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## UBER in the U.S. and Canada: Is the Gig-Economy Exploiting or Exploring Labor and Employment Laws by Going Beyond the Dichotomous Workers' Classification?

Yasaman Moazami

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UBER IN THE U.S. AND CANADA: IS THE GIG-ECONOMY  
EXPLOITING OR EXPLORING LABOR AND EMPLOYMENT LAWS BY  
GOING BEYOND THE DICHOTOMOUS WORKERS'  
CLASSIFICATION?

*Yasaman Moazami\**

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## I. INTRODUCTION

Labor and employment laws largely reflect the underlying social, political and economic motivations of the times. The emergence of the internet commerce and the accessibility to smartphones, have enabled and transformed peer-to-peer (“P2P”) transactions in our society on a large scale.<sup>1</sup> Undeniably, the law is slowly metamorphosing to accommodate the need to address the P2P wave that has emerged in the past six years. But are the laws evolving fast enough and how can the law keep up with the new models of business constantly manifesting? The modern system of employment is so complex and unpredictable that it results in considerable confusion in workers’ classification.

Uber Technologies Inc. (“Uber”), is a popular transportation network company (“TNC”), which is now estimated to be operating in more than 80 countries and active in more than 580 cities worldwide.<sup>2</sup> Companies pioneered by Uber, have created a market for short trips in personally owned vehicles of the drivers through a smartphone applications software (“apps”).<sup>3</sup> Uber has

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<sup>1</sup> Vanessa Katz, *Regulating the Sharing Economy*, 30 BERKELEY TECH. L.J. 1067, 1067 (2015).

<sup>2</sup> *Uber Cities*, Uber Estimate, <http://uberestimator.com/cities> (last visited Apr. 7, 2017).

<sup>3</sup> Katz, *supra* note 2.

experienced an extraordinary growth over the past six years<sup>4</sup> and has successfully seeped into countries around the globe. This new phenomenon and many like it, have been coined under the terminology umbrella of the “sharing economy”<sup>5</sup> or “gig-economy”.<sup>6</sup>

The sharing economy, while not narrowly defined, primarily consists of any marketplace that brings together individuals to share or exchange their personal assets.<sup>7</sup> This economy facilitates community ownership of services and things by connecting people.<sup>8</sup> The process of sharing allows participants to gain access to goods without having to purchase the rights to the goods. This creates a cheaper alternative for consumers to enjoy the perks, while paying less. The number of on-demand companies matching labor supply and demand has been on a persistent climb.<sup>9</sup> These employment structures allow workers the opportunity to

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<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 1068.

<sup>6</sup> See generally Antonio Aloisi, *Commoditized Workers: Case Study Research on Labor Law Issues Arising from A Set of "On-Demand/gig Economy" Platforms*, 37 *Comp. Lab. L. & Pol'y J.* 653 (2016).

<sup>7</sup> Daniel K. McDonald, *Reputation Will Teach the Sharing Economy to Share*, 27 *U. FLA. J.L. & PUB. POL'Y* 219, 222 (2016).

<sup>8</sup> *Id.*

<sup>9</sup> Aloisi, *supra* note 6, at 653.

make their own schedule. Workers can choose to maintain a position either part-time or full-time.<sup>10</sup>

Despite the positive aspects that come with the gig-economy, these new platforms have circumvent employment laws by operating in an unconventional way in a world regulated by traditional rules.<sup>11</sup> This emerging gig-economy raises countless difficult legal questions.<sup>12</sup> P2P services, such as Uber, have created ambiguity and insecurity for Uber drivers as the service does not fall gracefully into any of the traditionally made legal classifications of employment.<sup>13</sup>

The rise of start-ups, such as Uber, raises questions about how it should be regulated. Uber, from its inception, faces rivals and regulators while simultaneously being threatened by the taxi industry.<sup>14</sup> The overwhelming query

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<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> Katz, *supra* note 1, at 1068.

<sup>13</sup> *Id.*

<sup>14</sup> Avery Hartmans and Nathan McAlone, *The Story of How Travis Kalanick Built Uber Into the Most Feared and Valuable Startup in the World*, BUS. INSIDER(Aug. 1, 2016) <http://www.businessinsider.com/ubers-history/#june-1998-scour-a-peer-to-peer-search-engine-startup-that-kalanick-had-dropped-out-of-ucla-to-join-snags-its-first-investment-from-former-disney-president-michael-ovitz-and-ron-burkle-of-yucaipa-companies-1>.

seems to be: whether existing laws and regulations are capable of regulating this new model of production of services or whether there is a need for new ones?<sup>15</sup>

Indeed, workers need protections and benefits to commensurate with the work they do. Workers should not be expected to work under certain circumstances without the rights, protections, and privileges of something more than an independent contractor status.<sup>16</sup> Workers want protection, sustainability and predictability in their livelihood as much as their employers.

On the other hand, employers need to be able to freely invest in new business models and opportunities, to continue to grow and evolve the market. This generation is living in a global economy filled with demands and services. So, it is important to tackle the vital task of regulating this new line of work, because as it seems, Uber and other P2P businesses are here to stay. Virtual platforms and apps on wireless devices have created an “invisible infrastructure” by connecting supply and demand of services and expedited interaction between individuals and businesses.<sup>17</sup>

The ties between the U.S. and Canada are significant. The two countries share 9,000 kilometers of border and Canada is by far America’s biggest trading partner with

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<sup>15</sup> Shu-Yi Oei and Diane M. Ring, *Can Sharing Be Taxed*, 93 WASH. U. L.REV. 989, 989 (2016).

<sup>16</sup> Megan Carboni, *A New Class of Worker for the Sharing Economy*, 22 RICH. J.L. & TECH. 11, 78 (2016).

<sup>17</sup> Aloisi, *supra* note 6, at 654



more than \$500 billion Canadian traded every year.<sup>18</sup> Resembling the U.S., Canada's society, economy and courts have been struggling to navigate through the new emerging platforms. This note will explore the similarities and the differences in labor and employments laws within the borders of these two great nations. This note explores Uber and its effects on labor and employment law in the United States and its neighboring country, Canada, while shedding light on the remaining unanswered questions and potential solutions. This note further analyzes the complications that have arisen in both countries due to the introduction of these new gig-workers.

## II. HISTORY OF LABOR AND EMPLOYMENT LAW IN THE U.S.

In the U.S., the labor movement advanced to protect the common interest of workers. For those in the industrial sector, organized labor unions fought for better wages, reasonable hours and safer working conditions.<sup>19</sup> The labor

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<sup>18</sup> Dan Oldfield, *Canada's Stake in the U.S. Election*, THE CHRON. J., (October 15, 2016), [http://www.chroniclejournal.com/opinion/columns/canada-s-stake-in-the-u-s-election/article\\_03b72f7c-9251-11e6-b81a-0fb3917f01cd.html](http://www.chroniclejournal.com/opinion/columns/canada-s-stake-in-the-u-s-election/article_03b72f7c-9251-11e6-b81a-0fb3917f01cd.html).

<sup>19</sup> *Labor Movement*, HIST. (2009), <http://www.history.com/topics/labor>.

movement led efforts to stop child labor, give health benefits and provide aid to workers who were injured or retired.<sup>20</sup>

In today's modern world, we are faced with a fascinating combination of "immense promise and peril for workers in the new digital economy."<sup>21</sup> Many lawyers and regulators predicted a sense of uneasiness due to the on-demand economy and its "trajectories on the labor framework."<sup>22</sup>

Legal scholars are facing a global drift towards the decentralization of structures and frameworks, in order to feed the fast-paced consumerism of today.<sup>23</sup> The resulting "shared" assets have made services attractively affordable and accessible with virtually little to no barriers. However, this new model of hyper-temporality of positions<sup>24</sup> have threatened to dismantle traditional labor markets.<sup>25</sup>

This line of work is viewed as a digital version of Taylorism<sup>26</sup> by many commentators. The comparison is

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<sup>20</sup> *Id.*

<sup>21</sup> Aloisi, *supra* note 6, 657

<sup>22</sup> *Id.*

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

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

<sup>25</sup> *Id.* at 658.

<sup>26</sup> See *Taylorism* BUS. DICTIONARY (2016)  
<http://www.businessdictionary.com/definition/Taylorism.html>

made due to the “efficient exploitation and expropriation” of work at the detriment of job security, while virtually no skill development for workers is being offered in these hyper-temporary positions.<sup>27</sup>

#### A. ORIGINS OF TODAY’S UNION MOVEMENT AND THE PROGRESSIVE ERA

By way of background, before there was a Labor Department, there was The Bureau of Labor Statistics (“BLS”). Originally part of the Department of Interior, the Bureau published its First Annual Report in 1886 containing

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(defining taylorism as the production efficiency methodology that breaks every action, job, or task into small and simple segments which can be easily analyzed and taught. Introduced in the early 20<sup>th</sup> century, Taylorism (1) aims to achieve maximum job fragmentation to minimize skill requirements and job learning time, (2) separates execution of work from work-planning, (3) separates direct labor from indirect labor (4) replaces rule of thumb productivity estimates with precise measurements, (5) introduces time and motion study for optimum job performance, cost accounting, tool and work station design, and (6) makes possible payment-by-result method of wage determination).

<sup>27</sup> *Id.*

a study on industrial depressions.<sup>28</sup> After much opposition, President William Howard Taft signed the Organic Act,<sup>29</sup> which created the U.S. Department of Labor.

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<sup>28</sup> *The U.S. Department of Labor Timeline – Alternative Version*, U.S. Dep’t. of Labor, <https://www.dol.gov/general/history/100/timeline> (last visited Apr. 5, 2017).

<sup>29</sup> The Organic Act of the Department of Labor, Pub. L. No. 426-62 (1913).

When the U.S. declared war on Germany and its allies on April 6, 1917, Congress created the War Labor Administration to organize wartime production, giving the Labor Department an important role in the subsequent victory.<sup>30</sup> Adequate war production became a national necessity and issues of working conditions and labor protections assumed paramount importance.<sup>31</sup> The Department took on the major responsibility of implementing the nation's war labor policies, which included recognition of the rights of workers to bargain collectively, establishment of machinery to adjust grievances, and an 8-hour workday.<sup>32</sup>

#### B. THE GREAT DEPRESSION LED TO THE NEW DEAL

The Great Depression in the U.S. began on October 29, 1929, a day known forever after as "Black Tuesday," when the American stock market—which had been roaring steadily upward for almost a decade—crashed, plunging the country into its most severe economic downturn yet.<sup>33</sup> The

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<sup>30</sup> Judson MacLaury, *A Brief History: The U.S. Department of Labor*, U.S. Dep't. of Labor <https://www.dol.gov/oasam/programs/history/dolhistoxford.htm> (last visited Apr. 7, 2017).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *New Deal*, HIST., <http://www.history.com/topics/new-deal> (last visited Apr. 8, 2017).

nation's money supply diminished and companies went bankrupt. Employers felt the economic pressure and were forced to fire their workers in droves.<sup>34</sup> By 1932, one of the bleakest years of the Great Depression, at least one-quarter of the American workforce was unemployed.<sup>35</sup> Over the next eight years, the government instituted a series of experimental projects and programs, known collectively as the New Deal, aimed to restore some measure of dignity and prosperity to many Americans.<sup>36</sup> Congress concluded that it was in the national interest to legitimize the anticompetitive activities of unions and found that workers did not have the ability to secure just compensation and safe working conditions as individual bargainers.<sup>37</sup> The imbalance of power between employers and workers contracting as individuals needed to be adjusted by giving workers the right to pool their strengths.<sup>38</sup> The National Labor Relations Act ("NLRA") passed in 1935 to protect employees who engage in union or other concerted activities and to promote collective bargaining.<sup>39</sup> The NLRA allows workers to bargain collectively about wages, work hours, and other

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

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> Stephen Plass, Securing Workers' Economic Rights Through Public Protest, 11 Intercultural Hum. Rts. L. Rv. 33, 43 (2016).

<sup>38</sup> *Id.* at 44.

<sup>39</sup> *Id.*

terms and conditions of employment. The Act also protects the right of workers to strike.<sup>40</sup> The Wagner model was used as a means to achieve economic recovery during the Great Depression.<sup>41</sup>

### C. REINVENTING THE WORKPLACE: IMPROVING QUALITY, SAFETY AND CREATING UNIONS

In the past few decades, foreign competition, changes in technology and declining productivity have led to the significant modifications in the way many U.S. businesses manage their dealings.<sup>42</sup> To meet the quality goals, businesses have moved away from top-down management, to a team approach.<sup>43</sup>

Labor laws are not intended to interfere with an employer's typical exercise of discretion in hiring and firing employees. In general, an employer may hire employees based on their individual merit, with no regard to union

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<sup>40</sup> *Id.*

<sup>41</sup> John Godard, *Labour Law and Union Recognition in Canada: A Historical-Institutionalist Perspective*, 38 *Queen's L.J.*, 391, 400 (2013).

<sup>42</sup> *Labor Law*, the free dictionary, <http://legal-dictionary.thefreedictionary.com/Modern+Labor+Law> (last visited Apr. 1, 2017)

<sup>43</sup> *Id.*

affiliation.<sup>44</sup> However, the motive of an employer in discharging an employee may be a controlling factor in determining whether the discharge is an unfair labor practice.<sup>45</sup>

The NLRA does not impose any economic responsibilities on employers to pay a fair or favorable wage, rather, it provides that employers must bargain about wages, hours and other terms and conditions of employment.<sup>46</sup> The law requires employers to meet with unions and bargain in good faith, however, it does not regulate the substantive terms of their discussion.<sup>47</sup> The NLRA does not permit the enforcement agency, the National Labor Relations Board, to provide substantive contract terms as a remedy for breach of this obligation.<sup>48</sup>

#### D. CONTRACT ENFORCEMENT AND CONTRACT DISPUTES

Almost every collective bargaining agreement in the United States contains a grievance procedure.<sup>49</sup> In the grievance procedure, the union and the employer try to settle any disputes over the meaning or application of

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<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> Plass, *supra* note 37.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> THE FREE DICTIONARY, *supra* note 42.



contract by themselves.<sup>50</sup> If the parties fail to follow the contract, they may invoke arbitration, a procedure that typically calls for referring the issue to an impartial third party for a final and binding determination.<sup>51</sup>

The arbitration of disputes under a collective bargaining agreement is a matter of contract, and the parties to it may delineate the scope of their arbitration clause.<sup>52</sup> The usual arbitration cases are disputes over seniority rights, employee discipline, pension or welfare benefits, rates of pay, and hours of work.<sup>53</sup> This is when classification and misclassification of workers can become problematic.

The new market is increasingly promoting the use of independent contractor relationships to help businesses reduce the costs and risks associated with hiring full-time employees.<sup>54</sup> Workers contracted as independent contractors do not get the social security, workers' compensation, medical, and unemployment insurance benefits typically provided to full-time employees.<sup>55</sup> If

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<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> Plass, *supra* note 37, at 50.

<sup>55</sup> *Id.*

loaded with those costs, the on-demand business model might not survive, at least not in its current thriving form.<sup>56</sup>

Nonetheless, there has been a major decrease in the percentage of workers in unions. About seven percent of the private sector workers are in a union, yet, the polls suggest that more workers would like to be a part of a union or some other form of effective workplace procedure which would allow for their voices to be heard by employers.<sup>57</sup> Some commentators believe that the decline in union representation has contributed to the rise of income disparity.<sup>58</sup>

### III. UBER'S CREATION AND ADVANCEMENT IN THE U.S. AND ITS RIPPLING EFFECTS ON LABOR AND EMPLOYMENT LAWS AND REGULATIONS

Uber was founded in March 2009, and a year later, on June of 2010, a company called UberCab surfaced in San Francisco.<sup>59</sup> The company, now known as Uber, has since

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<sup>56</sup> Benjamin Means, *Navigating the Uber Economy*, 49 U.C. DAVIS L. REV. 1511, 1514-15 (2016).

<sup>57</sup> Paul M Scunda, *The Wagner Model of Labour Law is Dead- Long Live Labour Law!*, 38 Queen's L.J., 545, 548-49 (2013).

<sup>58</sup> *Id.*

<sup>59</sup> Hartmans & McAlone, *supra* note 14.

spread like wildfire in 58 countries and is valued at a staggering \$60 billion and continues to grow.<sup>60</sup>

As many other innovative and modernizing ideas have experienced in the past, Uber services were met with both excitement and fear due to the unknown. Uber has had profound social implications because of its structural deviance from traditional business models. Uber falls under the category of the “collaborative economy” with its new digital format.<sup>61</sup> Uber has been scrutinized as having “exploitive tendencies similar to those which were already predominant a century ago.”<sup>62</sup> It has been argued that these “web-based work environments [might be] devoid of the worker protections of even the most precarious working-class jobs.”<sup>63</sup> This new employment model undermines the common structure of the “employer-employee” paradigm.<sup>64</sup>

#### A. UBER’S CLASSIFICATION OF DRIVERS AS NON-EMPLOYEES

Uber maintains that its drivers are not employees as defined by the NLRA and classifies its drivers as

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<sup>60</sup> *Id.*

<sup>61</sup> Aloisi, *supra* note 6, at 655

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

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

independent contractors, though drivers have continuously challenged their classification as non-employees.<sup>65</sup> The new policy on driver “deactivations,” which are principally the equivalent of firing drivers, has been met with a lot of dissension.<sup>66</sup> “Deactivation” has become one of the most argumentative issues for drivers who have found themselves out of work with no warning and no explanation, just a seemingly arbitrary decision by their “boss” via an app.<sup>67</sup> The lack of job security has unsurprisingly caused a lot of opposition.

#### B. DICHOTOMY OF CONTRACTOR VS. EMPLOYEE

Labor laws recognize workers providing services as an independent contractor or an employee. Independent contractors and employees are distinguished by their degree of control and the level of independence they possess in their work.<sup>68</sup> Labor laws commonly provide employees with more employment rights.

Uber drivers argue that Uber classifies them as

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

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> Huyen Le, *Are Uber Drivers Employees or Independent Contractors?*, Labor & Employment Law Forum (Feb. 20, 2017), <https://aualaborlawforum.org/2017/02/20/are-uber-drivers-employees-or-independent-contractors/>.

independent contractors in order to avoid expenses such as overtime pay, minimum-wage protections, unionization, and unemployment insurance.<sup>69</sup> Uber drivers have brought multiple class action suits against Uber in regards to the alleged misclassification, violations of tips law, tortious interference with advantageous relations, unjust enrichment/quantum merits, breach of contract, violation of the minimum wage law, and violations of overtime law.<sup>70</sup>

*O'Connor v. Uber Techs., Inc.* is a notable suit in regards to the classification dilemma.<sup>71</sup> In December 2015, the case was certified as a class action including all drivers who have contracted with Uber directly.<sup>72</sup> Plaintiffs in the suit allege that they are Uber's employees, and are therefore eligible for protections codified for employees in the California Labor Code.<sup>73</sup> On August 18, 2016, the Plaintiffs motion for preliminary approval of settlement was denied.<sup>74</sup>

The federal right to unionize only covers workers

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<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> See generally, Case Docket, *O'Connor v. Uber Technologies, Inc. et al.*, C13-3826 EMC  
<http://www.cand.uscourts.gov/EMC/OConnorvUberTechnologies>.

classified as employees. However, this right does not cover three major categories of farmworkers, domestic workers, and independent contractors.<sup>75</sup> Thus, the on-demand drivers are not covered by the federal statute. To many dissentients, this is a harsh interpretation of the congressional intent because it is very beneficial for the on-demand realm but at the expense of the workers.

While multiple factors regarding a worker's job description and contract are weighed to determine a worker's degree of control and independence in their work, these factors are no longer appropriate because they don't factor in the new business models. Integrating a third category that falls between the roles of contractor and employee would better protect workers who fall in the gaps.<sup>76</sup> It is now possible to work in a very employer-controlled environment without ever actually meeting one's employer.<sup>77</sup> Therefore, to be proactive, new factors and frameworks must be established to account for these new work environments.

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<sup>75</sup> Aarti Shahani, *Fact Checking Uber on Labor Laws*, NPR, (Dec. 16, 2015) <http://www.npr.org/sections/alltechconsidered/2015/12/16/460013970/fact-checking-uber-on-labor-laws>.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

### C. THE INTRODUCTION OF THE "INDEPENDENT WORKER"

Advocates of stronger regulations contend that the gig-economy work is so unique that it deserves a new legal category of workers. In December of 2015, economists Alan Krueger and Seth Harris published work proposing the "independent workers" category to occupy the gap between the traditional dichotomy.<sup>78</sup> The independent workers category bears some similarities to each category.<sup>79</sup>

Uber's global reach in western countries have resulted in fascinating labor and employment challenges and encounters. For instance, Czech Republic, Mexico and the Netherlands, all have statutory presumptions that effectively establish "employee" status as a default condition.<sup>80</sup> The U.S., however, does not have a default status and this distinction has resulted in costly litigation.<sup>81</sup> To make matters more complicated, current labor and employment laws are not applied consistently. Workers must meet

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<sup>78</sup> Seth D. Harris and Alan B. Krueger. *A Proposal for Modernizing Labor Laws for Twenty-First-Century Work: The "Independent Worker."* Hamilton Project, Discussion Paper, 5 (December 2015), [http://www.hamiltonproject.org/assets/files/modernizing\\_labor\\_laws\\_for\\_twenty\\_first\\_century\\_work\\_krueger\\_harris.pdf](http://www.hamiltonproject.org/assets/files/modernizing_labor_laws_for_twenty_first_century_work_krueger_harris.pdf).

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 6.

<sup>81</sup> *Id.*

varying tests across statutes for employee status and independent contractor status. For instance, the test under tax law is different than the occupational safety and health law.<sup>82</sup> Due to the differing purpose of each statute, a statute's scope of coverage is naturally formed to serve that law's specific purpose. Nevertheless, this lack of uniformity has led to situations where a worker might be deemed entitled to the minimum wage protection, but not to have her employer pay half of her payroll taxes.<sup>83</sup> Further, the factors to be considered by employers are not required elements, rather considerations, and could potentially lead to different results for similarly situated workers.<sup>84</sup> Thus, present labor and employment laws lack consistency and commonly result in disagreements that clog the court systems.

Workers that fall in the employee status benefit from their employment contract with their employers which include substantive terms that are enforced by law. Essentially, employees agree to be financially dependent on their employer and relinquish control over most aspects of their work lives, and in turn, the employer must provide the workers with some degree of economic security and stability.<sup>85</sup> Employers are obligated to pay at least the minimum wage and overtime premium pay; refrain from

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<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*



discriminating in their hiring, firing and the terms and conditions of employment based on the protected characteristics, such as race, sex and other selected personal characteristics; maintain a safe and healthy workplace environment; contribute towards the payroll taxes that make employees eligible for unemployment insurance, Social Security, Disability Insurance and Medicare, and provide workers' compensation insurance, among other benefits and protections.<sup>86</sup> In contrast, independent contractors do not relinquish control over their economic lives to others and generally work with multiple businesses or clients, without significant limitations. Independent contractors control the means and methods of the work they perform and take on the risk for profit or loss.<sup>87</sup>

The prevailing law falsely implies that employee and independent contractor statuses completely cover all work relationships in the U.S. Thus, the dichotomy, which traces back to the archaic law of "masters" and "servants," does not allow any room for new work relationships that straddle the two categories.<sup>88</sup>

These mobile-apps represent such a drastic innovation on traditional commerce that rules designed for

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<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

the industrial age are not suitable.<sup>89</sup> At the emergence of Uber, there were endless talks about deregulation. But the question many are asking is, how original is Uber's employment structure? What if Uber is not innovating commerce but merely innovating

the even older skill of treading lightly and dodging the legal system to evade rules that protect the consumers and workers from mega-corporations? These broad questions seem to all point to one major factor: the measurement of time.<sup>90</sup>

Uber promoters and campaigners hold that the driver's broad autonomy over their work schedule function much like entrepreneurs or small businesses within the mega-corporation. They reason, drivers can be doing things other than actively driving passengers while the app is running, thus the gig-economy jobs are incompatible with the pay laws at the core of employer-employee relationships.<sup>91</sup>

In reality, however, drivers do not enjoy such liberties. "Uber monitors each driver's acceptance rate [of ride requests], reports it to drivers weekly, and dismisses

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<sup>89</sup> Alan Pyke, *The Uber Revolution Hinges on One Key Question*, ThinkProgress (March 23, 2016), <https://thinkprogress.org/the-uber-revolution-hinges-on-one-key-question-15330ad544bc>.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

drivers who do not maintain a sufficient rate.”<sup>92</sup> The exact threshold for dismissal based on acceptance rates varies from city to city, but is generally averaged around 80 percent.<sup>93</sup> If a driver disregards more than one in five “pings” while the app is active, that can lead to termination.<sup>94</sup> Drivers have 15 seconds to respond and thus, this policy deprives drivers of the freedom people imagine them to have in between rides.<sup>95</sup> Traditional labor law distinguish between time spent “waiting to engage” with a work assignment, for which one cannot demand to be paid, and time spent “engaged to wait” for a work assignment to materialize, for which one must be paid.<sup>96</sup> Accordingly, when it comes to the measurement of time, this wrinkle has resulted in many disagreements.

#### D. UBER AND THE FREE-MARKET

Free-market refers to an economy where the government enforces little to no regulations on buyers and

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<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

sellers.<sup>97</sup> In a free market products or services are produced based on the law of supply and demand.<sup>98</sup> In this new age of technology and connection, consumers have gained access to things without having to actually own them.<sup>99</sup> The sharing economy has expanded our reach to what we can access,<sup>100</sup> not what we can actually afford to own. Services that were regarded as a luxury are now attainable within the concept of sharing because of the reduction in cost.<sup>101</sup> This economic shift has disrupted the traditional concept of possession. Ride Sharing Services are praised by some for its unregulated, non-unionized forum and for being a less expensive version of the taxi.

Companies like Uber are charting a new path by empowering consumers to make their own decisions and even help the environment in the process.<sup>102</sup> Uber provides low-cost rides at a moment's notice, through a smartphone

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<sup>97</sup> *What are Free Market Economies?*, Investopedia, <http://www.investopedia.com/video/play/free-market-economy/> (Last Visited March 17, 2017).

<sup>98</sup> *Id.*

<sup>99</sup> McDonald, *supra* note 7, at 220.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> Tyler O'Neil, *Uber's Free Market Environmentalism, Values and Capitalism* (2015), <http://www.valuesandcapitalism.com/ubers-free-market-environmentalism/>.

app that can be used at any time, at almost anywhere. The company markets its services to commuters and people drinking out on the night.<sup>103</sup> Each individual can now have their very own “designated driver.”<sup>104</sup> Indeed, statistics on Seattle DUIs revealed a lower rates of drunken driving in cities where Uber operates.<sup>105</sup> Similar trends are seen in Philadelphia and San Francisco. However, these results do not factor in other variables such as, drinking rates or police presence, which could also contribute to the decline of drunk driving.<sup>106</sup> The benefits of Uber also include less congestion. The company strives to take millions of cars off roads in cities where population is increasing. “UberPOOL” allows users to find other people in the area and arrange a modern time carpool.<sup>107</sup>

While there are great arguments by the free-market advocates, a noninterventionist approach may result in a preference for a narrow notion of autonomy over fair competition.<sup>108</sup> Notably so, adopting a nonintervention

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<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> Erez Aloni, *Pluralizing The “Sharing” Economy*, 91 WASH. L. REV. 1397, 1436 (2016).

policy in the context of the gig-economy allows for an advantage for the P2P economy over other valued traditional options. This can subsequently lead to a displacement of the traditional economies. If the P2P economy is attractive and primarily used to sell services because they are not subject to similar regulations like the other economies, then the P2P services gain an unfair advantage over the traditional economies. Consequently, if the traditional economies, i.e. Taxis, cannot survive the competition because of the said advantages, then choices for consumers may become more limited. This would result in fewer varieties for the people, which is contradictory to the free-market ideology. Thus, lack of regulations to protect and balance the playing field can result in the decline of providers for consumers.

#### IV. THE HISTORY OF LABOR AND EMPLOYMENT LAW IN CANADA

##### A. THE BEGINNING - THE FIGHT FOR A SHORTER WORK-WEEK

In the 19<sup>th</sup> century, there was an increase of immigrants migrating to Canada from Europe in the hopes of a better economic prospect and an easier life.<sup>109</sup> The history of unions in Canada started in 1872, when the Toronto typographical union went on strike demanding a

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<sup>109</sup> *History of Labour in Canada*, Canadian Labour Congress, <http://canadianlabour.ca/why-unions/history-labour-canada> (last visited Jan. 27, 2017).

shorter work day.<sup>110</sup> When the employers refused, the printers walked off the job on March 25, 1872. Publishers hired replacement workers to pressure the strikers and keep their businesses running.<sup>111</sup> However, by this time, the strikers had earned widespread support from other Toronto workers.<sup>112</sup> A crowd of 10,000 supporters showed up for a rally at Queen's Park on April 15, 1872.<sup>113</sup> Union activity was deemed illegal and the Toronto Globe publisher, George Brown, had the strike committee arrested for criminal conspiracy the next day.<sup>114</sup> This did not stop the protestors. Finally, Prime Minister John A. Macdonald introduced the Trade Union Act on April 18, 1872, legalizing and protecting unions.<sup>115</sup>

Although Canadian and American labor laws are both largely based on the Wagner model,<sup>116</sup> Canadian law has remained substantially more favorable to union recognition.<sup>117</sup> In Canada, the Wagner model was adopted to ensure order and stability during and after the Second World War.<sup>118</sup> Since the 1920s, labor law in Canada has been primarily within provincial legislative jurisdiction, and it has

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<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> Godard, *supra* note 41, at 392.

<sup>118</sup> *Id.* at 400.

varied to some degree across the country.<sup>119</sup>

## B. WARTIME AND LABOR RELATIONS REGULATIONS

Much like the U.S., wartimes in Canada were an essential time in the labor and employment law history and growth. During the Second World War the federal government, exercising its emergency wartime powers, established a national system of labor-relations law.<sup>120</sup> A labor relations board was introduced and there was an establishment of provisions on the certification of unions, the legal obligation for both parties to enter into good-faith collective bargaining, and prohibitions on unfair labor practices.<sup>121</sup> The order was abolished at the close of the war, but similar provincial legislation was soon after enacted across the country in 1948.<sup>122</sup>

In 1965, the Canadian Union of Postal Workers defied government policies and staged an illegal, country-wide strike.<sup>123</sup> They were fighting for the right to bargain collectively, the right to strike, higher wages and better

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<sup>119</sup> *Id.*

<sup>120</sup> Pattie Phillips, *Highlights in Canadian Labour History*, CBC News, September 4, 2009.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

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



management.<sup>124</sup> The strike lasted two weeks and is one of the largest "wildcat" strikes in Canadian history.<sup>125</sup> As a result of the labor dispute, the government extends collective bargaining rights to the public service, although some workers, like the RCMP and the military, were excluded.<sup>126</sup>

C. RECENT DEBATES ABOUT CLASSIFICATION:  
FOCUSES SHIFT, AS THE WORLD CHANGES

In an Ontario Court of Appeal decision, *McKee v. Reid's Heritage Homes Ltd.*, the Court of Appeal discussed the category of workers known as "dependent contractors".<sup>127</sup> The court emphasized that there are still two worker classifications, employees or contractors. However, in certain circumstances, the court will evaluate further to see whether a contractor should be classified as a dependent contractor or an independent contractor.<sup>128</sup>

The dependent contractor is a hybrid between an independent contractor and an employee. The legal

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<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> Irvin Schein, *When is a Worker a Dependent Contractor?*, Irvin Schein (August 19, 2014) <https://irvinschein.com/2014/08/19/when-is-a-worker-a-dependent-contractor/>.

<sup>128</sup> *Id.*

implications of being classified a dependent or an independent contractor are significant. In order to terminate a dependent contractor, the employer must give notice, or pay a severance in lieu of notice.<sup>129</sup> This is not required for independent contractors. An employer does not have the responsibility to withhold a depended contractor's income tax payments, pay for holiday time or assume employment benefits as it may do for an employee.<sup>130</sup>

Once a worker has been classified as a contractor, not an employee, the next step is to determine whether the worker is an independent or a dependent contractor. The sole criterion used to distinguish between the two contractor classes is the "exclusivity of the contractor."<sup>131</sup> If a worker is entirely dependent on one employer for his or her livelihood, the courts want to safeguard that worker due to his or her economic vulnerability.

Though this new status is not applicable to Uber and similar business models in the gig-economy, it is however, a critical indication that there are possibilities for more categories to be debated in the future to assist the limitations and inadequacies of the dichotomous workers' classification.

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<sup>129</sup> Hillary Findlay, *Dependent Contractors: A Third Employment Relationship with Legal Concerns for Sport Organization*, Sports law and Strategy Group, (July 29, 2013) <http://www.sportlaw.ca/2013/07/dependent-contractors-a-third-employment-relationship-with-legal-concerns-for-sport-organizations/>

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

## V. LAUNCH OF UBER IN CANADA AND ITS DEVELOPMENT TO DATE

Uber launched its controversial services in Toronto, Canada on March 16, 2012,<sup>132</sup> three years after its inception in California. Since its introduction, Toronto Councilors have been strained to decide on the future of ride-sharing services.<sup>133</sup> Uber has been a force of nature since its development and, as it seems, is determined to immobilize the taxi industry.<sup>134</sup> But, for now, the app-based ride service has been halted by the municipal bureaucracy, and forced to stall its plans to expand across the country.<sup>135</sup>

### A. BEFORE UBER: TAXI WARS STILL EXISTED

The antagonism and hostility that met Uber, is quite similar to the taxi wars of 1925-1950.<sup>136</sup> In the mid-1920s, taxi companies lobbied local governments in an effort to regulate fares. The lobbying activities upset the market and the roar

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<sup>132</sup> Travis, *Oh Canada! Uber Toronto Is Now Launched!*, UBER Newsroom (March 16, 2012), <https://newsroom.uber.com/canada/oh-canada-uber-toronto-is-now-launched/>

<sup>133</sup> Shawn Jeffords, *Future of Uber in Toronto in Council's Hands This Week*, Toronto Sun, May 1, 2016.

<sup>134</sup> Mark Gollom, *Uber's Invasion of Canada Snarled by Municipal Red Tape*, CBC News, May 14, 2016.

<sup>135</sup> *Id.*

<sup>136</sup> Joshua Errett, *From Thornton Blackburn to Uber: A Brief And Varied History Of Toronto Taxis*, CBC News, April 9, 2016.

resulted in the creation of an advisory committee to study the issue.<sup>137</sup> Toronto's Advisory Committee on Taxicabs became the first line of municipal reach of the taxi industry.<sup>138</sup> In 1949, 10 taxi companies united under the name "Diamond Taxi Cab Association," which ended the taxi wars.<sup>139</sup>

Soon after, obtaining licenses became a requirement. The first license was the Standard Taxicab Owner License. In 1974, regulation passed to allow drivers to operate taxis in vehicles they did not own.<sup>140</sup> In 1998, even more regulations were placed on drivers by introducing new classes of licensing.<sup>141</sup> Fees for the licenses, which were offered to existing Standard License holders for \$75,000 in 1998, have since quadrupled.<sup>142</sup>

#### B. UBER-IZATION OF THE CANADIAN ECONOMY

With the sudden surfacing of numerous mobile apps, some have notably caused a lot of confusion for the

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<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

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

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

provincial and municipal governments.<sup>143</sup> These new platforms have raised a lot of questions and concerns. When a condo owner decides to rent out their room for a night, a week, or even a month on Airbnb, should this owner be subject to pay a tourism tax imposed on hotels?<sup>144</sup> If a car owner drives recipients around as an Uber driver, does this driver need to have specific licenses and insurance coverages, like a taxi driver?<sup>145</sup> If a person rents out four or six parking spots on Rover, is he or she running a commercial parking lot? How many parking spots does it take to be considered a commercial endeavor?<sup>146</sup>

City bylaws have, as it seems, deliberately ignored some services, while deemed others as illegal.<sup>147</sup> Former Ontario MPP Tim Hudak had proposed legislation to embrace the sharing economy and legalize corporations like Uber.<sup>148</sup> In late 2015, he introduced a private members bill

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<sup>143</sup> Kyle Bakx, *The Uber-ization of The Canadian Economy*, CBC News, January 10, 2017 <http://www.cbc.ca/news/business/uber-airbnb-mowsnowpros-tradepros-mindsea-1.3923447>.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> Bakx, *supra* note 143.

<sup>148</sup> *Id.*

called the “Opportunity in the Sharing Economy.”<sup>149</sup> At each turn of Toronto's taxi history the question has remained the same: who gets to drive recipients, and at what cost.<sup>150</sup> Even if the latest regulations pass, that debate appears destined to continue.

## VI. CRITICAL DISTINCTIONS BETWEEN U.S. AND CANADIAN LABOR AND EMPLOYMENT LAW

There are two key differences between the two countries in regard to labor and employment laws. First, labor and employment issues in Canada are predominantly governed province by province rather than federally.<sup>151</sup> Under the Canadian Constitution, labor and employment issues are addressed at the provincial level, except where they are “integral to a federal work or undertaking.”<sup>152</sup> Federal works and undertakings include industries of national importance, such as railways, banks, airlines, communications and interprovincial transport.<sup>153</sup> Workers’ Compensation is handled exclusively at the provincial level,

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<sup>149</sup> Ryan Remiorz, ‘Legalize Uber’ Says Former Progressive Conservative Leader Tim Hudak, CBC news, December 10, 2015.

<sup>150</sup> Errett, *supra* note 135.

<sup>151</sup> *Critical Distinctions between U.S. and Canadian Labour and Employment Law*, Employment Law Alliance (Last visited January 11, 2017).

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

and employment insurance is only federal.<sup>154</sup> Approximately 90%<sup>155</sup> of the workforce is regulated at the provincial or territorial level. Unlike the U.S., there is no National Relations Board to govern the country's unionized workforce. Thus, a business that has multiple offices located in different provinces and employing workers, must ensure each of their HR policies and employment agreements reflect each jurisdiction's specific laws.<sup>156</sup>

Second, in the U.S. an employer is able to terminate its employee "at will", however there is no "employment at will" in Canada.<sup>157</sup> Unless there is just cause for firing an employee, the employee is entitled to notice, or pay in lieu of notice, upon termination of his or her employment.<sup>158</sup> There are, however, certain exceptions. For example, in Nova Scotia, employees with more than ten years of service can only be terminated for just cause.<sup>159</sup> In Quebec, the requirement is two or more years of service. The employee will be entitled to notice, or pay in lieu of notice, unless just

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<sup>154</sup> *Id.*

<sup>155</sup> Jacques Rouse, *Five Key Differences Between Canadian and U.S. Employment Law*, Lexology (September 28, 2012), <http://www.lexology.com/library/detail.aspx?g=86fb3400-e048-496d-809d-add4f14f3827>

<sup>156</sup> *Id.*

<sup>157</sup> *Critical Distinctions between U.S. and Canadian Labour and Employment Law*, *supra* note 151.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

cause for termination also amounts to a serious reason, which is a higher threshold.<sup>160</sup>

## VII. WHY MISCLASSIFICATION OF WORKERS IS AN IMPORTANT ISSUE

The new technology based gig-economy has fundamentally changed the nature of work so much so that the work model has drifted from the traditional employee or independent contractor categories. The gig-workers differ just about enough to make current legal classifications seemingly inadequate. Since its development, apps like Uber have lead heated policy discussions. Economists such as Seth Harris and Alan Kreuger argue that by clarifying the gig-workers' legal employment status, will not only protect the workers, but it will also facilitate innovating thinking. Indeed, it will further free up the courts from being pressured into choosing from two ill-fitting classifications.<sup>161</sup>

### A. A NEED FOR NEW CLASSIFICATIONS

Unlike the U.S., Canada has not clung to the dichotomous employee or independent contractor

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<sup>160</sup> *Id.*

<sup>161</sup> Ross Eisenbrey and Lawrence Mishel, *Uber Business Model Does Not Justify a New 'Independent Worker' Category*, Economic Policy Institute (March 17, 2016) <http://www.epi.org/publication/uber-business-model-does-not-justify-a-new-independent-worker-category/>.



framework and has recognized a “dependent contractor” status for some contractors. This status becomes relevant when a contractor has formed an exclusive relationship, 80% being a “rule of thumb,” over a lengthy period of time, such that the contractor is economically dependent on the continuation of the relationship.<sup>162</sup> Depending on the province, some of these dependent contractors are treated like employees in regards to the notice requirement of termination and eligibility for union membership.<sup>163</sup> This new contractor status demonstrates the possibilities of evolving and molding new frameworks to allow better representation of new work relationships.

Some scholars argue there is no need for a new category. They argue Uber drivers are employees, rather than independent contractors, because the drivers are not able to set their own fares, nor are they free to choose their own customers. Their performance and ratings are controlled and measured by Uber, their driving is essential to Uber’s business, and their work is vital to Uber’s powerful multinational business.<sup>164</sup> The claim that the work hours of Uber drivers are immeasurable and thus hard to fall in the employee-employer category is flawed because Uber can and has been measuring the time drivers have their apps on, to the very minute. This demonstrates that Uber and other

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<sup>162</sup> Hariss & Krueger, *supra* note 78, at 7.

<sup>163</sup> Eisenbrey & Mishel, *supra* note 161.

<sup>164</sup> *Id.*

similar digital apps can effectively administer guaranteed wage programs and track minimum-wage obligations.<sup>165</sup> Uber has disciplinary actions on drivers with low acceptance rates, thus, ensuring drivers respond quickly and frequently to ride requests when the app is turned on. This answers the assertion that drivers have the freedom or liberty to do personal chores while the app is active. The acceptance rate requirement means that when a driver's app is turned on, the driver is "engaged to wait" and thus should be compensable under the FLSA.<sup>166</sup> But the question remains, who will pay for the time a driver is engaged to wait? The entity that will benefit in the end should have to pay for that time.<sup>167</sup>

However, the many distinctions of the gig-worker warrant different treatment and protection under the law. The proposed new category, which falls neatly between the employee and independent contractor category, named independent worker, may be the best solution to safeguard gig-workers.

#### B. A NEED FOR CONSISTENCY

The distinction between different categories of workers, though complicated, is a crucial matter that must

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<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

be resolved.<sup>168</sup> While the determination of classification is a byproduct of complex sets of statutes and policies set forth by federal and state agencies, the effect on employees are undeniable.<sup>169</sup> Misclassified employees risk losing workplace protections, including the right to join a union, face an increased tax burden, receive no overtime pay, and are often ineligible for unemployment insurance and disability compensation.<sup>170</sup> Misclassification also adversely affects federal, state, and local governments because of revenue losses as employers avoid tax obligations.<sup>171</sup>

An independent contractor provides a good or service to another individual or business, often under the terms of a contract that dictates the work outcome, but the contractor retains control over how they provide the good or service.<sup>172</sup> As defined on the IRS website, “the general rule is that an individual is an independent contractor if the payer has the

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<sup>168</sup> DEP'T FOR PROF'L EMPS., *The Misclassification of Employees as Independent Contractors* 1 (June 2016), <http://dpeaflcio.org/wp-content/uploads/Misclassification-of-Employees-2016.pdf>.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Independent Contractor*, Internal Revenue Service. Retrieved from <http://www.irs.gov/Businesses/Small-Businesses-&Self-Employed/Independent-Contractor-Defined> (last visited March 17, 2017).

right to control or direct only the result of the work and not what will be done and how it will be done.”<sup>173</sup> This definition is clearly problematic for the gig-economy. As an employer, not only does Uber control and direct the result of the work, I.e. driving customers from point A to B, but it also strictly determines how many “pings” a driver must accept, how fast it must be accepted and in regards to UberPOOL, which route a driver should take. By the guidance of this simple definition, Uber drivers clearly do not fall cleanly into the independent contractor category that Uber is continuously insisting on.

The independent contractor is not subject to the employer’s control or guidance except as designated in a mutually binding agreement. The contract for a specific job usually describes its expected outcome.<sup>174</sup> Essentially, independent contractors treat their employers more like customers or clients, often have multiple clients, and are self-employed. Uber drivers, must abide by the rules set forth by Uber or they can be deactivated without any notice. Again, this does not seem to fit the work done by the gig-workers like Uber drivers.

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<sup>173</sup> *Id.*

<sup>174</sup> *Independent Contractor*, WEST’S ENCYCLOPEDIA OF AMERICAN LAW (2d ed. 2008), <http://legal-dictionary.thefreedictionary.com/independent+contractor> (last visited Mar. 26, 2017).

The line between employee and self-employed independent contractor is often unclear, and employers have the power to classify the workers as either.<sup>175</sup> The applicability of the test depends on the specific profession or workplace, generally, the independent contractor tests employed by the IRS and the Department of Labor (“DOL”) offer useful guidelines as to worker classification.<sup>176</sup>

According to the IRS, in order to determine a worker’s independence, three main factors must be analyzed. The first factor is behavioral.<sup>177</sup> If Uber’s workers are in fact independent contractors, then Uber may not control or have the right to control the worker as well as how the worker does his or her job. Uber drivers have to use the Uber app to accept or decline riders and that is the only way they can work. Uber drivers must accept one out of five pings as explained above, therefore there are noticeable expectations to follow company guidelines and that could potentially trigger employee status. The second factor has to do with financial aspect. The question to be asked here is, whether the business aspects of the worker’s job is controlled by the payer? An independent contractor generally takes on the risk of realizing a profit or incurring a loss from his or her work. Uber drivers, however, do not seem to fit into this mold either because as long as Uber

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<sup>175</sup> DEP’T FOR PROF’L EMPS., *supra* note 168.

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

drivers accept customers via the Uber app, they will get paid. The third category is to evaluate the type of relationship. This category is more so concerned with the written contracts or employee-type benefits. The issue as to who has the right to control is often not as clear and thus, the burden is placed on businesses to weigh all these factors to determine whether a worker is an independent contractor or an employee.<sup>178</sup>

### C. A NEED FOR PROTECTION

The greatest enticement for misclassifying workers is that employers are not required to pay Social Security and unemployment insurance (UI) taxes for independent contractors.<sup>179</sup> There are other major tax savings, such as savings from Medicare, which results in employers saving between 20 to 40% on labor costs.<sup>180</sup> Employers are not obligated to meet the minimum wage requirement because

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<sup>178</sup> *Id.*

<sup>179</sup> *Employee Misclassification Prevention Act: Hearing on S. 3254 Before the S. Comm. on Health, Educ., Labor, and Pensions*, 111th Cong. (2010) (statement of Seth D. Harris, Deputy Sec'y, U.S. Department of Labor), <http://www.dol.gov/sec/newsletter/2010/20100617-2.htm> (last visited Mar. 31, 2017).

<sup>180</sup> *Id.*

labor and employment laws are based on the traditional employee-employer relationship.<sup>181</sup>

Precise data on the extent of employer misclassification is unavailable because employers do not willingly disclose misclassification and there are no government agencies who would be able to conduct complete research on the matter.<sup>182</sup> State audits generally target 2% of employers and there are many cases of misclassification occurring in the “underground” economy, thus, estimates are likely underrepresenting the actual number of misclassified workers.<sup>183</sup>

Employee misclassification can strip individual workers of their rights and benefits, unfavorably affect administration of many federal and state programs, and create unjust competition for law-abiding employers.<sup>184</sup>

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<sup>181</sup> U.S. GOV'T ACCOUNTABILITY OFF., GAO-07-859T, EMPLOYEE MISCLASSIFICATION: IMPROVED OUTREACH COULD HELP ENSURE PROPER WORKER CLASSIFICATION 6-7 (2007), <http://www.gao.gov/new.items/d07859t.pdf>.

<sup>182</sup> *Id.* at 2.

<sup>183</sup> NAT'L EMP'T LAW PROJECT, INDEPENDENT CONTRACTOR MISCLASSIFICATION IMPOSES HUGE COSTS ON WORKERS AND FEDERAL AND STATE TREASURIES 4 (2015), <http://www.nelp.org/content/uploads/Independent-Contractor-Costs.pdf>

<sup>184</sup> DEP'T FOR PROF'L EMPS., *supra* note 168, at 5.

These consequences of employee misclassification are therefore wide reaching and should be addressed efficiently.

#### VIII. THE FUTURE OF UBER IN THE U.S. AND CANADA

New business models can result in a lot of push back from affected industries. However, in order to be proactive, the emergence of new models should result in the surfacing of new regulations in an attempt to standardize, instead of suppressing, modernization.

The regulation of taxis began as an effort to curb dire competition.<sup>185</sup> In 1937, New York City introduced regulations to resolve the disputes between cabbies undercutting one another's fares as they attracted customers.<sup>186</sup> The solution was to place a limit on the number of taxis allowed on city streets and to set fixed fares for everyone. This brought some order to the taxi market. Customers knew ahead of time the price of the cab ride and drivers could make a decent living.<sup>187</sup> There was a downside to this new order however. The limiting of the number of

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<sup>185</sup> Thomas Walkom, *Across Canada, Uber Killing Taxi Regulation: Walkom*, THE STAR (April 10, 2016), <https://www.thestar.com/news/canada/2016/04/10/across-canada-uber-killing-taxi-regulation-walkom.html>.

<sup>186</sup> *Id.*

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



cabs resulted in higher cab fares.<sup>188</sup>

Along comes Uber and turns the whole taxi company on its head. Though, the corporation does not classify itself as a taxi company, it is for all intents and purposes a ride service.<sup>189</sup> Its computer software mimics a traditional central dispatch service. Nonetheless, the price of the fare is no longer as predictable.<sup>190</sup> The same route taken from one location to another can now cost a low fee or a high fee, depending on the time of the day and the day of the week.<sup>191</sup> The corporation has the power to adjust the fee based on numerous factors throughout the day and week. If it wants to promote itself or get its name out of hot water, it may offer very cheap rides, at the expense of its drivers. People are becoming more comfortable with ride-sharing apps and there is no telling what will happen in the future. One very possible scenario is after all other cab companies go out of business, Uber will be able to raise its prices without worrying about competition and monopolize the riding service. As it seems, Uber is already on its way.

As for the future of the mega-corporation, Uber has been racing to reach the ultimate goal: make self-driving Ubers a reality. On September 14<sup>th</sup> of 2016, Uber announced

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<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

the world's first self-driving Ubers had hit the streets of Pittsburgh.<sup>192</sup> Since the first self-driving Uber, the company has been continuously conducting real-world testing in order to improve the technology.<sup>193</sup> Uber is actively trying to get permits from different states, including California, to resume testing of its self-driving vehicles on public state roads.<sup>194</sup> Uber started testing the self-driving Volvo XC90 SUVs in San Francisco in December of 2016 but the state DMV opposed to the testing since Uber had not applied for its autonomous testing permit prior to initiating the service.<sup>195</sup>

Uber has generated thousands of jobs since its launch in 2009 and the new self-driving technology could be shifting the trend.<sup>196</sup> The company is zealously investing in the self-driving technology, which is in turn putting the future of its drivers around the world at jeopardy.<sup>197</sup> There is

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<sup>192</sup> Anthony Levandowski, *Pittsburgh, your Self-Driving Uber is arriving now*, Uber Newsroom (Sept. 14, 2016).

<sup>193</sup> *Id.*

<sup>194</sup> Darrell Etherington, *Uber Will Apply for a Self-Driving Test Permit in California*, TechCrunch (March 2, 2017).

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

<sup>196</sup> Matt McFarland, *Uber's Push for Self-Driving Cars a Job Killer*, CNN Tech, Aug. 19, 2016.

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

great potential for cheaper rides for its customers, if the self-driving car becomes successful because there will be no human drivers to compensate.<sup>198</sup> In a world where computers and robots are rapidly getting smarter and more reliable, the 1.5 million drivers around the world seem to be on the chopping block.<sup>199</sup> More importantly to this note, if there are no human drivers needed, then the importance of workers' classification becomes obsolete.

## IX. CONCLUSION

This generation is coined as the "app-generation" by Howard Gardner and Katie Davis.<sup>200</sup> At the end of the day, consumers are speaking volumes by using their smartphone to "hail" a ride to their destination. Traditional labor laws are trying hard to influence a world that they were not meant for and this inconsistency is paramount. Perhaps, integrating a third category, that fills in the gap between contractors and employees could better protect and regulate businesses in the gig-economy. As seen in Canada the new classification called the dependent contractor, though not applicable to Uber and similar business models in the gig-economy, is a critical indication that there are possibilities for more worker classification to be discussed today and in

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

<sup>199</sup> *Id.*

<sup>200</sup> See generally, Howard Gardner and Katie Davis, *The App Generation: How Today's Youth Navigate Identity, Intimacy, and Imagination in a Digital World*, (2013).

the future. New categories are needed to assist the limitations and inadequacies of the present dichotomous workers' classification.

The gig-economy evolved so rapidly, that the law is still trying to catch up. By the time the law reaches a consensus on the gig-economy workers' classification, there may no longer be a need for human drivers because of self-driving cars or there may be introductions of further modes of employment that will need to be discussed. This new line of employment in the gig-economy has made it possible to work in a very employer-controlled environment, without ever actually meeting anyone holding the title of "employer." Thus, in the gig-economy world where the top of the pyramid is harder to see or sometimes even understand, it becomes essential to put into place laws and regulations that will help stabilize the conditions, while promoting innovative thinking. It is no easy task, but that is the purpose and duty of the law.