Who's Responsible Here? Establishing Legal Responsibility in the Fissured Workplace

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The nature of work is changing, with workers enduring increasingly precarious working conditions without any safety net. In response, this Article proposes a new "Concentric Circle Framework" to improve workers' access to civil, labor, and employment rights.

Many businesses, including app-based platforms, have restructured toward "fissured workplace" business models. They treat workers like employees (specifying behaviors and closely monitoring outcomes) but they classify workers as independent contractors (engaging them at an arms-length and denying them the rights and benefits tied to employment). These arrangements confound legal classifications of "employment" and expose deficiencies in existing workplace protections, which are based on "employment relationships." As a result, a growing number of workers lack both bargaining power and critical workplace rights and benefits.

We propose a Concentric Circle Framework to better govern workers' rights in the modern era. At the core, we maintain that certain rights and protections should not be tethered to an employment relationship, but rather to work itself. First, the Inner Circle establishes rights that should be

DOI: https://doi.org/10.15779/Z38G15TC0C.

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The authors are grateful to the Institute for New Economic Thinking for generous and sustained support of this project. We are also grateful to panelists and participants at the June 2019 Labor and Employment Relations Association (LERA) annual meeting and the Ford Foundation worker protection roundtable for detailed and informative comments on earlier drafts. Special thanks to Jennifer Abruzzo, Debbie Berkowitz, Sharon Block, Guy Davidov, Mark Erlich, Michael Felsen, Matthew Finkin, Seth Harris, Shannon Liss-Riordan, Raj Nayak, Michael Pappas, Richard Reibstein, Cathy Ruckelshaus, Erica Smiley, Rebecca Smith, Tricia Smith, Chris Tilly, and Jenny Yang for their review and feedback.

guaranteed to all workers, including freedom from discrimination and retaliation; access to a safe and healthful working environment; compensation for work and assurance of a minimum wage; and freedom to associate and engage in concerted activity. Second, the Middle Circle pertains to rights exclusive to employment (and not independent contractors). We assert that there should be a rebuttable presumption of employment for all workers, and we propose an updated legal test of employment. Finally, at the Outer Circle of the framework, we address the needs of legitimate independent contractors, suggesting broader policies that promote worker mobility and social welfare.

Other scholarship has focused exclusively on either independent contractors or employees, or it has proposed a new category of worker altogether. We contend that this comprehensive framework better assigns rights, responsibilities, and protections in the modern workplace than do other current legal doctrines or alternative proposals.

INTRODUCTION

Dynamex is a nationwide courier and delivery service offering on-demand pickup and delivery to individuals and businesses such as Office Depot and Home Depot.[1] In 2004, it reclassified its California drivers from employees to independent contractors.[2] As a result, California drivers were no longer eligible for significant labor and employment protections, including minimum wage guarantees, certain protections against discrimination, and eligibility for safety-net programs, such as workers' compensation and unemployment insurance.[3] After Dynamex's re-classification, drivers had to provide their own vehicles and cover their own taxes and transportation expenses, including paying for fuel, tolls, vehicle maintenance and insurance.[4] Drivers could also sub-contract deliveries and make deliveries for other companies.[5]

While the above is a standard setup for independent contracting, working with Dynamex also involved obligations that resembled

1. Dynamex Operations W., Inc. v. Super. Ct., 416 P.3d 1, 8 (Cal. 2018).

2. After the drivers sued, the California Supreme Court reconsidered, in *Dynamex*, the appropriate test for "determining whether drivers are employees or independent contractors for purposes of California wage orders, which impose obligations relating to minimum wages and maximum hours." *Id*.

3. *Id.*; *see also* Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2, e-3 (explaining the importance of employment status for protections against discrimination); Naomi B. Sunshine, *Employees as Price-Takers*, 22 LEWIS & CLARK L. REV. 105, 116 (2018); People v. Uber Techs., Inc., No. CGC-20-584402, slip op. at 5 (S.F. Super. Ct. Aug. 10, 2020) (holding that workers were no longer eligible for labor and employment protections due to status as independent contractors).

4. *Dynamex*, 416 P.3d at 8.

5. *Id*.

employment.[6] Although people driving for Dynamex used their own cars and trucks, drivers were sometimes required to attach the company's decals to their vehicles during deliveries.[7] Drivers also had to buy and wear Dynamex shirts and badges.[8] The company required certain drivers to buy a Nextel cellphone for communications with Dynamex; receive deliveries through Dynamex dispatchers at Dynamex's discretion, without a guaranteed number or type; and notify Dynamex when rejecting a delivery assignment or be liable for any losses to the company.[9] Dynamex still obtained the customers, set the rates customers were charged for delivery services, and negotiated the amounts drivers would receive.[10] While drivers could usually set their own schedules and routes, they had to provide Dynamex notice of the days they would work and complete all assignments the day they were assigned.[11]

The work required of Dynamex drivers represents a mix of delegated responsibilities that combine characteristics of independent-contractor service providers—figuring out routes, scheduling, and paying for one's expenses—and of employees—wearing a company logo, being issued specific equipment, and having rates, customers and delivery requirements set by the party for which one works. Dynamex drivers inhabit a grey area of independent contracting and traditional employment. Dynamex's practice is hardly unusual in this respect.

A significant amount of the work in the United States and many of the world's economies is done under a similar mix of conditions—a result of the "fissuring" of the workplace, where employers increasingly outsource various functions to contractors and subcontractors while maintaining substantial control over most of the outcomes of that work.[12] These business

6. *Cf.* Cotter v. Lyft, Inc., 60 F. Supp. 3d 1067, 1069 (N.D. Cal. 2015) ("At first glance, Lyft drivers don't seem much like employees. We generally understand an employee to be someone who works under the direction of a supervisor, for an extended or indefinite period of time, with fairly regular hours, receiving most or all his income from that one employer (or perhaps two employers). Lyft drivers can work as little or as much as they want, and can schedule their driving around their other activities. A person might treat driving for Lyft as a side activity, to be fit into his schedule when time permits and when he needs a little extra income. But Lyft drivers don't seem much like independent contractors either. We generally understand an independent contractor to be someone with a special skill (and with the bargaining power to negotiate a rate for the use of that skill), who serves multiple clients, performing discrete tasks for limited periods, while exercising great discretion over the way the work is actually done. Traditionally, an independent contractor is someone a principal might have found in the Yellow Pages to perform a task that the principal or the principal's own employees were unable to perform—often something tangential to the day-to-day operations of the principal's business.").

7. *Dynamex*, 416 P.3d at 8.

8. *Id*.

9. *Id*.

10. On-demand delivery drivers receive a percentage of the delivery fee or a flat fee. *Id*.

11. *Id*.

12. The concept of the fissured workplace was originally defined and analyzed in DAVID WEIL, THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT (2014).

models do so through a variety of organizational arrangements ranging from subcontracting and third party management to franchising and platform business models.[13]

Although varying in form, a common repercussion of fissured workplace business models is that they release the organizations that most directly benefit from contracted work from obligations to follow standard employment and labor laws. In other words, many businesses now *treat* workers like employees (specifying behaviors and then closely monitoring outcomes) but *classify* workers as independent contractors (engaging them at an arms-length and depriving them of the rights and benefits tied to employment).[14]

Fissured workplace arrangements continue to blur the boundaries of what marks "employment." In 1925, according to the Supreme Court, "a 'contract of employment' usually meant nothing more than an agreement to perform work."[15] Dictionaries usually considered "employment" as synonymous with "work."[16] Today, such assumptions no longer hold.

The increasingly ambiguous question of what constitutes "employment" is critically important. Employment is the basis for many of our fundamental workplace protections, including assurances of payment, safe workplace provisions, and protections against discrimination and sexual harassment.[17] Further, benefits provisions and basic safety-net policies like unemployment insurance and workers' compensation are also linked to employment.[18] Finally, wage and salary setting are often determined by employment responsibilities.[19]

As modern business structures raise the question of what defines employment, they expose faults in the current legal structures that tie worker protections to employment. The core purpose of worker protections is to remedy the unequal nature of working relationships. In most cases, workers do not have sufficient individual bargaining power to protect themselves against socially unacceptable outcomes in the labor market, especially in the absence of collective bargaining power. This vulnerability creates a role for

13. *Id.*; David Weil & Tanya Goldman, *Labor Standards, the Fissured Workplace, and the On-Demand Economy*, 20 PERSPS. ON WORK 27 (2016).

14. WEIL, *supra* note 12, at 8, 12-13, 17.

15. New Prime Inc. v. Oliveira, 139 S. Ct. 532, 539 (2019). Justice Gorsuch further noted that the Railroad Labor Board in 1922 interpreted "employee" to include anyone "engaged in the customary work directly contributory to the operation of the railroads." *Id.* at 543.

16. *Id.* at 540.

17. Sunshine, *supra* note 3, at 115-16.

18. *Id.* at 116.

19. *See* David Weil, *Understanding the Present and Future of Work in the Fissured Workplace Context*, 5 RSF: THE RUSSELL SAGE FOUND. J. SOC. SCIS. 147, 147-65 (2019).

the government to protect workers. Congress has responded to this need through legislation like the Fair Labor Standards Act (FLSA).[20]

However, current conditions show that the design and administration of worker protections undermine their purpose. Most of our critical workplace protection laws were flawed at the outset; they excluded certain categories of vulnerable workers and conditioned access to critical rights on employment status.[21] And the implementation of these laws further constricts their efficacy when employment relationships are determined by unpredictable and underinclusive inquiries.[22] To assess whether an employment relationship exists under some worker protection laws, Congress and courts have focused on the question of retained control. However, the control inquiry is problematic. First, questions of control do not always reflect the objectives of worker protection statutes.[23] Second, common-law development has further complicated the process of identifying employment relationships, muddling the scope of employer responsibilities.[24]

As businesses increasingly rely on "fissured workplace" business models and utilize independent contractors, risks once held by employers are placed onto workers. This means that worker protection laws fail a great and growing number of workers. Many independent contractors—both legitimately classified independent contractors and misclassified employees—lack the bargaining power and leverage needed to protect their own and societal interests.[25] These failures have been further exemplified during the COVID-19 pandemic and recognized by Congress in passing special unemployment insurance provisions and paid leave reimbursements for independent contractors.[26]

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20. *See, e.g.*, Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 706-07 ("The legislative history of the Fair Labor Standards Act shows an intent on the part of Congress to protect certain groups of the population from substandard wages and excessive hours which endangered the national health and well-being and the free flow of goods in interstate commerce. The statute was a recognition of the fact that due to the unequal bargaining power as between employer and employee, certain segments of the population required federal compulsory legislation to prevent private contracts on their part which endangered national health and efficiency and as a result the free movement of goods in interstate commerce . . . .") (citations omitted).

21. These laws likely presumed that independent contractors had sufficient bargaining power and leverage to protect their own interests without government intervention.

22. *See, e.g.*, Sec'y of Lab. v. Lauritzen, 835 F.2d 1529, 1542 (7th Cir. 1987) (Easterbrook, J., concurring) ("The conclusion of dependence in this case is an artifact of looking at the subject ex post - that is, after the workers are in the cucumber fields. To determine whether they are dependent on Lauritzen, we have to look at the arrangement ex ante.").

23. *See, e.g.*, S. G. Borello & Sons, Inc. v. Dep't of Indus. Rels., 769 P.2d 399, 403-04 (Cal. 1989).

24. *See infra* Part II.C.

25. The fissured workplace also presents an issue of joint employment, but this article focuses on enhancing protections for independent contractors and employees who companies have misclassified as independent contractors. We recognize that these issues are intertwined but do not address matters of joint employment in this Article.

26. David Weil, *New Laws for the Fissured Workplace*, AM. PROSPECT (Apr. 29, 2020), https://prospect.org/labor/new-laws-for-the-fissured-workplace/ [https://perma.cc/VB5L-2R6G].

This situation demands that we reimagine our system of worker protections. All workers must have some core protections and access to key laws. We contend that the central question involving worker protection should not be "what constitutes employment?" but rather "who is responsible here?" Workers deserve greater protections regardless of their employment status. We assert that this shift will reduce misclassification and create incentives for businesses to base their decisions on true tradeoffs rather than violating the law to save costs or other efforts to engage in regulatory arbitrage.[27]

We begin by setting the stage for urgent action. We examine how the "present of work"—let alone the "future of work"—devalues workers by providing them with less pay and benefits while imposing greater risks, and, at the same time, minimizing the liability of those who reap the greatest economic returns. We then focus on the history of assignment of responsibility and assess how poorly this aligns with industries in our current economy. After reviewing several proposals, we put forward a new model, the Concentric Circle Framework, to assign rights, responsibility, and protections in the workplace.

We argue that certain core benefits and protections (the Inner Circle) must exist for all people performing work, regardless of their employment relationship. These include freedom from discrimination and retaliation; access to a safe and healthful working environment; compensation for work and assurance of a minimum wage; and freedom to associate and engage in concerted activity. We next contend that for benefits and protections contingent on an employment relationship (the Middle Circle), there should be a rebuttable presumption of employment. The rebuttable presumption serves to recognize the risks often assumed by workers and acknowledge power asymmetries between workers and those benefiting from their work. For the Middle Circle, we propose adopting a new federal test of employment relationships. This prospective test is similar to the "ABC test" employed by many states but includes key components of the economic realities analysis courts use to interpret the FLSA (which gauges how economically dependent the worker is on the hiring party).[28] Finally, we suggest additional

27. *See, e.g.*, Seth D. Harris, *Workers, Protections, and Benefits in the U.S. Gig Economy*, GLOB. L. REV. (forthcoming Sept. 2018) (manuscript at 3) (noting that where there is legal ambiguity, "[c]ompanies committed to avoiding the costs of the legally imposed workplace social compact will twist or misrepresent work relationships to evade legally imposed benefits and protections through a form of regulatory arbitrage"); *see also* FRANÇOISE CARRÉ, ECON. POL'Y INST., (IN)DEPENDENT CONTRACTOR MISCLASSIFICATION 2 (June 8, 2015), https://files.epi.org/pdf/87595.pdf [https://perma.cc/Z8M6-CAAG] (detailing cost-savings of misclassification and concluding that "[m]isclassification is most common in industries where it is most profitable (such as construction, where workers' compensation insurance premiums are high.)").

28. *See, e.g.*, U.S. Dep't of Lab., Wage & Hour Div., Administrator's Interpretation No. 2015-1, The Application of the Fair Labor Standard Act's "Suffer or Permit" Standard in the Identification of Employees Who Are Misclassified as Independent Contractors (July 15, 2015) (withdrawn by the

mechanisms (the Outer Circle) to give workers access to, and to incentivize companies to fund, workplace benefits that promote worker mobility and social welfare.

I. THE PRESENT OF WORK: THE CHANGING NATURE OF EMPLOYMENT IN A FISSURED LANDSCAPE

A. Eroding Exit and Voice Options in the Labor Market Weaken Workers' Bargaining Power

A principle justification for workplace and labor laws comes from the need to rectify the unequal bargaining power of the labor market and the conditions that arise from that imbalance.[29] Institutional and market changes in the last three decades have weakened relative bargaining power for many workers, intensifying the need for a comprehensive re-examination of workplace protections.

In his classic book, *Exit, Voice, and Loyalty*, the political scientist A.O. Hirschman argued that dissatisfaction with a product, service, relationship, or other outcome can give rise to two broad options: one can walk away (exit) or try to change the outcome by engagement (voice).[30] In the labor market, exit and voice take the form of either quitting a job or using channels—unions, internal dispute resolution, rights granted by government—to seek changes in working conditions.[31]

Opportunities for workers to exercise exit or voice options have diminished in recent decades. Many workers in low wage labor markets and with limited "outside options," have experienced diminished mobility given fewer skills, less formal education, and smaller social networks.[32] Studies

Secretary of Labor on June 7, 2017), https://www.blr.com/html_email/ai2015-1.pdf [https://perma.cc/5QW6-62EE] (hereinafter Misclassification AI) (citing cases courts use to interpret the FLSA).

29. *See, e.g.*, HARRY A. MILLIS & ROYAL E. MONTGOMERY, LABOR'S PROGRESS AND SOME BASIC LABOR PROBLEMS 278 (1938) ("The widespread attempts in the last four decades, to regulate wages through exercise of the coercive power of the state have been an inevitable consequence of industry's failure to pay millions of its workers enough to enable them and their families to live in decency.").

30. ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES (1970); *see also* JOSH BIVENS ET AL., ECON. POL'Y INST., HOW TODAY'S UNIONS HELP WORKING PEOPLE: GIVING WORKERS THE POWER TO IMPROVE THEIR JOBS AND UNRIG THE ECONOMY (Aug. 24, 2017), https://files.epi.org/pdf/133275.pdf [https://perma.cc/9K3B-7U6F].

31. *See* RICHARD FREEMAN & JAMES L. MEDOFF, WHAT DO UNIONS DO? 94-110 (1984).

32. Michael A. Schultz, *The Wage Mobility of Low-Wage Workers in a Changing Economy, 1968 to 2014*, 5 RSF: THE RUSSELL SAGE FOUND. J. SOC. SCIS. 159, 179 (2019) ("Mobility out of low-wage work has declined for entrants into low wages since the late 1990s to the end of the study period in the early 2010s. Workers entering low-wage employment during the Great Recession (2007 to 2009) and the years afterward (2010 to 2013) experienced 3.7 and 4 percent lower probabilities of mobility. These effects are similar in size to the negative effect of being a woman relative to being a man and the positive effect of having a college degree relative to having a high school diploma. These Great Recession effects are the largest period effects by a factor of two since the late 1960s.").

show that the lifetime earnings of low wage workers are greatly impacted by local labor market shocks and that they are often unable to recover on account of their immobility.[33] Increasing concentration among companies that hire workers in labor markets further undermines exit options by limiting employment alternatives for those workers.[34] And the growth of non-compete agreements for low wage workers, even though they have little or no ability to competitively leverage their organization's intellectual property, further limits their exit option.[35]

The options for voice have also diminished considerably, mostly on account of the long-term decline of labor unions and collective bargaining in the vast majority of workplaces. The percent of wage and salary workers who were members of unions (union membership rate) fell by almost half in the last forty years.[36] In 1983, the union membership rate was 20.1%.[37] By 2019, it had fallen to 10.3%.[38] The Supreme Court's decision in *Janus v. American Federation of State, County, & Municipal Employees, Council 31*[39] further undermined the financial viability of public sector unions. Although in recent

33. *See* Abby Wozniak, *Are College Graduates More Responsive to Distant Labor Market Opportunities?*, 45 J. HUMAN RES. 944 (2010); Raj Chetty et al., *The Fading American Dream Trends in Absolute Income Mobility Since 1940*, 356 SCI. 398 (2017).

34. COUNCIL OF ECON. ADVISERS, LABOR MARKET MONOPSONY: TRENDS, CONSEQUENCES, AND POLICY RESPONSES (2016), https://obamawhitehouse.archives.gov/sites/default/files/page/files/20161025_monopsony_labor_mrkt_cea.pdf [https://perma.cc/WB58-VBT4]; *see also* JOSÉ AZAR ET AL., LABOR MARKET CONCENTRATION (2019); Efraim Benmelech et al., *Strong Employer And Weak Employees How Does Employer Concentration Affect Wages?* (Nat'l Bureau of Econ. Rsch., Working Paper No. 24307, 2018).

35. *See, e.g.*, JANE FLANAGAN, AM. CONST. SOC., NO EXIT: UNDERSTANDING EMPLOYEE NON-COMPETES AND IDENTIFYING BEST PRACTICES TO LIMIT THEIR OVERUSE (Nov. 2019), https://www.acslaw.org/wp-content/uploads/2019/11/Understanding-Employee-Non-Competes-and-Identifying-Best-Practices-to-Limit-Their-Overuse.pdf [https://perma.cc/38EK-6H68]. Fortunately, this trend has diminished due to public criticism of companies' use of non-competes and "no-poach agreements" in franchise and platform company agreements. *See, e.g.*, Sean Higgins, *Non-compete Clauses Increasingly a Liability for Businesses*, WASH. EXAM'R. (Sept. 4, 2018), https://www.washingtonexaminer.com/policy/economy/non-compete-clauses-increasingly-a-liability-for-businesses [https://perma.cc/Q2Z3-JA5P].

36. KARLA WALTER & DAVID MADLAND, CTR. FOR AM. PROGRESS, AMERICAN WORKERS NEED UNIONS 3 (2019), https://www.americanprogressaction.org/issues/economy/reports/2019/04/02/173622/american-workers-need-unions/ [https://perma.cc/Z2B9-6THP].

37. U.S. Bureau of Lab. Stat., *The Economics Daily, Union Membership Rate 10.5 Percent in 2018, Down From 20.1 Percent in 1983*, U.S. DEP'T OF LAB. (Jan. 25, 2019), https://www.bls.gov/opub/ted/2019/union-membership-rate-10-point-5-percent-in-2018-down-from-20-point-1-percent-in-1983.htm?view_full [https://perma.cc/T7EV-MZ7V].

38. U.S. BUREAU OF LAB. STAT., U.S. DEP'T OF LAB., UNION MEMBERS — 2019 (Jan. 22, 2020), https://www.bls.gov/news.release/pdf/union2.pdf [https://perma.cc/X9SR-E3RE]; U.S. BUREAU OF LAB. STAT., U.S. DEP'T OF LAB., UNION MEMBERSHIP IN THE UNITED STATES (Sept. 2016), https://www.bls.gov/spotlight/2016/union-membership-in-the-united-states/pdf/union-membership-in-the-united-states.pdf [https://perma.cc/R7VH-GZGL].

39. Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448 (2018) (prohibiting state and local government workers from negotiating collective bargaining agreements with fair share fee arrangements).

years we have seen the emergence of other avenues for workplace voice like worker centers, independent voice options remain the exception rather than the rule for working people.[40]

Access to individual and collective rights have also been eroded through recent court decisions.[41] In *Epic Systems Corporation v. Lewis*,[42] the Supreme Court held that the Federal Arbitration Act requires courts to enforce arbitration provisions in employment contracts, even when the arbitration terms prohibit the pursuit of class or collection actions.[43] Because class actions and class settlements can promote the exercise of substantive rights, such procedural restrictions can undermine implementation of workplace policies that are dependent on collective enforcement actions.[44] As Justice Ginsburg noted in dissent, "The inevitable result of today's decision will be the under enforcement of federal and state statutes designed to advance the well-being of vulnerable workers."[45]

Taken together, diminished exit and voice options further exacerbate imbalances in the labor market. Workplace policies must recognize this *ex ante* imbalance and hold organizations responsible for protecting workers' rights.

B. The Fissured Workplace Undermines Employees' Rights and Protections

Employers are moving away from a traditional employment model and toward what we call a "fissured workplace" model. This organizational model shifts responsibilities from lead businesses to other organizations while still maintaining significant control over workers' outcomes. This fissuring comes from outsourcing, contracting, subcontracting, or the use of

40. *See generally* JANICE FINE, WORKER CENTER: ORGANIZING COMMUNITIES AT THE EDGE OF THE DREAM (2006); STEVEN GREENHOUSE, BEATEN DOWN, WORKED UP: THE PAST, PRESENT, AND FUTURE OF AMERICAN LABOR (2019).

41. Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1616 (2018); *see also* Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1421 (2019).

42. *Epic Sys. Corp.*, 138 S. Ct. at 1623.

43. *Id.* at 1622-23.

44. David Weil, *Individual Rights and Collective Agents The Role of New Workplace Institutions in the Regulation of Labor Markets, in* EMERGING LABOR MARKET INSTITUTIONS FOR THE 21ST CENTURY (Richard Freeman, Larry Mishel, & Joni Hersch, eds., 2004).

45. *Epic Sys. Corp.*, 138 S. Ct. at 1646 (citing Jean R. Sternlight, *Disarming Employees How American Employers Are Using Mandatory Arbitration To Deprive Workers of Legal Protections*, 80 BROOK. L. REV. 1309 (2015)); *see also* Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C. L. REV. 679, 683-84 (2018) (concluding that the law of mandatory arbitration needs to be reconsidered "in light of mounting evidence that it effectively enables employers to nullify employee rights and to insulate themselves from the liabilities that back up crucial public policies."); ALEXANDER J.S. COLVIN, ECON. POL'Y INST., THE GROWING USE OF MANDATORY ARBITRATION (Apr. 6, 2018), https://files.epi.org/pdf/144131.pdf [https://perma.cc/J5MM-NC8A].

digital platforms to undertake much of the lead business' work.[46] The rise of fissured workplace arrangements allows employers to shift risks and responsibilities onto workers and incentivizes the misclassification of employees as independent contractors.[47] In turn, fissuring has undermined the rights and protections typically afforded workers via employment.

There were industries that were highly sub-contracted in the 1930s when Congress enacted the Fair Labor Standards Act (FLSA), and some were highly sub-contracted even earlier than that.[48] However, the sub-contracting business model was sector-specific at the time and limited to a handful of industries, including mining, garment, and industries where child labor was prevalent. Congress was aware of these problematic business models and sought to address them through protective legislation.[49] Yet, shifting work outside the boundaries of lead businesses and organizations has now become the rule, not the exception. This widespread phenomenon demands attention.

How did we get here? Over the past few decades, major companies throughout the economy have faced intense pressure to improve financial performance for private and public investors.[50] Organizations have responded by focusing their businesses on core competencies—that is, activities that provide the greatest value to their consumers and investors—and by shedding activities deemed less essential.[51] Firms typically started outsourcing activities like payroll, publications, accounting, and human resources, but

46. WEIL, *supra* note 12; *see also* Mitchell H. Rubinstein, *Employees, Employers, and Quasi-Employers An Analysis of Employees and Employers Who Operate in the Borderland Between an Employer-and-Employee Relationship*, 14 U. PA. J. BUS. L. 605, 640 (2012).

47. *See* Weil, *supra* note 26.

48. *See* Kati L. Griffith, *The Fair Labor Standards Act at 80 Everything Old is New Again*, 104 CORNELL L. REV. 557, 568 (2019) ("While twenty-first century businesses are certainly different from their vertically-integrated New Deal counterparts, the idea that some business arrangements would make it difficult to enforce the FLSA is not a new dynamic of our twenty-first century economy.").

49. Keith Cunningham-Parmeter, *From Amazon to Uber Defining Employment in the Modern Economy*, 96 B.U. L. REV. 1673, 1693 (2016) ("For example, New Deal reformers passed the FLSA in part to disrupt the nation's "sweating" system, wherein garment manufacturers contracted with sweatshops to produce their wares. Under this scheme, the sweatshops exposed workers to oppressive working conditions, while the clothing manufacturers that hired the sweatshops distanced themselves from these violations and protected their brands from reputational harm. By extending liability to parties that 'permitted' wage violations, Congress placed these clothing manufacturers squarely within FLSA's crosshairs.") (citations omitted); Griffith, *supra* note 48, at 579 ("the FLSA's framers foresaw that some businesses might change certain formalities such as where work is located, or how pay arrangements are structured, in ways that evaded coverage.").

50. The Business Roundtable generated significant press and interest when it announced in 2019 that it was moving *away* from its traditional "principles of shareholder primacy." The statement's "modern standard for corporate responsibility," includes a fundamental commitment to all stakeholders, which includes "investing in our employees … compensating them fairly … supporting them through training and education, [and fostering] dignity and respect." *Statement of Purpose of a Corporation*, BUS. ROUNDTABLE (Aug. 19, 2019), https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans [https://perma.cc/ES7Z-8HN6].

51. *See* WEIL, *supra* note 12, at 94.

over time this trend has spread to activities like janitorial work, facilities maintenance, and security. In many cases, this practice has gone even deeper, with firms outsourcing employment activities that are central to the company's work like housekeeping in hotels, cooking in restaurants, loading and unloading in retail distribution centers, and even basic legal research in law firms.[52]

Like a fissure in a once-solid rock that deepens and spreads, once core activities such as janitorial services, housekeeping, or package delivery are shifted, secondary businesses also begin to outsource their own responsibilities to other businesses, further entrenching this model. A common practice in janitorial work, for instance, is for companies in the hotel or grocery industries to outsource that work to cleaning companies. Those companies, in turn, often hire smaller businesses to provide workers for specific facilities or shifts. These work arrangements alter who is the employer of record, making the worker-employer tie tenuous and less transparent.[53]

Continuing technological advances and on-demand work platforms further enable traditional and virtual workplaces, such as those used by Uber, Lyft, Amazon Inc.'s Mechanical Turk, and Handy, to mask the control companies retain over a vast workforce of so-called independent contractors.[54]

Fissured workplace business models incentivize violations of our fundamental labor and employment standards. Because each level of a fissured workplace structure requires a financial return, the more layers of sub-contracting between the lead firm and the work, the slimmer are the remaining profit margins. At the same time, with additional layers of sub-contracting, labor typically represents a larger share of overall costs—and one of the only costs in direct control for those entities. Thus, companies have even greater incentives to cut corners with workers paying the price. Fissured workplace models undermine workers' rights, for example, when companies fail to pay janitors and cleaners,[55] cable and satellite installers,[56] carpenters,

52. *See id.* at 152-53. The company Snag, for example, claims to be "America's #1 hourly marketplace," connecting workers with shifts or jobs and employers with hourly workers within minutes in restaurants, retail, hospitality, and healthcare. *About*, SNAG, https://www.snagajob.com/about/ [https://perma.cc/CDR4-EHET].

53. David Weil, *Enforcing Labour Standards in Fissured Workplaces The US Experience*, 22:2 ECON. & LAB. REL. REV. 33, 37 (2011).

54. Weil & Goldman, *supra* note 13.

55. *See, e.g.*, Vazquez v. Jan-Pro Franchising Int'l, Inc., 923 F.3d 575 (9th Cir. 2019); Awuah v. Coverall N. Am., Inc., 707 F. Supp. 2d 80 (D. Mass. 2010).

56. *See, e.g.*, Scantland v. Jeffry Knight, Inc., 721 F 3d 1308 (11th Cir. 2013); Keller v. Miri Microsystems LLC, 781 F.3d 799 (6th Cir. 2015); Thornton v. Mainline Commc'ns, LLC, 157 F. Supp. 3d 844, 849 (E.D. Mo. 2016); Lang v. DirecTV, Inc., 801 F. Supp. 2d 532 (E.D. La. 2011); Solis v. Cascom, Inc., No. 3:09-CV-257, 2011 WL 10501391 (S.D. Ohio Sept. 21, 2011). *But see* Chao v. Mid–Atl. Installation Servs., Inc., 16 F. App'x 104 (4th Cir. 2001).

home care workers, and other workers their rightful wages and overtime—losses typically equivalent to losing three to four weeks of earnings.[57]

The growth of fissured work arrangements and increasing classification and misclassification of workers as independent contractors[58] deprives workers of their fundamental civil rights and labor and employment law protections and denies them access to some public benefits.[59] Independent contractors lack most civil rights protections and are unable to demand minimum wages, access unemployment insurance or workers' compensation, or collectively bargain for improved conditions.[60] Being split off from the main firm can also detrimentally impact workers' wages. When you work as an employee for a major business, wages and benefits tend to increase over time, regardless of whether that large employer is unionized.[61] But earnings fall significantly when a job is contracted out,[62] even for identical kinds of work and workers. Opportunities for "climbing the ladder" fade because the person in the mailroom (or, more likely, at the IT service desk) is now a

57. U.S. DEP'T OF LAB., WAGE & HOUR DIV., WAGE AND HOUR DIVISION DATA (2019), https://www.dol.gov/agencies/whd/data [https://perma.cc/TJ64-KY9G].

58. *See* U.S. GOV'T ACCOUNTABILITY OFF., EMPLOYEE MISCLASSIFICATION: IMPROVED COORDINATION, OUTREACH, AND TARGETING COULD BETTER ENSURE DETECTION AND PREVENTION (Aug. 2009), https://www.gao.gov/assets/300/293679.pdf [https://perma.cc/7BF8-ZT48] (concluding that a significant portion of independent contracting represents misclassification of workers); CARRÉ, *supra* note 27, at 1 (noting that state-level data shows that anywhere from ten to twenty percent of employers misclassify at least one employee and that about one third of construction workers in the U.S. South, an industry where the problem has been long entrenched, are estimated to be misclassified); *see also* Lawrence F. Katz & Alan B. Krueger, *Understanding Trends in Alternative Work Arrangements in the United States*, 5 RSF: THE RUSSELL SAGE FOUND. J. SOC. SCIS. 132 (2019); David Weil, *Lots of Employees Get Misclassified as Contractors. Here's Why It Matters*, HARV. BUS. REV. (2017), https://hbr.org/2017/07/lots-of-employees-get-misclassified-as-contractors-heres-why-it-matters [https://perma.cc/SA7E-DPUZ]; CATHERINE RUCKELSHAUS & CEILIDH GAO, NAT'L EMP. L. PROJECT, INDEPENDENT CONTRACTOR MISCLASSIFICATION IMPOSES HUGE COSTS ON WORKERS AND FEDERAL AND STATE TREASURIES 2-6 (2015), https://s27147.pcdn.co/wp-content/uploads/NELP-independent-contractors-cost-2017.pdf [https://perma.cc/BW4A-K78H]; Misclassification AI, *supra* note 28.

59. Weil, *supra* note 26; Lewis L. Maltby & David C. Yamada, *Beyond "Economic Realities" The Case for Amending Federal Employment Discrimination Laws to Include Independent Contractors*, 38 B.C. L. REV. 239, 247 (1997) ("All of these effects—"companies" or "employers" treating individuals as independent contractors rather than employees, large firms contracting out work to small firms, and the growth of temporary help agencies—increase the net number of independent contractors.").

60. A recent NLRB opinion illustrates the detrimental impact of the fissured workplace on collective bargaining efforts. In 2018, the NLRB concluded that protesting janitorial workers lost the protections of the NLRA because they engaged in unprotected picketing. Preferred Bldg. Servs., 366 N.L.R.B. No. 159 (Aug. 28, 2018). The Board reasoned that the picketers had inappropriately led the public to believe that the building management company was their employer and had power to adjust their working conditions.

61. *See generally* Charles Brown & James Medoff, *The Employer Size-Wage Effect*, 97:5 J. POL. ECON. 1027 (1989); John Gibson & Steven Stillman, *Why Do Big Firms Pay Higher Wages? Evidence from an International Database*, 91:1 REV. ECON. & STAT. 213, 213-18 (2009). Unionization also results in higher wages and benefits. *See generally* LAWRENCE MISHEL & MATTHEW WALTERS, ECON. POL'Y INST., HOW UNIONS HELP ALL WORKERS (Aug. 26, 2003), https://files.epi.org/page/-/old/briefingpapers/143/bp143.pdf [https://perma.cc/9LE7-869M].

62. Deborah Goldschmidt & Johannes F. Schmieder, *The Rise of Domestic Outsourcing and the Evolution of the German Wage Structure*, 132:3 QUARTERLY J. ECON. 1165, 1165-1217 (2017).

subcontractor without a pathway forward.[63] That not only means lower wage growth and reduced access to benefits, but also diminished opportunities for on-the-job training, social safety net protections like unemployment insurance and workers' compensation, access to valuable social networks, and other pathways for upward advancement. Taken together, the fissured workplace contributes to growing earnings inequality.[64]

The negative effects of a fissured workplace significantly impact workers earning low wages, people of color, immigrants, and undocumented workers. Outsourcing is prevalent in many fast-growing industries, including temporary help, health services, construction, manufacturing, transportation, and warehousing.[65] Women, people of color, and immigrants often work in low-wage and fissured sectors, further compounding historic and systemic inequities built into the National Labor Relations Act (NLRA) and the FLSA through occupation- and industry-specific carve-outs that disproportionately exempt such workers from basic labor protections.[66]

Additionally, there are significant costs for society as a whole when workers are misclassified as independent contractors. In addition to millions of dollars in unpaid wages, unpaid contributions to unemployment insurance, workers' compensation, and taxes, there are local economic losses that result

63. Neil Irwin, *To Understand Rising Inequality, Consider the Janitors at Two Top Companies, Then and Now,* N. Y. TIMES (Sept. 3, 2017), https://www.nytimes.com/2017/09/03/upshot/to-understand-rising-inequality-consider-the-janitors-at-two-top-companies-then-and-now.html [https://perma.cc/26JM-Y72W].

64. *See generally* Erling Barth et al., *It's Where You Work Increases in the Dispersion of Earnings across Establishments and Individuals in the United States*, 34:2 J. LAB. ECON. 67, 67-97 (2016); David Weil, *Inequality and the Fissured Workplace*, 21:2 CANADIAN LAB. & EMP. L. J. 207, 207-38 (2019).

65. For a comprehensive review of literature and estimates of the scope of the fissured workplace, *see* Weil, *supra* note 19; *see also* Goldschmidt & Schmeider *supra* note 62; LEAH VOSKO ET AL., CLOSING THE ENFORCEMENT GAP: IMPROVING EMPLOYMENT STANDARDS PROTECTIONS FOR PEOPLE IN PRECARIOUS JOBS (2020); Brief for Nat'l Emp. L. Project et al. as Amici Curiae Supporting Petitioners at 7, Browning-Ferris Indus. of Cal. Inc., No. 32-RC-109684 (N.L.R.B. 2014) (hereinafter NELP Brief).

66. *See, e.g.*, MARTHA ROSS & NICOLE BATEMAN, BROOKINGS, MEET THE LOW WAGE WORKFORCE (Nov. 2019), https://www.brookings.edu/wp-content/uploads/2019/11/201911_Brookings-Metro_low-wage-workforce_Ross-Bateman.pdf [https://perma.cc/DXX9-ZXDG]; David Cooper, *Workers of Color are Far More Likely to be Paid Poverty-Level Wages than White Workers*, ECON. POL'Y INST. (June 21, 2018), https://www.epi.org/blog/workers-of-color-are-far-more-likely-to-be-paid-poverty-level-wages-than-white-workers/ [https://perma.cc/D9KS-EFN5]; ELYSE SHAW ET. AL., INST. FOR WOMEN'S POL'Y RSCH., UNDERVALUED AND UNDERPAID IN AMERICA: WOMEN IN LOW-WAGE, FEMALE DOMINATED JOBS (2016), https://iwpr.org/wp-content/uploads/2020/09/D508-Undervalued-and-Underpaid.pdf [https://perma.cc/D5CL-WDB6].

from labor and employment violations.[67] Lack of health and safety oversight[68] and discrimination further elevate economic and social costs.[69] One study from 2016 suggested that gender-based discrimination in social institutions alone contributed to a loss of $12 trillion, or 16% of global income, by reducing women's access to education and jobs, resulting in lower productivity.[70] Others have also documented the individual and societal costs of racism and discrimination.[71]

Correctly classifying workers will continue to be a challenge in the on-demand economy. While many workers resemble independent contractors by having control over their work schedule and environment, they do not otherwise fit the traditional image of an independent contractor because they do not control their payment, rates, or work contracts.[72] Additionally, many

67. When families lose income or jobs, communities also face the consequences of workers who are unable to spend their earnings and stimulate the local economy. In addition, when low-wage workers are underpaid, "taxpayers must provide additional funding for social welfare programs to fill in the gaps that employers created." *See, e.g.*, DAVID COOPER & TERESA KROEGER, ECON. POL'Y INST., EMPLOYERS STEAL BILLIONS FROM WORKERS' PAYCHECKS EACH YEAR (May 10, 2017), https://files.epi.org/pdf/125116.pdf [https://perma.cc/PSS5-CEQM]. There are also significant costs at the state level. *See, e.g.*, Paul Berger & Sarah E. Needleman, *New Jersey Demands Uber Fork Over Nearly $650 Million in Unpaid Taxes, Fines*, WALL ST. J. (Nov. 15, 2019), https://www.wsj.com/articles/new-jersey-demands-uber-fork-over-nearly-650-million-in-unpaid-taxes-fines-11573836289#:~:text=Uber%20Technologies%20Inc.%20has%20been,from%20being%20classified%20as%20employees [https://perma.cc/S9EH-P8ZS] ("Earlier this week, the state's Department of Labor and Workforce Development demanded Uber and a subsidiary, Rasier LLC, hand over [$642 million] for failing to pay employment taxes by, the state argues, misclassifying drivers as independent contractors.").

68. *See* David Michaels, OSHA, *Testimony before the House Committee on Education and the Workforce Subcommittee on Workforce Protections*, U.S. DEP'T OF LAB. (Oct. 7, 2015), https://www.osha.gov/news/testimonies/10072015 [https://perma.cc/ZW6M-LQVR] (testifying to the numerous consequences of OSH Act violations).

69. *See, e.g.*, JOE R. FEAGIN & KARYN D. MCKINNEY, THE MANY COSTS OF RACISM (2003); Kenneth Terrell, *Age Discrimination Costs the Nation $850 Billion, Study Finds*, AARP (Jan. 30, 2020), https://www.aarp.org/politics-society/advocacy/info-2020/age-discrimination-economic-impact.html [https://perma.cc/BR3W-PFD4]; CROSBY BURNS, CTR. FOR AM. PROGRESS, THE COSTLY BUSINESS OF DISCRIMINATION: THE ECONOMIC COSTS OF DISCRIMINATION AND THE FINANCIAL BENEFITS OF GAY AND TRANSGENDER EQUALITY IN THE WORKPLACE (Mar. 22, 2012), https://cdn.americanprogress.org/wp-content/uploads/issues/2012/03/pdf/lgbt_biz_discrimination.pdf?_ga=2.56032875.1948764555.1603733635-1369080642.1603733635 [https://perma.cc/9VX4-CDLW]; GAËLLE FERRANT & ALEXANDRE KOLEV, OECD DEV. CTR., THE ECONOMIC EOST OF GENDER-BASED DISCRIMINATION IN SOCIAL INSTITUTIONS (June 2016), https://www.oecd.org/dev/development-gender/SIGI_cost_final.pdf [https://perma.cc/J5H5-Q25G].

70. *Id*.

71. ANI TURNER, ALTARUM, THE BUSINESS CASE FOR RACIAL EQUITY (April 24, 2018), https://altarum.org/RacialEquity2018 [https://perma.cc/57V5-Y4QB].

72. *See, e.g.*, SETH D. HARRIS & ALAN B. KRUEGER, BROOKINGS, A PROPOSAL FOR MODERNIZING LABOR LAWS FOR TWENTY-FIRST-CENTURY WORK: THE INDEPENDENT WORKER 2, 12 (2015), https://www.hamiltonproject.org/assets/files/modernizing_labor_laws_for_twenty_first_century_work_krueger_harris.pdf [https://perma.cc/BFM5-5HJU].

on-demand companies continue to flout their legal obligations while lobbying for more business-friendly laws and regulatory safe harbors.[73]

These workforce trends demand recognition and re-consideration about who is the appropriate entity—or entities—to hold responsible for workplace protections and benefits.[74]

II. THE EVOLUTION AND CHALLENGES OF DEFINING EMPLOYMENT

The threshold question of employment status critically determines a worker's protections and rights. However, defining employer-employee relationships has been a challenge for legislators, commentators, and jurists for centuries, dating back to development of master-servant relationships.[75] Given the difficulty of parsing work relationships, many labor and employment statutes either lack definitions for who is an employee covered by the law or have less-than-helpful circular definitions, such as "'employee' means an individual employed by an employer."[76] Even where employment is defined, courts have not always stayed true to the language of the statute, e.g., failing to broadly interpret the definition of "employ" in the FLSA.[77]

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73. *See, e.g.*, People v. Uber Techs., Inc., No. CGC-20-584402, slip op. at 5 (S.F. Super. Ct. Aug. 10, 2020) (quoting Rogers v. Lyft, Inc., 452 F. Supp. 3d 904, 911 (N.D. Cal. 2020) ("[R]ather than comply with a clear legal obligation, companies like Lyft are thumbing their noses at the California Legislature . . . .")); MAYA PINTO ET AL., NAT'L EMP. L. PROJECT, RIGHTS AT RISK: GIG COMPANIES' CAMPAIGN TO UPEND EMPLOYMENT AS WE KNOW IT (Mar. 25, 2019), https://s27147.pcdn.co/wp-content/uploads/Rights-at-Risk-4-2-19.pdf [https://perma.cc/C28B-RAXF].

74. In announcing a change to the NLRB's joint employer standard in August 2015, the Board stated that its new standard was necessary, as the current standard was "out of step with changing economic circumstances," including increasing numbers of employees employed through temporary staffing agencies and the range of occupations staffed by staffing agencies. Browning-Ferris Indus. of Cal., Inc., 362 N.L.R.B. 1599, 1599 (2015). In addition, states have recognized the need to respond to widespread misclassification. In the span of eight years (2004-2012), "twenty-two states have modified their statutory definitions of independent contractors or transformed penalties for the misclassification of employees." Anna Deknatel & Lauren Hoff-Downing, *ABC on the Books and in the Courts An Analysis of Recent Independent Contractor and Misclassification Statutes*, 18 U. PA. J. L. & SOC. CHANGE 53, 53 (2015).

75. *See, e.g.*, Waters v. Pioneer Fuel Co., 55 N.W. 52, 52 (Minn. 1893) ("It is not easy to frame a definition of the terms 'independent contractor' that will satisfactorily meet the conditions of different cases as they arise, as each case must depend so largely upon its own facts."); NLRB v. Hearst Publ'ns, 322 U.S. 111, 121 (1944), *rev'd on other grounds*, Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318 (1992) ("Few problems in the law have given greater variety of application and conflict in results than the cases arising in the borderland between what is clearly an employer-employee relationship and what is clearly one of independent entrepreneurial dealing."); Richard R. Carlson, *Why the Law Still Can't Tell an Employee When it Sees One and How it Ought to Stop Trying*, 22 BERKELEY J. EMP. & LAB. L. 295, 298-99 (2001) ("After nearly two hundred years of evolution, the multi-factored 'common law' test begs the question of employee status as much as answers it.").

76. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (2018).

77. *See, e.g.*, Bruce Goldstein et al., *Enforcing Fair Labor Standards in the Modern American Sweatshop Rediscovering the Statutory Definition of Employment*, 46 UCLA L. REV. 983 (1999).

As a result, the courts have heavily relied on common law definitions of "employee."[78] To answer the threshold question of employment, courts have developed tests for each statute to assess worker-employer relationships.

The status quo is inadequate.[79] Workers and employers lack certainty about the outcome in any given case. Courts have been reluctant to defer to the broad statutory definition of "employ" in the FLSA or to expansively interpret other standards.[80] Instead, courts have repeatedly defaulted to common law principles based on master-servant relationships that rely on principles of control as the *sine qua non* of determining rights and responsibilities.[81]

Understanding the evolution of these definitions, as well as the courts' interpretation of them, is a key step in proposing a new framework. Thus, this Part provides an overview of the legislative and common law history of employment definitions under four labor and employment statutes. It first addresses workers Congress intentionally excluded from the laws' protections. It next explains why the common-law origins of employment have hindered workers' ability to prove they are employees and thus, covered by these laws. Finally, this Part echoes the work of others in concluding that the Supreme Court has further limited the statutory text and purpose of at least one law, the FLSA.

While there are many statutes protecting workers' rights, this paper focuses on the NLRA, FLSA, Title VII of the Civil Rights Act of 1964 (Title VII), and the Occupational Safety and Health Act (OSH Act) as examples because they cover fundamental and interrelated components of workplace rights—the right to organize and collectively bargain, the right to a fair day's pay for a fair day's work (a living wage), the right to work free from discrimination, and the right to safe and healthful working conditions.

A. Seminal Labor and Employment Statutes Established Foundational Rights but Problematically Limited Access to Those Rights

Our foundational labor and employment statutes established principles of workplace rights and fair treatment but were unfortunately flawed from the start. First, they excluded categories of workers in need of workplace protections. The FLSA, enacted in 1938,[82] and the NLRA, enacted in 1935,[83] are key pieces of New Deal legislation that codified foundational labor and employment rights, including the right to a minimum wage and overtime and the ability to organize and collectively bargain. When Congress passed the

78. *See* discussion, *infra*.

79. Harris, *supra* note 27.

80. *See* discussion, *infra*; Goldstein et al, *supra* note 77, at 1028-29.

81. *See* discussion, *infra*.

82. Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*

83. National Labor Relations Act of 1935, 29 U.S.C. §§ 151-69.

FLSA and created the first federal minimum wage law, however, it left several categories of workers—including service workers, agricultural workers, and domestic workers—out of the FLSA's protections.[84] Congress also excluded agricultural and domestic workers, among others, from the NLRA.[85] Because these sectors were predominated by people of color and women, racial and gender discrimination played a significant role in their exclusion.[86] These exclusions have perpetuated inequities that continue to plague the labor market and many families' economic security.[87] While Congress later added protections for some of these sectors, many workers, some of whom are employees, remain unprotected by these laws.[88] Some employees also lack protections because their employers do not meet the threshold eligibility requirements, i.e., they have less than the number of employees (Title VII) or annual sales or services required by the statute (FLSA) or through regulation (NLRA).[89] Ensuring equity in workplace protection laws requires recognizing these roots and remedying these exclusions in future laws.

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84. *See, e.g.*, Llezlie Green Coleman, *Rendered Invisible African American Low-Wage Workers and the Workplace Exploitation Paradigm*, 60 HOW. L.J. 61, 85 (2016).

85. 29 U.S.C. § 152(3) ("The term 'employee' . . . shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse."); LINDA BURNHAM & NIK THEODORE, NAT'L DOMESTIC WORKERS ALL., HOME ECONOMICS: THE INVISIBLE AND UNREGULATED WORLD OF DOMESTIC WORK (2012), https://domesticworkers.org/sites/default/files/HomeEconomicsReport.pdf [https://perma.cc/U9KX-GWDK]; *see also* 29 U.S.C. § 652(5); 29 C.F.R. § 1975.6 (2015) (interpreting OSHA to exclude domestic workers).

86. Enacting the FLSA required support from Southern legislators whose regional economies relied on the exploitation of Black workers for agriculture, service, and domestic work. *See* HARMONY GOLDBERG, INT'L LABOUR OFF., THE LONG JOURNEY HOME: THE CONTESTED EXCLUSION AND INCLUSION OF DOMESTIC WORKERS FROM FEDERAL WAGE AND HOUR PROTECTIONS IN THE UNITED STATES (2015), https://pdfs.semanticscholar.org/2d3b/5d379d5e25ed27c6bafd793e753aa4542c20.pdf [https://perma.cc/E9Z9-4N85]; *see also* IRA KATZNELSON, FEAR ITSELF: THE NEW DEAL AND THE ORIGINS OF OUR TIME (2014).

87. For Black workers, for example, wages represent "a larger share of total family income." PAMELA JOSHI ET AL., HOW MUCH WOULD FAMILY AND MEDICAL LEAVE COST WORKERS IN THE US? RACIAL/ETHNIC VARIATION IN ECONOMIC HARDSHIP UNDER UNPAID AND PAID POLICIES 9 (Dec. 23, 2019), https://www.tandfonline.com/doi/pdf/10.1080/13668803.2019.1704398?needAccess=true [https://perma.cc/TP3Z-C3WC]. Black and Hispanic families are less likely to be able to afford a financial setback. *Id.* at 5 (citing BD. OF GOVERNORS OF THE FED. RSRV. SYS., REPORT ON THE ECONOMIC WELL-BEING OF U.S. HOUSEHOLDS IN 2018 (May 2019), https://www.federalreserve.gov/publications/files/2018-report-economic-well-being-us-households-201905.pdf [https://perma.cc/62MC-2GJN]). Losing a job through retaliation or discrimination, wage theft, or inability to work due to a lack of access to paid leave or paid sick days means that family incomes will suffer. *See generally* JOSHI ET AL., *supra*.

88. These historic inequities continue. In 2019, for example, when New Jersey increased its minimum wage to $15 an hour, the law excluded agricultural workers. N.J. STAT. ANN. § 34:11-56a4 (West 2019).

89. 42 U.S.C. § 2000e(b); 29 U.S.C. § 203(s)(1); 29 U.S.C. § 152; PRAC. L. LAB. & EMP., *NLRB Jurisdictional Limits and Standards Chart*, Westlaw (database maintained) (last visited Oct. 29, 2020).

B. Courts Problematically Rely on the Common Law Control Test Which Undermines Statutory Purpose

Unfortunately, even for covered workers, the power of these statutes is limited; workers are often unable to secure long term protections because courts rely on the so-called "control test" to define employment.[90] The most common test for employment relationships—the common law "control test"—originates from the English common law concept of master-servant relationships and vicarious liability determinations;[91] it was not designed to protect workers' rights. Under Title VII, the NLRA,[92] and other statutes where the word "employee" is used but not defined, courts typically use the common law "control test" to determine whether a worker is an employee or an independent contractor.[93]

The common law control test asks whether the employer "has the right to control the manner and means of the agent's performance of work."[94] This test arises from and overlaps substantially with the Restatement of Agency, which defines master as one "who controls or has the right to control the physical conduct of the other in the performance of the service."[95] It further defines an independent contractor as "a person who contracts with another to do something for him but who is not controlled by the other nor subject to the other's right to control with respect to his physical conduct in the performance of the undertaking."[96] Courts primarily examine "whether the putative employer 'retains the right to direct the manner in which the business shall be done, as well as the result to be accomplished, or, in other words, "not only what shall be done, but how it shall be done."'"[97]

While relevant for vicarious liability, this analysis is insufficient for effectuating the protective and social purposes of New Deal and civil rights legislation, including the FLSA and Title VII. Determinations of vicarious

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90. Matthew T. Bodie, *Participating as a Theory of Employment*, 89 NOTRE DAME L. REV. 661, 675, 677-78 (2013) (citing Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 739-70 (1989)).

91. *Id.*; *see also* NLRB v. Hearst Publ'ns, Inc., 322 U.S. 111, 120 n.19 (1944), *rev'd on other grounds*, Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318 (1992); Vazquez v. Jan-Pro Franchising Int'l, Inc., 923 F.3d 575, 594-95 (9th Cir. 2019).

92. *See* NLRB v. United Ins. Co. of Am., 390 U.S. 254, 256 (1968).

93. Carlson, *supra* note 75, at 304; Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 326 (1992); Bodie, *supra* note 90, at 675, 677-78 (citing Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730 (1989)). *But see* Browning-Ferris Industries of Cal., Inc. v. NLRB, 911 F.3d 1195 (D.C. Cir. 2018) (holding, in part, that common-law analysis of joint-employer status under NLRA can factor in both an employer's authorized but unexercised forms of control, and an employer's indirect control over employees' terms and conditions of employment).

94. Cunningham-Parmeter, *supra* note 49, at 1704 (citing Restatement (Third) of Agency § 7.07(3)(a) (Am. Law Inst. 2006)).

95. Restatement (Second) of Agency § 2 (Am. Law Inst. 1958).

96. *Id*.

97. Goldstein et al., *supra* note 77, at 1029 (1999) (quoting Singer Mfg. Co. v. Rahn, 132 U.S. 518, 523 (1889)).

liability relate to preventing future injuries, assuring compensation to victims, and spreading losses equitably.[98] This is understandable under tort law, where entities are in the best position to foresee and prevent certain conduct, making control central to this determination.[99] On the other hand, retention of control is not dispositive of who is responsible for protecting labor and employment rights, encouraging collective bargaining and equal employment opportunity, and "creating incentives for economic entities to internalize the costs of underpaying [or otherwise harming] workers – costs that would otherwise be borne by society."[100] Commenters have critiqued the test as insufficiently predictive,[101] an improper proxy,[102] under-inclusive,[103] and evaluating the wrong factors in the working relationship. Looking to control alone may not inform the determination of which workers are so economically dependent on their employers that they require the protections of labor and employment law.[104]

Perhaps as a result of these anomalies, courts developed additional factors to consider when distinguishing employees from independent contractors. While these factors reflected the nuances in employment relationships, they also further undermined the predictability of the analysis. Rather than determining liability exclusively by control, courts identified additional factors, most of which they established by the end of the nineteenth century.[105] They also started to look to the statutes' purposes. The Supreme Court of Minnesota in 1893, for example, looked to factors including the manner of compensation, the continuous nature of the employment, the

98. Vazquez v. Jan-Pro Franchising Int'l, Inc., 923 F.3d 575, 594-95 (9th Cir. 2019).

99. *Id.*

100. *Id.* (quotations and citations omitted).

101. Bodie, *supra* note 90, at 683 n.19.

102. *Id.*; Nancy E. Dowd, *The Test of Employee Status Economic Realities and Title VII*, 26 WM. & MARY L. REV. 75, 86 (1984).

103. Bodie, *supra* note 90, at 683 (citing C.C. E., Inc. v. NLRB, 60 F.3d 855, 858 (D.C. Cir. 1995)); Antenor v. D & S Farms, 88 F.3d 925, 933 (11th Cir. 1996) (The "courts have found economic dependence under a multitude of circumstances where the alleged employer exercised little or no control or supervision over the putative employees.").

104. Stephen F. Befort, *Revisiting the Black Hole of Workplace Regulation A Historical and Comparative Perspective of Contingent Work*, 24 BERKELEY J. EMP. & LAB. L. 153, 166, 168 (2003) ("Finally, the restrictive common law test is inconsistent with the fundamental objectives of modern labor and employment legislation. This legislation is rooted in the premise that 'individual workers lack the bargaining power in the labor market necessary to protect their own interests and to obtain socially acceptable terms of employment.' The common law test, which was fashioned in the nineteenth century for the purpose of determining the reach of respondeat superior tort liability, is blind to this goal. By focusing solely on the right to control, the test denies the benefits of protective social legislation to many workers who labor under subordinate economic circumstances.") (quotations and citations omitted); *see also* Dowd, *supra* note 102, at 86 ("The fundamental injustice resulting from the use of the common law test of employee status in Title VII cases is that the test fails to consider the employee's perspective of the relationship and the employer's ability to manipulate access to employment opportunities and to control the terms and conditions of employment.").

105. Carlson, *supra* note 75, at 310.

exclusivity of the relationship, the employer's and worker's control over aspects of the work, relative contributions of equipment and resources for the work, the length of the employment, and a comparison of the employer's general treatment of the worker in comparison with other workers who were apparently regular employees.[106] These factors presaged what would later become the economic realities analysis used to evaluate employment relationships under the FLSA.[107]

By implementing these changes, courts acknowledged that analyzing control alone might not satisfy the protective purpose of the laws:

> Thus, while control over the work was a basic premise of respondeat superior, it competed with an increasing number of other factors when the courts turned to the question of coverage under social welfare and protective legislation. Courts were frequently inclined to give added weight to factors other than control when the effect was to extend protection to needy workers rather than to impose tort liability on employers. Indeed, it has probably always been the case that a worker could be an independent contractor for tort purposes, but an employee for purposes of some protective legislation.[108]

At the beginning of the twentieth century, Judge Learned Hand introduced what would become the "statutory purpose" test in recognition of the value of protective legislation.[109] In *Lehigh Valley Coal Co. v. Yensavage*,[110] the plaintiff, a miner, was injured during an explosion in defendant's coal mine. The company's business model was that all miners were either independent contractors or employees of independent contractors.[111] Thus, the defendant argued, "the plaintiff, was not an employe[e] of the company, and that they owed him none of the duties of a master to a servant."[112]

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106. *Id.* at 310-11 (citing Waters v. Pioneer Fuel Co., 55 N.W. 52 (Minn. 1893)).

107. *See, e.g.*, Scantland v. Jeffry Knight, Inc., 721 F.3d 1308, 1311-12 (11th Cir. 2013) (considering for purposes of determining economic realities (1) the nature and degree of the alleged employer's control as to the manner in which the work is to be performed; (2) the alleged employee's opportunity for profit or loss depending upon his managerial skill; (3) the alleged employee's investment in equipment or materials required for his task, or his employment of workers; (4) whether the service rendered requires a special skill; (5) the degree of permanency and duration of the working relationship; (6) the extent to which the service rendered is an integral part of the alleged employer's business).

108. Carlson, *supra* note 76 at 311 (citations omitted); Vazquez v. Jan-Pro Franchising Int'l, Inc., 923 F.3d 575, 594-95 (9th Cir. 2019).

109. Lehigh Valley Coal Co. v. Yensavage, 218 F. 547 (2d Cir. 1914).

110. *Id.* at 548, 552-53.

111. This practice returned in the 1980s in mining, spearheaded by Massey coal and what became known as the "Massey Doctrine." Under this system, the company's coal reserves were classified into three groups according to the quality and accessibility of coal. The company owned and operated mines where high quality coal was readily accessible. Those with average coal quality and accessibility were given to subsidiaries or contractors, although Massey maintained some ownership and control over operations. However, coal seams that were difficult to access and contained more marginal reserves, "the company desired to have only a brokerage relationship . . . no long-term contractual or financial arrangement." *See* WEIL, *supra* note 12, at 102 (in a section called "Past as Prologue").

112. *Lehigh Valley*, 218 F. at 552.

Judge Hand rejected the defendant's theory, noting it contravened the statute's purpose:

> The company is therefore not in the business of coal mining at all, in so far as it uses such miners, but is only engaged in letting out contracts to independent contractors, to whom they owe as little duty as to those firms which set up the pumps in their mines. Thus what is confessedly only a means of speeding up the miners and their helpers becomes conveniently an incidental means of stripping from them the protection of the statute. The laborers, under this contention, are to have recourse as an employer only to one of their own, without financial responsibility or control of any capital; the miner is to take his chances in the mine without the right to a safe place to work, or any other protection except as an invited person. This misses the whole purpose of such statutes, which are meant to protect those who are at an economic disadvantage.[113]

Judge Hand justified the statutory purpose approach because "where all the conditions of the relation require protection, protection ought to be given."[114] He suggested other factors may be relevant to the employment relationship analysis, including indicators of economic dependence, such as opportunity for profit or loss, control over work, and how integral the work is to the company:

> It is absurd to class such a miner as an independent contractor in the only sense in which that phrase is here relevant. He has no capital, no financial responsibility. He is himself as dependent upon the conditions of his employment as the company fixes them as are his helpers. By him alone is carried on the company's only business; he is their "hand,"[115] if any one is. Because of the method of his pay one should not class him as though he came to do an adjunctive work, not the business of the company, something whose conduct and management they had not undertaken.[116]

Courts look to many of these factors when analyzing the economic realities of an employment relationship under the FLSA, including the workers' economic dependence on the employer, their relative investments, whether the work is integral to the business, their ability to impact profit or loss, and the nature and degree of control.[117]

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113. *Id*.

114. *Id.*

115. Henry Ford allegedly said, "Why is it that when I buy a pair of hands, I always get a human being as well?" Richard C. Reuben, *Democracy and Dispute Resolution Systems Design and the New Workplace*, 10 HARV. NEGOT. L. REV. 11, 22 n.53 (2005) (citing DON COHEN & LAURENCE PRUSAK, IN GOOD COMPANY: HOW SOCIAL CAPITAL MAKES ORGANIZATIONS WORK 6 (2001)).

116. *Lehigh Valley*, 218 F. at 552-53.

117. *See, e.g.*, Misclassification AI, *supra* note 28; Scantland v. Jeffry Knight, Inc., 721 F.3d 1308, 1311-12, 1316-19 (11th Cir. 2013); Antenor v. D & S Farms, 88 F.3d 925, 933-37 (11th Cir. 1996); Real v. Driscoll Strawberry Assocs., Inc., 603 F.2d 748, 755 (9th Cir. 1979); Sec'y of Lab. v. Lauritzen, 835 F.2d 1529, 1537-38 (7th Cir. 1987); Dole v. Snell, 875 F.2d 802, 811 (10th Cir. 1989).

Thirty years later, the Supreme Court rejected the common law control test in interpreting the NLRA and endorsed Judge Hand's statutory purpose test and economic realities analysis. The Court held in *NLRB v. Hearst Publications*[118] that "newsboys,"[119] men who sold defendants' papers, were employees covered by the Wagner Act and the NLRA and thus able to unionize. The Court declared that the question of whether the newsboys were employees was to be determined "primarily from the history, terms and purposes of the legislation."[120] The Supreme Court reasoned that trying to distinguish between "employment" and "entrepreneurial enterprise" required a definition broader than just the common law master-servant relationship but narrower than anyone "rendering service to others."[121] The Court held that "employee" in the NLRA "must be read in the light of the mischief to be corrected and the end to be attained" in order to serve its statutory purpose.[122] The Court asserted the importance of looking to "facts involved in the economic relationship" when determining where protection is needed.[123] There, the Court found that the permanency of the newsboys' working relationship, their limited ability to control their profit or loss, how integral they were to the business, their relative investment, and their lack of control over the terms and conditions of their work were central to the working relationship. Thus the Court concluded that the newsboys had the right to unionize.[124]

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118. 322 U.S. 111 (1944).

119. The Court clarified that the vendors at issue "misnamed boys, are generally mature men, dependent upon the proceeds of their sales for their sustenance, and frequently supporters of families." *Id.* at 116.

120. *Id.* at 124.

121. *Id.* at 124-25.

122. *Id.* at 124.

123. *Id.* at 129; *see also* U.S. v. Silk, 331 U.S. 704, 713 (1947) (citing NLRB v. Hearst Publ'ns, 322 U.S. 111, 120, 123-24, 128, 131) ("We concluded that, since that end was the elimination of labor disputes and industrial strife, 'employees' included workers who were such as a matter of economic reality. The aim of the Act was to remedy the inequality of bargaining power in controversies over wages, hours and working conditions. We rejected the test of the 'technical concepts pertinent to an employer's legal responsibility to third persons for the acts of his servants.' This is often referred to as power of control, whether exercised or not, over the manner of performing service to the industry. We approved the statement of the National Labor Relations Board that 'the primary consideration in the determination of the applicability of the statutory definition is whether effectuation of the declared policy and purposes of the Act comprehend securing to the individual the rights guaranteed and protection afforded by the Act.'") (citation omitted).

124. *Hearst*, 322 U.S. at 131-32 ("In this case the Board found that the designated newsboys work continuously and regularly, rely upon their earnings for the support of themselves and their families, and have their total wages influenced in large measure by the publishers who dictate their buying and selling prices, fix their markets and control their supply of papers. Their hours of work and their efforts on the job are supervised and to some extent prescribed by the publishers or their agents. Much of their sales equipment and advertising materials is furnished by the publishers with the intention that it be used for the publisher's benefit.").

In response, Congress quickly intervened. In 1947, Congress passed the Taft-Hartley Act,[125] which the Court has construed as a Congressional rejection of *Hearst* and a return to the common law control test.[126] While the National Labor Relations Board (NLRB) also said it was returning to the common law control test, it nonetheless continued to evaluate economic realities factors.[127]

Because the common law control test was contrary to the statutory purpose of these laws, courts necessarily developed other metrics of analyzing employment relationships, including the statutory purpose test and economic realities analyses. While these analyses better addressed the nuances of employment relationships, they also made outcomes less predictable in any given case. This lack of predictability invites abuse and may enable employers' misclassification of employees as independent contractors.

C. The Court has Constricted the FLSA's Expansive Statutory Language, Diminishing Workers' Rights and Protections

In enacting the FLSA, Congress rejected the common law control test in favor of a broader definition of employment. However, the Supreme Court has slowly chipped away at the breadth of the FLSA's reach.[128] The FLSA defines "employ" broadly as including "to suffer or permit to work,"[129] and "employer" as "any person acting directly or indirectly in the interest of an

125. Labor Management Relations Act, 29 U.S.C. §§ 141-197.

126. NLRB v. United Nat'l Ins. Co. of Am., 390 U.S. 254, 256 (1968) ("The obvious purpose of [the Taft-Hartley] amendment was to have the [National Labor Relations] Board and the courts apply general agency principles in distinguishing between employees and independent contractors under the Act."). Over time, the Board shifted away from strict application of the common law control test and began incorporating other factors into its analysis. *See* Corp. Express Delivery Sys. v. NLRB, 292 F.3d 777, 781 (D.C. Cir. 2002) (upholding a Board finding of employee status for owner-operator truck drivers based primarily on the employer's restrictions on the rights of drivers to employ others or use their vehicles for other jobs – truckers lacked "entrepreneurial opportunity" and were therefore employees); SuperShuttle DFW, Inc., 367 N.L.R.B. No. 75 (Jan. 25, 2019) (evaluating common law factors through the prism of entrepreneurial opportunity); Velox Express, Inc., 368 N.L.R.B. No. 61 (Aug. 29, 2019) (an employer's act of misclassifying statutory employees as independent contractors does not violate the law because it does not restrain, coerce or interfere with employees' ability to engage in protected concerted activity).

127. *See* FedEx Home Delivery, 361 N.L.R.B. 610 (2014), *enforcement denied*, 849 F.3d 1123 (D.C. Cir. 2017); Lancaster Symphony Orchestra v. NLRB, 822 F.3d 563 (D.C. Cir. 2016), *enforcing* 357 N.L.R.B. 1761 (2011); Ariz. Republic, 349 N.L.R.B. 1040 (2007); St. Joseph News-Press, 345 N.L.R.B. 474 (2005); Argix Direct, Inc., 343 N.L.R.B. 1017 (2004); Pa. Academy of the Fine Arts, 343 N.L.R.B. 846 (2004); Slay Transp., Co., 331 N.L.R.B. 1292 (2000); Roadway Package Sys., Inc., 326 N.L.R.B. 842 (1998); Dial-A-Mattress Operating Corp., 326 N.L.R.B. 884 (1998).

128. *See* Walling v. Portland Terminal Co., 330 U.S. 148, 150-52 (1947); Cunningham-Parmeter, *supra* note 49, at 1694 ("Congress repudiated more restrictive common law definitions of employment and instead embraced an expansive vision of employer-employee relationships.").

129. 29 U.S.C. § 203(g).

employer in relation to an employee."[130] The Supreme Court has recognized that the scope of employment under the FLSA is the "broadest definition that has ever been included in any one act."[131]

When Congress enacted the FLSA in 1938, it drew from nineteenth century child labor laws to construct a broad employment test.[132] The phrase "suffer or permit" (or variations of the phrase) was commonly used in state laws regulating child labor and was "designed to reach businesses that used middlemen to illegally hire and supervise children."[133] A key rationale underlying the "suffer or permit" standard in child labor laws was to hold employers liable when they had knowledge that the work was performed illegally and had the capacity to prevent it.[134] For example, in *People ex rel. Price v. Sheffield Farms-Slawson-Decker Company*,[135] Justice Cardozo held a milk company liable for child labor violations when it failed to intervene after its drivers hired children to guard milk bottles during deliveries. New York's labor code stated at the time that "[n]o child under the age of fourteen years shall be employed or *permitted* to work."[136]

By extending coverage to those who suffered or permitted children to work, child labor laws expanded coverage beyond those who controlled the child laborer and prevented employers from evading liability by claiming lack of knowledge.[137]

The "suffer or permit" standard also predated child labor laws and was used in non-labor statutory contexts as far back as the early 1800s "to place an affirmative obligation on actors to prevent something from happening or to impose punishment when the actor's failure to prevent caused harm."[138]

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130. 29 U.S.C. § 203(d); *see also* Griffith, *supra* note 48, at 579 (noting the definition uses acting "indirectly" in describing businesses which are covered employers).

131. United States v. Rosenwasser, 323 U.S. 360, 362-63, 363 n.3 (1945) (quoting from statement of Senator Black on Senate floor); *cf.* Sec'y of Lab. v. Lauritzen, 835 F.2d 1529, 1543 (7th Cir. 1987) (Easterbrook, J., concurring) ("The definition, written in the passive, sweeps in almost any work done on the employer's premises, potentially any work done for the employer's benefit or with the employer's acquiescence.").

132. Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 326 (1992) ("The definition of 'employee' in the FLSA evidently derives from the child labor statutes.").

133. Antenor v. D & S Farms, 88 F.3d 925, 929 n.5 (11th Cir. 1996); *see also* MATTHEW F. FINKIN, AMERICAN LABOR AND THE LAW: DORMANT, RESURGENT, AND EMERGENT PROBLEMS, ch. 3, §4.01(A)(1) (Frank Hendrickx & Roger Blanpain eds., 2019).

134. Misclassification AI, *supra* note 28, at 3; Goldstein et al., *supra* note 77, at 1042.

135. 121 N.E. 474, 477 (N.Y. 1918).

136. Cunningham-Parmeter, *supra* note 49, at 1694 (emphasis added).

137. Misclassification AI, *supra* note 28; Goldstein et al., *supra* note 77, at 1043; Cunningham-Parmeter, *supra* note 49, at 1690-92.

138. Goldstein et al., *supra* note 77, at 1015-16, 1030 (citing Pennsylvania Act from 1705 which read "No Swine shall be suffered to run at large").

Even before that, British criminal statutes interpreted "suffer or permit" to require constructive, but not actual, knowledge.[139]

Despite the Supreme Court's recognition of the history, breadth and purpose of the "suffer or permit" language in the FLSA, the Court "inadvertently displaced" the statutory language by adopting the economic realities analysis it had developed under the NLRA and the Social Security Act (SSA).[140] "Although the Supreme Court's approach extended coverage far beyond what the common-law control test would have created, it is flawed by virtue of its neglect of the 'suffer or permit to work' definition."[141] While the tests the Court and Congress have articulated under the NLRA have changed over time, the economic realities analysis has remained, with some variations and disagreement, the inquiry for cases under the FLSA.

In 1947, faced with two employment relationship decisions under separate statutes, the SSA and the FLSA, the Court analyzed them the same way. In *U.S. v. Silk*,[142] the Court held that while some workers were employees, coal truck drivers were independent contractors for purposes of the SSA.[143] Because the SSA lacked a definition of employee, as it had done in *Hearst*, the Court looked to the statute's purpose as well as the economic realities of the relationship in making its decision.[144] That same day the Court held in *Rutherford Food Corp. v. McComb*,[145] that meat boners were slaughterhouse employees under the FLSA. While acknowledging the broad language of the FLSA, the Court nonetheless used the same economic realities factors it had used in *Hearst* and *Silk* to resolve the case rather than interpreting the FLSA's broader statutory language.[146]

Half a century later, the Court clarified that the FLSA in theory should not be treated the same as the NLRA and SSA. In *Nationwide Mutual Insurance Co. v. Darden*,[147] a 1992 Employee Retirement Income Security

139. *Id.* at 1018-28 (discussing numerous examples of this language and its interpretation in British and U.S. criminal statutes).

140. *Id.* at 1107-08, 1108 n.86, 1116.

141. *Id.* at 1107.

142. 331 U.S. 704 (1947).

143. *Id.* at 718-719 ("These driver-owners are small businessmen. They own their own trucks. They hire their own helpers. In one instance they haul for a single business, in the other for any customer. The distinction, though important, is not controlling. It is the total situation, including the risk undertaken, the control exercised, the opportunity for profit from sound management, that marks these driver-owners as independent contractors.").

144. *Id.* at 712 ("the terms 'employment' and 'employee,' are to be construed to accomplish the purposes of the legislation"); *see id.* at 716 ("The Social Security Agency and the courts will find that degrees of control, opportunities for profit or loss, investment in facilities, permanency of relation and skill required in the claimed independent operation are important for decision. No one is controlling nor is the list complete.").

145. 331 U.S. 722, 727-28 (1947).

146. *Id.* at 723 (referring to the FLSA, NLRA, and SSA as "the social legislation of the 1930's"); *see also* Goldstein et al., *supra* note 77, at 1120-21.

147. 503 U.S. 318 (1992).

Act (ERISA)[148] decision, the Supreme Court rejected the statutory purpose test of *Hearst* and *Silk*, but acknowledged that the NLRA, SSA, and ERISA, which lack helpful definitions of "employee," are distinct from the text of the FLSA. The Court distinguished employment under ERISA from the FLSA, noting that "suffer or permit" "stretches the meaning of 'employee' to cover some parties who might not qualify as such under a strict application of traditional agency law principles."[149] The Court held, however, that where a statute, like ERISA, lacks a specific definition of employment (or contains only a circular definition), courts should assume Congress meant to apply the common-law definition of employment using traditional agency principles.[150]

In adopting the common law agency test, however, the Court directed lower courts that relevant factors in the inquiry include those that address the economic realities of the situation:

> In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.[151]

Although the Court intended to distinguish the economic realities analysis under the FLSA from the common law control test, its instruction to lower courts for how to analyze employment relationships remained closer than Congress likely intended when it enacted the FLSA.

More recent decisions have followed the Court's guidance in *Darden* and reiterated that where statues like Title VII have circular definitions of employee and employer, courts should apply the common-law test.[152] The

148. Employee Retirement Income Security Act, 29 U.S.C. § 1001 *et seq.*

149. *Darden*, 503 U.S. at 324-26.

150. *Id.* at 323-24*;* Goldstein et al., *supra* note 77, at 1131-32. Ultimately, the Court adopted for ERISA a common-law test that it had previously summarized in another case. The Court identified thirteen factors that should be considered in determining a worker's status: (1) the hiring party's right to control the manner and means by which the product is accomplished; (2) the skill required; (3) the source of the instrumentalities and tools; (4) the location of the work; (5) the duration of the relationship between the parties; (6) whether the hiring party has the right to assign additional projects to the hired party; (7) the extent of the hired party's discretion over when and how long to work; (8) the method of payment; (9) the hired party's role in hiring and paying assistants; (10) whether the work is part of the regular business of the hiring party; (11) whether the hiring party is in business; (12) the provision of employee benefits; and (13) the tax treatment of the hired party. Maltby & Yamada, *supra* note 59, at 252-53.

151. *Darden*, 503 U.S. at 323-24 (quoting Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 751-52 (1989)).

152. *See, e.g.*, EEOC v. Global Horizons, Inc., 915 F.3d 631, 638 (9th Cir. 2019).

Ninth Circuit in 2019 rejected use of the economic realities test in a Title VII joint employment case, but suggested "that there may be little functional difference among the common-law agency test, the economic-reality test, and a third test that blends elements of the first two (the so-called 'hybrid' test)."[153]

Whether labor and employment statutes define "employment," "employees," and "independent contractors," or not, courts continue to play an outsize role in developing the appropriate analysis of employment relationships, regardless of the statutory language. For the past two centuries, courts have adjusted and added to the list of relevant factors in an effort to clarify when the employer controls the details and outcomes of the work, and whether the worker is economically dependent on the employer.[154]

Courts consistently note that these factors are non-exhaustive and promote a "totality of the circumstances" approach.[155] As a result, determining whether parties have an employment relationship requires looking to a "kaleidoscope" of tests and factors depending on the law at issue and the location of the case, making outcomes unpredictable.[156] Of course, employment relationships are not unique in this regard; judges and juries engage with fact specific, totality of the circumstances tests every day.

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153. *Id.* at 639 (citation omitted).

154. *See, e.g.*, Waters v. Pioneer Fuel Co., 55 N.W. 52, 52 (Minn. 1893) ("It is not easy to frame a definition of the terms "independent contractor" that will satisfactorily meet the conditions of different cases as they arise, as each case must depend so largely upon its own facts."); NLRB v. Hearst Publ'ns, 322 U.S. 111, 121 (1944) ("Few problems in the law have given greater variety of application and conflict in results than the cases arising in the borderland between what is clearly an employer-employee relationship and what is clearly one of independent entrepreneurial dealing."); Cotter v. Lyft, Inc., 60 F. Supp. 3d 1067, 1081-82 (N.D. Cal. 2015) ("As should now be clear, the jury in this case will be handed a square peg and asked to choose between two round holes. The test the California courts have developed over the 20th Century for classifying workers isn't very helpful in addressing this 21st Century problem."); Carlson, *supra* note 75, at 299 ("After nearly two hundred years of evolution, the multi-factored 'common law' test begs the question of employee status as much as answers it.").

155. Misclassification AI, *supra* note 28, at 3 (citing Hopkins v. Cornerstone Am., 545 F.3d 338, 343 (5th Cir. 2008) ("To determine if a worker qualifies as an employee, we focus on whether, as a matter of economic reality, the worker is economically dependent upon the alleged employer or is instead in business for himself."); Baker v. Flint Eng'g & Constr. Co., 137 F.3d 1436, 1440 (10th Cir. 1998) ("the economic realities of the relationship govern, and 'the focal point is whether the individual is economically dependent on the business to which he renders service or is, as a matter of economic fact, in business for himself.'"); Brock v. Superior Care, Inc., 840 F.2d 1054, 1059 (2d Cir. 1988) ("The ultimate concern is whether, as a matter of economic reality, the workers depend on someone else's business . . . or are in business for themselves."); Usery v. Pilgrim Equip. Co., 527 F.2d 1308, 1311 (5th Cir. 1976) (The economic realities factors "are aids—tools to be used to gauge the degree of dependence of alleged employees on the business with which they are connected. It is dependence that indicates employee status. Each test must be applied with that ultimate notion in mind.").

156. Carlson, *supra* note 75, at 327-28; Sec'y of Lab. v. Lauritzen, 835 F.2d 1529, 1539 (Easterbrook, J., concurring). ("It is comforting to know that 'economic reality' is the touchstone. One cringes to think that courts might decide these cases on the basis of economic fantasy. But 'reality' encompasses millions of facts, and unless we have a legal rule with which to sift the material from the immaterial, we might as well examine the facts through a kaleidoscope. Which facts matter, and why? A legal approach calling on judges to examine all of the facts, and balance them, avoids formulating a rule of decision.").

On the other hand, as the nature of employment has evolved in recent decades, the unpredictability of assessing who is protected under core labor and workplace statutes is increasingly problematic. Congress designed the FLSA, NLRA, Title VII, and other labor standards in order to provide workers with certain rights and protections and assign certain responsibilities to those who employ them or rely on their labor. In the wake of significant changes to business and employment structures, it is critically important to assess whether those purposes are still being achieved, and, if not, how they might be more consistently realized.[157]

III. PREAMBLE CONSIDERATIONS FOR A NEW APPROACH TO WORKER RIGHTS, PROTECTIONS AND THE ASSIGNMENT OF RESPONSIBILITY

The landscape for workers has drastically changed. With the growth of the fissured workplace, the insufficient enforcement of existing laws, and the decline in unionization and worker power, an increasing number of workers are being left without legal protections or any safety net. The COVID-19 pandemic and subsequent recession have brought to light and exacerbated many workers' precarious working conditions.[158] This problem demands that we question the necessity of tying legal protections to employment status. Over time, courts have eroded protections for employees. Independent contractors are no longer primarily entrepreneurs with skills and bargaining power who do not need significant legal protections; instead, they are often the most vulnerable and underpaid workers.[159] By using multiple standards across different statutes, courts have made liability and the assignment of responsibility unpredictable for workers and business organizations. Unfortunately, some employers use these discrepancies to their advantage, rampantly and egregiously violating workers' existing rights.[160]

Before presenting our framework, it is important to engage with other proposals that reimagine worker coverage in the 21st Century and beyond, and explain why we do not endorse them. In this Part, we assess the merits of proposals that posit a "third classification," as well as the potential for industry-specific solutions before developing our own proposal in depth.

We believe that labor and employment policies that restore core rights and protections must clearly define parties' obligations and generate predictable outcomes. These characteristics will, in turn, improve their

157. *See* Browning-Ferris Indus. of Cal. Inc., 362 N.L.R.B. 1599 (2015).

158. *See, e.g.*, Lazaro Gamio, *The Workers Who Face the Greatest Coronavirus Risk*, N.Y. TIMES (Mar. 15, 2020), https://www.nytimes.com/interactive/2020/03/15/business/economy/coronavirus-worker-risk.html [https://perma.cc/YU2R-LKBM].

159. *See, e.g.*, Cunningham-Parmeter, *supra* note 49, at 1684.

160. *See, e.g.*, COOPER & KROEGER, *supra* note 67, at 4; Tanya L. Goldman, *Addressing and Preventing Retaliation*, *in* THE LABOR STANDARDS ENFORCEMENT TOOLBOX (Janice Fine et al., eds. 2019); People v. Uber Techs., Inc., No. CGC-20-584402, slip op. at 5 (S.F. Super. Ct. Aug. 10, 2020).

enforceability.[161] In order to be effective, the law must be comprehensive and enforceable. Otherwise these provisions can exacerbate rather than address underlying imbalances in bargaining power.[162] Furthermore, to the extent practicable, the law should encourage compliance, or at least anticipate and shield against unintended consequences, such as perverse incentives for employers to avoid the responsibilities and costs of compliance.[163]

A. Proposed New Worker Designations Could Further Erode Labor Standards

Some scholars argue that emerging work relationships require new laws because these relationships do not fit into the existing legal definitions of employee or independent contractor. They suggest a third designation of worker, other than "employee" and "independent contractor," to ensure that these workers, who might otherwise be considered independent contractors, are offered necessary protections.[164] In Canada, for example, the "dependent contractor" designation provides rights to individuals who are legally independent contractors but who lack bargaining power, making them economically dependent on their employer.[165] Due to this economic dependency, dependent contractors are offered some of the same protections as employees, including collective bargaining rights.[166] Scholars suggest that a third designation might also help workers by explicitly allowing businesses to provide some benefits, such as group insurance plans, they would otherwise not provide for fear of adding indicia of an employment relationship.[167] This concept has been popular within on-demand platforms

161. *See, e.g.*, Aguilera v. Cook Cnty. Police and Corr. Merit Bd., 760 F.2d 844, 847 (7th Cir. 1985) (Posner, J.) ("It is an ideal of our profession, if all too often an unattainable one, to make law certain."); *Lauritzen*, 835 F.2d at 1539 ("Surely Holmes was right in believing that legal propositions ought to be in the form of rules to the extent possible. Why keep cucumber farmers in the dark about the legal consequences of their deeds?") (citation omitted); Deknatel & Hoff-Downing, *supra* note 74, at 61 (objective and predictable definitions benefit most workers).

162. Raja Raghunath, *A Founding Failure of Enforcement Freedmen, Day Laborers, and the Perils of an Ineffectual State*, 18 CUNY L. REV. 47, 59 n.56 (2015) (quoting CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE 103 (1990)) ("Statutes designed to reduce or eliminate the social subordination of disadvantaged groups are frequently subject to skewed redistribution and failure as a result of inadequate implementation. The very problems that make such statutes necessary in the first instance tend to undermine enforcement; market failure is matched by government failure.").

163. Sunshine, *supra* note 3, at 152-53.

164. *See, e.g.*, Harris, *supra* note 27, at 39-40; Sunshine, *supra* note 3, at 134-40 (summarizing proposals dating back to 1965).

165. Elizabeth Kennedy, *Freedom from Independence Collective Bargaining Rights for "Dependent Contractors"*, 26 BERKELEY J. EMP. & LAB. L. 143, 153-55 (2005).

166. Sunshine, *supra* note 3, at 140-41 (discussing dependent contractor proposal raised in H. W. Arthurs, *The Dependent Contractor A Study of the Legal Problems of Countervailing Power*, 16 U. TORONTO L.J. 89, 90 (1965)); Kennedy, *supra* note 165, at 153-55.

167. Harris, *supra* note 27, at 37.

and app-based companies that rely on technology because they contend that labor and employment laws neither anticipated nor are sufficient to address their business model.[168]

Although we recognize shifts in work structure necessitate a re-balancing of worker protections, we disagree that a new worker designation will ameliorate eroded labor standards.[169] While there may be ambiguity in some on-demand business models, this ambiguity is not distinctive to the on-demand sector but can be found in the wider economy.[170] Additionally, legislating to specific technology in a time of rapid technological change is risky and unsustainable.

The dependent contractor category, which exists in some other countries, including Canada, Spain, and Italy,[171] is not the panacea scholars seek.[172] Canada, for instance, has different social safety nets and stronger default presumptions of employment than the U.S.[173] Without these protections in the U.S., the dependent contractor category could further diminish workers' rights. Rather than lifting independent contractors up and granting them more rights, a dependent contractor category may pull employees down into a status with fewer protections or effectively trade away some of their rights for other benefits.[174] Rideshare drivers, who have sparked much of the "dependent worker" conversations in the U.S., are a

168. *See, e.g.*, Dara Khosrowshahi, *I Am the C.E.O. of Uber. Gig Workers Deserve Better*, N.Y. TIMES (Aug. 10, 2020), https://www.nytimes.com/2020/08/10/opinion/uber-ceo-dara-khosrowshahi-gig-workers-deserve-better.html [https://perma.cc/A9QY-KT5U]; PINTO ET AL., *supra* note 73, at 3-6 (detailing state-level policy efforts to exclude workers working via online platforms from protections afforded employees).

169. *See, e.g.*, Ross Eisenbrey & Lawrence Mishel, *Uber Business Model Does Not Justify a New Independent Worker' Category*, ECON. POL'Y INST. (Mar. 17, 2016), https://www.epi.org/publication/uber-business-model-does-not-justify-a-new-independent-worker-category/ [https://perma.cc/8M9U-K5ZY].

170. Sunshine, *supra* note 3, at 156 ("The triangular relationship between workers, companies, and customers, often found in the gig economy, is also present in many non-gig economy work relationships, such as those of delivery and taxi drivers. It offers important clues in reevaluating the employment category.").

171. Miriam Cherry and Antonio Aloisi suggest that the dependent contractor category in Canada has resulted in some increased workplace protections for workers who would not otherwise have had them. On the contrary, in Spain this category does not apply to many workers, partly because it requires a worker to work primarily for one business. In Italy, dependent contractor classifications have resulted in in what the authors fear would happen in the U.S.—the third category helps companies avoid obligations to their employees instead of adding protections for independent contractors. Miriam A. Cherry & Antonio Aloisi, "*Dependent Contractors" in the Gig Economy A Comparative Approach*, 66 AM. U. L. REV. 635, 638-39, 655-70 (2017); Sunshine, *supra* note 3, at 143-44 (describing the same).

172. Sunshine, *supra* note 3, at 140; *see also* Cherry & Aloisi, *supra* note 171, at 639.

173. In some countries, the category confers rights on dependent contractors that the U.S. does not even provide to employees, such as the right to advance notice of termination, rather than at-will employment. Sunshine, *supra* note 3, at 143 n.230.

174. Cherry & Aloisi, *supra* note 171, at 639 ("Italy, on the other hand, saw systemic arbitrage between the standard employment category and the intermediate category. The result was confusion and the stripping of workers' rights by misclassifying them downwards.").

perfect example. Under existing laws, many have been able to prove that they are in fact employees.[175] Third-way classifications would only decrease their employment rights, including rights to a minimum wage and access to workers' compensation.

As discussed in the next Part, we prefer to resolve these problems by clarifying the definitions and rights for existing employment-based workplace protections and expanding certain protections for independent contractors rather than building a third designation.[176]

B. Industry-Specific Approaches are Not Broad Enough to Address Systemic Problems

States are also introducing and passing sector-specific laws to address widespread independent contractor misclassification in certain industries. For example, California is experimenting with several legislative techniques to hold lead employers responsible for their workforce.[177]

Other states have also passed legislation providing industry-specific protections, including Pennsylvania,[178] Delaware,[179] and Maine.[180] The

175. *See, e.g.*, Sunshine, *supra* note 3, at 156 ("Thus, intermediate categories may be useful for some gig economy workers and others, but they are not needed for many drivers, because most drivers, including those who work for app-based companies, are employees."); David Weil, *Op-Ed Call Uber and Lyft Drivers What They Are Employees*, L.A. TIMES (July 5, 2019), https://www.latimes.com/opinion/op-ed/la-oe-weil-uber-lyft-employees-contractors-20190705-story.html [https://web.archive.org/web/20201026194356/https://www.latimes.com/opinion/op-ed/la-oe-weil-uber-lyft-employees-contractors-20190705-story.html]; People v. Uber Techs., Inc., No. CGC-20-584402, slip op. at 4 (S.F. Super. Ct. Aug. 10, 2020); Rogers v. Lyft, Inc., 452 F. Supp. 3d 904 (N.D. Cal. 2020); People v Maplebear, Inc., No. 2019-00048731 (Cal. Super. Ct. Feb 18, 2020) (granting injunction stating Instacart workers are employees); In re Vega, 149 N.E.3d 401 (N.Y. 2020) (holding Postmates workers and those similarly situated are employees for purposes of unemployment); Razak v. Uber Techs., Inc., 951 F.3d 137, 147 (3d Cir. 2020); Lowman v. Unemployment Comp. Bd. of Rev., 235 A.3d 278 (Pa. 2020) (holding Uber driver is an employee under Pennsylvania unemployment law); Islam v. Cuomo, No. 20-CV-2328 (LDH), 2020 WL 4336393 (E.D.N.Y. July 28, 2020) (Uber drivers are employees for purposes of unemployment).

176. *See* Sunshine, *supra* note 3, at 147 (concluding that there are two articulated reasons for an intermediate category, "to reduce legal uncertainty—to account for those relationships for which it is difficult to determine whether a worker is an employee or an independent contractor . . . . [and] to expand employment protections and rights beyond employees.").

177. These efforts are also aimed at establishing liability for joint employers, a critical issue, but beyond the scope of this paper. One technique is CAL. LAB. CODE § 2810.3 (West 2020), which creates up-the-chain liability for a subcontractor's wage violations when the client employer uses workers supplied by a labor contractor to perform labor within the client employer's "usual course of business." California passed several other sector specific acts, including legislation holding businesses that contract for services in the property services industry, which includes janitorial work, jointly liable for any unpaid wages, CAL. LAB. CODE § 238.5 (West 2020); legislation covering general contractors in construction, CAL. LAB. CODE § 218.7 (West 2020); and legislation specific to port truck drivers. S.B. 1402, 2017-18 Reg. Sess. (Cal. 2018).

178. 43 PA. STAT. AND CONS. STAT. ANN. § 933.3 (West 2011).

179. DEL. CODE ANN. tit. 19, § 3501 *et seq.* (2020).

180. ME. REV. STAT. ANN. tit 39-A, § 114 (2011) (repealed Oct. 1, 2013). *See generally* CATHERINE K. RUCKELSHAUS & SARAH LEBERSTEIN, NAT'L EMP. L. PROJECT, NELP SUMMARY OF INDEPENDENT

National Domestic Workers Alliance has won legislative victories in nine states and two cities: Oregon, Illinois, New York, California, New Mexico, Nevada, Connecticut, Massachusetts, Hawaii, and Seattle and Philadelphia.[181] This legislation protects workers who are employees, but are often excluded from labor laws through explicit statutory or regulatory carve-outs or because their employers do not employ enough workers to meet the qualifying threshold.[182] In New York City, there have been many advances to protect independent contractors, including Driver Pay Rules that establish a minimum per trip payment approved by the city's Taxi and Limousine Commission for certain ride-hail company drivers (High-Volume For-Hire Services).[183]

Sector-specific approaches are important experiments deserving analysis. They create opportunities to develop new floors and explore the best mechanism for enhancing rights and protections.[184] State and local laws often lead to shifts in federal labor and employment standards.[185] They do not, however, provide a systemic response to larger structural problems. A sector-specific approach may also result in implementation and enforcement barriers if workers—particular those moving between sectors—do not understand their rights, employers do not understand their legal responsibilities, and enforcement agencies have insufficient resources to conduct adequate outreach, engagement, and enforcement.[186] Unfortunately,

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CONTRACTOR REFORMS NEW STATE AND FEDERAL ACTIVITY 6 (2011), https://www.nelp.org/wp-content/uploads/2015/03/2011IndependentContractorReformUpdate.pdf [https://perma.cc/J9P2-TWQL].

181. JULIE KASHEN, CENTURY FOUND., DOMESTIC WORKERS BILL: A MODEL FOR TOMORROW'S WORKFORCE 5 (2019), https://tcf.org/content/report/domestic-workers-bill-a-model-for-tomorrows-workforce/?agreed=1 [https://perma.cc/3JUG-X8TY].

182. *Id*.; BURNHAM & THEODORE, *supra* note 85, at 8.

183. Driver Income and Lease Transparency Rules, Loc. L. No. 150 (2018) (codified as amended in scattered sections of RULES OF THE CITY OF NEW YORK, tit. 35); *see also* Kaitlyn A. Laurie, *Capping Uber in New York City Ramifications for Rideshares, the Road, and Outer-Borough Residents*, 46 FORDHAM URB. L.J. 942, 945-48, 948 n.17 (2019) (describing history of N.Y.C. Council Introduction No. 144-B and the Taxi and Limousine Commission's adoption of minimum pay rate for app-based drivers, effective December 31, 2018). Seattle is moving towards providing a minimum wage for Uber and Lyft drivers. *Uber, Lyft drivers in Seattle to make minimum wage starting in January*, KING 5 (Aug. 13, 2020), https://www.king5.com/article/news/local/seattle-uber-lyft-rideshare-drivers-minimum-wage-approved-mayor-jenny-durkan/281-0f6a94cc-4c3a-42f4-81ed-d17d91735515 [https://perma.cc/RPG9-UJCY].

184. *See* KASHEN, *supra* note 181.

185. Some of the language in Title VII has its origins, for example, in New York's civil rights law. *See, e.g.*, Terry Lichtash, *Ives-Quinn Act—The Law Against Discrimination,* 19:2 ST. JOHN'S L. REV. 170, 170-76 (2013).

186. *See, e.g.*, Charlotte S. Alexander & Arthi Prasad, *Bottom-Up Workplace Law Enforcement An Empirical Analysis*, 89 IND. L.J. 1069, 1071 (2014) ("Workplace law enforcement . . . depends significantly on worker 'voice,' with workers themselves identifying violations of their rights and making claims to enforce them.").

these initiatives can also lead to political maneuvering and carve-outs for certain industries,[187] as well as ballot initiatives in response to regulation.[188]

VI. A CONCENTRIC CIRCLE FRAMEWORK OF RIGHTS, PROTECTIONS, AND RESPONSIBILITY AT THE WORKPLACE

We propose structuring workers' rights, protections, and responsibilities around a framework of concentric circles. This legal and policy framework draws from the foregoing legal principles on how to define employment but modernizes these standards to reflect current (and likely future) work structures for millions of workers.

The concentric circles emanate outward from an Inner Circle of protections that are linked to *work* and not to legal definitions of *employment*. These core protections are primary and address the inherent power imbalance in the work relationship.[189] The law and courts have recognized these central workplace protections as essential and feasible to provide to all workers. We argue that these fundamental rights should be accordingly elevated and associated with work.

The Middle Circle of rights, protections, and related responsibilities are linked to the employment relationship. However, because this set of rights is also critical, the Middle Circle operates on a *presumption of employment.* That is, all workers should be employees by default and have access to this set of rights on the condition that this presumption is rebuttable. Employers should have to disprove a worker's employment status. In order to overcome

187. *See, e.g.*, PINTO ET AL., *supra* note 73 (detailing state-level policy efforts to exclude workers working via online platforms from protections afforded employees).

188. *See, e.g.*, Cal. Ballot Pamph., Gen. Election (Nov. 3, 2020), at 30-39 (text of Proposition 22); REY FUENTES ET AL., RIGGING THE GIG: HOW UBER, LYFT, AND DOORDASH'S BALLOT INITIATIVE WOULD PUT CORPORATIONS ABOVE THE LAW AND STEAL WAGES, BENEFITS, AND PROTECTIONS FROM CALIFORNIA WORKERS (July 2020), https://s27147.pcdn.co/wp-content/uploads/Rigging-the-Gig_Final-07.07.2020.pdf [https://perma.cc/AKC2-U6SS].

189. We recognize that worker power and voice are essential and foundational to the successful implementation and enforcement of any law. Re-thinking this aspect of labor law is part of the ongoing efforts of numerous experts and legal scholars, including one such effort, Harvard Law School's Clean Slate Project. *See Clean Slate for Worker Power*, LAB. & WORKLIFE PROGRAM, HARVARD L. SCH. (2020), https://lwp.law.harvard.edu/clean-slate-project [https://perma.cc/837A-N7WZ]. The Clean Slate Project was a collaborative and inclusive process of asking: what would labor law look like if, starting from a clean slate, it was designed to empower working people to build a truly equitable American democracy and a genuinely equitable American economy? We envision that the Project's report will be critical to and complementary to the Concentric Circle Framework. *See generally* SHARON BLOCK & BENJAMIN SACHS, LAB. & WORKLIFE PROGRAM, HARVARD L. SCH., CLEAN SLATE FOR WORKER POWER: BUILDING A JUST ECONOMY AND DEMOCRACY (Jan. 2020), https://lwp.law.harvard.edu/files/lwp/files/full_report_clean_slate_for_worker_power.pdf [https://perma.cc/XQ5H-45VU]. Finally, we suggest additional mechanisms (the Outer Circle) to give legitimate independent contractors access to, and to incentivize companies to fund, workplace benefits that promote worker mobility and social welfare.

the default presumption, an employer should have to meet clear criteria tied to the economic realities of employment and independent contracting.

The Outer Circle assures access to a range of portable benefits by clarifying who is responsible for funding them and creating mechanisms for their funding.

A. The Inner Circle: Fundamental Rights Related to Work

In calling for legislation on fair labor standards in 1937, President Franklin Roosevelt stated, "there are a few rudimentary standards of which we may properly ask general and widespread observance. Failure to observe them must be regarded as socially and economically oppressive and unwarranted under almost any circumstance."[190] Roosevelt was referring to a minimum wage, a maximum work week, the elimination of child labor, and the right of self-organization and collective bargaining.[191] However, these "few rudimentary standards" could equally apply to the right to freedom from discrimination and to health and safety protections. As a society, we have identified these "rudimentary standards" as critical protections for the workplace and thus we must vigilantly defend these rights at all costs.

A core set of protections should extend to workers, regardless of their employment status. These rights would be tied to the work itself rather than employment status.[192] Thus, each contracting party (whether by employment or contracting) would be required to factor the other into their operational decisions—including the decision on classification itself, preventing hiring parties from misclassifying their workforce to avoid the costs of complying with and providing rights and benefits connected to employment.[193] This would address a key flaw of the present statutory system that fuels regulatory arbitrage.[194]

The Inner Circle includes prohibitions on discrimination and retaliation; affirmative rights to work in a safe and healthy environment; requirements

190. Franklin D. Roosevelt, *Message to Congress on Establishing Minimum Wages and Maximum Hours*, AM. PRESIDENCY PROJECT (May 24, 1937), https://www.presidency.ucsb.edu/node/209566 [https://perma.cc/9PFV-EBMF].

191. *Id.*

192. As Annette Bernhardt argues, "[U]ltimately we will need to modernize our legal and regulatory framework for the twenty-first-century workplace to reflect new configurations of economic power . . . In other words, the employment relationship may no longer be the only, or even main, legal anchor of workers' rights." Annette Bernhardt, *It's Not All About Uber*, 20 PERSPS. ON WORK 14, 76 (2016).

193. *See, e.g.*, Contingent Workforce Equity Act, S. 2504, 103d Cong. § 2(a)(6) (1994) ("[M]any employers misclassify their employees as independent contractors to avoid the requirements of social security, unemployment insurance, workers' compensation, and other laws.").

194. *See* Sunshine, *supra* note 3, at 139; Harris, *supra* note 27, at 3 (noting that where there is legal ambiguity, "[c]ompanies committed to avoiding the costs of the legally imposed workplace social compact will twist or misrepresent work relationships to evade legally imposed benefits and protections through a form of regulatory arbitrage.").

that work be appropriately compensated; and freedom of association and the right to engage in acts for mutual aid and protection.[195]

We examine the importance, development, and potential expansion of each core right in turn.

1. Freedom from Discrimination

Prohibiting discrimination against all workers is an affirmation of "human dignity."[196] It also serves to eliminate "subordination and segregation" and "enforc[es] a principle of equal membership in society."[197] Nobody should be excluded from equal employment opportunities or have to endure harassment or other discrimination to earn a wage and support their family. Contracts for work that permit discrimination undermine these goals.[198]

Independent contractors with specialized skills or unique services have economic leverage in relationships to prevent or avoid such treatment (i.e., exercise exit or voice options).[199] However, many workers placed in independent contractor relationships do not hold this same power and thus

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195. There are other rights that are both feasible and critical for all workers to have, such as paid family and medical leave. State paid family and medical leave laws already include options for independent contractors to participate in their social insurance programs, and the bill that would provide paid family and medical leave at the federal level, the Family and Medical Insurance Leave Act (FAMILY Act), would automatically include independent contractors. S. 463/H.R. 1185, 116th Cong. § 5 (2019). This article focuses, however, on workplace protections already established at the federal level, at least for employees, while acknowledging the need for additional benefits.

196. *See* Danielle Tarantolo, *From Employment to Contract Section 1981 and Antidiscrimination Law for the Independent Contractor Workforce*, 116 YALE L.J. 170, 202-05 (2006) (arguing that instead of revamping Title VII, the ADA, and the ADEA, we should amend § 1981 and extend it to the other nonracial classes protected by those statutes).

197. Samuel Bagenstos, *"Rational Discrimination," Accommodation, and the Politics of (Disability) Civil Rights*, 89 VA. L. REV. 825, 839 (2003) ("Antidiscrimination law is best justified as a policy tool that aims to dismantle patterns of group-based social subordination, and that does so principally by integrating members of previously excluded, socially salient groups throughout important positions in society. Although antidiscrimination law is plainly moralistic, its moralism inheres not in an effort to punish individuals who act on bad thoughts, but in the large-scale project of eliminating subordination and segregation and of enforcing a principle of equal membership in society."); Maltby & Yamada, *supra* note 59, at 274 ("Amending the primary employment discrimination statutes to explicitly include independent contractors is the best way to protect these workers in the midst of a changing labor market.").

198. *Cf.* Bagenstos, *supra* note 197, at 858 ("The moral wrong of discrimination inheres in an employer's placing his or her own interests ahead of the moral imperative to avoid participating in the system of subordination and occupational segregation. Individual employers have a moral obligation to avoid contributing to such a system because they are the only ones who can take effective action against it, and their actions, when aggregated with those of other employers, are what constitutes the system. Moreover, all employers must have this obligation, or the goal of integration will be left unsatisfied.").

199. In economic theory, the Hicks-Marshall law of derived labor demand (named for John Hicks and Alfred Marshall) links the elasticity of demand for a product or service to the demand for labor used to create that product or service. The more (less) elastic the demand for a product or service, the less (more) that the workers who produce it can earn from their effort. The concept applies to the work of a specialized contractor whose demand would be less elastic would be more able to demand a higher wage (or price) for that work. *See* JOHN HICKS, THE THEORY OF WAGES 94-95 (1st ed. 1932).

need legal protection from discrimination.[200] "Independent contractors need a strong backbone of legal antidiscrimination protection not only as a practical means to bring and enforce claims but also as a symbol of their dignity and equality as autonomous participants in the labor market."[201]

We have a record of prohibiting race discrimination in making and enforcing contracts, so this is not untested territory under federal law.[202] Section 1981 of the Civil Rights Act of 1886 guarantees all persons in the United States the "same right to make and enforce contracts . . . as is enjoyed by white citizens."[203] The Supreme Court has confirmed that Section 1981 "affords a federal remedy against discrimination in private employment on the basis of race."[204]

Nor is this a novel proposal. Senator Howard Metzenbaum introduced the Contingent Workforce Equity Act in 1994, proposing a number of statutory amendments to expand the legal rights and protections of contingent workers, including the prohibition of discrimination against independent contractors.[205] More recently, Senator Patty Murray introduced the Bringing an End to Harassment by Enhancing Accountability and Rejecting Discrimination in the Workplace Act (BE HEARD in the Workplace Act).[206] Among other provisions, the act would extend civil rights protections to non-employees, including independent contractors, volunteers, interns, fellows, and trainees.[207]

Independent contractors already have protections in the case of race-based discrimination and under some state and local laws.[208] Like the BE

200. Tarantolo, *supra* note 196, at 173 ("[C]ontingent workers, including independent contractors, likely represent a substantial and growing portion of the population."). We recognize that in addition to prohibiting certain behavior, this would entail certain obligations for employers, such as potential record-keeping, reporting, and training and HR obligations, in addition to potentially offering accommodations. However, we do not consider these obligations to pose insurmountable challenges.

201. *Id.* at 215.

202. 42 U.S.C. § 1981.

203. *Id.*

204. Johnson v. Ry. Exp. Agency, Inc., 421 U.S. 454, 459-60 (1975).

205. Contingent Workforce Equity Act, S. 2504, 103d Cong. (1994); Maltby & Yamada, *supra* note 59, at 263, 266; Tarantolo, *supra* note 196, at 209.

206. BE HEARD in the Workplace Act, S. 1082/H.R. 2148, 116th Cong. (2019).

207. *Id.* § 301.

208. The New York City Human Rights Law (NYCHRL) protects everyone visiting or living in New York from discrimination and discriminatory harassment motivated in part by that person's actual or perceived race, creed, color, national origin, gender, sexual orientation, age, disability, or alienage or citizenship status or other protected status. The NYCHRL includes independent contractors: "For purposes of this definition, natural persons employed as independent contractors to carry out work in furtherance of an employer's business enterprise who are not themselves employers shall be counted as persons in the employ of such employer." N.Y.C. ADMIN. CODE § 8-102 (1991); *see also* Assemb. B. A8421, § 4, 2019-2020 Reg. Sess. (N.Y. 2019) (ensuring contractors and others contracting for work are protected from sexual harassment and discrimination); Hawaii Domestic Workers Bill of Rights, §§ 1-2, 2013 Haw. Sess. Laws 248 (prohibiting discrimination in terms, conditions, and privileges of employment, but not hiring and firing); Workplace Transparency Act, 820 ILL. COMP. STATE. ANN. 96 (West 2019) (protecting

HEARD in the Workplace Act, our proposal would broaden anti-discrimination protections to all protected classes under our civil rights laws, including Title VII, the Americans with Disabilities Act (ADA),[209] and the Age Discrimination in Employment Act (ADEA).

Some may fear that extending discrimination protections in this manner might unnecessarily limit individual choices about whom to hire or contract with in every aspect of their life, including in their home, or even violate constitutional rights to free association.[210] While the exact contours of work contracts would need to be established, we note that the Supreme Court has stated that "'the Constitution . . . places no value on discrimination,' and while '[i]nvidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment . . . it has never been accorded affirmative constitutional protections.'"[211] Furthermore, we are confident that existing defenses in Title VII, such as the bona fide occupational qualification could apply here, to ensure that employers are adequately protected.[212] Thus, these potential

contractors and others who contract directly to perform services for an employer from harassment); 2019 Md. Laws 222 (protecting independent contractors from discrimination and harassment); An Act Relating to the Prevention of Sexual Harassment, 2018 Vt. Acts & Resolves 663 (prohibiting sexual harassment against all people engaged to perform work or services, including independent contractors); Pennsylvania Human Relations Act, 43 PA. STAT. AND CONS. STAT. ANN. §§ 951-963 (West 1991); *see generally*, ANDREA JOHNSON ET AL., PROGRESS IN ADVANCING ME TOO WORKPLACE REFORMS IN #20STATESBY2020, NAT'L WOMEN'S L. CTR. (July 2019), available at https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2019/07/20-States-By-2020-report.pdf [https://perma.cc/UFW3-9HW9].

209. The ADA enshrined critical civil rights protections regarding equal employment opportunity for people with disabilities. In addition to prohibiting certain discriminatory behavior, it also creates certain rights to reasonable accommodations. This has led some commentators to view it as creating an accommodation mandate, distinct from antidiscrimination requirements. *See, e.g.*, Bagenstos, *supra* note 197, at 828 (describing commentary). Professor Bagenstos disagrees with this position, arguing that "both the ADA's accommodation requirement and traditional antidiscrimination provisions aim to overcome systematic patterns of stigma and subordination by targeting a practice of occupational segregation that undergirds those patterns." *Id.* at 830. A full discussion is beyond the scope of this article, other than to note that there are powerful arguments for inclusion of the ADA, including its accommodation requirements, in this antidiscrimination framework. We acknowledge that there would be barriers, for example, to a homeowner ensuring his home is accessible when hiring a plumber with a physical disability, but this could be addressed by the statutory language requiring reasonable accommodations that do not impose an undue hardship. *See* 42 U.S.C. § 12112(b)(5).

210. *Cf.* Linda C. McClain, *The Civil Rights Act of 1964 and "Legislating Morality" On Conscience, Prejudice, and Whether "Stateways" Can Change "Folkways*," 95 B.U. L. REV. 891, 918-19 (2015) (detailing arguments against "legislating morality" in the Civil Rights Act); Heart of Atlanta Motel, Inc. v. U.S., 379 U.S. 241, 244 (1964) (resolving challenge to constitutionality of Title VII in which appellants argued the law deprived it of "the right to choose its customers and operate its business as it wishes"); Anthony Q. Fletcher, *Forbidden Grounds The Case Against Discrimination Law*, 30 HARV. J. ON LEGIS. 571, 571-577 (1993) (Book Review of Richard Epstein's book Forbidden Grounds, which calls for the "repeal of the discrimination laws as applied to private employment contracts").

211. Runyon v. McCrary, 427 U.S. 160, 176 (1976).

212. *Cf.* Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385, 389 (5th Cir. 1971) ("While we recognize that the public's expectation of finding one sex in a particular role may cause some initial difficulty, it would be totally anomalous if we were to allow the preferences and prejudices of the

obstacles do not outweigh the universal benefit of guaranteeing all workers the right to work free of discrimination.

2. Retaliation Protections

Workers should also not be discriminated against for exercising or attempting to exercise their protected rights, even when they lack a formal employment relationship. Prevention of or prompt response to retaliation is critical to protecting the rule of law and workers' rights. Employers strategically retaliate to undermine law enforcement and obstruct justice by silencing victims and witnesses.[213] When an employer instills a fear of retaliation into the work environment, workers have no choice but to remain silent. Even when retaliation is addressed, it is hard to undo the chilling effect of a retaliatory action. Workers who witness retaliation become less willing to speak up and report violations.[214] Combatting retaliation is therefore fundamental to protecting labor and employment standards, the rule of law, and worker power.

The right to protection against retaliation is fundamental for all workers. As with non-discrimination principles, the extension of this right is also feasible under our civil rights and social protection legislation. Some federal and state laws have already bestowed retaliation protections to workers beyond employees.[215] The FLSA, for example, says "it shall be unlawful for *any person* . . . (3) to discharge or in any other manner discriminate against any employee because such employee has filed any complaint . . . ."[216]

customers to determine whether the sex discrimination was valid. Indeed, it was, to a large extent, these very prejudices the Act was meant to overcome. Thus, we feel that customer preference may be taken into account only when it is based on the company's inability to perform the primary function or service it offers.").

213. *See, e.g.,* Tanya Goldman, *supra* note 160.

214. Charlotte S. Alexander, *Anticipatory Retaliation, Threats, and the Silencing of the Brown Collar Workforce*, 50 AM. BUS. L.J. 779, 781 (2013) (noting that in a 2013 report on Alabama's poultry processing industry, almost 100 percent of the workers who had previously witnessed employer retaliation were uncomfortable asking their employers about problems with workplace safety, discrimination, and wages) (citation omitted).

215. *See, e.g.*, Fair Labor Standards Act, 29 U.S.C. § 215(a); 42 U.S.C. § 2000e-3 ("It shall be an unlawful employment practice for an employer to discriminate against any of his *employees or applicants for employment* . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.") (emphasis added); ARIZ. REV. STAT. ANN. § 23-364(b) (2016) ("No employer or other person shall discriminate or subject any person to retaliation for asserting any claim or right under this article, for assisting any other person in doing so, or for informing any person about their rights.").

216. 29 U.S.C. § 215(a) (emphasis added). This differs somewhat from our proposal because it still requires the aggrieved party asserting retaliation to be an "employee," but it does expand the scope of actionable retaliation beyond FLSA coverage.

Courts[217] and the U.S. Department of Labor (DOL) interpret this to prohibit retaliation even where the employer or the employment relationship is not covered by the FLSA.[218] The DOL holds that "because section 15(a)(3) prohibits 'any person' from retaliating against 'any employee', the protection applies to all employees of an employer even in those instances in which the employee's work and the employer are not covered by the FLSA."[219]

Thus, where an employer admits to making a threat, but denies an employment relationship, this broad language allows the agency to proceed with the retaliation investigation without assessing the nature of the working relationship.[220] Additionally, the FLSA applies even if an agent of the employer, such as the employer's sibling or spouse, retaliates.[221] Thus, an employer can no longer defend its actions by claiming that there is no employment relationship. State and local jurisdictions, including Seattle and New York City, have enacted similar retaliation protections.[222]

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217. *See, e.g.*, Centeno-Bernuy v. Perry, 302 F. Supp. 2d 128, 136 (W.D.N.Y. 2003) ("Thus, the anti-retaliation provision of the FLSA does not apply only to employers; it applies to 'any person.'") (citing cases).

218. *See* Brief for Nat'l Immigr. L. Ctr. as Amici Curiae Supporting Plaintiff-Appellant at 6-7, Arias v. Raimondo, 860 F.3d 1185 (9th Cir. 2017) (No. 15-15120) ("Indeed, decisions finding that Section 215(a)(3) provides a cause of action even if the conditions for individual or enterprise coverage – an element typically required for a FLSA action – are not present further support the applicability of Section 215(a)(3) to non-employers in private actions."); *see also* Wirtz v. Ross Packaging Co., 367 F.2d 549, 550-51 (5th Cir. 1966) ("The prohibitions of Section 15(a)(3) are . . . unlimited, for they are directed to 'any person.' Thus the clear and unambiguous language of the statute refutes the district court's view that either the employee or his employer must be engaged in activities covered by the Act's wage and hour provisions in order for the strictures against discriminatory discharge to be invoked."); Sapperstein v. Hager, 188 F.3d 852, 857 (7th Cir. 1999) (allowing Section 215(a)(3) action to proceed where enterprise coverage was not present since "Congress instead wanted to encourage reporting of suspected violations by extending protection to employees who filed complaints, instituted proceedings, or indeed, testified in such proceedings, as long as these concerned the minimum wage or maximum hour laws"); Obregon v. JEP Family Enters., Inc., 710 F. Supp. 2d 1311, 1314 (S.D. Fla. 2010) ("The FLSA's prohibition on retaliation is broader than its coverage of minimum wage or overtime wage violations and applies even if the employee cannot show 'individual coverage' or 'enterprise coverage'.") (citations omitted).

219. U.S. DEP'T OF LAB., WAGE & HOUR DIV., FACT SHEET # 77A: PROHIBITING RETALIATION UNDER THE FAIR LABOR STANDARDS ACT (FLSA) (Dec. 2011), https://www.dol.gov/whd/regs/compliance/whdfs77a.pdf [https://perma.cc/R3T2-CRLH].

220. *See id.*

221. 29 U.S.C. § 203(d) (defining "employer" as "any person acting directly or indirectly in the interest of an employer in relation to an employee"); *see also Arias*, 860 F.3d at 1191-92 ("Congress clearly means to extend section 215(a)(3)'s reach beyond actual employers."); Bowe v. Judson C. Burns, Inc., 137 F.2d 37, 38-39 (3rd Cir. 1943); *Sapperstein*, 188 F.3d at 856-57; *Centeno-Bernuy*, 302 F. Supp. 2d at 138; Montano-Perez v. Durrett Cheese Sales, Inc., 666 F. Supp. 2d 894, 902 (M.D. Tenn. 2009).

222. *See, e.g.*, ARIZ. REV. STAT. ANN. § 23-364(b) ("No employer or other person shall discriminate or subject any person to retaliation for asserting any claim or right under this article, for assisting any other person in doing so, or for informing any person about their rights."); Wage Theft Ordinance, SEATTLE MUN. CODE § 14.20.035(b) (prohibiting retaliation by an employer "or any other person" for exercising rights under their wage theft ordinance); Freelance Isn't Free Act, Loc. L. No. 140 (2016) (codified at N.Y.C. ADMIN. CODE §§ 20-927–20-936) (assuring freelance workers the right to a written contract, timely and full payment, and protection from retaliation); N.Y.C. Human Rights Law, Loc. L. No. 172

While Title's VII's language is not as broad as the FLSA's, this legislation still offers some retaliation protections for non-employees,[223] such as applicants for employment and former employees.[224] A number of federal laws, including the ADA, prohibit not just retaliation, but also "interference" with the exercise or enjoyment of rights under the statute.[225] Although the ADA's interference and anti-retaliation provision both apply to "any individual," the interference provision goes even further, protecting any individual who is subject to coercion, threats, intimidation, or interference with respect to ADA rights.[226]

Similarly, the NLRA prohibits restraint, coercion and interference with the exercise of rights guaranteed in Section Seven of the NLRA.[227] Its language includes "any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice,"[228] and statutory protection encompasses situations involving non-employees, such as former employees and applicants for hire.[229] The NLRB has frequently stated that the NLRA protects "members of the working class generally."[230] Thus, as current legislation already recognizes the importance of protecting workers from retaliation, we propose that any protections tied to work should be coupled with robust anti-retaliation provisions.

(2019) (codified as amended in scattered sections of N.Y.C. ADMIN. CODE ch. 1) (providing employment discrimination and harassment protections to freelancers and independent contractors).

223. 42 U.S.C. § 2000e-3 ("It shall be an unlawful employment practice for an employer to discriminate against any of his *employees or applicants for employment* . . . because he has opposed any practice made an unlawful employment practice by this title, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.") (emphasis added).

224. U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC-CVG-2016-1, EEOC ENFORCEMENT GUIDANCE ON RETALIATION AND RELATED ISSUES (Aug. 25, 2016), https://www.eeoc.gov/laws/guidance/enforcement-guidance-retaliation-and-related-issues [https://perma.cc/NEJ3-PP57].

225. 42 U.S.C. § 12203(b) ("It shall be unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this chapter.").

226. § 12203(a)-(b).

227. 29 U.S.C. § 152(3) ("The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment . . . .").

228. *Id.*

229. *See, e.g.*, Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941); FES, 331 N.L.R.B. 9 (2000), *supplemented by* 333 N.L.R.B. 66 (2001), *enforced*, 301 F.3d 83 (3d Cir. 2002); B.E.&K., Inc., 252 N.L.R.B. 256 (1980).

230. *See, e.g.*, Giant Food Mkts., 241 N.L.R.B. 727, 728 n.5 (1979); Little Rock Crate & Basket Co., 227 N.L.R.B. 1406 (1977); Oak Apparel, 218 N.L.R.B. 701 (1975); Briggs Mfg. Co., 75 N.L.R.B. 569 (1947).

3. Assurance of Safe and Healthful Working Conditions

A right to work in a safe and healthful environment should be fundamental, regardless of a worker's employment status. In passing the OSH Act, Congress recognized the importance of "assur[ing] so far as possible every working man and woman in the Nation safe and healthful working conditions."[231] Congress also acknowledged the importance of creating incentives for employers to reduce occupational safety and health hazards.[232]

The OSH Act creates duties for employers both towards their employees and in general:

> a) Each employer—
>
> (1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees;
>
> (2) shall comply with occupational safety and health standards promulgated under this chapter.[233]

Because of this, "[c]ourts have frequently ruled that the OSH Act, and the regulations promulgated thereunder, sweep broadly enough so as to allow the Secretary to impose duties on employers to persons other than their employees."[234] Thus, in enforcing the OSH Act, the Occupational Safety and Health Administration (OSHA) is able to cite multiple employers at a worksite, even if they do not all have an employment relationship with the worker. This implies that when a party charged with providing a safe work environment fails to do so, that party should be held accountable.

In fact, such a policy exists in the construction industry. The OSHA multi-employer citation policy includes the concept of a "controlling employer" who "has general supervisory authority of the worksite, including the power to correct safety and health violations itself or require others to correct them. Control can be established by the contract or, in the absence of

231. 29 U.S.C. § 651(b).

232. *Id.* Some other states, such as Washington, also encourage the provision of "safe and healthful working conditions for every man and woman working." WASH. REV. CODE § 49.17.010 (2020). The Washington law defines "employer" to include one who "employs one or more employees *or who contracts with one or more persons*," and "employee" as "every person in this state who is engaged in the employment of *or who is working under an independent contract* the essence of which is his or her personal labor for an employer under this chapter whether by way of manual labor or otherwise." WASH. REV. CODE § 49.17.020(4)-(5) (2020) (emphasis added).

233. 29 U.S.C. § 654.

234. Sec'y of Lab. v. Trinity Indus., Inc., 504 F.3d 397, 402 (3d Cir. 2007); *see also* Solis v. Summit Contractors, Inc., 558 F.3d 815, 818 (8th Cir. 2009) ("[S]ubsection (a)(2) creates a specific duty to comply with standards for the good of all employees on a multi-employer worksite."); Acosta v. Hensel Phelps Constr. Co., 909 F.3d 723, 727 (5th Cir. 2018).

explicit contractual provisions, by the exercise of control in practice."[235] In 2009, the Eighth Circuit Court of Appeals affirmed OSHA's unambiguous right to issue citations to employers for violations even where the latter's own employees are not exposed to hazards related to that violation (e.g., where workers employed by an electrical subcontractor are exposed to a hazard because of the general contractor's failure to provide proper electrical grounding at the worksite).[236]

Broadening the conception of a "controlling employer" to an organization that exercises similar authority over a worksite, akin to a general contractor, would operationalize the right to a safe and healthful work environment (i.e., in compliance with OSHA's standards) regardless of employment status. David Michaels, the former Assistant Secretary for OSHA, describes this requirement as a "duty of care."[237]

4. The Right to Remuneration for Work and Assurance of a Minimum Wage

The basic notion that people should be paid and receive a minimum wage for their work is also fundamental and should be tied to work rather than employment status.[238] The notion of labor market contracting is premised on an enforceable right to receive payment for work, in contrast to earlier compulsory labor of indentured servitude and slavery.[239] The right to fair payment underlies not only recoveries under the FLSA, but also criminal enforcement for labor trafficking and forced labor.[240] We propose two rights

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235. OCCUPATIONAL SAFETY & HEALTH ADMIN., CPL 02-00-124, MULTI-EMPLOYER CITATION POLICY §§ X(B)-(E) (Dec. 10, 1999), https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_id=2024&p_table=DIRECTIVES [https://perma.cc/G3XL-6H8Q].

236. *See Solis*, 558 F.3d at 829 ("[T]he controlling employer citation policy places an enormous responsibility on a general contractor to monitor all employees and all aspects of a worksite.").

237. OCCUPATIONAL SAFETY & HEALTH ADMIN., POLICY BACKGROUND ON THE TEMPORARY WORKER INITIATIVE (July 15, 2014), https://www.osha.gov/memos/2014-07-15/policy-background-temporary-worker-initiative [https://perma.cc/GEQ7-WTEL] (addressing OSHA's policy on employer responsibilities); *see also* David Michaels & Jordan Barab, *The Occupational Safety and Health Administration at 50 Protecting Workers in a Changing Economy*, 110 AMER. J. PUB. HEALTH 631, 631-35 (2020) (arguing there is precedent for this in OSHA's treatment of staffing agency workers who are injured or killed while working for a host company).

238. This is separate from the right to overtime compensation under the FLSA, which is covered in the second circle.

239. *See, e.g.*, Rebecca E. Zietlow, *Slavery, Liberty, and the Right to Contract*, 19 NEV. L.J. 447, 448 (2018) ("[F]reedom of contract was not an end in itself; it was a means to the end of achieving equal citizenship and fundamental rights for freed slaves and empowering all workers to exercise more control over their working lives."); *cf.* U.S. CONST. amend. XIII, § 1 ("Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States.").

240. *Cf.* United States v. Calimlim, 538 F.3d 706, 715 (7th Cir. 2008) ("The whole point of criminalizing the act of harboring for financial gain and punishing it more strictly is to remove the financial incentive for doing so."); Carazani v. Zegarra, 972 F. Supp. 2d 1, 16 (D.D.C. 2013) (citing Trafficking

related to compensation for performing work: (1) the right to remuneration, strengthening existing contract-based rights; and (2) the right to receive a minimum wage.

First, connecting the right of remuneration to work protects workers from one of the most potent methods of exploitation, particularly for those in the workforce with limited exit and voice options. The right would be actionable under different legal remedies associated with the form of work, in addition to rights currently available under contract law.[241] While employees' right to renumeration would mirror the rights bestowed under the FLSA's definition, workers outside the scope of employment would still be guaranteed renumeration. All workers, regardless of status, should have expansive rights to receive compensation for work performed, including increased penalties for the failure to pay promptly. In addition, new technologies could be harnessed to create escrow accounts for worker compensation, securing those funds in the event that payment disputes arose.[242] State and local laws, such as the Freelance Isn't Free Act in New York City, provide models for ensuring prompt payment with remedies for all workers.[243] In addition, courts have long enforced contract claims for payment, so this would not require entirely new mechanisms for enforcement, at least for private rights of action.[244]

Second, all workers, regardless of employment status, should have the right to receive the federal statutory minimum wage. These assurances protect the most vulnerable, lowest-paid workers, who have the least access

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Victims Protection Act, 18 U.S.C. § 1595) (discussing provisions for calculating civil damages for forced labor under the FLSA and the Trafficking Victims Protection Act).

241. *See, e.g.*, U.S. v. Klinghoffer Bros. Realty Corp., 285 F.2d 487, 494 (2d Cir. 1960) ("[W]hen an employer has failed to pay a bargained for hourly wage, minimum or otherwise, for a compensable period of employment, he has of course breached his contract"); San Carlos Irrigation & Drainage Dist. v. U.S., 877 F.2d 957, 959 (Fed. Cir. 1989) ("To recover for breach of contract, a party must allege and establish: (1) a valid contract between the parties, (2) an obligation or duty arising out of the contract, (3) a breach of that duty, and (4) damages caused by the breach."). There are also provisions for breach of contract under state law. *See, e.g.*, Andreatta v. Eldorado Resorts Corp., 214 F. Supp. 3d 943, 955 (D. Nev. 2016) ("A breach of contract claim under Nevada law requires (1) the existence of a valid contract, (2) a breach by the defendant, and (3) damage as a result of the breach.").

242. The New York legislature recently passed a bill "to increase the likelihood that victims of 'wage theft' [would] be able to secure payment of unpaid wages for work already performed from their employers." S.B. S2844B/Assemb. B. A486B, 2019-2020 Reg. Sess. (N.Y. 2019). It would have allowed employees who had filed a claim for wage theft to file a lien against their employer's in-state real or personal property. The Governor vetoed it this year.

243. Freelance Isn't Free Act, Loc. L. No. 140 (2016) (codified at N.Y.C. ADMIN. CODE §§ 20-927–20-936) (providing protections for freelance workers by providing them a right to a written contract; timely and full payment for work; and protection from retaliation, as well as establishing penalties for violations of these rights).

244. Restatement (First) of Contracts § 326 (Am. Law Inst. 1932) (discussing available judicial remedies for breach of contract); *see also Klinghoffer*, 285 F.2d at 494 ("[W]hen an employer has failed to pay a bargained for hourly wage, minimum or otherwise, for a compensable period of employment, he has of course breached his contract.").

to voice or exit, from exploitation.[245] The right to a minimum wage would be implemented through different mechanisms depending on work status, paralleling those described for the right to remuneration for work.

There is precedent for requiring a minimum wage without requiring compliance with all Fair Labor Standards Act requirements. For example, although farm workers were historically excluded from federal labor standards protections, they were partially granted federal minimum wage protections through 1966 amendments to the FLSA.[246] There are also examples from other sectors, including taxi and limousine drivers (who receive minimum wage but not overtime protections)[247]—and workers protected under various state and local laws.[248] The right to renumeration and minimum wage are critical to economic security, particularly for workers paid the lowest wages and with the least bargaining power, and should be provided to all workers.

5. Freedom of Association and the Right to Engage in Acts for Mutual Aid and Protection

The right to engage in concerted activity is critical because it upholds workers' right to a voice and the right to collectively withhold labor to protest working conditions. Section Seven of the NLRA grants employees the right to self-organization[249] and to engage in concerted activities for the purpose of "mutual aid and protection," affirming employees' right to not only engage

245. Cotter v. Lyft, Inc., 60 F. Supp. 3d 1067, 1074 (N.D. Cal. 2015) (quoting Martinez v. Combs, 231 P.3d 259, 271 (Cal. 2010)) ("These statutes are designed to protect workers. For example, the minimum wage statute seeks to guarantee that the 'weakest and most helpless class' of workers receive 'a wage that insures for them the necessary shelter, wholesome food and sufficient clothing.'"); *cf.* Dynamex Operations W., Inc. v. Super. Ct., 416 P.3d 1, 32 (Cal. 2018) ("Wage and hour statutes and wage orders were adopted in recognition of the fact that individual workers generally possess less bargaining power than a hiring business and that workers' fundamental need to earn income for their families' survival may lead them to accept work for substandard wages or working conditions."). *See generally* Erica L. Groshen & Harry J. Holzer, *Improving Employment and Earnings in Twenty-First Century Labor Markets An Introduction*. 5 RSF: THE RUSSEL SAGE FOUND. J. SOC. SCIS. 1-19 (2019).

246. Fair Labor Standards Amendments of 1966, Pub. L. 89-601, § 203(a), 80 Stat. 833, 833-34 (1966); Marc Linder, *Farm Workers and the Fair Labor Standards Act Racial Discrimination in the New Deal*, 65 TEX. L. REV. 1335, 1337 (1987).

247. 29 U.S.C. § 213; *see also Driver Pay*, TAXI & LIMOUSINE COMM'N, https://www1.nyc.gov/site/tlc/about/driver-pay.page [https://perma.cc/99FB-LZ4W] (citing Driver Pay Rules set by the Commission that establish a minimum per trip payment for certain ride-hail company drivers who are "High-Volume For-Hire Services").

248. *See, e.g.*, Domestic Workers Ordinance, SEATTLE MUN. CODE § 14.23.020(A) (providing the right to earn the Seattle minimum wage whether an employee or independent contractor); Hawaii Domestic Workers Bill of Rights, §§ 2-3, 2013 Haw. Sess. Laws 248 (incorporating a right to the state minimum wage for domestic workers).

249. Beth Israel Hosp. v. NLRB, 437 U.S. 483 (1978) (holding that freedom of employees to effectively communicate with one another regarding self-organization is "essential to their right to self-organize").

in activities but also advocate for their shared interests.[250] Thus, the "mutual aid and protection" clause covers employee efforts to improve their terms and conditions of employment through direct actions targeted at their specific employer, as well as efforts to "improve their lot as employees through channels outside the immediate employee-employer relationship" and activities "in support of employees of employers other than their own."[251] The Supreme Court has found that the NLRB must adapt the NLRA to the "changing patterns of industrial life,"[252] and the NLRB has recognized "the recent dramatic growth in contingent employment relationships," as one such changing economic circumstance.[253] This recognition additionally warrants extending these rights to all workers, regardless of employment status.

The right to engage in mutual aid and protection extends beyond a particular workplace and includes concerted advocacy when the subject matter has a direct nexus to employees' interests as employees, based on a totality of the circumstances.[254] In *Kaiser Engineers*,[255] the NLRB found that a group letter to Congress, wherein employees opposed a competitor's application to the DOL to ease restrictions on visas for foreign engineers, was protected because the employees shared a joint concern over job security. Similarly, in *Petrochem Insulation, Inc.*,[256] a union was permitted to intervene in state environmental and other regulatory permit proceedings because the union had a shared interest in securing a living wage for non-unionized employees, which would expand union job opportunities, improve wage bargaining, and further employee health and safety.

All workers should have the core right to engage in activities that advance their interests without fear of or actual retaliation, including discharge. Protecting the right to have a living wage, health and safety, breaks, and collective bargaining relies on workers filing complaints with government authorities.[257] Retaliation threatens workers' ability and

250. Fresh & Easy Neighborhood Mkt., 361 N.L.R.B. 151 (2014).

251. Eastex, Inc. v. NLRB, 437 U.S. 556 (1978) (upholding statutory protection for distribution of literature that urged employees to vote for candidates supporting a federal minimum wage increase and to lobby against right to work provisions in state constitution).

252. NLRB v. J. Weingarten, Inc., 420 U.S. 251, 266 (1975).

253. Browning-Ferris Indus. of Cal., Inc., 362 N.L.R.B. 1599, 1599 (2015).

254. *Eastex*, 437 U.S. 556, 565-567 (protecting employees' efforts to improve working conditions through resort to administrative and judicial forums and appeals to legislators); Sun Cab, Inc., 362 N.L.R.B. 1587, 1588 (2015) (protecting extended break where taxi drivers protested proposed taxi authority action that would likely result in reduced driver wages); s*ee also* OFF. OF GEN. COUNS., NLRB, GC 08-10, GUIDELINE MEMORANDUM ON UNFAIR LABOR PRACTICE CHARGES INVOLVING POLITICAL ADVOCACY 6-7 (Jul. 22, 2008), https://apps.nlrb.gov/link/document.aspx/09031d4580145ee5 [https://perma.cc/V3KN-XFVN].

255. 213 N.L.R.B. 752 (1974), *enforced*, 538 F.2d 1379 (9th Cir. 1976).

256. 330 N.L.R.B. 47 (1999), *enforced*, 240 F.3d 26 (DC Cir. 2001).

257. Griffith, *supra* note 48, at 93-94.

motivation to file complaints or attempt to improve working conditions, undermining all workplace conditions.

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Our proposal to secure these core protections for all workers might seem like an acceptance of the fissured workplace and misclassification of employees. We believe, on the contrary, that the assurance of these core rights will only enhance workers' civil rights and labor protections, and empower them as they navigate inherently unequal working relationships and evolving business structures.[258] We acknowledge that this proposal is not comprehensive of all rights attached to employment but makes some choices about which protections are essential and feasible to provide to all workers. That is why the Concentric Circle Framework couples these new rights with the Middle Circle, which further enhances existing protections for employees. The more the Middle Circle strengthens protections for employees and misclassified workers, the smaller the number of workers relying on rights exclusively within the Inner Circle.

B. The Middle Circle: Presumptive Employer Status

The next level of rights, protections, and responsibilities are those already linked to employment status, but with a presumption and test that enhance those protections. These include, for example, the right to overtime under the FLSA, the right to organize and be represented through collective bargaining under the NLRA, and safety net protections, including access to workers' compensation and unemployment insurance.[259]

In this Part, we focus on two central attributes for determining whether an employment relationship exists. First, there should be a presumption of an employment relationship that the putative employer must rebut. Second, an employer must meet a strong, predictive test in order to rebut the presumption.

A rebuttable presumption will help rebalance the power dynamics between workers and employers. This presumption ensures that workers have access to workplace protections until proven otherwise, and rightfully places

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258. We also view the framework as constitutional in light of United States v. Darby, 312 U.S. 100, 102 (1941).

259. Under state and local law there is growing momentum around additional rights and protections related to work, including access to paid sick and safe time; paid family and medical leave; fair and predictable schedules; and fair chance employment. *See Hearing on the Healthy Families Act (H.R. 1784) Examining a Plan to Secure Paid Sick Leave for U.S. Workers Before the Workforce Protections Subcomm. of the H. Comm. Of Educ. And Lab.*, 116th Cong. (2020) (statement of Tanya L. Goldman, Senior Policy Attorney, Center for Law and Social Policy); *see also Colorado Voters Overwhelmingly Approve Paid Family & Medical Leave*, A Better Balance (Nov. 4, 2020), https://www.abetterbalance.org/colorado-voters-overwhelmingly-approve-paid-family-medical-leave/ [https://perma.cc/MPD2-4GWS]. The presumptive employer status would have positive implications for all of these critical workplace rights.

the burden of proof on the only entity—or entities—in the fissured workplace with access to the necessary evidence to establish the existence of an employment relationship or lack thereof.[260] Rebuttable presumptions generally serve one or more goals, including furthering socially desirable policies and providing "a legal mechanism to account for the restricted access to evidence an employee is likely to have."[261] This is particularly relevant in the context of basic labor and employment protections. "Wage and hour statutes and wage orders were adopted in recognition of the fact that individual workers generally possess less bargaining power than a hiring business and that workers' fundamental need to earn income for their families' survival may lead them to accept work for substandard wages or working conditions."[262]

The rebuttable presumption would be a new cross-cutting federal policy that amends all workplace statutes. In a preamble, the statute would frame the issue by laying out the major changes in the economy that have altered the nature of work, leading to a need for a new default status and a set of basic rights for workers.

The rebuttable presumption, coupled with a stronger test, will benefit businesses, workers, and enforcement agencies by being predictable, easier to administer, and producing fewer disputed outcomes.[263] Using the same test for a host of labor and employment legislation will also simplify standards for workers, employers, advocates, regulators, and judicial bodies.

This system would offer most workers both the fundamental rights and protections from the Inner Circle as well as a secondary set of rights tied to employment. The subset of those who are legitimately independent

260. Harris, *supra* note 27, at 32.

261. Joel S. Hjelmaas, *Stepping Back from the Thicket A Proposal for the Treatment of Rebuttable Presumptions and Inferences*, 42 DRAKE L. REV. 427, 435 (1993) (citing Ronald D. Rotunda, *The Civil Rights Act of 1991 A Brief Introductory Analysis of the Congressional Response to Judicial Interpretation,* 68 NOTRE DAME L. REV. 923, 934 (1993)) ("Perhaps no other type of rebuttable presumption has been the center of as much controversy as those that deal with employment discrimination. Those who advocate shifting the burden of proof to the defendant once a rebuttable presumption has been established consider this procedural protection to be critical to the enforcement of civil rights legislation.").

262. Dynamex Operations W., Inc. v. Super. Ct., 416 P.3d 1, 32 (Cal. 2018); United States v. Rosenwasser, 323 U.S. 360, 361 (1945) (citation omitted) (holding that wage and hour laws are intended to protect workers against "the evils and dangers resulting from wages too low to buy the bare necessities of life and from long hours of work injurious to health").

263. RUCKELSHAUS & LEBERSTEIN, *supra* note 180, at 4 ("The most effective laws combating independent contractor misclassification are those that are the simplest to administer. Creating a presumption of employee status, either for all labor and employment laws, or by individual law, is one example of a 'simple fix.'"); *cf. Principles of the Law of Family Dissolution Analysis and Recommendations*, 8 DUKE J. GENDER L. & POL'Y 1, 26 (2001) ("Rebuttable presumptions that decide the majority of litigated cases facilitate this goal by making the results of potential litigation more predictable."); Hargrove v. Sleepy's, LLC, 106 A.3d 449, 464, (N.J. 2015) ("[T]he 'ABC' test operates to provide more predictability and may cast a wider net than the FLSA 'economic realities' standard.").

contractors would be entitled to the fundamental protections of the Inner Circle but not the Middle Circle.

Under this model, businesses and other organizational entities should only rely on contracted work for specialization, quality, need for short term or irregular access to skills, services, etc. Because it would be easier for enforcement agencies and private parties to challenge illegal business models, employers would have less incentive to misclassify workers than they do now.[264]

The rebuttable presumption of employment, however, still requires a test. In order to ensure that a revised system moves forward, such a test must address deficiencies of the status quo: lack of clarity of the boundaries of employment as they relate to underlying economic realities. We believe there are two reasonable standards from which to draw.[265] The first is the economic realities test arising from the FLSA, which does not currently include a rebuttable presumption, but could be adapted accordingly. We ultimately reject the economic realities analysis because it lacks sufficient predictability. The second is the ABC test developed in several states, most recently adopted in California.[266] In the ABC test, as discussed further below, the defendant already has the burden to rebut the presumption established by the plaintiff's prima facie case. We recommend a third option: using the ABC test, but with a construction that focuses on factors, such as ability to set price, that demonstrate economic independence or a need for workplace protections.

1. Option 1: Economic Realities Analysis

The economic realities analysis seeks to determine whether individuals are truly in business for themselves and not in need of labor standards protections, or whether they are economically dependent on an alleged employer or employers.[267] As a test, it is meant to cut through subterfuge and

264. *See, e.g.*, Assemb. B. 5, § 1(e), 2019-2020 Reg. Sess., 2019 Cal. Legis. Serv. 296 (West) ("It is also the intent of the Legislature in enacting this act to ensure workers who are currently exploited by being misclassified as independent contractors instead of recognized as employees have the basic rights and protections they deserve under the law, including a minimum wage, workers' compensation if they are injured on the job, unemployment insurance, paid sick leave, and paid family leave. By codifying the California Supreme Court's landmark, unanimous Dynamex decision, this act restores these important protections to potentially several million workers who have been denied these basic workplace rights that all employees are entitled to under the law.").

265. We do not consider the common law control test a viable option. See discussion *supra* Part II.B

266. Assemb. B. 5, § 2, 2019-2020 Reg. Sess., 2019 Cal. Legis. Serv. 296 (West).

267. *See, e.g.*, Hopkins v. Cornerstone Am., 545 F.3d 338, 343 (5th Cir. 2008) ("To determine if a worker qualifies as an employee, we focus on whether, as a matter of economic reality, the worker is economically dependent upon the alleged employer or is instead in business for himself."); Baker v. Flint Eng'g & Constr. Co., 137 F.3d 1436, 1440 (10th Cir. 1998) (citations omitted) (quoting Henderson v. Inter-Chem Coal. Co., Inc., 41 F.3d 567, 570 (10th Cir. 1994)) ("The economic realities of the relationship govern, and 'the focal point is whether the individual is economically dependent on the business to which he renders service or is, as a matter of economic fact, in business for himself.'"); Brock v. Superior Care, Inc., 840 F.2d 1054, 1059 (2d Cir. 1988) ("The ultimate concern is whether, as a matter of economic

labels to get to the nature of the putative employment relationship.[268] By focusing on an ultimate determination of whether a worker is really in business for him or herself or is economically dependent on the employer, the test provides sufficient flexibility to adapt to changing workplace structures while continuing to offer protections to those workers most in need of them.[269] Perhaps for this reason, in 1994, the Dunlop Commission recommended that Congress adopt the economic realities test "and apply it across the board in employment and labor law."[270] In particular, it recommended:

> A single definition of employee for all workplace laws based on the economic realities of the employment relationship. The law should confer independent contractor status only on those for whom it is appropriate—entrepreneurs who bear the risk of loss, serve multiple clients, hold themselves out to the public as an independent business, and so forth.[271]

The multi-factor economic realities analysis determines whether a worker is an employee or an independent contractor under the FLSA.[272] The factors typically include:

> (A) the extent to which the work performed is an integral part of the employer's business;
> (B) the worker's opportunity for profit or loss depending on his or her managerial skill;
> (C) the extent of the relative investments of the employer and the worker;
> (D) whether the work performed requires special skills and initiative;
> (E) the permanency of the relationship; and
> (F) the degree of control exercised or retained by the employer.[273]

The factors are considered in totality to determine whether a worker is economically dependent on the employer, and thus whether the worker is an

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reality, the workers depend on someone else's business . . . or are in business for themselves."); Scantland v. Jeffry Knight, Inc., 721 F.3d 1308, 1312 (11th Cir. 2013) (quoting Mednick v. Albert Enters., Inc., 508 F.2d 297, 301-02 (5th Cir. 1975)) ("Ultimately, in considering economic dependence, the court focuses on whether an individual is 'in business for himself' or is 'dependent upon finding employment in the business of others.'").

268. *See, e.g.*, Misclassification AI, *supra* note 28, at 5 (citing cases).

269. *See id.* at 8.

270. Maltby & Yamada, *supra* note 59, at 259 (citing report).

271. U.S. DEP'T OF LABOR, THE DUNLOP COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS: FINAL REPORT 12, 35-41 (1994) (containing policy recommendations concerning contingent workforce).

272. *See, e.g.*, Tony & Susan Alamo Found. v. Sec'y of Lab., 471 U.S. 290, 301 (1985) (noting that the test of employment under the FLSA is economic reality); Goldberg v. Whitaker House Co-op, Inc., 366 U.S. 28, 33 (1961) (deeming economic reality of worker's relationship with employer, rather than any technical concepts or labels used to describe relationship, are determinative).

273. *See, e.g.*, Acosta v. Off Duty Police Servs., Inc., 915 F.3d 1050, 1055 (6th Cir. 2019); Misclassification AI, *supra* note 28.

employee under the FLSA's expansive definition of "employ" as "to suffer or permit to work."[274]

In applying the economic realities factors, courts have described independent contractors as workers with economic independence who operate a business of their own.[275] For example, the test requires one to consider whether the working party sets the price and quality standards for its activity and the nature of its relationship with other potential "customers" (if, in fact, that is what they are). In a similar vein, by integrating the profit or loss notion, the test requires consideration of how much the party undertaking work can set operational policies that affect its costs.[276]

The economic realities analysis, as a totality of the circumstances test, is particularly useful for distinguishing between hard cases and what might appear to be professions with similar titles but different circumstances. Take for example, a yoga instructor. Is she an employee or an independent contractor? Using the economic realities analysis, one may find that yoga instructor *A* is an employee and yoga instructor *B* is truly an independent contractor, even though they have the same title and a similar skill set.

Say yoga instructor *A* works for Namaste Yoga, a popular yoga chain. Namaste Yoga does all the advertising, hiring, scheduling, and pays her either by the hour or a percentage based on how many students attend each class. Namaste Yoga maintains its brand through certain commonalities that exist in each class, including wearing Namaste Yoga apparel to teach, including specific poses and sequences, and reserving specified amounts of time for warm-up and final resting poses. Under an economic realities analysis, Instructor *A* is likely an employee of the yoga studio as customers go to the studio to experience the Namaste Yoga experience. While Instructor *A* has opportunities to stand out as better or worse than other instructors, she has no real opportunity for profit or loss beyond teaching more classes.

Yoga instructor *B* works at Namaste Wellness Center. The Center provides her space and allows her to reserve time slots, but she is responsible for her own advertising, class development, price-setting, payment collection, and communications. The Center also offers non-yoga related classes and activities. Instructor *B* looks much more like an independent contractor running her own yoga business. She is not economically dependent on Namaste Wellness Center; she could rent space elsewhere and offer other yoga classes. The significant difference in this hypothetical is that her opportunity for profit or loss is entirely determined by her, and the Center appears to neither exercise nor retain almost any control over her.

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274. *See* U.S. v. Rosenwasser, 323 U.S. 360, 362-63 (1945) ("A broader or more comprehensive coverage of employees . . . would be difficult to frame."); Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 326 (1992) (holding that FLSA defines "employ" with "striking breadth").

275. *See* cases cited *supra* note 267.

276. *See Scantland*, 721 F.3d at 1316-17.

While the economic realities analysis is consistent and helpful in determining who needs legal protection, judges and practitioners have struggled with its application in practice. Critiques of the economic realities analysis include that its multiple prongs are too malleable and that the test is insufficiently predictive of outcome.[277] While the economic realities analysis produces uniform results in some industries, in others, such as trucking and cable installers, it has generated widely diverging outcomes based on similar (if not identical) facts.[278] Because it is a standard, not a rule, with multiple factors to weigh, this test has the potential to invite litigation and gaming of the system.

2. Option 2: The ABC Test

The ABC test, on the other hand, is a rule and offers a relatively more straightforward approach that avoids the totality of the circumstances balancing of the economic realities analysis. But unlike the economic realities analysis, the ABC test may generate both over- and under-inclusive results. Many states, including California, have adopted the ABC test and their experience can serve as models for our purposes.[279] California's interpretation of the test presumes that workers are employees unless *the employer* can establish that the worker is:

> (A) free from control by the putative employer, both under the contract, and in fact; and
> (B) doing work that is outside the usual course of business of the putative employer; and
> (C) engaged in an independently established business.[280]

277. *See, e.g.*, Sec'y of Lab. v. Lauritzen, 835 F.2d 1529, 1539 (7th Cir. 1987) ("[W]e should be able to attach legal consequences to recurrent factual patterns. Courts have had plenty of experience with the application of the FLSA to migrant farm workers. Fifty years after the Act's passage is too late to say that we still do not have a legal rule to govern these cases. My colleagues' balancing approach is the prevailing method, which they apply carefully. But it is unsatisfactory both because it offers little guidance for future cases and because any balancing test begs questions about which aspects of 'economic reality' matter, and why."); Dynamex Operations W., Inc. v. Super. Ct., 416 P.3d 1, 33 (Cal. 2018). ("[A] multifactor, 'all the circumstances' standard makes it difficult for both hiring businesses and workers to determine in advance how a particular category of workers will be classified, frequently leaving the ultimate employee or independent contractor determination to a subsequent and often considerably delayed judicial decision."); *see also* Jennifer Middleton, *Contingent Workers in a Changing Economy Endure, Adapt, or Organize?*, 22 N.Y.U. REV. L. & SOC. CHANGE 557, 568-69 (2019) ("The legal test for determining employee/independent contractor status is a complex and manipulable multifactor test which invites employers to structure their relationships with employees in whatever manner best evades liability.").

278. *See, e.g.*, Roeder v. Directv, Inc., No. C14-4091-LTS, 2017 WL 151401, at *10 (N.D. Iowa Jan. 13, 2017) (citing cases finding that cable or satellite television installers are employees and independent contractors under the FLSA).

279. *See generally* Deknatel & Hoff-Downing, *supra* note 74; *see also* WEIL, *supra* note 12, at 204-205 (recommending adoption of the ABC test); CAL. LAB. CODE § 2750.3 (West 2020).

280. *Dynamex*, 416 P.3d at 40.

If the employer fails to establish any one of these prongs, an employment relationship exists.[281]

California codified the ABC test (AB5) in 2019.[282] Massachusetts,[283] New Jersey,[284] and Connecticut[285] already use the test in their wage and hour laws. Twenty-seven states use some version of the ABC test in their unemployment insurance laws, and about ten states apply it to labor laws within a particular sector, typically construction or landscaping.[286] New Jersey currently has a bill that would further strengthen its existing ABC test,[287] and advocates in other states, including New York[288] and Illinois,[289] have announced campaigns.

There are a number of benefits to the ABC test. In order to show a worker is an independent contractor, the employer must establish *each* of the three prongs, simplifying the analysis and improving predictability.[290] If it fails to establish even one, the worker should be treated as an employee.[291] As the California Supreme Court noted, this allows courts to focus on the prongs most relevant to a case, in whichever order the court chooses, without having to balance or weigh any factors.[292] Additionally, the ABC test has led to more consistent results and allowed certain states to eliminate problematic

281. *Id.* at 39-40.

282. Assemb. B. 5, 2019-2020 Reg. Sess., 2019 Cal. Legis. Serv. 296 (West). AB5 affects determinations under the Labor Code, the Unemployment Insurance Code, and the wage orders of the Industrial Welfare Commission. There are several pending lawsuits challenging AB5. *See, e.g.*, Kanishka Singh, *Federal Judge Temporarily Exempts Truck Drivers From California Gig Worker Law*, REUTERS (Jan. 1, 2020), https://www.reuters.com/article/us-california-labor-lawmaking/federal-judge-temporarily-exempts-truck-drivers-from-california-gig-worker-law-idUSKBN1Z01TO [https://web.archive.org/web/20201026214000/https://www.reuters.com/article/us-california-labor-lawmaking/federal-judge-temporarily-exempts-truck-drivers-from-california-gig-worker-law-idUSKBN1Z01TO] (complaint available at https://perma.cc/4CQE-JYGV). In November 2020, voters in California passed Proposition 22, exempting some app-based delivery and ride-share drivers from AB5. Kate Conger, *Uber and Lyft Drivers in California Will Remain Contractors*, N.Y. TIMES (Nov. 4, 2020), https://www.nytimes.com/2020/11/04/technology/california-uber-lyft-prop-22.html [https://perma.cc/2GK5-CXS4].

283. MASS. GEN. LAWS ch. 149, § 148B (2020).

284. Hargrove v. Sleepy's, LLC, 106 A.3d 449, 453 (N.J. 2015) (holding ABC test was proper test for determining whether individual was employee or independent contractor for wage claim purposes).

285. Rebecca Smith, *Washington State Considers ABC Test for Employee Status*, NAT'L EMP. L. PROJECT (Jan. 2019), https://www.nelp.org/blog/washington-state-considers-abc-test-employee-status/ [https://perma.cc/76XG-NZ95].

286. *Id.*

287. S. 863, 219th Leg., 2020 Sess. (N.J. 2020).

288. *See, e.g.*, Eli Rosenberg, *Gig Economy Bills Move Forward in Other Blue States, After California Clears the Way*, WASH. POST (Jan. 17, 2020), https://www.washingtonpost.com/business/2020/01/17/gig-economy-bills-move-forward-other-blue-states-after-california-clears-way/ [https://perma.cc/MR2W-GFJC].

289. *Id.*

290. *See* Dynamex Operations W., Inc. v. Super. Ct., 416 P.3d 1, 40 (Cal. 2018).

291. *Id.*

292. *Id.* at 39-40.

business models, such as the predatory janitorial franchises in Massachusetts.[293]

Prong A of the ABC test requires that an employer establish that the worker is free from control by the putative employer, both under the contract and in fact.[294] This means that retaining control, even if the employer does not exercise it, will undermine an employer's claim that the worker is an independent contractor. While this is a factor in the economic realities and common law tests, the ABC test, like the economic realities analysis, rejects control as the main determinant.[295]

Prong B looks at whether the worker is performing work outside the usual course of the putative employer's business.[296] This analysis is similar to the economic realities assessment of whether the work is "integral."[297] In the fissured workplace, Prong B is critical. But it might be increasingly difficult to delineate work as "integral" as companies distance themselves from workers while retaining control over their activity through other organizational mechanisms, including algorithmic management.[298] For example, janitorial franchising has been challenged as a form of misclassification because individual franchisees' pricing, customer contract and service relationships, and even ability to take on additional work are controlled by a master franchisor.[299] In this setup, the master franchisor depends on unit franchisees to clean and profits directly from their performance, but asserts that it is not a cleaning company (and hence not an employer) and is instead in the business of franchising.[300] Similarly, FedEx

293. This has also resulted in some management-side lawyers' concerns that the test is too difficult for employers to rebut. Richard Reibstein, *A Solution to the "Five Degrees of Independent Contractor Misclassification,"* INDEP. CONTRACTOR MISCLASSIFICATION & COMPLIANCE (Dec. 17, 2019), https://www.independentcontractorcompliance.com/2019/12/17/a-solution-to-the-five-degrees-of-independent-contractor-misclassification/ [https://perma.cc/Z5PR-LE8Q].

294. *See Dynamex*, 416 P.3d at 36.

295. *Id.* at 39-40 ("It bears emphasis that in order to establish that a worker is an independent contractor under the ABC standard, the hiring entity is required to establish the existence of each of the three parts of the ABC standard.").

296. *Id.* at 37-38.

297. *Cf.* Rutherford Food Corp. v. McComb, 331 U.S. 722, 729 (1947) (holding that the inquiry instead focuses on whether "the work done, in essence, follows the usual path of an employee"); *see also* Vazquez v. Jan-Pro Franchising Int'l, Inc., 923 F.3d 575, 597 (9th Cir. 2019) ("A common test for comparing the businesses of a hiring entity and a putative employee is to see whether the putative employees were 'necessary' or 'incidental' to the hiring entity's business.").

298. Prong B could potentially cause challenges where independent contractors are integrated into a digital platform that is legitimately using technology to better connect two contracting parties, such as Etsy sellers and their customers. We would not typically consider such providers to be employees of the digital platform, depending on the specific facts relevant to the platform and its users.

299. *See generally* WEIL, *supra* note 12, ch. 6.

300. *Vazquez*, 923 F.3d at 597-99; Awuah v. Coverall N. Am., Inc., 707 F. Supp. 2d 80, 84 (D. Mass. 2010) ("These quotes suggest that franchising is not in itself a business, rather a company is in the business of selling goods or services and uses the franchise model as a means of distributing the goods or services to the final end user without acquiring significant distribution costs. Describing franchising as a business

has argued it is not a delivery company and therefore not the direct employer of drivers, but rather that it is a logistics company that connects people who want to deliver packages and people who want to sell packages.[301] Most on-demand platforms argue they don't actually provide the service performed by their contractors—they are technology companies connecting users/customers and providers.[302] By doing so, a rideshare company like Uber seeks to argue that a driver is not an employee whose work is integral to the business of transporting customers; rather a driver is themselves a customer of the company's software.[303] Prong B's analysis of whether the worker is performing labor that is part of the usual course of the hiring entity's business remains critical and requires probing analysis of the true nature of the business.

Prong C of the ABC test requires that the employer prove the worker is participating or engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity.[304] In the fissured workplace, companies set up structures to make their contractors look like businesses, such as requiring them to incorporate, have their own employees, or set themselves up as franchisees.[305] Courts, then,

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in itself, as Coverall seeks to do, sounds vaguely like a description for a modified Ponzi scheme—a company that does not earn money from the sale of goods and services, but from taking in more money from unwitting franchisees to make payments to previous franchisees."); Da Costa v. Vanguard Cleaning Sys., Inc., No. 15–04743, 2017 WL 4817349, at *6 (Mass. Super. Ct. Oct. 2, 2017) ("Vanguard cannot reasonably maintain that commercial cleaning is not part of its ordinary course of business to avoid classifying its workers as employees while simultaneously touting that it is 'a leader in the commercial cleaning industry.'"). *See generally* WEIL, *supra* note 12, ch. 6.

301. *See, e.g.*, Alexander v. FedEx Ground Package Sys., 765 F.3d 981, 997 (9th Cir. 2014).

302. *See, e.g.*, U.S. Dep't of Lab., Wage & Hour Div., Opinion Letter on FLSA 2019-6 (Apr. 29, 2019), https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/2019_04_29_06_FLSA.pdf [https://perma.cc/6F8W-Y9XB]; OFF. OF GEN. COUNS., NLRB, ADVICE MEMORANDUM ON UBER TECHNOLOGIES CASES (April 16, 2019), https://www.laborrelationsupdate.com/wp-includes/ms-files.php?file=2019/05/NLRB-Uber-memo.pdf [https://perma.cc/B9F7-CL8C]. *But see* LAWRENCE MISHEL & CELINE MCNICHOLAS, ECON. POL'Y INST., UBER DRIVERS ARE NOT ENTREPRENEURS: NLRB GENERAL COUNSEL IGNORES THE REALITIES OF DRIVING FOR UBER 1 (Sept. 20, 2019), https://files.epi.org/pdf/176202.pdf [https://perma.cc/EZC6-ANSL].

303. *See, e.g.*, Cotter v. Lyft, Inc., 60 F. Supp.3 d 1067, 1078 (N.D. Cal. 2015) ("Lyft tepidly asserts there is no need to decide how to classify the drivers, because they don't perform services for Lyft in the first place. Under this theory, Lyft drivers perform services only for their riders, while Lyft is an uninterested bystander of sorts, merely furnishing a platform that allows drivers and riders to connect, analogous perhaps to a company like eBay. But that is obviously wrong.").

304. Dynamex Operations W., Inc. v. Super. Ct., 416 P.3d 1, 38 (Cal 2018).

305. *See, e.g.*, *Investigation in Utah and Arizona Secures Wages and Benefits for More Than 1,000 Construction Workers Who Were Wrongly Classified*, U.S. DEP'T OF LAB. (Apr. 23, 2015), https://www.dol.gov/newsroom/releases/whd/whd20150518 [https://perma.cc/P2PN-XFWZ] ("The defendants required the construction workers to become "member/owners" of limited liability companies, stripping them of federal and state protections that come with employee status. These construction workers were building houses in Utah and Arizona as employees one day and then the next day were performing the same work on the same job sites for the same companies but without the protection of federal and state wage and safety laws. The companies, in turn, avoided paying hundreds of thousands of dollars in payroll taxes.").

must probe the realities, and not the labels, of the relationship. The Massachusetts Appeals Court has framed this analysis as a question of whether the worker is wearing their own hat or the company's hat.[306] This prong incorporates some aspects of the economic realities analysis, such as relative investments, permanency, and opportunity for profit or loss.[307]

Prong C has the added benefit of potentially disincentivizing non-compete provisions. Specifically, if a company prohibits a worker from competing, then the company cannot satisfy prong C because the worker is not being permitted to engage in their own independent business, rendering them an employee.[308]

Overall, the ABC test may offer a more predictable test for workers and decision makers and provide employers and businesses a better assessment of the risks and costs of classification decisions.[309] The test can be so inclusive, however, that the California legislature had to exclude a number of occupations from the ABC test, including licensed insurance agents, doctors, dentists, lawyers, architects, engineers, registered securities broker-dealers or

306. *See, e.g.*, Boston Bicycle Couriers, Inc. v. Deputy Dir. of Div. of Emp. & Training, 778 N.E.2d 964, 970 (Mass. App. Ct. 2002) ("[T]he proprietary interest test seeks to discern whether the worker is wearing the hat of an employee of the employing company, or is wearing the hat of his own independent enterprise.").

307. *See, e.g.*, OR. REV. STAT. ANN. § 670.600(3) (West 2020) ("A person is considered to be customarily in an independently established business if any three of the following requirements are met . . . The person bears the risk of loss related to the business . . . The person makes a significant investment in the business . . ."); 43 PA. STAT. AND CONS. STAT. ANN. § 933.3(b)(2)-(6) (West 2020); ME. REV. STAT. ANN. tit. 26, § 1043(11)(E)(c) (2019); Sw. Appraisal Grp., LLC v. Adm'r, Unemployment Comp. Act, 155 A.3d 738, 749 (Conn. 2017) ("Factors to consider in evaluating the totality of the circumstances under part C include: (1) the existence of state licensure or specialized skills; (2) whether the putative employee holds himself or herself out as an independent business through the existence of business cards, printed invoices, or advertising; (3) the existence of a place of business separate from that of the putative employer; (4) the putative employee's capital investment in the independent business, such as vehicles and equipment; (5) whether the putative employee manages risk by handling his or her own liability insurance; (6) whether services are performed under the individual's own name as opposed to the putative employer; (7) whether the putative employee employs or subcontracts others; (8) whether the putative employee has a saleable business or going concern with the existence of an established clientele; (9) whether the individual performs services for more than one entity; and (10) whether the performance of services affects the goodwill of the putative employee rather than the employer.").

308. Vector Mktg. Corp. v. Me. Unemployment Ins. Comm'n, 610 A.2d 272, 273-75 (Me. 1992) (finding that cutlery sales managers and representatives lacked proprietary interest necessary to satisfy part C because there was no evidence they held themselves out as 'an independent businessperson'; they identified very closely with cutlery company through business cards, office signage, and business checks; they had noncompete provisions in their contracts; and they sold no products other than company's); Enesco Grp., Inc. v. Me. Dep't. of Lab., No. CIV.A. AP-01-46, 2002 WL 746084, at *4 (Me. Super. Ct. Mar. 18, 2002) (citing non-compete clause, among other facts, in concluding that sales representative was an employee).

309. *See, e.g.*, Teresa A. McQueen, *Dynamex is not "Armageddon." Even though it may feel like it!*, 60 ORANGE CNTY. L. 51, 52 (2018) ("Truth be told, *Dynamex's* ABC test is as close as we're likely to come to a bright-line rule on determining when an independent contractor is really independent for wage and hour purposes. Less wiggle room and increased enforcement abilities make this a powerful tool for transformation."); *see also* RUCKELSHAUS & LEBERSTEIN, *supra* note 180 ("This 'ABC' test for non-employee status is the most objective and the most difficult for employers to manipulate.").

investment advisers, direct sales salespersons, real estate licensees, workers providing licensed barber or cosmetology services, and others performing work under a contract for professional services, with another business entity, or pursuant to a subcontract in the construction industry.[310]

The example of a hairdresser highlights some of the distinctions between the economic realities analysis and the ABC test. Under the economic realities analysis, a court could find that a hairdresser who rents his chair in a salon, but is well-established, has his own clientele that only comes to the salon to visit him (and would likely follow him to a different salon if he left), chooses his own equipment and product, and sets his own prices, is an independent contractor. A different judge, however, might determine that his relative investment is small compared to the salon's rent, overhead, and advertising costs, that his work is integral, and thus, conclude that he is an employee. On the other hand, it is unlikely that the same hairdresser could be anything but an employee under the ABC test: he is doing work that is part of the usual course of business of the salon and is not engaged in an independently established business. As a rule, the ABC test offers a trade-off. Perhaps some class of hairdressers who might be independent contractors become employees. If there are societal costs associated with that, they are overcome by the broader benefits of greater clarity, predictability, and protections.

Our main concern with the tractability of the ABC test is that if it is truly overinclusive, legislatures will continue to include carve-outs, which often reflect *political* will and power rather than a need to re-balance power in a working relationship.

3. Proposing an ABC Test with Rules of Construction Based on Business Operations

We recommend a third option for determining employment status. Our proposal would use the framework of the ABC test, but incorporate aspects of the economic realities analysis that focus on the attributes of business operation that connote the activity of an independent business entity. This could also be viewed as incorporating rules of construction for the ABC test—similar to those in the ADA Amendments Act and the BE HEARD in the Workplace Act, and clarifying the proper legal considerations for each prong.[311] This option combines the virtues of the economic realities analysis

310. CAL. LAB. CODE §§ 2750.3(a)-(b) (West 2020) (noting that employment relationships in these occupations will be governed by the test set out in S. G. Borello & Sons, Inc. v. Dep't of Indus. Rels., 769 P.2d 399 (Cal. 1989), as well as setting out different relevant factors in determining which occupations fall under the exemptions).

311. When Congress amended the ADA in 2008, it noted that courts had "narrowed the broad scope of protection intended to be afforded by the ADA, thus eliminating protection for many individuals whom Congress intended to protect." ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat 3553 (2008). As amended, the ADA now includes "rules of construction" for the definition of disability under

with the greater clarity and rebuttable presumption already embodied in the ABC test.

This test would center on evaluating the worker's opportunities for profit or loss beyond just accepting or rejecting more work. Critical activities would include setting price and quality standards for goods or services provided; setting key product or service standards and characteristics; overseeing the marketing and development of products; making expansion and contraction decisions; and making decisions affecting the costs of service provision or production. The ability to directly affect profit or loss in significant ways indicates whether a party has meaningful bargaining power going beyond the decision to say "yes" or "no" to a job or gig. Incorporating that criteria into a modified ABC test would link the test back to the purposes of regulating work in the first place.

The core functions of a business revolve around its ability to set price, quality, and service levels. An economic actor that lacks this capacity operates in an environment where economic returns are determined almost exclusively by the party compensating them. As noted by scholar Naomi Sunshine:

> Workers who lack significant input into the prices charged for their services or the pay rates they receive ought to be considered employees under the current tests for employment. . . . [P]rices and pay are more clear-cut indicators of whether the worker is actually a representative of the company for which she is providing services, and is thereby subject to the company's control—the essence of the most widely used test for employee status. Further, a worker's lack of input into prices and pay suggests the work performed is part of the employer's normal course of business.[312]

Some of the occupational exemptions in AB5 also require that workers engage in activities such as setting their own prices or rates and negotiating directly with their customers.[313] For example, licensed barbers are only excluded from the ABC test if they set their own rates, process their own payments, receive payment directly from their clients, have discretion to determine their clientele, and schedule their own appointments, among other factors.[314] If these requirements are built into the construction of the ABC test, there may be less of a demand for risky carve-outs.

These factors play an important role in evaluating platform models' business structures. Many of those businesses' economic value is determined by customer perceptions of service and expectations of price. Platform transportation companies' (like Uber and Lyft) growth was fueled both by

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the ADA. 42 U.S.C. § 12102(4); *see also* BE HEARD Act, *supra* note 206, at Title II (rules of construction for strengthening workplace rights).

312. Sunshine, *supra* note 3, at 105.

313. CAL. LAB. CODE §§ 2750.3(c)(1)(C), (E)-(F) (West 2020).

314. CAL. LAB. CODE § 2750.3(c)(2)(B)(xi) (West 2020).

the convenience and speed of service (including the ability to observe the location of the car providing the pick-up) and the lower price relative to taxi alternatives.[315] These attributes are determined by the platform and the technologies and algorithms underlying them rather than by the myriad drivers providing that service.[316] Technological advances and enhanced monitoring mechanisms may allow companies to more easily engage a workforce with lowered transactional costs while maintaining stringent control over many aspects of workers' jobs, from their schedules, to the way they dress, to the tasks they carry out.[317] Indicia of contractor control—like the ability to impact profit or loss by setting price and quality standards for goods or services provided; setting key product or service standards; overseeing the marketing and development of products; and making decisions affecting the costs of service provision or production—reflect the complex factors in the economic realities analysis. Focusing on such criteria could provide clarity in applying the default rule. This test would also incentivize businesses to evaluate the amount of control they are willing to relinquish in exchange for the power to set and assure service, quality, and other outcome standards. In sum, the combination of a rebuttable presumption and a strong ABC-like test for employment relationships—incorporating rules of construction that adequately address fissured workplaces—would enhance predictability and better assure worker protections.

C. The Outer Circle: Funding Core Workplace Benefits to Assure Portability

The Outer Circle would include a set of rights, protections, and responsibilities that workplace policies incentivize but that employers are not legally required to provide to legitimate independent contractors. In particular, it would include two social safety net benefits: workers' compensation and unemployment insurance. The Outer Circle would also include access to currently non-mandatory benefits such as paid family and medical leave, retirement savings, and training and skill development funds for both employees and independent contractors.

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315. JAMES PARROTT & MICHAEL REICH, THE NEW SCH. CTR. FOR N.Y.C. AFFS., AN EARNINGS STANDARD FOR NEW YORK CITY'S APP-BASED DRIVERS ECONOMIC ANALYSIS AND POLICY ASSESSMENT 6, 40 (2018), http://www.centernyc.org/s/Parrott-Reich-NYC-App-Drivers-TLC-Jul-2018jul1.pdf [https://perma.cc/VE58-HP3V].

316. *Id*.; *see also* SARAH KESSLER, GIGGED: THE END OF THE JOB AND THE FUTURE OF WORK 43 (2018).

317. *See, e.g.*, ALEXANDRA MATEESCU & AIHA NGUYEN, DATA & SOCIETY, EXPLAINER: WORKPLACE MONITORING AND SURVEILLANCE (Feb. 2019), https://datasociety.net/wp-content/uploads/2019/02/DS_Workplace_Monitoring_Surveillance_Explainer.pdf [https://perma.cc/FVA9-T4UB].

The Outer Circle recognizes that many workers face and likely will continue to face volatility in the course of their working years, working for many different employers and for short spans of time, regardless of employment status.[318]

The Outer Circle for social safety net policies would create better financing mechanisms to ensure that employers' payments into social insurance systems address that volatility.[319] Both workers' compensation and unemployment insurance systems could more closely resemble the kind of multi-employer risk pooling systems long associated with collectively bargained benefits systems in the construction, transportation, and garment industries.[320] Under those systems, employers pay into systems based on hours worked rather than under the assumption of a relatively fixed number of permanent employees.

Outer Circle social insurance could aid legitimate independent contractors in reducing risk exposure from health and safety injuries (workers' compensation) or from intermittent periods where they lack work (unemployment insurance). Those workers could have mechanisms to pay into such risk pools either through their own direct contributions or those of their customers. Benefit levels and coverage under either social insurance program would reflect the levels of worker contributions either through employer contributions (from all sources) or their own contributions in the case of independent contractors.[321]

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318. *See, e.g.*, Robert Maxim & Mark Muro, *Rethinking Worker Benefits for an Economy in Flux*, BROOKINGS (Mar. 30, 2018), https://www.brookings.edu/blog/the-avenue/2018/03/29/rethinking-worker-benefits-for-an-economy-in-flux/ [https://perma.cc/7KZQ-VHST] (noting federal and state legislative proposals and laws to provide independent contractors with benefits).

319. *See, e.g.*, Rebecca Smith, *Pandemic Crisis Spotlights How Gig Workers and Other Misclassified Workers are Forced to Work Without Critical Protections Like Unemployment Insurance, Paid Sick Days, and Paid Leave*, NAT'L EMP. L. PROJECT (Mar. 24, 2020), https://www.nelp.org/publication/independent-contractors-covid-19-working-without-protections/ [https://perma.cc/3AGH-6TTZ].

320. Congress recognized as much in enacting the Pandemic Unemployment Assistance program in the Coronavirus Aid, Relief and Economic Security Act ("CARES Act"), which provides federal funding for unemployment insurance benefits for certain independent contractors affected by the COVID-19 pandemic. Pub. L. No. 116-136, 134 Stat. 281 (2020). Similarly, in the Families First Coronavirus Response Act ("FFCRA"), Congress provided provisions to reimburse independent contractors for time needed for paid sick leave and leave to care for a child whose school was closed or child care provider was unavailable because of the pandemic. Pub. L. No. 116-127, 134 Stat. 178 (2020); *see also* CTR. FOR L. & SOC. POL'Y, PAID SICK DAYS AND PAID LEAVE PROVISIONS IN FFCRA AND CARES ACT (May 6, 2020),
https://www.clasp.org/sites/default/files/publications/2020/05/2020_may_COVID19%20PSD_FFCRA_CARES.pdf [https://perma.cc/W6WV-SVMV].

321. We have models for social insurance funds for paid family and medical leave in eight states and the District of Columbia, as well as proposed federal legislation – the Family and Medical Insurance Leave (FAMILY) Act and the Providing Americans Insured Days of Leave (P.A I.D. Leave) Act. FAMILY Act, S. 463/H.R. 1185, 116th Cong. (2020); P.A.I.D. Leave Act, S. 3513/H.R. 6442, 116th Cong. (2020). In the federal legislation, employers and employees pay, through payroll taxes, small contributions into an insurance fund, from which they are able to take partial wage replacement when they need to be out of work for a personal medical situation, parental leave, or caregiving needs. Self-employed workers are

Similarly, Outer Circle systems could be created for non-mandatory benefits.[322] These would include methods to provide workers—employees or independent contractors—a means to accumulate retirement savings beyond those arising from Social Security or traditional employer-based systems. Rather, retirement benefit systems would provide mechanisms for workers to accumulate savings from joint worker and employer contributions from different employers or contracting partners over the course of their work lives. These Outer Circle benefits could be structured in the fashion of multi-employer funds with contributions related to hours worked.[323]

Volatile work relationships create disincentives for businesses to invest in training and skill enhancement. Apprenticeship systems that developed in the unionized segment of construction created a mutually beneficial solution to underinvestment: workers could gain access to training opportunities that enhanced upward mobility in their craft while individual employers (contractors) who might otherwise not have the incentive or resources to invest in training could do so through pooled apprenticeship funds.[324] Analogous funds and programs could be established to provide workers—whether as employees or independent contractors—access to training resources and programs for skill enhancement.

The Outer Circle acknowledges that workers facing greater volatility in their work life—whether because of the changing nature of technology and work, their own preferences, or some combination of both—require new, more portable means to access both a social safety net and other forms of benefits. But our Concentric Circle Framework does not view the need for portability as something that must be traded for access to other social protections.[325] Instead, it envisions a system where workers can gain access

covered through a variety of mechanisms in existing state legislation, including paying into the fund. In Massachusetts, employers must also pay in for 1099-MISC workers where they make up more than fifty percent of their total Massachusetts workforce combined. MASS. GEN. LAWS ch. 175M, §6(d) (2018). In response to the COVID-19 pandemic, Congress passed the FFCRA and the CARES Act, which provide tax credits to independent contractors as well as mandate and reimburse paid sick leave and emergency family leave for child care for certain employees. CARES Act, Pub. L. No. 116-136, 134 Stat. 281 (2020); FFCRA, Pub. L. No. 116-127, 134 Stat. 178 (2020). Additionally, Senators Murray and Gillibrand and Congresswoman DeLauro introduced the P.A.I.D. Leave Act, a comprehensive emergency paid sick days and paid family and medical leave bill, including coverage for independent contractors. *See generally* P.A.I.D. Leave Act, S. 3513/H.R. 6442, 116th Cong. (2020).

322. We do not consider the system for providing health coverage given the scale and distinctive nature of that benefit and the larger question of whether it should be provided through employment or through non-employment related coverage.

323. *See, e.g.*, Teresa Ghilarducci & Kevin Terry, *Scale Economies in Union Pension Plan Administration 1981–1993*, 38 INDUS. RELS. 11, 17 (2002); William Even & David MacPherson, *What Do Unions Do to Pension Performance?*, 52 ECON. INQUIRY 1173, 1189 (2014).

324. *See* sources cited *supra* note 323.

325. *Cf.* Harris & Krueger, *supra* note 72 (offering portability in exchange for minimum wage and overtime protections for workers falling into that new classification); Khosrowshahi, *supra* note 168.

to more portable benefits while also being afforded the protections and rights society should continue to provide working people.

CONCLUSION

The fissured workplace has fundamentally changed the model of business structures and radically altered the nature of work. But workplace policies have not adequately factored these profound changes into their assessment of workers' rights and protections and businesses' corresponding responsibilities. Instead, public policies have followed the status quo, failing to address critical elements of the problems they seek to address.

The impact of the COVID-19 pandemic on millions of front-line workers, particularly workers of color, leaves policymakers no choice but to deal with the long term, widespread repercussions of the fissured workplace. These impacts, however, are neither unstoppable nor inevitable; public policy can respond to these changes and implement reforms that uplift workers and protect them from exploitation.

New technologies, the changing expectations of employees, and the dynamic quality of business will always affect the nature of work. This has been true throughout economic history. But this does not mean we should forget or dismiss the underlying reason for workplace laws that go back to the beginning of the twentieth century: the recognition that workers need protections because of the drastic power differential between employers and workers. This imbalance persists in the fissured workplace of today, and likely will continue into the foreseeable future. Although we may need to assess whether the ways we provide protections are effective, the underlying commitment of public policies to fairness in the workplace and society must remain.

With these fundamental changes come new opportunities to reimagine how we conceptualize workers' rights. By entitling all workers to essential rights and protection, more expansively defining employment, and creating more portable benefits, we can assure legal protections within the fissured workplace and hold parties benefiting from workers' labor responsible for assuring these rights.