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The Political Development of Contingent Work in the United States: Independent Contractors from the Coal Mines to the Gig Economy

Eva Bertram *

Abstract. The meaning and salience of employee status in the United States and the “regulatory void” that defines the independent contractor designation, reflect decisions made by state and federal legislatures, courts, and bureaucratic agencies. Their decisions, over time, have allowed and sometimes facilitated the growth of nonstandard work and the expansion of an unregulated zone of contingency. The issues raised in current legal and political struggles over the role of independent contractors in the “gig economy” are therefore more old than new; they are the latest iteration of a century-long conflict over the boundaries of the U.S. employment relationship.

Keywords: *Contingent Work, Non-standard Work, Independent Contractors, Gig Economy, U.S. Employment Relationship.*

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*By some measures, 40 percent of U.S. workers will be in nonstandard jobs by the year 2020. These could be a series of part-time roles, or as a freelance contractor working via a technology platform such as Uber [. . .] the great question is therefore how do you regulate these working arrangements?*¹

1. Introduction

The past four decades have seen major transformations in the character of work and the structure of the labor market in the United States. One of the most distinctive trends is the growth of nonstandard work arrangements. The scholarly literature has emphasized the role of increased globalization and technological change in driving the spread of contingent work.² As employers adopt workforce strategies that increase their flexibility and lower their costs, nonstandard work arrangements have become more common, and the commitment to regular full-time employment has declined.³ Debate continues over the degree of choice and range of options available to business leaders facing increased global competition.⁴ More recent studies have begun to address the fissuring and fragmenting of employment relations by businesses,⁵ and the larger societal impact of work arrangements that are not simply part-time, short-term, or low-wage, but insecure and precarious.⁶

With a few important exceptions, however, scholars have had little to say about the role of politics and state institutions in the rise of contingent

¹ “Regulating the Gig Economy,” The World Bank, December 22, 2015.

² See Barry Bluestone and Bennett Harrison, *The Great U-Turn: Corporate Restructuring and the Polarizing of America* (New York: Basic Books, 1988).

³ See for example Katherine V.W. Stone and Harry Arthurs, eds., *Rethinking Workplace Regulation: Beyond the Standard Contract of Employment* (New York: Russell Sage Foundation, 2013).

⁴ Eileen Appelbaum, Annette Berhardt, and Richard J. Murane, eds., *Low-Wage America: How Employers Are Reshaping Opportunity in the Workplace* (New York: Russell Sage Foundation, 2003); Paul Osterman, *Securing Prosperity* (Princeton, NJ: Princeton University Press, 2001); and Paul Osterman and Beth Shulman, *Good Jobs America: Making Work Better for Everyone* (New York: Russell Sage Foundation, 2011).

⁵ David Weil, *The Fissured Workplace* (Cambridge, Mass.: Harvard University Press, 2014).

⁶ See for example Arne L. Kalleberg, *Good Jobs, Bad Jobs: The Rise of Polarized and Precarious Employment Systems in the United States, 1970s to 2000s* (New York: Russell Sage Foundation, 2011); Miriam Cherry, “Beyond Misclassification: The Digital Transformation of Work,” *Comparative Labor Law and Policy Journal* Vol. 37, No. 3 (Spring 2016); Guy Standing, *The Precariat* (London: Bloomsbury, 2011); and Leah F. Vosko, *Managing the Margins: Gender, Citizenship and the International Regulation of Precarious Employment* (Oxford, UK: Oxford University Press, 2010).

work.⁷ Yet most nonstandard work arrangements require a permissive legal and regulatory environment if they are to become widespread: actions are needed by judicial, legislative, and bureaucratic bodies. Understanding current trends in nonstandard employment, in short, requires attention to the political development of the employment relationship as it has evolved over time.

I argue that with major expansions in nonstandard work in the 1970s and 1980s – and continuing today in the “gig economy” – the U.S. is witnessing a stealth deregulation of the labor market through the rise of contingent work. For the most part, laws are not being passed to roll back existing regulations. Yet increasing numbers of workers, across a range of sectors and occupations, are not covered by the core labor laws and social protections that regulate the labor market.

This is not simply the familiar story of the long decline of the postwar model of employment relations – with its commitment to stable, long-term employment – and the emergence of more fluid and flexible workplace relations.⁸ Rather, the spread of contingent work has begun to hollow out the employment relationship itself. The laws and institutions designed to govern that relationship are still in place, but new and larger cohorts of workers skirt the boundaries of the employment relationship or fall outside of it altogether, and into what one labor and employment law scholar calls the “regulatory void” of contingent work.⁹ Part-time workers, for example, are technically employees but may not qualify for unemployment benefits or employer-provided pensions. Temporary agency workers find themselves in a triangulated relationship in which their “employer” may be the temp agency and the company that uses their services a “customer” of the agency. Both groups of workers fall short of the standards needed to secure full labor protections. Other workers are entirely unprotected, as nonemployees.

Under what circumstances can a worker not be an employee be eligible for core legal protections? Apart from various statute-specific exclusions,

⁷ Exceptions include George Gonos, “The Contest over ‘Employer’ Status in the Postwar United States,” *Law and Society Review* Vol. 31, No. 1 (1997): 81-110; Annette Bernhardt, “The Role of Labor Market Regulation in Rebuilding Economic Opportunity in the United States,” *Work and Occupations*, Vol. 39, No. 4 (2012): 354-75; and Jamie Peck and Nik Theodore, “Politicizing Contingent Work: Countering Neoliberal Labor Market Regulation from the Bottom Up?” *South Atlantic Quarterly*, Vol. 111, No. 4 (2012): 741-61.

⁸ See for example Stone and Arthurs, *op. cit.*

⁹ Stephen F. Befort, “The Regulatory Void of Contingent Work,” *Employment Rights and Employment Policy Journal*, Vol. 10 (2006).

there are three primary routes.¹⁰ Some workers may be judged to be too high up in the company's management and supervisory hierarchies to warrant employment protections themselves. Others may be working in "noneconomic" rather than employment relationships. Employers have argued that certain students, trainees, and prison laborers, for example, are not employees because their activities are guided by nonfinancial, nonmarket goals. Both of these have at times been wrongly applied to exclude workers from employee status.¹¹ The third category, however, is the most sweeping and salient today: workers may be classified as independent contractors rather than employees.

In the U.S. context, the boundarylines governing employment status are at once highly malleable, ambiguous, and consequential: the implications of which side of the employee/nonemployee line one falls are enormous. The U.S. system of labor rights and social protections includes a patchwork of laws at the federal and state levels; virtually all restrict coverage to those defined as employees. These include the Fair Labor Standards Act (FLSA), which ensures a minimum wage and overtime compensation; the National Labor Relations Act (NLRA), which protects employees' right to organize unions and to bargain collectively; and the Social Security Act, which requires employers to administer and contribute to payroll taxes for employees' Social Security and Medicare coverage, as well as the federal-state Unemployment Compensation program. Additional protections include equal employment opportunity laws, worker compensation statutes, laws governing employer-provided benefits, and workplace health and safety regulations under the Occupational Safety and Health Act (OSHA).

Coverage under these laws falls along a continuum. At one end are employees in traditional, full-time jobs; they qualify for most protections. At the other end are independent contractors, who are excluded from coverage under the NLRA, FLSA, worker's compensation, and equal employment opportunity laws, and do not benefit from employer contributions to Social Security, Medicare, or unemployment insurance. Coverage for workers in the middle of the continuum varies by statute, jurisdiction, and particular circumstances. Domestic workers, for example, many of whom are part of the contingent workforce, are statutorily

¹⁰ See Noah D. Zatz, "Working Beyond the Reach or Grasp of Employment Law," in Annette Bernhardt, Heather Boushey, Laura Dresser, and Chris Tilly, eds., *The Gloves-Off Economy: Workplace Standards at the Bottom of America's Labor Market* (Champaign, IL: Labor and Employment Relations Association, 2008).

¹¹ *Ibid.*, 36-7.

excluded under the NLRA and OSHA. Temporary workers and contract company workers are covered under the FLSA, but their status under other statutes varies by circumstances: many contingent workers find that they are not able to access coverage because they work for a small firm, or they do not meet eligibility requirements regarding numbers of hours worked, duration of employment, or earnings.¹²

The implications are significant, and reach beyond the challenges experienced by workers in particular sectors. The spread of contingent work – particularly on the heels of the Great Recession – has contributed to higher levels of inequality as companies replace regular full time or hourly work with on-demand work. Heavier reliance on part-time workers, together with increased outsourcing of jobs globally, has helped contribute to wage stagnation and declining prospects for the middle class.¹³ A 2014 study for the Federal Reserve Bank of Chicago identified a close link between slow growth in real wages “and marginally attached labor force participants, particularly those working part time involuntarily for economic reasons”¹⁴ – a description that fits many contingent workers today, from temp workers to many independent contractors in the gig economy.

In the analysis that follows, I develop three main claims. First, the U.S. employment relationship is an evolving legal and political construct. In particular, the meaning and salience of employee status, and the regulatory void that defines the independent contractor designation, reflect decisions made by state and federal legislatures, courts, and bureaucratic agencies. Second, their decisions, over time, have allowed and even facilitated the growth of nonstandard work and the expansion of an unregulated zone of contingency. And third, the issues raised in current legal and political struggles over the role of independent contractors in the gig economy are more old than new; they are the latest iteration of a century-long conflict over the shape of the employment relationship.

¹² See Sandra E. Gleason, ed., *The Shadow Workforce: Perspectives on Contingent Work in the United States, Japan, and Europe* (Kalamazoo, MI: Upjohn Institute for Employment Research, 2006), 311 and Chapter Six; United States General Accounting Office, “Contingent Workforce: Size, Characteristics, Earnings and Benefits,” April 2105; and National Domestic Workers Alliance, “Employment Protections for Domestic Workers: An Overview of Federal Law.”

¹³ Steven Greenhouse, “Our Economic Pickle,” *The New York Times*, January 12, 2013.

¹⁴ Daniel Aaronson and Andrew Jordan, “Understanding the Relationship between Real Wage Growth and Labor Market Conditions,” Federal Reserve Bank of Chicago, *Essays on Issues*, No. 327 (October 2014).

I chart the political origins and evolution of the current boundaries of the employment relationship, with a particular focus on the distinction between independent contractors and employees. This historical perspective demonstrates how the independent contractor category – used by employers for a century to escape employment obligations – was constructed piecemeal by courts and legislatures over time. I begin with current data and debates over contingent work in the U.S. and a brief comparative perspective, then turn to history to shed light on recent political struggles over Uber and other leading companies in the on-demand economy.

2. Contingency and its Consequences

Until recently, reliable data on the size and characteristics of the contingent workforce were difficult to find. The U.S. Department of Labor’s Bureau of Labor Statistics (BLS) began to survey this segment of the workforce only in 1995, in a nationwide Contingent Work Supplement to the BLS monthly Current Population Survey. The survey was repeated on a number of occasions, providing the first time-series data, through 2005.¹⁵ In 2015, in response to congressional requests for updated information, the U.S. Government Accountability Office (GAO) released an analysis of the contingent workforce updating a comprehensive report first released in 2000, and drawing on a number of more recent national surveys and reports.¹⁶

Despite differences over how to define nonstandard or contingent work, most analysts would agree that core contingent workers include on-call workers, day laborers, temporary workers (whether hired through temp agencies or directly), and contract company workers. According to the GAO, these “core contingent” workers comprised 7.9 percent of the labor force in 2010 (up from 5.7 percent in 1999). Many analysts also include in their definition of the contingent workforce a broader set of

¹⁵ United States General Accounting Office, “Contingent Workers: Incomes and Benefits Lag Behind Those of Rest of Workforce,” June 2000, 6; and US GAO, 2015, *op. cit.*, 3. Since 2012, the BLS has requested funding to conduct the survey every two years. The BLS commissioner announced in March 2016 that the Department of Labor would fund a one-time update of the CWS in March 2017, even as the administration sought congressional approval of funding for regular updates. See U.S. Department of Labor, Bureau of Labor Statistics, “Why This Counts: Measuring ‘Gig’ Work,” Commissioner’s Corner, March 3, 2016.

¹⁶ US GAO, 2015, *op. cit.*, 2.

workers, including independent contractors, self-employed, and part-time workers. Workers within these categories reflect a wider range of skills, occupations, industries, and employment stability. But they share the experience of not having full access to the benefits and protections traditionally provided through full-time, regular work arrangements. Using its broad definition, the GAO estimated the size of the contingent workforce at 40.4 percent of the entire labor force in 2010. This marked a substantial increase, up from 35.3 percent in 2006, and 29.9 percent in 1999.¹⁷

Several categories of the contingent workforce have shown a significant uptick in recent years. The largest increases (measured in numbers of workers) over the first decade of the 2000s were among independent contractors (from 6.3 to 12.9 percent of the overall workforce, a doubling), and part-time workers (13.2 to 16.2 percent). Though they represent a smaller share of the workforce, two other categories grew rapidly as well: agency temps (0.9 to 1.3 percent, an increase of nearly fifty percent), and contract company workers (0.6 to 3.0 percent, a five-fold increase).¹⁸ Economists Lawrence Katz and Alan Krueger identified similar trends in a large contingent work survey they conducted in late 2015, noting substantial growth between 2005 and 2015 in the number of people who report working as independent contractors, on-call workers, temporary help workers, and contract company workers.¹⁹

The data on contingent work reveal systemic disparities in pay and benefits received by contingent workers in contrast to their counterparts in regular employment. The GAO found that contingent workers earned 10.6 percent less on an hourly basis than standard workers in 2012, even after controlling for geography, demographics, union membership, occupation and industry, and educational level.²⁰

¹⁷ US GAO, 2000, *op. cit.*, 4 and 14 (for figures); and US GAO, 2015, *op. cit.*, 12 (for figures), and 11 for their rationale for using a broader definition of contingent work, following the Department of Labor's Wage and Hour Division's "focus more broadly on the employer-employee relationship" rather than the specific job-term. Despite extensive attention to gig-economy companies such as Uber, they account for a small share of the contingent workforce, and of its growth. For a caution against overstating the importance of companies in the gig economy, see Lawrence Mishel, "Uber is Not the Future of Work," *Atlantic Monthly*, November 16, 2015.

¹⁸ US GAO, 2000, *op. cit.*, 14; and US GAO, 2015, *op. cit.*, 12

¹⁹ Lawrence F. Katz and Alan B. Krueger, "The Rise and Nature of Alternative Work Arrangements in the United States, 1995 -2015," March 29, 2016.

²⁰ US GAO, 2015, *op. cit.*, 5.

The gap in pay increased when the effects of the limited work hours of most contingent workers were factored in.²¹ Partly as a consequence, core contingent workers were more than three times as likely to be in families with low incomes (33.1 percent, compared to 10.8 percent of standard workers).²² And they were more than twice as likely to be in families with incomes below the federal poverty line (15.2 percent, compared to 6.2 percent of standard workers).²³ The GAO estimated that contingent workers were less likely to be covered by a private health insurance plan than standard workers (61 to 77.9 percent), and much less likely to have a work-provided plan (21.4 to 53.1 percent).²⁴ Contingent workers were also 67.6 percent less likely to participate in a work-based retirement plan than standard workers.²⁵

Survey data analyzed by the GAO reveal important information about the demographic characteristics of contingent workers. Contingent workers were generally younger than standard full-time workers, with the exceptions of independent contractors and self-employed workers. The gender distribution of contingent workers varied widely by category. In 2010, for example, 72.1 percent of part-time workers were women (up from 70.1 percent in 1999). Women also outnumbered men in agency temp and direct hire temp positions in 1999. But by 2010, the group that the GAO calls “core contingent” had become predominantly male: 61.5 percent were men, and 38.8 percent women.²⁶

In terms of race and ethnicity, 47.9 percent of the core contingent group were white, compared to 70.1 percent of standard full-time workers. Some 19.3 percent were Black, compared to 13.4 percent of full-time workers; and 29.2 percent of core contingent workers were Hispanic, compared to 13.0 percent of full-time workers. In terms of educational attainment, 83.7 percent of the core contingent group had only a high school diploma or less, compared to 55.4 percent of full-time workers. Only 11.0 percent of

²¹ Contingent workers made 16.7 percent less on a weekly basis, and 12.9 percent less on an annual basis, even when controlling for the effects of part-time or part-year work. Without those controls for working hours (i.e. actual earnings), contingent workers brought in 27.5 percent less weekly, and 47.9 percent annually. US GAO, 2015, *op. cit.*, 6.

²² Other contingent groups reported substantial levels of low family income as well: 18.8 percent of independent contractors, and 19.5 of part-time workers said their family earnings were under \$20,000. This was nearly twice the percentage of standard workers reporting low family incomes. The survey was from 2010. US GAO, 2015, *op. cit.*, 18.

²³ US GAO, 2015, *op. cit.*, 31, based on 2012 data.

²⁴ US GAO, 2015, *op. cit.*, 30, based on 2011 surveys.

²⁵ US GAO, 2015, *op. cit.*, 29.

²⁶ US GAO, 2000, *op. cit.*, 46; and US GAO, 2015, *op. cit.*, 68.

the core contingent workforce had a bachelor's degree, and 2.4 percent a graduate degree, compared to 20.0 and 9.4 percent of full-time workers.²⁷

3. Contingency in Comparative Context

Contingent work is not new, nor is its recent expansion limited to the United States. Casual or informal work has always been present, particularly on the margins of certain sectors. Since the 1970s, however, it has assumed new forms and increased in reach and scope, as the impact of globalization and rapid technological change generate major shifts in work organization across the developed world. “The nature and pace of changes occurring in the world of work, and particularly in the labor markets, have given rise to new forms of employment relationship which do not always fit within the traditional parameters,” notes Giuseppe Casale, then-Director of the Labor Administration and Inspection Programme of the International Labor Organization.²⁸ The political and policy response to these developments has varied across countries, and most face continuing challenges. Yet a sharp distinction exists between the reaction in much of Western Europe and the U.S. response.

Most European systems of labor law and social protections, like the U.S. system, rest on a historically-rooted dichotomy between what is often called “subordinate employment” and “autonomous work.” Labor law exists to protect workers in positions of subordinate employment – those whose choices are fewer and whose bargaining position is weaker within the employment relationship. Those engaged in autonomous work are considered independent, not in need of such protection; their concerns are dealt with through civil or commercial rather than labor law.²⁹

As globalization began to alter existing employment arrangements, European systems adopted varying changes in laws and regulations. Although debates continue over the appropriate response to an evolving

²⁷ Both the independent contractor and part-time categories remained largely white, though less so than in the past. By 2010, white workers accounted for 75.3 percent of independent contractors (down from 84.8 in 1999), and 72.0 percent of standard part-time workers (down from 78.5 in 1999). *Ibid.*

²⁸ Giuseppe Casale, ed., *The Employment Relationship: A Comparative Overview* (International Labour Organization, 2011), 3.

²⁹ Adalberto Perulli, “Subordinate, Autonomous, and Economically Dependent Work,” in Casale, *ibid.*, 137-38.

challenge,³⁰ the European response to date has included two general approaches: creating new categories of workers, in order “to broaden the rules for subordinate employment to include those self-employed workers who are in a state of economic dependence;” and extending certain protective measures “beyond the circle of subordinate workers.”³¹ In Italy, for example, the concept of “quasi-subordinate workers,” who are self-employed but deserving of some employee-like protections, has existed under law for three decades.³² Germany debated and developed a broader legal framework for such work, incorporating a category of “workers similar to employees” into labor legislation beginning in 1953.³³ The United Kingdom has more recently introduced a category of worker “which lies somewhere between (subordinate) employee and self-employed person.”³⁴ France has opted instead to extend labor laws in other ways, to accommodate changes in the employment contract.³⁵ The U.S. system, however, still retains only two categories. According to a 1999 report from the U.S. Department of Labor, “No legal meaning attaches to such descriptions as dependent contractor, permanent employee, regular employee, temporary employee, and the like. There are only employees entitled to a modest suite of rights, and independent contractors entitled to fewer.”³⁶ The explanation lies in part in the origins and political development of the two categories, within the context of the U.S. employment relationship.

4. Political Origins and Early History

The distinction between “employees” (who are protected under contemporary labor and social protections) and “independent contractors” (who are not) has its origins in the pre-industrial political economy. Just as the modern employer-employee relationship was constructed on the master-servant relationship of the pre-industrial era,

³⁰ See for example, *ibid.*, for debates in Italy, France, Germany, and the United Kingdom, as well as within European Community law.

³¹ *Ibid.*, 182-83.

³² *Ibid.*, 165.

³³ *Ibid.*, 170.

³⁴ *Ibid.*, 172.

³⁵ *Ibid.*, 168.

³⁶ Jeffrey Sack, Emma Phillips, and Hugo Leal-Neri, “Protecting Workers in a Changing Workworld: The Growth of Precarious Employment in Canada, the United States, and Mexico,” in Casale, *op. cit.*, 260.

the term “independent contractor” is linked to early notions of an “independent calling.” The term was used to indicate that such a worker was at liberty to work for multiple clients – perhaps as a skilled artisan or craftsman – rather than serve a single master.³⁷

On occasion, courts were asked to address the distinction beginning in the mid-19th century, often to clarify whether an employer could be held liable if a worker’s negligence caused harm to others. The question courts generally asked was whether and to what degree the employer had control over the worker’s actions.³⁸ In what came to be accepted as the common-law “control” test of employment status, if a court found that the employer had the right to control in detail how work was carried out, then the worker was judged to be an employee. If not, the worker was considered an independent contractor, and the employer was not held responsible for his or her actions.³⁹

With the spread of industrialization and more complex forms of wage labor came the earliest forms of Progressive Era social and labor legislation, generally at the state level and often industry-specific. Between 1911 and 1917, for example, workers’ compensation laws were passed in thirty-seven states. The new protections raised the stakes of the employee/independent contractor distinction. Employers were now responsible for certain workplace injuries suffered by their employees, but not by independent contractors they hired. Yet the line distinguishing the two was not always clear, and the language of the new laws was vague. Not surprisingly, some employers proved quick to exploit the ambiguity.⁴⁰ Some courts recognized the potential for employers to evade their obligations by calling their employees contractors. In a prominent 1914 case, the Lehigh Valley Coal Company claimed that one of its miners, who was seeking compensation for a workplace injury, was actually an independent contractor, in part because he was free to employ and

³⁷ Richard R. Carlson, “Why the Law Can’t Tell an Employee When It Sees One and How It Ought to Stop Trying,” *Berkeley Journal of Employment and Labor Law*, Vol. 22, No. 2 (2001): 301-3. See also Marc Linder, *The Employment Relationship in Anglo-American Law: A Historical Perspective* (New York, N.Y.: Greenwood Press, 1989), Part II.

³⁸ Carlson, *op. cit.*, 304.

³⁹ Befort, *op. cit.*, 249; and Robert Sprague, “Worker (Mis)Classification in the Sharing Economy: Square Pegs Trying to Fit into Round Holes,” *A.B.A. Journal of Labor & Employment Law*, Vol. 31, No. 1: 53.

⁴⁰ Linder, *op. cit.*, 176; and Carlson, *op. cit.*, 304-11. The laws were designed to protect those who were dependent on and subordinate to an employer; but not independent contractors, “who were thought of as autonomous entrepreneurs rolling the dice for themselves and not in need of regulatory intervention.” Befort, *op. cit.*, 252-53.

supervise his own “helpers.”⁴¹ The judge was not persuaded. He challenged the company’s contention that it “is. . . not in the business of coal mining at all, in so far as it uses such miners, but is only engaged in letting out contracts to independent contractors.”⁴² Judge Learned Hand noted:

It is true that the statute uses the word “employed,” but it must be understood with reference to the purpose of the act, and where all the conditions of the relations require protections, protections ought to be given. It is absurd to class such a miner as an independent contractor. [...] He has no capital, no financial responsibility. He is himself as dependent upon the conditions of his employment as the company fixes them as are his helpers. By him alone is carried on the company’s only business.⁴³

Judge Hand led the way in enlisting a wider range of factors to determine employee status, including the degree of economic dependence between employees and employers (which came to be called the “economic realities” test), and where relevant, the larger purpose of a protective statute. Similar moves to elevate the economic dependence test emerged sporadically, but the control test remained the main determinant of employment status, particularly in worker compensation cases around the country.⁴⁴

Despite occasional court actions on workers’ status, the issue posed little concern in the early 20th century, in part due to the limited reach and scope of Progressive Era social and labor protections. All this changed abruptly with the avalanche of New Deal legislation, passed as part of President Franklin Delano Roosevelt’s response to the Great Depression in the early 1930s. As sweeping new protections were written into federal law, the stakes were transformed overnight.

⁴¹ Carlson, *op. cit.*, 311-13.

⁴² Cited in Marc Linder, “What is an Employee? Why It Does, But Should Not, Matter,” *Law and Inequality*, Vol. 7 (1989): 175.

⁴³ *Ibid.*, 176. See *Lehigh Coal Co. v. Yensavage*, 218 F. 547 (2d Cir. 1914).

⁴⁴ Judge John Wood in New York in 1914, and the California state legislature in 1917, employed the economic realities test, but both were quickly reversed. Linder, *The Employment Relationship*, *op. cit.*, 177-79. As one legal historian noted, “Judge Hand’s underlying fear may have been that if the mining company’s transformation of this large workforce from ‘employee’ to ‘independent contractors’ succeeded, then the nation’s basic industries might cease to be ‘employers’ at all, while still continuing their businesses with the very same unprotected workers in their service.” Carlson, *op. cit.*, 312.

Three measures in particular changed the equation for both workers and employers. The National Labor Relations Act (NLRA) or Wagner Act, established the right of employees to organize through unions and to bargain collectively with their employers. Passed in 1935, the Act created a new National Labor Relations Board (NLRB). Its members, appointed by the president (and confirmed by Congress), were charged with enforcing laws related to bargaining and unfair labor practices.

The Social Security Act of 1935 provided federal social insurance protections for workers, including a federal retirement program (Social Security). Payroll tax contributions to the program were split between employers and employees. Independent contractors and self-employed workers were responsible for both halves of that contribution. The Act also created the federal-state unemployment system, which pays benefits to qualifying employees when they become unemployed. Independent contractors and self-employed workers are generally not covered by unemployment insurance, and companies that hire them are not required to contribute to state unemployment funds on their behalf.

The Fair Labor Standards Act (FLSA) followed in 1938. It set the first federal minimum wage, required overtime pay for eligible employees who worked more than forty hours a week, and required employers to keep records of the hours worked and wages earned by their employees.⁴⁵

In the years following the New Deal, the nation saw a surge in labor organizing and unionization. The end of World War II brought more labor activity and a sustained period of unprecedented economic growth. In this context, the employment relationship in the United States grew more robust than at any point before or since. A new standard was set, of stable, long-term employment for a single employer, backed by adequate wages and health and pension benefits.

The first signs of this “standard employment relationship” emerged in the early decades of the twentieth century, as large employers sought to foster long-term attachment among by employees.⁴⁶ The spread of the model was accelerated by the expansion of unions, particularly industrial unions, in the New Deal and postwar period. In order to gain advantages in the tight labor markets of the era, even nonunion firms such as IBM, Dupont, and Exxon modeled their workforce policies on those of their unionized competitors. They constructed internal labor markets, respecting seniority

⁴⁵ For a description of these and other federal laws “designed to protect workers,” see US GAO, 2000, *op. cit.*, 49-56.

⁴⁶ Katherine V.W. Stone, “The Decline of the Standard Contract of Employment in the United States: A Socio-Regulatory Perspective,” in Stone and Arthurs, *op. cit.*, 63-4.

in hiring and layoffs, and they paid wages and provided benefit packages that were competitive with their unionized counterparts. Many of the country's largest and most profitable companies, unionized or not, sought the advantages of employee loyalty and a highly-trained workforce, and adopted workforce policies that set a standard of secure and stable employment for the broader labor market.⁴⁷ By the postwar period, the core features of the standard employment relationship included “an implicit promise of job security and employer-provided health and pension benefits,” as well as “predictable promotions and wage growth opportunities.”⁴⁸

The combined effect of the booming economy, new federal protections, and higher levels of unionization was to boost wages and increase economic equality. Hourly wages in the private sector rose steadily, at a clip of more than 2.5 percent a year for the three decades following World War II, including for those at the bottom of the wage scale.⁴⁹ The share of workers covered by work-based pensions rose from 15 percent in 1940 to 25 percent in 1950, and continued to increase to a peak of 46 percent in 1980.⁵⁰ Work-based health insurance coverage grew even faster, from 10 percent in 1940 to 51 percent in 1950.⁵¹ It was, in short, a very good time to be a worker in the United States – if you were an employee.

The significance of a worker's employment status had never been higher: only employees were covered by the new laws. Yet the New Deal legislation did little to clarify the distinction between employees and independent contractors. Each of the New Deal laws contained its own definition of the “employee” who would be covered under the statute. The definitions varied; none was clear and some were simply circular. The Fair Labor Standards Act, for example, specified that “employee” would “include any individual employed by an employer.”⁵²

The failure to render a single definition was compounded by a fragmented approach to administration: multiple federal agencies were charged with administering the various new labor and social insurance protections. The

⁴⁷ Paul Osterman, *Securing Prosperity* (Princeton, NJ: Princeton University Press, 2001), Chapter 2; and Stone, *ibid.*, 64.

⁴⁸ Stone *Ibid.*, 58-63.

⁴⁹ Lawrence Mishel, Josh Bivens, Elise Gould, and Heidi Shierholz, *The State of Working America, 12th Edition* (Ithaca, NY: Cornell University Press, 2012), 181.

⁵⁰ “Employee Benefits,” *Congressional Quarterly Researcher*, February 2000, 74.

⁵¹ *Ibid.*, 76.

⁵² Linder, *The Employment Relationship, op. cit.*, 185. See Charles J. Muhl, “What is an Employee? The Answer Depends on the Federal Law,” U.S. Bureau of Labor Statistics, *Monthly Labor Review*, January 2002: 3-11.

Bureau of Internal Revenue determined who was an employer, who an employee, and who not, for purposes of federal payroll taxes. The National Labor Relations Board (established by the NLRA) decided which workers were employees, and therefore under the NLRA's protections for organizing and collective bargaining. The Department of Labor determined which workers, as employees, were covered by the wage and hour regulations of the FLSA. And the Social Security Board determined which employers and employees were required to contribute to and eligible to receive Social Security (and later, Medicare).

New Deal social and labor legislation did more than disperse decisionmaking on employee status, however. In several cases, the laws inscribed longstanding social hierarchies into the new framework of protections. Even as they sought to "level the playing field" between employees and employers, lawmakers wrote some workers, including those in some of the nation's most precarious and vulnerable occupations, out of the legislation altogether. The National Labor Relations Act, Fair Labor Standards Act, and Social Security Act introduced groundbreaking rights and protections, but excluded agricultural and domestic workers.⁵³

In each case, the move was explicitly political, reflecting concessions to win the votes of southern lawmakers determined to retain the racial hierarchies that defined the southern economy.⁵⁴

Meanwhile, the courts continued to make determinations regarding employee status, faced with a longer roster of protective statutes but no clearer guidance on the question. In a 1944 case (*Hearst v. NLRB*), Supreme Court Justice Wiley Blount Rutledge drew attention to the issue: "Few problems in the law have given greater variety of application and conflict in results than the cases arising in the borderland between what is clearly an employer-employee relationship and what is clearly one of independent entrepreneurial dealing." The Court ruled that "in doubtful situations," the more inclusive criteria used by Judge Hand decades earlier should apply, with the definition of employee "determined broadly by

⁵³ The Social Security Act, which originally covered about half the workforce, also did not include farm and domestic workers (nor those who were self-employed, or who worked for government or the nonprofit sector). These groups were covered under subsequent program expansions. Larry DeWitt, "The Decision to Exclude Agricultural and Domestic Workers from the 1935 Social Security Act," *Social Security Bulletin*, Vol. 70, No. 4, 2010.

⁵⁴ On the exclusions from the Social Security Act, see for example Robert C. Lieberman, *Shifting the Color Line: Race and the American Welfare State* (Cambridge, Mass.: Harvard University Press, 1998).

underlying economic facts rather than technically and exclusively by previously established legal classifications.” In *Hearst*, four Los Angeles newspapers were required under the NLRA to bargain with a union of their newspaper vendors. The papers had claimed that the vendors were independent contractors, rather than employees, and therefore the NLRA’s legal obligation did not apply. The Court rejected the claim, arguing for advancing the NLRA’s purpose by extending protections rather than limiting them. The word “employee,” the Court asserted, “takes its color from the statute and must be read in light of the mischief to be corrected.”⁵⁵ Additional Supreme Court rulings in 1947 applied the same logic to the question of who should be covered under Social Security, setting in motion plans to extend coverage to additional groups of workers.⁵⁶

In 1947 and 1948, however, a Republican-controlled Congress (the first since the New Deal) pushed back hard against the pro-labor trajectory of recent court and legislative decisions, with a series of moves to constrain the expansion of labor and social protections. Most significant was the Labor Management Relations Act of 1947 (Taft-Hartley), designed to limit the growing power of organized labor. It included, for the first time, language that explicitly excluded anyone “having the status of an independent contractor” from coverage under the NLRA.⁵⁷ In addition, the House Report accompanying the legislation leveled a blistering attack on the Supreme Court and NLRB for using a broader, more inclusive test to determine employee status, and instructed the Board to limit its determinations to narrower common-law “control” factors. In 1948, Congress passed two additional measures – overriding vetoes from President Truman – that prohibited extension of Social Security coverage to certain groups of workers (“door-to-door salesmen,” “home workers,” news vendors), and ordered that the Social Security Act’s definition of

⁵⁵ *NLRB v. Hearst Publ’ns, Inc.* 322 U.S. 111 (1944).

⁵⁶ Wilbur J. Cohen and James L. Calhoun, “Social Security Legislation, January-June 1948,” *Social Security Bulletin* Vol. 11, No. 7 (July 1948): 3-12.

⁵⁷ Micah Prieb Stoltzfus Jost, “Independent Contractors, Employees, and Entrepreneurialism Under the National Labor Relations Act: A Worker-by-Worker Approach,” *Washington and Lee Law Review*, Vol. 68 (2011): 321; and Noah D. Zatz, “Beyond Misclassification: Tackling the Independent Contractor Problem Without Redefining Employment,” *ABA Journal of Labor and Employment Law*, Vol. 26, No. 2 (Winter 2011): 280.

“employee” not include individuals who would be considered independent contractors under common-law “control” rules.⁵⁸

In the post Taft-Hartley period, courts largely returned to the narrower control test of employee status, sometimes citing the congressional intent expressed in Taft-Hartley. The NLRB also shifted focus to the narrower “right to control” test in drawing the line between employee and independent contractor status.⁵⁹

The 1960s and 1970s brought more liberal Congresses and a series of new protections and expansions in coverage under existing laws. FLSA protections, for example, were extended to some farmworkers and government employees in 1966, and to many domestic workers in 1974. Regularly employed farm workers and domestic workers had received Social Security coverage in 1950.⁶⁰ Significant new workplace rights were legislated, beginning with the Civil Right Act of 1964. Title VII of the Act protected job applicants and employees from discrimination on the basis of race, color, sex, religion, or national origin. Protections from discrimination against older applicants and employees on the basis of age were legislated in 1967. New requirements that employers provide employees with a hazard-free workplace were enacted in 1970, under the Occupational Safety and Health Act. And in 1974, the Employee Retirement Income Security Act required employers and employee organizations to meet certain standards in their benefit plans.⁶¹

As the advantages of employment status mounted, however, the distinction between independent contractor and employee grew more problematic for many workers. The new protections in most cases again applied only to workers who were employees. In some cases, whether employees were protected depended on how long they had worked for a particular employer, or how many employees the business had. (Employees of small businesses are excluded from some protections.) Independent contractors, and in many cases other self-employed workers, largely remained outside the system.

⁵⁸ “Social Security,” *CQ Almanac*, 1948, 4th edition, 143-46, Washington, D.C., Congressional Quarterly, 1949.

⁵⁹ Zatz, *op. cit.*, 281; Jost, *op. cit.*, 322-33.

⁶⁰ Patricia P. Martin and David A. Weaver, “Social Security: A Program and Policy History,” *Social Security Bulletin*, Vol. 66, No. 1, 2005.

⁶¹ US GAO, 2015, *op. cit.*, 64-5.

5. The Rise of Contingency

Beginning in the mid-1970s, employers responded to a series of sharp economic downturns and falling profits by cutting labor costs, using now-familiar strategies of downsizing, outsourcing, and off-shoring.⁶² All of the conditions were now in place for the expanded use of independent contractors and other contingent employees as a core part of this strategy. The financial costs and legal burdens of hiring employees had grown exponentially as a result of New Deal laws and new antidiscrimination and health and safety regulations of the 1960s and 1970s. Hiring independent contractors, in contrast, remained inexpensive, simple, and unregulated. The distinction between employees and independent contractors remained ambiguous in ways employers could use to their advantage. The main pieces of federal protective legislation explicitly limited their protections to employees, but left the definition unclear. Courts varied in their interpretations, but typically left significant latitude to employers by imposing the narrow criteria of the control test.

In 1978, Congress took steps that further facilitated the increased reliance on independent contractors. Citing business complaints over the Internal Revenue Service (IRS) enforcement of employee classification rules, lawmakers passed Section 530, a tax bill provision that made it more difficult to hold employers accountable for misclassifying their employees as independent contractors. “Lawmakers at the time envisioned that a laissez-faire regulatory approach to contract hires would give employers a temporary breather from rules,” according to *Congressional Quarterly*. But the “temporary breather” became permanent in 1982, and remained on the books despite repeated initiatives to remove it.⁶³

The legislation took the unusual step of prohibiting the IRS from issuing new regulatory guidance on how to define independent contractors, leaving the agency to respond to requests for rulings on a case-by-case basis. In a move that further lowered incentives for strict adherence to the law, Section 530 also created a “safe harbor” for employers using independent contractors. It specified that if companies meet certain conditions, they cannot be held liable for “federal employment taxes,

⁶² Bluestone and Harrison, *op. cit.*; and William J. Baumol, Alan S. Blinder, and Edward N. Wolff, *Downsizing in America* (New York: Russell Sage Foundation: 2003).

⁶³ Richard Rubin, “IRS Keeps Forced Silence on Defining Contractors,” *Congressional Quarterly Weekly Report*, 30 June 2008: 1752.

penalties and interest,” even if the IRS finds that they have misclassified employees as independent contractors.⁶⁴

With government effectively stepping aside, opting not to limit or regulate the rise of the contingent workforce, the primary remaining obstacle to a widespread embrace of nonstandard work was the rules and practices of the standard employment relationship, with its commitment to internal labor markets, adequate compensation and benefits, and stable, long term employment. That model, however, faced serious threats by the 1970s.

The legal and institutional framework undergirding the American version of the standard employment relationship had always been weak, far weaker than its European counterparts, particularly given the absence of any basic legal right to employment security. The United States is “practically unique among industrialized countries for having no statutory or constitutional protections for job security,” notes legal historian Katherine Stone. The U.S. model of standard employment relations thus emerged “not as a set of legally imposed obligations, but as a widespread social practice.”⁶⁵ For years, industry leaders poised to profit from increased use of contingent workers particularly in the temp sector had targeted the assumptions behind the standard employment relationship through a massive public relations initiative aimed at employers. The PR effort complemented a decades-long campaign to win legal and regulatory reforms favorable to the temp industry.⁶⁶

Although temporary workers existed in a contingent category distinct from independent contractors, the argument pitched to employers for hiring workers on an as-needed basis, without assuming the full legal and financial obligations of the standard employment relationship, applied to both groups, and indeed, to most contingent workers. Detailed in Erin Hatton’s study of the rise of the temp industry, the marketing of contingency included advertisements designed to persuade business leaders to abandon longstanding ideas about the benefits of loyal and stable employment relations. Uniforce, a New York temp agency, released

⁶⁴ These include a) a record of consistency in treating their workers as independent contractors, b) compliance with 1099 reporting requirements, and c) having a “reasonable basis” for categorizing the workers as independent contractors. William Hayes Weissman, “Section 530,” National Association of Tax Reporting and Professional Management, February 28, 2009, 6.

⁶⁵ Stone, “The Decline,” *op. cit.*, 58-63.

⁶⁶ For a detailed examination of the protracted political and public relations campaigns by the temp industry to create the legal framework and public climate that would fuel the industry’s growth, see Gonos, *op. cit.*

an ad in 1970 titled “They’re Drinking Up the Profits.” Three workers were featured in conversation around a water cooler. The ad read:

They’re not thirsty. They’re bored. Not enough to do. Those sounds you hear are profits gurgling down the drain in salaries, overhead and all those extra payroll expenses and employee benefits. That’s what happens when you’re staffed up to handle peak volume business. Modern management stops the profit drain with UNIFORCE guaranteed temporaries. Creatively used to augment a permanent nucleus in peak periods. It’s the one way to make sure you have all the people you need only when you need them.⁶⁷

Kelly Services went further in underscoring the advantages of shedding responsibility for permanent employees, and added a gendered dimension in its 1971 ad:

Never takes a vacation or holiday.
Never asks for a raise.
Never costs you a dime for slack time. (When the workload drops, you drop her.)
Never has a cold, slipped disc or loose tooth. (Not on your time, anyway.)
Never costs you for unemployment taxes and social security payments. (None of the paperwork, either!)
Never costs you for fringe benefits. (They add up to 30% of every payroll dollar.)
Never fails to please. (If our Kelly Girl employee doesn’t work out, you don’t pay. We’re that sure of our girls.)⁶⁸

By the 1980s, employers confronting increased competition were retreating from the standard employment relationship in large numbers, reflected in large-scale restructuring of company workforces through outsourcing and subcontracting, as well as strategies to cut costs by reducing positions and pay, requiring workers to cover more of their health care premiums, and converting from defined benefit to defined contribution retirement plans. In the 1990s, these trends were compounded by an additional source of pressure: investors increasingly judged companies by their quarterly performances, pressuring managers

⁶⁷ Erin Hatton, *The Temp Economy: From Kelly Girls to Permatemps in Postwar America* (Philadelphia, Pa.: Temple University Press, 2011), 69-70.

⁶⁸ Cited *ibid.*, 51. Hatton also addresses the gender dimensions of “Kelly Girl” services.

to make workforces more lean and efficient. This expectation accelerated attempts to cut labor costs.⁶⁹

In various configurations – from the use of temps and independent contractors in-house to contracting out services – employers began to rely more heavily and consistently on nonstandard work arrangements. Because they constituted the outer rings of a company’s workforce, absorbing the ebbs and flows in demand, the contingent workforce was often the first to contract in size during downturns and the first to expand during recoveries.⁷⁰ But the institutional structures needed to maintain this workforce – from a friendly regulatory environment to temporary staffing agencies to increased public acceptance – remained in place through cyclical economic shifts. And over time, even as various categories of contingent workers remained a small share of the overall U.S. workforce, their numbers were growing. The number of workers placed by temporary work agencies, for example, doubled in the 1980s, and again in the 1990s.⁷¹

The increased use of independent contractors was reflected in part in the rise of misclassification cases, in which employers knowingly or mistakenly misclassified their workers as independent contractors rather than employees. Cases of misclassification arose in virtually every major industry by the late 1980s. Those most affected included “farmworkers, construction workers, nurses and other health workers, janitors, casual and temporary retail employees, forestry workers, truck drivers, taxi drivers, carpet layers, and wholesale or door to door salespeople.”⁷²

The trend was growing in the more skilled segments of the labor market as well, including in industries long known for adherence to the principles of the postwar standard employment relationship. In order to combine an

⁶⁹ Eileen Appelbaum, “Reducing Inequality and Insecurity: Rethinking Labor and Employment Policy for the 21st Century,” *Work and Occupations* Vol. 39, No. 4 (2012): 312-13.

⁷⁰ See, for example, Jamie Peck and Nik Theodore, “Flexible Recession: The Temporary Staffing Industry and Mediated Work in the United States,” *Cambridge Journal of Economics* Vol. 31 (2006): 175 and 178, for evidence that the temporary staffing industry, which employed just 2.5 percent of the U.S. labor force, accounted for more than a quarter of job losses in the 2001 recession, then added positions at a much faster rate in the subsequent slow recovery.

⁷¹ Mishel, Bernstein, and Schmitt, *The State of Working America: 1998-99*, 248-50; Mishel, Bernstein and Shierholz, *The State of Working America, 2008/2009*, 255-56; and USDL, Bureau of Labor Statistics, “The Employment Situation: April 2016,” Table B-1.

⁷² Marc Linder, “The Involuntary Conversion of Employees into Self-Employed: The Internal Revenue Service and Section 530,” *Clearinghouse Review* Vol. 14 (1988): 14.

affordable smaller “core” of regular employees with a sheddable team of contingent workers, some employers hired contractors on a semi-permanent basis; these workers became known as “permatemps.” Employers were not legally obligated to pay temp workers hourly wages equivalent to those of regular employee counterparts. And despite the “temp” label, there was nothing in the law that specifically restricted employers to hiring temp workers for temporary periods.

In many cases, independent contractors worked alongside regular employees, conducting the same labor, indistinguishable other than their employment status, and with it, their respective rights under the law and degree of protection under various social programs. Sometimes companies were caught and held accountable. Microsoft wrongly classified a large number of its workers as “independent contractors” in the 1990s. These workers “performed the same work as employees, during the same working hours at the same worksite and in the same work teams under the same supervisors,” yet Microsoft refused to include them in employee benefit and pension plans, and avoided paying unemployment and Social Security taxes on their compensation until the Ninth Circuit Court ruled in 1996 that the workers were in fact employees.⁷³ Four years later, Microsoft spent \$97 million to settle a longstanding lawsuit, this time for its misuse of permatemps.⁷⁴

The core of the contingent work strategy – whether using temp workers, permatemps, or independent contractors – was expressed bluntly by one of AT&T’s corporate leaders. As the company once known for its tradition of “jobs for a lifetime” moved abruptly to shed 40,000 of its 300,000 employees in 1996, one of the vice presidents for human resources explained: “People need to look at themselves as self-employed, as vendors who come to this company to sell their skills [. . .] In AT&T, we have to promote the whole concept of the work force being contingent, though most of the contingent workers are inside our walls.”⁷⁵ Federal action on the issue was limited. Congress issued periodic reports on misclassification, but failed to put the issue on the policy agenda in a

⁷³ Carlson, *op. cit.*, 297 and 298, footnote 13; and Robert W. Wood, “Defining Employees and Independent Contractors,” ABA Business Law Section, May/June, 2008.

⁷⁴ Steven Greenhouse, “Technology; Temp Workers at Microsoft Win Lawsuit,” *The New York Times*, December 13, 2000.

⁷⁵ Edmund L. Andrews, “Don’t Go Away Mad, Just Go Away: Can AT&T Be the Nice Guy as It Cuts 40,000 Jobs?” *The New York Times*, February 13, 1996.

sustained way.⁷⁶ A blue-ribbon commission appointed by President Clinton on the Future of Worker-Management Relations addressed the problem, among others, in 1994. The commission argued for “making the single definition of employee for all workplace laws based on the economic realities of the employment relationship.”⁷⁷ But the recommendation was never put into practice. Meanwhile, the courts, if anything, were moving in the other direction. A Supreme Court ruling in 1992 (*Nationwide Mutual v. Darden*) directed that unless federal programs and protections explicitly included a broader definition of “employee,” the narrower common-law control test should be used.⁷⁸ The lack of federal action and inconsistent enforcement by the courts deepened what Stephen Befort has called the “regulatory void” into which contingent workers fell in growing numbers.

6. Conflicts in the Gig Economy

The contingent workforce saw another wave of expansion in the late 1990s and early 2000s. Triggered in part by large-scale advances in information technology, it began when restrictions on the use of the Internet (previously available to government and academic researchers only) were lifted in 1991, and private businesses and the public were able to go on-line. A rapid increase in digital commerce followed, leading to the dot-com boom and the growth of Internet retailers highly attuned to fluctuations in consumer demand. The transformation of cell phones into “smart” phones in the late 1990s accelerated the trend: people could now connect to the Internet, and buy and sell, from virtually anywhere they could get cell service.⁷⁹

The digital marketplace mushroomed as the country entered a severe recession from 2007 to 2009, followed by a slow and painful recovery.

⁷⁶ See for example “Contractor Games: Misclassifying Employees as Independent Contractors,” House Committee on Government Operations, October 16, 1992.

⁷⁷ U.S. Commission on the Future of Worker-Management Relations, Final Report, 1994, 12.

⁷⁸ Befort, *op. cit.*, 250. Carlson argues that *Darden* asserted the primacy of the “control” test, but then described that test in a way that included hallmarks of the “economic realities” approach. Carlson, *op. cit.*, 344. See *Nationwide Mut. Ins. Co. v. Darden*, 503, U.S. 318 (1992).

⁷⁹ Kevin Kelly, “We Are the Web,” *Wired*, August 13, 2005; and “The Gig Economy: Is the Trend Toward Non-Staff Employees Good for Workers?” *Congressional Quarterly Researcher*, March 18, 2016: 278.

Companies that used the Internet and cell phones to link customers with the sellers of goods and services launched in large numbers: in 2008 and 2009, Uber, Airbnb and Taskrabbit began operations.⁸⁰ When the recession triggered massive job losses, many full-time workers tried to make ends meet on short-term work in the digital economy.⁸¹ The growing on-demand market was heralded by many as a tremendous source of entrepreneurial opportunity, flexibility, and freedom derived from open access.⁸² It has been called the “on-demand economy”, the “gig economy,” the “sharing economy;” perhaps the most accurate label is the “1099 economy,” which refers to the tax form required of the army of independent contractors who do much of the work of the new digital companies.⁸³

From the standpoint of employment relations, the emerging gig economy fits squarely into the long history of contingent work and its struggles – albeit in a new and accelerated form.⁸⁴ The gig economy has generated two main types of work, as Valerio De Stefano has pointed out, including in a recent study for the International Labor Organization.⁸⁵ The first, “work on demand via app”, includes basic activities such as cleaning, transportation, and errand-running, which are coordinated through apps managed by companies such as Uber, Taskrabbit, and Handy, but are performed locally. The second, “crowdwork” (sometimes called crowd-sourcing), allows workers to perform tasks through online platforms such as Crowdfunder, Clickworkers, and Amazon Mechanical Turk.⁸⁶ Crowdwork platforms are ideally designed for “microtasks,” small, quickly-executed tasks that require little supervision. Tasks can range from content creation (summarizing a document, transcribing a recording), to

⁸⁰ “The Gig Economy: Is the Trend Toward Non-Staff Employees Good for Workers?” *Congressional Quarterly Researcher*, March 18, 2016: 279.

⁸¹ *Ibid.*, 275.

⁸² For examples of how gig-economy companies describe their work as transformative, and a description of the experience of working for those companies, see Sarah Kessler, “Pixel and Dime: On (Not) Getting by in the Gig Economy,” *Fast Company*, March 18, 2014. See also *ibid.*, 279.

⁸³ See Justin Fox, “The Rise of the 1099 Economy,” *Bloomberg View*, December 11, 2015.

⁸⁴ See, for example, Dean Baker, Center for Economic and Social Policy Research, “The Sharing Economy Must Share a Level Playing Field,” February 11, 2015.

⁸⁵ Valerio De Stefano, “The Rise of the ‘Just-in-Time Workforce’: On-Demand Work, Crowdwork, and Labor Protection in the ‘Gig Economy,’” *Comparative Labor Law and Policy Journal* Vol. 37, No. 3 (Spring 2016). The following discussion is based in part on De Stefano’s excellent research and analysis on these issues.

⁸⁶ *Ibid.*, 462.

tagging photos, to locating information online.⁸⁷ Typically operating only online, these platforms link users of services with an unlimited number of workers worldwide.

As different as the two types of digitally-based gig work are (with one enlisting dogwalkers, delivery people, and drivers, and the other relying solely on an on-line workforce), they share several features that heighten both the advantages to employers and the challenges faced by workers. One shared feature is “the idea of distributing work to an indistinct ‘crowd’ of operators,” rather than to an in-house workers or even an identifiable team of contracted workers. Access to the labor pool is immediate and continuous, allowing quick and precise matching of demand and supply and limited transaction costs for companies. Companies’ labor costs are also extremely low, for both market and nonmarket reasons: competition among workers is intensive and rapid – and for tasks performed online, global, including workers from countries with low prevailing wage rates. And because gig economy workers are overwhelmingly hired as independent contractors, their access to labor and social protections is limited: the companies that hire them avoid any financial obligation to provide workers with Social Security contributions, sick pay, or even minimum hourly wages.⁸⁸ Employers of independent contractors are not even subject to the FLSA requirements to track hours and wages; they need only report on total payments to them.

Control of workers’ performance in the gig economy raises additional concerns. Generally exercised through “automated rating and review mechanisms” that gather customer feedback on individual workers, control costs companies little, yet enables close and continuous management of workers, often tied directly to the threat of termination: platforms can “exclude ‘poor performers’ by simply deactivating the profile of – and therefore terminating the relationship with – workers that fall below a certain average rating.”⁸⁹

⁸⁷ Janine Berg, “Income Security in the On-Demand Economy: Findings and Policy Lessons from a Survey of Crowdworkers,” *Comparative Labor Law and Policy Journal* Vol. 37, No. 3 (Spring 2016): 545.

⁸⁸ De Stefano, *op. cit.*, 463.

⁸⁹ Some of these risks are heightened for crowdworkers. One of the leading platforms, Amazon Mechanical Turk, for example, allows customers “to reject tasks already completed, and thus decline payment, without offering any explanation, whilst still retaining the work already done.” The way in which the platforms operate not only lowers the administrative and management costs of platforms, which can effectively outsource “key HR functions to their own customers,” it also creates significant risk and uncertainty for workers who depend on a certain platform (such as Uber) for income and

The evidence that gig work belongs squarely in the troubling category of contingent work is reflected in recent surveys by the International Labor Organization. Like “non-gig” contingent work, gig work entails high levels of uncertainty and risk. There is no job security, and the threat of job loss via email hangs over workers dependent on their gig income. Working hours are uncertain, as are income flows. Surveys of crowdworkers by the ILO indicate that for a sizable number of workers, gig income is essential, and not simply a desirable source of extra funds. Nearly 40 percent of those surveyed relied on crowdwork as their main source of income; another 35 percent used the funds to supplement income from other employment.⁹⁰ Wage and income levels are also often low. U.S. Amazon Mechanical Turk (AMT) workers surveyed earned an average of \$5.55 an hour, based on total earnings divided by total hours worked (paid and unpaid).⁹¹ In addition, independent contractors in the gig economy must cover their own healthcare and retirement costs.

In many respects, gig work exacts a more extreme form of the consequences of contingency described earlier. Perhaps most important is the fact that technology enables businesses to access an “extremely scalable workforce, [which] in turn grants unheard levels of flexibility for the businesses involved. Workers are provided ‘just-in-time’ and compensated on a ‘pay-as-you-go’ basis; in practice they are only paid during the moments they actually work for a client.”⁹² As the CEO of Crowdfunder put it:

Before the Internet, it would be really difficult to find someone, sit them down for ten minutes and get them to work for you, and then fire them after those ten minutes. But with technology, you can actually find them, pay them the tiny amount of money, and then get rid of them when you don’t need them anymore.⁹³

Not surprisingly, the impact on workers is acute uncertainty. One AMT worker surveyed by the ILO explained:

may have invested their own funds to begin work (by buying supplies or leasing a car that meets requisite standards). Valerio De Stefano, “The Rise of the ‘Just-in-Time Workforce’: On-Demand Work, Crowdwork, and Labor Protection in the ‘Gig Economy,’” *Comparative Labor Law and Policy Journal* Vol. 37, No. 3 (Spring 2016): 463-64.

⁹⁰ Berg, *op. cit.*, 566.

⁹¹ *Ibid.*, 557.

⁹² De Stefano, *op. cit.*, 476.

⁹³ Cited in *ibid.*

It's an extremely unstable existence. I cannot say to myself, I'm going to log in from 9 to 5 today and do enough work to make X amount of dollars. Sometimes there is work to do and sometimes there isn't. So it becomes right time, right place, and fighting other workers for the better paying tasks/work if/when they are available. If you want to be successful, you can't stop. You can't log out.⁹⁴

Gig work, in short, may be the newest form of contingent labor, but it rests on classic characteristics of nonstandard work. And like earlier forms of contingent work, its expansion requires alignment or accommodation with existing labor laws and social protections. As coal companies did at the outset of the 20th century, and temp agencies did at the century's end, leading gig companies are pushing to redefine the boundaries of the employment relationship to categorise certain workers as non-employees, exploiting the ample ambiguities and opportunities in the existing framework of protections.

The front line of the conflict is in the courts, where the labor practices of gig companies have generated a wave of litigation. Once again the central issue is whether workers in the platform-based gig economy are employees or independent contractors.⁹⁵

Lawsuits have been filed against a range of companies, from Handy (housecleaning services) and Crowdfunder (crowdfunder platform) to Instacart (grocery delivery), Washio (drycleaning delivery) and Grubhub (restaurant delivery). In many cases, workers claim employee status and argue that their employers have violated wage and hour rules (such as failure to pay minimum wages) under the federal FLSA or state statutes; companies generally insist that the workers are not employees eligible for FLSA protections, but are independent contractors.⁹⁶

Cases involving the ride-hailing services Uber and Lyft have drawn the most attention. Both companies have argued that they are essentially technology companies offering platforms to match drivers with customers. The U.S. District Court in the Northern District of California rejected the argument, in separate cases. “[I]t is clear that Uber is most certainly a transportation company, albeit a technologically sophisticated

⁹⁴ Cited Berg, *op. cit.*, 561,

⁹⁵ Miriam Cherry, “Beyond Misclassification: The Digital Transformation of Work,” *Comparative Labor Law and Policy Journal* Vol. 37, No. 3 (Spring 2016): 2 (in manuscript version).

⁹⁶ *Ibid.*

one,” the court said, observing that Uber “does not simply sell software; it sells rides.”⁹⁷

A class-action suit on behalf of Uber drivers filed in California maintained that the drivers are employees because:

They are required to follow a litany of detailed requirements imposed on them by Uber, and they are graded, and subject to termination, based on their failure to adhere to these requirements . . . However, based on their misclassification as independent contractors, Uber drivers are required to bear many of the expenses of their employment. . . California law requires employers to reimburse employees for such expenses.⁹⁸

In many such cases, the tests for employee status provide ambiguous guidance about the boundaries in the employment relationship and the distinction between employees and independent contractors. The difficulties of applying the control test – by assessing whether the companies have the authority to closely control workers’ activities – are a case in point. On the one hand, many on-demand companies devote significant resources to quality control, often providing detailed rules and instructions to workers. Companies like Uber “use customer ratings to maintain almost a constant surveillance over workers, with consumers deputized to manage the workforce.”⁹⁹ On the other hand, drivers are free to decide whether and when to show up for work, suggesting a measure of independence.

With some factors tilting toward employee status and others toward independent contractor status, judges have expressed frustration. In *Cotter v. Lyft*, District Court Judge Vince Chhabria noted that the jury “will be handed a square peg and asked to choose between two round holes. The test the California courts have developed over the 20th century for classifying workers isn’t very helpful in addressing this 21st century problem.”¹⁰⁰ The indeterminacy of the tests for employee status is real. But it is by no means a 21st century problem. Indeed, the court’s statement in another case that “Uber would not be a viable business entity without its drivers”¹⁰¹ sounds remarkably similar to Judge Hand’s comment a century earlier in reference to a coal miner whom the

⁹⁷ De Stefano, *op. cit.*, 489-90.

⁹⁸ *Congressional Quarterly Researcher*, 2016, *op. cit.*, 282.

⁹⁹ Cherry, *op. cit.*, 6; and discussion in De Stefano, *op. cit.*, 491-92.

¹⁰⁰ Cited Cherry, *op. cit.*, 7.

¹⁰¹ De Stefano, *op. cit.*, 490.

company claimed was only an independent contractor: “By him alone is carried on the company’s only business.”¹⁰²

By 2016, Uber was taking steps to limit any possible damage to its business model through lawsuits, by settling the major class-action claim, and requiring drivers to agree to settle future disputes through arbitration rather than in the courts. As part of the settlement reached in April, Uber agreed to pay “up to \$100 million in reimbursement damages to nearly 400,000 drivers,” but did not give ground on the question of whether they were employees. In August, a federal judge found the settlement insufficient and refused to approve it, saying it was “not fair, adequate, and reasonable,” given the billions of dollars at stake if the drivers were ruled to have been employees.¹⁰³ The future of the case was thrown into further uncertainty when a federal court ruled in September that private arbitration agreements were enforceable in a separate class-action case brought by Uber drivers over the issue of background checks.¹⁰⁴

As litigation continues in the courts, Uber (and to a lesser degree Lyft) has waged an intensive lobbying effort to create a supportive regulatory environment for its operations at the state and city levels. Uber’s strategy is bold. The company identifies potential markets and launches operations in towns and cities with little notice or regard for state or local laws and regulations. It works quickly to build a customer base, then mobilizes its base to respond to challenges by local government. Uber may send alerts to riders, for example, urging them to sign a petition to state officials seeking to block or regulate the company’s operations. The company claims that hundreds of thousands of riders have done so in particular regulatory battles, and that it can gather hundreds of electronic signatures a minute when necessary.¹⁰⁵

At the same time, Uber deploys its sizable team of lobbyists – at least 161 by one estimate, with a presence in at least 50 U.S. cities and states – to create the necessary regulatory changes. By the end of 2014, Uber was operating in 138 American cities, 110 more than a year earlier. Officials in

¹⁰² Cited Linder, “What is an Employee?” *op. cit.*, 176.

¹⁰³ Mike Isaac, “Judge Overturns Uber’s Settlement with Drivers,” *The New York Times*, August 19, 2016.

¹⁰⁴ Mike Isaac, “Ruling Tips Uber Drivers Away from Class-Action Suits,” *The New York Times*, September 7, 2016.

¹⁰⁵ Rosalind S. Helderman, “Uber Pressures Regulators by Mobilizing Riders and Hiring Vast Lobbying Network,” *The Washington Post*, December 13, 2014.

17 cities and states had bent to Uber's wishes, approving measures that allow the company to operate.¹⁰⁶

Uber and Lyft have also pressed hard at the state level, spending almost \$900,000 combined on lobbying in the 2015-2016 legislative session in California alone. They have successfully stymied potential new regulations. When Assemblywoman Lorena Gonzalez introduced a bill to allow Uber and Lyft drivers (and other gig workers) to collectively bargain for pay and benefits, the companies pushed back. In an April hearing, Gonzalez said, "I know that these companies don't want to be regulated. . . they've complained through every single bill through this Legislature that somehow we're impeding the progress of innovation if there are any kind of guidelines." Gonzalez has since withdrawn the bill.¹⁰⁷

Uber has encountered some obstacles, including occasional organized opposition from its own drivers. Drivers in the Dallas area rebelled at a new demand by the company to pick up another category of riders; the company backed down after a three-day standoff at its headquarters. "We started realizing we're not contractors; we're more like employees," insisted one driver.¹⁰⁸

The issues regarding working conditions, insurance requirements, and other regulatory concerns are many. But the highest stakes question – in the courts and in statehouses – remains the status of the companies' workers. A determination that drivers are employees could increase costs for the companies by an estimated 30 percent or more (to cover payroll taxes, unemployment insurance, and mileage).¹⁰⁹ Uber has lobbied lawmakers at the state level to pass "model codes" for the regulation of on-demand transportation companies like itself. Although the codes cover a range of issues, Uber's model legislation includes language saying that its workers are independent contractors.¹¹⁰

Like employers in years past, Uber is spending hundreds of millions of dollars to create a regulatory environment that will sustain a new model of employment relations, in which workers who share many of the same vulnerabilities as regular employees are nonetheless considered "independent" under the law. The question echoes across the on-demand

¹⁰⁶ Helderman, *op. cit.*

¹⁰⁷ Liam Dillon, "Uber and Lyft are Winning at the State Capital – Here's Why," *Los Angeles Times*, May 7, 2016.

¹⁰⁸ *Congressional Quarterly Researcher*, 2016, *op. cit.*, 282.

¹⁰⁹ Dillon, *op. cit.*

¹¹⁰ Cherry, *op. cit.*, 18. Cherry notes that provisions of local transportation statuses may not be determinative regarding employee status.

economy. A recent article in *Fast Company* warned: “Lose this workforce structure – either by a wave of class-action lawsuits, intervention by regulators, or through the collective action of disgruntled workers – and you lose the gig economy.”¹¹¹

The gig economy occupies a very thin slice of the U.S. workforce to date, and the challenges faced by gig workers do not encompass the problems of wage stagnation, underemployment, and economic insecurity confronted by much of the traditional labor force. Yet the challenges underway and the changes sought by Uber and others have the potential to be transformative, altering the basic terms of the already attenuated employment relationship in ways that reverberate across the larger landscape of contingent work.

6. Conclusion: The Politics of Reform

The widespread use of contingent work arrangements has produced a quiet deregulation of significant expanses of the U.S. labor market. One effect is that millions of the country’s most vulnerable workers cannot gain access to many basic social and labor protections and supports. This is not simply a consequence of globalization and technological innovation making jobs more flexible and insecure. It is also the result of how contingent labor has been constructed politically, in legislatures and courts, over decades. The consequences emerge particularly sharply in the case of independent contractors – a group that includes some of the nation’s most vulnerable, as well as some of its most advantaged, workers – whose status as “employees” or “nonemployees” is a central issue in current political struggles over the gig economy.

The larger political and policy questions posed by the conflict over the employment relationship have begun to draw the attention of policy analysts. Proposals for reform have taken two main forms.

One approach is to redefine the employment relationship, generally by expanding the number of categories. As described earlier, legislatures in a number of countries have created a category of “dependent contractors,” to address the circumstances of workers who are not legally employees under traditional rules, but are economically dependent on their employers and therefore in need of the legal and social protections afforded to legal employees. In countries such as Canada, Germany, the

¹¹¹ Cited in *Congressional Quarterly Researcher*, 2016, *op. cit.*, 282.

Netherlands, and Sweden, employment laws apply to dependent contractors as if they were employees in some regards, and treat them as non-employees in other respects. In Germany, for example, the middle category of “employee-like persons” is not afforded traditional employee protections under the country’s laws regarding working time or protection against dismissals. But they are protected by statutes that provide the right to collective bargaining, set health and safety standards for the workplace, and protect against sexual harassment.¹¹²

Some legal scholars have called for the creation of a similar “dependent contractor” status in the United States, to extend to currently uncovered workers a set of employee protections that advance broader social purposes, such as anti-discrimination laws (under Title VII of the Civil Rights Act), workplace health and safety protections (under OSHA), and the right to organize (under the NLRA).¹¹³ One proposal for redrawing the lines in employment law that has garnered recent attention in the U.S. comes from two academics and former Obama administration officials, Seth Harris and Alan Krueger. They argue for establishing an “independent worker” category, specifically for those working in the “online gig economy” [who] do not fit easily into the existing legal definitions of ‘employee’ or ‘independent contractor’ status.” They propose extending to these workers protections and benefits including “civil rights protections, tax withholding, and employer contributions for payroll taxes,” as well as the right to unionize and bargain collectively, though not under the umbrella of the NLRA.¹¹⁴

Critics of this approach have argued that many workers who are now considered independent contractors should simply be afforded the full range of employee protections and rights— including an NLRA-backed right to bargain collectively, minimum wage and overtime rules, workers’ compensation, and unemployment insurance – which would not be extended to “independent workers” under the Harris and Krueger proposal.¹¹⁵ Some argue that state and federal labor and social legislation should designate a broad range of 1099 employees, or workers in certain

¹¹² Stephen F. Befort, “The Regulatory Void of Contingent Work,” *Employment Rights and Employment Policy Journal*, Vol. 10 (2006): 254.

¹¹³ *Ibid*, 255.

¹¹⁴ Seth D. Harris and Alan B. Krueger, “A Proposal for Modernizing Labor Laws for Twentieth Century Work: The ‘Independent Worker,’” The Hamilton Project, December 2015, Abstract.

¹¹⁵ Ross Eisbenbrey and Lawrence Mishel, “Uber Business Model Does not Justify a New ‘Independent Worker’ category, Economic Policy Institute, March 17, 2016.

on-demand sectors, as “statutory employees” for the purposes of these protections. The statutes would then apply regardless of how a worker’s employer characterizes the employment relationship.¹¹⁶

A second reform approach is to regulate nonstandard work. The European Union and other OECD countries have created specific standards and regulations that apply to nonstandard jobs. The EU has adopted directives addressing part-time work (1997), fixed-term work (1999) and temporary agency work (2008). The directives generally establish that nonstandard workers must be treated the same as regular employees in terms of basic working and employment conditions, “unless different treatment is justified on objective grounds.” Specific directives state that nonstandard workers must have equitable access to training opportunities and information about vacancies in permanent or full-time positions, and that information about the use of non-standard work must be made available to workers’ representatives.¹¹⁷

A broader review of the 32 countries in the OECD (in 2014) suggests a range of regulatory options that might be considered in the U.S. Eleven countries, for example, impose restrictions on the use of “fixed-term contracts” that seek to limit them to genuinely temporary circumstances. In the majority of countries, there is a cumulative limit on fixed-term contracts (usually 2-4 years), and in about half, there are limits on the duration or renewals of temp agency contracts. The United States, by contrast, is one of only three countries (along with Canada and Israel) that have “no regulation at all on the cumulative duration or renewals” of such contracts.¹¹⁸

Policy approaches in Europe and elsewhere thus offer a range of reform strategies that might be pursued in the United States to address the eroding terms of the employment relationship and the challenges facing the contingent workforce. As this study makes clear, however, it is the political debate and struggle over labor market conditions and reforms

¹¹⁶ This approach is already applied to specific groups of workers under federal Social Security law. A number of state worker’s compensation and unemployment insurance programs also automatically cover certain categories of workers, regardless of whether they are otherwise considered contractors or employees. Rebecca Smith and Sarah Leberstein, “Rights on Demand: Ensuring Workplace Standards and Worker Security In the On-Demand Economy,” National Employment Law Project, September 2015, 10.

¹¹⁷ *Social Europe Guide: Labour Law and Working Conditions*, European Commission, 2014, 38-9.

¹¹⁸ About half the OECD countries also had restrictions on seasonal contracts, “project work contracts” or “temporary work agency” contracts. *Ibid.*, 160-64.

that will determine whether any of these approaches are pursued, and in what form.

ADAPT International Network



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