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Who's an Employee Now? Classifying Workers in the Age of the "Gig" Economy

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WHO’S AN EMPLOYEE NOW? CLASSIFYING WORKERS IN THE AGE OF THE “GIG” ECONOMY

*Catherine Engelmann**

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INTRODUCTION

\$4.7 million. That number represents the combined contributions Uber and Lyft made to lobbying efforts in 2020.¹ Compare this to the \$12.50 Ben Valdez, a California-based Uber driver, who drives for the company 12 to 15 hours a day, three days per week, receives per hour.² In today’s economy, which the “gig economy” occupies a growing share, greater competition means more pressure on companies to lower prices. From the worker’s perspective, lower prices translate into lower wages and fewer employee benefits.³

Because of how labor and employment laws have developed in the United States, employers are responsible for extending and paying for many essential benefits, such as health insurance, disability insurance, unemployment insurance, and more.⁴ A problem lies in the fact that workers,

1. See Victor Reklaitis, *Uber and Lyft Set Records in Annual Spending on Washington Lobbying*, MARKETWATCH (Jan. 22, 2021, 4:21 PM), <https://www.marketwatch.com/story/uber-and-lyft-set-records-in-annual-spending-on-washington-lobbying-11611350508> [<https://perma.cc/3M2L-HYHS>].

2. See Michael Sainato, *‘I Can’t Keep Doing This’: Gig Workers Say Pay Has Fallen After California’s Prop 22*, GUARDIAN (Feb. 18, 2021, 5:00 AM), <https://www.theguardian.com/us-news/2021/feb/18/uber-lyft-doordash-prop-22-drivers-california> [<https://perma.cc/PH23-PHPP>]. On good days, Valdez makes \$100 for eight hours of work, amounting to \$12.50 per hour, less than California’s \$14 hourly minimum wage — not accounting for fuel and other expenses like vehicle repairs. See *id.* The article does not specify whether this compensation includes money earned from tips, but, in any event, the difference is likely negligible since the vast majority of Uber customers do not tip their drivers. See Andrew J. Hawkins, *Nearly Two-Thirds of Uber Customers Don’t Tip Their Drivers, Study Says*, VERGE (Oct. 21, 2019, 3:32 PM), <https://www.theverge.com/2019/10/21/20925109/uber-tipping-riders-drivers-percentage-gender-nber-study> [<https://perma.cc/5BJZ-YL3G>]; see also Ken Jacobs & Michael Reich, *The Uber/Lyft Ballot Initiative Guarantees Only \$5.64 an Hour*, U.C. BERKELEY LAB. CTR. (Oct. 31, 2019), <https://laborcenter.berkeley.edu/the-uber-lyft-ballot-initiative-guarantees-only-5-64-an-hour-2/> [<https://perma.cc/F8NN-2EC4>].

3. See DAVID WEIL, *THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT* 14–15 (2014).

4. See Brian A. Brown II, Note, *Your Uber Driver Is Here, but Their Benefits Are Not: The ABC Test, Assembly Bill 5, and Regulating Gig Economy Employers*, 15 BROOK. J. CORP. FIN. & COM. L. 183, 186 (2020); see also *My Employer Says I Am an Independent Contractor. What Does This Mean?*, COMMUN WORKERS AM., <https://cwa-union.org/about/rights-on-job/>

like Mr. Valdez, who provide services via platform companies,⁵ are largely not legally classified as employees, rendering them without legal protections and benefits associated with “traditional” employment.⁶ As this Note explains, in addition to lacking assurance of making federal statutory minimum wage along with other basic rights, Valdez and others, who work for platform companies, such as Uber, must take on the financial and tax responsibilities of independent business entities, while not reaping the benefits and, at the same time, often remaining financially dependent on the platform. Change is seemingly approaching as the Department of Labor, the Internal Revenue Service, and other stakeholders discover and increase enforcement mechanisms against the improper classification of workers as independent contractors. At the same time, in part due to lack of regulation, and intense lobbying efforts, the law in its current state continues to accommodate platform companies’ business model, putting little pressure on them to provide workers with bare minimum rights, such as a livable wage.

One problem long-facing employers, workers, legislatures, and courts is that of defining the contours of the employment relationship, especially in relation to whether a worker is an independent contractor or an employee. The independent contractor, in contrast to a traditional employee, brings to

legal-toolkit/my-employer-says-i-am-independent-contractor-what-does-mean [https://perma.cc/864H-FT4Q] (last visited Feb. 23, 2022).

5. Platform company is used throughout this Note to describe online intermediaries that hire service providers to provide customers with short-term access to services. Examples include both unskilled “physical” services, such as transportation and delivery providers, and “crowdwork,” which can involve skilled work, such as “writing software code.” See Arne L. Kalleberg & Michael Dunn, *Good Jobs, Bad Jobs in the Gig Economy*, 20 PERSPS. ON WORK 10, 11–12 (2016). The working relationship between the intermediary and the worker varies depending on the service the platform provides. Further, the needs of workers in each segment of the workforce vary — for example, a Handy worker performing carpentry and home repairs may be at risk of hurting their back while working, while such injury poses less of a risk for the data analyst sitting at a desk from home (although perhaps a non-ergonomic chair can pose its own risk). This Note focuses on platforms with physical presence due to their closer approximation to the physical world of employers and employees. While there are distinct issues for crowdsourced work that can involve multiple jurisdictions — and countries — the issue of exploitation and protection dealt with here also have application in the crowdsource universe.

6. Only “employers” in the legal sense are required to provide worker’s compensation, see, e.g., N.Y. WORKERS’ COMP. LAW § 202 (McKinney 2021), unemployment insurance, see, e.g., N.Y. LAB. LAW § 560 (McKinney 2021), and those of a certain size are required to pay for employee health insurance. See *Affordable Care Act Tax Provisions for Employers*, INTERNAL REVENUE SERV. (Nov. 23, 2021), <https://www.irs.gov/affordable-care-act/employers> [https://perma.cc/93QN-GT7W]. In addition, federal antidiscrimination law applies only to employees and applicants for employee positions. See 42 U.S.C. § 2000e-2(a)(1); see also *Adcock v. Chrysler Corp.*, 166 F.3d 1290, 1292 (9th Cir. 1999) (“[T]here must be some connection with an employment relationship for Title VII protections to apply.” (quoting *Lutcher v. Musicians Union Loc. 47*, 633 F.2d 880, 883 (9th Cir.1980))).

mind an individual engaged in business for herself.⁷ The independent contractor is rightly understood to contract with the hiring entity to complete a specific project that is outside the core business realm of the other party.⁸ For example, a construction worker contracts with a homebuilder to perform carpentry for a new building. The homebuilder specifies the job and the timeframe in which he wants the work completed, and the two parties agree on the level of compensation for the finished project. This scenario also involves an aspect of skill; a giant real estate development might require the work of many independent contractors, some specializing in carpentry, electric, or plastering, to complete the project.⁹ These contractors may work on many projects simultaneously.¹⁰

In reality, distinguishing an independent contractor from an employee has become quite complex and made more so by the corporate trend to outsource, subcontract, and franchise work.¹¹ In many cases, courts struggle to apply judicially created tests, which rely on a number of nebulous concepts. Some of these considerations include to what extent the hiring entity exercises control over the worker, whether the worker has the opportunity for profit and loss, and whether the worker is engaged in an independent trade of the same nature as the service he provides. The existence of such different tests, and even different versions of such tests, across jurisdictions and statutes is an issue that has sparked extensive debate in the legal community.¹²

Misclassification — where employers, often purposely, wrongly classify their workers as independent contractors — harms workers who must consequently foot the bill for injuries suffered on the job or else must resort to costly and time-consuming tort actions to recover damages.¹³ This

7. See *Dynamex Operations W., Inc. v. Superior Ct.*, 416 P.3d 1, 33 (Cal. 2018) (describing a “traditional contractor” as one “working only in his or her own independent business” and providing the “independent plumber or electrician” as an example).

8. See WEIL, *supra* note 3, at 120.

9. See *Dynamex*, 416 P.3d at 33 (discussing the original conception of independent contractor as an individual who performs work that the hiring entity cannot “execute for themselves” and as one who maintains their own business and advertises as much to the public).

10. Additionally, when one thinks of such a contractor, one thinks of an entity that advertises their services to the public; for example, a solo law practitioner would carry business cards advertising his or her practice.

11. See WEIL, *supra* note 3, at 20.

12. See, e.g., Richard R. Carlson, *Why the Law Still Can't Tell an Employee When It Sees One and How It Ought to Stop Trying*, 22 BERKELEY J. EMP. & LAB. L. 295, 335–53 (2001); Seth D. Harris & Alan B. Krueger, *Is Your Uber Driver an Employee or an Independent Contractor*, 20 PERSPS. ON WORK 30, 30 (2016); John A. Pearce II & Jonathan P. Silva, *The Future of Independent Contractors and Their Status as Non-Employees: Moving on from a Common Law Standard*, 14 HASTINGS BUS. L.J. 1, 7–10 (2018).

13. Workers' compensation laws, in most cases codified by state legislatures, apply only to legally classified employees. See Juno Turner, Note, *All in a Day's Work? Statutory and*

phenomenon also impacts both the federal and state governments in the form of lost tax revenue.¹⁴ States, in particular, lose out on unemployment and worker compensation insurance premiums, which turns into a problem when — as one study on the Maine construction industry found — injured workers appear on the workers' compensation payroll only after they are injured.¹⁵ The federal government experiences loss of social security taxes, which employers are required to pay on behalf of employees but not independent contractors.¹⁶

The issue of misclassification is particularly pervasive in the context of the business model employed by many digital platform companies, which rely on classifying their workers as independent contractors.¹⁷ One purported rationale for such classification is to ensure that workers have “flexibility,” namely flexibility to choose when and if they work.¹⁸ Platform companies, such as Uber, Lyft, and DoorDash, argue that this scenario benefits individuals who have other commitments during working hours, allowing them the opportunity to earn extra money in their spare time.¹⁹ The

Other Failures of the Workers' Compensation Scheme as Applied to Street Corner Day Laborers, FORDHAM L. REV. 1521, 1531–32 (2005). Workers' compensation relies on a trade-off; employees trade away their right to bring a tort lawsuit, while employers, in return, contribute to a state worker's compensation insurance fund. *See id.*

14. *See* FRANÇOISE CARRÉ & RANDALL WILSON, THE SOCIAL AND ECONOMIC COSTS OF EMPLOYEE MISCLASSIFICATION IN THE MAINE CONSTRUCTION INDUSTRY 2 (2005), https://scholarworks.umb.edu/cgi/viewcontent.cgi?article=1041&context=esp_pubs [<https://perma.cc/HH27-DKEQ>].

15. *See id.* This undermines the rationale of workers' compensation insofar as employers are not supporting the system they benefit from.

16. *See id.* Independent contractors themselves must pay these. *See generally* SOC. SEC. ADMIN., NO. 05-10022, IF YOU ARE SELF-EMPLOYED (2022), <https://www.ssa.gov/pubs/EN-05-10022.pdf> [<https://perma.cc/YYA7-MHVL>].

17. *See* Li Jin, Scott Duke Kominers & Lila Shroff, *A Labor Movement for the Platform Economy*, HARV. BUS. REV. (Sept. 24, 2021), <https://hbr.org/2021/09/a-labor-movement-for-the-platform-economy> [<https://perma.cc/G5YH-ZPLY>] (“In the United States, most gig workers and creators are classified as ‘independent contractors’ . . .”).

18. *See, e.g.,* Faiz Siddiqui & Nitasha Tiku, *Uber and Lyft Used Sneaky Tactics to Avoid Making Drivers Employees in California, Voters Say. Now, They're Going National.*, WASH. POST. (Nov. 17, 2020, 7:00 AM), <https://www.washingtonpost.com/technology/2020/11/17/uber-lyft-prop22-misinformation/> [<https://perma.cc/U2WE-L8FM>] (recounting advertisements paid for by Uber and Lyft highlighting the “independence,” “earnings opportunities,” and “flexibility” afforded to drivers by the independent contractor model).

19. *See* Dara Khosrowshahi, Opinion, *I Am the C.E.O. of Uber. Gig Workers Deserve Better.*, N.Y. TIMES (Aug. 10, 2020), <https://www.nytimes.com/2020/08/10/opinion/uber-ceo-dara-khosrowshahi-gig-workers-deserve-better.html> [<https://perma.cc/9A7Z-PV3R>] (“Unlike traditional jobs, drivers have total freedom to choose when and how they drive, so they can fit their work around their life, not the other way around. Anyone . . . who's been forced to choose between school and work, will tell you this type of freedom has real value and simply does not exist with most traditional jobs.”).

theory that employment status limits worker flexibility is unfounded.²⁰ Instead, the more likely explanation for companies' opposition to such classification is that they wish to avoid the obligations imposed on them by federal and state labor laws. Companies have, accordingly, successfully lobbied for laws that deprive their workers of rights and protections afforded to workers in other contexts rather than empowering them in the form of additional earning opportunities.²¹

This Note highlights how businesses have extended and overused the independent contractor designation such that it is often applied to workers who do not fit the original understanding of what the designation describes.²² The birth and explosion of the platform economy have only served to exacerbate this tension. This is unfair to gig workers, who, in many cases, perform the same work as those who would traditionally be classified as "employees," in some cases for the same hours, without enjoying the protections and benefits that "employees" have secured.²³ Moreover,

20. See NAT'L EMP. L. PROJECT & P'SHIP FOR WORKING FAMS., REMOTE CONTROL: THE TRUTH AND PROOF ABOUT GIG COMPANIES AS EMPLOYERS 3 (2020) [hereinafter REMOTE CONTROL], <https://s27147.pcdn.co/wp-content/uploads/NELP-PWF-Fact-Sheet-Remote-Control-Truth-Proof-Gig-Companies-Employers.pdf> [<https://perma.cc/6TGU-EB8A>].

21. See *California Proposition 22: App-Based Drivers as Contractors and Labor Policies Initiative* (2020), BALLOTPEDIA [hereinafter *California Proposition 22*], https://ballotpedia.org/California_Proposition_22,_App-Based_Drivers_as_Contractors_and_Labor_Policies_Initiative [<https://perma.cc/E626-V38S>] (last visited Mar 29, 2022).

22. Exemplifying this phenomenon are those companies which have "replaced" traditional employees with independent contractors who perform the same work as former employees. See Mike Dickerson, *Vons, Pavilions to Fire "Essential Workers," Replace Drivers with Independent Contractors: California Begins to See the Devastating Effects of Proposition 22*, KNOCKLA (Jan. 4, 2021), <https://knock-la.com/vons-fires-delivery-drivers-prop-22-e899ee24ffd0/> [<https://perma.cc/7F3Q-SAYJ>] (finding that in the wake of Proposition 22's passage, California grocery chain Vons replaced its delivery drivers with a third-party delivery service that hires workers as independent contractors); see also *SuperShuttle DFW, Inc.*, 367 N.L.R.B. No. 75, at *22 (Jan. 25, 2019) (Member McFerran, dissenting) (pointing out that SuperShuttle drivers, whom the NLRB majority had found to be independent contractors excluded from coverage under the National Labor Relations Act (NLRA), had been treated as employees until 2005).

23. See NAT'L EMP. L. PROJECT, RIGHTS AT RISK: GIG COMPANIES' CAMPAIGN TO UPEND EMPLOYMENT AS WE KNOW IT (2019), <https://www.nelp.org/publication/rights-at-risk-gig-companies-campaign-to-upend-employment-as-we-know-it/> [<https://perma.cc/K9TJ-Z85K>]. This phenomenon is famously characterized by David Weil as the "fissured workplace." See WEIL, *supra* note 3, at 7. The term describes the modern business model wherein several degrees of corporate separation divide the employer from the worker. See *id.* An example of such divide is the loading dock crewmember, who is paid by a temporary staffing agency that is in turn compensated for the number of trucks loaded by a company overseeing Walmart's distribution center. See *id.* at 2. Thus, Walmart effectively shields itself from the loading dock crew, those who are performing essential work for the company. See *id.* While an extreme example, it sheds light on the structures that businesses can create so that they may classify essential workers as independent contractors, and thereby avoid obligations typically owed to employees. See *id.*

misclassification is unfair to employers, who classify workers in good faith, and society, which must absorb its costs in the form of missing tax revenue.²⁴

Part I of this Note examines the independent contractor designation, its history, and how digital platform companies have come to exploit the independent contractor designation for their economic benefit at the expense of workers who perform work that forms the core of companies' businesses. This Part analyzes the application of the existing tests used to determine employment status for the purposes of protection of the primary employment statutes. Of particular focus is the application of the ABC test — originating in Maine in 1935, more recently applied by the California Supreme Court, and enacted by the California legislature — to workers who participate in the platform economy.²⁵

Part II of the Note examines whether the traditional binary classification of independent contractor and employee is sufficient to encompass the gig economy and addresses whether a third intermediary category is needed. In addition, this Part analyzes whether a third category, as some scholars have proposed, holds promise or hinders workers in attaining the benefits and protections they need to survive, such as health insurance and compensation for injury on the job. Ultimately, the Note concludes that the employee-independent contractor binary is workable, even in the context of the growing “gig economy.”²⁶ However, reforms must be made to ensure that workers are not deprived of crucial protections.

Part III analyzes the “Concentric Circles” theory of rights allocation recently proposed by former Deputy Chief of Staff and Senior Policy Advisor to Administrator Tanya Goldman and former Wage and Hour Division Administrator David Weil.²⁷ This Note agrees with much of Goldman's and Weil's approach. In particular, this Note agrees that all workers should be guaranteed certain “fundamental” rights.²⁸ These include

24. See generally NAT'L EMP. L. PROJECT, INDEPENDENT CONTRACTOR MISCLASSIFICATION IMPOSES HUGE COSTS ON WORKERS AND FEDERAL AND STATE TREASURIES (2020), <https://s27147.pcdn.co/wp-content/uploads/Independent-Contractor-Misclassification-Imposes-Huge-Costs-Workers-Federal-State-Treasuries-Update-October-2020.pdf> [<https://perma.cc/RPP6-6XU4>].

25. See Pearce & Silva, *supra* note 12, at 27; see also S.G. Borello & Sons, Inc. v. Dep't of Indus. Rels., 769 P.2d 399, 403 (Cal. 1989); Assemb. B. 5 (Cal. 2019); Christopher J. Cotnoir, Comment, *Employees or Independent Contractors: A Call for Revision of Maine's Unemployment Compensation "ABC Test,"* 46 ME. L. REV. 325, 332 (1994). This Note analyzes the ABC test in greater detail in *infra* Section I.B.iii.

26. See generally Elka Torpey & Andrew Hogan, *Working in a Gig Economy*, U.S. BUREAU LAB. STAT. (May 2016), <https://www.bls.gov/careeroutlook/2016/article/pdf/what-is-the-gig-economy.pdf> [<https://perma.cc/K6UF-W9UB>].

27. See Tanya Goldman & David Weil, *Who's Responsible Here?: Establishing Legal Responsibility in the Fissured Workplace*, 42 BERKELEY J. EMP. & LAB. L. 55, 88–113 (2021).

28. See *id.* at 61.

freedom from discrimination and retaliation, safe and healthful working conditions, remuneration for work performed, and assurance of a minimum wage. Part IV details reservations about Goldman's and Weil's "middle circle."²⁹ Specifically, it argues that guaranteeing all workers the right to organize and engage in acts for mutual aid and protection is not feasible in application to the gig economy, and should instead be based on economic dependency.³⁰ Furthermore, it asserts that access to injury or disability and unemployment insurance is crucial, and businesses that provide services with inherent risks should be responsible for mitigation.³¹

I. THE INDEPENDENT CONTRACTOR DESIGNATION: ITS GENESIS AS A "NARROW EXCEPTION" AND ITS APPLICATION TO TODAY'S WORKERS

A. Origins of the Independent Contractor and Its Evolution

The U.S. legal system's treatment of the independent contractor as a status distinct from the traditional employee originates in common law tort liability and the law of agency.³² As of the 1935 publication of the First Restatement of Agency, whether a firm could be held liable for harms caused by its workers hinged on whether the worker was an employee or an independent contractor of that firm.³³ At common law, an employer could avoid tort liability for harms caused by its workers if those workers were, in fact, independent contractors and not employees.³⁴ An exception to this rule applied to inherently dangerous businesses. An employer engaged in such work was liable for injuries caused by the negligence of its workers regardless of their employment status.³⁵

Later on, with the genesis of New Deal-era federal employment legislation, classification became determinative of much more than liability in tort actions. Having an employee meant responsibility for payroll taxes,

29. *See id.*

30. *See id.* at 89–101.

31. Goldman and Weil argue that employers should have to rebut the presumption of employment status to evade responsibility for guaranteeing these rights. *See id.* at 101.

32. *See* Charles W. Pierson, *A Recent Attempt to Limit the Independent Contractor Doctrine*, 8 YALE L.J. 63, 64 (1898) (discussing early cases addressing the Independent Contractor Doctrine).

33. *See* RESTATEMENT (FIRST) OF AGENCY § 2 (AM. L. INST. 1933); *see also* S.G. Borello & Sons, Inc. v. Dep't of Indus. Rels., 769 P.2d 399, 403 (Cal. 1989) (en banc) ("The distinction between independent contractors and employees arose at common law to limit one's vicarious liability for the misconduct of person rendering service to him.").

34. *See, e.g.,* McCafferty v. Spuyten Duyvil & Port Morris R.R. Co., 61 N.Y. 178, 184 (1874).

35. *See, e.g.,* Boylhart v. 200 N.E. 793, 793 (N.Y. 1936); Covington v. Steinbrock, 55 N.E. 618, 619 (Ohio 1899); Carson v. Blodgett Const. Co., 174 S.W. 447, 448 (Mo. Ct. App. 1915).

contributing to Social Security, and paying time-and-a-half overtime.³⁶ Consequently, the “independent contractor” defense was used by employers wishing to avoid liability for the protections and benefits afforded by federal statutes such as the Fair Labor Standards Act,³⁷ National Labor Relations Act,³⁸ and the Social Security Act,³⁹ and any responsibility for making contributions to state-mandated worker’s compensation and unemployment insurance.⁴⁰ The incentives for employers to misclassify their workers as independent contractors became significant.⁴¹

Likewise, the stakes for workers are high,⁴² and the impact of “independent contractor” status on workers is two-fold. For one, independent contractors lack minimum wage and antidiscrimination protections, the right to a safe and healthy workplace, and the right to organize and collectively bargain.⁴³ Additionally, independent contractors lack insurance in the face of injury or temporary unemployment.⁴⁴ On top of lacking basic workplace protections, independent contractors are required to pay taxes that are traditionally associated with those who work for themselves.⁴⁵ They must deduct Social Security and Medicare taxes from their wages at the rate of self-employed persons, costs typically shared by the employer in a traditional employment setting.⁴⁶ This takes an unjust toll on workers who are misclassified by self-serving hiring parties.

Importantly, the “gig worker” is particularly vulnerable in the face of misclassification. For one, the platform economy is less regulated than the traditional workplace, causing both uncertainty for workers and employers

36. See INTERNAL REVENUE SERV., PUBLICATION 15-A, EMPLOYER’S SUPPLEMENTAL TAX GUIDE 4 (2022); see also Fair Labor Standards Act, 29 U.S.C. § 207(a)(2)(C).

37. See *Walling v. Rutherford Food Corp.*, 156 F.2d 513, 516 (10th Cir. 1946) (“[T]he boners were not employees of Kaiser, within the meaning of the Act, but were independent contractors . . .”), *affirmed sub. nom.*, *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947).

38. See *NLRB v. Hearst Publ’ns*, 322 U.S. 111, 113 (1944).

39. See *United States v. Silk*, 331 U.S. 704, 705 (1947).

40. See U.S. BUREAU OF LAB. STAT., USDL-21-1647, EMPLOYER COSTS FOR EMPLOYEE COMPENSATION — JUNE 2021 1 (2021), <https://www.bls.gov/news.release/pdf/eccc.pdf> [<https://perma.cc/M9NY-F4DY>].

41. See *supra* notes 36–40 and accompanying text.

42. See Sainato, *supra* note 2.

43. See Lynn Rhinehart et al., *Misclassification, the ABC Test, and Employee Status*, ECON. POL’Y INST. (June 16, 2021), <https://www.epi.org/publication/misclassification-the-abc-test-and-employee-status-the-california-experience-and-its-relevance-to-current-policy-debates/> [<https://perma.cc/8KYV-XA8P>].

44. See *id.*

45. See *id.*

46. See *Self-Employment Tax (Social Security and Medicare Taxes)*, INTERNAL REVENUE SERV. (June 19, 2022), <https://www.irs.gov/businesses/small-businesses-self-employed/self-employment-tax-social-security-and-medicare-taxes> [<https://perma.cc/6PAF-C4A6>].

involved and a challenge in accounting for this segment of the economy.⁴⁷ Further, although companies advertise their services to the worker as an intermediary step to launch her own independent business, this scenario rarely materializes.⁴⁸ Because the legal system has largely allowed this business model to grow unchecked, such workers continue to be deprived of the rights of traditional employees though a platform service is, in many cases, their primary source of work.⁴⁹ Crucially, these workers lack a voice — in part because they are unprotected by federal legislation guaranteeing the right to organize and, additionally, because the scattered nature of their “workplace” is not conducive to this activity.⁵⁰

Additionally, the fact that such workers are not, in fact, independent enterprises with many clients, but in fact are, in many cases, reliant on one or more platform services for their livelihood, makes “deactivation” from one of these networks potentially devastating.⁵¹ Compounding this precarity, business leadership is both physically and legally removed from the worker.⁵² In the background, businesses’ drive for profitability creates

47. See Jay Shambaugh, Ryan Nunn & Lauren Bauer, *Independent Workers and the Modern Labor Market*, BROOKINGS INST. (June 7, 2018), <https://www.brookings.edu/blog/up-front/2018/06/07/independent-workers-and-the-modern-labormarket/> [<https://perma.cc/S8NM-FXS6>]; see also Torpey & Hogan, *supra* note 26.

48. Low paying unskilled “gig” jobs draw a largely immigrant workforce. See Lauren Markham, *The Immigrants Fueling the Gig Economy*, ATLANTIC (June 20, 2018), <https://www.theatlantic.com/technology/archive/2018/06/the-immigrants-fueling-the-gig-economy/561107/> [<https://perma.cc/3E7N-JTF5>]. Because these jobs are, in many instances unskilled and underpaid, workers are not able to use them as a launching point for future independent businesses of their own. See Sarah Jaffe, *The Battle for the Future of “Gig” Work*, VOX (May 18, 2021, 8:00 AM), <https://www.vox.com/the-highlight/22425152/future-of-gig-work-uber-lyft-driving-prop-22> [<https://perma.cc/6DSJ-A2B3>].

49. See Maria Figueroa, *The Digital Platform Battleground*, 25 PERSPS. ON WORK 32, 34 (2021) (recounting a survey in which two-thirds of delivery worker respondents reported “regularly work[ing] [via platform applications] at least six days per week”).

50. See National Labor Relations Act, 29 U.S.C. §§ 152(3), 157 (applying the Act’s protections to “employees”); see also Figueroa, *supra* note 49, at 33–34 (discussing “challenges” of organizing workers for “location-based digital platforms,” including that unions have avoided putting resources into developing industries).

51. See Jillian Kaltner, Note, *Employment Status of Uber and Lyft Drivers: Unsettling Settled*, 29 HASTINGS WOMEN’S L.J. 29, 35 (2018) (“If a driver’s rating falls too low (it is not specified on the website how low), Uber will deactivate their account thus ending the ‘partnership’ between Uber and the driver.”) (discussing how driver independent contractors are left unprotected by antidiscrimination legislation). At least some crowdwork platforms allow customers to decline to compensate workers for any reason. See *Crowd Work and the “On-Demand” Economy*, EUR. TRADE UNION INS., <https://www.etui.org/topics/health-safety-working-conditions/hesamag/the-future-of-work-in-the-digital-era/crowd-work-and-the-on-demand-economy> [<https://perma.cc/XT9V-JG4U>] (last visited Feb. 23, 2022).

52. See WEIL, *supra* note 3, at 94–95 (discussing subcontracting, franchising and supply chain business models — each of which establishes many legal degrees of separation between the lead firm and the employees).

immense incentives for maintaining this multi-tiered organization, leaving little hope for workers to have more authority in the process.⁵³

In recent years, numerous studies have exposed just how pervasive the problems of misclassification are. The National Employment Law Project found that in California, nine out of ten businesses inspected by a state task force were engaged in illegal misclassification.⁵⁴ As a result of the burden imposed by misclassification,⁵⁵ states have amplified their efforts to curb the practice.⁵⁶

The huge incentives for employers to classify workers as independent contractors are problematic in themselves, particularly because of the diminished bargaining power workers have in the face of powerful employers. The problem is mitigated by the enactment of the ABC test, which presumes employee status unless the hiring party can prove:

- (A) that the worker is free from the control . . . of the [hiring entity] . . . ;
- (B) that the worker performs work that is outside the usual course of the hiring entity's business; and (C) that the worker is customarily engaged in an independently established trade, occupation, or business⁵⁷

Worker advocates champion this test as placing the burden of proof on the party better able to bear that burden and the one benefitting from the work.⁵⁸ The widespread enactment of this test is encouraging in this regard. However, as this Note explores, the test is vulnerable to distortion, as has been demonstrated by legislative modifications of the "B" prong implemented in most enacting states.

Ultimately, the employee-independent contractor bifurcation, where one worker in one jurisdiction is classified as an employee and therefore has the right to organize, for example, whereas a worker with the same job

53. *See id.* at 95 ("The downward pressure on wages and associated benefits intensifies with each cascading tier of fissured employment").

54. *See* NAT'L EMP. L. PROJECT, *supra* note 24, at 3.

55. *See id.* The report indicates that such misclassification was found by "at least one [state] agency." *See id.* Though not explicitly specified, the report suggests that the agencies that conducted the audits are those involved in the workers' compensation and unemployment insurance systems.

56. *See* Daniel I. Small et al., *NJ Continues Its Aggressive Crackdown on Independent Contractor Misclassification*, SEYFARTH SHAW LLP (July 13, 2021), <https://www.seyfarth.com/news-insights/nj-continues-its-aggressive-crackdown-on-independent-contractor-misclassification.html> [<https://perma.cc/Q7BJ-F4HZ>].

57. *See* *Dynamex Operations W., Inc. v. Superior Ct.*, 416 P.3d 1, 7 (Cal. 2018).

58. *See* Eric Markovits, Note, *Easy as ABC: Why the ABC Test Should Be Adopted as the Sole Test of Employee-Independent Contractor Status*, 2020 CARDOZO L. REV. DE NOVO 224, 247 (2021); *see also* Ricard Pochkhanawala, *ANALYSIS: Gig Worker Classification Fight Goes Beyond California*, BLOOMBERG L. (Feb. 2, 2021, 2:28 PM), <https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-gig-worker-classification-fight-goes-beyond-california> [<https://perma.cc/MMW8-2BVW>].

description in another jurisdiction is left without labor protections, is artificial.⁵⁹ This issue has been highlighted by the difficulties that gig workers — some of whom spend substantial time performing essential work of a platform company — have had in securing basic rights. Further, because the existing legal bifurcation is artificial and oftentimes counterintuitive, employers and employees face uncertainty about whether employees will receive the most basic rights and protections.⁶⁰ The determination of employment status is often made *ex post facto*. The lack of federal guidance and, thereby, the abundance of litigation in this area, cries out for courts to devise their own interpretative gloss. Indeed, courts have stepped in as integral policymakers in this area. The California Supreme Court's pacesetter *Dynamex Operations West, Inc. v. Superior Court*⁶¹ decision will be examined later on, along with the other primary tests that have emerged.

B. Employee Defined: A Patchwork Quilt of Tests

The advent of major New Deal-era employment legislation led to the classification of workers impacting much more than just tort liability; employment status has become pivotal in determining what rights and benefits workers are owed.⁶² Absent explicit legislative direction,⁶³ courts are left to grapple with legislative intent, statutory purpose, and precedent to construct workable tests to determine employment status.⁶⁴ The pressure to

59. See Veena Dubal, *Employment Law: The Employee vs. Independent Contractor Dichotomy*, 2 JUDGES BOOK 51, 53 (2018); see also *FedEx Home Delivery v. NLRB*, 563 F.3d 492, 503 (D.C. Cir. 2009) (determining that FedEx's "single-route" drivers were independent contractors and not protected by the NLRA).

60. For example, federal antidiscrimination legislation, federal statutory minimum wage, and the right to organize apply only to individuals who satisfy the legal definition of "employee." See National Labor Relations Act, 29 U.S.C. § 152(3) (excluding "independent contractor" from the definition of "employee"); see also Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-2 (defining "unlawful employment practice" as employer action against "employees" or "applicants for employment"); *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 728–29 (1947) (determining whether meat boners are employees for purposes of the Fair Labor Standards Act (FLSA)).

61. *Dynamex*, 416 P.3d at 1.

62. See Pearce & Silva, *supra* note 12, at 6.

63. See Employee Retirement Income Security Program, 29 U.S.C. § 1002(6) (defining "employee" as "any individual employed by an employer"); see also Fair Labor Standards Act, *id.* § 203(g) (defining employment as "to suffer or permit to work"); Social Security Act of 1935, 42 U.S.C. § 410 (defining employment as "any service . . . by an employee for the person employing him"); *Butler v. Drive Auto. Indus. of Am., Inc.*, 793 F.3d 404, 408 (4th Cir. 2015) ("As the Supreme Court has noted, definitions of 'employer' and 'employee' in federal law are circular and 'explain[] nothing.'" (quoting *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323 (1992))).

64. See *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323 (1992) (finding no contradictory authority preventing the application of the common-law test); *cf. id.* at 324

make these tests standardized and, therefore, repeatable stems not only from the need to provide clarity to workers and hiring parties but also to create a more useful precedent for courts to follow.

Because of the external factors that courts must consider in determining the application of this array of statutes, a number of tests have emerged. This Section examines each standard, how it has been applied and highlights weaknesses in its application. After describing the primary tests,⁶⁵ this Section will explore their use in the context of the platform economy, along with state legislative efforts to specifically address platform companies and their workers.

i. The Right to Control Test

The first of the employee-independent contractor classification schemes to take hold in the United States is the common law “right to control” test.⁶⁶ Initially, courts developed a set of factors to analyze the extent to which a hiring entity could be liable for tort damages incurred as a result of its workers’ actions.⁶⁷ The doctrine stemmed from the logic that the employer who has little to no involvement in the day-to-day functioning of its workers should not be held liable for their actions.⁶⁸ Today, courts revert to this test where no other test is prescribed or little guidance is provided by the statute at issue in a given case.⁶⁹

(recounting the Fourth Circuit’s reliance on the policy and purpose of Employee Retirement Income Security Act of 1974 (ERISA) to reject the common-law approach).

65. This Note describes the three primary categories of extant tests. There is yet a fourth test devised by various Courts of Appeals — sometimes referred to as a “hybrid” test — that combines aspects of the common law right to control test and the economic realities test. *See, e.g.,* *Wilde v. Cnty. of Kandiyohi*, 15 F.3d 103, 105 (8th Cir. 1994); *Frankel v. Bally, Inc.*, 987 F.2d 86, 89–90 (2d Cir. 1993). This Note describes the economic realities test in greater detail at Section I.B.ii *infra*.

66. *See* *Pearce & Silva, supra* note 12, at 7–8; *see also Darden*, 503 U.S. at 322–23, 327 (reasoning that the common law principles of agency should be used to determine employment status for purposes of ERISA, where the statute otherwise lacks an instructive definition of employee). The test has also been widely employed in state court for purposes of determining responsibility under worker compensation laws. *See, e.g.,* *Rolick v. Collins Pine Co.*, 925 F.2d 661, 665 (3d Cir. 1991); *Hanson v. Transp. Gen., Inc.*, 716 A.2d 857, 865 (Conn. 1998).

67. *See* *S.G. Borello & Sons, Inc. v. Dep’t of Indus. Rels.*, 769 P.2d 399, 403 (Cal. 1989).

68. *See* *Dowsett v. Dowsett*, 207 P.2d 809, 811 (Utah 1949).

69. *See* *Comey v. Hill*, 438 N.E.2d 811, 814 (Mass. 1982) (resorting to common law definition of employee absent legislative direction); *see also Wilde*, 15 F.3d at 105 (“[W]hen a statute does not helpfully define the term ‘employee,’ courts should not imply a meaning that is broader than the common-law definition.” (citing *Darden*, 503 U.S. at 322)).

While courts have constructed varying iterations of the common law test,⁷⁰ they generally draw a distinction between the hiring entity authorized to specify only the result of the work and the company that has the power to control how it is accomplished.⁷¹ The oft-cited version the U.S. Supreme Court sets out in *Nationwide Mutual Insurance Co. v. Darden*⁷² is as follows: in determining the extent of the hiring entity's "right to control the manner and means by which the product is accomplished," the court investigates factors, including "skill required," the supplier of the "instrumentalities and tools," the place of work, "the duration of the relationship between the parties," the worker's discretion over his hours, the payment method, whether the worker can hire assistants, "whether the work is part of the regular business of the hiring [entity]," whether employee benefits are provided, and how the worker's taxes are treated.⁷³

Notwithstanding the discretionary nature of the factors to be applied and their relative weight,⁷⁴ the test benefits from its straightforwardness in terms of the burden of production for the parties involved. For example, it is not difficult to imagine the type of evidence that a hiring party, a worker, or a court would need to look towards to determine the party responsible for paying for equipment and controlling the hours and location of work.

On the other hand, the test is not self-sufficient. That is, the analysis can depend on the results of other complex findings. For example, the "tax treatment of the hired party" is dependent on the employer's determination of whether, for purposes of the Internal Revenue Code, the employer must

70. See Carlson, *supra* note 12, at 299 ("While judges frequently speak of the 'common law' test of employee status and employment relations, they have generally failed to articulate any consistent rule or test. Instead, they have perpetuated an ever-expanding catalogue of 'factors'" (internal citation omitted)).

71. See, e.g., Viado v. Domino's Pizza, LLC, 217 P.3d 199, 202 (Or. Ct. App. 2009) ("An agent is an employee if the principal has the right to control the physical details of the work performed by the agent; in other words, the principal directs not only the end result, but also controls *how* the employee performs the work.").

72. 503 U.S. 318 (1992).

73. See *id.* at 323–24. Courts also draw upon the factors enunciated in the Second Restatement of Agency, which closely resembles the *Darden* factors, with the addition of "whether or not the work is a part of the regular business of the employer" and "whether or not the parties believe they are creating the relation of master and servant." RESTATEMENT (SECOND) OF AGENCY § 220 (2)(h)–(i) (AM. L. INST. 1988).

74. See Hargrove v. Sleepy's, LLC, 106 A.3d 449, 460 (N.J. 2015) (describing the test as a "totality-of-the-circumstances evaluation"). To note, it is almost uniformly agreed to be a totality of the circumstances test, with no one factor being determinative. See Pearce & Silva, *supra* note 12, at 9. However, the D.C. Circuit created a wrinkle in the consensus when it decided *FedEx Home Delivery v. NLRB*, 563 F.3d 492 (D.C. Cir. 2009). There, the court found a current of entrepreneurialism to run through its analysis. See *id.* at 497 ("[W]here some factors cut one way and some the other, [the determinative principle] is whether the position presents the opportunities and risks inherent in entrepreneurialism.").

pay payroll taxes on account of the worker.⁷⁵ Whether an employee is an independent contractor or employee for purposes of this employment tax is, in turn, determined by no fewer than 20 factors, including elements themselves analyzing control.⁷⁶ Additionally, perhaps indicative of its subjectivity, courts often must resort to legislative purpose to render a determination.⁷⁷ Although invoking legislative purpose in close cases may best reflect congressional intent, it both causes and demonstrates unpredictability in outcome.⁷⁸

While bringing in additional factors should seemingly make decisions more well-grounded in the existence of an employment relationship, the National Labor Relations Board (NLRB) and Courts of Appeals have ricocheted between varying interpretations of the common law test, yielding unpredictable results. In 2009, the D.C. Circuit observed in *FedEx Home Delivery v. NLRB* that throughout the test's history, there was an apparent underlying focus on the worker's entrepreneurial opportunity.⁷⁹ In that case, the majority found that FedEx drivers' ability to sell their routes pointed towards a finding of independent contractor status.⁸⁰ The right to "sell" routes without permission from FedEx was indicative of entrepreneurial opportunity, despite the fact that only two drivers had done so.⁸¹

The majority in *FedEx* pointed to other factors that would seemingly support employee status under traditional elements of the right to control test, such as the requirement that workers wear FedEx uniforms, use trucks sporting the FedEx logo, deliver FedEx customers' packages each day, Tuesday through Saturday, and that, of course, the workers performed the essential part of FedEx's business — to deliver packages — but held that these factors were not "determinative" of employee status.⁸² In sum, the court found that drivers' contractual right to sell their routes, along with their ability to hire assistants, despite evidence that very few had taken advantage of such abilities, outweighed the numerous indicators of both control and

75. See *Darden*, 503 U.S. at 324 (quoting Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 752 (1989)); see also Rev. Rul. 87-41, 1987-1 C.B. 296.

76. See INTERNAL REVENUE SERV., *supra* note 36, at 4-5, 7-9.

77. See, e.g., *NLRB v. Hearst Publ'ns*, 322 U.S. 111, 129 (1944).

78. See *NLRB v. United Ins. Co. of Am.*, 390 U.S. 254, 256 (1968).

79. See 563 F.3d at 497 ("[W]hile all the considerations at common law remain in play, an important animating principle by which to evaluate those factors in cases where some factors cut one way and some the other is whether the position presents the opportunities and risks inherent in entrepreneurialism.").

80. See *id.* at 500. The *FedEx* court found that evidence that the drivers could contractually assign their routes pointed towards economic independence. See *id.*

81. As the dissent noted, a factual investigation had revealed evidence of only two route sales, resulting in dubious profits for the driver. See *id.* at 515 n.19 (Garland, J., dissenting)

82. See *id.* at 500-01 (majority opinion).

economic reliance on FedEx.⁸³ The NLRB, during the Obama Administration, rejected the *FedEx* Court's reasoning in *FedEx Home Delivery II* and held that rather than focusing on any one factor, courts should evaluate all of the factors in the Second Restatement of Agency and weigh them according to the factual circumstances of each case.⁸⁴ The original *FedEx* Court's gloss was later echoed by the NLRB under the Trump Administration in *SuperShuttle DFW, Inc.*,⁸⁵ and criticized the *FedEx II* approach for inventing a new factor altogether by "ask[ing] whether the evidence tends to show that the putative contractor is, in fact, *rendering services as part of an independent business*."⁸⁶

ii. The Economic Realities Test

The other primary test, also originating from common law, is termed the economic realities test. This test is a variation on the right to control test⁸⁷ and broadens the scope of who gets considered an "employee."⁸⁸ In general, the test examines the financial dependency of the worker on the hiring entity, looking to the circumstances on the ground as well as certain more formalized aspects of the right to control test.⁸⁹

Some scholars maintain that this test was first employed in an early workers' compensation opinion by Judge Learned Hand.⁹⁰ In *Lehigh Valley Coal Co. v. Yensavage*, Judge Hand found that the economic dependency of the coal miner on the defendant-employer, combined with the purpose of the Worker's Compensation Act to protect disadvantaged workers, necessitated a finding of coverage.⁹¹

83. *See id.* at 504; *see also id.* at 510–11, 515 (Garland, J., dissenting).

84. *See* *FedEx Home Delivery (FedEx II)*, 361 N.L.R.B. 610, 610 (2014).

85. 367 N.L.R.B. No. 75, at *8 (Jan. 25, 2019).

86. *FedEx II*, 361 N.L.R.B. at 620 (emphasis added).

87. *See* Pearce & Silva, *supra* note 12, at 9.

88. *See* Walling v. Rutherford Food Corp., 156 F.2d 513, 516 (10th Cir. 1946) (finding that, due to the Fair Labor Standards Act's remedial purpose, "coverage is to be determined broadly by reference to the underlying economic realities rather than by traditional rules governing legal classifications of master and servant" (emphasis added)); *accord* Zheng v. Liberty Apparel Co., 355 F.3d 61, 69 (2d Cir. 2003) (applying economic realities test, given that the FLSA includes the "broadest definition of 'employ' that has ever been included in any one act" (internal citation omitted)).

89. *See, e.g.*, Pendleton v. JEVS Hum. Servs., Inc., 463 F. Supp. 3d 548, 561–70 (E.D. Pa. 2020).

90. *See* Carlson, *supra* note 12, at 311; *see also* *Lehigh Valley Coal Co. v. Yensavage*, 218 F. 547, 552–53 (2d Cir. 1914) (Hand, J.).

91. 218 F. at 552–53 ("It is true that the statute uses the word 'employed,' but it must be understood with reference to the purpose of the act, and where all the conditions of the relation require protection, protection ought to be given. It is absurd to class such a miner as an independent contractor . . . He has no capital, no financial responsibility. He is himself as

Others attribute the test's origination to the Supreme Court's opinion in *NLRB v. Hearst Publications*, where the Court analyzed the meaning of "employee" as used in the National Labor Relations Act (NLRA).⁹² There, the majority agreed with the NLRB's findings that the "newsboys" depended on their earnings from the publishing company and their "sales equipment and advertising materials" were provided by the publishing company.⁹³ Rejecting "technical concepts" of the workers' status and relying also on the purpose of the Act to redress imbalances of power among employers and employees, the Court affirmed the finding that the newsboys were "employees" under the NLRA.⁹⁴

The Supreme Court has since returned to the common law agency factors when analyzing the question of employee status under the NLRA.⁹⁵ In 1947, Congress amended the NLRA to specifically exclude independent contractors.⁹⁶ Interpreting this amendment as congressional disapproval of the economic realities test, the Court rejected that test with respect to NLRA disputes in favor of the traditional common law agency factors.⁹⁷

Under the economic realities test, a reviewing court examines six factors: (1) the extent to which the employer has the right to control the manner in which the work is completed; (2) the worker's opportunity for "profit or loss depending on his managerial skill;" (3) the worker's "investment in equipment or materials;" (4) the degree of skill required for the job; (5) the working relationship's permanence; and (6) "whether the service rendered is an integral part of the . . . business."⁹⁸

dependent upon the conditions of his employment as the company fixes them as are his helpers.").

92. 322 U.S. 111, 131 (1944); *see also* Karen R. Harned, Georgine M. Kryda & Elizabeth A. Milito, *Creating a Workable Legal Standard for Defining an Independent Contractor*, 4 J. BUS., ENTREPRENEURSHIP, & L. 93, 101 (2010).

93. 322 U.S. at 131.

94. *See id.* at 129 (holding that the NLRB's finding was supported under a rational basis review).

95. *See NLRB v. United Ins. Co. Am.*, 390 U.S. 254, 256 (1968).

96. *See* Robert J. Rosenthal, *Exclusions of Employees Under the Taft-Hartley Act*, 4 ILR REV. 556, 565 (1951); *see also* 29 U.S.C. § 152(3).

97. *See United Ins.*, 390 U.S. at 256. The test is also used, in some form, to classify workers under the Equal Pay Act of 1963, Family and Medical Leave Act of 1993, and the Employee Polygraph Protection Act of 1988. *See* Harned et al., *supra* note 92, at 100. In addition, the U.S. Department of Labor prescribes the economic realities test to determine whether an employment relationship exists for purposes of the FLSA. *See* U.S. DEP'T OF LAB., WAGE & HOUR DIV., FACT SHEET #13: EMPLOYMENT RELATIONSHIP UNDER THE FAIR LABOR STANDARDS ACT (FLSA) 1 (2008), <https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/whdfs13.pdf> [<https://perma.cc/953N-7ZE9>].

98. *Real v. Driscoll Strawberry Assocs.*, 603 F.2d 748, 754 (9th Cir. 1979); *see also* U.S. DEP'T OF LAB., *supra* note 97, at 1.

Though there is considerable overlap between these factors and the common law test,⁹⁹ one key difference lies in the economic realities test's inclusion of the putative employer's right to control as a component of the analysis rather than the base inquiry. Because it is a multi-factor "totality of the circumstances test," courts examine other factors besides control, both contractually and in fact, which may impact the court's determination of employee status.¹⁰⁰ Additionally, the test looks to factors included in the common understanding of the "true" independent contractor, pointing to such factors as the skill required and whether the task performed is in the usual course of business.¹⁰¹ In utilizing this test, courts often perform their analysis to effectuate the purpose of the legislation at issue, which typically points towards a finding of employee status.¹⁰²

In many ways, the economic realities test highlights important distinctions between an employee and an independent contractor. When one thinks of an employee, one thinks of an individual dependent on her employer for work; when the employer does not have work, neither does the employee. Additionally, the employer typically supplies the physical space and the tools required to complete the work.¹⁰³ Likewise, the employer depends on the employee to perform the work necessary to conduct its business.¹⁰⁴

The economic realities test is used to determine coverage of the Fair Labor Standards Act (FLSA);¹⁰⁵ however, its underlying rationale supports a broader application. Because the employee tends to rely on a single entity for work and the employer likewise depends on the employee for the operation of its business, it makes sense to hold the employer responsible for

99. This is particularly true for the first prong, which examines the extent of the putative employer's control.

100. See Kermit Roosevelt III, *Certainty Versus Flexibility in the Conflict of Laws* 2–3 (2019) (on file with University of Pennsylvania Carey Law School) (discussing the inherent flexibility involved in standards, which require judges to weigh multiple factors versus rules, which provide certainty and limit opportunity for judicial discretion).

101. See WEIL, *supra* note 3, at 120 (discussing the legitimate form of independent contracting where among other things "contractors control their own businesses" and "maintain their own . . . skills").

102. See Carlson, *supra* note 12, at 353–54.

103. These factors are reflected in the worker's opportunity for profit or loss depending on managerial skill, and the worker's investment in equipment or materials. See *supra* note 98 and accompanying text.

104. This factor is reflected in the sixth factor — whether the employee renders a service integral to the business. See *id.*

105. See JON O. SHIMABUKURO, CONG. RSCH. SERV., R46765, *WORKER CLASSIFICATION: EMPLOYEE STATUS UNDER THE NATIONAL LABOR RELATIONS ACT, THE FAIR LABOR STANDARDS ACT, AND THE ABC TEST 1* (2021), <https://crsreports.congress.gov/product/pdf/R/R46765#:~:text=Fair%20Labor%20Standards%20Act%2C%20and%20the%20ABC%20Test,-The%20classification%20of&text=The%20economic%20reality%20test%20is,of%20a%2040%2Dhour%20workweek> [https://perma.cc/HZ5E-PDFS].

providing basic worker protections like minimum wage, health insurance, and unemployment insurance in the event of layoffs due to lack of work.

Few courts have had the opportunity to apply the economic realities test to determine gig workers' employment status. However, there is potential for the entrepreneurial opportunity factor to cause uncertainty and deny certain workers rights in this context. For example, a district court found that this factor militated in favor of independent status because UberBLACK drivers were able to choose whether or not to work for Uber, whether they could work for competitors, and whether they could confine their working hours to high-demand times to capitalize on "surge" pricing.¹⁰⁶ From these facts, however, an alternative conclusion is equally possible. In contrast to an independent business entity that has numerous clients *to* whom they provide service, UberBLACK drivers chose between different companies *for* which they provided services.¹⁰⁷ Similarly, choosing to work hours based on surge pricing does not necessarily prove an opportunity for profit or loss *dependent on managerial skill* but rather indicates that Uber has substantial control over pricing and therefore how much compensation drivers receive.

The economic realities test carries promise to afford workers vital protections. However, as it stands, the "entrepreneurial opportunity" prong has been misconstrued such that the test no longer serves its purpose of avoiding the long and technical right to control analysis in favor of the more basic inquiry — whether the employee is economically dependent on the employer.¹⁰⁸ The D.C. Circuit and the NLRB under President Trump altered the test to encompass essentially hypothetical capability, rather than the "economic facts" of the relation to which the Supreme Court had instructed the NLRB and reviewing courts to look.¹⁰⁹ If the test is to serve its purpose — of affording economically disadvantaged employees with rights to a minimum wage¹¹⁰ — the analysis needs to focus on factual evidence rather than the employees' putative rights to hire assistants or assign contractual rights to other individuals.

106. See *Razak v. Uber Techs., Inc.*, No. 16-573, 2018 WL 1744467, at *16–17 (E.D. Pa. Apr. 11, 2018), *vacated and remanded*, 951 F.3d 137 (3d Cir. 2020).

107. See *id.*

108. See *NLRB v. Hearst Publ'ns*, 322 U.S. 111, 125–28 (1944) (rejecting the "technical legal refinement [that] has characterized the long evolution of the employee-independent contractor dichotomy in the courts for other purposes" in favor of an approach that better serves the purpose of remedying the unequal bargaining power between dependent employees and their employer).

109. See *id.* at 128.

110. See Benjamin F. Burry, Comment, *Testing Economic Reality: FLSA and Title VII Protection for Workfare Participants*, 1 U. CHI. LEGAL F. 561, 563–64 (2009).

iii. *The ABC Test, Its Enactment by States, and Its Applications in the Gig Context*

1. *Overview of the ABC Test*

At the state level, a third test known as the ABC test has been enacted with increasing frequency in recent years. This Note focuses on this test for three reasons. First, the test has emerged as the prevailing reform for state independent contractor definitions¹¹¹ — indeed, 21 states have enacted some version of the three-pronged test.¹¹² Second, it is the only test to put the burden on the hiring entity to overcome a presumption that the worker is an employee.¹¹³ Because of this, it has been employed by an increasing number of states to combat misclassification.¹¹⁴ Additionally, its application to the platform economy would seem to classify many workers as employees.¹¹⁵ However, a third reason is that some state legislatures have subverted the test, hindering its potential to provide more assurance to workers and employers.¹¹⁶

In contrast to the federal tests described above, the ABC test places the burden on the employer to overcome the presumption that a worker is an employee. In the seminal *Dynamex* case, California became the largest state by population to adopt the ABC test.¹¹⁷ Later, the state legislature approved its usage when it passed Assembly Bill 5 (AB 5), which codified and expanded the *Dynamex* holding to apply to all workers.¹¹⁸

111. Pearce & Silva, *supra* note 12, at 27.

112. This number reflects states who have adopted the test in any form, not those limited to the form the California Supreme Court outlined in *Dynamex*. See SHIMABUKURO, *supra* note 105, at 14–27.

113. See *id.* at 1.

114. See *id.* at 9 n.90.

115. To classify a worker as an independent contractor, the employer must prove that the worker performs work outside the ordinary operations of the business. See *infra* text accompanying note 124. For platform companies providing transportation services, it would seem difficult to prove that a driver does not perform functions essential to the business.

116. Because of the potential for widespread liability, platform companies have expended extraordinary resources towards lobbying state legislatures to make an exemption for online intermediaries. See Rebecca Smith, ‘Marketplace Platforms’ and ‘Employers’ Under State Law — Why We Should Reject Corporate Solutions and Support Worker-Led Innovation, NAT’L EMP. L. PROJECT (May 18, 2018), <https://www.nelp.org/publication/marketplace-platforms-employers-state-law-reject-corporate-solutions-support-worker-led-innovation/> [<https://perma.cc/HM6G-PVK8>].

117. *Dynamex Operations W., Inc. v. Superior Ct.*, 416 P.3d 1, 3 (Cal. 2018).

118. See Assemb. B. 5, ch. 296 (Cal. 2019); see also SHIMABUKURO, *supra* note 105, at 12 n.112. AB 5 codifies *Dynamex*, where the California Supreme Court held the ABC test applies to California wage laws and expands its holding to include the entirety of the California Labor Code and state unemployment insurance laws. See Todd H. Lebowitz & Mark Zisholtz, *Now*

This phenomenon is not limited to California. The ABC test “has been adopted [in full] in at least 20 states and the District of Columbia.”¹¹⁹ In 18 of 20 such states, the test has been incorporated into unemployment insurance laws.¹²⁰ In many states, the ABC test is used to determine employee status for purposes of laws setting mandatory minimum wages, and in a handful of states — construction-industry specific laws.¹²¹ It has been estimated that as many as 38 states have adopted the ABC test in some form.¹²² One likely explanation for the recent trend among states to codify the ABC test into law is its potential to function as a tool to combat widespread misclassification.¹²³

Under the framework the California Supreme Court envisioned, workers are presumed to be employees unless and until the employer can prove the existence of three factors suggestive of independent contractor status:

(A) that the worker 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) that the worker performs work that is outside the usual course of the hiring entity’s business, and (C) that the worker is customarily engaged in an independently established trade, occupation or business¹²⁴

Because the ABC test presumes an employment relationship unless the employer satisfies each of the three factors, the ABC test, in comparison to the other primary tests, poses the biggest hurdle for employers to overcome if they wish to classify their workers as independent contractors. For example, if the business successfully shows that (A) it lacks control over the worker and that (C) the worker is customarily engaged in an independently established trade, but (B) the worker does not perform the work provided outside the usual course of the hiring entity’s business, the worker still would be classified as an employee. Because of this, employers face a major challenge in escaping liability under its application than under the other tests

That California Has Passed AB 5, What Are the Options for Businesses Using Independent Contractors?, 45 EMP. RELS. L.J. 38, 38 (2020).

119. See SHIMABUKURO, *supra* note 105, at 1. That said, states that have adopted a version of the ABC test have not mirrored California’s version and have undermined its efficacy. See *infra* Section II.B.iii.2.

120. See SHIMABUKURO, *supra* note 105, at 18–27.

121. See *id.*

122. See Pearce & Silva, *supra* note 12, at 27.

123. See generally Anna Deknatel & Lauren Hoff-Downing, *ABC on the Books and in the Courts: An Analysis of Recent Independent Contractor and Misclassification Statutes*, 18 U. PA. J.L. & SOC. CHANGE 53, 67 (2015).

124. *Dynamex Operations W., Inc. v. Superior Ct.*, 416 P.3d 1, 40 (Cal. 2018).

because any one factor is dispositive.¹²⁵ Not surprisingly, worker advocates champion the test for being the hardest for employers to manipulate.¹²⁶

The ABC test certainly holds promise to guarantee workers crucial protections, ones they might not otherwise enjoy under the alternative tests. Specifically, as stated above, states have largely enacted the ABC test to determine employee status for purposes of unemployment insurance.¹²⁷ The test has also been employed, in some variation, to determine employee status for purposes of state workers' compensation laws.¹²⁸ As Judge Hand noted in *Lehigh Valley*, workers' compensation is vital assurance that a worker financially dependent on his employer will not suffer financial ruin from the inevitable workplace injury, particularly in an industry such as mining.¹²⁹ Likewise, it is crucial that the worker have assurance that during periodic spans of time without employment, outside of the worker's control, he will have the means to survive.

Additionally, the ABC test benefits from its apparent simplicity. With only three factors to apply, in contrast to, say, the 13 factors set forth by the Court in *Darden*, there is more certainty in the outcome, a benefit for employers, workers, and courts.¹³⁰

2. ABC Test: A Problematic Subversion

a. Prong B: Outside of the Employer's Places of Business

While the ABC test holds promise to assure workers vital protections, the vast majority of state legislatures have subverted Prong B to include a geographical component,¹³¹ such that it risks misclassifying workers who should properly be considered employees.

The *Dynamex* version of Prong B requires the employer to prove that the worker performs services outside of the employer's ordinary course of business.¹³² This formulation makes sense in light of the traditional

125. See *id.* at 41 (“[E]ach part of the ABC test may be independently determinative of the employee or independent contractor question . . .”).

126. See Deknatel & Hoff-Downing, *supra* note 123, at 67 (“Worker advocates have called ABC the ‘most objective’ test and ‘the most difficult for employers to manipulate.’”).

127. See, e.g., CONN. GEN. STAT. § 31-222(B) (2012); MASS. GEN. LAWS ch. 151A, § 2 (2022).

128. See Assemb. B. 5 § 1(e) (Cal. 2019).

129. See *Lehigh Valley Coal Co. v. Yensavage*, 218 F. 547, 552–53 (2d Cir. 1914).

130. See Carlson, *supra* note 12, at 299 (describing how the lists of factors courts apply are frequently “nonexhaustive” and “ever-expanding,” rendering the “analysis . . . more complex and its outcome less predictable.”). In addition, Carlson points out the multi-factor common law test “begs the question of employee status as much as answers it.” *Id.*

131. See Deknatel & Hoff-Downing, *supra* note 123, at 100.

132. See *supra* note 124 and accompanying text.

conception of the independent contractor — one who is in business for herself — in contrast to an employee who performs the integral work of the business.¹³³ For example, “an outside plumber repairing a leak in a retail store is not part of the store’s usual course of business,”¹³⁴ whereas a tailor regularly hired by a dry cleaner to perform alterations would likely be considered a part of the dry cleaning business.¹³⁵

Yet, several states have subverted the analysis by including a geographical component.¹³⁶ These states allow the employer to show that the worker either performs services outside the usual course of the business (as in the traditional test) or *outside of the places of business of the firm for which the service is performed*.¹³⁷ Nineteen states have enacted the test in some form for unemployment insurance law coverage.¹³⁸ All but two of these laws include the place of business clause.¹³⁹ Further, the vast majority of these states have not enacted the ABC test in the workers’ compensation realm.¹⁴⁰ The workers’ compensation statutes of these states range from providing specific exclusions for independent contractors¹⁴¹ to providing vague or non-

133. *See* *Dynamex Operations W., Inc. v. Superior Ct.*, 416 P.3d 1, 12–13 (Cal. 2018).

134. *People v. Uber Techs., Inc.*, 270 Cal. Rptr. 3d 290, 311 (Ct. App. 2020).

135. *See id.*

136. *See, e.g.*, LA. STAT. ANN. § 23:1472(12)(e)(ii) (2014); MD. CODE ANN. LAB. & EMP. § 8-205(a)(3)(ii) (West 2022).

137. *See, e.g.*, CONN. GEN. STAT. § 31-222(a)(1)(B) (2012).

138. *See* SHIMABUKURO, *supra* note 105, at 14–27.

139. Alaska, Connecticut, Delaware, Hawaii, Illinois, Louisiana, Maryland, Massachusetts, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, Vermont, Washington, and West Virginia incorporate the “place of business” clause. *See id.* Just two states — Maine and California — require proving that the worker perform work outside the usual course of the hiring entity’s business. *See id.*

140. *See, e.g.*, ALASKA STAT. § 23.30.395 (2020); CONN. GEN. STAT. § 31-275 (2022); DEL. CODE ANN. tit. 19, § 2301 (2022); HAW. REV. STAT. § 386-1 (2017); 820 ILL. COMP. STAT. 305/1 (2022); LA. STAT. ANN. § 23:1021 (2022); ME. STAT. tit. 39, § 102(13)(B) (2021); MD. CODE ANN. LAB. & EMP. § 9-101 (West 2022); MASS. GEN. LAWS ch. 152, § 1(4) (2022); NEB. REV. STAT. § 48-114 (2022); N.H. REV. STAT. ANN. § 281-A:2 (2021); N.M. STAT. ANN. § 51-1-42 (2021); W. VA. CODE § 23-4-1 (2022); N.J. DEP’T OF LAB. & WORKFORCE DEV’T, AN EMPLOYER’S GUIDE TO WORKERS’ COMPENSATION IN NEW JERSEY 5–6, https://www.nj.gov/labor/forms_pdfs/wc/pdf/WC-373.pdf [<https://perma.cc/3EGA-LR6M>] (last visited Mar. 22, 2022); WASH. DEP’T OF LAB. & INDUS., EMPLOYER’S GUIDE TO WORKERS’ COMPENSATION INSURANCE IN WASHINGTON STATE 2–3 (2020), <https://www.lni.wa.gov/forms-publications/F101-002-000.pdf> [<https://perma.cc/M3X2-B4HH>]. Vermont is seemingly the only state to enact the ABC test in this context. *See* VT. DEP’T OF LAB., WHO IS AN EMPLOYEE VS. INDEPENDENT CONTRACTOR, https://labor.vermont.gov/sites/labor/files/doc_library/Who%20is%20an%20Employee%20vs.%20Independent%20Contractor.pdf [<https://perma.cc/CWD8-T7ZC>] (last visited Mar. 17, 2022). It is worth noting that California, a foremost proponent of the ABC test, has not enacted it in the workers compensation context. *See* CAL. LAB. CODE § 2750.3 (2020) (repealed 2020).

141. *See* ALASKA STAT. § 23.30.395 (2022).

definitions of employees.¹⁴² Lacking a statute with an instructive definition, reviewing courts resolving workers' compensation disputes have applied the common law agency test¹⁴³ and another common law test known as the "relative nature of the work test."¹⁴⁴

Omitting a statutory definition of employee in workers' compensation acts indicates that state legislatures intend for courts to resort to the common-law agency test or another such common law test in resolving coverage disputes.¹⁴⁵ One possible rationale for hinging employee status for workers' compensation coverage on the common law definition is the agency factors' roots in tort liability.¹⁴⁶ Perhaps states view employers as appropriately responsible for insuring against on-the-job injuries, where those employers would be vicariously liable for harms resulting from the workers' performance of their jobs.¹⁴⁷ On the contrary, if the employer would not incur tort liability for a worker's injurious acts, the employer would not be held responsible for insuring against that worker's injury.

It is impossible to identify with certainty a policy explanation for the application of the ABC test in the unemployment insurance context but not others; however, it is worth examining more closely the implications. In contrast to the *Dynamex* version of the ABC test, the incorporation of the geographical component, as in the vast majority of states, makes it more likely that an employer would be able to avoid employee classification and, therefore, evade the obligation to contribute unemployment insurance funds

142. See W. VA. CODE § 23-4-1 (2022).

143. See *DeJesus v. R.P.M. Enters., Inc.*, 255 A.3d 885, 908 (Conn. Ct. App. 2021); see also *Harger v. Structural Servs., Inc.*, 916 P.2d 1324, 1329 (N.M. 1996).

144. See *Odsather v. Richardson*, 96 P.3d 521, 523 (Alaska 2004). The relative nature of the work test is another multi-factor test that inquires about "the character of the claimant's work or business; and . . . the relationship of the claimant's work or business to the purported employer's business." *Id.* (quoting *Benner v. Wichman*, 874 P.2d 949, 952 (Alaska 1994)). These questions themselves require the consideration of numerous factors. Scrutinizing the nature of the claimant's work includes looking at: "(1) the degree of skill involved, (2) whether the claimant holds himself out to the public as a separate business, and (3) whether the claimant bears the accident burden." *Id.* The relationship between the claimant's work and the putative employer's business is investigated with reference to:

(1) the extent to which claimant's work is a regular part of the employer's regular work, (2) whether the claimant's work is continuous or intermittent, and (3) whether the duration of the work is such that it amounts to hiring of continuing services rather than a contract for a specific job.

Id.; see also *Brush Hay & Mill. Co. v. Small*, 388 P.2d 84, 87 (Colo. 1963) (en banc).

145. See *Pearce & Silva*, *supra* note 12, at 7–8.

146. See *supra* Section I.A.

147. See *supra* Section I.A. This argument is supported by the fact that contributions to workers' compensation insurance contributions relieve employers of liability for employee tort actions. See generally David B. Torrey et al., *Recent Developments in Workers' Compensation and Employers' Liability Law*, 52 TORT TRIAL & INS. PRAC. L. 709 (2017).

on behalf of its workers.¹⁴⁸ However, implementing the ABC test in either form provides greater certainty in application due to its evaluation of relatively few and easy-to-apply standards.¹⁴⁹ And, in either form, the test should render more employers responsible than would the traditional common law agency test. It is possible that states view unemployment insurance misclassification as a more pressing problem; while workplace accidents may occur sporadically,¹⁵⁰ an economic downturn can affect millions, as exemplified by the surge in unemployment during the COVID-19 pandemic.¹⁵¹ The frequency and severity of the problem corresponds to the financial impact on the government.¹⁵² In other words, when employers do not provide workers benefits and the individual cannot subsidize the costs, those costs must later be defrayed, in some form, by the state via public assistance.¹⁵³

There are huge ramifications to the geographic subversion of Prong B in the context of the platform economy as applied to “location-based work,” such as rideshare or crowdsourcing work.¹⁵⁴ For example, almost all workers providing transportation services would surely be considered to perform work outside of the enterprise’s place of business.¹⁵⁵ Yet, there is

148. Allowing the employer to prove that the employee works outside the employer’s places of business provides the employer with another route to proving independent contractor status. See Deknatel & Hoff-Downing, *supra* note 123, at 100–01.

149. See SHIMABUKURO, *supra* note 105, at 10.

150. Actual medical costs — as opposed to lost wages — would also in most cases be covered by insurance, as even low-salaried workers would be covered by Medicaid, already required to be funded by the state.

151. See Rhinehart et al., *supra* note 43, at 8–9.

152. See NAT’L EMP. L. PROJECT, PUBLIC TASK FORCES TAKE ON EMPLOYEE MISCLASSIFICATION: BEST PRACTICES 3 (2020), <http://stage.nelp.org/wp-content/uploads/Policy-Brief-Public-Task-Forces-Take-on-Employee-Misclassification.pdf> [<https://perma.cc/H4CC-2D8E>].

153. For example, the government must compensate for uncompensated medical care. See Teresa A. Coughlin, Haley Samuel-Jakubos & Rachel Garfield, *Sources of Payment for Uncompensated Care for the Uninsured*, KFF (Apr. 6, 2021), <https://www.kff.org/uninsured/issue-brief/sources-of-payment-for-uncompensated-care-for-the-uninsured/> [<https://perma.cc/S3KC-9S8P>]; see also Rhinehart et al., *supra* note 43, at 8–9 (“[U]nemployment benefits for independent contractors . . . are paid for by taxpayers Tens of thousands of Uber and Lyft drivers have accessed these programs, meaning that the federal government — and taxpayers — financially supported the drivers through the pandemic, not Uber and Lyft.”); NAT’L EMP. L. PROJECT, *supra* note 152, at 3.

154. See Figueroa, *supra* note 49, at 33–34 (distinguishing digital platforms providing services such as “design” and “computer programming” from “[l]ocation-based platforms” connecting consumers with “on-demand” services in the “transportation, food/goods delivery, house chores, and personal care” industries).

155. See *Athol Daily News v. Bd. of Rev. of Div. of Emp. & Training*, 786 N.E.2d 365, 372 (Mass. 2003). Like in this case, as discussed in *infra* note 156, transportation workers are mobile and could therefore be considered by courts to work outside the employer’s place of business.

no sensible rationale for denying newspaper delivery couriers job-related protections solely because their work necessitates mobility.¹⁵⁶ Likewise, in the platform economy, it is hard to imagine an instance in which a platform company in the transportation or food delivery industries, with offices in San Francisco, New York, and other urban areas,¹⁵⁷ would not win on that prong, likely implicating this segment of the “gig” workforce. On the other end of the “gig” spectrum, individuals who work for digital platforms such as Amazon’s Mechanical Turk, even if working full-time for the platform, would likely fail to qualify as employees under this condition.

The ABC test has the potential to uproot the employment practices of platform companies. Harbingers of its further enactment have indeed caused anxiety for platform executives, as evidenced by recent political reactions by Uber and Lyft.¹⁵⁸ After the passage of AB 5,¹⁵⁹ Uber and Lyft, in an attempt to avoid expensive employment obligations, successfully lobbied for Proposition 22 (Prop 22), an exemption for rideshare drivers.¹⁶⁰ Further, efforts to codify some version of the ABC test have encountered legislative backlash,¹⁶¹ as is highlighted by bills outlining lengthy classification frameworks specifically applicable to platform workers.¹⁶² These bills have the clear impact of rendering almost all, if not all, platform workers independent contractors. Unsurprisingly, platform companies have

156. *See id.* at 372–73 (“It is clear that all of the carriers make deliveries outside of premises owned by the News or which could fairly be deemed its ‘places of business.’”) (distinguishing a case involving a bicycle courier business, which business was “virtually indistinguishable from the services performed by the bicycle couriers”). A Massachusetts appellate court found that taxi limousine drivers were independent contractors for the same reason. *Comm’r of the Div. of Unemployment Assistance v. Town Taxi of Cape Cod*, 862 N.E.2d 430, 435 (Mass. App. Ct. 2007) (“Drivers were not confined to a specific geographical location and were free to choose locations where they would look for passengers.”).

157. *See Uber Headquarters and Office Locations*, CRAFT, <https://craft.co/uber/locations> [<https://perma.cc/YGV7-YAHW>] (last visited Mar. 30, 2022).

158. *See California Proposition 22*, *supra* note 21.

159. *Aseemb. B. ch. 296* (Cal. 2019).

160. The provision exempts app-based drivers from AB 5’s coverage. *See California Proposition 22*, *supra* note 21. Advertisements worked to convince the public that Prop 22 would afford workers “flexibility,” which allegedly they were not granted under AB 5, while at the same time providing protections. *See Khosrowshahi*, *supra* note 19 (stating that if drivers were classified as employees, they would “lose the flexibility they have”). *But see REMOTE CONTROL*, *supra* note 20, at 3 (“There is no law or policy that requires employers to take away flexibility if workers receive employee benefits.”). Uber and Lyft are also eyeing Massachusetts, a state with employee-friendly classification laws, as a potential target for a Prop 22-like initiative. *See Pat Murphy, Prop 22 Win Has Uber, Lyft Eyeing Bay State as New Battleground*, MASS. LAWS. WKLY. (Nov. 19, 2020), <https://masslawyersweekly.com/2020/11/19/prop-22-win-has-uber-lyft-eyeing-bay-state-as-new-battleground/> [<https://perma.cc/C7JP-GH8R>].

161. This is a different form of backlash than that referred to with respect to the geography limitation imposed on prong B. *See supra* notes 136–44 and accompanying text.

162. *See Smith*, *supra* note 116.

themselves lobbied for these laws, known as “marketplace contractor” laws.¹⁶³ A Tennessee law sets forth ten factors that determine whether a worker for a platform company is an independent contractor that essentially mirror the business model that platform companies have constructed.¹⁶⁴ Perversely, one factor weighed in favor of finding independent contractor status requires that the company “provide[] no medical or other insurance benefits to the marketplace contractor,”¹⁶⁵ effectively discouraging platform companies from providing such benefits. Nearly identical laws have been passed in Arizona, Florida, Indiana, Iowa, and Kentucky.¹⁶⁶

Unsurprisingly, in the face of the seemingly iron-clad Prong B, platform companies have attempted to argue that worker “service providers” carry out a different function from the services themselves.¹⁶⁷ As the argument goes, Uber is not in the transportation industry but in the business of connecting consumers with drivers.¹⁶⁸ This attempt is also reflected in platform companies’ tendency to rename their workers as “partners”¹⁶⁹ or “pros.”¹⁷⁰ Altering the nomenclature to further disguise the fact that workers perform work that is the lifeblood of the platforms’ business is a transparent effort by platform companies to avoid creating any impression of employment status. Granted, this argument has been largely unpersuasive, as courts have tended to see this argument’s hollowness for what it is.¹⁷¹

b. Prong A: Contract Requirement

In addition to mirroring the text of Prong B set forth in *Dynamex*, the ABC test’s viability depends on the maintenance of Prong A’s requirement that

163. *See id.* (reporting that, at least in Tennessee, Handy provided the draft legislation).

164. *See* TENN. CODE § 50-8-102 (2019).

165. *See id.* § 50-8-102(a)(9).

166. *See, e.g.,* ARIZ. REV. STAT. § 23-1603 (2016); FLA. STAT. § 451.02 (2019); IND. CODE § 22-1-6-3 (2019); IOWA CODE § 93.2 (2020); KY. REV. STAT. § 336.137 (West 2021). These laws set forth the definition for employment status across all employment laws, that is, worker compensation, unemployment compensation, and state minimum wage laws.

167. *See, e.g.,* *People v. Uber Techs., Inc.*, 270 Cal. Rptr. 3d 290, 302 (Ct. App. 2020).

168. *See id.*

169. *See Get Ready to Drive with Us*, UBER, <https://www.uber.com/hk/en/drive/how-it-works/> [<https://perma.cc/S624-ZE3Q>] (last visited Mar. 7, 2022).

170. *See Be a Professional with Handy!*, HANDY, <https://www.handy.com/apply> [<https://perma.cc/9J9Z-E5VH>] (last visited Mar. 30, 2022); *see also* Valerio De Stefano, *The Rise of the “Just-in-Time Workforce”: On-Demand Work, Crowdwork, and Labor Protection in the “Gig Economy,”* 37 COMP. LAB. L. & POL’Y J. 471, 472 (2016) (discussing the “commodification of work” exemplified by catchphrases such as “‘gigs,’ ‘tasks,’ ‘rides,’ etc.”).

171. *See Uber*, 270 Cal. Rptr. 3d at 311–12 (“A number of cases have considered contentions that ride-sharing companies such as Lyft and Uber are in the business solely of creating technological platforms . . . Uber has been . . . unsuccessful in making [this] pitch to the courts.”).

the employer withholds control both contractually and *in fact*.¹⁷² The problem with hinging employment status on contract terms is that it opens the door for the employer to manipulate the terms of the contract to give an appearance of lack of control when, in reality, the employer exercises control over the manner in which the work is performed.¹⁷³ For example, the independent contractor agreement DoorDash requires its workers to sign states that the worker, among other things, “understands . . . they have the sole right to control the manner in which deliveries are performed and the means by which those deliveries are completed.”¹⁷⁴ This arrangement is true, in some sense — drivers for such apps are told when and where to pick up food and to have it delivered but precisely how they get there is discretionary. However, as will be explained below, the app exercises control in more subtle ways, which is not the case in a traditional independent contractor scenario. If the ABC test relies solely on contractual terms, the test risks disguising actual control with carefully chosen contractual language.

On the one hand, per the agreement, delivery couriers working for DoorDash are free to choose their own mode of transportation and are not required to display “any signage or other designation of DoorDash on their vehicle or person.”¹⁷⁵ It may very well be the case that workers do have the freedom to drive their own cars, ride their own bikes, and choose to work only during certain times of the day. On the other hand, in reality, the company exercises employer-like control over many aspects of the work. For example, DoorDash and other food delivery platforms exercise “technical control” over which customers couriers are matched with and, in some cases, withhold detailed information about the nature of the job request, such as the distance to be traveled and how much pay the worker

172. See, e.g., N.J. REV. STAT. § 34:20-4(a) (2016).

173. See Deknatel & Hoff-Downing, *supra* note 123, at 68–69 (discussing how the variation opens the door for employers to “contractually designate a worker as an independent contractor, while in reality preserving employer-like control”). It also opens the door for courts to examine the actual day-to-day relationship of the parties less carefully in favor of basing analysis solely on the terms of the contract. See *Hair v. La. Crane & Trucking Co.*, 996 So. 2d 435, 436–37 (La. Ct. App. 2008) (determining that despite the “harsh” result, because the written contract between the injured truck driver and the employer stated that the individual was required to provide his own workers’ compensation insurance, the employer did not need to supply workers’ compensation benefits).

174. *Independent Contract Agreement — United States*, DOORDASH, https://help.doordash.com/dashers/s/ica-us?language=en_US [<https://perma.cc/3UZK-WR4H>] (last visited Mar. 7, 2022).

175. See *id.*

will take home.¹⁷⁶ Additionally, the platforms exercise control over pricing and enact practices that likely inure to the benefit of the platform.¹⁷⁷

While courts do seem to all but uniformly see through attempts by employers to use “sham independent contractor agreements”¹⁷⁸ to avoid obligations imposed by employment laws,¹⁷⁹ the marketplace contractor-specific laws discussed above do signal a possible legislative pitfall. These laws, in some cases, require only that the contractor agreement reflect certain conditions, such as the worker’s flexibility in working hours, responsibility for expenses incurred on the job, and the worker’s own payment of employment taxes.¹⁸⁰

The potential for problematic legislative exemptions to the ABC test does highlight a strength of the economic realities test. The economic realities test acknowledges that whatever arrangement is in effect between the parties may be superseded by the reality of the financial dependence of the worker on his employer.¹⁸¹ As courts have noted, this approach often carries out the purpose of employment legislation, which is to remedy power and economic imbalances between the employer and the employee by mandating the provision of employment benefits and protections, which employers might otherwise be incentivized to withhold.

*iv. Viability of the Employee-Independent Contractor Dichotomy
in the Context of the Gig Economy*

In some ways, the problem with the legal employee-independent contractor dichotomy is that there is one at all. The fact that there are multi-factor, judicially-contrived tests leads one to wonder what, if anything, about the legal “employee” status makes certain workers deserving of protections

176. See Kathleen Griesbach et al., *Algorithmic Control in Platform Food Delivery Work*, 5 *SOCIUS* 1, 6 (2019).

177. For example, DoorDash offers “set rates of ‘bonus pay’ during times peak demand times.” See *id.* at 5. Workers for Instacart (a grocery-delivery app) have speculated that the platform learns the worker’s bottom line, the lowest wage they are “likely to accept, and then tailors offers to each accordingly.” See *id.* at 6; see also WEIL, *supra* note 3, at 121 (describing the business’s control over pricing, “timing, place of delivery, and so on” and the provision of “clear standards, guidelines, monitoring, and penalties . . . about the consequences to the subcontractor if it fails to meet the guidelines. This is the glue that holds subcontractors to the outcomes that are central to the lead firm’s core competency.”).

178. Sw. Appraisal Grp., LLC v. Adm’r, 155 A.3d 738, 745 (Conn. 2017).

179. See Carlson, *supra* note 12, at 341–42; see also James v. Uber Techs. Inc., 338 F.R.D. 123, 136 (N.D. Cal. 2021) (rejecting Uber’s argument against class certification based on differences among drivers’ contracts because despite the agreements, “a jury could find that Uber exercised no control — or too much control — over its drivers under all of the agreements, despite their differences”).

180. See, e.g., ARIZ. REV. STAT. § 23-1603(A)(3) (2016).

181. See discussion *supra* Section I.B.ii.

while others are not.¹⁸² This difficulty is highlighted by the fact that two tribunals can analyze similar fact patterns and reach different conclusions about whether a worker is an employee for purposes of certain legislation by using different tests.¹⁸³ Underscoring the artificiality of the distinction is the puzzling reality that a driver for Uber in California, after the passage of AB 5 and before the passage of Prop 22, would be classified as an employee and, therefore, entitled to workers compensation, unemployment insurance, paid sick and family leave, and health insurance,¹⁸⁴ whereas an Uber driver in Pennsylvania might not be entitled to those same rights merely because of the classification scheme of the state in which she works.¹⁸⁵

Despite the seeming arbitrariness of the distinction, overhauling the current employee-independent contractor bifurcation in the foreseeable future seems unlikely, considering it is rooted in common law stemming from a century ago. There is also substantial Supreme Court precedent for engaging in such multi-factor analyses across a broad range of legislation, and about half of states have recently passed a law that, while reformative, still maintains the binary classification scheme. This Section discusses proposals to create a third category to encompass hard-to-classify employees, ultimately concluding that its implementation is impracticable.

Additionally, crafting employment legislation, particularly surrounding the “gig” economy, seems inextricably enmeshed in party politics, rendering sweeping changes unlikely.¹⁸⁶ The successful disguise of Prop 22 as a pro-

182. Carlson, *supra* note 12, at 299–300; *see also* Hanson v. Transp. Gen., Inc., 716 A.2d 857, 860–61 (Conn. 1998) (discussing the Connecticut Supreme Court’s long-standing invocation of the right to control test absent explicit legislative instruction).

183. Currently, “[i]t is . . . the case, particularly in state law, that a worker may be an employee for one purpose and an independent contractor for another, especially in any state that has adopted the . . . ‘ABC test.’” Carlson, *supra* note 12, at 354. This is a separate but equally puzzling issue.

184. This is unless the employer can successfully prove independent contractor status under the ABC test. *See* CAL. LAB. CODE § 2750.3(a)(1)(A)–(C) (West 2020) (repealed 2020).

185. For example, a court that sits in a state still utilizing one of the traditional common law tests could find that on balance, the sum total of the factors cut against a finding of employment status; i.e., such a court might find that because the driver supplies his own vehicle and controls if and when he works, the economic realities of the arrangement point towards independence. *See* Goldman & Weil, *supra* note 27, at 111 (showing how a hairdresser might be deemed an employee or an independent contractor depending on one’s interpretation, versus under the ABC test, where that worker would almost surely be considered an employee).

186. Arizona, Florida, Iowa, and Indiana — states that have enacted marketplace contractor laws — have Republican governors and Republican control of the state senate. *See State Government Trifectas*, BALLOTPEdia, https://ballotpedia.org/State_government_trifectas [https://perma.cc/B6EB-ZXJP] (last visited Mar. 22, 2022). Kentucky’s former Republican governor signed the state’s marketplace contract bill into law. *See* H.B. 220, Reg. Sess. (Ky. 2018); *Kentucky Gubernatorial and Lieutenant Gubernatorial Election, 2015*, BALLOTPEdia,

worker bill, and the enactment of marketplace contractor laws in several states demonstrate the immense lobbying power of platform companies.¹⁸⁷ It is possible that states, feeling the effects of lost tax revenue in the form of missing unemployment insurance and worker compensation contributions,¹⁸⁸ will be forced to recalibrate. Pervasive misclassification has indeed inspired legislative reform. For example, proponents of the ABC test have garnered support for its application to the construction industry — an industry in which misclassification is known to be rampant.¹⁸⁹ At the same time, there is a strong possibility that additional states will follow the lead of the meaningful minority of states that have codified the ABC test in its improper form.

II. DISRUPTING THE DICHOTOMY: THE DEPENDENT CONTRACTOR

A. Proposal of a Third Category

Some scholars, confronted with the inconsistent and counterintuitive nature of the independent contractor-employee distinction, have questioned whether a bifurcated classification system makes sense at all in the modern economy.¹⁹⁰ One proposal, which resembles systems already in place in Canada and the United Kingdom,¹⁹¹ advocates creating a third category of

https://ballotpedia.org/Kentucky_gubernatorial_and_lieutenant_gubernatorial_election,_2015 [<https://perma.cc/SM4Q-Q4YF>] (last visited Mar. 22, 2022).

187. See *supra* notes 160–62 and accompanying text.

188. See J. Paul Leigh, *Economic Burden of Occupational Injury and Illness in the United States*, 89 MILBANK Q. 728, 745 (2011).

189. See Deknatel & Hoff-Downing, *supra* note 123, at 69 (discussing prong A's contractual provision, which at the time had only been enacted in four states and two of those states had applied that language solely to the construction industry); see also Rhinehart et al., *supra* note 43, at 5 (discussing the “rampant” misclassification of workers in the construction industry). Another possible factor in this industry-specific application is that is that construction is a notoriously dangerous industry. See Jason Ryser, *Is Construction Work the Most Dangerous Industry?*, FLICKINGER SUTTERFIELD & BOULTON (Feb. 27, 2020), <https://utahinjurylawyers.com/is-construction-work-the-most-dangerous-industry/> [<https://perma.cc/K5RP-RXEY>] (“The construction industry is infamous for being one of the most dangerous fields to work in . . . [T]his type of work . . . results in thousands of non-fatal injuries that cost companies millions each year.”). Perhaps states do not want to be left to pick up the tab in instances of inevitable on-the-job injury. See Leigh, *supra* note 188, at 728–29; see also N.J. REV. STAT. § 34:20-4 (2022) (defining construction employee, for purposes of several employment statutes including Temporary Disability Benefits, according to the ABC test).

190. See Pearce & Silva, *supra* note 12, at 30.

191. The 1995 Ontario Labor Relations Act defines the dependent worker as encompassing both contracted and uncontracted workers who are “in a position of economic dependence upon, and under an obligation to perform duties for, [another] person more closely resembling the relationship of an employee than that of an independent contractor.” Labour Relations Act, 1995, S.O. 1995, ch. 1, sched. A, § 1 (Can.).

worker — the independent worker, otherwise known as a “dependent contractor.”¹⁹²

In 1975, Canada introduced the concept of the “dependent worker” into labor statutes to expand coverage beyond traditional employees.¹⁹³ The 1995 Ontario Labor Relations Act defines the dependent worker as encompassing both contracted and uncontracted workers who are “in a position of economic dependence upon, and under an obligation to perform duties for, [another] person more closely resembling the relationship of an employee than that of an independent contractor.”¹⁹⁴ In 1992, the Ontario Labor Relations Board, an independent body that, like the NLRB, adjudicates labor disputes, decided that drivers working for a taxi dispatcher who “derive[d] a substantial proportion of their income on a regular basis” from fares obtained via the dispatcher’s system should properly be classified as dependent contractors.¹⁹⁵ Recently, in the context of the gig economy, the NLRB ruled that delivery couriers working for food-delivery app Foodora were employees.¹⁹⁶

While this system has not yet gained traction in the United States, some scholars have proposed that the third category may encompass workers occupying the legal gray area; those sharing qualities with both traditional employees and independent contractors.¹⁹⁷ To these supporters, it is not clear that the platform intermediary should bear responsibility for their

192. See Pearce & Silva, *supra* note 12, at 30. See generally SETH D. HARRIS & ALAN B. KRUEGER, THE HAMILTON PROJECT, A PROPOSAL FOR MODERNIZING LABOR LAWS FOR TWENTY-FIRST-CENTURY WORK: THE “INDEPENDENT WORKER” (2015).

193. See Miriam A. Cherry & Antonio Aloisi, “*Dependent Contractors in the Gig Economy: A Comparative Approach*,” 66 AM. U. L. REV. 635, 653 (2017); see also David Doorey, *The Classification of “Gig” Workers in Canadian Work Law*, ON LAB. (July 7, 2020), <https://onlabor.org/the-classification-of-gig-workers-in-canadian-work-law/> [<https://perma.cc/W5V6-XPR9>]. The “dependent contractor” status has been introduced into some but not all employment legislation in Canada — for example, while the dependent contractor is included in collective bargaining legislation, it is not yet incorporated into wage standards laws. See Ryan White, *How the Ontario Labour Board Ruled Foodora Workers Are “Employees” and Not Independent Contractors*, L. WORK (Mar. 5, 2020), <https://lawofwork.ca/how-the-ontario-labour-board-ruled-foodora-workers-are-employees/> [<https://perma.cc/R5SC-NQXS>].

194. Labour Relations Act § 1.

195. See *Retail, Wholesale & Dep’t Store Union (AFL) v. Diamond Taxicab Ass’n (Toronto) Ltd.*, 1992 CanLII 6786, ¶ 45 (Can. Ont. Lab. Rels. Bd. 1992).

196. See White, *supra* note 193.

197. Opponents of according gig workers “full” employment status cite their ability to choose to work — or not at all. As such, the employment relationship can be “fleeting, occasional, or constant, at the discretion of the *independent worker*.” See HARRIS & KRUEGER, *supra* note 192, at 9. On the other hand, the gig worker resembles the employee insofar as an intermediary controls “some aspects of the methods and means of work.” *Id.* at 10.

financial stability or expenses incurred from an on-the-job injury.¹⁹⁸ Former Deputy Secretary of Labor Seth Harris and Princeton economist Alan Krueger identify the gig worker as the prototypical “independent worker,” typically one who is staffed on a job via an intermediary.¹⁹⁹ Others view the archetypal “dependent contractor” as one who is financially dependent on one or a small selection of employers, the theory being that employer control is linked with employee dependency.²⁰⁰

To create this third category, Harris and Krueger suggest omnibus legislative reform.²⁰¹ Among the rights accounted for in their legislative overhaul are the “freedom to organize and collectively bargain,” the ability to pool resources to purchase a range of services, tax withholding for Federal Insurance Contributions Act payroll taxes, workers’ compensation insurance, “wage and hour protections and unemployment insurance,” and health insurance.²⁰²

Proponents of an independent worker classification argue that instead of granting employee status for purposes of the employment statutes, various mechanisms would ensure independent workers receive needed rights. For example, via injunctions or other remedies, courts could ensure that antitrust laws did not impede the independent worker from bargaining collectively.²⁰³ Additionally, disability insurance and health care would be made accessible to independent workers via insurance pools. A safe-harbor provision would be crafted to ensure that offering such workers these benefits would not falsely indicate employee status.²⁰⁴

B. Challenges of a Third Category

While the proposal is a noble attempt to afford greater protections to gig workers, it is doubtful that a tripartite system would provide needed certainty for workers and employers. One challenge with creating a “third” category is that it may create more problems than it solves. Already a difficult task to ascertain who falls within the two extant categories, a third category is bound only to compound the problem.²⁰⁵ Instead of clarifying the distinction

198. *See id.* at 6, 19 (“[Independent workers] are not true independent businesspeople But their relationships with intermediaries are not so dependent, deep, extensive, or long lasting that we should ask these intermediaries to assume responsibility for all aspects of independent workers’ economic security.”).

199. *See id.* at 22.

200. *See* Pearce & Silva, *supra* note 12, at 30.

201. *See* HARRIS & KRUEGER, *supra* note 192, at 15.

202. *Id.* at 15–21.

203. *See id.* at 16–17.

204. *See id.* at 17.

205. For example, as in tribunals in jurisdictions with the third category, instead of deciding disputes over independent contractor or employee status, courts would need to determine

between the two existing categories of workers, the addition of the third test would likely only shift the analysis.²⁰⁶ Additionally, in countries where a third category has been implemented, such as in Canada, the addition has effectively resulted in an expansion of the definition of employee.²⁰⁷ If amending the definition of employee would achieve the same result, the benefit of adding a third category is not clear.

For example, it is not apparent how a third category of worker, regardless of nomenclature, differs in outcome from the employee defined by the economic realities test. As discussed earlier, the economic realities test is supposed to — in addition to examining traditional aspects of control — account for the economic dependency of the worker on the hiring entity.²⁰⁸ Furthermore, a widespread legislative overhaul acknowledging a third category and granting workers certain employment rights seems unlikely to gain traction, given the lack of support in the Senate for the Protecting the Right to Organize Act.²⁰⁹

Adding a third category to the mix also creates a practical challenge in providing the collective benefits that Harris and Krueger envision for independent workers, including collective bargaining, health and disability insurance, and retirement benefits.²¹⁰ For example, effective organizing for the purpose of collective bargaining requires forming bargaining units that have similar working conditions, methods of compensation, benefits, supervision, and, importantly, contact with one another.²¹¹ Would dependent workers and employees comprise the same bargaining unit? Intermediaries purchasing group insurance plans would also face the task of sorting out which workers had access to these plans. Theoretically, they would have to sponsor multiple insurance plans — those for employees and dependent workers.

These challenges suggest that maintaining the existing dichotomy is the more workable option — Part III address a proposal of concentric circles to accord workers the benefits and protections they deserve.

whether an employer had properly classified a worker as a dependent or independent contractor. *See* Pearce & Silva, *supra* note 12, at 33.

206. *See id.* at 33.

207. *See* Cherry & Aloisi, *supra* note 193, at 655.

208. *See supra* Section I.B.ii.

209. *See* Jennifer G. Prozinski & Karel Mazanec, *The PRO Act: Congress to Consider Landmark Changes to the NLRA*, VENABLE (Apr. 23, 2021), <https://www.venable.com/insights/publications/2021/04/the-pro-act-congress-to-consider-landmark> [<https://perma.cc/5ZMZ-254S>].

210. *See* HARRIS & KRUEGER, *supra* note 192, at 17.

211. *See* Blue Man Vegas, LLC v. NLRB, 529 F.3d 417, 421 (D.C. Cir. 2008).

III. MAINTAINING THE DICHOTOMY WITH REFORM: ANALYZING WORKERS' RIGHTS AND EMPLOYMENT BENEFITS THROUGH THE CONCENTRIC CIRCLES LENS

Recognizing that gig workers do not fit neatly into either the employee or the independent contractor model, Tanya Goldman and David Weil²¹² urge policymakers to reconsider which party or parties should bear responsibility for providing workplace protections and benefits.²¹³ They envision a theoretical framework wherein rights are accorded in “concentric circles,” starting with an “Inner Circle” of protections afforded all workers, and emanating outward to a “Middle Circle of rights, protections, and related responsibilities.”²¹⁴ This so-called middle circle “operates on a *presumption of employment*,” where the employer is presumptively responsible for providing rights unless the employer proves otherwise.²¹⁵ The remaining “Outer Circle” aims to clarify which party is responsible for providing and funding “a range of portable benefits.”²¹⁶

Goldman and Weil maintain that certain fundamental protections should be afforded to all those who perform work regardless of legal employment status.²¹⁷ As such, the Inner Circle would guarantee all workers protection against discrimination and retaliation, a safe and healthy workplace, fair compensation, and the “right to engage in acts for mutual aid and protection.”²¹⁸

The Middle Circle is dependent on employment status. Still, the burden is on the putative employer to disprove that the worker is an employee by satisfying a revised version of the ABC factors.²¹⁹ The Middle Circle includes “the right to overtime under the FLSA, the right to organize and be represented through collective bargaining under the NLRA, and safety net protections, including access to workers’ compensation and unemployment insurance.”²²⁰ In deciding how best to assure that the appropriate workers are afforded these rights, Goldman and Weil explore the possibility of the economic realities test but ultimately reject it in favor of a revised version of the ABC test.²²¹ Goldman and Weil envision an ABC test that incorporates some of the factors from the economic realities test that, in their view, make

212. *See generally* Goldman & Weil, *supra* note 27.

213. *See id.* at 70.

214. *Id.* at 88.

215. *Id.*

216. *Id.* at 89.

217. *See id.*

218. *Id.* at 89–90.

219. *See id.* at 101.

220. *Id.*

221. *See id.* at 103.

it meaningful, particularly in the context of the modern “fissured workplace.”²²² They suggest that the ability to set prices and thereby incur a profit or loss is particularly indicative of a legitimate independent contractor.²²³

The Outer Circle comprises a set of benefits that employers are incentivized but “not legally required to provide to legitimate independent contractors.”²²⁴ For individuals classified as employees under the revamped ABC test, employers would contribute to workers’ compensation and unemployment insurance systems “based on hours worked rather than under the assumption of a relatively fixed number of permanent employees.”²²⁵ Independent contractors, on the other hand, would pay into these “risk pools” through their own or their customers’ contributions.²²⁶

IV. APPLICATION OF THE CONCENTRIC CIRCLES TO THE GIG UNIVERSE AND PROPOSAL FOR MODIFICATION

This Part analyzes the application of the Concentric Circles approach to the gig universe and agrees with the core aspects of the theory while also expressing hesitation regarding the distribution of certain rights. Goldman and Weil propose the Concentric Circles approach, in part, in response to the corrosive effects of the fissured workplace,²²⁷ including the platform business model, on workers’ rights.²²⁸ It is worth exploring in greater detail how the layered rights and benefits they envision would work in conjunction with this segment of the workforce. The “gig” workforce is uniquely positioned insofar as workers perform short-term tasks to multiple clients; yet, their ability to set prices, retain compensation for their work, and establish a customer base is largely limited by the interposition of the third-

222. See *id.* at 111–12; see also *infra* note 227. See WEIL, *supra* note 3, at 15 for an overview of the concept of a fissured workplace.

223. See Goldman & Weil, *supra* note 27, at 112–13. In addition, Goldman and Weil propose that the following factors be examined in the course of their ABC-like analysis: whether the worker sets quality standards, “set[s] key product or service standards; oversee[s] the marketing and development of products; and make[s] decisions affecting the cost of service provision or production.” *Id.* at 113.

224. *Id.*

225. *Id.* at 114.

226. Workers’ compensation and unemployment insurance benefits would reflect contribution levels. The Outer Circle would also create mechanisms for “non-mandatory benefits” retirement fund programs, outside of Social Security or “traditional employer-based systems.” *Id.* at 115.

227. The fissured workplace refers to Weil’s foundational concept of the modern business model, which shifts business activities that do not form the central output of the business to outside organizations, and in pertinent part, focuses on reducing wages and minimizing benefits. See WEIL, *supra* note 3, at 7–9, 15.

228. See Goldman & Weil, *supra* note 27, at 65.

party intermediary. Therefore, there are factors that render implementation of these rights a challenge.

The Inner Circle comprises antidiscrimination and retaliation protection, the right to a safe and healthy workplace, the right to remuneration and a minimum wage, and the right to engage in acts for mutual aid and protection.²²⁹ Few would deny that all workers deserve such basic civil rights. Moreover, congressional intent for these rights to apply broadly is reflected in the statutory purpose of Title VII, the Occupation Safety and Health Act (OSHA), the FLSA, and the NLRA.²³⁰ However, the implications for the gig economy need to be fully fleshed out to determine if the scheme is workable.

Affording gig workers the right against discrimination is feasible, though enforcement mechanisms will need to be carefully considered. First, there is precedent for widened application of federal antidiscrimination law — Title VII's application is not limited to current employees but extends to applicants and former employees.²³¹ Therefore, applying the law more broadly is not a big leap. Intermediaries will need to budget for increased legal fees, as they will need to take responsibility for enforcement of this right, given that they are the parties more able to bear the financial burden of pursuing legal action administratively or in court. With respect to holding accountable involved parties, the online intermediary should be helpful in that such apps necessarily retain users' personal data.²³² To ensure that platform workers have a cause of action, Title VII's definition of employee should encompass workers for platform intermediaries.

The right to a safe and healthy workplace, as envisioned by OSHA, is complicated for several reasons. For one, the nature of the jobs that gig workers perform is inherently temporary. On any one day, a worker providing cleaning or maintenance services on behalf of Handy²³³ could find

229. *See id.* at 89–90, 97. Mutual aid and protection includes any action that workers take to better working conditions. *See id.* at 100. Weil and Goldman argue that all workers should be able to engage in such acts without fear of retaliation. *See id.*

230. National Labor Relations Act, 29 U.S.C. § 151; *see also id.* § 202; EEOC v. Nalbandian Sales, Inc., 36 F. Supp. 2d 1206, 1210 (E.D. Cal. 1998) (applying Title VII to third-party retaliation claim and describing the statute's broad remedial purpose); *About OSHA*, U.S. DEP'T LAB., <https://www.osha.gov/aboutosha> [<https://perma.cc/F5B4-D5XW>] (last visited Feb. 23, 2022).

231. *See* 42 U.S.C. § 2000e-2.

232. *See* Prableen Bajpai, *How Uber Uses Your Ride Data*, INVESTOPEDIA (Sept. 20, 2021), <https://www.investopedia.com/articles/investing/030916/how-uber-uses-its-data-bank.asp> [<https://perma.cc/MFD9-KK8P>].

233. Handy is an app-based home cleaning, maintenance, and installation business. *All Services*, HANDY, <https://www.handy.com/services> [<https://perma.cc/2JGR-9A4H>] (last visited Feb. 23, 2022).

themselves working in several “workplaces.”²³⁴ Would Handy be responsible for ensuring that each customer’s home provided acceptable working conditions?²³⁵ In the context of crowdwork, where workers perform jobs remotely — and in many cases from home — OSHA could provide standards that platforms such as Amazon Mechanical Turk and Upwork would have to follow or else be subject to citation.²³⁶ Also, though this Note agrees that all workers should be entitled to a safe and healthy workplace, the question arises as to which employer would be subject to citations if a worker receives jobs through several platforms. In many European countries, for example, a worker acquires dependent worker status if she derives a certain percentage of her income from the employer.²³⁷ If responsibility is allocated based on the percentage of work, that could very well cause problems of uncertainty for employers and workers and might be particularly complex if an employee derived income from many different sources at one time.²³⁸

While undoubtedly being compensated appropriately for work performed is an essential right, even the right to the federal statutory minimum wage runs into certain challenges in the context of the gig economy. As an initial matter, workers should be assured prompt remuneration for any service performed.²³⁹ However, guaranteeing a minimum wage requires further consideration.²⁴⁰ As alluded to earlier, platform companies, such as Uber

234. See Masha Goncharova, *Ride-Hailing Drivers Are Slaves to the Surge*, N.Y. TIMES (Jan. 12, 2017), <https://www.nytimes.com/2017/01/12/nyregion/uber-lyft-juno-ride-hailing.html?searchResultPosition=1> [<https://perma.cc/4FQ9-9BKM>] (suggesting that a worker could simultaneously work for more than one app “workplace” at one time).

235. The Occupational Safety and Health Administration has addressed the issue of traditional employees working from home but has not specifically addressed gig working arrangements. See Letter from Richard E. Fairfax, Dir., Directorate of Compliance Programs, Occupational Safety & Health Admin., to T. Trahan, CSC Credit Svcs. (Nov. 15, 1999), <https://www.osha.gov/laws-regs/standardinterpretations/1999-11-15> [<https://perma.cc/TMJ3-J7YQ>].

236. See Michael ‘Six’ Silberman et al., *Crowd Work and the ‘On-Demand’ Economy*, EUR. TRADE UNION INST. (2017), <https://www.etui.org/topics/health-safety-working-conditions/hesamag/the-future-of-work-in-the-digital-era/crowd-work-and-the-on-demand-economy> [<https://perma.cc/3F2M-YK55>]. In addition to promulgating standards, OSHA can also cite employers for providing a hazardous workplace under OSHA’s “General Duty” clause. See Occupational Safety and Health Act of 1970, 29 U.S.C. § 654(a)(1). Perhaps in the context of crowdwork, platforms could be required to subsidize workers’ home office equipment to a certain extent.

237. See Felicia Rosioru, *Legal Acknowledgement of the Category of Economically Dependent Workers*, 5 EUR. LAB. L.J. 279, 289–90 (2014).

238. See *id.* at 294 (discussing the issue of how to determine economic dependency on one employer).

239. See Goldman & Weil, *supra* note 27, at 98.

240. As Goldman and Weil suggest, this could be assured via contract law remedies and under different legal remedies associated with the form of work. See *generally id.*

and Lyft, alter their prices in reaction to increased customer demand, spurring certain drivers to choose to work during these more profitable hours.²⁴¹ Would all drivers be guaranteed the same base rate of pay, regardless of when they worked? Uber could conceivably push back, saying that a worker driving on a slow weekday night should not be guaranteed the same rate of pay as a worker driving during rush hour. What is more, Uber and other platforms have and likely would continue to argue that workers should not be compensated for idle time, as in time spent between jobs.²⁴² How and whether to account for non-working yet “active” time — time spent engaging with the app but not performing a job — should be considered.

Goldman and Weil are not unique in their proposal that platform workers should have the right to organize. Workers’ rights advocates and workers themselves have urged policy reform in this area.²⁴³ The ability to bargain collectively has the potential to catalyze major improvements in the working conditions of platform workers. However, the collectivity and community of shared interests that bargaining depends upon is less dependable in the platform economy than in the traditional workplace, where workers naturally have the opportunity to congregate.²⁴⁴ However, because of technology’s ability to facilitate communication, organizing is certainly possible among gig workers.

Considering that gig workers are spatially isolated, exercising the right to organize and engaging in acts for mutual protection could provide a challenge.²⁴⁵ The inherently varied nature of the work performed for these apps and the fissured business models make it difficult to target collective interests for reform. That is, Uber drivers do not have an identifiable “supervisor” who sets terms and conditions of employment — these are

241. *See id.* at 21.

242. Platform companies are quick to point out that workers may spend time scanning more than one “app” in search for customers, arguing that this time spent disengaged from the platform may not be counted as working time. *See* Faiz Siddiqui, *Uber, Other Gig Companies Spend Nearly \$200 Million to Knock Down an Employment Law They Don’t Like — And It Might Work*, WASH. POST (Oct. 26, 2020), <https://www.washingtonpost.com/technology/2020/10/09/prop22-uber-doorDash/> [<https://perma.cc/T2TH-BTRQ>] (discussing Prop 22, for which platform companies lobbied, and its exclusion of payment guarantees for idle time); *see also* Natasha Singer & Mike Isaac, *An App That Helps Drivers Earn the Most from Their Trips*, N.Y. TIMES (May 9, 2015), <https://www.nytimes.com/2015/05/10/technology/a-dash-board-management-consultant.html> [<https://perma.cc/J2MX-2C7S>].

243. *See generally* Figueroa, *supra* note 49.

244. *See* Michael David Maffie, *The Role of Digital Communities in Organizing Gig Workers*, 59 INDUS. RELS. 123, 123 (2020).

245. It is not entirely clear whether Goldman and Weil support all workers’ right to unionize or whether they envision protecting only other forms of concerted activity. *See* Goldman & Weil, *supra* note 27, at 99–101. However, unionization and collective bargaining would pose problems in the context of gig workers.

instead controlled by corporate executives far removed from workers.²⁴⁶ Companies, in turn, would likely argue that algorithms determine much of the working conditions. Selecting an appropriate bargaining unit when workers do have varying conditions and potentially, interests, could pose a challenge but would not be impossible.²⁴⁷

Instead of guaranteeing this right regardless of employment status, a version of the economic realities test should control determinations of whether a worker is an employee for purposes of the right to organize. As discussed earlier, courts already employ the economic realities test for purposes of FLSA.²⁴⁸ This revised test would more accurately capture the economic dependency of the gig worker on the putative employer, omitting factors such as investment in equipment and materials, and instead of looking to the permanence of the working relationship, would ask what percentage of a worker's income she derived from her work for a given platform.²⁴⁹ Administrative guidance from the NLRB to this effect would ensure that gig workers are not excluded by courts.

A version of the economic realities test reflecting the economic dependency of the worker on a platform should also govern unemployment insurance determinations. That is, all hiring entities should be required to contribute to unemployment insurance funds on behalf of workers who are economically dependent on their employer. A 50% threshold makes sense because if a worker derives the majority of her income from a particular entity, she is financially dependent on that employer.²⁵⁰ An economic dependency analysis raises the question of over what period of time is the person's income analyzed.²⁵¹ A period of one month might simplify calculations and exclude workers who work for particular platforms on a very temporary basis. A version of the economic realities test with a factor analyzing economic dependency also makes sense in light of the purpose of unemployment insurance laws — to pressure employers to share in the financial burden of unemployment and to relieve state governments of some of this responsibility.²⁵²

246. See, e.g., WEIL, *supra* note 3, at 14.

247. See generally Jin et al., *supra* note 17.

248. See *supra* Section I.B.ii.

249. This test would reflect rules in Spain and Germany, where if a worker derives 75% and 50% of her income from an employer, economic dependency is established. See Rosioru, *supra* note 237, at 294.

250. See *id.*

251. See *id.*

252. See, e.g., Daniel Nelson, *The Origins of Unemployment Insurance in Wisconsin*, 51 WIS. MAG. HIST. 109, 118 (1967–68).

A. The ABC Test Alone Should Determine Accountability for Workplace Injury

Under Goldman's and Weil's approach, workers' compensation benefits would be presumptively accorded if the worker satisfied the ABC test in addition to certain factors of the economic realities test.²⁵³ This Note agrees that the ABC test should be applied but does not view the added economic realities factors as necessary in this context.

Placing sole responsibility for workplace injury on workers themselves is unfair, particularly for those reliant on such work to earn a living.²⁵⁴ Inspection of both the third category and the Concentric Circles approaches reveals that certain work-related injuries will not be accounted for, thereby burdening economically precarious workers. Inevitably, workers who are found not to be "dependent" per Harris and Krueger's scheme will lack coverage. Likewise, workers who do not satisfy the heightened ABC test-economic realities hybrid entitling them to "middle circle" protections will need to rely on the goodwill of employers who volunteer to contribute towards workers' compensation and unemployment insurance funds on behalf of their workers.²⁵⁵

The ABC test has the greatest potential to provide coverage to workers who are most deserving of workplace injury insurance and certainty for employers, workers, and state agencies. It only makes sense that employers should take responsibility for mitigating risks associated with the services they provide, which the ABC test would ensure.²⁵⁶ However, if the ABC test is to carry out this potential, it must be enacted in the form that the *Dynamex* Court laid out.²⁵⁷ As discussed above, the political variations spawned by implementation in differing legislative climates stand in the way

253. Goldman and Weil view the capacity to "set price, quality, and service levels" as important indicators of employer status (in addition to the application of the ABC test). See Goldman & Weil, *supra* note 27, at 112. In the context of gig workers working for location-based platforms, this factor would militate towards employee status, given that platforms set pricing and service standards.

254. See Monica Anderson et al., *The State of Gig Work in 2021*, PEW RSCH. CTR. (Dec. 8, 2021), <https://www.pewresearch.org/internet/2021/12/08/the-state-of-gig-work-in-2021/> [<https://perma.cc/YBG6-VWLA>] (reporting that 23% of workers for technological platforms rely on income generated through such platforms). As discussed in *supra* Section I.B.iii, the ABC test is not currently the law for purposes of workers' compensation in the overwhelming majority of states. In other states, vague statutory definitions and the common law right to control test govern. This leaves workers without certainty that they will be compensated for debilitating on-the-job injuries.

255. See *supra* notes 214–26.

256. See *supra* Section I.B.iii. The B prong analyzes whether the worker is performing the business's core work. If the worker is carrying out such work and that work carries a risk, the employer should bear some responsibility for mitigation.

257. See *supra* note 124 and accompanying text.

of its success.²⁵⁸ Uniformity is particularly important across all states, especially in the transportation industry, where workers may often traverse jurisdictional lines with frequency.

B. Contribution to Collective Funds Should Be Mandatory

As part of the Outer Circle, Goldman and Weil suggest that employers could voluntarily contribute to worker compensation, unemployment insurance, and retirement funds based on hours worked.²⁵⁹ These contributions would go towards supporting platform workers who are classified as “true” independent contractors after the application of the ABC-economic-realities test. While these pools would appropriately allow employers to contribute funds to cover truly independent workers performing jobs on behalf of platforms, more pressure is needed to ensure the funds’ viability. As it is difficult to imagine employers — particularly “fissured” corporations yearning to cut labor costs²⁶⁰ — voluntarily providing for any extraneous benefit, employers should be required to contribute a certain amount per profit towards these funds. This would address potential difficulties in assessing how much to contribute on behalf of each worker.²⁶¹

Goldman’s and Weil’s Concentric Circles approach rightly accords basic rights to all workers, regardless of legal status; that said, their implementation in the context of the gig economy could provide challenges that need to be carefully considered. Moving outward, this Part has agreed that a test is necessary to determine which workers should be accorded the next “tier” of rights, including unemployment insurance and workers’ compensation benefits. This Part has agreed that, for purposes of unemployment insurance, a version of the economic realities test should apply. For purposes of workers’ compensation, differing from Goldman’s and Weil’s approach, this Note has argued that the ABC test is the best solution.

CONCLUSION

The employment status of “gig” workers remains an open question in many states and is subject to change at the federal level. In continuing efforts to regulate the gig economy, courts, policymakers, and legislators should be aware of the need for uniformity in this area so that workers with the same

258. *See supra* Section I.B.ii.

259. *See* Goldman & Weil, *supra* note 27, at 113–14.

260. *See* WEIL, *supra* note 3, at 126, 139–40.

261. Uber itself has suggested requiring gig companies to establish benefit funds, indicating at least some stakeholders support the notion. *See* Khosrowshahi, *supra* note 19.

job description are not employees for one purpose in one state and independent contractors in another state. While changes are needed to ensure workers receive appropriate rights, this Note has argued that maintaining the existing employee-independent contractor dichotomy is workable.

As a matter of human rights, all who perform work, no matter their legal status, should have confidence they will receive minimum compensation for work performed and that they will have protection against discrimination. Moreover, workers subject to injury on the job should be rest assured that they can seek employer-sponsored insurance coverage — employers who hire workers to perform work with inherent risks should generally be held responsible for such injuries. Further, a version of the economic realities test should be uniformly enacted to ensure unemployment insurance contributions on behalf of those who are dependent on a single employer. These reforms will more properly relieve states of the financial burden and appropriately require the employer to bear some responsibility for supporting workers who perform the core function of its business.