



Three Paths to Update Labor Law for the Gig Economy

BY JOSEPH V. KENNEDY | APRIL 2016

Rapidly growing Internet market platforms have turned a bright spotlight on U.S. labor laws, which are showing themselves to be hopelessly outdated as they impose rigid divisions between employees and independent contractors.

Because of their rapid growth, Internet-based market platforms such as Uber, Airbnb, and TaskRabbit have attracted a growing level of regulatory attention, much of it centered on their relationship with workers. As symbols of the U.S. labor market's increasing diversity and fluidity, these Internet platforms also have turned a bright spotlight on the country's labor laws, which are showing themselves to be hopelessly outdated as they impose rigid divisions between employees and independent contractors. Although this increasing obsolescence would exist without the new platforms, their growth creates an impetus to enact productive changes. Congress and the states should seize the moment to reform all major labor laws—from the Occupational Safety and Health Act to the Employee Retirement and Income Security Act—so they apply only to work relationships where they make sense. In lieu of that, Congress should create a narrow exemption for Internet platforms, so they can experiment with new ways to help their workers.

The work environment has experienced significant changes over the past three decades. On the supply side, one driver has been a series of IT innovations, including smartphones and more effective mobile networks, Web 3.0 applications, and cloud computing, which together make possible Internet platforms that people can access anytime, anywhere for a

large range of purposes. On the demand side, a growing number of students, parents, retirees, and others are seeking more flexible alternatives to full-time work.

A growing array of companies has responded to these trends by using Internet platforms that try to match the skills and desires of workers with the needs of potential buyers. This comparatively small, but rapidly growing, phenomenon has become known as the “gig” economy. However, labor laws have not kept up. Instead of adapting to the evolving needs of both workers and those who would benefit from their skills, the nation’s federal, state, and local labor laws continue to depend on the historical distinction between an employee and an independent contractor.

Many labor laws regulate the relationship between an employer and its employees. In contrast, independent contractors are presumed to be able to look out for themselves when negotiating contracts with different clients. But there is little in between, which is where most of the gig economy exists. Moreover, the irony is that, at both the federal and state levels, this distinction is a relic of tort law and is not very relevant to the statutory purpose of most labor laws. It persists largely by default.

Ideally, Congress would revisit each of the country’s major labor laws and carefully tailor them to achieve their specific goals.

This creates a problem, because outmoded labor laws are imposing costs on the gig economy. First, they introduce a great deal of uncertainty, by linking significant policy consequences to highly subjective and shifting criteria for who is considered an “employee.” Second, they discourage the creation of the flexible and varied job opportunities that Americans increasingly need by banning certain relationships and subjecting gig platform companies to large potential liabilities. Finally, as gig platforms offer people an expanding array of work arrangements, current labor laws do a poor job of benefiting the workers they are intended to protect.

This paper describes three possible paths forward in reforming labor law for the gig economy:

1. The first path would be to create a new category of worker, between full employee and independent contractor. While this would be an improvement on the current system, it risks replacing two rigid categories with three rigid categories, which still may not provide an optimal fit for all work arrangements.
2. The second path would be for Congress to revisit each of the country’s major labor laws and carefully tailor them to achieve their specific goals. This would be ideal, but it would involve a long and difficult political process.
3. The third path, which would be easier in the near term, would be to draft a carve-out for workers who depend on Internet platforms to find gig work. A well-crafted statute would ensure that workers, customers, and platforms all benefit from reform.

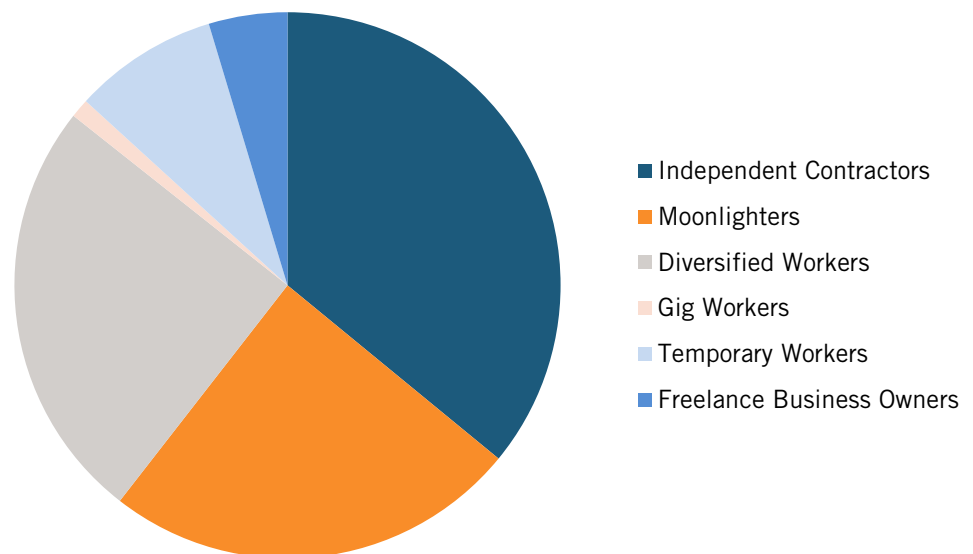
None of these would entirely solve the problem, because each state also has its own labor laws. Without similar changes at the state level, many of the benefits of reform would remain out of reach. But any of the three paths would jumpstart the process of updating U.S. labor law.

THE NATURE OF THE GIG ECONOMY

The labor force has always had “gig” employees. Some of these were teenagers and part-time workers trying to make some extra money while juggling school, homecare, or retirement. Others were traditional tradesmen or consultants who had their own businesses. Both faced the daunting tasks of finding clients, negotiating agreements, and making sure that they actually got paid for their work. At the same time, their customers also faced challenges, including finding the right workers and ensuring that they would do a good job. Internet platforms offer both workers and consumers a much more effective means of finding work and workers. In the gig economy, labor-matching platforms can also help third parties. For example, restaurants no longer have to hire their own drivers in order to offer home delivery to prospective customers; platforms like GrubHub fill the gap.

Although much of the current debate on labor law has been centered on Internet platforms generally, and Uber specifically, platforms actually account for only a small portion of what might be called the nontraditional economy—those jobs that do not fit neatly into the employee-independent contractor separation. Freelancers Union estimates that there are nearly 54 million “freelancers,” comprising 34 percent of workers.¹ But this figure includes all independent contractors, people with more than one job, and temporary workers. Many of these people fall somewhere between employee and independent contractor, depending on the specific circumstances of their employment. Another study that counted only those that use a digital platform to deliver personal services estimated that 600,000 workers participate in the gig economy, of which 400,000 work for Uber. (See Figure 1, which assumes that all gig workers would otherwise be diversified workers.)² Nevertheless the rapid rise in this small number has provoked a great deal of concern. To pick just one example, a recent report from the New America Foundation referred to an “alarming transformation” of the U.S. workforce that “threatens to eviscerate the national safety net.”³

Figure 1: Division of the Freelance Economy⁴



The alarm is mostly misplaced. Internet platforms are largely providing additional opportunities and providing new ways of adding value for those who are already self-employed by making it easier to find clients. Figures 2 and 3 show that broader measures of self-employment have been trending downward for some time in both the United States and Europe.

Figure 2: U.S. Self-Employed as a Share of Non-Farm Employment⁵

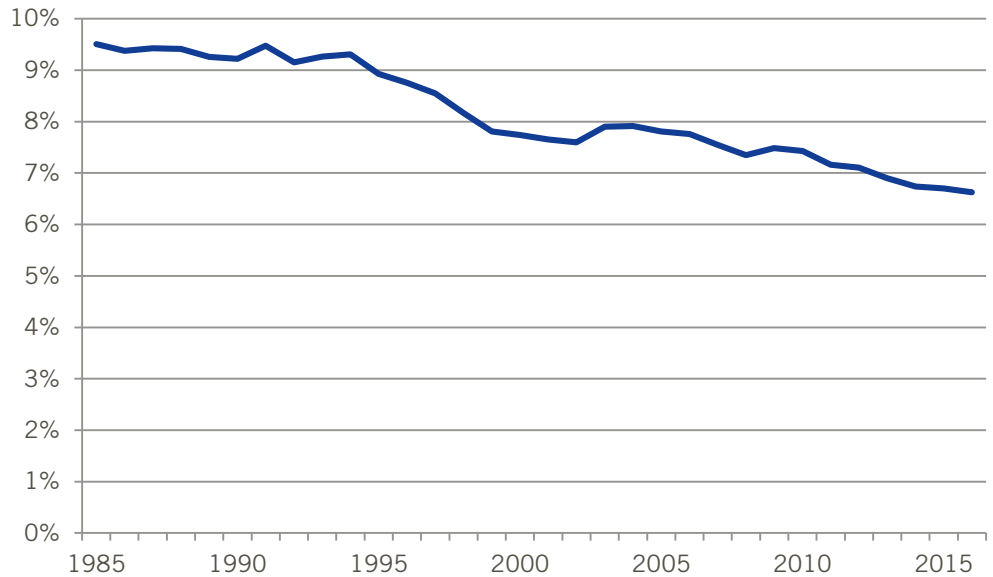
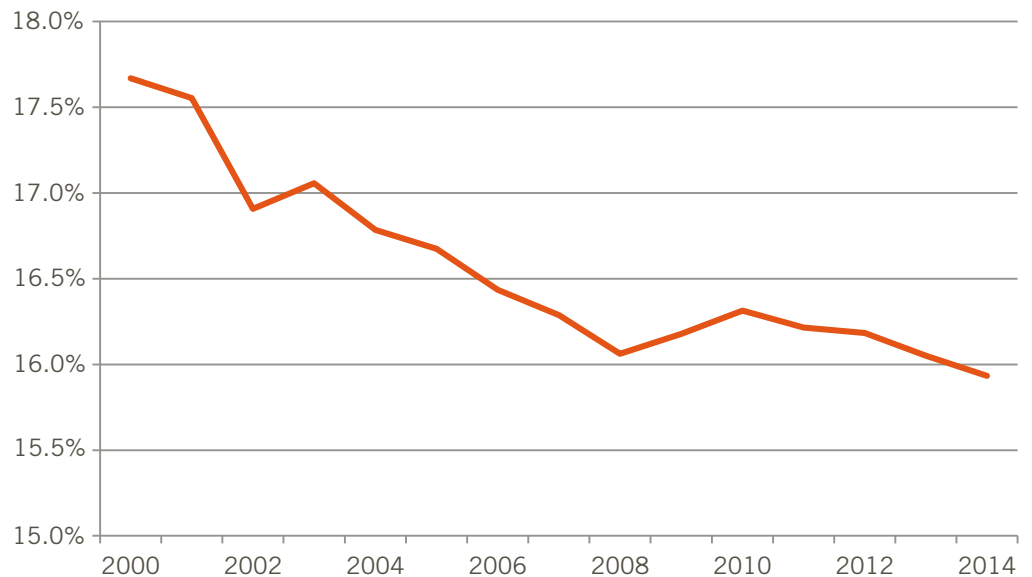


Figure 3: E.U. Self-Employed as a Share of Total Employed⁶



A previous Information Technology and Innovation Foundation (ITIF) report discussed the economic role of Internet platforms generally, arguing that at present they do not require additional regulation.⁷ Briefly, platforms rely on information technology to make it easier for different sides of a market to find each other and engage in mutually rewarding

transactions. In doing so, they dramatically reduce the transaction costs of finding a match, negotiating a transaction, and enforcing it. There is considerable confusion about what a platform is, and what the difference between a sharing platform and a gig platform is. One reason is because they are at least five distinct kinds of platforms:

- Software platforms, such as the iPod and Android, which match hardware manufacturers with software developers and consumers;
- Social platforms such as Facebook, Angie's List, and Twitter, which help individuals find and communicate with each other about a variety of subjects;
- Goods platforms, such as Amazon and Etsy, which help consumers find and purchase a large variety of products by different makers;
- Sharing economy platforms, such as Airbnb and Zipcar, which help individual and corporate owners of underutilized goods rent them out to others; and
- Gig-economy platforms, such as Uber and TaskRabbit, which create a market for personal services.

Well-known gig platforms include Uber and Lyft (ride sharing), UpCounsel (legal experts), Instacart (shopping and delivery), and TaskRabbit (odd jobs). Some platforms operate internationally and have a large number of workers and huge market valuations (although not huge profits). Others seek to fill a narrow market niche within a specific geographic area. Although they all use a combination of Internet and mobile technology to match workers with consumers, their business models and relationships with workers can vary significantly.

The interaction between gig platforms and workers engaging in the various sorts of roles between independent contractor status and employee status is easy to see by looking at how a plumber might earn income:

- Working alone and relying on word of mouth and mail advertising;
- Working alone and setting up a Facebook or Google+ page to reach out to customers;
- Working alone and getting business through a positive review on Angie's List;
- Working alone and getting jobs through TaskRabbit or Thumbtack;
- Working part-time for a plumbing company and getting paid per job; and
- Working full-time for a plumbing company and getting paid a salary.

Traditionally, labor laws clearly would not cover the first example but would cover the last. But where exactly does labor law stop being appropriate, especially when the same individual could be pursuing many of these paths at the same time?

Gig platforms differ widely in the degree of specialization they offer, the geographic area in which they offer services, and the role they play in facilitating the transaction between the buyer and seller. Among the activities that a platform may perform in the market are:

- Vetting workers through background checks or other means;
- Providing training and support to workers;

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- Storing data on both buyers and workers to facilitate future transactions;
 - Setting prices;
 - Handling payments; and
 - Maintaining a rating system for one or both sides.

Each of these activities has the potential to add value to the transaction between the two main parties by enhancing the quality of the good or service, reducing the transaction costs associated with it, or making the worker more productive. Society should encourage platforms to perform these roles whenever doing so would increase social value. It should also encourage them to help their workers in other ways, such as linking workers with one another for advice or support or arranging free financial guidance. Unfortunately, labor laws actively discourage companies from performing many of these activities because doing so increases the chance that courts will find the existence of an employer-employee relationship. Such a finding in turn activates a wide range of labor laws, some of which make no sense in the context of the specific market. As a result, gig workers often receive less support than would otherwise be the case were labor law clearer.

Although much of the current debate on labor law has been centered on Internet platforms like Uber, these platforms actually account for only a small portion of what might be called the nontraditional economy.

Despite their small numbers, gig platforms are starting to deliver enormous benefits to both workers and consumers. On the worker side, platforms boost incomes. Polls show that the vast majority of gig workers are happy with their experience and value the flexibility and freedom as well as the low barriers to entry that the work affords them.⁸ The gig economy also allows students, parents with young children, retirees, and other workers to fit work into their schedules. For example, one Uber driver in Washington, D.C., is a minister who established a start-up church but needs the work Uber provides to make ends meet until he adequately grows his congregation.⁹

At the same time, Internet platforms provide tremendous benefits to consumers. In many cases, such as ride sharing, platforms provide users with a greater choice among workers. This usually results in cheaper and higher-quality service than the existing industry. Much of this improvement comes from greater efficiency, since workers don't have to spend as much time waiting for riders.¹⁰

Traditional markets often do not serve poorer consumers very well because the profit margins are smaller. The price reductions that usually come from greater competition have a highly progressive effect because they account for a greater portion of low-income spending. For example, Uber, whose size and market value make it a visible target for regulation, has revolutionized the ride-for-hire industry, including providing better and lower-cost service to neighborhoods that have long been underserved by the regulated taxicab industry.

A few platforms, such as Hello Alfred, have decided to make all of their workers employees. Establishing an employer-employee relationship gives the company more control over when and where a worker gets deployed. It is also likely to increase the benefits that the company receives from any training it gives the worker. It entitles the worker to minimum-wage benefits and overtime, although the worth of these depends upon how many hours someone works. Finally, a closer relationship may instill increased loyalty, reduce turnover

(which can be costly for a company), and provide greater job security (although in today's economy no workers should feel very secure if their performance is mediocre or demand for their services falls).

Another gig platform, TaskRabbit, guarantees its “Taskers” a specific minimum wage, even though the law does not specifically require it. In doing so, it increases the chance that a judge will find that it has enough control over the relationship to establish an employer-employee relationship. It is possible that, as the economy continues to improve and the labor force tightens, competition among platforms for the best employees may cause more of them to voluntarily adopt more aspects of the employee-employer model. For other platforms and for many workers, the value of flexibility and control over working hours will make either a more formal relationship or a guaranteed minimum wage infeasible. However, these workers could still benefit from some forms of support that the platform might give, such as tax assistance or training.

LONG-ESTABLISHED LABOR LAW AND THE RISING GIG ECONOMY

The application of most labor laws depends on the existence of an employer-employee relationship. The decision about whether such a relationship exists is determined by a common-law standard that uses a varying number of general factors to evaluate the totality of the relationship. If, because of slight changes in the nature of the relationship, a worker goes from being an independent contractor to an employee, a long list of legal regulations suddenly attaches to it. These laws may have little relevance to the specific employer or employee. They may even destroy the basis of the relationship. As a result, gig platforms are often reluctant to alter their business models by providing extra help to workers.

Several federal labor laws potentially govern the respective duties of workers and those that hire them. Most of these laws establish a minimum standard for how employers treat workers. They operate on the premise that employers have most of the control and power in the relationship and that individual workers are unable to defend their interests. The laws therefore prevent a race to the bottom in which companies gain a competitive advantage by treating their workers poorly. The major federal statutes are:

- The Occupational Safety and Health Act, governing workplace safety;
- The Fair Labor Standards Act, governing minimum wage and overtime;
- The National Labor Relations Act, covering collective bargaining;
- The Family Medical Leave Act, covering family and medical leave;
- The Age Discrimination in Employment Act, covering job discrimination;
- The Employee Retirement and Income Security Act, covering employee benefits including health care and pensions; and
- The Internal Revenue Code, covering withholding and reporting requirements.

In addition, each state has a number of its own statutes governing the workplace. The two most important are those covering workers' compensation and unemployment benefits. Although these are federal programs, implementation varies from state to state depending on the specific statutes. In addition, states tend to have their own laws governing taxes, worker safety, and minimum wages.

The distinction between employees and independent contractors is a relic of common law and bears no natural relationship to the specific purpose of various federal and state labor laws.

The laws allow for a distinction according to the nature of the relationship between the workers and whoever is paying them. They sometimes also make a distinction based on the size of the business. Both of these distinctions recognize that the laws should not apply to all work relationships. The problem is that most of the laws fail to articulate the bounds of their application very well. As a consequence, courts have relied on a common-law distinction between employees and independent contractors that is extremely subjective and often bears little relationship to the policy goals of the specific statute being applied.

Federal statutes are usually not very helpful in deciding who can be considered an “employee.”¹¹ For example, the Fair Labor Standards Act (FSLA) defines an “employee” as “any individual employed by an employer,”¹² while an “employer” is a person “acting ... in the interest of an employer in relation to an employee.”¹³ Similarly, “employ” means to “suffer or permit work.”¹⁴ The Internal Revenue Service, which regulates withholding and payroll tax requirements, basically adopts the common-law standard described below by considering 11 general factors when deciding whether someone is an employee, such as whether the firm provides training to the worker and whether the worker has an opportunity to make a profit or suffer a loss from the job.¹⁵ In an attempt to straighten out this circular reasoning, the U.S. Supreme Court has ruled that the term “employee,” when used in federal employment law, is presumed to have its common-law meaning and is to be distinguished from “independent contractor.”¹⁶

The problem is that the employee-independent contractor distinction bears no natural relationship to the specific purpose of various federal and state labor laws.¹⁷ Centuries ago, a large part of the population worked for themselves or as craftsmen for the general public. Others worked as “servants” for “masters.” It was common for someone with more means to hire several full-time servants to perform daily work. It was also common for such individuals to occasionally hire specialists for work such as building a home, paving a driveway, or writing a will.

From time to time, a worker would injure someone while working. In such circumstances, the injured party would often attempt to recover against the master as well as the worker because the former had more money. The courts would then have to decide whether, given the specific circumstances of the individual case, it was fair to hold the master liable for an accident that he was not directly responsible for. When these cases were appealed, upper courts would try to set out legal principles that lower courts could apply to future cases. The law gradually evolved to center on the degree of control the master exercised over the worker, looking at all of the circumstances. This test was usually stated as a varying number of factors, such the length of the service, whether the servant held specialized knowledge, and whether the servant also worked for others. The number of factors varied as different courts either expanded one factor into several or consolidated several factors into one.

A key point is that these cases always looked at the liability to an injured third party. The courts developed the employee-independent contractor test because someone had to decide these cases and no statute applied. Because the court’s attention was focused on how to allocate liability over a past event, and the individual decision was expected to have a minimal impact on future relationships, the analysis tended to focus on achieving the

correct outcome given the specific facts of the case rather than on setting out clear guidelines that other companies and workers could rely on. The result is that the distinction between an employee and an independent contractor currently depends on a varying number of factors of uncertain weight, each of which is highly subjective and fact-dependent. The desires and expectations of the parties play little role in the decision.¹⁸

The common-law test served its purpose very well. Because people do not plan to have accidents, its inability to give future guidance made little difference. However, it was never intended to play a large role in labor law issues such as age discrimination, minimum wages, or the right to unionize. Unfortunately, when delineating the coverage of new labor laws, Congress has usually defaulted to the common-law standard through such circular definitions as those cited above.

But using the common law to define the coverage of major labor laws creates many difficulties. First, it pretends to apply the same statutory coverage to legislation dealing with such diverse matters as tax withholding, workplace safety, and employee benefits. Although it is not clear why all of these laws should revolve around a single definition, doing so has dramatically increased both the legal and economic consequences of a finding of an employer-employee relationship with respect to any law.

Second, the test provides very little forward guidance to companies and their workers when negotiating agreements. The large degree of subjectivity in most factors gives little guidance to either judges or juries. Given the increased flexibility and diversity of labor markets, this is a growing problem.

Third, given the number of federal and state laws, a worker could conceivably be an employee under one law but an independent worker under others. His standing could also change over time. Identical workers could be employees in one state but not another. The threat of large retroactive penalties encourages companies to err on one side of the line or another even when a more ambiguous relationship would benefit both parties. Because these laws have major implications, it is important to know who they apply to. Yet, companies that try to classify their workers as independent contractors cannot know for certain whether they have successfully done so until a judge or administrator makes a final determination if and when a worker using their platform challenges the company. Small changes in how they operate their business model may alter the result. For example, Uber's decision to require that drivers' cars be fewer than 10 years old was mentioned as a factor in California's finding that its drivers were employees, even though Uber drivers can choose when and how much they work.¹⁹

Now that the common-law standard has become central to the application of so many laws, changing it will be almost impossible. The enormous consequences of even a minor change guarantee that business groups and labor unions will resist any broad alteration that could possibly be detrimental to any of their members. It is also not clear that anyone can delineate an alternative test that legislators and courts could apply to all statutes. Absent any linkage to the particular policy objectives of a specific statute, these debates can never come to a resolution.

The enormous consequences of even a minor change in the common-law standard guarantee that business groups and labor unions will resist any broad alteration that could possibly be detrimental to any of their members.

Lawrence Eisenbrey and Lawrence Mishel largely dismiss these claims in a paper for the Economic Policy Institute.²⁰ Their paper focuses on the proposal by Seth Harris and Alan Krueger described below, but the overall tone suggests that current labor law can adequately apply to gig platforms. Unfortunately, Eisenbrey and Mishel devote most of their paper to Uber, whose workers are probably closest to being employees, at least under Uber's current business model. It would be interesting to know how they would apply current law to other gig platforms. The authors do not address the large costs imposed by the uncertainty surrounding current law. Nor do they address the fact that this uncertainty deters companies from providing various forms of support to their workers, for fear of having them become employees.

THREE PATHS TOWARD BETTER LABOR LAW FOR THE GIG ECONOMY

There are, however, three alternatives. All start from the premise that the historical employer-independent contractor distinction is no longer relevant to a significant part of the workforce of which the gig economy is only a small part. However, each has problems.

Path #1: Creating a Third Category of Workers

The first option is to create a third category of workers. This would recognize that a grey area has opened up between the traditional roles of employee and independent contractor. Workers who fell within this third category could be protected by a combination of some of the existing laws and new laws written especially for them.

A paper commissioned by the Hamilton Project at the Brookings Institution recently advocated this approach.²¹ Seth Harris and Alan Krueger, both former officials in the Obama Administration, proposed creating a new category of “independent workers” who use an intermediary (not necessarily an Internet platform) to connect with customers. Workers who use platform intermediaries to sell or rent their goods (such as Etsy and Airbnb) would not be included in this category. Harris and Krueger also imply that the worker would make the decision about whether to accept or reject a given job (possibly within “broadly defined limits”). The intermediary could also set “certain threshold requirements” and the price for workers who are able to use its service. Harris and Krueger then recommend which of the existing labor laws should apply to this new category. They propose that antidiscrimination laws apply to these new relationships. Intermediaries should also be required to withhold taxes and contribute the employer's share of FICA taxes. They would amend existing laws to allow the platform to pool its services to offer insurance and other benefits to workers and to allow workers to organize. However, they would not apply minimum wage or workers' compensation laws to this category.

Senator Mark Warner (D-VA) has also mentioned creating a third category as a possible solution.

A potential downside of introducing a new category is that it would amount to replacing the country's existing system of two categories to fit all with a new system of three categories to fit all. The lines between each category might still be just as uncertain. Thus, for many workers, the structural issues outlined above might still remain.

Path #2: Tailoring Specific Laws to Achieve Their Intended Purposes

The ideal approach is also comparatively complex and politically difficult: recognizing that the coverage of each labor law should be driven by its purpose and the nature of the problem that Congress was trying to solve, rather than by whether a worker is classified as an employee for purposes of tort liability. Law professor Richard Carlson advocated this approach over a decade ago, and this report borrows heavily from his analysis.²²

Under such an approach, instead of most laws applying to all employees but not to independent contractors, individual laws would apply when it made sense given the nature of the work, the degree and control exercised by the employer, and the best interests of the immediate parties. When making these determinations, Congress and state legislatures should focus on six important facts.

The first is the need for clarity. Rather than replacing one subjective test with another, Congress should put in place more objective criteria that guide employers and judges in applying the law. These criteria will vary depending on the specific law, but good candidates are the size of the employer, a worker's yearly earnings from a given employer, contractual provisions, and the interests of a majority of workers (not just a small group of disgruntled workers seeking a big payoff from a class action suit).

Most employers, and especially platforms, can change their business model in response to bad laws.

The second is that most employers, and especially platforms, can change their business model in response to bad laws. If the cost of complying with various labor laws becomes too large, firms are likely to cut their ties to some workers even further by limiting the amount that any individual person works, using a variety of contractors instead of just one, or severing all nonessential ties to the worker. Conversely, companies that are forced to accept more responsibility for workers may find that it is not practical to allow some to work fewer than 10 hours a week, for example, or confine their work to summers and not the school year. In each case, the firm would regain control of the relationship, but the interest of at least some workers and consumers would be harmed.

Uber, for example, in order to reduce the likelihood of being classified as an employer, could let drivers negotiate fees with riders, even though research shows that most customers prefer a set fee. It could also require riders to pay with PayPal or cash so that Uber would not manage financial transactions, and then charge drivers the same fee they currently pay. Finally, Uber could stop giving drivers directions for the best way to travel to riders and find their destinations. Each of these changes would reduce the total value created by the transaction.

The third fact is that the vast majority of costs associated with federal and state labor laws are paid by workers. Harris and Krueger cite research estimating that at least 80 percent of the employer's cost of providing benefits is ultimately borne by employees in the form of reduced wages.²³ This imposes a large burden on legislators and administrative agencies to make sure that the benefits of mandated protections, such as OSHA requirements, exceed their costs. If legal benefits are worth less than the costs that employees ultimately have to bear, either in terms of reduced wages or fewer job opportunities, then workers will be worse off. In some instances, this can be done by streamlining regulations to reduce

compliance cost. But in other cases, workers may be better off keeping the money in their pockets rather than using it to purchase more benefits.

Again looking at Uber, it would be a simple thing to increase drivers' fees in order to transfer any regulatory costs, including tax withholding and minimum wages, from the company to the workers. Other businesses might find it slightly more difficult, but there is little evidence to think that they will not be largely successful over time.

The fourth consideration is that the law should not unduly influence whether the company provides benefits of various sorts to the workers. Because existing labor laws link so many consequences to the finding of an employer relationship, they actually encourage firms to distance themselves from workers.

Fifth, many polls of workers who use Internet platforms show that they prefer to work part-time.²⁴ Pushing them toward full-time work with the platform in order to qualify for greater benefits may cause them to quit the platform. Many of the workers are true independent contractors, using the platform only as another tool for marketing their business. According to a recent poll of 11 gig platforms, 39 percent of workers own their own business. Another 24 percent want to.²⁵ Perhaps most significant, many already have full-time jobs and access to traditional benefits such as health care and pension benefits.²⁶ It would make little sense to try to extend double coverage to them.

Finally, policymakers should keep in mind that the best employee protection policy is a strong economy that creates many high-skilled jobs. These jobs also tend to pay higher wages. More importantly, when there are lots of jobs to be filled, workers have choices, and firms have to compete for good talent. Even in today's slow growth environment, we see companies struggling to find good workers and offering higher wages and increased benefits in order to retain them.

How then might the main federal laws be applied? We can speculate on some of the main outcomes. Similar conclusions have been reached by Carlson and, surprisingly, given their focus on creating a separate category, Harris and Krueger.

The Occupational Safety and Health Act

The purpose of the Occupational Safety and Health Act is to ensure that employers provide workers with a safe environment within which to work. Important aspects of worker safety include the structural soundness of the building they work in, the design and functionality of the tools they use, and protections against air or other contamination. Assuming the requirements pass cost/benefit tests, it makes sense for the government to make companies responsible for the facilities that they control. But, when the company controls the facility, it should not matter whether the workers are employees or independent contractors. In many cases the two workers will be performing similar activities.

However, it does not make sense to hold companies liable for things that they do not control. Under the Clinton administration, the Occupational Safety and Health Administration (OSHA) once issued a letter of interpretation that would have extended the

law's requirements to the homes of employees who telecommute. OSHA argued that employees who worked from home deserved protection just as much as those who worked in an office. It made no sense to hold companies liable for the safety of premises that they did not control and that their workers probably did not want to open up to them, and that employees had every incentive to keep safe. OSHA quickly withdrew the letter. However, OSHA did rightly maintain its position that employers would be liable for the safety of hazardous manufacturing that employees performed in their home.²⁷

Similarly, OSHA should focus on the degree of control that a company has over the facilities in which workers operate and the tools they use. When the firm provides either, OSHA should apply. It should not focus on the contractual relationship between the firm and the worker. In the gig economy, many workers supply their own transportation and tools. They work out of their homes or the homes of their clients, neither of which the platform controls nor has access to. In this context it makes little sense to apply OSHA requirements to the platform, even if the workers are deemed to be employees for other purposes. Nor should laws establish a clear preference for one form of ownership over another.

It would be very difficult to apply the Family and Medical Leave Act in cases where a gig worker can choose when and where to work.

The Family Medical Leave Act (FMLA)

The Family and Medical Leave Act provides employees with up to 12 weeks of unpaid leave in order to deal with childbirth or a medical emergency concerning themselves or a family member. FMLA only applies to full-time workers who have worked with an employer for more than one year. It also only applies to companies with 50 or more employees. Some Democrats in Congress have been calling for a major extension of FMLA benefits by extending them to more workers and making more leave paid.

It is quite clear that workers will end up paying most of the cost of any extension of FMLA benefits.²⁸ Supporters of the law argue that the benefits are worth it, in part because it encourages the socially beneficial action of staying home with a newborn for the first 12 weeks. They also point out the insurance aspect of the program. In any given year, most workers may end up losing more in wages than they receive in benefits. But when a family emergency strikes, a worker will have the capacity to deal with it without losing employment.

It is also clear that FMLA benefits make little sense in the case of traditional independent contractors since they would be paying their own benefits. To prevent workers from starting shortly before they know they will be eligible for leave, the law would have to impose a threshold not just for the amount of time worked, but also the hours per week. There could be private insurance programs to cover family medical emergencies, but workers would then have to pay premiums. In many cases, companies could use their purchasing power to help their workers buy cheaper coverage. In fact, many already do this for their employees, and some gig platforms may be willing to do it for their workers. By not focusing on the employer-independent contractor distinction, the law could encourage these arrangements rather than discourage them.

Congress could also allow workers to set up an emergency account and put up to 50 percent of their annual income, up to \$25,000, into it pre-tax. If Congress also allows

workers to make withdrawals tax-free upon a birth or other identified emergency, the income would escape all taxation. The limited amount of the fund would minimize revenue losses, but the freedom from taxation would be an incentive to set aside money in the account. Firms could be allowed to make contributions to the account of all their workers, whether they were employees for other purposes or not.

The Age Discrimination in Employment Act

Having made a social decision that businesses cannot discriminate against their employees for reasons of age, race, sex, or other traits, it is not clear why those same businesses should be allowed to discriminate against independent contractors, especially those whom they use on a regular basis, for the very same traits. Few would argue that companies like Uber should be able to discriminate against women or minorities. The employer-independent contractor distinction therefore seems of little importance here.

The Employee Retirement and Income Security Act (ERISA)

The main purpose of ERISA is to make sure that companies pay whatever benefits a worker earns and to require companies to make benefits widely available as a condition of deducting their cost. It is important to note that employers are not required to offer any pension benefits.

It does not make any sense to discourage firms from extending pension benefits to as many independent contractors as they wish.

It does not make any sense to discourage firms from extending pension benefits to as many independent contractors as they wish. For many companies this will probably require fairly simple payroll changes and impose little burden. The programs should be voluntary on both sides. Ideally, it should be easy for any worker making under a certain threshold to set up an individual retirement account and receive the full tax benefits associated with it. The main benefit is the exclusion up to a cap (per year) of \$18,000 in 2016 from federal and state taxes (\$24,000 if the worker is 50 or over). Most independent contractors are already able to shelter income in a SEP-IRA. Other proposals, such as the Obama administration's myRA also try to address this problem, by making it easier for workers whose employer does not offer a pension plan to set up an alternative. If all workers are able to set up an account into which they can place pre-tax income and have it grow tax-free, the question of who manages it should be less important. Ideally, the law would allow workers to transfer their personal plan to that run by any firm they worked for, as long as both parties agreed. Firms should be allowed to provide 401(k) accounts and make voluntary contributions to their workers' accounts without affecting their status under any other labor law or to help their workers set up SEP-IRA accounts and make contributions to them.

The Affordable Care Act

Until passage of the Affordable Care Act (ACA), employer-provided insurance was covered as an employee benefit under ERISA. The ACA did two things that substantially altered the importance of the employer-employee relationship as it applies to health care. First, the law requires any private employer with 50 or more full-time equivalent employees to provide affordable health insurance to at least 95 percent of its full-time employees (those working more than 30 hours a week) and dependents or pay a fee. Smaller firms are not required to offer any insurance. Economists believe that most of this cost is passed on to employees in the form of lower take-home pay.²⁹ Some people have expressed concern that

this requirement could cause companies to reduce work hours to below the 30-hour threshold.³⁰ In any case, many employers seem to be having difficulty getting low-income workers to participate in their plans. This may indicate that the workers do not believe coverage is worth the premiums they would have to pay.

The second change was to create state exchanges in which workers can purchase insurance on their own. Insurance companies are barred from excluding individuals based on preexisting conditions. Although there is some doubt about whether these exchanges are financially stable in the long run, they make workers less dependent on their employers for coverage. In fact, because lower-income workers can qualify for subsidies, they may be better off on the exchanges than on an employer plan.

Given this, requiring gig platforms to provide health-care coverage to their workers becomes less important. Nevertheless, select changes could improve the health care available to workers. Congress could amend the laws to allow firms to channel some payments into an account from which the individual would make premium payments without incurring any additional liability under federal labor laws. In order to avoid additional complexity, these payments should be subject to income but not payroll taxes, and the worker should remain eligible for any premium subsidies. This change is especially important for the gig economy because of the ACA's heavy dependence on the 30-hour workweek to determine eligibility for the employer's health plan. Without an ability to control or even monitor when a worker is effectively available for work, platforms would have great difficulty determining which of their workers qualify for coverage.

In many cases, it would be relatively easy for companies to alter their payroll systems to withhold and pay taxes for a larger share of their workers. This would relieve workers of an enormous legal and paperwork burden.

The Internal Revenue Code

The primary issues involved in the Internal Revenue Code are withholding and payment of Federal Insurance Contributions Act (FICA) taxes. Both employees and independent contractors have to pay income taxes on their earnings; however, the law requires employers to withhold a portion of pay from most of their employees and send it to the government. Employees receive a credit for these payments when they file taxes. Both employees and independent contractors also have to pay the employee share of FICA taxes, although employees have these withheld from their paychecks. However, firms only pay their share of FICA taxes for their employees; independent contractors have to pay both shares themselves. Employers have to file a form 1099 for most independent contractors, so the IRS already knows roughly how much each individual is earning.

Withheld income taxes come directly out of an employee's salary. Numerous studies have shown that employers also pass on the cost of their FICA contributions.³¹ As a result, the effective tax burden is the same for both employees and independent contractors. The main difference is that the government receives advance and accurate tax payments for employees, and it has to rely on independent contractors to accurately declare their income and make tax payments in a timely manner. Harris and Krueger cite research to conclude that "there is reason to believe that independent contractors are less likely than employees to pay their full tax liabilities."³²

If the revenue loss associated with workers paying taxes themselves is relatively small, the benefits of the employee-independent contractor test may not justify the enormous legal

complexity and uncertainty imposed by the current IRS standards. But even if this were true, workers could still use help with their taxes. In many cases, it would be relatively easy for companies to alter their payroll systems to withhold and pay taxes for a larger share of their workers. This would relieve workers of an enormous legal and paperwork burden. But given all the other implications of acting like an employer, the companies have no incentive to do so, lest they trigger broader employer obligations.

It would be fairly simple to improve the law. Harris and Krueger propose requiring intermediaries (including platforms) to withhold taxes from all independent workers with whom they work.³³ They also would require the intermediaries to pay the employer share of FICA taxes. In most cases, this will be relatively easy for the platform and will simplify life for the worker. Of course, the intermediary would almost surely reduce worker pay by an equivalent amount. But this might unduly burden small platforms with a lot of occasional workers. An alternative would be to require companies to withhold taxes and pay the FICA tax for all independent contractors once they have paid an independent contractor more than \$5,000 in the filing year. For workers who earn less, the company should be allowed to provide tax assistance, including access to software that would calculate any withholding requirement. Most of these marginal workers are likely to face minimal withholding requirements anyway. Many firms might decide to go even further if the legal consequence of doing so were reduced.

Workers' Compensation Insurance

Workers' compensation programs provide a mandatory administrative process for compensating workers for workplace injuries. Each state maintains its own program. Even if it were feasible, gig workers might not benefit from an extension of workers' compensation laws. These laws benefit workers by making it easier to gain compensation for a workplace injury. But this coverage would come at the cost of higher fees per job for gig workers. Coverage also prevents employees from suing their employer, even for injuries caused by negligence. On net, workers probably get greater coverage for a broader range of injuries and recovery is faster, less expensive, and does not require proof of negligence. However, for serious accidents, the ones employers most need coverage for; recoveries may be much lower than under tort law.

Given this, it might make sense to protect workers by improving the efficiency of the normal court system, making it faster and cheaper to prosecute a case and to expand workers' health insurance for normal injuries, whether they occur on the job or not. Companies would still have an incentive to avoid accidents; otherwise they could be sued, and workers would have private health insurance to protect them from uncovered accidents.

In this context, Harris and Krueger suggest that the law should encourage companies to pool their purchasing power, in order to voluntarily provide independent insurance policies to nonemployee workers.³⁴ Given that the company will pass any costs on to the worker, the best way to ensure that the coverage is worth the cost might be to make coverage voluntary on the part of both employers and employees.

Unemployment Insurance

Because they conclude that firms cannot measure the working hours of independent workers in the same way they measure the hours of their employees, Harris and Krueger also conclude that these workers should not benefit from unemployment insurance. This makes sense, because assuming that a worker performs well, platform workers may never have to worry about getting laid off or not having any income because they can always get more gig jobs. Moreover, workers who have more than one income stream have more protection against a large decline in income. Their income may be more volatile than normal, and it may decline for reasons beyond their control, but it is unlikely to go to zero. They also have the option of making up for any temporary declines by working more hours. Finally, because platforms do not have to pay unemployment insurance taxes, workers should enjoy higher incomes.

Harris and Krueger would encourage gig firms to pool their purchasing power to create a private unemployment insurance system or a system of individual accounts.³⁵ Unless it were tied to actual earnings as opposed to hours “worked,” any platform that tried to do this would have to worry about workers gaming the system by finding ways to increase their hours on the platform without increasing their actual work. But again, should a gig platform want to do this, it should not be counted as a factor in determining an employee relationship.

Still, discrete changes might help workers smooth over income gaps. If workers were allowed to request firms to delay their payments, and the taxes associated with them, by up to six months, they could effectively save income during good months and draw it down during lean times. Given their current ability to bank income, such a plan may not add much value, however.

The Fair Labor Standards Act

The Fair Labor Standards Act sets minimum wages and requires employers to pay their workers overtime if they work more than 40 hours a week.

The 40-hour wage week only applies to employers with full-time workers, but does not apply to those workers working more hours at another employer or on their own. The fact that many workers on Internet platforms already have a full-time job, or work for more than one platform, suggests that federal policy regarding the 40-hour week should not be applied to gig platforms.

The federal minimum wage has not changed for seven years, which is why Democrats and progressive organizations have been working to increase it. Many state and local jurisdictions have already raised their own minimum wages. But in either case, since the minimum wage is set per hour, it is hard to see how government could apply it to workers in the gig economy. Unless firms have a large degree of control over how many hours someone works and their productivity during those hours, they cannot be held responsible for ensuring that the worker earns a certain amount per hour. Doing so is likely to destroy the benefits of the relationship. For instance, some Uber drivers may not want to work very hard while they are driving for the company. They might want to accept only certain calls or run only one or two rides per hour. They may value the ability to decline rides if they

Since the minimum wage is set per hour, it is hard to see how government could apply it to workers in the gig economy.

happen to be doing something else at the time, including giving a ride to a Lyft passenger. Although employers can monitor how long a worker is logged into the platform, they cannot control how hard the person works or, oftentimes, the value of the service. Harris and Krueger came to a similar conclusion.³⁶

The National Labor Relations Act

Another issue is the application of the National Labor Relations Act, which largely governs the right of workers to unionize. Union strategy depends primarily on restricting the supply of non-unionized workers in order to commandeer a higher wage and greater job security. The model breaks down if firms are allowed to hire workers who are willing to work for less than the union wage.

The current model of unionization relies on two principles. The first is that either all workers in a bargaining unit will be unionized or none will. The second is that in some states a majority of workers may require the minority to support the union, because everyone is compelled to pay fees for representation regardless of whether or not they join the union. The union then gains a monopoly on supplying labor but must bargain on behalf of all workers, even those that oppose its formation. It is difficult to see how this model could be applied to markets as flexible and decentralized as those based on Internet platforms. For now, most pressure to unionize workers concentrates on those who earn a significant portion of their income working for one platform. But to apply this rule to Uber, where much of the focus currently is, would exclude most of its drivers. Would drivers who drove for fewer than 10 hours a week or for fewer than 20 weeks in the year be excluded from the bargaining unit? If the union were certified, would it or could it press the company to accept rules that would make those workers unprofitable?

Federal labor relations laws do not apply to nonemployees. In the absence of a union, any collective action by workers is subject to normal antitrust rules.³⁷ This significantly limits their ability to gain any bargaining advantage. Although Harris and Krueger do not think that gig workers should be employees in the normal sense, they do advocate amending antitrust law to allow them to organize and bargain over the terms and conditions of their work.³⁸ The city of Seattle recently passed a law permitting Uber and Lyft drivers to unionize. It is not clear whether the law will survive preemption and antitrust challenges, however.³⁹ A patchwork of different local and state laws on unionizing poses a large challenge to any platforms that operate nationally.

An easier solution might be to encourage workers to self-organize on a voluntary basis outside of a union, although possibly with its tactical support. As long as they concentrated on improving the situation of workers as individuals rather than as a group, they should not run afoul of antitrust laws. This seems to be happening with New York Uber drivers.⁴⁰ Even better, unions could be encouraged to adopt more of a health-club model, selling memberships to individual workers in return for the services that they provide. Almost all workers are likely to need career advice, financial planning, and help negotiating salaries and raises. Those who work for platforms are also likely to need advice on recordkeeping, tax preparation, marketing, and pricing. Organizations such as the Freelancers Union, Peers, and Intuit have already recognized the need for these efforts. Unions could perform

an enormous social benefit and help millions more workers if they focused on the individual needs of each worker rather than the collective whole. Platforms might even be willing to subsidize these efforts.

Path #3: Creating a Special Carve-Out for Internet Platforms

A third way to begin reforming labor law for the gig economy would be to create a special exemption from many of the labor laws specifically for gig platforms. Platforms are unique enough that legislation could define them fairly precisely, making it clear whom the law covers and whom it does not. Despite their rapid growth, they are also a small enough part of the workforce that treating them differently would not upend the broader labor markets.

An exemption, even if it lasted only 5 or 10 years, would give Congress a chance to experiment with the application of labor laws to a new century. The temporary nature could motivate firms to provide more services to their workers in order to persuade Congress to extend and broaden it. We could see whether companies are willing to create a more supportive and involved relationship with their workers in order to reduce turnover, improve quality, and enhance their public reputations. We could also see whether these attempts actually benefitted workers and raised their incomes or job satisfaction. If the experiment were successful, it could be applied to a broader section of the temporary, part-time, and independent workforce. If it were not, it could be ended with little damage done.

Platforms are unique enough that legislation could define them fairly precisely, making it clear whom the law does and does not cover.

How could such an exemption be created? One option is to state explicitly that no worker shall be considered an employee of a platform for the purpose of any labor law if the platform's role is primarily to connect the worker with prospective clients for the purpose of performing a personal service or selling a good if 1) the workers have complete freedom in deciding what hours they will work, and 2) the workers are free to refuse individual work assignments. Companies would still be free to perform activities such as setting prices, handling payments, and vetting both workers and customers, on the rationale that these activities create value for both workers and consumers.

An exemption would also allow companies to expand their support for workers without worrying about taking on the extensive legal liabilities associated with an employer-employee relationship. Congress could see whether companies actually provide additional benefits to their workers once the threat of employee status was removed. If they did, workers would become much better equipped to shape their own careers. The most likely sources of value seem to be in tax planning and preparation, financial advice, insurance discounts, business loans and capital goods, and peer advice. Given the importance of finding and keeping good workers, it is likely that platforms would find it in their best interest to provide at least some of these services to their workers.

Problems and Opportunities at the State Level

All of these possibilities fail to deal directly with state laws. Every state has its own set of labor standards. The most important of these are unemployment insurance and workers' compensation. However, many states and even cities have their own laws applying to minimum wages, work conditions, and health coverage. Almost all of these rely either

U.S. labor law imposes a broad set of protections on employees, but it relies on a dated common-law definition that is unrelated to the social goals of most labor legislation.

directly or indirectly on the common-law employee-independent contractor distinction. For instance, last year California’s labor commissioner determined that an individual Uber driver was an employee under the state’s labor code. The code creates an inference of “employment” when the worker performs personal services rather than business services. However, in making the final determination, the commissioner cited precedent establishing 11 factors, all of which are consistent with the traditional common-law test.⁴¹ These included whether the service provided requires a special skill, the length of the relationship, and whether the work is related to the regular business of the company. The case did not provide any precedent for whether other Uber drivers qualify as employees under the same law or whether the plaintiff qualifies as an employee under other California or federal laws. The immediate effect was limited to Uber paying the driver \$4,152.20 in expenses and interest. But, if applied broadly, the most likely effect would be to force Uber to dramatically reduce the flexibility it gives its drivers.

As a result, even significant reform of the federal laws may have limited benefits. If companies still face strong disincentives at the state level to having their workers classified as employees and if providing optional assistance to workers increases the probability of such a relationship being formed, then firms are unlikely to support their workers in ways that they might otherwise.

States should amend their statutes according to the above principles or at a minimum rely less on the common-law definition as a default for all labor laws. Alternatively, they could create an exemption for workers in the gig economy. But ideally, Congress would extend the preemption of state and local laws in this area. An exemption for gig platforms could cover all platforms that either serve users across state boundaries or operate in more than one state. There is considerable theory and precedent for the federal government preempting states on Internet policy. State actions with regard to the Internet can have negative effects on the entire economy, and it makes little sense to regulate inherently cross-border Internet services at the state level. Congress has recognized this many times with legislation creating a national framework or preempting states in areas like digital signatures and Internet tax.

CONCLUSION

Social, economic, and technological forces have been changing the American workforce for the last few decades. Although Internet platforms account for only a small portion of this evolution, their rapid rise and the prominence of a few specific companies have attracted much of the attention and fear often associated with economic change.

One of the more contentious issues has been whether workers should be considered employees of the companies they work for and, more broadly, the obligation that platforms have to assist their workers. U.S. labor law imposes a broad set of protections on employees, but it relies on a dated common-law definition that is unrelated to the social goals of most labor legislation. Continued reliance on this definition discourages gig-platform companies from offering more assistance to workers who use the platform.

The greatest problems arise in cases such as minimum-wage laws, family leave benefits, and union representation, where society wants to impose a broad social goal on the private relationship between a firm and its workers. These goals may be very worthwhile, but in most cases it would be more efficient to support workers directly through social policy rather than labor law. In general, the best ways to help workers are by encouraging a diversity of employment opportunities and by providing direct income supplements.⁴²

For most other laws, individual statutes should be amended to apply the law more appropriately in ways that do not depend upon the common-law distinction between employees and independent contractors. Short of this, Congress should pass a narrow exemption for Internet platforms and preempt state and local labor regulations from applying to platforms. There are strong indications that either of these reforms would do a much better job of supporting individual gig-economy workers in the large variety of their circumstances than does today's outdated model.

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