

The Gig Workers Facing the Regulator: the Good, the Bad, and the Future

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Abstract

This Article breaks new ground by providing a conceptual framework to understand the law and economics of the gig economy (in particular, the “gig workers”), its impact on labor productivity and income distribution, and policy interventions that are required by the government and central bankers as technology-aided gig employment spreads across the globe. From a legal and regulatory perspective, the gig economy challenges both domestic and international employment frameworks related to labor law. From an economic perspective, the rise of the gig economy is likely to increase overall productivity. Increases in productivity arise from an increase in labor force participation and getting access to lower-salaried workers from across borders, leading to more specialization and standardization of work. At the same time, full-time employment in a gig type set-up may lead to lower income and economic vulnerability for workers in developed countries. Regulators will soon have to address the challenges associated with some workers getting displaced by technological disruption. There is a need to find ways to absorb these laborers through alternative employment, which may be achieved by governments working closely with businesses and training centers to impart necessary additional skills for the displaced workers. At the same time, for the spread of gig employments, there is a need to invest in ICT-related infrastructure, such as telecommunication and internet connection, particularly in emerging economies.

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I. INTRODUCTION

The gig economy is a broad concept and includes short-term jobs, digitally enabled, and those that are executed with the help of online platforms.¹ Gig work gained popularity during the height of the U.S. Financial Crisis (2008-2009) when there was a dearth of full-time jobs. People faced with uncertain income prospects opted for contract-based employments in digitally-enabled marketplaces where platforms connect the workers with the potential hirers.² All of the terms “sharing economy,” “digital platform economy,” and “online platform economy” are synonymous. The gig ecosystem is comprised of both high-skilled workers, such as consultants, and low-skilled ones, such as delivery drivers or Uber and Lyft drivers.³ The “digital platform economy,” by offering a greater degree of flexibility, can accommodate workers who want to work simultaneously on multiple projects. Musicians, plumbers, writers, photographers, and drivers can use the platform as a way to find positions within their part of the gig economy. “Gig” can be differentiated from other types of informal work. Informal work is characterized by laborers (comprising plumbers, carpenters, painters, day laborers, etc.) wherein a contractor or middleman hires them daily for work done for a third party in sectors such as construction and agriculture. Similarly, traditional job agents, who use notice boards or offices to connect job seekers to companies with open positions, are also not part of a gig economy.⁴ These middlemen take an unfair cut for matching the job seekers with jobs. The gig economy, in contrast, uses platform-based technology. This enables “peer-to-peer” exchanges without the middlemen. Such a type of service is not platform-enabled. Usually, it involves the transfer of wage surplus from the informal workers to the middlemen who facilitate the former to find a job. In short, the gig economy pertains to outsourcing activities.

There are a few other notable characteristics of a platform-enabled gig economy. These are:

On-demand service economy: In a gig economy, the workers use their skills to complete tasks or *gigs* within a pre-specified time.⁵ The platforms connect workers to the hirers, and the owners of assets (such as cars and houses) to the potential customers. For example, musicians, plumbers, writers, photographers, delivery boys, bloggers, car and house owners, etc., are all part

¹ There is no official definition for a short-term contract. There are instances when people are working for more than a year as a contractual worker, and yet they fall under the classification of short-term contract.

² JEREMIAS PRASSL, HUMANS AS A SERVICE: THE PROMISE AND PERILS OF WORK IN THE GIG ECONOMY 58 (2018); Martin Kenney & John Zysman, *The Rise of the Platform Economy*, 32 ISSUES SCI. & TECH. 62 (2016).

³ Diana Farrell & Fiona Greig, *The Online Platform Economy: Has Growth Peaked?*, LABOR: SUPPLY & DEMAND EJOURNAL, 2017, at 1–24.

⁴ Bertin Martens, *An Economic Policy Perspective on Online Platforms* 1–55 (Inst. for Prospective Tech. Stud. Digit. Econ., Working Paper No. 5, 2016), <https://perma.cc/D4RK-BFQS>.

⁵ Koen Frenken & Juliet Schor, *Putting the Sharing Economy Into Perspective*, 23 ENV'T INNOVATION & SOC. TRANSITIONS 3, 4–6 (2017).

of the gig economy.⁶ Independent workers utilize their expertise or assets to finish gigs or tasks within a specified time to earn income.

Scalability: A gig economy is scalable in nature. The platform-enabled gig economy can accommodate a large number of buyers and sellers. The cost of entering the platform-enabled market is minimal. According to Drahokoupil and Fabo, digital platforms have lowered the transaction cost of labor outsourcing and temporary access to goods and services.⁷ It has become easier for any person looking for a job to find one, and the information asymmetry associated with finding a job has been reduced.⁸ For example, in India, before the onset of the digital world, applicants for a job had to wait long hours in lines (sometimes even for the whole day) at national employment exchanges just to take the first step in the job search process. In present times, job seekers search for jobs and apply to them through digital platforms.⁹

Standardized and outcome-oriented: When it comes to delivery of jobs or services, in a gig setup the jobs are standardized. Payments are linked to the outcome and are made once the consumers are happy with the product or the services delivered. Since the job performed is *outcome*-based, the problems associated with moral hazard or asymmetric information do not arise.¹⁰ For example, in any organized sector, people cannot be fired once they have been hired. The laborers cannot be suspended, transferred, or fired without serving a notice period or trade unions agreeing to such a decision. The onus of risk associated with employees—for better or worse—lies with the employers.¹¹ The gig economy is driven by task-based jobs, and the problems associated with moral hazards generally do not arise.

However, one should note that the homogeneity and standardization of the services provided are subjective in nature. From a seller's perspective, the quality of services provided may differ; for example, the house offered for rent or the car offered for a ride may be less spacious and luxurious. From the buyer's perspective, the hirers may not be satisfied with the type of report or analysis that the potential expert has given. Unlike renting a car or a house, writing a report involves services produced and consumed remotely. However, the rating system in a platform-enabled website ensures that there is not too

⁶ Gig work is emerging as a livelihood option for job-seeking students, low- and high-skilled workers, retirees, and women who quit jobs to fulfill family responsibilities.

⁷ Jan Drahokoupil & Brian Fabo, *The Platform Economy and the Disruption of the Employment Relationship* (ETUI Research Paper-Policy Brief, No. 5, 2016).

⁸ See Y. Zhao, *Labor Migration and Earnings Differences: The Case of Rural China*, 47 *ECON. DEV. & CULTURAL CHANGE* 767, 767–82 (1999).

⁹ Nilanjan Banik, *Could Online Gig Work Drive Economic Growth?*, 9 *WORLD ECON. BRIEF* 1, 3 (2019), <https://perma.cc/6FYN-P225>.

¹⁰ *Id.* at 14; see also Christopher Stanton & Catherine Thomas, *Landing the First Job: The Value of Intermediaries in Online Hiring*, 82 *REV. ECON. STUD.* 810 (2016).

¹¹ Although, the owner can hire a manager or micro-manage himself to ensure that the job is performed.

much differentiation in the quality of services provided.¹² Clients' hiring decisions are primarily conditional upon the feedback provided by other clients.¹³

Flexibility in the nature of job and service provided: There are two constituent elements for a platform-enabled gig economy: labor and capital.¹⁴ Uber, Task Rabbit, Swiggy, Zomato, etc., are all part of the *labor market platform*. In this respect, gig workers are provided with the flexibility to work for more than a single contractor.¹⁵ Similarly, the aggregators may provide more than one type of service. For example, Uber, which is generally known as a taxi service aggregator, also has Uber Eats, which is a food delivery and online take-out service. Then there is the *capital market platform*. For example, these days owners of a house or a car can rent out their assets using a digital platform such as Airbnb and Hertz.¹⁶ The transaction on a capital platform—such as renting out cars or properties—takes place on a temporary basis. This is distinct from the online buying and selling of goods on platforms such as Alibaba or Amazon, where the transfer of ownership happens between the buyers and the sellers.¹⁷

Given these aforementioned characteristics and based on the work arrangement that the gig economy offers, it is spreading fast. In the United States, around 34 percent of workers were part of the gig economy in 2017.¹⁸ A more conservative appraisal has been put forward by a Federal Reserve Report, which estimates that 31 percent of the population is involved in work involving digital platforms, and analysis predicts that it will escalate to about half of the workforce by 2020.¹⁹

Worldwide, there is a major demand for short-duration gig employments in sectors such as Information Technology (IT), IT-enabled services, e-commerce and start-up, retail, and the hospitality and fast-moving consumer

¹² Banik, *supra* note 9, at 2.

¹³ See generally Stanton & Thomas, *supra* note 10.

¹⁴ Farrell & Greig, *supra* note 3, at 2.

¹⁵ For instance, many driver partners take rides from both Uber and Ola cab aggregators.

¹⁶ Airbnb is an online hospitality service brokerage firm wherein the members can use the service to arrange or offer lodging, primarily for tourism purposes.

¹⁷ Long-term transactions over the platforms, for example the buying and selling of properties, may not be considered part of the gig economy because they fail the connotation of short-term contracts. Here, ownership of goods changes hands from the sellers to buyers permanently. In the case of gig, transactions are mediated through a capital platform and consumers get temporary access to goods and services.

¹⁸ Nandita Bose, *U.S. Labor Secretary Supports Classifying Gig Workers as Employees*, REUTERS (Apr. 29, 2021, 10:50 AM), <https://www.reuters.com/world/us/exclusive-us-labor-secretary-says-most-gig-workers-should-be-classified-2021-04-29/>.

¹⁹ *Report on the Well-Being of U.S. Households in 2017 – May 2018*, FED. RSRV. (2018), <https://perma.cc/C6MC-DL8B>. A digital platform refers to the software or hardware of a site. For example, Facebook and LinkedIn are examples of digital platforms.

good (FMCG) sector.²⁰ During 2015, “there were about 26,000 open jobs in the United States, with hourly wage rates varying between \$16 to \$22 on average.”²¹ However, the growth of the gig economy also raises difficult questions concerning workplace protection rights and what a “good” job will look like. This calls for crystallizing a legal definition to balance the interests of the entrepreneurs and create safe and fair working standards for gig workers. Presently, the gig economy faces serious challenges in upholding labor rights. To the Authors’ knowledge, this Article is the first to examine the rights of gig workers, learning from the experiences in the United States and the European Union (EU).

Additionally, this Article examines the impact of the gig economy on employment and income distribution. Finally, in light of the above discussion, the Authors comment on the role of governments and other institutions, such as central banks, in sustaining the gig economy. Fundamentally, this Article demonstrates that worker rights in the gig economy will become more central to the fair functioning of the labor market. Part II explores potential problems and disputes related to the rights of gig workers. Part III discusses legal prospects as practiced in two services-driven economies, namely the United States and the European Union. Part IV addresses the impact of the gig economy on employment and productivity. Part V is on the gig economy and income distribution. Part VI contains policy recommendations in light of the above analysis. Finally, Part VII concludes this Article and offers some parting thoughts.

II. MAPPING THE LEGAL ISSUES INVOLVED IN THE GIG ECONOMY

The gig economy poses serious challenges in upholding labor rights.²² Gig workers are not covered under standard employee contracts. Payments for gig workers are based on work they undertake and complete. There is no scope of compassion for the workers should they fail to perform the job due to something such as falling sick or if a broader downturn in the economy causes a decline in business. The commoditization of work means gig workers are vulnerable to fluctuation in demand. The absence of social security makes things worse for the gig workers. Those who consider gigs as their full-time job are not even employees of the company, so they do not receive any other benefits provided

²⁰ Fast moving consumer goods are consumer packaged goods such as beverages, toiletries, over-the-counter drugs, etc., that are sold quickly at a relatively low cost. For more on the types of gig employment, see generally MCKINSEY GLOB. INST., INDEPENDENT WORK: CHOICE, NECESSITY, AND THE GIG ECONOMY (2016).

²¹ WORLD BANK GRP., THE EFFECTS OF TECHNOLOGY ON EMPLOYMENT AND IMPLICATIONS FOR PUBLIC EMPLOYMENT SERVICES 1, 6 (2015), <https://perma.cc/8NRW-7J44> [hereinafter WORLD BANK GRP., EFFECTS OF TECHNOLOGY].

²² Valerio De Stefano, *The Rise of the “Just-in-Time Workforce”: On-Demand Work, Crowdsourcing, and Labor Protection in the “Gig-Economy”*, 37 COMP. LAB. L. & POL’Y J. 471, 472 (2016); Orly Lobel, *The Gig Economy & the Future of Employment and Labor Law*, 51 UNIV. S.F. L. REV. 51, 52 (2017); Adrián Todolí-Signes, *The End of the Subordinate Worker? The On-Demand Economy, the Gig Economy, and the Need for Protection for Crowdworkers*, 33 INT’L J. OF COMPAR. LAB. L. & INDUS. REL. 241, 247 (2017).

to employees, like health insurance, paid time off, family leave protection, etc.²³ It is quite unlikely that the corporations employing gig workers would transfer any benefits.²⁴ Related to this point, several lawsuits have been filed in the United States against Uber for misclassifying drivers as independent contractors, both at the state and federal levels.²⁵ Identifying the legal differences between groups of workers has become strenuous and challenging, especially due to the creation of numerous new business arrangements within the gig economy. Obtaining the right answer is crucial though, as misclassifying workers can create massive legal liabilities for a company.²⁶

The workers also lose out. This is particularly relevant at a time when the coronavirus pandemic is affecting the business outlook across the world. Although countries such as the United States and the United Kingdom are offering fiscal stimulus—the United States has announced a \$2 trillion employment stimulus package²⁷ and the United Kingdom has announced a £350 billion stimulus package for U.K. firms²⁸—nothing had been directed toward gig workers until recently. The United States is among those few countries on a global scale that do not ensure “paid sick leave.”²⁹ This is one of the primary reasons why workers who are afflicted with lethal diseases and life-threatening conditions (for instance, coronavirus, cancer, etc.) are left with limited to no options other than to work, even when they are medically unfit to do so. They have to take extraordinary measures to work within the prescribed framework of their jobs. However, due to the worldwide COVID-19 pandemic, even the United States has offered unemployment insurance to gig economy workers for up to thirty-nine weeks, giving them an extra \$600 a week.³⁰ On the other hand, the U.K. is furnishing a cash grant of 80 percent of

²³ Lobel, *supra* note 22, at 56.

²⁴ Tom Wall, *Gig Economy: If You Don't Work, You Can't Eat*, THE GUARDIAN (Mar. 21, 2020), <https://perma.cc/FFY5-K3SF>.

²⁵ Sam Levin, *Uber Lawsuits Timeline: Company Ordered to Pay Out \$161.9m Since 2009*, THE GUARDIAN (Apr. 16, 2016), <https://perma.cc/5X2F-CR7Y>; Dara Kerr, *Uber Hit With New Lawsuit on Whether Its Drivers Are Employees*, C-NET (Sept. 13, 2019), <https://perma.cc/SF26-C9Q5>; Eli Rosenberg, *N.Y. Ride-Hailing Drivers File Suit Against Uber, Allege They Are Owed Millions in Undercut Wages*, WASH. POST (Nov. 7, 2019), <https://perma.cc/TH57-NVNY>.

²⁶ David J. Oberly, *Proper Classification of Workers in the “Gig” Economy*, FOR THE DEF., Jan. 2017, at 58.

²⁷ Press Release, The White House Briefing Room, Fact Sheet: The American Jobs Plan (Mar. 31, 2021), <https://perma.cc/A2YS-BKU2>.

²⁸ Heather Stewart, *Whatever It Takes: Chancellor Announces £350bn Aid for UK Businesses*, THE GUARDIAN (Mar. 17, 2020, 4:56 PM), <https://perma.cc/2E69-W9MJ>.

²⁹ Patricia Stoddard-Dare et al., *Paid Sick Leave and Psychological Distress: An Analysis of US Workers*, 88 AM. J. ORTHOPSYCHIATRY 1, 1–9 (2018).

³⁰ Alicia Adamczyk, *The Extra \$600 in Weekly Unemployment Benefits Runs Out at the End of July—Here's What You Need to Know*, CNBC (May 28, 2020, 12:47 PM), <https://perma.cc/K3VD-FU4K>; see also Heidi Shierholz, *With Millions of Workers Receiving Unemployment Benefits and No End in Sight for the COVID-19 Pandemic, Congress Must Act*, WORKING ECON. BLOG ECON. POL'Y INST. (Oct. 1, 2020, 9:56 AM), <https://perma.cc/NV4J-QWV4>; David Sherfinski, *Don't Let Us*

the average monthly profit to self-employed people, amounting to £2,500 per month over the next quarter.³¹

Notwithstanding these direct cash transfers, there seems to be a lack of clarity regarding the rights of gig workers. This new gig economy is not only a hotbed of innovation, but is also becoming a hotbed of litigation, particularly over the issue of worker classification.³² In Section II.A, this Article will further discuss the problems facing workers, especially regarding the misclassification of their status as “employees” as “self-employed.” In Section II.B, this Article will look at the problems faced by states concerning taxation and international trade.

A. What Is a Gig Worker? Moving Toward a New Employment Classification for Workers in the Gig Economy

The major potential problem is that gig workers are not in tune with the legal definition of employees. Every state has its own definition, but it mainly depends upon the degree of control that the company has over the worker.³³ It is difficult for an individual worker to afford the cost of legal proceedings. This makes gig workers more vulnerable to settlement, even when they have a good legal claim. The only solution to this is class action lawsuits, but companies have started putting arbitration clauses in their contracts to prevent the risk of this type of litigation.³⁴ Historical narratives imply that the classification of workers tends to reflect a worker’s actual status of employment, but this cannot allow for neglecting the enjoyment of labor rights and the social protection accorded to them. The Court of Appeals of New York (New York’s court of last resort) has taken a divergent view,³⁵ however, concluding that couriers for Postmates, an online delivery company, could not be deemed as equivalent to employees and are therefore not eligible to receive any insurance benefits.³⁶

The Court of Appeals of New York stated that the purported evidence of control by the company, such as the setting up of pay rates, handling customer

Die: *U.S. Gig Workers Brace for Unemployment Benefits Cliff*, REUTERS (Sept. 1, 2021, 12:00 AM), <https://perma.cc/STU8-DVXX>; Jeffrey Kucik & Don Leonard, *Pandemic Hardship Is About to Get a Lot Worse for Millions of Out-Of-Work Americans*, CONVERSATION (Sept. 7, 2021, 8:47 AM), <https://perma.cc/WF6H-V2BP>.

³¹ Hanna Ziady, *Help Is Coming for Gig Economy Workers and Small Businesses Hit by the Coronavirus Crisis*, CNN (last updated Mar. 26, 2020, 2:15 PM), <https://perma.cc/TX4R-6SDG>.

³² Alysia J. Ward, *The More Things Change, the More They Remain the Same: Worker Classification in the Gig Economy*, BRADLEY (Oct. 22, 2019), <https://perma.cc/9YBR-WG5S>.

³³ Todoli-Signes, *supra* note 22, at 255.

³⁴ Jill I. Gross, *The Uberization of Arbitration Clauses*, 9 Y.B. ARB. & MEDIATION 43, 43 (2017).

³⁵ For greater clarity, the Court of Appeals of New York has overturned *Matter of Vega*, meaning that the appellate level court’s decision does not represent the state of the law in New York. As of 2020, Postmates drivers are employees, not independent contractors, in New York. *Matter of Vega* (Postmates, Inc.—Comm’r Labor), 35 N.Y.3d 131, 140 (N.Y. 2020).

³⁶ Douglas Lipsky, *Postmates Delivery Workers Are Not Employees – Says New York Appellate Court*, L. FIRM NEWSWIRE (June 26, 2018), <https://perma.cc/AYS5-N2PK>.

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complaints, and tracking the deliveries, was tantamount to “incidental control” and did not establish substantial evidence of an employer-employee relationship.³⁷ The principal idea behind this is that one should scrutinize the facts and not the parties’ considerations.

On the same footing, GrubHub food delivery workers were categorized as independent contractors by a U.S. Magistrate Judge in San Francisco.³⁸ The U.K. court stated that Deliveroo riders were independent contractors because they could take up alternate work, which suggested the impersonal character of the engagement.³⁹ In its landmark judgment in the misclassification lawsuit against Dynamex, the Supreme Court of California proclaimed, by consensus, a new test for deciding if a worker is an employee or an independent contractor.⁴⁰ According to the test (called the ABC test), a worker would be presumed to be an employee unless the employer can establish that it has complied with these three distinct requirements: (a) the work is free from the direction or control of the hirer in relation to the performance of its work; (b) the worker does work which is outside the usual course of the hiring entity’s business; and (c) the worker is customarily involved in an independently set up trade, business, or occupation of a similar nature as the work performed by the hirer.⁴¹

B. Which Benefits More from the Gig Economy: Labor or Capital?

The second major problem in the gig economy relates to the initial outlay of capital.⁴² Those who are not always available for work have less of a chance of getting a gig because of the platform algorithm, for example, algorithm

³⁷ Matter of Vega, 162 A.D.3d 1337, 1339 (N.Y. App. Div. 2018) (holding that “[w]hile proof was submitted with respect to Postmates’ incidental control over the couriers, including, among other things, the fact that Postmates determines the fee to be charged, determines the rate to be paid, tracks the subject deliveries in real time and handles customer complaints, in our view, such proof does not constitute substantial evidence of an employer-employee relationship to the extent that it fails to provide sufficient indicia of Postmates’ control over the means by which these couriers perform their work.”).

³⁸ Daniel Wiessner, *U.S. Judge Says Grubhub Driver Was Independent Contractor*, REUTERS (Feb. 8, 2018, 6:31 PM), <https://perma.cc/JH22-B75Q>; Lawson v. Grubhub, Inc., 13 F.4th 908, 944 (9th Cir. 2021).

³⁹ Anna Tims, *Gig Economy Ruling Has Deliveroo Riders Without Rights and Buying Their Own Kit*, THE GUARDIAN (Nov. 19, 2017, 2:00 PM), <https://perma.cc/R4CA-EFDP>.

⁴⁰ Timothy Kim, *The Dynamex Decision: The California Supreme Court Restricts Use of Independent Contractors*, SHEPPARDMULLIN LABOR & EMP. L. BLOG (May 1, 2018), <https://perma.cc/5NRJ-4F8D>.

⁴¹ Tony Marks, *The California Supreme Court Deals a Blow to Independent Contractors*, FORBES (May 29, 2018, 8:16 PM), <https://perma.cc/2BR4-4WRY>; Dynamex Operations W., Inc. v. Superior Ct., 416 P.3d 1, 7–9 (Cal. 2018).

⁴² Ephrat Livni, *The Gig Economy Is Quietly Undermining a Century of Worker Protections*, QUARTZ (last updated Feb. 27, 2019), <https://perma.cc/MVH9-4R97>; see Julien Chaisse, *International Investment Law and Taxation: From Coexistence to Cooperation*, INT’L CTR. FOR TRADE & SUSTAINABLE DEV. (ICTSD) & WORLD ECON. F. (2016).

trading.⁴³ Peer-to-Peer platforms are used by big businesses to complete their employments through a cheaper system rather than hiring directly.⁴⁴ In this system, companies are the only ones who are profiting as they incur substantially less liability by classifying workers as independent contractors. To avoid greater inequality, there should be an implementation of human rights law addressing economic polarization.⁴⁵

Since many gig workers have multiple sources of income, many of them do not know what their tax obligations are or how much they owe the tax authorities in penalties. In the United Kingdom, Her Majesty's Revenue and Customs indicated that £4.4 billion of potential tax revenue was left uncollected from cash-in-hand jobs in 2018.⁴⁶ The Estonian tax authority employs an excellent method of tax collection to resolve this issue. It has developed an electronic tax system with Uber that allows the driver to declare their income at the touch of a button.⁴⁷ This system increased government tax revenue six-fold.⁴⁸

The gig economy is an ongoing process globally.⁴⁹ Recent importing patterns ordinarily presume that only the large firms have the scale to achieve the adequate variable cost savings from importing to counteract the fixed costs involved in doing so.⁵⁰ Talent management is critical for many companies as a means of furnishing more flexibility. Workers are allowed to link and associate anytime, anywhere. One of the key traits of the so-called fourth industrial revolution is that it has failed to generate enormous job opportunities.⁵¹ The gig economy has been critical to the rise of a global marketplace for online labor.⁵² Whether negative or positive, this is the "neo-globalization strain" in its crudest structure. Trade Unions (namely Sweden's Unionen or Germany's

⁴³ See James Duggan et al., *Algorithmic Management and App-Work in the Gig Economy: A Research Agenda for Employment Relations and HRM*, 30 HUM. RES. MGMT. J. 114 (2020).

⁴⁴ Livni, *supra* note 42.

⁴⁵ Chanu Peiris, *How Human Rights Law Is Evolving to Address Inequality*, CHATHAM HOUSE (Dec. 10, 2018), <https://perma.cc/3SR9-RZU7>.

⁴⁶ *Tax and the Gig Economy*, MISHCON DE REYA (May 16, 2018), <https://perma.cc/J7NM-7FE8>.

⁴⁷ David Mardiste, *Embracing Uber, Estonia Shows Tax Needn't Be an Issue*, REUTERS (last updated June 9, 2016, 10:00 AM), <https://perma.cc/6PVD-ZH8B>; Ulrika Lomas, *Estonia Consults With Uber on Tax Framework*, GLOB. TAX NEWS (Oct. 9, 2015), <https://perma.cc/ZBR3-Q58Q>.

⁴⁸ Aili Vahtla, *Tax Authority: Uber, Taxify Income Declarations Up Sixfold*, ERR (May 29, 2017, 4:47 AM), <https://perma.cc/7NTU-MKRH>; See also Julien Chaisse *Making Tax Dispute Resolution Mechanisms More Effective—The Base Erosion and Profit Shifting Project and Beyond*, 10 CONTEMP. ASIA ARB. J. 1 (2017); Julien Chaisse, *Investor-State Arbitration in International Tax Dispute Resolution—A Cut Above Dedicated Tax Dispute Resolution?*, 41 VA. TAX REV. 149 (2016).

⁴⁹ Greg Sandler, *The Gig Economy Is Going Global*, AM. EXPRESS (May 29, 2019), <https://perma.cc/Q2SN-BJEQ>.

⁵⁰ Christopher T. Stanton & Catherine Thomas, *Missing Trade in Tasks: Employer Outsourcing in the Gig Economy* (Harv. Bus. Sch. Working Paper No. 18-096, 2019), <https://perma.cc/LK2M-6VRN>.

⁵¹ Sandler, *supra* note 49.

⁵² Sarah O'Connor, *How to Manage the Gig Economy's Growing Global Jobs Market*, FIN. TIMES (2018), <https://perma.cc/N8FP-4GET>.

IG Metall) are aware of the possibilities and the dangers of this neo-globalization strain.⁵³ The Unions constructed a site for the users to rate various platforms, the working conditions, and have started striving for data transparency, local minimum wages, and improved dispute resolution procedures.⁵⁴

Researchers at the University of Oxford and the University of Pretoria, in a three-year investigation, communicated with scores of multiple online gig workers from South Africa, Kenya, Nigeria, the Philippines, Malaysia, and Vietnam.⁵⁵ The workers from the aforementioned nations stated their inclination toward and admiration of the freedom and flexibility the work provides.⁵⁶ Some of the workers referred to it as being “lucrative.”⁵⁷ However, they reported their work as uncertain, lacking stability, isolating, and taxing.⁵⁸ At the same time, workers in richer nations found themselves undermined by their competitors in poorer places.⁵⁹

In the gig economy, companies and individuals disintegrate a job into a sequence of responsibilities and assignments, anything from data entry or translation to copyrighting and coding. Subsequently, workers can place their “bids” to do the offered work. This is known as the “human cloud.” The sense of competitiveness is more inwards in the human cloud.⁶⁰

In order to create an improved work future for all, three key opportunities must be leveraged. First, corporate responsibility must foster respect for human rights (companies should mandatorily take up the task of respecting human rights, and labor rights to be specific, in line with the U.N. Guiding Principles). At a minimum, this would imply that companies should rightly guarantee to workers the full enjoyment of social safeguards and labor rights

⁵³ The European Trade Union Confederation (ETUC) reported that “Unionen in Sweden and IG Metall in Germany have agreed to work together to find ways organise the growing number of people working in isolation through online platforms. It is estimated that some 700,000 people in Sweden are earning their living through ‘crowd-working’: selling their labour to employers via platform-based companies, a phenomenon also known as the sharing or ‘gig’ economy. Many of these online jobs are precarious and badly paid. ILO research indicates that workers suffer from lack of autonomy, constant pressure and no way of claiming their rights.” *German and Swedish Unions Unite to Defend Crowdworkers*, EUR. TRADE UNION CONFEDERATION, <https://perma.cc/EX5H-HAEU> (last visited Feb. 14, 2022). See also Chris Burns, *Can a New Nordic Online Portal Help Protect Digital Economy Workers?*, EQUAL TIMES (July 3, 2017), <https://perma.cc/G3AJ-7Y4S>.

⁵⁴ Ulrich Rippert, *Germany’s IG Metall Union Offers to Collaborate in Restructuring the Steel and Electronics Industries*, WORLD SOCIALIST WEB SITE (Feb. 6, 2020), <https://perma.cc/ZAD5-8XBC>.

⁵⁵ MARK GRAHAM ET AL., THE RISKS AND REWARDS OF ONLINE GIG WORK AT THE GLOBAL MARGINS (2017).

⁵⁶ *Id.* at 6.

⁵⁷ *Id.*

⁵⁸ *Id.* at 6–9.

⁵⁹ *Id.* at 7–8.

⁶⁰ Hina Belitz, *Gig Economy Worker Rights Demand a Global Approach*, INSIGHT (Aug. 6, 2019), <https://perma.cc/V6P7-66NB>.

and also abstain from defying policies and legislations that guarantee such safeguards. This may include implementing human rights policies, due diligence processes, remediation, and abrogating forced arbitration clauses in workers' contracts.

Second, globally, lawmakers should make sure that their legislative proposals adopt a presumption that is inclined towards employee status and imparts gig workers with similar rights and protections that are accorded to other employees. The protections comprise incentives for minimum wages, overtime pay, unemployment insurance, workers' compensation, family and medical leave, and most importantly the right of collective bargaining and business incentives.

Third, governments should switch the present paradigm from one that incentivizes businesses to categorize workers as "independent contractors" or "non-employees" to one that incentivizes businesses to categorize workers as "employees," thereby giving workers far greater bargaining power in their workplaces.⁶¹

III. THE LEGAL PROSPECTS: HOW EMPLOYMENT PROTECTION LEGISLATION MAY BE CIRCUMVENTED BY THE USE OF LEGAL FICTIONS

There is a fair chance that when the reader considers the gig economy, they will think of the likes of Lyft and Uber or Mechanical Turk and Deliveroo.⁶² The world of work is going through an enormous transitional phase, a perturbation determined by economic, political, and technological forces that are beyond the government's reach. In the battle for the future of labor rights, the gig economy stands on the frontline. As a matter of fact, the gig economy examines the workers' ability to maintain their crucial security and profits in employment, or watches them sacrificed on the altar of ensuring higher revenues for shareholders. However, new technologies have witnessed start-ups like Uber and Deliveroo balloon into global corporations with only a handful of employees, while the vast majority of their labor force have been misled and are wrongly categorized as "self-employed." As so-called "self-employed" workers, they are aware of the quality of the benefits offered to other employees that have enabled major companies to prosper in countries that value job security. Considering the inequality in power and wealth, gig workers are searching for the safeguards of the court and the rule of law.⁶³

⁶¹ *Corporate Legal Accountability Annual Briefing 2019 – The Future of Work: Litigating Labour Relationships in the Gig Economy*, BUS. & HUM. RTS. RES. CTR. (Mar. 25, 2019), <https://perma.cc/67Q6-SWYF> [hereinafter *Corporate Legal Accountability Annual Briefing 2019*].

⁶² Adi Gaskell, *Is the Gig Economy Set to Disrupt the Legal Profession?*, FORBES (Oct. 14, 2019, 6:03 AM), <https://www.forbes.com/sites/adigaskell/2019/10/14/is-the-gig-economy-set-to-disrupt-the-legal-profession/#4635ad0e2ad6>.

⁶³ *Corporate Legal Accountability Annual Briefing 2019*, *supra* note 61.

A. For Any Employee, There Can Be More Than One Employer!

Under the doctrine of joint employment, an employee who is officially employed by one employer (namely the primary employer) might also be affirmatively employed by some other employer (say the secondary employer), and the secondary employer retains sufficient power over the terms and conditions of the employment.⁶⁴

The primary and secondary employers are two independent entities. In the context of workers' compensation, certain employers may benefit from the status of a joint employer. In most states, workers' compensation is the exclusive remedy for employees enduring work-related injuries that result from negligence on the employer's part.⁶⁵ Many state workers' compensation statutes recognize that an employee may have multiple employers for workers' compensation purposes. In these states, in a tort action for workplace injuries, multiple employers, including joint employers, may be entitled to an exclusivity defense.⁶⁶ If the employee recovers workers' compensation benefits from one joint employer, he may be barred from asking for tort damages from another joint employer.

1. Joint Employment Liability in the U.S.

Miriam Cherry and Orly Lobel have widely discussed the legal issues involved in Amazon's "Mechanical Turk," which is a platform run by Amazon to distribute small tasks to workers throughout the world.⁶⁷ Companies use platforms to put separation between the entity needing service and the worker

⁶⁴ See, e.g., Linda Auerbach Allderice et al., *Another Shift on Joint Employment and Independent Contractors*, HOLLAND & KNIGHT BLOG (Jan. 12, 2021), <https://perma.cc/KQM6-Z943>; see also Marc Linder, *The Joint Employment Doctrine: Clarifying Joint Legislative-Judicial Confusion*, 10 HAMLIN J. PUB. L. & POL'Y 321 (1989); Marc Peralta, *Identifying Joint Employment Is as Easy as ABC*, 45 SETON HALL LEGIS. J. 261 (2021).

⁶⁵ CONGR. RSCH. SERV., WORKERS' COMPENSATION: OVERVIEW AND ISSUES (2020), <https://perma.cc/6MX2-33TY>; see also Tess Hardy, *Big Brands, Big Responsibilities: An Examination of Franchisor Accountability for Employment Contraventions in the United States, Canada, and Australia*, 40 COMP. LAB. L. & POL'Y J. 285 (2019).

⁶⁶ The "[w]orkers' compensation is often referred to as a grand bargain between workers and employers. Under workers' compensation, workers receive defined benefits for covered injuries, illnesses, and deaths without regard to fault or liability. In exchange for this coverage, employees are prohibited from suing their employers for workplace injuries, illnesses, and deaths. Workers' compensation is the exclusive remedy available to employees. Employers are protected from lawsuits but must pay defined benefits in all cases, regardless of fault, liability, or defense. Employers are able to purchase insurance to mitigate their financial risks and increase cost predictability or, in a majority of systems, can self-insure." CONGR. RSCH. SERV., *supra* note 65, at 2.

⁶⁷ See, e.g., Alexandra M. Mellis & Warren K. Bickel, *Mechanical Turk Data Collection in Addiction Research: Utility, Concerns and Best Practices*, 115 ADDICTION 1960, 1960–68 (2020); Michael Buhrmester et al., *Amazon's Mechanical Turk: A New Source of Inexpensive, Yet High-Quality Data?*, in *METHODOLOGICAL ISSUES AND STRATEGIES IN CLINICAL RESEARCH* 133, 133–39 (Am. Psych. Ass'n ed., 4th ed. 2016); Gabriele Paolacci & Jesse Chandler, *Inside the Turk: Understanding Mechanical Turk as a Participant Pool*, 23 CURRENT DIRECTIONS PSYCH. SCI. 184, 184–88 (2014).

providing the service. This shields the employer from liability.⁶⁸ Due to increased tariffs in the United States under the Trump administration, producing goods outside the United States became more expensive and employers looked to reduce cost by hiring cheaper employees. As the number of workers looking for non-standard employment increases, the number of potential issues arising under existing laws will also increase.⁶⁹

The Obama administration introduced the Joint Employer Doctrine.⁷⁰ This doctrine acknowledges that, for any employee, “there can be more than one employer.”⁷¹ If a U.S. employer uses technology to direct an employee’s work in another country, the potential exists for joint employment liability. This may lead to private parties using the regulation as a way of assessing liability throughout the labor chain.⁷² Thus, the application of the Joint Employment Doctrine could continue to be a risk for potential employers.⁷³

Recently, this doctrine has come to an end under the Trump Administration; the new rule took effect on March 16, 2020.⁷⁴ It limits the circumstances under which employers, such as a franchiser and its franchisees, can be considered joint employers for a group of workers under federal wage-and-hour law, thereby making them responsible for paying minimum wages and overtime.⁷⁵ However, in the United States, the Department of Labor (DOL) announced a final rule (“Final Rule”) to rescind an earlier rule (“March 2020 Rule”) setting out a test for determining whether a person or entity is a “joint employer” under the Fair Labor Standards Act (FLSA).⁷⁶ By rescinding the

⁶⁸ Kotaro Hara et al., *A Data-Driven Analysis of Workers’ Earnings on Amazon Mechanical Turk*, PROC. OF THE 2018 CHI CONF. ON HUM. FACTORS IN COMPUTING SYS., Apr. 2018, at 1–14.

⁶⁹ Ruben J. Garcia, *The Legal Landscape of the Global Gig Economy*, 22 LERA FOR LIBRS. 26 (2018).

⁷⁰ Hiba Hafiz et al., *Labor Law, Antitrust Law, and Economics Professors’ Comment on the National Labor Relations Board’s Proposed Joint-Employer Rule*, BOS. COLL. L. SCH. FAC. PAPERS, Jan. 2019; Ryan Eickmeier et al., *Advocating to Protect the Franchise Business Model – Stories From the Trenches on the Joint Employer Issue*, 16 INT’L J. FRANCHISING L. 3 (2018); Carl H. Petkoff, *Joint Employment Under the FLSA: The Fourth Circuit’s Decision to Be Different*, 70 S.C.L. REV. 1125 (2019).

⁷¹ David B. Walston, *The “Joint Employer” Standard in Employment Law: The Roll-Back Begins*, CHRISTIAN SMALL (Dec. 22, 2017), <https://perma.cc/6C4V-QJ83>.

⁷² U.S. CHAMBER COM., OPPORTUNITY AT RISK: A NEW JOINT-EMPLOYER STANDARD AND THE THREAT TO SMALL BUSINESS (2015).

⁷³ Joel J. Greenwald, *Joint Employer Liability—Are You At Risk?*, FORBES (Apr. 13, 2015, 7:00 AM), <https://perma.cc/5FMA-35BP>.

⁷⁴ Rescission of Joint Employer Status Under the Fair Labor Standards Act Rule, 86 Fed. Reg. 40,939, 40,954 (July 30, 2020) (to be codified at 29 C.F.R. 791), <https://perma.cc/9AJP-XNMK> [hereinafter Rescission of Joint Employer Status].

⁷⁵ Ben Penn, *Trump Cements Rule to Limit Companies’ Joint-Employer Risk (2)*, BLOOMBERG L. (last updated Jan. 12, 2020, 3:29 PM), <https://perma.cc/4NYV-ERYQ>.

⁷⁶ See US Department of Labor Announces Final Rule to Rescind March 2020 Joint Employer Rule, *Ensure More Workers Minimum Wage, Overtime Protections*, DEP’T OF LABOR (July 29, 2021), <https://perma.cc/U849-6M2B> [hereinafter US Department of Labor Announces Final Rule].

March 2020 Rule, the DOL intends to ensure that “more workers receive minimum wage and overtime protections” under the FLSA.⁷⁷

One study, “A Data-Driven Analysis of Workers’ Earnings on Amazon Mechanical Turk,” led by Singaporean management professor Kotaro Hara, found a median hourly wage of less than \$2 per hour, with only 4 percent earning more than \$7.25 per hour, which is the minimum rate as stated by the U.S. Wage and Hour Division.⁷⁸ Without monitoring employees’ hours, it will be tough to assess whether the work rate indeed equals the minimum wage.⁷⁹

2. Joint Employment Liability in the EU

Surprisingly, the joint employer doctrine is not recognized explicitly in any of the judgments of the European Court of Human Rights (ECHR). Nevertheless, two cases show the inclination of the ECHR towards acquiescing to the concept of joint employers. These cases are *Fernandez Martinez v. Spain* and *National Union of Rail, Maritime and Transport Workers v. the United Kingdom*.⁸⁰

A number of EU member states have implemented employment subsidies to produce jobs, although certain scaling down is happening as conditions of the labor market improve. Some member states now provide targeted subsidies to stimulate start-ups and general entrepreneurship. In Greece, subsidies are allowed for young “self-employed” individuals or youth-run enterprises, up to the age of 35 years for first-time employment.⁸¹ Additionally, Slovakia enacted legislation that extends public assistance in the context of social enterprises and the social economy.⁸² From 2018 on in Finland, unemployment benefits can be obtained in the form of a grant for the start-up of a new business while

⁷⁷ Rescission of Joint Employer Status, *supra* note 74.

⁷⁸ Alana Semuels, *The Internet Is Enabling a New Kind of Poorly Paid Hell*, THE ATLANTIC (Jan. 23, 2018), <https://perma.cc/Q2HJ-VXM4>.

⁷⁹ The Thirteenth Amendment to the U.S. Constitution prohibits slavery or involuntary servitude in the United States or any place subject to its jurisdiction. U.S. CONST. amend. XIII; H.R.J. Res., 38th Cong. (Jan. 31, 1865) (proposing the 13th Amendment to the Constitution). The problem is with the extraterritoriality of this law. One of the solutions is Alien Tort Statute (ATS) litigation in the United States under which, if a U.S. person commits a tortious act in violation of fundamental international law, they can be held liable. Alien Tort Statute, 28 U.S.C. § 1350. But, as stated in *Jesner v. Arab Bank, PLC*, the “ATS is ‘strictly jurisdictional’ and does not by its own terms provide or delineate the definition of a cause of action for international-law violations” that may limit the kind of claims that can be brought against corporations, but there are certainly consequences that most Americans would like to avoid such as being embroiled in an international human rights controversy. 138 S. Ct. 1386, 1389 (2018). In the end, though, litigation is unlikely, and that is why the incentives for cross-border outsourcing have increased. Garcia, *supra* note 69.

⁸⁰ OXFORD PRO BONO PUBLICO, JOINT EMPLOYERS AND AGENCY WORKERS: A COMPARATIVE REPORT PREPARED FOR THE INDEPENDENT WORKERS’ UNION OF GREAT BRITAIN (2017), <https://perma.cc/P69G-ESDK>.

⁸¹ Nicola Duell, *Employment and Entrepreneurship Under the Youth Guarantee—Experience from the Ground*, EUR. COMM’N (2018), <https://perma.cc/MF7H-Z8WN>.

⁸² *Id.*

being engaged as a part-time entrepreneur.⁸³ By reducing the tax wedge, some member states have curtailed labor costs, frequently targeting the lowest wages.⁸⁴ For instance, Lithuania instituted a vital reform, wherein the Personal Income Tax (PIT) law was amended, establishing a progressive tax instead of the prior flat rate, and increasing the amount of income exempt from tax.⁸⁵ Portugal established PIT reforms to mitigate the burdensome tax on low-to middle-income earners, comprising an augmentation in tax brackets.⁸⁶ Some member states have also interposed on the tax wedge by cutting contributions to social security. In 2019, France changed its tax credit for employment and competitiveness by implementing a reduction of social security contributions on wages up to 2.5 times the minimum wage level.⁸⁷ Since 2019, German people with low income have benefitted from cutbacks in their social security contributions.⁸⁸ Individuals with an income ranging from €450 per month to €1,300 (earlier €850) have benefitted from a protracted “transitional area” with diminishing contributions to social security.⁸⁹ Declined contributions to pensions will not result in decreased pension entitlements.⁹⁰ Up to 3.5 million employees are anticipated to benefit from the reform.⁹¹ The structural framework for setting up the wages has been the center point of discussion for introducing major reforms over the past few years. As the labor market situation ameliorates, numerous nations have raised minimum wage levels. At the same time, European countries are taking steps to establish a framework for instituting more predictable minimum wages. Except in countries like Germany, Luxembourg, Belgium, and Greece (which decreased minimum

⁸³ *Id.*

⁸⁴ In the EU, the “tax wedge” is defined as the sum of personal income taxes plus the employee and employer social security contributions net of family allowances, and it is expressed as a percentage of total labor costs (the sum of the gross wage and social security contributions paid by the employer). See EUR. COMM’N, TAX WEDGE ON LABOUR: SHIFTING TAX BURDEN FROM LABOUR TO OTHER FORMS OF TAXATION (2020), <https://perma.cc/PGZ7-MJF6>.

⁸⁵ Birutė Petrauskaitė, *Lithuania – Individual Tax Reform Sees Burden Shifted to Employees*, KPMG (July 18, 2018), <https://perma.cc/PP58-UDVN>.

⁸⁶ UNIVERSITA BOCCONI – ECONPUBBLICA – CTR. FOR RSCH. ON THE PUB. SECTOR, THE ROLE AND IMPACT OF TAXATION POLICIES (2011).

⁸⁷ Duell, *supra* note 81.

⁸⁸ Org. for Econ. Coop. & Dev. [OECD], *Taxing Wages: Special Feature: How Tax Systems Influence Choice of Employment Form* (Apr. 30, 2020) <https://perma.cc/F2PE-YN2D> (information under Country Details, 2019: Germany).

⁸⁹ ELLEN EHMKE & FABIAN LINDNER, LABOUR MARKET MEASURES IN GERMANY 2008–13: THE CRISIS AND BEYOND 13–17 (2015), <https://perma.cc/3AHT-AAVB>; see also Patricia Gallego & Granados Rebecca Olthaus, EUROMOD COUNTRY REPORT, GERMANY 2017–2020 (2020), <https://perma.cc/J7M2-RN25>.

⁹⁰ *International Update – Recent Developments in Foreign Public and Private Pensions*, U.S. SOC. SEC. ADMIN. (Jan. 2019), <https://perma.cc/CQ87-ARWT>.

⁹¹ *Midijob: Increasing the Income-Related Sliding Pay-Scale to 1,300 Euros From 2019*, WUNDER TAX (Jan. 6, 2020), <https://perma.cc/XV9P-4WYN>.

wages), in all other nations where changes occurred between 2017 and 2018, the statutory minimum wage levels improved.⁹²

As can be gleaned from the above, U.S. legislation is more strict than the EU's because, unlike the EU, there is a definite law regulating the topic in the United States.⁹³ In the United States, compensation is the only remedy for worker injuries.⁹⁴ Gig workers in the United States can now enjoy minimum pay from one employer, and they are no longer required to engage in multiple gigs to achieve this minimum pay.⁹⁵ However, following the March 16, 2020 change to the joint employer doctrine in the United States, the doctrine now covers workers' rights, but this is limited to minimum wage. Overtime remote workers of U.S. companies might be working below minimum wage and without overtime, which is difficult to track, as shown in Professor Hara's study.⁹⁶ On the other hand, in the EU there is no explicit joint employer concept, even though recent case law shows a tendency to recognize it. Many member states used employment subsidies to create jobs. Different types of reforms, as explained above, are helping to improve the rights of the employees in the EU. In the near future, the EU might adopt a joint employment doctrine or courts might increase their recognition of it.

B. The "Choice of Law" Provision

"Choice of law" provisions are being added to contracts where parties attempt to affix the location for resolving disputes. The reason parties are adding this clause is that, without it, there is a chance that a tribunal of a particular jurisdiction will find the terms of the contract contrary to public policy and not give effect to the term.⁹⁷

1. "Choice of Law" Provision in the U.S.

A choice of law provision places greater limits on enforcing arbitration at the international stage than currently exists in U.S. courts.⁹⁸ Three cases—one before the UK High Court, *R v. Deliveroo*,⁹⁹ one before the UK Court of Appeal,

⁹² OECD, *supra* note 88 (information under Country Details, 2019: Germany).

⁹³ See *US Department of Labor Announces Final Rule*, *supra* note 76.

⁹⁴ In the U.S., the "[w]orkers' compensation has been called a grand bargain between employers and workers that developed at the beginning of the 20th century in response to dissatisfaction with the tort system as a method of compensating workers for occupational injuries, illnesses, and deaths. Under this grand bargain, workers receive guaranteed, no-fault benefits for injuries, illnesses, and deaths, but forfeit their rights to sue their employers. Employers receive protection from lawsuits but must provide benefits regardless of fault." CONGR. RSCH. SERV., *supra* note 65.

⁹⁵ See generally Hardy, *supra* note 65.

⁹⁶ Hara Hiromi, *The Effects of Minimum Wages on Training*, RSCH. INST. OF ECON, TRADE & INDUS., June 2015, 15-E-075.

⁹⁷ Richard J. Bauerfeld, *Effectiveness of Choice-of-Law Clauses in Contract Conflicts of Law: Party Autonomy or Objective Determination?*, 82 COLUM. L. REV. 1659 *passim* (1982).

⁹⁸ Garcia, *supra* note 69, at 29.

⁹⁹ *R v. Deliveroo* [2018] EWHC (Admin) 3342 (Eng.).

Uber v. Aslam,¹⁰⁰ and one before the Third Department of the New York Supreme Court (an appeals court, but not one of last resort), *Matter of Lowry*,¹⁰¹—have concerned the categorization of drivers as self-employed contractors. It is well-established law in both jurisdictions that the courts can look beyond the wording of a contract if it is determined that the contract is designed to obscure the true nature of the relationship.¹⁰² Not doing so allows the engaging party to “avoid financial responsibilities associated with a contract of employment.”¹⁰³ The New York court and the majority of the judges in the U.K. Court of Appeal were of the view that the level of control exercised by Uber was sufficient to overrule the contractual provisions excluding employment status.¹⁰⁴

2. “Choice of Law” Provision in the EU

Similar to contracts in the United States, some EU employment contracts now also incorporate a choice of law clause to reduce transaction costs.¹⁰⁵ The clause creates a degree of certainty, especially when there is some sort of international element in a transaction. Article 3 of the Rome I Regulation states that the parties to a contract should stipulate the preferred law to be applied for any contractual disputes in the contract itself.¹⁰⁶ Article 3 provides extensive freedom of choice regarding the law to be applied while also retaining the possibility of opt out for states that are not members of the EU.¹⁰⁷ Here, there is reason to be concerned that employers may abuse this choice, as they can forum shop and attempt to unilaterally make the choice of law by inserting one of these clauses in a contract. This issue can affect the employees, as they

¹⁰⁰ *Uber BV v. Aslam* [2018] EWCA (Civ) 2748 (Eng.). “Reference might also be made to the decision in the case of *Pimlico Plumbers v. Smith*, [2018] UKSC 29, in which the Supreme Court that a plumber who purported to be engaged on a self-employed basis was in reality an employee of the applicants and entitled to the legal benefits associated with such status.” Ian Lloyd, *Applying Notions of Employment Within the Gig Economy – How Disruptive Is the Gig Economy for Employment Law?*, 20 COMPUT. L. REV. INT’L 36, 37 (2019).

¹⁰¹ *Matter of Lowry*, 138 N.Y.S.3d 238 (N.Y. App. Div. 2020), *leave to appeal dismissed sub nom.* *Lowry v. Uber Techs., Inc.*, 176 N.E.3d 306 (2021).

¹⁰² Vincent R. Martorana, *A Guide to Contract Interpretation*, REEDSMITH (July 2014), <https://perma.cc/A5JE-RER6>; *see also* *Interpretation of Contracts Under English Law*, ASHURST (Aug. 18, 2020), <https://perma.cc/D5W5-JFHN>.

¹⁰³ Lloyd, *supra* note 100, at 37.

¹⁰⁴ *See Lowry*, 138 N.Y.S.3d at 241–42; *Aslam*, *supra* note 100, ¶¶ 95–96.

¹⁰⁵ Miriam A. Cherry, *Regulatory Options for Conflicts of Law and Jurisdictional Issues in the On-Demand Economy*, in *Conditions of Work & Employment Series*, 21 (Int’l Lab. Org. Ser. No. 106, 2019), <https://perma.cc/TFQ8-2VLE>; *see also* EUR. JUD. NETWORK IN CIV. & COM. MATTERS, PRACTICE GUIDE: JURISDICTION AND APPLICABLE LAW IN INTERNATIONAL DISPUTES BETWEEN THE EMPLOYEE AND THE EMPLOYER 18 (2020), <https://perma.cc/744U-6USJ>.

¹⁰⁶ 2008 O.J. (L 177) 6, <https://perma.cc/768T-M5HU>.

¹⁰⁷ Article 3 of Rome I provides that “[a] contract shall be governed by the law chosen by the parties. The choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or to part only of the contract.” *Id.*

tend to have less bargaining power and may be in a disadvantageous position because of the chosen law. Rome I strives to set a minimum standard of employment safeguards that cannot be compromised by the chosen law.¹⁰⁸ In Article 3, Rome I directs the parties to make their choice of law.¹⁰⁹ Subsequently, Article 8 mandates that “[s]uch a choice of law may not, however, have the result of depriving the employee of the protection afforded to him by provisions that cannot be derogated from by agreement under the law that, in the absence of choice, would have been applicable”¹¹⁰ That is to say, the choice of law rules allow companies some discretion, but never at the cost of the workers’ rights.

However, the law in California and the EU is devoid of any statutes, directives, case law, or precedents relating to jurisdictional problems, conflict of law questions, or crowd-work platform issues.¹¹¹ Despite this, one can utilize a few of the pre-existing private international law doctrines and precedents discussed above to forecast how courts might treat these issues when faced with cross-jurisdictional questions related to the gig economy and no choice of law clause. The court’s inquiry would primarily be on where the work was to be habitually carried out in both jurisdictions, which corresponds to the knowledge acquired about where the work is in fact performed. This strategy would create grave challenges for the platforms by requiring them to follow various jurisdictional regulations once statutes and judicial decisions change how the law functions. Therefore, if the genuinely globalized platform exists, is also rational, wants to follow the rules, and contains workers from fifty nations, the platform will have to comply with the regulatory regimes of all fifty nations and will also be liable for legal action under them all.¹¹²

Regarding the choice of law clauses, the status of law in the United States and EU is similar. Both jurisdictions allow employers the freedom to choose the governing law in their contracts but also have some rules to protect employees. In the United States, courts are not limited by the scope of wording. As decided by the U.S. Appeal Board in the Uber case, even if the contract excludes certain employee rights, if the employer’s conduct contradicts the wording, then the court can interpret the wording to reflect the real employer-employee relationship. Thus, employers cannot exclude employees’ rights by putting provisions into the contract if the existing relationship with their employers is different than what the contract says. In the EU, The Rome Regulation creates a threshold to protect employees. According to Article 8, some rights cannot be derogated by agreement. Thus, Article 8 sets a minimum standard to protect employees in the EU.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ Cherry, *supra* note 105, at 27.

¹¹² *Id.*

C. Representation, Voice, and Collective Bargaining in the Gig Economy

Unions are a central driving force and have played a key role in assisting workers' organization and advancing collective bargaining for years.¹¹³ But a shift in employment trends and the development of gig and platform work poses new organizational challenges to unionization. Certain unions have at times gotten involved with platform and gig workers as a means to increase representation and incorporate a greater number of non-standard workers. The capability of unions to include non-standard workers into existing models and collective bargaining agreements might be an illustration of the specific industrial, regional, or national labor movements. Lately, platform workers have been able to establish some common interest, assemble a collective voice, and eradicate competitive pressure through the use of a worker's forum. However, the pre-existing struggles in forming new unions have made it difficult to assemble a collective voice.

In spite of this, firms are capable of capitalizing on the regulatory obscurity concerning collective bargaining and agency workers. Gig workers face unique problems in building a collective voice because of the online nature of the work. Collective bargaining, while complicated and demanding, is a system based on self-regulation that makes it possible for the workers, employers, and their organizations to wield strong democratic influence. It appears that gig workers encounter multiple bargaining challenges, including fostering common interest and reducing competition among workers, detecting sites for assembly, recognizing the counterpart to bargaining, and aiming towards the genesis of power to create a collective claim.¹¹⁴

1. Representation, Voice, and Collective Bargaining in the U.S.

In 2018, the Supreme Court of California in *Dynamex Operations West, Inc. v. Superior Court of Los Angeles*, enacted a new law (which later popularly came to be known as Assembly Bill) that required companies (such as Uber and Lyft) to consider and treat their workers as employees and not merely as "independent contractors."¹¹⁵

¹¹³ Harry C. Katz, *The Decentralization of Collective Bargaining: A Literature Review and Comparative Analysis*, 47 INDUS. & LAB. REL. REV. 3 (1993); see also Shae McCrystal & Mark Bray, *Non-Union Agreement-Making in Australia in Comparative and Historical Context*, 41 COMP. LAB. L. & POL'Y J. 753 (2021); Shuford Jones IV, *Wisconsin's Act 10 Limitations on Collective Bargaining: Balancing a Budget on the Backs of Public Employees*, 13 GEO. J.L. & PUB. POL'Y 543 (2015); Richard Bales, *A New Direction for American Labor Law: Individual Autonomy and the Compulsory Arbitration of Individual Employment Rights*, 30 HOUS. L. REV. 1863 (1994).

¹¹⁴ Hannah Johnston & Chris Land-Kazlauskas, *Organizing On-Demand: Representation, Voice, and Collective Bargaining in the Gig Economy*, in *Conditions of Work & Employment Series*, 2019, at 23 (Int'l Lab. Org. Ser. No. 94).

¹¹⁵ *Dynamex Operations*, 461 P.3d at 5; see also Robert W. Wood, *Despite Sweeping California Gig Worker Law, Uber Says It Won't Treat Drivers as Employees*, FORBES (Sept. 11, 2019, 2:54 PM), <https://perma.cc/RK8Q-Y9AX>; Margot Roosevelt et al., *A Bill Giving Workplace Protection to a Million Californians Moves One Step Closer to Law*, L.A. TIMES (Aug. 30, 2019, 4:40 PM), <https://perma.cc/WTK6-QCAA>.

This development in California stemmed discussions in other states within the United States as well.¹¹⁶ However, the California Assembly Bill presents a cautionary tale for other states.¹¹⁷ The Bill attracted criticism and dramatically affected businesses who employed gig workers.¹¹⁸ Uber sued California over Assembly Bill 5.¹¹⁹ It seems that, even though California has become the first state to attempt to bolster the rights of gig workers, the focus has been on the employers rather than the opinions of the gig workers themselves. However, this is an important start. This is a transition. A transition from an unregulated area to a more regulated one, which will result in protected gig workers who have meaningful bargaining power. Thus, Assembly Bill 5 in California should drive further regulation in other states.

2. Representation, Voice, and Collective Bargaining in the EU

Freedom of association and the effective recognition of collective bargaining rights in the gig economy are not devoid of obstacles. However, gig workers have devised numerous strategies to build collective agencies and encourage effective regulations concerning gig work. These include strategies for union renewal, as well as new means of organizational activities like worker forums, worker centers, and cooperatives.

For example, a trade union in the UK, the Independent Workers, wished to be recognized for the purpose of engaging in collective bargaining with Deliveroo.¹²⁰ The company was unwilling to accede to the union's request, and the union referred the matter to the Central Arbitration Committee,¹²¹ which, under the Trade Union and Labor Relations (Consolidation) Act 1992, has the power to adjudicate such disputes.¹²² The Committee found in favor of

¹¹⁶ Adam Bergman, *How California Assembly Bill 5 Affects the Gig Economy*, FORBES (Jan. 10, 2020), <https://perma.cc/PS8M-CPVV>; Jackson Lewis, *AB 5 Past and Present – What You Need to Know*, NAT'L L. REV. (Dec. 5, 2021), <https://perma.cc/C9A4-EBDR>.

¹¹⁷ Michael Lotito et al., *AB 5: The Aftermath of California's Experiment to Eliminate Independent Contractors Offers a Cautionary Tale for Other States*, JDSUPRA (Mar. 10, 2020), <https://perma.cc/JYC2-BKMQ>.

¹¹⁸ Margot Roosevelt, *New California Labor Law AB 5 Is Already Changing How Businesses Treat Workers*, L.A. TIMES (Feb. 14, 2020), <https://perma.cc/GDY9-5ELQ>; *California's Legislature Passed a Far-Reaching Labor Bill. It Could Make You Collateral Damage*, CALMATTERS (Mar. 3, 2020), <https://perma.cc/9UR4-3YGM>; *Opinion: California Will Soon Learn Assembly Bill 5 Was a Historic Mistake*, TIMES OF SAN DIEGO (Oct. 20, 2019), <https://perma.cc/YR3A-3PQZ>; Karen Anderson, *Another Voice: Assembly Bill 5 Harms Hundreds of Industries and Professions*, SACRAMENTO BUS. J. (Jan. 24, 2020), <https://perma.cc/98W7-XZDX>.

¹¹⁹ Jon Fingas, *Uber and Postmates Sue California Over Gig Worker Law*, ENGADGET (Dec. 31, 2019), <https://perma.cc/LQ7D-HNB6>.

¹²⁰ *Indep. Workers Union of Great Britain v. Cent. Arb. Comm.* [2021] EWCA (Civ) 952 (Eng.) [hereinafter *Indep. Workers*]; see Danny Smith, *Worker Status and Union Recognition – The Deliveroo Judgment*, RRADAR (July 13, 2020), <https://perma.cc/CC2A-QC6T>.

¹²¹ Smith, *supra* note 120.

¹²² See *About Us*, GOV.UK, <https://www.gov.uk/government/organisations/central-arbitration-committee/about> (last visited July 30, 2021).

Deliveroo.¹²³ The legislation, it was ruled, “applied where unions represented ‘workers’ and the individuals contracting with Deliveroo did not come within the scope of this definition.”¹²⁴

In EU law, the term “worker” generally has a broader meaning than in the U.K. In *Betriebsrat der Ruhrlandklinik gGmbH v. Ruhrlandklinik gGmbH*,¹²⁵ the Committee ruled that the legislation applied where the existence of something akin to an employment relationship was an essential prerequisite for the application of the provisions of the 1992 Act.¹²⁶ There is also a new EU law to protect gig workers that will:

require employers to inform all workers about essential aspects of their employment on their first day, including: description of their duties, starting date and pay information, indication of what a standard working day is, or reference hours, right to compensation for late canceling of work, only one probationary period, lasting a maximum of six months, allow employees to have other jobs, and banning exclusivity clauses.¹²⁷

In November of 2017, in the case of *Uber v. Aslam & Ors*,¹²⁸ the Employment Appeal Tribunal (EAT) in the U.K. confirmed an earlier decision that two Uber drivers were “workers” within the meaning of the relevant legislation (as opposed to independent contractors), and as such were entitled to employment-type benefits, including holidays and the national minimum wage.¹²⁹

The only freedom the weaker party enjoys is to decide whether to accept the other party’s terms or decline the contract. The level of detailed control exercised by Uber over its drivers working under its brand name is more extensive than that which tended to apply in previous technological eras. The Deliveroo case was determined on a fairly narrow basis and concerned the

¹²³ *Indep. Workers*, *supra* note 120.

¹²⁴ Lloyd, *supra* note 100, at 39.

¹²⁵ Bundesgerichtshof [BGH] [Federal Court of Justice] Mar. 17, 2015, 10 Entscheidungen des Bundesgerichtshofes in Zivilsachen [BGHZ] (Ger.).

¹²⁶ *Id.*

¹²⁷ *EU Law Fixes Minimum Rights for ‘Gig Economy’ Workers*, BBC (Apr. 16, 2019), <https://www.bbc.com/news/world-europe-47947220>; Alex J. Wood et al., *Minimum Wages for Online Labor Platforms? Regulating the Global Gig Economy*, in *THE DIGITAL TRANSFORMATION OF LABOR: AUTOMATION, THE GIG ECONOMY AND WELFARE* 74 (2020). The new rules should apply to all those who work at least three hours a week averaged over four weeks, which covers at least three million people—though it is a growing category of workers.

¹²⁸ *Aslam*, *supra* note 100.

¹²⁹ *See Kaseris v Rasier Pacific V.O.F.* (2017) 6610 FWC (Austl.) (finding an Uber driver was an independent contractor, not an employee, and noting that the concept of a “worker” in the UK is much broader than the concept of “employee” in Australia); Nick Noonan, *Contractors or Employees? Uber Drivers and the Kaseris Case*, HENRYWILLIAM, <https://perma.cc/LWX3-N348> (last visited Feb. 15, 2022); Jacquie Seemann & Conor McNair, *Employee or Contractor? A Problem that the Gig Economy Does Not Simplify*, THOMAS GEER (May 2, 2018), <https://perma.cc/JGE4-SUQE>.

interpretation of one piece of trade union legislation.¹³⁰ Operating such a service requires that the driver be licensed by the local government and maintain insurance cover.¹³¹

Collective bargaining is one of Uber drivers' primary tools, but this is necessarily premised on the basis that one size fits all. For better or for worse, this is the antithesis of the gig model, where work relationships are essentially flexible by nature. There is little doubt that there is a substantial number of individuals who value flexibility in terms of the ability to choose when and how they work. Against this, there is a concern that decades of employment protection legislation may be circumvented by the use of legal fictions. One of the major challenges of the law today is to find an appropriate balance between the two extremes.¹³²

Both the United States' and the EU's laws protect the rights of the workers directly and indirectly. In California, though, there is a definite law that ensures that workers are paid a minimum salary plus benefits. In the United States, there is only one piece of legislation regulating this area, while in the EU multiple court judgments and laws deal with the same topic. As such, the laws in the United States are much stricter than in the EU. Both in the United States and the EU, gig workers face great challenges in achieving collective bargaining powers. Unions are critical to giving workers representation, voice, and bargaining power. The online and disorganized nature of gig work creates unique problems for the building of a collective voice, both in service provision and also in crowd work. In the EU, to cope with these challenges, gig workers employ a variety of strategies, and agencies promote effective gig work regulation. Regarding the United States, following the California Supreme Court decision, Assembly Bill 5 represents a significant step towards giving all of these rights to the California gig workers employed by companies like Uber or Lyft. The recent developments in the United States give great hope for gig workers to achieve greater representation, voice, and bargaining power over time.

IV. THE GIG ECONOMY: ITS IMPACT ON EMPLOYMENT, PRODUCTIVITY, AND OTHER ASSOCIATED BENEFITS

From an economic perspective, the rise of technology, cheap labor, and entrepreneurial spirit is aiding the growth of the gig economy. The gig economy is here to stay.¹³³ As discussed in the previous part, the rise of the gig economy

¹³⁰ Ivan Levingston & Ellen Milligan, *Deliveroo Jumps After Court Rules Its Drivers Are Self-Employed*, BLOOMBERG (June 24, 2021), <https://perma.cc/K2AS-SEXK>; see also Kirsten Eiser et al., *UK Appeals Court Declares That Deliveroo Riders Are Not Workers*, MONDAQ (Sept. 7, 2021), <https://perma.cc/V5XK-7XL6>.

¹³¹ Matthew Schwartz, *Uber Can Keep Operating in London, Magistrate Rules*, NPR (Sept. 28, 2020), <https://perma.cc/K2WP-VF39>; see also Michael Lamb, *Ride Sharing and Car Insurance in Hong Kong*, CCW GLOB. (Mar. 3, 2021), <https://perma.cc/NMJ7-MPEA>.

¹³² See Lamb, *supra* note 131.

¹³³ See generally Nilanjan Banik & Milind Padalkar, *The Spread of Gig Economy: Trends and Effects*, 15 FORESIGHT & STI GOVERNANCE 19 (2021), <https://perma.cc/NKF6-DMA5>.

is challenging everything scholars and practitioners know about the way business is done and the law protecting the workers, including anti-discrimination law, unemployment compensation, and workers' compensation. As the cases of *Uber* and *Lyft* show, classifying workers as employees as opposed to independent contractors is going to increase the payroll costs.¹³⁴ There may also be spillover effects, especially on sectors such as construction and trucking, where there is not much demand for full-time workers.¹³⁵ Also, the platforms enabled markets to connect workers across geographical boundaries. The legal aspects of the gig economy are still evolving, and debate continues regarding the traditional elements of legal protection. However, from an economic perspective—based on various economic theories—the outcomes in terms of productivity, employment, and income distributions are easier to predict.

A. Productivity and Specialization

The gig economy will increase the overall quality of work by connecting consultants and online employers across national borders. There will be more *specialization* and *standardization* of work. Over the last two decades, Europe, for example, has witnessed a fall in labor productivity.¹³⁶ With a fall in its birth rate, aging population, and a strong anti-immigration policy in place, it is difficult to increase productivity. The working-age to retirees ratio will drop in Europe from 3.5 today to 2.2 by 2040.¹³⁷ The birth rate has also fallen. To maintain the replacement rate of population growth, 2.1 children should be born to each family in an economy, assuming an average death rate applicable to the world's population.¹³⁸ In contrast, the figures for some Eurozone economies are much lower: 1.38 for Greece, 1.39 for Spain, 1.41 for Italy, and 1.94 for the UK.¹³⁹ For Spain and Greece, the over-65 population will increase from around 17 percent now to 25 percent by 2030.¹⁴⁰ In an aging society combined with the presence of strong trade unions, it is not always possible to

¹³⁴ Alison Griswold, *How Much It Would Cost Uber and Lyft if Drivers Were Employees?*, QUARTZ (June 14, 2019), <https://perma.cc/762B-2TPR>.

¹³⁵ Devin Sun, *The Effect of Uber's Entrance on Wages for Low-Skilled Occupations Across the United States* (May 11, 2020) (junior paper, Princeton University), <https://perma.cc/PD9H-C748>.

¹³⁶ See *Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee, the Committee of the Regions and the European Central Bank, The EU Economy: 2007 Review: Moving Europe's Productivity Frontier*, COMM'N OF THE EUR. COMMUNITIES (Nov. 21, 2007); see also Andrés Rodríguez-Pose & Roberto Ganau, *Institutions & the Productivity Challenge for European Regions* (Oct. 2019), <https://perma.cc/P6ND-9EUK>.

¹³⁷ Banik, *supra* note 9, at 2; Robert D. Atkinson, *How to Reform Worker-Training and Adjustment Policies for an Era of Technological Change*, INFO. TECH. & INNOVATION FOUND. (Feb. 20, 2018), <https://perma.cc/E99K-SWFJ>.

¹³⁸ Banik, *supra* note 9, at 2.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

get a more productive worker.¹⁴¹ The way out is outsourcing employments to more skilled workers in developing countries. This will enable labor force participation (even in the presence of a strong anti-immigration policy) in a digital world and contribute to growth. In line with Adam Smith's principle of economic specialization, rather than hiring one generalist to complete all tasks, companies can designate tasks to various freelancers specialized in that area.¹⁴² Workers are also more accountable as performance standards dictate future income.

B. Impact on Economy, Employment, and Labor Participation

The gig economy will also affect the entire spectrum of employment, be it senior executives or workers such as delivery or Uber drivers. The gig economy is creating many more employment opportunities for low-skilled workers which were non-existent before in labor-abundant developing countries. As predicted by the famous Heckscher-Ohlin-Samuelson model, the advent of online platform technology in the developing world is going to increase demand for low-salaried service workers in labor-abundant economies, thereby increasing their wage rates.¹⁴³ In the absence of entry barriers, access to mobile and internet services has ensured the easy availability of gig jobs.

Within any economy, the incremental increase in labor productivity can happen not only because of gig work but also from structural transformation brought on through technological innovation.¹⁴⁴ Research from the McKinsey Global Institute found that the biggest impact of the freelance economy is the boost in labor force participation—those who were unemployed now find themselves with a varied way to earn income.¹⁴⁵ While analyzing the source of productivity growth, the Asian Development Bank found that much of the reason for high productivity growth among 31 countries in Asia related to the technological progress within a sector, for instance, agriculture becoming mechanized.¹⁴⁶ A smaller fraction of the growth in productivity is the result of a shift in occupation from low productivity to a high productivity sector (for example, labor movement from a low productivity agriculture sector to a high productivity service sector).¹⁴⁷

¹⁴¹ See James Sherk, *What Unions Do: How Labor Unions Affect Jobs and the Economy*, HERITAGE FOUND. (May 21, 2009), <https://perma.cc/6D7C-Z3SQ>.

¹⁴² ADAM SMITH, *WEALTH OF NATIONS* 3 (1776).

¹⁴³ EDWARD E. LEAMER, *THE HECKSCHER-OHLIN MODEL IN THEORY AND PRACTICE* 9 (1995); see generally R. M. Solow, *Perspectives on Growth Theory*, 8 J. ECON. PERSPS. 45 (1994).

¹⁴⁴ As the literature on growth theory suggests, in addition to technology, an increase in per-capita income can follow from an increase in labor force participation rate. See generally Solow, *supra* note 143.

¹⁴⁵ JAANA REMES ET AL., *SOLVING THE PRODUCTIVITY PUZZLE: THE ROLE OF DEMAND AND THE PROMISE OF DIGITALIZATION* 115–17 (2018).

¹⁴⁶ See AFRICAN DEV. BANK GRP., ASIAN DEV. BANK, EUR. BANK FOR RECONSTR. & DEV. & INTER-AM. DEV. BANK, *THE FUTURE OF WORK: THE REGIONAL PERSPECTIVES* 49 (2018), <https://perma.cc/Q69T-2HV5>.

¹⁴⁷ *Id.*

While analyzing a sample of 240,000 gig workers from 42 different platforms between October 2012 and June 2016, the J.P. Morgan Chase and Company Institute found that lower-income cohorts are more likely to participate in labor platforms compared to higher-income cohorts.¹⁴⁸ Typically, the low-income cohorts participate in *labor platforms*, such as Upwork and Uber, and the higher-income cohorts earn their money from *capital platforms*, such as Airbnb.¹⁴⁹ This study found that 0.6 percent of the people from the lowest income quintile use labor platforms, whereas 0.6 percent from the highest income quintile use capital platforms.¹⁵⁰ The lower-income group is more likely to use the *labor platforms*: 44 percent of the participants in the lowest income quintile stopped accessing platforms within 12 months compared to 53 percent of middle-income participants, and 60 percent from the highest income quintile.¹⁵¹ Another related study, carried out in the West Bank and Gaza region, highlights gender inequality. In the West Bank and Gaza region, there are 15,000 women who use the digital platform, making them 33 percent of the gig workforce.¹⁵² The total percentage of gig workers in this region is 19 percent of the entire labor force.¹⁵³ There are no legal barriers based on caste, religion, gender, and location. In the United States, before the advent of Airbnb, African American rental hosts were getting 12 percent less rent than their white American counterparts for the same type of house in the same location.¹⁵⁴ The spatial location of workers, whether urban, rural, or small towns, does not matter in the gig economy. Online labor markets such as Freelancer and Upwork are likely to substitute for physical labor migration and hence increase the working opportunities on digital platforms.

C. Impact on Other Sectors

A World Bank study estimated “digital jobs generate between two and four times more employment in other sectors in the economy,” implying a spillover effect on other sectors.¹⁵⁵ The lower price of services associated with the gig economy has generated consumer surpluses that can be spent on other sectors,

¹⁴⁸ Farrell & Greig, *supra* note 3, at 1–22.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 20.

¹⁵¹ Saori Imaizumi, & Indhira Santos, *Online Outsourcing: A Global Job Opportunity for Everyone?*, WORLD BANK BLOGS: LET’S TALK DEV. BLOG (Jan. 12, 2016), <https://perma.cc/3KWK-4GWB>.

¹⁵² *Id.*

¹⁵³ Indhira Santos & Saori Imaizumi, *Narrowing Gender Gaps Through Online Job Matching: How Does Souktel Do It?*, WORLD BANK BLOGS: LET’S TALK DEV. BLOG (Jan. 8, 2016), <https://perma.cc/Z4EN-H467>.

¹⁵⁴ Although, the organized labor market comes with a tag of equal opportunity employer, wherein the employer agrees not to discriminate against employee or job applicants because of race, color, national origin, or gender. Benjamin G. Edelman & Michael Luca, *Digital Discrimination: The Case of Airbnb.com* (Harvard Bus. Sch. NOM Unit, Working Paper No. 14-054, 2014).

¹⁵⁵ WORLD BANK GRP., EFFECTS OF TECHNOLOGY, *supra* note 21, at 3.

with a multiplier effect on income and employment generation. For example, after the introduction of taxi services by Uber and Ola, taxi fares were reduced in major cities in India.¹⁵⁶ Alcohol-related motor vehicle accidents and traffic congestion have also come down.¹⁵⁷ There are also other benefits of ridesharing leading to less traffic congestion (less time) and other motor vehicle accidents.¹⁵⁸ There are also environmental benefits. Compared to when cars stand idle in traffic, carpooling and car-sharing contribute to a lower carbon footprint.¹⁵⁹

V. THE GIG ECONOMY AND INCOME DISTRIBUTION

Economists argue that a flexible work environment, aided by mobile phones and the internet, will enable lower-income workers to find jobs easily.¹⁶⁰ However, evidence suggests that in developed countries, the gig economy may result in lower income and economic vulnerability for the low-skilled workers.¹⁶¹ According to the Stolper-Samuelson theorem, workers from developing countries participate and compete with their counterparts in developed countries, resulting in lower income for the latter.¹⁶² The advent of the gig economy ensured that the knowledge-based high-skilled workers continue to get premiums. In contrast, the returns for low-skilled workers are going to fall in the presence of increased competition across geographical boundaries. For example, doctors, professors, and scientists, who deliver their services on a contractual basis, are always going to charge higher wage rates compared to their full-time employed peers. This may not necessarily be true for accountants, technicians, or bloggers, as these jobs can be performed beyond national boundaries with the aid of technology. This alone may lead to a skewed income distribution within a society.

¹⁵⁶ Utsav Pandya et al., *Impact of Use of Mobile App of OLA Cabs and TAXI for Sure on Yellow and Black Cabs*, 9 PACIFIC BUS. REV. INT'L 91, 91–105 (2017), <https://perma.cc/6YV7-HLLD>.

¹⁵⁷ Brad N. Greenwood & Sunil Wattal, *Show Me the Way to Go Home: An Empirical Investigation of Ride Sharing and Alcohol Related Motor Vehicle Homicide*, 41 MIS Q. 163, 163–87 (2017); Z. Li et al., *How Do On-demand Ridesharing Services Affect Traffic Congestion? The Moderating Role of Urban Compactness*, PROD. AND OPERATIONS MGMT. (forthcoming), <https://perma.cc/5G8L-XU7H>.

¹⁵⁸ Li et al., *supra* note 157; see generally Niam Yaraghi & Shamika Ravi, *The Current and Future State of the Sharing Economy*, BROOKINGS INST. (Dec. 29, 2016), <https://perma.cc/BNF3-L9U9>.

¹⁵⁹ Yaraghi & Ravi, *supra* note 158.

¹⁶⁰ Banik & Padalkar, *supra* note 133, at 20–27.

¹⁶¹ Mindy E. Bergman & Vanessa A. Jean, *Where Have All The “Workers” Gone? A Critical Analysis of the Unrepresentativeness of Our Samples Relative to the Labor Market in the Industrial–Organizational Psychology Literature*, 9 INDUS. & ORGANIZATIONAL PSYCH. 84, 84–113 (2016).

¹⁶² The theorem states that—under specific economic assumptions (constant returns to scale, perfect competition, equality of the number of factors to the number of products)—a rise in the relative price of a good will lead to a rise in the real return to that factor which is used most intensively in the production of the good, and, conversely, to a fall in the real return to the other factor. See generally J. S. Chipman, *Factor Price Equalization and the Stolper-Samuelson Theorem*, 10 INT'L ECON. REV. 399 (1969).

For example, Card shows that a rise in wage inequality in Germany resulted from firms paying their high-skilled workers more than their low-skilled workers.¹⁶³ As the availability of high-skilled, talented workers is limited, wage premiums increase. In a related study using U.S. labor market data between 1978 and 2013, Song finds that wage inequality in the United States has to do with more competitive firms tending to keep their high-skilled laborers as full-time workers by paying a wage premium.¹⁶⁴ The low-skilled work, which is of the gig type, is outsourced both within and outside the United States. This has led to increased income inequality between high-skilled and low-skilled workers within the United States. This trend is similar for other countries such as Brazil, Sweden, Japan, and the United Kingdom, for which detailed worker-firms earning data is available.¹⁶⁵ Across geographical boundaries, because the gig employments are outsourced, low-skilled laborers from developing and less-developed countries stand to gain at the expense of their counterparts in the developed nations.

A. Reality

According to a report published by the International Labor Organization, about two-thirds of the US workers using the Amazon platform (popularly known as *Turkers*) made less than the federal minimum wage rate of \$7.25 an hour.¹⁶⁶ The same ILO report additionally found that only 7 percent of Germans on the Click worker platform made the statutory minimum wage of 8.84 Euros (\$10.40) an hour.¹⁶⁷ These workers do not have access to social security benefits such as health insurance, sick leaves, working hours, continuation of contracts, settlement of disputes, and minimum wage rates.¹⁶⁸ Services such as Uber and Airbnb are coming under increasing pressure to give social security benefits to their drivers. In the city of Seattle, Uber and Lyft drivers can form unions.¹⁶⁹ Even in India, the Supreme Court of India issued a judgment stating that women contractual laborers working from home would be considered “employees” of the company with full social security benefits.¹⁷⁰

¹⁶³ David Card et al., *Workplace Heterogeneity and the Rise of West German Wage Inequality*, 128 Q. J. ECON. 976, 976–1015 (2013).

¹⁶⁴ Jae Song et al., *Firming Up Inequality*, 134 Q. J. ECON. 1, 3–15 (2019).

¹⁶⁵ *Id.* at 46.

¹⁶⁶ Pechnipa Dominique Lam, *Thailand's E-Commerce Ecosystem: Understanding Business Formalization Within the Framework of Tax and Consumer Protection Regulations*, ECON. RSCH. INST. FOR ASEAN (forthcoming), <https://perma.cc/4LJH-DHPL>.

¹⁶⁷ Leonid Bershidsky, *Gig-Economy Workers Are the Modern Proletariat*, MINT (Sept. 26, 2018, 12:02 AM), <https://perma.cc/7E2S-QUHM>.

¹⁶⁸ Laurence Chandy, *The Future of Work in the Developing World*, BROOKINGS INST. (Jan. 31, 2017), <https://perma.cc/UN85-ME7S>.

¹⁶⁹ Nick Wingfield & Mike Issac, *Seattle Will Allow Uber and Lyft Drivers to Form Unions*, N.Y. TIMES (Dec. 14, 2015), <https://perma.cc/3PRF-SNUF>.

¹⁷⁰ Alok Prasanna Kumar, *Code on Wages and the Gig Economy*, 54 ECON. & POL. WKLY. 1, 7–8 (2019).

New, flexible ways of working could benefit groups that were traditionally marginalized, such as women, young people, and the disabled.¹⁷¹

B. Capital Platforms

Another possible source of unequal income distribution arises from the ownership of capital platforms. Although platform software has become ubiquitous, the market valuation of companies such as Uber, Airbnb, Facebook, and Amazon, put together, may in fact be higher than the GDP of many low-income countries. Uber was valued at \$82 billion in its share listing.¹⁷² The Uber platform is owned by a small group of entrepreneurs and their venture capitalists, wherein the valuation can be capitalized through either acquisition or stock offerings.

From an economic perspective, the rise of the gig economy is likely to increase overall productivity. At the same time, full-time employment in a gig-type setup may lead to lower income and economic vulnerability for workers in developed countries. There is a need to find ways to absorb these laborers for alternative employment. Governments can work closely with businesses and training centers to impart necessary additional skills for these displaced workers.

VI. UNDERSTANDING THE “GIG ECONOMY” AND THE CHANGING WORLD OF WORK: MAPPING REGULATORY INTERVENTIONS

In a gig world, regulatory interventions require facilitating the spread of the digital economy and at the same time ensuring that the workers are not exploited. In light of the above discussion (Parts II–V) and following the results of this Article’s empirical model, Part VI, identifies five specific and complementary policy and regulatory recommendations.

A. Supply-Side Interventions

Youth in developing and less-developed countries often find it hard to get jobs. In India, for example, on a daily basis less than two percent of the population who apply for a job get one.¹⁷³ A lack of educational and vocational skills leaves them with no other choice but to work as low-skilled wage laborers. From the government’s perspective, there is a need to build quality higher education and design curriculum in consultation with the private sector. The government can provide an enabling platform for students, IT professionals, and start-ups to interact with established corporations, leading technology companies, and industry mentors to build collective capabilities for the industry to deliver platform-enabled technologies.

¹⁷¹ ORG. FOR ECON. COOP. & DEV., GOING DIGITAL: THE FUTURE OF WORK FOR WOMEN 1 (2017).

¹⁷² *Uber Valued at \$82bn in Share Listing*, BBC (May 10, 2019), <https://perma.cc/GJV2-VYDR>.

¹⁷³ Banik, *supra* note 9, at 7.

B. Doing Business in a Digital World

In the *Ease of Doing Business Report 2019*, the World Bank placed India in the 77th position, which was a marked improvement from its 134th position out of a sample of 190 countries in 2014.¹⁷⁴ The government should tweak the policy and regulatory environments to facilitate the spread of digital technology. Complementary measures, such as investments in telecommunications, cyber-security, and internet and electricity connections, are necessary. Additionally, lowering logistical costs for setting up businesses and enforcing contracts will help. Examining data from Thailand's e-commerce space, Lam finds a lower administrative burden related to tax filing and that a simple regulatory regime helps with the formalization of e-commerce businesses.¹⁷⁵

C. Online Payment

Many small and medium enterprises are being transformed in this digital age. As most consumer-to-business transactions happen online, there is a need for business units to go digital. People are using apps such as Google Pay and Amazon Pay for buying goods and services. Even in advanced economies like Singapore, studies show that the advent of the gig economy has led to an increase in credit card sales.¹⁷⁶ Online payment systems are required for consumers to buy products. At the same time, the central banks and other regulatory bodies should ensure that these payment systems are secure and comply with global standards. This is to prevent money-laundering activities. Almost all of the tech giants, such as Google, Amazon, Alibaba, etc., introduced online transaction interface facilities. For example, Facebook announced the launch of its own digital currency—Libra—within the next six to twelve months.¹⁷⁷ Libra, which will be pegged to the U.S. dollar, can be used by online Facebook users to send money across borders to expand business.¹⁷⁸

D. The Role of Government in a Gig World

Governments should ensure that all of the clauses related to industry relations, social security, health and safety, and minimum wages are applicable to gig workers. From the consumption side, regulations related to data privacy have to be created and need to be enforced. In a digital world, an enormous amount of data about individuals and their activities is captured by platforms and is bundled and sold to various companies, all without getting

¹⁷⁴ See WORLD BANK GRP., *DOING BUSINESS 2019: TRAINING FOR REFORM 5* (16th ed. 2019); WORLD BANK GRP., *DOING BUSINESS 2014: UNDERSTANDING REGULATIONS FOR SMALL AND MEDIUM-SIZE ENTERPRISES 3* (11th ed. 2014).

¹⁷⁵ Lam, *supra* note 166.

¹⁷⁶ See generally SUMIT AGARWAL ET AL., *MOBILE WALLET AND ENTREPRENEURIAL GROWTH* 11, 17 (2018).

¹⁷⁷ *Facebook to Launch Global 'Libra' Cryptocurrency*, FRANCE 24 (June 18, 2019), <https://perma.cc/AV3Q-RZWF>.

¹⁷⁸ *Id.*

the consent of the consumers. A market can be created where, for instance, consumers are offered discounts on online platforms if they agree to sell their data.

The big companies—such as Facebook, Netflix, Google, etc., and the so-called “unicorns”—currently have no social obligations and continue to pour money into the growth of their respective companies with the objective of pleasing their shareholders.¹⁷⁹ Seldom is there an effort by these companies to reach out to individual governments for taking up any social cause. Individual governments can clamp down on tax evasion by making it mandatory, and use the money raised to invest in public services that counteract the growing inequality that is a policy challenge for many economies.

E. Targeted Assistance Programs and Job-Less Growth

Workers are displaced by technological disruption and jobs being shifted elsewhere. In this situation, policymakers can use big data and A.I. to map the skills and experiences of the displaced workers so that they have access to alternative employment.¹⁸⁰ The tax collected from the big technology firms can be used to give unemployment benefits (UIB) or universal basic income to the displaced workers.¹⁸¹

VII. CONCLUSION

The gig economy is a relatively new phenomenon. From an economic perspective, the rise of technology, cheap labor, and an entrepreneurial spirit is aiding the spread of the gig economy. From a legal and regulatory perspective, this Article demonstrates that workers’ rights in the gig economy will become more central to the fair functioning of the labor market. By comparing the three key issues of joint employment liability, choice of law clauses, and representation, voice, and collective bargaining in the EU and United States, this Article shows that all three have distinct qualities and different impacts on gig workers. The joint employment liability, choice of law clause, and representation, voice, and collective bargaining are thoroughly regulated, with the exception being the joint employment liability in the EU, which is not covered directly. The United States sufficiently provides laws on all the topics, but the problem there is that the rules are more rigid compared to the EU, and, in some places, they are very definitive and benefit only one party. The laws provided by the EU to deal with these provisions are less rigid in the sense that they provide enough rights to both the gig economy and the worker. The best possible future will be to provide both parties with equal

¹⁷⁹ A “unicorn” is a privately held start-up company with a valuation of \$1 billion or more.

¹⁸⁰ However, it should be noted that only a handful of countries have the capabilities to use big data and AI like this.

¹⁸¹ There is, however, a cost associated with UIB as it is likely to increase fiscal deficits and may not be able to identify the target group requiring such intervention. See Julien Chaisse & Xueling Ji, *The Pervasive Problem of Special Economic Zones for International Economic Law: Tax, Investment, and Trade Issues*, 19 WORLD TRADE REV. 567 (2020).

protection so that both the gig economy and its workers can benefit. If policy attempts to position the law in one party's favor, it will lead to chaos and numerous litigation before the courts of a particular jurisdiction.

In a gig world, workers across national boundaries are connected. The Authors observe that, although the low-skilled workers from developing and less developed countries are benefitting, their counterparts from the developed countries are losing out as these types of employments are outsourced. On the other hand, the high-skilled workers, both from developed and less developed economies, continue to be hired at a premium. This has led to an increase in income inequality between high-skilled and low-skilled workers. Overall, there is an increase in labor productivity and more specialization and standardization of work. However, there are concerns as the incomes of the low-skilled workers continue to fall. Governments need to step in to assuage the problem of economic vulnerability resulting from technological disruption. To enable displaced workers to find alternative employment, governments can use big data and A.I. to map the skills and experiences of these workers. Governments may also want to tax the super-rich tech giant firms and use these proceeds for doling out universal basic income to the displaced workers. A few specific questions, however, are still unanswered and can be the subject of future research. First, an analysis as to whether the newfound gig workers are the ones who are displaced from their earlier occupation because of online competition is warranted. For instance, in the case of a cab driver or a delivery boy who previously ran a retail shop, are they now in this profession because their shops were rendered obsolete because of the platform economy? Can the state, as a central planner, play an effective role in providing services in accordance with the skill sets available? Second, is there any instance of upward mobility or an increase in median income after the emergence of the platform economy? During the initial years when Uber started operating in India, there are stories of software professionals leaving their jobs and working as Uber drivers. However, these days, the men of this profession complain that their reward has gone down substantially. With an abundance of low-skilled workers in a hugely populous country like India, returns to the gig workers are likely to remain stagnant, if not go down further. Finally, can policymakers design some strategy that ensures transfer payment from the super-rich to the low-skilled gig workers?