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Whose Time Is It Anyway?: Evolving Notions of Work in the 21st Century

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Cover Page Footnote

Professor Laurie Leader is a Clinical Professor of Law at Chicago-Kent College of Law, where she has been on faculty since 1999. She has served on many committees, including cochair of the CBA's Young Lawyers Section of the Labor and Employment Law Committee from 1988 to 1989; and as regional co-chair of the ABA Labor and Employment Law Committee's first Trial Advocacy Competition in Chicago in 2006. Professor Leader is the author of *Wages and Hours: Law and Practice* (Lexis), an executive editor of Lindemann, Grossman & Weirich, *Employment Discrimination Law* (BBNA) and serves as Editor-in-Chief of Bender's (Lexis) *Labor & Employment Bulletin*.

WHOSE TIME IS IT ANYWAY?: EVOLVING NOTIONS OF WORK IN THE 21ST CENTURY

BY LAURIE E. LEADER*

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INTRODUCTION

The use of independent contracting has dramatically increased over the last decade—a phenomenon which, in part, is attributable to the changing nature of how we work. Technology and perceptions of work-life balance are among the factors contributing to this trend.¹ Employees increasingly seek more flexibility in work arrangements—both in terms of hours and locations—while employers seek to reduce benefits and other labor costs.

The nature of work has similarly evolved. Workplaces are less labor-intensive as jobs become automated or outsourced.² In other cases, the workplace itself is virtual, with work from remote locations becoming the rule rather than the exception. The gig economy has also emerged, where workers are labeled as independent contractors and where the “hiring party” provides platforms for work rather than work itself.³

Against this backdrop, it is perhaps surprising that little has changed in how the law defines “employment” and “work.” Certainly, whether a worker is classified as an “employee” has far-reaching consequences, including taxation, qualification for unemployment and employer-sponsored benefits, workers’ compensation coverage, and coverage under federal, state, and local labor and employment laws. With these issues hanging in the balance, why has so little been done to tailor definitions of “employer” and “employee” to the modern workplace, and what are the consequences of Congress and the courts often failing to act in this regard?

Except in the ridesharing industry,⁴ the trend in the courts has been to favor employment status and extend protections to contingent workers.⁵

1. Tad Milbourn, *In the Future, Employees Won't Exist*, TECHCRUNCH (June 13, 2015), <https://techcrunch.com/2015/06/13/in-the-future-employees-wont-exist/>.

2. See Christian Bodewig, *Replacing work with work: New Opportunities for workers cut out by automation?*, BROOKINGS, (Feb. 21, 2017), <https://www.brookings.edu/blog/future-development/2017/02/21/replacing-work-with-work-new-opportunities-for-workers-cut-out-by-automation/>; see also Gene Zaino, *The Impact of Automation on the Independent Workforce*, FORBES (May 2, 2017, 09:00 AM), <https://www.forbes.com/sites/forbeshumanresourcescouncil/2017/05/02/the-impact-of-automation-on-the-independent-workforce/#63ee9a175c51>.

3. Emilia Istrate & Jonathan Harris, *The Future of Work: The Rise of the Gig Economy*, NAT. ASS'N OF CTYS.: CTYS. FUTURES LAB (Nov. 2017), <https://www.naco.org/sites/default/files/documents/Gig-Economy.pdf>.

4. See, e.g., *Saleem v. Corp. Transp. Grp., Ltd.*, 854 F.3d 131, 134 (2d Cir. 2017) (“black car” drivers for car service platform held to be independent contractors and not employees); *McGillis v. Dep't of Econ. Opportunity*, 210 So. 3d 220, 225 (Fla. Dist. Ct. App. 2017) (Uber drivers held to be independent contractors rather than employees); cf. *Cotter v. Lyft, Inc.*, 193 F. Supp. 3d 1030, 1033–34, 1040 (N.D. Cal. 2016) (court approved settlement that retained independent contractor status for Lyft drivers).

5. “Contingent workers” are defined as freelancers, independent contractors, temporary workers, consultants, or other outsourced and non-permanent workers who are typically hired on a per-project basis. They can work on site or remotely. “Gig workers” are a

Likewise, there are changes in the definition of who may qualify as an “employer.” These changes are most evident in decisions holding affiliated companies to be joint employers under a variety of scenarios, including the extension of potential franchisee liability to franchisors⁶ and in administrative and judicial decisions holding leasing companies and the companies hiring them to be joint employers for Title VII purposes.⁷

In an economy where jobs are shrinking and there are no workplace guarantees, these trends make sense, although they are in conflict with the Trump Administration’s laissez-faire or pro-company policies in the employment arena.⁸ There is also the issue of drivers for Lyft and Uber who

subcategory of contingent worker who provide services brokered through tech-based platforms, such as Uber or Lyft. *See* *Glatt v. Fox Searchlight Pictures, Inc.*, 791 F.3d 376, 383 (2d Cir. 2015), *as modified*, 811 F.3d 528 (2d Cir. 2016) (interns as employees where employer is the “primary beneficiary” in the relationship and suggesting factors relevant to this analysis); *cf.* *Dynamex Operations W., Inc. v. Superior Court*, 416 P.3d 1, 7 (Cal. 2018) (in considering the propriety of certifying a class of delivery drivers allegedly misclassified as independent contractors in violation of a state wage order, California Supreme Court suggested that the drivers may qualify as employees rather than independent contractors and endorsed the three-part ABC test to determine whether the drivers were misclassified, with Dynamex bearing the burden of proof on the issue).

6. *See* *Cano v. DPNY, Inc.*, 287 F.R.D. 251, 260 (S.D.N.Y. 2012) (plaintiff stated a claim that franchisor and franchisee were joint employers for wage-hour purposes where Domino’s Pizza required its franchisees to use a certain payroll system and to adopt management, operation, hiring and inspection policies); *see also* *Bonaventura v. Gear Fitness One NY Plaza LLC*, 2018 U.S. Dist. LEXIS 53269, at *8 (S.D.N.Y. Mar. 28, 2018) (“The Second Circuit has not squarely addressed whether a franchisor of an independently owned franchise may be the ‘employer’ of a franchise employee for purposes of FLSA liability” and declaring that “[i]n the absence of clear guidance,” courts in that Circuit will rely on the economic reality test to determine whether an employment relationship exists).

7. *Baystate Alt. Staffing v. Herman*, 163 F.3d 668, 676 (1st Cir. 1998) (holding staffing corporation joint employer of temporary workers along with client companies who supervised their work); *cf.* *Salinas v. Commercial Interiors, Inc.*, 848 F.3d 125, 147–49 (4th Cir. 2017) (general contractor and defunct subcontractor joint employers of drywall installers, where they shared authority over and codetermined the key terms and conditions of the installers’ employment).

8. *See, e.g.*, USDOL’s June 2017 decision to withdraw Administrator’s Interpretation No. 2016-1, “Joint Employment Under the Fair Labor Standards Act and Migrant and Seasonal Agricultural Worker Protection Act” (Jan. 20, 2016). Michael J. Lotito and Ilyse Schuman, *DOL Withdraws Joint Employer and Independent Contractor Guidance*, (June 7, 2017), <https://www.littler.com/publication-press/publication/dol-withdraws-joint-employer-and-independent-contractor-guidance>; U.S. DEP’T OF LAB., *US SECRETARY OF LABOR WITHDRAWS JOINT EMPLOYMENT, INDEPENDENT CONTRACTOR INFORMAL GUIDANCE* (June 7, 2017), <https://www.dol.gov/newsroom/releases/opa/opa20170607>. The National Labor Relations Board retreated from its position that franchisors may be held to be joint employers of their franchisee’s employees. *See* *Hy-Brand Indus. Contractors, Ltd. v. Brandt*, 365 NLRB No. 156 (Dec. 14, 2017), 2017 NLRB LEXIS 635 (overruling the 2015 decision in *Browning-Ferris Indus. of Cal. Inc.*, 362 NLRB No. 186 (Aug. 27, 2015), 2015 NLRB LEXIS 672, holding that franchisors and franchisees could be joint employers, and returning to pre-*Browning-Ferris* joint employer standard that two or more entities may be deemed joint employer under the NLRA if one entity exercises control over essential employment terms of the other entity’s employees). However, the *Hy-Brand* decision was vacated, and the *Browning-Ferris* decision reinstated as a result of a motion to reconsider

straddle the line between independent contractors and employees without reaping any of the benefits of employment and without sharing in the vast majority of profits realized from the platforms under which they work.⁹

From a policy standpoint, contingent workers are in need of protection. Not only are technology and market forces driving the growing prevalence of “gig work,” but gig and other contingent workers are becoming increasingly marginalized in what is already a grossly inequitable bargaining relationship. These and other issues mandate that Congress and the courts reconsider who is entitled to wage-hour and other protections.

Part I of this Article explores traditional definitions of employment from the common law and the Internal Revenue Service (“IRS”) 20-Factor Test to the Fair Labor Standards Act’s economic realities test and other statutory definitions of the term. Part II examines expanding definitions of who qualifies as an “employer,” with an emphasis on joint employment relationships. Part III highlights new definitions of work that have emerged in the literature and as a result of litigation over the status of contingent workers in a gig economy, examines policy issues underlying worker classification in the twenty-first century, and proposes solutions to protect a growing contingent workforce while—at the same time—preserving the flexibility and conveniences associated with gig work.

I. EMPLOYEES VS. INDEPENDENT CONTRACTORS: WHY IT MATTERS AND CURRENT DEFINITIONS OF WORKERS AND WORK

A. Consequences of Worker Classification

Whether a worker is classified as an “employee” or “independent contractor” has profound consequences to employees and employers alike. From the employee’s perspective, classification affects the following: taxation; entitlement to unemployment compensation; Social Security and Medicare benefits; eligibility for health insurance and other employer-

based, in part, on Member Emanuel’s failure to recuse himself in the *Hy-Brand* case (his former firm represented a party in *Browning-Ferris*). See *Hy-Brand*, 2018 NLRB LEXIS 103, at *1–2. The Board’s reasoning in *Browning-Ferris* was recently endorsed by the D.C. Circuit. See *Browning-Ferris of Indus. of Cal., Inc. v. NLRB*, 911 F.3d 1195, 1218 (D.C. Cir. 2018). Despite this decision, the Board appears to be headed in the opposite direction. The new Board Chairman (John Ring) and the Board issued notice that it was considering a definition of joint employment through rule-making that mirrored the majority opinion and dissent in *Hy-Brand*. Interested parties are to submit comments to the proposed rule on or before January 28, 2019. See NAT’L LABOR RELATIONS BD., *NLRB Further Extends Time for Submitting Comments on Proposed Joint-Employer Rulemaking in Light of DC Circuit’s Recent Browning-Ferris Decision* (Jan. 11, 2019), <https://www.nlr.gov/news-outreach/news-story/nlr-b-further-extends-time-submitting-comments-proposed-joint-employer-1>.

9. Omri Ben-Shahar, *Are Uber Drivers Employees: The Answer Will Shape the Sharing Economy*, FORBES (Nov. 15, 2017, 11:24 AM), <https://www.forbes.com/sites/omribenshahar/2017/11/15/are-uber-drivers-employees-the-answer-will-shape-the-sharing-economy/#45fb85bc5e55>.

provided benefits; and coverage under federal, state, and local labor and employment laws, and state workers' compensation statutes.¹⁰ These coverages and benefits are generally unavailable to independent contractors¹¹ who pay self-employment taxes and certain business expenses and who—at least, in theory—have increased flexibility in their work and the ability to realize profits from their labors.

From the employer's perspective, businesses significantly reduce their expenses and obligations by classifying workers as independent contractors. Specifically, they avoid paying Federal Social Security, Medicare, and payroll taxes, unemployment insurance taxes, and state employment taxes by classifying workers as independent contractors rather than as employees.¹² Moreover, businesses are liable for their employees' negligent acts committed during the course of and within the scope of employment.¹³ Business also must comply with federal, state, and local laws regulating the employment relationship and be certain of its terms and conditions.¹⁴ No similar obligations generally attach when independent contractors are hired instead of employees.

Under all of these circumstances, there is no question that businesses realize substantial cost-savings, estimated at twenty-five to thirty percent, by classifying their workers as independent contractors.¹⁵ Indeed, the only downsides to such classification are that the business has less control over the manner and means by which the work is accomplished where independent contractors, as opposed to employees, perform the work, and there are

10. See generally U.S. DEP'T OF LAB.: WAGE-HOUR DIV. *Misclassification of Employees as Independent Contractors*, <https://www.dol.gov/whd/workers/misclassification> (last visited on Sept. 19, 2018).

11. *Id.*

12. *Id.*

13. See generally *Peña v. Greffet*, 110 F. Supp. 3d 1103, 1114–15 (D.N.M. 2015); *Walgreen Co. v. Hinchy*, 21 N.E.3d 99, 107 (Ind. Ct. App. 2014) (citing Restatement (Third) Agency § 7.07(1)); *Valles v. Albert Einstein Med. Ctr.*, 758 A.2d 1238, 1244 (Pa. Super. Ct. 2000); see also *Valentine v. Hodnett*, No. 5:14-CV-72, 2015 U.S. Dist. LEXIS 188205, at **22-23 (S.D. Tex. Sept. 16, 2015) (to hold an employer vicariously liable for the acts of an employee, a plaintiff must prove that the employee caused harm while acting within the scope of his or her general authority and in furtherance of the employer's business and objectives).

14. See, e.g., *FedEx Home Delivery v. NLRB*, 563 F.3d 492, 505 (D.C. Cir. 2009) (employees, not independent contractors, enjoy collective bargaining rights under the National Labor Relations Act, which expressly excludes independent contractors from its definition of "employee" at 29 U.S.C. § 152(3)); *Schwieger v. Farm Bureau Ins. Co.*, 207 F.3d 480, 483 (8th Cir. 2000) (employees and not independent contractors are covered by Title VII); *Alexander v. Rush N. Shore Med. Ctr.*, 101 F.3d 487, 494 (7th Cir. 1996) (physician – who was an independent contractor – could not maintain a Title VII action against hospital where he had privileges).

15. Paula M. Singer & Laura Francisco, *Benefits of Compensating Independent Contractors vs. Employees*, ALA-APA: LIBRARY WORKLIFE: HR E-NEWS FOR TODAY'S LEADERS (May 17, 2005), <http://ala-apa.org/newsletter/2005/05/17/benefits-of-compensating-independent-contractors-vs-employees/>.

significant potential costs and penalties associated with misclassifying employees as independent contractors.¹⁶

The government, too, has a stake in worker classification. According to the IRS, worker misclassification results in billions of dollars in lost revenues.¹⁷ Similar dollars are lost on the state and local levels as a result of worker misclassification.¹⁸

B. Statutory Definitions of Employment

Coverage under federal, state, and local labor and employment laws typically depends on employee status. Given the pivotal nature of this determination, it is surprising that the labor and employment statutes provide little guidance on who is an employee. For example, Title VII of the Civil Rights Act of 1964 defines an “employee” as “an individual employed by an employer,” subject to certain exceptions.¹⁹ Title VII’s definition of “employer” is also circular, focusing on the number of employees (fifteen or more) “for each working day in each of the twenty or more calendar weeks in the current or preceding calendar year” and on whether the putative employer is engaged in an industry affecting commerce.²⁰ Neither definition discusses the nature of the work performed.

Similar issues surrounding the statutory definitions of “employee” and “employer” may be found in the Employee Retirement Income Security

16. For example, in *O’Connor v. Uber Techs., Inc.*, 201 F. Supp. 3d 1110 (N.D. Cal. 2016), in the proposed settlement agreement, Uber agreed to pay \$84 million, plus an additional \$16 million contingent on an initial public offering (IPO) reaching one-and-a-half times Uber’s most recent valuation. *Id.* at 1117, Declaration of Shannon Liss-Riordan In Support of Plaintiff’s Motion for Preliminary Approval of Class Action Settlement, Exh. 6 at 13, 21. The class in *O’Connor* consisted of 385,000 California and Massachusetts drivers. The district court declined to approve the settlement agreement as “not fair, adequate and reasonable.” *O’Connor*, 201 F. Supp. 3d at 1135. Under California law, Cal. Lab. Code § 226.8, it is unlawful to misclassify workers as independent contractors.

17. See David Bauer, *The Misclassification of Independent Contractors: The Fifty-Four Billion Dollar Problem*, 12 RUTGERS J. L. & PUB. POL’Y 138, 144–45 & n.35 (2015); Michael Phillips, U.S. DEP’T OF THE TREAS., Ref. No. 2009-30-035, *While Actions Have Been Taken to Address Worker Misclassification, an Agency-Wide Employment Tax Program and Better Data Are Needed* 8 (2009). According to a 2009 report, the IRS estimated that worker misclassification costs the IRS approximately “\$54 billion per year in underreported employment tax, including losses of \$ 15 billion in unpaid FICA and UI taxes.” *Id.* at 8. The Internal Revenue Service (IRS), U.S. Department of Labor (USDOL), and state governments have increasingly concentrated their efforts to correct worker misclassification. As of October 2017, 37 states have formed partnerships with the USDOL to share and coordinate enforcement of worker misclassification. A sample agreement between the USDOL and the Alabama Department of Labor appears on the USDOL website at <https://www.dol.gov/whd/workers/Misclassification/all.htm>.

18. Bauer, *supra* note 17, at 144.

19. 42 U.S.C. § 2000e(f) (2018).

20. 42 U.S.C. § 2000e(b) (2018).

Act (“ERISA”),²¹ the Age Discrimination in Employment Act (“ADEA”),²² and the Fair Labor Standards Act (“FLSA”).²³ Accordingly, the real task of identifying employment relationships and defining their characteristics has been left to the courts.

Court decisions have been inconsistent at best, based on the overlapping tests used to determine employment status and an ever-changing list of factors deemed relevant to this analysis. Although courts tend to define employment more broadly when the statute has a remedial purpose, like the ADEA,²⁴ they most often rely on the common law test—and not on the underlying statutory purpose—in determining whether an individual is an employee or independent contractor.²⁵

C. The Traditional Common Law Agency Test

The common law definition of “employee” appears simplistic but produces varied results. Its focus is on “the hiring party’s right to control the manner and means by which the work is accomplished.”²⁶ Courts have articulated several factors, in addition to the right to control, weighing in on this analysis, including: (1) the skill required to do the job; (2) the source of the instrumentalities and tools; (3) the location of the work; (4) the duration of the relationship between the parties; (5) whether the hiring party has the right to assign additional projects to the hired party; (6) the extent of the hired party’s discretion over when and how long to work; (7) the method of payment; (8) the hired party’s role in hiring and paying assistants; (9) whether the work is part of the regular business of the hiring party; (10) whether the hiring party is in business; (11) the provision of employee benefits; and (12) the tax treatment of the hired party.²⁷

None of the foregoing factors is dispositive, and the list of factors is non-exhaustive.²⁸ Maximization of the right to control tends to militate in favor of employee status. The common law test applies to determine who

21. 29 U.S.C. § 1002(6) (2018) (defining “employee” as “any individual employed by an employer”).

22. 29 U.S.C. § 630(f) (2018) (defining “employee” as “an individual employed by any employer,” excepting certain elected officials, their personal staff, immediate advisors and those on a policymaking level).

23. 29 U.S.C. § 203(e)(1) (2018). The FLSA’s economic realities test used to determine employment status under that Act is discussed at notes 37–51 and accompanying text *infra*.

24. See *Lilley v. BTM Corp.*, 958 F.2d 746, 750 (6th Cir. 1992) (“The term ‘employee’ is to be given a broad construction in order to effectuate the remedial purposes of the ADEA”).

25. *Id.*; see also *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322–23 (1992) (applying common law test to ERISA and endorsing the use of that test to determine employment status whenever a federal statutory definition of “employee” is less than helpful).

26. See *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 751–52 (1989).

27. *Id.* (often referenced as the “*Reid* factors”); see also *Darden*, 503 U.S. at 322–23 (applying the *Reid* factors to determine whether the terminated plaintiff qualified as an “employee” for purposes of ERISA coverage).

28. *Reid*, 490 U.S. at 751–52.

qualifies as an “employee” under federal statutes that fail to provide a meaningful definition of that term.²⁹

D. The IRS 20-Factor Test: A Variation of the Common Law Test

The IRS has adopted a variation of the common law right-to-control test to determine whether a worker is an independent contractor or employee.³⁰ This test identifies the following twenty factors as helpful in determining whether an employment relationship exists:

1. Control – If the worker “is subject to the will and control of the employer not only as to what shall be done but how it shall be done,” the worker is an employee.³¹
2. Right to hire, fire, supervise, and pay assistants – Such actions suggest independent contractor status.
3. Training – Employer-provided training and mandatory attendance at meetings suggests an employment relationship.
4. Set work hours – Independent contractors set their own hours.
5. Integration – Where the worker’s services are an integral part of the hiring party’s operations, it is more likely that the worker is an employee.
6. Work schedule – Independent contractors set their own work schedules.
7. Services performed by worker – Independent contractors maintain flexibility in who will perform the work.
8. Permanency or duration of the relationship – Longevity or permanency in the relationship suggests employment status; by contrast, independent contractors tend to be hired on a project basis or for a set duration.

29. *Darden*, 503 U.S. at 318.

30. Rev. Rul. 87-41, 1987-1 C.B. 296.

31. 26 C.F.R. § 31.3401(c)-1(b).

9. Sequence of work – Independent contractors typically are free to determine how and in what order tasks will be performed.

10. Location of services – While not determinative, particularly with the marked increase in virtual and gig work, employees are usually required to perform work on the employer's premises.

11. Tools – Independent contractors supply their own tools.

12. Reports – Where the worker is required to submit periodic reports, an employment relationship is suggested. Where independent contractors are required to submit reports, it is typically based on contractual benchmarks for the completion of a project.

13. Investment – Investment in the work facilities or a particular project suggests independent contractor status.

14. Remuneration and withholding – Employees tend to be paid on an hourly or salaried basis subject to withholding, in contrast to independent contractors who tend to be paid by the project or job. Independent contractors pay self-employment taxes and are not subject to withholding.

15. Job-related expenses – Independent contractors pay their own business and travel expenses (although some of their expenses may be invoiced pursuant to the parties' contract), in contrast to employees, who are typically reimbursed for their expenses.

16. Termination – Most employees can be terminated at will without the employer incurring liability. The work of independent contractors typically ends when a project ends or the contract expires.

17. Ability to incur profit and loss – An independent contractor has the ability to realize profit or loss on the job. This should be distinguished from employee bonuses which may be linked to company sales or profits.

18. Full-time employment – Independent contractors are not hired on a full-time basis.

19. Right to work for multiple persons or entities – Independent contractors typically work for more than one person or entity.

20. Services offered to the public – Independent contractors generally hold themselves out for hire to the public or to other contractors within a particular trade.³²

The IRS streamlined this test in 2004, dividing the factors relevant to employment status into three categories based on (1) “behavioral control,”³³ (2) “financial control,”³⁴ and (3) the relationship of the parties.³⁵ Together, these categories and their factors focus on the totality of the relationship to determine whether a worker is an independent contractor or employee.³⁶

E. The Statutory or Primary Purpose Test

The statutory or primary purpose test focuses on the purpose of the underlying statute and its application instead of examining the indicia of the parties’ relationship. The test has its origins in the United States Supreme Court decision in *NLRB v. Hearst Publications, Inc.*,³⁷ in which the Court held that “newsboys” were employees within the meaning of the National Labor Relations Act’s (“NLRA”) definition of “employee.”³⁸ The Court

32. Rev. Rul. 87-41, 1987-1 C.B. 296.

33. IRS, *Behavioral Control*, <https://www.irs.gov/businesses/small-businesses-self-employed/behavioral-control> (last visited on Sept. 18, 2018). Behavioral control focuses on whether the hiring party has the right to control how the hired party works and considers: the type of instructions and degree of instruction given in connection with the work to be performed; evaluation systems utilized; and the training provided. *Id.*

34. IRS, *Financial Control*, <https://www.irs.gov/businesses/small-businesses-self-employed/financial-control> (last visited on Sept. 18, 2018). “Financial control” refers to facts determinative of whether the business has the right to control “the economic aspects of the worker’s job” and encompasses the following factors: whether the hired party makes a significant investment in the company; whether the hired party has an opportunity for profit and loss; the method of payment for work performed; whether the worker’s services are available to the market; and whether the hired party incurs unreimbursed expenses. *Id.*

35. IRS, *Type of Relationship*, <https://www.irs.gov/businesses/small-businesses-self-employed/type-of-relationship> (last visited on Sept. 18, 2018). The “type of relationship” category focuses on how the worker and business perceive their relationship to each other. Factors relevant to this determination include: the existence of a written contract; the provision of employee benefits; whether the services provided are key to the business’ activity; and the permanency of the parties’ relationship. *Id.*

36. See IRS, *Independent Contractor (Self-Employed) or Employee?*, <https://www.irs.gov/businesses/small-businesses-self-employed/independent-contractor-self-employed-or-employee> (last visited updated Apr. 23, 2018).

37. 322 U.S. 111 (1944).

38. *Id.* at 131. “Newsboys” referred to adult men who sold newspapers to customers on the city streets at established locations on a full-time basis, often for a number of years without turnover. The defendant publishers refused to bargain with them, on the basis that they were

rejected the notion that Congress intended to apply the common law agency test to the NLRA's definition of "employee" and instead looked to the economic reality of the relationship and the special purposes of the Act to reach its conclusion.³⁹ The Court explained its reasoning as follows:

Whether, given the intended national uniformity, the term 'employee' includes such workers as these newsboys must be answered primarily from the history, terms and purposes of the legislation. The word "is not treated by Congress as a word of art having a definite meaning. . . ." Rather, "it takes color from its surroundings [in] the statute where it appears," and derives meaning from the context of that statute, which "must be read in light of the mischief to be corrected and the end to be attained."⁴⁰

Congress subsequently amended the NLRA to expressly exclude independent contractors from the statutory definition of "employee,"⁴¹ and the Supreme Court issued its decision in *Nationwide Mutual Insurance Co. v. Darden*,⁴² endorsing the common law agency test as the benchmark to determine employment status when a federal statute offers little guidance on the issue.⁴³ Since *Darden*, courts have abandoned the statutory or primary purpose test as a vehicle to determine whether an individual is an employee or independent contractor for coverage purposes.⁴⁴

F. The Fair Labor Standards Act's Economic Realities Test

The FLSA provides that, subject to certain exceptions, the term "employee" means "any individual employed by an employer."⁴⁵ Excepted from the definition are volunteers, the personal staff of elected officials, ministerial and cleric employees, and military commissary employees.⁴⁶ An

independent contractors over whom the publishers exercised only incidental control. The NLRB concluded that the newsboys were employees but, on appeal, the Ninth Circuit reached the opposite conclusion.

39. *Id.* at 120, 129.

40. *Id.* at 124 (internal citations omitted).

41. 29 U.S.C. § 152(3) (2018).

42. 503 U.S. 318 (1992).

43. *Id.* at 322–23.

44. However, courts have considered a statute's purpose in other coverage contexts. *See, e.g., Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997) (Supreme Court considered statutory purpose in deciding to extend Title VII's anti-retaliation protection of "employees and applicants for employment" to former employee who allegedly received a negative reference after he filed an EEOC charge); *Hall v. DIRECTV, LLC*, 846 F.3d 757, 768 (4th Cir. 2017) ("Focusing first on the relationship between putative joint employers is essential to accomplishing the FLSA's 'remedial and humanitarian' purpose.") (internal citations and quotations omitted).

45. 29 U.S.C. § 203(e)(1) (2018).

46. 29 U.S.C. § 203(e)(2)(A)(i) (2018).

“employer” is likewise defined by the Act as “any person acting directly or indirectly in the interest of an employer in relation to an employee.”⁴⁷ These circular definitions are of little help in defining “work” for FLSA coverage purposes. The statutory definition of “employ,” which is “to suffer or permit to work,”⁴⁸ is too broad to be of much assistance, encompassing employees as well as independent contractors within its reach. Courts interpreting the FLSA have devised an “economic realities test” to determine whether a worker is an employee within the meaning of that Act.⁴⁹

The economic realities test is broader than the common law test used to distinguish employees from independent contractors. To determine whether an individual is an “employee” under the FLSA, courts look to the economic reality of the business relationship as a whole.⁵⁰ How the parties label the relationship is of little consequence.⁵¹ Instead, courts adopt a totality of the circumstances test in which a number of factors are analyzed with the focus on whether the worker is economically dependent on the hiring party or is in business for him or herself.⁵² Depending on the court, a four-, five- or six-factor economic realities test may apply.⁵³ These factors may include:

- (1) the degree of control exercised by the alleged employer over the workers; (2) the worker’s opportunity for profit or loss and investment in the business; (3) the degree of skill

47. 29 U.S.C. § 203(d) (2018).

48. 29 U.S.C. § 203(g) (2018).

49. See *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 726–27 (1947) (affirming the lower court’s decision that the common law test did not apply to the FLSA because “the Act concerns itself with the correction of economic evils through remedies which were unknown at common law . . . [and] the underlying economic realities . . . lead to the conclusion that the [plaintiffs] were and are employees of [the defendant].”). The Supreme Court first articulated the economic realities test in *Rutherford*. Decades later, the Court expressly adopted the test for FLSA cases in *Tony & Susan Alamo Found. v. Sec’y of Labor*, 471 U.S. 290, 301 (1985).

50. *Alamo Found.*, 471 U.S. at 301.

51. See *Scantland v. Jeffrey Knight, Inc.*, 721 F.3d 1308, 1311 (11th Cir. 2013) (“This inquiry is not governed by the ‘label’ put on the relationship by the parties or the contract controlling that relationship. . .”).

52. See *Hopkins v. Cornerstone Am.*, 545 F.3d 338, 342 (5th Cir. 2008), *cert. denied*, 556 U.S. 1129 (2009); *Baker v. Flint Eng’g & Constr. Co.*, 137 F.3d 1436, 1440 (10th Cir. 1998); *Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1059 (2d Cir. 1988).

53. See, e.g., *Saleem v. Corp. Transp. Grp., Ltd.*, 854 F.3d 131, 139 n. 19 (2d Cir. 2017) (adopting the five-factor test of *United States v. Silk*, 331 U.S. 704, 713 (1947)); *Keller v. Miri Microsystems LLC*, 781 F.3d 799, 807–12 (6th Cir. 2015) (six-factor test); *Scantland*, 721 F.3d at 1311–12 (six-factor test); *Martin v. Spring Break ‘83 Prods., LLC*, 688 F.3d 247, 251 (5th Cir. 2012) (four-factor test); *Hopkins*, 545 F.3d at 343 (five-factor test); *Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 75 (2d Cir. 2003) (six-factor test focusing on “functional control”); *Morrison v. Int’l Programs Consortium, Inc.*, 253 F.3d 5, 10 (D.C. Cir. 2001) (four-factor test); *Donovan v. Dialamerica Mktg., Inc.*, 757 F.2d 1376, 1381 (3d Cir. 1985), *cert. denied*, 474 U.S. 919 (1985) (six-factor test); *Donovan v. Brandel*, 736 F.2d 1114, 1117 (6th Cir. 1984) (six-factor test).

and independent initiative required to perform the work; (4) the permanency or duration of the relationship; and (5) the extent to which the work is an integral part of the employer's business.⁵⁴

While the courts differ on the factors and their emphasis, they agree that the factors are non-exhaustive and that no single factor is determinative.⁵⁵ “Rather, each factor is a tool used to gauge the economic dependence of the alleged employee and each must be applied with this ultimate concept in mind.”⁵⁶ Stated differently, the ultimate question is whether workers are employees “as a matter of economic reality . . . dependent upon the business to which they render service.”⁵⁷ Where an individual is able to work for competing companies, he or she is considered to be less economically dependent on the putative employer.⁵⁸ While this relinquishment of control is not dispositive, it weighs in favor of independent contractor status.⁵⁹

G. Hybrid Test: Combining the Common Law and Economic Realities Tests

The hybrid test is a combination of the common law and economic reality tests, with an emphasis on the right-to-control factor.⁶⁰ Generally, the

54. *Alamo Found.*, 471 U.S. at 301; *Zheng*, 355 F.3d at 67.

55. *See, e.g.*, *Thibault v. BellSouth Telcoms., Inc.*, 612 F.3d 843, 848–50 (5th Cir. 2010) (splicer hired to repair telecommunications grid after a hurricane was an independent contractor and not an employee of the telephone company, its contractor or subcontractor, despite the fact that the splicer performed hourly work that was subject to daily assignment, where splicer did not work exclusively for defendants, provided his own materials and equipment and determined how his work was to be performed); *Gustafson v. Bell Atl. Corp.*, 171 F. Supp. 2d 311, 321 (S.D.N.Y. 2001) (chauffeur for one of defendant's executives was technically an independent contractor, but qualified for FLSA coverage because the defendant exercised complete control over his on-the-job activities). *See generally Scantland*, 721 F.3d at 1312.

56. *Hopkins*, 545 F.3d at 343.

57. *Bartels v. Birmingham*, 332 U.S. 126, 130 (1947); *Saleem*, 854 F.3d at 141–46; *Martin v. Selker Bros., Inc.*, 949 F.2d 1286, 1293 (3d Cir. 1991).

58. *See Saleem v. Corp. Transp. Grp.*, 854 F.3d 131, 141–42 (2d Cir. 2017), (the fact that “black-car” drivers, who owned or operated “black-car” franchises, “could (and did) work for [defendant's] business rivals and transport personal clients while simultaneously maintaining their franchises without consequence” suggested that drivers were independent contractors); *Keller*, 781 F.3d at 807 (“If a worker has multiple jobs for different companies, then that weighs in favor of finding that the worker is an independent contractor.”).

59. *Saleem*, 854 F.3d at 141–42; *see also Thibault*, 612 F.3d at 846–847; *Carrell v. Sunland Constr., Inc.*, 998 F.2d 330, 334 (5th Cir. 1993); *Bates v. Bell Tel. Co.*, 1993 U.S. Dist. LEXIS 21507, at *7 (E.D. Pa. July 13, 1993), *aff'd* 22 F. 3d 300 (3d Cir. 1994).

60. *See Butler v. Drive Auto. Indus. of Am.*, 793 F.3d 404, 414 (4th Cir. 2015) (noting the court's application of the hybrid test to determine employee status in Title VII cases and adopting it in a joint employment context but modifying the relevant factors to “adequately capture the unique circumstances of joint employment”); *Hathcock v. Acme Truck Lines, Inc.*,

right-to-control component of the test focuses on who hires and fires, supervises, and sets work schedules. If that control lies with the worker, the relationship will be considered an independent contractor relationship. The economic realities component of the test, by contrast, focuses on how the worker is paid, whether his or her payments are subject to withholdings, whether the worker is eligible for employee benefits, and whether the worker works for the hiring party exclusively or has other clients and customers.⁶¹

The hybrid test is most commonly, but not exclusively, applied to determine employee status for Title VII coverage purposes.⁶² This application is questionable, however, in light of Supreme Court precedent suggesting that the common law agency test⁶³ applies to determine employee status in Title VII cases.

H. The ABC Test: Simplifying the Analysis

The final standard used to determine employee status is commonly referred to as the ABC test.⁶⁴ This test presumes that a worker is hired as an employee and places the burden on the hiring party to establish that the worker is an independent contractor by proof of *each* of the following factors:

- (a) that the worker is free from control and direction over performance of the work, both under the contract and in fact;
- (b) that the worker performs work that is outside the usual course of hiring entity's business; *and* (c) that the worker is customarily engaged in an independently established trade, occupation or business of the same nature as the work performed for the hiring entity.⁶⁵

262 F.3d 522, 526 (5th Cir. 2001), *cert. denied*, 535 U.S. 928 (2002) (employee status in Title VII case); *Deal v. State Farm Cty. Mut. Ins. Co.*, 5 F.3d 117, 118–19 (5th Cir. 1993) (employee status in Title VII and ADEA case).

61. *Deal*, 5 F.3d at 118–19.

62. *See, e.g.*, *Muhammad v. Dall. Cty. Cmty. Supervision & Corr. Dep't*, 479 F.3d 377, 380 (5th Cir. 2007) (“To determine whether an employment relationship exists within the meaning of Title VII, we apply a hybrid economic realities/common law control test.”) (internal citation and quotation omitted); *EEOC v. Zippo Mfg., Co.*, 713 F.2d 32, 37 (3d Cir. 1983) (mentioning the use of hybrid test for Title VII cases); *see also Hill v. City of Austin Pub. Works*, A-08-CV-079 LY, 2008 U.S. Dist. LEXIS 21434, at *2 (W.D. Tex. Mar. 19, 2008) (utilizing the hybrid test to find that workers were not employees of plaintiff-employer); *D’Annunzio v. Prudential Ins. Co. of Am.*, 927 A.2d 113, 121 (N.J. 2007) (utilizing hybrid test under the state whistleblower statute).

63. *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 318 (1992) (an ERISA case in which the Court applied the common law test but stated, in dicta, that the common law test applies to determine who qualifies as an “employee” in federal statutes, like Title VII, that do not otherwise provide a meaningful definition of the term); *Walters v. Metro. Educ. Enters., Inc.*, 519 U.S. 202, 211–12 (1997) (suggesting common law test applied in Title VII case).

64. *See Dynamex Operations W., Inc. v. Superior Court*, 416 P.3d 1, 48–50 (Cal. 2018).

65. *See id.*

The appropriate inquiry under Part (c) of the test “is whether the person engaged in covered employment actually has an independent business, occupation, or profession of the same nature as the work to be performed, not whether he or she could have one.”⁶⁶ Where the hiring party fails to establish each of these elements, the worker is deemed to be an employee and not an independent contractor.⁶⁷

II. THE EVOLUTION OF JOINT EMPLOYMENT DOCTRINE AND ITS EFFECT ON “EMPLOYEE” STATUS

A. Statutory Definitions of “Employer”

Labor and employment statutes offer little guidance on the question of who an employer is, despite the fact that employer status determines coverage under all of these statutes. Statutory definitions of employers are elusive, at best.

Title VII, for example, only applies to businesses that employ fifteen or more employees for at least twenty weeks in a relevant calendar year.⁶⁸ Other employment statutes similarly define employers based on the number of persons employed.⁶⁹ Given these definitions, it is not surprising that determinations of employer status often hinge on whether certain persons—most notably, partners, shareholders, and directors⁷⁰—should be counted as employees able to satisfy the employee minimum for coverage or whether they are, in essence, “employers” and thereby excluded from coverage. In making this determination, courts look to “the common-law element of

66. *Accord* JSF Promotions, Inc. v. Adm’r, 828 A.2d 609, 614 (Conn. 2003) (fact that the hiring party permits a worker to engage in similar activities for other businesses is insufficient to satisfy part C of the test; worker must be “customarily engaged in an independently established trade, occupation, profession or business” to satisfy part C of the standard); *see* McGuire v. Dep’t of Emp’t. Sec., 768 P.2d 985, 988 (Utah Ct. App. 1989).

67. *McGuire*, 768 P.2d at 987; *see, e.g.*, *Fleece on Earth v. Dep’t of Emp’t & Training*, 923 A.2d 594, 599–600 (Vt. 2007) (work-at-home knitters and sewers who made clothing sold by plaintiff children’s wear company were employees; company that designed all of the clothing and provided all patterns and yarn to the homeworkers could not satisfy part A of the ABC test, despite the facts that workers used their own machines and worked at their own pace and on days and at times of their choosing); *see generally* Deknatel & Hoff-Downing, *ABC on the Books and in the Courts: An Analysis of Recent Independent Contractor and Misclassification Statutes*, 18 U. PA. J.L. & SOC. CHANGE 53 (2015).

68. 42 U.S.C. § 2000e(b) (2018).

69. The Americans with Disabilities Act’s (“ADA”) definition of “employer” is identical to Title VII’s definition except it raises the employee minimum to 25. *See* 42 U.S.C. § 1211(5)(A) (2018). The Age Discrimination in Employment Act (“ADEA”) increases the minimum employee threshold to twenty (20 U.S.C. § 630(b) (2018)), while the Employment Retirement Income Security Act (“ERISA”) raises the minimum to fifty (50) and imposes some additional requirements (29 U.S.C. § 1002(5) (2018)).

70. *See, e.g.*, *Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440, 449–50 (2003) (whether shareholders and directors of a professional corporation should be counted as “employees” or “employers” under Title VII).

control,” specifically, whether the individual acts independently and participates in managing the organization or whether the individual is subject to the organization’s control.”⁷¹

Unlike Title VII, the FLSA does not consider employee numbers as a benchmark for employer status. Instead, the FLSA defines an “employer” as “any person acting directly or indirectly in the interest of an employer in relation to an employee,”⁷² and an “employee” as “any individual employed by an employer.”⁷³ Again, these definitions add little to the analysis which has been left to the courts.

B. Judicial Approaches to Defining Employers

Courts often assume, without deciding, that a particular entity is an “employer.” They are typically asked to determine “employer” status in two contexts: (1) in deciding whether a particular entity or person qualifies as an “employer” or “employee” for purposes of satisfying the employee threshold for coverage⁷⁴ (*i.e.*, only employees may be counted for coverage purposes); and (2) in deciding whether two or more entities or persons are considered to be a joint employer, jointly and severally liable for statutory violations of labor and employment laws.⁷⁵

There are essentially two approaches to determine who qualifies as the employer in the usual case. The first approach involves a two-step process: (1) determining whether the person or entity falls within the statutory definition of employer; and (2) determining whether an employment relationship exists between the parties, under a hybrid economic

71. See generally *id.* at 449, quoting EEOC Compliance Man. § 605:0009 (2000). *Clackamas* further adopted a six-factor test to determine whether partners, officers, directors and shareholders constitute employees of the organization, including: (1) whether the organization could hire or fire the individual or set the rules and regulations of the individual’s work; (2) whether and, if so, to what extent the organization supervised the individual’s work; (3) whether the individual reported to someone higher in the organization; (4) whether and, if so, to what extent the individual was able to influence the organization; (5) whether the parties intended that the individual be an employee, as expressed in written agreements or contracts; and (6) whether the individual shared in the profits, losses, and liabilities of the organization. *Id.* at 449–50, (quoting EEOC Compliance Man. § 605:0009).

72. 29 U.S.C. § 203(e)(2)(A)(i) (2018).

73. 29 U.S.C. § 203(e)(1) (2018).

74. *Clackamas*, 538 U.S. at 449–50 (whether shareholders and directors of a professional corporation should be counted as “employees” or “employers” under Title VII).

75. See, e.g., *Chao v. A-One Med. Servs., Inc.*, 346 F.3d 908, 917–18 (9th Cir. 2003); *Torres-Lopez v. May*, 111 F.3d 633, 639 (9th Cir. 1997); *Chao v. Barbeque Ventures, LLC*, No. 8:06CV676, 2007 WL 5971772, at *1, *6 (Neb. Dec. 12, 2007).

realities test.⁷⁶ Under the second approach, courts apply traditional common law or economic reality tests to determine employer status.⁷⁷

C. Joint Employment Theory or Doctrine

In the joint employment scenario, each employer has control over the employees, in contrast to the single employer situation in which two separate entities are considered as one.⁷⁸ The single employer doctrine is most often invoked by unions in a traditional labor law context to assert coverage over collectively bargained-for work⁷⁹ and to prevent an employer from creating or abusing a double-breasted operation to shift work from a unionized jobsite to a non-unionized environment to avoid paying wages and benefits under the applicable bargaining agreement.⁸⁰ When applied in a non-labor setting, the single employer doctrine may be invoked to determine whether a parent and subsidiary company constitute a single employer.⁸¹ Both the NLRB and the courts apply a multi-factor totality of the circumstances test to decide questions of single employer status, with particular emphasis on whether the two entities share centralized control over labor relations.⁸²

The single employer doctrine is sometimes confused with joint employment theory. While the single employer doctrine has little relevance to the protection of contingent workers or to the characterization of contingent or gig work, the opposite is true of joint employment. Joint employment theory generally provides that two entities or persons may be held jointly and severally liable for statutory or common law employment violations where the two entities or persons “share or co-determine those matters involving the essential terms and conditions of employment.”⁸³

76. See *Johnson v. Manpower Prof'l Servs., Inc.*, No. 11-20199, 2011 WL 4584757, at *4 (5th Cir. Oct. 5, 2011) (applying same hybrid test in the Title VII and §1981 case); *Deal v. State Farm Cty. Mut. Ins. Co.*, 5 F.3d 117, 118–19 (5th Cir. 1993) (employee status in Title VII and ADEA case).

77. See, e.g., *Hale v. Arizona*, 993 F. 2d 1387, 1394 (9th Cir. 1993) (FLSA applying economic realities test).

78. See *Butler v. Drive Auto Indus. of Am.*, 793 F.3d 404, 407–09 & n.3 (4th Cir. 2015); *NLRB v. Browning-Ferris Indus., Inc.*, 691 F.2d 1117, 1122 (3d Cir. 1982).

79. See, e.g., *Comm'n Workers of Am. v. U.S. W. Direct*, 847 F.2d 1475, 1477–78 (10th Cir. 1988).

80. See *S. Cal. Painters & Allied Trades v. Rodin & Co.*, 558 F.3d 1028, 1031 (9th Cir. 2009).

81. *Cook v. Arrowsmith Shelburne, Inc.*, 69 F.3d 1235, 1241 (2d Cir. 1995).

82. See *Radio & Television Broad. Technicians Local Union v. Broad. Serv. of Mobile, Inc.*, 380 U.S. 255, 256 (1965); *Point Am. Servs., Inc.*, 353 NLRB 973 (Feb. 25, 2009), at 1, 2009 NLRB LEXIS 49; *Dow Chem. Co.*, 326 NLRB 288 (1988), at 288. Courts consider the totality of circumstances and evaluate four factors in deciding single employer status: (1) whether operations are interrelated, (2) whether common management exists; (3) whether the parties have common ownership of financial control; and (4) where the two entities have share centralized control over labor relations. The fourth factor often emerges as the most important one. *Radio & Television Broad. Technicians*, 380 U.S. at 256.

83. *Graves v. Lowery*, 117 F.3d 723, 727 (3d Cir. 1997).

Stated differently, “courts look to whether both entities exercise sufficient control over the same employees” so that each may be considered an employer.⁸⁴

In practice, the joint employment doctrine may prevent an entity that effectively employs workers from shifting its employment obligations and any related liabilities to a second entity.⁸⁵ Thus, it has the potential to extend employment protections to gig and other contingent workers depending on the joint employment theory applied. As the Fourth Circuit has recognized, “the joint employment doctrine . . . recognizes the reality of changes in modern employment, in which increasing numbers of [contingent] workers are employed by temporary staffing companies that exercise little control over their day-to-day activities.”⁸⁶

There are, in fact, several versions of the joint employment doctrine. Both the NLRB and the United States Department of Labor have expanded and contracted their definitions of “joint employment” over the last five years.⁸⁷ The NLRB’s shift in position has generally revolved whether a putative employer must exert direct and significant control over the essential terms and conditions of employment in order to be held jointly liable or whether “indirect control” or the “reserved authority” to exercise control is sufficient for a finding of joint employment.⁸⁸ The Department of Labor’s shift in position occurred with the adoption and later withdrawal of Administrator’s Interpretation 2016-1, originally issued in January 2016, which established new and expansive standards for determining joint employment under the FLSA and the Migrant and Seasonal Agricultural Worker Protection Act.⁸⁹

The courts also have applied different standards in deciding whether, and to what extent, joint employment exists in a particular case. Historically, courts have used the economic realities test, the common law control test, or the hybrid test to determine in a fact-specific way whether joint employment

84. See *Bristol v. Bd. of Cty. Comm’rs*, 312 F.3d 1214, 1218–19 (10th Cir. 2002) (*en banc*) (quoting *Virgo v. Rivera Beach Assocs., Ltd.*, 30 F.3d 1350, 1360 (11th Cir. 1994)).

85. *Butler v. Drive Auto Indus. of Am.*, 793 F.3d 404, 410 (4th Cir. 2015); *Sibley Mem’l Hosp. v. Wilson*, 488 F.2d 1338, 1341 (D.C. Cir. 1973).

86. *Butler*, 793 F.3d at 410.

87. Celine McNicholas & Marni von Wilpert, *The joint employer standard and the National Labor Relations Board*, ECON. POL’Y INST. (May 31, 2017), <https://www.epi.org/publication/the-joint-employer-standard-and-the-national-labor-relations-board-what-is-at-stake-for-workers/>.

88. Compare *Browning-Ferris Indus. of Cal., Inc.*, 362 NLRB No.186 (Aug. 27, 2015) with *Hy-Brand Indus. Contractors, Ltd. v. Brandt*, 365 NLRB No. 156 (Dec. 14, 2017), 2017 NLRB LEXIS 635, *vacated on other grounds*, 2018 NLRB LEXIS 103 (Feb. 26, 2018). The *Hy-Brand* standard is now the subject of proposed rule-making notwithstanding a D.C. Circuit opinion endorsing the NLRB’s decision in *Browning-Ferris*. See *Browning-Ferris Indus. of Cal., Inc. v. NLRB*, 911 F.3d 1195, 1218 (D.C. Cir. 2018); see also *supra* note 8 and accompanying text.

89. See USDOL, Wage & Hour Div, Adm’rs Inter. No. 26-1, “Joint Employment Under the Fair Labor Standards Act and Migrant Seasonal Agricultural Worker Protection Act”, 2016 WL 284582 (Jan. 20, 2016).

exists.⁹⁰ While these tests are essentially the same tests used to determine employee status, the factors are modified when the inquiry relates to joint employment. To add even more confusion, the factors change with the various circuits.

In *Bonnette v. California Health & Welfare Agency*, the Ninth Circuit applied the joint employment theory to determine that “chore workers” hired to provide domestic services by public aid recipients were employees of the state welfare agencies that offered the welfare program.⁹¹ The court reasoned that the agencies were employers as a matter of economic reality based on the “considerable control” they exercised over the plaintiffs’ daily work.⁹² The court also identified four factors as relevant to the determination of joint employment: “whether the alleged employer (1) had the power to hire and fire employees; (2) supervised and controlled work schedules or conditions of employment; (3) determined the rate and method of [the worker’s] payment; and (4) maintained employment records.”⁹³

While several courts have adopted the *Bonnette* factors in joint employment cases, other courts have sharply criticized them or rejected a factor-based approach altogether.⁹⁴ Some of the criticisms have been directed to *Bonnette*’s focus on the degree to which the putative employer exercised direct control over the employee’s daily work and activities.⁹⁵

Most recently, the Fourth Circuit adopted a new joint employment test in *Salinas v. Commercial Interiors, Inc.*⁹⁶ In *Salinas*, the court rejected the *Bonnette* approach, which focused on the relationship between the employee and the putative joint employer, in favor of a new test focused “on the relationship between the putative joint employers.”⁹⁷ Under the latter

90. See *Faush v. Tuesday Morning, Inc.*, 808 F.3d 208, 214–16 (3d Cir. 2015) (applying the common law test with the *Reid* factors); *Burton v. Freescale Semiconductor, Inc.*, 798 F.3d 222, 227 (5th Cir. 2015) (applying a hybrid common law/economic realities test); *Love v. JP Cullen & Sons, Inc.*, 779 F.3d 697, 702–06 (7th Cir. 2015) (applying a five-factor economic realities test).

91. 704 F.2d 1465, 1470 (9th Cir. 1983).

92. *Id.* at 1470.

93. *Id.*

94. See, e.g., *Baystate Alt. Staffing v. Herman*, 163 F.3d 668, 675 (1st Cir. 1998); *Carter v. Dutchess Cmty. Coll.*, 735 F.2d 8, 12 (2d Cir. 1984); see also *Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 69 (2d Cir. 2003) (criticizing *Bonnette* as focused too narrowly on the employer’s right to control and adding six factors to the *Bonnette* four-factor test). The additional *Zheng* factors include: whether the putative joint employer’s premises and equipment were used for the work; and whether responsibility under the contract with the putative joint employer passed “without material changes” from one group of potential joint employees to another. *Id.* at 72.

95. See, e.g., *Moldenhauer v. Tazewell Pekin Consol. Commc’ns Ctr.*, 536 F.3d 640, 644 (7th Cir. 2008) (rejecting a factor-based approach to joint employment); see also *Zheng*, 355 F.3d at 69.

96. 848 F.3d 125 (4th Cir. 2017).

97. *Id.* at 141.

test, joint employment exists if the two entities “are not completely disassociated with respect to the worker.”⁹⁸

The *Salinas* court also identified the following “non-exhaustive” factors as relevant to a joint employment inquiry:

- (1) Whether, formally or as a matter of practice, the putative employers jointly determine, share, or allocate the ability to direct, control, or supervise the worker, whether by direct or indirect means;
- (2) Whether, formally or as a matter of practice, the putative joint employers jointly determine, share, or allocate the power to—directly or indirectly—hire or fire the worker or modify the terms or conditions of the worker’s employment;
- (3) The degree of permanency and duration of the relationship between the putative joint employers;
- (4) Whether through shared management or a direct or indirect ownership interest, one putative joint employer controls, is controlled by, or is under common control with the other putative joint employer;
- (5) Whether the work is performed on a premises owned or controlled by one or more of the putative joint employers, independently or in connection with one another; and
- (6) Whether, formally or as a matter of practice, the putative joint employers jointly determine, share, or allocate responsibility over functions ordinarily carried out by an employer, such as handling payroll; providing workers’ compensation insurance; paying payroll taxes; or providing the facilities, equipment, tools, or materials necessary to complete the work.⁹⁹

As demonstrated in Part III of this Article, the Fourth Circuit’s joint employment test in *Salinas* provides a vehicle with which to extend employment protections to gig and other contingent workers, including those in the ridesharing business.¹⁰⁰ Another such vehicle is the ABC test adopted

98. *Id.* citing 29 C.F.R. § 791.2.

99. *Id.* at 141–42; *see also* Hall v. DIRECTV, LLC, 846 F.3d 757, 769–70 (4th Cir. 2017).

100. *Salinas*, 848 F.3d 125.

by the California Supreme Court in *Dynamex Operations West, Inc. v. Superior Court*.¹⁰¹

III. ALTERNATIVE/CONTINGENT WORK ARRANGEMENTS: APPLYING TRADITIONAL TESTS AND EXPLORING NEW ONES

A. Alternative Approaches to Gig Classification

The traditional tests to determine whether a worker is an “employee” or “independent contractor” are less than helpful in characterizing workers who perform “crowdsourced work” or other virtual work.¹⁰² Websites such as Amazon.com’s Mechanical Turk,¹⁰³ have created new forms of work never contemplated by the FLSA or at common law. In the crowdsourcing model, firms post digital tasks to online platforms where workers can accept and complete particular tasks. Amazon and other crowdsourcing vendors “serve[] as conduit[s] for the worker to submit the completed work, and for the firm to pay the worker.”¹⁰⁴ Crowdsourcing vendors typically require workers and firms to sign their “click-wrap agreements” with pre-populated terms. Workers and firms only negotiate rates of pay and the specifics of the tasks to be performed; the vendor controls all the rest.¹⁰⁵

Amazon’s Mechanical Turk platform places a number of other restrictions on the crowdsourcing relationship, including payment of Amazon’s service fee and a prohibition against firms and workers contracting independently and outside the scope of Amazon’s agreement.¹⁰⁶ Amazon also demands that workers perform services as independent contractors.¹⁰⁷ Despite the fact that Amazon dictates the fundamental terms of the crowdsourcing relationships, to date, it has successfully avoided employer obligations and liability based on the terms of its unilateral worker contracts. Two factors have helped to accomplish this result: (1) characterizing the

101. 416 P.3d 1, 48–50 (Cal. 2018).

102. In “crowdsourcing,” computers automate and breakdown tasks and source out the work to be performed. The workers who perform the tasks are commonly referred to as “clickworkers.” See Miriam A. Cherry, *Working for (Virtually) Minimum Wage: Applying the Fair Labor Standards Act in Cyberspace*, 60 ALA. L. REV. 1077, 1088–1089 (2009).

103. Amazon’s Mechanical Turk is one of the most prominent crowdsourcing websites. The “turkers” may perform a variety of tasks, including tagging photos and comparing products, and receive payment in the form of credits from the Amazon.com website. *Id.* at 1089.

104. See Caleb Holloway, *Keeping Freedom in Freelance: It’s Time for Gig Firms and Gig Workers to Update Their Relationship Status*, 16 WAKE FOREST J. BUS. & INTELL. PROP. L. 298, 312 (Spring 2016) (quoting A. Felstiner, *Working the Crowd: Employment and Labor Law in the Crowdsourcing Industry*, 32 BERKELEY J. EMPL. & LAB. L. 143, 148 (2011)).

105. *Id.* at 313.

106. *Id.*

107. Felstiner, *supra* note 104, at 163 (noting that Amazon’s unilateral contract with workers also informs them that they “will not be entitled to any employee benefits[] and will not be eligible to recover worker’s compensation if injured.”).

work as piecework rather than hourly work, and (2) the fact that Amazon itself is “not involved in the actual transaction between workers and firms.”¹⁰⁸

Similar challenges to the definition of work have emerged with ridesharing companies like Lyft and Uber, which provide platforms for the performance of non-virtual work. In such “gig work,” the consumer actually hires the worker to provide rides through the mobile app platform provided.¹⁰⁹ Drivers are hired as independent contractors and approved online and, once approved, can access the app and start accepting trips.¹¹⁰ Although Uber drivers are able to choose their own days and hours of work and use their own vehicles, Uber has contracted with third parties to help drivers lease vehicles and obtain insurance and coverage.¹¹¹ Uber also sets rates, collects payment from the consumer via its app, and controls certain aspects of driver performance—such as the ability to terminate drivers with low acceptance rates.¹¹²

While Uber has attempted to defend certain worker misclassification cases by claiming that it is a “technology company” and not a “transportation company,” there is no question that its drivers are integral to the company’s business.¹¹³ The fact that Uber relies on its workers to perform the essence of the business, in contrast to “turkers,” who are not at the core of Amazon’s business, is another reason why Amazon has managed to avoid worker misclassification suits by freelancers performing tasks through its Mechanical Turk. Under the traditional tests used to determine “employee” versus “independent contractor” status, courts view the worker’s economic dependence and whether the tasks performed are integral to the company’s business as critical factors in the analysis favoring employment.¹¹⁴ Uber workers tend to meet these criteria more often than freelancers who work through Mechanical Turk; otherwise, the control asserted over the “turkers” by Amazon and that exerted over drivers by Uber is essentially the same.

In reality, all of these workers straddle the line between “independent contractor” and “employee” with no easy demarcation between the two. While all commentators and the courts acknowledge difficulties in applying the traditional employee-independent contractor dichotomy to gig workers, they have very different approaches to reconciling the two.

108. Holloway, *supra* note 104, at 314–15. Notably, Amazon also retains the right to terminate a worker’s contract at any time and thereby prevent the worker from continuing to perform work through its platform.

109. See generally Andrew G. Malik, Note, *Worker Classification and the Gig-Economy*, 69 RUTGERS U. L. REV. 1729, 1746–47 (2017).

110. *Id.* at 1747–48.

111. *Id.* at 1748.

112. *O’Connor v. Uber Techs., Inc.*, 201 F. Supp. 3d 1110, 1152 (N.D. Cal. 2016); see *Uber Fees: How Much Does Uber Pay, Actually? (With Case Studies)*, RIDESTER, <https://www.ridester.com/uber-fees/> (last updated Jan. 17, 2019).

113. *O’Connor*, 201 F. Supp. 3d at 1137.

114. See, e.g., *Bartels v. Birmingham*, 332 U.S. 126 (1947); *Saleem v. Corp. Transp. Grp., Ltd.*, 854 F.3d 131, 141–46 (2d Cir. 2017).

Some commentators suggest that a new classification of worker should emerge to cover individuals who perform gig work. This new classification of worker has been variously described in the literature as a “dependent contractor”¹¹⁵ or an “independent employee.”¹¹⁶ It is designed to offer greater protections to gig workers “who are not as autonomous as independent contractors but who also are not subject to the same degree of instruction and supervision as traditional employees.”¹¹⁷ As a variation on this theme, there are those who propose a new test to determine whether gig workers qualify as employees,¹¹⁸ and others who extend certain protections to gig workers—such as the right to bargain—regardless of their classification as independent contractors or employees.¹¹⁹

Still, other commentators advocate that gig workers should be classified as “employees” without proposing a new test for classification based on the degree of control exerted by the company providing the app or platform¹²⁰ or, from a policy standpoint, because the workers are low wage earners or marginalized.¹²¹

There are also commentators who argue that there is no need to make any changes at this juncture, instead adopting a “wait and see” attitude to allow free market forces time to flush out the issues.¹²² These commentators appear to be more concerned with stifling economic growth in the gig economy than with extending worker protections at significant costs to gig companies.¹²³

115. See Cherry, *supra* note 102, at 651 (proposing employee status as a default rule to extend protection to gig workers with “safe harbors [available] for people who are genuinely sharing in such a way that paid work is secondary or tertiary to their goals.”). The authors thereby distinguish “worker protection and coverage of those who are using platforms as an equivalent to professional employment, while exempting those who are using these platforms to create community.” *Id.* at 640. See also Lauren Weber, *What If There Were a New Type of Worker? Dependent Contractor*, WALL ST. J. (Jan. 28, 2015).

116. Michael Nadler, *Independent Employees: A New Category of Workers for the Gig Economy*, 19 N.C. J. L. & TECH. 443, 481 (2018).

117. *Id.* at 495.

118. See, e.g., Peter Gibbins, *Extending Employee Protections to Gig-Economy Workers Through the Entrepreneurial Opportunity Test of FedEx Home Delivery*, 57 WASH. U. J.L. & POL’Y 183, 194–202 (2018).

119. See Maria Lau, *Workers in the “Gig” Economy: The Case for Extending the Antitrust Labor Exemption*, 51 U.C. DAVIS L. REV. 1543, 1546–47 (2018) (advocating extension of the antitrust labor exemption to encompass gig economy workers, regardless of classification, “by legislation or possibly through interpretation, which would allow them to take collective action in dealing with the platform/intermediary without violating antitrust laws.”).

120. See Brishen Rogers, *Employment Rights in the Platform Economy: Getting Back to Basics*, 10 HARV. L. & POL’Y REV. 479, 513 (2016).

121. Robert Sprague, *Worker (Mis)Classification in the Sharing Economy: Square Pegs Trying to Fit in Round Holes*, 31 A.B.A. J. LAB. & EMPL. L. 53, 74 (2015).

122. Holloway, *supra* note 104, at 327.

123. *Id.* at 326–334.

A final approach argues against blanket classifications for gig workers, since there is a wide variation in how they work and, instead, posits that gig workers should be classified on a case-by-case basis.¹²⁴

B. Using Nontraditional Models to Protect Gig Workers While Safeguarding Flexibility in Their Work

As noted above, there are two existing theories that could extend protections to gig workers without sacrificing the flexibility central to their work: the Fourth Circuit's joint employment test articulated in *Salinas v. Commercial Interiors, Inc.*¹²⁵ and the ABC test adopted by the California Supreme Court in *Dynamex*.¹²⁶

Unlike the traditional common law right-to-control test or the economic realities test, the joint employment test pronounced in *Salinas* is helpful in analyzing the nature of triangular relationships like those created through Amazon's Mechanical Turk. The firm hiring the worker and Amazon are interrelated in establishing work parameters and in defining the terms of the relationship. In fact, Amazon's control over the worker is greater than that of the firm, whose role is limited to negotiating rates of pay and assigning the tasks to be performed. But it is the relationship of the putative employers that determines employee status in *Salinas*,¹²⁷ and on the Mechanical Turk platform, Amazon and its participating firms together "codetermine . . . the essential terms and conditions of the worker's employment."¹²⁸ On this basis, the "turkers" emerge as employees entitled to protection under federal and state labor and employment laws.

Application of the ABC test referenced in *Dynamex*¹²⁹ produces a similar result for workers in the ridesharing business. The ABC test presumes an employment relationship unless the hiring party demonstrates *all* of the following:

- (A) that the worker is free from the control and direction of the hirer in connection with performance of the work, both

124. Robert L. Redfearn III, *Sharing Economy Misclassification: Employees and Independent Contractors in Transportation Network Cos.*, 31 BERKELEY TECH. L.J. 1023, 1054 (2016).

125. 848 F.3d 125, 125 (4th Cir. 2017).

126. 416 P.3d 1, 48–50 (Cal. 2018), *pets. for modification and reh. denied*, 2018 Cal. LEXIS 3208 (Cal. Apr. 30, 2018).

127. 848 F.3d at 141.

128. *Id.* at 142.

129. 416 P.3d at 32. Although the *Dynamex* test's language has broad application, recent decisions applying *Dynamex* have concluded that the ABC test applies only to wage-order claims and not to claims predicated solely on California's Labor Code. *See, e.g., Garcia v. Border Transp. Grp.*, 28 Cal. App. 5th 558, 565 (Ct. App. 2018) (applying *Borello* standard to non-wage-order claims); *Karl v. Zimmer Biomet Holdings, Inc.*, No. C 18-04176 WHA, 2018 WL 5809428, *1, at *3 (N.D. Cal. Nov. 6, 2018) ("The ABC test applies only to claims arising under Industrial Welfare Commission Wage Orders.").

under the contract for the performance of such work and in fact; (B) that the worker performs work that is outside the usual course of the hiring party's business; and (C) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity.¹³⁰

Under the ABC test, Uber drivers would be classified as employees, because the company cannot satisfy at least two parts of the test needed for independent contractor status. Not only does Uber exert control over its drivers based on certain rules, fare collection, and pricing, but also, without question, the drivers' work is an integral part of Uber's business. Indeed, without its drivers, Uber has no business.

CONCLUSION

The trend toward gig and other contingent work is a natural consequence of technological advances that are expected to grow exponentially in the twenty-first century. While the flexibility associated with gig work is attractive to those seeking more work-life balance, supplemental income, or both, there are social and economic risks and costs related to that work. There are likewise significant costs to companies engaged in contingent work who misclassify their workers either intentionally or because the prevailing definitions of employee and independent contractor simply do not fit the "gig lifestyle." Therefore, new paradigms are needed to reconcile the unique demands associated with gig and other contingent work.

Because the legislative process reacts slowly to new challenges and because contingent workers are less than a priority, it is unlikely that Congress will move to protect these workers in the immediate future. In the meantime, contingent workers are growing in number and becoming increasingly marginalized. Those who are classified as independent contractors lack the bargaining and earning power traditionally associated with bona fide independent contractors. Ever-dependent on the "gig," their work life hangs in a delicate balance. However, there are immediate solutions without legislative action. Expanding the scope and application of the ABC test and modern joint employment doctrine are two alternative solutions to this growing problem.

130. *Id.* at 35.