

2018

## A Critical Examination of a Third Employment Category for On-Demand Work (In Comparative Perspective)

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### Recommended Citation

Cherry, Miriam A. and Aloisi, Antonio, A Critical Examination of a Third Employment Category for On-Demand Work (In Comparative Perspective) (January 1, 2018). Cambridge Handbook on the Law of the Sharing Economy (Nestor M. Davidson, Michele Finck & John J. Infranca, eds.); Saint Louis U. Legal Studies Research Paper.

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# **A CRITICAL EXAMINATION OF A THIRD EMPLOYMENT CATEGORY FOR ON-DEMAND WORK (IN COMPARATIVE PERSPECTIVE)**

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Forthcoming, Cambridge Handbook on the Law of the Sharing Economy  
(Nestor M. Davidson, Michele Finck & John J. Infranca, Eds.)

*A number of lawsuits in the United States are challenging the employment classification of workers in the platform economy. Employee status is a crucial gateway in determining entitlement to labor and employment law protections. In response to this uncertainty, some commentators have proposed an “intermediate”, “third,” or “hybrid” category, situated between the categories of “employee” and “independent contractor.”*

*After investigating the status of platform workers in the United States, the authors provide snapshot summaries of five legal systems that have experimented with implementing a legal tool similar to an intermediate category to cover non-standard workers: Canada, Italy, Spain, Germany, and South Korea. These various legal systems have had diverse results. There has been success in some instances, and unintended consequences in others.*

*Accordingly, we recommend proceeding with caution in considering the creation of a third category. That is due to the risk of arbitrage between the categories, and the possibility that some workers will lose rights by having their status downgraded into the third category. Cherry and Aloisi posit employee status as the default rule for most gig workers. The authors propose an exception for those working on a de minimis basis or those engaged in volunteerism for altruistic reasons.*

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We note at the outset that this book chapter owes a debt to our previous article, which explored classification issues in Canada, Italy, and Spain in greater length than we are able to in this chapter. For more on the approaches in these countries, see Miriam A. Cherry & Antonio Aloisi, “*Dependent Contractors in the Gig Economy?: A Comparative Approach*,” 66 AM. U. L. REV. 635 (2017).

*Introduction*

During the past five years there have been a number of lawsuits in the United States challenging the employment classification of workers in the gig economy.<sup>1</sup> Classification of a worker as an employee is an important “gateway” to determine who receives the protections of the labor and employment laws, including the right to organize, minimum wage, and unemployment compensation, as well as other obligations such as tax treatment. In response to both litigation and widespread confusion about how gig workers should be classified, some commentators have proposed a “third” or “hybrid” category, situated between the categories of “employee” and “independent contractor.” Proponents often note that creating a third category would be a novel innovation, appropriately crafted and tailored for an era of digital platform work.<sup>2</sup>

However, as we have noted in a previous article, such an intermediate category of worker is actually not new. In this chapter we will provide snapshot summaries of five legal systems that have experimented with implementing a legal tool similar to a third category to cover non-standard workers: Canada, Italy, Spain, Germany, and South Korea. These various legal systems have had diverse results. There has been success in some instances, and misadventure in others. We believe that examining these experiences closely will help to avoid potential problems that are beginning to surface in discussions about the third category and the gig economy.

This chapter largely will forgo the background on how platforms operate or the description of the tasks workers do, instead focusing on the classification problem<sup>3</sup>. After examining the status of gig work in the United States and the calls for a third category, we turn to look at summaries of five legal systems and their experiences with the third category. After examining how, in Italy, some employees actually lost rights because their status was downgraded into an intermediate “parasubordinate” category, we

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<sup>1</sup> For a listing of the ongoing litigation surrounding the on-demand economy, see Miriam A. Cherry, *Beyond Misclassification: The Digital Transformation of Work*, 37 COMP. LAB. L. & POL’Y J. 577, 584-85 (2016).

<sup>2</sup> See, e.g. Vin Guerrieri, *Uber Cases Could Spur New Employee Classification*, LAW360 BLOG, May 6, 2016.

<sup>3</sup> This topic is widely covered in the first section of this Handbook. See also Antonio Aloisi, *Commoditized workers: Case study research on labor law issues arising from a set of on-demand/gig economy platforms*, 37 COMP. LAB. L. & POL’Y J. 577, 653-90 (2016).

must be careful to consider the unintended consequences of creating a third category. Informed by these national case studies, we provide a review of what we might expect if a third category were to be created in the United States, along with noting some of the practical difficulties.

Based on the proposals for a third category as well as the country studies, we ultimately set forward a different proposal for reform. Rather than creating another category and risking further mischief around the subject of worker misclassification, we advocate that the default rule for platform work should be employee status or something resembling it closely. At the same time, we readily acknowledge that there are parts of the sharing economy that are not about labor relations or potential exploitation of workers; rather, they are about communities, innovation, and genuine sharing. The goal of our proposal is protection for those who are using platforms as their main source of income as an equivalent to professional employment, while exempting those who are using these platforms to create community values or as a way to volunteer.

#### *The Classification Problem in the United States*

We will begin with the U.S., the jurisdiction that saw the invention of the gig economy and that has, until recently, also been the site of most classification disputes. Under U.S. law, whether a worker is an employee or independent contractor is determined through various multifactored tests dependent on the facts of the relationship.<sup>4</sup> The “control” test derives from the caselaw and decisions on agency law, and focuses on a principal’s right to control the worker. In brief we will suffice to say that some of the factors for finding employee status are whether the employer may direct the way in which the work is performed, determine the hours involved, and provide the employee with direction.<sup>5</sup> On the other hand, elements that lean toward independent contractor

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<sup>4</sup> See Katherine V.W. Stone, *Legal Protections for Atypical Employees: Employment Law for Workers without Workplaces and Employees without Employers*, 27 BERKELEY J. EMP. & LAB. L. 251, 257-58 (2006) (listing factors from the cases). Oft-cited cases on this subject include *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 728-29 (1947); *Ira S. Bushey & Sons, Inc. v. U.S.*, 398 F.2d 167 (2d Cir. 1968); *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326 (1992).

<sup>5</sup> See, e.g. *Herman v. Express Sixty-Minutes Delivery Service, Inc.*, 161 F.3d 299 (5<sup>th</sup> Cir. 1998).

classification include high-skilled work, workers providing their own equipment, workers setting their own schedules, and getting paid per project, not per hour.<sup>6</sup> In an alternate test, courts examine the economic realities of the relationship to determine whether the worker is exhibiting entrepreneurial activity, or whether the worker is financially dependent upon the employer<sup>7</sup>. The label affixed to the relationship is a factor in the outcome, but it is certainly not dispositive.

Many commentators had hoped these disputes over worker classification would be concluded, or at least be shaped, by the wage and hour lawsuits within platform companies that have been pending in the Northern District of California. But the largest of these suits, *O'Connor v. Uber*,<sup>8</sup> has been in the process of settling for over a year now. Like other litigation, including the crowdwork minimum wage lawsuit *Otey v. Crowdfunder*, the cases have been settling without providing any definite answers about whether platform workers are employees or independent contractors.<sup>9</sup>

### *Calls for Creating a Third Category in the United States*

As litigation over worker misclassification lawsuits continues in various U.S. jurisdictions, proponents have looked to the third category as a solution. Intuitively appealing, a third category would resolve many of the ongoing lawsuits and disputes over misclassification plaguing the on-demand sector. Many of the calls for a third category originated in Silicon Valley, with the third category virtually mirroring what is now independent contractor status.<sup>10</sup> Some proponents of the third category claim that such a proposal would have advantages for gig workers as well, who

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<sup>6</sup> See, e.g. Richard R. Carlson, *Variations on A Theme of Employment: Labor Law Regulation of Alternative Worker Relations*, 37 S. TEX. L. REV. 661, 663 (1996).

<sup>7</sup> See Katherine V.W. Stone, *Legal Protections for Atypical Employees: Employment Law for Workers Without Workplaces and Employees Without Employers*, 27 BERKELEY J. EMP. L. & LAB. L. 251, 257–58 (2006).

<sup>8</sup> *O'Connor v. Uber*, 3:13-cv-03826-EMC (N.D. Cal.).

<sup>9</sup> Cherry, *supra* note 1 at 584-85.

<sup>10</sup> “At a recent on-demand economy event, Simon Rothman, a venture capitalist and advisor to companies like Lyft and Taskrabbit, said, “I think it’s not 1099 versus W-2. I think the right answer is a third class of worker.” Caroline Donovan, *What a New Class of Worker Could Mean for the Future of Labor*, BUZZFEED NEWS, June 18, 2015, available at [https://www.buzzfeed.com/carolineodonovan/meet-the-new-worker-same-as-the-old-worker?utm\\_term=.uipR68pav#.qe99zxMmQ](https://www.buzzfeed.com/carolineodonovan/meet-the-new-worker-same-as-the-old-worker?utm_term=.uipR68pav#.qe99zxMmQ).

would at least attain some portion of the benefits that accrue to employees.

In 2015 a report written by Alan Krueger and Seth Harris, sponsored by the Hamilton Project, a subsidiary of the Brookings Institute, advocated for the creation of a third category.<sup>11</sup> Pursuant to this proposal, all gig economy workers would default into “independent worker” status. Under the Hamilton project proposal, such “independent workers” would gain rights to organize and bargain collectively under the NLRA and would also gain anti-discrimination protections under Title VII. However, the Hamilton project proposal excludes payment for overtime and minimum wage arrangements. Another study has come out largely echoing the Hamilton Project proposal.<sup>12</sup> Meanwhile, on the political front, Senator Mark Warren of Virginia has recently begun discussing the need for legislation to address some of the issues surrounding gig-work.<sup>13</sup>

### *A Comparative Approach*

To date, the recent calls to establish a third category of “independent worker” have focused only on the present state of the gig economy. Likewise, these calls have been centered almost wholly on the United States, where many popular crowdwork services were created. Situating the “dependent contractor” category within an historical and global context, however, we note that other countries have already experimented with contractual forms that functionally resemble the intermediate category, with various and mixed results. We provide “snapshots” of these legal interventions below.

### *Canada*

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<sup>11</sup> Seth D. Harris & Alan B. Krueger, *A Proposal for Modernizing Labor Laws for Twenty-First-Century Work: The “Independent Worker,”* THE HAMILTON PROJECT, available at [http://www.hamiltonproject.org/assets/files/modernizing\\_labor\\_laws\\_for\\_twenty\\_first\\_century\\_work\\_krueger\\_harris.pdf](http://www.hamiltonproject.org/assets/files/modernizing_labor_laws_for_twenty_first_century_work_krueger_harris.pdf).

<sup>12</sup> Abbey Stemler, *Betwixt and Between: Regulating the Shared Economy*, 43 FORDHAM URB. L. J. 31 (2017).

<sup>13</sup> Mark Warner, *Asking Tough Questions About the Gig Economy*, MARK R. WARNER (June 19, 2015), [http://www.warner.senate.gov/public/index.cfm/newsclips?ContentRecord\\_id=9ec95aab-a96c-4dd5-8532-b45667013d2e](http://www.warner.senate.gov/public/index.cfm/newsclips?ContentRecord_id=9ec95aab-a96c-4dd5-8532-b45667013d2e).

Historically, Canadian law used the term “employee” as a gateway to coverage, using the binary employee / independent contractor distinction just as in the United States. As most statutory definitions of “employee” in Canadian statutes were circular and unhelpful, the starting point for most analyses was the control test that had evolved under the principle of vicarious liability for torts.

In the late 1960s and early 1970s, the doctrine around employee status took an interesting turn with the Canadian adoption of the concept of “dependent contractor.” The development of the category is largely due to the efforts of leading law professor, Harry Arthurs.<sup>14</sup> An article by Professor Arthurs’ noted that in the 1960s small tradespeople, artisans, plumbers, craftsmen, and the like were increasingly structuring themselves as separate business entities.<sup>15</sup> Yet, despite setting up shop as separate companies, and thus falling outside the traditional purview of “employees,” these tradespeople had no other employees but the one worker-owner. As a matter of economic reality, Arthurs noted that these putative independent businesses were often almost wholly economically dependent on larger businesses. As such, Arthurs argued that the law did these small business people an injustice in ruling them outside of the bounds of the traditional labor relationship.<sup>16</sup>

The influence of Arthurs’ article spread far beyond academic circles. As the court in *Fownes Construction v. Teamsters* noted, this was “one law review article which has had an impact on the real world.”<sup>17</sup> Arthurs’ influence was such that the concept of “dependent contractor” became established within Canadian Law during the 1970s.<sup>18</sup> The effect was significant and beneficial in terms of bringing more workers within the scope of

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<sup>14</sup> Harry W. Arthurs, *The Dependent Contractor: A Case Study of the Legal Problems of Countervailing Power*, 16 U. TORONTO L.J. 89 (1965).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Fownes Construction Co. Ltd. and Teamsters*, [1974] 1 CLRBR 452 (British Columbia Labour Relations Board).

<sup>18</sup> See Michael Bendel, *The Dependent Contractor: An Unnecessary and Flawed Development in Canadian Labour Law*, 22 U. TORONTO L.J. 374, 376 (1982) (“Although the notion of the dependent contractor did not surface in Canada until 1965, concern for his status had become part of the conventional wisdom on labour relations by the early 1970s. Between 1972 and 1977 seven jurisdictions in Canada adopted legislation to grant dependent contractors employee status under their labor relations legislation.”).

collective bargaining.

Ultimately, in Canada the third category of “dependent contractor” has resulted in an expansion of the definition of employee. The category was enacted to help those workers who were essentially working on their own in a position of economic dependency, thus requiring labor protections.

The labor issues around platform work have yet to be heard by a Canadian court or adjudicative body. As such, predictions are inherently uncertain. But it does seem that the “dependent contractor” category and accordingly expansive definition of “employee” will make it more likely that gig economy workers will be able to access labor protections.

### *Italy*

Italy’s worker classification originated in the ancient Roman Law notion of “*locatio operarum*” (right to control the worker) and “*locatio operis*” (contract for a specific result).<sup>19</sup> This dichotomy was translated into the two categories of employee (in Italian, “subordinate worker”) and independent contractor in the Civil Code of 1942, with those binary categories still in force today.

In addition to the “*eterodirezione*” or managerial power factor,<sup>20</sup> the case law has developed a spectrum of subsidiary factors that could indicate the presence of an employment relationship.<sup>21</sup> A judge may disregard the contractual label when

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<sup>19</sup> The Roman distinction was between *locatio conductio operarum*, which refers to the classic master and servant contract and implies the right to control and encompasses respondeat superior, and *locatio conductio conductio operis*, which was based on the production of a specific result. See generally WILLIAM BURDIK, PRINCIPLES OF ROMAN LAW AND THEIR RELATIONS TO MODERN LAW (1938); Matthew Finkin, *Introduction*, COMP. LAB. L. & POL’Y J. 1, 1 (1999-2000).

<sup>20</sup> Cass. 22 November 1999 no 12926, RIDL 200011633. Moreover, in order to prove a subordinate relationship, this power should imply specific and well-defined directives rather than programmatic and vague instructions, since the latter are also compatible with the independent contractor’s category. Their compatibility with autonomous work are not sufficient for establishing an employment relationship

<sup>21</sup> Cass. sez. lav., 27/03/2000, n. 3674. “When an assessment of unambiguous elements such as the exercise of the managerial and disciplinary power is not enough to distinguish among employee and self-employed (being the presence



the substance of the work relationship reveals legal indicia of subordination (the so-called “primacy of facts” principle).<sup>22</sup> These factors include: (i) the requirement that the worker follow reasonable work rules; (ii) the length of relationship; (iii) the respect of set working hours; (iv) salaried work; and (v) absence of risk of loss related to the production. None of these elements is dispositive.<sup>23</sup>

Italian Law 533/1973 extended some procedural protection to a tranche of self-employed workers, which would later come to be known as “*lavoratori parasubordinati*” or “quasi-subordinate” workers. Comprised of a sub-set of self-employed workers, these *lavoratori parasubordinati* were distinguished as those workers who were “collaborating with a principal/buyer under a continuous, coordinated and predominantly personal relationship, although not of subordinate character” (“co.co.co” by abbreviation). Four “concurrent” factors needed to be ascertained in order to denote this intermediate category: (i) cooperation; (ii) continuity and length of the relationship; (iii) functional coordination with the principal; (iv) a predominantly personal service. This measure artificially created an intermediate category.

Looking at the content of the *lavoratore parasubordinato* category, only limited rights, mostly consisting of access to the labor courts, were extended to these workers. As a subset of autonomous workers, quasi-subordinate workers were still outside the scope of the substantive labor law.<sup>24</sup> As a consequence, it was much cheaper to hire a quasi-subordinate worker than an employee, because employees are entitled to substantive labor

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of the two powers a safe index of subordination, while its absence is not an indisputable sign of autonomy)...”

<sup>22</sup> Art. 1362 of the Italian Civil Code, provides that a contract must be interpreted with regard to the common intention and the behavior of the parties, and not merely to the literal meaning of its wording.

<sup>23</sup> Maurizio Del Conte, *Lavoro autonomo e lavoro subordinato: la volontà e gli indici di denotazione*, Orientamenti Della Giurisprudenza del Lavoro 66 (1995).

<sup>24</sup> STEFANO LIEBMAN, ILO NAT’L STUDIES, EMPLOYMENT SITUATIONS AND WORKERS’ PROTECTION, [http://www.ilo.org/wcmsp5/groups/public/---ed\\_dialogue/---dialogue/documents/genericdocument/wcms\\_205366.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---dialogue/documents/genericdocument/wcms_205366.pdf); MARK FREEDLAND & NICOLA KOUNTOURIS, THE LEGAL CONSTRUCTION OF PERSONAL WORK RELATIONS 122 n.61 (2011) (“The emergence of the notion of parasubordinati in the Italian legal domain is traditionally linked to Law 533/1973, . . . which prescribed that the rules of procedure for labor litigation also apply to the ‘relationship of agency, of commercial representation and other relations of collaboration materialising in a continuous and coordinated provision, predominantly personal, even if not of subordinate character.’”).

rights, annual leave, sick leave, maternity leave, other employee benefits, overtime, and job security against unfair dismissal.

Undesirable effects occurred quickly followed. Businesses increasingly began to hire workers that would previously have been classified as employees under the *lavoratore parasubordinato* category, hiding *bona fide* employment relationships in order to reduce costs and evade worker protections. Therefore, workers saw a “gradual erosion of the protections afforded to employees through jobs that are traditionally deemed to constitute master-servant relationships in the strict sense[,] progressively entering the no man’s land of an inadequately defined notion.”<sup>25</sup> Quasi-subordinate workers were seen as a low-cost alternative to stable employment relationships, especially because “no social security contributions had to be paid in their regard by the principal, at that time.”<sup>26</sup>

Revision truly began in 2003, when the legislature amended the content of the quasi-subordinate category with Legislative Decree No. 276/2003 (the so-called Biagi Reform). The legislature required the collaboration be linked to at least one “project” to ensure their authenticity and protect against businesses disguising employees as quasi-subordinate. Thus, a new definition emerged for quasi-subordinate workers: “*lavoro a progetto*” (i.e. project work, also “co.co.pro”). In 2012, the Italian legislature passed Law No. 92/2012 (Monti-Fornero Reform)<sup>27</sup> to counteract the misuse of the intermediate category by making employee status the default. Ultimately, the 2015 “Jobs Act” fundamentally eliminated the concept of project work that had its genesis in the 2003 Biagi law. The Jobs Act firmly established employee status is the default. While the quasi-subordinate category still technically exists, it is now limited in scope.<sup>28</sup>

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<sup>25</sup> STEFANO LIEBMAN, ILO NAT’L STUDIES, EMPLOYMENT SITUATIONS AND WORKERS’ PROTECTION, [http://www.ilo.org/wcmsp5/groups/public/---ed\\_dialogue/---dialogue/documents/genericdocument/wcms\\_205366.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---dialogue/documents/genericdocument/wcms_205366.pdf).

<sup>26</sup> ÜLRIKE MUEHLBERGER, DEPENDENT SELF-EMPLOYMENT, WORKERS ON THE BORDER BETWEEN EMPLOYMENT AND SELF-EMPLOYMENT (2007).

<sup>27</sup> Legge 28 giugno 2012, n. 92 - Disposizioni in materia di riforma del mercato del lavoro in una prospettiva di crescita.

<sup>28</sup> Article 2 of Legislative Decree No. 81/2015 (the “Jobs Act”) has designed a new notion of “collaborations organised by the principal”, whereby the client organises all performance related aspects, including above all time and site. Should this be the case, all employment statutory provisions afforded to subordinate workers apply to self-employed workers. See Antonio Aloisi, *Il*

For the past two decades, the quasi-subordinate category in Italy has resulted in arbitrage, struggle, and ultimately reversal. Introducing such a non-standard contract initially resulted in some employees seeing their classification status downgraded. Along with this loophole came an increase in precarious and non-standard work.

### *Spain*

The Spanish Workers' Act was passed in 1980, roughly ten years after Italy had engaged in major legislative reform. This law, *Estatuto de los Trabajadores*, covers only employees, defined as “those individuals who voluntarily perform their duties, in exchange for compensation, within the limits of the organisation and under the directions of a natural or juridical person, referred to as employer or entrepreneur.”<sup>29</sup> Spanish independent contractors were left to constitutional, civil and commercial provisions of the law.<sup>30</sup>

The traditional binary classification between employees and independent contractors in Spain depended upon a determination of self-organization, as an exercise of contractual autonomy. Spanish case law has interpreted the definition of an employee to be a combination of two concurrent elements: (i) the exercise of managerial power (“*dirección*”), and (ii) how much autonomy the workers have.<sup>31</sup> Spanish legal scholars have focused on the element of “alienness” (“*ajenidad*”, also defined as “ownership by another”) as a factor in determining whether an individual is an employee. “Alienness” is a proxy for the allocation of risk, and consequently, the ownership of “the means of production and the financial benefits obtained by the company from the employee’s

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*lavoro “a chiamata” e le piattaforme online della “Collaborative Economy”:* *nozioni e tipi legali in cerca di tutele/On-Demand Work and Online Platforms in the Collaborative Economy*, 2 LLI 2421 (2016).

<sup>29</sup> Article 1.1 Ley, 8/1980, de 10 de marzo 1980. “Those persons who carry out a trade or profession for economic gain on a regular, personal and direct basis on their own account, in the absence of any supervision or direction from a third party, whether or not they employ other workers on another’s account.” Ley, 8/1980, de 10 de marzo.

<sup>30</sup> A relatively recent one, Constitución Española 27 diciembre 1978.

<sup>31</sup> Perulli, *supra* note 84; J. Lujan Alcaraz, *Introducción*, El Estatuto del Trabajo Autónomo. Análisis de la Ley 20/2007, de 11 de julio, Laborum, 2007, 20. Royal legislative decree No. 1/1995 of 24 March, through which is approved the recast text of the law on the Statute of Workers, Official Gazette, No. 75, dated 29 March 1995, pp. 9654–9688.

work.”<sup>32</sup> As with other jurisdictions, the contractual label set by the parties is not dispositive. Rather, a judicial assessment of the substance of the relationship (e.g., day-by-day arrangements) is most important.<sup>33</sup>

In 2007, the Spanish legislature<sup>34</sup> enacted a new law (Law 20/2007, July 11, *Estatuto del trabajo autónomo*, LETA, i.e. Statute for Self-Employed Workers).<sup>35</sup> LETA regulated all forms of self-employed or independent contractor-type of work and covered all aspects of self-employment. LETA crafted a third category of workers: “*Trabajador Autónomo Económicamente Dependiente*” (or TRADE, i.e. economic dependent self-employed worker). The TRADE were extended a fairly comprehensive package of benefits and protections that are almost as good as those given to employees.

However, it is difficult to become a TRADE worker. The crucial component for determining whether a worker is a TRADE rests on a 75% threshold of economic dependency. The TRADE worker must “register” the position with the social administration agency, notify them of any changes, with the principal then verifying the information. These strict requirements are burdensome and time-consuming for both workers and businesses.<sup>36</sup>

Perhaps because of the extensive disclosure and heavy burden of compliance, few workers have actually become classified as TRADE.<sup>37</sup> Meanwhile, Spanish labor unions

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<sup>32</sup> See Miguel Ramón Alarcón Caracuel, *Dipendenza e alienità nella discussione spagnola sul contratto di lavoro*, in *Lavoro Subordinato E Dintorni. Comparazioni E Prospettive* 296 (1989); Consejo General del Poder Judicial, *Trabajadores autónomos*, 146 estudio de derecho judicial 100 (2008); Perulli, *supra* note 84.

<sup>33</sup> STS 29 dic. 1999 (RJ 1427/2000).

<sup>34</sup> See AA. VV. UN ESTATUTO PARA LA PROMOCIÓN Y TUTELA DEL TRABAJADOR AUTÓNOMO, Informe de la Comisión de Expertos, designada por el Ministerio de Trabajo y Asuntos Sociales, para la elaboración de un Estatuto del Trabajador Autónomo.

<sup>35</sup> Law No. 20/2007, Official Gazette, No. 166, 12 July 2007, pp. 29964–29978.

<sup>36</sup> Mark Freedland, *Application of labour and employment law beyond the contract of employment*, 146 INT’L. LAB. REV. 3 (2007).

<sup>37</sup> In 2012, only 9,000 TRADE contracts were signed, compared to the 400,000 forecasted. According to recent surveys by the Spanish organization “*Unión de Asociaciones de Trabajadores Autónomos y Emprendedores*,” only 2.4% of the

complained that the TRADE category was inappropriately covering what should be traditional employment relationships. With so few workers actually using this category, its usefulness is limited.

### **Germany**

Germany recognizes the categories of employees (*arbeitnehmer*) and independent workers. Although until recently there was no statutory definition of “employee,” the Federal Labor Court has traditionally focused on the concepts of personal dependence and the requirement that the worker must follow instructions as to time, site, and content of services.<sup>38</sup> The name given in the contract is of little importance; rather, it is the substance of the relationship that is important.

A German Federal Labour Court decision about circus performers is instructive. In that case, the Court focused on the lack of control that the owners had over the performances, finding these workers to be more like independent workers.<sup>39</sup> Independent workers are defined in opposition to employees, with Section 84(1)(2) of the Commercial Code noting that independent workers are “anybody who essentially is free in organizing his work and in determining his working time.”<sup>40</sup>

German law also recognizes a third category of employee-like person (*arbeitnehmeraehnliche Person*). As noted by a leading commentator, employee-like persons share two common characteristics: “they are economically dependent and are in similar need of social protection.”<sup>41</sup> German labor courts had recognized employee-like persons, and in 1974 the category was codified in Section 12a of the German Collective Bargaining Act (*Tarifvertragesgesetz*). According to Section 12a, an employee-like person must perform his or her duty to (i) the benefit of a client; (ii) under service contract for a specific project; (iii) personally and largely without collaboration of subordinate employees.

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workforce have one principal and consequently “were covered by the fairly extensive protections [for TRADE] afforded by the Law of 2007.”

<sup>38</sup> See Wolfgang Daubler, *Working People in Germany*, 21 COMP. LAB. L. & POL’Y J. 77, 79 (1999-2000).

<sup>39</sup> *Zirkus P GmbH & Co. KG v. Truppe C.*, Bundesarbeitsgericht [BAG] [Federal Labor Court], Aug. 11, 2015, 9 AZR 98/14.

<sup>40</sup> MANFRED WEISS & M. SCHMIDT, *LABOUR LAW AND INDUSTRIAL RELATIONS IN GERMANY* 45 (2008).

<sup>41</sup> Daubler, *supra* note 39 at 88-90.

Importantly, the provision also states that the employee-like person works mainly for one client and relies on a single client for 50% of his or her income, a threshold that has much in common with the Spanish TRADE.<sup>42</sup>

While the definition of employee-like persons has some variation among statutes, the main characteristic seems to be economic dependence. Employee-like persons enjoy some of the protections afforded to employees, including the right to unionize and bargain collectively, parental leave, paid holidays, and safety from harassment at work.

The aim of the third category of employee-like persons was to enlarge the scope of social protections, given the organizational and economic transformations around traditional employment relationships. Will workers in the gig economy be protected as employee-like persons on the basis of this third category? A recent article by Professor Bernd Waas points out that the requirement of working for one client for fifty percent of income could prove a significant hurdle for establishing employee-like person status for gig workers.<sup>43</sup> But Professor Waas also invokes the possibility of joint employer doctrine as a way to connect different companies who hire the same worker to perform work on the same platform.

### ***South Korea***

In South Korea, the employee category is defined by statute. Article 2(1) of the Korea Labor Standards Act uses the following definition: “a person, regardless of the kind of occupation, who offers labor to a business or workplace for the purpose of earning wages.”<sup>44</sup> Other sources that elaborate upon this provision reveal that the concept of subordination is also important to making a classification determination. A 2006 Korean Supreme Court decision interpreting the Korea Labor Standards Act lists a series of factors to determine employee status. These factors include whether the employer controls the content of

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<sup>42</sup> Stefanie Sorge, *German Law on Dependent Self-Employed Workers: A Comparison to the Current Situation Under Spanish Law*, 31 COMP. LAB. L. & POL'Y J. 249, 250 (2010).

<sup>43</sup> Bernd Waas, *Crowdwork in Germany*, in BERND WAAS ET ALII, CROWDWORK — A

COMPARATIVE LAW PERSPECTIVE, FRANKFURT 2017, PP. 142 – 186.

<sup>44</sup> Korea Labor Standards Act, Art. 2, Sec. 1, available at <http://elaw.klri.re.kr>

the work; whether the employee is subject to personnel regulations; whether the employer supervises the work; whether the employee is free to hire a subordinate to perform the work; who provides work tools; how wages and income tax are structured; and the economic situations of the parties, respectively.<sup>45</sup> Independent contractor status can conversely be inferred for those who do not meet the statutory definition of employees.

Interestingly for our purposes, South Korea has had a longstanding percentage of the workforce that finds work in the informal, precarious, and casual sector. Approximately one-third of the workforce finds work in the category of irregular employment (*bijeonggyujik*).<sup>46</sup> According to older accounts, this large percentage of irregular workers is a result of rural to urban migration and consequent mismatches in the labor force with the jobs on offer as well as worker displacement.<sup>47</sup> A more recent account points to the 1997 economic crisis and the IMF bailout, in which some traditional labor protections were compromised in the name of a flexible and competitive economy.<sup>48</sup> As a result, more workers found themselves working in irregular employment.

Within the *bijeonggyujik*, South Korean law recognizes a category of workers known as “special type workers.” As noted by Professor Deok Soon Hwang, special type workers are not a universal category but instead a statutorily-created occupational class for purposes of extending worker’s compensation coverage.<sup>49</sup> Specifically, Article 125 of the Korean Industrial Accident Compensation Act extends the protections of the worker’s compensation laws to groups of workers in “special types of employment,” so long as they provide labor service on a routine

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<sup>45</sup> Decision 2004-DA-29736, Korea Supreme Court (2006). Variations of this language also appear in Jong-Hee Park, *Employment Situations and Workers Protections*, Korea Labor Institute, Unpublished paper prepared for the ILO, November 1999, available at <[http://www.ilo.org/wcmsp5/groups/public/---ed\\_dialogue/---dialogue/documents/genericdocument/wcms\\_205370.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---dialogue/documents/genericdocument/wcms_205370.pdf)>.

<sup>46</sup> For discussion of the irregular sector, see Jennifer Jihye Chun, *The Struggles of Irregularly-Employed Workers in South Korea, 1992-2012* (unpublished working paper for EOIW, 2014).

<sup>47</sup> Ji-Whan Yun, *Unbalanced Development: The Origin of Korea’s Self-Employment Problem from a Comparative Perspective*, 47 J. OF DEVELOPMENT STUD. 786 (2011).

<sup>48</sup> See Chun, *supra* note 47.

<sup>49</sup> Deok Soon Hwang, *Platform Work in South Korea*, Korea Labor Institute. Translation in possession of authors. This article was published in Korean by the Korean Labor Law Institute.

basis exclusively to a company and do not use subordinates. This seems to be a way of distinguishing those workers who are dependent and in need of protection from true entrepreneurial enterprises.

The special types of employment are enumerated in the statute and are quite specific: “insurance salesperson, visiting teachers, ready mix truck driver, gold course caddies... door to door deliverers, quick service driver... loan solicitor, credit card solicitor, and exclusive chauffeur service worker[.]”<sup>50</sup> This last category of chauffeur was only added in July 2016. It is difficult to justify precisely why these occupational categories, and not others, are covered; the answer lies in the politics behind union coverage in the wake of the Asian economic downturn in the late 1990s.

In 2016, the Korea Labor Institute, in connection with the International Labour Office (ILO), organized a conference on crowdwork and the gig economy. Special sessions were held to discuss the status of gig workers in South Korea. While language barriers and translation issues have stymied market growth by gig economy companies within South Korea, the sector is continuing to grow.

While some gig workers, such as those working as drivers might be covered as special-type workers, participants noted that other types of gig workers, such as those working to perform odd jobs or those that work only in cyberspace would likely not be covered. Furthermore, even for the enumerated categories of special-type workers, the extent of coverage and protection is an open question. As noted above, it is far from certain if special-type workers enjoy the right to organize and the other protections extended to employees. Commentators at the ILO conference expressed concern and frustration about the precarious nature of gig work and the perceived gaps in coverage for gig workers.

### *Summary and Assessment of Outcomes*

The implementation of third categories in various nations highlights both successes as well as problems. Canada’s passage of legislation in the 1970s created a new category of “dependent

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<sup>50</sup> *Id.*



contractors” through amending the definition of “employee” in various statutes. The practical result of the “dependent contractor” category was to expand the definition of employee and to bring more workers under the ambit of labor law protection. The end result was increased coverage and the provision of a safe harbor for workers in need of protections, based on economic dependency. The third category seems to have worked well in terms of expanding the coverage of the laws to an increasing number of workers.

From Italy’s experimentation with the third category, we saw businesses trying to take advantage of a discounted status of the *parasubordinato* to evade regulations applicable to employees, such as social security contributions. The quasi-subordinate category created a loophole that actually resulted in *less* protection for workers. Through the years, the legislature attempted to adjust the category in order to provide appropriate coverage for workers. The ultimate result was confusion and since 2015, the intermediate category has been extremely limited. Rather, workers are now presumed by default to be employees.

Spain provided an example of a legal system that adopted a third category, but only for a very few workers. The law assumes that TRADE workers are predominantly working for one business; this could be a problem for platform workers who are working for multiple platforms. Looking at the causes of this very limited use of the category, it comes down to a heavy burden of requirements to be met, including the use of a strict economic threshold.

While Germany’s category of employee-like persons is far less stringent and burdensome, the category still requires a 50 percent dependency threshold. This threshold may prove problematic for German crowdworkers unless they can mesh several employers together through the joint employer doctrines (i.e. accounts across different platforms would be pooled).

Finally, South Korea has a category for special-type workers, but it is extremely narrow in scope, covering only certain types of occupational categories. The exclusivity requirement in the law may create trouble for gig workers who work for more than one platform. Further, the benefits extended to those who fall into the special-type workers category are meager. If the third type of category is too narrow, or the benefits provided too meager, the category may prove inadequate for the challenges of the on-

demand economy.

### *Analysis*

Note that the debate over misclassification actually can be interpreted two different ways. One way to view the issue is to acknowledge that there has been legitimate confusion about forms of gig work that do not fit easily into binary distinctions. After all, gig-workers have some characteristics that are common to independent contractors and yet others that are reminiscent of employees. The problem, under this view, lies with a legal test that is malleable, fact-intensive, and difficult to apply. The other way to consider the misclassification issue is to acknowledge that there has long been arbitrage of the law – illegitimate practices that lead to misclassification of what truly are employment relationships. These practices serve to hide employment relationships under the guise of “false” or “bogus” contractor situations. Note that both of these problems may exist within the same legal system.

At least in theory, establishing an intermediate category for gig work might alleviate legitimate confusion about how to apply to the test to gig workers. However, if the consequences of establishing such a third category would be arbitrage and downgrading of employees to intermediate status, that would do nothing to eliminate bogus contractor status. In fact, adding a new category could *increase* the possibility for arbitrage. We must acknowledge that three categories create more room for mischief than two, and we can see from the Italian case that such arbitrage there became widespread in response to the adoption of the quasi-subordinate worker category.

### *Difficulties with Implementing a Third Category in the United States*

If we examine the list of benefits and protections that go along with employee status, it becomes difficult to start excluding these from the third category. What protections are completely unnecessary? One of the primary complaints of many gig workers is inadequate pay for their time, so Harris & Kreuger’s suggestion that wage and hour laws could be excluded seems problematic. Apart from difficulties defining the category or how it would be constituted, there are also practical difficulties. In the United

States, establishing a third category over a patchwork of state and federal regulation would be complex.

While it is possible that judges and administrative bodies could shift their interpretation of the statutes so as to create a third category, it is unlikely given the way that the statutes are written. Given the current political climate it seems doubtful that a third category would be high on the legislative agenda in the United States right now. Looking beyond Congress, adding a third classification when the statutes only call for two categories would call for a vast feat of administrative or judicial activism. At least at this moment, reform in this direction seems unlikely from a practical perspective.

#### *Shifting Towards a Default Presumption of Employee Status*

Rather than create a new category, one way to govern the difficult classification issues is to change the default rules. Instead of having the platform choose to classify workers as independent contractors in its terms of service online and then later defend its position in lengthy, expensive, and time-consuming litigation, what if we began with a presumption that, above a certain threshold of hours, workers are employees? Then those who truly are independent businesses or self-employed would opt-out of regulations based on a set of easily understood standards.

But what about the idea that the gig economy is innovative? Should platforms be given special treatment because they use new technology? Innovation has not typically been a basis for an exemption from the labor laws. The problem is distinguishing between authentic innovators, who could compete on a level playing field or who have a distinct and interesting new technology or business model, and those platforms that are profiteers who exist only to take advantage of cheap labor by undercutting the law. Hence our argument is that platforms should be normalized and treated like other employers, rather than fight over their supposed exceptionalism.

Business models that either are truly “sharing,” some mix of profit and non-profit (for example, “B” corporations),<sup>51</sup> or those that engage in prosumer transactions, genuinely might need room to experiment. There should be a “safe harbor” created if the work

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<sup>51</sup> Miriam A. Cherry, *The Law and Economics of Corporate Social Responsibility and Greenwashing*, 14 U.C. DAVIS BUS. L. J. 281, 294 (2014).

looks more like volunteerism, sharing, or the work is being undertaken for altruistic reasons or community-minded motivations. More recently, the European Commission has supported this view in its Communication on the “collaborative economy,” distinguishing between professional providers and private individuals.<sup>52</sup>

There are also some instances where the provision of a service is *de minimis* (or provided so infrequently) that it does not merit employee status. For example, if someone logs into a crowdwork platform and does some proofreading for an hour a month, that user is probably not an employee. Likewise, those who participate in Lyft as a carpool on their way to work three days a week are probably not employees. We do not wish to impose burdensome legalities on users for one-off situations. Likewise, we would not want to discourage neighbors or volunteers from providing their services to others when those efforts are *truly voluntary* or used only to defray legitimate expenses, such as those who carpool from city to city in Europe through BlaBlaCar. Rather, we are more concerned with platforms that seem to be competing with, or in some instances replacing, full-time employment with on-demand precarious work.<sup>53</sup>

### *Conclusion*

#### *Calls for a third category in the United States reflexively*

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<sup>52</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A European Agenda for the Collaborative Economy. On Wednesday 20 December 2017, the Court of Justice of the European Union (CJEU) ruled that *UberPop* is not an information society service, but rather a transport service. In particular, the Court took the view that the service provided by the platform is more than a matching activity connecting, by means of a digital app, a nonprofessional driver with a private individual. Indeed, the provider of that intermediation service simultaneously organizes and offers urban transport services. In C-434/15 *Asociación Profesional Elite Taxi v Uber Systems Spain* (2014) ECLI:EU:C:2017:981 the Court observed that “Uber determines at least the maximum fare by means of the eponymous application, that the company receives that amount from the client before paying part of it to the non-professional driver of the vehicle, and that it exercises a certain control over the quality of the vehicles, the drivers and their conduct, which can, in some circumstances, result in their exclusion”.

<sup>53</sup> Janine Berg, *Uber, Income Security in the On-Demand Economy: Findings and Policy Lessons from a Survey of Crowdworkers*, 37 COMP. LAB. L. & POL’Y J. 543 (2016), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2740940](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2740940).

appear to be an easy solution, tailor-made for the problems surfacing in the gig economy. That initial reaction, however, is tempered upon further study of the content and history of the implementation of the third category in other nations. In this book chapter we examined the experiences of other nations in the hopes of learning winning strategies and avoiding problems.

In Italy, the adoption of the third category led to widespread arbitrage of the categories, with businesses moving employees into a “bogus” discounted status in the quasi-subordinate category. In Spain, the requirements for attaining the third category were burdensome enough that the third category only is applicable to a tiny number of workers. Viewed in this light, experimenting with a third category might be seen as more risky than just the “easy” or “obvious” solution as it first appears.

Rather than risking arbitrage of the categories, and the possibility that some workers will actually end up losing rights, it makes sense to think about employment status as the default rule for most gig workers, except those that may fit into a safe harbor because they are either not working very much (true “amateurs”) or are engaged in volunteerism for altruistic reasons (truly “sharing”). If there is to be an intermediate category, establishing one that, like Canada’s “dependent contractor,” expands the scope of the employment relationship would best meet the needs of gig workers. Such a default rule or expanded definition makes sense whether we are thinking about gig workers, those in fissured workplaces, franchises, or other non-standard or contingent work arrangements.