

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

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## ABSTRACT

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

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

We propose a Concentric Circle framework to better govern workers’ rights in the modern era. At the core, we maintain that certain rights and protections should not be tethered to an employment relationship, but to work itself. Thus, the right to be compensated for work and paid a minimum wage; freedom from discrimination and retaliation; access to a safe working environment, and the right to associate and engage in concerted activity should belong to all workers, not just employees. Second, as a middle circle, we argue for a rebuttable presumption of employment to address those rights that remain exclusive to employees (and not independent contractors), and we propose an updated legal test of employment. Finally, at the outer ring of the framework, we suggest policies that could enhance workers’ access to benefits that promote worker mobility and social welfare.

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

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## INTRODUCTION

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

While the above is a standard setup for independent contracting, working with Dynamex also involved obligations that resembled employment rather than independent contracting. Although people driving for Dynamex used their own cars and trucks, for some customers they were required to attach the company's decals to their vehicles during deliveries. Drivers also had to buy and wear Dynamex shirts and badges. The company required certain drivers to buy a Nextel cellphone for communications with Dynamex; receive deliveries through Dynamex dispatchers at Dynamex's discretion, without a guaranteed number or type; and notify Dynamex to reject an offered delivery or be liable for any losses to the company. Dynamex still obtained the customers, set the rates customers were charged for delivery services, and negotiated the amounts drivers would receive.<sup>2</sup> Drivers usually could set their own schedules and routes, but they had to both provide Dynamex notice of the days they would work and complete all assignments the day they were assigned.

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

A significant amount of the work in the United States and many of the world's economies is done in a similar mix of conditions. Many businesses have restructured to *treat* workers like employees (specifying behaviors and then closely monitoring the outcomes that are crucial to their consumers

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<sup>1</sup> After the drivers sued, the California Supreme Court reconsidered, in *Dynamex Operations West Inc. v. Superior Court*, 416 P.3d 1 (Cal. 2018), the appropriate test for determining whether drivers are employees or independent contractors for purposes of California wage orders, which impose obligations relating to minimum wages and maximum hours. All facts in this Introduction are from the Dynamex decision.

<sup>2</sup> For drivers assigned to a specific fleet or scheduled route, Dynamex paid them a flat fee or a percentage of the delivery fee. Dynamex usually paid on-demand delivery drivers a percentage of the delivery fee or a flat fee per item delivered.

and investors) but to *classify* workers as independent contractors (engaging them at an arms-length and cutting them off from rights and benefits tied to employment).

These arrangements continue to blur the boundaries of what marks “employment.” In 1925, according to the Supreme Court, “a ‘contract of employment’ usually meant nothing more than an agreement to perform work.”<sup>3</sup> Dictionaries usually considered “employment” as synonymous with “work.”<sup>4</sup> Today, such assumptions no longer hold.

The increasingly ambiguous question of what constitutes “employment” is critically important. Employment is the basis for many of our fundamental workplace protections, including assurances of pay for work done, provision of a safe workplace, and protections against discrimination and sexual harassment. Further, benefits provisions and basic safety-net policies like unemployment insurance and workers’ compensation are also linked to employment. Finally, wage and salary setting itself are powerfully affected by employment responsibilities.

As modern business structures pressure the question of “employment,” they expose faults in the current legal structures that premise eligibility for worker protection on designated employment relationships. The core purpose of worker protection laws is to address the problem that work relationships are inherently unequal. In most cases, workers do not have sufficient individual bargaining power to protect themselves against socially unacceptable outcomes in the labor market, especially in the absence of collective bargaining power. This vulnerability creates a role for government to protect workers. Congress recognized this in enacting legislation like the Fair Labor Standards Act.<sup>5</sup>

However, current conditions show that the design and administration of these worker protections undermine their purpose. Most of our critical workplace protection laws were flawed at the outset, both because they excluded certain categories of vulnerable workers and because they conditioned access to critical rights and protections on an employment relationship.<sup>6</sup> Additionally, the implementation of these laws further constricts their efficacy by determining employment relationships based on unpredictable and underinclusive inquiries like control. To determine whether

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<sup>3</sup> *New Prime Inc. v. Oliveira*, 139 S.Ct. 532, 539 (2019). Justice Gorsuch further noted that the Railroad Labor Board in 1922 interpreted “employee” to include anyone “engaged in the customary work directly contributory to the operation of the railroads.” *Id.* at 543.

<sup>4</sup> *Id.* at 539.

<sup>5</sup> *See, e.g., Brooklyn Savings Bank v. O’Neil*, 324 U.S. 697, 706-07 (“The legislative history of the Fair Labor Standards Act shows an intent on the part of Congress to protect certain groups of the population from substandard wages and excessive hours which endangered the national health and well-being and the free flow of goods in interstate commerce. The statute was a recognition of the fact that due to the unequal bargaining power as between employer and employee, certain segments of the population required federal compulsory legislation to prevent private contracts on their part which endangered national health and efficiency and as a result the free movement of goods in interstate commerce . . . .”) (internal citations omitted).

<sup>6</sup> This decision was likely based on the assumption that independent contractors had sufficient bargaining power and leverage to protect their own interests without government intervention.

an employment relationship exists, Congress and courts have focused on the question of retained control. However, the control inquiry is problematic. First, questions of control are not always consistent with the intended purpose of worker protection statutes. Second, common-law development has made identifying an employment relationship unpredictable, decreasing clarity of employer responsibilities and compliance with the law.

Current business practices highlight these faults as businesses increasingly rely on “fissured workplace” business models utilizing independent contractors that shifts greater risks from employers onto workers. This means that worker protection laws fail a great and growing number of workers. Many independent contractors—both legitimately classified independent contractors and those employees that companies have misclassified as independent contractors—lack the bargaining power and leverage needed to protect their own and societal interests.<sup>7</sup>

We argue that this situation creates an urgent need to rethink our system of worker protections by providing all workers some core protections and by enhancing workers’ access to other key laws. We contend that the central question involving worker protection should not be “what constitutes employment?” but rather “who is responsible here?” Workers deserve more protections regardless of employment status. We assert that this will reduce misclassification and create incentives for businesses to base their decisions on true tradeoffs rather than on regulatory arbitrage.

We begin by setting the stage for urgent action. We review evidence that the “present of work”—let alone “the future of work”—provides less and less of the value created by work going to those who do it while more and more of the risks associated with work are shifted onto them and away from those who derive economic returns from that work. We then focus on the history of assignment of responsibility and how poorly that comports with the way that industries in our economy operate. After reviewing several responses that have been proposed in recent years, we put forward a new Concentric Circle framework for assigning rights, responsibility, and protections in the workplace.

We argue that certain core benefits and protections (the center circle) must exist for all people performing work, regardless of their employment relationship. These include the right to be paid a minimum wage and compensated for work; freedom from discrimination and retaliation; access to a safe working environment; and the right to associate and engage in concerted activity. We next contend that for benefits and protections where an employment relationship is required to access rights (the middle circle), there should be a rebuttable presumption of employment, better assigning risk and acknowledging increasing information and power asymmetries between people working and those benefiting from the work. Regarding this middle circle, we additionally propose adopting a federal test of employment relationships closer to the “ABC test” employed by many states but

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<sup>7</sup> The fissured workplace also makes common the possibility of joint employment, but this article focuses on enhancing protections for independent contractors and employees who companies have misclassified as independent contractors. We acknowledge the analysis of employment includes joint employment and the issues are intertwined.

including key components of the economic realities analysis courts look to in interpreting the Fair Labor Standards Act. Finally, we suggest additional mechanisms (the outer circle) to give workers access to, and to incentivize companies to fund, workplace benefits that promote worker mobility and social welfare.

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

### *A. Eroding exit and voice options in the labor market weaken worker bargaining power*

A principle justification for workplace and labor laws arises from the need to rectify the unequal bargaining power of the labor market and the conditions that arise from that imbalance.<sup>8</sup> Institutional and market changes in the last three decades have weakened relative bargaining power for many workers, intensifying the need for a comprehensive re-examination of workplace protections.

In his classic book, *Exit, Voice, and Loyalty*, the political scientist A.O. Hirschman argued that dissatisfaction with a product, service, relationship, or other outcome can give rise to two broad options: one can walk away (exit) or try to change the outcome by engagement (voice).<sup>9</sup> In the labor market, exit and voice take the form of either quitting a job or using channels—unions, internal dispute resolution, rights granted by government—to seek changes in conditions at work.

Opportunities to exercise exit or voice options have diminished for workers in recent decades. For many workers in low wage labor markets and with limited “outside options,” exit has always been less of an option than posited in a competitive labor market. Workers with fewer skills, less formal education, and smaller social networks are less mobile. Studies show lifetime earnings are more impacted by local labor market shocks from which they do not recover, in part because they are less able to move in response to, say, local labor market downturns.<sup>10</sup> Increasing concentration in labor

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<sup>8</sup> See e.g., MILLIS AND MONTGOMERY, LABOR’S PROGRESS AND SOME BASIC LABOR PROBLEMS (McGraw-Hill Book Company, 1938), at 278 (“The widespread attempts in the last four decades, to regulate wages through exercise of the coercive power of the state have been an inevitable consequence of industry’s failure to pay millions of its workers enough to enable them and their families to live in decency.”).

<sup>9</sup> ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES (Harvard University Press, 1970); see also Bivens et al., *How today’s unions help working people: Giving workers the power to improve their jobs and unrig the economy*, EPI (Aug. 24, 2017), available at <https://www.epi.org/publication/how-todays-unions-help-working-people-giving-workers-the-power-to-improve-their-jobs-and-unrig-the-economy/>; Walter and Madland, *American Workers Need Unions*, Center for American Progress (Apr. 2, 2019), <https://www.americanprogressaction.org/issues/economy/reports/2019/04/02/173622/american-workers-need-unions/>.

<sup>10</sup> Abby Wozniak, A. (2010). “Are college graduates more responsive to distant labor market opportunities?” *Journal of Human Resources*, 45, no. 4:944-970.; Raj Chetty, David Grusky, Maximilian Hell, Nathaniel Hendren, Robert Manduca, Jimmy Narang (2017). “The fading American dream: Trends in absolute income mobility since 1940. *Science*, 28, April: 398-406.

markets further undermines exit options by limiting employment alternatives for workers.<sup>11</sup> And the growth of non-compete agreements even for low wage workers with little or no ability to competitively leverage the intellectual property of the organizations for which they work limit exit even further.<sup>12</sup>

The options for voice have also diminished considerably, most directly because of the long-term decline of labor unions and collective bargaining in the vast majority of workplaces. The percent of wage and salary workers who were members of unions (union membership rate) fell by almost half in the last 40 years. In 1983, the union membership rate was 20.1 percent. By 2019, it had fallen to 10.3 percent.<sup>13</sup> The Supreme Court’s decision in *Janus v. American Federation of State, County, and Municipal Employees, Council 31*<sup>14</sup> further undermines the financial viability of public sector unions. Although in recent years we have seen the emergence of other forms of workplace voice organizations like worker centers, independent voice options remain the exception rather than the rule for working people.<sup>15</sup>

Exercise of rights on an individual and collective basis have also been eroded through recent court decisions.<sup>16</sup> In *Epic Systems Corporation v. Lewis*, the Supreme Court held that the Federal Arbitration Act requires courts to enforce arbitration provisions in employment contracts, even when the arbitration terms prohibit the pursuit of class or collection actions. As Justice Ginsburg noted in

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<sup>11</sup> Council of Economic Advisers. Labor Market Monopsony: Trends, Consequences, and Policy Responses, Executive Office of the President, Issue Brief, October 2016. See also José Azar, Ioana Marinescu, and Marshall Steinbaum, Labor Market Concentration (December 10, 2018). Available at SSRN: <https://ssrn.com/abstract=3088767> or <http://dx.doi.org/10.2139/ssrn.3088767>.

<sup>12</sup> See, e.g., Jane Flanagan, *No Exit: Understanding Employee Non-Competes and Identifying Best Practices to Limit Their Overuse*, ACS Issue Brief (Nov. 2019), <https://www.acslaw.org/wp-content/uploads/2019/11/Understanding-Employee-Non-Competes-and-Identifying-Best-Practices-to-Limit-Their-Overuse.pdf>. Fortunately, this trend seems to have been slowed by public recognition about the use of non-competes and “no-poach agreements” in franchise agreements and platform companies. See, e.g., Sean Higgins, “Non-compete clauses increasingly a liability for businesses,” *Washington Examiner* (Sept. 4, 2018), <https://www.washingtonexaminer.com/policy/economy/non-compete-clauses-increasingly-a-liability-for-businesses>.

<sup>13</sup> U.S. DEP’T OF LABOR BUREAU OF LABOR STATISTICS, UNION MEMBERS, 2019 USDL-20-0108, <https://www.bls.gov/news.release/union2.nr0.htm> (last visited Feb 13, 2019); U.S. DEP’T OF LABOR BUREAU OF LABOR STATISTICS, UNION MEMBERSHIP IN THE UNITED STATES, SEP. 2016, <https://www.bls.gov/spotlight/2016/union-membership-in-the-united-states/home.htm> (last visited Feb 13, 2019).

<sup>14</sup> 138 S.Ct. 2448 (U.S. 2018) (prohibiting state and local government workers from negotiating collective bargaining agreements with fair share fee arrangements).

<sup>15</sup> See, e.g. JANICE FINE, *WORKER CENTER: ORGANIZING COMMUNITIES AT THE EDGE OF THE DREAM* (Cornell University Press, 2006); STEVEN GREENHOUSE, *BEATEN DOWN, WORKED UP: THE PAST, PRESENT, AND FUTURE OF AMERICAN LABOR* (Alfred A. Knopf, 2019).

<sup>16</sup> *Epic Systems Corporation v. Lewis*, 138 S.Ct. 1612, 1616 (U.S. 2018). See also *Lamps Plus, Inc., v. Varela*, 139 S.Ct. 1407 (U.S. 2019).

dissent, “The inevitable result of today’s decision will be the under enforcement of federal and state statutes designed to advance the well-being of vulnerable workers.”<sup>17</sup>

Taken together, diminished exit and voice options further exacerbate leverage imbalances in the labor market. Policies for the workplace require recognition of this *ex ante* imbalance in considering how to protect workers in assigning responsibilities to the organizations that benefit from their work.

*B. Fissuring workplaces undermine rights and protections arising from employment*

Employers are moving away from a traditional employment model and outsourcing and subcontracting much of their work.<sup>18</sup> This “fissuring” of the workplace, including increased outsourcing, contracting and subcontracting, and the rise of alternative work arrangements, has allowed employers to shift risks and responsibilities onto workers and incentivized the misclassification of employees as independent contractors.<sup>19</sup> Contracted workers have lower wages, fewer benefits, unreliable hours, and limited or no labor and employment protections. But most relevant here, fissuring has undermined the provision of rights and protections afforded workers via employment.

How did we get here? Over the past few decades, major companies throughout the economy have faced intense pressure to improve financial performance for private and public investors.<sup>20</sup> They responded by focusing their businesses on core competencies—that is, activities that provide the greatest value to their consumers and investors—and by shedding less essential activities.<sup>21</sup> Firms typically started outsourcing activities like payroll, publications, accounting, and human resources. But over time, this spread to activities like janitorial work, facilities maintenance, and security. In

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<sup>17</sup> Epic, 138 S.Ct. at 1646 (citing Sternlight, *Disarming Employees: How American Employers Are Using Mandatory Arbitration To Deprive Workers of Legal Protections*, 80 BROOKLYN L. REV. 1309 (2015)). See also Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C. L. REV. 679, 683–84 (2018) (concluding that the law of mandatory arbitration needs to be reconsidered “in light of mounting evidence that it effectively enables employers to nullify employee rights and to insulate themselves from the liabilities that back up crucial public policies”); Alexander J.S. Colvin, *The growing use of mandatory arbitration*, Economic Policy Institute (Apr. 6, 2018), <https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration-access-to-the-courts-is-now-barred-for-more-than-60-million-american-workers/>.

<sup>18</sup> DAVID WEIL, *THE FISSURED WORKPLACE: HOW WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT* (Harvard University Press, 2014); see also Mitchell H. Rubinstein, *Employees, Employers, and Quasi-Employers: An Analysis of Employees and Employers Who Operate in the Borderland Between an Employer-and-Employee Relationship*, 14 U. PA. J. BUS. L. 605, 640 (2012).

<sup>19</sup> WEIL, *THE FISSURED WORKPLACE*, *supra* note X.

<sup>20</sup> The Business Roundtable generated significant press and interest when it announced in 2019 that it was moving away from its traditional “principles of shareholder primacy.” The statement’s “modern standard for corporate responsibility,” includes a fundamental commitment to all stakeholders, which includes “investing in our employees... compensating them fairly ... supporting them through training and education, [and fostering] dignity and respect.” Business Roundtable “Statement of Purpose of a Corporation”, Aug. 19, 2019, <https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans>.

<sup>21</sup> WEIL, *THE FISSURED WORKPLACE*, *supra* note X.

many cases it went even deeper, spreading into employment activities that could be regarded as core to the company: housekeeping in hotels; cooking in restaurants; loading and unloading in retail distribution centers; even basic legal research in law firms.<sup>22</sup>

Like a fissure in a once-solid rock that deepens and spreads, once an activity like janitorial services, housekeeping, or package delivery is shed, the secondary businesses doing that work are affected, often shifting those activities to still other businesses. A common practice in janitorial work, for instance, is for companies in the hotel or grocery industries to outsource that work to cleaning companies. Those companies, in turn, often hire smaller businesses to provide workers for specific facilities or shifts. These work arrangements alter who is the employer of record or make the worker-employer tie tenuous and far less transparent.<sup>23</sup>

Because each level of a fissured workplace structure requires a financial return for their work, the further down one goes, the slimmer are the remaining profit margins. At the same time, as you move downward, labor typically represents a larger share of overall costs—and one of the only costs in direct control of those entities. That means the incentives to cut corners rise, leading to violations of our fundamental labor and employment standards. Violations related to fissuring appear, for example, in the form of failure to pay janitors and cleaners,<sup>24</sup> cable and satellite installers,<sup>25</sup> carpenters, home care workers, and other workers the wages and overtime they had rightly earned—losses typically equivalent to losing three to four weeks of earnings.<sup>26</sup>

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

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<sup>22</sup> Id. The company Snag, for example, portends to be “America’s #1 hourly marketplace,” connecting workers with shifts or jobs and employers with hourly workers within minutes in restaurants, retail, hospitality, and healthcare. SNAG, <https://www.snagajob.com/about/>

<sup>23</sup> David Weil, *Enforcing Labour Standards in Fissured Workplaces: The US Experience*, ECON. & LAB. REL. REV., 22:2 at 37 (2011).

<sup>24</sup> See, e.g., *Vazquez v. Jan-Pro Franchising Int’l, Inc.*, 923 F.3d 575 (9th Cir. 2019); *Awuah v. Coverall North America, Inc.*, 707 F. Supp. 2d 80 (D. Mass. 2010).

<sup>25</sup> See, e.g., *Scantland v. Jeffrey Knight, Inc.*, 721 F.3d 1308 (11th Cir. 2013); *Keller v. Miri Microsystems LLC*, 781 F.3d 799 (6th Cir. 2015); *Thornton v. Mainline Communications, LLC*, 157 F. Supp. 3d 844, 849 (E.D. Mo. 2016); *Lang v. DirecTV, Inc.*, 801 F. Supp. 2d 532 (E.D. La. 2011); *Solis v. Cascom, Inc.*, 3:09CV257, 2011 WL 10501391 (S.D. Ohio Sept. 21, 2011); *but see* *Chao v. Mid-Atlantic Installation Services, Inc.*, 16 Fed. App’x 104 (4th Cir. 2001).

<sup>26</sup> U.S. DEP’T OF LABOR WAGE & HOUR DIV., <https://www.dol.gov/whd/data/index.htm> (last visited Aug. 30, 2019).

economic losses that result from labor and employment violations.<sup>27</sup> There are also costs to society resulting from a lack of health and safety oversight<sup>28</sup> and discrimination.

The growth of fissured work arrangements and increasing classification and misclassification of workers as independent contractors<sup>29</sup> also means even more workers will work without the protections of our fundamental civil rights and labor and employment laws and without the ability to access some public benefits.<sup>30</sup> Independent contractors lack most civil rights protections, are unable to demand even the minimum wage, access unemployment insurance or workers' compensation, or collectively bargain for improved jobs.<sup>31</sup>

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<sup>27</sup> When families lose income or jobs, communities also face the consequences of workers who are unable to spend their earnings and stimulate the local economy. In addition, when low-wage workers are underpaid, "taxpayers must provide additional funding for social welfare programs to fill in the gaps that employers created." See, e.g., David Cooper and Teresa Kroeger, *Employers steal billions from workers' paychecks each year*, Economic Policy Institute, 2017, available at <https://www.epi.org/publication/employers-steal-billions-from-workers-paychecks-each-year-survey-data-show-millions-of-workers-are-paid-less-than-the-minimum-wage-at-significant-cost-to-taxpayers-and-state-economies/>. There are also significant costs at the state level. See, e.g., Paul Berger and Sarah E. Needleman, "New Jersey Demands Uber Fork Over Nearly \$650 Million in Unpaid Taxes, Fines," WALL STREET JOURNAL, Nov. 15, 2019 ("Earlier this week, the state's Department of Labor and Workforce Development demanded Uber and a subsidiary, Rasier LLC, hand over [\$642 million] for failing to pay employment taxes by, the state argues, misclassifying drivers as independent contractors.").

<sup>28</sup> See David Michaels, PhD, MPH (Assistant Secretary of Labor for the Occupational Safety and Health Administration (OSHA)). Testimony before the House Committee on Education and the Workforce Subcommittee on Workforce Protections. (Oct. 7, 2015), available at <https://www.osha.gov/news/testimonies/10072015> (testifying to the numerous consequences of OSH Act violations).

<sup>29</sup> See U.S. GOV'T ACCOUNTABILITY OFF., GAO-09-717, *EMPLOYEE MISCLASSIFICATION: IMPROVED COORDINATION, OUTREACH, AND TARGETING COULD BETTER ENSURE DETECTION AND PREVENTION* (2009) (concluding that a significant portion of independent contracting represents misclassification of workers); Françoise Carré, *(In)dependent Contractor Misclassification*, Economic Policy Institute (Jun. 8, 2015), <https://www.epi.org/publication/independent-contractor-misclassification> (noting that state-level data shows that anywhere from 10 to 20 percent of employers misclassify at least one employee and that about one-third of construction workers in the U.S. South, an industry where the problem has been long entrenched, are estimated to be misclassified); see also Lawrence F. Katz and Alan B. Krueger, *Understanding Trends in Alternative Work Arrangements in the United States*, NBER Working Paper No. 25425 (2019); David Weil, *Lots of Employees Get Misclassified as Contractors. Here's Why It Matters*, Harvard Business Review (2017), <https://hbr.org/2017/07/lots-of-employees-get-misclassified-as-contractors-heres-why-it-matters>; National Employment Law Project, *Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries*, 2-6 (Jul. 2015), <http://nelp.org/content/uploads/Independent-Contractor-Costs.pdf>; U.S. Dept. of Labor, Wage & Hour Div., Administrator's Interpretation No. 2015-1, *The Application of the Fair Labor Standard Act's "Suffer or Permit" Standard in the Identification of Employees Who Are Misclassified as Independent Contractors* (July 15, 2015), available at [http://www.blr.com/html\\_email/AI2015-1.pdf](http://www.blr.com/html_email/AI2015-1.pdf) (withdrawn by the Secretary of Labor on June 7, 2017) (hereinafter *Misclassification AI*).

<sup>30</sup> Weil, *supra* note X; Maltby & Yamada, 38 B.C. L. REV. at 247 ("All of these effects—"companies" or "employers" treating individuals as independent contractors rather than employees, large firms contracting out work to small firms, and the growth of temporary help agencies—increase the net number of independent contractors.").

<sup>31</sup> A recent NLRB opinion illustrates the detrimental impact of the fissured workplace on collective bargaining efforts. In 2018, the NLRB concluded that protesting janitorial workers lost the protections of the NLRA because they engaged in unprotected picketing. *Preferred Building Services*, 366 NLRB No. 159 (2018). The Board reasoned that the

The fissured workplace and misclassification of workers significantly impacts low-wage workers, people of color, immigrants, and undocumented workers. Outsourcing is prevalent in many fast-growing industries, including temporary help, health services, construction, manufacturing, transportation, and warehousing.<sup>32</sup> Women, people of color, and immigrants often work in low-wage and fissured sectors, further compounding the historic and systemic inequities that excluded them from being protected by the Fair Labor Standards Act and the National Labor Relations Act because of their concentration in occupations and industries excluded by those laws.

There were industries that were highly sub-contracted in the 1930s, when Congress enacted the Fair Labor Standards Act (FLSA), and earlier than that.<sup>33</sup> That business model was sector specific, however, and limited to a handful of industries, including mining, garment, and industries where child labor was prevalent. Congress was aware of the problematic business models in these industries and the importance of addressing them through protective legislation.<sup>34</sup> Shifting work outside the boundaries of lead businesses and organizations has now become the rule, however, not the exception. It is this widespread phenomenon that demands attention.

Continuing technological advances further allow for traditional and virtual workplaces and on-demand work platforms and apps, such as those used by Uber, Lyft, Amazon Inc.'s Mechanical Turk, and Handy, to mask the control companies retain over a vast workforce of so-called independent contractors.<sup>35</sup> It will be a continuing challenge to correctly classify workers in the on-demand economy, many of whom resemble independent contractors in their autonomy about their

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picketers had inappropriately led the public to believe that the building management company was their employer and had the ability to adjust their working conditions.

<sup>32</sup> Brief of National Employment Law Project et al, *Browning-Ferris Industries d/b/a BFI Newby Island Recyclery*, Case 32-RC-109684 (June 26, 2014) at 7, available at <http://www.nlr.gov/case/32-RC-109684> (hereinafter "NELP Brief").

<sup>33</sup> See Kati L. Griffith, *The Fair Labor Standards Act at 80: Everything old is new again*, 104 CORNELL L. REV. 557, 568 (2019) ("While twenty-first century businesses are certainly different from their vertically-integrated New Deal counterparts, the idea that some business arrangements would make it difficult to enforce the FLSA is not a new dynamic of our twenty-first century economy.").

<sup>34</sup> Keith Cunningham-Parmeter, *From Amazon to Uber: Defining Employment in the Modern Economy*, 96 B.U. L. REV. 1673, 1693 (2016) ("For example, New Deal reformers passed the FLSA in part to disrupt the nation's "sweating" system, wherein garment manufacturers contracted with sweatshops to produce their wares. Under this scheme, the sweatshops exposed workers to oppressive working conditions, while the clothing manufacturers that hired the sweatshops distanced themselves from these violations and protected their brands from reputational harm. By extending liability to parties that "permitted" wage violations, Congress placed these clothing manufacturers squarely within FLSA's crosshairs.") (internal citations omitted); Griffith, *supra* note X at 579 ("the FLSA's framers foresaw that some businesses might change certain formalities such as where work is located, or how pay arrangements are structured, in ways that evaded coverage.").

<sup>35</sup> David Weil and Tanya Goldman, *Labor Standards, the Fissured Workplace, and the On-Demand Economy*, PERSPECTIVES ON WORK (LERA, 2016).

work schedule and environment, but do not otherwise fit the traditional image of an independent contractor in that they do not control their payment, rates, or work contracts.<sup>36</sup>

These workforce trends require recognition and re-consideration about who is the appropriate entity—or entities—to hold responsible for workplace protections and benefits.<sup>37</sup> Being split off from the main firm affects more than employment law and labor standards compliance; it can also lower wages and access to benefits. When you work as an employee for a major business, decades of research shows that wages and benefits tend to increase over time, regardless of whether that large employer is unionized.<sup>38</sup> But earnings fall significantly when a job is contracted out<sup>39</sup>—even for identical kinds of work and workers. Opportunities for “climbing the ladder” fade because the person in the mailroom (or, more likely, at the IT service desk) is now a subcontractor without a pathway.<sup>40</sup> That not only means lower wage growth and reduced access to benefits, but also diminished opportunities for on-the-job training, protections from social safety nets like unemployment insurance and workers’ compensation, access to valuable social networks, and other pathways to upward advancement. Taken together, the fissured workplace contributes to growing earnings inequality.<sup>41</sup>

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<sup>36</sup> See, e.g., Seth Harris and Alan B. Krueger. 2015 (Dec.). “A Proposal for Modernizing Labor Laws for Twenty-First-Century Work: The Independent Worker” (pp. 2, 12). Discussion Paper 2015-10, The Hamilton Project. Washington, DC: The Brookings Institution.

<sup>37</sup> In announcing a change to the NLRB’s joint employer standard in August 2015, the Board stated that its new standard was necessary, as the current standard was “out of step with changing economic circumstances,” including growth of the number of employees employed through temporary staffing agencies and the range of occupations staffed by staffing agencies. *Browning-Ferris Industries d/b/a BFI Newby Island Recyclery*, 362 NLRB No. 186 (2015). States have similarly recognized the need to respond to widespread misclassification. In the span of eight years (2004-2012), “twenty-two states have modified their statutory definitions of independent contractors or transformed penalties for the misclassification of employees.” Anna Deknatel and Lauren Hoff-Downing, *ABC on the Books and In the Courts: An Analysis of Recent Independent Contractor and Misclassification Statutes*, 18 U. PA. J. L. & SOC. CHANGE 53 (2015).

<sup>38</sup> See generally Charles Brown and James Medoff. “The Employer Size-Wage Effect.” *Journal of Political Economy*, Vol. 97, No. 5 (Oct., 1989), pp. 1027-1059; John Gibson and Steven Stillman, Why Do Big Firms Pay Higher Wages? Evidence from an International Database, *The Review of Economics and Statistics*, Vol. 91, No. 1 (February 2009), pp. 213-218, MIT Press, <https://www.jstor.org/stable/25651329>. Unionization also results in higher wages and benefits. See, e.g., Matthew Walters and Lawrence Mishel “How unions help all workers,” Economic Policy Institute (Aug. 26, 2003), [https://www.epi.org/publication/briefingpapers\\_bp143/](https://www.epi.org/publication/briefingpapers_bp143/).

<sup>39</sup> Deborah Goldschmidt & Johannes F. Schmieder, 2017. “The Rise of Domestic Outsourcing and the Evolution of the German Wage Structure,” *The Quarterly Journal of Economics*, Oxford University Press, vol. 132(3), pages 1165-1217.

<sup>40</sup> Neil Irwin, “To Understand Rising Inequality, Consider the Janitors at Two Top Companies, Then and Now,” *NEW YORK TIMES* (Sept. 3, 2017), <https://www.nytimes.com/2017/09/03/upshot/to-understand-rising-inequality-consider-the-janitors-at-two-top-companies-then-and-now.html>.

<sup>41</sup> See generally Erling Barth, Alex Bryson, James C. Davis, and Richard Freeman, “It’s Where You Work: Increases in the Dispersion of Earnings across Establishments and Individuals in the United States,” *Journal of Labor Economics* 34, no. S2 (Part 2, April 2016): S67-S97; Weil, David, “Inequality and the Fissured Workplace.” *Canadian Labour and Employment Law Journal* 21, no.2 (Spring 2019): 207-238.

The fissured workplace also raises important questions and concerns about the respective responsibilities of joint employers, an issue the Obama and Trump administrations have prioritized, albeit with the Obama administration having tried to ensure workers would receive the full scope of statutory protections to which they are entitled, and the Trump administration seeking to limit employer liability under the relevant statutes.<sup>42</sup> In this article we focus on the issue of misclassification and determinations of employment relationships, although the issue is necessarily closely linked to the analysis of when two employers are joint employers.<sup>43</sup>

## II. THE EVOLUTION AND CHALLENGES OF DEFINING EMPLOYMENT

The threshold determination of employment status is the gateway to accessing a host of workplace protections and rights, yet defining employer-employee relationships has been a challenge for legislators, commentators, and jurists for centuries, dating back to development of master-servant relationships.<sup>44</sup> Given the difficulty of parsing work relationships, many labor and employment statutes either lack definitions for who is an employee covered under the law or have less-than-helpful circular definitions, such as “‘employee’ means an individual employed by an employer.”<sup>45</sup>

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<sup>42</sup> The Obama administration recognized the possibility that workers jointly employed by two or more employers has become more common in recent years and sought to ensure that workers receive from those joint employers the protections to which they are entitled. *See, e.g.*, *Browning-Ferris Industries d/b/a BFI Newby Island Recyclery*, 362 NLRB No. 186 (2015) (re-considering the test for joint employment and noting the definition of employer should encompass as many employment relationships as possible to foster collective bargaining); U.S. Dep’t of Labor, Wage & Hour Div., Administrator’s Interpretation No. 2016-1, *Joint employment under the Fair Labor Standards Act and Migrant and Seasonal Agricultural Worker Protection Act* (Jan. 20, 2016) (withdrawn by the Secretary of Labor on June 7, 2017) (hereinafter *Joint Employment AI*) (concluding that “[a]s a result of continual changes in the structure of workplaces, the possibility that a worker is jointly employed by two or more employers has become more common in recent years. In an effort to ensure that workers receive the protections to which they are entitled and that employers understand their legal obligations, the possibility of joint employment should be regularly considered in FLSA and MSPA cases . . .”). Under the Trump administration the Department of Labor, NLRB, and EEOC are trying to limit employers’ liability as joint employers, largely returning to the notion that employers must exercise direct control. *See, e.g.*, U.S. Dep’t of Labor, Wage & Hour Div., *Final Rule on Joint Employer Status Under the Fair Labor Standards Act* (Jan. 16, 2020); NLRB Notice of Proposed Rulemaking, *The Standard for Determining Joint-Employer Status* (Aug 14, 2018); *see also* Melissa Legault, “Employers Can Expect a Trio of Joint Employer Rules in December 2019,” *THE NATIONAL LAW REVIEW* (Nov. 26, 2019).

<sup>43</sup> *See, e.g.*, *Joint Employment AI* (noting that joint employment is rooted in the definition “to employ” and “[a]s with all aspects of the employment relationship under the FLSA and MSPA, the expansive definition of “employ” as including “to suffer or permit to work” must be considered when determining joint employment, so as to further the statutes’ remedial purposes.”).

<sup>44</sup> *See, e.g.*, *Waters v. Pioneer Fuel Co.*, 55 N.W. 52, 52 (Minn. 1893) (“It is not easy to frame a definition of the terms “independent contractor” that will satisfactorily meet the conditions of different cases as they arise, as each case must depend so largely upon its own facts.”); *N.L.R.B. v. Hearst Publications*, 322 U.S. 111, 121 (1944) (“Few problems in the law have given greater variety of application and conflict in results than the cases arising in the borderland between what is clearly an employer-employee relationship and what is clearly one of independent entrepreneurial dealing.”); Richard R. Carlson, *Why the Law Still Can’t Tell an Employee When it Sees One and How it Ought to Stop Trying*, 22 *BERKELEY J. EMP. & LAB. L.* 295, 298–99 (2001) (“After nearly two hundred years of evolution, the multi-factored “common law” test begs the question of employee status as much as answers it.”).

<sup>45</sup> Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e.

Even where employment is defined, courts have not always stayed true to the language of the statute, such as in interpreting the broad definition of “employ” in the Fair Labor Standards Act (FLSA).<sup>46</sup>

As a result, the courts have in large part relied on common law definitions of “employee.” As the courts have sought to answer the fundamental and threshold question of when someone is entitled to the rights and protections of labor and employment laws, they have further developed tests for each statute, such as the economic realities analysis, to determine the existence of an employment relationship.

The status quo is inadequate.<sup>47</sup> Workers and employers lack certainty about the outcome in any given case. Courts have been reluctant to give deference to the broad statutory definition of “to employ” from the FLSA or expansively interpret other standards considering their worker protection origins. Instead, courts have repeatedly defaulted to common law principles based on master-servant relationships that require reliance on control as the sine qua non of determining rights and responsibilities. Understanding the evolution of these definitions, as well as the courts’ interpretation of them, is a key step in suggesting a new framework. Thus, this Section provides an overview of the legislative and common law history of employment definitions under four labor and employment statutes. It first addresses workers Congress intentionally excluded from the law’s protections. It next explains why the common-law origins of employment have proven a barrier for workers in proving they are employees and thus covered by these laws. Finally, the section echoes the work of others in concluding that the Supreme Court has further limited the statutory text and purpose of at least one law, the Fair Labor Standards Act.

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

*A. Seminal labor and employment statutes established foundational rights but were flawed in limiting access to those rights.*

Our foundational labor and employment statutes set out significant principles of workplace rights and fair treatment but were flawed from the start. First, they excluded categories of workers in need of these workplace protections. The FLSA, enacted in 1938,<sup>48</sup> and the NLRA, enacted in 1935<sup>49</sup> are key pieces of New Deal legislation codifying foundational labor and employment rights, including

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

<sup>47</sup> Seth Harris, *Workers, Protections, and Benefits in the U.S. Gig Economy* (June 14, 2018). *Global Law Review* (Sept. 2018, Forthcoming). Available at SSRN: <https://ssrn.com/abstract=3198170>.

<sup>48</sup> 29 U.S.C. § 201 et seq.

<sup>49</sup> 29 U.S.C. §§ 151-169.

the right to a minimum wage and overtime and the ability to organize and collectively bargain. When Congress passed the FLSA and created the first federal minimum wage law, however, it left several categories of workers—including retail workers, service workers, agricultural workers, domestic workers, and construction workers—out of the FLSA’s protections. Congress also excluded agricultural and domestic workers, among others, from the NLRA. Because these sectors were predominated by people of color and women, racial and gender discrimination played a role in their exclusion.<sup>50</sup> These exclusions have perpetuated inequities that continue to plague the labor market and economic security of many families.<sup>51</sup> While Congress later added protections for some of these sectors, many workers, some of whom are employees, remain unprotected by these laws.<sup>52</sup> In addition to sectoral exclusions, some employees lack protections because their employers have less than the threshold number of employees (Title VII) or annual sales (or services as to the latter) required by the statute (FLSA or NLRA).

In passing Title VII of the Civil Rights Act of 1964, Congress added additional protections for employees by prohibiting discrimination on the basis of race, color, religion, sex, and national origin.<sup>53</sup> The Occupational Safety and Health Act of 1970 created the Occupational Safety and Health Administration to assure that workers had access to safe and healthful working conditions.<sup>54</sup>

*B. The problematic use of the common law control test as contrary to statutory purpose*

The initial design of these statutes was problematic for assuring long term workplace protections because of their reliance on the so-called “control test.” The most common test for employment

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<sup>50</sup> Enacting the FLSA required support from Southern legislators whose regional economies relied on the exploitation of Black workers for agriculture, service, and domestic work. See Harmony Goldberg, *The Long Journey Home: The Contested Exclusion and Inclusion of Domestic Workers from Federal Wage and Hour Protections in the United States*, International Labour Office (2015), [http://www.ilo.org/wcmsp5/groups/public/---ed\\_protect/---protrav/--travail/documents/publication/wcms\\_396235.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/--travail/documents/publication/wcms_396235.pdf); see also IRA KATZNELSON, *FEAR ITSELF: THE NEW DEAL AND THE ORIGINS OF OUR TIME* (Liveright, 2014).

<sup>51</sup> For black workers, for example, “wages represent a larger share of total family income.” Pamela Joshi, Maura Baldiga, Alison Earle, Rebecca Huber, Theresa Osypuk & Dolores Acevedo-Garcia (2019): How much would family and medical leave cost workers in the US? Racial/ethnic variation in economic hardship under unpaid and paid policies, Community, Work & Family, DOI: 10.1080/13668803.2019.1704398. Black and Hispanic families are less likely to be able to afford a financial setback. Id. (citing Board of Governors of the Federal Reserve System, 2019). Losing a job through retaliation or discrimination, wage theft, or inability to work due to a lack of access to paid leave or paid sick days means that family incomes will suffer. Board of Governors of the Federal Reserve System. (2019). Report on the economic well-being of U.S. households in 2018. Retrieved from Board of Governors of the Federal Reserve System website: <https://www.federalreserve.gov/publications/files/2018-report-economic-well-being-us-households-201905.pdf>.

<sup>52</sup> These historic inequities continue. In 2019, for example, when New Jersey increased its minimum wage to \$15 an hour, the law excluded agricultural workers. N.J.S.A. 34:11-56a4 (2019).

<sup>53</sup> Congress later enacted additional key civil rights protections including the Age Discrimination in Employment Act of 1967, the Americans with Disabilities Act of 1991 (ADA), and additional amendments to Title VII and the Fair Labor Standards Act, including the Pregnancy Discrimination Act and the Equal Pay Act.

<sup>54</sup> 29 U.S.C. § 651 et seq.

relationships—the common law “control test”—originates from vicarious liability determinations; it was not designed to protect workers’ rights. Under Title VII, the NLRA,<sup>55</sup> and other statutes where the word “employee” is used but not defined, courts typically use the so-called common law “control test” to determine when a worker is an employee and when they are an independent contractor.<sup>56</sup>

The control test has its origins in the concept of master-servant relationships in English common law.<sup>57</sup> Defining master-servant relationships was critical in the development of vicarious liability in torts.<sup>58</sup> It was needed to determine the extent of liability that should be imposed on a master for his servant’s actions. Early on courts grappled with distinguishing between workers that had an “independent calling,” such as those who may have worked with multiple clients and been their own masters, and those who were “servants.”<sup>59</sup> The rule that developed was that “a master was liable for an act of the servant commanded by the master or committed in the course of the servant’s service *controlled* by his master.”<sup>60</sup>

The common law control test asks a similar question to analyze relationships—whether the employer “has the right to control the manner and means of the agent’s performance of work.”<sup>61</sup> This test arises from and overlaps substantially with the Restatement of Agency, which defines a master as one “who controls or has the right to control the physical conduct of the other in the performance of the service.”<sup>62</sup> It further defines an independent contractor as “a person who contracts with another to do something for him but who is not controlled by the other nor subject to the other’s right to control with respect to his physical conduct in the performance of the undertaking.”<sup>63</sup> Courts primarily examine “whether the putative employer ‘retains the right to direct the manner in which the business shall be done, as well as the result to be accomplished, or, in other words, ‘not only what shall be done, but how it shall be done.’”<sup>64</sup>

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<sup>55</sup> See *NLRB v. United Ins. Co. of Am.*, 390 U.S. 254, 256 (1968).

<sup>56</sup> *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318, 326 (1992); 89 *Notre Dame L. Rev.* 661, 677–78 (citing *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989)); *but see* *Browning-Ferris Industries of Cal., Inc. v. NLRB*, 911 F.3d 1195 (D.C. Cir. 2018) (holding, in part, that common-law analysis of joint-employer status under NLRA can factor in both an employer’s authorized but unexercised forms of control, and an employer’s indirect control over employees’ terms and conditions of employment).

<sup>57</sup> See, e.g., Rubinstein, 14 *U. PA. J. BUS. L.* at 610; 89 *Notre Dame L. Rev.* 661, 675.

<sup>58</sup> William Blackstone describes the relationship between master and servant as one of the three “great relations in private life,” along with husband and wife and parent and child. Richard R. Carlson, *Why the Law Still Can’t Tell an Employee When it Sees One and How It Ought to Stop Trying*, 22 *BERKELEY J. EMP. & LAB. L.* 295, 302 (2001).

<sup>59</sup> *Id.*

<sup>60</sup> Matthew T. Bodie, *Participation as a Theory of Employment*, 89 *NOTRE DAME L. REV.* 661, 675 (2013) (emphasis added).

<sup>61</sup> Keith Cunningham-Parmeter, *From Amazon to Uber: Defining Employment in the Modern Economy*, 96 *B.U. L. REV.* 1673, 1704 (2016) (citing Restatement).

<sup>62</sup> Restatement (Second) of Agency § 2 (1958); see also Restatement (Second) of Torts.

<sup>63</sup> Restatement (Second) of Agency § 2 (1958).

<sup>64</sup> Bruce Goldstein et al., *Enforcing Fair Labor Standards in the Modern American Sweatshop: Rediscovering the*

While relevant for vicarious liability, this analysis is insufficient for effectuating the protective and social purposes of New Deal and civil rights legislation. Determinations of vicarious liability relate to preventing future injuries, assuring compensation to victims, and spreading losses equitably. That makes sense under tort law, where you want to hold liable the entity in the best position to foresee and prevent certain conduct, which often correlates with retaining control. On the other hand, it may not make sense in protecting labor and employment rights, encouraging collective bargaining and equal employment opportunity and “creating incentives for economic entities to internalize the costs of underpaying [or otherwise harming] workers – costs that would otherwise be borne by society.”<sup>65</sup>

Perhaps as a result of these anomalies, as courts sought to better understand the distinction between employees and independent contractors, they developed additional factors to consider. These factors reflected recognition of the nuances in employment relationships but also undermined the predictability of the test. Rather than determining liability exclusively by control, courts identified additional factors, most of which they laid out by the end of the nineteenth century. They also started to look to the statutes’ purposes. The Supreme Court of Minnesota in 1893, for example, looked to factors including the manner of compensation, the continuous nature of the employment, the exclusivity of the relationship, the employer’s and worker’s control over aspects of the work, relative contributions of equipment and resources for the work, the length of the employment, and a comparison of the employer’s general treatment of the worker in comparison with other workers who were apparently regular employees.<sup>66</sup> These factors presaged what would later become the economic realities analysis used to analyze employment relationships under the FLSA.

These developments included courts’ acknowledgement that looking to control alone might not suffice to effectuate the protective purpose of the laws:

Thus, while control over the work was a basic premise of respondeat superior, it competed with an increasing number of other factors when the courts turned to the question of coverage under social welfare and protective legislation. Courts were frequently inclined to give added weight to factors other than control when the effect was to extend protection to needy workers rather than to impose tort liability on employers. Indeed, it has probably always been the case that a worker could be an independent contractor for tort purposes, but an employee for purposes of some protective legislation.<sup>67</sup>

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*Statutory Definition of Employment*, 46 UCLA L. REV. 983, 1029 (1999) (quoting *Singer Mfg. Co. v. Rahn*, 132 U.S. 518, 523 (1889)).

<sup>65</sup> *Vazquez v. Jan-Pro Franchising International, Inc.*, 923 F.3d 575, 594–95 (9th Cir. 2019) (internal citations and quotations omitted).

<sup>66</sup> Carlson, *supra* note X at 310–11 (citing *Waters v. Pioneer Fuel Co.*, 55 N.W. 52 (Minn. 1893)).

<sup>67</sup> Carlson, *supra* note X at 311 (citations omitted); *Vazquez*, 923 F.3d at 594–95.

At the beginning of the twentieth century, Judge Learned Hand, acknowledging the importance of protective legislation, introduced what would become the “statutory purpose” test.<sup>68</sup> In *Lehigh Valley Coal Co. v. Yensavage*, the plaintiff, a miner, was injured during an explosion in the defendant’s coal mine. The company’s business model was that all miners were either independent contractors or employees of independent contractors.<sup>69</sup> Thus, defendant argued, “the plaintiff, was not an employe[e] of the company, and that they owed him none of the duties of a master to a servant.”<sup>70</sup>

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

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

Judge Hand justified the statutory purpose approach because “where all the conditions of the relation require protection, protection ought to be given.” He further elaborated on factors relevant to the employment relationship analysis, including those indicative of economic dependence, such as opportunity for profit or loss, control over the work, and how integral the work they are doing is to the company:

It is absurd to class such a miner as an independent contractor in the only sense in which that phrase is here relevant. He has no capital, no financial responsibility. He is himself as dependent upon the conditions of his employment as the company fixes them as are his helpers. By him alone is carried on the company’s only business; he is their ‘hand,’<sup>71</sup> if any

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<sup>68</sup> *Lehigh Valley Coal Co. v. Yensavage*, 218 F. 547 (2d Cir. 1914).

<sup>69</sup> This practice returned in the 1980s in mining, spearheaded by Massey coal and what became known as the “Massey Doctrine.” Under this system, coal reserves held by the company were classified into three groups according to the quality and accessibility of coal. The company owned and operated mines where high quality coal was readily accessible in seams. Those with average coal quality and accessibility were given to subsidiaries or contractors, although Massey would maintain some ownership and control over operations. However, coal seams that were difficult to access and more marginal reserves, “the company desired to have only a brokerage relationship...no long-term contractual or financial arrangement.” See, WEIL, *FISSURED WORKPLACE*, *supra* note X at 102 (in a section called “Past as Prologue”).

<sup>70</sup> 218 F. at 552.

<sup>71</sup> Henry Ford allegedly said, “Why is it that when I buy a pair of hands, I always get a human being as well?” Richard C. Reuben, *Democracy and Dispute Resolution: Systems Design and the New Workplace*, 10 HARV. NEGOT. L.

one is. Because of the method of his pay one should not class him as though he came to do an adjunctive work, not the business of the company, something whose conduct and management they had not undertaken.<sup>72</sup>

These factors are many of those that courts look to today in analyzing the economic realities of an employment relationship under the FLSA, including whether the worker is economically dependent on the employer, their relative investments, whether the work is integral, the opportunity for profit or loss, and the nature and degree of control.

Thirty years later, the Supreme Court rejected the common law control test in interpreting the NLRA and endorsed Judge Hand's statutory purpose test and economic realities analysis. The Court held in *NLRB v. Hearst Publications*<sup>73</sup> that "newsboys,"<sup>74</sup> men who sold defendants' papers, were employees covered by the Wagner Act and the NLRA and thus able to unionize. The Court declared that the question of whether the newsboys were employees was to be determined "primarily from the history, terms and purposes of the legislation." It stated that trying to distinguish between "employment" and "entrepreneurial enterprise" required a definition broader than just the common law master-servant relationship but narrower than "the entire area of rendering service to others."<sup>75</sup> Looking to statutory purpose, the Court noted that "employee" in the NLRA "must be read in the light of the mischief to be corrected and the end to be attained." Determining where the conditions of the relationship require protection means looking at the "facts involved in the economic relationship."<sup>76</sup> Looking at the working relationship of the newsboys and concluding that the newsboys should be able to unionize, the Court considered relevant the permanency of their relationship, their limited ability to control their profit or loss, how integral they were to the business, their relative investment, and their lack of control over the terms and conditions of their work.<sup>77</sup>

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REV. 11, 22 n.53 (2005) (citing Don Cohen & Laurence Prusak, *In Good Company: How Social Capital Makes Organizations Work* at 6 (2001)).

<sup>72</sup> 218 F. at 552-53.

<sup>73</sup> 322 U.S. 111 (1944).

<sup>74</sup> The Court clarified that the vendors at issue "misnamed boys, are generally mature men, dependent upon the proceeds of their sales for their sustenance, and frequently supporters of families." 322 U.S. at 116.

<sup>75</sup> 322 U.S. at 124-25.

<sup>76</sup> *Id.* at 129. *See also* U.S. v. Silk, 331 U.S. 704, 713 (1947) (citing *Hearst*, 322 U.S. at 120, 123-24, 128, 131) ("We concluded that, since that end was the elimination of labor disputes and industrial strife, 'employees' included workers who were such as a matter of economic reality. The aim of the Act was to remedy the inequality of bargaining power in controversies over wages, hours and working conditions. We rejected the test of the "technical concepts pertinent to an employer's legal responsibility to third persons for the acts of his servants." This is often referred to as power of control, whether exercised or not, over the manner of performing service to the industry. We approved the statement of the National Labor Relations Board that "the primary consideration in the determination of the applicability of the statutory definition is whether effectuation of the declared policy and purposes of the Act comprehend securing to the individual the rights guaranteed and protection afforded by the Act.") (internal citation omitted).

<sup>77</sup> *Hearst*, 322 U.S. at 131-32 ("In this case the Board found that the designated newsboys work continuously and regularly, rely upon their earnings for the support of themselves and their families, and have their total wages influenced in large measure by the publishers who dictate their buying and selling prices, fix their markets and control their supply

Congress quickly intervened. In 1947 Congress passed the Taft-Hartley Act,<sup>78</sup> which the Court has construed as Congressional rejection of *Hearst* and a return to the common law control test.<sup>79</sup> While the NLRB also said it was returning to the common law control test, it nonetheless continued to look at economic realities factors.<sup>80</sup>

### *C. The Court constricts the FLSA's expansive statutory language*

In enacting the FLSA, Congress rejected the common law control test in favor of a broader definition of employment, but the Supreme Court has chipped away at the breadth of its reach.<sup>81</sup> The FLSA defines “employ” broadly as including “to suffer or permit to work,”<sup>82</sup> and employer as “any person acting directly or indirectly in the interest of an employer in relation to an employee.”<sup>83</sup> The Supreme Court has recognized that the scope of employment under the FLSA is the “broadest definition that has ever been included in any one act.”<sup>84</sup>

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of papers. Their hours of work and their efforts on the job are supervised and to some extent prescribed by the publishers or their agents. Much of their sales equipment and advertising materials is furnished by the publishers with the intention that it be used for the publisher's benefit.”)

<sup>78</sup> Labor Management Relations Act, 29 U.S.C. § 141-197 (1947).

<sup>79</sup> NLRB v. United National Insurance Co. of Am., 390 U.S. 254, 256 (1968) (“The obvious purpose of [the Taft-Hartley] amendment was to have the [National Labor Relations] Board and the courts apply general agency principles in distinguishing between employees and independent contractors under the Act.”). Over time, the Board shifted away from strict application of the common law control test and began incorporating other factors into its analysis. See *Corporate Express Delivery Sys. v. NLRB*, 292 F.3d 777, 781 (D.C. Cir. 2002) (upholding a Board finding of employee status for owner-operator truck drivers based primarily on the employer's restrictions on the rights of drivers to employ others or use their vehicles for other jobs – truckers lacked “entrepreneurial opportunity” and were therefore employees); *SuperShuttle, DFW, Inc.*, 367 NLRB No. 75 (2019) (evaluating common law factors through the prism of entrepreneurial opportunity); *Velox Express, Inc.*, 368 NLRB No. 61 (2019) (an employer's act of misclassifying statutory employees as independent contractors is not violative as it does not restrain, coerce or interfere with employees' ability to engage in protected concerted activity).

<sup>80</sup> *FedEx Home Delivery*, 361 NLRB 610 (2014) enf. denied 849 F.3d 1123 (DC Cir. 2017); *Lancaster Symphony Orchestra v. NLRB*, 822 F.3d 563 (DC Cir. 2016), enf. 357 NLRB 1761 (2011); *Arizona Republic*, 349 NLRB 1040 (2007); *St. Joseph News-Press*, 345 NLRB 474 (2005); *Argix Direct, Inc.*, 343 NLRB 1017 (2004); *Pennsylvania Academy of the Fine Arts*, 343 NLRB 846 (2004); *Slay Transportation, Co.*, 331 NLRB 1292 (2000); *Roadway Package System, Inc.*, 326 NLRB 842 (1998); *Dial-A-Mattress Operating Corp.*, 326 NLRB 884 (1998).

<sup>81</sup> See *Walling v. Portland Terminal Co.*, 330 U.S. 148, 150-51 (1947); *Cunningham-Parmeter*, 96 B.U. L. REV. 1673, 1694 (“Congress repudiated more restrictive common law definitions of employment and instead embraced an expansive vision of employer-employee relationships.”).

<sup>82</sup> 29 U.S.C. 203(g)

<sup>83</sup> 29 U.S.C. 203(d); see also Griffith, *supra* note X at X (noting the definition uses acting “indirectly” in describing businesses which are covered employers).

<sup>84</sup> *U.S. v. Rosenwasser*, 323 U.S. 360, 363 n.3 (1945) (quoting from statement of Senator Black on Senate floor); cf. *Sec'y of Labor v. Lauritzen*, 835 F.2d 1529, 1543 (7th Cir. 1987) (Easterbrook, J., concurring) (“The definition, written in the passive, sweeps in almost any work done on the employer's premises, potentially any work done for the employer's benefit or with the employer's acquiescence.”).

When Congress enacted the FLSA in 1938, it drew from nineteenth century child labor laws to construct a broad employment test. The phrase “suffer or permit” (or variations of the phrase) was commonly used in state laws regulating child labor and was “designed to reach businesses that used middlemen to illegally hire and supervise children.”<sup>85</sup> A key rationale underlying the “suffer or permit” standard in child labor laws was that the employer’s opportunity to detect work being performed illegally and the ability to prevent it from occurring was sufficient to hold the employer liable. For example, in *People ex rel. Price v. Sheffield Farms-Slawson-Decker Company*,<sup>86</sup> Justice Cardozo held a milk company liable for child labor violations when it did not intervene when drivers, against company policy, hired children to guard milk bottles during deliveries. New York’s labor code stated at the time that “[n]o child under the age of fourteen years shall be employed or *permitted* to work.”<sup>87</sup>

Extending coverage of child labor laws to those who suffered or permitted the work expanded child labor laws’ coverage beyond those who controlled the child laborer, countering an employer’s argument that it was unaware that children were working, and preventing employers from using agents to evade legal requirements.<sup>88</sup>

The “suffer or permit” standard also predated child labor laws and was used in non-labor statutory contexts as far back as the early 1800s “to place an affirmative obligation on actors to prevent something from happening or to impose punishment when the actor’s failure to prevent caused harm.”<sup>89</sup> Even before that, British criminal statutes interpreted “suffer or permit” to require constructive, but not actual, knowledge.<sup>90</sup>

Despite the Supreme Court’s recognition of the history, breadth and purpose of the “suffer or permit” language in the FLSA, the Court “inadvertently displaced” the statutory language by adopting the economic realities analysis it had developed under the NLRA and the Social Security Act (SSA).<sup>91</sup> “Although the Supreme Court’s approach extended coverage far beyond what the common-law control test would have created, it is flawed by virtue of its neglect of the “suffer or permit to work” definition.”<sup>92</sup> While the tests the Court and Congress have articulated under the NLRA have changed

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<sup>85</sup> *Antenor v. D & S Farms*, 88 F.3d 925, 929 n.5 (11th Cir. 1996); see also Matthew Finkin (chapter on file with authors).

<sup>86</sup> 121 N.E. 474 (NY 1918)

<sup>87</sup> *Cunningham-Parmeter*, 96 B.U. L. Rev. 1673, 1694 (emphasis added).

<sup>88</sup> *Misclassification AI*; Goldstein, *supra* note X at 1043; *Cunningham-Parmeter*, *supra* note X at 1691-92.

<sup>89</sup> Goldstein, *supra* note X at 1015–16, 1030 (citing Pennsylvania Act from 1705 which read “No Swine shall be suffered to run at large”).

<sup>90</sup> *Id.* at 1018-28 (discussing numerous examples of this language and its interpretation in British and U.S. criminal statutes).

<sup>91</sup> *Id.* at 1107–08, 1116.

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

over time, the economic realities test has remained, with variations and some disagreement, the basis of analysis for cases under the FLSA.

In 1947, faced with two employment relationship decisions under separate statutes, the SSA and the FLSA, the Court analyzed them the same way. The Supreme Court decided *U.S. v. Silk*,<sup>93</sup> holding that while some of the workers were employees, coal truck drivers were independent contractors for purposes of the SSA.<sup>94</sup> Because the SSA lacked a definition of employee, as it had done in *Hearst*, the Court looked to the statute's purpose as well as the economic realities of the relationship in making its decision. That same day the Court held in *Rutherford Food Corp. v. McComb*,<sup>95</sup> that meat boners were slaughterhouse employees under the FLSA. While acknowledging the broad language of the FLSA, the Court nonetheless used the same economic realities factors it had used in *Hearst* and *Silk* to resolve the case, rather than interpreting the statutory language.<sup>96</sup>

A half a century later, the Court clarified that the FLSA in theory should not be treated the same as the NLRA and SSA. In *Nationwide Mutual Insurance Co. v. Darden*,<sup>97</sup> a 1992 Employee Retirement Income Security Act (ERISA)<sup>98</sup> decision, the Supreme Court rejected the statutory purpose test of *Hearst* and *Silk*, but acknowledged that the NLRA, SSA, and ERISA, which lack helpful definitions of "employee," are distinct from the text of the FLSA. The Court held that where the statute lacks definitions, courts should assume Congress meant to apply the common-law definition of employment using traditional agency principles.<sup>99</sup> In adopting the common law agency test, however, the Court directed lower courts that relevant factors in the inquiry include the economic realities of the situation:

In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is

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<sup>93</sup> 331 U.S. 704 (1947).

<sup>94</sup> *Id.* at 719 ("These driver-owners are small businessmen. They own their own trucks. They hire their own helpers. In one instance they haul for a single business, in the other for any customer. The distinction, though important, is not controlling. It is the total situation, including the risk undertaken, the control exercised, the opportunity for profit from sound management, that marks these driver-owners as independent contractors.").

<sup>95</sup> *Id.* at 727-28 (1947)

<sup>96</sup> *Id.* at 723 (referring to the FLSA, NLRA, and SSA as "the social legislation of the 1930's"). See also Goldstein, *supra* note X at 1121.

<sup>97</sup> 503 U.S. 318 (1992).

<sup>98</sup> 88 Stat. 829, 29 U.S.C. § 1001 *et seq.*

<sup>99</sup> *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318 (1992); Goldstein, *supra* note X at 1131-32. Ultimately, the Court adopted for ERISA a common-law test that it had previously summarized in another case. The Court identified thirteen factors that should be considered in determining a worker's status: (1) the hiring party's right to control the manner and means by which the product is accomplished; (2) the skill required; (3) the source of the instrumentalities and tools; (4) the location of the work; (5) the duration of the relationship between the parties; (6) whether the hiring party has the right to assign additional projects to the hired party; (7) the extent of the hired party's discretion over when and how long to work; (8) the method of payment; (9) the hired party's role in hiring and paying assistants; (10) whether the work is part of the regular business of the hiring party; (11) whether the hiring party is in business; (12) the provision of employee benefits; and (13) the tax treatment of the hired party. *Maltby & Yamada*, *supra* note X at 252-53.

accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.<sup>100</sup>

The Court therefore explicitly affirmed the breadth of the FLSA's language, noting that "suffer or permit" "stretches the meaning of "employee" to cover some parties who might not qualify as such under a strict application of traditional agency law principles."<sup>101</sup> But it also instructed lower courts to use the common law test where the statute contains a circular definition of employ, describing the test with reference to an economic realities analysis. The tests remain distinct, particularly in that decision-makers should not give undue weight to the "control" factor under the economic realities analysis.<sup>102</sup> But they remain likely closer than Congress intended when drafting the law in the 1930s.

More recent decisions have looked to the Court's guidance in *Darden* and reiterated that where statutes like Title VII have circular definitions of employee and employer the court should apply the common-law test.<sup>103</sup> The Ninth Circuit recently rejected use of the economic realities test in a Title VII joint employment case, but suggested "that there may be little functional difference among the common-law agency test, the economic-reality test, and a third test that blends elements of the first two (the so-called "hybrid" test)."<sup>104</sup>

Whether labor and employment statutes define employment, employees, independent contractors, or not, it has largely been the courts that have developed the appropriate analysis of employment relationships, regardless of the statutory language. Courts have, for the past two centuries, adjusted and added to the list of relevant factors in an effort to clarify when the employer controls the work, details, and results and whether the worker is economically dependent on that employer.

Courts consistently note that these factors are non-exhaustive and promote a "totality of the circumstances" approach. As a result, determining whether parties have an employment relationship requires looking to a "kaleidoscope" of tests and factors depending on the law at issue, and the location of the case, making outcomes less predictable.<sup>105</sup> Of course, employment relationships are

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<sup>100</sup> *Darden*, 503 U.S. at 323–24 (quoting *Reid*, 490 U.S. at 751-52).

<sup>101</sup> *Id.* at 326.

<sup>102</sup> *Misclassification AI*.

<sup>103</sup> See, e.g., *U.S. Equal Employment Opportunity Commission v. Global Horizons, Inc.*, 915 F.3d 631, 638 (9th Cir. 2019).

<sup>104</sup> *Id.* at 639 (internal citation omitted).

<sup>105</sup> *Carlson*, 22 Berkeley J. Emp. & Lab. L. 295, 327–28; *Lauritzen*, 835 F.2d at 1539 (Easterbrook, J., concurring). ("It is comforting to know that "economic reality" is the touchstone. One cringes to think that courts might decide these cases on the basis of economic fantasy. But "reality" encompasses millions of facts, and unless we have a legal rule with which to sift the material from the immaterial, we might as well examine the facts through a kaleidoscope. Which facts matter, and why? A legal approach calling on judges to examine all of the facts, and balance them, avoids formulating a rule of decision.").

not unique in this regard; totality of the circumstances tests requiring the application of legal tests to specific facts is the type of activity judges and juries engage in every day.

On the other hand, as the nature of employment has evolved in recent decades, the unpredictability of assessing who is protected under core labor and workplace statutes is increasingly problematic. Congress designed the FLSA, NLRA, Title VII, and other labor standards in order to provide workers with certain rights and protections and assign those who employ or draw on their labor certain types of responsibility. In the wake of significant changes to the structure of business and employment, it is appropriate to assess whether those purposes are still being achieved, and, if not, how they might be more consistently achieved.<sup>106</sup>

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

The landscape for workers has drastically changed. With the growth of the fissured workplace, insufficient enforcement of existing laws, decline in unionization, and lack of worker power and increasing fear, increasing numbers of workers are being left without legal protections or a safety net. This requires us to question original assumptions that legal protections must be tied to employment status. The courts have eroded protections for employees over time. Independent contractors no longer consist primarily of entrepreneurs with skills and bargaining power who do not necessarily need the legal protections of these laws.<sup>107</sup> The use of multiple standards across a variety of statutes has created a situation where the assignment of responsibility has become opaque and less predictable for workers and business organizations. In this environment, some employers are rampantly and egregiously violating workers' existing rights.<sup>108</sup>

There are other proposals on the table for re-thinking worker coverage in the 21<sup>st</sup> Century and beyond, that we think are important to address and explain why we are not endorsing them. We briefly review the option of sticking with the status quo, proposals regarding a "third classification," and industry-specific solutions before developing our proposal in depth.

We believe that labor and employment policies that restore core rights and protections that have been eroded must provide clarity in the obligations they place on parties and result in predictable and consistent outcomes. These characteristics will, in turn, improve their enforceability.<sup>109</sup> It is one thing to enshrine great principles in the law, but if they are not understood or enforceable, they will

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<sup>106</sup> See *Browning-Ferris Industries*, 362 NLRB No. 186, supra note X.

<sup>107</sup> See, e.g., *Cunningham-Parmeter*, 96 B.U. L. Rev. at 1684.

<sup>108</sup> See, e.g., *Cooper and Kroeger*, *Employers steal billions*, supra note X; Goldman, *Addressing and Preventing Retaliation*, supra note X.

<sup>109</sup> See, e.g., *Aguilera v. Cook County Police and Corrections Merit Bd.*, 760 F.2d 844, 847 (C.A.7 (Ill.),1985) (Posner, J.) ("It is an ideal of our profession, if all too often an unattainable one, to make law certain."); *Lauritzen*, 835 F.2d at 1539 ("Surely Holmes was right in believing that legal propositions ought to be in the form of rules to the extent possible. Why keep cucumber farmers in the dark about the legal consequences of their deeds?") (internal citation omitted); 18 U. Pa. J. L. & Soc. Change 53, 61 (objective and predictable definitions benefit most workers).

not achieve their purpose and can exacerbate rather than address underlying imbalances in bargaining power.<sup>110</sup> Finally, to the extent practicable, the law should anticipate and shield against unintended consequences, including incentivizing new forms of regulatory arbitrage.<sup>111</sup>

*A. Doing nothing: Why existing statutes are not enough*

Workplace statutes of the 20<sup>th</sup> Century sought to address the inherent imbalance of bargaining leverage in the labor market through providing rights and protections via employment. Fissuring has undermined the protections arising from employment in a context where bargaining leverage has declined for many workers. Challenges arising from the changing nature of work, including increasing misclassification of employees as independent contractors, are not in themselves new. We have been dealing with them for decades in both low- and high-tech sectors, including coal mining, garment, driving, and ride-hailing. For that reason, many have argued, including the authors,<sup>112</sup> that emerging business models always encounter tension with existing approaches to defining employment. The Supreme Court has recognized long-standing conflicts regarding “the borderland between what is clearly an employer–employee relationship and what is clearly one of independent, entrepreneurial dealing.”<sup>113</sup>

The FLSA in particular is remarkably well-suited for analyzing worker status, and has, as the Supreme Court has noted, the “broadest definition [of employment] that has ever been included in any one act,” even if the Court has not given the fullest effect to the “suffer or permit to work” textual language. The FLSA has needed relatively few changes over the years because its language is general enough, and its principles broad enough, to apply to the new occupations and job duties that result from rapidly changing industries and technologies.<sup>114</sup> The drafters were familiar with various subcontracting models, consequences of regulatory arbitrage, and the need to deter scofflaw employers from driving down all labor standards.<sup>115</sup>

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<sup>110</sup> Raja Raghunath, *A Founding Failure of Enforcement Freedmen, Day Laborers, and the Perils of an Ineffectual State*, 18 CUNY L. REV. 47, 59 fn56 (quoting Cass R. Sunstein, *After the Rights Revolution: Reconceiving the Regulatory State*, at V) (1990) (“Statutes designed to reduce or eliminate the social subordination of disadvantaged groups are frequently subject to skewed redistribution and failure as a result of inadequate implementation. The very problems that make such statutes necessary in the first instance tend to undermine enforcement; market failure is matched by government failure.”).

<sup>111</sup> Sunshine, 22 Lewis & Clark L. Rev. at 152-53.

<sup>112</sup> David Weil and Tanya Goldman, *Labor Standards, the Fissured Workplace, and the On-Demand Economy*, LERA Perspectives on Work, 2016.

<sup>113</sup> Liebman and Lyubarsky, “Crowdwork, the Law, and the Future of Work,” Perspectives on Work, 2016 (citing *NLRB v. Hearst Publications*).

<sup>114</sup> Griffith, *supra* note X.

<sup>115</sup> Title VII has also proved to be a remarkably nimble tool for change through common law and advocacy efforts in the courts and Congress. Using the somewhat sparse statutory language attorneys, advocates, the EEOC and the judiciary have nonetheless assured employees a host of equal employment opportunity protections, including developments such as disparate impact theory, religious accommodations, and prohibitions on sex discrimination

Yet the above history reflects that the Courts have been reluctant to give deference to the broad definition of employment from the FLSA or expansively interpret other standards. Instead, they have repeatedly defaulted to common law principles based on master-servant relationships that require reliance on control as the sine qua non of determining rights and responsibilities. Common law principles not only obscure the complexity of modern workplace relationships but also lead to inconsistency in its application.

*B. Third way classifications and “middle” options could codify eroded labor standards*

Some argue that emerging work relationships do not fit into the existing legal definitions of employee and independent contractor, necessitating new laws. They suggest a third designation other than “employee” and “independent contractor” could benefit some workers by providing additional protections for workers who might otherwise be considered independent contractors.<sup>116</sup> In parts of Canada, for example, the dependent contractor designation provides rights to individuals who are legally independent contractors but given their lack of bargaining power are so economically dependent on an employer that they merit some of the same protections as employees, including collective bargaining rights.<sup>117</sup> A third designation, the argument goes, might also benefit workers by explicitly allowing businesses to provide some benefits, such as group insurance plans, they would not otherwise provide for fear of creating additional indicia of an employment relationship.

While we have argued that changes in the structure of work necessitate a re-balancing of employment protections, we disagree that technological changes and new forms of digital organizing necessitate a new worker designation that could codify eroded labor standards.<sup>118</sup> While there may be some instances where app-based companies have characteristics that do not match neatly with one or the other of the models we discuss, this ambiguity is not distinctive to the on-demand sector but can be

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including sexual harassment, failure to conform to gender norms, and sexual orientation discrimination. *See, e.g., Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 79 (1998) (“statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed”). Some of these protections are, however, currently under threat in cases pending before the Supreme Court (*See, e.g., Bostock v. Clayton County, Georgia, Altitude Express v. Zarda*, and *R.G. and G.R. Harris Funeral Homes v. EEOC*) and on account of restrictive Executive branch guidance and rulemaking at other agencies, including the Department of Justice.

<sup>116</sup> *See, e.g., Harris and Krueger*, supra note X; Sunshine, 22 Lewis & Clark L. Rev. at 134-40 (summarizing proposals dating back to 1965).

<sup>117</sup> Sunshine, 22 Lewis & Clark L. Rev. at 140-41 (discussing dependent contractor proposal raised in H. W. Arthurs, *The Dependent Contractor: A Study of the Legal Problems of Countervailing Power*, 16 U. TORONTO L.J. 89, 90 (1965)); Elizabeth Kennedy, *Freedom from Independence: Collective BARGAINING Rights for “Dependent Contractors,”* 26 BERKELEY J. EMP. & LAB. L. 143, 153-55 (2005).

<sup>118</sup> Ross Eisenbrey and Lawrence Mishel, *Uber business model does not justify a new ‘independent worker’ category*, Economic Policy Institute, Mar. 17, 2016, available at <https://www.epi.org/publication/uber-business-model-does-not-justify-a-new-independent-worker-category/>.

found in the wider economy.<sup>119</sup> Additionally, there is a danger of legislating to specific technology in a time of rapidly changing technology and capability.

The dependent contractor category, which exists in some other countries, including Canada, Spain, and Italy<sup>120</sup> is not the panacea commentators seek.<sup>121</sup> Canada and some other countries with dependent contractor classifications have different social safety nets and stronger default presumptions of employment than in the U.S.<sup>122</sup> This is clearly not the context for the U.S., meaning that an intermediate category between employees and independent contractors may not improve the problem. Rather than lifting independent contractors up and granting them more rights, a dependent contractor category may function just as easily to pull employees down into a status with fewer protections, or effectively function to trade away certain rights in exchange for some other benefits.<sup>123</sup> Rideshare drivers, who have driven much of the “dependent worker” conversations in the United States, are a perfect example. Under our existing law, many have persuasively argued they are employees.<sup>124</sup> Third-way classifications would decrease their employment rights, including rights to a minimum wage and access to workers’ compensation.

As discussed in the next Section, our proposal prefers to resolve the problems the independent worker category seeks to address by clarifying the definitions and rights for existing employment-based workplace protections and expanding certain protections for independent contractors.<sup>125</sup>

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<sup>119</sup> Sunshine, 22 Lewis & Clark L. Rev. at 156 (“The triangular relationship between workers, companies, and customers, often found in the gig economy, is also present in many non-gig economy work relationships, such as those of delivery and taxi drivers. It offers important clues in reevaluating the employment category.”).

<sup>120</sup> Miriam Cherry and Antonio Aloisi suggest that the dependent contractor category in Canada has resulted in some increased workplace protections for workers who would not otherwise have had them. On the contrary, in Spain it has not applied to many workers, partly because it requires the worker to work primarily for one business. In Italy, it has resulted in what the authors fear would happen in the U.S.—the third category would help companies avoid obligations to their employees, rather than add protections for independent contractors. Miriam A. Cherry and Antonio Aloisi, “*Dependent Contractors*” in *the Gig Economy: A Comparative Approach*, 66 Am. U. L. Rev. 635, 639, 655-56, 638 (2017); Sunshine, Lewis & Clark L. Rev. at 143-44 (describing same).

<sup>121</sup> Sunshine, 22 Lewis & Clark L. Rev. at 140; *see also* Cherry and Aloisi, *supra* note X.

<sup>122</sup> In some countries, the category confers rights on dependent contractors that the U.S. does not even provide to employees, such as the right to advance notice of termination, rather than at-will employment. Sunshine, 22 Lewis & Clark L. Rev. at 143 fn 230.

<sup>123</sup> Cherry and Aloisi, 66 Am. U. L. Rev. at 639 (“Italy, on the other hand, saw systemic arbitrage between the standard employment category and the intermediate category. The result was confusion and the stripping of workers’ rights by misclassifying them downwards.”).

<sup>124</sup> See, e.g., 22 Lewis & Clark L. Rev. at 156 (“Thus, intermediate categories may be useful for some gig economy workers and others, but they are not needed for many drivers, because most drivers, including those who work for app-based companies, are employees.”); David Weil, “Op-Ed: Call Uber and Lyft drivers what they are: employees,” L.A. Times (July 5, 2019), <https://www.latimes.com/opinion/op-ed/la-oe-weil-uber-lyft-employees-contractors-20190705-story.html>; Lawrence Mishel and Celine McNicholas, *Uber drivers are not entrepreneurs: NLRB General Counsel ignores the realities of driving for Uber*, EPI, Sept. 20, 2019, <https://www.epi.org/publication/uber-drivers-are-not-entrepreneurs-nlr-general-counsel-ignores-the-realities-of-driving-for-uber/>.

<sup>125</sup> See 22 Lewis & Clark L. Rev. at 147 (concluding that there are two articulated reasons for an intermediate category, “to reduce legal uncertainty—to account for those relationships for which it is difficult to determine whether a worker is an employee or an independent contractor . . . [and] to expand employment protections and rights beyond

### C. Industry-specific approaches worth exploring to address fissuring

States are also introducing and passing sector-specific laws that address specific industries with widespread independent contractor misclassification. For example, California is experimenting with several legislative techniques for holding lead employers responsible for their workforce.<sup>126</sup>

Other states have also passed legislation providing industry specific protections including Pennsylvania,<sup>127</sup> Delaware,<sup>128</sup> and Maine.<sup>129</sup> The National Domestic Workers Alliance has won legislative victories in 9 states and two cities: Oregon, Illinois, New York, California, New Mexico, Nevada, Connecticut, Massachusetts, Hawaii, and Seattle and Philadelphia, gaining protections for workers who, though employees, are often excluded from labor laws because they do not meet employee thresholds.<sup>130</sup> There are various advances in New York City to protect independent contractors, including Driver Pay Rules that establish a minimum per trip payment approved by the city's Taxi and Limousine Commission for certain ride-hail company drivers (High-Volume For-Services).<sup>131</sup>

Sector-specific approaches are important experiments deserving analysis. They create opportunities to develop new floors and explore the best mechanism for enhancing rights and protections.<sup>132</sup> State and local laws often lead to federal labor and employment standards.<sup>133</sup> They do not, however, provide a systemic response to the larger changes discussed in this paper. A sector-specific approach may also result in implementation and enforcement barriers if workers—particular those moving between sectors—do not understand their rights, employers do not understand their legal responsibilities, and enforcement agencies have insufficient resources to conduct adequate outreach,

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employees.”).

<sup>126</sup> These efforts are also aimed at establishing liability for joint employers, a critical issue, but beyond the scope of this paper. One technique is California Labor Code § 2810.3 (2014), which creates up-the-chain liability for a subcontractor's wage violations when the client employer uses workers supplied by a labor contractor to perform labor within the client employer's "usual course of business." California passed several other sector specific acts, including legislation holding businesses that contract for services in the property services industry, which includes janitorial work, jointly liable for any unpaid wages, CA Lab. Code 238.5, 2016; legislation covering general contractors in construction, Lab. Code 218.7, 2018; and legislation specific to port truck drivers, Senate Bill 1402, 2018.1

<sup>127</sup> PA Construction Workplace Misclassification Act (effective Feb. 2011), PA ST 43 P.S. § 933.3.

<sup>128</sup> Workplace Fraud Act, 19 Del. C. § 3501 et seq.

<sup>129</sup> Act Concerning Independent Contractors in the Trucking and Messenger Courier Industries, 2011 Me. Legis. Serv. Ch. 176 (repealed Oct. 1, 2013). *See generally* National Employment Law Project, *Independent Contractor Reform Update*, (2015), available at

<sup>130</sup> Julie Kashen, *Domestic Workers Bill: A Model for Tomorrow's Workforce*, The Century Foundation (Dec. 17, 2019), <https://tcf.org/content/report/domestic-workers-bill-a-model-for-tomorrows-workforce/>.

<sup>131</sup> <https://www1.nyc.gov/site/tlc/about/driver-pay.page>

<sup>132</sup> Comments by Erica Smiley during LERA panel (notes on file with authors).

<sup>133</sup> Some of the language in Title VII has its origins, for example, in New York's civil rights law. *See, e.g.,* Terry Lichtash, *Ives-Quinn Act--The Law Against Discrimination*, St. John's L. Rev., 19:2, Article 18 (July 2013), available at <http://scholarship.law.stjohns.edu/cgi/viewcontent.cgi?article=5226&context=lawreview>.

engagement, and enforcement.<sup>134</sup> They further provide opportunities for political maneuvering and carve-outs for certain industries.<sup>135</sup>

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

We propose structuring rights, protections, and responsibilities around a framework of concentric circles. This legal and policy framework draws from forgoing legal principles about how to define employment but links those standards to a different framework arising from how work is structured now (and will be for the foreseeable future) for millions of workers.

The concentric circles emanate outward from a core set of protections that are linked to *work* and not to legal definitions of *employment*. These core protections are primary and recognize the inherent imbalance of leverage in the work relationship.<sup>136</sup> These are workplace protections that have been recognized in both laws and judicial interpretations as fundamental and feasible to provide to all workers. We argue they should be accordingly elevated and recognized as rights associated with work.

The second (middle) circle of rights, protections, and related responsibilities are linked to workplace policies that are also fundamental but are associated with legal characteristics of being in an employment relationship. The importance of this set of rights, protections, and responsibilities is indicated by the *presumption of employment*. That is, employment would be the default, but rebuttable, presumption for all workers, so unless employment is disproven for a particular set of workers, this set of workplace policies would apply. Criteria to overcome the default presumption should be based on clear principles that are linked to the economic realities of employment and independent contracting that can be easily identified by contracting parties.

The final (outer) circle relates primarily to access and provision of a social safety net and other benefits. The focus of this circle concerns assuring access for workers to a range of benefits that

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<sup>134</sup> See, e.g., Charlotte S. Alexander & Arthi Prasad, *Bottom-Up Workplace Law Enforcement: An Empirical Analysis*, 89 IND. L.J. 1069, 1071 (2014) (“Workplace law enforcement . . . depends significantly on worker ‘voice,’ with workers themselves identifying violations of their rights and making claims to enforce them.”).

<sup>135</sup> See, e.g., Maya Pinto, Rebecca Smith, and Irene Tung, *Rights at Risk: Gig Companies’ Campaign to Upend Employment As We Know It*, National Employment Law Project (Mar. 25, 2019), available at <https://nelp.org/publication/rights-at-risk-gig-companies-campaign-to-upend-employment-as-we-know-it/> (detailing state-level policy efforts to exclude workers working via online platforms from protections afforded employees).

<sup>136</sup> We recognize that worker power and voice are essential and foundational to the successful implementation and enforcement of any law. Re-thinking this aspect of labor law is part of the ongoing efforts of numerous experts and legal scholars, including one such effort, the Clean Slate Project at the Harvard Law School Labor and Worklife Program, <https://lwp.law.harvard.edu/clean-slate-project>. We envision that the Project’s report will be critical to and complementary to the Concentric Circle Framework. See Sharon Block and Benjamin Sachs, *Clean Slate for Worker Power: Building a Just Economy and Democracy*, Labor and Worklife Program, Harvard Law School (Jan. 2020).

increasingly require portability as well as clarifying the responsibility and mechanisms for funding those benefits.

#### A. *The inner core: Fundamental rights related to work*

In calling for legislation on fair labor standards in 1937, President Roosevelt stated, “there are a few rudimentary standards of which we may properly ask general and widespread observance. Failure to observe them must be regarded as socially and economically oppressive and unwarranted under almost any circumstance.” Roosevelt was speaking of a minimum wage, maximum work week, elimination of child labor, and the right of self-organization and collective bargaining, but his comments could hold equally true for labor and employment discrimination and health and safety protections in the workplace. As a society, we made a choice that some “rudimentary standards” in the workplace must be vigilantly protected to enhance the welfare of the nation’s workforce.

A core set of protections should extend to workers, regardless of their employment status, but linked to work itself. These rights would be actionable regardless of status.<sup>137</sup> As such, they would create corresponding responsibilities upon the parties contracting for work (either through employment or independent contracting) that would create incentives for those parties to explicitly factor them into operational decisions—including the decision on classification itself. This would address a key flaw of the present statutory system that fuels regulatory arbitrage.<sup>138</sup>

The inner core includes prohibitions on discrimination and retaliation; affirmative rights to work in a safe and healthy environment, requirements that work undertaken be appropriately compensated; and freedom of association and the right to engage in acts for mutual aid and protection.<sup>139</sup>

#### 1. Freedom from discrimination

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<sup>137</sup> As Annette Bernhardt argues, “ultimately we will need to modernize our legal and regulatory framework for the twenty-first-century workplace to reflect new configurations of economic power. . . . In other words, the employment relationship may no longer be the only, or even main, legal anchor of workers’ rights.” Bernhardt, “It’s Not All About Uber,” (2016), *Perspectives on Work*.

<sup>138</sup> See Sunshine, *supra* note X; Seth D. Harris, *Workers, Protections, and Benefits in the U.S. Gig Economy*, *Global Law Review* (Sept. 2018, Forthcoming), available at SSRN: <https://ssrn.com/abstract=3198170> (noting that where there is legal ambiguity, “[c]ompanies committed to avoiding the costs of the legally imposed workplace social compact will twist or misrepresent work relationships to evade legally imposed benefits and protections through a form of regulatory arbitrage.”).

<sup>139</sup> There are other rights that are both feasible and critical for all workers to have, such as paid family and medical leave. State paid family and medical leave laws already include options for independent contractors to participate in their social insurance programs and the bill that would provide paid family and medical leave at the federal level, the Family and Medical Insurance Leave (FAMILY) Act, S.463/H.R. 1185 (116th Cong) would automatically include independent contractors. This article focuses, however, on workplace protections already established at the federal level, at least for employees, while acknowledging the need for additional benefits.

Prohibiting discrimination against all workers is an “affirmation of human dignity.”<sup>140</sup> It also serves as a tool to eliminate “subordination and segregation” and “enforce[e] a principle of equal membership in society.”<sup>141</sup> Nobody should be excluded from equal employment opportunities or have to endure harassment or other discrimination to earn a wage and support their family. When some contracts for work allow for discrimination, they undermine these goals.<sup>142</sup>

Historically, independent contractors may have had enough power and leverage in relationships to prevent or avoid such treatment (i.e., exercise exit or voice options). Many workers today do not, but should not have to work in a discriminatory environment.<sup>143</sup> “Independent contractors need a strong backbone of legal antidiscrimination protection not only as a practical means to bring and enforce claims but also as a symbol of their dignity and equality as autonomous participants in the labor market.”<sup>144</sup>

We have a record of prohibiting race discrimination in making and enforcing contracts, so this is not untested territory under federal law.<sup>145</sup> Section 1981 of the Civil Rights Act of 1886 guarantees all persons in the United States the “same right to make and enforce contracts . . . as is enjoyed by white citizens.”<sup>146</sup> The Supreme Court has confirmed that Section 1981 “affords a federal remedy against discrimination in private employment on the basis of race.”<sup>147</sup>

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<sup>140</sup> Danielle Tarantolo, *From Employment to Contract: Section 1981 and Antidiscrimination Law for the Independent Contractor Workforce*, 116 YALE L.J. 170, 202–05 (2006) (arguing that instead of revamping Title VII, the ADA, and the ADEA, we should amend § 1981 and extend it to the other nonracial classes protected by those statutes).

<sup>141</sup> Samuel Bagenstos, “*Rational Discrimination, Accommodation, and the Politics of (Disability) Civil Rights*,” 89 VA. L. REV. 825, 858 (2003) (internal citation omitted) (“Antidiscrimination law is best justified as a policy tool that aims to dismantle patterns of group-based social subordination, and that does so principally by integrating members of previously excluded, socially salient groups throughout important positions in society. Although antidiscrimination law is plainly moralistic, its moralism inheres not in an effort to punish individuals who act on bad thoughts, but in the large-scale project of eliminating subordination and segregation and of enforcing a principle of equal membership in society.”); Maltby and Yamada, 38 B.C. L. Rev. at 274 (“Amending the primary employment discrimination statutes to explicitly include independent contractors is the best way to protect these workers in the midst of a changing labor market.”).

<sup>142</sup> Cf. Bagenstos, 89 VA. L. REV. at 839 (internal citation omitted) (“The moral wrong of discrimination inheres in an employer’s placing his or her own interests ahead of the moral imperative to avoid participating in the system of subordination and occupational segregation. Individual employers have a moral obligation to avoid contributing to such a system because they are the only ones who can take effective action against it, and their actions, when aggregated with those of other employers, are what constitutes the system. Moreover, all employers must have this obligation, or the goal of integration will be left unsatisfied.”).

<sup>143</sup> We recognize that in addition to prohibiting certain behavior, this would entail certain obligations for employers, such as potential record-keeping, reporting, and training and HR obligations, in addition to potentially offering accommodations, but do not consider these obligations to pose insurmountable challenges.

<sup>144</sup> Tarantolo, 116 Yale L.J. at 215.

<sup>145</sup> 42 U.S.C. § 1981.

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

<sup>147</sup> *Johnson v. Railway Exp. Agency, Inc.*, 421 U.S. 454, 459–60 (1975).

Nor is it a novel proposal. Senator Metzenbaum introduced The Contingent Workforce Equity Act in 1994, proposing a number of statutory amendments to expand the legal rights and protections of contingent workers, including prohibiting discrimination against independent contractors.<sup>148</sup> More recently, Senator Murray introduced the Bringing an End to Harassment by Enhancing Accountability and Rejecting Discrimination in the Workplace Act (BE HEARD in the Workplace Act). Amongst other provisions, the bill would extend civil rights protections to non-employees, including independent contractors, volunteers, interns, fellows, and trainees.<sup>149</sup>

Independent contractors already have protections in the case of race-based discrimination and under some state and local laws.<sup>150</sup> Like the BE HEARD Act, our proposal would broaden anti-discrimination protections to all protected classes under our civil rights laws, including Title VII, the ADA,<sup>151</sup> and the ADEA.<sup>152</sup>

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<sup>148</sup> <https://www.govtrack.us/congress/bills/103/s2504/summary>; Maltby and Yamada, 38 B.C. L. Rev. at 263, 266; Tarantolo, 116 Yale L.J. at 209.

<sup>149</sup> BE HEARD in the Workplace Act, S. 1082 / H.R. 2148, 116th Cong. (2019).

<sup>150</sup> The New York City Human Rights Law (NYCHRL) protects everyone visiting or living in New York from discrimination and discriminatory harassment motivated in part by that person's actual or perceived race, creed, color, national origin, gender, sexual orientation, age, disability, or alienage or citizenship status or other protected status. The NYCHRL includes independent contractors: "For purposes of this definition, natural persons employed as independent contractors to carry out work in furtherance of an employer's business enterprise who are not themselves employers shall be counted as persons in the employ of such employer." New York City, N.Y., Code § 8-102. See also A. 8421 §4 2019-2020 Reg. Sess. (NY 2019) (ensuring contractors and others contracting for work are protected from sexual harassment and discrimination); Hawaii Domestic Workers Bill of Rights, Act 248, 2013 Session, §§ 1-2, (prohibiting discrimination in terms, conditions, and privileges of employment, but not hiring and firing); Illinois S.B. 0075 101st Gen. Assemb. (Ill. 2019) (protecting contractors and others who contract directly to perform services for an employer from harassment), Maryland H.B. 679, 2019 Reg. Sess. (Md. 2019) (protecting independent contractors from discrimination and harassment); Vermont Act 183, H.707 §1, 2017-2018, Gen. Assemb., Reg. Sess. (Vt. 2018) (prohibiting sexual harassment against all people engaged to perform work or services, including independent contractors); Pennsylvania Human Relations Act, 43 Pa. Cons. Stat. Ann. §§951-963 (West 1991 & Supp. 2006)"; see generally Andrea Johnson et al., *Progress in Advancing Me Too Workplace Reforms in #20Statesby2020*, National Women's Law Center (July 2019), available at <https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2019/07/20-States-By-2020-report.pdf>.

<sup>151</sup> The ADA enshrined critical civil rights protections regarding equal employment opportunity for people with disabilities. In addition to prohibiting certain discriminatory behavior, it also creates certain rights to reasonable accommodations. This has led some commentators to view it as creating an accommodation mandate, distinct from antidiscrimination requirements. See, e.g., Bagenstos, 89 VA. L. REV. at 829 (describing commentary). Professor Bagenstos disagrees with this position, arguing that "both the ADA's accommodation requirement and traditional antidiscrimination provisions aim to overcome systematic patterns of stigma and subordination by targeting a practice of occupational segregation that undergirds those patterns." A full discussion is beyond the scope of this article, other than to note that there are powerful arguments for inclusion of the ADA, including its accommodation requirements, in this antidiscrimination framework. We acknowledge there would be barriers, for example, to a homeowner ensuring his home is accessible when hiring a plumber with a physical disability, but this could be addressed by the statutory language requiring reasonable accommodations that do not impose an undue hardship. See 42 U.S.C. § 12112(b)(5).

<sup>152</sup> Depending on the outcome of cases pending before the Supreme Court (*Bostock v. Clayton County, Georgia*, *Altitude Express v. Zarda*, and *R.G. and G.R. Harris Funeral Homes v. EEOC*) on the scope of protections for discrimination "because of sex," it would be important to ensure that these protections also cover workers on the basis

There might be a question as to whether extending discrimination protections in this manner might interfere with certain individual preferences or even violate constitutional rights to free association. While the exact contours and line-drawing for contracts for work would need to be drawn, we note that the Supreme Court has stated that “the Constitution . . . places no value on discrimination, and while ‘[i]nvidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment . . . it has never been accorded affirmative constitutional protections.’”<sup>153</sup> We are confident that existing defenses in Title VII, such as the bona fide occupational qualification, could be carefully tailored for closer cases.<sup>154</sup>

## 2. Retaliation protections

Workers should also not be discriminated against for exercising or attempting to exercise rights protected under worker protection and non-discrimination laws, even when they lack a formal employment relationship. Prevention of or prompt response to retaliation for the exercise of rights is critical to protecting the rule of law and workers’ rights. Employers strategically retaliate to undermine law enforcement and obstruct justice by silencing victims and witnesses.<sup>155</sup> When there is a culture and expectation of retaliation, workers are silenced, and workplace violations go unreported and unaddressed. Even when retaliation is addressed, it is hard to undo the chilling effect that the retaliatory action has already had on other workers in discouraging them from speaking up and reporting violations.<sup>156</sup> Combatting retaliation is therefore fundamental to protecting labor and employment standards, the rule of law, and worker power.

Like non-discrimination principles, protecting all workers against retaliation is feasible under our civil rights and social protection legislation. Retaliation protections beyond employees already exist under some federal and state laws. The FLSA, for example, says “it shall be unlawful for *any person* . . . (3) to discharge or in any other manner discriminate against any employee because such

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of sexual orientation and gender identity.

<sup>153</sup> Runyon v. McCrary, 427 U.S. 160, 176 (1976).

<sup>154</sup> Cf. Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385, 389 (C.A.5 1971) (“While we recognize that the public's expectation of finding one sex in a particular role may cause some initial difficulty, it would be totally anomalous if we were to allow the preferences and prejudices of the customers to determine whether the sex discrimination was valid. Indeed, it was, to a large extent, these very prejudices the Act was meant to overcome. Thus, we feel that customer preference may be taken into account only when it is based on the company's inability to perform the primary function or service it offers.”).

<sup>155</sup> See, e.g., Tanya Goldman, *Addressing and Preventing Retaliation and Immigration-Based Threats to Workers*, CLASP and Rutgers (Apr. 2019), available at <https://www.clasp.org/publications/report/brief/labor-standards-enforcement-toolbox-addressing-and-preventing-retaliation>.

<sup>156</sup> Charlotte S. Alexander, *Anticipatory Retaliation, Threats, and the Silencing of the Brown Collar Workforce*, 50 AM. BUS. L.J. 779, 781 (2013) (noting that in a 2013 report on Alabama’s poultry processing industry, almost 100 percent of the workers who had previously witnessed employer retaliation were uncomfortable asking their employers about problems with workplace safety, discrimination, and wages) (internal citation omitted).

employee has filed any complaint . . . .”<sup>157</sup> Courts<sup>158</sup> and the U.S. Department of Labor interpret this to prohibit retaliation even where the employer is not covered by the FLSA or the employment relationship is not covered by the FLSA’s enterprise coverage standard:<sup>159</sup>

Because section 15(a)(3) prohibits “any person” from retaliating against “any employee”, the protection applies to all employees of an employer even in those instances in which the employee’s work and the employer are not covered by the FLSA.<sup>160</sup>

Thus, where an employer admits to making a threat, but denies the employment relationship, such as by arguing that the employee is an independent contractor, this broad language allows the agency to proceed with the retaliation investigation without having to finalize an analysis of the employment relationship. Additionally, the FLSA applies if an agent of the employer, such as the employer’s sibling or spouse, is the one engaging in the retaliatory act.<sup>161</sup> This language also precludes the employer from defending itself by arguing there is no employment relationship, which is often a labor-intensive investigation that can detract from the merits of the claim. State and local jurisdictions, including Seattle and New York City, have enacted similar retaliation protections.<sup>162</sup>

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<sup>157</sup> 29 U.S.C. § 215(a) (emphasis added). This differs somewhat from our proposal because it still requires the aggrieved party asserting retaliation to be an “employee,” but does expand the scope of actionable retaliation beyond other FLSA coverage.

<sup>158</sup> See, e.g., *Centeno-Bernuy v. Perry*, 302 F. Supp. 2d 128, 136 (W.D.N.Y. 2003) (“Thus, the anti-retaliation provision of the FLSA does not apply only to employers; it applies to “any person.”) (citing cases).

<sup>159</sup> See, e.g., National Immigration Law Center Brief for the Plaintiff-Appellant as Amicus Curiae, pp. 6-7, *Arias v. Raimondo*, 860 F.3d 1185 (9th Cir. 2017) (“Indeed, decisions finding that Section 215(a)(3) provides a cause of action even if the conditions for individual or enterprise coverage – an element typically required for a FLSA action – are not present further support the applicability of Section 215(a)(3) to non-employers in private actions. See *Wirtz v. Ross Packaging Co.*, 367 F.2d 549, 550-51 (5th Cir. 1966) (“The prohibitions of Section 15(a)(3) are . . . unlimited, for they are directed to ‘any person.’ Thus the clear and unambiguous language of the statute refutes the district court’s view that either the employee or his employer must be engaged in activities covered by the Act’s wage and hour provisions in order for the strictures against discriminatory discharge to be invoked.”); *Sapperstein v. Hager*, 188 F.3d 852, 857 (7th Cir. 1999) (allowing Section 215(a)(3) action to proceed where enterprise coverage was not present since “Congress instead wanted to encourage reporting of suspected violations by extending protection to employees who filed complaints, instituted proceedings, or indeed, testified in such proceedings, as long as these concerned the minimum wage or maximum hour laws”); *Obregon v. JEP Family Enters., Inc.*, 710 F. Supp. 2d 1311, 1314 (S.D. Fla. 2010) (“The FLSA’s prohibition on retaliation is broader than its coverage of minimum wage or overtime wage violations and applies even if the employee cannot show “individual coverage” or “enterprise coverage.”) (citations omitted).”)

<sup>160</sup> U.S. Department of Labor Wage and Hour Division Fact Sheet # 77A: Prohibiting Retaliation Under the Fair Labor Standards Act (FLSA), <https://www.dol.gov/whd/regs/compliance/whdfs77a.pdf>

<sup>161</sup> The FLSA defines “employer” as including “any person acting directly or indirectly in the interest of an employer in relation to an employee.” 29 U.S.C. § 203(d). See also *Arias*, 860 F.3d at 1191–92 (“Congress clearly means to extend section 215(a)(3)’s reach beyond actual employers.”); *Bowe v. Judson C. Burns, Inc.*, 137 F.2d 37, 38-39 (3rd Cir. 1943); *Sapperstein v. Hager*, 188 F.3d 852, 856–57 (7th Cir. 1999); *Centeno-Bernuy*, 302 F. Supp. 2d at 138; *Montano-Perez*, 666 F. Supp. 2d at 902.

<sup>162</sup> AZ ST § 23-364(b) (“No employer or other person shall discriminate or subject any person to retaliation for asserting any claim or right under this article, for assisting any other person in doing so, or for informing any person about their rights.”); Seattle’s Wage Theft Ordinance likewise prohibits retaliation by an employer “or any other person”

Title VII's language is not as broad, but also already encompasses some situations where non-employees, including applicants for employment and former employees,<sup>163</sup> are covered by its retaliation protections.<sup>164</sup> A number of federal laws, including the Americans with Disabilities Act, prohibit not just retaliation, but also "interference" with the exercise or enjoyment of rights under the Statute. The interference provision is broader than the anti-retaliation provision, protecting any individual who is subject to coercion, threats, intimidation, or interference with respect to ADA rights, though both provisions apply to "any individual."<sup>165</sup>

Similarly, the NLRA prohibits restraint, coercion and interference with the exercise of the rights guaranteed in Section 7 of the NLRA. Its language includes "any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice,"<sup>166</sup> and statutory protection encompasses situations involving non-employees, such as former employees and applicants for hire.<sup>167</sup> The Board has frequently stated that the NLRA protects "members of the working class generally."<sup>168</sup> Thus any protections tied to work should be coupled with robust anti-retaliation provisions to protect the integrity of the law and workers' access to its rights.

### 3. Assurance of safe and healthful working conditions

A right to work in a safe and healthful environment should be a fundamental right, regardless of employment. Congress recognized in passing the OSH Act the importance of "assur[ing] so far as possible every working man and woman in the Nation safe and healthful working conditions."<sup>169</sup> Congress further acknowledged the importance of incentivizing employers to reduce occupational safety and health hazards to promote safe working conditions.<sup>170</sup>

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for exercising rights under their wage theft ordinance. Seattle Municipal Code 14.20.035(b); New York City's Freelance Isn't Free Act (2017) assures freelance workers the right to a written contract, timely and full payment, and protection from retaliation; the New York City Human Rights Law prohibits retaliation in employment, housing, and public accommodations.

<sup>163</sup> EEOC Enforcement Guidance on Retaliation and Related Issues (Aug. 25, 2016), <https://www.eeoc.gov/laws/guidance/retaliation-guidance.cfm>

<sup>164</sup> 42 USCA § 2000e-3 ("It shall be an unlawful employment practice for an employer to discriminate against any of his *employees or applicants for employment*, . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.") (emphasis added).

<sup>165</sup> 42 U.S.C. § 12203(b).

<sup>166</sup> 29 U.S.C. § 152 (3).

<sup>167</sup> *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941); *FES*, 331 NLRB 9 (2000), supplemented by 333 NLRB 66 (2001), *enfd.* 301 F.3d 83 (3d Cir. 2002); *B.E.&K, Inc.*, 252 NLRB 256 (1980).

<sup>168</sup> *Giant Food Markets*, 241 NLRB 727, 728 n.5 (1979); *Little Rock Crate & Basket Co.*, 227 NLRB 1406 (1977); *Oak Apparel*, 218 NLRB 701 (1975); *Briggs Mfg. Co.*, 75 NLRB 569 (1947).

<sup>169</sup> 29 USCA § 651(b).

<sup>170</sup> *Id.* Some other states, such as Washington, also encourage the provision of "safe and healthful working

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

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

Because of this, “[c]ourts have frequently ruled that the OSH Act, and the regulations promulgated thereunder, sweep broadly enough so as to allow the Secretary to impose duties on employers to persons other than their employees.”<sup>171</sup> Thus in enforcing the OSH Act, the Occupational Safety and Health Administration is able to cite multiple employers at a worksite, even if they do not all have an employment relationship with the worker. This implies that a worker who is operating in a work setting where the party that has responsibility for providing a safe work environment fails to do so, that party can be held responsible.

In fact, such a policy exists in construction. The OSHA multi-employer citation policy includes the concept of a “controlling employer” who “has general supervisory authority of the worksite, including the power to correct safety and health violations itself or require others to correct them. Control can be established by the contract or, in the absence of explicit contractual provisions, by the exercise of control in practice.”<sup>172</sup> In 2009, the Eighth Circuit Court of Appeals affirmed OSHA’s unambiguous right to issue citations to employers for violations even where the latter’s own employees are not exposed to hazards related to that violation.<sup>173</sup>

Broadening the conception of a “controlling employer” to an organization that exercises similar authority over a worksite akin to a general contractor would operationalize the right to being provided a safe and healthful work environment (i.e. in compliance with OSHA’s standards) regardless of employment status. David Michaels, the former Assistant Secretary for OSHA, describes this requirement as a “duty of care” that has precedent in OSHA’s treatment of staffing

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conditions for every man and woman working.” WA ST 49.17.010. The Washington law defines “employer” to include one who “employs one or more employees *or who contracts with one or more persons*,” and “employee,” as every person in this state who is engaged in the employment of *or who is working under an independent contract* the essence of which is his or her personal labor for an employer under this chapter whether by way of manual labor or otherwise.” WA ST 49.17.020(4)-(5) (emphasis added).

<sup>171</sup> Secretary of Labor v. Trinity Industries, Inc., 504 F.3d 397, 402 (3d Cir. 2007). See also Solis v. Summit Contractors, Inc., 558 F.3d 815, 818 (8th Cir. 2009) (“subsection (a)(2) creates a specific duty to comply with standards for the good of all employees on a multi-employer worksite”); Acosta v. Hensel Phelps Construction Company, 909 F.3d 723, 727 (5th Cir. 2018).

<sup>172</sup> OSHA Multi-employer Citation Policy, Directive No. CPL 2-0.124, issued December 10, 1999, sections X.B-X.E.

<sup>173</sup> The court in its opinion noted that “the controlling employer citation policy places an enormous responsibility on a general contractor to monitor all employees and all aspects of a worksite.” See Solis v. Summit Contractors, Inc., 558 F.3d 815, 829 (8th Cir. 2009).

agency workers who are injured or killed while working for a host company.<sup>174</sup> Such a requirement would create incentives for the controlling employer (i.e. the party with the duty of care, which in a fissured workplace would often be the “lead firm”) to establish systems, institute training, provide base level protections, and undertake review and monitoring of all of the entities operating under its umbrella.<sup>175</sup>

Even given the right to safe and healthful conditions, injuries and illness will still occur. Compensation for injuries provided by state workers’ compensation systems have eroded over the last three decades. We consider improving access to workers’ compensation (and to other safety net protections) below.

#### 4. The right to remuneration for work and assurance of a minimum wage

The basic notion that people should be paid and be provided a minimum wage for the work they undertake should also be a fundamental right related to work (and not just “employment”).<sup>176</sup> The notion of labor market contracting is premised on an enforceable right to receive payment for the work undertaken, and it delineates notions of work in a free market from relationships of indentured servitude or, taken to its extreme, slavery. It is what underlies not only recoveries under the Fair Labor Standards Act, but also criminal enforcement for labor trafficking and forced labor. We propose two rights related to compensation for performing work: (1) the right to remuneration, strengthening existing contract-based rights; and (2) the right to receive a minimum wage.

First, connecting the right of remuneration to work protects workers from one of the most potent methods of exploitation, particularly for those in the workforce with limitations in exit and voice options. The right would be actionable under different mechanisms associated with the form of work, in addition to those rights currently available under contract law. For workers who are employees, it would mirror that provided under the capacious definition of employment under the FLSA. For independent contractors, it could be manifested in more expansive rights to receive compensation for work performed, including increased penalties for the failure to pay promptly. In addition, new technologies could be harnessed to create escrow accounts for compensation paid to workers to secure those funds in the event that disputes arose in their payment.<sup>177</sup> State and local laws, such as

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<sup>174</sup> This policy is addressed in a 2014 OSHA memorandum for Regional Administrators: “Policy Background on the Temporary Worker Initiative,” (July 15, 2014), [https://www.osha.gov/temp\\_workers/Policy\\_Background\\_on\\_the\\_Temporary\\_Worker\\_Initiative.html](https://www.osha.gov/temp_workers/Policy_Background_on_the_Temporary_Worker_Initiative.html); see also David Michaels (forthcoming paper).

<sup>175</sup> Under existing OSHA policy, this becomes problematic when there is a party that controls a workplace but has no employees on site, in which case the workforce is theoretically not covered. For example, in upstream oil and gas production, major oil companies might control a drilling site, either remotely or through an independent “company man.” OSHA released a memo regarding this type of situation, which again could be an archetype for the type of comprehensive policy described here. See: <https://tjsisk.com/wp-content/uploads/2017/02/OSHA-Memorandum.pdf>

<sup>176</sup> This is separate from the right to overtime compensation under the FLSA, which is covered in the second circle.

<sup>177</sup> The New York legislature recently passed a bill, S2844B/A486B, “to increase the likelihood that victims of

the Freelance Isn't Free Act in New York City, provide models for ensuring prompt payment with remedies for all workers.<sup>178</sup> In addition, courts have long enforced contract claims for payment, so this would not require entirely new mechanisms for enforcement, at least for private rights of action.

Second, assurance that all workers, regardless of employment status, receive the federal statutory minimum wage recognizes that those working at the bottom of the wage distribution are also those least able to exercise either exit or voice options and therefore most vulnerable to exploitation. Given the amendments to employment status described in the “second (middle) circle” we would predict that only a small number of low wage jobs would meet the independent contractor criteria. But for those that did, making minimum wage a requirement of work, not just employment, would provide additional protections. The minimum wage right would be implemented through different mechanisms depending on work status, paralleling those described for the right to remuneration for work.

A minimum wage requirement regardless of work status is consistent with inclusion of minimum wage requirements even for those historically excluded from labor standards protections such as farm workers (granted federal minimum wage protections under the Migrant and Seasonal Agricultural Worker Protection Act), other piece rate workers, taxi and limousine drivers (who receive minimum wage but not overtime protections),<sup>179</sup> and various state and local laws.<sup>180</sup>

## 5. Freedom of association and the right to engage in acts for mutual aid and protection

The right to engage in concerted activity is an important principle affirming that all workers have a right to a voice and to collectively withhold their labor to affect their working conditions.<sup>181</sup> Section 7 of the NLRA grants employees the right to self-organization<sup>182</sup> and to engage in concerted

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‘wage theft’ [would] be able to secure payment of unpaid wages for work already performed from their employers.” It would have allowed employees who had filed a claim for wage theft to file a lien against their employer’s in-state real or personal property. The Governor vetoed it this year.

<sup>178</sup> New York City Local Law 140 of 2016 took effect in May 2017. The law provides protections for freelance workers by providing them a right to a written contract; timely and full payment for work; and protection from retaliation. The law establishes penalties for violations of these rights. Available at <https://www1.nyc.gov/site/dca/about/freelance-isnt-free-act.page>.

<sup>179</sup> 29 U.S.C. § 213; see also Driver Pay Rules that establish a minimum per trip payment approved by the city’s Taxi and Limousine Commission for certain ride-hail company drivers (High-Volume For-Services), <https://www1.nyc.gov/site/tlc/about/driver-pay.page>.

<sup>180</sup> See, e.g., Seattle Domestic Workers Ordinance, which includes the right to earn the Seattle minimum wage whether an employee or independent contractor, and the Hawaii Domestic Workers Bill of Rights, which incorporates the state minimum wage.

<sup>181</sup> One benefit of according a concerted activity right to all workers would be to ensure that they have the right to engage in class action litigation.

<sup>182</sup> This necessarily encompasses the right effectively to communicate with one another regarding self-organization. *Beth Israel Hospital*, 437 U.S. 483 (1978).

activities for the purpose of “mutual aid and protection,” which incorporates a link not only between the activity and issues affecting a workplace, but also employees’ interests as employees.<sup>183</sup> Thus, the “mutual aid and protection” clause covers employee efforts to improve their terms and conditions of employment through direct actions targeted at their specific employer, as well as efforts to “improve their lot as employees through channels outside the immediate employee-employer relationship” and activities “in support of employees of employers other than their own.”<sup>184</sup> Given that the Supreme Court has explained that the Board has the responsibility to adapt the Act to the changing patterns of industrial life,<sup>185</sup> the rationale behind this right warrants a determination that it should equally apply to all workers regardless of employment status.

The right to engage in mutual aid and protection extends beyond a particular workplace and includes concerted advocacy when the subject matter has a direct nexus to employees’ interests as employees, based on a totality of the circumstances.<sup>186</sup> In *Kaiser Engineers*,<sup>187</sup> the NLRB found that a group letter to Congress, wherein employees opposed a competitor’s application to DOL to ease restrictions on visas for foreign engineers, was protected because submission of the letter was based on a concern over job security for the protesting employees and others in the profession. Similarly, in *Petrochem Insulation, Inc.*,<sup>188</sup> a union’s intervention before state environmental and other regulatory permit proceedings was protected where an objective was to secure a living wage for non-unionized employees, thereby expanding union job opportunities, improving the union’s ability to bargain for higher wages, and furthering employee health and safety.

All workers should have the core right to engage in activities where there is a direct nexus to their interest as workers without fear of or actual retaliation, including discharge. For example, participating in and/or advocating for the national Day Without Immigrants of 2017 was motivated not only by mistreatment within specific workplaces, but also by concerns involving the Trump Administration’s crackdown on undocumented immigrants living and working in the U.S. In addition to attempting to elicit support from businesses and the community for their continued presence and labor, workers’ activities were connected to their interests as workers more broadly because more vigorous immigration enforcement will likely cause job security, employment standards, employment opportunities, and other working conditions to deteriorate for all workers,

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<sup>183</sup> *Fresh & Easy Neighborhood Market*, 361 NLRB No. 12 (2014).

<sup>184</sup> *Eastex, Inc., v. NLRB*, 437 U.S. 556 (1978) (upholding statutory protection for distribution of literature that urged employees to vote for candidates supporting a federal minimum wage increase and to lobby against right to work provisions in state constitution.)

<sup>185</sup> *NLRB v. J. Weingarten*, 420 U.S. 251, 266 (1975).

<sup>186</sup> *Id.* at 565-67 (efforts to improve working conditions through resort to administrative and judicial forms and appeals to legislators to protect their interests as employees are protected); *Nellis Cab Co.*, 362 NLRB No. 185 (2015) (extended break where taxi drivers drove down street honking and flashing lights and refusing to pick up passengers was protected since an object was to protest the taxi authority potentially issuing more medallions, which would likely result in reduced driver wages). See also GC Memorandum 08-10 Concerning Unfair Labor Practice Charges Involving Political Advocacy.

<sup>187</sup> 213 NLRB 752 (1974), enforced, 538 F.2d 1379 (9<sup>th</sup> Cir. 1976)

<sup>188</sup> 330 NLRB 47 (1999), enforced, 240 F.3d 26 (DC Cir. 2001)

documented and undocumented, especially in lower-wage industries.<sup>189</sup> And, while it may be a political protest, employers do have control over resolution of workers' concerns warranting protection for such a "strike."<sup>190</sup> In addition to addressing specific grievances, employers could reassure all workers that they will not exploit their immigration status in denying them fair treatment at work, could pledge that they will not call ICE to investigate its workers, and --to the extent that ICE does attempt to investigate or raid the workplace-- they could refuse to permit entry or search unless a warrant or subpoena is produced, and/or it could designate themselves as sanctuary employers.<sup>191</sup>

Protecting the right to have a living wage, health and safety, and entitlement to breaks, as well as collective-bargaining rights, relies on workers filing complaints with government authorities.<sup>192</sup> So, for example, with aggressive immigration enforcement and weak labor and employment enforcement, workers are less likely to file such complaints or attempt to better working conditions and employment standards, and discrimination is more likely as employers will be discouraged from hiring individuals who look or sound "foreign" in order to avoid workplace raids, sanctions or fines.

## 6. Establishing the core rights

In some respects, these core protections might be viewed as an acceptance of the fissured workplace and misclassification of employees. We view it, to the contrary, as increasing and enhancing civil rights and labor protections in light of the existing realities of worker bargaining power and evolving business structures.<sup>193</sup> We acknowledge some concern that this proposal requires a right-by-right negotiation of what belongs in the core inner circle (i.e., why include a right to a minimum wage but not overtime?). Which is why the second (middle) ring in the Concentric Circle Framework further enhances the existing protections we have already determined workers have accrued over the past century. The more the second circle works to strengthen protections for employees and misclassified workers, the smaller the inner core will necessarily become.

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<sup>189</sup> Laura D. Francis, *Fear of Immigration Raids May Harm Workplace Rights*, BLOOMBERG BNA, Mar. 1, 2017; Justin Miller, *Trump's Immigration Crackdown is Dangerous for Workers (Not Just Immigrants)*, AMER. PROSPECT, Jan. 31, 2017.

<sup>190</sup> The right to strike is afforded constitutional protection as a derivative of the fundamental right to freedom of association. See *NLRB v. Washington Aluminum*, 370 US 9, 14-15 (1962) (finding work stoppage lawful where there was no bargaining representative or established procedure for negotiating with the company, and thus, the workers took the most direct course to let the employer know they wanted a warmer work space); *Serndippity-Un-Ltd.*, 263 NLRB 768, 775 (1982) (work stoppage to protest safety violations and inadequate health care coverage protected where there was no representative or alternative method for solving the problem); *Polytech, Inc.*, 195 NLRB 695 (1972) (single refusal to work overtime lawful where workers were unrepresented and lacked structured protest procedures).

<sup>191</sup> Justin Phillips, *Bay Area Restaurants Register As Sanctuary Businesses*, S.F. CHRON., February 16, 2017; Sophia Tareen, *Restaurants Nationwide Seek 'Sanctuary' Status of Immigrant Employees*, PBS NEWSHOUR (Jan. 25, 2017).

<sup>192</sup> Kati L. Griffith, *Laborers or Criminals? The Impact of Crimmigration on Labor Standards Enforcement in THE CRIMINALIZATION OF IMMIGRATION: CONTEXTS AND CONSEQUENCES* 89, 93094 (Alissa R. Ackerman & Rich Furman eds., 2014).

<sup>193</sup> We also view the framework as constitutional in light of *U.S. v. Darby*, 312 U.S. 100 (1941).

### B. *The second circle: Presumptive employer status*

The next level of rights, protections, and responsibilities are those already linked to employment status, but with a presumption and test that enhances those protections. These include, for example, the right to overtime under the FLSA, the right to organize and be represented through collective bargaining under the NLRA, and safety net protections, including access to workers' compensation and unemployment insurance.<sup>194</sup>

We focus in this section on two central attributes for determining whether an employment relationship exists: First, there should be a presumption of an employment relationship the putative employer must rebut. Second, that presumption should be coupled with a strong, predictive test that must be met for an employer to rebut the presumption.

A rebuttable presumption will help re-balance the power dynamics between workers and employers by helping them access workplace protections and rightfully place the burden of proof on the only entity—or entities—in the fissured workplace who might have access to the necessary evidence to establish the existence or lack of an employment relationship.<sup>195</sup> Rebuttable presumptions generally serve one or more goals, including furthering socially desirable policies and providing “a legal mechanism to account for the restricted access to evidence an employee is likely to have.”<sup>196</sup> This is particularly relevant in the context of basic labor and employment protections. “Wage and hour statutes and wage orders were adopted in recognition of the fact that individual workers generally possess less bargaining power than a hiring business and that workers’ fundamental need to earn income for their families’ survival may lead them to accept work for substandard wages or working conditions.”<sup>197</sup>

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<sup>194</sup> Under state and local law there is growing momentum around additional rights and protections related to work, including access to paid sick and safe time, paid family and medical leave, fair and predictable schedules; and fair chance employment. The presumptive employer status would have positive implications for all of these critical workplace rights.

<sup>195</sup> Harris, *Workers, Benefits, and Protections*, *supra* note X.

<sup>196</sup> Thayer, 42 *DRAKE L. REV.* 427, 438 (citing Ronald D. Rotunda, *The Civil Rights Act of 1991: A Brief Introductory Analysis of the Congressional Response to Judicial Interpretation*, 68 *NOTRE DAME L. REV.* 923, 934 (1993)). “Perhaps no other type of rebuttable presumption has been the center of as much controversy as those that deal with employment discrimination. Those who advocate shifting the burden of proof to the defendant once a rebuttable presumption has been established consider this procedural protection to be critical to the enforcement of civil rights legislation. See Julius L. Chambers, *Twenty-Five Years of the Civil Rights Act: History and Promise*, 25 *WAKE FOREST L. REV.* 159, 170-71 (1990). Opponents to shifting the burden of proof assert that this creates a procedural disadvantage to employers that will lead to *de facto* quotas. See Rotunda, *supra*, at 925. This area of law is still developing. See 42 U.S.C. § 2000 e-2(m) (West Supp. 1993); *St. Mary’s Honor Ctr. v. Hicks*, 113 S. Ct. 2742 (1993).”

<sup>197</sup> *Dynamex*, 416 P.3d at 32; *Rosenwasser*, 323 U.S. at 361 (wage and hour laws are intended to protect workers against “the evils and dangers resulting from wages too low to buy the bare necessities of life and from long hours of work injurious to health”).

A rebuttable presumption will also help provide predictability around the legal test, benefiting businesses, workers, and enforcement agencies.<sup>198</sup> The rebuttable presumption would be a new cross-cutting federal policy that amends all workplace statutes. The statute would frame the need for a new default status for working people by laying out in a preamble the major changes in the economy that have changed the nature of work and the resulting need for provision of a set of basic rights (as established in the laws where the amended definition would apply) to people undertaking work. Additionally, using the same test for a host of labor and employment legislation would simplify standards for workers, employers, advocates, regulators, and judicial bodies.

If the above was operating as designed, it would provide most people undertaking work in the economy with both fundamental rights and protections from the inner core of rights as well as a secondary set linked to employment. It would leave those who are able to affect their profit or loss through activity as a separate group.

If the policy has been adequately crafted, businesses and other organizational entities would be making decisions regarding the contracting of work on the basis of the needs for specialization, quality, need for short term or irregular access to skills, services, etc. But those decisions would not be driven by regulatory arbitrage motivations.

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

## 1. Option 1: Economic Realities Analysis

The economic realities analysis seeks to determine whether individuals are truly in business for themselves and not in need of labor standards protections, or whether they are economically dependent on an alleged employer or employers.<sup>199</sup> As a test, it is meant to cut through subterfuge

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<sup>198</sup> Ruckelshaus & Leberstein (“The most effective laws combating independent contractor misclassification are those that are the simplest to administer. Creating a presumption of employee status, either for all labor and employment laws, or by individual law, is one example of a “simple fix.””).

<sup>199</sup> See, e.g., *Hopkins v. Cornerstone Am.*, 545 F.3d 338, 343 (5th Cir. 2008) (“To determine if a worker qualifies as an employee, we focus on whether, as a matter of economic reality, the worker is economically dependent upon the alleged employer or is instead in business for himself.”); *Baker v. Flint Eng’g & Constr. Co.*, 137 F.3d 1436, 1440 (10th Cir. 1998) (the economic realities of the relationship govern, and the focal point is whether the individual is economically dependent on the business to which he renders service or is, as a matter of economic fact, in business for himself); Brock

and labels to get at the reality of what is happening in the putative employment relationship, and is therefore adaptable to changing workplace structures. Perhaps for this reason, in 1994, the Dunlop Commission recommended that Congress adopt the economic realities test “and apply it across the board in employment and labor law.”<sup>200</sup> In particular, it recommended:

a single definition of employee for all workplace laws based on the economic realities of the employment relationship. The law should confer independent contractor status only on those for whom it is appropriate - - entrepreneurs who bear the risk of loss, serve multiple clients, hold themselves out to the public as an independent business, and so forth.<sup>201</sup>

The multi-factor “economic realities” test determines whether a worker is an employee or an independent contractor under the FLSA.<sup>202</sup> The factors typically include:

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

The factors are considered in totality to determine whether a worker is economically dependent on the employer, and thus an employee, keeping in mind the overarching principle that the FLSA should be liberally construed to provide broad coverage for workers, given the Act’s broad definition of “employ” as “to suffer or permit to work.”

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v. Superior Care, Inc., 840 F.2d 1054, 1059 (2d Cir. 1988) (“The ultimate concern is whether, as a matter of economic reality, the workers depend on someone else’s business . . . or are in business for themselves.”). “Ultimately, in considering economic dependence, the court focuses on whether an individual is ‘in business for himself’ or is ‘dependent upon finding employment in the business of others.’” *Scantland v. Jeffrey Knight, Inc.*, 721 F.3d 1308, 1312 (11th Cir. 2013) (quoting *Mednick v. Albert Enters., Inc.*, 508 F.2d 297, 301-02 (5th Cir. 1975)).

<sup>200</sup> Maltby and Yamada, 38 B.C. L. Rev. at 259 (citing report).

<sup>201</sup> Commission on the Future of Worker–Management Relations, U.S. Dep’t of Labor, Report and Recommendation 35–41 (1994) (containing policy recommendations concerning contingent workforce), available at [https://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?referer=https://en.wikipedia.org/&httpsredir=1&article=1004&context=key\\_workplace](https://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?referer=https://en.wikipedia.org/&httpsredir=1&article=1004&context=key_workplace).

<sup>202</sup> *See, e.g.*, *Tony & Susan Alamo*, 471 U.S. at 301 (noting that the test of employment under the FLSA is economic reality); *Goldberg v. Whitaker House Co-op, Inc.*, 366 U.S. 28, 33 (1961) (the economic realities of the worker’s relationship with the employer control, rather than any technical concepts used to characterize that relationship).

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

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

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

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

While the economic realities analysis is consistent and helpful in determining who needs legal protection, in practice judges and practitioners have struggled with its application. Critiques of the economic realities analysis include that its multiple prongs are too malleable and that the test is insufficiently predictive of the outcome.<sup>203</sup> While there has been some uniformity of decision-

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<sup>203</sup> See, e.g., Lauritzen, 835 F.2d at 1539 (“we should be able to attach legal consequences to recurrent factual patterns. Courts have had plenty of experience with the application of the FLSA to migrant farm workers. Fifty years after the Act’s passage is too late to say that we still do not have a legal rule to govern these cases. My colleagues’ balancing approach is the prevailing method, which they apply carefully. But it is unsatisfactory both because it offers

making in certain industries, others, such as trucking and cable installers, have had widely diverging outcomes based on similar (if not identical) facts. Because it is a standard, not a rule, with multiple factors to weigh, it has the potential to invite litigation and gaming of the system.

## 2. Option 2: The ABC Test

The ABC test, on the other hand, is a rule and offers a relatively more straightforward approach that avoids the totality of the circumstances balancing of the economic realities analysis. But, unlike the economic realities test, it may result in both over- and under-inclusiveness. Looking to the states as laboratories of innovation and experimentation, there is extensive experience and momentum around using the ABC test, including recent adoption of the test in California for wage orders.<sup>204</sup> The test, as adopted by the California legislature, presumes that workers are employees unless *the employer* can establish that the worker is:

- (A) free from control by the putative employer, both under the contract, and in fact; *and*
- (B) doing work that is outside the usual course of business of the putative employer; *and*
- (C) engaged in an independently established business.<sup>205</sup>

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

In September 2019, California adopted the ABC test, first laid out by its state Supreme Court, as its law, in Assembly Bill 5 (“AB5”).<sup>206</sup> The new law, which went into effect January 2020 (though there

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little guidance for future cases and because any balancing test begs questions about which aspects of “economic reality” matter, and why”); *Dynamex*, 416 P.3d at 33 (“a multifactor, “all the circumstances” standard makes it difficult for both hiring businesses and workers to determine in advance how a particular category of workers will be classified, frequently leaving the ultimate employee or independent contractor determination to a subsequent and often considerably delayed judicial decision.”). See also Middleton, *Contingent Workers in a Changing Economy: Endure, Adapt, or Organize?* (1997) 22 N.Y.U. REV. L. & SOC. CHANGE 557, 568-569 (“[t]he legal test for determining employee/independent contractor status is a complex and manipulable multifactor test which invites employers to structure their relationships with employees in whatever manner best evades liability”).

<sup>204</sup> See generally Deknatel & Hoff-Downing, *ABC on the Books and In the Courts: An Analysis of Recent Independent Contractor and Misclassification Statutes*, 18 U. PA. J. L. & SOC. CHANGE 53 (2015); See also WEIL, *THE FISSURED WORKPLACE*, *supra* note X at 204-205 [recommending adoption of the ABC test]; California AB5, CA Lab. Code § 2750.3 (Sept 2019).

<sup>205</sup> *Dynamex*, 416 P.3d at 40.

<sup>206</sup> Assembly Bill 5 (“AB5”), CA Lab. Code § 2750.3 (2019). The California Trucking Association has filed a lawsuit challenging the constitutionality of the law, and a federal district judge recently granted them a temporary restraining order prohibiting application of the law to them. See Kanishka Singh, “Federal judge temporarily exempts truck drivers from California gig worker law,” Reuters (Jan. 1, 2020), available at <https://www.reuters.com/article/us-california-labor-lawmaking/federal-judge-temporarily-exempts-truck-drivers-from-california-gig-worker-law-idUSKBN1Z01TO> (complaint available at [https://01a3edcb-713b-4446-a7f4-8c833b6d990e.filesusr.com/ugd/7c8ac7\\_8b183e17b4e64b168c01ee094b592ba4.pdf](https://01a3edcb-713b-4446-a7f4-8c833b6d990e.filesusr.com/ugd/7c8ac7_8b183e17b4e64b168c01ee094b592ba4.pdf)). Uber Technologies Inc and Postmates Inc have also sued to block the law. *Id.*

are several pending legal challenges), adopted the ABC test used by the court in determining whether drivers were employees or independent contractors for purposes of California wage orders, which imposes obligations relating to minimum wages, maximum hours, and some basic working conditions. Massachusetts, New Jersey,<sup>207</sup> and Vermont already use the test in their wage and hour laws. Twenty-seven states, including Washington, use some version of the ABC test in their unemployment insurance laws, and about nine states apply it to labor laws within a particular sector, typically construction or landscaping.<sup>208</sup> New Jersey currently has a bill that would further strengthen its existing ABC test, and advocates in other states, including New York and Illinois, have announced campaigns.

There are a number of benefits to the ABC test. In order to show a worker is an independent contractor, the employer must establish *each* of the three prongs, simplifying the analysis and improving predictability. If it fails to establish even one, the worker should be treated as an employee. As the California Supreme Court noted, this gives courts additional flexibility to look at those prongs that may be more straightforward for each case, in whichever order the court chooses, and without any balancing or weighing of factors.<sup>209</sup> Additionally, the ABC test has led to more consistent results and allowed certain states to eliminate problematic business models, such as the elimination of predatory janitorial franchises in Massachusetts.<sup>210</sup>

Prong A requires that the employer establish that the worker is free from control by the putative employer, both under the contract, and in fact. This means that retaining control, even if the employer does not exercise it, will be problematic in declaring a worker to be an independent contractor. This is also a factor in the economic realities and common law tests, though the ABC test, like the economic realities analysis, rejects control as a main or more important factor.

Prong B looks at whether the worker is performing work outside the usual course of the putative employer's business. This analysis can be similar to looking at whether the work is "integral" under the economic realities analysis.<sup>211</sup> In the fissured workplace, delineating work that is "integral" may become increasingly challenging.<sup>212</sup> In janitorial franchising cases, while a master franchisor depends on unit franchisees to perform the cleaning and profiting from their performance, they might

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<sup>207</sup> *Hargrove v. Sleepy's, LLC*, 106 A.3d 449 (N.J. 2015) (holding ABC test was proper test for determining whether individual was employee or independent contractor for purposes of wage claim).

<sup>208</sup> Rebecca Smith, *Washington State Considers ABC Test for Employee Status*, NELP (Jan. 2019), <https://www.nelp.org/blog/washington-state-considers-abc-test-employee-status/>.

<sup>209</sup> *Dynamex*, 416 P.3d at 39–40.

<sup>210</sup> This has also resulted in some management-side lawyers' concerns that the test is too difficult for employers to rebut. Comments from Richard Reibstein during LERA panel (notes on file with authors).

<sup>211</sup> Cf. *Rutherford Food*, 331 U.S. at 729 (inquiry instead focuses on whether "the work done, in essence, follows the usual path of an employee"); see also *Vazquez v. Jan-Pro Franchising International, Inc.*, 923 F.3d 575, 597 (9th Cir. 2019) ("A common test for comparing the businesses of a hiring entity and a putative employee is to see whether the putative employees were "necessary" or "incidental" to the hiring entity's business.").

<sup>212</sup> Prong B, in particular, may cause challenges where independent contractors are integrated into a platform, such as Etsy sellers, but we would not typically consider them to be employees.

also assert that they are not a cleaning company; they're in the business of franchising.<sup>213</sup> FedEx has argued it is not a delivery company; it is a logistics company that connects people who want to deliver packages and people who want to sell their packages.<sup>214</sup> All on-demand platforms argue they don't actually provide the service performed by their contractors, they're a technology company connecting users/customers and providers.<sup>215</sup> Going even further, legislatures in at least seven states have adopted "Handy" bills that presumptively consider any business model that deploys workers via a digital platform to rely on independent contractors.<sup>216</sup>

Prong C of the ABC test requires that the employer prove the worker is participating or engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity.<sup>217</sup> In the fissured workplace, companies set up structures to make their contractors look like businesses, such as requiring them to incorporate, have their own employees, or set themselves up as franchisees.<sup>218</sup> The Massachusetts Supreme Judicial Court has described it as a question of whether the worker is wearing their own hat, or wearing the hat of the company. This prong can incorporate some aspects of the economic realities analysis, such as relative investments, permanency, and opportunity for profit or loss.<sup>219</sup>

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<sup>213</sup> *Vazquez v. Jan-Pro; Awuah v. Coverall North America, Inc.*, 707 F. Supp. 2d 80, 84 (D. Mass. 2010) ("These quotes suggest that franchising is not in itself a business, rather a company is in the business of selling goods or services and uses the franchise model as a means of distributing the goods or services to the final end user without acquiring significant distribution costs. Describing franchising as a business in itself, as Coverall seeks to do, sounds vaguely like a description for a modified Ponzi scheme—a company that does not earn money from the sale of goods and services, but from taking in more money from unwitting franchisees to make payments to previous franchisees."); *Da Costa v. Vanguard Cleaning Systems, Inc.*, 2017 WL 4817349, at \*6 (Mass. Super. 2017) ("Vanguard cannot reasonably maintain that commercial cleaning is not part of its ordinary course of business to avoid classifying its workers as employees while simultaneously touting that it is 'a leader in the commercial cleaning industry.'").

<sup>214</sup> See, e.g., *Alexander v. FedEx Ground Package Sys.*, 765 F.3d 981, 997 (9th Cir. 2014).

<sup>215</sup> See, e.g., U.S. Dep't of Labor Wage and Hour Division Opinion Letter FLSA2019-6 (Apr. 29, 2019); National Labor Relations Board, Office of the General Counsel, Advice Memorandum, Subject: Uber Technologies Cases 13-CA-163062 et al., April 16, 2019; but see Lawrence Mishel and Celine McNicholas, *Uber drivers are not entrepreneurs: NLRB General Counsel ignores the realities of driving for Uber*, EPI, Sept. 20, 2019.

<sup>216</sup> Maya Pinto, Rebecca Smith, and Irene Tung, *Rights at Risk: Gig Companies' Campaign to Upend Employment As We Know It*, National Employment Law Project (Mar. 25, 2019), available at <https://www.nelp.org/publication/rights-at-risk-gig-companies-campaign-to-upend-employment-as-we-know-it/>

<sup>217</sup> *Dynamex*, 416 P.3d at 38.

<sup>218</sup> See, e.g., U.S. Dep't of Labor News Release, News Release, "Investigation in Utah and Arizona Secures Wages and Benefits for More Than 1,000 Construction Workers Who Were Wrongly Classified," Apr. 23, 2015, available at <https://www.dol.gov/newsroom/releases/whd/whd20150518> ("The defendants required the construction workers to become "member/owners" of limited liability companies, stripping them of federal and state protections that come with employee status. These construction workers were building houses in Utah and Arizona as employees one day and then the next day were performing the same work on the same job sites for the same companies but without the protection of federal and state wage and safety laws. The companies, in turn, avoided paying hundreds of thousands of dollars in payroll taxes.").

<sup>219</sup> See, e.g., OR. Rev. Stat. Ann. § 670.600(3) (noting that "a person is considered to be customarily in an independently established business if any three of the following requirements are met . . . The person bears the risk of loss related to the business . . . The person makes a significant investment in the business . . ."); 43 PA. Stat. Ann. § 933.3(b)(2)-(6) (West 2014); Me. Rev. Stat. Ann. tit. 26, § 1043(11)(E)(c) (2014); *Southwest Appraisal Group, LLC v.*

Prong C has the added benefit of potentially dis-incentivizing non-compete provisions. Specifically, it can be used to argue that if a company is prohibiting you from competing, then the company cannot satisfy prong C because the worker is not being permitted to engage in their own independent business.<sup>220</sup>

Overall, the ABC test may offer a more predictable test for workers and decision-makers and provide employers and businesses better assessment of risks and costs of classification decisions.<sup>221</sup> The debates over AB5 in California, however, resulted in the legislature excluding a number of occupations from the ABC test, including, for example, licensed insurance agents, certain licensed health care professionals, such as doctors and dentists, lawyers, architects, engineers, registered securities broker-dealers or investment advisers, direct sales salespersons, real estate licensees, and workers providing licensed barber or cosmetology services, and others performing work under a contract for professional services, with another business entity, or pursuant to a subcontract in the construction industry.<sup>222</sup>

The example of a hairdresser highlights some distinction between the economic realities analysis and the ABC test. Under the economic realities analysis, and depending on the specific facts, it might be possible to conclude that a hairdresser who rents his chair in a salon, but is well-established, has his own clientele that only comes to the salon to visit him (and would likely follow him to a different

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Administrator, Unemployment Compensation Act, 155 A.3d 738, 749, 324 Conn. 822, 839–40 (Conn. 2017) (“Factors to consider in evaluating the totality of the circumstances under part C include: (1) the existence of state licensure or specialized skills; (2) whether the putative employee holds himself or herself out as an independent business through the existence of business cards, printed invoices, or advertising; (3) the existence of a place of business separate from that of the putative employer; (4) the putative employee’s capital investment in the independent business, such as vehicles and equipment; (5) whether the putative employee manages risk by handling his or her own liability insurance; (6) whether services are performed under the individual’s own name as opposed to the putative employer; (7) whether the putative employee employs or subcontracts others; (8) whether the putative employee has a saleable business or going concern with the existence of an established clientele; (9) whether the individual performs services for more than one entity; and (10) whether the performance of services affects the goodwill of the putative employee rather than the employer.”).

<sup>220</sup> *Vector Marketing Corp. v. Maine Unemployment Ins. Commission*, 610 A.2d 272, 273–75 (Me. 1992) (cutlery sales managers and representatives lacked proprietary interest necessary to satisfy part C when there was no evidence they held themselves out as “an independent businessperson,” identified very closely with cutlery company through business cards, office signage, and business checks, had noncompete provisions in their contracts, and sold no products other than company’s); *Enesco Group, Inc. v. Maine Dept. of Labor*, 2002 WL 746084, at \*1 (Me. Super. 2002) (citing non-compete clause, among other facts, and concluding that sales representative was an employee).

<sup>221</sup> See, e.g., Teresa A. McQueen, *Dynamex is not “Armageddon.”* Even though it may feel like it! 60 Orange County Law. 51, 52 (2018) (“Truth be told, *Dynamex’s* ABC test is as close as we’re likely to come to a bright-line rule on determining when an independent contractor is really independent for wage and hour purposes. Less wiggle room and increased enforcement abilities make this a powerful tool for transformation.”); see also Ruckelshaus and Leberstein, *NELP Summary of Independent Contractor Reforms; New State and Federal Activity*, NELP (Nov. 2011), <https://www.nelp.org/wp-content/uploads/2015/03/2011IndependentContractorReformUpdate.pdf> (“This “ABC” test for non-employee status is the most objective and the most difficult for employers to manipulate.”).

<sup>222</sup> AB 5 (noting that employment relationships in these occupations will be governed by the test set out in *S. G. Borello & Sons, Inc. v. Department of Industrial Relations*, 769 P.2d 399 (CA 1989), as well as setting out different relevant factors in determining which occupations fall under the exemptions).

salon if he left), chooses his own equipment and product, and sets his own prices, is an independent contractor. A different judge might determine, however, that his relative investment is small compared to the salon's rent, overhead, and advertising costs, that his work is integral, and he is an employee. It is unlikely that same hairdresser could be anything but an employee under the ABC test, given that he is doing work that is part of the usual course of business of the salon and is not engaged in an independently established business. As a rule, the ABC test offers a trade-off. Perhaps some class of hairdressers who might be independent contractors become employees. If there are societal costs associated with that, they are overcome by broader benefits of greater clarity, predictability, and protections.

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

### 3. Option 3: ABC+ Business Operation / Rules of Construction

We recommend a third option for determining employment status, which would use the framework of the ABC test, but incorporate some aspects of the economic realities test that focus particularly on attributes closely related to core activities of the individual relating to business operation. This could also be viewed as rules of construction for the ABC test.<sup>223</sup> This option would combine the virtues of the economic realities test that focus on the actual activities of the individual with the greater clarity and rebuttable presumption already embodied in the ABC test.

As a way of affirmatively demonstrating that the individual was not an employee, this option would focus for Prongs A and C on activities central to opportunities to make a profit or loss beyond the simple on/off decision of taking or rejecting work. These would include setting price and quality standards for goods or services provided; setting key product or service standards and characteristics; overseeing the marketing and development of products; making expansion and contraction decisions; and making decisions affecting the costs of service provision or production. Being able to directly affect profit or loss in meaningful ways implies that the party has some measure of bargaining power going beyond the decision to say "yes" or "no" to a job or gig. Incorporating that criteria into a modified ABC test more closely links the test to the basis of regulating work in the first place.

One way of thinking about the economic reality of a business revolves centrally around its core decision to set price, quality, and service levels. An economic actor that lacks this capacity operates in an environment where economic returns are determined almost exclusively by the party compensating them. As noted by Sunshine:

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<sup>223</sup> When Congress amended the ADA in 2008, it noted that courts had "narrowed the broad scope of protection intended to be afforded by the ADA, thus eliminating protection for many individuals whom Congress intended to protect." ADA Amendments Act of 2008, 122 Stat 3553 (2008). As amended, the ADA now includes "rules of construction" for the definition of disability under the ADA. 42 USCA § 12102(4).

Workers who lack significant input into the prices charged for their services or the pay rates they receive ought to be considered employees under the current tests for employment. I demonstrate that prices and pay are more clear-cut indicators of whether the worker is actually a representative of the company for which she is providing services, and is thereby subject to the company's control--the essence of the most widely used test for employee status. Further, a worker's lack of input into prices and pay suggests the work performed is part of the employer's normal course of business.<sup>224</sup>

The requirement for some of the occupational exemptions included in AB 5 also include that the workers engage in activities such as setting their own prices or rates and negotiating directly with their customers. For example, licensed barbers will only be excluded from the ABC test if they set their own rates, process their own payments, are paid directly by their clients, have discretion to determine their clients, and schedule their own appointments, among other factors. To the extent these requirements can be built into the construction of the ABC test, it may eliminate the need for risky carve-outs.

These distinctions are particularly pertinent to evaluating platform models of businesses. A characteristic of many of those businesses is that their economic value is determined by customer perceptions of service and expectations of price: Platform transportation companies' (like Uber and Lyft) growth was fueled both by the convenience and speed of service (including the ability to observe the location of the car providing the pick-up) and the lower price relative to taxi cab alternatives. These attributes are determined by the platform and the technologies and algorithms underlying them rather than by the myriad of drivers providing that service. Technological advances and enhanced monitoring mechanisms may allow companies to more easily engage a workforce because of lowered transaction costs yet maintain stringent control over aspects of the workers' jobs, from their schedules, to the way that they dress, to the tasks that they carry out. Focusing on the span of worker control over these attributes—many of which are linked to the more complex set of criteria in the economic realities test—could provide clarity in applying the default rule. It would also once again have the virtue of providing real incentives for businesses in evaluating how much control they are willing to cede to workers operating under their systems in exchange for its need to set and assure service, quality, and other outcome standards.

### *C. The outer ring: Funding core workplace benefits to assure portability*

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

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<sup>224</sup> Naomi B. Sunshine, *Employees as Price-Takers*, 22 *Lewis & Clark L. Rev.* 105 (2018)

The third ring recognizes that many workers have been and will likely continue to face greater volatility in the course of their working years in terms of having a larger number of employers and shorter spans of work, regardless of employment status.<sup>225</sup>

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

Third ring social insurance could also recognize that legitimate independent contractors may seek ways to reduce risk exposure arising from health and safety injuries (workers' compensation) or intermittent periods where they lack work (unemployment insurance). Those workers could also be provided mechanisms to pay into such risk pools either through their own direct contributions or those of their customers. Benefit levels and coverage under either social insurance program would reflect the levels of worker contributions either through employer contributions (from all sources) or their own contributions in the case of independent contractors.<sup>226</sup>

Similarly, third ring systems could be created for non-mandatory benefits.<sup>227</sup> These would include methods to provide workers—employees or independent contractors—a means to accumulate retirement savings beyond those arising from Social Security or those that would continue to be provided through traditional employer-based systems. Rather, retirement benefit systems would provide mechanisms for workers to accumulate savings from the joint worker and employer contributions arising from a larger number of employers or contracting partners in the course of their work lives. As in the case above, these third ring benefits could be structured in the fashion of multi-employer funds with contributions related to hours worked.

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<sup>225</sup> See, e.g., Robert Maxim and Mark Muro, "Rethinking worker benefits for an economy in flux," Brookings (Mar 30, 2018), available at <https://www.brookings.edu/blog/the-avenue/2018/03/29/rethinking-worker-benefits-for-an-economy-in-flux/> (noting federal and state legislative proposals and laws to provide independent contractors with benefits).

<sup>226</sup> We have models for social insurance funds for paid family and medical leave in eight states and the District of Columbia, as well as proposed federal legislation – the Family and Medical Insurance Leave (FAMILY) Act. In the federal legislation, employers and employees pay, through payroll taxes, small contributions into an insurance fund, from which they are able to take partial wage replacement when they need to be out of work for a personal medical situation, parental leave, or caregiving needs. Self-employed workers are covered through a variety of mechanisms in existing state legislation, including paying into the fund. In Massachusetts, employers must also pay in for independent contractors where they make up more than 50 percent of their total Massachusetts workforce combined.

<sup>227</sup> We do not consider the system for providing health coverage given the scale and distinctive nature of that benefit and the larger question of whether it should be provided through employment or through non-employment related coverage.

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

The third ring acknowledges that workers facing greater volatility in their work life—whether because of the changing nature of technology and work, through their own preferences, or some combination of both—require new, more portable means to access both social safety net and other forms of benefits. But our concentric circle approach does not view the need for portability as something that must be traded for access to other social protections.<sup>228</sup> Instead, it envisions a system where workers can gain access to more portable benefits while being afforded the protections and rights society should continue to provide working people.

#### CONCLUSION

The changes in business organization that underlie the fissured workplace have been transformative. But workplace policies have not adequately factored these profound changes into the rights and protections for workers and the responsibilities placed upon business and other organizational entities. Public policies to deal with the workplace therefore hew to familiar paths that miss important characteristics of the problems they seek to address.

Although current political realities in the U.S. may preclude addressing the impacts of the fissured workplace in the short term, policymakers will be required to deal with them because of their broad impacts in the long term. The problematic consequences of the fissured workplace are not inexorable forces that cannot be stopped, but changes that can be shaped by public policies that impact private choices.

New technologies, the changing expectations of employees and the dynamic nature of business will always affect the nature of work. This has been true throughout economic history. But this does not mean we should forget or dismiss the underlying reason for workplace laws that go back to the beginning of the twentieth century: the recognition that workers need protections because the power to bargain is almost always skewed toward the employer. This imbalance has not evaporated in the fissured workplace of today, nor will it in the foreseeable future. Although we may need to assess whether the ways we provide protections are effective, the underlying commitment of public policies to fairness in the workplace and society must remain.

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<sup>228</sup> Cf. Harris and Krueger, *supra* note X, (offering portability in exchange for minimum wage and overtime protections for workers falling into that new classification).