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NONSTANDARD WORK AND WORKERS IN THE GIG WORKFORCE: AN INTRODUCTION AND PENNSYLVANIA WORKERS' COMPENSATION DOCTRINE

LEGAL CONSIDERATIONS

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I. Introduction

The Pennsylvania workers' compensation analysis surrounding workers laboring in nonstandard categories is straightforward as to some workers but untested as to others. General rules exist, both in the case law and in statute, to test whether a purported independent contractor is in fact in such a role or is, instead, an employee. Rules also exist for determining the employee status of temporaries and leased workers. Pennsylvania even has a remarkable case that holds that the employee of a franchisee is not the statutory employee of the franchisor when the franchisee defaults on its workers' compensation insurance obligation.[1]

The law is untested, meanwhile, with regard to the workers' compensation rights of those laboring in the true gig workforce, like Uber and Lyft drivers, handymen securing jobs through Taskrabbit and Handy, and *ad hoc* housekeepers laboring for an Airbnb host.

An attempt to predict how judges will interpret existing law, as to both contracted-out work and true gig work, seems a worthy task, as the population of workers in these categories is said to be on the rise. In general, the workplace has been said to have "fissured," with businesses, for a variety of reasons, aggressively contracting-out many of their traditional undertakings, concentrating instead on their "core competencies."[2]

[1] Saladworks, LLC v. WCAB (Gaudioso & UEGF), 124 A.3d 790 (Pa. Commw. 2015) (Commonwealth Court reversing Appeal Board decision holding that a restaurant franchisor could be a statutory employer; in doing so, court freed alleged statutory employer/restaurant franchisor from liability).

[2] *See* DAVID WEIL, THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT (2014). *See also* Emily A. Spieler, *(Re)assessing the Grand Bargain: Compensation for Work*

With regard to the true gig economy, the worker, to be able to secure gigs through the intermediary's app, must similarly agree, at the outset, that he or she is an independent contractor. Many such enterprises reference in their contracts the corresponding lack of workers' compensation coverage as well. For example, the Postmates agreement, found on its website, provides:

> Workers Compensation/Occupational Accident Insurance: Contractor agrees that Contractor will not be eligible for workers' compensation benefits through Postmates, and instead, will be responsible for providing Contractor's own workers' compensation insurance or occupational accident insurance, if permitted by law.[3]

In Washington state, notably, workers of this app-based enterprise filed a number of injury claims, prompting the powerful agency in that state, treating the workers as employees, to assess retroactive premiums on the company.[4]

On this point, differences of opinion exist with regard to whether such workers should be considered independent contractors or, instead, employees – that is, workers who are potentially entitled to workers' compensation. Some assert that regulation of sharing-economy enterprises – like obliging such businesses to comply with workers' compensation laws – will crush innovation and destroy opportunities for workers.[5] The competing social critique centers on a concern over unfair distribution of wealth. As noted in Part I of this article, the critique is that intermediaries, benefitted by technological innovations, become enriched while the subcontracted individuals who actually undertake the work are left with depressed pay, imperiled occupational health, and lack of the traditional social protections that are linked to employment.[6]

Injuries in the United States, 1900-2017, 69 RUTGERS UNIVERSITY LAW REVIEW 891, 958-959 (2017) (stating that the "fissured workplace involves increasingly complex firm-to-firm relationships, including layers of contracting and subcontracting, franchising, and use of staffing agencies. A growing number of people are classified as independent contractors, including workers who work in the gig economy, such as Uber drivers or Task Rabbits. Independent contractors are presumptively outside the reach of employment laws and benefits that are linked to an employment relationship, including workers compensation. While they may retain rights to sue in tort, these workers therefore lack social insurance for any non-negligently-caused injuries that may occur."), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3079871 (as of May 10, 2018).

[3] *See* https://fleet.postmates.com/legal/agreement (as of May 8, 2018).

[4] Nat Levy, *Postmates Ordered to Pay 2+ Years of Workers' Comp Premiums for More than 3000 Couriers* (Dec. 13, 2016), https://www.geekwire.com/2016/postmates-ordered-pay-2-years-workers-comp-premiums-3000-couriers/ (as of May 4, 2018).

[5] *See* Emily C. Atmore, *Killing the Goose that Laid the Golden Egg: Outdated Employment Laws are Destroying the Gig Economy*, 102 MINNESOTA LAW REVIEW 988 (Dec. 2017).

[6] Molly Tran & Rosemary K. Sokas, *The Gig Economy and Contingent Work: An Occupational Health Assessment*, 59 JOURNAL OF OCCUPATIONAL AND ENVIRONMENTAL MEDICINE 63 (Editorial, April 2017); Steven Hill, *The Sharing-the-Crumbs Economy: Why Silicon Valley's Techno-Utopian Vision of "Share Economy" is a Mirage*, THE GLOBALIST: RETHINKING GLOBALIZATION (Dec. 8, 2015), https://www.theglobalist.com/united-states-economy-workforce-labor/ (as of May 4, 2018).

This concern seems urgent, if it is true that more and more of the population – and not just students, the retired, and other part-timers – will be laboring in the true gig workforce.[7]

This paper recognizes these differences of opinion but concentrates not on philosophical matters but on how the law works – or could work – to address work injuries and deaths. It treats both the more familiar nonstandard work categories and the true gig workforce as well. The next section, Section II, reviews the traditional classifications of work – standard and non-standard – and explains how Pennsylvania workers' compensation law has treated the issue of injuries sustained by workers in nonstandard work. Section III then discusses in more detail the Pennsylvania legal tests for distinguishing independent contractors from employees. Section IV reviews how Pennsylvania workers' compensation laws have, from a structural point of view, treated the issue of which workers to include or exclude.

In Section V, this paper reviews legal developments in the area of the true gig workforce, a critical undertaking as laws in some states are being amended to address applicability, and courts are beginning to circulate decisions addressing the topic. Section VI inquires how Pennsylvania workers' compensation law would respond to a claim by an injured gig workforce worker, and what remedy for personal injury exists if such workers possess no workers' compensation remedy. The conclusion of this article briefly discusses proposals for completely different approaches.

II. Traditional Legal Classifications of Work; Distinguishing Standard Work from Nonstandard

NIOSH Director John Howard identifies as "standard work" two familiar patterns of labor. The first, which he calls the "industrial model," is the full-time work, in both the manufacturing and service sectors, that has most recently predominated in society – the nine-to-five process of workers laboring with an employer for an indefinite period of time. Control by the employing enterprise is usually clear in such situations. The second, which he calls the "craft model," is the work undertaken (typically) by skilled tradesmen laboring out of union halls for select employers, typically for finite periods. As Howard notes, "When the project ends, so does the worker's employment." He further remarks, in light of this *latter* pattern, "In many ways, the new nonstandard work arrangements look more like the 'craft' model, and less like the industrial model."[8]

When workers in either of these standard work categories are classified – or arbitrarily reclassified – as independent contractors, the workers' compensation law will analyze the relationship to ascertain whether the alleged employer has retained control, or the right to control, the worker's work. If such control is retained, a determination that the worker was an

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[7] A seriously injured Uber driver who was profiled in a 2016 article stated that his main source of income was driving for Uber. *See* Carolyn Said, *When Uber Drivers are Hurt at Work, Who Pays?* (June 23, 2016), https://www.sfchronicle.com/business/article/When-Uber-drivers-are-hurt-at-work-who-pays-8321792.php (as of May 20, 2018).

[8] *See* John Howard, M.D., J.D., *Nonstandard Work Arrangements and Worker Health and Safety*, 60 AMERICAN JOURNAL OF INDUSTRIAL MEDICINE, p.10 (2017), http://onlinelibrary.wiley.com/doi/10.1002/ajim.22669/abstract (as of May 4, 2018).

employee usually unfolds. Indeed, for workers in the *construction industry*, the law in Pennsylvania presumes that he or she is an employee unless the defendant proves otherwise.[9]

The practice of employers unreasonably characterizing (that is, misclassifying) their workers as independent contractors is a century-long phenomenon. A more contemporary phenomenon is the growth of *intended* nonstandard work. Such work includes (a) work through a temporary or staffing agency; and (b) labor under the auspices of a Professional Employer Organization (PEO) (also known as an employee leasing firm). In these situations, employment status can become ambiguous, but employers and courts rarely deny that the injured worker was the employee of *some* enterprise. Other workers are those (c) freelancing in one's own full- or-part-time enterprise (of course, a pattern of work of longstanding); and (d) working in the true gig workforce, to wit, labor via platform intermediaries in the new sharing economy.

To this list may be added the workers of franchisees. As with those laboring via temporary agencies, such workers are usually considered employees of some entity, but their employment relationship with franchisors has been an issue in Pennsylvania.[10]

A. ***Temporary/Staffing Company Workers***. No *per se* rule exists with regard to whether an individual, first retained by a temporary agency, remains an employee of the agency, as opposed to the temporary employer, when he or she suffers a work injury. The control test is applicable.[11] As a practical matter, most temporary agencies will cover this issue in the contract of hiring, and a sales pitch of such agencies is that they provide workers' compensation coverage, thus relieving the temporary employer of potential liability. In any event, "Under Pennsylvania law, there is a presumption that an employee remains an employee of the lending employer [the temporary agency] unless evidence shows that the borrowing employer [the agency's client] assumed control over the worker's manner of performing his work."[12]

Role of Insurance. When the injured worker is dispatched by a temporary agency to the agency client, and an injury occurs, the client, *i.e.*, the borrowing employer, maintains workers'

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[9] *See infra* Section IV(E).

[10] *See infra* Section II(D).

[11] The leading case is *JFC Temps, Inc. v. WCAB (Lindsay and G & B Packing),*680 A.2d 862 (Pa. 1996), *reversing G&B Packing v. WCAB*, 653 A.2d 1353 (Pa. Commw. 1995). In that case, the claimant was a temporary who had first obtained work through JFC Temps. JFC hired him and assigned him to G&B, a warehousing company, to drive a tractor trailer. While exiting a G&B truck, he slipped and fell. The claimant thereafter filed a claim petition seeking compensation from JFC. JFC joined G&B as an additional defendant. A referee concluded that JFC was the responsible entity, but the Supreme Court reversed. Instead, G&B was found to be the responsible employer. The court, however, declined to establish a broad rule "that a temporary employment agency should never be the employer responsible for paying workers' compensation benefits," and concluded, instead, that the better approach was to examine the circumstances of each case based principally on the control test. In the case at hand, the evidence showed that G&B controlled the details of the claimant's work. According to the court, "notwithstanding the fact that some factors weigh against finding G&B the responsible employer, the right to control the performance of the work is the overriding factor."

[12] W.W. Friedline Trucking, Inc. v. WCAB (Reynolds), 616 A.2d 728 (Pa. Commw. 1992).

compensation immunity – and this is so even if the agency has provided the workers' compensation insurance.[13] In addition, the temporary agency itself is, of course, entitled to such immunity.[14]

B. ***Employee Leasing/Professional Employer Organizations (PEOs)***. Employment arrangements exist whereby a worker is nominally considered the employee of an "employee leasing" firm, or "Professional Employer Organization" (PEO). This type of firm is typically a non-capitalized entity, which hires the employees of a company (its "client") and then leases them back to the company. The employee leasing firm handles such things as payroll, tax deductions, and the securing of workers' compensation coverage.[15]

Before 2013, this employment construct could give rise to confusion as to the party properly to be considered the injured worker's "employer." This confusion could lead, in turn, to disputes over the party responsible for workers' compensation. Under employee leasing arrangements, the employee leasing enterprise was the nominal or "co-employer" but, when a dispute would develop, Pennsylvania courts would use the control test to determine the identity of the employer. In most (perhaps all) cases, of course, the client of the employee leasing entity controlled the details of the work, and were this indeed the case under the facts at hand, the client, and not the employee leasing entity, would be considered the employer responsible for workers' compensation benefits. The process in Pennsylvania became regulated in 2013 with Act 102 of 2012, called the "Professional Employer Organization Act." It is codified not in the Workers' Compensation Act but in title 43 (Labor).[16] Section 303 of the Act addresses workers' compensation issues, including responsibility for insuring and the methods by which PEOs may insure.[17]

C. ***Individual Entrepreneurs***. Of course, work as a freelancer or individual entrepreneur is not new. True freelancers, that is, self-employed individuals, have traditionally been on their own in terms of securing medical and disability insurance, although they were, and are, obliged to pay into Social Security.

Yet, innovations in technology have reportedly empowered many individuals to work in crafts and other minor manufacturing enterprises out of their homes, and then market them via platforms like Etsy. According to one writer, further, "The use of mass-market 3D printing

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[13] Dempster v. Waste Management Inc., 1998 WL 1180021 (C.P. 1998), *aff'd in an unreported decision* 736 A.2d 687 (Pa. Super. 1999), *petition for allowance of appeal denied* 739 A.2d 166 (1999), *cert. denied*, 120 S. Ct. 175 (U.S. 1999).

[14] Nagle v. TrueBlue, Inc., 148 A.3d 946 (Pa. Commw. 2016).

[15] *See* DAVID B. TORREY & ANDREW E. GREENBERG, PENNSYLVANIA WORKERS' COMPENSATION: LAW & PRACTICE, § 2:40 *et seq.* (Thomson-Reuters 3rd ed. 2008).

[16] The law is codified at 43 P.S. §§ 933.01-933.04.

[17] *See infra* Section IV(D).

technology will create an army of back bedroom manufacturers," with attendant insurance and liability challenges.[18]

Likewise, individuals use platforms to become "Taskers," via enterprises like Taskrabbit, and undertake home repairs, painting, and similar jobs. The Pennsylvania Act speaks, at least in part, to the latter type of work. In this regard, workers so dispatched to personal residences, (which seems to be the typical scenario), do not thereby become employees of their clients. This is so because casual workers (that is, those who perform intermittent work only), not laboring in the *business* of the putative employer, are *excluded* from the definition of employee.[19] As a homeowner/client has no business in the first place, the "Tasker" is statutorily excluded. *The analysis would be different if a commercial entity retains a Tasker for labor in an aspect of its regular business.*

If it is true that the provision of services, and even the manufacture of home goods, will continue to grow as a work phenomenon, other issues are implicated. For example, Taskrabbit does not disallow its Taskers from utilizing assistants (though it requests that any such individuals also register on the app) and a Tasker may *himself* be deemed an employer for workers' compensation purposes if he exerts sufficient control over such workers.

D. ***Workers of Franchisees***. Workers laboring for franchise operations are in the category of standard work. Still, scholars of the changing workplace have remarked on the growth of franchising operations – expanding beyond the familiar example of restaurants, and into such undertakings as janitorial work – and its effect on wage disbursements and other workplace practices.[20] A particular point of criticism is that many franchisees can become highly leveraged and cash-strapped, leading to practices liking shorting employees on their wages. And, of course, a common response to a company being so leveraged is letting insurances lapse (or paying no attention to such responsibilities in the first place).

Under Pennsylvania law, such a scenario unfolded and tested the limits of the "statutory employer" concept, whereby the employees of a contracting enterprise which fails to insure become the employees, for workers' compensation purposes, of the general contractor. In that recent case, a Philadelphia franchisee of Saladworks had failed to insure, and its employee,

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[18] Graeme Newman, *The New Age of Technology: 3D Printing*, INSURANCE JOURNAL (May 6, 2013), https://www.insurancejournal.com/magazines/mag-features/2013/05/06/290460.htm (as of May 9, 2018). *See also* Ingrid Sapona, *Sorting Out the Insurance Risks Related to 3D Printers*, ADVANTAGE MONTHLY: EMERGING TRENDS PAPERS (April 2015).

[19] Section 104 of the Act, 77 P.S. § 22 ("The term 'employe,' as used in this act is declared to be synonymous with servant, and includes – All natural persons who perform services for another for a valuable consideration, exclusive of … persons whose employment is casual in character and not in the regular course of the business of the employer, and exclusive of persons to whom articles or materials are given out to be made up, cleaned, washed, altered, ornamented, finished or repaired, or adapted for sale in the worker's own home, or on other premises, not under the control or management of the employer….").

[20] *See generally* DAVID WEIL, THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT (2014).

having sustained an accident, was unable to secure benefits from his employer. He thus sought to cast the franchisor as his statutory employer. While the Appeal Board accepted this argument, the Commonwealth Court reversed. The court declared, with some irony, that Saladworks, as franchisor, "is not in the restaurant business or the business of selling salads."[21]

E. ***Workers in the Gig Workforce (Workers Laboring via Platform Intermediaries).*** As noted at the outset, enterprises like Uber, Lyft, Taskrabbit, Handy, Grubhub, and Postmates, deem workers undertaking labor via their respective applications to be independent contractors. Other well-known enterprises in this category are Instacart (grocery delivery); and Thumbtack (matching customers with skilled work).

This fact is patent from a review of the "Terms of Service" documents featured on their websites. And, indeed, "Central to Uber and Lyft's business model is the classification of drivers as independent contractors, and itself as a technological platform to connect those drivers with passengers."[22] Most of these enterprises deny that they are in the transportation, delivery, or home repairs business, instead portraying themselves as mere platforms to connect willing passengers or other clients with willing independent drivers or craftsmen.[23]

In Pennsylvania, to date, no decision, even at the WCJ level, has been handed down adjudicating whether a true gig workforce worker is indeed an independent contractor. What factors Pennsylvania courts would consider in the critical analysis are discussed below.[24]

III. Legal Test Distinguishing Employee from Independent Contractor: In Pennsylvania, Control Dominates

Scholars of employment law, when addressing the issue of "employee," invariably introduce the issue by explaining that courts apply three different theories (variously named): the control or common law test, the economic realities test, and the relative nature of the work test.[25]

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[21] Salad Works, LLC v. WCAB (Gaudioso & UEGF), 124 A.3d 790 (Pa. Commw. 2015).

[22] Catherine Tucciarello, *The Square Peg Between Two Round Holes: Why California's Traditional Right to Control Test is not Relevant for On-Demand Workers*, 13 SETON HALL CIRCUIT REVIEW 351 (2017).

[23] *See generally* Ethan Rubin, *Independent Contractors or Employees? Why Mediation Should be Utilized by Uber and its Drivers to Solve the Mystery of How to Define Working Individuals in a Sharing Economy Business Model*, 12 CARDOZO JOURNAL OF CONFLICT RESOLUTION 163 (Fall 2017).

[24] *See infra* Section VI.

[25] This is the categorization utilized by Professor Michael C. Duff in his textbook. *See* MICHAEL C. DUFF, WORKERS' COMPENSATION LAW: A CONTEXT AND PRACTICE CASEBOOK 2ND EDITION (Carolina Academic Press 2017). *See also* Jillian Kaltner, *Employment Status of Uber and Lyft Drivers: Unsettlingly Settled*, 29 HASTINGS WOMEN'S LAW JOURNAL 29 (2018). In an April 2018 case, the California Supreme Court filed a decision which, for certain purposes of state law, narrowed its rule for classification of workers as independent contractors. Dynamex Operations West v. Superior L.A. County, 2018 WL 1999120 (Cal. 2018). In the course of doing so, the court explained that the hiring entity "asserting independent contractor status [must] establish each of the three factors of the ABC test: i.e., to show that a worker is free from its control, performing work outside of the usual course of its business, and customarily engaged in independent work." Thomas A. Robinson, *California Court Narrows Rule for Classification of Workers as Independent Contractors* (blog post), May 2, 2018,

Under the Pennsylvania workers' compensation analysis, the first of these theories prevails to guide the adjudicator when the statute does not, by specific inclusion or exclusion, provide the answer. Subsidiary considerations exist, but *control* dominates. Pertinent to the analysis of this paper, however, is the fact that the Commonwealth Court has recognized, as a subsidiary criterion, the theoretical basis of the *third test* (relative nature of the work).[26]

Under the Pennsylvania scheme, the injured worker has the burden of proof of showing that he or she was an employee.[27] This is so except in the construction industry, where the employer seeking to show that its worker is an independent contractor bears the burden of proof.[28]

Though the injured worker bears this burden of proof, WCJs and appellate judges in Pennsylvania are admonished that "neither the compensation authorities nor the courts should be solicitous to find contractorship rather than employment, and inferences favoring the claim need make only slightly stronger appeal to reason than those opposed."[29] Consistent with this liberal spirit, the mere fact that a worker signs an instrument stating that he acknowledges that he is an independent contractor will not necessarily bind the worker.[30]

The all-important control test has, over the decades, been characterized as follows: "The relation of master and servant exists where the employer has the right to select the employe, the power to remove and discharge him, and the right to direct both, what work shall be done, and the way and manner in which it shall be done."[31] Commonwealth Court has refined the test:

> [T]he existence of an employer-employee relationship must be determined on a case-by-case basis with reference to four basic elements: (1) the right to select the employee; (2) the right and power to remove the employee; (3) the power to direct the manner of performance; and (4) the potential power to control the employee.[32]

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http://www.workcompwriter.com/california-high-court-narrows-rule-for-classification-of-workers-as-independent-contractors/ (as of May 11, 2018). For a discussion of how this case may relate to workers' compensation, see Michael C. Duff, *Dynamex Checks a Gig Line: California Supremes Respond to Intensifying Employee Misclassification* (blog post), May 2, 2018, http://lawprofessors.typepad.com/workerscomplaw/ (as of May 11, 2018).

[26] Southland Cable Co. v. WCAB (Emmett), 598 A.2d 329 (Pa. Commw. 1991).

[27] North Penn Transfer, Inc. v. WCAB, 434 A.2d 228 (Pa. Commw. 1981).

[28] *See infra* Part IV(E).

[29] North East Express, Inc. v. WCAB (Woytas), 465 A.2d 724 (Pa. Commw. 1983).

[30] Red Line Express Co., Inc. v. WCAB (Price), 588 A.2d 90 (Pa. Commw. 1991).

[31] Rich Hill Coal Corp. v. Bashore, 7 A.2d 302 (Pa. 1939).

[32] Sunset Golf Course v. WCAB (Dept. of Public Welfare), 595 A.2d 213 (Pa. Commw. 1991).

Commonwealth Court, in a leading case, explained in even further detail the employer-employee relationship in terms that *distinguishes it* from the relation of principal-independent contractor:

> A servant is the employee of the person who has the right of controlling the manner of his performance of the work, irrespective of whether he actually exercises that control or not[.] ….
>
> [No] hard and fast definition of whether any given relationship is one of independent contractor or that of employer-employee [exists]. [Courts] have[,] however, set forth indicia of such relationship to be used as guides in making such a determination, some of which are:
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> [C]ontrol of the manner work is to be done; responsibility for result only; terms of agreement between the parties; the nature of the work or occupation; skill required for performance; whether one employed is engaged in a distinct occupation or business; which party supplies the tools; whether payment is by the time or by the job; whether work is a part of regular business of the employer, and also the right of employer to terminate the employment at any time.[33]

Commonwealth Court, in another leading case, reiterated that it is material whether the work undertaken by the purported employee is a part of the employer's regular business. In *Southland Cable v. W.C.A.B. (Emmett),*[34] a television cable installer, fatally injured in the course of his employment, was found to be an employee of the purported employer, a cable television company, in material part because his labor was critical to the employer's business purpose.

Still, to date, the control analysis reviewed above predominates. For example, Commonwealth Court, just two years after *Southland Cable*, held that a paperboy was an independent contractor, and not an employee, of the newspaper for which he delivered papers. "We believe," the court stated, "that the Courier did not exercise sufficient control over Claimant's work and the manner in which it was performed…. Claimant's work was not controlled in such specific detail that his relationship with the Courier could be called anything but a contract for delivery of service. This becomes even more evident [from other factors]: the Courier did not prohibit Claimant from carrying competing newspapers or require Claimant to provide the Courier with notice or get prior approval when he wished to substitute another person to deliver the papers."[35]

In a 2016 case, meanwhile, a home health aide was held to be an independent contractor, not an employee. This was so even though her "referral agency," which assigned her to work full-time with a disabled or elderly individual (the client), exercised significant control over the

[33] J. Miller Co. v. Mixter, 277 A.2d 867 (Pa. Commw. 1971).

[34] Southland Cable Co. v. WCAB (Emmett), 598 A.2d 329 (Pa. Commw. 1991).

[35] Johnson v. WCAB (Courier Express), 631 A.2d 693 (Pa. Commw. 1993).

claimant's labor.[36] Indeed, the WCJ had found *as fact* that the company exercised control, by providing guidelines and the instruction to not leave the client unattended, to maintain confidentiality, and not use cellphones. The company also "established claimant's hours and wages, and had the ability to terminate her employment."

It is notable that both of these cases feature articulate dissents, thus demonstrating that sufficiency of control is a subjective determination. Further, the dissent in the 2016 case points out that the WCJ had specifically found "that the purpose of the independent contractor agreement 'was to attempt to avoid liability for any work injuries sustained by the aides who work for and are employed by [the company].'"

IV. How Pennsylvania Workers' Compensation Law & Doctrine can Respond

As submitted above, Pennsylvania workers' compensation doctrine surrounding several forms of nonstandard work exists to guide the analysis of whether a worker is an employee or an independent contractor. Thus, while social issues of fairness and safety surround the fissuring of the workforce, when a worker in these categories is injured, tools for the legal analyst are available.

On the other hand, doctrine with regard to workers laboring in the true gig workforce is not so clear. Some argue that the business model of such app-based intermediaries is so novel that a new category of work relationship must be invented.[37] Others, however, assert that existing rules are available to guide the analysis.[38] For example, a scholar at Fordham University Law School argues that enterprises like Uber "should be compelled" to assume social insurance responsibilities. He asserts that "[d]octrinal tools like the relative 'nature of the work test' [and rules surrounding] independent contractors … need to be tweaked to provide [workers' compensation coverage] for today's 'freelancers' and 'part-timers' …."[39] The editor of the Larson text has a similar view, asserting that "the gig economy is not nearly as unique and troublesome as some would have us believe…. [L]essons from the distant past should show us that existing laws are more than sufficient to meet the demand of today and tomorrow." Unlike the progressive Fordham scholar, however, he argues that the traditional rule *excluding* many cab drivers from employee status can be similarly applied to exclude Uber drivers – he asserts,

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[36] Edwards v. WCAB (Epicure Home Care, Inc.), 134 A.3d 1156 (Pa. Commw. 2016).

[37] SETH D. HARRIS & ALAN B. KRUEGER, A PROPOSAL FOR MODERNIZING LABOR LAWS FOR TWENTY-FIRST CENTURY WORK: THE "INDEPENDENT WORKER" (The Hamilton Project, Discussion Paper 2015-10, December 2015).

[38] Thomas A. Robinson, *California Grubhub Driver is Independent Contractor, not Employee: From Comp Standpoint: Are Uber, Lyft & Grubhub Truly "Disruptive?"* (blog post), http://www.workcompwriter.com/page/2/ (Feb 18, 2018) (as of May 9, 2018).

[39] George W. Conk, *Deadly Dust: Occupational Health and Safety as a Driving Force in Workers' Compensation Law and the Development of Tort Doctrine and Practice*, 69 RUTGERS UNIVERSITY LAW REVIEW 1139 (2017).

crossly, "Why shouldn't a person be free to choose a lower paying 'gig' that also provides a flexible schedule? Why must everyone be an employee?"[40]

It may be that existing doctrine can be used, either liberally or strictly (see above) to address the situation of the true gig workforce member. Of course, the other approach – short of inventing a new category of workers – is for workers' compensation and allied statutes to be *amended*. The law is already in fact "tweaked" to address marginal situations.

A. ***Explicit Inclusions.*** Workers' compensation laws have been amended over the decades to include certain categories of workers. For example, the Pennsylvania Act was amended in 1925 to include volunteer firefighters.[41] The fiction adopted is that they are employees of the municipality sponsoring the company, and a minimum compensation payable is imputed to them at two-thirds of the statewide average weekly wage. Thus, workers' compensation laws can potentially be amended to cover workers laboring in the gig workforce.

Precedent in this realm (specific inclusion) exists in the form of the New York "Black Car Fund."[42] Under this construct, limousine drivers, who otherwise were apparent independent contractors, became the employees of a special fund, administered within the framework of the state act. The Fund itself is funded by a 2.5% assessment per ride. Another example of potential inclusion is found in a California proposal which would cover day laborers, even those hired on a one-time basis, under the workers' compensation laws of that state.[43] Notably, day laborers in California, with sufficient hours and earnings, are already covered for their work in or around personal residences. As to the statutory and funding mechanisms, "The California Labor Code includes within its definition of 'employee' those 'employed by the owner or occupant of a residential dwelling whose duties are incidental to the ownership, maintenance, or use of the dwelling' (California Labor Code § 3351(d)). Homeowners' insurance policies in California are required to include workers' compensation coverage (California Insurance Code § 11590)."[44]

B. ***Explicit Exclusions***. Workers' compensation laws have similarly been amended over the decades to exclude certain categories of workers. For example, in 1993, the Pennsylvania legislature removed most insurance agents from the definition of employee,[45] apparently in acknowledgment that industry custom and practice was (and is) to classify such workers as independent contractors.

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[40] Thomas A. Robinson, *supra* note 38.

[41] Section 601 of the Act, 77 P.S. § 1031.

[42] *See infra* Part V(A)(3).

[43] *See* Louise Esola, *Day Laborers Included in California Workers Comp Bill*, BUSINESS INSURANCE (Jan. 8, 2018), http://www.businessinsurance.com/article/00010101/NEWS08/912318356/Day-laborers-included-in-California-workers-comp-bill (as of May 10, 2018).

[44] *See generally Research Brief, On-the-Job Injuries and Workers' Compensation Eligibility among Day Laborers in Residential Worksites in California* (UCLA-LOSH 2017), http://losh.ucla.edu/wp-content/uploads/sites/37/2016/01/On-The-Job-Injuries-And-Day-Laborers-April-2017.pdf (as of May 6, 2018).

[45] Section 321 of the Act, 77 P.S. § 676(2).

It is in the realm of exclusion that legislatures in a number of states have heeded the lobbies of platform-based business enterprises and have, just recently, excluded transportation network workers (Uber and Lyft drivers) and marketplace contractors (workers like the service providers of Taskrabbit and Handy). Alaska, a state which, by administrative action, at one time declared Uber drivers to be employees, now *excepts them* via legislative intervention.[46] Tennessee is a state which has enacted a marketplace contractor exclusionary law.[47]

C. ***Statutory Employment.*** Statutory employment is a device of workers' compensation laws that potentially imposes employer status on general contractors and other entities which seek to exercise critical operations via the service of subcontractors. That status is imposed, under the Pennsylvania Act, when their subcontractors fail to insure, and an employee of the subcontractor is injured.[48]

Such status is most familiar in the context of construction projects, when the general contractor contracts with a variety of entities to perform specialty work. Provision for this type of liability is found in Section 302(b) of the Pennsylvania Act.[49] Statutory employment can exist, however, outside the construction project context. In this regard, an employer can also gain the status of statutory employer under the less well-known Section 302(a) of the Act.[50] Under Section 302(a), the putative employer need not be in control of any premises, in contrast to the general contractor in the construction project scenario.

1. ***Leading Six L's precedent – contracting-out of trucking services by farm to warehouse of same enterprise.*** How statutory employment operates under Section 302(a) is illustrated in an important 2012 case of the supreme court. There, the claimant was not a construction worker but instead a truck driver. He was employed by a trucking company which was under contract with Six Ls, a tomato growing concern, to transport tomatoes from a Six L's farm to a processing facility owned by the enterprise. Six L's was alleged, and found to be, the statutory employer. True, the employer was not in control of the premises (the injury occurred in a truck accident), but such control is not a requirement of Section 302(a). Both Commonwealth and Supreme Courts so held.[51]

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[46] *See* Suzanne Downing, *Ridesharing Bill Passes, Making Way for Uber, Lyft*, www.mustreadalaska.com (May 17, 2017). *See infra* Part V(A)(1).

[47] *See infra* Part V(A)(2).

[48] DAVID B. TORREY & ANDREW E. GREENBERG, PENNSYLVANIA WORKERS' COMPENSATION: LAW & PRACTICE, § 2:16 *et seq.* (Thomson-Reuters 3rd ed. 2008).

[49] 77 P.S. § 461.

[50] 77 P.S. § 462.

[51] Six L's Packing Co. v. WCAB (Williamson), 44 A.3d 1148 (Pa. 2012).

2. ***Section 302(a) applied to real estate agent's enterprise of rehabilitating homes.*** In a 2014 decision, the court, applying this same section of the law, concluded that a real estate investor/agent/entrepreneur (Zwick), engaged in the rehabilitation of homes, was the statutory employer of Popchocoj, the employee of Rodrigues, one of his subcontractors.[52] Zwick argued that he could only be a statutory employer if he was in control of the premises. However, liability was founded case under Section 302(a), and not Section 302(b). Zwick also complained that Section 302(a) was inapplicable "because he is a licensed realtor, so the work claimant performed at the time of his injury was not a regular part of [his] business." The court rejected this argument as inconsistent with the record. Zwick admitted, in this regard, "that construction rehabilitation work was a part of his business. … Zwick further testified that he hired Rodrigues to do construction work at the property to prepare it for resale and that Zwick was 'essentially' the general contractor on the job. … Zwick also testified that Rodrigues had previously done construction work for him at another property … ." As far as the court was concerned, Zwick was in the "business of rehabilitating property for resale and … he hired Rodrigues to perform work that was a regular part of his business."

3. ***Limits of the doctrine: Section 302(a) as not extending to the franchising context.*** Commonwealth Court, in a 2015 case, pointedly distinguished the 2010 *Six L's* precedent, in a situation where a franchisor was alleged to be a statutory employer.[53] There, the worker was directly employed by a franchisee ("G21") of a restaurant franchisor, Saladworks. The owner had failed, as he was charged, under the franchise agreement, to secure a policy of workers' compensation insurance. When the worker sustained an injury, the Uninsured Employers Guaranty Fund (UEGF) sought to enjoin the franchisor as a statutory employer. The WCJ dismissed this attempt out of hand, but the Appeal Board reversed and found liability. Commonwealth Court, however, restored the WCJ's decision.

The court, in reversing, reviewed the *Six L's* case and found it distinguishable. It agreed with the employer that the Board had purportedly misunderstood the nature of the business of Saladworks. According to the court, "this Court must agree with Saladworks that its main business is the sale of franchises to franchisees that desire to use its name and 'System' and marketing expertise. [S]aladworks and G21 are [merely] connected through the agreement …. While Saladworks provides certain services to independent franchisees like G21, it is not in the restaurant business or the business of selling salads."

Imposition of liability as under Section 302(a) is common among state statutory employer laws. In a Virginia case, for example, the small Jewish cemetery in Richmond, Virginia, sought to outsource all of its maintenance to a subcontractor. That individual, in turn, employed a worker to mow the grass. The worker lost four toes in an accident with the mower. The Virginia statute, which is similar to Section 302(a), facilitated recovery by the worker as against the trustees of the cemetery. Oakwood Hebrew Cemetery v. Spurlock, 1992 WL 441851(Va. Ct. App. 1992).

[52] Zwick v. WCAB (Popchocoj), 106 A.3d 251 (Pa. Commw. 2014).

[53] Saladworks, LLC v. WCAB (Gaudioso), 124 A.2d 790 (Pa. Commw. 2015). The Supreme Court accepted the case on appeal but, in December 2015, dismissed the same as "improvidently granted."

D. ***Laws governing temporary workers and leased employees***. The Pennsylvania Act does not, via statute, address the rights of temporary workers. Instead, common law governs the analysis, and the control test that is set forth at length above informs the critical analysis.[54]

Employee leasing is, however, an employment structure that is regulated in Pennsylvania. Act 102 of 2012 is called the "Professional Employer Organization Act" and is codified not in the Workers' Compensation Act but in title 43 (Labor).[55] Section 303 of the Act addresses workers' compensation issues, including responsibility for insuring and the methods by which PEOs may insure. The law adds clarity in establishing that the PEO client will always be an employer responsible for workers' compensation: "Both the PEO and the client shall be an employer of covered employees assigned to the client … [under] the Workers' Compensation Act."[56]

The law, in general: (1) provides for how PEO contracts are to be formed – they must, among other things, be reduced to writing; (2) clarifies that both PEO (nominal employer) and client (actual employer) enjoy workers' compensation immunity from tort suit; and (3) directs the manner in which workers' compensation insurance is to be written. The law does not include a licensure and enforcement provision. This omission was perhaps unfortunate; the problem for many years with PEOs was that they would let their workers' compensation lapse, leaving both the injured worker and the employer on their own as to receipt of benefits and the means by which to pay them. This failure to attend to responsibilities has, notably, been identified as a hazard of the fissuring of the workplace.

The law, among other things, requires that PEOs reduce to writing in each arrangement a "Professional Employer Agreement." Among the requirements of the agreement is a proviso for which party, the PEO or its client, is to secure workers' compensation coverage. A pervasive theme of the Act, meanwhile, is that both the PEO and client (that is, the actual employer) are immune from suit under the exclusive remedy. The operative principle in this respect is the now-codified idea that the PEO and client are engaged in a "coemployment relationship." Of course, no tort immunity applies if neither PEO nor the client has secured the coverage.

E. ***The Construction Workforce Misclassification Act.*** The "Construction Workplace Misclassification Act" was enacted in October 2010.[57] Like the law governing PEOs, the CWMA is not an amendment of the Pennsylvania Workers' Compensation Act. It does, however, have an effect on workers' compensation.

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[54] The leading case, as noted above, is *JFC Temps, Inc. v. WCAB (Lindsay and G & B Packing),* 680 A.2d 862 (Pa. 1996), *reversing G&B Packing v. WCAB*, 653 A.2d 1353 (Pa. Commw. 1995). *See supra* note 11.

[55] The law is codified at 43 P.S. §§ 933.01-933.04.

[56] 43 P.S. § 933.303(a)(1).

[57] 43 P.S. §§ 933.1-933.17.

As noted above, Pennsylvania has traditionally been a common law jurisdiction when it comes to analyzing whether a worker, injured in the course of employment, is an employee or an independent contractor. The statute itself never treated, discretely, the difference between employee and independent contractor. If the alleged employer controls or directs, or has the right to control or direct, the details of the worker's labor, such worker is likely to be an employee and not an independent contractor. In the dispute process, the worker has the burden of proof of showing that he was subject to control and hence that he was an employee.

The 2010 statute changes this analysis when it comes to enterprises and their workers laboring in the construction industry. An employer in this context has the burden of proof of showing that its worker is an independent contractor and not an employee.

The statute defines "construction" as "erection, reconstruction, demolition, alteration, modification, custom fabrication, building, assembling, site preparation and repair work done on any real property or premises under contract …." Both commercial and residential undertakings are easily covered by this definition. As the statute is remedial, further, one would expect the courts at all levels to accord to the definition a liberal, not strict, construction. Thus, though such things as "roofing," "plumbing," and "painting" are not specified in the definition, such omissions are without significance. These activities should fall easily within the broader definition.

Under the statute, a worker is not, for workers' compensation purposes, to be considered an independent contractor unless three criteria are met: (1) the individual has a written contract (entered into before any injury) to perform such services; (2) the individual is free from control or direction over performance of such services both under the contract of service and in fact; and (3) as to such services, the individual is customarily engaged in an independently established trade, occupation, profession or business. The latter criterion is subject to a further multi-part definition, typically called an "ABC" test.[58]

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[58] The law in this regard provides as follows:

> Criteria. –
>
> An individual is customarily engaged in an independently established trade, occupation, profession or business with respect to services the individual performs in the commercial or residential building construction industry only if:
>
> (1) The individual possesses the essential tools, equipment and other assets necessary to perform the services independent of the person for whom the services are performed.
>
> (2) The individual's arrangement with the person for whom the services are performed is such that the individual shall realize a profit or suffer a loss as a result of performing the services.
>
> (3) The individual performs the services through a business in which the individual has a proprietary interest.
>
> (4) The individual maintains a business location that is separate from the location of the person for whom the services are being performed.
>
> (5) The individual:

In an educational 2017 case, now pending in the Supreme Court, Commonwealth Court held that the Board, applying the CWMA, erred in concluding that claimant was an employee, and not an independent contractor.[59] The claimant, a remodeler, secured work with a business, "Eastern Taste" (not yet open), at the behest of its owner, to assist in the remodeling of the business premises. In the wake of a dispute following his injury, the Board (reversing the judge), found that claimant was an employee.

The court, however, restored the WCJ's denial of benefits. Claimant received direction, but not as to the details of work. In addition to control, however, the court considered the CWMA. According to the court, "the dispositive question to determining if one falls within the purview of the CWMA is whether the individual is performing services for remuneration 'in the construction industry.'" The court characterized this as a question of first impression, noting further that the law does not explicitly define the phrase "in the construction industry." Of course, the law does describe "construction," but not *industry.* The court then cited *Webster's* for the definition of industry, to wit, "skill, employment involving skill" and "a department or a branch of a craft, art, business, or manufacture." Claimant, for his part, portrayed Eastern Taste as not in the restaurant business, but in the "restaurant construction" business. Claimant promoted the conceptualization of the employer as "in essence … a general contractor in the construction industry."

The court, however, informed by the definitions set forth above, rejected claimant's arguments. The court characterized as unreasonable claimant's argument that Eastern Taste was in the construction industry. As far as the court was concerned, the fact-findings established that Eastern Taste was in the restaurant business – not in the construction industry.

V. Legal Developments Unique to the Gig Workforce

A. ***Statutes.*** Some jurisdictions have addressed the employment status of true gig workforce workers via statutory amendments. Pennsylvania is a state where such proposed alterations to the law have apparently not been proposed. In the first two types of laws, the intended effect is to prevent laborers in the gig workforce from ever having a colorable claim of employee status and hence a cognizable workers' compensation claim. In the third type, the intended effect is precisely the opposite – arguable independent contractors are, through an innovative mechanism, *provided* with workers' compensation.

(i) previously performed the same or similar services for another person in accordance with paragraphs (1), (2), (3) and (4) while free from direction or control over performance of the services, both under the contract of service and in fact; or

(ii) holds himself out to other persons as available and able, and in fact is available and able, to perform the same or similar services in accordance with paragraphs (1), (2), (3) and (4) while free from direction or control over performance of the services.

(6) The individual maintains liability insurance during the term of this contract of at least $50,000.

[59] Department of Labor & Industry v. WCAB (Lin and Eastern Taste), 155 A.3d 103 (Pa. Commw. 2017) (appeal granted).

1. ***Transportation Network Laws.*** Both Florida and Alaska, for example, amended their laws in the course of 2017 to clarify that drivers for Uber and Lyft, and similar businesses, are independent contractors and not employees. These provisos are part of broader reforms that regulate "transportation network companies" ("TNCs") in a variety of ways. Both, for example, require that the driver and/or intermediary carry commercial liability insurance to cover the injury claims of passengers, and require that drivers be screened to exclude individuals with criminal backgrounds or drunk driving histories. These are features of a model law prepared by the National Conference of Insurance Legislators. According to the Council of State Governments, "The model law was based in part on Indiana's rideshare law that incorporated compromise language agreed to by rideshare company Uber and insurers...."[60] The Council notes that, even as of 2016, Arkansas, Indiana, and North Carolina had all altered their laws to recognize app-based drivers as independent contractors. The Alaska statute, notably, was enacted in the wake of earlier administrative action against Uber for alleged misclassification of its drivers as independent contractors.

As to the issue of employment status, the 2017 law (the "Transportation Network Companies Act"), provides as follows:

> (a) Except as provided in (b) of this section [dealing with a TNC which may be operated by the state, municipality, or Indian Tribe] a transportation network company is not an employer of transportation network company drivers …. A transportation network company driver is an independent contractor for all purposes and is not an employee of the transportation network company if the transportation network company[:]
>
> (1) does not unilaterally prescribe specific hours during which a driver shall be logged onto the digital network of the transportation network company;
>
> (2) does not impose restrictions on the ability of the driver to use the digital network of other transportation network companies;
>
> (3) does not restrict a driver from engaging in any other occupation or business; and
>
> (4) enters into a written agreement with the driver stating that the driver is an independent contractor for the transportation network company.[61]

[60] SEAN SLOANE, STATE REGULATION OF RIDESHARE COMPANIES, THE COUNCIL OF STATE GOVERNMENTS (April 2016), http://knowledgecenter.csg.org/kc/system/files/CR_rideshare.pdf (as of May 7, 2018).

[61] ALASKA STATUTES § 28.23.080. For background surrounding the Alaska statute, see Suzanne Downing, *Ridesharing Bill Passes, Making Way for Uber, Lyft*, www.mustreadalaska.com (May 17, 2017), http://mustreadalaska.com/ridesharing-bill-passes-uber-lyft/ (as of May 7, 2018).

The correlative Florida statute (with some superficial changes) reads precisely the same.[62] Lawyers commenting on the new law, at the time of enactment, remarked, "None of the four requirements is likely to impose any new burdens on the ride-sharing companies. The good news for transportation network companies is that by meeting a low bar for establishing independent contractor status, they will have clarity and certainty of their worker classifications. They will also be protected from claims available to employees arising under state law, such as claims for workers' compensation, unemployment compensation, and employment discrimination under the Florida Civil Rights Act."[63]

2. ***Marketplace Contracting Laws.*** A number of jurisdictions, acting in the same spirit, have enacted laws providing that "marketplace contractors" are indeed independent contractors, and not employees, when certain requirements are met. The Tennessee legislature, with S.B. 1967 (not yet codified) has enacted such a law. On the issue of the employee/independent contractor difference, the law provides as follows:

> (a) Notwithstanding any law to the contrary, a marketplace contractor is an independent contractor, and not an employee, of the marketplace platform for all purposes under state and local laws, rules, and ordinances ... if all of the following conditions are met:
>
> (1) The marketplace platform and marketplace contractor agree in writing that the contractor is an independent contractor with respect to the marketplace platform;
>
> (2) The marketplace platform does not unilaterally prescribe specific hours during which the marketplace contractor must be available to accept service requests from third-party individuals or entities. If a marketplace contractor posts the contractor's voluntary availability to provide services, the posting does not constitute a prescription of hours for purposes of this subdivision (a)(2);
>
> (3) The marketplace platform does not prohibit the marketplace contractor from using any online-enabled application, software, website, or system offered by other marketplace platforms;
>
> (4) The marketplace platform does not restrict the marketplace contractor from engaging in any other occupation or business;

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[62] FLORIDA STATUTES § 627.748(9).

[63] Anna P. Lazarus & Kevin J. White, *Florida Legislation Establishes That Ride-Sharing Drivers Are Independent Contractors, Not Employees* (May 23, 2017), https://www.huntonlaborblog.com/2017/05/articles/employeeindependent-contractor/florida-legislation-establishes-ride-sharing-drivers-independent-contractors-not-employees/ (as of May 7, 2018).

(5) The marketplace platform does not require marketplace contractors to use specific supplies or equipment; and

(6) The marketplace platform does not provide on-site supervision during the performance of services by a marketplace contractor.[64]

Law Professor Michael C. Duff reported, in 2018, on this Tennessee enactment. He pointed out that a number of other states, including Indiana, Utah, Kentucky, Florida, and Iowa, had already enacted such laws. He found it unsatisfactory that a significant swath of workers are, as a matter of law, excluded from the definition of employee for workers' compensation purposes. Such laws, said to be the result of lobbying by the platform-intermediary based enterprise "Handy" (which connects consumers with handymen) is, in his view, an unwelcome development. He believes that the laws could be widely utilized to exclude any number of workers (beyond familiar handymen) who are dispatched by their companies and then supervised remotely.[65]

Another critique of the Handy-sponsored litigation focuses on a possible perverse result of such laws. The owner of a conventional maid and handyman service insisted that laws like the Tennessee bill "will lead existing employers to convert to a lower-cost independent contractor model in order to compete …. 'It won't just be Handy, it'll be all of these virtual companies that are out there now,' That can be a raw deal for workers, who might be drawn in by a slightly higher hourly rate but then realize they will have to cover their equipment, transportation, insurance and self-employment taxes, he said."[66]

3. ***The New York Black Car Operators' Injury Compensation Fund.*** Under this innovation, enacted in 1999, limousine drivers who otherwise were independent contractors for their limousine services, or "central dispatch operators,"[67] are deemed employees of a special fund, administered within the framework of the New York workers' compensation law.[68]

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[64] Tennessee Senate Bill 1967, http://www.capitol.tn.gov/Bills/110/Bill/SB1967.pdf. The statute is TENNESSEE CODE § 50-10-101 *et seq*.

[65] *See* http://lawprofessors.typepad.com/workerscomplaw/, posts of March 20, 2018; March 27, 2018; and April 8, 2018 (featuring reproduction, in critical aspects, of the language of these new laws).

[66] Lydia DePillis, *For Gig Economy Workers in These States, Rights are at Risk*, CNN Money (March 14, 2018), http://money.cnn.com/2018/03/14/news/economy/handy-gig-economy-workers/index.html (as of May 7, 2018).

[67] According to the Fund's FAQs, "Central dispatch facilities" are "businesses that dispatch 'black car operators' to pick up and discharge passengers in New York State." Such enterprises "must become members of a not-for-profit corporation …, [the] New York Black Car Operators' Injury Compensation Fund, Inc. (Fund). The purpose of the Fund is to administer payment of workers' compensation to black car operators who are registered owners of a for-hire vehicle or a driver designated by such a registered owner to operate his/her for-hire vehicle and who is dispatched by a central dispatch facility." *See* http://www.nybcf.org/faqs/. Examples (among many others) are "Big Apple Car, Inc." and the "Roosevelt Car & Limo."

[68] NY EXEC. LAW, Article 6-F, § 160-cc thru 160-oo.

According to the Fund's website,[69] "The statute covers all drivers of The Black Car Fund member bases [dispatch operators] in the state of New York, although 98% of the companies are based in the greater New York City Metropolitan area. Bases must become members of The Black Car Fund if they meet the criteria outlined in the statute – meaning they cannot own more than 50% of their vehicles and must do a minimum of 90% of their business on a non-cash basis…." As for the source of revenue, "The Fund derives its income from a 2.5% surcharge, which is billed and collected by member bases from their clients and then remitted to The Fund. The Fund has approximately 300 member bases and collectively there are more than 70,000 affiliated drivers covered by Workers' Compensation."

As of 2009, the Fund, which technically could be a self-insured, provided workers' compensation insurance coverage through the State Insurance Fund, a corollary to the Pennsylvania State Workers' Insurance Fund (SWIF).

The Black Car Fund has received attention as an innovation that could serve as an example for how workers' compensation could be provided for various members of the gig workforce. Indeed, according to one media account, "It is often cited as a model for how benefits might function in the future…. Other states, including Washington and New Jersey, are considering bills mandating the collection of fees for various freelance services, which would then be used to pay for those workers' benefits."[70]

B. ***Select Cases Addressing Employment Status***. No Pennsylvania court precedent yet exists on whether a laborer in the true gig workforce is an employee or independent contractor for workers' compensation purposes. However, the criterion of control, and the subsidiary test of whether an individual's work is a regular part of the employer's business, are ubiquitous among states. Thus, an understanding of the leading cases on this issue can inform the critical analysis of the Pennsylvania system.

1. *O'Connor v. Uber Technologies*, 82 F. Supp.3d 1133 (N.D. Cal. 2016). In this case, the plaintiffs were Uber drivers who alleged that they had been misclassified by the company as independent contractors instead of employees. Among other things, they alleged that, because of the misclassification, they had been denied various protections of the California Labor Code, including the right to retain all tips received. The plaintiffs had agreed at the outset of their work that they were independent contractors. Uber tried to have the case thrown out on summary judgment, but the court denied such summary relief. The court explained that when an individual performs services for a putative employer, a rebuttable presumption arises that the worker is an employee. The putative employer thereupon has the burden of proof of showing that the worker was in fact an independent contractor. Here, Uber asserted that its drivers did not perform services for it in the first place, but the court rejected that argument. Meanwhile, it was for a jury to determine whether the various aspects of Uber's business operations reflected sufficient control of its drivers' work such that the workers were employees or independent contractors.

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[69] *See* http://www.nybcf.org/history/.

[70] *Black Car Fund Business Model Featured on NPR*, BLACK CAR NEWS (Feb. 27, 2018), https://www.blackcarnews.com/article/black-car-fund-business-model-featured-on-npr (as of May 7, 2018).

The court did observe that various aspects of control were reflected in the operation. These included (1) the rule that an Uber driver could not tell a passenger that he or she could be available for the next ride; instead, customers were always obliged to use the app; (2) the "suggestions" that drivers always be professionally attired and have jazz or NPR playing in the vehicle; (3) the protocol that the driver should always bring the vehicle right up to the passenger; (4) the ability to terminate the driver, essentially at will; and (5) the constant performance monitoring of drivers via analysis of customer rankings. With regard to this latter criterion, the court declared, "This level of monitoring, where drivers are potentially observable at all times, arguably gives Uber a tremendous amount of control over the 'manner and means' of its drivers' performance."[71]

2. *Lawson v. Grubhub*, 2018 WL 776354 (N.D. Cal. 2018). In this case, also from Northern California, the plaintiff was a Grubhub delivery driver. He had agreed in advance that he was an independent contractor. After he was terminated for "gaming" of the app, to maximize his earnings, he filed an action alleging improper classification, an act on the part of Grubhub which purportedly caused violations of the state's minimum wage, overtime, and employee expense reimbursement laws. The case was tried before a federal judge (no jury), who concluded that Grubhub had met the burden of proof that the delivery driver was, indeed, an independent contractor. The judge reviewed the same criteria as did the court in *O'Connor*, and found that any control exercised by Grubhub over the worker was insufficient to render him an employee.

Among other things, the court noted that Grubhub (1) did not control how the plaintiff made his deliveries, nor did it police or otherwise oversee the condition of his means of transportation; (2) did not control his physical appearance; (3) did not require that plaintiff undergo any training; (4) did not provide any supplies; (5) exercised no oversight (like undertaking performance checks); (6) did not preclude plaintiff from having others in the car with him during deliveries; (7) did not oblige plaintiff from accepting orders, even during periods of time when he said he was available; and (8) did not oblige him to make his deliveries within a specific amount of time. It was true that Grubhub's ability to *terminate* the plaintiff favored a finding of an employment relationship, as did an analysis of whether the work was part of Grubhub's regular business. In this latter regard, food delivery "is a regular part of [Grubhub's] business in Los Angeles…. Indeed, offering delivery services is key to Grubhub's continued growth in urban markets such as Los Angeles." Yet, the "principal test" under the California analysis is the *right of control*, and the factors relevant to this test overwhelmed the subsidiary factors suggesting employee status; the court thus found that the plaintiff was an independent contractor.

3. *Razak v. Uber Technologies*, 2018 WL 1744467 (E.D. Pa. 2018). In this case, the plaintiffs were Philadelphia-based drivers for UberBLACK (limousine drivers). They filed an action under the Fair Labor Standards Act and the state minimum wage laws asserting that they had been misclassified as independent contractors when they were in fact employees. Thus,

[71] In April 2016, Uber settled a class action brought in California by drivers who alleged that they had been misclassified. *See* https://www.reuters.com/article/us-uber-tech-drivers-settlement-idUSKCN0XJ07H (as of May 10, 2018).

among other things, they demanded back overtime pay. As in the two foregoing cases, the drivers had agreed at the outset of their work that they were independent contractors. On this occasion, however, the court applied the test used in the Third Circuit to determine employment status in Fair Labor Standards Act (FLSA) cases, and it held that the workers were indeed independent contractors.

The court noted that under the law, as applied in Pennsylvania, the injured worker had the burden of proving that he was an employee. The controlling test, meanwhile is the six-part test established (1985) in *Donovan v. DialAmerica Marketing, Inc*.[72] According to the *Razak* opinion:

> The seminal case in this Circuit for determining whether a worker is an employee under the FLSA is *Donovan v. DialAmerica Marketing, Inc.* …. *Donovan* makes clear that "Congress and the courts have both recognized that, of all the acts of social legislation, the Fair Labor Standards Act has the broadest definition of 'employee.'" … [T]he *Donovan* court also set forth six factors for determining whether a worker is an employee:
>
> (1) the degree of the alleged employer's right to control the manner in which the work is to be performed;
>
> (2) the alleged employee's opportunity for profit or loss depending upon his managerial skill;
>
> (3) the alleged employee's investment in equipment or materials required for his task, or his employment of helpers;
>
> (4) whether the service rendered requires a special skill;
>
> (5) the degree of permanence of the working relationship; and
>
> (6) whether the service rendered is an integral part of the alleged employer's business.
>
> [T]he *Donovan* court instructed that "neither the presence nor absence of any particular factor is dispositive," and thus, "courts should examine the circumstances of the whole activity" with a consideration, "as a matter of economic reality," of whether "the individuals are dependent upon the business to which they render service." ….

Applying this test to the situation of the UberBLACK drivers, the court found that only two of the factors pointed to employee status, to wit, the lack of special skills and the "integrality of service" to Uber's overall operations. On this point, the court acknowledged that "Uber

[72] Donovan v. DialAmerica Marketing, Inc., 757 F.2d 176 (3d Cir. 1985).

drivers are an essential part of Uber's business as a transportation company …. [I]f Uber could not find drivers, Uber would not be able to function…."

Yet, these factors were overwhelmed by the other indicia of independent contractor status, particularly the lack of pervasive control exercised by Uber over the drivers. True, Uber had the broad ability to terminate or deactivate a worker's use of the app, but "significant indications [exist] that Uber does not exercise substantial control over plaintiffs." These indications included the drivers' ability (1) to hire sub-contractors of their own; (2) to work for competing companies at the same time; and (3) to set their own hours.

The court, in detailing this aspect of its ruling, observed that "Uber places no restrictions on drivers' ability to engage in personal activities while Online, and Plaintiffs here … engaged in a range of personal activities while Online…. [W]hile Online, Plaintiffs …, accepted rides from private clients, slept, did personal errands, smoked cigarettes, took personal phone calls, rejected trips because they were tired, and conducted business for their independent transportation companies." It then concluded as follows (as the court here is discussing *control* – the pivotal focus of workers' compensation – its remarks are set forth in full):

> Given the unique business model which TNCs, such as Uber, have created, and their applicability to UberBLACK drivers, the fact that Uber does exercise some control when UberBLACK drivers are Online does not convert UberBLACK drivers into employees. The Court likens this situation to a carpenter, or a plumber, who is engaged to complete a renovation project for a homeowner. Very often, the exact date and time that the plumber/carpenter will come to the home is negotiated, but if the contractor is late or cancels, there is little the homeowner can do. The homeowner may impose certain requirements while the carpenter/plumber is in the house, such as not permitting certain fumes, footwear, music, or other conditions – but all of these conditions apply only while the carpenter/plumber is in the home – and they certainly do not suffice to conclude that the carpenter/plumber is an employee.
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> Thus, the Court concludes that, on the whole, the first *Donovan* factor – "the degree of the alleged employer's right to control the manner in which the work is to be performed" – weighs heavily in favor of "independent contractor" status.

VI. True Gig Workforce Laborers: Pennsylvania Workers' Compensation Law Considerations

A. ***Each case on its own facts.*** As pointed out by Professor Michael Duff, in lieu of statutory authority, each legal claim of a true gig workforce laborer will have to be examined on its own facts.[73] Still, the critical workers' compensation analysis in Pennsylvania will likely be

[73] Michael C. Duff, *Why Lawson v. Grubhub, Inc. did not Change the Independent Contractor World (and No One Case Could)* (blog post) (Feb. 17, 2018), http://lawprofessors.typepad.com/workerscomplaw/ ("An individual is covered as an employee under an employment statute – including workers' compensation statutes – if he or she fits the statutory employee definition. The analysis will always be fact-dependent and complicated.").

whether sufficient control is retained by the gig economy enterprise relative to its workers' labor.[74]

In addition, subsidiary tests, particularly whether the work is a type integral to the enterprise's business, will also be employed by the judge or other analyst. As discussed above, in the leading case *Southland Cable v. W.C.A.B. (Emmett),*[75] a television cable installer was found to be an employee of the purported employer, a cable television company, in significant part because his labor was critical to the employer's business purpose. The court in that case, affirming the first-level trial judge, stated, "The reasons expressed by the referee provide a more than adequate basis for finding an employer/employee relationship. In addition to testimony that employer retained some control over the manner in which the work was done, there is competent testimony that employer also provided some tools and identification materials, retained the right to terminate the employment at any time, and that the work performed by decedent was part of the regular business of employer, i.e., cable installation."

In any event, critical to the analysis will be review of the Terms & Conditions (contract) that the gig economy enterprise imposes on its potential worker as a condition precedent to his or her use of the enterprise's app to obtain work.

Also critical to the analysis is the potential for tort liability on the part of the principal if employee status on the part of a true gig workforce member is *not* found. In this regard, an independent contractor sustaining injury because of the negligence of his or her principal possesses a potentially actionable tort suit.[76]

B. ***The ubiquity of arbitration clauses.*** A threshold issue is the import of the arbitration clauses that are ubiquitous in the contracts into which sharing-economy businesses and their workers enter.[77] Presumably, a true gig workforce member filing a claim petition will not only be met with a denial of employee status, but an argument that the WCJ has no jurisdiction to entertain the dispute in the first place. Of course, Section 407 of the Act[78] invalidates pre-injury

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[74] *See supra* Section III.

[75] Southland Cable Co. v. WCAB (Emmett), 598 A.2d 329 (Pa. Commw. 1991) (equating the Pennsylvania "part of the employer's regular business" formulation with the "relative nature of the work" test set forth in the Larson treatise).

[76] *See, e.g.*, Fye v. Woodland Forrest Products, Inc., 1998 WL 1073921 (Ct. Common Pleas 1998) (truck driver, an employee of a service, had potentially cognizable action against logging company which had contracted with service to haul lumber).

[77] The Uber agreement, "U.S. Terms of Use," for example, has a prominent arbitration clause: "By agreeing to the Terms, you agree that you are required to resolve any claim that you may have against Uber on an individual basis in arbitration, as set forth in this Arbitration Agreement. This will preclude you from bringing any class, collective, or representative action against Uber, and also preclude you from participating in or recovering relief under any current or future class, collective, consolidated, or representative action brought against Uber by someone else." *See* https://www.uber.com/legal/terms/us/ (as of May 10, 2018).

[78] 77 P.S. § 731.

agreements that restrict workers' compensation rights, but a leading scholar of the field has strongly suggested that, push-come-to-shove, the Federal Arbitration Act would be held to preempt the workers' compensation authorities.[79] (It seems likely that most WCJs would hear such cases on the merits and leave it to the appellate courts to address such a novel jurisdictional argument.) It is also notable that some agreements, like those presented by Taskrabbit and Instacart, exclude workers' compensation claims from arbitration.[80]

C. ***Transportation network companies.*** Of course, not all sharing-economy enterprises are the same. With regard to the transportation network industry, at least one reported federal court case, the *O'Connor* decision from California, has examined how Uber oversaw its drivers and concluded that a factual issue did indeed present itself with regard to whether sufficient control existed by Uber so that its drivers could be employees.[81] Plainly, a Pennsylvania court could be convinced that the same or similar criteria (recounted in detail above) establish control for workers' compensation purposes. Prohibitions by ride-sharing services of discriminatory acts and the possession of firearms would also seem to reflect control over drivers.

A Pennsylvania court could also choose to take into account the nature of the ride-sharing industry and conclude that, because drivers are integral to the industry's operations – undertaking work essential to the employer's regular business – employment status has been established.[82]

The editor of the Larson treatise has correctly observed that the analysis in this area can be aided by a review of the analogous taxi industry cases.[83] Pennsylvania, however, does not seem to have produced, over the century, a precedential workers' compensation case addressing the issue of whether a cab driver for a dispatch service is an employee or independent contractor. The Connecticut Supreme Court, however, has addressed the issue directly. The court in that case, *Hanson v. Transportation General, Inc.*,[84] held that a taxicab enterprise, which was alleged to be the deceased worker's employer, had sufficiently divorced itself of control over the cab driver, and the court held that the deceased was an independent contractor and not an employee. Notably, the dispatch service (Metro) leased taxis to its owner-operators (including the deceased) and charged a "stand fee," but then required them to pay for maintenance, repairs, fines, towing, and taxes related to the vehicle. The owner-operator could also set up his own hours of operation, refuse to accept dispatch calls, hire a driver for the cab, use the vehicle for personal

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[79] *See* Michael C. Duff, *Compulsory Arbitration: More Empty Federal Preemption of State Workers' Comp?,* TORTSOURCE, p.3 (ABA Fall 2016).

[80] *See* https://www.taskrabbit.com/terms (as of March 8, 2018); https://shoppers.instacart.com/contracts/2017 (as of March 8, 2018).

[81] *See supra* Part V(B)(1).

[82] *See supra* Part VI(A).

[83] Thomas A. Robinson, *California Grubhub Driver is Independent Contractor, not Employee: From Comp Standpoint: Are Uber, Lyft & Grubhub Truly "Disruptive?"* (blog post), http://www.workcompwriter.com/page/2/ (Feb. 18, 2018) (as of May 9, 2018).

[84] Hanson v. Transportation General, Inc., 716 A.2d 857 (Conn. 1998).

errands, and keep all fares. Connecticut law, notably, is similar to that of Pennsylvania – *control* is the predominate focus of the critical analysis in both states.

A remarkable phenomenon is that Uber now provides liability insurance relative to its drivers' work, as if it acknowledges some level of potential vicarious liability. Presumably, if sufficient control exists such that such liability may follow, Uber acknowledges control over drivers that may lead to a finding of employee status.

D. ***"Marketplace Contractors."*** With regard to services that connect workers (like handymen, babysitters, pet-sitters, and the like) with home and business owners, the analysis is perhaps more difficult. Once again, however, precedent guides the judge or other analyst to the primacy of control and the subsidiary test of the nature of the work. Although each case must be considered on its own facts, the business models reflected by these types of enterprises at least intuitively do not seem to create an employer-employee relationship between app-based intermediary and worker. Individuals and small businesses have, after all, always connected with clients through intermediary resources (*e.g.*, community bulletin boards and newspapers).

As discussed above, workers dispatched to personal residences do not thereby become employees of their clients. This is so because casual workers (that is, those who perform intermittent work only), not laboring in the *business* of the putative employer, are *excluded* from the definition of employee.[85] Homeowners have no business in the first place. Importantly, the analysis is different if a commercial entity retains a Tasker for labor in an aspect of its regular business. In such instances, the injured Tasker will likely have a claim for workers' compensation against the commercial enterprise.

It is conceivable that an employee of a Tasker, who turns out to be uninsured for workers' compensation purposes, may, in the event of injury, seek to portray an intermediary like Taskrabbit as a statutory employer. Such a worker's theory would be that Taskrabbit has operated as a contractor to the customer (the homeowner) and that Taskrabbit has subcontracted-out all or a portion of the job.[86]

E. ***Entrepreneurs selling goods online; Airbnb Hosts.*** Self-employed individuals who make crafts at home, or engage in even more ambitious manufacturing with a 3D printer, do not seem to fit the bill as employees of their online markets. In this regard, no services are provided to the online market in exchange for an individual's labor. The larger issue for such individuals is more conventional – if the business becomes successful, and the crafter takes on paid assistants of his or her own, an employer-employee relationship has been created, thus creating social insurance responsibilities. Notably, an Etsy expert has wisely recommended that ambitious home crafters purchase workers' compensation insurance in such situations.[87]

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[85] *See supra* Part II(C). As to the statute, see Section 104 of the Act, 77 P.S. § 22 (quoted earlier).

[86] *See supra* Part IV(D).

[87] JASON MALINAK, ETSY-PRENEURSHIP: EVERYTHING YOU NEED TO KNOW TO TURN YOUR HANDMADE HOBBY INTO A THRIVING BUSINESS (2012).

The same advice is appropriate for "hosts" who advertise their homes for rent on sites like Airbnb. The user of such sites who begins to utilize cleaning staff for his or her many houses or apartments is, for workers' compensation purposes, forming an employer-employee relationship with such workers. An Airbnb adviser correctly admonishes, "Any Airbnb host that hires a property manager, cleaning crew, or any other person to work on site would be wise to grab workers compensation insurance."[88] As always, no homeowners,' or even commercial liability, policy will cover the work-related personal injury claims of any employee.[89]

F. ***Conclusion.*** It seems doubtful that the Pennsylvania Supreme Court would apply the precedents addressing the employee/independent contractor dichotomy in a purely mechanical way. It would also likely reject the arguments of the sharing-economy businesses that they are in essence passive intermediaries, no different in essence than the entities that have always facilitated connections between parties.

Scholars have, in this regard, observed that "[w]hile the sharing economy is new, the idea of sharing a resource is not. Rental markets for durable goods such as hotels, cars, and tools have been around for a long time, as have markets for personal services such as accounting, automotive repair, and singing lessons. What distinguishes the new sharing economy from the old is the appearance of the platform at the very heart of the transaction. What used to be a two-way transaction has become a three-way transaction."[90] The "platform at the very heart of the transaction" is now a major player in economic and work relationships.

Another scholar posits, persuasively, that "technology has completely changed the nature of sharing economies…. Despite its informal origins, the new sharing economy is largely driven by the for-profit motives of behemoth companies. In many instances, the new sharing economy is monetized and formalized even though the sharing-economy companies purport to serve as simple intermediaries. In reality, the companies' involvement in the peer-to-peer transaction generally is more pronounced than in traditional sharing economies. And, even more significantly, these companies stand to make a substantial profit from the peer-to-peer transactions they facilitate."[91]

Most people, including judges, now understand these economic realities of the new sharing economy – and the circumstances of the individuals who labor in the gig workforce that it has created.

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[88] *Types of Insurance for Airbnb Hosting*, PAYFULLY.COM (Oct. 25, 2017), https://blog.payfully.co/types-of-insurance-for-airbnb-hosting-39648ae00d19 (as of May 9, 2018).

[89] DAVID B. TORREY & ANDREW E. GREENBERG, PENNSYLVANIA WORKERS' COMPENSATION: LAW & PRACTICE, § 23:56 (Thomson-Reuters 3rd ed. 2008).

[90] CHAKRAVARTHI NARASIMHAN, SHARING ECONOMY: REVIEW OF CURRENT RESEARCH AND FUTURE DIRECTIONS (June 2017), http://www-bcf.usc.edu/~proserpi/papers/cns-sharing.pdf (as of May 10, 2018).

[91] Agnieszka A. McPeak, *Sharing Tort Liability in the New Sharing Economy*, 49 CONNECTICUT LAW REVIEW 171 (2016).

VII. Conclusion: Proposals for Different Approaches

The challenge of injury compensation for laborers in nonstandard work categories has, in Pennsylvania, been addressed by a combination of common law and statutory rules. Particularly for workers in the true gig workforce, other solutions may be forthcoming.

A dramatic reform would be the creation of a third type of worker altogether. In a December 2015 paper, scholars Seth Harris and Alan Krueger proposed the concept of the "independent worker" – that is, precisely the same workers who are discussed in this paper, laboring for online intermediaries. Such workers, under this proposal, would be allowed to collectively bargain, and have resort to civil rights laws, but would not be entitled to unemployment compensation. As for insurance, "intermediaries would be permitted to pool independent workers for purposes of purchasing and providing insurance and other benefits at lower costs and higher quality without the risk that their relationship will be transformed into an employment relationship."[92] Philadelphia attorney Brad Smith, noting this commentary, observes as follows:

> Harris and Krueger lay out an elaborate argument for what benefits should be transferred to the independent worker and how it would be done. As for workers' compensation, [they] suggest that the existing tort system is adequate for many workers' injuries in the sharing economy – although this is a contention to which many Uber drivers would disagree. Harris and Krueger acknowledge that this may not be sufficient, and therefore propose "that [businesses] be permitted to provide expansive workers' compensation insurance policies to the independent workers with which they work without transforming these relationships into employment. In exchange for this no-fault insurance coverage, [businesses] would receive limited liability and protection from tort suits." Their proposal goes on to allow variance between some states, with some states allowing this optional workers' compensation to operate privately, or requiring that there be more protections for independent workers. The pitfall of such an option seems immediately apparent: why would a business opt to provide this coverage if they are unlikely to be found negligent and thus liable in a typical civil suit?
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> Harris and Krueger acknowledge that the opt-in system "create[s] adverse selection and moral hazard problems" but believe that experience would lead to companies striking the appropriate balance. One can easily imagine that sharing economy workers – especially Uber drivers constantly at risk of a motor vehicle

[92] SETH D. HARRIS & ALAN B. KRUEGER, A PROPOSAL FOR MODERNIZING LABOR LAWS FOR TWENTY-FIRST CENTURY WORK: THE "INDEPENDENT WORKER" (The Hamilton Project, Discussion Paper 2015-10, December 2015). For summary and commentary, see Catherine Tucciarello, *The Square Peg Between Two Round Holes: Why California's Traditional Right to Control Test is not Relevant for On-Demand Workers*, 13 SETON HALL CIRCUIT REVIEW 351 (2017).

accident – would not find this plan adequate, at least in regard to workers' compensation insurance.[93]

Another approach, certainly conceivable in the ride-sharing industry, would be to assess a fee (essentially a tax) on each ride to in turn fund a workers' compensation program maintained by the intermediary. Of course, the Black Car Fund in New York is an example of such an approach.

Outside the realm of social insurance are private insurance products that the injured gig workforce laborer can purchase. Many over-the-road truck drivers, for example, purchase occupational accident policies. These policies are specifically designed for independent contractors who are excluded under workers' compensation.

Of course, another solution is to separate disability and medical coverage from employment altogether and create a system of universal coverage. Such proposals have, however, proven politically unacceptable. Indeed, during the period of preparation of this paper, the Affordable Care Act is being dismantled.

In the meantime, certainly in Pennsylvania, litigation, however unsatisfactory, seems to be the short-term means to an answer for how injured workers or their survivors will secure compensation for their losses.

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