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# EMPLOYMENT CLASSIFICATION AND HUMAN DIGNITY IN THE GIG ECONOMY

BRIDGET NICOLE GONZALEZ\*

## I. INTRODUCTION

What drives a business?<sup>1</sup> Most simply put, profit.<sup>2</sup> But to what end?<sup>3</sup> Employment classification has a significant impact on a business's profit.<sup>4</sup> The two most common worker classifications recognized globally are the independent contractor and the employee.<sup>5</sup> This classification determines whether the individual receives access to pay, qualifies for benefits, and gains protection from discrimination.<sup>6</sup> All these factors come at a cost to an employer and result in a cut in their overall profit.<sup>7</sup> In the twentieth century, employment classification has been subject to heavy litigation in a particular field: the gig economy.<sup>8</sup> The gig economy, which primarily grew in the twenty-first century, provides the ability for workers to have flexible and temporary jobs.<sup>9</sup> For some, the flexibility is beneficial as it allows people to

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<sup>1</sup> See Mike Raimondi, *What Drives Your Business?*, FORRESTER (Jan. 20, 2016), <https://go.forrester.com/blogs/whatdrivesyourbusiness/>.

<sup>2</sup> See *id.*

<sup>3</sup> See *id.*

<sup>4</sup> *Employee vs. Independent Contractor: The Profound Impact of Worker Classification on Your Business*, HMS L. GRP. LLP, <https://www.hmslawgroup.com/employee-vs-independent-contractor-profound-impact-worker-classification-business> (last visited Dec. 31, 2021).

<sup>5</sup> See Alex Steeno, *What is Worker Classification and Why Does it Matter?*, GREEN LIGHT (Aug. 5, 2021), <https://www.greenlight.ai/resources/what-is-worker-classification-and-why-does-it-matter/>.

<sup>6</sup> See *id.*

<sup>7</sup> See *id.*

<sup>8</sup> See Marten Männis, *Uber Drivers Considered as Employees in France, Court Rules*, IN HOUSE LEGAL (Mar. 6, 2020), <https://inhouse-legal.eu/public-policy-regulations/uber-france/>; see Cour de cassation [Cass.] [supreme court for judicial matters] soc., Mar. 4, 2020, Bull. civ. V, No. 374 (Fr.); *Rajab Suliman v Rasier Pacific Pty Ltd* [2019] FWC 4807, ¶ 3 (12 July 2019) (Austl.); *Janaka Namal Pallage v Rasier Pacific Pty Ltd* [2018] FWC 2579, ¶¶ 1, 14, 54 (11 May 2018) (Austl.); *Mr Michail Kaseris v Rasier Pacific V.O.F.* [2017] FWC 6610, ¶¶ 2–3 (21 December 2017) (Austl.); *McGillis v. Dep't of Econ. Opportunity*, 210 So. 3d 220, 223, 226 (Fla. Dist. Ct. App. 2017).

<sup>9</sup> See *Gig Economy*, INVESTOPEDIA, <https://www.investopedia.com/terms/g/gig-economy.asp> (last

work whenever and wherever they please.<sup>10</sup> However, others rely on their gig economy job to make a living, and this has led workers to demand employee rights.<sup>11</sup> The leading player in the rideshare gig economy is Uber, and much litigation has centered around their employees demanding more workplace rights.<sup>12</sup> Under the current system, to gain more rights, workers need to be classified as employees rather than independent contractors.<sup>13</sup> Consequently, Uber drivers have sued seeking reclassification as employees rather than independent contractors.<sup>14</sup>

Several countries around the world have already addressed this issue.<sup>15</sup> Countries such as France and the United Kingdom have chosen to classify Uber drivers as employees and workers, respectively—affording them employment benefits such as vacation days, paid time off, and health benefits—while Australia and the United States are still classifying Uber drivers as independent contractors.<sup>16</sup> Court decisions from around the world regarding Uber serve as a precedent to litigation concerning other gig economy workers' rights.<sup>17</sup> This Article will analyze the employment standards of four countries: France, the United Kingdom, the United States, and Australia, and

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visited Dec. 31, 2021); 20th International Conference of Labour Statisticians Geneva, *Statistical Definition and Measurement of Dependent "Self-Employed" Workers: Rationale for the Proposal for a Statistical Category of Dependent Contractors*, ¶ 33, I.L.O. Doc. 6 (Oct. 18, 2019).

In the new 'gig economy' taxi drivers and other ride providers generally own or lease the vehicle and decide on their own working time. The work is dispatched and mediated through an Internet application controlled by a company which determines the price of the service. Payment is made by the clients directly to the company which passes this on to the driver on a periodic basis minus a fee. The companies do not consider that the drivers are their employees and do not take responsibility for taxation and social contributions.

*Id.*

<sup>10</sup> See J. Edward Moreno, *Uber Poll: Drivers 'Overwhelmingly Support' Independent Contractor Status*, THE HILL (Aug. 25, 2020, 8:44 AM), <https://thehill.com/policy/technology/513506-uber-poll-drivers-overwhelmingly-support-independent-contractor-status>.

<sup>11</sup> See, e.g., Männis, *supra* note 8; see also Cass. soc., Bull. civ. V, No. 374 (Fr.).

<sup>12</sup> See, e.g., Männis, *supra* note 8; see also Cass. soc., Bull. civ. V, No. 374 (Fr.).

<sup>13</sup> See, e.g., Männis, *supra* note 8; see also Cass. soc., Bull. civ. V, No. 374 (Fr.).

<sup>14</sup> See, e.g., Männis, *supra* note 8; see also Cass. soc., Bull. civ. V, No. 374 (Fr.).

<sup>15</sup> See Männis, *supra* note 8; see also Kirsten Korosec & Natasha Lomas, *Uber Says it Will Treat UK Drivers as Workers in Wake of Supreme Court Ruling*, TECHCRUNCH (Mar. 16, 2021, 7:41 PM), <https://techcrunch.com/2021/03/16/uber-says-it-will-treat-uk-drivers-as-workers-in-wake-of-supreme-court-ruling/>.

<sup>16</sup> See Cass. soc., Bull. civ. V, No. 374 (Fr.); see also *Uber B.V. v. Aslam* [2021] UKSC 5, [130] (appeal taken from Eng.); see also Korosec & Lomas, *supra* note 15; see also Männis, *supra* note 8.

<sup>17</sup> See Männis, *supra* note 8; Korosec & Lomas, *supra* note 15; Daniel Wiessner, *Uber Drivers Are Contractors, Not Employees, U.S. Labor Agency Says*, REUTERS, <https://www.reuters.com/article/us-uber-contractors/uber-drivers-are-contractors-not-employees-u-s-labor-agency-says-idUSKCN1SK2FY> (May 14, 2019, 4:04 PM); *Uber Australia Investigation Finalised*, FAIR WORK OMBUDSMAN (June 7, 2019), <https://www.fairwork.gov.au/about-us/news-and-media-releases/2019-media-releases/june-2019/20190607-uber-media-release>; Cass. Soc., Bull. civ. V, No. 374 (Fr.); *Uber B.V. UKSC 5* (Eng.).

discuss each country's judicial decisions regarding the treatment of Uber drivers as independent contractors, employees, or workers.<sup>18</sup> The underlying goal of this inquiry is to assess whether human dignity is taken into account in legislative and judicial decision-making regarding worker classification since human dignity should be at the core of all work environments.<sup>19</sup> Such a stance is of mutual benefit: if employers show their employees that they are valued, employees will return the gratification.<sup>20</sup> Thus, for the reasons discussed below, all workers deserve to be treated according to decent standards of employment, which *inter alia*, would provide workers with employment benefits while retaining the employment status that encourages their flexibility.<sup>21</sup>

#### A. WHAT IS THE GIG ECONOMY?

The gig economy is defined as “flexible, temporary, or freelance jobs, often involving connecting with clients or customers through an online platform.”<sup>22</sup> This term was coined in the 1900s by jazz musicians who regularly performed in jazz clubs.<sup>23</sup> “The gig economy was turned up another notch in 2009, when Uber arrived, recruiting contract drivers.”<sup>24</sup> The popularity of this type of work stems from the independence that comes with the job, allowing workers to earn supplemental income.<sup>25</sup> As unemployment grew in 2007, the Great Recession increased the pool of potential workers who might tend towards self-employment.<sup>26</sup>

Uber was founded in 2009 and since then has faced ongoing litigation globally regarding employee rights.<sup>27</sup> When Uber launched, it classified its workers as independent contractors.<sup>28</sup> Individuals had the flexibility to work several jobs, make their own schedule, or not work for months at a time.<sup>29</sup> Some employees consider this flexibility a benefit, while others who rely on

<sup>18</sup> See Männis, *supra* note 8; Korosec & Lomas, *supra* note 15; Wiessner, *supra* note 17; *Uber Australia Investigation Finalised*, *supra* note 17.

<sup>19</sup> See Kristen Lucas, *Workplace Dignity: Communicating Inherent, Earned, and Remediated Dignity*, 52(5) J. MGMT. STUD. 621, 622 (2015).

<sup>20</sup> See *id.* at 632.

<sup>21</sup> See discussion *infra* Part III; see also *id.*

<sup>22</sup> *Gig Economy*, *supra* note 9.

<sup>23</sup> Gabrielle Pickard-Whitehead, *The History and Future of the Gig Economy*, SMALL BUS. TRENDS (Nov. 12, 2019), <https://smallbiztrends.com/2019/11/the-history-and-future-of-the-gig-economy.html>.

<sup>24</sup> *Id.*

<sup>25</sup> See *id.*

<sup>26</sup> See *id.*; Nicholas Kacher & Stephan Weiler, *Inside the Rise of the Gig Economy*, REGIONAL ECON. DEV. INST. (Apr. 2017), <https://redi.colostate.edu/wp-content/uploads/sites/50/2017/06/REDI-report-April-gig-economy.pdf>.

<sup>27</sup> See Brian O'Connell, *History of Uber: Timeline and Facts*, THE STREET (July 23, 2019, 3:00 PM), <https://www.thestreet.com/technology/history-of-uber-15028611>.

<sup>28</sup> See *id.*

<sup>29</sup> See Moreno, *supra* note 10.

their Uber job as a primary source of income feel that the lack of employee benefits is detrimental to their well-being.<sup>30</sup>

## B. THE IMPORTANCE OF WORKER CLASSIFICATION

The International Labour Organization (“ILO”) has recognized that the gig economy has led to transformations in the workforce.<sup>31</sup> In the United States “part-time employment is favoured by many employers, . . . mainly to aid flexibility over hours, but also because of the lower hourly wage and reduced benefits that are often provided to part-time workers.”<sup>32</sup> As recognized by the ILO, the gig economy can be categorized as non-standard employment (“NSE”).<sup>33</sup> NSE has grown and is more popular in “economic sectors that are subject to seasonal fluctuations, such as agriculture, construction[,] and transport[ion].”<sup>34</sup> Employers prefer workers in these sectors because they are often cheaper as they are paid lower wages, or employers save on social security and other benefits.<sup>35</sup> Generally, if an employee is on a fixed-term contract and the employer terminates the employment relationship, the employee is not entitled to compensation; but if an employee is classified as a permanent employee and the employer terminates the employment relationship, the employee is entitled to compensation.<sup>36</sup> Specifically, in permanent employment, when an employer terminates an employment relationship, the employer usually incurs certain costs such as severance pay, compensatory payments, and costs associated with notification procedures.<sup>37</sup> According to the ILO, an individual’s worker classification has several implications.<sup>38</sup>

<sup>30</sup> See Jeremy B. White, *Many Uber and Lyft Drivers Now Rely on the Work As Their Primary Income Source, Report Finds*, INDEP. (May 30, 2018, 7:56 PM), <https://www.independent.co.uk/news/business/news/uber-lyft-jobs-drivers-income-employees-independent-contractors-gig-economy-a8376271.html>; see also David Chau, *Uber Drivers Are Not Employees, Fair Work Ombudsman Finds*, ABC NEWS, <https://www.abc.net.au/news/2019-06-07/uber-fair-work-ombudsman-investigation-contractor-employee/11189828> (June 7, 2019, 3:17 AM).

<sup>31</sup> *Digital Labour Platforms*, INT’L LAB. ORG., <https://www.ilo.org/global/topics/non-standard-employment/crowd-work/lang--en/index.htm> (last visited Dec. 31, 2021).

<sup>32</sup> Int’l Labour Org. [ILO], *Non-Standard Employment Around the World: Understanding Challenges, Shaping Prospects*, at 163, (Nov. 16, 2016), [https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms\\_534326.pdf](https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_534326.pdf) [hereinafter *Non-Standard Employment Around the World*].

<sup>33</sup> See *id.* at 2, 7–8.

<sup>34</sup> *Id.* at 157.

<sup>35</sup> *Id.* at 162 (“Other regulatory differences, such as thresholds on social security and other entitlements for part-time work as well as other forms of NSE, make these arrangements cheaper, unwittingly creating incentives for their use.”).

<sup>36</sup> See *id.* at 187.

<sup>37</sup> See *id.* at 162.

<sup>38</sup> See *Non-Standard Employment Around the World*, *supra* note 32, at 101.

## II. IMPLICATIONS OF CLASSIFICATION: EMPLOYEES VS. INDEPENDENT CONTRACTORS

When individuals are classified as employees, they are afforded employment benefits such as unemployment insurance, minimum wage, and workers' compensation.<sup>39</sup> In countries such as the United States and Australia, "Uber and Lyft have[] [not] been required to abide by certain labor regulations, such as minimum wage, or pay[ing] payroll taxes for those workers, which feed into programs like unemployment insurance."<sup>40</sup> The benefit to Uber classifying their drivers as independent contractors is less paperwork and costs, leaving drivers responsible for reporting their income to the tax authorities as self-employed individuals.<sup>41</sup> Unlike full-time employees, independent contractors do not receive benefits such as healthcare and paid time off.<sup>42</sup>

## III. ESTABLISHING THE INTERNATIONAL MINIMUM STANDARD OF DECENT WORK

### A. CONSIDERATIONS OF HUMAN DIGNITY

The concept of human dignity is the commitment to human value or status and finds itself in the ethics, legal, and political spectrum.<sup>43</sup> Human dignity is not connected to gender, religion, race, nor class; it is the value in one's humanity.<sup>44</sup> The meaning of human dignity has transformed over time.<sup>45</sup> From its Latin, French, and English roots, the word is derived from one's merit.<sup>46</sup> Dignity was something you earned by your status (e.g.,

<sup>39</sup> See Paul Jones & Richard C. Auxier, *Taxes And The Gig Economy*, FORBES (Aug. 24, 2020, 1:03 PM), <https://www.forbes.com/sites/taxnotes/2020/08/24/taxes-and-the-gig-economy/?sh=14512a0628f0> (providing a transcript of the podcast in which tax issues that arise in the gig economy).

<sup>40</sup> Tyler Sonnemaker, *Uber and Lyft Drivers Are Now Employees Under California Law, According to a New Ruling from Regulators*, BUS. INSIDER (June 10, 2020, 6:00 PM), <https://www.businessinsider.com/uber-lyft-drivers-declared-employees-by-california-regulators-2020-6>; see Moreno, *supra* note 10 ("Ride-hailing apps like Uber contract drivers who use their own vehicles and work on their own terms. Though some may work as many hours as a full-time employee, they are not entitled to a health insurance or other benefits.").

<sup>41</sup> See Ariene Reis & Vikram Chand, *Uber Drivers: Employees or Independent Contractors?*, KLUWER INT'L TAX BLOG (Apr. 3, 2020), <http://kluwertaxblog.com/2020/04/03/uber-drivers-employees-or-independent-contractors/>.

<sup>42</sup> See Sonnemaker, *supra* note 40.

<sup>43</sup> See Stephen Riley & Gerhard Bos, *Human Dignity*, INTERNET ENCYC. OF PHIL., <https://iep.utm.edu/hum-dign/#SH3a> (last visited Dec. 31, 2021).

<sup>44</sup> See Emmaline Soken-Huberty, *What is Human Dignity? Common Definitions.*, HUM. RTS. CAREERS, <https://www.humanrightscareers.com/issues/definitions-what-is-human-dignity/> (last visited Dec. 31, 2021).

<sup>45</sup> See *id.*

<sup>46</sup> See *id.*

belonging to royalty or the church).<sup>47</sup> The rise of human rights began with the American and French Revolution, and after World War II, human dignity became the focal point in human rights.<sup>48</sup> Today, the phrase means the belief that all people hold a special value that is tied solely to their humanity.<sup>49</sup> Thus, dignity is no longer earned; it is something people are born with.<sup>50</sup> These values are further addressed and demanded in positive law by, to name a few, the International Labour Organization (ILO)<sup>51</sup> and the International Covenant on Economic Social and Cultural Rights (ICESCR).<sup>52</sup> Additionally, these values are embodied on the regional level in each state's bill of rights and in human rights conventions.<sup>53</sup> At the core, the true definition of human rights is that all humans are born free and equal, and this is the underlying principle at the center of these bodies: recognizing that we have transformed the definition of human dignity from its roots.<sup>54</sup>

The concept of human dignity in the New Haven School of Thought is summarized by the following eight values: power, enlightenment, wealth, well-being, skill, affection, respect, and rectitude.<sup>55</sup> Specifically, *power*, *well-being*, and *skill* are at the heart of the employment relationship.<sup>56</sup> *Power* because the individual has the flexibility to set their own hours as the majority of Uber drivers globally are classified as independent contractors.<sup>57</sup> *Well-*

<sup>47</sup> See *id.*

<sup>48</sup> See Hanna-Mari Kivisto, *The Concept of 'Human Dignity' in the Post-War Human Rights Debates*, 27 RES PUBLICA: REV. FILOSOFIA POLITICA 99, 100 (2012); see also Roza Pati, *Global Regulation of Corporate Conduct: Effective Pursuit of a Slave-Free Supply Chain*, 68 AM. U. L. REV. 1821, 1826 (2019) (acknowledging that significant historical events such as the American Revolution, the French Revolution, and World War II gave rise to an emphasis on the demands for human rights).

<sup>49</sup> See Soken-Huberty, *supra* note 44.

<sup>50</sup> See Lucas, *supra* note 19, at 621; see also Soken-Huberty, *supra* note 44 ("Article 1 states: 'All human beings are born free and equal in dignity and rights.'").

<sup>51</sup> See *The Benefits of International Labour Standards*, INT'L LAB. ORG., <https://www.ilo.org/global/standards/introduction-to-international-labour-standards/the-benefits-of-international-labour-standards/lang-en/index.htm> (last visited Dec. 31, 2021).

<sup>52</sup> See Comm. on Econ., Soc. and Cultural Rights, *General comment No. 23 (2016) on the right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights)*, ¶ 1, U.N. Doc. E/C.12/GC/23 (Apr. 27, 2016) [hereinafter *General comment No. 23*].

<sup>53</sup> See *id.*

<sup>54</sup> See Soken-Huberty, *supra* note 44.

<sup>55</sup> See W. Michael Reisman & Andrew R. Willard, *In Personal Performance Codes, One Size Doesn't Fit All: Clarifying the Professional Ethical Responsibility of Decision Makers*, 19 ASIA PAC. L. REV. 1, 11 (2011); see also W. Michael Reisman, *The View from the New Haven School of International Law*, 86 AM. SOC'Y INT'L L. 118, 119–20, 122 (1992) (describing the theories behind the New Haven School of Thought).

<sup>56</sup> See Pati Roza, Professor of Law, Lecture in International Law in the 21<sup>st</sup> Century Seminar Class at St. Thomas University College of Law: The New Haven School of Jurisprudence (POJ) (Apr. 15, 2021); see also Jeffrey Pfeffer, *The Overlooked Essentials of Employee Well-being*, MCKINSEY Q. (Sept. 11, 2018), <https://www.mckinsey.com/business-functions/organization/our-insights/the-overlooked-essentials-of-employee-well-being>.

<sup>57</sup> *Power* "refers to the making of decisions important to the social context as a whole and

*being* because although most Uber drivers retain their independent contractor status, they deserve more—employment benefits would contribute to their well-being.<sup>58</sup> *Skill* because they are practicing in a trade.<sup>59</sup> These values embody what the individual *wants* out of their lives.<sup>60</sup> It does not matter what *power*, *well-being*, or *skill* mean to an isolated individual.<sup>61</sup> The idea is that these values are inherent.<sup>62</sup>

Human dignity expands through multiple facets.<sup>63</sup> One being workplace dignity.<sup>64</sup> Workplace dignity is commonly defined as “a personal sense of worth, value, respect, or esteem that is derived from one’s humanity and individual social position; as well as being treated respectfully by others.”<sup>65</sup> Employees spend more time at work than they do at home, so there is a certain expectation that they will be treated with respect at work.<sup>66</sup> Some factors that have been recognized to improve workplace dignity include feedback, recognition, and positive co-worker experience.<sup>67</sup> It can be argued that employment benefits also contribute to workplace dignity.<sup>68</sup> Whether an

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enforceable against challengers when necessary by the use of severe sanctions. In order to have important decisions that could better serve human development, then good and effective governance is fundamental.” WILLIAM T. BAGATELAS ET AL., STUDIES IN ECONOMICS AND POLICY MAKING: CENTRAL/EAST EUROPEAN PERSPECTIVES, AND BEYOND 136 (Bruno S. Sergi et al. eds., 2010); see also Dara Khosrowshahi, *I Am the C.E.O. of Uber. Gig Workers Deserve Better.*, N.Y. TIMES (Aug. 10, 2020), <https://www.nytimes.com/2020/08/10/opinion/uber-ceo-dara-khosrowshahi-gig-workers-deserve-better.html> (stating that Uber drivers value the flexibility and power they have, including being able to choose “when and how they drive.”).

<sup>58</sup>

*Well-being* is opportunity for safety, health and comfort; relevant institutions include facilities for medical care and disease prevention. Because an unhealthy population cannot be a productive labor force, because a basic standard of health should be viewed as a fundamental human right, because it is unconscionable that diseases that could be eradicated or at least controlled continue to afflict millions in the less developed world, often robbing them of any human dignity.

BAGATELAS ET AL., *supra* note 57, at 137; see also Khosrowshahi, *supra* note 57 (demanding for change and stating that gig economy companies must “strengthen the rights and voices of workers.”).

<sup>59</sup> *Skill* “is opportunity to acquire and exercise excellence in a particular operation, including schools, artistic, vocational and professional organizations concerned with maintaining and improving standards of performance and taste.” BAGATELAS ET AL., *supra* note 57, at 137.

<sup>60</sup> Pati Roza, Professor of Law, Lecture in International Law in the 21<sup>st</sup> Century Seminar Class at St. Thomas University College of Law: The New Haven School of Jurisprudence (POJ) (Apr. 15, 2021).

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> See Reisman & Willard, *supra* note 55.

<sup>64</sup> See Tim Baker, *Why Dignity in the Workplace Is So Important*, HRM (Aug. 10, 2017), <https://www.hrmonline.com.au/performance/dignity-workplace-important/>.

<sup>65</sup> *Id.*

<sup>66</sup> See Anjali Tiwari & Radha R. Sharma, *Dignity at the Workplace: Evolution of the Construct and Development of Workplace Dignity Scale*, 10 FRONTIERS IN PSYCHOL. 1, 1 (2019), <https://www.frontiersin.org/articles/10.3389/fpsyg.2019.02581/full>.

<sup>67</sup> See *id.*

<sup>68</sup> See John M. Bremen, *Reducing Talent Risk Through Workplace Dignity*, FORBES (Aug. 30, 2021,



employee works as an independent contractor or an employee should not determine whether they receive employment benefits as employees rely on their employers to provide them with these benefits.<sup>69</sup>

Additionally, in July of 2003, U.S. Representative Luis Gutierrez recognized this issue.<sup>70</sup> He proposed legislation, the Day Laborer Fairness and Protection Act (“DLFPA”), “to ensure that individuals working as day laborers, or temporary workers, are afforded the full protection of and access to employment and labor laws that ensure workplace dignity and to reduce unfair competitive advantage for firms that abuse day laborers.”<sup>71</sup> The goal of the DLFPA is to protect workers that do not fall under the employee status by requiring employers of these workers to pay for their health insurance or worker’s compensation.<sup>72</sup> Workplace dignity should be practiced in all employment relationships regardless of an individual’s worker classification.<sup>73</sup>

## B. INTERNATIONAL LAW REGULATIONS

### i. International Covenant on Economic Social and Cultural Rights (ICESCR)

The International Covenant on Economic Social and Cultural Rights (“ICESCR”) is the “most widely-applicable” human rights international treaty.<sup>74</sup> The ICESCR monitors the implementation of the International Covenant on Economic, Social, and Cultural Rights by its State’s parties.<sup>75</sup> The ICESCR was adopted by the United Nations General Assembly in 1966.<sup>76</sup>

6:55 AM), <https://www.forbes.com/sites/johnbremen/2021/08/30/reducing-talent-risk-through-workplace-dignity/>.

<sup>69</sup> See Andrea H. Brustein, *Casual Workers and Employee Benefits: Staying Ahead of the Curve*, 7 U. PA. J. LAB. & EMP. L. 695, 696 (2005) (describing a variety of benefits such as “paid vacation days, sick leave, pension plans, and employer-sponsored health insurance to their full-time, permanent employees.”).

<sup>70</sup> See Juno Turner, *All in A Day’s Work? Statutory and Other Failures of the Workers’ Compensation Scheme as Applied to Street Corner Day Laborers*, 74 FORDHAM L. REV. 1521, 1545 (2005) (“The legislation broadly defines day labor to include all work that is ‘occasional or irregular,’ and includes those situations where a day laborer is employed only for the amount of time necessary to complete the discrete assignment for which he was hired.”).

<sup>71</sup> Brustein, *supra* note 69, at 708 (citing Day Laborer Fairness and Protection Act, H.R. 2870, 108th Cong. § 3 (2003)).

<sup>72</sup> See Turner, *supra* note 70, at 1546.

<sup>73</sup> See Brustein, *supra* note 69, at 708.

<sup>74</sup> *ECONOMIC, SOCIAL AND CULTURAL RIGHTS*, INT’L JUST. RESOURCE CTR., <https://ijr-center.org/thematic-research-guides/economic-social-and-cultural-rights-2/> (last visited Dec. 31, 2021).

<sup>75</sup> See *COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS*, UNITED NATIONS HUM. RTS. OFF. HIGH COMM’R, <https://www.ohchr.org/en/hrbodies/cescr/pages/cescrindex.aspx> (last visited Dec. 31, 2021).

<sup>76</sup> Mónica Pinto, *International Covenant on Economic, Social and Cultural Rights*, UNITED NATIONS AUDIOVISUAL LIBR. OF INT’L L., <https://legal.un.org/avl/ha/icescr/icescr.html> (last visited Dec. 31, 2021).

Since May of 2018, 168 United Nations Member States have adopted the ICESCR.<sup>77</sup> Under Article 7 of the ICESCR, The Right to a Fair Wage and Safe Working Conditions, the ICESCR protects worker's rights to "favorable work conditions," "fair wages[.]" and "equal remuneration" pay.<sup>78</sup> The ICESCR recognizes that "[t]he work itself must be 'decent,' meaning that it respects workers' physical and mental integrity, and respects their human rights in terms of work safety and remuneration."<sup>79</sup> The ICESCR recognizes that access to trade unions, freedom of association, and "social security [that] compensates for the lack of work-related income" are crucial to favorable work conditions.<sup>80</sup> In turn, these conditions allow individuals to obtain the highest standard of physical and mental health.<sup>81</sup> The ICESCR emphasizes the importance of workers being classified as employees. When workers are classified as independent contractors, they are not afforded these rights and thus, they are not experiencing the highest standard of physical and mental health.<sup>82</sup>

## ii. The International Labour Organization (ILO)

The International Labour Organization ("ILO") was created in 1919 and is the only tripartite United Nations ("UN") Agency.<sup>83</sup> The ILO has 187 member states and sets labor standards, develops policies, and creates programs to promote decent work for everyone.<sup>84</sup> The agency's mission is to "promot[e] social justice and internationally recognized human and labor rights, pursuing its founding mission that social justice is essential to universal and lasting peace."<sup>85</sup> The ILO International Labour Standards are legal documents created by ILO employers to set the basic standards at work.<sup>86</sup>

The ILO recognizes that work is a part of one's everyday life, and workers deserve to be treated with dignity.<sup>87</sup> The ILO has classified gig economy workers as *dependent contractors*, defined as:

"[W]orkers who have contractual arrangements of a commercial

<sup>77</sup> See *ECONOMIC, SOCIAL AND CULTURAL RIGHTS*, *supra* note 74.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* ("The remuneration should be enough so that individuals are able to earn 'a decent living for themselves and their families.'").

<sup>80</sup> *General comment No. 23*, *supra* note 52, at 1.

<sup>81</sup> *See id.* at 2.

<sup>82</sup> *See id.*

<sup>83</sup> *See About the ILO*, INT'L LAB. ORG., <https://www.ilo.org/global/about-the-ilo/lang--en/index.htm> (last visited Dec. 31, 2021).

<sup>84</sup> *See id.*

<sup>85</sup> *Mission and Impact of the ILO*, INT'L LAB. ORG., <https://www.ilo.org/global/about-the-ilo/mission-and-objectives/lang--en/index.htm> (last visited Dec. 31, 2021).

<sup>86</sup> *See What are ILO International Labour Standards?*, INT'L LAB. STANDARDS, <https://www.ioe-emp.org/policy-priorities/international-labour-standards> (last visited Dec. 31, 2021).

<sup>87</sup> *See The Benefits of International Labour Standards*, *supra* note 51.

nature to provide goods or services for or on behalf of another economic unit . . . [they] are not employees of that economic unit, but are dependent on that unit for organization and execution of the work or for access to the market.<sup>88</sup>

Even the ILO has recognized that since gig economy workers do not fit well under the definition of traditional employment, there has been an “over-estimation of one or the other of these groups (or of both)” and “it is difficult to monitor structural change.”<sup>89</sup>

#### IV. REGULATION OF WORK IN DOMESTIC JURISDICTIONS

##### A. CASE STUDY 1: FRANCE

On March 4, 2020, the *Cour de Cassation* ruled that Uber drivers should be classified as employees.<sup>90</sup> The *Cour de Cassation* is the “highest court of criminal and civil appeals in France,” and is thus considered the French Supreme Court.<sup>91</sup> In this case, the *Cour de Cassation* upheld the Paris Court of Appeals decision from March 2019, which found that an employment contract existed between Uber and its 28,000 drivers.<sup>92</sup> The case before the *Cour de Cassation* arose out of a self-employed Uber driver “claiming re-characterization of his relationship with Uber into an employment contract.”<sup>93</sup> Under French law, an employment relationship is considered a relationship of subordination, “characterized by the performance of work under the authority of an employer who has the power to give orders and directives, to control their execution and to punish the failings of his subordinate.”<sup>94</sup> Thus, the

<sup>88</sup> 20th International Conference of Labour Statisticians Geneva, *supra* note 9, at 10.

<sup>89</sup> *Id.* at 23.

<sup>90</sup> See *Cour de cassation* [Cass.] [supreme court for judicial matters] soc., Mar. 4, 2020, Bull. civ. V, No. 374 (Fr.); Männis, *supra* note 8.

<sup>91</sup> The Editors of Encyclopaedia Britannica, *Cour de Cassation*, ENCYCLOPAEDIA BRITANNICA, <https://www.britannica.com/topic/Cour-de-Cassation> (last visited Dec. 31, 2021); see, e.g., Soulier Avocats, *France: French Supreme Court Says Uber Drivers Are Employees!*, MONDAQ (Apr. 29, 2020), <https://www.mondaq.com/france/contract-of-employment/925062/french-supreme-court-says-uber-drivers-are-employees> (referring to the *Cour de Cassation* as the French Supreme Court); see also Romian Dillet, *Uber Driver Reclassified as Employee in France*, TECH. CRUNCH (Mar. 4, 2020, 11:51 AM), <https://techcrunch.com/2020/03/04/uber-driver-reclassified-as-employee-in-france/> (“[Since] the Court of Cassation is the supreme court of appeal in that case, Uber can no longer appeal the decision.”); see generally Cass. soc., Bull. civ. V, No. 374 (Fr.) (taking an appeal from a lower court).

<sup>92</sup> See Soulier Avocats, *supra* note 91.

<sup>93</sup> Régine Goury, “Uber”: The *Cour de Cassation* Reclassify the Contractual Relationship Between Uber and a Driver as an Employment Contract, MAYER|BROWN (Mar. 9, 2020), <https://www.mayerbrown.com/en/perspectives-events/publications/2020/03/cour-de-cassation-reclassify-the-contractual-relationship-between-uber-and-a-driver-as-an-employment-contract>; see Cass. soc., Bull. civ. V, No. 374 (Fr.) ¶ 3 (deciding whether petitioner’s request to re-classify his contractual relationship with Uber should be granted).

<sup>94</sup> Olivier Vibert, *A UBER DRIVER is an Employee According to French Courts*, FRENCH L. .BLOG

court based its decision on a two-pronged analysis: “[1] Is the self-employed status fictitious?” and “[2] Is there a subordinate relationship?”<sup>95</sup> In answering the first question, the court found that the characterization of the self-employed status of Uber drivers is fictitious because Uber drivers do not build their own clientele, they do not have the freedom to set their own rates, and do not have the freedom to set terms and conditions for their services.<sup>96</sup> It is actually the opposite, “[t]he company imposes the itinerary[,] and the driver’s fare is adjusted if this itinerary is not followed.” Additionally, “[t]he destination is unknown to the driver, thereby revealing that the driver cannot freely choose the route that suits him/her.”<sup>97</sup> In answering the second question, the court found that there is a subordinate relationship between Uber and their drivers because Uber has the discretion to temporarily disconnect or suspend a driver’s account if the driver has repeatedly declined a ride or if problematic behavior is reported.<sup>98</sup> Additionally, “Uber unilaterally determines its terms and conditions.”<sup>99</sup> Therefore, the *Cour de Cassation* has legally qualified the relationship between a driver and the company using an application platform as an employment contract.<sup>100</sup> However, these drivers may be considered independent contractors if one of “these platforms give[s] more freedom to their drivers and if these drivers are truly independent.”<sup>101</sup>

In response to the decision of the case, an Uber spokesperson sent the following statement:

This decision relates to the case of one specific driver, who hasn’t used the Uber app since 2017. The ruling does not reflect the reasons why drivers choose to use Uber: the independence and freedom to work if, when and where they want. Over the last two years we’ve made many changes to give drivers even more control over how they use Uber, alongside stronger social protections. We’ll keep listening to drivers and introduce further improvements.<sup>102</sup>

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(Mar. 6, 2020), <https://frenchlaw.blog/2020/03/06/a-uber-driver-is-an-employee-according-to-the-french-courts/>; see Dillet, *supra* note 91 (“When the driver goes online on Uber’s digital platform, there’s a relationship of subordination between the driver and the company. Based on that, the driver isn’t providing a service as a self-employed worker but as an employee,” the court wrote.”); see also Cass. soc., Bull. civ. V, No. 374 (Fr.) ¶ 6 (explaining how a subordinate relationship is characterized).

<sup>95</sup> Goury, *supra* note 93; see Cass. soc., Bull. civ. V, No. 374 (Fr.) (applying the two-prong analysis).

<sup>96</sup> See Goury, *supra* note 93; Cass. soc., Bull. civ. V, No. 374 (Fr.) ¶¶ 10, 15 (deciding whether the petitioner’s self-employed status was fictitious).

<sup>97</sup> Goury, *supra* note 93; see Cass. soc., Bull. civ. V, No. 374 (Fr.) ¶ 13 (relying on the fact that the driver is unaware of his or her destination when he or she accepts the Uber ride).

<sup>98</sup> See Goury, *supra* note 93; Cass. soc., Bull. civ. V, No. 374 (Fr.) ¶ 14.

<sup>99</sup> Goury, *supra* note 93; see Cass. soc., Bull. civ. V, No. 374 (Fr.) ¶ 9 (relying on Uber’s broad power to unilaterally determine the terms and conditions for suitable job performance).

<sup>100</sup> See Cass. soc., Bull. civ. V, No. 374 (Fr.) ¶ 6; see also Vibert, *supra* note 94.

<sup>101</sup> Vibert, *supra* note 94.

<sup>102</sup> Dillet, *supra* note 91.

## B. CASE STUDY 2: THE UNITED KINGDOM

In March of 2021, the Supreme Court of the United Kingdom (“U.K.”) ruled that Uber drivers will be treated as “workers.”<sup>103</sup> In the U.K., there are three types of designations: the worker, employed, and self-employed.<sup>104</sup> The worker is not an employee but instead entitles drivers to certain benefits.<sup>105</sup> This “worker” designation will give Uber drivers the opportunity to receive holiday pay, minimum wage, and, if eligible, automatic enrollment in pension plans, representing three percent (3%) of a driver’s earnings.<sup>106</sup>

Specifically, the U.K. Supreme Court ruled that the holiday pay is “to accrue on working time from log on to log off whereas Uber was committing only to these entitlements to accrue from [the] time of trip acceptance to drop off.”<sup>107</sup> This reflects a forty to fifty percent (40-50%) decrease in entitlement.<sup>108</sup> One of the claimants, James Farrar, recognizes that although this case signifies progress for Uber, “we cannot accept anything less than full compliance with legal minimums.”<sup>109</sup> He believes the next step is to go back to the Employment Tribunal to make sure that drivers are paid what they are legally entitled to.<sup>110</sup> The Supreme Court classifies Uber drivers as workers and stated in part:

Drivers are in a position of subordination and dependency in relation to Uber such that they have little or no ability to improve their economic position through professional or entrepreneurial skill[.] [However,] [i]n practice, the only way in which they can increase their earnings is by working longer hours while constantly meeting Uber’s measures of performance.<sup>111</sup>

Additionally, the Supreme Court did not agree with Uber’s assertion that Uber drivers can grow their business, as their only option is to spend more time driving.<sup>112</sup> This ruling is particularly important because the U.K. is one of the only countries that recognizes a third category of worker

<sup>103</sup> See *Uber B.V. v. Aslam* [2021] UKSC 5, [130] (appeal taken from Eng.) (holding that the claimant driver is classified as a worker); Korosec & Lomas, *supra* note 15.

<sup>104</sup> See Korosec & Lomas, *supra* note 15.

<sup>105</sup> See *id.*

<sup>106</sup> See *id.*

<sup>107</sup> *Id.*; see *Uber B.V.* UKSC 5 ¶ 124 (Eng.).

<sup>108</sup> See Korosec & Lomas, *supra* note 15.

<sup>109</sup> *Id.*

<sup>110</sup> See *id.*

<sup>111</sup> Lawrence Mishel & Celine McNicholas, *What We Learned from the UK Case Rendering Uber Drivers Employees*, ECON. POL. INST. (Mar. 2, 2021, 2:48 PM), <https://www.epi.org/blog/what-we-learned-from-the-uk-case-rendering-uber-drivers-employees/>.

<sup>112</sup> See *id.*

classification—the *worker*.<sup>113</sup> This classification allows individuals to enjoy their independent contractor status with benefits which is described later in this Article as the beginning of an optimal solution for workers.<sup>114</sup>

### C. CASE STUDY 3: THE UNITED STATES

There are several cases throughout the United States that have decided on the worker classification of Uber drivers.<sup>115</sup> In March of 2020, Plaintiffs Ali Razak, Kenan Sabani, and Khaldoun Cherdoud filed suit on behalf of a class action of UberBLACK drivers against Uber Technologies in Pennsylvania for violations of the federal minimum wage and overtime requirements under the Fair Labor Standards Act of 1938 (“FLSA”).<sup>116</sup> Plaintiffs claimed they were entitled to these benefits because “time spent online on the Uber Driver App qualifies as compensable time under the FLSA.”<sup>117</sup> In opposition, Uber argued that Plaintiffs were independent contractors because they had the autonomy to accept or deny a trip.<sup>118</sup> The Third Circuit relied on the seminal case *DialAmerica* to determine the employee status of UberBLACK drivers in Pennsylvania.<sup>119</sup> This case acknowledges that in drafting the FLSA, the legislature intended to have a broad definition of the word “employee.”<sup>120</sup> The six factors used by the Third Circuit to determine whether a worker is classified as an employee were:

- 1) the degree of the alleged employer’s right to control the manner in which the work is to be performed; 2) the alleged employee’s opportunity for profit or loss depending upon his managerial skill; 3) the alleged employee’s investment in equipment or materials required for his task, or his employment of helpers; 4) whether the service rendered required a special skill; 5) the degree of permanence of the working relationship; [and] 6) whether the service rendered is an integral part of the alleged employer’s business.<sup>121</sup>

<sup>113</sup> *A Third Approach to Classification – What is a British “Worker,”* VINSON & ELKINS (June 19, 2018), <https://www.velaw.com/insights/a-third-approach-to-classification-what-is-a-british-worker/>.

<sup>114</sup> See Mishel & McNicholas, *supra* note 111.

<sup>115</sup> See, e.g., *Razak v. Uber Techs., Inc.*, 951 F.3d 137 (3d Cir. 2020); *California v. Uber Techs., Inc.*, 56 Cal. App. 5th 266 (2020); *Matter of Lowry (Uber Techs., Inc.—Commissioner of Labor)*, 189 A.D.3d 1863 (N.Y. App. Div. 2020); *McGillis v. Dep’t of Econ. Opportunity*, 210 So. 3d 220, 220 (Fla. Dist. Ct. App. 2017).

<sup>116</sup> See *Razak*, 951 F.3d at 139.

<sup>117</sup> *Id.* at 140.

<sup>118</sup> See *id.*

<sup>119</sup> See *id.* at 142 (referencing *Donovan v. DialAmerica Mktg., Inc.*, 757 F.2d 1376, 1382 (3d Cir. 1985)).

<sup>120</sup> See *id.*

<sup>121</sup> See *id.* at 142–43 (quoting *DialAmerica*, 757 F.2d at 1382).

The court, after applying the six factors, found that four of the factors were particularly indicative of Plaintiffs' status as independent contractors.<sup>122</sup> Specifically, "the employer's right to control the manner in which the work is to be performed[,] . . . the ability of Plaintiffs to hire sub-contractors and work for competing companies, . . . the alleged employees' opportunity for profit or loss," and the driver's control over the relationship permanence with the customer.<sup>123</sup> Since the majority of the *DialAmerica* factors led to classifying UberBLACK drivers in Pennsylvania as independent contractors, the Third District held that Plaintiffs were independent contractors.<sup>124</sup> Likewise, the US Federal Labor Board's Associate General Counsel determined that Uber drivers should be classified as independent contractors.<sup>125</sup>

However, in August of 2020, Uber and Lyft in California were ordered to comply with the AB5 bill by Judge Ethan Schulman and thus, ordered to convert California Uber drivers to employee status.<sup>126</sup> In September of 2019, the State Government approved the AB5 bill, "designed to determine if an individual should be qualified as an independent contractor or employee."<sup>127</sup> This bill was specifically designed to regulate companies that hire gig economy workers, such as Uber, Lyft, and DoorDash.<sup>128</sup> A three-part test is applied in order to determine which qualification is applicable:

- (A) Is the individual free from the control of the hiring company?;
- and (B) Is the individual providing a service that is not the hiring company's core business?; and (C) Is the individual truly engaged in running his/her own business of the same nature of the service

<sup>122</sup> See *Razak*, 951 F.3d at 143.

<sup>123</sup> *Id.*

<sup>124</sup> See *id.* at 143–44.

<sup>125</sup> See Männis, *supra* note 8; see also Wiessner, *supra* note 17 ("Drivers for ride-hailing company Uber Technologies Inc are independent contractors and not employees, the general counsel of a U.S. labor agency has concluded, in an advisory memo that is likely to carry significant weight in a pending case against the company and could prevent drivers from joining a union.").

<sup>126</sup> See *Uber Techs., Inc.*, 56 Cal. App. 5th at 266; see also Bloomberg, *California Wins Ruling Against Uber, Lyft: Judge Says Drivers are Employees*, L.A. TIMES (Aug. 10, 2020, 3:34 PM), <https://www.latimes.com/business/story/2020-08-10/uber-lyft-drivers-ab5-injunction-employees-independent-contractors> ("Uber Technologies Inc. and Lyft Inc. were ordered Monday to convert their California drivers from independent contractors to employees with benefits, an early loss in a court battle that the gig economy can't afford to lose."); see also Bobby Allyn, *California Judge Orders Uber And Lyft To Consider All Drivers Employees*, NPR, <https://www.npr.org/2020/08/10/901099643/california-judge-orders-uber-and-lyft-to-consider-all-drivers-employees> (Aug. 11, 2020, 6:48 PM) ("Schulman said Lyft and Uber use 'circular reasoning' by only treating tech workers, not drivers, as employees.").

<sup>127</sup> Reis & Chand, *supra* note 41; see also Rebecca Lake, *California Assembly Bill 5 (AB5)*, INVESTOPEDIA, <https://www.investopedia.com/california-assembly-bill-5-ab5-4773201> (Aug. 29, 2021) ("California Assembly Bill 5 (AB5), popularly known as the 'gig worker bill,' is a piece of legislation that went into effect on Jan. 1, 2020, and required companies that hire independent contractors to reclassify them as employees, with some exceptions.").

<sup>128</sup> See Lake, *supra* note 127.

provided to the hiring company?<sup>129</sup>

If the three questions are answered in the affirmative, the worker is classified as an independent contractor.<sup>130</sup> If any of the three questions are answered in the negative, the worker is classified as an employee, and thus receives the protections under California labor laws, and Uber would be obligated to pay payroll taxes.<sup>131</sup> Specifically, if the employment relationship between Uber and its drivers is an employment contract, then Uber will be responsible for social security, unemployment, withholding taxes on the amounts paid to the driver, and insurance obligations.<sup>132</sup> On the opposite side of the spectrum, if Uber drivers are considered independent contractors, Uber has fewer costs and paperwork; and Uber drivers must report their income to the tax authorities.<sup>133</sup>

The order on Uber and Lyft to comply with the AB5 bill was brought by the Attorney General of California, City Attorneys of Los Angeles, San Diego, and San Francisco on behalf of the People of the State of California against Uber and Lyft.<sup>134</sup> This lawsuit came at a particularly difficult time for Uber and Lyft amidst the COVID-19 pandemic.<sup>135</sup> In response to this lawsuit, Uber conducted a study and released a poll that found that “their drivers ‘overwhelmingly support’ being classified as independent contractors.”<sup>136</sup> The survey found that eighty-two percent (82%) of drivers support their independent contractor status.<sup>137</sup> Uber is concerned about reclassifying their drivers as employees because ride prices would increase by nearly thirty

<sup>129</sup> Reis & Chand, *supra* note 41.

<sup>130</sup> *See id.*

<sup>131</sup> *See id.*

<sup>132</sup> *See id.*

<sup>133</sup> *See id.*

<sup>134</sup> *See* California v. Uber Techs., Inc., 56 Cal. App. 5th 266, 266 (2020); *see also* Bloomberg, *supra* note 126.

<sup>135</sup> *See* Bloomberg, *supra* note 126 (“Uber reported a wider loss and a 67% decline in ride revenue during the quarter that ended in June.”).

<sup>136</sup> Moreno states as follows:

“Drivers and Voters overwhelmingly support Uber’s new Independent Contractor (IC) plan . . . that allows Drivers to continue to work as Independent Contractors, maintaining the flexibility and freedom of working independently, but gives them access to benefits that today are only available to employees under existing labor laws,” according to the firms that conducted the poll — Benenson Strategy Group and GS Strategy Group.

Moreno, *supra* note 10; *see* Allyn, *supra* note 126 (“In a statement, Lyft said: ‘Drivers do not want to be employees, full stop. We’ll immediately appeal this ruling and continue to fight for their independence. Ultimately, we believe this issue will be decided by California voters and that they will side with drivers.’”); *see also* Axios, *Uber Releases Poll Showing Support for CEO’s Benefits Plan*, AXIOS (Aug. 25, 2020), <https://www.axios.com/uber-independent-contractors-employees-poll-8f92131e-8879-4eb7-85f9-d16e18bae65f.html> (emphasizing that drivers prefer to be classified as independent contractors because it provides them with flexibility as well as benefits that regular employees obtain under labor laws).

<sup>137</sup> *See* Moreno, *supra* note 10.



percent (30%) in San Francisco, and in less populated areas, there could be a 120% increase.<sup>138</sup> Uber subsequently conducted a second poll asking Uber drivers if they would be interested in a flexible benefits plan which would allow drivers to keep their independent contractor status, and eighty-nine percent (89%) of drivers supported the plan.<sup>139</sup> Lyft conducted a similar poll, and eighty-two percent (82%) of Lyft drivers also preferred their independent contractor status, and ninety percent (90%) described it as “a ‘good arrangement.’”<sup>140</sup> Uber’s CEO recognizes that the current employer system is not favorable to Uber drivers.<sup>141</sup>

California also responded to the controversy over the initial AB5 bill by first, in September of 2020, passing Assembly Bill 2257 (exempting several jobs from the AB5 bill), and second, in November of 2020, by passing Proposition 22 (classifying gig economy workers as independent contractors but providing them with benefits).<sup>142</sup> However, in Assembly Bill 2257, gig-economy workers such as Uber and Lyft drivers were not exempt under the AB5 bill.<sup>143</sup> On the other hand, Proposition 22 classifies app-based delivery and rideshare drivers as independent contractors but provides them with other benefits.<sup>144</sup> This bill is funded by state income taxes paid by rideshare and

<sup>138</sup> See Bloomberg, *supra* note 126 (stating that the reclassification of Uber drivers would result in a drastic increase in prices ranging from a 30 percent to a 120 percent increase). Alison Stein, an Economist at Uber, states as follow:

The overwhelming majority of drivers in California today spend far less than [40 hours a week]. It is an unfortunate consequence of reclassification that the majority of these workers would be displaced. Statewide, we estimate that the number of drivers active each quarter would fall from 209,000 to 51,000 [1]. This represents a 76% decrease in the number of drivers finding work on the Uber platform.

Alison Stein, *Analysis on Impacts of Driver Reclassification*, MEDIUM (May 28, 2020), <https://medium.com/uber-under-the-hood/analysis-on-impacts-of-driver-reclassification-2f2639a7f902>; see also Allyn, *supra* note 126 (“Uber and Lyft, which already have trouble turning a profit, have argued that converting drivers to formal employees with benefits would force the companies to lay off drivers and result in higher prices for passengers.”).

<sup>139</sup> See Moreno, *supra* note 10.

<sup>140</sup> See Moreno, *supra* note 10 (“[Lyft] is doubling down on a familiar message from gig economy companies: Most independent contractors don’t want to be employees,’ that poll said.”); Axios, *supra* note 136 (discussing a poll conducted by Lyft where they found that most independent contractors don’t want to be employees).

<sup>141</sup> See Moreno, *supra* note 10 (“Our current employment system is outdated and unfair. It forces every worker to choose between being an employee with more benefits but less flexibility, or an independent contractor with more flexibility but almost no safety net,’ Uber CEO Dara Khosrowshahi wrote in an op-ed this month.”); see also Dara Khosrowshahi, *The High Cost Of Making Drivers Employees*, UBER NEWSROOM (Oct. 5, 2020), <https://www.uber.com/en-CA/newsroom/economic-impact/>.

<sup>142</sup> See Lake, *supra* note 127.

<sup>143</sup> *Id.*

<sup>144</sup> See CAL. BUS. & PROF. CODE §§ 7451–7453, *invalidated by* *Castellanos v. State of California*, No. RG21088725, 2021 Cal. Super. LEXIS 7285; see also *Proposition 22*, LEGIS. ANALYST’S OFF. (Nov. 3, 2020), <https://lao.ca.gov/BallotAnalysis/Proposition?number=22&year=2020> (defining app-based rides and delivery companies as “companies [who] allow customers to hire rides or order

delivery company drivers and investors.<sup>145</sup> The bill states that the network company and the app-based driver enter into a written contract where the driver cannot be terminated unless the ground is specified in the contract.<sup>146</sup> Most importantly, this bill gives certain drivers benefits such as a health insurance stipend, rest policy, earnings minimum, limited workers compensation coverage, and prohibits workplace discrimination.<sup>147</sup> Gig economy companies such as Lyft, Uber, and Doordash pledged over \$200 million dollars to pass Proposition 22 because it is more inferior, and thus less costly than employee status.<sup>148</sup> Some of the notable differences include that Proposition 22 affords minimum wage (fourteen dollars (\$14) per hour), which only applies during active hours (when they have a passenger in their vehicle or are en-route to pick up a passenger).<sup>149</sup> Some other non-monetary benefits include requiring drivers to take a break of at least six hours.<sup>150</sup> However, a group of Uber and Lyft drivers have filed suit to overturn Proposition 22 as “unconstitutional because it limits the power of the Legislature to grant workers the right to organize, and excludes drivers from being eligible for workers’ compensation.”<sup>151</sup> On August 20, 2021, State Superior Judge Frank Roesch agreed, and ruled Proposition 22 unconstitutional.<sup>152</sup> The portion of

food for delivery on a phone app.”).

<sup>145</sup> See *Proposition 22*, *supra* note 144.

<sup>146</sup> See CAL. BUS. & PROF. § 7452, *invalidated by Castellanos*, 2021 Cal. Super. LEXIS 7285.

<sup>147</sup> See *Proposition 22*, *supra* note 144; CAL. BUS. & PROF. §§ 7454–7461, *invalidated by Castellanos*, 2021 Cal. Super. LEXIS 7285.

<sup>148</sup> See *No 22 on Mobile Workers Alliance*, MOBILE WORKERS ALL., <https://mobilealliance.org/caprop-22-facts/> (last visited Dec. 31, 2021); see also *California: Prop 22 Strips Gig Workers of Minimum Wage*, HUM. RTS. WATCH (Nov. 9, 2020, 10:38 AM), <https://www.hrw.org/news/2020/11/09/california-prop-22-strips-gig-workers-minimum-wage#> (“The passage of Proposition 22 in California is a blow to the rights of gig workers, effectively stripping them of the state’s minimum wage guarantee, paid sick leave, and other protections,” Human Rights Watch and Amnesty International said in a joint statement today.”).

<sup>149</sup> See *No 22 on Mobile Workers Alliance*, *supra* note 148; CAL. BUS. & PROF. § 7449(f), *invalidated by Castellanos*, 2021 Cal. Super. LEXIS 7285; Kim Lyons, *Uber and Lyft Roll Out New Benefits for California Drivers Under Prop 22*, THE VERGE (Dec. 14, 2020, 3:38 PM), <https://www.theverge.com/2020/12/14/22174600/uber-lyft-new-benefits-california-drivers-prop-22-gig-economy>. But see *California: Prop 22 Strips Gig Workers of Minimum Wage*, *supra* note 148 (stating that Proposition 22 has actually stripped drivers of California’s guaranteed minimum wage).

<sup>150</sup> See Lyons, *supra* note 149.

<sup>151</sup> The Associated Press, *Drivers for Uber, Lyft and Delivery Services Sue to Overturn California Prop. 22*, AUTO BLOG (Jan. 14, 2021, 9:17 AM), <https://www.autoblog.com/2021/01/14/prop-22-lawsuit-uber-lyft-drivers-california/>; see *Castellanos*, 2021 Cal. Super. LEXIS 7285, at \*1 (“Alameda County Superior Court, granting petition filed by several rideshare drivers and union, issued writ of mandate compelling State of California and Director of California Department of Industrial Relations to cease enforcement of Proposition 22’s provisions (Bus. & Prof. Code § 7448 et seq.) as unconstitutional.”).

<sup>152</sup> See *Castellanos*, 2021 Cal. Super. LEXIS 7285, at \*1; Justin Ray, *Prop. 22 is Ruled Unconstitutional: What it Means, How Apps Reacted and What Happens Next*, L.A. TIMES (Aug. 23, 2021, 6:10 AM), <https://www.latimes.com/california/newsletter/2021-08-23/proposition-22-lyft-uber-decision-essential-california>.

2021] *EMPLOYMENT CLASSIFICATION AND HUMAN DIGNITY* 69

the Act at issue that is relevant to this Article is California Business & Professional Code § 7451, which states:

Notwithstanding any other provision of law, including, but not limited to, the Labor Code, the Unemployment Insurance Code, and any orders, regulations, or opinions of the Department of Industrial Relations or any board, division, or commission within the Department of Industrial Relations, **an app-based driver is an independent contractor and not an employee or agent with respect to the app-based driver's relationship with a network company if the following conditions are met:**

- (a) The network company does not unilaterally prescribe specific dates, times of day, or a minimum number of hours during which the app-based driver must be logged into the network company's online-enabled application or platform.
- (b) The network company does not require the app-based driver to accept any specific rideshare service or delivery service request as a condition of maintaining access to the network company's online-enabled application or platform.
- (c) The network company does not restrict the app-based driver from performing rideshare services or delivery services through other network companies except during engaged time.
- (d) The network company does not restrict the app-based driver from working in any other lawful occupation or business.<sup>153</sup>

The court found that Section 7451 of the Act is unconstitutional because “declaring app-based drivers to be independent contractors, thereby removing them from [the] workers’ compensation system, usurps [the California] Legislature’s power to determine which workers must be covered or not covered by workers’ compensation system.”<sup>154</sup> The language of the Act states that if any portion of Section 7451 is severable, the whole Act shall be stricken, which in effect led to Proposition 22 being deemed unconstitutional.<sup>155</sup> Since Proposition 22 was put in place to overrule the AB5 bill, and now that Proposition 22 has been overruled, the AB5 rule comes back into effect, meaning Uber drivers in California are classified as employees with benefits.<sup>156</sup> Thus, in order for the initiatives of Proposition 22 to be effective,

<sup>153</sup> CAL. BUS. & PROF. CODE § 7451, *invalidated by Castellanos*, 2021 Cal. Super. LEXIS 7285 (emphasis added).

<sup>154</sup> *Castellanos*, 2021 Cal. Super. LEXIS 7285, at \*1.

<sup>155</sup> See CAL. BUS. & PROF. CODE § 7467(b); see *Castellanos*, 2021 Cal. Super. LEXIS 7285, at \*6.

<sup>156</sup> See Kate Wheeling, *Q&A: What Overturning Prop 22 Could Mean for the Future of the Gig Economy*, DOT.LA (Sept. 6, 2021, 12:24 PM), <https://dot.la/proposition-22-california-2020-2654920815/particle-2>. By overturning Proposition 22, the classification of gig economy workers

individual state legislatures, in this case California, or the federal legislature need to grant workers the right to qualify as independent contractors with benefits.<sup>157</sup>

In analyzing some other recent decisions of other states, Florida declared Uber drivers to be classified as independent contractors.<sup>158</sup> On the other hand, in New York, the Supreme Court found that Uber drivers qualify as employees because they exercise sufficient control over their drivers.<sup>159</sup> The factors used to establish this include the fact that “Uber controls the drivers’ access to their customers, calculates and collects the fares and sets the drivers’ rate of compensation[,] . . . provides a navigation system, tracks the drivers’ location on the app throughout the trip[,] . . . controls the vehicles[,] [and] precludes certain driver behavior.”<sup>160</sup> Thus, Uber in upstate New York is responsible for their employees’ unemployment insurance contributions.<sup>161</sup> Nonetheless, the majority of the United States still classifies Uber drivers as independent contractors.<sup>162</sup>

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in California reverts to the AB5 bill, affording drivers to be entitled to:

minimum wage; they will be entitled to be paid overtime if they work more than 40 hours a week; they’ll be entitled to protection against discrimination on the basis of race, religion, gender, etc[.]; they’ll be entitled to workers compensation benefits if they’re injured. It will improve minimum standards for drivers.

*Id.*; *Castellanos*, 2021 Cal. Super. LEXIS 7285, at \* 2 (“Before Proposition 22 went into effect, the Legislature passed an act adopting the ‘ABC test’ for employment status, which was understood to reclassify app-based drivers as employees. (Stats. 2019, ch. 296 [hereafter ‘AB5’]”).

<sup>157</sup> See The Associated Press, *supra* note 151.

<sup>158</sup> See *McGillis v. Dep’t of Econ. Opportunity*, 210 So. 3d 220, 226 (Fla. Dist. Ct. App. 2017). (holding that the driver’s flexibility of choosing who, when, and where to drive was indicative of an independent contractor status); see also *Reis & Chand*, *supra* note 41 (pointing out that Uber drivers are considered independent contractors in both Florida and in Pennsylvania); see also Robert T. Dumbacher & Kevin J. White, *Florida Court Finds Uber Drivers are Independent Contractors, Not Employees*, HUNTON ANDREWS KURTH (Feb. 9, 2017), <https://www.huntonlaborblog.com/2017/02/articles/employeeindependent-contractor/florida-court-finds-uber-drivers-independent-contractors-not-employees/> (stating that the Third Circuit analyzed both the “driver’s contract with Uber and the nature of the parties’ relationship” and determined that “Uber did not maintain the type of control to which a traditional employee is subject and therefore found that Uber drivers are not entitled to benefits under Florida’s unemployment insurance statute.”).

<sup>159</sup> See *Matter of Lowry* (Uber Techs., Inc.—Commissioner of Labor), 189 A.D.3d 1863, 1865 (N.Y. App. Div. 2020); see also Kevin J. Smith & Jamie Moelis, *Battle Over Rideshare Worker Classification Continues: New York Supreme Court Holds Uber Drivers Are Employees, Entitled to Unemployment Insurance*, NAT’L L. REV. (Jan. 8, 2021), <https://www.natlawreview.com/article/battle-over-rideshare-worker-classification-continues-new-york-supreme-court-holds>.

<sup>160</sup> *Matter of Lowry*, 189 A.D.3d at 1865–66; Smith & Moelis, *supra* note 159 (quoting *Matter of Lowry*).

<sup>161</sup> See *Matter of Lowry*, 189 A.D.3d at 1866; see also Smith & Moelis, *supra* note 159 (citing *Matter of Lowry*).

<sup>162</sup> See *Wiessner*, *supra* note 17; see, e.g. *McGillis*, 210 So. 3d at 226–27.

## D. CASE STUDY 4: AUSTRALIA

As discussed above, the Fair Work Ombudsman (“FWO”) decided not to pursue Uber Australia Pty Ltd for employee entitlements, determining that Uber drivers are independent contractors.<sup>163</sup> The most recent decision on this issue, in July of 2019, is consistent with the determination made by the FWO.<sup>164</sup> Rajab Suliman began working for Uber, also known as Rasier Pacific Pty Ltd, in August of 2017.<sup>165</sup> Suliman brought suit against Uber because Uber logged him off the Rider Application in February of 2019 with no explanation.<sup>166</sup> Due to Uber’s actions, Suliman was unable to perform his duties and claimed that these actions constituted an unfair dismissal pursuant to Section 394 of the Fair Work Act 2009 (“FWA”).<sup>167</sup> The issue before the court was whether Plaintiff is considered an employee under Section 394 of the FWA.<sup>168</sup> Suliman characterized his relationship with Uber as a “casual employee” because he had flexible hours, did not negotiate fares, did not know how long a trip would take, and did not control payment.<sup>169</sup> The court disagreed.<sup>170</sup> First, Clause 4 of the service agreement between Plaintiff and Uber was indicative of an independent contractor relationship.<sup>171</sup> Next, the court discussed that Suliman was not a casual employee because of his ability to log off and on without Uber’s permission.<sup>172</sup> The court reasoned that if Suliman was a casual employee, he likely could not leave work at his leisure as he currently has the autonomy to do so.<sup>173</sup> The court also recognized that under traditional employment relationship tests, Suliman’s relationship with

<sup>163</sup> See Melinda Bell, *FWO Finds Uber Drivers are Not Employees*, HALL & WILCOX (June 17, 2019), <https://hallandwilcox.com.au/thinking/fwo-finds-uber-drivers-are-not-employees/>.

<sup>164</sup> See Bell, *supra* note 163; *Rajab Suliman v Rasier Pacific Pty Ltd* [2019] FWC 4807, ¶ 1 (12 July 2019) (Austl.); see also *Janaka Namal Pallage v Rasier Pacific Pty Ltd* [2018] FWC 2579, ¶ 81 (11 May 2018) (Austl.) (holding that the Uber driver claimant was classified as an independent contractor); *Mr Michail Kaseris v Rasier Pacific V.O.F.* [2017] FWC 6610, ¶ 3 (21 December 2017) (Austl.) (finding that the Uber driver was an independent contractor); *Uber Australia Investigation Finalised*, FAIR WORK OMBUDSMAN (June 7, 2019), <https://www.fairwork.gov.au/about-us/news-and-media-releases/2019-media-releases/june-2019/20190607-uber-media-release> (highlighting the FWO’s investigation of Uber Australia, who stated that there was overwhelming evidence to support the finding that Uber drivers are independent contractors). But *c.f.* Mishel & McNicholas, *supra* note 111 (discussing the recent United Kingdom Supreme Court ruling where the Court found that Uber drivers are indeed employees).

<sup>165</sup> See *Suliman* FWC 4807 at ¶ 1 (Austl.).

<sup>166</sup> See *id.* at ¶ 1.

<sup>167</sup> See *id.*; see also *Fair Work Act 2009* s 394 (Austl.) (defining an unfair dismissal as “when an employee is dismissed from their job in a harsh, unjust or unreasonable manner.”).

<sup>168</sup> See *Suliman* FWC 4807 (Austl.) at ¶ 3; see also *Fair Work Act 2009* s 394 (Austl.) (listing status as an employee as one of the elements to sustain a claim for unfair dismissal).

<sup>169</sup> See *Suliman* FWC 4807 (Austl.) at ¶¶ 3, 22.

<sup>170</sup> See *id.* at ¶ 37.

<sup>171</sup> See *id.* at ¶ 11.

<sup>172</sup> See *id.* at ¶ 38.

<sup>173</sup> See *id.* at ¶¶ 39–40.

Uber leads toward classification as a contractor.<sup>174</sup> For these reasons, the court found that Suliman was not an employee of Uber and was thus not protected from unfair dismissal.<sup>175</sup>

## V. AGENCIES THAT REGULATE EMPLOYEES

### A. WHY FRANCE AND THE UNITED KINGDOM SEE UBER DRIVERS AS EMPLOYEES/WORKERS

#### i. The French Labour Code

In French law, there are only two statuses: the employee and self-employed.<sup>176</sup> There was a great deal of pressure for the legislature to address the issue of where these gig-economy workers fall, and if not, to make a new category for them.<sup>177</sup> However, as discussed above, at least as it applies to Uber, the *Cour de Cassation* classified Uber drivers as employees in March of 2020.<sup>178</sup> Notwithstanding this holding, an employee is not defined by French Labour Law; it is solely defined under an employment contract.<sup>179</sup> An employment contract has three factors under French law: “(1) discharge of tasks[,] (2) remuneration[,] and (3) relationship of subordination.”<sup>180</sup> The first two factors are found in almost every agreement, and the third is what differentiates employees from independent contractors.<sup>181</sup> The French Labour Code presumes that a person is an independent contractor if the individual’s “working conditions are defined exclusively by himself or in a contract, in conjunction with his customer[;]” this includes individuals who are registered as self-employed service providers, although this presumption is

<sup>174</sup> See *id.* at ¶ 41.

<sup>175</sup> *Suliman* FWC 4807 ¶¶ 81–82 (Austl.).

<sup>176</sup> *Reclassification of the Contract Between a Delivery Rider and a Digital Platform: A Strong Message Sent by the Cour De Cassation*, SOULIER AVOCATS (Dec. 29, 2018), <https://www.soulier-avocats.com/en/reclassification-of-the-contract-between-a-delivery-rider-and-a-digital-platform-a-strong-message-sent-by-the-cour-de-cassation/> [hereinafter Soulier Avocats].

<sup>177</sup> See *id.* (speculating that the Cour de Cassation sent a “strong signal” to the French legislator to “fully tackle this issue[.]”).

<sup>178</sup> See Cour de cassation [Cass.] [supreme court for judicial matters] soc., Mar. 4, 2020, Bull. civ. V, No. 374 (Fr.); see also Mathieu Rosemain & Dominique Vidalon, *Top French Court Deals Blow to Uber by Giving Driver ‘Employee’ Status*, REUTERS (Mar. 4, 2020, 9:05 AM), <https://www.reuters.com/article/us-uber-court-idUKKBN20R23F> (“France’s top court has recognized the right of an Uber driver to be considered an employee[.]”).

<sup>179</sup> See Cass. soc., Bull. civ. V, No. 374 (Fr.) (stating that Uber BV is an employment contract); see also *Legal Framework Differentiating Employees from Independent Contractors*, L&E GLOB., <https://knowledge.leglobal.org/eic/country/france/legal-framework-differentiating-employees-independent-contractors-7/> (last visited Dec. 31, 2021) (“An employment contract is defined as an agreement by which an individual works for another person (natural or legal), under the latter’s subordination, for which s/he receives remuneration.”).

<sup>180</sup> *Legal Framework Differentiating Employees from Independent Contractors*, *supra* note 179.

<sup>181</sup> *Id.*

rebuttable.<sup>182</sup> However, as is the case with most employment laws, “the self-employed have no entitlement to statutory employment rights but are instead subject to specific regulations (and sometimes professional rules) applicable to their activity.”<sup>183</sup> This has led independent contractors to file suits, without hesitation, in an attempt to requalify their relationship as an employer-employee relationship.<sup>184</sup>

The distinction between an independent contractor and employee is essential because employees enjoy “guaranteed remuneration, guaranteed periods of rest, the right to engage in collective bargaining, and the right to a social protection.”<sup>185</sup> To account for members in the gig economy, France proposed a bill in September of 2019 with the intent to create a separate employment status for gig economy workers.<sup>186</sup> Yet, the bill was defeated in the French Senate.<sup>187</sup> However, France remains one of the only countries where gig economy workers (such as those working for Uber) enjoy the employment status.<sup>188</sup> The implications of this classification on the employer include becoming “liable for social security contributions, . . . respect[ing] working hours and, where applicable, [paying] overtime[,]” among other benefits.<sup>189</sup> Thus, in France, Uber drivers are on their way to receiving the workplace dignity they deserve through entitlement to employment benefits.<sup>190</sup> However, this classification may not allow for the flexibility Uber drivers enjoy as independent contractors.<sup>191</sup> A potential solution to this conflict of interests is discussed later in this Article.<sup>192</sup>

<sup>182</sup> *Id.*

<sup>183</sup> Joël Grangé & Camille Ventejou, *Employment and Employee Benefits in France: Overview*, PRAC. L. (Mar. 1, 2021), <https://uk.practicallaw.thomsonreuters.com/0-503-0054>.

<sup>184</sup> See Marie-Thérèse Eugénio, *Issues of Employment Status in France*, GLOB. WORKPLACE INSIDER (June 4, 2018), <https://www.globalworkplaceinsider.com/2018/06/issues-of-employment-status-in-france/>.

<sup>185</sup> Nicolas Boring, *France: Bill Intended to Create New Status for Platform Economy Workers Defeated in Senate*, LIBR. OF CONG. (July 2, 2020), <https://www.loc.gov/law/foreign-news/article/france-bill-intended-to-create-new-status-for-platform-economy-workers-defeated-in-senate/>.

<sup>186</sup> *See id.*

<sup>187</sup> *Id.*

<sup>188</sup> *See How France is Responding to the Uber and the Gig Economy*, HACKLER FLYNN & ASSOC., <https://hacklerflynnlaw.com/how-france-is-responding-to-the-uber-and-the-gig-economy/> (last visited Dec. 31, 2021) (“France’s highest appeals court has become the first to declare that a former Uber driver should be recognized as an employee rather than an independent worker.”).

<sup>189</sup> Helene Fouquet, *Uber Drivers’ Self-Employed Status ‘Fictitious’, France Rules*, YAHOO! FIN. (Mar. 4, 2020), <https://finance.yahoo.com/news/uber-drivers-self-employed-status-174704591.html>.

<sup>190</sup> *See id.*

<sup>191</sup> *See Moreno, supra* note 10 (quoting Uber CEO, Dara Khosrowshahi, who stated that Uber’s current employment system “forces every worker to choose between being an employee with more benefits but less flexibility, or an independent contractor with more flexibility but almost no safety net.”).

<sup>192</sup> *See infra* Part VI.

## ii. The United Kingdom's Labour Law

The U.K.'s Labour Law distinguishes between three different classes of workers: the employee, worker, or self-employed.<sup>193</sup> The distinction determines an individual's statutory employment rights and tax treatment.<sup>194</sup> The U.K. Labour Law assesses whether an individual is an employee based on the following factors: (i) "[t]he degree of day-to-day control exerted over the individual by the business"; (ii) "[w]hether the business is obliged to provide work for the individual, and he/she is obliged to do it"; and (iii) "[w]hether the individual is required to provide services personally or can send a substitute."<sup>195</sup> The more evidence there is to support these factors, the more likely the individual will be considered an employee.<sup>196</sup> The worker category "includes employees, but will also include an individual who has entered into a contract personally to perform any work or services for another party, as long as that other party is not the client or customer of any business carried on by the individual."<sup>197</sup> Lastly, the self-employed category includes workers who "provide[] services to another party in the course of running a business or profession in his/her own right."<sup>198</sup> Under the U.K. Labour Law, employers are required to have employers' liability insurance, similar to worker's compensation in the United States, for any injury which occurs on the job.<sup>199</sup> Additionally, all eligible employees are automatically enrolled in a pension plan (with employer contributions of either three percent (3%) of qualified earnings or four percent (4%) of base salary); life assurance (covering three to four times an employee's annual salary); disability insurance; free healthcare services; sick leave and pay; and annual leave (full-time employees can take up to twenty-eight (28) days off).<sup>200</sup>

## B. WHY THE UNITED STATES AND AUSTRALIA SEE UBER DRIVERS AS INDEPENDENT CONTRACTORS

As discussed above, worker classification has several implications.<sup>201</sup> However, one of the implications not recognized above is how this has an effect on *who* the claimant is.<sup>202</sup> A typical claimant in these actions is the

<sup>193</sup> See Katie Clark & Paul McGrath, *Employment and Employee Benefits in the UK: Overview*, PRAC. L. (July 1, 2020), <https://uk.practicallaw.thomsonreuters.com/7-503-4973>.

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> See *Comparing US Employee Benefits to Those in the UK*, ZEDRA (Sept. 17, 2020), <https://www.zedra.com/news-events/news/us-uk-employee-benefits-comparison/>.

<sup>200</sup> See *id.* (highlighting employment benefits offered to U.K. employees).

<sup>201</sup> See Männis, *supra* note 8 (stating that a company may experience a major blow when a court reclassifies its workers).

<sup>202</sup> See *id.*



Uber driver, the individual who is not being afforded the labor protections they deserve.<sup>203</sup> Another claimant may be a union that defends transportation worker's rights.<sup>204</sup> However, in countries where Uber drivers are classified as independent contractors, labor unions cannot defend the drivers.<sup>205</sup> Therefore, the claimants analyzed in this section are the Uber drivers themselves, as they are not entitled to be represented by labor unions.<sup>206</sup>

#### i. The United States Fair Labor Standards Act

The Fair Labor Standards Act of 1938 ("FLSA") "provide[s] for the establishment of fair labor standards in employments in and affecting interstate commerce, and for other purposes."<sup>207</sup> An employer is defined under the FLSA as "any person acting directly or indirectly in the interest of an employer in relation to an employee," and an employee as "any individual employed by an employer."<sup>208</sup> If a worker is classified as a non-exempt employee under the FLSA, the employer must pay him or her the federal hourly minimum wage and overtime pay for hours that exceed the 40-hour workweek.<sup>209</sup> Conversely, an independent contractor is not considered an employee under the FLSA, and thus, employers are not required to provide them with those same benefits.<sup>210</sup> Independent contractors are not entitled to minimum wage nor overtime protections.<sup>211</sup>

#### ii. Australia's Fair Work Act

The Fair Work Act 2009 ("FWA") is the primary legislation of all Australia's workplace relations.<sup>212</sup> The FWA governs and ensures that employers and business owners adhere to the legislation.<sup>213</sup> The main goal of the FWA

<sup>203</sup> See, e.g., Cour de cassation [Cass.] [supreme court for judicial matters] soc., Mar. 4, 2020, Bull. civ. V, No. 374 (Fr.) (involving "Mr. X," an Uber driver who petitioned the lower court to request reclassification as an employee).

<sup>204</sup> For example, the App Drivers & Couriers Union ("ADCU") claims to be the "UK's largest independent trade union for app based drivers and couriers." See generally ADCU, <https://www.adcu.org.uk/> (last visited Dec. 31, 2021).

<sup>205</sup> See Männis, *supra* note 8.

<sup>206</sup> See *id.*

<sup>207</sup> 29 U.S.C. § 201.

<sup>208</sup> 29 U.S.C. §§ 203(d)–(e)(1).

<sup>209</sup> Independent Contractor Status Under the Fair Labor Standards Act, 86 Fed. Reg. 1168, 1168 (Jan. 7, 2021) (to be codified at 29 C.F.R. pt. 780, 788, 795).

<sup>210</sup> See *id.*

<sup>211</sup> See Susan Milner Parrot & Smith Anderson, *Independent Contractor Status Under the FLSA Being Reviewed by Biden DOL*, JD SUPRA (Feb. 26, 2021), <https://www.jdsupra.com/legalnews/independent-contractor-status-under-the-2475166/>.

<sup>212</sup> See *Fair Work in Australia*, EMPLOYSURE, <https://employsure.com.au/guides/fair-work-australia/> (last visited Dec. 31, 2021) (defining the Fair Work Act 2009 as Australia's "most important piece of employment law" that establishes minimum terms and conditions for employees).

<sup>213</sup> See *id.* (stating that the purpose of the Fair Work Act 2009 is to regulate Australia's employer-

is to provide fair working conditions (e.g., minimum wage) and prevent employee discrimination (e.g., unfair dismissal) for employees.<sup>214</sup> There are certain entitlements that employers are required to provide: the National Employment Standards (NES), Modern Awards, and enterprise agreements.<sup>215</sup> The FWA extends some general protections for independent contractors, such as coercion, adverse action, and abuses of freedom of association.<sup>216</sup> The Fair Work Ombudsman (“FWO”) and the Fair Work Commission (“FWC”) are independent government organizations under the Fair Work Act 2009.<sup>217</sup> The FWC maintains the minimum wage and employment conditions.<sup>218</sup> Similarly, the FWO ensures the enforcement of the FWA and helps employers, contractors, and employees with workplace responsibilities.<sup>219</sup>

In June of 2019, after a two-year investigation, the FWO “announced that it would not pursue Uber Australia Pty Ltd (Uber Australia) for employee entitlements” because it found Uber drivers should be classified as independent contractors and that no employment relationship existed between Uber and its drivers.<sup>220</sup> The organization contested that in order for an employment relationship to exist, there must be at least “an obligation for an employee to perform work when it is demanded by the employer.”<sup>221</sup> The FWO reached its decision by considering evidence of log-on and log-off records, drivers’ contracts, payment records, and interviews.<sup>222</sup> Some of the factors that indicated independence include that Australian Uber drivers have the flexibility to choose their own driving schedule, and Uber Australia does not require drivers to work during specific hours of the day.<sup>223</sup> The FWO “stressed that its probe related only to Uber – and was not an investigation into other

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employee relations).

<sup>214</sup> See *id.*

<sup>215</sup> See *id.*

<sup>216</sup> See *Contractor Rights & Protections*, AUSTL. GOV’T BUS., <https://business.gov.au/people/contractors/contractor-rights-and-protections> (June 24, 2020); see also Kristine Bason, *7 Things You Need to Know About Fair Work General Protections*, LEGAL VISION, <https://legal-vision.com.au/fair-work-general-protections/> (July 18, 2019) (stating that “general protections have a wide reach” as “they protect independent contractors[.]”).

<sup>217</sup> *Fair Work in Australia*, *supra* note 212.

<sup>218</sup> See *id.*

<sup>219</sup> See *id.*

<sup>220</sup> Bell, *supra* note 163; see Männis, *supra* note 8; see also *Uber Australia Investigation Finalised*, *supra* note 17 (“The weight of evidence from our investigation establishes that the relationship between Uber Australia and the drivers is not an employment relationship[.]”).

<sup>221</sup> *Uber Australia Investigation Finalised*, *supra* note 17; see Männis, *supra* note 8 (“The [FWO’s] conclusion emphasi[z]ed that employment relations require, at a minimum, an obligation for an employee to perform work, when demanded so by the employer.”).

<sup>222</sup> Chau, *supra* note 30; see *Rajab Suliman v Rasier Pacific Pty Ltd* [2019] FWC 4807, ¶ 76 (12 July 2019) (Austl.) (stating that the ruling was based on evidence presented “in relation to Mr[.] Suliman’s circumstances, the 2017 Services Agreement and the indicia considered as a whole.”).

<sup>223</sup> See *Suliman* FWC 4807 ¶ 21 (Austl.); see also *Uber Australia Investigation Finalised*, *supra* note 17 (“Our investigation found that Uber Australia drivers are not subject to any formal or operational obligation to perform work . . . [They] have control over whether, when, and for how long they perform work, on any given day or on any given week.”).

companies in the gig economy including Ola [a ride-sharing application], Deliveroo [a delivery service application], DiDi [a ride-sharing application] and Menulog [a delivery service application].”<sup>224</sup> The effect of this determination is that Uber drivers are not entitled to receive sick leave, minimum wage, nor annual leave.<sup>225</sup> Similar to the response from Uber France after the ruling from France’s highest court, Uber Australia said it welcomed the FWO’s findings and stated, “[d]river-partners tell us they value the freedom of being their own boss . . . . In fact, more than 90 per cent of driver-partners in Australia tell us flexibility is the key attraction to using the Uber app.”<sup>226</sup> Following this decision, an outraged Australian Uber driver, commented that the decision is incorrect because drivers are not allowed to set their own rates as contractors should be allowed to.<sup>227</sup> The Transport Workers Union (“TWU”) recognized that this decision calls for law reform as it is devastating for workers in the gig economy.<sup>228</sup> Professor Sarah Kaine from the University of Technology Sydney commented that she does not feel that this decision is definitive because “the [FWO] is not the only actor that can take action against Uber” as unions and individual drivers can take action as well.<sup>229</sup> In response to this litigation, Uber Australia states that:

Uber Australia welcome[d] the FWO [decision], [adding that] “their drivers value the ‘freedom of being their own boss.’” “We believe that being your own boss does not need to come at the expense of security and support in work. Uber believes that everyone should have access to a set of affordable and reliable social protections, whatever category of employment they are in,” a spokesperson for the company said. “We want to work with governments and the community to ensure Australians can access independent and flexible earning opportunities, without limiting their access to the support and security they deserve.”<sup>230</sup>

Another outraged Australian Uber driver also commented on his disappointment with the FWO’s decision and stated, “It goes against decisions

<sup>224</sup> Chau, *supra* note 30.

<sup>225</sup> *Id.*

<sup>226</sup> *Id.*

<sup>227</sup> *Id.*; see Dillet, *supra* note 91 (stating that a Paris court concluded Uber drivers “couldn’t build their own customer base and couldn’t set prices.”).

<sup>228</sup> See Chau, *supra* note 30. The TWU began in 1888 and now represents over 30,000 transportation workers by “fight[ing] for a fair day’s pay for a fair day’s work.” *About Us*, TRANSP. WORKERS’ UNION NSW, <https://twunsw.org.au/about-us/> (last visited Dec. 31, 2021).

<sup>229</sup> Chau, *supra* note 30; see Dillet, *supra* note 91 (“Other drivers could leverage the ruling from the top court for their specific cases.”).

<sup>230</sup> Dominic Powell, *Fair Work Ombudsman Determines that Uber Australia Drivers are not Employees in Landmark Ruling*, SMART CO. (June 7, 2019), <https://www.smartcompany.com.au/business-advice/legal/fwo-uber-drivers-not-employees/>.

made in several other courts around the world which found Uber to be an employer.”<sup>231</sup> This comment reiterates the importance of this Article.<sup>232</sup> Comments, such as the ones from the two Australian Uber drivers above, demonstrate a need to search for a universal solution among the courts internationally.<sup>233</sup>

Additionally, the Australian Senate has recognized the disconnect in the gig economy and has made a recommendation for the Fair Work Act to “be amended to ensure that all workers have the protections of the Act and access to the labour standards, minimum wages and conditions established under the Act, so that these rights accrue to dependent and on demand contracting, preventing those arrangements from being disguised as independent contracting.”<sup>234</sup>

## VI. APPRAISAL, ALTERNATIVES, AND RECOMMENDATIONS

### A. WHY CLASSIFYING UBER DRIVERS AS INDEPENDENT CONTRACTORS OR EMPLOYEES IS PROBLEMATIC TO THE GREATER GOOD

App-based platforms have created “‘fissured workplace’ business models[,]” as they treat workers like employees (monitoring and controlling their behaviors), but classify workers as independent contractors (stripping them of their rights and benefits).<sup>235</sup> Minimum wage, paid time off, and medical leave all “arguably contribute to the dignity of employees, and when such employment standards do not exist, or when they exist in a diminished form (e.g., when workers and employers can largely ‘contract out’ of these standards), then the dignity of employees is diminished as well.”<sup>236</sup> In addition, our country is currently amidst uncertain times due to the effects of the COVID-19 pandemic.<sup>237</sup> Due to social distancing and business closures

<sup>231</sup> Chau, *supra* note 30; *see* Dillet, *supra* note 91.

<sup>232</sup> *See supra* Part IV (discussing the inconsistent classification of Uber drivers in France, the U.S., the U.K., and Australia).

<sup>233</sup> *See* Chau, *supra* note 30 (citing an Uber driver’s belief that the FWO decision was inconsistent when compared to other international court rulings).

<sup>234</sup> Chapter 8 *The Gig Economy: Hyper Flexibility or Sham Contracting?*, PARLIAMENT OF AUSTRALIA, [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Education\\_and\\_Employment/AvoidanceofFairWork/Report/c08](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/AvoidanceofFairWork/Report/c08) (last visited Dec. 31, 2021).

<sup>235</sup> Tanya Goldman & David Weil, *Who’s Responsible Here? Establishing Legal Responsibility in the Fissured Workplace*, 42 BERKELEY J. EMP. & LAB. L. 55, 55 (2021) (“These arrangements confound legal classifications of ‘employment’ and expose deficiencies with existing workplace protections, which are based on ‘employment relationships.’”).

<sup>236</sup> Avner Levin, *Dignity in The Workplace: An Enquiry into the Conceptual Foundation of Workplace Privacy Protection Worldwide*, 11 ALSB J. EMP. & LAB. L. 63, 70 (2009); *see California: Prop 22 Strips Gig Workers of Minimum Wage*, *supra* note 148 (“Gig companies should bring their wage and labor policies and practices in line with international human rights and labor standards, Human Rights Watch and Amnesty International said.”).

<sup>237</sup> *See* Sonnemaker, *supra* note 40 (stating that “the COVID-19 pandemic has brought new scrutiny to the labor practices of gig work companies.”); *see also* Bénédicte Apouey et al., *Gig Workers*

nationwide, Uber drivers have faced a steep drop in income, and since their status from independent contractors to employers or independent contractors with benefits has not been implemented, they struggle without healthcare, paid time off, and their inability to claim unemployment insurance.<sup>238</sup> Additionally, due to the effects of the pandemic, Uber has laid off 6,700 office workers, and Lyft has laid off 1,000 employees.<sup>239</sup> In August of 2020, “Uber announced . . . it lost \$1.8 billion in the past three months as millions of people stayed home during the pandemic.”<sup>240</sup> It is against Uber drivers’ human and workplace dignity for them not to be afforded with these aforementioned rights, especially during a time when such benefits are needed most.<sup>241</sup> One may argue that due to the decline in demand for ridesharing during COVID-19, these individuals have effectively lost their means of employment during one of the most devastating economic eras in U.S. history.<sup>242</sup> Is having a job not enough?<sup>243</sup> The answer is no.<sup>244</sup> Our country is in a state of disrepair, and as the economy worsens, Uber drivers are left with no basic rights: no sick days, no affordable health insurance, no paid family leave, no overtime pay, no access to unemployment insurance, and no protection from getting fired for reporting discrimination, harassment, or wage theft.<sup>245</sup> If there is any time that the employment system needs to be changed, it is now.<sup>246</sup> The reality is that Uber currently has such little business that its drivers are not

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*During the COVID-19 Crisis in France: Financial Precarity and Mental Well-Being*, 97 J. URB. HEALTH 776, 776 (2020) (“[Gig economy] workers cannot rely on stable incomes and are excluded from the labor protections offered to employees, features which have been exacerbated by the [COVID-19] crisis.”); see generally *Framework for Implementing Community Mitigation Measures for Lower-Resource Countries*, CDC (July 21, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/global-covid-19/community-mitigation-measures.html> (displaying how policy can change quickly with little warning to employers or employees).

<sup>238</sup> Sonnemaker, *supra* note 40; see Allyn, *supra* note 126 (“Uber is now making more money delivering food than it is from ride-hailing. Still, its revenue remains down 30% from the same period last year.”).

<sup>239</sup> See Allyn, *supra* note 126; see also Apouey et al., *supra* note 237 (explaining results from a study conducted in March and April of 2020 in France “that 3 weeks into the lockdown, 56% of [the] overall sample had stopped working and respondents had experienced a 28% income drop on average.”).

<sup>240</sup> *Uber and Lyft Must Classify Drivers as Employees in California, Judge Says*, CBS NEWS (Aug. 11, 2020, 11:40 AM), <https://www.cbsnews.com/news/uber-lyft-drivers-california-employee-classification-gig-workers/>.

<sup>241</sup> See Baker, *supra* note 64 (discussing factors that threaten workplace dignity).

<sup>242</sup> See Kate Morgan, *Should You be Grateful for a Job?*, BBC (March 31, 2021), <https://www.bbc.com/worklife/article/20210329-should-you-be-grateful-for-a-job> (noting that it has become a “common refrain” to state “I’m just grateful to have a job[.]”).

<sup>243</sup> See *id.* (discussing the pressure employees have felt to feel grateful for their jobs amidst the pandemic).

<sup>244</sup> See *id.* (“[I]t’s possible some of that gratitude is misplaced. Perhaps it’s not quite appropriate to be thankful that an employer is ‘letting you’ work for them.”).

<sup>245</sup> *No 22 on Mobile Workers Alliance*, *supra* note 148.

<sup>246</sup> See *id.* (“By continuing to treat drivers as contractors, Uber and Lyft deprives drivers of protections and rights they’re entitled to, including unemployment, paid sick leave, and livable wages.”).

receiving enough work to sustain a living.<sup>247</sup> These drivers should at least be afforded benefits in the event they become ill or unemployed as a result of the pandemic.<sup>248</sup>

It may seem as though the right choice is to classify these drivers as employees.<sup>249</sup> However, this also can be problematic because if Uber drivers are considered employees, for example, as defined by the FLSA, they would be capped at working forty (40) hours a week unless Uber agrees to pay them overtime for hours worked over forty (40).<sup>250</sup> However, that would not be fair to the majority of Uber drivers as most of them enjoy their job due to the flexibility it brings them—to sign off and on whenever they want.<sup>251</sup> Luckily, there is a *third way* that can address all of these issues.<sup>252</sup>

## B. SOLUTION: THE THIRD WAY

With new workplace technologies comes the need for new labor laws.<sup>253</sup> As the saying goes, “you can’t fit a square peg in a round hole.”<sup>254</sup> It is time to restructure labor laws to adapt to the changes in the labor force.<sup>255</sup> As discussed above, Proposition 22 in California was an attempt to classify Uber drivers as independent contractors with limited benefits; however, the legislation was struck down on August 20, 2021 as unconstitutional.<sup>256</sup> Similarly,

<sup>247</sup> Natalie Saenz, *Local Uber and Lyft Drivers Adjust to Work During Pandemic*, J. STAR (Feb. 9, 2021), [https://journalstar.com/news/local/local-uber-and-lyft-drivers-adjust-to-work-during-pandemic/article\\_e0d6086c-493b-5327-845d-0f28af93ef9a.html](https://journalstar.com/news/local/local-uber-and-lyft-drivers-adjust-to-work-during-pandemic/article_e0d6086c-493b-5327-845d-0f28af93ef9a.html) (“Jory Keuten, 29, has worked for Uber and Lyft for four years and said he has been working longer hours as a way to offset the decrease in the number of people needing rides. ‘It’s probably a third as busy as what it normally is,’ he said.”).

<sup>248</sup> See Allyn, *supra* note 126.

<sup>249</sup> See Männis, *supra* note 8 (noting that there is a link of subordination between the driver and the company).

<sup>250</sup> See 29 U.S.C. § 207(a) (“[N]o employer shall employ any of his employees . . . for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the [40] hours[.]”).

<sup>251</sup> Bobby Hoyt, *Uber Driver Reviews – What it’s REALLY Like Working for Uber*, MILLENNIAL MONEY MAN (Oct. 2, 2020), <https://millennialmoneyman.com/uber-driver-reviews/> (“Drivers love being able to earn money on their own time. You don’t have to make a major commitment, like starting your own business, or dedicate a ton of time in the beginning to learning how things work.”).

<sup>252</sup> See Moreno, *supra* note 10.

<sup>253</sup> See Goldman & Weil, *supra* note 235, at 55 (“The nature of work is changing, with workers enduring increasingly precarious working conditions without any safety net.”).

<sup>254</sup> DICTIONARY.COM, <https://www.dictionary.com/browse/you-can-t-fit-a-round-peg-in-a-square-hole> (last visited Dec. 31, 2021) (defining this saying as “People can’t be forced into roles for which they are not suited.”).

<sup>255</sup> See Shira Ovide, *Uber’s Next Idea: A New Labor Law*, N.Y. TIMES (Aug. 20, 2020), <https://www.nytimes.com/2020/08/11/technology/uber-labor-law.html> (“Uber has created new job options, and employment law wasn’t written with apps in mind.”).

<sup>256</sup> See *Proposition 22*, *supra* note 144; see generally Korosec & Lomas, *supra* note 15 (explaining how the Supreme Court in the U.K. recently ruled in March of 2021 that Uber drivers are classified as workers, which under their U.K. law means an employee with limited benefits); see also Ray, *supra* note 152.

in the United Kingdom, there is a third employment classification—the *worker* who is not an employee yet receives holiday pay, minimum wage, and, if eligible, automatic enrollment in pension plans (three percent (3%) of driver’s earnings).<sup>257</sup> Thus, there is already at least one nation and one state that has pushed and tried to push for this change, respectively. Uber CEO Dara Khosrowshahi proposed a similar idea, which calls for the U.S. employment system to implement a third category of workers who keep their status as independent contractors but receive employment benefits.<sup>258</sup> Mr. Khosrowshahi stated that “[h]ad such a requirement been the law in every U.S. state, Uber would have . . . contributed \$655 million to the fund in 2019 alone[.]”<sup>259</sup> Mr. Khosrowshahi even recognized, to his detriment, that there is an issue with classifying Uber drivers as independent contractors.<sup>260</sup> He states: “Our current system is binary, meaning that each time a company provides additional benefits to independent workers, the less independent they become. That creates more uncertainty and risk for the company, which is a main reason why we need new laws and can’t act entirely on our own.”<sup>261</sup>

If employment law does not advocate for this change, the only option for Uber drivers to receive benefits is to classify them as full-time employees.<sup>262</sup> However, Uber customers will suffer as a result because the costs of rides would increase significantly.<sup>263</sup> Additionally, Uber drivers would suffer in that it would force Uber to have fewer drivers because the profitability of rides would decrease.<sup>264</sup> Most Uber drivers actually enjoy the flexibility “to

<sup>257</sup> See Korosec & Lomas, *supra* note 15.

<sup>258</sup> See Justin Wise, *Uber CEO Proposes Flexible ‘Benefits Funds’ for Drivers Without Making Them Employees*, THE HILL (Aug. 10, 2020, 9:11 AM), <https://thehill.com/policy/technology/511282-uber-ceo-proposes-flexible-benefits-funds-for-drivers-without-making-them?rl=1>

(“There has to be a ‘third way’ for gig workers,” Khosrowshahi said, proposing laws requiring gig economy companies to establish ‘benefits funds’ that offer cash to workers for benefits including health insurance or paid time off.”); see also Ovide, *supra* note 255 (“Dara Khosrowshahi, Uber’s chief executive, argued in The New York Times this week for a ‘third way’ — a new employment status with the flexibility of contract work but also some employee-like protections.”).

<sup>259</sup> Wise, *supra* note 258.

<sup>260</sup> See *id.* (“Khosrowshahi admitted that the current system offers a ‘serious drawback’ in the event of an emergency.”).

<sup>261</sup> Lou Whiteman, *Uber CEO Calls for “Third Way” for Gig Workers in New York Times OpEd*, THE MOTLEY FOOL (Aug. 10, 2020, 2:11 PM), <https://www.fool.com/investing/2020/08/10/uber-ceo-calls-for-third-way-for-gig-workers-in-ne.aspx>.

<sup>262</sup> See *id.* (“[Uber’s CEO] . . . urged lawmakers in Washington to update labor laws to give contractors and other so-called gig workers more benefits *without* making them full-time employees.”) (emphasis added).

<sup>263</sup> See Ovide, *supra* note 255 (explaining that the consequences of classifying drivers as employees is an increase in the cost of many Uber rides, forcing Uber to have fewer drivers); see also Rachel Clayton, *Gig Economy Under the Microscope as Former Deliveroo Driver Takes Company to Fair Work Commission for Unfair Dismissal*, ABC NEWS (Oct. 22, 2020, 8:42 PM), <https://www.abc.net.au/news/2020-10-23/why-changing-laws-for-uber-deliveroo-drivers-is-so-hard/12803440> (“If the system changes to benefit the driver, those costs are likely to be passed on to the consumer in the form of higher prices.”).

<sup>264</sup> See Ovide, *supra* note 255 (explaining that if Uber drivers are classified as employees, the cost of Uber rides would increase because current Uber fares “are artificially low . . . because drivers are

work almost as much or as little as [they] want, cash out [their] pay instantly, take a break at a moment's notice, or even go on a six-month vacation."<sup>265</sup> This flexibility and ability to work for oneself is what "makes ride-hail driving stand out in the vast array of service jobs and low-wage work."<sup>266</sup> The issue really becomes that, although Uber drivers are mostly part-time drivers, the full-time drivers do not get to take advantage of the flexibility as they rely on Uber for their primary income, work an employee-like schedule, but without the applicable protections.<sup>267</sup> While full-time Uber drivers stand in line to fight for their rights, part-time Uber drivers are rightfully worried that the flexibility they love may no longer be available to them.<sup>268</sup>

Under Uber's Working Together Proposal, Uber "outlines a set of priorities for industry and government action that [they] believe will improve the quality of work for the millions of independent workers who get work through platforms like Uber's while preserving the flexibility that [they] know these workers value."<sup>269</sup> Uber recognizes that although they call the government to act, they, too, will need to make changes.<sup>270</sup> The government, specifically, will need to accrue funds that individuals can direct toward the benefits that are most important to them; require states to provide the gig economy employers "with occupational accident insurance that covers medical expenses and disability payments for accidents and injuries that occur" during the scope of employment; and for the states to protect workers against discrimination, harassment, and prejudice.<sup>271</sup> Additionally, Uber and the industry will also need to act on those items and in addition: take a national survey of the drivers to get their feedback, engage with representatives who can speak on behalf of the drivers, help eligible drivers to register to vote, provide transparency to drivers of their earning expectancy, give drivers fast access to earnings and clarity as to dispute inaccuracies, and develop opportunities to make investments to support drivers.<sup>272</sup> Like Uber's CEO, University of Adelaide's Professor Andrew Stewart agrees that this would be the best solution, stating that "the simplest answer to creating positive and lasting

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effectively subsidizing them by getting lower compensation than they would as employees."); see also Fouquet, *supra* note 189 ("Costs per driver could surge by thousands of dollars if the company has to treat drivers as employees and not independent contractors.").

<sup>265</sup> See Harry Campbell, *Uber Drivers Just Want to be Free*, N.Y. TIMES (Sept. 16, 2019), <https://www.nytimes.com/2019/09/16/opinion/uber-ab5-california.html>.

<sup>266</sup> *Id.*

<sup>267</sup> See *id.* (discussing how drivers with employee-like schedules do not benefit from protections like minimum wage, unemployment insurance, benefits, or workers' compensation).

<sup>268</sup> See *id.* ("[D]rivers who actually want to remain independent contractors are rightly worried that the flexibility they love will disappear.").

<sup>269</sup> *A First Step Toward a New Model for Independent Platform Work*, UBER (Aug. 10, 2020), <https://www.uber.com/newsroom/working-together-priorities/>.

<sup>270</sup> See *id.* (stating that Uber "commit[s] to working proactively and in partnership with lawmakers[.]").

<sup>271</sup> *Id.*

<sup>272</sup> *Id.*



change to on-demand workers' lives is to have the Federal Government 'step in and sort it all out' by changing our labour laws."<sup>273</sup> At the very minimum, Uber drivers should be entitled to minimum wage, given access to a safe working environment, freedom from discrimination and retaliation, and lastly, the right to have access to labor unions.<sup>274</sup> Each country's respective legislature needs to create a third class of employees to account for the fifty-nine million Americans,<sup>275</sup> \$6.3 billion Australians,<sup>276</sup> five million Brits,<sup>277</sup> and the one million French citizens<sup>278</sup> that participate and contribute to the gig economy.

### C. WHOM MIGHT THIS AFFECT IN THE COMING YEARS?

In the coming years (if they have not already been affected), food delivery service providers could be facing a similar backlash.<sup>279</sup> In California in 2020, DoorDash and Uber Eats were sued for misclassifying workers in violation of the AB5 bill.<sup>280</sup> "Treating the drivers as essentially freelancers, Ms. Figueroa said, has allowed the food delivery apps to offset what have been thin profit margins by not having to pay for health insurance, retirement benefits or workers' compensation for injuries on the job."<sup>281</sup>

Similarly, in 2018, France ruled on classification of food delivery service providers.<sup>282</sup> The Labour Chamber of the *Cour de Cassation* in France ruled

<sup>273</sup> Clayton, *supra* note 263.

<sup>274</sup> See Goldman & Weil, *supra* note 235, at 55–56.

<sup>275</sup> See I. Mitic, *Gig Economy Statistics: The New Normal in the Workplace*, FORTUNLY (Aug. 16, 2021), <https://fortunly.com/statistics/gig-economy-statistics/#gref> (stating that about 59 million Americans participate in the gig economy).

<sup>276</sup> See *The Rise of the Gig Economy and its Impact on the Australian Workforce*, ACTUARIES DIGIT. (Dec. 16, 2020), <https://www.actuaries.digital/2020/12/16/the-rise-of-the-gig-economy-and-its-impact-on-the-australian-workforce/> (noting that, as of 2019, Australia's gig economy reached \$6.3 billion in total size).

<sup>277</sup> See Josie Griffiths, *THE GIG ISSUE What is the Gig Economy? Meaning Explained*, THE SUN (Feb. 19, 2021, 3:54 PM), <https://www.thesun.co.uk/money/3985964/what-gig-economy-meaning-explained/> ("There are five million people currently working in the gig economy in the UK[.]").

<sup>278</sup> See Michel Rose, *France's Gig Economy Creates Hope and Tension as Election Looms*, REUTERS (Apr. 11, 2017, 4:55 AM), <https://www.reuters.com/article/us-france-election-gigeconomy-analysis/frances-gig-economy-creates-hope-and-tension-as-election-looms> ("France now has 1.1 million registered self-contracting workers[.]").

<sup>279</sup> See Männis, *supra* note 8.

<sup>280</sup> See Roy Maurer, *DoorDash, Uber Eats Sued for Misclassifying Workers*, SHRM (June 26, 2020), <https://www.shrm.org/resourcesandtools/hr-topics/talent-acquisition/pages/door-dash-uber-eats-sued-misclassifying-workers>; see also Andrew J. Hawkins, *San Francisco's District Attorney Sues DoorDash for Alleged Unfair Business Practices*, THE VERGE (June 16, 2020, 5:34 PM), <https://www.theverge.com/2020/6/16/21293474/door-dash-sf-district-attorney-lawsuit-worker-misclassification> (explaining that DoorDash and Uber Eats were sued because they illegally classified delivery workers as independent contractors when they were employees).

<sup>281</sup> Kimiko de Freytas-Tamura, *Food Delivery Apps are Booming. Their Workers are Often Struggling*, N.Y. TIMES (Mar. 19, 2021), <https://www.nytimes.com/2020/11/30/nyregion/bike-delivery-workers-covid-pandemic.html>.

<sup>282</sup> See *Cour de cassation [Cass.] [supreme court for judicial matters] soc.*, Nov. 28, 2018, Bull. civ.

that an employment contract existed between a deliverer and a digital platform.<sup>283</sup> The case revolved around Take Eat Easy, an application that partners with restaurants and allows customers to order food delivered by Take Eat Easy drivers.<sup>284</sup> The case came before the court when the plaintiff, a delivery driver, sought to reclassify his contractual relationship as an employer-employee relationship.<sup>285</sup> Initially, the Paris Labour Court of Appeals dismissed the claim.<sup>286</sup> However, the *Cour de Cassation* overturned the decision, finding that the elements the Paris Labour Court relied on to reject the reclassification of the services agreement as an employment contract were irrelevant.<sup>287</sup> The *Cour de Cassation* stated that “the existence of an employment relationship . . . depends on the factual circumstances in which the workers exercise their activity,” rather than the jargon used to by the parties.<sup>288</sup> Further, in French law, subordination is used in order to determine whether an employment agreement can be reclassified as an employment contract, and thus whether “it is therefore necessary to analyze if the conditions in which the activity is exercised allow to determine that a power of control, direction and sanction is exercised by the platform operator.”<sup>289</sup> The *Cour de Cassation* found that in this case, there was such existence of subordination.<sup>290</sup> This decision binds all lower courts in France to reclassify gig economy workers as long as “it is apparent from the conditions in which workers of the platform perform their activity that the platform operator exercises a power of direction, control and sanction,” and it will impact other delivery services in France.<sup>291</sup> France is not alone; there are foreign judges

V, No. 1737 (Fr.); see also *Soulier Avocats*, *supra* note 176 (stating that on November 28, 2018, France ruled on a case seeking the reclassification of workers).

<sup>283</sup> See Cass. soc., Bull. civ. V, No. 1737 (Fr.); see also *Soulier Avocats*, *supra* note 176 (explaining that the worker was an employee since he/she was placed under the subordination of the platform).

<sup>284</sup> See Cass. soc., Bull. civ. V, No. 1737 (Fr.); see also *Soulier Avocats*, *supra* note 176 (stating the facts of this case involved a company, Take Eat Easy, partnering with restaurants and delivering food to customers).

<sup>285</sup> See Cass. soc., Bull. civ. V, No. 1737 (Fr.); see also Karen Durand-Hakim, *In France, Is a Driver or Delivery Person Paid Via a Digital Platform Considered an Employee of That Company?*, LINEE NETWORK (Apr. 15, 2019), <https://lineenetwork.org/france-driver-delivery-person-employee-uber-take-eat-easy/> (discussing the French Supreme Court’s decision on whether a Take Eat Easy driver should be reclassified as an employee); see also *Soulier Avocats*, *supra* note 176 (stating that a delivery rider initiated proceedings to reclassify his contractual relationship as an employer-employee relationship).

<sup>286</sup> See Cass. soc., Bull. civ. V, No. 1737 (Fr.); see also *Soulier Avocats*, *supra* note 176 (stating that the Paris Labour Court of Appeals dismissed the driver’s claim after applying the fundamental principles of its case-law).

<sup>287</sup> *Soulier Avocats*, *supra* note 176.

<sup>288</sup> *Id.*; see Cass. soc., Bull. civ. V, No. 1737 (Fr.).

<sup>289</sup> *Soulier Avocats*, *supra* note 176; see Cass. soc., Bull. civ. V, No. 1737 (Fr.).

<sup>290</sup> See Cass. soc., Bull. civ. V, No. 1737 (Fr.) (characterizing the relation of the deliverer and the company as one of subordination); see also *Soulier Avocats*, *supra* note 176 (“[T]he existence of such a relationship of subordination was duly established for the Labour Chamber of the *Cour de Cassation*.”).

<sup>291</sup> *Soulier Avocats*, *supra* note 176 (explaining that reclassification should be done on a case-by-

in Spain (Deliveroo), California (Uber), England (Uber), and Australia (Foodora)<sup>292</sup> who have similarly acknowledged that these drivers should benefit from labor laws.<sup>293</sup>

Moreover, in December of 2020, the New York Supreme Court of upstate New York held that drivers for US Pack Logistics, LLC, (“US Pack”), a delivery service company, were considered employees because US Pack “exercised sufficient control over its employee drivers based on facts demonstrating that they were assigned specific workdays and hours by US Pack’s operations manager, were issued an identification badge bearing US Pack’s name, and were required to sit in the client’s parking lot during set hours.”<sup>294</sup> The wave of these cases in the past three years is evidence that this is just the beginning of reclassifying gig economy workers.<sup>295</sup>

## VII. CONCLUSION

The gig economy has gained popularity because of the independence that comes with the job, and it allows workers to earn supplemental income.<sup>296</sup> The leading player in the gig economy is Uber, and much litigation has centered around their employees demanding more rights.<sup>297</sup> Under the current system, followed by most countries around the world, the only way to demand more rights is to be classified as an employee rather than an independent contractor.<sup>298</sup> Generally, the employee status affords drivers employee benefits, unlike the independent contractor status.<sup>299</sup> However, although case law in France has determined that Uber drivers are considered employees, a poll conducted by Uber U.S. found that eighty-nine percent (89%) of Uber

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case basis where employers exercise control); see Cass. soc., Bull. civ. V, No. 1737 (Fr.) (noting that “the characterization of a salaried employment relationship is based on objective elements,” including “the performance of work under the authority of an employer who has the power to give orders and directives, to to [sic] control the execution and to sanction the breaches of his subordinate.”).

<sup>292</sup> See, e.g., *Joshua Klooger v Foodora Australia Pty Ltd* [2018] FWC 6836 ¶¶ 102–03 (16 November 2018) (Austl.) (“[T]he correct characteri[z]ation of the relationship between the applicant and the respondent is that of employee and employer.”).

<sup>293</sup> See *Soulier Avocats*, *supra* note 176 (identifying a trend set by foreign judges in England, Spain, California, Australia).

<sup>294</sup> *Smith & Moelis*, *supra* note 159 (citing *Matter of Thomas*, 138 N.Y.S.3d 244, 245 (Sup. Ct. 2020)).

<sup>295</sup> See, e.g., *Männis*, *supra* note 8 (stating that the UK Court of Appeals “ruled that UK drivers should be classified as workers entitled to minimum wage and holiday pay.”).

<sup>296</sup> See *Pickard-Whitehead*, *supra* note 23 (“30% of gig workers choose to work this way because it means they are independent and effectively free agents”); see also *Campbell*, *supra* note 265 (“After thousands of conversations with drivers, [The Rideshare Guy] found that while [drivers] come from all walks of life, one of the main reasons they value this work is flexibility.”).

<sup>297</sup> See *Männis*, *supra* note 8 (discussing multiple cases across various countries in which Uber is involved).

<sup>298</sup> For example, now that France has classified drivers as employees, it can require Uber to pay benefits to drivers, such as paid holidays. See *id.*

<sup>299</sup> See *id.* (noting that employees are entitled to benefits like minimum wage and holiday pay).

drivers support their independent contractor status.<sup>300</sup> This was the case despite Uber drivers not receiving employee rights when classified as an independent contractor.<sup>301</sup> Thus, the optimal solution would be for Uber drivers to retain their independent contractor status and have the option to receive benefits.<sup>302</sup> It seems that the United Kingdom and the state of California have achieved that goal *in some respect*.<sup>303</sup> Uber's CEO recognizes that the current employer system is not favorable to Uber drivers and has proposed a "third way."<sup>304</sup> He states, "there has to be a 'third way' for gig workers, but we need to get specific, because we need more than new ideas—we need new laws[.]"<sup>305</sup> All workers deserve to be treated according to decent standards of employment, which *inter alia*, would provide workers with employment benefits.<sup>306</sup> Basic employment benefits such as minimum wage, paid time off, and medical leave all contribute to the dignity of employees.<sup>307</sup> When such employment standards are stripped from individuals, or when they exist in a diminished form, then the dignity of employees is diminished as well.<sup>308</sup> The solution is to stay in line with the employee's demands—-independent contractor classification with flexible status and benefits.<sup>309</sup> California and the United Kingdom have paved the way for more states and countries to

<sup>300</sup> See Moreno, *supra* note 10.

<sup>301</sup> See *id.* ("Though some [Uber drivers] may work as many hours as a full-time employee, they are not entitled to a health insurance or other benefits."); see *supra* Section IV.C.

<sup>302</sup> See Khosrowshahi, *supra* note 141 ("[Uber] propose[s] creating new benefit funds that would give gig workers cash they can use for the benefits they want, like health insurance or paid time off. All companies would be required to participate, so benefits follow the worker even if they move between platforms.").

<sup>303</sup> See Korosec & Lomas, *supra* note 15 (discussing the U.K. ruling where the court classified Uber drivers as workers, enabling them to qualify for holiday pay, minimum wage, and automatic enrollment in pension plans); see also *Castellanos v. State of California*, No. RG21088725, 2021 Cal. Super. LEXIS 7285 (holding that since Proposition 22 was put in place to overrule the AB5 bill, and now that Proposition 22 has been overruled, the AB5 rule comes back into effect, meaning Uber drivers in California are classified as employees with benefits).

<sup>304</sup> See Moreno, *supra* note 10 ("Our current employment system is outdated and unfair. It forces every worker to choose between being an employee with more benefits but less flexibility, or an independent contractor with more flexibility but almost no safety net[.]"); see also Khosrowshahi, *supra* note 141; see also Whiteman, *supra* note 261 ("Khosrowshahi . . . urged lawmakers in Washington to update labor laws to give contractors and other so-called gig workers more benefits without making them full-time employees.").

<sup>305</sup> Whiteman, *supra* note 261.

<sup>306</sup> See Tiwari & Sharma, *supra* note 66 (noting that the International Labour Organization explained "dignity as one of the fundamental human rights" in its constitution).

<sup>307</sup> See William Riggs & David Batstone, *Balancing Profits and Human Dignity in the Gig Economy*, THE HILL (Dec. 31, 2019, 10:35 AM), <https://thehill.com/opinion/finance/476344-balancing-profits-and-human-dignity-in-the-gig-economy> (discussing how certain transportation companies with transparent wages and full health benefits "offer a way of thinking about human dignity and an on-demand workforce that is not only capitalistic but compassionate.").

<sup>308</sup> See *id.* (noting that "squeezing wages and worker benefits" raises "critical societal concerns for lifestyle and dignity in the modern metropolis[.]").

<sup>309</sup> See Wise, *supra* note 258 (discussing Uber CEO's desire "for a set of new laws providing *more* benefits for independent contractors *without* designating them as employees.") (emphasis added).

2021]      *EMPLOYMENT CLASSIFICATION AND HUMAN DIGNITY*      87

expand on this third employment classification and make it better.<sup>310</sup> Allowing Uber drivers to be classified as independent contractors with employment benefits is the optimal solution for achieving human dignity in the gig economy.<sup>311</sup> The third way is pivotal to the success of the gig economy while leading workers to get the respect they deserve: human dignity.<sup>312</sup>

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<sup>310</sup> See, e.g., Lake, *supra* note 127 (discussing a California bill that extends employee classification to applicable gig workers); Korosec & Lomas, *supra* note 15 (discussing how the U.K. has created a “workers” category where individuals aren’t classified as employees, but are nonetheless entitled to benefits like minimum wage and holiday pay).

<sup>311</sup> See Riggs & Batstone, *supra* note 307 (noting that companies with similar offerings allow for “human dignity and an on-demand workforce that” are both capitalistic *and* compassionate).

<sup>312</sup> See *id.* (arguing that capitalism and compassion *can* coexist as “profit does not have to exploit human beings” and “capitalism can be both socially and environmentally conscious.”).