

WORKER CLASSIFICATION AND THE GIG-ECONOMY

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INTRODUCTION

The labor market is changing. As a result of these changes, a new breed of companies has emerged. The “gig-economy”¹ is one of several terms used to describe the advent of companies that do not offer any direct services of their own, but instead act as intermediaries between workers and customers.

“Contingent workforce” firms—such as Uber,² Airbnb,³ and Taskrabbit⁴—offer individuals the opportunity to build their own small businesses on their own terms. Individuals who drive through Uber, host guests through Airbnb, or clean and complete errands through Taskrabbit all have the ability to connect easily with customers, set their own hours, and even work for several competitors simultaneously.⁵

Both consumers and investors have responded to the success of these firms. Uber’s record-breaking valuations,⁶ as well as the over one billion trips it has supplied,⁷ are a testament to the growth of these types of companies. Because of the low barriers to entry for new individuals in the gig-economy, there is rarely a lack of available workers.

On the other hand, some argue that these firms are really just a new take on an old trick: cutting labor costs by misclassifying

1. Katy Steinmetz, *Exclusive: See How Big the Gig Economy Really Is*, TIME (Jan. 6, 2016), <http://time.com/4169532/sharing-economy-poll>. Alternative terms include the “sharing-economy” and “contingent-worker economy.” For a more detailed discussion of the nomenclature, see *infra* notes 90–95 and accompanying text.

2. See *infra* Section II.A.1.

3. See *infra* Section II.A.3.

4. See *infra* Section II.A.2.

5. See *infra* Section II.A.

6. Douglas MacMillan, *Uber in Fresh Funding Round that Could Value Company at Up to \$64.6 Billion*, WALL ST. J. (Dec. 3, 2015, 5:25 PM), <http://www.wsj.com/articles/uber-in-fresh-funding-round-that-could-value-company-at-up-to-64-6-billion-1449180409> (“Uber Technologies Inc. has raised a new round of funding that could value the ride-hailing company at as high as \$64.6 billion, a person familiar with the matter said.”).

7. Lori, *One in a Billion*, UBER: NEWSROOM (Dec. 31, 2015), <https://www.uber.com/newsroom/one-in-a-billion> (announcing the billionth Uber trip).

employees as independent contractors.⁸ If the drivers, hosts, or taskers were recognized as employees, the firms would have to provide the full gamut of employee rights.⁹ This includes the right to unemployment benefits, medical leave, and workers' compensation. Independent contractors are also ineligible for overtime pay.¹⁰ Forcing companies to provide these benefits would likely result in companies changing how they do business to avoid going under, because many rely on workers who value the flexibility of being independent contractors.¹¹

But are gig-economy companies really just another attempt to avoid the costs associated with employees? Or are these companies a response to market trends to which the law should adapt and recognize? Based on this Note's analysis of several comprehensive studies of the changing U.S. labor market, it seems as though these companies are not nefariously skirting the law. Instead, these companies simply do not fit within a legal framework that was developed in a different time.

The difficulty of worker classification in the gig-economy presents three possible scenarios:

- Individuals working for these firms are actually employees and entitled to the rights associated with that status.¹²
- Individuals working for these firms are rightfully classified as independent contractors.
- Neither status fully and satisfactorily captures the relationship between these firms and the individuals. If this is the case, a third category could remedy the shortcomings of the existing employee/independent contractor framework.

If a third category is not created, both courts and gig-economy companies will be forced to settle for one of the first two options—at the expense of innovation and advancement. Though, in fairness, even if a third category is created, firms might still try to work around it and seek independent contractor status. That possibility, however, will not

8. See, e.g., Robert Reich, *Why the Sharing Economy Is Harming Workers—And What Must Be Done*, HUFFINGTON POST: THE BLOG (Nov. 28, 2015, 12:02 PM), http://www.huffingtonpost.com/robert-reich/why-the-sharing-economy-i_1_b_8672120.html.

9. See *Misclassification of Employees as Independent Contractors*, U.S. DEP'T LAB., WAGE & HOUR DIVISION, <http://www.dol.gov/whd/workers/misclassification> (last visited Mar. 1, 2018).

10. *Id.*

11. See *infra* Section II.A.

12. This could lead to the failure of hundreds of companies, and part-time employee status might make workers worse off. See *infra* Section I.A.

be further addressed in the interest of pragmatic optimism and a sense that, if presented with a more workable legal solution, gig-economy companies would embrace it.

Gig-economy companies, such as Uber, are a result of the rise of independent contractors in the labor market and the employee-independent contractor dichotomy falls short of capturing, protecting, regulating, and facilitating the relationship between these companies and the individuals who use them.

Part I of this Note will examine the current state of worker classification law and will provide a relevant background for understanding worker classification issues facing the gig-economy. Part II will introduce some of the most prominent gig-economy companies, offer an explanation for why these companies have become so popular, and present some of the issues facing them. Part III will examine some of the ways that those issues could be addressed. Ultimately, this Note concludes that the current dichotomy, where workers are classified either as employees or independent contractors, is no longer sufficient and should be reformed or adapted to meet the unique needs of the gig-economy.

I. THE CURRENT STATE OF WORKER CLASSIFICATION LAW

Extensive legal scholarship has already traced the origins and development of worker classification law.¹³ Nonetheless, a brief examination of the current state of worker classification law is vital to understanding how gig-economy companies fit into that law. This task is slightly more onerous than it seems.¹⁴ Worker classification

13. See generally David Bauer, *The Misclassification of Independent Contractors: The Fifty-Four Billion Dollar Problem*, 12 RUTGERS J.L. & PUB. POL'Y 138 (2015) (examining the implications of intentional worker misclassification); Anna Deknatel & Lauren Hoff-Downing, *ABC on the Books and in the Courts: An Analysis of Recent Independent Contractor and Misclassification Statutes*, 18 U. PA. J.L. & SOC. CHANGE 53 (2015) (analyzing the shape and effectiveness of a recent wave of state worker classification legislation); Rick A. Pacynski, *Legal Challenges in Using Independent Contractors*, 72 MICH. B.J. 671 (1993) (exploring causes for the trend toward use of independent contractor status and outlining the various tests).

14. See *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323 (1992) (dismissing the definition of employee used in the Employee Retirement Income Security Act as "completely circular and explain[ing] nothing"); *FedEx Home Delivery v. NLRB*, 563 F.3d 492, 497 (D.C. Cir. 2009) (characterizing the common-law agency test as "unwieldy"); Scott J. Brewerton, Comment, *Alexander v. FedEx Ground Package System, Inc.*, 765 F.3d 981 (9th Cir. 2014), 48 SUFFOLK U. L. REV. 537, 542 (2015); Griffin Toronjo Pivateau, *Rethinking the Worker Classification Test: Employees, Entrepreneurship, and Empowerment*, 34 N. ILL. U. L. REV. 67, 76, 84-94 (2013) (examining a wide variety of legal tests used to classify workers).

standards differ among states, as well as between states and the federal government.¹⁵ Whether a worker is an employee or an independent contractor may also depend on context—for example, the test applied for workers' rights and labor purposes is different from the test used for federal tax laws.¹⁶ Although most of these tests are not completely different from one another and overlap somewhat, the Government Accountability Office's description of the status of worker classification law frames the situation well: "[T]he tests used to determine whether a worker is an independent contractor or an employee are complex, subjective, and differ from law to law."¹⁷

An understanding of the applicable law is only one part of grasping why worker classification matters. Whether a worker is classified as an employee or an independent contractor has implications in the areas of taxation, tort liability, and both state and federal labor and employment laws. Thus, before examining the current state of the law, an examination of how the law translates into real relationships between individuals will provide vital context.

A. *Why Does Worker Classification Matter?*

Worker classification law is typically discussed in the vacuum of the various applicable tests, but such a discussion neglects many of the subtleties, nuances, and realities of the business-worker relationship. The determination of whether a worker is an employee or an independent contractor has profound consequences and reflects an important distinction in the relationship between companies and workers.

At the most basic level, the distinction between employees and independent contractors is control. But that understates the significance of the distinction. In order to better understand the nature and nuance of worker classification, a general—but by no means comprehensive—analysis of the benefits and drawbacks of the two classifications to both workers and businesses is useful.¹⁸

15. See *infra* Section I.B.

16. Compare 26 U.S.C. § 3121 (2012) (Internal Revenue Code), with 29 U.S.C. § 203 (2012) (labor).

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

18. See generally Deknatel & Hoff-Downing, *supra* note 13, at 53; Pacynski, *supra* note 13; Pivateau, *supra* note 14, at 71–75; Alexandre Zucco, Note, *Independent Contractors and the Internal Revenue Service's "Twenty Factor" Test: Perspective on the Problems of Today and the Solutions for Tomorrow*, 57 WAYNE L. REV. 599, 599–601 (2011).

1. Worker Classification Implications for Individuals

For many individuals operating as independent contractors, the main benefit is the classification's namesake: independence.¹⁹ Independent contractors are generally able to set their own hours and may work as much or as little as they desire.²⁰ Some workers may also prefer to be classified as independent contractors because of the tax deductions allowed for business expenditures.²¹ A recent survey also indicated that independent contractors tend to have a higher degree of satisfaction with their jobs than standard employees do.²²

However, with the freedom of being an independent contractor comes the burden of not being an employee.²³ Because income tax is not withheld by the employer, independent contractors sometimes owe more than their employee counterparts when the time comes to file taxes.²⁴

On the other hand, the advantages to a worker of being an employee include "minimum wages, overtime benefits, health insurance, workers[] compensation for those hurt on the job, unemployment benefits for those who are laid off, proof of employment for those trying to rent or get a loan, and . . . lower taxes."²⁵ Employees also have the right to unionize under federal law.²⁶ Some workers may

19. Gillian B. White, *In the Sharing Economy, No One's an Employee*, ATLANTIC (June 8, 2015), <http://www.theatlantic.com/business/archive/2015/06/in-the-sharing-economy-no-ones-an-employee/395027> ("[F]or those who are doing particularly well in their field, [independent contractor status] can afford them the ability to work for multiple employers, or charge more in the name of having to cover their expenses, or ramp up or pare down on hours, depending on their needs at the time.").

20. Tx Zhuo, *Are Sharing-Economy Workers Contractors or Employees?*, ENTREPRENEUR (Aug. 28, 2015), <http://www.entrepreneur.com/article/249439>.

21. 26 U.S.C. §§ 162, 167 (allowing for deduction and depreciation, respectively, of certain business expenses).

22. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-15-168R, CONTINGENT WORKFORCE: SIZE, CHARACTERISTICS, EARNINGS, AND BENEFITS 24 (2015) [hereinafter CONTINGENT WORKFORCE: SIZE, CHARACTERISTICS, EARNINGS, AND BENEFITS], <http://gao.gov/assets/670/669766.pdf> (finding 85% of independent contractors were content with their employment type, and were also more likely to report being "very satisfied" with their jobs, than standard full-time workers—56.8% versus 45.3%).

23. White, *supra* note 19 ("The lack of employee status can leave workers with little protection when something goes wrong. That can be particularly problematic in some new companies, where an employee's job can rely heavily on subjective and nebulous assessments, like customer ratings The lack of employee status can also mean limited recourse for workers who face discrimination or want to unionize.").

24. See Zhuo, *supra* note 20.

25. White, *supra* note 19.

26. 29 U.S.C. § 157 (2012) ("Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection").

find the employee title restrictive, however, as it does not offer the flexibility and freedom associated with being an independent contractor.

2. Worker Classification Implications for Businesses

Businesses typically save money when hiring independent contractors²⁷ and are less likely to be liable for the malfeasance of those workers.²⁸ Using independent contractors also allows businesses to expand or contract their workforces more easily to accommodate fluctuations in workload.²⁹ Nevertheless, some businesses may be hesitant to hire independent contractors, depending on the nature of their industry, because the businesses are not able to exert a high degree of control.

For businesses, hiring employees offers the advantages of quality control and dependable workers.³⁰ Businesses rely on uniformity and branding in order to build customer trust and loyalty.³¹ When a business's workers are employees, the business enjoys the benefits of imposing stringent standards of uniformity and quality, ensuring a consistent experience for customers.³²

The drawback of classifying workers as employees is that the cost is generally much higher than the cost of hiring independent contractors.³³ Employers must also withhold taxes and make contributions on behalf of employees.³⁴

27. Employers are not required to withhold taxes or make Social Security and Medicare contributions on behalf of independent contractors. SHAE IRVING & THE EDITORS OF NOLO, *NOLO'S ENCYCLOPEDIA OF EVERYDAY LAW: ANSWERS TO YOUR MOST FREQUENTLY ASKED LEGAL QUESTIONS* 140 (Marcia Stewart ed., 9th ed. 2014).

28. See, e.g., Sarah Kessler, *The Gig Economy Won't Last Because It's Being Sued to Death*, *FAST COMPANY* (Feb. 17, 2015) [hereinafter Kessler, *The Gig Economy Won't Last*], <http://www.fastcompany.com/3042248/the-gig-economy-wont-last-because-its-being-sued-to-death>.

29. RICHARD J. REIBSTEIN, LISA B. PETKUN & ANDREW J. RUDOLPH, PEPPER HAMILTON LLP, *THE 2015 WHITE PAPER ON INDEPENDENT CONTRACTOR MISCLASSIFICATION: HOW COMPANIES CAN MINIMIZE THE RISKS* 3 (2015), <http://www.pepperlaw.com/resource/5395/6F3>.

30. Kessler, *The Gig Economy Won't Last*, *supra* note 28.

31. See, e.g., David Foggin, *Trust Builds Brand Loyalty*, *GUARDIAN* (Oct. 1, 2014, 11:30 AM), <http://www.theguardian.com/media-network/media-network-blog/2014/oct/01/trust-brand-loyalty-naked-wines-debenhams>.

32. Ellen Huet, *Contractor or Employee? Silicon Valley's Branding Dilemma*, *FORBES* (Nov. 18, 2014, 11:00 AM), <http://www.forbes.com/sites/ellenhuet/2014/11/18/contractor-or-employee-silicon-valleys-branding-dilemma/#33cb68b54c78784f3dc4454e> (discussing the value of branding to sharing economy companies).

33. See Zhuo, *supra* note 20.

34. IRVING & THE EDITORS OF NOLO, *supra* note 27, at 140.

B. What Is the Law?

In lieu of a comprehensive analysis of worker classification law across jurisdictions and contexts, a representative and relevant selection of worker classification law will be sufficient for the purposes of this Note. This Section outlines some of the most prevalent and notable applications of worker classification law.

1. Traditional Agency Law: The “Right to Control” Test

The “right to control” test offers a natural starting place for analyzing worker classification tests. Under this test, an employer-employee relationship generally exists if the business, or other entity or individual, has the right to control both the result of services and the means by which the result is accomplished.³⁵ Importantly, it is generally not necessary that the employer actually exert the right to control.³⁶ Whether there exists a sufficient “right to control” is typically determined based on all relevant facts and circumstances.³⁷

Supreme Court jurisprudence has made clear that the proper definition of “employee” is moored in the common law.³⁸ When a statute contains—but does not helpfully define—the term “employee,” the Supreme Court presumes that Congress intended to apply the traditional agency law criteria for identifying master-servant relationships.³⁹ Thus traditional agency law’s focus on the “right to control” lays a solid foundation for understanding the definition of “employee.”

In *Nationwide Mutual Insurance Co. v. Darden*, a terminated insurance salesman brought suit seeking to enforce the substantive provisions of the Employee Retirement Income Security Act against his former employer after he was excluded from receiving plan benefits from the employer post-termination.⁴⁰ The argument hinged on whether the terminated salesman was an employee, a term the Act defined as

35. STAFF OF J. COMM. ON TAXATION, 110TH CONG., PRESENT LAW AND BACKGROUND RELATING TO WORKER CLASSIFICATION FOR FEDERAL TAX PURPOSES 3 (Comm. Print 2007), <https://www.irs.gov/pub/irs-utl/x-26-07.pdf> (“In other words, an employer-employee relationship generally exists if the person providing the services is subject to the will and control of the employer not only as to what shall be done but how it shall be done.” (citing Treas. Reg. § 31.3401(c)-(1)(b) (as amended in 1970))).

36. *Id.*

37. *Id.*

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

39. *Id.* at 322–23 (citing *Comty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 739–40 (1989)).

40. *Id.* at 319–21.

“any individual employed by an employer.”⁴¹ Admonishing that definition as circular and explaining nothing, the Supreme Court determined that the proper test was the general common law of agency:

[W]e consider the hiring party’s right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party’s discretion over when and how long to work; the method of payment; the hired party’s role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.⁴²

The Court further clarified that the test contains “no shorthand formula or magic phrase that can be applied to find the answer”; therefore, all the factors must be weighed, with no single factor being dispositive.⁴³

Despite the relative simplicity, and seemingly universal applicability, of the traditional agency law test, the test’s utility is subverted by Congress’s penchant for including more comprehensive definitions of “employee” in statutes.

2. The IRS Common Law Test

Among the most notable adaptations of the “right to control” test is the Internal Revenue Service (“IRS”) test.⁴⁴ The IRS is concerned with worker classification because businesses “must withhold income taxes, withhold and pay Social Security and Medicare taxes, and pay unemployment tax on wages paid to an employee,” whereas they “do not generally have to withhold or pay any taxes on payments to independent contractors.”⁴⁵ The specific instances where the IRS decides to pursue enforcement and litigation will be discussed below.

41. *Id.* at 321 (citing 29 U.S.C. § 1002(6) (2012)).

42. *Id.* at 323–24 (quoting *Reid*, 490 U.S. at 751–52)).

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

44. See *Independent Contractor (Self-Employed) or Employee?*, IRS, <https://www.irs.gov/Businesses/Small-Businesses-&Self-Employed/Independent-Contractor-Self-Employed-or-Employee> (last updated Dec. 28, 2017).

45. *Id.*

The IRS has strived to maintain a test that accurately parses the difference in relationships between employees and independent contractors. First developed in 1987, the IRS twenty-factor test was based on an examination of cases and rulings.⁴⁶

In part because of the difficulty in applying the twenty-factor test, and in part because many of the factors were no longer relevant, the IRS recently adopted a new approach for determining worker classification.⁴⁷ The current IRS test stands as a useful example of how government entities have sought to codify and clarify the worker classification test.⁴⁸

The current IRS test groups evidence into three categories instead of listing twenty relevant factors.⁴⁹ The three categories of evidence the IRS has identified as potentially relevant are: (1) behavioral control,⁵⁰ (2) financial control,⁵¹ and (3) relationship of the parties.⁵² While this

46. STAFF OF J. COMM. ON TAXATION, *supra* note 35, at 3. The twenty factor test—factors indicating the degree of control, and how they are assessed—are as follows: Instructions; Training; Integration; Services rendered personally; Hiring, supervision, and paying assistants; Continuing relationship; Set hours of work; Full time required; Doing work on employer's premises; Order or sequence test; Oral or written reports; Payment by the hour, week, or month; Payment of business and/or traveling expenses; Furnishing tools and materials; Significant investment; Realization of profit or loss; Working for more than one firm at a time; Making service available to the general public; Right to discharge; Right to terminate. *Id.* at 3–5; *see also* Rev. Rul. 87-41, 1987-1 C.B. 296 (“These sections provide that generally the relationship of employer and employee exists when the person or persons for whom the services are performed have the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but as to how it shall be done.”).

47. I.R.S., Information Letter No. INFO 2004-0087 (Apr. 8, 2004), <https://www.irs.gov/pub/irs-wd/04-0087.pdf>.

48. *See Independent Contractor (Self-Employed) or Employee?*, *supra* note 44.

49. DEPT OF THE TREASURY, INTERNAL REVENUE SERV., INDEPENDENT CONTRACTOR OR EMPLOYEE?: TRAINING MATERIALS 2-7 (1996), http://www.sjsu.edu/people/annette.nellen/website/IRS_TrainingMaterials_ECorEmployee_1996.pdf.

50. *Behavioral Control*, IRS, <https://www.irs.gov/Businesses/Small-Businesses-&Self-Employed/Behavioral-Control> (last updated Sept. 13, 2017) (“Behavioral control refers to facts that show whether there is a right to direct or control how the worker does the work. A worker is an employee when the business has the right to direct and control the worker. The business does not have to actually direct or control the way the work is done—as long as the employer has the right to direct and control the work.”).

51. *Financial Control*, IRS, <https://www.irs.gov/Businesses/Small-Businesses-&Self-Employed/Financial-Control> (last updated Sept. 13, 2017) (“Financial control refers to facts that show whether or not the business has the right to control the economic aspects of the worker’s job.”).

52. *Type of Relationship*, IRS, <https://www.irs.gov/Businesses/Small-Businesses-&Self-Employed/Type-of-Relationship> (last updated Nov. 27, 2017) (“Type of relationship

categorization simplifies the twenty-factor test to some extent, the three categories are all further partitioned by the relevant facts to be considered.⁵³ “Behavioral control” encompasses four factors;⁵⁴ “financial control” proposes inquiry of five factors;⁵⁵ and “type of relationship” has four factors.⁵⁶

The test addresses the facts and circumstances of the relationship; the designation or description of the relationship by the parties is largely irrelevant.⁵⁷ Recent guidance from the IRS stated that for purposes of determining whether a worker is an employee or an independent contractor, “all information that provides evidence of the degree of control and independence must be considered.”⁵⁸

In a supplemental guide, the IRS identified several industry examples to help employers classify workers.⁵⁹ Of particular relevance was the example that taxicab drivers are independent contractors.⁶⁰

refers to facts that show how the worker and business perceive their relationship to each other.”)

53. *Independent Contractor (Self-Employed) or Employee?*, *supra* note 44.

54. The “behavioral control” factors fall into the following categories:

- Type of instructions given
- Degree of instruction
- Evaluation systems
- Training

Behavioral Control, *supra* note 50.

55. The “financial control” factors fall into the following categories:

- Significant investment
- Unreimbursed expenses
- Opportunity for profit or loss
- Services available to the market
- Method of payment

Financial Control, *supra* note 51.

56. The “type of relationship” factors fall into the following categories:

- Written contracts
- Employee benefits
- Permanency of the relationship
- Services provided as key activity of the business

Type of Relationship, *supra* note 52.

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

58. *Independent Contractor (Self-Employed) or Employee?*, *supra* note 44.

59. DEPT OF THE TREASURY, INTERNAL REVENUE SERV., PUB. 15-A, EMPLOYER’S SUPPLEMENTAL TAX GUIDE 8–10 (2017), <http://www.irs.gov/pub/irs-pdf/p15a.pdf> (including industry examples of building and construction, trucking, computer, attorney, automobile, and salesperson).

60. *Id.* at 10 (“*Example.* Tom Spruce rents a cab from Taft Cab Co. for \$150 per day. He pays the costs of maintaining and operating the cab. Tom Spruce keeps all fares that

While this is far from an exact analogue to gig-economy companies, the comparison to Uber is self-evident.

3. Fair Labor Standards Act

The Fair Labor Standards Act (“FLSA”)⁶¹ is a federal statute that “establishes minimum wage, overtime pay, recordkeeping, and youth employment standards affecting employees in the private sector and in Federal, State, and local governments.”⁶² Generally, the FLSA applies to most businesses and employers.⁶³ The more complex inquiry is who constitutes an “employee” under the FLSA.

Congress defined “employee” for purposes of the Act: “any individual employed by an employer.”⁶⁴ While that definition is circular and nearly useless, the statute also provides that “[e]mploy’ includes to suffer or permit to work.”⁶⁵ The practical test applied for purposes of the FLSA considers the “economic reality” of the relationship between the worker and the business.⁶⁶ The “economic realities test” makes it harder to classify a worker as an independent contractor and relies on the application of six factors to determine whether a worker is an employee or an independent contractor.⁶⁷

he receives from customers. Although he receives the benefit of Taft’s two-way radio communication equipment, dispatcher, and advertising, these items benefit both Taft and Tom Spruce. Tom Spruce is an independent contractor.”).

61. 29 U.S.C. §§ 201–219 (2012).

62. *Compliance Assistance—Wages and the Fair Labor Standards Act (FLSA)*, U.S. DEP’T LABOR, WAGE & HOUR DIVISION, <http://www.dol.gov/whd/flsa> (last visited Mar. 1, 2018) (“Covered nonexempt workers are entitled to a minimum wage of not less than \$7.25 per hour effective July 24, 2009. Overtime pay at a rate not less than one and one-half times the regular rate of pay is required after 40 hours of work in a workweek.”).

63. U.S. DEP’T OF LABOR, WAGE & HOUR DIV., *HANDY REFERENCE GUIDE TO THE FAIR LABOR STANDARDS ACT 2* (2016), <https://www.dol.gov/whd/regs/compliance/wh1282.pdf> (“[C]ertain enterprises having workers engaged in interstate commerce, producing goods for interstate commerce, or handling, selling, or otherwise working on goods or materials that have been moved in or produced for such commerce by any person, are covered by the FLSA.”).

64. 29 U.S.C. § 203(e)(1) (2012).

65. *Id.* § 203(g).

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

67. *Schultz v. Capital Int’l Sec., Inc.*, 460 F.3d 595, 601–02 (4th Cir.), *opinion corrected and superseded by* 466 F.3d 298, 304–05 (4th Cir. 2006) (“The factors are (1) the degree of control that the putative employer has over the manner in which the work is performed; (2) the worker’s opportunities for profit or loss dependent on his managerial skill; (3) the worker’s investment in equipment or material, or his employment of other workers; (4) the degree of skill required for the work; (5) the permanence of the working relationship; and (6) the degree to which the services rendered are an integral part of the putative employer’s business.”).

The FLSA authorizes the Department of Labor, Wage and Hour Division, to carry out its own investigations, enforce through administrative and legal remedies, and bring suit on behalf of employees.⁶⁸ The FLSA enforcement actions most relevant to this Note are individual or class action lawsuits brought by employees—or workers who contend they are employees.⁶⁹

C. *Where Is the Law Going? Increased Enforcement Efforts*

This Note focuses on the current law's ambiguity regarding gig-economy companies; however, intentional worker misclassification has driven a recent increase in enforcement efforts in an attempt to curtail the business practice of misclassifying workers to save on costs.⁷⁰ For instance, the IRS and the U.S. Department of Labor, with the help of state governments, have recently been engaged in highly publicized “crackdowns” of companies that may be misclassifying employees as independent contractors.⁷¹ While employee misclassification is by no means a novel issue, the increased enforcement efforts could have a devastating effect on gig-economy companies if they are caught in the crosshairs of a regulatory agency and forced to change their business models.

The IRS has a significant interest in cracking down on worker misclassification.⁷² According to IRS estimates, worker misclassification results in billions of dollars of lost tax revenue.⁷³ IRS worker

68. U.S. DEPT OF LABOR, WAGE & HOUR DIV., *supra* note 63, at 14–15.

69. These suits can be extremely lucrative for plaintiffs' attorneys because the FLSA allows for recovery of back wages, an equal amount in liquidated damages, plus attorneys' fees and court costs. *Id.*

70. Bauer, *supra* note 13, at 143–44 (examining the implications of intentional worker misclassification); Deknatel & Hoff-Downing, *supra* note 13, at 64–79 (analyzing the shape and effectiveness of a recent wave of state worker classification legislation).

71. Robert W. Wood, *New Crackdown on Using Independent Contractors*, FORBES (Nov. 15, 2012, 10:40 PM), <http://www.forbes.com/sites/robertwood/2012/11/15/new-crackdown-on-using-independent-contractors/#549799197aaf>.

72. Some have speculated that increasing state and federal budget deficits, in addition to the Affordable Care Act rollout, are driving the IRS's recent increase in efforts to combat worker misclassification. Matthew Vilmer, *Employers Beware of IRS Worker Classification Crackdown*, LAW360 (June 9, 2014, 2:05 PM), <http://www.law360.com/articles/545670/employers-beware-of-irs-worker-classification-crackdown> (theorizing that the government may choose to increase revenues by enforcing current tax laws instead of raising taxes—a typically unpopular solution).

73. TREASURY INSPECTOR GEN. FOR TAX ADMIN., EMPLOYERS DO NOT ALWAYS FOLLOW INTERNAL REVENUE SERVICE WORKER DETERMINATION RULINGS 1 (June 14, 2013) [hereinafter EMPLOYERS DO NOT ALWAYS FOLLOW INTERNAL REVENUE SERVICE WORKER DETERMINATION RULINGS], <https://www.treasury.gov/tigta/auditreports/2013reports/201330058fr.pdf>. The last comprehensive misclassification estimate from the IRS was for

misclassification efforts have typically relied on form SS-8, implemented in 1994, which workers or firms may voluntarily file to request a determination of a worker's status.⁷⁴ Perhaps unsurprisingly, about ninety percent of SS-8 forms are submitted by workers.⁷⁵ Online communities of Uber drivers have begun exploring the possibility of utilizing Form SS-8 to have the IRS make a determination of their worker status.⁷⁶ Form SS-8, however, is unlikely to be Uber drivers' path to employee status.

An audit of the SS-8 program revealed that in fiscal year 2012, about half of the requests received were returned to the filer because a determination could not be made or because additional information was required.⁷⁷ The IRS anticipated it would receive no response for half of those returned.⁷⁸ When a Form SS-8 request *does* result in a determination that a worker is an employee, the IRS mails a letter to the employer explaining the outcome and clarifying that the employer is responsible for filing corrected tax returns.⁷⁹ Citing a lack of

tax year 1984. *Id.* In that year, it found that "15 percent of employers misclassified 3.4 million workers as independent contractors. This resulted in an estimated total tax loss of \$1.6 billion in Social Security taxes, Medicare taxes, Federal unemployment taxes, and Federal income taxes (for Tax Year 1984)." *Id.*

74. *Id.* at 3. Form SS-8 determinations apply the common law test for whether a worker is an employee for purposes of federal employment taxes and income tax withholding. *Id.*

75. Robert W. Wood, *IRS Inspector Urges Crackdown on Mislabeled Independent Contractors*, FORBES (July 30, 2013, 11:20 AM), <http://www.forbes.com/sites/robertwood/2013/07/30/irs-inspector-urges-crackdown-on-mislabeled-independent-contractors/#1a1e24ef2450>. In his article, Wood states that in one year, seventy-two percent of all form SS-8 requests produced rulings that the workers were employees. *Id.*; see also U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-717, EMPLOYEE MISCLASSIFICATION: IMPROVED COORDINATION, OUTREACH, AND TARGETING COULD BETTER ENSURE DETECTION AND PREVENTION 21 (2009) ("In fiscal year 2008, 72 percent of all Form SS-8 requests filed resulted in IRS determinations that the workers in question were employees . . .").

76. Bob Reynolds, *File Form SS-8 to Have the IRS Make a Determination of Worker Status (Employee or IC)*, UBERPEOPLE.NET (Dec. 30, 2015, 9:58 PM), <http://uberpeople.net/threads/file-form-ss-8-to-have-the-irs-make-a-determination-of-worker-status-employee-or-ic.51834> (hoping that a favorable Form SS-8 determination could result in Uber being subject to minimum wage and overtime laws).

77. EMPLOYERS DO NOT ALWAYS FOLLOW INTERNAL REVENUE SERVICE WORKER DETERMINATION RULINGS, *supra* note 73, at 6 ("The SS-8 Program received 6,262 worker determination requests in Fiscal Year 2012. Of these, approximately 2,900 were returned to the employer/worker.").

78. *Id.*

79. The letter states in part: "The SS-8 Program does not calculate your balance due and send you a bill. You are responsible for satisfying the employment tax reporting, filing, and payment obligations that result from this determination, such as filing employment tax returns or adjusting previously filed employment tax returns." *Id.* at 4.

enforcement authority, the SS-8 audit revealed that only seventeen percent of employers appeared to comply with the ruling.⁸⁰

The IRS has recently implemented several recommendations from the audit aimed at optimizing the process and ensuring compliance.⁸¹ Additionally, in 2011 the IRS entered into an agreement with the U.S. Department of Labor as part of a joint initiative to improve compliance with existing laws, reduce instances of worker misclassification, and decrease the tax gap.⁸²

The Department of Labor has also recently stepped up its own enforcement efforts through its own “misclassification initiative”⁸³ and has identified employee misclassification as “one of the most serious problems facing affected workers, employers and the entire economy.”⁸⁴ In July 2015, the Department of Labor issued a memorandum of guidance stating that for purposes of the FLSA, courts should apply a broad definition and find “most workers are employees.”⁸⁵ Shortly after, Secretary of Labor Thomas Perez clarified that gig-economy companies would face the same level of scrutiny as other companies.⁸⁶ Business

80. *Id.* at 11.

81. *Id.* at 6. In 2010, the IRS also introduced the Voluntary Classification Settlement Program, which allows taxpayers—typically employers—to voluntarily reclassify workers as employees and obtain relief for potential past tax liability. I.R.S. Announcement 2012-45, 2012-51 I.R.B. 724 (Dec. 12, 2012), <https://www.irs.gov/pub/irs-irbs/irb12-51.pdf>.

82. Memorandum of Understanding Between the Internal Revenue Serv. & the U.S. Dep’t of Labor 1 (Sept. 19, 2011), <http://www.dol.gov/whd/workers/MOU/irs.pdf>.

83. John Thompson, *Independent Contractor Enforcement: There’s More than the IRS to Fear*, FORBES (May 9, 2013, 11:17 AM), <http://www.forbes.com/sites/janetnovack/2013/05/09/independent-contractor-enforcement-theres-more-than-the-irs-to-fear/#ab1a76923c69>.

84. *Misclassification of Employees as Independent Contractors*, *supra* note 9; see also *Wage and Hour Division (WHD)*, U.S. DEP’T LAB., <https://www.dol.gov/whd/data/index.htm> (last visited Mar. 1, 2018) (noting that in 2016 alone, the Department of Labor’s Wage and Hour Division found more than \$77.2 million in back wages for more than 106,000 workers in low wage industries such as the janitorial, temporary help, food service, day care, hospitality, and garment industries).

85. U.S. DEP’T OF LABOR, WAGE & HOUR DIV., ADMINISTRATOR’S INTERPRETATION NO. 2015-1, at 1–2 (July 15, 2015), <http://online.wsj.com/public/resources/documents/InterpretMisclass.pdf> (“The FLSA’s definition of employ as ‘to suffer or permit to work’ and the later-developed ‘economic realities’ test provide a broader scope of employment than the common law control test. Indeed, although the common law control test was the prevalent test for determining whether an employment relationship existed at the time that the FLSA was enacted, Congress rejected the common law control test in drafting the FLSA. Instead, the FLSA defines ‘employ’ broadly as including ‘to suffer or permit to work,’ which clearly covers more workers as employees.” (citations omitted)).

86. Andrea M. Kirshenbaum, *Square Peg of Sharing Economy, Round Hole of Wage-and-Hour Law*, LEGAL INTELLIGENCER (Nov. 2, 2015, 12:00 AM), <http://www.thelegalintelligencer.com/id=1202741238960/Square-Peg-of-Sharing-Economy-Round-Hole-of-WageandHour-Law?sreturn=20160028163054> (“[R]egardless of the

leaders have expressed concern that the guidance will make it more difficult for employers to use independent contractors.⁸⁷

In addition to IRS and Department of Labor efforts, state governments have begun ramping up their efforts to correct instances of worker misclassification. As of October 2017, thirty-seven states have entered into partnerships with the Department of Labor.⁸⁸ These agreements seek to share information and coordinate enforcement between states and the federal government.

While gig-economy companies have largely avoided the government's increased enforcement efforts, it seems inevitable that these companies will soon be targeted.⁸⁹

II. THE CHANGING LABOR MARKET AND THE GROWTH OF A NEW ECONOMY

The current dichotomy of worker classification—in which workers are strictly categorized as either employees or independent contractors—may still have some utility, but as the world changes, so too must the law. A growing number of indicators point to the conclusion that the labor market is undergoing a drastic shift—a shift that the current state of employment law may not fully be prepared to address.

I posit that gig-economy companies have not driven the increase in independent contracting and the 1099 workforce. Likewise, gig-economy companies do not merit a reconsideration of worker classification law because they are changing the labor market. Rather, the gig-economy companies have emerged in response to shifts in the labor market and are filling a void presented by societal and economic change. So the

employment context, [the DOL] uses the same analysis to determine whether a worker is an employee or an independent contractor.' Eschewing suggestions for a 'third category of employment,' as a solution that would require legislative action, Perez relied on the current law, which he reasoned provides a 'useful framework for understanding the rights and responsibilities of workers and employers.'" (second alteration in original)).

87. Melanie Trottman, *Employees vs. Independent Contractors: U.S. Weighs in on Debate over How to Classify Workers*, WALL ST. J. (July 15, 2015, 8:57 PM), <http://www.wsj.com/articles/labor-department-releases-guidance-on-classification-of-workers-1436954401>.

88. *Misclassification of Employees as Independent Contractors*, *supra* note 9.

89. The lack of government enforcement efforts against sharing economy companies is unsurprising, considering enforcement efforts have typically concentrated on "industries where workers are most likely to be mistakenly or deliberately cheated out of their wages, and where [those workers] are least likely to speak up and report such violations." David Weil, *Strategic Enforcement to Maximize Impact*, U.S. DEP'T LAB. BLOG (Oct. 31, 2014), <http://blog.dol.gov/2014/10/31/strategic-enforcement-to-maximize-impact> [<https://web.archive.org/web/20141227020437/https://blog.dol.gov/2014/10/31/strategic-enforcement-to-maximize-impact>].

labor market has changed, companies are changing, and now the law must change as well. The rise of gig-economy companies merits a reconsideration of law because their rise was a response to changes in the labor market.

A. *A New Kind of Company*

The economy, the labor market, and the way companies, workers, and consumers interact are changing. Commentators use many terms for this phenomenon: collaborative consumption,⁹⁰ the sharing economy,⁹¹ the gig-economy, and the contingent worker economy, among others. Despite its popularity, critics argue that the term “sharing economy” has become a misnomer, as there is very little actual “sharing” going on.⁹² The term “gig economy,” however, has become increasingly popular and seems to describe more accurately what is happening.⁹³ Workers perform short-term tasks for consumers after being connected through a platform. It is not uncommon for workers to offer their services on multiple platforms at the same time. Regardless of the label, the underlying concept remains largely the same⁹⁴: Internet commerce has facilitated the growth of peer-to-peer transactions on a large scale.⁹⁵

90. Rachel Botsman, *The Case for Collaborative Consumption*, TEDxSYDNEY (May 2010), http://www.ted.com/talks/rachel_botsman_the_case_for_collaborative_consumption?language=en.

91. Although the exact origin is unclear, the term “sharing economy” is largely traceable to the work of NYU law professor Yochai Benkler, who posited that network technology could mitigate the property issue known as the “tragedy of the commons” through “commons-based peer production.” See Yochai Benkler, *Coase’s Penguin, or, Linux and The Nature of the Firm*, 112 YALE L.J. 369, 378 (2002); Yochai Benkler, *Sharing Nicely: On Shareable Goods and the Emergence of Sharing as a Modality of Economic Production*, 114 YALE L.J. 273, 334 (2004).

92. Alex Hern, *Why the Term ‘Sharing Economy’ Needs to Die*, GUARDIAN (Oct. 5, 2015, 4:43 PM), <http://www.theguardian.com/technology/2015/oct/05/why-the-term-sharing-economy-needs-to-die> (“The ‘sharing economy’ is a meaningless term that was only coined in the first place because of the tech industry’s desire to pretend everything it does is new and groundbreaking.”); Sarah Kessler, *The ‘Sharing Economy’ Is Dead, and We Killed It*, FAST COMPANY (Sept. 14, 2015), <http://www.fastcompany.com/3050775/the-sharing-economy-is-dead-and-we-killed-it>.

93. Arun Sundararajan, *The ‘Gig Economy’ Is Coming. What Will It Mean for Work?*, GUARDIAN (Jul. 25, 2015, 7:05 PM), <https://www.theguardian.com/commentisfree/2015/jul/26/will-we-get-by-gig-economy>.

94. *The Rise of the Sharing Economy*, ECONOMIST (Mar. 9, 2013), <http://www.economist.com/news/leaders/21573104-internet-everything-hire-rise-sharing-economy>.

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

Just how prevalent are these platforms or companies? By one estimate, there are approximately 850 “sharing economy” companies globally.⁹⁶ The diversity of these companies highlights just how widespread they are. Essentially, the offerings of gig-economy companies can be grouped into five categories: buying things, hiring people to do things, sharing things, borrowing things, and exchanging things.⁹⁷

Three of the most well-known of these companies are Uber, Taskrabbit, and Airbnb.⁹⁸ These companies also serve as good examples for purposes of this Note, as they demonstrate different ways gig-economy companies are using workers and how the line between employee and independent contractor is becoming blurred.

1. Uber

Uber was birthed from a simple idea in 2008—“tap a button, get a ride.”⁹⁹ Although it began as a premium ride-sharing service, Uber has matured into a mobile app that “connects riders with safe, reliable, convenient transportation providers at a variety of price-points in cities around the world.”¹⁰⁰ UberX, which launched in 2012, allows users to request a ride through the Uber app and to connect with a driver—

96. See *The Most Popular Ideas in the Sharing Economy*, JUSTPARK, <https://www.justpark.com/creative/sharing-economy-index> (last visited Mar. 1, 2018) (offering the “most comprehensive interactive overview of the sharing economy ever made”). The methodology of this aggregation, as described by the site:

We’ve taken all the active companies listed under the sharing economy, collaborative consumption and peer-to-peer (AngelList & Crunchbase). We then cross-checked this against the company Appendix of *The Business of Sharing* (Palgrave Macmillan, 2015) by JustPark CEO Alex Stephany.

The full list was then filtered to remove any sites and companies that are no longer active, or did not belong under these categories. We manually checked the list too, going through a wide variety of company descriptions and straplines to determine in the most detailed and concrete way possible, what each service actually does.

Id.

97. *Id.*

98. Hern, *supra* note 92 (referring to Uber, Airbnb, and TaskRabbit as “the holy trinity of the Sharing Economy”).

99. *Our Trip History*, UBER, <https://www.uber.com/our-story/?int=b> (last visited Mar. 1, 2018); see also *O’Connor v. Uber Techs., Inc.*, 82 F. Supp. 3d 1133, 1135 (N.D. Cal. 2015) (“In a nutshell, Uber provides a service whereby individuals in need of vehicular transportation can log in to the Uber software application on their smartphone, request a ride, be paired via the Uber application with an available driver, be picked up by the available driver, and ultimately be driven to their final destination. Uber receives a credit card payment from the rider at the end of the ride, a significant portion of which it then remits to the driver who transported the passenger.”).

100. *The Most Popular Ideas in the Sharing Economy*, *supra* note 96.

typically in the driver's own car—who provides transportation. The entire transaction is handled through the app, and there is no need for the rider and driver to communicate at all.

In a recent worker classification suit, Uber contended that it is a “technology company,” not a “transportation company.”¹⁰¹ Without drivers to use that technology, however, Uber would not be worth the record-breaking amount that it is.¹⁰² As of 2015, Uber had over 400,000 active drivers, or “partners,” in the United States alone.¹⁰³ Uber drivers apply and must be approved online; they are then able to access the app and start accepting trip requests.¹⁰⁴ While data on drivers is only available from Uber and the surveys that it conducts, the profiles provide an interesting look at just who is working in this new economy.

Uber drivers do not fit a specific profile; nineteen percent are women, eleven percent are students, nearly half are parents, and around two-thirds never earned income from driving before starting with Uber.¹⁰⁵ A large majority of Uber drivers use the platform on the side and value it for the flexibility and convenience it offers.¹⁰⁶ It seems

101. *O'Connor*, 82 F. Supp. 3d at 1137.

102. Eric Newcomer, *Uber Raises Funding at \$62.5 Billion Valuation*, BLOOMBERG TECH. (Dec. 3, 2015, 1:21 PM), <http://www.bloomberg.com/news/articles/2015-12-03/uber-raises-funding-at-62-5-valuation> (“Uber Technologies is looking to raise as much as \$2.1 billion in a financing round that would value the car-booking company at \$62.5 billion, said people familiar with the matter.”); *see also* Liyan Chen, *At \$68 Billion Valuation, Uber Will Be Bigger than GM, Ford, and Honda*, FORBES (Dec. 4, 2015, 11:23 AM), <http://www.forbes.com/sites/liyanchen/2015/12/04/at-68-billion-valuation-uber-will-be-bigger-than-gm-ford-and-honda/#73454e9b5858> (remarking that Uber's recent valuation is higher than that of General Motors, Ford Motor, and Honda Motor).

103. Natalia, *Uber and the American Worker: Remarks from David Plouffe*, UBER: NEWSROOM (Nov. 3, 2015), <https://newsroom.uber.com/1776> (defining an “active driver” as one who takes at least four trips a month). Globally, Uber serves 633 cities worldwide. *See Our Trip History*, *supra* note 99.

104. *Uber: Drive*, UBER, <https://www.uber.com/drive> (last visited Mar. 1, 2018); *see also* Jonathan V. Hall & Alan B. Krueger, *An Analysis of the Labor Market for Uber's Driver-Partners in the United States* 2 n.1 (Nat'l Bureau of Econ. Research, Working Paper No. 22843, 2016), <http://www.nber.org/papers/w22843> (“Although requirements vary by city, before they can utilize the Uber platform, a potential driver typically must: (1) pass a background check and a review of their driving record; (2) submit documentation of insurance, registration, and a valid driver's license; (3) successfully complete a city-knowledge test; and (4) drive a car that meets a quality inspection and is less than a certain number of years old.”).

105. Jessica, *New Survey: Drivers Choose Uber for Its Flexibility and Convenience*, UBER: NEWSROOM (Dec. 7, 2015), <https://newsroom.uber.com/driver-partner-survey>.

106. *Id.* (“69% of drivers have other full-time or part-time work outside of Uber 50% drive fewer than 10 hours per week on average; 40% say when they drive just depends what else is on their schedule, 38% set an earnings goal, 16% drive a set amount of time. . . . 88% started driving with Uber because it fit their life well, not because it was their only option.”).

Uber drivers are largely defying classic norms about the way workers and companies interact.¹⁰⁷

The company's current use of independent contractor status is a vital part of why so many drivers have embraced the platform. However, some of Uber's practices, which typically benefit drivers, are also some of the main reasons it has come under scrutiny for worker misclassification.¹⁰⁸ Uber contracts with third parties to help drivers lease vehicles, obtain insurance coverage, and even get cellphones to use the app.¹⁰⁹ Drivers who have sued the company have cited those offerings as indicating an employer-employee relationship.¹¹⁰ This is indicative of a problem in the gig-economy; companies might be reluctant to provide useful services to workers out of fear that those services will be used against them in court.¹¹¹

2. TaskRabbit

TaskRabbit, founded in 2008, allows users, or "clients," to post a small job or errand on the TaskRabbit app or website and connect with a "Tasker" who will complete the task.¹¹² All Taskers are backed by a TaskRabbit insurance policy and undergo a background check.¹¹³ TaskRabbit currently operates in forty U.S. cities, boasts 50,000 Taskers, and allows users to outsource a wide variety of jobs.¹¹⁴ "When

107. See *Uber and the American Worker*, *supra* note 103 ("[Y]ou're more likely to find someone who drives 10 hours one week and zero hours the next week than someone who works every Tuesday and Wednesday from 5 to 10 pm."). Notably, these remarks came from David Plouffe, a former Obama campaign manager recently hired by Uber as its senior vice president of policy and strategy. Dan Primack, *Uber Hires Obama Campaign Manager David Plouffe to Lead Policy*, FORTUNE (Aug. 19, 2014), <http://fortune.com/2014/08/19/uber-hires-obama-advisor-david-plouffe-to-lead-policy>.

108. *O'Connor v. Uber Techs., Inc.*, 82 F. Supp. 3d 1133, 1137–38 (N.D. Cal. 2015).

109. *Id.* at 1135, 1153.

110. See discussion *infra* Section II.C.1.

111. Huet, *supra* note 32 ("The independent contractor dilemma has another twist, too. Many companies, worried about a lawsuit, won't give their workers training or benefits, even if they think it would be helpful.")

112. TASKRABBIT, <https://www.taskrabbit.com> (last visited Mar. 1, 2018). "On TaskRabbit . . . if you want someone to fix a broken door or move a piece of furniture, you choose from a menu of services—'cleaning,' 'handyman,' 'personal assistant' or 'moving help'—then type more details about the job, input your credit card details and address and choose from a roster of workers." Quentin Fottrell, *Some TaskRabbit Handymen Can Make \$78,000 a Year*, MARKETWATCH (Mar. 31, 2015, 6:03 AM), <http://www.marketwatch.com/story/some-taskrabbit-handymen-can-make-78000-a-year-2015-03-31>.

113. Fottrell, *supra* note 112.

114. *TaskRabbit Now in 40 Cities!*, TASKRABBIT: BLOG (Jun. 22, 2017), <https://blog.taskrabbit.com/2017/06/22/find-taskrabbit-in-40-cities>; TASKRABBIT, *supra* note 112.

Apple launched the iPhone 5, in 2012, three hundred and fifty people hired others through TaskRabbit to wait in line in San Francisco and New York City.”¹¹⁵

TaskRabbit initially allowed Taskers to bid on jobs but abandoned that model in favor of one where users post a task and can choose from a small number of Taskers with various skill sets and hourly rates.¹¹⁶ Individual Taskers set their own hourly rates, but that rate cannot be lower than the highest minimum wage in TaskRabbit-participating cities.¹¹⁷ While it does not guarantee Taskers will actually get to work, this feature makes TaskRabbit an outlier among the three companies in focus here.

The nature of TaskRabbit’s workforce is largely obscure, as the company does not publish demographic data.¹¹⁸ That aside, the company has revealed that around fifteen percent of workers on TaskRabbit work full time, and, of those, “many earn \$6,000 to \$7,000 a month after the commission is deducted.”¹¹⁹ Some have speculated that TaskRabbit offers a source of income for workers who have been laid off from full-time corporate jobs—a claim substantiated by the high education levels of TaskRabbit workers.¹²⁰

3. Airbnb

Airbnb, founded in 2008, is a similar company offering a much different service.¹²¹ Instead of allowing workers to provide transportation, or perform odd-jobs, Airbnb connects property owners with travelers in need of accommodations in more than 65,000 cities

115. Adrienne Raphel, *TaskRabbit Redux*, NEW YORKER (July 22, 2014), <http://www.newyorker.com/business/currency/taskrabbit-redux>.

116. See Kessler, *The Gig Economy Won’t Last*, *supra* note 28.

117. Raphel, *supra* note 115.

118. See Casey Leins, *Who’s a Sharing Economy Worker?*, U.S. NEWS: DATAMINE (Aug. 21, 2015, 1:49 PM), <https://www.usnews.com/news/blogs/data-mine/2015/08/21/uber-airbnb-etsy-who-are-the-sharing-economy-workers>.

119. Fottrell, *supra* note 112 (comments of Jamie Viggiano, a spokeswoman for TaskRabbit).

120. Casey Newton, *Temping Fate: Can TaskRabbit Go from Side Gigs to Real Jobs?*, VERGE (May 23, 2013, 11:00 AM), <http://www.theverge.com/2013/5/23/4352116/taskrabbit-temp-agency-gig-economy> (“The education levels of the company’s contractors help tell the story: 70 percent have at least a bachelor’s degree, 20 percent have master’s degrees, and 5 percent have a Ph.D.”).

121. Similar to Uber, Airbnb boasts a multi-billion dollar valuation. Davey Alba, *Airbnb Confirms \$1.5 Billion Funding Round, Now Valued at \$25.5 Billion*, WIRED: BUS. (Dec. 7, 2015, 7:49 PM), <http://www.wired.com/2015/12/airbnb-confirms-1-5-billion-funding-round-now-valued-at-25-5-billion>.

and 191 countries.¹²² Similar to Uber, Airbnb does not own any of the lodgings it lists online—it simply connects people who do own those spaces, and people who want to stay in them. Unlike Uber, Airbnb has not faced much scrutiny over worker classification of hosts; instead, Airbnb's chief woe is regulatory.¹²³ That battle is outside the scope of this Note, but Airbnb still offers a good view of the kind of people working in the gig-economy.

Airbnb, like TaskRabbit, does not provide the extensive demographic information that Uber does, but Airbnb does sporadically publish information about “hosts” on a city-by-city basis in order to evaluate the economic impact the company is having on those cities.¹²⁴ A 2012 study in San Francisco revealed that fifty-six percent of hosts use their Airbnb income to help pay their mortgage or rent, and forty-two percent use their Airbnb income to pay for regular living expenses.¹²⁵ Similarly, a survey focused on New York from 2012–2013 revealed that eighty-seven percent of hosts rent out the home they live in, and the typical host earns \$7530 per year.¹²⁶ Perhaps most indicative of the opportunity offered by gig-economy companies was that more than half of hosts did not have a traditional full-time job, and sixty-two percent said Airbnb helped them stay in their homes.¹²⁷

Because there is “little or no risk of a host being considered an employee,” Airbnb has “more freedom to bring the providers ‘closer’ and engage in interaction with their hosts that might be associated with a firm-employee relationship in a traditional company.”¹²⁸ This manifests itself in high standards for hosts, as well as a \$1,000,000 liability

122. *About Us*, AIRBNB, <https://www.airbnb.com/about/about-us> (last visited Mar. 1, 2018).

123. Ron Klain, *Airbnb's Biggest Disruption: America's Laws*, FORTUNE (Sept. 10, 2014), <http://fortune.com/2014/09/10/airbnbs-biggest-disruption-americas-laws> (“What makes AirBnb exceptional is not any technological breakthrough, but how it is challenging local hospitality regulation, condo board rules, and all the other limitations on who can charge what and when for short-term housing usage.”).

124. *Airbnb Economic Impact*, AIRBNB, <http://blog.airbnb.com/economic-impact-airbnb> (last visited Mar. 1, 2018) (“Each of the studies . . . reviews the findings of host and guest surveys, Airbnb bookings data, and analysis by local economists in the cities we study. In addition to traditional outputs, such as total economic impact and number of jobs created, the studies also present a broader range of impacts—summarizing . . . how the income earned by resident hosts and local businesses strengthens communities and economies.”).

125. *Id.*

126. *Id.*

127. *Id.*

128. Justin Fox, *New Worker Classification Needed for Sharing Economy, Uber Drivers*, INS. J. (June 24, 2015), <http://www.insurancejournal.com/news/national/2015/06/24/372814.htm>.

insurance policy on all properties.¹²⁹ Although Uber and TaskRabbit also maintain standards and some level of insurance, the luxury of being somewhat insulated from worker classification troubles is unique to Airbnb.¹³⁰

B. *Economic Indicators of Change*

The matter is far from settled, but economic trends indicate that independent contractor work is on the rise. Few would contest that the current labor market is drastically different from the labor market that existed in 1935, when the National Labor Relations Act was enacted.¹³¹ While it is not necessary to explore fully the shifts in the U.S. economy, an understanding of how the labor market is changing, and how gig-economy companies have developed in response to that change, is crucial groundwork in contemplating whether the traditional model of worker classification still works.

Attempting to parse the myriad of studies that explore the relationship between the gig-economy and the labor market is no easy task. After all, workers in the gig-economy are often labeled independent contractors—a classification shared by construction workers, healthcare professionals, authors, and athletes, to name a few.¹³² While it might not be possible to totally isolate the effect of the gig-economy companies, an examination of several approaches to this problem reveals that the increase in independent contractor work came before the gig-economy companies emerged.

A reasonable starting point in understanding the way these studies offer insight to the gig-economy workforce is the Bureau of Labor Statistics' ("BLS") "contingent worker" category.¹³³ The BLS "contingent

129. *Earn Money As an Airbnb Host*, AIRBNB, <https://www.airbnb.com/host> (last visited Mar. 1, 2018); *The \$1,000,000 Host Guarantee*, AIRBNB, <https://www.airbnb.com/guarantee> (last visited Mar. 1, 2018).

130. Laura Entis, *Employee, Not Contractor: What the Uber Ruling Means for the Sharing Economy*, ENTREPRENEUR (June 26, 2015), <http://www.entrepreneur.com/article/247795> (quoting a Los Angeles attorney who believed that applying the same argument brought by Uber drivers—that they are employees—to Airbnb hosts is "a little ridiculous").

131. 29 U.S.C. §§ 151–169 (2012).

132. White, *supra* note 19.

133. The BLS categorized workers as contingent or non-contingent. In 2005, The BLS decided to stop keeping track of "contingent workers," a testament to the difficulty of capturing this workforce in a meaningful way. Kessler, *The Gig Economy Won't Last*, *supra* note 28; see also Elaine Pofeldt, *Shocker: 40% of Workers Now Have 'Contingent' Jobs, Says U.S. Government*, FORBES (May 25, 2015, 11:27 AM), <http://www.forbes.com/sites/elainepofeldt/2015/05/25/shocker-40-of-workers-now-have-contingent-jobs-says-u-s-government/#749e1a272532>.

worker” category encompassed people who work but do not have traditionally secure jobs.¹³⁴ In 2005, roughly thirty percent of survey respondents were categorized as “contingent workers.”¹³⁵ While independent contractors were included in the “contingent worker” category, on their own independent contractors accounted for 7.4% of total employment.¹³⁶ Conveniently, the U.S. Government Accountability Office undertook a similar survey in 2015 and found “contingent workers” accounted for 40.4% of the employed labor force, and independent contractors accounted for 12.9% on their own.¹³⁷ While the increase is interesting, it is important to note that these findings were the result of various national survey data sources, including the Current Population Survey and General Social Survey.¹³⁸

A study published by the American Action Forum in July 2015 deconstructed survey data from the Government Accountability Office and the General Social Survey to support its conclusion that the number of workers in the “gig economy” grew at a faster rate than overall employment.¹³⁹ The study further estimated that freelancing accounted for nearly one third of all jobs added from 2010 to 2014.¹⁴⁰

134. *Labor Force Statistics from the Current Population Survey*, BUREAU LAB. STAT., <http://www.bls.gov/cps/lfcharacteristics.htm#contingent> (last modified Feb. 16, 2018) (“Contingent workers are people who do not expect their jobs to last or who reported that their jobs are temporary. They do not have an implicit or explicit contract for ongoing employment. Alternative employment arrangements include people employed as independent contractors, on-call workers, temporary help agency workers, and workers provided by contract firms The latest published data are from a supplemental survey conducted in February 2005.”).

135. See Press Release, Bureau of Labor Statistics, *Contingent and Alternative Employment Arrangements*, February 2005, at 2 (July 27, 2005), <https://www.bls.gov/news.release/pdf/conemp.pdf>.

136. *Id.*

137. CONTINGENT WORKFORCE: SIZE, CHARACTERISTICS, EARNINGS, AND BENEFITS, *supra* note 22, at 12.

138. *Id.* at 1–2.

139. Will Rinehart & Ben Gitis, *Independent Contractors and the Emerging Gig Economy*, AM. ACTION F. (July 29, 2015), <http://americanactionforum.org/research/independent-contractors-and-the-emerging-gig-economy> (“We find that the number of workers in the gig economy grew between 8.8 and 14.4 percent from 2002 to 2014. For comparison, overall employment increased by 7.2 percent over the same period. Independent contractors constitute a significant portion of gig workers, and grew by 2.1 million workers from 2010 to 2014, accounting for 28.8 percent of all jobs added during the recovery.”).

140. *Id.*

The gig economy is of rising importance in the overall U.S. economy. From 2002 to 2014, workers in the gig economy expanded between 8.8 percent and 14.4 percent. Independent contractors, most notably, helped put 2.1 million people to work, accounting for 28.8 percent of all jobs added from 2010 to 2014. The ride sharing industry alone helped bring in an additional \$519 million in economic

Yet another study published in June 2015, in response to “breathless stories about how the nature of jobs is changing,” took the adverse position and suggested that “if the end of employment-as-usual is coming, the change hasn’t started showing up yet.”¹⁴¹ The study supported this claim by examining the Current Population Survey and pointing out several metrics that were either stagnant or had decreased following the recession and the dawn of the gig-economy.¹⁴²

While these studies make interesting and compelling points and support those points with ample data from various surveys, it could be argued that their reliance on survey responses—which certainly have utility in some traditional employment contexts—might not be representative of the changes taking place in the labor market.

A study published in December 2015 criticized the use of survey data to draw conclusions about the relationship between the gig-economy and the labor market.¹⁴³ The study presented its own—particularly compelling—view of how the labor market is changing by comparing twenty years’ worth of IRS data on W-2 and 1099-MISC forms.¹⁴⁴ The data suggested not only that changes in the labor market

activity from 2010 to 2013 for independent workers, while injecting 22,000 jobs into the sector. Though it is early, the online gig economy also seems to also be a growing piece of United States’ economy of the 21st century.

Id.

141. Adam Ozimek, *We Are Not a Nation of Freelancers*, MOODY’S ANALYTICS: DATAPOINTS (June 29, 2015, 3:56 PM), <https://www.economy.com/dismal/analysis/datapoints/255258/We-Are-Not-a-Nation-of-Freelancers> (“For starters, you might guess from coverage that self-employment is at an all-time high. In fact, the share of the workforce reporting they are unincorporated self-employed is declining and lower than at any point in the last 70 years.”).

142. *Id.* The study focused on three indicators: the share of the workforce reporting they are self-employed, the share of employed reporting they have multiple jobs, and the share of employed workers who reported having full-time jobs. *Id.*

143. ELI DOURADO & CHRISTOPHER KOOPMAN, MERCATUS CTR., *EVALUATING THE GROWTH OF THE 1099 WORKFORCE 2* (2015), https://www.mercatus.org/system/files/Evaluating-Growth-1099_Dourado_MOP_v2.pdf (“A weakness in using survey data to explore the changing nature of work is that survey answers can change along with respondents’ understanding of the nature of work. Do full-time Uber drivers understand themselves to be ‘self-employed’ or employed by Uber? It is plausible that they might answer either way. Is being an Airbnb host ‘working a second job’? It is unlikely that the hosts themselves see it that way.”).

144. *Id.* at 2–5. W-2 forms provide a barometer for traditional employment relationships, while 1099-MISC forms are a good measure for growth of independent contractor work. *Id.* at 2 (“W-2 forms provide a measure of activity within the traditional employment relationship. [W-2 forms] are issued by the IRS for salaries and wages reported by employers for each employee. For individuals working multiple jobs, multiple W-2 forms are issued. . . . [T]he 1099-MISC is the best measure for the growth in independent work. 1099-MISCs include reported income for individuals who have received between \$600 and \$20,000 outside the traditional employment relationship. This

are underway, but that these changes have been underway since before gig-economy companies were ever conceived.¹⁴⁵ The study concluded by arguing:

The more flexible work arrangements offered by [gig-economy] platforms provide an alternative for those excluded from traditional employment relationships. The rise of firms such as Uber . . . should be seen as the product rather than the cause of the growing 1099 workforce. These companies are able to offer employment on these more flexible terms only because there is a willing supply of workers eager to accept them. Without the nontraditional arrangements offered by the [gig-economy], workers would be worse off.¹⁴⁶

C. Evidence of a Problem

As gig-economy companies grow, they face increasing opposition on multiple fronts. Civil actions from aggrieved workers, as well as federal and state regulatory and administrative enforcement initiatives have become increasingly common.¹⁴⁷

1. Class Actions and the Gig-Economy

*O'Connor v. Uber Technologies, Inc.*¹⁴⁸ is arguably the most prominent judicial action against a gig-economy company.¹⁴⁹ The case was brought as a class action against Uber by a group of drivers who contended they were employees of Uber, as opposed to its independent contractors.¹⁵⁰ The crux of the case, of course, was the driver's claim

also includes individuals who have taken part in fewer than 200 transactions with a single entity or within a particular platform. In the context of the sharing economy, 1099-MISC forms are issued for income reported by firms for each individual.”)

145. *Id.* at 5.

146. *Id.*

147. See *supra* Section I.C, for a discussion of the increased enforcement efforts of various government agencies in preventing, policing, and punishing worker misclassification.

148. 82 F. Supp. 3d 1133 (N.D. Cal.), *class certified*, No. C-13-3826 EMC, 2015 WL 5138097 (N.D. Cal. Sept. 1, 2015).

149. Handy—a company that operates similarly to TaskRabbit, but exclusively offers maid and handyman services—has also faced multiple lawsuits alleging employee misclassification. Complaint at 1, *Emmanuel v. Handy Techs., Inc.*, No. 15-12914 (D. Mass. July 7, 2015), ECF No. 1; see also *Zenelaj v. Handybook Inc.*, 82 F. Supp. 3d 968 (N.D. Cal. 2015). One of those cases was sent to arbitration, pursuant to the agreement plaintiffs signed before working for Handy. *Zenelaj*, 82 F. Supp. 3d at 979 (granting Handy's motion to compel arbitration).

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

that they were being deprived of the benefits associated with being classified as employees.¹⁵¹ The drivers argued that “Uber exercises considerable control and supervision over both the methods and means of its drivers’ provision of transportation services, and that under the applicable legal standard they are employees.”¹⁵² In response, Uber has essentially argued that it is a “technology company,” not a “transportation company.”¹⁵³ Although the case has not yet been adjudicated on the merits, Uber has suffered setbacks in the form of a denial of a motion to compel arbitration,¹⁵⁴ a denial of a motion for summary judgment,¹⁵⁵ and a certification of the class of drivers on most of the relevant issues.¹⁵⁶ The class action certification could have dire consequences for Uber’s future, since a ruling would affect Uber’s relationship with all similarly situated drivers.¹⁵⁷

The attorney at the helm of the California-based Uber class action is no stranger to bringing high-profile cases on behalf of workers seeking employee status.¹⁵⁸ In 2009, Shannon Liss-Jordan won a class action suit on behalf of exotic dancers against the lounge where the dancers worked.¹⁵⁹ The lounge contended it was merely a platform for the dancers, although it kept a percentage of dancers’ earnings, charged

151. *Id.* (“Plaintiffs claim that they are employees of Uber, as opposed to independent contractors, and thus are eligible for various statutory protections for employees codified in the California Labor Code, such as a requirement that an employer pass on the entire amount of any gratuity ‘that is paid, given to, or left for an employee by a patron.’” (quoting CAL. LAB. CODE § 351 (West 2017))).

152. *Id.* at 1137–38 (“Uber does not sell its software in the manner of a typical distributor. Rather, Uber is deeply involved in marketing its transportation services, qualifying and selecting drivers, regulating and monitoring their performance, disciplining (or terminating) those who fail to meet standards, and setting prices.”).

153. *Id.* at 1137 (“Uber bills itself as a ‘technology company,’ not a ‘transportation company,’ and describes the software it provides as a ‘lead generation platform’ that can be used to connect ‘businesses that provide transportation’ with passengers who desire rides.”).

154. *O’Connor v. Uber Techs., Inc.*, 150 F. Supp. 3d 1095, 1104–09 (N.D. Cal. 2015) (denying Uber’s motion to compel arbitration on the bases that some drivers had opted out and as “a matter of public policy”).

155. *O’Connor*, 82 F. Supp. 3d at 1153 (denying Uber’s motion for summary judgment).

156. *O’Connor v. Uber Techs., Inc.*, No. C-13-3826 EMC, 2015 WL 5138097, at *37 (N.D. Cal. Sept. 1, 2015) (certifying the class of drivers).

157. Laura Sydell, *How a Suit Against Uber Could Redefine the Sharing Economy*, NPR: LAW (Sept. 2, 2015, 5:20 AM), <http://www.npr.org/2015/09/02/436820824/california-court-grants-uber-drivers-class-action-status>.

158. Biz Carson, *This Lawyer Fought for FedEx Drivers and Strippers. Now She’s Standing Up for Uber Drivers*, BUS. INSIDER (May 27, 2015, 4:26 PM), <http://www.businessinsider.com/shannon-liss-riordan-the-lawyer-behind-ubers-lawsuit-2015-5>.

159. *Chaves v. King Arthur’s Lounge, Inc.*, No. 07-2505, 2009 WL 3188948, at *1 (Mass. Super. Ct. July 30, 2009).

them a fee, and did not allow them to work at other lounges.¹⁶⁰ While the parallels to the Uber situation are certainly obvious, it is by no means a direct comparison.¹⁶¹ After applying the Massachusetts state test for independent contractors,¹⁶² the court certified the class of dancers and granted summary judgment in their favor.¹⁶³ The court's analysis centered on a determination that the dancers' performance was not outside the lounge's usual course of business.¹⁶⁴ The lounge eventually shut down, and Liss-Jordan went on to bring similar suits against nightclubs and lounges across the country that utilized similar business models.¹⁶⁵

Suing individual business entities is one matter, but a class action worker classification suit against a national or multi-national firm is an entirely different fight. Such litigation can span multiple jurisdictions, which inevitably apply different classification tests, and last for years. The complexity of this sort of legal battle is well exemplified in the case of FedEx, the parcel delivery service.¹⁶⁶ As of February 2015, FedEx

160. *Id.* Night clubs and lounges around the country utilize similar business models. Lauren Smiley, *What Strippers Can Teach Uber*, MEDIUM:MATTER (Apr. 20, 2015), <https://medium.com/matter/what-strippers-can-teach-uber-1f5b15e5b427#.5xf1q8rpd>.

161. Uber's chief argument is that it is a technology company that offers a platform for drivers and riders to connect, and Uber does keep a percentage of each ride, though unlike *Chaves*, Uber does not charge drivers to use the platform or restrict their use of other similar platforms. See *supra* Section II.A.1 for a discussion of how Uber blurs the line between employee and independent contractor.

162. *Chaves*, 2009 WL 3188948, at *1 ("Under Massachusetts law, a worker will be considered an employee unless: '(1) The individual is free from control and direction in connection with the performance of the service, both under his contract for the performance of service and in fact; and (2) the service is performed outside the usual course of the business of the employer; and, (3) the individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed.' The burden of proof is on the employer, and 'because the conditions are conjunctive, [the employer's] failure to demonstrate any one of the criteria set forth in subsections (1), (2), or (3) suffices to establish that the services in question constitute "employment" within the meaning of the statute.' There is a rebuttable presumption that 'any person performing services for another is an employee unless the employer meets the three prong test.'" (alteration in original) (citations omitted)).

163. *Id.*

164. *Id.* (rejecting the lounge's argument that its main business was selling alcohol and that the dancers' presence was the equivalent of television screens at a sports bar).

165. Smiley, *supra* note 160; see also Rebecca Davis O'Brien, *Are Exotic Dancers Employees or Independent Contractors?*, WALL ST. J. (Dec. 2, 2014, 8:42 PM), <http://www.wsj.com/articles/are-exotic-dancers-employees-or-independent-contractors-1417570961>.

166. Thomas R. Revnew, *The Push to Correct the Misclassification of Commercial Truck Drivers*, FED. LAW., July 2015, at 16, 16–17 (detailing various cases against FedEx that applied California, Oregon, and Kansas tests to determine that FedEx drivers should be classified as employees).

was involved in roughly twenty nationwide suits revolving around its classification of delivery drivers as independent contractors.¹⁶⁷ Commentators have speculated that, as a result of increased funding and enforcement initiatives,¹⁶⁸ there is a trend toward finding that drivers are employees, not independent contractors.¹⁶⁹ Such rulings could cost FedEx hundreds of millions of dollars in retroactive expenses and penalties.¹⁷⁰

Another recent, yet somewhat distinct, worker classification suit includes an April 2015 consent judgment against construction companies found to be improperly labeling workers as “member/owners” of limited liability companies instead of employees.¹⁷¹

2. State Administrative Agency Decisions

Multiple state agencies have also weighed in on the worker classification of Uber drivers.¹⁷² In May 2015, a Florida state agency ruled that an ex-Uber driver was an employee, becoming the first state agency to make such a ruling.¹⁷³ That decision was later reversed in September 2015 after Uber appealed.¹⁷⁴ Not all of Uber’s appeals were so successful, however.¹⁷⁵ In June 2015, a California judge affirmed the decision of a state agency¹⁷⁶ that found an Uber driver was an

167. Mark B. Solomon, *Judge Rules in Favor of FedEx Ground, Hunt in Massachusetts Worker-Classification Cases*, DC VELOCITY (Feb. 19, 2015), <http://www.dcvelocity.com/articles/20150219-judge-rules-in-favor-of-fedex-ground-hunt-in-massachusetts-worker-classification-cases>.

168. See *supra* Section I.C.

169. Revnew, *supra* note 166, at 16.

170. Solomon, *supra* note 167.

171. *Investigation in Utah and Arizona Secures Wages and Benefits for More than 1,000 Construction Workers Who Were Wrongly Classified*, U.S. DEPT LAB. (Apr. 23, 2015), <http://www.dol.gov/newsroom/releases/whd/whd20150518>.

172. 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>.

173. See Rasier LLC, No. 0026 2825 90-02 (Fla. Dep’t of Econ. Opportunity Sept. 30, 2015). The agency applied the test from section 220 of the *Restatement (Second) of Agency* to determine whether an employer-employee relationship existed. *Id.*

174. *Id.*

175. Davey Alba, *Uber Isn’t About to Roll Over on Making Drivers Employees*, WIRED (June 17, 2015, 4:58 PM), <http://www.wired.com/2015/06/uber-isnt-roll-making-drivers-employees>.

176. Barbara Ann Berwick, No. 11-46739 EK, 2015 WL 4153765 (Cal. Labor Comm’r’s Office June 3, 2015). The California Labor Commissioner’s Office relied on California’s presumption of employment in classification disputes for personal services and cited *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* in its analysis. *Id.* at *4 (citing 769 P.2d 399 (Cal. 1989)).

employee, not an independent contractor.¹⁷⁷ These state agency decisions generally only apply to the individual worker who brought the claim, but their utility—as persuasive or convincing authority in larger cases—is not lost on plaintiffs’ attorneys.¹⁷⁸ In a statement after the unsuccessful California appeal, Uber criticized the ruling as undermining the main reason drivers choose to work for the platform.¹⁷⁹ Overall, however, Uber has taken such losses in stride: “We disagreed with the decision, but since it only affects one person . . . we decided to focus on the bigger picture,” an Uber spokesperson [told] WIRED.¹⁸⁰ Perhaps the fact that such losses are an anomaly for Uber makes them less concerning.

Uber has claimed “other states have determined Uber drivers are independent contractors rather than employees of the company, including labor or unemployment boards in Georgia, Arizona, Pennsylvania, Colorado, Indiana, Texas, New York, Illinois, and California.”¹⁸¹ Despite the relative one-sidedness of these state-agency skirmishes, both parties recognize that the real fight will be in the class action suit.¹⁸²

3. More General Indicators of Trouble for the Gig-Economy

The fallout from the recent Uber cases and decisions has been felt beyond just the ridesharing company itself—the cleaning services company, Homejoy, shut down in July 2015 after struggling to raise enough funding.¹⁸³ Homejoy’s CEO stated that investors were generally

177. *Uber Techs. v. Berwick*, No. CGC-15-546378, 2015 WL 10385003, at *1 (Cal. Super. Ct. Sept. 21, 2015).

178. Davey Alba, *In California, Uber Loses Another Round in Driver Debate*, WIRED (Sept. 10, 2015, 7:13 PM) [hereinafter Alba, *In California*], <http://www.wired.com/2015/09/california-uber-loses-another-round-driver-debate> (“Shannon Liss-Riordan, the Boston lawyer who is representing the Uber drivers in the class-action suit against the company, has cited the California Labor Commission’s [sic] decision in her arguments in court. She says this and other decisions by state agencies solidify her side’s stance. ‘This California decision supports our argument that when a fact-finder sits down to look at the facts, and applies California laws, Uber drivers are employees,’ Liss-Riordan says.”).

179. Natalia, *Statement on California Labor Commission Ruling*, UBER: NEWSROOM (June 17, 2015), <https://newsroom.uber.com/clcstatement> (“It’s important to remember that the number one reason drivers choose to use Uber is because they have complete flexibility and control. The majority of them can and do choose to earn their living from multiple sources, including other ride sharing companies.”).

180. Alba, *In California*, *supra* note 178 (omission in original).

181. *Id.*

182. *See supra* Section II.C.1.

183. Carmel DeAmicis, *Homejoy Shuts Down After Battling Worker Classification Lawsuits*, RE/CODE (July 17, 2015, 11:17 AM), <http://www.recode.net/2015/7/17/11614814/cleaning-services-startup-homejoy-shuts-down-after-battling-worker> (“The lawsuits were

becoming more hesitant to invest in gig-economy companies as a result of the uncertainty of worker classification suits.¹⁸⁴ Notably, Homejoy was in the early stages of four lawsuits brought by workers who argued they should be classified as employees.¹⁸⁵

In addition to legal challenges, companies like Uber are facing increased scrutiny both directly from workers and from the public. In 2014, Uber drivers protested outside of the company's San Francisco headquarters as part of a "global day of protest."¹⁸⁶ In the same year, drivers in New York staged a protest against Uber's decisions to cut rates and implement new policies forcing drivers to accept less lucrative rides.¹⁸⁷

III. A BETTER WAY? OUTCOMES OF THE CURRENT SYSTEM AND THE NEED FOR A NEW SOLUTION

The current state of worker classification law is ill-equipped to deal with the way gig-economy companies utilize workers to offer services. Worker classification in the gig-economy is a problem. It seems safe to say that given the tumultuous state of gig-economy companies' independent contractor-reliant business model, something is going to change soon. This Part will analyze some of the present and proposed solutions to the problem of classifying workers in the gig-economy. To better understand the feasibility and effectiveness of these solutions, they will be analyzed in terms of the epicenter of responsibility. Some solutions are internal and center on workers and companies, while others are external and are driven by regulators, legislators, and other third parties.

the nail in the coffin—Homejoy didn't have the war chest of Uber to fight long, costly legal battles.”).

184. *See id.* (“The on-demand space has become a riskier bet for investors in a short amount of time.”).

185. *Id.*

186. Patrick Kulp, *Uber Drivers Protest Outside Company Headquarters in San Francisco*, MASHABLE (Oct. 23, 2014), <http://mashable.com/2014/10/23/uber-san-francisco-protest>. The “global day of protest” demonstrators were not seeking to be classified as employees; rather, they were protesting promotional rate decreases that Uber had implemented to keep up with competitors. *Id.*

187. Johana Bhuiyan, *Behind The Scenes Of Uber's Biggest Driver Strike*, BUZZFEED NEWS (Sept. 19, 2014, 1:44 PM), <http://www.buzzfeed.com/johanabhuiyan/behind-the-scenes-of-ubers-biggest-driver-protest#.qaL0a0DyW1>. Several drivers at the New York protest expressed concerns that Uber was using temporary cost-cuts to force competitors out of the market. *Id.*

A. "Internal" Options—Workers' and Companies' Current Choices

Neither workers, nor the companies themselves, are going to be able to solve the dilemma of worker classification in the gig-economy under the current state of the law.

1. Ineffective and Inefficient Worker-Driven Solutions

Workers are unlikely to be able to solve the classification problem in the gig-economy on their own. Although court cases are pending, and adjudication is certainly a viable solution, any decision under the current framework is going to come down to employee- or independent-contractor-status.¹⁸⁸ But if a court were to rule in the worker's favor, and a company were to classify all its workers as employees, many of the unique benefits of the gig-economy would be lost and some companies would cease to exist. Additionally, government entities are slow to act and their decisions are subject to appeals.¹⁸⁹

One potential option for workers is to refuse to work for companies that classify them as independent contractors and get positions as employees at other, non-gig-economy, companies. This is, of course, easier said than done. The changing labor market has made it more difficult for workers to find full-time employment.¹⁹⁰ Some workers who are in between jobs, or just looking to make some extra money, might prefer to be classified as independent contractors.¹⁹¹ The inherent difficulty of a worker-driven solution is that not all workers have a problem with the current system.

2. Company Driven Initiatives—One Size Does Not Fit All

The change could, alternatively, come from the companies themselves. Unfortunately, the rigidity of worker classification law has left gig-economy companies with few options—and none of them are ideal. Some companies, committed to—and seemingly reliant on—the independent-contractor business model, have chosen to fight claims that they are misclassifying workers through litigation and arbitration.¹⁹² Other companies have determined that those legal battles are simply

188. See *supra* Section II.C; Heather Kelly, *Uber's Never-Ending Stream of Lawsuits*, CNN TECH (Aug. 11, 2016, 10:30 AM), <http://money.cnn.com/2016/08/11/technology/uber-lawsuits/> ("In the U.S., there are more than 70 pending federal suits against the company and many more in state courts.").

189. See *supra* Section II.C.

190. See *supra* Section II.B.

191. See *supra* Section II.A.

192. See *supra* Sections II.C.1, II.C.2.

too costly and have gone out of business.¹⁹³ Some companies have opted to abandon the business model they were built on and have converted independent contractors to full employees.¹⁹⁴ Because of its success in some cases, this solution merits further exploration.

Switching independent contractors to employees is one of the few choices for companies that want to stay in business and are unwilling or unable to engage in drawn-out legal battles.¹⁹⁵ While some might celebrate such a solution, it is a luxury few gig-economy companies have available.

Choosing to classify workers as employees could be seen as accepting and rectifying the criticism of some who have contended that gig-economy companies are really just putting a new veneer on an old trick: misclassifying workers to save on costs.¹⁹⁶ So far, only a few gig-economy companies have decided to classify workers as employees.¹⁹⁷ One such company is San Francisco-based Shyp, an on-demand packaging and shipping service.¹⁹⁸ Shyp's CEO explicitly denied that the decision was a result of recent lawsuits against similar technology companies,¹⁹⁹ but stated that it was instead a result of Shyp's financial ability to handle the change and a desire to exert a higher degree of control over workers.²⁰⁰

Shyp's relatively optimistic approach to reclassifying workers as employees is unlikely to work for other gig-economy companies. For one, Shyp is much smaller than other gig-economy companies, which makes

193. See *supra* Section II.C.3.

194. Zhuo, *supra* note 20.

195. Although this analysis largely implies a company might choose to reclassify workers independent of any litigation, it is far more likely that a company's decision to reclassify workers would be the result of litigation, or in order to avoid it.

196. See Smiley, *supra* note 160 ("They're passing themselves off as doing great things for the world, when really they're creating these jobs that don't even have the basic protections that have been put in place over decades to make sure workers get some minimum standards.").

197. Zhuo, *supra* note 20 ("Instacart and Shyp have begun converting their 1099 contractors into W2 employees, hoping to standardize the customer experience while avoiding the headaches popping up for companies like Uber and Homejoy.").

198. See SHYP, <https://www.shyp.com> (last visited Mar. 1, 2018). Shyp uses couriers to pick up items from customers, and then uses drivers and warehouse workers to ensure that items are packed up and shipped out properly. Although its drivers and warehouse workers have had employee status since the service began, in July 2015 CEO Kevin Gibbon decided to convert couriers from independent contractors to employees as well. Davey Alba, *Shyp Makes Couriers Employees Before It's Too Big to Change*, WIRE D (July 1, 2015, 5:32 PM) [hereinafter Alba, *Shyp*], <https://www.wired.com/2015/07/shyp-makes-couriers-employees-big-change>.

199. *A Note from Shyp's CEO*, SHYP (July 1, 2015), <http://blog.shyp.com/shyp-ceo-note>.

200. See Alba, *Shyp*, *supra* note 198.

such a solution much simpler.²⁰¹ Shyp is also not a typical example of a gig-economy company switching to employees because Shyp relied on the use of independent contractors to build its brand and achieve the financial position required to classify workers as employees.²⁰² If Shyp were to serve as a model for other gig-economy companies, what independent contractor-incubation period would be appropriate before switching? There is no easy or universal answer.

The decision to switch to employees might have made sense for Shyp, but these companies are very unique: the business model of one could lend to such a change,²⁰³ while the business model of another could make it impossible.²⁰⁴ Some companies are only able to attract workers because of the flexibility associated with independent contractor status and would likely not be able to attract enough staff if they were to switch classifications.²⁰⁵ Furthermore, Shyp might have wanted more control in order to set workers' hours to ensure customers would never have to wait too long. Other companies, such as Uber, instead rely on increased pricing to encourage more drivers to work during peak hours.²⁰⁶

Despite its appeal for being simple and fitting within the current framework of the law, the solution of making all gig-economy workers employees does not seem feasible for all gig-economy companies. It could defeat the very purpose of many of these companies. Ultimately, forcing these companies to classify workers as employees would negate their innovation, and all workers might not benefit from the change.

201. Shyp currently only operates in San Francisco, compared to Uber, which operates in 633 cities globally. *Shipping Made Easy*, SHYP, <https://www.shyp.com/pickups> (last visited Mar. 1, 2018); *see also supra* note 103 and accompanying text.

202. *But see* Sam Sanders, *California Labor Commission Rules Uber Driver Is an Employee, Not a Contractor*, NPR (June 17, 2015, 4:58 PM), <http://n.pr/1N3iPcW> ("Uber's obviously been wildly successful because it developed a concept that caught on But that gives it no excuse to ignore labor laws that have been put into place over decades that protect workers' rights. Uber is a \$50 billion company, it says. And the idea that it somehow can't afford to pay for what employers are required to pay for is just a little bit beyond belief." (quoting attorney Shannon Liss-Riordan)).

203. Kessler, *The Gig Economy Won't Last*, *supra* note 28 ("Other companies that seem well suited to the gig economy, like a package delivery service called Parcel, an on-demand laundry service called FlyCleaners, and an office-cleaning app called Managed by Q, have also made the decision to hire employees, citing their ability to ensure a quality experience.").

204. *See supra* notes 166–70 and accompanying text. This overlaps with the worker-centric issues discussed *supra* Section III.A.1.

205. DeAmicis, *supra* note 183 ("[The CEO] defended Homejoy's decision to make its workers contractors, citing the importance of flexibility for its cleaners.").

206. *See supra* Section II.A.

For now, the most practical and workable internal solution would be for companies to take a one-by-one approach and classify some workers as employees, and others as independent contractors.²⁰⁷ This answer is far from perfect, but without some action from an outside party, it is the only available option.²⁰⁸

B. “External” Options—Solutions from Third Parties

Because a solution from within seems unfeasible, the best hope of mollifying the issues of worker classification in the gig-economy will have to come from somewhere else. Courts have the ability to force companies to categorize workers one way or another, but that solution is obvious and not particularly appealing. Real change in worker classification would have to come from the legislature. It could be a long time before legislative change is enacted—if it is at all. Fortunately, there are some third-party solutions that could help workers get the protection they are asking for, while allowing gig-economy companies to maintain the business models that have made them so popular.

1. Third-Party Organizations

Legal solutions aside, there are third parties that offer some middle ground in the dispute about whether workers should be classified as employees or independent contractors. The Freelancers Union, for example, entered into a partnership with Uber-competitor Lyft in 2014.²⁰⁹ Lyft stated that the partnership would give drivers access to health insurance, retirement plans, and other benefits.²¹⁰ While

207. Another sharing-economy company experimented with, and abandoned, a threshold-model for converting independent contractors to employees. Scott Kirsner, *In the Sharing Economy, a Rift over Worker Classification*, BOSTON GLOBE (Aug. 17, 2014), <http://www.bostonglobe.com/business/2014/08/16/sharing-economy-are-workers-employees-independent-contractors/6GTpn1a735kNiM7T7k2vtO/story.html?event=event25>. Hello Alfred offers weekly errand services, and “once the errand-runners—called ‘Alfreds’—are working 20 hours or more a week, they can opt to become employees, receiving health insurance and other benefits.” *Id.*; see also *Become an Alfred*, HELLO ALFRED, <https://www.helloalfred.com/become-an-alfred> (last visited Mar. 1, 2018).

208. Zhuo, *supra* note 20 (“The marketplace needs a defined ‘full-time independent contractor’ status to continue to function in a way that pleases both sides. In the meantime, many companies will start to see a larger mix of 1099s and W2s in their workforces. It’s not a perfect answer, but until new legislation creates another option, it’s their only choice.”).

209. *Lyft Partners with Freelancers Union*, LYFT: BLOG (June 30, 2014), <http://blog.lyft.com/posts/2014/6/30/lyft-partners-with-freelancers-union>.

210. *Id.*; see also *Frequently Asked Questions*, FREELANCERS UNION, <https://www.freelancersunion.org/about/faqs> (last visited Mar. 1, 2018).

employee-type benefit plans would certainly be helpful to workers in the gig-economy, such a solution does not address many other deficiencies of being an independent contractor, such as a lack of minimum wages, reimbursement for expenses, overtime, and paid leave. Although this solution addresses only one part of the worker classification issue, it seems like a step in the right direction.

Other solutions offer to help workers more indirectly, such as Peers.²¹¹ Peers bills itself as “the world’s largest independent sharing economy community,” and offers insurance and other benefit plans directly to workers.²¹² Peers also provides an “income discovery” tool to help workers discover which gig-economy companies are right for them; a review tool for workers to share and rate their experiences working for various companies; forums for exchanging advice; and a “support marketplace” which provides workers with information.²¹³ Peers suffers from similar shortfalls as the Freelancers Union does, but such a marketplace-based solution should benefit workers.²¹⁴

2. Legislative Action

Lastly, the spotlight on solutions turns to the law. Arguments that the current worker classification tests are sufficiently suited to deal with the gig-economy have some validity, but they usually boil down to the fact that companies can afford to classify workers as employees.²¹⁵ Should that really be the basis for applying the law? Uber could likely afford to classify workers as employees, or to fight endless legal battles

211. Peers, LINKEDIN, <https://www.linkedin.com/company/peers-org> (last visited Mar. 1, 2018) (“Peers’ mission is to make the sharing economy work for the people who power it. . . . Peers wants to make the sharing economy a better work opportunity, by making it easier for workers to find, compare and manage work in the sharing economy.”).

212. Sarah Kessler, *Peers Says Its New Focus Is Helping Sharing Economy Workers*, FAST COMPANY (Nov. 12, 2014), <http://www.fastcompany.com/3038310/peers-says-its-new-focus-is-helping-sharing-economy-workers>.

213. *Id.*

214. *Id.* (“Reading advice from other workers, for instance, can be helpful in navigating success on different platforms. Reviews, which include average income, can help paint a more realistic picture of what to expect. And the support tool helps connect workers with options they might not otherwise know about, like freelancers’ health insurance.”).

215. Carson, *supra* note 158. Shannon Liss-Riordan, the attorney behind several high profile worker classification suits, stated, “I just don’t know how Uber can argue with a straight face that as a \$40 billion dollar company it can’t afford to insure its drivers, pay minimum wage or pay overtime, or be reimbursed for their expenses. This is not going to put Uber out of business.” *Id.*

against such a decision, but other gig-economy companies cannot survive, or finance, such endeavors.²¹⁶

Instead of confining courts to the rigidity of the old tests, legislators have the opportunity to adopt a more nuanced view of the employer-worker relationship. Indeed, some courts have already lamented the current state of worker classification law in the context of the gig-economy:

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 . . . are not expressly encompassed by the . . . 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 . . . to the facts at hand.²¹⁷

Such an undertaking is by no means a simple task, and a solution that changes the traditional way courts have thought about worker classification could have far-reaching consequences.²¹⁸ But given the way the labor market has changed, worker classification should change as well.²¹⁹ A third category of worker classification has been proposed before, but the rapid growth of gig-economy companies could be the tipping point required to put such a proposal into action.²²⁰ A third

216. See *supra* Section II.C.3. In an interview following the announcement that the company would be closing, Homejoy’s CEO lamented the current state of worker-classification law: “How do we support and do right by those people while remaining a two-way platform? . . . I wish we were able to do more for them, but the reality is that we can’t under the current regulatory environment.” DeAmicis, *supra* note 183.

217. O’Connor v. Uber Techs., Inc., 82 F. Supp. 3d 1133, 1153 (N.D. Cal. 2015).

218. See *Uber and the American Worker: Remarks from David Pouffe, supra* note 103 (“Around 80 percent of real estate agents were independent in 2014; 64 percent of registered financial advisors are estimated to [be] independent; even 20 percent of emergency room doctors are estimated to be independent. And yes, 90 percent of taxi drivers are estimated to be independent contractors. So any ideas or policy proposals will inevitably affect these other industries and must take these equities into account.”).

219. See *supra* Section II.B.

220. 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> (“Wilma Liebman, a former

category could allow companies to continue to give workers flexibility to control when and where they work, while also giving workers benefits and training without concerns of being sued for treating them like employees.²²¹

There are signs that support for creation of a third category by legislative action might be gaining traction. In Seattle, legislation has been announced that would grant for-hire drivers the right to collectively bargain with the companies they work for.²²² Such a solution would side-step the federal laws and the complicated tests associated with providing collective bargaining rights.²²³ Seattle's solution would work similarly to a union, and could eventually extend to more gig-economy workers.²²⁴ The initiative would likely face significant legal opposition, but could serve as a harbinger of similar efforts and initiatives at the state and local level.

CONCLUSION

Workers have typically been classified one of two ways: employees or independent contractors. While that classification system worked well in the labor market it was created to address, the labor market has changed. Because of the changing labor market, and the changing nature of how people find work, gig-economy companies have become enormously popular. The discord here is clear; workers value the opportunity and flexibility offered by the gig-economy, but desire more benefits and protection. On the other hand, companies rely on the contingent nature of these employees to ensure customer needs are met, but are restricted from exercising too much control or offering benefits for fear of being sued.

To force these companies to conform to the old dichotomy of worker classification would be to ignore the changes that have made them so prevalent. While there are several possible—and mostly partial—

chairwoman of the National Labor Relations Board and an adjunct professor at New York University School of Law . . . suggested the dependent contractor classification in a dissenting opinion she wrote in 2005 in a case about newspaper carriers.”).

221. See *id.*; Kessler, *The Gig Economy Won't Last*, *supra* note 28.

222. Lydia DePillis, *Seattle Might Try Something Crazy to Let Uber Drivers Unionize*, WASH. POST: WONKBLOG (Aug. 31, 2015), <http://wpo.st/dj0L1>.

223. See *supra* Sections I.A, I.B.

224. DePillis, *supra* note 222 (“Drivers would vote on a non-profit organization to serve as their ‘exclusive driver representative,’ which would then negotiate a contract with the company. If the two parties fail to come to an agreement, they have to submit to arbitration. The resulting contract would be enforced through the courts, rather than the National Labor Relations Board, which unions have found to be slow and sometimes ineffective in deterring employers from violating contract terms.”).

solutions to this problem, issues will persist without legislative action. In order to allow these companies to continue to provide a platform for workers, legislatures should create a third category of worker classification. A category that recognizes the changing nature of the labor market, and reconciles the unique needs and demands of both workers and companies would ensure that these companies can continue to operate and provide workers the opportunity to earn a living.
