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Miriam A. Cherry

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EMPLOYEE STATUS FOR “ESSENTIAL WORKERS”: THE CASE FOR GIG WORKER PARITY

*Miriam A. Cherry**

The continuing misclassification of gig workers as independent contractors has been problematic for over a decade. Several misconceptions have contributed to this marginalization of on-demand workers: technology that often obscures the work that is being performed; the view that platform work is a side hustle; or that platform work exists only for customer convenience or frivolous requests. During the coronavirus pandemic these myths about gig work were turned upside down as on-demand workers were recognized for their efforts and labeled essential workers. With that recognition came newly-awarded benefits, like pandemic unemployment assistance and paid sick leave. As such, the events of the pandemic moved—at least some—gig workers closer to parity with traditional employees, even if temporarily. But the status issue in the law remains, and adds to a problem that I term the “essential worker paradox.” In this Article, I contend that platform workers have proven their value to the workforce and economy, and should be classified as employees.

* Appointed as Professor of Law, St. John’s University School of Law; Current Professor of Law and Associate Dean for Research & Engagement, Co-Director of the William C. Wefel Center for Employment Law, Saint Louis University Law School. Many thanks to the faculty at St. John’s University, Chicago-Kent College of Law, and Saint Louis University Law School, as well as the Wolters Kluwer educational webinar, which all provided the opportunities to receive feedback on this paper. For support and input, thanks to Antonio Aloisi, Janine Berg, Alexander Boni-Saenz, Matthew Bodie, Valerio De Stefano, Michael Duff, Nancy Kim, Marcia McCormick, Elizabeth Pendo, Michael Perino, Michael Oswald, Winnie Poster, Rosemary Salomone, Ana Santos Rutschman, Michael Simons, Sandra Sperino, Liz Tippet, Cheryl Wade, and Ruqaiyah Yearby. Many thanks to research librarian David Kullman and faculty fellows Olivia Dinwiddie, Jacquelyn Silicia, and Alex Beezley for excellent research assistance. Finally, my appreciation to Daniel Overstreet, Michelle Korol, Thomas Murtland, Willie Almack, and the Editors of the *Loyola of Los Angeles Law Review* for their publication assistance.

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I. INTRODUCTION

Throughout the many phases of the coronavirus pandemic, gig workers have been on the frontlines, providing essential services like grocery shopping, transportation, and food delivery. Yet in the spring and summer of 2020, many encountered difficulties because they lacked protective equipment and had neither sick days nor other employee benefits available.¹ Gig workers also found themselves in difficult and oppositional experiences with platform users. For example, a Lyft driver wrote on his blog about the fact that many of the riders refused to wear masks, and were either abusive or resentful when he attempted to enforce Lyft's safety rules.² Some of these passengers were too drunk to drive themselves and did not seem to have the coordination to put on a mask.³ Other passengers had the capacity to follow the rules but wished to ignore them.⁴ Facing these kinds of reactions, at a time when there was no vaccine available, some drivers threw up their hands and gave up on masks because they needed the income so desperately; but as they did so, they knew they were taking risks with their health.⁵

Indeed, that particular gamble sometimes led to tragic results. At the beginning of the pandemic, Uber driver Khaled Zayyid, who used to work almost eighty hours per week on the platform, decided to halt driving because of his pre-existing health conditions.⁶ But as the months went by, and bills began to accumulate, Zayyid returned to driving for Uber.⁷ Zayyid told his family stories about conflicts with riders who refused to wear their masks.⁸ Only a week after returning

1. Nitasha Tiku, *Gig Workers Face the Spread of the New Coronavirus with No Safety Net*, WASH. POST (Mar. 2, 2020), <https://www.washingtonpost.com/technology/2020/02/29/gig-workers-face-spread-new-coronavirus-with-no-safety-net/> [<https://perma.cc/XXU5-ZC6N>].

2. Peter Jakubowicz, *Diary of a Lyft Driver During Covid: 'He Says He's Not Wearing a Mask to Ride in a Car,'* THE GUARDIAN (Nov. 19, 2020, 4:00 AM), <https://www.theguardian.com/lifeandstyle/2020/nov/19/diary-lyft-driver-covid-coronavirus> [<https://perma.cc/DL2U-QTHM>].

3. *Id.* (recounting an instance in which a drunken passenger tried to use a package of cigarettes as a mask and other passengers wore children's masks, not covering their faces and mouths).

4. *Id.*

5. *See id.*; *see also* Kate Conger et al., *Pandemic Erodes Gig Economy Work*, N.Y. TIMES (Apr. 4, 2020) (noting difficulty faced by rideshare drivers due to a lack of tourism and airplane flights), <https://www.nytimes.com/2020/03/18/technology/gig-economy-pandemic.html> [<https://perma.cc/NGM8-EEFG>].

6. Suhauna Hussain, *This Uber Driver Died of COVID-19. Proposition 22 Will Sway His Family's Fate*, L.A. TIMES (Nov. 1, 2020, 5:15 AM), <https://www.latimes.com/business/technology/story/2020-11-01/prop-22-uber-driver-covid-19-death-benefits-workers-comp> [<https://perma.cc/QDZ3-9F2Y>].

7. *Id.*

8. *See id.*

to work, Zayyid tragically fell ill with COVID-19 and died shortly thereafter.⁹ Uber claimed that since Zayyid was an independent contractor, no worker's compensation or death benefits would be available to help his family. Later, activists held a candlelight vigil outside of Uber's San Francisco corporate headquarters to protest the deaths of Khaled Zayyid and other rideshare drivers from COVID-19.¹⁰

During the coronavirus pandemic approximately forty percent of U.S. workers shifted from in-person work to working remotely from home.¹¹ But many "frontline" gig work jobs could not be performed remotely, leading to increased exposure for these workers.¹² Before a vaccine was available, thousands of healthcare workers died.¹³ Grocery store clerks and cashiers found themselves in close contact with

9. *Id.*

10. *Activists Hold Candlelit Vigil Outside Uber HQ for Delivery Drivers Who Died During the Pandemic*, RT WORLD NEWS (Dec. 23, 2020, 2:02 PM), <https://www.rt.com/news/510530-activists-vigil-delivery-drivers-covid/>; see also Dugan Arnett & Nestor Ramos, *31 and Sturdy, Until Coronavirus Hit: Youngest Massachusetts Victim to Date Succumbs*, BOS. GLOBE (Apr. 1, 2020, 5:46 PM), <https://www.bostonglobe.com/2020/04/01/nation/youngest-massachusetts-coronavirus-victim-succumbs-31/> [<https://perma.cc/MGE3-XLMR>] (recounting story of 31-year-old Uber driver who died of COVID-19).

11. May Wong, *Stanford Research Provides a Snapshot of a New Working-from-Home Economy*, STANFORD NEWS (June 29, 2020), <https://news.stanford.edu/2020/06/29/snapshot-new-working-home-economy/> [<https://perma.cc/KQ85-TEW9>] (quoting Stanford economist David Bloom, who estimated over forty-two percent of the country's workers transitioned to remote work during the pandemic).

12. James J. Brudney, *Forsaken Heroes: COVID-19 and Frontline Essential Workers*, 48 *FORDHAM URB. L.J.* 1, 2–3 (2020) (recounting instances of grocery store workers, bus drivers, and meatpacking workers becoming ill from COVID-19).

13. *Lost on the Frontline: Thousands of US Healthcare Workers Have Died Fighting Covid-19. We Count Them and Investigate Why*, THE GUARDIAN (Apr. 8, 2021, 8:59 AM), <https://www.theguardian.com/us-news/ng-interactive/2020/dec/22/lost-on-the-frontline-our-findings-to-date> [<https://perma.cc/L4H8-EK97>] (counting 3,600 deaths from COVID-19 and noting that nurses were especially impacted).

the public, and they too fell ill in high numbers.¹⁴ Cleaners,¹⁵ bus drivers,¹⁶ and nursing home attendants¹⁷ all risked their health to complete their work and serve the public. And workers in the meatpacking industry, forced to share close quarters with each other, saw a high rate of illness, while the Occupational Safety and Health Administration (OSHA) under the Trump administration was largely absent in enforcing workplace safety rules.¹⁸

And being present, in person, was a requirement for many on-demand jobs as well. While some forms of crowdwork are computer based, others require in person task completion. Whether it was grocery shopping for Instacart, delivering food and restaurant meals for DoorDash, or picking up and delivering packages for Shipt, gig workers kept showing up and working hard to make sure that meals, supplies, and groceries got to the people who needed them.¹⁹ In fact, many

14. See, e.g., Brittany Shammass & Hannah Knowles, *A Trader Joe's Employee Called for Stronger Coronavirus Measures. The Company Fired Him*, WASH. POST (Feb. 28, 2021, 5:23 PM), <https://www.washingtonpost.com/business/2021/02/28/trader-joes-fired-employee-coronavirus/> [https://perma.cc/LR76-VJYR]; Russell Redman, *UFCW: Over 11,500 Grocery Workers Affected in First 100 Days of Pandemic*, SUPERMARKET NEWS (June 26, 2020), <https://www.supermarketnews.com/issues-trends/ufcw-over-11500-grocery-workers-affected-first-100-days-pandemic> [https://perma.cc/C36H-WYB7] (reporting that UFCW union reported that 82 grocery store clerks had died from COVID-19).

15. See, e.g., Marianna Brady, *Coronavirus: Are Hospital Cleaners Forgotten Heroes in This Crisis?*, BBC NEWS (Apr. 20, 2020), <https://www.bbc.com/news/world-us-canada-52359101> [https://perma.cc/VA2S-HVZG]; Pat Eaton-Robb, *Cleaners Risk Health to Work During Pandemic, Then Lose Jobs*, AP NEWS (May 1, 2020), <https://apnews.com/article/virus-outbreak-health-us-news-ct-state-wire-new-york-1e42278a213ebc0f9d4c64883f091fa0> [https://perma.cc/5AK4-J4NX].

16. See, e.g., Michael Levenson, *11 Days After Fuming About a Coughing Passenger, a Bus Driver Died from the Coronavirus*, N.Y. TIMES (Apr. 4, 2020), <https://www.nytimes.com/2020/04/04/us/detroit-bus-driver-coronavirus.html> [https://perma.cc/G58U-VGSQ]; Kristen Griffith, *'We Can't Drive a School Bus Virtually': Carroll County Bus Drivers Express Health, Safety Concerns*, CAROLL CNTY. TIMES (Jan. 6, 2021, 5:00 AM), <https://www.baltimoresun.com/maryland/carroll/education/cc-bus-drivers-20210106-mbnvnby5ghf35aag42vq5gcq3m-story.html> [https://perma.cc/BL49-MWAW].

17. See, e.g., Tanya Lewis, *Nursing Home Workers Had One of the Deadliest Jobs of 2020*, SCI. AM. (Feb. 18, 2021), <https://www.scientificamerican.com/article/nursing-home-workers-had-one-of-the-deadliest-jobs-of-2020/> [https://perma.cc/4P9P-VLN8]; Shawn Mulcahy et al., *Caregivers on the Front Lines in Nursing Homes Risk Health, Safety During Pandemic*, WASH. POST (June 29, 2020), <https://www.washingtonpost.com/business/2020/06/29/caregivers-front-lines-nursing-homes-risk-health-safety-during-pandemic/> [https://perma.cc/9WZT-DL25].

18. *Many Say OSHA Not Protecting Workers During COVID-19 Pandemic*, NAT'L PUB. RADIO (July 4, 2020, 7:58 AM), <https://www.npr.org/2020/07/04/887239204/many-say-osha-not-protecting-workers-during-covid-19-pandemic> [https://perma.cc/5AMH-X45M]; see also Emily A. Benfer et al., *Health Justice Strategies to Combat the Pandemic: Eliminating Discrimination, Poverty, and Health Disparities During and After COVID-19*, 19 YALE J. HEALTH POL'Y L. & ETHICS 122, 164 (2020).

19. Michelle Cheng, *How the Pandemic Made Instacart "Essential,"* QUARTZ (June 10, 2021), <https://qz.com/1940943/how-instacart-became-essential-in-the-pandemic/> [https://perma.cc/MZ6L-QU23].

gig platforms were busier than ever and many gig workers were working longer hours than they might typically have worked otherwise.²⁰ Instacart hired over 300,000 workers to handle the increased business that they saw on the platform during 2020.²¹ Rideshare drivers, on the other hand, sometimes struggled.²² Although demand increased because many people were seeking to avoid public transportation,²³ the demand for air travel declined.²⁴ As such, the mainstay of providing rides to and from the airport could no longer be counted on.²⁵ During the pandemic, gig work positions were considered “essential work” under state and federal guidelines, and as such the gig workers were labeled “essential workers.”²⁶

Similar stories have played out around the world, casting gig workers as heroes. Chinese delivery drivers were initially hailed for their role in helping to maintain a quarantine area around Wuhan.²⁷ As

20. Yuliya Chernova, *Gig Worker Balances Big Paydays Against Coronavirus Risks*, WALL ST. J. (Mar. 20, 2020, 11:38 AM), <https://www.wsj.com/articles/gig-worker-balances-big-paydays-against-coronavirus-risks-11584718716> [<https://perma.cc/7A3V-EVHY>].

21. See Alexandra Sternlicht, *Instacart Wants to Hire 300,000 Shoppers to Help Meet Coronavirus Demand*, FORBES (Mar. 23, 2020, 5:57 PM), <https://www.forbes.com/sites/alexandra-sternlicht/2020/03/23/instacart-wants-to-hire-300000-shoppers-to-help-meet-coronavirus-demand/> [<https://perma.cc/6FMP-2UXF>]. During the initial lockdowns of March and April 2020, the pandemic and the highly contagious nature of the coronavirus turned simple, everyday tasks, like grocery shopping, into a difficult ordeal. Rather than worry about exposure and contagion, customers flocked to grocery delivery services, mailed meal plans, and restaurant meal delivery. Restaurants, facing spacing and capacity restrictions on indoor dining, turned to curbside pickup and various delivery services to continue their operations. And in turn, customers turned to on-demand platforms to deliver these pre-made meals and prepared foods. Platforms, including Uber Eats, DoorDash, and Grubhub, faced an increasing demand for their services. Gig shoppers at various other stores saw the need for their services rise and on-demand transactions facilitated many purchases that kept people supplied and the U.S. economy running.

22. See *infra* notes 269, 276, 279 and *supra* note 6.

23. Alejandro De La Garza, *COVID-19 Has Been ‘Apocalyptic’ for Public Transit. Will Congress Offer More Help?*, TIME (July 21, 2020, 5:03 PM), <https://time.com/5869375/public-transit-coronavirus-covid/>.

24. Gina Heeb, *U.S. Air Travel Dropped 60% in 2020 as Covid-19 Hammered Airlines*, FORBES (Feb. 16, 2021, 1:29 PM), <https://www.forbes.com/sites/ginaheeb/2021/02/16/us-air-travel-dropped-60-in-2020-as-covid-19-hammered-airlines/>.

25. Shannon Bond, *How Uber and Its Riders Are Adapting to the New ‘Social,’* NAT’L PUB. RADIO (June 20, 2020, 9:58 AM), <https://www.npr.org/2020/06/10/873499410/how-uber-and-its-riders-are-adapting-to-the-new-social> [<https://perma.cc/46AG-FA3A>].

26. See *infra* Part III; see also Christopher C. Krebs, *Advisory Memorandum on Identification of Essential Critical Infrastructure Workers During COVID-19 Response*, U.S. DEP’T HOMELAND SEC., CYBERSECURITY & INFRASTRUCTURE SEC. AGENCY (Mar. 28, 2020) [hereinafter *Identification of Essential Critical Infrastructure Workers*] (defining essential workers), https://www.cisa.gov/sites/default/files/publications/Version_3.0_CISA_Guidance_on_Essential_Critical_Infrastructure_Workers_1.pdf [<https://perma.cc/BZ8T-YNEH>].

27. Charlie Campbell, *These Delivery Drivers Are Risking Their Health to Keep China Running During the Coronavirus Epidemic*, TIME (Mar. 16, 2020, 12:24 PM), <https://time.com/5803803/china-delivery-driver-ecommerce-covid19/> [<https://perma.cc/FRG5-XLE4>].

the virus spread around the world, however, the gig workers delivering food and necessary supplies began to feel increasingly vulnerable and at risk. French delivery workers on the UberEats platform noted that the company offered additional promotions that may have encouraged multiple trips and risked violating lockdown orders.²⁸ Between those additional risks and a lack of personal protective equipment, some gig delivery drivers in France complained that they were being turned into “cannon fodder.”²⁹ A report by Sydney, Australia’s Centre for Work Health and Safety noted that gig workers were often in serious traffic accidents, feared to report dangerous conditions, and received only limited safety help from the platforms they worked for during the pandemic.³⁰ South Korean delivery and gig workers literally exhausted themselves, with a dozen dying on the job from long hours, a phenomena known as *gwarosa*.³¹ The World Economic Forum reported that over 70 percent of gig workers felt abandoned by their platforms during the pandemic, and felt that the safety measures that were offered to them were inadequate.³² Other gig workers felt the pressure to “work sick”³³ since platforms only paid workers when the task or gig was completed, not a salary that allowed for sick days or other benefits.

28. Francine Aizicovici, “*On est de la Chair à Canon*”: *Les Livreurs de Repas à Domicile Inquiets Face au Coronavirus*, LE MONDE (Mar. 19, 2020, 5:28 PM), https://www.lemonde.fr/economie/article/2020/03/19/coronavirus-on-est-de-la-chair-a-canon-s-insurge-maxime-livreur-a-velo_6033665_3234.html [https://perma.cc/U4T5-JPBV].

29. Elisa Braun et al., *Coronavirus Pandemic Leaves Gig Economy Workers Exposed*, POLITICO (Mar. 19, 2020, 6:00 AM), <https://www.politico.eu/article/coronavirus-pandemic-leaves-gig-economy-workers-exposed/> [https://perma.cc/WYM3-B2LA].

30. Tom Rabe, “*We Have No Protection*”: *Abuse, Dangerous Conditions Beset Sydney’s Gig Economy*, SYDNEY MORNING HERALD (Nov. 10, 2020, 12:00 AM), <https://www.smh.com.au/national/nsw/we-have-no-protection-abuse-dangerous-conditions-beset-sydney-s-gig-economy-2020-1109-p56cxy.html> [https://perma.cc/7JQH-HQ8W].

31. Choe Sang-Hun, *Delivery Workers in South Korea Say They’re Dying of ‘Overwork’*, N.Y. TIMES (Jan. 13, 2021), <https://www.nytimes.com/2020/12/15/world/asia/korea-couriers-dead-overwork.html> [https://perma.cc/BW8B-P2ET] (noting that on-demand couriers have been excluded from the protection of the laws and that businesses and customers demand “bullet speed”); see also Harold Thibault, “*C’est Sans Fin, Je Suis Vraiment Épuisé*”: *En Corée du Sud, des Livreurs Meurent Littéralement de Surmenage*, LE MONDE (Dec. 1, 2020, 10:42 AM), https://www.lemonde.fr/economie/article/2020/12/01/c-est-sans-fin-je-suis-vraiment-epuise-le-surmenage-un-risque-majeur-pour-les-livreurs-sud-coreens_6061716_3234.html.

32. Josephine Moulds, *Gig Workers Among the Hardest Hit by Coronavirus Pandemic*, WORLD ECON. F. (Apr. 21, 2020), <https://www.weforum.org/agenda/2020/04/gig-workers-hardest-hit-coronavirus-pandemic/> [https://perma.cc/7UN7-VXNG].

33. Naomi Ishisaka, *Gig Workers Fall Through the Public Health Safety Net as Coronavirus Spreads in Washington*, SEATTLE TIMES (Mar. 9, 2020, 8:28 PM), <https://www.seattletimes.com/seattle-news/gig-workers-fall-through-the-public-health-safety-net-as-covid-19-spreads/> [https://perma.cc/5H52-FW8L].

These events illustrate what I term the “essential worker paradox.” On the one hand, the labor of gig workers had been recognized as being of critical importance during the pandemic. On the other hand, gig workers have been treated by the law as outside the bounds of employment protection. Due to the nuances of the law surrounding employment classification, gig workers have been kept from employment status and its protections, including minimum wage, the right to join a union, and basic statutory benefits.³⁴ The misclassification issues trace back to the nature and design of computer-intermediated work and how it has not been recognized as true employment.³⁵

The stark difference in treatment between gig workers and regular employees was certainly unfair before the pandemic, but in light of gig workers’ sacrifices during the coronavirus pandemic, that differential treatment now is indefensible. Indeed, with so many full-time employees using apps and computer platforms to help them accomplish their work remotely, the distinctions and categories make even less sense than they did before. Indeed, for the last decade, in jurisdictions around the world, gig workers have been suing to claim employee status.³⁶ Paid by the task, and managed by algorithms that can automatically deactivate an account, gig employment is amongst the most precarious types of work in the U.S. economy.³⁷ With no job security, and in fact automatic deactivation from many apps, no rights under employment law, and a lack of benefits, gig workers have long been marginalized by the view that their work exists only for the sake of convenience, that it is a side-hustle, or that it is invisible.³⁸

But the meal delivery driver, the on-demand grocery shopper, and the on-demand package deliverer are not on the margins anymore—

34. Miriam A. Cherry, *Beyond Misclassification: The Digital Transformation of Work*, 37 COMPAR. LAB. L. & POL’Y J. 577, 581, 585 (2016).

35. Juan Carlos Alvarez de la Vega et al., *The Gig Economy in Times of COVID-19: Designing for Gig Workers’ Needs*, MICROSOFT RSCH. SYMP. ON THE NEW FUTURE OF WORK (2020), <https://www.microsoft.com/en-us/research/uploads/prod/2020/07/NFW-Alvarez-de-la-Vega-et-al.pdf> [<https://perma.cc/3MJK-BSTX>] (noting that the issue may be one of app and computer design, but that programmers should also be designing software not just for companies or customers, but also to look out for the interests of gig workers).

36. See, e.g., Cherry, *supra* note 34, at 586–92 (detailing lawsuits by gig economy workers over the issue of misclassification).

37. V.B. Dubal, *The Drive to Precarity: A Political History of Work, Regulation, & Labor Advocacy in San Francisco’s Taxi & Uber Economies*, 38 BERKELEY J. EMP. & LAB. L. 73, 75, 78 (2017).

38. See Pete Robertson, *How the Gig Economy Creates Job Insecurity*, BBC (Sept. 18, 2017), <https://www.bbc.com/worklife/article/20170918-how-the-gig-economy-creates-job-insecurity> [<https://perma.cc/662J-R3NV>].

the services they have provided have become essential to people's lives.³⁹ There seems to have been an accompanying shift in how these tasks are viewed along with the risks that gig workers have taken, which has come with very specific benefits, like pandemic unemployment assistance and sick days, which were not available to gig workers before.⁴⁰ As such, the events of the pandemic moved—at least some—gig workers closer to parity with traditional employees. Such a move toward parity with employees is long overdue. This Article will argue that because of their heroic efforts during the pandemic, we should resolve the essential worker paradox in favor of gig workers' employee status. There is no longer any principled distinction that can be drawn between these hard-working gig workers and other employees.

This Article proceeds in five parts, following this Introduction. Part II will examine some of the misconceptions around gig work that have held back the campaign to be recognized as employees. Then, Part III will discuss the changing legal landscape that gig workers have faced in attaining employee status. Primarily, this part focuses on the November 3, 2020, Proposition 22 vote in California and the setback it represented for gig workers, although recent events may blunt its force. Then, Part IV examines the role of gig workers as essential workers in the pandemic. Finally, Part V and the Conclusion set forth the case for gig workers to attain parity with employees. Gig workers have risked their health and worked hard to keep their communities safe during the pandemic. As such, they have earned the same basic rights and protections as employees. But first, it is important to see how and why this predicament developed.

II. GIG WORKERS: A STUDY IN PRECARIETY

Apart from their legal status, gig workers have long struggled with misconceptions about the importance and seriousness of the work they perform. Social and popular perceptions of gig work are important because the law in this area is still developing. In the past few years, the on-demand economy has grown rapidly, and according to one 2017 study there were over 57 million gig workers in the U.S. before the pandemic happened.⁴¹ According to an Edison poll, African

39. See *Identification of Essential Critical Infrastructure Workers*, *supra* note 26.

40. See *infra* Section IV.B.

41. TJ McCue, *57 Million U.S. Workers Are Part of the Gig Economy*, FORBES (Aug. 31, 2018, 6:30 PM), <https://www.forbes.com/sites/tjmccue/2018/08/31/57-million-u-s-workers-are-part-of-the-gig-economy> [<https://perma.cc/MVW7-9XJM>]; see also *Helping the Gig Economy*

American and Latinx adults are overrepresented among those working in the gig economy.⁴² Some indicators show that high unemployment rates during the pandemic have caused some laid-off workers to turn to gig work as a stop-gap.⁴³ Aside from the delivery and shopping services mentioned in the Introduction, gig work also includes remote tasks that are performed through a computer platform. These services have seen incredible growth during the pandemic as well. For example, Fiverr, an online work platform that specializes in graphics, design, and computer programming, saw new U.S. freelance registrations rise 48 percent in 2020 from the previous year.⁴⁴ And international crowdwork platform Upwork reported a 24 percent increase in signups during the summer of 2020.⁴⁵ Gig work functions as a bellwether for the economy more generally.

Meanwhile, courts, administrative law judges, policymakers, voters, and gig companies themselves are all grappling with the question of whether gig workers are employees or independent contractors.⁴⁶ Some of the misunderstandings about gig work had their inception at the very beginning of the 2010s, when digital platforms largely adopted the umbrella term of the “sharing” economy. As the author has written in another publication, the terminology of “sharing” has

Work Better for Gig Workers, INT’L LAB. ORG., <https://perma.cc/UDQ3-5DXF> (referencing 2017 report that 55 million people in the U.S. are gig workers). **Error! Hyperlink reference not valid.** *But see* Elisabeth Buchwald, *The Government Has No Idea How Many Gig Workers There Are, and That’s A Problem*, MARKETWATCH (Jan. 7, 2019, 3:51 PM), <https://www.marketwatch.com/story/the-government-has-no-idea-how-many-gig-workers-there-are-heres-why-thats-a-problem-2018-07-18> [<https://perma.cc/BZH9-Y3F3>].

42. *The Gig Economy*, MARKETPLACE-EDISON RSCH. POLL 4 (Dec. 2018), <http://www.edisonresearch.com/wp-content/uploads/2019/01/Gig-Economy-2018-Marketplace-Edison-Research-Poll-FINAL.pdf> [<https://perma.cc/5VTX-WA5R>].

43. *See* Matthew Lavietes & Michael McCoy, *Waiting for Work: Pandemic Leaves U.S. Gig Workers Clamoring for Jobs*, REUTERS (Oct. 19, 2020, 4:11 AM), <https://www.reuters.com/article/us-biggerpicture-health-coronavirus-gigw/waiting-for-work-pandemic-leaves-us-gig-workers-clamoring-for-jobs-idUSKBN2741DM> [<https://perma.cc/X8PZ-4DEA>]; *see also* Jeanna Smialek et al., *Workers Face Permanent Job Losses as the Virus Persists*, N.Y. TIMES (Oct. 3, 2020), <https://www.nytimes.com/2020/10/03/business/economy/coronavirus-permanent-job-losses.html> [<https://perma.cc/HPT9-7KXY>] (noting concerns about structural unemployment).

44. Kim Mackrael, *In the Covid Economy, Laid-Off Employees Become New Entrepreneurs*, WALL ST. J. (Nov. 18, 2020, 11:22 AM), <https://www.wsj.com/articles/in-the-covid-economy-laid-off-employees-become-new-entrepreneurs-11605716565> [<https://perma.cc/ATZ5-MB6A>].

45. Alana Akhtar, *The Pandemic Could Be Turning the Gig Economy White-Collar, if This Summer’s New Freelancers Are Any Indication*, BUS. INSIDER FR. (Sept. 24, 2020, 12:56 PM), <https://www.businessinsider.fr/us/upwork-pandemic-gig-economy-white-collar-high-skilled-summer-freelancers2020-9> [<https://perma.cc/6ZNB-XEH8>].

46. *See* Alana Semuels, *What Happens When Gig-Economy Workers Become Employees*, THE ATLANTIC (Sept. 14, 2018), <https://www.theatlantic.com/technology/archive/2018/09/gig-economy-independent-contractors/570307/> [<https://perma.cc/T3TT-HBHH>].

largely been a misnomer, as almost all gig work is paid work, and remuneration is expected.⁴⁷ However, for many years the rhetoric of the sharing economy provided a halo effect for platforms even while these platforms were engaged in problematic labor practices.⁴⁸ This part of the Article notes several of the most prominent mistaken beliefs that have circulated on the subject of gig work during the past decade.

First, these misperceptions include the view that gig work is only a “side hustle”—a way to make quick, extra money on top of, or in addition to, a regular job. This view implies that employee rights and benefits are unnecessary, because they will be supplied by the worker’s fulltime job. A second misconception is that gig work is only for frivolous or unnecessary conveniences, perhaps made by high-maintenance or demanding customers. The workers participating in such frivolous endeavors may not even be formally called workers, and instead platforms give them cutesy nicknames or titles. Lastly, gig workers also are engaged in a form of invisible labor, where their work is hidden by the interface of the platform.⁴⁹ Computer crowdworkers may even have their work attributed to efficient websites or artificial intelligence, with the actual people doing the work erased from the customer’s consciousness.

These distorted views of gig work have in the past served to marginalize gig workers, contributing to a narrative that the benefits and protections of employee status are unnecessary. Alternately, these views may also lead to the belief that these benefits have not been truly earned because of the perception that the work gig workers perform is

47. Miriam A. Cherry, *Corporate Social Responsibility and Crowdfunding in the Gig Economy*, 63 ST. LOUIS U. L.J. 1, 4 (2018); see also Ryan Calo & Alex Rosenblat, *The Taking Economy: Uber, Information, and Power*, 117 COLUM. L. REV. 1623, 1625 (2017) (“Sharing economy rhetoric tends to lump together small enterprises motivated by a common social bond, such as local food and housing cooperatives, with billion-dollar global businesses like Uber and Airbnb that readily integrate the language of sharing and connectivity into their branding. . . . We, however, draw a distinction between the variety of businesses that the rhetoric of the sharing economy evokes, like selling grandma’s pies on the corner, and the billion-dollar companies that operate for profit at a global scale.”); Erez Aloni, *Pluralizing the “Sharing” Economy*, 91 WASH. L. REV. 1397, 1406–08 (2016) (identifying “sharing” and similar designations as misnomers, which have been recognized as disguising conventional activities to treat employees unfairly); Abbey Stemler, *The Myth of the Sharing Economy and Its Implications for Regulating Innovation*, 67 EMORY L.J. 197, 199 (2017) (noting that sharing economy companies “convince communities, regulators, and courts that they are facilitating altruistic activities that utilize excess capacity, support job growth, and alter how we consume. This Myth helps these Platforms avoid everything from employment laws . . . to liability for consumer harm” (footnote omitted)).

48. See PHIL ROSENZWEIG, *THE HALO EFFECT* (2007).

49. See INVISIBLE LABOR: HIDDEN WORK IN THE CONTEMPORARY WORLD (Marion G. Crain, Winifred R. Poster, & Miriam A. Cherry eds., 2016).

trivial or only for convenience. The next few sections explore the issue further, but all of these views have been challenged by the realities of gig work during the coronavirus pandemic.

A. Gig Work as “Side Hustle”

For years, gig economy workers have had their lack of rights taken less seriously in part because their work has often been viewed as a mere “side hustle.” The term “side hustle” is commonly used to describe work in the gig economy, referring to a source of extra income earned in a worker’s spare time that supplements the regular income from a full-time job.⁵⁰ The term might not be all bad; it has a certain edginess to it. As comedian Bill Maher jokingly put it, “[a] side hustle sounds kind of cool, like you’re a private eye”⁵¹ But the term “side hustle” also has some important implications for workers in the gig economy: if gig work consists of a few hours of moonlighting to supplement full-time work, then there is no need for employee benefits or minimum standards around that work. In fact, further regulations might be burdensome, and even unwelcome.

While the term “side hustle” seemed to appear alongside the emergence of gig work in the 2010s, the term itself actually has a surprisingly long history. The term “hustle” on its own seems to have come into common usage during the 1920s to mean a scam, and “hustlers” became synonymous with the con men or grifters who ran the scam.⁵² After World War II, “hustle” morphed from a description of fraud to become more of a description of work, or even a type of fast-paced work.⁵³ African American newspapers kept the term alive, and

50. *Ultimate Guide to Earning Extra Income in the Gig Economy*, MONEY MGMT. INT’L, <https://www.moneymanagement.org/budget-guides/earn-extra-income> [https://perma.cc/Y5MF-7G7S]; see also CHRIS GUILLEBEAU, *SIDE HUSTLE: FROM IDEA TO INCOME IN 27 DAYS* (2017) (guiding readers on how to make extra money by launching a side hustle quickly).

51. Real Time with Bill Maher, *New Rule: Not in It Together*, YOUTUBE (Feb. 12, 2021), <https://youtu.be/Hem8RG0tsUw> [https://perma.cc/4FL8-7TTL] (noting that despite the coolness of the term, in fact a side hustle is more like driving for Uber and also making seashell jewelry, suggesting both careers lack career development or advancement).

52. *The Origins of ‘Side-Hustle,’* MERRIAM-WEBSTER, <https://www.merriam-webster.com/words-at-play/words-were-watching-side-hustle> [https://perma.cc/ZP7B-U7SY].

53. William Glass, “Hustle”: *What It Means and Why We Use It*, MEDIUM (Mar. 9, 2017), <https://medium.com/@williamglass/hustle-what-it-means-and-why-we-use-it-b07a94928bca> [https://perma.cc/9TTW-MVP4] (noting that both Al Capone and Mark Zuckerberg could be hustlers, and that hustle “is how con-artists create schemes that take advantage of good people. It’s how people get jobs they have no business getting. It’s how terrible products still sell. But hustle is also how humans survive in a world where lots of things eat humans to get by. It is how we do all the best things we do. Hustle means that bad circumstances and a bad start don’t have to determine what becomes of you.”).

used the term “hustle” to mean serious effort at work.⁵⁴ In modern parlance, a “side hustle” meaning a sideline or profitable type of work undertaken in addition to a regular, 9-to-5 job, has become commonly-used once again, often in connection with flexible platform work.⁵⁵

However, the term “side hustle” is mostly inaccurate when looking at the realities of how much time gig workers spend working on platforms. While statistics about work in the gig economy are often difficult to come by because the information is considered proprietary by gig platforms, some recent surveys shed light on the subject. A 2014 study sponsored by Uber found that 1/3 of their drivers worked for Uber on a full-time basis.⁵⁶ Roughly another 1/3 worked part-time for another platform or part-time job, with a final 1/3 driving for Uber on top of a full-time job.⁵⁷ For at least 2/3 of Uber drivers surveyed, ridesharing work was not a side-hustle, but either their main source of income or a major source of income.⁵⁸ As another data point, a 2018 study by Statista found that only 4 percent of gig workers are working less than ten hours per week.⁵⁹ The majority of gig workers, 54 percent, worked from eleven to thirty hours per week, a fairly substantial part-time job.⁶⁰ Finally, 38 percent of the gig workers surveyed worked between thirty-one and sixty hours on platforms, with another 3 percent working more than sixty hours per week.⁶¹ The United Nations International Labor Office’s study of crowdworkers showed that nearly 40 percent of those surveyed treated crowdwork as their main

54. Isabella Rosario, *When the ‘Hustle’ Isn’t Enough*, NAT’L PUB. RADIO (Apr. 3, 2020, 11:00 AM), <https://www.npr.org/sections/codeswitch/2020/04/03/826015780/when-the-hustle-isnt-enough> [<https://perma.cc/6V2A-M8KP>].

55. Kristen Barker, *Do You Use the Term “Side Hustle?” (Results from Our Investigation)*, INST. FOR WOMEN’S ENTREPRENEURSHIP AT CORNELL (Aug. 5, 2019), <https://perma.cc/6FNB-L7GP>. *But see* Joey Montano, *Stop Misidentifying the Meaning of “Side Hustle,”* MEDIUM (Nov. 15, 2018), https://medium.com/@joey_montano/stop-misidentify-the-meaning-of-side-hustle-153faf496036 [<https://perma.cc/7SQF-G4WK>] (asking probing and difficult questions like “is it a ‘side hustle’ when you work 3 part-time jobs that still require you to live paycheck to paycheck?”).

56. Jonathan V. Hall & Alan B. Krueger, *An Analysis of the Labor Market for Uber’s Driver-Partners in the United States* 10 (Nat’l Bureau of Econ. Rsch., Working Paper No. 22843, 2016), https://www.nber.org/system/files/working_papers/w22843/w22843.pdf [<https://perma.cc/Q66W-GYUT>].

57. *Id.*

58. *Id.*

59. *Total Number of Hours Worked Per Week by Gig Economy Workers in the U.S. in 2018*, STATISTA (Jan. 20, 2021), <https://www-statista-com.ezp.slu.edu/statistics/916508/gig-economy-tot-al-number-hours-worked-per-week/>.

60. *Id.*

61. *Id.*

source of income, and less than 15 percent said that they worked due to boredom or a lack of anything else to do.⁶²

These statistics mean that the story of the “side hustle” fails to take into account the situation of gig workers who are working for on-demand platforms on either a robust part-time or what even may resemble a full-time basis. As an example, a mother-of-four who worked on many leading gig platforms used gig platforms as her main source of income since 2014.⁶³ She remarked that during the pandemic, she was especially concerned about her ratings on the Instacart platform: “When you’re taking away from my ratings, you’re taking away from my ability to make bills, my ability to buy groceries, my ability to clothe my children because this isn’t just a gig for me, this is how I make it.”⁶⁴ For a significant share of gig workers, platform work is their equivalent of a full-time job.

And during the pandemic, with unemployment rates reaching as high as 14.7 percent during the Spring of 2020,⁶⁵ laid-off or furloughed employees turned to gig work more-or-less full time in order to make ends meet.⁶⁶ The influx onto gig platforms was similar to past recessions. For example, during the early part of the 2010s new gig platforms saw sign-ups surging based on desperate job seekers who were recovering from the fallout from the 2008 financial crisis and the ensuing recession.⁶⁷ And even during smaller economic downturns, such as government shut-downs or temporary furloughs, gig platforms

62. Janine Berg, *Income Security in the On-Demand Economy: Findings and Policy Lessons from a Survey of Crowdworkers*, 37 COMPAR. LAB. L. & POL’Y J. 543, 566 (2016).

63. Lavietes & McCoy, *supra* note 43.

64. *Id.*

65. Heather Long & Andrew Van Dam, *U.S. Unemployment Rate Soars to 14.7 Percent, the Worst Since the Depression Era*, WASH. POST (May 8, 2020), <https://www.washingtonpost.com/business/2020/05/08/april-2020-jobs-report/> [https://perma.cc/FLC5-BCB4]. Summer 2020 also saw high unemployment. U.S. Bureau of Labor Statistics, U.S. Dep’t of Labor, *Unemployment Rate 16.1 Percent in Massachusetts, 4.5 Percent in Utah, in July 2020*, ECON. DAILY (Aug. 27, 2020), <https://www.bls.gov/opub/ted/2020/unemployment-rate-16-point-1-percent-in-massachusetts-4-point-5-percent-in-utah-in-july-2020.htm> [https://perma.cc/UZE3-RVTG] (noting overall unemployment rate of 10.2 percent nationwide).

66. *Gig Workers Face Shifting Roles, Competition in Pandemic*, VOA (July 6, 2020, 9:05 PM), <https://www.voanews.com/covid-19-pandemic/gig-workers-face-shifting-roles-competition-pandemic> [https://perma.cc/FM3K-MB44]; Lavietes & McCoy, *supra* note 43.

67. See Joshua Brustein, *The Gig Economy Was Built to Thrive in a Downturn—Just Not This One*, BLOOMBERG, (May 6, 2020, 3:45 AM), <https://www.bloomberg.com/news/newsletters/2020-05-06/the-gig-economy-was-built-to-thrive-in-a-downturn-just-not-this-one> [https://perma.cc/9GY4-L67Y].

would see an influx of new workers joining them.⁶⁸ For many, even those who do have a full-time job, a side hustle is required because of stagnating wages in full-time employment and rising expenses and inflation, including a sharp spike in housing costs.⁶⁹

One major implication of gig work as a “side hustle” is that if gig work is something that people only engage in occasionally when they are in need of extra income, that implies that employment regulation is not needed. Not only would those regulations be unnecessary, but perhaps they would even be unwanted or burdensome. As labor economist Janine Berg has said about online computer crowdwork:

Crowdwork shares many similarities with other forms of nonstandard employment such as temporary work, part-time work, or temporary agency work. In addition to the casual and unstable nature of the work, crowdwork as well as other work in the “on-demand economy,” is often portrayed as additional income for secondary earners, and thus, *not real work*. This discourse has existed for decades in debates on pay and regulation of nonstandard employment. For example, opponents of the U.S. minimum wage have often argued (incorrectly) that minimum wage earners are predominantly teenagers working part-time, retail jobs, and thus there is no need to increase their pay as they are working for pocket money. Or stated differently, that the job may be precarious, but the worker is not.⁷⁰

Similar stories have been told in the past about women’s participation in the labor force, as a type of justification for keeping women’s wages below the wages of men. During the Industrial Revolution, women who worked in factories were routinely paid less than men who did the same or similar work.⁷¹ Factory owners during this time justified lower wages for women because women were assumed to

68. Jory Heckman, *Furloughed with Nowhere to Go, Feds Give ‘Gig Economy’ a Shot*, FED. NEWS NETWORK (Jan. 18, 2019, 9:33 AM), <https://federalnewsnetwork.com/government-shutdown/2019/01/furloughed-with-nowhere-to-go-feds-give-gig-economy-a-shot/> [<https://perma.cc/L4QR-C6AF>] (describing government shutdown and one furloughed employee’s efforts to work in the gig economy).

69. Alissa Quart, *The Con of the Side Hustle*, N.Y. TIMES (Apr. 6, 2019), <https://www.nytimes.com/2019/04/06/opinion/sunday/tax-day-side-hustle.html> [<https://perma.cc/LVU6-6XCP>].

70. Berg, *supra* note 62, at 565 (emphasis added).

71. JOYCE BURNETTE, GENDER, WORK AND WAGES IN INDUSTRIAL REVOLUTION BRITAIN (2008) (examining wage differentials).

have claims on the earnings of male relatives, whether fathers, brothers, or husbands.⁷² As such, it was viewed that women were only working for themselves; they had no other relatives to support. Therefore lower wages were justified because supposedly women would spend their wages, or “pin money,” on vanity purchases or frivolities.⁷³ This rhetoric made a return during the 1950s and 1960s, as temporary agencies promoted the view that their female workers were largely housewives looking for work as a stimulating amusement.⁷⁴ One executive of a temporary agency described their average worker as someone who did not “want full-time work, but she’s bored with strictly keeping house. Or maybe she just wants to take a job until she pays for a davenport or a new fur coat.”⁷⁵ If the money paid was not necessary for making a living, then maybe it was no surprise that the remuneration offered for such positions was low.

Returning to side hustles, we can see that this terminology is not actually an accurate description for the majority of gig workers who are spending more than ten hours a week on platforms, and the almost one-fifth whose work on platforms approaches full-time work.⁷⁶ The question of whether gig workers actually “need” the wages or whether they are merely working for “extra money,” has been again re-animated in the examination of gig work in a way that is actually harmful in ensuring minimum legal standards for the majority of workers on the platform. In addition to this minimization of the work, another misconception that has been problematic for gig workers is the idea that the work that they do on platforms is only for the sake of convenience.

B. Casual Workers

Another misconception generally shared about gig work is that gig workers are engaged in frivolous or casual work undertaken only for customer convenience. Platforms themselves fostered this view in the early 2010s as they sought to attract customers to use their various

72. See Janice Traflet, *Gendered Dollars: Pin Money, Mad Money, and Changing Notions of a Woman's Proper Place*, 26 *ESSAYS ECON. & BUS. HIST.* 189, 192 (2008).

73. See *id.* There are conflicting descriptions of the term “pin money.” Some use the term to refer to a small amount of money that is spent on wanted, but non-essential, items. Others have used the term to refer to the household allowance that a male breadwinner might provide to a non-working spouse or female family member to use as discretionary spending.

74. ERIN HATTON, *THE TEMP ECONOMY: FROM KELLY GIRLS TO PERMATEMPs IN POSTWAR AMERICA* 38–43 (2011).

75. *Id.* at 38.

76. *Total Number of Hours Worked Per Week by Gig Economy Workers in the U.S. in 2018*, *supra* note 59.

websites and apps.⁷⁷ As a selling point to induce new customers to sign up and use their services, many platforms promoted the speed and ease with which on-demand platforms could fulfill the customer's every whim.⁷⁸ Further, no task was too small, niche, or frivolous to fulfill; in fact, platforms allowed for the monetization of many smaller tasks that in the past would likely not have resulted in paid work.⁷⁹ Whether that need was for an electrified scooter at every corner, or an umbrella rental for as long as a rainstorm lasted, where a possible demand surfaced, an on-demand platform seemed to spring up to cater to that demand.⁸⁰

Platforms validated even seemingly frivolous customer requests for assistance. In fact, TaskRabbit founder Leah Busque would speak at events, noting that the idea to start the company came to her because there was no time to replenish the supply of dog food, just at the precise moment that she and her husband were about to take a taxi to meet friends for dinner.⁸¹ Worried that stores would be closed by the time the social obligation had ended, Busque and her husband wished that they could have paid for last-minute help from someone who could pick up more dog food while they dined.⁸² Other examples used in the early days of platforms included services in San Francisco that offered to pick up the customer's car and drive it to a parking spot, then deliver the car to whatever destination the customer wanted it at the end of the evening.⁸³ And, of course, no discussion of on-demand services would

77. See, e.g., *Unveiling the New TaskRabbit*, The Hutch (June 17, 2014), <https://blog.taskrabbit.com/unveiling-the-new-taskrabbit> [<https://perma.cc/BZP3-TSDS>] (describing website and mobile application features that “make it easier than ever to live smarter by relying on TaskRabbit as your trusted source for home services”).

78. See, e.g., *The History of Uber*, UBER, <https://www.uber.com/newsroom/history/> [<https://perma.cc/BS75-HUT8>].

79. Miriam A. Cherry, *Cyber Commodification*, 72 MD. L. REV. 381, 385–86 (2013).

80. Lindsay Maizland, *A Chinese Company Tried Making Umbrella-sharing a Thing. It Didn't Go Well*, VOX (July 11, 2017, 4:20 PM), <https://www.vox.com/world/2017/7/11/15952886/china-umbrella-sharing-fail> [<https://perma.cc/668V-UWR4>]; Alissa Walker, *Everything You Need to Know About Scooters, Bike Share, Dockless Bikes in Los Angeles*, CURBED L.A. (May 24, 2019, 2:10 PM), <https://la.curbed.com/2018/7/31/17623336/bird-lime-scooter-bike-app-locations-cost-hours> [<https://perma.cc/3DYB-7QST>].

81. See, e.g., Layne Winn, *TaskRabbit Founder on the Pressure Entrepreneurs Face to Succeed*, ABC NEWS (Dec. 13, 2019, 8:09 AM), <https://abcnews.go.com/Business/taskrabbit-founder-pressure-entrepreneurs-face-succeed/story?id=67707440> [<https://perma.cc/T4PT-YMKP>].

82. Neil Koenig, *Leah Busque: How Taskrabbit Grew by Leaps and Bounds*, BBC NEWS (Oct. 25, 2013), <https://www.bbc.com/news/business-24641936> [<https://perma.cc/R3PL-R5MJ>].

83. Michael Finney, *New Valet Apps Take Away Stress of Parking in San Francisco*, ABC7 NEWS (Feb. 18, 2015), <https://abc7news.com/san-francisco-parking-valet-apps/524008/> [<https://perma.cc/NN2F-SQP6>].

be complete without mention of paying someone else to stand in a line for them⁸⁴ or paying another for the delivery of luxury coffee drinks.⁸⁵

Further complicating the matter, some platforms have used or continue to use alternate terms to refer to the process of work, and even to the workers themselves. For example, rather than being hired and going through an employee orientation, workers on these platforms go through a similar process, yet it is called “onboarding.”⁸⁶ In the crowdwork context, onboarding presumably involves establishing an online account, some amount of learning about the company, having questions answered, and then being set up to work. The use of the term “onboarding,” however, evades the word “hiring,” which appears in many statutes in relation to labor rights.

Similarly, an employee who was not performing well might be given feedback, recommendations for improvement, or referred to progressive discipline, then ultimately fired if not performing the quantity and quality of work expected. However, workers in the gig economy are not fired, rather, they are “deactivated.”⁸⁷ This impersonal terminology conceals a destructive truth: deactivation is potentially worse than being fired. A gig worker only discovers their deactivation when they log into the app and find that their account is erased and they are banned from returning to the platform.⁸⁸ This may also include erasure of data or information built up around the worker’s

84. Kathleen Elkins, *People Are Paying Up to \$1,500 for Someone Else to Take Their Place in Line*, BUS. INSIDER (Oct. 25, 2015, 9:30 AM), <https://www.businessinsider.com/professional-line-sitters-2015-10> [<https://perma.cc/GH7U-N2TA>].

85. Gloria Dawson, *Why Coffee Delivery Is the Future of On-Demand Ordering*, EATER (Jan. 14, 2016, 12:00 PM), <https://www.eater.com/2016/1/14/10758072/starbucks-delivery-dunkin-donuts-office> [<https://perma.cc/48DF-TVNT>].

86. *Will You Pass the Uber Background Check?*, RIDESHARING DRIVER (July 15, 2020), <https://perma.cc/3U8B-7HXZ> (informing Uber drivers of details surrounding the background checks they must complete before “onboarding”).

87. See Sydney Brownstone, *Seattle Lyft Driver Wants to Know Why She Was Deactivated After Attending a Teamsters Organizing Meeting*, THE STRANGER (Nov. 19, 2015, 11:47 AM), <https://www.thestranger.com/blogs/slog/2015/11/19/23163805/seattle-lyft-driver-wants-to-know-why-she-was-deactivated-after-attending-a-teamsters-organizing-meeting> [<https://perma.cc/8M9E-VHYW>] (detailing “deactivation” of Lyft driver who organized meeting for drivers at union office).

88. *Fired from Uber: Why Drivers Get Deactivated, & How to Get Reactivated*, RIDESHARING DRIVER, <https://www.ridesharingdriver.com/fired-uber-drivers-get-deactivated-and-reactivated/> [<https://perma.cc/9C9H-39M3>] (last updated Oct. 6, 2021) (stating that Uber rarely actually states “you’re fired,” but rather says things like “Your account needs attention” or “Your account has been placed on hold”); Carolyn Said, *Uber, Lyft Drivers Fear Getting Booted from Work*, S.F. CHRON. (Oct. 14, 2018, 12:39 PM), <https://www.sfchronicle.com/business/article/Uber-Lyft-drivers-fear-getting-booted-from-work-13304052.php> [<https://perma.cc/F9X7-MBPT>] (describing instances of workers discovering that their accounts had been deactivated).

account. The platform is under no requirement to give a reason for deactivation, with no appeal or recourse on the part of the worker.⁸⁹ Further, deactivation can be an automatic response to user ratings falling below a number, as a result of algorithmic management.⁹⁰ In fact, many of the initial gig economy settlement negotiations around rideshare requested the right to “grieve” an automatic deactivation to an arbitrator.⁹¹

In any event, this use of alternate language for employment terms is far from an accident. In fact, a leaked document from European food delivery app Deliveroo exposed these linguistic manipulations for what they clearly were—attempts to cover up or disguise the existence of an employment relationship. The leaked Deliveroo document provided synonyms for many of the terms that exist for employees and directed its managers to use those other terms. For example, instead of hiring riders at a recruiting center, personnel is engaged in onboarding at a “supply center.”⁹² Rather than refer to shifts, supervisors refer to riders’ availability, and “log ins” rather than clocking in.⁹³ Riders are supposed to talk about their “kit” or “equipment” rather than uniforms, and “invoices” rather than pay slips.⁹⁴ While inventing this alternate terminology is certainly creative, the lengths that some platforms will go to in order not to call their workers “employees” is even more incredible.

Platforms have referred to their workers in doublespeak, dubbing them “Ninjas,” “Turkers,” “Rabbits,” “Taskers,” “Roos,” “Partners,” and even somewhat pathetically, “Friends.”⁹⁵ It is true that some of

89. Said, *supra* note 88.

90. Deepa Das Acevedo, *Invisible Bosses for Invisible Workers, or Why the Sharing Economy Is Actually Minimally Disruptive*, 2017 U. CHI. LEGAL F. 35, 42.

91. The practice of deactivation has encountered significant enough issues that it has become part of the settlement negotiations in the Uber and Lyft litigations. *Cotter v. Lyft, Inc.*, 176 F. Supp. 3d 930, 934 (N.D. Cal. 2016); *O’Connor v. Uber Techs., Inc.*, 201 F. Supp. 3d 1110, 1117–19 (N.D. Cal. 2016). Under the terms of these settlement agreements, drivers would have the ability to be heard by a labor arbitrator before being disconnected. *Cotter*, 176 F. Supp. 3d at 934; *O’Connor*, 201 F. Supp. 3d at 1117–19.

92. Sarah Butler, *Deliveroo Accused of ‘Creating Vocabulary’ to Avoid Calling Couriers Employees*, THE GUARDIAN (Apr. 5, 2017, 1:00 PM), <https://www.theguardian.com/business/2017/apr/05/deliveroo-couriers-employees-managers> [<https://perma.cc/8F49-SYYU>].

93. *Id.*

94. *Id.*

95. BITE NINJA, <https://biteninja.com> [<https://perma.cc/4MFZ-GUNK>]; AMAZON MECHANICAL TURK, <https://www.mturk.com> [<https://perma.cc/QC72-M6F2>]; *Earn Money Your Way*, TASKRABBIT, <https://www.taskrabbit.com/become-a-tasker> [<https://perma.cc/6VLZ-QNJY>]; DELIVEROO, <https://deliveroo.co.uk> (last visited Feb. 6, 2022); *Become a Partner-Driver? All Uber Benefits at a Glance*, UBER, <https://www.uber.com/en-NL/blog/become-a-partner-driver-all-uber>

the terms platforms use, like “Ninjas,” are deferential and respectful of someone’s expertise. Yet others of these terms for workers are cutesy, such as “Roos,” which could be seen as trivializing. Still others, for example, calling a human worker the name of an animal, could be viewed as dehumanizing.⁹⁶ TaskRabbit stopped calling its workers “TaskRabbits” or “Rabbits” in 2014, according to their “Hutch” weblog (another rabbit-themed, cutesy name), as part of a new branding campaign.⁹⁷ Since that time, the platform has used the term “Tasker.”⁹⁸ While being called a “Tasker” is certainly not as dehumanizing as being called a “Rabbit” or “TaskRabbit,” it still emphasizes the rote and routine nature of the job, and not the person behind the work. There is a logic behind this parallel terminology, as it discourages gig workers from forming their identities as a worker or relating to other workers in similar situations, which could lead to solidarity and collective organizing.

Ultimately, those who use platforms to perform their jobs have had to push back against the view that the work they do is somehow frivolous or not as important than that done by other workers. Their work itself, promoted as marginal in marketing and branding materials, means that workers are seen as fungible or disposable. Cutesy nicknames and alternate terms for the workers or the work they perform have also held gig workers back from achieving recognition as employees. In addition to the minimization of both gig workers and the type of work that they perform, the next section will explore the ways that gig work is often made invisible to customers who use on-demand platforms.

C. *Gig Work as Invisible Work*

Some of the practices and methods of on-demand can serve to make gig workers invisible. The invisible nature of some work is another distinct area of inquiry, encompassing wide-ranging practices

benefits-at-a-glance/ [https://perma.cc/J6YM-7WAV]; *What Is a Frnd?*, FRND-SHIPS, <https://frndships.com/frnds/> [https://perma.cc/KG9E-PEBY].

96. See Alyson Shontell, *My Nightmare Experience as a TaskRabbit Drone*, BUS. INSIDER (Dec. 7, 2011, 12:43 PM), <https://www.businessinsider.com/confessions-of-a-task-rabbit-2011-12> [https://perma.cc/3J48-93YX].

97. *Unveiling the New TaskRabbit*, *supra* note 77 (“Some changes are small—for starters, we received some feedback on our brand terminology. So, once The New RaskRabbit is live, TaskRabbits will be called ‘Taskers’ and TaskPosters will be called ‘Clients.’”).

98. *Id.*

including emotional and unremunerated labor, such as acting as someone's "work spouse." As co-editor of the book *Invisible Labor: Hidden Work in the Contemporary World*, my contribution to that book focused on the ways that invisible labor was being performed on platforms seemingly without customers, co-workers, or sometimes even the workers themselves being aware of it.⁹⁹ As an example, consider content editors on Facebook and other social media websites who work to remove material that violates the terms of service. While some content editors are employees, others take on those jobs piecemeal as tasks on a crowdwork site. Although the content moderator's job is vital for keeping the platforms running, few users know that humans are performing the work.¹⁰⁰ Rather, most believe the job is done by artificial intelligence. Unfortunately, the job is wrenching for those who are performing it. They see the worst parts of human nature, like beheadings and other torture videos constantly, and it wears on them psychologically.¹⁰¹

As Mary Gray and Siddharth Suri explain in the book *Ghost Work*, artificial intelligence has not yet evolved to a point where it can help with complex tasks, so in the meantime, human labor is required to fill in the gaps.¹⁰² Numerous systems are described as automated, yet human work is still involved in transcribing information, tagging and labeling products, helping to train artificial intelligence, or dealing with judgment calls over what content is offensive. Because platforms make people invisible to the end user of the website, they have struggled to have their work recognized. While some of these workers "behind the machine" are employees, others do computer work through crowdwork platforms like Amazon's Mechanical Turk, Upwork, or Crowdfunder.¹⁰³ Because requesters can reject work and not pay for

99. INVISIBLE LABOR: HIDDEN WORK IN THE CONTEMPORARY WORLD, *supra* note 49.

100. Casey Newton, *The Trauma Floor*, THE VERGE (Feb. 25, 2019, 8:00 AM), <https://www.theverge.com/2019/2/25/18229714/cognizant-facebook-content-moderator-interview-s-trauma-working-conditions-arizona> [<https://perma.cc/9UBL-RTQG>].

101. *See id.* ("That people don't know there are human beings doing this work is, of course, by design. Facebook would rather talk about its advancements in artificial intelligence, and dangle the prospect that its reliance on human moderators will decline over time. But given the limits of the technology, and the infinite varieties of human speech, such a day appears to be very far away. In the meantime, the call center model of content moderation is taking an ugly toll on many of its workers.").

102. MARY L. GRAY & SIDDHARTH SURI, *GHOST WORK* (2019).

103. Christopher Mims, *Without Humans, Artificial Intelligence Is Still Pretty Stupid*, WALL ST. J. (Nov. 12, 2017, 7:00 AM), <https://www.wsj.com/articles/without-humans-artificial-intelligence-is-still-pretty-stupid-1510488000> [<https://perma.cc/E9ZU-7QXY>]; *Hire Pros with the Skills You Need*, UPWORK, <https://www.upwork.com/hire/> [<https://perma.cc/XTV4-5STZ>].

it, wage theft in this sector is common.¹⁰⁴ In addition, workers have to search for each individual task they will complete, and that is also time for which they are not paid.¹⁰⁵ Some workers have established message boards and advice listings to help them write scripts or use bots to increase their rate of pay.¹⁰⁶ Another fix was the Turkopticon platform, which allowed workers to rate requesters based on their generosity and fairness.¹⁰⁷ Still, the average wage on work platforms like Amazon Mechanical Turk are roughly half of the United States minimum wage.¹⁰⁸

All of these various views of the on-demand economy—that gig workers are only there for a “side hustle,” that the platforms are there only for convenience, and that the work that is being done is invisible—convey a narrative that gig workers are somehow marginal or “less deserving” of employment protections than other workers. If gig workers have another job, but are working on platforms for extra, supplemental income, then the narrative would tell us that these workers do not “need” employee benefits or higher pay, since they receive that from their primary job. If the platforms and their services are not critical, visible, or important, then the fact that workers on these platforms make marginal wages or even below minimum wage should not be concerning either. And, finally, gig workers may be invisible in the eyes of the law, because of the way that their work relationship is categorized by the law. The next section details the gig workers’ legal struggles to pursue the rights and protections that employees are entitled to.

104. Miriam A. Cherry & Winifred R. Poster, *Crowdwork, Corporate Social Responsibility, and Fair Labor Practices*, in RESEARCH HANDBOOK ON DIGITAL TRANSFORMATIONS 291, 308 (F. Xavier Olleros & Majlinda Zehgu eds., 2016) (describing instances in which wage theft happens when requesters reject the work on the platform); Alana Semuels, *The Internet Is Enabling a New Kind of Poorly Paid Hell*, THE ATLANTIC (Jan. 23, 2018), <https://www.theatlantic.com/business/archive/2018/01/amazon-mechanical-turk/551192/> [<https://perma.cc/V5V7-WKPE>].

105. See Semuels, *supra* note 104.

106. E.g., Msori, *MTurk Scripts*, REDDIT (June 9, 2017, 2:59 PM), https://www.reddit.com/r/mturk/comments/6gbkyj/mturk_scripts/ [<https://perma.cc/D444-CR5G>] (a message board for users of Amazon’s Mechanical Turk platform).

107. M. Six Silberman & Lilly Irani, *Operating an Employer Reputation System: Lessons from Turkopticon, 2008–2015*, 37 COMPAR. LAB. L. & POL’Y J. 505, 506 (2016).

108. Andy Newman, *I Found Work on an Amazon Website. I Made 97 Cents an Hour*, N.Y. TIMES (Nov. 15, 2019), <https://www.nytimes.com/interactive/2019/11/15/nyregion/amazon-mechanical-turk.html> [<https://perma.cc/64CZ-8B5Y>]; Alex Mayyasi, *Who Makes Below Minimum Wage in the Mechanical Turk Sweatshop?*, PRICEONOMICS (July 3, 2013), <https://priceonomics.com/who-makes-below-minimum-wage-in-the-mechanical/> [<https://perma.cc/R3VP-BWXL>]; Berg, *supra* note 62, at 557.

III. GIG WORKERS AND THE PROBLEM OF EMPLOYMENT CLASSIFICATION

During the last decade, years before the pandemic, gig workers brought legal cases around the world, seeking to obtain the same benefits and legal protections as traditional employees. The results, however, have been far from uniform.¹⁰⁹ Courts in Italy and France have examined the amount of control and surveillance that platforms have over workers and have concluded that employment protections should apply.¹¹⁰ Other courts, relying on gig workers' flexibility to set their own hours and the fact that gig workers often supply their own equipment, have instead determined that gig workers are independent contractors, or in the United Kingdom, fit into the third intermediate category of "worker," which provides many (but not all) of the same rights and benefits as employees.¹¹¹

During the past decade, the platform economy has not only disrupted established business and labor models but also has challenged the legal tests and structures traditionally used for employee classification.¹¹² In the United States, as in many countries, employee status is an important gateway to determine which workers will receive the protection of the labor and employment laws, including the right to organize and bargain collectively, eligibility for minimum wage, unemployment insurance, and worker's compensation.¹¹³ As such, classification as an employee is crucial in ensuring decent standards and

109. Miriam A. Cherry, *A Global System of Work, A Global System of Regulation?: Crowdwork and Conflicts of Law*, 94 TUL. L. REV. 183, 187 (2020).

110. Cour de cassation [Cass.] [supreme court for judicial matters] soc., Mar. 4, 2020, Bull. civ. V, No. 374, 106 (Fr.); *Italy Court Rules Uber Food Delivery Riders Were Exploited*, AP NEWS (May 30, 2020), <https://apnews.com/article/62609b97fbc25575cb1fcc2573db48f1>; see also Sam Schechner & Preetika Rana, *Uber Ruling in France Boosts Gig Workers' Rights*, WALL ST. J. (Mar. 4, 2020, 3:35 PM), <https://www.wsj.com/articles/france-uber-ruling-puts-gig-workers-rights-in-focus-11583353513> [<https://perma.cc/BT2H-BYS6>] (describing ruling by France's highest appeals court that Uber drivers should be recognized as employees).

111. See *Uber BV v. Aslam* [2021] 5 UKSC 31, 37 (Eng.) ("Taking these factors together, it can be seen that the transportation service performed by drivers and offered to passengers through the Uber app is very tightly defined and controlled by Uber.").

112. Ulysse Lojkine, *Cartographier la Géopolitique des Plateformes*, LE GRAND CONTINENT (Feb. 19, 2020), <https://legrandcontinent.eu/fr/2020/02/19/geopolitique-des-plateformes/> [<https://perma.cc/7A56-PVT8>] (providing summaries of various jurisdictions and their differing approaches to worker classification in the gig economy). For additional background to the problem of worker classification in the on-demand economy, see Valerio De Stefano, *The Rise of the "Just-in-Time Workforce": On-Demand Work, Crowdwork, and Labor Protection in the "Gig-Economy"*, 37 COMPAR. LAB. L. & POL'Y J. 471 (2016).

113. Cherry, *supra* note 34, at 578.

working conditions.¹¹⁴ California, as the birthplace of the gig economy, became a battleground over rideshare regulation.

In California, in the 2015 *Cotter v. Lyft, Inc.*¹¹⁵ litigation, Judge Vince Chhabria characterized work in the on-demand economy as handing the court “a square peg and asked to choose between two round holes.”¹¹⁶ With its flexible “open call” that allows workers the flexibility about when and how to work, combined with algorithms and customer ratings that track and surveil every move that the worker makes, the gig-work model combines some aspects of the employment relationship and some aspects of the independent contractor relationship.¹¹⁷ As the initial round of litigation settled out of court,¹¹⁸ the California Supreme Court, the legislature, and the voters all became involved in the “trilogy” that was about to unfold, and which is still unfolding at the time that this Article goes into publication.

A. *The California Supreme Court’s Dynamex Decision*

In 2018, the California Supreme Court announced its decision in *Dynamex Operations West, Inc. v. Superior Court* (“*Dynamex*”).¹¹⁹ The court announced a new standard for determining employment status in the state of California, known as the “ABC” test due to its three factors. While the ABC test for employee status was new to California, it actually was an older test for employee status used in many jurisdictions.¹²⁰ The first part of the test, Part A, embodied the traditional control test, asking whether the worker was free from the “control and direction of the hirer in connection with the performance of the work.”¹²¹ Part B of the test declared that to be an independent contractor, the worker would have to perform work “outside the usual course of the hiring entity’s business[.]”¹²² In other words, Part B required that there truly be some division between the hiring company’s business and the type of work that the hiring company required the putative independent contractor to perform. Finally, Part C asked whether the

114. De Stefano, *supra* note 112, at 481.

115. 60 F. Supp. 3d 1067 (N.D. Cal. 2015).

116. *Id.* at 1081.

117. *Id.*

118. Miriam A. Cherry, *Gig Economy: Settlements Leave Labor Issues Unsettled*, ST. LOUIS U. SCH. LAW (May 5, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2776213.

119. 416 P.3d 1 (Cal. 2018).

120. Keith Cunningham-Parmeter, *Gig-Dependence: Finding the Real Independent Contractors of Platform Work*, 39 N. ILL. U. L. REV. 379, 408 (2019).

121. *Id.* at 418.

122. *Id.* at 412–13.

worker was customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity.¹²³

The *Dynamex* decision was a catalyst for many of the political events that would ensue in California, even though the hiring entity in *Dynamex* was not actually a digital platform. Further, the court's ruling was limited in the sense that it only applied to California wage orders.¹²⁴ Nonetheless, the *Dynamex* decision touched off a heated debate about the nature of the employment relationship, which groups of workers should be covered by labor and employment laws, and what the *Dynamex* decision might mean for businesses around the state, including platform economy businesses.

The reason for all the attention was that the new ABC test was expansive, and its practical effect would be to make many more workers employees.¹²⁵ Of the three parts of the test, it was noted that Part B would likely cause problems for the gig economy.¹²⁶ If the business of a platform company was to provide passengers with rides from one part of the city to another, and the rideshare drivers were providing it, it would be very difficult to argue that the drivers were somehow not involved in a fundamental part of the platform's business. In fact, the European Court of Justice had previously heard similar types of arguments and soundly rejected Uber's attempt to argue that it was a software provider removed from the business of transportation.¹²⁷

In the wake of the *Dynamex* decision, gig economy companies began to lobby the California Legislature to change the coverage of the employment law statutes, and so did labor unions.¹²⁸ Gig economy companies wanted a legislative overhaul to the *Dynamex* decision, one

123. *Id.* at 414.

124. *Dynamex*, 416 P.3d at 5.

125. Cunningham-Parmeter, *supra* note 120, at 414.

126. *Id.* at 407.

127. Case C-434/15, *Asociación Profesional Élite Taxi v. Uber Sys. Spain SL*, ECLI:EU:C:2017:981 (Dec. 20, 2017); see Natasha Lomas, *Europe's Top Court Leaning Towards Dealing Uber a Big Regulatory Blow*, TECHCRUNCH (May 11, 2017, 4:59 AM), <https://techcrunch.com/2017/05/11/europes-top-court-leaning-towards-dealing-uber-a-big-regulatory-blow/> [<https://perma.cc/EB7L-2LM2>] (“Uber is [therefore] not a mere intermediary between drivers willing to offer transport services occasionally and passengers in search of such services. On the contrary, Uber is a genuine organiser and operator of urban transport services in the cities where it has a presence.”).

128. Josh Eidelson, *The Gig Economy Is Coming for Millions of American Jobs*, BLOOMBERG BUSINESSWEEK (Feb. 17, 2021, 1:00 AM), <https://www.bloomberg.com/news/features/2021-02-17/gig-economy-coming-for-millions-of-u-s-jobs-after-california-s-uber-lyft-vote> [<https://perma.cc/4AJM-2M92>].

that would either change the test to a more relaxed standard for finding independent contractor status, or one that would present a clear “carve-out” to the law for on-demand platform companies.¹²⁹ At the same time, labor unions pressed the legislature to codify the *Dynamex* ruling and the expanded ABC test for employee status.¹³⁰

B. California Legislature Passes AB-5

It was in the midst of this charged political context in 2019 that the California Legislature passed, and California Governor Gavin Newsom signed, AB5, which adopted *Dynamex*’s expanded ABC test for employee status.¹³¹ The text of AB5 cited the “harm to misclassified workers who lose significant workplace protections,” the loss of revenue to the state, and the unfairness to companies that compete with companies that misclassify workers as the reasons behind the decision to expand coverage.¹³² AB5 also expanded the *Dynamex* ABC test holding beyond its original purview of wage orders.¹³³ Under the provisions of AB5, the ABC test would apply to all aspects of the California Labor Code, including unemployment, collective bargaining, and anti-discrimination law.¹³⁴ Under Part B of the ABC test, it appeared that gig workers would finally be included in AB5’s expanded definition of employee.¹³⁵ Many worker advocates followed the situation closely to see what an employee-centered gig work model might look like.

Uber and Lyft, however, categorically refused to comply with AB5. In fact, the major platforms did not take any action to comply with the change in the law or reclassify their workers as employees. Rather, on December 30, 2019, gig companies Uber and Postmates filed a lawsuit in federal court to prevent it from going into effect.¹³⁶

129. *Id.*

130. Steve Smith, *Labor Joins Gonzalez Fletcher to Introduce New Bill to Protect Workers from Misclassification*, CAL. LAB. FED’N (Dec. 3, 2018), <https://calaborfed.org/labor-joins-gonzalez-fletcher-to-introduce-new-bill-to-protect-workers-from-misclassification/> [https://perma.cc/XEX7-K67Y].

131. Richard Gonzales, *California Governor Signs Law Protecting Gig Economy Workers*, NAT’L PUB. RADIO (Sept. 18, 2019, 7:14 PM), <https://www.npr.org/2019/09/18/762108954/california-governor-signs-law-protecting-gig-economy-workers> [https://perma.cc/WV6M-HVW6].

132. Assemb. B. 5, 2019–2020 Reg. Sess. (Cal. 2019).

133. *Id.*

134. *Id.*

135. Cunningham-Parmeter, *supra* note 120, at 416.

136. Olson v. California, No. CV 19-10956, 2020 WL 905572, at *3 (C.D. Cal. Feb. 10, 2020).

On-demand companies then began negotiating with California lawmakers to create a third hybrid category for gig workers, which would offer some, but not all, employment rights.¹³⁷ Meanwhile, the companies stalled changing their business models and, pointing to the ongoing lawsuits, refused to implement the new employee status. Later, during the 2020 pandemic, rideshare company Lyft threatened to cease operations in California if it were required to comply with AB5.¹³⁸ In the meantime, California municipal attorneys general began filing lawsuits seeking injunctions against Uber and Lyft to require them to comply with the law.¹³⁹ These lawsuits requested that the gig companies take action to reclassify their workers and begin providing employment protections and benefits, or else be ordered to do so by the courts.¹⁴⁰ The attorneys general were successful at both the trial and appeals court level, but Uber and Lyft's attorneys kept drawing out the process to request more time.¹⁴¹

C. The Proposition 22 Campaign

Meanwhile, Uber and Lyft engaged in delaying tactics until Proposition 22 appeared on the ballot in November 2020. Along with a coalition of other gig companies, Uber and Lyft declared their intention to fight AB5 through this ballot initiative. Gig economy companies contributed over \$200 million to exempt on-demand companies from AB5 and to keep gig workers as independent contractors.¹⁴² While unions and groups of gig workers strongly opposed these efforts in grassroots campaigns, they were outspent by more than twenty to one in the leadup to the November election season.¹⁴³ Uber and Lyft

137. Ronald Zambrano, *How Biden May Save Gig Workers from California's Prop 22*, LAW360 (Dec. 16, 2020, 10:04 AM), <https://www.law360.com/articles/1335406/how-biden-may-save-gig-workers-from-california-s-prop-22> [<https://perma.cc/4HAT-V3BE>].

138. Kate Conger, *Uber and Lyft Get Reprieve After Threatening to Shut Down*, N.Y. TIMES (Aug. 20, 2020), <https://nyti.ms/2QarROv> [<https://perma.cc/4ZHV-8ZZQ>].

139. *People v. Uber Techs., Inc.*, 270 Cal. Rptr. 3d 290, 296 (Ct. App. 2020).

140. *Id.* at 306.

141. *Id.* at 317; see also Sara Ashley O'Brien, *Uber and Lyft Must Reclassify Drivers as Employees, Appeals Court Finds*, CNN (Oct. 23, 2020, 1:19 AM), <https://www.cnn.com/2020/10/23/tech/uber-lyft-california-appeal/index.html> [<https://perma.cc/2R3F-S9ZE>].

142. Jeremy B. White, *Gig Companies Break \$200M Barrier in California Ballot Fight*, POLITICO (Oct. 29, 2020, 8:15 PM), <https://perma.cc/8RJX-DXC2>.

143. Brian Merchant (@bcmmerchant), TWITTER (Nov. 4, 2020, 1:37 PM), <https://twitter.com/bcmerchant/status/1324103506739916801> [<https://perma.cc/E424-VXZY>]; Kari Paul & Julia Carrie Wong, *California Passes Prop 22 in a Major Victory for Uber and Lyft*, THE GUARDIAN (Nov. 4, 2020, 4:14 AM), <https://www.theguardian.com/us-news/2020/nov/04/california-election-voters-prop-22-uber-lyft> [<https://perma.cc/P6HY-NTN3>].

portrayed the issue as one of flexibility, arguing that their drivers did not want to become shift workers/employees.¹⁴⁴ The platforms also argued that if the proposition was voted down, then operations might no longer be financially sustainable, and costs for the average user might rise rapidly.¹⁴⁵ As part of the campaign in favor of Proposition 22, Uber and Lyft amplified the voices of some of their drivers who wanted to work on flexible schedules and featured these drivers in their advertising campaigns.¹⁴⁶

In addition, rideshare apps themselves started to feature advertisements in favor of Proposition 22, which told customers that their drivers supported the measure and should talk to them about why it was important to vote “yes.”¹⁴⁷ DoorDash drivers were instructed to deliver branded bags that had pro-Proposition 22 messages on them, which could understandably have made customers believe that the workers favored its passage as well.¹⁴⁸ Other restaurant and food delivery services directed their workers to include political leaflets asking for a vote of “yes” on Proposition 22 along with the meals and food that they dropped off.¹⁴⁹ Some California Uber drivers were sent a pop up message that asked them to select “Yes on Proposition 22” or “OK” in order to move forward to working on the app.¹⁵⁰ As a result, a group of Uber drivers filed a class action lawsuit complaining that they were given misleading messages about Proposition 22 on the app.¹⁵¹ The lawsuit alleges that Uber pressured its drivers to follow a particular political course of action, which is against state law in California.¹⁵² Nonetheless, these advertisements, flyers, and pop-up ads

144. David Mamaril Horowitz, *Prop. 22: Rideshare Drivers, Labor Advocates Revel in Proposition's Reversal*, MISSION LOCAL (Aug. 23, 2021), <https://missionlocal.org/2021/08/rideshare-drivers-labor-advocates-revel-in-propositions-reversal/> [<https://perma.cc/MPQ4-9C67>].

145. Conger, *supra* note 138.

146. Maeve Allsup & Erin Mulvaney, *Drivers Sue Over Pressure to Back Gig Worker Measure*, BLOOMBERG L. NEWS (Oct. 22, 2020, 3:13 PM), <https://news.bloomberglaw.com/bloomberg-law-analysis/uber-drivers-sue-company-over-pressure-to-support-prop-22> [<https://perma.cc/4S2D-S3DJ>].

147. Sam Harnett, *Gig Companies Are Making Their Workers Promote Prop. 22*, KQED (Oct. 20, 2020), <https://www.kqed.org/news/11842964/gig-companies-are-making-their-workers-promote-prop-22> [<https://perma.cc/8TRP-TCUW>].

148. *Id.*

149. Sasha Lekach, *Uber Tacks on New Fee for Prop. 22 Gig Worker Benefits*, MASHABLE (Dec. 15, 2020), <https://mashable.com/article/uber-lyft-prop-22-benefits> [<https://perma.cc/4BZR-CX75>].

150. Allsup & Mulvaney, *supra* note 146.

151. Class Action Complaint and Demand for Jury Trial at 1, *Valdez v. Uber Techs., Inc.*, No. CGC-20-587266 (Cal. Super. Ct. S.F. Cnty. Oct. 22, 2020).

152. *Id.*

seemed to have had a large impact on customers and the ultimate outcome of the vote.

The fact that part-time employees could also work flexible hours and have part-time schedules was a message completely lost in the Proposition 22 campaign rhetoric. The platforms' message caught on with the California electorate, who were bombarded with advertisements in favor of Proposition 22's passage. Other voters were concerned because they depended on services like Lyft to get them to and from work, doctor's appointments, and other situations where transportation was needed, and Lyft's threats to leave the state may have struck a chord. Other customers may have been worried about the potential increase in cost of various services and simply did not want to pay more. And because Proposition 22 also included some protections for gig workers, many voters who were not the most aware may have thought paradoxically that by voting to approve the measure, they were actually helping rideshare drivers.¹⁵³ California voters approved Proposition 22 on November 3, 2020.¹⁵⁴

The result took many commentators and politicians by surprise, as most ballot initiatives in California fail.¹⁵⁵ Further, the California Legislature had just passed AB5 the year before, signifying the political will to expand the category of "employee" to include the vulnerable group of gig workers. As such, when California voters approved Proposition 22 on November 3, 2020, stripping gig workers of employee status and curtailing some of their newly-found rights, it left many labor advocates disappointed and concerned.¹⁵⁶

153. Brian Chen & Laura Padin, *Prop 22 Was a Failure for California's App-Based Workers. Now, It's Also Unconstitutional*, NAT'L EMP. L. PROJECT (Sept. 16, 2021), <https://www.nelp.org/blog/prop-22-unconstitutional/> [<https://perma.cc/P54Y-CXLX>].

154. Sara Ashley O'Brien, *Prop 22 Passes in California, Exempting Uber and Lyft from Classifying Drivers as Employees*, CNN BUS. (Nov. 4, 2020, 4:02 PM), <https://www.cnn.com/2020/11/04/tech/california-proposition-22/index.html> [<https://perma.cc/6XN6-JR7L>].

155. See *Initiative Summary of Data*, CAL. SEC'Y STATE (2021), <https://elections.cdn.sos.ca.gov/ballot-measures/pdf/summary-data.pdf> [<https://perma.cc/M36E-7QV8>] (of the 392 initiatives that qualified for the California ballot between 1912 and 2021, 63.77% were rejected by the voters).

156. Greg Bensinger, *Other States Should Worry About What Happened in California*, N.Y. TIMES (Nov. 6, 2020), <https://nyti.ms/3l6p72l> [<https://perma.cc/2E3G-FG9F>] ("[Prop. 22] will encourage other companies to reclassify their work force as independent contractors, and once they do, over a century of labor protections vanishes overnight," says Robert Reich, former U.S. Secretary of Labor.).

D. *The Impact of Proposition 22 and Subsequent Events*

Proposition 22 was a type of compromise, and so it promised more rights than those that an independent contractor would typically ever receive. As such, it *de facto* created a new hybrid type of category, despite technically still having the label of “independent contractor.” Proposition 22 does provide California rideshare and delivery drivers some benefits that independent contractors do not typically receive. For example, Proposition 22 required a healthcare subsidy consistent with the average contributions required under the Affordable Care Act (ACA), a minimum earnings guarantee for time worked while actively providing rides, compensation for certain vehicle expenses, and occupational accident insurance to cover on-the-job injuries.¹⁵⁷ Proposition 22 also prohibited employment discrimination by rideshare companies and allowed gig workers the right to bring an action under California’s anti-discrimination laws.¹⁵⁸

Still, the protections and benefits provided are substantial. Even though Proposition 22 explicitly notes that the on-demand workers are now independent contractors for purposes of California law, they will now receive many more benefits and protections than independent contractors have ever received in any jurisdiction in the United States. It has even led some to call Proposition 22 a “third way” for gig workers.¹⁵⁹ But without employee status, drivers may not have the right to organize or bargain collectively. Other rights (such as minimum wage only for time worked, not while looking for work) offered in this compromise are less than what a California employee would receive. Further, gig companies have already started tacking on fees to its services

157. Lekach, *supra* note 149.

158. CAL. BUS. & PROF. CODE § 7456 (West 2021), *invalidated by* Castellanos v. State, No. RG21088725, 2021 WL 3730951 (Cal. Super. Ct. Aug. 20, 2021).

159. Brian Chen & Maya Pinto, *Uber’s New Gig Worker Bill Is the Same Old Trick: Deregulation and Special Treatment for Exploitive Companies*, NAT’L EMP. L. PROJECT (June 2, 2021), <https://www.nelp.org/blog/ubers-new-gig-worker-bill-is-the-same-old-trick-deregulation-and-special-treatment-for-exploitive-companies/> [<https://perma.cc/BNK5-RKWE>]. The idea has been theoretically discussed in the United States, but this is the first attempt to carry it out. For more discussion on this point, see Seth D. Harris & Alan B. Krueger, *A Proposal for Modernizing Labor Laws for Twenty-First-Century Work: The “Independent Worker,”* THE HAMILTON PROJECT (Dec. 2015), https://www.hamiltonproject.org/assets/files/modernizing_labor_laws_for_twenty_first_century_work_krueger_harris.pdf [<https://perma.cc/4ECA-EYED>], and Miriam A. Cherry & Antonio Aloisi, “*Dependent Contractors*” in *the Gig Economy: A Comparative Approach*, 66 AM. U. L. REV. 635 (2017).

as a “California Driver Benefits Fee” and passing them along to customers, a fee designation which was nowhere described in the voting materials.¹⁶⁰

Unions openly declared their opposition to Proposition 22 and expressed a willingness to challenge it in court.¹⁶¹ The year that the gig economy companies spent in non-compliance is also still being litigated, with California government officials seeking to hold the companies accountable for past violations when AB5 was the law.¹⁶² And, as mentioned in the last section, gig workers themselves have filed lawsuits alleging that they were ordered to vote in favor of Proposition 22 and to engage in compelled speech supporting it.¹⁶³

The union challenges in court culminated in a lawsuit brought by Service Employees International Union and several drivers, leading to a ruling by Alameda County Superior Court Judge Frank Roesch in the summer of 2021.¹⁶⁴ Judge Roesch’s decision held that Proposition 22 was unconstitutional and unenforceable, noting “[i]t appears only to protect the economic interest of the network companies in having a divided, ununionized workforce, which is not a stated goal of the legislation.”¹⁶⁵ The ruling focused on the fact that the law encroached upon the California Legislature’s ability to regulate the workforce, particularly the worker’s compensation system.¹⁶⁶ Proposition 22 had made it very difficult to regulate in the area, establishing the need for a 7/8 vote of the legislature in order to make changes.¹⁶⁷ Such a requirement usurped the role of the legislature in the court’s view and

160. Levi Sumagaysay, *California Post-Prop. 22: Gig Workers to See Pay Changes, Customers to See Higher Prices*, MARKETWATCH (Dec. 14, 2020, 10:13 PM), <https://www.marketwatch.com/story/california-post-prop-22-gig-workers-to-see-pay-changes-customers-to-see-higher-prices-11607991899> [<https://perma.cc/8C9F-TVXL>].

161. Sara Ashley O’Brien, *Drivers and Labor Union Seek to Overturn New California Prop 22 Law*, CNN (Jan. 12, 2021, 5:56 PM), <https://www.cnn.com/2021/01/12/tech/california-prop-22-lawsuit/index.html> [<https://perma.cc/WYZ7-CMGM>].

162. Max Kutner, *Uber Tells 9th Circ. Prop. 22 Doesn’t Moot AB 5 Challenge*, LAW360, (Dec. 9, 2020, 6:46 PM), <https://www.law360.com/articles/1336032/uber-tells-9th-circ-prop-22-doesn-t-moot-ab-5-challenge> [<https://perma.cc/QEM3-4K7J>].

163. See Allsup & Mulvaney, *supra* note 146; Class Action Complaint and Demand for Jury Trial, *supra* note 151, at 12.

164. *Castellanos v. State*, No. RG21088725, 2021 WL 3730951, at *5 (Cal. Super. Ct. Aug. 20, 2021); see also Maeve Allsup, *Prop. 22 Backers Appeal Ruling Striking California Gig Work Law*, BLOOMBERG L. NEWS (Sept. 23, 2021, 7:16 AM), <https://news.bloomberglaw.com/us-law-week/prop-22-backers-appeal-ruling-striking-california-gig-worker-law> [<https://perma.cc/DZ2E-Y5FH>].

165. *Castellanos*, 2021 WL 3730951, at *5.

166. *Id.* at *1.

167. *Id.* at *3.

would have required the passage of a state constitutional amendment rather than ballot initiative.¹⁶⁸ Where the case goes from there is far from certain, but the rideshare platforms have already filed appeals as of the time of this writing.¹⁶⁹

While these issues have also made headlines in other states, such as pending legislation in New York City,¹⁷⁰ the situation in California stands as an example of the back-and-forth, the advances and the retrenchment of the last decade, and highlights the complexity of the issues involved and the interplay of different sources of political power and the ballot initiative process within California. For now, the process will play out, and the hybrid independent contractor category will be watched closely. Further, the story will continue to evolve Uber and other gig economy companies will likely introduce copycat legislation in other states or utilize the ballot initiative processes in those states.¹⁷¹ Meanwhile, some gig workers' groups are looking for support from the new administration coming to power. President Biden has been a vocal proponent of the ABC test for employment status and has proposed extending it nationally.¹⁷² The Department of Labor has already rescinded the Trump administration's proposed guidance about employee classification for purposes of the Fair Labor Standards Act.¹⁷³ Similarly, the Biden National Labor Relations Board may decide to reverse the Trump administration's ruling that gig workers were not employees and could not organize.¹⁷⁴

168. *Id.* at *2, *4.

169. Kate Conger & Kellen Browning, *A Judge Declared California's Gig Worker Law Unconstitutional. Now What?*, N.Y. TIMES (Aug. 23, 2021), <https://www.nytimes.com/2021/08/23/technology/california-gig-worker-law-explained.html> [<https://perma.cc/374V-QZ29>]; Suhauna Hussain, *Prop. 22 Was Ruled Unconstitutional. What Will the Final Outcome Be?*, L.A. TIMES (Aug. 25, 2021, 1:01 PM), <https://www.latimes.com/business/technology/story/2021-08-25/after-prop-22-ruling-whats-next-uber-lyft> [<https://perma.cc/HB9S-GY69>].

170. Jeffrey C. Mays, *New York Passes Sweeping Bills to Improve Conditions for Delivery Workers*, N.Y. TIMES (Sept. 23, 2021), <https://www.nytimes.com/2021/09/23/nyregion/nyc-food-delivery-workers.html> [<https://perma.cc/UDH9-YEYD>].

171. Braden Campbell, *3 Takeaways as Gig Cos. Prevail at Polls on Worker Status*, LAW360 (Nov. 4, 2020, 8:46 PM), <https://www.law360.com/articles/1325919/3-takeaways-as-gig-cos-prevail-at-polls-on-worker-status> [<https://perma.cc/R9E3-3VJZ>].

172. Zambrano, *supra* note 137.

173. Max Kutner, *DOL Pulls Trump-Era Guidance on Contractors, Truckers*, LAW360 (Feb. 19, 2021), <https://www.law360.com/articles/1356867/dol-pulls-trump-era-guidance-on-contractors-truckers>.

174. Eleanor Mueller, *'Not Dealing with Rookies': Companies Brace for Biden's New Labor Cops*, POLITICO (Sept. 6, 2021, 7:00 AM), <https://www.politico.com/news/2021/09/06/companies-brace-biden-labor-509516> [<https://perma.cc/LE38-9WTW>].

Events during the 2020-2021 coronavirus pandemic may assist gig workers in their quest for parity with traditional employees. Programs like extended unemployment assistance were available to gig workers alongside traditional employees. The next portion of the Article discusses what these changes might mean for the future of worker rights in the gig economy.

IV. GIG WORKERS AS ESSENTIAL WORKERS

The view of gig work as marginal and unimportant has changed dramatically because of the pandemic. Gig workers faced increased exposure to the coronavirus so that others could receive grocery deliveries, prepared meals, medications, packages, and other necessities. Labeled “essential workers” by the law, gig workers continued to show up and work in person.¹⁷⁵ This part covers the “essential worker” designation: the origins of the term, who qualifies as an essential worker under state and federal guidelines, and what this designation has meant for gig workers. Further, this part analyzes the CARES Act and related legislation, as those laws have extended significant benefits to gig workers such as temporary unemployment and paid sick leave. Yet, there are significant problems that have arisen with these programs, which stem at least in part because of the ambiguity surrounding gig worker employment status.

A. *Essential Workers and Essential Work*

Estimates from the Brookings Institute found that 50 million U.S. workers qualified as frontline or essential workers under federal and state pandemic guidelines.¹⁷⁶ These frontline workers, unfortunately, also earned lower wages than the average worker.¹⁷⁷ In addition, many people thought of “frontline” workers as having a public-facing presence, needing to be available to deal with people, but in reality many

175. Faiz Siddiqui, *Gig Workers Face Arrest and Charges While Delivering During Pandemic and Curfews*, WASH. POST (June 17, 2020), <https://www.washingtonpost.com/technology/2020/06/17/gig-workers-arrests-protests-pandemic/> [<https://perma.cc/CQU8-Y3W4>] (noting in completing deliveries during lockdowns, gig workers for Caviar and Uber Eats took the risk of being hassled by law enforcement).

176. Adie Tomer & Joseph W. Kane, *To Protect Frontline Workers During and After COVID-19, We Must Define Who They Are*, BROOKINGS (June 10, 2020), <https://www.brookings.edu/research/to-protect-frontline-workers-during-and-after-covid-19-we-must-define-who-they-are/> [<https://perma.cc/DCH8-5GGQ>].

177. *Id.*

of these frontline jobs are largely invisible to the customer. For example, cleaners working to sanitize office buildings were crucial to make the buildings safe, yet few would list the importance of that role, given that the work often takes place during hours when no one else is present. Another study by the Economic Policy Institute noted that minority groups are over-represented among essential workers.¹⁷⁸ We have some information about who the essential workers are. But where did the term “essential worker” come from, and how is that defined in modern-day parlance? This section hopes to provide at least partial answers to these questions.

1. Historical Background and Definitions

Before the pandemic, U.S. labor and employment law did not distinguish between essential versus non-essential work, or even in-person versus remote work, in any clear way. Employment law in the U.S. is more deregulated than in other parts of the world, and the relative value of labor is typically determined by the market, alongside regulation that either sets minimum standards or that emphasizes pay equity. As such, there has not typically been an attempt to apportion legal protections based on the importance or “essential-ness” of the work being performed or how the work is performed. It is true that certain occupational categories, such as those in the mining or the nuclear power industry, are more highly regulated because of known safety hazards, but apart from these types of outliers, specific sectoral regulation is fairly atypical for U.S. employment law.

While the term “essential worker” seemed to have appeared from whole cloth during the start of the 2020 pandemic, there is a history behind that concept and (informal) classification. The concept of “essential work” has come to the forefront during previous periods of disease, warfare, or natural disaster.¹⁷⁹ For example, in early modern Europe, professional doctors and skilled workers typically fled the

178. Celine McNicholas & Margaret Poydock, *Who Are Essential Workers?*, ECON. POL'Y INST.: WORKING ECON. BLOG (May 19, 2020, 11:25 AM), <https://www.epi.org/blog/who-are-essential-workers-a-comprehensive-look-at-their-wages-demographics-and-unionization-rates>.

179. Indeed, the Black Death and its high mortality rate actually gave rise to employment legislation. Employers in Britain requested the crown institute a cap on wages, because of the acute shortage of labor after the pandemic. Such regulation was at odds with market forces and thus was unsuccessful. See Stewart J. Schwab, *Predicting the Future of Employment Law: Reflecting or Refracting Market Forces?*, 76 IND. L.J. 29, 33 (2001).

crowded cities that were often the epicenters of epidemics.¹⁸⁰ But much work still needed to be done in those cities, especially work diagnosing disease, caring for patients, enforcing quarantines, and other critical tasks for maintaining public health.¹⁸¹ Many of the workers who handled these tasks were labeled “essential” and became pressed into this service out of economic necessity.¹⁸² Some of those who worked in these essential capacities were elderly women, who typically would not have been given these occupational opportunities, but for whom the rules and strictures of society were bent to allow their workforce participation.¹⁸³ Those who were recipients of charity and pensions, those who used to work in businesses that were shuttered, servants left to fend for themselves—all worked during pandemics, often at dangerously risky tasks.¹⁸⁴ They did so under various degrees of economic necessity, and indeed, it was those at the bottom of the socioeconomic ladder, then and now, who shouldered the largest share of the work while putting their own lives and health at risk.

Moving into the modern industrial age, cycles of armed conflict have also given rise to work classification systems that attempted to prioritize “essential” industries over others. For example, steel, lumber, and coal were classified as essential industries for the United States during World War I because of the need for particular commodities to aid in the war effort.¹⁸⁵ Later, in the lead-up to the U.S. entry into World War II, President Franklin D. Roosevelt created a War Manpower Commission, which recruited labor for war and essential civilian industries and trained workers for jobs related to the war effort.¹⁸⁶ Certain industries and manufacturing concerns were labeled

180. Elisabeth Berry Drago, *Quacks, Plagues, and Pandemics*, SCI. HIST. INST. (Dec. 15, 2020), <https://www.sciencehistory.org/distillations/quacks-plagues-and-pandemics> [<https://perma.cc/9G4T-RMTW>].

181. Richelle Munkhoff, *Searchers of the Dead: Authority, Marginality, and the Interpretation of Plague in England, 1574–1665*, 11 GENDER & HIST. 1, 9–13 (1999).

182. Kevin Siena, *Epidemics and ‘Essential Work’ in Early Modern Europe*, HIST. & POL’Y (Mar. 25, 2020), <http://www.historyandpolicy.org/opinion-articles/articles/epidemics-and-essential-work-in-early-modern-europe> [<https://perma.cc/33ZT-EAYT>].

183. Munkhoff, *supra* note 181, at 1–2.

184. See GIULIA CALVI, HISTORIES OF A PLAGUE YEAR: THE SOCIAL AND THE IMAGINARY IN BAROQUE FLORENCE 64–65, 72–73, 95–96 (Dario Biocca & Bryant T. Ragan Jr. trans., 1989).

185. *Essential Workers—Definition, History, and Importance*, WSHU PUB. RADIO (Sept. 25, 2020), <https://www.wshu.org/post/essential-workers-definition-history-and-importance#stream/0> [<https://perma.cc/BZ89-6BTE>].

186. War Manpower Commission, 8 Fed. Reg. 11,420 (Aug. 17, 1943), <https://www.govinfo.gov/content/pkg/FR-1943-08-17/pdf/FR-1943-08-17.pdf> [<https://perma.cc/T2YW-LLFM>].

“essential activities” by the Commission.¹⁸⁷ In 1943, the Commission labeled particular job titles and areas as “critical occupations.”¹⁸⁸ The demand for such essential workers would pull in marginalized groups that had previously been excluded from opportunities in the labor market, often because of widespread employment discrimination against women and people of color.¹⁸⁹ The popularized images of Rosie the Riveter emphasized that women’s work was needed to maintain the war effort and to sustain domestic production.¹⁹⁰

In all these previous efforts at definitions, the idea of work as being “essential” meant that the work was critical, important, or crucial to the functioning of society. Despite the risks that might be present to the individual worker’s health or safety, the work needed to continue toward a great goal of saving lives or winning wars. Because of the increased risk of those tasks, those who take them on were doing so based on economic necessity. With this history and background on the terminology around essential work and essential workers, the next Section turns to the definitions of essential worker under the current law.

2. Federal Government Definitions of “Essential Worker”

The 2020 CISA Guidance (“the Guidance”) for work in the pandemic covered broad categories of different occupations and industries that were critical for the continued functioning of society.¹⁹¹ Key among these definitions was the inclusion of gig work in the Guidance. For example, the Guidance includes “[r]estaurant carry-out and quick serve food operations, including . . . food prep centers, carry-out, and delivery food workers” in its definition of essential businesses.¹⁹² In addition, the CISA guidance mentions “[w]orkers supporting personal and commercial transportation services including taxis, delivery services, vehicle rental services, [and] bicycle maintenance.”¹⁹³ Finally,

187. *Id.* at 11,420–21.

188. *Id.* at 11,420.

189. John J. Corson, *The Labor Force: Its Recruitment and Training*, 9 LAW & CONTEMP. PROBS. 418, 420 (1942) (noting previously underutilized sources of labor including that of women, racial minorities, youth, the imprisoned, and the disabled).

190. Kellie B. Gormly, *Rosie the Riveter Gets Her Due 75 Years After the End of World War II*, SMITHSONIAN MAG. (Dec. 8, 2020), <https://www.smithsonianmag.com/smithsonian-institution/rosie-riveter-gets-her-due-75-years-after-end-world-war-ii-180976474/> [https://perma.cc/KAA3-VWNU].

191. *Identification of Essential Critical Infrastructure Workers*, *supra* note 26.

192. *Id.*

193. *Id.*

the CISA guidance includes “car-sharing services, and transportation network providers.”¹⁹⁴ Based on these definitions, gig work grocery shopping, food, meal, and restaurant delivery, and rideshare driving for a transportation network provider would all be considered “essential work” under the CISA guidance.¹⁹⁵

Importantly, the CISA guidance makes no distinction or divide between those who are performing this work under “employee” status and those who are performing this work as independent contractors.¹⁹⁶ The CISA definition was focused more on what work was critical in particular sectors of the economy to keep the population supplied with food and other necessities during lockdown periods than it was on legal niceties. Rather than focusing on the business details and factors that might bring work within the ambit of “employment,” the CISA guidance focused more on the purpose of the work and how it might help with efforts to control the pandemic.

3. State Definitions of “Essential Worker” and Platform Definitions

In addition to the CISA guidelines, states have also adopted the term “essential worker” to help make determinations about business closures. Some states have used the same exact language as the federal CISA guidance.¹⁹⁷ Other states, such as Alaska and Colorado, permitted and encouraged places of public accommodation, such as restaurants and bars, to offer food and beverage using only take-out and delivery as necessary.¹⁹⁸ Colorado also provided an exemption for transportation and infrastructure necessary to support critical business.¹⁹⁹ While these two state guidelines did not mention gig workers directly, their coverage and presence is implied. That is especially as

194. *Id.*

195. Brudney, *supra* note 12, at 2–4.

196. *Identification of Essential Critical Infrastructure Workers, supra* note 26.

197. For the definition in Texas, see Exec. Order No. GA-23 (May. 18, 2020), https://gov.texas.gov/uploads/files/press/EO-GA-23_phase_two_expanding_opening_COVID-19.pdf [<https://perma.cc/X746-4MK5>]. For the definition in Georgia, see Exec. Order No. 03.14.20.01 (Mar. 14, 2020, 10:15 AM), <https://gov.georgia.gov/document/2020-executive-order/03142001> [<https://perma.cc/68QY-BJEY>].

198. Alaska Governor Michael J. Dunleavy, COVID-19 Health Mandate (Mar. 17, 2020), <https://gov.alaska.gov/wp-content/uploads/sites/2/03172020-SOA-COVID-19-Health-Mandate-003.pdf> [<https://perma.cc/6CBA-KZ39>].

199. Colo. Dep’t of Pub. Health & Env’t, Fourth Updated Public Health Order 20-24 Implementing Stay at Home Requirements (Apr. 9, 2020) <https://cha.com/wp-content/uploads/2020/04/Fourth-Updated-Public-Health-Order-Authorized-Business.pdf> [<https://perma.cc/M8Y8-KHK9>].

platforms would be a key part of the infrastructure to support restaurants and to get meals delivered to restaurant patrons.

Other states, such as Indiana, Hawaii, and California, have expressly mentioned gig work as included in their definitions of essential work. These states' definitions mention "businesses that ship or deliver groceries, food, alcoholic and non-alcoholic beverages, goods or services to end users or through commercial channels," "transportation network providers (such as Uber and Lyft)," and "employees supporting personal and commercial transportation services, including taxis, bicycle services, Transportation Network Companies, and delivery services including Delivery Network Companies."²⁰⁰

Apart from either federal, state, or municipal definitions, many on-demand platforms themselves have viewed the services their workers provide as "critical" or "essential businesses." In one letter to its "Dashers" (i.e. gig workers), the platform DoorDash noted that "[d]eliveries from restaurants and grocery stores have been deemed essential services in the following jurisdictions, meaning Dashers may continue to perform delivery services."²⁰¹ Uber has similarly told its workers that they are "essential" and that in providing transportation, they are providing an "essential service."²⁰² Ultimately, the definitions of "essential worker" all emphasized the importance of the gig work performed during the pandemic. Like the federal guidance, none of these state definitions or directives mention the employee versus independent contractor distinction.

Even with its various formulations, most gig workers who work via app easily have fit into the definition "essential" workers during the pandemic. Defining work as "essential" means that it is "very important." It means that the work is not a luxury or work for conven-

200. CAL. FOR ALL, ESSENTIAL WORKFORCE (Apr. 28, 2020), <https://covid19.ca.gov/img/EssentialCriticalInfrastructureWorkers.pdf> [<https://perma.cc/J9LT-QFNK>]; Off. of the Governor, State of Hawai'i, Sixth Supplementary Proclamation Amending and Restating Prior Proclamations and Executive Orders Related to the Covid-19 Emergency (Apr. 25, 2020), https://governor.hawaii.gov/wp-content/uploads/2020/04/2004144-ATG_Sixth-Supplementary-Proclamation-for-COVID-19-distribution-signed.pdf [<https://perma.cc/4BZ2-D8J2>].

201. *COVID-19: Dasher Exemption to Shelter-in-Place Orders Letter*, DOORDASH, <https://help.doordash.com/dashers/s/article/COVID-19-Dasher-Exemption-to-Shelter-in-place-Orders-Letter> [<https://perma.cc/ZY8X-EQL7?type=image>].

202. Damien Venuto, *Covid-19 Coronavirus: Uber Eats Suspended Due to Lockdown*, NZ HERALD (Aug. 17, 2021, 1:52 PM), <https://www.nzherald.co.nz/business/covid-19-coronavirus-uber-eats-suspended-due-to-lockdown/37N62FOXKT5KEWMQIZECPEB5TE/> [<https://perma.cc/65KG-GYKP>].

ience, it is work that is done to help society survive a threat or a harrowing time. In past definitions, a critical occupation might be something directly war-related, but in other instances might actually mean one in which demand for labor far outstripped supply. These issues raise further questions. What types of work are seen as heroic, important, and valorized, and which forms of works are marginalized? What happens when these categories blur? We will return to these questions in Section V of the Article, which argues in favor of parity for gig workers based on these very definitions of essential work.

B. Legislative Protections for Gig Workers During the Pandemic

During the early stages of the pandemic, federal and state legislatures and administrative agencies across the United States acknowledged the essential nature of gig economy workers, issuing emergency regulatory interventions that conferred greater protection to gig economy workers. Most notably, the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) granted gig workers federal unemployment benefits, and related legislation granted some gig workers paid sick leave.²⁰³ While the provisions in the CARES Act and related legislation moved gig workers toward the benefits that other employees currently receive as of right, it did not cover all the changes that needed to be made. For example, gig workers asked for increased supplies of personal protective equipment to keep themselves safe,²⁰⁴ hazard pay,²⁰⁵ and supplies of disinfectants.²⁰⁶ Some on-demand companies have met those safety and risk-related requests voluntarily, while others only did so grudgingly or only in the face of protests or other

203. Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, §§ 4114–4120, 134 Stat. 281 (2020); *see also* Sean Ludwig, *Coronavirus Aid, Relief, and Economic Security Act: What Small Businesses Need to Know*, U.S. CHAMBER COM. (Mar. 31, 2020), <https://www.uschamber.com/co/start/strategy/cares-act-small-business-guide> [<https://perma.cc/Z3CD-QE3C>] (giving details about the changes to paid sick leave and paid family medical leave from the Families First Coronavirus Response Act).

204. *See* Megan Rose Dickey, *Gig Workers Say They Are Struggling to Get Personal Protective Equipment from Companies*, TECHCRUNCH (Apr. 16, 2020, 11:35 AM), <https://tcrn.ch/2z7esl8> [<https://perma.cc/RS3M-3TXX>].

205. *See* Andrew Keshner, *'Anybody Who Works at This Point Deserves Hazard Pay': The Working Conditions That Led One Instacart Worker to Strike*, MARKETWATCH (Apr. 2, 2020, 9:11 AM), <https://www.marketwatch.com/story/is-this-batch-worth-me-going-to-this-store-and-possibly-bringing-home-covid-19-what-life-is-like-for-one-striking-instacart-worker-2020-04-01> [<https://perma.cc/U9EC-JTAX>].

206. *See* Alina Selyukh & Shannon Bond, *Amazon, Instacart Grocery Delivery Workers Demand Coronavirus Protection and Pay*, NAT'L PUB. RADIO (Mar. 30, 2020, 8:47 AM), <https://www.npr.org/2020/03/30/823767492/amazon-instacart-grocery-delivery-workers-strike-for-coronavirus-protection-and-> [<https://perma.cc/7L3D-RASB>].

collective action by gig workers.²⁰⁷ Even so, the changes in the CARES Act and in other related legislation have demonstrably improved working conditions for gig workers and brought them closer to the rights and benefits enjoyed by traditional employees.²⁰⁸ This section will explore some of these pressing issues and how the CARES Act for the first time brought gig workers closer to parity with employees throughout the pandemic.

1. Unemployment Coverage for Gig Workers

In late March 2020, the CARES Act was passed by Congress and signed into law by then-President Trump with the purpose of providing economic assistance for American workers, families, and small businesses suffering due to the pandemic.²⁰⁹ In an unprecedented action, the CARES Act expressly granted gig workers unemployment benefits.²¹⁰ In the past, state unemployment statutes had only applied to “employees.”²¹¹ Often when gig workers were deactivated from platforms, they were told that they were not eligible for unemployment benefits.²¹² In other circumstances, gig workers challenged these determinations, appealed the results, and won unemployment benefits.²¹³ These same problems of employment classification have resulted in uneven decisions about unemployment benefits.

Provisions within the CARES Act radically changed that dynamic. The provisions created additional funding for the Pandemic Unemployment Assistance (PUA) program, which made individuals who would ordinarily not qualify for regular unemployment compensation and are unable to continue working as a result of COVID-19,

207. Dickey, *supra* note 204; Selyukh & Bond, *supra* note 206.

208. Andrew J. Hawkins, *Hundreds of Uber and Lyft Drivers Rally in San Francisco for Employee Protections*, THE VERGE (Aug. 27, 2019, 5:37 PM), <https://www.theverge.com/2019/8/27/20835658/uber-lyft-driver-rally-ab5-pete-buttigieg-employee-protections> [https://perma.cc/R74E-EC8U].

209. *The Treasury Department Is Delivering COVID-19 Relief for All Americans*, U.S. DEP'T TREASURY, <https://web.archive.org/web/20210401201530/https://home.treasury.gov/policy-issues/cares>.

210. Ludwig, *supra* note 203.

211. Nicole Clark, *Insight: Gig Workers Can Qualify for CARES ACT Unemployment Aid*, BLOOMBERG L. NEWS (May 6, 2020), <https://news.bloomberglaw.com/daily-labor-report/insight-gig-workers-can-qualify-for-cares-act-unemployment-aid> [https://perma.cc/X72L-FMNF].

212. Chen & Padin, *supra* note 153.

213. Order, Decision or Award of the Labor Commissioner at 1, *Berwick v. Uber Techs., Inc.*, No. 11-46739 EK (Cal. Lab. Comm'r June 3, 2015); *see also* Sam Sanders, *California Labor Commission Rules Uber Driver Is an Employee, Not a Contractor*, NAT'L PUB. RADIO (June 17, 2015, 4:58 PM), <https://www.npr.org/sections/thetwo-way/2015/06/17/415262801/california-labor-commission-rules-uber-driver-is-an-employee-not-a-contractor> [https://perma.cc/6RXP-DGKQ].

such as self-employed workers, independent contractors, and gig workers, eligible for unemployment benefits.²¹⁴ The legislation as well as the U.S. Department of Labor’s guidance on the topic specifically use the term “gig workers” for the implementation of the PUA.²¹⁵ To qualify for PUA benefits, a gig worker would have to provide self-certification that they lost work directly because of the COVID-19 pandemic.²¹⁶ Such scenarios of losing work directly because of coronavirus include, but are not limited to, a personal diagnosis of coronavirus, a household member’s diagnosis of coronavirus, responsibility for providing care for a family member with coronavirus, school closures related to coronavirus requiring the individual care for a child, and, most broadly, public health emergencies due to coronavirus that severely limit one’s ability to continue performing customary work activities or have forced one to suspend such activities.²¹⁷

The CARES Act’s extension of unemployment benefits to gig workers was a groundbreaking acknowledgment of the importance of gig work. This would not have been a benefit that gig workers could have counted on prior to the pandemic. For some gig workers, who lost income because of temporary cutbacks on travel and transportation usage, the legislation was helpful during the fallow period. However, these unemployment benefits were temporary, and as described below, some gig workers had a difficult time accessing them.

2. Access to Paid Sick Leave

As part of the package of aid in the Families First Coronavirus Response Act (FFCRA), Congress passed the Emergency Paid Sick Leave Act.²¹⁸ The Emergency Paid Sick Leave Act created specific expansions to help bridge the gap for workers who did not receive sick leave through their employers.²¹⁹ These expansions covered situations where the employee became sick with COVID-19 symptoms, was exposed to COVID-19, or where the worker was caring for a sick family

214. Letter from John Pallasch, Assistant Sec’y, U.S. Dep’t of Lab., Emp. & Training Admin., to State Workforce Agencies (Apr. 5, 2020), https://wdr.doleta.gov/directives/attach/UIPL/UIPL_16-20.pdf [<https://perma.cc/JW22-ELSB>].

215. *Id.*

216. *Id.*

217. *Id.*; Clark, *supra* note 211.

218. *Families First Coronavirus Response Act: Questions and Answers*, U.S. DEP’T OF LAB., <https://www.dol.gov/agencies/whd/pandemic/ffcr-questions> [<https://perma.cc/N6DH-GY3J>].

219. *See id.*

member.²²⁰ In addition, some states, like Colorado and New York, temporarily extended the reach of their paid sick leave structures.²²¹ The FFRCRA expansion expired on December 31, 2020, but many employers voluntarily decided to provide sick leave for their employees moving forward.²²² As of this writing, none of these extended measures have achieved any legal permanence.

The regulatory response regarding paid sick leave was important for many reasons during the pandemic.²²³ Public health agencies have long recommended that workers stay home to avoid spreading illness to others in the workplace.²²⁴ For many workers, the ability to rest or self-isolate while sick is largely determined by their access to paid sick leave.²²⁵ Studies have shown that workers who lack paid sick leave are 1.5 times more likely to go to work while they are contagious, mostly because either they cannot afford to stay at home or they are worried that there will be reprisals for taking time off.²²⁶ Among OECD countries, the United States is only one of two that does not provide its workers with universal access to paid sick leave.²²⁷

The other reason that the passage of the Emergency Paid Sick Leave Act was so significant is that, incredibly, only a minority of

220. *Id.*

221. Shennan Harris & Lilah Sutphen, *State Law Round-Up: Covid-19 State and Local Paid Sick Leave Law Developments (US)*, NAT'L L. REV. (Apr 21, 2020), <https://www.natlawreview.com/article/state-law-round-covid-19-state-and-local-paid-sick-leave-law-developments-us> [<https://perma.cc/E4AE-4NME>].

222. *Families First Coronavirus Response Act: Questions and Answers*, *supra* note 218.

223. See Drew DeSilver, *As Coronavirus Spreads, Which U.S. Workers Have Paid Sick Leave—and Which Don't?*, PEW RSCH. CTR. (Mar. 12, 2020), <https://www.pewresearch.org/fact-tank/2020/03/12/as-coronavirus-spreads-which-u-s-workers-have-paid-sick-leave-and-which-dont/> [<https://perma.cc/72JJ-E9K6>].

224. *Stay Home When You Are Sick*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/flu/business/stay-home-when-sick.htm> [<https://perma.cc/9HFT-VDSK>] (last updated Aug. 31, 2020).

225. Erin Garrity, *Guacamole Is Extra but the Norovirus Comes Free: Implementing Paid Sick Days for American Workers*, 58 B.C. L. REV. 703, 704, 718 (2017).

226. Jody Heymann et al., *Protecting Health During COVID-19 and Beyond: A Global Examination of Paid Sick Leave Design in 193 Countries*, 15 GLOB. PUB. HEALTH 925, 925–34 (2020); NAT'L EMP. L. PROJECT, SILENCED ABOUT COVID-19 IN THE WORKPLACE (June 2020), <https://s27147.pcdn.co/wp-content/uploads/Silenced-About-COVID-19-Workplace-Fear-Retaliation-June-2020.pdf> [<https://perma.cc/Q5EU-RKXT>].

227. AMY RAUB ET AL., WORLD POL'Y ANALYSIS CTR., PAID LEAVE FOR PERSONAL ILLNESS: A DETAILED LOOK AT APPROACHES ACROSS OECD COUNTRIES 3 (2018), https://www.worldpolicycenter.org/sites/default/files/WORLD%20Report%20-%20Personal%20Medical%20Leave%20OECD%20Country%20Approaches_0.pdf [<https://perma.cc/4ZS5-BFNN>].

states currently mandate any paid sick leave for employees.²²⁸ Currently only 13 states and Washington D.C. have enacted paid sick leave laws.²²⁹ The states that mandate paid sick leave include Connecticut, California, Massachusetts, Oregon, Vermont, Arizona, Washington, Rhode Island, Maryland, New Jersey, Michigan, Nevada, and Maine.²³⁰ Some states, like New Jersey, started with individual cities and municipalities passing paid sick leave laws.²³¹ After Jersey City and Newark passed ordinances for paid sick time, that influenced other cities within the state to do the same.²³² Eventually, this led to a statewide bill requiring New Jersey employers to provide paid sick time to their employees.²³³ Maine was the most recent addition to the list, changing the law during the pandemic to require paid sick leave for employees.²³⁴

Regardless of state minimum statutory mandates, many private employers voluntarily provide paid sick leave as an important benefit. From a practical perspective, that means that the availability of paid sick leave varies by occupation, size of employer, and geography.²³⁵ Paid sick leave seems to more broadly cover workers in the top quarter of earnings, with around only 31% of people in the lowest-earning tenth having coverage.²³⁶

While this uneven coverage is problematic for both workers and society (from a public health perspective), gig workers are in an even more precarious position than other workers. This precarity arises because the state laws on sick leave discussed above will only apply to “employees.” Based on the gig work model, workers only earn money on platforms as they complete tasks they are not provided benefits like paid time off or paid sick leave. As such, those who rely on gig work as a source of primary income are often forced into an untenable choice between working sick and paying for necessities like food and shelter.²³⁷ Recently, the City of Seattle, Washington, passed laws that

228. *Paid Sick Leave*, NAT’L CONF. OF STATE LEGISLATURES (July 21, 2020), <https://www.ncsl.org/research/labor-and-employment/paid-sick-leave.aspx> [<https://perma.cc/9U4B-B64T>].

229. *Id.*

230. *Id.*

231. Kevin J. Skelly, *Paid Sick Time Trend Continues*, 23 N.J. EMP. L. LETTER 1, 1 (2015).

232. *Id.*

233. *Id.*

234. S. Paper 110, 129th Me. Legis., 1st Reg. Sess. (Me. 2019); ME. REV. STAT. ANN. tit. 26, § 637(7) (2019).

235. Desilver, *supra* note 223.

236. *Id.*

237. Heymann et al., *supra* note 226, at 925.

guaranteed workers (regardless of employment status) paid sick and safe days.²³⁸ Seattle's municipal government chose to be expansive in their coverage so that regardless of rulings on the issue of employee status, gig workers would be entitled to paid sick leave.

3. Hazard Pay

In April of 2020, federal legislation was proposed to provide additional pay to essential workers.²³⁹ The idea behind hazard pay, or, "hero pay," was to compensate frontline workers for the increased risk of contagion they would likely face on the job.²⁴⁰ However, the federal legislation on this subject failed to pass.²⁴¹ Nonetheless, some grocery stores and other businesses decided to pay an additional "hero" bonus of a few extra dollars per hour.²⁴² Unions took up the cause of hazard pay, using it to push for wage increases.²⁴³ And some municipalities mandated an additional \$2-4 per hour payment of hazard pay, with laws aimed at larger businesses that employed a critical mass of essential workers.²⁴⁴

But most hazard pay was a temporary measure. In the summer of 2020, many retail companies ended hazard pay and instead replaced it with a one-time bonus for essential workers.²⁴⁵ And despite the fact that the pandemic continued on, some employers pushed back against hazard pay for frontline workers. For example, Kroger closed two of its grocery stores in Seattle, Washington, claiming that those closures

238. Steven Marchese, *Gig Worker Paid Sick and Safe Time Ordinance*, SEATTLE OFF. OF LAB. STANDARDS, <http://www.seattle.gov/laborstandards/ordinances/covid-19-gig-worker-protections-gig-worker-paid-sick-and-safe-time-ordinance> [<https://perma.cc/UNM6-VXXN>].

239. Molly Kinder et al., *The COVID-19 Hazard Continues, but the Hazard Pay Does Not: Why America's Essential Workers Need a Raise*, BROOKINGS (Oct. 29, 2020), <https://www.brookings.edu/research/the-covid-19-hazard-continues-but-the-hazard-pay-does-not-why-americas-front-line-workers-need-a-raise/> [<https://perma.cc/BD9M-F2K6>].

240. *Id.*

241. Wayne Winegarden, *Government-Mandated Hero Pay Fails to Achieve Its Lofty Goals*, FORBES (Jan. 15, 2021, 10:15 AM), <https://www.forbes.com/sites/waynewinegarden/2021/01/15/government-mandated-hero-pay-fails-to-achieve-its-lofty-goals/>.

242. *Id.*

243. Nathaniel Meyersohn, *These Cities Want to Give Grocery Store Workers Hazard Pay*, CNN (Feb. 3, 2021, 12:57 PM), <https://www.cnn.com/2021/02/03/business/grocery-stores-hazard-pay-seattle-los-angeles/index.html> [<https://perma.cc/25A3-978R>].

244. *Id.* (noting that law required grocery and pharmacy retailers with three hundred or more employees nationally or ten on any one site would be required to pay \$5/hour in hazard pay); Winegarden, *supra* note 241.

245. Kinder et al., *supra* note 239.

were in response to the higher wages required as hazard pay.²⁴⁶ Meanwhile, many essential workers pointed to low wages and argued that they needed a higher pay scale to be compensated for the risks they were taking.²⁴⁷ However, just as in previous pandemics, those who kept working and taking risks were often those who were in the most marginal occupational and financial positions.²⁴⁸

C. Continuing Issues and Problems

Despite legislative extension of certain temporary employment rights to gig workers, some problems remain. The systems that would allow gig workers to access unemployment and sick leave were cobbled together rapidly, and many gig workers had trouble accessing their benefits. Other practices, like tip baiting, emerged during the pandemic and are part of a larger discussion of fair pay for work on digital platforms.²⁴⁹ While gig work companies have stepped up to address some of these issues, some problems remain. Most of these problems stem from the continued ambiguities about gig worker employment status.

1. Accessing Benefits

Although the PUA's extended unemployment benefits have been a positive development for gig workers overall, some gig workers in particular reported difficulties accessing the PUA benefits.²⁵⁰ Eligibility for the PUA program was generally the same across the nation, but the actual process of qualification, application, and disbursement were all administered at the state-level.²⁵¹ The split federal-state process meant that some state unemployment agencies required that an indi-

246. Nathaniel Meyersohn, *Kroger Will Close More Stores over Hazard Pay Laws for Workers*, CNN (Feb. 18, 2021, 3:10 PM), <https://www.cnn.com/2021/02/17/business/kroger-closing-grocer-y-workers-hazard-pay/index.html> [<https://perma.cc/N3SZ-ZKWR>].

247. Kinder et al., *supra* note 239.

248. Brudney, *supra* note 12, at 27.

249. Sara Ashley O'Brien & Kaya Yurieff, *People Are Luring Instacart Shoppers with Big Tips—And Then Changing Them to Zero*, CNN (Apr. 9, 2020, 3:01 PM), <https://www.cnn.com/2020/04/09/tech/instacart-shoppers-tip-baiting/index.html> [<https://perma.cc/2C9N-Q95G>].

250. See Dara Kerr, *Gig Workers with COVID-19 Symptoms Say It's Hard to Get Sick Leave from Uber, Lyft, Instacart*, CNET (Mar. 26, 2020), <https://www.cnet.com/features/gig-workers-with-covid-19-symptoms-say-its-hard-to-get-sick-leave-from-uber-lyft-instacart/> [<https://perma.cc/WF76-UXYQ>].

251. Allsup & Mulvaney, *supra* note 146; U.S. Department of Labor Publishes Guidance on Pandemic Unemployment Assistance, U.S. DEP'T OF LAB. (Apr. 5, 2020), <https://www.dol.gov/newsroom/releases/eta/eta20200405> [<https://perma.cc/8WZN-B2MQ>].

vidual first file for traditional state unemployment compensation, receive a rejection letter, and then re-file a new claim with the state for the PUA program.²⁵² With unemployment systems already bogged down by claims during an extreme period of high unemployment, these kinds of burdensome bureaucratic systems created serious delays.²⁵³ In many states, gig workers complained that the system was slow, difficult to use, and unwieldy.²⁵⁴ Since many gig workers make less than minimum wage, this delay was a serious problem for many living paycheck-to-paycheck. Because of these financial pressures, the process of applying for unemployment has been called “nerve wracking.”²⁵⁵ One gig worker described the situation as “a terrible sort of Kafkaesque, bureaucratic nightmare,” after he tried to phone the unemployment office 600 times and received a busy signal every time he called.²⁵⁶

Although there were some problems with initial implementation and several months of delay, by mid-May 2020 at least 37 states were able to start distributing PUA payments to gig workers.²⁵⁷ But gig workers have reported ongoing problems with accessing these benefits even beyond May 2020. Laid-off or furloughed workers describe two

252. *Unemployment Insurance Relief During COVID-19 Outbreak*, U.S. DEP’T OF LAB., <https://www.dol.gov/coronavirus/unemployment-insurance> (last visited Feb. 8, 2022).

253. See Rebecca Rainey, *Millions of Gig Workers Are Still Waiting for Unemployment Benefits*, POLITICO (Apr. 30, 2020, 9:56 AM), <https://www.politico.com/news/2020/04/30/millions-of-gig-workers-are-still-waiting-for-unemployment-benefits-225844> [https://perma.cc/C57Q-LCUM]; Shannon Bond, *‘We Can’t Take Your Call’: Uber Drivers, Other Gig Workers Struggle for Unemployment*, NAT’L PUB. RADIO (May 19, 2020, 10:02 AM), <https://www.npr.org/2020/05/19/858410180/we-can-t-take-your-call-uber-drivers-other-gig-workers-struggle-for-unemployment> [https://perma.cc/6E4L-KT5Y].

254. Susana Capelouto, *Georgia Gig Workers Find Long, ‘Stressful’ Wait for Unemployment Payments*, NAT’L PUB. RADIO (May 5, 2020), <https://www.wabe.org/georgia-gig-workers-wait-a-long-time-for-unemployment-payments/> [https://perma.cc/YK27-5HKQ]; Lisa Rowan, *Why Is It So Hard to Get Your Pandemic Unemployment Benefits?*, FORBES (Mar. 1, 2021, 8:00 AM), <https://www.forbes.com/advisor/personal-finance/why-its-so-hard-to-claim-unemployment/> [https://perma.cc/M847-TZX4].

255. Capelouto, *supra* note 254 (describing a complex system and a “nerve-wracking” wait for payments).

256. Claire Withycombe, *Self-employed, Gig Workers Still Waiting for Oregon to Distribute Unemployment Benefits*, SALEM STATESMAN J. (June 11, 2020, 8:42 AM), <https://www.statesmanjournal.com/story/news/politics/2020/06/10/oregon-coronavirus-unemployment-covid-19-pua/5335310002/> [https://perma.cc/4BKC-P4BM].

257. Andrew Soergel, *Most States Are Finally Getting Unemployment Benefits to Gig Workers Affected by Coronavirus*, U.S. NEWS (May 15, 2020, 7:30 AM), <https://www.usnews.com/news/economy/articles/2020-05-15/unemployment-benefits-finally-begin-to-reach-gig-workers-hit-by-covid-19>.

hour waits on phone calls, only to have the call then drop.²⁵⁸ As mentioned earlier, part of the difficulty was no doubt attributable to the vast influx of new claims. But other delays were caused because traditionally gig workers and other independent workers were not listed in W-2 income tax reports, which generally are used by state unemployment agencies to determine eligibility for benefits.²⁵⁹ Outdated filing systems and old computer networks also contributed to delays, as well as the fact that during the pandemic there were a spate of fraudulent unemployment filings that needed to be investigated.²⁶⁰ The Federal Bureau of Investigation noted that the pandemic brought a spike in fraudulent unemployment insurance claims and accompanying identity theft.²⁶¹

Problems with wait times and bureaucracy were also a problem for gig workers who tried to access paid sick leave.²⁶² For example, one Instacart worker had gotten tested for COVID and was waiting to hear what his status was, but rather than being given access to sick leave, the worker was deactivated from the platform.²⁶³ Others complained about the excessive documentation that was needed once they received a COVID-19 diagnosis.²⁶⁴ Still others noted that they were confused, and were never given instructions about how to access the paid leave program.²⁶⁵ As one Uber driver who had tried (unsuccessfully) to access sick leave benefits put it:

They sent me a link that didn't work. They said that a doctor or public-health official would have to log in and create an account with a medical ID to submit a special request form. . . . My doctor was frankly so busy she couldn't. We

258. Rowan, *supra* note 254 (describing the efforts of one worker to call, email in order to try to claim benefits, yet coming away unsuccessfully).

259. *Id.*

260. *Id.*

261. *FBI Sees Spike in Fraudulent Unemployment Insurance Claims Filed Using Stolen Identities*, FED. BUREAU OF INVESTIGATION (July 6, 2020), <https://www.fbi.gov/news/pressrel/press-releases/fbi-sees-spike-in-fraudulent-unemployment-insurance-claims-filed-using-stolen-identities> [<https://perma.cc/VDL5-7PS3>].

262. Aarian Marshall, *Covid-19 Opens the Door for Gig Workers to Win Sick Pay*, WIRED (June 7, 2020, 7:00 AM), <https://www.wired.com/story/covid-opens-door-gig-workers-sick-pay/> [<https://perma.cc/ADZ8-KV37>].

263. *Instacart's COVID "Sick Pay"—The Reality*, PAY UP, <https://payup.wtf/instacart-covid-sick-pay> (last visited Feb. 8, 2022).

264. Russel Brandom, *Sick Days: Instacart Promises a Safer Way to Shop, but Workers Tell a Different Story*, THE VERGE (May 26, 2020, 9:00 AM), <https://www.theverge.com/21267669/instacart-shoppers-sick-extended-pay-quarantine-leave-coronavirus> [<https://perma.cc/6VEJ-6DF9>].

265. *See id.*

make Uber literally all of their money and I can't even afford my insulin in the state of Texas. They couldn't even throw us a bone?²⁶⁶

Again, some of these systems were new, but other workers felt like all they were getting was the runaround. All of these factors contributed to the sense of frustration that gig workers had in trying to access these new sick leave benefits.

Many of the problems gig workers encountered in accessing benefits stemmed from their ambiguous employment status pre-pandemic. These ambiguities meant that state unemployment divisions apparently never viewed gig workers as full and equal participants in the labor force. As such, when gig workers were finally granted benefits in the CARES Act, state unemployment offices were caught off guard. Despite benefits specifically earmarked for gig workers, they still were marginalized based on unemployment offices' pre-existing structural limitations, such as using W-2 information to determine eligibility for benefits. And so, once again, the ambiguous legal status of gig workers led to injustice.

2. Tip-Baiting and Other Deceptive Practices

Beyond the difficulty accessing unemployment benefits and paid sick leave, gig workers during the pandemic also had trouble obtaining proper payment for their work.²⁶⁷ This is the latest part of a continuing problem. Earnings on various platforms have been the subject of many controversies in the past. Workers have sued gig companies because of payment problems and a lack of transparency around charges, fees, and how tip payments have been calculated.²⁶⁸

But in addition to these problems that have long-been a feature of work on digital platforms, a new practice called "tip baiting" started to become a serious problem during the pandemic. The practice of tip baiting involved customers posting a large amount as a tip in order to

266. Lia Russell, *Uber's Bait and Switch on Paid Sick Leave*, THE AM. PROSPECT (May 5, 2020), <https://prospect.org/coronavirus/uber-bait-and-switch-on-paid-sick-leave/> [<https://perma.cc/LA33-8WBX>].

267. Laviertes & McCoy, *supra* note 43.

268. Joel Rubin, *Lawsuit Accuses Uber of Ripping Off Drivers, Paying Them Smaller Fares Than What Passengers Pay*, L.A. TIMES (Apr. 28, 2017, 3:55 PM), <https://www.latimes.com/local/lanow/la-me-uber-drivers-lawsuit-20170429-story.html> [<https://perma.cc/74DP-4Z9A>]; Aaron Gordon & Dhruv Mehrotra, *Uber and Lyft Take a Lot More from Drivers Than They Say*, JALOPNIK (Aug. 26, 2019, 12:04 PM), <https://jalopnik.com/uber-and-lyft-take-a-lot-more-from-drivers-than-they-sa-1837450373> [<https://perma.cc/GZL8-JCVL>].

get prompt fulfillment of their order, and then those same customers later removing part of the tip amount. For example, one gig worker on Instacart noted a promised tip of \$55 on a grocery order, only to have the customer remove the large tip the hour after delivery.²⁶⁹ The removal of the tip left the worker demoralized, as most of her earnings from that day had evaporated.²⁷⁰ The practical result of tip baiting was to take the money away from the gig worker who earned it.²⁷¹ The practice seems incredibly problematic and deceptive, a type of bait-and-switch. Yet most grocery delivery platforms still allow the customer some time to either raise or lower the amount of tip provided with no intervention from the platform.²⁷² The practice of tip baiting seemed to pick up steam when there were shortages of both products and workers during the spring and summer of 2020.²⁷³ Indeed, tip baiting was one of the issues leading to work stoppages during the spring and summer of 2020 on many gig platforms.²⁷⁴

More generally, tip baiting and other similar practices bring to the forefront the fact that gig workers deserve to have fair and transparent wage structures for their work. Such fair pay structures would include minimum wages that incorporate time that is spent looking for work and the time in between various tasks undertaken on the platform. Gig workers can sometimes struggle to make minimum wage for on-demand apps that require in person work.²⁷⁵ Gig workers faced other problems during the pandemic, too, like not having adequate bathroom facilities or places where they could wash their hands.²⁷⁶

269. O'Brien & Yurieff, *supra* note 249.

270. *Id.* (recounting story of Instacart worker Annaliisa Arambula, who said, "I don't pretend to be a hero, like a nurse in a hospital . . . but I literally am exposing myself . . . and when I return home, exposing my own family to the possibility of transmitting this disease. When you know that it's somebody who's just doing it to game the system and to get their order when they want it, it's really frustrating.").

271. *See id.*

272. Natasha Mascarenhas, *Instacart Makes Changes to Tip Policy Following Shopper Complaints*, TECHCRUNCH (June 5, 2020, 12:00 PM), <https://techcrunch.com/2020/06/05/instacart-makes-changes-to-tip-policy-following-shopper-complaints/> [<https://perma.cc/XD74-JA3N>].

273. *See* O'Brien & Yurieff, *supra* note 249.

274. *See, e.g.*, Michael C. Duff, *New Labor Viscerality? Work Stoppages in the "New Work" Non-Union Economy*, 65 ST. LOUIS U. L.J. 115 (2020).

275. RESTAURANT OPPORTUNITIES CTRS. UNITED, *THE GIG IS UP: THE NEW GIG ECONOMY AND THE THREAT OF SUBMINIMUM WAGES 3* (Mar. 2019), <https://rocunited.org/wp-content/uploads/sites/7/2020/02/TheGigIsUp.pdf> [<https://perma.cc/8EAB-8FYQ>].

276. *See* Edward Ongweso Jr., *Gig Workers' Only Chance to Pee Is Apparently an App*, VICE (Oct. 23, 2020, 6:00 AM), <https://www.vice.com/en/article/93w5by/gig-workers-only-chance-to-pee-is-apparently-an-app> [<https://perma.cc/STW4-TYL3>] (noting the lack of bathroom facilities for gig workers, and platform's responses that they should use a separate app to locate bathrooms).

While these are continuing problems that will be need to be addressed, the fact is that at the very least, the pandemic moved some number of gig workers closer to parity with employees. But when gig workers tried to access the benefits provided by the expanded PUA plan, for example, they encountered confusion about their employment status, and as a result, their claims and payments were delayed and their needs minimized.²⁷⁷ During the pandemic, the issue of employee classification translated into lost benefits, delayed benefits, and additional stress for gig workers.²⁷⁸ The same has been true for the difficulties that gig workers encountered with accessing their sick leave benefits.²⁷⁹ The way forward is clear—and it involves parity for gig workers with other employees.

V. THE ARGUMENT FOR PARITY

There is not much good that has come out of the coronavirus pandemic, which has been a time of death and suffering for so many. But at least the pandemic has served as a catalyst for a long-needed “jumpstart” for gig workers’ rights. Now because of the pandemic, the public is more aware that gig work is real work, important work, and essential work.

At the same time that gig workers were risking their lives, many salaried or 9-to-5 employees began working from home, with some using internal online platforms to complete their work. The result of all these changes is that the previous divisions between remote work and in-person work, and work provided directly versus work facilitated on a computer program or cellphone app can no longer be maintained. Where once those kinds of technological distinctions might have justified differential treatment for gig workers, the reality is that these categories have begun to blur and collapse. This next Section examines the trends, discussions, and changes in the law to argue in favor of parity for gig workers.

A. *The Essential Worker Paradox*

The discourse on gig workers during the pandemic presents what I term the *essential worker paradox*: How can workers be considered essential and yet at the same time be completely disregarded when

277. Capelouto, *supra* note 254.

278. See Clark, *supra* note 211.

279. Brandom, *supra* note 264.

they try to gain the basic protections that employees receive? The paradox might be explained by separating out the concept of essential work from the people who are deemed essential workers. *Essential work* is the labor that needs to happen in order for society to function; food and agriculture production, energy production, the provision of medical services, and transportation, to name a few examples. This work is of critical importance, and without it the consequences to the economy and to humanity's health would be dire. *Essential workers*, on the other hand, are the people who of necessity are needed to produce the essential work.

While *essential work* is valued and valorized, the notion often seems to be separated from the *essential workers* who are involved in actually providing it. We can see this distinction in the statistics about how essential workers are underpaid compared to other employees, or the news stories about large grocery chains shuttering stores rather than providing hazard pay to store cashiers and clerks.²⁸⁰ The lower wages and casual attitude toward safety for frontline workers means that essential workers are not being treated as if they are critical or important.

In fact, perhaps because of the risks that gig workers take and the lack of safety measures, it often seems that employers treat frontline workers as disposable workers. Gig workers and other essential workers took the risks that others did not want to take and are many did so out of economic necessity.²⁸¹ Indeed, it is hard to understand how the work could be seen as so incredibly important, and yet so little consideration and respect could be given to the person who is performing that work.

Indeed, separating the worker's humanity from the work they produce is problematic. The organizing documents of the United Nations—International Labor Office recognized this truth in their declaration that labor is not a commodity.²⁸² In other words, work is done by people, and the personhood and human rights of the worker exist separately and distinctly from the work being done. A worker has

280. Michael Sainato, 'They Don't Care': US Supermarket Chain Shuttters Stores After Hazard Pay Rules, THE GUARDIAN (Mar. 26, 2021, 5:00 AM), <https://www.theguardian.com/us-news/2021/mar/26/krogers-us-supermarket-chain-stores-closed-layoffs> [<https://perma.cc/KVM6-XZZF>].

281. Aizicovici, *supra* note 28.

282. INT'L LAB. ORG., ILO DECLARATION OF PHILADELPHIA 1 (1944). For the full text, see INT'L LAB. ORG., ILO CONSTITUTION 15 (2015).

value and worth as a human being beyond their mere capability to produce.

These human rights concepts can help us to disentangle the essential worker paradox. We must not claim that work society and the economy needs is essential but then simultaneously treat those workers performing those tasks as disposable. And we know that gig workers, out of any frontline workers, are among the most marginalized because of the continuing problems around their legal status. Instead, we must look at essential work and essential workers in tandem. Gig workers took enough risks during this pandemic to say that they truly are essential, and thus have earned parity with employees.

B. We Are All Gig Workers Now

As over 50 million Americans moved from full-time in person work to some form of hybrid work or to work from home during the pandemic, remote work became normal. And as computer intermediated work will continue to be ubiquitous, most of the reasons for excluding gig workers from employee status seem increasingly problematic and out of touch with the way that work is being performed.

To take an example, consider office workers who used to work in an office but then switched to working from home during the pandemic. Remote work was possible for these office workers because they used digital platforms to connect them with their supervisors, coworkers, and subordinates. Those office workers still would be considered employees even if they had the flexibility to sign in and complete work during flexible working hours, perhaps as they managed household chores or helped their children with virtual school. The old arguments about why gig workers should be left out of employment protections, typically framed around flexible work schedules, seem hollow in light of these fundamental changes to the structure of work.

And because so many workers have switched to remote work, this is even more of a reason why employee status for gig workers is such an important concern. Within the fissured workplace, many jobs could be split up, outsourced, or placed on digital platforms.²⁸³ And the lack of any fundamental rights for gig workers creates the incentives for that to happen. If we stop to think about it, solidarity with gig workers makes sense for workers across the occupational hierarchy. And it

283. DAVID WEIL, *THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT* (2014).

makes even more sense in light of the incredible sacrifices that gig workers have made during the pandemic so that others could be safe.

C. Moving from Temporary to Permanent Rights

Temporary rights and protections in the wake of the pandemic are one thing; but they are not enough to reward gig workers fully for their sacrifices during the pandemic. The schism between those who are employees, and those who are being denied coverage only because they use a platform to access their work is increasingly unfair and illogical, as noted throughout this Article. The changes that were implemented during the pandemic on a temporary basis should become permanent.²⁸⁴ Gig workers should continue to have access to paid sick leave and unemployment protections.

Beyond unemployment and paid sick leave, there are other labor and employment protections that gig workers should be able to access. For example, having a reasonable minimum wage that included time searching for work or getting to work would help with financial stability. Allowing gig workers to sue for discrimination and harassment would mean that fewer gig workers would be sidelined by prejudices or unfair employment practices. The ability to join a union and bargain collectively would be absolutely key to achieving fair wages and benefits. And the right to blow the whistle on wrongdoing at work, without fear of reprisal, would also be important. In listing these benefits that would help gig workers, it becomes more obvious that these are the typical rights of employees. In fact, employment law has already largely sorted out the important needs, rights, and responsibilities of employees.²⁸⁵ Gig workers have now earned these same rights.

There are counterarguments, to be sure. While it might be difficult to argue that gig workers were only working on trivial matters (due to their service during the pandemic), platforms might try to argue that the employee model would be too expensive to maintain. Or, as they did during the Proposition 22 campaign in California, platforms might argue that making workers employees would take away their flexibility and freedom of contract. Finally, there is also an argument that even some *employees* who are essential workers were not

284. Megan Tobias Neely, *What Will U.S. Labor Protections Look Like After Coronavirus?*, HARV. BUS. REV. (Apr. 2, 2020), <https://hbr.org/2020/04/what-will-u-s-labor-protections-look-like-after-coronavirus> [https://perma.cc/A3VC-FD9Q].

285. De Stefano, *supra* note 112, at 483.

treated particularly well during the pandemic.²⁸⁶ For example, at the beginning of the pandemic, health care workers who wanted to wear N-95 masks while treating patients were often reprimanded or fired.²⁸⁷ Incredibly, the justification at that time was that hospitals and doctor's practices did not want to worry or alarm patients.²⁸⁸ Some retail and grocery store workers were violently attacked when they attempted to enforce mandatory mask policies in stores.²⁸⁹

However, the rebuttals to these arguments are more convincing. All businesses struggle with costs and profitability, but they still must provide minimum wage to their workers. As platforms were starting in the early 2010s, perhaps they needed room to experiment, but these are well-established businesses now. Further, part-time work can still be flexible and yet come under the ambit of "employee" protection. Part-time employee status seems to have gotten lost during the Proposition 22 debate where the platform companies emphasized a loss of flexibility. Finally, the negative treatment of frontline employees and healthcare workers is hardly a reason to deny another group of workers the rights that they deserve. In fact, these disturbing stories of frontline employees being treated poorly is more likely a reason that we should try to raise the standards for all workers, not a reason to withhold benefits from gig workers.

This Article has pointed to several key reasons that lead to the conclusion that there should be parity for gig workers with existing

286. See, e.g., Brudney, *supra* note 12, at 4–5 (noting that frontline essential employees bore "disproportionate health risks" and that the law's response to the struggles of essential employees has been "fragmented and disappointing").

287. Sophie Sherry, *Nurse Says She Was Fired by Northwestern Memorial Hospital After Warning Co-Workers That Face Masks Being Used Were Not the Safest*, CHI. TRIB. (Mar. 25, 2020, 6:00 AM), <https://www.chicagotribune.com/news/breaking/ct-nurse-northwestern-memorial-hospital-coronavirus-20200324-6smjuxbn6fgnxpaiyzzkjymorq-story.html>.

288. Chethan Sathya, *Why Would Hospitals Forbid Physicians and Nurses From Wearing Masks?*, SCI. AM. (Mar. 26, 2020), <https://blogs.scientificamerican.com/observations/why-would-hospitals-forbid-physicians-and-nurses-from-wearing-masks/> [https://perma.cc/3EE5-BX2K].

289. See, e.g., Teo Armus, *Two Trader Joe's Customers Were Asked to Put on Masks. They Attacked Employees Instead, Police Said, WASH. POST* (July 29, 2020), <https://www.washingtonpost.com/nation/2020/07/29/covid-trader-joe-face-masks/> [https://perma.cc/DH33-E76Q]; Carlie Porterfield, *No-Mask Attacks: Nationwide, Employees Face Violence for Enforcing Mask Mandates*, FORBES (Aug. 15, 2020, 2:42 PM), <https://www.forbes.com/sites/carlieporterfield/2020/08/15/no-mask-attacks-nationwide-employees-face-violence-for-enforcing-mask-mandates/>; Soo Kim, *'Violent' Customer Attacks Grocery Store Worker with Bottle After Being Asked to Wear Mask*, NEWSWEEK (Jan. 19, 2021, 4:55 AM), <https://www.newsweek.com/coronavirus-washington-state-mask-mandate-grocery-store-employee-attacked-1562512> [https://perma.cc/B7K8-Y8J9]; Alejandro De La Garza, *'We All Worry About It.' Grocery Workers Fear Confrontations with Shoppers Over Mask Rules*, TIME (May 26, 2020, 12:51 PM), <https://time.com/5841124/grocery-workers-masks/>.

employees. That change would have important implications. Apart from minimum wages, unemployment benefits, and discrimination protections it would also mean that gig workers could join unions. Presumably increased gig worker power and pressure from unions would mean an end to deceptive practices like “tip baiting.”²⁹⁰ Gig worker parity could be accomplished through legislation, by court decisions, or by Acts of Congress. But the way forward depends on securing protections for all workers, regardless of the technology they may use to help them accomplish their work.

VI. CONCLUSION

During the coronavirus pandemic gig workers have been of tremendous service to so many citizens, delivering meals and groceries, providing transportation, and increasing their own exposure to disease so that others could stay at home during lockdowns. A full recognition of those sacrifices should result in gig workers receiving the same labor and employment law protections and benefits that employees traditionally receive.

Indeed, these employment protections for gig workers will be critical so that they will be able to engage fully in the hoped-for post-pandemic economic recovery. As voters, unions, companies, and policymakers grapple with the aftermath of the pandemic and its impact on the world of work generally, the sacrifices and service of gig workers during this time should not be forgotten. Without a doubt, gig workers have proven themselves worthy of the same labor market protections that employees receive under the law. The trend toward parity that started in the pandemic needs to be continued and is one of the few bright spots of hope to come out of a difficult and tragic time.

290. See O’Brien & Yurieff, *supra* note 249.

