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The Case for Gig Worker Parity

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Employment Status for “Essential Workers”:  
The Case for Gig Worker Parity

By Miriam A. Cherry\*

I. INTRODUCTION

Gig workers have been on the frontlines of the coronavirus pandemic, providing essential services like grocery shopping, transportation, and food delivery. Yet many encountered difficulties because they lacked protective equipment, had neither benefits or sick days, and would likely not be able to receive worker’s compensation if they became ill.<sup>1</sup> Gig workers also encountered difficult situations with the customers they were helping to serve. For example, a Lyft driver wrote about his experiences, noting that many of the riders refused to wear masks, and in fact resented him for attempting to enforce Lyft’s safety rules.<sup>2</sup> Some of these passengers were too drunk to drive themselves, and did not seem to have the coordination to put on a mask.<sup>3</sup> Other passengers were capable of following the rules, yet felt that the pandemic was a hoax or that the mask rules did not apply to them. Some drivers threw up their hands and gave up on masks because they needed the income so desperately; but as they did so, they knew they were taking risks with their health.<sup>4</sup>

Indeed, that particular gamble has sometimes led to tragic results. At the beginning of the pandemic, Uber driver Khalid Zayyid, who used to work almost eighty hours per week on the platform, decided to stay close to home because of his pre-existing health conditions.<sup>5</sup> But as the

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<sup>1</sup> *Gig Workers Face the Spread of the New Coronavirus with No Safety Net*, WASH. POST (Feb. 29 2020), <https://www.washingtonpost.com/technology/2020/02/29/gig-workers-face-spread-new-coronavirus-with-no-safety-net/>.

<sup>2</sup> Peter Jakubowicz, *Diary of a Lyft Driver during COVID: “He says he’s not wearing a mask to ride in a car,”* THE GUARDIAN, (Nov. 19, 2020), <https://www.theguardian.com/lifeandstyle/2020/nov/19/diary-lyft-driver-covid-coronavirus>.

<sup>3</sup> *Id.* (recounting an instance in which a drunken passenger tried to use a package of cigarettes as mask and other passengers wore children’s masks, not covering their faces and mouths).

<sup>4</sup> *Id.* See also Kate Conger et al., *Pandemic Erodes Gig Economy Work*, N.Y. TIMES (Mar. 18, 2020), <https://www.nytimes.com/2020/03/18/technology/gig-economy-pandemic.html> (noting difficulty faced by rideshare drivers due to a lack of tourism and airplane flights).

<sup>5</sup> Shauna Hussain, *This Uber Driver Died of COVID-19*, L.A. TIMES, Nov. 1, 2020, <https://www.latimes.com/business/technology/story/2020-11-01/prop-22-uber-driver-covid-19-death-benefits-workers-comp>.

months went by, and bills began to accumulate, Zayyid returned to driving for Uber.<sup>6</sup> Zayyid told his family about riders who refused to wear masks. Just a week after returning to work, tragically Zayyid fell ill with COVID-19 and died shortly thereafter.<sup>7</sup> Uber claimed that since Zayyid was an independent contractor, no worker's compensation or death benefits would be available to his family. In response, activists held a candlelight vigil outside of Uber's San Francisco corporate headquarters to protest the deaths of Khalid Zayyid and other rideshare drivers from COVID-19.<sup>8</sup>

During the coronavirus pandemic approximately forty percent of U.S. workers shifted from in-person work to working remotely from home.<sup>9</sup> But many "frontline" jobs could not be done remotely. That necessary component of public contact has led to the risk of exposure for these workers.<sup>10</sup> Thousands of healthcare workers have been sickened and died.<sup>11</sup> Grocery store clerks and cashiers have found themselves in close contact with the public, and they too have

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<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Activists hold candlelit vigil outside Uber HQ for delivery drivers who died during the pandemic*, RT (Dec. 23, 2020), <https://www.rt.com/news/510530-activists-vigil-delivery-drivers-covid/>. See also Dugan Arnett & Nestor Ramos, *Against this Enemy, Youth Wasn't Enough; Friends and Family Aren't Sure Where Riley Rumrill Contracted the Virus that Killed Him*, BOSTON GLOBE (Apr. 2, 2020) (recounting story of 31-year-old Uber driver who died of COVID).

<sup>9</sup> May Wong, *Stanford Research Provides a Snapshot of a New Working-from-Home Economy*, STANFORD NEWS (June 29, 2020), <https://news.stanford.edu/2020/06/29/snapshot-new-working-home-economy/> (quoting Stanford economist David Bloom, who estimated over forty-two percent of the country's workers transitioned to remote work during the pandemic).

<sup>10</sup> James J. Brudney, *Forsaken Heroes: COVID-19 and Frontline Essential Workers*, 48 FORDHAM URB. L.J. 1, 2 (2020) (recounting instances of grocery store workers, bus drivers, and meatpacking workers becoming ill from COVID-19).

<sup>11</sup> *Lost on the Frontline: Thousands of US Healthcare Workers Have Died Fighting COVID-19*, THE GUARDIAN (Feb. 10, 2021), <https://www.theguardian.com/us-news/ng-interactive/2020/dec/22/lost-on-the-frontline-our-findings-to-date> (counting 3,500 deaths from COVID-19 and noting that nurses were especially impacted).

fallen ill.<sup>12</sup> Cleaners,<sup>13</sup> bus drivers,<sup>14</sup> and nursing home attendants<sup>15</sup> have all risked their health to complete their work. And workers in the meatpacking industry, forced to share close quarters with each other have resulted in contagion and worker death, while the Occupational Safety and Health Administration (OSHA) was largely absent in enforcing workplace safety rules.<sup>16</sup> Even more shockingly, supervisors and managers at one meatpacking plant organized a winner-take-all betting pool to wager on how many employees would catch COVID-19.<sup>17</sup>

And being present, in person, was a requirement for many gig work jobs too. Whether it was grocery shopping for Instacart, delivering food and restaurant meals for DoorDash, or picking up and delivering packages for Shipt, gig workers kept showing up and working hard to make sure that meals, supplies, and groceries got to the people who needed them.<sup>18</sup> In fact, many gig platforms were busier than ever and many gig workers were working even longer

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<sup>12</sup> See, e.g. Brittany Shammas & Hannah Knowles, *A Trader Joe's Employee Called for Stronger Coronavirus Measures. The Company Fired Him*, WASH. POST. (Feb. 28, 2021), [https://www.washingtonpost.com/business/2021/02/28/trader-joes-fired-employee-coronavirus/?utm\\_campaign=wp\\_main&utm\\_medium=social&utm\\_source=facebook&fbclid=IwAR0BT14TogOY9U6\\_oGWjZmwtx0kR7wvks4BIU0ms7kd7ltDESo9I3jbL3MQ](https://www.washingtonpost.com/business/2021/02/28/trader-joes-fired-employee-coronavirus/?utm_campaign=wp_main&utm_medium=social&utm_source=facebook&fbclid=IwAR0BT14TogOY9U6_oGWjZmwtx0kR7wvks4BIU0ms7kd7ltDESo9I3jbL3MQ); Russell Redman, *UFCW: Over 11,500 Grocery Workers Affected in First 100 Days of Pandemic*, SUPERMARKET NEWS (June 26, 2020) (reporting that UFCW union reported that 82 grocery store clerks had died from COVID-19).

<sup>13</sup> See e.g. Marianna Brady, *Coronavirus: Are Hospital Cleaners Forgotten Heroes in this Crisis*, BBC NEWS, (April 20, 2020), <https://www.bbc.com/news/world-us-canada-52359101>; Pat Eaton-Robb, *Cleaners risk health to work during pandemic, then lose jobs*, AP NEWS (May 1, 2020).

<sup>14</sup> See, e.g. Michael Levinson, *11 Days After Fuming About a Coughing Passenger, a Bus Driver Died from the Coronavirus*, N.Y. TIMES, (April 4, 2020), <https://www.nytimes.com/2020/04/04/us/detroit-bus-driver-coronavirus.html>; Kristen Griffith, *"We can't drive a school bus virtually," Carroll County Bus Drivers Express Health, Safety Concerns*, CAROLL COUNTY T., Jan. 6, 2021.

<sup>15</sup> See, e.g. Tanya Lewis, *Nursing Home Workers Had One of the Deadliest Jobs of 2020*, SCIENTIFIC AMER., (Feb. 18, 2021), <https://www.scientificamerican.com/article/nursing-home-workers-had-one-of-the-deadliest-jobs-of-2020/>; *Nursing Home Workers Risk Health, Lives During Pandemic*, WASH. POST, Jun. 29, 2020.

<sup>16</sup> *Many Say OSHA Not Protecting Workers during COVID-19 Pandemic*, NPR HEALTH (July 4, 2020), <https://www.npr.org/2020/07/04/887239204/many-say-osh-not-protecting-workers-during-covid-19-pandemic>; See also Emily A. Benfer et al, *Health Justice Strategies to Combat the Pandemic: Eliminating Discrimination, Poverty, and Health Disparities During and After COVID-19*, 19 YALE J. HEALTH POL'Y L. & ETHICS 122, 146 (2020).

<sup>17</sup> Laurel Wamsley, *Tyson Foods Fires 7 Plant Managers Over Betting Ring on Workers Getting COVID-19*, NPR (Dec. 16, 2020), <https://www.npr.org/sections/coronavirus-live-updates/2020/12/16/947275866/tyson-foods-fires-7-plant-managers-over-betting-ring-on-workers-getting-covid-19>; Joshua Rhett Miller, *Tyson Foods Manager Fired for COVID Betting Pool Calls it "Something fun,"* N.Y. POST (Dec. 29, 2020), <https://nypost.com/2020/12/29/fired-tyson-manager-calls-covid-pool-simply-something-fun/>.

<sup>18</sup> Michelle Cheng, *How the Pandemic Made Instacart "Essential,"* QUARTZ (Dec. 5 2020), <https://qz.com/1940943/how-instacart-became-essential-in-the-pandemic/>.

hours.<sup>19</sup> Instacart hired over 300,000 workers to handle the increased business that they saw on the platform.<sup>20</sup> Rideshare drivers, on the other hand, sometimes struggled. Although demand was up because people avoided public transportation, on the other people were not traveling by air nearly as much and so the mainstay of providing rides to and from the airport were no longer as much in demand. During the pandemic, gig work positions were considered “essential work” under state and federal guidelines, and as such the gig workers were labeled “essential workers.”<sup>21</sup>

Similar stories have played out around the world. Chinese delivery drivers were initially hailed as heroes for their role in helping to maintain a quarantine area around Wuhan.<sup>22</sup> As the virus spread around the world, however, gig workers delivering food and necessary supplies began to feel increasingly vulnerable. French delivery workers on the UberEats platform noted that the company offered additional promotions that may have encouraged multiple trips and risked violating lockdown orders.<sup>23</sup> Between that and a lack of personal protective equipment, the gig delivery drivers complained that they were being turned into “cannon fodder.”<sup>24</sup> A report

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<sup>19</sup> Yuliya Chernova, *The Coronavirus Pandemic – Making It Work: Gig Worker Balances Big Paydays Against Risks*, WALL ST. J., Mar. 21, 2020.

<sup>20</sup> Alexandra Sternlicht, *Instacart Wants to Hire 3000,000 Shoppers to Help Meet Coronavirus Demand*, FORBES (Mar. 23, 2020), <https://www.forbes.com/sites/alexandrasternlicht/2020/03/23/instacart-wants-to-hire-300000-shoppers-to-help-meet-coronavirus-demand/?sh=69ecf5672213>. During the initial lockdowns of March and April 2020, the pandemic and the highly contagious nature of the coronavirus turned simple, everyday tasks, like grocery shopping, into a difficult ordeal. Rather than worry about exposure and contagion, customers flocked to grocery delivery services, mailed meal plans, and restaurant meal delivery. Restaurants, facing spacing and capacity restrictions on indoor dining, turned to curbside pickup and various delivery services to continue their operations. And in turn, customers turned to on-demand platforms to delivery these pre-made meals and prepared foods. Platforms, including Uber Eats, DoorDash, and Grubhub, faced an increasing demand for their services. Gig shoppers at various other stores saw the need for their services rise and on-demand transactions facilitated many purchases that kept people supplied and the U.S. economy running.

<sup>21</sup> See Part III, *infra*; See also U.S. DEP’T OF HOMELAND SEC., CYBERSEC. & INFRASTRUCTURE SEC. AGENCY, ADVISORY MEMORANDUM ON IDENTIFICATION OF ESSENTIAL CRITICAL INFRASTRUCTURE WORKERS DURING COVID-19 RESPONSE (May 19, 2020), [https://www.cisa.gov/sites/default/files/publications/Version\\_3.0\\_CISA\\_Guidance\\_on\\_Essential\\_Critical\\_Infrastructure\\_Workers\\_1.pdf](https://www.cisa.gov/sites/default/files/publications/Version_3.0_CISA_Guidance_on_Essential_Critical_Infrastructure_Workers_1.pdf) [hereinafter IDENTIFICATION OF ESSENTIAL CRITICAL INFRASTRUCTURE WORKERS] (defining essential workers).

<sup>22</sup> Charlie Campbell, *These Delivery Drivers are Risking Their Health to Keep China Running During the Coronavirus Epidemic*, TIME (Mar. 16, 2020), <https://time.com/5803803/china-delivery-driver-ecommerce-covid19/>.

<sup>23</sup> Francine Aizicovici, “*On est de la chair a canon*”: les livreurs de repas a domicile inquiets face au coronavirus, LE MONDE (Mar. 19, 2020), [https://www.lemonde.fr/economie/article/2020/03/19/coronavirus-on-est-de-la-chair-a-canon-s-insurge-maxime-livreur-a-velo\\_6033665\\_3234.html](https://www.lemonde.fr/economie/article/2020/03/19/coronavirus-on-est-de-la-chair-a-canon-s-insurge-maxime-livreur-a-velo_6033665_3234.html).

<sup>24</sup> Elisa Braun, et al., *Coronavirus Pandemic Leaves Gig Economy Workers Exposed*, POLITICO, (Mar. 19, 2020), <https://www.politico.eu/article/coronavirus-pandemic-leaves-gig-economy-workers-exposed/>.

by Sydney, Australia’s Centre for Work Health and Safety noted that gig workers were often in serious traffic accidents, feared to report dangerous conditions, and received only limited safety help from the platforms they worked for during the pandemic.<sup>25</sup> South Korean delivery and gig workers have literally worn themselves out, with a dozen dying on the job from long hours and exhaustion, a phenomena known as *gwarosa*, precipitated by the increase in deliveries during the pandemic.<sup>26</sup> The World Economic Forum reported that over 70 percent of gig workers felt abandoned by their platforms, and were unhappy with the safety measures and support that were offered to them.<sup>27</sup> Other gig workers felt the pressure to “work sick”<sup>28</sup> since platforms only pay workers when the task or gig is completed, not a salary that allows for sick days.

This is what I am term the “essential worker paradox.” On the one hand, the labor of gig workers had been recognized as being absolutely critical during the pandemic. On the other hand, gig workers have been treated by the law as outside the bounds of employment protection. Due to the nuances of the law surrounding employment classification, gig workers have been kept from employment status and its protections, including minimum wage, the right to join a union, and basic statutory benefits.<sup>29</sup> The misclassification issues trace back to the nature and design of computer-intermediated work and how it has not been recognized as true employment.<sup>30</sup> The stark difference in treatment between gig workers and regular employees was unfair before the pandemic, but in light of gig workers’ tremendous sacrifices during the coronavirus pandemic, the differential treatment now is indefensible. Indeed, with so many full-time employees using apps and platforms to help them accomplish their work, the distinctions

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<sup>25</sup> Tom Rabe, “*We have no protection,*”: *Abuse, dangerous conditions beset Sydney’s Gig Economy*, THE SYDNEY MORNING HERALD (Nov. 10, 2020), <https://www.smh.com.au/national/nsw/we-have-no-protection-abuse-dangerous-conditions-beset-sydney-s-gig-economy-20201109-p56cxy.html>.

<sup>26</sup> Choe Sang-Hun, *Delivery Workers in South Korea Say They’re Dying of “Overwork,”* N.Y. TIMES, Dec. 15, 2020 (noting that on-demand couriers have been excluded from the protection of the laws and that businesses and customers demand “bullet speed”). See also Harold Thibault, “*C’est sans fin, je suis vraiment epuise,*”: *en Coree du Sud, des livreurs meurent litteralement de surmenage*, LE MONDE (Dec. 1, 2020), [https://www.lemonde.fr/economie/article/2020/12/01/c-est-sans-fin-je-suis-vraiment-epuise-le-surmenage-un-risque-majeur-pour-les-livreurs-sud-coreens\\_6061716\\_3234.html](https://www.lemonde.fr/economie/article/2020/12/01/c-est-sans-fin-je-suis-vraiment-epuise-le-surmenage-un-risque-majeur-pour-les-livreurs-sud-coreens_6061716_3234.html).

<sup>27</sup> Josephine Moulds, *Gig workers among the hardest hit by coronavirus pandemic*, WORLD ECONOMIC FORUM, (Apr. 21, 2020), <https://www.weforum.org/agenda/2020/04/gig-workers-hardest-hit-coronavirus-pandemic/>.

<sup>28</sup> Naomi Ishisaka, *Gig workers fall through the public health safety net as coronavirus spreads in Washington*, SEATTLE TIMES, (Mar. 9, 2020), <https://www.seattletimes.com/seattle-news/gig-workers-fall-through-the-public-health-safety-net-as-covid-19-spreads/>.

<sup>29</sup> Miriam A. Cherry, *Beyond Misclassification: The Digital Transformation of Work*, 37 COMP. LAB. L. & POL’Y J. 577, 581 (2016).

<sup>30</sup> Juan Carlos Alvarez de la Vega, et al., *The Gig Economy in Times of COVID-19: Designing for Gig Workers’ Needs*, *Microsoft Research Position Paper*, MICROSOFT RESEARCH SYMPOSIUM ON THE NEW FUTURE OF WORK, (Aug. 5-7, 2020), <https://www.microsoft.com/en-us/research/uploads/prod/2020/07/NFW-Alvarez-de-la-Vega-et-al.pdf> (noting that the issue may be one of app and computer design, but that programmers should also be designing software not just for companies or customers, but also to look out for the interests of gig workers).

and categories make even less sense now. Indeed, for the last decade, in jurisdictions around the world, gig workers have been suing to claim employee status.<sup>31</sup> Paid by the task, and managed by algorithms that can automatically deactivate an account, gig employment is amongst the most precarious types of work in the U.S. economy.<sup>32</sup> With no job security, and in fact automatic deactivation from many apps, and no rights under employment law, and a lack of benefits, gig workers have long been marginalized by the view that their work exists only for the sake of convenience, that it is a side-hustle, and in some instances completely invisible, by the very nature of the tasks that these workers do.<sup>33</sup>

But the meal delivery driver, the on-demand grocery shopper, and the on-demand package deliverer are not on the margins anymore – the services they provide have become essential to people’s lives.<sup>34</sup> There seems to have been an accompanying shift along with the risks that gig workers have taken, which has come with very specific benefits, like pandemic unemployment assistance and sick days, which were not available to gig workers before. As such, the events of the pandemic have moved—at least some—gig workers closer to parity with traditional employees. Such a move toward parity with employees is long overdue. This Article will argue that because of their heroic efforts during the pandemic, we should resolve the essential worker paradox in favor of gig worker’s employee status. There is no principled distinction that can be drawn between these hard working gig workers and other employees.

This Article proceeds in five parts, following this Introduction. Part II will examine some of the misconceptions around gig work and that have held back the campaign to be recognized as employees. Then, Part III will discuss the changing legal landscape that gig workers have faced in attaining employee status. Primarily this part focuses on the November 3, 2020 Proposition 22 vote in California and the setback it represented for gig workers in that state. Then, Part IV examines the role of gig workers as essential workers in the pandemic. Finally, Part V and the Conclusion set forth the case for gig workers to attain parity with employees. Gig workers have risked their health and worked hard to keep others safe during this pandemic. They have earned the same basic rights and protections as employees. But first, it is important to see how and why the gig economy found itself in this predicament in the first place.

## II. GIG WORKERS: A STUDY IN PRECARIETY

Apart from their legal status, gig workers have long-struggled with misconceptions about the importance and seriousness of the work they perform. Social and popular perceptions of gig work are important because the law in this area has been rapidly developing. In the past few years the on-demand economy has grown rapidly, and according to one 2018 study, there are

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<sup>31</sup> See, e.g., Cherry, *supra* note 29, at 586-592 (detailing lawsuits by gig economy workers over the issue of misclassification).

<sup>32</sup> Veena B. Dubal, *The Drive to Precarity: A Political History of Work, Regulation, & Labor Advocacy in San Francisco’s Taxi and Uber Economies*, 38 BERKELEY J. EMP. & LABOR L. 73, 75, 78 (2017).

<sup>33</sup> See Pete Robertson, *How the Gig Economy Creates Job Insecurity*, BBC (Sept. 18, 2017), <https://www.bbc.com/worklife/article/20170918-how-the-gig-economy-creates-job-insecurity> [<https://perma.cc/662J-R3NV>].

<sup>34</sup> See IDENTIFICATION OF ESSENTIAL CRITICAL INFRASTRUCTURE WORKERS, *supra* note 3.



over 57 million Americans gig workers.<sup>35</sup> According to an Edison poll, African American and Latinx adults are overrepresented among those working in the gig economy.<sup>36</sup> But all of these statistics about the on-demand economy are pre-pandemic. Some indicators show that high unemployment rates during the pandemic have caused some laid-off workers to turn to gig work as a stop-gap.<sup>37</sup> Aside from the delivery and shopping services mentioned in the Introduction, gig work also includes remote professional tasks that are performed through a platform. These services have seen incredible growth during the pandemic as well. For example, Fiverr, an online work platform that specializes in graphics, design, and computer programming, saw new U.S. freelance registrations rise 48 percent in 2020 from the previous year.<sup>38</sup> And international crowdwork platform Upwork reported a 24 percent increase in signups during the summer of 2020.<sup>39</sup> Gig work functions as a bellweather for the economy more generally.

Meanwhile, courts, administrative law judges, policymakers, voters, and gig companies themselves are all grappling with the question of whether gig workers are employees or independent contractors.<sup>40</sup> Some of the misunderstandings about gig work had their inception at the very beginning of the 2010s, when digital platforms largely adopted the umbrella term of the “sharing” economy. As the author has written about in another publication, the terminology of “sharing” has largely been a misnomer, as almost all gig work is paid work, remuneration is expected.<sup>41</sup> However, for many years the rhetoric of the sharing economy provided a halo effect

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<sup>35</sup> *Helping the Gig Economy Work Better for Gig Workers*, INT’L LABOUR ORG. (2020), [https://www.ilo.org/washington/WCMS\\_642303/lang--en/index.htm](https://www.ilo.org/washington/WCMS_642303/lang--en/index.htm); see also TJ McCue, *57 Million U.S. Workers Are Part of the Gig Economy*, FORBES (Aug. 31, 2018, 6:30 PM), <https://www.forbes.com/sites/tjmccue/2018/08/31/57-million-u-s-workers-are-part-of-the-gig-economy/#6a3d67d87118>. But see Elisabeth Buchwald, *The Government Has No Idea How Many Gig Workers There Are, And That’s A Problem*, MARKETWATCH (Jan. 7, 2019, 3:51 PM), <https://www.marketwatch.com/story/the-government-has-no-idea-how-many-gig-workers-there-are-heres-why-thats-a-problem-2018-07-18>.

<sup>36</sup> THE GIG ECONOMY, MARKETPLACE-EDISON RESEARCH POLL, Dec. 2018, available at <http://www.edisonresearch.com/wp-content/uploads/2019/01/Gig-Economy-2018-Marketplace-Edison-Research-Poll-FINAL.pdf>.

<sup>37</sup> See Andrew Soergel, *Survey: 1 in 4 Americans Has Lost Job or Income to Coronavirus*, U.S. NEWS & WORLD REP. (Apr. 8, 2020), <https://www.usnews.com/news/economy/articles/2020-04-08/1-in-4-americans-has-lost-job-or-income-to-coronavirus-survey>. See also *Workers Face Permanent Job Losses as the Virus Persists*, N.Y. TIMES, Oct. 3, 2020.

<sup>38</sup> Kim Mackrael, *New Entrepreneurs emerge From Wreck of Covid Economy*, WALL ST. J., Nov. 19, 2020.

<sup>39</sup> Allana Akhtar, *The pandemic could be turning the gig economy white-collar, if this summer’s new freelancers are any indication*, BUSINESS INSIDER, Sept. 23, 2020, <https://www.businessinsider.fr/us/upwork-pandemic-gig-economy-white-collar-high-skilled-summer-freelancers2020-9>.

<sup>40</sup> Alana Semuels, *What Happens When Gig-Economy Workers Become Employees*, THE ATLANTIC, (Sept. 14, 2018), <https://www.theatlantic.com/technology/archive/2018/09/gig-economy-independent-contractors/570307/>.

<sup>41</sup> Miriam A. Cherry, *Corporate Social Responsibility and Crowdfunding in the Gig Economy*, 63 ST. LOUIS U. L. J. 1, 4 (2018). See also Ryan Calo & Alex Rosenblat, *The Taking Economy: Uber, Information, and Power*, 117 COLUM. L. REV. 1623, 1625 (2017) (“Sharing economy

for platforms even while these platforms were engaged in problematic labor practices.<sup>42</sup> This part of the Article will explore several of the most prominent mistaken beliefs that have circulated on the subject of gig work during the past decade.

First, these misperceptions include the view that gig work is only a “side hustle” – a way to make quick extra money on top of, or in addition to, a regular job. This view implies that employee rights and benefits are unnecessary, because they will be supplied by the worker’s main job. A second misconception is that gig work is only for frivolous or unnecessary conveniences, perhaps made by a set of high maintenance customers. The workers participating in such frivolous endeavors may not even be formally called workers, and instead platforms give them cutesy nicknames or titles. Lastly, gig workers also are engaged in a form of invisible labor, where their work is hidden by the interface of the platform.<sup>43</sup> Computer crowdworkers may even have their work attributed to efficient websites or artificial intelligence.

These distorted views of gig work have in the past served to marginalize gig workers, contributing to a narrative that the benefits and protections of employee status are unnecessary for gig workers. Alternately, these views may also lead to the belief that these benefits have not been truly “earned” because of the perception that the work gig workers perform is trivial or only for convenience. The next few sections explore the issue further, but all of these views have been challenged by the realities of gig work during the coronavirus pandemic.

#### A. *Gig Work as “Side Hustle”*

For years, gig economy workers have had their lack of rights taken less seriously in part because their work is often viewed as a mere “side hustle.” The term “side hustle” is commonly used to describe work in the gig economy, and it means a source of extra income earned in a worker’s spare time that supplements the regular income from a full-time job.<sup>44</sup> The term might

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rhetoric tends to lump together small enterprises motivated by a common social bond, such as local food and housing cooperatives, with billion-dollar global businesses like Uber and Airbnb that readily integrate the language of sharing and connectivity into their branding .... We, however, draw a distinction between the variety of businesses the rhetoric of the sharing economy evokes, like selling grandma’s pies on the corner, and the billion-dollar companies that operate for profit at a global scale.”); Erez Aloni, *Pluralizing the “Sharing” Economy*, 91 WASH. L. REV. 1397, 1406-08 (2016); Abbey Stemler, *The Myth of the Sharing Economy and Its Implications for Regulating Innovation*, 67 EMORY L.J. 197, 199 (2017) (noting that sharing economy companies “convince communities, regulators, and courts that they are facilitating altruistic activities that utilize excess capacity, support job growth, and alter how we consume. This myth helps these Platforms avoid everything from employment laws . . . to liability for consumer harm . . .”).

<sup>42</sup> See PHIL ROSENZWEIG, *THE HALO EFFECT ... AND THE EIGHT OTHER BUSINESS DELUSIONS THAT DECEIVE MANAGERS* (2007).

<sup>43</sup> *INVISIBLE LABOR: HIDDEN WORK IN THE CONTEMPORARY WORLD* (Marion Crain, Winifred Poster, & Miriam A. Cherry eds., 2016).

<sup>44</sup> *Ultimate Guide to Earning Extra Income in the Gig Economy*, MONEY MANAGEMENT INTERNATIONAL, <https://www.moneymanagement.org/budget-guides/earn-extra-income> (last visited Feb. 27, 2021); see also CHRIS GUILLEBEAU, *SIDE HUSTLE FROM IDEA TO INCOME IN 27 DAYS* (2017).

not be all bad; it has a certain edginess to it. As comedian Bill Maher jokingly put it, “a side hustle sounds kind of cool, like you’re a private eye...”<sup>45</sup> But the term “side hustle” also has some important implications for workers in the gig economy: if gig work consists of a few hours of moonlighting to supplement full-time work, then here is no need for employee benefits or minimum standards around that work. In fact, further regulations might be burdensome, and even unwelcome.

While the term “side hustle” seemed to appear alongside the emergence of gig work in the 2010s, the term itself actually has a surprisingly long history. The term “hustle” on its own seems to have come into common usage during the 1920s to mean a scam, and “hustlers” became synonymous with the con men or grifters who ran the scam.<sup>46</sup> During the 1950s, “hustle” morphed from a description of fraud to become more a description of work, or even a type of employment.<sup>47</sup> African American newspapers kept the term alive, and used the term “hustle” to mean a serious effort at work, knowing that working hard was necessary to achieve financial stability, given the pervasive racial discrimination of the time.<sup>48</sup> And “side hustle” appeared in this decade as well, meaning a sideline or profitable type of work undertaken in addition to a regular, 9-to-5 job. While the term faded from the limelight until the 2010s, it has retained this meaning of a second job for additional income in our modern parlance.<sup>49</sup>

However, the term “side hustle” is mostly inaccurate when looking at the realities of how much time gig workers spend working on platforms. While statistics about workers in the gig economy are often difficult to come by because the information is considered proprietary by gig platforms, some surveys have shed light on hours worked. A 2014 study sponsored by Uber found

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<sup>45</sup> “*New Rule: Not In It Together*,” REAL TIME WITH BILL MAHER, [https://www.youtube.com/watch?v=Hem8RG0tsUw&t=191s&ab\\_channel=RealTimewithBillMa](https://www.youtube.com/watch?v=Hem8RG0tsUw&t=191s&ab_channel=RealTimewithBillMa) her (noting that despite the coolness of the term, in fact a side hustle is more like driving for Uber and also making seashell necklaces to sell in an Etsy store – gigs with no potential for career development or advancement).

<sup>46</sup> Alex Collinson, *The Toxic Fantasy of the “Side Hustle,”* PROSPECT (Aug. 19, 2019), <https://www.prospectmagazine.co.uk/politics/side-hustle-meaning-work-second-jobs>.

<sup>47</sup> William Glass, “*Hustle*”: *What it Means and Why We Use It*, MEDIUM, (Mar. 9, 2017), <https://medium.com/@williamglass/hustle-what-it-means-and-why-we-use-it-b07a94928bca> (noting that both Al Capone and Mark Zuckerberg could be hustlers, and that hustle “is how con-artists create schemes that take advantage of good people. It’s how people get jobs they have no business getting. It’s how terrible products still sell. But hustle is also how humans survive in a world where lots of things eat humans to get by. It is how we do all the best things we do. Hustle means that bad circumstances and a bad start don’t have to determine what becomes of you.”).

<sup>48</sup> Isabella Rosario, *When the “Hustle” Isn’t Enough*, CODE SWITCH, NPR, April 3, 2020, <https://www.npr.org/sections/codeswitch/2020/04/03/826015780/when-the-hustle-isnt-enough>.

<sup>49</sup> Kristen Barker, *Do You Use the Term Side Hustle?*, WOMEN’S ENTREPRENEURSHIP AT CORNELL, (Aug. 5, 2019), <http://bofainstitute.cornell.edu/more/do-you-use-the-term-side-hustle-results-from-our-investigation/>. *But see* Joey Montano, *Stop Misidentifying the Meaning of “Side Hustle,”* MEDIUM (Nov. 15, 2018) (asking probing and difficult questions like “Is it a “side hustle when you work 3 part-time jobs that still require you to live paycheck to paycheck?”).

that 1/3 of their drivers only worked for Uber on a full-time basis.<sup>50</sup> Roughly another 1/3 worked part-time for another platform or part-time job, with a final 1/3 driving for Uber on top of a full-time job.<sup>51</sup> For at least 2/3 of Uber drivers at that point, ridesharing work was not a side-hustle, but either their main source of income or a major source of income.<sup>52</sup> As another data point, a 2018 study by Statista found that only 4 percent of gig workers are working less than ten hours per week. The majority of gig workers, 54 percent, worked from eleven to thirty hours per week, a fairly substantial part-time job.<sup>53</sup> Finally, 41 percent of the gig workers surveyed worked between thirty one and sixty hours on platforms, with another 3 percent working more than sixty hours per week.<sup>54</sup> The United Nations International Labor Office’s study of crowdworkers showed that nearly 40 percent of those surveyed treated crowdwork as a full-time job, and only 15 percent said that they worked due to boredom or a lack of anything else to do.<sup>55</sup>

These statistics mean that the story of the “side hustle” fails to take into the account the situation of gig workers who are working for on-demand platforms on either a robust part-time or what even may resemble a full-time basis. As an example, Ayana Headspeeth, a mother-of-four who worked on many leading gig platforms used gig platforms as her main source of income since 2014.<sup>56</sup> She remarked that during the pandemic, she was especially concerned about her ratings on the Instacart platform: “When you’re taking away from my ratings, you’re taking away from my ability to make bills, my ability to buy groceries, my ability to clothe my children because this isn’t just a gig for me, this is how I make it.”<sup>57</sup> For a significant share of gig workers, platform work is their equivalent of a full-time job.

And during the pandemic, with unemployment rates reaching as high as 14 percent during the Spring of 2020,<sup>58</sup> laid-off or furloughed employees turned to gig work more-or-less full time

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<sup>50</sup> Jonathan V. Hall & Alan Krueger, *An Analysis of the Labor Market for Uber’s Driver-Partners in the United States* 10 (Nat’l Bureau of Eco. Research, Working Paper No. 22843, 2014), [https://www.nber.org/system/files/working\\_papers/w22843/w22843.pdf](https://www.nber.org/system/files/working_papers/w22843/w22843.pdf).

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Total Number of Hours Worked Per Week By Gig Economy Workers in the U.S. 2018*, STATISTA, (Jan. 20, 2021), <https://www-statista-com.ezp.slu.edu/statistics/916508/gig-economy-total-number-hours-worked-per-week/>.

<sup>54</sup> *Id.*

<sup>55</sup> Janine Berg, *Income Security in the On-Demand Economy: Findings and Policy Lessons from a Survey of Crowdworkers*, 37 J. COMP. LAB. L. & POL’Y J. 543, 565 (2016).

<sup>56</sup> Matthew Lavietes & Michael McCoy, *Waiting for Work: Pandemic Leaves U.S. Gig Workers Clamoring for Jobs*, REUTERS, (Oct. 19, 2020), <https://www.reuters.com/article/us-biggerpicture-health-coronavirus-gigw/waiting-for-work-pandemic-leaves-u-s-gig-workers-clamoring-for-jobs-idUSKBN2741DM>.

<sup>57</sup> *Id.*

<sup>58</sup> Heather Long & Andrew Van Dam, *U.S. Unemployment Rate Sours to 14.7 percent, the Worst Since the Depression Era*, THE WASHINGTON POST (May 8, 2020, 4:05 PM), <https://www.washingtonpost.com/business/2020/05/08/april-2020-jobs-report/>. Summer 2020 also saw high unemployment. U.S. Dep’t of Labor, *Unemployment rate 16.1 percent in Massachusetts, 4.5 percent in Utah, in July 2020*, U.S. BUREAU OF LABOR STATISTICS (Aug. 27, 2020), <https://www.bls.gov/opub/ted/2020/unemployment-rate-16-point-1-percent-in->

to make ends meet.<sup>59</sup> The same influx to gig platforms was similar to past recessions as well. For example, during the early part of the 2010s new gig platforms surged based on desperate job seekers who were recovering from the fallout from the 2008 financial crisis and ensuing recession. And even during smaller economic downturns, such as government shut-downs or temporary furloughs, gig platforms would see an influx of new workers joining them.<sup>60</sup> For many, even those who do have a full-time job, a side hustle is required because of stagnating wages in full-time employment and rising expenses, including a sharp spike in housing costs.<sup>61</sup> During the pandemic, with so many workers flooding onto platforms, average wages have been pushed down.<sup>62</sup>

One major implication of gig work as a “side hustle” is that if gig work is something that people only engage in occasionally when they are in need of extra income, that implies that with these one-off, occasional transactions, employment regulation is not needed. Not only unnecessary, but perhaps these regulations would be unwanted and perhaps even become burdensome. As labor economist Janine Berg has said about online computer crowdwork:

Crowdwork shares many similarities with other forms of nonstandard employment such as temporary work, part-time work, or temporary agency work. In addition to the casual and unstable nature of the work, crowdwork as well as other work in the “on-demand economy,” is often portrayed as additional income for secondary earners, and thus, not real work. This discourse has existed for decades in debates on pay and regulation of nonstandard employment. For example, opponents of the U.S. minimum wage have often argued (incorrectly) that minimum wage earners are predominantly teenagers working part-time, retail jobs, and thus there is no need to increase their pay as they are working for pocket money. Or stated differently, that the job may be precarious, but the worker is not.<sup>63</sup>

Similar stories have been told in the past about women’s participation in the labor force, as a type of justification for keeping women’s wages below that of men’s. During the Industrial Revolution, women who worked in factories were routinely paid less than men who did the same or similar

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massachusetts-4-point-5-percent-in-utah-in-july-2020.htm (noting overall unemployment rate of 10.2 percent nationwide).

<sup>59</sup> *Gig Workers Face Shifting Roles, Competition in Pandemic*, AP, (July 6, 2020), <https://www.voanews.com/covid-19-pandemic/gig-workers-face-shifting-roles-competition-pandemic>.

<sup>60</sup> Jory Heckman, *Furloughed with Nowhere to Go, Feds Give “Gig Economy” a Shot*, FEDERAL NEWS NETWORK, Jan. 18, 2019, <https://federalnewsnetwork.com/government-shutdown/2019/01/furloughed-with-nowhere-to-go-feds-give-gig-economy-a-shot/> (describing government shutdown and one furloughed employee’s efforts to work in the gig economy).

<sup>61</sup> Alissa Quart, *The Con of the Side Hustle*, N.Y. TIMES, (April 6, 2019), <https://www.nytimes.com/2019/04/06/opinion/sunday/tax-day-side-hustle.html>.

<sup>62</sup> Alana Semuels, “*It’s a Race to the Bottom.*” *The Coronavirus is Cutting Into Gig Worker Incomes as the Newly Jobless Flood Apps*, TIME MAGAZINE, (May 15, 2020), <https://time.com/5836868/gig-economy-coronavirus/>.

<sup>63</sup> Berg, *supra* note 55.

work.<sup>64</sup> Factory owners during this time justified lower wages for women because they were assumed to have claims on the earnings of male relatives, whether fathers, brothers, or husbands. As such, it was assumed that women were only working for themselves; they had no other relatives to support. Because women would therefore spend their wages on vanity purchases or frivolities, sometimes referred to as “pin money,” this was used as a justification for keeping their wages lower.<sup>65</sup> This rhetoric made a return during the 1950s and 1960s, as temporary agencies promoted the view that their workers were largely bored housewives looking for work as a stimulating amusement.<sup>66</sup> One executive of a temporary agency described their average worker as someone who did not “want full-time work, but she’s bored with strictly keeping house. Or maybe she just wants to take a job until she pays for a davenport or a new fur coat.”<sup>67</sup> If the money paid was not really necessary for making a living, then maybe it was no surprise that the remuneration offered for such positions was low.

Returning to the language of side hustles, this deeper examination has shown that this is not a necessarily an accurate description for the majority of gig workers who are spending more than ten hours a week on platforms, and the almost one-fifth whose work on platforms approaches full-time work. The question of whether gig workers actually “need” the wages or whether they are merely working for “extra,” has been again re-animated in the examination of gig work, in a way that is actually harmful in ensuring minimum legal standards. In addition to this side hustle minimization of the work, another misconception that has been problematic for gig workers is the idea that the work that they do on platforms is only for convenience and is not really necessary.

### B. Casual Workers

Another misconception generally shared about gig work is that gig workers are engaged in frivolous or casual work undertaken only for customer convenience. Platforms themselves fostered this convenience view in the early 2010s as they sought to attract customers to use their various websites and apps. As a selling point to induce new customers to sign up and use their services, many platforms promoted the speed and ease with which on-demand platforms could fulfill the customer’s every need or whim. Further, none of those wants and needs were too small, niche, or frivolous to fulfill; in fact, platforms allowed for the monetization of many smaller tasks that in the past would likely not have resulted in paid work.<sup>68</sup> Whether that need was for an electrified scooter at every corner, or an umbrella rental for as long as a rainstorm lasted, where a possible

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<sup>64</sup> JOYCE BURNETT, *GENDER, WORK, AND WAGES IN INDUSTRIAL REVOLUTION BRITAIN* (2008) (examining wage differentials).

<sup>65</sup> There are conflicting descriptions of the term “pin money.” Some use the term to refer to a small amount of money that is spent on wanted, but non-essential, items. Others have used the term to refer to the household allowance that a male breadwinner might provide to a non-working spouse or female family member to use as discretionary spending. See Janice Traflet, *Gendered Dollars: Pin Money, Mad Money, and Changing Notions of a Woman’s Proper Place*, 26 *ESSAYS IN ECON. & BUS. HIST.* 189, 190 (2008).

<sup>66</sup> ERIN HATTON, *THE TEMP ECONOMY* 38 (2011).

<sup>67</sup> *Id.* at 38.

<sup>68</sup> Miriam A. Cherry, *Cyber Commodification*, 72 *MD. L. REV.* 381 (2013).

demand surfaced, an on-demand platform seemed to spring up to cater to that demand.<sup>69</sup>

Platforms validated even seemingly frivolous customer requests for assistance. In fact, TaskRabbit founder Leah Busque would say that the company's origin story involved her realization that there was no time to replenish her supply of dog food, just at the precise moment that she and her husband were about to take a taxi to meet friends for dinner.<sup>70</sup> Worried that stores would be closed by the time the social obligation had ended, Busque and her husband wished that they could have paid for last-minute help from someone who could pick up more dog food while they dined.<sup>71</sup> Other examples used in the early days of platforms included services in San Francisco that offered to pick the customer's car and drive it to a parking spot, then deliver the car to whatever destination the customer wanted it at the end of the day.<sup>72</sup> And, of course, no discussion of on-demand services would be complete without mention of paying someone else to stand in a line for them<sup>73</sup> or paying another for the delivery of luxury coffee drinks.<sup>74</sup>

Further complicating the matter, some platforms have used or continue to use alternate terms to refer to the process of work, and even to the workers themselves. For example, rather than being hired and going through an employee orientation, workers on these platforms go through a similar process, yet it is called "onboarding."<sup>75</sup> In the crowdwork context, onboarding presumably involves establishing an online account, some amount of learning about the company, having questions answered, and then being set up to work. The use of the term "onboarding," however, evades the word "hiring," which appears in many statutes in relation to labor rights. Onboarding also avoids the traditional phrase "employee orientation." Thus, "onboarding" is a euphemistic evasion to describe what is a fairly straightforward "hiring" process.

Similarly, an employee who was not performing well might be given feedback, recommendations for improvement, or referred to progressive discipline, then ultimately fired if not performing the quantity and quality of work expected. However, workers in the gig economy

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<sup>69</sup> Lindsay Maizland, *A Chinese Company Tried Making Umbrella Sharing a Thing. It Didn't Go Well*, VOX (July 11, 2017, 4:20 PM), <https://www.vox.com/world/2017/7/11/15952886/china-umbrella-sharing-fail>.

<sup>70</sup> See, e.g., Layne Winn, *TaskRabbit Founder on the Pressure Entrepreneurs Face to Succeed*, ABC NEWS (Dec. 13, 2019, 10:09 AM), <https://abcnews.go.com/Business/taskrabbit-founder-pressure-entrepreneurs-face-succeed/story?id=67707440> (noting that founder of TaskRabbit platform did so in response to a need for late night dog food delivery).

<sup>71</sup> Neil Koenig, *Leah Busque: How Taskrabbit Grew by Leaps and Bounds*, BBC NEWS, Oc. 24, 2013, <https://www.bbc.com/news/business-24641936>.

<sup>72</sup> Michael Finney, *New Valet Apps Take Away Stress of Parking in San Francisco*, ABC7 NEWS (Feb. 18, 2015), <https://abc7news.com/san-francisco-parking-valet-apps/524008/>.

<sup>73</sup> Kathleen Elkins, *People are Paying Up to \$1,500 for Someone Else to Take their Place in Line*, BUSINESS INSIDER (Oct. 25, 2015, 11:30 AM), <https://www.businessinsider.com/professional-line-sitters-2015-10>.

<sup>74</sup> Gloria Dawson, *Why Coffee Delivery is the Future of On-Demand Ordering*, EATER (Jan. 14, 2016, 12:00 PM), <https://www.eater.com/2016/1/14/10758072/starbucks-delivery-dunkin-donuts-office>.

<sup>75</sup> *Will You Pass the Uber Background Check?*, Ridesharing Driver (Jan. 15, 2018), <https://www.ridesharingdriver.com/will-you-pass-the-uber-background-check/> (informing Uber drivers of details surrounding the background checks they must complete before "onboarding").

are not fired, rather, they are “deactivated.”<sup>76</sup> This impersonal terminology conceals a destructive truth; deactivation is potentially worse than being fired. A gig worker only discovers their deactivation when they log into the app and find that their account is erased and they are banned from returning to the platform.<sup>77</sup> This may also include erasure of data or information built up around the worker's account. The platform is under no requirement to give a reason for deactivation, with no appeal or recourse on the part of the worker. Further, deactivation can be an automatic response to user ratings falling below a number, as a result of algorithmic management.<sup>78</sup> In fact, many of the initial gig economy settlement negotiations requested the right to “grieve” a deactivation to an arbitrator.<sup>79</sup>

In any event, this use of alternate language for employment terms is far from an accident. In fact, a leaked document from European food delivery app Foodora exposed these linguistic manipulations for what they clearly are -- attempts to cover up or disguise the existence of an employment relationship. The leaked Foodora document provides synonyms for many of the terms that exist for employees and directs its managers to use those other terms. For example, instead of hiring riders at a recruiting center, personnel is engaged in onboarding at a supply center.<sup>80</sup> Rather than refer to shifts, supervisors refer to riders' availability, and “log ins” rather than clocking in.<sup>81</sup> Riders are supposed to talk about their “kit” or “equipment” rather than

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<sup>76</sup> See Sydney Brownstone, *Seattle Lyft Driver Wants to Know Why She Was Deactivated after Attending a Teamsters Organizing Meeting*, THE STRANGER (Nov. 15, 2015, 11:47 AM), <https://www.thestranger.com/blogs/slog/2015/11/19/23163805/seattle-lyft-driver-wants-to-know-why-she-was-deactivated-after-attending-a-teamsters-organizing-meeting> (detailing “deactivation” of Lyft driver who organized meeting for drivers at union office).

<sup>77</sup> *Fired from Uber: Why Drivers Get Deactivated, and How to Get Reactivated*, RIDESHARING DRIVER (Feb. 7, 2018), <https://www.ridesharingdriver.com/fired-uber-drivers-get-deactivated-and-reactivated/> [<https://perma.cc/N6UX-67T8>] (stating that Uber rarely actually states “you're fired,” but rather says things like “Your account needs attention” or “Your account has been placed on hold”); Carolyn Said, *Uber, Lyft Drivers Fear Getting Booted from Work*, S.F. CHRON. (Oct. 14, 2018, 12:39 PM), <https://www.sfchronicle.com/business/article/Uber-Lyft-drivers-fear-getting-booted-from-work-13304052.php> (describing instances of workers discovering that their accounts had been deactivated).

<sup>78</sup> Deepa Das Acevedo, *Invisible Bosses for Invisible Workers, or Why the Sharing Economy is Actually Minimally Disruptive*, U. CHI. LEGAL F. at 35, 42 (2017), <https://legal-forum.uchicago.edu/publication/invisible-bosses-invisible-workers-or-why-sharing-economy-actually-minimally-disruptive>.

<sup>79</sup> The practice of deactivation has encountered significant enough issues that it has become part of the settlement negotiations in the Uber and Lyft litigations. *Cotter v. Lyft, Inc.*, 176 F. Supp. 3d 930, 934 (N.D. Cal. 2016); *O'Connor v. Uber Techs., Inc.*, 201 F. Supp. 3d 1110, 1117-19 (N.D. Cal. 2016). Under the terms of these settlement agreements, drivers would have the ability to be heard by a labor arbitrator before being disconnected. *Cotter*, 176 F. Supp. 3d at 934; *O'Connor*, 201 F. Supp. 3d at 1117-19.

<sup>80</sup> Sarah Butler, *Deliveroo Accused of ‘Creating Vocabulary’ to Avoid Calling Couriers Employees*, THE GUARDIAN, Apr. 5, 2017, <https://www.theguardian.com/business/2017/apr/05/deliveroo-couriers-employees-managers>.

<sup>81</sup> *Id.*



uniforms; and their “invoices” rather than pay slips.<sup>82</sup> While inventing this alternate terminology is certainly creative, the lengths that some platforms will go to in order not to call their workers “employees” is even more incredible.

Platforms have referred to their workers in doublespeak, dubbing them “Ninjas,” “Turkers,” “Rabbits,” “Taskers,” “Roos,” “Partners,” and even somewhat pathetically at times, “Friends.”<sup>83</sup> It is true that some of the terms platforms use, like “Ninjas,” are deferential and respectful of someone’s expertise. Yet others of these terms for workers are cutesy, such as “Roos,” might be seen as trivializing. Still others, for example, calling a human worker the name of an animal, could be viewed as dehumanizing.<sup>84</sup> TaskRabbit stopped calling its workers “TaskRabbits” or “Rabbits” in 2014, according to their “Hutch” weblog, as part of a “branding” campaign.<sup>85</sup> Since that time, the platform has used the term “Tasker.” While being called a “Tasker” is certainly not as dehumanizing as being called a “Rabbit” or “TaskRabbit,” it is still a far cry from being called a worker. There is a logic behind devising this parallel terminology, as it discourages gig workers from forming an identity as a worker or relating to other workers in similar situations, which could lead to solidarity and collective organizing.

Ultimately, gig workers have had to push back against the view that the work they do is somehow frivolous or not as important as that done by other workers. Their work itself, promoted as being marginal to begin with, is a clue that the gig workers themselves are just cogs in the machine, largely fungible or disposable. Cutesy nicknames and alternate terms for the workers or the work they perform have also held back gig workers. Apart from these views that minimize both gig workers and the type of work that they perform, the next section will explore the ways that gig work is often made invisible to customers who use on-demand platforms.

### C. Gig Work as Invisible Work

Some of the practices and methods of on-demand can serve to make gig workers invisible. The invisible nature of some work is another distinct area of inquiry, encompassing wide-ranging practices including emotional and unremunerated labor, such as acting as someone’s “work spouse.” As co-editor of the book *Invisible Labor: Hidden Work in the Contemporary World*, my contribution focused on the ways that invisible labor was being performed on platforms seemingly without customers, co-workers, or sometimes even the workers themselves being aware of it.<sup>86</sup> As an example, think of content editors on Facebook and other social media websites who work to remove material that violates the terms of service; while some of these

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<sup>82</sup> *Id.*

<sup>83</sup> *Start Tasking. Earn Money Your Way*, TaskRabbit, <https://www.taskrabbit.com/become-a-tasker>; *Become a Driver-Partner*, Uber, <https://help.uber.com/h/3362f824-b3de-4cc3-979d-6bafcbc24290>.

<sup>84</sup> Alyson Shontell, *My Nightmare Experience as a TaskRabbit Drone*, BUSINESS INSIDER, (Dec. 7, 2011), <https://www.businessinsider.com/confessions-of-a-task-rabbit-2011-12>.

<sup>85</sup> *Unveiling the New TaskRabbit*, THE HUTCH, (June 17, 2014), <https://blog.taskrabbit.com/unveiling-the-new-taskrabbit> (“Some changes are small – for starters, we received some feedback on our brand terminology. So, once The New TaskRabbit is live, TaskRabbits will be called “Taskers” and Task-Posters will be called “Clients.”).

<sup>86</sup> *INVISIBLE LABOR: HIDDEN WORK IN THE CONTEMPORARY WORLD* (Marion Crain, Winifred Poster, & Miriam A. Cherry eds.. 2016).

workers are employees, others work on content editor jobs through crowdworking platforms. Some of the flagged content might include violent scenes or pornography. Although the content moderator's job is vital for keeping the platforms running, few users know that humans are performing the work. Rather, most believe the job is done by artificial intelligence.<sup>87</sup> Unfortunately, the job is wrenching for those who are performing it. They see the worst parts of human nature constantly, and it wears on them psychologically.<sup>88</sup>

As Mary Gray and Siddharth Suri explain in their book *Ghost Work*, artificial intelligence has not yet evolved to a point where it can help with complex tasks.<sup>89</sup> And so, in the meantime human labor fills in the gaps, whether in transcribing information, tagging and labeling products, helping to train artificial intelligence, or dealing with judgment calls over what content on social media is offensive. Because platforms make them invisible to the end user of the website, these workers have struggled to be recognized. While some of these workers “behind the machine” are employees, others do computer work through crowdwork platforms like Amazon's Mechanical Turk, Upwork, or Crowdfunder.<sup>90</sup> As I have discussed elsewhere, because requesters can reject work and not pay for it, wage theft in this sector is rampant.<sup>91</sup> In addition, workers have to search for each individual task they will complete, and that is time for which they are not paid. Some workers have established message boards and advice listings to help them write scripts or use bots to increase their rate of pay. Another fix was the Turkopticon platform, which allowed workers to rate requesters based on their generosity and fairness.<sup>92</sup> Still, the average wage on work platforms like Amazon Mechanical Turk are roughly half of the United States minimum wage of \$7.25/hour.<sup>93</sup>

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<sup>87</sup> Casey Newton, *The Trauma Floor*, THE VERGE, (Feb. 25, 2019), <https://www.theverge.com/2019/2/25/18229714/cognizant-facebook-content-moderator-interviews-trauma-working-conditions-arizona>.

<sup>88</sup> *Id.* (“That people don’t know there are human beings doing this work is, of course, by design. Facebook would rather talk about its advancements in artificial intelligence, and dangle the prospect that its reliance on human moderators will decline over time. But given the limits of the technology, and the infinite varieties of human speech, such a day appears to be very far away. In the meantime, the call center model of content moderation is taking an ugly toll on many of its workers.”)

<sup>89</sup> MARY L. GRAY & SIDDHARTH SURI, *GHOST WORK* (2019).

<sup>90</sup> Christopher Mims, *Without Humans, Artificial Intelligence is Still Pretty Stupid*, WALL ST. J. (Nov. 12, 2017), <https://www.wsj.com/articles/without-humans-artificial-intelligence-is-still-pretty-stupid-1510488000>.

<sup>91</sup> Miriam A. Cherry & Winifred R. Poster, *Corporate Social Responsibility and Crowdwork*, RESEARCH HANDBOOK ON DIGITAL TRANSFORMATIONS (F. XAVIER OLLEROS & MAJLINDA ZHEGU, EDS. 2016) (describing instances in which wage theft happens when requesters reject the work on the platform); 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/>.

<sup>92</sup> M. Six Silberman & Lilly Irani, *Operating an Employer Reputation System: Lessons from Turkopticon 2008-2015*, 37 COMP. LAB. L. & POL'Y J. 505 (2016).

<sup>93</sup> Andy Newman, *I Found Work on an Amazon Website. I Made 97 Cents an Hour*, N.Y. TIMES (Nov. 15, 2019), <https://www.nytimes.com/interactive/2019/11/15/nyregion/amazon-mechanical-turk.html>; Alex Mayyasi, *Who Makes Below Minimum Wage in the Mechanical Turk*

All of these various views of the on-demand economy – that gig workers are only there for a “side hustle,” that the platforms are there only for convenience to cater to high-maintenance customers, and that the work does not seem visible at all – convey a narrative that gig workers are somehow marginal or “less deserving” of employment protections than other workers. If gig workers have another job, but are working on platforms for extra, supplemental income, then the narrative would tell us that these workers do not “need” employee benefits or higher pay, as they are not using these platforms for survival. If the platforms and their services are not critical, visible, or important, then the fact that workers on these platforms make marginal wages or even below minimum wage is not particularly important either. And, finally, gig workers may be invisible in the eyes of the law, because of the way that their work relationship is categorized by the law. While employees receive benefits and protections, independent contractors or self-employed workers do not. The next section details the gig workers’ legal struggles to pursue the rights and protections that employees are entitled to.

### III. GIG WORKERS AND THE PROBLEM OF EMPLOYMENT CLASSIFICATION

Before the pandemic, meaningful changes to the status of gig economy workers were incremental and accomplished through a patchwork approach.<sup>94</sup> Over the past five years, gig workers have brought legal cases around the world, seeking to obtain the same benefits and legal protections as traditional employees. The results, however, have been far from uniform.<sup>95</sup> Numerous courts, such as those in Italy and France, have looked at the amount of control and surveillance that platforms have over workers and have concluded that employment protections should apply.<sup>96</sup> Other courts, relying on gig workers’ flexibility to set their own hours and the fact that gig workers often supply their own equipment, have instead determined that gig workers are independent contractors, or in the United Kingdom, fit into the third intermediate category of “worker,” which provides many (but not all) of the same rights and benefits as employees.<sup>97</sup>

During the past decade, platform economy companies have not only disrupted established business and labor models, but also have challenged the legal tests and structures traditionally used

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*Sweatshop?*, PRICEONOMICS (July 3, 2013), <https://priceonomics.com/who-makes-below-minimum-wage-in-the-mechanical/#:~:text=Roughly%20half%20of%20the%20Mechanical,cou%20covered%20by%20most%20labor%20laws>; Berg, *supra* note [ ] at 24.

<sup>94</sup> Miriam A. Cherry, *A Global System of Work, A Global System of Regulation?: Crowdwork and Conflicts of Law*, 94 TUL. L. REV. 183 (2020).

<sup>95</sup> *Id.*

<sup>96</sup> Cour de cassation [Cass.] [supreme court for judicial matters] soc., Mar. 4, 2020, Bull. civ. V, No. 374 (Fr.); *Italy Court Rules Uber Food Delivery Riders Were Exploited*, ASSOCIATED PRESS (May 30, 2020), <https://apnews.com/article/62609b97fbc25575cb1fcc2573db48f1>; *see also* Sam Schechner & Preetika Rana, *Uber Ruling in France Boosts Gig Workers’ Rights*, WALL ST. J. (Mar. 4, 2020, 3:35 PM), <https://www.wsj.com/articles/france-uber-ruling-puts-gig-workers-rights-in-focus-11583353513>.

<sup>97</sup> *See* Aslam Farrar v. Uber BV, UK Sup. Ct. 5 (2021) (“Taking these factors together it can be seen that the transportation service performed by drivers and offered to passengers through the Uber app is very tightly defined and controlled by Uber.”).

for employee classification.<sup>98</sup> In the United States, as in many countries, employee status is an important gateway to determine which workers will receive the protection of the labor and employment laws, including the right to organize and bargain collectively, eligibility for minimum wage, unemployment insurance, and worker’s compensation.<sup>99</sup> As such, classification as an employee is crucial in ensuring decent standards and working conditions.<sup>100</sup>

The on-demand model of work does not fit neatly into binary categories. In *Cotter v. Lyft*, Judge Vince Chhabria characterized work in the on-demand economy as handing the court “a square peg and asked to choose between two round holes.”<sup>101</sup> With its flexible “open call” that allows workers the flexibility about when and how to work, combined with algorithms and customer ratings that track and surveil every move that the worker makes, the gig-work model combines some aspects of the employment relationship and some aspects of the independent contractor relationship.<sup>102</sup> As the initial round of cases against platform companies settled out of court in California,<sup>103</sup> the gig model would offer a shakeup of the test that might be used in order to sort out these types of employee misclassification issues.

#### A. *The California Supreme Court’s Dynamex Decision*

In 2018, the California Supreme Court announced its decision in *Dynamex Operations West, Inc. v. The Superior Court of Los Angeles County* (“*Dynamex*”).<sup>104</sup> The court announced a new standard for determining employment status in the state of California, known as the “ABC” test due to its three factors. While the ABC test for employee status was new to California, it actually was an older test for employee status used in many jurisdictions.<sup>105</sup> The first part of the test, Part A, embodied the traditional control test, asking whether the worker was free from the “control and direction of the hirer in connection with the performance of the work[.]”<sup>106</sup> Part B of the test declared that to be an independent contractor, the worker would have to perform work

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<sup>98</sup> Ulysse Lojkine, *Cartographier la geopolitique des plateformes*, LE GRAND CONTINENT (Feb. 19, 2020), <https://legrandcontinent.eu/fr/2020/02/19/geopolitique-des-plateformes/> (providing summaries of various jurisdictions and their differing approaches to worker classification in the gig economy). For additional background to the problem of worker classification in the on-demand economy, see 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 (2016).

<sup>99</sup> Miriam A. Cherry, *Beyond Misclassification: The Digital Transformation of Work*, 37 COMP. LAB. L. & POL’Y J. 577 (2016).

<sup>100</sup> De Stefano, *supra* note [ ].

<sup>101</sup> *Cotter v. Lyft*, 60 F. Supp. 3d 1067, 1081 (N.D. Cal. 2015).

<sup>102</sup> *Id.*

<sup>103</sup> Miriam A. Cherry, *Gig Economy: Settlements Leave Labor Issues Unsettled*, LAW 360, (June 8, 2016), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2776213](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2776213).

<sup>104</sup> *Dynamex Operations West, Inc. v. The Superior Court of Los Angeles County*, 416 P.3d 1 (2018).

<sup>105</sup> Keith Cunningham-Parmeter, *Gig-Dependence: Finding the Real Independent Contractors of Platform Work*, 29 N. ILL. L. REV. 379 (2019).

<sup>106</sup> *Id.* at 418.

“outside the usual course of the hiring entity’s business[.]”<sup>107</sup> In other words, Part B required that there truly be some division between the hiring company’s business and the type of work that the hiring company required the putative independent contractor to perform. Finally, Part C asked whether the worker was customarily engaged in an independently established trade, occupation or business of the same nature as the work performed for the hiring entity.

The *Dynamex* decision was a catalyst for many of the political events that would ensue in California, even though the hiring entity in *Dynamex* was not itself a digital platform. Further, the court’s ruling was limited in the sense that it only applied to California wage orders.<sup>108</sup> Nonetheless, the *Dynamex* decision touched off a heated debate about the nature of the employment relationship, which groups of workers should be covered by labor and employment laws, and what the *Dynamex* decision might mean for businesses around the state, including platform economy businesses. The reason for the attention was that the new ABC test that the *Dynamex* court adopted was quite expansive, and its practical effect would be to make many more workers employees.<sup>109</sup> Of the three parts of the test, it was noted that Part B would likely cause problems for the gig economy.<sup>110</sup> If the business of a platform company was to provide passengers with rides from one part of the city to another, and the rideshare drivers were providing it, it would be very difficult to argue that the drivers were somehow not involved in a fundamental part of the platform’s business. In fact, the European Court of Justice had previously heard similar types of arguments, and soundly rejected Uber’s attempt to argue that it was a software provider removed from the business of transportation.<sup>111</sup>

In the wake of the *Dynamex* decision, gig economy companies began to lobby the California legislature to change the coverage of the employment law statutes, and so did labor unions.<sup>112</sup> Gig economy companies wanted a legislative overhaul to the *Dynamex* decision, one that would either change the test to a more relaxed standard for finding independent contractor status, or one that would present a clear “carve out” to the law for on-demand platform companies. At the same time, labor unions pressed the legislature to codify the *Dynamex* ruling and the expanded ABC test for employee status.<sup>113</sup>

### B. California Legislature Passes AB-5

It was in the midst of this charged political context in 2019 that the California legislature

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<sup>107</sup> *Id.* at 413.

<sup>108</sup> *Dynamex Operations West, Inc. v. The Superior Court of Los Angeles County*, 416 P.3d 1 (2018).

<sup>109</sup> Cunningham-Parmeter, *supra* note 105.

<sup>110</sup> *Id.*

<sup>111</sup> 2017 E.C.R. C-434/15 (“Uber is therefore not a mere intermediary between drivers willing to offer transport services occasionally and passengers in search of such services. On the contrary, Uber is a genuine organiser and operator of urban transport services in the cities where it has a presence”).

<sup>112</sup> Josh Eidelson, *The Gig Economy is Coming for Millions of American Jobs*, BLOOMBERG L. NEWS, Feb. 17, 2021.

<sup>113</sup> Steve Smith, *Labor Joins Gonzalez Fletcher to Introduce New Bill to Protect Workers from Misclassification*, CAL. LABOR FED’N (Dec. 3, 2018), <https://calaborfed.org/labor-joins-gonzalez-fletcher-to-introduce-new-bill-to-protect-workers-from-misclassification/>.

passed, and California Governor Gavin Newsom signed, the AB5 Bill, which adopted *Dynamex*'s expanded ABC test for employee status.<sup>114</sup> The text of AB5 cited the “harm to misclassified workers who lose significant workplace protections,” the loss of revenue to the state, and the unfairness to companies that compete with companies that misclassify workers as the reasons behind the decision to expand coverage.<sup>115</sup> AB5 also expanded the *Dynamex* ABC test holding beyond its original purview of wage orders.<sup>116</sup> Under the provisions of AB5, the ABC test would apply to all aspects of the California Labor Code, including unemployment, collective bargaining, and anti-discrimination law.<sup>117</sup>

Many businesses lobbied for, and received, exemptions from AB5's coverage, meaning that whether those businesses had hired employees would be based on the prior control test that had been in force before the decision in *Dynamex*. Some of these exempted occupational categories included the professions, typically highly skilled labor. Those exempted included lawyers, accountants, engineers, architects, investment advisors, physicians, surgeons, dentists, psychologists, and veterinarians.<sup>118</sup> But some of the exempted occupations included occupations that were outside the highly paid professions: direct salespeople, private detectives, fishermen, real estate agents, and hair stylists.<sup>119</sup> These carveouts from the ABC test were difficult to harmonize, as many of these careers had little in common, except that those employers had been able to lobby successfully for an exemption. Despite some of these uneven exemptions from the law, worker rights advocates largely hailed the California legislature's passage of AB5 as a progressive and forward-thinking change. Under Part B of the ABC test, it appeared that gig workers would finally be included in AB5's expanded definition of employee.<sup>120</sup> Many worker advocates followed the situation closely to see what an employee-centered gig work model might look like.

Uber and Lyft, however, categorically refused to comply with AB5. In fact, the major platforms did not take any action to comply with the change in the law or reclassify their workers as employees. Rather, when the AB5 bill came into effect on January 1, 2020 Uber and Postmates filed a lawsuit in federal court challenging its constitutionality.<sup>121</sup> On-demand companies then began negotiating with California lawmakers to create a third hybrid category, which would offer some employment rights to gig workers, even if those were not “full” employment rights. Meanwhile, the companies stalled about changing their business models and, pointing to the ongoing lawsuits, refused to implement the new employee status. Later in that year, during the 2020 pandemic, rideshare company Lyft threatened to cease operations in California if it were required to comply with AB5.<sup>122</sup> In the meantime, California municipal attorneys general began

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<sup>114</sup> Richard Gonzales, *California Governor Signs Law Protecting Gig Economy Workers*, NAT'L PUB. RADIO (Sept. 18, 2019, 7:14 PM), <https://www.npr.org/2019/09/18/762108954/california-governor-signs-law-protecting-gig-economy-workers>.

<sup>115</sup> A.B. 5, 2019 Leg., Reg. Sess. (Cal. 2019).

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> A.B. 5, 2019 Leg., Reg. Sess. (Cal. 2019).

<sup>119</sup> *Id.*

<sup>120</sup> Cunningham-Parmeter, *supra* note 105.

<sup>121</sup> *Olson v. California*, No. 19-CV-10956, 2020 WL 905572 (C.D. Cal. Feb. 10, 2020).

<sup>122</sup> Kate Conger, *Uber and Lyft Get Reprieve After Threatening to Shut Down*, N.Y. TIMES (Aug. 20, 2020), <https://nyti.ms/2QarROv>.

filing lawsuits seeking injunctions against Uber and Lyft to get them to comply with the law.<sup>123</sup> These lawsuits requested that the gig companies take action to reclassify their workers and begin providing employment protections and benefits, or else be ordered to do so by the courts. The attorneys general were successful at both the trial and appeals court level, but Uber and Lyft's attorneys kept drawing out the process to request more time.<sup>124</sup>

### C. The Proposition 22 Campaign

Meanwhile, Uber and Lyft engaged in delaying tactics until there could be a vote on Proposition 22 in November 2020. Along with a coalition of other gig companies, Uber and Lyft declared their intention to fight AB5 through a ballot initiative, eventually known as Proposition 22. Gig economy companies contributed over \$200 million to exempt on-demand companies from AB5 and to keep gig workers as independent contractors.<sup>125</sup> While unions and groups of gig workers strongly opposed these efforts in grassroots campaigns, they were outspent by more than 20 to 1 in the leadup to the November election season.<sup>126</sup> Uber and Lyft portrayed the issue as one of flexibility, arguing that their drivers did not want to become 9 to 5 employees. The platforms also argued that if the proposition was voted down, then operations might no longer be financially sustainable, and costs for the average user might rise rapidly. As part of the campaign in favor of Proposition 22, Uber and Lyft amplified the voices of some of their drivers who wanted to work on flexible schedules, and featured these drivers in their advertising campaigns.<sup>127</sup>

In addition, rideshare apps themselves started to feature advertisements in favor of Proposition 22, which told customers that their drivers supported the measure and should talk to them about why it was important to vote “yes.”<sup>128</sup> DoorDash drivers were instructed to deliver branded bags that had pro-Proposition 22 messages on them, which could understandably have made customers believe that the workers favored its passage as well.<sup>129</sup> Other restaurant and food delivery services directed their workers to include political leaflets asking for a vote of “yes” on Proposition 22 along with the meals and food that they dropped off.<sup>130</sup> Some California

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<sup>123</sup> People v. Uber Techs., Inc., 56 Cal. App. 5th 266 (Cal. Ct. App. 2020).

<sup>124</sup> *Id.*; See also Sara Ashley O'Brien, *Uber and Lyft must reclassify drivers as employees, appeals court finds*, CNN, (Oct. 23, 2020), <https://www.cnn.com/2020/10/23/tech/uber-lyft-california-appeal/index.html>.

<sup>125</sup> Jeremy B. White, *Gig Companies Break \$200M Barrier in California Ballot Fight*, POLITICO (Oct. 29, 2020), <https://www.politico.com/states/california/story/2020/10/29/gig-companies-break-200m-barrier-in-california-ballot-fight-9424580>.

<sup>126</sup> Brian Merchant (@bcmerchant), TWITTER (Nov. 4, 2020, 3:37 P.M.), <https://twitter.com/bcmerchant/status/1324103506739916801>; Kari Paul & Julia Carrie Wong, *California Passes Prop 22 in a Major Victory for Uber and Lyft*, THE GUARDIAN (Nov. 4, 2020), <https://www.theguardian.com/us-news/2020/nov/04/california-election-voters-prop-22-uber-lyft>.

<sup>127</sup> Sam Harnett, *Gig Companies Are Making Their Workers Promote Prop. 22*, KQED, Oct. 20, 2020, <https://www.kqed.org/news/11842964/gig-companies-are-making-their-workers-promote-prop-22>.

<sup>128</sup> *Id.*

<sup>129</sup> Lekach, *supra* note [ ].

Uber drivers were sent a pop up message that asked them to select “Yes on Proposition 22” or “OK” in order to move forward to working on the app.<sup>131</sup> As a result, a group of Uber drivers filed a class action lawsuit complaining that they were given misleading messages about Proposition 22 on the app. The lawsuit alleges that Uber pressured its drivers to follow a particular political course of action, which is against state law in California.<sup>132</sup> Nonetheless, these advertisements, flyers, and pop up ads seemed to have had a large impact on customers and the ultimate outcome of the vote.

The fact that part-time employees could also work flexible hours and have part-time schedules was a message that got completely lost in the Proposition 22 campaign rhetoric. The platforms’ message caught on with the California electorate, who were bombarded with advertisements in favor of Proposition 22’s passage. Other voters were concerned because they depended on services like Lyft to get them to and from work, doctor’s appointments, and other situations where transportation was needed, and Lyft’s threats to leave the state may have struck a chord. Other customers may have been worried about the potential increase in cost of various services and simply did not want to pay more. And because Proposition 22 also included some protections for gig workers, many voters who were not the most aware may have thought paradoxically that by voting to approve the measure, they were actually helping rideshare drivers. California voters approved Proposition 22 on November 3, 2020.<sup>133</sup>

California is viewed as a progressive jurisdiction and would rank as the world’s seventh largest economy on its own. The result took many commentators and politicians by surprise, as most ballot initiatives in California fail.<sup>134</sup> Further, the California legislature had just passed AB5 the year before, signifying the political will to expand the category of “employee” to include the vulnerable group of gig workers. As such, when California voters approved Proposition 22 on November 3, 2020, stripping gig workers of employee status and curtailing some of their newly-found rights, it left many labor advocates disappointed and concerned.<sup>135</sup>

#### *D. The Impact of Proposition 22*

As Proposition 22 was a compromise, and promised more rights for gig workers than those that an independent contractor would typically ever receive, it *de facto* created a new hybrid type of category, even though gig workers would technically still carry the label of

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<sup>131</sup> Maeve Allsup & Erin Mulvaney, *Drivers Sue Over Pressure to Back Gig Worker Measure*, BLOOMBERG NEWS, Oct. 22, 2020.

<sup>132</sup> Class Action Complaint and Demand for Jury Trial, Valdez et al. v. Uber Tech. et al., No. CGC-20-58726 (Sup. Ct. Cal. San Francisco Cnty. Oct. 22, 2020).

<sup>133</sup> Sara Ashley O’Brien, *Prop. 22 Passes in California, Exempting Uber and Lyft from Classifying Drivers as Employees*, CNN, Nov. 4, 2020, <https://www.cnn.com/2020/11/04/tech/california-proposition-22/index.html>.

<sup>134</sup> CAL. SEC’Y OF STATE, HISTORY OF CALIFORNIA INITIATIVES: SUMMARY OF DATA (2020), <https://elections.cdn.sos.ca.gov/ballot-measures/pdf/summary-data.pdf> (of the 376 initiatives that qualified for the California ballot between 1912 and 2017, 64% were rejected by the voters).

<sup>135</sup> Greg Bensinger, *Other States Should Worry About What Happened in California*, N.Y. TIMES (Nov. 6, 2020), <https://nyti.ms/3l6p72l> (“[Prop. 22] will encourage other companies to reclassify their work force as independent contractors, and once they do, over a century of labor protections vanishes overnight,” says Robert Reich, former U.S. Secretary of Labor).



“independent contractor.” Proposition 22 does provide California rideshare and delivery drivers some benefits that independent contractors do not typically receive. For example, under Proposition 22, these benefits and protections include a healthcare subsidy consistent with the average contributions required under the Affordable Care Act (ACA), a minimum earnings guarantee for time worked while actively providing rides, compensation for certain vehicle expenses, and occupational accident insurance to cover on-the-job injuries.<sup>136</sup> Proposition 22 also prohibits employment discrimination by rideshare companies and allows gig workers the right to bring an action under California’s anti-discrimination laws.<sup>137</sup>

These protections and benefits are fairly substantial. Even though Proposition 22 explicitly notes that the on-demand workers are now independent contractors for purposes of California law, they will now receive many more benefits and protections than independent contractors have ever received in any jurisdiction in the United States. It has even led some to call Proposition 22 a “third way” for gig workers.<sup>138</sup> But without employee status, there is no right for the drivers to organize or bargain collectively, and other rights (such as minimum wage only for time worked, not while looking for work) offered in this compromise are less than what a California employee would receive. Further, gig companies have already started tacking on fees to its services as a “California Driver Benefits Fee,” and passing them along to customers, a fee designation which was nowhere described in the voting materials.<sup>139</sup>

Unions have declared their opposition to Proposition 22 and their willingness to challenge Proposition 22 in court.<sup>140</sup> The year that the gig economy companies spent in non-compliance is also still being litigated, with California government officials seeking to hold the companies accountable for past violations when AB5 was the law.<sup>141</sup> Given the California Legislature’s previous vote in favor of employee status for gig workers, it would not be surprising if there is additional political maneuvering in the coming months and years including further ballot initiatives. And, as mentioned in the last section, gig workers themselves have filed lawsuits alleging that they were ordered to vote in favor of Proposition 22 and to engage in

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<sup>136</sup> [ ]

<sup>137</sup> *Id.*

<sup>138</sup> The idea has been theoretically discussed in the United States, but this is the first attempt to carry it out. For more discussion on this point, see Harris & Krueger, *A Proposal for Modernizing Labor Laws for Twenty-First-Century Work: The “Independent Worker,”* THE HAMILTON PROJECT (2015) and Miriam A. Cherry & Antonio Aloisi, ‘*Dependent Contractors*’ in *the Gig Economy: A Comparative Approach*, 66 AM. UNIV. L. REV. 635 (2017).

<sup>139</sup> Levi Sumagaysay, *California Post-Prop. 22: Gig Workers to See Pay Changes, Customers to See Higher Prices*, MARKETWATCH (Dec. 14, 2020), <https://www.marketwatch.com/story/california-post-prop-22-gig-workers-to-see-pay-changes-customers-to-see-higher-prices-11607991899>.

<sup>140</sup> Sasha Lekach, *Uber Tacks on New Fee for Prop. 22 Gig Worker Benefits*, MASHABLE (Dec. 15, 2020), <https://mashable.com/article/uber-lyft-prop-22-benefits/>.

<sup>141</sup> Max Kutner, *Uber Tells 9th Circuit Prop. 22 Doesn’t Moot AB 5 Challenge*, LAW360, (Dec. 9, 2020), <https://www.law360.com/articles/1336032/uber-tells-9th-circ-prop-22-doesn-t-moot-ab-5-challenge>.

compelled speech supporting it.<sup>142</sup> It would seem that further lawsuits and additional votes may come to pass.

Currently, the *Dynamex* decision itself remains the law for all traditional businesses, other than those that deal with exempted occupational categories, and the gig economy. As such, many traditional businesses have started to complain that gig workers should not be allowed a carve out from the law, when the law was specifically crafted to try to cover them. As a final note, Proposition 22 was the most expensive ballot initiative in California's history. The enormous lobbying effort behind it has led some to question the wisdom of the initiative process itself. Ballot initiatives were designed as a type of "direct democracy" to allow the average voter, the common person, to have their voice be heard. If the initiative process is dominated by large corporate interests, the very purpose of the ballot initiative process is subverted. Others have expressed concern that this vote undermines minimum labor standards.<sup>143</sup> While this particular vote only involved gig workers, the concern is of a slippery slope, as other industries may try to seek similar exemptions from various parts of labor regulation that they do not like or do not agree with.<sup>144</sup>

The back-and-forth, the advances and the retrenchment of the last decade, highlight the complexity of the issues involved and the interplay of different sources of political power and the ballot initiative process within California. For now, the process will play out and the hybrid independent contractor category will be watched closely. Further, the story will continue to evolve in the coming year. Without a doubt, Uber and other gig economy companies will likely introduce copycat legislation in other states or utilize the ballot initiative processes in those states.<sup>145</sup> Meanwhile, some are looking for support from the new administration coming to power. President Biden has been a vocal proponent of the ABC test for employment status and has proposed extending it nationally.<sup>146</sup> The Department of Labor has already rescinded the Trump administration proposed guidance about employee classification for purposes of the Fair Labor Standards Act.<sup>147</sup> Similarly, the Biden National Labor Relations Board will likely reverse the Trump administration's ruling that gig workers were not employees, and could not organize.

Paradoxically, events during the 2020-2021 coronavirus pandemic may actually help gig

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<sup>142</sup> See Allsup & Mulvaney, *supra* note [ ]; Class Action Complaint and Demand for Jury Trial, Valdez et al. v. Uber Tech. et al., No. CGC-20-58726 (Sup. Ct. Cal. San Francisco Cnty. Oct. 22, 2020).

<sup>143</sup> Josh Eidelson, *The Gig Economy is Coming for Millions of American Jobs*, BLOOMBERG L. NEWS, Feb. 17, 2021.

<sup>144</sup> Greg Bensinger, *Other States Should Worry About What Happened in California*, N.Y. TIMES (Nov. 6, 2020), <https://nyti.ms/316p721> ("[Prop. 22] will encourage other companies to reclassify their work force as independent contractors, and once they do, over a century of labor protections vanishes overnight," says Robert Reich, former U.S. Secretary of Labor).

<sup>145</sup> Braden Campbell, *3 Takeaways as Gig Cos. Prevail at Polls on Worker Status*, LAW360 (Nov. 4, 2020), <https://www.law360.com/articles/1325919/3-takeaways-as-gig-cos-prevail-at-polls-on-worker-status>.

<sup>146</sup> Ronald Zambrano, *How Biden May Save Gig Workers From California's Prop 22*, LAW360 (Dec. 16, 2020), <https://www.law360.com/articles/1335406/how-biden-may-save-gig-workers-from-california-s-prop-22>.

<sup>147</sup> Max Kutner, *DOL Pulls Trump-Era Guidance on Contractors, Truckers*, LAW360, Feb. 19, 2021.

workers in their quest for parity. During the 2020 pandemic, the treatment of gig workers was coming closer to parity with traditional employees, through programs like extended unemployment assistance, which was extended to platform workers in the CARES Act. Instead of seeing gig work as disposable, it seems that many of the food delivery, rideshare, and grocery apps are now starting to be understood by both lawmakers and the public as essential work. The next portion of the Article will talk about this paradigm shift to essential work, and what it might mean for the future of worker rights in the gig economy.

#### IV. Gig Workers as Essential Workers

The view of gig work as marginal and unimportant certainly has changed during the pandemic. They put themselves at increased risk of illness so that others could receive grocery deliveries, prepared meals, medications, packages, and other essential items. Labeled “essential workers” by the law, gig workers continued to show up and work in person.<sup>148</sup> This Section covers the “essential worker” designation: the origins of the term, who qualifies as an essential worker under state and federal guidelines, and what this designation has meant for gig workers. Further, this section analyzes the CARES Act and related legislation, as those laws have extended significant benefits to gig workers such as temporary unemployment and paid sick leave. Yet, there are significant problems that have arisen with these programs, which stem at least in part because of the ambiguity surrounding gig worker employment status.

##### A. *Essential Workers and Essential Work*

Recent estimates from the Brookings Institute found that 50 million U.S. workers qualified as frontline or essential workers under federal and state pandemic guidelines.<sup>149</sup> Some of the other results from this report are surprising. For example, when looking at overall earnings, frontline workers earn lower wages than average.<sup>150</sup> In addition, many people think of “frontline” workers as having a public presence, but many of these jobs are actually largely invisible to the end user or customer. For example, cleaners that work to sanitize office buildings are crucial to make them safe working environments, yet few acknowledge the importance of that role. A different study by the Economic Policy Institute noted that minority groups are over-represented among essential workers.<sup>151</sup>

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<sup>148</sup> Faiz Siddiqui, *Gig Workers Face Arrest and Charges While Delivering during Pandemic and Curfews*, WASH. POST, June 17, 2020, <https://www.washingtonpost.com/technology/2020/06/17/gig-workers-arrests-protests-pandemic/> (noting in completing deliveries during lockdowns, gig workers for Caviar and Uber Eats took the risk of being hassled by law enforcement).

<sup>149</sup> Adie Tomer & Joseph W. Kane, *To Protect Frontline Workers During and After COVID-19, We Must First Define Who They Are*, BROOKINGS INSTITUTE REPORT, (June 10, 2020), <https://www.brookings.edu/research/to-protect-frontline-workers-during-and-after-covid-19-we-must-define-who-they-are/>.

<sup>150</sup> *Id.*

<sup>151</sup> Celine McNicholas & Margaret Poydock, *Who Are Essential Workers?*, ECONOMIC POLICY INSTITUTE’S WORKING ECONOMICS BLOG, (May 19, 2020), <https://www.epi.org/blog/who-are-essential-workers-a-comprehensive-look-at-their-wages-demographics-and-unionization-rates/>.

We know some basics about who the essential workers are. But where did the term “essential worker” come from, and how is that defined in modern day parlance? This Section hopes to provide at least partial answers to these questions.

### 1. *Historical Background and Definitions*

Before the pandemic, U.S. labor and employment law did not distinguish between essential versus non-essential work per se. Employment law in the U.S. is more deregulated than in other parts of the world, and relatively weights or value of labor is typically determined by the market. As such, there has not typically been an attempt to apportion protections based on the importance of the work being done. It is true that certain occupational categories, such as those in the mining or the nuclear power industry, are more highly regulated because of known safety hazards to workers in those industries.

While the term “essential worker” seemed to have essentially sprung from nowhere during the start of the 2020 pandemic, that may not be entirely accurate. The concept of essential work did exist in the past, but only seems to have come to the forefront during times of war or disease.<sup>152</sup> In early modern Europe, professional doctors and skilled workers often fled the crowded cities that were often the epicenters of epidemics. But much work still needed to be done in those cities, especially work diagnosing disease, caring for patients, enforcing quarantines, and other critical tasks for maintaining public health.<sup>153</sup> Many of the workers who handled these tasks were essential pressed into this service out of economic necessity.<sup>154</sup> Some of those who worked in these essential capacities were elderly women, who typically would not have been given these occupational opportunities, but for whom the rules and strictures of society were bent to allow their workforce participation.<sup>155</sup> Those who were recipients of charity and pensions, those who used to work in businesses that were shuttered, and servants left to fend for themselves, all worked during pandemics, often at dangerously risky tasks.<sup>156</sup> They did so under various degrees of economic duress, and indeed, it was the poor, then and now, who shouldered the largest share of the work while putting their own lives and health at risk.

Moving into the modern industrial age, cycles of conflict have also given rise to work classification systems that attempted to prioritize essential industries. For example, steel, lumber, and coal were seen as essential industries during World War I because of the need for

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<sup>152</sup> Indeed, the Black Death and its high mortality rate actually gave rise to employment legislation. Employers in Britain requested the crown institute a cap on wages, because of the acute shortage of labor after the pandemic. Such regulation was at odds with market forces and thus was unsuccessful. See Stewart Schwab, *Predicting the Future of Employment Law: Reflecting or Refracting Market Forces*, 76 IND. L. J. 29 (2001).

<sup>153</sup> Richelle Munkhoff, *Searchers of the Dead: Authority, Marginality, and the Interpretation of the Plague in England, 1574-1665*, 11(1) GENDER & HISTORY 1 (1999).

<sup>154</sup> Kevin Siena, *Epidemics and “Essential Work” in Early Modern Europe*, HISTORY & POLICY BLOG, (March 25, 2020), <http://www.historyandpolicy.org/opinion-articles/articles/epidemics-and-essential-work-in-early-modern-europe>.

<sup>155</sup> Munkhoff, *supra* note [ ].

<sup>156</sup> GIULIA CALVI, HISTORIES OF A PLAGUE YEAR: THE SOCIAL AND THE IMAGINARY IN BAROQUE FLORENCE (TRANS. DARIO BIOCICA & BRYANT T. RAGAN JR. 1989).

particular commodities to aid in the war effort.<sup>157</sup> Later, in the lead-up to the U.S. entry into World War II, President Franklin D. Roosevelt created a War Manpower Commission which recruited labor for war and essential civilian industries and trained workers for jobs related to the war effort. Certain industries and manufacturing concerns were labeled “essential activities” by the Commission.<sup>158</sup> In 1943 the Commission labeled particular job titles and areas as “critical occupations.”<sup>159</sup> The demand for such essential workers would pull in groups that had previously been excluded from opportunities in the labor market, often because of widespread employment discrimination against women and people of color.<sup>160</sup> The popularized images of Rosie the Riveter emphasized that women’s work was needed to maintain the war effort and to sustain domestic production.<sup>161</sup>

In all these previous efforts at definitions, the idea of work as being “essential” meant that the work was critical, important, or crucial to the functioning of society. Despite the risks that might be present to the individual worker’s health or safety, this work needed to continue. Another way of thinking about essential work is that because of the risk involved, too few people want to staff those jobs. And it ends up being those who have little choice, due to economic necessity or financial precarity, who typically comprise the bulk of essential workers. With this history and background on the terminology around essential work and essential workers, the next Section turns to the definitions of essential worker under the current law.

## 2. *Federal Government Definitions of “Essential Worker”*

The 2020 CISA Guidance (“the Guidance”) for work in the pandemic covers broad categories of different occupations and industries that are critical for the continued functioning of society.<sup>162</sup> Key among these definitions for our purposes is that gig work comes within the definitions provided by the Guidance. For example, the Guidance includes “restaurant and quick serve food operations, including ... food prep centers, carryout, and delivery food workers” in its definition of essential businesses.<sup>163</sup>

In addition, the CISA guidance mentions “workers supporting personal and commercial

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<sup>157</sup> *Essential Workers – Definition, History, and Importance*, NATL. PUB. RADIO, Sept. 25, 2020, <https://www.wshu.org/post/essential-workers-definition-history-and-importance#stream/0>.

<sup>158</sup> War Manpower Commission, 8 (162) Federal Reg. 11420 (Aug. 17, 1943).

<sup>159</sup> *Id.*

<sup>160</sup> John J. Corson, *The Labor Force: Its Recruitment and Training*, 9:3 L. & CONTEMP. PROBS. 418 (Summer 1942) (noting previously underutilized sources of labor including that of women, racial minorities, youth, the imprisoned, and the disabled).

<sup>161</sup> Kellie B. Gormly, *Rosie the Riveter Gets Her Due 75 Years After the End of World War II*, SMITHSONIAN MAG., (Dec. 8, 2020), <https://www.smithsonianmag.com/smithsonian-institution/rosie-riveter-gets-her-due-75-years-after-end-world-war-ii-180976474/>.

<sup>162</sup> U.S. DEP’T OF HOMELAND SEC., CYBERSEC. & INFRASTRUCTURE SEC. AGENCY, ADVISORY MEMORANDUM ON IDENTIFICATION OF ESSENTIAL CRITICAL INFRASTRUCTURE WORKERS DURING COVID-19 RESPONSE (May 19, 2020), [https://www.cisa.gov/sites/default/files/publications/Version\\_3.0\\_CISA\\_Guidance\\_on\\_Essential\\_Critical\\_Infrastructure\\_Workers\\_1.pdf](https://www.cisa.gov/sites/default/files/publications/Version_3.0_CISA_Guidance_on_Essential_Critical_Infrastructure_Workers_1.pdf) [hereinafter IDENTIFICATION OF ESSENTIAL CRITICAL INFRASTRUCTURE WORKERS]

<sup>163</sup> *Id.*

transportation services including taxis, delivery services, vehicle rental services, [and] bicycle maintenance.” Finally, the CISA guidance includes “car-sharing services, and transportation network providers.”<sup>164</sup> Based on these definitions, gig work grocery shopping, food, meal, and restaurant delivery would all be considered “essential work” under the CISA guidance.<sup>165</sup>

Importantly, the CISA guidance makes no distinction or divide between those who are performing this work under “employee” status and those who are performing it as independent contractors. The CISA definition was focused more on what work was critical in particular sectors of the economy to keep the population supplied with food and other necessities during lockdown periods. Rather than focusing on the business details and factors that might bring work within the ambit of “employment,” the CISA guidance focused more on the purpose of the work and how it might help with efforts to control the pandemic.

### 3. State Definitions of “Essential Worker” and Platform Definitions

In addition to the CISA guidelines, states have also adopted the term “essential worker” to help make determinations about business closures. Some states have used the same exact language as the federal CISA guidance.<sup>166</sup> Other states, such as Alaska and Colorado, permitted and encouraged places of public accommodation, such as restaurants and bars, to offer food and beverage using only take-out and delivery as necessary.<sup>167</sup> Colorado also provided an exemption for transportation and infrastructure necessary to support critical business.<sup>168</sup> While these two state guidelines did not mention gig workers directly, their coverage and presence is implied. That is especially as platforms would be a key part of the infrastructure to support restaurants and to get meals delivered to restaurant patrons.

Still more states, such as Indiana, Hawaii, and California, have expressly mentioned gig work as included in their definitions of essential work. These states’ definitions mention “businesses that ship or deliver groceries, food, alcoholic and non-alcoholic beverages, goods or services to end users or through commercial channels,” “transportation network providers (such as Uber and Lyft),” and “employees supporting personal and commercial transportation services, including taxis, bicycle services, Transportation Network Companies, and delivery services including Delivery Network Companies.”<sup>169</sup>

Apart from either federal, state, or municipal definitions, many on-demand platforms

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<sup>164</sup> *Id.*

<sup>165</sup> Brudney, *supra* note [ ] at 2-3.

<sup>166</sup> For the definition in Texas, CITY OF AUSTIN, TEXAS, INFORMATION FOR BUSINESSES AND INDUSTRIES, <https://www.austintexas.gov/department/information-businesses-and-industries> (last visited Mar. 9, 2021). For the definition in Georgia, see GA. DEP’T OF ECON. DEV., GEORGIA’S STATEWIDE EXECUTIVE ORDER: GUIDELINES FOR BUSINESSES, <https://www.georgia.org/covid19bizguide#critical> (last visited Mar. 9, 2021).

<sup>167</sup> GOV. MICHAEL J. DUNLEAVY, STATE OF ALASKA, COVID-19 HEALTH MANDATE 3.1 (Mar. 17, 2020), <https://gov.alaska.gov/wp-content/uploads/sites/2/03172020-SOA-COVID-19-Health-Mandate-003.pdf>.

<sup>168</sup> COLO. DEP’T OF PUB. HEALTH & ENV’T, FOURTH UPDATED PUBLIC HEALTH ORDER 20-24 IMPLEMENTING STAY AT HOME REQUIREMENTS (Apr. 9, 2020), <https://cha.com/wp-content/uploads/2020/04/Fourth-Updated-Public-Health-Order-Authorized-Business.pdf>.

<sup>169</sup> <https://covid19.ca.gov/img/EssentialCriticalInfrastructureWorkers.pdf>

themselves have viewed the services their workers provide as “critical” or “essential businesses.” In one letter to its “Dashers” (i.e. gig workers), the platform DoorDash notes that “Deliveries from restaurants and grocery stores have been deemed essential services in the following jurisdictions, meaning Dashers may continue to perform delivery services.”<sup>170</sup> Uber has similarly told its workers that they are “essential” and that in providing transportation, they are providing an “essential service.” Ultimately, the definitions of “essential worker” all emphasize the importance of the gig work being done during the pandemic. Like the federal guidance, none of these state definitions or directives mention the employee versus independent contractor distinction.

Even with its various formulations and definitions, most gig workers who work via app easily have fit into the definition “essential” workers during the 2020-2021 coronavirus pandemic. Defining work as “essential” means that it is “very important.” It means that the work is not a luxury or work for convenience, it is work that is done to help society survive a threat or a difficult time. In past definitions, a critical occupation might be something directly war-related, but in other instances might actually mean one in which demand for labor far outstripped supply. These issues raise further questions. What types of work are seen as heroic, important, and valorized, and which forms of works are marginalized? What happens when these categories blur? We will return to these questions in Section V of the Article, which argues in favor of parity for gig workers based on these very definitions of essential work.

### *B. Legislative Protections for Gig Workers During the Pandemic*

During the early stages of the pandemic, federal and state legislatures and administrative agencies across the United States acknowledged the essential nature of gig economy workers, issuing emergency regulatory interventions that conferred greater protection to gig economy workers. Most notably, the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) granted gig workers federal unemployment benefits and related legislation granted some gig workers paid sick leave.<sup>171</sup> While the provisions in the CARES Act and related legislation moved gig workers toward the benefits that other employees currently receive as of right, it did not cover all the changes that need to be made. For example, gig workers have asked for increased supplies of personal protective equipment to keep themselves safe,<sup>172</sup> hazard pay,<sup>173</sup>

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<sup>170</sup> *COVID-19: Dasher Exemption to Shelter-in-Place Orders Letter*, DOORDASH, [https://help.doordash.com/dashers/s/article/COVID-19-Dasher-Exemption-to-Shelter-in-place-Orders-Letter?language=en\\_US](https://help.doordash.com/dashers/s/article/COVID-19-Dasher-Exemption-to-Shelter-in-place-Orders-Letter?language=en_US) (last visited Mar. 9, 2021).

<sup>171</sup> Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. No. 116-136, tit. IV, §§ 4114-4120, 134 Stat. 281 (2020); *See also* Sean Ludwig, *Coronavirus Aid, Relief, and Economic Security Act: What Small Businesses Need to Know*, U.S. CHAMBER OF COM. (Mar. 27, 2020), <https://www.uschamber.com/co/start/strategy/cares-act-small-business-guide>.

<sup>172</sup> *See* Megan Rose Dickey, *Gig Workers Say They Are Struggling to Get Personal Protective Equipment from Companies*, TECHCRUNCH (Apr. 16, 2020, 1:35 PM), <https://tcrn.ch/2z7esl8>.

<sup>173</sup> *See* Andrew Keshner, “*Anybody Who Works at this Point Deserves Hazard Pay*”: *The Working Conditions that Led One Instacart Worker to Strike*, MARKETWATCH (Apr. 2, 2020, 9:11 AM), <https://www.marketwatch.com/story/is-this-batch-worth-me-going-to-this-store-and-possibly-bringing-home-covid-19-what-life-is-like-for-one-striking-instacart-worker-2020-04-01>.

and supplies of disinfectants.<sup>174</sup> Some on-demand companies have met those safety and risk-related requests voluntarily, while others only did so grudgingly or only in the face of protests or other collective action by gig workers. Even so, the changes in the CARES Act and in other related legislation have demonstrably improved working conditions for gig workers and brought them closer to the rights and benefits enjoyed by traditional employees.<sup>175</sup> This section will explore some of these pressing issues and how the CARES Act for the first time brought gig workers closer to parity with employees throughout the pandemic.

### 1. *Unemployment Coverage for Gig Workers*

In late March 2020, the Coronavirus Aid, Relief, and Economic Security (CARES) Act was passed by Congress and signed into law by then-President Trump with the purpose of providing economic assistance for American workers, families, and small businesses suffering due to the pandemic.<sup>176</sup> In an unprecedented action, the CARES Act expressly granted gig workers unemployment benefits.<sup>177</sup> In the past, state unemployment statutes had only applied to “employees.” Often when gig workers were deactivated from platforms, they were told that they were not eligible for unemployment benefits. In other circumstances, gig workers challenged these determinations, appealed the results, and won unemployment benefits.<sup>178</sup> These same problems of employment classification have resulted in uneven decisions about unemployment benefits.

Provisions within the CARES Act radically changed that dynamic. The provisions created additional funding for the Pandemic Unemployment Assistance (PUA) program, which made individuals who would ordinarily not qualify for regular unemployment compensation and are unable to continue working as a result of COVID-19, such as self-employed workers, independent

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<sup>174</sup> See Alina Selyukh & Shannon Bond, *Amazon, Instacart Grocery Delivery Workers Demand Coronavirus Protection and Pay*, NAT’L PUB. RADIO (Mar. 30, 2020, 8:47 AM), <https://www.npr.org/2020/03/30/823767492/amazon-instacart-grocery-delivery-workers-strike-for-coronavirus-protection-and->.

<sup>175</sup> Andrew J. Hawkins, *Hundreds of Uber and Lyft drivers rally in San Francisco for employee protections*, THE VERGE (Aug. 27, 2020, 5:37 PM), <https://www.theverge.com/2019/8/27/20835658/uber-lyft-driver-rally-ab5-pete-buttigieg-employee-protections>,

<sup>176</sup> *The Treasury Department is Delivering COVID-19 Relief for All Americans*, U.S. DEP’T OF THE TREASURY, <https://home.treasury.gov/policy-issues/cares> (last visited Mar. 10, 2021).

<sup>177</sup> Sean Ludwig, *Coronavirus Aid, Relief, and Economic Security Act: What Small Businesses Need to Know*, U.S. CHAMBER OF COM. (Mar. 27, 2020), <https://www.uschamber.com/co/start/strategy/cares-act-small-business-guide>.

<sup>178</sup> *Uber Technologies, Inc. v. Barbra Berwick*, Case No: 11-46739 EK (2015). See also Sam Sanders, *California Labor Commission Rules Uber Driver is an Employee, Not a Contractor*, NAT’L. PUB. RADIO (June 17, 2015), <https://www.npr.org/sections/thetwo-way/2015/06/17/415262801/california-labor-commission-rules-uber-driver-is-an-employee-not-a-contractor>.



contractors, and gig workers, eligible for unemployment benefits.<sup>179</sup> The legislation as well as the U.S. Department of Labor’s guidance on the topic specifically use the term “gig workers” for the implementation of the PUA.<sup>180</sup> To qualify for PUA benefits, a gig worker would have to provide self-certification that they lost work directly because of the COVID-19 pandemic. Such scenarios of losing work directly because of coronavirus include, but are not limited to, a personal diagnosis of coronavirus, a household member’s diagnosis of coronavirus, responsibility for providing care for a family member with coronavirus, school closures related to coronavirus requiring the individual care for a child, and, most broadly, public health emergencies due to coronavirus that severely limit one’s ability to continue performing customary work activities or has forced one to suspend such activities.<sup>181</sup>

The CARES Act’s extension of unemployment benefits to gig workers was a groundbreaking acknowledgment of the importance of gig work. This would not have been a benefit that gig workers could have counted on prior to the pandemic. For some gig workers, who lost income because of temporary cutbacks on travel and transportation usage, the legislation was a helpful addition during a slow time at work. However, these unemployment benefits were temporary, and as described below, some gig workers had a difficult time accessing them.

## 2. Access to Paid Sick Leave

As part of the package of aid in the Families First Coronavirus Response Act (FFCRA), Congress passed the Emergency Paid Sick Leave Act.<sup>182</sup> The Emergency Paid Sick Leave Act created specific expansions to help bridge the gap for workers who did not receive sick leave through their employers.<sup>183</sup> These expansions covered situations where the employee became sick with COVID-19 symptoms, was exposed to COVID-19, or where the worker was caring for a sick family member.<sup>184</sup> In addition, some states, like Colorado and New York, have temporarily extended the reach of their paid sick leave structures.<sup>185</sup> The FFCRA expansion expired on December 31, 2020, but employers may voluntarily decide to provide leave for their

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<sup>179</sup> U.S. DEP’T OF LAB., EMP. & TRAINING ADMIN., UNEMPLOYMENT INSURANCE PROGRAM LETTER NO. 16-20 (Apr. 5, 2020), [https://wdr.doleta.gov/directives/attach/UIPL/UIPL\\_16-20.pdf](https://wdr.doleta.gov/directives/attach/UIPL/UIPL_16-20.pdf), <https://www.dol.gov/newsroom/releases/eta/eta20200405>.

<sup>180</sup> *Id.*

<sup>181</sup> U.S. DEP’T OF LAB., EMP. & TRAINING ADMIN., UNEMPLOYMENT INSURANCE PROGRAM LETTER NO. 16-20 (Apr. 5, 2020), [https://wdr.doleta.gov/directives/attach/UIPL/UIPL\\_16-20.pdf](https://wdr.doleta.gov/directives/attach/UIPL/UIPL_16-20.pdf); Nicole Clark, *Gig Workers Can Qualify for CARES ACT Unemployment Aid*, BLOOMBERG LAW (May 6, 2020), <https://news.bloomberglaw.com/daily-labor-report/insight-gig-workers-can-qualify-for-cares-act-unemployment-aid>.

<sup>182</sup> Families First Coronavirus Response Act, Pub. L. No. 116-127, § 1, 134 Stat. 178 (2020).

<sup>183</sup> *Id.*, Division E.

<sup>184</sup> U.S. Department of Labor Wage and Hour Division, *Families First Coronavirus Response Act: Questions and Answers*, <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions#104>.

<sup>185</sup> Shennan Harris and Lilah Sutphen, *State Law Round-Up: Covid-19 State and Local Paid Sick Leave Law Developments (US)*, NATIONAL L. REV., Apr 21, 2020, <https://www.natlawreview.com/article/state-law-round-covid-19-state-and-local-paid-sick-leave-law-developments-us>.

employees.<sup>186</sup> As of this writing, none of these extended measures have achieved any permanence, however.

The regulatory response about paid sick leave was important for many reasons during the pandemic.<sup>187</sup> Public health agencies have long recommended when dealing with infectious diseases that workers stay home to avoid spreading illness to others in the workplace. For many workers, the ability to rest or self-isolate while sick is largely determined by their access to paid sick leave.<sup>188</sup> Among OECD countries, the United States is only one of two that does not provide its workers with universal access to paid sick leave.<sup>189</sup> A lack of paid sick leave negatively impacts public health. Studies have shown that workers who lack paid sick leave are 1.5 times more likely to go to work while they are contagious, mostly because either they cannot afford to stay at home or they are worried that there will be reprisals for taking time off.<sup>190</sup>

The other reason that the passage of the Emergency Paid Sick Leave Act was so significant is that, incredibly, only a minority of states currently mandate any paid sick leave for employees.<sup>191</sup> Currently only 13 states and Washington D.C. have enacted paid sick leave laws.<sup>192</sup> The states that mandate paid sick leave include Connecticut, California, Massachusetts, Oregon, Vermont, Arizona, Washington, Rhode Island, Maryland, New Jersey, Michigan, Nevada, and Maine.<sup>193</sup> Some states, like New Jersey, started with individual cities and municipalities passing paid sick leave laws.<sup>194</sup> After Jersey City and Newark passed ordinances for paid sick time, that influenced other cities within the state to do the same. Eventually, this led to a statewide bill requiring New Jersey employers to provide paid sick time to their employees.<sup>195</sup> Maine was the most recent addition to the list, changing the law during the pandemic to require paid sick leave for employees.<sup>196</sup>

Regardless of state minimum statutory mandates, many private employers voluntarily provide paid sick leave as an important benefit. From a practical perspective, that means that the

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<sup>186</sup> U.S. Department of Labor Wage and Hour Division, *Families First Coronavirus Response Act: Questions and Answers*, <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions#104>.

<sup>187</sup> Drew DeSilver, *As coronavirus spreads, which U.W. workers have paid sick leave – and which don't?*, Pew Research Center, <https://www.pewresearch.org/fact-tank/2020/03/12/as-coronavirus-spreads-which-u-s-workers-have-paid-sick-leave-and-which-dont/>

<sup>188</sup> Erin Garrity, *Guacamole is Extra but the Norovirus Comes Free: Implementing Paid Sick Days for American Workers*, 58 B.C. L. REV. 703 (2017).

<sup>189</sup> Amy Raub et. al, *Paid Leave for Personal Illness: A Detailed Look at Approaches Across OECD Countries*, WORLD POLICY ANALYSIS CENTER (2018), [https://www.worldpolicycenter.org/sites/default/files/WORLD%20Report%20-%20Personal%20Medical%20Leave%20OECD%20Country%20Approaches\\_0.pdf](https://www.worldpolicycenter.org/sites/default/files/WORLD%20Report%20-%20Personal%20Medical%20Leave%20OECD%20Country%20Approaches_0.pdf)

<sup>190</sup> Heymann et. al, *Protecting health during COVID-19 and beyond: A global examination of paid sick leave design in 193 countries*, 15 GLOBAL PUBLIC HEALTH 925-934 (2020).

<sup>191</sup> *Id.*

<sup>192</sup> *Paid Sick Leave*, NAT'L CONF. OF STATE LEGISLATURES (July 21, 2020), <https://www.ncsl.org/research/labor-and-employment/paid-sick-leave.aspx>.

<sup>193</sup> *Id.*

<sup>194</sup> Kevin J. Skelly, *Paid Sick Time Trend Continues*, 3 N.J. EMP. L. LETTER 1 (2015).

<sup>195</sup> *Id.*

<sup>196</sup> S. DOC. NO. 369, 129<sup>th</sup> Maine Legislature., Reg. Sess. (Me. 2019); 26 M.R.S. §637(7) (2019).

availability of paid sick leave varies by geography, occupation, size of employer, and geography.<sup>197</sup> Paid sick leave seems to more broadly cover workers in the top quarter of earnings, with around only 31% of people in the lowest-earning tenth having coverage. Another difference is between the public and private sector.<sup>198</sup> More government workers have access to paid sick leave than their private counterparts.

While this uneven coverage is problematic for both workers and society (from a public health perspective), gig workers are in an even more precarious position than most workers. This precarity arises because the state laws on sick leave discussed above will only apply to “employees.” Based on the gig work model, workers only earn money on platforms as they complete tasks; they are not provided benefits like paid time off or paid sick leave. As such those who rely on gig work as a source of primary income are often forced into an untenable choice between working sick and paying for necessities like food and shelter.<sup>199</sup> Recently, the City of Seattle, Washington, passed laws that guaranteed workers (regardless of employment status) paid sick and safe days.<sup>200</sup> Seattle’s municipal government chose to be expansive in their coverage so that regardless of rulings on the issue of employee status, gig workers would be entitled to paid sick leave.

### 3. Hazard Pay

In April of 2020, federal legislation was proposed to provide additional pay to essential workers.<sup>201</sup> The idea behind hazard pay, or, “hero pay,” as some have referred to it, was to compensate frontline workers for the increased risk of contagion they would likely face on the job. However, the federal legislation on this subject failed to pass.<sup>202</sup> Nonetheless, some grocery stores and other businesses decided to pay an additional “hero” bonus of a few extra dollars per hour. Unions took up the cause of hazard pay, using it to push for wage increases. And some municipalities mandated an additional \$2-4 per hour payment of hazard pay, with laws aimed at larger businesses that employed a critical mass of essential workers.<sup>203</sup>

But most hazard pay was a temporary measure. In the summer of 2020, many retail companies ended hazard pay and instead replaced it with a one-time bonus for essential

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<sup>197</sup> Drew DeSilver, *supra* note.

<sup>198</sup> *Id.*

<sup>199</sup> Heymann, et al., *supra* note 190.

<sup>200</sup> *Gig Worker Paid Sick and Safe Time Ordinance*, DOMESTIC WORKERS STANDARDS BD., SEATTLE.GOV, <http://www.seattle.gov/laborstandards/ordinances/covid-19-gig-worker-protections-/gig-worker-paid-sick-and-safe-time-ordinance> (last visited Mar. 10, 2021).

<sup>201</sup> Wayne Winegarden, *Mandated Hero Pay Fails to Achieve Its Lofty Goals*, FORBES, (Jan. 15, 2021, 10:15 AM), <https://www.forbes.com/sites/waynewinegarden/2021/01/15/government-mandated-hero-pay-fails-to-achieve-its-lofty-goals/?sh=511128383815>.

<sup>202</sup> *Id.*

<sup>203</sup> Nathaniel Meyersohn, *These cities want to give grocery store workers hazard pay*, CNN, (Feb. 3, 2021, 12:57 PM), <https://www.cnn.com/2021/02/03/business/grocery-stores-hazard-pay-seattle-los-angeles/index.html> *Pandemic Hazard Pay: LA City Council committee votes to move forward with proposed emergency ordinance*, ABC7, (Jan. 27, 2021), <https://abc7.com/hazard-pay-covid-pandemic-coronavirus/10073194/> (noting that law required grocery and pharmacy retailers with three hundred or more employees nationally or ten on any one site would be required to pay \$5/hour in hazard pay).

workers.<sup>204</sup> And despite the fact that the pandemic continued on, some employers pushed back against hazard pay for frontline workers. For example, Kroger closed two of its grocery stores in Seattle, Washington, claiming that those closures were in response to the higher wages required as hazard pay.<sup>205</sup> Meanwhile, many essential workers pointed to low wages and argued that they needed a higher pay scale to be compensated for their risk they were taking. However, just as in previous pandemics, those who kept working and taking risks were often those who were in the most marginal occupational and financial positions.<sup>206</sup>

### *C. Continuing Issues and Problems*

Despite legislative extension of certain temporary employment rights to gig workers, some problems remain. The systems that would allow gig workers to access unemployment and sick leave were cobbled together rapidly, and many gig workers had trouble accessing their benefits. Other practices, like tip baiting, emerged during the pandemic and are part of a larger discussion of fair pay for work on digital platforms. While gig work companies have stepped up to address some of these issues, some problems remain. Most of these problems stem from the continued ambiguities about gig worker employment status.

#### *1. Accessing Benefits*

Although the PUA's extended unemployment benefits have been a positive development for gig workers overall, some gig workers in particular reported difficulties accessing the PUA benefits.<sup>207</sup> Part of the difficulty . Eligibility for the PUA program was generally the same across the nation, but the actual process of qualification, application, and disbursement were all administered at the state-level.<sup>208</sup> The split federal-state process meant that some state unemployment agencies required that an individual first file for traditional state unemployment compensation, receive a rejection letter, and then re-file a new claim with the state for the PUA program.<sup>209</sup> With unemployment systems already bogged down by claims during an extreme period of high unemployment, these kinds of burdensome bureaucratic systems created serious

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<sup>204</sup> Molly Kinder, et al., *The COVID-19 Hazard continues, but the Hazard Pay Does Not: Why America's Essential Workers Need a Raise*, BROOKINGS REPORT (Oct. 29, 2020), <https://www.brookings.edu/research/the-covid-19-hazard-continues-but-the-hazard-pay-does-not-why-americas-frontline-workers-need-a-raise/>.

<sup>205</sup> Nathaniel Meyersohn, *Kroger will close more stores over hazard pay laws for workers*, CNN, (Feb. 18, 2021, 3:10 PM), <https://www.cnn.com/2021/02/17/business/kroger-closing-grocery-workers-hazard-pay/index.html>.

<sup>206</sup> Brudney, *supra* note 10.

<sup>207</sup> See Dara Kerr, *Gig Workers with COVID-19 Symptoms Say It's Hard to Get Sick Leave from Uber, Lyft, Instacart*, CNET (Mar. 26, 2020), <https://www.cnet.com/features/gig-workers-with-covid-19-symptoms-say-its-hard-to-get-sick-leave-from-uber-lyft-instacart/>.

<sup>208</sup> <https://news.bloomberglaw.com/daily-labor-report/insight-gig-workers-can-qualify-for-cares-act-unemployment-aid>

<sup>209</sup> *Id.*

delays.<sup>210</sup> In many states, gig workers complained that the system was slow, difficult to use, and unwieldy.<sup>211</sup> Since many gig workers make less than minimum wage, this delay was a serious problem for many living paycheck-to-paycheck. Because of these financial pressures, some gig workers described the process of filing for unemployment as “nerve-wracking.”<sup>212</sup> Another gig worker went further, describing the situation as “a terrible sort of Kafkaesque, bureaucratic nightmare,” after he tried to phone the unemployment office 600 times and received a busy signal every time he called.<sup>213</sup>

Although there were some problems with initial implementation and several months of delay, by mid-May 2020 at least 37 states were able to start distributing PUA payments to gig workers. But gig workers have reported ongoing problems with accessing these benefits even beyond May 2020. Laid-off or furloughed workers describe two hour waits on phone calls, only to have the call then drop, or email inboxes that just bounce back to the sender, unread.<sup>214</sup> As mentioned earlier, part of the difficulty was no doubt attributable to the vast influx of new claims. But other delays were caused because traditionally gig workers and other independent workers were not listed in W-2 income tax reports, which generally are used by state unemployment agencies to determine eligibility for benefits.<sup>215</sup> Outdated filing systems and old computer networks also contributed to delays, as well as the fact that during the pandemic there were a spate of fraudulent unemployment filings that needed to be investigated.<sup>216</sup> The Federal Bureau of Investigation noted that the pandemic brought a spike in fraudulent unemployment

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<sup>210</sup> Rebecca Rainey, *Millions of Gig Workers are Still Waiting for Unemployment Benefits*, POLITICO, (April 30, 2020), <https://www.politico.com/news/2020/04/30/millions-of-gig-workers-are-still-waiting-for-unemployment-benefits-225844>; Shannon Bond, “*We Can’t take Your Call*”: *Uber Drivers, Other Gig Workers Struggle for Unemployment*, NAT’L PUB. RADIO, (May 19, 2020), <https://www.npr.org/2020/05/19/858410180/we-can-t-take-your-call-uber-drivers-other-gig-workers-struggle-for-unemployment>.

<sup>211</sup> Susanna Capelouto, *Georgia Gig Workers Find Long, “Stressful” Wait for Unemployment Payments*, NAT’L PUB. RADIO, (May 5, 2020), <https://www.wabe.org/georgia-gig-workers-wait-a-long-time-for-unemployment-payments/>.

<sup>212</sup> *Id.* ((describing a complex system and a “nerve-wracking” wait for payments).

<sup>213</sup> Claire Withycombe, *Self-employed, gig workers still waiting for Oregon to distribute unemployment benefits*, SALEM STATESMAN J., (June 10, 2020), <https://www.statesmanjournal.com/story/news/politics/2020/06/10/oregon-coronavirus-unemployment-covid-19-pua/5335310002/>.

<sup>214</sup> Lisa Rowan, *Why is it So hard to Get Your Pandemic Unemployment Benefits?*, FORBES ADVISOR, (March 1, 2021), <https://www.forbes.com/advisor/personal-finance/why-its-so-hard-to-claim-unemployment/> (describing the efforts of one worker to call, email in order to try to claim benefits, yet coming away unsuccessfully).

<sup>215</sup> *Id.*

<sup>216</sup> *See, e.g.* Anya Tucker, *More Capital Region Residents Report Identity Theft due to Widespread Unemployment Benefits Fraud*, ABC NEWS10, (Feb. 9, 2021), <https://www.news10.com/top-stories/more-capital-region-residents-report-identity-theft-due-to-widespread-unemployment-benefits-fraud/>.

insurance claims and accompanying identity theft.<sup>217</sup>

Problems with wait times and bureaucracy were also a problem for gig workers who tried to access paid sick leave.<sup>218</sup> For example, one Instacart worker had gotten tested for COVID and was waiting to hear what his status was, but rather than being given access to sick leave, the worker was deactivated from the platform. Others complained about the excessive documentation that was needed once they received a COVID-19 diagnosis. Still others noted that they were confused, and never given instructions about how to access the paid leave program. As one Uber driver who had tried (unsuccessfully) to access sick leave benefits put it:

“They sent me a link that didn’t work. They said that a doctor or public-health official would have to log in and create an account with a medical ID to submit a special request form. My doctor was frankly so busy she couldn’t. We make Uber literally all of their money and I can’t even afford my insulin in the state of Texas. They couldn’t even throw us a bone?”<sup>219</sup>

Again, some of these systems were new, but other workers felt like all they were getting was the runaround. All of these factors contributed to the sense of frustration that gig workers had in trying to access these new sick leave benefits.

Many of the problems gig workers encountered in accessing benefits stemmed from their ambiguous employment status pre-pandemic. These ambiguities meant that state unemployment divisions apparently never viewed gig workers as full and equal participants in the labor force. As such, when gig workers were finally granted benefits in the CARES Act, state unemployment offices were caught off guard. Despite benefits specifically earmarked for gig workers, they still ended up marginalized based on unemployment offices’ pre-existing structural limitations, like using W-2 information to determine eligibility for benefits. And so, once again, the ambiguous legal status of gig workers led to problems.

## 2. *Tip-Baiting and Other Deceptive Practices*

Beyond the difficulty accessing unemployment benefits and paid sick leave, gig workers during the pandemic also contended with problems that concerned proper payment for their work. In some ways this is nothing new. Earnings on various platforms have been the subject of many controversies in the past. Workers have sued gig companies because of payment problems and a lack of transparency around charges, fees, and how payments have been calculated.<sup>220</sup>

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<sup>217</sup> Press release, *FBI Sees Spike in Fraudulent Unemployment Insurance Claims Filed Using Stolen Identities*, (July 6, 2020), <https://www.fbi.gov/news/pressrel/press-releases/fbi-sees-spike-in-fraudulent-unemployment-insurance-claims-filed-using-stolen-identities>.

<sup>218</sup> Aarian Marshall, *COVID-19 Opens the Door for Gig Workers to Win Sick Pay*, WIRED (June 7, 2020), <https://www.wired.com/story/covid-opens-door-gig-workers-sick-pay/>.

<sup>219</sup> Lia Russell, *Uber’s Bait and Switch on Sick Leave*, AM. PROSPECT, (May 5, 2020), <https://prospect.org/coronavirus/uber-bait-and-switch-on-paid-sick-leave/>.

<sup>220</sup> Joel Rubin, *Lawsuit Accuses Uber of Ripping off Drivers, Paying Them Smaller Fares than what Passengers Pay*, L.A. TIMES, April 28, 2017; Aaron Gordon & Dhruv Mehotra, *Uber and Lyft Take a Lot More from Drivers Than They Say*, JALOPNIK, (Aug. 26, 2019), <https://jalopnik.com/uber-and-lyft-take-a-lot-more-from-drivers-than-they-sa-1837450373>.

But in addition to these problems that have long-been a feature of work on digital platforms, a new practice called “tip baiting” started to become a major problem during the pandemic. The practice of tip baiting involved customers posting a large amount as a tip in order to get prompt fulfillment of their order, and then those same customers later editing down the tip amount. For example, one gig worker on Instacart noted a promised tip of \$55 on a grocery order, only to have the customer remove it the next day.<sup>221</sup> The removal of the tip left her demoralized, as most of her earnings from that day had instantly evaporated.<sup>222</sup> The practical result of tip baiting is to take the money away from the gig worker who earned it.<sup>223</sup> The practice seems incredibly problematic and deceptive, a type of bait-and-switch played on workers. Yet most grocery delivery platforms do allow the customer time to either raise or lower the amount of tip provided. The practice of tip baiting seemed to pick up steam when there were shortages during the spring and summer of 2020. Indeed, tip baiting was one of the issues leading to some of the work stoppages during the spring and summer of 2020 on many gig platforms.<sup>224</sup>

More generally, tip baiting and other practices like it bring to the forefront the fact that gig workers deserve to have fair and transparent wage structures for their work. Such fair pay structures would include minimum wages that incorporate time that is spent looking for work and time in between various tasks undertaken on the platform. Gig workers can sometimes struggle to make minimum wage for on-demand apps that require in person work. Those crowdworkers who only do tasks online on average earn only half the U.S. minimum wage.<sup>225</sup> (That is half of the old minimum wage of \$7.25 / hour, not the proposed enhanced minimum wage of \$15/hour, that was considered and then blocked by the Senate in February of 2021).<sup>226</sup> Fair pay remains as a continuing struggle for gig workers.

Gig workers faced other problems during the pandemic, too, like not having adequate restroom facilities or places where they could wash their hands.<sup>227</sup> While these are continuing

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<sup>221</sup> *Id.*

<sup>222</sup> *Id.* (recounting story of Instacart worker Annalisa Arambula, who said, “I don’t pretend to be a hero, like a nurse in a hospital . . . but I literally am exposing myself and when I return home, exposing my own family to the possibility of transmitting this disease. When you know that it’s somebody who’s just doing it to game the system and to get their order when they want it, it’s really frustrating.”).

<sup>223</sup> Sarah Ashley O’Brien & Kaya Yurieff, *People are Luring Instacart Shoppers with Big Tips – And Then Changing Them to Zero*, CNN (Apr. 9, 2020, 3:01 PM), <https://www.cnn.com/2020/04/09/tech/instacart-shoppers-tip-baiting/index.html>.

<sup>224</sup> See, e.g. Michael C. Duff, *New Labor Viscerality? Work Stoppages in the “New Work,” Non-Union Economy*, \_\_ ST. LOUIS L.J. \_\_ (forthcoming 2021), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3637605](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3637605).

<sup>225</sup> Berg, *supra* note 55.

<sup>226</sup> *Democrats Abandon \$15 Minimum Wage Backup Plan*, WASH. POST, Feb. 28, 2020; Jacob Pramuk, *\$15 Minimum Wage Not Allowed in Biden’s COVID Relief Bill, Senate Official Says*, CNBC, (Feb. 25, 2021), <https://www.cnbc.com/2021/02/25/15-minimum-wage-decision-biden-covid-relief-bill.html>.

<sup>227</sup> Edward Ongweso Jr., *Gig Workers’ Only Chance to Pee Is Apparently an App*, VICE, (Oct. 23, 2020), <https://www.vice.com/en/article/93w5by/gig-workers-only-chance-to-pee-is-apparently-an-app> (noting the lack of bathroom facilities for gig workers, and platform’s responses that they should use a separate app to locate bathrooms).

problems that will be need to be addressed, the fact is that at least the pandemic moved some gig workers closer to parity with employees, if only on a temporary basis. But when gig workers tried to access the benefits provided by the expanded PUA plan, they often encountered confusion about their employment status, and as a result, their claims and payments were delayed and their needs minimized. During the pandemic, this issue of employee classification has translated into lost benefits, delayed benefits, and additional stress for gig workers.<sup>228</sup> The same has been true for the difficulties that gig workers have encountered with accessing their new sick leave benefits.<sup>229</sup> The way towards solving these problems more permanently is clear – and it involves parity for gig workers with other employees.

## V. THE ARGUMENT FOR PARITY

There is not much good that has come out of the 2020 coronavirus pandemic, which has been a time of suffering for so many. But at least the pandemic has served as a catalyst for a long-needed “jumpstart” for gig worker’s rights. Prior to the pandemic, gig work was viewed more as marginal work done only convenience. Now, more people are aware that gig work is real work, and attitudes are starting to change. Indeed, when the pandemic struck, grocery delivery shoppers, meal delivery workers, and on-demand rideshare drivers were all understood to be working at important jobs and were considered “essential” workers under most people’s understandings as well as under the law. As a result, the CARES Act and related legislation provided temporary unemployment and paid sick leave programs that treated gig workers the same as employees.

At the same time that all these events were taking place for gig workers, many salaried or 9-to-5 employees started working from home, using online platforms on a regular basis to complete their work. The result of all these changes is that old categories between remote work and in-person work, or work that needed to be facilitated on an app simply can no longer be maintained. Where once those kinds of technological distinctions might have justified differential treatment for gig workers, the reality is that these categories have begun to blur and collapse. This next Section examines the trends, discussions, and changes in the law to argue in favor of parity for gig workers.

### A. *The Essential Worker Paradox*

The discourse on gig workers during the pandemic presents what I call the *essential worker paradox*: How can workers be essential and yet at the same time be completely disregarded when they try to gain the basic protections that employees receive? The paradox might be explained by separating out the concept of essential work from the people who are deemed essential workers. *Essential work* is the labor that needs to happen in order for society to function; food and

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<sup>228</sup> See Nicole Clark, *Gig Workers Can Qualify for CARES ACT Unemployment Aid*, BLOOMBERG L. (May 6, 2020, 3:01 AM), [https://www.bloomberglaw.com/document/XBOENS4000000?bna\\_news\\_filter=daily-labor-report&jcsearch=BNA%252000000171bc1ad730a5f9bd3f86dc0001#jcite](https://www.bloomberglaw.com/document/XBOENS4000000?bna_news_filter=daily-labor-report&jcsearch=BNA%252000000171bc1ad730a5f9bd3f86dc0001#jcite).

<sup>229</sup> Russel Brandom, *Sick Days: Instacart Promises a Safer Way to Shop, But Workers Tell a Different Story*, THE VERGE (May 26, 2020, 9:00 AM), <https://www.theverge.com/21267669/instacart-shoppers-sick-extended-pay-quarantine-leave-coronavirus>.



agriculture production, energy production, the provision of medical services, and transportation, to name a few examples. This work is of critical importance, and without it the consequences to the economy and to health would be dire. *Essential workers*, on the other hand, are the people who of necessity are needed to produce the essential work.

While *essential work* is valued and valorized, the notion often seems to be separated from the *essential workers* who are involved in actually providing it. We can see this distinction in the statistics about how essential workers are underpaid compared to other employees, or the news stories about large grocery chains shuttering stores rather than provide hazard pay to store cashiers and clerks.<sup>230</sup> The lower wages and casual attitude toward safety for frontline workers means that essential workers are not being treated as if they are critical, important, unique, or irreplaceable. In fact, perhaps because of the risks that gig workers are taking, it often seems they are often treated as disposable. Gig workers and other frontline workers are taking the risks that others do not want to take, and are doing so out of economic necessity. As one French gig worker put it, “on est la chair a canon,” which means, “we are cannon fodder.”<sup>231</sup> Indeed, it is hard to understand how the work could be seen as important, and yet so little consideration be given to the person who is performing that work.

The attempted division of work from the worker providing the labor also has a long tradition, and has in the past led to labor abuses. There, the labor that people provided was prized, but the workers themselves were treated poorly. In fact, these are the reasons that the organizing documents of the United Nations – International Labor Office declared that labor is not a commodity.<sup>232</sup> In other words, work is done by people, and the personhood and human rights of the worker must exist separately and distinctly from the importance of the work being done. To put it in another perspective, the view recognizes that the person who is working has a value and worth a human being beyond what they are able to produce.

These human rights concepts can help us to disentangle the essential worker paradox. We must not claim that work is essential but then treat gig workers as disposable. And we know that gig workers, out of any frontline workers, are among the most marginalized because of the continuing problems around their legal status. But knowing how and why these terms are being confused and in some instances exploited opens up an opportunity when we look at the essential work and essential workers in tandem. Gig workers took enough risks during this pandemic to say that they have truly are essential, and thus have earned parity with employees.

### *B. We are All Gig Workers Now*

As over 50 million Americans moved from full-time in person work to some form of hybrid work or to work from home, remote work became more normalized. And as computer intermediated work will likely continue to become more ubiquitous, most of the reasons for excluding gig workers from employee status seem increasingly problematic and out of touch with the way that work is being performed.

To take an example, consider office workers who used to work in an office but then switched to working from home during the pandemic. Remote work was possible for these

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<sup>230</sup> See note [ ], *supra*.

<sup>231</sup> Aizicovici, *supra* note [ ].

<sup>232</sup> DECLARATION OF PHILADELPHIA, INTERNATIONAL LABOUR OFFICE (1944), and for full text, see ILO, *Constitution of the International Labor Organization* (Geneva, 1992), 22.

office workers because they used digital platforms to connect them with their supervisors, co workers, and subordinates. Those office workers still would be considered employees even if they had the flexibility to sign in and complete work during flexible working hours, perhaps as they managed household chores or helped children with virtual school. The old arguments about why gig workers should be left out of employment protections, typically framed around flexible work schedules, seem hollow in light of these fundamental changes to the structure of work.

And because so many workers have switched to remote work, this is even more of a reason why employee status for gig workers is such an important concern. Within the fissured workplace, many jobs could be split up, outsourced, or put onto digital platforms.<sup>233</sup> And the lack of any fundamental rights for gig workers creates the incentives for that to happen. If we stop to think about it, solidarity with gig workers makes sense for workers across the occupational hierarchy. And it makes even more sense in light of the incredible sacrifices that gig workers have made during the pandemic so that others could stay safe.

### *C. Moving from Temporary to Permanent Rights*

Temporary rights and protections in the wake of the pandemic are one thing; but they are not enough to reward gig workers fully for their sacrifices during the pandemic.<sup>234</sup> The schism between those who are employees, and those who are being denied coverage only because they use a platform to access their work is increasingly unfair and illogical, as noted above. The changes that were implemented during the pandemic on a temporary basis should remain.<sup>235</sup> Access to paid sick leave and unemployment protections should be made permanent for gig workers.

Beyond unemployment and paid sick leave, there are other protections that gig workers need. For example, having a reasonable minimum wage that included time searching for work or getting to work would help with financial stability. Allowing gig workers to sue for discrimination and harassment would mean that fewer gig workers would be sidelined by prejudices or unfair employment practices. The ability to join a union and bargain collectively would be absolutely key. And the right to blow the whistle on wrongdoing at work, without fear of reprisal, would also be important. In listing these benefits which would help gig workers, it becomes more obvious that these are the typical rights of employees. In fact, employment law has already largely sorted out the important needs, rights, and responsibilities of employees.<sup>236</sup> Gig workers have earned these same rights.

There are counterarguments. While it might be difficult to argue that gig workers were only working on trivial matters (due to their service during the pandemic), platforms might try to argue that the employee model would be too expensive to maintain. Or, as they did during the Proposition 22 campaign in California, platforms might argue that making workers employees would take away their flexibility and freedom of contract. Finally, there is also an argument that

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<sup>233</sup> DAVID WEIL, *THE FISSURED WORKPLACE* (2013).

<sup>234</sup> *See, e.g.* THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* (2017) (TRANS. ARTHUR GOLDHAMMER).

<sup>235</sup> Megan Tobias Neely, *What Will U.S. Labor Protections Look Like After Coronavirus?*, HARV. BUS. REV. (Apr. 2, 2020), <https://hbr.org/2020/04/what-will-u-s-labor-protections-look-like-after-coronavirus>.

<sup>236</sup> DeStefano, *supra* note [ ].

even some employees who are essential workers were not treated particularly well during the pandemic.<sup>237</sup> For example, at the beginning of the pandemic, health care workers who wanted to wear N-95 masks while treating patients were often reprimanded or fired.<sup>238</sup> Incredibly, the justification at that time was that hospitals and doctor’s practices did not want to worry or alarm patients.<sup>239</sup> Some retail and grocery store workers were violently attacked when they attempted to enforce mandatory mask policies in stores.<sup>240</sup>

There are rebuttals to these counter arguments that I believe are convincing. All businesses struggle with costs and profitability, but they still must provide minimum wage to their workers. As platforms were just starting, perhaps they needed room to experiment, but these are well-established businesses now. Further, part-time work can still be flexible and yet come under the ambit of “employee” protection. Businesses can and should treat their workers with dignity and fair wages the same way that traditional businesses do. Finally, negative treatment of frontline employees is hardly a reason to deny another group of workers the rights that they deserve. In fact, these disturbing stories of frontline employees being treated poorly is more likely a reason that we should try to raise the standards for all workers, not a reason to withhold benefits from gig workers.

This Article has pointed to several key reasons that lead to the conclusion that there should be parity for gig workers with employees. That change would have important implications. Apart from minimum wages, unemployment benefits, and discrimination protections it would also mean that gig workers could join unions. Presumably increased gig worker power and pressure from unions would mean an end to deceptive practices like “tip baiting,” which harm only the workers, but not the platforms.<sup>241</sup> Gig worker parity could be accomplished through legislation, by court decisions, or by Acts of Congress. But the way forward depends on securing protections for all workers, regardless of the technology they may use to help them accomplish their work.

## VI. CONCLUSION

During the 2020 coronavirus pandemic gig workers have been of tremendous service, delivering meals and groceries, providing transportation, and increasing their own exposures to illness and disease to make sure that others could stay at home during lockdowns. A full

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<sup>237</sup> See, e.g. Brudney, *supra* note [ ] at 5-7 (noting that frontline essential employees bore “disproportionate health risks” and that the law’s response to the struggles of essential employees has been “fragmented and disappointing.”).

<sup>238</sup> Sophie Sherry, *Nurse says she was fired by Northwestern Memorial Hospital after warning co-workers that face masks being used were not the safest*, CHI. TRIB., Mar. 25, 2020, <https://www.chicagotribune.com/news/breaking/ct-nurse-northwestern-memorial-hospital-coronavirus-20200324-6smjuxbn6fgnxpaiyzzkjymorq-story.html>.

<sup>239</sup> *Id.*

<sup>240</sup> See, e.g. Teo Armus, *Two Trader Joe’s customers were asked to put on masks. They attacked employees instead*, WASH. POST, July 29, 2020; Carley Porterfield, *No-Mask Attacks*, FORBES, Aug. 15, 2020; Soo Kim, *“Violent” Customer Attacks Grocery Store Worker with Bottle After Being Asked to Wear Mask*, NEWSWEEK, Jan. 19, 2021; *Grocery Workers Fear Confrontations Over Mask Rules*, TIME MAGAZINE, May 25, 2020.

<sup>241</sup> Sarah Ashley O’Brien & Kaya Yurieff, *People are Luring Instacart Shoppers with Big Tips – And Then Changing Them to Zero*, CNN (Apr. 9, 2020, 3:01 PM), <https://www.cnn.com/2020/04/09/tech/instacart-shoppers-tip-baiting/index.html>.

recognition of those sacrifices should result in gig workers receiving the same labor and employment law protections and benefits that employees traditionally receive.

Indeed, these employment protections for gig workers will be critical so that they will be able to engage fully in the hoped-for robust post-pandemic economic recovery. As voters, unions, companies, and policymakers grapple with the aftermath of the pandemic and its impact on the world of work generally, the sacrifices and service of gig workers during this time should not be forgotten. Without a doubt, gig workers have proven themselves worthy of the same labor market protections that employees receive under the law. The trend toward parity that started in the pandemic needs to be continued, and is one of the few bright spots of hope during a difficult and tragic time.