




**UN-ILO Report:
Gig Worker Status
in the United States**

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Employee Misclassification

Classification a “gateway” issue for minimum wage, union membership, unemployment, worker’s compensation, discrimination, disability accommodations, etc.



Employee Misclassification

Problems started in early part of the 2010s, as most of the gig platforms used the label “independent contractors” to refer to workers on their websites and apps.

While gig work had some aspects of *independent contracting*, such as flexibility, payment by the task, and the provision of their own working tools.

Gig work also had aspects of the *employment relationship*, including control over various aspects of the work, including minutiae, and the work being performed was integral to the software application.

Status Issues in California

- 2016: *Cotter v. Lyft, O'Connor v. Uber* settled.
- 2018: *Dynamex* establishes ABC Test.
- 2020: California passed AB5.
- 2020: Uber and Lyft refuse to comply with AB5.
- 2020: Prop 22 passed to overturn AB5.
 - Strange new (?) status created.
- 2021: Prop. 22 was declared unconstitutional.



The ABC Test Across the United States

28 states use ABC or some of ABC test for defining independent contractors

- Common Law/Master-Servant
- ABC
- Other
- A/B or A/C
- IRS (20 Factor)
- Contract
- Common Law



Source: U.S. Department of Labor, Contracted or Task Employment, 2015, Chicago. Note: Some states use a combination of tests or different tests depending on the specific activity (e.g. freelance services or nonparties). wvccsp.org | @WVCCSP

New York City Council

- In 2021, New York City Council passed six bills focusing on basic rights to gig workers.
- These bills focused on basic rights for gig workers:
 - Minimum Wage standards
 - Tips / Tip baiting
 - Bathroom Access
- However, the overall question of gig worker status was left unaddressed.



Austin, Texas

- Austin, Texas required safety measures including additional insurance, background checks, driving requirements.
- There was a ballot initiative where voters wanted these regulations, and Uber threatened to withdraw.
- As a result, Uber left the market.
- Since then, Uber has adopted these same requirements, and has returned (snuck back?) to the Austin, Texas market.



City of Seattle's Legislation

- In 2015, legislation in the City of Seattle established sick and safe days for rideshare drivers.
- They would also allow rideshare drivers to join unions, organize, and bargain collectively.
- However, based on provisions of the NLRA, question of pre-emption.

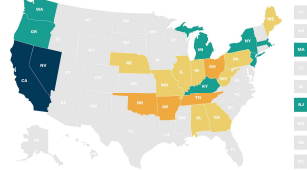


Pending Legislative Changes

Legislation Addressing Worker Classification

Which states considered legislation in 2019?

- ABC Tech legislation introduced
- Other employment status tech legislation introduced
- ABC Tech legislation enacted
- Other employment status tech legislation enacted



Source: ABC Tech Association. Data as of June 15, 2019. Note: Enacted legislation in Nevada is a state bill. No legislation would amend the state's existing ABC Tech.

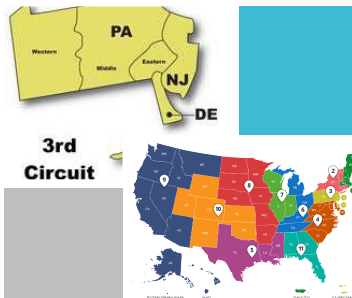
Provisions of Transportation Network Codes



Third Circuit Decision in Razak v. UberTechs., Inc., 951 F.3d 137 (3d Cir. 2020).

Case concerns Philadelphia, Pennsylvania drivers for Uber Black, who were alleging violations of Pennsylvania and Federal minimum wage and overtime laws.

Third Circuit: Pennsylvania, New Jersey, and Delaware.



Third Circuit Decision in Razak v. UberTechs., Inc., 951 F.3d 137 (3d Cir. 2020).

This group of rideshare drivers had opted out of Uber's mandatory arbitration provision.



Third Circuit Decision in *Razak v. Uber Techs., Inc.*, 951 F.3d 137 (3d Cir. 2020).

- The District court for the Eastern District of Pennsylvania had, after certain proceedings, decided that Uber had proven independent contractor relationship, based on flexibility. Awarded summary judgment to Uber.
- However, on appeal, the Third Circuit ruled that a trial would be necessary because of important disputed issues of fact that remained to be resolved.

Third Circuit Decision in *Razak v. Uber Techs., Inc.*, 951 F.3d 137 (3d Cir. 2020).

The test for determining "employees" from "independent contractors" in the Third Circuit comes from a test developed in *Donovan v. DialAmerica Marketing, Inc.*, 757 F.2d 1376 (3d Cir. 1985):

- 1. Degree of alleged employer's right to control the manner in which the work is to be performed;
- 2. Alleged employee's opportunity for profit or loss depending on managerial skill;
- 3. Alleged employee's investment in equipment or materials required for his task, or use of helpers;
- 4. Whether the services rendered required a special skill;
- 5. Degree of the permanence of the working relationship;
- 6. Whether the service rendered is an integral part of the alleged employer's business.

Algorithmic Management



Impact of *Razak v. Uber* Decision

- The U.S. Supreme Court declined to grant certiorari, so this is the final decision for the states within the Third Circuit.
- In addition, as the first U.S. Court of Appeals to rule on this issue, the precedent becomes more influential.
- Particularly after Proposition 22 in California and the constitutional problems that are now being litigated, this is a favorable precedent for those arguing that platform/gig workers are entitled to the rights and benefits of employees.

NLRB: Developments on the National Level


- Former President Trump's NLRB issued advice memo that said gig workers were independent contractors.
- Marty Walsh, Secretary of Labor, rescinded this advice memo.
- Currently this issue is being reconsidered at the NLRB in the *Atlanta Opera* matter.



Changes to Gig Worker Status Due to the Pandemic



Miriam A. Cherry,
Employment Status for "Essential Workers": The Case for Gig Worker Parity, ___ LOYOLA L.A. L. REV. ___ (2022).



Aspen Coursebook Series
 Miriam A. Cherry

Work in the Digital Age
 A Coursebook on Labor, Technology, and Regulation



Wolters Kluwer

Writing about the Gig Economy

Miriam A. Cherry, *Working for (Virtually) Minimum Wage*, 60 ALA. L. REV. 577 (2009).

A Taxonomy of Virtual Work, 45 GA. L. REV. 951 (2011).

Beyond Misclassification: The Digital Transformation of Work, 37 COMP. LAB. L. & POL'Y J. 577 (2016).

Age Discrimination in the On-Demand Economy, 40 BERKELEY J. LAB. & EMP. L. 29 (2019).

Crowdwork, Conflicts of Law, and Global Supply Chains, 94 TULANE L. REV. 183 (2020).

WORK IN THE DIGITAL AGE: LABOR, TECHNOLOGY AND REGULATION (Aspen / Wolters Kluwer, 2021).

Employment Status for "Essential Workers": The Case for Gig Worker Parity, 55 LOYOLA L.A. L. REV. ___ (forthcoming 2022).



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