Littler | Workplace Policy Institute

Littler Mendelson, P.C.
815 Connecticut Avenue, NW
Suite 400
Washington, DC 20006

Tammy McCutchen
202.414.6857 direct
202.842.3400 main
tmccutchen@littler.com

Dane Steffenson
404.443.3501 direct
404.233.0330 main
dsteffenson@littler.com

James A. Paretti, Jr.
202.789.3422 direct
202.842.3400 main
jparetti@littler.com

Michael J. Lotito
415.677.3135 direct
415.433.1940 main
mlotito@littler.com

October 24, 2020

Submitted via www.regulations.gov

The Honorable Cheryl M. Stanton
Administrator
Wage and Hour Division
United States Department of Labor
200 Constitution Avenue N.W., Rm S-3502
Washington, DC 20210

Re: RIN 1235-AA34; Independent Contractor Status under the Fair Labor Standards Act

Dear Administrator Stanton:

The Workplace Policy Institute (WPI) of Littler Mendelson, P.C., submits the following comments in response to the notice of proposed rulemaking ("NPRM") of the U.S. Department of Labor (the "Department"), 85 FR 60600 (September 25, 2020), on independent contractor status under the Fair Labor Standards Act ("FLSA").

By way of background, WPI facilitates the employer community's engagement in legislative and regulatory developments that affect their workplaces and business strategies. WPI harnesses the deep subject matter expertise of Littler, the largest law firm in the world with a practice devoted exclusively to the representation of employers in employment and labor law matters. Littler's clients range from new and emerging businesses to Fortune 100 companies throughout the country and around the world.

WPI is very supportive of the Department's efforts to adopt, for the first time through notice and comment rulemaking, its interpretations on independent contractor status under the FLSA. We believe the proposed rule is generally balanced and reasonable, clarifying without changing established law. The rule should promote certainty and predictability for both workers and businesses, thus promoting worker choice and innovation in the economy.

We applaud the Department's thorough analysis of the chaotic state of the law, and its decision to retain the long-standing economic reality test while sharpening the factors used to apply that test. The proposed rule will effectively refocus and align the economic reality factors to avoid the inefficient, duplicative and often confusing analyses that ensued from the overlap among factors. Without these regulations, we fear continued unpredictability and inconsistent results from the various Wage and Hour

Division offices and federal courts – leading to increased costs for businesses, decreased worker choice, and more uncertainty throughout the economy.

However, as detailed below, we do have several suggestions to further sharpen and clarify the independent contractor standards. We ask the Department to consider:

- Adding "exclusivity" as a separate factor;
- Eliminating the three "guidepost" factors entirely;
- Adding a new section containing examples; and
- Creating a safe harbor for businesses who adopt independent contractor practices allowed or required by federal, state or local laws.

Our goal in making these suggestions is to focus the economic reality test analysis on those factors most probative of economic dependence in the most factual situations, thus adding further sharpness, clarity, and predictability to the law. Our suggestions are also made considering independent contractor standards under other federal and state laws, and proposed changes to state laws (such as California's Proposition 22 and New Jersey's portable benefits bill S943), as we believe the Department's proposed regulations can and should become a model for both federal and state policymakers as they consider the independent contractor issue under other federal and state laws.

I. Independent Contracting[1] is an Individual Choice

Independent work is not a new phenomenon – it existed hundreds, even thousands of years before the industrial revolution of the mid-nineteenth century brought us the concept of employment, which in turn came decades before the Fair Labor Standards Act was enacted in 1938.[2] Nothing in the text or legislative history of any federal employment law indicates that Congress intended to supplant or displace independent work and require instead for all workers to be employees.

Beginning in 1947, the Supreme Court recognized that the concepts of "employment" and "employee" under the FLSA have their limits, and that the FLSA does not apply to independent contractors.[3] Thus, we proceed from the fundamental premise that independent contracting is, and

---

[1] Independent contracting comes in many forms. Gig workers connecting to customers through app- or web-based marketplaces. Self-employed freelancers providing professional services. Small businesses contracting with larger businesses. Our comments apply to all forms of independent contracting regardless of its industry, form or label. We use the terms gig worker, freelancers and independent workers interchangeably and to include any type of independent contractor relationship.

[2] *See* Tammy McCutchen and Alex MacDonald, *Ready,* U.S. Chamber of Commerce, *Fire, Aim: How State Regulators Are Threatening the Gig Economy and Millions of Workers and Consumers*, at 6-10 (Jan. 2020) ("Chamber"), https://www.uschamber.com/sites/default/files/ready_fire_aim_report_on_the_gig_economy.pdf (attached as Exhibit A).

[3] *Walling v. Portland Terminal Co.*, 330 U.S. 148, 152 (1947) ("The definition 'suffer or permit to work' was obviously not intended to stamp all persons as employees."). *See also Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 295 (1985) (the FLSA's "statutory definition[s] … have [their] limits."); *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 729 (1947) (recognizing independent contractors are not within the FLSA protections).

should be maintained as, a model of work that millions of Americans pursue, every day, as a matter of personal choice.

There are advantages and disadvantages to both options. For many workers, the choice to pursue their livelihood as W-2 employees makes sense. For some, an employment relationship can provide routine and stability of a set schedule and paycheck. Also, employees are protected by federal and state employment laws.

The choice to be an employee, though, comes with costs: the loss of autonomy, flexibility and control that freelancers and independent contractors enjoy.[4] As the Department has recognized, the ability to control one's work (together with earning profits and risking losses) "strikes at the core of what it means to be an entrepreneurial independent contractor, as opposed to a 'wage earning' employee."[5] Unlike employment, independent contracting provides individuals the opportunity to structure their working arrangements around family, caregiving, class schedules, medical appointments, and other personal circumstances. Employers tell employees when to come to work, what work to do, and how to perform their work. Independent contractors can work when they want, where they want, and how they want. Employers tell employees when they can eat lunch. Independent contractors eat lunch at their leisure. Employees must obtain permission from their employer to take vacation. Independent contractors just go. An employee who does not come to work will be fired. If an independent contractor takes time off it may negatively affect earnings but not the ability to work.

Perhaps most important, W-2 employment rarely offers an individual worker the opportunity for full entrepreneurship – the chance to pursue the American Dream as one's own "boss." While these considerations may not be as important to some workers, they are very much so to others.[6]

From the worker's perspective, for many, independent work is the most viable or the only viable option, particularly where they are balancing work with other personal or family obligations.[7] For example, 48 percent of freelancers report being caregivers, while 33 percent report having a disability in their household, according to Upwork's Freelance Forward 2020 report.[8] Of caregivers who work

---

[4] *See* Chamber at 5.

[5] NPRM at 60612.

[6] People who pursue being their own boss have always chosen to work without benefits available to employees. And, the tradeoff has never solely been about gaining greater wealth. That remains truer today. Post baby boomers value a flexible work schedule, location, and access to training and development opportunities over income. *See* Harvard Business Review, *The Future of Work is Now: Setting the Course for an Empowered and Connected Workforce* (2019).

[7] *See generally* Upwork, *Freelance Forward 2020: The U.S. Independent Workforce Report* (September 2020) ("Upwork") (surveying 6,001 U.S. workers, 2,132 of whom engaged in "supplemental, temporary, project- or contract-based work" within last 12 months), https://www.upwork.com/i/freelance-forward; *see also* Dennis Vilorio, *Self-Employment: What to Know To Be Your Own Boss, BLS Career Outlook* (June 2014) (many who opt for self-employment value autonomy—deciding for themselves what kind of work to do, whom to do it for, where and when they do it, and even how much to pay themselves), https://www.bls.gov/careeroutlook/2014/article/self-employment-what-to-know-to-be-your-own-boss.htm.

[8] Upwork at 9.

independently, 67 percent report that doing so gives them more flexibility to be available for their families, while 72 percent of freelancers with a disability in their household indicate that their independent work model gives them the flexibility they require to address personal, mental, or physical needs.[9] Independent work is also important to seniors. Twenty percent of independent workers are over the age of 55.[10] This group does not appear to be working out of financial necessity alone; rather two-thirds do not believe they can find employment as satisfying as their current 1099 work.[11] If independent contracting is not permitted to exist, these seniors and others will either not work or will have less satisfying work.

Many believe that an important disadvantage of independent contracting is the lack of health benefits. But the facts tell a different story. Approximately 90 percent of gig workers have health insurance,[12] with more than half saving for retirement.[13] Less than one-third purchase their own individual insurance, and most indicate that health insurance does not affect their decision to work as an independent contractor. Anecdotally, companies interviewed who contract with gig workers believe that many of these workers have made an economic decision based on the demographics of their household. Where, for example, a spouse is working in an employment relationship, receiving lower pay but more robust benefits, the independent worker may choose work without benefits for higher pay, resulting in an overall higher net income while preserving flexibility and health benefits for the household.[14] In fact, 65 percent of freelance workers report that they make more money as independent workers than they had as an employee, with 57 percent indicating it took less than six months for their independent earnings to surpass their prior wages.[15]

Indeed, a recent study by the Coalition for Workforce Innovation found that independent workers report that they are satisfied with their work arrangements by an overwhelming 94 percent.[16] This satisfaction level has remained consistent, if not increased, over time. In a 2005 report, the Bureau of Labor Statistics (BLS) surveyed contractors and concluded that "[t]he majority of independent

---

[9] *Id.*

[10] *See* Ahu Yildirmaz, Mita Goldar, Sara Klein, *Illuminating the Shadow Workforce: Insights Into the Gig Workforce in Businesses*, ADP Research Institute (February 2020) ("ADP Research Institute") (defining "gig" workers as those workers receiving Form 1099-MISC from their hiring entity or those receiving Form W-2 who worked for less than six months in a 12-month period) at 3, https://www.adpri.org/research/illuminating-the-shadow-workforce/?release=illuminating-the-shadow-workforce-2020.

[11] *Id*.

[12] *Id*.

[13] T. Rowe Price, *Press Release: The Majority of Independent Workers are Actively Saving for Retirement* (March 25, 2019), https://www.troweprice.com/corporate/en/press/t--rowe-price--the-majority-of-independent-workers-are-actively-.html.

[14] ADP Research Institute at 4.

[15] Upwork at 18.

[16] Coalition for Workforce Innovation, *Project Details: National Survey of 600 Self-Identified Independent Contractors* (January 2020) ("CWI") (surveying 600 self-identified independent contractors), at 5 (attached as Exhibit B), https://rilastagemedia.blob.core.windows.net/rila-web/rila.web/media/media/pdfs/letters%20to%20hill/hr/cwi-report-final.pdf.

contractors (82 percent) preferred their work arrangement to a traditional job."[17] This finding was largely unchanged in BLS's 2017 survey of independent contractors, which found that independent workers affirmatively choose their flexible work arrangements; 79 percent of independent contractors prefer their arrangements to employment; and fewer than one in ten independent contractors would prefer a work arrangement.[18]

The security and protections of an employment relationship or the autonomy, flexibility and control of independent contracting – that is the choice. And, workers should be free to choose without government interference. It is the worker, not regulators or legislators, who should decide whether employment or independent contracting best meets his or her needs – family, flexibility, income.

Any regulatory scheme that so burdens the choice as to render independent contracting unsustainable is both economically inefficient and an infringement on workers' liberties. Laws that force businesses to guarantee wages, provide benefits, or impose employment-like protections for independent contractors will limit who businesses partner with to ensure the revenue generated by the contractors sufficiently exceeds any costs.[19] Whether statutory or regulatory, laws designed to restrict independent contracting and deny workers a free choice should be rejected by policymakers.

The Department's proposed rule allows for both employment and independent contracting to co-exist, and maximizes the ability of workers to choose the model of work which best suits them and their families. We commend the Department for putting forward a balanced proposal that provides clarity and certainty, while continuing to make the independent contractor option a free and valued choice for millions of American workers.

II. Failure to Regulate will Stifle Growth and Interfere with Worker Choice

Much has changed in our economy and technology in the 74 years since the Court first articulated the "economic reality" test for distinguishing between employee and independent contractor in 1947: "in the application of social legislation employees are those who as a matter of economic reality are dependent upon the business to which they render service."[20] Both the Department and the courts have struggled to define "dependence" in the modern economy – resulting in confusion, unpredictability and inconsistent results. We agree with the Department that "clear articulation will lead to increased precision and predictability in the economic reality test's application,

---

[17] Bureau of Labor Statistics, *Contingent and Alternative Employment Relationships* (July 2005) (defining contingent workers as those "who do not expect their jobs to last or who reported that their jobs are temporary"), https://www.bls.gov/news.release/history/conemp.txt.

[18] Bureau of Labor Statistics, *Contingent and Alternative Employment Arrangements—May 2017*, News Release (June 7, 2018) (defining contingent workers as those "who do not expect their jobs to last or who reported that their jobs are temporary"), https://www.bls.gov/news.release/pdf/conemp.pdf.

[19] Chamber at 37.

[20] *Bartels v. Birmingham,* 322 U.S. 126, 130 (1947).

which will in turn benefit workers and businesses and encourage innovation and flexibility in the economy."[21]

Independent contracting in our country has increased in recent years. Prior to the coronavirus pandemic in the U.S., the independent workforce was growing at a rate three times faster than growth in the total workforce.[22] Indeed, economists have predicted that by 2027, more than 50 percent of the U.S. workforce will participate in the gig economy.[23] Moreover, given the advent of remote work occasioned by the current pandemic, 58 percent of non-freelancers who are now working remotely indicate they are considering independent work in the future.[24] Research indicates that roughly 59 million Americans engaged in freelance work in the last year, representing 36 percent of the total U.S. workforce, and generating $1.2 trillion in annual earnings.[25] Moreover, from 2010 to 2019, the share of gig workers in companies increased by 15 percent (from 14.2 percent to 16.4 percent). Some have estimated that by 2027, more than 86 million workers—more than 50 percent of the U.S. workforce—will be engaging in freelance work.[26]

Regulators and courts have not adapted well to this new reality. We appreciate the Department's recognition that continued legal uncertainty under the FLSA, "especially acute when it comes to the growing number of more flexible and nimble work relationships" may "deter innovative work arrangements by creating legal risks with respect to misclassifying workers as independent contractors instead of employees."[27] For our clients at least, we can confirm for the Department that:

> Under the status quo, a company may believe it cannot be sure of a classification outside of costly litigation applying the economic reality test (which may be too unwieldly as currently applied). The prospect of such litigation expense and any potential back wages and penalties [is] enough to deter businesses from exploring innovative business models and working relationships. Thus, legal uncertainty regarding worker

---

[21] NPRM at 60600.

[22] *See* Milja Milenkovic, *The Future of Employment—30 Telling Gig Economy Statistics*, SMALLBIZGENIUS (Aug. 20, 2019) (studies on the gig economy are gathered in the end notes), https://gigonomy.info/the-future-of-employment-30-telling-gig-economy-statistics/.

[23] *See* Elaine Pofeldt, *Are We Ready For A Workforce That Is 50% Freelance?*, Forbes (Oct. 17, 2017), https://www.forbes.com/sites/elainepofeldt/2017/10/17/are-we-ready-for-a-workforce-that-is-50-freelance/#f8da4a3f82b2.

[24] Upwork at 11.

[25] *See id.* at 5. *See also* Shane McFeely and Ryan Pendell, Gallup, *What Workplace Leaders Can Learn From the Real Gig Economy* (August 16, 2018), https://www.gallup.com/workplace/240929/workplace-leaders-learn-real-gig-economy.aspx.

[26] *See* Statista, *Number of Freelancers in the United States from 2017 to 2028,* https://www.statista.com/statistics/921593/gig-economy-number-of-freelancers-us/

[27] NPRM at 60609.

> classification may inhibit the development of new job opportunities or result in the elimination of existing jobs.[28]

When state laws also are considered, the status quo is legal chaos, not just legal uncertainty. Independent contractor tests differ by jurisdiction and issue. Federal law alone has three different tests: the FLSA's six (or seven) factor economic reality test; the 20-factor common law test of the Internal Revenue Service; and the *Darden* 12-factor common law test.[29] "Most states also have different standards under different laws – wage and hour, workers' compensation, unemployment, equal employment opportunity, workplace safety, and/or tax laws may each have different requirements."[30] A single state may have two, three or more different tests under different state laws. Massachusetts, for example, currently has four different independent contractor tests under tax, unemployment, workers' compensation, and wage-hour laws. Keeping up with changing state law is a challenge, but as of January 2020, our 450-page survey shows that for at least one law in the state:

- Thirty states follow the IRS 20-factor test,[31]
- Seventeen states use the Darden 12-factor test,[32]
- Eleven states follow the FLSA economic reality test,[33]
- Twenty-five have adopted a different multi-factor balancing test,[34]
- Twenty-three states apply the traditional or a modified ABC conjunctive test,[35] and
- Sixteen states use another conjunctive test, with multiple required factors.[36]

A single worker, under this complicated web of federal and state law, could meet the independent contractor test under one federal law but not another, under one state law but not another, or any other combination.

Lack of certainty and predictability slows growth, reduces opportunities for workers, and interferes with worker choice. The Department needs to regulate in this space. The Department is taking an important first step in bringing clarity and predictability to the FLSA economic reality test for independent contractor status. With proposed regulations rooted in Supreme Court economic reality

---

[28] NPRM at 60610.

[29] *See* Chamber at 44-51 (Appendix, setting forth the three federal tests).

[30] *Id.* at 44.

[31] *Id.* at 46.

[32] *Id.* at 48.

[33] *Id*. at 47.

[34] *Id*. at 49

[35] *Id.* at 50-51.

[36] *Id.* at 51. For example, under Maine's unemployment law, a worker is considered to be an employee unless five required factors *and* three of an additional seven factors are met. Me. Rev. Stat. Ann. tit. 26, § 1043(11)(E). Wisconsin's workers compensation law provides that a worker is an employee unless nine required factors are met. Wis. Stat. § 102.07(8)(b).

test precedent, the new rules also must provide the regulated community with a clear roadmap on how that precedent will be applied in today's economy.

III. The Department's Proposal to Retain the Economic Reality Test Codifies Historical Precedent

The FLSA's definitions of "employer," "employee" and "employ," are circular and unhelpful. An "employer" is "any person acting directly or indirectly in the interest of an employer."[37] An "employee" is "any individual employed by an employer."[38] "Employ" means "to suffer or permit to work."[39] The FLSA does not define independent contractor.

With the key terms left virtually undefined by Congress, one of the early tasks of interpretation by the Supreme Court was to determine the FLSA's scope and limits.[40] Relying on the "to suffer or permit" definition of employ, the Court found that the employment relationship under the FLSA is broader and more inclusive than the common law, which focused the inquiry on the right to control the performance of the work.[41] Thus, "control," said the Court, cannot be the only inquiry when determining the existence of an employment relationship under the FLSA. Yet, the Supreme Court also decided that the "definition 'suffer or permit to work' was obviously not intended to stamp all persons as employees,"[42] and the FLSA's "statutory definition[s] … have [their] limits."[43]

To distinguish between employees and independent contractors under other federal employment laws, the Supreme Court began to look at "underlying economic facts" in the 1944 case of *NLRB v. Hearst Publications*.[44] In *Bartels v. Birmingham*,[45] a 1947 case involving the Social Security Act, the economic reality test, as we know it today, was born: "[I]n the application of social legislation," the Supreme Court stated, "employees are those who as a matter of economic reality are dependent upon

---

[37] 29 U.S.C. § 203(d).

[38] 29 U.S.C. §203(e)(1).

[39] 29 U.S.C. § 203(g).

[40] *Rutherford Food,* 331 U.S. at 728 ("there is in the [FLSA] no definition that solves problems as to the limits of the employer-employee relationship under the Act.").

[41] *Portland Terminal Co.*, 330 U.S. at 150–51 ("But in determining who are 'employees' under the Act, common law employee categories or employer-employee classifications under other statutes are not of controlling significance. This Act contains its own definitions, comprehensive enough to require its application to many persons and working relationships, which prior to this Act, were not deemed to fall within an employer-employee category." (citations omitted)); *Rutherford Food*, 331 U.S. at 728 ("The [FLSA] definition of 'employ' is broad."). *See also Nationwide Mut. Ins. Co. v. Darden,* 503 U.S. 318, 326 (1992) ("[T]he FLSA … defines the verb 'employ' expansively to mean 'suffer or permit to work.' This … definition, whose striking breadth we have previously noted, stretches the meaning of 'employee' to cover some parties who might not qualify as such under a strict application of traditional agency law principles." (citations omitted)).

[42] *Portland Terminal*, 330 U.S. at 152.

[43] *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 295 (1985).

[44] 322 U.S. 111, 124 (1944).

[45] 332 U.S. 126 (1947).

the business to which they render service."[46] Congress abrogated these two cases in 1947 and 1948, respectively, turning the focus of the employment inquiry back to the common law under the NLRB and SSA.[47] But, for the FLSA, the economic reality test, which the Supreme Court first applied to the FLSA in the 1947 *Rutherford Food*[48] case, survives unchanged – because of the broad definition of "to employ" in the FLSA as "to suffer or permit to work" and the failure of Congress to amend the FLSA after *Rutherford Food.*[49]

The employment relationship under the FLSA, then, is broader than the common law but not unlimited, determined under the economic reality test. For all other federal "social legislation" – the NLRA, the SSA, Title VII, OSHA – the common law governs.

Today's more textualist Supreme Court may conclude that the circular FLSA definitions of "employer," "employee," and "employ" are a thin reed to abandon the common law. The text of the FLSA does not include any mention of economic realities or any other language to indicate that the employment relationship under the FLSA is different from the common law principles that were already well established in 1938. Nonetheless, in light of the hundreds of federal Circuit and District Court decisions that followed, it is unsurprising that the Department has not proposed to abandon the economic reality test. That is for Congress or the Supreme Court.

Any attempt by the Department to depart from the economic reality test likely would result in a successful legal challenge to this rulemaking. In the spirit of "don't let the perfect be the enemy of the good," we support the Department's proposed section 795.105(a) providing that independent contractors are not employees and section 795.105(b) providing that the "ultimate inquiry" to determine employment status is whether, "as a matter of economic reality, the individual is economically dependent on that employer for work."

IV. The Department's Proposed Economic Reality Factors Will Simplify Application of the Test Without Departing from Historical Precedents

The core inquiry of economic dependence is rooted in long-established Supreme Court precedent, but as the Department has noted, "the Supreme Court has not mandated any specific set or formulation of economic reality factors for purposes of the FLSA, nor has it explicitly opined on any

---

[46] *Id.* at 130.

[47] *NLRB v. United Ins. Co. of Am*., 390 U.S. 254, 256 (1968) (Congress amended the NLRA on June 23, 1947, rejecting *Hearst* with the "obvious purpose" of having "the Board and the courts apply general agency principles in distinguishing between employees and independent contractors under the Act."); United States v. W. M. Webb, Inc., 397 U.S. 179, 187–88 (1970) (citing S. Rep. No. 80-1255, at 12 (1948) and H.R. Rep. No. 2168, at 9 (1948) (Congressional resolution, passed over a Presidential veto, opposed a proposed Treasury Department regulation to adopt the economic reality test under the SAA)).

[48] 331 U.S. 722 (1947).

[49] *Darden*, 503 U.S. at 324-25. *See also Goldberg v. Whitaker House Co-op., Inc.,* 366 U.S.28, 33 (1961) (applying the economic reality test to determine employment under the FLSA); *Tony & Susan Alamo,* 471 U.S. at 301 (same).

factor's relative probative value of the inquiry."[50] The Supreme Court first articulated five factors as important for the economic reality analysis in the 1947 Social Security Act cases of *United States v. Silk*[51] and *Bartels v. Birmingham*:[52] degree of control, opportunities for profit or loss, investment in facilities, permanency of relationship, and the skill required in the claimed independent operation. Also in 1947, in the *Rutherford Food*[53] FLSA case, the Court considered whether the work was "a part of the integrated unit of production" thus adding a sixth factor.

The Supreme Court also stated in the 1947 cases that no one factor is controlling, the list of factors is not complete, and the total situation controls.[54] Thus, while the economic reality test has remained unchanged, the factors used to apply the test have changed over time and differ from court to court.[55] The Department's own changing and inconsistent sub-regulatory guidance has not been helpful to a regulated community that craves clear rules and predictability.[56] Thus, we applaud the Department for proposing to codify through this notice and comment rulemaking a sole and authoritative set of factors it will use to bring clarity in its application of the economic reality test. We are hopeful that federal courts will defer to the Department's interpretations thus unifying the economic reality test factors over all circuit and district courts.

In formulating an authoritative list of factors, the Department has correctly returned to the "ultimate inquiry" under the economic reality test: "whether, as a matter of economic reality, the worker is dependent on a particular individual, business, or organization for work (and is thus an employee) or is in business for him- or herself (and is thus an independent contractor)."[57] After an exhaustive review of case law, the Department found that two factors – control and the opportunity for

---

[50] NPRM at 60602.

[51] 331 U.S. 704, 716 (1947).

[52] 332 U.S. at 130.

[53] 331 U.S. at 729-730.

[54] *Silk*, 331 U.S. at 716 ("No one is controlling nor is the list complete."); *Rutherford Food*, 331 U.S. at 730 ("We think, however, that the determination of the relationship does not depend on such isolated factors but rather upon the circumstances of the whole activity."); *Bartels*, 332 U.S. at 130 ("It is the total situation that controls.").

[55] *Compare Usery v. Pilgrim Equip. Co.,* 527 F.2d 1308, 1311 (5th Cir. 1976) (five factors, not adopting the integrality factor) and *Brock v. Superior* Care*, Inc*., 840 F.2d 1054, 1058 (2d Cir. 1988) (five factors, combining the profit or loss factor and the investment factor, with *Real v. Driscoll Strawberry Assocs., Inc.*, 603 F.2d 748, 754 (9th Cir. 1979) (applying a six-factor test). *See also, e.g., Parrish v. Premier Directional Drilling, L.P.*, 917 F.3d 369, 379 (5th Cir. 2019) (skill factor expanded to "skill and initiative"); *Scantland v. Jeffry Knight, Inc.,* 721 F.3d 1308, 1311 (11th Cir. 2013) (expanded permanence factor to included exclusivity); *Hopkins v. Cornerstone America,* 545 F.3d 338, 343 (5th Cir. 2008) (investment factor changed to "the relative investments of the worker and the alleged employer").

[56] *Compare* Opinion Letter (Aug. 13, 1954) (six factors) with Fact Sheet #13, "Employment Relationship under the Fair Labor Standards Act (FLSA)" (July 2081) (adding as a seventh factor the "degree of independent business organization and operation") and Opinion Letter FLSA2019-6 (April 29, 2019) (going back to six factors). *See also* Administrator's Interpretation No. 2015-1 (July 15, 2015), now withdrawn, declaring for the first time that "most workers are employees" and minimizing the importance of the control factor by stating that "no one factor (*particularly the control factor)* is determinative" (emphasis added).

[57] NPRM at 60600.

profit or loss – are the most probative of whether workers are economically dependent on another business or in business for themselves. This conclusion is indisputable. Below we provide suggestions, however, to provide additional clarification regarding these two factors. Also highly probative of economic dependence, in our view, is whether a worker has the opportunity to provide services to multiple consumers. In the proposed rule, the Department discusses "exclusivity" within the control factor. Below we ask the Department to adopt exclusivity as its own factor to be given equal weight with control and the opportunity for profit or loss.

A. The Nature and Degree of the Individual's Control Factor

The Department proposes the "nature and degree of the individual's control over the work" as its first economic reality factors:

> This factor weighs towards the individual being an independent contractor to the extent the individual, as opposed to the potential employer, exercises substantial control over key aspects of the performance of the work, such as by setting his or her own schedule, by selecting his or her projects, and/or through the ability to work for others, which might include the potential employer's competitors. In contrast, this factor weighs in favor of the individual being an employee under the Act to the extent the potential employer, as opposed to the individual, exercises substantial control over key aspects of the performance of the work, such as by controlling the individual's schedule or workload and/or by directly or indirectly requiring the individual to work exclusively for the potential employer. Requiring the individual to comply with specific legal obligations, satisfy health and safety standards, carry insurance, meet contractually agreed-upon deadlines or quality control standards, or satisfy other similar terms that are typical of contractual relationships between businesses (as opposed to employment relationships) does not constitute control that makes the individual more or less likely to be an employee under the Act.[58]

Under the proposed rule, the control factor would be one of two "core factors," considered "most probative as to whether or not an individual is an economically dependent employee" and thus "afforded greater weight in the analysis than is any other factor."[59]

We agree with the Department that control should be a core factor given greater weight when determining economic dependence. We are unaware of any test of employment status in any jurisdiction or under any law that does not put great weight on the control factor. The common law test focuses on control. The Supreme Court in *Rutherford Food* cautioned that control is not the sole

[58] 29 CFR § 795.110(d)(1)(i) (proposed).

[59] 29 CFR § 795.110(c) (proposed).

consideration under the economic reality test.[60] In *Silk*[61] and *Bartels,*[62] the Court considered additional factors to determine economic dependence. Yet, as the Department's own review of case law revealed, more than any other factor, the degree of control dictates the inquiry's result. When the alleged employer substantially controls the work, almost without fail, courts find that the individual is an employee.[63] When the individual substantially controls the work, courts nearly always conclude that the individual is an independent contractor.[64]

We view the Department's articulation of this factor important in two ways: *First,* the focus on "the individual's control over the work," and *second,* the use of the phrase "substantial control."

Some commenters may object to focusing this factor on the control of the work by the individual rather than the potential employer and may therefore ask the Department to revise the regulatory language to "the potential employer's control over the work." Such a revision is unnecessary, even though some courts have so articulated this factor.[65] As the Department states, federal courts consider the "degree of control over the work by the worker and by the potential employer" to determine control.[66] But the economic reality test focuses on the individual – whether the individual is economically dependent on another business or in business for him or herself. Thus, the focus of each factor should also be on the economic realities of the individual, not the businesses with which the contract. Changing the proposed regulatory language would only cause confusion and increase transaction costs, with no corresponding benefit.

For example, sharing business systems can create efficiency and lower barriers to entry. Most businesses "outsource" one or more systems or functions to a business partner or third-party vendor. An alleged employer who provides such systems is not controlling its business partner. A service provider is not controlled by using an app to connect with customers. A franchisee is not controlled by using a payroll system provided through the franchisor. A law firm is not controlled by its help desk vendor.

In the final rule, the Department should also retain the phrase "substantial control" to make clear that the individual need not control the work in all aspects, or even over all key aspects, with the relevant inquiry focused on what control was actually asserted, rather than what control was

---

[60] 331 U.S. at 730.

[61] 331 U.S. 704, 716 (1947).

[62] 332 U.S. at 130.

[63] NPRM at 60619.

[64] *Id.*

[65] *See, e.g., Razak*, 951 F.3d at 142; *Hobbs*, 946 F.3d at 829; *McFeeley*, 825 F.3d at 241; *Keller*, 781 F.3d at 807; *Scantland*, 721 F.3d at 1312.

[66] NPRM at 60612, fn. 34.

theoretically possible.[67] There is no requirement under the case law that an independent contractor be completely free of control in all aspects.

We support the language in proposed section 795.105(d)(1)(i) that "[r]equiring the individual to comply with specific legal obligations, satisfy health and safety standards, carry insurance, meet contractually agreed-upon deadlines or quality control standards, or satisfy other similar terms that are typical of contractual relationships between businesses (as opposed to employment relationships) does not constitute control that makes the individual more or less likely to be an employee under the Act." It is hard to imagine any business today that is not required to comply with a regulation or can survive in business without meeting deadlines or quality standards. The Department should retain the proposed regulatory language that none of these contractual or legal requirements is indicative of control under the economic reality test, as any uncertainty here could deter businesses from engaging contractors in a regulated environment. However, the Department should consider moving this language to its own subsection, and adding examples. For instance, in construction, general contractors must ensure subcontractors meet building codes. Government contractors must ensure their contractors pay prevailing wages. Franchisors must protect their brands by requiring franchisees to meet quality standards. Gig economy companies should not be discouraged from ensuring that service providers using their platforms are appropriately licensed or have not committed violent crimes. These types of controls do not demonstrate an employment relationship.

As discussed in more detail below, we suggest that the Department remove the language regarding exclusivity from proposed section 795.105(d)(1)(i), specifically, deleting "through the ability to work for others, which might include the potential employer's competitors" and "by directly or indirectly requiring the individual to work exclusively for the potential employer." Instead, the Department should adopt exclusivity as a separate factor, given equal weight with the control and opportunity for profit or loss factors, as follows:

> *The individual's opportunity to obtain work from others.* This factor weighs towards the individual being an independent contractor to the extent the individual has the opportunity to obtain work from clients or customers other than the alleged employer. Obtaining work opportunities from multiple clients or customer makes it unlikely that the individual is economically dependent on any one client or customer. In contrast, this factor weighs in favor of the individual being an employee if the alleged employer, through contract or practice, significantly restricts the individual's ability to obtain work from others.

Finally, to further clarify and sharpen the analysis under the control factor, we ask the Department to include additional examples of "key aspects of the performance of the work" and

---

[67] *See* 29 C.F.R. § 795.100 (proposed) ("In evaluating the individual's economic dependence on the potential employer, the actual practice of the parties involved is more relevant than what may be contractually or theoretically possible."), which we also support.

indicate whether each weighs in favor of employee or independent contractor status. Currently section 795.105(d)(1)(i) lists as "key aspects" only: setting work schedules, controlling workload, selecting projects, and requiring the individual to work exclusively for the potential employer. More is needed to clarify and ensure predictability when applying this factor. For the Department's consideration, we offer additional examples that (a) are indicative of independent contractor status, (b) are indicative of employee status, and (c) do not weigh in either direction.

Indicia of Independent Contractor Status
The individual's acts or ability to: • Control whether to work at all • Control the location of where to perform the work • Control how the work is performed • Set prices or choose between work opportunities based on prices • Hire employees or engage subcontractors
Indicia of Employment Status
The alleged employer's practice or ability to: • Require the individual to comply with company specific procedures regarding how the work is performed • Require set schedule or minimum hours • Control when the individual can take meal and rest breaks • Control when the individual can take time off
Not Probative of Worker Classification
The alleged employer's practice or ability to: • Require the individual to comply with or pass down contractual and legal obligations to subcontractors and employees • Require the individual to comply with customer requirements • Track and monitor data related to the individual • Provide the individual with market data on pricing • Establish default pricing that the individual may change • Provide the individual with information related to the establishment or running of a business • Provide the individual with emergency assistance (e.g., protective equipment during a public-health crisis) • Comply with federal, state or locals laws related to a contracting relationship

B. The "Opportunity for Profit or Loss" Factor

The Department proposes the "individual's opportunity for profit or loss" as a second core economic reality factor:

> This factor weighs towards the individual being an independent contractor to the extent the individual has an opportunity to earn profits or incur losses based on his or her exercise of initiative (such as managerial skill or business acumen or judgment) or management of his or her investment in or capital expenditure on, for example, helpers or

> equipment or material to further his or her work. While the effects of the individual's exercise of initiative and management of investment are both considered under this factor, the individual does not need to have an opportunity for profit or loss based on both for this factor to weigh towards the individual being an independent contractor. This factor weighs towards the individual being an employee to the extent the individual is unable to affect his or her earnings or is only able to do so by working more hours or more efficiently.[68]

We agree with the Department that the opportunity for profit or loss is highly probative of economic dependence, or the lack of it, and should be given more weight than the skill, permanence and integrated factors.[69] Individuals who are in business for themselves ordinarily would have an opportunity for profit or loss. Entrepreneurs take risks – sometimes winning, sometimes losing. Indeed, the Supreme Court relied on this factor in the decisions creating the economic reality test.[70] Further, as the Department's exhaustive research uncovered, when an individual had opportunities for profit or loss, federal courts have confirmed independent contractor status.[71]

The Department's proposal to combine this factor with an individual's investment in facilities and equipment, following Second Circuit precedent, is a welcome change that will bring clarity and reduce overlap. Wise decisions about investments are perhaps the clearest path to increasing profits or suffering losses. While it is sometimes difficult to determine whether an individual's personal initiative, managerial skill, or business acumen provides profit or loss opportunities, investments are so interrelated with profits and losses[72] that analyzing them separately is duplicative and unnecessary – especially with the greater weight that the Department proposes for this factor.

Although the preamble refers to "meaningful" investment, that adjective appropriately does not appear in the language of proposed section 795.105(d)(1)(ii). We anticipate that both the Department and federal courts would struggle to define what is "meaningful." Should the Department choose to further define "investment" in the final rule, the term should be defined as the amount of investment necessary to perform the contracted work, looking to whether the individual or the alleged employer purchased the equipment or tools used by the individual to complete the work.[73]

---

[68] 29 CFR 795.105(d)(1)(ii) (proposed).

[69] 29 CFR § 795.110(c) (proposed).

[70] *See Silk,* 331 U.S. at 717-18; *Whitaker House,* 331 U.S. at 32.

[71] NPRM at 60619.

[72] *See Saleem*, 854 F.3d at 145, n. 29 ("investment, by definition, creates the opportunity for profit or loss").

[73] *See, e.g., Lauritzen*, 835 F.2d at 1540–41 (Easterbrook, J. concurring) ("Think of lawyers, many of whom do not even own books. The bar sells human capital rather than physical capital, but this does not imply that lawyers are 'employees' of their clients under the FLSA."); *see also Faludi*, 950 F.3d at 275 ("Faludi provided his own phone and computer" and "made investments in his continuing education and home office equipment").

We also agree with the Department's rejection of "side-by-side" comparisons of investment.[74] Looking to the relative investment of the individual performing the work and a company that is offering the work provides no useful insight. Electricians, HVAC technicians, plumbers, accountants, painters, and others would effectively be excluded from contracting with any but the smallest of companies. Even homeowners invest more in their homes than the contractor cleaning their gutters or the plumber who unclogs their toilets. Moreover, contracts between large corporations and small businesses permeate business-to-business relationships; yet few stakeholders, if any, would question the independence of these small businesses. Relative investment has "little relevance" to the economic reality test because "[l]arge corporations can hire independent contractors, and small businesses can hire employees."[75] As the Department states, the stand-alone "relative investments" test "merely highlights the obvious and unhelpful fact that individual workers – whether employees or independent contractors – likely have fewer resources than businesses that, for example, maintain corporate offices or drill oil wells."[76]

We applaud the Department for abandoning the "side-by-side comparison method," and further ask that the final section 795.105(d)(1)(ii) not include the term "substantial" or any other adjective to describe the amount of investment required. The proposal properly focuses the investment inquiry on whether any investment (regardless of size) by the worker can be leveraged to produce a profit or be lost. If the Department finalizes the rule with a stand-alone investment factor, rather than as part of the control factor as proposed, it should be given only secondary weight, and the regulations should indicate that investments necessary to perform the contracted work are indicative of independent contractor status.

Finally, although we generally support section 795.105(d)(1)(ii), we ask the Department to remove the last sentence in its final regulations: "This factor weighs towards the individual being an employee to the extent the individual is unable to affect his or her earnings or is only able to do so by working more hours or more efficiently." This sentence appears in Opinion Letter FLSA2019-6 (April 29, 2019). In support of codifying the statement, the Department relies on cases involving workers producing goods or providing services on a piece rate.[77] This seems scant support for such a broad statement. The rationale for this rule is unclear. An individual who uses initiative, skill or judgment to perform a job more efficiently can generate greater profits, even if compensated by the hour or piece rate. A worker who can install an air conditioning unit more quickly may demand higher rates and attract more customers, with time left over for family. A worker may invest in artificial intelligence applications to serve more clients in less time, and thus generate more fees from more clients while working the same hours. The factor is the opportunity for profit *or loss* – not profit *and* loss. If an

---

[74] Administrator's Interpretation No. 2015-1 (July 15, 2015) (withdrawn).

[75] *Karlson*, 860 F.3d at 1096. *See also Parrish*, 917 F.3d at 383 ("Obviously, [the oil drilling company] invested more money at a drill site compared to each plaintiff's investments.").

[76] NPRM at 60614 (citing *Hopkins*, 545 F.3d at 344, and *Parrish*, 917 F.3d at 383) (quotations and citations omitted).

[77] *Id.* at 60614, fn. 38, citing *Whitaker House*, 366 U.S. at 33 (piece rate workers producing knitted goods at home), *Hodgson v. Cactus Craft of Arizona*, 481 F.2d 464, 467 (9th Cir. 1973) (piece rate workers producing novelty and souvenir gift items at home), and *DialAmerica*, 757 F.2d at 1385 (piece rate workers researching telephone numbers at home).

individual can increase profits by working the same or more hours more efficiently, that is enough even if there is no risk of loss. Especially under the Department's restatement of this factor, this final sentence seems contrary to the rest of the section unless significantly narrowed to include only unskilled workers paid by the hour who have no opportunity to perform their work more efficiently. In which case, the focus is on the inability to work more efficiently. The ability to use managerial skill, expertise, market experience, or business acumen to perform work more efficiently is indicative of independent contractor status.

C. The Department Should Adopt "Exclusivity" as a Separate Factor

The ability to work "for any customer" has been an important part of the economic reality test since the Supreme Court's *Silk* decision in 1947.[78] However, "exclusivity" has never found a consistent and comfortable home within the court-developed economic reality factors, however articulated. As the Department describes, federal courts have analyzed exclusivity under the control factor and the permanency factor.[79] In *Silk*, the Court found exclusivity important under both the integration[80] and the control factors.[81] *Freund* found exclusivity probative under three factors – control,[82] permanence,[83] and profit or loss.[84]

We agree with the Department that such overlap and blurring of factors is confusing and inefficient,[85] and applaud the goal to eliminate the exclusivity overlap. The Department proposes to analyze exclusivity under the control factor alone.[86] The proposed section 795.110(d)(1)(i) would provide that "requiring the individual to work exclusively for the potential employer" would weigh in favor of employee status.

To the extent exclusivity falls under any other factor, we agree that it is control. But the ability to obtain work from multiple customers is highly probative of individuals in business for themselves. The

---

[78] 331 U.S. at 719.

[79] *See* NPRM at 60607.

[80] 331 U.S. at 718 (unloaders were employees even though they did not work "regularly" because they "did work in the course of the employer's trade or business" (the integrated factor)).

[81] *Id*. at 719 (truck drivers were independent contractors in part because they could perform work "for any customer").

[82] 185 F. App'x at 783 ("Hi–Tech exerted very little control over Mr. Freund [in part because] Freund was free to perform installations for other companies.").

[83] *Id.* at 784 (("Freund's relationship with Hi–Tech was not one with a significant degree of permanence… [because] Freund was able to take jobs from other installation brokers.").

[84] *Id.* at 783 ("looseness of the relationship between Hi–Tech and Freund permitted him great ability to profit," in part, because "Freund could have accepted installation jobs from other companies.").

[85] NPRM at 60608 ("This overlap results in exclusivity being analyzed twice in many cases once as part of the control factor and again as part of the permanence factor. As with initiative, such repetitive analysis is inefficient and may exacerbate confusion."

[86] NPRM at 60612 ("Third, the Department proposes to further reduce overlap by analyzing the exclusivity of the relationship as a part of the control factor only, as opposed to both the control and permanence factors.").

Department should adopt exclusivity as a separate factor given the same weight as the proposed core factors of control and the opportunity for profit or loss, for three reasons:

First, exclusivity is fundamentally different from the other facts analyzed under control. The control factor asks the Department and federal courts to determine whether the individual "exercises substantial control over key aspects of the performance of the work."[87] Most of these key aspects focus on the work the individual is performing for the alleged employer: determining work schedules, selecting projects, and working with little or no supervision – in short, control over when, what, where and how work is performed.[88] Exclusivity, in contrast, focuses on the relationships between the individuals and their clients and customers.

Second, the probative value of exclusivity is at least equal to the two proposed core factors. The Department acknowledges that some economic reality factors are more probative than others – control and the opportunity for profit or loss – and proposes to give these greater weight.[89] Control, the Supreme Court stated, although not the sole consideration "is characteristically associated with the employer-employee relationship."[90] The "opportunity for profit and loss factor is more closely tied to the concept of economic dependence than any other factors because it is a necessary component of being in business for oneself."[91] The Department proposes these two core factors because they are most probative of "whether workers are in business for themselves or are instead dependent on another's business."[92] There are few cases, the Department concluded after a thorough review of case law, in which courts found workers who controlled their own work to be employees.[93] Similarly, courts that found no opportunity for profit or loss predominately concluded the worker was an employee.[94]

Exclusivity is similarly probative of the economic dependence inquiry. Like the Department's review of case law involving the control and the opportunity for profit or loss factors, a review of decisions considering exclusivity reveals the same consistent results. The Littler law firm maintains a database of nearly 2,000 independent contractor cases. The database powers ComplianceHR's artificial intelligence-based Navigator IC application,[95] which uses answers to an on-line questionnaire to predict whether a court would determine that an individual is an employee or independent contractor. As new cases are decided, our knowledge management attorneys flag the case to indicate the factors

---

[87] *Id*.

[88] *Id.*, and proposed section 795.110(d)(1)(i).

[89] *Id*.

[90] *Bartels,* 332 U.S. at 130.

[91] NPRM at 60612 (citing *Corporate Exp. Delivery Sys. v. NLRB*, 292 F.3d 777, 780 (D.C. Cir. 2002), and *FedEx Home Delivery v. NLRB*, 563 F.3d 492, 497 (D.C. Cir. 2016).

[92] *Id.*

[93] *Id.* at 77.

[94] *Id.* at 78.

[95] ComplianceHR, www.compliancehr.com, is a joint venture between Littler and software provider, Neota Logic. Former Wage & Hour Administrator Tammy McCutchen, now an officer of ComplianceHR, was the primary architect of the Navigator IC application and its sister application, Navigator OT, which provides predictive assessments for classifying employees as exempt "white collar" employees.

considered by the court – 25 different factors, in all, reflecting all factors considered in all states under all laws. The database includes 353 federal cases, 266 of which analyze independent contracting under the FLSA. In those 266 cases, the courts considered the exclusivity factor in 51.5% of the cases.

As with control and the opportunity for profit or loss, few cases found that an individual with multiple customers was an employee, or that an individual performing full-time work for a single potential employer was an independent contractor.[96] Conversely, federal courts have found that when an alleged employer requires a worker to work 40, 50 or 60 hours a week, the worker is more likely to be an employee, even if the worker is not bound by a non-compete agreement.[97] As the Department has proposed for all the factors, actual practice is more probative than contractual possibilities. Entrepreneurs generally have multiple clients or customers – the more clients and customers, the more likely that the individuals are in business for themselves rather than dependent on another's business. The fact that an employee may work other jobs as an employee does not detract from the probative value of exclusivity. A worker with one or even two part-time jobs, working only 10 or 20 hours per week as an employee, may also be an independent contractor in a different line of business, as three sources of work indicates the worker is not dependent on any one source. The question is whether the purported employer is restricting the individual's ability to work for others by contract or in practice. An employee cannot decide to work for anyone other than the employer during a scheduled shift; but an independent contractor can accept work using multiple digital platforms at the same time. In the former case, the worker's options are restricted; in the latter, they are not.

Third, adding a third core factor provides a tie-breaker. It prevents the core factors from equally pointing in opposite directions and thus, as discussed below, eliminates the need for the secondary factors of skill, permanence and integration.

---

[96] *Compare Jimenez v. Best Behavioral Healthcare, Inc.,* 2019 WL 2357590 (E.D. Pa. 2019) (psychotherapist with non-compete agreement and disputed evidence on whether he actually saw outside patients was an employee), *with Leffler v. Creative Health Services*, 2017 WL 4347610 (E.D. Pa. 2017) (psychotherapist who performed work for multiple providers and did not have an exclusive relationship with the potential employer was an independent contractor). *Compare Lovo v. Express Courier International,* 2019 WL 387367 (N.D. Tex. 2019) (drivers who did not have time to work for other companies found to be employees), *with*; *Mikhaylov v. Y&B Transportation Co.*, 2019 WL 1492907 (E.D.N.Y. 2019) (truck drivers who provided no evidence that they were not allow to work elsewhere were independent contractors). *See also Meyer v. United States Tennis Association,* 2015 WL 3938148 (2nd Cir. 2015) (tennis umpires at the U.S. Open who are free to serve as umpires for other tennis associations and work at the U.S. Open for only a few weeks each year are independent contractors); *James Holland, Plaintiff, v. Bynum & Sons Plumbing*, 2013 WL 11904712 (N.D. Ga. 2013) (although potential employer stated that worker could take "side work," court concluded worker was an employee because no side work occurred).

[97] *See. e.g., Lovo v. Express Courier International,* 2019 WL 387367 (N.D. Tex. 2019) (plaintiff who worked "virtually every waking moment" for defend found to be employee); *James Holland, Plaintiff, v. Bynum & Sons Plumbing*, 2013 WL 11904712 (N.D. Ga. 2013) (plaintiff who worked full time found to be an employee).

V. The Remaining Factors Should Be Eliminated As Adding Unnecessary Confusion with Little Probative Value

We applaud the Department's efforts to sharpen and clarify the skill, permanence, and integration factors. We agree that these factors are far less probative of economic dependence than the control and opportunity for profit or loss factors (and as we have proposed, exclusivity). In fact, in most cases the probative value is minimal and far outweighed by the confusion and lack of predictability resulting from attempts to apply these factors.

Thus, we suggest that each should be eliminated from the economic reality analysis. Eliminating those factors would streamline and simplify the analysis – a positive result for the entire regulated community. The Department acknowledges the secondary factors are confusing, often overlap the control and profit/loss factors, and "are not always as probative to an inquiry into whether a worker is, as a matter of economic reality, in business for him- or herself or economically dependent on someone else for work."[98] Further, because the Department proposes to "remove such confusing overlaps," the "probative value" of the other factors "become even more limited."[99] The Department should sharpen the economic reality test even further to ensure greater clarity and predictability. Control, the opportunity for profit and loss, and exclusivity – each of which in different ways and looking to different facts – are highly probative of whether or not a worker is economically dependent on another's business or in business for him or herself.

Nonetheless, in the alternative, should the Department retain these three factors, below we offer suggestions on how to further sharpen and clarify them.

A. The "Skill Required" Factor

If the two core factors of control and the opportunity for profit or loss point to opposite conclusions, the Department proposes the "skill required" as one of three subordinate factors that could break the tie:

> This factor weighs in favor of the individual being an independent contractor to the extent the work at issue requires specialized training or skill that the potential employer does not provide. This factor weighs in favor of the individual being an employee to the extent the work at issue requires no specialized training or skill and/or the individual is dependent upon the potential employer to equip him or her with any skills or training necessary to perform the job.[100]

---

[98] NPRM at 60620.

[99] *Id*.

[100] 29 CFR § 795.110(d)(2)(i) (proposed).

Under the proposed rule, the Department would not analyze initiative and judgment as part of the skill factor, as doing so would overlap with the control and opportunity for profit or loss factors.[101] So narrowed, this factor has little probative value in determining economic dependence and should be eliminated as a separate factor.

Proposed section 795.105(d)(2)(i) explains that the "skill required" factor weighs in favor of the individual being an employee if the work at issue requires no specialized training or skill. The proposed language does not define either "specialized training" or "skill." We believe the regulated community, courts, and Department investigators will have difficulty applying this factor thus undermining the clarity and predictability that the Department seeks. A fundamental problem is distinguishing the training and skills that weigh in favor of independent contractor status and those that do not. All jobs require some skills and some training. A product demonstrator must know about the product, how best to demonstrate it, and how to engage with customers. A truck driver needs "a higher level of knowledge, skills, and physical abilities than that required to drive a non-commercial vehicle" and "must pass both skills and knowledge testing" to obtain a commercial driver's license.[102] A carpenter may have learned his trade from family without formal training or an apprenticeship. Are such skills and training sufficient? We suggest that this requires a value judgment, and the Department has not offered the regulated community any standards to help it make that judgment. Also, this factor requires the Department and the courts to single out some workers as "unskilled" – a pejorative and disrespectful label – and potentially deny such "unskilled" workers the opportunity and choice to start their own businesses or to work independently. Individuals with all types of training and skills can be in business for themselves. An individual can open a small retail shop, for example, without specialized training or background. An owner of a lawn care business need only know how to drive a mower and trim plants. A personal shopper need only gave good taste in clothes.

If the Department retains this factor, it should include language or examples of "specialized training or skills" – or expect increased litigation as the regulated community, courts, and Department investigators struggle to determine the meaning of the term. Further, the Department should provide that the factor is neutral if the work does not require specialized training or skill, and weighs in favor of independent contractor status otherwise. Finally, the Department should delete the last phrase of the proposed section providing that the factor will weigh in favor of employment status if "the individual is dependent upon the potential employer to equip him or her with any skills or training necessary to perform the job." This statement overlaps with the Department's opportunity for profit or loss factor, which includes consideration of whether the individual or potential employer invest in equipment or have initiative to improve skills through training. The language also fails to distinguish between voluntary and mandatory training, creating an unresolved conflict with the proposed language under the control factor, section 795.110(d)(1)(i), that requires an individual "to comply with specific legal obligations, satisfy health and safety standards, carry insurance, meet contractually agreed-upon deadlines or quality control standards, or satisfy other similar terms that are typical of contractual

---

[101] NPRM at 60620-21.

[102] *See* Federal Motor Carrier Safety Administration website, *Commercial Driver's License Program,* https://www.fmcsa.dot.gov/registration/commercial-drivers-license.

relationships between businesses (as opposed to employment relationships) does not constitute control that makes the individual more or less likely to be an employee under the Act."

B. The "Permanence of the Working Relationship" Factor

The Department proposes "permanence" as a second guidepost factor:

> This factor weighs in favor of the individual being an independent contractor to the extent the work relationship is by design definite in duration or sporadic, which may include regularly occurring fixed periods of work, although the seasonal nature of work by itself would not necessarily indicate independent contractor classification. This factor weighs in favor of the individual being an employee to the extent the work relationship is instead by design indefinite in duration or continuous.[103]

As noted above, we suggest that the Department eliminate this factor as duplicative of the control and exclusivity factors and unnecessary. We also suggest that the permanence or duration of a business relationship is of limited probative value in determining economic dependence. Many business relationships are by design indefinite and continuous in duration. But that does not change the nature of either organization in the relationship or the analysis of economic dependence.

Nonetheless, although we agree with the Department's narrowing of this factor, including removing analysis of exclusivity, questions will remain that undermine predictability and will spur litigation. The proposed rule provides that the factor will weigh in favor of an individual being an independent contractor to the extent "the work relationship is by design definite in duration or sporadic." We ask the Department to clarify the distinction between "work relationships" and relationships that merely have the potential for work, to define "definite" and "indefinite," and distinguish between "continuous" and "sporadic." The Department has not provided enough information in the regulatory language or the preamble for the regulated community to be able to predict how this factor would be applied. Adding examples to the regulatory language would be helpful if the Department retains this factor in the final rule.

Because the Department uses the word "work" to modify "relationship," the analysis of the permanence factor should be limited to time periods when work is actually performed. Otherwise the word "work" in the proposed rule would be meaningless.[104] An individual who signs up for a virtual marketplace to connect with customers seeking grocery delivery or who signs up with a home care registry to connect to families needing caregivers, for example, is signing up for potential work in the future. Such individuals would not be creating an indefinite "working relationship" for purposes of this factor, even if they continue to obtain work through the virtual marketplace or home care registry for

---

[103] 29 CFR 795.105(d)(2)(ii) (proposed).

[104] Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (2012) at 148-149 (under the surplusage canon, "legal drafters should not include words that have no effect").

many years. Rather, the working relationship begins when each opportunity is offered and accepted and ends when that opportunity is completed. There is a separate working relationship – with the customer, not with the virtual marketplace or home care registry – each time a gig worker makes one delivery, cleans one house, or gives one person a ride or each time a caregiver accepts one client referral. Thus, in Opinion Letter FLSA2019-6, the Department concluded that a virtual marketplace company does not have a "permanent working relationship with its service providers that would be indicative of an employer-employee relationship." By design, these relationships are definite in duration or sporadic. We ask the Department to include an example in the final rule so stating.

Similarly, for results to be predictable, the regulated community needs more information to understand when a relationship is definite in duration or sporadic "by design." The Department should make clear that "by design" is viewed at the time the *working* relationship is formed and not by redefining the relationship with the benefit of hindsight. Whether a relationship is definite in duration or sporadic "by design" should be determined by looking to the intention of the parties when they entered each separate engagement. For example, duration is definite by "design" if a freelance writer agrees to prepare an article for a media company regardless of whether the freelancer takes one day or one month to draft the article. The relationship is sporadic "by design" even if the freelancer engages to write another article for the same media company a few days or weeks later.

The Department should also further explain what it means by "definite." We suggest "definite" should not be defined by the length of a relationship. Some construction projects take years to complete, and potential employers should not be compelled to artificially end a relationship after a month or a year. "Definite in duration" also should not require that the parties agree to a date certain when the work relationship will end, as that may not be known when the relationship begins (for example, when the assignment is for completion of a project). Rather, it should be sufficient for this factor to weigh in favor of independent contractor status if the parties agree that the current work relationship will end after a date certain or when the project, contracted work, or gig ends. Also, the parties should be able to renew their relationship, if mutually beneficial, without transforming the relationship into a *de facto* employment relationship. Currently, businesses limit the renewals of beneficial relationships for fear of the relationship being viewed as continuous and thus an employment relationship. This is inefficient for both, and especially harsh on the individual worker who cannot re-engage with the business, at least for some period, even though he or she provided excellent mutually beneficial service. Parties' who repeatedly renew their contracts when mutually beneficial should not be viewed with hindsight to transform what was "by design" definite in duration to a more indefinite relationship.

The regulated community also needs to better understand the meaning of "sporadic" versus "continuous." The permanence factor should not weigh in favor of employment status merely because an individual enters a series of separate work arrangements with an alleged employer over the course of a month or years. Such an interpretation could artificially and inefficiently lead potential employers, for example, to refuse to enter work arrangements with a freelancer whom they have worked with before. To illustrate the potential consequences, consider the aftermath of California's AB5, which prohibited news outlets from publishing more than 35 articles per year from an individual freelance writer:

Multiple news outlets announced that they would no longer contract with California freelancers, costing hundreds of independent writers their livelihoods.[105]

C. The "Integrated Unit" Factor

The final benchmark factor proposed by the Department and the most confusing is the "integrated unit" factor:

> This factor weighs in favor of the individual being an employee to the extent his or her work is a component of the potential employer's integrated production process for a good or service. This factor weighs in favor of an individual being an independent contractor to the extent his or her work is segregable from the potential employer's production process. This factor is different from the concept of the importance or centrality of the individual's work to the potential employer's business.[106]

Although we prefer that the Department eliminate this factor entirely, we welcome the Department's proposal to reframe this factor from "whether the service rendered is an integral part of the alleged employer's business" to whether the work is "part of an integrated unit of production."[107] The prior framing has little probative value to determine economic dependence.[108] However, our clients were uniformly confused about the meaning of "an integrated unit of production" and how it would apply to their businesses. Like the "production versus staff" dichotomy still sometimes used to determine whether an employee qualifies for the Part 541 administrative exemption, applying a production line analogy to a modern economy seems unhelpful, to say the least. As discussed below, if the Department retains this factor in the final rule, it needs to be further sharpened and clarified.

As an initial matter, we welcome the Department's abandonment of this factor's focus on the "importance" of the work to the business of the potential employer. The 1947 Supreme Court cases did not mention importance. Instead, in *Rutherford Food,* the Court found the workers to be employees because they "work[ed] alongside admitted employees."[109] The 1947 Treasury regulations included this factor as: "[i]ntegration of the individual's work in the businesses to which he renders services."[110]

---

[105] *See, e.g.,* Suhauna Hussain, *Vox Media Cuts Hundreds of Freelance Journalists as AB 5 Changes Loom*, Los Angeles Times (Dec. 17, 2019), https://www.latimes.com/business/story/2019-12-17/vox-media-cuts-hundreds-freelancers-ab5.

[106] 29 CFR 795.105(d)(2)(iii) (proposed).

[107] NPRM at 60612, 60616-18.

[108] *Lauritzen*, 835 F.2d at 1541 (Easterbrook, J. concurring) (whether work is integral "has neither significance nor meaning" because "*[e]verything* the employer does is 'integral' to its business—why else do it?") (emphasis in original).

[109] 331 U.S. at 729.

[110] 12 FR at 7966-67.

It was not until the 1980s that courts began to replace "integration" with "integral," meaning important.[111] We agree with the Department that "importance" has little probative value to determine economic dependence.[112] No rational business would spend time or money to engage an individual to perform work that is unimportant. Moreover, the fact that the work is important does not inform us whether that individual is dependent on the business for work or in business for him- or herself. In fact, a worker who provides a potential employer with a scarce service that is in high demand is likely not dependent on a single business for work. The more important the work, in other words, the less likely the individual is to be economically dependent.

But, the meaning of "integration" in the proposed rule needs clarification. When is a worker "a component of the potential employer's integrated production process"? Even reformulated as "integrated" rather than "integral," this factor still depends on the characterization of the potential employer's core business. In that, the proposed rule is not an improvement in the modern economy. The Department should add examples to the proposed section 795.105(d)(2)(iii) to clarify when the integrated production process of a business begins and ends.

Federal courts, for example, have disagreed on whether gig economy companies are technology companies or companies providing the services the providers perform.[113] The Department answered this question in Opinion Letter FLSA2019-6, recognizing that virtual platform companies are intermediaries distinct from the individuals who are direct providers of services and thus not integral. The Department also explained that the gig company's "business operations effectively terminate at the point of connecting service providers to consumers and do not extend to the service provider's actual provision of services." The Department should include this language as an example in the final rule.

The Department could also provide in the final rule that franchisees are not part of the franchisor's integrated production process. A franchisor is not in the business of providing services to the end consumer. Rather, the core business of a franchisor is limited to developing and marketing a business model and providing business support to franchisees thus ensuring the strength of the brand. The integrated production process for home care registries is establishing the referral service to connect families in need of home care with home care workers. Thus, the work of home care workers in providing care is not integrated under the proposed rule. The core business of a cable company is to provide internet and cable television services, not to install cable. The Department could develop

---

[111] *See, e.g.*, *Lauritzen*, 835 F.2d 1529, 1534-35; *DialAmerica Mktg.*, 757 F.2d at 1386.

[112] NPRM at 60616.

[113] *Compare O'Connor v. Uber Techs., Inc.*, 82 F. Supp. 3d 1133, 1153 (N.D. Cal. 2015) ("[D]rivers perform a regular and integral part of Uber's business[.]") and *Razak*, 951 F.3d at 147 n. 12 ("We also believe [there] could be a disputed material fact" whether Uber is "a technology company that supports drivers' transportation businesses, and not a transportation company that employs drivers.") with *State Dep't of Employment, Training & Rehab., Employment Sec. Div. v. Reliable Health CareServs. of S. Nevada, Inc.*, 983 P.2d 414, 419 (Nev. 1999) ("[W]e cannot ignore the simple fact that providing patient care and brokering workers are two distinct businesses.").

another example from the court cases reaching different results on whether running cable and installation is part of the core business of cable companies.[114]

Because an "integrated production process" is a new concept for the regulated community and the courts, the Department should also add language to the proposed provision that leaves no leeway for misinterpretation. In the preamble, the Department characterized integration as the worker's service being "merged into the business's operation."[115] The Department should add this helpful concept to the regulatory language. Also helpful is the Department's discussion in the preamble that individuals are not integrated if able to perform the work "without depending on the potential employer's production process."[116] We also ask that the Department include in section 795.105(d)(2)(iii), the essential facts and findings that the Department relies on from *Green* and *Zheng* that can be summarized as:

- Work outside a potential employer's core business, such as the collateral services of billing and quality assurance by virtual markets, is not part of the integrated production process.
- Work on a production line does not indicate employment status unless facts establish that an independent contractor relationship was established to evade the FLSA requirements.
- This factor should not be interpreted to bring normal, strategically-oriented contracting relationships within the ambit of the FLSA.
- Individuals are not part of the integrated production process merely because they or their work contribute to the potential employer's revenue.

Finally, we request two additional minor clarifications. *First,* in the preamble, when discussing the integrated process, the Department states that integration "requires the coordinated function of interdependent subparts working towards a specific unified purpose."[117] We are concerned that the phrase "unified purpose" could be used to broaden the integrated business process to include every business function of a potential employer. The Department should not include such language in the final regulations or preamble, and instead clarify that the "unified purpose" cannot be broader than the potential employer's core or primary business purpose. *Second*, in discussing an individual working "closely alongside conceded employees and perform[ing] identical or closely interrelated tasks as those employees," a classic *Rutherford Food* hypothetical, the Department continues, "such as where an individual provides office cleaning services as part of a team of employees."[118] Courts could interpret this to mean that janitorial services that occur alongside a team of employees (*e.g.,* clerical or production line workers) can only be performed by employees. Presumably, the sentence is referring to

---

[114] *Compare Cromwell v. Driftwood Elec. Contractor, Inc.,* 348 F. App'x 57 at 58-59 (5th Cir. 2009) with *Thibault* v. *BellSouth Telecommunication*, 612 F.3d 843 at 844-49 (5th Cir. 2010).

[115] NPRM at 60616.

[116] NPRM at 60618 (citing *Green*, 2017 WL 4863239, at *14).

[117] *Id*.

[118] *Id.*

"a team of employees" who are also performing janitorial services. The Department should omit this language from the final regulations or preamble, and should clarify this point to avoid the potential confusion.

VI. The Department Should Add Examples Showing How the Proposed Rule Will be Applied in Specific Industries

The regulated community, the courts, and the Department's own investigators need to understanding how each factor addresses economic dependence when applied to particular facts. Accordingly, we ask the Department to add a new, separate section describing how the proposed economic reality test factors will apply in particular industries or under particular facts. The examples, by providing useful analogies for all stakeholders, will further the rule's goals of ensuring consistent application, increasing predictability, and decreasing litigation. Below we suggest how the proposed rule would apply in industries that have generated significant litigation.

A. Virtual Marketplaces

Gig workers who are providing a service to someone with whom they have connected through a technology platform known also as a virtual marketplace company (VMC) are generally independent contractors who are not economically dependent on the VMC. The test for this analysis has been sharpened and clarified since the Department issued Opinion Letter FLSA2019-6, but the conclusion under the updated analysis remains the same. In fact, when properly analyzed, all factors point towards gig workers being independent contractors.

As the Department found in Opinion Letter FLSA2019-6, service providers exercise control through complete autonomy to choose if, when, where, how, and for whom they will work. To be sure, the providers rely on the platform to quickly obtain jobs, but that reliance does not make them economically dependent on a VMC. Rather, the service providers can find other work through competitor VMC platforms, directly from other customers, or through any other means. Providers have the right to "multi-app"—that is, simultaneously run competing virtual platforms to compare virtual opportunities in real time and pick the best opportunity on a job-by-job basis.[119] They also have the right to perform work for clients outside of any app, such as clients they obtain through word-of-more, traditional advertising, directory listings, classified pages, lead generation services, or other means. Thus demonstrating that the VMC has no control over providers' work opportunities.[120] On the other hand, VMCs do not impose control that creates economic dependence through required shifts, large quotas, mandatory training, inspecting providers' work, rate providers' performance, or impose requirements on how providers must perform their work.

Actions that VMCs take to facilitate the transaction do not equate to control – for example, requiring service providers to register and sign a service agreement, conducting background or identity

[119] *See Parrish*, 917 F.3d at 387 (holding that work "on a 'project-by-project basis' … counsels heavily in favor of [independent contractor] status" (citation omitted)).

[120] *See Saleem*, 854 F.3d at 141–42.

checks, ensuring providers have required licenses to perform the services they offer, providing masked communications between consumer and provider, or removing a provider who commits an identified breach that may harm the integrity of the virtual marketplace.[121]

Similarly, VMCs may provide default pricing to reduce transaction costs, but that does not diminish a provider's opportunity for profit or loss. Service providers have the opportunity to increase profits and minimize losses by changing default pricing, choosing jobs with better pricing, working in locations that reduce travel and allow consecutive service opportunities, and deciding how they will perform the work. Investing in a larger car, a more advanced computer, or better tools can impact profits or loses. A service provider can also decide whether incurring a cancellation fee to take a different, better job is worthwhile. All such decisions require service providers to use managerial skill and initiative and impact profits or loses.[122]

A provider can impact profits or losses by choosing to use different platforms in different locations at different times of the day, as the jobs offered may be at higher prices for more reliable customers at better locations. Providers able to multi-app further control their profit or loss by "toggling back and forth between different" competing VMC platforms.[123] They can also enhance their profit opportunities by working in particular zones, particular times, or in particular patterns – all based on their knowledge and experience in the particular market. In that way, they are no different than the food-truck owner who knows to set up in heavy foot-traffic areas at lunch time. Lost opportunity cost is at the core of every decision a provider makes. Providers further risk losing money through cancellation fees, deciding what equipment to purchase at what price, and improperly managing the need to maintain rather than repair or replace equipment. Providers' opportunity for profit and loss demonstrates that they are not economically dependent on any particular VMC.

Based on how most VMCs operate, both control and the opportunity for profit or loss point strongly towards providers being independent contractors. Moreover, the importance of exclusivity cannot be ignored and multi-apping is quintessential non-exclusivity. Because the core factors strongly indicate no employment relationship there is no need to consider the guideposts. However, if a situation arose that was less clear, the guideposts will also typically point towards independent contractor status.

The skills factor is likely to be neutral unless the VMC mandates training which would then indicate an employment relationship. Most often, VMCs will provide information that a provider may review on how its platform works, including tips on best practices that may include feedback from existing users (consumers and service providers) on what consumers expect. If a provider seeks and utilizes information and other training whether by the VMC or elsewhere that would slightly point towards independent contractor status.

---

[121] Opinion Letter FLSA2019-6.

[122] *See Mid-Atl. Installation Servs.*, 16 F. App'x at 107 (providers retain some control over their profit and loss even where default pricing is used).

[123] *See Saleem*, 854 F.3d at 144; *see also Parrish*, 917 F.3d at 387 (holding that work "on a 'project-by-project basis' … counsels heavily in favor of [independent contractor] status" (citation omitted)).

Permanence does not exist in this environment, which by design structures the business relationships only "on a 'project-by-project basis'" each for a limited duration of time.[124] The relationship contemplates that the provider may accept multiple discrete opportunities, which are sporadic by design, as neither party has any obligation to offer or accept another discrete opportunity and there is no future promises or guarantees of future business opportunities. If a platform required a permanent on-going commitment to accept all jobs within certain parameters, that scenario would present a different balance and might require a different analysis.

As discussed in the preamble and Opinion Letter FLSA2019-6, a VMC operates as an intermediary. VMCs offers a finished product to providers – the platforms which allow service providers to connect with consumers. The business operations of VMCs effectively terminate at the point of connecting providers to consumers, and do not extend to the provider's actual provision of services.[125] In other words, the providers are not an integral part of a VMC's referral service. The platform exists to provide technology that reduces transaction costs of finding customers, performing the work, and collecting fees from the consumer. Because the service provider performs no work to maintain or create the technology, but rather performs short-term work for many customers using the platform to find service providers, this factor will almost always point towards independent contractor status.[126]

B. Home Care Registries

The purpose of a home care agency is to provide care directly to individuals in need of care in the home. In nearly all, if not all, instances a home care agency is an employer. On the other hand, business models known most commonly as registries act as an intermediary company as a referral business a bit like VMCs with the purpose of matching individuals who need care in the home (client) with a qualified, vetted independent caregiver. Some registries operate their businesses much more like a home care agency. The more that is true, the more likely the registry will be an employer. True registries are not.

Registries do not assert control over a caregiver's work such that the caregiver is economically dependent on the registry. Registries provide referrals which both caregiver and client can accept or reject. Registries gather enough information from both caregiver and client to know if they meet each other's needs (*e.g.,* travel restrictions, requiring a non-smoker, strong enough to assist large client, etc.) but make no subjective decisions about whether they will be a good fit (personality or looks won't be a good fit) so that the caregiver and client are in control rather than the registry. Registries do not create economic dependence by imposing control through required shifts, large quotas, mandatory training, inspecting caregivers' work, rating caregiver's performance, or imposing requirements on how caregiver must perform the work. The client has the option of compensating the registry for the referral fee in a lump sum or through administrative fees paid based on an hourly rate on top of wages. If the rate is not disclosed, such that it is negotiated separately from wages, the registry may be acting more like an

---

[124] Opinion Letter FLSA2019-6 (quoting *Parrish*, 917 F.3d at 387).

[125] *Werner*, 529 F. App'x at 545.

[126] *See Saleem*, 854 F.3d at 142.

employer deciding the caregiver's wage. Importantly, registries do not restrict caregivers' ability to work elsewhere including with clients from competing registries. The client may choose to pay the referral fee in a lump sum rather than through administrative fees if the client decides to continue working with the caregiver and not use the registry's administrative services. Registries providing administrative services such as recordkeeping, invoicing, collecting and disbursing payments and other ministerial services do not increase any economic dependence on it. However, were a registry to take over for a client to ensure accuracy of hours worked and adjusting a caregiver's time that would be an exercise of control.

The caregiver will negotiate what work needs to be done, the work schedule and pay rate with the client. Once the referral is made, the registry has no authority to terminate the caregiver from the job. Registries are usually required by law to verify credentials and qualifications, conduct a background check and engage in other quality-control measures for each caregiver none of which is indicative of control. Registries do not supervise or mandate training to the caregiver. However, making information or training available that is not required related to providing home care through a registry, updating safe practices and changes in the law or standard of care, and tips on best practices that may include feedback from clients on what they often expect is not indicative of an employment relationship unless the training is mandatory. So long as a registry is not acting like an agency or is indirectly asserting control through discipline, the registry will not be exercising control and this factor will point strongly towards independent contractor status for the caregiver.

Caregivers who accept opportunities referred by registries have an opportunity for profit and loss through their initiative and business acumen. A caregiver's low investment is not probative so long as the opportunity for profit or loss exists through initiative and business acumen. As discussed, caregivers are free to choose the assignments they want to accept allowing them to select those most advantageous to them from a number of registries. Some caregivers may want to choose the highest pay while another wants the easiest commute and a third might want certain shifts or a client who sleeps a lot to permit studying or other personal interests to be done at work. Significantly, all of these caregivers have the ability to perform the same type of work for an agency as an employee if that is believed more advantageous. Unlike an employee, caregivers who accept referrals from registries are not economically dependent upon them as they can accept work from any registry with complete freedom to select the type of assignment and negotiate work tasks, schedule and pay.

The lack of exclusivity is one of the most probative factors of economic independence. Whether analyzed under the control factor or as a separate factor, it strongly supports caregivers' status as independent contractors. As all of the core factors point towards caregivers not being economically dependent on registries, it is likely only when a registry is acting more like an agency that there will be an employment relationship. The guideposts should not need to be consulted. If they were, skills would likely be neutral unless a registry mandated training which would indicate an employment relationship exists. Permanence does not exist as the working relationship is assignment-by-assignment which are determined by the caregiver and the client, not the registry. The caregiver performs no work for the registry. So, there is no working relationship relevant to this analysis.

Lastly, the caregiver is not integrated into a registry's production process. As discussed in the preamble and Opinion Letter FLSA2019-6, a registry, like a VMC, operates as an intermediary. Registries

offer a service to caregivers and clients; the business operations effectively terminate at the point of connecting caregiver and client and do not extend to the caregiver's actual provision of services.[127] In other words, the caregivers are not an integral part of a registry's referral service. Accordingly, this factor will almost always point towards independent contractor status.[128]

C. Physicians and Similar Medical Professionals

Physicians often agree to contract with a medical center to fill a specialty need that the hospital cannot cover with its current staff. Cases are split as to whether a medical center exercised control that indicated it was an employer because it required the contract physicians to abide by safety protocols and licensing requirements, carry insurance or meet other contractually agreed upon terms. Section 795.105(d)(1)(i) makes clear that these facts do not suggest the medical center is exercising control. Similarly, a medical center can conduct a review of the physician's work to determine whether to renew a contract without exercising control. A physician who is able to provide medical services without supervision, decide whether to perform the work personally or hire someone to do it, and most importantly is free to work elsewhere including his or her own private practice exercises control that indicates independent contractor status. Employee physicians are supervised by the chief of a department or chief medical officer and answer to a board. They cannot hire someone else to perform the work.

Similarly, if the physician bills for medical services provided, the physician has opportunity for profit and loss. The physician's ability to choose whether to work personally or hire someone else and work elsewhere provides such opportunity. In order to bill for medical services and provide malpractice insurance requires an investment from which the physician may make or lose money. As all core factors point towards independent contractor status, the guideposts do not need to be considered.

D. Franchising

Franchisors are generally not employers of franchisees.[129] Franchising is regulated by the Fair Trade Commission (FTC) Franchise Rule,[130] which provides that:

> (1) The franchisee will obtain the right to operate a business that is identified or associated with the franchisor's trademark, or to offer, sell, or distribute goods, services, or commodities that are identified or associated with the franchisor's trademark;

---

[127] *Werner*, 529 F. App'x at 545.

[128] *See Saleem*, 854 F.3d at 142.

[129] *Chen v. Domino's Pizza, Inc.*, No. 09-107 (JAP), 2009 WL 3379946, at *3 (D.N.J. Oct. 16, 2009) (collecting cases and noting that "[c]ourts have consistently held that the franchisor/franchisee relationship does not create an employment relationship between a franchisor and a franchisee's employees").

[130] 16 C.F.R. § 436.1 *et seq.*

(2) The franchisor will exert or has authority to exert a significant degree of control over the franchisee's method of operation, or provide significant assistance in the franchisee's method of operation. [131]

Under federal trademark law, the franchisor, as the licensor of its trademark, must keep control over it or risk constructive abandonment of its mark.[132] Consistent with proposed section 795.105(d)(1)(i), imposing quality control standards to ensure the consistent quality of a work product, brand, or business reputation does not constitute control that indicates economic dependence. Moreover, any actions consistent with the franchisor's legal obligations should be protected by a safe harbor, which is proposed in the following section. Essentially, like models proposed at the state level, franchising "established a regulated classification status unique from that of an employee or independent contractor."[133]

Franchising is a significant part of the economy and growing at an ever faster pace.[134] If the control which franchisor's asserted to protect its brand indicated an employment relationship, the franchise business model would be eviscerated.[135] A franchisor does not "control" the work of a franchisees (under joint employment or independent contractor standards) when advising them on how to increase profitability – even when that involves reviewing and providing advice on employee pay and scheduling – when the franchisees, not the franchisor, make the decisions.[136] The FTC acknowledges that a franchisor protects its brand through exercising control over where the business may operate, hours of operation, appearance or layout of the business, production techniques, accounting practices and systems, personnel policies, mandating training, and providing a mandatory operating manual.[137] Franchisors also "frequently provide franchisees with a platform to post job advertisements and collect job applications, and often recommend or provide analytical systems and tools to increase efficiency."[138] Although some controls will leave little room for interpretation or alternative choices, the franchisee will retain substantial control over the day-to-day operations and how to implement the business model.

The third prong of the FTC's Franchise Rule requires that "the franchisee makes a required payment or commits to make a required payment to the franchisor or its affiliate" upon commencing business. Accordingly, there should always be an investment to be leveraged for profit and at risk of

---

[131] 16 C.F.R. § 436.1(h).

[132] 15 U.S.C. § 1127.

[133] *Patel v. 7-Eleven, Inc.*, 2020 WL 5440623 *8 (D. Mass. Sept. 10, 2020).

[134] FRANdata, *Franchise Business Economic Outlook 2020* (2019) (prepared for the International Franchise Association), https://franchiseeconomy.com/assets/32304.pdf.

[135] *Id*. at *9.

[136] *See Orozco v. Plackis*, 757 F.3d 445 at 449-51 (5th Cir. 2014) (holding that there was insufficient evidence to find that the potential joint employer supervised and controlled workers' schedules, pay rates, or other conditions of employment).

[137] FTC's Franchise Rule Guide at 3, www.ftc.gov/system/files/documents/plain-language/bus70-franchise-rule-compliance-guide.pdf.

[138] Final Rule, *Joint Employer Status Under the Fair Labor Standards Act,* 85 FR 2820, 2843 (Jan. 16, 2020) ("Joint Employer Final Rule"), https://www.govinfo.gov/content/pkg/FR-2020-01-16/pdf/2019-28343.pdf.

loss.[139] The day-to-day control of running the business such as how to staff, manage, market and decide on and negotiate expenses provide opportunity for profit or loss through initiative. In most franchises, the relevant analysis under the core factors should confirm no employment relationship.

E. Janitorial

A business who hires an individual to help its own janitorial staff and who works alongside and is treated the same as the businesses own employers as to when, how, and where work is to be performed is likely an employer. Here, the workers would exercise little to no control and have no opportunity to increase profits though investment or using initiative to work more efficiently. During the scheduled work hours, the worker must be available to perform work as the employer requests.

On the other hand, a business that hires an individual or janitorial service company may exercise sufficient control to indicate independent contractor status if the worker decides when and how to clean, even if the business sets timelines or quality standards. If the business did not control where else the janitors can work, and they do work elsewhere as a janitor, the control and exclusivity factors would point towards independent contractor status.

If the individual provided his or her own cleaning supplies and equipment necessary to perform the work that would be sufficient investment to constitute an opportunity for profit or loss. The larger investment by the business being cleaned in its building, supplies, equipment, etc. are irrelevant. Even if the business provided most or all of the supplies and equipment such that there was minimal to no investment, the individual would still have an opportunity for profit or loss as using initiative to learn to perform the work more efficiently would result in higher profit within the same amount of time and working less efficiently would result in lost revenue. Also, the individual's ability to schedule the work within a window permits the work to be strategically scheduled for maximum profit even if the incremental gain is small.

F. Construction

Whether being hired directly by the general contractor on a large project with many subcontractors, by one of those subcontractors or by an owner acting as his or her own general contractor, many individual skilled tradesmen and small businesses choose to work as independent subcontractors in construction. Independent contractors on a jobsite often have to coordinate with each other, and the progress of the job dictates when certain work has to be completed.[140] The location or timing of the work is often dictated by the nature or circumstances of the work itself, requiring the

---

[139] 16 C.F.R. § 436.1(h)(3).

[140] *Jean-Louis v. Metro. Cable Commc'ns, Inc.*, 838 F. Supp. 2d 111,1125-26 (S.D.N.Y. 2011) (finding that providing windows of time in which technicians had to perform cable installation in customers' homes did not constitute supervision or control of employees' work schedules); *Aimable v. Long and Scott Farms*, 20 F.3d 434, 441 ("It is not surprising that [a farm] would (and, despite [the FLSA], should be able to) give general instruction to [a farm labor contractor] as to which crops to harvest at a particular time.").

general contractor to dictate when and where subcontractors perform the work. Such control does not indicate an employment relationship.

As a general matter, businesses that contract for work to be performed by other entities must of necessity be able to indicate or even mandate specifications for the end product and the time and place of performance that meets the business' needs.[141] These specifications often are derived from building codes, architectural and engineering designs, and customer requirements. Examples include concrete curing to a certain strength, ensuring that electrical work complies with code, installing the type of plumbing types required by code in locations dictated by customer needs, and ensuring drywall is not installed until plumbing and electrical work clears inspection. Subcontractors may have to comply with jobsite drug-testing rules, a general contractor's safety rules, and have to report progress so that everyone on the jobsite is safe and able to perform their job. A general contractor can permit subcontractors to voluntarily attend training without suggesting an employment relationship. So long as the control is not over how the work is performed it is not indicate an employment relationship.[142]

Most subcontractors also have an opportunity for profit or loss. Unlike an employee, they can choose to further subcontract the work if that is beneficial for larger financial gain or provides desired flexibility. Because the subcontractor controls how the job is done, the subcontractor can manually perform work or invest and use tools that will increase efficiency. An employee is told how to perform the work and with which tools that the employer provides. Also, subcontractors may use initiative to learn skills or properly lay out a job so that more work can be done in less time resulting in increased profit in the same period of time. Choosing to work less efficiently results in a loss of the additional profits. Where a subcontractor has invested in tools that assist in performing the work, especially equipment that replaces manual tasks, the investment – regardless how small – demonstrates an investment that is leveraged for profit or loss. The fact that the hiring business has significantly more equipment is not relevant. An employee will not earn more money as a result of the potential employer's investment in an air compressor and nail gun while an entrepreneur risks a loss if the gained efficiency does not pay for the equipment.

As the core factors are likely to point in the same direction when analyzed in this manner there is no need to analyze any of the three guidepost factors. Under the two core factors – control and the opportunity for profit or loss – the result is clear. Individuals who control how the work is performed and can impact profits by investment in equipment or further subcontracting, for example, are independent contractors.

---

[141] Joint Employer Final Rule at 2841.

[142] *Mendez v. Timberwood Carpentry & Restoration*, 2009 WL 4825220, at *6 (S.D. Tex. Dec. 9, 2009) (finding that supervisory rights that "extend only to securing satisfactory completion of the terms of [an]Agreement or [the] quality of the work to be performed . . . ha[ve] no bearing on [an entity's] employer' status") (internal quotation marks omitted).

VII. The Department Should Include a Safe Harbor

The lack of employment protections and benefits has been the driving force behind the efforts of some policymakers to eliminate or drastically reduce independent contracting. Businesses fear to provide such benefits to independent contractors as doing so can bring with it obligations of employment status that are often incompatible with the independent contracting relationships freely entered into by individuals and businesses.

However, some legal and policy experts have advocated requiring or allowing business to provide some protections and benefits to independent contractors without jeopardizing their classification status. For example, former Acting and Deputy Secretary of Labor Seth Harris and economist Alan Krueger, in a Brookings Institution paper, have suggested a new "independent worker" category providing some of the historical employment protections but not all. In their paper, for example, Harris and Krueger suggest that independent workers should be allowed to pool risks for purposes of purchasing insurance, and be protected under antidiscrimination laws, but the application of wage laws would be "impossible to properly administer for independent workers.[143] Similarly, in a paper published by for the U.S. Chamber of Commerce, Tammy McCutchen, a former Wage & Hour Administrator, suggests that, instead of waging war on independent contracting, policymakers should consider extending association health and retirement plans to independent contractors, allowing businesses to subsidize such benefits, extending anti-discrimination laws to independent contractors, and setting up separate workers' compensation funds to protect independent contractors injured on the job.[144] Most recently, in a paper for the Progressive Policy Institute, economist Michael Mandel and technology policy expert Alec Stapp have advocated changes to tax laws that penalize independent workers who try to provide for their own health and retirement benefits and suggest occupational accident insurance as an alternative to workers' compensation.[145] Proposition 22 advocates similarly.

Some states have adopted or are considering suggestions to require or allow businesses to provide such protections and benefits. Four states – Florida, Montana, Texas and Virginia – now allow or require businesses to include independent contractors on their workers' compensation coverage.[146] On the ballot in November, California's Proposition 22 would provide earnings protections and require businesses to provide healthcare stipends and insurance to qualifying independent contractors. Such changes are supported by worker and business advocates. This "middle ground" may be the future of independent contracting.

---

[143] Seth D. Harris and Alan B. Krueger, *A Proposal for Modernizing Labor Laws for Twenty-First-Century Work: The "Independent Worker"* (December 2015), https://www.govinfo.gov/content/pkg/FR-2020-01-16/pdf/2019-28343.pdf.

[144] Chamber at 39-42.

[145] Michael Mandel and Alec Strapp, *Regulatory Improvement for Independent Workers: A New Vision* (July 21, 2020), https://www.progressivepolicy.org/publication/regulatory-improvement-for-independent-workers-a-new-vision/.

[146] Tex. Lab. Code § 406.123; Va. Code § 65.2-101; MCA § 39-71-401; Fla. Stat. § 440.02.

In some instances, businesses fear such compromises, however, because providing wage protections, healthcare subsidies, workers compensation, and the like could be found to indicate employment status under the FLSA. We are certain the Department does not intend this rulemaking to discourage changes in state or other laws that require or permit businesses to provide protections and benefits to their independent contractor partners. To avoid this, we ask the Department to include a new section in its final rule establishing a safe harbor for businesses complying with existing or new federal, state, or local laws requiring or permitting businesses to provide benefits or protections to independent contractors, as follows:

> *Safe Harbor*. An individual will not be found to be an employee when a potential employer provides protections or benefits as allowed or required by federal, state or local laws, including but not limited to minimum guaranteed earnings, health insurance, retirement benefits, health or retirement subsidies, life insurance, workers compensation or similar insurance, unemployment insurance, sick or other paid leave, training and expense reimbursement.

VIII. The Department's Proposed Rule Should be a Model for Other Federal Agencies and the States

We commend the Department for the balanced approach it has taken in its proposed rule. While beyond the limits of the Department's regulatory authority in this rulemaking, as stakeholders, we take this opportunity to express our support for adoption of the Department's standard by other federal, state, and local policymakers. The Departments proposed rule should be a model for determining independent contractor status throughout the country.

Under the current patchwork of federal and state regulation, numerous agencies have adopted numerous tests (with innumerable variations in application) to determine employee status under various federal laws. The Internal Revenue Service, for example, uses a 20-factor version of the common law test for purposes of payroll taxes and withholding. The Equal Employment Opportunity Commission, which administers federal civil rights law, had adopted a version of the economic realities test for some statutes within its purview, and a hybrid test for others. The National Labor Relations Board has yet another standard. While these tests often overlap, or include similar factors in their analyses, it would benefit all parties if a single uniform standard governed the analysis under federal law.

Today, under existing law and regulation, it is more than conceivable that a worker may be considered an independent contractor for purposes of employment taxes, an employee for purposes of anti-discrimination law, and yet again a contractor for purposes of federal leave law. This uncertainty – and the unnecessary administrative costs and burdens it imposes on businesses – would be mitigated by a uniform federal standard under all federal laws.

The Department should take an active, leadership role in encouraging other federal agencies and Congress to adopt its final regulations as the sole and authoritative definition of "employment" under all federal statutes.

State policymakers could also benefit from the Department's proposed rule. Around the country, policymakers are considering a growing number of new or revised laws to regulate the relationships between businesses and independent contractors. Lawmakers have proposed or passed new laws modifying the tests for independent contractor status, requiring written contracts, and imposing additional penalties for misclassification. States should also adopt one authoritative definition of the employment relationship.

The Department's proposed rule is consistent with many state laws under many state statutes. Most states, under at least one state law, either expressly adopt the FLSA economic reality test or apply a common law test.[147] As noted above, and recognized by the Department, the common law test of employment is broader than the FLSA economic reality test. Thus, application of the Department's proposed regulations would be a slight expansion of the "employment" definition in common law states. The resulting cost savings that comes with consistent and predictable laws, and reduction in litigation, however, would more than offset any small contraction of independent contractor status. It is our view, that most of our clients would welcome a single, authoritative independent contractor test nationwide – under every statute, federal or state. We are a long way from achieving such a result and it may not be achievable; but the Department's rulemaking is a significant first step.

The proposed rule stands in stark contrast to efforts in some states, most notably California, to abandon historical precedent and deny worker liberties and economic opportunities. California provides a cautionary tale of regulators hurting the very workers they intend to protect.[148] The controversy in California began in 2018 with *Dynamex Operations v. Superior Court,*[149] where the California Supreme Court discarding a test from a 30-year old case, *Borello & Sons, Inc. v. Department of Industrial Relations*[150] to find that a driver was an employee, not an independent contractor. To reach this determination, the Court introduced an "ABC" test narrower than the traditional ABC test applied in many other states. The business community responded that the Court, in effect, created a new law. The California legislature responded by adopting Assembly Bill 5 (AB 5), a bill of over 3,400 words codifying the narrow ABC test in California. The test itself is only 130 words. Any person providing labor or services for remuneration shall be considered an employee, rather than an independent contractor, unless the "hiring entity" demonstrates that all of the following conditions are satisfied:

- The person is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact,
- The person performs work that is outside the usual course of the hiring entity's business, and

---

[147] *See* Chamber at 44-51 (appendix).

[148] Patrice Onwuka, *Free the Freelancers* (Oct. 19, 2020) (video), www.prageru.com/video/free-the-freelancers.

[149] 4 Cal. 5th 903 (2018).

[150] 48 Cal. 3d 341 (1989).

- The person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

The remainder of AB 5 created at least 41 "exceptions" to California's narrow ABC test. Lawyers and doctors and real estate agents, for example, have exceptions. Exempt professions get to apply the old common law balancing test in *Borello*. In effect, then, the bill created tests to determine which test to apply. There seems little consistency in the 41 exemptions. Given the arbitrary nature of who "wins" and who "loses" under the law, some have suggested that the exemptions were based on how much political clout any given occupation or industry had in the Sacramento halls of legislature.

AB 5 went into effect on January 1, 2020, but the controversy continues. About 31 bills were introduced to amend or repeal the law, and eventually they were whittled down to one: AB 2257. This bill, signed into law last month, adds approximately 26 more exceptions, and also tweaks some of the current exceptions. But AB 2257 does not alter the basic framework of the California test. Also, Californians are currently weighing in on another modification of AB 5 by voting on Proposition 22, which would provide that app-based drivers are individual contractors, while also providing earnings guarantees and other benefits and protections to the drivers.[151]

Whether or not Proposition 22 passes, other businesses and independent contractors in California will still be grappling with numerous significant unanswered legal questions related to independent contractor status for years to come.

By threatening to eliminate the independent contractor business model, AB 5 by design will result in many more workers – perhaps up to two million independent contractors in California – being reclassified as employees for wage and hour laws and other purposes. There is no shortage of anecdotal evidence of disruption in many segments of California's workforce. In the wake of AB-5's passage, California Assemblyman Kevin Kiley collected hundreds of reports from workers who are facing lost income and job opportunities because of AB 5 as companies scale back or eliminate completely their use

---

[151] WPI has analyzed the impact of AB 5 extensively – the confusion and chaos it has caused for workers and employers and the failed attempts to "fix" a fundamentally-flawed law. *See, e.g.,* Michael J. Lotito, James A. Paretti and Bruce J. Sarchet, *Independent Contractor Issues in California: Summer 2020 Update* (September 2020), https://www.littler.com/publication-press/publication/independent-contractor-issues-california-summer-2020-update; Michael J. Lotito, James A. Paretti and Bruce J. Sarchet, *AB 5: The Aftermath of California's Experiment to Eliminate Independent Contractors Offers a Cautionary Tale for Other States* (March 2020), https://www.littler.com/files/ab_5_-_the_aftermath_of_californias_experiment.pdf); Michael J. Lotito, James A. Paretti, Bruce J. Sarchet and Patrick C. Stokes, *Now What? Practical Tips for Navigating California Post-AB 5* (September 2019), https://www.littler.com/publication-press/publication/now-what-practical-tips-navigating-california-post-ab-5; Michael J. Lotito and Bruce J. Sarchet,, *AB 5: The Great California Employment Experiment—A Littler Workplace Policy Institute Report* (August 2019), https://www.littler.com/files/ab_5_task_force_report.pdf; Michael J. Lotito and James A. Paretti, *Franchising and California at a Crossroads: the Dynamics of Dynamex and the ABC Test* (July 2019), https://www.littler.com/publication-press/publication/franchising-and-california-crossroads-dynamics-dynamex-and-abc-test;

of independent contractors in the state.[152] Economic analyses indicate that implementing the ABC test nationwide could result in up to 50 percent of independent contractors being reclassified as employees, and increase business costs anywhere from $3.6 billion to $12.1 billion.[153] Given these dramatically increased costs, it is unlikely that their new "employers" will be able to retain the services of many of these newly reclassified workers, and more likely that many of them may see their livelihood eliminated entirely.

We congratulate the Department on proposing a rule that codifies the long-standing economic reality test and sharpens the factors used to apply that test, ensuring consistency and predictability while safeguarding economic opportunity, independence, and flexibility for workers. The Department's proposed rule is simple and straightforward. In sharp contrast, AB 5 is a confused mess – perhaps the worst drawn legislation in history. Policymakers in other states would be best served by avoiding the chaos that is AB 5 and instead modeling state laws on the Department's regulations.

Respectfully submitted,

WORKPLACE POLICY INSTITUTE
LITTLER MENDELSON, P.C.

Tammy McCutchen, Principal
Dane Steffenson, Special Counsel
James A. Paretti, Jr., Shareholder
Michael J. Lotito, Co-Chair, WPI

---

[152] Kevin Kiley, *Stories from Those Affected by AB 5,* https://electkevinkiley.com/ab5book/; *see also* Independent Women's Forum, *Chasing Work: Hear Real Stories of Workers Impacted by Job-Killing Regulations,* https://www.iwf.org/chasing-work/).

[153] Isabel Soto, *Economic Costs of the PRO Act, American Action Forum* (January 21, 2020), https://www.americanactionforum.org/research/economic-costs-of-the-pro-act/.

Appendix A

U.S. CHAMBER OF COMMERCE
Employment Policy Division

Ready, Fire, Aim

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

January 2020

Contents

Ready, Fire, Aim

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

A White Paper Prepared for the U.S. Chamber of Commerce[1]

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

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

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

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

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

---

1 Tammy McCutchen and Alex MacDonald are attorneys in the Washington, DC office of Littler Mendelson P.C. Ms. McCutchen previously served as the Wage & Hour Administrator at the U.S. Department of Labor.

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

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

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

It doesn’t have to be this way. Lawmakers can address concerns around gig workers while preserving the gig model itself. However, before doing so, especially with respect to traditional employee benefits, they must obtain data to ensure that any proposals are what gig workers want and need and do not do more harm than good. They can expand access to benefit systems like association health and retirement plans. They can extend civil-rights protections to independent contractors. They can create workers’-compensation funds for gig workers, and all of this can be done without creating full-blown employment relationships. Any of these measures would address concerns about the gig economy while avoiding any lasting damage to this nascent industry.

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

1

The Historical Roots of the Gig Economy

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

The Tradition of Independent Work

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

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

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

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

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

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

6 Id. at 20.

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

8 Id. at 35–36.

9 Id. at 35.

10 Id. at 40.

The Industrial Revolution and the Centralization of Work

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

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

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

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

11 Id. at 2, 158.

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

13 Id.

14 Id. at 410.

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

16 Id.

17 Komlosy, supra note 4, at 158.

18 Applebaum, supra note 12, at 414.

19 Id.

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

21 Id.

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

23 Id.

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

25 Applebaum, supra note 12, at 419.

26 Id.

27 Id.

28 Id.

The Modern Workforce and the Triumph of the "Job"

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

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

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

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

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

29 Komlosy, supra note 4, at 176.

30 Applebaum, supra note 12, at 517.

31 Komlosy, supra note 4, at 176.

32 Applebaum, supra note 12, at 419.

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

34 Donkin, supra note 20, at 66–67.

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

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

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

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

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

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

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

42 Donkin, supra note 20, at 148.

43 Id.

2

Defining the Gig Economy

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

What do we mean by the "gig economy"?

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

While these people and marketplaces raise their share of policy questions, those questions are not the focus of this paper. This paper focuses on workers providing services through gig platforms and their relationship with the platform holders. To that end, when we use the term "gig economy," we mean the one-to-one exchange of goods and services between service providers and end-market customers facilitated by virtual-marketplace companies (or "platform holders").

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

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

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

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

46 Id.

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

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

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

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

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

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

48 Id.

49 Id.

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

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

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

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

54 Id.

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

56 Id.

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

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

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

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

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

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

How big is the gig economy?

Estimates on the gig economy's size vary wildly—in part because of disagreements over the definition. For example, in 2018, the U.S Department of Labor's Bureau of Labor Statistics published its first study in thirteen years tracking "contingent and alternative employment arrangements."[62] The study defined "contingent workers" as "those who do not have an explicit or implicit contract for continuing employment."[63] Overall, the Bureau found that these workers represented 1.3% to 3.8% of the U.S. workforce—down from 1.8% to 4.1% in February 2005.[64]

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

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

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

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

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

63 Id. at 9.

64 Id. at 1.

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

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

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

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

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

65 Id. at 1–2.

66 Id.

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

68 See Kasriel, supra note 67 (arguing that the Bureau's "methodology probably undercounts the size of the freelance economy").

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

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

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

72 Federal Reserve Report, supra note 44.

73 Id.

74 Id.

75 Id.

Even more bullish than the Board, the firm UpWork has estimated that 36% of the U.S. workforce has engaged in some type of freelancing—and that more than half of working millennials have done so.[76] UpWork also expects freelancing to make up more than half of the total workforce by 2027.[77] The survey defines freelancers as any individual who has engaged in supplemental, temporary, project or contract-based work within the past 12 months. For our purposes, however, it is impossible to say how many of these freelancers will be gig workers because UpWork's report does not segregate gig workers into a separate category.[78]

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

The researchers also found, however, that this trend began before the gig economy truly took off. The companies commonly thought to embody the gig economy—Uber Lyft, DoorDash, and the like—launched between 2009 and 2013.[85] But 1099 filings began to rise as early as 2000.[86] So it's impossible to attribute the entire increase in 1099s to gig companies alone.[87] Indeed, the researchers speculate that these companies may be less a cause of the increase in 1099s than a symptom.[88] That is, the companies grew so quickly because there was already a large independent labor force ready to provide services through their platforms.[89] They did not create this workforce; they merely absorbed it.[90]

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

---

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

77 Id.

78 Id.

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

80 Id.

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

82 Dourado & Koopman, supra note 79.

83 Id.

84 Id.

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

86 Dourado & Koopman, supra note 79.

87 Id.

88 Id.

89 Id.

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

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

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

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

Who are the gig workers?

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

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

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

91 See Kasriel, supra note 67.

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

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

94 JPMorgan Report, supra note 45, at 21.

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

96 Id.

97 BLS Survey, supra note 62, at 3.

98 Federal Reserve Report, supra note 44.

99 Id.

100 Id.

101 Id.

102 Id.

103 Id.

104 Federal Reserve Report, supra note 44.

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

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

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

On earnings, reliable data are scarce. The Bureau of Labor Statistics found that independent contractors earned "roughly similar" compensation to that of workers in "traditional" employment relationships: traditional employees earned $884 per week, while independent contractors earned $851 per week.[111] But again, that comparison omits most gig workers, as it includes only "primary" jobs, not secondary sources of income.[112] It also includes all independent contractors, not just those who use online gig platforms.[113]

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

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

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

106 Id.

107 Id.

108 Id.

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

110 Id. at 7, 10.

111 BLS Survey, supra note 62, at 8.

112 See Kasriel, supra note 67.

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

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

115 Id.

116 Id. at 24.

117 BLS Survey, supra note 62, at 3.

118 Id.

119 UpWork Survey, supra note 76.

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

121 See Sherk, supra note 120, at 4.

3

Criticisms of the Gig Economy

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

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

Misclassification

First, the critics claim that the gig economy is built on "misclassification."[122] Again, most gig workers are classified as independent contractors. Critics often claim that this classification is incorrect: under existing legal standards, they say, gig workers should be considered the employees of gig platform holders.[123] They assume—data notwithstanding[124]—that gig workers earn most or all of their income from gig work; and as a result, the workers are effectively beholden to platform holders. The critics argue that this dependence should result in an employment relationship, even if the relationship hasn't qualified under traditional legal tests.[125]

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

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

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

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

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

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

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

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

Instability

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

126 See id. at 1686.

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

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

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

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

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

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

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

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

135 See 29 U.S.C. § 152(3).

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

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

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

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

Lack of Benefits

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

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

Critics also argue that the platform providers are "free riding" on traditional employers—in this case those who are providing coverage for gig workers through their primary jobs. In addition, they continue, the platform providers that do not classify gig workers as employees have an advantage over traditional employers with 50 or more full-time equivalent employees because such employers are subject to the Patient Protection and Affordable Care Act (ACA) employer mandate that requires employers to either provide affordable and adequate health care coverage to full-time employees (generally those who work more than 30 hours per week) or possibly pay a penalty[143] (this particular argument ignores the fact that many gig workers do not work the requisite hours to be classified as full time under the ACA).

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

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

140 See Befort, supra note 128, at 419.

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

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

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

4

State Efforts to Regulate the Gig Economy

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

California and the ABC Test

In 2018, the California Supreme Court handed down its opinion in *Dynamex v. Superior Court*,[145] an epochal decision that sparked what may prove to be the most consequential labor-market shift in modern history. The decision involved the definition of "employ" under California's wage orders, which govern minimum wages, overtime, and working conditions in certain industries.[146] California had historically followed a multi-factor test, focusing on whether the hiring entity had the right to control the worker.[147] *Dynamex* scrapped that test in favor of a restrictive ABC test.[148]

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

1. the worker is free from control and direction in connection with the service performed;

2. the worker performs the service outside the usual course of the hiring entity's business; and

3. the worker is customarily engaged in an independently established trade, occupation, profession, or business of the same type involved in the service being performed.[149]

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

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

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

146 Id. at 5.

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

148 Dynamex, 416 P.3d at 35–36.

149 Id.

150 Id.

151 Id. at 35–36, 40.

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

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

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

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

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

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

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

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

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

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

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

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

159 Id.

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

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

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

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

Similar legislation was introduced in Oregon[170] and Kentucky.[171] In the latter state, House Bill 355 would have adopted the ABC test for wage-and-hour purposes; and like the Washington bill, it would have imposed penalties and fees for "misclassification."[172] Workers would also have been able to bring an independent cause of action for misclassification, for which they could recover liquidated damages, costs, and attorneys' fees.[173]

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

162 Id.

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

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

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

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

167 Id. § 4(8)(a).

168 Id. § 4(9).

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

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

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

172 Id. §§ 1, 2(1)(f).

173 Id.

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

More legislation of this type is likely on the way. Perhaps the biggest battleground will be New York, where advocates are already pushing for AB 5–style legislation.[174] Commentators expect fierce lobbying and legislative debates, perhaps on the same or a larger scale than those seen around AB 5.[175]

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

Extending Coverage to Independent Contractors

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

Other states have extended their anti-discrimination laws to independent contractors. Maryland took that step in April 2019,[179] and Tennessee[180] considered a similar bill in the same legislative session.

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

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

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

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

176 NYC Int. No. 856.

177 Id.

178 Id.

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

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

181 See Opfer & Clukey, supra note 174.

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

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

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

185 Id. at 6.

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

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

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

This model may be catching on. In 2019, the city of Minneapolis considered a similar law containing nearly identical payment and penalty provisions.[191] The law would bar companies from refusing to pay a "freelance worker" within the time specified in the contract.[192] Freelance workers could sue to enforce this requirement; and if they won, they could recover fees, costs, and liquidated damages.[193] But importantly, like the New York City law, the Minneapolis proposal disclaims any intent to reclassify independent contractors as employees.[194]

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

186 Id. at 2.

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

188 Id.

189 Id.

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

191 See Minneapolis Ordinance No. 2019-00699.

192 Id.

193 Id.

194 Id.

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

196 Id.

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

198 Id.

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

Maintaining the Status Quo

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

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

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

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

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

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

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

202 See authorities cited in note 200, supra.

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

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

205 Id. at 7.

206 Id.

207 Id. at 7–9.

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

209 Id. at 4.

210 Id. at 7–8, 10.

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

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

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

211 Id. at 11–12.

212 Id. at 11.

213 Id. at 13.

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

215 Id.

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

5

Effects of State Regulation on the Gig Economy

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

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

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

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

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

Traditional legal tests often classify gig workers as independent contractors.[218] Those tests ask whether the worker operates independently of gig platforms; focusing mainly on how much control the platform holder exercises.[219] Applying that framework, both the Wage and Hour Division and the National Labor Relations Board's general counsel have found that gig workers were independent contractors[220]—as have many courts.[221] So under existing tests, platform holders have done nothing wrong by legally classifying gig workers as independent contractors. Put simply, there is no "misclassification."[222]

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

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

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

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

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

---

218 See authorities cited in note 58, supra.

219 See id.

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

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

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

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

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

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

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

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

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

229 Id.

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

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

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

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

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

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

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

---

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

232 See id.

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

234 Dourado & Koopman, supra note 79.

235 Id.

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

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

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

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

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

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

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

243 Id.

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

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

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

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

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

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

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

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

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

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

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

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

247 29 U.S.C. § 2611(2)(A).

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

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

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

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

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

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

This result is particularly important for collective-bargaining purposes. Proponents of reclassification have often cited the need to allow gig workers to bargain collectively with platform holders as a way to correct imbalances in bargaining power.[254] But collective bargaining remains chiefly the domain of federal law.[255] And as long as gig workers remain independent contractors under federal law, collective bargaining by gig workers will remain legally suspect. Further, even if the right to organize were granted, gig workers might decide to exercise their federally protected right not to unionize, as most American private-sector employees have done.

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

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

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

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

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

256 See Chamber of Commerce of the U.S. of Am. v. City of Seattle, 890 F.3d 769, 775 (9th Cir. 2018) (citing Seattle Mun. Code § 6.310.735(H)(1)).

257 Id.

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

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

260 15 U.S.C. § 1.

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

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

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

264 Id. at 780–81.

265 Id. at 790.

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

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

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

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

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

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

266 Id.

267 Id.

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

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

270 Sherk, supra note 120, at 4.

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

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

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

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

275 Id.

276 Id.

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

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

We should not be surprised by this result. The traditional trade-off in employment relationships has always been security for control. If states force platform holders to provide the security associated with employment, they should expect platform holders to exercise the corresponding control. And those controls will necessarily change the nature of gig work—often to the detriment of gig workers.[279] Military spouses, transitioning service members, ex-offenders, students, parents, and moonlighters may no longer have access to the gig economy.[280] Legislators will have closed an avenue for millions of Americans to supplement their incomes or sustain themselves when they are in between jobs. In that sense, they may actually be raising costs for the state, which may need to provide social services to people who no longer have alternate work opportunities. And they will, perhaps, have smothered a nascent industry in its cradle.[281]

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

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

279 See Sherk, supra note 120, at 7.

280 Id.

281 Id. at 1.

6

Options for the Gig Economy

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

Exploring Coverage under Current Options

Before creating new programs, lawmakers should look at existing benefit options for gig workers who actually need coverage and explore why such individuals are not using these options. As noted in previous sections, a majority of Americans under age 65 receive their health care coverage from their employers. The ACA was an attempt to expand coverage in the individual market through market reforms, premium subsidies for individuals and families with income below 400% of the federal poverty level, and Medicaid expansion at a state's option. Of course, the ACA is not without its problems, and as premiums have increased (combined with other factors), coverage in the individual market has begun to decrease.

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

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

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

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

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

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

Contributions by Platform Holders.

Of course, even if policymakers succeed in expanding access to association plans, affordability may still be a concern, as it is with the ACA Exchanges. In addition to the tax advantages of employer-provided coverage, employers also generally provide a portion of the premium for health care coverage, which is not includible as income[284] Independent contractors, by contrast, pay the entire cost of coverage (unless eligible for an Exchange subsidy).[285] However, self-employed individuals are allowed a deduction for the cost of coverage under Internal Revenue Code Section 162(l).

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

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

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

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

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

287 Id. § 29.

288 Id.

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

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

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

Crafting Worker Protections to Fit the Gig Model

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

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

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

290 Id. § § 7454(a)(1)–(2).

291 Id.

292 Id. § 7454(f).

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

294 Id.

295 Befort, supra note 128, at 419.

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

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

Studying and Experimenting with the Gig Economy

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

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

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

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

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

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

300 Sherk, supra note 120, at 7.

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

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

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

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

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

Appendix

Summary of State Independent Contracting Laws

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

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

Balancing Tests

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

1. **Instructions:** If the person for whom the services are performed has the right to require compliance with instructions, this indicates employee status.

2. **Training:** Worker training (e.g., by requiring attendance at training sessions) indicates that the person for whom services are performed wants the services performed in a particular manner (which indicates employee status).

3. **Integration:** : Integration of the worker's services into the business operations of the person for whom services are performed is an indication of employee status.

4. **Services rendered personally: :** If the services are required to be performed personally, this is an indication that the person for whom services are performed is interested in the methods used to accomplish the work (which indicates employee status).

5. **Hiring, supervision, and paying assistants:** If the person for whom services are performed hires, supervises or pays assistants, this generally indicates employee status. However, if the worker hires and supervises others under a contract pursuant to which the worker agrees to provide material and labor and is only responsible for the result, this indicates independent contractor status.

6. **Continuing relationship:** A continuing relationship between the worker and the person for whom the services are performed indicates employee status.

7. **Set hours of work:** The establishment of set hours for the worker indicates employee status.

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

8. **Full time required:** If the worker must devote substantially full time to the business of the person for whom services are performed, this indicates employee status. An independent contractor is free to work when and for whom he or she chooses.

9. **Doing work on employer's premises:** If the work is performed on the premises of the person for whom the services are performed, this indicates employee status, especially if the work could be done elsewhere.

10. **Order or sequence test:** If a worker must perform services in the order or sequence set by the person for whom services are performed, that shows the worker is not free to follow his or her own pattern of work, and indicates employee status.

11. **Oral or written reports:** A requirement that the worker submit regular reports indicates employee status.

12. **Payment by the hour, week, or month:** Payment by the hour, week, or month generally points to employment status; payment by the job or a commission indicates independent contractor status.

13. **Payment of business and/or traveling expenses.** If the person for whom the services are performed pays expenses, this indicates employee status. An employer, to control expenses, generally retains the right to direct the worker.

14. **Furnishing tools and materials:** The provision of significant tools and materials to the worker indicates employee status.

15. **Significant investment:** Investment in facilities used by the worker indicates independent contractor status.

16. **Realization of profit or loss:** A worker who can realize a profit or suffer a loss as a result of the services (in addition to profit or loss ordinarily realized by employees) is generally an independent contractor.

17. **Working for more than one firm at a time:** If a worker performs more than de minimis services for multiple firms at the same time, that generally indicates independent contractor status.

18. **Making service available to the general public:** If a worker makes his or her services available to the public on a regular and consistent basis, that indicates independent contractor status.

19. **Right to discharge:** The right to discharge a worker is a factor indicating that the worker is an employee.

20. **Right to terminate:** If a worker has the right to terminate the relationship with the person for whom services are performed at any time he or she wishes without incurring liability, that indicates employee status.

States Laws Adopting the IRS 20-Factor Test

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

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

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

State Laws Adopting the FLSA Economic Reality Test	
Alaska	Wage & Hour
District of Columbia	Wage & Hour
Florida	EEO, Wage & Hour
Illinois	MW & OT
Iowa	MW & OT
Louisiana	Unemployment
Michigan	EEO, Wage & Hour
Ohio	Wage & Hour
Pennsylvania	Wage & Hour
Tennessee	Workers' Compr
Washington	Wage & Ho

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

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

State Laws Adopting The Common Law "Control" Or Other Balancing Test	
Alabama	Common Law
Alaska	Workplace Safety
Arizona	All except Tax
Connecticut	EEO, Workers' Comp
Delaware –	EEO, Wage & Hour, Workers' Comp
District of Columbia	EEO, Unemployment, Workers' Comp
Florida	EEO, Unemployment
Hawaii	Workers' Comp
Idaho	Workers' Comp
Illinois	Workers' Comp
Indiana	Wage Payment
Iowa	EEO, Unemployment, Wage Payment, Workers' Comp
Kansas	EEO, Unemployment, Wage & Hour, Workers' Comp
Kentucky	EEO, Unemployment, Wage & Hour, Workers' Comp
Louisiana	EEO, Wage Payment
Maryland	Wage & Hour, Workers' Comp
Massachusetts	EEO, Workers' Comp

State Laws Adopting The Common Law "Control" Or Other Balancing Test **Continued**	
Minnesota	EEO, Unemployment, Wage & Hour, Workers' Compensation
Mississippi	Unemployment, Wage & Hour
Missouri	EEO, Wage & Hour, Workers' Comp
Montana	All
Nebraska	EEO, MW & OT, Workers' Comp
Nevada	Workers' Comp
New Jersey	EEO, Tax, Workers' Comp
New Mexico	Tax, Workers' Comp
New York	EEO, Unemployment, Wage & Hour, Workers Comp
North Carolina	EEO, Unemployment, Wage & Hour, Worker's Comp
North Dakota	EEO, Unemployment, Wage & Hour, Workers' Comp
Ohio	EEO, Tax, Unemployment, Workers' Comp
Oklahoma	All
Oregon	EEO, Wage & Hour
Pennsylvania	Workers' Comp
Rhode Island	Wage & Hour, Workers' Comp
South Carolina	All
South Dakota	EEO
Texas	EEO
Vermont	EEO
Virginia	Workers' Comp
Washington	EEO, Workplace Safety
West Virginia	Wage & Hour, Workplace Safety
Wisconsin	EEO
Wyoming	EEO

Conjunctive Tests

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

a. The individual has been and will continue to be free from control and direction in connection with the performance of such service, both under his contract for the performance of service and in fact;

b. The service is performed either outside the usual course of the business for which the service is performed or is performed outside of all the places of business of the enterprise for which the service is performed; and

c. The individual is customarily engaged in an independently established trade, occupation, or profession.

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

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

a. the person is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact;

b. The person performs work that is outside the usual course of the hiring entity's business;

c. The person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

States Adopting the Narrow ABC Test	
California	All
Massachusetts	Wage & Hour

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

State Laws Adopting Other Multi-Factor Conjunctive Test	
Alaska	Workers' Comp
Florida – Workers' Comp	Workers' Comp
Georgia –Unemployment, Workers' Comp	Workers' Comp
Louisiana – Workers' Comp	Workers' Comp
Maine – All	All
Michigan – Workers' Comp	Workers' Comp
Nevada – All (two alternative tests, including the traditional ABC test)	All
New Hampshire – Wage & Hour, Workers' Comp	Workers' Comp
Oregon – Unemployment, Tax, Workers' Comp	Workers' Comp
Texas – Workers' Comp	Workers' Comp
Utah – Workers' Comp	Workers' Comp
Vermont – Workers' Comp	Workers' Comp
Washington – Unemployment, Workers' Comp	Unemployment, Workers' Comp
West Virginia – Workers' Comp	Workers' Comp
Wisconsin – Unemployment, Worker's Comp	Unemployment, Workers' Comp
Wyoming – Unemployment, Workers' Comp	Unemployment, Workers' Comp

U.S. CHAMBER OF COMMERCE
Employment Policy Division

Appendix B

C | W | I Coalition for Workforce Innovation

PROJECT DETAILS

National Survey of 600 Self-Identified Independent Contractors

Conducted January 2020

Summary Of Findings

Who Are They?

60%
Age: Under 45

18-34	34%
35-44	26%
45-54	25%
55-64	11%
65+	4%

+15pts
Liberal

Liberal	41%
Moderate	32%
Conservative	26%
NET Liberal	+15

37%
Non-White

White	63%
Non-White	37%
African American	17%
Hispanic	15%
Asian	5%

● For statistical purposes, what is your age? ● If you had to label yourself, would you say you are a liberal, a moderate or a conservative in your political beliefs? ● What is your race?

Some numbers may be off +/- 1% due to rounding.

Who Are They?

69% Work Full-Time

Full Time	69%
Part-Time	26%
Occasionally	4%

67% Multiple Sources

One Company	32%
Multiple Companies	46%
Direct for Multiple Customers	21%

- Do you work: 1) Full-time (More than 30 hours per week); 2) Part-time (15-30 hours per week); OR, 3) Occasionally (Less than 15 hours per week)?
- Do you currently obtain work opportunities in connection with: 1) One company in particular; 2) Multiple companies; OR, 3) Directly for multiple customers?

33% Perform App-Based Delivery/Ride Share Work*
(197 Respondents Indicate They Perform Work for a App-Based Delivery and/or Ride Sharing Service)

28%	27%	27%	27%	24%	22%	21%	21%	8%
Technology	Professional Services	Sales	Personal Services	Freelance Communications	App Based Delivery *	Ride Sharing*	Creative Design	Non App Delivery
Such as web design, app developer, or programmer	Like accounting, legal advice, healthcare, & consulting	Like real estate, eBay retailer, & social sales/ network marketing	Such as hair dresser, tutoring, & fitness	Including journalism, copywriting, & social media	Such as Amazon, Doordash, Instacar Shipt, & TaskRabbit	Such as Lyft or Uber	Including photography & graphic artist	Such as grocery stores, newspapers & other products

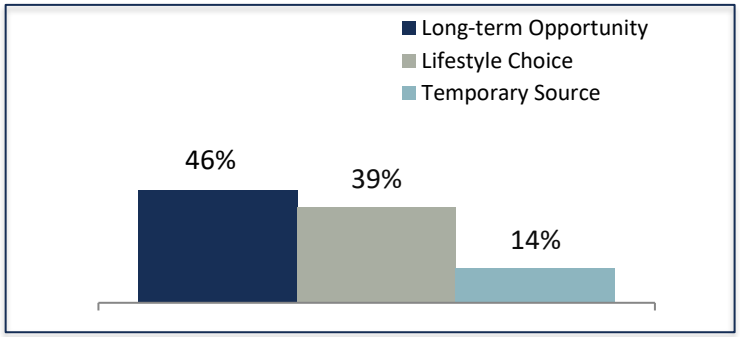
What type of work do you do? (Multiple Responses Allowed)

Some numbers may be off +/- 1% due to rounding.

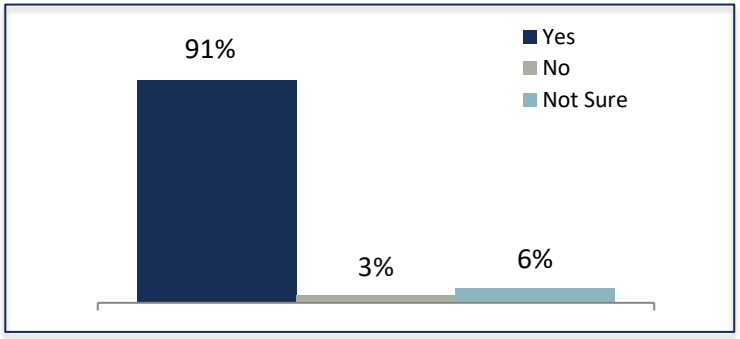
Views About Current Work Arrangement

Is the work you're doing as a freelancer:

- A **long-term** business opportunity;
- A **lifestyle choice**;
- A **temporary, short-term** source of income?



Do you plan to continue working in your current independent work arrangement for the next six months?



Job Satisfaction Rating

Overall, how satisfied or dissatisfied are you with your current independent work arrangement?

94% **Percent Who Say They Are Satisfied with Their Current Work Arrangement**

Satisfied	**94%**
Very satisfied	62%
Somewhat satisfied	32%
Dissatisfied	6%
Not Sure	1%
NET Satisfied	+88

Some numbers may be off +/- 1% due to rounding.

The Rewards & Trade Offs

Flexibility | Wages/Stable Income | Benefits

Like Most About Freelancing

What do you like most about the work you do as a freelancer?

• Own Boss/Work Independent/Additional Freedom	21%
• Work Flexibility	18%
• Work Hours	18%
• Easy/Enjoyable Work	9%
• Good/Great Job	7%
• Customer Service/Interacting with Others	6%
• Money/Pay/Income	5%
• Variety of Job/Work Projects	3%
• Convenient/Work from Home	3%
• Everything	2%
• Reliable/Security	1%
• Other	5%
• Nothing	1%

Like Least About Freelancing

What do you like least about it?

• Low Pay/Income	16%
• Unpredictable/Inconsistent/Instable Pay/Income	11%
• Hours/Long Hours	9%
• Hard to Find Jobs/Gigs	8%
• Being the Boss/Ins & Outs of Running a Business	6%
• Customer Service/Interacting with Others	6%
• Lack of Benefits/Insurance	4%
• High Level of Stress	3%
• Everything	1%
• Other	7%
• Nothing/I Like My Work	26%

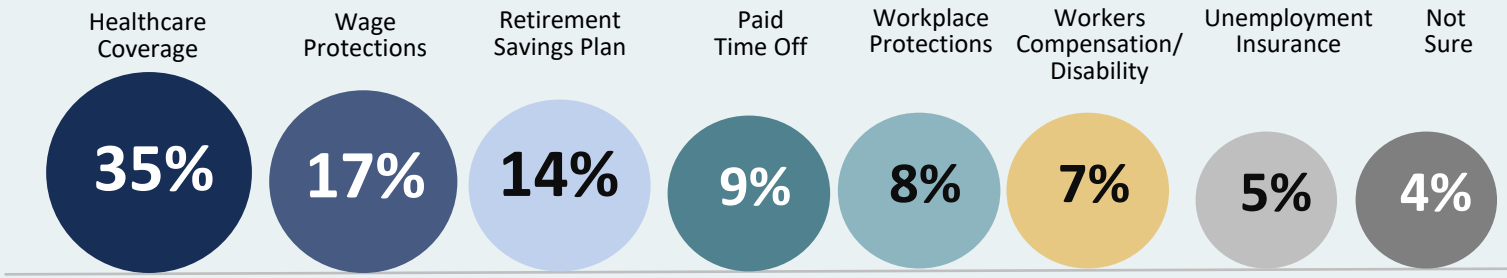
vs.

Some numbers may be off +/- 1% due to rounding.

Employment Benefits

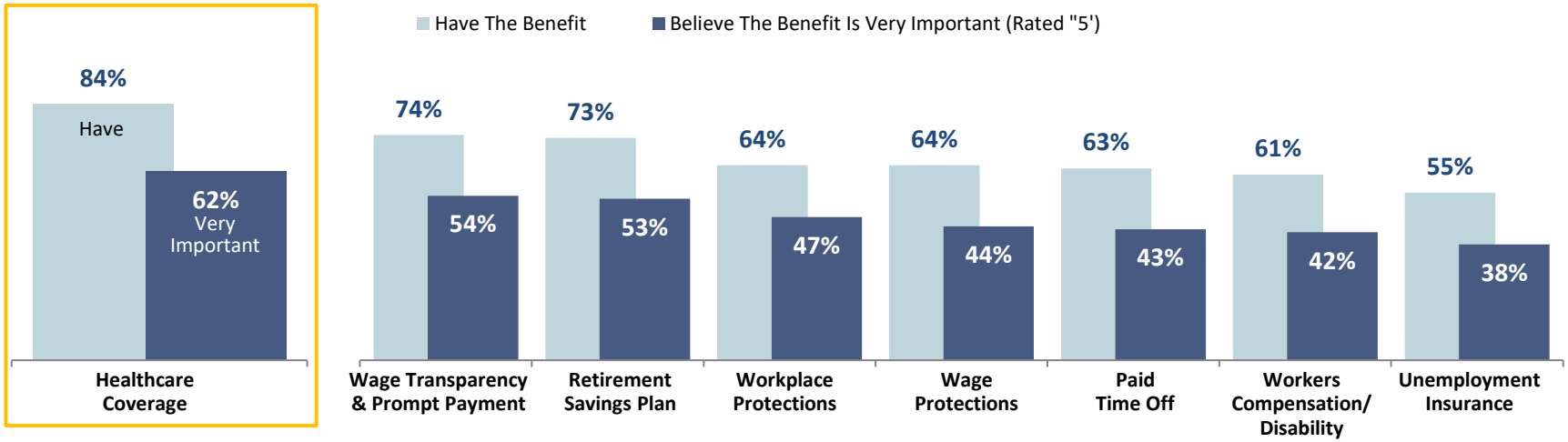
The Benefits that Matter Most

Which would you say is the most important benefit to offer independent workers, like yourself?



Worker Benefits: Those They Have vs. Those Most Important to Have

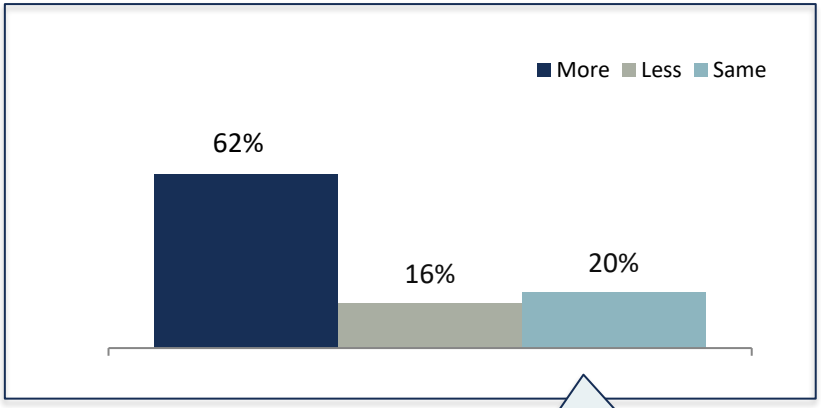
- On a scale of 1 to 5 with 1 Not At All Important and 5 Very Important, please rate how important it is to you personally that you have access to each of the following benefits. Results Below Are Percent Who Rated It A 5—Very Important.
- Which of the following employee benefits and protections do you currently have and how did you obtain them? Results Below Are Percent Who Have It



Some numbers may be off +/- 1% due to rounding.

Opportunities for Work

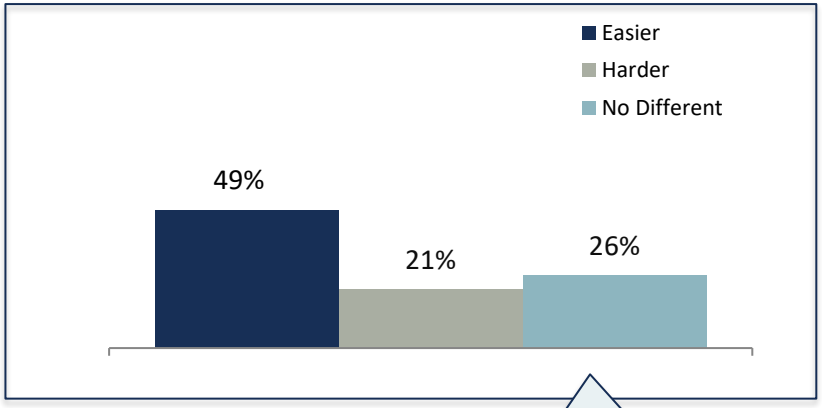
Would you say there are more opportunities or less opportunities to find well-paying and satisfying work as a freelancer compared to 2 to 3 years ago?



Results By Key Audiences

	Overall	Age	
		<45	45+
More	**62%**	67	53
Less	**16%**	14	18
Same	**20%**	18	23
Not sure	**3%**	1	6
NET More	***+46***	***+53***	***+36***

Would you say current workplace and labor laws are making it easier or harder to be a freelancer?



Results By Key Audiences

	Overall	Age	
		<45	45+
Easier	**49%**	56	37
Harder	**21%**	21	20
No Different	**26%**	20	36
Not sure	**4%**	3	7
NET Easier	***+28***	***+35***	***+17***

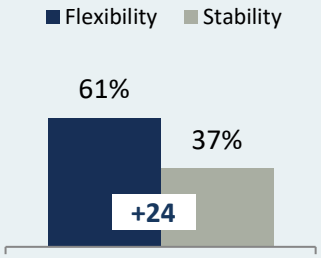
Some numbers may be off +/- 1% due to rounding.

The Cross Pressures

Flexibility vs. Stability

Which of the following is the most important to you personally:

- Having the **flexibility to choose when and where to work**;
- Having **access to a steady income and benefits**

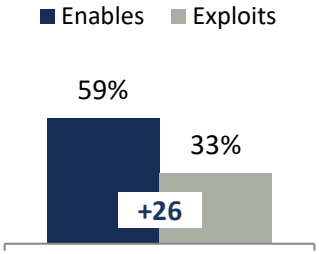


	Overall	App-Based Work	Age		Race		Ideology			
			<45	45+	White	Non white	Very Lib	SW Lib	Mod	Cons
Flexibility	61%	55	54	73	63	59	55	64	62	63
Stability	37%	44	46	25	35	40	43	35	36	35
NET	*+24*	*+11*	*+8*	*+48*	*+27*	*+19*	*+12*	*+29*	*+26*	*+28*

Enables vs. Exploits

Which comes closest to your own opinion:

- Today's gig economy **enables workers** to take back control from companies and seek out more ownership over their careers and lives;
- Today's gig economy **exploits workers** by making it easier for companies to avoid state and federal labor laws and employee benefits in order to cut costs

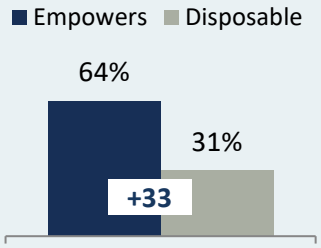


	Overall	App-Based Work	Age		Race		Ideology			
			<45	45+	White	Non white	Very Lib	SW Lib	Mod	Cons
Enables	59%	57	57	61	60	57	59	56	56	64
Exploits	33%	39	36	29	30	39	38	35	37	24
NET	*+26*	*+18*	*+21*	*+33*	*+30*	*+19*	*+21*	*+21*	*+19*	*+40*

Empowered vs. Disposable

Which comes closest to your own opinion:

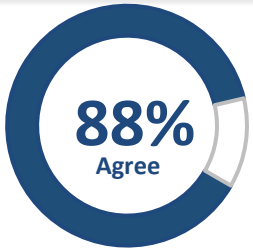
- Today's gig economy **empowers workers** by giving them greater freedom and flexibility, encouraging more entrepreneurship, and improving their work/life balance;
- Today's gig economy has **made workers more disposable**, providing them with no financial security, safety net, or basic employee rights



	Overall	App-Based Work	Age		Race		Ideology			
			<45	45+	White	Non white	Very Lib	SW Lib	Mod	Cons
Empowers	64%	66%	62	67	65	63	59	60	65	70
Disposable	31%	31%	33	28	29	34	38	32	32	25
NET	*+33*	*+35*	*+30*	*+39*	*+36*	*+29*	*+21*	*+28*	*+33*	*+45*

Some numbers may be off +/- 1% due to rounding.

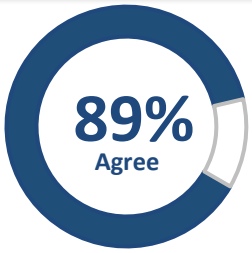
Views on Current Labor Laws



53% Strongly Agree

Technology Making It Easier to Find Well Paying & Satisfying Work

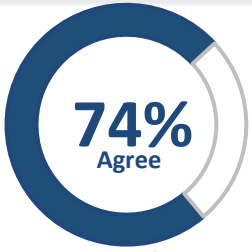
Advances in technology have made it easier for all people—regardless of their college education or background—to find well-paying and satisfying work that fits around their lives, rather than having to fit their lives around their work.



50% Strongly Agree

Workers No Longer Have to be Stuck in Bad Work Situations

Workers no longer have to feel stuck in a bad work situation. Gig work has made it easier for workers to leave a bad situation and try new opportunities that provide additional benefits, flexibilities and are more meaningful and rewarding than a traditional job.



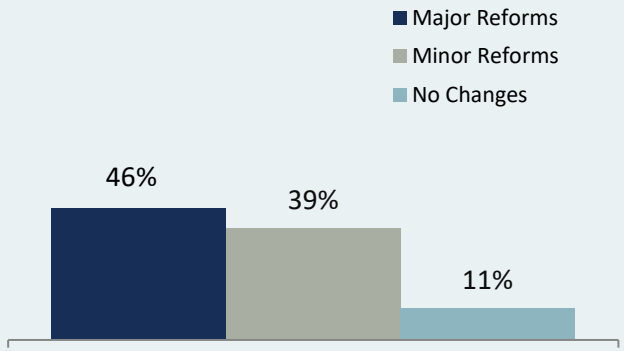
38% Strongly Agree

Today's Labor Laws are Outdated & Hamper Innovation

When it comes to today's gig economy, our workplace and labor laws are extremely outdated and hamper innovation, economic opportunity, and worker empowerment.

Labor Reforms Needed: Major vs. Minor vs. None

In your opinion, do we need major reforms, minor changes or no changes to employment laws related to workers in today's economy?



BY KEY AUDIENCES

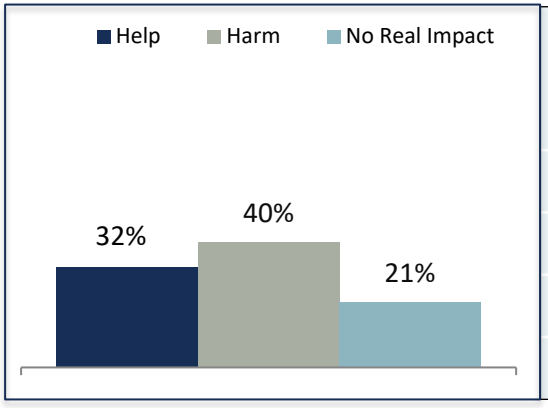
	Overall	App-Based Work	Age		Race		Ideology			
			<45	45+	White	Non white	Very Lib	SW Lib	Mod	Cons
Major	46%	53	49	42	43	50	71	43	38	37
Minor	39%	36	37	42	41	36	20	46	43	45
No Changes	11%	9	10	11	10	11	6	8	12	15
NET Major	*+7*	*+17*	*+11*	*0*	*+3*	*+14*	*+51*	*-3*	*-5*	*-8*

Some numbers may be off +/- 1% due to rounding.

The Impact of California AB5

Perceived Impact of AB5

Does making it harder to classify someone as a freelancer or independent contractor rather than a traditional employee help or harm people like yourself?



	Overall	App-Based Work	Age		Race		Ideology			
			<45	45+	White	Non white	Very Lib	SW Lib	Mod	Cons
Help	32%	45	37	23	30	34	51	27	26	26
Harm	40%	35	36	46	42	36	27	43	42	46
No real impact	21%	17	22	20	19	25	15	18	27	21
NET Help	*-8*	*+10*	*+1*	*-23*	*-12*	*-2*	*+24*	*-16*	*-15*	*-19*

The Best Path Forward

Which comes closest to your own opinion:

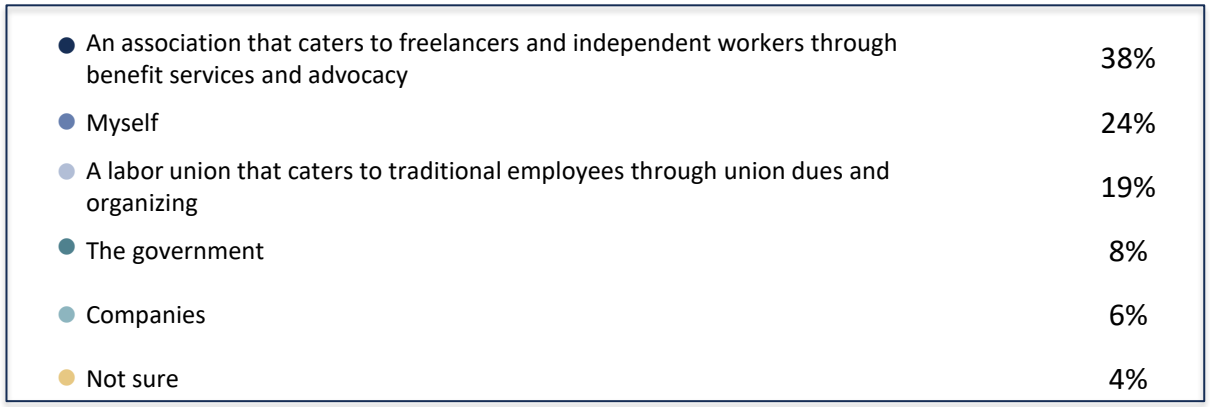
Today's growing freelance market is a popular and useful way to work - **requiring modern, innovative approaches to worker benefits and protections, not the restrictive government regulations** of the past	60%
Today's growing freelance market has been built on the backs of exploited gig economy workers - **requiring government to step in and provide better protections**	33%
Not sure	7%
NET Modern Approach	***+27***

Some numbers may be off +/- 1% due to rounding.

Advocacy

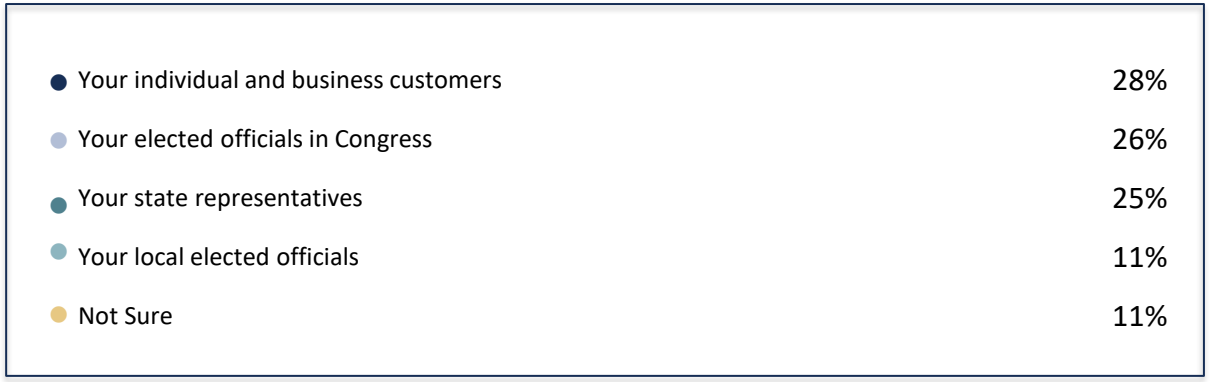
Trust Most as Your Advocate

Who do you trust the most to advocate on your behalf about the most important issues affecting freelancers and independent contractors like yourself?



Trust Most to Develop Policies to Protect & Empower Today's Modern Workforce

Now, if you had to choose between the following, who do you trust the most to develop policies that protect and empower today's modern workforce including people like yourself?

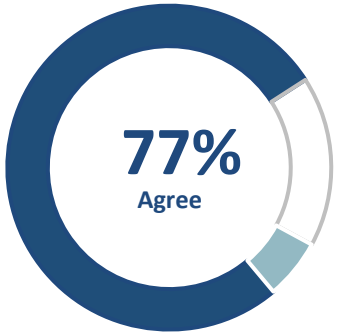


Some numbers may be off +/- 1% due to rounding.

Positioning

Politicians are Trying to Fix What's Not Broken

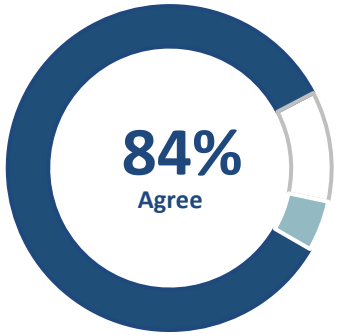
Agree/Disagree: Attempts to crackdown on today's gig economy is another example of policy makers and politicians trying to fix something that's not broken



Agree	**77%**
Strongly Agree	43%
Somewhat Agree	35%
Disagree	**17%**
Not sure	6%
NET Agree	***+60***

Making It Harder to Find Independent Work Not the Solution

Agree/Disagree: Today's gig economy is not without its problems but making it harder for individuals to choose independent work arrangements like freelancing and independent contracting is not the solution



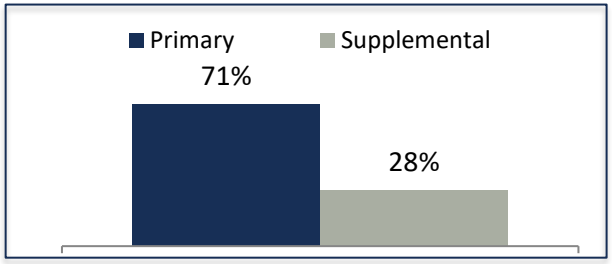
Agree	**84%**
Strongly Agree	46%
Somewhat Agree	38%
Disagree	**11%**
Not sure	5%
NET Agree	***+73***

Some numbers may be off +/- 1% due to rounding.

Appendix

Appendix

Do you consider the amounts you earn as freelancer: 1) A primary source of income; OR, 2) A supplemental source of income



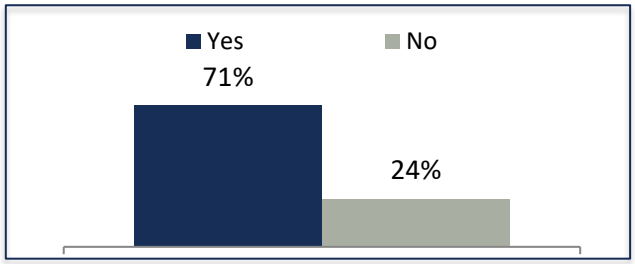
When it comes to your current independent work arrangement, are you paid:

An hourly wage	37%
A per-project fee	31%
An hourly wage plus tips	12%
A sales commission	8%
A fixed monthly fee	7%
A per-delivery fee plus tip	5%
Prefer not to say	2%

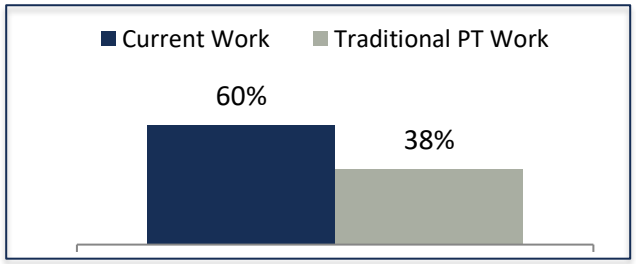
What type of retirement savings plan do you currently have?

401 (k) plan	41%
Roth savings account	19%
SEP IRA account	7%
State run retirement program	6%
Not sure	4%
Don't have a retirement savings plan	23%

AMONG THOSE WITH TRADITIONAL JOB:
Have you ever considered quitting your traditional job to work solely as a freelancer?



AMONG THOSE WITH TRADITIONAL JOB: If given an option, would you prefer: 1) Your **current independent work arrangement** with control over when and where to work; 2) A **traditional, part-time role** with pre-determined schedule and access to traditional benefits



Some numbers may be off +/- 1% due to rounding.

Appendix

Which of the following should be the top priority for policy leaders and workforce advocates moving forward:

• Ensuring people who want to work independently are treated fairly under the law in terms of access to training, benefits, and certain protections without risking independent work status	41%
• Ensuring independent work is available for a broad range of positions, platforms, and industries	19%
• Ensuring workplace laws and regulations aimed at gig workers are consistent across the country	18%
• Ensuring individuals have the freedom to determine how, when, and where they work	18%
• Not sure	4%

In your opinion, which of the following is the most important issue facing people with independent work arrangements like yourself? Please select just one.

• Access to affordable benefits—including healthcare, retirement, disability and unemployment insurance	29%
• Work/life balance issues—such as flexible hours, scheduling independence, and time off when you need it	26%
• Wage and payment issues—including fair wages, transparency, and prompt payment for services	22%
• Worker protections—such as being respected, treated fairly, and valued for your services	15%
• Complicated and burdensome tax filings	7%
• Not sure	3%

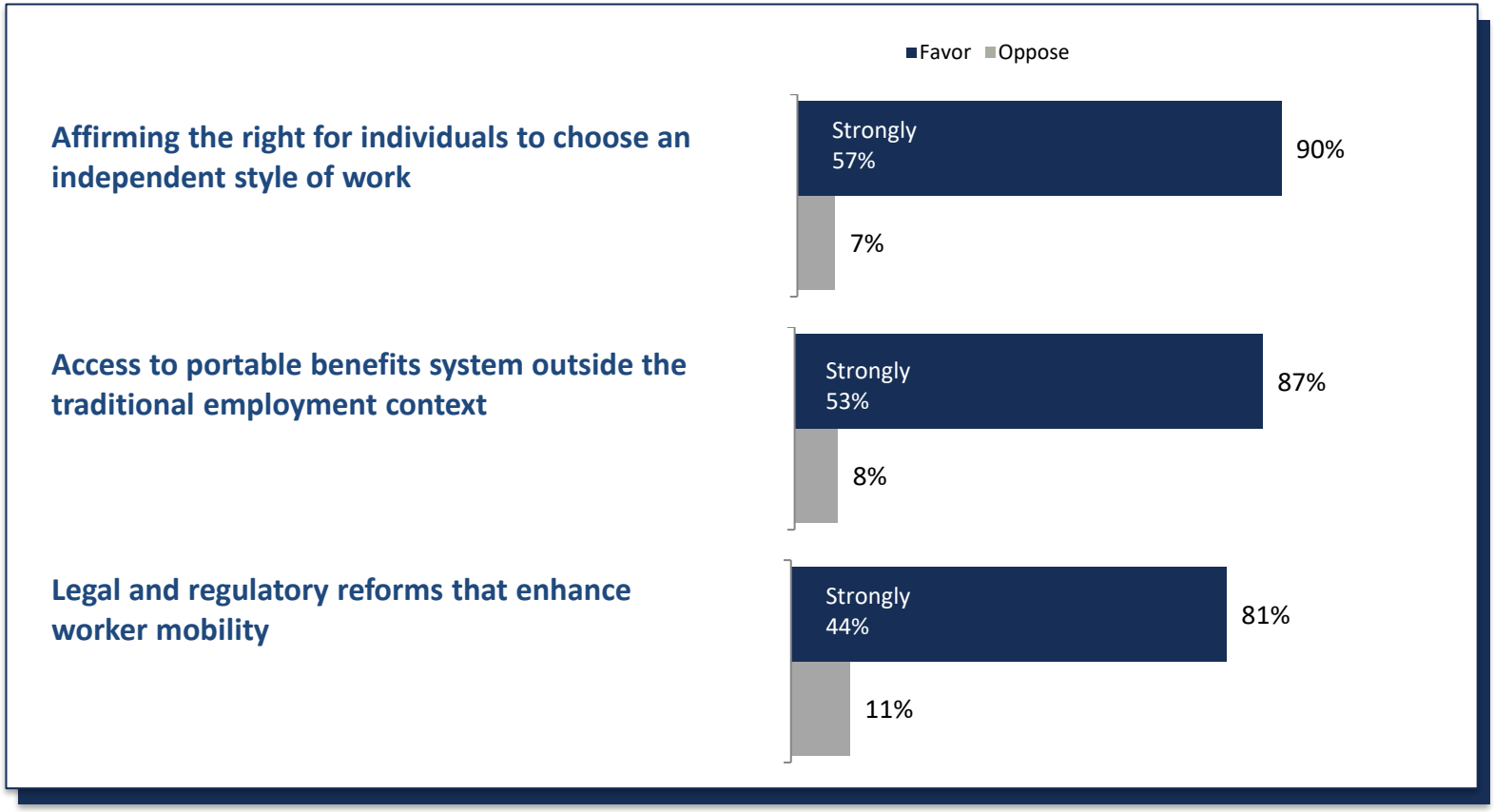
And which of these would make you most willing to consider leaving your current independent work arrangement for a more traditional job with a single company?

• Better pay	32%
• Health care benefits	19%
• Retirement options	9%
• Understanding my personal financial wellness	8%
• Sick leave and paid vacation	6%
• Maternity and paternity leave	4%
• None of these would make me consider leaving independent work	19%
• Not sure	3%

Some numbers may be off +/- 1% due to rounding.

Alternative Labor Initiatives

The following are other ways elected officials and business leaders can help people who freelance or work independently thrive in today's economy. Please indicate whether you favor or oppose each proposal.



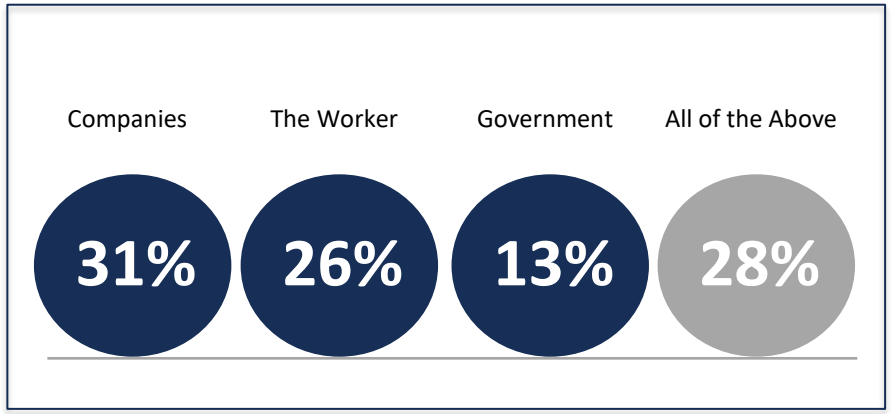
Some numbers may be off +/- 1% due to rounding.

Appendix

When it comes to obtaining important benefits like healthcare, retirement, and disability insurance, which comes closest to your own experience:

• It's a challenge to find access to affordable benefits and **could use more help from the government** to provide them	36%
• It's a challenge to find access to affordable benefits and **could use more options from private market providers**	30%
• There are **plenty of resources available** to get the benefit coverage you need at a price you can afford if you really want them	30%
• Not sure	4%

Generally speaking, who do you think should be responsible for providing workers in today's gig economy with traditional employee benefits like healthcare, retirement plans, and disability insurance?



Some numbers may be off +/- 1% due to rounding.

Appendix

With which political party are you registered?	Republican	31%
	Democratic	44%
	Independent	21%
	Libertarian	2%
	Other	3%
	NET Democrat	+13
What is your gender?		
	Male	49%
	Female	51%
What state do you live in?	Northeast	18%
	Midwest	21%
	South	38%
	West	23%
Which of the following best describes the area you live?	Urban	45%
	Suburban	37%
	Rural	18%
What is the highest level of education you have completed?	High school	16%
	Some college/Assoc/Trade	32%
	Four-year college degree	26%
	Graduate school	27%
What is your current household income?	<$50,000	39%
	$50,000-$100,000	39%
	Over $100,000	22%

Some numbers may be off +/- 1% due to rounding.