

We Are All Gig Workers Now: Online Platforms, Freelancers & the Battles Over Employment Status & Rights During the Covid-19 Pandemic

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I. INTRODUCTION

Since the early days of the coronavirus pandemic, unemployment rates leapt to the highest they have been since 1975.¹ Stay-at-home orders and

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1. Andrew Soergel, *Unemployment Highest Since Great Depression as Coronavirus Collapses Labor Market*, U.S. NEWS & WORLD REP. (May 8, 2020), <https://www.usnews.com/news/national-news/articles/2020-05-08/unemployment-highest-since-great-depression-as-coronavirus-collapses-labor-market>. By state, most record highs are in April 2020,

declining demand led many companies to lay off their workers. Millions of Americans filed for unemployment. At the same time, some sectors saw a surge in activity. Delivery services became in high demand as many opted to receive their groceries, meals, and shopping straight to their home. Digital platforms like Instacart increased hiring to meet changing patterns of consumption. Whether continuing to work in high-risk service industries or experiencing a drastic decline in their income, gig workers face the challenges of managing their health and financial risks in a legal landscape that largely leaves them unprotected by employment and labor laws. The pandemic exposed the already highly contested fault lines that sharply separate employees and freelancers. The economic crisis also triggered an unprecedented legislative reform that challenges the issue of employee classification. Congress passed the Coronavirus Aid Relief and Economic Security (CARES) Act in March 2020, a \$2 trillion relief package, offering augmented unemployment relief not only to employees but also to the self-employed, including gig workers. The Families First Coronavirus Response Act (FFCRA) was passed to provide sick leave in the form of tax credits that also extended to the self-employed. Beyond the governmental responses, platform companies offered new limited relief to their workers in the form of sick leave, even as they continue to classify them as freelancers.

Mass layoffs alongside mass hiring present immense legal challenges even without a health pandemic. The COVID-19 crisis adds the challenges of health and safety, social distancing, risk management, and telecommuting. This Article examines employment law and employee classification in relation to the contemporary realities of the labor market during the coronavirus pandemic. As business models and market structures are constantly changing and shifting, one thing remains the same: how we classify the work relationship carries enormous weight in determining the rights and duties of market actors. In most instances, it is the worker who seeks classification as an employee, while businesses frequently seek to classify at least some of those who provide their labor as independent contractors or as employees of another employer. This reality is, at least in part, in direct response to our longstanding employment and labor laws that provide a range of protections to employees and far less protections

right after the coronavirus pandemic began. *Local Area Unemployment Statistics*, U.S. BUREAU LAB. STAT. (July 17, 2020), <https://www.bls.gov/web/laus/lausthl.htm> [https://perma.cc/9BUX-HLW7]. Interestingly, most record lows were right before the pandemic. *Id.* The highest rate of U.S. unemployment was 24.9% in 1933, during the Great Depression. Stanley Lebergott, *Labor Force, Employment, and Unemployment, 1929–39: Estimating Methods*, MONTHLY LAB. REV., July 1948, at 50, 51, <https://www.bls.gov/opub/mlr/1948/article/pdf/labor-force-employment-and-unemployment-1929-39-estimating-methods.pdf> [https://perma.cc/6YER-PQWW].

to independent contractors.² Common law doctrines protect employees from wrongful termination, mistreatment, injury, retaliation, and other adverse employer actions. A substantial number of state and federal laws similarly protect employees in the areas of wage and hour, discrimination, privacy, unionization, speech rights, leave rights, safety, and health.³ Independent contractors are, for the most part, not covered by any of these laws.⁴ At times, independent contractors have greater autonomy, and thereby possibilities for more income, than employees. Moreover, when it comes to ownership over ideas, innovation, and human capital, workers or service providers can benefit from a classification as independent contractors because employment laws require higher duties of loyalty—prohibiting employees from competing with their employer—and assignment of intellectual property to the employer.⁵ Whatever question we pose in the field of employment and labor law, the stakes of employee versus independent contractor classification are high.⁶

This Article presents the ways the COVID-19 pandemic has exposed the vulnerabilities of gig workers and the irrationalities of rigid classification tests that have always been the Achilles heel of the field of employment and labor law. This Article explores pandemic-related economic benefits that have been extended to freelancers and considers the ways the pandemic reveals the nature, and future, of the gig economy. Part II explains the federal and state efforts to expand unemployment benefits to freelancers. It describes how the CARES and FFCRA Acts have expanded the emergency unemployment benefits, paid sick leave, and family and medical leave

2. See Davide Migali, *Being an Employee Is Truly Awesome*, MEDIUM (June 10, 2019), <https://medium.com/swlh/being-an-employee-is-truly-awesome-6a5b67b1ca58> [<https://perma.cc/43XQ-CNFX>].

3. See, e.g., *Employee Rights*, U.S. DEP'T LABOR, <https://www.dol.gov/general/topic/disability/employeerights> [<https://perma.cc/9BE4-5SFQ>].

4. Orly Lobel, *The Four Pillars of Work Law*, 104 MICH. L. REV. 1539, 1543, 1545 (2006).

5. See generally ORLY LOBEL, TALENT WANTS TO BE FREE: WHY WE SHOULD LEARN TO LOVE LEAKS, RAIDS, AND FREE RIDING (2013) (discussing strategies to control a company's human and intellectual capital to successfully innovate); ORLY LOBEL, YOU DON'T OWN ME: HOW MATTEL V. MGA ENTERTAINMENT EXPOSED BARBIE'S DARK SIDE (2018) (providing one example of what happens when workers grant their employers the right to their creative ideas and intellectual property); Orly Lobel, *The New Cognitive Property: Human Capital Law and the Reach of Intellectual Property*, 93 TEX. L. REV. 789 (2015) (discussing the tension between protected forms of information and public domain, and the need to temper the rise of cognitive property).

6. See *Independent Contractor (Self-Employed) or Employee?*, IRS, <https://www.irs.gov/businesses/small-businesses-self-employed/independent-contractor-self-employed-or-employee> [<https://perma.cc/6EW6-WPRS>].

available to freelancers, and yet the funding and the operational details of these programs are still contested. Part III describes the continued service of gig workers during the pandemic, especially in the delivery sector, and how classification as freelancers has left many without medical leave rights, health and safety rights, and other protections. Drawing on my recent research, Part IV argues that the fight over employee classification is a red herring, as it misses the point about what public protections ought to be provided to all workers in the labor market. This Article proposes that certain employment and labor protections should be extended to non-employees whether they work on the digital platform or offline in more traditional settings. This Article further argues that our social welfare system should not be so heavily linked to the labor market.

II. THE CARES ACT & PANDEMIC-RELATED UNEMPLOYMENT BENEFITS FOR GIG WORKERS

Since the novel coronavirus crisis took hold of the United States in early 2020, all fifty states have been impacted by increasing levels of unemployment. The Bureau of Labor Statistics published that in March 2020, the unemployment rate increased from 3.5% to 4.4%.⁷ Such an increase has not happened since January 1975.⁸ The nature of the virus forced millions to stay at home and has halted almost every sector of the economy.⁹ By mid-March, forty-eight states declared a state of emergency to fight coronavirus.¹⁰ By the end of March, over ten million people filed new unemployment claims.¹¹ By the end of April, the unemployment rate increased to a record high

7. Press Release, Bureau of Labor Statistics, U.S. Dep't of Labor, The Employment Situation – March 2020, at 1 (Apr. 3, 2020), https://www.bls.gov/news.release/archives/empsit_04032020.pdf [<https://perma.cc/H5HR-6V4E>].

8. *Id.* “Nearly 17 million people filed initial claims for unemployment insurance over the past three weeks, suggesting that the unemployment rate is already above 15 percent—well above the rate at the height of the Great Recession.” Stephanie Aaronson & Francisca Alba, *The Unemployment Impacts of COVID-19: Lessons from the Great Recession*, BROOKINGS (Apr. 15, 2020), <https://www.brookings.edu/blog/up-front/2020/04/15/the-unemployment-impacts-of-covid-19-lessons-from-the-great-recession/> [<https://perma.cc/4YNC-BQ98>] (footnote omitted).

9. Eduardo Porter & Jim Tankersley, *Shutdown Spotlights Economic Cost of Saving Lives*, N.Y. TIMES (Mar. 24, 2020), <https://www.nytimes.com/2020/03/24/business/economy/coronavirus-economy.html> [<https://perma.cc/PM7X-5DZ5>].

10. Rosie Perper, Ellen Cranley & Sarah Al-Arshani, *Almost All US States Have Declared States of Emergency to Fight Coronavirus – Here’s What It Means for Them*, BUS. INSIDER (Mar. 16, 2020, 10:34 PM), <https://www.businessinsider.com/california-washington-state-of-emergency-coronavirus-what-it-means-2020-3> [<https://perma.cc/QFC8-87KR>].

11. Press Release, U.S. Dep't of Labor, Unemployment Insurance Weekly Claims 6 (Aug. 6, 2020), <https://www.dol.gov/ui/data.pdf> [<https://perma.cc/HK9X-GTY9>].

14.7%, and also recorded the largest monthly increase since 1948 when this data was first recorded.¹² After seeing the largest spike in unemployment, by the end of May, businesses slowly started to reopen, and the unemployment rate had a small decline to 13.3%.¹³

On March 27, the Coronavirus Aid Relief and Economic Security (CARES) Act was signed into law, devoting over \$2 trillion to economic relief.¹⁴ As part of the CARES Act, the Pandemic Unemployment Assistance (PUA) program temporarily expanded coverage under state unemployment programs to those who are typically not covered, such as the self-employed and independent contractors.¹⁵ PUA further grants this federally-funded unemployment compensation to other individuals who would not ordinarily qualify for unemployment, including individuals seeking part-time work and individuals who lack sufficient work history to ordinarily qualify for unemployment.¹⁶ In addition, PUA provides emergency increases to unemployment benefits for individuals who already qualify for state unemployment compensation.¹⁷ PUA provides up to thirty-nine weeks of benefits and an additional \$600 on top of the regular weekly unemployment benefits through the end of July.¹⁸ “To be eligible for the unemployment compensation under the CARES Act, an independent contractor must ‘provide self-certification’ that she is “able to work and available for work within the meaning of applicable state law, but is unemployed, partially unemployed, or unable or unavailable to work because” of a number of outlined coronavirus related reasons, including having to quit her job as a direct result of the novel coronavirus or having her place of work shut down as a direct

12. *Unemployment Rate Rises to Record High 14.7 Percent in April 2020*, U.S. BUREAU LAB. STAT. (May 13, 2020), <https://www.bls.gov/opub/ted/2020/unemployment-rate-rises-to-record-high-14-point-7-percent-in-april-2020.htm> [https://perma.cc/WS5H-K2RV].

13. Press Release, Bureau of Labor Statistics., U.S. Dep’t of Labor, *The Employment Situation – May 2020*, at 1 (June 5, 2020), <https://www.bls.gov/news.release/pdf/empstat.pdf> [https://perma.cc/46KS-D2ST].

14. *The CARES Act Works for All Americans*, U.S. DEP’T TREASURY, <https://home.treasury.gov/policy-issues/cares#:~:text=This%20over%20%242%20trillion%20economic,economic%20impacts%20of%20COVID%2D19> [https://perma.cc/B8KX-A6UU].

15. Coronavirus Aid, Relief, and Economic Security Act, H.R. 748, 116th Cong. §§ 1102(a)(2)(D)(ii)(I), 1102(a)(2)(G)(i)(IV), 2102, 2104(b)(1)(B) (2020); see also *Pandemic Unemployment Assistance*, CAL. EMP. DEV. DEP’T (Oct. 15, 2020), https://edd.ca.gov/about_edd/coronavirus-2019/pandemic-unemployment-assistance.htm [https://perma.cc/55TS-U5JD].

16. *Pandemic Unemployment Assistance*, *supra* note 15.

17. *Id.*

18. *Id.*

result of the coronavirus.¹⁹ The CARES Act also provides a Paycheck Protection Program (PPP), which permits an “eligible self-employed individual, independent contractor, or sole proprietorship” to receive emergency grants.²⁰

The expansion of the unemployment emergency benefits to independent contractors is unprecedented. Gig workers have been the matter of increasing national debates and legislative reforms in the past few years.²¹ With the pandemic, some of the most recognizable gig economy platforms have, yet again, been brought into the national spotlight. Recent changes in employee classification laws, such as California’s Assembly Bill 5 (AB5),²² combined with unprecedented unemployment, the increased demand for delivery services—but decreased use of ride-shares—and the inherent danger of working during a pandemic, have exposed the vulnerabilities of gig work.

In the days before the passage of the stimulus bill, Uber’s chief executive, Dara Khosrowshahi, wrote a letter to President Trump asking “that any economic stimulus or coronavirus-related legislation provide ‘protections and benefits for independent workers,’ along with ‘the opportunity to legally provide them with a real safety net going forward.’”²³ Uber got what it asked for. By extending the federal funding for unemployment assistance to the self-employed, gig workers can apply for the benefits even though the companies they work for continue to classify them as independent contractors. When the bill was passed, Khosrowshahi tweeted, “Thanks to the Senate for supporting 1.3M @Uber drivers & delivery people” and “Many

19. Greg Grisham, *Independent Contractors Now Temporarily Eligible for Unemployment Compensation*, MEMPHIS BUS. J. (Apr. 13, 2020, 2:51 PM), <https://www.bizjournals.com/memphis/news/2020/04/13/guest-column-independent-contractors-now.html> [<https://perma.cc/9LFL-4MGG>].

20. Coronavirus Aid, Relief, and Economic Security Act, H.R. 748, 116th Cong. § 1102(a)(2)(D)(ii)(II); see Brion Kirsch, *Paycheck Protection Program Loans Explained: Some Frequently Asked Questions Updated*, PULLMAN & COMPLEY (May 11, 2020), <https://www.jdsupra.com/legalnews/paycheck-protection-program-loans-32822/> [<https://perma.cc/W43Q-XE8C>]. During the recession, a similar federally funded unemployment insurance program was explored. See Chad Stone & William Chen, *Introduction to Unemployment Insurance*, CTR. ON BUDGET & POL’Y PRIORITIES (July 30, 2014), <https://www.cbpp.org/research/introduction-to-unemployment-insurance> [<https://perma.cc/36E7-LQ9S>]. The program expired in 2014. *Id.*

21. See generally Orly Lobel, *The Gig Economy & the Future of Employment and Labor Law*, 51 U.S.F. L. REV. 51 (2017) (discussing how the rise of the gig economy is partly due to the decline of full-time jobs and cycles of high unemployment rates); Orly Lobel, *The Law of the Platform*, 101 MINN. L. REV. 87 (2016) (discussing how policymakers can respond to the dynamics of the gig economy).

22. Assemb. B. 5, 2019–2020 Assemb., Reg. Sess. (Cal. 2019).

23. Noam Scheiber, *Drivers Say Uber and Lyft Are Blocking Unemployment Pay*, N.Y. TIMES (Mar. 24, 2020), <https://www.nytimes.com/2020/03/24/business/economy/coronavirus-uber-lyft-drivers-unemployment.html> [<https://perma.cc/H28C-TLFM>].

independent workers are on the frontlines; all deserve support.”²⁴ Uber also issued a statement, “Congress fully funded Pandemic Unemployment Assistance for gig workers so that every state, many of which face historic deficits, could give these workers immediate financial support at no cost to their own funds.”²⁵

When a state pays unemployment insurance to a worker it deems an employee, it can then demand reimbursement of the payment from the company retroactively, even if the company has not paid into the state unemployment insurance system.²⁶ The federal CARES Act funding, by contrast, is based on a federal unemployment insurance trust that taxes employers with no requirement that the companies of individuals applying for the grant pay into the fund retroactively.²⁷ However, on May 5, the state of California sued Uber and Lyft for classifying their drivers as contractors instead of employees in violation of state laws, including California’s newly enacted AB5, which fundamentally expands the classification of workers as employees.²⁸ Notably, New Jersey and New York, two states deeply impacted by COVID-19, each have proposed legislation to adopt the “ABC Test” and model statutes after California’s AB5.²⁹

24. Noam Scheiber, *Uber and Lyft Drivers Face Hurdles to Stimulus Bill Benefits*, N.Y. TIMES (Apr. 8, 2020), <https://www.nytimes.com/2020/04/08/business/economy/coronavirus-gig-unemployment.html> [https://perma.cc/5N2R-JJAZ].

25. Noam Scheiber, *Jobless Claims by Uber and Lyft Drivers Revive Fight Over Labor Status*, N.Y. TIMES (Apr. 17, 2020), <https://www.nytimes.com/2020/04/17/business/economy/coronavirus-uber-lyft-unemployment.html> [https://perma.cc/V5SU-BFWB].

26. See, e.g., Chris Opfer, *Uber Hit with \$650 Million Employment Tax Bill in New Jersey*, BLOOMBERG L. (Nov. 14, 2019, 6:55 AM), <https://news.bloomberglaw.com/daily-labor-report/uber-hit-with-650-million-employment-tax-bill-in-new-jersey> [https://perma.cc/SL3H-339Q].

27. Sam Harnett, *Uber and Lyft Aren’t Paying for Drivers’ Unemployment: You Are, Confirms Newsom*, KQED (Apr. 15, 2020), <https://www.kqed.org/news/11812496/uber-and-lyft-arent-paying-for-drivers-unemployment-you-are-confirms-newsom> [https://perma.cc/LW83-J5AB].

28. Shannon Bond, *California Sues Uber and Lyft for ‘Cheating’ Drivers and Taxpayers*, NPR (May 5, 2020, 6:07 PM), <https://www.npr.org/2020/05/05/850969759/california-sues-uber-and-lyft-for-cheating-drivers-and-taxpayers> [https://perma.cc/TRK4-KLF6]; Lemor Abrams, *Coronavirus Propels New Effort to Stop California’s Controversial AB5 Law*, CBS (Apr. 9, 2020, 10:21 PM), <https://www.cbs8.com/article/news/local/coronavirus-propels-new-effort-to-stop-californias-controversial-ab5-law/509-ffec2c25-ca83-4fe0-af73-74762c974897> [https://perma.cc/P9K2-C5SJ].

29. Eric Tate & Andrew Turnbull, *Employment Law Trends to Watch in 2020*, MORRISON FOERSTER (Feb. 24, 2020), <https://www.jdsupra.com/legalnews/employment-law-trends-to-watch-in-2020-88588/> [https://perma.cc/S8W4-8BPN].

California’s Attorney General, Xavier Becerra, accuses the companies of depriving their drivers of benefits while avoiding paying “hundreds of millions of dollars in social safety net obligations.”³⁰ Becerra and the City Attorneys of Los Angeles, San Diego, and San Francisco, filed suit against Uber and Lyft, seeking to enforce California’s Unfair Competition Law and asking for injunctive relief to prevent the misclassification of employees under AB5.³¹ The Complaint alleges that Uber and Lyft’s “misclassification of their Driver workforce has allowed Defendants to gain an unlawful competitive advantage over their competitors by circumventing the protections and benefits that the law requires employers to provide to their employees.”³² The Complaint seeks any money or property acquired by violations under the California Business and Professions Code and additional civil penalties in an amount up to \$2,500 for each violation of the UCL.³³ The suit was partially motivated by the companies’ response to the pandemic:

Uber and Lyft have worked relentlessly to find a work-around [to AB5]. They lobbied for an exemption to A.B.5, but the Legislature declined. They utilize driver contracts with mandatory arbitration and class action waiver provisions to stymie private enforcement of drivers’ rights. And now, even amid a once-in-a-century pandemic, they have gone to extraordinary lengths to convince the public that their unlawful misclassification scheme is in the public interest.³⁴

According to the California attorney general, Uber and Lyft drivers are employees under California’s ABC test because the companies exercise control over drivers through their apps, which “function like algorithmic managers.”³⁵ The lawsuit is still pending.

The CARES Act provides benefits for covered individuals only if they are “not entitled to any other unemployment compensation” or have exhausted their state unemployment compensation.³⁶ This could result in a catch-22. The PUA restriction could be interpreted as a requirement that gig workers apply and be denied benefits before applying for the benefits under the PUA.³⁷ In California, Governor Gavin Newsom signed an executive order

30. Bond, *supra* note 28.

31. *Id.*

32. Complaint for Injunctive Relief, Restitution, and Penalties at 18, *California v. Uber Techs., Inc.*, No. CGC-20-584402 (Cal. Super. Ct., Aug. 10, 2020).

33. *Id.* at 26.

34. *Id.* at 4.

35. *Id.* at 17.

36. Coronavirus Aid, Relief, and Economic Security Act, H.R.748, 116th Cong. § 2102 (2020).

37. Employees who do receive unemployment insurance from the state programs are eligible for Pandemic Unemployment Compensation (PUC) under the CARES Act, which provides \$600 a week to those who qualify under state unemployment insurance from the beginning of April through the end of July. Yet PUA benefits are still desirable as the program provides up to thirty-nine weeks of benefits and applies retroactively to the

ordering California's unemployment agency to assist gig workers to receive the federal PUA, seemingly in direct conflict with the federal guidance that only workers ineligible for traditional unemployment benefits can receive the federal pandemic assistance.³⁸ At the same time, under some states' laws, including California, gig workers such as Uber drivers are at least formally covered by the state unemployment insurance because of recent legislative reforms, although these states have not moved to systematically cover these workers.³⁹ Could this leave the workers empty-handed from either benefit program? These debates are far from resolved. California's recent reforms to classify gig workers as employees was brought to the ballots in November 2020.⁴⁰

California's AB5, the new law that broadens the definition of employee—extending employment status to most workers including platform gig workers—took effect just this year.⁴¹ The new legislation created a great deal of battles and administrative delays in the unemployment system. California began accepting PUA claims on April 28, and some employees are receiving disappointing news relating to their benefits.⁴² California, like many states, utilizes information from employment documents, such as W-2s, which are traditionally only given to employees.⁴³ As companies

beginning of February and are available once state compensation and PUC benefits are exhausted. *California: Unemployment Compensation Update*, BALLARD SPARH LLP (Apr. 29, 2020), <https://www.ballardspahr.com/alertspublications/legalalerts/2020-04-29-california-unemployment-compensation-update> [<https://perma.cc/AW95-ATXP>].

38. *Governor Newsom Announces New Initiatives to Support California Workers Impacted by COVID-19*, OFF. GOVERNOR GAVIN NEWSOM (Apr. 15, 2020), <https://www.gov.ca.gov/2020/04/15/governor-newsom-announces-new-initiatives-to-support-california-workers-impacted-by-covid-19/> [<https://perma.cc/HH6E-UBRJ>].

39. *See, e.g.*, Kate Conger & Noam Scheiber, *California Bill Makes App-Based Companies Treat Workers as Employees*, N.Y. TIMES (Sept. 11, 2019), <https://www.nytimes.com/2019/09/11/technology/california-gig-economy-bill.html> [<https://perma.cc/T2CU-WKC6>].

40. *Uber and Postmates Sue to Block New California Labor Law*, CBS NEWS (Dec. 30, 2019, 11:54 PM), <https://www.cbsnews.com/news/uber-and-postmates-sue-to-block-new-california-ab5-labor-law/> [<https://perma.cc/TL5F-GBWV>]; *see infra* note 128 and accompanying text.

41. *See* Carolyn Said, *AB5 Gig Work Bill: All Your Questions Answered*, S.F. CHRON. (Sept. 16, 2019), <https://www.sfchronicle.com/business/article/AB5-gig-work-bill-All-your-questions-answered-14441764.php> [<https://perma.cc/2M2H-5X7Q>].

42. Greg Iacurci, *Some Gig Workers Are Getting \$0 in Unemployment Benefits*, CNBC (Apr. 24, 2020, 9:26 AM), <https://www.cnbc.com/2020/04/24/some-gig-workers-are-getting-0-in-unemployment-benefits.html> [<https://perma.cc/A5FN-88EK>].

43. *See id.*

like Uber have never issued W-2s to their drivers, states are struggling to calculate the weekly benefits for these newly eligible employees.⁴⁴ There have been multiple allegations that Uber and Lyft have been making it difficult for their drivers to fill out the applications by failing to provide verifiable information about the hours drivers have worked with the companies.⁴⁵ Some applicants have received award letters from California’s Employment Development Department (EDD) stating that their total benefits were \$0.⁴⁶ The EDD has instructed gig economy workers to respond to such notices if they believe that their employer had previously “misclassified” them as independent contractors and their income was incorrectly reported.⁴⁷ Particularly troubling are the cases of “hybrid workers,” those who may earn a small amount on an employer’s payroll and thus receive a W-2 but largely earn a living through self-employment and gig work.⁴⁸ These hybrid workers who have made more than \$1,300 in any quarter for the previous eighteen months before applying have been excluded from receiving the benefits under PUA.⁴⁹ Instead of their total income serving as the basis for calculating their unemployment benefits, these hybrid workers are instead having only the W-2 income serve as their unemployment basis.⁵⁰

After the CARES Act passed, California issued guidelines on its government website instructing gig workers to “list your gig employer as your last employer.”⁵¹ Subsequently, Uber, Lyft, and DoorDash asked government officials to order “the state agency overseeing unemployment insurance to remove that sentence . . . and to help gig workers apply for Pandemic Unemployment Assistance.”⁵² The email from the platform companies stated, “Many self-employed ride-share and delivery drivers intend to apply for loans and other federal relief available to independent contractors,” . . .

44. See Megan Cassella & Rebecca Rainey, *Gig Workers Struggle to Claim Unemployment Relief*, POLITICO (Apr. 15, 2020, 5:30 PM), <https://www.politico.com/news/2020/04/15/workers-struggle-to-claim-unemployment-relief-188814> [<https://perma.cc/DL39-C9ZL>].

45. *Id.*

46. Iacurci, *supra* note 42.

47. *Pandemic Unemployment Assistance FAQs*, CAL. EMP. DEV. DEP’T, https://www.edd.ca.gov/about_edd/coronavirus-2019/pandemic-unemployment-assistance/faqs.htm [<https://perma.cc/N654-JEK4>].

48. Kim Christensen, *Gig Workers Are Now Eligible for Special Unemployment Benefits. But Many Won’t Get Them*, L.A. TIMES (May 2, 2020, 4:00 AM), <https://www.latimes.com/california/story/2020-05-02/coronavirus-unemployment-gig-workers-benefits-pandemic> [<https://perma.cc/988M-E8SC>].

49. *Id.*

50. *See id.*

51. Scheiber, *supra* note 25 (quoting *Pandemic Unemployment Assistance FAQs*, *supra* note 47).

52. *Id.*

and they ‘worry that making an inaccurate representation that they are employees,’ could preclude that” application process.⁵³

Other states are similarly experiencing ongoing battles over employee status, which had begun well before the pandemic. In 2018, New York’s unemployment insurance appeal board ruled that Uber drivers were eligible for unemployment benefits.⁵⁴ However, Uber has stated that the ruling only applied to the three claimant drivers in 2018 because it had changed policies in recent years.⁵⁵ At the same time, New York has not demanded contributions to the unemployment insurance fund from Uber. Similarly, Illinois and New Jersey issued decisions before the crisis that gig drivers were eligible for state unemployment insurance.⁵⁶ Gig platforms have not paid into state unemployment funds in those states where they are theoretically required to do so. New Jersey sent Uber a bill for \$650 million in unpaid unemployment insurance for its drivers in 2019.⁵⁷

After the CARES Act passed, the Labor Department issued a guidance that may make it more difficult for gig workers to apply for the unemployment benefits.⁵⁸ The guidance states that independent contractors can only apply if they are “forced to suspend operations.”⁵⁹ And even beyond eligibility fights, although Congress included gig workers under the stimulus package,

53. *Id.*

54. Dana Rubinstein, *Uber Loses a ‘Precedential’ Victory, and Some New York State Drivers Win ‘Employee’ Status*, POLITICO (July 18, 2018, 7:01 PM), <https://www.politico.com/states/new-york/albany/story/2018/07/18/uber-loses-a-precedential-victory-and-some-new-york-state-drivers-win-employee-status-518782> [<https://perma.cc/83TN-VSLL>].

55. Scheiber, *supra* note 23.

56. See Eric Cox, *Gig Workers Now Eligible to Apply for Unemployment Benefits*, CBS CHI. (May 11, 2020, 5:57 AM), <https://chicago.cbslocal.com/2020/05/11/gig-workers-now-eligible-to-apply-for-unemployment-benefits/> [<https://perma.cc/3FBV-CY38>]; Karin Price Mueller, *If You’re a Gig Worker, Freelancer or Self-Employed, Here’s How You Can Get Unemployment Benefits*, NJ ADVANCE MEDIA (Apr. 14, 2020), <https://www.nj.com/coronavirus/2020/04/if-youre-a-gig-worker-freelancer-or-self-employed-heres-how-you-can-get-unemployment-benefits.html> [<https://perma.cc/M4G5-R53U>].

57. Opfer, *supra* note 26.

58. See Julie Kashen et al., *Collective Responses for Independent Contractors during COVID-19*, CENTURY FOUND. (Apr. 21, 2020), <https://tcf.org/content/report/collective-responses-for-independent-contractors-during-covid-19/?session=1> [<https://perma.cc/2FPX-H5TA>].

59. *Id.*

states have delayed paying any benefits to such workers.⁶⁰ Due to difficulties caused by modernizing old unemployment systems and strict eligibility guidelines from the Labor Department, many drivers have been unable to take advantage of the benefits awarded under the federal stimulus package.⁶¹

In addition to the CARES Act, Congress passed the Families First Coronavirus Response Act (FFCRA), which provides paid sick leave in the form of refundable tax credits.⁶² Like the CARES Act's unemployment benefits, the sick leave benefits under the FFCRA extend broadly to employees, small and midsize businesses, and self-employed workers.⁶³ Under the FFCRA, private employers with *fewer* than 500 employees are required to provide employees with paid leave taken for reasons related to COVID-19 and will be eligible for tax credits to compensate for the cost of providing employees with that leave.⁶⁴ The FFCRA was designed to allow employers to keep their employees on the payroll and abide by the required public health guidelines. The FFCRA provides two weeks—up to eighty hours—of paid sick leave if an employee is unable to work because the employee is quarantined due to COVID-19 related symptoms, and two weeks of paid sick leave at two-thirds the employee's regular rate of pay if an employee is unable to work because of a "bona fide need" to care for an individual subject to quarantine.⁶⁵ Employees may take up to an additional ten weeks of paid expanded family and medical leave at two-thirds the employee's regular rate of pay if an employee is unable to work due to a need to care for a child whose school or childcare provider is closed or unavailable for reasons related to COVID-19. Looking ahead, the bigger picture is that the extension of unemployment benefits and sick leave to independent contractors presents a new path in American law, though the current measures are temporary and narrow. The United States has historically been an outlier in mandating very limited sick leave rights to

60. Tony Romm, *Uber Drivers and Other Gig Economy Workers Were Promised Unemployment Benefits. It May Be a Long Wait.*, WASH. POST (Apr. 2, 2020, 5:37 AM), <https://www.washingtonpost.com/business/2020/04/02/uber-airbnb-lyft-unemployment-coronavirus/> [https://perma.cc/5XYX-JFM9].

61. Scheiber, *supra* note 23; Romm, *supra* note 60.

62. See *Families First Coronavirus Response Act: Questions and Answers*, U.S. DEP'T LAB., <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions> [https://perma.cc/R7BE-742J].

63. *Temporary Rule: Paid Leave Under the Families First Coronavirus Response Act*, U.S. DEP'T LAB., <https://www.dol.gov/agencies/whd/ffcra> [https://perma.cc/MNW7-98UN].

64. *Id.* The 500 employees also include "joint-employees," which essentially excludes staffing and temp agencies from providing this leave. *Id.*

65. *Families First Coronavirus Response Act: Employer Paid Leave Requirements*, U.S. DEP'T LAB., <https://www.dol.gov/agencies/whd/pandemic/ffcra-employer-paid-leave> [https://perma.cc/9REX-RTRM].

employees compared to the rest of the developed world.⁶⁶ Local governments have also been stepping in during the pandemic to provide clarity and benefits where state and federal regulations are lacking. The San Francisco Board of Supervisors recently unanimously approved a local ordinance that requires employers with 500 or more workers to provide two weeks of paid sick leave on account of COVID-19.⁶⁷

III. THE GIG OF DELIVERY DURING QUARANTINE & THE HEALTH AND SAFETY OF FREELANCERS

At least 25 million Americans work in the “gig economy,” or roughly one in six Americans in the workforce.⁶⁸ The “gig economy” is, by nature, comprised of a variety of different occupations. Gig workers are employed as graphic designers, ride-share drivers, dog walkers, and wedding photographers.⁶⁹ Some of these gigs can be done online, for example providing editing and programming services via Fiverr or selling artisan goods via Etsy. Other gigs are at the frontier of in-person services, such as shopping, delivery, and cleaning. The stay-at-home orders issued by governors in most states forced Americans to live a new way of life. Instead of the usual Friday afternoon rush in grocery stores, one could expect to stand in line for at least twenty minutes before even stepping foot inside the store. Although the specific restrictions vary from state to state, and some of these restrictions have slowly been lifted, most of these emergency orders commonly declare grocery, restaurant, and package

66. Danielle Kurtzleben, *Lots of Other Countries Mandate Paid Leave. Why Not the U.S.?*, NPR (July 15, 2015, 11:47 AM), <https://www.npr.org/sections/itsallpolitics/2015/07/15/422957640/lots-of-other-countries-mandate-paid-leave-why-not-the-us> [https://perma.cc/74E7-5JRY]. For a discussion of American sick leave provisions, see Orly Lobel, *Big-Box Benefits: The Targeting of Giants in a National Campaign to Raise Work Conditions*, 39 CONN. L.J. 1685, 1691, 1697 (2007).

67. Dawn Kawamoto & Ted Anderson, *S.F. Board of Supervisors Passes COVID-19 Paid Sick Leave Requirement*, S.F. BUS. TIMES (Apr. 7, 2020, 10:19 PM), <https://www.bizjournals.com/sanfrancisco/news/2020/04/07/s-f-board-of-supervisors-passes-covid-19-paid-sick.html> [https://perma.cc/7T29-9DSX].

68. Shawn Donnan, Reade Pickert & Catarina Saraiva, *U.S. Job Losses Pass 22 Million with Gig Workers Waiting for Aid*, BLOOMBERG L. (Apr. 16, 2020, 7:09 AM), <https://news.bloomberglaw.com/daily-labor-report/american-jobs-collapse-worsens-with-gig-workers-stuck-in-limbo> [https://perma.cc/8RPY-TMYV].

69. See Steve Harvey, *Self-employed? Coronavirus and the Gig Economy*, FABRIK (Mar. 25, 2020), <https://fabrikbrands.com/coronavirus-and-the-gig-economy/> [https://perma.cc/S832-FLED].

delivery to be “essential work” that will continue during the lockdown.⁷⁰ This new mode of living has imposed limitations on various groups of individuals—especially the elderly or those who are immunocompromised. Ordering food or essential products for home delivery—what was once considered mostly on account of convenience—is now what some people must rely on. As a result, while a majority of people are sheltering in place to avoid the virus, gig workers across the nation are risking their health and safety to ensure people in quarantine can access the supplies they need. The School of Public Health at the University of Washington released an estimate that 10%—14.5 million—of American workers are employed in occupations where exposure to disease or infection happens at least weekly and 18.4%—26.5 million—where exposure happens at least monthly.⁷¹ Some, out of financial necessity, are turning to gig work for the first time despite the risks. These frontline gig workers are disproportionately people of color and immigrants.⁷²

Ride-sharing has seen dramatic drops with drivers for Uber and Lyft among the hardest hit by the impact of COVID-19.⁷³ With fewer users seeking rides, gig drivers are concerned that the lack of pay and protections will cripple them financially.⁷⁴ Yet other gig work has seen a rise in demand, like grocery delivery, take-out services, and online work.⁷⁵ Instacart and Shipt saw tips rising 30% during the pandemic, and DoorDash reported increases in earning per hour.⁷⁶ At the beginning of the quarantine orders, grocery stores saw record high increases in consumer spending.⁷⁷ In March,

70. See Mike Snider, *What Is Essential and Non-Essential During a Pandemic?*, USA TODAY (Mar. 21, 2020, 8:03 AM), <https://www.usatoday.com/story/money/business/2020/03/21/coronavirus-conditions-lead-state-decisions-essential-businesses/2884758001/> [https://perma.cc/9WBC-76TU].

71. MARISSA G. BAKER, TREVOR K. PECKHAM & NOAH S. SEIXAS, ESTIMATING THE BURDEN OF UNITED STATES WORKERS EXPOSED TO INFECTION OR DISEASE: A KEY FACTOR IN CONTAINING RISK OF COVID-19 INFECTION 1, 4 (2020), <https://doi.org/10.1371/journal.pone.0232452> [https://perma.cc/95GA-TTDZ].

72. See Megan Rose Dickey, *Gig Workers in San Francisco Are Mostly People of Color and Many Are Immigrants, According to Survey*, TECHCRUNCH (May 5, 2020, 11:45 AM), <https://tcrn.ch/3dj62FX> [https://perma.cc/ZT64-PQNK].

73. See Daniel Howley, *‘Hopeless and Scared’: Uber and Lyft Drivers Face Financial Ruin After Coronavirus*, YAHOO FIN. (Mar. 20, 2020), <https://finance.yahoo.com/news/uber-lyft-drivers-financial-ruin-coronavirus-172639654.html> [https://perma.cc/T4RY-D4AJ].

74. See *id.*

75. See Alexandra Olson, *What to Know before Applying for Gig Work During the Coronavirus Pandemic*, FORTUNE (Apr. 15, 2020, 4:00 PM), <https://fortune.com/2020/04/15/coronavirus-jobs-hiring-gig-workers-uber-lyft-instacart-food-delivery/> [https://perma.cc/7CAU-GH62].

76. *Id.*

77. Lydia Dishman, *The Delivery App Landscape Is Changing and Sustaining Businesses During COVID-19*, U.S. CHAMBER COM. (Mar. 30, 2020), <https://www.us>

grocery stores and large retailers—such as Walmart and Target—reportedly saw record numbers of downloads of their online applications.⁷⁸ Instacart, a grocery delivery platform, enjoyed a correlative spike as well, and had a tenfold increase in its sales growth rates week over week in March.⁷⁹ Accordingly, Instacart announced that it planned to hire 300,000 full service shoppers.⁸⁰ Similarly, Amazon, in the midst of mass layoffs in many sectors, has hired more than 175,000 workers in order to keep up with demand.⁸¹ Lyft, after suffering a large decline in ridership, started referring its drivers to Amazon in late March.⁸² In mid-April, Lyft launched a food and medical supply delivery service to help support health care centers, government agencies, and non-profits, allowing drivers to opt in to make such deliveries.⁸³

Contactless delivery services, such as Uber Eats, GrubHub, DoorDash, and Postmates—the major food delivery services—reportedly slowed down at first, in part as consumers reacted “to both the expense of ordering prepared meals from restaurants and the relative safety of knowing how

chamber.com/co/good-company/launch-pad/coronavirus-pandemic-food-delivery-businesses [https://perma.cc/8GCG-WSAX].

78. Sarah Perez, *Grocery Delivery Apps See Record Downloads amid Coronavirus Outbreak*, TECHCRUNCH (Mar. 16, 2020, 9:14 AM), <https://techcrunch.com/2020/03/16/grocery-delivery-apps-see-record-downloads-amid-coronavirus-outbreak/> [https://perma.cc/W6T9-3MQW]. As of April 7, 2020, Walmart was the number one shopping app in the United States and surpassed downloads of Amazon’s app by 20%. Jessica Dumont, *Walmart’s Grocery App Downloads Reach Record Highs*, GROCERY DIVE (Apr. 13, 2020), <https://www.grocerydive.com/news/walmarts-grocery-app-downloads-reach-record-highs/575855/> [https://perma.cc/CGW5-NTYQ].

79. See Perez, *supra* note 78.

80. Danielle Abril, *Help Wanted: Amazon and Online Delivery Services Staff Up During Coronavirus Outbreak*, FORTUNE (Mar. 24, 2020, 6:00 AM), <https://fortune.com/2020/03/24/amazon-instacart-shipt-hiring-coronavirus/> [https://perma.cc/SK5Y-AB5A].

81. *Amazon Has Hired 175,000 Additional People*, AMAZON DAY ONE (Apr. 13, 2020), <https://blog.aboutamazon.com/company-news/amazon-hiring-for-additional-75-000-jobs> [https://perma.cc/Q2L6-C4W3]; see also Michelle Cheng, *Gig Jobs Are Suddenly Looking More Secure amid Coronavirus*, QUARTZ (Mar. 18, 2020), <https://qz.com/1820467/companies-shift-to-hiring-more-delivery-workers-amid-coronavirus/> [https://perma.cc/ZA59-UDK2].

82. Nick Statt, *Lyft Is Referring Drivers to Jobs at Amazon After Massive Ridership Decline*, VERGE (Mar. 27, 2020, 8:22 PM), <https://www.theverge.com/2020/3/27/21197699/lyft-amazon-coronavirus-ridership-decline-job-referral-warehouse-grocery-delivery> [https://perma.cc/8UPD-SC2G].

83. Brian Heater, *Lyft Launches Food and Medical Supply Delivery for Agencies and Orgs Impacted by COVID-19*, TECHCRUNCH (Apr. 15, 2020, 9:45 AM), <https://techcrunch.com/2020/04/15/lyft-launches-food-and-medical-supply-delivery-for-agencies-and-orgs-impacted-by-covid-19/> [https://perma.cc/59BB-JNLT].

their food was prepared at home.”⁸⁴ Still, these companies are now actively adding delivery workers to their ranks.⁸⁵ Other, lesser-known delivery companies have risen to prominence during the pandemic, such as the Target-owned delivery company Shipt, the Philadelphia-based startup goPuff, and New York-based FreshDirect. DoorDash started a “priority access program” giving access and preference to restaurant employees to sign up for the delivery app.⁸⁶ Uber’s app allowed Uber drivers to shift from ride-hailing to Uber Eats delivery driving.⁸⁷

Delivery during a pandemic is risky business. While gig companies profit from the increase in demand, gig workers have been typically classified as independent contractors, working without health care benefits or sick leave options. Independent contractors are also generally not covered by federal and state health and safety regulations.⁸⁸ Gig workers in the transportation space are especially exposed to virus contraction.⁸⁹ As a result, since the beginning of the pandemic, workers have sounded alarms about the lack of pay or protection.⁹⁰ Instacart, Whole Foods, and Amazon—which owns Whole Foods—each faced strikes and walkouts in March and April.⁹¹ Instacart shoppers demanded better pay and health protection as they continued to expose themselves while making deliveries. Instacart changed some of its policies immediately after the protest and announced that it would “provide health and safety kits” to its shoppers, which included hand sanitizer, face

84. Dishman, *supra* note 77.

85. See Abril, *supra* note 80.

86. Olson, *supra* note 75.

87. See *How to Start Delivering Using the Uber Eats App*, UBER, <https://www.uber.com/us/en/drive/basics/how-to-start-delivering/> [<https://perma.cc/CVS9-BKPQ>].

88. See generally Orly Lobel, *Interlocking Regulatory and Industrial Relations: The Governance of Workplace Safety*, 57 ADMIN. L. REV. 1071 (2005) (discussing how independent contractors are not covered by regulations and can be underregulated). For a discussion of how this issue impacts professional athletes, see Adam M. Finkel et al., *The NFL as a Workplace: The Prospect of Applying Occupational Health and Safety Law to Protect NFL Workers*, 60 ARIZ. L. REV. 291, 295 (2018).

89. See *Here Is Everything Rideshare (Uber/Lyft) Drivers Need to Know About Coronavirus*, GRIDWISE (Mar. 6, 2020), <https://gridwise.io/here-is-everything-rideshare-uber-lyft-drivers-need-to-know-about-coronavirus> [<https://perma.cc/7NQV-ZD4Y>].

90. Alina Selyukh & Shannon Bond, *Amazon, Instacart Grocery Delivery Workers Demand Coronavirus Protection and Pay*, NPR (Mar. 30, 2020, 8:47 AM), <https://www.npr.org/2020/03/30/823767492/amazon-instacart-grocery-delivery-workers-strike-for-coronavirus-protection-and-> [<https://perma.cc/JR94-LCHF>].

91. See *id.*; Russell Brandom, *After Walkouts, Amazon Pledges Temperature Checks and Masks in All Warehouses*, VERGE (Apr. 2, 2020, 10:12 AM), <https://www.theverge.com/2020/4/2/21204254/amazon-warehouse-walkout-coronavirus-protections-masks-temperature> [<https://perma.cc/Q8LG-X9S8>]; Shirin Ghaffary, *The Instacart Strike, Explained*, VOX (Mar. 30, 2020, 9:10 PM), <https://www.vox.com/recode/2020/3/30/21200495/instacart-strike-coronavirus-covid-19-working-conditions-amazon-whole-foods-gig-economy> [<https://perma.cc/2MBK-U2DX>].

masks, and a reusable thermometer.⁹² Similarly, Amazon has been criticized for the lack of health protection in some of its warehouses and fulfillment centers.⁹³ Some of its Whole Foods employees staged a walkout in protest of lack of health protection in the face of increased grocery demand.⁹⁴ Amazon began taking employees' temperatures before entering work and providing protective masks for employees.⁹⁵ Uber and Lyft have also provided some cleaning and sanitizing materials to their drivers.⁹⁶ However, only in mid-April did Uber begin providing masks to some of its drivers in hard-hit areas, and only in early May did it announce that drivers would be required to wear face masks.⁹⁷

The major platform companies have also announced limited sick leave pay for their workers. Uber, Lyft, Instacart, and DoorDash provided fourteen days of paid sick leave to drivers if they had a coronavirus diagnosis and

92. Ghaffary, *supra* note 91.

93. *See, e.g.*, Brandom, *supra* note 91.

94. *Id.*

95. *Id.*

96. *See* Patrick Sisson, *Uber and Lyft Drivers in NYC, Concerned by Coronavirus, Say Apps Aren't Helping Enough*, CURBED N.Y. (Mar. 13, 2020, 12:57 PM), <https://ny.curbed.com/2020/3/13/21178259/coronavirus-new-york-city-uber-lyft-transportation-drivers> [<https://perma.cc/V6DC-8ULH>].

97. Andrew J. Hawkins, *Uber to Start Shipping Face Masks to Drivers and Deliver Workers*, VERGE (Apr. 9, 2020, 2:00 PM), <https://www.theverge.com/2020/4/9/21215186/uber-face-mask-drivers-delivery-workers-shipping-coronavirus> [<https://perma.cc/Y36R-YDU7>]; Kirsten Korosec, *Uber Drivers and Riders Will Be Required to Wear Face Coverings*, TECHCRUNCH (May 4, 2020, 1:37 PM), <https://techcrunch.com/2020/05/04/uber-drivers-and-riders-will-be-required-to-wear-face-coverings/> [<https://perma.cc/V4KY-GC39>]; Gus Fuldner, *COVID-19 Safety Update*, UBER NEWSROOM (Apr. 10, 2020), <https://www.uber.com/newsroom/covid-19-safety-update/> [<https://perma.cc/S8M3-EHF7>]. On April 7, Uber shipped its first order of face masks to New York City drivers. Hawkins, *supra*. Gig work companies including Lyft, Uber, DoorDash, Postmates, and Instacart initiated emergency assistance policies for independent contractors. *See An Update on COVID-19 Financial Assistance*, UBER (Apr. 10, 2020), <https://www.uber.com/blog/update-covid-19-financial/> [<https://perma.cc/ZC6C-6XN9>]; *Introducing New Guidelines and Policies to Support the Health and Safety of the Instacart Shopper Community*, INSTACART (Mar. 9, 2020), <https://medium.com/shopper-news/introducing-new-guidelines-and-policies-to-support-the-health-safety-of-the-shopper-community-df75892eb220> [<https://perma.cc/F3WK-9P3R>]; *Lyft's Latest on COVID-19*, LYFT, <https://www.lyft.com/safety/coronavirus> [<https://perma.cc/JJE9-T9ZE>]; *Postmates Coronavirus (COVID-19) Response*, POSTMATES (Mar. 13, 2020), <https://blog.postmates.com/postmates-coronavirus-covid-19-response/> [<https://perma.cc/4EVY-ES5J>]; *Protecting Yourself and Others from the Coronavirus (COVID-19)*, DOORDASH, https://help.doordash.com/consumers/s/article/Custom-Protecting-yourself-and-others-from-the-Coronavirus-COVID-19?language=en_US [<https://perma.cc/A765-YF4P>].

needed to stay home.⁹⁸ Postmates announced it would pay for doctors' visits and medical expenses for any driver who contracts COVID-19. DoorDash set up a "task force" to develop support for its contractors, which includes fourteen days of assistance to those drivers who contract COVID-19 or are placed under quarantine.⁹⁹ Amazon Flex said it would assist drivers impacted by the outbreak on an "individual, case-by-case basis."¹⁰⁰ Instacart's amended sick pay policy only applies after a worker provides documentation of a positive COVID-19 test.¹⁰¹

Underlying these private responses by platforms regarding the risks their laborers are facing are the ongoing legal battles about classification. Last year, San Diego's City Attorney office brought suit against Instacart alleging that the company was misclassifying its drivers as independent contractors in violation of California law.¹⁰² Similar to Uber, the company regards itself as a "communications platform," arguing that workers are not controlled and are free to make their own schedules.¹⁰³

98. Johnny Diaz & Karen Zraick, *Walmart, Uber and Others Tweak Sick-Leave Policies as Coronavirus Spreads*, N.Y. TIMES (Mar. 11, 2020), <https://www.nytimes.com/2020/03/11/business/new-sick-leave-policy.html> [<https://perma.cc/VF4L-LAE3>]; Jay Peters, *Instacart and DoorDash Now Offer Paid Sick Leave for Workers Diagnosed with COVID-19*, VERGE (Mar. 10, 2020, 3:34 PM), <https://www.theverge.com/2020/3/10/21173287/instacart-coronavirus-sick-pay-workers-in-store-shoppers-covid19> [<https://perma.cc/YJH5-YKV6>]; see also *An Update on COVID-19 Financial Assistance*, supra note 97.

99. Richard R. Meneghello, *What Gig Economy Companies Are Doing During the COVID-19 Outbreak*, LEXOLOGY (Mar. 15, 2020), <https://www.lexology.com/library/detail.aspx?g=67082c5c-e915-49f9-9038-9c8276b78051> [<https://perma.cc/UCF4-FZAP>].

100. Jay Peters, *Amazon Flex Drivers Won't Be Paid if They Have to Stay Home Due to Coronavirus, but Uber's and Lyft's Will*, VERGE (Mar. 7, 2020, 10:05 AM), <https://www.theverge.com/2020/3/6/21168724/amazon-flex-coronavirus-warner-uber-lyft-postmates-grubhub-instacart-doordash> [<https://perma.cc/2C5V-BE8M>].

101. Dara Kerr, *'An Artificially High Bar': Instacart's COVID-19 Sick Leave Is Hard to Get*, CNET (May 20, 2020, 5:00 AM), <https://www.cnet.com/news/an-artificially-high-bar-instacarts-covid-sick-leave-is-hard-to-get/> [<https://perma.cc/VX94-X5N5>]; Russell Bandom, *Instacart Will Expand Sick Pay to More Gig Workers*, VERGE (June 2, 2020, 4:01 PM), <https://www.theverge.com/2020/6/2/21278359/instacart-sick-pay-gig-workers-dc-ag-telemedicine-childcare> [<https://perma.cc/557P-B6TP>].

102. Jesse Marx, *San Diego's Case Against Instacart Is Going Strong amid Coronavirus Crisis*, VOICE SAN DIEGO (Mar. 27, 2020), <https://www.voiceofsandiego.org/topics/government/san-diegos-case-against-instacart-is-going-strong-amid-coronavirus-crisis/> [<https://perma.cc/F884-V6NP>].

103. Sara Libby, *Instacart Lawsuit Puts City Attorney in the Thick of the Worker Classification Fight*, VOICE SAN DIEGO (Feb. 11, 2020), <https://www.voiceofsandiego.org/topics/government/instacart-lawsuit-puts-city-attorney-in-the-thick-of-the-worker-classification-fight/> [<https://perma.cc/5A7N-6M4W>]. In addition, there have been legal battles on the ways shoppers on the platform are tipped. In 2017, Instacart settled a \$4.6 million class action suit with its independent contractors who claimed improper tip pooling. Brenna Houck, *Instacart Is Revising Its Outrageous Tipping Policy, Following Public Outcry*, EATER (Feb. 6, 2019, 5:32 PM), <https://www.eater.com/2019/2/6/18214354/instacart-delivery-worker-pay-tipping-policy-doordash> [<https://perma.cc/EHC2-WU5A>].

Responding to Instacart's growth during the pandemic, the San Diego City Attorney said in a statement, "At a time when delivery services are needed more than ever, Instacart must earn the public's trust by protecting its employees and the customers whose food they touch Health and safety is everyone's first priority and Instacart needs to step up, act responsibly and follow the law."¹⁰⁴

Gig workers face uncertainty and risk during the pandemic, which has exposed fault lines in employee classification. This means that employees who have a medical condition that increases the risk of COVID-19 may be able to claim accommodation by leave, reduced hours, and work-from-home as well as claiming unsafe working conditions under the federal Occupational Safety and Health Administration (OSHA) Act. OSHA's general duty clause, requiring employers to prevent significant risk to their employees, and OSHA's work refusal rule, allowing employees to stop working in the face of imminent danger, also only extend to employees.¹⁰⁵

This resulted in Instacart changing the description of a service fee, which customers may have misinterpreted as a tip. *Id.* Now Instacart is under fire again as a result of consumer tip-baiting. See Natasha Mascarenhas, *Instacart Makes Changes to Tip Policy Following Shopper Complaints*, TECHCRUNCH (June 5, 2020, 2:00 PM), <https://techcrunch.com/2020/06/05/instacart-makes-changes-to-tip-policy-following-shopper-complaints/> [<https://perma.cc/4ULV-LKXX>]. Tip-baiting is a practice where consumers input a large tip to incentivize a driver to take the order, but after the delivery is made, the consumer reduces the tip significantly or leaves no tip at all. *Id.* Under Instacart tipping policy, consumers had a three-day window to change or remove a tip. *Id.* As a result of tip-baiting, Instacart has changed its policy to a 24-hour window and the user must leave feedback. If the user constantly removes tips, Instacart may deactivate their account. *Id.* Similarly, in 2017, DoorDash adopted a policy guaranteeing its drivers a minimum payment per delivery. Andy Newman, *DoorDash Changes Tipping Model After Uproar from Customers*, N.Y. TIMES (July 24, 2019), <https://www.nytimes.com/2019/07/24/nyregion/doordash-tip-policy.html> [<https://perma.cc/CN2K-NQH9>]. However, any tip the driver received went to subsidize DoorDash's contribution to the minimum guarantee instead of actually tipping the driver. *Id.* This policy did not change until 2019 after backlash from bad publicity. *Id.*

104. Chris Jennewein, *City Attorney Seeks Injunction Against Instacart Grocery Delivery Firm*, TIMES SAN DIEGO (Mar. 28, 2020), <https://timesofsandiego.com/business/2020/03/28/city-attorney-seeks-injunction-against-instacart-grocery-delivery-firm/> [<https://perma.cc/C5YX-BA92>].

105. See *Workers' Right to Refuse Dangerous Work*, U.S. DEP'T LABOR, <https://www.osha.gov/right-to-refuse.html> [<https://perma.cc/5YL7-B9ME>]. Note however that the application of safety and health laws even with regard to employees when it concerns a virus pandemic is not without challenge. California, for example, only has a limited framework for workers' compensation claims for contagious diseases during a pandemic, which requires a showing that infections in the workplace were proportionately greater than that of the general population. See, e.g., *Bethlehem Steel Co. v. Indus. Accident Comm'n*, 135 P.2d 153, 157 (Cal. 1943). In *Bethlehem Steel*, the California Supreme Court again affirmed a finding

Notably, independent contractors are not bound by the exclusive remedy of workers' compensation law. This could prove an advantage for a freelancer if they can show negligence, like putting them in unnecessary health risks during the pandemic. Unlike employees, a freelancer could bring a tort claim against the business in court. These debates about classification and their high stakes expose the inadequacy of the current system, which presents all-or-nothing choices about protecting people in the job market.

IV. EMPLOYEE STATUS AS A RED HERRING

For years, the legal system has treated freelancers differently from regular employees. Under certain circumstances, gig workers may be better off economically, especially with regard to managing their work-life balance, than employees. In other cases, gig workers are low-wage laborers with a small income and large instability. I have long argued in my scholarship that the dichotomous distinction between employee/non-employee has been misplaced with regard to many aspects of employment law.¹⁰⁶ The pandemic is further illustrating—as well as complicating—the employment law landscape for the gig economy. As we saw in the previous Parts, many of our frontline workers are classified as freelancers and they rightfully protest and demand protections as they continue to work while the number of coronavirus cases continues to climb. While some of the protests have resulted in the distribution of hand sanitizer, masks, and thermometers, access to pandemic-related sick leave, health and safety regulation, and unemployment benefits has been limited and demands for hazard pay have largely been ignored. The inadequate protection of vulnerable gig workers is apparent now more than ever.

At the same time, employees are experiencing many changes in the way they work and again, more than ever, gigs and full-time employment often look similar to each other: each becoming remote and self-directed. The changes brought about by the pandemic will affect the very nature of work for the long run. The pandemic has employers reconsidering and reimagining daily work which is driving technology adoption, schedule flexibility, and

of compensability where employees working in shipyards contracted a contagious eye disease. *Id.* Despite evidence that the eye disease was also an epidemic to some extent in the community, the court nonetheless found the exposure to the eye disease in shipyards was in excess to that in the community. *Id.* at 157. As such, the court classified the eye disease as an injury arising out of and in the course of employment. *Id.* at 154.

106. See, e.g., Lobel, *The Gig Economy*, *supra* note 21, at 58; Lobel, *The Law of the Platform*, *supra* note 21, at 98, 99; Lobel, *The Four Pillars*, *supra* note 4, at 1542, 1543; Orly Lobel, *The Debate over How to Classify Gig Workers Is Missing the Bigger Picture*, HARV. BUS. REV. (July 24, 2019), <https://hbr.org/2019/07/the-debate-over-how-to-classify-gig-workers-is-missing-the-bigger-picture> [<https://perma.cc/4WVG-7VCH>].

telecommuting. Moreover, the pandemic has spurred workers to organize and utilize their collective voice to demand the prioritization of institutional goals from their employers—and elected representatives—such as gender and race equity, and health and safety regulations. From a government perspective, the pandemic has prompted legislators at all levels of government to reconsider the fundamental tenets—and definitions—of employment law and provided the circumstances of necessity, which demand creative and progressive solutions. The pandemic has presented an opportunity to imagine a new vision of work and not merely a return to the status quo. However, the pandemic has also revealed the deepening gaps between the haves—those who have job security—and the have-nots. Digitalization, automation, and remote work will continue to change the way we work and further present challenges to outdated laws. In light of the economic downturn and the projected long recovery, it is time to adopt reforms to address the pressing challenges of the labor market.

Tying benefits such as health care and even basic income to employment status is particularly problematic during a global health crisis.¹⁰⁷ The temporary expansion of unemployment benefits, through a federal initiative,¹⁰⁸ presents a case study and an opportunity: the provision of employment rights and benefits to independent contractors and the delinking of certain rights from the labor market altogether. The temporary measures introduced by the federal stimulus bill demonstrate the apparent gaps in the patchwork of state laws that compose the national social safety net. The COVID-19 pandemic came at a time where many states have changed—or are considering changing—their independent contractor classifications or expanded their paid sick leave laws.

In 2020, New York employees are newly entitled to ten weeks of paid sick leave—which will increase to twelve in 2020—while California and New Jersey both have extended their maximum duration for paid family from six to eight weeks in California and from six to twelve weeks in New

107. Victor Tan Chen & Ofer Sharone, *The Second Phase of Unemployment Will Be Harsher*, ATLANTIC (Apr. 19, 2020), <https://www.theatlantic.com/ideas/archive/2020/04/americas-compassion-for-the-unemployed-wont-last/610243/> [<https://perma.cc/3TA9-N9C7>].

108. See *Federal CARES Act Provisions for Unemployment*, CAL. EMP. DEV. DEP'T (Oct. 15, 2020), [https://www.edd.ca.gov/about_edd/coronavirus-2019/cares-act.htm#:~:text=Pandemic%20Emergency%20Unemployment%20Compensation%20\(PEUC,8%2C%202018%2C%20or%20after](https://www.edd.ca.gov/about_edd/coronavirus-2019/cares-act.htm#:~:text=Pandemic%20Emergency%20Unemployment%20Compensation%20(PEUC,8%2C%202018%2C%20or%20after) [<https://perma.cc/E97N-4K27>].

Jersey.¹⁰⁹ Washington, interestingly, has made employees eligible for twelve weeks of paid sick leave if they have a medical or family event, sixteen weeks if they have both, and eighteen weeks for special circumstance, such as pregnancy complications.¹¹⁰ Both Washington and New York have considered expanding employment rights as portable benefits, which would give independent contractors access to workers' compensation, unemployment insurance, and other support such as help paying for health insurance.¹¹¹ The 2017 Washington House Bill 2109 would have required employers of independent contractors to contribute to a pool of money managed by an independent nonprofit.¹¹² Another piece of legislation, House Bill 1601, has been introduced in 2020 and similarly calls for portable benefits.¹¹³ The coronavirus pandemic has shown how important the expansion of benefits to freelancers can be, and the impact that it can have on that state's employee well-being and financial security, while providing an opportunity to develop the proper infrastructure, resources, and tools for independent contractors to have access to those benefits.

The question of employee status has been contested and litigated for decades and the debates have accelerated over the past few years. But the COVID-19 crisis has accelerated, as well as halted, some of these battles.¹¹⁴ On March 11, Shannon Liss-Riordan, a labor class action attorney, filed complaints against Uber and Lyft to give drivers access to unemployment benefits and sick days under California law in federal court.¹¹⁵ Other decisions have come out in favor of Uber's stance that its drivers are independent contractors. In 2018, a federal judge in San Francisco found that delivery drivers for GrubHub were independent contractors.¹¹⁶ Subsequently, a federal judge in Philadelphia found that Uber drivers were independent contractors

109. Sebastian Chilco & Michelle Barrett Falconer, *California Extends Paid Family Leave Benefits from 6 to 8 Weeks*, JDSUPRA (Dec. 12, 2018, 7:32 PM), <https://www.jdsupra.com/legalnews/california-extends-paid-family-leave-44788/> [<https://perma.cc/4P6L-QEQV>].

110. Rachel Lerman & Benjamin Romano, *Workers Start Paying for Washington State's New Paid-Leave Law in 2019. Here's How It Works*, SEATTLE TIMES (Dec. 12, 2018, 7:32 PM), <https://www.seattletimes.com/business/employers-would-be-parents-get-set-for-new-washington-state-medical-and-family-leave/> [<https://perma.cc/8ZEL-2CLU>].

111. Sophie Quinton, *With Growth of the Gig Economy, States Rethink How Workers Get Benefits*, PEW CHARITABLE TR. (Feb. 22, 2017), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2017/02/22/with-growth-of-the-gig-economy-states-rethink-how-workers-get-benefits> [<https://perma.cc/VL93-XXPY>].

112. *Id.*

113. H.B. 1601, 66th 2019 Leg., Reg. Sess. (Wash. 2019).

114. Scheiber, *supra* note 25.

115. Scheiber, *supra* note 23.

116. *Lawson v. Grubhub, Inc.*, 302 F. Supp. 3d 1071, 1072 (N.D. Cal. 2018); Joel Rosenblatt, *GrubHub Drivers Are Independent Contractors – Not Employees – Under California Law, Judge Rules*, L.A. TIMES (Feb. 8, 2018, 2:15 PM), <https://www.latimes.com/business/la-fi-grubhub-drivers-20180208-story.html> [<https://perma.cc/3RL9-9RTU>].

because Uber does not exercise enough control over the drivers and the drivers have flexibility in their schedule.¹¹⁷ Similarly, in 2019, the National Labor Relations Board released a memo stating that because Uber drivers set their own hours, own the vehicles they drive, and are free to work for competitors, they cannot be considered employees under federal law.¹¹⁸ In 2017, before Uber's initial public offering, Uber sought approval from the Securities Exchange Commission to frame its business model as one where the drivers themselves were Uber's customers, rather than the passengers, and Uber merely facilitates the connection between driver and passenger.¹¹⁹ As we saw, the lack of consistency has prompted state legislatures to enact reforms, hoping to move beyond the patchwork of classification laws that exists today.

In my research of the gig economy and digital platforms, I have proposed new paths for systematic reform, where each path is complementary rather than mutually exclusive to the others.¹²⁰ The first path is to clarify and simplify the notoriously malleable classification doctrine. Historically the common law test for employee classification has consisted of anywhere between three and twenty factors, which tend to be applied case by case.¹²¹ New laws such as California's AB5 move in this direction. AB5 is modeled after *Dynamex Operations West, Inc. v. Superior Court*, where the court held that, in the context of wage orders adopted by California's Industrial Welfare

117. Razak v. Uber Techs., Inc., No. 16-573, 2018 WL 1744467, at *1 (W.D. Pa. Apr. 11, 2018); *Philadelphia U.S. District Court Determines Uber Drivers Are Independent Contractors*, NAT'L L. REV. (Apr. 23, 2018), <https://www.natlawreview.com/article/philadelphia-u-s-district-court-determines-uber-drivers-are-independent-contractors> [<https://perma.cc/7PDP-7Z8U>].

118. Advice Memorandum from Jayme L. Sopher, Associate Gen. Counsel, Nat'l Lab. Relations Bd. on Uber Technologies, Inc. to Jill Coffman, Reg'l Dir., Nat'l Lab. Relations Bd. 14 (Apr. 16, 2019), <https://www.laborrelationsupdate.com/files/2019/05/NLRB-Uber-memo.pdf> [<https://perma.cc/GNB9-3A8H>]; see also Daniel Wiessner, *Uber Drivers Are Contractors, Not Employees, U.S. Labor Agency Says*, REUTERS (May 14, 2019, 8:04 PM), <https://www.reuters.com/article/us-uber-contractors/uber-drivers-are-contractors-not-employees-us-labor-agency-says-idUSKCN1SK2FY> [<https://perma.cc/53YH-N9DX>].

119. Francine McKenna, Jeremy C. Owens & Caitlin Huston, *Uber Believes It Has SEC Nod for Earnings Approach that Mirrors Business Model*, MKT. WATCH (Oct. 30, 2017, 10:29 AM), <https://www.marketwatch.com/story/uber-an-early-adopter-of-new-revenue-recognition-rules-believes-it-has-secs-blessing-of-its-business-model-2017-10-25> [<https://perma.cc/PP98-VTPB>].

120. Lobel, *The Gig Economy*, *supra* note 21, at 61; Lobel, *The Law of the Platform*, *supra* note 21, at 88, 89; Lobel, *The Four Pillars*, *supra* note 4, at 1542, 1543; Lobel, *The Debate over How to Classify Gig Workers*, *supra* note 106.

121. See Lobel, *The Gig Economy*, *supra* note 21, at 61.

Commission¹²² (IWC), individuals are presumed to be employees under such orders unless the hiring entity proves the worker is an independent contractor.¹²³ The wage orders are only meant to cover employees, not independent contractors. To meet the burden, the employer must establish each of the three factors of the “ABC test,” showing

- (A) that the worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact;
- (B) that the worker performs work that is outside the usual course of the hiring entity’s business; *and*
- (C) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed.¹²⁴

If any of these three prongs are not established, then an individual will be classified as an employee covered by the IWC’s wage orders. *Dynamex* clarified that the common law test for determining the existence of an employer-employee relationship described in *S.G. Borello & Sons, Inc. v. Department of Industrial Relations*¹²⁵ is not the sole appropriate standard to use. This *Dynamex* holding was subsequently enacted into a hotly debated law, AB5. The suit discussed in Part II, brought by California’s attorney general and the cities of Los Angeles, San Diego, and San Francisco against Uber and Lyft pertaining to unemployment insurance, outlines how Uber and Lyft drivers qualify as employees under the ABC test.¹²⁶ The initial complaint alleges twenty-five separate facts to demonstrate how Uber and Lyft fail Part A of the ABC test, including that the “Defendant’s App, in combination with each Defendant’s policies, functions like an algorithmic manager that effectively supervises its Drivers like a human manager.”¹²⁷ This suit, one of the first to be brought under AB5, could have resulted in a

122. CAL. CODE REGS. tit. 8, § 11090 (2020); Cal. Indus. Welfare Comm’n, Order No. 9-2001 (July 1, 2002), <https://www.dir.ca.gov/IWC/WageOrders2005/IWCArticle9.html> [<https://perma.cc/M6ZV-VXD2>]. The Industrial Welfare Commission, established in 1913, regulated wages, hours, and working conditions in California. See Susan Diane Casement, Katherine Philips Edson and California’s Industrial Welfare Commission 33 (1987) (unpublished M.A. thesis, Kansas State University), <https://core.ac.uk/download/pdf/33362008.pdf> (last visited Oct. 19, 2020). The California legislature defunded later defunded the Commission, but its seventeen wage order regulations remain in effect. See CAL. DEP’T INDUS. REL., <https://www.dir.ca.gov/iwc/wageorderindustriesprior.htm> [<https://perma.cc/M3BZ-2K6V>].

123. See *Dynamex Operations W., Inc. v. Superior Court*, 416 P.3d 1, 1 (Cal. 2018).

124. *New ABC Test for Independent Contractors Sends California Employers Reeling*, FISHER PHILLIPS (July 2, 2018), <https://www.fisherphillips.com/resources-newsletters-article-new-abc-test-for-independent-contractors-sends> [<https://perma.cc/BB5N-AVJV>].

125. *S.G. Borello & Sons, Inc., v. Dep’t of Indus. Rel.*, 769 P.2d 399, 415 (Cal. 1989).

126. Complaint, *supra* note 32, at 3, 4.

127. *Id.* at 9, 10.

landmark decision in the employee classification of gig workers and provided persuasive precedent for states that adopt the ABC test. However, in November 2020, in a major win for gig economy companies, California voters passed Proposition 22, which exempts transportation and delivery platforms like Uber and Lyft from AB5, which codified the ABC test of *Dynamex*.¹²⁸ The ABC test will continue to be applied in California to industries that have not been exempted from AB5. The test will also continue to be applied in states that have adopted it either through legislation or common law doctrine. The new Biden Administration will also likely turn its attention to clarifying the classification of employees.

A second path pertains to expanding certain employment regulation and rights beyond classification to anyone who provides their labor. These include antidiscrimination rights and whistleblowing rights that should be extended to both employees and independent contractors. For example, there have been many reports about employees forced out for sounding the alarm on an employer's policy of forcing workers to remain at the workplace when they could be working from home.¹²⁹ Freelancers who want to speak up about dangerous company practices should also be protected from retaliation.

128. 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> [<https://perma.cc/P5H4-4D4T>]. Instead of requiring these companies to classify their gig workers as employees rather than independent contractors, Proposition 22 enacts a variety of new wage regulations that are specific to app-based drivers. See Shuhua Hussain & Johana Bhuiyan, *Prop. 22 Passed, a Major Win for Uber, Lyft, DoorDash. What Happens Next?*, L.A. TIMES (Nov. 4, 2020), <https://www.latimes.com/business/technology/story/2020-11-04/prop-22-passed-what-happens-next> (“[T]he law will require that companies provide an hourly wage for time spent on rides equal to 120% of either the local or a statewide minimum wage. The measure grants workers driving at least 15 hours a week a stipend for health insurance coverage, and a larger one for those putting in 25 hours a week. Drivers will also have access to occupational accident insurance to cover on-the-job injuries, which would include coverage for medical expenses and disability benefits.”).

129. Jon Brodtkin, *Charter Engineer Quits Over “Reckless” Rules Against Work-from-Home*, ARS TECHNICA (Mar. 17, 2020, 10:58 AM), <https://arstechnica.com/tech-policy/2020/03/charter-faces-blowback-after-banning-work-from-home-during-pandemic/> [<https://perma.cc/VEG6-ZUEG>].

A third path suggests creating rules that are specific to independent contractors. For example, labor law provides that only employees may form a union.¹³⁰ But new laws could create specific organizing and participation rights for freelancers. Localities and companies have been experimenting with middle ground solutions. On December 4, 2018, New York City’s Taxi and Limousine Commission (TLC) adopted rules requiring ride-share companies like Uber and Lyft to meet minimum hourly wage requirements for their drivers.¹³¹ Something important about these rules is that they are agnostic to the legal classification of the drivers as employees or independent contractors. We can envision more expansive laws that support various forms of concerted activity for mutual aid for new platform workers. Such initiatives are already underway as private organizing, but the law could recognize these efforts and support them.¹³² For the purposes of collective bargaining, as with other policy areas including discrimination laws and whistleblower laws, expanding protections beyond the formal status of “employee” conforms with the principles and logic at the basis of employment and labor law regulations.

The fourth path focuses on delinking social welfare provisions from the workplace, for example, health care and retirement funds that would be provided directly to all those who need them rather than to workers through employment. The coronavirus pandemic has further illustrated the risks inherent in gig work and the current structure of the legal regime. During the pandemic, many gig workers have found themselves in financial danger if they do not continue to work and physical danger if they do.¹³³ While traditional classification tests continue to inform policy and adjudication, the contemporary approach to employee status illuminates the importance of simplifying, clarifying, and broadening the definitions of employment. Many protections were designed to protect workers, ensure living wages, and decent terms and conditions of work, and those should be extended to workers even as the formal patterns and relationships are shifting.

130. See *All About Unions*, WORKPLACE FAIRNESS, <https://www.workplacefairness.org/labor-unions> [https://perma.cc/WQG6-DTXK].

131. N.Y.C. TAXI & LIMOUSINE COMM’N, NOTICE OF PROMULGATION 2–3 (2018), https://www1.nyc.gov/assets/tlc/downloads/pdf/driver_income_rules_12_04_2018.pdf [https://perma.cc/XPK6-8B67].

132. See, e.g., *COVID-19 Freelance Artist Resource*, FREELANCE ARTIST RESOURCE, <https://covid19freelanceartistresource.wordpress.com/> [https://perma.cc/LN5T-BPWM]; *Freelancers Relief Fund*, FREELANCERS UNION, <https://www.freelancersunion.org/resources/freelancers-relief-fund/> [https://perma.cc/3KAG-BRW4].

133. Josephine Moulds, *Gig Workers Among the Hardest Hit by Coronavirus Pandemic*, WORLD ECON. F. (Apr. 21, 2020), <https://www.weforum.org/agenda/2020/04/gig-workers-hardest-hit-coronavirus-pandemic/> [https://perma.cc/XVU7-KGLP].

V. CONCLUSION

The COVID-19 pandemic has triggered a landslide of job losses and unemployment claims. The pandemic's emergency economic recovery responses; federal, state, and local efforts; and private initiatives all provide an opportunity to set a new path that will shape the future of the labor market for decades to come.

