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Unbundling Employment: Flexible Benefits for a New Economy

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Unbundling Employment: Flexible Benefits for a New Economy

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Should workers for Uber, Lyft, Handy, TaskRabbit, and other "platforms" in the new economy be classified as "employees" or "independent contractors?" This Article argues that no one has convincingly answered this question because neither definition fits the way people work on these platforms. Labor regulations forged in the Great Depression—under which a worker is classified as either an employee, who is entitled to a statutory bundle of employment benefits, or an independent contractor, who cannot receive them—make little sense in the new economy, where one worker may perform discrete tasks on many platforms, seeking different benefits from each job. This Article introduces a solution to the worker-classification problem: unbundle the benefits of work. It develops the framework for a new category of "shared worker" that will encourage platforms to compete for labor by offering different sets of benefits to workers, and it argues that this flexible category will lead to more optimal working conditions in the sharing economy.

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Introduction

Our labor laws are over 80 years old.[2] While the way people work has drastically changed, laws have not. In today's economy, people use technology platforms like Handy, Uber, and AirBnB to offer untapped and under-utilized labor and capital to other users. This reflects a new way of working that does not fit with traditional understandings of employment and contracting. American labor law needs a new definition of worker that fits with the new ways people work. This article offer the "Shared Worker" as a new worker classification for the sharing economy.

Today's technology-enhanced economy has many names. Any term used reflects certain biases. The term "sharing economy" emphasizes one positive aspect of this new economy: allocating under-utilized assets to higher value uses. Other terms include the "1099 economy" to emphasize the struggle of independent contractors.[3] Some call it the "on-demand economy," which also pertains to labor issues, but emphasizes the economic benefit of matching supply and demand. Some use the term "gig economy" because it's a little double entendre: a gig refers to doing a job and has technological references. Whatever it is called, it is substantially distinguishable from the traditional economy.

The traditional economy is based on resource extraction. Literally, this means mining raw materials from the earth, smelting ore, and assembling products like cars. In contrast, the sharing economy is based on resource re-allocation. The resources that were extracted and sold in the traditional economy may be under-used. For example, consider a vacant home. This home is built from stuff extracted via the traditional economy. It was sold to someone who no longer has much use for it, but it's not a good candidate for resale due to tax or other reasons. This vacant home is an under-used asset. The sharing economy provides technological solutions to make better use of this asset. Thus, the sharing economy value chain moves both left to right

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[2] National Labor Relations Act of 1935, 29 U.S.C. 151-169.

[3] Shu-Yi Oei & Diane M. Ring, Can Sharing Be Taxed?, 93 Wash. U.L. Rev. 989, 1023 (2016) ("Some commentators have suggested that the worker classification categories of current law are unsatisfactory and that a new category of worker might be necessary to better capture economic relationships in the new '1099 economy.'")

and right to left, with a platform at the center.[4] For a visual illustration of the value chain in the sharing economy, see Figure 2 in Appendix A

In the future, we will probably see even more resource allocation taking place in the co-operative sharing economy that may not require a platform. In other words, blockchain technology can be used to enable decentralized resource allocation. The technology that powers cryptocurrency today may in the future be used to support peer-to-peer on-demand labor markets. This could eliminate many of the problems faced by contemporary sharing economy platforms that are surfaced in this article. This blockchain value chain is distinguishable from both the traditional value chain and the sharing economy value chain in that it resembles a web.[5]

But this Article will not speculate on the future. Rather, this Article provides a framework to resolve the legal tensions already occurring in the sharing economy today. Labor law defined during the Great Depression, when most Americans worked in the traditional economy, requires a rigid classification of workers as either "employees" or "independent contractors." Neither of these defintions fit how people work in the sharing economy. This Article offers a new third choice, the "Shared Worker," that allows the market for labor to determine the optimal mix of employment benefits for today's worker.

While this Article is not the first to argue that there should be a third category of workers for the sharing economy,[6] it is the first to contribute a flexible framework that could be implemented via well understood legal mechanisms. To do so, this Article will proceed with

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[4] DHL Reveals the Sharing Economy is Shaking Up Logistics, http://www.dpdhl.com/en/media_relations/press_releases/2017/dhl_reveals_sharing_economy_shaking_up_logistics.html

[5] "SK" Sanjeev Kumar Roy, Can Blockchain Technology UnBlock Supply Chain Management (Oct. 23, 2016), https://www.linkedin.com/pulse/can-blockchain-technology-unblock-supply-chain-management-roy

[6] See., e.g., Oei & Ring at 1023, citing Lauren Weber, What If There Were a New Type of Worker? Dependent Contractor, Wall St. J. (Jan. 28, 2015, 10:28 AM) ("A handful of legal scholars have argued that labor policy should expand to include a third category, one that extends some protections to those who take on project-based work but have little leverage or power in their work arrangements.") available at http://www.wsj.com/articles/what-if-there-were-a-new-type-of-worker-dependent-contractor-1422405831.

three Parts. Part I will frame today's legal tensions with a historical perspective, which provides some background as to how America's labor laws were instituted. Part II will demonstrate the problems in today's shifting legal landscape with an exploration of circuit splits in doctrinal law and discrepancies between how courts will actually rule on some of the fundamental issues of labor law. This requires a substantive discussion on two core doctrinal areas: the distinction between employee and independent contractor and the joint employment doctrine, both of which turn on the definition of "employment." Part III introduces a solution for re-defining employment that fits how people work in the 21st century. Work today is more flexible than ever, especially in the sharing economy, so the classification of "shared worker" developed in this Article provides for flexibility and choice of benefits and protections.

I. Background of a Changing Economy

Labor law developed during the Great Depression, when many Americans were out of work and half of non-farm workers toiled in loosely regulated factories.[7] The service economy of today looks very different from 1935 in terms of what jobs people do and how they do them. People's expectations about work and employment have also changed greatly.

The rise of the sharing economy comes from its promise and potential to give service economy workers more freedom and control while helping people leverage technology to maximize their labor productivity. Many scholars have debated whether the sharing economy will actually fulfill this promise.[8] This Article does not opine on that debate. Rather, this Article argues that this promise will be frustrated by the application of old rules to this new economy. To that end, this Part I explains how labor laws developed and introduces the sharing economy to highlight the contrast between then and now.

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[7] U.S. Bureau of the Census, Historical Statistics of the United States, Colonial Times to 1970, Part 1, Series D 127-1411 (Year: 1935; Total Non-Farm Workers: 27:035; Mining: 897; Construction: 912; Manufacturing: 9069; Transportation: 2786; Trade: 5431; Finance: 1335; Other Services: 3142; Government: 3481. Total Goods: 10,878; Total Services: 9908 (in thousands))

[8] E.g., Sofia Ranchordas, Does Sharing Mean Caring? Regulating Innovation in the Sharing Economy, 16 Minn. J. L., Sci. & Tech. 413 (2016).

A. Labor Law and the Great Depression

Labor law as it exists today was largely conceived and codified when half of the Americans worked in manufacturing. It is vital to understand the zeitgeist of the traditional economy and its most critical failure, the Great Depression, to understand the legislative history and political economy that gave rise to labor law.

The traditional economy is based on resource extraction, like means mining raw materials from the earth, smelting ore, and assembling products like cars.[9] In business terms, value in the traditional economy moves from left to right, as each step in the manufacturing process adds value to consumers.[10]

To understand the manufacturing value chain in the traditional economy, consider the manufacture of a car. First, coal is mined, to make steel. This steel has more value than the coal in the ground did. Second, that steel is transported to a car assembly-line factory, where it has more value as car door panel. Third, that door panel is incorporated with other "inputs" from other "upstream producers" such as glass windshields and electronic components to create a functional car. A whole car that can drive is worth more than the sum of its static parts. Fourth, the finished product (our new car) is transported from a centralized manufacturing facility in Indiana to retail auto dealers all over America, where it is more convenient for prospective buyers to test and acquire that car. Fifth, salespeople at those dealerships inform buyers about the car's features, help buyers secure financing, and teach them to use the technical feature on the vehicle. Sixth, independent aftermarket car maintaneance and repair services providers help keep that car running. Each step in this process, which can be visualized as a river upon which inputs flow from upsteam supply to downstream sales, adds value to the product. For a visual illustration of the value chain in the traditional economy, see Figure 1 in Appendix A.

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[9] See Part I, *supra*.

[10] MindTools, Porter's Value Chain, available at https://www.mindtools.com/pages/article/newSTR_66.htm

In 1929, only about 20% of gainfully employed Americans worked in the service sector and 22% in agriculture, forestry and fishing.[11] More than half of all gainfully employed American worked in or for factories, with jobs in extraction of minerals, manufacturing, construction, transportiation, and trade.[12] The unemployment rate was less than 1% of gainful workers.[13] Then the Great Depression began around October 29, 1929.[14] On this date, known as Black Tuesday, stock markets crashed. People made runs on bankrupt banks, and panic erupted in the streets.[15] Factories were unable to get loans and were forced to shut down operations.[16] As operations ceased, goods became scarcer, so prices rose.[17] Millions of Americans who worked in these factories were laid off. The unemployment rate spiked to over 22% in 1933 to 1935.[18] The masses of unemployed and under-employed Americans had less money to spend because they were not earning enough income.[19] This put additional pressure on the remaining manufacturers, who had to further decrease output in light of decreased demand.[20] The vicious cycle of scarcity and inflation disrupted the entire international economy,[21] and it changed the way people felt about work and the subsequent role of government.

Meanwhile, there were also thinkers coming up with new ideas about how to understand the economy. John Maynard Keynes argued that the cause of this depression was that there was insufficient spending

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[11] U.S. Bureau of the Census, Historical Statistics of the United States, Colonial Times to 1970, Part 1, Series D 62-76.
[12] Id.
[13] Id.
[14] Benjamin Roth, James Ledbetter, & Daniel B. Roth, The Great Depression (2009).
[15] Id.
[16] Randall E. Parker, The Economics of the Great Depression: A Twenty-First Century Look Back at the Economics of the Interwar Era (2007).
[17] Id.
[18] U.S. Bureau of the Census, Historical Statistics of the United States, Colonial Times to 1970, Part 1, Series D.
[19] Id.
[20] Id.
[21] Barry Eichengreen and Kevin H. O'Rourke, A Tale of Two Depressions (April 21, 2009) ("The great depression was a global phenomenon.") http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.520.3990&rep=rep1&type=pdf

power.[22] His solution to this crisis and the way to prevent similar ones in the future was that the government should have policies that make sure the average person has more money in their pocket.[23] In other words, Keynes believed the federal government could solve the insufficient spending power that led to the depression by the government itself spending more. He argued that government expenditures, especially on infrastructure, would solve this problem.[24]

In 1932, Franklin Delano Roosevelt ran against incumbent President Herbert Hoover on a much more orthodox platform.[25] FDR originally campaigned on a balanced budget platform.[26] Hoover was not that popular at the time, given that formerly working-class people were dependent on soup from Al Capone's soup kitchens. FDR won the 1932 presidential election in a landslide, but he changed his approach once in office. Even though he campaigned making conventional or orthodox balanced budget promises, he said in his 1936 campaign that it would have been a crime against the American people to have balanced our budget in 1933, 1934, or 1935.[27] Instead, FDR promises "a new deal with the American people."[28]

FDR's New Deal included many policies that were set in place to allow the government to have much more control over labor wages and even the pricing of goods and services. For example, the National Recovery Act authorized FDR, in the executive capacity, to regulate wages and

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[22] John Maynard Keynes, The General Theory of Employment, Interest, and Money (1936).
[23] Id.
[24] Id.
[25] FDR Library, A President's Evolving Approach to Fiscal Policy in Times of Crisis ("FDR began his 1932 campaign for the presidency espousing orthodox fiscal beliefs. He promised to balance the federal budget, which Herbert Hoover had been unable to do.") https://fdrlibrary.org/budget
[26] Id.
[27] Id. ("FDR answered in 1936 at a campaign speech in Pittsburgh: 'To balance our budget in 1933 or 1934 or 1935 would have been a crime against the American people. To do so we should either have had to make a capital levy that would have been confiscatory, or we should have had to set our face against human suffering with callous indifference. When Americans suffered, we refused to pass by on the other side. Humanity came first.'")
[28] FDR Library, Acceptance Speech to the 1932 Democratic Convention ("I pledge you, I pledge myself to a new deal for the American people.")

prices directly.[29] Such direct wage control by the federal government was unprecedented in American history.

These populist policies concerned many people, including economists. Even Keynes, the economist who argued that the government should spend on infrastructure to help America recover from the Great Depression, wrote a letter to the White House effectively saying that FDR had gone too far with these policies.[30] Regardless, FDR actually went further and created what some scholars have referred to as the most radical piece of legislation in American federal history.[31]

The National Labor Relations Act (NLRA) emerged amid constant protests from masses of American who weredemanding some sort of fundamental change in the way the government regulates work and the economy. Amid this zeitgeist, the NLRA established that the official policy of the United States was to promote labor unions.[32] The NLRA also created the National Labor Relations Board (NLRB), which was an entity that was designed to protect workers, primarily

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[29] National Industry Recovery Act of 1933, Pub.L. 73–67, 48 Stat. 195, enacted June 16, 1933, codified at 15 U.S.C. § 703).

[30] John Maynard Keynes, "From Keynes to Roosevelt: Our Recovery Plan Assayed," New York Times, December 31, 1933 ("I do not mean to impugn the social justice and social expediency of the redistribution of incomes aimed at by the NRA and by the various schemes for agricultural restriction. The latter, in particular, I should strongly support in principle. But too much emphasis on the remedial value of a higher price-level as an object in itself may lead to serious misapprehension of the part prices can play in the technique of recovery. The stimulation of output by increasing aggregate purchasing power is the right way to get prices up and not the other way around."), http://www.naomiklein.org/files/resources/pdfs/keynes-roosevelt-1933.pdf

[31] Karl E. Klare, Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941, 62 Minn. L. Rev. 265, 265 (1978) ("When passed, the National Labor Relations (Wagner) Act was perhaps the most radical piece of legislation ever enacted by the United States Congress.").

[32] National Labor Relations Board, The National Labor Relations Act ("Congress enacted the National Labor Relations Act ("NLRA") in 1935 to protect the rights of employees and employers, to encourage collective bargaining, and to curtail certain private sector labor and management practices, which can harm the general welfare of workers, businesses and the U.S. economy."), https://www.nlrb.gov/resources/national-labor-relations-act

by supporting unionization.[33] the NLRA was succeeded by the Fair Labor Standards Act (FLSA) of 1938.[34] The FLSA legislated many popular sentiments. For example, it established the 40-hour work week.[35] Now, employers must pay overtime if a worker works for more than 40 hours in one week. The contemporary concept of time-and-a-half pay comes from the FLSA.[36] Many scholars question whether these populist Depression-era laws are helpful to traditional workers today.[37] It is more doubtful that these policies provide optimal working conditions for workers in the sharing economy.

B. Emergence of the Sharing Economy

The concerns that stimulated the development of labor law are not concerns today. Thus, the laws designed to address these concerns do not adequately represent the interests of employees today. Most Americans are not deeply concerned about powerful employers in one-factory towns because most Americans do not work in such factories or live in such towns anymore. Looking back with 20-20 hindsight, the demand for a 40-hour workweek seems out of place. Today people are no longer demanding a 40-hour work week: they are looking for a four-hour workweek![38] Nowadays, people hope to use the Internet to leverage their labor productivity to earn more while working less. Americans' expectations about work have changed as the reality of work has changed. The laws have not.

Labor conditions have changed radically since the labor laws were enacted. In 1935, when labor laws were emerging, more than 50 percent of America's labor force was involved in the production of goods.[39] Over 90% of these workers labored in factories that

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[33] NLRA.
[34] 29 U.S.C. 203.
[35] Id.
[36] Id.
[37] Julius Getman, The National Labor Relations Act: What Went Wrong; Can We Fix It?, 45 B.C. L. Rev. 125, 126 (2003) ("The key provisions that led to such great hopes by unions and their supporters remain in force, but after many years of working with the NLRA, optimism has given way to cynicism and despair about the law's ability to protect workers and enhance collective bargaining.")
[38] Timothy Ferriss, The 4-Hour Workweek (2007 Random House Publishers).
[39] U.S. Bureau of the Census, Historical Statistics of the United States, Colonial Times to 1970, Part 1, Series D 127-1411 (Year: 1935; Total Non-

manufactured things.[40] Work meant making stuff, often on an assembly line in a centralized location like a factory. But that is not how most people work today. In 2013, 83% of non-farm Americans worked in the service sector.[41] In January 2018, only 8.8M of 326M (2.7%) Americas labored in manufacturing,[42] whereas 9.1M out of 127M (7.2%) who worked in manufacturing in 1935.[43] In other terms, 63% fewer American workers labor in manufacturing now than when the labor laws were enacted.

Whereas half of non-farm workers labored in manufacturing in the 1930s,[44] only 17% of jobs today are directly related to resource extraction.[45] This is partially because resource extraction has become much more efficient. Automation further allows the economy to allocate labor to more productive tasks.

More and more Americans are participating in an emerging economy that is not based on resourced extraction but upon resource allocation. That asset can be human labor or capital. One might have a car sitting in the garage or an apartment available for rent. In a traditional economy, such an asset can be sold or leased, but this is not always efficient. Moreover, it is difficult in the traditional economy to re-purpose under-used labor.

Today's technology-enhanced economy has many names. Any term used reflects certain biases. The term "sharing economy" emphasizes one positive aspect of this new economy: allocating under-utilized assets to higher value uses. Other terms include the "1099 economy"

Farm Workers: 27:035; Mining: 897; Construction: 912; Manufacturing: 9069; Transportation: 2786; Trade: 5431; Finance: 1335; Other Services: 3142; Government: 3481. Total Goods: 10,878; Total Services: 9908 (in thousands)).

[40] Id.

[41] Giuseppe Berlingieri, Outsourcing and the shift from manufacturing to services, http://cep.lse.ac.uk/pubs/download/cp413.pdf

[42] Bureau of Labor Statistics, NAICS 31-33, https://www.bls.gov/iag/tgs/iag31-33.htm

[43] U.S. Bureau of the Census, Historical Statistics of the United States, Colonial Times to 1970, Part 1, Series D 127-1411.

[44] U.S. Bureau of the Census, Historical Statistics of the United States, Colonial Times to 1970, Part 1, Series D 127-1411.

[45] Giuseppe Berlingieri, Outsourcing and the shift from manufacturing to services, http://cep.lse.ac.uk/pubs/download/cp413.pdf

to emphasize the struggle of independent contractors.[46] Some call it the "on-demand economy," which also pertains to labor issues, but emphasizes the economic benefit of matching supply and demand. Some use the term "gig economy" because it's a little double entendre: a gig refers to doing a job and has technological references. Whatever it is called, it is substantially distinguishable from the traditional economy.

The sharing economy is based on resource re-allocation. The resources that were extracted and sold in the traditional economy may be under-used. For example, consider a vacant home. This home is built from stuff extracted via the traditional economy. It was sold to someone who no longer has much use for it, but it's not a good candidate for resale due to tax or other reasons. This vacant home is an under-used asset. The sharing economy provides technological solutions to make better use of this asset. Thus, the sharing economy value chain moves both left to right and right to left, with a platform at the center.[47] For a visual illustration of the value chain in the sharing economy, see Figure 2 in Appendix A

The sharing economy provides a means to make better use of the assets and labor that cannot be put to work in the traditional economy. Sharing economy companies like Airbnb, TaskRabbit, Uber, and Lyft allow people who want to offer up some of their under-used labor or under-used assets to do so on a technological platform. On this platform, another person who wants to take advantage of those resources can find them. Note that we still require the traditional economy to initially create these resources, but now we have a new way of utilizing them, thanks to a centralized technological platform. Unfortunately, these new platforms are subject to old laws, which constrain their business models in unintended and undesirable ways.

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[46] Shu-Yi Oei & Diane M. Ring, Can Sharing Be Taxed?, 93 Wash. U.L. Rev. 989, 1023 (2016) ("Some commentators have suggested that the worker classification categories of current law are unsatisfactory and that a new category of worker might be necessary to better capture economic relationships in the new '1099 economy.'")

[47] DHL Reveals the Sharing Economy is Shaking Up Logistics, http://www.dpdhl.com/en/media_relations/press_releases/2017/dhl_reveals_sharing_economy_shaking_up_logistics.html

II. Problems with New Work and Old Laws

Modern labor law mainly concerns "employees," so the definition of employee is fundamental to understanding modern labor law. Workers can be classified as either employees or independent contractors: there are only two options, and neither fits the sharing economy model of work. Some have argued that the use of the independent contractor labor is being abused by employers who want to avoid providing benefits.[48] Others point out that sharing economy business models cannot function if labor must receive all the protections and benefits that are needed by steel workers in one-factory towns.[49] As a result, some courts and legislators have attempted to eviscerate the utility of independent contractors.[50] Recent court decisions that have expanded the joint employer doctrine could render the independent contractor label meaningless.[51] This Article argues that the tension is not resolvable in today's economy because it emerges from outdated ideas about work and workers. Instead, a new definition of "shared worker" is necessary to resolve the tension. But first, this Article highlights contemporary problems courts have in trying to apply the distinction between employee and independent contractors to the new ways people work in the sharing economy. This reveals that the tensions between old law and new work cannot be resolved without creating a novel category of worker.

A. Employee versus Independent Contractor

The fundamental tension between the labor laws and the sharing economy comes up doctrinally in the legal distinction between an employee and an independent contractor. These two distinct categories of workers emerge out of necessity from the NLRA because many of the protections afforded by the NLRA only flow to employees.

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[48] See, e.g., Sherrod Brown, Working Too Hard for Too Little: A Plan for Restoring the Value of Work in America (March 2017), https://www.brown.senate.gov/download/working-too-hard-for-too-little

[49] William Boal, Testing for Employer Monopsony in Turn-of-the-Century Coal Mining, Rand Journal (1995).

[50] See Part II.B *supra*.

[51] Id.

NLRA defines employment and therefore "employee" extremely broadly.[52] The legislative history indicates that the goal of the NLRA was to protect anyone who might be an employee in fact.[53] The IRS today has a narrower definition which is also quite relevant in legal analysis even outside of the domain of tax.[54]

Unfortunately, the IRS definition of employee is quite a bit harder to understand and apply than the NLRA definition because the IRS calls for a 20-factor test plus a case-by-case basis analysis that requires arbiters to consider all the facts and circumstances.[55] The Supreme Court has said that there can be no one test to determine employment.[56] The task of classifying workers as employees is thus quite difficult because there are no clear and consistent tests promulgated by legislature, agencies, or courts. This task becomes even harder and more uncertain when we try to apply 80-year-old case

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[52] Section 2 of the NLRA ("The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.")

[53] National Labor Relations Board, Legislative History of the National Labor Relations Act of 1935 (1949).

[54] IRS, Independent Contractor (Self-Employed) or Employee? https://www.irs.gov/businesses/small-businesses-self-employed/independent-contractor-self-employed-or-employee

[55] Independent Contractors IRS 20-Factor Test, https://www.regent.edu/admin/busoff/pdf/20-questions1099test.pdf

[56] United States v. Silk, 331 U.S. 704, 713, 67 S. Ct. 1463, 1468, 91 L. Ed. 1757 (1947) ("The problem of differentiating between employee and an independent contractor or between an agent and an independent contractor has given difficulty through the years before social legislation multiplied its importance. When the matter arose in the administration of the National Labor Relations Act, 29 U.S.C.A. s 151 et seq., we pointed out that the legal standards to fix responsibility for acts of servants, employees or agents had not been reduced to such certainty that it could be said there was 'some simple, uniform and easily applicable test.'")

law, statute, agency opinions, and legislative history to the new sharing economy.

While the NLRA defines employee one way, the NLRB takes another position, the IRS offers a third (indeed, the IRS has taken different and even contradictory positions), and appellate courts in different circuits offer a fourth, fifth, sixth, and seventh approach, while the Supreme Court held only that there cannot be any one test. In other words, attempting to define "employee" under American law in the sharing economy is an impossible task. Regardless, it is not enough to say the law is a mess. It is better to try and sort it out. The 20-factor IRS test is probably the best starting point to do that, as it contains most if not all of the factors that courts and agencies might consider when determining whether a worker is an employee.

Since this Article invokes the IRS test, it will also use tax language to explain the consequences of the result of this test. If the IRS classification of a worker is an employee, that person receives an IRS Form W-2.[57] On the other hand, if a worker is an "independent contractor," such person receives an IRS Form 1099.[58] This is why people refer to employee versus independent contractor analysis alternatively as the W2/1099 discussion. To round out our tax analysis, a partner in a partnership or a member of a flow-through LLC receives an IRS Schedule K-1 (Form 1065).[59] Therefore, W-2, 1099, and K-1 are the three main tax classifications for workers, but K-1 partners are generally not pertinent to the matter at hand of categorizing workers in the sharing economy.

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[57] IRS, About Form W-2, Wage and Tax Statement ("Every employer engaged in a trade or business who pays remuneration, including noncash payments of $600 or more for the year (all amounts if any income, social security, or Medicare tax was withheld) for services performed by an employee must file a Form W-2 for each employee"), https://www.irs.gov/forms-pubs/about-form-w2

[58] IRS, About Form 1099-MISC ("File Form 1099-MISC for each person to whom you have paid during the year…[for] services performed by someone who is not your employee…"), https://www.irs.gov/forms-pubs/about-form-1099-misc-miscellaneous-income

[59] IRS, About Schedule K-1 (Form 1065), Partner's Share of Income, Deductions, Credits, etc. ("The partnership files a copy of this schedule with the IRS to report your share of the partnership's income, deductions, credits, etc."), https://www.irs.gov/forms-pubs/about-schedule-k1-form-1065

How a worker is classified has implications on how the worker gets paid. This is discussed in detail below, but for the present purpose of motivating what may otherwise seem like a dry overview of a 20-factor test, it bears mentioning that employees receive many benefits like time-and-a-half overtime, Family Medical Leave Act protections, and the right to unionize.[60] But 1099 independent contractors do not receive these benefits. The recent spate of lawsuits from workers seeking re-classification from 1099 independent contractors to W-2 employees comes from their desire to get these benefits.[61]

The IRS's 20-factor test for defining "employee" is best understood as a signpost for what all the facts and circumstances might be when a court or agency evaluates the status of a workers. It is not a strict test per se. The 20 factors involve: (1) Instructions; (2) Training; (3) Integration; (4) Personal services; (5) Assistants; (6) Continuing relationship; (7) Set hours of work; (8) Full time required; (9) Employer's premises; (10) Order or sequence test; (11) Oral or written reports; (12) Payment terms; (13) Payment of expenses; (14) Tools and materials; (15) Significant investment; (16) Profit or loss; (17)Working for multiple firms; (18) Services available to public; (19) Right to discharge; and (20) Right to terminate.

Addressing each of these factors in turn:

(1) "Instructions" asks the question: does the person who is working receive instructions directly from the purported employer? Or do they have some flexibility about what they do on a day to day basis?
(2) "Training" involves answering the question: does the purported employer provide training sessions?
(3) Integration asks how integral the work is? Is it a plug and play operation? Could you have one person doing the carpentry today and a different person doing the carpentry tomorrow, with a similar result? Or is this something more

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[60] National Labor Relations Board, Employee Rights, https://www.nlrb.gov/rights-we-protect/employee-rights

[61] Jessica Lee, Unionize Uber? Legal fight over Seattle drivers draws national attention, The Seattle Times (March 29, 2017), https://www.seattletimes.com/seattle-news/transportation/unionize-uber-legal-fight-over-seattle-drivers-draws-national-attention/

fundamental? You cannot just swap out the CEO of Coca-Cola and expect the company to run well. So that has to do with the integration.

(4) Personal service means the workers is required to perform the work personally and cannot substitute someone else to do the work, which is a hallmark of employment.

(5) Assistants means the worker has the ability to hire, supervise, and pay other assistants to the employer, which is evidentiary of employment.

(6) Continuing relationships mean that someone who shows up at work every day is probably an employee under that factor. Someone who calls in and says, "Are you looking for me to come in tomorrow?" is more likely an independent contractor.

(7) Set hours of work means an employer controls when work is performed. An independent contract has more freedom as to when the work is completed.

(8) Full time required is an important factor. Some who is working 40 hours a week, 9 to 5, for a single firm is probably an employee.

(9) "Employer's premises" is another important factor. However, as employers and even the federal government promotes hoteling and the ability to work remotely, this factor seems less relevant.

(10) Order or sequence relates to how much control the putative employer has over the work. An independent contract generally has more control about deciding the process of work than an employee does.

(11) Whether or not an employer, a purported employer, will ask for regular status reports call in the office: "What's going on this week?" Someone who's going to be called into the office weekly and talked to is more likely an employee.

(12) How often they're paid: if you're being paid on an invoice basis, you know, terms, 14 days, you're more likely an independent contractor; if you receive a paycheck every second and fourth Friday of the month you're more likely an employee.

(13) Generally, employees get reimbursed for business and travel expenses, although that practice has been diminishing in certain areas. Still, independent contractors are generally not reimbursed for their business and traveling expenses.

(14) Independent contractors generally bring their own tools and

materials to the job. A worker who has a laptop provided? by a putative employer is evidence that indicates that the worker is probably an employee. Likewise, a construction worker using their putative employer's reciprocating saw, as opposed to the one she or he brought to work that day, evidences employment. Wearing a hard hat or a t-shirt that says the name of the construction company or staffing company also evidences employment.

(15) Whether or not a worker made a significant investment to perform the work is related to the next factor, sharing in the risk of loss, as an investment can result in a loss. Doing so makes a worker seem more like an independent contractor. An employee is not expected to bear the risk of loss for an operation.

(16) Realizing a profit or loss is similar to the risk of loss concept. A worker who realizes she or he is in a position to potentially lose money, is more likely to be an independent contractor.

(17) Working for just one company, especially one that requires exclusive work for that company, evidences employment. On the other hand, a worker who works for three different people will have a hard time saying they're all employers, although the joint employment doctrine is discussed below.

(18) Providing services to the general public, such as a lawyer who "hangs a shingle," where anyone who comes to that office can get legal advice, as opposed to be solely being an adviser to a certain corporation, looks more like an independent contractor, whereas a person who works for just one company is more likely an employee of that one company.

(19) If the putative employer has the right to fire a worker, or seems to have the right to terminate, that's another factor generally evidencing employment.

(20) Similarly, a worker who has the right to terminate the relationship at any time, without incurring any liability, means you are more likely to be an employee because we know employees cannot be forced to work; whereas an independent contractor would breach a contract if they fail to complete a project.

In addition to these 20 factors, the IRS will look generally at behavioral control, financial control, and the overall relationship between the parties. Some of the twenty factors are no longer as

relevant as they once were in our economy. Others are more relevant than they ever have been, and they are all based on individual circumstances.

Generally, litigation that relates to these factors is initiated by an independent contractor who wants to be reclassified as an employee. Such a worker wants to be seen as an employee under this test to receive certain benefits. It is better for most people to be an employee than an independent contractor. While independent contractors gain flexibility, an employee is protected by a 40-hour, 5-day workweek with time-and-a-half pay for overtime (unless exempt). Other benefits required by law include workers compensation, part time disability, and FMLA. Employees usually get health, dental, and vision insurance from employers, whereas independent contractors have to pay for that on their own. Employees are usually included in a retirement plan, often with an employer's matching contribution, on a 401k, or a 403b. Employee pensions are less common, but they were quite common. Life insurance is not required by law, but employees often receive it as part of their package, plus paid vacation time. Those employee rights and benefits are reasons why a person might be happier to be categorized as an employee as opposed to an independent contractor.

On the other hand, there are some strings that attach to being an employee. One of those is the employer can demand exclusive work. An employee cannot simultaneously work for a competitor and could be restricted from doing any other work. The employer can demand an employee show up for work at 9 am and stay until 5 pm. The employer will almost always retain all the intellectual property that worker generates. This way of working does not work for an increasing number of workers in the modern economy.

Those strings also pull in the other direction regarding tort liability. The doctrine of *respondeat superior* (literally, "let the boss answer") holds a principal vicariously liable for torts committed by their agents.[62] Courts generally apply either the benefits test or the characteristics test to determine when an employer is vicariously

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[62] Restatement (Third) Of Agency § 2.04 (2006) ("An employer is subject to liability for torts committed by employees while acting within the scope of their employment.")

liable for the torts of an employee.[63] But *respondeat superior* does not apply to independent contractors. Of course, under common law, there is yet another test for whether a putative employee is an independent contractor for the purposes of determining liability. The Third Restatement of Torts proffers an eleven-part test that is similar to but not exactly the same as the IRS test described above [cite]. This further illustrates the rampant confusion about the distinction between employee and independent contractor. The schisms in law around this distinction make it extremely difficult to avoid litigation and liability for misclassification. This presents a virtually insurmountable challenge to sharing economy companies, as there is no precedent for the way they hire and work.

Uber will be exposed to less liability if their drives are considered independent contractors rather than employees. Although the laws of agency and the laws of torts are not exactly aligned with the laws of employment, generally similar factors are applied to determine whether tort liability will impute to a principal. Companies who hire independent contractors have fewer responsibilities in general: companies do not have to withhold independent contractors' taxes, they are generally not responsible for their torts and contracts, they are generally not liable for illegal conduct like making kickbacks or bribes, there is no obligation to pay for unemployment insurance, and other benefits. Although, as we saw with the fiascoes that happened to Uber in 2017, there are definitely some reputational liabilities that cannot be avoided, and there are many reasons why Uber and similar platforms would prefer its workers to be classified as independent contractors, but the law cannot give sharing economy platforms like Uber certainty about when a worker will be classified as an independent contractor.

Employers who classify employees wrongly as independent contractors are subject to a number of penalties.[64] In 2011, the United States Department of Labor and the IRS signed a Memorandum of Understanding to work together to try to scourge out misclassification

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of employees.[65] Many states also ferret out misclassification.[66] The penalties attached depend on how egregious the misclassification was.

There are three categories of worker misclassification: unintentional misclassification, intentional misclassification, and fraudulent misclassification. Fraudulently misclassifying might subject an employer to criminal penalties up to $1000 dollars per misclassified worker and a $50 dollar fine per year. Taxes that should have been withheld are owed with interest plus fines.

The Department of Labor launched their misclassification initiative in 2010.[67] In 2014, the Department of Labor awarded $10.2M to 19 state attorney general offices to assist in this initiative.[68] These states created an interagency task force and there are now 37 states that also have state laws against worker misclassification.[69] Misclassification can result in paying money to the federal government, the state government, plus fines, and there are a number of agencies that have authority to come after employers.

But it is not that easy to apply the IRS 20-factor test dispositively to sharing economy jobs. Consider the sharing economy platform TaskRabbit. TaskRabbit advertises handymen for small tasks.[70] For example, someone might like to shop at IKEA, but hates putting the furniture together. Another person might enjoy putting together IKEA

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[65] Department of Labor, Labor secretary, IRS commissioner sign memorandum of understanding to improve agencies' coordination on employee misclassification compliance and education (Sept. 19, 2011), https://www.dol.gov/opa/media/press/whd/WHD20111373.htm

[66] Id. ("11 state agency leaders also sign, agree to memorandums of understanding")

[67] Department of Labor, Improving Workplace Conditions through Strategic Enforcement: A Report to the Wage and Hour Division (May 2010), https://www.dol.gov/whd/resources/strategicEnforcement.pdf

[68] Department of Labor, $10.2M Awarded to Fund Worker Misclassification Detection, Enforcement Activities in 19 State Unemployment Insurance Programs (August 17, 2014), https://www.dol.gov/newsroom/releases/eta/eta20141708

[69] Venable LLP, Focus on Misclassification – Are Your Workers "Employees" or "Independent Contractors?" (March 2011), https://www.venable.com/files/Publication/435f765d-a52e-4786-b22e-f45225aa10d0/Presentation/PublicationAttachment/5f52f7d2-b875-4871-9e96-fb0f101b3a52/EBEC_Alert_3-11.pdf

[70] TaskRabbit, How It Works, https://www.taskrabbit.com/how-it-works

furniture. One person, a "tasker," goes on TaskRabbit and offers their free time to put together IKEA furniture for $28 an hour. Another person goes on TaskRabbit and decides that paying $28 dollars an hour to avoid putting together IKEA furniture is a good deal. TaskRabbit is a platform allowing these people to match. One tasker named John has a 98% approval rating. He charges $28 per hour. He has a five-out-of-five start rating from TaskRabbit. Is he an employee of TaskRabbit or is he an independent contractor to TaskRabbit?

Generally, John looks like a contractor. He can refuse the job: he does not have to do that work. TaskRabbit is not going to tell him how to put that IKEA furniture together. But John receives instructions from TaskRabbit on where and when to go to do the job. It is hard to say whether he is integrated with TaskRabbit services: he has earned "elite" status on that platform, and he can charge more per hour because he is elite. Other factors are even more difficult to apply: is John offering personal services to the public when he only offers IKEA building services through the TaskRabbit web site? Is this a continuing relationship where John has 49 reviews that enable him to charge more than an average tasker? Does he incur a risk of loss where he has to bring his own tools and drive his own car to the job site?

The analysis of whether drivers for Uber, the ride-sharing service, are employees or independent contractors is even more complicated than TaskRabbit. Uber does not tell you to work eight hours per day or at any particular time, but that platform offers a lot of incentives to get drivers on the road. They offer certain bonuses after four hours and extra pay for working during certain time periods.[71] A driver can refuse to make any pick up, but that will reduce a diminution of the driver's score, which would make it hard to get additional rides, and eventually get that driver kicked off the platform entirely. Does that constitute the ability of Uber to [constructively] discharge drivers? Drivers generally bring their own cars, but Uber now offers a driver

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[71] Uber, How Surge Pricing Works, https://www.uber.com/drive/partner-app/how-surge-works/

car leasing program. Uber can deactivate drivers, and Uber must activate drivers to participate in the first place.[72]

Uber leasing is particularly problematic. A driver who is driving an Uber car, and not one's own personal vehicle, starts to look a little different than a typical sharing-economy participant. The sharing economy reallocates underutilized assets, whereas the traditional economy requires obtaining new assets to offer a service. Using the car sitting in the driveway getting rusty because it is not driven enough to offer ride sharing is a little different than deciding to lease or purchase an automobile to offer rides on Uber.

Litigation on W-2/1099 issues is heating up. One attorney in particular is leading the charge against what she pejoratively calls the "1099 economy." Liss-Riordan negotiated an $100M settlement from her employee characterization suit against Uber, although a federal judge later ruled that deal to be unfair.[73] Her firm sued GrubHub.[74] GrubHub is a food delivery service that matches up three parts of a network: hungry people who want to eat, restaurants who want to sell food, and people who want to drive that food to hungry people.[75] Her firm sued Amazon representing its "flex" delivery drivers who want to be reclassified as employees.[76] In all these cases, the analysis under

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[72] Uber Forum, How to Activate Your Uber Driver Account, http://www.uberforum.com/threads/how-to-activate-your-uber-driver-account.288/

[73] Michael Liedtke, Judge Rejects $100 Settlement in Key Case with Uber Drivers, Associated Press (Aug. 19, 2016), https://www.apnews.com/4e281dacc8ec4505901c3961f5892b73/Judge-rejects-$100M-settlement-in-key-case-with-Uber-drivers

[74] Jon Steingart, GrubHub Wage Case May See New Delivery: Worker Status Test Redo, BNA (Jan. 25, 2018) ("Liss-Riordan is the lawyer for former GrubHub food delivery driver Raef Lawson, who says the online food ordering company incorrectly classified him as an independent contractor and that it owes him overtime and reimbursement for business expenses he'd be entitled to under state law if he had been classified correctly as an employee."), https://www.bna.com/grubhub-wage-case-n73014474636/

[75] GrubHub, About Us, https://about.grubhub.com/about-us/overview/default.aspx

[76] Angel Gonzalez, Amazon delivery drivers sue company over job status, The Seattle Times (Oct. 5, 2016) ("The complaint, filed late Tuesday in U.S. District Court in Seattle, was brought forth by Shannon Liss-Riordan, the attorney who led two class-action lawsuits by discontented drivers against

traditional tests is complicated and inconclusive. Amazon flex drivers do not work specified hours, but they do have to meet many standards imposed by Amazon. A flex driver wears a safety vest that says Amazon, drives a white van provided by Amazon with a sticker that says Amazon on it, and delivers Amazon packages to specified locations. Those are factors that counsel toward flex drivers having employee status. On the other hand, flex drivers do not expect a continuing relationship with Amazon, they can work for multiple people at once, and they can select whether or not to work on any given day.

The NLRB has been involved in these lawsuits too. Notably, the NLRB sued Handy Technologies.[77] Handy provides a platform for home cleaning services.[78] While the market dictates the upper limit of prices for services on Handy, Handy never pays less than $18 an hour. They set a minimum and then they let the market adjust from there. Handy generally engages with low-skilled, low-income, low-education workers, and part of its corporate mission is to help these people climb the economic ladder. To do this, Handy encouraged its workers to get bank accounts.[79] The NLRB claimed this was providing training, which aided their case for misclassification against Handy.[80] Most scholars probably recognize that having a bank account is better than putting the money under your mattress: workers can be paid more quickly, it helps people budget and understand the assets that they have, it builds credit, it's safer, etc. Encouraging workers to do this, plus offering them job training, language skills, and other opportunities are factors that led the NLRB to reclassify Handy workers as employers. Handy responded by offering fewer services and less training to workers to avoid this risk of reclassification.[81] The IRS, the DOL, the NLRB, state attorneys general, and plaintiff's

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Uber."), https://www.seattletimes.com/business/amazon/amazon-delivery-drivers-sue-company-over-job-status/

[77] Josh Eidelson, U.S. Labor Board Complaint Says On-Demand Cleaners Are Employees, Bloomberg (Aug. 31, 2017), https://www.bloomberg.com/news/articles/2017-08-31/u-s-labor-board-complaint-says-on-demand-cleaners-are-employees

[78] Handy, About Us, https://www.handy.com/about

[79] Interview with Oisin Hanrahan, on file with the author.

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[81] Interview with Oisin Hanrahan, on file with the author.

attorneys are also fighting for reclassification of workers in the sharing economy.

Sharing economy firms argue that their business model does not work if these workers are employees and not independent contractors. And there are many workers who depend on these firms. There are workers in the sharing economy who drive for Uber and Lyft, perform tasks for TaskRabbit, and clean for Handy. Such people cobbled together a full-time employment lifestyle for themselves out of working through three or four of these companies. What will happen to them if there is reclassification? Will they be able to have the profits they enjoy? On the other hand, what about people that are driving for Uber 60 hours a week, are totally dependent on that firm for sustenance, and might not have recourse if they are deactivated?

The problem with using the NLRA to protect sharing economy workers is that the sharing economy does not look like the traditional economy that existed when these laws were created. In the traditional economy, people were mining coal out of the ground, using that to produce energy, using that energy to produce glass, and selling that glass. The traditional value chain moves left to right. In the sharing economy there is a value chain that moves in both directions toward a platform in the middle. Work, employment, productivity, and value creation are fundamentally different now.

B. The Joint Employment Doctrine

The joint employment doctrine, which was developed in the 1930s to prevent employers from circumventing the NLRA,[82] is likewise being stretched and distorted to cover the innovative ways people work. Analysis under this doctrine is like the analysis for classifying a worker as an employee or an independent contractor—a worker must first and foremost be an employee in order for joint employment to attach, so it is susceptible to all the problems with applying the worker classification that were described in the prior section. Additionally, the traditional analysis of joint employment is also challenged by the change in how people work. Instead of having jobs, many people do jobs, and this makes joint employment analysis even harder.

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[82] NLRA Bulletin No. 18 (1939)

The joint employment doctrine is designed to prevent an employer from chiseling an employee out of overtime by forming two firms and having the employee work for each: work 39 hours for one, 39 hours for the other. If two separate nominally separate but actually similar or related firms employ a worker in this way, the putative joint employer may be liable for 38 hours of overtime (time-and-a-half) pay and other full-time employment benefits.[83] The term "joint employment" first appears in the July 1939 Department of Labor Interpretive Bulletin Number 13, which makes it clear that its policy rationale was to prevent an end-run around labor laws that protect full time employees, as evidenced by the 1930s parlance of "wage chiseling."

There are distinct types of joint employment that have emerged from the common law: horizontal joint employment and vertical joint employment. Horizontal joint employment is older and simpler. Imagine that Capital Co. owns 51% shares in two different hotels, Hotel A and Hotel B. Hotel A hires Larry Labor to work for 35 hours a week for $10 per hour, and Hotel B also hires Larry to work for 35 hours a week for $10 per hour. Larry earns $700 per week and does not receive full-time employee benefits like health care. Larry sues Hotel A, Hotel B, and Capital Co. for $225 per week in unpaid overtime plus the value of employee benefits. Does Larry prevail?

According to the Department of Labor Wage and Hour Division Fact Sheet #35 (January 2016), Larry will prevail on his claim of horizontal joint employment if he can show the hotels are "sufficiently related to or associated with each other." Courts will look at all the facts and circumstances, including but not limited to: who owns the putative joint employers; whether the employers have overlapping directors or managers; whether the employers share control over operations; whether one employer supervises the work of the other; whether the employers share authority over the employee; whether the employers treat employees of a pool of workers available to both of them; whether the employers share clients or customers; and whether there are any agreements between the employers. Applying this to Larry's hypothetical, if Hotel B asks Hotel A to send over Larry particularly when Hotel B is understaffed, or if Hotel B commonly asks Hotel A to

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[83] 29 CFR 791.2.

provide workers in general, that is evidence that the hotels are joint employers.

The doctrine of vertical joint employment developed more recently and has a different focus. Not only is vertical joint employment difficult to analyze factually, but the law is also in a confusing state of flux. In January 2016, the DOL issued Administrator's Interpretation 2016-01. This non-binding statement included the first instance where the DOL took an administrative position that distinguished between "horizontal" joint employment and "vertical" joint employment. Previously, this distinction was made only by certain courts. Scholars saw this as a shift in the DOL's focus toward prosecuting vertical joint employers more vigorously. AI 2016-01 also set forth the DOL's "economic realities" test for vertical joint employment, which is described below. But, on June 7, 2017, the DOL issued a three-sentence press release withdrawing AI 2016-01.[84] Scholars saw this move as a shift in the DOL's approach back to a more traditional theory of employment relationships.[85] Obviously, it is hard to build a solid firm on shifting sand. This confusion is disruptive for employers and makes life difficult for the lawyers who advise them.

Moreover, courts can and do consider all the facts and circumstances in evaluating vertical joint employment claims. However, there is some DOL guidance as to what economic reality factors to consider: whether the putative employer directs, controls, or supervises the work; whether the putative employer has the power to hire or fire the employment or to change rate or method of pay; permanence or length of the relationship between the putative employer and the employee; whether the employee is performing low-skill (easily replaceable) services or performing tasks that require substantial training and integration; whether the work is performed on the putative employer's premises; and whether the putative employer generally performs functions that would ordinarily be performed by employees.[86] These factors evidence that the employee is "economically dependent" on the putative employer.

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[84] https://www.dol.gov/newsroom/releases/opa/opa20170607.

[85] https://www.littler.com/publication-press/publication/dol-withdraws-joint-employer-and-independent-contractor-guidance

[86] 29 CFR 500.20.

Imagine next that Louise Labor is employed by Smart Staffing Services. SSS could send Louise to any job site, but in reality, SSS has sent Louise to Data Entry Inc.'s offices every working day for five years, where DEI tell her what data to enter and how to use their systems. DEI pays SSS for Louise's services, and SSS pays Louise's salary, for nine months. Then one day, SSS closes down suddenly, without paying Louise. Can Louise sue DEI for back wages because DEI is really her employer?

Applying the DOL factors to Louise, it may seem obvious that DEI is her vertical joint employer: she works on DEI premises, performs the tasks they give her (which are similar to the work that DEI employees do), and has done so every day for nine months. However, this is also the norm in staffing agency relationships. To call Louise an employee of DEI would mean also reclassifying millions of people who are similarly engaged in work.

The test traditionally applied by most courts was found in Bonnette v. California Health and Welfare Agency[87] and rarely resulted in a finding of vertical joint employment. Bonnette employer a four-part economic reality test to determine vertical joint employment: "whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records."

But on January 25, 2017, the Fourth Circuit declined to apply the Bonnette test in the case of Salinas v. Commercial Interiors, Inc., and instead created a new test that dramatically increases the liability for putative vertical employers that some scholars say renders the independent contractor concept meaningless. Salinas will "Consider six factors to determine whether two or more persons or entities 'are not completely dissociated' with respect to the worker."[88] The Salinas test thereby makes vertical joint employment even easier to find that horizontal joint employment. Horizontal joint employment exists where the employee has two employment relationships with two or more employers where the employee can prove the employers are

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[87] 9th Cir. 1981 ("Bonnette")

[88] Salinas v. Commercial Interiors, Inc., 848 F.3d 125, 141-142 (4th Circ. 2017)

sufficiently associated or related such that courts will find that that we are going to impute ownership of both to one. Vertical joint employment under Salinas seems to shift burden of persuasion to employers who will have to prove they are *completely dissociated*. In many traditional cases where vertical joint employment was not found, complete dissociation would have been very hard to prove. On Monday, January 8, 2018, the Supreme Court denied cert and refused to review *Salinas*.[89] With a different test in almost all of the federal circuits, the state of the vertical employer doctrine is thus very much in flux in the courts today.

Legislators are also showing interest in strengthening the vertical joint employer doctrine. Senator Sherrod Brown (D-OH) introduced the Fair Playing Field Act in 2015 to "crack down on employers who misclassify workers and cheat them out of earned benefits."[90] Brown's 2017 plan for restoring the value of work in America, titled "Working Too Hard For Too Little," would make it harder for employers to use independent contractors because, "Workers are marginalized when they are hired as temps through a staffing agency instead of as direct employees."

Clearly, there is a lot of tension and confusion about employment today. While independent contractor relationships are becoming more prevalent, they are also becoming more contentious. The sharing economy has changed employment relationships, and people's expectations about work seem to be changing as well. Battle lines are drawn as workers want to be classified as employees, and firms, especially on the sharing economy platform, want to obtain labor through independent contractors. Many scholars have suggested how the definition of each or the test for both could or should be changed. This Article makes a different argument: neither employee nor independent contractor is the proper label for the way people work in the sharing economy. We need a new definition of work and worker that fits the new economy.

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90 https://www.congress.gov/bill/114th-congress/senate-bill/2252

III. Solving the Tension with "Shared Workers"

To effectuate meaningful change for laborers in the emerging sharing economy, one must think beyond legacy understanding of "employee" and "contractor." These terms, and the legal framework that developed considering them, do not properly govern the new workers in the sharing economy, which this section will term "shared workers." That is not to say the legacy system is failing those that fit into the traditional mold. But the old framework does not work for this new economy. Therefore, this Part introduces a new way to categorize the "shared workers" in the sharing economy.

Neither employee nor independent contractor properly defines how people work for sharing economy platforms. An Uber driver is neither an employee of Uber nor an independent contractor to Uber, as the services that driver renders are primarily for the benefit of the rider, not for Uber. Uber is an intermediary that takes a cut of the proceeds, but matchmakers, like brokers, are traditionally not seen as any sort of employer. However, it also does not make sense to say that the Uber driver is an employee of or an independent contract to the rider.

The sharing economy requires flexibility above all. The economics of on-demand pricing only works when Uber can get more drivers on the road at the same time that riders have increased demand for rides. This business model cannot exist where workers are guaranteed no more and no less than an eight-hour work day.

Obviously, Uber does not want to classify its drivers as employees. Sharing companies generally are litigating against the prospect of shared workers' employee status. But policy should not be made based solely on what is good for employers (even though platforms argue that what is good for them is good for the economy writ large). While the plain incongruity between sharing economy work and traditional jobs is another reason not to apply old regulations to new business strategies, it is fundamentally important to think about what shared workers want.

Some may argue that the litigation by shared workers for reclassification as employees demonstrates that all shared workers want to be employees, but this is clearly not the case. Survey data empirically shows that shared workers for platforms such as Uber do not value employee benefits as much as they value the flexibility that comes from being an independent contractor. However, it is equally

clear that some shared workers are unhappy with their status. That is why a flexible solution that offers the best of both will produce optimal results.

A. What Shared Workers Want

When drivers on multiple ride-sharing and delivery platforms (including Uber, Lyft, Postmates, DoorDash, UberEats, and Juno) were surveyed by an independent third party about what matters most to them, 53.5% responded "pay" and 38.4% responded "flexibility."[91] Of course, taking advantage of pay incentives such as surge pricing requires flexibility, so to some extent pay is dependent on flexibility. Only 1.1% responded "benefits (health insurance, unemployment, etc.)."[92]

Contrast this with the fact that almost 100% of union contracts in the manufacturing sector require employers to provide life insurance and some sort of medical coverage.[93] Obviously, life and health insurance are not free, so employers will have to provide less pay if they have to provide more benefits. The Bureau of Labor Statistics demonstrated the average cost of employee benefits in September 2017 was $11.31 per hour worked, while the average wages were $24.33 per hour worked.[94] Why should Uber be required by law to allocate some 31.7% of employee compensation to benefits when only 1.1% of Uber drivers consider this to be the most important factor and 53.5% consider pay to be the most important factor?

One reason why sharing economy workers like Uber drivers prefer pay over benefits is because these workers typically work for several platforms. For example, 67.7% of Uber drivers work for two or more on-demand driving or delivery services.[95] These workers may also work for additional sharing platforms in other sectors, and they may also work traditional jobs in the mainstream economy. While the

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[91] The Rideshare Guy, RSG 2017 Survey Results, https://therideshareguy.com/rsg-2017-survey-results-driver-earnings-satisfaction-and-demographics/

[92] Id.

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[94] Bureau of Labor Statistics, Employer Costs for Employee Compensation – September 2017, https://www.bls.gov/news.release/pdf/ecec.pdf

[95] RSG Survey.

incremental value of each additional dollar earned is obviously quite high (otherwise there would be no rational reason for people to work more at all), if a worker already has health insurance from one employer, the incremental value of a second, third, and fourth health insurance policy from additional employers has quickly diminishing returns.

Whatever the reason, sharing economy workers may have quite different preferences for the mix of pay, flexibility, and benefits provided from work than traditional economy workers may want. In fact, it seems quite apparent that sharing economy workers prefer what sharing economy platforms are offering from the simple fact that they are freely choosing to work for these platforms! Accordingly, the sensible regulatory framework must allow people to make the free and informed choice to work in the way they want, not to impose rigid work standards from a bygone era on a new generation of workers.

B. How to Regulate Shared Work

The sharing economy is valued by consumers and shared workers alike for its flexibility. Shared work must be regulated both flexibly and with certainty. The current state of uncertainty about worker classification is only good for lawyers and academics who can generate fees and papers, while workers and platforms are harmed. But a blanket classification of all shared workers as either "employees" or "independent contracts" (thereby applying rigid standards to all workers regardless of skill, industry, and preference) would be folly. The Department of Labor, the Internal Revenue Service, and other regulators who govern employment (collectively, "government agencies") should create a third category of "shared worker" that is subject to an opt-in regime of disclosure and oversight.

The opt-in shared workers system would first require a sharing economy platform to submit a proposed definition of "shared worker" under that platform. This public filing with government agencies would define the mix of pay, benefits, and flexibility that the platform will offer. For example, Uber may propose that its shared workers will receive maximum pay and minimum benefits, while Lyft (its competitor) may propose a different blend that offers lower pay but more flexibility and certainty. Handy could offer a minimum wage of $18 per hour and require attendance and monthly training sessions, while TaskRabbit could pay shared workers solely according to a market price and put no additional demands on them.

Government agencies would then be tasked with reviewing the platform's proposed definitions of shared workers according to basic principles of fairness and compliance at least with the minimum standards that independent contractors should expect to receive under the law. Through a review and comment period, agencies would work with platforms to refine the definition and clarify it so it would be easily understood by a person of ordinary skills. Other requirements, such as translating the shared worker definition into multiple languages and posting it on a public website, could also be imposed on the platform by the government agencies. Once approved, the platform could be required to maintain the published standards for shared workers unless the government agency approves an amendment, and fraud liability could result if the platform fails to maintain the published standards. The shared worker definition functions as a sort of public contract between the platform and society that government agencies as well as private individuals would have rights to enforce.

Shared workers now have a clear choice as to what benefits they want to receive from work. So long as there is vigorous competition in the market for shared workers, platforms will constantly innovate and compete to offer workers the best mix of benefits as to attract and retain the top talent. This will preserve the virtue of the sharing economy as a flexible and innovating working environment while pressuring companies to offer an optimal mix of benefits to shared workers and value to consumers.

In return for promulgating a shared worker definition, government agencies must put compliant platforms in a safe harbor, where they are not at risk of employee reclassification. This would incentivize platforms to engage in this exercise in social contracting and curtail the dead weight loss to most of society that results from legal uncertainty and litigation. Employers who participate in the new opt-in shared worker system would benefit from the corresponding reduction in legal risk.

Conclusions

Sharing economy platforms are distinct in the way they operate from traditional employers. Platforms are not "employers" in the conventional sense. Rather, they are matchmakers—they provide an on-demand base of workers willing to provide a service to consumers, and then encourage consumers to use those services—so they are always facing pressures from a two-sided market. Labor rules based

on traditional manufacturing work in the one-sided centralized production of goods for powerful or monopsonistic employers are a bad fit for the decentralized, multi-sided, competitive platform service economy. The shared worker opt-in framework proposed in this Article would leverage the competitive pressures on the supply side of the two-sided market to improve working conditions for Americans in the sharing economy.

APPENDIX A

Figure 1: The Traditional Value Chain

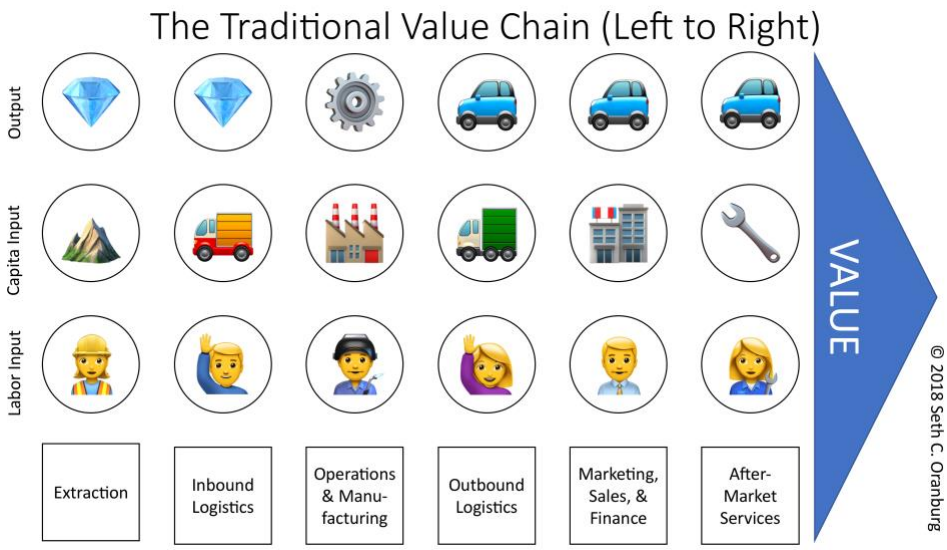

Figure 2: The Sharing Value Chain