

2018

Extending Employee Protections to Gig-Economy Workers Through the Entrepreneurial Opportunity Test of Fedex Home Delivery

Peter Gibbins

Follow this and additional works at: https://openscholarship.wustl.edu/law_journal_law_policy



Part of the [Labor and Employment Law Commons](#)

Recommended Citation

Peter Gibbins, *Extending Employee Protections to Gig-Economy Workers Through the Entrepreneurial Opportunity Test of Fedex Home Delivery*, 57 WASH. U. J. L. & POL'Y 183 (2018),
https://openscholarship.wustl.edu/law_journal_law_policy/vol57/iss1/15

This Note is brought to you for free and open access by the Law School at Washington University Open Scholarship. It has been accepted for inclusion in Washington University Journal of Law & Policy by an authorized administrator of Washington University Open Scholarship. For more information, please contact digital@wumail.wustl.edu.

Extending Employee Protections to Gig-Economy Workers Through the Entrepreneurial Opportunity Test of *Fedex Home Delivery*

Peter Gibbins

INTRODUCTION: THE RISE OF THE GIG-ECONOMY

Just as the internet has transformed the way people communicate and consume information, it is transforming the relationship between businesses, workers, and consumers through online platforms like Uber and Lyft. In what is referred to as the “gig-economy,” more and more people are working as independent contractors through online platforms that link them to consumers. The gig-economy is not an official term but generally refers to workers performing individual tasks or “gigs,” “often through a digital marketplace.”¹ Though the size of the gig economy is inherently difficult to measure, from 2003 – 2013, the number of “non-employer businesses” associated with the gig-economy grew by over 1 million.² In addition to the well-known ridesharing apps Uber and Lyft, services like Handy and Taskrabbit offer housecleaning, organization, and handyman services;³ Favor and Postmates deliver virtually anything;⁴ and Instacart offers a grocery shopping and delivery service,⁵ just to name a few. Most of these new businesses classify their workers exclusively as “independent contractors” and not employees.⁶

Despite the relative newness of this work arrangement, gig-economy non-employer businesses have already been hit with numerous lawsuits related to or affected by how they classify their workers. They have been

1. Elka Torpey & Andrew Hogan, *Working in a Gig Economy*, UNITED STATES DEPARTMENT OF LABOR, (May 2016) <http://www.bls.gov/careeroutlook/2016/article/what-is-the-gig-economy.htm>.

2. *Id.*

3. See HANDY, <https://www.handy.com/> (Mar. 21, 2018); see also TASKRABBIT, <https://www.taskrabbit.com/> (Mar. 21, 2018).

4. See FAVOR, <https://favordelivery.com/> (Mar. 21, 2018); POSTMATES, <https://postmates.com/> (Mar. 21, 2018).

5. See INSTACART, <https://www.instacart.com/> (Mar. 21, 2018).

6. See Gillian B. White, *In the Sharing Economy, No One's an Employee*, THE ATLANTIC (June 8, 2015), <http://www.theatlantic.com/business/archive/2015/06/in-the-sharing-economy-no-ones-an-employee/395027/>. Of note is Instacart, which classifies some of its workers as part-time employees. Davey Alba, *Instacart Shoppers Can Now Choose to be Real Employees*, WIRED (June 22, 2015), <https://www.wired.com/2015/06/instacart-shoppers-can-now-choose-real-employees/>.

sued over workers' tortious conduct, worker classification, and worker pay.⁷ In some instances, lawsuits have been blamed for the total failure of businesses. The CEO of the now-shuttered housecleaning service Homejoy specifically blamed four lawsuits regarding worker classification as the "deciding factor" in Homejoy's closing.⁸

The independent contractor relationship significantly limits the rights and protections afforded workers, and by extension, it significantly reins in costs for businesses.⁹ However, some companies are concerned about the sustainability of gig-work for those who rely on gigs for a significant portion of their income and as a result are unable to access many of the benefits available to traditional employees.¹⁰ The problem of sustainability of gigs for workers has even prompted academics, labor leaders, and industry leaders to sign an open letter calling for, among other things, basic universal protections for workers regardless of how they earn their income.¹¹ Uber has also decided in some instances to extend rights to

7. See, e.g., Dan Levine, *Uber Settles Wrongful Death Lawsuit in San Francisco*, REUTERS (July 15, 2015), <http://www.reuters.com/article/us-uber-tech-crash-settlement-idUSKCN0PO2OW20150715>; Dave Alba, *Some Drivers Really Aren't Happy About the \$100M Uber Settlement*, WIRED (May 16, 2016), <https://www.wired.com/2016/05/drivers-really-arent-happy-100m-uber-settlement/>.

8. Carmel Deamicis, *Homejoy Shuts Down After Battling Worker Classification Lawsuits*, RECODE (July 31, 2015), <http://www.recode.net/2015/7/17/11614814/cleaning-services-startup-homejoy-shuts-down-after-battling-worker>.

9. In 2015, an independent analysis by Fortune magazine estimated that Uber saves some \$4 billion in costs by classifying drivers as independent contractors. Stephen Gandel, *Uber-nomics: Here's What It Would Cost Uber to Pay Its Drivers as Employees*, FORTUNE (September 17, 2015), <http://fortune.com/2015/09/17/ubernomics/>. Juxtapose this figure with leaked documents from the same time period showing Uber was experiencing losses, and it is easy to see why gig-economy businesses are reluctant to classify their workers as employees. Maya Kosoff, *New Revenue Figures Show Uber Is Losing a Lot of Money*, BUSINESS INSIDER (Aug. 5, 2015), <http://www.businessinsider.com/ubers-revenue-profit-and-loss-2015-8>.

10. Etsy, an online marketplace utilized by small-scale producers of a variety of goods, released a white paper discussing the need for those not "traditionally employed" to have "a single place to manage benefits," "a simple, common way to fund those benefits," and "a way to manage income fluctuations." *Economy Security for the Gig Economy: A Social Safety Net That Works for Everyone That Works*, ETSY (Fall 2016), https://extfiles.etsy.com/advocacy/Etsy_EconomicSecurity_2016.pdf.

11. *Common Ground for Independent Workers*, FROM THE WTF? ECONOMY TO THE NEXT ECONOMY (Nov. 9, 2015), <https://wtfeconomy.com/common-ground-for-independent-workers-83f3bfef548f>.

2018] Extending Employee Protections to Gig-Economy Workers 185

workers that the law does not otherwise require.¹² Even though companies like Uber are deciding to extend some protections not usually given to contractors, the growth in gig economy work necessitates adapting the law to offer increased rights and protections for workers while also allowing workers and businesses to maintain some of the flexibility the current contractor relationship allows.¹³

Unions can offer solutions to many of the problems presented by this new world of work as labor unions are already experienced deliverers of a variety of services relevant to gig-economy workers and the businesses

12. In New York, Uber agreed to give drivers limited rights to act through a bargaining agent though “the deal falls short of actual union representation.” Daniel Wiessner & Dan Levine, *Uber Deal Shows Divide in Labor’s Role in Gig Economy*, REUTERS, May 23, 2016, <https://www.reuters.com/article/us-uber-tech-drivers-labor/uber-deal-shows-divide-in-labors-drive-for-role-in-gig-economy-idUSKCN0YE0DF>. Uber also agreed as part of one of the proposed but now scuttled *O’Connor* settlements to allow drivers in California and Massachusetts to form driver’s associations. *Id.* Though these agreements fall short of traditional union rights, Uber is making concessions in allowing some form of organizing to occur among its contractors. *Id.* Some criticize Uber’s move to allow driver’s associations as simply a self-serving attempt to prevent the organizing of traditional unions. Josh Eidelson, *Uber Found an Unlikely Friend in Organized Labor*, BLOOMBERG BUSINESSWEEK (Oct. 27, 2016), <https://www.bloomberg.com/news/articles/2016-10-27/uber-found-an-unlikely-friend-in-organized-labor>. The Independent Drivers Guild operated in partnership with the International Association of Machinists and Aerospace Workers is partially funded by Uber and has already agreed never to strike or to engage in more concerted union organizing. *Id.* At the same time, the association hopes to eventually manage a benefits fund for Uber drivers. *Id.*

13. Not only is the number of “non-employer” businesses growing, but gigs are comprising a greater percentage of workers’ income. *See, e.g., Working in a Gig Economy, supra* note 1. As of September 2015, one percent of working adults earned income through online platforms and of those, a quarter earned seventy-five percent or more of their income through such services. *Paychecks, Paydays, and the Online Platform Economy: Big Data on Income Volatility*, JPMORGAN CHASE & CO. (February 2015), <https://www.jpmorganchase.com/corporate/institute/report-paychecks-paydays-and-the-online-platform-economy.htm>. Rates of alleged worker misclassification are also high. A 2000 study by the Department of Labor found that up to thirty percent of workers in audited firms were misclassified. LALITH DE SILVA ET AL., INDEPENDENT CONTRACTORS: PREVALENCE AND IMPLICATIONS FOR UNEMPLOYMENT INSURANCE PROGRAMS (Feb. 2000), <http://wdr.doleta.gov/owsdrr/00-5/00-5.pdf>. A Government Accountability Office study reported that as far back as 1984, the IRS estimated that misclassification cost the federal government nearly \$1.6 billion in lost income tax revenue. U.S. GOV’T ACCOUNTABILITY OFF., GAO-09-717, EMPLOYEE MISCLASSIFICATION: IMPROVED COORDINATION, OUTREACH, AND TARGETING COULD BETTER ENSURE DETECTION AND PREVENTION (2009). In recent years, the Department of Labor has stepped up enforcement of federal wage and hour laws both to protect employees and gain revenue. *See, e.g., Laurie Merrill, Companies Accused of Worker Misclassification to Pay \$700K in Back Wages, Penalties*, ARIZONA REPUBLIC (Apr. 23, 2015), <http://www.azcentral.com/story/money/business/career/2015/04/23/companies-accused-misclassifying-workers-pay-back-wages-penalties/26277823/>.

they work with. Most obviously, unions can bargain for improved working conditions in a manner which is far more efficient and flexible than constantly litigating quality of work issues through class action lawsuits.¹⁴ Unions can also offer training and professional support for workers seeking to improve the quality of the services they deliver,¹⁵ and benefits along with or in lieu of benefits offered by traditional employers.¹⁶ All of this can be accomplished in ways that still allow parties to enjoy much of the flexibility and cost-savings of their current, gig-economy working relationships.¹⁷

However, the extent to which workers can organize into groups, and what they are allowed to do once organized, currently hinges on whether or not they are viewed as employees or independent contractors. Workers must be deemed as employees to enjoy the legal protections for union activity under laws such as the National Labor Relations Act (“NLRA”). Without employee classification, not only will workers be faced with the difficulty of organizing without legal protections, their ability to collectively bargain around quality of work issues, particularly pay, is

14. AFL-CIO, *Collective Bargaining*, <https://aflcio.org/what-unions-do/empower-workers/collective-bargaining> (last visited Feb. 16, 2018).

15. AFL-CIO, *Training and Apprenticeships*, <http://www.aflcio.org/Learn-About-Unions/Training-and-Apprenticeships> (last visited April 1, 2018).

16. See, e.g., U.S. DEP’T OF LAB., *Health Plans & Benefits*, <https://www.dol.gov/general/topic/health-plans> (last visited Feb. 16, 2018). See also, UNIONPLUS, <https://www.unionplus.org/> (last visited Feb. 16, 2018) (offering a variety of discounts to everything from health and life insurance to car rentals for union members).

17. Some have suggested that creating an intermediate, third class of worker could extend protections in a number of areas in a way that maintains the flexibility workers and businesses need. See, e.g., Seth D. Harris & Alan B. Krueger, *A Proposal For Modernizing Labor Laws For Twenty-First Century Work: The “Independent Worker”*, THE HAMILTON PROJECT 2 (Dec. 2015), http://www.hamiltonproject.org/assets/files/modernizing_labor_laws_for_twenty_first_century_work_krueger_harris.pdf. See also, Doug Hass, *Protecting the Sharing Economy: Creating an FLSA Dependent Contractor Status*, DAY SHIFT (Sept. 22, 2015), <http://dayshift.com/2015/09/22/protecting-the-sharing-economy-creating-an-flsa-dependent-contractor-status/56/> (proposing a “dependent contractor” status under the Fair Labor Standards Act). Indeed, other countries have used a third worker classification for years with varied results. See generally, Miriam A. Cherry & Antonio Aloisi, *“Dependent Contractors” in the Gig Economy*, 66 Am. U.L. Rev. 635 (2017). I argue that if gig-economy workers did not enjoy employee protections under other laws but were granted bargaining rights under the NLRA, they could use union processes to address other shortcomings in their work. Regardless, the employee classification issues I explore in this Note would be an issue for courts to address whether workers were classified as a new, third class of worker or if workers simply sought full employee classification under the existing NLRA regime.

2018] Extending Employee Protections to Gig-Economy Workers 187

severely restricted by antitrust laws. Enjoying rights under the NLRA is essential for gig-economy workers to work collectively with employers to make gig-work economically sustainable for all parties involved. Extending rights under the NLRA will require courts to appropriately classify those workers in need of greater protection.

In Part I of this note, I discuss the development of the employer/employee relationship in the law and the adoption of factors used by courts to settle classification questions to this day. Part II examines the effects of antitrust law and the NLRA. Part III examines current cases dealing with workers in the gig economy. Finally, in Part IV, I propose that tests already utilized by courts are capable of determining which gig-economy workers do, in fact, require protections under the NLRA.

I. THE EMPLOYER/EMPLOYEE RELATIONSHIP: ITS ORIGIN & SIGNIFICANCE

The employer/employee relationship, including the rights and responsibilities this relationship confers on the parties, has its roots in the master/servant relationship in England.¹⁸ The master/servant relationship had such primacy that it was viewed as familial in nature, similar to the husband/wife and parent/child relationships.¹⁹ Industrialization transformed work such that greater distinctions in employment relationships were needed.²⁰ Tort law in particular drove the development of the employment relationship's classification to deal with issues of liability to employers for harms against third parties resulting from the acts of workers.²¹ Additionally, the increasingly impersonal nature of employment ushered in by the industrial revolution necessitated guaranteeing certain protections for employees by law.²²

Courts have utilized multiple tests for determining the nature of the employment relationship at issue in a given case, particularly in cases

18. Richard R. Carlson, *Why the Law Still Can't Tell an Employee When It Sees One and How It Ought to Stop Trying*, 22 BERKELEY J. EMP. & LAB. L. 295 (2001).

19. *Id.* at 303.

20. *Id.* at 304.

21. *Id.*

22. *Id.*

dealing with the doctrine of respondeat superior, with various forms of the right to control test being central among them.²³ This test usually consists of ten factors:

- 1) “the extent of control which . . . the master may exercise over the details of the work;
- 2) whether or not the one employed is engaged in a distinct occupation or business;
- 3) the kind of occupation, with reference to whether...the work is usually done under the direction of the employer...;
- 4) the skill required in the particular occupation;
- 5) whether the employer or the workman supplies the instrumentalities... for the person doing the work;
- 6) the length of time for which the person is employed;
- 7) the method of payment, whether by the time or by the job;
- 8) whether or not the work is a part of the regular business of the employer,
- 9) whether or not the parties believe they are creating the relation of master and servant;
- 10) and whether the principal is or is not in business.”²⁴

Certain factors are emphasized depending on the context of the case, and courts have also chosen to focus on specific factors to the effective

23. For a historical account of the development of the control test and respondeat superior, see Gerald M. Stevens, *The Test of the Employment Relation*, 38 MICH. L. REV. 188, 189 (1939). The right to control test defines “an employment relationship as a relationship of control: the employer gives orders, plans out jobs in minute detail, and monitors the employee’s performance.” Brishen Rogers, *Employment Rights in the Platform Economy: Getting Back to Basics*, 10 HARV. L. & POL’Y REV. 479, 485 (2016). The independent contractor relationship is different in that the contractor is expected to complete a task, but the employer refrains from supervising the work because the employer lacks the skills to do so. *Id.*

24. RESTATEMENT (SECOND) OF AGENCY § 220 (AM. LAW INST. 1958). The newer Restatement of Employment Law takes a simpler approach, identifying an employee as one who “(1)[A]cts, at least in part, to serve the interests of the employer; (2) the employer consents to receive the individual’s services; and (3) the employer controls the manner and means by which the individual renders services, or the employer otherwise effectively prevents the individual from rendering those services as an independent business person.” RESTATEMENT OF EMPLOYMENT LAW § 1.01 (AM. LAW INST. 2015).

2018] Extending Employee Protections to Gig-Economy Workers 189

exclusion of others.²⁵ Notwithstanding the pervasiveness of the right to control test, statutory definitions for the employment relationship also came into use as legislatures enacted various laws responding to the *laissez faire* state of employment practices.²⁶ These statutory definitions were often vague and gave courts considerable latitude in making determinations.²⁷

Where statutory definitions were absent, difficult to apply, or granted courts considerable discretion for determining the relationship at hand, courts would often fall back on old tests or cite cases dealing with different statutes to flesh out the bounds of the relationship in various contexts.²⁸ Historically, and in the present, courts generally favor multi-factor tests for determining the nature of the relationship in question with the ten factors of the right to control test usually being the ones

25. See *infra* notes 52-58 and accompanying text.

26. Jeffrey E. Dilger, *Pay No Attention to the Man Behind the Curtain: Control as a Nonfactor in Employee Status Determinations Under FedEx Home Delivery v. NLRB*, 26 ABA J. LAB. & EMP. L. 123, 126 (2010). Just as legislators were expanding the statutory framework addressing the employment relationship, they were also changing the significance of the relationship as employment status came to guarantee employees certain rights and protections, and the relationship ceased to serve solely as a vehicle for determining liability under respondeat superior. Robert L. Redfearn III, *Sharing Economy Misclassification: Employees and Independent Contractors in Transportation Network Companies*, 31 BERKELEY TECH. L.J. 1023, 1031 (2016). Different agencies also employ different tests of employment for their own purposes including for use in administrative hearings and investigating statutory violations. See, e.g., *Fact Sheet 13: Am I an Employee?: Employment Relationship Under the Fair Labor Standards Act (FLSA)*, UNITED STATES DEPARTMENT OF LABOR – WAGE AND HOUR DIVISION (May 2014), <http://www.dol.gov/whd/regs/compliance/whdfs13.htm>. See also, *Independent Contractor (Self-Employed) or Employee?*, INTERNAL REVENUE SERVICE (Oct. 2, 2014), <http://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/Independent-Contractor-Self-Employed-or-Employee>.

27. Dilger, *supra* note 26.

28. See, e.g., *United States v. Silk*, 331 U.S. 704 (1947) (applying reasoning from a NLRA case to social security legislation). The Supreme Court has specifically held that:

Where Congress uses terms that have accumulated settled meaning under...the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms....In the past, when Congress has used the term “employee” without defining it, we have concluded that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine.

Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 322-23 (1992) (quoting *Kelley v. Southern Pacific Co.*, 419 U.S. 318, 322-23 (1974)).

examined.²⁹

In some instances, statutes provided a broader definition for an employee or offered specific factors legislators wanted courts to consider. The Fair Labor Standards Act relied on a broader definition of employee to target “pre-New Deal sweatshops that placed multiple...intermediaries between workers [and those who] effectively set their terms and conditions of employment.”³⁰ At the extreme end, certain California employment laws operate under a presumption of employment, placing the burden on the business to prove the workers in question are independent contractors and not full employees.³¹

Whether a worker is determined to be an employee or an independent contractor has significant implications for the rights and responsibilities of both the worker and employer.³² For example, the nature of the relationship determines how, and if, liability can be imposed on one party – the employer - for the acts of another – the employee. Generally, an employer is liable for the actions of an employee but not an independent contractor, though exceptions exist.³³ Various other responsibilities attach as well depending on the relationship. Employees, but not independent contractors, for example, enjoy collective bargaining rights under the NLRA.³⁴ When classified as independent contractors, workers are often denied the right to bring actions against their “employers” under state or federal wage and hour laws.³⁵ Having employees as such requires employers to withhold taxes, and it may require employers to provide certain benefits or to participate in various insurance schemes depending on the state.³⁶ Workers are also barred from bringing discrimination

29. See *supra* note 23 and accompanying text.

30. Rogers, *supra* note 23.

31. *Navaran v. EGL, Inc.*, 616 F.3d 895, 900 (9th Cir. 2010). In *Navaran*, the Ninth Circuit stated that under California law, once a plaintiff establishes that he provided services for a business, he has established a prima facie case that an employer/employee relationship was present, and the burden then shifts to the employer to prove “that the presumed employee was an independent contractor.” *Id.*

32. Redfearn, *supra* note 26, at 1028.

33. See, e.g., *Sugimoto v. Exportadora de Sal*, 19 F.3d 1309, 1311-12 (9th Cir. 2014).

34. *FedEx Home Delivery v. NLRB*, 563 F.3d 492, 505 (D.C. Cir. 2009).

35. Timothy P. Glynn, *Taking the Employer Out of Employment Law? Accountability for Wage and Hour Violations in an Age of Enterprise Disaggregation*, 15 EMP. RIGHTS & EMP'T POLICY J. 201, 204 (2011).

36. Lynn P. Hendrix & William G. Laughlin, *Employee v. Independent Contractor: The Distinctions and the Consequences to the Natural Resources Industry*, 35 ROCKY MTN. MIN. L. INST.

2018] Extending Employee Protections to Gig-Economy Workers 191
claims under Title VII of the Civil Rights Act if they are not employees.³⁷

II. ANTITRUST LAW AND ORGANIZING RIGHTS UNDER THE NLRA: A TANGLED WEB FOR WORKERS

In his article surveying the application of antitrust laws to labor relations, Prof. Sanjukta Paul notes that “[t]he Sherman Act became the first federal statute regulating labor.”³⁸ Courts first applied the Sherman Act to labor relations in *United States v. Workingmen’s Amalgamated Council of New Orleans*, a case dealing with a longshoremen’s strike in New Orleans.³⁹ Some years later, the Supreme Court approved of this use of the Sherman Act in *Loewe v. Lawlor*.⁴⁰ In *Loewe*, the Court held that a union was engaged in activities that could be considered a restraint of trade under the Sherman Act when it organized a boycott against a company which refused to recognize the union as a bargaining agent.⁴¹

Though courts eventually began carving out exemptions for organizing workers, it was not until the NLRA was passed that employees enjoyed full organizing rights without the shadow of antitrust law hanging over them.⁴² The NLRA protected individuals seeking to form a union, but the act specifically limited those rights to employees and not independent contractors.⁴³ The rights extended to employees by the NLRA includes, *inter alia*, the right to organize and join a union, the right to collectively bargain, and the right to strike.⁴⁴ Prior to the passage of the NLRA, workers’ rights to organize and bargain were often restricted by challenges

19 (1989).

37. See, e.g., *Broussard v. L.H. Bossier, Inc.*, 789 F.2d 1158 (5th Cir. 1986).

38. Sanjukta Paul, *The Enduring Ambiguities of Antitrust Liability for Worker Collective Action*, 47 *LOY. U. CHI. L.J.* 969, 990, 995 (2016).

39. 54 F. 994 (E.D. La. 1893).

40. 208 U.S. 274, 301 (1908).

41. *Id.* at 302 (stating that “[i]t is true this statute has not been much expounded by judges, but, as it seems to me, its meaning . . . includes combinations which are composed of laborers acting in the interest of laborers”).

42. Paul, *supra* note 38, at 1032.

43. 29 U.S.C. § 152(3) (1978).

44. See NLRB, *Employee Rights Under the National Labor Relations Act*, <https://www.nlr.gov/sites/default/files/attachments/basic-page/node-3788/employeeightsposter-8-5x11.pdf> (last visited Jan. 27, 2017).

under antitrust laws.⁴⁵

When the NLRA was first passed, the Supreme Court felt that the common law right to control test would prove to be too difficult to apply and would result in inconsistent results, so it favored considering the industry in question and whether or not employment classification would address some of the ills the NLRA was intended to address.⁴⁶ The Court's approach to analyzing employment status, referred to as the economic realities test,⁴⁷ largely hinged on the extent to which the tasks the workers were engaged in were central to the employer's business as well as the extent to which the workers were dependent on the wages earned.⁴⁸ This resulted in a very broad definition of "employee" that Congress eventually constrained with the Taft-Hartley Amendments to the NLRA which re-asserted the need to use common law tests for classifying workers and specifically excluded "independent contractors" from the NLRA's protections.⁴⁹ Following the Taft-Hartley amendments to the NLRA, courts naturally gravitated back towards the full, common law right to control test, with courts consolidating the economic realities test considered in *Hearst* into one factor out of the many considered.⁵⁰ However, the courts still leaned towards a broad definition of "employee" even within the new constraints imposed by Congress.⁵¹

In more recent rulings pertaining to employment status under the

45. Paul, *supra* note 38, at 976.

46. See *NLRB v. Hearst Publ'g*, 322 U.S. 111, 122-28 (1944).

47. See, e.g., § 11.4 *Distinguishing Employees From Independent Contractors – The Economic Realities Test*, 20 Minn. Prac., Business Law Deskbook (2017).

48. *Hearst Publ'g*, 322 U.S. at 131. In considering whether the workers were employees under the NLRA, the Court acknowledged that they appeared to be independent contractors in some regards, but it considered the extent to which independent contractors "may be as 'helpless in dealing with an employer,' as 'dependent . . . on his daily wage' and as 'unable to leave the employ and to resist arbitrary and unfair treatment'" as traditional employees when it decided to treat the workers as employees. *Id.* at 127. This economic realities test has been more fully fleshed out as including the following factors: the extent to which the employer controls the work performed; "the employee's opportunity for profit or loss depending on his managerial skill"; investments by the employee in helpers and equipment; whether any special skills are required to carry out the task; the permanence of the employment relationship; and "whether the service rendered is an integral part of the alleged employer's business." See, *supra*, note 47.

49. See Labor Management Relations Act of 1947, Pub. L. No. 80-101, 61 Stat. 136.

50. See, e.g., *United States v. Silk*, 331 U.S. 704, 713-14 (1947).

51. See, e.g., *NLRB v. United Ins. Co. of Am.*, 390 U.S. 254, 260-61 (1968) (holding that "debit agents" who were responsible for collecting premiums and selling policies and were paid in commissions were employees under the NLRA).

2018] Extending Employee Protections to Gig-Economy Workers 193

NLRA, the control test is in flux once more. In the D.C. Circuit, the test's emphasis has shifted to entrepreneurial opportunity. In *Corporate Express Delivery Systems v. NLRB*, the court adopted the logic of the National Labor Relations Board in holding that delivery drivers were employees under the NLRA. The court held that in some instances the degree of control exerted by the putative employer is often not as relevant in determining employment status as whether the worker is presented the opportunity to take "economic risk, and has the corresponding opportunity to profit from working smarter, not just harder."⁵²

In *FedEx Home Delivery v. NLRB*, delivery drivers were deemed independent contractors because they had entrepreneurial opportunities not available to traditional employees. These rights included: the ability to sell, assign, or bequeath their contractual rights to third parties without Fedex's permission; the right to hire their own employees to assist in package delivery; and the right to contract for multiple routes.⁵³ In his dissent, Judge Garland stated that there was little precedent for considering entrepreneurial opportunity as dispositive over the various factors traditionally used in the common law right to control test.⁵⁴ Judge Garland further noted that many of the workers in question failed to take advantage of the entrepreneurial opportunities supposedly available to them.⁵⁵ Though it holds less sway in other circuits,⁵⁶ entrepreneurial opportunity is still treated as determinative in the D.C. Circuit. The Court reaffirmed its first *FedEx* holding in a later case with virtually identical facts and parties,⁵⁷ and it used entrepreneurial opportunity to find the workers in question were employees in *Lancaster Symphony Orchestra v. NLRB*.⁵⁸

52. 292 F.3d 777, 780 (D.C. Cir. 2002).

53. 563 F.3d 492, 504 (D.C. Cir. 2009).

54. *Id.* at 517.

55. *Id.* at 516 (quoting *C.C. Eastern, Inc. v. NLRB*, 60 F.3d 855, 860 (D.C. Cir. 1995) "It may not be necessary for workers to regularly exercise their right to engage in entrepreneurial activity for that factor to weigh in the balance, but if a company offers its workers entrepreneurial opportunities that they cannot realistically take, then that does not add any weight to the Company's claim that the workers are independent contractors.").

56. See *Crew One Productions, Inc. v. NLRB*, 811 F.3d 1305, 1310 (11th Cir. 2016) (emphasizing that special treatment is given to the factor of control in determining employment status under the NLRA).

57. *FedEx Home Delivery v. NLRB*, 849 F.3d 1123 (D.C. Cir. 2017).

58. 822 F.3d 563, 570 (D.C. Cir. 2016). In *Lancaster Symphony Orchestra*, the court noted that even though workers could accept or decline specific performances or work for other symphonies if

By being excluded from the NLRA, independent contractors still must contend with challenges to any collective action under antitrust law, and many cases dealing with organizing rights of workers hinge solely on how workers are classified.⁵⁹ The restrictions on independent contractors have also been historically used in cases involving workers doing work similar to drivers working for Uber and Lyft.⁶⁰ While there are instances when applying antitrust laws to the organizing efforts of independent contractors may make sense, in the context of certain gig-economy non-employers, the gray area between the NLRA and antitrust leaves workers in a tough spot.⁶¹

The entire NLRA framework, including the exclusion of independent contractors, was developed with notions of the employer/employee relationship that are fast becoming woefully anachronistic.⁶² With an increased reliance on temporary workers, and workers changing jobs more frequently, there are fewer companies that act as “stable employer[s] of long-term, full-time employees.”⁶³ Modern supply chains, outsourcing,

they so chose, they could not fill multiple roles in the symphony, hire employees, or hire a replacement for a performance and then profit by pocketing the difference. *Id.*

59. See, e.g., *FedEx Home Delivery*, 563 F.3d at 492; and *United Ins. Co. of Am.*, 390 U.S. at 254. See also *NLRB v. Hearst Publ'g*, 322 U.S. 111 (1944). This case not only explained the importance of a worker's classification for protecting organizing rights, but also insisted on the importance of national standards in this area of law. The congressional record specifically mentions *NLRB v. Hearst Publ'g*, and Congress explicitly chose to restrict bargaining rights to employees after a string of NLRB decisions expanded the scope of the NLRA. H.R. Rep. No. 80-245, at 18 (1947); NATIONAL LABOR RELATIONS BOARD, VOLUME 1, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, 309 (1985). Just as Congress chose to specify that certain workers were exempt from bargaining rights, Congress's ambiguity in drafting the Sherman Act created the legal possibility of using antitrust law to restrict independent contractors from organizing. See *supra* notes 38-42 and accompanying text. The decision to use wording regarding “restraints on trade” as opposed to more specific language dealing with, i.e., price-fixing or monopolistic behavior, allowed independent contractors working together to negotiate fairer wages or conditions to be characterized as “restricting trade” and fall afoul of the law. See *supra* notes 38-42 and accompanying text.

60. Truck drivers in particular are a group that has faced immense challenges related to collective bargaining rights due to their ambiguous employment status, with a long line of cases highlighting the various ways courts have attempted to determine drivers' employment statuses. Richard C. Tinney, Annotation, *Trucker as Independent Contractor or Employee Under § 2(3) of National Labor Relations Act (29 U.S.C.A. § 152(3))*, 55 A.L.R. Fed. 20 (1981).

61. See *infra* notes 66-77 and accompanying text.

62. Heather Whitney, *Rethinking the Ban on Employer-Labor Organization Cooperation*, 37 *Cardozo L. Rev.* 1455, 1465 (2016).

63. *Id.*

2018] Extending Employee Protections to Gig-Economy Workers 195

franchise networks which exert “downward pressure on wages,”⁶⁴ and the growing gig economy are all examples of how the modern economy is developing in ways the architects of the NLRA never imagined.⁶⁵

In response to the changing economic landscape, non-union worker organizations are developing new tactics for interacting with businesses and consumers in the furtherance of worker rights. These new tactics, however, leave organizations on shaky legal ground, particularly since these organizations must thread the needle between prohibitions under antitrust law and the NLRA. Non-union worker organizations are increasingly using modern companies’ sensitivities to public perception to gain leverage and force companies to recognize worker organizations which are not traditional unions.⁶⁶ Some of these worker organizations stand alone, but many are backed in whole or in part by traditional unions, muddying an already confusing organizing landscape.⁶⁷

While worker organizations use various tactics to pressure employers to bargain in some fashion or simply make concessions, contractor associations cannot directly pressure employers through boycotts or other behaviors similar to a traditional union strike. Courts addressed this head-

64. *Id.* at 1467.

65. *Id.* at 1468-69.

66. *Id.* at 1479. Companies understand that many consumers prefer patronizing businesses and buying products made by employees who are treated well, and organizations are publicizing companies’ failures to be socially conscious employers, or in the alternative, publicizing good deeds to reward companies who improve worker relations. *Id.* at 1476. However, traditional unions face restrictions under the NLRA to cooperate with employers in consumer relations. *Id.* at 1480. To the extent worker organizations made up of contractors are reclassified as traditional unions, they are limited in their ability to engage in consumer relations, and yet the fact that the independent contractors they represent are not protected by the NLRA forces these organizations to behave in the ways that they do in the first place. *Id.* Despite some of the difficulties these non-traditional organizations face, some are achieving notable successes. The Immokalee Worker’s program has made huge gains for agricultural workers who are technically independent contractors through public awareness campaigns that target retailers that buy from the farms that employ the workers in question. *Id.* at 1463, 1483-84.

67. *Id.* at 1488-89. Fast Food Forward and the Fight for 15 are organizing fast food workers in pursuit of a higher minimum wage either through pressuring employers directly or through political action aiming to change minimum wage laws. *Id.* Fast food workers are employees and thus are protected by the NLRA, but they have been considered out of reach for union campaigns because they are usually employed by franchisees with limited resources instead of the fast food giants themselves. In any event, the lack of a dues structure makes this form of organizing unsustainable for these types of campaigns. *Id.* at 1487.

on in *Federal Trade Commission v. Superior Court Trial Lawyers Ass'n*.⁶⁸ Here, an association of trial lawyers organized their membership and refused to take on indigent defendants referred by the District of Columbia until the District agreed to pay increased rates.⁶⁹ Though the District itself took no action against the association, the Federal Trade Commission ("FTC") filed a complaint alleging a restraint in trade by the lawyers "refusing to compete for or accept new appointments...a conspiracy to fix prices and to conduct a boycott, [and engaging in] unfair methods of competition."⁷⁰ The Supreme Court held that the lack of market power on the part of those organizing and the reasonableness of their terms sought was irrelevant in determining that sanctions under antitrust law were appropriate.⁷¹ Surveys of antitrust actions in recent years show that collective actions by independent contractors seeking to improve their working conditions were targeted by the FTC, consistent with the aforementioned decision.⁷²

The position of worker organizations becomes even more complicated when we consider that the act of directly bargaining with management could arguably lead to an organization being classified as a union.⁷³ This risk of union classification presents a complicated maze of issues for an organization representing independent contractors. Because they are contractors, the workers themselves do not enjoy individual protections for union activity under the NLRA. It is for this reason that the organizations

68. 493 U.S. 411 (1990). Other types of professional associations have also run afoul of antitrust laws by restricting how members can communicate with the public or setting up certain bidding processes that were deemed anti-competitive. See, e.g., *Fed. Trade Comm'n v. Ind. Fed'n of Dentists*, 476 U.S. 447 (1986); *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679 (1978).

69. *Id.*

70. *Id.* at 418.

71. *Id.* at 423-24. Prof. Sanjukta Paul observes that when the courts have invoked antitrust laws to prohibit the direct action of independent contractors seeking improved conditions, they are effectively forcing contractors to work since any form of work stoppage is considered an illegal restraint of trade. Paul, *supra* note 38, at 1008.

72. Paul, *supra* note 38, at 983. It is worth noting that though the Supreme Court in *Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, was unwilling to consider the market power of the defendants or the reasonableness of the terms sought, in some areas the law started slowly moving away from *per se* condemnation, that is, courts were willing to consider the effects of the acts in question rather than summarily condemning the acts out of hand. See Randall Marks, *Labor and Antitrust: Striking a Balance Without Balancing*, 35 AM. U.L. REV. 699, 713-714 (1986).

73. Whitney, *supra* note 62, at 1495-1500.

2018] Extending Employee Protections to Gig-Economy Workers 197

adopt alternative organizing and pressure tactics.⁷⁴ At the same time, traditional unions are forbidden from using some of the alternative tactics these worker organizations employ.⁷⁵ So, if these workers were successful in their pressure tactics such that management was willing to negotiate directly with the organization regarding working conditions, the act of bargaining could cause the organization to be classified as a union, which in turn would immediately force the organization to disengage from the tactics that brought it success in the first place.⁷⁶ If they somehow manage to bargain directly without being classified as a union, they still must contend with the threat of antitrust bars on independent contractors bargaining as a group.⁷⁷

Notable differences between traditional unions and worker organizations comprised of contractors extend beyond the tactics they employ to pressure companies. Unions have historically provided a variety of services to members that are fast vanishing from the modern employment context. Unions have often worked with employers to develop, implement, and manage benefits such as pensions.⁷⁸ Unions have also provided health services,⁷⁹ and members use the group buying power that a union offers to purchase insurance and other services not provided by the employer that are nonetheless relevant to the members' occupation.⁸⁰ Finally, bargaining contracts presents many additional

74. Whitney, *supra* note 62, at 1481-82.

75. Whitney, *supra* note 62, at 1488-89.

76. Whitney, *supra* note 62, at 1498. What constitutes bargaining, or "bilateralism," is not always clear. Whitney, *supra* note 62, at 1498. The NLRB has found that presumably one-way processes, where, at the invitation of management, employees present the results of brainstorming sessions to management without any additional back-and-forth, are nonetheless bilateral mechanisms similar enough to bargaining to classify an organization as a union. Whitney, *supra* note 62, at 1498 (discussing, *inter alia*, NLRB v. Cabot Carbon Co., 360 U.S. 203, 211-12 (1959) and the expansive concept of "dealing" as it relates to defining labor organizations).

77. Whitney, *supra* note 62, at 1496.

78. See generally, Richard B. Freeman, *Unions, Pensions, and Union Pension Funds*, in PENSIONS, LABOR, AND INDIVIDUAL CHOICE 89-122 (David A. Wise, ed., 1985).

79. See *supra* note 16.

80. One of the more unique examples of insurance offered through unions is the legal/liability insurance provided to police officers. Officers can be insured against civil damages resulting from their actions in the line of duty, and the insurance funds provide defense counsel, both civil and criminal, alongside or in lieu of counsel provided by the employing agency. See, e.g., *FOP Legal Defense Plan*, FRATERNAL ORDER OF POLICE, <http://www.foplegal.com/index.html>.

benefits beyond common issues like wages.⁸¹ Even employers have been known to view working with unions favorably.⁸²

III. PRESENT CASES DEALING WITH THE INDEPENDENT CONTRACTOR CLASSIFICATION OF GIG-ECONOMY WORKERS

Gig-economy workers have brought suits where employment classification was a central issue, though courts have been hesitant to make determinations on workers' status.⁸³ In other instances, courts have leaned towards employee classifications under state law, but state law determinations would not yet bear on matters under the NLRA, keeping workers and businesses in a state of uncertainty.⁸⁴ The applicability of state law determinations is also dubious as persuasive authority since states may utilize agency tests disfavored under federal law.⁸⁵ The NLRB

81. Labor relations theorists have noted that “[t]he collective bargaining process is thought to be adequate to protect whatever rights workers feel are worth negotiating for, and the essentially democratic nature of union representation ensures that workers’ voices are adequately represented at the bargaining table.” Richard A. Bales, *The Discord Between Collective Bargaining and Individual Employment Rights: Theoretical Origins and a Proposed Reconciliation*, 77 B.U. L. REV. 687, 745-48 (1997).

82. Volkswagen decided that if their American plants were to unionize, it would be easier to integrate the plants into their global system which is heavily unionized and features various committees and management structures unions help administer. Whitney, *supra* note 62, at 1472-73.

83. See, e.g., *O’Connor v. Uber Techs, Inc.*, 201 F.Supp.3d 1110, 1124-28 (N.D. Cal. 2016). In the *O’Connor* case, the first settlement proposed saw the plaintiffs giving up on the question of classification, a matter of some consternation amongst drivers in the class and others. *Id.* The *O’Connor* settlement also dealt with matters regarding drivers’ right to collect tips, among other things, which bear on the conditions under which drivers work. *Id.* at 1119. This presents a curious situation where a class action lawsuit may affect working conditions for a class which, absent being deemed a class of employees and not contractors, cannot collectively bargain for the same conditions agreed to as part of a settlement.

84. In *Cotter et al. v. Lyft Inc.*, the court noted that even though many aspects of drivers work status technically satisfied criteria for independent contractors, other aspects suggested the drivers “look[ed] very much like the kind of worker the California Legislature has always intended to protect as an ‘employee.’” Order Denying Cross-Motion for Summary Judgement, *Cotter v. Lyft, Inc.*, No. 13-cv-04065-VC (N.D. Cal. 2015). Companies like Lyft and Uber have at times also restricted the right of their independent contractors to contract with other parties regarding the services they offer, which, it has been observed, brings into question the extent to which these contractors can ultimately be considered “independent.” Valerio De Stefano, *The Rise of the “Just-in-Time Workforce”: On-Demand Work, Crowd Work and Labor Protection in the “Gig-Economy,”* 37 COMP. LAB. L. & POL’Y J. 471, 488 (2016).

85. California, for example, uses a control test for establishing employee status. *Ayala v. Antelope Valley Newspapers, Inc.*, 327 P.3d 165, 171 (Cal. 2014). This would be problematic in

2018] Extending Employee Protections to Gig-Economy Workers 199

also seems to be making an effort to force a judicial determination of Uber drivers' statuses.⁸⁶

IV. PROPOSAL: COURTS COULD EXTEND LABOR LAW PROTECTIONS TO GIG-ECONOMY WORKERS UTILIZING THE ENTREPRENEURIAL OPPORTUNITY TEST

While some might argue that the problems of the gig-economy could be solved if workers were simply classified as employees under all the relevant statutes, guaranteeing them the fullest rights and protections the law provides is not without its drawbacks.⁸⁷ Not only could employee classification of gig-economy workers threaten the viability of growing businesses who have legitimate reasons to pursue greater flexibility than the traditional employment relationship allows, workers themselves may also wish to maintain greater flexibility. Flexible scheduling and the freedom to complete tasks in the manner preferred by the worker, to the extent the employer actually allows this, are all legitimate reasons for a worker to avoid full employee classification. Similarly, by paying workers by the gig and not by the number of hours worked as required under wage and hour laws, companies can keep costs low. They can then pass on savings to consumers while, ideally, maintaining competitive, per-gig pay rates for workers.

At the same time, if collective bargaining rights were extended to gig-economy workers, negotiations could address shortcomings in the business-worker relationship with greater flexibility than statutes might otherwise allow and without costly litigation that results in rigid determinations that are not easily undone by any party. Allowing membership in full unions would also allow workers to purchase benefits

jurisdictions such as the D.C. Circuit where entrepreneurial opportunity carries more weight.

86. NLRB v. Uber Techs., Inc., No. 16-mc-80057-KAW, *1 (N.D. Cal. Aug. 19, 2016). Though this NLRB case does not directly challenge the classification of workers, it considers whether Uber has violated worker rights which ultimately requires a determination by the courts of whether drivers are employees, because as discussed earlier, that determination is central to what rights workers are owed.

87. Full employment classification might spell the end of a profitable industry. Richard A. Epstein, *Uber and Lyft in California: How to Use Employment Law to Wreck an Industry*, FORBES (Mar. 16, 2015), <http://www.forbes.com/sites/richardepstein/2015/03/16/uber-and-lyft-in-california-how-to-use-employment-law-to-wreck-an-industry/#497f3cbc506f>.

as a group, and they could provide these benefits through legal entities accustomed to operating under a robust regulatory framework that protects the interests of members.⁸⁸

To accomplish this, courts would still need to address questions of worker classification, either to determine that gig-economy workers for a given company are employees, or, if statutes were amended, classifying workers in an intermediate category. Developing a standard to differentiate gig-economy workers such as Uber or Lyft drivers from contractors who enjoy considerably greater control over their own work and livelihood is essential. The entrepreneurial opportunity test seen in *FedEx Home Delivery*⁸⁹ might allow for such a distinction.

Though *FedEx Home Delivery* could be viewed as anti-worker and an obstacle to union organizing because the workers in that case were deemed contractors, the entrepreneurial opportunity test employed would almost certainly identify a variety of gig-economy workers as employees. It would be particularly useful for gig-economy workers because those workers are harder to classify under a traditional control analysis. Gig-economy jobs by their nature offer workers considerable freedom in when they work and the specific tasks they accept or decline, and the workers often complete their tasks unsupervised. Though Uber, for example, designs its platform in a way that allows it to exercise a considerable amount of control indirectly,⁹⁰ courts are already struggling to determine if the amount of control exerted is sufficient for employee classification.⁹¹

At the same time, unlike the drivers in *FedEx Home Delivery*, Uber drivers do not have the same opportunity to take “economic risk, and [the] corresponding opportunity to profit from working smarter, not just harder.”⁹² They have no contractual rights that they can assign or otherwise transfer.⁹³ Although drivers have the freedom to decide when

88. See *supra* notes 14-16.

89. See *supra* notes 52-57 and accompanying text.

90. Sarah Kessler, *How Uber Manages Drivers Without Managing Drivers*, FAST COMPANY (Aug. 9, 2016) <https://www.fastcompany.com/3062622/how-ubers-app-manages-drivers-without-technically-managing-drivers>.

91. See *supra* note 85.

92. 292 F.3d 777, 780 (D.C. Cir. 2002).

93. *Software License and Online Services Agreement*, RAISER, LLC, ¶ 14.4 (Nov. 10, 2014) https://uber-regulatorydocuments.s3.amazonaws.com/country/united_states/p2p/Partner%20Agreement%20November%2010%202014.pdf (last accessed Jan. 28, 2017). Paragraph 5.1 of this

2018] Extending Employee Protections to Gig-Economy Workers 201

they work and the neighborhoods they work in, they do not hire employees or have other opportunities to profit from anyone's work but their own.⁹⁴

While it might be tempting to return to the economic realities test employed by the Supreme Court in early NLRA cases such as *Hearst*,⁹⁵ that test could lead to inconsistent results in the case of gig-economy workers. Though the test bears many similarities to the entrepreneurial opportunity test, some of the factors are distinct from the entrepreneurial opportunity test such as how central a worker's job is to the employer's core business.⁹⁶ Considering the importance of a worker to the employer's core business might militate in favor of finding employee status where it is not appropriate or desired by the parties. Also, in *Hearst* the Court considered how dependent the workers were on their wage from the employer.⁹⁷ In the case of gig-economy companies, there are huge variations between workers' dependence on the wages earned with some acquiring a large percentage of their earnings from gig work and others working only occasionally to earn extra spending cash. This variation would leave the *Hearst* test unworkable in many instances.

CONCLUSION

Whichever way legislators and judges choose to proceed in the area of labor and employment law for gig-economy workers, it is clear that the existing regulatory framework needs adjustments to effectively protect individuals in this new world of work. While we would be well-served to draft new laws and abandon old tests—such as the right to control test—which were not developed with worker rights in mind, we should not assume that all existing legal tests are inadequate to differentiate between different types of workers in the gig-economy; nor should we reject a test as anti-worker simply because it has sometimes resulted in less legal protections for workers rather than more. When fairly applied, the

Uber driver agreement states that the driver is being provided a “non-exclusive, non-transferable, non-sublicensable, non-assignable license.” *Id.* at ¶ 5.1.

94. See, *Lancaster Symphony Orchestra*, *supra* note 58 and accompanying text.

95. See *supra* note 48 and accompanying text.

96. See *supra* note 48 for a discussion of the factors the test considers.

97. See *supra* note 48 and accompanying text.

entrepreneurial opportunity test might surprise us with the results it could deliver in the twenty-first century economy.