

# The Gig Economy: An Annotated Bibliography

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*Companies like Uber, Lyft, Postmates, Airbnb, and others have become established within society, to the point that Uber has become a regularly used verb. While the consumer benefits of these companies has been immediate, the legal implications remain far murkier. This emerging market has demonstrated that the twentieth century laws are unable to cope with these twenty-first century businesses in regard to employee rights, employer responsibilities, consumer protections, and federal and state regulations. This bibliography presents the primary and secondary sources which are essential to understanding what has been termed the “gig economy” so that readers have a background of the legal standards currently applied, as well as the legal scholars seeking to create clarity within the existing legal framework.*

INTRODUCTION .....	362
PART I: RELEVANT PRIMARY LAW.....	363
<i>COTTER V. LYFT, INC.</i> , 60 F. SUPP. 3D 1067 (N.D. CAL. 2015) .....	363
<i>O’CONNOR V. UBER TECHS, INC.</i> , 82 F. SUPP. 3D 1133 (N.D. CAL. 2015).....	364
FAIR LABOR STANDARDS ACT AND AMENDMENTS .....	365
NATIONAL LABOR RELATIONS ACT .....	366
PART II: SCHOLARLY INTRODUCTION TO THE GIG ECONOMY .....	367
SARAH A. DONOVAN, DAVID H. BRADLEY & JON O. SHIMABUKURO, CONG. RESEARCH SERV., R44365, WHAT DOES THE GIG ECONOMY MEAN FOR WORKERS? (2016)..	367
BENJAMIN MEANS & JOSEPH A. SEINER, <i>NAVIGATING THE UBER ECONOMY</i> , 49 U.C. DAVIS L. REV. 1511 (2016).....	367
VALERIO DE STEFANO, <i>THE RISE OF THE “JUST-IN-TIME WORKFORCE”: ON-DEMAND WORK, CROWDWORK, AND LABOR PROTECTION IN THE “GIG-ECONOMY”</i> , 37 COMP. LAB. L. & POL’Y J. 471 (2016).....	368
MIRIAM A. CHERRY, <i>BEYOND MISCLASSIFICATION: THE DIGITAL TRANSFORMATION OF WORK</i> , 37 COMP. LAB. L. & POL’Y J. 577 (2016).	369
MIRIAM A. CHERRY, <i>ARE UBER AND TRANSPORTATION NETWORK COMPANIES THE FUTURE OF TRANSPORTATION (LAW) AND EMPLOYMENT (LAW)?</i> , 4 TEX. A&M L. REV. 173 (2017) .....	370
PART III: UPDATING STANDARDS IN RESPONSE TO THE GIG ECONOMY ..	371
SETH D. HARRIS & ALAN B. KRUEGER, <i>A PROPOSAL FOR MODERNIZING LABOR LAWS FOR TWENTY-FIRST-CENTURY WORK: THE “INDEPENDENT</i>	

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<i>WORKER</i> " (HAMILTON PROJECT, DISCUSSION PAPER NO. 2015-10, 2015).....	371
EMILY C. ATMORE, NOTE, <i>KILLING THE GOOSE THAT LAID THE GOLDEN EGG: OUTDATED EMPLOYMENT LAWS ARE DESTROYING THE GIG ECONOMY</i> , 102 MINN. L. REV. 887 (2017).....	372
ALEX KIRVEN, COMMENT, <i>WHOSE GIG IS IT ANYWAY? TECHNOLOGICAL CHANGE, WORKPLACE CONTROL, AND SUPERVISION, AND WORKERS' RIGHTS IN THE GIG ECONOMY</i> , 89 U. COLO. L. REV. 249 (2018).....	373
PART IV: EXTENDING EXISTING LEGAL STANDARDS FOR THE GIG ECONOMY.....	374
RYAN CALO & ALEX ROSENBLAT, <i>THE TAKING ECONOMY: UBER, INFORMATION, AND POWER</i> , 117 COLUMBIA L. REV. 1623 (2016).....	374
MARIANO LAO, <i>WORKERS IN THE "GIG" ECONOMY: THE CASE FOR EXTENDING THE ANTITRUST LABOR EXEMPTION</i> 51 U.C. DAVIS L. REV. 1543 (2018).....	376
MARTIN H. MALIN, <i>PROTECTING PLATFORM WORKERS IN THE GIG ECONOMY: LOOK TO THE FTC</i> , 51 IND. L. REV. 377 (2018).....	376

## INTRODUCTION

In recent years, companies like Uber, GrubHub, Postmates, and others have created a new economic paradigm where traditional services such as transportation, food delivery, and grocery shopping have been streamlined directly to the customers' specifications. This paradigm has necessarily affected labor relations since workers are now hired for a discreet purpose, based on an individual need. The development of this non-traditional employment has led to interactions between users and companies which are more direct and individualized; unsurprisingly, this has led to a change in the relationship between employee and employer. The rise of this so-called gig economy (or "platform" economy or "sharing" economy or any other term one wishes to apply) has meant that current labor and employment laws have not kept pace with the new reality. In current years, cases and regulations have attempted to define the contours of the gig economy but to varying degrees and with myriad results, and often based on existing (and outdated) norms. This annotated bibliography addresses the growing scholarship on the gig economy to put the legal issues into perspective, and highlights how current legal experts are attempting to address a new world in terms of old laws.

In compiling this bibliography, law review/journal articles were selected from 2010 onward, though most of the literature and all of the articles within this bibliography come from 2015 onward, representing the need for legal clarity after the Northern District of California cases discussed below. Every effort has been made to include all articles from the top 50 law journals as defined by the Washington and Lee Journal rankings,

however articles outside of these journals have been included when particularly relevant. The articles represented here present an overview of the scholarly discussion surrounding the gig economy, and represents myriad solutions to many problems, without a clear consensus on which are the most pressing. The bibliography seeks to present the reader with articles addressing these solutions and problems in a general way, to give the reader a greater understanding of the controversies and ambiguity present in discussions of the gig economy.

As the literature will demonstrate, many of the legal problems associated with the gig economy center on defining those providing the actual service in the gig economy, i.e. are they employees legally obligated to employee benefits or independent contractors who fall outside of employee protections. Many of the theses, arguments, and historical background within the following articles will attempt to tease out the distinctions between whether these actors are employees or independent contractors. However, for purposes of brevity and uniformity, this bibliography will refer to these actors as “gig workers”, demonstrating that these individuals are doing the work within the gig economy, and differentiating them from the “gig companies” which are providing the forum within which workers and customers interact.

#### PART I: RELEVANT PRIMARY LAW

*COTTER V. LYFT, INC.*, 60 F. SUPP. 3D 1067 (N.D. CAL. 2015).

Lyft drivers brought a suit against the company claiming that they were improperly designated as independent contractors while in fact they were employees.<sup>1</sup> The court immediately identified the grey area in which Lyft drivers operate as neither clearly one nor the other, and that a decision in any direction would have profound consequences for the drivers and the company.<sup>2</sup> Applying California law, the court looked at the “principal” test to determine “whether the person [or company] to whom service is rendered has the right to control the manner and means of accomplishing the result desired.”<sup>3</sup> Since reasonable people could differ on the question, the court ruled that the question of the employee status must go to the jury.<sup>4</sup>

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1. *Cotter v. Lyft, Inc. (Cotter I)*, 60 F. Supp. 3d 1067, 1069 (N.D. Cal 2015).

2. *Cotter I*, 60 F. Supp. 3d at 1069.

3. *Id.* at 1075 (quoting *S.G. Borello & Sons, Inc. v. Dep’t of Indus. Relations*, 769 P.2d 399, 404 (Cal. 1989)); *id.* at 1075-76 (under this standard the company need not exercise exclusive control, but rather “necessary control” over operations, where the right to terminate a worker at will represents a strong presumption of control).

4. *Id.* at 1076.

Although courts (both California and Ninth Federal Circuit courts) have ruled on these questions, they have only done so when the facts weighed heavily on one side or the other.<sup>5</sup> However, since “a reasonable jury could conclude that the plaintiff Lyft drivers were employees [and yet] also conclude that they were independent contractors, there must be a trial.”<sup>6</sup> Following the same reasoning, the court dismissed Lyft’s motion for summary judgment claiming the workers were independent contractors as a matter of law since they enjoyed flexibility in employment.<sup>7</sup> The court dismissed this motion due to the fact that Lyft “instructed” drivers to follow certain rules, and whether these rules were mandatory is less important than whether these rules can be enforced as mandatory.<sup>8</sup>

Concluding their ruling, the court recognized that “the jury in this case will be handed a square peg and asked to choose between two round hole” and that “[t]he test the California courts have developed over the 20th Century for classifying workers isn't very helpful in addressing this 21st Century problem.”<sup>9</sup> While the court believed the decision would ultimately be made by a jury, the two sides reached a settlement the following year<sup>10</sup> and uncertainty remained unanswered.

*O'CONNOR V. UBER TECHS, INC.*, 82 F. SUPP. 3D 1133 (N.D. CAL. 2015).

In a case decided by the same court (Northern District of California) on the same day, *O'Connor* revolved around the question of whether Uber workers were independent contractors as a matter of law.<sup>11</sup> The Northern District denied the motion under California law which states there is a rebuttable presumption of employment when workers “provide a service to [the company].”<sup>12</sup> The court dismissed the motion on grounds that the drivers were presumptive employees because “as a matter of law . . . Uber’s drivers render service to Uber.”<sup>13</sup> Like *Cotter*, the court did not decide the

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5. *Id.* at 1077-78.

6. *Id.* at 1078.

7. *Cotter*, 60 F. Supp. 3d at 1078-79 (claiming that the flexibility of when and where to work amounted to flexibility enjoyed by independent contractors was quickly dismissed by the court).

8. *Id.* at 1079 (reiterating their reasoning, “whether Lyft actually exercises this control is less important than whether it retains the right to do so”).

9. *Id.* at 1081.

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

11. *O'Connor v. Uber Techs, Inc. (O'Connor I)*, 82 F. Supp. 3d 1133, 1135 (N.D. Cal. 2015).

12. *O'Connor I*, 82 F. Supp. 3d at 1141 (citing *S.G. Borello & Sons*, 769 P.2d at 404).

13. *Id.* at 1145.

question of worker status, similarly reasoning that the question of worker status must be decided by a jury.<sup>14</sup>

Unlike *Cotter*, this case also considered Uber’s argument that is not a “transportation company” but rather a “technology company” and that they employ no drivers and instead independently contract with “transportation providers” (i.e. Uber drivers).<sup>15</sup> The court quickly dismissed this argument, recognizing that focusing “on the substance of what the firm actually does . . . , it is clear that Uber is most certainly a transportation company, albeit a technologically sophisticated one.”<sup>16</sup> While the case was ultimately settled,<sup>17</sup> the court recognized Uber’s argument that the drivers were presumptively independent contractors was centrally based upon their characterization of the firm as a technology company,<sup>18</sup> and categorically refused to accept this characterization in the ruling.<sup>19</sup>

#### FAIR LABOR STANDARDS ACT AND AMENDMENTS

In response to the Great Depression, the United States Congress passed the Fair Labor Standards Act (FLSA),<sup>20</sup> recognizing that “industries engaged in commerce” engaged in “labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers” is a threat and danger to commerce, allowing Congress to eliminate these conditions “without substantially curtailing employment or earning power.”<sup>21</sup> The FLSA defines employer<sup>22</sup> and employee<sup>23</sup> narrowly, and somewhat ambiguously.

Since the FLSA is contingent upon the existence of an employer-employee relationship, the definitions of these terms have governed the traditional application of who qualifies as an employee, which has long been determined under the “economic reality test.”<sup>24</sup> For an employment

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14. *Id.* at 1148.

15. *Id.* at 1137.

16. *Id.* at 1141-42 (the court used evidence of Uber’s marketing strategy, using phrases such as “best transportation service in San Francisco,” identifying the company as “Everyone’s Private Driver,” and other descriptions of Uber as a “transportation system”).

17. See *O’Connor v. Uber Technologies, Inc. (O’Connor II)*, No. 13-cv-03826-EMC, 2019 WL 1437101, at \*15-16 (N.D. Cal. Mar. 29, 2019).

18. *O’Connor I*, 82 F. Supp. 3d at 1141.

19. *Id.* at 1142, 1145.

20. Fair Labor Standards Act of 1938, 29 U.S.C.A. §§ 201-219. (West, Westlaw Edge current through P.L. 116-16).

21. *Id.* § 202.

22. *Id.* § 203(d) (“any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency . . .”).

23. *Id.* § 203(e)(1) (“any individual employed by an employer”).

24. *United States v. Silk*, 331 U.S. 704 (1947).

relationship to exist under the common law,<sup>25</sup> there must be (1) a degree of control exercised by the employer over the workers, (2) the workers' have an opportunity to profit or invest in the business, (3) there is a degree of skill required to perform the work, (4) there is a permanence, or at least a durability, of the working relationship, and (5) the work is integral to the employer's business.<sup>26</sup> This test has been broadly applied within every American jurisdiction to distinguish employees and independent contractors, but which has proven inconclusive in determining employment status for gig workers.

#### NATIONAL LABOR RELATIONS ACT

The express purpose of the National Labor Relations Act (NLRA)<sup>27</sup> was also in response to the Great Depression: specifically, to address the "inequality of bargaining power between employees" who have limited freedom to affect the market "and employers who [affect] the flow of commerce, and tend[] to aggravate recurrent business depressions, by depressing wage rates . . . and by preventing the stabilization of competitive wage rates and working conditions within and between industries."<sup>28</sup> To eliminate this inequality, the NLRA encourages collective bargaining and freedom to associate and negotiate for fairer wages and better working conditions.<sup>29</sup> The National Labor Relations Board (NLRB)<sup>30</sup> is empowered to ensure that no company is conducting "unfair labor practices" as defined in the NLRA.<sup>31</sup>

The NLRB is central to the understanding of the gig economy since many of the final decisions and binding law in this area have come from them.<sup>32</sup> While the rulings by the NLRB have followed a certain trajectory, recent decisions<sup>33</sup> demonstrate how the NLRB is not subject to precedent

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25. Restatement (Second) of Agency § 220 (Am. Law Inst. 1958) (defining the distinction between employee and independent contractor).

26. See generally, Debra T. Landis, Annotation, *Determination of "Independent Contractor" and "Employee" Status for Purposes of § 3(e)(1) of the Fair Labor Standards Act (29 U.S.C.A. § 203(e)(1))*, 51 A.L.R. Fed. 702, § 2 (1981).

27. National Labor Relations Act, 29 U.S.C.A. §§ 151-169 (West, Westlaw Edge current through P.L. 116-16).

28. *Id.* § 151.

29. *Id.* §§ 151 & 157.

30. *Id.* § 160.

31. *Id.* § 158.

32. See *FedEx Home Delivery*, 361 N.L.R.B. No. 55 (Sept. 30, 2014), *overruled by*, *Supershuttle DFW, Inc.*, 367 N.L.R.B. No. 75, 2018-19 NLRB Dec. ¶ 16508 (Jan. 25, 2019) (the cases demonstrate how the NLRB can reverse a common law rule, and then return to that same rule with relative ease. The importance of NLRB decisions to the current interpretation and application of gig work classification cannot be understated).

33. *Id.*

when ruling upon employment standards within the emerging gig economy, further highlighting the importance to any current understanding and application of the standards defining gig workers.

## PART II: SCHOLARLY INTRODUCTION TO THE GIG ECONOMY

SARAH A. DONOVAN, DAVID H. BRADLEY & JON O. SHIMABUKURO, CONG. RESEARCH SERV., R44365, WHAT DOES THE GIG ECONOMY MEAN FOR WORKERS? (2016).

The Congressional Research Service began asking the same questions about the gig economy as legal scholars in the aftermath of *Cotter I* and *O'Connor I* decisions.<sup>34</sup> The paper begins with the economic realities of the gig economy, including the “on demand” and direct nature of the work, as well as the lack of uniformity between the companies within the gig economy.<sup>35</sup> The authors ask whether gig workers are either employees or independent contractors, weighing the factors but never reaching an answer.<sup>36</sup> Ultimately the only conclusion the paper reaches is that the gig economy is “not well understood” and there is “considerable uncertainty” about the workers and type of work done,<sup>37</sup> thus demonstrating the need for the legal analysis represented in the rest of the bibliography. While not helpful in answer the question of how gig workers should be classified, this paper presents a completely unvarnished and objective look at the facts and figures at the genesis of the legal debates on the gig economy.

BENJAMIN MEANS & JOSEPH A. SEINER, *NAVIGATING THE UBER ECONOMY*, 49 U.C. DAVIS L. REV. 1511 (2016).

This essay focuses on the nature of “at-will employees” and how the nature of at-will work compares to work within the gig economy,<sup>38</sup> while conversely explaining how employees within a traditional Fair Labor Standards Act application are not equivalent to at will employees.<sup>39</sup> This essay, viewing the relationship between gig workers and gig companies from the side of the latter, provides a comprehensive legal and historical analysis of the traditional differences between independent contractors and employees, and yet how the gig economy presents unique challenges to this

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34. Sarah A. Donovan, David H. Bradley & Jon O. Shimabukuro, Cong. Research Serv., R44365, What Does the Gig Economy Mean for Workers? (2016).

35. *Id.* at 1-2.

36. *Id.* at 8-11.

37. *Id.* at 14.

38. Benjamin Means & Joseph A. Seiner, *Navigating the Uber Economy*, 49 U.C. DAVIS L. REV. 1511, 1518 (2016).

39. *Id.* at 1524.

paradigm.<sup>40</sup> Means and Seiner propose a new test based on “how much flexibility does the individual have in the working relationship?”<sup>41</sup> According to the authors, “the overall flexibility of the workforce supports the conclusion that many workers in the on-demand economy are independent contractors.”<sup>42</sup>

The rationale for developing a new test rests on the authors’ legitimate concern that the current legal framework without a legal standard for determining employment vs. independent contracting will lead to excessive litigation.<sup>43</sup> Furthermore, a clear standard will give gig workers clarity in understanding exactly what their role within the company is, determining that they will be independent contractors rather than employees. The authors’ further call on jurisdictions to rethink at-will employment to take technological transformations of the economy into account.<sup>44</sup>

VALERIO DE STEFANO, *THE RISE OF THE “JUST-IN-TIME WORKFORCE”: ON-DEMAND WORK, CROWDWORK, AND LABOR PROTECTION IN THE “GIG-ECONOMY”*, 37 COMP. LAB. L. & POL’Y J. 471 (2016).

On the flip side of the coin, and favoring the side of gig workers, Valerio de Stefano analyzes the conditions of gig workers within the gig economy, using existing labor laws and practices as her standard.<sup>45</sup> De Stefano focuses on two specific types of gig work: “Crowdwork is . . . executed through online platforms” placing many organizations into contact with many individuals through the internet, breaking down tasks into “microtasks.”<sup>46</sup> What de Stefano calls “work-on-demand via app” creates a workforce performing traditional jobs while the clerical work is carried out through apps.<sup>47</sup> The fundamental difference between these two forms of gig

40. *Id.* at 1525-1527.

41. *Id.* at 1535. The authors’ offer little rationale for why “flexibility” should be the standard; while they recognize that flexibility is becoming normalized for employees, they contend that “when the worker has significant discretion to decide when to work . . . the worker has . . . a greater degree of independence” than workers who must essentially clock in and out. *Id.* at 1538. However, the authors’ recognition that flexibility does not destroy an “employee” designation, combined with their conceit that “many employees are now demanding ‘[f]lexible schedules,’ . . .” and that flexibility is a benefit offered to gig workers raises the question as to why flexibility should be the standard at all, when it is so arbitrary. *Id.*

42. *Id.* at 1541.

43. Means & Seiner, *supra* note 38, at 1532.

44. *Id.* at 1545.

45. Valerio de Stefano, *The Rise of the “Just-in-Time Workforce”: On-Demand Work, Crowdwork, and Labor Protection in the “Gig-Economy”*, 37 COMP. LAB. L. & POL’Y J. 471 (2016).

46. *Id.* at 473-74.

47. *Id.* at 474.

work is that the former is truly global while the latter is necessarily local, requiring supply and demand of services in a set geographic region. From this distinction, de Stefano argues strongly that “work-on-demand via app” (hereafter “app workers”) is inherently work done by traditional employees, while crowdsource work is more accurately analogized to independent contractors, yet often all gig workers are lumped into the same classification.<sup>48</sup>

Evaluating gig workers under the employee vs. independent contractor analysis, de Stefano reaches a far different conclusion than Means and Seiner, specifically that the demands made on app workers exert a tremendous amount of control, as well as assessment of how well these workers are meeting said demands via the app rating and comment system.<sup>49</sup> Further distinguishing her analysis from Means and Seiner, the author contends that any new classification or standard for determining gig worker status would do more harm than good,<sup>50</sup> implicitly contending that litigation is the best way to sort out where gig workers fall.<sup>51</sup> Ultimately the author’s solution is either through the presumption that all gig workers are employees or alternatively expand protections and rights for all workers, regardless of classification.<sup>52</sup>

MIRIAM A. CHERRY, *BEYOND MISCLASSIFICATION: THE DIGITAL TRANSFORMATION OF WORK*, 37 COMP. LAB. L. & POL’Y J. 577 (2016).

Miriam Cherry represents the scholarly vanguard of analysis of the gig economy. In her first work in this bibliography, she achieves the dual purpose of provided the relevant litigation leading to the scholarly debate about the gig economy, as well as articulating the gig economy within the philosophical understanding of the twenty-first century workforce.<sup>53</sup> While this article provides less legal analysis than the all the rest in this bibliography, it is included for the research and analysis of the relevant litigation within the gig economy in Part I, looking at not just rideshare companies, but the litigious reality of the gig economy.<sup>54</sup> Since the publication of this article,

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48. *Id.* at 484-85.

49. *Id.* at 491-92.

50. de Stefano, *supra* note 45, at 495.

51. *Id.* at 493 (the argument that there should be no new standard or test is preceded by the acknowledgment that without a new standard “litigation on the classification of workers in the gig-economy will flourish... as most of the issues at hand are at the core of employment regulations and ... labor protection in most jurisdictions” requiring a complex solution to the complex problem).

52. *Id.* at 500.

53. Miriam A. Cherry, *Beyond Misclassification: The Digital Transformation of Work*, 37 COMP. LAB. L. & POL’Y J. 577, 578-79 (2016).

54. *Id.* at 584-593 (particularly relevant to the litigation discussion is the Northern District of California as the venue for the majority of this litigation, representing both an employee friendly state in terms of labor laws, as well as the center of many technologically

the conclusion from Cherry's analysis of this litigation remains true today: "no clear consensus has emerged on how courts will determine employee versus independent contractor status" for gig workers.<sup>55</sup> Cherry's deep analysis of Katherine Van Wezel Stone theory of the digital transformation of work provides readers with more of a philosophical understanding of work, but is helpful in providing some of the analogous paradigm shifts in employee status in other sectors of the economy.<sup>56</sup> This article concludes with argument that gig work should be a category within Stone's "model of industrial and digital work" transformation.<sup>57</sup>

MIRIAM A. CHERRY, *ARE UBER AND TRANSPORTATION NETWORK COMPANIES THE FUTURE OF TRANSPORTATION (LAW) AND EMPLOYMENT (LAW)?*, 4 TEX. A&M L. REV. 173 (2017).

Miriam Cherry's goal in this article is a broader consequential legal analysis. The article eschews "easy or reflexive judgments about Uber or other [transportation network companies] TNCs" in favor of analyzing how Uber and other gig companies are currently affecting both employment and transportation law.<sup>58</sup> Her thesis for the article is to extrapolate current trends and precedents to predict the future trajectory of these effects.<sup>59</sup> Breaking down her analysis between both transportation law and employment law, she begins with the former, presenting evidence of Uber's lobbying of local governments, and their ability to use information and technology to improve responsiveness.<sup>60</sup>

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innovative companies, which have led to questions about workers' rights within the gig economy).

55. *Id.* at 594.

56. *Id.* at 594-95 (citing KATHERINE V. W. STONE, *FROM WIDGETS TO DIGITS* (Cambridge Univ. Press, 2004)).

57. *Id.* at 594-96 (Stone's thesis is that in the twenty-first century, work has shifted from industrial, where loyalty was prized and upward mobility was common, to knowledge-based work where knowledge and skills are valued and mobility occurs through horizontal moves to better firms rather than loyalty to a single firm. Stone also refers to this as a digital transformation of work).

58. Miriam A. Cherry, *Are Uber and Transportation Network Companies the Future of Transportation (Law) and Employment (Law)?* 4 TEX. A&M L. REV. 173, 177 (2017).

59. *Id.* (as Cherry notes, "[p]redicting the future, especially of technology, is always a fraught task" but accepting that the gig business model is here to stay, it is possible to predict which aspects of the "model are here to stay" and which "parts are unlikely to remain").

60. *Id.* at 182 (specifically, Uber focuses on local ordinances arguing for exceptions to traditional regulations on taxicab services. Similarly, their efficiency provides promising potential for expanding into delivery, public transportation, and other traditionally municipal services currently struggling in some urban centers); *id.* at 175 (the focus on local government has also been somewhat bullying, with "Uber has... proven itself litigious" and have

A similar query is made into whether Uber (and gig companies more generally) are the future of employment law, addressing the shared concern of other scholars as to how gig workers are defined, and how these definitions have and will affect the gig business model.<sup>61</sup> Looking beyond the employer control questions of the applicable case law, Cherry presents gig employees as precarious laborers who are subject to the whims of employer and customer alike,<sup>62</sup> which Cherry claims “is a return to industrial (or even pre-industrial...) systems.”<sup>63</sup> Cherry concludes that while these companies may be brought into existing legal standards or not, it is less certain that the business model will fade away, presenting a scenario in which “bad jobs”<sup>64</sup> become more normalized simply because they are more available.<sup>65</sup>

### PART III: UPDATING STANDARDS IN RESPONSE TO THE GIG ECONOMY

SETH D. HARRIS & ALAN B. KRUEGER, *A PROPOSAL FOR MODERNIZING LABOR LAWS FOR TWENTY-FIRST-CENTURY WORK: THE “INDEPENDENT WORKER”* (HAMILTON PROJECT, DISCUSSION PAPER NO. 2015-10, 2015).

The Hamilton Project serves as a forum for experts and thinkers to propose policy initiatives for emerging legal issues. The authors in this paper propose a compromise where gig workers (or as they refer to them, “independent workers”) are legislatively defined and provided with some of the benefits of employees though not all.<sup>66</sup> To define these workers, the authors propose a three factor test to determine who qualifies for the proposed benefits: (1) hours worked must be measurable,<sup>67</sup> (2) employers may not define the employee status at the outset,<sup>68</sup> and (3) that worker contracts

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adopted “an aggressive attitude of ‘asking forgiveness’ rather than ‘asking permission’ of local authorities”).

61. *Id.* at 185-87.

62. *Id.* at 192-93.

63. Cherry, *supra* note 58, at 193 (quoting Cherry, *supra* note 53, at 601).

64. *Id.* (bad jobs are defined by “sociologists” as work with little discretion, no due process system in reviews, and very few opportunities for advancement, all of which are true of gig work).

65. *Id.* at 193-94 (implicit in this conclusion is the understanding that the legal standards have been glacially slow in relation to gig company business practices and innovations, especially where employees are concerned).

66. Seth D. Harris & Alan B. Krueger, *A Proposal for Modernizing Labor Laws for Twenty-First-Century Work: the “Independent Worker”*, at 5 (Hamilton Project, Discussion Paper No. 2015-10, 2015).

67. *Id.* at 13 (this qualification ensures that employers are not placed in the impossible position of calculating bits of time here and there to attach benefits, while also recognizing that work with a more fluid recognition of time worked has the tradeoff of providing more flexibility to the worker, thus providing an alternative benefit).

68. *Id.* at 13-14 (the authors refer to this as neutrality, indicating that the only way for independent worker status to be recognized is to ensure that the employer remains neutral

need to ensure equitable application of the profits or benefits from the business.<sup>69</sup> To achieve this new standard, the authors propose legislation as opposed to courts or administrative rulings determining the contours of gig worker classification.<sup>70</sup> While the paper further addresses whether the broader economy has misidentified other workers not within the gig economy,<sup>71</sup> the paper concludes that the proposed reforms will reduce legal uncertainty, while simultaneously protecting workers and ensuring the long term sustainability of the gig economy.<sup>72</sup>

EMILY C. ATMORE, NOTE, *KILLING THE GOOSE THAT LAID THE GOLDEN EGG: OUTDATED EMPLOYMENT LAWS ARE DESTROYING THE GIG ECONOMY*, 102 MINN. L. REV. 887 (2017).

This article articulates another potential solution to the current confusion over worker classification, but in a manner that “properly balances and protects the interests” of entrepreneurial businesses and gig workers.<sup>73</sup> According to Emily Atmore, the problem with the gig economy’s place in current employment law is its failure “to adequately protect” gig workers and “the dangerous limits it places on economic growth.”<sup>74</sup> This argument retreads many of the arguments within the literature, but nests these arguments in a firm centered framework.<sup>75</sup> The premise claims the existence of a job opportunity as a benefit to workers, a benefit threatened by the worker classification question as it either provides workers with all employee benefits or none at all, and “places an extreme financial burden on emerging companies to provide benefits to workers.”<sup>76</sup>

As with other authors, Atmore identifies the largest problem with regulation of the gig economy in the outdated language, intent, and economics

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to the definition, as opposed to defining workers into the category most beneficial to the firm).

69. *Id.* at 14 (this recognizes the fact that currently gig workers are denied the benefits wrought by the company, based on the fact that they are defined as independent contractors. The company therefore must provide contracts in which the surplus economic benefits provided by the relationship are efficiently applied, as opposed to maintained by the employer exclusively).

70. *Id.* at 15-17 (the authors propose a series of new and reform legislation to ensure that workers are provided with a complete and stable legal standard by which they will be defined, since (as has been demonstrated) court and administrative decisions are subject to ambiguity or relatively quick reversals).

71. Harris & Krueger, *supra* note 66, at 22-24.

72. *Id.* at 27.

73. Emily C. Atmore, Note, *Killing the Goose that Laid the Golden Egg: Outdated Employment Laws are Destroying the Gig Economy*, 102 MINN. L. REV. 887, 890 (2017).

74. *Id.* at 902.

75. *Id.* at 908-909.

76. *Id.* at 909 (it appears in this portion of the argument that Atmore’s use of “benefits” refers to “any benefits” of employment, *i.e.* a paycheck, health insurance, time off, etc.).

of employment law,<sup>77</sup> which “pit businesses against individuals” and “make it impossible to guarantee both worker rights and promote economic growth.”<sup>78</sup> Dismissing previous theories of interpretation,<sup>79</sup> Atmore suggests a “comprehensive remedy” which will “preserve economic opportunity, promote economic efficiency, and protect economic security.”<sup>80</sup> Her proposed legislation would create a safe harbor for gig companies to classify worker,<sup>81</sup> create a third worker classification of “dependent contractor,”<sup>82</sup> and create “universalized benefits” for all workers.<sup>83</sup> Atmore concludes that something will need to change to ensure the survival of the gig economy itself, as well as the employment those jobs provide.<sup>84</sup>

ALEX KIRVEN, COMMENT, *WHOSE GIG IS IT ANYWAY? TECHNOLOGICAL CHANGE, WORKPLACE CONTROL, AND SUPERVISION, AND WORKERS' RIGHTS IN THE GIG ECONOMY*, 89 U. COLO. L. REV. 249 (2018).

Alex Kirven demonstrates the extent to which the gig economy permeates into all employment areas by using Graduate Assistants as another example of gig employees.<sup>85</sup> Within this example, Kirven claims that “contingent” jobs “or other ‘alternative work arrangements’” have directly led to the gig economy.<sup>86</sup> The particular gig workers in question are graduate assistants, a group not traditionally considered as part of the gig economy, but which meet many of the same standards and are considered in much the

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77. *Id.* at 901-902 (Atmore supports her contention by claiming the Uber settlement “has little legal significance except to further underscore the law’s continuing inability to properly classify workers”); *see also O’Connor II*, 2019 WL 1437101, at \*8-10.

78. Atmore, *supra* note 73, at 912.

79. *Id.* at 914-15.

80. *Id.* at 915.

81. *Id.* at 916 (Atmore concedes that this would “limit worker protections in the near future” it provides a temporary reprieve for companies to create jobs while the second and third prongs of her plan are implemented).

82. *Id.* at 918 (not quite independent contractors, but also not employees since they have “increased worker independence and decreased [traditional] company control”).

83. Atmore, *supra* note 73, at 920 (Atmore recognized this is a long term and complicated proposal, but believes the need for social safety nets and provide flexibility in the laws to ensure innovation while protecting workers, thereby adapting to any future employer-employee models).

84. *Id.* at 922.

85. Alex Kirven, Comment, *Whose Gig is it Anyway? Technological Change, Workplace Control, and Supervision, and Workers’ Rights in the Gig Economy*, 89 U. COLO. L. REV. 249, 266 (2018).

86. *Id.* at 257 (while many proponents and actors within the gig economy appreciate the benefits of flexibility within the gig economy, Kirven claims that these same actors have little agency in dictating the market factors, such as price, supply, and, most importantly, employment conditions, which directly impact the profitability of any particular gig within the market).

same light as other gig workers in other sectors.<sup>87</sup> Part II<sup>88</sup> discusses the NLRB while Part III<sup>89</sup> discusses the underlying National Labor Relations Act, and the paramount importance that decisions from the NLRB have in this particular market, while simultaneously applying standards which are out of date.<sup>90</sup>

Kirven's description and evaluation of existing labor laws, and how the gig economy has fallen through the cracks, leads to his call for a new legal standard to evaluate gig workers. Any modern test of worker (not just gig worker) status must include the understanding that (1) workers are often dependent on multiple "employers,"<sup>91</sup> and (2) supervision is no longer direct from a person but is an algorithm which directs employer decisions.<sup>92</sup> It is therefore necessary for a two part test to determine "(1) what kind of service the worker is providing, and (2) whether the company is economically dependent on the service the workers . . . are providing."<sup>93</sup> While, Kirven uses the examples of Uber and Lyft to demonstrate the need for this standard rather than Graduate Assistants addressed substantially in the comment, and this standard is invariably targeted to ensuring Uber and Lyft drivers fall into the employee realm, the standard is well supported and the potential problems are identified by the author.<sup>94</sup> This article provides a terrific outline of the gig economy legal problems, and proposes a solution to fix many of the legal problems within the current legal framework.

#### PART IV: EXTENDING EXISTING LEGAL STANDARDS FOR THE GIG ECONOMY

RYAN CALO & ALEX ROSENBLAT, *THE TAKING ECONOMY: UBER, INFORMATION, AND POWER*, 117 COLUMBIA L. REV. 1623 (2016).

Taking a very different view of the gig economy, Ryan Calo and Alex Rosenblat evaluate how gig companies use technology and information to

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87. *Id.* at 267-68 (specifically, the value of tuition credits or the stipend/salary GAs receive is much smaller than what faculty members receive, which has led to greater dependence on GAs to provide academic instruction in public and private colleges and universities, demonstrating the same transition from full time to contingent employment in every other gig sector addressed).

88. *Id.* at 269-72 (citing *Trs. of Columbia Univ.*, 364 N.L.R.B. No. 90, 2016-17 NLRB Dec. (CCH) ¶ 16216 (Aug. 23, 2016)).

89. *Id.* at 274-78.

90. *Id.* at 273 ("underlying the New Deal employment and labor laws was the assumption that most workers would be employees and not independent contractors").

91. *Id.* at 287.

92. *Id.*

93. *Id.* at 288.

94. *Id.* at 290-91.

benefit the company at the expense of the worker and customers.<sup>95</sup> The authors' review the legal condition of the gig economy, highlighting the same themes and conundrums that all the authors in this bibliography have touched upon.<sup>96</sup> However, they address the gig economy from a new angle, instead identifying the vast information differential between the company and the workers and customers.<sup>97</sup> While the authors' concede that how the workers are defined is important, their greater concern is with the customers, who are cut off from any and all information about the operations and technology of the company.<sup>98</sup>

The solution proposed by the authors applies consumer protection law to even out the imbalance of information, which has always been central to consumer protection laws.<sup>99</sup> The authors are repeatedly surprised by the absence of application of these laws in the literature on the gig economy, primarily since information about any and all consumers is ubiquitous within technology based firms, such as the gig companies.<sup>100</sup> Similar to previous authors, proponents of a more aggressive regulatory policy on gig companies, Calo and Rosenblat wish to apply existing laws to the problems at hand, rather than create new categories of employee and employer, leading to unintended consequences.

Vital to protecting consumers in the gig economy will be to force companies to reveal some of their data collection and management,<sup>101</sup> and then for agencies to counteract any deceptive or underhanded dealings the companies are undertaking.<sup>102</sup> A third option presents a similar solution hiding in plain sight: requiring gig companies to act as fiduciaries of the customer information, so that they do not use the information in harmful ways.<sup>103</sup> Central to the analysis by Calo and Rosenblat are the pervasive issues created by the gig economy, which go far beyond how workers are classified, and have the potential to use consumer information for nefarious purposes.

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95. Ryan Calo & Alex Rosenblat, *The Taking Economy: Uber, Information, and Power*, 117 COLUMBIA L. REV. 1623, 1627 (2016) (gig companies "possess deeply asymmetric information about and power over consumers and other participants... [a]nd they are beginning to leverage that power in problematic ways.").

96. *Id.* at 1634.

97. *Id.* at 1636.

98. *Id.* at 1670.

99. *Id.* at 1675 ("detecting and addressing harmful asymmetries of information and power... between firms and consumers, is thus at the heart of consumer protection law.").

100. Calo & Rosenblat, *supra* note 95, at 1676.

101. *Id.* at 1682-83.

102. *Id.* at 1687-88.

103. *Id.* at 1688-89.

MARIANO LAO, *WORKERS IN THE "GIG" ECONOMY: THE CASE FOR EXTENDING THE ANTITRUST LABOR EXEMPTION* 51 U.C. DAVIS L. REV. 1543 (2018).

Mariano Lao proposes extending the antitrust labor exemption to cover gig workers, rather than pushing gig worker into one camp or the other.<sup>104</sup> Building upon the literature and understanding that gig workers fall somewhere in between employees and independent contractors, Lao is able to find a place for these workers into antitrust legal protections, specifically the right to collectively bargain.<sup>105</sup> The article builds a strong case for the values of antitrust exemptions for employees to collectively act to obtain fair pay and better working conditions.<sup>106</sup>

The remainder of the article addresses competing proposals, as well as the drawbacks to Lao's own proposal.<sup>107</sup> These evaluations, as well as the proposal itself, are centered around a free-market, employee centered model in which employees act to better their conditions within the present framework, as opposed to legislative action changing the standards to accommodate an emerging market.<sup>108</sup> Conversely, extending the antitrust labor exemption to gig workers does not grant them any new rights beyond collectively bargaining, ensuring that any extension of workers rights are achieved through inclusion of workers and employees to reach a sustainable model for both sides.<sup>109</sup> Lao's approach is unique in that it gives gig workers the power to determine the trajectory of the gig economy, rather than mandate one path or the other, presenting a more sustainable path toward gig worker benefits.

MARTIN H. MALIN, *PROTECTING PLATFORM WORKERS IN THE GIG ECONOMY: LOOK TO THE FTC*, 51 IND. L. REV. 377 (2018).

Identifying how much of the gig economy literature has revolved around Uber and Lyft, Martin Malin demonstrates that the question of em-

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104. Mariano Lao, *Workers in the "Gig" Economy: The Case for Extending the Antitrust Labor Exemption* 51 U.C. DAVIS L. REV. 1543, 1547-48 (2018) (these proposals, addressed in many of the articles in this bibliography, would eviscerate the flexibility of work and the profitability of start-up gig companies if all gig workers are defined as employees, diminishing the economic and consumer power within the gig economy).

105. *Id.* at 1559 (addressing the costs and benefits of extending antitrust regulation into the gig economy, the author understands the hesitance but rests on the fact that gig workers do not share the typical characteristics of independent contractors, then their treatment as such under antitrust law is unwarranted).

106. *Id.* at 1565-67.

107. *Id.* at 1573 (the concern with other proposals is the wholesale change to the market, leaving gig companies reeling from the changes to their models and providing a windfall to all gig workers regardless of actual work done); *id.* at 1583.

108. *Id.* at 1575-76.

109. Lao, *supra* note 104, at 1584-85.

ployee status cannot be determined uniformly across gig platforms, making the question impossible to answer for all gig workers.<sup>110</sup> Instead, the gig economy relationship between companies and employees are more analogous to franchisor-franchisee relationships, with many of the same “power imbalances, dependencies and vulnerabilities to abuse”<sup>111</sup> gig workers and franchisees seek the relationship as a source of income,<sup>112</sup> are subject to levels of control from the company,<sup>113</sup> are at a considerable disadvantage in bargaining power within the relationship,<sup>114</sup> and assume much of the risk within the business model.<sup>115</sup> The “comparable vulnerability” along “with the shared characteristics of franchisees and [gig workers]” make the franchise-franchisee model an obvious one to apply in the gig economy.

The central problem in the gig economy as Malin sees it, is the information disparity between the company and workers.<sup>116</sup> After discussing the FTC disclosure rule<sup>117</sup> and the arguments for and against mandatory disclosure from gig companies,<sup>118</sup> Malin calls for the FTC to require disclosure of basic information from gig companies through the same process they require disclosure from franchisors to franchisees.<sup>119</sup> Citing considerable anecdotal evidence of misrepresentation from gig companies to gig workers,<sup>120</sup> Malin supports his call for extension of the disclosure rule, further

110. Martin H. Malin, *Protecting Platform Workers in the Gig Economy: Look to the FTC*, 51 IND. L. REV. 377, 378, 383-84 (2018).

111. *Id.* at 379-80 (this would allow the Federal Trade Commission to place disclosure requirements upon gig companies, which would provide greater informed consent for gig workers entering the company).

112. *Id.* at 387 (workers entering into either relationship do so with the expectation that the income for the worker will be a livable one, rather than passive).

113. *Id.* at 387-88 (gig companies exercise control over the “value of the trademark” where they require gig workers to adhere to certain uniform standards to ensure uniform service and operations among their locations).

114. *Id.* at 388-89 (this disparity exists since gig workers seek out the employment, providing the company with all of the leverage, and extends to disparities in resources, information, and agency within the company).

115. Malin, *supra* note 110, at 390-91 (the gig worker’s inability to stay profitable or meet other criteria allow the company to sever the relationship, even for reasons beyond the worker’s control).

116. *Id.* at 404-05.

117. *Id.* at 393-94 (FTC requires franchisors to disclose “general business information” and company history, employment history, company management information, pending or previous litigation, fees and other purchases required by the franchisee, a table of the franchisee’s obligations, any assistance provided by the franchisor, as well as substantial information about the contract provisions, in addition to several other requirements).

118. *Id.* at 401-402 (requiring disclosure often leads to an unwieldy

119. *Id.* at 409

120. Malin, *supra* note 110, at 409 (analogizing the misrepresentation within the gig economy to misrepresentation within the franchise economy that has since been remedied or otherwise mitigated by the FTC rule).

arguing that the extension “can occur now without any need to enact or amend legislation or to reconsider common law doctrines” thus preserving the current legal framework.<sup>121</sup>

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121. *Id.* at 410.