

# Regulatory Reboot: Modernizing Gig-Economy Law

Zachary M. Leininger\*

INTRODUCTION.....	707
I. BACKGROUND: ESTABLISHING THE CURRENT ACADEMIC LANDSCAPE AND LAYING THE FOUNDATIONS OF THIS ANALYSIS.....	709
A. <i>What Is the Gig Economy?</i> .....	709
B. <i>Significance of the Gig Economy</i> .....	710
C. <i>Florida v. California: Domestic Approaches Compared</i> .....	711
D. <i>Comparing the Legal Models</i> .....	712
1. <i>The Common Law Approach</i> .....	712
2. <i>California: A Case Study in Expansive Protection of             Workers</i> .....	714
3. <i>Florida’s Modified Common Law Approach</i> .....	716
II. ANALYSIS.....	717
A. <i>National State of Affairs</i> .....	717
B. <i>California: Tackling Gig Economy Regulation with a         Progressive Mindset</i> .....	718
C. <i>Florida: Approaching the Modern Economy with a         Traditional Strategy</i> .....	720
D. <i>Comparing the Numbers</i> .....	721
E. <i>Considering the Law</i> .....	722
1. <i>Iowa and the Common Law States</i> .....	722
2. <i>Deviation Under the Federal Model</i> .....	723
III. RECOMMENDATION.....	725
CONCLUSION .....	726

## INTRODUCTION

In 2009, the world of transportation was fundamentally and permanently altered when Uber launched its online platform and began its ridesharing service,<sup>1</sup> connecting independent drivers with customers seeking transportation. In an unlikely turn of events, Uber’s app-based platform revolutionized transportation through allowing riders to easily and quickly secure on-demand transportation. At the same time, the platform also thrust the gig

---

\* I’d like to thank Garland Ellis, Joseph Shauf, and Matthew Fagan for being sources of extensive discussion on this topic as I developed this Note. I’d like to thank my editor, Jackson Vicknair, for his help in turning a rough idea of researching gig economies into a fleshed out note topic. And I’d like to thank the entire Volume 51 editorial staff for all their hard work editing my Note. It’s an honor to publish in such a prestigious journal and I could not have done it without them.

1. Henry Hoening, *The History of Uber*, INVESTOPEDIA (Feb. 5, 2025), <https://www.investopedia.com/articles/personal-finance/111015/story-uber.asp> [<https://perma.cc/3HR3-H9A4>].

economy to the forefront of political and legal discourse.<sup>2</sup> Several centuries old in concept, the “gig economy” refers to work that individuals enter on a piecemeal basis, where workers agree to perform discreet tasks as opposed to entering into a position of long-term employment for a specific company.<sup>3</sup>

The recent growth in this segment of the economy has significantly affected the day-to-day economic activities and labor practices of many Americans.<sup>4</sup> Increasing numbers of working-aged adults are opting for work in the gig economy as a supplement to, or complete replacement for, traditional employment positions.<sup>5</sup> In light of this evolution, it is timely to consider the proper course for legislatures and administrative agencies to pursue going forward, with regard to the regulation of the gig economy. To that end, this Note will strive to compare the regimes of two U.S. jurisdictions, California and Florida, and determine which regime best serves all interested actors in the gig economy. Through this analysis, this Note will strive to identify the best approach forward for common law jurisdictions, with Iowa standing in as the quintessential common law jurisdiction. This Note will proceed in three Parts. Part I will lay the foundation for the analysis through establishing what the gig economy is, why it is significant, and outlining the current regulatory regimes for each relevant jurisdiction. Part II will then analyze the relative outputs of each jurisdiction, in order to assess which regime best serves the key actors from the industry. And Part IV will then offer the ideal regime for states to implement going forward in order to best balance the potential for economic growth from the gig economy and the alternative danger of ignoring the important risks attendant to gig economy participation.

Notably, some commentators have taken the approach of writing off the alleged benefits of gig work altogether.<sup>6</sup> They argue that the industry’s promise of flexibility and autonomy is a farce that allows companies to increase their profit at the expense of the working class through bypassing obligations owed to employees. While no doubt an important issue to be assessed, the question goes beyond the scope of this Note. This Note will assume the existence of the gig economy and confine itself to an analysis of what regulatory approach makes this growing industry maximally beneficial to companies, workers, and consumers.

---

2. See *id.* (discussing Uber’s entanglement in legal battles across the United States as courts wrestle with how to classify Uber’s drivers, whether as employees or independent contractors).

3. *What Is the Gig Economy, and Who Are Its Workers?*, MARYVILLE UNIV. BLOG (Feb. 28, 2023), <https://online.maryville.edu/blog/what-is-the-gig-economy/> [<https://perma.cc/7T9X-QHYH>].

4. See *id.* (noting that in 2022 almost 65 million Americans participated in the gig economy); *What Is the Gig Economy?*, MCKINSEY & CO. (Aug. 2, 2023), <https://www.mckinsey.com/featured-insights/mckinsey-explainers/what-is-the-gig-economy> [<https://perma.cc/E7HG-FPYQ>] (noting that 36% of surveyed respondents who are employed consider themselves independent workers, up from 27% in 2016; but note that this number does *not* refer to app-based work specifically, which comprises a much smaller number).

5. See *supra* note 3 and accompanying text.

6. See, e.g., Jenna Inouye, *A Brief History of Work: The Gig Economy and Freelance Labor*, MEDIUM (June 8, 2023), <https://medium.com/tech-impact/a-brief-history-of-work-the-gig-economy-and-freelance-labor-606956f94dbb> [<https://perma.cc/JR6U-7KY3>].

I. BACKGROUND: ESTABLISHING THE CURRENT ACADEMIC LANDSCAPE AND LAYING THE FOUNDATIONS OF THIS ANALYSIS

A. *What Is the Gig Economy?*

The gig economy refers to an industry characterized by agreements between individuals or entities to perform discrete tasks or services as opposed to recurring, regular employment.<sup>7</sup>

While the modern gig economy has grown exponentially in size and scope in recent years,<sup>8</sup> the concept itself is far from novel.<sup>9</sup> Indeed, some commentators have quipped that the modern conception of the gig economy likely replicates the same form of business that was likely conducted as far back as the Paleolithic Era.<sup>10</sup> While perhaps intended to be tongue in cheek, this presumption is logical in that, if we define the gig economy as being characterized by an agreement to give “X” value in exchange for “Y” service or good, this is the most basic and fundamental form of transaction, not unlike what we would expect the most ancient humans to have engaged in once they discovered the concept of trading goods.

In fact, even in relatively recent Western culture, the notion of working for oneself, performing discreet tasks for pay, was the norm for most people.<sup>11</sup> Several commentators have suggested that the jolting economic downturn of the Great Depression and the resulting inability to secure long-term, stable employment stimulated a turn to seeking one-off opportunities to generate income.<sup>12</sup> Thus, the modern concept of the gig economy was born. And while the post-Depression era may have seen a return to reliance on “traditional” work forms, the growth of the internet that would soon follow in the 1990s gave another surge to the gig economy.<sup>13</sup> This novel resource would enable workers to offer their services and secure customers quickly and conveniently. This, coupled with further economic downturn in 2008–2009 and 2020, has seemingly solidified the gig economy’s place within our modern economic framework.<sup>14</sup>

7. See, e.g., *Gig Economy*, FREELANCE MOVEMENT, <https://www.freelance-movement.org/gig-economy> [<https://perma.cc/J8SH-HAL7>].

8. See *supra* note 3 and accompanying text.

9. See *infra* note 12 and accompanying text (noting that the prevalence of gig work dissipated during the Great Depression, as workers sought greater stability that was better obtained through conventional employment).

10. Rudly Raphael, *Getting Your Hustle On: The Rise of the Gig Economy*, GREENBOOK (June 2, 2022), <https://www.greenbook.org/insights/executive-insights/getting-your-hustle-on-the-rise-of-the-gig-economy> [<https://perma.cc/3MRJ-ND3H>].

11. See MARYVILLE UNIV. BLOG, *supra* note 3 (discussing the gig economy).

12. INTERFAITH CTR. ON CORP. RESP., DEHUMANIZATION, DISCRIMINATION AND DESKILLING: THE IMPACT OF DIGITAL TECH ON LOW-WAGE WORKERS 18–20 (2024), <https://www.iccr.org/reports/dehumanizationdiscrimination-and-deskillingthe-impact-of-digital-techon-low-wage-workers-the-case-for-shareholder-engagement/> [<https://perma.cc/44JQ-K5S5>].

13. *Id.*

14. NICHOLAS KACHER & STEPHAN WEILER, INSIDE THE RISE OF THE GIG ECONOMY 1–2 (2017), <https://csuredi.org/wp-content/uploads/2022/04/REDI-report-April-gig-economy.pdf> [<https://perma.cc/SUS9-PGUM>] (noting that the Recession of 2007 triggered massive growth in this sector of the economy); Rebecca Henderson, *How COVID-19 Has Transformed the Gig Economy*, FORBES (Dec. 10, 2021), <https://www.forbes.com/sites/rebeccahenderson/2020/12/10/how-covid-19-has-transformed-the-gig-economy/> (on file with the *Journal of Corporation Law*) (noting gig economy growth following the onset of the coronavirus and the government regulations that limited access to stable employment).

With the prevalence of app-based freelance work, the idea of gig work often calls to mind companies like Uber and Lyft. And while app-based companies like these are a substantial segment of the gig economy, their workers represent far from the majority of freelancers.<sup>15</sup> On the contrary, many freelance workers fill roles in traditionally “professional” industries, including diverse roles such as web design, financial services, and legal services.<sup>16</sup>

### B. Significance of the Gig Economy

Questions regarding the ideal legal test to govern the gig economy may seem rather inconsequential. However, for the growing number of Americans foregoing traditional employment in favor of independent work,<sup>17</sup> this is anything but irrelevant. On the contrary, whatever test a state adopts will determine whether gig workers are entitled to workers’ compensation<sup>18</sup> and sick leave,<sup>19</sup> among other variables. Clearly, the question is of great significance—a significance that will only continue to grow in the coming years as this segment of the economy continues its recent boom.<sup>20</sup>

Furthermore, in view of the recency of growth in the gig economy, it should not be surprising to see that the legal landscape has not yet caught up with this evolution. This poses a problem, insofar as the possibility of abundant economic growth flowing from this market is tempered by commensurate risks to gig workers.<sup>21</sup> These risks encompass broad

15. STATISTA, SHARE OF FREELANCE WORKERS IN THE UNITED STATES IN 2021, BY INDUSTRY (2024), [https://www.statista.com/statistics/1128117/share-people-freelancing-industry-us/?srsltid=Afm-BOoqZXQo68RaJRMcuMd3\\_Mwkgd-N3aa6zU4q2bJsVTZpeTUjo6ibn](https://www.statista.com/statistics/1128117/share-people-freelancing-industry-us/?srsltid=Afm-BOoqZXQo68RaJRMcuMd3_Mwkgd-N3aa6zU4q2bJsVTZpeTUjo6ibn) [https://perma.cc/2LX8-TGCF] (sourcing data from Upwork that illustrates workers in the transportation industry comprise 39% of the freelance economy in the United States).

16. *Id.*; see MARYVILLE UNIV. BLOG, *supra* note 3 (noting that gig work includes a range of services from “side-hustles,” selling handmade goods, or offering professional services like web design); see also MCKINSEY & CO., *supra* note 4 (“[A] category that may include lawyers, accountants, actors, social-media influencers, traveling nurses, and other specialists.”).

17. See MARYVILLE UNIV. BLOG, *supra* note 3 (“Projections indicate that by 2028, freelancers who perform gig work will total 90 million and account for more than half of the U.S. workforce.”).

18. See, e.g., LaFluer v. LaFleur, 452 N.W.2d 406, 410 (Iowa 1990) (illustrating worker’s compensation case involving an independent contractor); *Compliance*, IOWA DEP’T. OF INSPECTIONS, APPEALS, & LICENSING, <https://dial.iowa.gov/hearings/workers-comp/compliance> [https://perma.cc/QTJ3-346X] (explaining in the Frequently Asked Questions section of the website that Iowa workers’ compensation law does not cover independent contractors); see also Tyler Jett, ‘You Just Don’t Know What to Expect’: The Freedom and Fights of Iowa’s Gig Economy, DES MOINES REG. (Sept. 1, 2019), <https://www.desmoinesregister.com/story/news/2019/09/02/iowa-gig-economy-des-moines-uber-lyft-labor-job-market-legislature-job-market-freelance-contractor/2150869001/> [https://perma.cc/9G8X-XFC3]

19. Michael Kim, *Do California’s Paid Sick Leave Rules Apply to Independent Contractors?*, CKB VIENNA (Aug. 14, 2017), <https://www.ckbvienna.com/blog/2017/8/14/do-californias-paid-sick-leave-rules-apply-to-independent-contractors> [https://perma.cc/VEY5-JN3R]; Jett, *supra* note 18.

20. See MARYVILLE UNIV. BLOG, *supra* note 3 (citing a Statista report projecting 90 million gig workers in the U.S. economy by 2028 which will represent “more than half of the U.S. workforce”).

21. See generally Senhu Wang, Lambert Zixin Li & Adam Coutts, *National Survey of Mental Health and Life Satisfaction of Gig Workers: The Role of Loneliness and Financial Precarity*, BMJ OPEN, Dec. 9, 2022, at 1 <https://bmjopen.bmj.com/content/bmjopen/12/12/e066389.full.pdf> [https://perma.cc/V7FP-BWN4] (discussing the worse mental health outcomes of individuals working in the gig economy as compared to those with long-term employment positions); see also The Investopedia Team, *Understanding the Gig Economy: Flexible Jobs*

areas of the individual workers' lives, such as health risks to the individual, including loss of healthy sleep patterns and damage to family relationships, as well as economic injury stemming from the absence of employment benefits.<sup>22</sup> Additionally, the structure of the gig economy can have an impact on the health of the broader economy in a negative way due to the downward impact on wages.<sup>23</sup> Through internet-based freelance work, employers have access to a broader pool of applicants and can more conveniently outsource work to lower-income areas.<sup>24</sup>

As such, for states to ensure that their constituents enjoy maximum benefit from this growing market, it is critical that they craft appropriate legislation tailored to this new era of independent work. The ideal framework should not approach the problem from the perspective of partisan economic policy. Rather, the ideal framework is one that takes into account the needs of all constituents, balancing both the need for workers' rights with the desire of gig companies to continue to develop their business model and experience continued economic growth.<sup>25</sup>

### C. *Florida v. California: Domestic Approaches Compared*

The recent explosion in the growth of the gig economy necessitates a reconsideration of the legal structures governing this industry, and, potentially, a corresponding overhaul of legal regimes if they prove ill-suited to the modern era.<sup>26</sup>

To the extent that states have attempted to update their regulatory regimes, they have taken myriad approaches to do so. Some—to include California—have pursued an aggressively progressive model for gig economy regulation.<sup>27</sup> This model prioritizes maximizing benefit for workers within the gig economy, increasing cost for companies and reducing their bottom line. On the other hand, states like Florida have embraced more traditional positions, opting to protect companies and their bottom lines through creating rebuttable presumptions of independent contractor status.<sup>28</sup> Still many other states have taken no strong steps to modify their regulatory regimes.<sup>29</sup> These states still adhere to the traditional

---

*Explained*, INVESTOPEDIA (Aug. 20, 2025), <https://www.investopedia.com/terms/g/gig-economy.asp> [<https://perma.cc/BEE3-99VY>].

22. The Investopedia Team, *supra* note 21 (noting loss of healthy sleep patterns, strained work-life balance, and lack of paid sick and family leave as downsides to freelance work).

23. *Id.*

24. *Id.*

25. See MARYVILLE UNIV. BLOG, *supra* note 3 (“Projections indicate that by 2028, freelancers who perform gig work will total 90 million and account for more than half of the U.S. workforce.”).

26. See generally Adrián Todolí-Signes, *The ‘Gig Economy’: Employee, Self-Employed, or the Need for a Special Employment Regulation*, 23 EUR. REV. LAB. RSCH. 193 (2017) (discussing the possibility of governments developing entirely new classification systems in view of the modern economy and the development of forms of labor that look like independent contractor work in many respects but lack the level of true control and financial security which often came with such roles).

27. See, e.g., Veena B. Dubal, *Economic Security and the Regulation of Gig Work in California: From AB5 to Proposition 22*, 13 EUR. LAB. L.J. 51, 57 (2022) (noting the expansive access to workers protection and employment resources for alleged independent contractors under California’s Proposition 22).

28. See, e.g., Jett, *supra* note 18 (noting that Iowa is one of seven states which passed legislation denying protection of workers’ rights to gig workers).

29. See *supra* Part I.D.1 (discussing right to control test).

“right to control” test, which effectively allows courts to apply a loose multi-factor test to assess whether individual workers are employees or contractors.<sup>30</sup>

While much work has been done to study the gig economy broadly, as well as individual regulatory models, there is a dearth of research performing a comparative analysis of different regulatory regimes within the United States. To fill that gap, this Note will seek to analyze the legal regimes and attendant gig economies of Florida and California. The analysis will consider the details of these regimes and the way the regimes impact the gig market through analyzing the economic output of the companies acting in that sphere. The comparison of these states will present a stark contrast, insofar as the two have gone in markedly different ways.<sup>31</sup>

Through this analysis, this Note will strive to determine which end of the regulatory spectrum proves most beneficial to the industry, and accordingly which path would create the best economic environment for the many remaining common law jurisdictions. For the purpose of this analysis, the “common law” model will be assessed through one current common law jurisdiction, namely Iowa.

#### D. Comparing the Legal Models

The starting point for this Note’s analysis will be a brief consideration of the basic legal framework employed by each of the relevant jurisdictions. This analysis will begin with an overview of the traditional common law framework. This represents the “baseline” under United States law and thus is the logical place to begin.

##### 1. The Common Law Approach

The common law model for assessing the employee versus independent contractor question is the “right to control” test.<sup>32</sup> This test typically boils down to a broad question of whether the managing entity controls the method by which the worker performs the assigned task, as opposed to merely controlling the outcome to be reached.<sup>33</sup> An affirmative answer leads to a finding of employer-employee relationship, while a negative answer indicates that the worker is merely an independent contractor.<sup>34</sup>

Iowa relies on a traditional common law framework for governing the worker classification analysis. Specifically, Iowa’s case law and administrative code cite an iteration of the common law right to control test as being determinative of employee versus independent contractor status.<sup>35</sup>

---

30. *Id.*

31. Dubal, *supra* note 27, at 55–57; *Gig Economy Game-Changer? New Florida Law Ensures Contractor Status for Drivers*, FISHER PHILLIPS (Apr. 25, 2017), <https://www.fisherphillips.com/en/news-insights/gig-economy-game-changer-new-florida-law-ensures-contractor-status-for-drivers.html> [https://perma.cc/QN3L-AAQP].

32. Joseph Russel, *U.S. Worker Classification: The Common Law and the ABC Tests*, WORKSOME (Dec. 30, 2023), <https://www.worksome.com/blog/u-s-worker-classification-the-common-law-and-abc-tests> [https://perma.cc/YEJ7-6T64].

33. *Id.*

34. *See id.* (noting that this test generally starts from a presumption of contractor status, with an affirmative answer leading to a finding of employee status).

35. *Id.*; *see also* 23 IOWA ADMIN. CODE 871–23.19(96) (2025).

The Iowa Supreme Court has consistently held that Iowa is a “right to control” state.<sup>36</sup> For example, in the case of *Nelson v. Cities Service Oil Co.*, the court analyzed a worker’s status in the context of a claim for compensation benefits filed by a widow following the death of her husband while on the job.<sup>37</sup> The court found that her husband was not entitled to benefits because he was an independent contractor at the time of his death.<sup>38</sup> Central to the court’s reasoning was that the decedent had set his own hours and supplied his own equipment, and was thus in no real sense under the control of the alleged employer.<sup>39</sup>

The court more recently affirmed this view in the case *LaFleur v. LaFleur*, in which a man sued the alleged employer of a newspaper deliveryman who had hit the plaintiff with his vehicle.<sup>40</sup> The court found that the deliveryman was an independent contractor and not an employee.<sup>41</sup> The opinion cited the independence of the deliveryman with regard to the details of how he accomplished his tasks as evidence that he was not subject to the control of the company, and therefore was not an employee.<sup>42</sup>

Furthermore, Iowa law codifies the right to control test for the purpose of administrative agency decisions in the Iowa Administrative Code.<sup>43</sup> Chapter 23 of the Iowa Administrative Code says at § 871–23.19(96), “[t]he relationship of employer and employee exists when the person for whom services are performed has the right to control and direct the person who performs the services . . . as to the details and means by which that result is accomplished.”<sup>44</sup>

From the cases and legislative pronouncements, some important factors begin to materialize, namely control over the manner of completing a task, rather than control over the outcome alone, flexibility or control over scheduling, and whether the manager heavily invests in the workers conduct, as by supplying equipment for the job. The Iowa common law approach resembles the federal government’s recently promulgated test under the Fair Labor Standards Act.<sup>45</sup> The federal test considers six factors, making clear that none are dispositive, but rather should be weighed equally in a holistic assessment of the relationship.<sup>46</sup> The six factors include: “1. Opportunity for profit or loss depending on managerial

36. See *LaFluer v. LaFleur*, 452 N.W.2d 406, 408 (Iowa 1990); *Malinge v. Webster Oil Co.*, 234 N.W. 254, 256–57 (Iowa 1931) (noting that independent contractors are “subject to the employers control only as to the results” as distinguished from being subject to control with regard to the manner of achieving the specified result); *Nelson v. Cities Serv. Oil Co.*, 146 N.W.2d 261, 265 (Iowa 1966) (noting that “[t]he principal accepted test of an independent contractor is that he is free to determine for himself the manner in which the specified results shall be accomplished”).

37. *Nelson*, 146 N.W.2d at 262.

38. *Id.* at 266.

39. *Id.* at 265.

40. *LaFleur*, 452 N.W.2d at 407.

41. *Id.* at 410.

42. See *id.* at 408–09 (noting that control is the essential question and identifying several factors that indicated a lack of control in this case).

43. IOWA ADMIN. CODE 871–23.19(96) (2025).

44. *Id.*

45. *Fact Sheet 13: Employee or Independent Contractor Classification Under the Fair Labor Standards Act (FLSA)*, U.S. DEP’T OF LAB., WAGE & HOUR DIV. (Mar. 2024), <https://www.dol.gov/agencies/whd/fact-sheets/13-flsa-employment-relationship> [<https://perma.cc/E3KJ-7AFF>] [hereinafter “Fact Sheet 13”].

46. *Id.* (“No single factor determines a worker’s status, and no one factor or combination of factors are more important than the other factors. Instead, the totality of the circumstances of the working relationship should be considered.”).

skill, 2. Investments by the worker and the employer, 3. Permanence of the work relationship, 4. Nature and degree of control, 5. Whether the work performed is integral to the employer's business, and 6. Skill and initiative."<sup>47</sup> The Department of Labor goes on to explain that "[a]dditional factors may be considered as well if they are relevant to whether the worker is in business for themselves or is economically dependent on the employer for work."<sup>48</sup> Their reliance on variations of the traditional "right to control" test make Iowa and the federal model very viable case studies in a common law approach to workers' rights.

## 2. California: A Case Study in Expansive Protection of Workers

California stands ahead of the pack in its current approach to regulating the gig economy. The jurisdiction recently adopted a statutory codification of the "ABC Test" to analyze the proper classification of workers.<sup>49</sup> While the traditional right to control test asks simply whether the alleged employee is under the control of the employer in the manner of completing their work, the ABC test applies a more exacting standard. Specifically, the ABC test has three elements, requiring employers to overcome a presumption of employment status by showing that

(1) The worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact; (2) [t]he worker performs work that is outside the usual course of the hiring entity's business; and (3) [t]he worker is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.<sup>50</sup>

The test sets a high bar, which will make it far more difficult for employers to legally classify their workforce as independent contractors. The significance is far from merely symbolic. AB5 requires use of the ABC test when assessing eligibility for employment-related benefits "including protections for the minimum wage, overtime, unemployment insurance, and workers' compensation."<sup>51</sup> While AB5 has certainly not been without opposition, it seems poised to remain in force for the foreseeable future after the Ninth Circuit's recent decision, affirming its validity.<sup>52</sup>

However, this considerable step away from a common law approach was diluted only a short time later by the subsequent passage of Proposition 22 (Prop 22), a ballot initiative financed in large part by app-based delivery companies who sought a carveout for their drivers in order to avoid the AB5 test.<sup>53</sup> Prop 22, formally called the "App-Based Drivers

---

47. *Id.*

48. *Id.*

49. Dubal, *supra* note 27, at 60 (noting that AB5 codifies the test applied by the court in *Dynamex Operation West v. Superior Court of Los Angeles*, 4 Cal.5th 903 (Cal. 2018)).

50. *Independent Contractor Versus Employee*, STATE OF CAL. DEP'T. INDUS. RELATIONS, [https://www.dir.ca.gov/dlse/faq\\_independentcontractor.htm](https://www.dir.ca.gov/dlse/faq_independentcontractor.htm) [<https://perma.cc/RJR8-GAMD>].

51. Dubal, *supra* note 27, at 55.

52. *Olson v. Cal.*, 104 F.4th 66, 81 (9th Cir. 2024).

53. Dubal, *supra* note 27, at 55.

As Contractors and Labor Policies Initiative”<sup>54</sup> and enacted as the “Protect App-Based Drivers and Services Act”<sup>55</sup> was marketed to voters as much-needed protection for the independence of app-based drivers.<sup>56</sup> While the initiative offers certain benefits to drivers that were not previously available to independent contractors,<sup>57</sup> the timing following the passage of AB5 makes it evident that the initiative represents a concession by app-based companies seeking to retain the benefit of categorizing their drivers as independent contractors through offering negligible benefits.<sup>58</sup>

Prop 22 does not, however, apply to independent contractors across the board.<sup>59</sup> Rather, it applies only to app-based drivers, and even then, only under four specific conditions.<sup>60</sup> Namely:

- (a) The . . . company does not unilaterally prescribe specific dates, times of day, or a minimum number of hours during which the app-based driver must be logged into the . . . company’s . . . platform . . . (b) The . . . company does not require the app-based driver to accept any specific rideshare service or delivery service request . . . (c) The . . . company does not restrict the app-based driver from performing rideshare services or delivery services through other . . . companies except during engaged time . . . (d) The network company does not restrict the app-based driver from working in any other lawful occupation or business.<sup>61</sup>

It seems probable that the success of app-based transportation companies will spur efforts by employers in other industries to adopt lobbying efforts in pursuit of their own carve-outs. Thus, it is an open question whether AB5 will continue to have the influence one would have initially expected.

Nonetheless, while there is the potential for increased carve-outs of certain industries from AB5 coverage, California still offers strong benefits to independent contractors in general.<sup>62</sup> Furthermore, even the narrower rights under Prop 22 still offer more protections to independent contractors than would have been available in a common law jurisdiction. This landscape makes California a viable case study in a progressive approach to workers’ rights in the gig economy.

54. Jim Probasco, *California Proposition 22 (Prop 22): What It Means, How It Works*, INVESTOPEDIA (Mar. 14, 2023), <https://www.investopedia.com/california-proposition-22-prop-22-5085852> [<https://perma.cc/E998-XYVM>]; see, e.g., Gracie Williams Clevenger, *What’s the ‘Gig’ Idea?: The Importance of Understanding Who Employees are Under the FLSA*, 8 BUS. ENTREPRENEURSHIP & TAX L. REV. 433, 449 (2024).

55. CAL. BUS. & PROF. CODE § 7448 (2020).

56. Dubal, *supra* note 27, at 55.

57. See Probasco, *supra* note 54 (noting that drivers received compensation for expenses during engaged time, a minimum income guaranteed, subsidies for health care, company provided accident insurance, and disability insurance, among others).

58. See Dubal, *supra* note 27, at 56 tbl.2 (showing that under Prop 22, drivers have a lower guaranteed wage, less reimbursement for expenses, no paid sick leave, and no unemployment insurance).

59. See CAL. BUS. & PROF. CODE § 7463 (2020) (noting that the carveout applied to TNC drivers, DNC drivers, and TCP drivers and permit holders).

60. *Id.* (noting that drivers will not be deemed independent contractors unless they satisfy § 7451 subsections (a)–(d)).

61. *Id.* § 7451(a)–(d) (2020).

62. See *supra* notes 51–56 and accompanying text.

### 3. Florida's Modified Common Law Approach

Contrary to the progressive California model, Florida has essentially codified a traditional common law approach for regulating the gig economy.<sup>63</sup> The primary test for analyzing worker classification is the standard “right to control” test.<sup>64</sup> This considers the extent to which the alleged employer retained the ability to “control what can be done and how it will be done.”<sup>65</sup> This is achieved through weighing twenty factors, broadly classified as “Behavioral,” “Financial,” and “Type of Relationship” considerations.<sup>66</sup>

However, Florida has gone further than simply preserving this common law approach. Seeking to protect the bottom line of app-based companies in order to encourage industry growth, Florida enacted a bill that explicitly protects app-based drivers from classification as employees.<sup>67</sup> The bill mandates independent contractor status when:

1. The TNC [transportation network company, including companies such as Uber and Lyft] cannot unilaterally prescribe specific hours during which drivers should be logged into the digital network;
2. The TNC must permit drivers to work for other ride-sharing services;
3. The TNC must allow drivers to engage in any other occupation or business they desire; and
4. The TNC and driver must agree in writing that the driver is an independent contractor.<sup>68</sup>

As Fisher Phillips notes, “[t]hese requirements are fairly typical for sharing economy companies, so it will not be difficult for most businesses to adapt to this provision of the law . . . .”<sup>69</sup>

Ultimately, this means more flexibility for drivers potentially offset by fewer benefits. However, Florida has not left drivers without recourse. More recently, in 2022, the legislature adopted a bill that protects companies from misclassification claims for giving emergency benefits to their workers.<sup>70</sup> Fisher Phillips notes that “[the law] clarifies that any actions taken by businesses to provide emergency relief for gig economy workers will not destroy the independent contractor relationship, and they will remain shielded from misclassification claims.” The article goes on to note that this offsets the risk under the

63. *How to Determine if a Worker Is an Independent Contractor*, FLA. DEP’T. OF MGMT. SERV., [https://www.dms.myflorida.com/workforce\\_operations/retirement/section\\_218\\_agreements/independent\\_contractor\\_determinations](https://www.dms.myflorida.com/workforce_operations/retirement/section_218_agreements/independent_contractor_determinations) [<https://perma.cc/F9CR-ABUX>].

64. *See id.* (noting that the primary characteristic of an employee as compared to an independent contractor is the right to control what is done and the manner in which it is done); *Mia. Herald Publ’g. Co. v. Kendall*, 88 So. 2d 276, 279 (noting the significance of the right to control to the Florida Supreme Court’s analysis of independent contractor status).

65. FLA. DEP’T. OF MGMT. SERV., *supra* note 63.

66. *Id.*

67. *See FISHER PHILLIPS*, *supra* note 31.

68. *Id.*

69. *Id.*

70. *Sign of the Times? New Law Protects Florida Companies from Misclassification Claims When Aiding Gig Economy Workers in Emergencies*, FISHER PHILLIPS (May 13, 2022), <https://www.fisherphillips.com/en/news-insights/law-protects-florida-companies-misclassification-claims-gig-economy> [<https://perma.cc/8WJ9-YMPF>].

currently prevailing law of liability for employers if they provide aid that makes it appear as though their relationship is more akin to employer-employee.<sup>71</sup> Indeed, this is a risk that gig companies have cited explicitly as a reason for *not* providing such benefits to their employees.<sup>72</sup>

Thus, Florida seems to have committed to a “freedom of contract” approach, wherein the parties will have the freedom to define for themselves the nature of their working relationship. However, the law will also allow companies to compete for the goodwill of their independent contractors through offering benefits in times of need.

## II. ANALYSIS

In order to accurately assess whether either California or Florida truly excels as a regulatory framework, it is necessary not only to measure how they compare to one another, but also how they compare to some independent baseline. For the purpose of this Note, that baseline will be the national statistics regarding average gig output across the United States. This will prevent unfairly inflating the success of either regime which may marginally outperform the other, while in reality both may exceed the national average. From there, this Note will present the available data on the state-specific economies of California and Florida.<sup>73</sup>

### A. National State of Affairs

The national gig economy is, by available metrics, thriving.<sup>74</sup> Data reports increasing involvement in the gig economy, with an estimated 25–43% of the U.S. workforce participating in it in some way, whether for primary or supplemental income.<sup>75</sup> While the data vary from as low as 10% to as high as 20%, reasonable approximations indicate that a little less than half of all gig workers, roughly 10–13%, rely on the gig economy as their primary source of income.<sup>76</sup> These percentages indicate that over 40 million Americans participate in the gig economy in some way, with almost 17 million, as a low estimate, relying on this segment of the economy for their primary source of income.<sup>77</sup>

71. *Id.*

72. See Stavros Gadinis & Amelia Miaiad, *A Test of Stakeholder Capitalism*, 47 J. CORP. L. 47, 86 (2021) (describing, in the context of healthcare for drivers, Uber’s concern that this would tip the scales of an independent contractor versus employee test and trigger a finding that drivers are employees).

73. Scarce data can frustrate an analysis of this segment of the economy. Furthermore, what data is available varies considerably based on the specific criteria used to qualify a worker as a member of the gig economy. Despite this, there is data available that gives a reasonable approximation of the success of these economies.

74. See, e.g., *How Many Gig Workers Are There?*, GIG ECON. DATA HUB, <https://www.gigeconomy-data.org/basics/how-many-gig-workers-are-there> [<https://perma.cc/93H9-M7F7>] (reporting that over a quarter of the U.S. workforce participate in the gig economy in some way, with 10–13% using it as their primary source of income); STATISTA, PROJECTED GROSS VOLUME OF THE GIG ECONOMY FROM 2018 TO 2023 (IN BILLION U.S. DOLLARS) (2025), [https://www.statista.com/statistics/1034564/gig-economy-projected-gross-volume/?srsltid=AfmBOoqAle\\_Z7\\_VSpSbzk8byvtVDQHH48NyTNJCC9aFjhOIJVBI42LC8](https://www.statista.com/statistics/1034564/gig-economy-projected-gross-volume/?srsltid=AfmBOoqAle_Z7_VSpSbzk8byvtVDQHH48NyTNJCC9aFjhOIJVBI42LC8) [<https://perma.cc/F585-W8G3>] (sourcing data from Mastercard which projected growth from a gross volume of \$204B in 2018 to \$455B in 2023).

75. GIG ECON. DATA HUB, *supra* note 74.

76. *Id.*

77. *Id.*

This increased size has not resulted in drastically increased wages.<sup>78</sup> Gig worker income, by the available data, is less than that of their traditional employee counterparts.<sup>79</sup> While roughly one in every seven gig workers (14%) surveyed by the Economic Policy Institute (EPI) earned below the \$7.25/hour federal minimum wage, none of their “W-2” counterparts surveyed reported earnings below the minimum wage.<sup>80</sup> Worse still, 29% of gig workers surveyed reported earning less than their state’s minimum wage.<sup>81</sup> Indeed, per research conducted by the EPI, a full 64% of gig workers earn less than \$15.00/hour.<sup>82</sup>

Thus, the national stage portrays a rapidly expanding gig economy. However, this has not led to increased pay for workers, who overall seem to earn less than their employee counterparts and are more likely to earn less than the applicable minimum wage. Nonetheless, optimism seems to be prevailing, as the overwhelming majority are satisfied with the arrangement.<sup>83</sup> With this baseline established, this Note turns to the state-specific performances of California and Florida.

### B. California: Tackling Gig Economy Regulation with a Progressive Mindset

Following the recent enactment of AB5 and Prop 22, California’s gig economy has seen less than ideal results. While AB5 strived to increase access to benefits for California’s workers, the preliminary data five years out demonstrate fewer workers and spotty enforcement of Prop 22.<sup>84</sup>

From a pay perspective, AB5 has led to increased income for covered workers. Under AB5, these newly classified employees are now entitled to California’s \$16.50/hour minimum wage as employees under state law.<sup>85</sup>

This increased pay, however, has come with a cost in the form of decreased jobs. Liya Palagashvili and colleagues conducted a study using the Current Population Survey to analyze the number of workers engaged in independent work prior to and following the

78. See, e.g., BEN ZIPPERER ET AL., NATIONAL SURVEY OF GIG WORKERS PAINTS A PICTURE OF POOR WORKING CONDITIONS, LOW PAY 5–6 (2022), <https://www.epi.org/publication/gig-worker-survey/> [<https://perma.cc/S8T4-HCLY>].

79. See *id.* at 5 (noting that “0% of W-2 service workers reported earning less than the federal minimum wage” and “[m]ore than twice as many gig workers (26%) as those in the W-2 sample (11%) earn less than \$10.00 an hour”).

80. *Id.* at 5 tbl.2.

81. *Id.* at 6 tbl.3.

82. See *id.* at 5 tbl.2 (showing that 14% earn less than \$7.25, 12% earn between \$7.25 and \$9.99, and 38% earn between \$10.00 and \$14.99).

83. See, e.g., STATISTA, SATISFACTION OF GIG ECONOMY WORKERS WITH INDEPENDENT WORK IN THE UNITED STATES IN 2021 (2025), <https://www.statista.com/statistics/916294/gig-economy-satisfaction-workers-current-job/> [<https://perma.cc/L7C8-5GGX>] (sourcing data from MBO Partners and Rockbridge Associates which show that 77% of U.S. gig workers report being “very satisfied” with their work arrangement).

84. See, e.g., Liya Palagashvili et al., Assessing the Impact of Worker Reclassification: Employment Outcomes Post-California AB5 3 (Jan. 31, 2024) (unpublished manuscript), <https://www.mercatus.org/research/working-papers/assessing-impact-worker-reclassification-employment-outcomes-post> [<https://perma.cc/V5Z5-3ZTC>] (explaining that under the AB5 regulatory model, the hope was to see an increase in employment which was equal to or greater than the decrease in independent contractors; however, “[w]e find no significant evidence that AB5 increased traditional employment. Instead, we find that this regulation decreased self-employment and overall employment of affected occupations in California.”).

85. *Minimum Wage*, STATE OF CAL. DEP’T. OF INDUS. RELS. (Dec. 2025), [https://www.dir.ca.gov/dlse/minimum\\_wage.htm](https://www.dir.ca.gov/dlse/minimum_wage.htm) [<https://perma.cc/EVS2-NEHY>].

enactment of AB5.<sup>86</sup> Their findings demonstrate a 10.5% decrease in self-employment following the enactment of AB5 and no commensurate increase in traditional employment.<sup>87</sup> In fact, their survey found an overall 4.4% decrease in employment, including both traditional employment and self-employment.<sup>88</sup> This is especially striking because prior to AB5 and Prop 22 the California gig market had been growing, albeit modestly. Annette Bernhardt and colleagues conducted a study analyzing the numbers from 2014–2016 and found that in those two years there was a 0.6% increase in the number of independent workers.<sup>89</sup> Research conducted by ADP using pre-AB5 and Prop 22 data shows that prior to their reclassification initiative, California had the second largest gig economy in the country with a projected 20% of their workforce involved in it.<sup>90</sup> While it is no doubt true that correlation alone does not prove causation, it is notable that this statistical decrease coincides with anecdotal reports by business owners, especially small business owners, who report an inability to afford the increased cost of labor under AB5.<sup>91</sup>

Prop 22, on the other hand, has faced an alternative hurdle of lack of enforcement. The UC Berkley Labor Center conducted an extensive study and found that transportation companies have largely failed to follow through on their promises in the initiative.<sup>92</sup> For example, while nominally entitled to 120% of the \$16.50/hour state minimum wage for all active driving time, the study found that the average pay for ride-hailing drivers is \$7.12/hour and the average for delivery drivers is \$5.93/hour.<sup>93</sup> The lack of enforcement is driven largely by apathy.<sup>94</sup> The California Attorney General’s Office is responsible for enforcing the law, but has declined to pursue individual complaints, opting to only enforce cases where there is evidence of a pattern of noncompliance by the company.<sup>95</sup> In effect, this leaves individual drivers without any legal recourse unless they can essentially compile a “class” of aggrieved gig workers. This could be a difficult task in any industry, but no doubt is markedly more difficult in an industry characterized by its decentralized model where individual drivers are less likely to have strong relationships with other drivers.

The overall picture of the gig economy in California is one of modestly increased pay for AB5 covered workers offset by sharply decreasing rates of job availability on the one hand, and an apparent lack of any enforcement of Prop 22 on the other hand. The legislature

86. Palagashvili et al., *supra* note 84, at 10.

87. *Id.* at 12 tbl.3.

88. *Id.*

89. Annette Bernhardt et al., *The ‘Gig Economy’ and Independent Contracting: Evidence from California Tax Data* 18–19 (Cal. Pol’y Lab, Working Paper No. 2021-6, 2021).

90. AHU YILDIRMAZ, MITA GOLDAR & SARA KLEIN, ILLUMINATING THE SHADOW WORKFORCE: INSIGHT INTO THE GIG WORKFORCE IN BUSINESSES 9 (2020), <https://www.adpresearch.com/wp-content/uploads/2020/07/Illuminating-the-Shadow-Workforce-Full-Report.pdf> [<https://perma.cc/NH2N-CLF5>].

91. Manuel Cosme, Jr., *It’s Time to Reform AB5 to Help California’s Business Climate*, CALMATTERS (Feb. 5, 2021), <https://calmatters.org/economy/2021/02/its-time-to-reform-ab-5-to-help-californias-business-climate/> [<https://perma.cc/KL57-9ESM>].

92. Levi Sumagaysay, *California Companies Wrote Their Own Gig Worker Law. Now No One Is Enforcing It*, CALMATTERS (Sept. 4, 2024), <https://calmatters.org/economy/2024/09/gig-work-california-prop-22-enforcement> [<https://perma.cc/Q4QQ-5D7E>] (revealing that driver pay is still far below what is guaranteed by Prop 22, and, despite inquiring with the companies, the researchers were denied detailed information in several cases on different areas of compliance, as well as whether the companies are cost-shifting these expenses to consumers).

93. *Id.*

94. *Id.*

95. *Id.*

has thus largely sold out California workers through adopting rigorous legislation under the guise of promoting workers' rights and then failing to adequately enforce this legislation and leaving workers to fight for the smaller pool of remaining jobs.

*C. Florida: Approaching the Modern Economy with a Traditional Strategy*

In stark contrast to the California economy, Florida's gig economy is thriving. Unlike California, it is increasing in size, far outpacing the national economy,<sup>96</sup> and is estimated to be the best paying state in the country for gig workers.<sup>97</sup>

In terms of size, the Florida gig economy is leading the way nationally.<sup>98</sup> Rough approximations predict that there are roughly 2.5 million gig workers in Florida.<sup>99</sup> CareerSource Florida, a Florida governmental organization, estimates that there was a 5.4% increase in independent workers from 2013–2018.<sup>100</sup> ADP reports that Florida's gig workforce comprises 22% of the state workforce, outpacing the rest of the country considerably.<sup>101</sup> Notably, this outsizes even California's substantial pre-AB5/Prop 22 numbers.<sup>102</sup> This large proportion aligns with the estimates offered by CareerSource Florida, which, in their recent study of the Florida gig economy, noted that Florida has high levels of economic activity in industries which are overrepresented by gig workers at the national level.<sup>103</sup>

Florida's state-level growth has been driven by strong city-level growth. Better Cities Project reports that Florida is one of the fastest growing states in the nation, particularly in several major urban areas.<sup>104</sup> The gig economies in Miami and Lakeland, in particular, are growing rapidly, outpacing traditional workforce growth.<sup>105</sup>

Beyond the size, Florida's gig workers are estimated to be the best paid in the country. While data on pay is unfortunately scarce, Agents Only did a survey of the state gig economies and found Florida's to be the best-paying nationally.<sup>106</sup>

96. See Neilsberg Research, *The State of Gig Economy in Florida. Statistics and Trends [2022]*, NEILSBERG (Dec. 7, 2022), <https://www.neilsberg.com/insights/the-state-of-gig-economy-in-florida/> [<https://perma.cc/2ZM2-WZXW>] (noting that the Florida gig economy is estimated to have 2.5 million participants as of 2019); CAREERSOURCE FLA., *THE GIG ECONOMY AND FLORIDA'S WORKFORCE SYSTEM 31* (2020), <https://careersourceflorida.com/wp-content/uploads/2019/12/Gig-Economy-Report.pdf> [<https://perma.cc/MXP8-B3F2>] (reporting higher levels of Florida economic activity in industries where gig workers are overrepresented at the national level).

97. *Best States for Gig Workers*, AGENTS ONLY (Sept. 20, 2023), <https://www.agentsonly.com/blog/best-states-for-gig-workers> [<https://perma.cc/8KAX-SJVK>].

98. YILDIRMAZ, GOLDAR & KLEIN, *supra* note 90, at 9.

99. Neilsberg Research, *supra* note 96.

100. *Florida's Gig Economy Dashboard*, CAREERSOURCE FLA., <https://analytics.careersourceflorida.com/GigEconomy> [<https://perma.cc/6VRE-6ZGS>].

101. YILDIRMAZ, GOLDAR & KLEIN, *supra* note 90, at 9.

102. *Id.*

103. See CAREERSOURCE FLA., *supra* note 100.

104. See, e.g., PATRICK TOUHEY ET AL., *COMMUNITIES AND THE GIG ECONOMY 19* (2021), <https://bettercities.org/wp-content/uploads/2021/12/Gig-Economy-Better-Cities-Project.pdf> [<https://perma.cc/NXJ8-N4BV>].

105. *Id.* at 6.

106. See AGENTS ONLY, *supra* note 97.

#### D. Comparing the Numbers

Considering the data, it is difficult to contest the supremacy of the Florida method. The total picture of the Florida gig economy is one of a large, and growing, workforce. It towers over the rest of the country, outpacing California even prior to the enactment of AB5 and Prop 22, and its workforce is the best paid—all while preserving a traditional common law approach to workforce regulation.<sup>107</sup>

Indeed, it is likely this less restrictive classification method that drives the Florida success story.<sup>108</sup> This framework reduces costs for the companies involved, allowing for greater re-investment, which in turn yields expanded growth for the economy at large.<sup>109</sup>

It is also notable that this less restrictive common law approach offers benefits to the government, and in turn the taxpayer, insofar as government officials need not expend as many resources monitoring worker classification.<sup>110</sup> Under the California model, with a rigorous classification system, frequent misclassification is almost inevitable.<sup>111</sup> Given the difficulty of qualifying as an independent contractor under the ABC test of AB5, many of these attempts are likely to be legally problematic, requiring administrative intervention and expense of judicial resources to settle the matter.<sup>112</sup>

The Florida model offers benefits in its comparatively low-cost enforcement and is bolstered by data that show strong economic performance. California, on the other hand, has pursued a more progressive model, dependent on extensive government intervention, which has not resulted in the promised benefits. To the contrary, it has eliminated some of the traditional appeal of the gig economy, while simultaneously decreasing the availability of gig jobs.

Furthermore, Florida's more lenient classification system allows "gigging" to remain an option for the nine-to-five office worker who is drawn to this non-traditional work experience, not as a full-time job, but rather as an evening side hustle.<sup>113</sup> By forcing these companies to classify their workforce as employees, California stripped away this flexibility, opened the door to more rigid control of workers by the gig companies, and thus drove away a large portion of the workforce who may not have wanted this much structure.<sup>114</sup>

107. See discussion *supra* Part III.C. (analyzing the data on the Florida gig economy).

108. See TOUHEY ET AL., *supra* note 104, at 20 (noting that the ease of classifying workers as independent contractors likely drove the growth of the app-based gig economy in Florida).

109. See Cosme, Jr., *supra* note 91 (discussing how in California the loss of jobs was driven, in part, by the greatly increased cost to employers of hiring previously classified contractors as employees).

110. See *id.* ("The lawsuits that followed AB5's enactment take extraneous time both on the companies and civil justice system.").

111. See *id.* ("With its technicalities and its retroactive application, AB5 simply makes it too easy for entrepreneurial lawyers to take advantage of the law.").

112. *Id.*

113. See YILDIRMAZ, GOLDAR & KLEIN *supra* note 90, at 16 (noting that many gig workers view the gig economy as appealing for its flexibility, and accept this as a tradeoff for the lack of company benefits and stability offered by traditional employment); Gadinis & Miazad, *supra* note 72, at 83 (noting that a significant contingency of Uber drivers prefer independent contractor status, insofar as it secures enhanced flexibility for them); Cosme, Jr., *supra* note 91 (noting that a significant drawback of the AB5 approach is the loss of flexibility for gig workers).

114. See Cosme, Jr., *supra* note 91; *Gig Economy Is Facing Its Own Legal Revolution*, ROOSTED (Feb. 4, 2024), <https://www.roostedhr.com/why-californias-new-ab-5-bill-will-change-the-gig-economy-forever> [<https://perma.cc/YT5G-RNLF>] (noting anecdotal experiences of New York Lyft drivers whose ability to log into specific service zones was drastically reduced following enactment of wage laws for gig workers in that state).

Proponents of the law will contend that this is only a minor downside, worthwhile in view of the protections now afforded to workers in all segments of the economy. Indeed, some commentators have simply taken it as a given that AB5 corrects the previously erroneous classification of gig workers as independent contractors, who were always owed protection as employees.<sup>115</sup> But this argument seems futile in hindsight, because it is not clear that California successfully gave these workers any real benefits at all. While a portion of the workforce received the full promise of AB5 and Prop 22, the balance has been left out of work or receiving the same low pay under an unenforced Prop 22.<sup>116</sup>

Furthermore, regardless of anyone's conception of what the proper classification has been historically, the more important question to ask is what the appropriate classification *should be* going forward. Florida has answered that question for the nation as it leads the way in building a robust gig economy that works for both workers and companies.<sup>117</sup>

### E. Considering the Law

An important aspect of the Florida model, beyond any economic benefit, is that it also gets the law right. This Section will consider the application of the common law model to gig workers, in order to assess the legally appropriate classification under that framework.

#### 1. Iowa and the Common Law States

The traditional common law test, which Iowa and many other states still utilize to determine worker status, is the "right to control" test.<sup>118</sup> This test looks to various factors defined by case law, and in some jurisdictions by statute, to determine whether the worker is subject to the control of the manager in performing their work.<sup>119</sup> Some common factors include whether the employer retains the right to set the worker's hours, whether the payment structure is based on the task performed as opposed to hours worked, whether the employer controls the method used to perform a given task, whether the worker supplies their own equipment, whether the worker is able to provide their services to many clients simultaneously, and whether they are restricted to a specific hiring entity.<sup>120</sup>

Applying these traditional "right to control" principles to gig workers such as Uber drivers, the application clearly tilts in favor of independent contractor status. Uber does not

115. See Celine McNicholas & Margaret Poydock, *How California's AB5 Protects Worker's from Misclassification*, ECON. POL'Y. INST. (Nov. 14, 2019), <https://www.epi.org/publication/how-californias-ab5-protects-workers-from-misclassification/> [<https://perma.cc/UL2K-WELV>] (arguing that AB5 will prevent future "misclassification" of gig workers as independent contractors).

116. See discussion *supra* Part II.B (analyzing pay under an unenforced Prop 22).

117. See discussion *supra* Part III.B (noting Florida's lead in terms of size of their gig economy and average income of gig workers).

118. See CATHERINE K. RUCKELSHAUS & BRUCE GOLDSTEIN, *THE LEGAL LANDSCAPE FOR CONTINGENT WORKERS IN THE UNITED STATES 2* (2015), <https://www.nelp.org/app/uploads/2015/03/LegalLandscapeUS.pdf> [<https://perma.cc/84U6-BKTZ>] ("The common law's standard generally is called the 'right to control' test.").

119. See *id.* (describing the factors to be considered as developed in significant cases).

120. See Adam Fink, *Employee vs. Independent Contractor: 20 Questions to Help You Figure It Out*, COHEN & CO. (Mar. 24, 2022), <https://www.cohenco.com/knowledge-center/insights/march-2022/employee-vs-independent-contractor-20-questions-to-help-you-figure-it-out> [<https://perma.cc/GMS2-3V8X>] (noting that scheduling control, payment arrangement, ability to perform one's services for multiple parties, supplying equipment, and control over the method of performance all factor into the "right to control test" as applied by the IRS).

unilaterally set hours for drivers but allows them to log on and accept customer orders at the individual driver's convenience.<sup>121</sup> Furthermore, Uber does not provide the principal piece of equipment used by drivers—the vehicle they use for transportation.<sup>122</sup> Rather, drivers use their own cars, bikes, motorcycles, or any other method of transportation they may prefer. And finally, rounding out the factors noted above, Uber does not restrict drivers from working for a single rideshare service, and many Uber drivers work with multiple rideshare companies.<sup>123</sup>

Of course, jurisdictions like California that opt for an alternative framework are not necessarily disputing that the traditional test does not lead to this conclusion—they are making a policy determination that it *should not* lead to this conclusion. However, proponents of California's model need to keep in mind that there are trade-offs regardless of the regime adopted. While Florida may not require as many benefits, their gig workers are assured a greater degree of freedom from intervention and control by the hiring entity. On the other hand, in California, companies that are now required to classify their contractors as employees will likely begin to treat them accordingly. This means employer-set hours and a potential limit on the ability to work for multiple services at once. This shift is not a hard one to foresee in the new AI-era that features automated supervision and assessment of employee, especially in an industry that is already almost exclusively digital.

This loss of independence will undoubtedly make gig work infeasible for moonlighters who once relied on it as a convenient source of extra income but cannot coordinate Uber's mandatory schedule with their nine-to-five job. Simply put, it is unrealistic to expect that drivers can have both the degree of independence that presently characterizes their industry coupled with extensive benefits.

Further still, this does not account for the additional pragmatic lesson from the California experience—simply passing a law does not mean it will be enforced, and it does not preclude the market from reacting through reducing the workforce altogether.<sup>124</sup>

## 2. Deviation Under the Federal Model

Given the specific formulation of the six-factor federal test, it is conceivable that the worker classification result for the Uber hypothetical noted above could come out differently under federal law. This result, however, derives from ambiguous drafting, likely designed to give excessive discretion in enforcing the rule.<sup>125</sup> To illustrate, attempting to

121. See *Uber: Drive*, UBER, <https://www.uber.com/us/en/drive/> [<https://perma.cc/CW26-VNFG>] (“Drive when you want, make what you need. Earn on your own schedule.”).

122. Uber does not provide a car to drivers as a feature of their work but Uber does facilitate transactions for drivers to purchase or rent cars through their website. See *Rent or Buy a Car for Rideshare on Uber's Vehicle Marketplace*, UBER, [https://www.uber.com/us/en/drive/vehicle-solutions/?uclid\\_id=500d68c3-4e0b-45d7-9850-6d02143525b7](https://www.uber.com/us/en/drive/vehicle-solutions/?uclid_id=500d68c3-4e0b-45d7-9850-6d02143525b7) [<https://perma.cc/4WDE-QV8S>] (noting options to rent or buy a car for rideshare on Uber's Vehicle Marketplace).

123. See, e.g., Clarke Bowman, *I'm a Driver for Uber and Lyft—Here Are The 10 Biggest Mistakes I See Passengers Make.*, BUS. INSIDER (Jan. 11, 2020), <https://www.businessinsider.com/uber-driver-lyft-passenger-mistakes-2020-1> [<https://perma.cc/HY4R-TN7F>]

124. See *supra* Part II.B (discussing the general lack of enforcement of Prop 22).

125. See Marc Scribner & Adrian Moore, *Federal Independent Contract Regulation Threatens the Gig Economy*, REASON FOUND. (Feb. 6, 2024), <https://reason.org/commentary/federal-independent-contractor-regulation-threatens-the-gig-economy/> [<https://perma.cc/7ZHH-DGRH>] (arguing that the rule's “ambiguity lends itself to

apply the test to Uber proves more difficult than might be apparent. This is based on the sheer difficulty of understanding the meaning of the factors.

The first factor asks whether there is “[o]pportunity for profit or loss depending on managerial skill.”<sup>126</sup> In theory, any worker hired by a manager, even the most obvious independent contractor, would garner an affirmative answer to this question, insofar as simply collecting the agreed-upon price of one’s services depends on the manager having the financial resources to be able to pay. But of course, this depends in turn on their managerial skill. If the managerial skills are lacking, then the company will be less likely to have a steady revenue stream. Furthermore, in most cases *most* workers can profit from their own managerial skill. The more productive a worker is, the more likely they are to earn promotions within a company, which generally carries with it increased pay.

The second factor assesses whether both parties make investments in the arrangement. This proves even more difficult to apply, in spite of the guidance provided by the Department of Labor (DOL) indicating that “entrepreneurial investments” that “support the growth of a business” point towards independent contractor status.<sup>127</sup> In theory, any contract requires some investment by both parties, but even if we attempt to limit it to so-called entrepreneurial investments, it’s unclear what precisely that means. If entrepreneurial investment is defined as any investment that grows the company, then there is not a single worker in the American workforce who fails to satisfy this factor. The shift worker at a warehouse that loads trucks most definitely performs work that supports company growth, insofar as without her efforts, orders will not be delivered to customers and sales will decline. This factor thus appears to be essentially meaningless, as it can be interpreted more narrowly or broadly depending on the desired outcome in a particular situation.

Applying factor three makes the situation even more interesting. The third factor questions the “[p]ermanence of the work relationship.”<sup>128</sup> According to the DOL’s guidance, the primary inquiry here is whether the arrangement is “sporadic or project based” or alternatively, “continuous” lacking any “fixed ending date” and potentially exclusively offered to one managing entity.<sup>129</sup> In the latter case, there is likely an employment relationship.<sup>130</sup> This factor seems incredibly unworkable in practice, insofar as, like factor one, it arguably can support a finding of employee status for many quintessential independent contractors. Furthermore, it is generally unclear why the length of the relationship or the decision whether to offer one’s services to multiple clients should be highly indicative of worker status. More fundamental to the question would seem to be whether you are allowed, under the terms of your arrangement, to offer services to other clients. Indeed, under factor three, arguably clients will need to begin treating their lawyer held on retainer as an employee and offer all the benefits and pay all the taxes that come with that classification.

Of course, the issues with any individual factor are not detrimental to the entire test, in that no single factor is dispositive.<sup>131</sup> Nonetheless, the point stands that if multiple

---

competing interpretations, which will likely result in inconsistent application and federal enforcement” which will in turn cause hesitancy to hire independent contractors in the first place, which is “likely the point”).

126. Fact Sheet 13, *supra* note 45.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.* (describing employee or independent contractor classification under the Fair Labor Standards Act).

131. *See, e.g.*, Fact Sheet 13, *supra* note 45.

factors prove ambiguous and malleable, it calls into question whether this is really an advisable route forward. The problem of ambiguity and uncertainty is compounded by the completely subjective catch-all included by the DOL—“[a]dditional factors may be considered . . . .”<sup>132</sup> The federal test thus offers a shocking lack of predictability, but in the process, it also offers yet another strong reason why the Florida model is preferable.

### III. RECOMMENDATION

The foregoing analysis of the Florida and California gig economy regulatory regimes leaves no doubt as to the proper course forward for the remaining common law states, namely to maintain their current common law regimes. In fact, state legislatures should consider doubling down further on this regime and embracing the full Florida model. This should include the Florida policy explicitly exempting specific areas of the gig economy from employee status and instead classifying them as independent contractors.<sup>133</sup>

This legislation would not necessarily be appropriate for all sectors of the gig economy, specifically those that tend to draw more full-time workers who are relying on the gig economy for a living. However, it is certainly advisable where gig workers tend to rely on the freelance work as a supplement to traditional work. It could be argued, in view of Florida’s wild success while retaining a preference for independent contractor status,<sup>134</sup> that this limited approach may not be necessary. Perhaps all else being equal (including population, climate, flow of tourism, etc.) other jurisdictions would surpass Florida if they were even more expansive in their independent contractor carveout and applied this more broadly. However, it is undeniable that at least as much of a preference for independent contractor status as seen in Florida is preferable to the rigid California approach.

Therefore, as a first step, states should apply an independent contractor presumption to segments of the economy that tend to draw in “moonlighters” seeking to make easy cash outside of their normal nine-to-five schedule. According to data collected by Freelance Forward, there are several industries that satisfy this criterion. In 2022, they noted that roughly 17% of gig workers engage in both traditional and freelance work.<sup>135</sup> According to research by Zety, nearly half of the gig economy works 20 hours or less per week.<sup>136</sup> States can use this initial phase as a litmus test for how broadly to extend the codification of independent contractor status. If the initial trial proves successful, as Florida’s

---

132. *Id.*

133. FISHER PHILLIPS, *supra* note 31 (delving into the Florida TNC statute which allows companies to classify their drivers as independent contractors as long as the company does not impose strict scheduling requirements, permits drivers to work for other rideshare companies, allows drivers to engage in any other kind of work they wish to, and there is a written agreement to independent contractor status). Additionally, the vast majority of rideshare companies check all four of these boxes in their relationship with their drivers. *Id.*

134. *See* discussion *supra* Part II.C (explaining the role of independent contractors in Florida’s employment sector); Kevin J. White, *Florida Legislation Establishes That Ride-Sharing Drivers Are Independent Contractors, Not Employees*, HUNTON (May 23, 2017), <https://www.hunton.com/hunton-employment-labor-perspectives/florida-legislation-establishes-ride-sharing-drivers-independent-contractors-not-employees> [https://perma.cc/W2QX-7XRS] (noting that the Florida law enacting this independent contractor test was adopted in 2017 and went into effect that same year, thus pre-dating the statistics reported in Part III.B).

135. Beth Kempton, *Gig Economy Statistics and Key Takeaways for 2024*, UPWORK (Oct. 27, 2023), <https://www.upwork.com/resources/gig-economy-statistics> (on file with the *Journal of Corporation Law*).

136. *See id.* (reporting that 49% of gig workers work less than 20 hours per week).

experiences suggest, then they can increasingly expand the legislation to more industries and seek the ideal level of independent contractor preference.

As a preliminary matter, states should apply this independent contractor carve-out to rideshare and delivery drivers by adopting a comprehensive TNC statute mirroring Florida's statute. This law should impose basic requirements on companies, which will serve to ensure that they give flexibility to their drivers to set their schedules and work freely with other app-based platforms as well as in traditional employment settings.

This will work especially well given the concentration of diversified drivers in the rideshare and delivery driver space, meaning they tend not to rely exclusively on ridesharing to sustain themselves.<sup>137</sup> At the same time, the legislation will leave in place the traditional common law test for gig workers in positions where diversification is less likely. This dichotomy is essential to ensure that the regime works well for all gig workers. The approach would allow full freedom of contract for gig workers in primarily diversified industries, while granting a lower bar to claim employee status, and all its benefits, for workers in less diversified parts of the industry.

At the same time, this model will also ensure both that workers less likely to rely exclusively on gig work have flexibility to continue relying on this industry for moonlighting, as well as give gig companies lower overhead costs. This decreased overhead for companies will drive down costs for the consumer and increase the total revenue of the gig economy. Of course, opponents of this policy will argue that this flexibility could be maintained even while classifying drivers as employees, thus calling into question the logic of the process. This is a faulty argument, however, because it is unlikely that such flexibility could be maintained. Once companies are required to pay minimum wage and benefits to drivers, they will have no reason not to exert full control and begin to micromanage their workers. This could include setting rigorous hour requirements, laying off costly excess manpower, and restricting workers' ability to work with other companies, potentially even companies in other industries.<sup>138</sup>

Over time, if the Florida model proves replicable, this proposed path should lead to increased wages for gig workers across states that adopt this approach. Thus, paradoxically, allowing for lower pay and fewer benefits, when applied in a competitive economy, yields a higher return for both workers and companies.

#### CONCLUSION

The world is rapidly changing as technology continues to develop. This has led to massive changes in all areas of the economy, perhaps most notably in the gig economy as

---

137. See M. Keith Chen et al., *The Value of Flexible Work: Evidence from Uber Drivers* 13 (Nat'l Bureau of Econ. Rsch., Working Paper No. 23296, 2017) (noting that 52.6% of Uber drivers are "Infrequent Driver[s]" and 19.3% are "Weekend & Evening Driver[s]," thus evidencing a lack of reliance on this gig profession as a sole means of livelihood).

138. See Tasneem Zakeer, *Working for Uber: Full-Time Employment or Just a Side 'Gig'?*, NYU J.L. & BUS. ONLINE, <https://www.nyu.edu/org/single-post/working-for-uber-full-time-employment-or-just-a-side-gig> [https://perma.cc/F2JD-RKSV] (noting Uber's projected layoffs and hours requirements in view of the then-impending AB 5 enforcement in California, as well as proposing the policy of permitting a bifurcation of worker classification in the gig economy, allowing workers to opt for employee status at their discretion; it further notes the inevitable concession of far increased oversight and control by the company in the case of reclassification, including but not limited to drivers' losing the right to work for competitors alike, such as Uber and Lyft).

far more workers have opted to forgo the traditional employment experience in favor of app-based freelance work. These changes have necessitated reconsideration at the state level of legal regimes designed to govern a far different economic landscape. Two states have risen to that challenge in very different ways. California adopted a rigorous employment model, categorizing most former independent contractors as employees under its new “ABC” test.<sup>139</sup> Florida has adhered to a common law model and made the test even more lenient by allowing gig companies to receive a presumption of independent contractor status upon satisfying the statute’s conditions.<sup>140</sup>

While California’s ‘worker-centric’ model may seem to be the intuitive path to improved working conditions, Florida’s experience has demonstrated that less restriction of businesses is in fact preferable. Florida has a rapidly growing gig economy with the highest paid workers in the world.<sup>141</sup> This growth is driven by several local counties that are growing at a rate rapidly outpacing the growth of the traditional employment sector.<sup>142</sup> On the other hand, California is losing gig workers and has failed to fully make good on the promises of AB5 and Prop 22, with the latter going largely unenforced.<sup>143</sup> This has led to overall decreased labor participation in the gig economy and poor wages,<sup>144</sup> which is exacerbated in comparison to the stronger Florida economy.

The path is clear for the remaining common law states. These states should pursue a flexible common law approach, while adopting a TNC statute like Florida’s which mandates an independent contractor presumption for diversified segments of the gig economy. By embracing this framework, they can drive their economies forward while preserving full freedom of contract for areas of the economy where gig work tends to be the sole source of income. Through mirroring the Florida regulatory regime, these states will be able to secure similar prosperity for their gig workers.

---

139. LYNN RHINEHART ET AL., MISCLASSIFICATION, THE ABC TEST, AND EMPLOYEE STATUS 10 (2021), <https://www.epi.org/publication/misclassification-the-abc-test-and-employee-status-the-california-experience-and-its-relevance-to-current-policy-debates/> [<https://perma.cc/ZRD2-GVSS>].

140. *See supra* Part I.D.3.

141. *See supra* Part II.B.

142. *See id.*

143. Sumagaysay, *supra* note 92.

144. Eliza McCullough et al., *Prop 22 Depresses Wages and Deepens Inequities for California Workers*, NAT’L EQUITY ATLAS (Sept. 2022), <https://nationalequityatlas.org/prop22-paystudy> [<https://perma.cc/E7AX-J9GM>].