

The Cupola

Scholarship at Gettysburg College



Student Publications

Student Scholarship

Fall 2018

A Third Class of Worker: The Dependent Contractor

Lisa J. Fendrick
Gettysburg College

Follow this and additional works at: https://cupola.gettysburg.edu/student_scholarship

 Part of the [Benefits and Compensation Commons](#), [Organizational Behavior and Theory Commons](#), and the [Organization Development Commons](#)

Share feedback about the accessibility of this item.

Fendrick, Lisa J., "A Third Class of Worker: The Dependent Contractor" (2018). *Student Publications*. 653.
https://cupola.gettysburg.edu/student_scholarship/653

This open access student research paper is brought to you by The Cupola: Scholarship at Gettysburg College. It has been accepted for inclusion by an authorized administrator of The Cupola. For more information, please contact cupola@gettysburg.edu.

A Third Class of Worker: The Dependent Contractor

Abstract

The following research paper is intended to address the worker classification issue that has intensified due to the rise of the gig economy. After reviewing the current literature on the subject, it will be made clear that a change must be made to the binary classification system that is used in the United States, and to the methods used to categorize workers within the system. This paper proposes the addition of a 'dependent contractor' category, which would be a subcategory of employee, and would fall between independent contractor and employee in terms of what benefits they would be entitled to. In addition, a modified version of The Fair Labor Standards Act (FLSA) test would be the only test used to classify workers. This would effectively limit the confusion that presently exists due to the use of multiple classification tests. Prior to any of these systematic changes being made, it is also proposed that a 'safe harbor' period be implemented to allow organizations the opportunity to prepare for any burden that they may face due to the changes that are eventually made, and for some dependent contractor benefits to naturally emerge.

Keywords

worker misclassification, dependent contractor, independent contractor, employee, gig economy

Disciplines

Benefits and Compensation | Organizational Behavior and Theory | Organization Development

Comments

Senior capstone paper written for OMS 405: Advanced Topics in IOD and OS: The Gig Economy.

Creative Commons License

Creative

Commons

License

This work is licensed under a [Creative Commons Attribution 4.0 License](https://creativecommons.org/licenses/by/4.0/).

A Third Class of Worker: The Dependent Contractor

Lisa Fendrick

Gettysburg College

Abstract

The following research paper is intended to address the worker classification issue that has intensified due to the rise of the gig economy. After reviewing the current literature on the subject, it will be made clear that a change must be made to the binary classification system that is used in the United States, and to the methods used to categorize workers within the system. This paper proposes the addition of a ‘dependent contractor’ category, which would be a subcategory of employee, and would fall between independent contractor and employee in terms of what benefits they would be entitled to. In addition, a modified version of The Fair Labor Standards Act (FLSA) test would be the only test used to classify workers. This would effectively limit the confusion that presently exists due to the use of multiple classification tests. Prior to any of these systematic changes being made, it is also proposed that a ‘safe harbor’ period be implemented to allow organizations the opportunity to prepare for any burden that they may face due to the changes that are eventually made, and for some dependent contractor benefits to naturally emerge.

Keywords: worker misclassification, dependent contractor, independent contractor, employee, gig economy

A Third Class of Worker: The Dependent Contractor

“I’ll order an Uber,” “let’s Postmates some food,” “I booked us an Airbnb for the weekend.” These phrases, or ones similar to them, are used quite frequently in today’s modern world. The ease and simplicity of using platforms such as Uber, Lyft, Grubhub, Postmates, Airbnb, and TaskRabbit for simple tasks has caused these services to skyrocket in popularity, especially amongst members of the younger generation. Whether one is aware of it or not, by utilizing the services provided by these platforms, they are participating in what is known as the gig economy. The gig economy has evolved relatively recently along with the technology that has enabled its creation. Individuals can easily use their smartphone apps to have immediate access to an entire labor force for a multitude of odd jobs. Due to the fact that the gig economy is so new and has numerous interchangeable terms, like the sharing economy, the platform economy and the on-demand economy, it can be a bit difficult to define. For the purposes of this paper, though, it can be understood as a labor market in which independent contractors are hired for short term, flexible jobs that are typically mediated through technology, such as apps.

Consumers within the gig economy are attracted to its services because it is quick, hassle free, and generally not over-the-top expensive. However, while it may be all about convenience and ease on the consumer side of the gig economy, the same is not true on the side of the worker. During a campaign speech made in July of 2015, Hillary Clinton addressed the gig economy and some of these looming issues:

Many Americans are making extra money renting out a spare room, designing websites...even driving their own car. This ‘on demand’ or so-called ‘gig economy’ is creating exciting opportunities and unleashing innovation, but it’s

also raising hard questions about workplace protections and what a good job will look like in the future. (as cited in Sundararajan, 2016, p. 161)

The very fact that Clinton chose to mention the emerging issues in the gig economy during a Presidential campaign speech speaks to the magnitude of the worker misclassification dilemma.

Taking into consideration the many court cases across the country that have come to light in recent years concerning members of the gig economy, it is evident that there is a major problem with this new type of work. That problem is the confusion of whether or not workers in the gig economy are independent contractors or employees of their platforms. Currently, gig workers are classified as independent contractors, not employees. Why is this a problem? Well, the binary worker classification system that is used in the United States was developed as a result of Roosevelt's New Deal, during a time when nothing like the gig economy even existed. It is not the timing of the creation of this system that is an issue, but the fact that it has failed to evolve along with the changing nature of work. As will be explained later in more depth, gig workers do not fit into either the "employee" or "independent contractor" categories that exist under the current classification system. In fact, the characteristics of their job place them somewhere in between the two categories.

Worker misclassification is a serious issue due to its negative effects on not just the worker, but also on their employer and the government. The purpose of this paper is to address the issue of worker misclassification in the gig economy and to propose the feasible solution of the eventual implementation of a third category of worker, the dependent contractor. After a review of the current literature on the subject, a proposal on how to approach the addition of a new worker category will follow, and lastly, a section with a discussion of implications and thoughts for future research will conclude this paper.

Literature Review

Current Standards

Worker classification in the modern economy should be a concern for all employers. Utilizing the services of gig workers is something that many organizations are familiar with or will become familiar with in the future as its popularity increases. When interacting with gig workers, there are two main ideas that employers should be considering if they want to maintain the independent contractor-employer relationship (Clark, 2018). First, employers must make the distinction that the gig workers they are hiring *are* independent contractors and stick to it. To do this, it may be helpful for the employers to understand how employee and independent contractor are defined. Essentially, employees are those who work under contract for pay, and are dependent on their employers for various factors of their work, such as location of work and the provision of tools. On the other hand, independent contractors are individuals who are self-employed, provide services to multiple organizations or people, and are paid based on time or by job completed. The primary issue that can disrupt this distinction from being made is the type of work the employer assigns to the gig worker. Clark says that “it is generally not a good idea to bring on short-term talent to perform the organizations core functions, as opposed to work supporting individual projects” (2018, para. 7). If gig workers begin performing major tasks of the organization, the boundary between independent contractor and employee becomes blurred, and it opens the organization up to scrutiny. The second idea employers should consider is creating distance between the organization and the gig worker. Independent contractors should not be given any sort of organization handbook or be assigned to an organization supervisor, because the more that the organization interacts with the worker, the more the relationship appears to be one between an employer and employee. This is not to say that certain protections

should not be made when utilizing gig workers. For instance, if there is a case where a gig worker is accused of misconduct, the organization should handle the situation as if the misconduct was committed by an employee. This would protect the organization's reputation because they would be exhibiting care in the handling of serious situations. Clark suggests some quality points on how employers can maintain the separation between employee and independent contractor, which is what gig platforms, like Uber and Lyft, intend to do because they are uninterested in paying for employee benefits. It is still a difficult task to achieve, though, especially when there are many possible worker classification tests that can be followed. Many gig platforms are struggling to maintain the boundaries of independent contractors, raising the issue of worker misclassification.

Three of the major worker classification tests that are currently used in the United States are based on the Fair Labor Standards Act (FLSA), Common Law, and the ABC Test. The FLSA regulates minimum wage and overtime payment rules, but also provides guidelines for employee and independent contractor categorization. Dokko, Mumford, and Whitmore Schanzenbach (2015) suggest that the FLSA classification method distinguishes types of workers based on the financial relationship between the employer and employee. The FLSA test examines factors such as “whether a worker provides services that are integral to the employer’s business, whether the worker has the opportunity to make a profit or suffer a loss, [and] whether the worker has an extended relationship with the employer” (Dokko et al., 2015, p. 5). So, the FLSA places more of an emphasis on the economic reality of the situation, rather than the level of control, which seems to be the deciding factor under the Common Law test (“Fact Sheet 13,” 2008).

The Common Law test was the first legal classification system created to determine if workers were independent contractors or employees in America (Pinsof, 2016). Common Law

rules largely focus on the degree of control that the employer has over the worker compared to the worker's independence. To weigh these factors against each other, the IRS suggests examining the behavior, finances, and type of relationship that exists between a particular worker and their employer ("Independent Contractor (Self-Employed) or Employee?," 2018). For the behavior factor, it must be asked if the company controls what the worker does and how they do it. The finance category is somewhat similar to that of the FLSA in that it analyzes who has the financial power in the situation. Lastly, the type of relationship factor looks at any sort of contracts that exist between the two parties, which may convey elements of control. One similarity between the Common Law test and the FLSA test is that there is no 'magic number/score' on either of the tests that can deem someone an employee or independent contractor. Rather, both tests come down to a judgement that must be made after accounting for all of the various factors.

The final worker classification method that must be mentioned is the ABC test. This is the hardest test for employers to overcome because it heavily favors placing workers in the employee category (Meneghello, 2018). Traditionally, the ABC test has been used by states to distinguish employees from independent contractors when determining unemployment tax. According to Pinosof, "the test is a simplified version of the common law control test, and has come to dominate employment classification reform across the states" (Pinosof, 2016, p. 369). The test assumes that the worker is an employee from the beginning, and then gives three possible criteria for challenging that specification. The three criteria are "whether the worker is free from control or direction in the performance of the work; whether the work is done outside the usual course of the firm's business; and whether the worker is customarily engaged in an independent trade, occupation, profession, or business" (Pinosof, 2016, p. 369). The ABC test is

becoming increasingly popular when it comes to employee classification; yet, organizations and court systems still tend to vary on which test they choose to use. This is problematic because the tests are clearly not the same. One of the tests can result in a worker being classified as an employee, while a different test can place the same worker in the independent contractor category. Worker misclassification is a serious issue because it has negative effects on multiple parties. The workers are denied rights and benefits, the employers face the threat of legal action against them, and the State loses potential tax revenue.

Relevant Classification Court Cases

Based on the variance in the current standards explained above, along with the disruption that has been caused by the rise of gig platforms, such as Uber, it is not surprising that many worker classification cases have been brought to court in the past few years. The different outcomes and rulings of the following cases highlight the need for lawmakers to seriously consider the inadequacy of the current worker classification system and determine possible solutions.

There have been at least two cases where judges have ruled that gig workers are independent contractors, and not employees. In February of 2018, Grubhub was involved in a case against Raef Lawson, a former driver for the platform. This became the first gig economy case in the country to reach a trial verdict (Noguchi, 2018). Lawson sued Grubhub, claiming that the company exerted significant control over him during his shifts and that he should be considered an employee and be provided with benefits as such. However, a judge for the U.S. District Court of Northern California disagreed, and ruled that Lawson was an independent contractor. The judge said that Lawson was not a traditional employee because he did not receive performance evaluations, go through an orientation/training process, and was not required to

wear a uniform (Noguchi, 2018). In a similar case that closed in April of 2018, a Philadelphia judge ruled that UberBlack drivers are independent contractors. U.S. District Judge Michael Baylson claimed that Uber did not exert enough control over the drivers for them to be considered employees. Baylson justified this by saying that “the drivers work when they want to and are free to nap, run personal errands, or smoke cigarettes in between rides,” and are thus, not controlled in any stringent manner by Uber (Wiessner, 2018, para. 2).

In contradiction to the two previously mentioned court rulings, there have been other cases resulting in gig workers being classified as employees. The *Berwick v. Uber Technologies* case saw California’s Labor Commissioner decide that a former Uber driver was an employee during his time with the company because Uber was involved with every aspect of the work being done, and therefore, had a high level of control over the worker (Donovan, Bradley, & Shimabukuro, 2016). The Commissioner used the FLSA test in this case and ended up rewarding the former driver a sum of money to pay for mileage for car usage and interest on expenses, but unpaid wages or coverage for damages was not granted. *Dynamex Operations West v. Superior Court* was a similar Californian case that occurred in early 2018. The ruling of this case made it so that “hiring entities need to prove that all of their workers satisfy the 'ABC test' in order to properly classify them as contractors” (Meneghello, 2018, para. 1). One immediate result of this was that all Californian cannabis delivery drivers, who were once classified as independent contractors, became employees. While this has made customers more comfortable with using the delivery service because the employees are better trained, it has also increased these cannabis companies’ costs by 12%-15%, which is a lot for businesses in the emerging industry (Semuels, 2018). There are other implications that are necessary to consider when gig workers suddenly become employees. For example, if this were to happen to Uber, the company would have to

greatly reduce the drivers' percentage of pay per ride to cover the cost of employee benefits if the classification change were to take effect. Also, Uber would likely have to decrease their work force because workers would need to be screened more closely, making it harder for people who want to pick up a quick job to do so (Ben-Shahar, 2017). Clearly, a solution needs to be made as for what type of classification test should be used and for how to properly categorize gig platform workers.

A variety of solutions have been proposed to solve this problem. Lobel (2017) suggests that the current classification tests should be simplified, making it harder for workers to qualify as independent contractors, thus, making more people eligible for employee status. Pinsof (2016) on the other hand, believes that there already exists a quality classification method in the ABC test, and proposes that it should be used by all employers. This is believed to be the best option because the test "eliminates the most manipulable factors, such as intent, location, and method of payment," and is the least outdated test compared to the Common Law and FLSA tests (Pinsof, 2016, p. 370). The question then becomes should the ABC test be applied retroactively? This question was especially important after the *Dynamex Operations West v. Superior Court* case in California that was previously discussed because of the financial factor. Should businesses be held liable for past wages that would have been earned by employees who were previously considered contractors? Even though the Dynamex ruling made no such suggestion, a California case involving exotic dancers ruled that the ABC test *should* be applied retroactively, and that the dancers were entitled to past wages (Meneghello, 2018). The city of San Francisco also seems to be taking the Dynamex case ruling seriously. City officials are requesting a complete list of drivers who have worked for Uber and Lyft since 2015 along with their hours, wages, and

benefits in order to determine if they have been properly classified, and if not, what they may be entitled to (Said, 2018).

The possibility of certain rulings to be applied retroactively, like in the case discussed above, creates a great deal of uneasiness for businesses. An interesting proposal made by Artmore (2017) and Sundararajan (2016) suggests implementing a temporary ‘safe harbor’ before any major classification changes are made. Essentially, the safe harbor would be a period of time where companies could brace for change in the worker classification system. This would “protect gig companies from legal uncertainty and the potentially fatal effects of the employee classification” (Artmore, 2017, p. 916). The safe harbor would allow companies to financially prepare for the burden of paying for employee benefits and prepare employees for changes in their wages and policies.

Proposed Solutions

Many proposed solutions involve the creation of a third category of worker, but most of them differ on what that category would look like. Dokko et al. (2015) say that there is a need for this new category because gig workers fall somewhere in between independent contractors and employees, and the current tests do not address that issue. The third category of worker that Artmore (2017) suggests implementing after the safe harbor period would be entitled to fundamental rights such as fair pay, but would receive no benefits, like health insurance. Donovan et al.’s (2016) proposed third category is the complete opposite of Artmore’s and would be called “independent workers.” Independent workers would qualify for benefits, as in insurance, but would not have certain labor protections based on their hours worked, such as minimum wage or overtime. Pierce & Silva (2018) propose yet another third category of worker called the “dependent contractor,” which already exists in Canada and Germany. The difference

between the dependent and independent contractor is the extent to which the worker relies on their employers for income. If a worker has many income sources, they are likely to be an independent contractor, but if they rely heavily on one or two sources, then they are a dependent contractor and would be entitled to receive some benefits that employees receive, like severance packages (Pierce & Silva, 2018). While many of the proposals for a third category of worker differ in their definition, it is a quite common suggestion to have this third category, which should be considered by lawmakers.

There are multiple third category proposals, which all slightly vary from one another, but one issue that Artmore (2017), Lobel (2017) and Sundararajan (2016) agree upon is the need to change the benefits system in America. Lobel suggests that employment protections should be expanded, regardless of classification as a worker or independent contractor. Similarly, Artmore believes that benefits should be universalized in order to ease the negative effects of a smaller workforce that has resulted from technological advances. So, no matter the changes made to the classification system, the consensus seems to be that benefits should be broadened beyond the employment lines.

Proposal

Why a Third Category is Necessary

Based on the literature review presented above, it can be determined that changes need to be made to the American worker classification system. A modern mindset must be applied to solve this problem that has existed not only during the rise of the gig economy, but for many decades. The gig economy is so new, though, and because of that, fresh ideas and thought processes should be applied in order to solve the worker misclassification problem. In line with much of the reviewed literature, it is proposed that a third category of worker be added to the

current classification system. A third category is necessary for a multitude of reasons. The binary classification system that exists today is a result of New Deal legislation and has unfortunately not successfully evolved with the changing nature of work that has been fueled by technology (Weber, 2015). This failure of the system to progress along with society is especially evident when it comes to those working in the gig economy. On-demand workers who use apps on their smartphones to find jobs cannot be expected to fit into the two categories that were formed before this new type of work even existed. Cruz (2015) even suggests that gig workers are too much of a “blend” of what it means to be an independent contractor or an employee. Gig workers have flexible schedules, do not wear uniforms, and do not work at the physical location of the company. However, they are performing tasks essential to the organization’s business. Based on these characteristics, it is impossible for gig workers to perfectly fit into either of the two categories.

Presently, gig workers are classified as independent contractors, but the many court cases and high level of confusion concerning whether or not they are employees or independent contractors proves that they are misclassified. The misclassification of workers as independent contractors is a major crisis which needs to be addressed urgently as it deprives workers of certain rights they should be guaranteed based on the nature of their work. Although gig workers should not be granted full employee rights, they do deserve more than they are currently given due to of the characteristics of their work, such as the financial and functional dependence that they have upon their employers. Misclassification is also an economic issue because it causes billions of dollars of loss for federal, state and local tax revenue. This is due to the fact that as independent contractors, gig workers’ employers are not required to withhold any taxes from their compensation (Bauer, 2015). In addition, unemployment compensation programs are also

unable to collect on billions of dollars because employers are only required to pay unemployment taxes for employees (Bauer, 2015). So, if only for purely financial reasons, lawmakers should be motivated to add a third category of worker.

Gig workers being classified as independent contractors is a failure on the part of the system because they are anything but 'independent.' In fact, they are extremely dependent on the business model of the particular organization that they are working for, whether it be for financial reasons or how they are being managed by the organization. They are also "completely vulnerable to (1) any collapse in that business or (2) any change in that business model" ("The Case for the 'Dependent Contractor,'" n.d., para. 5). For instance, an Uber driver can decide when or where to work but is completely reliant on the organization for many factors of their work, such as their wages and the ability for them to connect with passengers. This element of dependence brings up the idea of the dependent contractor, which was briefly mentioned above in the literature review. Being that there is evident dependence of gig workers on their respective platforms, and the dependent contractor category has been successfully implemented in a few Western nations already, it is proposed that the dependent contractor be the third category to be added to the American worker classification system. Details of the specifics of this category are to be further explained in the following sections.

Looking to Other Countries

The dependent contractor category exists in Canada, Spain and Germany. According to Cruz (2015), in Canada, if an organization has relied on specific individuals for a number of years, and if those people are gaining at least 80% of their income from that job, then they are likely a dependent contractor. In Germany, to be considered a dependent contractor, workers must receive 50% of their income from a single organization, while in Spain, it's 75% (Cruz,

2015). Examining any of these cases can give insight as to how the dependent contractor category could potentially work in the United States. For the purposes of this paper, the example of Canada will be examined more closely.

The push for the addition of the dependent contractor category in Canada pre-dated the gig economy by many decades, exemplifying the notion that employee classification is a longstanding problem. It was in 1965 when Professor Harry Authors first made his plea to the Canadian government to “reconsider the outer limits of the employee status” (Bendel, 1982, p. 374). Essentially, he wanted the benefits of employment status to reach a broader scope of people. Authors’ main concern was for those people he called dependent contractors, who were independent contractors in the eyes of the law but were economically dependent on those they worked for. His proposal was made in the sixties, so Authors was not focusing on Uber drivers or Grubhub delivery people, but workers such as truck drivers, taxi drivers, farmers and fishermen. These types of workers basically worked full time for a single organization and were paid for their time, yet they were still classified as independent contractors, which was problematic for Authors (Cherry & Aloisi, 2017). Authors specifically argued for his dependent contractor category to be included as a subcategory of ‘employee’ and for protections to be extended to them. The main protection that Authors was pushing for was the right for this group of workers to unionize, which they were unable to do under the restraints of being independent contractors. The dependent contractor was quickly adopted as a subcategory of employee by many Canadian classification systems in the seventies. The new category proved to be “beneficial for a significant number of workers formerly excluded from the ambit of collective bargaining laws” (Cherry & Aloisi, 2017, p. 653). Due to the new category’s implementation, more protections were granted to workers who did not have any access to such protections prior.

While Canada did have some success with the new dependent contractor category, they have also had some difficulties, leading some to argue against having it at all. These difficulties can be helpful to learn from when it comes time to implement changes within the American system. One argument against the dependent contractor comes from Langille & Davidov (1999), who suggested that the category's addition was unnecessary and was simply a result of the failure of judges who were unable to properly classify workers in the employee category when it was appropriate to do so. This could be argued to be the case in the United States currently because many gig workers resemble employees, but there is contention between judges when it comes to how they are categorizing these people, as was seen in the literature review. In the United States, though, a new category is necessary to give gig workers appropriate titles and provide them with benefits reflecting that title and the nature of their work.

Another issue that Canada has had with the addition of the new category stems from the fact that different provinces within the country strayed from Authors' suggestions and adopted variant definitions of the term dependent contractor. For example, British Columbia and Newfoundland followed Authors' definitions and suggestions. However, Saskatchewan deviated and chose to not even include the term dependent contractor in their system, but rather chose to expand the definition of employee. The lack of universal policy adoption surrounding what it means to be an employee, an independent contractor or a dependent contractor results in confusion and vulnerability for both the workers and the organizations. A similar issue that Canada had was a lack of consensus on which classification test to use. As in the United States, Canada has multiple worker classification tests. This again generates a problem because different tests can lead to different results. Disagreement between the Canadian provinces on definitions

and tests can lead to confusion which could be avoided in the United States by ensuring that all of the states apply the same definitions and utilize the same test.

Implementation of the Dependent Contractor Category

Instilling a new category within the American worker classification system will be a multi-step process. It will not be an immediate change, but one that will require years to make in order to ease organizations into the new reality, rather than shocking them with a sudden change that they are unequipped to deal with. The steps involved in making this alteration to the classification system would be to (1) have a ‘safe harbor’ period, (2) implement the new category, (3) and then switch to the use of a modified FLSA test for all worker classification purposes.

As stated, the first proposed step to making this change to the American classification system would be to initiate a safe harbor period, a concept briefly discussed in the literature review. So, what exactly is a safe harbor? Well, the idea of safe harbors was a product of Section 530 of the Revenue Act of 1978. Section 530 is a provision that “prevents the IRS from retroactively reclassifying independent contractors as employees and subjecting the employer to federal employment taxes, penalties, and interest for such misclassification” (Bauer, 2015, p. 161). Having a safe harbor period before making any legitimate changes would allow gig platforms to experiment with granting their workers some benefits and to financially prepare for the eventual addition of the dependent contractor, when they will be required to provide certain benefits. Under current labor law, companies are discouraged from offering any benefits to their independent contractors such as training classes, insurance, and tax withholdings, because it would open them up to misclassification lawsuits (Badger, 2016). So, the safe harbor period

would allow the platforms to see if they are able to handle providing benefits to their workers and give them time to make any necessary changes to their business if they are unable to.

The safe harbor period would also guarantee that the new rules would not be applied retroactively. This offers a major cushion for the platforms because if they were forced to pay for the benefits of every former and current worker, the financial burden could bankrupt them. For instance, Uber has had tens of thousands of drivers since its inception in 2009. If they were forced to provide benefits for each of these people who had ever worked for them, the financial impact on their organization would likely be fatal.

Sundararajan (2016) is a major proponent for the use of a safe harbor period before any classification changes are made. It is his opinion that it will provide platforms with enough time and space to experiment in order for researchers and lawmakers to “learn what kinds of protections and benefits might actually emerge naturally as market outcomes” (Sundararajan, 2016, p. 187). For example, if platforms begin offering health insurance, one outcome could be that they begin to attract more workers who are perhaps more qualified or talented than their original workers were. So, the safe harbor period will allow for some of the effects of the new category to be learned before it is actually in place. The safe harbor period is a necessary step in this process because it will ease platforms into the new system and soften the financial blow that they may face as a result of the time they will have to prepare. It would not be worthwhile to put the effort of making this classification change in the first place if the platforms were unable to handle its effects.

The safe harbor period would need to last for a few years, maybe three to five, in order for the platforms to properly adjust for the dependent contractor category and to allow enough time for naturally emerging outcomes to be understood. Once the new category is implemented,

it is imperative that all American states and territories adopt the same definitions. Organizations and labor law judges need to explicitly follow the same definition and methods to avoid the state of disagreement that the American courts are currently in regarding worker classification in the gig economy. Because the dependent contractor category is rooted in the idea of financial dependence, it seems only natural to use the FLSA's definitions because they also focus on the economic facts of worker-employer relations. In the following section, employee and independent contractor will first be defined, and then the proposed definition of dependent contractor will be explained.

The definitions of employee and independent contractor are already in existence under the FLSA, but after the new category is added, it is proposed that they are the *only* definitions used for these terms when it comes to worker classification. The definition to be used for the term employee is a person who, "as a matter of economic reality, follows the usual path of an employee and is dependent on the business which he or she serves" ("Fact Sheet 13," 2008, para. 2). This will still be the category where the traditional worker falls, with 'traditional' meaning those workers permanently employed under contract. The counterpart to the employee, the independent contractor, will be defined as "a person who is engaged in a business of his or her own" and is not economically dependent on those that they work for ("Fact Sheet 13," 2008, para. 2). There are some more dramatic proposals than this one, which argue for the elimination of the independent contractor category and to make all workers employees. However, the independent contractor is still necessary in today's economy. Classifying all workers as employees would have a great negative effect on small business and many industries, such as the consulting, healthcare, and insurance industries, who heavily rely on their use of independent

contractors (Bauer, 2015). Also, the independent contractor is necessary because it is still a good fit for many freelance workers who derive their income from multiple sources.

In order to define the term dependent contractor, Canada can again be looked to for guidance. In Canada, ‘dependent’ refers to a relationship in which the contractor is economically reliant upon a single employer or client (Coombe, 2017). Financial dependence can simply be for factors such as one’s paycheck, or for more specific factors, like the need to pay off a loan for a car that a worker bought to become a Lyft driver. In Ontario, Canada dependent contractor is defined as someone who is “in a position of economic dependence upon and under obligation to perform duties for [another person],” and who resembles an employee more so than an independent contractor (Langille & Davidov, 1999, p. 25). As is done in Canada, it is proposed that the dependent contractor category be a subcategory of employee. The definition of dependent contractor to be adopted by the American worker classification system will be an individual who, in accordance to a written contract and in exchange for pay, performs an activity or job for an employer; this person must have autonomy in their work, possess some of the tools needed to do the job, and receive the majority of their income from a single source (Carboni, 2016).

The final proposed step in making this change official is to determine which test will be used to classify workers from here on out. Going along with the theme of economic dependence, a modified version of the FLSA test will be used to separate independent contractors from employees. This test is the best choice because it allows for judgement based on economic dependence, which is less obscure of a determinant than control, a factor that some of the other reviewed tests focus on. The five major factors derived from the original FLSA that the new test will consider are:

1. The extent to which the services rendered are an integral part of the principal's business.
2. The permanency of the relationship.
3. The nature and degree of control by the principal.
4. The worker's opportunities for profit and loss.
5. The amount of initiative, judgement, or foresight in open market competition with others required for the success of the worker. ("Fact Sheet 13," 2008, para. 4)

If after considering the above factors, an individual is determined to be an employee, then a set of secondary criteria must be examined to see if that person is a dependent contractor or an employee. According to Carboni (2016), a dependent contractor-employer relationship exists if the worker:

1. Possesses at least some material and/or infrastructure necessary for the activity, independent of the employer's material and/or infrastructure;
2. Works subject to organizational, technical, and procedural criteria that the employer provides, such as business styles, scheduling and other employer or end-client requirements;
3. Performs the activity autonomously, that is without being subject to close supervision of the employer and regardless of the time needed to carry out the task;
4. Receives remuneration based on the quantity and quality of the work performed.

(Carboni, 2016, p. 39)

Based on this collection of criteria, the employees, independent contractors and dependent contractors will be separated from each other and be granted with the appropriate benefits according to their title. The criteria also solve the issue of gig worker classification because they will now be categorized as dependent contractors. The question then becomes what benefits

should the dependent contractor be entitled to? Well, that is something which can be learned from the safe harbor period after some benefits naturally emerge as the best contenders. Perhaps one protection that dependent contractors should be granted, though, is the right to organize, in accordance to Authors' original proposal for Canada.

Implications and Conclusion

The suggestions proposed in this paper are not made without the understanding of their various implications. The main result of this proposal is the need for additional empirical research. The gig economy is such a new phenomenon that there is a lack of academic research regarding the subject as a whole, and specifically on the issue of employee classification. Ideas suggested in this paper are merely theoretical and based on examination of previous literature. By no means should changes be made to the American economy solely based on theory. There needs to be data gathered and analyzed in order to justify the proposed alterations that would affect millions of workers. Concerning the topic of this paper, there are a few particular areas where more knowledge is needed. Specifically, research should be directed towards logistics of the safe harbor period, possible dependent contractor benefits, and potential long-term effects of the new category.

First, more proposals such as this one must be made. There is a great deal of discourse surrounding worker classification in the gig economy, yet there are only a few legitimate proposals for solutions that have been made. As the issue of worker misclassification grows along with the gig economy, scholars should be focusing on possible solutions rather than simply emphasizing the existence of the problem. Second, research is needed to determine how long the safe harbor should last in order to experience the proper effects. This proposal suggested three to five years, but that was merely an estimate, and may be too short of a period. A benchmark for

success of the safe harbor period could be that platforms begin providing benefits for their gig workers of their own volition. Third, dependent contractor benefits must be established. Yes, some of these will be discovered during the safe harbor period, but it would be beneficial to pin some down prior to that time. Researchers must consider all those benefits provided to employees as potential candidates to be applied to dependent contractors. From that pool, they should choose the ones most appropriate in order to make dependent contractors fit in between employees and independent contractors. Two rights that researchers may want to focus on are the right to unionize and protections against discrimination. The right to unionize would go along with what Authors originally proposed for Canada in the 1960s and enable gig workers to assemble and fight for common goals. Protection against discrimination for factors such as age, race, disabilities and gender would be a good right for dependent contractors to have because it allows everyone equal opportunity to make a living. Eventually, researchers should also consider detaching the allocation of benefits to those with certain worker statuses and consider making them universally available. The concept of universal benefits is a very large proposal to be made and would likely be a very time consuming and cumbersome process for the nation to undertake. However, much of the literature points to it as the final solution down the line. Fourth, research must be conducted on how the dependent contractor category will apply to other members of the work force who are not in the gig economy. This new category may alter how many non-gig workers are classified, so effects of this should be understood.

A final issue that should be addressed by future research concerns those gig workers who work for more than one platform. Currently, examples of this are most prevalent for ride sharing platforms, like Uber and Lyft. Drivers for these platforms have been known to switch between the two in order to make the most profit, but the proposed definition of dependent contractor

states that the worker must receive the majority of their income from a single source. The issue raised here may be solved by the fact that workers will be more inclined to work for a single platform if that platform provides more competitive benefits on top of the benefits that are going to be required for dependent contractors.

The major implication that this research should have is to get lawmakers talking and motivate them to take action. They are the ones who can actually instill change in the classification system, so they should be listening to the issues raised by the gig economy and understand how to address them. To motivate lawmakers to make the necessary actions, they must be educated by members of the gig economy, as well as by scholars in the organizational management field on the negative effects of worker misclassification in the gig economy. Once they understand the magnitude of the problem, they should be persuaded to take action. Gig platforms should also be motivated as organizations to help solve this problem because as time goes on, the money and resources that they will need to put in to handle various court cases of workers claiming that they should be employees will only increase. Employee misclassification is a major problem with wide ranging effects that should be addressed as soon as possible because participation in and consumption of the gig economy is only going to escalate and exacerbate any unsolved problems. The proposals made in this paper, which include the addition of the dependent contractor category, are feasible solutions to this problem and should be seriously considered by those who can introduce actual changes into the American economy.

References

- Artmore, E. (2017). Killing the goose that laid the golden egg: Outdated employment laws are destroying the gig economy. *Minnesota Law Review*, 102(6), 887-922. Retrieved from <http://www.minnesotalawreview.org>
- Badger, E. (2016). What happens when we all become our own bosses. *Washington Post*. Retrieved from <https://www.washingtonpost.com/>
- Bauer, D. (2015). The misclassification of independent contractors: The fifty-four billion dollar problem. *Rutgers Journal of Law & Public Policy*, 12(2), 138-178.
- Bendel, M. (1982). The dependent contractor: An unnecessary and flawed development in Canadian labour law. *The University of Toronto Law Journal*, 32(4), 374-411.
- Ben-Shahar, O. (2017, Nov 15). Are Uber drivers employees? The answer will shape the sharing economy. *Forbes*. Retrieved from <https://www.forbes.com/>
- Carboni, M. (2016). A new class of worker for the sharing economy. *Richmond Journal of Law & Technology*, 22(4), 1-56.
- Cherry, M., & Aloisi, A. (2017). "Dependent contractors" in the gig economy: A comparative approach. *American University Law Review*, 66(3), 635-689.
- Clark, M. (2018). Navigating employment law in the gig economy. *HR Magazine*. Retrieved from <https://www.shrm.org>
- Coombe, F. (2017). Worker, employee, IC or dependent? *Contingent Workforce Strategies*. Retrieved from <https://cwstrategies.staffingindustry.com/>
- Cruz, R. (2015). A class of their own? independent contractors causing a conundrum. *Workforce*. Retrieved from <http://www.workforce.com/>

- Dokko, J., Mumford, M., & Whitmore Schanzenbach, D. (2015). *Workers and the online gig economy*. Washington, D.C.: The Hamilton Project. Retrieved from <https://www.brookings.edu>
- Donovan, S. A., Bradley, D. H., & Shimabukuro, J. (2016). *What does the gig economy mean for workers?* Washington, D.C.: Congressional Research Service. Retrieved from <https://digitalcommons.ilr.cornell.edu/>
- Fact sheet 13: Employment relationship under the fair labor standards act (FLSA). (2008). *U.S. Department of Labor*. Retrieved from <https://www.dol.gov/>
- Independent contractor (self-employed) or employee? (2018, November 2). *Internal Revenue Service*. Retrieved from <https://www.irs.gov/>
- Langille, B., & Davidov, G. (1999). Beyond employees and independent contractors: A view from Canada. *Comparative Labor Law & Policy Journal*, 21(1), 7-46.
- Lobel, O. (2017). The gig economy and the future of employment and labor law. *University of San Francisco Law Review*, 51(1), 51-74.
- Meneghello, R. (2018, Jul 20). State court concludes ABC test should be applied retroactively. *Fisher Phillips*. Retrieved from <https://www.fisherphillips.com/>
- Noguchi, Y. (2018). Gig economy renews debate over whether contractors are really employees. *NPR*. Retrieved from <https://www.npr.org>
- Pearce, J., & Silva, J. (2018). The future of independent contractors and their status as non-employees: Moving on from a common law standard. *Hastings Business Law Journal*, 14(1), 1-35. Retrieved from <https://repository.uchastings.edu/>

- Pinsof, J. (2016). A new take on an old problem: Employee misclassification in the modern gig-economy. *Michigan Telecommunications and Technology Law Review*, 22(2), 341-373.
Retrieved from <https://repository.law.umich.edu/>
- Said, C. (2018, May 29). San Francisco to Uber, Lyft: Tell us what drivers earn. *The San Francisco Chronicle*. Retrieved from <https://www.sfchronicle.com/>
- Schein, I. (2014). Canada: When is a worker a dependent contractor? *Mondaq*. Retrieved from <https://www.mondaq.com/>
- Samuels, A. (2018, Sep 14). What happens when gig-economy workers become employees. *The Atlantic*. Retrieved from <https://www.theatlantic.com/>
- Sundararajan, A. (2016). *The sharing economy*. Boston: The MIT Press.
- The case for the dependent contractor. (n.d.). *Wolf, Baldwin & Associates, P.C.*. Retrieved from <https://www.wolfbaldwin.com/>
- Weber, L. (2015, Jan 28). Careers: What if there were a new type of worker? Dependent contractor. *Wall Street Journal*. Retrieved from <https://www.wsj.com/>
- Wiessner, D. (2018, April 12). U.S. judge says Uber drivers are not company's employees. *Reuters*. Retrieved from <https://www.reuters.com/>