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Redefining Employment for the Modern Economy

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The explosive growth of “platform economy” companies such as Uber has brought public attention to a longstanding issue facing workers in this country: the fissuring of employment.¹ Fissuring comes in many forms, but three are especially important:

- Misclassification. Some companies improperly classify workers as independent contractors rather than employees, or require individual workers to form sole proprietorships or even franchises, such that workers have no legal employer.
- Subcontracting. Other companies (“user firms”) hire labor through contractors or temporary agencies. Such workers have a legal employer—the third-party agency—but user firms may exert or share power over working conditions.
- Franchising. Still other companies, especially in the restaurant, retail, and hotel sectors, carry out business through franchising arrangements. Franchisors may maintain power over franchisees’ business operations, and therefore over working conditions, while disclaiming employment duties toward franchisees’ workers.

All three schemes tend to deprive workers of their rights under employment laws, which generally do not protect independent contractors and do not effectively protect many subcontracted workers or workers for franchisees. The sums involved can be significant. One journalist estimated that if Uber were found to employ its drivers, it would owe them an additional \$4 billion per year in the U.S. alone.² The number of workers impacted is also quite large. Wage and Hour Administrator David Weil estimates that there are “over 29 million workers in just five industries affected by the fissured workplace, including in the construction, hospitality, janitorial, personal care, and home health care industries.”³

¹ See generally DAVID WEIL, *THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT* (2014).

² Steven Gandel, *Uber-nomics: Here’s What It Would Cost Uber To Pay Its Drivers as Employees*, *FORTUNE* (Sept. 17, 2015, 2:12 PM), <http://fortune.com/2015/09/17/ubernomics/> [<https://perma.cc/X2EF-MNSR>].

³ David Weil, Testimony at Hearing on “Make It in America: What’s Next?” (July 28, 2015). See also SARAH & CATHERINE, *INDEPENDENT CONTRACTOR VS. EMPLOYEE: WHY INDEPENDENT CONTRACTOR MISCLASSIFICATION MATTERS AND WHAT WE CAN DO TO STOP IT*, at 4 (Nat’l Emp. L. Project ed., May 2016), (as many as 30% of employers misclassify at least some workers).

The sudden visibility of such issues in the platform economy has sparked various law reform proposals. Most prominently, commentators and even lawmakers have suggested that Congress create a new legal category of worker that would slot between “employee” and “independent contractor,” with limited employment rights.⁴ This Issue Brief argues that such a reform would be unwise. Ethically speaking, contracted workers are no less deserving of basic protections than employees, especially when they don’t have a choice as to their employment status. Practically speaking, existing tests for employment are already very confusing, and adding a new category will only compound matters, increasing litigation and enforcement costs. Doing so may also lead companies to downgrade employees into this new category to avoid various legal duties.

This Issue Brief instead proposes that Congress expand the test for employment status under wage/hour, discrimination, and collective bargaining laws. Part I discusses the challenges of defining employment with precision, drawing from the Uber and Lyft suits. Part II assesses proposals for an intermediate category of worker. Part III then argues that reforming federal definitions of employment would be preferable to creating a new intermediate classification.

I. The Challenge of Defining Employment

There are basically two legal tests for employment, both of which rely on lists of factual elements to determine the nature of the parties’ relationship. The “control test” under the common law of agency governs most federal employment statutes.⁵ It defines an employment relationship as a relationship of control: the employer plans out tasks, gives orders, and monitors performance. An independent contracting relationship is different and involves an individual who runs his or her own separate business. As one judge put it, the “paradigm of an independent contractor” is one who sells “only expertise.”⁶

In applying the control test, the Restatement of Agency instructs courts to consider multiple factors including the worker’s skills, the duration of the parties’ engagement, the method of payment, and the putative employer’s ability to terminate the worker at will.⁷ Unfortunately, such factors can cloud, rather than illuminate, the central question in such cases: whether the worker is truly in business for him- or herself. Many employment relationships, after all, are not defined by rigid task definition and control. The Second Restatement of Agency gives the examples of a cook or gardener hired in a manor. Either might bristle if their employer sought to exert minute control over their work – yet both are unquestionably employees since they are not running independent businesses.⁸

⁴ See, e.g., Seth D. Harris & Alan B. Krueger, *A Proposal for Modernizing Labor Laws for Twenty-First-Century Work: The “Independent Worker”* 2 (Hamilton Project, Discussion Paper 15-10, 2015), http://www.hamiltonproject.org/assets/files/modernizing_labor_laws_for_twenty_first_century_work_krueger_harris.pdf; James Surowiecki, *Gigs with Benefits*, NEW YORKER (July 6, 2015), <http://www.newyorker.com/magazine/2015/07/06/gigs-with-benefits>.

⁵ See *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323 (1992) (common law “control test” applies to ERISA); *NLRB v. United Insurance*, 390 U.S. 254, 256 (1968) (affirming that the proper test for employment under the NLRA is the “control test”).

⁶ See *Sec’y of Labor v. Lauritzen*, 835 F.2d 1529, 1545 n.3 (7th Cir. 1987) (Easterbrook, J., concurring).

⁷ RESTATEMENT (SECOND) OF AGENCY § 220 (AM. LAW INST. 1958).

⁸ *Id.* at § 220 cmt. d; see also *Lauritzen*, 835 F.2d at 1540 (Easterbrook, J., concurring) (stating focus on “right to control” is over broad, as it would sweep in nearly all suppliers as employees of their clients).

More fundamentally, the control test is a poor way to determine responsibility for working conditions, since it was designed to determine liability *to third parties* for workers' torts—not to remedy power imbalances in the labor market.⁹

Legislatures have often responded by defining employment more broadly in worker-protective statutes. Some states create a legal presumption that anyone providing services to a business is an employee, shifting the burden of proof on that key question.¹⁰ In the federal Fair Labor Standards Act (FLSA),¹¹ Congress discarded the control test and instead defined “employ” as including “to suffer or permit to work.”¹² Congress’ targets were garment manufacturers and “jobbers” who placed contractual intermediaries between themselves and sweatshop workers.¹³ By framing the test in the passive voice, Congress imposed an affirmative duty on firms to prevent violations both within their enterprises and among their first-tier suppliers.¹⁴ Interpreting such statutory language, courts and agencies have developed various multi-factor tests¹⁵ to determine whether “as a matter of economic reality,” rather than contractual form, “the individual is dependent on the entity,” as opposed to being in business for themselves.¹⁶

The difficulties associated with applying such tests are apparent in the Uber and Lyft misclassification suits. In the two most prominent cases, drivers alleged that the companies misclassified them as independent contractors and therefore owed them, among other things, back wages (in the Lyft case) and work-related expenses (in both cases).¹⁷ The suits arose under California

⁹ See, e.g., Alan Hyde, *Legal Responsibility for Labour Conditions Down the Production Chain*, in CHALLENGING THE LEGAL BOUNDARIES OF WORK REGULATION 83, 94 (Judy Fudge, Shae McCrystal, & Kamala Sankaran, eds., 2012). Brishen Rogers, *Toward Third-Party Liability for Wage Theft*, 31 BERKELEY J. EMP. & LAB. L. 1, 6 (2010) [hereinafter Rogers, *Toward Third-Party Liability*].

¹⁰ *Nayaran v. EGL, Inc.*, 616 F.3d 895, 900 (9th Cir. 2010) (applying a presumption of employment under California workers’ compensation and wage/hour laws).

¹¹ 29 U.S.C. § 203(g) (1938) (defining “employ” as “suffer or permit to work.”) See also *Darden*, 503 U.S. at 326 (stating that the FLSA definition “stretches the meaning of ‘employee’ to cover some parties who might not qualify as such under a strict application of agency law principles”).

¹² 29 U.S.C. § 203(g). See also *Darden*, 503 U.S. at 326. Congress later applied the same definition of employment to agricultural workers under the Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. §§ 1807–72 (1983).

¹³ Mark Anner, Jennifer Bair & Jeremy Blasi, *Towards Joint Liability in Global Supply Chains: Addressing the Root Causes of Labor Violations in International Subcontracting Networks*, 35 COMP. LAB. L. & POL’Y J. 1, 17 (2014).

¹⁴ U.S. Dep’t of Labor, Wage & Hour Div., Administrator’s Interpretation No. 2015-1 at 3 (July 15, 2015) (summarizing Department’s interpretation of that test as determining relationships of economic dependence) [hereinafter “Dep’t of Labor Memorandum”].

¹⁵ E.g., *Antenor v. D & S Farms*, 88 F.3d 925, 929 (stating that the factors to consider in determining the employment classification of farm workers include: “(1) The nature and degree of the grower’s control of the farmworkers; (s) the degree of the grower’s supervision, direct or indirect, of the farmworkers’ work; (3) the grower’s right, directly or indirectly, to hire, fire, or modify the farmworkers’ employment conditions; (4) the grower’s power to determine the workers’ pay rates or methods of payment; (5) the grower’s preparation of payroll and payment of the workers’ wages; (6) the grower’s ownership of the facilities where the work occurred; (7) the farmworkers’ performance of a line-job integral to the harvesting and production of saleable vegetables; and (8) the grower’s and labor contractor’s relative investment in equipment and facilities.”).

¹⁶ Dep’t of Labor Memorandum, *supra* note 14, at 3 (summarizing and discussing case law to this effect).

¹⁷ *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067, 1070 (N.D. Cal. 2015); *O’Connor v. Uber Techs., Inc.*, 82 F. Supp. 3d 1133, 1135 (N.D. Cal. 2015).

law, which has a broad test for employment.¹⁸ In March 2015, two federal judges in San Francisco denied the companies' motions for summary judgment, holding that the drivers had raised material questions of fact on the issue of employment.¹⁹

Judge Edward Chen's opinion in the Uber case reasoned that the level of control exerted by Uber over drivers seemed analogous to that FedEx exercised over its drivers in a case finding employment, especially given the role of customer feedback and complaints in ensuring a particular level of service.²⁰ It cited cases holding that workers may set their own hours and still be legal employees, so long as the putative employer exerts substantial control while they are on the clock.²¹ It noted that Uber could apparently end contracts with drivers at will,²² which it described as important because the right to discharge a worker at will gives a putative employer "the means of controlling the [putative employee's] activities."²³ Yet it held that the factors were inconclusive, especially given past courts' divergent applications of them.²⁴

In the Lyft case, Judge Vince Chhabria struck a telling metaphor: if the case reached a jury, it would be "handed a square peg and asked to choose between two round holes."²⁵ Lyft drivers are not classic independent contractors, since they are actually at the core of Lyft's business and often work for the company for years. Yet, the Judge reasoned, they are not classic employees either, since they were able to set their own hours and had minimal contact with Lyft managers, and since Lyft didn't exercise control over their appearance.²⁶

Both cases illustrate how workers face an uphill battle even despite favorable law. Multi-factor tests enable defendants to develop multiple issues of fact, which can distract attention from the remedial

¹⁸ California applies a test derived from *S.G. Borello & Sons, Inc., v. Dep't of Indus. Relations*, 769 P.2d 399, 407 (Cal. 1989) (noting the following factors: (a) whether the one performing services is engaged in a distinct occupation or business; (b) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (c) the skill required in the particular occupation; (d) whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work; (e) the length of time for which the services are to be performed; (f) the method of payment, whether by the time or by the job; (g) whether or not the work is a part of the regular business of the principal; and (h) whether or not the parties believe they are creating the relationship of employer-employee; . . . [as well as the following factors] (1) the alleged employee's opportunity for profit or loss depending on his managerial skill; (2) the alleged employee's investment in equipment or materials required for his task, or his employment of helpers.; (3) whether the service rendered requires a special skill; (4) the degree of permanence of the working relationship; and (5) whether the service rendered is an integral part of the alleged employer's business.").

¹⁹ *Cotter*, 60 F. Supp. 3d at 1070 (alleging failure to pay minimum wages and reimburse drivers for expenses); *Uber II*, 82 F. Supp. 3d at 1135–6 (alleging failure to pass on gratuities and reimburse for expenses).

²⁰ *Uber II*, 82 F. Supp. 3d at 1140.

²¹ *Id.*

²² *Id.* at 1149 n.19.

²³ *Id.* at 1139 (quoting *Ayala v. Antelope Valley Newspapers, Inc.*, 327 P.3d 165, 171 (2014)).

²⁴ *Id.* at 1140–41 (summarizing cases that drew different inferences from requirements that drivers wear uniforms, and from drivers' use of personal vehicles).

²⁵ *Cotter*, 60 F. Supp. 3d. at 1081.

²⁶ *Id.* at 1081.

goals of employment legislation. Indeed, even in states with favorable laws such as California, advocates report it is difficult to convince courts that such laws sweep as broadly as they do.²⁷

II. “Independent Worker” Proposals as a False Start

Given these challenges—which, it bears repeating, courts confronted for *many decades* prior to the emergence of on-demand labor platforms²⁸—various commentators have advocated for a new legal category of worker. A leading proposal by Seth Harris and Alan Krueger suggests that legislatures define a category of “independent workers” who would have protections against discrimination and rights to collective bargaining (albeit under a new and undefined legal regime), but no rights to unemployment benefits, wage and hour protections, or workers compensation.²⁹ Harris and Krueger see this category of independent workers as narrow, largely limited to workers who “operate in a triangular relationship” in which they “provide services to customers identified with the help of intermediaries.”³⁰ Their main target is workers for Uber, Lyft, Handy, TaskRabbit, Instacart, and similar firms, though their proposal would also reach beyond such workers.

While Harris and Krueger highlight various failings of our current employment benefits system, their proposal has significant drawbacks. The first and most important is that it would make employment status litigation even more confusing—and therefore more expensive—by forcing courts to delineate the boundaries between *three* legal categories rather than two. Notably, while Harris and Krueger highlight the difficulties of defining employment with precision, they do not propose legally operative language that would distinguish independent workers from other categories of worker. Courts would therefore be left to determine the boundary cases, likely drawing on the confusing tests discussed above.

Second, while the proposal seeks to encourage firms to “level up” by reclassifying independent contractors as independent workers, it seems just as likely to encourage firms to “level down” by reclassifying employees as independent workers. That is a serious risk, especially since the universe of workers on online labor platforms is very small—a recent study estimated that only 0.5% of adults work on them each month.³¹

²⁷ NAT’L EMP. L. PROJECT, CONTRACTED WORK POLICY OPTIONS 4 (Mar. 2015),

<http://www.nelp.org/content/uploads/2015/03/Subcontracting-Policy-Templates.pdf>.

²⁸ See, e.g., NLRB v. Hearts Pub’s Inc., 322 U.S. 111, 121 (1944) (“Few problems in the law have given greater variety of application and conflict in results than the cases arising in the borderland between what is clearly an employer-employee relationship and what is clearly one of independent, entrepreneurial dealing.”)

²⁹ See Harris & Krueger, *supra* note 4. Harris and Krueger also suggest that independent workers be eligible for employer tax withholding and payroll tax, issues this Issue Brief does not cover.

³⁰ *Id.* at 9.

³¹ DIANA FARRELL & FIONA GREIG, PAYCHECKS, PAYDAYS, AND THE ONLINE PLATFORM ECONOMY: BIG DATA ON INCOME VOLATILITY 5 (J.P. Morgan Chase & Co. Inst., ed. Feb. 2016),

<https://www.jpmorganchase.com/corporate/institute/document/jpmc-institute-volatility-2-report.pdf>. In comparison,

one recent study estimated that 16% of workers are in temporary work, independent contracting, on-call work, or contracted-out work. Lawrence Katz & Alan Krueger, *The Rise and Nature of Alternative Work Arrangements in the United States, 1995-2015* (NBER Working Paper No. 22667, 2016),

https://krueger.princeton.edu/sites/default/files/akrueger/files/katz_krueger_cws_-_march_29_20165.pdf.

Third, the proposal may overcomplicate collective bargaining. It would revise antitrust law to enable independent workers to organize and bargain, steering clear of our existing labor law regime both because “independent workers” would not be employees, and because that regime is widely regarded as outdated. But the proposal doesn’t explain how workers’ concerted action would then be governed. Would restrictions on strikes and picketing be imported from the National Labor Relations Act (NLRA)? Would firms have a duty to bargain with independent workers’ unions? If so, when, and who would determine whether they were bargaining in good faith? What duties would unions of independent workers bear toward represented workers? Rather than require courts or a new administrative agency to address such questions, it seems simpler to leave them in the competence of the National Labor Relations Board (NLRB), which has over 75 years of experience.

Fourth and finally, the proposal lets companies off the hook for some very basic obligations, such as minimum wages and overtime. Harris and Krueger argue that it is difficult or even impossible to measure work hours for Uber drivers since they may perform personal tasks while they have the app turned on, and since they may use multiple ridesharing apps at the same time. The argument is reasonable, but it concedes too much. Recordkeeping has long been complicated for on-call workers and workers who have down time while at their jobs. It is premature to carve out an exception from the governing regulations before considering in full how existing laws and regulations may apply.³² Moreover, Uber already requires drivers to accept a certain percentage of referrals and sometimes guarantees drivers certain compensation by the hour, strongly suggesting that it already monitors both their hours and their activities.³³ If the problem is that drivers use multiple platforms, finally, Uber could classify drivers as employees and require them to use its platform exclusively—especially given recent evidence that only 14% of workers use more than one labor platform.³⁴ In general, the growth of contingent work arrangements counsels for more worker protections rather than fewer.

III. Redefining Employment

Rather than creating a new category of worker, it would be both simpler and fairer to expand and clarify the scope of employment under the core federal labor/employment statutes.³⁵ That redefinition should target the three primary forms of fissuring: misclassification, subcontracting, and franchising. Ideally, an omnibus bill would do the following:

³² Under the FLSA the key distinction is between workers who are “waiting to be engaged” (and therefore not working) and workers who are “engaged to wait” (and therefore working). *Fact Sheet #22: Hours Worked Under the Fair Labor Standards Act (FLSA)*, WAGE & HOUR DIV., U.S. DEPT OF LABOR (July 2008), <https://www.dol.gov/whd/regs/compliance/whdfs22.pdf>; Harris & Krueger, *supra* note 4, at 9 (noting this rule but arguing that drivers are likely “waiting to be engaged” since they can perform personal tasks while they have apps on).

³³ ROSS EISENBREY & LAWRENCE MISHLE, *UBER BUSINESS MODEL DOES NOT JUSTIFY A NEW “INDEPENDENT WORKER” CATEGORY* (Econ. Pol’y Inst. ed., 2016), <http://www.epi.org/publication/uber-business-model-does-not-justify-a-new-independent-worker-category/> [<https://perma.cc/T9H4-86SK>].

³⁴ FARRELL & GREIG, *supra* note 31, at 23.

³⁵ The discussion below considers the FLSA, the National Labor Relations Act (NLRA), Title VII of the Civil Rights Act of 1964 (Title VII), and other antidiscrimination statutes. Such a reform should also be considered for other employment statutes, including the Employee Retirement Income Security Act (ERISA), the Occupational Health and Safety Act (OSHA), and tax-related statutes such as the Federal Insurance Contributions Act (FICA) and the Federal Unemployment Tax Act (FUTA). FICA is especially important given the sums involved for misclassified workers.

1. Redefine employment per the “suffer or permit” test and specify that the “suffer or permit” test defines employment *very* broadly;
2. Define workers in certain highly fissured industries as the legal employees of firms who contract with them individually for labor, and/or the joint employees of user firms who obtain their labor through subcontracting or franchising arrangements;
3. Develop concrete guidance for courts to apply in other industries, or direct an expert agency to do the same; and
4. Place the burden of proof on the party seeking to avoid employment status and implement other procedural and remedial reforms.³⁶

A. Deeper into the Substantive Definition

In clarifying the meaning of “suffer or permit,” Congress could endorse the Department of Labor’s (DOL’s) recent analysis of that question. In a 2015 interpretive memorandum, the DOL wrote that courts in misclassification cases “should be guided by the FLSA’s statutory directive that the scope of the employment relationship is very broad,” and should ultimately seek “to determine whether the worker is economically dependent on the employer (and thus its employee) or is really in business for him or herself (and thus its independent contractor).”³⁷ In a separate memorandum, the DOL has held that economic dependence also defines “vertical joint employment” relationships, or relationships in which a user firm obtains labor through a subcontracting arrangement, or enters into a franchising arrangement with a worker’s employer.³⁸

Given that workers have found it difficult to convince courts that FLSA’s “suffer or permit” standard actually means what it says, Congress could also provide concrete guidance for how to apply that test in practice, or direct an agency to do the same. That guidance could include a list of enumerated industries whose workers will always be the employees or joint employees of whoever purchases their services, whether directly or through an intermediary. A key starting point is industries where agencies and states have recognized that misclassification or labor-only subcontracting is especially common, including construction, farm labor, home health care, hospitality, garment manufacturing, janitorial, on-demand labor platforms, restaurant work, security services, and warehouse work.³⁹

³⁶ In determining how the party bearing such a burden could rebut it, Congress or agencies could draw on states’ experiences applying the “ABC” test for employment that is used in a majority of state unemployment insurance laws. *See* CATHERINE RUCKELSHAUS ET AL., WHO’S THE BOSS: RESTORING ACCOUNTABILITY FOR LABOR STANDARDS IN OUTSOURCED WORK 35–36 (Nat’l Emp. L. Project ed., May 2014) (explaining that, under the “ABC” test, a party seeking to evade responsibility must show that “(1) an individual is free in fact from control or direction over performance of the work; (2) the service provided is outside the usual course of the business for which it is performed; and (3) an individual is customarily engaged in an independently-established trade, occupation, or business”).

³⁷ Dep’t of Labor Memorandum, *supra* note 14, at 2.

³⁸ U.S. Dep’t of Labor, Wage & Hour Div., Administrator’s Interpretation No. 2016-1 (Jan 20, 2016).

³⁹ *See* Weil, *supra* note 3 (noting some such industries); CAL. LAB. CODE § 2810 (West 2013) (imposing special duties on “[i]ndividuals contracting for labor or services with construction, farm labor, garment, janitorial, security guard, or warehouse contractors”); CAL. LAB. CODE § 2810.3 (West 2013) (holding firms jointly liable for wage/hour and workers compensation violations by contractors hired to perform “labor within [their] usual course of business.”). In an ongoing case that could have far-reaching ramifications for franchising arrangements, the NLRB alleges that McDonalds is the

That guidance could also clarify that common law notions of control play a minor role in employment status cases and identify factors that indicate whether the worker is truly in business for him or herself. As noted by the DOL,⁴⁰ the following considerations are key:

- Whether the putative employer could carry out its business without the work at issue;
- Whether the worker exerts the sort of managerial skill characteristic of an independent business or trade, such as advertising his or her services, negotiating contracts with terms specific to each job, and deciding which jobs to perform and when to perform them, all free from any direction from the putative employer;
- How the worker’s investment in capital goods or other business resources compares to the putative employer’s investment;
- Whether the putative employer dictates regularized contract terms to workers, contractors, or franchisees.

B. Procedural and Remedial Reforms

The ordinary burden of proof in civil litigation, of course, rests with the plaintiff. In employment status cases, that can be quite unfair given the resource disparities between the parties. Many states have responded in their unemployment compensation statutes by creating a presumption that anyone who performs work for another is the other’s employee, then requiring the other to disprove employment status.⁴¹ Such an approach has proven a workable means of deterring misclassification.

Congress could also deter misclassification by enhancing remedies.⁴² For example, it could entitle workers to liquidated damages upon a finding of misclassification, and double or treble damages for pecuniary harms suffered as a result of misclassification. It could also require companies to disclose to workers their classification, the implications of their classification, how the law determines employee and independent contractor status, and how to contest that classification before the DOL or other agencies; it could then presume misclassification when such information is not provided.⁴³

Finally, Congress should consider adding a private right of action to the FLSA’s “hot goods” provision, which permits the Secretary of Labor to enjoin the transport or sale of goods produced in violation of the Act and to seek monetary damages from those holding the goods. That provision

joint employer of its franchisees workers. *See McDonald’s USA, LLC, a Joint Employer, et al.*, 363 NLRB No. 14, slip op. (2016).

⁴⁰ *See generally* Dep’t of Labor Memorandum, *supra* note 14, at 6–10, 13–14.

⁴¹ *See* RUCKELSHAUS ET AL., *supra* note 36.

⁴² Notably, the NLRB Division of Advice issued a memorandum finding that an employer’s misclassification of employees as independent contractors is an unfair labor practice. Off. Gen. Couns., Nat’l Labor Relations Bd., Advice Memorandum, Pacific 9 Transportation, Inc., No. 21-CA-150875, (Dec. 18, 2015), http://hr.cch.com/ELD/AdvicememoPac921_CA_150875_12_08_15_.pdf.

⁴³ These provisions were included in the proposed federal Payroll Fraud Prevention Act of 2015, which would have amended the definition of employment under the FLSA but not other statutes. H.R. 3427, 114th Cong. (2015), <https://www.congress.gov/114/bills/hr3427/BILLS-114hr3427ih.pdf>.

extends responsibility well beyond the boundaries of traditional employment, and can be a very effective means of ensuring wage/hour compliance.⁴⁴

C. Act-Specific Considerations

These reforms would have various act-specific effects that are worth noting briefly.

Under the FLSA, a more expansive definition of employment ought to be coupled with several additional reforms. First, the FLSA has an antiquated “collective action” procedure, rather than a standard class action procedure, such that workers must affirmatively opt in to a suit. Reform is warranted there. Second, Congress should clarify that questions of employment status may not be subject to arbitration.⁴⁵ And third, the FLSA exempts taxi drivers from its overtime provisions; reform to that provision is warranted on grounds of fairness to drivers as well as on public safety grounds.⁴⁶

Agencies may also need to update rules around joint employers’ responsibilities. The Family and Medical Leave Act’s (FMLA) joint employer rules, for example, designate a “primary” and a “secondary” employer with different duties.⁴⁷ Such a distinction may become necessary in antidiscrimination cases. The NLRB’s current standard, which requires that joint employers bargain only over terms and conditions of employment that they possess the authority to control, seems workable even under an expanded definition of employment.⁴⁸

Finally, redefining employment status as detailed here would expand coverage under federal antidiscrimination statutes including Title VII, the Age Discrimination in Employment Act, and the Americans with Disabilities Act. This would reduce the complexity of emerging claims that Uber and other companies may be discriminating against drivers by making employment decisions on the basis of biased customer feedback.⁴⁹ While expanding the scope of those Acts’ coverage may seem to impose onerous burdens on employers, employers are already prohibited from discriminating against independent contractors on the basis of race under Section 1981 of the Civil Rights Act of 1866,⁵⁰ and both Title VII and Section 1981 have long held employers responsible for various harms perpetrated by third parties.⁵¹ Moreover, causal standards under existing antidiscrimination doctrine

⁴⁴ 29 U.S.C. § 215(a)(1) (1950) (stating that “good faith” purchasers are exempted from the statute).

⁴⁵ See, e.g., *D.R. Horton*, 357 NLRB 184 (2012) (holding that class action waiver in employment arbitration agreement violates the NLRA); *accord* *Morris v. Ernst & Young*, No. 13-16599, 2016 WL 4433080 (9th Cir. Aug 22, 2016); *but see* *Murphy Oil USA, Inc. v. N.L.R.B.*, 808 F.3d 1013 (5th Cir. 2015) (rejecting NLRB’s theory in *D.R. Horton*).

⁴⁶ 29 U.S.C. § 213(b)(17).

⁴⁷ *Fact Sheet #28N: Joint Employment and Primary and Secondary Employer Responsibilities Under the Family and Medical Leave Act*, WAGE & HOUR DIV., U.S. DEP’T OF LABOR, <https://www.dol.gov/whd/regs/compliance/whdfs28n.pdf>.

⁴⁸ See *Miller & Anderson, Inc.*, 364 NLRB No. 39, slip op. at 10–11 (2016).

⁴⁹ Compare Noah Zatz, *Beyond Misclassification: Gig Economy Discrimination Outside Employment Law*, ON LABOR (Jan. 19, 2016), <https://onlabor.org/2016/01/19/beyond-misclassification-gig-economy-discrimination-outside-employment-law/> (outlining possible causes of action that do not require a finding of employment status).

⁵⁰ 42 U.S.C. § 1981.

⁵¹ See *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) (holding that companies may be vicariously liable for sexual harassment by supervisors that does not lead to a tangible employment action); Noah D. Zatz, *Managing the Macaw: Third-*

are fairly stringent, typically requiring plaintiffs to prove intent to discriminate, which should prevent employers from bearing undue burdens.

IV. Concluding Observations

While the challenges faced by workers in the platform economy are generating a great deal of attention, policymakers should not lose sight of broader trends toward fissuring that impact a far, far larger proportion of the workforce. Since employment is fundamentally a legal status, and often a contested one, even seemingly targeted reforms may have far-reaching legal consequences. Significant reforms of our labor and employment laws should focus broadly on that group of workers, and generally should enhance rather than limit their rights.

About the Author

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Party Harassers, Accommodation, and the Disaggregation of Discriminatory Intent, 109 COLUM. L. REV. 1357 (2009) (outlining the prevalence of employer liability for harassment by third parties).