
WAKE FOREST JOURNAL OF BUSINESS
AND INTELLECTUAL PROPERTY LAW

VOLUME 16

SPRING 2016

NUMBER 3

**KEEPING FREEDOM IN FREELANCE: IT'S TIME FOR GIG
FIRMS AND GIG WORKERS TO UPDATE THEIR
RELATIONSHIP STATUS**

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I. INTRODUCTION

A new way of working in the American economy is developing, and it is time for the law to catch up. A new kind of worker, the “gig worker,” is rapidly growing in prominence. Gig workers go by many other names, but are perhaps most popularly exemplified by drivers for Uber Technologies, Inc. (“Uber”).¹ Uber and other companies doing business in the “access economy”² see themselves not as employers, but as conduits between those who need jobs done on-demand and those who can and will do work on an ad hoc basis.³ Gig workers themselves are gravitating toward this method of work because the trappings of traditional employment have become undesirable to them.⁴ This new way offers entrepreneurial opportunity to those who will take it.

A noisy minority of gig workers are unsatisfied with the consequences of starting a micro-business because they want the flexibility of entrepreneurialism without the sacrifice.⁵ Taking advantage of outmoded laws that determine whether a worker is properly classified as an employee or an independent contractor, these frustrated freelancers are putting at risk an experiment about which so many others are enthusiastic, including gig workers, gig firms, consumers, and venture capitalists.⁶ Litigation over gig worker misclassification highlights the absurdity of forcing “square pegs” into “one of two round holes.”⁷

The binary choice between classification as either an employee or

¹ Antonio Aloisi, *Commoditized Workers* 14 (Aug. 4, 2015) (unpublished Ph.D. thesis, Luigi Bocconi University), available at <http://ssrn.com/abstract=2637485>.

² Gina M. Eckhardt & Fleura Bardhi, *The Sharing Economy Isn't About Sharing at All*, HARV. BUS. REV. (Jan. 28, 2015), <https://hbr.org/2015/01/the-sharing-economy-isnt-about-sharing-at-all> (clarifying that “access” is a more appropriate term than “sharing” or “peer” where goods and services are being commercially bought and sold, rather than exchanged freely).

³ See, e.g., *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067, 1078 (N.D. Cal. 2015); *O'Connor v. Uber Tech., Inc.*, 82 F. Supp. 3d 1133, 1141 (N.D. Cal. 2015).

⁴ See Jonathan Hall & Alan Krueger, *An Analysis of the Labor Market for Uber's Driver-Partners in the United States* 3 (Princeton Univ. Indus. Relations Section, Working Paper No. 587, 2015), available at <http://dataspace.princeton.edu/jspui/handle/88435/dsp010z708z67d>.

⁵ Natasha Singer, *In the Sharing Economy, Workers Find Both Freedom and Uncertainty*, N.Y. TIMES (Aug. 16, 2014), http://www.nytimes.com/2014/08/17/technology/in-the-sharing-economy-workers-find-both-freedom-and-uncertainty.html?_r=0.

⁶ See Serena Saitto, *Uber Valued at \$40 Billion in \$1.2 Billion Equity Funding*, BLOOMBERG BUS. (Dec. 4, 2014, 12:21 PM), <http://www.bloomberg.com/news/articles/2014-12-04/uber-valued-at-40-billion-with-1-2-billion-equity-fundraising> (demonstrating enthusiasm by discussing Uber's tremendous growth).

⁷ *Cotter*, 60 F. Supp. 3d at 1081–82.

an independent contractor, under traditional concepts, is a forced dichotomy that ought to be rendered false. One proposed method for achieving this end is for creative legislators to develop a third designation.⁸ Some commentators call for this new “dependent contractor” status,⁹ while others argue for modifications to the existing tests for employment status.¹⁰ The tests that are currently applied by the courts are convoluted, contrived, and simply inappropriate for gig workers.¹¹

Media coverage sensationalizes the ways that gig work is not right for everyone by presenting the pitfalls so dramatically as if to say that it should not be a choice at all.¹² Surely common sense dictates that one cannot expect to become independently wealthy simply by testing the waters of gig work. Micro-entrepreneurs should not be exempted from the risks that are attendant with any new business venture. Effort should of course be made to ensure fairness, but also informed decision-making. Contracts presented in click-wrap agreements that are easy to enter do discourage mindfulness,¹³ and other bargaining inequalities need to be considered.¹⁴ Even so, these concerns should provide no excuse for irresponsibility on the part of entrants to the gig workforce wanting conduit companies to pay handsome rewards and absorb all the risks.¹⁵

Gig workers should be allowed to operate as companies in their own right, engaging in freelance jobs to the degree they desire. The range spans from developing a hobby or earning supplemental income, up to fashioning a new career or creating a gig subcontractor firm and anywhere in between.¹⁶ Forcing employment status on gig workers will

⁸ Lauren Weber, *What if There Were a New Type of Worker? Dependent Contractor*, WALL ST. J. (Jan. 28, 2015, 10:28 AM), <http://www.wsj.com/articles/what-if-there-were-a-new-type-of-worker-dependent-contractor-1422405831>.

⁹ *Id.*

¹⁰ See, e.g., Robert Sprague, *Worker (Mis)Classification in the Sharing Economy: Square Pegs Trying to Fit in Round Holes*, 31 A.B.A. J. LAB. & EMP. L. 1, 23 (2015).

¹¹ See generally *Cotter*, 60 F. Supp. 3d at 1067; *O'Connor v. Uber Tech., Inc.*, 82 F. Supp. 3d 1133 (N.D. Cal. 2015).

¹² Denise Cheng, *Reading Between the Lines: Blueprints for a Worker Support Infrastructure in the Peer Economy 3* (May 8, 2014) (unpublished M.S. thesis, Mass. Inst. Tech.) (on file with author), available at <http://hellodenise.com/mit-thesis.pdf>.

¹³ See Alek Felstiner, *Working the Crowd: Employment and Labor Law in the Crowdsourcing Industry*, 32 BERKELEY J. EMP. & LAB. L. 143, 171 (2011).

¹⁴ Aloisi, *supra* note 1, at 7–11.

¹⁵ See *id.* at 8–9.

¹⁶ See FREELANCERS UNION & ELANCE-ODESK, *Freelancing in America: A National Survey of the New Workforce*, 4–7, <https://fu-web-storage->

not only destroy the financial incentives that allow these fledgling businesses to obtain capital, but will obviate the *raison d'être* for gig work: freedom from employer control. Few companies will pay the price of employment without exerting maximum control in order to recognize an adequate return on that investment.

The current but outdated method of worker classification essentially creates a vague definition of an independent contractor as anyone who is not an employee.¹⁷ This allows numerous ways that a worker can be overprotectively pigeonholed into employee status.¹⁸ This is true because the concept of independent contract work is based on a stale model.¹⁹ It was once sensible that the independent contractor designation was limited to skilled laborers who provide a finished product, free from interference in the process. No longer should this be; “independent” need not equate to working entirely without sensible guidelines or restrictions.

There is a strong need for small jobs to be done frequently by workers who have the time, tools, ability, and desire.²⁰ Market inefficiency is the problem that the still-developing “access economy” is designed to address.²¹ Allowing conduit companies to provide streamlined methods in support of effective branding is good for the gig worker, who could not otherwise reach the same audiences with the same consistency.²² Some aspects of gig work should be developed through the science of business, rather than by confused jurors or inflexible statutes. Successful companies will be those that manage to satisfy the people on both ends of the transactions they facilitate: gig workers and those that pay for the goods and services offered.

This comment will first discuss the existing rigid division between employees and independent contractors, and how it applies to gig workers and the companies that connect them with ad hoc jobs. Thematically, the argument that follows will be that the “access economy” method of connecting the supply of service providers with demanding consumers is indeed something new that should be treated as such. Culturally familiar notions of work should not prevent change that keeps pace with the needs and desires of society. Some level of worker protection is valuable, but ever-expanding entitlements

prod.s3.amazonaws.com/content/filer_public/7c/45/7c457488-0740-4bc4-ae45-0aa60daac531/freelancinginamerica_report.pdf (last visited Jan. 31, 2016).

¹⁷ See Sprague, *supra* note 10, at 6–8.

¹⁸ See *id.* at 9–10.

¹⁹ See *id.* at 21–22.

²⁰ See Cheng, *supra* note 12, at 24–26.

²¹ See *id.* at 26.

²² *Id.* at 25.

unreasonably constrict the free market flow of labor.²³ Gig work has only begun to tap the potential of unused resources that can eliminate inefficiencies and promote growth.

Gig workers, particularly millennials, want the freedom to experiment and develop their own styles and combinations of work and personal life.²⁴ Consumers crave on-demand services (Uber for everything!²⁵) to fulfill a growing set of needs and desires. Firms want to facilitate the connection between gig workers and consumers. The surface of possibilities in this arena has barely been scratched, yet a dissatisfied few want to risk throwing the gig work baby out with the murky bathwater of regulations and preposterous common law tests.²⁶

II. BACKGROUND

A. Gig Work—What it is, Who is Doing it, and Why

First, understand that gig work is not about sharing.²⁷ Second, there are many different kinds of work that people are doing on an ad hoc basis, and there is room for more. Some do not require any special skill; others do.²⁸ There is potential for gig workers to develop and refine new skills, discover new talents and passions, or just subsidize some other expanding or changing part of their lives. Whether by working in a single job genre or a combination of several, not everyone who does gig work wants to make a career out of it.²⁹

²³ See, e.g., Chris Conover, *How the Affordable Care Act Reduces Our Liberty*, FORBES (Aug. 10, 2012, 9:51 AM), <http://www.forbes.com/sites/chrisconover/2012/08/10/how-the-affordable-care-act-reduces-our-liberty/#2b3aee072fd5>.

²⁴ Elly Leavitt, *Rise of Gig Economy Highlights Changing Job Ideals Among Millennials*, USA TODAY COLLEGE (Aug. 7, 2015, 1:00 PM), <http://college.usatoday.com/2015/08/07/gig-economy-millennials/>.

²⁵ Geoffrey A. Fowler, *There's an Uber for Everything Now*, WALL ST. J. (May 5, 2015, 1:09 PM), <http://www.wsj.com/articles/theres-an-uber-for-everything-now-1430845789>.

²⁶ See *Regulating the Gig Economy*, WORLD BANK (Dec. 22, 2015), <http://www.worldbank.org/en/news/feature/2015/12/22/regulating-the-gig-economy>.

²⁷ Eckhardt & Bardhi, *supra* note 2.

²⁸ Neil Howe, *The Gig Economy is Alive and Growing*, INS. THOUGHT LEADERSHIP, <http://insurancethoughtleadership.com/the-gig-economy-is-alive-and-growing/> (last visited Nov. 3, 2015).

²⁹ Kia Kokalitcheva, *Uber CEO: Most Drivers Work Too Little to Be Considered Full Time Employees*, FORTUNE (Oct. 21, 2015, 1:49 AM), <http://fortune.com/2015/10/21/travis-kalanick-part-time-drivers/>.

1. *Gig work is not about “sharing”*

The term “sharing economy” is used appropriately when referring to peer-to-peer networks that facilitate the optimal use of a resource that cannot be fully consumed by one individual alone.³⁰ Ridesharing, for example, still exists where two or more people, typically strangers who become acquainted only by the use of a virtual network, pile into one car for a daily commute,³¹ or even a single trip. Some altruism, even if directed at environmental rather than philanthropic concerns, is necessarily present in the properly termed “sharing economy.”³² This is also sometimes referred to as “collaborative consumption.”³³

A different dynamic is present when the goods consumed, or the services provided, are offered only in exchange for compensation.³⁴ The term “access economy” has been proffered³⁵ and is more apt to describe what is discussed here, that being ad hoc jobs or “gig work” for pay. Whatever the ideal terminology may be, references to “sharing” will be minimized here to avoid giving the impression that gig workers are not at all concerned about getting paid, despite the truth that money is not the only, or even always the most critical, motivation for every person who decides to do gig work.³⁶

2. *Gig work genres: “there’s an Uber for that”³⁷*

Uber is presently one of the most ubiquitous firms offering gig work.³⁸ “Uber for X” is a common way to describe a burgeoning type of on-demand service,³⁹ particularly if it is based on the use of a software application most commonly accessed via smartphone (an “app”). Thus, Airbnb is Uber for lodging, where consumers can use the app to rent out couches, rooms, or whole apartments and homes as if they were hotels.⁴⁰ VRBO, Homeaway, and Flipkey make similar

³⁰ Eckhardt & Bardhi, *supra* note 2.

³¹ See, e.g., *About Rideshare*, THE RIDESHARE COMPANY (Nov. 21, 2015, 5:00 PM), http://www.rideshare.com/About_Rideshare/.

³² *Id.*

³³ See, e.g., Cheng, *supra* note 12, at 55.

³⁴ Eckhardt & Bardhi, *supra* note 2.

³⁵ *Id.*

³⁶ Hall & Krueger, *supra* note 4.

³⁷ Jennifer Alsever, *Hair Styling? Pet Sitting? Marijuana? There’s an Uber for That*, INC., <http://www.inc.com/magazine/201502/john-brandon/theres-an-uber-for-that.html> (last visited Feb. 12, 2016).

³⁸ Aloisi, *supra* note 1, at 16.

³⁹ Erin Griffith, *The Problem with ‘Uber for X’*, FORTUNE (Aug. 11, 2015, 6:00 AM), <http://fortune.com/2015/08/11/uber-profitable-business-model/>.

⁴⁰ *About Us*, AIRBNB, <https://www.airbnb.com/about/about-us> (last visited Feb.

offerings for longer term vacationers.⁴¹ Homestay takes this a step further by combining lodging with local insider information offered by knowledgeable, interactive hosts.⁴² Sidecar and Lyft are Uber's competitors.⁴³ Postmates is Uber for delivery of "anything," including meals from restaurants that do not deliver.⁴⁴ Handy is Uber for household cleaning.⁴⁵ TaskRabbit is Uber for handyman services (e.g., minor home repairs and remodeling), cleaning, moving, shopping, and more.⁴⁶

Some gig work isn't quite so Uberesque. Etsy workers sell their own handmade goods, vintage items, or craft supplies, often developing their own brand identities.⁴⁷ The list goes on: sitters for babies, dogs, and houses; education, tutoring, and coaching; blog writing, marketing, accounting, and legal services.⁴⁸ While extensive, this sampling is not exhaustive, nor will it remain comprehensive for long after it is written. The possibilities are endless.

Synergistic combinations also abound. A car driver could easily deliver meals via Postmates between providing Uber rides, or simultaneously if she is particularly savvy with existing technology.⁴⁹ A TaskRabbit tasker could be writing blog content or advertising copy while he waits for someone else's laundry to finish drying. These are but two of the many obvious examples of what can already be done now, in the infancy of gig work opportunities. As new apps offering services crop up, new combinations will be imagined. This begs the question of why gig workers would expect to be paid an hourly rate when their services may not be exclusively dedicated to any one gig firm.

12, 2016).

⁴¹ See VRBO, <https://www.vrbo.com/info/about-the-family> (last visited Feb. 12, 2016); HOMEAWAY, <https://www.hoemaway.com/info/about-the-family> (last visited Feb. 12, 2016); FLIPKEY, <http://www.flipkey.com> (last visited Feb. 12, 2016).

⁴² *About Us*, HOMESTAY, <https://www.homestay.com/about-us> (last visited Feb. 12, 2016).

⁴³ See *Find Work*, PEERS, <http://www.peers.org/find-work/> (last visited Feb. 12, 2016).

⁴⁴ *About Postmates*, POSTMATES, <https://postmates.com/about> (last visited Feb. 12, 2016).

⁴⁵ *About Us*, HANDY, <http://www.handy.com/about> (last visited Feb. 12, 2016).

⁴⁶ *How TaskRabbit Works*, TASKRABBIT, <https://www.taskrabbit.com/> (last visited Feb. 12, 2016).

⁴⁷ *About Etsy*, ETSY, <https://www.etsy.com/about/?ref=ifr> (last visited Feb. 12, 2016).

⁴⁸ *Find Work*, PEERS, <http://www.peers.org/find-work/> (last visited Feb. 12, 2016).

⁴⁹ Uber seems prepared to capture this overlap under its own service umbrella. See James Covert, *Uber Is Taking on Postmates with New Delivery Service*, N.Y. POST (Oct. 14, 2015, 8:00 AM), <http://nypost.com/2015/10/14/uber-is-taking-on-postmates-with-new-delivery-service/>.

3. *Who is doing gig work and why*

“[M]edia assertions about the peer economy range from the romantic to [the] condescending”⁵⁰ Accounts of gig workers either extoll the “wildly successful” or sympathize with those “who feel victimized.”⁵¹ The focus on these extremes draws attention away from the majority of gig workers who are pleased with their experiences and happy to have new options.⁵² Satisfaction is not sensational, so these workers “are not part of public consciousness,” but these tales of only wealth or woes “do not move a worker support agenda forward.”⁵³

One bleakly painted picture of gig work describes “Zoe,” a hypothetical woman in her late twenties who supplements the income from her almost-full-time job by taking on gig work through TaskRabbit, Uber, and Airbnb.⁵⁴ With all these jobs, poor Zoe still struggles financially, yet remains convinced that taking on student loans to finish college would not help.⁵⁵ Her story laments the passing of an aging social contract that once provided a baseline of financial security to most employees, who then worked in full-time salaried positions.⁵⁶ Zoe’s tale sets up a proposal for providing the benefits of employment through a program analogous to Social Security.⁵⁷ Without discussing the merits of that proposal, suffice it to say that the authors agree that the solution to Zoe’s income struggle is not to dampen or eliminate “the efficiencies and flexibility that companies like TaskRabbit and Uber bring to the market,”⁵⁸ even though they portray an extremely negative caricature of a gig worker.

The problem of income inequality in the United States is not to be dismissed. However, it was not created by, nor has it been exacerbated by, the independent contractor classification of gig workers, and it certainly will not be resolved by forcibly redefining them as employees.⁵⁹ Notably, “[f]ifteen times as many driver-partners said [in a survey that] Uber had made their lives better, rather than worse, by giving them more control over their schedule (seventy-four percent

⁵⁰ Cheng, *supra* note 12, at 86.

⁵¹ *Id.* at 66.

⁵² *See id.*

⁵³ *Id.*

⁵⁴ Nick Hanauer & David Rolf, *Shared Security, Shared Growth*, 37 DEMOCRACY J. 6, 9–12 (Summer 2015), available at <http://democracyjournal.org/magazine/37/shared-security-shared-growth/>.

⁵⁵ *Id.*

⁵⁶ *Id.* at 12.

⁵⁷ *See id.* at 17.

⁵⁸ *Id.* at 11.

⁵⁹ Hall & Krueger, *supra* note 4, at 1.

versus five percent).”⁶⁰ A similar number said they would prefer a flexible schedule and self-employment to a steady nine-to-five schedule with some benefits and a definite salary.⁶¹

“More than a third of U.S. workers now identify as freelancers, according to a recent study by the Freelancers Union, with over thirty million identifying as either ‘independent’ or ‘diversified’ workers who work for multiple employers. That number is expected to grow.”⁶²

Who is doing gig work? How, when, and why are they choosing ad hoc jobs? Each is a question with plethoric answers. There is no typical gig worker profile. Methods and motivations vary as much as personality and circumstance, as any given gig worker’s ways may not remain static for long. Gig work can provide an option for semi-retirement or to supplement a fixed retirement income.⁶³ For those who are tired of waiting for baby boomers to make room so that gen-Xers can rise as millennials enter the workforce,⁶⁴ gig work presents a flexible salve. Millennials transitioning from college and high school are often uninterested in committing to a cubicle, and may find their niche in or through gig work.⁶⁵

Gig work is universally a source of income, but not everyone imagines it will be the primary source, or even wants that to be the case.⁶⁶ Etsy celebrates producers who quit their day jobs,⁶⁷ and that’s a laudable goal for some. Yet, gig work can serve purposes other than replacing career employment. Gig work can be a substitute for hard to find internships,⁶⁸ which frequently pay little or nothing. In professional and other skilled arenas, it could serve as a vehicle for apprenticeship. Moonlighters supplement traditional employment with

⁶⁰ *Id.* at 11.

⁶¹ *Id.*

⁶² Annie Gaus, *Can the ‘1099’ Labor Model Survive the Collision Between Uber and its Drivers?*, UPSTART BUS. J. (Nov. 2, 2015, 8:00 AM), <http://upstart.bizjournals.com/companies/startups/2015/11/02/can-the-1099-labor-model-survive-the-collision.html?page=all>.

⁶³ See Cheng, *supra* note 12, at 25.

⁶⁴ See, e.g., Ted Rall, *Baby Boomers, Please Retire*, ANEWDOMAIN, <http://anewdomain.net/2015/06/15/dear-baby-boomers-please-retire/> (last visited Feb. 12, 2016).

⁶⁵ Leavitt, *supra* note 24.

⁶⁶ See FREELANCERS UNION, *supra* note 16, at 4 (noting that just “one in three (36%)” of surveyed moonlighters “said they’ve thought about quitting to freelance full-time.”).

⁶⁷ Julie Schneider, *Quit Your Day Job*, THE ETSY BLOG (Mar. 17, 2015), <https://blog.etsy.com/en/quit-your-day-job-satsuma-street/>.

⁶⁸ See, e.g., *About Us*, FLIP GIGS, <http://flipgigs.com/about-us> (last visited Feb. 1, 2016).

gig work.⁶⁹ Others diversify and derive income from multiple sources, adding gig work to other jobs, whether temporary, part or full time, or freelance.⁷⁰ Gig workers can also fit the traditional concept of independent contractor by offering skilled services,⁷¹ but can significantly expand their own access to markets for their services by taking advantage of the tremendous networks of buyers that are harnessed by mobile apps and websites. Freelancers sometimes even own their own businesses and employ⁷² or subcontract with others, although some gig apps may not currently allow for this variation.⁷³

B. Employee or Independent Contractor: An Outdated Distinction

“[T]here are myriad ways to describe a worker” who is not an employee including “contingent worker, freelancer, micro-entrepreneur, and small business [owner/operator].”⁷⁴ Unfortunately, “through legal goggles, there are only two: the employee and the independent contractor.”⁷⁵

Traditional employment laws are based on a nineteenth century concept that no longer holds the same relevance in the twenty-first century. Designed to allocate responsibility for the tortious injuries to third parties by workers, the doctrine of *respondeat superior* (“let the master answer”) led to the definition of an employee as wholly distinct from an independent contractor.⁷⁶ An employee was one whose work was done at the direction and under the control of the master.⁷⁷ A non-employee, today’s independent contractor, performed work that was tangential to the master’s business and under his own direction and control.⁷⁸ Put simply, the widget company employs the widget maker, but not the painter who puts a fresh coat on the widget factory. When a widget maker injures a third party while working, the widget company is responsible; if a painter injures that same third party while painting,

⁶⁹ See FREELANCERS UNION, *supra* note 16, at 5.

⁷⁰ *Id.*

⁷¹ *Id.* at 5.

⁷² *Id.*

⁷³ Sarah Kessler, *The Gig Economy Won’t Last Because It’s Being Sued to Death*, FAST COMPANY (Feb. 17, 2015, 6:00 AM), <http://www.fastcompany.com/3042248/the-gig-economy-wont-last-because-its-being-sued-to-death> (describing two sisters who teamed up first to complete jobs and then to sue Handy for worker misclassification).

⁷⁴ See Cheng, *supra* note 12, at 70.

⁷⁵ *Id.*

⁷⁶ See Sprague, *supra* note 10, at 7–8.

⁷⁷ See *id.* at 7.

⁷⁸ *Id.* at 7–8.

the painter is responsible—not the widget company.

The employee/independent contractor distinction served a meaningful purpose in the context of torts, but the definitions borne out of this division of liability have permeated other areas of the law beyond a point that can be easily explained.⁷⁹ Statutory, administrative, and judicial tests for employment status are widely varied from each other, and are convoluted even standing alone.

The Internal Revenue Service’s (“IRS”) test for distinguishing between the two, for the purpose of determining tax liability, weighs in at a hefty twenty factors.⁸⁰ The Fair Labor Standards Act (“FLSA”),⁸¹ the National Labor Relations Act (“NLRA”),⁸² the Civil Rights Act (“CRA”),⁸³ the Employment Retirement Income Security Act (“ERISA”),⁸⁴ Title VII, the Age Discrimination in Employment Act (“ADEA”), and the Americans with Disabilities Act (“ADA”) each include the maddeningly circular description of an employee as “an individual employed by an employer.”⁸⁵

Statutes like these were designed “in the middle of the [twentieth century], with a particular version of employment in mind.”⁸⁶ Drafters “envisioned physical worksites, one-to-many relationships between employers and employees, and lengthy employment durations. Modern work displays the opposite trends, and, in fact, crowdsourcing’s very appeal is that it seems to make the [twentieth century] concept of employment obsolete.”⁸⁷

Common law tests for employment vary by jurisdiction and are no more helpful than codified definitions.⁸⁸ Controversy over Uber and Lyft driver classification illustrates the inconsistent results of applying different tests.⁸⁹ The California Labor Commission found that one driver was an employee, in opposition to its own 2012 ruling on another driver.⁹⁰ New York City’s Taxi and Limousine Commission found that

⁷⁹ *Id.* at 8–9.

⁸⁰ Rev. Rul. 87-41, 1987-1 C.B. 296.

⁸¹ 29 U.S.C. § 203 (2012).

⁸² 29 U.S.C. § 152 (2012).

⁸³ 42 U.S.C. § 2000e (2012).

⁸⁴ 29 U.S.C. § 1002 (2012).

⁸⁵ *See* 42 U.S.C. § 2000e (2012); Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 630(f) (2012); American with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12111(4) (2012).

⁸⁶ Felstiner, *supra* note 13, at 178–79.

⁸⁷ *Id.*

⁸⁸ *Id.* at 180–83.

⁸⁹ *See* Sarah McBride & Dan Levine, *In California, Uber Driver is Employee, Not Contractor*, REUTERS (June 18, 2015, 4:44 PM), <http://www.reuters.com/article/us-uber-california-idUSKBN0OX1TE20150618>.

⁹⁰ *Id.*

Uber drivers are independent contractors—for now.⁹¹ Oregon’s Bureau of Labor and Industries has concluded that Uber drivers are employees under the “economic realities” test that considers such factors as control, dependency, permanency, skill, and opportunity.⁹² The Florida Department of Economic Opportunity reversed itself on appeal and found that one Uber driver was an independent contractor.⁹³ Agencies in nine other states have sided with Florida and Uber on this point.⁹⁴

III. ANALYSIS

A. Gig Work Does Not Fit the Traditional Molds

1. *Gig work is something new and different*

Gig work is undeniably different than traditional employment. Despite the vitriol that has been spouted against Uber and other companies accused of misclassification, the fact that strong arguments can be made both for and against classification of gig workers as independent contractors, with no clear winner, is evidence that gig work defies existing definitions. “The Supreme Court said that no one factor—neither the common law test, the economic realities test nor [a] hybrid test—should be the single determinant of worker classification. Neither should two legal classifications—and their accompanying resources—fit all work realities.”⁹⁵

One way of showing that gig workers are not clearly employees is to consider ways that gig firms lack control over the relationship. Control is an important, if not dispositive, factor that is present in all iterations of the employment test.⁹⁶

The question is not whether a company actually exerts control over

⁹¹ Henry Goldman, *Uber Drivers Are Freelancers, Not Employees*, *New York City Official Says*, BLOOMBERG POL. (July 14, 2015, 11:09 AM), <http://www.bloomberg.com/politics/articles/2015-07-14/uber-drivers-are-freelancers-not-employees-nyc-official-says>.

⁹² Advisory Opinion of Brad Avakian, Comm’r of the Bureau of Labor and Indus. of the State of Oregon, Re: The Employment Status of Uber Drivers (Oct. 14, 2015), *available at* <http://media.oregonlive.com/commuting/other/101415%20Advisory%20Opinion%20on%20the%20Employment%20Status%20of%20Uber%20Drivers.pdf>.

⁹³ Davey Alba, *Florida Says Uber Driver Isn’t an Employee After All*, WIRED (Oct. 1, 2015, 6:20 PM), <http://www.wired.com/2015/10/florida-uber-decision-reversal/>.

⁹⁴ *Id.*

⁹⁵ Cheng, *supra* note 12, at 85.

⁹⁶ *See, e.g., Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067, 1075 (N.D. Cal. 2015).

its workers, but whether it holds the power to control.⁹⁷ Successful gig companies are those with strong brand images;⁹⁸ brands require consistency of product or service execution,⁹⁹ so these companies craft guidelines for gig workers to use. Companies call them suggestions, but they can and do enforce many of them like rules.¹⁰⁰

The ability to terminate a gig worker's access to the network as a punishment for failure to follow the rules has been seen as a sign of power to control.¹⁰¹ But this termination of access is unlike a firing in that it is actually an end to a series of repeated contracts that produced unsatisfactory results. By comparison, no individual or firm who hires an outside lawyer or accountant would be prevented from ending a dissatisfactory relationship no matter how many times the contract had been repeated.¹⁰² Lawyers might be needed sporadically, and accountants perhaps only annually or quarterly. Typical gig work is done faster than either of these and therefore can be repeated more frequently, but this compression of time should not negate the voluntary contractual agreement that was reached before any work was ever done.

Gig workers actually retain more control over their relationships with gig companies than is true of the reverse. Uber can cut off a worker's access to the network of consumers at any time and for any or no reason,¹⁰³ but any gig firm's strongest motivation to do this is to ensure consistent brand quality. By contrast, a gig worker can start, stop, or pause and restart the relationship at any time.¹⁰⁴ Traditional employers sometimes do give employees minor influence over when and where they work, but these are the exception. Even though many jobs could be done at a distance and at any hour, employers still

⁹⁷ See, e.g., *id.* at 1075–76.

⁹⁸ See Jonathan Salem Baskin, *The Five Keys to Uber's Valuation*, FORBES (Dec. 5, 2014, 4:34 PM), <http://www.forbes.com/sites/jonathansalembaskin/2014/12/05/the-5-keys-to-ubers-valuation/> (“Uber isn’t a business with a successful brand, as much as it is a brand that is a successful business.”).

⁹⁹ See Kevin Lane Keller, *The Brand Report Card*, HARV. BUS. REV. (2000), available at <https://hbr.org/2000/01/the-brand-report-card>.

¹⁰⁰ O’Connor v. Uber Tech., Inc., 82 F. Supp. 3d 1133, 1149–50 (N.D. Cal. 2015).

¹⁰¹ *Id.* at 1151.

¹⁰² See *id.*

¹⁰³ *Id.* at 1149–50.

¹⁰⁴ See, e.g., *Driving Jobs vs Driving with Uber*, UBER, <https://www.uber.com/driver-jobs> (last visited Feb. 1, 2016) (“[I]f you’re interested in taking time off when you need it, and not having to ask permission to spend more time with your kids, maybe you should learn more about partnering with Uber With Uber, you’ll get to be your own boss, set your own schedule and only drive when you feel like it.”).

overwhelmingly prefer centralized operations.¹⁰⁵

Traditional employers do not allow employees to come to work at utterly random intervals—e.g., an hour this week, forty the next and none at all for three weeks, no pattern and no explanation necessary. At-will employment does allow both employer and employee to end the relationship at any time, for (very nearly) any reason, or no reason at all.¹⁰⁶ But gig workers can punctuate their schedules with impunity, taking a hiatus whenever and for however long they wish. It is not insignificant that gig workers retain the ability to return without missing a beat—needing no permission from the company to do this time and again. Yet, courts have given this level of worker control short shrift while myopically focusing on Uber’s ability to cut off a driver whose consumer ratings reflect consistently poor work product, or who clogs the network by refusing too many ride requests.¹⁰⁷

Gig work is also not entirely consistent with the traditional notion of an independent contractor; the classic paradigm is a worker with a special skill or trade. Many gig jobs require minimal skill, such as driving a car. Not all independent contractors, though, are licensed professionals. They can be highly skilled accountants, lawyers, professors, and cosmetologists, or comparatively unskilled house painters, exotic dancers, and newspaper carriers. Painting a house is really no more or less complicated than navigating traffic in a busy city. What’s more, taxicab drivers have long been classified as independent contractors and not employees.¹⁰⁸

Courts acknowledge that Uber drivers are not exactly taxicab drivers,¹⁰⁹ but courts also conclude that Uber offers transportation services comparable to taxi companies.¹¹⁰ At any rate, the basic skills

¹⁰⁵ See Emma Plumb, *Working Through the Snow*, U.S. NEWS & WORLD REP. (Feb. 26, 2015, 10:20 AM), <http://www.usnews.com/opinion/economic-intelligence/2015/02/26/2015-record-breaking-winter-prove-benefits-of-teleworking> (citing several studies to support the conclusion that “remote work is [still] far from the norm.”).

¹⁰⁶ RESTATEMENT OF EMPLOYMENT LAW § 2.01 (2015).

¹⁰⁷ *O’Connor v. Uber Tech., Inc.*, 82 F. Supp. 3d 1133, 1149–52 (N.D. Cal. 2015).

¹⁰⁸ *But see* Lydia DePillis, *Labor Board’s Shift in Legal Interpretation Could Allow Many Taxi Drivers to Unionize*, WASH. POST (Oct. 29, 2015), <https://www.washingtonpost.com/news/wonk/wp/2015/10/29/labor-boards-shift-in-legal-interpretation-could-allow-thousands-of-taxi-drivers-to-unionize/>.

¹⁰⁹ *See, e.g., Bos. Taxi Owners Ass’n, Inc. v. City of Bos.*, 84 F. Supp. 3d 72, 81 (D. Mass. 2015) (holding that “TNCs operate in a fundamentally different manner from traditional taxicabs” and “there are significant distinctions between their business models, of which the Court only scratches the surface, that permit state or local authorities to treat them differently”).

¹¹⁰ *See, e.g., Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067, 1078 (N.D. Cal. 2015).

required for taxi and Uber drivers are essentially the same. Taxis, though, have developed a poor reputation for customer service among riders. Uber facilitates a better experience by communicating the high standards of customer service that consumers value and expect, arguably a greater skill than simply driving. For holding drivers to their contractual obligations to provide a satisfactory service, Uber is accused of worker misclassification.¹¹¹

2. *Gig work combines the virtual and the physical*

Gig work can be readily compared to its virtual counterparts, where firms post digital tasks called “cognitive piecework” to an online platform where individual workers can accept and complete one or more tasks.¹¹² This is sometimes referred to as crowdsourcing, and is exemplified by Amazon’s Mechanical Turk platform.¹¹³ Amazon, like the typical crowdsourcing vendor, “serves as a conduit for the worker to submit the completed work, and for the firm to pay the worker.”¹¹⁴ Amazon takes a commission for having provided the service of connecting firms with workers, but is not an employer.¹¹⁵ Workers are independent contractors, not employees.¹¹⁶

Consider the comparison of Transportation Network Companies (“TNCs”) like Uber and Lyft to Amazon’s Mechanical Turk workers. Uber and Lyft have argued that the service they provide is a conduit platform much like Amazon’s Mechanical Turk.¹¹⁷ California courts have rejected this argument based on the type of service offered—providing transportation to riders.¹¹⁸ The tests weigh against independent contractor status, noting a supposed lack of specialized skill required to be a driver,¹¹⁹ yet many crowdsourced computer driven tasks require even less skill than operating a motor vehicle—e.g., tagging photos.¹²⁰ In fact, the “vast bulk of the [tasks] posted on [Amazon’s Mechanical Turk] can be performed by almost anyone of

¹¹¹ See *O’Connor v. Uber Techs., Inc.*, No. C-13-3826, 2015 WL 5138097, at *16, *19–20 (N.D. Cal. Sep. 1, 2015).

¹¹² Felstiner, *supra* note 13, at 148.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ See *id.* at 161–63.

¹¹⁶ *Id.* at 163.

¹¹⁷ See generally *Cotter v. Lyft, Inc.* 60 F. Supp. 3d 1067, 1078 (N.D. Cal. 2015); *O’Connor v. Uber Tech, Inc.*, 82 F. Supp. 3d 1133, 1137, 1141 (N.D. Cal. 2015).

¹¹⁸ See *O’Connor*, 82 F. Supp. 3d at 1141; *Cotter*, 60 F. Supp. 3d at 1078.

¹¹⁹ See *Cotter*, 60 F. Supp. 3d at 1069; *O’Connor*, 82 F. Supp. 3d at 1139.

¹²⁰ Felstiner, *supra* note 13, at 148.

any skill level, in roughly the same manner and period of time.”¹²¹

Amazon’s Mechanical Turk “contains no opportunity or method for negotiation” between workers and firms.¹²² Amazon explicitly asserts that its role is as a venue only, and that it has no control over the quality of the services provided by workers.¹²³ And yet, Amazon does regulate some important terms of the relationship between firms and workers, including the right to reject work without payment.¹²⁴ Amazon also forbids “parties from contracting independently” thus “ensur[ing] that Amazon will receive its service fee.”¹²⁵ Amazon’s unilateral contract demands that workers “perform services as independent contractors and not as employees” and informs them that they “will not be entitled to any employee benefits, and will not be eligible to recover worker’s compensation if injured.”¹²⁶ Amazon claims and receives vendor-only status because it is “not involved in the actual transaction” between workers and firms, yet it is able to mandate and enforce the terms of the transaction with impunity.¹²⁷

The contract between firms and workers using Amazon’s Mechanical Turk is not negotiated between the parties; rather, each “learn[s] their obligations to one another by consulting the click-wrap agreement they have both been compelled to execute with the vendor.”¹²⁸ “The vendors, in binding both workers and firms to their click-wrap, have, in essence, prospectively filled in the content of the worker–firm contract.”¹²⁹ Aside from agreement on the rate of pay “and the specifics of the task, there exists no true privity between the workers and their employer.”¹³⁰ Amazon, unlike Uber and Lyft, is able to operate under this model, treating workers’ tasks “as a string of independent contracts. . . .”¹³¹

Amazon’s arrangement with its workers on Mechanical Turk is very much like Uber with its drivers, except that Mechanical Turk workers provide their services virtually rather than in a vehicle. Amazon operates many different businesses, making it seem much different than Uber and other streamlined businesses. Yet, the Mechanical Turk

¹²¹ *Id.* at 177–78.

¹²² *See id.* at 162.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.* at 163.

¹²⁷ *Id.* at 163–64.

¹²⁸ *Id.* at 171.

¹²⁹ *Id.*

¹³⁰ *Id.* at 172.

¹³¹ *Id.*

enterprise is nothing without its workers,¹³² just as Uber is nothing without its drivers.

One significant difference between Uber and Amazon is in the rate of pay, where Mechanical Turk workers can only choose whether or not to accept an offer made by a firm, and Uber drivers can only be selective about when and where they accept rides but cannot set their own rates.¹³³ Still, Uber drivers earn a great deal more on average¹³⁴ than Mechanical Turk workers, even after subtracting expenses and taxes.

The majority of workers who use Amazon's Mechanical Turk do not see it as a significant source of income.¹³⁵ The rate of pay for work on this platform is often paltry—as low as \$0.01 for a unit of work.¹³⁶ At any rate of speed, even for the smallest of tasks, that is far below minimum wage.¹³⁷ This makes it “essentially impossible to earn a living as a full time” worker using Amazon's Mechanical Turk.¹³⁸ “But this does not prevent [workers] from using the platform to earn some much-needed supplemental income.”¹³⁹

Even though Amazon does not control the pay rate for any individual task, it does require that the rate be for piecework and not time.¹⁴⁰ Amazon also requires prepayment, and can force payment when firms delay.¹⁴¹ When a worker is removed from the platform, it can even seize balances, resulting in the equivalent of unpaid wages.¹⁴²

Control “in the context of a virtual work environment may mean something very different from control in a physical worksite.”¹⁴³ One important measure of control asserted by Amazon over its virtual workers is that it be the exclusive venue, at least between any worker and firm who ever connect through its platform.¹⁴⁴ Additionally, Amazon's contract is one that mandates arbitration for all disputes, without exception.¹⁴⁵ Significantly, Amazon reserves the right to

¹³² *Id.* at 195.

¹³³ See *Worker Web Site FAQs*, AMAZON MECHANICAL TURK, https://www.mturk.com/mturk/help?helpPage=worker#how_complete_hit (last visited Jan. 28, 2016). See also *Frequently Asked Questions*, UBER, <https://partners.uber.com/drive/> (last visited Jan. 28, 2016).

¹³⁴ See Hall & Krueger, *supra* note 4, at 18.

¹³⁵ Felstiner, *supra* note 13, at 165.

¹³⁶ *Id.* at 167.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 195.

¹⁴¹ *Id.*

¹⁴² *Id.* at 193–94 n. 196.

¹⁴³ *Id.* at 192.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 193.

terminate a worker's contract at any time, and in doing so ends that worker's ability to ever perform work for firms via the platform.¹⁴⁶ This same power, when wielded by Uber, amounted to a firing under employment at will, and was fatal to that company's argument that its drivers are independent contractors.¹⁴⁷

"Amazon . . . maintains records of work already accepted and completed . . . [including] rejection percentages. These figures function as a virtual resume, which [firms] then rely on in dealing with the [worker]." ¹⁴⁸ Uber's star ratings perform a similar role; consistently low ratings can result in fewer connections with riders or even ejection from the platform.¹⁴⁹

Some argue that Uber is not just a technology company, not only because it facilitates rides in vehicles, as announced in *O'Connor v. Uber Technologies*,¹⁵⁰ but also because "its revenues do not depend on the distribution of its [platform], but on the amount of rides generated by drivers."¹⁵¹ Amazon's Mechanical Turk derives a commission from each task, and therefore also depends on the amount of work performed. But, strangely, it is deemed a mere conduit as a technology company because all of the work is done virtually. If the argument is for fair labor standards, the distinction between virtual and physical work ought to be of no moment. The relationship between Uber and drivers is much the same as between Amazon and Mechanical Turk workers. It does not follow that, simply because drivers must step out from behind a desk, they deserve greater protection. Perhaps this serves as an argument for better standards to be applied to virtual workers, but the point here is that the firms and workers of each are operating in a nearly identical relationship, except that Uber drivers' computers are attached to vehicles.

The speed at which work is done has been radically compressed since the origin of independent contractor status. A revolution of transactional efficiency was set in motion by the computer, followed by the internet, then cell phones, and now the combination of these into smartphones. Cars may soon be driverless. Other technological advancements yet to be imagined will surface. Jobs will continue to be altered by these changes including who (or what) does the work, how,

¹⁴⁶ *Id.*

¹⁴⁷ See *O'Connor v. Uber Tech., Inc.*, 82 F. Supp. 3d 1133, 1139 (N.D. Cal. 2015).

¹⁴⁸ Felstiner, *supra* note 13, at 194.

¹⁴⁹ James Cook, *Uber's Internal Charts Show How Its Driver-Rating System Actual Works*, BUS. INSIDER (Feb. 11, 2015, 11:53 AM), <http://www.businessinsider.com/leaked-charts-show-how-ubers-driver-rating-system-works-2015-2?r=UK&IR=T>

¹⁵⁰ See *O'Connor*, 82 F. Supp. 3d at 1135.

¹⁵¹ Aloisi, *supra* note 1, at 17.

and why. The choice between independent contractor and employee, under current standards, is no longer sufficient to describe what is actually happening in the workforce. There is a need for either newly refined definitions of the two, or a third category.

B. Statutory Benefits of Employment

When a worker is wholly dependent on a single organization, and reciprocally invested in the success of that organization, it stands to reason that the worker should be protected from certain harms. This is especially true where employment is at-will, meaning that either party can choose to end the arrangement at any time and for any or no reason (as long as it is not an illegal reason).¹⁵² Employee classification entitles workers to statutory benefits that are unavailable to independent contractors.¹⁵³ These include: Social Security; Medicare; workers' compensation; short-term disability (in certain states); unemployment compensation; and time off to vote, serve as a juror or under military duty, for family and medical leave purposes, and for religious observances.¹⁵⁴ Additional federal and state protections are in place against various forms of discrimination, and for minimum wage payment.¹⁵⁵ All of these are expensive and administratively burdensome for employers—which explains the economic incentive for firms to engage independent contractors whenever possible.

When a worker is free to come and go as she pleases, and is only invested to the degree of a single transaction, it does not stand to reason that the same protections should apply. Even if that same transaction is repeated often, the gig worker still holds all of the power to determine its frequency. Independent contractors epitomize exactly this kind of freedom. It is thus absurd to award the ad hoc worker a windfall of entitlements through employment classification, foisting the cost on the organization, and to simultaneously expect that the organization will not be inclined to reap the benefits of that investment.

In arguing that Amazon Mechanical Turk workers should be able to demand rights as employees, commentator Alek Felstiner recommended that workers unite around Amazon as a joint employer in order to “substantially simplify litigation and enforcement”¹⁵⁶ Coalescing around the biggest target with the deepest pockets is not a new strategy by any means, but the fact that a tactic is common does not

¹⁵² RESTATEMENT OF EMPLOYMENT LAW § 2.01 (2015).

¹⁵³ ROBERT J. NOBILE, ESSENTIAL FACTS: EMPLOYMENT § 5:3 (2015).

¹⁵⁴ *Id.*

¹⁵⁵ *See id.* § 4:3; *id.* § 6:2.

¹⁵⁶ Felstiner, *supra* note 13, at 187.

make it necessarily fair or justifiable. Recent arguments in favor of expanding the definition of a joint employer have gained traction with the National Labor Relations Board (“NLRB”) but run contrary to “precedents that had allowed lots of flexible contracting arrangements in the labor market.”¹⁵⁷

If a company is disallowed the use of independent contractors, and thus made to give its workers all the benefits, protections, and entitlements of employment, then that company will expect the worker to behave like an employee. That is, the company will exert the maximum level of control for which it has paid. For example, gig workers should not be constrained from earning income from multiple sources simultaneously. But gig firms cannot be expected to pay workers on an hourly basis when worker time is not exclusively dedicated to a job obtained through that firm. If gig workers are made employees, this efficiency and increased earning potential will be lost. People who choose to do gig work overwhelmingly do so because they want something different than they’ve had before. They want freedom from offices, desks, cubicles, bosses, coworkers, and perhaps most importantly, rigid mandatory schedules. Gigging offers flexibility to skilled and unskilled workers alike. It can allow an unskilled worker to identify or develop a skill or talent, if that is a goal for that individual’s journey. Freedom to explore will be significantly constrained if gig workers cannot function as independent contractors because fewer firms will form where that arrangement is unavailable, and those that do will behave like traditional employers.

C. Worker Classification Tests Bewilder Juries, Obscure and Delay Answers

Companies should be able to predict, to a reasonable degree of legal and therefore financial certainty, their answer to the question of whether or not a worker is properly classified as an employee or an independent contractor. Those who argue that gig workers are obviously employees should recognize that companies accused of misclassification have strong, legitimate arguments in the opposite direction. Companies should not be required to gamble with classification by risking jury trials.

Defaulting to classification of workers as employees simply because that is the safer route is not a plausible solution for most gig firms. An

¹⁵⁷ George Leef, *NLRB’s Browning-Ferris Decision—Yet Another Administrative Law Abuse*, FORBES (Sept. 17, 2015, 9:00 AM), <http://www.forbes.com/sites/georgeleef/2015/09/17/nlrbs-browning-ferris-decision-yet-another-administrative-law-abuse/>.

exception to that rule is Managed by Q, Inc. (“Managed by Q”), a firm that caters to workplaces by offering cleaning, supply stocking, and maintenance services on-demand.¹⁵⁸ Managed by Q chooses to employ its workers, but admits that its “employment model will be hard to scale as the company grows . . . and is currently embraced by only a handful of early-stage, on-demand startups”¹⁵⁹ Significantly, Managed by Q caters to businesses rather than the general consumer market and also offers subscription services,¹⁶⁰ presumably in an effort to predict and steady the cash flows it must need to be able to afford employee benefit expenses.

Vilification of companies like Uber overlooks the unfairness to the organization that develops in good faith a business model that relies on independent contractor classification. Startups with incredible ideas will simply not start because they cannot risk the litigation expense, even if they believe they could win years down the road. FedEx drivers claimed misclassification between 2000 and 2007; the protracted litigation eventually settled in 2015 for \$228 million.¹⁶¹ The Ninth Circuit found that summary judgment was proper because FedEx retained too much control over drivers to justify the independent contractor classification.¹⁶² One important and hotly disputed control measure was scheduling—the drivers successfully argued that while FedEx was not allowed “to set its drivers’ specific working hours down to the last minute,” the company had created guidelines that effectively dictated when work had to be done.¹⁶³ Any hope for precedential analogy between drivers for FedEx and TNCs is wasted given the factual dependency of the analysis.¹⁶⁴

Uber and Lyft cases illustrate the complexities of judicial tests for employment when applied to TNCs. *O’Connor v. Uber Technologies*, a recent California decision, certified a class action suit involving drivers who have driven for Uber directly since 2009.¹⁶⁵ These drivers

¹⁵⁸ Maya Kosoff, *Companies Like Uber Could Learn a Thing or Two from This Office Cleaning Startup. Where the Workers Are as Happy as the Clients*, BUS. INSIDER (Mar. 10, 2015, 12:41 PM), <http://www.businessinsider.com/managed-by-q-hires-cleaners-as-employees-2015-3>.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ Robert W. Wood, *FedEx Settled Independent Contractor Mislabeling Case for \$228 Million*, FORBES (June 16, 2015, 8:39 AM), <http://www.forbes.com/sites/robertwood/2015/06/16/fedex-settles-driver-mislabeling-case-for-228-million/>.

¹⁶² *Slayman v. FedEx Ground Package Sys., Inc.*, 765 F.3d 1033, 1043 (9th Cir. 2014).

¹⁶³ *Id.*

¹⁶⁴ *See id.* at 1043; Wood, *supra* note 161.

¹⁶⁵ *O’Connor v. Uber Tech, Inc.*, No. C-13-3826 EMC, 2015 WL 5138097, at

claimed violations of California's Labor Code because they were misclassified as independent contractors, instead of as employees.¹⁶⁶ The court noted that when California's *Borello* test for employment was applied "at the summary judgment stage, the Court [then] determined that . . . Uber drivers . . . are . . . presumptive employees as a matter of law."¹⁶⁷ In finding uniformity sufficient to support a class action, the Court also reviewed Uber's policies under *Borello*, looking first to the extent of Uber's control over its drivers, then to a laundry list of secondary factors.¹⁶⁸

The control factor focuses on power held, rather than power actually wielded.¹⁶⁹ Media coverage has latched onto the "presumptive" aspect at the summary judgment stage, glossing over the inconclusiveness of leaving the issue for a jury to decide.¹⁷⁰ Truly enough, Uber was deemed to hold significant power, whatever the amount it actually exerts, over its drivers because the company: (a) sets the rate of pay unilaterally; (b) maintains star ratings while monitoring driver performance and compliance with heavy-handed suggestions and other requirements; and importantly, (c) retains the right to terminate drivers' contracts without cause.¹⁷¹ However, weighing against these employment signals and in favor of independent contractor status were the facts that Uber does not at all (d) restrict drivers from driving for direct competitors; (e) control drivers' routes or territories; or (f) control drivers' schedules, in any way.¹⁷²

As if this list weren't enough to confuse any juror, add to this the *Borello* test which provides eight of its own factors, and approves of five more, but leaves the weight of any combinations up to the bewildered factfinder.¹⁷³ The thirteen secondary factors add to the bulk of material to consider, but do little to illuminate the most sensible result. Assuming that the court's assessments are accurate, some support the independent contractor designation while others do not, but

*37 (N.D. Cal. 2015) (leaving room for the Plaintiffs to later develop a subclass that could include additional drivers who worked for Uber indirectly).

¹⁶⁶ *Id.* at *1.

¹⁶⁷ *Id.* at *5. (citing *O'Connor v. Uber Tech., Inc.*, 82 F. Supp. 3d 1133, 1141–1145 (N.D. Cal. 2015)).

¹⁶⁸ *Id.* at *16–30.

¹⁶⁹ *O'Connor v. Uber Tech., Inc.*, 82 F. Supp. 3d 1133, 1139 (N.D. Cal. 2015).

¹⁷⁰ *E.g.*, Heather Somerville, *Former Uber Driver Was an Employee, Rules California Department*, REUTERS (Sept. 9, 2015, 11:44 PM), <http://www.reuters.com/article/2015/09/10/uber-tech-california-ruling-idUSL1N11F1KT20150910#1rWLSgYSYmXImCKr.97>.

¹⁷¹ *Uber Tech, Inc.*, 2015 WL 5138097, at *17, *19; *See also O'Connor*, 82 F. Supp. 3d at 1133.

¹⁷² *Id.*

¹⁷³ *O'Connor*, 82 F. Supp. 3d at 1139–40.

none is particularly meaningful alone, and there is no formula for what combinations of factors mean more when found together.

Judge Edward M. Chen, like Judge Vince Chhabria in *Cotter v. Lyft*,¹⁷⁴ believes that a TNC like Uber or Lyft is disingenuous when arguing that it is a technology company and not a car service.¹⁷⁵ In the *O'Connor* opinion, Judge Chen declared fundamental the fact that “Uber simply would not be a viable business entity without its drivers”¹⁷⁶ Again, the same is true for Amazon’s Mechanical Turk, which would also be nothing without its largely unskilled virtual workforce.¹⁷⁷

Judge Chen appeared relieved that he would not be the ultimate factfinder, concluding the opinion with an indictment of this forced and false dichotomy:

The application of the traditional test of employment—a test which evolved under an economic model very different from the new “sharing economy”—to Uber’s business model creates significant challenges. Arguably, many of the factors in that test appear outmoded in this context. Other factors, which might arguably be reflective of the current economic realities (such as the proportion of revenues generated and shared by the respective parties, their relative bargaining power, and the range of alternatives available to each), are not expressly encompassed by the *Borello* test. It may be that the legislature or appellate courts may eventually refine or revise that test in the context of the new economy. It is conceivable that the legislature would enact rules particular to the new so-called “sharing economy.” Until then, this Court is tasked with applying the traditional multifactor test of *Borello* and its progeny to the facts at hand.¹⁷⁸

The Court thus made its “preliminary finding that Uber drivers are presumptive employees” under California law, but assailed the “ambiguous result” of applying its own many-factored test in this context.¹⁷⁹

In *Cotter v. Lyft*, Judge Chhabria was unconvinced that Lyft is “simply connecting random users of its platform.”¹⁸⁰ Finding the

¹⁷⁴ *Cotter v. Lyft, Inc.*, 69 F. Supp. 3d 1067 (N.D. Cal. 2015).

¹⁷⁵ See generally *O'Connor*, 82 F. Supp. 3d at 1141–42.

¹⁷⁶ *Id.* at 1142.

¹⁷⁷ Felstiner, *supra* note 13, at 195.

¹⁷⁸ *O'Connor*, 82 F. Supp. 3d at 1153.

¹⁷⁹ *Id.*

¹⁸⁰ *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067, 1078 (N.D. Cal. 2015).

argument to be “not a serious one,” Judge Chhabria explained his view that:

Lyft tepidly asserts there is no need to decide how to classify the drivers, because they don’t perform services for Lyft in the first place. Under this theory, Lyft drivers perform services only for their riders, while Lyft is an uninterested bystander of sorts, merely furnishing a platform that allows drivers and riders to connect, analogous perhaps to a company like eBay. But that is obviously wrong.¹⁸¹

Lyft’s assertion may not be obviously right, but it is not obviously wrong, considering the similarities between its operating model and that of Amazon’s Mechanical Turk.¹⁸² Yet, the court seems to make a silent distinction where the service provided takes place in a physical, rather than a virtual space.¹⁸³ This would make sense if applying, for example, the computer employee exemption¹⁸⁴ under the FLSA, but Amazon’s Mechanical Turk typically requires low to no special skills, and workers earn far below the minimum wage—nowhere near the minimum weekly salary or hourly rate for exempt computer employees.¹⁸⁵

A comparison of Lyft and Uber to cab companies is more persuasive,¹⁸⁶ yet courts have also been able to recognize that neither is a cab company—instead, that both are something new and different—by embracing the TNC designation¹⁸⁷ initiated by the California Public Utilities Commission.¹⁸⁸

¹⁸¹ *Id.*

¹⁸² *Compare Amazon Mechanical Turk Participation Agreement*, AMAZON, <https://www.mturk.com/mturk/conditionsofuse> (last updated Dec. 2, 2014), with *Lyft Terms of Service*, LYFT <https://www.lyft.com/terms> (last updated Nov. 3, 2015).

¹⁸³ See *Cotter*, 60 F. Supp. 3d at 1067.

¹⁸⁴ U.S. DEP’T OF LABOR, WAGE & HOUR DIV., *Fact Sheet #17E: Exemption for Employees in Computer-Related Occupations Under the Fair Labor Standards Act* (July 2008), available at http://www.dol.gov/whd/overtime/fs17e_computer.pdf.

¹⁸⁵ 29 C.F.R. § 541.400 (2015).

¹⁸⁶ See *Yellow Cab Cooperative, Inc. v. Workers’ Comp. Appeals Bd.*, 277 Cal. Rptr. 434, 437 (Cal. Ct. App. 1991) (noting that, contrary to Yellow Cab’s insistence that it merely served as a lessor of taxicabs, Yellow “cultivated the passenger market by soliciting riders, process[ed] requests for service through a dispatching system,” and instructed the drivers in “service” and “courtesy”); *Decision Adopting Rules and Regulations to Protect Public Safety While Allowing New Entrants to the Transportation Industry*, Cal. Pub. Utilities Comm’n, D. 13-09-045, 63–68 (Sept. 19, 2013) (concluding that companies such as Lyft are engaged in the business of providing passenger transportation for compensation).

¹⁸⁷ See, e.g., *Cotter*, 60 F. Supp. 3d at 1078; *O’Connor v. Uber Tech., Inc.*, 82 F. Supp. 3d 1133 (N.D. Cal. 2015).

¹⁸⁸ *Order Instituting Rulemaking on Regulations Relating to Passenger*

Judge Chhabria swatted away the “mere platform” argument, but recognized fully that Lyft did have strong support for its position that drivers could properly be classified as independent contractors.¹⁸⁹ Near the end of the opinion, Judge Chhabria expressed his frustration at being hamstrung by laws that must be applied, but that make little sense in the workforce dynamic at issue:

As should now be clear, the jury in this case will be handed a square peg and asked to choose between two round holes. The test the California courts have developed over the [twentieth century] for classifying workers isn't very helpful in addressing this [twenty-first century] problem. Some factors point in one direction, some point in the other, and some are ambiguous. Perhaps Lyft drivers who work more than a certain number of hours should be employees while the others should be independent contractors. Or perhaps Lyft drivers should be considered a new category of worker altogether, requiring a different set of protections. But absent legislative intervention, California's outmoded test for classifying workers will apply in cases like this. And because the test provides nothing remotely close to a clear answer, it will often be for juries to decide. That is certainly true here.¹⁹⁰

Entrepreneurs, managers, lawyers, accountants, and others generally involved in business operations should not be expected to guess what a confused jury might say. Faced with tremendous uncertainty, most would cry uncle and run for the safe cover of defaulting to employment classification. That unfortunate choice would result in some would-be firms never obtaining enough capital to get off the ground, while those that do form would struggle to keep enough cash flowing to sustain the on-demand model. Instead of waiting for legislators to get creative, perhaps “[c]ourts should adjust existing doctrines, and create new ones as appropriate, to confront the utterly novel set of questions upon which they will increasingly be asked to rule.”¹⁹¹

Carriers, Ridesharing, & New Online-Enabled Transp. Servs., Cal. Pub. Utilities Comm'n, D. 14-04-022, 2014 WL 1478349, at *1 (Cal. P.U.C. Apr. 10, 2014).

¹⁸⁹ *Cotter*, 60 F. Supp. 3d at 1078.

¹⁹⁰ *Id.* at 1081–82.

¹⁹¹ Felstiner, *supra* note 13, at 200.

D. Developing the Definition of an Independent Contractor

Stories of struggle paint a grim picture of what it looks like when a person tries to make a full time living out of gig work.¹⁹² But these stories are slanted and wrongly assume that full time work is what most gig workers want out of the arrangement.¹⁹³ It is too early in the experiment to determine that gig work can't be done without granting employee status, whether by cloudy common law or stale statute.

Without further refinement of the current classification standards, gig companies and others that wish to use independent contractors must roll the dice or pay a hefty price for peace of mind. As it stands, companies can choose to risk worker misclassification in order to save enormous expense, or take the costly but safe route of treating workers as employees.¹⁹⁴ The risks include at least enforcement actions, litigation initiated by plaintiff workers and predatory class action law specialists, and restitution for underpayment of taxes.¹⁹⁵

If the picture remains unclear, or if gig workers truly become presumptive employees because of confused jurors, then capital investments will be increasingly difficult to obtain. Creative ideas will be squelched. The losers will not be limited to the Travis Kalanicks¹⁹⁶ of the world; gig workers of all kinds will be frustrated. Consumers of gig-generated services will be turned away. Market experimentation will be whittled even further down, simply to preserve a concept of employment that is falling out of favor and fading in relevance.

1. Changes in the law

One proposed solution is to reverse the dependency test for employment status.¹⁹⁷ The question now is whether or not the worker is dependent on the employer.¹⁹⁸ In the gig economy, relatively few

¹⁹² See Hanauer & Rolf, *supra* notes 54–58 and accompanying text.

¹⁹³ See *supra* notes 50–54 and accompanying text.

¹⁹⁴ See Richard Reibstein, Lisa B. Petklun & Andrew J. Rudolph, *The 2015 White Paper on Independent Contractor Misclassification: How Companies Can Minimize the Risks*, PEPPER HAMILTON LLP, http://www.pepperlaw.com/uploads/files/icmisclassification_minimizerisk_04_2015.pdf (last visited Feb. 12, 2016).

¹⁹⁵ *Id.*

¹⁹⁶ Travis Kalanick is Uber's controversial CEO. See Carolyn Said, *Internal Uber E-mails Reflect Company's Brash Reputation*, SFGATE (Jan. 30, 2015, 5:28 PM), <http://www.sfgate.com/business/article/Internal-Uber-e-mails-reflect-company-s-brash-6051762.php>.

¹⁹⁷ See Sprague, *supra* note 10, at 19–23.

¹⁹⁸ *Id.* at 19.

workers may depend on a single employer. In fact, “the majority of Task Rabbit ‘Taskers’ and Uber drivers, unlike FedEx drivers, appear to be the antithesis of dependent workers—relatively few are solely economically dependent on one ‘employer.’”¹⁹⁹ This is one factor that clearly supports the independent contractor designation. Finding this result unacceptable because gig workers would be vulnerable and therefore deserving of all traditional employment protections and entitlements, Robert Sprague looks for a way to make the square peg round.²⁰⁰ Thus, in order to reach an opposite result, the reversed question would be whether the employer is dependent on its workers for the function those workers fulfill.²⁰¹ If the workers’ efforts are central to the business of the company, then the workers would be classified as employees.²⁰²

The widget company’s primary business is widgets; it does not depend on painters to sustain this business, so painters are independent contractors because they do not make widgets. But what happens when companies diversify their functions so that no single business is central? That is not a hyperbolic question—Amazon is best known for its internet retail business, but that is far from all that it does (e.g., Mechanical Turk crowd work facilitation).²⁰³

Sprague assumes that gig workers are vulnerable, and that the best route to protection is to make them all employees.²⁰⁴ Contrary to the sensationalist media coverage that portrays all gig workers as abused and begging to be made employees, many gig workers are very happy with this new way of approaching work.²⁰⁵ Oftentimes, they selected gig work because it allows them to escape the very relationship they found so constricting: employee of an employer (still, in some ways, servant to a master).²⁰⁶ If companies are forced to treat gig workers as employees, they will not maintain the status quo of power. They will exert the maximum control because they are being made to pay for it, and this will destroy the very reason so many workers have gravitated to gig work.

Another idea is for a third classification called “dependent contractor” to capture the “‘people who are borderline’ [between

¹⁹⁹ *Id.* at 20.

²⁰⁰ *Id.*

²⁰¹ *See id.* at 21.

²⁰² *Id.*

²⁰³ *See* Felstiner, *supra* note 13, at 160–61.

²⁰⁴ Sprague, *supra* note 10, at 23.

²⁰⁵ Don Charlton, *The Rise of the Gig Worker in the Sharing Economy*, TECH CRUNCH (July 9, 2015), <http://techcrunch.com/2015/07/09/the-rise-of-the-gig-worker-in-the-sharing-economy/#.6sndrd6:AHZ7>.

²⁰⁶ *See* FREELANCERS UNION, *supra* note 16.

employee and independent contractor] and economically dependent on one employer.”²⁰⁷ That concept has not found roots in the United States, partly because “[e]mployers would need explicit guidance about which protections would be extended from the patchwork of laws that currently govern employment” and because regulators have had more pressing and fruitful enforcement concerns.²⁰⁸

Birthing a new category would indeed be a complicated affair. Yet, there are better reasons for rejecting changes that focus on worker dependency. An independent contractor should not be transformed into an employee simply because he puts all his working eggs in one contractual basket. Making this possible would only encourage all companies to divide work between more independent contractors and splinter otherwise satisfactory relationships simply to avoid hiring unwanted and unneeded employees.

It is much too early in the development of the gig work model to pull the plug. Companies that are sprouting in response to the access economy idea are moving quickly. That frightens some and confuses others. Just like any new business that needs time to work out the kinks before it becomes established, these gig businesses need room to mature. Instead of jumping to the conclusion that some poor workers ought to have their unrealistic expectations met by making them employees, the focus should be on how to help gig workers and companies flourish.

Employment blogger Doug Haas proposes a first step toward reformation with an “intermediate dependent contractor classification” under the FLSA that would set the stage for “better protect[ion of] sharing economy and other ‘alternative’ workers without destroying either the business model or workers’ choices to participate in it.”²⁰⁹ Haas explains:

Under the current regulatory dichotomy that strongly favors employee classification, only some of the for-profit parts of the sharing economy would likely survive, albeit with a dramatically different cost structure, killing off most of the benefits of the sharing-driven model in

²⁰⁷ Lauren Weber, *What if There Were a New Type of Worker? Dependent Contractor*, WALL ST. J. (Jan. 28, 2015, 10:28 AM), <http://www.wsj.com/articles/what-if-there-were-a-new-type-of-worker-dependent-contractor-1422405831>.

²⁰⁸ *Id.*

²⁰⁹ Doug Haas, *Protecting the Sharing Economy: Creating an FLSA Dependent Contractor Status*, THE DAY SHIFT (Sept. 22, 2015), <http://dayshift.com/2015/09/22/protecting-the-sharing-economy-creating-an-flsa-dependent-contractor-status/56/>.

the first place. The other probable alternative, a *Lochner*-style substantive due process challenge by contractors and members of sharing cooperatives who object to being forced into employment, is no improvement. Using economic dependence to label a worker an employee against his or her will does arguably violate substantive due process, at least as applied to contractors who present credible evidence that they have made a voluntary decision to contract.²¹⁰

Instead of further manipulating these already overwrought tests for employment, it should be acknowledged that gig work is not just a new name for something old. A different kind of work has emerged, and new rules need to be developed. This is not to say that gig workers will not fight for some of the same protections and entitlements that employees now enjoy. However, gig workers should not expect employee styled treatment without making employee commitments and sacrifices. Gig workers need to understand the new model before entering that workforce.

Millennials are probably the most likely to comprehend and accept the differences²¹¹ because the phenomenon is coming of age alongside them. The next generation may wonder what this fuss was all about. Members of Generation X are leading gig firms, and their cohort admires the entrepreneurial spirit they signify.²¹² It is not ageist to recognize that generational differences can hinder understanding and delay positive growth. Members of the baby boomers and earlier generations are more likely to hold fast to what they know—the employment of the past.²¹³ This is unfortunate for many who would benefit from gig work, particularly those that are reluctant to leave the workforce because absolute retirement holds little appeal.

Independent contractors are essentially defined in the negative as

²¹⁰ Doug Hass, *Do Sharing Economy Cases Show that the FLSA is Outdated? Yes!*, THE DAY SHIFT (Sept. 18, 2015), <http://dayshift.com/2015/09/18/do-sharing-economy-cases-show-that-the-flsa-is-outdated-yes/18/>.

²¹¹ See, e.g., Rob Asghar, *Study: Millennials are the True Entrepreneur Generation*, FORBES (Nov. 11, 2014, 8:32 PM), <http://www.forbes.com/sites/robasghar/2014/11/11/study-millennials-are-the-true-entrepreneur-generation/> (“A full 77% of millennials say that flexible work hours are a key to boosting productivity within their generation . . .”).

²¹² *Id.*

²¹³ See, e.g., John B. Becton, Harvell J. Walker & Allison Jones-Farmer, *Generational Differences in Workplace Behavior*, 44 J. APPLIED SOC. PSYCHOL. 175, 182 (2014) (noting “that there are significant job tenure mean differences between Boomers and Gen X and between Boomers and Millennials when controlling for relative age and the interaction between relative age and generation.”).

workers who are not employed by an employer.²¹⁴ Traditionally, an independent contractor is not subject to significant control by an employer, and is not wholly dependent on any one employer.²¹⁵ Gig workers fit this basic concept, and legislators have an opportunity to recognize that defining independent contractors only by what they are not has left an enormous hole in the law. Unpredictability is a natural part of doing business, but some answers ought to be knowable, including who is and who is not an employee. Firms and workers alike would appreciate and enjoy the confidence to go forward with their relationships free from doubt over what each owes to the other.

A positively formed definition of who is an independent contractor should include gig workers. Statutory codification of independent contractor definitions should be molded to accommodate the current realities of working, which are far different than they once were. Legislators may have supposed that gig work would turn out to be a passing trend. While the market waits for them to realize that it is not, there are steps that can be taken to help gig workers fit more neatly into the role of independent contractor.

2. *Market solutions that may develop freely if allowed*

Uber drivers do not want to be classified as employees.²¹⁶ Gig workers want to avoid the oppression of employer control and enjoy the freedom of flexibility.²¹⁷ Like crowd workers for Amazon, the “primary advantage” of being a gig worker “is the freedom to choose when and where to work, how long to spend, and what work to perform.”²¹⁸ The best solutions will be discovered, proposed, negotiated, formed, and implemented by and between gig workers and gig firms. They will not be borne of any administrative, legislative, or judicial means.

Gig firms can take some actions that would help gig workers thrive while supporting the independent contractor designation by relinquishing control in ways that can benefit both sides. The possibilities include but should not be limited to the following: (a) make certain that each newly established relationship is as clear as possible, from its very inception; (b) offer tools for micro-entrepreneurial success, including financial literacy; (c) encourage and support

²¹⁴ See Sprague, *supra* note 10, at 6–8.

²¹⁵ See *id.*

²¹⁶ Danny Vinik, *Uber Drivers: We Aren't Employees*, POLITICO (June 17, 2015, 6:14 PM), <http://www.politico.com/agenda/story/2015/06/uber-drives-consider-themselves-independent-contractors-000093>.

²¹⁷ See *id.*

²¹⁸ Felstiner, *supra* note 13, at 154.

synergistic combinations across gig firms; (d) allow gig workers to set their own rates of pay; (e) permit subcontracting; (f) let portable reputations replace terminations; and (h) engage in constructive dialogue with workers' rights groups.

(a) *Be clear from the start.* Gig firms and “most crowdsourcing vendors” alike each “make some effort to impose a default structure on the employment relationships.”²¹⁹ Mandatory and nonnegotiable “terms of use tend either to specify explicitly that providers of crowd labor will serve as independent contractors or otherwise require that workers waive any rights that might flow from the employment relationship.”²²⁰ Becoming a gig worker might be too quick and easy for some. Enforceability of click-wrap or click-through agreements is a topic for another paper, but gig firms ought to consider taking steps to ensure that new workers fully understand the nature of the relationship they are forming when they sign up as independent contractors.

The startup costs for a gig worker consist of a computer, or a smartphone that may even be provided gratis, and “a reasonably fast internet connection.”²²¹ The barriers to entry and the costs and risk associated with exit are very low for both firms and workers.²²² This kind of “flexibility would have been unprecedented in the job market of the twentieth century, and remains quite rare today[,]”²²³ although it is gaining popularity. Easy access to the gig workforce is a good thing, but getting started should be accompanied by some small measure of education about independent contract work, delivered in plain language. At the very least, this would strengthen the argument that all workers entered a contractual relationship voluntarily.

(b) *Offer tools for success.* Pitfalls such as failing to plan, save for, and pay quarterly taxes can be avoided if workers are exposed to important concepts that may never have reached their awareness, particularly if they have only ever worked as traditional employees.

“The independent contractor status privileges the archetypical freelancer, who is a skilled professional with moxie. Archetypical freelancers are aware of the hurdles, and they know at least to expect the unexpected. This sort of mental preparation makes all the difference.”²²⁴ Gig work can supplement traditional employment, but

²¹⁹ *Id.* at 151.

²²⁰ *Id.*

²²¹ *Id.* at 154.

²²² *See id.*

²²³ *Id.*

²²⁴ Cheng, *supra* note 12, at 71.

it can also provide a transition to true entrepreneurship.²²⁵ Struggling gig workers may need to increase their own personal financial literacy in order to become and remain successful.²²⁶

Further, the idea that a new entrant into a business field should be immediately profitable goes against the very concept of entrepreneurialism. No realistic person starts a fledgling business expecting to be in the black within the first year or couple of years. Micro-entrepreneurs should not expect a golden ticket, and those who elect to enter the gig job market should not be rewarded for being ill-informed and for misapprehending the nature of gig work. Those that decry the loss of traditional employment are crying wolf about the absolute disappearance of jobs they see as normal and acceptable. They are also deluded about the permanence of those jobs that once were secure and offered the opportunity to flourish in a single employer career.

Gig firms can help potential new entrants to the gig workforce by offering informational tools that would encourage hopeful and ambitious workers to be knowledgeable about what is possible and what is realistic. Resisting the temptation to overstate earning potential could go a long way to prevent disappointment that might spark litigation.

(c) *Encourage synergies.* Perhaps it is true that, at the moment, it is very difficult to cobble together a lucrative and satisfying career from a patchwork of different jobs. Yes, journalists have ventured out into the gig economy for as much as a month to prove that point,²²⁷ but struggling in the early stages is universal to the entrepreneurial experience. No one who is starting a business expecting to turn a tidy profit after only one month should move forward. It seems likely that the loudly complaining minority of gig workers is part of this group. Starting a business requires commitment, perseverance, and sacrifice. Some gig workers haven't made as much as they hoped as soon as they imagined, but we do not know and should not presume that this is because they are being treated unfairly. The disappointed group of gig workers can only claim surprise if they went into the business blindly. This behavior should not be rewarded, but it happens and should be acknowledged.

People do not stay with one employer or even in one career for very

²²⁵ See *id.* at 79.

²²⁶ See *id.* at 94, 104.

²²⁷ Sarah Kessler, *Pixel & Dime: On (Not) Getting by in the Gig Economy*, FAST COMPANY (Mar. 18, 2014, 6:00 AM), <http://www.fastcompany.com/3027355/pixel-and-dime-on-not-getting-by-in-the-gig-economy>.

long anymore.²²⁸ Many do not want to. Companies know this, and are understandably reluctant to be forced into collectively insulating nomadic employees from the economic risks that come along with frequent change.²²⁹ Gig work makes it possible for a person to hop from one job, or kind of job, to another and back and forth, as they please. Notably, this kind of flexibility could also allow gig workers to multi-task and earn money from two different jobs at one time. Companies that facilitate this should not be expected to treat these workers as if they were dedicated and continuous members of a cohesive workforce.

Gig firms can help workers identify job combinations that are complementary (e.g., driving for Uber and providing courier service; producing handmade goods for Etsy while renting out space at home via Airbnb).²³⁰ It should be clear that working for more than one app is acceptable and even encouraged. For the gig workers that do wish to forge a diverse “career” out of several flexible jobs, or who just need a steady stream of income, the pairings might not be obvious but could be a boon. Diversification of a freelancing portfolio would serve to improve the prospect of building a viable business out of so-called odd jobs.

(d) *Permit subcontracting.* Vilma Zenelaj cleaned houses using the Handy app until she was caught subcontracting cleaning work to her sister Greta.²³¹ The sisters presented themselves as class representatives in a suit against Handy.²³² The bulk of the claims were sent to arbitration in accord with the unambiguous terms of the contract, despite the sisters’ argument that the cleaners were unsophisticated parties.²³³ Handy’s rule against bringing anyone along on a job²³⁴ was likely meant to protect customers more than to control workers, but highlights a potential improvement on the gig model.

²²⁸ See, e.g., Becton et al., *supra* note 213, at 178.

²²⁹ See generally Jeanne Meister, *Job Hopping Is the ‘New Normal’ for Millennials: Three Ways to Prevent a Human Resource Nightmare*, FORBES (Aug. 14, 2012, 8:58 AM), <http://www.forbes.com/sites/jeannemeister/2012/08/14/job-hopping-is-the-new-normal-for-millennials-three-ways-to-prevent-a-human-resource-nightmare/#340ee5aa5508>.

²³⁰ See Covert, *supra* note 49 and accompanying text.

²³¹ Lauren Weber & Rachel Emma Silverman, *On-Demand Workers: ‘We Are Not Robots,’* WALL ST. J. (Jan. 27, 2015, 7:55 PM), <http://www.wsj.com/articles/on-demand-workers-we-are-not-robots-1422406524>.

²³² *Id.*

²³³ Zenelaj v. Handybook, Inc., 82 F. Supp. 3d 968, 972–74 (N.D. Cal. 2015).

²³⁴ Carolyn Said, *Handy.com Housecleaners’ Lawsuit Could Rock On-demand Companies*, SFGATE (Nov. 13, 2014, 4:20 PM), <http://www.sfgate.com/business/article/Handy-com-housecleaners-lawsuit-could-rock-5891672.php>.

If gig workers want to maximize efficiency by sharing jobs, gig firms should build this option into their apps. Workers must of course understand that firms will want to capture every possible commission and thus will require transparency when subcontracting.²³⁵ Firms that allow the option would benefit from greater satisfaction among workers and consumers. They would also provide one more avenue for gig workers to achieve full time income from freelancing, where desired, and another legitimate argument against employment classification.

(e) *Allow individual rates of pay.* Amazon's Mechanical Turk workers perform some task for rates far below the minimum wage.²³⁶ Circumventing minimum wage is not an honorable goal, but gig firms are understandably reluctant to pay an hourly wage when they cannot control the productivity, or exclusive attention to one job, of any worker.²³⁷ In every situation where it is possible for workers to set their own rates for jobs, this should be what happens. Uber riders would not be confused for long; riders might even relish the opportunity to pay a lower rate to a driver who is further away in exchange for waiting an additional few minutes, and vice versa. Transactional negotiations like these would make gig workers more clearly independent contractors than employees.²³⁸

(f) *Let portable reputations replace terminations.* However inexpensive the independent contractor arrangement might seem, there are significant costs for gig firms that are contributing to the blurring of lines where control of workers is concerned. Like crowd workers, "[e]ven the most committed [gig] worker will have less at stake than a formal employee, especially when any positive reputation a [gig] worker may build has limited currency outside the platform."²³⁹ Because of this lowered commitment, gig firms are likely to find that some gig workers are "less concerned with meeting specifications and adhering to policies."²⁴⁰ Naturally, the temptation for gig firms is to find a way to set and maintain standards. This is where gig workers begin to lose some of the freedom they were seeking and gig firms start to look like employers.

In order to ensure product or service quality, digital crowdsourcing vendors have shifted the risk back to workers by drafting contracts

²³⁵ See generally *id.*

²³⁶ See Felstiner, *supra* note 13, at 165, 167.

²³⁷ See Kessler, *supra* note 73.

²³⁸ See *id.*

²³⁹ Felstiner, *supra* note 13, at 153.

²⁴⁰ *Id.* at 152.

allowing firms to reject deficient work without having to pay.²⁴¹ Gig firms have responded in a similar fashion by promulgating guidelines and suggestions that have been viewed as rules where violations result in an end to the relationship between firm and worker.²⁴² An alternative approach would be to allow gig workers to carry their service reputations with them wherever they go,²⁴³ and use their ratings to promote themselves for other gig work even when multiple jobs overlap in time and function. Workers would thus be incentivized to perform well in order to attain a potential reward, rather than to avoid a threatened punishment. This would certainly bolster a gig firm's argument that it does not have significant control over its workers, whose freedom would extend that much further beyond flexible scheduling.

“[P]roblems with reputation portability may reveal themselves only after the worker has invested a significant time and energy on the platform and wishes to capitalize on that investment.”²⁴⁴ These workers “ought to be able to take their reputations with them,” so that the experience and positive feedback they have accumulated performing crowd labor does not evaporate once they leave the platform.”²⁴⁵ Uber drivers and other gig workers would benefit from the ability to use their ratings as reputational currency. Certainly, this might enable them to succeed through competitor platforms, but Uber seems unconcerned with that risk and does not prohibit working for competitors. More importantly, a driver's gleaming resume, as written by riders, could just as easily encourage someone to hire them for other unrelated tasks and services, from courier to house cleaning and far beyond. A cleaner working through Handy may be able to market herself better as a tasker via TaskRabbit if consumers using that app could easily see her individual history of consistent five-star Handy ratings. Gig firm apps should be able to speak to each other in this manner so that a gig worker's reputation would translate and serve as a virtual resume.

When a gig worker consistently performs poorly, terminating the contract by cutting off access to the platform app resembles a traditional firing too closely for classification comfort.²⁴⁶ Instead, gig firms should maximize the impact of reputations developed by ratings from service

²⁴¹ *Id.* at 153.

²⁴² *O'Connor v. Uber Techs., Inc.*, 82 F. Supp. 3d 1133, 1142–43 (N.D. Cal. 2015).

²⁴³ *See id.* at 202 (citing Jonathan Zittrain, *Ubiquitous Human Computing*, 32 UNIV. OF OXFORD LEGAL RES. PAPER SERIES 1–2 (2008), available at <http://ssrn.com/abstract=1140445>).

²⁴⁴ *Id.* at 157–58.

²⁴⁵ *Id.* at 202.

²⁴⁶ *Id.* at 193–94.

purchasers. By clearly and appropriately allowing negative reviews to surface and impact a worker's reputation, consumers will avoid that individual service provider, and an exit can happen organically. Letting a bad reputation replace terminations would swing the pendulum away from employer control and back toward independent contract status.

(g) *Engage worker groups.* Gig workers are already finding ways to make their voices heard through various websites (e.g., Freelancers Union,²⁴⁷ Peers,²⁴⁸ and UberPeople²⁴⁹) and they will probably only get louder. Leading gig firms can engage in a constructive dialogue with these groups to learn what it would take to have a more satisfied and more effective, perhaps even less litigious, workforce. Future firms might learn what mistakes to avoid by reaching out directly, or by simply doing a little bit of reconnaissance on worker group websites. Until gig workers can be definitively classified as independent contractors, unionization will remain a goal for some.²⁵⁰ Proactive use of these forums by gig firms could provide an advantage over companies that choose to ignore the complaints of workers, perhaps by addressing some frustrations before they become class action lawsuits.

IV. CONCLUSION

Workers are gravitating toward a new and flexible relationship with firms that help them to produce income. Traditional employment dynamics are too constraining for both gig workers and gig firms. The antiquated ideal of independent contractors as only including skilled professional specialists does not capture this modern form of work. Gig work defies existing definitions, causing expensive uncertainty in the labor market.²⁵¹ Firms need to accurately predict costs by knowing that they can properly classify workers. Workers want to find the freedom that freelancing promises, but need to be adequately informed and prepared for the challenges of micro-entrepreneurialism. Both sides

²⁴⁷ *About Us*, FREELANCERS UNION, <https://www.freelancersunion.org/about/> (last visited Feb. 12, 2016).

²⁴⁸ *Making the Sharing Economy Work for the People Who Power It*, PEERS, <http://www.peers.org/about/> (last visited Feb. 12, 2016).

²⁴⁹ *Uber Drivers Forum*, UBERPEOPLE.NET, <http://uberpeople.net/> (last visited Feb. 12, 2016).

²⁵⁰ See Cole Stangler, *Why The Uber, Lyft Driver Union Push Could Disrupt the Gig Economy*, INT'L BUS. TIMES (Dec. 18, 2015, 4:36 PM), <http://www.ibtimes.com/why-uber-lyft-driver-union-push-could-disrupt-gig-economy-2232778>.

²⁵¹ See *Employees or Independent Contractors in the Gig Economy - Lessons from Uber, Lyft, Homejoy*, ROTH LEGAL SOLUTIONS LLC (July 22, 2015), <http://www.rothlegalsolutions.com/blog/2015/10/19/employees-or-independent-contractors-in-the-gig-economy-lessons-from-uber-lyft-homejoy>.

benefit from streamlined processes, but must be careful to let guidelines guide and not control. The legal concept of an independent contractor ought to be challenged for its dependence on the egregiously labyrinthine tests for employment. Instead, independent contractors should be afforded a positive definition, to include the new freelancing that is gig work. Until such time, gig firms would be wise to adjust their models to more clearly align gig workers away from employment status, thereby avoiding the significant risks attendant with misclassification.

