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Gig-Economy Myths and Missteps

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ABSTRACT. This Essay explores the rich history of flexible employment models from union hiring halls to alternative compensation structures. It explains how gig companies are responsible for popularizing the narrative that employment is inherently inflexible, unlike independent contracting, through corporate public-relations campaigns and lobbying. Grounded in this history, the Essay argues that "third-category" laws, which purport to resolve the tension between gig work and employment, simply reinforce existing labor market inequalities, undermine longstanding frameworks of employment and labor law, and legitimize misclassification as a form of wealth transfer from working people to corporations. Instead, it advocates for legislation that secures for employees the putative benefits of contracting. Finally, the Essay offers guidance for labor enforcers on avoiding the third-category trap in negotiated misclassification settlements.

INTRODUCTION

The popular origin story of the gig economy goes like this. New technology has effected a fundamental change in our labor economy, facilitating flexible, autonomous work. That work takes the form of "gigs" that cannot be accommodated by the rigid legal frameworks of traditional employment and labor law. Platform companies aggressively propagate this narrative, and many legislators, enforcers, courts, and workers accept it. Amid a growing ethos of employee dissatisfaction and ennui, the promise of flexible and independent labor has mass appeal. But multiple historical revisionisms underlie this understanding.

This Essay explores the rich history of flexible employment models, from union hiring halls to alternative compensation structures, to expose the fiction of inflexibility in the employment regime. In exploring this history, the Essay explains how gig-company lobbying and public-relations campaigns over recent decades are responsible for convincing so many that employment is inherently inflexible, while independent contracting is inherently flexible. Grounded in this history, the Essay builds on existing literature to show that "third-category"

laws—which purport to resolve the tension between gig work and employment—simply reinforce existing labor market inequalities by conceding the classification question, regardless of the economic reality of the working relationship, and granting massive corporate subsidies from primarily minority workers to shareholders. Instead, this Essay advocates for legislation that secures for employees the putative benefits of contracting, like flexible scheduling laws. Finally, this Essay quantifies the billion-dollar price for workers and the state when labor enforcers accept the third-category sham in negotiated misclassification settlements.

I. THE MISCLASSIFICATION PANDEMIC

A quick glance at the labor economy might inspire optimism: most workers who left the labor market during the Covid-19 pandemic have returned,[1] the unemployment rate is low,[2] and there are more jobs than workers.[3] But closer inspection tells a different story. Workers' compensation relative to economic output has declined over the past seventy years.[4] Since the 1970s, a confluence of

1. *The Labor Supply Rebound from the Pandemic*, WHITE HOUSE (Apr. 17, 2023), https://www.whitehouse.gov/cea/written-materials/2023/04/17/the-labor-supply-rebound-from-the-pandemic [https://perma.cc/2W33-UGVU].

2. *The January 2024 Employment Report: Explaining that Big, Upside Surprise*, WHITE HOUSE (Feb. 2, 2024), https://www.whitehouse.gov/cea/written-materials/2024/02/02/the-january-2024-employment-report-explaining-that-big-upside-surprise [https://perma.cc/Z8UR-DSN4] (identifying that the unemployment rate is under four percent).

3. Stephanie Ferguson & Makinizi Hoover, *Understanding America's Labor Shortage: The Most Impacted Industries*, U.S. CHAMBER COM. (July 24, 2024), https://www.uschamber.com/workforce/understanding-americas-labor-shortage-the-most-impacted-industries [https://perma.cc/VTE7-6N7M] ("Even if every unemployed worker were to fill an open job within their respective industry, there would still be millions of unfilled job positions . . . .").

4. *Labor Share of Output Has Declined Since 1947*, BUREAU LAB. STATS. (Mar. 7, 2017), https://www.bls.gov/opub/ted/2017/labor-share-of-output-has-declined-since-1947.htm [https://perma.cc/7D7F-AN57]; *see also* Yasser Abdih & Stephan Danninger, *What Explains the Decline of the U.S. Labor Share of Income?* 4-6 (Int'l Monetary Fund, Working Paper No. 17-167, 2017), https://www.imf.org/-/media/Files/Publications/WP/2017/wp17167.ashx [https://perma.cc/D2JV-XATC] (outlining trends in the U.S. labor share since 1960). Post-World War II, the minimum wage was higher relative to the cost of living, full employment was the norm, and American union density was at its peak. *See* Lawrence Mishel, Elise Gould & Josh Bivens, *Wage Stagnation in Nine Charts*, ECON. POL'Y INST. 10-12 (Jan. 6, 2015), https://files.epi.org/2013/wage-stagnation-in-nine-charts.pdf [https://perma.cc/K6A9-SQ9B] (noting that the minimum wage peaked in 1968 and union membership has declined since 1960). These features of a strong labor market checked corporate power and enabled a stronger middle class. *See* Laura Feiveson, *Labor Unions and the U.S. Economy*, U.S. DEP'T TREASURY (Aug. 28, 2023), https://home.treasury.gov/news/featured-stories/labor-unions-and-the-us-economy [https://perma.cc/BG6T-QAFZ].

factors combined to stymie worker power and relative income: among them, steady de-unionization, globalization, and technological change.[5] These factors have compounded the false promise of trickle-down economics, which further amassed corporate wealth at the expense of the working class.[6] And the recent pandemic only amplified these bleak trends for working people, leaving many unemployed, underemployed, or unsafe at work.[7]

Post-2020, while the employment rate has rebounded, worker morale has not.[8] Many attribute this to macroeconomic conditions: while wages have generally kept pace with inflation, prices remain high and housing affordability is at an all-time low.[9] But several structural features of the American labor market itself, taken together, easily account for persistent worker disempowerment.

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5. *See* Abdih & Danninger, *supra* note 4, at 6–11.

6. *See* David Hope & Julian Limberg, *The Economic Consequences of Major Tax Cuts for the Rich* 7, 21 (Int'l Ineqs. Inst., Working Paper No. 55, 2020), https://eprints.lse.ac.uk/107919/1/Hope_economic_consequences_of_major_tax_cuts_published.pdf [https://perma.cc/Z2A7-Y8JN] ("major tax cuts for the rich push up income inequality"); Era Dabla-Norris, Kalpana Kochhar, Frantisek Ricka, Nujin Suphaphiphat & Evridiki Tsounta, *Causes and Consequences of Income Inequality: A Global Perspective*, INT'L MONETARY FUND 4 (June 2015), https://www.imf.org/en/Publications/Staff-Discussion-Notes/Issues/2016/12/31/Causes-and-Consequences-of-Income-Inequality-A-Global-Perspective-42986 [https://perma.cc/U5ZC-8ZN6] ("[I]f the income share of the top 20 percent (the rich) increases, then GDP growth actually declines over the medium term, suggesting that the benefits do not trickle down. In contrast, an increase in the income share of the bottom 20 percent (the poor) is associated with higher GDP growth.").

7. *See, e.g.*, *Labor Market Dynamics During the COVID-19 Pandemic*, BUREAU LAB. STATS. (Nov. 15, 2022), https://www.bls.gov/blog/2022/labor-market-dynamics-during-the-covid-19-pandemic.htm [https://perma.cc/LY9Y-GE8V]; Josh Cunningham, *The Pandemic's Effect on the Economy and Workers*, NAT'L CONF. ST. LEGISLATORS (Jan. 19, 2021), https://www.ncsl.org/labor-and-employment/the-pandemics-effect-on-the-economy-and-workers [https://perma.cc/V9E5-H3HY].

8. Morgan Smith, *Workers Are the Unhappiest They've Been in 3 Years—And It Can Cost the Global Economy $8.8 Trillion*, CNBC (Oct. 2 2023, 10:05 AM EDT), https://www.cnbc.com/2023/10/02/-employee-happiness-has-hit-a-3-year-low-new-research-shows.html [https://perma.cc/W7XM-5BGB]; Vanessa Fuhrmans & Lindsay Ellis, *Why Is Everyone So Unhappy at Work Right Now?*, WALL ST. J. (Nov. 27, 2023, 11:43 AM ET), https://www.wsj.com/lifestyle/careers/workers-morale-pay-benefits-remote-52c4ab10 [https://perma.cc/Q28F-4Y9H].

9. *See, e.g.*, *id.*; Jeanna Smialek & Jim Tankersley, *Want to Know What's Bedeviling Biden? TikTok Economics May Hold Clues*, N.Y. TIMES (Nov. 17, 2023), https://www.nytimes.com/2023/11/17/business/economy/tiktok-biden-economy.html [https://perma.cc/25ZD-GGUX]; Simmone Shah, *Yes, Inflation Is Going Down. But Here's Why Prices Aren't*, TIME (Aug. 14, 2024), https://time.com/7005553/inflation-grocery-prices-rates [https://perma.cc/R87L-XF98].

Most American employees are at-will and can be fired at any time.[10] Many workers, especially low-wage workers, have nonstandard work schedules or need multiple jobs to get by.[11] Around twenty percent of the workforce is subject to noncompetes, which limit worker mobility and wages.[12] Mandatory arbitration contracts and class-action waivers, which preclude workers from enforcing their rights in court or as a class, now bind more than half of the private-sector workforce.[13] And despite recent high-profile union victories,[14] union membership has declined to just six percent of the private workforce, compared to one-third of the private workforce in the 1950s.[15]

Within this bleak labor landscape, the misclassification of workers as independent contractors has exploded to crisis levels.[16] Unlike employees,

10. *At-Will Employment — Overview*, NAT'L CONF. ST. LEGISLATURES (Apr. 15, 2008), https://www.ncsl.org/labor-and-employment/at-will-employment-overview [https://perma.cc/VJ78-5G2Z].

11. *Collateral Damage: Scheduling Challenges for Workers in Low-Wage Jobs and Their Consequences*, NAT'L WOMEN'S L. CTR. 1-2 (Apr. 2017), https://nwlc.org/wp-content/uploads/2017/04/Collateral-Damage.pdf [https://perma.cc/2NHV-T65W].

12. *See* Evan P. Starr, J. J. Prescott & Norman D. Bishara, *Noncompete Agreements in the U.S. Labor Force*, 64 J.L. & ECON. 53, 53-54 (2021). Recently, the Federal Trade Commission (FTC) issued a final rule banning noncompetes nationwide, see Non-Compete Clause Rule, 89 Fed. Reg. 38342 (May 7, 2024) (to be codified at 16 C.F.R. pts. 910, 912), but as of August 2024, the FTC is enjoined from enforcing the ban. *See* Ryan, LLC v. Fed. Trade Comm'n, No. 24-CV-00986-E, 2024 WL 3879954, at *14 (N.D. Tex. Aug. 20, 2024).

13. Forced arbitration systematically disempowers workers by forcing them out of court and into secret arbitral fora where they face dramatically lower odds of success. *See, e.g.*, Andrea Cann Chandrasekher & David Horton, *Arbitration Nation: Data from Four Providers*, 107 CALIF. L. REV. 1, 60 (2019) (warning that in arbitration, "self-represented plaintiffs file few claims and rarely prevail on the merits or obtain relief in the form of a settlement"); David Horton & Andrea Cann Chandrasekher, *Employment Arbitration After the Revolution*, 65 DEPAUL L. REV. 457, 458 (2016) (describing that some see "arbitration provisions in employment contracts as particularly coercive"). This particularly affects low-wage workers. *See* Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration*, ECON. POL'Y INST. 2, 9 (2018), https://files.epi.org/pdf/144131.pdf [https://perma.cc/PBE9-8YWA].

14. Employees have initiated campaigns to unionize at Starbucks, Amazon, Apple, and The New York Times. Thomas Kochan & Wilma Liebman, *America's Seeing a Historic Surge in Worker Organizing. Here's How to Sustain It*, WBUR (Sept. 5, 2022), https://www.wbur.org/cognoscenti/2022/09/05/worker-organizing-labor-day-thomas-kochan-wilma-liebman [https://perma.cc/K4FR-5W7X].

15. Dan Burns, *US Union Membership Rate Hits Fresh Record Low in 2023*, REUTERS (Jan. 23, 2024), https://www.reuters.com/markets/us/us-union-membership-rate-hits-fresh-record-low-2023-labor-dept-2024-01-23 [https://perma.cc/3D5P-5GQ8]; *The State of Our Unions*, WHITE HOUSE (Sept. 5, 2022), https://www.whitehouse.gov/cea/written-materials/2022/09/05/the-state-of-our-unions [https://perma.cc/TC6P-5HAJ].

16. No perfect measure of misclassification exists, but all sensible proxies for misclassification have steadily increased. For example, the percentage of workers engaged in alternative work

independent contractors are not entitled to federal or state labor protections, including minimum-wage pay for all time "suffer[ed] or permit[ed] to work" under the Fair Labor Standards Act (FLSA),[17] overtime pay, sick leave, workers' compensation, and protections from discrimination under Title VII, the Americans with Disabilities Act, the Age Discrimination in Employment Act, and more.[18] Independent contractors have no right to collective bargaining under the National Labor Relations Act (NLRA).[19] Only employers must pay payroll taxes, including Federal Insurance Contributions Act taxes that fund Social Security and Medicare, as well as unemployment insurance, workers' compensation, and, in some jurisdictions, paid sick leave.[20] Whereas employers must pay or

arrangements, defined as "temporary help agency workers, on-call workers, contract workers, and independent contractors or freelancers," rose from 10.7% in February 2005 to 15.8% in late 2015. Lawrence F. Katz & Alan B. Krueger, *The Rise and Nature of Alternative Work Arrangement in the United States, 1995-2015*, at 2 (Nat'l Bureau of Econ. Rsch., Working Paper No. 22667, Sept. 2016), https://www.nber.org/system/files/working_papers/w22667/w22667.pdf [https://perma.cc/723B-DSDC]. The number of self-employed workers also continued to increase from 2017 to 2022. Anabel Utz, Julia Yixia Cai & Dean Baker, *The Pandemic Rise in Self-Employment: Who Is Working for Themselves Now?*, CTR. FOR ECON. POL'Y & RSCH. (Aug. 29, 2022) https://www.cepr.net/the-pandemic-rise-in-self-employment-who-is-working-for-themselves-now [https://perma.cc/HD8S-HRJQ]. Recent estimates suggest that anywhere from 10-30% of the workforce is misclassified. *Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries*, NAT'L EMP. L. PROJECT (Oct. 2020), https://www.nelp.org/app/uploads/2017/12/Independent-Contractor-Misclassification-Imposes-Huge-Costs-Workers-Federal-State-Treasuries-Update-October-2020.pdf [https://perma.cc/3LAD-2WRL] (summarizing state-specific studies of misclassification rates).

17. *See* 29 U.S.C. § 203(g) (2018).

18. In other words, the protections of these and other laws only apply to employees. *See, e.g.*, 29 U.S.C. § 203 (2018) (describing the requirements of employers under the Fair Labor Standards Act (FLSA)); 42 U.S.C. § 2000e–2 (2018) (describing prohibitions against discrimination by employers under Title VII); 42 U.S.C. § 12112(a) (2018) (describing prohibited discrimination against employees under the Americans with Disabilities Act); 29 U.S.C. § 623 (2018) (describing prohibited age discrimination against employees under the Age Discrimination in Employment Act).

19. Atlanta Opera, Inc., 372 N.L.R.B. No. 95, at 2 (June 13, 2023) ("Section 2(3) of the Act excludes independent contractors from statutory coverage.").

20. One 2020 study estimated that Uber and Lyft would owe $413 million in unemployment taxes in California from 2014 to 2019 if drivers were employees. Ken Jacobs & Michael Reich, *What Would Uber and Lyft Owe to the State Unemployment Insurance Fund?*, BERKELEY LAB. CTR. 1 (May 2020), https://laborcenter.berkeley.edu/pdf/2020/What-would-Uber-and-Lyft-owe-to-the-State-Unemployment-Insurance-Fund.pdf [https://perma.cc/XE4F-PKXJ]. Another study found that in Massachusetts in 2023 alone, Uber and Lyft shirked $47 million in unemployment taxes, workers' compensation, and paid leave insurance. *Assessing Transportation Network Companies' Financial Obligations to Massachusetts Program*, OFF. OF THE STATE AUDITOR OF MASS. (Apr. 30, 2024), https://www.mass.gov/doc/assessing-transportation-network-companies-financial-obligations-to-massachusetts-programs/download [https://perma.cc/E3DE-HV4Q].

reimburse employees for business expenses, independent contractors bear all of their work-related costs and expenses.[21] And whereas most employees have a right to know their rate of pay and any changes to it,[22] independent contractors do not, and many platform companies secretly and algorithmically adjust worker pay.[23]

The logic of the employee/contractor distinction is that employees are economically dependent on and controlled by their employers and are thereby vulnerable to exploitation. In turn, they require benefits and protections that countervail corporate power, like the FLSA and the NLRA.[24] In contrast, bona fide independent contractors are economically independent and not subject to corporate control—that is, they are independent businesses—so they do not need comparable protections from exploitation.[25] For this reason, both the FLSA and the NLRA interrogate the true nature of the working relationship (what the FLSA calls the "economic reality") in determining whether workers are employees or contractors.[26] But when employers misclassify workers, they get the

21. See 29 C.F.R. § 778.217 (2019), which requires employers to reimburse expenses incurred by employees on employer's behalf or for employer's convenience. No similar provision exists for contractors.

22. Most states' wage laws require employers to report workers' rate of pay and provide notice for any changes. *See* Jessica X.Y. Rothenberg, Tracey E. Diamond & Susan K. Lessack, *State Notice Requirements for Employee Pay Reductions*, TROUTMAN PEPPER (Apr. 9, 2020), https://www.troutman.com/insights/state-notice-requirements-for-employee-pay-reductions.html [https://perma.cc/GH3F-C9Q4].

23. *See, e.g.*, Veena Dubal, *The House Always Wins: The Algorithmic Gamblification of Work*, LPE BLOG (Jan. 23, 2023), https://lpeproject.org/blog/the-house-always-wins-the-algorithmic-gamblification-of-work [https://perma.cc/9ZC6-W4DD].

24. *See generally* Jonathan Grossman, *Fair Labor Standards Act of 1938: Maximum Struggle for a Minimum Wage*, U.S. DEP'T LAB., https://www.dol.gov/general/aboutdol/history/flsa1938 [https://perma.cc/PV6E-DW8U] (describing the legislative history and purpose of the FLSA to protect "ill-nourished, ill-clad, and ill-housed" workers and end "unnecessarily long hours which wear out part of the working population while they keep the rest from having work to do" and the intent to do so by creating minimum wages that would "underpin the whole wage structure . . . at a point from which collective bargaining could take over").

25. *See* NLRB v. Hearst Publ'ns, Inc., 322 U.S. 111, 124, 129 (1944) (interpreting the National Labor Relations Act's (NLRA's) coverage and explaining that "[w]hether the term 'employee' includes (particular) workers must be answered primarily from the history, terms and purposes of the legislation" and that "when [] the economic facts of the relation make it more nearly one of employment than of independent business enterprise with respect to the ends sought to be accomplished by the legislation, those characteristics may outweigh technical legal classification for purposes unrelated to the statute's objectives and bring the relation within its protections"); *see also* NLRB v. United Ins. Co. of Am., 390 U.S. 254, 258-59 (1968) (listing whether workers "operate their own independent businesses" as a "decisive factor[ ]" in the employee/contractor inquiry).

26. The FLSA considers a six-part "economic reality" test to determine whether a worker is an employee or is in business for themselves, considering: (1) opportunity for profit or loss

benefit of control over their workforce without any of the costs or liability of employment. And by shirking employment liability, misclassification begets wage theft.

In the absence of robust misclassification enforcement, it should be no surprise that misclassification is on the rise. Fewer benefits and protections for workers means lower costs and less liability for firms, allowing them to reap up to thirty percent cost savings on labor.[27] On the flip side, misclassification reduces individual-worker earnings by tens of thousands of dollars on average annually.[28] It also exacerbates existing inequities because women and people of color are overrepresented in occupations at the highest risk for misclassification.[29] In addition to hurting workers, misclassification harms compliant businesses that cannot compete with the artificially low cost of misclassified labor.[30] And more generally, misclassification hurts the economy by allowing companies

depending on managerial skill, (2) investments by the worker and the employer, (3) permanence of the work relationship, (4) nature and degree of control, (5) whether the work performed is integral to the employer's business, and (6) skill and initiative. *See infra* note 141 and discussion. Similarly, the NLRA applies an "independent-business analysis," which interrogates the degree of independence, ownership, and control that workers have over the circumstances of their work. Atlanta Opera, Inc., 372 N.L.R.B. No. 95, at 13 (June 13, 2023).

27. *See* Terri Gerstein, *How Uber and Lyft Avoid Millions in Business Taxes*, SLATE (May 20, 2024, 11:30 AM), https://slate.com/business/2024/05/uber-lyft-gig-economy-driver-classification-business-taxes-unemployment.html [https://perma.cc/66WJ-FSKR]; *Rights at Risk: Gig Companies' Campaign to Upend Employment as We Know It*, NAT'L EMP. L. PROJECT 2 (2019), https://www.nelp.org/app/uploads/2022/03/Rights-at-Risk-4-2019.pdf [https://perma.cc/YYW8-MAB8] ("Companies have substantial economic incentive to misclassify and can pocket as much as 30 percent of payroll costs when they misclassify workers.").

28. *See* John Schmitt, Heidi Shierholz, Margaret Poydock & Samantha Sanders, *The Economic Costs of Worker Misclassification*, ECON. POL'Y INST. 4 tbl.1 (Jan. 25, 2023), https://files.epi.org/uploads/The-economic-costs-of-worker-misclassification-1.pdf [https://perma.cc/4JGD-3T4L]. Many gig companies have also exploited their workforces as consumers. For example, Uber and Lyft pushed subprime auto loans and insurance onto drivers for years. Maya Kosoff, *Uber Is Reportedly Pushing Its Drivers to Sign Up for "Subprime" Auto Loans*, BUS. INSIDER (Nov. 4, 2014), https://www.businessinsider.com/uber-encourages-drivers-sign-up-subprime-loans-2014-11 [https://perma.cc/B63V-VSCY].

29. *See* Charlotte S. Alexander, *Misclassification and Antidiscrimination: An Empirical Analysis*, 101 MINN. L. REV. 907, 910, 919 (2017).

30. *See* Sandeep Vaheesan, *The Gig Economy vs. America's Workers*, PROJECT SYNDICATE (May 17, 2024), https://www.project-syndicate.org/commentary/uber-lyft-doordash-ballot-measures-massachusetts-legalize-gig-workers-by-sandeep-vaheesan-2024-05 [https://perma.cc/5GU9-RGCF]. FTC Commissioner Alvaro M. Bedoya recently explained that this could rise to the level of an unfair method of competition under the FTC Act. Alvaro M. Bedoya, Comm'r, Fed. Trade Comm'n, "Overawed": Worker Misclassification as a Potential Unfair Method of Competition, Remarks at the Global Competition Review: Law Leaders Global Summit, at 4-5 (Feb. 2, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/Overawed-Speech-02-02-2024.pdf [https://perma.cc/5NZJ-2EJ7].

to achieve significant cost savings through artificially depressed labor costs, rather than a legitimate competitive advantage like those gained from superior services or investment in research and development.[31] All of these trends have distributional consequences: when labor is fissured, corporate gains are increasingly shared with and concentrated in the investor class, rather than the working class.[32]

The state of misclassification is changing rapidly. In 2014, David Weil documented decades of increased workplace fissuring, including misclassification, subcontracting, temp work, and offshoring.[33] In the decade since, through the proliferation of gig companies that engage workers as contractors, fissures in the labor economy have only deepened. While the application-based gig model was previously associated primarily with transportation and delivery services like Uber and Instacart, it has now expanded to industries traditionally composed of employees, like nursing and elder care,[34] as well as restaurant and bar-service work.[35]

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31. Ironically, despite the massive cost savings misclassifiers reap, many gig companies remain unprofitable, insisting that they must first use investor capital to establish market dominance before even attempting to profit. *See* Mike Isaac, *Which Tech Company Is Uber Most Like? Its Answer May Surprise You*, N.Y. TIMES (Apr. 28, 2019), https://archive.is/rP0Xz [https://perma.cc/FJ8E-MVXS]. Uber did not turn profit until 2023. *See* Jasper Jolly & Graeme Wearden, *Landmark Moment as Uber Unveils First Annual Profit as Limited Company*, GUARDIAN (Feb. 7, 2024), https://www.theguardian.com/technology/2024/feb/07/landmark-moment-as-uber-unveils-first-annual-profit-as-limited-company [https://perma.cc/5EQ3-GZ6C].

32. DAVID WEIL, THE FISSURED WORKPLACE 9 (2014). To put this in economic terms, American workers face a crisis of labor monopsony. *See generally* Carmen Sanchez Cumming, *Understanding the Economics of Monopsony: How Labor Markets Work Under Imperfect Competition*, WASH. CTR. FOR EQUITABLE GROWTH (Apr. 6, 2022), https://equitablegrowth.org/understanding-the-economics-of-monopsony-how-labor-markets-work-under-imperfect-competition [https://perma.cc/BH56-3XH5] (documenting the negative impacts of labor market consolidation like depressed average wages).

33. *See generally* WEIL, *supra* note 32, at 93-179 (discussing the forms and consequences of the fissured workplace).

34. *See, e.g.*, Michael Waters, *The Gig Economy Is Coming for Elder Care*, HUSTLE (Feb. 9, 2024), https://thehustle.co/09282020-elder-care [https://perma.cc/B8NP-85KW]; Press Release, U.S. Dep't Lab., US Department of Labor Suit Seeks $140K in Back Wages, Damages for Rockford Healthcare Workers Misclassified as Independent Contractors (Feb. 8, 2024), https://www.dol.gov/newsroom/releases/whd/whd20240208 [https://perma.cc/7EAL-FSHA]; Colin Lecher, *What Happens When Nurses Are Hired Like Ubers*, MARKUP (Oct. 5, 2023, 8:00 ET), https://themarkup.org/working-for-an-algorithm/2023/10/05/what-happens-when-nurses-are-hired-like-ubers [https://perma.cc/L2ZZ-NHWM].

35. *See, e.g.*, James Salazar, *SF Settles Lawsuit with Hospitality Startup that Must Pay Workers Millions*, S.F. EXAMINER (Feb. 23, 2024), https://www.sfexaminer.com/news/business/qwick-must-pay-workers-millions-in-sf-lawsuit-settlement/article_f872d6d8-d1af-11ee-97d2-efa35ed75f71.html [https://perma.cc/MK43-Z8Y9].

To begin making sense of this crisis, the next Part explores a popular narrative about gig work from a historical and legal perspective.

II. THE FLEXIBILITY MYTH

One popular understanding of the gig economy, widely accepted by workers,[36] is that new technology facilitates flexible, independent work that cannot be accommodated by historical legal frameworks for employment.[37] As Uber's CEO wrote in *The New York Times*, "Our current employment system is outdated and unfair. It forces every worker to choose between being an employee with more benefits but less flexibility, or an independent contractor with more flexibility but almost no safety net."[38] The conclusion follows that the unique benefits of contracting, like scheduling flexibility, are important enough for workers to forgo the traditional benefits and protections of employment. This perspective has even surfaced in judicial opinions.[39] But multiple historical revisionisms

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36. For an explanation of workers' perceptions of flexibility vis-a-vis classification status, see, for example, Veena Dubal, *An Uber Ambivalence: Employee Status, Worker Perspectives, & Regulation in the Gig Economy* (U.C. Hastings L. Legal Stud. Rsch. Paper No. 381, 2019), https://ssrn.com/abstract=3488009 [https://perma.cc/NS2D-VJQG]; Tony West, *Uber: Drivers Tell Us Through Focus Groups and Surveys They Don't Want to Be Employees*, USA TODAY (Sept. 16, 2019, 6:16 PM ET), https://www.usatoday.com/story/opinion/2019/09/16/uber-drivers-tell-us-they-dont-want-employees-editorials-debates/2346851001 [https://perma.cc/DV3E-ZTC4].

37. *See, e.g.*, Seth D. Harris & Alan B. Krueger, *A Proposal for Modernizing Labor Laws for Twenty-First-Century Work: The "Independent Worker,"* HAMILTON PROJECT 5 (Dec. 2015), https://www.hamiltonproject.org/assets/files/modernizing_labor_laws_for_twenty_first_century_work_krueger_harris.pdf [https://perma.cc/H4V2-SCT2] ("New and emerging work relationships arising in the 'online gig economy' do not fit easily into the existing legal definitions of 'employee' and 'independent contractor' status.").

38. Dara Khosrowshahi, *I Am the C.E.O. of Uber. Gig Workers Deserve Better*, N.Y. TIMES (Aug. 10, 2020), https://www.nytimes.com/2020/08/10/opinion/uber-ceo-dara-khosrowshahi-gig-workers-deserve-better.html [https://perma.cc/58RM-HT9Z].

39. *See, e.g.*, Capriole v. Uber Techs., Inc., 7 F.4th 854, 857 (9th Cir. 2021) ("On one side of the divide are those involved in the design and high-level operation of a company's platform, who are almost always deemed 'employees,' entitling them to certain protections and benefits but at the cost of greater employer control over their activities. On the other side is a much larger bloc[,] . . . the so-called 'gig-economy workers,' most if not all of whom are classified as 'independent contractors,' a status conferring flexibility but little security."); Razak v. Uber Techs., Inc., No. CV 16-573, 2024 WL 2831805, at *15 (E.D. Pa. June 4, 2024) (holding that "here, factfinders must balance (1) the worker flexibility inherent to app-based ridesharing platforms, and (2) those platform's attempts at quality control and standardization"). But note some judges have pushed back on this logic. *See, e.g.*, Cunningham v. Lyft, Inc., No. 19-CV-11974-IT, 2020 WL 2616302, at *12 (D. Mass. May 22, 2020), *aff'd*, 17 F.4th 244 (1st Cir. 2021) ("Lyft asserts that if it used an employment model, it 'would []use tens of thousands of fewer drivers[] in a rigid set of shifts at the time and places with sufficient demand.' . . . This

underlie this narrative. In reality, there exists a rich history of flexible models of employment for seasonal, short-term, and gig work.

Consider union hiring halls. Historically, hiring halls — a type of union-run employment agency — facilitated gigs for workers in industries with a consistent demand for labor on a seasonal or short-term basis, like job-by-job or project-by-project work, especially in construction and shipping.[40] Hiring halls operated either exclusively — that is, with exclusive contracts to provide labor to employers — or nonexclusively, where the hall would be one of multiple sources of workers.[41] Employers seeking hiring halls' services would need to enter a collective-bargaining relationship with the union operating the hall. While hiring halls functioned as intermediaries between employees and employers rather than as employers themselves, they were nonetheless subject to stringent rules regarding fairness in staffing decisions, recordkeeping, and transparency.[42] For decades, union hiring halls performed a critical staffing function in industries with seasonal or project-based work and provided workers with all the attendant employment benefits, protections, and collective-bargaining rights.[43]

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argument is a red herring. Nothing in the relief sought by Plaintiffs would interfere with drivers' flexible schedules. Absent a collective-bargaining agreement, employers may choose to schedule employees on a fixed schedule, may require them to be 'on-call' and to report to work on the employer's demand, or may allow them to set their own schedule.").

40. *See* Samuel D. Rosen, *Hiring Halls and the National Labor Relations Board*, 9 WAKE FOREST L. REV. 51, 51 (1972).

41. *See generally* Leslie W. Bailey, Jr., *Construction Union Hiring Halls: Service Under a Collective Bargaining Agreement as a Prerequisite to High Priority Referral*, 19 WM. & MARY L. REV. 203 (1977) (discussing hirings halls in the construction industry); Joseph W. Moreland & Michael J. Stapp, *A Primer on Hiring Halls in the Construction Industry*, 37 CHI. LAB. L.J. 817 (1986) (same); Samuel D. Rosen, *Hiring Halls and the National Labor Relations Board*, 9 WAKE FOREST L. REV. 51 (1972) (analyzing hiring halls under the NLRA).

42. Harris Freeman & George Gonos, *The Commercial Temp Agency, the Union Hiring Hall, and the Contingent Workforce: Toward a Legal Reclassification of For-Profit Labor Market Intermediaries*, *in* JUSTICE ON THE JOB: PERSPECTIVES ON THE EROSION OF COLLECTIVE BARGAINING IN THE UNITED STATES 275, 283-84 (Richard N. Block, Sheldon Friedman, Michelle Kaminski & Andy Levin eds., 2006) (summarizing federal regulations on hiring halls). To be sure, though, some hiring halls flout the rules. *See, e.g.*, Press Release, Matthew J. Platkin, N.J. Att'y Gen., Division on Civil Rights Files Complaint in Superior Court Against Ironworkers Local 11 for Allegedly Violating the Law Against Discrimination (June 24, 2024), https://www.njoag.gov/division-on-civil-rights-files-complaint-in-superior-court-against-ironworkers-local-11-for-allegedly-violating-the-law-against-discrimination [https://perma.cc/3G7C-QW84].

43. In the 1990s, academics observed the relationship between hiring halls and temporary staffing agencies, noting the irony that union halls were aggressively regulated in the late 20th century just as private staffing firms were increasingly deregulated. *See, e.g.*, RICHARD N. BLOCK, JUSTICE ON THE JOB: PERSPECTIVES ON THE EROSION OF COLLECTIVE BARGAINING IN THE UNITED STATES 275-304 (Richard N. Block, Sheldon Friedman, Michelle Kaminski & Andy Levin eds., 2006).

Notably, union hiring halls have not entirely disappeared. They persist in part in unions and guilds throughout the entertainment and service industry, where short-term, project-based work remains common. For example, the Actors Equity Association and the American Federation of Musicians (AFM) negotiate contracts and provide some staffing functions for professional theater employees and musicians, respectively.[44] Both unions negotiate collective-bargaining agreements with union venues on behalf of member performers, who in turn are able to take gigs as employees with attendant benefits. Under this system, performers frequently retain significant flexibility. For example, AFM musicians who attain a chair in a Broadway show can retain their contracts while using substitutes for up to fifty percent of the time,[45] and even performer substitutes are covered by the union agreement and treated as employees.[46] A few strong service-industry unions—for instance, Las Vegas's Culinary Workers Union, UNITE HERE Local 226—also maintain "training halls" that, like hiring halls, offer training and job placement in sometimes-seasonal industries like hospitality.[47] Counterintuitively, as Sanjukta M. Paul observed, "Uber purports to perform exactly the same functions as a hiring hall: it brings together buyers and sellers in time and space, and it also sets the price of the ride."[48] But while hiring halls are granted an exemption from antitrust law in recognition of their unique pro-employee function, Paul argues firms like Uber that set prices for independent contractors should be subject to antitrust scrutiny for price fixing.[49]

Since the FLSA was passed, commission-based, piecework, and flat-rate compensation have also afforded flexible employment in many industries. In a commission system, workers are compensated for some unit of productivity, like items sold by a salesperson. In order for commissions to be bona fide, they must provide some sales or productivity incentive linked to compensation in a manner

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44. Mark D. Meredith, Note, *From Dancing Halls to Hiring Halls: Actors' Equity and the Closed Shop Dilemma*, 96 COLUM. L. REV. 178, 179 (1996); *see, e.g.*, Radio City Prods. LLC & Associated Musicians of Greater N.Y., Loc. Union 802, Am. Fed'n of Musicians, Collective Bargaining Agreement 16 (June 1, 2016) (describing that the venue must notify the union in advance of open auditions, so that in turn the union can advertise auditions to members).

45. *See* The Broadway League Inc., Disney Theatrical Prods. & Associated Musicians of Greater N.Y., Loc. 802, Collective Bargaining Agreement at (VIII)(M)(3) (Mar. 7, 2016).

46. *See, e.g.*, *id.* at VIII(B), (D).

47. Harold Meyerson, *Las Vegas as a Workers' Paradise*, AM. PROSPECT (Dec. 11, 2023), https://prospect.org/special-report/las-vegas-workers-paradise [https://perma.cc/GL4Z-4KSC] (discussing HERE Local 226's "Culinary Training Academy").

48. Sanjukta M. Paul, *Uber as For-Profit Hiring Hall: A Price-Fixing Paradox and Its Implications*, 38 BERKELEY J. EMP. & LAB. L., 233, 252 (2017).

49. *Id.* at 254 ("This difference between Uber and a hiring hall is significant because the distributional aspect of a hiring hall is what justifies its price coordination in a services market.").

that decouples employees' time worked and pay.[50] Historically, commissioned employees typically worked in retail environments with seasonal variations in productivity. Many contemporary sales workers, particularly in real estate, remain compensated by commission. Similarly, under piecework or piece-rate pay, employees are compensated per "piece," that is, per some unit produced. From the mid-nineteenth through mid-twentieth century, piecework proliferated in the agricultural, textile, and manufacturing industries.[51] Piecework was commonly used by large companies to create "home work" for employees that could be completed off-premises, like garment, jewelry, or toy assembly.[52] But early- and mid-century piecework was far from flexible or empowering: in particular, many women worked full-time hours from home for starvation wages in addition to shouldering domestic responsibilities.[53] This plight motivated, in part, the passage of the FLSA and more stringent protections for piecework and home work in particular.[54] Contemporary employees compensated through piece-rate pay typically work in construction, medical transcription, artisan production, and satellite installation.[55] Finally, a variation of piecework is flat-rate pay, where

50. Although FLSA does not define "bona fide commission," Department of Labor (DOL) opinion letters explain that bona fide commissions provide an "incentive" for employees to work more efficiently by compensating employees for the value of the tasks they complete, not the time spent completing them. U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter Fair Labor Standards Act (FLSA), 2006 WL 4512957, at *1. Therefore, "hourly payments do not qualify as commissions." U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter Fair Labor Standards Act (FLSA), 2005 WL 3308624, at *2.

51. *See generally* Peter Baker, *Production Restructuring in the Textiles and Clothing Industries*, 8 NEW TECH., WORK & EMP. 43, 47 (1993) (noting that "[t]he tradition of piece work in the textile industry is strong"); JACOB AUGUST RIIS, HOW THE OTHER HALF LIVES: STUDIES AMONG THE TENEMENTS OF NEW YORK 82-85, 93-95 (1990) (documenting piecework wages for New York City textile workers and cigarette makers); Charles Brown, *Firms' Choice of Method of Pay*, 43 INDUS. & LAB. REL. REV. 165-S, 175-S tbl.2 (1990) (displaying the results of the Industry Wage Study of manufacturers' use of salary and piecework wage structures).

52. This garnered the name "industrial homework" or "sweatshop work." Kati L. Griffith, *The Fair Labor Standards Act at 80: Everything Old Is New Again*, 104 CORNELL L. REV 557, 573-74 (2019).

53. *See* Veena Dubal, *Digital Piecework*, DISSENT (Fall 2020), https://www.dissentmagazine.org/article/digital-piecework [https://perma.cc/SL3X-KDWR] (describing manufacturers' advertisement of piecework as for "pleasure" when "[i]n reality . . . [t]hat work took place in between, during, and after unpaid domestic work, at rates that were roughly one half of what women factory workers made").

54. Griffith, *supra* note 52, at 574-76; *Fact Sheet #24: Homeworkers Under the Fair Labor Standards Act (FLSA)*, U.S. DEP'T LAB. (July 2008), https://www.dol.gov/agencies/whd/fact-sheets/24-flsa-homeworkers [https://perma.cc/5GQL-JW4C].

55. Jackie Munro-Vahey, *Reaping the Rewards of Hard Work: Eliminating the New Mexico Minimum Wage Act's Exemption for Workers Paid on a Piecework, Flat Rate, and Commission Basis*, 53 N.M. L. REV. 483, 495 (2023); *Piece-Rate Pay: Should You Do It?*, TIMESHEETS, https://blog.timesheets.com/2021/03/piece-rate-pay-should-you-do-it [https://perma.cc/2XQ9-TTS8].

employees are paid a flat rate per task regardless of how long the task takes to complete.[56] Historically, mechanics were (and in some states still are) paid flat rates for standard services.[57]

Because employers do not compensate commissioned, piecework, or flat-rate employees strictly per hour, these compensation structures may afford employees greater flexibility to choose when and how much they work and respond to seasonal or other variations in demand for their services. But critically, under the FLSA, piecework, flat-rate, and commission compensation structures have never been excuses to pay workers exploitation wages: employers nonetheless must abide by minimum-wage laws.[58] State wage laws also do not exempt commissioned, piece-rate, or flat-rate workers from employment protections, with the limited, misguided exception of New Mexico.[59] Notably, the FLSA does exempt some commissioned employees from overtime pay, but only where the commission does not "offend[] the purposes of the FLSA" to protect vulnerable workers in positions where long hours could lead to accidents and injuries.[60] (The irony of this rule is that many gig workers, like drivers and delivery workers, are precisely the type of vulnerable worker in a dangerous industry that the FLSA's drafters recognized a need to protect, and yet they remain de facto exempt from overtime by virtue of misclassification.)

Piecework, flat-rate, and commission-based pay are not inherently superior or fairer methods of compensation; workers paid under these untraditional structures may also be misclassified as independent contractors or exploited like

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56. Munro-Vahey, *supra* note 55, at 495.

57. *Id.* at 485, 491.

58. In other words, there is no FLSA exemption for employees with these compensation structures, with few exceptions. The FLSA's drafters observed that if piece-rate workers were not covered by the FLSA, it would invite employers to change how they pay workers in order to circumvent the law. *See* Griffith, *supra* note 52, at 576-78. Note that when the FLSA was passed, commissioned retail workers in interstate commerce were initially exempt. Fair Labor Standards Act of 1938, ch. 676, § 13(a)(2), 52 Stat. 1060. But Congress amended the FLSA in 1961 to generally cover commissioned employees. *See* Munro-Vahey, *supra* note 55, at 494-95. Note that an exemption from the FLSA persists for hand-harvest, seasonal, agricultural employees compensated on piecework basis. 29 U.S.C. § 213(a)(6)(C) (2018); *see* Munro-Vahey, *supra* note 55, at 492-96 (explaining the legislative history of the exemption, which historically primarily affected Southern, Black agricultural workers, as rooted in histories of racism and slavery).

59. Munro-Vahey, *supra* note 55, at 491.

60. The FLSA's legislative history reveals three purposes for the overtime rule: (1) to prevent workers who prefer longer hours from taking work from those who prefer shorter hours; (2) to spread work hours across workers to minimize unemployment; and (3), critically, to protect vulnerable workers in positions where long hours could lead to accidents and injuries. *See, e.g.*, Mechmet v. Four Seasons Hotels, Ltd., 825 F.2d 1173, 1175-76 (7th Cir. 1987); Alvarado v. Corp. Cleaning Servs., Inc., 782 F.3d 365, 371 (7th Cir. 2015).

any others.[61] Non-hourly pay can also be less predictable. But these untraditional structures reflect the historical and legal reality that the employment framework is robust enough to tolerate diverse work schedules and wage structures, without sacrificing employment law's protection of minimum wages and standards for all time worked.[62] And even within these untraditional wage structures, employees retain the right to bargain collectively under the NLRA, regardless of how much or little they work.

It would be shortsighted to reject the myth of inflexible employment without addressing the companion myth of flexible contracting. To start, at least half the work on gig platforms is done by full-time workers, so most gig company profit is actually driven by workers with regular routines, not flexible ones.[63] And in reality, gig workers' schedules are far from flexible. Gig drivers report that there are better and worse times to drive, so picking the hours that work best for them often means earning less.[64] More perniciously, many gig companies offer modest "bonuses" to induce drivers to sign up for times or batches of jobs when forecasted demand is high but then decrease the number and quality of offerings to drivers over time, effectively "locking in" workers by creating expectations of future bonuses that never materialize.[65] Gig companies routinely use "steering"

61. *See* Alvaro M. Bedoya, "Commanding the Price of Labor": Confronting the Human Cost of Labor Monopsony, Remarks at the 24th Annual Loyola Antitrust Colloquium, Loyola University School of Law, at 1-3 (Apr. 26, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/bedoya-commanding-price-labor-speech.pdf [https://perma.cc/PP5A-7UBC] (describing nineteenth century piece-rate can labeler exploitation by beef industry monopoly); *see also* Press Release, Off. Att'y Gen. D.C., Attorney General Schwalb Resolves Workers' Rights Investigation into DC Gyms, Secures $450K for Fitness Trainers and the District (Nov. 2, 2023), https://oag.dc.gov/release/attorney-general-schwalb-resolves-workers-rights [https://perma.cc/V7U7-468T] (announcing the settlement of an investigation into a gym for a sham commission pay structure).

62. Through an analysis of FLSA's legislative history, Kati L. Griffith further shows that the FLSA's drafters intended it to be broad: for example, drafters rejected attempts to limit the definition of "employment" by the nature of the labor contract between worker and firm, the number of workers at a particular establishment, and a number of other potentially limiting factors. *See* Griffith, *supra* note 52, at 569-87.

63. *Flexibility and the On-Demand Economy*, NAT'L EMP. L. PROJECT 4 (June 2016), https://www.nelp.org/app/uploads/2016/06/Policy-Brief-Flexibility-On-Demand-Economy.pdf [https://perma.cc/5PYS-HN44]. By over-emphasizing part-time or infrequent gig workers, gig companies can assert that drivers are not economically dependent on platform work—one of the prongs of the economic reality analysis. *See supra* note 141 and discussion.

64. Noah Sheidlower, *The Biggest Perk of Gig Work Might Also Be Its Downfall*, BUS. INSIDER (Mar. 10, 2024, 6:23 AM EDT), https://www.businessinsider.com/driving-for-uber-lyft-flexibility-gig-work-doordash-stock-earnings-2024-3 [https://perma.cc/8KCG-P95Z].

65. Marshall Steinbaum, *The Antitrust Case Against Gig Economy Labor Platforms*, LPE BLOG (Apr. 7, 2022), https://lpeproject.org/blog/the-antitrust-case-against-gig-economy-labor-platforms [https://perma.cc/2X4V-QX4J].

tactics to drive workers towards longer shifts that effectively prevent workers from "multi-apping," operating as de facto noncompetes.[66] And critically, most gig workers do not choose gig work as a preference, but rather as a last resort in addition to another low-paying job.[67]

In short, gig work is not a new phenomenon. Historically, gig work has been, and in many industries remains, perfectly consistent with employment and its attendant benefits and protections through union hiring halls, guild clearinghouses, and piecework, flat-rate, or commission-based employment. Flexibility does not fundamentally inure to either employment or contracting. Rather, in the American labor economy, profit-motivated firms are incentivized to reduce the scheduling flexibility of workers—employees and misclassified contractors alike—wherever possible, to guarantee consistent productivity or match consumer demand. And, in the absence of effective misclassification enforcement, gig companies have a financial incentive to classify workers as contractors rather than competing for employees through wages and benefits.

III. THE PROPAGANDA MACHINE

This rich history of gig employment raises the question: what has led to the consensus among so many workers, scholars, enforcers, legislators, and even judges that contemporary gig work is irreconcilable with employment? Two answers emerge. First, while flexibility and employment are theoretically and historically compatible, the opportunities for flexible employment are decreasing, especially for low-wage workers.[68] Part IV discusses legislative responses to this phenomenon. Second, as this Part describes, gig companies have for the past decade mounted aggressive legislative and public-relations campaigns to advance the narrative that second-class contractor status is the only way for workers to attain flexibility.

Since their origin, gig companies have churned out television and web advertisements for workers and consumers with slogans like "Flexibility Works."[69] Lyft has produced and promoted blogs and web series espousing the virtue of

66. *Id.* ("[Gig platforms] also offer rewards for accepting a given number of gigs in close succession, in effect a short-term noncompete agreement.").

67. NAT'L EMP. L. PROJECT, *supra* note 63, at 3.

68. NAT'L WOMEN'S L. CTR, *supra* note 11, at 1-2. Some observers misattribute this decline to a fundamental legal incompatibility, rather than firm behavior. *See infra* Part V.

69. Uber, *Flexibility Works | Uber*, YOUTUBE (Jan. 24, 2022), https://www.youtube.com/watch?v=yW3LvZsz12Y [https://perma.cc/RJ2M-ZWY4].

"flexibility so there's time to pursue other passions."[70] Gig executives have penned op-eds regurgitating this logic.[71] Not content to tell their own story, gig companies have repeatedly—and sometimes secretly—placed op-eds from gig workers celebrating flexibility and, on that basis, expressing a preference for contractor status.[72] And gig companies have donated to local organizations that are purportedly progressive or pro-worker, and those organizations have in turn published articles that cynically tout the flexibility of gig work as a boon to minority workers.[73]

Behind the scenes, gig companies work together. Uber, Lyft, DoorDash, and Instacart formed a corporate lobby group called "Flex" that now includes Shipt, Grubhub, and HopSkipDrive as "corporate members."[74] Flex proselytizes: "Today's flex work is inherently different from traditional employment. It's an entrepreneurial opportunity facilitated by technology platforms . . . allowing workers to use their time on their own terms."[75] Through Flex, gig companies have commissioned surveys to demonstrate gig workers' purported preference for flexible work and independent-contractor status.[76] In turn, these same

70. Lyft, *"Going From Broke" Spotlights the Benefits of Flexible Work Through Lyft Rideshare*, LYFT: LYFT NEWS (Mar. 2, 2023), https://www.lyft.com/blog/posts/going-from-broke-spotlights-the-benefits-of-flexible-work-through-lyft [https://perma.cc/7MQK-56UK].

71. *See, e.g.*, Khosrowshahi, *supra* note 38.

72. Dana Kerr & Maddy Varner, *Uber and Lyft Donated to Community Groups Who Then Pushed the Companies' Agenda*, MARKUP (June 17, 2021, 8:00 ET), https://themarkup.org/news/2021/06/17/uber-and-lyft-donated-to-community-groups-who-then-pushed-the-companies-agenda [https://perma.cc/T9JX-H3PH].

73. *See, e.g.*, Flexibility & Benefits for Massachusetts Drivers, *Drivers of Color Call for Flexibility and Benefits for App-Based Drivers in Letter to Legislature*, YES FOR MASS. DRIVERS, https://yesformassdrivers.org/drivers-of-color-call-for-flexibility-and-benefits-for-app-based-drivers-in-letter-to-legislature [https://perma.cc/KH2W-8RHW]; *see also* Kirsten John Foy, *Don't Stifle Independent Work Model of Gig Economy Jobs for People of Color*, LOHUD (Feb. 4, 2021, 4:09 AM ET), https://www.lohud.com/story/opinion/2021/02/04/dont-stifle-independent-work-model-gig-economy-jobs-people-color/4373207001 [https://perma.cc/HS7P-83L8] ("So, when I hear talk about eliminating the flexible work model and forcing these workers into the old-fashioned employer/employee system, all I hear is an attempt to force Black and Brown workers into a structure that doesn't work for them and never has."). The author is the founding member of an organization that identifies Uber as a "beneficiary." Foy, *supra*.

74. *About Us*, FLEX, https://www.flexassociation.org/about-us [https://perma.cc/S3QQ-LFXX].

75. *What Does the Future of Work Look Like?*, FLEX, https://www.flexassociation.org/thought-leadership [https://perma.cc/FN2Y-BQUH].

76. *Worker Survey*, FLEX, https://www.flexassociation.org/report/worker-survey [https://perma.cc/Z99U-ZT43].

companies cite these survey results in their promotional materials.[77] Flex has lobbied against pro-worker measures, including the new federal Department of Labor (DOL) independent-contractor rule,[78] the Protecting the Right to Organize Act (PRO Act),[79] and state anti-misclassification measures, all on the basis of protecting workers' flexibility.[80]

Flex is hardly the only lobbying organization with multiple gig-company members. Amazon, DoorDash, Instacart, Lyft, Uber, Shipt, TaskRabbit, Rover, GrubHub, and GetAround are just some of the gig-company members of the lobbying organization TechNet, which spent almost $4.5 million in 2017 and 2018 on advocacy for the federal New Economy Works to Guarantee Independence and Growth Act.[81] The Act would solidify gig workers as contractors, yet again in the name of worker choice and flexibility.[82] Likewise, the Coalition for Workforce Innovation (CWI)—a corporate lobby group that includes Uber, Lyft, Shipt, and a wide variety of gig companies in the healthcare-staffing industry—claims its "coalition supports policy proposals that protect, empower, and enhance the choice, flexibility, and economic opportunity of individuals that choose nontraditional work arrangements."[83] CWI has lobbied aggressively in support of the Workforce Flexibility and Choice Act, which would formalize gig workers as nonemployees.[84] Several gig companies have resisted efforts to increase transparency regarding their lobbying efforts.[85]

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77. *Flexible Schedules and Flexible Benefits*, SHIPT (Oct. 12, 2023), https://corporate.shipt.com/news/flexible-schedules-and-flexible-benefits-a-new-model-would-boost-financial-security-for-shoppers-wh [https://perma.cc/28NN-JVFQ].

78. *See infra* note 141.

79. H.R. 842, 117th Cong. (2021). The PRO Act, which would institute the ABC test and strengthen workers' rights to organize, was introduced and passed in the House of Representatives in March 2020 but did not advance in the Senate; it was reintroduced in the House in 2021 but failed to advance due to a Senate filibuster. *Id.*

80. Karl Evers-Hillstrom, *Gig Companies Launch Lobbying Group to Counter PRO Act Push*, HILL (Mar. 8, 2022, 5:20 PM ET), https://thehill.com/business-a-lobbying/business-a-lobbying/597404-gig-companies-launch-lobbying-group-to-counter-pro [https://perma.cc/7TY3-JHA5].

81. NAT'L EMP. L. PROJECT, *supra* note 27, at 14.

82. H.R. 4165, 115th Cong. (2017).

83. *Mission*, COAL. FOR WORKFORCE INNOVATION, https://workforceinnovation.net/about [https://perma.cc/5R7T-2ACR].

84. *Statement in Response to the Introduction of the Worker Flexibility and Choice Act*, NAT'L EMP. L. PROJECT (July 22, 2022), https://www.nelp.org/statement-in-response-to-the-introduction-of-the-worker-flexibility-and-choice-act [https://perma.cc/9TU5-3LZB].

85. Lyft, Inc., Proxy Statement (Form DEF 14A) 25 (Apr. 28, 2021), https://s27.q4cdn.com/263799617/files/doc_financials/2021/AR/Proxy-Statement-2021-(1).pdf [https://perma.cc/87CD-DKDL] (recommending against shareholder proposal to annually disclose "[p]ayments by Lyft used for (a) direct or indirect lobbying or (b) grass-roots lobbying

In addition to forming corporate lobby guilds, gig companies have retained credentialed economists and former political appointees to author favorable, seemingly independent studies touting the gospel of flexibility (and occasionally, failing to disclose their financial support for these studies[86]). For example, soon after its launch, Uber engaged Alan B. Krueger, economist and former Assistant Secretary of the Treasury for Economic Policy to President Obama, as a consultant.[87] Krueger teamed up with then-employee and Uber shareholder Jonathan Hall to publish a paper under the reputable auspices of the National Bureau of Economic Research. The paper summarized the findings of a survey — the methodology and interpretation of which have since been rebuked[88] — to report that drivers were by and large "very satisfied," were motivated by a preference for flexible work, and preferred to be independent contractors rather than employees.[89] Krueger subsequently partnered with Seth D. Harris, former United States Deputy Secretary of Labor under President Obama, to author a paper insisting that "emerging work relationships arising in the 'online gig economy' do not fit easily into the existing legal definitions of 'employee' and 'independent contractor' status," which laid the groundwork for laws that enshrine gig workers as contractors.[90]

When legislators and enforcers attempt to regulate gig companies in progressive states, gig companies escalate the conflict. The starkest example exists in California. In 2020, the state legislature passed Assembly Bill 5 (AB 5) — a law containing the worker-friendly ABC test for determining employee status, which

communications, in each case including the amount of the payment and the recipient"); Uber Techs., Inc., Proxy Statement (Form DEF 14A) 80 (Mar. 29, 2021), https://s23.q4cdn.com/407969754/files/doc_financials/2021/ar/FINAL-Typeset-Definitive-Proxy.pdf [https://perma.cc/YLY2-Y7PH] (recommending against shareholder proposal to annually disclose "[p]ayments by Uber used for (a) direct or indirect lobbying or (b) grass-roots lobbying communications, in each case including the amount of the payment and the recipient").

86. KATIE J. WELLS, KAFUI ATTOH & DECLAN CULLEN, DISRUPTING D.C.: THE RISE OF UBER AND THE FALL OF THE CITY 45-46 (2023). On the other side of the coin, Uber and Lyft have worked to undermine the nomination or confirmation of advocates of full employment, as they did with David Weil's nomination to be the head administrator of the DOL Wage and Hour Division. Sarah Tsai, *The Shameful Defeat of David Weil's Nomination*, ONLABOR (May 3, 2022), https://onlabor.org/the-shameful-defeat-of-david-weils-nomination [https://perma.cc/9KVR-X5MQ].

87. Jonathan V. Hall & Alan B. Krueger, *An Analysis of the Labor Market for Uber's Driver-Partners in the United States*, (Nat'l Bureau Econ. Rsch. Working Paper 22843, 2016), https://www.nber.org/system/files/working_papers/w22843/w22843.pdf [https://perma.cc/9J76-YQZ2].

88. Janine Berg & Hannah Johnston, *Too Good to Be True? A Comment on Hall and Krueger's Analysis of the Labor Market for Uber's Driver-Partners*, 72 ILR REV. 39, 39 (2018).

89. Hall & Krueger, *supra* note 87, at 11-12.

90. Harris & Krueger, *supra* note 37, at 5.

would have likely resulted in liability for many gig companies as employers.[91] In response, gig companies spent a combined $220 million to mount a successful ballot initiative, Proposition 22 (Prop 22), to reverse AB 5—an initiative that gig companies styled as "[p]rotecting the ability of Californians to work as independent contractors . . . so [they] can continue to choose which jobs they take, to work as often or as little as they like, and to work with multiple platforms or companies."[92] To pass Prop 22, gig companies bombarded voters with (occasionally dishonest) advertising centering flexibility and worker choice.[93] Ironically, after Prop 22 passed with 58% of the vote, the companies began to reduce incentive compensation to drivers, resulting in overall *lower* driver pay statewide compared to pre-Prop 22 ($5.64/hour, compared to the $15.60/hour promised under

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91. Under the ABC test, a worker is an employee "unless the hiring entity demonstrates [] the following: (A) The person is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact. (B) The person performs work that is outside the usual course of the hiring entity's business. (C) The person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed." Assemb. B. 5, 2019-2020 Leg., Reg. Sess. (Cal. 2019) (enacted) (codified at CAL. LAB. CODE §§ 2750.3, 3351 (West 2019) and CAL. UNEMP. INS. CODE §§ 606.5, 621 (West 2020)). The ABC test is the most worker-friendly because of its presumption of an employment relationship and because it places the burden on the employer to satisfy all three prongs of the test.

92. CAL. BUS. & PROF. CODE § 7449(e) (West 2020).

93. In one instance, an Uber/Lyft super political action committee paid $20,000 to an organization vaguely called "Progressive Voter Guide," which distributed mailers enthusiastically endorsing Proposition 22 (Prop 22) as "provid[ing] app-based drivers new benefits," among endorsements for other popular and genuinely progressive causes, in the name of fictional organizations like "Feel the Bern," "Council of Concerned Women Voters," and "Our Voice, Latino Voter Guide." Mike Moffitt, *Fake 'Progressive' Mailers Urge Yes on Uber/Lyft's Prop. 22*, S.F. GATE (Oct. 9, 2020, 5:34 PM), https://www.sfgate.com/politics/article/Fake-progressive-mailers-urge-yes-on-Uber-Lyft-15635173.php [https://perma.cc/UA4N-PSE7]; Laura Padin, *Prop 22 Was a Failure for California's App-Based Workers. Now, It's Also Unconstitutional.*, NAT'L EMP. L. PROJECT (Sept. 16, 2021), https://www.nelp.org/prop-22-unconstitutional [https://perma.cc/53AJ-VTET].

Prop 22)[94]; only 15% of California drivers were able to claim any benefits like healthcare stipends[95]; and many voters expressed remorse.[96]

Following the Prop 22 playbook, after the Massachusetts Office of the Attorney General (MA OAG) sued Uber and Lyft, a coalition of companies led by Uber, Lyft, DoorDash, and Instacart called "Flexibility and Benefits for Massachusetts Drivers" broke state campaign-spending records[97] in lobbying for multiple third-category-reform ballot initiatives for November 2024; if successful, the initiatives would enshrine drivers' status as contractors and provide some minimum pay for driving time.[98] The same companies, through Flex, mounted expensive advertisements in Washington, touting gig workers' enviable "work life balance," in support of an eventually successful third-category law, avoiding the companies' need for a referendum in that state.[99]

These gig-company tactics are not new but rather borrow from companies in other industries seeking deregulation, like oil, tobacco, and guns.[100] Just like

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94. *California Proposition 22, App-Based Drivers as Contractors and Labor Policies Initiative (2020)*, BALLOTPEDIA, https://ballotpedia.org/California_Proposition_22,_App-Based_Drivers_as_Contractors_and_Labor_Policies_Initiative_(2020) [https://perma.cc/2GS8-49B9]; Ken Jacobs & Michael Reich, *The Uber/Lyft Ballot Initiative Guarantees Only $5.64 an Hour,* U.C. BERKELEY LAB. CTR. (Oct. 31, 2019), https://laborcenter.berkeley.edu/the-uber-lyft-ballot-initiative-guarantees-only-5-64-an-hour-2 [https://perma.cc/5T3E-5987].

95. Laura Padin, *Prop 22 Was a Failure for California's App-Based Workers. Now, It's Also Unconstitutional*, NAT'L EMP. L. PROJECT (Sept. 16, 2021), https://www.nelp.org/prop-22-unconstitutional [https://perma.cc/WPP4-DCFQ].

96. Faiz Siddiqui & Nitasha Tiku, *Uber and Lyft Used Sneaky Tactics to Avoid Making Drivers Employees in California, Voters Say. Now, They're Going National.*, WASH. POST (Nov. 17, 2020, 7:00 AM EST), https://www.washingtonpost.com/technology/2020/11/17/uber-lyft-prop22-misinformation [https://perma.cc/DP38-JFGF]. Regardless of voter remorse, Prop 22 can only be repealed by a seven-eighths vote of the California legislature. CAL. BUS. & PROF. CODE § 7465(a) (West 2020).

97. Anna Kramer, *Protocol: How Uber and Lyft Compromised with Labor in Washington State—and Kept Drivers from Becoming Employees*, NAT'L EMP. L. PROJECT (Apr. 13, 2022), https://www.nelp.org/how-uber-and-lyft-compromised-with-labor-in-washington-state-and-kept-drivers-from-becoming-employees [https://perma.cc/V9C4-LELG].

98. Beth Treffeisen, *Question 3: What to Know About the Ballot Measure that Would Allow Rideshare Drivers to Unionize*, BOSTON.COM (Sept. 20, 2024), https://www.boston.com/news/politics/2024/09/20/massachusetts-ballot-question-3-rideshare-drivers-unions [https://perma.cc/3YLY-AY3W]. Aspects of these referenda were supplanted by the Massachusetts Office of the Attorney General's (MA OAG's) July 2024 settlement with the companies. *See infra* notes 164-66 and accompanying text.

99. Brody Mullins & Ryan Tracy, *Uber, Lyft and Others Launch Campaign to Head Off Unions*, WALL ST. J. (Mar. 8, 2022), https://www.wsj.com/amp/articles/uber-lyft-and-others-launch-campaign-to-head-off-unions-11646733600 [https://perma.cc/XF8G-4TCG].

100. Oil and natural-gas companies have long championed climate change interventions emphasizing individual responsibility, like recycling, over those requiring corporations to practice environmental stewardship. *See* Geoffrey Supran & Naomi Oreskes, *Rhetoric and Frame*

these companies before, gig companies now use self-serving legislative advocacy and downright deceptive advertising campaigns to insist that individual workers' preferences for flexibility justify predatory business models—ignoring the reality that, for many workers, gig work is not a preference but a last resort.

IV. THE THIRD-CATEGORY SHAM

The increasingly popular approach to regulating gig work is "third-category" legislation, which purports to resolve the fictional tension between gig work and employment. Under third-category laws, gig workers are neither employees or standard independent contractors, but a "third category" of worker who forfeits employment in exchange for narrow benefits like minimum-pay protections, paid sick leave, or healthcare stipends.[101] Despite the name, third-category laws universally enshrine gig workers as independent contractors. Armed with the understanding that, legally and historically, gig work and employment cohere, worker advocates should be skeptical.

While the limited benefits afforded by third-category laws may appeal to some gig workers, there is a straightforward reason why the gig industry embraces them: third-category workers are dramatically cheaper than employees. While third-category laws purport to set minimum-pay standards, they only compensate workers for active time, like time that Uber/Lyft drivers spend driving a passenger or Instacart/DoorDash workers spend completing a delivery.

Analysis of ExxonMobil's Climate Change Communications, 4 ONE EARTH 696, 697 (2021); Kate Yoder, *How the Recycling Symbol Lost Its Meaning*, GRIST (June 12, 2024), https://grist.org/culture/recycling-symbol-logo-plastic-design [https://perma.cc/7M2Q-HZFU]. Likewise, tobacco companies have long sponsored prestigious journals that downplay tobacco's harmful health effects while shifting responsibility away from corporations and onto consumers. *See* Supran & Oreskes, *supra*, at 709-10; Jodie Briggs & Donna Vallone, *The Tobacco Industry's Renewed Assault on Science: A Call for a United Public Health Response*, 112 AM. J. PUB. HEALTH 388, 388 (2022). And gun companies have emphasized self-defense and responsible gun ownership to resist regulation while heavily advertising guns in tactical, offensive contexts like videogames. *See* Ryan Busse, *The Gun Industry Created a New Consumer. Now It's Killing Us.*, ATLANTIC (July 25, 2022), https://www.theatlantic.com/ideas/archive/2022/07/firearms-industry-marketing-mass-shooter/670621 [https://perma.cc/J6RB-U5B5].

101. Jennifer Sherer & Margaret Poydock, *Flexible Work Without Exploitation*, ECON. POL'Y INST. 2-3 (Feb. 23, 2023), https://www.epi.org/publication/state-misclassification-of-workers [https://perma.cc/M25V-UPLH]. These laws typically apply either to gig workers or a subset of gig workers like "transportation network drivers." *See, e.g.*, W. VA. CODE § 17-29-11 (2015) (stating "[d]rivers are independent contractors and not employees of the transportation network company" if certain conditions are met); N.C. GEN. STAT. § 20-280.8 (2015) (creating a rebuttable presumption "that a TNC driver is an independent contractor"); N.H. REV. STAT. ANN. § 359-U:20 (2023) (stating that "TNC drivers are presumed to be independent contractors"); W.Y. STAT. ANN. § 31-20-110 (2017) (stating that a "driver shall be an independent contractor, not subject to the Wyoming Worker's Compensation Act").

While employers must pay minimum wage for any time an employee spends engaged for the benefit of the employer,[102] including time spent waiting to be assigned a ride or a delivery job, gig companies shirk these costs with impunity under third-category laws. Unsurprisingly, lobbying organizations like Flex, TechNet, and CWI have spent millions of dollars in support of third-category proposals.[103]

While third-category laws offer immediate, limited support to gig workers, they ignore the central dilemma of misclassification: firms retain extreme control over working conditions while shirking the responsibility of employment. In other words, under the FLSA, the economic reality of the relationship between a worker and a company determines whether the relationship is one of employment,[104] but under third-category laws, the economic reality of the relationship is irrelevant. By exempting employers or industries from scrutiny under the economic reality framework and by formalizing companies' ability to shirk labor costs, third-category laws amount to a victory for corporations in their ongoing fight for deregulation and wealth transfer from workers to corporations and their shareholders. And as scholars like Veena Dubal have noted, third-category laws reinforce existing labor-market inequalities by conceding the classification question and solidifying independent contractors — most of whom are Black or brown — as low-status workers.[105]

The experience of California gig workers post-Prop 22 highlights the ultimate third-category scam: Prop 22 promised California gig workers higher minimum wages and healthcare stipends rather than employment, but many California gig workers report that their companies are not meeting even these limited promises.[106] Without the ability to sue in court (due to arbitration clauses), the protections of employment (including the ability to appeal to state employment authorities), or the right organize, California gig workers have virtually no recourse to demand even their paltry promised benefits under Prop 22.[107] Likewise, in New York City, local legislation promised drivers a fluctuating minimum

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102. *See* Armour & Co. V. Wantock, 323 U.S. 126, 133 (1944) ("[A]n employer . . . may hire a man to do nothing, or to do nothing but wait for something to happen . . . . Whether time is spent predominantly for the employer's benefit or for the employee's is a question dependent upon all the circumstances of the case."); Skidmore v. Swift & Co., 323 U.S. 134, 136 (1944) ("no principle of law []precludes waiting time from also being working time").

103. NAT'L EMP. L. PROJECT, *supra* note 27, at 13, 15.

104. *See infra* note 141 and discussion.

105. *See* Veena Dubal, *The New Racial Wage Code*, 15 HARV. L. & POL'Y REV. 511, 514-18 (2021).

106. Levi Sumagaysay, *California Companies Wrote Their Own Gig Worker Law. Now No One Is Enforcing It*, CALMATTERS (Sept. 4, 2024), https://calmatters.org/economy/2024/09/gig-work-california-prop-22-enforcement [https://perma.cc/T45M-2EZZ].

107. *Id*.

pay rate tied to all time worked (including time spent waiting for riders).[108] But rather than actually paying for waiting time, the companies have instead starting locking drivers out of their platforms altogether at sporadic hours to limit recorded (and therefore compensable) waiting time.[109] Without employment, New York City drivers have no recourse against lock-outs.[110] For gig companies, that promises of minimum pay and benefits are virtually unenforceable without employment, is a feature—not a bug—of third-category laws.

But surprisingly, organized labor has also supported third-category laws in many instances.[111] For example, in Massachusetts, the Service Employees International Union (SEIU) backed multiple November 2024 third-category ballot initiatives, including a successful initiative, Question 3, that gives drivers limited bargaining rights.[112] (Of course, unions are not a monolith: the Teamsters opposed this referendum and any measures short of reclassification.[113]) The most straightforward and charitable explanation for SEIU's support is the lack of viable alternatives. Most gig workers have been forced to waive their right to challenge classification in court or in a class.[114] While in rare cases, workers may successfully challenge classification and win individual relief in arbitration, these decisions are not precedential, are secret, and only affect one worker.[115] Where

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108. Natalie Lung, Leon Yin, Aaron Gordon & Denise Lu, *How Uber and Lyft Used a Loophole to Deny NYC Drivers Millions in Pay*, BLOOMBERG (Oct. 10, 2024), https://www.bloomberg.com/graphics/2024-uber-lyft-nyc-drivers-pay-lockouts [https://perma.cc/23UC-A64W].

109. *Id*.

110. *Id*.

111. *See, e.g*., Luis Feliz Leon, *Here's What's in the New Bill Jointly Backed by Uber and the Teamsters in Washington State*, LAB. NOTES (Feb. 25, 2022), https://labornotes.org/2022/02/heres-whats-new-bill-jointly-backed-uber-and-teamsters-washington-state [https://perma.cc/L68A-QTBC].

112. Katie Johnston, *As Showdown with Uber and Lyft Draws Near, Labor Groups Are Split on Their Aims*, BOSTON GLOBE (Apr. 29, 2024, 5:52 AM), https://www.bostonglobe.com/2024/04/29/business/uber-lyft-drivers-classification-employment-union-bargaining [https://perma.cc/JC2W-SEWM]; Will Katcher, *Mass. Election Results: Question 3, Authorizing Uber and Lyft Driver Union, Passes*, MASSLIVE (Nov. 6, 2024), https://www.masslive.com/politics/2024/11/mass-election-results-question-3-authorizing-rideshare-union-on-brink-of-approval.html [https://perma.cc/MKM6-C6AE]. While, unlike some third-category legislation, Question 3 does not explicitly refer to gig drivers as independent contractors, it plainly regards drivers as contractors because all drivers would be covered by the NLRA by default if employees.

113. *Id*.

114. Although the Ninth Circuit recently recognized a limited exception by finding Amazon Flex drivers are exempt from the Federal Arbitration Act and not bound by arbitration clauses because they were engaged in interstate commerce. Rittmann v. Amazon.com, 971 F.3d 904, 907 (9th Cir. 2020).

115. For example, two Arise Virtual Solutions (Arise) workers won arbitration awards finding they were each misclassified as independent contractors and were awarded individual damages in

individual or class action is barred, workers' only hope for reclassification is an enforcement suit by the federal DOL or a state attorney general.[116] Given that a minority of states have dedicated worker-protection resources, this is cold comfort. And even where state attorneys general have brought misclassification suits, gig companies have stalled litigation to a crawl by attempting to compel arbitration, launching protracted procedural challenges, and mounting decisive ballot initiatives like Prop 22.[117] In light of this defeat, some unions have decided to take what they can get, including third-category reforms, particularly if they come with quasi-collective-bargaining benefits.[118] For example, Question 3 grants gig drivers sectoral-bargaining power. Specifically, it authorizes a driver organization to become the exclusive bargaining representative for gig drivers after collecting signatures from twenty-five percent of active drivers, and it permits a state Employment Relations Board (but not the NLRB) to hear unfair work practice allegations.[119] On the one hand, it is reasonable to believe that limited organizing rights, like those under Question 3, could improve some workers' circumstances, at least in the short term, even without reclassification.

But this piecemeal approach is ultimately ill-fated: as drafters of the FLSA recognized, wage-and-hour protections and collective-bargaining rights are both necessary to protect and empower workers, but neither is sufficient on its own.[120] With wage-and-hour standards but no collective bargaining, employers

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2015. Ken Armstrong, Justin Elliott & Ariana Tobin, *Meet the Customer Service Reps for Disney and Airbnb Who Have to Pay to Talk to You*, PROPUBLICA (Oct. 2, 2020, 5:00 AM EDT), https://www.propublica.org/article/meet-the-customer-service-reps-for-disney-and-airbnb-who-have-to-pay-to-talk-to-you [https://perma.cc/HB9G-M45P]. Nearly a decade elapsed with most Arise workers' circumstances unchanged, until the D.C. Attorney General brought a misclassification suit against Arise that resulted in it leaving the District in early 2024. *See infra* notes 157-57 and accompanying text.

116. Or, in California, a suit under the Private Attorneys General Act. *See* W. Eric Baisden & Adam Primm, *States Seeking to Expand Availability of Private Attorney General Laws to Combat Arbitration Agreements*, JD SUPRA (Feb. 25, 2020), https://www.jdsupra.com/legalnews/states-seeking-to-expand-availability-24619 [https://perma.cc/33GX-FM9J].

117. *See supra* Part III.

118. Johnston, *supra* note 112.

119. *Question 3: Unionization for Transportation Network Drivers*, SEC'Y COMMONWEALTH MA., https://www.sec.state.ma.us/divisions/elections/publications/information-for-voters-24/quest_3.htm [https://perma.cc/3MBV-KG72].

120. *See, e.g.*, Franklin D. Roosevelt, Annual Message to the Congress (Jan. 3, 1938), *in* 7 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 1, 6 (Samuel I. Rosenman ed., 1941) (describing the FLSA as "legislation to end starvation wages and intolerable hours," after which "more desirable wages are and should continue to be the product of collective bargaining"). Put another way, perhaps unions, preoccupied with labor law, undervalue the importance of employment law. But as Kate Andrias and Craig Becker explain, the bifurcation of employment and labor law as discrete categories—one concerned with individual rights and the other concerned with collective rights—is a political development, divorced from the

would have a financial incentive to pay minimum wages without the deterrence of a protected-employee strike. On the flip side, collective-bargaining rights with no wage-and-hour standards means negotiations would proceed without any objective baseline for pay or conditions, likely leading to more contracts with sub-minimum living wages and working conditions.[121] (Not to mention that bargaining rights under third-category initiatives like Question 3 do actually entail the threat of NLRA-protected strikes.) Moreover, even where third-category legislation extends some bargaining rights to gig workers, it typically only extends to workers who perform a minimum amount of work on the platform, leading to the ironic result that workers who use the platform sparingly—that is, flexibly—are categorically excluded from even the limited benefits.[122]

To be sure, there are even more cynical explanations for labor's support of Question 3 and similar initiatives: namely, unions—but not necessarily workers—stand to benefit from increased membership and dues under sectoral bargaining.[123] As critics of sectoral (industry-wide) bargaining point out, these unions are less dependent on a strong, engaged base and do not require organizing to grow, leading to weaker solidarity and fewer pro-worker outcomes.[124]

Given that legislative efforts like AB 5 in California have not succeeded in the face of corporate third-category countermeasures like Prop 22, it is reasonable for legislatures to be pessimistic about their ability to improve gig work directly.

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legislative history and purpose of the FLSA and the NLRA. Kate Andrias, *An American Approach to Social Democracy: The Forgotten Promise of the Fair Labor Standards Act*, 128 YALE L.J. 616, 629, 687-88 (2019); Craig Becker, *Thoughts on the Unification of U.S. Labor and Employment Law: Is the Whole Greater than the Sum of the Parts?*, 35 YALE L. & POL'Y REV. 161, 162-63 (2016).

121. As Héctor Figueroa, the head of an SEIU local in New York, put it: "Collective bargaining without a minimum wage[] means that we are forced to bargain for what should already be rightfully ours." Noam Scheiber, *Debate over Uber and Lyft Drivers' Rights in California Has Split Labor*, N.Y. TIMES (June 29, 2019), https://www.nytimes.com/2019/06/29/business/economy/uber-lyft-drivers-unions.html [https://perma.cc/39US-N6FY].

122. *2024 Information for Voters*, SEC'Y COMMONWEALTH MA., https://www.sec.state.ma.us/divisions/elections/publications/information-for-voters-24/quest_3_full_text.htm [https://perma.cc/VAE7-GP4T] (explaining that an "active transportation network driver" under Question 3 is one who completed more than the median number of rides in the previous six months).

123. Luke Goldstein, *Massachusetts Ballot Measure Criticized for Creating Gig Worker "Company Unions,"* AM. PROSPECT (Sept. 23, 2024), https://prospect.org/labor/2024-09-23-massachusetts-ballot-measure-gig-worker-company-unions [https://perma.cc/3JSN-WDAC].

124. *Id.*; But others note that "inclusive sectoral bargaining, when combined with worksite bargaining, offers numerous advantages for workers . . . because, unlike firm-based bargaining, which tends to compress wages within a firm, sectoral bargaining directly affects wages throughout the labor market." Kate Andrias, *Union Rights for All: Towards Sectoral Bargaining in the United States*, *in* THE CAMBRIDGE HANDBOOK OF U.S. LABOR LAW: REVIVING AMERICAN LABOR FOR A 21ST CENTURY ECONOMY 59 (Richard Bales & Charlotte Garden eds., 2020).

(And if a Prop 22-style referendum is inevitable, perhaps an AB 5-style law is not advisable). But this does not mean legislatures should wash their hands of gig workers. Unlike third-category laws that identify limited benefits of employment and extend them to gig workers, an alternative paradigm is preferable: securing for *employees* the perceived benefits of contracting, namely, flexibility. After all, contractors and employees do not exist in separate labor markets — the very same worker may move in and out of employment and contracting throughout their career — so creating better work experiences requires thinking holistically. And many employees, especially low-wage employees, face increasingly variable and unpredictable schedules,[125] which creates flexibility for employers at the expense of employees.[126] All of these practices shift business risk from firms onto employees.

Some states and cities have already passed laws that guarantee employees' flexibility, like part-time pay parity,[127] the right not to have to find coverage,[128] schedule transparency and notice requirements,[129] compensation for schedule changes,[130] the right to request scheduling accommodations,[131] first right of

125. For example, schedules are increasingly determined algorithmically based on predicted demand. *See* Kaye Loggins, *Here's What Happens When an Algorithm Determines Your Work Schedule*, VICE (Feb. 24, 2020, 9:00 AM), https://www.vice.com/en/article/g5xwby/heres-what-happens-when-an-algorithm-determines-your-work-schedule [https://perma.cc/V6QR-6A49].

126. NAT'L WOMEN'S L. CTR., *supra* note 11, at 1-2. For hourly employees, more than half the workforce, variable schedules mean variable incomes. John Caplan, *America's Hourly Workers*, FORBES (Mar. 12, 2021, 11:06 AM), https://www.forbes.com/sites/johncaplan/2021/03/12/americas-hourly-workers [https://perma.cc/9JAS-274N].

127. *See, e.g.*, S.F., CAL., LAB. & EMP. CODE div. I, art. 42, § 5 (2015) (requiring employers of retail workers to treat part-time employees equally to comparable full-time employees with respect to starting wages, access to paid and unpaid time off, and eligibility for promotions).

128. *See, e.g.*, SEATTLE, WASH., MUN. CODE § 14.22.045(3)(a) (2016) (prohibiting employers from requiring employees to find a replacement work missed due to a protected reason).

129. *See, e.g.*, SEATTLE, WASH., MUN. CODE § 14.22.40 (2016) (requiring employers to provide employees with initial notice of schedule and fourteen days' advance notice of new schedules).

130. *See, e.g.*, CHI., ILL., MUN. CODE § 6-110-050(b) (2020) (providing compensation for employees subject to employer-initiated schedule changes); S.F., CAL., LAB. & EMP. CODE div. I, art. 42, § 4(c)(2) (2015) (same).

131. *See, e.g.*, N.H. REV. STAT. ANN. § 275:37-b (2016) (prohibiting employers from retaliating against employees "solely because the employee requests a flexible work schedule"); VT. STAT. ANN. tit. 21, § 309 (2014) (requiring employers to consider flexible work requests semi-annually).

refusal for existing employees,[132] breaks between shifts,[133] split-shift pay,[134] protections from reduced hours,[135] reporting pay,[136] and paid time off.[137] Like any pro-worker measure, flexible employment laws will face industry pushback. But many progressive jurisdictions have already succeeded in passing some of these laws, [138] which cannot be said of states' and cities' legislative efforts to reclassify gig workers, which pose a more existential threat to gig companies. And if a number of progressive states and cities passed comprehensive flexible-employment laws, at least some gig workers would surely opt for traditional employment. Likewise, some of the frustration that drives workers into the informal gig economy would be diminished.[139]

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132. *See, e.g.*, CHI., ILL., MUN. CODE § 6-110-060(a) (2020) (requiring an employer to offer additional available shifts to existing covered employees before offering them to temporary employees); SAN JOSE, CAL. MUN. Code, § 4.101.040(A) (2016) (same).

133. *See, e.g.*, EMERYVILLE, CAL., MUN. CODE § 5-39.06 (2017) (giving employees the right to decline shifts with fewer than eleven hours between them and to 1.5 times regular pay if accepted); SEATTLE, WASH., MUN. CODE § 14.22.035(A)-(B) (2016) (same, but for ten hours between shifts).

134. *See, e.g.*, CAL. CODE REGS. tit. 8, § 11040(4)(C) (2001) (requiring one hour's pay at minimum wage for split shifts worked); N.Y. COMP. CODES R. & REGS., tit. 12, § 142-2.4 (2016) (similar); D.C. MUN. REGS. tit. 7, § 906 (1994) (similar).

135. *See, e.g.*, N.Y., N.Y. ADMIN. CODE § 20-1221 (2017) (prohibiting a fast-food employer from reducing an employee's hours by more than fifteen percent of the highest hours in the employee's regular schedule during the last 12 twelve months without the employee's consent).

136. *See, e.g.*, N.J. ADMIN. CODE § 12:56-5.5(a) (1995) (providing compensation for employees who are required to report to work and are not given sufficient work); 28 R.I. GEN. LAWS § 28-12-3.2(a) (1974) (same); D.C. MUN. REGS. tit. 7, § 907 (1994) (same); CAL. CODE REGS. tit. 8, § 11040(3)(B)(2) (2001) (same); CONN. AGENCIES REGS. § 31-62-D2(d) (1972) (same); 454 MASS. CODE REGS. 27.04(1) (2015) (same).

137. Eighty-seven percent of private sector employees have some paid leave but half the lowest decile of earners, and a third of part-time workers, do not. Molly Weston Williamson, *The State of Paid Time Off in the U.S. in 2024*, AM. PROGRESS (Jan. 17, 2024), https://www.americanprogress.org/article/the-state-of-paid-time-off-in-the-u-s-in-2024 [https://perma.cc/MCA2-DTUS].

138. Future research should analyze whether independent contracting rates go down when flexible employment opportunities increase in a jurisdiction.

139. To be sure, any legislation that increases costs for employers may further incentivize misclassification, which underscores the importance of creating strong penalties for violations and prioritizing robust enforcement at every level of government. *See* Anna Stansbury, *Incentives to Comply with the Minimum Wage in the US and UK*, IZA INST. OF LAB. ECON. 16 (Mar. 2024), https://docs.iza.org/dp16882.pdf [https://perma.cc/L23Z-TT3N] (finding that typical firms need a 48%-83% probability of detection by federal DOL or a 25% probability of a successful FLSA suit to have an incentive to comply under existing wage and hour penalties).

V. THE ENFORCER'S PREROGATIVE

When legislative attempts to combat misclassification are defeated decisively, we would hope to see enforcers and courts, perhaps less susceptible to corporate influence, curb misclassification. But so far, we have not. Ideally, the solution to the misclassification crisis would be robust federal enforcement but, to date, the federal DOL has been far from a leader here: DOL has yet to take on any of the largest platform companies.[140] On a modest positive note, in January 2024, DOL issued a final rule that reinstated a worker-friendly version of the economic-realities test for determining whether a worker is an employee under the FLSA.[141] But, while the rule stands, its impact is limited given that most gig workers never see a day in court due to forced arbitration and class-action waivers.[142] Further, outcomes of misclassification litigation are stochastic, regardless of the legal standard applied.[143] In fairness, federal resources are grossly insufficient.[144] But

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140. To date, federal DOL has not sued any major gig company (Uber, Lyft, Instacart, DoorDash, GrubHub, Shipt, Amazon Flex, Handy, TaskRabbit, Rover, Postmates, Caviar, GoPuff, Fetch, etc.) for misclassification.

141. Employee or Independent Contractor Classification Under the Fair Labor Standards Act, 89 Fed. Reg. 1638, 1726 (Jan. 10, 2024) (to be codified at 29 C.F.R. pts. 780, 788, 795) (reversing Independent Contractor Status Under the Fair Labor Standards Act, 86 Fed. Reg. 1168 (Jan. 7, 2021)). The 2024 rule establishes a six-prong "totality-of-the-circumstances" test for economic reality considering the following factors, none of which are dispositive: (1) the worker's opportunity for profit or loss depending on managerial skill; (2) investments by the parties; (3) the work relationship's permanency; (4) the nature and degree of control over the work; (5) whether the work is an integral part of the employer's business; and (6) the worker's skill and initiative. Employee or Independent Contractor Classification Under the Fair Labor Standards Act, 29 C.F.R. 795.110(b)(1)-(6). In contrast, the 2021 rule implemented a five-prong test, which emphasized two "core factors": "the nature and degree of the individual's control over the work" and "the worker's opportunity for profit or loss." Employee or Independent Contractor Classification Under the Fair Labor Standards Act, 89 Fed. Reg. at 1644. By emphasizing all six factors, none of which are dispositive, the 2024 rule restores the Obama-era test, under which more gig workers are likely to be classified as employees. For example, whereas the 2021 rule would have likely given strong weight to workers' scheduling flexibility in the "core" prong regarding the "nature and degree of . . . control," the 2024 rule leaves room for a more comprehensive and fact-specific inquiry into the workers' circumstances. Critically, the 2024 rule emphasizes the putative employer's *right* to control workers, above and beyond control they actually exercise. *See* Employee or Independent Contractor Classification Under the Fair Labor Standards Act, 89 Fed. Reg. at 1721.

142. *See supra* note 13 and accompanying text.

143. *See* Charlotte S. Alexander, *Misclassification and Antidiscrimination: An Empirical Analysis*, 101 MINN. L. REV. 907, 951 (2017).

144. DOL's enforcement resources have declined over the last five decades even as the labor economy has expanded. Daniel Costa & Philip Martin, *Record-Low Number of Federal Wage and Hour Investigations of Farms in 2022*, ECON. POL'Y INST. (Aug. 22, 2023), https://www.epi.org/publication/record-low-farm-investigations

for over a year, DOL has had the strongest pro-worker rule likely to exist anytime soon—which the current Trump administration is likely to roll back entirely[145]—yet it still has not taken any significant action to combat misclassification.[146] So, in reality, DOL's lack of recent leadership is more likely a reflection of political priorities or industry capture, rather than pragmatic considerations.[147]

In the absence of federal anti-misclassification action under democratic leadership, and under the certainty of inaction by the current republican leadership, states and cities must move the needle. A handful of jurisdictions have begun to take on the gig economy through litigation: offices of attorneys general in Massachusetts, Minnesota, California, and Washington, D.C., have all filed misclassification lawsuits against gig companies, but none have yet been litigated to

[https://perma.cc/U9RB-4MMB]; Ihna Mangundayao, Celine McNicholas & Margaret Poydock, *Worker Protection Agencies Need More Funding to Enforce Labor Laws and Protect Workers*, ECON. POL'Y INST.: WORKING ECON. BLOG (July 29, 2021, 12:29 PM), https://www.epi.org/blog/worker-protection-agencies-need-more-funding-to-enforce-labor-laws-and-protect-workers [https://perma.cc/5M2V-FRMY].

145. Passing third-category legislation to enshrine contractor status for gig workers is a Project 2025 platform. *See Mandate for Leadership—The Conservative Project, Project 2025*, HERITAGE FOUND. 590 (2023), https://static.project2025.org/2025_MandateForLeadership_FULL.pdf [https://perma.cc/7QT4-F2BZ].

146. After all, efforts to codify an even stronger presumption of employment, like the PRO Act, have yet to gain meaningful traction. Craig Ruiz, *Union Top Priority PRO Act Clears Senate Committee, but Sinema and Kelly Still Not Supporting*, CHAMBER BUS. NEWS (July 11, 2023), https://chamberbusinessnews.com/2023/07/11/union-top-priority-pro-act-clears-senate-committee-but-sinema-and-kelly-still-not-supporting [https://perma.cc/UFH3-U2K7].

147. Courting government actors has been part of Uber's domestic and international playbook. Stephanie Kirchgaessner, Felicity Lawrence & Johana Bhuiyan, *The Uber Campaign: How Ex-Obama Aides Helped Sell Firm to World*, GUARDIAN (July 10, 2022), https://www.theguardian.com/news/2022/jul/10/uber-campaign-how-ex-obama-aides-helped-sell-firm-to-world [https://perma.cc/46B4-R57C]. The Biden Administration has elevated a number of individuals more sympathetic to gig companies than their workforces. For example, the Biden Whitehouse hired Seth Harris, whose academic work laid the foundation for third-category laws like Prop 22, as Deputy Assistant to the President for Labor and the Economy. Jennifer Epstein, *Biden Adds Former Obama Labor Official Harris to White House*, BLOOMBERG (Mar. 2, 2021), https://www.bloomberg.com/news/articles/2021-03-02/biden-adds-former-obama-labor-official-harris-to-white-house [https://perma.cc/R3RM-2QYA]. More recently, Vice President Harris's presidential campaign courted Tony West, her brother-in-law, who also happens to be Uber's General Counsel. Christopher Cadelago, *Harris Allies Trying to Recruit Obama Hand David Plouffe for Top Campaign Role*, POLITICO (July 22, 2024, 10:26 PM EDT), https://www.politico.com/news/2024/07/22/harris-campaign-obama-adviser-00170374 [https://perma.cc/5KTH-JYKN]. Most recently, Harris gave a prominent campaign role to David Plouffe who previously, as senior vice president at Uber, lobbied aggressively for laws favoring the company. Zephyr Teachout, *Kamala Harris's Big Business Choice*, N.Y. REV. (Aug. 4, 2024), https://www.nybooks.com/online/2024/08/04/kamala-harris-big-business-choice [https://perma.cc/242Z-34QE].

their merits.[148] Attorneys general in other states like New York and New Jersey have commenced formal misclassification investigations or issued administrative assessments regarding misclassification.[149] But as revealed by the experience of the Office of the Attorney General of California—which has been in litigation against Uber and Lyft since 2020[150] and endured the whiplash of AB 5 and Prop 22—litigating misclassification cases to their merits is extraordinarily time-consuming and resource-intensive. While slow litigation can be an artifact of civil procedure, it is also a strategy adopted by gig companies that stand to benefit from delays: in the time that litigation is pending (like in California), they can lobby for legislative changes (like Prop 22) that eliminate litigation risk.[151]

For all these reasons, misclassification settlements may be a more realistic or desirable avenue for change from the perspective of enforcers, as compared with judicial merits decisions.[152] But just as legislators' choices about gig work have distributional consequences, so too do settlements. By reviewing recent gig misclassification settlements, this Part offers a taxonomy of settlement types, which primarily vary in terms of injunctive relief (i.e., what changes they require of companies). These range from *no injunctive relief* to prospective *reclassification* of contractors as employees to *eviction* of the company from a jurisdiction altogether. And in the middle of this spectrum rests an alternative that entails some alternative *transformation* of the business relationship or the firm's treatment of workers.

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148. The Massachusetts Attorney General sued Uber and Lyft; both the Office of Attorney General of the District of Columbia and the Minnesota Office of Attorney General sued Arise Virtual Solutions, Inc. and Shipt, Inc.; and the California Office of the Attorney General, along with the San Francisco City Attorney, sued Handy, Uber, and Lyft. *See infra* notes 157-66 and accompanying text.

149. The New York Attorney General and New Jersey Office of the Attorney General have both investigated Uber and Lyft. *See infra* notes 153, 163 and accompanying text.

150. Press Release, Cal. Off. Att'y Gen., Attorney General Becerra and City Attorneys of Los Angeles, San Diego, and San Francisco Sue Uber and Lyft Alleging Worker Misclassification (May 5, 2020), https://oag.ca.gov/news/press-releases/attorney-general-becerra-and-city-attorneys-los-angeles-san-diego-and-san [https://perma.cc/C3XF-WPGB].

151. Katie J. Wells, Declan Cullen & Kafui Attoh, *Inside Uber's Political Machine*, N.Y. REV. (May 9, 2024), https://archive.is/6XPT0 [https://perma.cc/VJB5-EBPK].

152. While settlements are not precedential and only bind their signatories, they can still set the stage for future settlements with other gig companies or in other jurisdictions. In addition to providing faster resolutions and immediate relief for workers, settlements can achieve outcomes that a court would or could not order. For example, enforcers could require companies to change policies or make other material changes, like dropping forced arbitration from contracts with workers, as a condition of settlement.

A. No Injunctive Relief

Parties could settle with no injunctive relief, that is, no change to workers' classification, but with backwards-looking monetary relief for workers or the state. As an example, in 2022, Uber paid $100 million, representing unemployment taxes and penalties for a five-year period, to resolve an administrative assessment from the New Jersey DOL.[153] The assessment implicated misclassification in all but name because only employers are obligated to withhold and remit unemployment taxes from employee paychecks, which fund unemployment benefits for workers that lose employment. Effectively, the resolution required Uber to pay its unemployment tax bill for a short backwards-looking period, but it did not require Uber to pay for any of the other harms of misclassification (like wages owed workers) or require Uber to do anything differently moving forward, including with respect to unemployment-insurance taxes.[154]

The benefits of this resolution are obvious: it provided an immediate and significant influx of cash for the state unemployment fund. Equally obvious are its limitations: it put nothing directly into workers' pockets, changed nothing about Uber's ongoing treatment of drivers, and merely reset the clock on any misclassification investigation. Critically, because the resolution did not require any conduct changes or release Uber from any claims outside the period of 2014 to 2018, it fully preserved the misclassification question and offered the company no prospective peace. As a result, the New Jersey DOL could sue Uber again today for the same conduct postdating 2018 and achieve the exact same result, while suing for misclassification-related remedies for drivers in the meantime. This approach may appeal to states and workers insofar as it provides immediate relief. But pursuing repeat settlements without systematically changing firm

153. Originally, the New Jersey DOL issued Uber and its New Jersey subsidiary a $649 million assessment, which it sought to enforce in the New Jersey Office of Administrative Law. That action was dismissed after the parties mediated and the New Jersey DOL issued a revised, much lower assessment for roughly $100 million, which the companies paid in full. Uber Techs., Inc. v. N.J. Dep't of Lab. & Workforce Dev., No. 05103-20 (Off. of Admin. Law, Oct. 5, 2022); Raiser, LLC v. N.J. Dep't of Lab. & Workforce Dev., No. 05104-20 (Off. of Admin. Law, Oct. 5, 2022). *See also* Press Release, N.J. Dep't of Lab. & Workforce Dev., Uber Pays $100M in Driver Misclassification Case with NJ Department of Labor and Workforce Development and Attorney General's Office (Sept. 13, 2022), https://www.nj.gov/labor/lwdhome/press/2022/20220913_misclassification.shtml [https://perma.cc/VS7A-GRZM] (describing the state's audit, assessment, and settlement).

154. Uber Techs., Inc. v. N.J. Dep't of Lab. & Workforce Dev., No. 05103-20 ¶ 1 (Off. of Admin. Law, Oct. 5, 2022) (releasing the companies from liability under the New Jersey Unemployment Compensation Law and Temporary Disability Benefits Law for 2014-2018).

behavior is obviously inefficient: here, the investigation leading to settlement spanned more than three years.

B. Reclassification

Perhaps most simply, settlements could require prospective reclassification of workers as employees. As one example, in February 2024, the San Francisco City Attorney's Office announced a settlement with Qwick to resolve a lawsuit alleging misclassification.[155] Pre-settlement, Qwick provided on-demand staffing to the hospitality industry through independent-contractor servers, bussers, bartenders, and dishwashers. Post-settlement, Qwick will convert its workers to full employees and function as a traditional staffing firm in the restaurant industry.[156]

While this may be an ideal outcome from an enforcer's perspective — and may be their default starting position in negotiations — it is naturally the hardest sell to companies given the increased costs of employment. And, realistically, because many gig companies' entire business model is based on misclassification, reclassification would be a death knell. But where gig companies participate in an industry with existing and profitable employment business models, like the restaurant industry, this approach may be feasible.

C. Eviction

An alternative simple approach is to require the firm to dissolve within the relevant jurisdiction — that is, to stop doing business there. As one example, in April 2024, the D.C. Attorney General reached a settlement with Arise Virtual Solutions, Inc. (Arise), a gig company that engages independent-contractor "agents" who perform customer-service calls for client companies.[157] Under the settlement, Arise must cease all business in D.C. (Notably, Arise has been

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155. *Chiu Secures $2.1 Million Deal Requiring Gig Economy Company to Reclassify Workers as Employees*, CITY ATT'Y S.F. (Feb. 22, 2024), https://www.sfcityattorney.org/2024/02/22/chiu-secures-2-1-million-deal-requiring-gig-economy-company-to-reclassify-workers-as-employees [https://perma.cc/3CAE-8JWG].

156. *Id.* More recently, the D.C. Office of the Attorney General reached similar reclassification-based settlements with Fetch, a package delivery service, and Food Works Group, a food systems nonprofit. Press Release, Off. Att'y Gen. D.C., Attorney General Schwalb Secures over $227,000 for Workers & DC in Multiple Wage Theft Actions (June 6, 2024), https://oag.dc.gov/release/attorney-general-schwalb-secures-over-227000 [https://perma.cc/RL3L-576R].

157. Press Release, Off. Att'y Gen. D.C., Attorney General Schwalb Secures $3 Million for Workers & DC in Wage Theft Enforcement Action (Mar. 12, 2024), https://oag.dc.gov/release/attorney-general-schwalb-secures-3-million-workers [https://perma.cc/2XAP-CCVJ].

tactically pulling out of states with the most progressive labor laws for years in a game of whack-a-mole with enforcers.[158])

This settlement outcome might be unappealing to firms and enforcers alike: eliminating an entire market is bad business for firms and, on the flip side, eliminating any form of economic activity may be undesirable optics for a political official, especially an elected attorney general with business-community constituencies. But where reclassification is economically impossible for the firm and no viable alternative short of reclassification would render the business model compliant, this may be the only way to avoid lengthy litigation with a functionally equivalent result.

D. Transformation

Lastly, a settlement could require the company to make changes to its business short of reclassification. This split-the-difference option may initially be the most appealing for targets and enforcers, but it is by far the most distributionally significant and should be approached cautiously. Transformation settlements fall into two categories: (1) transforming the nature of the business relationship or (2) transforming workers' wages or working conditions.

Consider a recent example in the first category. In May 2023, the San Francisco City Attorney announced a settlement with Handy, a gig-economy company that offers in-home domestic services.[159] Under the settlement, in addition to providing restitution for workers, called "pros," Handy agreed to let pros set their own minimum hourly rates and negotiate hours and pay with customers.[160] Handy also agreed to relinquish certain forms of technical surveillance and control over pros, including real-time geolocation information.[161] Handy is also barred from penalizing pros for being selective about which jobs to take.[162] All

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158. Ken Armstrong, Justin Elliott & Ariana Tobin, *Meet the Customer Service Reps for Disney and Airbnb Who Have to Pay to Talk to You*, PROPUBLICA (Oct. 2, 2020), https://www.propublica.org/article/meet-the-customer-service-reps-for-disney-and-airbnb-who-have-to-pay-to-talk-to-you [https://perma.cc/HB9G-M45P].

159. Press Release, S.F. Dist. Att'y, District Attorney Brooke Jenkins Announces a $6 Million Settlement and Permanent Injunction in Worker Protection Lawsuit (May 18, 2023), https://www.sfdistrictattorney.org/press-release/district-attorney-brooke-jenkins-announces-a-6-million-settlement-and-permanent-injunction-in-worker-protection-lawsuit [https://perma.cc/P9Z4-GMBJ].

160. Stipulated Final Judgment and Permanent Injunction, California v. Handy Techs. Inc., No. CGC-21-590442, 4-10, 16 (Cal. Super. Ct. May 18, 2023).

161. *Id*. at 8.

162. *Id*. at 6, 9-10. Many gig companies measure workers' "acceptance rate" and penalize workers for declining jobs by offering them fewer or worse jobs in the future. *See* Marshall Steinbaum, *The Antitrust Case Against Gig Economy Labor Platforms*, LPE BLOG (Apr. 7, 2022),

things considered, the Handy settlement effectively requires business-model changes that bolster pros' classification as bona fide independent contractors. While the settlement does not set minimum wages for pros or offer any sick leave (the domain of employment), its terms are clearly geared toward providing genuine independence to pros, evidenced by pros' new ability to negotiate prices, their unrestricted ability to choose jobs and hours, and their freedom from company surveillance.

Compare this to two other recent high-profile settlements in the latter category (i.e., requiring changes to workers' wages or working conditions). In November 2023, the New York Office of the Attorney General (NY OAG) announced a settlement with Uber and Lyft for $328 million combined to resolve its misclassification investigation of the companies.[163] Most recently, in July 2024, MA OAG also reached a settlement with Uber and Lyft for a combined $175 million, *after* finishing the vast majority of its misclassification trial against both companies.[164] Both settlements require a minimum pay for drivers — $26 per hour in New York and $32.50 per hour in Massachusetts — but only contemplate payment for "engaged time," that is, time driving to pick up a rider or completing a ride, not the substantial time spent waiting to be offered jobs.[165] Both

https://lpeproject.org/blog/the-antitrust-case-against-gig-economy-labor-platforms [https://perma.cc/2X4V-QX4J].

163. Reading the New York Office of the Attorney General (NY OAG) press release, the allegations are not obvious. *See* Press Release, Off. N.Y. State Att'y Gen., Attorney General James Secures $328 Million from Uber and Lyft for Taking Earnings from Drivers (Nov. 2, 2023), https://ag.ny.gov/press-release/2023/attorney-general-james-secures-328-million-uber-and-lyft-taking-earnings-drivers [https://perma.cc/4585-DES3]. But the settlement plainly implicates misclassification: as a condition of settlement, Uber and Lyft must provide paid sick leave (which only applies to employees), pay for training time (compensable work time for employees), and meet certain minimum-pay requirements (although notably not the minimum wage, which only applies to employees). Uber Techs., Inc., No. 23-040 (Nov. 1, 2023) [hereinafter NY OAG Uber/Lyft Settlement], https://ag.ny.gov/sites/default/files/settlements-agreements/uber-lyft-aods.pdf [https://perma.cc/S5GZ-TCMY].

164. The settlement was announced on the eve of closing statements. Jennifer Smith, *Campbell Explains Why She Settled Uber, Lyft Case on Eve of Likely Court Victory*, COMMONWEALTH BEACON (July 15, 2024), https://commonwealthbeacon.org/ballot-questions/campbell-explains-why-she-settled-uber-lyft-case-on-eve-of-likely-court-victory [https://perma.cc/NL5W-ERPZ].

165. NY OAG Uber/Lyft Settlement, app. A ("Engaged time is defined to include (i) the time between accepting a rider's requested trip and reaching the rider's requested pick-up destination and waiting for the rider at the requested pick-up destination and (ii) the time spent transporting the rider to the requested drop-off destination."); Settlement Agreement Between the Attorney General and Uber Technologies, Inc., and Lyft, Inc., Campbell v. Uber Techs., Inc., No. 20184CV01519-BLS1 ¶¶ 17, 20-21 (Mass. Super. Ct. June 27, 2024) [hereinafter MA OAG Uber/Lyft Settlement] ("'Engaged Time' shall mean the total of P2 Time [time elapsed after accepting ride before picking up rider] and P3 Time [time with rider in the car] on a Company Driver App").

settlements provide paid sick leave that accrues at a rate of one hour of leave per 30 hours of active time (up to 56 hours per year in New York and 40 hours per year in Massachusetts).[166] Under the MA OAG settlement (but not that of NY OAG), the companies also must obtain occupational accident insurance for drivers and contribute to a "portable health fund," which will provide cash stipends for healthcare plans for drivers who average enough weekly engaged time.[167]

Unlike the Handy settlement, the NY OAG and MA OAG settlements do nothing to bolster drivers' statuses as independent contractors: they do not offer drivers the ability to negotiate rates, choose jobs without restriction or influence, or be free from company surveillance. But both settlements nonetheless offer the companies a broad release from misclassification liability.[168] In other words, the settlements concede classification in exchange for modest driver protections and benefits that fall far short of employment, all without increasing drivers' independence in any way. While the settlements offer minimum-pay standards that may appear generous (above minimum wage) on their face, the settlement terms do not compensate drivers for all time worked (unlike pay protections for employees) and do not require the companies (unlike employers) to reimburse business expenses like gas and auto insurance. As a result, considering all time worked and all expenses incurred by drivers, drivers will almost certainly continue to earn subminimum wages, notwithstanding the settlement. Ironically, while the settlements offer drivers some benefits like sick leave, these benefits accrue slowly based on engaged time, and therefore likely do not inure to drivers who work sporadically and infrequently—the very workers whose "flexibility" the companies claim to promote. (Even those drivers who work enough to accrue these benefits will not be eligible for overtime pay.) And, unlike employees, drivers impacted by these settlements still do not have collective-bargaining

166. NY OAG Uber/Lyft Settlement ¶ 26; MA OAG Uber/Lyft Settlement ¶ 30-33.

167. MA OAG Uber/Lyft Settlement ¶ 45-46.

168. NY OAG committed not to investigate, sue, or seek additional damages related to the subject of the settlement, including any claims relating to New York's Minimum Wage Act (like minimum wage and overtime claims), which were *not* included under the settlement. NY OAG Uber/Lyft Settlement ¶ 39. This releases Uber/Lyft from claims for at least five years, after which "the Parties will meet and confer to discuss the continued relevance and sufficiency of the prospective relief." *Id.* ¶ 42. Despite this broad release, the settlement reserves some rights for NY OAG: "[T]he OAG reserves the right to investigate or litigate alleged violations outside the subject matter of the investigation, including alleged violations that depend on a finding that Drivers are misclassified." *Id.* ¶ 42. This narrow carve-out refers to the few misclassification-related harms, like failure to pay unemployment insurance, that were not addressed by the settlement. MA OAG offers a similarly broad release and only requires the parties to meet and confer regarding "the continued relevance and sufficiency of the prospective relief" or in the event that "any of the [p]arties believes there is a material change in the law applicable to [d]rivers." MA OAG Uber/Lyft Settlement ¶ 81-87.

rights,[169] are not covered by workers' compensation,[170] and are not presumptively covered by other state employment protections.

Quantifying how much these settlements left on the table is difficult because neither jurisdiction has published comprehensive data on the companies. But helpfully, Massachusetts has conducted enough public research to facilitate some estimates. First, consider damages owed to workers for waiting time.[171] According to a study conducted by the state, Massachusetts ride-hail drivers were paid $1,428,574,247 in 2023.[172] While studies differ somewhat,[173] ride-hail drivers spend about 34% of their working time waiting for a ride offer.[174] Combining these statistics, if employees, Massachusetts drivers are owed $735,932,188 in

169. Post-settlement, the Massachusetts Attorney General remarked that she would like to see drivers' rights to organize secured. Chris Lisinski, *Uber, Lyft Drivers Praise Settlement, Push for Union*, COMMONWEALTH BEACON (July 2, 2024), https://commonwealthbeacon.org/politics/uber-lyft-drivers-praise-settlement-push-for-union [https://perma.cc/5V3A-3TZ3]. But she did not demand this as a condition of settlement. Even if drivers get some bargaining rights, they will need to bargain for conditions that all other employees have by virtue of employment.

170. While the MA OAG settlement requires the companies to procure occupational accident insurance, this is typically less comprehensive than state-administered workers' compensation coverage. MA OAG Uber/Lyft Settlement ¶ 40; *see*, *e.g.*, Michael Grabell & Howard Berkes, *Inside Corporate America's Campaign to Ditch Workers' Comp*, PROPUBLICA (Oct. 14, 2015), https://www.propublica.org/article/inside-corporate-americas-plan-to-ditch-workers-comp [https://perma.cc/HW8F-L6RE].

171. Note the MA OAG did not seek damages for drivers in the first instance, only declaratory and injunctive relief. Healey v. Uber Techs., Inc., 2021 WL 1222199, at *1 (Mass. Super. Ct. Mar. 25, 2021). However, if the MA OAG won its trial on the merits, as expected, it could (and should) have subsequently sought damages for drivers and the state. *Id.* at 4.

172. Ma. Off. of the State Auditor, *Assessing Transportation Network Companies' Financial Obligations to Massachusetts Programs*, MASS.GOV tbl.4 (Apr. 26, 2024), https://www.mass.gov/info-details/quantifying-tnc-drivers-earnings-in-massachusetts [https://perma.cc/BG8S-HK5T].

173. *See, e.g.*, James A. Parrott & Michael Reich, *A Minimum Compensation Standard for Seattle TNC Drivers*, CTR. FOR N.Y.C. AFFS. (July 2020), https://www.seattle.gov/documents/Departments/LaborStandards/Parrott-Reich-Seattle-Report_July-2020%280%29.pdf [https://perma.cc/7UQK-MJAQ] (finding a 36-40% waiting time in Seattle); James A. Parrott & Michael Reich, *Transportation Network Company Driver Earnings Analysis and Pay Standard Options*, MINN. DEP'T LAB. & INDUS. 31 (Mar. 8, 2024), https://www.dli.mn.gov/sites/default/files/pdf/TNC_driver_earnings_analysis_pay_standard_options_report_030824.pdf [https://perma.cc/8NEF-8QP7] (finding a 20.1% waiting time in Greater Minnesota counties).

174. One study commissioned by Uber and Lyft, so perhaps less likely to be biased against the companies, found that drivers spend thirty to thiry-eight percent of their miles driven waiting for a ride offer (a good proxy for the share of time spent waiting). Melissa Balding, Teresa Whinery, Eleanor Leshner & Eric Womeldorff, *Estimated TNC Share of VMT in Six US Metropolitan Regions*, FEHR & PEERS 9 fig.3 (Aug. 6, 2019), https://issuu.com/fehrandpeers/docs/tnc_vmt_findings_memo_08.06.2019 [https://perma.cc/TU6C-2ZRY].

damages for waiting time for 2023.[175] Given that MA OAG releases Uber for all backwards-looking conduct, this number should be multiplied by at least three years, the statute of limitations: $2,207,796,560.[176] And Massachusetts has mandatory treble damages where an employer fails to timely pay wages,[177] so in litigation, the companies' exposure for waiting time is more than *$6.6 billion*. Consider just one other category of damages available to misclassified workers: business expenses. According to one study, drivers' business expenses equal 49 cents on the dollar earned.[178] Using the estimate of drivers' dollars earned, including waiting time ($2,164,506,430), we can estimate an additional $1,060,608,150 per year in liability—another *$9.5 billion* in exposure for three years with treble damages.

Finally, consider damages left on the table for the state—unpaid workers' compensation payments and unemployment insurance contributions. The same Massachusetts study, using the estimated $1,428,574,247 in driver earnings (*excluding* waiting time), estimates $52,285,817 in lost workers' compensation payments and $20,714,327 in lost unemployment insurance payments for 2023.[179] Considering all time worked (*including* waiting time), this methodology yields $79,220,935.30 in lost workers' compensation payments[180] and $31,385,343.20 in unemployment-insurance payments[181] for 2023. Multiplying by three years yields exposure of $237,662,806 for workers' compensation and $94,156,029.60 for unemployment insurance.

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175. That is, conservatively applying the companies' payment models rather than the minimum wage, and assuming a 34% waiting time: ($1,428,574,247 / 0.66) - $1,428,574,247 = $735,932,188.

176. MASS. GEN. LAWS ch. 149, § 150 (2015).

177. Reuter v. City of Methuen, 489 Mass. 465, 466 (2022) (finding the Massachusetts Wage Act, MASS. GEN. LAWS ch. 149, § 148-150, requires that employers that fail to timely pay wages must pay treble the amount of the wages as liquidated damages).

178. *The Real Economics of Ridehail Work*, DRIVERS DEMAND JUST. 2 (2023), https://driversdemandjustice.org/wp-content/uploads/2023/10/Gig-Worker-Report-Design_780.pdf [https://perma.cc/SXS9-TVYV].

179. Ma. Off. of the State Auditor, *Estimated Lost TNC Payments to Workers' Compensation (2023)*, MASS.GOV (Apr. 30, 2024) [hereinafter MA Auditor Lost Compensation Calculations], https://www.mass.gov/info-details/estimated-lost-tnc-payments-to-workers-compensation-2023 [https://perma.cc/RF9E-NHRY]; Ma. Off. of the State Auditor, *Estimated Lost TNC Payments to Unemployment Insurance (2023)*, MASS.GOV (Apr. 30, 2024) [hereinafter MA Auditor Lost Unemployment Insurance Calculations], https://www.mass.gov/info-details/estimated-lost-tnc-payments-to-unemployment-insurance-2023 [https://perma.cc/53VP-Q94H].

180. ($2,164,506,430 / 100) * $3.66. *See* MA Auditor Lost Compensation Calculations, *supra* note 179.

181. $2,164,506,430 * 0.0145. *See* MA Auditor Lost Unemployment Insurance Calculations, *supra* note 179.

Economically, the MA OAG settlement was by no means a good deal for drivers or the state: combining the above estimates, it left a minimum of *$16.5 billion dollars* on the table. While no public estimates of New York drivers' time exist, it is safe to assume the math works out similarly badly for the NY OAG settlement. So why would the states agree to such a bad deal—particularly the MA OAG, which not only was at the conclusion of years-long litigation and a trial, but also proclaimed at the end of trial that it was sure to win the case on its merits?[182]

The MA OAG offered one limited explanation: after the MA OAG sued the companies, a coalition including Uber and Lyft backed a third-category ballot initiative for November 2024 to enshrine drivers' status as contractors.[183] As a condition of the MA OAG settlement, the companies agreed to cease all support for the initiative.[184] The Massachusetts Attorney General explained: "A win in court might have given drivers restitution for pay they were owed in the past, but a successful ballot initiative would have wiped out its impact . . . . Our deal with Uber and Lyft made sure that drivers can have both."[185]

Yet on its face, the Attorney General's explanation falls far short. Under the settlement, drivers receive neither complete restitution nor forward-looking protections and benefits equal to employment.[186] And while a successful Prop 22-style initiative would be devastating, a misclassification determination on the merits would have been the first of its kind, sending a clear message that Uber and Lyft's labor model defies longstanding law. It would also expose the companies to *billions* of dollars in liability, a price tag that might actually impact their bottom line, unlike a mere multi-million dollar deal.[187] And even if these settlements were the best attainable result for Uber and Lyft drivers under the gun of ballot initiatives, the agreements nevertheless negatively impact the fight for employment protections for gig workers more broadly, by conceding that corporate power—not economic reality—determines which workers get the protections of

182. Smith, *supra* note 164.

183. After the initiative was rejected once by the Massachusetts Supreme Judicial Court over a vaguely worded provision about accident liability, the companies took no chances and gathered signatures to submit *five* additional versions of the same ballot question. *Id.*; Shira Schoenberg, *SJC Throws Out Uber-Lyft Ballot Question*, COMMONWEALTH BEACON (June 14, 2022), https://commonwealthbeacon.org/economy/sjc-throws-out-uber-lyft-ballot-question [https://perma.cc/9753-8Z3U].

184. MA OAG Uber/Lyft Settlement ¶ 82.

185. Smith, *supra* note 164.

186. *See supra* notes 168-170 and accompanying text.

187. For example, as of October 2024, Uber's market capitalization is over 160 billion dollars. *Uber Technologies, Inc. (UBER)*, YAHOO FIN., https://finance.yahoo.com/quote/UBER [https://perma.cc/3UYS-A5Q9].

employment.[188] Here, in a surprisingly antidemocratic move, the MA OAG made the political determination that its settlement terms, under which drivers remain contractors and are shorted *billions* of dollars, are more desirable than a merits decision and subsequent ballot initiative, under which drivers would also remain contractors.[189]

Put simply, the New York and Massachusetts Uber/Lyft settlements fall for the third-category sham. Given NY OAG's and MA OAG's positions that drivers are misclassified—the premise of the enforcement actions—and given that neither settlement substantively changes the relationship between the companies and drivers, the agreements effectively bless ongoing labor violations. (Tellingly, nowhere in the Massachusetts Attorney General's justification of the settlement did she express that the companies persuaded her on the merits; quite the opposite, she expressed confidence that her office would prevail on the merits.[190]) So while the settlements will cost a modest one-time sum, they permit the companies to continue shirking the costs and responsibilities of employment while maintaining control over their drivers—an overwhelming win for the companies. And Massachusetts drivers, like California drivers post-Prop 22, will have little to no recourse if the companies fail to abide by the settlement,[191] which some drivers have already complained about.[192] Meanwhile, Uber has already imposed a new fee on riders in Massachusetts, called a "Drivers Benefits

188. Massachusetts uses the ABC test, not the economic reality test, for determining worker classification. MASS. GEN. LAWS ch. 149, § 148B (2024). But both tests interrogate the realities of the working relationship. *See supra* note 91. And that Massachusetts uses the most worker-friendly test only increases the likelihood that the state would have prevailed in litigation.

189. Unsurprisingly, organized labor's reaction is mixed. Some unions have celebrated the settlements' terms, like the New York Taxi Workers Alliance regarding the NY OAG settlement, and the Service Employees International Union regarding the MA OAG settlement. Press Release, Off. N.Y. State Att'y Gen., Attorney General James Secures $328 Million from Uber and Lyft for Taking Earnings from Drivers (Nov. 2, 2023), https://ag.ny.gov/press-release/2023/attorney-general-james-secures-328-million-uber-and-lyft-taking-earnings-drivers [https://perma.cc/4585-DES3]; *Massachusetts Uber, Lyft Drivers Launch Historic Ballot Initiative to Win Union Rights*, SERV. EMPS. INT'L UNION (July 3, 2024), https://www.seiu.org/2024/07/massachusetts-uber-lyft-drivers-launch-historic-ballot-initiative-to-win-union-rights [https://perma.cc/QM6A-84F6].

190. Smith, *supra* note 164.

191. *See supra* Part III and note 107.

192. The Rideshare Guy, *Is Lyft Following Massachusetts' New Minimum Wage Laws?*, YOUTUBE (Sept. 12, 2024), https://www.youtube.com/watch?v=9l9HsL8zoKA [https://perma.cc/G65Q-JWMY] (sharing screenshots of Uber rides offered to Massachusetts drivers after the settlement implementation date, offering less than $32.50 per hour).

Surcharge," to recoup the costs of the settlement.[193] And Uber has released multiple nationwide advertisements touting its "agreement" to pay higher wages, as if it was purely voluntary, and proclaiming the terms of the settlement "good for drivers, good for Massachusetts."[194]

Just as legislatures should avoid the third-category sham and be wary of its ahistorical justification and industry origins, so too must enforcers. If states are not prepared to fight for merits decisions on misclassification, or hold the line on principled settlements that avoid the third-category trap, then they should not take on gig companies at all.[195] Because when even progressive attorneys general concede that some workers do not need to be paid and protected for all time worked, regardless of the economic realities of the working relationship, employment protections like the FLSA, the NLRA, and their state equivalents virtually lose all meaning, and the result is billions of dollars in corporate subsidies at the expense of primarily minority working people.[196]

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193. *Understanding Massachusetts Rider Prices*, UBER: UBER BLOG (Aug. 9, 2024), https://www.uber.com/blog/understanding-massachusetts-rider-prices [https://perma.cc/KKJ5-G5J4].

194. *See, e.g.*, Uber, *Pay Standards, Benefits Coming for Mass. Uber Drivers*, FACEBOOK (July 20, 2024), https://www.facebook.com/uber/videos/1686963522132333 [https://perma.cc/EY5K-HPPK]; Uber, *$32.50 per Active Hour Wage Secured for Uber* Drivers, FACEBOOK (Aug. 14, 2024) https://www.facebook.com/uber/videos/296291063547497 [https://perma.cc/9ZSE-E4SC]. The Massachusetts Attorney General has taken to X to denounce Uber for these deceptive advertisements, but nothing in the settlement prohibits the companies from effectively taking credit for their new obligations. Andrea Joy Campbell (@MassAGO), X (formerly TWITTER) (Aug. 15, 2024), https://x.com/MassAGO/status/1824070034282475781 [https://perma.cc/7KU8-6PQ9] ("You might be seeing some of the ads from Uber's media blitz trying to take credit for this, but let's be clear: they're paying because they have to, not because they want to.").

195. Or enforcers could consider enforcement frameworks outside of employment/labor law, like bringing antitrust price-fixing claims or challenging misclassification as an unfair method of competition. *See supra* notes 48, 65-66.

196. States are not the only actors opting for third-category settlement. In June 2023, DOL sued Arise, in what the agency called "the largest misclassification case in its history." Press Release, U.S. Dep't Lab., U.S. Department of Labor Sues National Customer Support Service Provider in Florida for Workers Misclassified as Independent Contractors (June 29, 2023), https://www.dol.gov/newsroom/releases/WHD/WHD20230629-1 [https://perma.cc/Q96V-HJ7H]. But in July 2024, months after the D.C. Office of the Attorney General's settlement with Arise for $3 million and eviction from D.C., DOL settled with Arise for the exact same amount of money, without requiring significant business changes. Settlement Agreement, Su v. Arise Virtual Sols., Inc., No. 23-cv-61246-DMM (S.D. Fla. July 12, 2024). Arise agreed to pay federal minimum wage to agents for some categories of time worked. *Id.* ¶ 4. But unlike the NY OAG/MA OAG Uber/Lyft settlements, DOL did not offer Arise a prospective release from misclassification liability; it simply released backwards-looking claims from June 2021 through July 2024. *Id.* ¶ 10.

CONCLUSION

The NLRA and the FLSA were hard-won legislative responses to a national crisis of overworked, underpaid, and endangered workers. Just under a century after their passage, a new economy of exploited workers has emerged in some of the most dangerous contemporary industries, outside the protections of the NLRA and the FLSA. With the proliferation of contract gig work and the advent of third-category laws, workers' right law is at an inflection point — an existential crisis for employment as a framework. When the protections of employment do not cover all people working for a company's benefit and under its control, we legally cede to corporations the power to decide which workers deserve protection. Course correcting will require reckoning with multiple realities: employment and flexibility are theoretically and historically compatible, and the purported flexibility of contracting is illusory. Workers' rights will never be won at the expense of employment, the FLSA, or the NLRA through third-category legislation or settlements. And protecting vulnerable workers will require both challenging misclassification and legislating better flexible-employment options.

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