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Jaclyn Kurin

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JACLYN KURIN\*

## A Third-way for Applying U.S. Labor Laws to the Online Gig Economy: Using the Franchise Business Model to Regulate Gig Workers

### INTRODUCTION

In the 1930's, the music industry first coined the term "gig" to refer to "an engagement to play at a party for one evening."<sup>1</sup> Eventually, the word's meaning evolved to include any kind of temporary work engagement.<sup>2</sup>

The current discussion about the "gig economy," "gig work or jobs," or "gig companies" refers to a job subset in which entrepreneurs obtain work through an internet-based platform that matches them to consumers seeking their services.<sup>3</sup> In today's economy, there are countless gig companies that provide a wide range of services including: transportation, home-repair, cleaning, food delivery, laundry, and others. A recent survey has shown that "more than 90 million Americans, 44 percent of all US adults, have either offered their services through online brokers or been a customer of someone who has."<sup>4</sup>

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\* J.D. 2016, Antonin Scalia Law School, George Mason University. Special thanks to NetChoice's Executive Director Steve DelBianco and Senior Policy Counsel Carl Szabo for their advice and insight.

1. *Gig*, PARTRIDGE'S CONCISE DICTIONARY OF SLANG & UNCONVENTIONAL ENGLISH 183 (Paul Beale ed., 1989).

2. See SETH D. HARRIS & ALAN B. KRUEGER, THE BROOKINGS INST., A PROPOSAL FOR MODERNIZING LABOR LAWS FOR TWENTY-FIRST-CENTURY WORK: THE "INDEPENDENT WORKER" 6 (2015); JOSEPH V. KENNEDY, INFO. TECH. & INNOVATION FOUND., THREE PATHS TO UPDATE LABOR LAW FOR THE GIG ECONOMY 3 (2016).

3. See generally Antonio Aloisi, *Commoditized Workers: Case Study Research on Labor Law Issues Arising from A Set of "On-Demand/gig Economy" Platforms*, 37 COMP. LAB. L. & POL'Y J. 653 (2016) (discussing the new issues that are presented by the unique business model of the "gig economy" and "gig workers"). Aloisi explains:

Uber – the world's most renowned car-hailing company – is undermining traditional taxi companies and UpWork – a global freelancing platform – is providing clerical or high-skill activities. These [new social] tools have the potential to "chop up" a broad array of jobs into several detached tasks that can be allocated to "on-demand" workers, just when they are needed.

*Id.* at 655 (internal citations omitted).

4. Monitor's Editorial Board, *The 'Gig Economy,'* CHRISTIAN SCI. MONITOR (Jan. 8, 2016), <http://www.csmonitor.com/Commentary/the-monitors-view/2016/0108/The-gig-economy>; Katy Steinmetz,

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In June 2016, the Department of Commerce published a report about the current internet service-transaction economy<sup>5</sup> and defined “gig” workers as individuals who use “digital matching firms” to obtain jobs.<sup>6</sup> According to the Department of Commerce, these digital matching firms exhibit four characteristics:

1. They use information technology (IT systems), typically available via web-based platforms, such as mobile “apps” on internet-enabled devices, to facilitate peer-to-peer transactions.
2. They rely on user-based rating systems for quality control, ensuring a level of trust between consumers and service providers who have not previously met.
3. They offer the workers who provide services via digital matching platforms flexibility in deciding their typical working hours.
4. To the extent that tools and assets are necessary to provide a service, digital matching firms rely on the workers using their own.<sup>7</sup>

Over the past few years, gig companies have pervaded headlines.<sup>8</sup> Many have lauded these companies for creating more opportunities for those seeking work and

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*Exclusive: See How Big the Gig Economy Really Is*, TIME (Jan. 6, 2016), <http://time.com/4169532/sharing-economy-poll>.

5. ESA, U.S. DEP'T OF COMMERCE, ESA ISSUE BRIEF NO. 01-16, DIGITAL MATCHING FIRMS: A NEW DEFINITION IN THE “SHARING ECONOMY” SPACE (2016) [hereinafter ESA, DIGITAL MATCHING FIRMS] (“Increasingly, consumers and independent service providers are engaging in transactions facilitated by an Internet-based platform. The digital firms that provide the platforms are often collectively referred to as belonging to the ‘sharing’ or ‘collaborative’ economies, among other descriptors.”).

6. *Id.*; see also Eric Morath, *A Tricky Task: Government Tries to Define the Gig Economy*, WALL ST. J. (June 27, 2016 6:00 AM), <http://blogs.wsj.com/economics/2016/06/27/a-tricky-task-government-tries-to-define-the-gig-economy> (explaining that the definition does not include apps or websites from “several types of companies that are often associated with the sharing or digital economy, such as eBay and Etsy, which are viewed as mostly online retailers. It also cuts out bike-sharing and some types of car-sharing services, such as ZipCar, which are essentially rental firms and not peer-to-peer operators.”).

7. ESA, DIGITAL MATCHING FIRMS, *supra* note 5, at 1–2.

8. See, e.g., Robert Ratton III, *Do the Hustle: Gig Economy's Side Hustle Goes Mainstream*, JDSUPRA.COM (Jan. 27, 2017) (“When the term ‘gig economy’ was coined in 2009, it described the workplace of the sometimes-unfortunate souls forced outside of the traditional workforce . . . . By 2015, roughly 54 million Americans, one out of every three members of the workforce, have entered to some degree into the gig economy . . . . Not only has the gig economy appeared in the halls of legislature, but more traditional businesses are incorporating gig economy concepts into their business models.”).

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supplemental income.<sup>9</sup> In addition, many workers believe that their affiliation with a gig company has drastically improved the rate in which they can find customers.<sup>10</sup> This, in turn, has allowed these gig workers to focus their efforts on providing the specific revenue generating services they specialize in rather than on marketing and advertising.<sup>11</sup> Moreover, workers have also appreciated the work schedule flexibility that many of these companies provide.<sup>12</sup>

Sentiment toward these gig companies has not been entirely positive, however. Critics claim that many of these companies have structured their businesses in ways that subvert labor laws designed to protect employees.<sup>13</sup> These critics argue that

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9. *The On-Demand Economy Survey*, PRESS RELEASE (Burson Marsteller), Jan. 6, 2016 [hereinafter Burson Marsteller, *The On-Demand Economy*], <http://www.burson-marsteller.com/what-we-do/our-thinking/on-demand/ondemand/press-release>. The release notes that, “71 percent of [gig workers] . . . say working in the industry has been a *positive experience*; their main motivations include extra income (33 percent), a need for additional income (26 percent), flexibility (25 percent) and independence (25 percent).” *Id.* (emphasis added). Additionally, a national survey has suggested that the majority of gig workers and employers are satisfied with gig companies:

Sixty-two percent of all employers believe that the On-Demand Economy is a completely different way of doing business and 52 percent say the On-Demand Economy is creating more opportunities for workers by bringing more wage-earning opportunities to more people. Similarly, according to the earlier *On Demand Economy Survey*, sixty-two percent of On-Demand Economy workers say it is a completely different way of doing business and 57 percent say it is creating more opportunities for workers by bringing more wage-earning opportunities to more people.

*Workforce of the Future Survey*, PRESS RELEASE (Burson Marsteller), June 30, 2016, <http://www.burson-marsteller.com/what-we-do/the-future-workforce-survey/press-release>.

10. Monitor’s Editorial Board, *supra* note 4; Burson Marsteller, *The On-Demand Economy*, *supra* note 9 (indicating that 51 percent of those who offer On-Demand Economy services say, “their financial situation has improved over the past year, compared to 34 percent of the general population; 64 percent of offerors also expect their financial situations to improve in the next year, compared to 47 percent of the general population”).

11. See John Utz, *What is a Gig? Benefits for Unexpected Employees*, 62 PRAC. LAW. 19, 20–22 (2016) (noting that because “gig workers do not need to invest in establishing a company and marketing to a consumer base, operating costs may be lower and allow workers’ participation to be more transitory in the gig market (i.e., they have greater flexibility around the number of hours worked and scheduling.)”).

12. See BURSON MARSTELLER, THE ASPEN INSTITUTE & TIME, THE ON-DEMAND ECONOMY SURVEY: MOTIVATED VS. CASUAL WORKERS INFOGRAPHIC (2016), <http://burson-marsteller.s3.amazonaws.com/wp-content/uploads/2016/01/06151052/Motivated-v-Casual-Workers-Infographic-V3.pdf> (reporting that 78 percent of infrequent or “casual workers” do not rely on gig work as their primary source of income, deriving less than “20% of their personal income from the [gig] economy”). The report also demonstrates that only thirty-two percent of gig workers rely on gig work as their primary source of income, deriving more than “40% of their personal income” from gig jobs. *Id.*

13. See Jennifer Pinsof, *A New Take on an Old Problem: Employee Misclassification in the Modern Gig Economy*, 22 MICH. TELECOMM. & TECH. L. REV. 341, 343 (2016) (“In response to various suits brought by Uber drivers challenging their independent contractor status . . . . Uber argued [that] it was not a transportation company at all, but rather a ‘neutral technological platform designed simply to enable drivers and passengers to transact the business of transportation.’”) (internal citation omitted).

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commission-based<sup>14</sup> gig companies turn profits by avoiding traditional operating costs such as the payment of employee benefits.<sup>15</sup>

Although some gig companies voluntarily provide the employee benefits mandated by law,<sup>16</sup> other gig companies maintain that they are exempt from doing so by virtue of their licensing agreements and believe their workers are merely independent contractors.<sup>17</sup>

Despite some inconsistency across jurisdictions, courts and agencies have largely found that at least some form of business relationship exists between the gig company and the worker.<sup>18</sup> The discrepancy, however, largely stems from differing tests and standards applied to determine whether a worker is an independent contractor or an employee of the gig company under law.<sup>19</sup>

Scholars have offered several approaches as to how to address this issue: (1) create a new worker classification,<sup>20</sup> (2) develop a new legal test for determining employee status,<sup>21</sup> and (3) broaden the coverage of labor statutes to include all workers.<sup>22</sup> This Article breaks from recent proposals that call for a change in the existing law and, instead, proposes a different solution that balances the interests of gig companies, entrepreneurs, and consumers within the existing legal framework and gig market.

Specifically, gig companies should adopt a franchise business model. In doing so, these companies would be able to shield themselves from the liability incurred

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14. ESA, DIGITAL MATCHING FIRMS, *supra* note 5, at 2.

15. Monitor's Editorial Board, *supra* note 4; KENNEDY, *supra* note 2, at 10; HARRIS & KRUEGER, *supra* note 2, at 5, 27.

16. See Deepa Das Acevedo, *Regulating Workforce Relationships in the Sharing Economy*, 20 EMP. RTS. & EMP. POL'Y J. 1, 10 (2016) (“[P]latforms often substitute themselves for government safeguards meant to protect public goods like safety, non-discrimination, and fair labor practices. Uber, for instance, vets aspiring drivers . . .”).

17. *Id.* at 355 (explaining that “employers have used various tactics to label workers as independent, for example by manipulating subtle semantic distinctions, exploiting subcontracting structures, or registering workers as independent business entities”).

18. See *id.* at 347, 352 (“No single factor is dispositive. Courts evaluate each of the ten factors with an eye towards determining which party generally has control over the work process . . .”).

19. See *id.* at 348, 352.

20. KENNEDY, *supra* note 2, at 10 (proposing the creation of a third category of workers); HARRIS & KRUEGER, *supra* note 2, at 5, 27 (proposing “a new legal category of workers . . . call[ed] ‘independent workers,’” who qualify for coverage of some labor laws, such as “Social Security and Medicare payroll taxes, but not others, such as time-and-a-half for overtime hours”).

21. KENNEDY, *supra* note 2, at 10–11, 19; HARRIS & KRUEGER, *supra* note 2, at 7 (“Existing law wrongly implies that employees and independent contractors occupy the entire field of work relationships in the U.S. economy. This dichotomy is a vestige of the early law of ‘masters’ and ‘servants’ that is as archaic as the words suggest.”).

22. KENNEDY, *supra* note 2, at 10–11, 19 (noting that “[c]ontinued reliance on [the common-law] definition” of an employer-employee relationship “discourages gig-platform companies from offering more assistance to workers who use the platform”).

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by franchisees. Moreover, gig companies as franchisors would be able to maintain the necessary control over their brand without having to provide the same compensatory benefits to franchisees as they otherwise would for employees.

This Article has five parts. Part I explains how gig companies function as digital matching firms to facilitate transactions between gig workers and consumers.<sup>23</sup> Part II summarizes the historical and legal frameworks and policy considerations surrounding worker classifications.<sup>24</sup> Next, Part III provides an explanation of the franchise business model.<sup>25</sup> Here, the author demonstrates how the franchise relationship fits within the existing legal framework and employee status determinations.<sup>26</sup> Following, Part IV summarizes recent legal authority which has maintained that gig companies are not exempt from providing employee benefits.<sup>27</sup> Lastly, Part V explains how employing the franchise business model may better serve gig companies moving forward.<sup>28</sup>

### I. THE ROLE OF GIG COMPANIES AS MATCHER IN A TWO-SIDED MARKET

In 2012, Professor Alvin E. Roth won the Nobel Prize in economics for illustrating that the conditions for successful market transactions are based on the principles of market design and matching.<sup>29</sup> In his scholarship, Professor Roth maintained that a “marketplace” brings together participants willing to transact.<sup>30</sup>

According to Roth, marketplaces work best when the market is “thicker and quicker, bigger and less congested.”<sup>31</sup> A thicker market means that there are many participants who wish to transact.<sup>32</sup> Congestion occurs when participants are overwhelmed with options.<sup>33</sup> To overcome congestion, participants need a way to quickly identify the most promising offers within the marketplace.<sup>34</sup>

“Matching” describes the application and selection process that marketplace participants use for completing a transaction.<sup>35</sup> Roth explains that an “offer isn’t

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23. See *infra* Part I.

24. See *infra* Part II.

25. See *infra* Part III.

26. See *infra* Part III.

27. See *infra* Part IV.

28. See *infra* Part V.

29. Alvin E. Roth – *Facts*, NOBEL MEDIA AB 2014, [http://www.nobelprize.org/nobel\\_prizes/economic-sciences/laureates/2012/roth-facts.html](http://www.nobelprize.org/nobel_prizes/economic-sciences/laureates/2012/roth-facts.html) (last visited Feb. 15, 2017).

30. ALVIN E. ROTH, WHO GETS WHAT AND WHY 8 (2015).

31. *Id.* at 104.

32. *Id.* at 9.

33. *Id.* at 8.

34. *Id.*

35. *Id.* at 4.

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just a set of terms, it's a proposal of a match to a particular counterpart."<sup>36</sup> As such, the matching process can be *ad hoc* or structured by design.<sup>37</sup> Matching businesses thrive by designing a matching environment that ensures transactions are "safe and simple" and that enables participants to quickly differentiate competing offers.<sup>38</sup>

Many of today's gig companies are digital matching firms that facilitate transactions between entrepreneurs and consumers. Roth explains that these companies owe their success to their ability to design a matching environment that is superior to alternatives.<sup>39</sup>

For example, transportation based gig companies match drivers with riders. The drivers are entrepreneurs who sell the vacant passenger seats in their vehicles while the riders are the consumers seeking to buy those seats and ride to a specific destination. Roth explains that "[i]f making a match . . . [was] too frustrating, [then consumers] would go back to using taxis."<sup>40</sup>

## II: AN OVERVIEW OF THE LABOR MARKET AND EMPLOYMENT STATUS CATEGORIES: EMPLOYEE VS. INDEPENDENT CONTRACTOR

### A. *The Changing U.S. Labor Market Has Historically Informed Notions of Employee Status and Benefit Coverage*

The current employment relationship, consisting of extensive employer-provided benefits, is a relatively recent development in the history of our labor market and was the product of a long list of historical, political, technological, and market factors.<sup>41</sup>

According to American economic historian, Professor Sanford M. Jacoby, these factors specifically manifested themselves in:

*changes in technology and the composition of the workforce; new social norms associated with the labor movement and with the public's response to the Great Depression; the expansion of government's role in the economy;*

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36. ROTH, *supra* note 30, at 111.

37. *Id.* at 6.

38. *Id.* at 11, 51–52.

39. *Id.* at 102–04.

40. *Id.* at 105.

41. See SANFORD M. JACOBY, *EMPLOYING BUREAUCRACY: MANAGERS, UNIONS, AND THE TRANSFORMATION OF WORK IN THE TWENTIETH CENTURY* (Anne C. Duffy ed., Lawrence Erlbaum Associates, Inc., rev. ed. 2004), [http://www.untag-smid.ac.id/files/Perpustakaan\\_Digital\\_1/BUREAUCRACY%20Employing%20bureaucracy%20%20managers,%20unions,%20and%20the%20transformation%20of%20work%20in%20the%20twentieth.pdf](http://www.untag-smid.ac.id/files/Perpustakaan_Digital_1/BUREAUCRACY%20Employing%20bureaucracy%20%20managers,%20unions,%20and%20the%20transformation%20of%20work%20in%20the%20twentieth.pdf) (discussing the progression of the employment system from the late nineteenth century to present day). The new employment relationship is exemplified as an employer providing a range of employment benefits that "sustain jobs during good times and bad; provide health, old-age, and other benefits; and avoid[ing] wage cuts as a response to business fluctuations." *Id.* at 217.

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*the managerialization of corporate governance; the professionalization of management; and employee training and other efficiency-oriented responses of employers to more enduring employment relationships.*<sup>42</sup>

Indeed, such substantial employment benefits and working condition protections guaranteed by current employment standards are in stark contrast to those provided in the late 1700's. In fact, from then up until "the nineteenth century[,] the [employment] relationship was predominantly one of status described as '[principal] and [agent],' with the legally imposed rules implementing a dominant-servient relation."<sup>43</sup> "The relationship of a [principal] to his journeymen and apprentices was governed by the law of [principal] and [agent] . . . that grew out of the status of the worker as, in effect, a member of the [principal's] household."<sup>44</sup> "[I]ndentured servants and, later, bound apprentices signified their displeasure [with the relationship] by running away."<sup>45</sup> Through this relationship the journeyman mastered a craft, and "his ability to sell his skills elsewhere."<sup>46</sup>

With the growth of the post-Civil War industrial economy, came a time of repugnant employment practices. Employers paid such low wages that most families, including children, had to work and endure hazardous working conditions.<sup>47</sup> To make matters worse, many businesses delegated employment decisions to foremen who would make hiring and wage related decisions based on arbitrary factors, personal ties, and racial prejudices.<sup>48</sup> Employers enforced a drive

42. *Id.* at 217–18.

43. MATTHEW W. FINKIN, ET AL., LEGAL PROTECTION FOR THE INDIVIDUAL EMPLOYEE 1 (3d ed. 2002).

44. *Id.* at 3–4.

45. *Id.* at 4.

46. *Id.*

47. *Id.* at 7–8. Some have characterized factory life as exemplifying "employer's plenary exercise of prerogative unilaterally to make and enforce rules." *Id.* at 7. Employers instituted "rules . . . to 'enhance control' of the working force: specification of the working time, fines for absences and tardiness, prohibitions on leaving the premise or engaging in casual conversations, and forfeiture of wages for quitting without notice were common." *Id.* In the early 1900s, the "employer[s] control over employees' working (and non-working) lives in some industries could be and was far-reaching." *Id.* at 8. This working environment of pervasive employer control was not the exception but instead was common in several industries. For example, a "Southern cotton textile manufacture developed" out of a "mill town-wholly owned by a company [that] insisted on employing entire families . . ." *Id.* These company towns exerted near-total control over the residents who lived within them. *See id.* (describing these oppressive controls over employees as including, "wage structure[s] for male and female operators and children" so as to "require the entire family to work, and the [practice of] dismissal of all for the misconduct of one" of the employees). Similarly, employers "provided housing, schooling, churches, and engaged in a certain amount of 'welfare' work, even to efforts at regulating private life, recreation, and religion." *Id.*

48. *See* JACOBY, *supra* note 41, at 13–18. Jacoby recounts how from 1880 to 1915, foremen, across all industries, exercised near unanimous control over employment matters and were "given free rein in hiring, paying, and supervising workers." *Id.* at 13.



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system and implemented various wage incentive plans, such as those based on piece-rates, in a conscious effort to pay as few employee benefits as possible.<sup>49</sup>

In response to these conditions, trade workers formed unions to increase their bargaining power and curb arbitrary hiring practices, increase wages, and improve working conditions.<sup>50</sup> Through collective action, these new unions provided more power to the individual workers whose labor strikes were a powerful motivation behind labor reforms.<sup>51</sup>

Then, during World War I, the federal government, which had previously taken a *laissez-faire* approach to employment practices, began to intervene in an effort to prevent work stoppages that deterred wartime production demands.<sup>52</sup> Many liberal labor reforms did not last much past the war era, however.<sup>53</sup>

Following, during the Great Depression, the economy and work force faced massive layoffs and unemployment coupled with low employee turnover.<sup>54</sup> Since most employers had not provided employees with any unemployment benefits, many state unemployment funds went broke trying to provide welfare benefits to

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49. See JACOBY, *supra* note 41, at 33–42. “The first incentive wage schemes used in American industry were piece-rate wages, which became increasingly popular after 1880.” *Id.* at 33. Employers had used different piece-rate systems to avoid paying employees and motivate workers to get maximum productivity. “[P]iece rates were not a price paid for the product of their work but simply one way of paying of their labor power while increasing their output.” DAVID MONTGOMERY, *THE FALL OF THE HOUSE OF LABOR: THE WORKPLACE, THE STATE, AND AMERICAN LABOR ACTIVISM, 1865-1925* 152 (1987). “Failure to produce at a high level brought direct and instant punishment: loss of pay.” FINKIN, ET AL., *supra* note 43, at 8–9. This type of task system thrived in industries where the final product was the result of group work. “[E]very worker [had] a stake in the output of the group” because one worker failing to complete his task prevented the ultimate production of the good and led to the loss of pay for other workers. *Id.* at 9.

50. See JACOBY, *supra* note 41, at 18–23. One method unions used to curb arbitrary hiring practices was the implementation of closed or preferential shops which “restricted the foreman’s discretion to hire whomever he chose and enhanced demand for union labor.” *Id.* at 19. Unions were also a powerful force in increasing wages by demanding businesses create a standard rate which all union members were supposed to receive. *Id.* at 19. With respect to working conditions, unions regulated working hours and imposed specified production output limits. *Id.* at 21.

51. See *id.* at 33–34, 40, 89–91. Jacoby states that “the most famous of these new wage incentive plans was Frederick W. Taylor’s differential piece[-]rate, which . . . set [the minimum rate] ‘scientifically’ by breaking a task down into its component parts, timing these parts, eliminating ‘unnecessary motions,’ and then arriving at a minimum time for task completion.” *Id.* at 33. Consequently, when employers began to introduce such wage-incentive plans, unionized trades turned to striking because they feared the plans would cheapen labor through breaking down tasks into simpler jobs and could eradicate collective bargaining by “ultimately turning the wage bargain into an individual matter between the worker and his employer.” *Id.* at 34.

52. See *id.* at 104–06, 112–13.

53. See *id.* at 128–34, 154–66. Jacoby states that “[m]ost of the problems that had justified employment reform during the war period were gone: The union threat had receded, productivity was high, turnover was low, and labor was easily available.” *Id.* at 129.

54. See *id.* at 154–56.

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millions of unemployed workers.<sup>55</sup> Out of desperation, many adult employees agreed to be paid lower wages and work longer hours.<sup>56</sup> Even when an entire family worked, many families were still unable to afford basic life necessities.<sup>57</sup>

In an effort to increase purchasing power and reduce unemployment, the federal government passed the Fair Labor Standards Act setting minimum wage and maximum hour standards,<sup>58</sup> and enacted other legislation to increase employment stabilization by shifting the burden of unemployment benefits onto private employers.<sup>59</sup>

During World War II, the government continued to exercise extensive control over the labor market. Much like World War I, the government sought to deter wartime strikes and supported collective bargaining rights by “compel[ling] employers to negotiate with and grant membership security to the unions.”<sup>60</sup> Additionally, the government established agencies that made decisions “affecting pay and labor allocations between firms.”<sup>61</sup> Over time, workers began to establish themselves in their communities, and by the 1950’s, inequality levels had decreased.<sup>62</sup>

But, this prosperity was short-lived. By the 1970’s “there was a growing concern over worker dissatisfaction . . . , [c]ompanies faced increased opportunities and incentives to open nonunion facilities. . . . [and] [g]overnment regulation of the workplace proliferated along various dimensions.”<sup>63</sup>

Simultaneously, many large corporations restructured their personnel practices to ensure compliance with remedial government legislation prohibiting certain forms of discriminatory practices in employment.<sup>64</sup> To avoid “the risk of lawsuits

55. See *id.* at 154 (“Local governments struggled with varying degrees of success to fill the gap, but most municipal relief programs were bankrupt by fall of 1931.”).

56. See, e.g., Letter from R.H.O., to President Franklin Roosevelt (Mar. 4, 1937), in *SLAVES OF THE DEPRESSION: WORKERS’ LETTERS ABOUT LIFE ON THE JOB* 76 (1987).

57. See, e.g., Letter From Mrs. L.B., to President Franklin Roosevelt & Eleanor Roosevelt (May 3, 1937), in *SLAVES OF THE DEPRESSION: WORKERS’ LETTERS ABOUT LIFE ON THE JOB*, 76–77 (1987).

58. Fair Labor Standards Act, 29 U.S.C. § 206–07 (2012); see JACOBY, *supra* note 41, at 185.

59. E.g., Federal Unemployment Tax Act, 26 U.S.C. § 3301 (2012). See JACOBY, *supra* note 41, at 176 (explaining how the federal government promoted employment stabilization by pressuring private employers to implement work-sharing programs).

60. JACOBY, *supra* note 41, at 194.

61. *Id.*

62. See *id.* at 207–08 (finding that by the mid-1950s, the benefits reserved for salaried employees had been extended to include a majority of blue-collar workers).

63. *Id.* at 212.

64. *Id.* at 214. To achieve such remedial reforms, Congress passed several federal statutes during that period. *Id.* Jacoby states that “[s]tarting with the Manpower Development and Training Act of 1962, the [F]ederal [G]overnment kept up a steady pace of regulatory innovation the likes of which had not been seen since the 1930s: the Equal Pay Act (1963), Civil Rights Act (1964), Economic Opportunity Act (1964), Occupational Safety and Health Act (1970), Equal Employment Opportunity (EEO) Act (1972),

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and other negative publicity” from non-compliance with [Equal Employment Opportunity] and occupational safety laws,” employers “centralized” their personnel practices for “hiring, firing, disciplining, directing, training, promoting and compensating subordinates.”<sup>65</sup> Departing from a regime where foremen oversaw nearly all hiring and management practices, corporate governance structures began to change and CEOs and presidents became more involved in employment related decisions.<sup>66</sup>

Since the 1980’s, union membership has declined while the service-based industry has expanded.<sup>67</sup> Jacoby claims that today “most U.S. [businesses] are service providers whose success depends less on technological breakthroughs than on customer attraction and retention.”<sup>68</sup> As a result, many businesses are seeking to cultivate customer loyalty by retaining experienced employees who are satisfied with their working conditions.<sup>69</sup> In doing so, some employers have shifted certain compensation risks back to employees.<sup>70</sup> They have done so by altering guaranteed benefit plans and offering performance-based pay options in their place.<sup>71</sup>

While there is certainly some contention over the interpretation of the data, several analysts have argued that the labor market is undergoing a significant change once again.<sup>72</sup> One characteristic of this change is the growth in the number of nonstandard jobs—those entailing various forms of self-employment, contractual, temporary and part-time work.<sup>73</sup> While there are various contributing factors, one reason for this growth is undoubtedly the rise of the gig economy.

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Comprehensive Employment and Training Act (1973), and various executive orders, including one that established the Office of Federal Contract Compliance Programs.” *Id.*

65. *Id.*

66. See JACOBY, *supra* note 41, at 33–34, 204, 214.

67. See Bradley Nash, Jr., *Labor Law and the State: The Crises of Unions in the 1980s* (Apr. 19, 2000) (unpublished Ph.D. dissertation, Virginia Polytechnic Institute) (on file with the University Libraries, Virginia Tech).

68. JACOBY, *supra* note 41, at 221.

69. *Id.*

70. *Id.* at 220.

71. See *id.* Jacoby explains that employers universally have shifted some of their risks on to employees by changing the types of benefit plans they offer, such as “managed-care health plans and larger deductibles for health insurance,” and going from offering “defined-benefit pension plans to defined contribution pension plans.” *Id.* But at the same time, employers compete for workers by offering “more variability into pay packages via discretionary bonuses, group incentives, profit sharing, stock options, and other forms of performance-based pay.” *Id.*

72. JACOBY, *supra* note 41, at 218.

73. *Id.* at 219.

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*B. Policy Considerations Influencing Employee Status Determinations*

Today, workers generally fall within one of two legal classifications: employees or independent contractors. These classifications were founded upon the agency principles highlighted below.

The agency doctrine maintains that the principal should be liable when he exerts a degree of control over the manner and means of the agent's work that causes damage to a third-party.<sup>74</sup> Public policy justifies holding the employer liable in certain situations, based on "deliberate allocation of a risk" principles.<sup>75</sup> The underlying objective of this policy is that the employer/principal be held responsible for the "losses caused by the torts of employee, which as a practical matter [occurred] in the conduct of the employer's enterprise" as a cost of doing business.<sup>76</sup>

The distinct autonomy an independent contractor exercises in pursuing their enterprise does not warrant the same policy considerations. Put another way, because "the employer has no right of control over [how the work is done], it is . . . the contractor's own enterprise, and he, rather than the employer, is the proper party to be charged with responsibility for preventing the risk, and administering and distributing it."<sup>77</sup>

Nevertheless, doctrines of apparent authority and non-delegable duties may still permit a finding of employer liability for various acts of independent contractors.<sup>78</sup>

Although one of the overarching purposes of this policy is to efficiently allocate market risk, employment status considerations are also influenced by bargaining disparities, antitrust issues, technological advances, and societal interests in improving public health.<sup>79</sup>

*C. The Law Surrounding Employees and Independent Contractors*

While every company has its own unique goals and requirements, hiring independent contractors rather than employees may provide several operational and financial advantages. Firstly, independent contractors may provide temporary or specialized expertise for an impermanent job.<sup>80</sup> This allows companies to provide more expansive services without necessarily having to hire additional

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74. See PROSSER & KEETON ON THE LAW OF TORTS § 69 (W. Page Keeton et. al. eds., 5th ed. 1984).

75. *Id.*

76. *Id.*

77. *Id.* § 71.

78. Mark Macmurdo, *Hold the Phone! "Peer-to-Peer" Ridesharing Services, Regulation, and Liability*, 76 LA. L. REV. 307, 337–39 (2015).

79. See JOHN R. COMMONS ET AL., HISTORY OF LABOUR IN THE UNITED STATES 25–36 (1918).

80. Todd H. Lebowitz, *Independent Contractor Misclassification*, 2015 LEGAL ANALYSIS (BAKER HOSTETLER, Cleveland, OH), Oct. 16, 2015, at 6.

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employees for a season and then laying them off once the job is finished.<sup>81</sup> Furthermore, many labor statutes that guarantee employment benefits and protections for employees do not apply to independent contractors.<sup>82</sup>

Determining whether a worker is covered by a statute depends on the statute in question and the test the court or agency uses to determine worker classification.<sup>83</sup> Nearly every state has passed its own additional laws on worker's compensation, unemployment coverage, minimum wage requirements, prohibited workplace discrimination, and other employment matters.<sup>84</sup> Furthermore, even when a state statute mirrors a federal statute, state legislatures may choose to forego the federal definition of a covered worker in place of a more expansive definition that broadens coverage.<sup>85</sup>

To complicate matters further, the definition of a covered employee may vary from statute to statute within the same state. For example, a state may use one test to determine if a worker is an employee for purposes of unemployment compensation, yet that same state may apply a different test to determine if the worker is entitled to employee minimum wage and overtime pay.<sup>86</sup>

Unless the statute explicitly provides otherwise, however, courts generally default to the state's common law agency test.<sup>87</sup> This test generally takes the form of a multi-factor inquiry and may vary slightly across jurisdictions.<sup>88</sup> Despite this slight variation, the universal focus across jurisdictions remains on the employer's degree of control over the worker.<sup>89</sup> Examples of some of the factors which courts consider

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81. *Id.*

82. *Id.* at 6, 9.

83. *Id.* at 10.

84. *See, e.g.*, MD. CODE ANN., LAB. & EMPL. § 9-101; *see also* MD. CODE ANN., LAB. & EMPL. § 3-903.

85. Richard J. Reibstein et al., *Independent Contractor Misclassification: How Companies Can Minimize the Risks*, 2015 WHITE PAPER (PEPPER HAMILTON, Philadelphia, PA), Apr. 27, 2015, at 1, 4–5.

86. Todd H. Lebowitz, *Independent Contractor Misclassification*, 2016 LEGAL ANALYSIS (BAKER HOSTETLER, Cleveland, OH), Jan. 2016, at 1, 13–14.

87. *Id.* at 17.

88. *Id.* at 13–14, 26–27.

89. *See* Rasier LLC v. Florida, No. 0026 2834 68-02, 21 n.22 (Fla. Dep't of Econ. Opportunity Dec. 3, 2015) (final determination) (applying the FLSA's economic realities test, the adjudicator concluded that while "the Fair Labor Standards Act's 'economic reality' test is different from, and of 'a broader scope' than, traditional common law" the FLSA factors are "similar to the Restatement factors" in that both seek to determine whether "the worker is . . . [an] employee . . . [or really an] independent contractor" based on the economic reliance associated with the employer-employee). *Id.* The adjudicator based this reasoning on a "Labor Department document" which stated that "[u]ltimately, the goal [of applying the economic realities test] is . . . to determine whether the worker is economically dependent on the employer (and thus its employee) or is really in business for him or herself (and thus its independent contractor.)" *Id.* (first alteration in the original). *See generally* Sharma v. Washington Metropolitan Area Transit Authority, 57 F. Supp. 3d 36 (D.D.C. 2014); Munoz v. Industrial Com'n of Arizona, 234 Ariz. 145, 318 P.3d 439 (Ariz. Ct. App. 2014).

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in this inquiry are contained in the Restatement (Second) of Agency § 220.<sup>90</sup> These factors include:

1. the extent of control which, by the agreement, the principal may exercise over the details of the work;
2. whether or not the one employed is engaged in a distinct occupation or business;
3. the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
4. the skill required in the particular occupation;
5. whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
6. the length of time for which the person is employed;
7. the method of payment, whether by the time or by the job;
8. whether or not the work is a part of the regular business of the employer;
9. whether or not the parties believe they are creating the relation of principal and agent; and
10. whether the principal is or is not in business.<sup>91</sup>

*D. Agency Involvement and Presumptions*

State and federal agencies enforce the labor laws promulgated by Congress and state legislatures. These agencies are tasked with interpreting statute and putting forth regulations that ensure coverage dispensation.<sup>92</sup>

In making employment status determinations, courts and agencies alike presume that a statute broadly covers most workers.<sup>93</sup> In other words, these entities operate

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90. RESTATEMENT (SECOND) OF AGENCY § 220 (1958).

91. *Id.* One expert explains the evolution of the right to control test in determining agency status for the purpose of tort liability:

The First Agency Restatement supplemented the right to control test that had been used in the prior century to delimit employer vicarious liability for the torts of its employees within the scope of employment. These reformulations, including that offered by the Supreme Court in two decisions as a default rule for federal employment statutes. Sometimes overlooked is the fact that the Agency Restatement supplemented the “right to control” test with ten or more other factors, but had not specified why these factors were relevant to the distinction of independent contractor.

Michael Harper, *The Restatement of Employment Law’s “Entrepreneurial Control” Test*, NYU LAB. & EMP. L. NEWS (NYU Center for Labor and Employment Law, New York, N.Y.), Fall 2015, at 6, [http://www.law.nyu.edu/sites/default/files/Labor%20Center%20Fall%202015%20Newsletter\\_0.pdf](http://www.law.nyu.edu/sites/default/files/Labor%20Center%20Fall%202015%20Newsletter_0.pdf).

92. See LEBOWITZ (2015), *supra* note 80, at 7–8.

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under the legal presumption that a worker/complainant is an employee within the meaning of the statute.<sup>94</sup> Under this employee presumptive regime, the employer bears the burden of overcoming the presumption by making an affirmative showing that the particular worker is not an employee within the meaning of the statute.<sup>95</sup>

Agencies and courts use an employee presumption in order to counteract power imbalances and information asymmetry.<sup>96</sup> Ordinarily, employers must comply with certain reporting requirements regarding their employees.<sup>97</sup> Since many statutes involving employee benefits and taxation are tied to the amount of employees an employer has, there are certain incentives for the employer to under-report its amount of employees.<sup>98</sup> Thus, agencies which cannot afford to monitor each business' operations are at an informational disadvantage that can only be overcome if the burden of proof is shifted to the employer.

#### *E. The Changing Tide in Interpreting Employee Status*

As discussed above, the Depression was an abysmal period for workers' rights.<sup>99</sup> Operating within traditional common law agency principles centering around the right of control, many employers were able to insulate their businesses from liability and statutory compliance by contracting with intermediary companies that provided an independent contractor labor force.<sup>100</sup>

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93. See *Independent Contractor Versus Employee*, CA.GOV, [http://www.dir.ca.gov/dlse/FAQ\\_IndependentContractor.htm](http://www.dir.ca.gov/dlse/FAQ_IndependentContractor.htm) (last visited Feb. 9, 2017) (citing CAL. LAB. CODE § 3357 (1937)).

94. *Id.*

95. See, e.g., Treas. Reg. § 31.3121(d)-(1)(c) (as amended in 1980); U.S. DEP'T TREAS., I.R.S., EMPLOYER'S SUPPL. TAX GUIDE, CAT. NO. 21453T (Dec. 23, 2015) [hereinafter I.R.S. EMPLOYER'S TAX GUIDE], <https://www.irs.gov/pub/irs-pdf/p15a.pdf>.

96. See, e.g., O'Connor v. Uber Techs., Inc., 82 F. Supp. 3d 1133, 1138 (N.D. Cal. 2015) (holding that Uber was unable to rebut the presumption that their drivers were employees instead of independent contractors); Cotter v. Lyft, Inc., 60 F. Supp. 3d 1067, 1073 (N.D. Cal. 2015) (stating that under California law, if someone performs a service for a company, the person performing the service is generally presumed to be an employee); Hennighan v. Insphere Ins. Sols., Inc., 38 F. Supp. 3d 1083, 1097 (N.D. Cal. 2014), *aff'd*, 650 F. App'x 500 (9th Cir. 2016) (deciding that despite the presumption that a person who provides services to the employer is an employee, the plaintiff was considered an independent contractor because of the lack of control the employer had over the plaintiff). See generally Narayan v. EGL, Inc., 616 F.3d 895, 900 (9th Cir. 2010); Villalpando v. Exel Direct Inc., 303 F.R.D. 588, 600 (N.D. Cal. 2014); S. G. Borello & Sons, Inc. v. Dep't of Indus. Relations, 769 P.2d 399, 403 (Cal. 1989).

97. See I.R.S. EMPLOYER'S TAX GUIDE, *supra* note 95, at 7.

98. LEBOWITZ (2015), *supra* note 80, at 7–8; see, e.g., 29 U.S.C. § 630 (2012) (pertaining to employers who have twenty or more employees); 42 U.S.C. § 2000e (2012) (pertaining to employers with fifteen or more employees); 42 U.S.C. § 1211 (2012) (pertaining to employers with fifteen or more employees); 29 U.S.C. § 2611 (2012) (pertaining to employers with fifty or more employees).

99. See *supra* Part II.

100. U.S. Dep't of Labor, Wage & Hour Div., Administrator's Interpretation No. 2015-1, The Application of the Fair Labor Standards Act's "Suffer or Permit" Standard in Identification of Employees Who Are

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Congress passed the FLSA and expanded the definition of an employee in order to address this situation.<sup>101</sup> The Department of Labor (DOL), which is the agency charged with enforcing the FLSA, has also provided its own interpretation of the law maintaining that, “[t]he ultimate inquiry under the FLSA is whether the worker is economically dependent on the employer or truly in business for him or herself.”<sup>102</sup>

The DOL determines whether an individual is economically dependent by applying factors analyzing the economic reality of the relationship.<sup>103</sup> Although the proportional weight attributed to the test’s factors varies across circuits, the DOL’s 2015 interpretation is quite instructive and focuses on:

*(1) the extent to which the work performed is an integral part of the employer’s business; (2) the worker’s opportunity for profit or loss depending on his or her managerial skill; (3) the extent of the relative investments of the employer and the worker; (4) whether the work performed requires special skills and initiative; (5) the permanency of the relationship; and (6) the degree of control exercised or retained by the employer.*<sup>104</sup>

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Misclassified as Independent Contractors (July 15, 2015), at 3–4. The Administrator’s interpretation explains that the FLSA’s definition of employee, which is to “suffer or permit” work was based on state child labor laws:

Prior to the FLSA’s enactment, the phrase “suffer or permit” (or variations of the phrase) was commonly used in state laws regulating child labor and was “designed to reach businesses that used middlemen to illegally hire and supervise children.” A key rationale underlying the “suffer or permit” standard in child labor laws was that the employer’s opportunity to detect work being performed illegally and the ability to prevent it from occurring was sufficient to impose liability on the employer. Thus, extending coverage of child labor laws to those who suffered or permitted the work was designed to expand child labor laws’ coverage beyond those who controlled the child laborer, counter an employer’s argument that it was unaware that children were working, and prevent employers from using agents to evade requirements.

*Id.* at 3 (internal citations omitted).

101. *Id.* at 1–2. The Administrator’s interpretation explains that Congress intended that the meaning of employee under the FLSA would be more comprehensive than the common law, agency definition:

The FLSA’s definition of employ as “to suffer or permit to work” and the later-developed “economic realities” test provide a broader scope of employment than the common law control test. Indeed, although the common law control test was the prevalent test for determining whether an employment relationship existed at the time that the FLSA was enacted, Congress rejected the common law control test in drafting the FLSA. Instead, the FLSA defines “employ” broadly as including “to suffer or permit to work,” which clearly covers more workers as employees.

*Id.* (internal citations omitted).

102. *Id.* at 5.

103. *Id.* at 5–6.

104. *Id.* at 4.



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Even though traditional agency principles are still evident in the economic realities test, the slight variations in this test have tended to lead to more frequent findings of an employer-employee relationship.<sup>105</sup>

The Tenth Circuit introduced the term “economic realities,” which was later adopted by the Supreme Court in *Rutherford Food Corp. v. McComb*.<sup>106</sup> In this case, the Supreme Court held that skilled carvers tasked with deboning meat were employees under the FLSA because their work was integral to the slaughtering plant’s business.<sup>107</sup> In *Rutherford*, the carvers were on the assembly line with the rest of the employees.<sup>108</sup> Even though they worked for a different company, the employer exerted extensive control over the carvers by paying them on a piece-rate system, complaining “frequently about their failure to cut all of the meat off the bones.”<sup>109</sup> Furthermore, the carvers could only work during the hours when the rest of the meat packing assembly line operated.<sup>110</sup> Thus, the Court found that the control exerted was indistinguishable from the control the employer would use over an employee who performed the same duty.<sup>111</sup>

In *Dole v. Snell*, the Tenth Circuit found cake decorators were integral to a custom cake business because hiring an independent contractor to perform the decoration task did not change the work performed.<sup>112</sup> Similarly, in *Doty v. Elias*, the Tenth Circuit found restaurant workers were integral to the restaurant’s business.<sup>113</sup> Ultimately, the crux of these determinations depended upon whether the employer used a piece-work system to fulfill duties that were essential to the operation of the business.<sup>114</sup> As such, the integral to business factor was given more relative weight than some of the other factors guiding the employment status inquiry.

More recently, as several decisions regarding the misclassification of FedEx delivery drivers illustrate, the determination of employee status depends largely on whether employer controls sufficiently prevent the worker from being in business

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105. *Id.* at 1–2.

106. *See Rutherford Food Corp. v. McComb*, 331 U.S. 722, 727 (1947).

107. *Id.* at 729.

108. *Id.* at 730.

109. *Id.* at 726–29 (internal citations and quotations omitted).

110. *See generally id.* at 725–27.

111. *Id.* at 730 (“While profits to the boners depended upon the efficiency of their work, it was more like piecework than an enterprise that actually depended for success upon the initiative, judgment or foresight of the typical independent contractor.”).

112. *See* 875 F.2d 802, 811 (10th Cir. 1989) (finding that cake decorators “[are] obviously integral” to the business of selling custom-decorated cakes).

113. 733 F.2d 720, 723 (10th Cir. 1984).

114. *See, e.g., Rutherford*, 331 U.S. at 730–31; *United States v. Rosenwasser*, 323 U.S. 360, 362–63 (1945); *Snell*, 875 F.2d at 809–11.

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for himself—i.e. being able to function as an independent contractor or sole proprietor.<sup>115</sup>

The majority decision in the NLRB's *Browning-Ferris Industries of California, Inc.* case also illustrates this change in the inquiry.<sup>116</sup> In *Browning-Ferris* the NLRB, tasked with conducting the employment status inquiry, found that the Browning Ferris company (BFI) was a joint employer of workers that a contractor, Leadpoint Business Services, had hired to complete housekeeping and janitorial duties at the BFI recycling center.<sup>117</sup> Although BFI did not exercise any direct or immediate control over those workers, as Leadpoint was responsible for setting the workers' wages and benefits, and BFI never established safety, training, disciplinary and other rules for work, the majority nevertheless concluded that BFI operated as a joint employer.<sup>118</sup> As such, those workers were entitled to collective bargaining rights, enabling them to negotiate not just with contractor but also with the BFI corporate headquarters.<sup>119</sup> As the dissent in *Browning Ferris* described, the majority essentially found that parent companies are legally joint-employers with their contractors, staffing agencies, and franchisees.<sup>120</sup>

As the NLRB dissent points out, to reach these conclusions, the majority invoked an economic realities test that Congress had expressly repudiated by statute.<sup>121</sup> The majority justified their approach because of bargaining disparities in the market place.<sup>122</sup> Such a test, the majority reasoned, was within the Board's power because the purpose of the statute was to remedy societal harms.<sup>123</sup> However, as the dissent explained, the majority's policy-based rationale behind their inquiry was similarly denounced by Congress.<sup>124</sup> The dissent stated that "our colleagues have announced a new test of joint-employer status based on policy and economic interests that Congress has expressly prohibited the Board from considering."<sup>125</sup>

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115. See, e.g., *Alexander v. FedEx Ground Package Sys., Inc.*, 765 F.3d 981, 988–89 (9th Cir. 2014); *Craig v. FedEx Ground Package Sys., Inc.*, 686 F.3d 423, 426–29 (7th Cir. 2012); *Huggins v. FedEx Ground Package Sys., Inc.*, 592 F.3d 853, 861 (8th Cir. 2010); *FedEx Home Delivery v. NLRB*, 563 F.3d 492, 495–96 (D.C. Cir. 2009); *In re FedEx Ground Package Sys., Inc.*, 734 F. Supp. 2d 557, 584–88 (N.D. Ind. 2010); *Afinson v. FedEx Ground Package Sys., Inc.*, 281 P.3d 289, 297–300 (Wash. 2012).

116. See *Browning-Ferris Indus. Of Cal., Inc.*, 362 N.L.R.B. No. 186, 2 (2015) (holding that BFI and Leadpoint are considered joint-employers of the employees because: (1) BFI had control over which employees Leadpoint could hire and fire; (2) BFI had direct and indirect control over work processes and task assignments; and (3) BFI had a significant role in determining employees' wages).

117. *Id.* at 20.

118. *Id.* at 4–6.

119. *Id.* at 20.

120. *Id.* at 31 (Miscimarra and Johnson, JJ., dissenting).

121. *Id.* at 28.

122. *Browning-Ferris Indus. Of Cal., Inc.*, 362 N.L.R.B. No. 186 at 1.

123. See *id.* at 20.

124. *Id.* at 48 (Miscimarra and Johnson, JJ., dissenting).

125. *Id.*

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The dissent further argued that the majority's motivation for an egalitarian market place is not only contrary to our capitalist economy but also impractical to implement.<sup>126</sup> Ultimately, such a test could effectively erode many business relationships. As the dissent illustrated:

*Under the majority's test, the homeowner hiring a plumbing company for bathroom renovations could well have all of that indirect control over a company employee! We suppose that our colleagues do not intend that every business relationship necessarily entails joint employer status, but the facts relied upon here demonstrate the expansive, near-limitless nature of the majority's new standard.*<sup>127</sup>

Additionally, the dissent recognized that the majority's test for zero scale employer involvement "threatens existing franchising arrangements in contravention of Board precedent and trademark law requirements."<sup>128</sup> The dissent explained that "in many if not most instances, franchisor operational control has nothing to do with labor policy but rather compliance with federal statutory requirements to maintain trademark protections."<sup>129</sup> The dissent elaborated that "even while franchise law requires some degree of oversight and interaction, it was never the intent of Congress, by that interaction, to make a franchisee the agent of its franchisor for any purpose."<sup>130</sup> The dissent then warned that "the new joint-employer standard portends unintended consequences for a franchisor's compliance with the requirements of another Federal act that is totally unrelated to labor relations."<sup>131</sup>

Employer groups are fighting the decision.<sup>132</sup> International Franchise Association (IFA) President Steve Caldera has said that "[t]he Board's tortured analysis will undoubtedly be met with skepticism and will be rejected by local franchise owners, legislators and, ultimately, the courts."<sup>133</sup> Caldera said, "[t]he IFA believes that by forcing major employers to adopt a one-size-fits-all approach to establishing

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126. *Id.* at 21 ("First, no bargaining table is big enough to seat all of the entities that will be potential joint employers under the majority's new standards. In this regard, we believe the majority's new test impermissibly exceeds our statutory authority.").

127. *Id.* at 36.

128. *Id.* at 45.

129. *Id.*

130. *Id.* at 46.

131. *Id.*

132. See generally Caroline B. Galiatsos, Note, *Beyond Joint Employer Status: A New Analysis for Employers' Unfair Labor Practice Liability Under the NLRA*, 95 B.U. L. REV. 2083, 2087 (2015).

133. Carl Horowitz, *NLRB Rules in Favor of Teamsters in 'Joint Employer' Case*, NAT'L LEGAL AND POL'Y CTR. (Sept. 2, 2015), <http://nlpc.org/stories/2015/09/02/nlrb-rules-favor-teamsters-joint-employer-case>.

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workplace standards, franchisees lose flexibility.”<sup>134</sup> Jania Bailey, an IFA board member, responded to the decision, stating that “[i]f this goes into effect then the franchisor has to step in and have a standard for hiring, human resources, payroll, everything. It basically nullifies this independent business model.”<sup>135</sup> Similarly, Beth Milito, Senior Legal Counsel for the National Federation for Independent Business, stated that, “thousands of Americans make a living as subcontractors, and this is a direct threat to them . . . . They want the independence [of] being their own boss and . . . [the growth potential] . . . that [is lost] if there are no longer any regulatory or financial advantages in hiring subcontractors.”<sup>136</sup>

Other recent decisions by the NLRB also demonstrate how the expansive interpretation of the right to control not only threatens technological innovation, but also risks destroying entire industries.<sup>137</sup> Ultimately, if the NLRB and other adjudicators follow the majority’s reasoning, the new test could be the death knell for future entrepreneurship.

## III: HOW ARE GIG COMPANIES CHARACTERIZED?

A. *Do Gig Companies Have an Employment Relationship with Entrepreneurs?*

Many gig companies contend that they are exempt from providing various benefits under law because their business relationships are merely licensor-licensee relationships.<sup>138</sup> Nevertheless, many courts appear to be unpersuaded by this argument and have found that at least some form of employment relationship exists.<sup>139</sup> In doing so, judges have then been left to determine whether the entrepreneur’s services sufficiently constitute the work of an independent contractor or an employee.

Some courts have interpreted gig company policies as constituting sufficient employer control over an employee.<sup>140</sup> These policies include business or operational features that most gig companies use, such as requiring the entrepreneur to provide on-demand service and display the company’s trademark

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134. *Id.*

135. *Id.*

136. *Id.*

137. *See, e.g.,* Miller & Anderson, Inc., 364 N.L.R.B. No. 39, 7 (2016); Browning-Ferris Indus. of Cal. et al., Inc., 362 N.L.R.B. No. 186, 45–46 (2015) (Miscimarra and Johnson, JJ., dissenting).

138. *See, e.g.,* Cotter, et al. v. Lyft, Inc., 60 F. Supp. 3d 1067, 1078 (N.D. Cal. 2015); O’Connor v. Uber Techs. Inc., 82 F. Supp. 3d 1133, 1138 (N.D. Cal. 2015); Berwick v. Uber Techs. Inc., No. 11-46739EK, 2015 WL 4153765, at \*4 (Cal. Labor Comm’r June 3, 2015); *see* Rasier LLC v. Florida, No. 0026 2834 68-02, 7–9, 11, 14 (Fla. Dep’t of Econ. Opportunity Dec. 3, 2015) (final determination).

139. *See, e.g.,* Cotter, 60 F. Supp. 3d at 1078; O’Connor, 82 F. Supp. 3d at 1142; Berwick, No. 11-46739EK, at \*6.

140. *See, e.g.,* O’Connor, 82 F. Supp. 3d at 1142; *see also* Wittenstein v. Fugazy Cont’l Corp., 59 A.D.2d 249, 250–51 (N.Y. App. Div. 1977).

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when working, using a consumer ranking system as a quality control mechanism for monitoring their performance, and collecting payment directly from consumers.<sup>141</sup>

Many gig companies have faced worker classification lawsuits. These have included those providing transportation services like Uber<sup>142</sup> and Lyft,<sup>143</sup> as well as companies offering such services as grocery delivery -Instacart,<sup>144</sup> couriers - Postmates<sup>145</sup> and Shyp,<sup>146</sup> restaurant food delivery -Caviar,<sup>147</sup> laundry and dry-cleaning -Washio,<sup>148</sup> house cleaning and home repair -Homejoy<sup>149</sup> and Handyman.<sup>150</sup>

Moreover, courts have also rejected the argument that gig companies are essentially personnel staffing agencies.<sup>151</sup> In *O'Connor v. Uber Technologies, Inc.*, Judge Edward Chen explained:

*Uber not only unilaterally qualifies and selects its drivers, it maintains an ongoing relationship and exercises supervision over their performance. Uber's success depends upon the quality of its drivers' ongoing performance. In contrast, recruiters engage in a one-time transaction and do not supervise the clients it places; nor does the recruiter's income depend on the ongoing performance of those clients.*<sup>152</sup>

Not taking on the risk of noncompliance, some gig companies have voluntarily classified their relationships with workers as employer-employee relationships.<sup>153</sup>

141. See, e.g., *Alexander v. FedEx Ground Package Sys., Inc.*, 765 F.3d 981, 984–90 (9th Cir. 2014).

142. See *O'Connor v. Uber Techs., Inc.*, No. 13-cv-03826-EMC, 2016 U.S. Dist. LEXIS, at \*29–30 n. 6 (identifying 15 cases dealing with worker classification).

143. See, e.g., *Cotter*, 60 F. Supp. 3d at 1078; *Loewen v. Lyft, Inc.*, 129 F. Supp. 3d 945, 948 (N.D. Cal. 2015).

144. See, e.g., *Bynum v. Maplebear Inc.*, 160 F. Supp. 3d 527 (E.D.N.Y. 2016); *Cobarruviaz v. Maplebear, Inc.*, 143 F. Supp. 3d 930, 934 (N.D. Cal. 2015).

145. See, e.g., Amended Complaint and Jury Demand, *Singer, et al. v. Postmates, Inc.*, No. 4:15-cv-01284 (N.D. Cal. Mar. 19, 2015).

146. See, e.g., Amended Class Action Arbitration Demand at 1, *Tang v. Shyp, Inc.* (Am. Arb. Ass. July 7, 2015) [hereinafter *Tang Amended Class Action Arbitration Demand*].

147. See, e.g., *Levin v. Caviar, Inc.*, 146 F. Supp. 3d 1146, 1149–50 (N.D. Cal. 2015).

148. See, e.g., *Taranto v. Washio, Inc.*, 9845 No. CGC 15-546584, 2015 Cal. Super. LEXIS, at \*1 (N.D. Cal. 2015).

149. See, e.g., *Iglesias v. Homejoy, Inc.*, No. 15-CV-01286-EMC, 2015 WL 5698741, at \*2 (N.D. Cal. Sept. 29, 2015).

150. See, e.g., *Zenelaj v. Handybook*, 82 F. Supp. 3d 968, 970 (N.D. Cal. 2015).

151. See, e.g., *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067, 1078 (N.D. Cal. 2015); *O'Connor v. Uber Techs. Inc.*, 82 F. Supp. 3d 1133, 1138 (N.D. Cal. 2015).

152. *O'Connor*, 82 F. Supp. 3d at 1138 n.13.

153. Rebecca Smith & Judy Conti, *Candidates: How Will You Turn 'Gig' Jobs Into Good Jobs?*, THE HILL (Mar. 22, 2016, 3:00 PM), <http://thehill.com/blogs/congress-blog/labor/273789-candidates-how-will-you-turn-gig-jobs-into-good-jobs>.

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Others, such as Homejoy, dissolved their companies because they were unable to pay mounting litigation costs incurred from responding to worker misclassification lawsuits.<sup>154</sup> Still others have agreed to multi-million dollar settlements to avoid the risks of a negative legal determination.<sup>155</sup>

*B. Gig Companies Are Subject to Vicarious Liability for Entrepreneurs and Other Legal Claims Regarding Their Business Practices*

As demonstrated below, gig companies are not immune from the litigation risks that other employers or corporate entities face. Courts have held gig companies liable for both the acts of their entrepreneurs and for their business practices.<sup>156</sup> Specifically, workers, consumers, and state governments have all pursued litigation against gig companies for tortious injuries, contractual violation, fraudulent market practices, non-compliance with industry regulations, and other statutory requirements.<sup>157</sup>

Consumers and other third-parties have sued gig companies for injurious torts caused by entrepreneurs.<sup>158</sup> In doing so, these plaintiffs attempt to hold gig companies strictly liable for their products and negligence.<sup>159</sup> Under the negligence theory, gig companies “have a duty to take reasonable care to guarantee the proper hiring, training, and supervision” of their workers, “regardless of whether an employment relationship exists.”<sup>160</sup> As a result, gig companies may be liable for negligent misrepresentations regarding the competence of their workers. For example, California has sued Uber, alleging that the gig company misrepresented the fitness of the drivers on its ride-sharing platform.<sup>161</sup>

Gig companies also have been sued for breach of contract, fraud, and violations of civil regulations. Some courts have struck contractual clauses in gig companies’ arbitration agreements with entrepreneurs, refusing to enforce clauses on

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154. *Iglesias v. Homejoy, Inc.*, No. 15-CV-01286-EMC, 2015 WL 5698741, at \*2 (N.D. Cal. Sept. 29, 2015).

155. *See generally, e.g.*, Plaintiffs’ Motion for Preliminary Approval of Class Action Settlement, *Shepard v. Lowe’s HIW, Inc.*, No. 12-CV-03893-JSW (N.D. Cal. filed May 23, 2014) (moving for approval of Lowe’s \$6.5 Million settlement for misclassification).

156. Complaint for Damages and Demand for Trial by Jury at 4, *Liu v. Uber Techs. Inc.*, No. CGC-14-536979 (Cal. Super. Ct. filed Jan. 27, 2014).

157. *See supra* Part III.A; *Cotter, et al. v. Lyft, Inc.*, 60 F. Supp. 3d 1067, 1078 (N.D. Cal. 2015); *O’Connor v. Uber Techs. Inc.*, 82 F. Supp. 3d 1133, 1138 (N.D. Cal. 2015); *Berwick v. Uber Techs. Inc.*, No. 11-46739EK, 2015 WL 4153765, at \*1 (Cal. Labor Comm’r June 3, 2015).

158. Complaint for Damages and Demand for Trial by Jury at 4, *Liu v. Uber Techs. Inc.*, No. CGC-14-536979 (Cal. Super. Ct. filed Jan. 27, 2014).

159. *Id.*

160. *Macmurdo, supra* note 78, at 341.

161. Complaint for Permanent Injunction, Civil Penalties, Restitution and other Equitable Relief at 5, *People v. Uber Techs., Inc.*, No. CGC-14-543120 (Cal. Super. Ct. filed Dec. 9, 2014).

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arbitration venue, fee-sharing, and fee-splitting, deeming them to be unconscionable.<sup>162</sup>

Other courts have permitted lawsuits against gig companies for statutory violations stemming from their business operations. For example, Shyp, a full-service shipping gig company, faced suit for civil penalties under California's Private Attorneys General Act.<sup>163</sup> Also, Postmates has been sued for violating the Fair Credit Reporting Act by failing to comply with consumer report disclosure and notice requirements when deciding whether an entrepreneur can perform courier services for customers.<sup>164</sup>

Some gig companies have also been subject to various regulatory requirements for their business industries. For instance, transportation-based gig companies in California must comply with California's Public Utilities Commission ("CPUC") regulations for businesses that transport passengers on California public highways.<sup>165</sup> The CPUC rejected the argument that Uber, Lyft, and Sidecar gig companies were "just an app."<sup>166</sup> Instead, those companies now bear the onus in ensuring that their driver-entrepreneurs satisfy insurance and vehicle maintenance requirements.<sup>167</sup>

Furthermore, some courts have rejected gig companies' attempts to quash state and municipal legislation intended to grant workers labor rights. In 2016, United States District Court Judge Robert Lasnik dismissed the U.S. Chamber of Commerce's lawsuit, filed on behalf of transportation gig companies, Uber and Eastside for Hire, Inc., against Seattle, alleging that the City's ordinance giving drivers the right to unionize for collective bargaining purposes violates and is preempted by federal antitrust law (Sherman Act), is preempted by the NLRA, and violates the Washington Consumer Protection Act and the Washington Public Records Act.<sup>168</sup> Judge Lasnik dismissed the lawsuit, arguing that the Chamber and gig company members lacked the requisite standing because the ordinance had not harmed them.<sup>169</sup> Judge Lasnik stated, "[n]either of the Chambers' members has

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162. See *Vargas v. Delivery Outsourcing, LLC*, No. 15-cv-03408-JST, at 20 (N.D. Cal. Mar. 14, 2016) (severing the choice of law and forum selection clauses from the arbitration provision, and enforcing the rest of the arbitration provision).

163. Tang Amended Class Action Arbitration Demand, *supra* note 146.

164. First Amended Class Action Complaint, *Nesbitt v. Postmates, Inc.*, No. 3:15-cv-04052-VC (N.D. Cal. filed Sept. 24, 2015).

165. Macmurdo, *supra* note 78, at 315.

166. *Id.*

167. *Id.* at 319, 322–23.

168. Order Granting Defendants' Motion to Dismiss at 1, *Chamber of Com. of the United States v. Seattle*, No. C16-0322RSL (W.D. Wash. Aug. 9, 2016).

169. *Id.* at 7.

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suffered an injury that is traceable to the Ordinance and would be redressed if the Ordinance were declared invalid or enforcement were otherwise enjoined.”<sup>170</sup>

## IV. THE FRANCHISE BUSINESS MODEL

A. *Franchising Is About Brand Control*

Franchising is a contractual relationship between two independent business entities, the licensor of the franchise brand (franchisor), and the licensee (franchisee).<sup>171</sup> In exchange for using the franchisor’s trade name and system for operating the business—i.e. a method of providing services to customers—the franchisee pays a franchise fee and agrees to adhere to certain quality controls.<sup>172</sup> These controls help to protect the franchise brand assets: trademark, trade names, and good will.<sup>173</sup> The franchisee is responsible for the daily management of its independently owned business.<sup>174</sup> Furthermore, the franchisee’s profits and losses are based solely on its own performance and capabilities.<sup>175</sup>

Franchising enables an entrepreneur to go into business for himself without having to face several of the risks associated with other start-ups.<sup>176</sup> The disclosure requirements discussed *infra* are one reason for this.<sup>177</sup>

On the consumer end, the consumer chooses the franchisee’s services instead of another competitor because he prefers the quality of the franchisor’s brand and expects that the franchisee’s services will meet that brand standard.<sup>178</sup>

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170. *Id.*

171. *What is a Franchise*, INT’L FRANCHISE ASS’N, <http://www.franchise.org/what-is-a-franchise> (last visited Feb. 15, 2017) (“In a business format franchise relationship[,] the franchisor provides to the franchisee not just its trade name, products and services, but an entire system for operating the business.”).

172. *Id.* (“Franchising is simply a method for expanding a business and distributing goods and services through a licensing relationship. In franchising, franchisors (a person or company that grants the license to a third party for the conducting of a business under their marks) not only specify the products and services that will be offered by the franchisees (a person or company who is granted the license to do business under the trademark and trade name by the franchisor), but also provide them with an operating system, brand and support.”).

173. *Id.* (“At its core, franchising is about the franchisor’s brand value, how the franchisor supports its franchisees, how the franchisee meets its obligations to deliver the products and services to the system’s brand standards and most importantly – franchising is about the relationship that the franchisor has with its franchisees.”).

174. *Id.* (“In a franchise system, the owner of the brand does not manage and operate the locations that serve consumers their products and services on a day-to-day basis.”).

175. *Id.* (“Serving the consumer is the role and responsibility of the franchisee.”).

176. *Id.* (“Franchising is a contractual relationship between a licensor (franchisor) and a licensee (franchisee) that allows the business owner to use the licensor’s brand and method of doing business to distribute products or services to consumers.”).

177. *See infra* Part IV.B.1.



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### B. Franchise Law

Franchises are regulated entities, subject to state and federal franchising laws. Franchising laws cover (1) disclosure/registration requirements,<sup>179</sup> and (2) standards governing the relationship between franchisor and franchisee.<sup>180</sup> These laws involve an array of legal issues that arise during the franchise agreement, including: contractual provisions regarding performance obligations and termination restrictions,<sup>181</sup> the use of the franchisor's intellectual property,<sup>182</sup> market competition and unfair trade practices,<sup>183</sup> labor laws,<sup>184</sup> and tort liability.<sup>185</sup>

#### 1. Franchise Disclosure/Registration Requirements

The Federal Trade Commission (FTC) enforces various disclosure requirements for franchises along with some states that impose additional disclosure and registration requirements.<sup>186</sup> The FTC defines a "franchise" as a business entity exhibiting three qualities: (1) Trademark, (2) Significant Control or Assistance, and (3) Franchisee Fee.<sup>187</sup> To satisfy the Trademark requirement, the franchisor must license to the

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178. INT'L FRANCHISE ASS'N, *supra* note 171 ("A franchisor's brand is its most valuable asset and consumers decide which business to shop at and how often to frequent that business based on what they know, or think they know, about the brand. To a certain extent consumers really don't care who owns the business so long as their brand expectations are met.").

179. Honey V. Gandhi, *Franchising in the United States*, 20 LAW & BUS. REV. AM. 3, 7 (2014).

180. *Id.*

181. *Id.* at 22–23.

182. *Id.* at 13–16.

183. *Id.* at 16–19.

184. *Id.* at 19–22.

185. Gandhi, *supra* note 179, at 19–22.

186. *Id.* at 7.

187. FTC Franchise Rule, Definitions, 16 C.F.R. § 436.1(h) (2016). This rule explains that:

Franchise means any continuing commercial relationship or arrangement where the franchisor promises that (1) The franchisee will obtain the right to operate a business that is identified or associated with the franchisor's trademark, or to offer, sell, or distribute goods, services, or commodities that are identified or associated with the franchisor's trademark; (2) The franchisor will exert or has authority to exert a significant degree of control over the franchisee's method of operation, or provide significant assistance in the franchisee's method of operation; and (3) As a condition of obtaining or commencing operation of the franchise, the franchisee makes a required payment or commits to make a required payment to the franchisor or its affiliate.

*Id.* Andre Jaglom explains how many states may amend their franchise laws by adopting the new 2008 Franchise Registration and Disclosure Guidelines:

Although it is expected that all franchise filing states will eventually adopt the 2008 Guidelines (in some cases with individual state modifications), only Maryland and Wisconsin have expressly done so. Several other states, including Minnesota, New York and North Dakota, have provided links to the 2008 Guidelines on their official websites, implicitly adopting them.

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franchisee “the right to distribute goods and services that bear the franchisor’s trademark, service mark, trade name, logo, or other commercial symbol.”<sup>188</sup> To meet the Significant Control or Assistance requirement, the franchisor must exert “significant control of, or provide[] significant assistance to the franchisee’s method of operation.”<sup>189</sup> For the Franchisee Fee requirement, the franchisee must pay the franchisor at least \$500 within the first six months of operations.<sup>190</sup> Under the FTC Rule and under many state laws, payment constituting a franchise fee is very broad and “can include rent, required advertising payments, payments for initial equipment or inventory, fees for training seminars or security deposits, or a fee to keep the territory exclusive.”<sup>191</sup>

Under the Amended FTC Franchise Rule, the franchisor must furnish the franchisee with the Franchise Disclosure Document (FDD) that has information in twenty-three categories regarding the franchised business, its operations, financial representation, and other pertinent information on franchisee ownership.<sup>192</sup> The franchisor must provide the FDD fourteen days before the franchisee signs the franchise agreement or pays any consideration.<sup>193</sup> Furthermore, the franchisor must make supplemental disclosures if there have been any material changes in the information provided in the FDD.<sup>194</sup> Federal law does not require franchisors to file the FDD with the FTC, however some states do require that the Disclosure Document be filed with the respective state agency.<sup>195</sup>

## 2. Franchise Relationship Laws

States are the primary source for laws governing the franchise relationship. Tantamount to these relationships are those laws regulating performance obligations and termination restrictions. Franchisees are required to perform certain duties, as stipulated in the FDD and the franchise agreement regarding the franchise elements. Additionally, courts recognize that “franchisors have the ability to enact changes and adjustments to many aspects of the franchise system and its policies” to ensure the long-term success of the franchise brand.<sup>196</sup> These system-

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Andre R. Jaglom, *The Broad Scope of Franchise Laws: Traps for the Distribution Contract Dealer*, SW041 ALI-CLE 1, 2 n.8 (2014).

188. *U.S. Franchise Law Basics*, VINSON FRANCHISE LAW FIRM, <http://franchiselaw.net/startups/usfranchiselawbasics.html> (last visited Feb. 15, 2017).

189. *Id.*

190. *Id.*

191. Jaglom, *supra* note 187, at 2.

192. *Id.* at 3.

193. *Id.* at 17.

194. Gandhi, *supra* note 179, at 8–9.

195. *Id.*

196. Leonard H. MacPhee, *Recent Franchise Cases and the Importance of Clear and Complete FDDs and Franchise Agreements*, ASPATORE 1, 10, 2013 WL 3773412 (June 1, 2013) (noting that franchisors have the

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wide changes include “couponing and discounting, advertising and marketing fund payments, [changes to] prices” and products offered, “upgrades to the retail location and equipment,” software changes, and other aspects of the franchise brand.<sup>197</sup>

Most disputes stem from franchisees’ refusal to comply with adjustments to the franchise system. Typically, franchisees challenge the franchisor’s ability to enact these changes and enforce compliance by claiming that a new performance requirement is unnecessary for preserving the brand standard.<sup>198</sup> Most courts decide whether performance obligation is part of the brand standard based on the language in the franchise agreement.<sup>199</sup> Many franchisors have been successful in implementing these changes by including in the franchise agreement general contractual provisions whereby the franchisee agrees to accept and comply with changes the franchisor in good faith believes are necessary and desirable for the franchise.<sup>200</sup>

Franchisors may terminate franchisees that do not meet performance obligations, including failing to pay the franchise fee or not complying with the franchise service standards.<sup>201</sup> Most states regulate franchise termination provisions.<sup>202</sup> In many instances, states require that a franchisor must first provide the franchisee with “notice” of non-compliance and an opportunity to “cure” defective performance before terminating a franchisee for “good cause.”<sup>203</sup>

#### 3. Franchisor Liability

Franchisors are not liable for all of their franchisees’ tortious conduct or labor law violations. In many instances, the ultimate determination typically depends on the degree of control the franchisor exerts over the franchisee’s operations.

In the context of tort liability, a franchisor may be “vicariously liable to third parties for the negligence or other misconduct of its franchisees” when the franchisor “has effective control over the operations of its franchisee.”<sup>204</sup> Additionally, a franchisor could be “liable for the conduct of a franchisee that is

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authority to make changes and adjustments to franchise system and its policies); Gandhi, *supra* note 179, at 11 (explaining that the definition of a franchise entails that the franchisor grants the franchisee the authority to sell their goods under the franchisor’s marketing plan).

197. MacPhee, *supra* note 196, at 1.

198. Gandhi, *supra* note 179, at 18 (citing *Burda v. Wendy’s Int’l, Inc.*, 659 F. Supp. 2d 928, 930 (S.D. Ohio 2009)).

199. See MacPhee, *supra* note 196, at 13 (noting that “[c]ourts will look to the [contract] preamble in connection with interpreting the rights and obligations the parties assumed in connection with that contract”).

200. *Id.* at 3.

201. Gandhi, *supra* note 179, at 22.

202. *Id.*

203. *Id.*

204. Jaglom, *supra* note 187, at 7.

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either required by the franchisor or represented as part of the franchisor's operations."<sup>205</sup> However, a franchisor is not subject to liability if "the franchisor does not have control over the pertinent injury-causing day-to-day activities of the franchisee."<sup>206</sup>

With regard to labor law claims, because the franchisee hires workers to operate his establishment and makes managerial decisions affecting employment, the franchisee and not the franchisor is responsible for ensuring compliance with labor laws. Therefore, workers alleging labor law violations sue the franchisee that employs them. For example, several Merry Maids franchisees have been sued both by their cleaning service workers and government agencies for an array of labor law violations—pregnancy and disability discrimination, workers' compensation, and unfair labor practices.<sup>207</sup> In those cases, the suits were limited to the specific franchisee that engaged in the unlawful conduct.<sup>208</sup>

Franchisee workers have attempted to hold franchisors liable for labor law violations based on the joint-employer theory.<sup>209</sup> Despite this, the basis for finding the employee-employer relationship in franchising has been overwhelmingly rooted in whether the franchisor has exercised control over the franchisee workers beyond what was necessary for protecting the franchisor's brand assets.<sup>210</sup> Some franchisor-friendly states have enacted statutes that prohibit holding franchisors liable under the joint employer theory altogether.<sup>211</sup>

#### 4. Franchisees are not Presumptive Employees

Franchisees are generally presumed to be independent contractors for the purpose of employee status determinations.<sup>212</sup> By way of example, a federal district court in

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205. *Id.*

206. *Id.*

207. See generally Tentative Ruling, *Cruz v. Merry Maids of Fresno*, No. 11CECG01156, 2015 WL 4714377 (Cal. Super. July 13, 2015).

208. *NLRB v. Le Fort Enters., Inc.*, 791 F.3d 207, 210 (1st Cir. 2015) (finding that Merry Maids franchisee required collective bargaining rights for the twenty-nine employees working for it); Tentative Ruling, *Cruz v. Merry Maids of Fresno*, 2015 WL 4714377, at \*2 (Cal. Super. July 13, 2015) (granting summary judgment to franchisor Merry Maids in cleaning workers' misclassification lawsuit); *EEOC v. V&B LLC*, No. 14-cv-393 (Sept. 15, 2015) (settling a pregnancy and disability discrimination suit against Merry Maids franchisee).

209. See *Patterson v. Dominos LLC*, 333 P.3d 723, 726 (Cal. 2013) (holding that franchisor was not liable for sexual harassment claim brought by franchisee worker); *Vandemark v. McDonald's Corp.*, 904 A.2d 627, 633, 636 (N.H. 2006) (holding that a franchisor was not liable for franchisee's security measures).

210. See generally, e.g., *Vandemark*, 904 A.2d at 627 (holding that the franchisor was not liable for franchisee's security measures).

211. Andrea Wells, *New Look in Franchise Liability*, INS. J. (Jan. 11, 2016), <http://www.insurancejournal.com/magazines/coverstory/2016/01/11/394052.htm> ("Some states, including Michigan, Texas, Tennessee[,] and Louisiana, have already passed legislation aimed at protecting franchisors from being considered a joint employer with their franchisees. Virginia and Wisconsin may also follow suit.").

212. Gandhi, *supra* note 179, at 19.

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*Juarez v. Jani-King of California, Inc.* held that if the relationship is defined by a franchise agreement—the entrepreneur-franchisee carries the initial burden of establishing that the franchisor exercised control beyond that necessary to protect and maintain its interest in its trademark, trade name, and goodwill.<sup>213</sup>

In *Juarez*, the court found that the entrepreneur-franchisee for a cleaning service franchise failed to overcome its burden of proof.<sup>214</sup> As a part of the franchise agreement, Jani-King’s franchisees were required to follow specific cleaning methods and handle customer complaints a certain way.<sup>215</sup> Franchisees had to wear uniforms, use Jani-King’s name and phone number in client communication, and receive approval before they created marketing and advertising tools.<sup>216</sup>

After finding that these controls were “policies required to protect Jani-King’s service mark and goodwill,” the court concluded that the entrepreneur-franchisee failed to provide sufficient “evidence tending to prove that an employer-employee relationship existed between Jani-King and its franchisees.”<sup>217</sup>

## V. THIRD-WAY FOR CLASSIFYING GIG WORKERS

### A. Gig Jobs That Fit the Franchise Model

Although they currently do not have to comply with the formal documentation requirements of franchise laws, many gig companies would likely fit within the franchise business mold seamlessly. This section will examine two current gig companies and will explain how these companies would benefit from structuring their business as a franchise.

#### 1. Uber Technologies

Uber drivers are entrepreneurs who earn money by transporting passengers to a particular destination.<sup>218</sup> Consumers have stated that they appreciate the ease and convenience of being able to book a ride using the app.<sup>219</sup> Furthermore, consumers have also appreciated the affordable pricing and driver accountability that the

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213. *Juarez v. Jani-King of California, Inc.*, 273 F.R.D. 571, 582 (N.D. Cal. 2011).

214. *Id.*

215. *Id.* at 583.

216. *Id.*

217. *Id.*

218. *Driver’s Requirements: How to Drive with Uber*, UBER, <https://www.uber.com/drive/requirements> (last visited Feb. 15, 2017).

219. Max Chafkin, *Admit it, You Love Uber*, FAST COMPANY (Sept. 8, 2015), <https://www.fastcompany.com/3050762/tech-forecast/admit-it-you-love-uber>.

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service provides.<sup>220</sup> These positive associations with the Uber brand benefit drivers.<sup>221</sup>

Under the current policy, Uber drivers must use the Uber app to book rides with passengers, and while transporting them, must display the Uber trademark and conform to company service policies.<sup>222</sup> The policies include keeping their vehicles clean and well-maintained, dressing appropriately, taking the best route, being nice to the passenger, picking up the passenger after accepting his ride request, opening the passenger's door and offering to carry his bags, among other service standards.<sup>223</sup> To ensure drivers maintain Uber's quality standards, Uber uses GPS tracking technology, a customer rating system, and in rare instances deactivates the accounts of non-compliant driver-entrepreneurs.<sup>224</sup>

These company policies, using the Uber app for ride booking and payment, offering affordable prices, requiring that drivers display the Uber trademark in their vehicles and provide a consumer-friendly experience, are all policies of what could be an Uber franchise.<sup>225</sup> Treating drivers as franchisees fits seamlessly within the current Uber model. Uber would not be required to own a fleet of vehicles as drivers would still be responsible for providing their own cars, retaining insurance, and paying for their business expenses. Additionally, rather than starting their own transportation companies from the ground-up, driver-entrepreneurs would benefit from using Uber's intellectual property and business service model for transporting passengers.<sup>226</sup>

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220. *Id.*

221. *See, e.g.,* Ellen Huet, *Uber Tests Taking Even More from Its Drivers with 30% Commission*, FORBES, (May 18 2015, 6:32 PM), <http://www.forbes.com/sites/ellenhuet/2015/05/18/uber-new-uberx-tiered-commission-30-percent/#2c1c16fd75cc> ("UberX drivers will pay a 30% commission on their first 20 rides in a week, 25% on their next 20 rides, and then 20% on any rides beyond that."); Olivia Lambert, *A New Report Explores the Benefits of Uber*, NEWS.COM (Feb. 1, 2016); Caroline O'Donovan & Jeremy Singer, *How Much Uber Drivers Actually Make Per Hour*, BUZZFEED (Jun. 22, 2016, 7:37 PM), [https://www.buzzfeed.com/carolineodonovan/internal-uber-driver-pay-numbers?utm\\_term=.gkddlEo7v#.erxaJ3PK5](https://www.buzzfeed.com/carolineodonovan/internal-uber-driver-pay-numbers?utm_term=.gkddlEo7v#.erxaJ3PK5) ("Uber data suggests that drivers overall in three major U.S. markets — Denver, Detroit, and Houston — earned less than \$13.25 an hour after expenses in late 2015, according to calculations based on more than a million trips.").

222. *Safety Behind the Wheel: Our Commitment to Drivers*, UBER, <https://www.uber.com/drive/safety> (last visited Feb. 11, 2017).

223. James Cook, *Uber's Internal Charts Show How Its Driver-Rating System Actually Works*, BUS. INSIDER (Feb. 11, 2015, 11:53 AM), <http://www.businessinsider.com/leaked-charts-show-how-ubers-driver-rating-system-works-2015-2>; *see supra* Part III.

224. *See* Cook, *supra* note 223.

225. *See* *Juarez v. Jani-King of California, Inc.*, 273 F.R.D. 571, 582 (N.D. Cal. 2011); *Rasier LLC v. Florida*, NO. 0026 2834 68-02, 1, 12 (Fla. Dep't of Econ. Opportunity Dec. 3, 2015) (final determination); Gandhi, *supra* note 179, at 3, 9; Jaglom, *supra* note 187; INT'L FRANCHISE ASS'N, *supra* note 171; Huet, *supra* note 221; *see supra* Part III.

226. *See* *Rasier LLC*, No. 0026 2834 68-02, at 12; INT'L FRANCHISE ASS'N, *supra* note 171; *see supra* Part III.

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Furthermore, Uber would likely not have to change its revenue model as driver-entrepreneurs could still pay Uber a 20% to 30% commission for each passenger ride.<sup>227</sup> Collectively, these commission payments could still be required in a franchise agreement and could also serve as the franchise fee.<sup>228</sup>

In addition, Uber's driver-deactivation process, which is based on its customer rating system, could also fit within franchise termination requirements, mandating that franchisors provide franchisees "notice" and allow a "cure period" before terminating the franchisee "for cause." Uber deactivates accounts of driver-entrepreneurs who have consistently failed to comply with the Uber's service policies.<sup>229</sup> Drivers who routinely receive poor customer ratings for any reason including—choosing a "bad route," "disrespecting" the passenger, unsafe driving, having an unkempt car, or talking on the phone while driving—would satisfy the termination for "good cause" requirement.<sup>230</sup> Furthermore, Uber already satisfies the "notice" requirement by sending weekly emails to driver-entrepreneurs about their ratings, noting when those ratings fall below the service standard, and detailing the specific customer criticisms that led to their poor ratings.<sup>231</sup> Uber also already satisfies the "cure" opportunity requirement by giving driver-entrepreneurs a period to improve performance and also provides concrete suggestions for increasing their ratings, thus ensuring compliance with Uber's customer service policies.<sup>232</sup>

Clearly, many of Uber's company service policies and current mechanisms for ensuring quality control already align with the franchise business model.

### 2. *TaskRabbit*

The franchise model could also be applied to TaskRabbit, where the TaskRabbit company is the franchisor and the Tasker-entrepreneur is the franchisee.

Consumers choose Tasker-entrepreneurs to perform tasks over business competitors because of the TaskRabbit service brand. The TaskRabbit brand guarantees a consumer experience that includes: on-demand task service, convenient task booking and payment using the TaskRabbit app, quality task performance at an affordable price, better Tasker selection through a customer

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227. See INT'L FRANCHISE ASS'N, *supra* note 171; O'Donovan & Singer, *supra* note 221; *see supra* Part III.

228. Gandhi, *supra* note 179, at 3, 8–9; Jaglom, *supra* note 187; INT'L FRANCHISE ASS'N, *supra* note 171; O'Donovan & Singer, *supra* note 221; *see supra* Part III.

229. *Uber Community Guidelines*, UBER, <https://www.uber.com/legal/community-guidelines/us-en> (last visited Feb. 15, 2017).

230. Cook, *supra* note 223.

231. *Id.*; *see supra* Part III.

232. Cook, *supra* note 223; *see supra* Part III.

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rating system, and trust that the Tasker who appears at the consumer's door in a TaskRabbit uniform will provide safe and reliable task service.<sup>233</sup>

Accordingly, the Tasker-entrepreneur, who uses the TaskRabbit app to book task work, benefits from using TaskRabbit's brand assets—its name, intellectual property, and reputation. Additionally, contrary to competitive businesses, TaskRabbit does not set a time limit or minimum number of tasks that the Tasker-entrepreneur must complete to continue using the internet-platform.<sup>234</sup> Instead, Taskers enjoy substantial autonomy by deciding which tasks to accept, the duration for completing the task, and the instruments needed for performing the task.<sup>235</sup>

TaskRabbit exercises quality controls over the Tasker-entrepreneurs to the extent necessary to protect the company's brand assets.<sup>236</sup> Although Tasker-entrepreneurs must wear a uniform while performing a contracted task, the uniform requirement is no different than that proscribing what McDonald's workers must wear while on duty.<sup>237</sup> The Tasker's uniform could easily be described as a hallmark of the TaskRabbit service brand because the uniform both displays the TaskRabbit trademark and the uniform policy distinguishes the Tasker-entrepreneur from competitors.<sup>238</sup> Additionally, like Uber, TaskRabbit uses a customer rating system as a disciplinary mechanism to maintain the TaskRabbit service brand.<sup>239</sup> Although Tasker-entrepreneurs do not risk deactivation, those who fail to satisfy company service standards by receiving poor customer ratings appear lower on the list of Taskers used by consumers to make a selection.<sup>240</sup>

233. *How to Hire for Same Day*, TASKRABBIT, <https://support.taskrabbit.com/hc/en-us/articles/210729683-How-to-Hire-for-Same-Day> (last visited Jan. 21, 2017).

234. *See, e.g., How Does Pricing Work?*, TASKRABBIT (July 11, 2016 6:06 PM), <https://support.taskrabbit.com/hc/en-us/articles/205313140-How-does-Pricing-Work> (“Taskers are independent contractors and each Tasker has full control of their hourly rates.”); *TaskRabbit Terms of Service*, TASKRABBIT, <https://www.taskrabbit.com/terms> (last visited Feb. 15, 2017); Jackie Zimmerman, *Working on TaskRabbit*, MONEY (Mar. 12, 2015), <http://time.com/money/3714829/working-for-taskrabbit> (“Taskers set their own rates and those who fully commit to the platform, roughly 10% to 15% of them, can earn \$6,000 to \$7,000 a month.”).

235. *Rasier LLC v. Florida*, NO. 0026 2834 68-02, 1, 12 (Fla. Dep't of Econ. Opportunity Dec. 3, 2015) (final determination); *see supra* note 234; *supra* Part III.

236. *Rasier LLC*, No. 026 2834 68-02, at 12; *see supra* note 234; *supra* Part III.

237. *Compare Ana Rodriguez, McDonald's New Employee Manual*, Amazon S3, 2 (May 2, 2014, 12:23 PM), [http://s3.amazonaws.com/scschoolefiles/497/mcdonalds\\_employee\\_handbook.pdf](http://s3.amazonaws.com/scschoolefiles/497/mcdonalds_employee_handbook.pdf), *with How TaskRabbit Works: Insights into Business & Revenue Model*, JUGGERNAUGHT (Aug. 10, 2015), <http://nextjuggernaut.com/blog/how-task-rabbit-works-insights-into-business-revenue-model>.

238. *See supra* note 237 and accompanying text.

239. *Ratings and Reviews on the TaskRabbit Platform*, TASKRABBIT, <https://support.taskrabbit.com/hc/en-us/articles/213301766-Ratings-and-Reviews-on-the-TaskRabbit-Platform> (last visited Feb. 15, 2017).

240. *Id.*; *TaskRabbit Performance Metrics*, TASKRABBIT, <https://support.taskrabbit.com/hc/en-us/articles/204409610-TaskRabbit-Performance-Metrics> (last visited Feb. 15, 2017).



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The TaskRabbit revenue model, in which TaskRabbit takes 30% commission of the total price paid for the task performed,<sup>241</sup> could also be maintained through the franchise agreement. For example, the franchise agreement could stipulate that TaskRabbit receive 30% commission on all gross proceeds from the entrepreneurs task services. Therefore, if a Tasker-entrepreneur earns \$50, for a short, one-hour task, then TaskRabbit would collect \$15.<sup>242</sup> However, for a longer task, such as moving furniture that could take four hours to complete, a Tasker-entrepreneur may earn anywhere from \$240 to \$600, and TaskRabbit would collect a service fee commission of \$72 to \$180.

#### *B. Adjudicating Employment Misclassification Claims for Gig Companies Using the Franchise Model*

As has been demonstrated through the specific examples outlined above, if gig companies adopted a franchise model, the gig economy would remain largely unaffected. Gig companies could continue to perform their matching function with little interruption or change in their revenue streams. Entrepreneurs and consumers could continue to engage in the service transactions as they currently do.

The only difference between a franchise gig regime and the current gig regime is that gig company-franchisors would be shielded from certain labor claims.

##### *1. The Gig Company-Franchisor*

Those companies that adopt a franchise business model would need to comply with state and federal franchise laws mandating certain disclosure/registration requirements and governing the franchise relationship.<sup>243</sup> Although gig companies must wait fourteen days before the franchise relationship can be established,<sup>244</sup> this is hardly enough time to bring operations to a stand still.

Furthermore, in many states, gig company-franchisors would benefit from the favorable legal presumption that their entrepreneur-franchisee is an independent contractor.<sup>245</sup> Many of the gig companies' operational and consumer service requirements that courts have viewed as evidence that the entrepreneur is an employee, such as the gig company taking disciplinary actions based on customer rankings and requiring entrepreneurs to provide on-demand service to consumers, are more likely to be construed as performance obligations and termination

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241. See *What is a TaskRabbit Service Fee?*, TASKRABBIT (June 13, 2016 7:49 PM), <https://support.taskrabbit.com/hc/en-us/articles/204411610-What-is-the-TaskRabbit-Service-Fee> (explaining TaskRabbit takes a 30% commission fee).

242. *Id.*

243. See *supra* Part III.

244. See FTC Franchise Rule, Definitions, 16 C.F.R. § 436.1(h) (2016); Jaglom, *supra* note 187; *supra* Part III.

245. See *supra* Part III.

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provisions, typical of all franchise agreements. Additionally, given that franchises are highly regulated entities, courts are less likely to perceive gig companies as a regulatory avoider attempting to misclassify entrepreneurs in order to subvert labor law requirements.

In the long-run, the additional costs gig companies would pay toward franchise regulatory fees may prove a mere pittance when the alternative could mean paying millions in back-pay to workers for labor law violations.<sup>246</sup>

## 2. *The Entrepreneur-Franchisee*

With regard to their day-to-day operations, entrepreneur-franchisees would largely remain unaffected by the shift toward a franchise model as they would still be able to provide the same on-demand work to consumers in accordance with the gig company's service and commission policies.

In addition, even though franchisees do not enjoy the same legal protections as employees, the expansive franchise laws and disclosure requirements still provide significant protection for franchisees. While the employee presumption may no longer fall in their favor, they are certainly not enjoined from bringing forth labor claims.<sup>247</sup> As has been explained, in these inquiries, the judge would have to evaluate whether the entrepreneur-franchisee sufficiently established that the franchisor required the entrepreneur to comply with additional performance conditions beyond what is necessary for maintaining the franchise brand.<sup>248</sup> While this burden has shifted, it certainly is not impossible to overcome.<sup>249</sup>

## CONCLUSION

Although their reception has not been universally positive, the growth of Internet based gig companies has allowed a great deal of entrepreneurs to go into business for themselves. Much like the impermanent and flexible nature of gigs in the music

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246. See *O'Connor v. Uber Techs., Inc.*, 82 F. Supp. 3d 1138, 1141–42 (N.D. Cal. 2015); *Berwick v. Uber Techs., Inc.*, No. 11-46739EK, 2015 WL 4153765, at \*4 (Cal. Labor Comm'r June 3, 2015); Cyrus Farviar, *Judge Expresses Notable Concerns over Proposed \$100M Settlement in Uber Case*, ARSTECHNICA (June 2, 2016, 8:17 PM), [http://arstechnica.com/tech-policy/2016/06/most-drivers-in-uber-labor-case-would-get-under-25-so-some-protest-settlement](http://arstechnica.com/tech-policy/2016/06/most-drivers-in-uber-labor-case-would-get-under-25-so-some-protest-settlement/) (“Several weeks ago, the two sides came to a proposed agreement of \$100 million and other benefits, which would end the class-action lawsuit known as *O'Connor v. Uber*. The lawsuit covers 385,000 current and former drivers in California and Massachusetts. The settlement requires sign-off by the judge to take effect.”); Jaglom, *supra* note 187; *supra* Part III.

247. See *Juarez v. Jani-King of California, Inc.*, 273 F.R.D. 571, 582 (N.D. Cal. 2011); *supra* Part III.

248. See *Juarez*, 273 F.R.D. at 582; Gandhi, *supra* note 179, at 3, 8–9; Alisa Harrison, *Ruling Threatens Viability of Franchise Business in Massachusetts*, INT'L FRANCHISE ASS'N (Mar. 29, 2010), <http://www.franchise.org/Franchise-News-Detail.aspx?id=5041>; INT'L FRANCHISE ASS'N, *supra* note 171; *supra* Part III.

249. See, e.g., *Juarez*, 273 F.R.D. at 582; *supra* Part III.

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industry, the gig economy has provided a much desired flexibility to both businesses and workers.

Despite its growing prevalence, it seems the law has not kept up with the innovation that moves the gig economy. Courts and policymakers have thus far been reluctant to distinguish these newer gig companies from more traditional employment models. As a result, these gig companies are subject to the same tortious liability, consumer protection regulations, and labor laws as any other employer would be. This has left courts applying traditional worker classifications to a new and growing type of labor force that does not necessarily fit within the traditional mold. Given the recent trend in the law, courts will likely continue to favor interpretations finding an employer-employee relationship in many circumstances to the detriment of gig companies.

For this reason, to better address their needs going forward and protect themselves from certain litigation risks, gig companies should consider adopting a franchise model and seek to convert their existing “licensees” to franchisees. Even though franchises are heavily regulated, a franchise model would likely be the best option for gig companies seeking to maintain an element of brand control while also seeking to be shielded from liability and other operational costs.