arguing that judges construe the control test too narrowly out of a fear that “just about everyone” would be considered an employer under a broader reading).

¹²⁴ See, e.g., Aspen Institute Economic Opportunities Program, *Working in America: The 1099 Workforce and Contingent Workers at 1* (2015) (reporting that 79% of on-demand providers work on-demand part time); Katz & Krueger, *supra* note 70, at 11 (reporting that more than half of Uber driver-partners work between 1 and 15 hours per week).

¹²⁵ See Cunningham-Parmeter, *supra* note 95, at 1674 (arguing that companies should be considered employers when they “meaningfully influence working conditions”); Jennifer Middleton, *Contingent Workers in A Changing Economy: Endure, Adapt, or Organize?*, 22 *N.Y.U. Rev. L. & Soc. Change* 557, 568–69 (1996) (criticizing traditional legal tests as being open to manipulation).

The critics emphasize several effects this perceived misclassification has on the workers and society. First, they argue, if workers are not classified as employees, they do not enjoy protection under traditional employment and labor laws.¹²⁶ Most of these laws—for example, Title VII, the NLRA, the FLSA, and the Family Medical Leave Act (FMLA)—apply only to employees.¹²⁷ As independent contractors, gig workers fall outside the laws' coverage.¹²⁸

Second, critics argue that when gig workers are classified as independent contractors, states lose out on tax revenue. States tax the employment relationship in various ways, including payroll taxes, unemployment taxes, and workers'-compensation taxes. These taxes do not apply to independent contractors.¹²⁹ What's more, businesses do not withhold income taxes from their payments to independent contractors. The responsibility for paying those taxes lies with the independent contractor, who, critics argue, may be less likely to report his or her income. So when businesses classify workers as independent contractors, the argument follows, they starve the state of revenue that should be feeding the public coffers.¹³⁰ Legislators and advocates in California claim that the state is losing between \$2 billion and \$7 billion in tax revenue each year because of misclassification.¹³¹

New Jersey recently sent Uber a \$650 million bill for unemployment and disability insurance taxes, claiming the company misclassified drivers as independent contractors.¹³²

Third, critics argue that as independent contractors, gig workers lack the bargaining power to improve their own lots.¹³³ Independent contractors have no right to join labor unions or bargain collectively.¹³⁴ Nor do platform holders have any obligation to recognize or bargain with a collection of gig workers.¹³⁵ Gig workers must therefore bargain with platform holders one on one.¹³⁶

Instability

Related to this lack of bargaining power, the critics claim, is a lack of stability—both economic and legal. Gig workers are not shift workers: they have no assigned work hours, and so no way to accurately predict their income from week to week. Critics point out that gig workers are more likely than other workers to worry about whether their jobs will last.¹³⁷ Such worries could cause them to make economic choices geared toward the short term. As gig work makes up a larger and larger share of the economy, such short-term decision-making could skew the economy and society in unexpected directions—or so the critics claim.¹³⁸

¹²⁶ See *id.* at 1686.

¹²⁷ See 29 U.S.C. § 152(3) (defining employee for purposes of the NLRA); 29 U.S.C. § 202(e)(1) (defining employee under the FLSA); 42 U.S.C. § 2000e(f) (defining employee under Title VII); 29 U.S.C. § 2611(2)(A) (defining eligible employee under the FMLA).

¹²⁸ Cunningham-Parmeter, *supra* note 95, at 1686; Stephen F. Befort, Labor and Employment Law at the Millennium: A Historical Review and Critical Assessment, 43 B.C. L. Rev. 351, 416 (2002) (arguing that workers classified as independent contractors fall outside the regulatory safety net).

¹²⁹ See Cunningham-Parmeter, *supra* note 95, at 1686; National Employment Law Project, Fact Sheet: Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries (July 2015), <https://www.nelp.org/wp-content/uploads/Independent-Contractor-Costs.pdf>.

¹³⁰ See Middleton, *supra* note 125, at 571 (arguing that misclassification deprives government of tax revenues).

¹³¹ See, e.g., S.B. 5690, 66th Leg., 2019 Reg. Sess. § 2 (Wash. 2019) (arguing that misclassification costs the state \$2 billion per year); Christian Britschgi, New Employment Regulations Could Destroy California's Gig Economy, Reason.com (June 3, 2019), <https://reason.com/2019/06/03/new-employment-regulations-could-destroy-californias-gig-economy/> (reporting that California legislators passed AB 5 to recoup roughly \$6.5 billion per year in new employment taxes); Ashley Cullins, Hollywood Faces "Devastating" Costs from California Bill Targeting Gig Economy, Hollywood Reporter (June 19, 2019), <https://www.hollywoodreporter.com/news/hollywood-faces-devastating-costs-state-bill-targeting-uber-1219575> (reporting that AB 5 aimed at solving "misclassification," which legislators estimated costed California \$7 billion per year).

¹³² See Chris Opfer, Uber Hit With \$650 Million Employment Tax Bill in New Jersey, BloombergLaw.com (November 14, 2019), <https://news.bloomberglaw.com/daily-labor-report/uber-hit-with-650-million-employment-tax-bill-in-new-jersey>.

¹³³ See Befort, *supra* note 128, at 419; Harris & Krueger, *supra* note 122, at 2 (advocating an extension of collective-bargaining rights to gig workers).

¹³⁴ See Harris & Krueger, *supra* note 122, at 2; 29 U.S.C. § 152(3) (excluding independent contractors from coverage under the NLRA).

¹³⁵ See 29 U.S.C. § 152(3).

¹³⁶ See Harris & Krueger, *supra* note 122, at 2 (arguing that legislators should extend collective-bargaining rights to gig workers).

¹³⁷ See Government Accountability Office, Contingent Workforce: Size, Characteristics, Earnings, and Benefits, GAO-15-168R (2015).

¹³⁸ See Abdullahi Muhammed, Does the Gig Economy Really Lead to Higher Job Insecurity?, Forbes (Jan. 24, 2019), <https://www.forbes.com/sites/abdullahimuhammed/2019/01/24/does-the-gig-economy-really-lead-to-higher-job-insecurity/#76840a774328> (reviewing arguments that gig economy causes job insecurity).

Nor, the critics say, do gig workers always know whether they are employees or independent contractors. Because the traditional employment tests involve multi-factor balancing, even lawyers struggle to predict how courts will evaluate some work relationships.¹³⁹ This analysis is even more difficult for the average gig worker, who is likely to be young, inexperienced, and lacking any legal training.¹⁴⁰

Lack of Benefits

Finally, critics focus on the difficulty some gig workers have in securing benefits, such as health insurance, retirement coverage and workers' compensation.

In the U.S., most individuals under age 65 obtain health care coverage from their employer.¹⁴¹ Unlike employees, some gig workers may be responsible for their own benefits.¹⁴² However, under the definition used in this paper (namely, workers providing services through gig platforms) many gig workers do not use gig work as the primary source of income, and may well get these benefits from their primary employer or another source, such as Tricare, Medicare, or a spouse.

Critics also argue that the platform providers are “free riding” on traditional employers—in this case those who are providing coverage for gig workers through their primary jobs. In addition, they continue, the platform providers that do not classify gig workers as employees have an advantage over traditional employers with 50 or more full-time equivalent employees because such employers are subject to the Patient Protection and Affordable Care Act (ACA) employer mandate that requires employers to either provide affordable and adequate health care coverage to full-time employees (generally those who work more than 30 hours per week) or possibly pay a penalty¹⁴³ (this particular argument ignores the fact that many gig workers do not work the requisite hours to be classified as full time under the ACA).

These criticisms have sparked calls for reform in many states and localities. The efforts at carrying those reforms into effect are the subject of our next section.

¹³⁹ See Middleton, *supra* note 125, at 568–69.

¹⁴⁰ See Befort, *supra* note 128, at 419.

¹⁴¹ See Sarah R. Collins, et al., Health Insurance Coverage Eight Years After the ACA, The Commonwealth Fund (Feb. 7, 2019), <https://www.commonwealthfund.org/publications/issue-briefs/2019/feb/health-insurance-coverage-eight-years-after-aca> (reporting that “[m]ore than half of Americans under age 65 — about 158 million people — get their health insurance through an employer”).

¹⁴² See Gig Economy Protections: Did the EU Get It Right?, Wharton, Univ. of Penn. (May 6, 2019), <https://knowledge.wharton.upenn.edu/article/eu-gig-economy-law/> (stating that gig workers, such as those who work with platform providers, “don’t enjoy health care benefits for themselves or their families”, but ignoring the fact that many may have primary employment with another employer that provides coverage). However, the portion of the study from the US focused on self-employed individuals, which, as noted previously, is broader than this paper’s definition.

¹⁴³ See Harris & Krueger, *supra* note 122, at 6 (arguing that gig companies should pay “five percent of independent workers’ earnings (net of commissions) to support health insurance subsidies in the exchanges as a solution to the free rider problem and to support health insurance.”) This argument, however, ignores that most “gig workers” do not work the requisite hours to be classified as full-time under the ACA.





State Efforts to Regulate the Gig Economy

As criticisms of the gig economy have taken hold in statehouses across the country, lawmakers have proposed a multiplicity of new regulatory regimes, ranging from small administrative tweaks to broader-reaching legislation. The most radical of these efforts has emerged in California, where lawmakers adopted an employment test that raises a significant threat to the gig model—a narrowed “ABC” test.¹⁴⁴

California and the ABC Test

In 2018, the California Supreme Court handed down its opinion in *Dynamex v. Superior Court*,¹⁴⁵ an epochal decision that sparked what may prove to be the most consequential labor-market shift in modern history. The decision involved the definition of “employ” under California’s wage orders, which govern minimum wages, overtime, and working conditions in certain industries.¹⁴⁶ California had historically followed a multi-factor test, focusing on whether the hiring entity had the right to control the worker.¹⁴⁷ *Dynamex* scrapped

that test in favor of a restrictive ABC test.¹⁴⁸

Under California’s ABC test, a worker is presumed to be an employee. If the hiring entity wants to classify the worker as anything else, it must prove that the worker satisfies three criteria:

1. the worker is free from control and direction in connection with the service performed;
2. the worker performs the service outside the usual course of the hiring entity’s business; and
3. the worker is customarily engaged in an independently established trade, occupation, profession, or business of the same type involved in the service being performed.¹⁴⁹

The worker must satisfy each of these criteria.¹⁵⁰ If the worker fails any one, she will be considered an employee.¹⁵¹

¹⁴⁴ Our summary of the existing federal and state tests for employee versus independent contractor status covers over 400 pages, and thus cannot be included in any detail here. Federal law includes three separate tests: the IRS 20-factor test; the economic reality test that applies under the Fair Labor Standards Act; and the Darden common law test applicable to all other employment laws. All are multi-factor balancing tests. States may have different test under different laws also – under tax, unemployment, workers’ compensation, wage and hour, and equal employment laws. Some of the state laws follow the IRS 20-factor test or the FLSA economic reality test, or have adopted different multi-factor balancing tests. Other state laws use the traditional “ABC” test, which requires that three conjunctive requirements be met before a worker can be classified as an independent contractor; but, a few states have adopted a narrowed ABC test or a different conjunctive with multiple required factors. Some state laws presume independent contractor status if the parties so state in a contract. Other states presume employment status. This tangle of federal and state laws makes compliance in all jurisdictions by national employers challenging. The appendix places current state laws into six categories: the IRS 20-factor test, the economic reality test, other multi-factor balancing test, the traditional ABC test, a narrowed ABC test, and other conjunctive tests.

¹⁴⁵ 416 P.3d 1 (Cal. 2018), reh’g denied (June 20, 2018).

¹⁴⁶ *Id.* at 5.

¹⁴⁷ See *S.G. Borello & Sons, Inc. v. Dep’t of Indus. Relations*, 769 P.2d 399, 407 (Cal. 1989) (adopting multi-factored common-law-style test).

¹⁴⁸ *Dynamex*, 416 P.3d at 35–36.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 35–36, 40.

“Dynamex sparked widespread concern and some confusion in the business community, including among gig companies.”

Dynamex sparked widespread concern and some confusion in the business community, including among gig companies.¹⁵² Of chief concern was whether the test would apply retroactively.¹⁵³ The U.S. Court of Appeals for the Ninth Circuit first held that the decision was retroactive, but later withdrew its opinion and certified the issue to the California Supreme Court.¹⁵⁴ In the interim, two lower California appellate courts held that *Dynamex* did apply retroactively.¹⁵⁵

Ostensibly trying to resolve this confusion, the California Legislature stepped in. But it did more than simply codify *Dynamex*.

After a chaotic legislative process in which intense lobbying led legislators to carve out a menagerie of exemptions, the Legislature enacted a bill adopting the ABC test not only for wage orders, but for all purposes under California’s Labor Code, including unemployment and workers’ compensation.¹⁵⁶

That move could result in the reclassification of nearly two million workers—10% of California’s workforce,¹⁵⁷ which could include many gig workers.¹⁵⁸ While the law’s reach is by no means limited to gig workers, they seem to have been the legislature’s primary target: most discussions leading up to the final vote centered on them. Some large platform holders publicly stated that they believed their service providers would still pass the new, stricter test.¹⁵⁹ These same companies also pledged \$90 million to overturn AB 5 through a ballot measure—the Protect App-Based Services Act.¹⁶⁰

152 See, e.g., Britschgi supra note 131; Nicole Karlis, How California’s Gig Economy Bill Will Affect the Rest of the Country, Salon.com (July 13, 2019), <https://www.salon.com/2019/07/13/how-californias-gig-economy-bill-will-affect-the-rest-of-the-country/> (reporting on fallout from *Dynamex* and subsequent legislative efforts).

153 See Erin Mulvaney, *Dynamex* Ruling Applies Retroactively, Another California Court Says, Bloomberg Law (Oct. 9, 2019) (reporting on subsequent decisions determining retroactivity of *Dynamex*).

154 See *Vasquez v. Jan-Pro Franchising Int’l, Inc.*, No. 17-1609 (9th Cir. July 22, 2019) (withdrawing prior panel decision and certifying question to California Supreme Court).

155 See *Gonzales v. San Gabriel Transit, Inc.*, No. B282377, 2019 CA App Lexis 989 (Cal. App. 2d Dist. Oct. 08, 2019); *Garcia v. Border Transp. Grp., LLC*, 239 Cal. Rptr. 3d 360 (Cal. App. 2018).

156 See A.B. 5, 2019–20 Sess. (Cal. 2019).

157 See, e.g., 2 Million California Gig Workers Face Uncertain Future Under Assembly Bill 5, Times of San Diego (Sept. 7, 2019), <https://timesofsandiego.com/business/2019/09/07/2-million-california-gig-workers-face-uncertain-future-under-assembly-bill-5/>; Judy Lin, From Strip Clubs to Strip Malls, How 2 Million Workers Could be Sept Up in a Bill Aimed at the Gig Economy, Cal Matters (June 30, 2019), <https://calmatters.org/economy/2019/06/california-dynamex-gig-worker-classification-independent-contractors-uber-lyft-strippers-truckers-freelancers/>; see also A.B. 5, 2019–20 Sess., preamble (Cal. 2019) (estimating that the bill will reclassify “several million” workers).

158 See 2 Million California Gig Workers Face Uncertain Future Under Assembly Bill 5, Times of San Diego (Sept. 7, 2019).

159 *Id.*

160 See Kate Conger & Noam Scheiber, California Bill Makes App-Based Companies Treat Workers as Employees, N.Y. Times (Sept. 11, 2019), <https://www.nytimes.com/2019/09/11/technology/california-gig-economy-bill.html>; Kate Conger, Uber, Lyft and DoorDash Pledge \$90 Million to Fight Driver Legislation in California, N.Y. Times (Aug. 29, 2019), <https://www.nytimes.com/2019/08/29/technology/uber-lyft-ballot-initiative.html?auth=login-email&login=email&module=inline>; Jeremy B. White, Uber, Lyft Pitch Landmark California Worker Proposal—and Tech Industry’s First Ballot Threat, Politico (Oct. 29, 2019), <https://www.politico.com/states/california/story/2019/08/29/uber-lyft-pitch-landmark-california-worker-proposal-and-tech-industrys-first-ballot-threat-1160752>. See Section IV.A, *infra*, for more discussion of the Protect App-Based Drivers and Services Act.

The ABC test is not, of course, entirely new. About twenty states already use it for unemployment purposes.¹⁶¹ A handful of other states have adopted it for broader purposes, including wage-and-hour law.¹⁶² These states include New Jersey,¹⁶³ Massachusetts,¹⁶⁴ and Connecticut.¹⁶⁵

Other states are considering the same approach that California took with A.B. 5. For example, in the 2019 legislative session, lawmakers in Washington State introduced the “Employee Fair Classification Act.”¹⁶⁶ That bill would have adopted a new, stricter form of the ABC test.¹⁶⁷ Businesses would not only have had to satisfy the ABC prongs; they would also have had to show that the worker filed a schedule of expenses with the IRS and registered an active account with the state Department of Revenue.¹⁶⁸

If a business could not prove the worker did these things, it could be liable for “misclassification”—an offense carrying civil penalties and fees.¹⁶⁹

Similar legislation was introduced in Oregon¹⁷⁰ and Kentucky.¹⁷¹ In the latter state, House Bill 355 would have adopted the ABC test for wage-and-hour purposes; and like the Washington bill, it would have imposed penalties and fees for “misclassification.”¹⁷² Workers would also have been able to bring an independent cause of action for misclassification, for which they could recover liquidated damages, costs, and attorneys’ fees.¹⁷³

161 See Rebecca Smith, Washington State Considers ABC Test for Employee Status, Nat’l Emp. L. Project (Jan. 28, 2019), <https://www.nelp.org/blog/washington-state-considers-abc-test-employee-status/> (summarizing state laws using ABC test—including California, Washington, Idaho, Nevada, Arizona, New Mexico, Colorado, Nebraska, Oklahoma, Louisiana, Minnesota, Illinois, Iowa, Indiana, Ohio, Alabama, Georgia, Pennsylvania, Maryland, New Jersey, New York, Vermont, Rhode Island, Connecticut, New Hampshire, Massachusetts, and Maine).

162 *Id.*

163 See N.J. Admin. Code § 43:21-19(i)(6)(A)–(C) (adopting ABC test under state wage-payment law); *Hargrove v. Sleepy’s, LLC*, 106 A.3d 449, 458 (N.J. 2015) (adopting ABC test under state wage-and-hour law).

164 See Mass. Gen. Laws ch. 149, § 148B(a)(1)–(3) (adopting ABC test under state wage-and-hour law).

165 See Conn. Dep’t of Labor, Joint Enforcement Commission on Employee Misclassification (April 20, 2010), <https://www.ctdol.state.ct.us/wgwkstnd/JEC/WorkerMisClassFAQs.pdf>.

166 See S.B. 5690, 66th Leg., 2019 Reg. Sess. (Wash. 2019).

167 *Id.* § 4(8)(a).

168 *Id.* § 4(9).

169 *Id.* § 7. So far, the bill has generated opposition from both sides of the ideological divide. Even traditionally liberal groups worry that it will convert independent professionals leasing space from other professionals into employees. See Protect Washington State’s Small Businesses. Oppose 1515, 5513, 1601 and 5690, Change.org, <https://www.change.org/p/washington-state-house-protect-small-washington-state-s-small-businesses-oppose-1515-5513-1601-and-5690> (opposing H.B. 5690); HB 1601, SB 5690—Universal Worker Protections Act, Nat’l Fed’n of Indep. Bus. (Feb. 2019), <https://www.nfib.com/assets/UWPA-independent-contractors-HB-1601-SB-5690-1.pdf> (same).

170 H.B. 2498, 80th Leg., 2019 Reg. Sess. (Or. 2019).

171 See H.B. 355, 2019 Reg. Sess. (Ky. 2019).

172 *Id.* §§ 1, 2(1)(f).

173 *Id.*

“Perhaps the biggest battleground will be New York, where advocates are already pushing for AB 5–style legislation.”

More legislation of this type is likely on the way. Perhaps the biggest battleground will be New York, where advocates are already pushing for AB 5–style legislation.¹⁷⁴ Commentators expect fierce lobbying and legislative debates, perhaps on the same or a larger scale than those seen around AB 5.¹⁷⁵

In the meantime, states have launched other efforts to regulate the industry—most of them less radical than wholesale reclassification, but still potentially disruptive to the gig model. We examine those efforts next.

Extending Coverage to Independent Contractors

Rather than reclassify gig workers across the board, some jurisdictions are simply extending employment-style rules to independent contractors. New York City has been particularly active in this space. In May 2018, it directed its Taxi and Limousine Commission to set a minimum per-trip payment for ride-sharing services.¹⁷⁶ This minimum payment must be enough to ensure that ride-share drivers earn at least as much per hour as taxi drivers.¹⁷⁷ And that amount must be at least the minimum wage.¹⁷⁸

Other states have extended their anti-discrimination laws to independent contractors. Maryland took that step in April 2019,¹⁷⁹ and Tennessee¹⁸⁰ considered a similar bill in the same legislative session.

Still other states are trying to extend coverage by creating a new classification for workers. According to media reports, New York lawmakers plan to introduce legislation to create “dependent workers.”¹⁸¹ These workers would enjoy at least some of the same benefits as employees, though exactly which ones is so far unclear.¹⁸² New York considered a similar bill in 2019, though that version would not have extended benefits automatically; it would have directed the state department of labor to study the issue first.¹⁸³

The concept of a third class of workers is not original to New York. It comes from a paper by Seth Harris, President Obama’s Deputy Labor Secretary, and economist Alan Krueger, where the authors proposed extending civil-rights protections and collective-bargaining rights to dependent workers, including many gig workers.¹⁸⁴ The authors also proposed allowing gig companies to withhold employment taxes and make payroll-tax contributions for these workers without creating a full-blown employment relationship.¹⁸⁵

174 See Chris Opfer & Keshia Clukey, *New York Said to Become Next Battleground for Gig Worker Law*, Bloomberg Law (Oct. 9, 2019) (reporting advocates are pushing New York lawmakers to adopt something like California’s AB 5).

175 *Id.*; see also H.R. 8721, 2019–20 Reg. Sess. (N.Y. 2019) (proposing to adopt ABC test for unemployment purposes).

176 NYC Int. No. 856.

177 *Id.*

178 *Id.*

179 H.B. 679, 2019 Reg. Sess. (Md. 2019).

180 H.B. 387, 110th Gen (Tenn. 2019).

181 See Opfer & Clukey, *supra* note 174.

182 See *id.* (reporting that the details of the bill have not yet been released).

183 *Id.* (citing A.B. 8343, 2019–20 Reg. Sess. (N.Y. 2019)).

184 See Harris & Krueger, *supra* note 122, at 1–2.

185 *Id.* at 6.

“In the meantime, some lawmakers are aiming their efforts at the contractual relationship between gig workers and platform holders.”

They did not, however, recommend covering these workers under state wage-and-hour laws, which they saw as incompatible with the gig model.¹⁸⁶ How much of this proposal ends up in the New York bill remains to be seen.

In the meantime, some lawmakers are aiming their efforts at the contractual relationship between gig workers and platform holders. In New York City, lawmakers passed the Freelance Isn't Free Act, which requires companies to reduce their agreements with independent contractors to writing.¹⁸⁷ It also requires companies to pay contractors on the date listed in the contract.¹⁸⁸ If no date is listed, they must pay within 30 days after the contractor provides the services.¹⁸⁹ Companies that fail to pay on time face civil penalties and liquidated damages.¹⁹⁰

This model may be catching on. In 2019, the city of Minneapolis considered a similar law containing nearly identical payment and penalty provisions.¹⁹¹ The law would bar companies from refusing to pay a “freelance worker” within the time specified in the contract.¹⁹²

Freelance workers could sue to enforce this requirement; and if they won, they could recover fees, costs, and liquidated damages.¹⁹³ But importantly, like the New York City law, the Minneapolis proposal disclaims any intent to reclassify independent contractors as employees.¹⁹⁴

Finally, other states are testing ways to extend workers' compensation to gig workers. Again, New York is out in front. It established the “Black Car Fund,” a nonprofit organization providing workers compensation to for-hire drivers.¹⁹⁵ The fund now boasts more than 70,000 participants.¹⁹⁶ Similarly, in Massachusetts, Uber itself launched a pilot program allowing drivers to buy into a workers' compensation fund.¹⁹⁷ The fund offers injured drivers up to \$1 million to cover medical costs and lost earnings.¹⁹⁸

186 *Id.* at 2.

187 N.Y. City Adm. Code tit. 20, ch. 10.

188 *Id.*

189 *Id.*

190 *Id.*; see also Nancy Cremins, The On-Demand Economy Continues to Grow, but Legal Consequences Abound for Employers and Employees in the U.S. and Abroad, *Boston Bar J.* (Feb. 2, 2018), <https://bostonbarjournal.com/tag/lyft/> (describing efforts by cities to regulate gig economy, including the Freelance Isn't Free Act).

191 See Minneapolis Ordinance No. 2019-00699.

192 *Id.*

193 *Id.*

194 *Id.*

195 See Who We Are, Black Car Fund, <http://www.nybcf.org/about> (last visited Oct. 21, 2019).

196 *Id.*

197 See Cremins, *supra* note 190 (reporting on Uber pilot program).

198 *Id.*

“At the federal level, both the Department of Labor’s Wage and Hour Division and the National Labor Relations Board’s general counsel issued opinions finding that gig workers were properly classified as independent contractors”

Maintaining the Status Quo

A few other states have moved in the opposite direction. For example, Florida now designates for-hire drivers on digital platforms as independent contractors if they meet certain criteria.¹⁹⁹ The Florida law mirrors similar measures passed in other states,²⁰⁰ most of which create a classification “safe harbor” when certain criteria are met.²⁰¹ Common criteria include that the driver does not have to accept particular tasks, does not have to work at any particular time or location, and is not limited to using one platform at a time.²⁰²

At the federal level, both the Department of Labor’s Wage and Hour Division and the National Labor Relations Board’s general counsel issued opinions finding that gig workers were properly classified as independent contractors.²⁰³ These opinions reinforce that, by traditional measures, gig workers are not employees.

First, the Wage and Hour Division concluded in an opinion letter that workers on an unnamed gig platform were independent contractors under the FLSA.²⁰⁴ The Division reasoned that as a matter of “economic realities,” the workers worked for their customers, not the platform holder.²⁰⁵ The platform holder served largely as a referral service.²⁰⁶ It exercised little control over the services provided, and so could not be considered an employer.²⁰⁷

Soon after, in a case involving drivers using the Uber platform, the Board’s general counsel concluded that the drivers were properly classified as independent contractors under the NLRA.²⁰⁸ The general counsel applied the common-law test, under which the “animating principle” is “whether the position presents the opportunities and risks inherent in entrepreneurialism.”²⁰⁹ The general counsel emphasized that Uber’s model allowed drivers to schedule their own work: drivers could work when they wanted and however much they wanted, and so controlled their own opportunities for profit or loss.²¹⁰

¹⁹⁹ See H.B. 221, 2017 Leg. (Fla. 2017).

²⁰⁰ These states include Alaska, Arizona, Colorado, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Rhode Island, South Dakota, Tennessee, Texas, Utah, West Virginia, Wisconsin, and Wyoming. See Gali Racabi, TNC and MC State Laws: Preemption of Local Government Regulations and Treatment of Employment Status of Drivers (Oct. 2018) (collecting state laws preserving the status of drivers participating in transportation network companies’ platforms as independent contractors as long as certain conditions are met).

²⁰¹ See, e.g., Ariz. Rev. Stat. § 23-1603 (presuming that virtual-marketplace contractors are independent contractors when specified conditions are met); Colo. Rev. Stat. § 40-10.1-602 (specifying that virtual-marketplace contractors “need not” be considered employees); Mich. Comp. Laws Serv. § 257.2137 (specifying that “transportation network company drivers” are independent contractors when certain criteria are satisfied); Mo. Rev. Stat. § 387.432 (specifying that transportation network companies (TNCs) are not employers of driver-partners unless the parties agree otherwise in writing).

²⁰² See authorities cited in note 200, *supra*.

²⁰³ See NLRB Gen. Counsel Memo, *supra* note 51, at 13; Wage & Hour Div. Op. Letter, *supra* note 52, at 9.

²⁰⁴ Wage & Hour Div. Op. Letter, *supra* note 52, at 9.

²⁰⁵ *Id.* at 7.

²⁰⁶ *Id.*

²⁰⁷ *Id.* at 7–9.

²⁰⁸ NLRB Gen. Counsel Memo, *supra* note 51, at 13.

²⁰⁹ *Id.* at 4.

²¹⁰ *Id.* at 7–8, 10.

“The general counsel emphasized that Uber’s model allowed drivers to schedule their own work: Drivers could work when they wanted and however much they wanted, and so controlled their own opportunities for profit or loss.”

For its part, Uber exercised none of the control typical of an employment relationship.²¹¹ It did not require drivers to work at certain places or times, nor did it evaluate the drivers’ performance: it left that task to customers, who could rate their experiences with drivers through the Uber app.²¹² Altogether, this system left the drivers independent from Uber’s control and, therefore, properly classified as independent contractors.²¹³

The approach reflected in these opinions marks a shift from the prior administration’s view. In 2015, the Department of Labor issued an interpretive bulletin advising that most workers were employees.²¹⁴ While purporting to apply the economic-realities test, it reached a result contrary to prevailing classification practices in the gig economy.²¹⁵ After the 2016 election, however, the Department withdrew the bulletin.²¹⁶ So at least for now, as a matter of federal law, it seems that gig workers will remain independent contractors.

²¹¹ Id. at 11–12.

²¹² Id. at 11.

²¹³ Id. at 13.

²¹⁴ See U.S. Dep’t of Labor, Wage & Hour Div., Administrator’s Interpretation No. 2015-1 (2015).

²¹⁵ Id.

²¹⁶ See Press Release, U.S. Dep’t of Labor, Office of Public Affairs, U.S. Secretary of Labor Withdraws Joint Employment, Independent Contractor Informal Guidance (June 7, 2017), <https://www.dol.gov/newsroom/releases/opa/opa20170607> (announcing withdrawal of prior guidance).





Effects of State Regulation on the Gig Economy

“These new laws overshoot their ostensible goals and will likely hurt those they are designed to help—either by reducing the availability of gig work or eliminating the work’s most attractive features”

Unsurprisingly, some of these state regulatory approaches are better designed than others. While some have taken a prudent, incremental approach, others aim to effect wide-scale economic and social change in one stroke. These broader efforts, such as California’s AB 5, pose more danger than their proponents are willing to admit. These new laws overshoot their ostensible goals and will likely hurt those they are designed to help—either by reducing the availability of gig work or eliminating the work’s most attractive features. Worse, they fail to address the problems supposedly motivating them in the first place. These failures stem largely from the faulty assumptions underlying their approach—in particular, the assumption that lawmakers can “fix” the gig economy simply by transforming gig workers into employees.

Efforts to reclassify gig workers as employees are based on false premises.

Misclassification. Again, proponents of wide-scale reclassification efforts like AB 5 argue that reforms are necessary to address “misclassification.”²¹⁷ But this argument puts the tail before the dog. Whether a worker is an independent contractor or an employee depends, of course, on whether the worker meets the existing legal definitions. Businesses classify workers by applying existing standards. If those standards show that the worker is an independent contractor, and the business classifies the worker accordingly, no “misclassification” occurs.

²¹⁷ See, e.g., A.B. 5, § 1, 2019–20 Sess. (Cal. 2019) (citing harms to “misclassified” workers); S.B. 5690, 66th Leg., 2019 Reg. Sess. (Wash. 2019) (arguing that ABC test is necessary to address misclassification).

Traditional legal tests often classify gig workers as independent contractors.²¹⁸ Those tests ask whether the worker operates independently of gig platforms; focusing mainly on how much control the platform holder exercises.²¹⁹ Applying that framework, both the Wage and Hour Division and the National Labor Relations Board's general counsel have found that gig workers were independent contractors²²⁰—as have many courts.²²¹ So under existing tests, platform holders have done nothing wrong by legally classifying gig workers as independent contractors. Put simply, there is no “misclassification.”²²²

But ultimately, what the critics object to is not how platform holders are applying existing law. When they say that platform holders are misclassifying workers, they do not mean that gig workers are employees under current legal standards. Gig workers are *properly* classified under those standards; it is the standards themselves that critics object to as flawed.²²³

But in these terms, “misclassification” is a misnomer. There is no archetypal employee. The distinction between an employee and an independent contractor is a social and legal construct. How the federal and state governments define these terms is a policy judgment. If lawmakers choose to transform gig workers into employees, they are choosing to change the rules of the road.

They are not, contrary to their assertions,²²⁴ addressing widespread misconduct by gig companies.

Undermining traditional employment.

Reclassification proponents also presume there is something inherently wrong with gig platforms' business model. They claim that by relying on independent contractors, gig companies put businesses that classify their workers as employees at a competitive disadvantage.²²⁵ These competitive pressures, they argue, may cause other business to abandon the traditional employment model, which could ultimately undermine the social safety net.²²⁶

But this hyperbole does not match the data. Businesses are not abandoning traditional employment in droves.²²⁷ While the gig economy is surely growing, it remains a small fraction of the overall labor market.²²⁸ By some estimates, it still includes less than half a percent of all workers.²²⁹ Yet even if one assumes, as this paper does, that those estimates undercount the gig economy, traditional employment still dwarfs gig work by any measure.²³⁰ Indeed, even gig-economy companies maintain healthy workforces of traditional employees as software code writers, marketers, finance, and so on.

218 See authorities cited in note 58, *supra*.

219 See *id.*

220 See NLRB Gen. Counsel Memo, *supra* note 51, at 13; Wage & Hour Div. Op. Letter, *supra* note 52, at 9.

221 See, e.g., Razak, 2018 WL 1744467, at *1 (finding that Uber drivers were independent contractors under federal and Pennsylvania law); McGillis, 210 So. 3d at 226 (finding that Uber drivers were independent contractors because, among other things, the drivers “work[ed] at their own direction” and the company provided “no direct supervision”); Varsity Tutors LLC, 2017 WL 3184555, at *7–8.

222 Of course, because gig work arrangements change from platform to platform, some gig workers may work less independently than others. Whether any given worker qualifies as an employee depends on that worker's circumstances.

223 See, e.g., Cunningham-Parmeter, *supra* note 95, at 1674 (arguing that companies should be considered employers when they “meaningfully influence working conditions”); Middleton, *supra* note 125, at 568–69 (criticizing traditional legal tests as open to manipulation).

224 See Middleton, *supra* note 125, at 571 (arguing that misclassification is widespread under current legal standards); S.B. 5690, 66th Leg., 2019 Reg. Sess. (Wash. 2019) (citing misclassification as a reason to adopt ABC test).

225 See, e.g., A.B. 5, § 1(b), 2019–20 Sess. (Cal. 2019) (citing the “the loss to the state of needed revenue from companies that use misclassification to avoid obligations such as payment of payroll taxes, payment of premiums for workers' compensation, Social Security, unemployment, and disability insurance”); Mass. Office of the Attorney Gen., An Advisory from the Attorney General's Fair Labor Division on M.G.L. c. 149, s. 148B 2008/1, at 1 (2008) [hereinafter “Mass AG Advisory Op.”]

226 See Mass AG Advisory Opinion, *supra* note 225, at 1.

227 See Dourado & Koopman, *supra* note 79 (observing that W-2 filings still dwarf 1099 filings).

228 See, e.g., Katz & Krueger, *supra* note 70, at 17 (concluding that only half a percent of American workers participated in gig work).

229 *Id.*

230 See Federal Reserve Report, *supra* note 44 (reporting that while nearly a third of workers reported participating in some type of gig work, only three percent reported using a web- or app-based platform to connect with customers).

Even other types of alternative working relationships still dwarf gig work.²³¹ More workers still participate in on-call work and work through temp agencies than work through online platforms.²³² The gig economy is simply too small to pose any systemic threat to the traditional employment model.

Nor is there evidence that, even in these small portions, gig work is replacing traditional employment. It is true that, by some estimates, alternative work arrangements have accounted for a great deal of American job growth over the last decade.²³³ But there is no evidence that gig work's growth has come at the expense of traditional employment. The American labor market has been becoming less dynamic for decades; companies were creating jobs at slower rates before there ever was an Uber or a Lyft.²³⁴ These companies, then, are likely less a cause of slow job growth than a symptom.²³⁵ Gig companies did not undermine the traditional labor market; they provided new opportunities to workers.²³⁶

Reformers do not grapple with these data when they criticize gig companies. Instead, they assume that the companies' success itself proves that the companies enjoy some unfair advantage.²³⁷ But boiled down, this assumption shows only that gig companies have worked within the law to fashion innovative business models. That these models succeed is not an indictment of their progenitors, but an endorsement.²³⁸

Lost revenues. Finally, reclassification proponents assume that reclassification is necessary to recover "lost" tax revenue.²³⁹ In California, AB 5's proponents openly lamented the billions of dollars gig platforms "cost" the state by classifying their workers as independent contractors.²⁴⁰ Legislators in Washington State likewise emphasized the additional revenue the state would collect after widespread reclassification.²⁴¹

But these revenues do not represent new money; they have to come from somewhere. Most likely, they will come out of workers' pockets. When economists examine the effects of increased payroll taxes, they often find that employers ultimately pass those taxes on to workers, usually by reducing wages.²⁴² And the costs not passed to workers will be passed to the consumer. It is not, then, platform holders who will provide new revenues to the state: it is ordinary taxpayers, the consumer and the worker.²⁴³ In this sense, reclassification acts as a hidden tax increase for everyone.

Stability. Reclassification proponents also overestimate the stability traditional employment offers. The default rule in the United States is employment at will: either an employer or an employee can terminate the relationship at any time and for any reason not specifically prohibited by law.²⁴⁴ And employment guarantees no minimum hours or set schedule.²⁴⁵

231 See BLS Survey, *supra* note 62, at 1 (estimating that 10.1 percent of workers participated in any form of alternative working arrangements).

232 See *id.*

233 See Katz & Krueger, *supra* note 70, at 7.

234 Dourado & Koopman, *supra* note 79.

235 *Id.*

236 *Id.* ("These companies are able to offer employment on more flexible terms only because there is a willing supply of workers eager to accept them. Without the nontraditional arrangements offered by the sharing economy, workers would be worse off.")

237 See Cunningham-Parmeter, *supra* note 95, at 1684 (citing rapid growth of gig companies as evidence of their pernicious effects).

238 Indeed, if traditional employment were as attractive to all workers as the critics believe, classifying workers as independent contractors would put gig companies at a competitive disadvantage. Workers would abandon gig platforms at the first opportunity to enter the traditional workforce. The "problem" would correct itself.

239 See Mass AG Advisory Op., *supra* note 225, at 1.

240 See A.B. 5, § 1(b), 2019–20 Sess. (Cal. 2019).

241 S.B. 5690, 66th Leg., 2019 Reg. Sess. (Wash. 2019).

242 See Sherk, *supra* note 120, at 5 (reporting that when companies are forced to pay increased payroll taxes, they offset wages by a nearly equal amount).

243 *Id.*

244 See Jay M. Feinman, The Development of the Employment at Will Rule, 20 Am. J.L. Hist. 118, 118 (1976).

245 In recent years, some jurisdictions have enacted "predictive scheduling" laws requiring specified notice before scheduling an employee for work (or canceling an employee's shift). See, e.g., S.B. 828, 79th Legl. Assembly, 2017 Reg. Sess. (Ore. 2018) (adopting predictive-scheduling requirements). But these laws remain the exception; and indeed, their very existence shows that employment alone does not guarantee any stability in hours or work schedules.

So in some ways, an employee enjoys less stability than an independent contractor. The employee is at the employer's beck and call; her schedule is subject to the employer's whims. The gig worker, by contrast, can count on being able to log in through the platform of her choice to earn income when she needs to. She therefore enjoys greater freedom and greater predictability.

Employees do, of course, enjoy some legal rights that independent contractors do not. But again, these rights rarely guarantee a continued job. Nothing stops an employer from cutting hours or headcount to adjust to market conditions. Making gig workers into employees will not insulate them from those risks.

Reclassification efforts fail to address the major criticisms of the gig economy.

These logical failings might be forgivable if reclassification efforts fixed the problems they were meant to solve. Unfortunately, they do not.

It is true that gig workers report concerns about benefits and job stability, even while expressing a preference for flexible work. Were reclassification able to preserve this flexibility while extending benefits and job protections, it might be worth the trade-off. In reality, however, it does little to move the needle on these issues. Instead, it will likely undermine the gig model while extending few if any benefits to gig workers.

No automatic protections. Proponents of reclassification often assume that making a worker an employee automatically gives the worker all the benefits traditionally associated with employment.²⁴⁶ But a more careful analysis belies that assumption.

For starters, not every employee qualifies for every employment benefit. To take one example, the Family Medical Leave Act protects an employee's leave only after the employee works 1,250 hours in a 12-month period.²⁴⁷ Many gig workers will likely never meet that threshold.

They tend to engage in gig work only sporadically: one study showed that half of all workers who earned income through an online labor platform in a given month earned no income from a similar platform in the next month.²⁴⁸ That finding matched other studies, which have shown that few gig workers use gig platforms consistently.²⁴⁹ To the contrary, they more often turn to gig work only to supplement to their other sources of income.²⁵⁰ It is likely, then, that many gig workers will never qualify for employment benefits tied to working consistently on a platform over a period of time. Unemployment benefits also fall in this category.²⁵¹

Nor, indeed, will reclassification at the state level automatically qualify workers for protections at the federal level. As we have seen, federal law continues to use traditional employment tests, like the common-law test and the economic-realities test.²⁵²

246 See, e.g., A.B. 5, § 1(e), 2019–20 Sess. (Cal. 2019).

247 29 U.S.C. § 2611(2)(A).

248 See JPMorgan Report, *supra* note 45, at 23 (reporting that only 56% of workers who performed gig work in a given month also reported it in the next month).

249 See Federal Reserve Report, *supra* note 44 (finding that only 30% of workers earning money from gig activities earned money from those activities in all or most months of the year, and that the median number of hours was five).

250 See, e.g., JPMorgan Report, *supra* note 45, at 24.

251 Middleton, *supra* note 125, at 572 (noting that many states require employees to work for 20 weeks before qualifying for unemployment benefits). See also *id.* at 575 ("Therefore, workers who move in and out of the workforce or who work part-time may not be eligible to receive social security retirement benefits or disability insurance, despite having paid into the system.").

252 See Wage & Hour Div. Op. Letter, *supra* note 52, at 4 (citing *Parrish v. Premier Directional Drilling, L.P.*, 917 F.3d 369, 379–80 (5th Cir. 2019); *Saleem v. Corp. Transp. Grp., Ltd.*, 854 F.3d 131, 138–40 (2d Cir. 2017); *Keller v. Miri Microsystems LLC*, 781 F.3d 799, 806–07 (6th Cir. 2015)).

And under those tests, most gig workers will continue to be independent contractors, no matter how they are classified under state law.²⁵³ Furthermore, many assume that an employee that is reclassified under state law automatically would be covered under an employer-sponsored benefit plan, such as a health or retirement plan. However, Section 514 of the Employee Retirement Income Security Act of 1974, as amended (ERISA) likely would preempt any state law requiring coverage, and an employer would be free to define “employee” within the confines of ERISA.

This result is particularly important for collective-bargaining purposes. Proponents of reclassification have often cited the need to allow gig workers to bargain collectively with platform holders as a way to correct imbalances in bargaining power.²⁵⁴ But collective bargaining remains chiefly the domain of federal law.²⁵⁵

And as long as gig workers remain independent contractors under federal law, collective bargaining by gig workers will remain legally suspect. Further, even if the right to organize were granted, gig workers might decide to exercise their federally protected right not to unionize, as most American private-sector employees have done.

To illustrate the point, in 2015, Seattle adopted the nation’s first law extending collective-bargaining rights to for-hire drivers working for gig platforms.²⁵⁶ Business groups immediately challenged the law on two grounds. First, they argued, the local law was preempted by federal labor law.²⁵⁷ The NLRA preempts all state laws regulating either a subject covered by federal labor law or a subject Congress meant to leave unregulated.²⁵⁸ And because Congress explicitly excluded independent contractors from the NLRA’s definition of *employee*, the challengers argued, states could not give them bargaining rights without interfering with Congress’s design.²⁵⁹ Second, the Sherman Antitrust Act forbids combinations in restraint of trade.²⁶⁰ By allowing what were in effect independent businesses to combine and bargain collectively, the city had licensed a price-fixing cartel.²⁶¹

While the Ninth Circuit ultimately rejected the preemption argument,²⁶² it found merit in the antitrust argument.²⁶³ The city admitted that allowing drivers to set prices collectively would ordinarily violate the Sherman Act, but it argued that its ordinance was exempt from that Act under an exception for state action.²⁶⁴ The court disagreed. The state-action rule did not apply when private actors supervised the anticompetitive activity.²⁶⁵

253 See *id.*; NLRB Gen. Counsel Memo, *supra* note 51, at 13 (finding Uber driver–partners to be independent contractors under federal labor law).

254 See Harris & Krueger, *supra* note 122, at 2 (advocating extending collective-bargaining rights to “dependent workers”). Cf. also *Dynamex*, 416 P.3d at 32.

255 See *Chamber of Commerce of U.S. v. Brown*, 554 U.S. 60, 65 (2008) (explaining that the NLRA preempts state and local laws regulating conduct also regulated by the NLRA).

256 See *Chamber of Commerce of the U.S. of Am. v. City of Seattle*, 890 F.3d 769, 775 (9th Cir. 2018) (citing Seattle Mun. Code § 6.310.735(H)(I)).

257 *Id.*

258 See *Lodge 76, Int’l Ass’n of Machinists & Aerospace Workers, AFL-CIO v. Wisconsin Employment Relations Comm’n*, 427 U.S. 132, 138 (1976) (explaining that the NLRA preempts states from regulating conduct Congress meant to leave unregulated); *San Diego Bldg. Trades Council, Millmen’s Union, Local 2020 v. Garmon*, 359 U.S. 236, 245 (1959) (“When an activity is arguably subject to s 7 or s 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted.”).

259 *City of Seattle*, 890 F.3d at 775.

260 15 U.S.C. § 1.

261 *City of Seattle*, 890 F.3d at 775.

262 The Ninth Circuit’s opinion hardly resolves the preemption question. In the past, the Supreme Court has proven willing to read NLRA preemption more widely than the circuit court. See, e.g., *Brown*, 554 U.S. at 75–76 (reversing Ninth Circuit to hold that California statute forbidding recipients of state funds to use the funds “to assist, promote, or deter union organizing” was preempted by the NLRA).

263 *City of Seattle*, 890 F.3d at 789–90.

264 *Id.* at 780–81.

265 *Id.* at 790.

“Platform holders will become responsible for providing an hourly minimum wage and overtime.”

And the city failed to show that state actors exercised any authority over the terms negotiated between the drivers and gig platforms.²⁶⁶ To the contrary, those terms would be controlled by private, non-state parties.²⁶⁷

Any similar law would face the same legal challenges. It is unlikely, then, that states can give gig workers the right to bargain collectively simply by changing their designation under state law. Instead, doing so will likely require a change in federal law—an unlikely result in the near term.²⁶⁸

Undermining the gig model. In survey after survey, gig workers report that the primary benefit of gig work is flexibility. They gravitate to gig work because it allows them to make their own schedules and choose their own projects.²⁶⁹ They like feeling like their own boss.²⁷⁰ And for many of them, this is not simply a preference: they may be students, parents, or workers with other full-time jobs.²⁷¹

Proponents of reclassification assume that gig work would retain these features even after workers become employees. The evidence, however, suggests the opposite.

Logically, platform holders would have to make some changes to their models. If gig workers become employees, they will be subject to state wage-and-hour laws.²⁷² Platform holders will become responsible for providing an hourly minimum wage and overtime.²⁷³ So to ensure they can continue making a profit, platform holders will have to take more control over when and where gig employees work.²⁷⁴ They will have to limit the time gig workers can spend working and schedule the workers at places and times where opportunities for revenue are greatest.²⁷⁵ Gig employees will therefore no longer control their own schedules or projects or where they work; they will become more like shift workers.²⁷⁶

²⁶⁶ Id.

²⁶⁷ Id.

²⁶⁸ See NLRB Gen. Counsel Memo, supra note 51, at 13 (finding drivers using Uber’s platform to be independent contractors under federal labor law).

²⁶⁹ See, e.g., Tito Boeri, et al., Social Protection for Independent Workers in the Digital Age, European Conference of Fondazione Rodolfo De Benedetti Pavia 45 (2018) (reporting that the most common reason workers choose gig work is to complement existing income sources, work from home, and have flexible hours).

²⁷⁰ Sherk, supra note 120, at 4.

²⁷¹ See, e.g., id. (reporting that 87% of Uber drivers work part time); Federal Reserve Report, supra note 44 (reporting that large numbers of gig workers are also enrolled in school); JPMorgan Report, supra note 45, at 24 (finding that most gig workers use gig work to supplement income from other sources).

²⁷² See, e.g., *Dynamex*, 416 P.3d at 35–36 (adopting ABC test under state wage orders); A.B. 5, § 1(e), 2019–20 Sess. (Cal. 2019) (explaining that one purpose of reclassifying workers is to provide them with rights under state wage-and-hour law).

²⁷³ Cf. NYC Int. No. 856 (requiring ride-sharing services to provide driver–partners with a minimum hourly wage).

²⁷⁴ See Sherk, supra note 120, at 7 (projecting that if gig companies are forced to convert their workers into employees, they will take more control over the workers’ schedules).

²⁷⁵ Id.

²⁷⁶ Id.

“The traditional trade-off in employment relationships has always been security for control. If states force platform holders to provide the security associated with employment, they should expect platform holders to exercise the corresponding control.”

Gig companies may also more strictly control access to their platforms. Today, one of the gig economy’s primary benefits is its low barrier to entry.²⁷⁷ Platform holders have an incentive to open their platforms to as many workers as possible; doing so improves utility and convenience for consumers by increasing their options. But once platform holders have to guarantee wages and other benefits, they will behave more like traditional employers and be more selective about whom they partner with. They will have to ensure that every new service provider can generate enough revenue to justify his or her wages and benefits, and that will make them more careful about offering work opportunities.”

We should not be surprised by this result. The traditional trade-off in employment relationships has always been security for control. If states force platform holders to provide the security associated with employment, they should expect platform holders to exercise the corresponding control.

And those controls will necessarily change the nature of gig work—often to the detriment of gig workers.²⁷⁹ Military spouses, transitioning service members, ex-offenders, students, parents, and moonlighters may no longer have access to the gig economy.²⁸⁰ Legislators will have closed an avenue for millions of Americans to supplement their incomes or sustain themselves when they are in between jobs. In that sense, they may actually be raising costs for the state, which may need to provide social services to people who no longer have alternate work opportunities. And they will, perhaps, have smothered a nascent industry in its cradle.²⁸¹

277 See Harris & Krueger, *supra* note 122, at 7 (observing that Uber drivers tend to be younger than taxi drivers and attributing that phenomenon in part to lower barriers of entry).

278 Cf. Dourado & Koopman, *supra* note 79 (noting that dynamism in the traditional labor market has declined for decades, and that gig companies are likely picking up the slack) (“Insofar as sharing-economy firms provide innovative and efficient ways to implement and manage those nontraditional arrangements, they are promoting economic inclusion for workers who now find fewer opportunities in the traditional labor market.”).

279 See Sherk, *supra* note 120, at 7.

280 *Id.*

281 *Id.* at 1.





Options for the Gig Economy

Before coming up with solutions in search of problems, lawmakers should first determine if gig work, namely, workers providing services through gig platforms, is the problem or if there are other ways to provide health insurance, retirement coverage, workers' compensation, and unemployment insurance to independent contractors and self-employed individuals. And to answer this question, more data is needed to determine if gig workers are engaging with marketplace platforms because they expect benefits from the work, or if they simply want supplemental or other income, which seems to be the case. Unfortunately, by looking to change classification standards, some cities and states are trying to provide benefits to gig workers who may not even want or need them and ignoring existing coverage options for independent contractors and self-employed individuals.

Exploring Coverage under Current Options

Before creating new programs, lawmakers should look at existing benefit options for gig workers who actually need coverage and explore why such individuals are not using these options. As noted in previous sections, a majority of Americans under age 65 receive their health care coverage from their employers. The ACA was an attempt to

expand coverage in the individual market through market reforms, premium subsidies for individuals and families with income below 400% of the federal poverty level, and Medicaid expansion at a state's option. Of course, the ACA is not without its problems, and as premiums have increased (combined with other factors), coverage in the individual market has begun to decrease.

Outside the ACA, the administration has pursued additional health care options. In 2018, final regulations were issued for Association Health Plans (AHPs), which would allow small businesses to band together and buy group coverage otherwise available only to large employers. The regulations also would allow health plans to include working business owners who employed no other people.²⁸²

Many Americans have access to retirement benefits through their employer. However, there also are a variety of savings vehicles available in the individual market, such as traditional Individual Retirement Accounts (IRAs), and Roth IRAs – both of which have tax advantages. Self-employed individuals may also establish a solo 401(k), which allows higher contribution amounts than an IRA.

²⁸² See Definition of Employer under Section 3(5) of ERISA—Association Health Plans, 83 Fed. Reg. 28912 (June 21, 2018). The rule has been challenged in court by a coalition of states.

“Lawmakers could allow self-employed individuals to buy into plans on the same terms offered to employers. Individuals would enjoy the savings the plans offer while preserving their independence from any single employer.”

In addition, in July 2019, the Department of Labor issued its final rule on Association Retirement Plans (ARPs), which would allow small businesses to band together to offer their employees retirement coverage. Like AHPs, ARPs also include working owners.

Expanding AHPs and ARPs further to allow self-employed gig workers who do not consider themselves to be business owners to participate in such plans could allow them to buy into plans on the same terms offered to employers. Individuals would enjoy the savings the plans offer while preserving their independence from any single employer. Gig workers could continue to use multiple platforms as frequently or infrequently as they wanted without putting their benefits at risk.²⁸³ However, such a change likely would require Congressional action.

Contributions by Platform Holders.

Of course, even if policymakers succeed in expanding access to association plans, affordability may still be a concern, as it is with the ACA Exchanges. In addition to the tax advantages of employer-provided coverage, employers also generally provide a portion of the premium for health care coverage, which is not includible as

income.²⁸⁴ Independent contractors, by contrast, pay the entire cost of coverage (unless eligible for an Exchange subsidy).²⁸⁵ However, self-employed individuals are allowed a deduction for the cost of coverage under Internal Revenue Code Section 162(l).

Some states are exploring the idea of allowing gig platforms to contribute to a worker’s retirement or health coverage without risking an employment relationship. For example, a recently introduced Washington State bill would require platform holders to contribute a percentage of the fees they collect from consumers to a nonprofit third-party benefit provider.²⁸⁶ This provider would guarantee qualifying workers health coverage, paid time off, and retirement benefits, as well as any other benefit it decides to offer.²⁸⁷ Workers could receive contributions from more than one platform holder and could carry their benefits with them from job to job.²⁸⁸ Before considering such an option, however, lawmakers should ensure that this does not undermine gig workers’ ability to earn supplemental income and force platform providers to pay for coverage that may not be needed.

²⁸³ See, Bruce Sarchet et al., Littler Mendelson, P.C., AB 5: The Great Employment Experiment—A Littler Workplace Policy Institute Report (2019), <https://www.littler.com/publication-press/publication/ab-5-great-california-employment-experiment-littler-workplace-policy> (arguing that expansion of association-based health and retirement plans would “help decouple access to these benefits from traditional employment and address one of the most common concerns about independent contracting”).

²⁸⁴ According to the Kaiser Family Foundation 2019 Employer Health Benefit Survey, in 2019, covered workers contributed 18% of premiums for single coverage and 30% for family coverage. See 2019 Employer Health Benefits Survey, Section 6, Published Sept. 25, 2019 available at <https://www.kff.org/report-section/ehbs-2019-section-6-worker-and-employer-contributions-for-premiums/>

²⁸⁵ See BLS Survey, *supra* note 62, at 8 (noting that workers in alternative work arrangements seldom receive health insurance through their jobs).

²⁸⁶ Universal Worker Protections Act, H.R. 1601 (2019–2020).

²⁸⁷ *Id.* § 29.

²⁸⁸ *Id.*

“If policymakers want to preserve gig workers’ flexibility while also expanding access to benefits, they should first determine if such expansion is needed, what current options are available, and whether new proposals may do more harm than good.”

Platform holders have been open to these ideas as well. Following the passage of AB 5 in California, a group of gig companies sponsored the Protect App-Based Drivers and Services Act, a ballot initiative designed to protect workers’ independence while also providing them with certain benefits.²⁸⁹ Among other things, the Act would require platform holders to provide health-care subsidies to Cover California similar to those received by employees.²⁹⁰ The level of subsidy would depend on how many hours the individual provided services through a particular platform.²⁹¹ Like the Washington bill, the Act would allow the individual to collect subsidies from multiple platform holders and carry benefits from job to job.²⁹²

Collectively, these types of proposals are being considered because it is perceived that gig workers may have less access to benefits than employees do. However, we lack data to support this contention. If policymakers want to preserve gig workers’ flexibility while also expanding access to benefits, they should first determine if such expansion is needed, what current options are available, and whether new proposals may do more harm than good.

Crafting Worker Protections to Fit the Gig Model

Beyond benefits, some jurisdictions are finding ways to protect gig workers without converting them into employees. To date, three general approaches have emerged: regulating the independent-contractor relationship, extending statutory protections to independent contractors, and setting up separate funds to protect independent contractors.

Regulating the Contract Relationship. New York City’s Freelancing Isn’t Free Act, discussed above, offers a good example of the first approach. While the Act explicitly disavows any intent to change independent contractors into employees, it requires companies contracting with individuals to follow certain guidelines.²⁹³ For example, the companies must pay the amounts they owe to independent contractors by a given date or face civil penalties.²⁹⁴ This type of approach—building protections into the contractual relationship to prevent abuse—preserves the gig model while addressing concerns about the imbalances in bargaining power between gig workers and platform holders.²⁹⁵

²⁸⁹ Protect App-Based Drivers and Services Act (2019), https://protectdriversandservices.com/wp-content/uploads/2019/10/Protect-App-Based-Drivers-Services-Act_Annotated.pdf?mod=article_inline; see also Sebastian Herrera, Uber, Lyft Unveil Ballot Initiative to Counter California Gig-Economy Law, Wall Street J. (Oct. 29, 2019), <https://www.wsj.com/articles/uber-lyft-unveil-ballot-initiative-to-counter-california-gig-economy-law-11572386291>

²⁹⁰ Id. § 7454(a)(1)–(2).

²⁹¹ Id.

²⁹² Id. § 7454(f).

²⁹³ See N.Y. City Adm. Code tit. 20, ch. 10.

²⁹⁴ Id.

²⁹⁵ Befort, supra note 128, at 419.

Extending Protections to Independent Contractors. In other states, lawmakers have simply extended existing worker protections outside the employment relationship. For example, Maryland recently tweaked its anti-discrimination laws to cover independent contractors.²⁹⁶ Few objections can be raised against requiring platform holders not to discriminate on the basis of protected categories like race or sex. Nothing about antidiscrimination laws upsets the gig model, and nothing about such laws interferes with worker flexibility.²⁹⁷

Setting up separate funds for independent contractors. Still other states are experimenting with workers' compensation funds to protect independent contractors. Here again, New York offers a model—the Black Car Fund,²⁹⁸ discussed above. States could go even further by allowing platform holders to contribute to such funds without turning their independent contractors into full-blown employees.²⁹⁹ Again, most platform holders avoid offering any type of coverage because they fear creating an employment relationship.³⁰⁰ By eliminating that risk, states would motivate gig companies to contribute voluntarily as a benefit of using their platforms.

Studying and Experimenting with the Gig Economy

The gig economy remains new and changing. Its largest company, Uber, came into existence only ten years ago. Much remains to be understood about the gig economy's potential and risks. So before burying the field in a blizzard of regulation, lawmakers should make sure they understand the lay of the land.

Today, however, some states are taking a ready-shoot-aim approach. They are trying to fit a twenty-first century phenomenon into a twentieth-century model. What they should be doing instead is studying the problem. While many states have launched "misclassification" studies,³⁰¹ the gig economy's problem is not misclassification. In fact, policy makers know so little about the gig economy that they don't know what its problems really are. Lawmakers need more comprehensive data.

296 H.B. 679, 2019 Reg. Sess. (Md. 2019).

297 See Harris & Krueger, *supra* note 122, at 5 ("[P]roviding protection against workplace discrimination would help ensure neutrality between employment relationships and independent worker relationships while providing more-expansive protection against discriminatory acts in the workplace and labor market.").

298 Who We Are, Black Car Fund, <http://www.nybcf.org/about> (last visited Oct. 21, 2019).

299 Cf. Boeri et al., *supra* note 269, at 59 (proposing the creation of "shared security accounts").

300 Sherk, *supra* note 120, at 7.

301 See, e.g., S.B. 493, 80th Leg. (Nev. 2019) (proposing to create a misclassification task force); HB 716, 2019 Sess. (Pa. 2019) (same).

The most obvious candidate to provide this data is the Bureau of Labor Statistics. The Bureau, however, cannot simply rerun its 2017 contingent-worker survey. For the reasons already discussed, that survey failed to capture large swaths of the gig workforce. By focusing on “primary” jobs, it left out all part-timers, moonlighters, and people looking only to supplement other sources of income.³⁰² Any future surveys must therefore include both workers who use digital platforms as their primary sources of income and those who use the platforms only occasionally. The data suggests that more gig workers fall into the latter category than the former.³⁰³ Such data would also likely indicate that gig workers are not seeking benefits from platform providers, but are instead seeking supplemental income.

By capturing the whole gig workforce, we may begin to understand the incentives driving people to gig work, as well as the economic headwinds they face. Only with the full picture will lawmakers and regulators be better equipped to tackle the problems that critics believe plague the gig economy. And only then can we create a regulatory regime made for the gig economy of the twenty-first century.

302 See Kasriel, *supra* note 67 (criticizing Bureau for crafting its survey to cover only primary jobs)

303 See, JPMorgan Report, *supra* note 45, at 24 (finding that most gig workers use gig work only to supplement other sources of income).

Appendix

Summary of State Independent Contracting Laws

State laws on independent contractor status are a confused morass and changing rapidly. Most states have different standards under different laws – wage and hour, workers’ compensation, unemployment, equal employment opportunity, workplace safety, and/or tax laws may each have different requirements. Some of these laws are “balancing tests,” which include a number of factors for courts to consider and determine independent contractor status considering the totality of the circumstances.

Other laws are “conjunctive tests,” with three or more required factors all of which must be met for a worker to be classified as an independent contractor. Based on a detailed survey of independent contractor standards in every state, below we roughly classify the tests under different state laws (as they existed as of the publication of this paper) into three types of balancing tests and three types of conjunctive tests.

Balancing Tests

The IRS 20-factor balancing test considers the following factors:

- 1. Instructions:** If the person for whom the services are performed has the right to require compliance with instructions, this indicates employee status.
- 2. Training:** Worker training (e.g., by requiring attendance at training sessions) indicates that the person for whom services are performed wants the services performed in a particular manner (which indicates employee status).
- 3. Integration:** : Integration of the worker’s services into the business operations of the person for whom services are performed is an indication of employee status.
- 4. Services rendered personally:** : If the services are required to be performed personally, this is an indication that the person for whom services are performed is interested in the methods used to accomplish the work (which indicates employee status).
- 5. Hiring, supervision, and paying assistants:** If the person for whom services are performed hires, supervises or pays assistants, this generally indicates employee status. However, if the worker hires and supervises others under a contract pursuant to which the worker agrees to provide material and labor and is only responsible for the result, this indicates independent contractor status.
- 6. Continuing relationship:** A continuing relationship between the worker and the person for whom the services are performed indicates employee status.
- 7. Set hours of work:** The establishment of set hours for the worker indicates employee status.

“State laws on independent contractor status are a confused morass and changing rapidly. Most states have different standards under different laws – wage and hour, workers’ compensation, unemployment, equal employment opportunity, workplace safety, and/or tax laws may each have different requirements.”

8. **Full time required:** If the worker must devote substantially full time to the business of the person for whom services are performed, this indicates employee status. An independent contractor is free to work when and for whom he or she chooses.
9. **Doing work on employer’s premises:** If the work is performed on the premises of the person for whom the services are performed, this indicates employee status, especially if the work could be done elsewhere.
10. **Order or sequence test:** If a worker must perform services in the order or sequence set by the person for whom services are performed, that shows the worker is not free to follow his or her own pattern of work, and indicates employee status.
11. **Oral or written reports:** A requirement that the worker submit regular reports indicates employee status.
12. **Payment by the hour, week, or month:** Payment by the hour, week, or month generally points to employment status; payment by the job or a commission indicates independent contractor status.
13. **Payment of business and/or traveling expenses.** If the person for whom the services are performed pays expenses, this indicates employee status. An employer, to control expenses, generally retains the right to direct the worker.
14. **Furnishing tools and materials:** The provision of significant tools and materials to the worker indicates employee status.
15. **Significant investment:** Investment in facilities used by the worker indicates independent contractor status.
16. **Realization of profit or loss:** A worker who can realize a profit or suffer a loss as a result of the services (in addition to profit or loss ordinarily realized by employees) is generally an independent contractor.
17. **Working for more than one firm at a time:** If a worker performs more than de minimis services for multiple firms at the same time, that generally indicates independent contractor status.
18. **Making service available to the general public:** If a worker makes his or her services available to the public on a regular and consistent basis, that indicates independent contractor status.
19. **Right to discharge:** The right to discharge a worker is a factor indicating that the worker is an employee.
20. **Right to terminate:** If a worker has the right to terminate the relationship with the person for whom services are performed at any time he or she wishes without incurring liability, that indicates employee status.

States Laws Adopting the IRS 20-Factor Test

Alabama	Unemployment, Tax
Arizona	Tax
Arkansas	All
Connecticut	Tax
Delaware	Tax
District of Columbia	Tax
Florida	Tax
Georgia	Tax
Hawaii	Tax
Idaho	Tax, Wage & Hour
Illinois	Tax
Indiana	Tax, Workers' Comp
Iowa	Tax
Maryland	Tax
Massachusetts	Tax
Michigan	Tax, Unemployment
Minnesota	Tax
Mississippi	Tax
Missouri	Tax, Unemployment
Nebraska	Tax
New York	Tax
North Carolina	Tax
Pennsylvania	Tax
Rhode Island	Tax, Unemployment
Tennessee	All except Workers' Comp
Texas	Unemployment, Wage & Hour
Utah	Tax
Virginia	Unemployment, Tax
West Virginia	Tax
Wisconsin	Tax

The FLSA economic reality test balances the following seven (7) factors:

1. The extent to which the services rendered are an integral part of the principal's business.
2. The permanency of the relationship.
3. The amount of the alleged contractor's investment in facilities and equipment.
4. The nature and degree of control by the principal.
5. The alleged contractor's opportunities for profit and loss.
6. The amount of initiative, judgment, or foresight in open market competition with others required for the success of the claimed independent contractor.
7. The degree of independent business organization and operation.

State Laws Adopting the FLSA Economic Reality Test

Alaska	Wage & Hour
District of Columbia	Wage & Hour
Florida	EEO, Wage & Hour
Illinois	MW & OT
Iowa	MW & OT
Louisiana	Unemployment
Michigan	EEO, Wage & Hour
Ohio	Wage & Hour
Pennsylvania	Wage & Hour
Tennessee	Workers' Compr
Washington	Wage & Ho

The federal common law “control” test (the “Darden test”) balances twelve (12) factors to determine the amount of control a company has over the independent contractor:

1. The contractor’s right to control when, where, and how the individual performs the job.
2. The skill required for the job.
3. The source of the instrumentalities and tools.
4. The location of work.
5. The duration of the relationship between the parties.
6. Whether the contractor has the right to assign additional projects to the individual.
7. The extent of the individual’s discretion over when and how long to work.
8. The method of payment.
9. The contractor’s role in hiring and paying assistants.
10. Whether the individual’s work is part of the regular business of the contractor..
11. Whether the contractor is in business..
12. The provision of employee benefits to the individual.

State Laws Adopting The Common Law “Control” Or Other Balancing Test

Alabama	Common Law
Alaska	Workplace Safety
Arizona	All except Tax
Connecticut	EEO, Workers’ Comp
Delaware –	EEO, Wage & Hour, Workers’ Comp
District of Columbia	EEO, Unemployment, Workers’ Comp
Florida	EEO, Unemployment
Hawaii	Workers’ Comp
Idaho	Workers’ Comp
Illinois	Workers’ Comp
Indiana	Wage Payment
Iowa	EEO, Unemployment, Wage Payment, Workers’ Comp
Kansas	EEO, Unemployment, Wage & Hour, Workers’ Comp
Kentucky	EEO, Unemployment, Wage & Hour, Workers’ Comp
Louisiana	EEO, Wage Payment
Maryland	Wage & Hour, Workers’ Comp
Massachusetts	EEO, Workers’ Comp

State Laws Adopting The Common Law “Control” Or Other Balancing Test Continued

Minnesota	EEO, Unemployment, Wage & Hour, Workers’ Compensation
Mississippi	Unemployment, Wage & Hour
Missouri	EEO, Wage & Hour, Workers’ Comp
Montana	All
Nebraska	EEO, MW & OT, Workers’ Comp
Nevada	Workers’ Comp
New Jersey	EEO, Tax, Workers’ Comp
New Mexico	Tax, Workers’ Comp
New York	EEO, Unemployment, Wage & Hour, Workers Comp
North Carolina	EEO, Unemployment, Wage & Hour, Worker’s Comp
North Dakota	EEO, Unemployment, Wage & Hour, Workers’ Comp
Ohio	EEO, Tax, Unemployment, Workers’ Comp
Oklahoma	All
Oregon	EEO, Wage & Hour
Pennsylvania	Workers’ Comp
Rhode Island	Wage & Hour, Workers’ Comp
South Carolina	All
South Dakota	EEO
Texas	EEO
Vermont	EEO
Virginia	Workers’ Comp
Washington	EEO, Workplace Safety
West Virginia	Wage & Hour, Workplace Safety
Wisconsin	EEO
Wyoming	EEO

Conjunctive Tests

The traditional state “ABC” test requires all three of the following:

- a. The individual has been and will continue to be free from control and direction in connection with the performance of such service, both under his contract for the performance of service and in fact;
- b. The service is performed either outside the usual course of the business for which the service is performed or is performed outside of all the places of business of the enterprise for which the service is performed; and
- c. The individual is customarily engaged in an independently established trade, occupation, or profession.

State Laws Adopting the Traditional ABC Test

Alaska	Unemployment
Colorado	All (A&C prongs only)
Connecticut	Wage & Hour, Unemployment
Delaware	Unemployment
Hawaii	Unemployment
Idaho	Unemployment (A&C prongs only)
Illinois	EEO, Unemployment, Wage Payment
Indiana	MW & OT (A&C prongs only), Unemployment
Kansas	Tax (A&C prongs only)
Maryland	Unemployment
Massachusetts	Unemployment
Nebraska	Unemployment, Wage Payment
New Hampshire	Unemployment
New Jersey	Unemployment, Wage & Hour
New Mexico	Unemployment
Pennsylvania	Unemployment (A&C prongs only)
South Dakota	Unemployment, Wage & Hour, Workers Comp (A&C only)
Utah	Unemployment (A&C prongs only)
Vermont	Unemployment, Tax, Wage & Hour
Washington	Unemployment (may also apply 6-part conjunctive test)
West Virginia	Unemployment

Two states have adopted a narrowed “ABC” test, which eliminates the option under the B prong for a company to classify a worker as independent contractor if they perform work outside of the company’s places of business:

- a. the person is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact;
- b. The person performs work that is outside the usual course of the hiring entity’s business;
- c. The person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

States Adopting the Narrow ABC Test

California	All
Massachusetts	Wage & Hour

Other state laws have adopted some other multi-factor conjunctive test.

State Laws Adopting Other Multi-Factor Conjunctive Test

Alaska	Workers’ Comp
Florida – Workers’ Comp	Workers’ Comp
Georgia – Unemployment, Workers’ Comp	Workers’ Comp
Louisiana – Workers’ Comp	Workers’ Comp
Maine – All	All
Michigan – Workers’ Comp	Workers’ Comp
Nevada – All (two alternative tests, including the traditional ABC test)	All
New Hampshire – Wage & Hour, Workers’ Comp	Workers’ Comp
Oregon – Unemployment, Tax, Workers’ Comp	Workers’ Comp
Texas – Workers’ Comp	Workers’ Comp
Utah – Workers’ Comp	Workers’ Comp
Vermont – Workers’ Comp	Workers’ Comp
Washington – Unemployment, Workers’ Comp	Unemployment, Workers’ Comp
West Virginia – Workers’ Comp	Workers’ Comp
Wisconsin – Unemployment, Worker’s Comp	Unemployment, Workers’ Comp
Wyoming – Unemployment, Workers’ Comp	Unemployment, Workers’ Comp



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