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Fellowship Capstone | Policy Brief

The Fiction Of Flexibility: How The Gig Economy Is Exploiting Workers

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I. Executive summary

Gig platforms like Uber and DoorDash, through classifying their workers as independent contractors, deprive them of minimum wage, unionizing protections, and many more benefits—while companies save in labor costs. Yet, these companies retain a large control of their workers, setting the prices, imposing their branding, and controlling their algorithms. Their legal contradictions suggest violations of antitrust and labor laws, naked licensing, tort liability, and more. With significant developments such as new FTC and local policies, as well as court rulings like *Confederación Hípica*, regulatory and organizing options have opened up. This brief examines the current unsustainable nature of the gig economy, the legal contradictions gig companies make, and the necessary reforms to create a fairer economy.

II. Overview

Over the past decade, the gig economy has rapidly expanded. 2021 data from the Pew Research Center found that at least 16% of American adults have earned money through a gig platform—often to supplement their income.[1] For studies including independent work and "side hustles," estimates go up to even 36% of the American workforce, or around 58 million workers, with youth aged 18-24 especially likely to engage in gig work.[2] Such gig companies classify their workers as independent contractors, therefore avoiding labor regulations and compulsory benefits, and in turn, weakening the abilities for their workers to unionize. This directly harms workers by shifting costs onto workers, lowering their wages, and preventing collective action.

It is especially contradictory that these companies insist that their workers be classified as independent contractors when those very companies violate the "independent" structure themselves. These gig platforms set the prices, fully control the algorithms behind the platform, terminate at will, and force workers to fall in line with their branding and platforms. This demonstrates a clear legal contradiction on the part of the companies. Even under this independent contracting system, these companies would be criminal for price-fixing, at risk of trademark abandonment, and liable for their employees.

Policy has not yet met the needs of the rapidly changing gig economy. Even when progress is made, such as in California's AB5 law, which helped set a test to prove gig workers as employees, significant resistance and lobbying from gig companies have reversed or significantly gutted fair laws. However, small wins across the country have taken place in local legislatures and in the courts. These developments mean that the

time is ripe to take forceful action.

A. Relevance

Without a doubt, this issue of misclassification is vitally important in today's economy, given the large number of American gig workers aforementioned. Especially for the large number of today's youth in the gig economy, the current exploitative system excludes gig workers from key benefits, competitive wages, and a way to bargain—the benefits past generations had to achieve economic self-actualization.

This key economic, democratic, and moral failure in policy thus far, around gig workers, must change to protect a rapidly growing population of informal workers—if we can hope to create an opportunity economy that brings stability.

III. History

A. Current Stances

Since the 2010s, gig platforms have expanded with the rise of the internet and interconnectivity. From their inception, companies like Uber, Lyft, and DoorDash have tried to frame themselves as simply "tech platforms" that simply connect independent contractors.

2018 litigation in the California Supreme Court, Dynamex Operations West, Inc. v. Superior Court, created the "ABC test," which presumes workers to be employees unless proved otherwise with the three-part test.[3] This was later codified in 2019 through California Assembly Bill 5.[4] Feeling threatened by these regulations, gig companies lobbied with approximately $205 million[5] to pass Proposition 22,[6] exempting app-based drivers from the new law. The monopolistic and decentralized nature of the industry made it particularly easy to create a unified effort to pass this proposition.

Despite this resistance, wins for gig workers have taken place nationwide. New Jersey, which also has a similar ABC test, fined Uber $100 million in 2021 because of failure to pay employer taxes from misclassification.[7] In addition, Uber has faced litigation on being civilly liable for sexual assault violations from its drivers, further diminishing this independent contractor notion.[8] Uber has tried to argue that it actually does pass the ABC test by saying that it is simply a technology platform, and therefore its drivers aren't integral to the core of the business, meaning that. However, this argument has failed in the past and it clearly doesn't pass the first part of the test.[9]

In regard to tort liability, courts have found that respondeat superior liability is plausible in the case of Uber, as seen in *Erik Search v. Uber Technologies,* though Uber still often denies liability.[10] In the past, with FedEx, liability on negligent hiring and tort claims pushed for a reclassification of their drivers to actual employees.[11]

In more legal developments, the decision in *Confederacion Hipica de Puerto Rico v. Confederacion de Jinetes Puertorriqueños (2022)*[12] was an important point for gig workers' rights in organizing. The First Circuit Court of Appeals ruled that the Clayton Act's labor exemption also

covers any independent contractor selling their own labor. Given this, gig workers are now protected from antitrust liability in regard to unionizing and taking collective action. This then spurred the Biden FTC to announce in 2022 a recognition of gig organizing rights and that they would take on unfair business practices from gig companies and that gig workers were legally protected to unionize.[13] Later, the Department of Labor (DOL) also passed a rule to raise the bar for independent contractor classification (though it may be rescinded in the new Trump administration.)[14] With this, the dispute has still continued on today.

IV. Policy Problem

A. Stakeholders

The most important and most obvious stakeholders within this gig economy problem are the workers themselves, especially youth entering the workforce. Many of these gig workers lack benefits (as a result of their worker status), cannot save up money, and will struggle with retirement. Further, as the independent contracting model is expanding to other sectors, reform of the gig economy must be comprehensive so as to give relief to workers across sectors.

On the other hand, there are the gig platforms themselves, which benefit from labor cost savings through classifying workers as independent contractors. This consolidated industry has shown in the past its ability to lobby heavily against any type of regulation—which is important to keep in mind when bringing reforms.

Some other important stakeholders include the government, whose fiscal impact and policymaking capacity will be vital in this policy discussion. Labor unions will also play an important role through putting collective sectoral pressure.

B. Risks of Indifference

Indifference to gig worker exploitation poses severe economic and social detriments, especially since the nature of gig economy expansion is like a slippery slope.

For our next generation of workers, the youth dependent on these platforms as primary or supplementary income, it is unacceptable that the youth today may not have the same labor benefits that allowed for previous generations to pay off debt, build savings, and achieve economic actualization. Being complacent with the expansion of contractor precarity to an entire generation will have long-term, intergenerational detriments: delayed family formation, reduced homeownership, and diminished retirement security.

Increasingly, gig economy jobs have grown in their share of job growth in the U.S. If this expansion goes unchecked and leaks into other sectors, stable, formal jobs with labor protections and benefits will become a minority, reverting back to a time where precarity and easy exploitation are the norm.[15] Even industries like healthcare may see an increase in nurses or other professionals being placed under contractor status. This slippery slope is not an imaginary notion; in Europe, 60% of Ryanair pilots are classified as the equivalent of an independent contractor, losing out on some potential benefits.[16]

It is also clear that indifference only makes it

harder to solve down the line. Gig corporations will only entrench their political time by the month and year, as seen with their lobbying in Prop 22. Each step resisting the unfair structure, no matter how small, will make it easier to push forward later on. Inaction will perpetuate and expand an economic system where a worker has fewer rights, less earnings, and fewer benefits than a worker only a few decades ago.

C. Nonpartisan Reasoning

This issue of misclassification and exploitation is an issue that affects individuals and stakeholders across the political spectrum:

1) Economic Opportunity
With a large portion of the American working population, especially youth, depending on gig platforms for income. These workers are often earning below minimum wage, even as low as $9-13 after expenses (in Massachusetts).[17] Previous generations entered the workforce into stable jobs with benefits, allowing them to tackle debt, purchase homes, and feasibly plan retirement. This undermines opportunity, becoming an issue beyond the borders of partisanship. Both economic mobility and equitable opportunities are desirable for all Americans.

2) Competition and Predictability
Reforms will help promote competition by preventing companies from gaining an unfair advantage using classification loopholes—ultimately creating better service for customers and treatment for workers. Further, gig platforms face constant legal uncertainty. AB5 passed, but later Prop 22 exempted many workers from it. In the UK, despite reclassification, loopholes around minimum wage were created.[18] This cycle of litigation creates instability for workers, companies, and competitors. Workers will now not remain in a precarious situation, unaware of their rights. Platforms and governments will benefit from consistent rules. The later proposed policies will provide a resolution through policy, instead of constant chaos.

3) Legal Standing:
Regardless of motives or policy opinions, one thing that is certain is that gig platforms cannot credibly claim workers are independent contractors when they control all the parts of their workers' lives: controlling algorithms, mandating branding, and being able to fire at will. Further, their price fixing amongst multiple "independent" contractors, in other words competitors, would suggest horizontal price fixing, meaning that many of these gig platforms have likely been committing antitrust violations. In addition, companies like Uber, which mandate branding on their workers' cars without comprehensive quality control or employment responsibility, may be committing "naked licensing,"[19] meaning that their trademark could potentially be abandoned under §45 of the Lanham Act.[20] As mentioned earlier, Uber's liability in employment tort cases further demonstrates the legal arbitrariness of the business model. The just execution of the

law is not partisan and should be a priority on all parts of the political spectrum.

V. Tried Policy

One of the first wins for gig workers was in 2019, when AB5 from California codified the "ABC test," which presumed that workers are employees unless three factors are proven: 1. The worker is free from company control; 2. the work is outside the company's usual business; 3. the worker has an independent trade or business. As a result, though, the gig company lobby spent an unprecedented amount of money to pass Proposition 22, ultimately exempting many workers from this rule. Further, the aforementioned new DOL rule, though likely being reversed and litigated under a new presidential administration, would make it easier for gig workers to be classified as employees to qualify for the Fair Labor Standards Act (FLSA).[21] In Washington State, drivers are now guaranteed sick/family leave, even without employee status, because of negotiations in the state.[22] Beyond simply gig work, looking at other areas, such as the fast food industry, can give more perspective policy-wise. In California, the state passed legislation to create a sectional bargaining council for fast food workers, allowing them to effectively negotiate wages[23]. Thus proving decentralized industries can collectively bargain for better conditions—notwithstanding litigation over classification.

VI. Policy Options

Federal ABC Test

First and foremost, the obvious solutions to abusive misclassification indeed go back to the ABC test, established in AB5 in California. By amending the FLSA and the National Labor Relations Act of 1935 (NLRA),[24] workers will be presumed employees unless proven otherwise with the 3-pronged test consisting of 1. freedom from control, 2. work outside of usual business, and 3. independent trade on the part of the contractor. This would, in addition to giving workers normal benefits, also protect their right to organize and collectively bargain.[25] The DOL would play a vital role in actually investigating and enforcing these changes in federal law. There is precedent allowing for such regulations, through the Commerce Clause and more. This national standard will reinstate hard-fought protections for workers, create uniformity, and overall create a fairer economy. Another possible, but novel, policy could be making a whole new class altogether. In Canada, a new class of "dependent contractors" allows for flexibility without excluding all benefits.[26] It is worth noting that this is the ideal end goal in federal legislation, but it would definitely face a concerted effort of lobbying and resistance from gig companies.

Federal Prosecution

An easier path without passing any new legislation would be federal prosecution. The antitrust contradictions committed by many gig corporations are clear, with horizontal price fixing the violation of the Sherman Act—in addition to the misclassification.[27] Thus, the FTC, DOL, and DOJ have viable grounds to pursue litigation—putting pressure on contradicting companies. Either they will be forced to admit employment and give benefits to their workers, or they will face hefty antitrust/labor fines and punishments. Further, the threat of litigation and incurring fines can also be used as leverage against

resistance and lobbying from gig companies when passing legislation and reforms.

Sectoral Bargaining and Prohibition

Next, on sectoral bargaining, local governments can pursue this policy that has been successful in the past. Policies allowing gig workers to collectively bargain and even set up a formal council to do so can be very powerful in pushing for change on a grassroots level, and this organizing on a local level can set the stage for more work to be done on the federal level. For example, the California Fast Food Council shows how sectoral bargaining ordinances can be powerful in giving independent contractors a voice to increase wages and benefits.[28] This is politically feasible and can be implemented quickly, granting more rights to independent contractors without the need to establish a nationwide ABC test, though it can help eventually push for a nationwide policy.

Sectoral Prohibition

In addition, in recognizing the contagion effect of this informal work revolution, it is important not to forget to preemptively protect other professions and industries. Especially with licensed workers, it is important to prevent the exacerbation of a convoluted and unfair system. This trend of informal employment growth endangers the years of progress that established stable work. Legislation on all levels of government can be enacted to prohibit licensed professionals like pilots and nurses from being classified as independent contractors. This is especially important with state-licensed workers, as their extensive training justifies employment accountability and protections. Again, any such legislation would be enforced through the DOL and NLRB.

VII. Conclusions

The rapid proliferation of gig platforms across the U.S. economy, in addition to outdated laws, poses a large threat to gig workers as well as the stable work institution as a whole. These platforms misclassify employees to exclude them from benefits while they commit legal violations. With new opportunities opened up by court cases, state policies, and more, this is the moment to enact reform around the gig economy. Policymakers and government agencies need to be bold in their action by prosecuting legal contradictions, promoting collective bargaining, containing the spread of independent contracting, and lastly, codifying classification standards. Precarity does not mean flexibility, and the foundation of fair work must be protected in America so that workers may prosper.

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