



1-1-2023

An Update on Gig Worker Employment Status Across the United States

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Recommended Citation

Miriam A. Cherry, *An Update on Gig Worker Employment Status Across the United States*, 54 U. PAC. L. REV. 21 (2023).

Available at: <https://scholarlycommons.pacific.edu/uoplawreview/vol54/iss1/8>

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An Update on Gig Worker Employment Status Across the United States

Miriam A. Cherry*

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I. INTRODUCTION

Thank you for the invitation to speak at this timely and important symposium addressing employment misclassification in the on-demand economy. For the past fifteen years I have been writing about gig work as part of a larger focus on how technology is shaping and transforming the way that we perform work, think about work, and regulate the employment relationship. For purposes of this symposium, I have been asked to provide an update on some of the efforts to regulate gig worker employment status across the United States, including federal, state, and municipal approaches. This paper will provide and analyze some regulatory highlights from around the country.

The regulatory structure for gig work in the United States is at this time an uneven patchwork where politics and change are constant factors. While regulators have struggled to keep pace with technology, platform companies have engaged in extensive lobbying and political maneuvering in arguing for independent contractor status. In light of these challenges, a plethora of regulatory approaches among the states have emerged. Meanwhile, federal reforms that arose during the 2020 coronavirus pandemic—sick days and unemployment benefits—temporarily brought gig workers closer to parity with employees. These pandemic-driven law reforms should be examined, retained, and extended.

This symposium contribution will begin by providing some background on the topic, and then will situate the discussion within the context of recent events in California dealing with gig worker misclassification. The discussion will then turn to initiatives on the federal, state, and municipal level that have attempted to address the misclassification issue; and the lessons that we can learn from these examples. In the penultimate section, the paper will turn to the impact of the pandemic on gig workers and will suggest that there should no longer be a distinction drawn between gig work and other types of work due to the increase of computer-mediated work; all should receive benefits. Finally, this symposium paper provides a conclusion and addresses questions from the symposium participants, law review editors, and the general audience.

II. BACKGROUND

In the first decade of the 2000s, (a time before Uber and Lyft), I spoke at labor and employment conferences about workers receiving tasks via computer or their cellphones, and my predictions that work would shift from geographical, physical workplaces to work performed remotely or wholly in cyberspace.¹ At that point, legal audiences, at least, seemed skeptical. My predictions seemed too far-fetched and futuristic, and the idea of work on phones, or work remotely, sounded—to

1. See generally Miriam A. Cherry, *Cyber Commodification*, 72 MD. L. REV. 381 (2013).

some—like I was describing a video game. Others, who were seemingly unfamiliar with gig work, questioned why such arrangements would be of interest to either workers or hirers anyway.

With the rise of rideshare and other gig platforms during the early 2010s, those doubts suddenly vanished. An increasing number of U.S. workers joined on-demand platforms, especially in the recessions following the 2008–2012 financial crisis.² And lawyers, the courts, and legal academia began to take notice of gig work too, as numerous lawsuits were brought in the middle of the 2010s challenging the classification of platform workers as independent contractors.³ More recently, during the coronavirus pandemic of 2020, customer reliance on platforms increased, with gig workers providing vital services to the public, including car rides, medication delivery, and grocery shopping and delivery. Meanwhile, during the pandemic over 40% of the U.S. workforce shifted to remote work.⁴ These trends will be important for the future of work.⁵ Regulators have been trying to keep pace with these changes, particularly the issue of worker misclassification in the gig economy that is the topic of the symposium.

As other speakers have noted, worker classification is a gateway issue affecting access to minimum wages, union membership, disability accommodations, and other employment rights.⁶ With that said, first we turn to California, the state that pioneered the gig economy.

III. THE GIG BATTLES OF CALIFORNIA

The employment status question in California has been characterized by politicization, attempts at change, and major reverses to the point of legal indeterminacy. These changes have been so dramatic that they have been dubbed the “gig battles of California.”⁷ The dramatic reverses in the legal status of gig workers during the past decade were initiated by workers seeking the benefits of employee status.⁸ Other speakers in this symposium, including keynote speaker Assemblywoman Lorena Gonzalez, have focused on these misclassification problems that have arisen in California.

2. MONICA ANDERSON, ET AL., PEW, *THE STATE OF GIG WORK IN 2021* (Dec. 2021) (reporting growth in the gig economy, with 16% of workers saying they have worked on online labor platforms).

3. See PHIL BLOOMER, BUS. & HUM. RTS. RES. CTR., *THE FUTURE OF WORK: LITIGATING LABOUR RELATIONSHIPS IN THE GIG ECONOMY* 12 (2019).

4. NICHOLAS BLOOM, STAN. INST. FOR ECON. POL’Y RSCH., *HOW WORKING FROM HOME WORKS OUT* 1 (June 2020).

5. MIRIAM A. CHERRY, *WORK IN THE DIGITAL AGE* 64–68 (WOLTERS KLUWER 2021).

6. Miriam A. Cherry & Antonio Aloisi, *Dependent Contractors in the Gig Economy: A Comparative Approach*, 66 AMER. U. L. REV. 635, 637 (2017).

7. I attribute this phrase to my colleague and friend Michael Duff, who used it as the title of a talk that he gave at Saint Louis University Law School in Fall of 2021. Michael Duff, Professor, Talk at the Saint Louis Law School: Presumptions in the Age of Covid-19 (Feb. 24, 2021).

8. See Miriam A. Cherry, *Proposition 22: A Vote on Gig Worker Status in California*, COMPAR. LAB. L. & POL’Y J. (forthcoming 2023).

Confusion regarding classification of gig workers originally arose in California in the early 2010s because gig work shared some of the attributes of both employee and independent contracting work. Apps and online platforms used the status of “independent contractor” on their websites and in their online agreements. This resulted in significant costs savings, as it meant the platforms would not be required to pay employment taxes or benefits to the workers like unemployment.⁹ In the early- to mid- 2010s, gig workers challenged the platforms’ online terms characterizing them as independent contractors in the *O’Connor v. Uber* and *Cotter v. Lyft* cases in the Northern District of California.¹⁰ However, those cases settled in the middle of the decade, with the ultimate question around gig worker status remained unresolved.¹¹

Then, in the 2018 *Dynamex* decision, the Supreme Court of California adopted the ABC test to determine employee status for purposes of California wage orders.¹² Under the ABC test, the employer has the burden to show that the workers do not meet any of the three parts of the test: A) control by the hiring entity; B) performing work outside of the hiring entity’s business; or C) the worker is practicing an independent and established trade or occupation.¹³ The ABC test generally makes it easier for workers to show employee status.¹⁴ In the case of gig workers, Prong B specifically would mean that gig workers—who perform all the services and are vital to the operation of the platform—would be classified as employees.

As Assemblywoman Gonzalez mentioned in her keynote talk, the California Legislature sought to codify the ABC test with AB 5. AB 5 expanded the ABC test beyond the scope of wage orders to all provisions of the California Labor Code, including unemployment insurance, anti-discrimination, and collective bargaining. Governor Gavin Newsom signed AB 5 in 2019, and it went into law in 2020. But on-demand platforms balked at compliance with AB 5 and filed lawsuits to try to hold up enforcement. Lyft even threatened to cease operations if it had to reclassify its drivers as employees. Rather than finding a way to comply with the law, gig platforms instead spent \$200 million to advocate for a change in the law: Proposition 22.

Proposition 22 sought to roll back the gains that gig workers had received through AB 5. While AB 5 and the ABC test would still be the test for employee status for workers in the traditional economy, platform workers would be exempted and re-defined as independent contractors. Proposition 22 passed in

9. CHERRY, *supra* note 5, at 9.

10. *Cotter v. Lyft Inc.*, 60 F. Supp. 3d 1059, 1067 (N.D. Cal. 2015).

11. Miriam A. Cherry, *Gig Economy: Settlements Leave Labor Issues Unsettled*, LAW360 (May 5, 2016) <https://www.law360.com/articles/791341/gig-economy-settlements-leave-labor-issues-unsettled> (on file with the *University of the Pacific Law Review*).

12. *Dynamex Operations W. v. Superior Ct.*, 4 Cal. 5th 903, 903 (2018).

13. *Id.* at 916–17.

14. See generally Keith Cunningham-Parmeter, *Gig-Dependence: Finding the Real Independent Contractors of Platform Work*, 29 N. ILL. L. REV. 379 (2019).

November 2020, to the dismay of many gig worker advocates. However, Proposition 22 did give gig workers some rights that had never been extended to independent contractors; the ability to sue for employment discrimination, minimum earnings, and a subsidy to gain health insurance under the Affordable Care Act.¹⁵ This created a hybrid “third way” type of category, with significant carveouts, however. Gig workers could not join a union under this legislation, for example. Proposition 22 also prevented the California Legislature from overturning the ballot initiative unless there was a seven-eighths vote, requiring near unanimity.

A final skirmish over AB 5 is still ongoing. Service Employees International Union and rideshare drivers brought a constitutional challenge to AB 5, arguing that the ballot initiative effectively deprived the legislature of the ability to regulate employment and labor matters. In 2021, Judge Frank Roesch agreed with the union and drivers, ruling that AB 5 encroached too far upon the California Legislature’s ability to regulate on labor and employment matters, particularly worker’s compensation.¹⁶ The case is currently being appealed as of this writing.

In only the last five years, the California Supreme Court, the California Legislature, the voters, and now the courts (again) have all been involved in the question of whether gig workers are employees. While perhaps there have been more shifts in California than in other jurisdictions, legislation across the United States shares some of this uneven development. Unfortunately, there are common threads between California and other states that have dealt with continual political lobbying, confusion, revision, and retrenchment. In fact, we can see the same type of indeterminacy within the initiatives and case law on the federal/national level.

IV. OVERVIEW OF NATIONAL DEVELOPMENTS AROUND GIG WORKER STATUS

Shifting from California to the national landscape, the classification issue has received differing treatment from two presidential administrations. In 2019 then-President Donald Trump’s National Labor Relations Board released an advice memorandum stating that gig workers should be classified as independent contractors, making them ineligible for union membership.¹⁷ In 2021, President Joseph Biden’s Department of Labor walked back that advice memorandum,

15. Sara Ashley O’Brien, *Prop. 22 Passes in California, Exempting Uber and Lyft from Classifying Drivers as Employees*, CNN (Nov. 4, 2020), <https://www.cnn.com/2020/11/04/tech/california-proposition-22/index.html> (on file with the *University of the Pacific Law Review*).

16. *Castellanos v. State of California*, No. RG21088725 (Aug. 20, 2021), *appeal docketed*, No. A163655 (Cal. App. Dec. 13, 2021); *see also* Maeve Allsup, *Prop. 22 Backers Appeal Ruling Striking California Gig Work Law*, BLOOMBERG L.(Sept. 22, 2021), <https://news.bloomberglaw.com/us-law-week/prop-22-backersappeal-ruling-striking-california-gig-worker-law> (on file with the *University of the Pacific Law Review*).

17. Advice Memorandum from Jayne L. Sophir, Assoc. Gen. Couns., Div. of Advice, Off. of the Gen. Couns., Nat’l Lab. Rels. Bd., to Jill Coffman, Reg’l Dir., Region 20, Off. of Jayme L. Sophir, Assoc. Gen. Couns., Div. of Advice, Off. of the Gen. Couns., Nat’l Lab. Rels. Bd., 1 (Apr. 16, 2019), <https://apps.nlr.gov/link/document.aspx/09031d4582bd1a2e> (on file with the *University of the Pacific Law Review*).

rescinding its application.¹⁸ Labor Secretary Marty Walsh has stated publicly the Biden administration's position in favor of employee status for gig workers; including the ability to organize and bargain collectively under the National Labor Relations Act (NLRA).¹⁹ The issue was recently open for briefing and comment at the National Labor Relations Board (NLRB) as part of the *Atlanta Opera* matter reconsidering the test for employee status for the purposes of the National Labor Relations Act.²⁰ As of this writing, the matter is currently pending. In addition, in October 2022, the Wage and Hour Division of the Department of Labor began a rulemaking procedure to adopt a looser test for the application of the Fair Labor Standards Act.²¹

There has also been recent United States Court of Appeals precedent on the gig worker classification issue. In 2020, the Third Circuit issued an influential decision leaning toward employee status for gig workers in the case *Razak v. Uber*.²² Razak and his colleagues were Philadelphia rideshare drivers for the limousine part of the business, Uber Black. Razak and these other drivers from the Uber Black division had opted out of the mandatory arbitration provision—a term in Uber's boilerplate—that would normally block drivers from bringing suits against the company.²³ In their lawsuit, Razak and the other Uber Black drivers alleged violation of the Fair Labor Standards Act (FLSA). The District Court had awarded summary judgment to Uber, in essence foreclosing the drivers' argument that they were entitled to the protections of the FLSA.²⁴

On appeal, however, the Third Circuit found that a trial would be necessary to determine whether the drivers were employees or independent contractors of Uber.²⁵ The court examined the factors from a previous case, *Donovan v. DialAmerica Marketing*, which discussed the aspects of control, the ability to incur a profit or withstand a loss, the degree of special skill needed for the work, how permanent the working relationship was, and whether the work performed was part of the putative employer's business or a separate business.²⁶ Applying these factors, the Third Circuit found that there were open questions as to the degree of

18. See Robert Iafolla, *NLRB Reconsidering Trump-Era Independent Contractor Test*, BLOOMBERG L. (Dec. 27, 2021), <https://news.bloomberglaw.com/daily-labor-report/nlr-reconsidering-trump-era-independent-contractor-test> (on file with the *University of the Pacific Law Review*).

19. Nandita Bose, *U.S. Labor Secretary Supports Classifying Gig Workers as Employees*, REUTERS (Apr. 29, 2021), <https://www.reuters.com/world/us/exclusive-us-labor-secretary-says-most-gig-workers-should-be-classified-2021-04-29/> (on file with the *University of the Pacific Law Review*).

20. *Id.*; see also Robert Iafolla, *Gig Economy Central to Labor Board Debate on Contractor Test*, BLOOMBERG L. (Feb. 11, 2022), <https://news.bloomberglaw.com/daily-labor-report/gig-economy-central-to-labor-board-debate-on-contractor-test> (on file with the *University of the Pacific Law Review*).

21. Employee or Independent Contractor Classification Under the Fair Labor Standards Act, 87 Fed. Reg. 62218 (proposed Oct. 13, 2022) (to be codified at 40 C.F.R. pts. 78, 788, 795).

22. 951 F.3d 137, 137 (3d Cir. 2020).

23. *Id.* On mandatory arbitration provisions and platform labor, see Charlotte Garden, *Disputing Work Law: Arbitration in the Gig Economy*, 2017 U. CHI. L. F. 205 (2018).

24. 951 F.3d 137, 141 (3d Cir. 2020).

25. *Id.* at 144–45.

26. *Id.* at 142–43.

the driver's actual independence.²⁷ The *Razak* case has thus set a favorable precedent for arguing for gig worker employee status. There have been other developments at the state and municipal level, to which I will now turn.

V. STATE AND MUNICIPAL UPDATES

Beyond the highly contested federal and California gig battles over gig worker employment status; various states and municipalities have tried to regulate some of these issues. Some of these, like Austin, Texas' gig skirmish, resemble the dramatic reverses and indeterminacy that has been characteristic of California's gig battles. New York City's efforts, on the other hand, have resulted in modest and incremental changes. And still other regulatory approaches, like Seattle, Washington's effort to allow rideshare drivers to join unions, have met with opposition and have been stymied by litigation. These disparate approaches are all worth considering in terms of ease of implementation and effectiveness.

A. Austin, Texas

The Austin, Texas experience has been similar in many ways to the back-and-forth politicization similar to the events that played out in California. In December 2015, the Austin City Council passed an ordinance imposing a handful of regulations on rideshare companies, including a requirement that drivers be subject to criminal background checks and that they carry adequate liability insurance.²⁸ The following year, in May 2016, Uber and Lyft backed a ballot initiative, Proposition 1, that would have repealed the council's regulations. Proposition 1 essentially would have effectively allowed ride-sharing companies to self-regulate.²⁹ When Austin voters rejected Prop. 1, Uber and Lyft suspended operations in Austin completely.³⁰ Local rideshare services stepped in to fulfill demand in their absence. However, in May 2017, Uber and Lyft resumed business in Austin after the Texas legislature passed House Bill 100, which created statewide regulations for ride-sharing companies very similar to the legislation the

27. *Id.* at 145–46.

28. Chase Hoffberger, *Council to Vote on TNC Ordinance*, AUSTIN CHRON. (Dec. 14, 2015), <https://www.austinchronicle.com/daily/news/2015-12-14/council-to-vote-on-tnc-ordinance/> (on file with the *University of the Pacific Law Review*).

29. See AUSTIN, TEX., CITY CODE § 13-2, art. 4 (2016); see also Alex Hern, *Uber and Lyft Pull Out of Austin After Locals Vote Against Self-Regulation*, GUARDIAN (May 9, 2016), <https://www.theguardian.com/technology/2016/may/09/uber-lyft-austin-vote-against-self-regulation> (on file with the *University of the Pacific Law Review*).

30. *Id.*; see also Camila Domonoske, *Uber, Lyft Vow to Stop Driving In Austin After Voters Keep Regulations*, NPR (May 9, 2016), <https://www.npr.org/sections/thetwo-way/2016/05/09/477310339/uber-lyft-vow-to-stop-driving-in-austin-after-voters-affirm-regulations> (on file with the *University of the Pacific Law Review*).

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city of Austin had proposed.³¹ House Bill 100 required companies to acquire permits from the Texas Department of Licensing and Regulation, pay an annual fee of \$5,000, and required driver background checks.³²

B. New York City Council

New York City has taken a more incremental approach to regulation. In September 2021, the New York City Council passed six bills concerning platform work.³³ These bills, however, sidestepped the question of gig worker status. Instead, the New York City bills were focused directly on health and safety issues specifically pertaining to gig work. One bill focused on minimum wage standards for gig workers, specifically how working time/on-the-clock time is calculated. This has been an important concern for gig workers, who have traditionally only been paid for the straight time spent performing tasks, not the transportation time to get from one gig to the next, or for the total time logged into the app when they were available to work.³⁴ The New York City Council bills also addressed “tip baiting,” a practice where customers were allowed to enter a large tip initially (so that their job would be accepted quickly), but then later, after performance, cut down the tip.³⁵ Access to bathrooms has also been a problem for gig workers, especially during the pandemic when restaurants restricted use of their restroom facilities.³⁶ The six bills passed by the New York City Council were an attempt to provide some of the basic rights that would help gig workers while leaving aside the more controversial employee status question.

C. Seattle, Washington

The last approach that will be discussed is the approach of Seattle, Washington. In 2015, Seattle wanted to establish safe and sick days for rideshare drivers. To accomplish this goal, the city passed a regulation that would give

31. See Alex Samuels, *Uber, Lyft Return to Austin as Texas Gov. Abbott Signs Ride-Hailing Measure into Law*, TEXAS TRIB. (May 29, 2017), <https://www.texastribune.org/2017/05/29/texas-gov-greg-abbott-signs-measure-creating-statewide-regulations-rid/> (on file with the *University of the Pacific Law Review*).

32. TEX. OCC. CODE ANN. § 2402 (West 2021).

33. See Kelly M. Cardin & Jessica R. Schild, *New York City Council Passes Six Bills Protecting Gig Economy Delivery Workers*, OGLETREE DEAKINS (Sept. 30, 2021), <https://ogletree.com/insights/new-york-city-council-passes-six-bills-protecting-gig-economy-delivery-workers/> (on file with the *University of the Pacific Law Review*).

34. See *id.*

35. See Meghan McCarty Carino, “Tip Baiting” Is Just the Latest Battle Over Tips Among Gig Workers, MARKETPLACE (Apr. 10, 2020), <https://www.marketplace.org/2020/04/10/tip-baiting-latest-battle-gig-workers/> (on file with the *University of the Pacific Law Review*); see also Sarah Ashley O’Brien, *Instacart Adjusts Its Tipping Policy Again to Address Tip Baiting*, CNN (Apr. 5, 2022), <https://www.cnn.com/2022/04/05/tech/instacart-tipping-policy-update/index.html> (on file with the *University of the Pacific Law Review*).

36. See Edward Ongweso Jr., *Gig Workers’ Only Chance to Pee Is Apparently an App*, VICE (Oct. 23, 2020), <https://www.vice.com/en/article/93w5by/gig-workers-only-chance-to-pee-isapparently-an-app> (on file with the *University of the Pacific Law Review*).

rideshare drivers the ability to unionize and bargain collectively, regardless of their employee status.³⁷ Unionization, the Seattle lawmakers believed, would act as a check on the power of platforms and alleviate the power differential between companies and drivers.

However, the Chamber of Commerce sued Seattle over the new law. The case was tied up in court for many years, on issues such as federal preemption by the NLRA before the litigation ended.³⁸ The fate of regulations like the one in Seattle have not been conclusively established. After this symposium talk was given, Washington State passed House bill 2076, which sidestepped the issue of employment status, but would give rideshare drivers minimum wage, paid sick leave, and help establish a worker's center for drivers that could help to remedy the power imbalance between workers and transportation network companies. The bill is set to go into effect on January 1, 2023.³⁹

Having provided this comparative overview of events on the United States municipal, state, and national level, I will turn to the changes in gig work in recent years, largely in response to the coronavirus pandemic of 2020.

VI. GIG WORKERS DURING THE CORONAVIRUS PANDEMIC AND ITS AFTERMATH

During the spring of 2020, work around the world changed drastically. In the United States, there was a dramatic shift to remote work, with over 40% of the United States' workforce working virtually.⁴⁰ At the same time, frontline workers put themselves at risk, and were classified as "essential workers." To stay safe, the public increasingly relied on gig workers for essential services, such as delivery of meals, groceries, shopping, medication pickup, and ridesharing.⁴¹ Gig workers shouldered much of the burden of many frontline jobs, which meant health risks in the time before the coronavirus vaccine.

The dependence on gig workers resulted in what I have termed the "essential worker paradox."⁴² There was widespread acknowledgement that the actual *work* that gig workers did in delivery, was critical, i.e., essential. However, the *workers* were not treated as essential, but rather as replaceable. This was particularly a problem for gig workers because, with no recognition as employees, there would—

37. See Daniel Wiessner, *U.S. Court Revives Challenge to Seattle's Uber, Lyft Union Law*, REUTERS (May 11, 2018), <https://www.reuters.com/article/us-uber-seattle-unions/u-s-court-revives-challenge-to-seattles-uber-lyft-union-law-idUSKBN1IC27C> (on file with the *University of the Pacific Law Review*).

38. See Heidi Groover, *Lengthy Legal Fight Over Seattle's Uber Unionization Law Comes to an End*, SEATTLE TIMES (Apr. 13, 2020), <https://www.seattletimes.com/seattle-news/transportation/lengthy-legal-fight-over-seattles-uber-unionization-law-comes-to-an-end/> (on file with the *University of the Pacific Law Review*).

39. H.B. 2076, 2021 Leg. Sess. (Wash. 2021).

40. Miriam A. Cherry, *Employee Status for "Essential Workers": The Case for Gig Worker Parity*, 55 LOY. L.A. L. REV. 683 (2022).

41. *Id.* at 688.

42. *Id.* at 690.

in the normal course of things—not be any sick days available, and studies have shown that workers are more likely to work sick when they have no access to paid sick leave.⁴³

Logically, the categories of essential work and gig work start to break down when closely examined. The overlap between essential workers and gig workers can lead to confusing and contradictory outcomes. For example, consider this chart:

Comparing the Categories		Essential Worker	Non-Essential Worker
	Employee Status	I. Restaurant Delivery Driver	III. Accountant for Firm
	Gig Work/ Independent Contractor	II. Grubhub Delivery Driver	IV. Accountant on Upwork

Quadrant I includes essential workers who have employee status. An example is a restaurant delivery driver who works directly for one restaurant on a full-time basis, and as such is classified as an employee. However, if we move to Quadrant II, gig workers are also performing this same work delivering restaurant meals, via an online platform such as Grubhub or Doordash. Gig workers in Quadrant II have uncertain status under current laws, even though in reality they are doing the exact same work as those delivery drivers in Quadrant I. The same type of unfairness reveals itself in a comparison between Quadrant III and Quadrant IV. Quadrant III includes workers doing non-essential work that have employee status. An example is an accountant at an accounting firm who works on a typical nine to five basis. But an accountant in Quadrant IV on the bottom left corner, who is working for the platform Upwork, would again be stuck in this gig work, with uncertain legal status.

But this chart reveals another layer of unfairness. Compare Quadrant II (essential workers who have uncertain status in the gig economy) and Quadrant III (a non-essential worker who is an employee). The comparison reveals that an essential worker who had to risk their health to make a living during the pandemic would not be considered eligible for basic employee protections, compared to a remote worker—also using a platform—who would receive such protections. This is not in any way meant to devalue the work of remote non-essential workers; and

43. See generally Jody Heymann et al, *Protecting Health During COVID-19 and Beyond: A Global Examination of Paid Sick Leave Design in 193 Countries*, 15 GLOB. PUB. HEALTH 925 (2020).

they are employees. But the chart is a way of showing that the categories as they are currently constituted are irrational in an era of remote and virtual work. While these contradictions appeared even before the pandemic, the use of technology to enable remote work for full-time employees has truly shaken up the categories.

The pandemic also brought about the recognition that gig work is important work, not just for convenience. In the beginning of the gig economy in the early 2010s, on-demand platforms themselves perpetuated that gig work was either part of the sharing economy, and not monetized, or that it was just for frivolous tasks.⁴⁴ For example, the founder of TaskRabbit told the origin story of her company as a late-night search for dog food while instead wanting to enjoy a night out with friends.⁴⁵ But nowadays, there is a recognition that gig work is more than tasks undertaken for frivolity. And furthermore, the idea that gig work is only a side hustle has been countered.⁴⁶ There has been a substitution effect of gig work for full-time employment. This especially was the case during the summer of 2020 and parts of 2021 when unemployment rates were over ten percent.⁴⁷

VII. CONCLUSION, QUESTIONS AND ANSWERS

The groceries do not pack themselves. Increasingly, the public understands that there are *workers* performing these tasks—it is not just something that the platform is able to do and produce a result without actual people, performing real jobs behind the websites. The current crisis comes at a moment when some employee rights, like unemployment insurance and paid sick leave, which were temporarily available to gig workers because of the pandemic, might be rescinded.⁴⁸ These newly-recognized rights of gig workers should not just be about temporary fixes; they should extend beyond the pandemic. With that in mind, thank you again to the audience, and I am ready for questions.

44. Cherry, *supra* note 40, at 693.

45. See, e.g., Layne Winn, *TaskRabbit Founder on the Pressure Entrepreneurs Face to Succeed*, ABC NEWS (Dec. 13, 2019), <https://abcnews.go.com/Business/taskrabbit-founderpressure-entrepreneurs-face-succeed/story?id=67707440> (on file with the *University of the Pacific Law Review*).

46. Cherry, *supra* note 40, at 695.

47. See Heather Long & Andrew Van Dam, *U.S. Unemployment Rate Sours to 14.7 percent, the Worst Since the Depression Era*, WASH. POST (May 8, 2020), <https://www.washingtonpost.com/business/2020/05/08/april-2020-jobs-report/> (on file with the *University of the Pacific Law Review*); U.S. Dep't of Labor, Bureau of Lab. Stats., *Unemployment rate 16.1 percent in Massachusetts, 4.5 percent in Utah, in July 2020*, ECON. DAILY (Aug. 27, 2020), <https://www.bls.gov/opub/ted/2020/unemployment-rate-16-point-1-percent-in-massachusetts-4-point-5-percent-in-utah-in-july-2020.htm> (on file with the *University of the Pacific Law Review*) (noting overall unemployment rate of 10.2 percent nationwide).

48. Cf. Alex Rosenblat, *Gig Workers Are Here to Stay. It's Time to Give Them Benefits.*, HARV. BUS. REV. (July 3, 2020), <https://hbr.org/2020/07/gig-workers-are-here-to-stay-its-time-to-give-them-benefits> (on file with the *University of the Pacific Law Review*).

A. Comments from the Audience

Jay Mootz:

Thank you, Miriam. That was great. I like the essential worker angle and thinking through that, as you were saying that it occurred to me [there is a thread connecting] all the great employment law cases. The cases where a court is going to do something important. They all say there are three interests—the employer, the employee, and society. And it seems like that is one thing we have not heard as much about today—the social interest. Now collecting taxes, we have heard it, but I think it sort of thematizes because those workers are essential not for their own purposes or the employer’s purposes but for all of us, so I really thought that was a great insight.

Miriam Cherry:

Thank you for the comment. I agree that the public interest is a thread running through the doctrine of labor and employment law. Courts have created exceptions from the at-will employment rule for discharges that contravene public policy, for those reporting on violations of the law, or whistleblowers. The reason that those protections are provided is there are social interests that exist separate and apart from the private contract of employee and employer. Instead, we are thinking about the larger social context, like the environmental resources that might be polluted if a worker is ordered to dump chemicals into a stream. If the worker refuses and is fired for it, that is a matter in the public interest. And then thinking about some of the risky and important work that gig workers took on during the pandemic and the dissonance that comes with that—they are called essential workers and yet what does that get them? It should get them basic employee status one would think that, correct? Yet that that has not been the case.

B. Questions from the Audience

1. Question 1

Matt Urban:

Do you think states, and other nations even, possibly are modeling themselves after California, or responding to California as much as we like to think? Or is this sometimes a local problem that should have different solutions in different areas?

Miriam Cherry:

California was where the gig economy started. Apps and platforms like Uber and Lyft were pioneered in Silicon Valley and tested in the Bay Area. Other jurisdictions have been watching and following California because these apps and the gig work model have spread across the country and indeed, across the world. Then there is the regulatory angle, which I referred to earlier as the “Gig Battles of California.” Perhaps if there had been a resolution of the issues raised in *Cotter v.*

Lyft and *O'Connor v. Uber* back in 2015—not a settlement, but a definitive judgment that decided the status question—then maybe we could have had a template for other jurisdictions. Instead, the incentives of litigation and the pressure to reach a settlement derailed that and we were left with confusion. Of course, there are many questions beyond employee status that are also interesting to think about, like how to calculate wages and working time, and some of the other questions that arise for gig workers. The California Legislature might consider legislation on these issues. Because of the confusion over status and misclassification, however, these issues have not received the attention they deserve.

2. Question 2

Anonymous Comment from Zoom Chat:

How do you think that people can show or highlight the sort of non-intuitive costs that come along with being classified as an independent contractor?

Miriam Cherry:

I want to return to Professor Mootz's comment about the social interest associated with work. During the pandemic, there were a large volume of unemployment filings but gig companies that maintained their workers were independent contractors were not making payment into the unemployment system. Someone had to pick that up, and that left it to the last resort, meaning government and the taxpayers to absorb the cost. If none of the safety nets that we think of as being associated with employee status provided exist, the public is made responsible. That results in a spillover effect, or what the Europeans call "social dumping," or employers providing only sparse or no benefits that the public subsidizes. So those are some of the costs with classifying gig workers as independent contractors.

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