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Worker Classification Conundrums in the Gig Economy

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Worker Classification Conundrums in the Gig Economy

Susan E. Provenzano*

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I. INTRODUCTION

In the 1990s, few Californians would have dreamed they might one day “tap a button, get a ride”¹ for local transit. They would have stared in disbelief to hear of a future where consumers order groceries online, rate fellow citizen-drivers with digital stars, and hire contractors through apps. Such is the modern reality, courtesy

* Assistant Professor of Law, Georgia State University School of Law. My sincere thanks to Jay Mootz for spearheading this symposium and inviting me to participate. For their generous sponsorship of this Symposium, I am grateful to the *University of the Pacific Law Review*, the McGeorge School of Law Capital Center for Law and Policy, and the McGeorge Public Policy Programs.

1. This is styled as “Uber’s core promise.” *Tap a Button. Get a Ride. From Every App.*, UBER DEVS. (Dec. 2, 2015), <https://uber-developers.news/tap-a-button-get-a-ride-from-every-app-4a9d2eddf9f2> (on file with the *University of the Pacific Law Review*).

of the sector variously known as the sharing economy, platform economy, and gig economy.² This Symposium explores how employment law treats workers and firms in this economy—particularly in the frontline state of California.³ It begins with a fundamental question: who is an “employee” and who is an “independent contractor” in the eyes of the law? The issue of worker classification matters not just for employment law, but also for intricate regulatory regimes (think taxation) and for tort and contract liability. And it is especially hard to pin down in an era when firms of all stripes call themselves “tech companies,” and treat their workers as “third-party providers” connected to consumers through the firm’s digital platform.⁴

In a dispute, courts and regulators have the final say about worker classification.⁵ But that determination comes at the back end—a product of tests that yield inconsistent results amid legal proceedings. At the start of the working relationship, firms are in the proverbial driver’s seat, steering worker classification with two primary considerations. One is the legal risk of *misclassification*—that is, the penalty for treating a worker as an independent contractor when she is really functioning as an employee, or vice versa.⁶ These are referred to as the *legal stakes* of worker classification. The second consideration is pragmatic. Along with the legal risks, firms weigh the business benefits of employing versus contracting in various jobs and mold the classifications accordingly.⁷ These are referred to as the

2. Shu-Yi Oei, *The Trouble with Gig Talk: Choice of Narrative and the Worker Classification Fights*, 81 DUKE L. & CONTEMP. PROBS. 107, 107 & n.1 (2018) (listing these labels for the sector and analyzing the rhetoric surrounding them). To fit this Symposium’s title, this Essay will use the phrase “gig economy.”

3. As you will read in the rest of this volume, California has been hotbed of gig economy worker classification litigation, legislation, and regulatory activity. Highlights include a new worker classification test establishing a rebuttable presumption that a worker is an employee (the “ABC” test); followed by legislation adopting the ABC test to deal with gig economy misclassification (AB 5, 2019 Leg., 2019–2020 Reg. Sess. (Cal. 2019)); followed by a successful ballot initiative exempting certain gig businesses from AB 5 (Cal. Proposition 22 (2020)); followed by a California Superior Court ruling deeming Prop 22 unconstitutional (*Castellanos v. State*, No. RG21088725, 2021 WL 3730951 (Aug. 20, 2021), *appeal docketed*, No. A163655 (Cal. App. Dec. 13, 2021)). See Francis J. Mootz III, *A Legal Backdrop: A Maze of Confusion*, 54 U. PACIFIC L. REV. 1, 1–2 (2022).

4. See Blake E. Stafford, *Riding the Line Between Employee and Independent Contractor in the Modern Sharing Economy*, 51 WAKE FOREST L. REV. 1223, 1243 (2016) (“These platforms define themselves as ‘technology companies’ that simply furnish a platform allowing drivers and riders to connect, analogous to a company like eBay.”); Oei, *supra* note 2, at 124 (“Under this conceptual vision, the customers of firms like Uber are the drivers, taskers, or other service providers . . . rather than the end-user customers who enjoy the services.”).

5. This final say takes various forms, including individual and class action worker lawsuits and federal and state regulatory and administrative enforcement actions. Andrew G. Malik, *Worker Classification and the Gig Economy*, 69 RUTGERS U. L. REV. 1729, 1754 (2017).

6. The U.S. Department of Labor deems the “misclassification of employees as independent contractors . . . one of the most serious problems facing affected workers employers[,] and the entire economy.” *Misclassification of Employees as Independent Contractors*, U.S. DEP’T LAB. BLOG (June 3, 2022), <https://blog.dol.gov/2022/06/03/misclassification-of-employees-as-independent-contractors-under-the-fair-labor-standards-act> (on file with the *University of the Pacific Law Review*). The DOL and the IRS have, accordingly, stepped up enforcement efforts, “engag[ing] in highly publicized ‘crackdowns’ of companies that may be misclassifying employees as independent contractors.” Malik, *supra* note 5, at 1741.

7. These incentives make worker classification susceptible to firm manipulation. Malik, *supra* note 5, at 1730–31 (referring to gig firms’ “new take on an old trick: cutting labor costs by misclassifying employees as independent contractors”).

incentives of worker classification. Setting the stage for the rest of the Symposium, this Essay elaborates on why worker classification matters and why it is so fraught in the gig economy where stakes and incentives are shaped by erratic legal frameworks and firm opportunism.

II. THE FRAUGHT NATURE OF WORKER CLASSIFICATION IN THE GIG ECONOMY

Historically, the law has treated worker classification as binary: an individual labor supplier is either an employee or an independent contractor.⁸ This distinction centers on *firm control* and *worker dependence*.⁹ Those who depend on a firm to make a living and whose day-to-day responsibilities are subject to that firm's control are employees. Because they are economically vulnerable, employees are treated to a bundle of rights and entitlements in federal, state, and private-ordering realms.¹⁰ Independent contractors, on the other hand, are treated by the law as entrepreneurial and self-sufficient.¹¹ Legally speaking, independent contractors must fend for themselves, from taxes to insurance to fair wages.

These legal concepts and distinctions are poorly suited to modern gig realities.¹² For one thing, the gig economy has upended traditional notions of “control” and “dependence.” Firms like Uber, GrubHub, and Instacart have relinquished what looks like the definition of control. They tout flexibility, permitting gig workers to decide when, how, and where they work.¹³ They peddle

8. This binary arose during the industrial revolution, as work and workers diversified in the wake of vicarious tort liability making employers responsible for their employees' harms. The law needed a way to identify which workers would subject firms to vicarious liability and which ones would not. Stafford, *supra* note 4, at 1225; see generally Richard R. Carlson, *Why the Law Still Can't Tell an Employee When It Sees One and How It Ought to Stop Trying*, 22 BERKELEY J. EMP. & LAB. L. 295, 301–34 (2001). Later, the impetus for worker classification shifted to “protecting employees.” Stafford, *supra* note 4, at 1226.

9. The three dominant modern tests share this dual emphasis. The “control” test emphasizes the “right to control the manner and means by which the product is accomplished.” *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 323 (1992). In the IRS's 20-factor version of that test, nine factors deal with control, while six more are aimed at determining economic dependence. The IRS now groups these factors into three categories, two of which are “behavior control” and “financial control”—the flip side of economic dependence. DEP'T OF TREASURY, IRS PUBLICATION 15-A, EMPLOYER'S SUPPLEMENTAL TAX GUIDE 7 (2019). The competing “economic realities” test considers “the degree of control exercised . . . over the workers” with an overarching focus on the worker's “economic dependence.” See, e.g., *Sec'y of Lab. v. Lauritzen*, 835 F.2d 1529, 1535, 1538 (7th Cir. 1987). The ABC test presumes employee status unless the firm proves rebuts that status with proof of non-control and non-dependence. See, e.g., *Dynamex Operations W. v. Superior Ct.*, 4 Cal. 5th 903, 956 (2018).

10. Oei, *supra* note 2, at 120–23 (surveying the legal rights of employees versus independent contractors); see also Malik, *supra* note 5, at 1731, 1734 (noting that employee status comes with “unemployment benefits, medical leave, and workers' compensation” as well as “minimum wages, overtime benefits, [and] health insurance” along with easy “proof of employment” and “lower taxes”).

11. Malik, *supra* note 5, at 1734 (“For many individuals operating as independent contractors, the main benefit is the classification's namesake: independence,” in exchange for foregoing employment rights and entitlements).

12. *Id.* at 1759 (“The current state of worker classification law is ill-equipped to deal with the way gig-economy companies utilize workers to offer services.”); Stafford, *supra* note 4, at 1224 (noting that courts “struggle to apply ‘outmoded’ worker classification tests that originated in the nineteenth century”).

13. Sara Libby, *Instacart Lawsuit Puts City Attorney in the Thick of the Worker Classification Fight*, VOICE

autonomy, where workers decide the manner and means of getting the job done—usually with their own, self-insured equipment.¹⁴ As for the workers, they appear less “dependent” on a given firm, with many dividing their time among what firms brand as “side hustles”—GrubHub deliverers and Instacart shoppers by day, Uber and Lyft drivers by night.¹⁵ With this paradigm, it is hard to calibrate and allocate the protections that go along with employment.

So far, the law of worker classification has yielded conflicting results for gig workers.¹⁶ That is thanks to a menu of multi-factor tests, which have developed piecemeal to fill the statutory void of worker classification definitions,¹⁷ populated by maladaptive factors. One such factor is whether the worker is integral to the firm’s business. A “yes” answer points in the employment direction, and a “no” answer suggests an independent contracting relationship.¹⁸ This factor does little to unpack gig worker classifications. For instance, a driver is integral to a transportation firm, but not to a self-styled technology company; the determination reflects nothing but the firm’s own business framing. Another oft-cited factor is the permanence of the working relationship.¹⁹ The more “permanent” the relationship, the more likely the worker is to be an employee.²⁰ But how is permanence measured for an Instacart shopper who has licensed the Shopper App for the past ten years, has used it only intermittently, and has been matched each time with a different grocery store and delivery customer?²¹ To make matters worse, no one can agree on a single classification test. The number and content of

OF SAN DIEGO (Feb. 11, 2020), <https://voiceofsandiego.org/2020/02/11/instacart-lawsuit-puts-city-attorney-in-the-thick-of-the-worker-classification-fight/> (on file with the *University of the Pacific Law Review*).

14. *Id.*

15. Malik, *supra* note 5, at 1745 (“It is not uncommon for workers to offer their services on multiple platforms at the same time.”); Stafford, *supra* note 4, at 1240 (discussing the “fluidity” among gig platforms that facilitates providing services for multiple firms).

16. Malik, *supra* note 5, at 1754–59 (discussing inconsistent gig worker classification litigation outcomes across agencies, states, and industries).

17. Many federal and state labor and employment laws define an “employee” as “an individual employed by an employer”—a circular definition that would not pass muster on a law school exam. *See, e.g.*, Fair Labor Standards Act (FLSA), 29 U.S.C. § 203(e)(1); Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e(f); Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1002(6); *see also* CAL. LAB. CODE § 3351 (“‘Employee’ means every person in the service of an employer . . .”). For a full discussion of the worker classification test menu that has developed in the wake of this statutory circularity, see Mootz, *supra* note 3, at 5–10.

18. DAWN D. BENNETT-ALEXANDER & LAURA P. HARTMAN, EMPLOYMENT LAW FOR BUSINESS 17 (McGraw Hill, 7th ed. 2012) (reprinting the IRS test and noting that “employee activities are integrated with the organization’s business” while “IC services are typically limited to nonessential business activities”).

19. *See, e.g.*, *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 323 (1992); *Sec’y of Lab. v. Lauritzen*, 835 F.2d 1529, 1535 (7th Cir. 1987).

20. BENNETT-ALEXANDER & HARTMAN, *supra* note 18, at 17 (reprinting the IRS test and observing that “[e]mployees typically have an open-ended relationship with a company” while “IC’s work on a project-by-project basis, each time with a new contract”).

21. In typical gig firm fashion, Instacart’s “Shopper Application Terms and Conditions” casts shoppers in the role of licensed “app users” rather than workers. *See Instacart Shopper Application Terms and Conditions*, INSTACART, <https://www.instacart.com/shoppers-terms> (last updated Dec. 10, 2020) (on file with the *University of the Pacific Law Review*).

factors shift from state to state, statute to statute, and issue to issue.²² Even the tests' shape vary. In some tests, factors are equally weighted; in others they are tiered; and in still others they are forged into a rebuttable presumption of employee status.²³

The upshot is that the same worker can be classified differently under different laws and in different states.²⁴ A court may agree with a firm, for example, that a gig worker coded as an “independent contractor” is just that, and thus she cannot sue under federal anti-discrimination laws if she is disciplined for reporting sex discrimination. But the National Labor Relations Board may see that same worker as an employee who cannot be disciplined for speaking up about unfair labor practices. Similarly, California gig workers who call themselves independent contractors may receive state wage protections, but New York gig workers may not.

This is the square-peg, round-hole legal milieu in which firms evaluate the legal stakes of worker classification and in which modern gig workers operate. As the next section explains, those stakes are many and high.

III. THE LEGAL STAKES OF WORKER CLASSIFICATION

The legal stakes of misclassification run the gamut of regulation, from wage and hour compliance to workplace treatment and to taxes and benefits. As explained below, each regulatory arena carries its own set of risks and consequences.

A. Wage and Hour Compliance

The federal Fair Labor Standards Act (FLSA) requires firms to pay employees a minimum wage and to compensate them for overtime work.²⁵ Independent contractors, presumed to set their own schedule and to command pay for value, do not receive these protections. Under wage and hour laws, the consequences of misclassification are serious. A firm that denies overtime to workers who *function*

22. Malik, *supra* note 5, at 1754–58; Stafford, *supra* note 4, at 1225–34.

23. *Darden's* control test, for example, gives special weight to the “right to control the manner and means by which the product is accomplished”—effectively the first tier—then supplements it with twelve second-tier factors. *Darden*, 503 U.S. at 323. The economic realities test typically weights factors equally. *See, e.g., Lauritzen*, 835 F.2d at 1539. The rebuttable presumption in favor of employee status appears in the ABC test. *See* *Dynamex Operations W. v. Superior Ct.*, 4 Cal. 5th 903, 956 (2018).

24. Indeed, “the law can produce conflicting worker classifications even within the same company.” Stafford, *supra* note 4, at 223 n.2 (citing cases).

25. 29 U.S.C. §§ 206–07. The FLSA carves out minimum wage and overtime exceptions for “administrative,” “professional,” and “executive” workers. *See* 29 C.F.R. §§ 541.100, 541.200, 541.300 (2022). The California Labor Code contains similar provisions. *See also* CAL. LAB. CODE § 1182.12 (West 2022).

as employees but are *paid* as independent contractors will not only owe back-wages with interest, it will also pay stiff fines to the government—especially if the firm was *trying* to dodge its wage obligations.²⁶

B. Anti-Discrimination Protection

Employees are protected by federal and state anti-discrimination laws, which ban discrimination based on an array of statuses, including race, sex, gender identity, age, pregnancy, disability—and in some states and localities—parentage, weight, and even youth.²⁷ Independent contractor victims of discrimination cannot invoke these laws; they are largely relegated to tort actions against the individual perpetrators.²⁸ For firms, the consequence of misclassifying a worker as an independent contractor is legal liability in a private discrimination suit or an Equal Opportunity Commission (EEOC) enforcement action. Discrimination remedies are powerful (at least in theory); they include backpay, front pay, and reinstatement, along with punitive or liquidated damages for willful discrimination.²⁹

C. Labor Law Protections

Employees, but not independent contractors, are protected against unfair labor practices under the National Labor Relations Act (NLRA).³⁰ The NLRA's protections include employees' rights to collectively voice concerns about the terms and conditions of employment and to engage in union organizing activities.³¹ Thus, a group of employees who object to low pay and parsimonious benefits

26. Among the FLSA's most powerful remedies is its imposition of liquidated damages *unless* the employer can prove that its classification was in good faith. 29 U.S.C. § 216(b). Willful misclassification can yield hefty civil fines and even criminal penalties. BENNETT-ALEXANDER & HARTMAN, *supra* note 18, at 9.

27. *See, e.g.*, 42 U.S.C. § 2000e (covering race, sex, national origin, religion, and color discrimination); *Bostock v. Clayton County*, 140 S. Ct. 173 (2020) (interpreting Title VII to prohibit sexual orientation and gender identity discrimination); Age Discrimination in Employment Act, 29 U.S.C. § 630 (protecting those aged 40 and over); Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) (protecting pregnancy); Americans With Disabilities Act, 42 U.S.C. § 12111 (protecting persons with disabilities and persons regarded as disabled); CAL. GOV. CODE § 12940(a) (West 2022) (protecting seventeen characteristics); ALASKA STAT. ANN. § 18.80.220 (West 2022) (protecting parentage); SAN FRANCISCO, CAL. POLICE CODE § 3303 (protecting height and weight); N.J. REV. STAT. § 10:5-1 (protecting old and young age); *Garnes v. Passaic County*, 437 N.J. Super. 520 (2014) (upholding that the New Jersey statute does not limit protections to a certain age).

28. *Garnes v. Passaic County*, 437 N.J. Super. 520 (2014) (upholding that the New Jersey statute does not limit protections to a certain age); *see generally* Lewis Maltby & David Yamada, *Beyond Economic Realities: The Case for Amending Federal Employment Discrimination Laws to Include Independent Contractors*, 38 B.C. L. REV. 239, 239–40 (1997).

29. *See, e.g.*, *Remedies for Employment Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, www.eeoc.gov/remedies-employment-discrimination (last visited May 31, 2022) (on file with the *University of the Pacific Law Review*) (discussing a range of discrimination remedies).

30. National Labor Relations Act, 29 U.S.C. §§ 152(3), 158.

31. *Id.* § 157 (“Employees shall have the right to self-organization, to form, join, or assist labor organizations . . . and to engage in other concerted activities.”).

cannot be punished for raising these issues, but a group of independent contractors who raise the same issues can be terminated without consequence. Here too misclassification has risks. A firm that disciplines protesting workers wrongly presumed to be independent contractors faces NLRB (and state equivalent) enforcement proceedings and injunctions.³²

D. Liability for Worker-Caused Harms to Third Parties

When an employee injures another person while acting in the scope of her employment—say, by causing a car crash during a delivery—the firm is vicariously liable. In the law’s eyes, employees are agents whose tortious actions run directly to the employer.³³ Not so for independent contractors, who typically bear responsibility for their own tortious conduct.³⁴ Usually, harmed third parties sue both the firm and the worker, and if the worker’s classification is in dispute, the firm will deny liability by arguing that the worker is an independent contractor, not an employee.³⁵ If the firm has miscalculated, it faces whatever remedies flow from the worker’s tort.³⁶

E. Taxation

Firms and workers are both responsible for paying their share of taxes to the IRS.³⁷ But what is owed and how it is paid depends on worker classification. For employees, firms must make payroll deductions for income taxes and Social Security and Medicare taxes, as well as pay the employer’s share of Social Security and Medicare taxes, along with purchasing unemployment insurance.³⁸ Independent contractors, issued 1099 forms and gross wage checks, must pay these

32. *Id.* § 160 (describing unfair labor practice proceedings and the NLRB’s enforcement powers).

33. RESTATEMENT (THIRD) OF AGENCY § 2.04 (AM. L. INST. 2006) (“An employer is subject to liability for tort committed by employees while acting within the scope of their employment.”).

34. TIMOTHY P. GLYNN ET AL., *EMPLOYMENT LAW: PRIVATE ORDERING AND ITS LIMITATIONS* 14 (Aspen 3d ed. 2015).

35. *See, e.g.,* McCary v. Wade, 861 So. 2d 358, 360–61 (Miss. Ct. App. 2003) (citing a firm defending on misclassification grounds a third-party tort suit arising from worker-caused car accident naming firm and worker as defendants).

36. Such remedies include medical expenses and past and future lost wages and compensatory damages. *See id.* at 360.

37. Oei, *supra* note 2, at 120–21 (discussing firm and worker tax obligations, citing I.R.C. §§ 3401, 3402, 3501, 6041 & 6050W).

38. *Independent Contractor (Self-Employed) or Employee?*, INTERNAL REVENUE SERV., <https://www.irs.gov/businesses/small-businesses-self-employed/independent-contractor-self-employed-or-employee> (last visited May 31, 2022) (on file with the *University of the Pacific Law Review*).

taxes on their own.³⁹ If a firm treats a worker as an independent contractor for tax purposes but the IRS disagrees, both the firm and the worker are on the hook. They jointly bear the brunt of misclassification in the form of fines and back taxes.⁴⁰

F. Employee Benefits

Broadly speaking, employee benefits encompass firm-sponsored programs such as retirement and profit-sharing plans, sick leave, vacation pay, and health insurance, along with public programs such as workers compensation and unemployment insurance.⁴¹ Employees are entitled to these benefits; independent contractors are not.⁴² A firm that withholds these benefits due to misclassification could find itself on the wrong end of a benefits suit or a state agency administrative action.

G. Duty of Loyalty and Intellectual Property Rights

Generally speaking, employees impliedly sign over intellectual property rights to their employers for works created within the scope of employment.⁴³ Employees must also refrain from competing against their employers while working for them.⁴⁴ In contrast, independent contractors own their intellectual property and may freely compete. In this arena, the risks lie with the workers. A sales worker who misunderstands herself to be an independent contractor, leaves her firm, and then recruits former customers or suppliers may be liable in tort for breaching her duty of loyalty.⁴⁵ A staff photographer operating on the same assumption may be liable in copyright if she profits from photographs taken at the firm's behest.⁴⁶

39. *Id.*; Oei, *supra* note 2, at 120–21 (discussing firm requirements to issue W2 forms and withhold taxes from employee paychecks, versus issuing 1099 forms to independent contractors, who must then pay the full tax liability).

40. BENNETT-ALEXANDER & HARTMAN, *supra* note 18, at 10–11 (detailing firm and worker penalties for tax-based misclassification).

41. GLYNN ET AL., *supra* note 34, at 14 (discussing workers' compensation obligations for employees but not independent contractors); Oei, *supra* note 2, at 122 (discussing unemployment insurance entitlements for employees but not independent contractors).

42. Famously, Microsoft Corporation was sued by (and agreed to pay a \$93 million settlement to) workers it had deemed temps (i.e., independent contractors); these workers claimed employee status, seeking retroactive benefits from the firm's profit-sharing plan. *Vizcaino v. Microsoft Corp.*, 120 F.3d 1006 (9th Cir. 1997); *Employee Benefits—Contingent Workforce: Microsoft to Pay \$97 Million to Settle Temporary Workers' Class Action Lawsuits*, 69 U.S.L.W. 2363 (Dec. 19, 2000).

43. GLYNN ET AL., *supra* note 34, at 527 (“[U]nder copyright law, the employer presumptively owns employee-authored works.”). The exception to this default rule is patent ownership, which runs in the opposite direction. *Id.*

44. *Id.* at 16 (explaining that only employees, not independent contractors, owe a duty of loyalty not to compete with the firm while employed).

45. Such was the fact pattern in *Midwest Ink Co. v. Graphic Ink Systems*, 2003 WL 360089 (N.D. Ill. Feb. 18, 2003).

46. This fact pattern was presented in *Natkin v. Winfrey*, 111 F. Supp. 2d 1003 (N.D. Ill. 2000), but photographers succeeded in arguing their independent contractor status.

* * *

As important as the law is to worker classification, this array of legal risks stands alongside business incentives that influence a firm's employee/independent contractor calculus. And though workers rarely have much say in the matter, they have their own personal and financial incentives for wanting to be employees or independent contractors. Sometimes these firm and worker incentives align in a classification, but often they do not. The next section explains how these competing incentives play out amid the gig economy dynamic—and what happens when they clash.

III. WORKER CLASSIFICATION INCENTIVES

A. Firm Incentives: The Instacart Promise

For firms, the incentives to classify a worker as an employee or independent contractor revolve around cost and quality control. Consider how this plays out for Instacart, a grocery delivery service launched in the San Francisco Bay Area in 2012.⁴⁷ Like many modern gig companies, Instacart labels itself a tech business, a firm where “technology meets transformation” with a “new model for online grocery shopping and convenient home delivery.”⁴⁸ Instacart serves three constituencies: grocery retailers, grocery brands, and grocery customers.⁴⁹ To satisfy each one, Instacart needs top-notch technology, savvy sales and marketing, and first-rate grocery partners and shoppers. On one hand, hiring employees, rather than contractors, for all this work is expensive. Employment comes with regular pay, benefits, equipment, and legal and tax compliance. On the other hand, employment begets quality control, working relationship power, consistency, and coherence.⁵⁰ For each job category, Instacart must balance these incentives to classify workers as employees or independent contractors.

Take the workers on Instacart's central operations team, a group of one hundred who were ordered to return to the San Francisco office three days a week in the midst of the pandemic.⁵¹ With this order, Instacart re-committed to paying

47. Instacart's legal corporate name is Maplebear, Inc. See DUN & BRADSTREET BUS. DIRECTORY, https://www.dnb.com/business-directory/company-profiles.maplebear_inc.150c4473380332c2413e8974456a6c6f.html (last visited May 31, 2022) (on file with the *University of the Pacific Law Review*).

48. *About Us*, INSTACART, <https://www.instacart.com/company/about-us> (last visited May 31, 2022) (on file with the *University of the Pacific Law Review*).

49. *Id.*

50. GLYNN ET AL., *supra* note 34, at 24 (“[P]erhaps the most important overarching reason for choosing to employ workers rather than outsource or contract with independents is to exercise greater control over worker activities,” especially when “exacting control is perceived as necessary to maintain quality or content” and “to ensure coordination between components of the enterprise.”).

51. Zoe Schiffer, *Instacart Tells Entry-Level Team to Return to Office, Senior Managers Can Stay Home*, VERGE (May 11, 2021), <https://www.theverge.com/2021/5/11/22429690/instacart-remote-work-policy-office-reopen-coronavirus-pandemic> (on file with the *University of the Pacific Law Review*).

for office upkeep, equipment use, heating, cooling, lighting, and related expenditures. These workers were classified as employees,⁵² so Instacart was already incurring regular salary, benefits, and legal tax and compliance costs for them. To Instacart, these total costs of employment—including re-upping for overhead—were likely worthwhile. The company’s return-to-work order cited the importance of “team cohesion, cross-collaboration, and sustained performance over time.”⁵³ Responsible for logistics, trust, and safety,⁵⁴ these employees also worked in sensitive areas. From Instacart’s standpoint, it made sense to regain a firm hand in supervising these workers, consistent with their employee status.

Without a doubt, worker fungibility influenced classifying central operations workers as employees from the beginning. As reported in stories about the return-to-work order, many of these workers were low-level, at-will employees with little experience in the tech industry.⁵⁵ Employing, rather than contracting with, these workers ultimately justified Instacart’s “my way or the highway” attitude towards those who resisted coming back to the office. Without incurring much cost, Instacart could swap these “easily replaceable”⁵⁶ workers with new ones who would accept on-premises work in exchange for the protections and benefits of employment. An independent contractor, self-sufficient and free to supply her skills elsewhere, would be less willing to accede.

A different rationale incentivizes employee status for Instacart’s software engineers.⁵⁷ For this group, employment gives Instacart built-in intellectual property and competition protections. The costs of regular salary, benefits, and compliance⁵⁸ are likely outweighed by Instacart’s need to keep these core employees close and their innovations closer. Instacart could use work-for-hire agreements to maintain IP rights⁵⁹ and to stave off competition from this group, but that would not address quality and management control concerns. Even though many Instacart software engineers work offsite,⁶⁰ their mission-critical work requires the buy-in, supervision, and continuity that come with employee status.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.* (“[T]he [return to work] requirement does not apply to most other teams at the company, nor does it extend to senior managers in the central operations organization. Those employees are able to work remotely, popping into the office a ‘percentage of time’ throughout the month, according to the internal note.”).

56. *Id.*

57. Instacart’s on-line advertising for software engineer positions characterize these workers as employees who are configured into teams with core objectives. *Engineering*, INSTACART, <https://instacart.careers/team-engineering> (last visited May 31, 2022) (on file with the *University of the Pacific Law Review*).

58. Software engineers are also likely to meet one or more of the FLSA’s exemptions, lessening Instacart’s compliance burden. *See supra* note 25.

59. *See, e.g.*, *Natkin v. Winfrey*, 111 F. Supp. 2d 1003, 1008 (N.D. Ill. 2000) (explaining how work-for-hire arrangements permit firms to “own” copyrightable independent contractor creations).

60. *See Instacart Software Engineer, Front End*, GLASSDOOR, <https://www.glassdoor.com/job-listing/software-engineer-front-end-instacart> (last visited May 31, 2022) (on file with the *University of the Pacific Law Review*) (“Instacart is a Flex First team. . . . Our employees have the flexibility to choose where they do their best work – whether it’s from home, an office, or your favorite coffee shop. . . .”).

As Instacart advertises in a posting for “Software Engineer, Customers Front End,” these workers are responsible for “rapidly improving and modernizing our front end code base” to “meet and exceed” customer expectations.⁶¹ They must “maintain our high engineering standards and bring consistency to our code base.”⁶² They are expected to have “a strong sense of ownership” over their work, which demands close, ongoing collaboration with product managers, designers, and internal and external partners.⁶³ Such teamwork, engagement, and commitment would be hard to demand from independent contractors who are hired on a project basis and free to compete.

The incentives point in the opposite—*independent contractor*—direction for Instacart’s shoppers. For one thing, their workflow is not guaranteed; in contrast to Instacart’s corporate and tech workers, the need for shoppers depends on customer demand. This demand can wax and wane seasonally, geographically, and economically. From Instacart’s standpoint, to give shoppers steady employment, salary, and benefits in this environment would be a poor investment. And because the shoppers themselves can’t be assured enough daily grocery trips to make a living wage, they may depend on multiple forms of gig work, which understandably reduces their commitment and responsiveness to Instacart. In line with these incentives and realities, job advertisements for Instacart shoppers embrace the independent contractor model: “[B]e your own boss”; “[e]njoy the flexibility of choosing when, where, and how much you earn”; “[w]ith no set hours or days, you can shop as much or as little as you want, anytime you want.”⁶⁴ The message is clear and enticing: work with us and stay in control of your schedule and earnings. Just as clear is Instacart’s cost-savings motive. Independent contracting creates an efficient variable labor cost model, bypasses the complexities of managing hourly pay and overtime, frees Instacart from payroll expenses and tax compliance, and avoids vicarious tort liability if a shopper injures another grocery patron, driver, or customer on the job.

The contractor classification of shoppers is all well and good for Instacart, except for one thing: it arguably underplays the risks of *misclassification*. According to Instacart’s own training videos, “without our shoppers Instacart is just a website”; in other words, shoppers are every bit as essential to the business as tech workers, a hallmark of employee status under many legal tests.⁶⁵ Indeed, Instacart deems shoppers “the face of Instacart and the reason customers keep coming back.”⁶⁶ Accordingly, Instacart exercises exacting control over key aspects of its shoppers’ work—including delivery timeliness by virtue of its “Groceries

61. *Id.*

62. *Id.*

63. *Id.*

64. *Drive with Instacart in Colombia, SC*, INSTACART, <https://shoppers.instacart.com/instacart-jobs-in-columbia-sc> (last visited May 31, 2022) (on file with the *University of the Pacific Law Review*).

65. Libby, *supra* note 13.

66. *Id.*

Delivered in Under an Hour” guarantee.⁶⁷ In this vital respect (among others, including a customer performance rating system), shoppers are not their “own bosses” but are fully accountable to Instacart. So argues the San Diego City attorney in the recently settled misclassification lawsuit filed in 2019 after California adopted the ABC test for worker classification⁶⁸—the test that requires *firms to disprove* their control over workers to justify an independent contractor classification.⁶⁹ Relying on evidence like Instacart’s delivery guarantee, the suit contended that Instacart controls shoppers like employees, but then illegally strips them of employee protections and burdens them with independent contractor expenses.⁷⁰ This is the classic “have your cake and eat it too” misclassification fact pattern, under which Instacart faced multiple forms of liability.⁷¹ Under the settlement, Instacart will pay \$46.5 million, including \$6 million in civil penalties to be paid out in a workers’ restitution fund.⁷²

B. Worker Incentives: The Instacart Bind

Now consider the classification incentives for the workers in each category, starting with Instacart’s central operations employees. Broadly speaking, their incentives may align with Instacart’s in an employee classification. With employment status, central operations workers avoid self-employed tax hassles, searching for regular work, locating workspace, and funding their own equipment. Employee status at Instacart may also come with investments in training and professional development, which ultimately enhances these workers’ marketability. And should a central operations employee injure or be injured by a co-worker or harm a third party, that person can count on (at least in theory) workers’ compensation and the doctrine of vicarious liability to ease the financial burden.

Additionally, central operations workers may value the certainty and stability of employment with Instacart. By and large, their skills may not lend themselves to lucrative freelance arrangements. With transferrable skills untethered to intellectual property, central operations workers are also less vulnerable to loyalty breaches or IP-related lawsuits, lowering those risks of employment. And notwithstanding their “replaceability,” Instacart has daily operational needs to occupy these workers, at least until they quit or are terminated at Instacart’s will. Here, the law buttresses the workers’ incentives towards employee status. By

67. *Id.*

68. *Id.* The lawsuit is *People v. Maplebear*, Case No. 37-2019-00048731-CU-MC-CTL, 2020 WL 6493799, at *1 (San Diego Super. Ct. Feb. 18, 2020).

69. See Stafford, *supra* note 4, at 1232.

70. Libby, *supra* note 13; Media Release, San Diego City Att’y Mara W. Elliot, City Attorney Wins Key Battle With Instacart: Appeal Court Says Case Seeking to Protect Workers Can Proceed Without Arbitration (May 20, 2022) [hereinafter Media Release] (on file with the *University of the Pacific Law Review*).

71. Libby, *supra* note 13; Media Release, *supra* note 70.

72. Media release, *supra* note 70.

carving out illegal reasons for job actions, labor and employment discrimination laws effectively narrow Instacart's grounds for personnel decision-making—or at least require risk management analysis. As a result, statutory protections offer a measure of de facto job security for Instacart's central operations employees despite their at-will status.

Turning to the software engineers, their incentives may conflict with Instacart's predisposition towards employment. For the same reason Instacart wants to maintain and control these workers' IP and engineering solutions, the engineers may prefer to keep the fruits of their labor. They may reason that having portable innovations—along with their ability to innovate in the first place—are precisely what puts them in demand. Particularly if they routinely work as independent contractors, software engineers may be willing to pay the price of autonomy by foregoing the security and predictability of employment and managing their own tax compliance.

For that matter, being employed may not generate meaningful cost savings for the engineers. If, say, a newly hired software engineer has been working remotely and is expected to continue off-site, she does not reap as many benefits of company-funded overhead and equipment. And because the daily desk work of a software engineer is unlikely to create much in the way of third-party tort risk, she is likely to see little value in the vicarious liability aspect of employment. On the flip side, working as an independent contractor may increase a software engineer's earning potential. As an independent contractor, she would be free to generate multiple income streams without duty of loyalty concerns.⁷³ All of this assumes, however, that Instacart has project-based work to give software engineers who want to be independent contractors. If what Instacart is offering software engineers is long-term, integrated, full-time, high-paying work with career growth potential, then employment status may be the only (and most desirable) option for these workers.

Ending with Instacart's shoppers, they are in a classification bind. They may well prefer employment, with its regular work and built-in wage, labor, and discrimination protections, not to mention benefits and a tax-compliant paycheck. But given fluctuating customer demand, there is no such thing as regular work for an Instacart shopper. Shoppers must create their own workflow and income streams by piecing together multiple forms of contract labor. Yet all the "side hustles" in the world cannot add up to what is fundamental about employment—minimum wages, overtime pay, steady paychecks, health insurance, and retirement benefits. And because shoppers have physical autonomy—albeit not performance autonomy—Instacart's tort and cost-avoidance incentives foreclose shoppers' ability to negotiate for employment status. Compounding the economic vulnerability of contractor status are below the barriers to entry.⁷⁴ Unlike the skills

73. See GLYNN ET AL., *supra* note 34, at 16. Of course, confidentiality and proprietary information agreements may limit these freedoms, for independent contractors who sign them.

74. See Malik, *supra* note 5, at 1730 ("Because of the low barriers to entry for new individuals in the gig-

of a software engineer, the skills of an Instacart shopper are readily available in the workforce. It is easy to replace a low-rated or slow-delivering shopper with another, especially with Instacart's advertised promise of "being your own boss."

In short, though Instacart considers its shoppers to be independent contractors, they lack many meaningful traits of this classification and thus less incentive to want it. Although many shoppers may enjoy the job's flexibility and independence, they are not, as many independent contractors are, effectively running their own businesses or operating as freelancers in high demand with negotiating leverage. As such, shoppers may not enjoy the independent earning power or profits that offset the costs of contracting. They get what many would consider the worst of both worlds: all the burdens of independent contracting with none of the benefits of employment.

For Instacart shoppers, diametrically opposed firm-worker incentives form the perfect misclassification storm, as the San Diego City Attorney's civil action makes plain. Instacart's business model depends on classifying shoppers as independent contractors to save costs, while subjecting them to employee-like control in matters of performance. The shoppers, meanwhile, have much greater difficulty aligning their classification incentives with reality.

IV. CONCLUSION

This Essay has introduced the conundrums of worker classification in the gig economy. The problems range from outdated, ill-fitting, unpredictable worker classification tests, to mismatched firm and worker incentives, to inconsistent regulatory treatment across the law and nation. Couple all of this with the high business, legal, and personal stakes of worker classification, ever-growing and changing gig platforms, and intense consumer demand for convenience, and the need for new legal, economic, and policy solutions becomes clear. A range of reform proposals, along a clear-eyed view of the gig economy's future state, await readers in the rest of this volume.

economy, there is rarely a lack of available workers.”).

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