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Updating Legal Norms for a Precarious Workforce Manuscript.pdf

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by

Robert Sprague*

INTRODUCTION

Jobs that provide a decent wage, adequate benefits, and some semblance of stability have been the bedrock of American-household economic security since the mid-twentieth century.[1] But for millions of U.S. workers in the twenty-first century, jobs do not pay enough, provide few—if any—benefits, and lack opportunities for advancement or career growth.[2] In real dollar terms, median income in 2017 was not much more than in 1979.[3] The nature of work has also changed. More and more, the role of many workers in the modern U.S. economy is not that of a true employee, yet also not that of a true independent businessperson who has the freedom to negotiate his or her compensation or terms of service.[4] But the legal tests used to classify whether a worker is an employee, who is afforded various

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[1] *See* Mark R. Rank & Thomas A. Hirschl, *Economic Security and the American Dream, in* WORKING AND LIVING IN THE SHADOW OF ECONOMIC FRAGILITY 140, 143 (Marion G. Crain & Michael Sherraden eds., 2014).

[2] *See The Future of Work: Preserving Worker Protections in the Modern Economy: Before the Subcomm. on Workforce Prots. and Subcomm. on Health, Emp't, Labor, and Pensions of the H. Comm. on Educ. & Labor*, 116th Cong. 1 (2019) [hereinafter Weil Testimony] (testimony of David Weil, Dean and Professor Heller School for Social Policy and Management, Brandeis University).

[3] *See id.*

[4] *See* SETH D. HARRIS & ALAN B. KRUEGER, A PROPOSAL FOR MODERNIZING LABOR LAWS FOR TWENTY-FIRST-CENTURY WORK: THE "INDEPENDENT WORKER" 8 (2015), http://www.hamiltonproject.org/assets/files/modernizing_labor_laws_for_twenty_first_century_work_krueger_harris.pdf ("The heart of the challenge for independent workers is that they do not resemble independent contractors or employees with respect to their most fundamental characteristics.").

workplace protections, or an independent contractor who is not entitled to workplace protections, have not kept pace with evolving, on-demand work. While the debate about classification continues, legislation to provide non-employee workers with any benefits or protections is almost non-existent and many workers are left unprotected.

This article provides an analysis of these issues. Part I reveals the changing nature of work in the modern economy. It demonstrates that work, for many, has become contingent and precarious. Part II provides an overview of the traditional tests used to determine whether an employee has been misclassified as an independent contractor, and therefore wrongly deprived of workplace protections. This overview reveals that the tests are woefully out of date and provide little if any clarity. Part III examines more modern classification schemes, including what is known as the ABC test. Part III also examines newer legislation that prescribes independent contractor status for certain workers and business models. But as with the traditional classification tests, the more modern legislation still lacks clarity. Part IV reviews recent, and struggling, attempts to provide non-employee workers traditional employee protections and benefits.

This article reveals there is still no real clarity for classifying workers as employees or independent contractors, a problem becoming more exacerbated by the growth of precarious, on-demand work. The result is that more and more precarious workers have no workplace protections and benefits.

I. THE NATURE OF WORK IN THE MODERN ECONOMY

In the past half-century, employers have moved away from a traditional employment model of full-time employees with job security and benefits, to a model of outsourcing and contracting.[5] Organizations, it is argued, must be more flexible to compete, which requires workers to also become

[5] *See* Weil Testimony, *supra* note 2, at 2.

more flexible.[6] In this "fissured workplace,"[7] "[p]athways to employment are increasingly obscure in the United States."[8]

Sundararajan has argued that salaried, permanent jobs in "asset-heavy" businesses are on their way out while flexible on-demand labor in "asset-light" businesses is in.[9] Meanwhile, Clegg and Baumeler have identified "liquid organizations" that have few long-term investments that are difficult to disinvest; in particular, their investments in people are very largely liquid, are easily liquidated, and carry no long-term investment implications.[10] These developments have helped create precarious

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[6] *See* Stewart Clegg & Carmen Baumeler, *Essai: From Iron Cages to Liquid Modernity in Organization Analysis*, 31 ORG. STUD. 1713, 1720 (2010) ("Rather than internalize all organizational needs within the envelope of bureaucracy, projects are bid for, worked on, negotiated and shared with other similarly mobile and flexible people working on temporary assignments with high levels of self-responsibility, unclear boundaries and insecure incomes. Time-bound and specific disaggregated projects require individuals to be flexible and adaptable—to be constantly ready and willing to change tactics at short notice, to abandon commitments and loyalties without regret and to pursue opportunities according to their current availability.").

[7] *See* David Weil, *Fissured Employment: Implications for Achieving Decent Work, in* CREATIVE LABOUR REGULATION: INDETERMINACY AND PROTECTION IN AN UNCERTAIN WORLD 35, 37 (Deirdre McCann et al. eds., 2014) (describing the fissured employment strategy as one in which large corporations in major economic sectors no longer directly employ a majority of their workforce, but rather contract with multiple employment purveyors who, in turn, compete with each other to obtain the large firms' business).

[8] Gerald F. Davis, *After the Corporation*, 41 POL. & SOC'Y 283, 294 (2013). Davis concludes: "To oversimplify only slightly, big firms prefer investing in machines to people, and small firms rely on outside vendors for much of the heavy lifting of production and distribution." *Id.* at 295.

[9] *See* ARUN SUNDARARAJAN, THE SHARING ECONOMY: THE END OF EMPLOYMENT AND THE RISE OF CROWD-BASED CAPITALISM 1–2 (2016).

[10] *See* Clegg & Baumeler, *supra* note 6, at 1718 (discussing liquid organizations).

work,[11] which has been generally described as "employment that is uncertain, unpredictable, and risky from the point of view of the worker[,]"[12] or simply as working without a safety net.[13] It is a complex dynamic that has been brewing over the past half-century driven by a number of factors. Companies have moved manufacturing abroad to supply overseas markets rather than export goods manufactured in the United States.[14] This has led to a decline in manufacturing jobs coupled with a consequent increase in service sector jobs that, combined with political decisions to deregulate markets and to reduce enforcement of market standards, has resulted in a decline in union membership, worker bargaining power, and an increase in employer bargaining power.[15] Many commentators have argued more and

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[11] *See* GUY STANDING, THE PRECARIAT: THE NEW DANGEROUS CLASS 1 (2014) (describing the "precariat" as millions of workers around the world without an anchor of stability).

[12] Arne L. Kalleberg, *Precarious Work, Insecure Workers: Employment Relations in Transition*, 74 AM. SOC. REV. 1, 2 (2009).

[13] *See* Sen. Mark R. Warner, *Asking Tough Questions About the Gig Economy: Washington Needs to Address the Issues Surrounding America's Rapidly Changing Workforce* (June 19, 2015), https://www.warner.senate.gov/public/index.cfm/2015/6/sen-mark-warner-asking-tough-questions-about-the-gig-economy-washington-post (reprint of *Washington Post* editorial).

[14] *See* Louis Uchitelle, MAKING IT: WHY MANUFACTURING STILL MATTERS 27 (2017) ("By the late 1990s the truly multinational manufacturer—headquartered in the United States and running sophisticated factories spread across the globe—had come fully to life.").

[15] *See id.*; Kalleberg, *supra* note 12, at 2–3; *see also* ARNE L. KALLEBERG, GOOD JOBS, BAD JOBS: THE RISE OF POLARIZED PRECARIOUS EMPLOYMENT SYSTEMS IN THE UNITED STATES, 1970S TO 2000S 21 (2011); *see also* CELINE MCNICHOLAS ET AL., UNPRECEDENTED: THE TRUMP NLRB'S ATTACK ON WORKERS' RIGHTS (2019), https://www.epi.org/files/pdf/177387.pdf (arguing "[u]nder the Trump administration, the National Labor Relations Board (NLRB) has systematically rolled back workers' rights to form unions and engage in collective bargaining with their employers, to the detriment of workers, their communities, and the economy"); *Vital Statistics*, UNIONFACTS.COM, https://www.unionfacts.com/cuf/vitals (reporting that union membership, as percentage of the total U.S. labor force, has declined from just under 30% in the 1950s to currently 11.3%) (last visited Jan. 9, 2020).

more jobs are being lost to automation throughout the economy, principally impacting nonroutine, low-wage, manual jobs.[16] For example, Merchant has argued that Uber drivers are treated as temporary and eminently replaceable because Uber investors believe the company will rely on autonomous vehicles in the near future.[17] Companies, operating under a "neoliberal" model,[18] have sought increased labor flexibility by transferring risks and insecurity onto workers,[19] leading to an erosion of full-time work for a particular employer at its place of work.[20] In short, there has been a substantial decline in long-term

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[16] *See, e.g.*, NIGEL M. DE S. CAMERON, WILL ROBOTS TAKE YOUR JOB? 68 (2017); Guido Matias Cortes et al., *Disappearing Routine Jobs: Who, How, and Why?* 3 (Nat'l Bureau of Econ. Research, Working Paper No. 22918, 2016), http://www.nber.org/papers/w22918; Melanie Arntz et al., *The Risk of Automation for Jobs in OECD Countries: A Comparative Analysis* 4 (OECD Social, Employment and Migration, Working Paper No. 189, 2016), http://www.oecd-ilibrary.org/the-risk-of-automation-for-jobs-in-oecd-countries_5jlz9h56dvq7.pdf (concluding that while, on average, nine percent of jobs are automatable across the twenty-one OECD countries, "low qualified workers are likely to bear the brunt of the adjustment costs as the automatibility of their jobs is higher compared to highly qualified workers. Therefore, the likely challenge for the future lies in coping with rising inequality . . . .").

[17] Brian Merchant, *Corporate Delusions of Automation Fuel the Cruelty of Uber and Lyft*, PORTSIDE (May 11, 2019), https://portside.org/2019-05-11/corporate-delusions-automation-fuel-cruelty-uber-and-lyft.

[18] *See* DANIEL STEDMAN JONES, MASTERS OF THE UNIVERSE: HAYEK, FRIEDMAN, AND THE BIRTH OF NEOLIBERAL POLITICS 2 (2012) (defining neoliberalism as "the free market ideology based on individual liberty and limited government that connect[s] human freedom to the actions of the rational, self-interested actor in the competitive marketplace").

[19] STANDING, *supra* note 11, at 1; *see also* DAVID WEIL, THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT 49–50 (2014) (discussing the notion, emanating from the public capital markets and private equity companies in the 1980s and 1990s, that firms should focus on their core competencies and shed everything else—including a significant portion of their long-term employee base—that was not contributing directly to the bottom line).

[20] Kalleberg, *supra* note 12, at 3; *see also* ERIN HATTON, THE TEMP ECONOMY: FROM KELLY GIRLS TO PERMATEMPS IN POSTWAR AMERICA 2 (2011) ("By the turn of the twenty-first century, . . . it became acceptable to talk about workers—*all* workers, from the highly skilled to the day laborer—as costly sources of rigidity in an economy that required flexibility.");

employment opportunities with an accompanying reduction in job security in the private sector.[21] Commentators suggest that a principal motivation for shifting to temporary, part-time, and contingent workforces, besides lowering labor costs, is to insulate core employees from economic fluctuations by using peripheral workers to buffer or absorb economic fluctuations.[22] Ultimately though, it is argued, firms cannot resist the substantial cost savings associated with a peripheral workforce.[23]

Brad DeLong, *The Jobless Recovery Has Begun*, THE WEEK (July 20, 2009), http://www.theweek.com/articles/503493/jobless-recovery-begun (suggesting that the recovery from the 2009 recession would be "jobless" because firms think that their workers are much more disposable).

[21] Henry S. Farber, *Short(er) Shrift: The Decline in Worker-Firm Attachment in the United States, in* LAID OFF, LAID LOW: POLITICAL AND ECONOMIC CONSEQUENCES OF EMPLOYMENT INSECURITY 10, 30 (Katherine S. Newman ed., 2008) (analyzing mean job tenure data from 1975–2005); *see also* CARRIE M. LANE, A COMPANY OF ONE: INSECURITY, INDEPENDENCE, AND THE NEW WORLD OF WHITE-COLLAR UNEMPLOYMENT 37 (2011) (noting that in the 1970s and 1980s layoffs in the United States became more frequent, more permanent, and more likely to occur in prosperous companies following a new "lean and mean" management ethos, as well as automation, deindustrialization, business cycles and cost cutting, often achieved by sending jobs overseas); Kalleberg, *supra* note 12, at 6–8 (noting that since the 1970s there has been a general decline in the average length of time people remain employed with a particular employer, an increase in long-term unemployment, growth in perceived job insecurity, growth of nonstandard work arrangements and contingent work, and an increase in risk-shifting from employer to employee).

[22] *See* BENNETT HARRISON & BARRY BLUESTONE, THE GREAT U-TURN: CORPORATE RESTRUCTURING AND THE POLARIZING OF AMERICA 45 (1988); *see also* RANA FOROOHAR, MAKERS AND TAKERS: THE RISE OF FINANCE AND THE FALL OF AMERICAN BUSINESS 2–3 (2016) (arguing that American businesses spend more time and effort on financial engineering rather than traditional (i.e., product) engineering). "[W]orkforce participation is as low as it's been since the late 1970s. It used to be that as the fortunes of American companies improved, the fortunes of the average American rose, too." *Id.* at 3.

[23] *Cf.* HARRISON & BLUESTONE, *supra* note 22, at 45–46; *see also* James H. Wolfe, *Determination of Employer-Employee Relationships in Social Legislation*, 41 COLUM. L. REV. 1015, 1015 (1941) ("As the financial burdens imposed on the employer grow heavier, there is a temptation to avoid them by fashioning contracts transforming employer-employee relationships by legal guises into those of vendor-vendee, lessor-lessee, or independent contractor.") (footnotes omitted). This

Other commentators have placed more emphasis on recent operational trends colloquially referred to as the "sharing," "gig," or "on-demand" economy, though they generally cannot agree on a precise definition.[24] Today it stands for Internet platform-based intermediaries that use software (most commonly a smartphone app) to connect providers, for a fee, with those in need of products or services.[25] Ultimately, contrary to Sundararajan's vision of peer-to-peer networks replacing the

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can be true for small startup businesses as well. *See, e.g.* Jeffrey Sparshott, *Tiny Firms Stay That Way—Number of One-Person Companies Soars, but It Won't Do Much to Expand Overall Jobs*, WALL ST. J., Dec. 29, 2016, at A3 (quoting one owner of a nonemployee business, "It's so expensive to hire the first worker—it's grim, all the paperwork, unemployment taxes.") (internal quotation marks omitted).

[24] *See, e.g.*, SUNDARARAJAN, *supra* note 9, at 27 (stating that he is unaware of any consensus on a definition of the sharing economy). Sundararajan views the phenomenon more as "crowd-based capitalism," arguing the "crowd" (represented by peer-to-peer networks) will replace the corporation at the center of capitalism. *Id.* at 2, 27. Other commentators envision an environment more closely akin to social enterprises and cooperatives. *See, e.g.*, Jenny Kassan & Janelle Orsi, *The Legal Landscape of the Sharing Economy*, 27 J. ENVTL. L. & LITIG. 1, 3 (2012) (describing the sharing economy as facilitating "community ownership, localized production, sharing, cooperation, small scale enterprise, and the regeneration of economic and natural abundance").

[25] *See, e.g.*, Steven Greenhouse, *The Whatchamacallit Economy*, N.Y. TIMES (Dec. 16, 2016), http://www.nytimes.com/2016/12/16/opinion/the-whatchamacallit-economy.html (noting there often isn't much actual sharing going on and that the "sharing economy" is also referred to as the on-demand economy, peer-to-peer economy, crowd-based economy, gig economy, and collaborative economy); *see also* SUNDARARAJAN, *supra* note 9, at 27 (summarizing the characteristics of whatever one may call this "economy" as "[b]lurring the lines between fully employed and casual labor, between independent and dependent employment, between work and leisure: many traditionally full-time jobs are supplanted by contract work that features a continuum of levels of time commitment, granularity, economic dependence, and entrepreneurship"); DIANA FARRELL & FIONA GREIG, PAYCHECKS, PAYDAYS, AND THE ONLINE PLATFORM ECONOMY: BIG DATA ON INCOME VOLATILITY 5 (2016), https://www.jpmorganchase.com/corporate/institute/document/jpmc-institute-volatility-2-report.pdf (defining "the Online Platform Economy as economic activities involving an online intermediary that provides a platform by which independent

corporation at the center of capitalism,[26] the "sharing economy" is a business model that operates less like sharing and more like traditional corporate profit-making that happens to use a smartphone app.[27] On-demand businesses are currently epitomized by Airbnb (matching people who have a house, apartment, or room available for short-term rent with travelers looking for an alternative place to stay), Uber and Lyft (matching people who are willing to give rides in their cars to people looking for a ride), TaskRabbit, matching people who need a chore performed with workers who are willing to perform the chore), and Grubhub (an internet food ordering service that connects diners to local restaurants).[28]

The "gig economy" refers more broadly to the evolving nature of on-demand work.[29] As one report explains, "This is a new age of *non-employee* workforce management, one that is founded on the progression of social and business networks, enterprise technology, and an overall shift in how today's

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workers or sellers can sell a discrete service or good to customers. Labor platforms, such as Uber or TaskRabbit, connect customers with freelance or contingent workers who perform discrete projects or assignments. Capital platforms, such as eBay or Airbnb, connect customers with individuals who rent assets or sell goods peer-to-peer.").

[26] SUNDARARAJAN, *supra* note 9, at 27.

[27] Greenhouse, *supra* note 25; *see also* Rachel Botsman, *Defining the Sharing Economy: What Is Collaborative Consumption—and What Isn't?*, FAST CO. (May 27, 2015, 6:15 AM), https://www.fastcoexist.com/3046119/defining-the-sharing-economy-what-is-collaborative-consumption-and-what-isnt ("The 'sharing economy' is a term frequently incorrectly applied to ideas where there is an efficient model of matching supply with demand, but zero sharing and collaboration involved.").

[28] *See* Lawson v. Grubhub, Inc., 302 F. Supp. 3d 1071, 1073 (N.D. Cal. 2018); *see also* HARRIS & KRUEGER, *supra* note 4, at Appendix, 28–33 (listing and describing twenty-six "prominent" online intermediary companies).

[29] *See* Shu-Yi Oei, *The Trouble with Gig Talk: Choice of Narrative and the Worker Classification Fights*, 81 LAW & CONTEMP. PROBS., no. 3, 2018, at 107, 118 (noting that as the "sharing economy" sector matured, different descriptors have arisen, such as "gig economy," "1099 economy" [because workers receive an IRS 1099 form to reflect payments received rather than a W-2 form to reflect wages received], "peer-to-peer economy," and "platform economy").

enterprises approach their talent engagement strategies."[30] One commentator suggests that anyone working in a nontraditional job could be considered a contingent, temporary, or "gig" worker.[31] One perspective of the gig economy is that it allows skilled and entrepreneurial workers to leverage their talents to move from good to great jobs.[32] In a 2015 study, the Institute for the Future found a number of worker advantages in the gig economy: part-time workers supplementing "traditional" low-paying jobs; highly-skilled educated workers finding numerous consulting opportunities; freelancers who can work when they want to; full-time "gig" workers who, for whatever reason (recent move; laid-off), are unable to find or hold a "traditional" full-time job; workers who are attempting to re-enter the workforce; workers who leverage entrepreneurial skills to maximize gig opportunities; and workers who thrive at

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[30] CHRISTOPHER J. DWYER, THE STATE OF CONTINGENT WORKFORCE MANAGEMENT 2016–2017: ADAPTING TO A NEW WORLD OF WORK 5 (2016), https://www.fieldglass.com/sites/default/files/2017-11/state-of-contingent-workforce-management-2016-2017-Ardent-SAP-Fieldglass.pdf (emphasis added).

[31] Michelle Capezza, *The Independent Worker: An Interview with Gene Zaino, CEO of MBO Partners*, TECH. EMP. L. (Nov. 3, 2016), http://www.technologyemploymentlaw.com/benefits-compensation/the-independent-worker-an-interview-with-gene-zaino-ceo-of-mbo-partners/; *see also* FARRELL & GREIG, *supra* note 25, at 20 (noting that labor platforms, such as Uber or TaskRabbit, are often referred to as the "Gig Economy"). *But see* HARRIS & KRUEGAR, supra note 4, at 10 Box 2 (defining the online gig economy as involving "the use of an Internet-based app to match customers to workers who perform discrete *personal tasks*, such as driving a passenger from point A to point B, or delivering a meal to a customer's house[;]" excluding intermediaries that facilitate the sale of goods and impersonal services to customers, such as Etsy.com (a Web site where individuals sell handmade or vintage goods) and Airbnb) (alteration in original).

[32] *See* Diane Mulcahy, *Who Wins in the Gig Economy, and Who Loses*, HARV. BUS. REV. (Oct. 27, 2016), https://hbr.org/2016/10/who-wins-in-the-gig-economy-and-who-loses (noting also that the gig economy allows low-skill workers to move from bad jobs to better work).

working multiple gig opportunities.[33] Similarly, a 2016 Intuit-sponsored survey of on-demand workers broke them into five categories: "career freelancers" (twenty percent of respondents) who are building a career through freelancing; "business builders" (twenty-two percent of respondents) who want to work for themselves and not hold a traditional job; "side giggers" (twenty-six percent of respondents) who are seeking financial stability by moonlighting; "passionistas" (fourteen percent of respondents) who are well-educated workers that are more interested in flexibility and the nature of the work rather than the money; and "substituters" (eighteen percent of respondents) who are replacing a traditional job they lost or they cannot find one.[34]

Does the gig economy represent a new wave of entrepreneurship and innovation or a race to the bottom for exploited workers?[35] Overall, gig workers report being generally satisfied with their on-demand work. The Intuit survey found, for example, that over eighty percent of "career freelancers" and "business builders" were each satisfied with their on-demand platforms, while "substituters" were least

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[33] *See* MIRIAM LUECK AVERY ET AL., VOICES OF WORKABLE FUTURES: PEOPLE TRANSFORMING WORK IN THE PLATFORM ECONOMY 7–30 (2015), http://www.iftf.org/fileadmin/user_upload/downloads/wfi/IFTF_WFI_Voices_of_Workable_Futures_2016.pdf.

[34] Elaine Pofeldt, *How Happy Is Your Uber Driver? Survey Offers Candid Glimpse Of Gig-Economy Workers*, FORBES (Feb. 7, 2016, 6:26 PM), http://www.forbes.com/sites/elainepofeldt/2016/02/07/how-happy-is-your-uber-driver-survey-offers-candid-glimpse-of-gig-economy-workers.

[35] *See, e.g.*, Arne L. Kalleberg & Michael Dunn, *Good Jobs, Bad Jobs in the Gig Economy*, 20 PERSP. ON WORK 10, 10 (2016) ("Some see the gig economy as promoting entrepreneurship and limitless innovation coupled with jobs that offer considerable flexibility, autonomy, and work/life balance, as well as opportunities for individuals to supplement their incomes by monetizing their resources."; noting also that "skeptics argue that gig jobs leave workers open to exploitation and low wages as employers compete in a race to the bottom"); Arun Sundararajan, *The "Gig Economy" Is Coming. What Will It Mean for Work?*, GUARDIAN (July 25, 2015, 7:05 PM), https://www.theguardian.com/commentisfree/2015/jul/26/will-we-get-by-gig-economy (questioning whether the gig economy "portends a dystopian future of disenfranchised workers hunting for their next wedge of piecework").

satisfied (forty-seven percent).[36] A 2015 Uber-sponsored survey found that eighty-one percent of its drivers were satisfied with their experience.[37] In contrast, another survey found that sixty-seven percent of respondents who have worked as an independent contractor would choose not to do so again in the future.[38] In general, though, many gig workers complain that they make well under the minimum wage after subtracting expenses and have to work 60–70 hours per week just to eke out a living.[39]

The Institute for the Future notes downsides to working in the gig economy: income and job insecurity; lack of benefits, particularly health insurance; and dead-end work with no possibility of advancement.[40] Standing paints a fairly bleak portrait of the gig worker:

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[36] Pofeldt, *supra* note 34.

[37] *New Survey: Drivers Choose Uber for Its Flexibility and Convenience*, UBER NEWSROOM (Dec. 7, 2015), https://newsroom.uber.com/driver-partner-survey/. *But see generally* Janine Berg & Hannah Johnston, *Too Good to Be True? A Comment on Hall and Krueger's Analysis of the Labor Market for Uber's Driver-Partners*, 72 IRL REV. 39 (2019) (critiquing the Uber survey).

[38] Elaine Pofeldt, *Survey Exposes Dark Side of the Uber Economy*, FORBES (Aug. 25, 2016, 11:17 AM), https://www.forbes.com/sites/elainepofeldt/2016/08/25/survey-exposes-soft-underbelly-of-the-uber-economy/#59f53b6dbbc8.

[39] *See* Steven Greenhouse, *False Freedom: Sharing the Scraps from the Perilous Gig Economy*, LITERARY HUB (Aug. 7, 2019), https://lithub.com/false-freedom-sharing-the-scraps-from-the-perilous-gig-economy/.

[40] AVERY ET AL., *supra* note 33, at 46–47; *see also* Mark Frauenfelder, *Making the Gig Economy Work for Everyone*, IFTF BLOG (Dec. 16, 2016), http://www.iftf.org/future-now/article-detail/making-the-gig-economy-work-for-everyone/ ("[I]f you take a higher altitude look at the growing landscape of algorithmic matchmaking services, you'll see some troubling aspects. For example, traditional workers can usually converse with human bosses, but on a platform, workers are told what to do by algorithmic 'managers' that consider humans to simply be part of a pool of inputs to be allocated in response to changes in network conditions. To make things worse, workers in the gig economy are isolated from one another, making it extremely difficult for them to develop a collective voice to negotiate with platform owners and designers about issues that affect their livelihood.").

> All these [workers] face insecurity, low and fluctuating incomes, chronic uncertainty, and lack of control over time. They have no fixed hours or workplaces. . . . [T]hey live in a tertiary time regime, in which labor and work blur into each other, without payment for downtime, waiting, retraining, networking, and so on. They have illusion of freedom while also feeling that they are under incessant control.[41]

The Intuit survey reveals that most on-demand work is part time, with thirty percent of workers still holding down a traditional full-time or part-time job, while another thirty-three percent are simultaneously engaged in contracting, consulting, or running a business.[42]

Regardless of the moniker or the exact methodology, there is a definite and growing trend of reduced long-term employment and increasing contingent work arrangements.[43] David Weil and Tanya

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[41] Guy Standing, *Taskers: The Precariat in the On-Demand Economy (Part One)*, WORKING-CLASS PERSP. (Feb. 16, 2015), https://workingclassstudies.wordpress.com/2015/02/16/taskers-the-precariat-in-the-on-demand-economy-part-one/. Meanwhile, Chee satirically captures the zeitgeist of working in the gig economy:

> Upon entering a new office (read: coffee shop), identify yourself as a freelancer by asking for the Wi-Fi with a warm smile and a hint of apology . . . .
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> . . .
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> People may shame you for checking your phone constantly; they are unaware that your work hours never end and that you must be on email at all times. Ignore those who scoff—they probably have "day jobs" and comfortable, routine lives filled with family, friends and bliss. Who wants that anyway? Check your email again.
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> . . .
>
> Work hours may never end, yet you will wonder, "Could I be doing more?"
>
> . . .
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> [Your] health plan is: Don't get sick.

Karen Chee, *Freelancers of the World, Unite in Despair!*, N.Y. TIMES, Oct. 14, 2018, at SR.2.

[42] Pofeldt, *supra* note 34 (concluding that "many workers' salaries aren't paying the bills, unless they do extra on-demand work"); *see also* Annette Bernhardt, *It's Not All About Uber*, 20 PERSP. ON WORK 14, 15 (2016) (noting surveys "consistently" finding that a majority of the workers who use platforms are working on them only part-time and part-year to smooth over periods of unemployment or to supplement income).

[43] *See, e.g.,* LANE, *supra* note 21, at 38 (noting that white-collar workers have accounted for a steadily increasing proportion of total U.S. job losses since the 1980s as their jobs became "increasingly insecure due to the rising emphasis on

Goldman assert that "[a] myopic focus on the on-demand world obfuscates more fundamental changes that have become pervasive across a wider spectrum of industries."[44] They argue that "[m]any business models in the on-demand sector represent a deepening fissuring of the workplace, as technology and software algorithms enable companies to further outsource significant proportions of the work."[45]

Although some may argue that today's on-demand work is really an old model in a new package, as the following discussion reveals, there are some differences, most particularly that workers set their own hours and determine, on their own, when, how often—and even if—they want to work. And these differences are confounding established laws used to determine whether these workers should be classified as employees or independent contractors.

II. APPLYING "TRADITIONAL" LAW TO NEW WORK ARRANGEMENTS

In re *Mitchell*[46] exemplifies the accelerating transformation of the U.S. (and, to some extent, global) workforce to a contingent, on-demand labor pool primarily populated by (sometimes partially)

'flexible'—easily hirable and fire-able—labor . . ., the availability of inexpensive white-collar laborers abroad, and the financial pressures of quarterly reporting"); Capezza, *supra* note 31 ("By [2021], nearly one in two people will work independently, or will have done independent work at some point in their careers."); Mulcahy, *supra* note 32 ("Work is being disaggregated from jobs and reorganized into a variety of alternative arrangements, such as consulting projects, freelance assignments, and contract opportunities."); DWYER, *supra* note 30, at 8–9 ("Nearly 38% of the world's workforce is now considered 'non-employee,' which includes contingent/contract workers, temporary staff, gig workers, freelancers, professional services, and independent contractors.").

[44] David Weil & Tanya Goldman, *Labor Standards, the Fissured Workplace, and the On-Demand Economy*, 20 PERSP. ON WORK 26, 26 (2016); *see also* Bernhardt, *supra* note 42, at 15 (questioning whether the gig economy is new activity or merely moonlighting supplanted on platforms). *But see* Standing, *supra* note 41 ("Informed observers predict that within the next decade, one in every three labor transactions will be done online as part of the 'on-demand,' 'sharing,' 'gig,' or 'crowd labor' economy.").

[45] Weil & Goldman, *supra* note 44, at 27.

[46] 44 N.Y.S.3d 567 (N.Y. App. Div. 2016).

self-employed workers classified as independent contractors. In 2010, Gregory Mitchell entered into a contract to become a media blogger for the print and online magazine, *The Nation*. Mitchell was paid a "freelance payment" of $46,800 per year, paid in monthly installments.[47] During the approximately four and one-half years Mitchell worked for *The Nation*, he was free to pursue other work, which he did—publishing approximately eight books and blogging for other entities.[48] When Mitchell's contract was not renewed in 2014, he applied for unemployment insurance benefits. Both the New York Department of Labor and the New York Unemployment Insurance Appeal Board ruled that Mitchell, as well as similarly situated workers, was an employee entitled to unemployment insurance benefits.[49]

In many respects, one could consider Mitchell's working relationship with *The Nation* as that of a "traditional" employee—he was paid an annual salary in monthly installments and was reimbursed for certain business-related expenses; his contract required that he identify himself as a writer for *The Nation*; he was assigned an intern for assistance; he was restricted from publishing the same content with competitors (at least within forty-eight hours of the content's publication), he was required to use *The Nation's* software system to post his blog entries; and on at least one occasion, he was directed to continue to write on a particular topic after he expressed a desire to go in another direction.[50]

However, the New York Supreme Court Appellate Division reversed, concluding that Mitchell was an independent contractor—he was not formally interviewed for his position; he worked from home (indeed, he was not permitted to work from *The Nation's* offices) using his own laptop; he had no supervisor; he did not suffer any adverse consequences if he did not post a story; he generally was not assigned to write on a particular topic; and could post a story to his blog prior to it being edited by *The*

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[47] *Id.* at 568.

[48] *Id.*

[49] *Id.*

[50] *Id.* at 570.

Nation's staff.[51] Ultimately, the Appellate Division concluded, while *The Nation* exercised incidental control over the results produced by Mitchell, it did not exercise sufficient *control over the means* employed by him to achieve the results.[52]

In the past few years, there has been a spate of "gig"–related misclassification disputes.[53] The earlier "gig" cases, involving Uber and Lyft, struggled with classification because the workers exhibited attributes associated with both independent contractors and employees. In *O'Connor v. Uber*

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[51] *Id.* at 571.

[52] *See id.* at 569. *Contrast with In re* Barrier Window Sys., Inc., 53 N.Y.S.3d 222 (N.Y. App. Div. 2017) (concluding that Barrier Window installers were employees rather than independent contractors because, for example, Barrier determined the installation price and selected an installer from a list that it maintained, with no negotiation of the installation price with the installer).

[53] Misclassification occurs when a worker classified as an independent contractor is, in fact (and in the eyes of the law) an employee (and vice versa). There are certainly misclassification disputes in other types of work. *See, e.g.*, McFeeley v. Jackson St. Entm't, LLC, 825 F.3d 235 (4th Cir. 2016) (exotic dancers); Meyer v. U.S. Tennis Ass'n, 607 Fed. App'x 121 (2nd Cir. 2015) (tennis umpires); Schultz v. Capital Int'l Sec., Inc., 466 F.3d 298 (4th Cir. 2006) (personal protection service agents); Safarian v. Am. DG Energy, Inc., No. 10-6082, 2015 WL 12698441 (D.N.J. Nov. 24, 2015) (field service engineer); *In re* Yoga Vida NYC, Inc., 64 N.E.3d 276 (N.Y. 2016) (yoga instructors); *see also generally Exploiting Workers by Misclassifying Them as Independent Contractors: Before the Emp't & Hous. Subcomm. of the Comm. on Gov't Operations*, 102d Cong. (1991) [hereinafter *Exploiting Workers*] (focusing primarily on employment classification in the construction industry); David Cowley, *Employees vs. Independent Contractors and Professional Wrestling: How the WWE Is Taking a Folding-Chair to the Basic Tenets of Employment Law*, 53 U. LOUISVILLE L. REV. 143 (2014) (discussing employment classification of professional wrestlers); Diane M. Ring, *Silos and First Movers in the Sharing Economy Debates*, 13 L. & ETHICS HUM. RTS. 61 (2019) (noting the worker classification debates extend beyond ridesharing companies such as Uber and Lyft and affect workers across a variety of sectors); Robert Sprague, *Worker (Mis)Classification in the Sharing Economy: Trying to Fit Square Pegs into Round Holes*, 31 A.B.A. J. LAB. & EMP. L. 53, 62–67 (2015) (discussing employment classification cases involving FedEx package delivery drivers).

Technologies, Inc.,[54] the District Court for the Northern District of California concluded that whether Uber drivers were employees or misclassified independent contractors was a mixed question of law and fact suitable for a jury, after contrasting, *inter alia*, that the drivers provided a service to Uber and were closely monitored, while also providing their own vehicles and having the freedom to essentially work when the wanted for as long as they wanted.[55] Within just a few days, another judge in the District Court for the Northern District of California noted that Lyft drivers didn't seem much like employees while simultaneously not looking much like independent contractors either, and therefore concluded the case must go to a jury because reasonable people could differ on whether the drivers were employees or independent contractors.[56]

More recently, though, some courts and regulatory agencies have concluded gig workers were correctly classified as independent contractors.[57] For example, in *Lawson v. Grubhub, Inc.*,[58] Magistrate

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[54] 82 F. Supp. 3d 1133 (N.D. Cal. 2015).

[55] *Id.* at 1153 (concluding "[t]he application of the traditional test of employment—a test which evolved under an economic model very different from the new "sharing economy"—to Uber's business model creates significant challenges"). *Contrast* Razak v. Uber Techs., Inc., No. 16-573, 2018 WL 1744467, at *13 & n.17 (E.D. Pa. Apr. 11, 2018) (granting Uber's motion for summary judgment because drivers had not brought sufficient proof to meet their burden of showing they are employees), *with In re* [Redacted], ALJ Case No. 016-23858, (N.Y. Unemployment Insurance App. Board June 9, 2017), https://www.uberlawsuit.com/NY%20unemployment%20decision.pdf (concluding Uber drivers were employees entitled to unemployment insurance benefits under New York law).

[56] Cotter v. Lyft, Inc., 60 F. Supp. 3d 1067, 1069, 1080–81 (N.D. Cal. 2015).

[57] The track records are quite mixed with respect to gig-related classification tests. While the *O'Connor* and *Cotter* courts denied Uber's and Lyft's (respectively) motions to dismiss, many cases have either settled or been transferred to mandatory arbitration per the underlying workers' contracts. *See* Miriam A. Cherry, *Beyond Misclassification: The Digital Transformation of Work*, 37 COMP. LAB. L. & POL'Y J. 577, 584–85 (2016) (summarizing the status of numerous gig-related classification lawsuits).

[58] 302 F. Supp. 3d 1071 (N.D. Cal. 2018).

Judge Corley in the District Court for the Northern District of California concluded that a grocery delivery worker was an independent contractor and not an employee because "Grubhub did not control the manner or means of Mr. Lawson's work, including whether he worked at all or for how long or how often, or even whether he performed deliveries for Grubhub's competitors at the same time he had agreed to deliver for Grubhub."[59] Similarly, in *Vega v. Postmates, Inc.*,[60] the New York Supreme Court Appellate Division concluded couriers who performed on-demand pick-up and delivery services from local restaurants or stores for Postmates were independent contractors. In particular, the workers did not report to any supervisor, retained unfettered discretion whether to log into the Postmates platform, set their own work schedule, were free to accept, reject or ignore any delivery request without penalty, could simultaneously work for other companies, including Postmates' direct competitors, were not required to wear a uniform, and could choose their own mode of transportation.[61]

The Office of the General Counsel for the National Labor Relations Board (NLRB) recently concluded Uber properly classified its drivers as independent contractors because it did not exercise

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[59] *Id.* at 1091–92. Subsequent to this ruling, the California Supreme Court adopted the ABC test for determining worker classification. *See* Dynamex Operations W. Inc. v. Superior Court, 416 P.3d 1 (Cal. 2018); infra notes 76–80 and accompanying text (providing an overview of the ABC test). The proceedings in *Lawson* have been stayed pending a ruling from the California Supreme Court as to whether *Dynamex* can be applied retroactively. Lawson v. Grubhub, Inc., No. 18-15386, 2019 WL 5876923 (9th Cir. Sept. 26, 2019).

[60] 78 N.Y.S.3d 810 (N.Y. App. Div. 2018).

[61] *See id.* at 812; *accord In re* Walsh, 92 N.Y.S.3d 750, 752 (N.Y. App. Div. 2019) (concluding TaskRabbit service provider (a "tasker") was an independent contractor because the only control exercised by the company was "over the platform that taskers used to get jobs, not over any aspects of the jobs themselves").

sufficient control over them.[62] In particular, drivers (1) "had virtually unfettered freedom to set their own work schedules[,]" (2) controlled their work locations rather than being restricted to assigned routes or neighborhoods, and (3) could work for competitors.[63] And the U.S. Department of Labor's Wage and Hour Division issued an Opinion Letter in April 2019 concluding that service providers for an unnamed platform-based business are independent contractors.[64] The Wage and Hour Division concluded the business does not appear to exert control over its service providers: they "have complete autonomy to choose the hours of work that are most beneficial to them"; they have the right to simultaneously work for competitors; nor does the business inspect their work for quality or rate their performance.[65]

Labor and employment laws—such as anti-discrimination, fair labor standards and labor relations, family and medical leave, and state workers' and unemployment compensation—focus on protecting employees.[66] No parallel laws protect workers who are not classified as employees, namely

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[62] Advice Memorandum from the NLRB Office of the Gen. Counsel to Jill Coffman, Regional Director Region 20, Uber Technologies, Inc., Nos. 13-CA-163062, 14-CA-158833, 29-CA-177483 (Apr. 16, 2019), https://apps.nlrb.gov/link/document.aspx/09031d4582bd1a2e.

[63] *See id.* at 6.

[64] Dep't of Labor, Wage & Hour Div. Opinion Letter (April 29, 2019) [hereinafter DOL Op. Letter], https://www.dol.gov/whd/opinion/FLSA/2019/2019_04_29_06_FLSA.pdf. Without naming the company, the Opinion Letter described the company's business as "an online and/or smartphone-based referral service that connects service providers to end-market consumers to provide a wide variety of services, such as transportation, delivery, shopping, moving, cleaning, plumbing, painting, and household services." *Id.* at 1. These are similar to the services offered by TaskRabbit. *See* https://www.taskrabbit.com/m/all-services.

[65] *See* DOL Op. Letter, *supra* note 64, at 8.

[66] *See, e.g.*, 42 U.S.C. §§ 2000e(b), 2000e-2(a) (2016) (Title VII of the Civil Rights Act of 1964); *id.* § 12111(5)(A) (2016) (Americans with Disabilities Act); 29 U.S.C. § 206(a) (2016) (Fair Labor Standards Act); *id.* §§ 152(3), 157 (2016) (National Labor Relations Act); *id*. § 2611(2)(A) (2016) (Family and Medical Leave Act); CAL. LAB. CODE § 3357 (2011)

independent contractors.[67] Arguably, most workers would prefer to receive legal workplace protections and most employers would prefer to avoid their associated costs. As such, we find ourselves in a continuous struggle to determine just which workers are independent contractors and which are actually employees subject to labor law protections. In fact, one scholar asserts "the legal bifurcation of workers into 'employees' and 'independent contractors' has contributed significantly to the growth of precarious work in the United States."[68] This has been a long-running struggle with no easy solution.[69] Courts have

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(regarding workers' compensation coverage: "Any person rendering service for another, other than as an independent contractor, or unless expressly excluded herein, is presumed to be an employee.").

[67] *See, e.g.*, Global Hawk Ins. Co. v. Le, 170 Cal. Rptr. 3d 403, 410 (Cal. Ct. App. 2014) ("An independent contractor is not eligible for workers' compensation."); Hubbard v. Henry, 231 S.W.3d 124, 128–29 (Ky. 2007) (holding employees, but not independent contractors, are eligible for unemployment compensation); Subcontracting Concepts, Inc. v. Comm'r of the Div. of Unemployment Assistance, 19 N.E.3d 464, 467 (Mass. App. Ct. 2014) (holding same); Peidong Jia v. Unemployment Comp. Bd. of Review, 55 A.3d 545, 548 (Pa. Commw. Ct. 2012) (holding same); *see also Exploiting Workers, supra* note 53, at 2 (statement of Rep. Tom Lantos, Chairman, H.R. Subcomm. on Emp't & Hous.) (noting that independent contractors are not protected by Occupational Safety and Health, minimum wage and hour, antidiscrimination, and collective bargain laws; "When an employer switches a worker from employee to contractor status, he is in effect cutting him or her adrift, depriving the worker of essential, congressionally-mandated support."); Levi Sumagaysay, *Uber Drivers' Wages Revisited: How Much Do They make?*, MERCURY NEWS (May 17, 2018, 12:53 PM), https://www.mercurynews.com/2018/05/17/uber-drivers-wages-revisited-how-much-do-they-make/ (reporting on a study indicating Uber drivers "take home about $9.21 an hour, or less than minimum wage in many of the biggest markets where the ride-hailing service operates").

[68] V.B. Dubal, *Wage Slave or Entrepreneur?: Contesting the Dualism of Legal Worker Identities*, 105 CAL. L. REV. 65, 67 (2017); *cf.* Miriam A. Cherry & Antonio Aloisi, *Dependent Contractors in the Gig Economy: A Comparative Approach*, 66 AM. U. L. REV. 635 (2017) (arguing that in the on-demand economy there should be safe harbors for workers for whom paid work is not their first priority).

[69] For example, with respect to determining just who is an employee under various labor and worker welfare laws, see Edwin R. Teple, *The Employer-Employee Relationship*, 10 OHIO ST. L.J. 153, 153 (1949) ("Unfortunately, the

long recognized "simplicity and uniformity, [in classifying workers] resulting from application of 'common-law standards,' does not exist."[70]

As the summary of classification cases presented above indicates, the degree of control the employer exercises over the means of the work performed is the first, and often most important, factor considered by the "traditional" tests in determining whether a worker is an employee or independent contractor.[71] This "right to control" originated in agency law to determine whether an employer should

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significance of the problem is matched by the difficulty of its solution. There is a growing field of borderline cases in which the accepted tests simply do not offer a clear-cut answer. Many relationships are like the swoose, which had unmistakable characteristics of both the swan and the goose. Neither the courts nor the legislatures have yet devised a yardstick equal to the task of unerringly separating the swans from the geese and at the same time cataloguing their hybrid offspring with any degree of uniformity."); *see also* NLRB v. Hearst Publ'ns, 322 U.S. 111, 121 (1944) ("Few problems in the law have given greater variety of application and conflict in results than the cases arising in the borderland between what is clearly an employer-employee relationship and what is clearly one of independent entrepreneurial dealing. This is true within the limited field of determining vicarious liability in tort. It becomes more so when the field is expanded to include all of the possible applications of the distinction.") (footnote omitted). This remains just as true today. *See* Jennifer Pinsof, Note, *A New Take on an Old Problem: Employee Misclassification in the Modern Gig-Economy*, 22 MICH. TELECOMM. & TECH. L. REV. 341, 343 (2016) ("For over 100 years, America has classified workers into these two categories [independent contractor or employee], yet the law continuously fails to do so in a uniform, predictable, and purposeful way.").

[70] *Hearst Publ'ns*, 322 U.S. at 122 (noting that within a single jurisdiction a person who is held to be an independent contractor for the purpose of imposing vicarious liability in tort may be an employee for the purposes of particular legislation, such as unemployment compensation). For example, many "gig" workers like the flexibility of "dipping" into the platform economy and stepping back out as the situation warrants. *See* AVERY ET AL., *supra* note 33, at 8.

[71] *See supra* text accompanying notes 54–65; *see also* Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 751 (1989) ("In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished."). There are additional factors that are considered, namely: skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party;

be liable to third parties injured by a worker—no control, no liability.[72] In general, some form of classification test, focused on the right to control the means of the work, is applied when an applicable workplace statute does not define employment.[73] But as courts have noted, particularly in the Northern District of California, this test for determining worker classification has not kept pace with changes in work. It is "outmoded" and leaves juries being "handed a square peg and asked to choose between two

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the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party. *Id.* at 751–52; *see also* RESTATEMENT (SECOND) OF AGENCY § 220(2) (1958). But these additional factors are merely secondary to control under most classification tests. *See* Lisa J. Bernt, *Suppressing the Mischief: New Work, Old Problems*, 6 N.E. U. L.J. 311, 319 (2014) ("[W]hile other factors. . . might be considered in some tests, the hiring party's control over the manner of work is still typically a significant, perhaps the most important, factor.").

[72] *See, e.g.*, Standard Oil Co. v. Anderson, 212 U.S. 215, 222 (1909) ("[W]e must inquire whose is the work being performed, a question which is usually answered by ascertaining who has the power to control and direct the servants in the performance of their work."); Singer Mfg. Co. v. Rahn, 132 U.S. 518, 523 (1889) ("[T]he relation of master and servant exists whenever the employer retains the right to direct the manner in which the business shall be done, as well as the result to be accomplished, or, in other words, not only what shall be done, but how it shall be done.") (internal quotation marks omitted); *see also* Keith Cunningham-Parmeter, *Gig-Dependence: Finding the Real Independent Contractors of Platform Work*, 39 N. ILL. U. L. REV. 379, 400–06 (2019) (revealing that independent contractors have traditionally been liable for their own torts, instead of their employers, because the independent contractors have the financial wherewithal to compensate those they may injure).

[73] *See* Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 326–27 (1992) ("Agency law principles comport, moreover, with our recent precedents and with the common understanding, reflected in those precedents, of the difference between an employee and an independent contractor."; determining classification with respect to ERISA, which does not define employment); Richard R. Carlson, *Why the Law Still Can't Tell an Employee When It Sees One and How It Ought to Stop Trying*, 22 BERKELEY J. EMP. & LAB. L. 295, 314 (2001) (arguing "the wider the range of facts a court entertains as evidence of employer control and domination, the more likely the court will find a worker to be an employee").

round holes."[74] Is it therefore time to abandon the traditional tests that prioritize the hiring party's right to control when attempting to classify gig workers?[75]

III. APPLYING UPDATED LAWS TO NEW WORK ARRANGEMENTS

The so-called ABC test provides a variation on the traditional control-focused classification tests by making control only one of three factors that all must be satisfied before a worker can be classified as an independent contractor. Under the ABC test, a worker is *presumed* to be an employee unless the hiring party establishes the worker: (A) is free from the control and direction of the hiring party in connection with the performance of the work, both under the contract for the performance of the work and in fact; *and* (B) performs work that is outside the usual course of the hiring party's business; *and* (C) is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed. The ABC test applies predominantly to unemployment

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[74] *See* Cotter v. Lyft, Inc., 60 F. Supp. 3d 1067, 1080–81 (N.D. Cal. 2015); *cf.* Lawson v. Grubhub, Inc., 302 F. Supp. 3d, 1071, 1093 (N.D. Cal. 2018) ("Under California law whether an individual performing services for another is an employee or an independent contractor is an all-or-nothing proposition. If Mr. Lawson is an employee, he has rights to minimum wage, overtime, expense reimbursement and workers compensation benefits. If he is not, he gets none. With the advent of the gig economy, and the creation of a low wage workforce performing low skill but highly flexible episodic jobs, the legislature may want to address this stark dichotomy."); *see also* Razak v. Uber Techs., Inc., No. 16-573, 2018 WL 1744467, at *13 & n.17 (E.D. Pa. Apr. 11, 2018) ("Transportation network companies ('TNCs'), such as Uber and its most frequent U.S. competitor, Lyft, present a novel form of business that did not exist at all ten years ago, available through the use of 'apps' installed on smart phones. With time, these businesses may give rise to new conceptions of employment status."; noting also that Uber's business model shares some characteristics in common with a joint venture); Blake E. Stafford, *Riding the Line between Employee and Independent Contractor in the Modern Sharing Economy*, 51 WAKE FOREST L. REV. 1223, 1232 (2016) (noting that given the number of factors that can be examined, courts have reached conflicting results while purporting to use the same test).

[75] *Cf.* O'Connor v. Uber Techs., Inc., 82 F. Supp. 3d 1133, 1153 (N.D. Cal. 2015) ("It is conceivable that the legislature would enact rules particular to the new so-called 'sharing economy.'").

compensation claims in the seventeen states (plus Puerto Rico and the Virgin Islands) that have enacted it.[76]

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[76] *See* ALASKA STAT. ANN. § 23.20.525(a)(8) (West 2009); Calif. Assembly Bill 5, § 2 (adding LABOR CODE § 2750.3; effective Jan. 1, 2020); CONN. GEN. STAT. ANN. § 31-222(a)(B)(ii) (West 2017); DEL. CODE ANN. tit. 19, § 3302(10)(k) (West 2019); HAW. REV. STAT. ANN. § 383-6 (West 1984); 820 ILL. COMP. STAT. ANN. 185/2 (West 2015); IND. CODE ANN. § 22-4-8-1(b) (West 2006); LA. STAT. ANN. § 23:1472(12)(E) (2014); MASS. GEN. LAWS ANN. ch. 149, § 148B(a) (2004); NEB. REV. STAT. ANN. § 48-604(5) (West 2018); NEV. REV. STAT. ANN. § 612.085 (West 1993); N.H. REV. STAT. ANN. § 282-A:9(III) (West 2011); N.J. STAT. ANN. § 43:21-19(i)(6) (West 2017); N.M. STAT. ANN. § 51-1-42(F)(5) (West 2015); P.R. LAWS ANN. tit. 11, § 202(j)(5) (1995); VT. STAT. ANN. tit. 21, § 1301(6)(B) (West 2014); V.I. CODE ANN. tit. 24, § 302(k)(5) (2009); WASH. REV. CODE ANN. § 50.04.140(1) (West 1991); W. VA. CODE ANN. § 21A-1A-16(7) (West 1997). Illinois and Nevada have additional ABC tests that apply solely to the construction industry, while the District of Columbia, Maryland, and New York have also adopted the ABC test but limit it strictly to the construction industry. *See* D.C. CODE ANN. §§ 32-1331.02, 32-1331.04(c)(2) (West 2013); 820 ILL. COMP. STAT. ANN. 185/5, 185/10(b) (West 2008); MD. CODE ANN., LAB. & EMPL. §§ 3-902, 3-903(c) (West 2012); NEV. REV. STAT. ANN. 608.0155(2) (2019); N.Y. LAB. LAW § 861-c(1) (McKenney 2010). Finally, four additional states have adopted only Parts A and C of the ABC test. *See* COLO. REV. STAT. ANN. § 8-70-115(1)(b) (West 2016); IDAHO CODE ANN. § 72-1316(4) (West 2008); S.D. CODIFIED LAWS § 61-1-11 (2011); UTAH CODE ANN. § 35A-4-204(3) (West 2006) (applicable to unemployment insurance claims); *see also* GA. CODE ANN. § 34-8-35(f) (West 2012) (adopting parts A and C, but adding an alternative element to satisfy part C: the worker is subject to an IRS determination against employee status); MONT. CODE ANN. § 39-71-417(4)(a) (West 2011) (using only Parts A and C but applicable only for obtaining an independent contractor certification); 43 PA. STAT. AND CONS. STAT. ANN. § 933.3(a) (West 2011) (adding an additional requirement to parts A and C: a written contract to perform the services in question; applicable only to the construction industry); WYO. STAT. ANN. § 27-3-104(b) (West 2014) (for unemployment insurance purposes, "An individual who performs service for wages is an employee for purposes of this act unless it is shown that the individual: (i) Is free from control or direction over the details of the performance of services by contract and by fact; . . . (v) Represents his services to the public as a self-employed individual or an independent contractor; and (vi) May substitute another individual to perform his services"; subsections (ii)–(iv) repealed); WYO. STAT. ANN. § 27-14-102(a)(xxiii) (West 2018) (same definition applicable to workers' compensation claims). *See generally* Anna Deknatel & Lauren Hoff-Downing, *ABC on the Books and in the Courts: An Analysis of Recent Independent Contractor and Misclassification*

Although Maine is considered the first state to have adopted the ABC test in 1935,[77] most of the ABC statutes have been passed this century,[78] most recently, and controversially, in California with passage of Assembly Bill 5 (known as AB 5).[79] The ABC test removes the reliance on the control factor because even if control is absent, the remaining two factors (parts B and C) must also be met in order to classify a worker as an independent contractor.[80] It is perhaps this shift away from the control factor that has caused platform-based enterprises with substantial operations in California to consider that state's adoption of AB 5 to be an existential threat,[81] to the extent that Uber, Lyft and other on-demand

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Statutes, 18 U. PA. J.L. & SOC. CHANGE 53 (2015) (providing a detailed discussion of the evolution of the ABC test). In addition, the U.S. Senate and House of Representatives have introduced two identical bills that would incorporate the ABC test in defining an employee under the National Labor Relations Act. Protecting the Right to Organize Act of 2019, S. 1306, H. 2474, § 4(a)(2), 116th Cong. (2019) (amending 29 U.S.C. § 152(3) (2016)); *see also* Protecting Workers' Freedom to Organize Act, S. 664, § (2)(1), 116th Cong. (2019) (incorporating the ABC test in defining an employee under the National Labor Relations Act).

[77] *See* Deknatel & Hoff-Downing, *supra* note 76, at 65 n.66. Maine currently uses a multifactor test. *See* ME. REV. STAT. ANN. tit. 26, § 1043(11)(E) (2011).

[78] *See supra* note 76.

[79] Calif. Assembly Bill 5, § 2 (adding LABOR CODE § 2750.3; effective Jan. 1, 2020).

[80] *See, e.g.*, Athol Daily News v. Bd. of Div. of Emp't and Training, 786 N.E.2d 365, 369–70 (Mass 2003) ("The employer bears the burden of proof, and, because the conditions are conjunctive, its failure to demonstrate any one of the criteria set forth in subsections [A, B, or C], suffices to establish that the services in question constitute 'employment. . . .'").

[81] *See, e.g.*, Andrew J. Hawkins, *Uber and Lyft Face an Existential Threat in California—and They're Losing*, VERGE (Sept. 2, 2019, 9:38 AM), https://www.theverge.com/2019/9/2/20841070/uber-lyft-ab5-california-bill-drivers-labor (discussing Uber's and Lyft's reactions to the pending enactment of legislation in California codifying the ABC test).

companies have pledged up to $90 million to pass a ballot initiative, the "Protect App-Based Drivers and Service Providers Act," to partially supersede AB 5.[82]

AB 5 is a codification of the California Supreme Court decision, *Dynamex Operations West, Inc. v. Superior Court*.[83] While there do not appear to be any published court opinions applying the ABC test

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[82] *See* Josh Eidelson, *Uber, Lyft, DoorDash Put $90 Million to Possible Ballot War*, BLOOMBERG (Aug. 29, 2019, 4:01 PM), https://www.bloomberg.com/news/articles/2019-08-29/uber-lyft-pledge-60-million-to-possible-labor-law-ballot-fight. But these companies want AB 5 to not apply only to *their* business models; their ballot proposal would exempt only app-based rideshare and service providers. *See* Protect App-Based Drivers and Service Providers Act, https://protectdriversandservices.com/wp-content/uploads/2019/10/Protect-App-Based-Drivers-Services-Act_Annotated.pdf (last visited Jan. 9, 2020). In the meantime, the District Court for the Southern District of California issued a temporary restraining order, preventing the classification of persons driving or hauling freight as an employee or independent contractor under AB 5. *See* Order Granting Temporary Restraining Order at 2, Cal. Trucking Ass'n v. Atty. Gen. Xavier Becerra, No. 3:18-cv-02458-BEN-BLM (S.D. Cal. Dec. 31, 2019). Specifically, the court concluded the plaintiffs had shown that part B of AB 5 is likely preempted by the Federal Aviation Administration Authorization Act (FAAAA) (49 U.S.C. § 14501(c)(1) (2016)) "because AB-5 effectively mandates that motor carriers treat owner-operators as employees, rather than as the independent contractors that they are." *Id.* at 3. The California Superior Court for the County of Los Angeles has also ruled that Part B of both AB 5 and the *Dynamex* ABC test are preempted by the FAAAA. *See* Order Granting in Part Defendants' Motion *In Limine* Re Preemption and Non-Retroactivity of ABC Worker Classification Test, People *ex rel*. California v. Cal Cartage Transp. Express LLC, No. BC 689320 (Cal. Super. Ct. Jan. 8, 2020).

[83] 416 P.3d 1 (adopting the ABC test; interpreting the application of CAL. CODE REGS. tit. 8, § 11090 (2001), applying to all persons employed in the transportation industry and imposing obligations on hiring entities with respect to minimum wages, maximum hours, and specified basic working conditions). While AB 5 is effective as of January 1, 2020, one question is whether *Dynamex* applies to classification lawsuits initiated before the *Dynamex* decision. Courts have ruled *Dynamex* applies retroactively and other courts have stayed earlier classification decisions pending the California Supreme Court's ruling on whether *Dynamex* applies retroactively. *See* Gonzales v. San Gabriel Transit, Inc., 253 Cal. Rptr. 3d 681, 700–01 (Cal. Ct. App. 2019); Garcia v. Border Transp. Grp., LLC, 239 Cal. Rptr. 3d 360, 374 (Cal. Ct. App. 2018); Vazquez v. Jan-Pro Franchising Int'l, Inc., 923 F.3d 575 (9th Cir. 2019) (applying *Dynamex* retroactively), 930 F.3d 1107

to a platform-based business model, courts and commentators, prior to the enactment of AB 5, have suggested that *Dynamex* could impose a serious threat to those companies' business models.[84]

However, some existing rulings applied to workers outside the gig economy suggest that application of the ABC test to platform-based workers would not automatically result in an employee classification. As discussed earlier, courts and agencies have not had too much difficulty finding gig workers free from control.[85] Part B (the worker performs work that is outside the usual course of the hiring party's business) has been satisfied when the hiring party is considered a broker,[86] a role most

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(withdrawing holding and certifying to California Supreme Court question of whether *Dynamex* applies retroactively); 939 F.3d 1050 (reinstating holding pending decision by California Supreme Court whether *Dynamex* applies retroactively). The California Supreme Court has reportedly agreed to determine whether *Dynamex* applies retroactively. *See* Michael Lotito & James Paretti, Jr., *California Supreme Court Agrees to Hear Dynamex Retroactivity Question*, JDSUPRA (Nov. 25, 2019), https://www.jdsupra.com/legalnews/california-supreme-court-agrees-to-hear-67503/.

[84] *See, e.g.*, O'Connor v. Uber Techs., Inc., Nos. 13-cv-03826-EMC, 15-cv-00262-EMC, 2019 WL 1437101, at *9 (N.D. Cal. Mar. 29, 2019); *see also Garcia*, 239 Cal. Rptr. 3d at 374 (reversing trial court's decision taxi driver was an independent contractor; applying *Dynamex* retroactively to conclude taxi company could not satisfy part C of the ABC test); Laurie E. Leader, *Whose Time Is It Anyway: Evolving Notions of Work in the 21st Century*, 6 BELMONT L. REV. no. 2, 2019, at 120 (asserting that under parts A and B, Uber drivers would be classified as employees); John O. McGinnis, *The Sharing Economy as an Equalizing Economy*, 94 NOTRE DAME L. REV. 329, 359 (2018) (stating *Dynamex* threatens to impose the "corporate–employee relationship" on platform-based businesses); Chris Opfer, *Uber Hit With $650 Million Employment Tax Bill in New Jersey*, BLOOMBERG L. (Nov. 14, 2019, 2:31 PM), https://news.bloomberglaw.com/daily-labor-report/uber-hit-with-650-million-employment-tax-bill-in-new-jersey (reporting that Uber was assessed $650 million in unpaid New Jersey unemployment and disability payments for its employee-drivers; noting New Jersey has adopted the ABC test).

[85] *See supra* text accompanying notes 58–65.

[86] *See, e.g.*, Q.D.-A., Inc. v. Indiana Dep't of Workforce Dev., 114 N.E.3d 840, 848 (Ind. 2019) (concluding drivers providing "drive-away" services were not providing services within the hiring party's usual course of business unless the hiring party itself also performed drive-away services); State Dep't of Emp't, Training and Rehab., Emp't Sec. Div. v. Reliable Health Care Servs. of S. Nev., Inc., 983 P.2d 414, 418 (Nev. 1999) (concluding "the business of brokering health

platform-based businesses claim.[87] With regard to part C of the ABC test (the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed), there are arguably mixed results. Applying other misclassification tests in which this factor was only secondary to control, the District Court for the Northern District of

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care workers does not translate into the business of treating patients for these purposes, and thus a temporary health care worker does not work in the usual course of an employment broker's business within the purview of" part B of the ABC Test); Trauma Nurses, Inc. v. Bd. of Review, N.J. Dep't of Labor, 576 A.2d 285, 291 (N.J. Super. Ct. App. Div. 1990) (holding nurses were not employees of broker who supplied nurses' temporary services to hospitals; "The record does not substantiate the naked claim that a broker in the business of matching a nurse with the personnel needs of a hospital is undertaking the provision of health care services. The service of supplying health care personnel does not translate into the business of caring for patients."); *see also* State of Neb., Dep't of Pub. Welfare v. Saville, 361 N.W.2d 215, 219–20 (Neb. 1985) (concluding workers who provided housecleaning, lawn work, and light transportation for welfare recipients were not employees of welfare agency because the services provided were outside the usual course of the welfare agency's business, which was to pay for the services, not provide the services); Ruggiero v. Am. United Life Ins. Co., 137 F. Supp. 3d 104, 122 (D. Mass. 2015) (concluding insurance sales agent was not performing services in the usual course of the insurance company's business because the agent's sales were only merely incidental because (1) the agent could and did sell for other companies, and (2) the company sold its policies through multiple sales agents); Vermont Dep't of Labor U.I. Bulletin No. 539 (Sept. 1, 2017), https://legislature.vermont.gov/Documents/2018/WorkGroups/House%20Commerce/Bills/H.143/H.143~Maria%20Royle~UI%20Treatment%20of%20TNC~3-29-2018.pdf. (concluding that under part B, for purposes of unemployment insurance, drivers for Transportation Network Companies (TNCs) are not employees because TNCs are not in the business of owning or operating a fleet of vehicles for purposes of providing transportation for hire to the general public).

[87] *See, e.g.*, Peter Talbot, *Uber Launches An App to Connect Job Seekers with Gig Work*, NPR (Oct. 3, 2019, 4:04 PM), https://www.npr.org/2019/10/03/766861700/uber-launches-an-app-to-connect-job-seekers-with-gig-work (reporting on Uber's announcement of its Uber Works app, through which workers for a variety of services can connect with people desiring those services).

California stated this factor weighed in favor of employee classification for delivery service providers,[88] while the NLRB's Office of the General Counsel assumed *arguendo* that Uber drivers did not work in a distinct occupation or business.[89] In contrast, when actually applying part C, the Vermont Department of Labor concluded that drivers for Transportation Network Companies (TNCs) were engaged in an independently established trade or business because "they own the tools or equipment (in this case, a passenger motor vehicle) necessary to engage in the business of transporting passengers, maintain their own driver's license and insurance, and are free to offer their services to as many TNCs as they choose to."[90]

While there are certainly strong arguments that application of the ABC test to on-demand working arrangements will lead to more employee classifications, at the same time, many states are enacting legislation prescribing certain on-demand workers as independent contractors.

Seven states (Arizona, Florida, Indiana, Iowa, Kentucky, Tennessee, and Utah) have enacted "Marketplace Contractor" statutes.[91] In addition, the Texas Workforce Commission has adopted the marketplace contractor definitions for purposes of regulating unemployment compensation.[92] Common features of these statutes are the definition of a marketplace platform, market contractor, and

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[88] *See* Lawson v. Grubhub, Inc., 302 F. Supp. 3d 1071, 1088–89 (N.D. Cal. 2018).

[89] *See* DOL Op. Letter, *supra* note 64, at 13.

[90] *See* Vermont Dep't of Labor U.I. Bulletin No. 539, at *2 (Sept. 1, 2017), https://legislature.vermont.gov/Documents/2018/WorkGroups/House%20Commerce/Bills/H.143/H.143~Maria%20Royle~UI%20Treatment%20of%20TNC~3-29-2018.pdf.

[91] ARIZ. REV. STAT. ANN. §§ 23-1601–1604 (2016); FLA. STAT. ANN. §§ 451.01–.02 (West 2018); IND. CODE ANN. §§ 22-1-6-1–3 (West 2018); IOWA CODE ANN. §§ 93.1–.2 (West 2018); KY. REV. STAT. ANN. § 336.137 (West 2018); TENN. CODE ANN. §§ 50-8-101–103 (West 2018); UTAH CODE ANN. §§ 34-53-101–102, 201 (West 2018) (limited to just building services (cleaning and janitorial; furniture delivery, assembly, moving, or installation; landscaping; home repair; or similar)).

[92] 40 TEX. ADMIN. CODE § 815.134 (2019).

exemptions. Marketplace platforms are generally defined as entities that (A) operate an Internet web site or smartphone application that facilitates the provision of services by marketplace contractors to individuals or entities seeking the services; (B) accept service requests from the public only through the organization's Internet web site or smartphone application and does not accept service requests by telephone, facsimile, or in person at a retail location; and (C) do not perform services at or from a physical location in the state.[93] A market contractor is defined as a person or entity that enters into an agreement with a marketplace platform to provide services to third parties.[94]

Marketplace contractor statutes prescribe that the contractor is an independent contractor, as long as there is a written agreement providing: the worker is an independent contractor, all or substantially all of the payments paid to the marketplace contractor are based on the performance of services or other output by the contractor, the contractor may work any hours or schedules the contractor chooses, the contractor may perform services for other parties without restriction, and the contractor bears responsibility for all or substantially all of the expenses that the contractor pays or incurs in performing

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[93] *See* Ariz. REV. STAT. ANN. § 23-1603(E); IND. CODE. ANN. § 22-1-6-2(2); FLA. STAT. ANN. § 451.01 (limited though to temporary household services); KY. REV. STAT. ANN. § 336.137(1)(b). Most of the definitions exclude services performed in the employment of the state or political subdivision or Indian tribe, as well as any religious, charitable, or educational organization. They also generally exclude from the definition any digital website or smartphone application where the services facilitated consist of transporting freight, sealed and closed envelopes, boxes or parcels or other sealed and closed containers for compensation. Indiana excludes passenger transport services provided in connection with technology offered by a transportation network company. IND. CODE. ANN. § 22-1-6-1(3). A transportation network company (TNC) uses a digital network to connect TNC riders to TNC drivers to request prearranged rides. *See id.* § 8-2.1-17-18; *infra* note 102 and accompanying text.

[94] *See* IND. CODE. ANN. § 22-1-6-2(1); IOWA CODE ANN. § 93.1; KY. REV. STAT. ANN. § 336.137(1)(a).

the services, without the right to obtain reimbursement from the marketplace platform for the expenses.[95]

It is not surprising that Handy, which provides cleaning, handyman and home improvement service providers through an online app, has lobbied for marketplace contractor statutes.[96] While perhaps adding clarity to the employee/independent contractor classification issue, at least for platform-based companies, commentators have been quick to point out that marketplace contractor statutes could create more economic insecurity for workers by making it easier for businesses to reclassify employees as independent contractors.[97] And Professor Michael Duff argues that the broad nature of the statutes could impact workers beyond what is currently considered the gig economy because "virtually any" business providing services through an online app could have its workers classified as employees.[98]

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[95] *See* Ariz. REV. STAT. ANN. § 23-1603(A) (containing additional provisions); IND. CODE. ANN. § 22-1-6-3; FLA. STAT. ANN. § 451.02(1); IOWA CODE ANN. § 93.2; KY. REV. STAT. ANN. § 336.137(2); *see also* Ariz. REV. STAT. ANN. § 23-1601 (containing additional multiple factors required to support a declaration of independent business status by the worker).

[96] *See* Sarah Kessler, *Handy Is Quietly Lobbying State Lawmakers to Declare Its Workers Aren't Employees*, QUARTZ (Mar. 30, 2018), https://qz.com/work/1240997/handy-is-trying-to-change-labor-law-in-eight-states/; Handy, https://www.handy.com/; Rebecca Smith, *'Marketplace Platforms' and 'Employers' Under State Law—Why We Should Reject Corporate Solutions and Support Worker-Led Innovation*, NAT'L EMP. L. PROJECT (May 18, 2018), https://www.nelp.org/publication/marketplace-platforms-employers-state-law-reject-corporate-solutions-support-worker-led-innovation/ (reporting that at least in Tennessee, Handy provided the draft legislation).

[97] *See* Libby Reder et al., *State Legislation Aimed at Helping Online Platforms Could Harm Workers*, ASPEN INST. (Mar. 27, 2018), https://www.aspeninstitute.org/blog-posts/worker-classification-state-legislation-2018/.

[98] *See* Michael C. Duff, *New Tennessee "Gig" Law: "Handyman Special" or New Flavor of Opt-Out*, WORKERS' COMPENSATION L. PROF BLOG (Mar. 20, 2018), https://lawprofessors.typepad.com/workerscomplaw/2018/03/new-tennessee-gig-law-handyman-special-or-new-flavor-of-opt-out.html (commenting specifically on Tennessee's statute).

While Handy has been lobbying for laws classifying its gig workers as independent contractors, Uber has been doing the same for drivers of Transportation Network Companies (TNCs).[99] Fundamentally, TNC statutes, which have been adopted in one form or another in forty-one states, take away local community powers to establish passenger transportation regulations by doing so at the state level.[100] However, TNC statutes in fourteen states, similar to the marketplace contractor statutes, establish conditions to prescribe independent contractor classification for drivers. In general, under these statutes, drivers will be classified as independent contractors as long as the TNC: (1) does not unilaterally prescribe specific hours during which a driver shall be logged onto the TNC's digital network; (2) does not restrict a driver from engaging in any other occupation or business; (3) imposes no restrictions on the TNC driver's ability to utilize a website, digital network, or software application of other TNCs; (4) does not assign a TNC driver a particular territory in which transportation network company services may be provided; and (5) enters into a written agreement with the driver stating that the driver is an independent contractor for the TNC.[101] The difference between the marketplace

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[99] *See* JOY BORKHOLDER, UBER STATE INTERFERENCE: HOW TRANSPORTATION NETWORK COMPANIES BUY, BULLY, AND BAMBOOZLE THEIR WAY TO DEREGULATION (2018), https://www.forworkingfamilies.org/sites/default/files/publications/Uber%20State%20Interference%20Jan%202018.pdf.

[100] *See id.* at 4.

[101] *See* ALASKA STAT. ANN. § 28.23.080(a) (West 2017) (omitting requirements 3 and 4); ARK. CODE ANN. § 23-13-719(a) (2015); DEL. CODE ANN. tit. 2, § 1911 (West 2016); FLA. STAT. ANN. § 627.748(9) (West 2018) (omitting requirement 4); MICH. COMP. LAWS ANN. § 257.2137(1) (West 2017); MISS. CODE ANN. § 77-8-21 (West 2016); MO. ANN. STAT. § 384.414 (West 2017) (omitting requirement 4); N.H. REV. STAT. ANN. § 376-A:20 (2018); TEX. OCC. CODE ANN. § 2402.114 (West 2017); W. VA. CODE ANN. § 17-29-11(a) (West 2016); WYO. STAT. ANN. § 31.20.110(a) (West 2017) (omitting requirement 4); *see also* IND. CODE ANN. § 8-2.1-19.1-4 (West 2015) (providing that TNC driver is an independent contractor as long as the TNC does not control, direct, or manage a TNC driver who connects to the TNC's digital network and the TNC does not own, control, operate, or manage a personal vehicle used by a TNC driver to provide prearranged ride); R.I. GEN. LAWS ANN. § 39-14.2-16 (West 2016) (prescribing TNC drivers to be independent contractors if they meet requirements

contractor statutes and these provisions is that rather than apply to any business that operates through on online app, TNC statutes apply to businesses that use a digital network to connect TNC riders to TNC drivers who provide prearranged rides.[102] The digital network used by the TNC to connect riders and drivers is defined as "any online-enabled application, software, website, or system offered or used by a [TNC] that enables the prearrangement of rides with [TNC] drivers."[103]

Rather than redefine employee/independent contractor classification, the eighteen states that have adopted marketplace contractor and TNC statutes (some states enacting both) have instead prescribed independent contractor status for certain app-based gig workers. While this approach provides clarity, it does so at the expense of worker protections.

IV. BENEFITS AND PROTECTIONS FOR ON-DEMAND WORKERS

Some commentators have suggested that independent contractors be included in various employment statutes. Seth Harris and Alan Krueger have provided one of the more comprehensive

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under IRS and Rhode Island tax statutes, and the TNC and TNC driver agree in writing that the TNC driver is an independent contractor of the TNC); UTAH CODE ANN. § 13-51-103(2) (West 2019) (generally prescribing a TNC driver as an independent contractor). *But see* N.C. GEN. STAT. ANN. § 20-280.8 (West 2015) (providing a rebuttable presumption that a TNC driver is an independent contractor and not an employee, and the presumption may be rebutted by application of the common law test for determining employment status).

[102] *See* ALASKA STAT. ANN. § 28.23.180(4); ARK. CODE ANN. § 23-13-702(4); DEL. CODE ANN. tit. 2, § 1901(4); FLA. STAT. ANN. § 627.748(1)(e); MICH. COMP. LAWS ANN. § 257.2102(l); MISS. CODE ANN. § 77-8-1(e); MO. ANN. STAT. § 384.400(4); N.H. REV. STAT. ANN. § 376-A:1(V); N.C. GEN. STAT. ANN. § 20-280.1(6); R.I. GEN. LAWS ANN. § 39-14.2-1(8); TEX. OCC. CODE ANN. § 2402.001(5); W. VA. CODE ANN. § 17-29-1(3); WYO. STAT. ANN. § 31.20.101(v); *see also* UTAH CODE ANN. § 13-51-102(4).

[103] *See* ALASKA STAT. ANN. § 28.23.180(1); ARK. CODE ANN. § 23-13-702(1); DEL. CODE ANN. tit. 2, § 1901(1); FLA. STAT. ANN. § 627.748(1)(a); MICH. COMP. LAWS ANN. § 257.2102(m); MISS. CODE ANN. § 77-8-1(d); MO. ANN. STAT. § 384.400(2); N.H. REV. STAT. ANN. § 376-A:1(II); R.I. GEN. LAWS ANN. § 39-14.2-1(3); TEX. OCC. CODE ANN. § 2402.001(2); W. VA. CODE ANN. § 17-29-1(2); WYO. STAT. ANN. § 31.20.101(i); *see also* UTAH CODE ANN. § 13-51-102(6).

examinations of the challenges to revising employment laws to incorporate a growing type of worker, the "independent worker"—who "chooses when and whether to work at all. The [employment] relationship can be fleeting, occasional, or constant, at the discretion of the *independent worker*."[104] They recommend that independent workers be afforded many standard employment-related protections, including freedom to organize and collectively bargain, civil rights, tax withholding, workers' compensation insurance, affordable health insurance, and risk pooling (for protections that might not be provided through an employer).[105]

Harris's and Krueger's analysis is limited to "gig economy" workers who provide services through intermediaries. In general, there is a significant gap in benefits coverage between traditional and non-traditional workers, so that as more workers engage in non-traditional work, the more they lack essential benefits.[106] There have been previous initiatives more broadly aimed at employment insecurity and inequality. For example, U.S. Senator Sherrod Brown (D-OH) proposed raising the minimum wage, increasing the overtime salary threshold, requiring paid sick days and family medical leave, and strengthening collective bargaining rights.[107] Senator Brown also addressed worker misclassification by supporting the Fair Playing Field Act.[108] This proposed legislation did not change the legal test for

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[104] HARRIS & KRUEGER, *supra* note 4, at 9.

[105] *See id*. at 15–21. One significant restraint addressed by Harris and Krueger is that because independent workers often wait for work simultaneously for multiple employers, it is often difficult measure work hours; as such, they recommend that employers not be required to provide hours-based benefits, such as overtime and minimum wage. *See id.* at 13.

[106] *See* LIBBY REDER ET AL., DESIGNING PORTABLE BENEFITS: A RESOURCE GUIDE FOR POLICYMAKERS 17 (2019), https://www.aspeninstitute.org/content/uploads/2019/06/Designing-Portable-Benefits_June-2019_Aspen-Institute-Future-of-Work-Initiative.pdf

[107] *See* U.S. SENATOR SHERROD BROWN, WORKING TOO HARD FOR TOO LITTLE: A PLAN FOR RESTORING THE VALUE OF WORK IN AMERICA 3 (2017), http://www.brown.senate.gov/download/plan-to-restore-value-of-work.

[108] S. 2252, 114th Cong. (2015).

determining whether a worker is an employee or independent contractor; it merely gave the IRS authority to take action against employers who misclassify their workers.[109] More substantively, Senator Brown proposed that employers with more than $7.5 million in annual receipts and 500 independent contractors be required to pay half of payroll taxes for those workers.[110] Senator Brown is targeting large companies relying on a business model that classifies their entire, large workforces as independent contractors.[111] He believed this approach would "increase the cost of classifying workers as independent contractors and, ideally, lead large companies to rethink choosing a business model that relies on a workforce of independent contractors in lieu of employees."[112]

Senator Elizabeth Warren (D-MA) took a more holistic approach: "all workers—no matter when they work, where they work, who they work for. . .—. . . should have some basic protections and be able

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[109] *See* BROWN, *supra* note 107, at 37. The proposed legislation would also have required employers to inform workers of their status so they could better determine whether they were misclassified and take action accordingly. *See id*.

[110] *See id.*

[111] *Id.* (noting the independent contractor status was not created to be used by companies as a way of avoiding taxes, labor standards, and workers' rights; rather "Congress intended for the category to distinguish between those who work under supervision and those who decide how the work will be done and usually hire others to do the work") (internal quotation marks omitted) (alterations omitted).

[112] *Id.* ("Creating this safeguard against abuse will redefine the independent contractor status as a classification for workers who are truly independent and truly contractors."). Senator Brown also recognized that "[c]ompanies that classify workers as independent contractors will not sponsor a retirement plan because it is an important indicator to the IRS and the Courts of an employer-employee relationship." *Id.* at 40. He therefore proposed "increasing access to a tax-preferenced savings program for workers who file 1099 tax forms [to] help . . . address the economic insecurity that often accompanies the independent contractor status." *Id.*

to build some economic security for themselves and their families."[113] While Senator Brown would have required large employers to deduct payroll taxes, Senator Warren proposed "electronic, automatic, and mandatory withholding of payroll taxes must apply to everyone[,]" including independent contractors.[114] Senator Warren also advocated for the availability of (pooled) catastrophic insurance for workers who were not covered by workers' compensation, as well as paid leave.[115]

While Senator Brown's and Senator Warren's proposals are a few years old, and not progressed beyond their initial proposal stage, advocacy and some legislation continue that, while accepting independent contractor classification for gig workers, provide them with portable benefits that are decoupled from any particular job or company.[116] The U.S. Senate and House of Representatives have introduced identical bills to establish a portable benefits pilot program.[117] The bill sets aside up to $20 million to fund efforts by state and local governments and nonprofit organizations to evaluate, design, or

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[113] Elizabeth Warren, U.S. Senator, Remarks at the New America Annual Conference, "Strengthening the Basic Bargain for Workers in the Modern Economy" 4 (May 19, 2016), https://www.warren.senate.gov/files/documents/2016-5-19_Warren_New_America_Remarks.pdf.

[114] *Id.*

[115] *See id.*; *see also* Warner, *supra* note 13 (noting many workers in the on-demand economy have no safety-net).

[116] *See generally* REDER ET AL., *supra* note 106 (providing an overview of portable benefits); *see also* NATALIE FOSTER, PORTABLE BENEFITS RESOURCE GUIDE 10 (2016), https://assets.aspeninstitute.org/content/uploads/2016/07/resource_guide_final8-1.pdf?_ga=2.174832290.1253371806.1572450693-2096790282.1572450693; *The Future of Work: Preserving Worker Protections in the Modern Economy: Before the Subcomm. on Workforce Prots. and Subcomm. on Health, Emp't, Labor, and Pensions of the H. Comm. on Educ. & Labor*, 116th Cong. 15 (2019) (testimony of Brishen Rogers, Associate Professor, Temple University Beasley School of Law, Visiting Associate Professor, Georgetown University Law Center (Fall 2019), Fellow, Roosevelt Institute) (noting the idea of portable benefits is not new).

[117] Portable Benefits for Independent Workers Pilot Program Act, S. 541, H.R. 4016, 116th Cong. (2019).

improve upon new or existing portable benefits.[118] Under the bills, portable benefits are work-related benefits that workers could maintain upon changing jobs,[119] including workers' compensation, skills training, disability coverage, health insurance coverage, retirement saving, income security, and short-term saving.[120] Eligible workers under the proposed pilot program are defined as "any worker who is not a traditional full-time employee of the entity hiring the worker for the eligible work, including any independent contractor, contract worker, self-employed individual, freelance worker, temporary worker, or contingent worker."[121]

Legislation has been introduced in the state of Washington that provides portable benefits for any worker who is not an employee and who provides services for financial compensation through another company, and who worked at least 30 cumulative hours or the lesser of either thirty tasks, trips, or shifts in a calendar year.[122] Benefits would include workers' compensation, health insurance, paid time off, and retirement benefits.[123] Legislation providing similar portable benefits has also been introduced in New Jersey.[124]

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[118] *See id.* §§ 3(1), 4(b)(1).

[119] *See id.* § 3(4)(A).

[120] *See id*. § 3(6).

[121] *Id*. § (3)(3).

[122] H.B. 5690, § 30, 66th Legis. (2019).

[123] *See id.* § 41.

[124] *See* S67, A3824, 218th Legis. (2018). Although there have been reports New Jersey's governor would sign the legislation into law in late 2019 (*see, e.g.,* Salvador P. Simao, *New Jersey Is About to Take Another Step Towards Eliminating the Use of Independent Contractors by Providing Them with Benefits*, FORDHARRISON (Oct. 29, 2019), https://www.fordharrison.com/new-jersey-is-about-to-take-another-step-towards-eliminating-the-use-of-independent-contractors-by-forcing-employers-to-provide-them-with-benefits), there is no record of him having done so. There were also reports in late 2016 that the New York Assembly was considering a draft portable benefits bill, written by Handy and requiring participant workers to be classified as independent contractors. *See* Dan Levine & Kristina Cooke, Unions, Gig-

As this review indicates, providing a full range of portable benefits for non-employee workers is still far from reality. Most legislation falls within initial proposals, pilot programs, and a few states providing paid medical or family leave.[125]

CONCLUSION

This article has shown that the nature of work in the United States is changing, particularly with regard to an increase in contingent and precarious employment arrangements, often by classifying workers as independent contractors. Concurrently, though, the law has not kept pace and respect for precedent has left courts lamenting old and outdated rules for new circumstances, but declining to change those rules. Some states have adopted a newer ABC test that greatly simplifies the classification schema. However, while many believe the test portends a trend of employee classification for on-demand workers, time will only tell as the ABC test is applied to those workers.

Meanwhile, however, a few states have begun enacting legislation that prescribes independent contractor status for certain on-demand workers. While these laws can certainly provide clarity, they also prescribe precarity for the affected workers. Finally, rather than address the classification issue at all, some recent proposals and initiatives aim to provide traditional employee-style workplace protections and benefits to non-employee workers. However, these initiatives are very limited and only in the early stages of possible development.

Economy Firms Gear Up for New York Benefits Battle, Reuters (Nov. 28, 2016, 4:07 AM), https://in.reuters.com/article/labor-tech-benefits-idINKBN13N0Y6. The New York Assembly has introduced two identical bills (S02650/A04778) creating a task force to examine "jobs and the new economy." *See generally* Genevieve Douglas, *Portability Makes Some Paid Leave Programs Good for Gig Workers*, DAILY LAB. REP. (May 24, 2019) (on file with author) (reviewing state portable paid leave initiatives).

[125] *See* Douglas, *supra* note 124.

Meanwhile, classifying any non-traditional worker, and particularly an on-demand worker, as an employee or independent contractor will still depend on the type of work performed, the type of complaint, and where the complaint is brought. In the meantime, more and more workers find themselves in precarious working arrangements with minimal workplace protections and benefits.