

LEADERSHIP FOR GREATER PURPOSE

“FUTURE DIRECTIONS OF LABOR AND EMPLOYMENT LAW”

Thursday, June 8, 2017

2:30 pm - 5:15 pm (Discussion)

5:15 pm - 6:30 pm (Cocktail Reception)

Joe's Seafood, Prime Steaks & Stone Crab Restaurant

(Gigi's Room / Terrace Bar)

750 - 15th Street, N.W. (15th & H Streets)

Washington, D.C.

AGENDA

Panel 1:

Seth Harris, Founder HarrisLaw, former Deputy Secretary and Acting Secretary of Labor, U.S. Department of Labor

Seema Nanda, Executive Vice Present & COO, Leadership Conference on Civil & Human Rights

Michael Eastman, Managing Counsel, NT Lakis, and Vice President, Public Policy, Equal Employment Advisory Council

Marc Freedman, Executive Director, Labor Law Policy, U.S. Chamber of Commerce

Moderator: Hal Coxson, Shareholder & Co-Chair, Government Relations Practice Group, Ogletree Deakins

Panel 2:

Steven Greenhouse, former workplace writer, NY Times

Lynn Rhinehart, General Counsel, AFL-CIO

Brian Hayes, Shareholder and Co-Chair, Traditional Labor Practice Group, Ogletree Deakins; former Senate-confirmed Board Member, NLRB

Moderator: John Higgins, past President, College of Labor & Employment Lawyers and former Acting General Counsel & Board Member, NLRB

A Proposal for Modernizing Labor Laws for Twenty-First-Century Work: The “Independent Worker”

Seth D. Harris and Alan B. Krueger



MISSION STATEMENT

The Hamilton Project seeks to advance America's promise of opportunity, prosperity, and growth.

We believe that today's increasingly competitive global economy demands public policy ideas commensurate with the challenges of the 21st Century. The Project's economic strategy reflects a judgment that long-term prosperity is best achieved by fostering economic growth and broad participation in that growth, by enhancing individual economic security, and by embracing a role for effective government in making needed public investments.

Our strategy calls for combining public investment, a secure social safety net, and fiscal discipline. In that framework, the Project puts forward innovative proposals from leading economic thinkers — based on credible evidence and experience, not ideology or doctrine — to introduce new and effective policy options into the national debate.

The Project is named after Alexander Hamilton, the nation's first Treasury Secretary, who laid the foundation for the modern American economy. Hamilton stood for sound fiscal policy, believed that broad-based opportunity for advancement would drive American economic growth, and recognized that "prudent aids and encouragements on the part of government" are necessary to enhance and guide market forces. The guiding principles of the Project remain consistent with these views.





A Proposal for Modernizing Labor Laws for Twenty-First-Century Work: The “Independent Worker”

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DECEMBER 2015

NOTE: This discussion paper is a proposal from the authors. As emphasized in The Hamilton Project’s original strategy paper, the Project was designed in part to provide a forum for leading thinkers across the nation to put forward innovative and potentially important economic policy ideas that share the Project’s broad goals of promoting economic growth, broad-based participation in growth, and economic security. The authors are invited to express their own ideas in discussion papers, whether or not the Project’s staff or advisory council agrees with the specific proposals. This discussion paper is offered in that spirit.

BROOKINGS

Abstract

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. The distinction is important because employees qualify for a range of legally mandated benefits and protections that are not available to independent contractors, such as the right to organize and bargain collectively, workers’ compensation insurance coverage, and overtime compensation. This paper proposes a new legal category, which we call “independent workers,” for those who occupy the gray area between employees and independent contractors.

Independent workers typically work with intermediaries who match workers to customers. The independent worker and the intermediary have some elements of the arms-length independent business relationships that characterize “independent contractor” status, and some elements of a traditional employee-employer relationship. On the one hand, independent workers have the ability to choose when to work, and whether to work at all. They may work with multiple intermediaries simultaneously, or conduct personal tasks while they are working with an intermediary. It is thus impossible in many circumstances to attribute independent workers’ work hours to any employer. In this critical respect, independent workers are similar to independent businesses. On the other hand, the intermediary retains some control over the way independent workers perform their work, such as by setting their fees or fee caps, and they may “fire” workers by prohibiting them from using their service. In these respects, independent workers are similar to traditional employees.

Evidence is presented suggesting that about 600,000 workers, or 0.4 percent of total U.S. employment, work with an online intermediary in the gig economy. Although there are probably many more workers who currently work with an offline intermediary who would qualify for independent worker status than there are who work with an online intermediary, the number of workers participating in the online gig economy is growing very rapidly.

In our proposal, independent workers — regardless of whether they work through an online or offline intermediary — would qualify for many, although not all, of the benefits and protections that employees receive, including the freedom to organize and collectively bargain, civil rights protections, tax withholding, and employer contributions for payroll taxes. Because it is conceptually impossible to attribute their work hours to any single intermediary, however, independent workers would not qualify for hours-based benefits, including overtime or minimum wage requirements. Further, because independent workers would rarely, if ever, qualify for unemployment insurance benefits given the discretion they have to choose whether to work through an intermediary, they would not be covered by the program or be required to contribute taxes to fund that program. However, intermediaries would be permitted to pool independent workers for purposes of purchasing and providing insurance and other benefits at lower cost and higher quality without the risk that their relationship will be transformed into an employment relationship.

Our proposal seeks to structure benefits to make independent worker status neutral when compared with employee status, as well as to enhance the efficiency of the operation of the labor market. By extending many of the legal benefits and protections found in employment relationships to independent workers, our proposal would protect and extend the social compact between workers and employers, and reduce the legal uncertainty and legal costs that currently beset many independent worker relationships.

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Chapter 1. Introduction

New and emerging work relationships arising in the “online gig economy” do not fit the existing legal definitions of “employee” and “independent contractor” status. These definitions determine which workers are required to receive certain protections and benefits from their employers. Under the current legal framework, the workers and intermediaries with whom they work in these emerging relationships face unnecessary and excessive uncertainty regarding a range of legal protections and benefits that employees receive. Legal uncertainty creates inefficiencies for all parties concerned. In addition, work-related benefits that could prove valuable to both workers and businesses—such as intermediaries using their size and pooling advantages to purchase low-cost life insurance for the independent workers they engage—are sometimes eschewed to reduce the risk that the law will impose an employment relationship and the corresponding legal obligations because of the provision of these benefits. As a result, the emergence of new forms of work that could benefit workers, businesses, and consumers could be slowed, or even stopped, by a legal regime for classifying workers that does not accommodate these innovative arrangements. A further concern with the current legal framework is that companies working online and offline to match workers to final customers could organize work in such a way as to classify jobs that were traditionally performed by employees into independent contractor relationships to avoid providing employees with benefits that are a crucial part of the social compact.

To address these problems, we propose a new legal category of workers, which we call “independent workers,” who occupy a middleground between traditional employees and independent contractors. An archetypal example of independent workers is for-hire drivers who work on the Lyft or Uber platforms. We refer to these companies, and others like them, as “intermediaries” because they are the intermediary between the independent worker and the ultimate customer. These independent worker arrangements bear some similarities to

independent contractors and some similarities to traditional employees. On the one hand, the drivers can choose when and whether to work, similar to independent contractors, but on the other hand, drivers face restrictions that are imposed by the intermediary on how much they charge customers. Other online intermediaries that utilize a similar model include TaskRabbit (for a variety of tasks) and Mechanical Turk (for tasks completed online).

Technology is creating exciting new opportunities to link workers who provide services directly to customers, with potentially large gains in the quality, speed, and efficiency of service. From an economic and societal perspective, however, it is important that, if these new intermediaries are to succeed and expand, it is a result of their superior technology, efficiency, or service, not because their technology or business model enables regulatory arbitrage. For example, if an intermediary succeeds by displacing traditional employers who offer the same service because the intermediary gains a cost advantage by avoiding provision of certain legally mandated benefits and protections, then welfare is reduced by the innovation.

Below, we propose that Congress and, where appropriate, state legislatures, enact legislation to define and establish a third legal category of workers: independent workers. This legislation would clearly define the protections and benefits that intermediaries would be required to provide to the workers with whom they conduct business. These protections and benefits would approximate the social compact guaranteed to employees, albeit with important differences that reflect the substantive distinctions between employment relationships and independent worker–intermediary relationships. In crafting this legislation, Congress should abide by a set of governing principles to identify these workers; we describe those principles below. We also provide an analysis of the size, growth, and business models used by an emerging set of online intermediaries.

Chapter 2. Challenges and Background

It is our view that labor and employment law has evolved over time in the United States to reflect a social compact between employees and employers. This social compact represents a synthesis between the desire to enhance the efficiency of the operation of the labor market (e.g., to overcome information asymmetries and imperfections) and to ensure that the employment relationship treats workers fairly in light of the unequal bargaining power that typifies most employee–employer relationships. This social compact has served the United States well and, in our view, should be preserved and protected unless there are compelling reasons to alter it.

But workers participating in the growing online “gig economy” are at risk of being excluded from this social compact. These are the workers who use an Internet-based app created by an intermediary that matches customers to workers who will perform personal services. Independent workers do not fit into either of the two legal statuses currently available under U.S. labor, employment, and tax law: employees or independent contractors. As noted, such workers have some similarities to independent contractors and some similarities to traditional employees. We offer a fuller discussion of these similarities and differences below. The resulting ambiguity in these workers’ legal status leads to uncertainty and inefficiency in the labor market that are harmful to both the workers and the intermediaries in several ways.

First, determining whether workers in the online gig economy are employees or independent contractors will require, and can be expected to continue to require, long, costly and uncertain legal battles.¹ Some Western economies (e.g., Czech Republic, Estonia, France [in selected circumstances], Mexico, The Netherlands, Portugal) have statutory presumptions that essentially establish “employee” status as a default condition (OECD 2014). Absent a rebuttal of the presumption, there is no uncertainty regarding a worker’s status. There is no default status in U.S. law, however. The resulting uncertainty is costly to workers, who do not know the benefits that they will ultimately qualify for, and to intermediaries, who face uncertain costs. Both parties face the prospect of high transaction costs resulting from litigation or government enforcement interventions.

Second, current labor and employment laws are not harmonized or applied consistently. Workers and employers must confront different tests across statutes for employee status and independent contractor status. These tests and courts’ interpretations vary across statutes because the core purposes of those statutes vary (e.g., tax law serves a different purpose from occupational safety and health law). So, a statute’s scope of coverage should be expected to best serve that law’s purpose. Nonetheless, the classification of workers as employees or independent contractors requires analysis of several different tests that, at least theoretically, could lead to different results. For example, a worker might be deemed entitled to the minimum wage, but not to have her employer pay half of her payroll taxes.

An even greater risk comes from the fact that these tests are collections of factors for consideration rather than clear thresholds or required elements. Labels applied in contracts are irrelevant. Courts and administrative agencies often warn that no single factor governs, and the weighing of factors is often left to individual decision makers. As a practical matter, in too many cases conclusions are driven by a predetermined desired outcome rather than by objective analysis. As a result, similarly situated workers, such as truck drivers, could be employees under a statute in one jurisdiction, but independent contractors under the same statute in a different jurisdiction.²

Because they occupy a middle ground between employees and independent contractors, independent workers and the intermediaries with which they work are especially vexed by this ambiguous system. As noted above, independent workers satisfy different factors of both the employee and independent contractor tests under most labor, tax, and employment laws. Will courts and administrative agencies classify them consistently across laws and jurisdictions? Can independent workers and intermediaries predict how they will be treated when the legal dust settles? This risk and uncertainty creates a barrier to the continuation and creation of relationships that can be beneficial to all parties involved.

Third, many independent workers who are classified as independent contractors may not have the means to secure many of the protections and benefits that are available to traditional employees. Independent workers also face barriers

to “pooling” that would increase their bargaining power both in dealings with their intermediaries and in markets for fringe benefits that could provide them with many of the same benefits and protections that are legally mandated for employees.

Finally, some employers may reorganize their work to classify employees as independent contractors to avoid providing required benefits and protections under the social compact and to gain an unfair advantage over their competitors. Equally troubling, the uncertainty in this dichotomous classification system facilitates both intentional and unintentional misclassification of workers by employers, usually in the direction of independent contractor status that deprives workers of many important legal protections and benefits.

THE “EMPLOYEE” VS. “INDEPENDENT CONTRACTOR” DICHOTOMY

The difference between the status of employees and independent contractors is more than an issue of nomenclature. A sizable list of protections and benefits are at stake, depending on how the relationship is classified. It is worth reviewing what is at stake.

Employees benefit from contracts with their employers that include significant substantive terms that are imposed by law. In essence, employees agree to be economically dependent on their employers by relinquishing control over many aspects of their work lives (and, to some extent, their economic futures) and, in return, employers must provide workers with a degree of economic security. Myriad laws at the federal and state level require employers to pay employees at least the minimum wage and overtime premium pay; refrain from discriminating in hiring, firing, and the terms and conditions of employment on the basis of race, sex, and other selected personal characteristics; maintain safe and healthy workplaces; contribute toward the payroll taxes that make employees eligible for unemployment insurance, Social Security, Disability Insurance, and Medicare; and provide workers’ compensation insurance, among other protections. Under the Patient Protection and Affordable Care Act (ACA), many employers also will be required to provide employees with health insurance or pay a penalty if they do not. Finally, the Employee Retirement Income Security Act (ERISA) requires covered employers to satisfy certain requirements if they provide employees with a retirement savings plan.

Various laws apply tests to identify employees and their employers who are covered by some or all of this social compact. Key features of the determination of employee status include the likelihood that the employment relationships will continue indefinitely, or at least beyond the completion of a given task, even if only for a specified term, and whether the employer gives the worker instructions about how to do the work. Employees are also expected to have little control over their work hours, unless

their employers delegate such control to them. Table 1 provides a summary of how the Fair Labor Standards Act (FLSA), Internal Revenue Code (IRC), common law, and selected other employment laws determine employee status. These tests are an imperfect and increasingly outdated means for determining eligibility for coverage under the social compact.

Independent contractors, in contrast to employees, do not relinquish control over their economic lives to others. Generally speaking, they are independent businesses working with multiple other businesses or clients without significant limitations, except those to which they may agree by contract or laws that may pertain to businesses in their sector. Typically, these relationships are not expected to last beyond the completion of a particular task, activity, or deadline. In the past, independent contractors have operated more at the periphery of others’ businesses rather than performing more-integral work, but the fissuring of work and business relationships and the increasingly complex supply chains that have developed over the past several decades in some industries have made this consideration less important (Weil 2014).

Independent contractors control the methods and means of the work they perform for others, make significant capital investments, possibly employ others, and retain the opportunity for profit or loss. For these reasons, independent contractors are expected to have some bargaining power—even if it is not equal bargaining power—that allows them to enter into successful arms-length contracts with other businesses and clients.

Existing law wrongly implies that employees and independent contractors occupy the entire field of work relationships in the U.S. economy. This dichotomy is a vestige of the early law of “masters” and “servants” that is as archaic as the words suggest. Newly emerging “independent workers” participate in new kinds of work relationships that occupy a space between these two statuses.

Other countries have not clung to a dichotomous employee-independent contractor categorization of work relationships. Both Canada and Germany, for example, recognize a “dependent contractor” status for some independent contractors. This status becomes relevant when a contractor has formed an essentially exclusive relationship (80% being a “rule of thumb” for “exclusive” in Canada) over a lengthy period of time with one client such that the contractor is economically dependent on the continuation of that relationship. In some Canadian provinces these dependent contractors are treated like employees, at least with respect to termination notifications and eligibility for union membership (Kennedy 2014). While dependent contractor status illustrates that there is room for more than two legal statuses in the world of work, it is worth noting that the dependent contractor concept does not accurately correspond to the relationship between intermediaries and independent workers because

TABLE 1.

Definitions of "Employee" Under Selected Statutes

	Role of work: Is the work performed integral to the employer's business?	Skills Involved: Is the work not necessarily dependent on special skills?	Investment: Does the employer provide the necessary tools and/or equipment and bear the risk of loss from those investments?	Independent Business Judgment: Has the worker withdrawn from the competitive market to work for the employer?	Duration: Does the worker have a permanent or indefinite relationship with the employer?	Control: Does the employer set pay amount, work hours, and manner in which work is performed?	Benefits: Does the worker receive insurance, pension plan, sick days, or other benefits that suggest an employment relationship?	Method of Payment: Does the worker receive a guaranteed wage or salary as opposed to a fee per task?	Intent: Do the parties believe they have created an employer-employee relationship?
Fair Labor Standards Act <i>(Centered on degree of economic dependence on employer)</i>	YES	YES	YES	YES	YES	YES	N/A	N/A	N/A
Internal Revenue Code (IRC) <i>(Centered on control)</i>	YES ¹	YES	YES ²	YES ³	YES	YES	YES	YES	N/A
Nationwide Mut. Ins. v. Darden <i>(ERISA and other laws)⁴</i>	YES	YES	YES	N/A	YES	YES	YES	YES	N/A
Common Law <i>(From Restatement Second of Agency § 220)</i>	YES	YES	YES	YES	YES	YES	N/A	YES	YES

Note: "Yes" contributes to a conclusion that the worker is an "employee"; "N/A" indicates the factor is not considered under the specified law.

¹The IRS looks at the role of the work as an indicator of control – if the work is "key" to employer's business, the employer will likely have the right to direct or to control the work)

²The IRS also specifically looks at whether the worker has a high degree of unreimbursed expenses.

³The IRC does not use "business judgment" as a term, but does ask if the worker's services are available to the market directly.

⁴The Supreme Court draws its multi-factor test from *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318 (1992).

independent workers typically have only fleeting relationships with their final customers. For this reason, we see no evidence that Canada, for example, has sought to apply the status to its intermediaries and independent workers.

THE GRAY AREA

The heart of the challenge for independent workers is that they do not resemble independent contractors or employees with respect to their most fundamental characteristics. Independent workers typically have little individual bargaining power and, as a result, do not have the ability to negotiate contracts with either intermediaries or their ultimate customers that could secure for them the protections and benefits that are available to employees. They are not true independent businesspeople in that they do not have freedom to negotiate their compensation

or terms of service. But their relationships with intermediaries are not so dependent, deep, extensive, or long lasting that we should ask these intermediaries to assume responsibility for all aspects of independent workers' economic security. They are not true employees. Thus, the existing employee-independent contractor dichotomy does not offer a satisfying or reliable path in these new and emerging circumstances.

Forcing these new forms of work into a traditional employment relationship could be an existential threat to the emergence of online-intermediated work, with adverse consequences for workers, consumers, businesses, and the economy. At the same time, relying on the existing employee-independent contractor dichotomy to classify workers whose circumstances do not easily fit either definition risks depriving those workers of any benefits or protections of the social compact, and risks

BOX 1.

An Example

A simple hypothetical example illustrates a representative challenge posed by the existing employee-independent contractor dichotomy. Imagine an independent worker driving around her city in her car. She has apps for Uber and Lyft open on separate electronic devices. She is waiting for a customer who is seeking a ride from the area in which she is driving to another part of the city. Two questions arise: (1) Should the driver be compensated for this waiting time? And, if so, (2) who should compensate her?

Under existing FLSA doctrine, and assuming the driver is an employee, whether the driver's waiting time constitutes compensable work hours turns on the question of whether the driver is "waiting to be engaged" or "engaged to wait." This distinction, in turn, depends on whether the driver can use the waiting time for her own personal purposes. If she can, she is waiting to be engaged and does not qualify to be paid for the waiting time. If the employer controls the employee's movement during the waiting time, or there is too little time available for personal activity, the employee is engaged to wait and entitled to compensation.

In this context, it seems the better argument is that the driver is waiting to be engaged. She can turn off the apps at will and go to her traditional job, undertake another moneymaking activity, drive her children to school, or park by the side of the road and take a nap. Even if she does not turn off either app, she is not obligated to pick up any particular customer. She can wait for a customer of her choosing, or until after she has completed her personal activities, whatever they might be.

Let's assume for purposes of reaching the second question, however, that this legal conclusion is incorrect and that the driver is deemed to be engaged to wait. She has two apps open: one for Uber and one for Lyft. Who should pay the driver for this waiting time? Both Uber and Lyft? Whichever intermediary offers the ride that the driver ultimately accepts? Whichever intermediary offers the most rides to this driver during that day? We should not pretend that existing FLSA doctrine answers this question since there is no analogy in the employee-employer relationship to a driver with two simultaneously open apps for different services. This situation is not joint employment. If anything, Uber and Lyft are competitors for the driver's services, not co-employers. The best legal answer seems to be that there is not a good answer.

the erosion of the social compact for employees. If the dual goals of labor and employment law are increased efficiency and protection of workers from the consequences of unequal bargaining power, then the status quo serves neither goal in the case of independent workers.

INDEPENDENT WORKERS

Independent workers operate in a triangular relationship: they provide services to customers identified with the help of intermediaries. The intermediaries create a communications channel, typically an "app," that customers use to identify themselves as needing a service—for example, a car ride, landscaping services, or food delivery. (An intermediary need not utilize the Internet to match independent workers and customers, but we initially focus on online intermediaries because they have the greatest potential to disrupt working relationships.) The intermediaries' apps allow independent workers to select which customers they would like to serve. The intermediary does not assign the customer to the independent worker; rather, the independent worker chooses or declines to serve the customer (sometimes within broadly defined limits). However, the intermediary may set certain threshold requirements for independent workers who are eligible to use its app, such as criminal background checks. The intermediary may also set the price (or at least an upper bound on the price)

for the service provided by independent workers through its app. But the intermediary exercises no further control over how and whether a particular independent worker will serve a particular customer. The intermediary is typically rewarded for its services with a predetermined percentage of the fee paid by the customer to the independent worker.

The best known of these kinds of triangular relationships are drivers providing ride-sharing services to customers brokered through online apps provided by Uber and Lyft. Somewhat less famous are the independent workers doing odd jobs like landscaping, maid service, home repairs, and other tasks for customers using similar apps provided by intermediaries such as Taskrabbit and Thumbtack. There are several especially important aspects of these triangular relationships. First, the independent worker provides personal services only when she chooses to do so. The intermediary plays no role in this decision. This is qualitatively different from an employment relationship, even one in which a worker may be allowed to work from home or to choose flexible working hours. The independent worker chooses when and whether to work at all. The relationship can be fleeting, occasional, or constant, at the discretion of the *independent worker*.

The independent worker may offer her services through multiple intermediaries, or combine working with intermediaries and employment with a traditional employer. Like traditional employees, independent workers are integral to the business of the intermediary. The intermediary's business lives or dies by the provision of services by independent workers. Lyft would not exist if no drivers were willing to provide car ride services through the Lyft platform.

These relationships do not fit neatly into the employee-independent contractor dichotomy. Independent workers are not employees for the following reasons: they do not make

themselves economically dependent on any single employer, they do not have an indefinite relationship with any employer, and they do not relinquish control over their work hours or the opportunity for profit or loss. Independent workers are not independent contractors because some aspects of the methods and means of work—including the price of their services—are controlled by the intermediary and because they are integral to the business of the intermediary. Independent workers are, in some respects, like individuals working for others, and in other respects are like independent businesses (e.g., they use their own equipment and control their own hours). Hence we propose a new legal and economic category of independent workers.

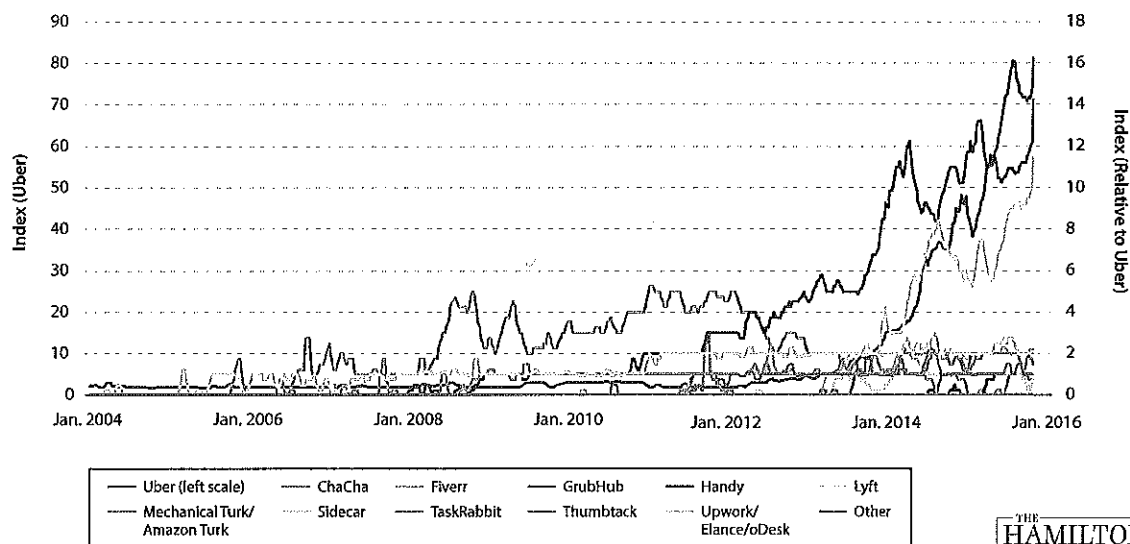
BOX 2.

The Scope and Growth of the Online Gig Economy

There has been much speculation about the size and growth rate of the gig economy. We are particularly interested in the number of workers participating in the “online gig economy,” because this sector is growing rapidly and often involves workers that fall in the gray area between employees and independent contractors. As we are defining it, the online gig economy involves the use of an Internet-based app to match customers to workers who perform discrete *personal tasks*, such as driving a passenger from point A to point B, or delivering a meal to a customer’s house. Note that this definition *excludes* intermediaries that facilitate the sale of goods and impersonal services to customers, such as TeacherPayTeachers.com, a Web site where teachers sell lesson plans and other nonpersonal services to other teachers, and Etsy.com, a Web site where individuals sell handmade or vintage goods. It also excludes Airbnb, a Web site where people can rent apartments, houses, and other accommodations.

FIGURE 1.

Google Trends: Four-Week Moving Average of Web Searches



Source: Google Trends analysis by authors.

Notes: “Other” includes agentanything, axiom law, clickworker, Eden McCallum, Gengo, Gocurb/TaxiMaglc, hourly nerd, Instacart, mediacast, Fed Beacon, Samasource, Shyp, Skillshare, trycaviar/caviar delivery, and Washio. Search period spans January 1, 2015- November 7, 2015. Google Trends normalizes the data for each term specified relative to the total number of Google searches conducted in that week, so that the time period with the most searches for Uber equals 100.



The Appendix table lists 26 prominent companies that act as intermediaries in the online gig economy, the types of services that they supply, and the nature of their business arrangements with workers. This list is meant to illustrate examples of emerging opportunities in the gig economy, and not to necessarily classify their workers. We are not advocating that every worker engaged with every intermediary in the online gig economy should be classified as an independent worker. It is quite common that these businesses compensate workers who utilize their app on a commission basis, with commissions taken by the intermediary typically in the 10 to 20 percent range, though commissions are sometimes higher. Some of the intermediaries control the fee that workers can charge end customers for their services, while others allow workers to propose a fee. Determining whether the workers who participate in these online markets are independent workers would require a deeper analysis of their relationship with their intermediary.

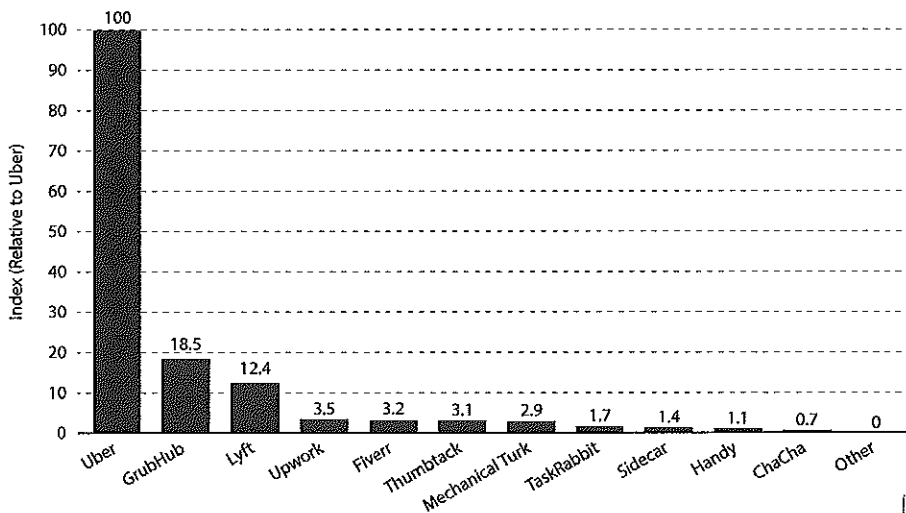
Unfortunately, because almost all of these companies are privately held start-ups, little public information is available regarding their size, growth rate, revenues, or profitability. Nevertheless, we can obtain a rough estimate of their size and growth rate from Google Trends (www.google.com/trends/). Google Trends enables users to track the relative frequency of searches for various terms. Specifically, we used Google Trends to compute the relative number of searches conducted in the United States containing the names of each intermediary listed in the Appendix table; we then normalized the data relative to searches for the term “Uber” each week. “Uber” is by far the most frequent term that arises in searches for the intermediaries in the table.

Figure 1 summarizes the data, and shows a four-week moving average of the relative frequency of searches for each intermediary. The exponential growth rate of Uber searches since 2013 matches the exponential growth rate of Uber driver-partners reported in Hall and Krueger (2015). In addition to Uber, intermediaries Lyft and Grubhub also exhibit an exponential growth path. Searches for ChaCha, a search engine guided by humans, grew rapidly until 2012 and then trailed off as the company encountered difficulties.

Figure 2 provides a bar chart on the relative number of searches for each intermediary, and combines the data for every week from January through early November 2015. The searches are indexed relative to searches for Uber. The second-most-common intermediary that Internet users searched for was Grubhub. Searches for Grubhub were about one-fifth as common as searches for Uber. (Note that Uber is shown on the scale on the left vertical axis, and all of the

FIGURE 2.

Google Trends: Cumulative Web Searches in 2015



Source: Google Trends analysis by authors.

Notes: “Other” includes Agent Anything, Axiom, Caviar, Clickworker, Curb, Eden McCallum, Gengo, Hourly Nerd, Instacart, Medicast, Red Beacon, Samasource, Shyp, Skillshare, and Washio. Search period spans January 1, 2015- November 7, 2015. Google Trends normalizes the data for each term specified relative to the total number of Google searches conducted in that week, so that the period with the most searches for Uber equals 100.

others are shown on the scale on the right vertical axis.) Searches for Lyft, Uber's largest online competitor, were only 12 percent as frequent as were searches for Uber. The skewness of the distribution of searches for online intermediaries is noteworthy. Only seven other intermediaries registered more than one percent as much search interest as Uber. The other 25 intermediaries combined generated only about half (48.5 percent) as much search activity as did Uber.

We can derive a rough estimate of the size of the online gig economy as follows. First, note that in December 2014 Uber had 162,000 active drivers in the United States, and the number of drivers more than doubled every six months from 2012 to 2014 (Hall and Krueger 2015). Assuming this pace continued into 2015, Uber had around 400,000 active driver-partners in the fall of 2015. If the number of workers providing services through an intermediary is proportional to the number of Google searches—an assumption that is quite plausible for Lyft and less clear for other intermediaries—then there would only be about 600,000 workers, or 0.4 percent of total employment in the United States, engaged with all of the intermediaries in the Appendix table. If, however, Google searches translate into five to ten times as many workers per search incident for apps other than Uber and Lyft—to make an extreme assumption—then there would be about 1.2 to 1.9 million workers engaged in the online gig economy. This figure is in the ballpark of McKinsey's estimate that 1 percent of the U.S. working-age population participates in "contingent work that is transacted on a digital marketplace" (McKinsey Global Institute 2015). There are probably many more workers who work for traditional intermediaries (i.e., that do not use apps to match workers with customers) who would be classified as independent workers than there are workers who work for emerging intermediaries (i.e., that use Internet-based apps) who would be classified as independent workers.

Although precise estimates of the number of workers engaged in the gig economy are not available and must await further research, these calculations suggest that independent workers operating in online markets make up a very small share of total U.S. employment at present. However, it is clear that some intermediaries are growing rapidly, and creating a rapidly expanding new segment of the workforce.

Chapter 3. Principles of a New Worker Classification

To identify independent workers and guide the determination of the benefits and protections for which they should qualify, we offer three main principles: immeasurability of work hours, neutrality, and efficiency.

IMMEASURABILITY OF WORK HOURS

The boundary between work and nonwork for independent workers is largely indeterminable. A worker in the online gig economy could be primarily engaged in personal tasks while one or more intermediaries' apps are turned on. It would stretch any reasonable definition of "work" to count this time as work hours, as the example in box 1 illustrates. This fact of the online gig economy creates an immediate problem for implementing the social compact. Many benefits included in that compact, such as the minimum wage, overtime pay, and ACA eligibility, are tied to hours worked—and, even more specifically, hours worked for a particular employer. Determining whether and for whom an independent worker is "working" is impossible or deeply problematic in too many circumstances for the concept of work hours to translate into these emerging relationships.

There are circumstances in which independent workers are undeniably working. For example, a landscaper is working during the time she is mowing a customer's lawn or trimming hedges. A driver is working while he has a customer in his car and the car is under way to the customer's destination. It is equally undeniable that technological developments have made recording this time even easier than using a clock or watch. Yet these independent workers are working for the customer during these times, and not the intermediary. Once the connection between customer and independent worker has been made, the intermediary has no role except to collect payment and transmit it to the independent worker. Even under the broadest definition of "employ" in the law, which is found in the FLSA, the intermediary cannot be said to "suffer or permit" this work.

If a worker works for two intermediaries at the same time, as illustrated by the example of a driver who uses apps for Lyft and Uber simultaneously, it is unclear how the law would or should apportion total work hours between the two companies. Moreover, a worker could spend time at home with her app turned on, waiting for a possible work opportunity, while primarily performing work for another intermediary or engaging in nonwork activities. Conceptually, workers' hours spent waiting to be engaged in work cannot be apportioned to a specific employer. In this sense, independent workers are working for themselves and working on their own time.

If work hours cannot be apportioned and measured for the purposes of assigning benefits or assessing hourly earnings, we think it makes little sense to require intermediaries to

Creative destruction works to raise living standards when new entrants gain an advantage because they provide better goods or services, or the same goods or services more efficiently.

provide hours-based benefits, such as overtime and the minimum wage. Although employees have a hard-earned right to these protections, independent workers can be viewed as having traded these protections for the flexibility that their work arrangement affords.

NEUTRALITY

Creative destruction works to raise living standards when new entrants gain an advantage because they provide better goods or services, or the same goods or services more efficiently. However, when start-ups gain advantage because they skirt certain worker or customer protections, and not because they

have developed a better product or better way of producing it, creative destruction is destructive to living standards. It is therefore important that businesses do not organize themselves to move workers into independent worker status in order to gain an unfair advantage over other employers by skirting legal protections and required benefits. From society's perspective, it is important that businesses not choose to structure their work relationships to meet the definitions of independent workers or independent contractors in order to free ride on other employers with respect to providing certain benefits, such as health insurance.

Neutrality also requires that workers in "old economy" jobs who meet the definition of independent worker, as opposed to independent contractor or employee, should be classified as "independent workers." For example, as argued in the analysis below, many taxi drivers who are currently classified as independent contractors could be deemed to be independent workers, depending on their terms and conditions of work. In this way, taxi drivers would be treated just like independent workers who provide rides through the Uber and Lyft platforms.

EFFICIENCY

The independent worker contract should be efficient in the sense that it enables workers and intermediaries to maximize the joint surplus that their relationship produces. For example, independent contractor status is currently inefficient for many intermediaries and their contract workers because the intermediary avoids providing benefits that would make both the worker and the intermediary better off to reduce the chances of the relationship being ruled an employment relationship. We believe that legal uncertainty, and the intentional and unintentional misclassification it facilitates, are significant contributors to this inefficiency.

These principles are of first-order importance in guiding the reform of labor, employment, and other laws concerning independent workers, although we acknowledge that progress in meeting one of the principles can conflict with progress in meeting another. For example, crafting rules to ensure neutrality could create uncertainty that, at least in the short run, could reduce efficiency. Nevertheless, explicitly specifying the key objectives and recognizing the trade-offs involved is a first step toward devising a more rational system.

Chapter 4. Legal Reform for “Independent Workers”

In view of these principles, we propose that Congress, and state legislatures where applicable, enact legislation that would guarantee or permit the following benefits and protections for independent workers to ensure they can benefit from America’s social compact. It is worth noting that federal law problems can be solved with a single act of Congress that amends the applicable tax, labor, and employment laws, as well as antitrust statutes, as appropriate. We acknowledge that proposed legislation addressing multiple subjects often faces the difficult challenge of working its way through multiple committees with different jurisdictions in each house of Congress. Nonetheless, the only way to ensure inclusion of all of the protections and benefits we consider important to independent worker status is a single omnibus bill. State law changes may also be required to address workers’ compensation and unemployment insurance issues. States with their own antitrust and workplace laws may need to amend those statutes to reconcile them with Congress’s amendments to federal law, if federal law changes do not override state laws.

While an argument might be made that courts or administrative agencies could use their existing authority to address a few of the problems created by the emergence of independent workers, the evolution of an entirely new third legal classification for workers should not be left to judges or regulators. Our principal concern is not the typical process argument around the propriety of unelected judges and regulatory officials making certain policy decisions rather than the democratically elected branches of government. Rather, our objection is that courts do not have the power, on their own, to ensure that independent workers receive their full and fair share of the social compact—that is, the full complement of protections and benefits that must be established by statute. Moreover, courts do not have sufficient authority to ensure a fully efficient solution to the problems created by the emergence of independent workers. Similarly, regulatory agencies like the Internal Revenue Service (IRS) and the U.S. Department of Labor do not have the authority to provide all of these benefits or an efficient outcome. A comprehensive solution will necessarily require Congress taking action followed, where necessary, by state legislatures.

We propose the following reforms.

FREEDOM TO ORGANIZE AND COLLECTIVELY BARGAIN

Antitrust laws should be amended to allow independent workers to organize for the purpose of aggregating their individual bargaining power so they may bargain successfully with their intermediaries over the terms and conditions of their work. Collective action could address imbalances in bargaining power between individual independent workers and intermediaries and thereby give independent workers some ability to influence their compensation and benefits while providing them an opportunity to gain a voice in their relationships with intermediaries. The ability to organize would also make independent worker status more neutral with respect to employee status.

Collective action by employees is protected by the National Labor Relations Act (NLRA). In principle, the NLRA safeguards employees’ “right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities” (29 U.S.C. § 157). The NLRA seeks to enforce these rights by deeming certain employer and union behaviors that infringe them to be “unfair labor practices” that may be remedied by order of the National Labor Relations Board (NLRB) (29 U.S.C. § 158).

The NLRB is the administrative agency created by the NLRA to which Congress delegated responsibility over private sector-labor relations. In addition to prosecuting and adjudicating unfair labor practices, the NLRB administers elections that determine whether a majority of an identified group of employees wants to be represented by a union. If a union wins a representation election, or secures voluntary recognition from an employer with majority support within a group of employees, then the union is the exclusive representative of all employees in that “bargaining unit” (29 U.S.C. § 153(b)).

Because they are not employees, in our proposal independent workers would not be covered by the NLRA and, therefore, would not have access to the NLRB and its processes, or to any of the NLRA’s remedies (29 U.S.C. § 152(3)). In some regards, this may be beneficial for independent workers’ organizing

prospects. The NLRA has been long derided as ossified, ineffective, and lacking in effective remedies for violations of employees' rights to organize and bargain collectively (Estlund 2002; Weiler 2009). Many unions have migrated away from organizing workers through NLRB elections to private "neutrality and card check" agreements with employers that operate outside the scope of the NLRB (Brudney 2005). In part because the NLRA does not effectively safeguard workers' freedom to choose a union, the private sector union density rate in the United States has declined from a high of 37 percent in 1955 to below 7 percent in 2014 (Bureau of Labor Statistics 2015; Kleiner 2001; Lui 2013).

The advent of many of the same technologies that make intermediaries possible has reduced the transaction costs of organizing independent workers. Mass organizing on Twitter, Facebook, Snapchat, and other social media platforms is in its early stages, but opportunities may exist for creative organizers to build significant power for independent workers if they are not subject to the detailed and burdensome requirements of a private sector labor law designed for different kinds of work relationships and workplaces. To facilitate organizing efforts, intermediaries could even be required to provide organizations seeking to represent independent workers with the contact information of independent workers who work with the intermediary. Nascent organizing efforts by some independent worker groups have already begun (www.coworker.org; Hudnall 2015).

The main legal challenge for independent workers' organizing activity is federal antitrust law. Section 1 of the Sherman Antitrust Act (Sherman Act) establishes that "every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal" (15 U.S.C. § 1). Section 2 of the Sherman Act makes it a misdemeanor to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations" (15 U.S.C. § 2). Similarly, Section 3 holds that "every contract, combination . . . , or conspiracy, in restraint of trade or commerce" is illegal (15 U.S.C. § 3). The purpose of these provisions is to protect free and unfettered competition in product and service markets from untoward efforts to "fix" the competition for the benefit of particular competitors or for competitors against consumers.

The risks these provisions create for independent workers seeking to organize are illustrated by the challenges that independent physicians encountered in the late 1990s when they organized for the purpose of negotiating with health maintenance organizations and managed care organizations regarding fees, patient care, and other issues. In several cases involving nonemployee physicians, the U.S.

government alleged antitrust violations under the Sherman Act. Settlements prohibiting any such organizing effectively foreclosed the physicians' efforts.⁴

Employees represented by unions do not face the same antitrust limitations. Unions benefit from a "labor exemption" from antitrust law when they engage in core activities such as organizing, bargaining with employers, or administering collective bargaining agreements. The exemption flows from very broad language in section 6 of the Clayton Antitrust Act:

The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor . . . organizations, instituted for the purposes of mutual help . . . or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws. (Clayton Antitrust Act, 15 U.S.C. § 17)

Further reinforcing the labor exemption, and to cure courts' inability to resist interventions against unions in disputes with employers during the first third of the twentieth century, both section 20 of the Clayton Antitrust Act (Clayton Act) and section 4 of the Norris-LaGuardia Act prohibit injunctions that would limit employees' ability to organize into unions and bargain with their employers (29 U.S.C. § 101).

The "labor exemption" is generally available only when a bona fide labor organization is promoting legitimate labor interests rather than entrepreneurial or other interests unrelated to the employer-employee relationship. The labor organization also must act independently of any nonlabor group. These limitations seek to ensure that labor unions focus their organizing and bargaining efforts on the labor market rather than on disrupting free competition in product and service markets.

The Supreme Court held in *Columbia River Packers Assn., Inc. v. Hinton* (315 U.S. 143 1942), that the exemption is not available to associations of independent contractors because they cannot form a bona fide labor organization under labor law or negotiate over an employment relationship that does not exist. *Hinton* and its progeny may doom any hope that the Clayton Act can be interpreted to protect independent workers' organizing from antitrust attacks, despite the fact that independent workers principally sell their own labor, as contemplated by section 6's broad declaration. It is possible that an argument could be made that independent workers are different from independent contractors and, as a result, that *Hinton* should not govern. Yet a better approach seems to be for Congress to craft an "independent workers exemption" from any antitrust laws that might infringe upon their efforts

to organize and bargain through the imposition, for example, of court injunctions or other judicial remedies.

To advance antitrust law's interest in protecting product and service markets from illicit restraints on competition, this independent workers exemption could include the same limitations to which the labor exemption is subject: independent worker organizations could be required to organize around and bargain over their equivalents of wages, hours, and the terms and conditions of their contractual relationships with the intermediaries. Collective efforts to set the prices paid by customers, for example, or to otherwise define product or service market outcomes should not be exempted. Another option would be to simply include independent workers under the NLRA.

ABILITY TO POOL

There are potentially large efficiency advantages if intermediaries are able to pool their independent workers for the purpose of purchasing or directly providing or administering certain benefits for workers. The benefits of risk pooling in insurance markets is well known. In essence, pooling helps to reduce adverse selection in the take-up of insurance that could render insurance policies prohibitively expensive and cause the entire insurance market to cease to exist (Rothschild and Stiglitz 1976). In addition, by pooling employees and jointly purchasing and administering certain benefits in bulk, intermediaries and their workers could benefit from scale economies and superior bargaining power that are unavailable to them as individuals. As a result, prices almost certainly would be significantly lower for independent workers and intermediaries than for individual purchasers, and both services and products could be greater in quality, quantity, or both.

Intermediaries could use their scale and pooling opportunities to offer independent workers a range of insurance services, tax preparation assistance, and financial services. Products and services that likely would be offered include auto insurance, disability insurance, health insurance and health care, banking and savings products, retirement products, and liability insurance. Currently, however, intermediaries are loath to take advantage of pooling efficiencies because offering benefits to workers would raise the risk that their work relationships would be adjudged employment by a court or administrative agency. To overcome this inefficient predicament, we propose that intermediaries be covered by a safe harbor provision such that pooling independent workers for purposes of providing benefits would not be legally interpreted as an indication of employee status.

Pooling is a common feature of employment relationships, and so the ability of intermediaries to pool their independent workers to purchase goods and services would approximate neutrality between the two statuses. Employers and employees would continue to have some advantages, including favorable tax treatment for retirement products and health insurance, which would provide some incentive to establish employment relationships over independent worker relationships. Yet our proposal would give independent workers a greater opportunity to participate in the social compact than would be available were they to be classified as independent contractors.

CIVIL RIGHTS PROTECTIONS

Expanding workplace antidiscrimination protections to include independent workers will help make that status neutral compared with employee status, extend a key aspect of the social compact to independent workers, and help the labor market to operate more efficiently.

Employees benefit from protections provided by a broad, well-developed, and reasonably effective battery of federal

Intermediaries could use their scale and pooling opportunities to offer independent workers a range of insurance services, tax preparation assistance, and financial services.

employment antidiscrimination statutes. These statutes prohibit almost all employers from discriminating against their employees or job applicants on the basis of race, national origin, color, sex, religion, age, and disability.⁵ Prohibited discriminatory acts may relate to hiring, firing, promotions, compensation or training decisions, job shift assignments, or almost any decision affecting an employee's terms and conditions of employment. Additional statutes and presidential executive orders add groups of employees to those protected from discrimination by federal contractors, including LGBT Americans and many veterans, and impose affirmative action obligations on the contractors.⁶

Workers who are not employees, including independent contractors, do not have access to these federal statutory antidiscrimination protections. Under existing law, independent workers also would not receive such protections. In federal law, only section 1981 of the Civil Rights Act of 1866 (42 U.S.C. § 1981) addresses discrimination in the relationships formed between employers and independent contractors or independent workers, and it is a starkly limited and inadequate tool when compared with employees' protections. In particular, section 1981 prohibits only race discrimination,⁷ although "race" is defined broadly to include ancestry and some ethnic characteristics.⁸ Nonetheless, independent contractors and independent workers could not bring federal claims if intermediaries discriminate on the basis of sex, disability, or age, for example.

Furthermore, section 1981 guards against only intentional discrimination, or "disparate treatment" in civil rights parlance, and not "disparate impact"—that is, particular practices that produce discriminatory results whether intended or not. Accordingly, if 98 percent of the relationships entered into by an intermediary were with white independent workers because the intermediary limits its recruitment to wealthier geographic areas in which white workers are grossly overrepresented, black and Latino independent workers could not bring a successful claim absent some evidence of discriminatory intent. Otherwise, however, section 1981 claims can be used to seek relief for many of the same kinds of discriminatory acts prohibited by the federal employment discrimination laws.

Section 1981 differs from federal employment discrimination laws in some ways that may benefit independent workers, however. For example, remedies under section 1981 are more expansive and generous than those available under the federal employment discrimination laws. Section 1981 claims are filed directly in court without a requirement of exhausting the administrative process at the U.S. Equal Employment Opportunity Commission (EEOC).⁹ Finally, section 1981's statute of limitations is longer.

The most obvious and straightforward solution to inadequate antidiscrimination protections for independent workers would be to include them within the protections of the federal employment discrimination laws. This approach ensures neutrality between employment relationships and independent worker relationships while providing more-expansive protection against inefficient discriminatory acts in the workplace and labor market. With this solution, intermediaries would derive the benefits of political compromises that have limited damages recoveries and force claims into the EEOC processes for mediation and dispute resolution.

Of course, this approach would require congressional action to amend these laws. While civil rights laws have been traditionally contentious topics in Congress, we believe that amending the federal employment discrimination laws is more likely than a wholesale rewriting of section 1981 both to expand the list of protected groups and to include disparate impact claims. It is also substantially more likely than crafting and enacting a new and targeted antidiscrimination statute dedicated exclusively to the protection of independent workers.

TAX WITHHOLDING AND THE FEDERAL INSURANCE CONTRIBUTIONS ACT

Withholding taxes for employees began during World War II as a measure to raise revenues to fund the war effort.¹⁰ A withholding tax is an advance payment toward an employee's final tax liability. In essence, employers deduct a certain amount of income from an employee's weekly or monthly paycheck, and remit the money to the IRS as an advance payment of income and payroll taxes. If the amount of taxes withheld exceeds an employee's ultimate tax liability, then the excess is refunded by the IRS. Tax withholding helps employees to smooth their after-tax income throughout the year and facilitates revenue collection by the IRS.

Absent their employers withholding their taxes and transferring them to the IRS, employees would be responsible for making quarterly payments to the IRS on their own, or saving sufficient funds to be able to pay their entire tax liability when they file their income tax return. Independent contractors are responsible for their own tax payments. This can be burdensome and create tax penalties if it is not done properly, and also can cause fluctuations in consumption and asset allocations because independent contractors may be required to make a large tax payment when filing their income taxes. Because of these added burdens of complying with tax laws, there is reason to believe that independent contractors are less likely than employees to pay their full tax liabilities (Gandhi 1994). So, tax withholding also can be expected to produce increased tax compliance, and greater revenues for the federal government and the states.

Tax withholding by intermediaries would reduce workers' administrative burden of paying income and social insurance taxes. Given economies of scale, withholding services provided by intermediaries would also be economically efficient and improve compliance with tax laws. We propose that intermediaries would be required to provide withholding services for income and social insurance taxes owed by all independent workers with whom they work. Tax withholding by intermediaries would support the principle of neutrality between employment status and independent worker status since most employees benefit when their employers withhold state and federal income and payroll taxes.

In addition, to maintain neutrality with employees, we propose that intermediaries pay half of independent workers' contributions toward the Federal Insurance Contributions Act (FICA) payroll taxes for Social Security and Medicare. Although in the long run, intermediaries are likely to shift the ultimate burden of paying for FICA contributions to workers through fee adjustments, as explained below, the assignment of legal tax liability can potentially affect tax incidence in some cases. In addition, tax shifting can take place for employees as well, so requiring intermediaries to contribute half of FICA contributions will make it easier for employees and independent workers to compare their compensation, because they will be on more-equal footing.

Our principles that guide the creation of an independent worker status lead us to suggest a more nuanced approach to some other benefits, such as allowing intermediaries to opt into workers' compensation insurance. We conclude that it would not be efficient or feasible to require intermediaries to provide this class of workers with other protections and benefits, such as overtime protection or unemployment insurance.

WORKERS' COMPENSATION INSURANCE

State laws typically require that employers provide their employees with workers' compensation insurance. Although this paper is principally focused on *federal* labor, employment, and tax laws, workers' compensation insurance is the oldest social insurance program in the United States and undeniably an integral part of America's employment social compact. Therefore, we consider it a necessary, if challenging, part of any discussion of independent workers.

Workers' compensation provides cash compensation and medical benefits to employees who experience workplace injuries or illnesses. In addition, it provides employees' survivors with compensation in the event of a fatality. It is a strict liability system—that is, the employee need not show that the employer was negligent or otherwise at fault in order to collect benefits. Payments are made based on a state-established matrix that principally considers the severity of the employee's work-related injury or illness and the employee's tangible economic losses. For example, an employee's permanent total disability would result in greater compensation than a partial impairment (Burton 2009).

Workers' compensation itself is the product of a grand bargain. In principle, employees receive reasonably predictable compensation for work-related injuries and illnesses without the cost and complication of proving in court that their employers failed to protect them from injury or illness. In return, employers receive immunity from costly lawsuits under state tort laws that could result in judgments against them that could be many multiples of the amounts they pay for any single workers' compensation claim, or even substantially more.

Because there is no employment relationship with the intermediaries with which they work, and therefore no immunity provided by workers' compensation laws, independent workers currently are able to use tort law to seek compensation for injuries or illnesses that result from their work relationships (for fatalities, survivors could bring the claims), assuming they are classified as independent contractors. Risk of tort judgments should create incentives for intermediaries to use reasonable care in their dealings with independent workers.¹¹

Texas and Oklahoma allow employers to opt out of their state workers' compensation insurance system and employees of employers that have opted out of the system are able to bring tort actions against their employers, but some employers have succeeded in significantly dulling the incentives of these states' tort laws and deprived their employees of fair recoveries using the limited damages remedies permitted by ERISA (Grabell and Berkes 1974). Because independent workers are not employees, ERISA would not be available as a tool to avoid responsibility to independent workers under state tort laws (ERISA, 29 U.S.C. 18 § 1003(a)).

Tort laws require, in most cases, that an intermediary commit some act or omission before being held liable, which may more accurately reflect the nature of the relationship between intermediaries and independent workers than workers' compensation's no-fault strict liability system. Independent workers generally do not perform their work on an intermediary's premises or use equipment supplied by an intermediary. In the case of Uber and Lyft, drivers use their own cars. In the case of TaskRabbit and similar apps, workers use their own tools or other supplies (or perhaps their customers') to work in their customers' homes, yards, or businesses. In the case of Mechanical Turk and similar apps, they are typically working in their homes on their personal computers. Thus, a legitimate question can be raised whether an intermediary should be expected to take responsibility for injuries, illnesses, or fatalities that are more likely than not beyond its control, particularly absent any proof of an ability to avoid the injury through reasonable care.

It is possible to imagine circumstances in which an intermediary's negligence may cause an injury to an independent worker. For example, Task Rabbit may have received complaints from independent workers that a particular customer has threatened violence against them. If Task Rabbit were to send another independent worker without prior experience with the customer to that customer's home for an odd job while negligently misrepresenting that there had been no complaints against that customer, then tort liability might be possible if the customer were to attack the independent worker. Similarly, Uber, Lyft, or other driving services might require their drivers to submit information through their apps while driving in a manner that unduly

distracts the drivers and leads to accidents and driver injuries. Tort liability might be possible in these circumstances as well, and provide an appropriate remedy.

Although the tort system may often be the best solution for addressing work-related injuries for intermediaries and independent workers, it is possible that in some instances workers' compensation insurance would offer a more efficient solution, although workers' compensation would be rife with adverse selection concerns if employees can opt into the system. We therefore propose that intermediaries be permitted to opt to provide expansive workers' compensation insurance policies to the independent workers with which they work without transforming these relationships into employment. In exchange for this no-fault insurance coverage, intermediaries would receive limited liability and protection from tort suits. States would provide the legal framework within which these policies would operate, but not operate the systems themselves. States could require that the policies provide the same level or more protection to independent workers than their state workers' compensation system. While opt-in and voluntary systems of insurance can create adverse selection and moral hazard problems, experience with these policies could inform design changes that might reduce these risks over time, and intermediaries would have the right to opt out of the system and be subject to tort actions if adverse selection and moral hazard cause workers' compensation insurance to be prohibitively expensive.

WAGE AND HOUR PROTECTIONS AND UNEMPLOYMENT INSURANCE

As discussed in greater detail above, measuring the working hours of independent workers in the same manner as the hours of employees is impossible. This reality of the independent worker-intermediary relationship makes certain rules that depend on the measurement of working hours—particularly a minimum wage for each hour worked and overtime for hours worked in a week in excess of forty—impossible to properly administer for independent workers. Since their circumstances are quite different, neutrality does not require the same legal treatment of independent workers and employees. Accordingly, similar to independent contractors, independent workers would not be covered by the FLSA's requirements of overtime pay and the minimum wage in our proposal.¹² Rather, our view is that compensation and benefits issues should be the subject of bargaining between (preferably organized) independent workers and intermediaries. Moreover, the easy entry and exit from independent work should provide some protection against substandard wages and exploitative work hours.

Similarly, because independent workers control when and whether they will work, the fundamental principles of the federal-state unemployment insurance system do not apply. Unemployment insurance benefits are generally provided to

employees who lose their jobs through no fault of their own, and not to those who voluntarily opt out of their jobs or stop working temporarily by choice. Employers pay a tax on their payrolls to fund unemployment insurance benefits for laid-off employees, although, ultimately, employer-funded benefits of this sort are often funded largely out of workers' wages. Since independent workers are not employees, and they would not be eligible for unemployment benefits, their earnings would not be subject to this payroll tax (Woodbury 2009).

Consistent with our discussion of pooling arrangements above, intermediaries should be permitted to pool resources across workers and create a private unemployment insurance system, or a system of individual accounts for independent workers who stop working.¹³ Such a system could come about as a result of collective bargaining between independent workers and intermediaries, or it could be established by intermediaries acting on their own. Organized independent workers may also seek protections against or compensation from intermediaries that cease doing business with particular independent workers for economic or other reasons that lack sufficient cause. Facilitating any or all of these systems would move independent worker status closer to neutrality with employee status and improve the efficiency of the labor market.

AFFORDABLE CARE ACT AND HEALTH INSURANCE

Maintaining neutrality between independent workers and employees after the employer mandate that is part of the ACA takes effect presents an important set of challenges. The mandate, also known as the Employer Shared Responsibility Provision of the Affordable Care Act, requires that firms with fifty or more full-time equivalent employees offer health insurance that meets minimum value and affordability standards for their employees. Employers who do not offer such coverage to at least 95 percent of their full-time employees are subject to a penalty. The threshold for full-time employment under the statute is thirty or more hours of work per week (26 U.S.C. 43 § 4980H). However, because work hours are immeasurable for independent workers, determining eligibility for the mandate and for coverage under the mandate is problematic. Nonetheless, in our view, independent workers should benefit from the social compact that supports employer-provided health insurance, and their intermediaries bear some responsibility under that compact.

If independent workers are treated like independent contractors with respect to the employer mandate, they would not be counted toward the 50 full-time employee threshold, and intermediaries would not be subject to a penalty for failing to offer independent workers health insurance. As a result, intermediaries may be viewed as free riding on other employers who provide health insurance to their independent workers. For example, an independent worker may have a

traditional employment relationship with an employer on another job that provides health insurance or a spouse whose employer provides family coverage. Such free riding would violate the neutrality principle. Moreover, if independent workers turn to exchanges to purchase health insurance and receive tax subsidies, intermediaries will have an advantage over other employers that would pay a penalty in similar circumstances.

Consequently, we propose that intermediaries be required to pay a contribution equal to five percent of independent workers' earnings (net of commissions) to support health insurance subsidies in the exchange as a solution to the free rider problem and to support health insurance tax subsidies. This five percent figure could be adjusted over time depending on health insurance costs and earnings growth.

Chapter 5. Are independent workers different from other third-party players in labor markets?

In his landmark book *The Fissured Workplace*, David Weil (2014) offers a thorough account of the shift from traditional bilateral and long-lasting employment relationships to more-diverse arrangements principally resulting from corporations outsourcing many of their functions. Whether or not fissuring of the workplace is the cause, independent workers are not the only workers who find themselves in some form of triangular relationship with customers and other enterprises in U.S. labor markets. Our view is that the application of our proposed independent worker category should *not* be limited to the online gig economy. In fact, the very nature of law—treating like cases alike—requires that this new category include any group of workers who satisfy the definition of independent workers we offered above. Accordingly, if there are workers in triangular relationships with intermediaries and customers, then they should be considered for independent worker status.

We cannot offer a comprehensive list of potential candidates for independent worker status in this paper, but some obvious candidates should be discussed and analyzed. In particular, many traditional taxi drivers (as opposed to Uber and Lyft drivers), temporary staffing agency employees, labor contractors, members who secure jobs through union hiring halls, outside sales employees, and (perhaps) direct sales employees occupy the points of triangles with other economic actors. In some of these cases, under existing law, an employment relationship is formed. In others, the workers are classified as independent contractors. Below we evaluate some specific cases. In a couple of cases, by applying the principles discussed in this paper, we conclude that workers should be reclassified (or considered for reclassification) as independent workers. In fact, we believe the neutrality principle requires it. In other cases, we conclude that there should be no reclassification given the nature of the work relationship.

For this latter category of work relationships, we find that there are meaningful differences from the independent worker-intermediary relationship. As we explain below, in several cases, the employer exercises more control over the worker's work hours, work tasks, and means of performing the work. As a result, work hours are not immeasurable like those of independent workers, and the employer's greater control contributes to the worker's greater dependence upon the employer. In addition, some of these relationships

are expected to last for longer periods than an independent worker's relationship with an intermediary. This suggests even greater worker dependence upon the employer. These factual distinctions that are fundamental to the task of classifying employees, independent contractors, and independent workers should produce different legal results.

We hasten to add that none of these distinctions depend upon technology, in general, or the use of an Internet-based app, in particular. If a temporary staffing agency or a union hiring hall used an online app to conduct its business, our conclusions would not change because the core of their business models and relationships with workers would not have changed.

TAXI DRIVERS

Nearly 500,000 Americans worked as a taxi or limo driver as their main or secondary job per month in 2015, according to a tabulation of the Current Population Survey. For the tiny percentage of readers who have not encountered them, taxi drivers transport customers from place to place by car. Taxi drivers may have any of three relationships with taxi companies. Owner-operators, in essence, are their own taxi companies: the driver owns the taxi and bears responsibility for all aspects of the taxi and her work schedule, including potentially leasing the taxi to others. There is no triangle in this relationship; rather, it is a bilateral relationship between the owner-operator and the customer. An owner-operator is an independent business. Independent subletters are owner-operators without the ownership. They lease a taxi, but operate it in whatever manner they see fit without direction or involvement by the lessor. Again, like owner-operators, the relationship is bilateral, not triangular. Thus, like owner-operators, and other small business owners who lease the premises on or in which they work, the best argument is that these independent subletters are independent businesses.

The triangular relationship and more complicated classification task comes with workers who rent or lease taxis for a day or longer, but who essentially work for the taxi company that leases the cab. The driver may pay a flat rental fee for the use of the taxi for a specified period or receive a portion of the day's fares from the taxi company. Since the lease suggests the drivers have assumed some or all of the risk of opportunity or loss, these workers are typically classified as independent

contractors. However, the rented taxi is branded with the cab company's name, telephone number, and (perhaps) Web site address. Customers who do not hail a taxi on the street (a practice that is usually limited to a few large cities and many airports) place an order either by phoning the cab company's dispatcher, completing a form on the company's Web site, or using an "e-hailing app" when one is available. The cab company then dispatches a taxi driver to pick up the customer using a two-way radio system, an in-taxi mobile data terminal, or some other communications device.

Apart from the technological difference, this relationship between drivers and taxi companies closely resembles the triangular relationship between independent worker-drivers, ride services such as Uber and Lyft, and riders. It also has some indicia of the independent contractor relationship and other indicia that it is an employment relationship, just like independent workers in the online gig economy. There are two principal nontechnological differences that make taxi drivers more like employees than independent contractors. First, Uber, Lyft, and other online ride services do not require drivers to rent the services' cars. Plainly, both taxi drivers and online ride service drivers invest capital in the enterprise—cash for taxi drivers, personal cars for the online ride services' drivers—and thereby take on some opportunity for profit or loss. Yet the drivers for the online services look more like independent contractors in this regard. Drivers for the online ride services can benefit by taking a tax deduction for depreciation of their vehicles and from the opportunity to use their vehicles at their discretion for purposes other than driving the services' customers. Taxi drivers derive neither benefit. The taxi companies' greater control over the vehicles' use and its condition, as well as their ability to depreciate the vehicles, suggests that the taxi drivers may be more like employees than the online ride services' drivers in this regard.

Second, with the exception of rides hailed on the street, taxi companies appear to have more control over matching customers and drivers than the online ride services. Taxi companies often decide which taxi will pick up each customer, whereas the online ride services leave this choice to their drivers (or at least the choice of first refusal), within some broadly defined rules. It also seems unlikely that a taxi driver, apart from meal and restroom breaks, would stop picking up riders during a shift when she must earn back the investment in the taxi rental. Online ride service drivers do not have shifts. They float in and out of working, essentially at will. This means that taxi companies have greater control over their riders' work processes—another factor that suggests taxi drivers are closer to employees than independent contractors.

In sum, taxi drivers who rent or lease their vehicles bear a close resemblance to the *independent workers* that operate in triangular relationships in the online gig economy. In particular, they share some indicia of independent contractors as well as some indicia of employees. The same arguments that suggest that Uber and Lyft

drivers should qualify as independent workers in our proposed legal architecture would apply equally well to many taxi drivers' work relationships. Furthermore, assigning a similar legal status to workers in the same relationship with an intermediary, regardless of the nature of the technology employed, will support the neutrality principle.

TEMPORARY STAFFING AGENCIES

Agencies such as Kelly Services and Manpower provide temporary workers to client employers to perform work ordinarily undertaken by the client's employees, typically in the client's workplace. One common compensation scheme involves the temporary staffing agency receiving a percentage of the temporary worker's hourly wage for every hour worked. There is little question that the client employer forms an employment relationship with the worker because it controls almost all aspects of the employee's work and, at least for the duration of the relationship, the employee does not and cannot work for anyone else during the hours committed to the client employer. For this period, the employee is economically dependent on the client employer and, to the extent it shares decision-making with its client, with the temporary staffing agency. These important characteristics of this relationship distinguish it from the independent worker's relationship with the intermediary.

A question may arise, however, about whether the temporary staffing agency is a "joint employer" of the temporary worker.¹⁴ In some cases, for example under the FLSA, the answer is usually "yes." But this relationship also differs from the independent worker–intermediary relationship. The temporary staffing agency ordinarily conducts a skills assessment when it begins working with a temporary worker. Based on this skills assessment, the agency decides the clients and jobs to which the temporary worker will be referred. It exercises significant control over the employment relationship in this way. Presumably, the worker may refuse some number of assignments, but the desire to sustain a continuing relationship with the temporary staffing agency would limit these choices. The temporary staffing agency may also retain some ability to hire and fire the employee, or to transfer her to a new job. It almost always pays the employee and takes responsibility for tax withholding, payroll taxes, and workers' compensation premiums. Furthermore, as with other employees, there is an expectation that the temporary worker will sustain a relationship with the agency beyond the completion of a particular assignment. In all of these ways, this relationship looks like a traditional employment relationship rather than the independent worker–intermediary relationship, and it is usually treated as an employment relationship.

LABOR CONTRACTORS

Labor contractors operate in a manner that is somewhat similar to temporary staffing agencies, but they play a larger

role in managing the temporary workers in the workplace. They find the workers and provide their labor to the client employer to fill a temporary need, but the labor contractors directly supervise the work of the employees on behalf of the client employer, usually in the client's workplace. In this way, the labor contractor's control over the employee is greater than that exercised by the temporary staffing agency, and an employment relationship is more likely, as a result.

UNION HIRING HALLS

In certain industries such as construction and maritime, some employers find new employees through hiring halls established and managed by the unions with which the employers have a collective bargaining relationship. The employer identifies a job opening, contacts the hiring hall in search of a union member to fill the job, and the union runs a form of competition among its members—often based, in part, on objective factors like seniority in the union, industry, and/or occupation—to fill the job. The successful union member becomes an employee of the employer for the duration of the job.¹⁵

Unlike with independent workers, that relationship with the ultimate customer—the employer—is not fleeting. It can last months or years. Unlike with temporary workers, the union is not a joint employer. It has no role in the employment relationship after running the employment competition. The hiring occurs according to criteria determined by the employer, not the union, with certain boundaries established through collective bargaining. Furthermore, the union is an instrumentality of the collective of its members. It has no independent interest or profit motive. In fact, it receives no payment for running the hiring competition. Rather, its payment comes in the form of regular dues from its members—a payment for collective bargaining and other services rendered—and per capita contributions from the employer to a trust fund established to finance the hiring hall.

OUTSIDE SALES EMPLOYEES AND DIRECT SALES WORKERS

Outside sales employees may be the least like independent workers of these examples. They typically receive commissions for selling an individual company's goods within a territory or to a list of customers and prospective customers provided by that company. Some may receive a small base salary that may or may not be charged against the commissions.¹⁶ Critically, these sales transactions are conducted at the customer's place of business, not at the seller's facility. Yet the principal difference between sales employees and independent workers is that the former sells goods and the latter sells services. This is more than mere difference in form: In addition to exercising some control over territories and target customers, the company purveying the goods makes every decision about the goods, and often controls aspects of the sales system, including

marketing. The goods purveyor is ultimately responsible to the customer for the quality and performance of the goods. Future sales will depend in large part on the quality of the product, not on the quality of the salesperson.

The neutrality principle requires us to consider whether direct sales workers should be treated like outside sales employees given the similarity in their functions, or whether they should be independent workers. Direct sales workers also affiliate with a company and sell its products. However, there is often a meaningful difference: direct sales workers typically have greater freedom than outside sales employees to make decisions about how, when, and to whom they will sell the company's products. For example, they generally have the ability to set their own work hours and days without any direction from the purveyor of the goods they sell. Direct sales typically involves face-to-face discussions (or the use of personal social media channels like Facebook) and product demonstrations that may be targeted to friends, neighbors, family, and others. Direct sales workers usually earn commissions, but they receive no salary. Like independent businesses, some direct sellers have the opportunity to recruit additional workers to sell their products and, in return, may receive a portion of the new seller's commissions from the company. For these reasons, under existing law, they are generally treated as independent contractors rather than as employees.

Although they may not be employees, the question of whether direct sales workers should be classified as independent workers turns principally on the answers to three questions. First, what is the extent of the product-purveying company's involvement with the direct sales worker's customers? If the company plays a role in identifying potential customers and connecting them to the direct sales worker in a manner that resembles the efforts of intermediaries in the online gig economy, then the direct sales workers may be independent workers. In other words, the workers, companies, and customers may have the kind of triangular relationship that characterizes the independent worker status. Second, does the company or the worker bear the risk and opportunity for profit and loss? Independent workers primarily bear the risk associated with the amount of time and effort they invest in providing direct customer service. Their additional investments, like the use of a personal car or tools, are limited. But if direct sales workers are required to invest in a sizable inventory of products that they may or may not be able to sell, whether for themselves or for the sales teams they assemble, then they are operating more like independent businesses and probably should be classified as independent contractors rather than as independent workers. Third, does the purveyor of goods exert other forms of control over the workers, such as requiring uniforms? If so, this would militate in favor of a determination of independent worker status.

Chapter 6. Economic Analysis of the Proposal

In the face of new and emerging work relationships in the online gig economy, this proposal aims to improve worker classification in three significant ways: reducing legal uncertainty, enhancing economic efficiency, and strengthening the social compact.

REDUCING LEGAL UNCERTAINTY

One of the goals of our proposal is to reduce legal uncertainty associated with the determination of employee, independent contractor, and independent worker status. In the short run, a change in law may introduce some additional uncertainty as new statutory, regulatory, and judicial rules are interpreted in the context of real-world factual circumstances and information about the changed legal rule spreads. It is not uncommon, for example, for the amount of litigation associated with a particular statute or regulation to increase temporarily after an amendment is adopted because the amendment disrupts received understandings of the meaning and application of the law. Congress could also increase uncertainty if new laws are laced with ambiguous language.

On the other hand, a third legal category governing the treatment of workers will also reduce uncertainty in both the short and long terms. Legal rules defining “independent workers” can and should more closely reflect the actual experience of workers in that category than the current definitions of “employee” and “independent contractor.” As a result, employers, workers, lawyers, regulators, and judges seeking to apply this new definition to the facts of a particular case may find reaching a conclusion about how the law applies to these workers both easier and less uncertain. An apt metaphor is a large tent that is suspended between two poles positioned at distant ends. With only the two poles, the middle of the tent will flap sloppily in any reasonably strong wind. But the introduction of a third pole to hold up the middle of the tent will reduce the flapping and give more shape to the tent, even if the tent is not perfectly taut.

One way in which legal uncertainty could be reduced would be to establish a default condition, such as a strong rebuttable presumption that all workers are employees. Employers could seek to rebut the presumption by demonstrating that the workers satisfy all elements of independent contractor status, which would have to be clearly articulated in a new legal rule.

Although, as noted above, some countries have established a default rule of this sort, careful deliberation and debate would be required to determine if a default rule is appropriate in the context of the U.S. labor market.

ENHANCING ECONOMIC EFFICIENCY

In an ideal labor market with no frictions and perfect information, the cost of many of the benefits that employers are legally required to provide to employees would be ultimately borne by employees themselves in the form of lower wages. In other words, the cost of benefits—like taxes—can be shifted from one party to another. Indeed, in the case of mandated benefits, the likelihood of shifting costs from employers to employees is even higher than it is for taxes since employees directly value the benefits that they receive, which leads to an outward shift in labor supply (Summers 1989).

Of course, the labor market often is characterized by frictions and imperfect information. This is particularly likely to be the case in traditional employment relationships, where the employment relationship is expected to endure and employees and employers make investments in the relationship. Moreover, individual employees typically face bargaining disadvantages compared with employers. In this situation, the assignment of which party is initially required to pay for benefits can affect the party that ultimately bears the cost of the benefits. The default can matter in a bargaining model.

Research has found that 80 percent or more of employers’ costs of providing employee benefits, such as health insurance or workers’ compensation insurance, is ultimately borne by employees in the form of lower wages (Gruber 1994; Gruber and Krueger 1991). In addition, the lion’s share of payroll taxes are likely to be shifted from employers to employees because labor supply is more inelastic than labor demand.

These observations suggest that most of the economic impact of requiring intermediaries to provide certain benefits or pay for certain payroll taxes will ultimately be offset in the form of lower net fees collected by independent workers and higher commissions taken by intermediaries. For example, if an intermediary is required to pay for half of its independent workers’ Social Security contributions, whereas before independent contractors paid for both halves themselves, fee

schedules that remunerate independent workers will likely eventually be adjusted to reduce the independent workers' compensation by the amount of the intermediary's Social Security contributions.

This analysis changes, however, when the independent worker status enables intermediaries to provide benefits in a more efficient manner than would be the case under independent contractor status. For example, if intermediaries can provide life insurance benefits more cheaply than workers could purchase them on their own, then a surplus is created that enables both sides to benefit.

In the standard Coasian explanation for why firms employ workers as opposed to contracting with external parties to provide services, transaction costs make it more efficient for firms to directly employ and supervise workers than to specify and monitor all of the contingencies required for their services in a contract. Firms thus find it more efficient to use hierarchies, directives, and internal structures to ensure that the desired work is performed. The emerging online apps have the potential to greatly reduce the transaction costs associated with contracting and monitoring the provision of certain services. Thus, the Coasian explanation for the growth of online intermediaries is that new computer and information technology enables a more efficient means for companies to contract with third parties (i.e., technology lowers the transaction costs that induce companies to hire employees rather than to contract work out).

The Coasian analysis overlooks the role of rent sharing, morale, and internal labor markets within firms. Because employee morale is critical for productivity, and because morale is affected by employees' perceptions of fairness, firms often find that they must share some rents with workers in order to maintain high morale, quality, and productivity (Blanchflower, Oswald, and Sanfey 1996). Rent sharing is more likely to occur in less-competitive industries that have product market rents to share, in highly unionized industries, and in highly capital-intensive industries. If networking technology leads to more disintermediation of traditional employment, it could have the effect of reducing rent sharing while it raises productivity. This is less likely in industries where most of the

work is already conducted by independent contractors, such as taxi services, or in sectors where product markets are highly competitive and employees are nonunionized.

The standard Coasian analysis assumes a perfectly competitive and efficient labor market with no transaction costs. However, in actual labor markets workers and firms often implicitly or explicitly (in the case of unionized workplaces) bargain over wages and face significant frictions that create transaction costs. Although the legal assignment of responsibility for paying taxes or funding benefits is irrelevant in a competitive market because the ultimate incidence would be shifted between the parties based on their relative elasticities of supply and demand, if a work relationship is marked by bargaining power, then switching the party responsible for paying for taxes or benefits can have consequences for incidence. The legal assignment of responsibilities, for example, is likely to affect the default position in bilateral bargaining settings, and thus to influence the ultimate outcomes.

STRENGTHEN THE SOCIAL COMPACT

Over the course of the 20th Century, a social compact developed between employees and employers in the U.S. that protected employees from dangerous working conditions, provided a minimum level of economic security, and defined norms of fairness. The social compact has served workers, employers, and society well. This social compact is jeopardized by the misclassification of employees into independent contractor status. It is also challenged by emerging forms of work that do not fit neatly into the employee-employer relationship.

Establishing a new legal classification for independent workers would help to strengthen the social compact. In particular, components of the social compact that are appropriate for their working relationship, such as Civil Rights protection and the right to collectively bargain, would be extended to independent workers. This would have the immediate effect of bringing more workers under the umbrella of important components of the social compact. In addition, adhering to the neutrality principle would help maintain the social compact for traditional employees by reducing the incentive for employers to reclassify workers as independent contractors.

Chapter 7. Conclusion

The online gig economy represents a small but rapidly growing segment of the workforce, especially in the ride-sharing and food-delivery sectors. This new and emerging sector has the potential to provide many new opportunities for workers and customers but raises serious challenges to the administration of existing employment, labor, and tax law. In particular, the workers who utilize intermediaries to identify customers to deliver services, such as car rides, do not fit neatly into existing legal categories of independent contractors and employees. We have sought to craft a new employment status that we call “independent workers,” to fill this void and improve the efficiency and fairness of the labor market, and reduce legal uncertainty. Many workers in the “offline economy” who are currently

classified as independent contractors, such as taxi drivers, would also fit into this new category.

Independent workers would receive some protections and benefits of employees, such as the right to organize and the requirement that intermediaries contribute half of Social Security and Medicare payroll taxes, but not others, such as time-and-a-half for overtime hours. Most importantly, we think that reforms along the lines that we propose would help to protect and extend the hard-earned social compact that has protected workers and improved living standards over the past century, reduce uncertainty, and enhance the efficient operation of the labor market.

Chapter 8. Appendix

APPENDIX TABLE

Description of Several Prominent Online Intermediary Companies

	Description/Business Model	Date Formed	Size
Agent Anything	<ul style="list-style-type: none"> • Similar to TaskRabbit, but only college students perform tasks (must verify through .edu email address). • Client posts a "mission" and a price; an interested agent accepts the mission and becomes responsible for completing it. • Also has option to facilitate bidding among agents. This model appears to be a hybrid between TaskRabbit's new model (where the client is presented with options to choose among) and old model (where the Taskers bid for tasks). 	<ul style="list-style-type: none"> • June 2010: founded 	N/A
Axiom	<ul style="list-style-type: none"> • Provides "tech-enabled legal services" including data analytics of contracts, due diligence, adjusting to regulatory changes, etc. Axiom also provides secondments (temporary in-house counsel). • Attorneys and staff are paid an annual salary, but only for the months actually worked/staffed on project. 	<ul style="list-style-type: none"> • 1999: founded 	<ul style="list-style-type: none"> • 1,500 employees in 11 offices. • Recently signed a \$73M contract to handle a trade agreement. • Almost \$200M in sales as of summer 2015. • \$28M in 2013 from 1 investor.
Caviar	<ul style="list-style-type: none"> • Similar to GrubHub, but specializes in delivering to restaurants that ordinarily do not deliver their food. • Couriers are compensated per-delivery. They are interviewed and background checked but not trained. • Takes 25% commission per delivery. 	<ul style="list-style-type: none"> • March 2013: launched 	<ul style="list-style-type: none"> • Caviar was acquired in August 2014 by "Square" (portable iPhone device for credit card payments). Caviar received only Square stock in the transaction but was valued at \$90M. • By August 2014, had raised \$15M in venture funding.
ChaCha	<ul style="list-style-type: none"> • A Web site and app launched in 2006. Users get answers to questions—essentially, a search engine where answers are generated by humans ("Guides") rather than by an algorithm. • Guides are paid a few cents for each question they answer. ChaCha has some rules about who can become a Guide—e.g., must have access to highspeed internet, must complete training and orientation, and pass a "Readiness Test." 	<ul style="list-style-type: none"> • 2006: founded 	<ul style="list-style-type: none"> • In 2006, ChaCha had over \$100M in funding and was generating excitement, however by 2015 it had laid off most of its employees and appears to be declining rapidly in value and in market-share.

Description/Business Model	Date Formed	Size
<p>Clickworker GmbH</p> <ul style="list-style-type: none"> • Similar to Mechanical Turk, but specifically for standardized tasks that cannot be done by a computer. • "Clickworkers" provide a variety of services, including taking surveys, digitalization, translation, creating content, and doing Web research. Clients come to Clickworker with a project, Clickworker breaks down the project into smaller tasks, doles out the work to individual clickworkers, and conducts quality control over the final product. • Clickworkers use their own computers and choose their own hours. Clickworker tests and trains the individual clickworkers to determine which worker is suitable for what tasks. 	<ul style="list-style-type: none"> • 2005: founded as humangrid GmbH • 2011: relaunched as online marketplace 	<ul style="list-style-type: none"> • Reportedly has worked with 700,000 freelancers in 136 countries. • \$14.2M in funding as of July 2013.
<p>Curb</p> <ul style="list-style-type: none"> • Similar to Uber, but draws on a pool of licensed taxi drivers. Standard taxi rates apply; the benefit to the rider is tracking the ride through an app similar to Uber. It appears the pay structure is the same as in an ordinary taxi setting: the app merely facilitates/modernizes the process of hailing a cab. 	<ul style="list-style-type: none"> • 2007: founded as RideCharge, an online platform to book and expense ground travel for business travelers • 2009: becomes Taxi Magic, a mobile app for ordering taxis on demand • August 2014: rebrands as Curb 	<ul style="list-style-type: none"> • Available in 60 cities. • Draws on 35K cars from 90 cab companies. • \$10.7M in funding as of August 2014.
<p>Eden McCallum</p> <ul style="list-style-type: none"> • Management consulting firm that relies on a stable of independent consultants who are selected to teams to work on projects. Consultants can decline any project. 	<ul style="list-style-type: none"> • 2000: founded 	<ul style="list-style-type: none"> • Over 500 independent consultants. • Over 1,500 projects completed. • Revenue unclear, but Harvard Business Review reported it was a "\$40M firm" in 2012.
<p>Fiverr</p> <ul style="list-style-type: none"> • Sellers offer services ranging from graphic design to translation. • The default price is a fixed \$5 fee, although the fixed price can be set higher. • Fiverr profits by taking a processing fee from the buyer and taking a cut of the fee paid to the seller. Sellers collect \$4 for a \$5 "gig" completed. Buyer pays a \$.50 processing fee on purchases \$10 and under. For purchases over \$10, the processing fee is 5%. • As sellers complete orders and maintain low cancellation rates and 4+ star rating, they can move up "levels" which offer more perks—especially greater exposure on the Web site and ability to have more gigs listed at the same time. 	<ul style="list-style-type: none"> • February 2010: launched 	<ul style="list-style-type: none"> • Ranked among 100 most popular Web sites in the US (and top 150 in the world) since 2013. • Raised \$30M in Series C funding in August 2014, bringing total funding to \$50M. • Claims over 300M gigs completed since 2010.

Description/Business Model	Date Formed	Size
<p>Gengo</p> <ul style="list-style-type: none"> • Crowdsourced language translation services headquartered in Tokyo. • Translators must pass a proprietary proficiency exam. Translation quality is monitored. • Businesses post translation work to the platform. Translators self-assess the difficulty and timeline. If interested, the translator selects the job and begins to work. • Standard rate charged is \$.06/word; standard rate paid is \$.03/word. Higher rates apply for more difficult work. 	<ul style="list-style-type: none"> • 2008: founded as myGengo • 2012: rebranded as Gengo 	<ul style="list-style-type: none"> • 10,000+ registered translators. • As of May 2015, had raised \$24.2M in 6 rounds from 23 investors. • 2013 Series B investment of \$12M.
<p>Grubhub</p> <ul style="list-style-type: none"> • A large, public company that delivers food from local restaurants. It has begun developing its own delivery service that will function like Curb's delivery service. It previously relied on the restaurants' own delivery teams. 	<ul style="list-style-type: none"> • 2004: founded • 2013: merges with Seamless 	<ul style="list-style-type: none"> • 700 US cities and London. • Approx. 174K order placed daily. • Trading on NYSE at \$27.34/share on 9/14/2015.
<p>Handy</p> <ul style="list-style-type: none"> • Allows individuals to hire home cleaners, plumbers, or handymen. • Individuals select a day/time and project, and Handy selects and dispatches a "professional" to assist. Individuals cannot review or select the professional. • Professionals are background checked and insured. • Handy takes 20 percent of booking price. 	<ul style="list-style-type: none"> • 2012: founded 	<ul style="list-style-type: none"> • \$60.7M in 5 rounds of funding from 9 investors. • Available in 37 cities across US, UK, and Canada. • By June 2015 claims to have completed 1 million bookings.
<p>Hourly Nerd</p> <ul style="list-style-type: none"> • Businesses hire freelance consultants (current MBA students and graduates) on an hourly basis. Consultants choose their own fees and create their own profiles. Businesses submit a project and outline their needs. • HourlyNerd's algorithm generates appropriate "experts" who then submit bids for the businesses to choose among. • HourlyNerd restricts the "nerds" to those who have graduated from certain selective schools. • Consultants are also provided with a "proprietary toolkit" as well as formatting templates. • Takes a 14.5 percent commission. 	<ul style="list-style-type: none"> • February 2013: launched 	<ul style="list-style-type: none"> • 10,000 consultants. • Raised \$7.8M in Series B (in February 2015).
<p>Instacart</p> <ul style="list-style-type: none"> • Same-day shopping and delivery from stores like Whole Foods, Costco, and Petco. • In summer 2015 Instacart divided the shopping and delivery role. Shoppers have the option to switch to employee status, but drivers may not. Most shoppers have switched. • For orders over \$35, Instacart charges \$3.99 for orders delivered in 2 hours and \$5.99 for deliveries within the hour. For orders under \$35 (but over \$10), two hour deliveries are \$7.99 and hour deliveries are \$9.99. During "Busy Periods" these base prices rise. Instacart also offers a membership that is \$99/year, but free 2-hour deliveries. • On top of delivery fees, the customer pays for the groceries, which are priced based on agreements between Instacart and the retailer. 	<ul style="list-style-type: none"> • July 2012: founded 	<ul style="list-style-type: none"> • 7K shoppers in 16 US cities. • \$274.8M in 5 rounds of investing.

Description/Business Model	Date Formed	Size
Lyft <ul style="list-style-type: none"> Peer-to-peer ridesharing app similar to Uber. Takes a 20 percent commission. 	<ul style="list-style-type: none"> Summer 2012: launched as a short-distance ride share offshoot of Zimride that connected riders and drivers for long distances to split costs (not a paid service) 	<ul style="list-style-type: none"> \$1B in venture funding. Valued at \$2.5B. Operates in 65 U.S. cities.
Mechanical Turk <ul style="list-style-type: none"> Part of Amazon. Crowdsourcing online marketplace connecting individuals ("Turkers") and businesses ("Requesters") to do work that computers cannot (e.g., writing product descriptions, selecting the "best" picture). Turkers browse available jobs and complete them at a payment rate set by the employer. 	<ul style="list-style-type: none"> Unknown: founded for Amazon's internal use 2005: launched to the public 	<ul style="list-style-type: none"> N/A
Medicast <ul style="list-style-type: none"> On-demand "house call" doctor visits. Patients can choose from three subscription levels: Plus (\$39/mo for two visits spread over 12 months), Premium (\$75/mo for 4 visits over 12 months); On Demand (one-time visit for \$249 with an added night/weekend fee of \$100). Doctors are paid according to the number of patients seen per day. They are provided an iPad with Medicast resources on it. 	<ul style="list-style-type: none"> 2013: founded 	<ul style="list-style-type: none"> 1.94M in 2 rounds of funding. Currently operating in Miami/South Florida and LA/Orange County.
Red Beacon <ul style="list-style-type: none"> Peer-to-peer task outsourcing. Similar to Task Rabbit, but specifically for household services (e.g., repairing leaky faucet). Model: (1) a client describes the size and scope of the project, (2) Red Beacon sends a list of qualified repair people, (3) the client selects up to five to interview, (4) the selected repair people contact the client to discuss the project and name a price. The client then selects one to perform the task based on reviews, description of expertise, and price. 	<ul style="list-style-type: none"> 2008: founded 2012: purchased by Home Depot 	<ul style="list-style-type: none"> Home Depot, Inc. purchased for an undisclosed amount.
Samasource <ul style="list-style-type: none"> Similar to Mechanical Turk: provides business services to companies. Samasource breaks down large-scale projects and sources it out to workers. Major difference is that it is a 501(c)(3)—its central aim is helping workers in developing nations. Samasource trains workers in basic computer skills. -Samasource takes a "small cut" of each transaction. 	<ul style="list-style-type: none"> June 2008: founded 	<ul style="list-style-type: none"> As of March 2015 has had 6,527 workers. Raised \$1.5M in 12 rounds from 8 investors.

Description/Business Model	Date Formed	Size
<p>Shyp</p> <ul style="list-style-type: none"> • Individuals and businesses pay Shyp to package and send any item. • “Shyp Heroes” have been background checked and “extensively” trained at Shyp Academy. They are not allowed to accept tips. • Shyp appears to be moving away entirely from peer-to-peer or contract models and toward an employee model. 	<ul style="list-style-type: none"> • March 2014: launched 	<ul style="list-style-type: none"> • Operates in 5 cities. • As of September 2015 it has raised \$62.2M.
<p>Sidecar</p> <ul style="list-style-type: none"> • Similar to Uber/Lyft but drivers can set their own prices. Riders can also screen drivers by selecting a ceiling for how much they are willing to pay for a ride. This includes electing to share the ride with a stranger headed in the same direction. • Sidecar also offers a delivery service, which is now its primary focus (according to their CEO in a statement in August 2015). • Takes a 25 percent fee from each transaction. 	<ul style="list-style-type: none"> • January 2012: launched 	<ul style="list-style-type: none"> • Operates in 8 U.S. cities. • \$35M in venture funding.
<p>Skillshare</p> <ul style="list-style-type: none"> • Peer-to-peer courses/classes. • “Teachers” create video content for the Web site, teaching skills from a variety of areas (e.g., how to use InDesign, how to build a Web site, how to do calligraphy). “Members” subscribe to view the video classes for a monthly fee. Teachers earn money through a royalties pool and also can earn bonuses for recruiting other teachers. • Skillshare provides teachers with materials to help them get started on creating content. Skillshare also establishes “class guidelines” that teachers must follow (including resolution quality, minimum duration, and level of creativity/educational nature). • Skillshare takes 50 percent of the Premium Membership revenue. 	<ul style="list-style-type: none"> • November 2010: founded • April 2011: site went live 	<ul style="list-style-type: none"> • As of March 2014 it was valued at \$20M. • By March 2014 it had raised \$10.8M in venture funding.
<p>Task Rabbit</p> <ul style="list-style-type: none"> • Online and mobile marketplace to outsource small jobs and tasks. • Users name a task and a price and then Task Rabbit assigns a Tasker to the job. • Task Rabbit used to be a bidding-model marketplace until its July 2014 reboot. Now, Taskers are assigned instead of bidding, they must wear a uniform, and tasks are paid on an hourly basis. • Task Rabbit takes about 20 percent commission. 	<ul style="list-style-type: none"> • 2008: founded 	<ul style="list-style-type: none"> • 2M users. • 50,000 Taskers. • \$134M valuation.
<p>Thumbtack</p> <ul style="list-style-type: none"> • Online marketplace for services (e.g., wedding officiating, personal training, wall painting). • Thumbtack vets the professionals (checking licenses, etc.). • Users describe what service they need performed. If interested, professionals can pay \$3-25 to send a quote to the potential customer. The user then evaluates the quotes and selects a professional to complete the task. 	<ul style="list-style-type: none"> • 2009: founded 	<ul style="list-style-type: none"> • 150,000 professionals available. • 5 million projects/year. • August 2014: raised \$100M through Series D round of venture capital funding.

Description/Business Model	Date Formed	Size
<p>Uber</p> <ul style="list-style-type: none"> Peer-to-peer ridesharing app. App determines the price for each ride. Typically takes 20 percent commission and collects fee for insurance. 	<ul style="list-style-type: none"> 2009: launched black car service 2012: launched UberX (taxi-like service with regular cars) 	<ul style="list-style-type: none"> \$7B in venture funding. Valued at \$50B. Available in 58 countries and 300 cities.
<p>Upwork</p> <ul style="list-style-type: none"> Connect businesses with freelance workers (e.g., computer programming, translating, legal work). Similar to Mechanical Turk. A business posts a job onto the platform and interested freelancers apply. The business interviews the interested applicants and decides. Business decides if payment is made per hour or per project. Upwork takes 10 percent commission. 	<ul style="list-style-type: none"> 2003: founded as Elance-oDesk 2015: rebranded as Upwork 	<ul style="list-style-type: none"> 4 million registered clients. 9 million registered freelancers. \$1B in work done per year.
<p>Washio</p> <ul style="list-style-type: none"> "Uber for laundry." Delivers laundry and dry cleaning. Customers place an order on the app, specifying a time window for pickup and drop off. "Ninjas" collect the clothes, which are dry cleaned or washed, dried, and folded. Customers can have clothes picked up within 30 minutes with WashioNow. Ninjas must have a driver's license, smart phone, and a car made after 2000. 	<ul style="list-style-type: none"> 2013: founded 	<ul style="list-style-type: none"> \$13M in venture funding.

Authors

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Seth D. Harris is a Distinguished Scholar at Cornell University's School of Industrial & Labor Relations. He served four and one-half years as the Deputy US Secretary of Labor and six months as Acting US Secretary of Labor and a member of President Barack Obama's Cabinet. Beginning in January 2007, he chaired Obama for America's Labor, Employment and Workplace Policy Committee, and later founded the campaign's Disability Policy Committee. He also advised then-Senator Obama on issues arising in the Senate Health, Education, Labor and Pensions Committee. In August 2008, he joined the Obama-Biden transition planning committee's Agency Review Working Group. After Election Day 2008, he oversaw the Obama-Biden transition team's efforts in the Labor, Education and Transportation departments and 12 other agencies. From 1997 to 2000, he served as Counselor to Secretary of Labor Alexis Herman. From 1993 to 1997, he served as Acting Assistant Secretary of Labor for Policy, Deputy Assistant Secretary of Labor for Policy, and Special Assistant to Secretary Robert of Labor Reich. Prior to re-joining the Labor Department in 2009, he served as a professor of law at New York Law School and director of its Labor and Employment Law programs, as well as a visiting professor of law at Seton Hall Law School. He served as a law clerk to Judge William Canby of the US Court of Appeals for the Ninth Circuit and to Judge Gene Carter of the US District Court for the District of Maine. He has published extensively on workplace and employment issues, from both legal and economic perspectives. He earned a BS degree with honors from Cornell University in 1983 and a JD cum laude from New York University School of Law in 1990 where he was the Editor-in-Chief of the *Review of Law and Social Change*.

Disclosure

Seth Harris has no economic relationship with any company operating in the online gig economy. In the interest of full disclosure, Alan Krueger acknowledges that he has coauthored a study commissioned by Uber in the past, although he has no ongoing relationship with the company or any other company operating in the online gig economy.

Professor Alan B. Krueger

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Alan B. Krueger is the Bendheim Professor of Economics and Public Affairs at Princeton University. He served as Chairman of President Barack Obama's Council of Economic Advisers from November 2011 to August 2013, and was a member of the President's Cabinet. In 2009-10, he served as Assistant Secretary for Economic Policy and Chief Economist of the U.S. Department of the Treasury and in 1994-95 he served as Chief Economist of the U.S. Department of Labor. He is the founding Director of the Princeton University Survey Research Center. He wrote for the *New York Times* Economic Scene column and *Economix* blog from 2000 to 2009. Krueger was named a Sloan Fellow in Economics in 1992 and an NBER Olin Fellow in 1989-90. He was editor of the *Journal of Economic Perspectives* from 1996 to 2002. He was elected a Fellow of the Econometric Society in 1996, a fellow of the Society of Labor Economists in 2005, and a member of the Executive Committee of the American Economic Association in 2004. Professor Krueger was awarded the Kershaw Prize by the Association for Public Policy and Management in 1997 for the most significant contributions to public policy research by someone under age 40, elected a fellow of the American Academy of Arts & Sciences in 2002, and awarded the IZA Prize in Labor Economics in 2006. He earned a BS degree with honors from Cornell University in 1983 and a PhD in Economics from Harvard University in 1987.

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Endnotes

1. Extensive litigation and administrative decision making is already under way involving Uber and other intermediaries. See, e.g., *O'Connor v. Uber Techs.*, 2015 U.S. Dist. LEXIS 116482, 80 Cal. Comp. Cases 852 (N.D. Cal. 2015); *Levin v. Caviar Inc.*, Case No. 15-1285 (N. D. Cal. 2015); *Singer v. Postmates*, Case No. 14-1284 (N.D. Cal 2015.)
2. Truck drivers offer an instructive example. Compare *North American Van Lines, Inc. v. N.L.R.B.* [National Labor Relations Board], 869 F.2d 596 (D.C. Cir. 1989) (under the National Labor Relations Act [NLRA], truck drivers are independent contractors) with *Aetna Freight Lines, Inc. v. N.L.R.B.*, 520 F.2d 928, (6th Cir. 1975) (under NLRA, truck drivers are employees). Compare also *Redwine v. Refrigerated Transport Co.*, 84 S.E.2d 478 (Ga. Ct. App. 1954) (under state unemployment insurance law, truck drivers are employees) and *Rozran v. Durkin*, 381 Ill. 97, 45 N.E.2d 180 (Ill. 1942) (under state unemployment insurance law, truck drivers are employees); with *Nat'l Trailer Convoy, Inc. v. Undercofler*, 137 SE2d 328 (Ga. Ct. App. 1964) (under state unemployment insurance law, truck drivers are independent contractors) and *Hammond v. Dep't of Empl.*, 480 P.2d 912 (Idaho 1971) (under state unemployment insurance law, truck drivers are independent contractors).
3. There is a subtle but important distinction between a company like Apple and Lyft in this regard. Apple does not manufacture iPhones, which are integral to its business, but instead contracts out their manufacture to Foxconn and other suppliers. Apple is not an intermediary that hires independent workers to provide personal services to third-party customers. Rather, it enters into a bilateral relationship with Foxconn in which Apple buys what Foxconn produces according to Apple's specifications. Foxconn does not interact with Apple's customers. Apple contracts with Foxconn to produce a *good* that Apple and others sell to customers.
4. See, e.g., *United States v. Federation of Physicians and Dentists, Inc.*, CA 98-475 JFF (D. Del. Oct. 22, 2001) (consent decree), <http://www.justice.gov/atr/case-document/proposed-final-judgment-116>; *United States v. Federation of Certified Surgeons and Specialists, Inc.*, 64 Fed. Reg. 5831 (Dep't Justice 1999) (consent decree); *Federal Trade Commission v. College of Physicians and Surgeons of Puerto Rico*, <https://www.ftc.gov/enforcement/cases-proceedings/9710011/college-physicians-surgeons-puerto-rico-centralmed-inc-fajardo>. See generally Kennedy 2014 at 155–60; Brewbaker 2000.
5. Title VII of the Civil Rights Act, 42 U.S.C. § 2000e (1964) (prohibiting employment discrimination on the basis of sex, race, color, national origin, and religion); Age Discrimination in Employment Act, 29 U.S.C. §§ 621–634 (1967) (prohibiting age discrimination against anyone at least forty years of age); Americans with Disabilities Act, 42 U.S.C. §§ 101–336 (1990) (prohibiting discrimination against people with disabilities); Equal Pay Act, 29 U.S.C. § 206 (1963) (prohibiting employment discrimination between employees on the basis of sex by paying unequal wages for equal work).
6. Exec. Order No. 11,246, 41 C.F.R. 60-1.1 (1978) (prohibiting U.S. government contractors from employment discrimination on the basis of race, color, religion, sex, or national origin); Exec. Order No. 13,672, 41 C.F.R. 60-4.9 (2014) (prohibiting U.S. government contractors from discriminating on the basis of sexual orientation and gender identity); Rehabilitation Act, 29 U.S.C. § 503 (1973) (prohibiting discrimination on the basis of disability in programs conducted by federal agencies, programs receiving federal funding, in federal employment, and by federal contractors); Vietnam Era Veterans' Readjustment Assistance Act, 38 U.S.C. § 4212 (1974) (prohibiting discrimination by employers and federal contractors against disabled veterans and veterans who served active duty during war).
7. Some state laws protect a long list of groups. See, e.g., Minn. Stat. § 363A.17 (providing that it is an unfair discriminatory practice for a business "to intentionally refuse to do business with, to refuse to contract with, or to discriminate in the basic terms, conditions, or performance of the contract because of a person's race, national origin, color, sex, sexual orientation, or disability, unless the alleged refusal or discrimination is because of a legitimate business purpose").
8. For example, Section 1981 has been applied not only to discrimination against African-Americans and white Americans, but also against Latinos, Jews, and Arabs. See, e.g., *St. Francis Coll. v. Al-Khazraji*, 481 U.S. 604 (1987); *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615 (1987); see also *Pourghoraishi v. Flying J*, 449 F.3d 751 (7th Cir. 2006) (collecting cases).
9. It is worth noting, however, that the difference in forum may disadvantage low-wage workers who may be unable to afford private counsel to bring a claim in federal court. Complaints can be filed with the EEOC without the assistance of counsel, although the EEOC is not an adjudicative body and may not be able to generate a resolution of the complaint.
10. Ironically, Milton Friedman was a key contributor in the group at the U.S. Treasury Tax Research Department that helped develop the idea of withholding taxes (Taylor 2014).
11. We do not seek to address the agency law question of whether an intermediary should be held liable for the negligent or intentionally tortious acts of the independent workers with which it does business. This is not fundamentally an employment question and it would not be resolved by federal laws. Rather, it is an issue for state courts and legislatures.
12. To the contrary, most aspects of the FLSA's protections against exploitative child labor do not require measuring work hours. For this reason, these same protections should apply in the world of independent workers to guard against any opportunity for this new form of work relationship to be used for the exploitation of children.
13. Senator Mark Warner (D-VA) has been on the vanguard in considering alternative models for providing independent workers with social safety net benefits. See, for example, Warner (2015).
14. The NLRB recently reconsidered and significantly expanded its definition of joint employment, for example. See *Browning-Ferris Indus.*, Case 32-RC-109684 (NLRB Aug. 27, 2015) (Decision on Review and Direction).
15. These jobs often have fixed terms or are associated with the completion of a particular task, like constructing a building or sailing a cargo ship from one port to another.
16. Perhaps because of the prevalence of commissions in outside sales, Congress exempted outside sales employees from the FLSA's minimum wage and overtime protections (29 U.S.C. § 213(a)(1)). The fact that Congress felt the need to exempt these workers from the FLSA's protections strongly suggests that it had concluded these workers otherwise would be treated as employees.

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Highlights

Seth Harris of Cornell University and Alan Krueger of Princeton University propose the creation of a new legal category of workers, to be called "independent workers," to address the current legal uncertainty regarding whether workers in the online gig economy should receive employment and tax benefits and protections. Their proposal would allow independent workers to gain access to collective bargaining, various forms of insurance, civil rights protections, employer-provided benefits, and tax withholding.

The Proposal

Create a New Classification for Independent Workers. Congress and, where necessary, state legislatures would pass legislation to establish a new classification for independent workers. In doing so, Congress and state legislatures would consider three guiding principles in the new worker classification system to recognize that: work hours are difficult or impossible to measure, businesses should not organize themselves to fit their workers into one status over another, and workers and businesses should maximize the joint benefits of their relationship. The new classification would encompass both new types of work, such as jobs in the online gig economy, and more-established forms, such as taxi driving.

Assign Benefits and Protections to Independent Workers. Congress would assign new benefits and protections to independent workers, following the proposed guiding principles. Benefits such as tax withholding and various forms of insurance would be available to independent workers without businesses facing full employment classification, while benefits tied to hours such as minimum wage and overtime pay would be excluded.

Benefits

This proposal would address the uncertainty that workers and businesses face in the current legal environment regarding a range of legal protections and benefits that employees receive. Harris and Krueger argue that the proposal would increase efficiency in the labor market, enhance worker protections, encourage innovation, and decrease costly legal battles by addressing a key deficiency in current employment law.



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