BALANCING FLEXIBILITY AND VULNERABILITY: WORKER CLASSIFICATION IN THE GIG ECONOMY

Mollie Pinion Harper

Over the last decade, the rapid proliferation and globalization of technology has profoundly impacted the economy, the job market, and the ways in which companies, workers and consumers interact.[1] These changes are the direct result of booming internet commerce and a massive growth of peer-to-peer transactions on a global scale.[2] Commentators use various terms to describe this phenomenon, including collaborative consumption, the sharing economy, the gig economy, and the peer economy, among others.[3] However, the term "gig economy" most accurately describes the current state of the modern workforce.[4] In a gig economy, companies create platform marketplaces by utilizing the internet, mobile phones, and other technology to facilitate direct links between suppliers and consumers on a large scale.[5] Gig workers who perform short-term tasks or personal services are matched with consumers after being connected through an online platform, and it is not unusual for gig workers to offer their services across multiple platforms at the same time.[6]

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1. Robert Rubin, Panel Discussion on The Impact of the Gig Economy on Work and Workers, Modernizing Labor Laws in the Online Gig Economy, THE HAMILTON PROJECT 2 (Dec. 9, 2015) (transcript available at https://www.hamiltonproject.org/assets/files/labor_laws_gig_economy_krueger_harris_transcript_12-9-2015.pdf).

2. Venessa Katz, *Regulating the Sharing Economy*, 30 BERKELEY TECH. L.J. 1067, 1067 (2015).

3. Natasha Singer, *In the Sharing Economy, Workers Find Both Freedom and Uncertainty*, N.Y. TIMES (Aug. 16, 2014), http://www.nytimes.com/2014/08/17/technology/in-the-sharing-economy-workers-find-both-freedom-and-uncertainty.html?_r=0.

4. Arun Sundararajan, *The 'Gig Economy' Is Coming. What Will It Mean for Work?*, GUARDIAN (July 25, 2015), https://www.theguardian.com/commentisfree/2015/jul/26/will-we-get-by-gig-economy.

5. FED. TRADE COMM'N, THE "SHARING" ECONOMY: ISSUES FACING PLATFORMS, PARTICIPANTS & REGULATORS 10 (2016), https://www.ftc.gov/system/files/documents/reports/sharing-economy-issues-facing-platforms-participants-regulators-federal-trade-commission-staff/p151200_ftc_staff_report_on_the_sharing_economy.pdf.

6. *See* Seth D. Harris & Alan B. Krueger, *A Proposal for Modernizing Labor Laws for Twenty-First Century Work: The "Independent Worker*," *in* THE HAMILTON PROJECT 28–33 (2015),

Although it is difficult to determine the exact number of workers in the gig economy,[7] there are approximately 900 gig economy companies globally that offer a wide array of services, ranging from helping with household chores and borrowing vehicles to swapping vegetables and helping decorate Christmas trees.[8] Generally, the diversity of gig economy offerings can be grouped into five categories: buying things, hiring people to do things, sharing things, borrowing things, and exchanging things.[9] A few of the most well-known gig companies include Uber, Lyft, AirBnB, and TaskRabbit.[10]

At the heart of the evolution and rapid growth of the gig economy is the contentious issue of worker classification. Much of the law treats worker classification as binary: an individual worker is either an employee or an independent contractor. How a worker is classified within this framework depends largely on the degree of control the firm has over the worker and the extent of worker dependence on the firm.[11] Those who depend on a firm to earn a wage and whose daily responsibilities are subject to that firm's control are considered employees.[12] Because employees are considered economically vulnerable due to such financial dependence, firms are legally obligated to provide employees with certain rights and protections, such as overtime pay, tax withholding, insurance and fair wages.[13] On the other hand, independent contractors are viewed as entrepreneurial and largely self-sufficient, leaving them to fend for themselves in those areas.[14] In other words, the main benefit of operating as an independent contractor is the classification's namesake: independence, in exchange for foregoing employment rights.

Though the binary system seems simple enough, worker classification as applied to modern workers in the gig economy is marked by vast variability and ambiguity. Particularly as it pertains

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https://www.hamiltonproject.org/assets/files/modernizing_labor_laws_for_twenty_first_century_work_krueger_harris.pdf.

7. Singer, *supra* note 3 (noting that it is hard to draw a reliable estimate of gig workers because workers may be registered and work with several firms in the same month, week, or even day).

8. *The Most Popular Ideas in the Sharing Economy*, JUSTPARK, https://www.justpark.com/creative/sharing-economy-index/ (last visited June 7, 2025).

9. *Id.*

10. Alex Hern, *Why the Term 'Sharing Economy' Needs to Die*, GUARDIAN (Oct. 5, 2015), https://www.theguardian.com/technology/2015/oct/05/why-the-term-sharing-economy-needs-to-die (describing Uber, AirBnB, and TaskRabbit as "the holy trinity of the Sharing Economy").

11. Shu-Yi Oei, *The Trouble with Gig Talk: Choice of Narrative and the Worker Classification Fights*, 81 DUKE L. & CONTEMP. PROBS. 107, 121–22 (2018).

12. *Id. at* 121.

13. *Id.* at 120.

14. *Id.*

to gig workers, existing employment law "provides nothing remotely close to a clear answer" on how to properly classify gig workers under the binary framework.[15] The legal landscape in this area is fragmented and boasts a dizzying array of standards and tests, which often offer three to twenty factors, ambiguous and circular definitions, conflicting interpretations and inconsistent applications across jurisdictions.[16] This is because gig workers and firms operate within a legal grey area that is prone to conflict and inconsistency, as their working relationship fits neatly within neither available classification.[17]

The crux of the issue lies not in the novelty of the gig economy but in the outdated and ill-suited binary classification framework that is poorly suited to modern gig realities, wherein gig workers are "square pegs" being forced into "two round holes."[18] The current framework not only creates legal uncertainty for both gig workers and firms but also has profound implications on the rights and protections that workers are legally entitled to. Generally speaking, an employee enjoys various employer-sponsored programs, including retirement plans, sick leave, vacation pay, and health insurance, as well as public programs such as worker's compensation and unemployment insurance.[19] Employees are legally entitled to these benefits, while independent contractors are not.[20] The consequences of classification—ranging from economic insecurity to the denial of fundamental labor protections—highlights an urgent need for reform in the gig economy.

Recent judgments and legislative efforts signify a broad recognition of the need for swift and sustainable change that reflects the modern and nuanced reality of the gig economy. In advocating for a hybrid category narrowly tailored to gig and other "grey area" workers, this Comment posits a third way forward, reconciling the desired flexibility of gig work with the benefits afforded only to employees. Drawing on various proposals for reform, this Comment ultimately argues for a legislative overhaul, creating a third hybrid category of worker that is entitled to some traditional employee rights and protections. This approach not only seeks to minimize the

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15. Cotter v. Lyft, Inc., 60 F. Supp. 3d 1067, 1082 (N.D. Cal. 2015).

16. Orly Lobel, *The Gig Economy & The Future of Employment and Labor Law*, 51 U.S.F. L. REV. 51, 61 (2017).

17. *Cotter*, 60 F. Supp. at 1082 (suggesting that the current framework provokes conflict and inconsistency because it "provides nothing remotely close to a clear answer" on how to properly classify gig workers).

18. *Id.* at 1081 ("The jury in this case will be handed a square peg and asked to choose between two round holes.").

19. Natalie Gombalova, *Understanding Your Options: A Guide to Full-Time Employee Benefits in the USA,* FOOTHOLD AM., https://www.footholdamerica.com/blog/understanding-your-options-a-guide-to-full-time-employee-benefits-in-the-usa/ (Mar. 15, 2024).

20. Oei, *supra* note 11 at 121.

existing legal uncertainties surrounding worker classification but also aims to ensure fair and equitable treatment of gig workers.

Part I of this Comment demonstrates the dizzying array of legal definitions, tests, and factors that dominate worker classification law and examines some of the most prevalent and notable applications of the binary framework, including the "right to control test" arising from traditional agency law, the infamous twenty-factor test promulgated by the IRS, and the "economic realities test" under the Federal Fair Labor Standards Act (FLSA). Part I also examines a few notable state law standards, including the California Supreme Court's "ABC test" and the subsequent legislative battles over Assembly Bill 5 (AB5) and the Protect App-Based Drivers and Services Act (Prop 22). Part I concludes by briefly looking at state marketplace contractor statutes. Part II of this Comment then begins by outlining why current classification law is outdated, looking briefly at the history of the binary framework. Part II then examines how gig workers are not adequately captured in either classification because their working relationships have characteristics of both employees and independent contractors. It then delves into the legal, economic, and societal implications of the binary classifications, outlining the profound importance of correct classification for both workers and firms. Part III begins by looking at a few legislative and advocacy efforts that have been launched on behalf of gig workers, urging for change in the form of mandatory withholding for all workers, increased enforcement for misclassification cases, and portable benefits. Part III concludes by arguing that the most efficient and effective way to ensure gig workers are entitled to traditionally valued benefits and protections is to create a new hybrid category narrowly tailored to encapsulate the nuances of the modern gig working relationship. This approach seeks to balance the flexibility and autonomy valued by gig workers while affording them the legal protections and benefits traditionally afforded only to employees. By reexamining worker classification, this Comment ultimately aims to align labor laws with the changing nature of work in the modern economy, ensuring fair and equitable treatment for all workers.

I. THE FRACTURED NATURE OF WORKER CLASSIFICATION IN THE GIG ECONOMY

Thus far, the law of worker classification, especially as applied to gig workers, has yielded conflicting, fractured results. The legal tests that have developed out of the binary classification system have proven some of the "most notoriously unpredictable, blurry, and malleable legal tests, consisting of anywhere from 3 to as many as 20 factors, depending on which case or regulatory guidance is applied."[21] Some argue that the problem at the heart of the current system's shortcomings is not the newness or modernity of the gig economy but

21. Lobel, *supra* note 16 at 61.

rather the inherent complexity of the existing classification framework.[22] Indeed, to develop any meaningful understanding of the range of "laws, statutes, and regulations from local government to international law, from financial regulation to family law, one can simply create a map pinpointing all of the places in which the term "employee" appears."[23]

Examining the current state of worker classification law is vital in understanding how gig workers and companies fit within it, a task that proves much more difficult than it may seem. Classification standards differ among states and between states and the federal government.[24] Whether a worker is considered an employee or an independent contractor also depends on context. For instance, the test used for worker's rights and labor purposes differs from the test used for federal tax laws.[25] Though some have similarities and overlap in places, "[t]he tests used to determine whether a worker is an independent contractor or an employee are complex, subjective, and differ from law to law."[26] In order to demonstrate this complexity, this Section outlines some of the most prevalent and notable applications of worker classification law.

A. Traditional Agency Law: The "Right to Control Test"

The Supreme Court has made it clear that the definition and meaning of "employee" is rooted in common law.[27] When a statute contains but does not clearly define the term "employee," it is presumed that Congress intended to describe the traditional agency law approach for identifying the "conventional master-servant relationship."[28] In *Nationwide v. Darden*, an insurance salesman brought suit against his former employer seeking to enforce the provisions of the Employee Retirement Income Security Act (ERISA) after he was excluded from receiving termination benefits from his employer.[29] The Supreme Court was tasked with determining whether the terminated salesman was an employee within the scope of ERISA, which defined the term as "any individual employed by an employer."[30] Recognizing this definition as "completely circular and

22. *Id.*

23. *Id.* at 61–62.

24. JON O. SHIMABUKURO, CONG. RSCH. SERV., R46765, WORKER CLASSIFICATION: EMPLOYEE STATUS UNDER THE NATIONAL LABOR RELATIONS ACT, THE FAIR LABOR STANDARDS ACT, AND THE ABC TEST (2021).

25. *See, e.g.*, 29 U.S.C. § 203 (2012) (labor); 26 U.S.C. § 1321 (2012) (Internal Revenue Code).

26. U.S. GOV'T ACCOUNTABILITY OFF., GAO-06-656, EMPLOYEE ARRANGEMENTS: IMPROVED OUTREACH COULD HELP ENSURE PROPER WORKER CLASSIFICATION 25 (2006), http://www.gao.gov/new.items/d06656.pdf.

27. Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 323–25 (1992).

28. *Id.* at 322–23 (citations omitted).

29. *Id.* at 319–21.

30. *Id.* at 321 (quoting 29 U.S.C. § 1002(6) (2012)).

explain[ing] nothing," the Supreme Court adopted the common-law agency test for determining who qualifies as an employee:

> 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. Among the other factors relevant to this inquiry are the 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; 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.[31]

Despite the common law test's relative simplicity and seemingly broad applicability, the Court emphasized that it contains "no shorthand formula or magic phrase that can be applied to find the answer, . . . all of the incidents of the relationship must be assessed and weighed with no one factor being decisive."[32]

B. IRS Guidelines

One of the most notable adaptations of the common law right to control test comes from the Internal Revenue Service ("IRS"). The IRS takes an interest in worker classification because companies must "withhold income taxes, withhold and pay Social Security and Medicare taxes, and pay unemployment tax on wages paid to an employee," but they "do not generally have to withhold or pay any taxes on payments to independent contractors."[33] First developed in 1987, the IRS created a twenty-factor right to control test that strived to accurately distinguish the relationships between employees and independent contractors.[34] Using these factors, the IRS thought, courts would be able to discern whether an employer-employee relationship existed by establishing that "the person contracting for services has the right to control not only the result of the services, but also the means by which that result is accomplished."[35] Importantly,

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31. *Id.* at 323–24 (quoting Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 739–40 (1989)).

32. *Id.* at 324 (quoting NLRB v. United Ins. Co. of Am., 390 U.S. 254, 258 (1968)).

33. *Independent Contractor (Self-Employed) or Employee?*, IRS, https://www.irs.gov/businesses/small-businesses-self-employed/independent-contractor-self-employed-or-employee (May 15, 2025).

34. STAFF OF J. COMM. ON TAXATION, 110TH CONG., PRESENT LAW AND BACKGROUND RELATING TO WORKER CLASSIFICATION FOR FEDERAL TAX PURPOSES 3 (Comm. Print 2007), https://www.irs.gov/pub/irs-utl/x-26-07.pdf.

35. *Id.*

under this early approach, it was not required that the employer *actually* control the manner in which services were performed; instead, it was sufficient to show that the employer had "a right to control."[36] Whether requisite control existed was to be determined by twenty factors, with the weight of each factor varying "depending on the occupation and the factual context in which the services are performed."[37] The twenty factors identified by the IRS, indicating the degree of control, are as follows:

(1) Instructions;
(2) Training;
(3) Integration;
(4) Services rendered personally;
(5) Hiring, supervision, and paying assistants;
(6) Continuing relationship;
(7) Set hours of work;
(8) Full time required;
(9) Doing work on employer's premises;
(10) Order or sequence test;
(11) Oral or written reports;
(12) Payment by the hour, week, or month;
(13) Payment of business and/or traveling expenses;
(14) Furnishing tools and materials;
(15) Significant investment;
(16) Realization of profit or loss;
(17) Working for more than one firm at a time;
(18) Making service available to the general public;
(19) Right to discharge; and
(20) Right to terminate.[38]

Because the above twenty-factor test proved difficult to apply, the IRS adopted a new approach as an attempt to codify and clarify the worker classification determination.[39] Under the new approach, "all information that provides evidence of the *degree of control* and the *degree of independence* must be considered."[40] To determine the degrees of control and independence, the IRS identifies three categories of evidence as potentially relevant.[41] The three categories

36. *Id.*; *see also* Rev. Rul. 87-41, 1987-1 C.B. 296 ("These sections provide that generally the relationship of employer and employee exists when the person or persons for whom the services are performed have the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but as to how it shall be done.").

37. STAFF OF J. COMM. ON TAXATION, *supra* note 34, at 3.

38. *Id.* at 3–5.

39. IRS, Information Letter No. INFO 2004-0087 (Apr. 8, 2004), https://www.irs.gov/pub/irs-wd/04-0087.pdf.

40. DEP'T OF TREASURY, IRS PUB. 15-A, EMPLOYER'S SUPPLEMENTAL TAX GUIDE 7 (2019) (emphasis added).

41. STAFF OF J. COMM. ON TAXATION, *supra* note 34, at 5.

are: (1) behavioral control,[42] (2) financial control,[43] and (3) relationship of the parties.[44] While this characterization admittedly simplifies the twenty-factor test to some extent, each category is further portioned by the relevant factors to be considered for each determination. "Behavioral control" refers to "[f]acts that show whether the business has a right to direct and control how the worker does the task for which the worker is hired" and is determined based on the type and degree of instructions and training given to the worker.[45] "Financial control" refers to "[f]acts that show whether the business has a right to control the business aspects of the worker's job."[46]

Factors relevant to financial control include the extent to which the worker has reimbursed business expenses, the extent of the worker's investment, the extent to which the worker makes his or her services available to the relevant market, how the business pays the worker, and the extent to which the worker can realize a profit.[47] Lastly, "type of relationship" may be determined by considering written contracts between the parties describing the relationship they intended to create, whether the business provides the worker with employee benefits, the permanency of the relationship, and the extent to which the services performed by the worker are a key aspect of the company's regular business.[48] Notably, this simplified test aims to address the facts and circumstances of the parties' relationship, not the designation or description of the relationship by the parties.[49] In a supplemental guide, the IRS recognized various industry examples

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42. *Behavioral Control*, IRS, https://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/Behavioral-Control (Jan. 15, 2025) ("Behavioral control refers to facts that show whether there is a right to direct or control how the worker does the work. A worker is an employee when the business has the right to direct and control the worker. The business does not have to actually direct or control the way the work is done - as long as the employer has the right to direct and control the work.").

43. *Financial Control*, IRS, https://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/Financial-Control (Jan. 15, 2025) ("Financial control refers to facts that show whether or not the business has the right to control the economic aspects of the worker's job.").

44. *Type of Relationship*, IRS, https://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/Type-of-Relationship (Feb. 25, 2025) ("Type of relationship refers to facts that show how the worker and business perceive their relationship to each other.").

45. DEP'T OF TREASURY, *supra* note 40, at 7.

46. *Id.* at 8.

47. *Id.*

48. *Id.*

49. Rev. Rul. 87-41, 1987-1 C.B. 296 ("[I]f the relationship of employer and employee exists, the designation or description of the relationship by the parties as anything other than that of employer and employee is immaterial. Thus, if such a relationship exists, it is of no consequence that the employee is designated as a partner, coadventurer, agent, independent contractor, or the like.").

to help employers classify workers.[50] Of particular relevance here is the example that a taxicab driver is considered an independent contractor because the driver "pays the costs of maintaining and operating the cab" and both the driver and taxicab company benefit from the company's dispatch equipment and advertising.[51] While this is not an exact analogue to transportation in the gig economy, the link to companies such as Lyft and Uber is evident.

C. Fair Labor Standards Act—The "Economic Realties Test"

The federal Fair Labor Standards Act establishes "minimum wage, overtime pay, recordkeeping, and youth employment standards affecting employees in the private sector and in Federal, State, and local governments."[52] For purposes of the FLSA, Congress defines "employee" as "any individual employed by an employer."[53] Although this definition is painfully circular and largely useless, the FLSA also provides that to "[e]mploy" means "to suffer or permit to work."[54] The practical worker classification test applied under the FLSA considers the "economic reality"[55] of the relationship between the worker and the business, with the focal point on whether the worker "is economically dependent on the business to which he renders service or is, as a matter of economic reality, in business for himself."[56] The economic realities test relies on the application of six factors, often referred to as the "*Silk* factors," to determine whether a worker is an employee or independent contractor and include: (1) the degree of control that the employer has over the manner in which work is done; (2) the worker's opportunities for profit or loss; (3) the worker's investment in equipment material or employment of others; (4) the work's required degree of skill; (5) the permanence of the working relationship; and (6) the degree to which the work is a vital part of the employer's business.[57]

Most recently, in January 2024, the U.S. Department of Labor (DOL) issued a final rule aimed at combatting misclassification under the FLSA.[58] In an effort to create a classification analysis "more consistent with judicial precedent and the [FLSA's] text and purpose," the final rule returns to a "totality of the circumstances" analysis of

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50. DEP'T OF TREASURY, *supra* note 40, at 8–10 (including industry examples of building and construction, trucking, computer, attorney, automobile, and salesperson).

51. *Id.* at 9.

52. *Wages and the Fair Labor Standards Act*, U.S. DEP'T OF LAB.: WAGE & HOUR DIV., http://www.dol.gov/whd/flsa (last visited June 7, 2025).

53. Fair Labor Standards Act, 29 U.S.C. § 203(e)(1).

54. *Id.* § 203(g).

55. United States v. Silk, 331 U.S. 704, 713 (1947).

56. Schultz v. Cap. Int'l Sec., Inc., 460 F.3d 595, 601 (4th Cir. 2006) (quoting Henderson v. Inter-Chem Coal Co., 41 F.3d 567, 570 (10th Cir. 1994)).

57. *Id.* at 601–02.

58. 29 C.F.R. § 795 (2024).

the economic reality test in which the factors are weighted equally and are "considered in view of the economic reality of the whole activity."[59] The final rule further provides broader discussion of how scheduling, remote supervision, price setting, and the ability to work for others should be considered under the control factor.[60]

D. Other Common Law Standards

In line with the above statutory and regulatory guidance, worker classification "tests developed under the common law are notoriously incremental, applied case-by-case, reliant on multiple weighted factors, and frequently reject the labels adopted by the contracting parties."[61] In earlier gig cases involving ridesharing services Lyft and Uber, courts struggled to apply the binary classification standards because the drivers exhibited characteristics of both employees and independent contractors. In *Cotter v. Lyft, Inc.*,[62] Lyft drivers brought suit against the company claiming they were improperly classified as independent contractors when they were actually employees.[63] The court almost immediately recognized the grey area in which Lyft drivers operate as neither one nor the other, and that a decision would have profound consequences for both the drivers and the company.[64] Applying California state law, the court relied on the "Principal Test" to determine "whether the person [or company] to whom service is rendered has the right to control the manner and means of accomplishing the result desired."[65] Although California courts and the Ninth Circuit had already ruled on these questions, they had only done so when the facts of the case weighed heavily for one side or the other.[66] However, because Lyft drivers operate within an undefined grey area, the court ruled that the question of employee status must go to the jury where they "will be handed a square peg and asked to choose between two round holes."[67] Following the same reasoning, the court subsequently dismissed Lyft's motion for summary judgment, which claimed that the drivers were independent contractors as a matter of law because they enjoyed flexibility in employment.[68] Lyft's motion was dismissed primarily due to the fact that Lyft "instructed"

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59. Employee or Independent Contractor Classification Under the Fair Labor Standards Act, 89 Fed. Reg. 1638, 1639 (Jan. 10, 2024).

60. 29 C.F.R. § 795.110 (2024).

61. Lobel, *supra* note 16, at 62.

62. 60 F. Supp. 3d 1067 (N.D. Cal. 2015).

63. *Id.* at 1069–70.

64. *Id.* at 1069.

65. *Id.* at 1075 (alteration in original) (quoting S.G. Borello & Sons, Inc. v. Dep't of Indus. Rels., 769 P.2d 399, 404 (Cal. 1989)).

66. *Id.* at 1077–78.

67. *Id.* at 1076, 1081.

68. *Id.* at 1078–79 (explaining that the flexibility of when and how often to work amounted to the flexibility typically enjoyed by independent contractors).

drivers to follow certain rules,[69] and whether these rules were mandatory is less important than whether the rules could be enforced as mandatory.[70] At the conclusion of their ruling, the court emphasized that "[t]he test the California courts have developed over the 20th century for classifying workers isn't very helpful in addressing this 21st century problem."[71] While the court hoped the issue would ultimately be resolved by a jury, the two sides reached a settlement the following year, and the uncertainty remained unanswered.[72]

Another case decided by the Northern District of California on the same day, *O'Connor v. Uber Technologies, Inc.*,[73] revolved around whether Uber drivers were independent contractors as a matter of law.[74] Under California law, there is a rebuttable presumption of employment where workers "provide a service to [the company]."[75] Uber argued that it is not a "transportation company" but rather a "technology company" and that, as a result, they do not employ drivers who provide services to Uber but instead independently contract with "transportation providers" who provide services to customers.[76] This argument was quickly dismissed, with the court recognizing that "Uber is most certainly a transportation company, albeit a technologically sophisticated one."[77] The court acknowledged that Uber's argument that the drivers were independent contractors was based upon their characterization of Uber as a technology company and refused to accepted this characterization in the ruling.[78] The court thus found that the drivers were presumptive employees because "as a matter of law . . . Uber's drivers render service to Uber."[79] Like in *Cotter*, the court did not decide the question of worker status, reasoning that it must be decided by a jury,[80] but the question similarly never made it that far, as the case was ultimately settled.[81]

A spate of other cases have, unsurprisingly, taken different paths to determine gig worker classification. In 2020, the Third Circuit

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69. *Id.*

70. *Id.* at 1079 ("[W]hether Lyft actually exercises this control is less important than whether it retains the right to do so.").

71. *Id.* at 1081.

72. *See* Cotter v. Lyft, Inc., 193 F. Supp. 3d 1030, 1032 (N.D. Cal. 2016).

73. 82 F. Supp. 3d 1133 (N.D. Cal. 2015).

74. *Id.* at 1135.

75. *Id.* at 1141.

76. *Id.* at 1137.

77. *Id.* at 1141–42. The court based its determination on Uber's marketing strategy, which used phrases such as "best transportation service in San Francisco," "Everyone's Private Driver," and other descriptions of Uber as a "transportation system." *Id.* at 1142.

78. *Id.* at 1142, 1145.

79. *Id.* at 1145.

80. *Id.* at 1148.

81. O'Connor v. Uber Techs., Inc., No. 13-cv-03826, 2019 WL 1437101, at *15–16 (N.D. Cal. Mar. 29, 2019).

vacated the district court's grant of summary judgment in favor of Uber in a lawsuit brought by UberBLACK drivers.[82] The drivers claimed they were improperly classified as independent contractors and were instead employees entitled to minimum wage and overtime pay under the FLSA.[83] Applying the FLSA "economic realities test," the court focused on the degree of control Uber exercised over the drivers, the drivers' opportunity for profit or loss, and the permanence of the working relationship.[84] Although the Third Circuit agreed with the district court's finding that the second factor – the drivers' opportunity for profit or loss – weighed in favor of the drivers' assertions, it also emphasized that no one factor is dispositive.[85] Thus, the court concluded summary judgment was improper because genuine disputes of material fact remained as to the other factors.[86] In *Matter of Vega*,[87] the Court of Appeals of New York stated that purported evidence of control by Postmates, such as setting pay rates, handling customer complaints, and tracking deliveries, was equivalent to "incidental control" and did not establish substantial evidence of an employer-employee relationship.[88] Based upon a similar line of reasoning, a U.S. Magistrate Judge found that GrubHub workers were properly categorized as independent contractors because the firm did not supervise the worker, tell him when to work, what kind of transportation to use, or what routes to take.[89]

In a landmark judgment against Dynamex, the Supreme Court of California announced a "simpler, more structured test" for deciding whether a worker should be classified as an independent contractor or employee.[90] Commonly referred to as the "ABC test," all workers are presumptive employees and may be classified as independent contractors "only if the hiring business demonstrates that the worker in question satisfies *each* of three conditions: (a) that the worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of the work and in fact; *and* (b) that the worker performs work that it outside the usual course of the hiring entity's business; *and* (c) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in

82. Razak v. Uber Techs., Inc., 951 F.3d 137 (3d Cir. 2020).
83. *Id.* at 139.
84. *Id.* at 146–47.
85. *Id.* at 143.
86. *Id.* at 148.
87. 162 A.D. 3d. 1337 (N.Y. App. Div. 2018)
88. *Id.* at 1339.
89. Daniel Wiessner, *U.S. Judge Says GrubHub Driver Was Independent Contractor*, REUTERS (Feb. 8, 2018), https://www.reuters.com/article/grubhub-lawsuit/u-s-judge-says-grubhub-driver-was-independent-contractor-idINKBN1FT02G/; Lawson v. Grubhub, Inc., 13 F.4th 908 (9th Cir. 2021).
90. Dynamex Operations W., Inc. v. Superior Ct., 416 P.3d 1, 34 (Cal. 2018).

the work performed."[91] Following *Dynamex*, the California legislature passed AB5 to codify the decision in state law.[92] AB5 established that the ABC test was best suited for determining worker coverage under California's wage and hour laws, with certain exceptions.[93] Before AB5 was set to take effect in 2020, several gig companies, including California-based firms Uber, Lyft, and Instacart, had begun lobbying a multi-million-dollar ballot initiative to exclude their workers from the requirements of AB5.[94] The Protect App-Based Drivers and Services Act, commonly referred to as Prop 22, was a ballot initiative that sought to exempt rideshare drivers from AB5 while extending some limited pay and benefit protections to the drivers.[95] In August 2021, an Alameda County trial court deemed Prop 22 unconstitutional because it infringed on the legislature's authority to regulate workers' compensation.[96] However, after years of litigation, the California Supreme Court reversed the trial court's earlier ruling, upholding Prop 22 as constitutional because voters had the same power as the state legislature to pass workers' compensation laws and nothing in Prop 22 prevented the legislature from passing new workers' compensation laws in the future.[97]

E. "Marketplace Contractor" Statutes

While it is certainly arguable that application of the ABC test to gig workers could lead to more employee classifications and simplify the existing framework, several states have enacted legislation classifying certain "on-demand" workers as independent contractors via "Marketplace Contractor" statutes.[98] Marketplace contractor statutes define a "market contractor"[99] as an independent contractor, so long as a written agreement provides that the worker is classified

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91. *Id.*

92. A.B. 5, 2019–2020 Assemb., Reg. Sess. (Cal. 2019).

93. *Id.*

94. JENNIFER SHERER & MARGARET POYDOCK, ECON. POL'Y INST., FLEXIBLE WORK WITHOUT EXPLOITATION 15 (2023), https://files.epi.org/uploads/Flexible-work-without-exploitation-1.pdf.

95. *California Proposition 22, App-Based Drivers as Contractors and Labor Policies Initiative (2020)*, BALLOTPEDIA (2020), https://ballotpedia.org/California_Proposition_22,_App-Based_Drivers_as_Contractors_and_Labor_Policies_Initiative_(2020) ("A 'yes' vote supported this ballot initiative to define app-based transportation (rideshare) and delivery drivers as independent contractors and adopt labor and wage policies specific to app-based drivers and companies.").

96. SHERER & POYDOCK, *supra* note 94.

97. Castellanos v. State, 552 P.3d 406, 413 (Cal. 2024).

98. *See, e.g.*, ARIZ. REV. STAT. ANN. § 23-1601 (2018); FLA. STAT. §§ 451.01–.02; IND. CODE § 22-1-6-1 (2018); IOWA CODE §§ 93.1–.2 (2018); KY. REV. STAT. ANN. § 336.137 (2018).

99. A "market contractor" is generally defined as a person or entity that enters into an agreement with a marketplace platform to provide services to third parties. *See* IND. CODE § 22-1-6-2(1); KY. REV. STAT. ANN. § 336.137(1)(a).

as such, substantially all of the payments made to the marketplace contractor are based on the contractor's performance of services, the contractor may choose any hours or schedules to work, the contractor may perform services for other parties without restriction and the contractor is responsible for substantially all of the expenses paid or incurred in performing the services, without a right to reimbursement.[100] While such marketplace contractor statutes may add clarity in the classification determination, they could also increase the sense of economic insecurity felt by gig workers, making it easier for firms to reclassify employees as independent contractors.[101] Additionally, the potentially broad applicability of the statutes could impact workers beyond the scope of the gig economy, as virtually any firm providing services through an online platform or app could classify its workers as independent contractors.[102]

As this summary of misclassification law above demonstrates, simplicity and uniformity in classifying workers resulting from the application of numerous complex standards simply does not exist.[103] These standards and tests are "collections of factors for consideration rather than clear thresholds or required elements. Labels applied in contracts are irrelevant. Courts and administrative agencies often warn that no single factor governs, and the weighing of factors is often left to individual decision makers."[104] As a result, gig workers could be employees under a statute in one jurisdiction, but independent contractors under the same statute in a different jurisdiction.[105] This creates substantial uncertainty for gig workers and firms, as correct classification under each statute determines the benefits and protections that the worker receives and that the firm is on the hook for. Thus, the inconsistent and fractured application of the binary classification framework is outdated and ill-suited to protect modern workers in the gig economy.

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100. *See* ARIZ. REV. STAT. ANN. § 23-1603(A); IND. CODE. § 22-1-6-3; *see also* ARIZ. REV. STAT. ANN. § 23-1601 (containing additional multiple factors required to support a declaration of independent business status by the worker).

101. Natalie Foster 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/.

102. *See* Michael C. Duff, *New Tennessee "Gig" Law: "Handyman Special" or New Flavor of Opt-Out*, WORKERS' COMP. 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.

103. N.L.R.B. v. Hearst Publ'ns, 322 U.S. 111, 122 (1944).

104. Harris & Krueger, *supra* note 6, at 6.

105. *Id.* at 6 n.2 (explaining how some states interpret the NLRA to regard truck drivers as employees while other states regard them as independent contractors under the same statute).

II. THE TROUBLE FOR GIG WORKERS

The utility and applicability of the binary classification framework to the modern worker is rapidly decreasing. The labor market in the United States is drastically changing alongside the proliferation of new technology, and to put it simply, employment law is failing to keep up. Over the last century and beyond, the United States has moved from an industrial, manufacturing-based economy to a knowledge-based, information-rich economy, which has engendered a shift to a new mode of work.[106] During the industrial economy, the meaning of employment was fairly obvious:

> In 1848, one simply knew who were the proletarians. One knew because all the criteria – the relation to the means of production, manual character of labor, productive employment, poverty, and degradation – all coincided to provide a consistent image.[107]

Moreover, many of the current employee classification tests and standards were first developed during this early industrial era, when the employer-employee relationship was the most prevalent work arrangement.[108] As a result, statutory benefits and protections were only established for employees, who were regarded as the core of the workforce, and did not apply to the smaller subset of independent contractors.[109] Importantly, as the United States has shifted to a more modern information-based economy, classifying workers has become markedly more difficult in a labor context characterized by multiple classes of skilled labor, unclear boundaries between capital and labor, and a reduced emphasis on the importance of the physical workplace.[110]

In the modern economy, gig workers do not neatly align with either of the available classifications. Gig work is characterized and valued by its independence, offering workers flexibility in working hours, location, and methods.[111] That does not, however, prevent gig companies from implementing policies and requirements that limit a worker's ability to set their own terms of service and control their professional behavior.[112] Nonetheless, the working relationship between gig workers and firms is generally temporary and detached, which does not justify burdening the firm with the financial obligations accompanying employee status.[113] Take well-known gig

106. *See* KATHERINE V.W. STONE, FROM WIDGETS TO DIGITS 67–77 (2004) (outlining major economic shifts in the United States following the transition away from manufacturing jobs).

107. MARC LINDER, THE EMPLOYMENT RELATIONSHIP IN ANGLO-AMERICAN LAW 19 (1989).

108. Richard R. Carlson, *Variations on a Theme of Employment: Labor Law Regulation of Alternative Worker Relations*, 37 S. TEX. L. REV. 661, 663 (1996).

109. LINDER, *supra* note 107, at 19.

110. Carlson, *supra* note 108.

111. Harris & Krueger, *supra* note 6, at 9.

112. *Id.* at 8.

113. *Id.* at 8–9.

company Uber, for example. Uber drivers appear to resemble independent contractors in that they have complete control over when and for how long they work, where they work, and whether they work at all.[114] Uber drivers may also—and often do—have other working relationships, including driving for other rideshare direct competitors.[115] This degree of control is inconsistent with the traditional employee status, which is a somewhat intuitive result. Indeed, it is difficult to imagine an employer who would allow its employees to work whenever they had a whim to do so, to not work at all even if customers go unserved, or to work for direct competitors.[116] On the other hand, Uber drivers do resemble employees in that Uber exerts control over important aspects of the work arrangement, including setting the fares that are charged to customers.[117] Additionally, Uber drivers must comply with Uber's rules and policies regarding insurance, safety, and service.[118] Uber drivers are also subject to expulsion if their customer ratings fall below a certain level, a system maintained wholly by Uber.[119] In short, Uber drivers, and all gig workers, "do not resemble independent contractors or employees with respect to their most fundamental characteristics."[120] As a result, gig workers are at risk of being excluded from the social compact between employers and employees.[121] Thus, the existing binary framework does not provide a satisfying or reliable path for correctly classifying gig workers, resulting in profound economic and social consequences for both workers and firms.

A. The Consequences of Classification

By now, it is clear that the outdated classification framework is ill suited for the modern gig economy. Firms are expected to

114. *See* Cotter v. Lyft, Inc., 60 F. Supp. 3d 1067, 1069 (N.D. Cal. 2015) ("Lyft drivers can work as little or as much as they want, and can schedule their driving around their other activities. A person might treat driving for Lyft as a side activity, to be fit into his schedule when time permits and when he needs a little income."); Harris & Krueger, *supra* note 6, at 9–10 (describing the gig worker's control in that she "provides personal services only when she chooses to do so" and "chooses when and whether to work at all").

115. *See Cotter*, 60 F. Supp. 3d at 1069 ("A person might treat driving for Lyft as a side activity, to be fit into his schedule when time permits and when he needs a little income."); Harris & Krueger, *supra* note 6, at 9–10 (explaining that the gig worker may "may offer her services through multiple intermediaries, or combine working with intermediaries and employment with a traditional employer").

116. McGillis v. Dep't of Econ. Opportunity, 210 So. 3d 220, 226 (Fla. Dist. Ct. App. 2017).

117. O'Connor v. Uber Techs., Inc., 82 F. Supp. 3d 1133, 1142 (N.D. Cal. 2015) ("Uber sets the fares it charges riders unilaterally.").

118. *Id.* at 1136, 1142.

119. *Id.* at 1143.

120. Harris & Krueger, *supra* note 6, at 8.

121. *See id.* at 8–9.

accurately apply an overwhelming spread of tests and factors that force a binary choice. Importantly, this choice results in workers receiving either all employment benefits and protections or none of them. As a result, gig workers struggle with a wide array of issues, including poverty,[122] lack of bargaining power,[123] uncertainty and insecurity stemming from volatile income and demand,[124] and sudden deactivation.[125] In classifying a worker as an independent contractor, workers have limited or no access to the protections under federal wage and hour laws, and workers are not entitled to the benefits enjoyed by employees under anti-discrimination and labor laws. Moreover, firms avoid complying with tax law and paying for "worker's health benefits, social security, Medicare, unemployment, injured workers compensation, lunch breaks, paid sick days, and vacation leave."[126] As a growing and important part of the modern economy, gig workers are owed the rights and protections of traditional employment, and denying them those rights further proliferates the sense of insecurity and uncertainty pervading the gig economy workforce.

In addition to workers, gig companies also face risks, as well. Because of the outdated binary framework and fractured guidance, some companies run the risk of building a business model that relies on one classification and subsequently being ordered by a state or federal tribunal or agency to classify its workers as the other.[127] Such a classification overhaul could completely upend a business. Moreover, this exposes firms to the significant risk of costly and damaging class-action litigation and the risk of being held liable for

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122. *See* Jeff Daniels, *Nearly Half of California's Gig Economy Workers Struggling with Poverty, New Survey Says,* CNBC (Aug. 28, 2018), *https://www.cnbc.com/2018/08/28/about-half-of-californias-gig-economy-workers-struggling-with-poverty.html.*

123. Matthew DeBord, *Uber and Lyft are Trying to Make an End-Run Around Unionization*, BUS. INSIDER (June 14, 2019), *https://www.businessinsider.com1/uber-and-lyft-opposing-driver-unionization-california-2019-6.*

124. Mark Muro & Clara Hendrickson, *Managing Uncertainty: Paycheck Volatility Demands New Responses,* BROOKINGS INST. (Mar. 1, 2018), *https://www.brookings.edu/blog/the-avenue/2018/03/01/managing-uncertainty-paycheck-volatilitydemands-new-responses.*

125. Sarah O'Connor, *Driven to Despair – The Hidden Costs of the Gig Economy*, FIN. TIMES (Sept. 22, 2017), *https://www.ft.com/content/749cb87e-6ca8-11e7-b9c7-15af748b60d0.*

126. STEVEN HILL, NEW ECONOMY, NEW SOCIAL CONTRACT: A PLAN FOR A SAFETY NET IN A MULTIEMPLOYER WORLD 2 (2015), https://static.newamerica.org/attachments/4395-new-economy-new-social-contract/New%20Economy,%20Social%20Contract_UpdatedFinal.34c973248e6946d0af17116fbd6bb79e.pdf.

127. *See, e.g.*, Matthew Haag & Patrick McGeehan, *Uber Fined $649 Million for Saying Drivers Aren't Employees,* N.Y. TIMES (Nov. 14, 2019), https://www.nytimes.com/2019/11/14/nyregion/uber-new-jersey-drivers.html.

large fines or unpaid taxes due to misclassification.[128] Each of these hardships and risks faced by both gig workers and companies alike are outlined below.

In addition to its promulgation of the "economic realities test," the FLSA plays a crucial role in safeguarding employee rights by mandating that employers pay at least the federal minimum wage and provide compensation to employees for overtime work.[129] Independent contractors, on the other hand, do not receive these minimum protections, as they are presumed to have more control over their work, including the ability to set their own schedules and negotiate payment based on the value they provide. Under wage and hour laws, an employer that denies overtime to a worker who functions as an employee but is paid as an independent contractor may be required to pay both back wages with interest and civil fines.[130] This is especially true if it can be shown that the misclassification was a deliberate attempt to avoid fulfilling its obligations under the FLSA.[131]

A robust legal framework similarly affords employees a wide array of protections against discrimination in the workplace. Federal statutes, such as Title VII,[132] the Americans with Disabilities Act,[133] the Age Discrimination in Employment Act,[134] and other pieces of critical legislation, provide safeguards against workplace discrimination for various statuses, including, but not limited to, race, sex, gender identity, age, pregnancy, and disability.[135] As a whole, these anti-discrimination laws function to prohibit unfair treatment in hiring, promotions, job assignments, termination, and various other aspects of employment. They also protect employees from

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128. *Id.*

129. 29 U.S.C. §§ 206–207.

130. *Id.* § 216(b).The Fair Labor Standards Act has the ability to impose liquidated damages in this situation unless the employer can prove that its classification was in good faith. *See id.* § 259(a).

131. *Id.* § 216(a).

132. 42 U.S.C. § 2000e-2(a) ("It shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin[.]").

133. *Id.* § 12112(a) ("No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.").

134. 29 U.S.C. § 623(a)(1) ("It shall be unlawful for an employer . . . to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age[.]").

135. *See, e.g.*, Bostock v. Clayton County, 140 S. Ct. 1731 (2020) (interpreting Title VII to prevent discrimination based on sexual orientation and gender identity); Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) (protecting pregnancy); CAL. GOV'T CODE § 12940(a) (2025) (protecting eighteen classes).

harassment by their employers or co-workers related to protected characteristics and from retaliation for asserting their rights under them. Independent contractors cannot benefit from the same comprehensive suite of anti-discrimination laws.[136] Instead, they must often relegate to other legal avenues to redress discriminatory acts, such as tort claims against individual perpetrators.[137] In the anti-discrimination realm, the consequences of worker misclassification come with powerful remedies. These can include backpay, which compensates for lost wages, front pay, which covers potential future earnings lost, reinstatement to a previous position, and in cases of willful discrimination, punitive or liquidated damages.[138]

Employees are also entitled to protection under the National Labor Relations Act against unfair labor practices by an employer.[139] The NLRA enshrines the right of employees to collectively voice concerns over the terms or conditions of employment and to engage in union activities.[140] Unsurprisingly, independent contractors are not entitled to these same protections. Thus, a group of employees could not be punished for raising issues with low pay or inadequate benefits, but a group of independent contractors who raise the same issues could be terminated without cause or consequence, leaving them without recourse under the NLRA. For employers, disciplining protesting workers misclassified as independent contractors opens the door to enforcement proceedings and injunctions initiated by the National Labor Relations Board.[141]

As aforementioned, worker classification is also important to the IRS, as demonstrated by its lengthy twenty-factor classification test,[142] because it determines the amount that is owed and how that amount is paid for both firms and workers. For employees, employers must take payroll deductions for income taxes, Social Security taxes and Medicare taxes, pay the employer's share of Social Security and Medicare taxes, and purchase unemployment insurance.[143] Independent contractors, who are issued 1099 forms and gross wage

136. Lewis L. Maltby & David C. Yamada, *Beyond "Economic Realties": The Case for Amending Federal Employment Discrimination Laws to Include Independent Contractors*, 38 B.C. L. REV. 239 (1997).

137. *See id.* at 239–40.

138. *See Remedies for Employment Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/remedies-employment-discrimination (last visited June 7, 2025).

139. National Labor Relations Act, 29 U.S.C. §§ 151–169.

140. *Id.* § 157 ("Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively . . . and to engage in other concerted activities . . . .").

141. *Id.* § 160 (describing the NLRB's enforcement powers and unfair labor practice proceedings).

142. DEP'T OF TREASURY, *supra* note 40, at 7–9.

143. *Independent Contractor (Self-Employed) or Employee?*, *supra* note 33.

checks, must pay these taxes on their own.[144] If a firm classifies a worker as an independent contractor for tax purposes and the IRS disagrees with the classification, both the firm and the worker are on the hook, as they are jointly and severally liable for accompanying fines and back taxes.[145]

III. LOOKING FORWARD: A HYBRID CLASSIFICATION FOR THE MODERN WORKER

As illustrated thus far, worker classification in the gig economy has produced a complex and delicate legal conflict that necessitates swift and sustainable change. Designing meaningful reform for the gig economy must ask a fundamental question: "How can we protect workers in this new environment, while, at the same time, reaping the benefits of change and innovation?"[146] This Section will first examine the current slate of advocacy and reform efforts aimed at the misclassification of gig workers and briefly explain why these proposals do not fully address the problem. Then, it will briefly address some criticisms against creating a hybrid classification, ultimately arguing that sustainable reform in worker classification law requires a third category narrowly tailored for gig workers.

A. Recent Reform Proposals

Although the federal government has acknowledged that the decreasing utility of classification law to grey area gig workers is a pressing issue that will be examined soon, no clear solution has emerged.[147] Notably, however, there have been several initiatives broadly aimed at employment insecurity and inequality. For instance, Senator Elizabeth Warren has expressed that all workers, "no matter when they work, where they work, [or] who they work for . . . should have some basic protections and be able to build some economic security for themselves and their families."[148] To accomplish this, Warren proposed that "electronic, automatic, and mandatory withholding of payroll taxes must apply to everyone" and advocated for pooled insurance for workers not covered by workers'

144. *Id*.

145. DAWN D. BENNETT-ALEXANDER & LAURA P. HARTMAN, EMPLOYMENT LAW FOR BUSINESS 10–11 (7th ed. 2012)

146. *Modernizing Labor Laws in the Online Gig Economy, supra* note 1, at 2.

147. U.S. EQUAL EMP'T OPPORTUNITY COMM'N, STRATEGIC ENFORCEMENT PLAN: FISCAL YEARS 2017-2021, at 2 (2017) ("The commission adds a new priority to address issues related to complex employment relationships and structures in the 21st century workplace, focusing specifically on temporary workers, staffing agencies, independent contractor relationships, and the on-demand economy.").

148. Senator Elizabeth Warren, *Remarks at the New America Annual Conference: Strengthening the Basic Bargain for Workers in the Modern Economy,* NEW AM. ANN. CONF. 4 (May 19, 2016), https://www.warren.senate.gov/files/documents/2016-5-19_Warren_New_America_Remarks.pdf.

compensation.[149] U.S. Senator Sherrod Brown proposed raising the minimum wage, increasing overtime pay, requiring paid sick days and medical leave, and strengthening collective bargaining rights.[150] In targeting large companies relying on a business model that classifies their workforce as independent contractors, Senator Brown also 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 their workers.[151] Most notably, in an effort to "crack down on employers who misclassify workers and cheat them out of earned benefits," Brown has supported the Fair Playing Field Act, which gives the IRS the authority to take action against employers who misclassify their workers and requires employers to inform workers of their status to enable them to determine whether they are misclassified.[152]

Both Warren and Brown place the burden on the IRS to curtail and monitor misclassification issues. Their respective proposals advocate for a vast expansion of payroll tax withholding requirements to encompass independent contractors and for greater agency authority in taking enforcement actions against firms for misclassification.[153] Though a step in the right direction for protecting gig workers, the IRS simply lacks an agency-wide employment tax program that would be sufficient to address the broad issues of worker classification law.[154] Because the various business divisions of the IRS are limited in their ability to communicate, each division makes determinations based on its own goals, rather than based on comprehensive misclassification

149. *Id.*

150. *See* U.S. SEN. SHERROD BROWN, WORKING TOO HARD FOR TOO LITTLE: A PLAN FOR RESTORING THE VALUE OF WORK IN AMERICA 3 (2017).

151. *Id.* (noting that the independent contractor status was not created to be used by companies as a means of avoiding taxes, labor standards, and workers' rights).

152. Fair Playing Field Act of 2015, S. 2252, 114th Cong. (2015).

153. *See* BROWN, *supra* note 150, at 37 ("First, loopholes that enable employers to misclassify employees as independent contractors must be closed. The most expedient way to address the issue of misclassification is the enactment of legislation that would allow the IRS to take action against employers that wrongly treat workers as independent contractors instead of employees."); Warren, *supra* note 148, at 4 ("[I]f all workers are to have adequate benefits, then . . . mandatory withholding of payroll taxes must apply to everyone," including gig workers.").

154. *See* MICHAEL PHILLIPS, U.S. DEPT. OF THE TREASURY, NO. 2009-30-035, WHILE ACTIONS HAVE BEEN TAKEN TO ADDRESS WORKER MISCLASSIFICATION, AN AGENCY-WIDE EMPLOYMENT TAX PROGRAM AND BETTER DATA ARE NEEDED 5 (2009), https://iiiffc.org/images/pdf/employee_classification/Treasury.Inspec.Gen.02.04.2009.pdf ("An agency-wide employment tax program . . . which addresses worker classification is crucial to developing current data on the impact of worker misclassification on the tax gap.").

reform.[155] As a result, the IRS has thus far been largely unsuccessful in curtailing misclassification because, in line with classification law as a whole, the agency divisions lack uniformity in their methods of tracking and auditing misclassification cases.[156] While commendable, Warren and Brown's proposals fail to consider that the shortcomings of worker classification law are sweeping and ultimately misplace the great burden of reform on a federal agency that is ill-equipped to sufficiently tackle the problem.

Other efforts have supported classifying gig workers as independent contractors while providing them with portable benefits that are disconnected from a particular firm or job.[157] The Senate and House of Representatives have introduced identical bills aiming to establish a portable benefits program.[158] Under the bills, portable benefits are work-related benefits that workers would maintain while changing jobs, such as workers' compensation, short-term savings, skills training, income security, disability coverage, and retirement savings.[159] Eligible workers 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."[160] Although a portable benefits program has the potential to promote economic efficiency and equality among workers, there is a great deal of legal scholarship wholly devoted to arguing that any conferral of universal benefits and protections is inherently flawed, especially in the gig economy.[161] Though the nuances of each critique are expansive, portable benefits are generally disfavored because such plans are contingent on the collective bargaining power of unions.[162] This is problematic because the strength of union power in the United States is declining, and the collective bargaining rights of independent contractors are not protected under the NLRA.[163] Moreover, portable benefits are often industry-specific and are thus

155. *Id.* at 6.

156. The Small Business/Self-Employed Division tracks employment tax audits and worker misclassification audits; the Tax Exempt and Government Entities Division only tracks employment tax audits. The Large and Mid-Size Business Division has the capacity to track worker classification audits but rarely exercises the authority to do so. *Id.*

157. *See* Foster et al., *supra* note 101.

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

159. *Id.* §§ 3(4)(A), 3(6).

160. *Id.* § 3(3).

161. *See, e.g.*, Justin Azar, *Portable Benefits in the Gig Economy: Understanding the Nuances of the Gig Economy*, 27 GEO. J. ON POVERTY L. & POL'Y 409, 416–23 (2020) (outlining and critiquing multiple approaches to portable benefits in the gig economy).

162. STEVEN HILL, NEW AM., NEW ECONOMY, NEW SOCIAL CONTRACT, A PLAN FOR A SAFETY NET IN A MULTIEMPLOYER WORLD 7–8 (2015).

163. *Id.*

inapplicable considering the diversity of work offered in the gig economy.[164] Lastly, getting Congress to organize, draft, and agree on the contours of universalized benefits would likely be a development unseen for many years.[165] Other solutions range from a mere reinterpretation of the existing tests,[166] to a resolution of misclassification by employment contract,[167] to maintaining the current regime. However promising and well-conceived, these advocacy efforts and suggestions do not fully address the issues that gig workers will continue to face as a result of the binary classification system, necessitating the need for a hybrid classification.

B. Criticisms of Creating a New Category

Considering that gig workers operate within an undefined legal grey area and that the binary classification system has produced nothing but overly complex and fractured standards, the necessity of a hybrid category is fairly obvious. Nonetheless, some argue that overhauling the existing classification structure to incorporate the "independent worker"—who "chooses when and whether to work at all"—would not prove an easy undertaking, considering the vast differences across varying bodies of law.[168] Critics of the hybrid classification model contend that overhauling the current binary system would have many negative effects on the economy, employers, and workers. For one, some argue that "proposing a new legal bucket for grey-zone cases" would complicate, rather than simplify, worker classification issues.[169] However, the existing legal definitions of independent contractor and employee focus on the firm's right to control and prove "slippery" when applied in practice because of their inherent ambiguity.[170] A new classification, narrowly tailored to the

164. Azar, *supra* note 161, at 420.

165. *Id.* at 423. However, legislators have begun moving in this direction with the proposal of a new bill that would set aside funds for a grant program to help local governments innovate their employment benefit systems. While this action is small, it is an important first step that acknowledges the need for change to accommodate different forms of work. *See* Melissa Locker, *A Bill That Makes It Easier for Gig Economy Workers to Get Benefits Was Just Introduced in Congress*, FAST CO. (May 26, 2017), https://www.fastcompany.com/4038971/billthat-makes-it-easier-for-gig-economy-workers-to-getbenefits-is-with-the-senate.

166. 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, 367 (2001); Maltby & Yamada, *supra* note 136, at 274.

167. Megan Carboni, *A New Class of Worker for the Sharing Economy,* 22 RICH. J.L. & TECH. 1, 38–40 (2016).

168. Harris & Krueger, *supra* note 6, at 9, 15.

169. Valerio De Stefano, *The Rise of the "Justin-Time Workforce": On-Demand Work, Crowdwork, and Labor Protection in the "Gig-Economy,"* COMPAR. LAB. L. & POL'Y J. (2016) (forthcoming) (manuscript at 29), https://ssrn.com/abstract=2682602.

170. *Id.* ("Legal definitions . . . are always slippery when they are applied in practice: the real risk is shifting the grey-zone somewhere else without removing

needs of a modern technology-driven economy, that clearly and adequately defines both the worker and type of employer to which they apply, would relieve such ambiguity. Indeed, the current approach encourages ambiguity, and as "the trend of the working world" moves towards "greater complexity and variation," a clear definition of gig worker obviates the need to focus on the firm's right to control.[171]

Second, some critics suggest that a hybrid classification is simply unnecessary for providing gig workers with protection, as fundamental labor statutes "already provide for a broad definition of employment when determining the scope of their application."[172] Under this theory, creating a hybrid classification would wrongly assume that the "right to control" focus is so narrow that it "cannot provide guidance in securing employment protection in modern times."[173] For example, the FLSA, which defines "employ" as "to suffer and permit to work,"[174] was enacted in 1938, a time in which lawmakers stretched the bounds of the control test "to ensure the broadest application possible."[175] However, the unique nature of gig work renders the boundary between work and nonwork for gig workers nearly indeterminable.[176] Indeed, once the initial connection between the gig worker and an independent customer is established, the firm's involvement is limited to collecting payment and remitting it to the worker.[177] Even under the FLSA's broadest definition of "employ," it cannot be said that the firm is "suffering" or "permitting" the work after the platform itself has facilitated the initial connection.[178] Considering that two fundamental employment benefits provided by the FLSA—minimum wage and overtime pay—depend upon a relationship in which the worker is employed within the meaning of the statute, it becomes clear how even the broadest application of what it means to be employed within the binary framework fails to ensure that fundamental benefits and protections are afforded to gig workers.[179] Ultimately, the outdated binary classification system requires a comprehensive remedy that harnesses the benefits of the gig

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the risk of arbitrage and significant litigation in this respect, especially if the rights afforded to workers in that category afford any meaningful protection.")

171. Carlson, *supra* note 166, at 298, 301.

172. STEFANO, *supra* note 169, at 498.

173. *Id.* at 479.

174. 29 U.S.C. § 203(g).

175. STEFANO, *supra* note 169, at 32.

176. *See* Harris & Krueger, *supra* note 6, at 13 ("Determining whether and for whom an independent worker is 'working' is impossible or deeply problematic in too many circumstances for the concept of work hours to translate into these emerging relationships.").

177. *Id.*

178. *Id.*

179. *Id.*

economy.[180] Any such remedy should, at a minimum, minimize legal uncertainty and protect economic security, establishing a reasonable balance between business and individual interests. This can be achieved by reexamining the current classification tests and incorporating a hybrid category, tailored to the modern worker who falls in the grey area of the binary framework.

C. A Hybrid Classification—Minimizing Legal Uncertainty and Protecting Gig Workers

Continuing to force gig workers into the binary classification framework excludes them from the social compact between employees and employers, creating an "existential threat" to the modern workforce.[181] Thus, as suggested in *Cotter v. Lyft,* gig workers "should be considered a new category of worker altogether, requiring a different set of protections."[182] Other scholarship has similarly proffered that it would be "better to create a third category of workers, who would be subject to certain regulations, and whose employers would be responsible for some costs," such as reimbursement of expenses and workers' compensation, but not others, such as Social Security and Medicare taxes.[183] This hybrid worker classification resembles existing systems in parts of Canada and Germany, where a third category exists for the independent worker or "dependent contractor."[184] This status becomes relevant when a worker has formed an "essentially exclusive relationship" over a period of time with one firm such that the worker is economically dependent on the continuation of the relationship.[185] In some Canadian provinces, these dependent contractors are largely treated like employees, entitling them to termination and union rights.[186] As evidenced by the use of a dependent contractor status abroad, there is room for more than two legal classifications in a modern economy.

As suggested by Seth Harris and Alan Krueger, this hybrid classification should cover those independent workers who "operate

180. *See* Douglas Holtz-Eakin et al., *Washington Should Harness the Power of the Gig Economy*, HILL (Jan. 10, 2017), http://www.thehill.com/blogs/punditsblog/economy-budget/313512-washington-should-harnessthe-power-of-the-gig-economy.

181. Harris & Krueger, *supra* note 6, at 8–9.

182. *See* Cotter v. Lyft, Inc., 60 F. Supp. 3d 1067, 1082 (N.D. Cal. 2015).

183. James Surowiecki, *Gigs with Benefits,* NEW YORKER (June 29, 2015), https://www.newyorker.com/magazine/2015/07/06/gigs-with-benefits.

184. Harris & Krueger, *supra* note 6, at 7; Labor Relations Act, 1995, S.O. 1995, ch. 1, sched. A, § 1 (Can.) (defining the "dependent contractor" as encompassing both contracted and uncontracted workers who are "in a position of economic dependence upon, and under an obligation to perform duties for, [another] person more closely resembling the relationship of an employee than that of an independent contractor").

185. Harris & Krueger, *supra* note 6, at 7.

186. *Id.*

in a triangular relationship" in which they "provide services to customers identified with the help of intermediaries."[187] This would essentially encompass gig workers occupying the legal grey area in the binary framework, minimizing the legal certainty and ambiguity as to how such workers should be classified. Under this hybrid approach, an independent worker would qualify for many, though not all, of the benefits and protections that employees receive, including the freedom to organize and collectively bargain, anti-discrimination protection, tax withholding, and employer contributions for payroll taxes. Because it is markedly difficult to attribute a gig worker's working hours to a single firm, independent workers would likely not qualify for hours-based benefits, such as overtime or minimum wage.[188] Conceptually, independent workers would be trading these latter benefits for the flexibility that a gig work arrangement affords. Creating a third category would structure these benefits to make the status of a gig worker neutral when compared to an employee, enhancing the efficiency of the modern labor market.[189] By extending many of the legal protections and benefits afforded to employees, a new category of independent workers would protect the social compacts between workers and employers, ensuring that workers receive their fair share, and reduce the legal uncertainty that currently plagues worker classification law.

Practically, to directly and efficiently implement such reform, Congress should pass sweeping legislation that creates the hybrid classification across all relevant bodies of employment law. Notably, Congress retains the authority to harmonize federal worker classification law through a single legislative act amending the relevant employment statutes.[190] As such, both federal agencies and courts lack the capacity and authority to ensure that gig workers receive "their full and fair share of the social compact – that is, the complement of protections and benefits that must be established by statute."[191] Thus, the responsibility of creating a comprehensive solution in the form of a hybrid category necessarily falls on Congress.

CONCLUSION

The evolution of the gig economy has profoundly influenced the labor market and the ways in which companies, workers, and consumers interact. This evolution has significantly impacted traditional notions of employment, challenging the existing classification framework in which workers are classified as either employees or independent contractors. The current binary

187. *Id.* at 9.

188. *Id.* at 13.

189. *Id.* at 14–15.

190. *Id.* ("[T]he only way to ensure inclusion of all of the protections and benefits we consider important to independent worker status is a single omnibus bill.").

191. *Id.*; *see also* PHILLIPS, *supra* note 154, at 5.

framework, characterized by variability, ambiguity, and inconsistency, is outdated and ill-suited to adequately capture the grey area working relationships of gig workers. While the gig worker enjoys flexibility and independence, it is done so at the expense of basic fundamental rights and protections afforded to and valued by employees. By advocating for a third hybrid category of worker, this Comment presents a pragmatic and sustainable path forward that acknowledges the complexities of modern working relationships in the gig economy. Such reform is not just a legal imperative but also a moral one, ensuring that, as the marketplace evolves, so too does our legal framework in a manner that safeguards fairness and equity for all participants.