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Silos and First Movers in the Sharing Economy Debates

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Abstract: Over the past few years, a significant global debate has developed over the classification of workers in the sharing economy either as independent contractors or as employees. While Uber and Lyft have dominated the spotlight lately, the worker classification debates extend beyond ridesharing companies and affect workers across a variety of sectors. Classification of a worker as an employee, rather than an independent contractor, can carry a range of implications for worker treatment and protections under labor law, anti-discrimination law, tort law, and tax law, depending on the legal jurisdiction. The debates, at least in the United States, have been incomplete due to the failure of policy makers and advocates to consider the scope and interconnectedness of the worker classification issues across the full sweep of legal arenas. There is time, however, to remedy the incompleteness of these policy conversations before worker classification decisions ossify and path dependence takes hold.

Two interacting forces create the most serious risk for inadequate policy formulation: (1) silos among legal experts, and (2) first-mover effects. Both of these factors, silo and first mover, emerge in sharing economy debates in the United States. Tax experts and other legal specialists operate in distinct silos leading to a misunderstanding by non-tax analysts of the tax ramifications of worker classification, and to an under appreciation on the part of tax experts of the potential influence of “modest” tax rule changes on worker classification generally. The risks of such misunderstandings can be amplified by first-mover efforts, such as: (1) platforms’ contractual designation of workers as independent contractors to bolster a claim of nonemployer/nonemployee status; (2) platforms’ support for proposed tax legislation that would “clarify” the status of sharing workers as independent contractors for tax purposes if they satisfy a multiple-prong (relatively easy) safe harbor test; and (3) sharing economy worker litigation to secure employee status.

This Article identifies the incompleteness in the worker classification debates and argues for the active formulation of policy through a process that looks beyond individual fields. A more complete conversation requires

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analytical engagement across multiple fields and recognition of the de facto power of reform in one arena to influence others. Moreover, it is by no means clear that just because tax might arrive at the legislative drawing table first (due to first mover effects), that it should drive or shape the broader worker classification debate.

Keywords: sharing economy, gig economy, tax, employee, independent contractor, worker classification

Introduction

Over the past few years, a significant global debate has developed over the classification of workers in the sharing economy either as independent contractors or as employees. While Uber and Lyft have dominated the spotlight lately, the worker classification debates extend beyond ridesharing companies and affect workers across a variety of sectors. The vitality of this debate reflects the important shifts in the role of workers and the nature of work in an economy transformed by technology, communication, and interconnectivity. In the world of contemporary work, classification of workers has arguably become uncertain, given the gaps between existing case law and new workplace realities. Many find this uncertainty troubling because these labels do, in fact, matter. Classification of a worker as an employee, rather than an independent contractor, can carry a range of implications for worker treatment and protections under labor law, anti-discrimination law, tort law, and tax law, depending on the legal jurisdiction.

The debates, however, have been incomplete due to the failure of policy makers and advocates to consider the scope and interconnectedness of worker classification issues across the full sweep of legal arenas. The problem is not intractable, though. There is time to remedy the incompleteness of these policy conversations before worker classification decisions ossify and path dependence in legal regimes takes hold.

Two interacting forces create the most serious risk for inadequate and unintentional policy formulation: (1) silos among legal experts, and (2) first-mover efforts of sharing economy participants. Lawyers, regulators, policy makers, and academics operate in areas of expertise—legal silos. As a result, they explicitly and implicitly make assumptions about the legal effects in other areas. Problems arise when these assumptions are incorrect—or when experts in one field are unaware of the impact of their legal and regulatory actions on the legal trajectory of the same issue in another field. The impact of legal silos is

compounded by first-mover actions in the sharing economy. The ability to act first, and successfully, on a legal question can prove powerful and can enable that position to achieve an advantage going forward. For example, sharing platforms have contended from the outset that workers are not employees and that their relationship to the platforms and to end users is that of independent contractors. Moreover, these platforms have sought to solidify that legal position indirectly by embracing regulatory reforms in less high-profile legal areas that would “affirm” worker status as independent contractors.

Both of these factors, silo and first mover, emerge in sharing economy debates in the United States. The risks from silo-driven misconceptions can be amplified by strategic first-mover efforts, including: (1) platforms’ documentation of their relationship with workers drafted to bolster a claim of nonemployer/nonemployee status; (2) platforms’ support for new tax legislation that would “clarify” the status of sharing workers as independent contractors for tax purposes if they satisfy a multiple-prong (relatively easy) safe-harbor test; and (3) sharing economy worker litigation to secure employee status. In some cases, the “first-mover” actions may be undertaken without an appreciation of their compounding effects due to silos. The platforms, however, have demonstrated an appreciation for how to use the interplay of silos and first-mover effects to their advantage. That is, the platforms may not be siloed, but they understand how the existence of silos more generally offers a strategic opportunity.

The risk created by the intersection of legal silos and first-mover efforts is that important legal questions might be resolved—here, worker classification—without adequate appreciation by policymakers and other actors of the overall effects on labor, work, and social safety nets. Regardless of the specific conclusions on worker classification that ultimately emerge across the law, they should be the result of careful, thoughtful examination that reflects the best net consensus on the issue. They should not be determined by assumptions and misunderstandings fueled by first-mover power.

This Article, building on my prior work with co-author Shu-Yi Oei,¹ identifies the incompleteness in the sharing economy worker debates and argues for active formulation of policy through a process that looks beyond individual fields. A

¹ Shu-Yi Oei & Diane M. Ring, *Can Sharing Be Taxed?*, 93 WASH. U. L. REV. 989 (2016); Shu-Yi Oei & Diane Ring, *The Tax Lives of Uber Drivers*, 8 COLUM. J. OF TAX 56 (2017); Shu-Yi Oei & Diane Ring, *The Senate Tax Bill and the Battles over Worker Classification*, TAXPROF BLOG (Nov. 11, 2017), available at http://taxprof.typepad.com/taxprof_blog/2017/11/the-senate-tax-bill-and-worker-classification.html?utm_source=fark&utm_medium=website&utm_content=link&ICID=ref_fark; Shu-Yi Oei, *The Trouble with Gig Talk: Choice of Narrative and the Worker Classification Fights*, 81 L. & CONTEMP. PROBS. 107 (2018).

more complete conversation requires analytical engagement across multiple fields, *and* recognition of the de facto power of reform in one arena to influence others. Acknowledgement of the reality of these incomplete conversations by no means constitutes an argument for a unified worker classification schema across all fields. Rather it is a call for full awareness in making legislative and policy proposals, and for not acting on unfounded assumptions about the substantive law in other fields or about the porous nature of the boundaries between and among fields making comparable line-drawing decisions. Moreover, it is by no means clear that just because tax might arrive at the legislative drawing table first, that it should drive or shape the broader worker classification debate.

Part I outlines the current context of the worker classification debate including the classification of workers under law and their current treatment by businesses. Part II explores the role of legal silos in the identification of preferred legal rules and in policy formulation for worker classification in the sharing economy. Part III studies the reality of first-mover efforts in the sharing economy and the under appreciated power of such steps in shaping the legal landscape governing worker classification. Part IV analyzes the intersection of silos and first-mover efforts, offers a warning regarding the failure to engage in more complete debates, unpacks the drivers of these incomplete conversations, and makes recommendations for improved policy analysis. The Conclusion considers the implications of robust and complete debates and identifies potential losers from failed efforts to develop a more systematic approach for assessing these legal issues that cut across fields.

I The Context of the Worker Classification Debates

The reputation of the sharing economy has been built on the innovative platforms and apps developed to connect the provider of goods and services with consumers.² Nevertheless, a powerful driver of the sharing, or gig, economy are the workers who provide the services and assets central to the platform business.³ One only needs to envision the prototypical sharing businesses, such as

² See, e.g., Elka Torpey & Andrew Hogan, *Working in a Gig Economy, Career Outlook*, U.S. BUREAU OF LABOR STATISTICS (May 2016), available at <https://www.bls.gov/careeroutlook/2016/article/what-is-the-gig-economy.htm>.

³ See, e.g., Jonathan V. Hall & Alan B. Krueger, *An Analysis of the Labor Market for Uber's Driver Partners in the United States* (Nat'l Bureau of Econ. Research, Working Paper No. 22,843,

Uber, Lyft, and TaskRabbit, to appreciate that the services promised by these apps and platforms are in reality still provided by people. As others have noted, technology may have changed the ways in which consumers and service providers connect, but technology has not yet replaced the role of these service providers.⁴

All workers, however, are not the same under the law. In a wide variety of legal contexts, such as tort, employment, worker protection, discrimination, and tax, the classification of a worker as either an independent contractor or an employee creates significant benefits and burdens for workers and for businesses.⁵ Depending on the legal regime and the actor (e. g. worker or business), one classification status may be considered more attractive than the other. There is no uniform rule for distinguishing between employees and independent contractors, nor is there any binding requirement that classification under one regime be consistent with classification under other regimes. The tests across regimes and levels of government (e. g. federal and state) typically turn on multi-factor tests that incorporate elements such as the nature of control the worker has over performance of the task, the provision of needed tools, and the location of work. Depending on the circumstances, the stakes for classification can be high. For example, in the state-law employment context, classification of a worker as an employee brings with it a host of worker protections and benefits such as overtime, minimum wage, and other benefits, with corresponding costs to the employers.⁶

Historically, worker classification has been a messy task, which is not surprising given that the answer turns on the application of a multi-factor test. Against the backdrop of this longstanding challenge in worker classification, the

2016), available at <http://www.nber.org/papers/w22843.pdf> (noting that as of the end of 2015, more than 460,000 drivers were “actively partnering” with Uber in the United States).

4 See, e. g., sources cited *supra* note 1; see also JEREMIAS PRASSL, *HUMANS AS SERVICE* (2018) (reminding policy makers that the technological innovations underpinning the sharing economy do not vitiate the fundamental nature of what is being offered in the market — services that still must be performed by a human). Although Uber may be successful in eliminating drivers with the advent of driverless cars, many other platforms, such as TaskRabbit, will continue to rely on human workers for the foreseeable future.

5 See, e. g., Deepa Das Acevedo, *Regulating Employment Relationships in the Sharing Economy*, 20 EMP. RTS. & EMP. POL’Y J. 1 (2016); Benjamin Means & Joseph Seiner, *Navigating the Uber Economy*, 49 U.C. DAVIS L. REV. 1511, 1513–16 (2016); Brishen Rogers, *Employment Rights in the Platform Economy: Getting Back to Basics*, 10 HARV. L. & POL’Y REV. 480, 484–96 (2016); NAT’L EMP’T LAW PROJECT, *Policy Brief: The On-Demand Economy & Anti-Discrimination Protections* (June 2017), available at <http://www.nelp.org/content/uploads/On-Demand-Anti-Discrimination-Protections.pdf>.

6 See *infra* notes 25–29.

advent of the sharing economy introduced a new level of ambiguity into the classification and treatment of workers. Part I.A. outlines the typical position adopted by sharing economy businesses on the classification of their workers. Part I.B reviews the active litigation over worker status in the sharing economy, and identifies the common theme running through the parties' positions. Finally, Part I.C offers some initial observations regarding the current status of worker classification for platform businesses.

A Worker Classification Under Current Law

As a formal matter, each legal regime in the United States that has utilized the employee/independent contractor classification scheme has implemented its own test.⁷ That is, classification of workers for one purpose under the law (e.g. federal income tax) has not generally been dispositive for other legal purposes (e.g. labor law). But this formal statement of independence across fields disguises the operational realities of classification practice on the ground. On balance, courts and government agencies across a variety of fields turn to a common multi-factor test in determining whether a worker is an employee or an independent contractor.⁸ Thus, while the legal system is not bound to a universal standard across all fields, in practice the basic structure of the rules has generally converged.⁹ That said, tests do vary, and in some contexts there may be a presumption in favor of employee status. For example, the California Labor

⁷ See, e.g., *Berwick v. Uber Techs, Inc.*, No. 11–46,739 EK at 6–17 (Cal. Dep't of Labor June 3, 2015), available at <http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1988&context=historical> (describing process for determining worker status under California Labor law); *Sebago v. Bos. Cab Dispatch, Inc.*, 471 Mass. 321, 327–37 (2015) (outlining and applying Massachusetts law distinguishing independent contractors and employees). Variations on employee independent contractor tests outside the tax arena include the common law agency test, the economic realities test, and the “ABA test” applied by states. See, e.g., Robert L. Redfearn III, *Sharing Economy Misclassification: Employees and Independent Contractors in Transportation Network Companies*, 31 BERKELEY TECH. L. J. 1023 (2016); Rogers, *supra* note 5, at 487 n.48.

⁸ See, e.g., Redfearn III, *supra* note 7 (discussing multi-factor tests applied outside of tax); Rogers, *supra* note 5; Oei & Ring, *Can Sharing Be Taxed?*, *supra* note 1.

⁹ See, e.g., Means & Seiner, *supra* note 5, at 1527–31 (discussing the similarities between test under the federal Fair Labor Standards Act and the California labor law regarding for classifying workers).

Law, creates a rebuttable presumption that a worker is an employee.¹⁰ More broadly, the California Supreme Court has concluded that under the state's labor law multi-factor test for determining worker status as employee or independent contractor,

the “control-of-work-details” test for determining whether a person rendering service to another is an “employee” or an excluded “independent contractor” must be applied with deference to the purposes of the protective legislation. The nature of the work, and the overall arrangement between the parties, must be examined to determine whether they come within the “history and fundamental purposes” of the statute.¹¹

Given the degree to which the weighing of factors can be an imprecise task, the net results can be somewhat unpredictable. If some regime includes a presumption or policy tilt in the analysis (when other regimes do not), further variability in worker classification conclusions across regimes is likely.

For tax purposes, the Internal Revenue Service (“IRS”) has developed a 20-factor test to distinguish independent contractors from employees, which includes a mix of behavioral, financial, and relational factors.¹² Courts similarly

10 See DEP'T OF INDUS. RELATIONS LABOR COMM'R'S OFFICE, STATE OF CALI., *Independent Contractor Versus Employee*, available at https://www.dir.ca.gov/dlse/faq_independentcontractor.htm (last visited Sept. 6, 2018) (discussing California Labor Code Section 3357).

11 S.G. Borello & Sons, Inc. v. Dep't of Indus. Relations, 48 Cal. 3d 341, 353–54 (1989) (en banc).

12 See, e.g., INTERNAL REVENUE SERV., *Independent Contractor Defined*, (Apr. 24, 2018), available at <https://www.irs.gov/businesses/small-businesses-self-employed/independent-contractor-defined>. The factors (listed in Rev. Rul. 87–41, 1987–1 C.B. 296) include: (1) whether the person for whom the services are performed has the right to require compliance with that person's instructions; (2) whether there is worker training; (3) whether the worker's services are integrated into business operations; (4) whether the “[s]ervices must be rendered personally”; (5) whether the person for whom the services are performed hires assistants; (6) whether there is a continuing relationship; (7) whether set hours are established; (8) whether full-time work is required; whether the work must be done on the employer's premises; (9) whether the work must be performed in a particular sequence; (10) whether the worker must submit regular reports; (11) whether the worker is paid by the hour, week or month; (12) whether the person for whom the services are performed “furnish[es] significant tools, materials or equipment”; (13) whether the worker invests in facilities used in performance of services that are not furnished by the employer (indicating independent contractor); (14) whether the work can realize a profit or loss; (15) whether the worker works for more than one firm at the same time; (16) whether the workers makes her services available to the general public; (17) whether there is a right to discharge the worker; and (18) whether the worker can terminate the relationship at any time without incurring liability (indicating employee). See Oei & Ring, *Can Sharing Be Taxed?*, *supra* note 1, at 1020.

have drawn on these factors in their worker-classification efforts.¹³ The multi-factor test in taxation does not incorporate a presumption or preference for a particular classification. Rather, the expectation is that the classification will be the result of direct application of the multiple factors, though in a fact-intensive and messy way. Overall, under the tax law, a worker tends to be classified as an independent contractor if the person for whom the work is being performed has the right to control or direct only the result of the work, and not the details of how it is accomplished.¹⁴

B Treatment by Sharing Businesses

Against this backdrop of law delineating between employees and independent contractors, most sharing-economy platforms have adopted the position that their gig workers (those that provide the underlying services of the business model such as drivers for Uber, or services providers for TaskRabbit) are independent contractors for all purposes, including tax, labor, and tort law.¹⁵ Thus, for example, on its website, Lyft states in its terms and conditions:

Relationship with Lyft

As a Driver on the Lyft Platform, you acknowledge and agree that you and Lyft are in a direct business relationship, and the relationship between the parties under this Agreement is *solely that of independent contracting parties*. You and Lyft expressly agree that (1) this is not an employment agreement and does not create an employment relationship between you and Lyft; and (2) no joint venture, franchisor-franchisee, partnership, or agency relationship is intended or created by this Agreement. You have no authority to bind Lyft, and you undertake not to hold yourself out as an employee, agent or authorized representative of Lyft.

Lyft does not, and shall not be deemed to, direct or control you generally or in your performance under this Agreement specifically, including in connection with your provision of Services, your acts or omissions, or your operation and maintenance of your vehicle. You retain the sole right to determine when, where, and for how long you will utilize the Lyft Platform. You retain the option to accept or to decline or ignore a Rider's request for

13 See, e.g., *Schranz v. Commissioner*, 102 T.C.M. (CCH) 233 (2011); *Levine v. Commissioner*, T.C.M. (RIA) 2005-86 (2005); Rev. Rul. 87-41, 1987-1 C.B. 296.

14 See Oei & Ring, *Can Sharing Be Taxed?*, *supra* note 1, at 1020-21; See, e.g., INTERNAL REVENUE SERV., *supra* note 12; *Schranz v. Comm'r*, 102 T.C.M. (CCH) 233 (2011); *Levine v. Comm'r*, T.C.M. (RIA) 2005-86 (2005); Rev. Rul. 87-41, 1987-1 C.B. 296.

15 There are some exceptions. For example, the platform "Hello Alfred" (whose name is a play on the idea of a modern butler) which provides clients with a worker who will perform a wide variety of tasks in and out of the home uses only full and part-time W-2 employees. HELLO ALFRED, available at <https://www.helloalfred.com/alfreds> (last visited Sept. 6, 2018).

Services via the Lyft Platform, or to cancel an accepted request for Services via the Lyft Platform, subject to Lyft's then-current cancellation policies. With the exception of any signage required by law or permit/license rules or requirements, *Lyft shall have no right to require you to: (a) display Lyft's names, logos or colors on your vehicle(s); or (b) wear a uniform or any other clothing displaying Lyft's names, logos or colors. You acknowledge and agree that you have complete discretion to provide Services or otherwise engage in other business or employment activities.*¹⁶

In this provision, Lyft both asserts that drivers are not employees and highlights the various features of their arrangement that, under a multifactor test for worker status, would point towards independent contractor status.¹⁷ Uber includes comparable terms in its “Software Sublicense and Online Agreement” to which drivers must agree, providing in part:

This Agreement is between two co-equal, independent business enterprises that are separately owned and operated. *The Parties intend this Agreement to create the relationship of principal and independent contractor and not that of employer and employee. The Parties are not employees, agents, joint venturers or partners of each other for any purpose. As an independent contractor, you recognize that you are not entitled to unemployment benefits following termination of the Parties' relationship.*¹⁸

TaskRabbit also explicitly asserts in its Terms of Service that “taskers are independent contractors and not employees of the company.” Moreover, TaskRabbit, too, includes additional language directed at the worker classification tests, stating: “Users hereby acknowledge that company does not supervise, direct, control or monitor a tasker's work and is not responsible for the work performed or the tasks in any manner.”¹⁹ These platform positions on worker classification are not new, but reflect their stance from the outset, and have been manifest in their decisions on tax reporting, all of which have been consist with

¹⁶ LYFT, Terms of Service 19, (last updated Sept. 6, 2018), available at <https://www.lyft.com/terms> (emphasis added).

¹⁷ See also LYFT, *Tax information for U.S. drivers*, (“Drivers and riders are users of the platform and **aren't employees** of the company. As members of the community platform, drivers and riders aren't entitled to benefits, worker's compensation, or unemployment insurance.”), available at <https://help.lyft.com/hc/en-us/articles/213582038-2016-tax-info-for-drivers-classified> (last visited Sept. 6, 2018) (emphasis in original).

¹⁸ See *McGillis v. Dep't of Econ. Opportunity*, 210 So. 3d 220 (Fla. Dist. Ct. App. 2017), available at <http://www.3dca.flcourts.org/Opinions/3D15-2758.pdf> (quoting the Uber Software Sublicense and Online Agreement) (emphasis added).

¹⁹ TASKRABBIT, TaskRabbit Terms of Service 1, (last updated May 24, 2018), available at <https://www.taskrabbit.com/terms>.

an independent-contractor relationship, not one of employer and employee.²⁰ The unified stance of these major sharing economy platforms on worker status has met with some resistance both from gig workers and from regulators, who have pursued litigation and regulatory/legislative reform possibilities. As discussed more extensively in Part III, Uber drivers have litigated under federal and state law on worker misclassification, and related labor law and state wage law violations.²¹ Additionally, state and local governments have contemplated and,

20 See, e.g., Oei & Ring, *Can Sharing Be Taxed?*, *supra* note 1, at 1034–35. Despite their uniformity in reporting the gig workers as independent contractors, these platforms have varied in the kind of tax reporting they have undertaken within the independent contract frame. As we have detailed elsewhere, in 2014 Lyft, Uber, and Sidecar (another ridehailing platform then in existence) determined they would issue a Form 1099-K (a third-party reporting form) only for drivers with more than 200 rides and more than \$20,000 in payments during the year. These thresholds for reporting were based on the platforms conclusion that they were “third party settlement organizations” under tax law and thus not obligated to report on payments made to workers until those thresholds were crossed. In early 2015, Uber shifted tax-reporting positions. It still maintained drivers were independent contractors but concluded that Uber would issue a Form 1099-K to all drivers regardless of number of rides or amounts earned. The rationale for this shift was not explained. *Id.*

21 See, e.g., David Stretifeld, *Uber Drivers Win Preliminary Class-Action Status in Labor Case*, N. Y. TIMES (July 12, 2017), available at <https://www.nytimes.com/2017/07/12/business/uber-drivers-class-action.html?mcubz=1> (reporting drivers sued Uber in North Carolina arguing misclassification as independent contractors under federal labor law). In June 2017, a New York State administrative labor law judge ruled that three workers (and others similarly situated drivers) were employees for purposes of unemployment. See, e.g., Josefa Velasequez, *Administrative Law Judge Says Uber Drivers Are Employees, Not Contractors*, N.Y. L. J., (June 14, 2017 06:05 PM), available at <http://www.newyorklawjournal.com/id=1202789899357/Administrative-Law-Judge-Says-Uber-Drivers-Are-Employees-Not-Contractors>. Lawsuits are underway in other courts, including in California and Massachusetts: See, e.g., Order Denying Plaintiffs Motion for Preliminary Approval, *O'Connor v. Uber Techs., Inc.*, No. 13-cv-03826-EMC, 2016 WL 4,400,737 (N.D. Cal. Aug. 18, 2016) and *Yucesoy v. Uber Techs., Inc.*, No. 15-cv-00262-EMC, 2016 WL 493,189 (N.D. Cal. Feb. 9, 2016), available at <https://assets.documentcloud.org/documents/3031645/Uber-Settlement-Denied.pdf> (consolidated cases). For continuing docket information, see *O'Connor*, No. 13-cv-03826-EMC, 2016 WL 4,400,737, available at <https://dockets.justia.com/docket/california/candce/4:2013cv03826/269290>. In June 2017, drivers sued former Uber CEO (and current chairman) Travis Kalanick, for worker misclassification claims. *James v. Kalanick*, No. BC666055 (Super. Ct. of CA, L. A. Cty. filed June 22, 2017). Litigation on the workers classification question has not be limited to the United States. See, e.g., Dara Kerr, *U.K. Court Rules Uber Drivers are Employees, Not Contractors, Tech Industry*, CNET (Oct. 28, 2016 12:11 PM), available at <https://www.cnet.com/news/uber-uk-court-ruling-drivers-employees-not-contractors/>. Lyft, too, has been the subject to driver litigation. In March 2017, Lyft agreed to pay a total of \$27 million to settle a class action brought by 200,000 current and former drivers who challenged their classification by Lyft as independent contractors. Dana Kerr, *Lyft Paying \$27 M to Settle Driver Classification Suit, Tech Industry*, CNET (Mar. 17, 2017 4:14 PM), available at

in some cases, pursued legal changes in response to the current gig-worker classification practices. Some government responses have sought to reaffirm the independent contractor classification,²² and others to cabin it.²³

C Initial Observations

What can we take away from this quick survey of the U.S. landscape of gig worker classification at present? First, on balance, platforms have determined that classifying workers as independent contractors provides the best results overall for the platforms, across the range of legal contexts in which such classification dictates legal benefits and burdens. Second, workers have not uniformly accepted this classification. In some cases, they have challenged their platform in court, although the net outcome of these legal contests is ongoing at both a federal and state level across the country. It

<https://www.cnet.com/news/lyft-pays-27m-settles-driver-classification-suit-class-action-california/>. Under the settlement, drivers would continue to be classified as independent contractors. *Cotter v. Lyft*, No. 13-cv-04065-VC, 2017 WL 1,033,527 (N.D. Cali. Mar. 16, 2017) (Order Granting Final Approval of Settlement Agreement).

22 See, e.g., The New Economy Works to Guarantee Independence and Growth (NEW GIG) Act of 2017, S. 1549, 115th Cong. (2017), available at <https://www.congress.gov/bill/115th-congress/senate-bill/1549/text>. This legislation was proposed July 13, 2017 by Senate Finance Committee member John Thune, (R-S.D.). John Thune U.S. Senator for North Dakota, *Thune Introduces Bill to Add Certainty to Worker Classification Rules*, *Recent Press Releases* (July 13, 2017), available at <https://www.thune.senate.gov/public/index.cfm/2017/7/thune-introduces-bill-to-add-certainty-to-worker-classification-rules>; see also “To establish requirements for participants in the peer-to-peer economy to be considered independent contractors and not employees for purposes of several employment related statutes,” H.R. Res. 5918, 114th Cong. (as reported by H. Comm. On Education and the Workforce, July 18, 2016), available at <https://www.congress.gov/bill/114th-congress/house-bill/5918>.

23 For example, in Fall 2015, the city of Seattle, Washington, approved legislation that would require network transportation companies (including Uber and Lyft) to bargain with drivers if a majority want such representation (i.e. drivers can effectively unionize). See Seattle, Wash., Ordinance 124,968 (Dec. 23, 2015), <https://www.documentcloud.org/documents/2647488-LEG-Collective-Bargaining-ORD-D6-Passed.html>; Daniel Beekman, *Seattle First U.S. City to Give Uber, Other Drivers Power to Unionize*, *Local Politics*, SEATTLE TIMES (Dec. 14, 2015 at 1:09 PM), available at <http://www.seattletimes.com/seattle-news/politics/unions-for-taxi-uber-drivers-seattle-council-votes-today/>. In August 2017, a federal judge dismissed a challenge to this legislation. Order Granting Defendant’s Motion to Dismiss, 274 F. Supp. 3d 1140 (W.D. Wash. 2017), available at <http://www.chamberlitigation.com/sites/default/files/cases/files/17171717/OrderGrantingMotiontoDismiss-Chamberv.Seattle%28U.S.DistrictCourt-WAWD%29.pdf>.

may take some time for a consensus or predictable pattern to emerge from the series of litigations (and in some cases settlements). These worker challenges to classification status primarily arise through labor law and related claims, rather than in tax. Third, governments have engaged gradually on the classification front, and, for the most part, have not significantly altered the underlying legal framework. Certainly, the decision to do so remains a viable option.

II Silos: Taxation and the Sharing Economy

Not surprisingly, legal experts typically operate in what can be described as “legal silos” where they possess significant proficiency in one field of law but generally have only a more superficial understanding of other legal regimes. Even a single field, such as tax, can be so detailed and complicated (in terms of relevant statutes, regulations, cases, transactions and agencies) that expertise really can be claimed only for a subset of the field. While perhaps an inevitable result of the increasing complexity of law and the volume of material to be absorbed and processed, legal silos create a risk that experts may advocate certain legal outcomes without an awareness of the repercussions in other legal contexts. One prominent example from the sharing economy concerns the classification of workers as employees or independent contractors. As discussed below, the general tenor of the debate (at least in the United States) presumes the desirability of employee status, seemingly without understanding of the powerful and complicated tax effects of that outcome. Part II.A. reviews the presumptions in favor of employee status, and Part II.B. outlines the complicated tax perspective on worker classification. Together, they reveal the space in which misunderstandings and assumptions can arise.

A Assumptions about the Desirability of Employee Status

A relatively common feature of the U.S. employee-independent contractor debate in the sharing economy, particularly expressed through ongoing litigation, is the expectation that workers likely should and/or want to be classified as employees and not independent contractors. These views emerge most strongly in contexts in which sharing-economy workers are seeking labor protections

afforded exclusively to individuals classified as employees.²⁴ But what precisely are the labor protection benefits of being classified as an employee?

At an individual worker level, classification as an employee can bring a host of benefits (federal and state) including: minimum wage and overtime pay protections,²⁵ guarantees of unpaid leave,²⁶ health and safety regulations,²⁷ and various antidiscrimination protections.²⁸ On a group basis, employee classification allows workers to collectively bargain under the protections of the National Labor Relations Act.²⁹ Given this extensive array of work-related benefits and protections available to those classified as “employees” under each applicable regime, the efforts by worker advocates to ensure employee classification is unsurprising. But as explored further below, although workers have much to gain from being employees under labor and employment provisions, that same classification may be problematic for them from a tax perspective.

To be clear, there is certainly evidence that not all platform workers would share the view that employee status is preferable, even among those who perform primarily services (e.g. TaskRabbit, Uber, Lyft), as opposed to provide assets (AirBnb). In a study of online conversations of Uber and Lyft drivers, my co-author and I observed many instances in which drivers expressed a preference for their current status as independent contractors. In particular, they focused on the benefits of flexibility, independence, and of “not having a boss.”³⁰ Additionally, drivers expressed concern that if they were to be newly classified as employees, the IRS would audit them for unpaid back taxes, including employment taxes.

24 See, e.g., Benjamin Means & Joseph Seiner, *Navigating the Uber Economy*, 49 U.C. DAVIS L. REV. 1511 (2016) (noting litigation against Uber and Lyft by former drivers seeking classification as employees).

25 See, e.g., 29 U.S.C. § 206 (Fair Labor Standards Act); Department of Labor, Wage and Hour Division, *Minimum Wage Laws in the States* (July 1, 2018) (mapping minimum wages across the 50 states and comparing to federal minimum), available at <https://www.dol.gov/whd/minwageamerica.htm#stateDetails>.

26 29 U.S.C. § 2612 ch. 28 (Family Medical Leave Act).

27 29 U.S.C. § 651 ch. 15 (Occupational Health and Safety Act).

28 See, e.g., Title VII of the Civil Rights Act of 1964, P.L. No. 88–352, § 701, 78 Stat. 253 (1964), codified as 42 U.S.C. § 2000e; Age Discrimination in Employment Act of 1967, 29 U.S.C. ch. 14, § 621 et seq. (29 U.S.C. § 630); Americans with Disabilities Act of 1990, 42 U.S.C. ch. 126, § 12,101 et seq.

29 National Labor Relations Act, ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151–169 (2012)).

30 Oei & Ring, *The Tax Lives of Uber Drivers*, *supra* note 1, at 88 (reporting and assessing driver comments on their worker classification).

To the extent this expectation (that such workers would likely prefer employee status) is grounded in an analysis of worker benefits in one area of law (e. g. employment law), an extension beyond that area (either explicitly or implicitly) requires some appreciation of the classification effects in that new realm. As evidenced below in the Part II.B, that is not always an easy task. Certain features of employee classification for tax purposes are relatively salient and understood outside of the tax. But others may not be and may justify a more ambiguous conclusion about worker classification preferences.

B Tax Implications of Status as an Employee or Independent Contractor

Status as an employee or independent contractor directly effects taxation of workers in two very specific ways. First, the reporting and payment of employment taxes (social security and Medicare tax)³¹ and withholding of income tax turns on worker status. All workers are required to have the same total amount paid as employment taxes based on their wages. But a worker's status as employee or independent contractor determines who must do the reporting and the paying of taxes to the government.³² In the case of employees, both the social security tax³³ and the Medicare tax³⁴ are paid half by employees and half by the employer. However, the employer is responsible for collecting and transmitting all of the tax to the government. Thus, for employees, the reporting, withholding, and half of the payment burden are borne by the employer.³⁵

If instead a worker is an independent contractor, the same total amount of social security and Medicare taxes are due, but the worker pays both halves (i. e. 12.4% social security and 2.9% Medicare) and must handle the reporting and transmission of tax to the government. The worker, however, does get a deduction for the “employer” half of the social security and Medicare taxes.³⁶ As with

³¹ See I.R.C. §§ 3401–3402, 3501 (2012).

³² See Oei & Ring, *Can Sharing Be Taxed?*, *supra* note 1, at 1042 (reviewing treatment of employment taxes for employees and independent contractors).

³³ The social security tax rate is 6.2% each for employee and for employer, with a wage base capped at \$132,900 for 2019. I.R.C. § 1401(a) (2012).

³⁴ The employer and employee each pay the Medicare tax at a rate of 1.45%. *Id.* § 1401(b).

³⁵ Empirically, the question of whether the portion paid of wage taxes by the employer out of her own pocket is ultimately borne by the employer or effectively shifted to the employee, remains a subject of study and debate.

³⁶ Assuming prices adjusted in the market, it should not matter whether that half of the wage taxes are paid by the employer and deducted, or by the worker as independent contractor and

employees, independent contractors are responsible for the entirety of the income tax due, but now must ensure the payment of that tax to the government themselves. Given the absence of employer withholding, independent contractors generally are required to pay estimated taxes during the year (this mechanism seeks to guarantee that the full tax payments are actually made and that the taxpayer does not find herself with an enormous tax bill at year-end).³⁷ The net benefit of employee status, as regards income taxes, is release from the administrative and planning burden of reporting and paying of estimated taxes.

Second, the difference between employee and independent contractor status is particularly stark with regards to the ability to deduct business expenses — and for those workers who regularly incur substantial expenses (e. g. ridesharing drivers on platforms such as Uber and Lyft)³⁸—this difference is important. As independent contractors, such workers would be entitled to deduct their legitimate business costs against their driving and other income.³⁹ However, the tax picture for deductions looks distinctly different for any workers deemed to be employees of a platform. Prior to the 2017 tax reform (and resuming again in 2026), such employee-workers would in theory be able to deduct their ordinary and necessary expenses incurred, but in reality would

deducted. However, whether wages do fully adjust and how fast is an empirical question that remains in dispute.

37 See I.R.C. § 6654(a), (d) (2012); see also INTERNAL REVENUE SERV., PUB. NO. 505 at 24–32, WITHHOLDING AND ESTIMATED TAX (2017) (detailing circumstances under which estimated tax payments are required). Failure to meet estimated tax payment obligations brings its own penalties. See, e. g., § 6654.

38 Likely expenses include car maintenance, gas, and insurance.

39 I.R.C. § 162 (2012). Such taxpayers would encounter two constraints in reporting and securing these deductions: (1) distinguishing personal from business expenses, and (2) maintaining adequate documentation (e. g., miles driven, receipts).

Many drivers rely on personal vehicles in their ridesharing work (and the portion of expenses incurred in connection with their personal use of the vehicles would not be deductible). Evidence indicates that as of December 2014, 52% of Uber “partner-drivers” were part-time, with no previous driving experience, and driving fewer than 30 hours per week. BENENESON STRATEGY GRP., UBER: THE DRIVER ROADMAP (2015), available at https://newsroom.uber.com/wp-content/uploads/2015/01/BSG_Uber_Report.pdf (Uber commissioned study drawing on driver interviews). Moreover, drivers tend to use personal vehicles. See generally UBER, UBER VEHICLE REQUIREMENTS, BOSTON, available at <https://www.uber.com/drive/boston/vehicle-requirements/> (last visited Oct. 1, 2017); LYFT, VEHICLE REQUIREMENTS, available at <https://help.lyft.com/hc/en-us/articles/214219557-Vehicle-requirements> (last visited Oct. 1, 2017). Driving-related costs are generally allocated based on mileage. See INTERNAL REVENUE SERV., PUB. NO. 463 at 16–17, TRAVEL, ENTERTAINMENT, GIFT, AND CAR EXPENSES (2016); Oei & Ring, *Can Sharing Be Taxed?*, *supra* note 1, at 1010–11.

find the deduction limited.⁴⁰ These taxpayers/employees would follow the same initial steps of identifying and documenting business (as opposed to personal) expenses, but then would face an additional hurdle: in pre-2018 and post-2025 tax years, employees can only deduct business expenses to the extent they exceed 2% of the employee's adjusted gross income.⁴¹ As a practical matter, this limitation poses a significant barrier to many employees' ability to deduct these employment-related business expenses. Post-2017 and through 2025, the deduction situation for employee workers is even less attractive. The 2017 tax reform suspended the deductibility of employee business expenses entirely through 2025.⁴² During this window, no deduction for business expenses incurred by employees will be available regardless of the size of those deductions relative to the taxpayer's adjusted gross income.

Until December 2017, the "full" deduction for business expenses was the primary deduction-based advantage for independent contractors over employees.⁴³ However, the tax reform enacted in December 2017 added a new deduction available to independent contractors, but not employees. New section 199A grants independent contractors (along with partners and shareholders of an S corporation) a deduction of up to 20% of their qualified business income ("QBI").⁴⁴ For a taxpayer otherwise facing a top marginal rate of 37% in 2018, the 20% deduction would result in an effective rate on that income of 29.6%.⁴⁵ Although a number of restrictions can limit or even preclude access to the

40 I.R.C. § 67 (2017) (implementing a 2% floor on "miscellaneous itemized deductions").

41 Under the "2-percent floor rule," certain deductions (miscellaneous itemized deductions) to which an individual taxpayer is otherwise entitled, can be deducted only to the extent that in aggregate they exceed 2% of the taxpayer's adjusted gross income (AGI). *Id.* § 67. Broadly speaking, a taxpayer's AGI is his or her gross income minus certain expenses such as trade or business expenses (other than those incurred in the trade or business of being an employee). *Id.* § 62. For taxpayer's whose income exceeds a certain threshold (adjusted annually for inflation), deductions that survive the limitation in § 67, or are not subject to that limitation, may be subject to the phaseout rule in I.R.C. § 68. Under the phaseout rule, many of these surviving deductions will be phased out as the taxpayer's AGI exceeds the specified threshold and will be completely phased out at when AGI reaches an upper cap. *Id.* § 68.

42 *Id.* § 67(g).

43 See *infra* this section for discussion of the ability of employees to deduct comparable expenses incurred directly in the context of performing their sharing economy work.

44 I.R.C. § 199A (2012).

45 Consider the following simplified example: A taxpayer is subject to the top marginal rate of 37% on \$100 of income. If taxpayer then determines that this \$100 constitutes QBI under § 199A and that a full § 199A deduction of 20% is available based on that income, the taxpayer would be entitled to a deduction equal to \$20. Thus, this taxpayer would be taxed at 37% on \$80 income and would owe 29.6 in tax. The taxpayer's effective tax rate would be 29.6% (calculated as total tax paid of \$29.60 divided by total income \$100).

deduction, most of these constraints apply only for taxpayers with income above a specified threshold (\$157,500 for a single filer, and \$315,000 for a joint return).⁴⁶

It is likely that many sharing-economy workers find themselves with income below such thresholds and not subject to these restrictions, and thus able to secure the 20% deduction. This outcome enhances the upside of independent contractor classification at no cost to the business for (or through) which they are providing their services (e.g. Uber, Lyft, TaskRabbit). To the extent many platform businesses are seeking to classify large groups of workers as independent contractors (see Part III *infra*), the introduction of section 199A into the tax law adds an extra tool in their efforts to persuade, nudge, or push workers into that category. Whether this extra incentive will make a significant difference depends on a number of factors, including the plausibility of any claim that a worker is in fact an independent contractor. This is a subject we explore in other work,⁴⁷ but, for present purposes, we can observe that section 199A has the potential to increase efforts to claim independent contractor status for some workers, and thereby put additional pressure on various measures for locking-in that legal status.

C Mixed Effects of Taxation

Ultimately, in determining whether a worker would prefer to be treated as an employee or an independent contract for tax purposes, the question is how the worker would trade off the loss of tax deductions (either in part, pre-2017 and post-2025 due to the limitation on miscellaneous itemized deductions of employees, or in full during 2018–2025) with the benefit of reduced administrative and payment burdens (through not having to personally report, withhold, and submit the wage and income taxes, and pay the employer share of wage taxes). The answer to this question will likely vary by individual taxpayer and by sector. For example, some ridesharing drivers who have unrelated employment have sought to meet their obligations for quarterly reporting and taxpaying on rideshare income by increasing the withholding on their unrelated employee wages in

⁴⁶ I.R.C. 199A(e)(2) (adjusted for inflation). These taxable income thresholds are based on total income (not limited to the income from the qualified trade or business) without inclusion of the 20% deduction.

⁴⁷ Shu-Yi Oei & Diane Ring, *Tax Law's Workplace Shift*, BOSTON U. L. REV. (forthcoming 2019–2020).

another job.⁴⁸ Effectively, these drivers have rolled the administration, reporting and withholding obligations from their sharing work into their other job where these tasks are handled by their nonrideshare employer. Of course, these drivers still bear the financial burden⁴⁹ of paying the “employer” share of the wage taxes on the rideshare income by having to pay self-employment taxes with their Form 1040. For sharing economy workers with significant out-of-pocket business-related expenses, the ability to ensure full deductibility (as an independent contractor) might outweigh the costs of reporting and paying taxes, especially if they are otherwise employed (and able to shift the de facto administrative burden to their other employer).

However, other sharing-economy workers with few significant out-of-pocket costs (typically not drivers) may find the administrative and tax payment burdens far exceed any potential benefit from expense deductibility. This assessment of the tax deduction/administrative burden calculus may be especially true for those who lack employment outside the sharing economy through which they could indirectly arrange payment and reporting of tax on their ridesharing income.

The important take-away from the tax analysis is that worker classification affects taxation on multiple dimensions, and the net effect varies by industry and by individual worker characteristics. Just from a tax perspective, it is not clear that one specific worker classification would be universally (or predominantly) preferred by sharing economy workers. The detailed examination here of these divergent tax impacts from worker classification serves to emphasize how experts operating in distinct legal silos⁵⁰ might grasp the basic distinction between independent contractors and employees regarding tax compliance, but could easily have missed the significant “haircut”⁵¹ for deductible expenses incurred by workers classified as employees, or the introduction of an entirely new deduction (section 199A). However, the silo effect operates in both directions. Just as nontax experts may have missed or failed to appreciate certain tax outcomes, the tax community has demonstrated a limited appreciation of the importance of the worker classification debate outside of tax and how the debates across all fields may ultimately intersect. This example is further considered in Part IV.

⁴⁸ See Oei & Ring, *Tax Lives of Uber Drivers*, *supra* note 1.

⁴⁹ See *supra* note 36 for a discussion of the market adjustments for any shift in who formally owes the employer half of wage taxes.

⁵⁰ The effect of legal silos can be understood as a function of both expertise and the practical isolation of many legal fields from each other.

⁵¹ A trimming of something, in this case deductible expenses.

III First-Mover Effects in Sharing Economy Legal Debates

The relative newness of the sharing economy and its ability to occupy plausibly ambiguous regulatory gray zones in a number of fields has triggered much debate, both academic and legal. At issue is the appropriate treatment of businesses, activities and participants under current law, as well as the ideal legal treatment on a forward-looking basis.⁵² Various constituents have sought to shape this emerging legal debate through contract, rhetoric, litigation, local legislation, and federal legislation. In the process of doing so, most actors have been focused on a specific legal context (e. g. employment law, labor negotiations, or tax law). Whether intentional or not, these steps have the potential to provide significant first-mover⁵³ advantages to the successful parties.⁵⁴ In other work, my co-author and I have discussed the first-mover strategies of sharing-economy businesses seeking to avoid, at least for some period of time, regulation that might otherwise seem to apply to a business operating in a commercial sector (such as hotels or transportation). This essay identifies efforts by various parties to be the first to frame and/or solidify the classification of sharing economy workers as either employees or independent contractors through several available mechanisms. Although there is no expectation that any single litigation, settlement, local ordinance, or federal legislation would be the complete, definitive and final word on the debated classification issues in the sharing economy, early victories in any of these arenas provide first-mover advantages to the successful party. These efforts (and their potential rewards)

52 See, e. g., Oei & Ring, *Can Sharing Be Taxed?*, *supra* note 1.

53 The first mover concept plays a rich role in the analysis of firms and markets over the past half century. See, e. g., THOMAS C. SCHELLING, *STRATEGY OF CONFLICT* (1st ed. Harvard Univ. Press 1960); THOMAS C. SCHELLING, *STRATEGIES OF COMMITMENT AND OTHER ESSAYS*, (2007); M. B. Lieberman & D.B. Montgomery, *First-Mover Advantages*, 9 *STRATEGIC MGMT. J.* 41–58 (1988); M.B. Lieberman & D.B. Montgomery, *First-Mover (Dis)Advantages: Retrospective and Link with the Resource-Based View*, 19 *STRATEGIC MGMT. J.* 1111–25 (1998); E. Gal-Or, *First Mover and Second Mover Advantages*, 26 (No. 3) *INT’L ECON. REV.* 649–53 (1985); Michael Kopel & Clemens Löffler, *Commitment, First-Mover-, and Second-Mover Advantage*, 94 (2) *J. ECON.* 143–66 (2007).

54 Depending on the context and the actors, the primary focus and motivation may be to solve a specific problem, such as securing benefits for a client or providing immediate relief to workers seeking some recalibration in the balance of power with sharing economy platforms. However, it is not inconsistent with such first-line motives that the actors are effectively pursuing first-mover status with the potential to lock-in certain characterizations or interpretations of existing sharing economy relationships.

are neither surprising nor unusual, but in combination with legal silos, they pose a risk of law moving in directions not fully anticipated or intended by legislators, courts, or society. This Part explores four aspects of first-mover action in the sharing economy. Then Part IV considers the effects of legal silos and first-movers in tandem.

A Contracts, Labeling and Rhetoric

The platform businesses themselves have been leaders in using contract, labeling, and rhetoric to advance a vision of the platform-worker relationship as one of business intermediary and independent contractor. As detailed above in Part II.B, before the sharing economy attracted significant attention (from market participants or the legal system), the platform businesses themselves had already declared that sharing workers were independent contractors.⁵⁵ This step was powerful as it locked the parties into reporting and compliance conduct consistent with a classification that would then require litigation or legislation to change.⁵⁶ Effectively, it established the baseline against which challengers would then have to react.

Beyond using contract to stake out a classification, platforms also have relied on developing a narrative of their business model that supported the independent contractor claim. Professor Shu-Yi Oei offers a thoughtful analysis of this powerful and strategic use of language, descriptors and narrative as a resilient first-mover technique in her essay, *The Trouble with Gig Talk: Choice of Narrative and the Worker Classification Fights*.⁵⁷ In particular, she observes that the platforms initially framed the business model as a “sharing economy”—a framing which emphasized a non-commercial and non-professional vision of the services provided and highlighted the almost “neighborly” sharing underpinning the transactions. But the platforms then shifted to a “gig” characterization of the work. Although the sharing message had been useful initially in trying to justify noncompliance with business regulations (e. g. hotel, transportation), the

⁵⁵ See *supra* Part II.B.

⁵⁶ Of course, the parties could change the treatment by contract, and accordingly their conduct. However, given that the sharing platforms have evidenced a strong preference for the current contractual classification of independent contractor, and they present the terms to the workers, change is unlikely to come without outside intervention.

⁵⁷ Oei, *The Trouble with Gig Talk*, *supra* note 1.

more pressing concern for the platforms became the classification of workers across a variety of legal regimes. The shift to characterizing the work performed by platform workers as gig work resonated with the independent contractor classification. Professor Oei identifies⁵⁸ multiple ways in which the platforms promote this vision, including: (1) Uber's and Lyft's urging drivers to "be your own boss;"⁵⁹ and (2) TaskRabbit's suggestion that the platform enables workers to develop their own business.⁶⁰ Professor Oei then builds on these examples to explore the impact that such rhetoric can have in shaping discourse and debate, and tilting the existing playing field toward the independent contractor classification urged by sharing platforms. In combination with their contracts, the rhetoric provides platforms with a strong position from which to defend and promote their classification practices.

Following this true first-mover action, by which the platforms established the backdrop against which all other classification efforts respond, all relevant actors in the sharing economy (platform businesses, workers, and legislators) have pursued multiple mechanisms by which to cement their preferred worker classification for the sharing economy.

B Worker Litigation

Although the platform businesses have been the true first-movers, making significant decisions at the outset, other relevant parties have sought to create their own version of first-mover effects by staking out an early ruling on worker classification in some legal venue. For example, platform workers have instituted a variety of lawsuits challenging their treatment under state and federal labor law and argued that they should be classified as employees and thus entitled to all of the protections afforded that status. Examples include several

⁵⁸ *Id.* at 22–23.

⁵⁹ UBER, *Be Your Own Boss: Drive on the Uber Platform*, UBER NEWSROOM (Sept. 29, 2014), available at <https://newsroom.uber.com/us-Louisiana's/be-your-own-boss-drive-on-the-uber-platform/> ("Partners who drive on the Uber platform love it because they make higher earnings than traditional cab drivers and have the flexibility to set their own hours."). LYFT, *Drive toward what matters to you*, WHY LYFT available at <https://www.lyft.com/driver/why-drive-with-lyft> (last visited July 31, 2018) ("Be your own boss").

⁶⁰ TASKRABBIT, *Why Should I be a Tasker?*, TASKRABBIT SUPPORT, available at <https://support.taskrabbit.com/hc/en-us/articles/204411060-Why-should-I-be-a-Tasker-> (last updated July 30, 2018) ("TaskRabbit is a platform that enables individuals to make a meaningful income by building their own business.").

cases against Uber in California,⁶¹ a case against Uber in Massachusetts,⁶² a case against Lyft in California,⁶³ a case against Grubhub in California,⁶⁴ a case against DoorDash in California,⁶⁵ and rulings by state employment tribunals regarding Uber drivers.⁶⁶ Consistent with this abbreviated list, approximately one-third of the classification challenges during the period 2012–2016 were against Uber.⁶⁷

In a recent paper, Professor Dubal argues that the most concerted efforts to address the treatment of platform workers have been through these legal challenges to classification status. She reports that workers and their advocates embraced this strategy and affirmatively sought to freeze other efforts to address platform worker conditions in order to allow their litigation to play out in the courts.⁶⁸ Professor Dubal cites as evidence two specific examples: (1) the decision by a California state legislator not to pursue a bill allowing collective bargaining for gig workers because the labor community asked the legislator to wait until the *O'Connor* class action went to trial⁶⁹; and (2) platform drivers'

61 See, e.g., *O'Connor v. Uber Techs., Inc.*, No. 13-cv-03826-EMC, 2016 WL 4,400,737 (N.D. Cal. Aug. 18, 2016) and *Yucesoy v. Uber Techs., Inc.*, No. 15-cv-00262-EMC, 2016 WL 493,189 (N.D. Cal. Feb. 9, 2016) (consolidated cases); *Mohamed v. Uber Techs., Inc.*, 848 F.3d 1201 (9th Cir. 2016) and *Gillette v. Uber Techs., Inc.*, No. 3:14-cv-05241-EMC, 2016 WL 7,470,557 (9th Cir. 2016) (consolidated cases).

62 See *Lavitman v. Uber Techs., Inc.*, No. SUCV201204490, 2015 WL 728,187 (Mass. Super. Jan. 26, 2015).

63 *Cotter v. Lyft, Inc.*, No. 17–15,648, 2017 WL 4,535,961 (9th Cir. Sept. 15, 2017).

64 *Lawson v. Grubhub, Inc.*, 302F. Supp. 3d 1071 (N.D. Cal. 2018).

65 Keith Yandell, *An Update on Dasher Class Action*, DOORDASH (Apr. 10, 2017), available at <https://blog.doordash.com/an-update-on-dasher-class-action-6990643be500> (announcing DoorDash's settlement of a lawsuit regarding classification of workers for \$3.5 million).

66 See, e.g., *Taxi Workers Alliance v. Uber Techs., Inc.*, No. 016–23,858 (N.Y. Unempl. Ins. App. Bd., ALJ Burrows 2017), available at <http://www.almcms.com/contrib/content/uploads/sites/292/2017/06/ALJ-Decision-Redacted.pdf> (three Uber drivers found by New York State unemployment insurance appeal board to be employees for purposes of state unemployment benefits); *McGillis v. Dep't of Econ. Opportunity*, 210 So. 3d 220 (Fla. Dist. Ct. App. 2017), available at <http://www.3dca.flcourts.org/Opinions/3D15-2758.pdf> (affirming non-employee status of Uber drivers).

67 V.B. Dubal, *Winning the Battle, Losing the War?: Assessing the Impact of Misclassification Litigation on Workers in the Gig Economy*, 2017 WIS. L. REV. 740, 757 (2017) (citing her own unpublished article, Ruth Collier, V.B. Dubal and Christopher Carter, *Disrupting Regulation and Regulating Disruption: The Politics of Uber in the United States*, 16 (4) PERSP. ON POL. 919 (2018), available at <https://doi.org/10.1017/S1537592718001093>).

68 *Id.* at 744–45.

69 *Id.* (citing specific examples of California Assemblywoman Lorena Gonzalez “not mov[ing] forward with [a] gig workers bill ... because the labor community asked them to hold off until *O'Connor* went to trial”).

decision to “hold off on their organization and affiliation with a union” until the *O'Connor* case was decided.⁷⁰ However, despite these efforts to address worker status through litigation, the results have been limited. Some individual workers have been successful in labor tribunal decisions on their status (securing classification as an employee with the corresponding benefits).⁷¹ But these labor tribunal decisions are not binding for businesses regarding other workers—thus they do not contribute to a dramatic overhaul of worker classification in the sharing economy. Additionally, a number of Uber cases have been settled by the platform, thereby ensuring no adverse ruling and no precedential value.⁷² Other major class actions have been subject to challenges. In September 2017, the 9th Circuit heard oral arguments in the consolidated appeal of four Uber class actions⁷³ in which Uber argued that the clauses signed by drivers to surrender their rights to pursue class actions and to agree to arbitration were legally enforceable.⁷⁴ Shortly thereafter, the 9th Circuit issued an order⁷⁵ stating that the cases are withdrawn from submission pending resolution of three other cases⁷⁶ (not involving the sharing economy) before the Supreme Court on the same question regarding the validity of class waivers in a worker-arbitration agreement. The Supreme Court then upheld the waivers in May 2018,⁷⁷ a decision which will limit some workers’ ability to challenge their classification in court.

70 *Id.*

71 See, e.g., Ruth Berins Collier, V.B. Dubal, & Christopher Carter, *Labor Platforms and Gig Work: The Failure to Regulate* 21–22 (Inst. for Res. on Lab. & Emp., Working Paper No. 106–17, 2017), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3039742.

72 *Id.* at 22.

73 *O'Connor v. Uber Techs., Inc.*, No. 13-cv-03826-EMC, 2016 WL 4,400,737 (N.D. Cal. Aug. 18, 2016) and *Yucesoy v. Uber Techs., Inc.*, No. 15-cv-00262-EMC, 2016 WL 493,189 (N.D. Cal. Feb. 9, 2016) (consolidated cases); *Mohamed v. Uber Techs., Inc.*, 848 F.3d 1201 (9th Cir. 2016); *Rio v. Uber Techs., Inc.*, No. 15-CV-03667-EMC, 2015 WL 9,025,147 (N.D. Cal. Dec. 16, 2015), *appeal filed*, No. 15–17,475 (9th Cir. 2015).

74 Order for Oral Argument, *O'Connor*, 2016 WL 4,400,737 and *Yucesoy*, 2016 WL 493,189 (Aug. 11, 2017), available at [http://cdn.ca9.uscourts.gov/datastore/general/2017/08/17/14-16078Hearing notice 8.11.pdf](http://cdn.ca9.uscourts.gov/datastore/general/2017/08/17/14-16078Hearing%20notice%208.11.pdf); see also Daniel Wiessner, *9th Circuit may wait for SCOTUS ruling on waivers before deciding Uber appeals*, REUTERS, Sept. 21, 2017, available at <https://www.reuters.com/article/employment-uber/9th-circuit-may-wait-for-scotus-ruling-on-waivers-before-deciding-uber-appeals-idUSL2N1M229Z>.

75 9th Circuit Order, *O'Connor*, 2016 WL 4,400,737 and *Yucesoy*, 2016 WL 493,189 (Sept. 22, 2017), available at <http://cdn.ca9.uscourts.gov/datastore/general/2017/09/22/14-160789.22order.pdf>.

76 *NLRB v. Murphy Oil USA, Inc.*, No. 16–307 (U.S. May 21, 2018); *Epic Sys. Corp. v. Lewis*, No. 16–285 (U.S. May 21, 2018); and *Ernst & Young LLP v. Morris*, No. 16–300 (May 21, 2018).

77 *Epic Sys. Corp. v. Lewis*, 138 S.Ct. 1612 (2018).

In 2018, a series of decisions across states and tribunals continues to present a mixed picture on classification. A California court ruled in February 2018 that a Grubhub delivery driver was an independent contractor under state law.⁷⁸ Similarly, in April 2018, a federal court in Pennsylvania ruled on summary judgment that an Uber driver was an independent contractor and not an employee under FLSA.⁷⁹ But in July 2018, the New York State Unemployment Insurance Appeal Board concluded in a final determination that three Uber drivers were employees for purposes of state unemployment insurance benefits (rendering them entitled to benefits).⁸⁰ Finally, in a ruling with potentially broad implications in California, the California Supreme Court adopted a new test for worker classification that is expected to make it more difficult for businesses to classify workers as independent contractors under state law.⁸¹

Thus, to date, a definitive trajectory has not yet emerged from the litigation path taken by platform workers to challenge their classification as independent drivers. If these cases ultimately reach a substantive conclusion on worker classification, the determination of status could have a far reach—both in terms of number of workers covered and precedential effect. However, even a determination that these drivers constitute employees under the relevant law could have a more limited effect than the parties anticipate. Based on an analysis of earlier non-gig lawsuits challenging worker classification, Professor Dubal argues that the longer-term benefits to workers prevailing in classification litigation have been limited due to: (1) the political and economic power of the employers, and (2) the parties' redrafting of workers' contracts.⁸²

78 *Lawson v. Grubhub Holdings, Inc., and Grubhub Inc.*, No. 3–15-cv-05128-JSC, Opinion (Feb. 8, 2018).

79 *Razak v. Uber Technologies, Inc.* No. 16–573 (E.D. PA, Apt. 2018) (Memorandum re: Defendants Motion for Summary Judgment).

80 State of New York Unemployment Insurance Appeal Board, Decision in the Matter of Uber Technologies, Inc. Appeal Board No. 596,722, A.L.J. Case No. 016–234,949, July 12, 2018), available at <https://www.documentcloud.org/documents/4613843-Uber-AB-Decision-Redacted.html>.

81 *Dynamex Operations West, Inc. v. Superior Court of Los Angeles County*, Op. No. S222732 (Apr. 30, 2018), available at <https://scocal.stanford.edu/opinion/dynamex-operations-est-inc-v-superior-court-34584>. See, e.g., Heather Field, *Tax Implications of the Recent Dynamex Ruling on Worker Classification*, Surly Subgroup (May 3, 2018), available at <https://surlysubgroup.com/2018/05/03/tax-implications-of-the-recent-dynamex-worker-classification-ruling/>.

82 See Dubal, *supra* note 67, at 746–748.

C State and Local Legislative Reform

The obvious path for more universal impact on worker classification remains at the legislative level. The two major state efforts to secure some *limited* benefits for sharing economy workers emerged in California and New York but have yet to produce results. The California legislation,⁸³ referenced above in Part III.B, sought to provide certain platform workers, who are treated as independent contractors by the platform, with the right to collectively bargain. But as noted earlier, this legislation was withdrawn⁸⁴ apparently due to a strategic decision to let related litigation take priority,⁸⁵ and due to concern over potential anti-trust challenges.⁸⁶ The bill's sponsor had hoped to have a revised bill passed before the end of 2018.⁸⁷

The New York legislation, which was reportedly under consideration in early 2017 and is now on hold, would establish guidelines for a portable benefits plan that platform businesses could offer their workers. Under the plan, businesses would contribute to a plan for each worker and the worker could use the funds to purchase health insurance and other benefits. The trade-off, however, appears to be that participating workers would be considered independent contractors, not employees, under state law. One draft version of the legislation was circulated (perhaps not surprisingly) by platform business Handy (a home services platform), given that it offered a compromise that did not sacrifice classification of workers as independent contractors.⁸⁸ More generally, the bill was supported⁸⁹ by Tech:NYC, a tech lobby organization “represent[ing] New York’s

83 Hosting Platforms: Independent Contractors, AB-1727, Cali. Legislature, 2015–2016 Reg. Sess. (Cali 2016), available at https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201520160AB1727

84 *Id.*

85 See *supra* Part III.B.

86 See, e.g., Kate Conger, *California bill to give gig workers organizing rights stalls over antitrust concerns*, TECHCRUNCH (Apr. 21, 2016), available at <https://techcrunch.com/2016/04/21/california-bill-to-give-gig-workers-organizing-rights-stalls-over-antitrust-concerns/> (questions as to whether independent contractor collective bargaining rights would violate anti-trust laws).

87 Liam Dillon, *The Question that Continues to Loom over Uber and Lyft – and Vex Lawyers*, L.A. TIMES (Apr. 2, 2017, 12:05 AM), available at <http://www.latimes.com/politics/la-pol-sac-uber-unionization-bill-20170402-htmlstory.html> (Gonzalez Fletcher “hopes to author a bill that would reach the governor’s desk by the end of 2018.”).

88 Dan Levine & Kristina Cooke, *Unions, Gig-Economy Firms Gear Up for New York Benefits Battle*, REUTERS (Nov. 28, 2016, 6:21 AM), available at <https://www.reuters.com/article/us-labor-tech-benefits/unions-gig-economy-firms-gear-up-for-new-york-benefits-battle-idUSKBN13NOYL>.

89 See, e.g., Josh Eidelson, *It’s a New Game for Uber Drivers if New York Passes This Law*, BLOOMBERG (Jan. 10, 2017, 8:00 AM EST), available at <https://www.bloomberg.com/news/articles/2017-01-10/it-s-a-new-game-for-uber-drivers-if-new-york-passes-this-law>.

Tech Economy,” and whose members (among many others) include Uber and Handy.⁹⁰ In 2017, New York Governor Cuomo announced a task force⁹¹ to study the prospect of portable benefits, thereby putting legislative reform on hold.⁹²

In contrast to the more limited benefits at stake in the New York and California proposals, a Washington state bill⁹³ introduced in 2017 would provide stronger employee-type benefits to covered workers. The bill would: (1) require a mandatory benefits plan for businesses with more than 50 workers; (2) require substantial contributions to the plan; (3) include mandatory workers’ compensation plus a range of other optional benefits (including health insurance, paid time off and retirement benefits); and (4) offer a compromise on classification (workers would *not* forfeit employee status, but a business’s provision of benefits under the bill would not be evidence of an employment relationship between the platform and workers in future litigation).⁹⁴ As of March 2019, the bill remains in committee in the House.⁹⁵

Numerous other states have moved in the opposite direction by enacting legislation that has cemented the status of platform drivers as independent contractors, without securing offsetting benefits for workers. For example, on May 9, 2017, Florida Governor Rick Scott signed into law⁹⁶ the “Transportation Network Companies Act” (HB221).⁹⁷ The new provision deems platform drivers to be independent contractors if the platform satisfies four, *very easy to meet*, requirements (platform does not set work hours, does not bar driver from

90 TECH:NYC, *Our Members*, available at <https://www.technyc.org/our-members/> (last visited Aug. 1, 2018).

91 Andrew Cuomo, *New York State: Ever Upward 2017, State of the State*, 147–48 (2017), available at <https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/2017StateoftheStateBook.pdf>.

92 Sophie Quinton, *With Growth of the Gig Economy, States Rethink How Workers Get Benefits*, THE PEW CHARITABLE TRUSTS (Feb. 22, 2017), available at <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2017/02/22/with-growth-of-the-gig-economy-states-rethink-how-workers-get-benefits>.

93 H.B. 2109, 65th Leg., 2017 Reg. Sess. (Wash. 2017), available at <https://onlabor.org/wp-content/uploads/2017/05/2109.pdf>.

94 Maia Usui, *A Blueprint for Progressive Federalism: Washington State’s Portable Benefits Bill*, ONLABOR (May 17th, 2017), available at <https://onlabor.org/a-blueprint-for-progressive-federalism-washington-states-portable-benefits-bill/>.

95 WASH. STATE LEGIS., *Bill Status-at-a-Glance*, H.B. 2109 (Mar. 16, 2019 07:31 AM), available at <https://app.leg.wa.gov/bills/bills/BillNumber=2109&Initiative=false&Year=2019>.

96 News Release, Governor Scott Signs 11 Bills Into Law, Rick Scott 45th Governor of Florida (May 9, 2017), available at <https://www.flgov.com/2017/05/09/governor-scott-signs-11-bills-into-law/>.

97 H.B. 221, 2017 Legislature (Fla. 2017), available at <https://www.flsenate.gov/Session/Bill/2017/221/BillText/er/PDF>.

other work, does not bar driver from other platforms, and platform signs a contract with the driver that the driver is an independent contractor).⁹⁸ Florida is not alone in this legislative action.⁹⁹ Other states, including North Carolina,¹⁰⁰ Arkansas¹⁰¹ and Indiana¹⁰² include classification of drivers as independent contractors as part of their new transportation network company legislation.¹⁰³

The one legislative act that has shown some signs of being successful in securing benefits for platform drivers is the ordinance¹⁰⁴ passed by the City of Seattle Washington in fall 2015. Pursuant to the Seattle law, a business that hires or contracts with taxi drivers, for-hire transportation companies or transportation network companies must bargain with the drivers if a majority of the drivers seek to be so represented. Effectively, Seattle is permitting Uber and Lyft drivers to unionize.¹⁰⁵ The law survived a challenge by the Chamber of Commerce,¹⁰⁶ which had argued that the ordinance exceeded the city's proper exercise of authority and that the law violated the Sherman Act (antitrust) and Washington state antitrust law. In May 2018, the 9th Circuit ruled that a Seattle ordinance is not exempt from federal antitrust law (Sherman Act) pre-emption, thus keeping the law tied up in litigation. But, importantly for drivers seeking de facto unionization, the court also ruled that the ordinance does not violate the NLRA and the court basically implied that it is possible for the state

98 *Id.*

99 See, e.g., Dubal, *supra* note 67, at 754.

100 N.C. GEN. STAT. Art. 10a, §§ 20–280.1 to 0.10 (2018), available at https://www.ncga.state.nc.us/EnactedLegislation/Statutes/PDF/ByArticle/Chapter_20/Article_10A.pdf (creating a rebuttable presumption that drivers are independent contractors, section 20–280.8).

101 ARK. CODE ANN. § 23–13–719 (2018).

102 IND. CODE §§ 8.2.1–19.1–1 to –20 (2018), available at <https://law.justia.com/codes/indiana/2015/title-8/article-2.1/chapter-19.1/>.

103 See generally Heather Somerville & Dan Levine, *U.S. States Pass Laws Backing Uber's View of Drivers as Independent Contractors*, REUTERS, (Dec. 10, 2015, 2:23 PM), available at <https://www.reuters.com/article/uber-statelaws/u-s-states-pass-laws-backing-ubers-view-of-drivers-as-contractors-idUSL1N13Z1YP20151210>.

104 Seattle, Wash., Ordinance 124,968 (Dec. 23, 2015), available at http://clerk.seattle.gov/~legislativeItems/Ordinances/Ord_124968.pdf.

105 Diane Ring, *The Front Lines of Sharing Economy Legal Debates*, THE SURLY SUBGROUP (Aug. 11, 2017), available at <https://surlysubgroup.com/2017/08/11/the-front-lines-of-sharing-economy-legal-debates/>.

106 Order Granting Defendant's Motion to Dismiss, 274 F. Supp. 3d 1140 (W.D. Wash. 2017), available at <http://www.chamberlitigation.com/sites/default/files/cases/files/17171717/OrderGrantingMotiontoDismiss-Chamberv.Seattle%28U.S.DistrictCourt-WAWD%29.pdf>.

legislature to create an ordinance that is both Sherman Act and NLRA compliant (even though the current ordinance did not satisfactorily do so).¹⁰⁷

D Proposed Federal Tax Reform

While the above-detailed battle over worker classification (predominantly under state law) has played out in a series of litigations and legislative reforms, the tax law forged ahead with its own classification of platform workers. During 2017, two companion bills (The NEW GIG Act of 2017) were introduced in the U.S. House¹⁰⁸ and the Senate¹⁰⁹ regarding worker classification for tax purposes. The NEW GIG Act language, made it into the initial December 2017 Senate tax reform bill but was then dropped without official comment (though there was public commentary) before the new tax legislation was enacted.¹¹⁰

Touted as a “clarification” of existing worker classification rules, the bill sought to achieve such clarification through the introduction of a safe harbor, “which, if satisfied, would ensure that the worker (service provider) would be treated as an independent contractor rather than an employee.”¹¹¹ Under the proposal, if three objective tests are met, the worker would be treated for tax purposes as an independent contractor and not an employee. The first test looks to the relationship between the parties, including factors such as the specificity of the task, exclusivity of the relationship, and whether the service provider incurs expenses.¹¹² The second test turns on the location of the services and how they are provided.¹¹³ The third test requires a written contract between the two

107 Chamber of Commerce v. City of Seattle, D.C. No. 2:17-cv-00379-RSL Opinion (9th Cir. 2018), available at <http://www.chamberlitigation.com/sites/default/files/cases/files/18181818/Opinion%20-%20Chamber%20v.%20Seattle%20%28Ninth%20Circuit%29.pdf>.

108 The New Economy Works to Guarantee Independence and Growth (NEW GIG) Act of 2017, H.R. 4165, 115th Cong. (2017), available at <https://www.congress.gov/bill/115th-congress/house-bill/4165/text>.

109 The New Economy Works to Guarantee Independence and Growth (NEW GIG) Act of 2017, S. 1549, 115th Cong. (2017), available at <https://www.congress.gov/bill/115th-congress/senate-bill/1549/text>.

110 See Oei & Ring, *The Senate Tax Bill and The Battles Over Worker Classification*, *supra* note 1.

111 Press Release, Rep. Rice Introduces NEW GIG Act to Clarify Worker Classification (Oct. 27, 2017), available at <https://web.archive.org/web/20171110211736/https://rice.house.gov/media-center/press-releases/rep-rice-introduces-new-gig-act-to-clarify-worker-classification-rules>.

112 See Oei & Ring, *The Senate Tax Bill and The Battles Over Worker Classification*, *supra* note 1.

113 *Id.*

parties expressly stating that the relationship is one of independent contracting and acknowledging the obligations for taxes and reporting/withholding.¹¹⁴ Clearly, this safe harbor is meant to be very safe indeed (and it echoes the tests, described above, found in certain state-level transportation network company legislation). The first two tests likely would be satisfied by most sharing economy businesses by virtue of their basic structure. Moreover, many *nonsharing* businesses that rely on the services of an array of “freelance” workers would also meet the requirements. In reality, the reach of the proposal would extend far beyond the sharing economy. The third test simply requires the parties contractually state the conclusion of independent contractor status. Given that this is the current state of play for most workers on sharing platforms, it proves to be no burden at all for a business seeking to confirm tax classification of its workers as independent contractors. The safe harbor is given further protection from IRS scrutiny: if the parties have tried in good faith to comply with the safe harbor, but fail, the IRS can only reclassify workers as employees (and the payors/service recipients as employers) on a prospective basis.¹¹⁵

Beyond the safe harbor, the bill would revise certain third-party reporting obligations and would have the effect of increasing the number of platform workers subject to Form 1099-K information reporting. The one section of the proposal that distinctly addresses tax concerns articulated by sharing-economy workers (the burden of compliance with reporting and payment of estimated taxes)¹¹⁶ is that which institutes a new withholding obligation.¹¹⁷ Subject to some limits, the payor/service recipient would be required to withhold tax on payments made to independent contractors covered by the bill.¹¹⁸ If instituted, this rule would significantly reduce the administrative burden on platform workers regarding quarterly reporting and payment of estimated taxes. It would not, however, reduce the administrative compliance burden on these workers in taking business deductions. Workers would still need to determine what expenses were deductible, how to properly document these outlays, and how to distinguish businesses from personal costs.

From a purely tax perspective, the NEW GIG Act looks like an effort to address some of the more pressing concerns workers have regarding the

114 *Id.*

115 *See id.*; NEW GIG Act of 2017, S. 1549.

116 *See, e.g.,* Oei & Ring, *Can Sharing Be Taxed?*, *supra* note 1.

117 *See* NEW GIG Act of 2017, S. 1549, *supra* note 115; Oei & Ring, *The Senate Tax Bill and The Battles Over Worker Classification*, *supra* note 1.

118 *See* sources cited *supra* note 117.

administrative burden of taxes,¹¹⁹ while retaining the independent-contractor classification (which does have the tax advantage of giving workers greater ability to actually deduct their costs incurred in performing their services). What was entirely missing from the conversation surrounding the NEW GIG Act was its intersection with the rest of the debate regarding worker classification and the sharing economy. There seemed to be no appreciation of the potential impact of the legislation on active debates regarding working classification for various state and federal employment law and related purposes.

IV Intersections of Silos and First Movers

Through contract, rhetoric, litigation and legislation, the platforms and their workers have both sought to prevail on the worker-classification question and secure a first-mover advantage. Although the binding effect of a determination in one forum may be somewhat limited, given the diversity of jurisdictions, laws, businesses, and tribunals, the participants appreciate the potential power in being the first to frame the argument and create a legal baseline. DoorDash General Counsel Keith Yandell identified this advantage in April 2017 when he reported that the settlement just reached with workers over classification “represent[ed] a fair compromise ... and makes changes that will further cement Dashers’ [workers’] status as independent contractors.”¹²⁰ Even if such “cementing” is possible, and path dependence is established, that is no guarantee of appropriate policy outcomes.

The critical questions at stake in the sharing economy regarding worker classification are not susceptible to easy answers. Workers and businesses have multiple interests across various arenas. Holding current law steady, workers might, for example, prefer to be treated as independent contractors for some parts of tax law, and as employees for other parts of tax law, as well as for many

119 For further discussion of the tax burdens and challenges experienced by workers in the sharing economy, see Kathleen DeLaney Thomas, *Taxing the Gig Economy*, 166 U. PA. L. REV. 1415 (2018), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2894394; CAROLINE BRUCKNER, *SHORTCHANGED: THE TAX COMPLIANCE CHALLENGES OF SMALL BUSINESS OPERATORS DRIVING THE ON-DEMAND PLATFORM ECONOMY* (2016), available at <https://www.american.edu/kogod/research/upload/shortchanged.pdf>; Oei & Ring, *Can Sharing Be Taxed?*, *supra* note 1.

120 Keith Yandell, *An Update on Dasher Class Action*, DOORDASH (Apr. 10, 2017), available at <https://blog.doordash.com/an-update-on-dasher-class-action-6990643be500> (announcing DoorDash’s settlement of a lawsuit regarding classification of workers for \$3.5 million).

aspects of employment, labor, and discrimination law. Strong advocacy for a particular classification in one context might not produce a universally desired result for workers across all legal regimes. Moreover, it is not even clear that the debate regarding worker classification is being conducted at the appropriate level and is asking the “right” question.

Ultimately, the most appropriate question may be why particular rights, benefits and duties *should be* tied to a particular worker classification, especially if the borderline between the two categories is sufficiently porous. That is, rather than argue about the classification of a sharing economy worker under state law, perhaps the better legal and policy question is why should a benefit such as anti-discrimination protection be tied to an employee classification? There may be solid reasons—but they should be articulable and they should be linked to discernable distinctions between employees and independent contractors.¹²¹ Unfortunately, given that these issues are arising in the context of legal silos with strong first-mover efforts, the legal system may find itself on the cusp of powerful path dependence. The remaining question then is how we might envision an improved debate over worker classification that would be likely to generate more comprehensive, and less ad hoc, legal results. This Part first examines the intersection of silos and first-mover effects to illustrate the potential for unintended path dependence in worker classification. Then this Part considers ways in which legal debate can mitigate the constraining effects of silos and first movers in an effort to develop thoughtful policy outcomes.

A Interplay of Silos and First-Mover Actions

As explored above, lawyers, regulators, policy makers and academics have areas of expertise through which they assess and evaluate the sharing economy worker classification debate. That is, the legal community operates in silos of expertise. This reality affects the assessment of the underlying problem and the kinds of outcomes that might be sought—and it impacts the range of options that are offered, considered, and advocated. In particular, legal silos allow unsubstantiated assumptions (implicit or explicit) about the desirability of a legal rule to shape analysis. This silo effect, however, is compounded by strong

¹²¹ One possibility is that the reality of independent contractors has shifted over time, as workers who historically would have been employees are now functioning as micro-business persons without the expertise, power, and investment incentives of earlier independent contractors. See, e.g., Oei & Ring, *Can Sharing Be Taxed?*, *supra* note 1.

first-mover actions, especially if some parties fail to appreciate the scope and reach of the result. Two examples, drawn from Parts II and III help illustrate.

1 Litigation, Silos and First Movers

Not surprisingly, tax law is perhaps one of the legal fields most likely to experience the silo effect. In both legal practice and academia, the boundaries between tax and other legal fields can be quite strong with limited crossover. This reality may help explain the focus by driver-plaintiffs in the Uber classification litigation on securing employee status. From a labor, employment, benefits, or discrimination perspective, employee status has much to recommend it. But, as detailed in Part II.B and C, the tax story is more complicated and achieving employee classification without any corresponding change in the underlying platform model (such as a shift to the platform bearing the costs of driving) is not necessarily a worker-favorable tax outcome. Driver-employees who accumulate significant nondeductible business expenses may find themselves facing very high effective tax rates on their driving income due to their inability to take deductions.¹²² Furthermore, the unavailability of the section 199A deduction to these workers (with its corresponding reduction in effective tax rate) would further sharpen the tax disparity between such workers classified as employees and those classified as independent contractors.

Importantly, though, the criticism here is *not* of the decision to prioritize labor and related benefits, and thus chase employee status. Workers and their advocates could legitimately weight the benefits of employee-status outside of tax with the mixed benefits of employee status within tax and conclude that they are best served by pursuing employee status through litigation. Rather, the critique is of any failure to know that this trade-off is taking place due to the silo effect. The discourse surrounding sharing economy worker classification generally concentrates on labor law with the realities of taxation both underexplored and under appreciated. The silo-driven failure to consider tax more fully is compounded by the possibility that a ruling or reform will add weight on the scale in favor of employee status for other drivers, other ride-sharing businesses, and other platform workers more generally.

¹²² See *supra* notes 38–62.

2 Legislation, Silos and First Movers

A second example of the intersection of silos and first-mover effects can be seen from the tax side. The proposed tax reform (the NEW GIG Act) was generally hailed in the tax community as a positive step in alleviating the tax burdens experienced by platform workers.¹²³ When judged through a tax lens, this conclusion makes sense. Legislation that requires the platform business to handle quarterly reporting and payment of taxes would drastically reduce worker-taxpayer compliance burdens (though still leaving platform workers with critical compliance obligations in order to obtain appropriate business expense deductions). But, just as a non-tax lens was myopic in the litigation context, a tax-exclusive lens was myopic in the tax reform discussion. The tax silo led members of the legal community to embrace proposed tax reform without adequate appreciation of the impact in other fields.

Although the content of proposed tax reform would apply exclusively for tax purposes, the first-mover effects of having a federal tax law declare covered workers to be independent contractors could be significant. If enacted, the NEW GIG rules would create a new baseline in at least one legal field (tax) where sharing economy workers would be officially classified as independent contractors at the federal level. This classification would not be binding on states, nor would it be binding at the federal level outside of tax. Nonetheless, its impact would be powerful. Clearly, the sharing platforms saw this potential as they were among the identified supporters of the tax reform proposal. The tax analysts evaluating the reform from an exclusively tax perspective failed to consider the impact outside of tax, both because of the silo effect itself, and because of the lack of appreciation for the power of the first-mover function here.¹²⁴

The combination of silos and first movers is not limited to the sharing economy and is not limited to tax.¹²⁵ However, the intersection of these two

¹²³ See *supra* Part III.D.

¹²⁴ The first-mover effect can be influential not only in setting a baseline, but also in reducing pressure for broader, more comprehensive reform and analysis. For example, if the NEW GIG Act is viewed as alleviating the most significant tax burdens on workers, then it may be easier to discount the need for wholesale reform because the “tax problem” has been resolved. See, e.g., NEW GIG Act of 2017, H.R. 4165; NEW GIG Act of 2017, S. 1549, *supra* note 115.

¹²⁵ Nor is this problem limited to the multiplicity of legal silos regarding the sharing economy. Similar silo problems may emerge on a business sector basis. Thus, for example, regulators focused on ridesharing may fail to adequately consider the relative impact of their decisions on the taxi industry, and regulators focused on home-sharing may fail to consider the impact of their positions on hotels and long-term rental markets. At present, evidence suggests that the

forces have the potential to shape the future of sharing economy worker classification. To the extent the interplay of these two forces results in an overall legal path that is not the result of informed deliberation, we risk setting a course that does not reflect our collective best judgement.

The question, then, is how can we realistically avoid this outcome and how can we foster a better legal and policy conversation. Part IV.B takes up this question and identifies some of the primary goals and components of a more robust dialogue on the treatment of workers in the sharing economy.

B Paths for Better Decision-Making

Policy makers, commentators, and advocates bear some responsibility for ensuring that discussion and evaluation of policy options and proposals is undertaken with as full an awareness of collateral effects as possible. As reflected in the ongoing discourse about worker classification in the sharing economy, the need for such awareness is particularly acute where many actors operate in legal silos and active efforts are underway to lock-in specific legal outcomes. The relatively obvious solution at this point is to heighten awareness of silo effects and to pursue steps to counter the silo effect, especially in an active first-mover context. Crucial steps would include the following:

1. *Engagement across fields*: Interdisciplinary work within law is neither novel nor impossible. That said, in reality, the pressures of time, limited expertise, and lack of awareness appear to drive the circumscribed analysis undertaken on many issues. Active engagement through consultation outside one's field, topical conferences, and research projects that inherently unify multiple legal conversations swirling around a basic problem, offer the potential to reduce the number of false assumptions that underlay legal recommendations.
2. *Awareness itself*: The exhortation to engage across legal fields presumes an appreciation of the silo effect and also some level of knowledge about where the valuable intersections lie. Thus, for example, in the worker classification debate, it requires that analysts not only recognize the degree to which they operate in a silo (and that unexamined assumptions about other legal fields

concerns of these nonsharing sectors have attracted attention. See, e.g., Michael Goldstein, *Dislocation and Its Discontents: Ride-Sharing's Impact on the Taxi Industry*, FORBES (June 8, 2018), available at <https://www.forbes.com/sites/michaelgoldstein/2018/06/08/uber-lyft-taxi-drivers/#76d55bad59f0>.

pose risks), but that they realize worker classification is one of those issues that demands study from beyond the silo.

3. *Structured inquiry into collateral effects*: One option for ensuring that measures to combat silos would be undertaken would be to institutionalize a process of asking questions about notable collateral effects in the early stages of design, drafting and analysis. This approach and commitment could be incorporated into the work of individual scholars, legal advocates, and legislators.

Beyond the prospect of improved decision making on worker classification questions, these measures, when adopted in the sharing economy debates, have the potential to foster a deeper examination of the policy issues at stake. At a minimum, moving out of silos in a first-mover world increases the likelihood that we will pursue legal change based on a full appraisal of benefits and harms. More promising, however, is the possibility of encouraging examination of the deeper design and policy questions.

Here, in the worker classification context, the fundamental question is what benefits, risks, and responsibilities should be tied to worker status? Again, the question itself is not new. But the discussion within the sharing economy could revitalize this society-wide conversation given: (1) the newness of the sector and its relatively rapid impact on consumers/worker interactions in a variety of commercial settings (including transportation, accommodations, household help); (2) the rapid spread of the sector across the country, helping to make it a national phenomenon; (3) the current success of platforms in asserting a uniform worker classification, and using classification as part of their competitive advantage over more traditionally structured operations; and (4) the expansion of these issues globally, though with distinctive domestic twists. Thus, the benefits from a revised, anti-silo approach for assessing the details of worker classification could ultimately contribute to a more comprehensive review of the treatment of workers in society.

Conclusion

The debates over worker classification in the sharing economy have exhibited strong silo and first-mover effects, which in tandem threaten to undermine the development of legal rules and policies consistent with a careful assessment of benefits and harms. If the goal is the creation of policy based on more complete information, we must endorse a commitment to reduce silos effects where

possible. The primary factor in success will be acknowledgment of the role and power of silos operating in the legal system. From there we can develop both a broader legal foundation and a procedural framework for identifying important collateral effects and competing goals. The result, ideally, would be the design of rules (here, worker classification), that made sense from the combined perspective of tax, labor, employment and other fields of law. These rules need not be uniform, but in their reformulation, we should be attentive to spillover effects from decisions in one setting to another. To the extent identical classification rules would be ill-advised, legal actors could attempt to contain the reach of more field-specific rules through, for example, statements in the legislative history that explicitly limit the scope of a particular classification rule. Ultimately, the most significant benefit that may derive from a reduction in silos and an appreciation of first-mover effects is the prospect of engaging with the deeper policy choices that have made worker classification so important.

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