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## The Parallel Worlds of Guest Work and Gig Work

Leticia M. Saucedo

*University of California, Davis School of Law*, [lmsaucedo@ucdavis.edu](mailto:lmsaucedo@ucdavis.edu)

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## THE PARALLEL WORLDS OF GUEST WORK AND GIG WORK

LETICIA M. SAUCEDO\*

Work is stratified both in the brick-and-mortar world and in the gig economy. While this observation may seem trite, it demands attention because it may provide clues as to how methods of recruiting, hiring and maintaining a workforce that are embedded in discriminatory practices carry over to the independent contractor arrangements in gig work. In this Article, I compare the evolution of working conditions in guest work to the conditions of workers in the gig—also known as the platform—economy. Understanding the commonalities is a first step to building bridges between workers in the brick and mortar world and the gig world. Importantly, the demographics show that immigrants are the foundation of independent contracting in both worlds.

For purposes of this Article, I define gig work as all forms of independent contracting in which work is contracted on a temporary basis, whether monthly, weekly, daily, or even hourly or by the minute. The temporariness of the work is part of what makes the work precarious and the workers vulnerable.<sup>1</sup> These workers are excluded from the protections of labor and employment laws, as well as from the social benefit programs structured around employment, including health insurance, pensions, unemployment insurances and workers' compensation.<sup>2</sup> This definition also captures workers in both the brick-and-mortar economy and in the gig economy. This is important because I want to focus on the ways in which employer attitudes toward vulnerable workers in the former affect the treatment of workers in the latter. This is also important because gig work has grown in importance in the public imagination, if not in actual numbers.<sup>3</sup> In the end, we are talking about the same workers, who straddle the physical and virtual work worlds, even as the economy shifts.

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1. Arne L. Kalleberg, *Precarious Work, Insecure Workers: Employment Relations in Transition*, 74 AM. SOC. REV. 1, 1 (2009); Miriam Cherry, *Beyond Misclassification: The Digital Transformation of Work*, 37 COMP. LAB. L. & POL'Y J. 577, 578 (2016).

2. *Id.* at 581, 598.

3. See Annette Bernhardt & Sarah Thompson, *What Do We Know About Gig Work in California? An Analysis of Independent Contracting*, U.C. BERKELEY LAB. CTR. (June 14, 2017),

## I. DEMOGRAPHICS OF THE GIG AND BRICK AND MORTAR WORLDS

A recent California-based study noted the diversity of independent contractors, both in the brick and mortar and gig world:

[T]he demographics of the independent contractor workforce differ markedly across the occupational spectrum. We find that women, immigrants, and Latinos are disproportionately employed in what are typically low-wage [sic] occupations, while White independent contractors are disproportionately employed in what are typically higher-wage occupations. Clearly, more research is needed to understand the variation in independent contractor work in California, with a particular focus on identifying those occupations at risk of economic insecurity and especially misclassification.<sup>4</sup>

Platform gig workers tend to be lower income, male and younger.<sup>5</sup> A recent Pew Research Center study found that participation in the platform economy is more common among Blacks and Latinos.<sup>6</sup> About half of independent contractors are workers of color, and they are more likely to be foreign-born.<sup>7</sup> This trend has actually been increasing over the past three decades.<sup>8</sup>

Self-employment, or small business employment, has become a viable livelihood among Latino immigrants. In fact, business ownership is higher among the foreign-born than the native born in the United States.<sup>9</sup> Mexicans comprise the largest group of immigrants who start businesses or are self-employed in the United States, amounting to nearly a quarter of all immigrant businesses.<sup>10</sup> More than half of these businesses are run by immigrants having a high school degree or less, indicating that these businesses likely exist in construction, agriculture, service and other low-skill sectors.<sup>11</sup> The majority of immigrant businesses are unincorporated.<sup>12</sup>

In fact, immigrants are driving entrepreneurship in states that encourage such activity, including California. A recent study on the contributions of new

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<http://laborcenter.berkeley.edu/what-do-we-know-about-gig-work-in-california/> [<https://perma.cc/9PN4-LTRH>].

4. *Id.*

5. *Id.*

6. Aaron Smith, *Gig Work, Online Selling and Home Sharing*, PEW RESEARCH CTR. (Nov. 17, 2016), <http://www.pewinternet.org/2016/11/17/gig-work-online-selling-and-home-sharing/> [<https://perma.cc/4J2N-5GMG>].

7. See Bernhardt & Thompson, *supra* note 3.

8. MAGNUS LOFSTROM, PUB. POL'Y INST. OF CAL., ENTREPRENEURSHIP AMONG CALIFORNIA'S LOW-SKILLED WORKERS 6, 10 (Apr. 2010), [http://www.pplic.org/content/pubs/report/R\\_410MLR.pdf](http://www.pplic.org/content/pubs/report/R_410MLR.pdf) [<https://perma.cc/JJN5-EQPD>].

9. Robert W. Fairlie & Magnus Lofstrom, *Immigration and Entrepreneurship* 11 (Inst. for the Stud. of Lab., Discussion Paper No. 7669, 2013), <http://ftp.iza.org/dp7669.pdf> [<https://perma.cc/77J4-6RV6>].

10. *Id.* at 12.

11. *Id.* at 14, 16.

12. *Id.* at 17.

Americans in California concluded that immigrants in the state are overrepresented in self-employment and small business.<sup>13</sup> A separate study found that immigrants were almost twice as likely to start new businesses as the native-born population.<sup>14</sup> Immigrants are overrepresented as entrepreneurs in California, where they comprise thirty-eight percent of all entrepreneurs in the state but only twenty-seven percent of the population.<sup>15</sup> Immigrants started almost forty-five percent of new California businesses during the Great Recession, between 2007 and 2011.<sup>16</sup> Immigrants contributed to the California economy as entrepreneurs, small business persons, and self-employed individuals both at the high and the low end of the skills spectrum. At the low end, an estimated sixty percent of landscapers, seventy-two percent of agricultural workers, seventy-six percent of garment workers, and sixty-four percent of domestic workers are immigrants.<sup>17</sup> Immigrants tend to take the most labor-intensive jobs in the economy, and they are overrepresented in those jobs. Over ninety percent of sewing machine operators in California are immigrants, for example.<sup>18</sup> At the high end of the skill spectrum, 56.5% of software developers in California are immigrants.<sup>19</sup> Also at the high end of the skill spectrum are company owners, including Elon Musk, founder of Tesla, and Steven Chen and Jawed Karim, founders of YouTube.<sup>20</sup>

Importantly, immigrants perceive greater freedom in small business or self-employment opportunities because of the requirements for employment authorization that exist in the wage market. Studies show that “increased enforcement of employer sanctions against the hiring of unauthorized immigrants in wage/salary employment may lead to higher self-employment

13. NEW AMERICAN ECONOMY, THE CONTRIBUTIONS OF NEW AMERICANS IN CALIFORNIA 2 (2016), <http://research.newamericaneconomy.org/wp-content/uploads/2017/02/nae-ca-report.pdf> [<https://perma.cc/6MQA-TR6C>].

14. Fairlie & Lofstrom, *supra* note 9, at 7.

15. NEW AMERICAN ECONOMY, *supra* note 13, at 2.

16. *Id.* at 2–3.

17. *Id.* at 7.

18. *Id.* at 8.

19. *Id.*

20. NEW AMERICAN ECONOMY, *supra* note 13, at 3; James Conca, *Elon Musk—An African Immigrant Changes the World*, FORBES (Jun. 19, 2014, 4:44 PM), <https://www.forbes.com/sites/jamesconca/2014/06/19/elon-musk-an-african-immigrant-changes-the-world/#5f16d8433460> [<https://perma.cc/M3LM-HTSQ>]; John Cloud, *How a Couple of Regular Guys Built a Company that Changed the Way We See Ourselves*, TIME (Dec. 25, 2006), <http://content.time.com/time/magazine/article/0,9171,1570795-6,00.html> [<https://perma.cc/ZT69-4SKJ>]; Jim Hopkins, *Surprise! There's a Third YouTube Co-Founder*, USA TODAY (Oct. 11, 2006, 10:41 PM), [http://usatoday30.usatoday.com/tech/news/2006-10-11-youtube-karim\\_x.htm](http://usatoday30.usatoday.com/tech/news/2006-10-11-youtube-karim_x.htm) [<https://perma.cc/BKM9-XA95>].

rates.”<sup>21</sup> Independent contract work and self-employment have, therefore, become default strategies for avoiding unauthorized employment, which runs afoul of immigration law.<sup>22</sup> If independent contractors are not employees, the thinking goes, they are not subject to rules for hiring or employing undocumented workers.<sup>23</sup> This thinking converges with that of employers who seek to avoid the regulation of employment laws that apply to the employment relationship, but not to the contractor relationship.<sup>24</sup> Identifying as an independent contractor, for example, allows an undocumented worker to provide goods and services without being “knowingly hired” as an unauthorized alien and without having to verify employment authorization through the federal government’s verification system.<sup>25</sup>

An Uber driver who has immigration constraints might choose independent contractor status for its perceived freedom. Yet, this freedom is different from what we typically think about in the gig economy. In the dominant narrative, freedom is couched in terms of “freedom to:” to have flexibility in work hours, to arrange work around family or other obligations, to set the terms and conditions of one’s own employment, or to be one’s own boss. In the immigrant worker context, it’s “freedom from:” from regulation outside the workplace that affects one’s work status; from immigration enforcement in the workplace; and from rules in the contract labor realm that limit wages, restrict conditions, and restrict mobility.<sup>26</sup> Exploring the forms of employment arrangements allows us to think about how best to protect precarious workers as new economic arrangements emerge.

The gig economy takes its lead from how employers structured relationships in the brick and mortar economy—especially after the Great Recession—to incentivize independent contract or self-employment.<sup>27</sup> This is why the statistics concerning immigrants and their overrepresentation in self-employment are so revealing. They exemplify the ways in which employers take advantage of vulnerability that stems from factors such as immigration status, race, gender, or socioeconomic status. For every Elon Musk at the high end of the skill spectrum, there are thousands of immigrants at the low end, working through labor

21. NEW AMERICAN ECONOMY, *supra* note 13, at 26 (citing Sarah Bohn & Magnus Lofstrom, *Employment Effects of State Legislation*, in IMMIGRATION, POVERTY, AND SOCIOECONOMIC INEQUALITY 298–302 (David Card & Steven Raphael eds., 2013)).

22. Bohn and Lofstrom, *supra* note 21 at 287.

23. *Id.*

24. *See id.*

25. *Id.* at 284–85, 287.

26. Cindy Carcamo, *Immigrants Lacking Papers Work Legally – as Their Own Bosses*, L.A. TIMES (Sept. 14, 2013), <http://articles.latimes.com/2013/sep/14/nation/la-na-ff-immigration-business-20130915> [https://perma.cc/K6K4-BAJW].

27. Steven Hill, *Raw Deal: How the “Uber Economy” and Runaway Capitalism Are Screwing American Workers* 4–5 (2015).

contractors, third-party contractors, or subcontractors in industries that are thriving on their labor.<sup>28</sup>

The concentration of Latinos and immigrants among low-wage independent contractors is important because such a system is characteristic of low-quality workplace conditions—often including the misclassification of employees as independent contractors. Researchers note that, “[i]n low-wage occupations in particular, workers such as janitors employed by subcontractors may be forced to accept independent contractor status, even though they are clearly employees.”<sup>29</sup>

Many of the forms of social control that developed in the brick and mortar economy exist for gig workers, albeit in more sophisticated and nuanced versions. Looking to the treatment of workers in immigrant workplaces has important consequences for predicting the areas of dispute for gig workers in general. The next section of this Article describes the ways in which legislative efforts to control temporary workers signal forms of control beyond those available in traditional employment.

## II. THE VULNERABILITY OF IMMIGRANT WORKERS AND WHAT IT SIGNALS FOR GIG WORKERS

While immigrants are vulnerable in different ways, I focus here on the vulnerabilities that are perpetuated in the low-skill guest worker program in the United States. The most obvious vulnerability is guest workers’ temporary stay in the United States, which is entirely dependent on continued work with an employer sponsor.

### A. *Guest Work and the AG Act of 2017*

Under current immigration law, employers can hire temporary unskilled foreign labor—guest workers—for jobs that are seasonal, short-term, and to fill a temporary need of a company.<sup>30</sup> Examples of unskilled occupations eligible for guest work include forestry, landscaping, housekeepers, amusement and recreation attendants, service workers, poultry and meat processing workers, and construction laborers.<sup>31</sup> Guest workers start from a position of vulnerability because of parameters imposed by immigration law. In order to seek the services of a guest worker under the immigration statute, the employer must certify that

28. See NEW AMERICAN ECONOMY, *supra* note 13, at 6.

29. Bernhardt & Thompson, *supra* note 3.

30. Immigration and Nationality Act § 101(a)(15)(H)(ii)(B), 8 U.S.C. § 1101(a)(15)(H)(ii)(B) (2012).

31. *H-2B Temporary Non-Agricultural Labor Certification Program – Selected Statistics, FY 2014 YTD*, OFFICE OF FOREIGN LABOR CERTIFICATION (2014), [https://www.foreignlaborcert.doleta.gov/pdf/H-2B\\_Selected\\_Statistics\\_FY\\_2013\\_YTD\\_Q4\\_final.pdf](https://www.foreignlaborcert.doleta.gov/pdf/H-2B_Selected_Statistics_FY_2013_YTD_Q4_final.pdf) [<https://perma.cc/6S9K-5DG2>].

there are no qualified, willing, and available U.S. workers for the job and that the employment of a guest worker will not affect wages and working conditions in the local market.<sup>32</sup> The guest worker is therefore confined under immigration law to only a small subset of jobs for which these conditions are met. The Department of Labor must certify that the employer is offering wages and working conditions that would not discourage American workers from applying, which means offering a wage equal to the prevailing wage.<sup>33</sup> Second, the guest worker can only work for a temporary fixed period of time, currently less than one year.<sup>34</sup> After that, the guest worker must return to her home country.<sup>35</sup> Most importantly, the guest worker cannot move freely or easily from job to job if she is dissatisfied with her employment relationship.<sup>36</sup> The freedom to exit is circumscribed by provisions of the law that makes the guest worker deportable if she leaves the employment relationship.<sup>37</sup> These factors make the guest worker much more dependent on the employer—and therefore vulnerable—than the prototypical employee.

Limitations on the employment rights of guest workers as demonstrate the leverage employers have in industries that dominate the guest worker program. The limitations, are, of course, not natural or endemic to the jobs or the industries involved. We can see just how these limitations evolve by reviewing the ways in which employers continue to seek restrictions on employee protections for guest workers. Here is where things get worse, and at the same time demonstrate how much power employers have over employees who are vulnerable in one way or another.

The Agricultural Guestworker Act of 2017 (the “AG Act”) is a little-known bill that promises to introduce new and even more restrictive forms of control over guest workers.<sup>38</sup> I review it here because I want to demonstrate the aspects of work that employers seek to control. The AG Act proposes to expand the current guest worker program into industries outside of the traditional agricultural and low-skill work.<sup>39</sup>

The AG Act would authorize a dramatic expansion of the current guest worker, or H-2 program, by creating a new category of visas for agricultural and

32. Immigration and Nationality Act § 212(a)(5)(A)(i); 8 U.S.C. § 1182(a)(5)(A)(i) (2012).

33. 20 C.F.R. § 655.10(a) (2015).

34. 20 C.F.R. § 655.6 (2015); 8 C.F.R. § 214.2(h)(6)(ii)(B) (2018).

35. *See* 8 U.S.C. § 1227(a)(1)(C)(i) (2012).

36. *See* 8 C.F.R. § 214.2(h)(2)(i)(D) (2018).

37. An employer must notify the immigration agency if an H-2B employee abandons employment. Because the visa is contingent on employment, the H-2B employee will be considered out of compliance with her visa and deportable. *See* 8 C.F.R. § 214.2(h)(i)(B); Immigration and Nationality Act § 237(a)(1)(C)(i), 8 U.S.C. § 1227(a)(1)(C)(i) (2012).

38. AG Act, H.R. 4092, 115<sup>th</sup> Cong. (introduced October 23, 2017).

39. *Compare* H.R. 4092 § 2 (listing specific activities within the definition of “agricultural labor or services” including forestry and aquaculture) *with* 8 U.S.C. § 1101(a)(15)(H) (2018) (having no specific definition for “agricultural labor or services”).

food industry workers. Up to 450,000 visas would be available under a new H-2C guest worker program.<sup>40</sup> By contrast, the current H-2A program accounted for approximately 165,000 visas in 2016.<sup>41</sup> This visa program is envisioned as the major source of labor for the food industry.<sup>42</sup> If employers were to reach the 450,000-visa cap, the proposed legislation would allow employers to seek additional visas to ensure that employers are not vulnerable to labor shortages.<sup>43</sup> By locking in such a labor supply, employers shield themselves from possible organizing efforts. They can also ensure workplace control over a broader segment of their workers.

The AG Act will also affect existing labor efforts within the food industry. The AG Act would authorize an expansion in the categories of jobs to include aquaculture operations, dairies, raw (including meat and poultry) food processors, and forestry-related industries.<sup>44</sup> Importantly, many of these are industries have had long and successful histories of labor organizing.<sup>45</sup>

Finally, the AG Act would expand the definition of temporary labor to three years from the current ten months under the current program.<sup>46</sup> This means that guest workers would be available for not just seasonal, but for year-round work. While this would introduce a level of stability to the labor force in the food industries, it also would expand the number of workers in the labor force who are subject to severe restrictions on bargaining for better working conditions.<sup>47</sup>

Most importantly, the bill would place legal restrictions on the employment relationship that would necessarily create more vulnerable workers. First, the H-2C program would not require employers to provide free transportation and housing for workers, as the current program requires.<sup>48</sup> Second, under the H-2C program, wages would be calculated as a function of the minimum wage, rather

40. H.R. 4092 § 3(d).

41. Philip Martin, *The H-2A Farm Guestworker Program Is Expanding Rapidly: Here are the Numbers You Need to Know*, ECON. POL'Y INST.: WORKING ECON. BLOG (Apr. 13, 2017, 5:54 PM), <https://www.epi.org/blog/h-2a-farm-guestworker-program-expanding-rapidly> [<https://perma.cc/P7DR-5ML7>].

42. Kate Cox, *Why Today's Vote on H-2C Visas Is Food's Biggest Labor Battle*, THE NEW FOOD ECON. (Oct. 4, 2017), <https://newfoodeconomy.org/h2-c-visa-is-foods-biggest-labor-battle/> [<https://perma.cc/TJQ8-LBCT>].

43. H.R. 4092 § 3(d).

44. *Id.* at § 2.

45. *Dairy*, TEAMSTERS, <https://teamster.org/divisions/dairy> [<https://perma.cc/8BC3-B3S7>] (last visited Aug. 31, 2018); *Food Processing Division*, TEAMSTERS, <https://teamster.org/divisions/food-processing> [<https://perma.cc/ZB2T-ZJQN?type=image>] (last visited Aug. 31, 2018); *About the USTFA*, U.S. TROUT FARMERS ASS'N, <https://ustfa.org/about-the-ustfa/> [<https://perma.cc/5RXA-395Z>] (last visited Aug. 31, 2018).

46. H.R. 4092 § 3(a).

47. *See id.* at § 4.

48. H.R. JUDICIARY COMM., 115TH CONG., THE AGRICULTURAL GUESTWORKER ACT OF 2017, <https://judiciary.house.gov/wp-content/uploads/2017/10/102017-AG-Act-OnePager.pdf> [<https://perma.cc/KU2W-R3HN>].



than the higher prevailing wage.<sup>49</sup> Thus, the wages offered to H-2C workers might be lower than those currently offered to guest workers, by law. Guest workers under this program could make less than nine dollars per hour, compared to the over thirteen dollars per hour that dairy workers now earn.<sup>50</sup> Third, the legislation redefines at-will employment for guest workers by allowing the employer to terminate a worker, but not allowing a worker to quit a job without losing legal status.<sup>51</sup> Fourth, under the proposed legislation, unlike workers in other immigration categories, an H-2C worker does not have the right to allow a spouse or children to accompany him or her.<sup>52</sup> This condition also introduces a degree of vulnerability because it makes H-2C guest workers more socially and geographically isolated—and perhaps less likely to seek permanent workplace changes—than native-born workers.

Finally, with respect to employee voice, the Act would limit the methods by which H-2C workers could complain or grieve their working conditions. First, the legislation would require that H-2C workers seek mediation before filing a civil action against an employer.<sup>53</sup> Second, the legislation would make mandatory binding arbitration a condition of employment.<sup>54</sup> Third, the statute would require workers to share the costs of mediation or arbitration of an employment-related dispute.<sup>55</sup> A legislatively mandated arbitration procedure would effectively limit concerted activity, class actions, and freedom of contract for H-2C workers.

The AG Act would also limit the federal benefits available to these workers. H-2C workers would not be eligible for earned income, child tax, or health care premium credits.<sup>56</sup> More importantly, while H-2C workers would not be eligible for insurance under the Affordable Care Act, they would nonetheless be required to obtain their own health insurance as a condition of employment.<sup>57</sup> And, and as a signal that these workers are not full members of the polity, employers would also withhold ten percent of a worker's wages and deposit them into a fund only available in a U.S. embassy or consulate in the worker's home country, as a way to guarantee that workers return home.<sup>58</sup> Finally, while current H-2 workers can use federally-funded legal services to bring workplace complaints,

49. H.R. 4092 § 3(a).

50. *Minimum Wage*, U.S. DEP'T OF LABOR, <https://www.dol.gov/general/topic/wages/minimumwage> (last visited Aug. 30, 2018); *May 2017 National Industry-Specific Occupational Employment and Wage Estimates*, OCCUPATIONAL EMP'T STATISTICS, [https://www.bls.gov/oes/current/naics4\\_311500.htm](https://www.bls.gov/oes/current/naics4_311500.htm) [<https://perma.cc/D7YS-EK8H>] (last visited Aug. 30, 2018).

51. H.R. 4092 § 3(b).

52. *Id.* at § 3(c).

53. *Id.* at § 4.

54. *Id.* at § 6.

55. *Id.*

56. H.R. 4092 § 7.

57. *Id.* at § 7(c).

58. *Id.* at § 3(a).

H-2C workers would be barred from using federal legal aid for filing complaints against employers.<sup>59</sup>

The provisions of this proposed bill would regulate through the immigration statute the very terms and conditions of employment that Congress contemplated could be bargained for through contract or through concerted activity.<sup>60</sup> By dictating terms and conditions for guest workers, and by limiting the avenues for grievance, the H-2C program would effectively institutionalize subpar conditions in the food industry. More importantly, the proposed restrictions on employee rights signal the terms and conditions employers desire for the future. The methods of control in the proposed legislation include control over work time; control over the terms of the contract, including the term of the contract and restrictions on moving to another employer; control over the treatment of the worker outside the workplace (in the form of benefits limitations); and intrusion on privacy and autonomy, to the extent the legislation disallows family unification.<sup>61</sup>

#### B. *How Guest Work Conditions Are Creeping into the Gig Economy*

These methods of control are emerging as well in the gig economy, albeit in refined and sophisticated forms. The proposed changes to guest work programs mirror the evolution of the gig economy from an infrastructure of jobs that last months, weeks, days or hours to jobs that last minutes or seconds. Amazon Mechanical Turk and CrowdFlower are examples of the business model. Both are algorithmic platforms that outsource work that computers cannot yet master—facial recognition, for example—to humans who can do the work in seconds or minutes and for pennies.<sup>62</sup> The business model, as described by the Chief Executive Officer of CrowdFlower, sounds eerily similar to the rationale for establishing a guest worker program under immigration law:

Before the Internet, it would be really difficult to find someone, sit them down for ten minutes and get them to work for you, and then fire them after those ten minutes. But with technology, you can actually find them, pay them the tiny amount of money, and then get rid of them when you don't need them anymore.<sup>63</sup>

59. H.R. Judiciary Comm., 115th Cong., *supra* note 48.

60. *See* National Labor Relations Act § 7, 29 U.S.C. § 157 (2012).

61. *See generally* H.R. 4092.

62. Alana Semuels, *The Internet is Enabling a New Kind of Poorly Paid Hell*, THE ATLANTIC (Jan. 23, 2018), <https://www.theatlantic.com/business/archive/2018/01/amazon-mechanical-turk/551192/> [https://perma.cc/2RF9-6ZDB].

63. Moshe Z. Marvit, *How Crowdworkers Became the Ghosts in the Digital Machine*, THE NATION (Feb. 5, 2014), <https://www.thenation.com/article/how-crowdworkers-became-ghosts-digital-machine> [https://perma.cc/5QJP-EKXY].

The comparisons do not end there. In the gig economy's business model, workers are increasingly like commodities in the same ways that guest workers are increasingly expedient and fungible. Even though the forms of control are not legislated—as they are for guest workers—they are just as effective.

In the guest work context, employers offer take-it-or-leave-it contracts, first to U.S. workers and, if none are available or willing, then to guest workers. Wages are set, as are other conditions of employment, such as the term of the contract, the benefits provided, and the conditions for termination of the contract. The hiring process for Amazon's Mechanical Turk has been described in similar ways:

Here's how it works: the employers (called "Requesters") can be actual humans or a computer program running a script that automatically outsources any task it cannot perform to the crowd. The Requesters place microtasks (called "Human Intelligence Tasks," or HITs) on Amazon's Mechanical Turk website and offer non-negotiable contracts with a take-it-or-leave-it rate for each HIT. The Turkers (officially called "Providers") perform only small microtasks over and over, rarely getting a glimpse of the whole.<sup>64</sup>

Although guest workers are considered employees, many more immigrant workers—especially undocumented workers—work as independent contractors.<sup>65</sup> As such, they cannot avail themselves of the protections of labor and employment laws. Gig workers face the same restrictions. The vast majority are considered independent contractors.<sup>66</sup> The narrative of entrepreneurship is strong in the gig and platform sectors and platform providers sell themselves as marketplaces rather than employers.<sup>67</sup> As one scholar noted, the business model in the platform economy is:

to operate powerful software applications (apps) designed to match consumers who need a task done with entrepreneurs in search of their next 'gig' . . .

Upon closer inspection, however, it quickly emerges that many platforms offer much more than mere matchmaking services: they are in the business of *digital work intermediation*. To deliver tightly curated products and services to customers, gig-economy operators actively shape the entire transaction by means of close control over their workforce: from setting terms and conditions and checking relevant qualifications, to ensuring proper performance and payment.<sup>68</sup>

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64. *Id.*

65. Travis Putnam Hill, *In Texas, Undocumented Immigrants Have No Shortage of Work*, TEX. TRIB. (Dec. 16, 2016, 12:00 AM), <https://www.texastribune.org/2016/12/16/undocumented-workers-finding-jobs-underground-econ/> [<https://perma.cc/57XC-3KLJ>].

66. See Semuels, *supra* note 62.

67. Jeremias Prassl, *Humans as A Service: The Promise and Perils of Work in the Gig Economy* 5 (2018).

68. *Id.*

Just as the terms and conditions of the contract control important aspects of a guest worker's life, so do algorithms surrounding the ratings of gig workers who drive for Uber, dog-walk for Rover, or perform chores for TaskRabbit. The algorithms that companies use do not simply aggregate the preferences of customers and turn them into reputation ratings on a scale of one to five.<sup>69</sup> Algorithms monitor elements such as compliance with platform policies and how often and how quickly a worker responds to accepts new tasks.<sup>70</sup> Uber, for example, exercises control not through direct company policy, but through strategies and algorithms that push drivers to take jobs even though they might be unprofitable, and through gaming behavioral strategies such as pop-ups encouraging drivers to continue driving when they signal they are ready to quit for the day.<sup>71</sup>

Just as a guest worker is paid only for the services provided, and many times on a piece rate basis, the business model for the gig economy similarly requires that workers are paid only for the time they work. Gig workers are also responsible for the costs incident to their employment. Uber drivers, for example, must pay for their own gas, insurance and car costs.<sup>72</sup> They must also self-fund their health insurance and other benefits typically available through work.<sup>73</sup>

### C. Challenging Work Arrangements at Both Ends of the Work Spectrum

Several scholars and authors have noted that the work arrangements of gig workers are not that different from the types of workplace conditions of low-skill workers in the brick-and-mortar economy.<sup>74</sup> Work in both sectors of the economy has been broken down into smaller and smaller tasks, which draws in increasingly larger numbers of workers.<sup>75</sup> Interestingly, the gig economy is drawing upon the same traditionally excluded groups that guest work programs draw from: immigrants.<sup>76</sup> The innovation narrative hides the very risks that guest work employers seek to avoid to shift to workers, including labor shortages,

69. *Id.* at 53–54.

70. *Id.* at 54.

71. *Id.* at 56.

72. Joann Weiner, *The Hidden Costs of Being an Uber Driver*, WASH. POST (February 20, 2015), [https://www.washingtonpost.com/news/get-there/wp/2015/02/20/the-hidden-costs-of-being-an-uber-driver/?noredirect=on&utm\\_term=.32e0b5af3596](https://www.washingtonpost.com/news/get-there/wp/2015/02/20/the-hidden-costs-of-being-an-uber-driver/?noredirect=on&utm_term=.32e0b5af3596) [<https://perma.cc/6V3R-Q8F3>].

73. *Id.*

74. HILL, *supra* note 27 at 2–4; PRASSL, *supra* note 67, at 72–77; Cherry, *supra* note 1, at 579; Matthew W. Finkin, *Beclouded Work, Beclouded Workers in Historical Perspective*, 37 COMP. LAB. L. & POL'Y J. 603, 604, 615 (2016); Valerio De Stefano, *The Rise of the "Just-in-Time Workforce": On-Demand Work, Crowdwork, and Labor Protection in the "Gig Economy"*, 37 COMP. LAB. L. & POL'Y J. 471, 480–81 (2016).

75. PRASSL, *supra* note 67 at 76–77.

76. *Id.* at 77.

liability for employee benefits, and further regulation of the employment relationship.<sup>77</sup>

While the comparisons between work conditions in guest work and gig work are striking, the comparison might also serve to reveal possible solutions to the instability created in both fields. Understanding the potential vulnerability that comes from an imbalance of power in the employment relationship, the federal government guaranteed a minimum wage for guest workers. Currently, it is tied to the prevailing wage in an industry, although the AG Act seeks to change it to the minimum wage.<sup>78</sup> The AG Act would also guarantee a minimum amount of work.<sup>79</sup> Because the same dynamic of instability exists in the gig economy, similar measures would allow for decreased vulnerability in that sector. These changes should occur at the federal labor and employment level so that those laws evolve with the changes in the economy.

States, moreover, have begun to legislate protections for both immigrants and gig workers, recognizing the special vulnerabilities of these workers. For immigrant workers, California guarantees employment protections regardless of immigration status.<sup>80</sup> Employers there cannot retaliate against employees seeking workplace protections by threatening deportation.<sup>81</sup> Recently, the California legislature passed a law guaranteeing overtime wage protection to farmworkers—a category of employees not covered by the Fair Labor Standards Act and recognized as widely held by undocumented noncitizens in the state.<sup>82</sup> The goal of these laws is to remove incentives to hire vulnerable workers, either as employees or independent contractors. Seattle passed an ordinance increasing worker protections for transportation company drivers who were considered independent contractors, although the Ninth Circuit recently allowed challenge to the ordinance, filed by the U.S. Chamber of Commerce, to proceed on

77. *Id.* at 85–86.

78. 20 C.F.R. § 655.10(a) (2015); AG Act, H.R. 4092, 115<sup>th</sup> Cong. § 3(a) (introduced October 23, 2017).

79. H.R. 4092 § 3(a)

80. GABRIELA VILLAREAL, CAL. IMMIGRANT POL’Y CTR., *THE CALIFORNIA BLUEPRINT: TWO DECADES OF PRO-IMMIGRANT TRANSFORMATION* 4–5 (2015), <https://ncg.org/sites/default/files/resources/The-California-Blueprint-1.pdf> [<https://perma.cc/B6DM-KQPF>].

81. Andrew Khouri, *More Workers Say Their Bosses Are Threatening to Have Them Deported*, L.A. TIMES (Jan. 2, 2018, 7:00 AM), <http://www.latimes.com/business/la-fi-immigration-retaliation-20180102-story.html> [<https://perma.cc/4GWW-JBSS>].

82. Jazmine Ulloa & John Myers, *In Historic Move, Gov. Jerry Brown Expands Overtime Pay for California Farmworkers*, L.A. TIMES (Sept. 12, 2016, 5:55 PM), <http://www.latimes.com/politics/la-pol-sac-farmworkers-overtime-signed-20160912-snap-story.html> [<https://perma.cc/RR3Q-NK3X>]; Tamar Haspel, *Illegal Immigrants Help Fuel U.S. Farms. Does Affordable Produce Depend on Them?*, WASH. POST (Mar. 17, 2017), [https://www.washingtonpost.com/lifestyle/food/in-an-immigration-crackdown-who-will-pick-our-produce/2017/03/17/cc1c6df4-0a5d-11e7-93dc-00f9bdd74ed1\\_story.html?utm\\_term=.6011d41db0d6](https://www.washingtonpost.com/lifestyle/food/in-an-immigration-crackdown-who-will-pick-our-produce/2017/03/17/cc1c6df4-0a5d-11e7-93dc-00f9bdd74ed1_story.html?utm_term=.6011d41db0d6) [<https://perma.cc/9ZA2-YWBK>].

antitrust grounds.<sup>83</sup> The holding demonstrates that efforts to rein in gig economy overreach must be coordinated at state and federal levels.

The efforts of states also show the potential power of worker organization to bring balance to the operating rules in the gig economy. Much of this organizing will be done outside the confines of the National Labor Relations Act, which restricts what unions can do within the collective bargaining scheme.<sup>84</sup> For now, it must also be done within the confines of anti-trust law, which restricts any form of collusion that might lead to price-fixing.<sup>85</sup> There is an opportunity in this moment to consider strategies outside traditional labor organizing, in large part because the nature of employment is shifting. State and local organizing efforts can collaborate with state agencies, for example, to define employment in a way that includes gig workers. Gig workers, moreover, can file misclassification suits to achieve re-classification of their employment status. Finally, both federal and state law can legislate conditions in the gig economy, in much the same way that guest work regulation has developed the contours of guest work. Once we realize that the innovation narrative is not, in fact, innovative, we can start to build alliances across brick-and-mortar and virtual platform work to achieve leverage—and rights—for workers across the spectrum.

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Eric Posner and Glen Weyl recently floated a proposal that called for creating visas under a program they call the Visas Between Individuals Program.<sup>86</sup> The program would allow individuals to sponsor immigrants, who would agree to work for the sponsor for an agreed upon wage and period of time, not to exceed three years.<sup>87</sup> Sponsors could then hire out those immigrants, or pay them less than minimum wage to work directly for individuals to pay back the cost of the visa sponsorship.<sup>88</sup> The idea would be that individuals in the United States would receive benefits that corporations and businesses currently receive under existing temporary work programs. The proposal, smacking of indentured servitude, would allow individuals to sponsor their own immigrants indefinitely to work on projects as individuals see fit.<sup>89</sup> Essentially, sponsors would act as intermediaries, hiring out workers to employers looking for, much like labor contractors in guest worker programs, or like platform employers in

83. *Chamber of Commerce v. City of Seattle*, 890 F.3d 769, 776–77, 795 (9th Cir. 2018).

84. *See* National Labor Relations Act § 8(b), 29 U.S.C. § 158(b) (2012) (restricting the activities of unions as collective bargaining representatives).

85. *City of Seattle*, 890 F.3d at 780.

86. Eric A. Posner & E. Glen Weyl, *Radical Markets: Uprooting Capitalism and Democracy for a Just Society* 150 (2018).

87. *Id.* at 149–54.

88. *Id.*

89. *Id.*

the platform economy claim to be.<sup>90</sup> In the future of work that Posner and Weyl imagine, the humanity of the immigrant is erased. Jeremias Prassl warns that considering humans as cogs at the service of the platform economy puts us another step closer to the complete commodification of workers.<sup>91</sup> This Article has emphasized the conditions of vulnerability that make for an easier transition to the work world that both Prassl and Posner and Weyl predict. Importantly, the dehumanization of workers is much easier if they are hired for shorter and shorter periods of time. This is what makes the parallel between the guest worker program's evolution and the platform economy so apt. In both worlds, workers are seen as a piece of the production process that must be managed. In the case of guest workers and increasingly, immigrants in the gig economy, that they are foreign-born might facilitate the dehumanization process. The role of government requires that we re-humanize work, by recognizing that all workers, including short-term employees or independent contractors, deserve protections in the workplace no matter how short their gigs might be.

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90. *Id.* at 154.

91. PRASSL, *supra* note 67, at 4.