

# HASTINGS SCIENCE & TECHNOLOGY LAW JOURNAL

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This article discusses how traditional rules surrounding worker classification provide, or fail to provide, clear guidance on how to classify workers in the four categories. While Marketplaces, Contractor Marketplaces, and Service Platforms benefit from this guidance, Gig Platforms' workers are not entirely well suited to classification as either independent contractors or employees. This lack of guidance from traditional rules for emerging ways of doing business creates confusion that acts to prevent on-demand economy companies from providing benefits they often want to provide for workers and creates apprehension around how to structure their relationships with workers.

Given that classification assertions are required by the IRS in an entity's annual tax filings, I propose a means to use updated versions of those tax filings to drive intelligent, custom-built legislation to govern worker classification in Gig Platforms. Such federal legislation could selectively negate clickwrap terms where justified by long-recognized public policy goals, and serve those public policy goals in the modern workforce by applying either existing employee or independent contractor rules to the freelancers who take work from Gig Platforms under certain preidentified circumstances.

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This note will discuss the implications of this decision in determining what constitutes a reverse payment. Some courts have ruled that *Actavis* requires cash payments, and others rule that *Actavis* applies to reverse payment settlements involving noncash compensation. The note will address how the Hatch-Waxman Act has affected patent law, specifically in the pharmaceutical sphere. Additionally, this note addresses the “paragraph IV” route of patent litigation and how the circuit courts have ruled on this issue.

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paper also argues that PAEs have impacted how VCs behave. It offers an empirical analysis and finds that as PAEs became more active, VCs provided more funds to the companies they backed. This paper closes by discussing what VCs have done and could do to address PAEs and their activities.

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# Online Consent and the On-Demand Economy: An Approach for the Millennial Circumstance

by JESSICA L. HUBLEY\*

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## I. Introduction

Welcome to the new millennium, where you ask a stranger to drive you around in his car, stay in a stranger's spare bedroom while on vacation, buy a stranger's used shoes having never seen them, and have a stranger over to your home to build some furniture for you, and you do it all in minutes, over the Internet, with a couple of clicks – having *technically* executed a contract that agrees you're completely responsible if anything goes awry. This is the “on-demand economy.”

A panoply of early-stage companies has emerged to find new ways to use the Internet to profit from connecting consumers with goods and services they desire through this “on-demand economy.” These multitudes of snappily-named enterprises, large and small, can be grouped into four relatively simple categories: (1) marketplaces, where goods or property owned by a third party can be bought and sold through a web-based platform where *end-users choose to buy and sell*, (2) contractor marketplaces, where a skilled service provider can be hired on a temporary, task-basis to apply his or her skilled labor to a task *proposed by the user*, (3) gig platforms, where a consumer can *ask for a particular gig or task* to be performed that is designed by the platform, *but* no individual provider is under an obligation to appear to provide the service, and (4) service platforms, where a consumer *requests a particular service* designed by the platform *and* the platform can guarantee an individual service provider will be able to deliver. Albeit in different ways, the economic reality of the workers in each of these four circumstances is comparably both traditional employees and traditional independent contractors. Below I assess how these similarities and differences justify a unique classification – or at least a novel legal treatment – for workers on a gig platform.

Most entities with enough money to consult a lawyer will impose “clickwrap”<sup>1</sup> terms and conditions to manage relationships between the consumer, the provider, and the platform. These terms and conditions grant these entities great flexibility to disclaim liability and warranties. These entities may use these same clickwrap forms to define workers' roles, responsibilities, and classification, for example, as independent contractors or employees. Clickwrap agreements were reliably enforceable until recently. Of late, adjudicative bodies including at least one state labor commissioner began to ignore them in deciding disputes regarding worker classification involving individuals who “signed” clickwrap terms.<sup>2</sup> Claims

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1. A term of judicial origin, which is defined in detail *infra*.

2. See *Berwick v. Uber Techs., Inc.*, Labor Comm'n No. 11-46739 EK (June 3, 2015), *Supre. Ct. No. CGC-15-546378*.

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regarding worker reclassification have been allowed to proceed despite being arguably barred by the plain language of the clickwrap contract.<sup>3</sup>

This article discusses how traditional rules surrounding worker classification provide, or fail to provide, clear guidance on how to classify workers in the four categories mentioned above. While Marketplaces, Contractor Marketplaces, and service platforms benefit from this guidance,<sup>4</sup> Gig Platforms' workers are not entirely well suited to classification as either independent contractors or employees. This lack of guidance from traditional rules for emerging ways of doing business creates confusion that acts to prevent on-demand economy companies from providing benefits they often want to provide for workers and creates apprehension around how to structure their relationships with workers.

Given that classification assertions are required by the IRS in an entity's annual tax filings,<sup>5</sup> I propose below a means to use updated versions of those tax filings to drive intelligent, custom-built legislation to govern worker classification in Gig Platforms. Such federal legislation could selectively negate clickwrap terms where justified by long-recognized public policy goals, and serve those public policy goals in the modern workforce by applying either existing employee or independent contractor rules to the freelancers who take work from Gig Platforms under certain pre-identified circumstances.

## II. The On-Demand Economy and the Niche of the Gig Platform

The on-demand economy emerged over the last decade as a new commercial model facilitated by the laws of online contracts.<sup>6</sup> While the media commonly uses the term "on-demand" economy to refer to a multitude of online platforms, companies, and web-based software-as-a-service providers, this article focuses on four specific categories of web-based services with common characteristics. Categorizing on-demand companies in this way highlights how the law is lagging behind technology in a near-calamitous fashion; existing classification rules address a black

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3. *See id.*

4. Workers are classified as independent contractors in the former two and as employees in latter.

5. Corporations must file (1) a Form 1099-MISC (also sent to the contractor) for all contractors who made \$600+, (2) a Form W-2 (also sent to the employee) for all employee wages, (3) a Form 1120 (general tax return) that has line items for compensation of employees and contractor expense (which is "other expense" in section 2).

6. For one of many, many examples of the use of this term in the press, *see* Lauren Weber, *What if There Were a New Type of Worker? Dependent Contractor*, WALL ST. J. (Jan. 28, 2015, 10:28 AM), <http://www.wsj.com/articles/what-if-there-were-a-new-type-of-worker-dependent-contractor-1422405831>.

and white dichotomy (employee vs. contractor) where these marketplace realities warrant a more nuanced approach.

### A. Distinguishing On-Demand Services

Here are the different kinds of companies constituting the “On-Demand Economy” considered in this article:

<b>1) Marketplace</b>
Description: <i>Web-based forum, which facilitates transaction in goods or property between third party consumers and the owner/producer of the goods.</i>

#### 1) Examples:

- Pure Marketplaces – eBay and Etsy;
- “Part of the Business” Marketplace – Amazon (where it’s own brand of goods are sold such as Kindle Fire and goods of third party companies);
- “Forum” Marketplace – Craigslist (a forum to buy and sell goods); and
- Marketplace dedicated for renting and sharing of goods – Airbnb,<sup>7</sup> Getaround<sup>8</sup> or NeighborGoods.<sup>9</sup>

<b>2) Contractor Marketplace</b>
Description: <i>A platform where end-users can locate and/or engage independent contractors with specialized skills but neither the task nor the performance is specified by the web-based platform; at most, the platform provides for reviews of service providers’ performance or some practice tools.</i>

#### 2) Examples:

- Telemedicine platforms<sup>10</sup> or companies like InCloudCounsel,<sup>11</sup> which provides a platform for client to seek attorneys in a given specialty.

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7. See, e.g., AIRBNB, [www.airbnb.com](http://www.airbnb.com).

8. See, e.g., GETAROUND, [www.getaround.com](http://www.getaround.com).

9. See, e.g., NEIGHBORGOODS, <http://neighborgoods.net>.

10. See, e.g., TELEMEDICINE, [www.telemedicine.com](http://www.telemedicine.com).

11. See, e.g., INCLOUDCOUNSEL, [www.incloudcounsel.com](http://www.incloudcounsel.com).

### 3) Gig Platform

Description: *A web-based tool that connects service providers with consumers in search of a particularized service, where the platform defines the service but does not promise there will be a worker to provide it.*

#### 3) Examples:

- Uber, Lyft, and Sidecar (connecting passengers with individual or entity “transportation providers”);
- Handy (connecting handymen or maids to those who are in need of home-related services; or
- Taskrabbit (connecting consumers seeking a individual who can perform a particular task).

### 4) Service Platform

Description: *A website or application where end-users visit to receive a very specific service defined by the platform at a specific time and place.*

#### 4) Examples:

- Instacart (which allows users to order groceries and similar items and engages a shopper to purchase and deliver the groceries in a specified timeframe) and Shyp or Postmates (which allow users to arrange to have a package picked up from one place and delivered to another at a specified time).

This article does not discuss Service Platforms in depth because, for the purposes of this argument, there is little difference between Service Platforms’ relationships with their workers and traditional employer-employee relationships. They do use clickwrap terms, as most internet-based companies do. And some do use independent contractors, or at least begin by designating a portion of their service providers as independent contractors. But several Service Platforms have recently announced that they will shift worker classification for those that perform services through the platform to “employee” from “independent contractor.”<sup>12</sup> This seems

12. Connie Loizos, *CEO Kevin Gibbon On Why Shyp Is Converting Its 1099 Workers Into W2 Employees*, TechCrunch (July 1, 2015), <http://techcrunch.com/2015/07/01/ceo-kevin-gibbon-on-why-shyp-is-converting-its-1099-workers-into-w2-employees/>; see also Greg Bensinger, *Wading Into Silicon Valley Debate, Shyp Will Make Employees of Its Contractors*, WALL ST. J. (July 1, 2015, 1:38 PM), <http://blogs.wsj.com/digits/2015/07/01/wading-into-silicon-valley->

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consistent with the day-to-day tasks and management of Service Platform workers, given that the market appears to be addressing this type of classification disconnect; consequently, this argument does not focus on Service Platforms other than as a point of comparison.

Marketplaces, Gig Platforms, and other sites designed to help consumers find skilled service providers are commonly conflated by their own press commentary, venture capitalists, and media outlets. They are all lumped into the “on-demand” economy” or the “sharing economy” categories used by the press, by venture capitalists, and other commentators. However, enterprises in the Gig Platform category have important common characteristics that Marketplaces or Contractor Marketplaces lack and that I argue warrant distinct treatment. While existing legal structures still work well for worker classification and taxation surrounding Marketplaces and Contractor Marketplaces, they are outdated and inapplicable in light of the Gig Platforms’ novel structures and characteristics.

### **B. How Gig Platforms Relate to Traditional Employment Categories**

Why distinguish Gig Platforms from Marketplaces or Contractor Marketplaces? Because extant tax and employment law structures have a unique disconnect with Gig Platforms. The practical consequence of the melee of decades-old, complex state and federal laws governing worker classification is that most startups that transact over the Internet by connecting end-users with third party functions — Marketplace, Gig Platform, or otherwise — will not be able to easily determine how to classify those third parties.

Background on the genesis of the “1099 Contractor” is helpful to explain this disconnect. Individuals who perform work for an entity can currently do so under one of only two key tax distinctions: either as an “employee” or as an “independent contractor.” These traditional categories are summarized briefly below and are determined subject to a multi-factor, case-by-case analysis governed by a plethora of federal and state level courts and administrative bodies.

It is difficult, though not impossible, to surmise whether any on-demand economy worker is an employee or independent contractor within

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debate-shyp-will-make-employees-of-its-contractors/?mod=ST1. It is not surprising that such companies begin life using contractors to cut down on costs, but it is relevant that, once they reach a level where public scrutiny may apply, they are opting to reclassify workers rather than fight in court to preserve contractor classifications.

the existing framework. The IRS does provide a form, the SS-8,<sup>13</sup> that either the entity or the worker can file to ask the IRS to determine which classification is appropriate for federal income tax purposes. In light of the additional tax and employment law obligations an entity has for its employees that do not apply to its contractors (discussed *infra*), startup companies appear inclined to treat workers as independent contractors as often as and for as long as possible.<sup>14</sup>

Even among the melee of existing classification laws, one thing is clear: for purposes of its federal taxes, an entity files a “W-2” form to report wages paid to employees and a “1099-MISC” form to report payments to its individual contractors. The IRS’ 1099 category includes a number of forms<sup>15</sup> that an entity can use to report business expense to the IRS. For example, Form 1099-K<sup>16</sup> is available to entities for reporting processing of third party payments to a large number of unrelated recipients through “accounts with a central organization by a substantial number of providers of goods or services who are unrelated to the organization.”<sup>17</sup>

In the 1980s, when the IRS rules of worker classification were first crafted, the W-2 versus 1099-MISC distinctions made great sense. The categories reflected the reality of the 1980s workplace for an employee versus an independent contractor, and the control-based manner of distinguishing these lined up well with public policy and the workers’ reality. But this is no longer the case. The Internet has inexorably blurred these lines.

### 1. Traditional Employees

Employees rely upon — and work as a carefully controlled element of — employers’ reputations’ to earn income. As employees, workers are generally subject to employers’ instructions regarding how, when, and by

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13. *Form SS-8: Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding*, U.S. DEP’T OF THE TREAS., I.R.S. (May 2014), <http://www.irs.gov/pub/irs-pdf/fss8.pdf>.

14. This observation is based generally on marketplace behavior of pre-IPO startup companies in the 2010-2015 timeframe.

15. *Forms Related To General Instructions for Certain Information Returns*, U.S. DEP’T OF THE TREAS., I.R.S., <http://www.irs.gov/uac/About-Form-1099-Related-Forms>.

16. *Form 1099-K Payment Card and Third Party Network Transactions*, U.S. DEP’T OF THE TREAS., I.R.S., <http://www.irs.gov/uac/Form-1099-K,-Merchant-Card-and-Third-Party-Network-Payments>.

17. *2015 Instructions for Form 1099-K*, U.S. DEP’T OF THE TREAS., I.R.S., <http://www.irs.gov/pub/irs-pdf/i1099k.pdf>.

what means tasks are performed.<sup>18</sup> If, in the course and scope of performing employment duties, an employee negligently or criminally causes harm to another individual or entity, the employer can be subject to “vicarious liability” (aka *respondeat superior*) for the harm caused by the employee.<sup>19</sup> The employer will also be subject to a number of state and federal tax obligations for its employees that will be discussed in detail *infra*, and include social security and Medicare taxes. If the employee falls below either a state or federal salary threshold or works by the hour, certain wage and hour restrictions apply to employees.<sup>20</sup> The employer may additionally incentivize individuals to become employees by offering benefits like health insurance, disability insurance, life insurance, paid leave, and pre-tax accounts to set aside funds for expenses like commuting or retirement savings.<sup>21</sup> Since the passage of the Patient Protection and Affordable Care Act (“ACA”),<sup>22</sup> employers with more than 100 employees are also required to provide some “Minimum Essential Coverage” (i.e., compliant health insurance) to employees.<sup>23</sup>

18. In addition, employees generally have specified times they must appear for work, and they are paid a salary or hourly wage regardless of which tasks or projects they work on. Should employees invent something in the course of employment, they are obligated to assign ownership of that invention to their employer under the “work for hire” doctrine and myriad state and federal statutes, as well as more specific employment agreement contractual provisions.

19. The precise outlines of when such liability attaches depend upon the applicable state law. For examples of how one state, Pennsylvania, considers when vicarious liability is not appropriate, see *Valles v. Albert Einstein Med. Ctr.*, 758 A.2d 1238 (Pa. Super. Ct. 2000) (assessing whether an allegedly negligent doctor was an employee of a hospital or an independent contractor of that hospital in determining whether liability would attach); *Dee v. Marriott Int’l, Inc.*, 1999 WL 975125 (E.D. Pa. Oct. 6, 1999) (analyzing whether one employee’s sexual assault against another was subject to vicarious liability or was instead “excessive and so dangerous as to be totally without responsibility or reason” such that it should be treated as being outside the scope of employment).

20. As an example, California surveys the various thresholds that apply to myriad professions on the Division of Labor Standards Enforcement website, *available at* [http://www.dir.ca.gov/dlse/faq\\_overtimeexemptions.htm](http://www.dir.ca.gov/dlse/faq_overtimeexemptions.htm).

21. The IRS 20 factor test and state-level analyses do consider whether the entity provides “employee-like benefits” to the worker — however, not providing these does not clearly read in favor of a contractor classification. By contrast, there is a potential reclassification danger to an entity that helps contractors buy health or disability insurance — so they are not incentivized by current laws from providing such benefits to Giglancers.

22. See 26 U.S.C.A. § 5000A (2010) *et seq.*

23. For a summary of coverage that constitutes “Minimum Essential Coverage” under the ACA, see <http://www.irs.gov/Affordable-Care-Act/Individuals-and-Families/ACA-Individual-Shared-Responsibility-Provision-Minimum-Essential-Coverage>. See also IRS Notice 2013-54, *available at* <http://www.irs.gov/pub/irs-drop/n-13-54.pdf>. The employer also pays the expenses for tools and materials necessary to perform work tasks, which are in service of the employer’s bottom-line profits.

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In general, employees accept a fixed salary or hourly wage in exchange for appearing at a specified time and place to work in a role defined (and free to be redefined) at the will of the employer. The work performed is generated through the employers' business, whose revenue paid the salary. The employers' payroll taxes go toward things like covering the government's cost of unemployment benefits and social security once the employee is no longer employed, and the employer is required by state law to carry Workers Compensation insurance that pays for injuries sustained by the worker on the job. The employer's *respondeat superior* liability in turn makes that employer responsible for the employee's on-the-job negligence and/or other harm to third parties.<sup>24</sup> Usually an employer "withholds" projected individual income taxes on behalf of employees and automatically transmits it to the Treasury Department, to which the employer reports the employee's wages on IRS Form W-2.

## 2. Traditional Independent Contractors

An independent contractor, by contrast, is hired to perform a specific task or drive a specific outcome,<sup>25</sup> and relies upon his or her own reputation to earn income. The time in which work is completed and the means by which it may be completed is in the contractor's discretion, though of course the hiring entity could specify a high-level timeline or certain features for deliverables.<sup>26</sup> The entity that hires a contractor does not pay employment taxes, such a Medicare and other Payroll taxes; instead the contractor must pay such taxes in the form of "self-employment" taxes to the IRS.<sup>27</sup> They must shop for and purchase their own health insurance, disability insurance, life insurance, and other similar "benefits" some employers provide.

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24. Christensen v. Swenson, 874 P.2d 125 (Utah 1994).

25. Though definitions differ by jurisdiction, *see, e.g.*, Antelope Valley Press v. Poizner, 75 Cal. Rptr. 3d 887, 900 (Cal. Ct. App. 2008) (describing the traditional "notion [of] an independent contractor [as] someone hired to achieve a specific result that is attainable within a finite period of time, such as plumbing work, tax service, or the creation of a work of art for a building's lobby.").

26. The traditional test for whether a worker is an independent contractor presumes that a contractor will provide and pay for the means to complete the task (i.e., the tools and equipment) unless her agreement with the entity provides otherwise, and that the contractor has discretion to choose work hours and accept whether or not to perform any given task.

27. Independent contractors personally pay a "self-employment tax" along with their income taxes for amounts received from a contracting entity, and those amounts are reported on an IRS Form 1099-MISC.

For individual independent contractors (“freelancers”) thirty years ago, however, the circumstances were notably different than they are today. There was no ready method of acquiring 1099 work except through the reputation, professional license, and/or specialized skills. These publicly recognized credentials were not usually cheap or easy to acquire.

For example, a lawyer’s credibility would be established by membership in a state bar association and passing of the bar, through client referrals, and by publicity of the lawyer’s success in court or a huge merger they had helped orchestrate. Sometimes lawyers partner to amalgamate reputations (among other things) and develop business together — but their individual ability or reputation help them create those partnerships. An electrician, plumber or handyman could pay for ads in the yellow pages to help him get work, but he might also rely on client referrals and those client referrals might want to verify that he had a license affirming his capability to perform the task he was to be hired to complete. Taxi drivers could invest huge sums and undertake substantial background screening per local laws to get a livery license that would allow them to pick up passengers — functioning as a franchise that followed branding and presentation standards set by a central entity, but the individual drivers controlled the minute operations on an individual basis.

In any of these cases, vacation or illness meant missed income for the contractor, and he or she paid his or her own expenses and self-employment taxes that fed into the social services he or she might one day need for support. Such contractors invested much in their reputation and client satisfaction, because that could sometimes be more valuable than advertising in generating client business. But they also assumed all of the risk of harm by their contracting actions, whether to themselves or others — after all, they were likely in sole control of the choices they made regarding how to perform the assigned task. In sum, one had to have a personal reputation for competency to earn significant sums through independent contractor tasks.

### *3. Jurisdictional Considerations for Worker Classification Issues*

The foregoing summary notwithstanding, it’s critical to note that the rules that govern whether a particular worker should be classified as an “employee” or an “independent contractor” vary depending on which statute, legal obligation, jurisdiction, and circumstances are at issue – in fact, the same person can be both an employee and an independent contractor of the same entity at the same time if engaged to perform

different functions.<sup>28</sup> Rules exist at both the federal level, where they may come not only from the IRS and its Internal Revenue Code, as well as from other executive Departments (such as the Department of Labor) or federal statutes (such as ERISA),<sup>29</sup> and at the state level, where such rules take the form of state statutes, state regulations, or rules/opinions of a specific state agency like an employment equality agency or labor commissioner. This creates a complicated legal framework that is difficult to apply to new market circumstances as they arise, especially for early stage companies with no legal team.

Even a legal advisor, however, might find it difficult to assess the application of these diverse rules to a novel circumstance. A broad survey of such rules, regulations, cases, and agency opinions reveals that they overwhelmingly require a fact-specific, case-by-case determination of which classification should apply under the present circumstances — and a contractual agreement between the worker and the entity may be considered *or disregarded* by a court, as can the use of a W-2 (employee) tax form or a 1099 (contractor) tax filing by the entity on the individual worker's behalf.<sup>30</sup> In addition, these tests were, at least at the federal level, crafted in the 1980s, before the Internet was a commercial platform — arguably before it even existed.<sup>31</sup> Unsurprisingly, these fact-specific tests do not provide clear guidance as to whether an internet-based startup should treat someone who performs any service in connection with the startup's business as an employee or an independent contractor. These

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28. See I.R.S., Information Letter No. 2012-0069 on Employees and Independent Contractors Under Internal Revenue Code Section 3121(d) (Dec. 28, 2012), <http://www.irs.gov/pub/irs-wd/12-0069.pdf>.

29. Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (1974).

30. See generally *Trosper v. Stryker Corp.*, No. 13-CV-0607-LHK, 2014 WL 1619052 (N.D. Cal. Apr. 22, 2014); *Yellow Cab Coop. v. Workers Comp. Appeals Bd.*, 226 Cal. App. 3d 1288 (1991); *Toyota Motor Sales v. Superior Court*, 220 Cal. App. 3d 864, 877 (1990); I.R.S. Information Letter No. 2012-0069, *supra* note 28 (discussing how a particular individual can be both employee and contractor at the same time); I.R.S., DEP'T OF THE TREAS., Pub. 15-A, EMPLOYER'S SUPPLEMENTAL TAX GUIDE (2014), <http://www.irs.gov/pub/irs-pdf/p15a.pdf> (explaining the considerations that apply to a classification); CAL. LAB. CODE § 3357 (Deering 2015); CAL. LAB. CODE § 2802 (Deering 2015); Cal. Dep't of Ind. Rel., Div. of Labor Standards Enforcement, *Independent Contractor Versus Employee*, [http://www.dir.ca.gov/dlse/faq\\_independentcontractor.htm](http://www.dir.ca.gov/dlse/faq_independentcontractor.htm) (discussing the various California state agencies that may require classification). For a summary of state and federal tests that may apply to classification, see Sutherland Asbill & Brennan LLP, *Classification Tests* (2015), <http://www.workerclassification.com/Classification-Tests> (noting certain instances where a state follows the IRS classification).

31. See JOINT COMMITTEE ON TAXATION, JCX-26-07, PRESENT LAW AND BACKGROUND RELATING TO WORKER CLASSIFICATION FOR FEDERAL TAX PURPOSES (2007), <http://www.irs.gov/pub/irs-utl/x-26-07.pdf>.

tests also do not contemplate circumstances where a consumer might trust a stranger to provide a service because they trust a *brand* that doesn't employ that person, nor do they contemplate circumstances where a trusted brand can contractually disclaim liability for that stranger's actions. They are consequently inapposite to the classification concerns of the on-demand economy.

### C. Application of Traditional Structures to Gig Platforms

Today, many freelancers do still operate substantially as they did 30 years ago — usually where they have specialized skills or a specific professional license. There are still solo practice lawyers, cab drivers, plumbers, electricians, and they are still earning professional licenses, although they may now advertise in new ways, including through Contractor Marketplaces and otherwise over the Internet.

However, many of the reputation-based and trust-based mechanisms that drove work to skilled freelancers in the old world have been assumed by Gig Platforms in order to connect unskilled freelancers with work in the new world in a way that disrupts the traditional way of doing business in that industry. I refer to these unskilled freelancers who work on specific, platform defined gigs as “Giglancers” in this article.

Where once you looked for a taxi company and livery license to give a ride and would never get into a stranger's unmarked car for one, now thousands of people get into strangers' personal cars everyday because they trust Lyft, Uber, or Sidecar to connect them with a safe ride at an agreed price.<sup>32</sup> In San Francisco, before ride share apps like these evolved, I would regularly have conversations with taxi drivers about the issues with their work. Why are there never enough cabs on the weekend but you guys always seem to available for hire during the week? My taxi drivers explained that the city allowed only a set number of taxi licenses based on average demand — a number that was necessarily too high during the work week and far too low on Friday and Saturday. Rideshare apps solved this problem by tying both compensation and worker engagement more directly to real-time demand and offering drivers incentives to do more during peak hours.<sup>33</sup> But they still act franchise-like (as taxis do) in certain ways: they require a certain kind of car, that drivers keep it clean, and a certain level of

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32. This “imputed trust” phenomenon has been discussed previously with respect to both “rideshare” companies and some Marketplaces, like Airbnb. See Jason Tanz, *How Airbnb and Lyft Finally Got Americans to Trust Each Other*, WIRED MAG., (Apr. 23, 2014), <http://www.wired.com/2014/04/trust-in-the-share-economy/>.

33. Interview by Anita Wilhelm with Anonymous Lyft Driver (June 15, 2015).

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city knowledge, a brand label on the outside of the car, a background check, etc.<sup>34</sup>

Marketplaces and Contractor Marketplaces still effect transactions on the basis of the quality of the good or the seller/contractors' reputations as old-world freelancers obtained work exclusively through their own (or a firm's) reputation. But in a Gig Platform, a freelancer can obtain work as a result of the reputation and consumer trust built by Gig Platform. This "Giglancer" does not need specialized skills — the Gig Platform has defined the deliverable the end-user arrives to purchase, and that deliverable (a ride, a delivery in a set amount of time, a simple task to be performed) can come from any Giglancer that meets the platform criteria (e.g., have a clean car that's not too old, a license, and an account with the platform). In some — but not all — cases, Gig Platform reviews speak to the individual's capability and performance according to the Gig Platform's standards. If demand suddenly increases (there's a huge game!) the Gig Platform can increase incentives for Giglancers to show up at that time and meet demand. Critically, Gig Platforms do not require any particular level of work or hours (though they may attempt to incentivize these); the worker on a Gig Platform not only has the opportunity to start and stop work anytime without penalty, but also the power to start and stop work for other Gig Platforms, including among direct competitors, at will.

Service Platforms, by contrast, are much more like traditional employers in how they meet demand. Their internal processes can predictably assess demand (i.e., it won't be a surprise that shipping activity increases around the end of every year), so there's a good reason for them to set up service-provider-workers in advance to reliably meet that demand. The service performed is chosen by the Service Platform, which gives the service providers very specific instructions.<sup>35</sup> These service providers may be converted to employees once the Service Platform has systematized their response to marketplace demand.<sup>36</sup>

Like Marketplace "accounts" or Contractor Marketplace "profiles," both end-users and freelancers that connect through a Gig Platform create accounts with the Gig Platform. Yet, like the rules surrounding who

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34. *Berwick*, No. 11-46739-EK, Cal. Lab. Comm'r (June 3, 2015).

35. For an enterprise like Instacart, for example, shoppers are instructed to use certain "replacement items" if their ordered item is not available in the store. *See* INSTACART, <https://www.instacart.com/help/section/placing-an-order#204246964>.

36. For commentary on why this conversion might occur at a given time, *see generally* Connie Loizos, *CEO Kevin Gibbon On Why Shyp Is Converting Its 1099 Workers Into W2 Employees*, TECHCRUNCH (July 1, 2015), <http://techcrunch.com/2015/07/01/ceo-kevin-gibbon-on-why-shyp-is-converting-its-1099-workers-into-w2-employees>.

qualifies as which type of worker, the contractual case law governing the commercial relationship of an “account” on a Gig Platform are designed for a pre-Internet world, and their application to modern e-commerce thus far has been clunky.

### III. The Formation and Enforceability of Online Contracts

A basic tenant in contract law holds that forming a contract requires an offer, acceptance (or another manifestation of mutual assent), consideration, and (in certain cases) a writing — yet the vast majority of contracts ever formed by Americans younger than 24 — online contracts — lacked at least some of these elements.<sup>37</sup> Most of the time we visit an online article — and for some this can be hundreds of times per day — we are assumed to be agreeing to the terms and conditions of that website, even when we have trouble finding them.<sup>38</sup>

I have previously written<sup>39</sup> about the genesis of the modern law of online contracts, which arises from an exception to the unenforceability of contracts of adhesion in the context of purchase terms printed on a cruise ticket.<sup>40</sup> The underlying theory of that foundational case was that the cruise operator could not conduct business if it were required to negotiate specific terms with each and every purchaser. Over the next two and a half decades, courts have built off of this foundation to develop the law of “clickwrap,” “shrinkwrap,”<sup>41</sup> and “browsewrap” agreements.<sup>42</sup>

This overview of web terms’ enforceability is not presented to support a normative statement regarding whether courts have adopted the correct

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37. See Lindsay M. Howden & Julie A. Meyer, U.S. CENSUS. BUREAU, U.S. DEP’T OF COMM., C2010BR-03, AGE AND SEX COMPOSITION: 2010 (2011), <http://www.census.gov/prod/cen2010/briefs/c2010br-03.pdf>.

38. Consider, as just one example, this online version of Time magazine, where new article loads as you scroll to the end of the page where a lawyer like myself expects to find the terms — you could click article for hours on such sites and never locate the contract you’ve ostensibly agreed to with you visit. As discussed *infra*, these terms may not be enforceable — but the website host is generally still assuming they are. See Sarah Begley, *Millions More Americans Will Qualify for Overtime*, TIME MAG. (June 29, 2015), <http://time.com/3490889/obama-regulation-overtime>.

39. Jessica L. Hubley, *How Concepcion Killed the Privacy Class Action*, 28 SANTA CLARA HIGH TECH. L. J. 743, 749 (2011).

40. See *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 593-94 (1991).

41. See *Specht v. Netscape Commc’ns Corp.*, 306 F.3d 17, 32 (2d Cir. 2002) (defining shrinkwrap agreements as license agreements contained within the shrinkwrap of a box containing a software product).

42. See Hubley, *supra* note 39, at 749–57. Shrinkwrap agreements are rare in 2015, as they are defined in connection with a delivery of software on a disk.

model for enforcing online contracts.<sup>43</sup> It is simply to frame the diverse means by which the on-demand entities subject of this article establish contractual agreements with their users.

The critical difference between “clickwrap” and “browsewrap” agreements is in the degree of notice and access to the contract terms a user has. In sum, a “clickwrap” agreement “presents the user with a message on his or her computer screen, requiring that the user manifest his or her assent to the terms of the license agreement by clicking on an icon,” though the terms need not be present on the screen with that button.<sup>44</sup> A browsewrap agreement requires no specific click-to-assent, and courts will “enforce inconspicuous browsewrap agreements only when there is evidence that the user has actual or constructive notice of the site’s terms.”<sup>45</sup> Recently, the Ninth Circuit ruled that browsewrap terms present on every page of a site to which the user was never directed did not confer sufficient notice, without more, to establish contractual assent.<sup>46</sup> Yet at least one federal court has found that a user who creates an account and effects a purchase under a browsewrap form and later enters a clickwrap agreement to access deliverables is bound by the clickwrap agreement notwithstanding the unenforceability of the browsewrap agreement.<sup>47</sup> If a commercial relationship created by a clickwrap agreement is litigated today — that is, the contract terms were presented at least through a link in association with a specific user click — whether or not the contract is enforceable as a general matter is in some cases never mentioned in court opinions at all; the assumption is that the clickwrap terms will be enforceable.<sup>48</sup>

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43. For one example of such commentary, please see Edith R. Warkentine, *Beyond Unconscionability: The Case for Using “Knowing Assent” as the Basis for Analyzing Unbargained-for Terms in Standard Form Contracts*, 31 SEATTLE UNIV. L. REV. 469 (2008), <http://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=1056&context=sulr>.

44. *Be In, Inc. v. Google Inc.*, No. 12–CV–03373–LHK, 2013 U.S. Dist. LEXIS 147047, at \*23 (N.D. Cal. Oct. 9, 2013) (citing *Specht*, 306 F.3d at 22 n. 4. (quotation and citation omitted)) (“mere use of a website” could not demonstrate users’ assent, and that the “mere existence of a link” failed to notify users of terms of service.”), 2013 U.S. Dist. LEXIS 147047, at \*33.

45. *Tompkins v. 23andMe, Inc.*, No. 5:13–CV–05682–LHK, 2014 U.S. Dist. LEXIS 88068, at \*22 (N.D. Cal. June 25, 2014) (citing *Sw. Airlines Co. v. BoardFirst, L.L.C.*, No. 3:06–CV0891–B, 2007 WL 4823761 (N.D. Tex. Sept. 12, 2007); Mark A. Lemley, *Terms of Use*, 91 MINN. L. REV. 459, 459–60 (2006)).

46. See *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, (9th Cir. 2014).

47. See *Tompkins*, 2014 U.S. Dist. LEXIS 88068 at \*59 (noting that plaintiff’s challenging the enforcement of an arbitration provision had established procedural unconscionability in light of the first browsewrap presentation, but not substantive unconscionability).

48. See, e.g., *Perkins v. LinkedIn Corp.*, 53 F. Supp. 3d 1190 (N.D. Cal. 2014). Note, however, that the scope of consent provided through the language in such terms is still litigated. See, e.g., *In re Google, Inc. Privacy Policy Litig.*, No. 12–1382, 2012 WL 6738343, at \*5 (N.D. Cal. Dec. 28, 2012).

#### IV. Contractual Distinctions and Similarities among On-Demand Entities

The user agreement terms (“surveyed terms”) applicable to both consumers and providers through on-demand entities were surveyed and are provided below. Of the six sample entities surveyed (three Gig Platforms and one each of Marketplaces, Contractor Marketplaces, and Service Platforms), all presented online contracts to users that governed users’ behavior and use of the applicable software.<sup>49</sup> Users, like on-demand economy workers, who click-to-enter these contracts have no practical means of challenging their enforcement, and therefore are bound by strict limits upon platform liability and their own rights.

##### A. A Survey of Common Platform terms

The surveyed terms have some commonalities. Each of the surveyed terms is activated (i.e., assent is deemed given) upon any use of the services or platform. Each of the surveyed terms includes a broad copyright license for the entity to use user data) (whether input or collected).<sup>50</sup> In theory, this would give the entity the copyright licenses

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49. See following online terms: *Terms and Conditions*, UBER, <https://www.uber.com/legal/ind/terms> (last visited July 4, 2015) [hereinafter Uber Terms]; *Terms of Service*, LYFT, <https://www.lyft.com/terms> (last visited July 4, 2015) [hereinafter Lyft Terms]; *Terms of Service*, TASKRABBIT, <https://www.taskrabbit.com/terms>, (last visited July 4, 2015) [hereinafter TaskRabbit Terms]; *Terms and Conditions*, INCLOUDCOUNSEL, <https://www.incloudcounsel.com/terms> (last visited July 4, 2015) [hereinafter InCloudCounsel Terms]; *Terms of Use*, ETSY, <https://www.etsy.com/help/article/479> (last visited July 4, 2015) [hereinafter Etsy Terms]; *Terms of Service*, SHYP, <http://www.shyp.com/terms> (last visited July 4, 2015) [hereinafter Shyp Terms]. Collectively I refer to these agreements in this article as the “Surveyed Terms.”

50. See Uber Terms *supra* (“We may, in our sole discretion, permit Users to post, upload, publish, submit or transmit User Content on the Website or through the Service or ApplicationFalse User Content will be deemed non-confidential and non-proprietary. Accordingly, Uber shall have the non-exclusive, royalty-free, right to use, copy, distribute and disclose to third parties any User Content for any purpose, in any medium and throughout the world”); Lyft Terms *supra* (“To enable the Lyft Platform to use your Information, you grant to us a non-exclusive, worldwide, perpetual, irrevocable, royalty-free, sub-licensable (through multiple tiers) right and license to exercise the copyright, publicity, and database rights you have in your Information, and to use, copy, perform, display and distribute such Information to prepare derivative works, or incorporate into other works, such Information, in any media now known or not currently known”); Taskrabbit Terms *supra* (“You hereby grant Company a non-exclusive, worldwide, perpetual, irrevocable, royalty-free, sublicensable (through multiple tiers) right to exercise all copyright, publicity rights, and any other rights you have in Your Information, in any media now known or not currently known in order to perform and improve upon the Service.”); InCloudCounsel Terms *supra* (“You grant InCloud a perpetual, irrevocable, royalty-free, transferable right and license to use, copy, modify, delete in its entirety, adapt, publish, translate, create derivative works from, sell, distribute, and/or incorporate such content into any form, medium, or technology throughout the world without compensation to you. You have the right to remove any of your works from User Content at any time.”); Etsy Terms *supra* (“You grant Etsy

necessary to, for example, show the profile picture a user uploads to other users. In practice, unless there is some limitation elsewhere in an entity's contracts, the broad language through which this is achieved might be used for other purposes, as well. For example, Uber saw a press backlash after the revelation that it had a "God View" in which individual users were tracked at launch parties by name, though no lawsuit was filed over the practice as of the date of this paper.<sup>51</sup>

Whether users are bound by these form contracts also depends upon the means of assent. Among the surveyed terms, all but Uber present a link to the terms and conditions near the point of account creation, and therefore, as explained *supra*, all the non-Uber surveyed terms are likely enforceable. Even though Uber does not present end-user terms as a clickwrap agreement, a swift product change implementing the court-recognized assent procedure and a forced re-login by all users could probably render the Uber terms enforceable to the extent they are not now.<sup>52</sup> For purposes of this article, therefore, I'll assume Uber's counsel is busy on other matters and will implement this industry-standard practice soon, and therefore I treat all of the surveyed terms as though they are enforceable under current law for purposes of this analysis.

In sum, while some major online platforms still reflect a browsewrap-like model, most of the commonly known apps and websites discussed here have adopted a clickwrap model — which means users have little chance,

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a license solely to enable Etsy to use any information or Content you supply Etsy with, so that Etsy is not violating any rights you might have in that Content. You grant Etsy a non-exclusive, worldwide, perpetual, irrevocable, royalty-free, sublicensable (through multiple tiers) right to exercise the copyright, publicity, and database rights (but no other rights) you have in the Content, in any media now known or not currently known, with respect to your Content. You agree to allow Etsy to store, translate, or re-format your Content on Etsy and display your Content on Etsy in any way Etsy chooses. Etsy will only use personal information in accordance with Etsy's Privacy Policy."); Shyp Terms *supra* ("By posting Your Content on or through the Service, you hereby do and shall grant Shyp a worldwide, non-exclusive, perpetual, irrevocable, royalty-free, fully paid, sublicensable and transferable license to use, modify, reproduce, distribute, display, publish and perform, Your Content in connection with the Service and to improve Shyp's products and services, subject to the terms and conditions of this TOS and our Privacy Policy. Shyp has the right, but not the obligation, to monitor the Service, Content, or Your Content and to disclose your Your Content if required to do so by law or in the good faith belief that such action is necessary to (i) comply with a legal obligation, (ii) protect and defend the rights or property of Shyp, (iii) act in urgent circumstances to protect the personal safety of users of the Services or the public, or (iv) protect against legal liability.")

51. See Kashmir Hill, 'God View': Uber Allegedly Stalked Users For Party-Goers' Viewing Pleasure (Updated), FORBES (Oct. 3, 2014), <http://www.forbes.com/sites/kashmirhill/2014/10/03/god-view-uber-allegedly-stalked-users-for-party-goers-viewing-pleasure/>.

52. See *Tompkins*, 2014 U.S. Dist. LEXIS 88068 at \*19-23.

absent fraud in the execution,<sup>53</sup> of challenging the formation of a contract between user or provider and platform.

### **B. Survey of Limitations of Liability (Appendix A)**

As with most sophisticated e-commerce platforms, each of the Surveyed Terms limits the entity's liability. They do so both through caps on monetary damages and through exclusions of other categories of damages, in a manner subject of the chart attached as Exhibit A. All but the Uber terms disclaim *all* liability that can be legally disclaimed in connection with the use of the service (Uber instead caps its liability at €500 (approximately about US\$526) and disclaims liability other than for its gross negligence or willful misconduct, but notably the contract is promulgated under the laws of the Netherlands).

Each platform or marketplace discussed herein has also included brisk limits on that platform or marketplaces' liability to the end user — whether that end user is a 1099 service provider using the platform to find income or a consumer looking to buy goods or services through the platform.

### **C. Survey of Warranty Disclaimers (Appendix B)**

Differences begin to emerge when we look specifically at how surveyed terms disclaim warranty obligations and/or offer a limited performance warranty. While language choices vary and have slightly different legal force, it is clear that all four types of web-based entities make a point to disclaim not only traditional implied commercial warranties, but also any warranties that might be implied as to the quality of the deliverable on the platform. For an entity like Etsy, who seeks no control over what sellers list on its marketplace, effectively disclaiming its responsibility for the ultimate quality of the goods sold over the platform, reflects that Etsy does not control what goods are placed on the platform for sale, nor how they are positioned for users. Etsy has otherwise required prospective purchasers to acknowledge and agree to this. Gig Platforms Uber, Lyft, and Taskrabbit have much greater control over the way that the desired gig is performed, but use the click-through form to eliminate the implied warranties that might otherwise apply.

### **D. Survey of Indemnity Obligations (Appendix C)**

The surveyed terms impose indemnities and/or hold harmless clauses — that is, contractual mechanisms to require one party to assume certain liability that may be incurred by the other — users' use of the applicable

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53. See Hubley, *supra* note 39, at 764-67.

website or application. The surveyed terms uniformly require indemnity coverage (i.e., the end user is responsible for damages) where the terms have been breached, and most also impose responsibility on the user for the user's violation of the law or third party rights. The Gig Platforms and the Service Platform specifically impose an indemnity clause for claims arising from ones "use of the service," whereas the surveyed Marketplace and Contractor Marketplace do not.<sup>54</sup>

### V. Gig Platforms, Incentives, and Absurdities

By organizing the types of on-demand entities operating in the marketplace today into the four above categories: 1) Marketplaces where goods or property are sold on behalf of third party owners, 2) Contractor Marketplaces where skilled workers can be engaged for unspecified tasks by thirds parties, 3) Gig Platforms where specified tasks can be performed for end-users by service providers with schedule flexibility but not gig flexibility, and 4) Service Platforms where third parties arrive to ask for a specific task at a specific time and place — a road to more efficient legal treatment emerges.

Comparing the worker classification factors promulgated by the IRS<sup>55</sup> with the common law opinions in recent class-actions decisions against Uber and Lyft,<sup>56</sup> a few common considerations come to light; courts and regulators grapple with when deciding how to classify any particular worker. In addition, I have identified a few related economic drivers and mapped how each category of on-demand entity relates to these. These charted values include:

- What is the basis for the demand of what is transacted on the entity's software platform?

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54. While an attorney drafting terms will use his or her discretion in identifying relevant areas of risk for a client and treatment is not necessarily uniform among entities of the four types surveyed herein, it is likely that Etsy (Marketplace) and InCloudCounsel (Contractor Marketplace) do not state a user indemnity for "use of the service" because other provisions of their user agreements govern predictable, recurring platform marketplace actions. These actions can be defined and outlined in the user agreement such that breach of the user agreement effectively gives the entity indemnity coverage for anything arising from user's actions on the platform. By contrast, a Gig Platform or Service Platform does not have the ability to outline in advance all of the potential use actions of its users and therefore usually cannot disclaim all relevant liabilities by simply requiring an indemnity for noncompliance with its online terms.

55. See Worker Classification, *supra*, note 31.

56. See *O'Connor v. Uber Techs., Inc.*, Case No. 3:13-cv-03826-EMC, 2015 U.S. Dist. LEXIS 30684 (N.D. Cal. Mar. 11, 2015); *Cotter v. Lyft, Inc.*, Case No. 3:13-cv-04065-VC, 2015 U.S. Dist. LEXIS 30026 (N.D. Cal. Mar. 11, 2015).

- How predictable are changes in demand for the entity?
- How the worker creates services, or affects the demand serviced by the entity — in other words, is the worker’s task central to the operations of the entity or tangential to those operations?
- To what extent is the entity’s business operation or changes result in the unemployment of workers?
- Would vicarious liability traditionally attach for worker actions in the scope of the services designed for the platform, absent clickwrap disclaimers?
- Would workers compensation responsibility traditionally attach given the degree of entity control over the means of performance, absent clickwrap disclaimers?<sup>57</sup>
- Who has control over which hours the worker works?
- Who has control over the workflow presented or offered to the worker?
- Who has control of the means of performance of work tasks?

A diagram summarizing the answer to each of these for each of the four On-Demand categories is attached as Appendix D. Diagramed as such, it’s clear that Gig Platforms mimic employer-employee relationships at times, and they mimic independent contractor-entity relationships at times.

#### **A. Where Gig Platforms Align with Marketplaces**

Gig Platforms behave like Marketplaces or Contractor Marketplaces in connection with their identification and satisfaction of market demands. Like Marketplaces and Contractor Marketplaces, demand for what the platform provides is elastic and unpredictable — these entities are reliant on past usage to roughly estimate future demand, but this process is necessarily imperfect. None of these entities can really limit what work a worker chooses to accept elsewhere.<sup>58</sup> By contrast, on a Service Platform,

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57. This is another creature of both state and federal law. Under the Social Security Act of 1935 and the Federal Unemployment Tax Act, Federal guidelines drive state-specific programs – all of which, at core, are targeted to keep skilled workers afloat at their previous income level for a limited period of time in which they can find other work applicable to their skillset, with the expectation that their sustained spending is good for the economy (for a high-level overview, *see* Unemployment Compensation Law: An Overview, LEGAL INFORMATION INSTITUTE, [https://www.law.cornell.edu/wex/unemployment\\_compensation](https://www.law.cornell.edu/wex/unemployment_compensation)). However, where the work performed is not skilled, the underlying justification for unemployment payments falls apart.

58. More specifically, while a solo practice attorney may sell services through a Contractor Marketplace as well as finding clients in the traditional way (based on reputation or referrals) and

the entity reliably predicts (or has already recorded) the demand before engaging workers to meet it. Like Marketplace and Contractor Marketplaces, Gig Platforms cannot require the participation of any given service provider at any given time — they do not control the *hours* that worker chooses to work. They can offer incentives to work at predictably busy times, but they cannot require anyone to show up on the day the work appears. As such, their ability to respond to an uptick in demand (and therefore their ability to profit from that unusual uptick) is limited.

In addition, Gig Platforms presently require workers to pay their own expenses, which seems reasonable if you consider that, as with a Marketplace, they have no way of ensuring that their expenditures on worker business expenses would actually be used for their business. A car might be used to perform a TaskRabbit task, to drive for Uber, or to drive for Lyft — all in the same day.

## **B. Where Gig Platforms Align with Service Platforms**

Gig Platforms behave like Service Platforms in their control of task minutiae. Both Platforms fully dictate the quality, timing, and nature of the services, or task to be performed, — In other words, characteristics of the task or service are chosen and fixed by the platform and do not vary according to the service provider. Both choose the means by which work is distributed, how work is compensated, the manner in which work is performed if, and when it is accepted by the worker.

A Giglancer or service provider on a Service Platform, who is hurt while performing within the scope of the Gig or Platform service, as instructed by the platform, would be the classic recipient of worker's compensation insurance under traditional theories.<sup>59</sup> The common policy reasoning behind workers compensation is that, where an employee accepts the task of knowing what it will entail and having to perform it as the entity instructs, and the employer is in the best position vis-à-vis the employee to be familiar with industry pitfalls. Therefore, the employer should assume

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sellers on Etsy or eBay may use other Marketplaces (online or physical) to sell their own goods, Giglancers often take gigs from multiple Gig Platforms. Some surveys suggest as many as 60% of drivers in a city where both Uber and Lyft take driving gigs from both competitors. See Josh Waldrum, *Uber vs. Lyft: 5 Things I Learned From Giving Up My Car*, THE ZEBRA, <https://www.thezebra.com/insurance-news/848/uber-vs-lyft/>; or, for an example of individual commentary about working for both Gig Platforms, see J. Money, *Side Hustle Series #52: I'm a Lyft Driver and Uber Driver*, BUDGETS ARE SEXY (Sept. 3, 2014), <http://www.budgetsaresexy.com/2014/09/lyft-uber-driver-hustle/>. It's not clear precisely how often this happens (and it is reasonable to expect the number of people working for more than one Gig Platform at a time changes almost daily), but it is clear that it happens.

59. See *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171 (9th Cir. 2014).

the costs of the workers risk. For this reason, foreign national governments, and U.S. States began to adopt laws that replaced tort-based dispute resolution with automated worker compensation payments for injuries sustained in the course of performing the task of employment within the scope of employment.<sup>60</sup>

The same logic can be applied to the issue of whether *respondent superior*<sup>61</sup> liability should attach to Gig Platforms: Where the Giglancer is following instructions and/or within the scope of the gig, the entity is probably in the best position to avoid the harm and/or minimize the damage from that task, and is ultimately profiting from the risky behavior it has the opportunity to avoid. At present, the surveyed terms disclaim any such liability and frequently require an indemnity from both end-users and workers for the kind of tort claims that might be subject to *respondent superior* liability were the tortfeasor an employee.

### C. What Makes Gig Platforms Unique

Unique questions apply to Giglancers working through Gig Platforms. What about injuries sustained or inflicted while in-between gigs? What about expenses for things used in a gig *and* for other purposes? After all, the Gig Platforms don't instruct workers as to what to do in between gigs, so they don't know and cannot control the actions that might cause (or prevent) injury. In a Marketplace, there is no clear delineation between "on" time and "off" time; the goods sold or services performed are generally unique, there is no common expense that the Marketplace could

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60. See Gregory P. Guyton, *A Brief History of Worker's Compensation*, 19 IOWA ORTHOP. J. 106, (1999), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1888620/> ("The central tenet is that of "no-fault" insurance; industrial accidents are accepted as a fact of life and the system exists to deal with their financial consequences in as expeditious a manner as possible."); see also *id.* at n.7. Compare unemployment insurance/taxes, another creature of both state and federal law. Under the Social Security Act of 1935 and the Federal Unemployment Tax Act, Federal guidelines drive state-specific programs — all of which, at core, are targeted to keep skilled workers afloat at their previous income level for a limited period of time in which they can find other work applicable to their skillset, with the expectation that their sustained spending is good for the economy (for a high-level overview, see Unemployment Compensation Law, *supra* note 57. However, where the work performed is not skilled, the underlying justification for unemployment payments falls apart. Since Giglancers don't perform skilled tasks, I disregard unemployment protections for purposes of this article.

61. A core tenet of tort law wherein an employer is deemed liable for actions of its employees within the scope of their employment. As an example of a state implementing law, see CAL. CIV. CODE § 2338 (West 2015) ("Unless required by or under the authority of law to employ that particular agent, a principal is responsible to third persons for the negligence of his agent in the transaction of the business of the agency, including wrongful acts committed by such agent in and as a part of the transaction of such business, and for his willful omission to fulfill the obligations of the principal.").

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provide. Service Platforms, by contrast, will engage workers<sup>62</sup> when they can meet predictable demand for services (e.g., shipping services), so there is not generally “between” time to consider.

This “between gigs” (effectively, between accepting instructions and performing the task) time is unique to the Gig Platform. It does not only create a period of ambiguity as to which body of public policy (employee vs. independent contractor) should apply, but it also allows Giglancers to use tools in service of multiple constituents (or on their own behalf) on the same days and/or at the same times as they use them in the gig.

#### D. Where the Clickwrap Structure Falts

In 2015, courts in California<sup>63</sup> and Florida, refused to observe the contractual terms of Giglancers and Gig Platforms reached by way of a click-through agreement in the context of employment law.<sup>64</sup> By allowing cases against Gig Platforms to proceed beyond summary judgment upon claims that are expressly barred in the online terms (or, for which liability is technically placed on the worker/user by such terms), these suits have showed a limited space where at least some clickwrap terms are treated as unenforceable.

The work done in surveyed terms, summarized *supra*, to specifically disclaim certain kinds of liability is therefore, thrown into question. While there is no clear guidance as to how a court would treat claims against Gig Platforms under certain circumstances, there is clearly potential harm to users and Giglancers that might arise from using a Gig Platform. Recent press has reported allegations of property damage, assault, and rape by on-demand workers on Gig Platforms.<sup>65</sup>

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62. Admittedly, some service platforms begin their business life with workers as contractors. They do generally shift to classifying workers as employees (which is appropriate given the analysis here) for compliance purposes.

63. See *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067 (N.D. Cal. 2015); see also *Berwick v. Uber Techs., Inc.*, Labor Comm’n Case No. 11-46739-EK (June 3, 2015).

64. See *Cotter*, 60 F. Supp. 3d at 1074. Note that these cases also appear to disregard arbitration provisions in such terms.

65. Consider the following incidents from recent news (this article does not seek to assess whether any of the following allegations are true, but rather demonstrate that they exist to be adjudicated by our legal system):

- Rideshare app drivers reporting damage to their cars from intoxicated passengers.
- Rideshare app driver allegedly stabbed in the face, [Joe Fitzgerald Rodriguez](#), *Stabbed Uber Driver Files Class-Action Lawsuit Against Tech Company*, THE EXAMINER (May 3, 2015), <http://archives.sfoxaminer.com/sanfrancisco/stabbed-uber-driver-files-class-action-lawsuit-against-tech-company/Content?oid=2928834>.
- Rideshare app driver falsely accused of rape and had trouble paying his lawyer. Steve Schmadeke, *Rape Charge Dropped Against Former Uber Driver*, CHICAGO TRIBUNE

True or not, each of these allegations purportedly occurred within the scope and in the course of a gig taken from a Gig Platform. The Uber and/or Lyft terms put the liability for such alleged actions on the user/and or the driver, neither of whom is likely to have the spare change to either, employ a lawyer, litigate, or defend litigation — unlike a traditional large employer. Gig Platforms, where successful, are the party with the most potential control over the behavior of the end user and the service provider. Uber is the only party in a position to force the video and/or audio recording of an Uber trips for use as evidence, as Lyft is for Lyft trips. Taskrabbit is in a better position than either any tasker or any end user to implement safety checks through photos.

Recall that vicarious liability principles were crafted with pre-internet drivers on mind. Traditional independent contractors secured business on the basis of their own reputation, while traditional employees secured income based on the employer's reputation and the business the employer secured as a result. Thus, the employer was liable for actions of employees while profiting from control over those actions. Each Gig Platform is profiting on the basis of a market assumption that it is a trustworthy place to have a certain kind of gig fulfilled, and that the Gig Platforms set rules workers must follow to try to maximize that chances of a satisfactory placement of such trust and the resulting platform profits. Yet Gig Platforms' contracts still put all the responsibility for that placement, the underlying trustworthiness, and the performance of what they command on the shoulders of users and workers. The courts in *Cotter*<sup>66</sup> and *Berwick*<sup>67</sup> have begun to lift certain obligations off those individual shoulders on public policy grounds. However, they have yet to touch of the issue of vicarious liability. The opportunity is ripe to design a broader solution that puts the responsibility for the breach of consumer trust on the entity, which is profiting from that trust.

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(Apr. 6, 2015, 6:51 PM), <http://www.chicagotribune.com/news/local/breaking/ct-uber-driver-rape-charge-dropped-met-20150406-story.html>.

- Rideshare app driver allegedly raping drunk passenger in his home. Dug Begley, *Uber Driver Accused of Rape Did Not Have City Permit*, HOUSTON CHRONICLE (Apr. 6, 2015, 9:09 PM), <http://www.houstonchronicle.com/news/transportation/article/Uber-driver-accused-of-rape-not-permitted-by-city-6182503.php>.
- College student at USC who blacked out allegedly told her Rideshare app that driver had raped her. Tracy Bloom, *Uber Investigating After USC Student Accuses Driver of Rape*, KTLA 5 (May 1, 2015, 8:28 AM), <http://ktla.com/2015/05/01/usc-student-accuses-car-service-driver-of-rape/>.

66. See *Cotter*, 60 F. Supp. 3d at 1078.

67. See, e.g., *Berwick*, Labor Comm'n No. 11-46739-EK.

## VI. A Proposed Legislative Solution

Calls for a “third classification” or “third category” (i.e., besides independent contractor and employee) have come from various corners over the past year.<sup>68</sup> From within such cries emerge two polar concerns: (1) will regulating these entities stifle innovation and (2) will *not* regulating these entities abuse citizens who should be offered certain employment benefits.

First, this is a false dichotomy. These entities are not “unregulated” now. They are subject to a set of laws governing worker treatment whether they refer to those workers as “employees” or “contractors.” Whichever they choose, they will have to file a form (W-2, 1099-MISC, 1099-K, etc.) with the IRS each year. They will still have default legal obligations, albeit they will have more concrete, broader ones with respect to employees versus contractors. Satisfying marketplace cries to create a “new category” would not necessarily mean introducing regulation where there was none before. It *might* mean removing a legal exception that perhaps never should have applied to Gig Platforms.

Under normal circumstances, a “contractor” will have much greater flexibility to outline his or her liability and work deliverables in an independent contractor engagement. In software development contracts, for example, the parties tend to choose indemnities, limitations of liability, and warranty disclaimers tailored to the task at hand.<sup>69</sup> This is in contrast to employees, who are presented with an employment agreement that is usually non-negotiable. Gig Platforms, which set the non-negotiable rules of the platform and give instructions to both service providers and users, are in the best position to monitor their own Platform for wrongdoing. They control exactly how work will be performed and choose the compensation level for that work. The work they aggregate can be performed *without special skills* — where worker supply is high, pay is generally lower, and

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68. Noah Lang, *Employee or Contractor? Online Businesses Like Uber Need a New Category*, NEWSWEEK (June 21, 2015, 4:14 PM), <http://www.newsweek.com/employee-or-contractor-online-businesses-uber-need-new-category-345082>; Lauren Weber, *What If There Were a New Type of Worker? Dependent Contractor*, WALL ST. J. (Jan. 28, 2015, 10:28 AM), <http://www.wsj.com/articles/what-if-there-were-a-new-type-of-worker-dependent-contractor-1422405831>; Tristan Zier, *Could Creating a New Class Of Worker Solve The Sharing Economy's Labor Problems?*, FASTCOMPANY (June 19, 2015, 8:25 AM), <http://www.fastcoexist.com/3047617/could-creating-a-new-class-of-worker-solve-the-sharing-economys-labor-problems>; Connie Loizos, *A Third Classification of Worker? Don't Count On It*, TECHCRUNCH (July 2, 2015), <http://techcrunch.com/2015/07/02/a-third-classification-of-worker-dont-count-on-it/?ncid=rss>.

69. This generalization is drawn from my own experience representing contract software developers as well as common legal practice surrounding such contracts.

the public policy justifications for things like workers' compensation and minimum wage are strongest.

The IRS 1099 forms can better reflect our digital reality. A new set of 1099 forms can establish the status of Platform and Marketplace participants.<sup>70</sup> Existing forms that include a 1099-K where payments were routed through a marketplace or services marketplace can remain where they make great sense for marketplaces and contractor marketplaces, who do really just serve as payment processors. A 1099-MISC where a uniquely skilled worker performed a one-off task defined by its deliverable and was paid more than \$600, can continue to work for those with unique skills, who trade on their own reputations. I propose this class of tax reporting forms should also include a "1099-GIG" to report income a Giglancer has been paid by a Gig Platform.<sup>71</sup>

The proposed 1099-GIG would be the only one of these forms that does not presume the traditional independent contractor relationship under all circumstances. It would instead be created by a federal statute (which would preempt state employment laws, etc.). That federal statute would (1) distribute some worker's compensation liability to the Gig Platforms, (2) impose some vicarious liability on the Gig Platforms, (3) impose anti-discrimination laws upon the hiring and firing of Giglancers, (4) allow the Gig Platforms to avoid application of wage and hour laws to the 1099-GIG worker, (5) allow the Gig Platform to require the Giglancer to cover some selected expenses as long as those expenses were disclosed in advance of engagement, and (6) contemplate a grace period, as with the ACA, such that the applicable worker's compensation and vicarious liability laws wouldn't kick in until a certain number of "1099-GIG" were engaged. For example, none of these legislative exceptions and conditions would be effective until an entity filed its 50th 1099-GIG in a single tax year. This would allow early stage companies to avoid costs in the same way that has supported the growth of the on demand economy to date. Each of these statutory mechanisms is discussed in turn as a means to protect the innovation enabled by the 1099 contractor classification, while also serving the public policy goals employment laws were designed to serve. In addition, rather than the status quo — where Gig Platforms have a disincentive to provide or subsidize health, life, or disability insurance for

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70. Note that any of the 1099 forms will require the entity to obtain the social security number or Employer Identification Number of the individual contractor, so to do the same for other 1099 forms would not create an additional burden on startup businesses.

71. There may also be reason to use a "1099-P" where a Contractor Marketplace transmits user's payments to those who perform unique tasks and would be 1099-MISCs but withholds a commission.

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workers for fear they will be reclassified as employees, an updated system could require that the provision of such benefits be ignored in any reclassification analysis. In other words, whether or not Uber and Lyft elected to pay for a part of drivers' health insurance premiums, standing alone, would not create a risk of reclassification.<sup>72</sup>

Critically, any such statute should impose such obligations regardless of any click-wrapped contract terms used to establish the relationships between the Giglancer, Gig Platform, and consumer. The genesis of click-through enforceability was in the context of a software license,<sup>73</sup> not an agreement for personal services. We should instead use the kind of contract law applied to agreements for personal services to govern the relationships of Giglancers and Gig Platforms. I submit that it is sensible to impose public policy limits on contractual obligations of a Giglancer in the same way our laws limit employment agreements' enforceability, and that we can do that through the above-outlined statute by referencing existing state employment laws that supersede employment contracts in the marketplace today.

#### **A. Workers Compensation Liability for Gigs**

Gig Platforms have extensive control over most aspects of the Gig itself, but never *whether* or *how much* the Giglancer elects to work on a given day.<sup>74</sup> Gig Platforms do not — and cannot — prohibit a Giglancer from taking work elsewhere, including from competitors. I submit that Gig Platforms' liability to workers for injuries sustained on the job arise only when the Giglancer is performing the task for that Gig Platform within the scope of any Gig Platform instructions — in the moments when the Gig Platform has control over the Giglancer that mirrors control it would have over an employee, and when the Gig Platform is tapping its main revenue stream through the worker's labor. For example, a Giglancer on the

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72. Note that the IRS has declared that an employers' paying individual market premiums does not meet the requirement that employers provide "Minimum Essential Coverage" under the ACA. See I.R.S. Notice 2013-54 (Sept. 13, 2013). This is despite the fact that Qualified Health Plans on the individual market meet the requirements promulgated for employer's "Minimum Essential Coverage." One might argue that this structure unfairly prejudices smaller business with less negotiating leverage, or that it harms the public because health insurers can discriminate based on pre-existing conditions in the small group market. I hypothesize that the illogical result of IRS Notice 2013-54 arises from the IRS' desire to avoid employers using federal subsidies to help pay for employees' care. If this is indeed a concern, Gig Platforms could additionally be required to pay their share (i.e., the percentage of Giglancer income that originates with that Gig Platform) of the applicable individual's federal health insurance subsidy.

73. See *Specht v. Netscape Commc'ns. Corp.*, 306 F.3d 17 (2d Cir. 2002).

74. This is true, although they may provide incentives to well-reviewed workers in order to try to get them working more.

Taskrabbit platform who drops a hammer on his foot and breaks it while performing a gig that will make both himself and Taskrabbit money (but will drive a customer to use Taskrabbit rather than his individual services again), gets whatever worker's compensation would be available to employees under state laws. By contrast, a 1099-GIG worker for both Uber and Lyft hurt by an exploding gas canister while refilling, would be treated as an independent contractor; he could not recover from either Gig Platform by virtue of his 1099-GIG filing from those platforms because he was outside of the scope of work for either Gig.

### B. Vicarious Liability for Gig Platforms

Gig Platforms profit by advertising, to acquire public trust, in their ability to deliver the specified Gig safely and to customers' satisfaction. If that trust is a core reason for the sustainability of a business — as it must be with a Gig Platform — the entity should not be able to simultaneously profit from that trust and disclaim responsibility for breaking that trust. For example, Uber and Lyft were sued on December 2014, by the Los Angeles District attorney, who argues they “misrepresent and exaggerate” the quality of their background checks on their drivers.<sup>75</sup> Yet their surveyed terms would make the alleged crimes and torts occurring on the platform discussed *supra* (rape, stabbings, etc.) the responsibility of drivers and users alone. The Gig Platforms currently disclaim all of this liability.

I submit, therefore, that the proposed legislation requires courts to apply the laws of vicarious liability applicable to employees to 1099-GIG contractors acting within the scope of their Gig and/or pursuant to a Gig Platform's instructions. If an Uber driver picks up a passenger and assaults her rather than driving her to her destination, Uber would be subject to civil liability to the passenger in addition to the assaulting driver's personal criminal liability. In addition, if a crime or tort is enabled by the Gig Platform, the Gig Platform would be vicariously liable (for example, if a driver uses a rideshare app trip to know a passenger would be out of town and subsequently burgles the house where he picked her up).<sup>76</sup> One can imagine how the threat of such liability would motivate larger enterprises to implement additional safety mechanisms (such as the video cameras that already operate in taxi cabs at all times) and/or more extensive screening of

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75. See Associated Press, *California Sues Uber Over Background Checks; Lyft Settles*, BOSTON GLOBE, Dec. 10, 2014, <http://www.bostonglobe.com/business/2014/12/10/california-sues-uber-over-background-checks-lyft-settles/YzQlr4ZUm9H4aGOGzeJNmJ/story.html>.

76. Tara Fowler, *Uber Driver Allegedly Drove Woman to Airport, Then Went Back to Rob Her Home*, PEOPLE, Apr. 1, 2015, <http://www.people.com/article/uber-driver-arrested-attempted-burglary>.

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Giglancers, which will increase public safety. By contrast, if a Lyft driver exited his car and began beating a man on the street,<sup>77</sup> Lyft would not be liable because he was outside of the scope of his Gig.

In addition, states would be free to impose particular insurance requirements, as California has.<sup>78</sup> If the IRS had created the 1099-G category, new insurance and public policy regulations could more directly target the actors they seek to regulate.

### C. Removing Wage and Hour Laws for Giglancers

Because the Giglancer can choose how much to work and when to do it, there is less need for Depression-era protections of mandatory work breaks. Because Giglancers are free to shift between Gig Platforms if the economics of one Gig Platform no longer allow them to make sufficient income, there is no traditional justification for minimum wage laws or unemployment insurance schemes to apply to Giglancers.<sup>79</sup> Because Gigs are available to the same workers on multiple Gig Platforms at once, the danger of finding oneself without income because of the corporate restructuring, downsizing, or closing of one Gig Platform is minimal. Because the traditional justifications for wage, hour, and unemployment laws are not applicable to Giglancer circumstances, the proposed legislation would require courts to treat Giglancers as independent contractors when applying these laws.

### D. Removing Expense Reimbursement Rules for Giglancers

Because a Giglancer may use the same possession in performance of gigs for multiple Gig Platforms, it would not make much sense to require Uber to cover the cost of a car and gas that is also used to help its main competitor, Lyft, profit. This is especially true when a Giglancer is using “expenses” like a car she already owned. As such, for the payment of

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77. Elyce Kirchner & David Paredes, *Exclusive Video: Lyft Driver Allegedly Attacks Pedestrian*, NBC BAY AREA (Feb. 11, 2015, 3:40 PM), <http://www.nbcbayarea.com/news/local/Exclusive-Video-Lyft-Driver-Allegedly-Attacks-Pedestrian-240026921.html>.

78. *Compare* Legis. Counsel’s Digest, Ch. 389, Assemb. B. 2293 (Cal. 2014) (discussing Transportation Network Companies and insurance requirements), *with* Uber’s Insurance coverage, which falls slightly below this level at publication (*see* Nairi, *Insurance for UberX With Ridesharing*, UBER GLOBAL (Feb. 10, 2014), <http://newsroom.uber.com/2014/02/insurance-for-uberx-with-ridesharing>).

79. Prior to drafting this article, I conducted informal interviews with five Lyft drivers during rides. Of these five, four worked for Uber as well sometimes, and these people switched platforms depending on the demand on that platform. In addition, three of five reported that they had other jobs besides Giglancing. One woman explained she was a certified family therapist with a master’s degree and an ongoing practice, but she drove Lyft on the weekends to have enough money to pay San Francisco rent.

business expenses, the proposed legislation would require the application of state law applicable to independent contractors unless a state specifically legislated to have a particular expense covered under particular circumstances. Even without regulations requiring the payment of expenses, Gig Platforms may have market reasons to cover or share certain expenses.<sup>80</sup>

### **E. Providing a “Startup” Grace Period**

Those who criticize any new regulation of Gig Platforms often bemoan what they consider an inevitable stifling of innovation through regulation: “If Uber and Lyft had to guarantee minimum wages, buy cars, and take on the liability for 25,000 cars in a city, they could not have existed in the first place!”

Early-stage companies often have no choice but to ignore onerous laws or see their businesses fail. Legal compliance can be expensive. Without opining as to whether this practice is correct, it’s certainly true that Uber and Lyft (and a number of other “on-demand” entities) are not in compliance with every city ordinance, livery fee, hotel tax, etc. In other contexts — namely the ACA<sup>81</sup> — expensive compliance requirements exempt smaller businesses; then, once a business grows large enough (for example, 100 employees) regulatory compliance becomes mandatory. If stifling innovation is a concern, it can be assuaged by exempting Gig Platforms with less than  $n$  (i.e., 50) 1099-G forms filed in a given year from being treated as employers for vicarious liability or workers’ compensation purposes.

## **VII. Conclusion**

For our laws to effectively evolve with our markets, a critical review of those markets is warranted. In the case of the Gig Platform, as distinguished from a Marketplace where an independent contractor relationship fits traditional public policy justifications and a Service Platform where an employee relationship fits traditional public policy justifications, no old-world categories fit perfectly. Rather than leaving Gig Platforms guessing — or spending to fight litigation rather than

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80. See, e.g., Josh Lowensohn, *Lyft Goes After Uber’s Black Cars With New High-End Rides*, THE VERGE, May 8, 2014, <http://www.theverge.com/2014/5/8/5694720/lyft-goes-after-ubers-black-cars-with-new-high-end-rides>.

81. The ACA and its implementing regulations create a filing requirement for businesses with 50-100 employees, but only require employers to provide “Minimum Essential Coverage” if they have 100 or more employees. See Affordable Care Act Tax Provisions for Employers, IRS, <http://www.irs.gov/Affordable-Care-Act/Employers>.

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comply with a reasoned framework — there is an opportunity to promulgate intelligent revisions to worker classification frameworks. If promulgated from Congress in a way that clearly indicates to the marketplace where compliance is required, this is feasible. Congress would need to (1) create a means to identify a Giglancer, such as a particular annual tax filing, (2) identify where Giglancers should be treated as employees, (3) identify where they should be treated as independent contractors, and (4) categorically limit the enforceability of online terms in ways consistent with public policy.

“Take it or leave it” terms have grown commonplace in e-commerce, but there are limits to where public policy permits them. Courts and administrative agencies have begun, piecemeal, to attempt to define such limits, but the nature of the worker classification questions and the need for case-by-case analysis of the issue by a fact finder makes it incredibly difficult for market actors to implement compliance.

It seems an appropriate time, therefore, for Congress to provide such guidance. Fortunately, a simple comparison of On-Demand entities reveals a laser-focused way to do so.

**Appendix A**

	<b>Liability Cap</b>	<b>Liability Limits</b>
<b>Uber</b>	Without prejudice to the foregoing, and insofar as allowed under mandatory applicable law, Uber's aggregate liability shall in no event exceed an amount of EUR 500 or, where applicable, the equivalent of that amount in the currency used by you for the payment of the transportation services to the Transportation Provider.	Uber shall not be liable for any damages resulting from the use of (or inability to use) the Website or Application (but to the exclusion of death or personal injury), including damages caused by malware, viruses or any incorrectness or incompleteness of the Information or the Website or Application, unless such damage is the result of any wilful misconduct or from gross negligence on the part of Uber.
<b>Lyft</b>	In the event that you have a dispute with one or more Users, you agree to release Lyft (including our affiliates and each of our respective officers, directors, employees, agents, shareholders, and suppliers) from claims, demands and damages of every kind and nature, known and unknown, suspected and unsuspected, disclosed and undisclosed, arising out of or in any way connected to such disputes with other Users or to your use of the Lyft Platform or participation in the Services	In no event will we, our affiliates, or each of our respective officers, directors, employees, agents, shareholders or suppliers, be liable to you for any incidental, special, punitive, consequential, or indirect damages (including, but not limited to, damages for deletion, corruption, loss of data, loss of programs, failure to store any information or other content maintained or transmitted by the Lyft Platform, service interruptions, or for the cost of procurement of substitute services) arising out of or in connection with the Lyft Platform, the Services, or this Agreement, however arising including negligence
<b>Taskrabbit</b>	Common language + COMPANY DOES NOT ACCEPT ANY LIABILITY WITH RESPECT TO THE QUALITY OR FITNESS OF ANY WORK PERFORMED VIA THE SERVICE.  IF, NOTWITHSTANDING THE FOREGOING EXCLUSIONS, IT IS DETERMINED THAT COMPANY OR ITS PARTNERS IN PROMOTIONS, SWEEPSTAKES OR CONTESTS, AFFILIATES, ITS LICENSORS, OR ANY OF SUCH PARTIES' AGENTS, EMPLOYEES, OFFICERS, DIRECTORS, CORPORATE PARTNERS, OR PARTICIPANTS IS LIABLE FOR DAMAGES IN EXCESS OF THE TASKRABBIT GUARANTEE TERMS, IN NO EVENT WILL THE AGGREGATE LIABILITY, WHETHER ARISING IN CONTRACT, TORT, STRICT LIABILITY OR OTHERWISE, EXCEED THE TOTAL FEES PAID BY YOU TO COMPANY DURING THE SIX (6) MONTHS PRIOR TO THE TIME SUCH CLAIM AROSE.	The Service is only a venue for connecting Users. Because Company is not involved in the actual contact between Users or in the completion of the Task, in the event that you have a dispute with one or more Users, you release Company (and our officers, directors, agents, investors, subsidiaries, and employees) from any and all claims, demands, or damages (actual or consequential) of every kind and nature, known and unknown, suspected and unsuspected, disclosed and undisclosed, arising out of or in any way connected with such disputes. Company expressly disclaims any liability that may arise between Users of its Service. Company has no control over the use of any User's account and expressly disclaims any liability derived therefrom. Each Tasker hereby waives all rights and releases the Company from, and shall neither sue nor bring any proceeding against any such parties for, any claim or cause of action, whether now known or unknown, for defamation, invasion of right to privacy, publicity or personality or any similar matter, or based upon or relating to the use and exploitation of such Tasker's identity, likeness or voice in connection with the Service. Each User assumes all liability for proper classification of such User's workers as independent contractors or employees based on applicable legal guidelines.

	Liability Cap	Liability Limits
<p><b>InCloudCounsel</b></p>	<p>EXCEPT AS PROHIBITED BY LAW, YOU WILL HOLD INCLUD AND ITS OFFICERS, DIRECTORS, EMPLOYEES, AND AGENTS HARMLESS FOR ANY INDIRECT, PUNITIVE, SPECIAL, INCIDENTAL, OR CONSEQUENTIAL DAMAGE, HOWEVER IT ARISES (INCLUDING ATTORNEYS' FEES AND ALL RELATED COSTS AND EXPENSES OF LITIGATION AND ARBITRATION, OR AT TRIAL OR ON APPEAL, IF ANY, WHETHER OR NOT LITIGATION OR ARBITRATION IS INSTITUTED), WHETHER IN AN ACTION OF CONTRACT, NEGLIGENCE, OR OTHER TORTIOUS ACTION, OR ARISING OUT OF OR IN CONNECTION WITH THIS AGREEMENT, INCLUDING WITHOUT LIMITATION ANY CLAIM FOR PERSONAL INJURY OR PROPERTY DAMAGE, ARISING FROM THIS AGREEMENT AND ANY VIOLATION BY YOU OF ANY FEDERAL, STATE, OR LOCAL LAWS, STATUTES, RULES, OR REGULATIONS, EVEN IF INCLUD HAS BEEN PREVIOUSLY ADVISED OF THE POSSIBILITY OF SUCH DAMAGE. EXCEPT AS PROHIBITED BY LAW, IF THERE IS LIABILITY FOUND ON THE PART OF INCLUD, IT WILL BE LIMITED TO THE AMOUNT PAID FOR THE PRODUCTS AND/OR SERVICES, AND UNDER NO CIRCUMSTANCES WILL THERE BE CONSEQUENTIAL OR PUNITIVE DAMAGES. SOME STATES DO NOT ALLOW THE EXCLUSION OR LIMITATION OF PUNITIVE, INCIDENTAL OR CONSEQUENTIAL DAMAGES, SO THE</p>	
<p><b>Etsy</b></p>	<p>ETSY'S LIABILITY, AND (AS APPLICABLE) THE LIABILITY OF ETSY'S SUBSIDIARIES, OFFICERS, DIRECTORS, EMPLOYEES, AND SUPPLIERS, TO YOU OR ANY THIRD PARTIES IN ANY CIRCUMSTANCE IS LIMITED TO THE GREATER OF (A) THE AMOUNT OF FEES YOU PAY TO ETSY IN THE 12 MONTHS PRIOR TO THE ACTION GIVING RISE TO LIABILITY, AND (B) \$100. SOME STATES DO NOT ALLOW THE EXCLUSION OR LIMITATION OF INCIDENTAL OR CONSEQUENTIAL DAMAGES, SO THE ABOVE LIMITATION OR EXCLUSION MAY NOT APPLY TO YOU</p>	<p>IN NO EVENT SHALL ETSY, AND (AS APPLICABLE) ETSY'S SUBSIDIARIES, OFFICERS, DIRECTORS, EMPLOYEES OR ETSY'S SUPPLIERS BE LIABLE FOR ANY DAMAGES WHATSOEVER, WHETHER DIRECT, INDIRECT, GENERAL, SPECIAL, COMPENSATORY, CONSEQUENTIAL, AND/OR INCIDENTAL, ARISING OUT OF OR RELATING TO THE CONDUCT OF YOU OR ANYONE ELSE IN CONNECTION WITH THE USE OF THE SITE, ETSY'S SERVICES, OR THIS AGREEMENT, INCLUDING WITHOUT LIMITATION, LOST PROFITS, BODILY INJURY, EMOTIONAL DISTRESS, OR ANY SPECIAL, INCIDENTAL OR CONSEQUENTIAL DAMAGES</p>

	<p data-bbox="386 575 410 758"><b>Liability Cap</b></p> <p data-bbox="386 575 410 758"><b>Liability Limits</b></p> <p data-bbox="444 302 764 1031">EXCEPT AS PROVIDED IN SECTION 13, UNDER NO CIRCUMSTANCES AND UNDER NO LEGAL THEORY (WHETHER IN CONTRACT, TORT, OR OTHERWISE) SHALL SHYP BE LIABLE TO YOU OR ANY THIRD PARTY FOR (A) ANY INDIRECT, INCIDENTAL, SPECIAL, EXEMPLARY, CONSEQUENTIAL OR PUNITIVE DAMAGES, INCLUDING LOST PROFITS, LOST SALES OR BUSINESS, LOST DATA, OR (B) ANY DIRECT DAMAGES, COSTS, LOSSES OR LIABILITIES IN EXCESS OF THE FEES ACTUALLY PAID BY YOU IN THE LAST SIX (6) MONTHS PRECEDING THE EVENT GIVING RISE TO YOUR CLAIM, OR, IF NO FEES APPLY, one hundred (\$100) U.S. dollars. THE PROVISIONS OF THIS SECTION ALLOCATE THE RISKS UNDER THIS TOS BETWEEN THE PARTIES, AND THE PARTIES HAVE RELIED ON THESE LIMITATIONS IN DETERMINING WHETHER TO ENTER INTO THIS TOS.</p>
<p data-bbox="565 1625 630 1656"><b>Shyp</b></p>	

## Appendix B

	Warranty Disclaimers	Performance Warranty
<b>Uber</b>		<p>“The quality of the transportation services requested through the use of the Application or the Service is entirely the responsibility of the Transportation Provider who ultimately provides such transportation services to you. Uber under no circumstance accepts liability in connection with and/or arising from the transportation services provided by the Transportation Provider or any acts, actions, behaviour, conduct, and/or negligence on the part of the Transportation Provider. Any complaints about the transportation services provided by the Transportation Provider should therefore be submitted to the Transportation Provider.”</p>
<b>Lyft</b>	<p>Where permitted by law, “disclaim any implied warranties of title, merchantability, fitness for a particular purpose and non-infringement. Some states do not allow the disclaimer of implied warranties”; “do not warrant that your use of the Lyft Platform or Services will be accurate, complete, reliable, current, secure, uninterrupted, always available, or error-free, or will meet your requirements, that any defects in the Lyft Platform will be corrected, or that the Lyft Platform is free of viruses or other harmful components. We disclaim liability for, and no warranty is made with respect to, connectivity and availability of the Lyft Platform or Services.”</p>	<p>“[The Driver] will be solely responsible for any and all liability that results from or is alleged as a result of your provision of Services, including, but not limited to personal injuries, death and property damages (however, this provision shall not limit the scope of Lyft’s insurance policies referenced on <a href="http://www.lyft.com/safety">www.lyft.com/safety</a>)... We have no control over the quality or safety of the transportation that occurs as a result of the Services. We cannot ensure that a Driver or Rider will complete an arranged transportation service. We cannot guarantee that each User is who he or she claims to be. Please use common sense when using the Lyft Platform and Services...”</p>

	<b>Warranty Disclaimers</b>	<b>Performance Warranty</b>
<b>Taskrabbit</b>	<p>"NO WARRANTIES OR REPRESENTATIONS ABOUT THE ACCURACY OR COMPLETENESS OF THE CONTENT PROVIDED THROUGH THE SERVICE OR THE CONTENT OF ANY SITES LINKED TO THE SERVICE" ... "ASSUMES NO LIABILITY OR RESPONSIBILITY FOR ANY (I) ERRORS, MISTAKES, OR INACCURACIES OF CONTENT; (II) PERSONAL INJURY OR PROPERTY DAMAGE, OF ANY NATURE WHATSOEVER, RESULTING FROM YOUR ACCESS TO AND USE OF THE SERVICE; (III) ANY UNAUTHORIZED ACCESS TO OR USE OF OUR SECURE SERVERS AND/OR ANY AND ALL PERSONAL INFORMATION AND/OR FINANCIAL INFORMATION STORED THEREIN; NEITHER COMPANY NOR ITS AFFILIATES OR LICENSORS IS RESPONSIBLE FOR THE CONDUCT, WHETHER ONLINE OR OFFLINE, OF ANY USER... EACH CLIENT IS RESPONSIBLE FOR DETERMINING THE TASK AND SELECTING THEIR TASKER AND DETERMINING THE TASK AND COMPANY DOES NOT WARRANT ANY GOODS OR SERVICES PURCHASED BY A CLIENT AND DOES NOT RECOMMEND ANY PARTICULAR TASKRABBIT. COMPANY DOES NOT PROVIDE ANY WARRANTIES OR GUARANTEES REGARDING ANY TASKER'S PROFESSIONAL ACCREDITATION, REGISTRATION OR LICENCE."</p>	<p>"Company is not responsible for the performance of Users, nor does it have control over the quality, timing, legality, failure to provide, or any other aspect whatsoever of Tasks Clients, nor of the integrity, responsibility or any of the actions or omissions whatsoever of any Users. Company does not have control over the quality, timing or legality of Tasks delivered by its Taskers. Company makes no representations about the suitability, reliability, timeliness, or accuracy of the Tasks requested and provided by Users identified through the Service whether in public, private, or offline interactions."</p>
<b>InCloudCounsel</b>	<p>"TO THE FULLEST EXTENT PERMITTED BY LAW, INCLUD EXPRESSLY DISCLAIMS ALL WARRANTIES OF ANY KIND, WHETHER EXPRESS OR IMPLIED, INCLUDING BUT NOT LIMITED TO IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, TITLE AND NON-INFRINGEMENT... INCLUD MAKES NO WARRANTY THAT: (A) THE SITE, APPLICATIONS, OR THE MATERIALS WILL MEET YOUR REQUIREMENTS; (B) THE SITE, APPLICATIONS, OR THE MATERIALS WILL BE AVAILABLE ON AN UNINTERRUPTED, TIMELY, SECURE OR ERROR-FREE BASIS; (C) THE RESULTS THAT MAY BE OBTAINED FROM THE USE OF THE SITE, APPLICATIONS, OR ANY MATERIALS OFFERED THROUGH THE SITE OR APPLICATIONS, WILL BE ACCURATE OR RELIABLE; OR (D) THE QUALITY OF ANY PRODUCTS, SERVICES, INFORMATION OR OTHER MATERIAL PURCHASED OR OBTAINED BY YOU THROUGH THE SITE, APPLICATIONS, OR IN RELIANCE ON THE MATERIALS WILL MEET YOUR EXPECTATIONS."</p>	<p>"InCloud is not the publisher or author of the User Content. InCloud takes no responsibility and assumes no liability for any content posted by you or any third party - You are legally and ethically responsible for any User Content - writings, files, pictures or any other work - that you post or transmit using any InCloud service that allows interaction or dissemination of information."</p>

	<b>Warranty Disclaimers</b>	<b>Performance Warranty</b>
<b>Etsy</b>	<p>"[Where local law permits], ETSY [and its affiliates] SPECIFICALLY DISCLAIM ANY IMPLIED WARRANTIES OF TITLE, MERCHANTABILITY, PERFORMANCE, FITNESS FOR A PARTICULAR PURPOSE AND NON-INFRINGEMENT. IN ADDITION, NO ADVICE OR INFORMATION (ORAL OR WRITTEN) OBTAINED BY YOU FROM ETSY SHALL CREATE ANY WARRANTY." "You agree that Etsy is a venue and as such is not responsible or liable for any content, for example, data, text, information, usernames, graphics, images, photographs, profiles, audio, video, items, and links posted by you, other users, or outside parties on Etsy. You use the Etsy service at your own risk."</p>	<p>"Etsy has no control over the quality, safety, morality or legality of any aspect of the items listed, the truth or accuracy of the listings, the ability of sellers to sell items or the ability of buyers to pay for items. Etsy does not pre-screen users (except for services that require an application) or the content or information provided by users. Etsy cannot ensure that a buyer or seller will actually complete a transaction...Etsy cannot guarantee the true identity, age, and nationality of a user. Etsy encourages you to communicate directly with potential transaction partners through the tools available on the Site. You may also wish to consider using a third-party escrow service or services that provide additional user verification..."</p>
<b>Shyp</b>	<p>"THE SERVICE, INCLUDING THE SITE, SOFTWARE AND CONTENT, AND ANY SERVER AND NETWORK COMPONENTS ARE PROVIDED ON AN "AS IS" AND "AS AVAILABLE" BASIS WITHOUT ANY WARRANTIES OF ANY KIND, AND SHYP EXPRESSLY DISCLAIMS ANY AND ALL WARRANTIES, WHETHER EXPRESS OR IMPLIED, INCLUDING, BUT NOT LIMITED TO, THE IMPLIED WARRANTIES OF MERCHANTABILITY, TITLE, FITNESS FOR A PARTICULAR PURPOSE, AND NON-INFRINGEMENT."</p>	<p>"If a shipment is lost or damaged while in Shyp's Possession, you may file a claim with Shyp for reimbursement. All claims must be initiated within [30 days] of the mailing date by contacting us at [hello@shyp.com] where we will provide more details on how to file a claim. The original receipt of the shipping label and an image or photograph of the damaged item may be required when filing a claim. If the recipient accepts the shipment without noting any damage on the delivery record, we will assume the shipment was delivered in good condition. In order for us to consider a claim for damage, the contents, original shipping cartons, and packing must be available to us for inspection. Written documentation (such as a receipt) supporting the amount of a claim will also be required. All supporting documentation must be submitted within 30 days of claim initiation (60 days of mailing date) of the mailing date."</p>

**Appendix C**

<b>Warranty Disclaimers</b>	
<b>Uber</b>	In connection with: "(i) your use of the Services or services or goods obtained through your use of the Services; (ii) your breach or violation of any of these Terms; (iii) Uber's use of your User Content; or (iv) your violation of the rights of any third party, including Third Party Providers" and damage to Uber arising from User Content posted, user "violation or breach of any term of these User Terms or any applicable law or regulation, whether or not referenced herein," user "violation of any rights of any third party, including Transportation Providers arranged via the Application, or your use or misuse of the Application or Service."
<b>Lyft</b>	Claims relating to or arising out of your use of the Lyft Platform and participation in the Services (in violation of laws or third party rights)
<b>Taskrabbt</b>	Taskers' worker misclassification/employment claims arising from platform use, as well as "(i) your use or inability to use the Service, or (ii) any content submitted by you or using your account to the Service, including, but not limited to the extent such content may infringe on the intellectual rights of a third party or otherwise be illegal or unlawful."
<b>InCloudCounsel</b>	No indemnity; hold harmless cause for any damage arising "out of or in connection with" the Terms.
<b>Etsy</b>	Claims due to or arising from breach of the Terms, violations of law, or violations of any third party rights.
<b>Shyp</b>	Claims "arising or resulting from your breach of this TOS, any of Your Content, or your other access, contribution to, use or misuse of the Service."

### Appendix D

Forum (example)	Demand Basis	Demand Predictability	Work Relation to Entity Business	Entity Responsibility for Worker Unemployment	Vicarious Liability?	Worker's Comp-like Responsibility	Disability Responsibility	Control of Hours Worked	Control of Workflow	Control of Means	Payment of Expenses for Task
Marketplace (eBay, Etsy)	Quality of goods sold	Low	Tangential	0%	CDA Section 230 Immunity	No	No	Worker	Worker	Worker	Worker
Contractor Marketplace (InCloud Counsel)	Quality of services performed	Low	Tangential	0%	CDA Section 230 Immunity	No	No	Worker	Worker	Worker	Worker
Gig Platform (Uber, Lyft, Taskrabbit)	Quality of services performed	Low	Central	0%	??	Yes	??	Worker	Platform	Platform	Worker
Service Platform (Instacart, Shyp)	Quality of services performed	High	Central	100%	Yes	Yes	Yes	Entity	Platform	Platform	Worker

\* \* \*