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# The Gig Is Up: An Analysis of the Gig-Economy and an Outdated Worker Classification System in Need of Reform

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Travis Clark\*

Lyft drivers don't seem much like employees. We generally understand an employee to be someone who works under the direction of a supervisor for an extended or indefinite period of time. But Lyft drivers don't seem much like independent contractors either. We generally understand an independent contractor to be someone with a special skill (and with bargaining power to negotiate a rate for use of that skill), who serves multiple clients, performing discrete tasks for limited periods. Lyft drivers require no special skill when they give rides. Their work is central, not tangential to Lyft's business.

- Judge Chhabria, United States District Court Judge,  
San Francisco, CA<sup>1</sup>

## I. INTRODUCTION

The emergence of the gig-economy has resulted in one of the most vulnerable workforces in generations.<sup>2</sup> While the gig-economy has attracted significant media attention for its market successes, it has raised concerns about the workers who participate in it.<sup>3</sup> These concerns arise, in part, from

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\* J.D., Seattle University School of Law. In loving memory of Anne Schetter-Clark (1956-2016).

<sup>1</sup> Antonio Aloisi, *Commoditized Workers: Case Study Research on Labor Law Issues Arising from a Set of "On-Demand/Gig Economy" Platforms*, 37 COMPAR. LAB. L. & POL'Y J. 3 (2016) [<https://perma.cc/8YFG-8MDP>].

<sup>2</sup> STEVEN HILL, *RAW DEAL: HOW THE "UBER ECONOMY" AND RUNAWAY CAPITALISM ARE SCREWING AMERICAN WORKERS* 4-8 (1st ed. 2015).

<sup>3</sup> CONG. RSCH. SERV., R44365, *WHAT DOES THE GIG ECONOMY MEAN FOR WORKERS?* 1 (2017).

gig-companies who have taken advantage of the United States' worker classification system.<sup>4</sup>

The current United States worker classification system is binary. It requires employers to classify workers as employees or independent contractors.<sup>5</sup> This distinction is critical. Indeed, the structure of employment relationships hinges entirely on how a worker is classified.<sup>6</sup> This holds true because an employer's obligations to an employee are significantly greater than obligations to an independent contractor.<sup>7</sup> For employers, employee status triggers "enormous liability" for payroll taxes, pension benefits, and other employee benefits as well as liability for discrimination, sexual harassment, and on-the-job injuries.<sup>8</sup>

Conversely, independent contractor status subjects employers to lower costs and less regulation.<sup>9</sup> Employers are not required to withhold taxes, make social security or Medicare contributions, pay overtime wages, or provide paid leave.<sup>10</sup> Independent contractors are also deprived of traditional statutory employment protections afforded to employees.<sup>11</sup> In addition, workplace discrimination, collective bargaining, and workers' compensation statutes usually do not apply to non-employees.<sup>12</sup>

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<sup>4</sup> See *id.* at 2.

<sup>5</sup> *Independent Contractor (Self-Employed) or Employee?*, INTERNAL REVENUE SERV., <https://www.irs.gov/businesses/small-businesses-self-employed/independent-contractor-self-employed-or-employee> [<https://perma.cc/4Q7U-QCAC>].

<sup>6</sup> *Craig v. FedEx Ground Package Sys., Inc.*, 686 F.3d 423, 430 (7th Cir. 2012); Richard R. Carlson, *Why the Law Still Can't Tell an Employee when It Sees One and How It Ought to Stop Trying*, 22 BERKELEY J. EMP. & LAB L. 295, 296 (2001).

<sup>7</sup> Carlson, *supra* note 6, at 297–98.

<sup>8</sup> *Id.* at 298.

<sup>9</sup> Myra H. Barron, *Who's an Independent Contractor? Who's an Employee?*, 14 LAB. LAWYER 457 (1999).

<sup>10</sup> Andrew G. Malik, *Worker Classification and the Gig-Economy*, 69 RUTGERS U.L. REV. 1729, 1735, 1740 (2017).

<sup>11</sup> *Id.* at 1734.

<sup>12</sup> *Id.*

Furthermore, an independent contractor seeking the protection of these statutes often bears the burden of proving their employee status.<sup>13</sup>

Naturally, then, employers tend to misclassify their workers as independent contractors to avoid these costs.<sup>14</sup> The gig-economy is no different.<sup>15</sup> The current system “encourages [gig] companies like Uber and Lyft to treat its workers like independent contractors rather than employees.”<sup>16</sup> In fact, the gig-economy’s success depends on the misclassification of millions of workers.<sup>17</sup> After all, companies like Uber can save up to 30% on payroll taxes alone with the independent contractor classification.<sup>18</sup> This tendency to misclassify workers as independent contractors can actively harm many workers in the gig-economy.<sup>19</sup> The binary worker classification system has constructed workplace regimes where no employment protections exist for independent contractors.<sup>20</sup> Dependence on this system is outdated and ill-suited to protect vulnerable gig-workers.<sup>21</sup>

The current system is also ill-equipped to protect a burgeoning economy from debilitating regulatory risk.<sup>22</sup> Economists, legislators, and employers have expressed grave concerns that a new classification for gig-workers

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<sup>13</sup> *Id.*

<sup>14</sup> Leticia M. Saucedo, *The Legacy of the Immigrant Workplace: Lessons for the 21st Century Economy*, 40 T. JEFFERSON L. REV. 1, 10 (2017).

<sup>15</sup> *Id.* at 17.

<sup>16</sup> Steven Chung, *In the Gig Economy, Who Is an Employee And Who Is an Independent Contractor?*, ABOVE THE LAW (Oct. 2, 2019), <https://abovethelaw.com/2019/10/in-the-gig-economy-who-is-an-employee-and-who-is-an-independent-contractor/> [<https://perma.cc/63JD-AMUG>].

<sup>17</sup> *Id.* at 11.

<sup>18</sup> Saucedo, *supra* note 14, at 17.

<sup>19</sup> Malik, *supra* note 10, at 1734; Saucedo, *supra* note 14, at 13.

<sup>20</sup> Saucedo, *supra* note 14, at 5.

<sup>21</sup> Spencer Bankhead & D. Taylor Petersen, *Finding the Middle Ground: Establishing a Third, Hybrid Worker Classification*, 33 BYU PRELAW REV. 53 (2019).

<sup>22</sup> *Id.*

will overly burden employers with increased costs.<sup>23</sup> They worry that these higher costs will be passed onto the consumer and ultimately stifle economic innovation.<sup>24</sup>

Thus, the Washington State Legislature should adopt a new hybrid statutory worker classification: the marketplace contractor. This new classification should address exploitation of gig-workers by providing various basic employment protections while keeping costs down for innovative gig-companies.

## II. STRUCTURE OF THIS NOTE

Part III of this note explains what the gig-economy is, the structural problems that exist within it, and some of the arguments for and against its proliferation over the past decade. Part IV pivots into the arena of worker classification. It serves four functions. First, it will explain the general differences between independent contractors and employees. Second, it will explain the inherent ambiguity that exists within the current worker classification system. Third, it will outline the various consequences of misclassification for the state, worker, and employer. Fourth, it will survey the different classification tests used in the United States, including the test used in Washington State. Part V will introduce the hybrid classification: the marketplace contractor. It will explain what and how this new classification will address the pitfalls in the current worker classification system. Part VI will suggest and detail specific definitional statutes that Washington State should incorporate into its statutory scheme. Part VII will address some of the outstanding arguments against a hybrid classification. Lastly, Part VIII will conclude this note.

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<sup>23</sup> See generally Andre Andoyan, *Independent Contractor or Employee: I'm Uber Confused! Why California Should Create an Exception for Uber Drivers and the "On-Demand Economy"*, 47 GOLDEN GATE U.L. REV. 153 (2017).

<sup>24</sup> *Id.*

### III. THE GIG-ECONOMY—THE ECONOMY OF TOMORROW

#### A. *What Is the Gig-Economy?*

In its earliest form, the gig-economy referred to musicians performing “gigs” at various jazz clubs, bars, and concert halls.<sup>25</sup> Its current usage began “at the height of the 2009 financial crisis in early 2009, when the unemployed made a living by ‘gigging,’ or working several part time jobs.”<sup>26</sup> But throughout its usage, the gig-economy has been a labor market characterized by short-term or freelance employment relationships that offers flexible hours.<sup>27</sup> Gig-workers typically work irregular schedules that are driven by fluctuations in demand for their services.<sup>28</sup> Most gig-workers are paid on a piecework basis.<sup>29</sup> In other words, they are paid per task rather than hourly.<sup>30</sup>

Recent technological advancements and the proliferation of the smartphone have reshaped the gig-economy and commercial landscape.<sup>31</sup> Increased use of the smartphone has contributed significantly to the growth of the gig-economy through the creation of digitally mediated labor marketplaces and platforms.<sup>32</sup>

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<sup>25</sup> Leslie Heck, *Year in a Word: Gig Economy*, FINANCIAL TIMES (Dec. 15, 2015), <https://www.ft.com/content/b5a2b122-a41b-11e5-8218-6b8ff73aae15/> [<https://perma.cc/6MLH-FB64>].

<sup>26</sup> *Id.*

<sup>27</sup> Bill Wilson, *What Is the ‘Gig’ Economy?*, BBC NEWS (Feb. 10, 2017), <https://www.bbc.com/news/business-38930048> [<https://perma.cc/ANF3-JJ8K>].

<sup>28</sup> Andrew Stewart & Jim Stanford, *Regulating Work in the Gig Economy: What Are the Options?*, 28 ECON. & LAB. RELS. REV. 420, 421 (2017).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> CONG. RSCH. SERV., *supra* note 3, at 2.

<sup>32</sup> HANNAH JOHNSTON & CHRIS LAND-KAZLAUSKAS, INT’L LAB. OFF. – GENEVA, ORGANIZING ON-DEMAND: REPRESENTATION, VOICE, AND COLLECTIVE BARGAINING IN THE GIG-ECONOMY 3 (2019).

As a result, the gig-economy is generally understood to include two forms of work: “crowd-work” and “work-on-demand-via-app.”<sup>33</sup> Crowd-work is labor executed through online platforms that connect organizations, businesses, individuals, and clients with workers.<sup>34</sup> It often involves menial and monotonous online “microtasks” (e.g. tagging photos, completing surveys) that are beyond the capabilities of artificial intelligence.<sup>35</sup> Accordingly, crowd-work is chiefly executed online, allowing workers to operate anywhere in the world.<sup>36</sup>

Work-on-demand-via-app, however, involves the execution of traditional working activities like transporting, cleaning, shopping, and other various forms of traditional work.<sup>37</sup> This labor is channeled through smartphone applications managed by technology firms (Uber, DoorDash, etc.) who select, manage, and set minimum quality standards for their workforce.<sup>38</sup> Despite its similar online nature, work-on-demand-via-app differs from crowd-work because it matches online supply and demand of activities that are executed locally.<sup>39</sup>

The flexibility for workers and consumers alike has led to unprecedented market success for gig-economy retailers and service providers.<sup>40</sup> However, the gig-economy is staffed by many who have no choice but to participate in a labor market plagued with poor working conditions.<sup>41</sup>

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<sup>33</sup> Valerio De Stefano, *The Rise of the “Just-in-Time Workforce”: On-Demand Work, Crowd Work and Labour Protection in the “Gig-Economy”*, 37 COMPAR. LAB. L. & POL’Y J. 471, 473 (2016).

<sup>34</sup> *Id.* at 473–74.

<sup>35</sup> *Id.* at 474.

<sup>36</sup> *Id.* at 473.

<sup>37</sup> *Id.*

<sup>38</sup> Aloisi, *supra* note 1; Brishen Rogers, *The Social Costs of Uber*, 82 U. CHI. L. REV. ONLINE 85 (2015).

<sup>39</sup> De Stefano, *supra* note 33, at 473.

<sup>40</sup> UTTAM BAJWA ET AL., GLOBAL MIGRATION & HEALTH INITIATIVE, TOWARDS AN UNDERSTANDING OF WORKERS’ EXPERIENCES IN THE GLOBAL GIG ECONOMY (2018), [https://www.giomhi.org/uploads/7/4/4/8/74483301/workers\\_in\\_the\\_global\\_gig\\_economy.pdf](https://www.giomhi.org/uploads/7/4/4/8/74483301/workers_in_the_global_gig_economy.pdf) [<https://perma.cc/PHB7-HH8T>].

<sup>41</sup> Saucedo, *supra* note 14, at 13.

## B. The Gig-Economy's Shortcomings

The gig-economy has seismically shifted the traditional workplace model to be more individualized, independent, and impersonal.<sup>42</sup> But this impersonal relationship inherent to the gig-economy has created an environment that lacks employer accountability.<sup>43</sup> Consequently, working conditions for the vast majority of gig-workers appear to be poor, irrespective of the work being performed.<sup>44</sup> These conditions are largely defined by low wages, increased health and safety risks, and a lack of basic employment benefits.<sup>45</sup>

### 1. Low Wages

While independent contractors usually earn more than employees who do similar work, this higher wage has not materialized for many gig-workers.<sup>46</sup> Gig-workers are often paid less than their bricks-and-mortar counterparts.<sup>47</sup> About twice as many gig-workers earned less than \$30,000.00 per year when compared to the general United States population—an income that is far below a living wage for a family of four.<sup>48</sup> “One study found that

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<sup>42</sup> Paul E. Goately, *Workplace Safety in the Gig Economy Is Anyone Actually Paying Attention*, OCCUPATIONAL HEALTH & SAFETY (Dec. 16, 2019), <https://ohsonline.com/articles/2019/12/16/workplace-safety-in-the-gig-economy-is-anyone-actually-paying-attention.aspx> [<https://perma.cc/23KU-V5MX>].

<sup>43</sup> Taraneh Azar, *As Gig Economy Booms, Accountability Is Harder to Pinpoint*, SCOPE (Feb. 17, 2020), <https://thescopeboston.org/3165/features/gig-economy-accountability-harder-pinpoint/> [<https://perma.cc/D8TR-LMZ6>].

<sup>44</sup> Jeremias Prassl & Martin Risak, Uber, Taskrabbit, and Co.: *Platforms as Employers? Rethinking the Legal Analysis of Crowdwork*, 37 COMPAR. LAB. L. & POL'Y J. 619, 627 (2016).

<sup>45</sup> *Id.*

<sup>46</sup> Nick Kolakowski, *Do Contractors Earn More than Full-Time Employees?*, DICE (Feb. 21, 2019), <https://insights.dice.com/2019/02/21/contractors-earn-full-time-employees-2019/> [<https://perma.cc/QVN5-GKD3>].

<sup>47</sup> Arne L. Kalleberg & Michael Dunn, *Good Jobs, Bad Jobs in the Gig Economy*, 20 PERSPS. ON WORK 10 (2016).

<sup>48</sup> Sarah Kessler, *The Gig Economy: Lower Wages, More Injuries, Horrible Benefits: It's Worse than You Think*, LITERARY HUB (June 14, 2018), <https://lithub.com/the-gig-economy-lower-wages-more-injuries-horrible-benefits/> [<https://perma.cc/S624-JW35>].



contracted cleaners and security guards earned 15 and 17 percent less, respectively, than their in-house peers.”<sup>49</sup> Another 2016 study found that misclassified workers’ net income is often much less than that of similar workers who are classified as employees.<sup>50</sup> And low wages for gig-work is unfortunately not isolated to the United States. For example, nearly a quarter of Britain’s gig-workers in 2018 were paid below minimum wage. Moreover, companies like Uber can depress and stagnate wages by switching their demand for labor on and off on a minute-by-minute basis.<sup>51</sup>

On top of low wages, many gig-workers are forced to incur operational and other expenses otherwise covered under a traditional employment relationship.<sup>52</sup> An Uber driver, for example, must own a vehicle, pay for gas and maintenance, and pay taxes on wages earned.<sup>53</sup> Many gig-workers are therefore forced to work long and irregular hours to earn a living wage.<sup>54</sup>

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<sup>49</sup> *Id.*

<sup>50</sup> SARAH LEBERSTEIN & CATHERINE RUCKELSHAUS, NAT’L EMP. L. PROJECT, INDEPENDENT CONTRACTOR VS. EMPLOYEE: WHY INDEPENDENT CONTRACTOR CLASSIFICATION MATTERS AND WHAT WE CAN DO TO STOP IT (2016).

<sup>51</sup> Jim Edwards, *The ‘Gig Economy’ Is Destroying Wages*, BUS. INSIDER (May 22, 2017), <https://www.businessinsider.com.au/low-unemployment-wage-increases-gig-economy-2017-5> [https://perma.cc/S2UL-EMT9]; see also Sage Lazzaro, *Uber Drivers Plan Boycott After Fare Cuts Slash Their Earnings to Below Minimum Wage*, OBSERVER (Jan. 19, 2016), <https://observer.com/2016/01/uber-drivers-plan-boycott-after-fare-cuts-slash-their-earnings-to-below-minimum-wage/> [https://perma.cc/9L6P-DMS4].

<sup>52</sup> Kalleberg & Dunn, *supra* note 47.

<sup>53</sup> Kathleen Elkins, *A Day in the Life of an Uber, Lyft and Juno Driver Who Makes About \$6,000 a Month in NYC*, CNBC (Jan. 31, 2019), <https://www.cnbc.com/2019/01/30/a-day-in-the-life-of-a-full-time-uber-lyft-and-juno-driver-in-nyc.html> [https://perma.cc/C27G-E846].

<sup>54</sup> Alex Kirven, *Whose Gig Is It Anyway? Technological Change, Workplace Control and Supervision, and Workers’ Rights in the Gig Economy*, 89 U. COLO. L. REV. 249, 263 (2018).

## 2. Health and Safety Risks and Employer Liability

Gig-workers often face more serious health and safety risks when compared to their employee counterparts.<sup>55</sup> The lack of a traditional employment relationship frequently means that gig-work often lacks structured workplace training and supervision.<sup>56</sup> As such, many gig-workers require and are not provided personal protective equipment, training, or other traditional safety measures to reduce workplace risks.<sup>57</sup> The lack of workers' compensation alternatives for an injured gig-worker further exacerbates these risks.<sup>58</sup>

Furthermore, systemic and structural forces inherent to the gig economy also negatively impact its workforce's health. Chronic job insecurity—a known contributor to the overall health of contingent workers—impacts many gig-workers.<sup>59</sup> And the increase in inequality inherent to the gig-economy—that concentrates wealth and drives down wages through competition—further fuels the health disparity between gig-workers and employees.<sup>60</sup>

## 3. Lack of Employment Benefits

Gig-workers do not qualify for employment protections enjoyed by employees.<sup>61</sup> As independent contractors, they are not entitled to a myriad

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<sup>55</sup> Molly Tran & Rosemary K. Sokas, *The Gig Economy and Contingent Work: An Occupational Health Assessment*, 59 J. OCCUPATIONAL & ENV'T MED. 63 (2017).

<sup>56</sup> Craig Simonsen, *Workplace Safety in the Gig Economy: New Hazards and Liabilities*, SEYFARTH (May 9, 2019), <https://www.environmentalsafetyupdate.com/osha-compliance/workplace-safety-in-the-gig-economy-new-hazards-and-liabilities/> [https://perma.cc/97WY-8UKT].

<sup>57</sup> David Sparkman, *The Gig Economy Poses New Safety Threats and Liabilities*, EHS TODAY (June 17, 2019), <https://www.ehstoday.com/safety/gig-economy-poses-new-safety-threats-and-liabilities> [https://perma.cc/YUP3-ZJSX].

<sup>58</sup> Griffin Toronjo Pivateau, *Rethinking the Worker Classification Test: Employees, Entrepreneurship, and Empowerment*, 34 N. ILL. U.L. REV. 67, 74 (2013).

<sup>59</sup> Tran & Sokas, *supra* note 55.

<sup>60</sup> *Id.*

<sup>61</sup> CONG. RSCH. SERV., *supra* note 3, at 1.

of employment protections including minimum wage guarantees, workers' compensation, overtime compensation, family and medical leave, and unemployment compensation.<sup>62</sup> Perhaps most importantly, however, "workers hired as independent contractors are not entitled to the rights and protections of the NLRA."<sup>63</sup> Thus, as non-employees, gig-workers have no avenue to engage in concerted activity, join a union, or strike to improve wages and conditions.<sup>64</sup> On top of all that, gig-workers are required to pay their own payroll taxes.<sup>65</sup>

### *C. But Isn't the Gig-Economy a Good Thing for Workers?*

Proponents of the gig-economy assert that gig-work offers potential significant upsides for workers, namely flexibility.<sup>66</sup> And they are correct—workers can decide when to work, where to work, and what kind of work to accept.<sup>67</sup> Supporters also argue that this flexibility can help the underemployed with additional income to supplement their regular earnings while allowing those excluded from the labor market to find gainful employment.<sup>68</sup> Although factually true, contextualizing these claims severely diminishes their argumentative value.

These arguments incorrectly frame gig-work solely as a supplemental income. But in 2016, gig-work was the primary source of income for 32% of U.S. workers.<sup>69</sup> And as previously stated, those workers incur significant

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<sup>62</sup> *Id.* at 11.

<sup>63</sup> See Pivateau, *supra* note 58, at 75.

<sup>64</sup> *Id.*

<sup>65</sup> CONG. RSCH. SERV., *supra* note 3, at 11.

<sup>66</sup> Prassl & Risak, *supra* note 44, at 626.

<sup>67</sup> *Id.*

<sup>68</sup> Moshe Z. Marvit, *How Crowdworkers Became the Ghosts in the Digital Machine*, NATION (Feb. 5, 2014), <https://www.thenation.com/article/how-crowdworkers-became-ghosts-digital-machine/> [<https://perma.cc/E6SJ-NGVM>].

<sup>69</sup> *More than 1 in 3 Workers Participate in the Gig Economy, But Employers May Not Realize It*, CISION (July 17, 2018, 8:41 AM), <https://www.prnewswire.com/news-releases/more-than-1-in-3-workers-participate-in-the-gig-economy-but-employers-may-not-realize-it-300681928.html> [<https://perma.cc/5NAV-JJR9>].

expenses that participation in the gig-economy requires.<sup>70</sup> One gig-worker in New York City, for example, earned approximately \$75,000.00 a year driving for Uber, Lyft, and Juno six days a week.<sup>71</sup> But he netted far less than \$50,000.00 after deducting nearly \$20,000.00 in expenses and wage taxes.<sup>72</sup>

The highly-touted flexibility offered by gig-work is often overshadowed by the reality that many are forced to work long and irregular hours.<sup>73</sup> Many gig-workers switch between apps in order to combine wages, which often extends the workers' hours well beyond the traditional eight-hour work day.<sup>74</sup>

Proponents of the gig-economy also argue that workers' willingness to participate in the gig-economy demonstrates that the relationship between management and labor in the gig-economy is mutually beneficial.<sup>75</sup> But this argument fails to address how the gig-economy contributes to the structural inequities in the modern labor market. Of course, the very nature of the gig-economy "appeals to the possibilities for entrepreneurial control over resources and time," creating narratives of self-sufficiency and flexibility.<sup>76</sup> The mechanics of many of the applications (Uber, for example) make "being one's own boss" seem more accessible and less far-fetched.<sup>77</sup> However, the work structure created by the gig-economy depends on vulnerable workers who identify with this "entrepreneurial" narrative.<sup>78</sup> Indeed, many gig-workers—as many as 60%—report that earnings from

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<sup>70</sup> Elkins, *supra* note 53.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> Kirven, *supra* note 54, at 263.

<sup>74</sup> Lauren Markham, *The Immigrants Fueling the Gig Economy*, ATLANTIC (June 20, 2018),

<https://www.theatlantic.com/technology/archive/2018/06/the-immigrants-fueling-the-gig-economy/561107/> [<https://perma.cc/49GG-6Y9E>].

<sup>75</sup> Prassl & Risak, *supra* note 44, at 626.

<sup>76</sup> Saucedo, *supra* note 14, at 14.

<sup>77</sup> *Id.* at 15.

<sup>78</sup> *Id.* at 13–14.

labor platforms is vital to their financial wellbeing.<sup>79</sup> These workers “are more likely to come from low-income households” and are “more likely to gravitate towards physical tasks.”<sup>80</sup> And as previously explained, gig-work is characterized by low wages, increased health and safety risks, and lack of labor protections, which leaves gig-workers uniquely vulnerable in the United States workplace.<sup>81</sup>

Gig-workers deserve more.

#### IV. THE UNITED STATES’ BINARY WORKER CLASSIFICATION SYSTEM

##### *A. Employee vs. Independent Contractor*

The fundamental distinction between employees and independent contractors is the degree of control the employer exerts over the worker.<sup>82</sup> The IRS employs three “control” factors to determine a worker’s status: behavioral control, financial control, and the relationship of the parties.<sup>83</sup>

Behavioral control is the degree to which the employer has the right to direct the work performed by the worker.<sup>84</sup> Training the worker, giving detailed instructions, and dictating the tools needed to perform the job are all indicative of an employer-employee relationship.<sup>85</sup> Financial control represents the employer’s investment into the equipment used by the worker, how the worker is paid, and whether the worker’s services are

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<sup>79</sup> *Id.* at 18 (citing CATHERINE RUCKELSHAUS ET AL., NAT’L EMP. L. PROJECT, WHO’S THE BOSS: RESTORING ACCOUNTABILITY FOR LABOR STANDARDS IN OUTSOURCED WORK 3–5 (2014)).

<sup>80</sup> *Id.*

<sup>81</sup> CONG. RSCH. SERV., *supra* note 3, at 1.

<sup>82</sup> Malik, *supra* note 10, at 1733.

<sup>83</sup> *Understanding Employee vs. Contractor Designation*, INTERNAL REVENUE SERV. (July 20, 2017), <https://www.irs.gov/newsroom/understanding-employee-vs-contractor-designation> [<https://perma.cc/Y39Z-NS45>].

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

available to the free market.<sup>86</sup> The inquiry into the relationship of the parties examines how the parties perceive their business relationship.<sup>87</sup> None of these factors are determinative. Rather, the more control an employer exerts over a worker, the more likely an employer-employee relationship exists.<sup>88</sup>

Ordinarily, then, an employee is any worker who performs a service for an employer where the latter controls how and what work will be done.<sup>89</sup> “the relation of the [employer] and [employee] exists whenever the employer retains the right to direct the manner in which the business shall be done, as well as the result to be accomplished, or, in other words, ‘not only what shall be done, but how it shall be done.’”<sup>90</sup> An independent contractor, on the other hand, is usually a business owner or contractor who provides services to other businesses.<sup>91</sup> An independent contractor customarily operates a separate business from their “employer,” sets their own hours, and are only contractually bound to their “employer” for a specified period of time.<sup>92</sup> Therefore, the independent contractor is usually self-employed and responsible for all of the tax obligations of the business.<sup>93</sup>

### *B. Legal Ambiguity*

“Few problems in the law have given greater variety of application and conflict in results than the cases arising in the borderland

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<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Singer Mfg. Co. v. Rohn*, 132 U.S. 518, 523 (1889).

<sup>91</sup> INTERNAL REVENUE SERV., *supra* note 83.

<sup>92</sup> Malik, *supra* note 10, at 1734.

<sup>93</sup> See Tx Zhuo, *Are Sharing-Economy Workers Contractors or Employees?*, ENTREPRENEUR (Aug. 28, 2015), <https://www.entrepreneur.com/article/249439> [<https://perma.cc/T8P4-U87Q>].

between what is clearly an employer-employee relationship and what is one of the independent entrepreneurial dealing.”<sup>94</sup>

The legal distinction between an employee and an independent contractor is unfortunately ambiguous.<sup>95</sup> The ambiguity stems from various statutory and common law worker classification tests that focus on one subjective factor: “employer control.”<sup>96</sup> While all worker classification tests employ several factors to determine worker status, most courts place “employer control” at the heart of the analysis.<sup>97</sup> But “employer control” over a worker is not unique to employer-employee relationships.<sup>98</sup> In fact, an employer controls the work and relationship with independent contractors when it orders services, negotiates terms, or dictates how the work should be done.<sup>99</sup>

To resolve this obvious grey area, courts have generally held that an employer controls the details of an employee’s work, but only the results of a contractor’s work.<sup>100</sup> But this distinction fails to effectively differentiate between employees and independent contractors. Employers often allow employees to control the methods of performance, and many employers control the details of an independent contractor’s work.<sup>101</sup> Consequently,

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<sup>94</sup> *NLRB v. Hearst Publ’ns, Inc.*, 322 U.S. 111, 113 (1944), *overruled by* *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318 (1992).

<sup>95</sup> Carlson, *supra* note 6, at 298.

<sup>96</sup> Pivateau, *supra* note 58, at 71.

<sup>97</sup> Carlson, *supra* note 6, at 338.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *See, e.g., Spirides v. Reinhardt*, 613 F.2d 826, 833 (D.C. Cir. 1979); *Martin v. Goodies Distrib.*, 695 So.2d 1175, 1178 (Ala. 1997).

<sup>101</sup> *See, e.g., Delivery Express v. Wash. Dep’t of Lab. & Indus.*, 9 Wash. App. 2d 131, 140 (Wash. Ct. App. 2019) (finding that the essence of the delivery drivers’ contracts with the hiring entity was the drivers’ personal labor, and thus the hiring entity was required to pay workers’ compensation premiums); *Hix v. Minn. Workers’ Comp. Assigned Risk Plan*, 520 N.W.2d 497, 502 (Minn. Ct. App. 1994) (finding trucking firm’s instructions to drivers on where to pick up and drop off loads insufficient to show control because such instructions are necessary for drivers to serve the client).

the distinction has become illusory because it hinges on inherently subjective interpretations of “employer control.”<sup>102</sup>

The law recognizes the difference between an employee and an independent contractor. Yet when the law is applied to the facts, it often leads to confusing and inconsistent results that are ill-suited to evolving employment relationships.<sup>103</sup> As a result, employers are incentivized to misclassify workers as independent contractors.<sup>104</sup> Many employment experts agree that worker classification laws encourage ambiguity.<sup>105</sup> Courts have noted that these laws routinely fail to produce predictable results for workers whose status is uncertain.<sup>106</sup>

### C. Consequences of Misclassification

Worker classification has significant consequences for employers, workers, and the state.<sup>107</sup> From a financial perspective, the current system encourages employers to classify workers as independent contractors.<sup>108</sup> It reduces labor costs and costs associated with liability under various federal and state employment statutes.<sup>109</sup> Some studies show that an employee costs a business up to 30% more per worker than an independent contractor.<sup>110</sup>

<sup>102</sup> Carlson, *supra* note 6, at 340.

<sup>103</sup> Pivateau, *supra* note 58, at 68.

<sup>104</sup> Carlson, *supra* note 6, at 298.

<sup>105</sup> *Id.*

<sup>106</sup> *See, e.g.,* Hickey v. Arkla Indus., Inc., 699 F.2d 748, 752 (5th Cir. 1983) (finding “as a practical matter, the [economic realities] test cannot be rigidly applied” in determining the existence of an employment relationship); Richardson v. APAC–Mississippi, Inc., 631 So. 2d 143, 150 (Miss. 1994) (“[T]he various tests to determine the type of relationship are themselves generalities which can viewed quite differently, depending upon which judge is applying them.”).

<sup>107</sup> Malik, *supra* note 10, at 1733.

<sup>108</sup> Braden Seibert, *Protecting the Little Guys: How to Prevent the California Supreme Court’s New “ABC” Test from Stunting Cash-Strapped Startups*, 12 J. BUS., ENTREPRENEURSHIP & LAW 181, 184 (2019).

<sup>109</sup> *See generally* David Bauer, *Misclassification of Independent Contractors: The Fifty-Four Billion Dollar Problem*, 12 RUTGERS J.L. & PUB. POL’Y 138 (2015).

<sup>110</sup> Seibert, *supra* note 108, at 184.



Meanwhile, independent contractors cost a business significantly less.<sup>111</sup> The business avoids costly legal responsibilities like payroll taxes, employment taxes, and various employment benefits when using independent contractors.<sup>112</sup> Employers are further incentivized to misclassify their workers because misclassification itself does not usually violate any employment related statutes.<sup>113</sup>

Classification also imposes costs and risks on workers themselves.<sup>114</sup> Misclassification unjustly deprives workers of basic employment rights otherwise afforded to employees.<sup>115</sup> Most workers tragically assume they are entitled to a minimum wage, overtime pay, health and safety regulations, and anti-discrimination protections.<sup>116</sup> But many workers do not realize they have been misclassified until they apply for such employment protections.<sup>117</sup> Additionally, misclassified workers must litigate to obtain the correct classification and eligibility for various employment protections.<sup>118</sup> Alternatively, an independent contractor misclassified as an employee may be liable for unpaid federal and state taxes.<sup>119</sup>

Federal, state, and local governments also suffer financially from misclassification due to underreporting and non-filing by employers.<sup>120</sup> “Employers who misclassify their employees as independent contractors are robbing Social Security, Medicare, unemployment insurance, and workers’

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<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> Bauer, *supra* note 109, at 142.

<sup>114</sup> Karen R. Harned et al., *Creating a Workable Legal Standard for Defining an Independent Contractor*, 4 J. BUS., ENTREPRENEURSHIP & LAW 93, 98 (2010).

<sup>115</sup> See *Leveling the Playing Field: Protecting Workers and Businesses Affected by Misclassification: Hearing of the Comm. on Health, Educ., Lab., & Pensions*, 111th Cong. 7 (2010) (statement of Seth D. Harris, Deputy Sec’y, U.S. Dep’t of Lab.).

<sup>116</sup> Bauer, *supra* note 109, at 145.

<sup>117</sup> *Id.*

<sup>118</sup> Harned et al., *supra* note 114, at 98.

<sup>119</sup> *Id.*

<sup>120</sup> Bauer, *supra* note 109, at 146.

compensation funds of billions of dollars and reducing federal, state, and local tax revenues.”<sup>121</sup> In particular, unemployment compensation programs—a vital safety net for many workers—lose critical revenue because employers only have to pay federal and state unemployment taxes for employees and not for independent contractors.<sup>122</sup> For example, a 2004 study by researchers at the University of Massachusetts and Harvard University found that at least one in every seven construction workers were misclassified as independent contractors.<sup>123</sup> The study estimated that the illegal practice cost the state about \$15 million in various employment taxes.<sup>124</sup>

This trend has permeated the gig-economy, most notably the rideshare sector.<sup>125</sup> The illegal practice of misclassifying workers has resulted in a tremendous amount of lost income for rideshare drivers.<sup>126</sup> One rideshare driver filed suit against Uber alleging that the company owed him unreimbursed expenses totaling over \$10,000 a year.<sup>127</sup> To top it all off, rideshare companies consistently lower fares in an effort to increase demand and stave off competition.<sup>128</sup>

#### *D. Worker Classification Tests*

Worker classification is vitally important. It has significant implications for both employers and workers in taxation, tort liability, and employment

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 147.

<sup>123</sup> Robert Knox, “*Independent Contractor*” Abuses Among Immigrant Construction Workers in Boston, WORKING IMMIGRANTS (Nov. 16, 2006), <https://www.workingimmigrants.com/2006/11/”independent-contractor”-abuses-among-immigrant-construction-workers-in-boston/> [<https://perma.cc/DB4X-ZMU3>].

<sup>124</sup> *Id.*

<sup>125</sup> See generally Pamela A. Izvanariu, *Matters Settled but Not Resolved: Worker Misclassification in the Rideshare Sector*, 66 DEPAUL L. REV. 133 (2016).

<sup>126</sup> *Id.* at 138.

<sup>127</sup> O’Connor v. Uber Techs., Inc., 904 F.3d 1087 (9th Cir. 2018).

<sup>128</sup> Izvanariu, *supra* note 125, at 139.

regulation.<sup>129</sup> However, “[t]he tests used to determine whether a worker is an independent contractor or an employee are complex, subjective, and differ from law to law.”<sup>130</sup> This Subsection outlines some of the most prevalent worker classification tests and how they affect the gig-workforce and employers.

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

This test “offers a natural starting place for analyzing worker classification tests.”<sup>131</sup> The “Right to Control” test is the most prevalent test for determining the relationship between worker and employer.<sup>132</sup> As its name suggests, the employer’s “right to control” forms the heart of the legal analysis.<sup>133</sup> The emphasis on the “right to control” predates modern employment law.<sup>134</sup> This test served as the “foundation for determining whether an injured third party may hold a principal liable for a tort committed by its employee.”<sup>135</sup> Under this test, an employer would be liable for the negligence of its worker if it controlled the act that caused the injury or failed to properly supervise the work properly.<sup>136</sup> The common law

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<sup>129</sup> Malik, *supra* note 10, at 1733.

<sup>130</sup> U.S. GOV’T ACCOUNTABILITY OFF., GAO-06-656, EMPLOYMENT ARRANGEMENTS: IMPROVED OUTREACH COULD HELP ENSURE PROPER WORKER CLASSIFICATION 25 (2006).

<sup>131</sup> Malik, *supra* note 10, at 1736.

<sup>132</sup> See *How to Apply the Common Law Control Test in Determining an Employer/Employee Relationship*, SOC. SEC. ADMIN., [https://www.ssa.gov/section218training/advanced\\_course\\_10.htm](https://www.ssa.gov/section218training/advanced_course_10.htm) [<https://perma.cc/E9WH-JQGG>].

<sup>133</sup> Katherine V.W. Stone, *Legal Protections for Atypical Employees: Employment Law for Workers Without Workplaces and Employees Without Employers*, 27 BERKELEY J. EMP. & LAB. L. 251, 257 (2006).

<sup>134</sup> Robert Sprague, *Worker (Mis)Classification in the Sharing Economy: Trying to Fit Square Pegs into Round Holes*, 31 ABA J. LAB. & EMP. L. 53, 59 (2015).

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

agency test used to determine principal liability to third parties employed a multifactor test.<sup>137</sup>

Naturally, courts began to utilize this test to classify employment relationships.<sup>138</sup> Courts were notably more inclined to give additional weight to factors other than the right to control in order to extend protection to workers.<sup>139</sup> The Restatement (Second) of Agency lists the factors to be considered:

- (a) the extent of control which, by the agreement, the master may exercise over the details of the work;
- (b) whether or not the one employed is engaged in a distinct occupation or business;
- (c) the kind of occupation, with reference to whether in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
- (d) the skill required in the particular occupation;
- (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
- (f) the length of time for which the person is employed;
- (g) the method of payment, whether by the time or by the job;
- (h) whether or not the work is a part of the regular business of the employer;
- (i) whether or not the parties believe they are creating the relation of master and servant; and
- (j) whether the principal is or is not in business.<sup>140</sup>

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<sup>137</sup> *Id.*; see generally Richard A. Bales & Christian Patrick Woo, *The Uber Million Dollar Question: Are Uber Drivers Employees or Independent Contractors?*, 68 MERCER L. REV. 461 (2017).

<sup>138</sup> See *id.*

<sup>139</sup> Sprague, *supra* note 134, at 59.

<sup>140</sup> Restatement (Second) of Agency § 220 (AM. LAW INST. 1958).

Each of these factors are to be considered and balanced by the decisionmaker.<sup>141</sup> No formula exists to determine exactly how the factors should be balanced.<sup>142</sup> Importantly, though, this test is not conjunctive. Failure to satisfy one factor does not preclude a finding of employee status.<sup>143</sup> But while the test is not conjunctive, the primary focus remains on the employer’s *right* to control over the worker.<sup>144</sup> That is the determinative analysis.<sup>145</sup> “Even if the employer never exercises control, if [it] has the right to, the worker is likely an employee.”<sup>146</sup>

The lack of a formula or direction as to how to balance the factors unfortunately presents a unique problem.<sup>147</sup> No bright line rule for classification exists using this test.<sup>148</sup> There is no consensus as to how the factors should be weighed.<sup>149</sup> Therefore, the test can and has led to arbitrary, capricious, and inconsistent application of the law by decisionmakers.<sup>150</sup>

## 2. The “ABC” Test

The “ABC” worker classification test presumes every worker to be an employee.<sup>151</sup> It differs from the common law agency test because it is conjunctive, rather than disjunctive.<sup>152</sup> The test originates from the Massachusetts legislature’s change to the statutory definition of

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<sup>141</sup> Jenna Amato Moran, *Independent Contractor or Employee? Misclassification of Workers and Its Effect on the State*, 28 BUFFALO PUB. INT. L.J. 105, 108–09 (2009).

<sup>142</sup> *See id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> Pivateau, *supra* note 58, at 79.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 68, 76–77.

<sup>151</sup> Jean Murray, *What Is the ABC Test for Independent Contractors?*, THE BALANCE SMALL BUS. (Sept. 20, 2019), <https://www.thebalancesmb.com/what-is-the-abc-test-for-independent-contractors-4586615> [<https://perma.cc/24EF-FQNM>].

<sup>152</sup> *Id.*

independent contracting.<sup>153</sup> The ABC test places the burden of proving worker status on the party seeking the employment tax exemption.<sup>154</sup> Additionally, the ABC test requires the party with the burden of proof to satisfy a three-pronged test.<sup>155</sup>

Under the ABC Test, a worker is an independent contractor if:

A. The individual is free from control and direction in connection with the performance of the service, both under his contract for performance of service and in fact; and

B. The service is performed outside the usual course of the business of the employer; and

C. The individual is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the service performed.<sup>156</sup>

The “ABC” test was designed in part to address the disproportionate bargaining power that exists between low-wage workers and their employers.<sup>157</sup> Crucially, each individual prong must be satisfied to deny a worker employee status.<sup>158</sup> Thus, a worker is an employee if the employer fails to satisfy any of the three prongs.<sup>159</sup>

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<sup>153</sup> Anna Deknatel & Lauren Hoff-Downing, *ABC on the Books and in the Courts: An Analysis of Recent Independent Contractor and Misclassification Statutes*, 18 U. PA. J.L. & SOC. CHANGE 53, 65 (2015); MASS. GEN. LAWS ANN. ch. 149, § 148B (2014).

<sup>154</sup> Murray, *supra* note 151.

<sup>155</sup> Deknatel & Hoff-Downing, *supra* note 153, at 65.

<sup>156</sup> *Dynamex Operations W., Inc. v. Super. Ct. of L.A. Cnty.*, 416 P.3d 1 (Cal. 2018) (establishing a three-pronged conjunctive test which the hiring entity must satisfy for its workers to be considered independent contractors).

<sup>157</sup> Seibert, *supra* note 108, at 193.

<sup>158</sup> Deknatel & Hoff-Downing, *supra* note 153, at 65; Sean Kingston, *Examining the Dynamex ‘ABC Test’ by Various On-Demand Worker Types*, FISCHER PHILLIPS (May 8, 2018), <https://www.fisherphillips.com/gig-employer/examining-the-dynamex-abc-test-by-various> [<https://perma.cc/32WT-2ZPP>].

<sup>159</sup> Seibert, *supra* note 108, at 193.

This test has unsurprisingly been harshly criticized for overly restricting the use of independent contractors.<sup>160</sup> Some employers claim it injects uncertainty into employment relationships, which makes it nearly impossible to use independent contractors.<sup>161</sup> And many bona fide independent contractors worry that the test robs them of their prized independence and flexibility.<sup>162</sup>

Detractors further contend that the ABC test fails to address worker classification on a macro level because it does not consider negative implications on consumer and business innovation.<sup>163</sup> They assert that taxes and benefits that come with employee classification increase overhead costs which are then passed onto the consumer.<sup>164</sup> They also argue these costs will stifle the emergence of “game-changing” start-ups like Uber.<sup>165</sup>

But proponents of the ABC test retort that the provision of basic employment protections and benefits far outweighs the costs imposed on businesses.<sup>166</sup> First, they argue that worker misclassification increases the burden on the taxpayer to the tune of \$7 billion for California alone.<sup>167</sup> A laid off worker with no unemployment insurance, for example, must rely on government assistance to put food on the table.<sup>168</sup> And a worker injured on

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<sup>160</sup> Stephen L. Carter, *California Truck Ruling Exposes Weakness of Gig Economy Law AB5*, BLOOMBERG (Jan. 9, 2020), <https://www.bloomberg.com/opinion/articles/2020-01-09/ab5-california-law-threatens-gig-workers> [<https://perma.cc/P222-WKCZ>].

<sup>161</sup> Ben Burdick, *Recent Case: Dynamex Operations West, Inc. v. Superior Court*, 40 BERKELEY J. EMP. & LAB. L. 167, 176 (2019).

<sup>162</sup> Devin Fehely, *Heavy Truck Drivers Sharply Criticizing AB5, California's Gig Economy Worker Bill*, CBS (Sept. 17, 2019), <https://sanfrancisco.cbslocal.com/2019/09/17/heavy-truck-drivers-sharply-criticizing-ab5-californias-gig-economy-worker-bill/> [<https://perma.cc/4HCV-C2RU>].

<sup>163</sup> Andoyan, *supra* note 23, at 169.

<sup>164</sup> Bales & Woo, *supra* note 137, at 468–69.

<sup>165</sup> Andoyan, *supra* note 23, at 169–70.

<sup>166</sup> Steve Smith, *5 Reasons the CA Legislature Must Say Yes on AB5*, CAL. LAB. FED'N (Mar. 27, 2019), <https://calaborfed.org/5-reasons-the-ca-legislature-must-say-yes-on-ab-5/> [<https://perma.cc/5F65-PAJK>].

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

the job with no health insurance or workers' compensation is often forced to go to the emergency room—often the most expensive option for medical treatment.<sup>169</sup>

### 3. Washington State's Classification Test

Washington State uses a conjunctive test similar to the ABC test.<sup>170</sup> The statutes and common law that make up Washington's test render it difficult for an employer to classify a worker as an independent contractor.<sup>171</sup> Employees and many independent contractors in Washington are entitled to a variety of benefits. The state's statutory definition of employee is more inclusive than most. The definition includes every person in Washington "engaged in employment of an employer under [Title 51]."<sup>172</sup>

Curiously, Washington's statutory definition of "employee" also includes workers "under an independent contract, the essence of which is his or her personal labor."<sup>173</sup> So, an independent contractor that provides primarily personal labor to an employer may still be considered a covered worker.<sup>174</sup>

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<sup>169</sup> *Id.*; Janet Hunt, *Average Cost of an ER Visit*, BALANCE (Mar. 3, 2021), <https://www.thebalance.com/average-cost-of-an-er-visit-4176166> [<https://perma.cc/R9WB-R7WK>].

<sup>170</sup> See WASH. REV. CODE § 51.08.195 (2008); WASH. REV. CODE § 51.08.180 (2008); Dep't of Lab. & Indus. v. Lyons Enters., Inc., 347 P.3d 464, 471 (Wash. Ct. App. 2015); White v. Dep't of Lab. & Indus., 294 P.2d 650, 654 (Wash. 1956).

<sup>171</sup> *Id.*; see also Spencer Parr, *What Is the Washington State Industrial Insurance Act?*, WASH. L. CTR. (Aug. 23, 2018), <https://www.washingtonlawcenter.com/labor-industries-washington-state-industrial-insurance-act/> [<https://perma.cc/HE4Z-UXER>].

<sup>172</sup> WASH. REV. CODE § 51.08.180 (2008) ("Every person in this state who is engaged in the employment of an employer under this title whether by way of manual labor or otherwise in the course of his or her employment; also every person in this state who is engaged in the employment of or who is working under an independent contract, the essence of which is his or her personal labor for an employer under this title, whether by way of manual labor or otherwise, in the course of his or her employment, or as an exception to the definition of worker, a person is not a worker if he or she meets the test set[s] set forth in subsections (1) through (6) of RCW 51.08.195.").

<sup>173</sup> *Id.*

<sup>174</sup> WASH. REV. CODE § 51.08.180 (2008); *Lyons*, 347 P.3d at 471; *White*, 294 P.2d at 654.



Washington courts apply a two-part test to determine whether independent contractors are covered workers.<sup>175</sup> First, courts look to the “realities of the situation” to determine whether labor is the essence of the contract between the worker and the employer.<sup>176</sup> Therefore, if the worker’s labor serves as the method to execute the contract, then it is considered the “essence of the contract.”<sup>177</sup>

If the labor is “the essence of the contract,” the question then becomes whether the labor is personal.<sup>178</sup> Labor is not personal for purposes of the statute if it is performed by an independent contractor:

- A. who must of necessity own or supply machinery or equipment (as distinguished from the usual hand tools) to perform the contract . . . , or
- B. who obviously could not perform the contract without assistance . . . , or
- C. who of necessity or choice employs others to do all or part of the work he has contracted to perform.<sup>179</sup>

Satisfaction of one of these three factors renders a worker uncovered by the Act.<sup>180</sup> And ordinary vehicles and supplies are notably not deemed specialized equipment sufficient to satisfy part (A) of the personal labor test.<sup>181</sup>

The definitional statute does, however, carve out another exemption of certain workers from coverage if it meets a six-part conjunctive test

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<sup>175</sup> *Lyons*, 347 P.3d at 471.

<sup>176</sup> *Id.* at 471.

<sup>177</sup> *Id.* (holding that the essence of the cleaning contracts between the cleaners and the customers was labor because it was through the cleaners’ labor that customers’ facilities were made clean).

<sup>178</sup> *White v. Dep’t of Labor & Indus.*, 294 P.2d 650 (1956).

<sup>179</sup> *Id.* at 653.

<sup>180</sup> *Id.* at 654; *Lyons*, 347 P.3d at 471–73.

<sup>181</sup> *Henry Indus., Inc., v. Dep’t of Lab. & Indus.*, 381 P.3d 172, 179 (2016).

outlined in RCW 51.08.195.<sup>182</sup> A worker is considered a covered worker ***unless all six parts are satisfied.***<sup>183</sup>

The first factor requires the worker to be free from the control or direction of the hiring entity.<sup>184</sup> Second, the service provided by the worker must be either outside the usual course of business of the hiring entity or performed outside all of the places of business of the hiring entity.<sup>185</sup> Third, the worker must be customarily engaged in an independently established trade, occupation, profession, or business that is of the same nature as the service the worker is providing, or the worker must have a principal place of business eligible for a business deduction for federal income taxes.<sup>186</sup> Fourth, the worker must be responsible for filing expense deductions with the IRS for the type of business the worker is conducting.<sup>187</sup> Fifth, the worker must have established an account with Washington State's Department of Revenue and other state agencies for the business the worker is conducting.<sup>188</sup> And, sixth, the worker must maintain a separate set of books or records that reflects the income and expenses of the business which the worker is conducting.<sup>189</sup>

Washington's employee definitions and common law tests presume workers are covered. Similar to concerns with the ABC test, executives of gig-companies are concerned about the implications such laws have on their business models, which rely heavily on independent contractor classification.<sup>190</sup>

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<sup>182</sup> WASH. REV. CODE § 51.08.195 (2008); WASH. REV. CODE § 51.08.180 (2008).

<sup>183</sup> WASH. REV. CODE § 51.08.195 (2008).

<sup>184</sup> WASH. REV. CODE § 51.08.195(1) (2008).

<sup>185</sup> WASH. REV. CODE § 51.08.195(2) (2008).

<sup>186</sup> WASH. REV. CODE § 51.08.195(3) (2008).

<sup>187</sup> WASH. REV. CODE § 51.08.195(4) (2008).

<sup>188</sup> WASH. REV. CODE § 51.08.195(5) (2008).

<sup>189</sup> WASH. REV. CODE § 51.08.195(6) (2008).

<sup>190</sup> James C. Hardman, *Crimping Entrepreneurship: The Attack on Motor Carrier Sponsored Equipment Acquisition Programs*, 35 TRANSP. L.J. 157 (2008).

Washington's strict employee definitions do bode well for gig-workers because RCW 51.08.195(1)–(3) closely resemble the ABC test.<sup>191</sup> Both of these classification tests would force gig-companies to classify many of their workers as employees because they exert control over them.<sup>192</sup> Indeed, lawsuits have alleged this very premise.<sup>193</sup> While gig-companies will likely find success arguing that their workers are in an independently established trade, it will be difficult to prove that their workers provide services outside the employer's usual business.<sup>194</sup>

## V. THE MIDDLE GROUND: A GIG-WORKER CLASSIFICATION—THE MARKETPLACE CONTRACTOR

The meteoric growth of the gig-economy has left operational regulatory structures scrambling in an attempt to scale up regulations to protect vulnerable gig-workers.<sup>195</sup> Technological advancements intrinsic to the growth of the gig-economy are tied to heightened efficiency, consolidated risk management, and, ultimately, diminished oversight.<sup>196</sup> Recent settlements from gig-economy giants Uber and Lyft have allowed both companies to retain their independent contractor models.<sup>197</sup> Yet the settlements do nothing to resolve the underlying misclassification issue.<sup>198</sup>

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<sup>191</sup> Compare WASH. REV. CODE §51.08.195 (2008), with *Dynamex Operations W., Inc. v. Super. Ct. of L.A. Cnty.*, 416 P.3d 1 (Cal. 2018).

<sup>192</sup> Hannah Wiley, *Are Contracted Workers 'Oppressed' in California? Debate over 'Gig' Economy Heats Up*, SACRAMENTO BEE (July 11, 2019), <https://www.sacbee.com/news/politics-government/capitol-alert/article232513822.html>.

<sup>193</sup> Jacob Demmitt, *Uber Sued by Former Worker Seeking at Least \$44M on Behalf of All Washington State Uber Drivers*, GEEKWIRE (Nov. 20, 2015), <https://www.geekwire.com/2015/uber-hit-with-another-lawsuit-over-driver-classification-this-time-in-washington-state/> [<https://perma.cc/Q96M-NLAL>].

<sup>194</sup> Kingston, *supra* note 158.

<sup>195</sup> Azar, *supra* note 43.

<sup>196</sup> *Id.*

<sup>197</sup> Izvanariu, *supra* note 125, at 134.

<sup>198</sup> *Id.*

To directly and efficiently address this issue, Washington State must add a marketplace contractor classification to its worker classification laws. This new, hybrid classification must cure the deficiencies of the current workplace structure that exists in the gig-economy and focus on core employment protections for gig-workers. A focus on core employment protections can generally assist in combatting, from an ideological standpoint, dehumanization, and the risk of creating a new group of invisible workers.<sup>199</sup> From a practical standpoint, the hybrid classification can stress the recognition of the ultimate human character inherent to gig-economy work, even if such work is predominantly mediated by impersonal IT tools like smart-phone applications.<sup>200</sup> Therefore, this new classification must address workplace safety; require workers' compensation, minimum wage, and overtime wages; and grant gig-workers greater recourse for employment discrimination.

#### A. Workplace Safety

The marketplace contractor classification should serve to improve workplace conditions for gig-workers by treating gig-companies more like traditional employers. To dramatically improve conditions—for both workers and consumers alike—the new classification should impose vicarious liability on gig-employers. Vicarious liability is a legal doctrine that holds employers liable for the action, negligent or otherwise, of an employee when the employee was acting within the course and scope of their employment.<sup>201</sup>

Imposing vicarious liability for gig-employers can lead to an overall improvement in workplace standards.<sup>202</sup> Increased liability incentivizes gig-

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<sup>199</sup> De Stefano, *supra* note 33, at 499.

<sup>200</sup> *Id.*

<sup>201</sup> *How Does Vicarious Liability Affect Employers?*, Linkilaw (Aug. 24, 2017), <https://linkilaw.com/employee-regulations/vicarious-liability/> [<https://perma.cc/5EZL-5GMC>].

<sup>202</sup> Saucedo, *supra* note 14, at 19.

companies to provide proper safety training, personal protective equipment, and other various workplace protections and safety measures that ensure a safer environment.<sup>203</sup> Given the independent nature of gig-work, safety trainings for gig-workers are necessary to allow them to execute their job functions more safely.<sup>204</sup> Because of the transformative nature of the gig-economy, gig-companies should be required to proactively mitigate prevalent safety hazards or face legal liability as a consequence.<sup>205</sup>

Not surprisingly, gig-companies fiercely argue that safety hazards inherent to the gig-economy—road traffic safety, public interaction, use of household cleaning agents, etc.—are known and present dangers that their workers should be addressing themselves.<sup>206</sup> The companies contend that the current regulatory framework for prevention of workplace hazards does not apply in the absence of a traditional employment relationship.<sup>207</sup> On this last point, gig-companies are correct. The lack of an employment relationship puts the onus on gig-workers to institute measures to prevent known workplace hazards.<sup>208</sup>

Thus, Washington State’s new marketplace contractor classification should establish a more concrete employment relationship by imposing vicarious liability on gig-companies. In doing so, regulatory safety measures currently in place for traditional employers will be implemented for gig-workers as well.

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<sup>203</sup> James L. Curtis et al., *Workplace Safety in the Gig Economy: New Hazards and Liabilities*, SEYFARTH (May 9, 2019), <https://www.laborandemploymentlawcounsel.com/2019/05/workplace-safety-in-the-gig-economy-new-hazards-and-liabilities/> [<https://perma.cc/42HN-GZU5>].

<sup>204</sup> Sparkman, *supra* note 57.

<sup>205</sup> *Id.*

<sup>206</sup> Tran & Sokas, *supra* note 55.

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

### B. Minimum Wage & Overtime Wages

The marketplace contractor classification must also enforce state minimum wage, scheduling, and overtime regulations to further improve workplace conditions for gig-workers.<sup>209</sup> Many gig-companies pay their workers on a piecework basis.<sup>210</sup> So, a driver for DoorDash, for example, is paid only upon completion of the assigned delivery.<sup>211</sup> Consequently, a DoorDash driver might be paid less than the minimum wage on a slow day where the driver has to wait more than twenty minutes between deliveries. This, in turn, causes many gig-workers to work long hours for multiple companies to make up the difference.<sup>212</sup>

Some gig-companies have addressed this issue on their own initiative. Companies such as Favor—an Austin-based food delivery application—have essentially guaranteed all of their drivers a minimum wage.<sup>213</sup> If a Favor driver does not meet the company’s minimum pay guarantee, then Favor makes up the difference.<sup>214</sup> Washington’s new classification must codify such a guarantee from all gig-companies operating within the state.

However, gig-companies correctly point out that it would be difficult to apply an hourly wage to workers when they can work for multiple employers in any given day.<sup>215</sup> The gig-companies argue that it may be “impossible in many circumstances to attribute independent workers’ work

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<sup>209</sup> Sarah Kessler, *Could a Minimum Wage Work in the Gig Economy?*, FAST CO. (Apr. 6, 2016), <https://www.fastcompany.com/3058599/could-a-minimum-wage-work-in-the-gig-economy> [<https://perma.cc/E7MM-U952>].

<sup>210</sup> Stewart & Stanford, *supra* note 28, at 421.

<sup>211</sup> Kessler, *supra* note 209.

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

<sup>215</sup> SETH D. HARRIS & ALAN B. KRUEGER, THE HAMILTON PROJECT, A PROPOSAL FOR MODERNIZING LABOR LAWS FOR TWENTY-FIRST-CENTURY WORK: THE “INDEPENDENT WORKER” 2, 6–8 (2015), [https://www.hamiltonproject.org/assets/files/modernizing\\_labor\\_laws\\_for\\_twenty\\_first\\_century\\_work\\_krueger\\_harris.pdf](https://www.hamiltonproject.org/assets/files/modernizing_labor_laws_for_twenty_first_century_work_krueger_harris.pdf) [<https://perma.cc/7EPR-GWW3>].

hours to any employer.”<sup>216</sup> But it is not impossible; rather, a relatively simple solution can solve this “impossible” dilemma posited by gig-companies. Each company should be required to submit to the state the time worked and pay per hour for each of their workers. The state should then compile this data and determine whether a worker’s wage satisfies minimum wage requirements. If not, then the state should issue a wage order to each gig-company and apportion the amount to be paid by each company based on the hours the worker labored for each company.

In addition to supporting a minimum wage, the marketplace contractor classification must extend the Fair Labor Standards Act’s (FLSA) overtime compensation provisions to gig-workers. The FLSA does not limit worker hours but instead requires additional compensation for hours worked in excess of forty hours per workweek.<sup>217</sup> Generally, this pay amounts to one-and-a-half times a worker’s regular pay rate.<sup>218</sup>

Similar to their minimum wage concerns, gig-companies have expressed doubt as to how overtime wages can be tracked when workers labor for multiple employers.<sup>219</sup> A centralized mechanism—as suggested above—solves this problem. Apportioning overtime pay based on hours worked for a particular gig-company allows for overtime pay in the gig-economy. By apportioning overtime pay based on hours worked, each individual company will likely not be overburdened.

### *C. Workers’ Compensation*

The marketplace contractor classification should also require gig-companies to pay into Washington State’s industrial insurance fund, albeit at a reduced rate. The industrial insurance fund is Washington’s workers’ compensation fund that pays for medical expenses and lost wages that result

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<sup>216</sup> *Id.* at 2.

<sup>217</sup> CONG. RSCH. SERV., *supra* note 3, at 11.

<sup>218</sup> *Id.*

<sup>219</sup> Kessler, *supra* note 48.

from an on-the-job injury.<sup>220</sup> The funds and other workers' compensation laws provide much needed security to workers by providing temporary (or sometimes permanent) income to injured workers.<sup>221</sup> Indeed, these payments are frequently the first and only form of compensation available to workers injured on the job.<sup>222</sup> The fund ensures workers receive access to care and intensive medical treatments if necessary.<sup>223</sup> It also provides important income security pay to compensate an injured worker for past and future time lost due to the workplace injury.<sup>224</sup>

Workers' compensation laws thankfully operate with a no-fault provision, which means workers are protected regardless of who is at fault for the injury.<sup>225</sup> This no-fault provision extends to employers as well, and the worker is compensated through a fund into which every employer pays.<sup>226</sup> Therefore, a worker is entitled to workers' compensation if they are injured within the course and scope of their employment.<sup>227</sup>

Workplace danger inherent to many gig economy jobs requires workers' compensation to help protect the uniquely vulnerable workforce. Many gig-companies operate in higher risk industries where workers transport passengers and freight.<sup>228</sup> Using public roads and highways to carry out this work is inherently dangerous.<sup>229</sup> Furthermore, the gig-workplace is made

<sup>220</sup> WASH. REV. CODE § 51.08.175 (1977).

<sup>221</sup> See generally Jon Rehm, *Portability, the Gig Economy and Workers Compensation*, WORKERS' COMP. WATCH (June 1, 2017), <https://workerscompensationwatch.com/2017/06/01/portability-the-gig-economy-and-workers-compensation/> [<https://perma.cc/4YZ9-NTNK>].

<sup>222</sup> LU JINKS, WHY PAY MORE? THE EFFECTS OF INCREASED WAGE REPLACEMENT BENEFITS IN WORKERS' COMPENSATION 2 (2019).

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> James West, *Workers' Compensation: Why Is It Important?*, NCMIC (Mar. 7, 2017), <https://www.ncmic.com/learning-center/articles/insurance/business-insurance/workers-compensation-why-is-it-important/> [<https://perma.cc/9VAT-GT9P>].

<sup>226</sup> *Id.*

<sup>227</sup> *Id.*

<sup>228</sup> James L. Curtis et al., *supra* note 203.

<sup>229</sup> *Id.*



more dangerous because many gig-companies employ transient workforces that may lack the knowledge and skills to perform their jobs safely.<sup>230</sup>

Always concerned with costs, gig-companies worry that workers' compensation payments would overly burden them, which would then push costs onto the consumer.<sup>231</sup> Gig-companies also argue that the legal regime requiring such taxes would handicap their ability to recruit workers to keep pace with rising demand, adding significant costs to their bottom line.<sup>232</sup> Uber has stated that employment taxes like workers' compensation could add an additional \$500 million in costs per year.<sup>233</sup>

These worries are valid but overblown. A reduced payment into the state's workers' compensation fund will not impose debilitating operational costs for gig-companies. Washington employers pay into the workers' compensation on an hourly basis.<sup>234</sup> This rate is adjusted to be higher or lower depending on how dangerous the worker's job is.<sup>235</sup> For example, an accounting firm may pay \$0.18 per hour per accountant, while a firm specializing in bridge and tunnel construction can pay up to \$3.68 per hour.<sup>236</sup> Taxi-cab companies—who perform a service similar to Uber, Lyft, and many other gig-giants—pay \$0.62 per hour.<sup>237</sup> Thus, a rate *lower* than \$0.62 per hour cannot be said to overly burden most gig-companies.

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<sup>230</sup> *Id.*

<sup>231</sup> See generally Johana Bhuiyan, *Treat Workers as Employees? Uber, Lyft and Others Are Scrambling for a Compromise*, L.A. TIMES (June 23, 2019), <https://www.latimes.com/business/technology/la-fi-tn-dynamex-contractors-ab5-20190623-story.html> [<https://perma.cc/H6JW-BX4R>].

<sup>232</sup> *Id.*

<sup>233</sup> *Id.*

<sup>234</sup> See WASH. STATE DEP'T OF LAB. & INDUS., *2017-2020 Premium Base Rate Changes* (2020), [https://lni.wa.gov/insurance/\\_docs/2020ratesbustypeclasscode.pdf](https://lni.wa.gov/insurance/_docs/2020ratesbustypeclasscode.pdf) (last visited April 1, 2020) [<https://perma.cc/A5B7-N58U>].

<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

Further, since 2018, Washington has decreased its workers' compensation premiums for many businesses.<sup>238</sup>

In any event, companies like Uber—whose net worth in 2018 was valued at \$82 billion—cannot realistically argue that less than \$0.62 per hour per driver, would destroy their business model.<sup>239</sup>

#### *D. Workplace Discrimination*

Lastly, the marketplace contractor classification must also directly focus on anti-employment discrimination and the civil rights of gig-workers. In doing so, the hybrid classification should expand the scope of Washington law under chapter 49.60 of the Revised Code of Washington (RCW) to specifically include gig-workers and independent contractors.<sup>240</sup>

Chapter 49.60 is a general anti-discrimination chapter. The chapter makes it unlawful to discriminate on the basis of race, color, national origin, sex, or religion.<sup>241</sup> It also prohibits retaliation against a worker because they complained of discrimination, filed a charge of discrimination, or participated in an employment discrimination lawsuit.<sup>242</sup>

But the statute as currently written is ambiguous. A plain language reading of the definition of “employer” in chapter 49.60 leaves it unclear as to whether the chapter covers gig-employers as well.<sup>243</sup> Unfortunately, many courts have an implicit understanding that independent contractors

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<sup>238</sup> *Average Cost of Workers' Comp in Washington Dropping in 2018*, INS. J. (Dec. 1, 2017), <https://www.insurancejournal.com/news/west/2017/12/01/472944.htm> [<https://perma.cc/CKR9-MDZJ>].

<sup>239</sup> Adelo Seun, *How Much Is Uber Worth in 2019 and How Do They Make Their Money?*, JUST RICHEST (May 31, 2020), <https://justrichest.com/uber-worth-money/> [<https://perma.cc/5LQK-SWQB>].

<sup>240</sup> WASH. REV. CODE § 49.60 is a chapter of Washington State law that protects all people in Washington from unfair and discriminatory practices, including in employment. WASH. REV. CODE § 49.60.010 (2020).

<sup>241</sup> WASH. REV. CODE § 49.60.030 (2020).

<sup>242</sup> WASH. REV. CODE § 49.60.210 (2011).

<sup>243</sup> WASH. REV. CODE § 49.60.040(d)(10) (1995).

cannot claim employment discrimination violations because they do not have the same rights and protections as employees.<sup>244</sup>

Therefore, Washington must amend the definition of employer in chapter 49.60 to specifically include gig-workers. Expanding the scope in this way would address the exploitation of structural inequalities that exist in the gig-economy.<sup>245</sup>

## VI. THE STATUTE(S)

Implementing the marketplace contractor classification requires action from the state legislature. The current independent contractor-employee test is overly stringent and needs reform. At the present time, many states have in place statutes that delineate the rights of gig-workers. Thus, there is no need for Washington to reinvent the wheel. Instead, Washington should adopt definitional provisions from other states and incorporate them into the Revised Code of Washington.

This section will examine Arizona’s statutes that define gig-companies, digital platforms, and gig-workers. It will then explain the key changes to those statutes that are necessary to effectuate the goals outlined in the previous section.

To avoid the ambiguity that comes with the binary classification system, the Washington legislature must first properly define gig-companies, digital platforms, and gig-workers. Arizona and many other states have adequately defined these terms by specifying who qualifies as a gig-company and gig-worker. Washington should adopt these definitional statutes, but with important changes, to expand the rights of gig-workers.

Arizona defines “marketplace contractor” as follows:

1. Qualified marketplace contractor means any person or organization, including an individual, corporation, limited liability company, partnership, sole proprietor or other entity, that enters

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<sup>244</sup> Cal. Trucking Ass’n v. Su., 903 F.3d 953 (9th Cir. 2018).

<sup>245</sup> Saucedo, *supra* note 14, at 20.

into an agreement with a qualified marketplace platform to use the qualified marketplace platform's digital platform to provide service to third-party individuals or entities seeking those services.<sup>246</sup>

Arizona further defines "digital platforms":

2. Qualified marketplace platform means an organization, including, but not limited to, a corporation, limited liability company, partnership, sole proprietor or any other entity, that both:

a) Operates as a digital website or digital smartphone application that facilitates the provision of services by qualified marketplace contractors to individuals or entities seeking such services.

b) Accepts service requests from the public only through its digital website or digital smartphone application, and does not accept service requests by telephone, by facsimile or in person as physical retail locations.<sup>247</sup>

And Arizona explicitly defines gig-workers as marketplace contractors:

A. A qualified marketplace contractor shall be treated as an independent contractor for all purposes under state and local laws, regulations and ordinances, including employment security laws and workers' compensation laws, if all of the following apply:

1. All or substantially all of the payment for the services performed by the qualified marketplace contractor is related to the performance of services or other output.

2. The services performed by the qualified marketplace contractor are governed by a written contract executed between the qualified marketplace contractor and a qualified marketplace platform.

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<sup>246</sup> ARIZ. REV. STAT. § 23-1603(E) (2016).

<sup>247</sup> *Id.*

3. The written contract required by paragraph 2 of this subsection provides for all of the following:

A. That the qualified marketplace contractor is providing services as an independent contractor and not an employee.

B. That, pursuant to paragraph 1 of this subsection, all or substantially all of the payment paid to the contractor shall be based on the performances of services or other output.

C. That the qualified marketplace contractor is allowed to work any hours or schedules the qualified marketplace contractor chooses. If the qualified marketplace contractor elects to work specified hours or schedules, a contract may require the qualified marketplace contractor to perform work during the selected hours or schedules.

D. That the qualified marketplace contractor does not restrict the contractor's ability to perform services for other parties.<sup>248</sup>

Arizona's definitional statutes provide an excellent blueprint for statutory definitions of gig-workers and digital platforms. But they fail to provide any additional rights to gig-workers. Rather, the Arizona statutes essentially classify all gig-workers as independent contractors, thus depriving them of many employment rights previously discussed.<sup>249</sup> Therefore, these statutes render gig-workers functionally the same as independent contractors. Washington's legislature must correct this fatal flaw. Washington must create a functionally separate classification for gig-workers that affords them more rights and protections than traditional independent contractors.

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<sup>248</sup> ARIZ. REV. STAT. § 23-1603(A)(1)-(3) (2016).

<sup>249</sup> ARIZ. REV. STAT. § 23-1603(A)-(E) (2016).

To achieve this goal, Washington’s statutory definitions of “worker” and “employer” must be amended to specifically include the new marketplace contractor classification. The legislature should therefore explicitly revise those definitions in RCW Title 51.

Currently, RCW § 51.08.180 defines “worker” as “every person engaged in the employment of an employer under this title.”<sup>250</sup> This statute should simply be amended to expand the scope of the definition and define “worker” as “every person engaged in the employment, including marketplace contractors, of an employer, including under this title.” RCW § 51.08.070, on the other hand, defines “employer” as “any person, body of persons, corporate or otherwise . . . engaged in any work covered by the provisions of this title.”<sup>251</sup> This statute should similarly be amended to define “employer” as “any person, body of persons, corporate or otherwise, including digital platforms . . . engaged in any work covered by the provisions of this title.” In addition, the legislature should incorporate the definition of digital platform and mandate that any such entity must pay workers’ compensation premiums at a rate of 50% of the rate established for traditional businesses.

The definition of “employer” in RCW Chapter § 49.60.040(d)(10) must also be amended in a similar fashion. To subject gig-companies to Washington’s anti-discrimination laws, the definition must include digital platform employers. RCW § 49.60.040(d)(10) currently defines “employer” as “any person acting in the interest of employer, directly or indirectly, who employs eight or more persons.”<sup>252</sup> The statute should be amended to define “employer” as “any person acting in the interest of an employer, including a digital platform employer, directly or indirectly, who employs eight or more persons, including marketplace contractors.”

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<sup>250</sup> WASH. REV. CODE § 51.08.180 (2008).

<sup>251</sup> WASH. REV. CODE § 51.08.070 (2008).

<sup>252</sup> WASH. REV. CODE § 49.60.040(11) (1995).

These amended statutes would specifically define marketplace contractor and digital platform, include those terms in RCW Title 51 and RCW Title 49, and mandate reduced workers' compensation premiums. The amendments would impose increased liability and responsibility on gig-companies. Additionally, the amendments would provide valuable protections to gig-workers while at the same time not overly burdening gig-companies' business models with exorbitant costs.

## VII. CRITICISMS

Gig-economy champions often argue that creating a new hybrid classification would have many negative implications on the economy, employers, and workers.<sup>253</sup>

First, some argue that the creation of a new legal classification may complicate, rather than simplify, worker classification issues.<sup>254</sup> Critics contend that a hybrid test would be more complicated than a test based on the employer's control because it would be difficult to assess from where the worker's sources of income are derived.<sup>255</sup> However, the amendments in the previous section leave this argument largely meritless. The current legal definitions of employee and independent contractor revolve around the right to control of the hiring entity and are "slippery" when applied in practice because of their inherent ambiguity.<sup>256</sup> The amendments above are not ambiguous at all. Instead, they adequately define the specific workers and types of employers to which they apply. As explained earlier in this note, the ambiguity that arises from the binary classification system arises from

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<sup>253</sup> De Stefano, *supra* note 33, at 495.

<sup>254</sup> *Id.*

<sup>255</sup> *Id.*

<sup>256</sup> See, e.g., Hickey v. Arkla Indus., Inc., 699 F.2d 748, 752 (5th Cir. 1983) (noting that "as a practical matter, the economic realities test cannot be rigidly applied" in determining the existence of an employment relationship.); Richardson v. APAC-Miss., Inc., 631 So.2d 143, 150 (Miss. 1994) ("[T]he various tests to determine the type of relationship are themselves generalities which can viewed quite differently, depending upon which judge is applying them.").

the “right to control.”<sup>257</sup> Specifically defining marketplace contractor and digital platform obviates the need to use the “right to control” or any other classification tests.

Second, and most importantly, gig-companies argue that a hybrid classification could lead to higher costs for the consumer and reduced income opportunity for gig-workers.<sup>258</sup> However, cost concerns of gig-companies are largely predicated on the passage of Assembly Bill 5 in California, which would require gig-companies to pay a multitude of employment and labor taxes, including workers’ compensation.<sup>259</sup> The proposed statute and amendment above, however, would only require gig-companies to pay a reduced workers’ compensation rate, take on increased liability (which would be offset by workers’ compensation), and be bound by anti-discrimination provisions of Title 49. While such a statute would surely increase the cost of operation for gig-companies, it cannot be said to be overly burdensome. The statute would also provide much needed core protections and benefits to a vulnerable sector of workers.

## VIII. CONCLUSION

The current binary worker classification system is inadequate and fails to protect vulnerable gig-workers while also protecting the expansion of a new burgeoning economy. Worker classifications that depend on a multi-factor test are inherently ambiguous and lead to the misclassification of workers as independent contractors. Conversely, the ABC Test and Washington State’s current classification test are overly burdensome, and they make it virtually impossible to classify a worker as an independent contractor. For these

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<sup>257</sup> Carlson, *supra* note 6, at 298.

<sup>258</sup> Megan Rose Dickey, *Uber Plans to Keep Defending Independent Contractor Model for Drivers*, TECH CRUNCH (Sept. 11, 2019), <https://techcrunch.com/2019/09/11/uber-ab-5-independent-contractors/> [<https://perma.cc/WFD4-UFW7>].

<sup>259</sup> Judy Lin, *What Happens to Uber and Lyft Drivers once AB 5 Passes?*, CAL MATTERS (Sept. 5, 2019), <https://calmatters.org/economy/2019/09/what-happens-to-uber-and-lyft-drivers-once-ab-5-passes/> [<https://perma.cc/SJ5R-K7ZD>].



reasons, Washington State must adopt the marketplace contractor classification to grant much needed protections to vulnerable gig-workers.