
FROM AMAZON TO UBER: DEFINING EMPLOYMENT IN THE MODERN ECONOMY

KEITH CUNNINGHAM-PARMETER*

INTRODUCTION	1674
I. THE RISE OF THE CONTRACTOR DEFENSE	1680
A. <i>Working but Not Employed</i>	1681
B. <i>The Gig Economy and Independent Contractors</i>	1684
C. <i>Consequences of Contracting: Falling Wages, Declining Rights</i>	1688
II. THE ROLE OF CONTROL IN MODERN EMPLOYMENT TESTS	1691
A. <i>Control and the Economic Realities Test</i>	1691
B. <i>Control and the Common Law Test</i>	1695
C. <i>Judicial Demand for Evidence of Immediate Control</i>	1697
1. <i>Control and Independent Contractors</i>	1698
2. <i>Control and Intermediaries</i>	1700
III. FOUNDATIONS OF CONTROL	1704
A. <i>Subjects of Control</i>	1705
B. <i>Direction of Control</i>	1708
C. <i>Obligations of Control</i>	1710
IV. APPLICATIONS OF CONTROL	1714
A. <i>Control in the Traditional Economy</i>	1714
B. <i>Control in the Gig Economy</i>	1717
C. <i>Control and Other Workplace Rights</i>	1723
D. <i>In Defense of Refocused Control</i>	1725
CONCLUSION	1727

American companies increasingly hire workers without offering them formal employment. Because nearly all workplace protections apply only to “employers” and “employees,” businesses avoid these labels by delegating their employment responsibilities to workers and intermediaries. For example, Amazon hires third-party contractors to staff its distribution centers, FedEx Ground denies the employment status of its drivers, and Uber invites only independent contractors to join its platform. These nonemployee designations

* Professor of Law, Willamette University College of Law. J.D., Stanford University. I am grateful to Richard Birke, Matthew Bodie, Michael Dale, Caroline Davidson, Paul Diller, and Shanti Lewallen for helpful conversations and input on this Article. In addition, Kimberly Davis and Tyler Yeoman-Millette provided outstanding research assistance throughout this project. Finally, I greatly appreciate the excellent library research support that I received from Mary Rumsey.

make it difficult, if not impossible, for workers to enforce such basic rights as overtime and antidiscrimination protections.

Assessing the growing asymmetry between workers and firms, this Article critically evaluates what it means to employ workers today. Many companies disclaim their status as employers by claiming that they do not exercise daily, direct control over workers. But such a binary approach to control unnecessarily constrains the meaning of employment. In fact, employment status has never depended on whether firms control the minutia of the workplace. Rather, businesses today become employers when they meaningfully influence working conditions, even if layers of contractual relationships obscure that power.

Proposing a model for delineating the reach of employment law, this Article calls upon courts to assess three specific aspects of workplace control: the subjects of control, the direction of control, and the obligations of control. From peer-to-peer platforms that hire independent contractors to more traditional businesses that retain workers through intermediaries, companies that deny their status as employers may still effectively control the manner and means of work. Whether it is Amazon setting its contractors' pay scale, FedEx specifying the color of its drivers' socks, or Uber telling its drivers to play soft jazz on the radio, firms that control contractual outcomes frequently control working conditions as well. By analyzing these diverse permutations of control, this Article provides a framework for defining employer-employee relationships in contemporary workplace settings.

INTRODUCTION

Who should pay for workplace violations? It might seem like an easy question. After all, state and federal laws require employers to compensate employees for illegal employment practices.¹ But what about workers who seem to work for no one? Because only “employees” enjoy most workplace rights, many businesses attempt to avoid these responsibilities by denying their status as employers.² Think of a security firm that guards Amazon’s warehouses every night.³ The security guards do not work directly for

¹ See James Reif, ‘To Suffer or Permit to Work’: Did Congress and State Legislatures Say What They Meant and Mean What They Said?, 6 NE. U. L.J. 347, 350-54 (2014) (examining state and federal employment definitions); Eileen Silverstein, *From Statute to Contract: The Law of the Employment Relationship Reconsidered*, 18 HOFSTRA LAB. & EMP. L.J. 479, 479-80 (2001) (discussing the statutory regulation of employment).

² See Brishen Rogers, *Toward Third-Party Liability for Wage Theft*, 31 BERKELEY J. EMP. & LAB. L. 1, 17 (2010) (discussing the rise of workplace subcontracting).

³ See Integrity Staffing Sols., Inc. v. Busk, 135 S. Ct. 513, 515-17, 519 (2014) (rejecting the wage claims of workers who supplied warehouse services to Amazon through an intermediary); Melissa Allison, *Security Workers Laid Off at Amazon*, SEATTLE TIMES (Aug. 28, 2012, 2:55 PM), <http://www.seattletimes.com/business/security-workers-laid-off-at-amazon/> [https://perma.cc/BA5S-FYLD].

Amazon, but rather for a subcontractor that Amazon hires. If the guards encounter workplace problems (e.g., minimum wage violations or sexual harassment), they can sue the security firm as their direct employer, but not necessarily Amazon.⁴ Or consider the relationship that both Uber and FedEx Ground (“FedEx”) share with their drivers. Uber and FedEx have repeatedly characterized their drivers as “independent contractors” who do not work for the companies.⁵ Under all of these scenarios, the lead businesses (Amazon, FedEx, and Uber) utilize contractors (subcontractors and independent contractors) to shield themselves from laws designed to protect workers.⁶ Thus, if the drivers work overtime or if the security company vanishes without paying its guards, the lead firms may attempt to deny these claims by embracing the contractor defense.⁷

The law’s ambiguous definition of what it means to “employ” workers makes it increasingly difficult for laborers to hold firms accountable for illegal employment practices.⁸ This persistent uncertainty impacts an ever-expanding list of businesses in retail, service, home care, construction, information technology, and the burgeoning on-demand economy.⁹ From contract lawyers

⁴ See Timothy P. Glynn, *Taking the Employer out of Employment Law? Accountability for Wage and Hour Violations in an Age of Enterprise Disaggregation*, 15 EMP. RTS. & EMP. POL’Y J. 201, 203-04 (2011) (discussing subcontracting and limited employment liability).

⁵ See *Gray v. FedEx Ground Package Sys., Inc.*, 799 F.3d 995, 997 (8th Cir. 2015) (reviewing the independent contractor classification of FedEx delivery drivers); *Craig v. FedEx Ground Package Sys., Inc.*, 792 F.3d 818, 820-21 (7th Cir. 2015) (same); *Carlson v. FedEx Ground Package Sys., Inc.*, 787 F.3d 1313, 1326 (11th Cir. 2015) (same); *Alexander v. FedEx Ground Package Sys., Inc.*, 765 F.3d 981, 989-97 (9th Cir. 2014) (holding that FedEx workers are employees based on “powerful evidence of FedEx’s right to control the manner in which drivers perform their work”); *FedEx Home Delivery v. NLRB*, 563 F.3d 492, 504 (D.C. Cir. 2009) (ruling against FedEx workers under the common law test for employment); *O’Connor v. Uber Techs., Inc.*, 82 F. Supp. 3d 1133, 1145-48 (N.D. Cal. 2015) (evaluating the employment status of Uber drivers).

⁶ See Richard R. Carlson, *Why the Law Still Can’t Tell an Employee When It Sees One and How It Ought to Stop Trying*, 22 BERKELEY J. EMP. & LAB. L. 295, 337 (2001) (discussing the reasons why certain companies avoid the employer label).

⁷ See Cynthia Estlund, *Corporate Self-Regulation and the Future of Workplace Governance*, 84 CHI.-KENT L. REV. 617, 631-33 (2009) (considering how the contractor defense insulates large employers from liability).

⁸ See Yuval Feldman, *Ex-Ante vs. Ex-Post: Optimizing State Intervention in Exploitive Triangular Employment Relationships*, 30 COMP. LAB. L. & POL’Y J. 751, 753 (2009); Sarah Leberstein & Anastasia Christman, *Occupy Our Occupations: Why ‘We Are the 99%’ Resonates with Working People and What We Can Do to Fix the American Workplace*, 39 FORDHAM URB. L.J. 1073, 1086-90 (2012) (highlighting the growth of nonstandard work arrangements).

⁹ See Catherine K. Ruckelshaus, *Labor’s Wage War*, 35 FORDHAM URB. L.J. 373, 373, 382 (2008) (discussing the consequences of employee misclassification); Justin Fox, *Uber and the Not-Quite-Independent Contractor*, BLOOMBERG VIEW (June 23, 2015, 11:59 AM),

supplied by temp agencies to on-demand drivers who work “gigs” for peer-to-peer platforms, many Americans today provide labor to businesses that never technically employ them.¹⁰

Since the end of the Great Recession, U.S. businesses have aggressively engaged in a series of organizational changes—from classifying workers as independent contractors, to hiring subcontractors, to utilizing staffing agencies—to delegate employment-related responsibilities to outsiders.¹¹ Although the strategic use of contractors existed long before the most recent economic downturn, the Great Recession dramatically increased this trend.¹² Regrettably for workers caught in these settings, employment law violations represent a common practice.¹³ In addition to avoiding employment liabilities, firms that hire contractors fail to contribute to essential components of America’s social safety net such as Social Security and unemployment benefits.¹⁴ And the scope of the problem is growing. By 2020, up to forty percent of workers are projected to become contingent “pseudo-employees,” many of whom will lack the ability to enforce basic workplace protections.¹⁵

Given the potential cost-savings they offer, these organizational changes represent the “future of work” for which the law must account.¹⁶

<http://www.bloombergview.com/articles/2015-06-23/uber-drivers-are-neither-employees-nor-contractors> [<https://perma.cc/4UDF-QEGJ>] (examining the growth of independent contracting in the gig economy).

¹⁰ See Carlson, *supra* note 6, at 297, 336-37 (discussing reasons that firms engage in employee misclassification); see also KATHERINE V.W. STONE, FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE 67 (2004) (discussing the growth of contingent work in numerous sectors).

¹¹ See generally CATHERINE RUCKELSHAUS ET AL., WHO’S THE BOSS: RESTORING ACCOUNTABILITY FOR LABOR STANDARDS IN OUTSOURCED WORK 3-5, 19 (2014) (observing that staffing employment grew by forty-one percent in the years following the Great Recession, compared to overall employment growth of six percent).

¹² Glynn, *supra* note 4, at 202-04 (discussing business disaggregation following the Great Recession).

¹³ Rogers, *supra* note 2, at 10-11; Ruth Milkman, *Companies Must Take Full Responsibility for All Workers*, N.Y. TIMES (Sept. 14, 2015, 3:36 AM), <http://www.nytimes.com/roomfordebate/2015/09/14/whos-the-boss-when-you-work-for-a-franchise-or-contractor/companies-must-take-full-responsibility-for-all-workers> [<https://perma.cc/28R9-PGDA>] (discussing the prevalence of employment law violations in subcontracting relationships).

¹⁴ See Ruckelshaus, *supra* note 9, at 379-82 (examining the cost savings that come with subcontracting and workplace delegation).

¹⁵ INTUIT, INTUIT 2020 REPORT: TWENTY TRENDS THAT WILL SHAPE THE NEXT DECADE 20-21 (2010), https://http-download.intuit.com/http.intuit/CMO/intuit/futureofsmallbusiness/intuit_2020_report.pdf [<https://perma.cc/GK47-QM3V>] (projecting various changes in labor markets).

¹⁶ See RUCKELSHAUS ET AL., *supra* note 11, at 3-4 (“This restructuring of employment arrangements may well foreshadow a future of work different from the employer-employee paradigm around which many of our labor standards were constructed, but it should not

Unfortunately, current judicial pronouncements on these issues often embrace a cabined vision of employment that shields firms from liability.¹⁷ This constrained understanding of employer-employee configurations ultimately limits the reach of protective statutes, thereby resulting in a misalignment between modern workplace structures and employment rights.¹⁸

But there is a way to correct this growing asymmetry, and it begins by reassessing what it means to employ workers today. Many companies successfully disclaim their status as employers by arguing that they do not exercise daily, direct control over workers.¹⁹ Knowing the central gatekeeping role that courts assign to the concept of control, firms delegate immediate control responsibilities to outside entities (subcontractors) or to the workers themselves (independent contractors). The contractor defense works because the delegating firms appear to control no one. In reality, however, engaging businesses often retain far more control than initial appearances might suggest.²⁰ By scrutinizing the many sublayers of control that are often present in these relationships, this Article outlines new methods for thinking about the concepts of “control” and “employ” that remain central to modern employment.

Part I of this Article summarizes the growth of the contractor defense in both traditional workplace sectors and in the on-demand economy. Although the settings differ, the ramifications for workers are the same: businesses use the contractor defense to disclaim responsibility for complying with basic workplace rights such as overtime and antidiscrimination protections. Part II examines several recent judicial opinions that have erroneously validated the contractor defense by utilizing underinclusive definitions of “control” and “employ.”

Part III considers why many courts continue to affirm the contractor defense in a variety of settings. Judges in these cases tend to narrowly construe the meaning of control because a broader approach to the concept could conceivably expose just about anyone to employment claims.²¹ Responding to

spell the end of living wage jobs or business responsibility for work and workers.”).

¹⁷ See STONE, *supra* note 10, at 6 (asserting that existing workplace protections fail to account for shifting employment structures).

¹⁸ Julia Tomassetti, *The Contracting/Producing Ambiguity and the Collapse of the Means/Ends Distinction in Employment*, 66 S.C. L. REV. 315, 357 (2014) (considering the applicability of traditional employment protections to post-industrial workplace settings).

¹⁹ See, e.g., *Layton v. DHL Express (USA), Inc.*, 686 F.3d 1172, 1178, 1181 (11th Cir. 2012) (applying an employment test that looks for evidence of a company’s daily, direct control over workers); see also Tomassetti, *supra* note 18, at 335-36 (explaining how some judicial applications of employment tests require evidence of formal supervision).

²⁰ See, e.g., Tomassetti, *supra* note 18, at 370 (“FedEx, for example, requires its delivery drivers to sign an over 60-page agreement that details FedEx’s nationwide ‘standard of service.’”).

²¹ See Cynthia Estlund, *Who Mops the Floors at the Fortune 500? Corporate Self-Regulation and the Low-Wage Workplace*, 12 LEWIS & CLARK L. REV. 671, 690-91 (2008)

this concern, Part III calls upon courts to rethink three aspects of workplace control that help establish the outer limits of employer-employee relationships. Specifically, courts must fully assess the *subjects* of control, the *direction* of control, and the *obligations* of control to accurately delineate the reach of the nation's core workplace protections.

First, as to the subjects of control, companies that deny their status as employers often assert that the subject of any control-based inquiry should focus exclusively on a firm's immediate control of workers.²² But this view represents only one of many ways that firms can influence the manner and means of work. By shifting the subject of control from direct supervision to a company's overall ability to shape the contours of performance-related expectations, a longer list of potential employers emerges. For example, if a large firm controls every aspect of its relationship with a subcontractor or an independent contractor (such as the manner in which a product is produced, the labor costs for producing the product, and the timeline for delivering the product), then this direct control over labor-based outcomes provides the firm with effective control over working conditions as well.

Second, courts should determine the direction that control travels between firms and workers. When a business reserves all relevant forms of power over independent contractors and intermediaries, this type of one-way control gives rise to employment responsibilities because workers have no meaningful say over how to do their jobs. Conversely, evidence of bidirectional control in which a worker and a firm codetermine working conditions suggests that the worker is more like an entrepreneur and less like an employee.²³

Third, a definition of control that adheres to the core purpose of any employment test—to identify which businesses to hold accountable for employment violations—ought to focus on the obligations that larger, end-user firms have to prevent unlawful employment practices. In this way, the concepts of control and employer responsibility correspond to one another: if an end-user firm retains greater control over working conditions, then the firm has a heightened duty to detect and prevent unlawful employment practices. For example, courts might find that a larger firm controls a subcontractor and the wage violations it commits if the larger firm exerts significant influence over an undercapitalized middleman or knows of frequent wage violations in the industry but does nothing to prevent them.²⁴ Likewise, if a peer-to-peer

(arguing in favor of holding certain companies liable for the illegal employment practices of their contractors).

²² See Bruce Goldstein et al., *Enforcing Fair Labor Standards in the Modern American Sweatshop: Rediscovering the Statutory Definition of Employment*, 46 UCLA L. REV. 983, 1012-13 (1999) (asserting that the FLSA's history demonstrates congressional intent to extend liability beyond entities that exercise daily control over workers).

²³ See Shirley Lung, *Exploiting the Joint Employer Doctrine: Providing a Break for Sweatshop Garment Workers*, 34 LOY. U. CHI. L.J. 291, 352 (2003) (evaluating the concept of "dependent contractors").

²⁴ See *id.* at 352-55 (examining factors relevant to holding manufacturers and contractors

platform dictates the key terms of its drivers' work duties, then the platform should be held responsible for illegal wage activities if it does nothing to prevent violations that result from that work.²⁵ Thus, as with any duty analysis,²⁶ the burden to prevent unlawful behavior is rooted in the reasonably foreseeable harm that an engaging firm can anticipate when it becomes more involved in its transactions with contractors.²⁷

This detailed analysis of control does not mean that courts should focus exclusively on the concept of control at the expense of other employment-related factors. Indeed, numerous employment tests list control as one of several criteria that judges should evaluate when making employment determinations.²⁸ But given that control already stands at the center of most judicial examinations of the topic,²⁹ a framework that assesses the meaning of control can serve as a much-needed tool for determining the bounds of modern employment relationships.

Part IV of this article considers how this refocused approach to control applies to wage claims brought by workers in traditional industries and in the emerging gig economy. This Article then assesses how workers might apply these same concepts to other employment protections such as antidiscrimination and unionization rights. This Part also calls attention to several promising judicial opinions that have cut through the contractor defense by embracing a broad definition of control. Part IV concludes by anticipating possible objections to this proposed framework, including its potential unpredictability and the incentives it might create for firms to restructure (again) existing relationships to avoid employment responsibilities. Acknowledging these concerns, this Article explains how an expansive definition of control improves upon the malleable tests courts currently use to define employment, while simultaneously increasing accountability among firms.

Today, the same competitive forces that place downward pressure on wages also encourage companies to avoid employment-related responsibilities by

jointly liable).

²⁵ See *infra* Section IV.B (discussing different permutations of control in the gig economy).

²⁶ See Jennifer Arlen & Reinier Kraakman, *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, 72 N.Y.U. L. REV. 687, 699-707 (1997) (discussing incentives created by a duty-based approach to liability). *But see* Glynn, *supra* note 4, at 224-26 (outlining challenges posed by a duty-based approach to employment coverage).

²⁷ Rogers, *supra* note 2, at 6 (discussing the need to clarify existing definitions of employment).

²⁸ Tomassetti, *supra* note 18, at 333-36 (analyzing various employment tests that consider the concept of control).

²⁹ See Carlson, *supra* note 6, at 314 (discussing the primary role that control plays in employment tests).

hiring intermediaries and independent contractors.³⁰ Given the ease with which businesses can delegate jobs to outsiders, companies will continue to utilize the contractor defense to disclaim their status as employers.³¹ The control-based framework outlined here can help close this growing gap between workers and firms by critically evaluating the meaning of modern employment.

I. THE RISE OF THE CONTRACTOR DEFENSE

Not all workers fare equally in the rough and tumble world of today's post-industrial economy. Continuing flat wages in many sectors, especially in low-wage sectors, add to the problems of income inequality and economic stagnation in the United States.³² But rapid shifts in wages and working conditions are not the only factors that divide employees who sit at the top and bottom of the labor market.³³ In addition to the foregoing problems, a far less-discussed cleavage separates certain employees who enjoy the full range of workplace rights (e.g., labor, antidiscrimination, and overtime protections) from those who do not.³⁴

This Part outlines the growth of several contractor-based methods that companies use to disclaim work-related liabilities and to lower costs. By designating their staff as "independent contractors" or by engaging third-party intermediaries, firms attempt to avoid certain workplace obligations.³⁵ Although initially limited in scale, these changes now affect numerous industries.³⁶ From low-wage work in sectors such as maintenance, hospitality, and food preparation,³⁷ to high-skilled work in areas such as computer

³⁰ Estlund, *supra* note 7, at 618, 631 (remarking on current trends in labor markets that encourage firms to use intermediaries); see also Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 COLUM. L. REV. 319, 324 (2005) (explaining how some employers resist workplace enforcement efforts).

³¹ See Glynn, *supra* note 4, at 212-13 (describing the ways in which some firms outsource all tasks except "core functions . . . associated with highly skilled labor").

³² See generally RUCKELSHAUS ET AL., *supra* note 11, at 1-3 (examining the relationship between outsourcing and income inequality in the United States).

³³ See Estlund, *supra* note 21, at 671 (discussing the impact that income inequality has on broader democratic values); Glynn, *supra* note 4, at 212-13 (asserting that enterprise disaggregation "contributes to the depression of wages at the low end of the market and rising income inequality").

³⁴ See Noah D. Zatz, *Working Beyond the Reach or Grasp of Employment Law*, in LABOR & EMP'T RELATIONS ASS'N, *THE GLOVES-OFF ECONOMY: WORKPLACE STANDARDS AT THE BOTTOM OF AMERICA'S LABOR MARKET* 31 (Annette Bernhardt et al. eds., 2008) (emphasizing the need to analyze the exclusion of workers from labor protections).

³⁵ See generally Leberstein & Christman, *supra* note 8, at 1086-87 (examining how the use of labor intermediaries enables firms to skirt state regulations).

³⁶ See Glynn, *supra* note 4, at 202-03 (remarking that most large businesses now engage in some type of triangular employment).

³⁷ *Id.* at 212-13 (discussing the growth of outsourcing in different sectors); Ruckelshaus, *supra* note 9, at 373 (explaining that employers in the construction, hospitality, healthcare,

programming, higher education, and legal services, contractor relationships now touch diverse job categories.³⁸ At the far end of this frontier sits the budding on-demand economy, which is populated by firms that claim to employ no one.³⁹

A. *Working but Not Employed*

The uniforms that many workers wear today do not necessarily reflect the identities of their actual employers.⁴⁰ For example, the satellite television installer who drives a DirecTV-branded truck may not actually report to DirecTV.⁴¹ Likewise, the Westin housekeeper who cleans hotel rooms may not receive a paycheck from the hotel chain where she works.⁴² The process of “vertical integration,” wherein firms generate goods and services internally, has drastically declined over the last several decades.⁴³ Given the choice between producing a service in-house or buying it from outside sources, companies increasingly turn to third parties for essential services.⁴⁴ This

retail, childcare, and building industries often “hide behind subcontractors” and “call their workers ‘independent contractors’ not covered by workplace laws”). See generally ANNETTE BERNHARDT ET AL., *BROKEN LAWS, UNPROTECTED WORKERS: VIOLATIONS OF EMPLOYMENT AND LABOR LAWS IN AMERICA’S CITIES* 4, 12 (2009) (discussing the use of independent contractors in low-wage sectors).

³⁸ See Susan Harthill, *Shining the Spotlight on Unpaid Law-Student Workers*, 38 VT. L. REV. 555, 557-60 (2014) (examining the work relationships between law interns, law schools, and for-profit law firms); Leberstein & Christman, *supra* note 8, at 1086-89 (highlighting the effects of triangular employment on workers in different sectors); Danielle D. van Jaarsveld, *Overcoming Obstacles to Worker Representation: Insights from the Temporary Agency Workforce*, 50 N.Y.L. SCH. L. REV. 355, 363-65 (2006) (discussing Microsoft’s use of staffing agencies during the 1990s).

³⁹ See, e.g., *O’Connor v. Uber Techs., Inc.*, 82 F. Supp. 3d 1133, 1136-37 (N.D. Cal. 2015) (evaluating the employment classification of rideshare drivers).

⁴⁰ See RUCKELSHAUS ET AL., *supra* note 11, at 1-2 (outlining different forms of outsourcing).

⁴¹ See *In re DirecTV, Inc.*, 84 F. Supp. 3d 1373, 1374-75 (J.P.M.L. 2015).

⁴² *Tolentino v. Starwood Hotels & Resorts Worldwide, Inc.*, 437 S.W.3d 754, 755, 761-62 (Mo. 2014) (extending joint-employment liability to a hotel chain and its cleaning subcontractor).

⁴³ See Herbert Hovenkamp, *The Law of Vertical Integration and the Business Firm: 1880-1960*, 95 IOWA L. REV. 863, 865 (2010) (“Vertical integration occurs whenever a business firm does something for itself that it might otherwise have obtained on the market.”); Rogers, *supra* note 2, at 13-17; Lydia DePillis, *A Federal Agency Is About to Answer the Question: Who Do You Actually Work for?*, WASH. POST: WONKBLOG (July 11, 2014), <https://www.washingtonpost.com/news/wonk/wp/2014/07/11/a-federal-court-is-about-to-answer-the-question-who-do-you-actually-work-for/> [https://perma.cc/3QKG-95UZ] (asserting that some large companies hire very few workers who actually meet the legal definition of “employees”).

⁴⁴ Glynn, *supra* note 4, at 203-04 (discussing firm disaggregation); see also Zatz, *supra* note 34, at 34 (considering the relationship between vertical integration and workplace

growing commodification of work-related tasks has birthed an entire industry of labor intermediaries who sell discrete services in individualized packages to businesses.⁴⁵

Given the low price and availability of vendor-supplied labor, many formerly self-contained companies now rely on vast networks of contractors to maintain operations.⁴⁶ For example, some hospitals and hotels assign nearly all of their operations—housekeeping, maintenance, recordkeeping, etc.—to third parties.⁴⁷ Similarly, when Amazon recently opened a distribution center in Tennessee, it announced that 3500 of the 4500 new employees would actually work for an outside agency that contracted with Amazon.⁴⁸ But even though Amazon may not share an official employment relationship with workers in situations like this, the company can still exert significant influence over workers' pay and working conditions by controlling the firms that formally employ them.⁴⁹

Unsurprisingly, these movements have caused the number of people employed by labor-only agencies to explode in recent years. Since 2010, the staffing industry has added more jobs to the U.S. economy than any other sector.⁵⁰ While total employment in the labor market has grown by six percent

rights).

⁴⁵ See Glynn, *supra* note 4, at 212-13 (explaining how firms benefit from fragmentation); Katherine V.W. Stone, *Legal Protections for Atypical Employees: Employment Law for Workers Without Workplaces and Employees Without Employers*, 27 BERKELEY J. EMP. & LAB. L. 251, 253-54 (2006) (discussing the process of enterprise disaggregation).

⁴⁶ See Glynn, *supra* note 4, at 212; Rogers, *supra* note 2, at 4-5 (outlining structures of contemporary production).

⁴⁷ RUCKELSHAUS ET AL., *supra* note 11, at 7-8 (explaining how some businesses employ only a skeleton crew of direct employees).

⁴⁸ See Brief for the Labor Relations & Research Center, University of Massachusetts, Amherst as Amicus Curiae at 8-9, *Browning-Ferris Indus. of Cal., Inc.*, 362 N.L.R.B. No. 186 (Aug. 27, 2015) (No. 32-RC-109684) (examining the use of temporary agencies in the warehouse industry).

⁴⁹ See Chris Kirkham, *Amazon Cuts Back on Price, Delivery Times by Cheating Workers, Lawsuit Says*, L.A. TIMES (Oct. 29, 2015, 3:38 PM), <http://www.latimes.com/business/la-fi-amazon-contractors-20151030-story.html> [<https://perma.cc/6MTP-672W>]; Adam Satariano, *What Amazon Wants for Christmas: 100,000 Temps*, BLOOMBERG BUSINESSWEEK (Dec. 10, 2015, 5:12 PM), <http://www.bloomberg.com/news/articles/2015-12-10/what-amazon-wants-for-christmas-100-000-temps> [<https://perma.cc/6MN5-QE83>] (examining Amazon's use of temporary labor).

⁵⁰ Erin Hatton, *The Rise of the Permanent Temp Economy*, N.Y. TIMES: OPINIONATOR (Jan. 26, 2013, 3:41 PM), http://opinionator.blogs.nytimes.com/2013/01/26/the-rise-of-the-permanent-temp-economy/?_r=0 [<https://perma.cc/K9M4-GDKV>] (listing the characteristics of jobs created since the Great Recession); see Marc Lifsher, *A Fight over 'Perma-Temp' Work*, L.A. TIMES, May 7, 2014, at B2 (discussing the growth of the staffing industry).

since 2009, the staffing industry has grown by forty-one percent.⁵¹ Many of the workers involved in these arrangements are not temporary laborers at all, but rather assume the identity of “permatemps” who receive their paychecks from supplying firms while providing labor to companies that never formally employ them.⁵² Once a niche field in the 1970s that offered only short-term work in areas such as secretarial assistance, nursing help, and day labor, the temporary staffing sector now supplies labor to numerous industries.⁵³ Given this expansion, many end-user companies today see “temporary” staffing agencies as permanent extensions of their human resources departments.⁵⁴

Temporary staffing firms create “triangular employment relationships” between workers, intermediaries, and those end-user businesses that contract with staffing firms to hire workers.⁵⁵ In addition, traditional subcontractors can also create triangular employment by standing between workers and end-user firms.⁵⁶ Subcontractors differ from staffing agencies in the level of direct contact that workers have with end-user firms. Whereas staffing agencies technically hire workers and then send them to user businesses for supervision, a pure subcontractor theoretically performs predefined jobs with its own employees.⁵⁷ Competing with one another to win subcontracts, this class of intermediaries must frequently lower labor costs to secure work from end-user businesses.⁵⁸

The final method through which firms delegate employment-related responsibilities involves company-to-worker models in which individuals assume the title of “independent contractors.”⁵⁹ Under this system, the obligations of regulatory compliance do not fall on intermediaries but instead on the workers themselves. Because nearly every workplace statute excludes independent contractors from coverage, a business that hires true independent

⁵¹ RUCKELSHAUS ET AL., *supra* note 11, at 21-22 (outlining the growth of contingent employment).

⁵² *Id.* at 8, 19 (discussing jobs that involve “permatemping”).

⁵³ See Brief for the National Labor Relations Board as Amicus Curiae at 11-12, *Browning-Ferris*, 362 N.L.R.B. No. 186 (No. 32-RC-109684) (surveying the expansion of the temporary services industry); Stone, *supra* note 45, at 255 (“Since the 1980s, temporary employment has been the fastest growing portion of the labor market in the United States.”).

⁵⁴ See Leberstein & Christman, *supra* note 8, at 1086-87 (discussing the modern characteristics of temporary work).

⁵⁵ See Feldman, *supra* note 8, at 752 (examining different triangular employment relationships).

⁵⁶ See *id.* (characterizing subcontracting relationships as a form of triangular employment). See generally RUCKELSHAUS ET AL., *supra* note 11, at 7-19 (discussing the pervasiveness of third-party contracting in the U.S. labor market).

⁵⁷ See Zatz, *supra* note 34, at 41 (distinguishing staffing arrangements from traditional subcontracts).

⁵⁸ See Rogers, *supra* note 2, at 19-21 (discussing the challenge of prosecuting employment claims against undercapitalized subcontractors).

⁵⁹ RUCKELSHAUS ET AL., *supra* note 11, at 7 (listing different outsourcing models).

contractors has no responsibility under federal law to pay the minimum wage, comply with overtime requirements, or even adhere to prohibitions against sexual harassment.⁶⁰

Historically, firms reserved the independent contractor designation for entrepreneurial individuals whose skills demanded higher pay in the open market.⁶¹ Legislatures rationalized excluding these laborers from most employment laws because these individuals did not require the same legal protections as potentially more vulnerable, less-skilled “employees.”⁶² But as with the use of subcontractors and staffing agencies, firms now apply this designation to a much broader class of workers. For example, some low-skilled employees such as janitors and restaurant servers who once indisputably enjoyed employee status now work for businesses that designate them as independent contractors.⁶³ Often dependent on engaging firms for economic survival, these new independent contractors lack the entrepreneurial power of their predecessors.

B. *The Gig Economy and Independent Contractors*

No industry better exemplifies the vast expansion of independent contracting than the on-demand or “gig” economy.⁶⁴ Rooted in an economic model in which individuals sell services to one another, online platforms help facilitate varied forms of peer-to-peer work.⁶⁵ Although on-demand workers represent a relatively small segment of the labor force, the number of jobs in this area is increasing rapidly.⁶⁶ Take Uber: Valued at \$50 billion, Uber is the

⁶⁰ See Leberstein & Christman, *supra* note 8, at 1087-89 (examining the consequences of employee misclassification).

⁶¹ See Zatz, *supra* note 34, at 34 (discussing skillsets associated with independent contracting).

⁶² See Carlson, *supra* note 6, at 362.

⁶³ See Josh Eidelson, *FedEx Ground Says Its Drivers Aren't Employees. The Courts Will Decide*, BLOOMBERG BUSINESSWEEK (Oct. 17, 2014, 2:16 PM), <http://www.bloomberg.com/bw/articles/2014-10-16/fedex-ground-says-its-drivers-arent-employees-dot-the-courts-will-decide> [<https://perma.cc/2DFE-2XFZ>] (discussing the growth of independent contracting in janitorial services, home health care, and restaurants).

⁶⁴ See Noam Scheiber, *Employees, Contractors and Those in Between*, N.Y. TIMES, Dec. 11, 2015, at B1 (evaluating the legal classification of on-demand workers).

⁶⁵ See *Peer-to-Peer Rental: The Rise of the Sharing Economy*, ECONOMIST (Mar. 9, 2013), <http://www.economist.com/news/leaders/21573104-internet-everything-hire-rise-sharing-economy> [<https://perma.cc/TWS5-QYSU>] (outlining various features of the gig economy).

⁶⁶ See SETH D. HARRIS & ALAN B. KRUEGER, A PROPOSAL FOR MODERNIZING LABOR LAWS FOR TWENTY-FIRST CENTURY WORK: THE “INDEPENDENT WORKER” 11-12 (2015) (explaining that on-demand work represents a small but “rapidly expanding new segment of the workforce”); MCKINSEY GLOBAL INST., A LABOR MARKET THAT WORKS: CONNECTING TALENT WITH OPPORTUNITY IN THE DIGITAL AGE 33 (2015), <http://www.mckinsey.com/global-themes/employment-and-growth/connecting-talent-with->

fastest-growing startup in the world.⁶⁷ In fact, the ride-broker's growth has been so explosive that its private market value now equals that of mainstay public companies like Target and Kraft Foods.⁶⁸ Uber claims that it "owns no vehicles" and "employs no drivers."⁶⁹ But even as the rideshare firm denies its employer status, it adds hundreds of thousands of driver-partners to its platform each month.⁷⁰

Uber's ascension has devastated taxi companies in many regions. In New York City, for example, the number of rides provided by Uber jumped in two years from 300,000 to 3.5 million, while traditional cabs lost 2.1 million rides during the same period.⁷¹ In 2015, San Francisco's largest taxi company, Yellow Cab, filed for bankruptcy.⁷² And Uber's long-term business plan extends well beyond ridesharing. The company now delivers, or plans to deliver, food (UberEats), retail goods (UberRush), and flu shots (UberHealth), offering all of these services with nonemployee labor.⁷³

opportunity-in-the-digital-age [<https://perma.cc/69C4-P2HJ>]; Katy Steinmetz, *The Way We Work*, TIME, Jan. 18, 2016, at 46; Julie A. Totten & Clay Flaherty, *Old Law, New Economy: The Present and Future of Independent Contractor Classification in the On-Demand Workplace 1-2* (2016) (unpublished manuscript) (on file with author) (evaluating the expansion of on-demand work).

⁶⁷ See Tracey Lien, *A Thorn in Uber's Side*, L.A. TIMES, Jan. 24, 2016, at C1 (discussing Uber's growth); Chris Higson, *The Value of Uber*, FORBES (Oct. 9, 2015, 12:15 PM), <http://www.forbes.com/sites/lbsbusinessstrategyreview/2015/10/09/the-value-of-uber/#7b1658ac7dda> [<https://perma.cc/P432-2CXS>].

⁶⁸ Eric Newcomer, *The Sharing Economy, Friend or Foe?*, BLOOMBERG BRIEF (June 15, 2015), <http://newsletters.briefs.bloomberg.com/document/4vz1acbgfrxz8uwan9/what-it-is> [<https://perma.cc/EY7C-FW2Q>]; see also Steinmetz, *supra* note 66, at 46 (outlining characteristics of peer-to-peer platforms).

⁶⁹ See *O'Connor v. Uber Techs., Inc.*, 82 F. Supp. 3d 1133, 1137 (N.D. Cal. 2015) (explaining Uber's justifications for classifying itself as a technology company rather than as a transportation company); *Goldberg v. Uber Techs., Inc.*, No. 14-14264-RGS, 2015 WL 1530875, at *1 (D. Mass. Apr. 6, 2015) (noting Uber's assertion that the company "does not employ drivers or own any vehicles").

⁷⁰ Steinmetz, *supra* note 66, at 49 (evaluating the expansion of the peer economy); Ellen Huet, *Uber Is Adding "Hundreds of Thousands" of New Drivers Every Month*, FORBES (June 3, 2015, 11:05 PM), <http://www.forbes.com/sites/ellen3huet/2015/06/03/uber-adding-hundreds-of-thousands-of-new-drivers-every-month/#1f94f5df4212> [<https://perma.cc/5ZGN-W87D>] (discussing Uber's growth).

⁷¹ Casey Leins, *Who's a Sharing Economy Worker?*, U.S. NEWS & WORLD REP.: DATA MINE (Aug. 21, 2015, 1:49 PM), <http://www.usnews.com/news/blogs/data-mine/2015/08/21/uber-airbnb-etsy-who-are-the-sharing-economy-workers> [<https://perma.cc/RWL4-QZMZ>].

⁷² William Oremus, *The End of the Taxi Era*, SLATE (Jan. 8, 2016, 5:58 PM), http://www.slate.com/articles/technology/technology/2016/01/yellow_cab_in_san_francisco_is_just_the_beginning_uber_s_war_on_cabs_is.html [<https://perma.cc/W635-RLTD>] (examining how the on-demand economy disrupts traditional business models).

⁷³ See Leslie Picker & Mike Isaac, *Uber Said to Organize New Round of Funding*, N.Y.

Because it categorizes its “partners” as independent contractors, Uber does not extend any employment rights—including unemployment benefits, workers’ compensation, or overtime—to its drivers.⁷⁴ The rideshare firm gains immediate economic advantages from this strategy. Uber can save up to thirty percent in payroll taxes simply by classifying its drivers as nonemployees.⁷⁵ And Uber is not the only platform taking advantage of this exempt category of workers. Indeed, the gig economy is chock-full of firms that hire independent contractors to gain similar bottom-line benefits. From Lyft drivers to TaskRabbit gardeners, many peer marketplaces categorize their workers as nonemployees.⁷⁶

At first glance, the classification of on-demand workers as independent contractors might seem perfectly appropriate given that workers in the industry can accept gigs whenever they choose. But the significant influence that on-demand firms have over working conditions—from setting non-negotiable wage rates, to implementing behavior codes, to “deactivating” (i.e., firing) individuals who perform poorly—reflects a more traditional employer-employee dynamic.⁷⁷

Not only do on-demand platforms control key aspects of work-related expectations, but workers’ levels of economic dependence on peer marketplaces may also be greater than common perceptions suggest. For instance, while some workers in the industry behave like “microentrepreneurs” who devote as many hours to a single platform as they see fit, others behave more like “microearners” who support themselves by continuously piecing together diverse gigs (e.g., airport driver, housekeeper, burrito gopher).⁷⁸ In fact, one-third of on-demand workers say either that they cannot find traditional employment or that they earn forty percent or more of their income by working in the gig economy.⁷⁹ These workers may not depend economically on any one company for income, but their work for firms like TaskRabbit (chore platform), GrubHub (food delivery), and Washio (laundry)

TIMES, Oct. 24, 2015, at B1; Stephanie M. Lee, *The Uber Will See You Now*, BUZZFEED (Nov. 20, 2015, 5:34 PM), <http://www.buzzfeed.com/stephaniemlee/heres-how-uber-wants-to-shake-up-health-care#.eiMvxX35R2> [<https://perma.cc/KS4X-TDBV>].

⁷⁴ See Natasha Singer, *Check App. Accept Job. Repeat.*, N.Y. TIMES, Aug. 17, 2014, at BU1, BU4 (examining varying levels of worker dependence on peer-to-peer platforms).

⁷⁵ NAT’L EMP’T LAW PROJECT, INDEPENDENT CONTRACTOR MISCLASSIFICATION IMPOSES HUGE COSTS ON WORKERS AND FEDERAL AND STATE TREASURIES 1 (2015).

⁷⁶ See Singer, *supra* note 74, at BU4 (surveying the prevalence of independent contracting in the gig economy). But see NAT’L EMP’T LAW PROJECT, EMPLOYERS IN THE ON-DEMAND ECONOMY 1 (2016) (listing several on-demand platforms that changed their classification of workers from “independent contractors” to “employees”); Steinmetz, *supra* note 66, at 49 (discussing how Instacart classifies workers as employees).

⁷⁷ See Singer, *supra* note 74, at BU1 (examining worker autonomy in the on-demand economy).

⁷⁸ *Id.* (discussing different types of peer-to-peer work).

⁷⁹ Steinmetz, *supra* note 66, at 47.

adds up to a career.⁸⁰ And some on-demand firms may be encouraging this shift toward greater worker dependence. For example, Lyft—Uber’s primary competitor—recently created an incentive for individuals to work longer hours by allowing them to keep all of their fares (as opposed to the twenty percent commission that rideshare platforms typically take) if those drivers worked forty hours or more per week.⁸¹

Unfortunately, workers who devote a significant amount of labor to the gig economy may earn wages that fall well below the legal limits that protect acknowledged employees.⁸² Consider Favor, a local delivery service that pays its workers a certain dollar amount for each “favor” that they perform for members (e.g., picking up a customer’s lunch order). Even though the platform assures its members that they will earn at least nine dollars per hour regardless of the price that customers pay for each “favor,” once these gig-runners calculate the amount of time that they spend doing “favors” and the self-employment taxes that they owe, their earnings may fall below the minimum wage.⁸³

Reflecting this reality, Uber drivers have increasingly accused the rideshare platform of harsh working conditions and low wages. For example, drivers for UberBlack (the company’s high-end, ride-hailing service) recently protested Uber’s announcement in Dallas that it would require UberBlack drivers to also drive for UberX, which is the low-cost version of the platform.⁸⁴ Given that many of the protesters spent up to \$35,000 to buy luxury vehicles for UberBlack, the drivers worried that UberX’s lower per-mile rate would barely compensate them for their car payments, gas, and depreciation.⁸⁵ Although Uber eventually backed away from the decision, its unilateral announcement of rate cuts during slow seasons can often push drivers dangerously close to earning sub-minimum wages when accounting for pickup times, waiting, and driving hours.⁸⁶ For instance, Uber recently settled a lawsuit brought by a California woman who drove for the company in an SUV that she leased from one of Uber’s partner auto firms.⁸⁷ After Uber terminated the plaintiff for poor

⁸⁰ See Lien, *supra* note 67, at C1 (listing different types of jobs available in the on-demand economy).

⁸¹ See Singer, *supra* note 74, at BU4 (discussing ways in which workers become economically dependent on peer-to-peer platforms).

⁸² See *infra* Section IV.B (discussing the levels of control that firms exercise over workers in the gig economy).

⁸³ See Singer, *supra* note 74, at BU4 (examining the economic costs of on-demand work).

⁸⁴ See Noam Scheiber, *Solo Workers Unite to Tame Their Gig Jobs*, N.Y. TIMES, Feb. 3, 2016, at A1 (describing drivers’ frustration with being forced to accept lower-fare customers).

⁸⁵ *Id.*

⁸⁶ *Id.* (discussing operating costs that impact drivers’ take-home pay).

⁸⁷ See Complaint, *Dollar v. Uber Techs., Inc.*, No. 06-115672 CP (Cal. Dep’t Lab. Aug. 14, 2015); Biz Carson, *A Former Uber Driver Who Slept in Her Car Just Won a \$15,000*

performance (much as an employer would fire an employee), she sued the rideshare firm and claimed that, after subtracting Uber's various fees, her paychecks were "pennies" instead of the \$400 or \$450 per week that she expected to earn.⁸⁸ Without admitting fault, Uber paid the plaintiff \$15,018 for alleged employment violations.⁸⁹

In addition to its litigation in California, Uber has embraced the independent contractor defense to deny its responsibility to pay statutorily required wages in Florida, Massachusetts, New York, and Texas.⁹⁰ And Uber's disputes over its classification of drivers as independent contractors are not limited to wage claims. For example, in Washington, D.C., Uber used the independent contractor defense to deny responsibility for physical injuries that one of its passengers allegedly suffered at the hands of an Uber driver.⁹¹ Perhaps most remarkably, Uber recently relied upon the contractor defense to argue that it had no legal obligation to train its drivers to "treat individuals with disabilities who use the service in a respectful and courteous way"⁹²

These cases represent only the first ripples of a much larger wave of litigation brought against peer-to-peer companies that deny the employee status of their workers.⁹³ Indeed, courts are just beginning to grapple with the issue of employee misclassification in the gig economy.⁹⁴

C. *Consequences of Contracting: Falling Wages, Declining Rights*

As with peer-to-peer firms, companies in more traditional industries that hire only independent contractors can drastically slash compliance costs by placing themselves beyond the reach of formal workplace requirements.⁹⁵ Of course, whether any of the avoided employment laws still apply to self-

Legal Settlement with Uber, BUS. INSIDER (Jan. 12, 2016, 3:08 PM), <http://www.businessinsider.com/uber-driver-slept-with-family-in-vehicle-rented-from-uber-2016-1> [https://perma.cc/CSF3-SW7X]; see also Order, *Berwick v. Uber Techs., Inc.*, No. 11-46739 EK, at 8-9 (Cal. Dep't Lab. June 3, 2015) (concluding that Uber employed a California driver and owed the employee reimbursable expenses).

⁸⁸ See Carson, *supra* note 87 (discussing various instances of control that Uber exercised over the plaintiff during the course of her work relationship with the rideshare firm).

⁸⁹ *Id.*

⁹⁰ *In re Uber Techs., Inc., Wage & Hour Emp't Practices*, MDL No. 2686, 2016 WL 439976, at *1 (J.P.M.L. Feb. 3, 2016); *Lavitman v. Uber Techs., Inc.*, No. SUCV201204490, 2015 WL 728187, at *6 (Mass. Super. Ct. Jan. 26, 2015).

⁹¹ *Search v. Uber Techs., Inc.*, No. CV 15-257 (JEB), 2015 WL 5297508, at *1 (D.D.C. Sept. 10, 2015).

⁹² *Ramos v. Uber Techs., Inc.*, No. SA-14-CA-502-XR, 2015 WL 758087, at *12 (W.D. Tex. Feb. 20, 2015) (citing 49 C.F.R. § 37.173 (2015)).

⁹³ See Lien, *supra* note 67, at C1 (summarizing workplace suits filed against several on-demand firms).

⁹⁴ See *infra* Section IV.B (discussing the employment status of on-demand workers).

⁹⁵ See Rogers, *supra* note 2, at 13 (considering the ramifications of independent contracting).

designated independent contractors depends on the worker's actual job duties.⁹⁶ Workers cannot waive their status as employees merely by agreeing to contractual labels.⁹⁷ As such, courts can still hold firms that hire independent contractors accountable for employment law violations if workers satisfy the statutory definition of "employees."⁹⁸ But because individuals who assent to take-it-or-leave-it contracts may not appreciate the questionable enforceability of their own "independent contractor" agreements, these classifications can dissuade workers from enforcing basic rights.⁹⁹ Reflecting the prevalence of this dynamic, studies estimate that up to thirty percent of companies in the United States misclassify workers as independent contractors.¹⁰⁰

In addition to independent contracting, the use of subcontractors and staffing firms can also diminish working conditions. Businesses cite cost-savings as the primary reason for hiring vendors to perform labor-intensive work, so it should come as no surprise that many workers engaged in triangular employment relationships earn significantly less than similar workers who enjoy direct employment relationships with end-user firms.¹⁰¹ As intermediaries aggressively bid to win future contracts by lowering prices, the need to reduce wages grows as well.¹⁰²

These outcomes might initially seem like benign, natural byproducts of otherwise healthy competition among firms. But the cost-savings that end-user firms gain from hiring workers through intermediaries do not derive merely from increased efficiencies or old-fashioned competition. As subcontractors and staffing companies compete to win the business of end-user firms, pressure builds on these contractors to engage in unlawful employment practices to

⁹⁶ See *Scantland v. Jeffery Knight, Inc.*, 721 F.3d 1308, 1311 (11th Cir. 2013) (citing *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 729 (1947) ("This inquiry is not governed by the 'label' put on the relationship . . .").

⁹⁷ See, e.g., *Scantland*, 721 F.3d at 1312 (focusing on workers' duties and not contractual labels); see *Rogers*, *supra* note 2, at 13-14 (discussing the central importance of employee status in determining the applicability of workplace protections).

⁹⁸ See *Robicheaux v. Radcliff Material, Inc.*, 697 F.2d 662, 667 (5th Cir. 1983) ("An employee is not permitted to waive employee status.").

⁹⁹ See *Leberstein & Christman*, *supra* note 8, at 1088-89 (outlining the effects that independent contracting has on worker behavior).

¹⁰⁰ NAT'L EMP'T LAW PROJECT, *supra* note 75, at 1-2 (examining the prevalence of employee misclassification in many American industries); see *Leberstein & Christman*, *supra* note 8, at 1087 (noting that employee misclassification continues despite government efforts to curb the practice).

¹⁰¹ See *RUCKELSHAUS ET AL.*, *supra* note 11, at 9-13 (discussing contracting and wage rates in different service sectors); *Estlund*, *supra* note 21, at 687 (exploring the effect that contracting has on wage structures); *van Jaarsveld*, *supra* note 38, at 355-56 (listing motivations for using contingent work).

¹⁰² See *Estlund*, *supra* note 7, at 631-32 (examining the effects that contracting has on wages).

reduce costs.¹⁰³ For example, contractors may not earn enough in a particular transaction to pay for unemployment or workers' compensation insurance.¹⁰⁴ By cutting corners in these areas, labor intermediaries can pass the cost-savings of regulatory noncompliance to larger firms who can avoid the reputational harm associated with these violations.¹⁰⁵ These dynamics ultimately harm law-abiding businesses as well. As more firms enjoy the savings that come with delegation, other companies must follow suit to stay competitive.¹⁰⁶

In theory, workers caught in triangular employment relationships still retain the ability to vindicate their rights against the intermediaries that formally employ them. As named "employers," subcontractors and staffing firms technically remain responsible for ensuring compliance with workplace protections.¹⁰⁷ Yet nearly all cases in which workers seek to hold end-user firms liable for wage violations begin with the discovery that intermediaries have no assets to satisfy judgments.¹⁰⁸ Because many contractors are smaller in scale and can exit the market more easily than end-user firms, they can nimbly dodge enforcement actions in ways that their customers cannot.¹⁰⁹ As a result, this discount on the probability of enforcement represents a separate and distinct savings that delegating firms would not otherwise enjoy without triangular employment.¹¹⁰ Indeed, the ability to avoid prosecution may represent the largest savings of all. After all, if a contractor simply assumed the same regulatory costs that end-user firms normally take on, then triangular employment would not represent much of a discount in many situations.¹¹¹ But

¹⁰³ *Id.*; Feldman, *supra* note 8, at 752 (describing the prevalence of employment law violations in subcontracting).

¹⁰⁴ See Leberstein & Christman, *supra* note 8, at 1086 (outlining firms' delegation of employment responsibilities to outsiders); Ruckelshaus, *supra* note 9, at 380 (examining the common claim made by outsourcing firms that contractors exclusively employ their staff).

¹⁰⁵ See Carlson, *supra* note 6, at 338 (considering the benefits that firms enjoy by avoiding employer status); Estlund, *supra* note 7, at 630-31 (examining the relationship between subcontractors and end-user firms).

¹⁰⁶ See Ruckelshaus, *supra* note 9, at 373 (discussing the prevalence of subcontracting in certain sectors).

¹⁰⁷ See *id.* at 379-80 (outlining the challenges workers face in enforcing wage protections against intermediaries).

¹⁰⁸ See Rogers, *supra* note 2, at 20-21 (discussing the lack of incentives for user firms to ensure that their contractors comply with wage requirements).

¹⁰⁹ See Estlund, *supra* note 21, at 688 (examining how certain subcontractors fall outside "the gaze of the public and regulators"); Reif, *supra* note 1, at 347-48 (discussing the challenge of serving process on contractors and enforcing judgments against them).

¹¹⁰ See Glynn, *supra* note 4, at 204 (explaining how the low probability of enforcement represents an additional incentive to subcontract).

¹¹¹ See Zatz, *supra* note 34, at 49-50 (analyzing the mutual dependence that subcontractors and larger firms share).

by tapping into their unique ability to skirt employment mandates, intermediaries can maximize savings for the firms that engage them.

II. THE ROLE OF CONTROL IN MODERN EMPLOYMENT TESTS

In attempting to navigate the haze of multitiered work relationships, courts today should turn to contemporary definitions of employment for answers. Nearly every employment protection depends on the existence of an employer-employee relationship, and every employment test considers the level of control that putative employers retain over workers.¹¹² As such, the manner in which courts define control has direct bearing on whether a firm will or will not be held accountable for virtually any workplace claim. This Part considers the role that control plays in the two primary standards that courts use to make employment determinations: the economic realities test and the common law test for employment (i.e., the “right to control” test).¹¹³ By examining the constrained definition of control that some courts utilize when applying these standards, this Part lays the groundwork for a refocused approach to the concept that more effectively captures the many ways in which companies influence working conditions in contemporary employment settings.

A. *Control and the Economic Realities Test*

Drawing the line between laborers who fell inside and outside of employment law’s umbrella, New Deal legislators extended the Fair Labor Standards Act (the “FLSA”), the nation’s principal wage and hour statute, to as many workers as possible by defining “employ” as “to suffer or permit to work.”¹¹⁴ Admittedly, the statute’s anachronistic employment definition may not initially seem to add much clarity to the question of what it means to control workers today. But when Congress enacted the FLSA in 1938, it drew from nineteenth century child labor laws to construct a broad employment test that could overcome the contractor defense.¹¹⁵ In this way, the FLSA (and the state child labor laws it mirrored) sought to hold user firms responsible for violations whenever firms “permitted” (meaning “allowed”) or “suffered” (meaning “tolerated”) unlawful workplace acts, even if end-user firms hired

¹¹² See Carlson, *supra* note 6, at 339; Rogers, *supra* note 2, at 13.

¹¹³ See Lisa J. Bernt, *Suppressing the Mischief: New Work, Old Problems*, 6 NE. U. L.J. 311, 313-21 (2014) (summarizing the tests for defining employer-employee relationships).

¹¹⁴ Fair Labor Standards Act, Pub. L. No. 75-718, § 3, 52 Stat. 1060 (codified at 29 U.S.C. § 203(g) (2012)); see also Marc Linder, *Dependent and Independent Contractors in Recent U.S. Labor Law: An Ambiguous Dichotomy Rooted in Simulated Statutory Purposelessness*, 21 COMP. LAB. L. & POL’Y J. 187, 187 (1999) (referencing “hundreds of labor-protective statutes and regulations whose applicability hinges on employee status”).

¹¹⁵ *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326 (1992); *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 728 & n.7 (1947); see also Reif, *supra* note 1, at 360-61 (discussing the judicial reluctance to fully embrace the FLSA’s employment definition).

intermediaries or so-called “independent contractors” to shield themselves from liability.¹¹⁶

But even though the Supreme Court has commented on the “striking breadth” of the phrase “suffer or permit”¹¹⁷—terminology that appears not only in the FLSA but also in numerous other state and federal employment laws¹¹⁸—some judges still grudgingly interpret its meaning.¹¹⁹ Rather than recognize the wide-ranging nature of “suffer or permit,” many FLSA opinions instead assess the “economic realities” of the situation and ask whether a putative employer has exercised actual or functional control over a worker.¹²⁰ Yet each step in this analytic process remains strangely disconnected from the next. Take the relationship between “suffer or permit” and courts’ tendency to analyze the economic realities of a worker’s relationship to an engaging firm. Each inquiry actually has very little to do with the other. Originally articulated by the Supreme Court in a non-FLSA context, the economic realities test asks whether a laborer depends economically on a business for work.¹²¹ But this inquiry is very different from the question of whether a business *permitted* an unlawful employment practice. Whereas “suffer or permit” focuses on a putative employer’s behavior, the economic realities test completely shifts the spotlight from the company to the worker’s own economic existence.

After transitioning from “suffer or permit” to “economic realities,” courts typically conclude the analysis by ticking off a list of factors that include the question of whether a putative employer retained control over working

¹¹⁶ See Goldstein et al., *supra* note 22, at 1015-19 (summarizing the history of the term “suffer or permit”).

¹¹⁷ *Darden*, 503 U.S. at 326.

¹¹⁸ Thirty-four state wage statutes and two federal nonwage statutes use some version of “suffer or permit” to define employment. See Reif, *supra* note 1, at 372 (summarizing state wage protections). Compare 29 U.S.C. § 203(g), with Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. § 1802(5), and Family and Medical Leave Act, 29 U.S.C. § 2611(3). Because this terminology mirrors the FLSA’s text, an employment analysis under these statutes should mirror the FLSA’s standard for employment as well. See *Moreau v. Air France*, 356 F.3d 942, 946-47 (9th Cir. 2004) (examining joint-employer definitions under federal statutes that contain the “suffer or permit” terminology); WAGE & HOUR DIV., U.S. DEP’T OF LABOR, ADMINISTRATOR’S INTERPRETATION NO. 2015-1, THE APPLICATION OF THE FAIR LABOR STANDARDS ACT’S “SUFFER OR PERMIT” STANDARD IN THE IDENTIFICATION OF EMPLOYEES WHO ARE MISCLASSIFIED AS INDEPENDENT CONTRACTORS 2 n.2 (2015) (noting the overlap in employment definitions between statutes).

¹¹⁹ See Linder, *supra* note 114, at 209 (critiquing judicial interpretations of joint employment under the FLSA).

¹²⁰ Reif, *supra* note 1, at 353-54 (commenting on trends in judicial interpretations of the FLSA).

¹²¹ See *United States v. Silk*, 331 U.S. 704, 715-19 (1947) (testing employment status under the Social Security Act); Linder, *supra* note 114, at 207-08 (questioning the utility of the economic realities test).

conditions.¹²² Too often, however, the narrow definitions of control used in these analyses stray greatly from the FLSA's "suffer or permit" origins.¹²³

In contrast to this textually untethered approach to defining control, the FLSA's language and history show that federal lawmakers had an expansive notion of control in mind when they included the "suffer or permit" terminology in the FLSA. For example, New Deal reformers passed the FLSA in part to disrupt the nation's "sweating" system, wherein garment manufacturers contracted with sweatshops to produce their wares.¹²⁴ Under this scheme, the sweatshops exposed workers to oppressive working conditions, while the clothing manufacturers that hired the sweatshops distanced themselves from these violations and protected their brands from reputational harm. By extending liability to parties that "permitted" wage violations, Congress placed these clothing manufacturers squarely within FLSA's crosshairs. In addition to holding end-user garment companies accountable for wage violations, Congress also passed the FLSA to solve the persistent problem of middlemen who employed children in certain American industries.¹²⁵ By making these firms answer for their use of underage labor, Congress targeted businesses that hid behind middlemen who formally employed children. Thus, in both the context of the sweating system and child labor, Congress attempted to bypass intermediaries and hold end-user companies responsible for workplace violations, even when intermediaries had the most direct interaction with workers.¹²⁶

Numerous state child-labor opinions that preceded the FLSA provided Congress with guidance on the meaning of "suffer or permit."¹²⁷ For example, in *Curtis & Gartside Co. v. Pigg*,¹²⁸ the Oklahoma Supreme Court addressed the term's breadth.¹²⁹ There, a fourteen-year-old Oklahoma boy sued his employer after a chainsaw cut off his hand during a workplace accident at a

¹²² See generally Tomassetti, *supra* note 18, at 335-38 (discussing scholarly criticism of judicial applications of the FLSA's employment definition).

¹²³ 29 U.S.C. § 203(g) (2012).

¹²⁴ Estlund, *supra* note 21, at 688-89 (examining the FLSA's origins); Lung, *supra* note 23, at 312-14 (discussing the FLSA and joint-employment liability in the modern garment industry).

¹²⁵ See Reif, *supra* note 1, at 353.

¹²⁶ See *Antenor v. D & S Farms*, 88 F.3d 925, 929 n.5 (11th Cir. 1996) (explaining how state legislatures chose the term "suffer or permit" to "reach businesses that used middlemen to illegally hire and supervise children"); Goldstein et al., *supra* note 22, at 990-91 (asserting that Congress enacted the FLSA to target larger entities that utilized "judgement-proof middlemen").

¹²⁷ Fair Labor Standards Act, Pub. L. No. 75-718, § 3, 52 Stat. 1060 (codified at 29 U.S.C. § 203(g)); Goldstein et al., *supra* note 22, at 1040-47 (analyzing early state court rulings on the meaning of "suffer or permit"); Reif, *supra* note 1, at 380-86 (same).

¹²⁸ 134 P. 1125 (Okla. 1913).

¹²⁹ *Id.* at 1129.

door manufacturing company.¹³⁰ Reviewing the facts of the case, the Oklahoma Supreme Court held that although the door manufacturer had entered into an agreement with the boy's father that technically prohibited the boy from handling chainsaws, the company nevertheless "employed, permitted, or suffered" the child's work.¹³¹ Defining "permit" as acquiescence and "suffer" as tolerance of a violation, the *Curtis & Gartside* court held that Oklahoma's prohibition on child labor required companies to "positively prevent children from engaging in hazardous work."¹³²

Five years following *Curtis & Gartside*, Justice Cardozo, then of the New York Court of Appeals, wrote the leading case on the topic in *People ex rel. Price v. Sheffield Farms-Slawson-Decker Co.*¹³³ There, a milk company hired drivers who in turn hired children to guard milk bottles during deliveries.¹³⁴ Even though the milk company technically prohibited this practice, Justice Cardozo found that the company still knew that its drivers frequently hired children as guards anyway.¹³⁵ Turning to New York's labor code, which stated that "[n]o child under the age of fourteen years shall be employed or permitted to work," Justice Cardozo held that an employer must exercise "his own power to prevent" a violation and cannot "rid himself of that duty because the extent of the business may preclude his personal supervision"¹³⁶

As other scholars have recognized, both *Curtis & Gartside* and *Sheffield Farms* represent a near-continuous line of judicial authority that broadly construed the "suffer or permit" terminology prior to the FLSA's passage.¹³⁷ Therefore, by placing the same wording in the nation's wage and hour law, Congress repudiated more restrictive common law definitions of employment and instead embraced an expansive vision of employer-employee relationships.¹³⁸

Since the FLSA's passage, the Supreme Court has repeatedly spoken to the statute's breadth. For example, in *Rutherford Food Corp. v. McComb*,¹³⁹ the Court held that a slaughterhouse employed workers under the FLSA, even though the slaughterhouse used a subcontractor to hire and supervise

¹³⁰ *Id.* at 1125-27.

¹³¹ *Id.* at 1128-30 (citing S.B. No. 11 Sess. Laws 1909 (Laws 1909, c. 39, art. 1)).

¹³² *Id.* at 1129.

¹³³ 121 N.E. 474, 475 (N.Y. 1918).

¹³⁴ *Id.*

¹³⁵ *Id.* ("The defendant was not blind to the fact that the rule was often broken. Word had often come to it before that some of its drivers were employing boys to help them.").

¹³⁶ *Id.* at 476.

¹³⁷ Goldstein et al., *supra* note 22, at 1043-46 (outlining state courts' consistent treatment of child labor statutes); Reif, *supra* note 1, at 385 (describing how state courts ascribed "ordinary, common sense meanings" to terms like "suffer" and "permit").

¹³⁸ U.S. DEP'T OF LABOR, *supra* note 118, at 3 (distinguishing the FLSA's definition of "employ" from the stricter common law test).

¹³⁹ 331 U.S. 722 (1947).

employees.¹⁴⁰ Noting that the FLSA's employment definition derived from state child labor provisions, the *Rutherford* Court found that the FLSA applied "to many persons and working relationships, which prior to this Act, were not deemed to fall within an employer-employee category."¹⁴¹ Likewise, in *United States v. Rosenwasser*,¹⁴² the Court quoted Senator Hugo Black's assertion that the FLSA contained "the broadest definition that has ever been included in any one act."¹⁴³ More recently, in *Nationwide Mutual Insurance Co. v. Darden*,¹⁴⁴ the Court once again referenced the FLSA's "striking breadth" and origins in "child labor statutes."¹⁴⁵

In sum, throughout the course of its FLSA jurisprudence, the Supreme Court has made three broad observations about the statute's coverage: First, Congress adopted the FLSA's "suffer or permit" terminology directly from state child labor laws. Second, the FLSA's text differs from other workplace statutes that rely on common law understandings of employment. Third, the FLSA applies to those workers who courts would not ordinarily construe as "employees" under other tests.¹⁴⁶ Nevertheless, many courts still fail to honor these enunciated principles.¹⁴⁷ Instead, they narrowly construe the FLSA's text by restricting the meaning of control within an economic realities test that absolves firms of liability even when they have "suffered" or "permitted" FLSA violations.

B. *Control and the Common Law Test*

Unlike the FLSA, most federal employment statutes contain no substantive definition of employment.¹⁴⁸ Recognizing the FLSA's breadth (as compared to other statutes), the Supreme Court has called upon courts to utilize the narrower, common law test to define employment under those workplace statutes that lack their own employment definition.¹⁴⁹ Following this directive,

¹⁴⁰ *Id.* at 728-31.

¹⁴¹ *Id.* at 729 (quoting *Walling v. Portland Terminal Co.*, 330 U.S. 148, 150-51 (1947)).

¹⁴² 323 U.S. 360 (1945).

¹⁴³ *Id.* at 363 n.3.

¹⁴⁴ 503 U.S. 318 (1992).

¹⁴⁵ *Id.* at 326.

¹⁴⁶ *Id.*

¹⁴⁷ See *infra* Section II.C (assessing recent employment decisions that limit the FLSA's reach by narrowly defining control). But see *infra* Part IV (examining a countervailing legal trend wherein courts fully evaluate the layers of control in contemporary contracting relationships).

¹⁴⁸ See Frank J. Menetrez, *Employee Status and the Concept of Control in Federal Employment Discrimination Law*, 63 SMU L. REV. 137, 146 n.38 (2010); Reif, *supra* note 1, at 350-51 (examining different statutory definitions of employment).

¹⁴⁹ *Darden*, 503 U.S. at 326; see also *Eisenberg v. Advance Relocation & Storage, Inc.*, 237 F.3d 111, 113 (2d Cir. 2000) (applying the common law test to Title VII); Zatz, *supra* note 34, at 35 (discussing work laws that lack their own employment definitions).

courts apply the common law test to evaluate claims under the National Labor Relations Act ("NLRA") and the common law test or a "hybrid test" to assess coverage under Title VII of the Civil Rights Act of 1964 ("Title VII"), among other workplace statutes.¹⁵⁰

Given the FLSA's unique statutory language and breadth, an expansive definition of control may not initially seem to apply to these non-FLSA workplace claims. But despite facial distinctions between statutes, the concept of control actually unifies these different employment standards. For example, just as control appears as a crucial factor in the FLSA's economic realities test, control stands at the center of the common law's right to control test.¹⁵¹ In fact, given the presence of control in all of these standards, scholars have questioned whether courts actually differentiate between the tests.¹⁵²

Indeed, the common law's seemingly more restrictive approach to employment may at times actually apply to *more* workers than the economic realities test.¹⁵³ For example, whereas gig workers or seasonal employees do not necessarily depend economically on any single platform or business for employment (thus calling into question their coverage under the economic realities test), those same firms may still retain significant control over the manner and means of work (thus satisfying the common law definition of employment).¹⁵⁴

By emphasizing a putative employer's right to control working conditions, the common law test requires factfinders to consider control in all its variations.¹⁵⁵ Echoing the need to fully assess all forms of control, the U.S. Equal Employment Opportunity Commission ("EEOC")—the agency charged with enforcing Title VII—has criticized some courts for placing "undue emphasis on daily supervision of job tasks" when making Title VII coverage

¹⁵⁰ 29 U.S.C. § 152 (2012); 42 U.S.C. § 2000e(f) (2012); U.S. EQUAL EMP'T OPPORTUNITY COMM'N, EEOC NOTICE 915.002, ENFORCEMENT GUIDANCE: APPLICATION OF EEO LAWS TO CONTINGENT WORKERS PLACED BY TEMPORARY EMPLOYMENT AGENCIES AND OTHER STAFFING FIRMS, 1997 WL 33159161, at *4 n.10 (Dec. 3, 1997) (discussing the overlap between various employment tests); Brief for the National Labor Relations Board as Amicus Curiae, *supra* note 53, at 9-10 (examining employment tests under non-FLSA statutes).

¹⁵¹ See RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 1.01 cmts. d-e (2014) (outlining judicial decisions that fail to offer "any sharp distinction between the common-law test . . . and a multifactor economic-realities test").

¹⁵² See Glynn, *supra* note 4, at 216-17 (summarizing scholarly critiques of various employment tests); Tomassetti, *supra* note 18, at 335 (acknowledging the overlap between the common law and economic realities tests).

¹⁵³ See Marc Linder, *The Joint Employment Doctrine: Clarifying Joint Legislative-Judicial Confusion*, 10 HAMLINE J. PUB. L. & POL'Y 321, 323 (1989) (noting the "surprising outcome" in which the control test covers more workers than the economic realities test in certain triangular relationships).

¹⁵⁴ See *id.* at 326 (evaluating different employment standards).

¹⁵⁵ See *id.* at 323-24 (examining the scope of the common law test).

determinations involving multiple potential employers.¹⁵⁶ Instead, the EEOC has stated that several companies can concurrently control working conditions and that courts ought to determine whether one or more firms retain the “right to control the details of the work to be performed, to make or change assignments, and to terminate the relationship.”¹⁵⁷

The EEOC’s call for a comprehensive evaluation of control is consistent with the Supreme Court’s statement that the right to control test requires an assessment of “*all* of the incidents of the relationship,” without giving undue weight to any single factor.¹⁵⁸ This wide-ranging analysis of common law control means that courts should assess all aspects of firm-based authority over workers, including a company’s unexercised authority and even attenuated forms of control.¹⁵⁹ Courts can view control through this wider lens by looking well beyond instances of immediate supervision to identify every party that holds significant sway over the manner and means of work. As Part III explains, courts can engage in this more comprehensive evaluation of workplace influence by considering the diverse subjects of control, the direction of control, and the responsibilities that come with control in contemporary work settings.

C. *Judicial Demand for Evidence of Immediate Control*

Notwithstanding the need to assess control’s diverse workplace manifestations, many recent judicial opinions on this subject have refused to extend employer-related liability beyond parties that exercise daily, direct control over workers.¹⁶⁰ This Part evaluates several cases that exhibit this tendency. Although this analysis focuses on interpretations of control under the FLSA’s economic realities test, the following cases remain relevant to the judicial treatment of control under the common law standard as well. Given that courts often fail to differentiate between the two tests, interpretations of control under the FLSA’s broader employment definition help inform judicial understandings of control under the common law.¹⁶¹ After all, if courts

¹⁵⁶ Brief of the Equal Employment Opportunity Commission as Amicus Curiae at 7-8, *Browning-Ferris Indus. of Cal.*, 362 N.L.R.B. No. 186 (Aug. 27, 2015) (No. 32-RC-109684) (citing U.S. EQUAL EMP’T OPPORTUNITY COMM’N, *supra* note 150, at *5 n.12).

¹⁵⁷ U.S. EQUAL EMP’T OPPORTUNITY COMM’N, *supra* note 150, at *6.

¹⁵⁸ *NLRB v. United Ins. Co. of Am.*, 390 U.S. 254, 258 (1968) (emphasis added).

¹⁵⁹ *See* *Browning-Ferris Indus. of Cal.*, 362 N.L.R.B. No. 186, 2015 WL 5047768, at *18 (Aug. 27, 2015) (citing RESTATEMENT (SECOND) OF AGENCY § 220 cmt. d (1958)) (“The control needed to establish the relation of master and servant may be very attenuated.”); *see also* *Antenor v. D & S Farms*, 88 F.3d 925, 934 (11th Cir. 1996) (observing that indirect control “has more to do with common-law employment concepts of control than with economic dependence”).

¹⁶⁰ *See generally* Linder, *supra* note 114, at 207-08 (discussing the failure among many courts to expansively apply the “suffer or permit” terminology).

¹⁶¹ *See generally* Glynn, *supra* note 4, at 216-17 & n.69 (examining the shared

determine that an employment relationship does not exist under the FLSA's expansive test for employment, then they would be unlikely to adopt a broader understanding of control under the more restrictive common law test. Fortunately, not all recent employment decisions define control so narrowly. Capturing a countervailing trend in the case law, Part IV of this Article explains how other courts have taken a wide-ranging approach to control. By analyzing each line of cases, a refocused vision of control can emerge that better captures the diverse forms of influence that firms retain in contemporary employment relationships.

1. Control and Independent Contractors

When courts state that employer-employee determinations should focus on the economic realities of the situation, the described inquiry initially sounds straightforward enough. According to this framework, if workers are genuine entrepreneurs then they do not depend economically on any single firm for work and thus do not require the FLSA's protection.¹⁶² In application, however, the "economic realities" framework can unnecessarily shield firms from liability. For example, if a worker earns income outside of an employment relationship (i.e., lacks "economic dependence" on a single company), courts may decline to assign employer status to the engaging firm even though that firm exercised significant control over the worker.¹⁶³ The Fifth Circuit Court of Appeals recently exhibited this tendency in *Thibault v. BellSouth Telecommunications, Inc.*¹⁶⁴ In *Thibault*, a contractor who helped rewire New Orleans after Hurricane Katrina sued BellSouth for misclassifying him as an independent contractor.¹⁶⁵ After moving from his home in Delaware to Louisiana for the post-Katrina rebuilding effort, the plaintiff worked as a cable splicer and reported to BellSouth each morning to receive assignments for "the specific jobs to be done daily."¹⁶⁶

Reviewing the plaintiff's claim against BellSouth for unpaid overtime, the Fifth Circuit noted that the cable splicer worked for BellSouth while simultaneously operating a separate business in Delaware.¹⁶⁷ Concluding that

characteristics of the economic realities and right to control tests); Tomassetti, *supra* note 18, at 335-36 (noting that scholars question whether courts actually distinguish between the two standards).

¹⁶² U.S. DEP'T OF LABOR, *supra* note 118, at 5 ("The ultimate inquiry under the FLSA is whether the worker is economically dependent on the employer or truly in business for him or herself.").

¹⁶³ See Glynn, *supra* note 4, at 216 (discussing the centrality of control in many judicial applications of the FLSA).

¹⁶⁴ 612 F.3d 843, 851 (5th Cir. 2010).

¹⁶⁵ *Id.* at 844.

¹⁶⁶ *Id.* at 845 (explaining that the plaintiff had no professional experience as a splicer and learned "the basics of splicing over the course of an evening").

¹⁶⁷ *Id.* at 849.

the plaintiff was “a sophisticated, intelligent business man,” the *Thibault* court held that the plaintiff did not share an employment relationship with BellSouth.¹⁶⁸ The Fifth Circuit’s opinion in *Thibault* demonstrates how considerations of “economic dependence” can obscure the meaning of control, while straying far from FLSA’s “suffer or permit” origins. The judicial record in *Thibault* unequivocally showed that BellSouth certainly *permitted* the splicer’s work by assigning him to specific jobs each day, maintaining daily time logs of his hours, and requiring him to work the same hours as BellSouth’s admitted employees.¹⁶⁹ Downplaying these instances of control, however, the Fifth Circuit focused more on the plaintiff’s separate entrepreneurship.¹⁷⁰ Because the splicer made money on the side, the *Thibault* court held that the plaintiff could not collect overtime from BellSouth even though he worked eighty-four hours per week for the telecommunications company for many months.¹⁷¹

Even when a worker clearly earns her livelihood from one business (and thus exhibits high levels of economic dependence), courts may nevertheless still categorize the worker as a nonemployee.¹⁷² Consider the recent decision by the Tenth Circuit Court of Appeals in *Barlow v. C.R. England, Inc.*,¹⁷³ which involved a security guard who worked nights in a trucking company’s fenced maintenance yard.¹⁷⁴ After several months of employment, the security guard asked his supervisor at the trucking company for extra work.¹⁷⁵ In response, the supervisor suggested that the guard perform janitorial work on the side for the trucking company.¹⁷⁶ The catch, however, was that the trucking company did not want to formally employ the security guard as a janitor because the extra hours he would work as a janitor would qualify him for overtime. Therefore, according to the Tenth Circuit’s findings, the trucking company told the guard to form a separate janitorial business so that the trucking company could “get around” paying the guard/janitor overtime.¹⁷⁷

Reviewing the janitor’s challenge to his designation as an independent contractor, the Tenth Circuit held that the trucking company did not employ the janitor despite significant evidence of control.¹⁷⁸ For example, the plaintiff worked for the trucking company as a security guard/janitor five days per

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 846-47.

¹⁷⁰ *Id.* at 848-49.

¹⁷¹ *Id.* at 849.

¹⁷² See generally Linder, *supra* note 114, at 207-08 (criticizing applications of the economic realities test that fail to adhere to the FLSA’s text and purpose).

¹⁷³ 703 F.3d 497 (10th Cir. 2012).

¹⁷⁴ *Id.* at 500-01.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 501.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 506-08.

week,¹⁷⁹ and his supervisor at the trucking company reviewed the quality of his janitorial work.¹⁸⁰ In addition, the plaintiff provided janitorial services to no other firm but the trucking company and thus was completely dependent on one firm (the trucking company) for remunerative work.¹⁸¹ But despite the defendant's control over working conditions and its admitted purpose of "get[ting] around" the FLSA, the Tenth Circuit nevertheless held that the trucking company did not employ the plaintiff.¹⁸²

As the foregoing decisions demonstrate, courts frequently transform the economic realities test into a standard that circumscribes the meaning of control, while morphing the FLSA's broad "suffer or permit" terminology into "dead letters."¹⁸³ But independent contracting is not the only mechanism that firms use to achieve this end. In addition to designating their workers as nonemployees, other companies attempt to delegate employment responsibilities to outside firms. Once again, judicial interpretations on this related issue of triangular employment frequently decline to embrace an expansive definition of control.

2. Control and Intermediaries

When end-user firms engage in triangular employment relationships with intermediaries, courts can misapply the FLSA's employment test in several ways. For example, courts may refuse to hold end-user firms responsible for wage violations when plaintiffs depend *more* economically on the intermediary than on the end-user firms.¹⁸⁴ Despite this narrow understanding of employment, however, the FLSA's use of "suffer or permit" shows that Congress never intended to limit the statute's application to only those businesses that exhibited the *most* control over workers.¹⁸⁵ Indeed, as evinced by its legislative origins in regulating businesses that hired children through intermediaries, the FLSA "contemplates several simultaneous employers, each responsible for compliance with the Act."¹⁸⁶ Consistent with this purpose, the

¹⁷⁹ *Id.* at 501-07.

¹⁸⁰ *Id.*; *Barlow v. C.R. England, Inc.*, 816 F. Supp. 2d 1093, 1107 (D. Colo. 2011) (summarizing the factual background of the case), *aff'd in part, rev'd in part*, 703 F.3d 497 (10th Cir. 2012).

¹⁸¹ *Barlow*, 703 F.3d at 501 (stating that the trucking company was the only customer to which the plaintiff provided janitorial services).

¹⁸² *Id.* at 506-07.

¹⁸³ Goldstein et al., *supra* note 22, at 1107 (criticizing courts for failing to give full meaning to the "suffer or permit" terminology).

¹⁸⁴ See BILL BEARDALL ET AL., WHO IS AN EMPLOYER UNDER THE FLSA? 8 (2013) (cautioning against employment tests that limit the FLSA's application only to firms that exhibit the greatest level of control in triangular employment relationships).

¹⁸⁵ See *Antenor v. D & S Farms*, 88 F.3d 925, 932-33 (11th Cir. 1996) (underscoring the importance of analyzing various layers of control in multitiered employment).

¹⁸⁶ *Baystate Alt. Staffing, Inc. v. Herman*, 163 F.3d 668, 675 (1st Cir. 1998); see also

FLSA can hold multiple businesses liable as “joint employers,” as long as each firm satisfies the statute’s employment definition.¹⁸⁷ But despite the joint-employment theory’s potential applicability to end-user firms, many courts decline to extend the statute’s reach this far.¹⁸⁸

Consider the decision by the Eleventh Circuit Court of Appeals in *Layton v. DHL Express (USA), Inc.*,¹⁸⁹ in which the shipping company DHL hired a local third-party delivery company that in turn hired drivers of its own.¹⁹⁰ When the drivers sued DHL (not the third-party contractor) for failing to pay overtime, DHL defended against the plaintiffs’ FLSA claims by arguing that the plaintiffs were employed solely by the intermediary that DHL had retained.¹⁹¹ Embracing a narrow definition of control, the *Layton* court asked whether DHL maintained sufficient power over its intermediary to “assign specific tasks, to assign specific workers, or to take an overly active role in the oversight of the work.”¹⁹² But framed this way, the court’s employment test constituted nothing more than a standard search for daily, direct control that ultimately absolved DHL of overtime liability.¹⁹³

In ruling against the plaintiff drivers, the Eleventh Circuit disregarded a substantial amount of evidence that pointed to DHL’s significant involvement in the drivers’ daily work lives. For example, DHL owned the warehouse facilities where the drivers reported every morning, and the drivers could not begin their delivery routes until DHL authorized them to do so.¹⁹⁴ The drivers drove DHL-branded vehicles and wore DHL-branded uniforms, and DHL frequently conducted inspections to ensure compliance with its branding requirements.¹⁹⁵ The record even showed that DHL contacted the drivers “throughout the day” about “customer complaints, requests for re-deliveries, and other non-routine matters.”¹⁹⁶ Labeling these instances of DHL’s influence

Judith E. Bendich, *When Is a Temp Not a Temp?*, 37 TRIAL 42, 46-47 (2001) (discussing the concept of joint employment).

¹⁸⁷ *Antenor*, 88 F.3d at 929 (citing 29 C.F.R. § 500.20(h)(4)(i) (1996)) (“[A] worker can be economically dependent on, and thus jointly employed by, more than one entity at the same time.”); see also Zatz, *supra* note 34, at 38 (describing the relationship between the tests for independent contracting and joint employment).

¹⁸⁸ See generally BEARDALL ET AL., *supra* note 184, at 5-7 (discussing the judicial confusion over joint employment).

¹⁸⁹ 686 F.3d 1172 (11th Cir. 2012).

¹⁹⁰ *Id.* at 1173.

¹⁹¹ *Id.* at 1174.

¹⁹² *Id.* at 1178 (citing *Aimable v. Long & Scott Farms*, 20 F.3d 434, 441 (11th Cir. 1997)).

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 1173-74 (describing how the drivers transmitted delivery information to DHL by using scanners that their direct employer leased from the company).

¹⁹⁵ *Id.* at 1174.

¹⁹⁶ *Id.*

over the workers as an “indirect type of control,” the *Layton* court declined to categorize DHL as their employer.¹⁹⁷

Although some decisions like *Layton* have erected rigorous, control-based hurdles to joint employment, other decisions have absolved businesses of liability if they had innocent motives for creating triangular employment relationships. For example, in *Zheng v. Liberty Apparel Co.*,¹⁹⁸ the Second Circuit Court of Appeals held (without citing authority) that Congress never intended the FLSA to apply to “strategically oriented” or “typical outsourcing relationships.”¹⁹⁹ But, as explained above, the statute’s text, history, and purpose show that Congress sought to *target* outsourcing relationships when end-user firms retained the power to significantly influence working conditions.²⁰⁰ By defining “employ” as “to suffer or permit,” Congress drafted the FLSA to “defeat rather than implement contractual arrangements.”²⁰¹

Despite *Zheng*’s unjustified consideration of a company’s motivations for subcontracting, several recent judicial opinions have nevertheless cited *Zheng* and extended employment immunity to end-user firms that engaged in “typical” subcontracting.²⁰² For example, in *Cejas Commercial Interiors, Inc. v. Torres-Lizama*,²⁰³ a construction company in Oregon outsourced drywall work to a subcontractor.²⁰⁴ When the drywall company failed to pay its workers, the workers sued the larger construction business for unpaid wages.²⁰⁵ Despite substantial evidence of the construction company’s direct power over the drywallers,²⁰⁶ the *Cejas* court declined to hold the construction firm

¹⁹⁷ *Id.* at 1174-78.

¹⁹⁸ 355 F.3d 61 (2d Cir. 2003).

¹⁹⁹ *Id.* at 76.

²⁰⁰ See *Sec’y of Labor v. Lauritzen*, 835 F.2d 1529, 1543-45 (7th Cir. 1987) (Easterbrook, J., concurring) (asserting that the FLSA was “designed to defeat rather than implement contractual arrangements”); see also Menetrez, *supra* note 148, at 146 n.38 (noting the extensive reach of the FLSA’s “suffer or permit” terminology).

²⁰¹ 29 U.S.C. § 203(g) (2012); *Lauritzen*, 835 F.2d at 1543-45 (Easterbrook, J., concurring). Following *Zheng*, the Second Circuit clarified the issue of contractual motivations by stating that FLSA liability can apply to “arrangements [that] were not purposely structured to avoid FLSA obligations.” *Barfield v. N.Y.C. Health & Hosps. Corp.*, 537 F.3d 132, 145-46 (2d Cir. 2008) (discussing misinterpretations of *Zheng*).

²⁰² See, e.g., *Hugee v. SJC Grp., Inc.*, No 13 CIV. 0423 GBD, 2013 WL 4399226, at *8 (S.D.N.Y. Aug. 14, 2013); *Jean-Louis v. Metro. Cable Commc’ns, Inc.*, 838 F. Supp. 2d 111, 126 (S.D.N.Y. 2011); Reif, *supra* note 1, at 372-79 (discussing FLSA liability and outsourcing relationships).

²⁰³ 316 P.3d 389 (Or. Ct. App. 2013).

²⁰⁴ *Id.* at 389-91.

²⁰⁵ *Id.* at 390-91.

²⁰⁶ Despite acknowledging that the “suffer or permit” terminology in Oregon’s wage statute does not require evidence of daily, direct control, the *Cejas* court nevertheless embraced a control-focused inquiry. *Id.* at 393. In doing so, the *Cejas* court overlooked substantial evidence of the end-user firm’s control over workers. For example, the

responsible for the alleged wage violations. Straying far from the meaning of “suffer or permit,” the *Cejas* court cited *Zheng* for the unsupported proposition that wage-related liability should not extend to “normal, strategically oriented contracting schemes.”²⁰⁷

Likewise, a recent decision in Texas relied on *Zheng* to narrowly construe the meaning of control under the FLSA. In *Artis v. Asberry*,²⁰⁸ a large medical transport company subcontracted with smaller ambulance firms to provide medical transportation services.²⁰⁹ When drivers for the subcontractors failed to receive all of their wages, they asserted FLSA claims against the larger medical transport company.²¹⁰ Mirroring the judicial treatment of subcontracting in *Cejas* and *Zheng*, the *Artis* court held that FLSA liability does not normally extend to “legitimate subcontracting arrangement[s]” or to “run-of-the-mill subcontracting relationships.”²¹¹ Unfortunately, a test that immunizes firms unless plaintiffs present evidence of illegitimate motives or direct control completely ignores the meaning of “suffer or permit.”²¹² As explained above, a significant body of legislative and judicial authority demonstrates that Congress chose the phrase “suffer or permit” to broadly define employment in a way that included multiple contracting parties.²¹³ As such, when courts evaluate triangular employment relationships, the proper question for determining which businesses “employ” workers should not depend on whether a subcontracting relationship is “normal” or “strategically oriented,” but rather on whether an end-user firm permits or endures a contractor’s unlawful employment practices.

As the foregoing cases demonstrate, even though Congress drafted the FLSA to reach through contracting relationships, many courts simply do not honor this legislative goal. Instead, these courts have embraced a constrained vision of control that fails to account for the many forms of influence that end-user firms retain over workers.²¹⁴ Given this disconnect, a refocused understanding of employment must define what it means to control workers even when contractual layers stand between individuals and the firms that benefit from their work.

construction company kept an on-site supervisor who ensured that the drywallers “completed the subcontract in a timely manner” and was “responsible for the safe performance of all the drywall work at the site.” *Id.* at 391.

²⁰⁷ *Id.* at 398 (quoting *Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 76 (2d Cir. 2003)).

²⁰⁸ No. CIB. A. G-10-323, 2012 WL 5031196, at *1 (S.D. Tex. Oct. 16, 2012).

²⁰⁹ *Id.*

²¹⁰ *Id.* at *3.

²¹¹ *Id.* at *5 (citing *Zheng*, 355 F.3d at 74-75).

²¹² 29 U.S.C. § 203(g) (2012).

²¹³ See *supra* Section II.A (discussing the meaning of “suffer or permit”).

²¹⁴ See Estlund, *supra* note 7, at 632-34 (examining the judicial reluctance to expansively define the FLSA).

III. FOUNDATIONS OF CONTROL

The first step in formulating a coherent vision of employment begins by diagnosing the deficiencies of current tests. Many judges narrowly construe the meaning of control because no clear standard exists to outline the boundaries of employer-employee relationships.²¹⁵ In some ways, courts' wobbly take on coverage issues is understandable given the lack of guidance provided by existing employment standards. After all, the common law test poses the elusive question of whether an employer "has the right to control the manner and means of the agent's performance of work,"²¹⁶ and the FLSA only vaguely defines "employ" as "to suffer or permit to work."²¹⁷ Upon first glance, these phrases seem either uselessly anachronistic or hopelessly boundless. Consider, for example, a homeowner who hires a contractor to reroof her house: If the homeowner knows that the roofer works long hours late into the night without receiving overtime, does she *permit* a wage violation?²¹⁸ Or take a more modern example from the gig economy: If courts were to find that rideshare firms employ their drivers because such companies *permit* illegal wage practices, then why not also hold passengers accountable for *permitting* these same violations?²¹⁹

In their attempts to clarify the meaning of these tests, courts have listed various factors that supposedly give rise to actual, workable standards.²²⁰ But because of the permeable nature of the courts' non-exhaustive lists, these multifactored approaches to employment determinations have their own problems. For example, the number of factors on each court's "test" for economic realities varies widely between circuits and even within the same circuit.²²¹ The Fifth Circuit has listed two economic realities factors,²²² the

²¹⁵ See *Tenn. Coal, Iron & R.R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 597 (1944) (discussing the FLSA's ambiguities); Linder, *supra* note 114, at 209 (critiquing judicial interpretations of joint employment under the FLSA).

²¹⁶ RESTATEMENT (THIRD) OF AGENCY § 7.07(3)(a) (2006).

²¹⁷ 29 U.S.C. § 203(g) (2012).

²¹⁸ See Brief of the American Federation of Labor & Congress of Industrial Organizations as Amicus Curiae at 9-10, *Browning-Ferris Indus. of Cal.*, 362 N.L.R.B. No. 186 (Aug. 27, 2015) (No. 32-RC-109684) (considering a similar example involving independent contracting).

²¹⁹ See generally *O'Connor v. Uber Techs., Inc.*, 82 F. Supp. 3d 1133, 1141-45 (N.D. Cal. 2015) (examining employee misclassification in the on-demand economy).

²²⁰ See, e.g., *Slayman v. FedEx Ground Package Sys., Inc.*, 765 F.3d 1033, 1042-47 (9th Cir. 2014) (applying Oregon's right to control and economic realities tests); *Layton v. DHL Express (USA), Inc.*, 686 F.3d 1172, 1175-78 (11th Cir. 2012) (listing various economic realities factors).

²²¹ See BEARDALL ET AL., *supra* note 184, at 5-7 (criticizing courts' arbitrary selection of factors).

²²² *Beliz v. W.H. McLeod & Sons Packing Co.*, 765 F.2d 1317, 1327-28 (5th Cir. 1985).

Eighth Circuit has listed three,²²³ the First, Third, and Eleventh Circuits have listed four,²²⁴ the D.C. Circuit has listed five,²²⁵ the Second, Fourth, Sixth, Seventh, and Tenth Circuits have listed six,²²⁶ and the Ninth Circuit has listed thirteen²²⁷—all purporting to define employment. With unpredictable criteria appearing on these lists, businesses and workers can do little more than guess at the legal significance of their relationships to one another.²²⁸

But even though various factors appear in these assorted employment definitions, the concept of control remains constant in both the common law and economic realities tests.²²⁹ Thus, regardless of how a particular employment standard is articulated, no judge will hold a firm liable for employment violations without first considering the influence (whether exercised or reserved) that the firm has over working conditions.

Despite control's ubiquity in different employment standards, however, courts often unnecessarily confine the concept. For example, many judges look exclusively for evidence of a company's immediate supervision of workers.²³⁰ But this type of control only touches the surface of control's many modern manifestations. A person can control others by telling them what to do, but also by controlling work environments in ways that unequivocally impact employees' daily lives. The remainder of this Part critically evaluates three aspects of control—the subjects, direction, and obligations of control—that better capture the concept's meaning.

A. *Subjects of Control*

The touchstone definition of control—derived from the common law of agency—asks whether a firm “has the right to control the manner and means of the agent's performance of work.”²³¹ Although various employment statutes

²²³ *Ash v. Anderson Merchandisers, LLC*, 799 F.3d 957, 961 (8th Cir. 2015).

²²⁴ *Haybarger v. Lawrence Cty. Adult Prob. & Parole*, 667 F.3d 408, 418 (3d Cir. 2012); *Baystate Alt. Staffing, Inc. v. Herman*, 163 F.3d 668, 675 (1st Cir. 1998); *Villarreal v. Woodham*, 113 F.3d 202, 205 (11th Cir. 1997).

²²⁵ *Morrison v. Int'l Programs Consortium, Inc.*, 253 F.3d 5, 11 (D.C. Cir. 2001).

²²⁶ *Keller v. Miri Microsystems LLC*, 781 F.3d 799, 807 (6th Cir. 2015); *Barlow v. C.R. England, Inc.*, 703 F.3d 497, 506 (10th Cir. 2012); *Schultz v. Capital Int'l Sec., Inc.*, 466 F.3d 298, 304-05 (4th Cir. 2006); *Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 72 (2d Cir. 2003); *Sec'y of Labor v. Lauritzen*, 835 F.2d 1529, 1535 (7th Cir. 1987).

²²⁷ *Torres-Lopez v. May*, 111 F.3d 633, 639-40 (9th Cir. 1997).

²²⁸ See Goldstein et al., *supra* note 22, at 1055 (referring to the “quagmire of factors” in various economic realities tests); Rogers, *supra* note 2, at 4 & n.5 (discussing scholarly critiques of the courts' employment tests).

²²⁹ See Glynn, *supra* note 4, at 216-17 (considering the role that control plays in both employment standards).

²³⁰ See Carlson, *supra* note 6, at 340-41 (examining the judicial treatment of the concept of control).

²³¹ RESTATEMENT (THIRD) OF AGENCY § 7.07(3)(a) (2006).

articulate control somewhat differently, control still unifies a wide-range of employment tests.²³² Acknowledging control's importance in these determinations, courts typically comb judicial records looking for certain indicia of control such as a firm's power to hire workers, to set hours and pay, and to provide day-to-day supervision.²³³

Aware of these common hallmarks of control, many businesses structure their contracting relationships (either through the use of independent contractors or intermediaries) in a way that formally assigns these powers to outsiders.²³⁴ This maneuvering helps bolster a false distinction between certain businesses that control results (i.e., "non-employers") and businesses that control details of work (i.e., "employers").²³⁵ According to this frame, as long as engaging firms delegate authority to intermediaries or independent contractors, then this dichotomized notion of control absolves the engaging firms of employment-related liabilities. But in an era of enterprise disaggregation in which businesses control and rely upon diffuse contracting networks, the distinction between controlling the details of work and controlling the results of work quickly falls apart.

Given that fewer workplace arrangements involve a firm's continuous supervision of workers, a comprehensive analysis of control should examine a company's influence over *all* aspects of work, not merely a business's direct power over the so-called "essential" terms of hire, fire, hours, pay, and discipline.²³⁶ After all, the common law definition of control centers on "the right to control . . . performance of *work*,"²³⁷ and the FLSA identifies as employers those firms that "suffer or permit to *work*."²³⁸ Under both views, the critical inquiry focuses on whether an entity influences working conditions, not workers. Therefore, in addition to evaluating a company's control over the essential terms of work (either directly or through intermediaries), a complete control analysis ought to evaluate a firm's power over a wide range of conditions such as the location of work and outcome-based expectations that consequentially affect how workers do their jobs.²³⁹

²³² Carlson, *supra* note 6, at 314 (discussing the judicial search for evidence of "control and domination" in employment determinations); Glynn, *supra* note 4, at 208-09 (explaining how most employment tests focus on control).

²³³ See Goldstein et al., *supra* note 22, at 1010-13 (arguing in favor of expanding the subjects of control).

²³⁴ Carlson, *supra* note 6, at 341 (discussing strategies that some businesses use to delegate employment-related responsibilities).

²³⁵ *Id.* at 342 (outlining the connection between contractual specifications and control).

²³⁶ Brief of Service Employees International Union as Amicus Curiae at 21, *Browning-Ferris Indus. of Cal.*, 362 N.L.R.B. No. 186 (Aug. 27, 2015) (No. 32-RC-109684) (offering an expanded control analysis under the common law test for employment).

²³⁷ RESTATEMENT (THIRD) OF AGENCY § 7.07 (3)(a) (2006) (emphasis added).

²³⁸ 29 U.S.C. § 203(g) (2012) (emphasis added); see also Reif, *supra* note 1, at 360-61 (discussing the judicial reluctance to fully embrace the term).

²³⁹ Brief of Service Employees International Union as Amicus Curiae, *supra* note 236, at

An expansive vision of control should not only enlarge the list of relevant control-based subjects, but should also evaluate various methods by which firms deliver that control. Consider the common example of triangular employment relationships wherein end-user firms hire subcontractors that in turn hire their own staff to perform discrete tasks (e.g., security or building maintenance).²⁴⁰ Such an arrangement involves not one but three distinct levels of possible control: (1) the larger firm's direct control over the workers; (2) the intermediary's control over the workers; and (3) the larger firm's control over the intermediary.²⁴¹ Reflecting these three different avenues for influencing working conditions, the FLSA's regulations direct courts to consider not only the relationship between workers and firms but also whether "one employer controls, is controlled by, or is under common control with the other employer."²⁴² Despite these distinct opportunities for exerting influence over the manner and means of work, however, many courts examine only one level of triangular employment, thereby ignoring other corners of the relationship that may contain their own indicia of control.²⁴³

Today, a firm that controls a contractor's results increasingly controls working conditions. Whether a larger company hires independent contractors or intermediaries, information technology now makes it much easier for engaging firms to monitor workers' daily compliance with contractual specifications.²⁴⁴ For example, a business that hires a subcontractor to run its call center may monitor calls to ensure that workers strictly adhere to a detailed script.²⁴⁵ Similarly, although rideshare platforms do not hire physical supervisors to accompany drivers, these companies can monitor workers through customer reviews that reward or punish drivers based on their star ratings.²⁴⁶ In such situations, end-user firms retain the power to ensure that

21 (examining joint-employer status under the common law test for employment).

²⁴⁰ See van Jaarsveld, *supra* note 38, at 362 (discussing the connection between client firms and supply firms in temporary employment relationships).

²⁴¹ See BEARDALL ET AL., *supra* note 184, at 8 (distinguishing between employment relationships in vertical contracting).

²⁴² 29 C.F.R. § 791.2(b) (2012); see also John P. McAdams & Michael A. Shafir, *Parent Company Liability Under the Fair Labor Standards Act*, 25 TRIAL ADVOC. Q. 16, 19 (2006) (examining FLSA liability when multiple entities employ workers).

²⁴³ See Glynn, *supra* note 4, at 216-17 (discussing the hesitancy among some courts to broadly define the meaning of employment); McAdams & Shafir, *supra* note 242, at 19 (examining different levels of control that parent companies may exercise over subsidiaries).

²⁴⁴ Rogers, *supra* note 2, at 4-5 (considering the control that many buyers exercise in supply chains).

²⁴⁵ See Alan Hyde, *Who Speaks for the Working Poor?: A Preliminary Look at the Emerging Tetralogy of Representation of Low-Wage Service Workers*, 13 CORNELL J.L. & PUB. POL'Y 599, 600 (2004) (discussing the level of control that firms exercise over contingent service workers).

²⁴⁶ See *infra* Section IV.B (examining evidence of control in the gig economy).

workers comply with performance mandates even though no face-to-face supervision takes place.

Firms may also divide control-related responsibilities among multiple entities. For example, while a larger company may control the work premises, nature of the job, and operational functions of work, an intermediary may control payroll and performance issues.²⁴⁷ These different tiers of control operate together to define every aspect of an individual's job.

This dynamic of divided powers plays out between firms and independent contractors as well. For instance, a company may not retain any formal contractual right to set an independent contractor's schedule, but by designating a specific time window during which the contractor must perform certain jobs, the company effectively defines the worker's hours. In addition, a company may hold sway over the most crucial working condition of all—discharge—by retaining the power to unilaterally terminate its agreement with a subcontractor or independent contractor.²⁴⁸ Given the ubiquity of these various layers of control, fewer firms today can credibly claim that they play no role in the work-related details that yield contractual outcomes. By expanding the definition of control—both in terms of subjects and delivery methods—courts can better identify all forms of control that fall outside of traditional, bilateral employment relationships.

B. *Direction of Control*

In defining the scope of employment relationships, courts should also consider the direction that control travels between putative employers and workers. Judges often pose the question of directional power by asking whether a worker is really “in business for himself.”²⁴⁹ According to this query, genuine bidirectional control involves workers who actually influence key decisions that affect their jobs. For example, an individual who possesses marketable skills, exercises significant influence in bargaining, and operates a bona fide separate business most likely shares control with firms as a genuine independent contractor.²⁵⁰ On the other hand, if a worker simply drifts between

²⁴⁷ *Browning-Ferris Indus. of Cal.*, 362 N.L.R.B. No. 186, 2015 WL 5047768, at *18 (Aug. 27, 2015) (applying agency law to examine how businesses delegate employment decisions to different firms).

²⁴⁸ See Brief of Service Employees International Union as Amicus Curiae, *supra* note 236, at 20–26 (listing methods by which a user firm can meaningfully influence intermediaries and workers).

²⁴⁹ See, e.g., *Hopkins v. Cornerstone Am.*, 545 F.3d 338, 343 (5th Cir. 2008); *Baker v. Flint Eng'g & Constr. Co.*, 137 F.3d 1436, 1440 (10th Cir. 1998) (using the economic realities test to distinguish employees from independent contractors); see also RESTATEMENT (SECOND) OF AGENCY § 220(1) (1958) (asking under the common law “whether or not the one employed is engaged in a distinct occupation or business”); Bernt, *supra* note 113, at 315 (discussing the common law factors).

²⁵⁰ See Carlson, *supra* note 6, at 342 (discussing characteristics of worker independence).

jobs (e.g., temporary services or seasonal work), then the worker's transience does not result from independent business initiative or actual control over working conditions.²⁵¹ When control flows one way (from firms to workers), the chances that the parties share an employment relationship increase.²⁵²

In addition to job arrangements that involve independent contracting, the direction of control remains highly relevant to triangular employment. Many labor intermediaries today face such fierce competition in contractual bidding that they have no meaningful say over the wages and working conditions that they pass on to the employees whom they hire.²⁵³ Competing against one another to win the next contract, intermediaries do not even earn enough money in some transactions to turn a profit.²⁵⁴ When staffing firms and subcontractors operate in such circumstances, they often lack the economic leverage to resist employment-related demands issued by engaging firms that can cancel their contracts on short notice.²⁵⁵ In these situations, control flows in one direction from the larger company to intermediaries and finally to downstream workers.

If and when courts detect the presence of unidirectional control in employment relationships, the fact that end-user firms rarely act upon these contractual powers does not necessarily alter the analysis. Yet businesses today that invoke the contractor defense often seek to limit employment liability only to those companies over which they actually exercise control.²⁵⁶ Challenging this assertion, the FLSA's text and history show that Congress intended to hold larger companies accountable when they retained sufficient power over middlemen and independent contractors, even if the end-user firms never actually acted upon that underlying authority.²⁵⁷

Likewise, assessments of control under the common law should also consider an engaging firm's unexercised influence. The need for such an evaluation is evident in the Supreme Court's directive to ascertain whether or not an engaging firm controls "the manner and means by which the product is

²⁵¹ See U.S. DEP'T OF LABOR, *supra* note 118, at 12 (calling on courts to examine the reasons why employees may work several jobs).

²⁵² See, e.g., *Brock v. Mr. W Fireworks, Inc.* 814 F.2d 1042, 1054-55 (5th Cir. 1987) (discussing the relevance of an employee's ability or inability to market her skills to multiple firms).

²⁵³ See *Lung*, *supra* note 23, at 352-53 (examining worker dependence in independent contracting relationships).

²⁵⁴ See *Ruckelshaus*, *supra* note 9, at 380 (discussing subcontracting and price competition).

²⁵⁵ Brief of the American Federation of Labor & Congress of Industrial Organizations as Amicus Curiae, *supra* note 218, at 26 (examining intermediaries' lack of power in triangular employment relationships).

²⁵⁶ See *Glynn*, *supra* note 4, at 216-17.

²⁵⁷ See U.S. DEP'T OF LABOR, *supra* note 118, at 14 ("[T]he FLSA covers workers of an employer even if the employer does not exercise the requisite control over the workers . . .").

accomplished."²⁵⁸ According to this frame, even when an engaging firm lacks direct supervisory authority, certain reserved contractual powers may still give the firm one-way power to determine how workers do their jobs. Take, for example, an engaging business that holds contractual veto authority over contractors. In such a situation, intermediaries and independent contractors can only accomplish their own work-related tasks subject to the engaging firm's reserved control.²⁵⁹ If the engaging firm sets limits on how much intermediaries can pay workers or provides detailed instructions on how independent contractors should perform work, then control travels from the engaging firm to the workers, but not back again. Businesses become employers when they hold this one-way influence over workers, even if firms that retain ultimate authority over these matters rarely act upon their reserved power.²⁶⁰

C. *Obligations of Control*

As a firm's control over working conditions increases, its duty to prevent wage violations should increase as well. In the wage and hour context, the FLSA's "suffer or permit" terminology helps outline the obligations of control. A business cannot "permit" or "suffer" an act without having some connection to the prohibited subject. Congress borrowed the "suffer or permit" terminology directly from child labor statutes that held businesses accountable for allowing underage work.²⁶¹ Applying the same principle to modern contracting relationships, firms become employers when they exhibit sufficient levels of culpability in underlying violations. The FLSA's use of the word "suffer" helps distinguish between companies that do and do not retain enough influence over working conditions to be held accountable for the illegal wage acts of their contractors. To "suffer" is to "endure [a] . . . wrong, injury, [or] loss"²⁶² Viewed in this light, companies employ workers when they stomach wage-related losses that contractors cause and do nothing to prevent those injuries.

²⁵⁸ *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323 (1992) (emphasis added) (quoting *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 751 (1989)); see also Brief of the American Federation of Labor & Congress of Industrial Organizations as Amicus Curiae, *supra* note 218, at 14-15 (arguing for a broader approach to employment under the common law test).

²⁵⁹ *Browning-Ferris Indus. of Cal.*, 362 N.L.R.B. No. 186, 2015 WL 5047768, at *17 (Aug. 27, 2015) (evaluating reserved powers in the agency context).

²⁶⁰ Brief of Service Employees International Union as Amicus Curiae, *supra* note 236, at 4 (explaining how outsourcing firms retain contractual authority over workers).

²⁶¹ See *supra* Section II.A (discussing the FLSA's origins); see also Goldstein et al., *supra* note 22, at 1018 (considering historical applications of "suffer or permit").

²⁶² *Suffer*, OXFORD ENGLISH DICTIONARY ONLINE, <http://www.oed.com/view/Entry/193523?redir3ectedFrom=suffer> [https://perma.cc/66XV-P85Q] (last visited Aug. 31, 2016).

Although the FLSA's employment definition requires some level of blameworthiness on the part of culpable firms, this does not mean that the statute applies only to companies that have specific knowledge of illegal acts.²⁶³ Just as child labor laws defined employment broadly to prevent businesses from claiming ignorance of unlawful practices, the FLSA extends liability to employers that control working conditions but look the other way when violations occur.²⁶⁴ Among its definitions, "permit" means to "give . . . opportunity for."²⁶⁵ Viewed in this light, the more a firm controls working conditions, the more opportunities it gives for illegal wage practices if the firm does nothing to detect and prevent them. Conversely, companies with less authority over workers or intermediaries have less power to impact unlawful acts.²⁶⁶ At the furthest end of this spectrum, a party that reserves no control over working conditions (either directly or through intermediaries) creates no opportunities for FLSA violations. For example, a property owner who leases her building to an admitted employer cannot be said to permit the employer's unlawful wage practices just because a chance FLSA violation happens to occur on her property.²⁶⁷

The concepts of control and opportunity-creation interrelate in several ways. For example, an end-user firm can create opportunities for illegal employment practices by controlling a subcontract price in a way that makes wage violations more likely. Likewise, if the actual contract price paid to an intermediary or misclassified independent contractor falls below the minimum wage (based on the number of work hours reasonably required of a job) then the engaging firm creates opportunities for illegal wage practices.²⁶⁸ Similarly, if a business dictates a turnaround time on certain jobs that will necessarily require overtime work but fails to compensate laborers at overtime rates, the company sows the seeds of illegal wage practices.²⁶⁹ For these reasons, a

²⁶³ See Goldstein et al., *supra* note 22, at 1041 (discussing the meaning of the "suffer or permit" terminology).

²⁶⁴ U.S. DEP'T OF LABOR, *supra* note 118, at 3 (discussing the origins of the FLSA's employment definition in child labor laws).

²⁶⁵ *Permit*, OXFORD ENGLISH DICTIONARY ONLINE, <http://www.oed.com/view/Entry/141222?rskey=5UE3iD&result=3> [<https://perma.cc/67NG-Z82A>] (last visited Aug. 31, 2016).

²⁶⁶ See Goldstein et al., *supra* note 22, at 989-90 (examining a party's "power to prevent" FLSA violations).

²⁶⁷ See *id.* at 1138-39 (outlining certain duties placed on businesses by the FLSA's "suffer or permit" language); Reif, *supra* note 1, at 381 (discussing how the FLSA requires employers to affirmatively prevent misconduct).

²⁶⁸ See, e.g., *Castillo v. Givens*, 704 F.2d 181, 192 (5th Cir. 1983) (examining the relationship between a subcontract's price and wage violations); see also Lung, *supra* note 23, at 333-34 (explaining how contracting relationships can impair an intermediary's ability to comply with wage laws).

²⁶⁹ Lung, *supra* note 23, at 353-54 (discussing contracting circumstances that increase the likelihood of unlawful wage practices).

refocused approach to control should consider a firm's power over all work relationships and any risk-creating conduct that gives rise to violations.²⁷⁰

But just because an end-user firm has avoided creating opportunities for wage violations does not necessarily absolve the firm of FLSA liability. "Sufferance" includes "sanction implied by . . . failure to enforce a prohibition."²⁷¹ Viewed from this perspective, engaging firms "suffer" FLSA violations when they possess enough control over workplace relationships but fail to enact meaningful prohibitions against employment violations. As Justice Cardozo defined the term in the context of underage employment, "suffering" the work of minors entails "the non-performance of a non-delegable duty" to prevent the illegal work.²⁷² Echoing this sentiment, the FLSA's current child labor regulations apply the "suffer or permit" terminology to employers that "fail[] to exercise [their] power to hinder it."²⁷³ Thus, whether companies "suffer" illegal wage acts by neglecting to enforce prohibitions or "permit" violations by creating opportunities for those violations, the FLSA encourages businesses to enact genuine prophylactic measures.

As with the FLSA, the common law test for employment imposes additional employment-related obligations on firms when those firms retain the right to significantly influence working conditions. Deriving from the master-servant doctrine of pre-industrial England, the common law test asks whether firms retain control over "the manner and means of the agent's performance of work."²⁷⁴ According to this definition, a firm's power to control working conditions (whether reserved or exercised) serves as the key dividing line between employers and non-employers. Therefore, as a firm retains greater power over working conditions, its obligation to assume the employer role and take care of workers by adhering to core labor protections increases as well.²⁷⁵

²⁷⁰ See Rogers, *supra* note 2, at 54 (examining the FLSA and employer-based responsibilities).

²⁷¹ *Sufferance*, MERRIAM-WEBSTER (2015), <http://www.merriam-webster.com/dictionary/sufferance> [<https://perma.cc/5MJH-CFZ6>] (last visited Aug. 13, 2016).

²⁷² *People ex rel. Price v. Sheffield Farms-Slawson Decker Co.*, 121 N.E. 474, 476 (N.Y. 1918) (holding that "sufferance of work" implies a duty to "discover and prevent" underage employment); see also Rogers, *supra* note 2, at 57-58 (exploring the expansiveness of "sufferance").

²⁷³ 29 C.F.R. § 570.113(a) (2015); see also Reif, *supra* note 1, at 386-87 (examining the FLSA's regulations).

²⁷⁴ RESTATEMENT (THIRD) OF AGENCY § 7.07(3)(a) (2006); see Matthew T. Bodie, *Participation as a Theory of Employment*, 89 NOTRE DAME L. REV. 661, 662-64 (2013) (discussing the origins of the control test and arguing for a participation-based approach to employment).

²⁷⁵ See Bodie, *supra* note 274, at 666 (considering the relationship between employee participation and a firm's responsibilities to workers).

The relationship between control and employer-based obligations can be traced to the right to control test's origins in vicarious liability.²⁷⁶ Designed to hold firms liable for their agents' acts based on the company's control of its agents, the right to control test seeks to identify the party that is in the best position to prevent wrongs.²⁷⁷ Although employment determinations involve a firm's direct (not vicarious) liability, the original purpose of the right to control test remains the same: to impose heightened preventative duties on firms as they retain greater levels of influence over workers. By relating a firm's status as an employer to the firm's influence over a worker's conduct, the common law test creates a direct link between employer control and its responsibility to answer for any unlawful conduct that may occur in the course of an employee's work.²⁷⁸

End-user firms today often have the power to implement measures that can satisfy the employer-related duties that come with heightened control. As noted above, modern contracting arrangements already allow engaging businesses to closely monitor the quality, speed, and production of both intermediaries and independent contractors. With such observation methods already in place, it seems entirely feasible for these same companies to monitor compliance with employment mandates.²⁷⁹ For example, an engaging firm could examine a contractor's pay practices, verify a contractor's reputation, or establish a contract price with intermediaries and independent contractors to ensure compliance with minimum wage and overtime requirements.²⁸⁰ Likewise, if a larger company hires an unknown or thinly capitalized contractor, it could hold back certain payments on the contract until workers receive their wages.²⁸¹ If intermediaries or independent contractors refuse to open their books or disclose the actual conditions of work, then the engaging firms can exercise their ultimate contractual authority and end their relationships with these contractors.²⁸² Extending liability to established companies that fail to ensure employment-related compliance among their contractors would send a signal

²⁷⁶ See Michael C. Harper, *Defining the Economic Relationship Appropriate for Collective Bargaining*, 39 B.C. L. REV. 329, 334 (1998) (characterizing the common law test as "a means to determine which party should be responsible for setting the level of precaution").

²⁷⁷ *Id.*; see also Rogers, *supra* note 2, at 35 (examining the origins of the common law's standard for vicarious liability).

²⁷⁸ See Noah D. Zatz, *Beyond Misclassification: Tackling the Independent Contractor Problem Without Redefining Employment*, 26 A.B.A. J. LAB. & EMP. L. 279, 281 (2011) (evaluating the relationship between employer control and employment-based responsibilities).

²⁷⁹ See Estlund, *supra* note 21, at 692-93 (discussing the costs of increased monitoring).

²⁸⁰ See Glynn, *supra* note 4, at 231-32 (outlining strategies for discouraging wage violations among contractors).

²⁸¹ See *Reyes v. Remington Hybrid Seed Co.*, 495 F.3d 403, 408-09 (7th Cir. 2007).

²⁸² See Glynn, *supra* note 4, at 232 (outlining the leverage that larger companies can exercise to ensure that their contractors comply with wage laws).

to other firms that the most cost-effective system going forward requires bona fide preventative measures.²⁸³ In this way, the concepts of prevention and deterrence establish the boundaries of employer-employee relationships, while holding culpable firms accountable for their contractors' unlawful employment practices.²⁸⁴

IV. APPLICATIONS OF CONTROL

Courts can apply the refocused definition of control outlined here to numerous workplace settings. This Part evaluates several recent judicial opinions that have assessed different forms of workplace influence by considering the subjects, direction, and obligations of control.

A. *Control in the Traditional Economy*

Despite some courts' tendency to search only for evidence of immediate control in employment relationships, a few recent judicial opinions have begun to expand the scope of their control analyses.²⁸⁵ Perhaps no current litigation better exemplifies this broader approach to control than the nationwide overtime claims brought against FedEx Ground for categorizing its delivery drivers as independent contractors.

Sued across the country for employee misclassification, FedEx has asserted that its drivers are entrepreneurs and not employees.²⁸⁶ While some federal circuit courts have declined to rule one way or the other on the issue²⁸⁷ and one

²⁸³ See Rogers, *supra* note 2, at 54-55 (listing benefits of a duty-based approach to wage liability).

²⁸⁴ An evaluation of the obligations that come with control under the FLSA is relevant only to the question of whether a worker and firm share an employment relationship. Businesses "employ" workers when they suffer or permit work, as defined by the FLSA. 29 U.S.C. § 203(g) (2012); see also *supra* Section III.B (analyzing the FLSA's employment definition). However, once the employment relationship is established, all recognized employers are strictly liable for wage violations under the statute. See Norceide v. Cambridge Health All., 814 F. Supp. 2d 17, 24 n.5 (D. Mass. 2011) (remarking that the FLSA imposes "strict liability on employers").

²⁸⁵ See, e.g., Keller v. Miri Microsystems LLC, 781 F.3d 799, 816 (6th Cir. 2015) (denying summary judgment to a satellite-internet company that had classified a technician as an "independent contractor"); Scantland v. Jeffrey Knight, Inc., 721 F.3d 1308, 1320 (11th Cir. 2014) (holding that sufficient facts existed to support a finding that a repair service business misclassified staff as "independent contractors").

²⁸⁶ See Craig v. FedEx Ground Package Sys., Inc., 792 F.3d 818, 819 (7th Cir. 2015) (summarizing wage class action brought against FedEx in Kansas); Alexander v. FedEx Ground Package Sys., Inc., 765 F.3d 981, 984-85 (9th Cir. 2014) (summarizing California litigation).

²⁸⁷ Gray v. FedEx Ground Package Sys., Inc., 799 F.3d 995, 1003 (8th Cir. 2015); Carlson v. FedEx Ground Package Sys., Inc., 787 F.3d 1313, 1326-27 (11th Cir. 2015); Huggins v. FedEx Ground Package Sys., Inc., 592 F.3d 853, 861 (8th Cir. 2010).

court has rejected the drivers' claims,²⁸⁸ the Seventh and Ninth Circuit Courts of Appeals recently issued two leading opinions that definitively classified drivers as FedEx's employees.²⁸⁹ In *Slayman v. FedEx Ground Package System, Inc.*, the Ninth Circuit looked beyond the typical control topics of wages and daily supervision to consider FedEx's control over a diverse range of subjects such as the workers' appearance,²⁹⁰ behavior,²⁹¹ and equipment.²⁹² After reviewing FedEx's operating agreement with its drivers, the Ninth Circuit found that "FedEx controls its drivers' clothing from their hats down to their shoes and socks" through an elaborate appearance code.²⁹³ As to equipment, the *Slayman* court noted that although the drivers' owned their own FedEx-branded trucks (thus suggesting that the company lacked influence over the drivers' equipment), the company dictated decisions over the trucks' paint color, dimensions, and shelving materials.²⁹⁴

Rejecting the false dichotomy between control over "results" and control over "work details," the *Slayman* court explained how the two forms of control frequently merge in modern contracting. Namely, the Ninth Circuit stated that "no reasonable jury could find that the 'result' sought by FedEx includes every exquisite detail of the delivery driver[s'] fashion choices and grooming . . . having all of its vehicles containing shelves built to exactly the same specifications . . . [and] limiting drivers to a specific service area with specific delivery locations"²⁹⁵

The *Slayman* court also alluded to the obligations that come with control by noting that it saw "no difference at all between [the plaintiffs'] actual situation . . . and the situation of one hired to drive a [delivery] truck . . . owned and operated by [FedEx]."²⁹⁶ Highlighting the lack of any real-world distinction between FedEx's acknowledged employees and the misclassified workers, the Ninth Circuit suggested that the company bore equal legal responsibility to employees by retaining equal levels of control over

²⁸⁸ *FedEx Home Delivery v. NLRB*, 563 F.3d 492, 504 (D.C. Cir. 2009) (ruling against drivers under the common law test for employment).

²⁸⁹ *Craig*, 792 F.3d at 828; *Slayman v. FedEx Ground Package Sys., Inc.*, 765 F.3d 1033, 1047 (9th Cir. 2014) (holding that FedEx employed drivers that the company had misclassified as "independent contractors"); see also *Alexander*, 765 F.3d at 988 (finding employee status under the right to control test).

²⁹⁰ *Slayman*, 765 F.3d at 1042 ("FedEx can and does control the appearance of its drivers and their vehicles.").

²⁹¹ *Id.* at 1043 ("FedEx can and does control the times its drivers can work.").

²⁹² *Id.* at 1047 ("FedEx requires drivers to paint their vehicles a specific shade of white, to attach FedEx decals, and to keep their vehicles clean and presentable.").

²⁹³ *Id.* at 1042.

²⁹⁴ *Id.* at 1043.

²⁹⁵ *Id.* at 1044 (citing *Ruiz v. Affinity Logistics Corp.*, 754 F.3d 1093, 1101-02 (9th Cir. 2014)).

²⁹⁶ *Id.* at 1045-46 (questioning the extent to which drivers enjoyed entrepreneurial power given FedEx's right to veto drivers' attempts to delegate their routes to others).

differently marked groups. Evaluating control's one-way direction, many subjects, and obligations, the Ninth Circuit concluded that FedEx retained sufficient powers over the drivers (whether "formally or functionally") such that it employed them.²⁹⁷

The Seventh Circuit Court of Appeals recently reached a similar conclusion when it reviewed a wage class action brought by FedEx Ground drivers in Kansas. In *Craig v. FedEx Ground Package System, Inc.*,²⁹⁸ the Seventh Circuit echoed *Slayman* when it affirmed a state court's determination that FedEx controlled many details of the drivers' work, from their delivery times to their reporting requirements to their hairstyles and socks.²⁹⁹ In its opinion on the same case, the Kansas Supreme Court had observed that "if a worker is hired like an employee, dressed like an employee, supervised like an employee, compensated like an employee, and terminated like an employee, words in an operating agreement cannot transform that worker's status into that of an independent contractor."³⁰⁰ Adopting this finding, the Seventh Circuit held that the record conclusively established that FedEx employed its drivers.³⁰¹

In addition to decisions that have comprehensively evaluated control in the context of independent contracting, other recent judicial opinions have viewed triangular employment relationships through a wider control lens as well.³⁰² For example, in *Barfield v. New York City Health and Hospitals, Corp.*,³⁰³ the Second Circuit found that a hospital reserved sufficient control over a nurse's working conditions even though three separate staffing agencies formally employed her.³⁰⁴ When the nurse sued the hospital for unpaid overtime, the hospital claimed that only the staffing agencies served as her employer.³⁰⁵ In reviewing the record before it, the Second Circuit expansively defined the relevant subjects, direction, and obligations of control. For example, the *Barfield* court found that although the staffing agencies retained formal power to hire and fire the nurse, the hospital could decline to accept her services if

²⁹⁷ *Id.* at 1047.

²⁹⁸ 792 F.3d 818 (7th Cir. 2015).

²⁹⁹ *Id.* at 821 (citing *Craig v. FedEx Ground Package Sys., Inc.*, 335 P.3d 66, 81 (Kan. 2014)).

³⁰⁰ *Craig*, 335 P.3d at 81.

³⁰¹ *Craig*, 792 F.3d at 821.

³⁰² See, e.g., *Carrillo v. Schneider Logistics Trans-Loading & Distrib., Inc.*, No. 2:11-cv-8557-CAS, 2014 WL 183956, at *8 (C.D. Cal. Jan. 14, 2014) (ruling against Walmart's summary judgment motion on the issue of whether the company employed certain workers that its logistics contractor hired); *Becerra v. Expert Janitorial, LLC*, 309 P.3d 711, 724 (Wash. App. 2013) (denying summary judgment to a retailer that utilized janitorial services provided by an intermediary).

³⁰³ 537 F.3d 132 (2d Cir. 2008).

³⁰⁴ *Id.* at 135.

³⁰⁵ *Id.* at 136-37.

she performed poorly.³⁰⁶ In addition, the Second Circuit found that control took a one-way course from the hospital to the staffing agencies and finally to the nurse. For instance, even though the staffing agencies technically set the nurse's pay rate, the hospital paid the staffing agencies a fixed hourly rate for the exact number of hours that the nurse worked each week.³⁰⁷ This pay structure gave the hospital ultimate control over the nurse's compensation by "effectively set[ting] a cap on the hourly rate that the agencies would pay [the plaintiff]." ³⁰⁸

Turning to the obligations of control, the Second Circuit spoke to the non-delegable nature of an employer's responsibilities to its employees, even when intermediaries stand in the middle of triangular employment relationships. The *Barfield* court stated that if the hospital truly wanted to avoid becoming an employer it should have "take[n] more assertive steps to *prevent* such overtime work" ³⁰⁹ Finally, the Second Circuit spoke to the irrelevance of a firm's innocent motives in delegating employment responsibilities to others. Although the hospital had claimed that FLSA liability should apply only to "subterfuge or sham" arrangements, the *Barfield* court held that employment obligations extend to any firm that retains sufficient control over workers, "even absent a showing of subterfuge or business bad faith." ³¹⁰

The expansive approaches to control taken by the Second, Seventh, and Ninth Circuits in *Barfield* and the *FedEx* cases apply to employment settings beyond traditional industries like healthcare and shipping. Indeed, the emerging gig economy provides fertile ground for exploring the many subjects, direction, and obligations of control in modern work arrangements.

B. *Control in the Gig Economy*

Courts have only begun to consider the legal significance of the relationships that workers and on-demand platforms share. Admittedly, peer-to-peer businesses may initially seem less like employers that control their workers and more like labor brokers that simply connect workers to customers.³¹¹ In addition, service platforms appear to give workers far more

³⁰⁶ *Id.* at 138.

³⁰⁷ *Id.* at 144 ("The fact that [the hospital] calculated the hours [the plaintiff] worked and that it then paid the agencies an hourly rate for those hours, so that the agencies, in turn, paid [the plaintiff] an hourly rate for the exact same hours, indicates that [the hospital] exerted some control over [the plaintiff's] pay.").

³⁰⁸ *Id.* at 144-45.

³⁰⁹ *Id.* at 148 (emphasis added) (citing *Chao v. Gotham Registry, Inc.*, 514 F.3d 280, 290-91 (2d Cir. 2008)).

³¹⁰ *Id.* at 145-47.

³¹¹ See HARRIS & KRUEGER, *supra* note 66, at 8-10 (noting that on-demand workers retain control over scheduling but lack control over other aspects of work such as compensation).

flexibility and independence than more traditional jobs.³¹² Given the natural autonomy afforded to on-demand workers, the refocused vision of control outlined here may not seem to map neatly onto the gig economy. For example, if an individual cobbles together work by occasionally driving for Uber (ridesharing), moving packages for Postmates (delivery), and accepting dog-sitting gigs from DogVacay (pet care), no single platform necessarily controls the sum of the individual's work.³¹³ In fact, a finding of control (and therefore the existence of an employer-employee relationship) may not benefit these workers given the individualized scheduling freedoms that come with their status as independent contractors.³¹⁴

But the existence of worker autonomy in the gig economy may be more illusory than first appearances suggest. Examining the unique ways in which peer-to-peer platforms influence working conditions, two recent federal court opinions have questioned whether on-demand workers actually enjoy genuine entrepreneurial power.³¹⁵

In *O'Connor v. Uber Technologies, Inc.*, a federal district court in California assessed Uber's claim that it was not an employer but instead a "technology company" that generated "leads" for its "partners."³¹⁶ Dismissing this contention as "semantic framing," the *O'Connor* court held that the question of whether an on-demand platform acts like an employer should focus on "the substance of what the firm actually does."³¹⁷ Viewed from this perspective, the *O'Connor* court concluded that Uber did not sell technology to the public like a software firm but instead provided transportation services to the public by harnessing its drivers' labor. Given the central role that its partners played in carrying out Uber's business model, the primary question in *O'Connor* centered on the level of control that the rideshare platform actually retained over drivers.³¹⁸

³¹² See Singer, *supra* note 74, at BU1 (outlining certain workplace freedoms enjoyed by individuals in the gig economy).

³¹³ See, e.g., *O'Connor v. Uber Techs., Inc.*, 82 F. Supp. 3d 1133, 1136 (N.D. Cal. 2015) (describing an Uber driver who worked as a screenwriter and another who split work between multiple platforms).

³¹⁴ See James Surowiecki, *Gigs with Benefits*, NEW YORKER (July 5, 2016), <http://www.newyorker.com/magazine/2015/07/06/gigs-with-benefits> [<https://perma.cc/6ZGH-LEFP>] (discussing the reasons that some on-demand workers prefer independent contracting).

³¹⁵ *O'Connor*, 82 F. Supp. 3d at 1136; *Cotter v. Lyft*, 60 F. Supp. 3d 1067 (N.D. Cal. 2015).

³¹⁶ *O'Connor*, 82 F. Supp. 3d at 1141-42 ("The central premise of this argument is Uber's contention that it is not a 'transportation company,' but instead is a pure 'technology company' that merely generates 'leads' for its transportation providers through its software.").

³¹⁷ *Id.*

³¹⁸ *Id.* at 1138.

Downplaying its ability to determine working conditions, Uber emphasized its lack of control over drivers' schedules. Like other rideshare businesses, Uber does not dictate when its drivers log in to its platform.³¹⁹ In fact, Uber only requires drivers to provide one ride to customers every 180 days.³²⁰ Emphasizing this unique aspect of on-demand work, some scholars have argued that the presence of worker flexibility should guide judicial evaluations of workplace relationships in the gig economy.³²¹ The *O'Connor* court acknowledged that this aspect of control "might weigh heavily in favor of a finding of independent contractor status," but nevertheless held that the "more relevant inquiry is how much control Uber had over its drivers *while they [were] on duty* for Uber."³²² In other words, the court determined that a proper employment inquiry should consider flexible scheduling as only one of many control-based subjects. By examining other ways in which Uber exercised power over drivers once they logged in to the platform, the *O'Connor* court invited a broader discussion of the power that on-demand firms retain in their relationships with drivers. For instance, although Uber claimed that its drivers could reject the "leads" that Uber sent them while they were on duty, Uber's handbook contradicted this point by telling drivers that Uber "expect[ed] on-duty drivers to accept all [ride] requests" and that the company would "follow-up with all drivers that [were] rejecting trips."³²³

Although the issue of scheduling reflected aspects of bidirectional control (with drivers controlling *when* they logged in and Uber controlling drivers *once* they logged in), the issue of wages showed how Uber exclusively controlled the drivers' compensation. The *O'Connor* court noted that Uber set the price that customers paid for rides and that the company kept a "fee per ride" of roughly twenty percent of the billed amount.³²⁴ Uber's "partners" negotiated none of these terms.³²⁵ Thus, on the critical issue of pay, the *O'Connor* court found that Uber retained one-way control.³²⁶

Broadening the subjects of control beyond hours and compensation, the *O'Connor* court questioned whether Uber drivers actually enjoyed the fabled freedom that the gig economy promises workers. For instance, the court

³¹⁹ *Id.*

³²⁰ *Id.* at 1149.

³²¹ See Benjamin Means & Joseph A. Seiner, Essay, *Navigating the Uber Economy*, 49 U.C. DAVIS L. REV. 1511, 1538-39 (2016) (discussing the relationship between employer control and worker flexibility); see also HARRIS & KRUEGER, *supra* note 66, at 9-10 (juxtaposing various levels of control that on-demand workers have over their jobs).

³²² *O'Connor*, 82 F. Supp. 3d at 1151-52 (discussing Uber's practice of terminating drivers with low customer ratings).

³²³ *Id.* at 1149.

³²⁴ *Id.* at 1136-37.

³²⁵ *Id.* at 1144.

³²⁶ *Id.* at 1142 ("Uber sets the fares it charges riders unilaterally."); see also Scheiber, *supra* note 84, at A1 (discussing Uber's rate cuts in New York, San Francisco, and Tampa).

explained how Uber maintained a detailed performance protocol that directed drivers to dress professionally, send clients a text message, open doors for clients, and ensure that “the radio is off or on soft jazz or NPR.”³²⁷ In addition, Uber maintained a “Zero Tolerance” policy that prohibited drivers from soliciting clients outside of the Uber app.³²⁸ Uber enforced these substantive areas of control by threatening its “partners” with deactivation (i.e., discharge).³²⁹ The ridesharing company’s contract with its drivers specifically reserved “the right, at all times and at Uber’s sole discretion, to reclaim, prohibit, suspend, limit or otherwise restrict[] . . . the Driver from accessing or using the Driver App.”³³⁰ The judicial record in *O’Connor* demonstrated that Uber regularly acted upon this power by regularly terminating the bottom five percent of its driver pool.³³¹

The *O’Connor* court also considered how Uber transformed its customers into virtual supervisors. The court explained how Uber monitored its “partners” with customer star ratings and made deactivation decisions based on this feedback.³³² Reflecting on this system, the *O’Connor* court determined that the customers’ role as virtual supervisors enabled Uber to “constantly monitor certain aspects of a driver’s behavior,” thereby giving the company “a tremendous amount of control over the ‘manner and means’ of its drivers’ performance.”³³³ In sum, by balancing the drivers’ control over scheduling and Uber’s control over many other aspects of work, the *O’Connor* court held that sufficient facts supported the drivers’ challenge to their status as independent contractors.³³⁴

Mirroring many aspects of the *O’Connor* court’s assessment of employment relationships in the gig economy, another recent federal opinion also evaluated peer-to-peer work in light of a diverse set of control-based factors. In *Cotter v. Lyft, Inc.*,³³⁵ a federal district court in California considered the overtime and

³²⁷ *O’Connor*, 82 F. Supp. 3d at 1149-50.

³²⁸ *Id.* at 1142.

³²⁹ *Id.* at 1150 (“[T]here is evidence of drivers being admonished (or terminated) by Uber for failing to comply with its ‘suggestions.’”).

³³⁰ *Id.* at 1149.

³³¹ *Id.* at 1143 (“Uber documents further reveal that Uber regularly terminates the accounts of drivers who do not perform up to Uber’s standards.”); see also Tracey Lien, *Uber Tests Program to Track Speeding Drivers with Their Smartphones*, L.A. TIMES, Jan. 27, 2016, at C4 (discussing employee misclassification in the on-demand economy and debates over the level of control that on-demand firms exert over workers).

³³² *O’Connor*, 82 F. Supp. 3d at 1151.

³³³ *Id.* at 1151-52.

³³⁴ *Id.* at 1142; see also *Search v. Uber Techs., Inc.*, No. 15-257 (JEB), 2015 WL 5297508, at *7 (D.D.C. Sept. 10, 2015) (holding that a reasonable jury “could conclude that Uber exercised control over [the driver] in a manner evincing an employer-employee relationship”).

³³⁵ 60 F. Supp. 3d 1067 (N.D. Cal. 2015).

minimum wage claims of drivers for Uber's primary competitor, Lyft.³³⁶ The *Cotter* court acknowledged how initial appearances might point toward independent contractor status: "At first glance, Lyft drivers don't seem much like employees A person might treat driving for Lyft as a side activity, to be fit into his schedule when time permits and when he needs a little extra income."³³⁷ On the other hand, the *Cotter* court noted that Lyft drivers "don't seem much like independent contractors either," given the level of control that the ridesharing platform maintained over pay rates and performance criteria.³³⁸

Acknowledging these conflicting levels of control, the *Cotter* court addressed Lyft's contention that the company was "merely a platform, and that drivers perform[ed] no service for Lyft."³³⁹ The *Cotter* court categorized this claim as "obviously wrong" and noted that unlike a peer-to-peer sales company such as eBay that does nothing more than connect buyers and sellers, Lyft gave its drivers detailed instructions on how to do their jobs.³⁴⁰ Mirroring many of Uber's requirements, Lyft expected its on-duty members to accept dispatches and warned drivers that low acceptance rates (defined as repeatedly falling below seventy-five percent) would result in deactivation.³⁴¹ Lyft also gave drivers its "Rules of the Road," which directed them to keep their cars clean, to help passengers with luggage, to hold an umbrella for passengers, to play the passenger's preferred type of music, to follow GPS directions if passengers had no preference, and to "[g]reet every passenger with a big smile and fist bump."³⁴²

While Lyft claimed that this code was merely suggestive, the *Cotter* court observed that the "title 'Rules of the Road' does not sound like a list of suggestions," but instead evinced real, unidirectional control.³⁴³ Lyft's own Terms of Service bolstered this point by giving the company "sole discretion to bar [y]our use of the Services in the future, for any or no reason."³⁴⁴ Lyft not only retained one-way control over drivers' performance but often acted upon that power as well. For example, Lyft fired one *Cotter* plaintiff after he substituted his car without receiving permission from the platform to use a different vehicle, and the company dismissed another plaintiff after she posted an average passenger rating of 4.54 stars (out of five stars).³⁴⁵

³³⁶ See *id.* at 1069.

³³⁷ *Id.* (noting that unlike typical independent contractors, rideshare drivers do not need to have any special skills to do their jobs).

³³⁸ *Id.*

³³⁹ *Id.* at 1078.

³⁴⁰ *Id.*

³⁴¹ *Id.* at 1071.

³⁴² *Id.* at 1072.

³⁴³ *Id.* at 1079 (concluding that most of Lyft's instructions to drivers "are written as commands or prohibitions, not suggestions").

³⁴⁴ *Id.* at 1072.

³⁴⁵ *Id.* at 1073-74; see also Scheiber, *supra* note 84, at A3 (stating that Uber frequently

Finally, as to the obligations that come with control, the *Cotter* court suggested that a platform's duty to its staff may change depending on the amount and frequency of control present in the work relationship.³⁴⁶ For example, one *Cotter* plaintiff drove for Lyft only as a hobby and another plaintiff drove only ten hours per week.³⁴⁷ Reflecting on these limited opportunities for control, the court left open the possibility that "other Lyft drivers with heavier or more regular schedules might properly be deemed employees."³⁴⁸ In this way, the *Cotter* court suggested that increased instances of control may give rise to a heightened duty for Lyft to classify certain drivers as employees.³⁴⁹

Although Lyft exercised a great deal of control over the drivers when they were on duty, they also enjoyed many freedoms such as the ability to choose their work hours and to select the neighborhoods where they would drive.³⁵⁰ Based on these factors, the *Cotter* court held that the control analysis favored the drivers, but not so much as to conclusively categorize them as Lyft's employees.³⁵¹

As these leading decisions from the on-demand economy make clear, peer-to-peer work can expand the control analysis in several new directions. For example, the issue of scheduling—a hallmark of control—manifests itself in different and conflicting ways in the gig economy. On one hand, rideshare drivers behave like independent contractors who choose their own hours. On the other hand, once drivers report for duty, on-demand platforms expect drivers to accept new assignments and will deactivate members who decline such assignments—a far cry from the type of entrepreneurial power retained by independent contractors who can accept and reject jobs as they see fit.

The on-demand economy also expands the possible subjects and methods of control. For example, although no supervisor physically observes drivers' work, the star-rating system casts customers as virtual supervisors who facilitate the monitoring and enforcement of conduct codes.³⁵² In addition, peer-to-peer work alters the direction of control in distinct ways. While on-demand platforms hold unidirectional control over some subjects (pay,

terminates drivers in certain markets who earn customer ratings below 4.6 stars out of 5).

³⁴⁶ *Cotter*, 60 F. Supp. 3d at 1081.

³⁴⁷ *Id.* at 1081.

³⁴⁸ *Id.*

³⁴⁹ *Id.* at 1081-82 ("Perhaps Lyft drivers who work more than a certain number of hours should be employees while the others should be independent contractors.").

³⁵⁰ *Id.* at 1080-81 (commenting on similarities between Lyft drivers and regular delivery drivers).

³⁵¹ *Id.* at 1079.

³⁵² *O'Connor v. Uber Techs., Inc.*, 82 F. Supp. 3d 1133, 1151-52 (N.D. Cal. 2015) ("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.").

performance, and supervision), control takes a bidirectional course with other subjects (hours and work location). But despite these novel permutations of retained influence, the foundations of control remain the same. As these decisions make clear, courts evaluating peer-to-peer work must still consider the subjects, direction, and obligations of control to determine the existence of employer-employee relationships in the gig economy.

C. Control and Other Workplace Rights

The definition of control outlined here extends well beyond the wage claims of peer-to-peer workers. In fact, analyses of non-wage workplace issues that arise in both the traditional and on-demand economies can also benefit from an expansive approach to control.

Several recent federal courts opinions have embraced this broader understanding of control in the antidiscrimination context.³⁵³ For example, in *Faush v. Tuesday Morning, Inc.*,³⁵⁴ the Third Circuit Court of Appeals rejected a retailer's attempt to hold a staffing firm solely liable for allegations of racial harassment that occurred at the retailer's location.³⁵⁵ In *Faush*, the staffing firm Labor Ready hired and assigned an African-American employee to work temporarily at Tuesday Morning, a home-goods store.³⁵⁶ Reviewing the plaintiff's harassment allegations, the Third Circuit held that Tuesday Morning exercised significant control over the supplied worker even though Labor Ready formally employed him.³⁵⁷ For example, the *Faush* court found that Tuesday Morning effectively controlled the plaintiff's compensation by paying Labor Ready an hourly rate for the plaintiff's labor.³⁵⁸ The two firms shared control over hiring and firing as well; whereas Labor Ready hired the plaintiff and assigned him to the job site, Tuesday Morning retained the power to reject any supplied worker and could require Labor Ready to send a replacement.³⁵⁹ Alluding to the responsibilities that come with control, the Third Circuit noted that Tuesday Morning had agreed with Labor Ready to "provide a workplace free from discrimination," and thus "bore many of the legal responsibilities of

³⁵³ See, e.g., *EEOC v. Skanska USA Bldg., Inc.*, 550 F. App'x 253, 253-54 (6th Cir. 2013) (holding a general contractor liable under Title VII even when plaintiffs were hired by a subcontractor); *Tamayo v. Blagojevich*, 526 F.3d 1074, 1088 (7th Cir. 2008) (finding sufficient allegations of joint employment under Title VII to deny a defendant's motion to dismiss); *Daniel v. T & M Prot. Res.*, 992 F. Supp. 2d 302, 313-14 (S.D.N.Y. 2014) (rejecting a property manager's motion to dismiss a sex discrimination claim brought against the defendant as a joint employer).

³⁵⁴ 808 F.3d 208 (3d Cir. 2015).

³⁵⁵ *Id.* at 209.

³⁵⁶ *Id.* at 209-10.

³⁵⁷ *Id.* at 215-20.

³⁵⁸ *Id.* at 216-17 (discussing Tuesday Morning's daily control over workers and distinguishing the situation from an independent contracting relationship).

³⁵⁹ *Id.* at 216.

a traditional employer, including compliance with Title VII.”³⁶⁰ Given Tuesday Morning’s direct supervision of the plaintiff and its functional control over wages, hiring, and firing, the *Faush* court found sufficient facts to hold the retailer accountable as the supplied worker’s employer.³⁶¹

The same expansive approach to control applies to the common law test for employment under the NLRA. Mirroring the *Faush* court’s analysis of retained powers in the setting of triangular employment, the National Labor Relations Board (“NLRB” or “Board”) broadly defined control under the common law in *Browning-Ferris Industries of California, Inc.*³⁶² In that case, the Board evaluated a recycling company’s employment relationship with workers who were hired by a staffing firm.³⁶³ Considering a wide range of subjects and methods of control, the NLRB held that the common law test for employment applied to companies that exercised “ultimate control” over a variety of subjects such as the ability to reject supplied workers, effectively set pay rates, approve finished work, and terminate underlying contracts.³⁶⁴ Incorporating this more comprehensive definition of control into the common law test for employment, the NLRB held that the recycler at issue employed the supplied workers because it retained the power to reject them, determine their pay, and set their pace of work.³⁶⁵

In addition to situations involving triangular employment, analyses of independent contracting can also benefit from a comprehensive approach to common law control.³⁶⁶ For instance, the NLRB recently considered whether a nonprofit food charity had properly designated its door-to-door solicitors as “independent contractors.”³⁶⁷ Much like workers in the gig economy, the solicitors retained complete discretion over what days to work or whether to work at all.³⁶⁸ But as with judicial opinions on peer-to-peer work, the NLRB centered its control analysis not on the solicitors’ power over scheduling but on the nonprofit’s control over working conditions during the hours that the solicitors chose to work.³⁶⁹ On that front, the Board held that the charity at issue retained substantial control over numerous working conditions such as the method and location of work.³⁷⁰ Even though the solicitors worked individually without direct supervision, the NLRB found that the nonprofit

³⁶⁰ *Id.* at 215-17.

³⁶¹ *Id.* at 209.

³⁶² 362 N.L.R.B. No. 186, 2015 WL 5047768, at *12-13 (Aug. 27, 2015).

³⁶³ *Id.* at *21-22.

³⁶⁴ *Id.* at *12-13.

³⁶⁵ *Id.* at *20-25.

³⁶⁶ See *id.* at *15-16 (examining the relationship between independent contracting and employer control under the common law test for employment).

³⁶⁷ *Sisters’ Camelot*, 363 N.L.R.B. No. 13, 2015 WL 5678168, at *2 (Sept. 25, 2015).

³⁶⁸ *Id.* at *1.

³⁶⁹ *Id.* at *2.

³⁷⁰ *Id.*

controlled other key aspects of their performance and disciplined solicitors who violated workplace rules.³⁷¹ Given this level of reserved control and the fact that the solicitors lacked genuine entrepreneurial powers, the NLRB found that the nonprofit had improperly misclassified the solicitors as independent contractors.³⁷²

As the foregoing decisions reveal, courts assessing a wide range of workplace claims (e.g., wage, labor, and antidiscrimination) in a variety of sectors (e.g., the gig economy and more traditional industries) need not limit their control analyses to instances of daily, direct supervision. Instead, by expanding the scope of their employment determinations to include the subjects, direction, and obligations that come with control, judges can more accurately define the boundaries of modern workplace relationships.

D. *In Defense of Refocused Control*

Critics could raise several possible objections to the model of control outlined here. For example, employee-rights advocates might understandably view this project's embrace of control with some skepticism. They could point out, for example, that the Supreme Court created the economic realities test precisely to discourage courts from focusing only on control.³⁷³ But such a critique misses the project's main purpose. The goal here is not to convince courts to talk exclusively about control. Rather, by broadening the meaning of control, courts can better evaluate the contractor defense and incorporate this refocused definition of control into their existing employment tests. As such, this project recognizes that courts will inevitably treat control as a critical component of any employment analysis. Given this reality, an examination that includes control—rather than shuns it—provides a more useful model for assessing workplace relationships going forward.

Critics might also question the efficacy of a framework that hinges employer responsibility on the level of control that businesses retain over independent contractors and intermediaries. Such a system might create incentives for firms to engage in mere cosmetic compliance by facially satisfying the duties that come with control.³⁷⁴ To this end, companies might do little more than place clauses in their contractor agreements that require third parties to adhere to applicable work laws.³⁷⁵ But if the likelihood of employment liability increases as a firm's level of control over working conditions increases, then the level of required compliance should increase as well. The precise contours of genuine

³⁷¹ *Id.*

³⁷² *Id.* at *2-7.

³⁷³ See, e.g., U.S. DEP'T OF LABOR, *supra* note 118, at 2 (noting that under the economic realities test "no one factor (particularly the control factor) is determinative"); Linder, *supra* note 153, at 323-24 (discussing the role that control plays in the economic realities test).

³⁷⁴ Estlund, *supra* note 7, at 632-33 (outlining the limitations of internal monitoring).

³⁷⁵ See Glynn, *supra* note 4, at 225-26 (discussing the judicial tendency to validate minimum compliance efforts).

compliance will depend on numerous factors such as a firm's ability to predict and prevent harm.³⁷⁶ The more risk associated with a particular transaction, the more steps that a company must take to ensure compliance, such as conducting background inspections, holding unannounced site reviews, and penalizing contractors for violations.³⁷⁷

In addition to the danger of encouraging only cosmetic compliance, this model of refocused control could possibly discourage businesses from keeping an eye on their contractors altogether. For instance, if a company's level of control gives rise to a heightened duty to observe a firm's partners, then some businesses may try to distance themselves from intermediaries and independent contractors by disavowing all forms of monitoring.³⁷⁸ But this sort of disentanglement may be easier said than done. As noted above, firms that expect independent contractors and intermediaries to produce particularized outcomes often provide detailed instructions about how contractors must produce those outcomes.³⁷⁹ If end-user firms truly wish to avoid the obligations that come with employer status, then they must fully relinquish their control over decisions that directly affect working conditions as well. As a practical matter, however, the price of disassociation for end-user firms that currently hold power over various aspects of work may be greater than the price of ensuring workplace compliance among contracting parties.³⁸⁰

Notwithstanding the foregoing risks, an employment test that broadens the concept of control can substantially clarify the boundaries of modern employment relationships in important ways. Today, regardless of which employment standard courts utilize—the common law test or the economic realities test—both approaches to employment produce notoriously indeterminate results.³⁸¹ With their multifactored, non-exhaustive lists, these imprecise standards encourage companies to structure their employment relationships in ambiguous ways, while still maintaining control over those workplace issues that matter most to them.³⁸²

³⁷⁶ See Rogers, *supra* note 2, at 50-51 (examining various methods for deterring wage violations).

³⁷⁷ *Id.* (considering practical applications of compliance measures).

³⁷⁸ See Estlund, *supra* note 21, at 692 (examining possible responses from firms to the threat of heightened employment liability).

³⁷⁹ See *supra* Section III.A (discussing the relationship between control and contractual specifications).

³⁸⁰ See Arturs Kalnins, *A Trade-Off for Large Franchises and Companies*, N.Y. TIMES: ROOM FOR DEBATE (Sept. 14, 2015, 9:30 AM), <http://www.nytimes.com/roomfordebate/2015/09/14/whos-the-boss-when-you-work-for-a-franchise-or-contractor/a-trade-off-for-large-franchises-and-companies> [https://perma.cc/PR8V-FER3] (noting that employer status “may be a reasonable price to pay” for end-user firms that demand uniformity in workers’ performance).

³⁸¹ See Zatz, *supra* note 278, at 282 (highlighting certain similarities that current employment tests share).

³⁸² See Carlson, *supra* note 6, at 336 (examining the incentives created by various

Although it might appear that the present proposal simply replaces these vague tests with a new, unbounded definition of control, this broader vision of control actually offers greater analytic precision than existing models. Calling upon courts to consider a more diverse range of control-based subjects and delivery methods, this expansive approach to control still attaches employment liability only to those firms that have the ability to significantly influence the circumstances of work.³⁸³ Thus, in evaluating different permutations of direct, indirect, and reserved control, the test outlined here applies solely to businesses that hold sway over workers' lives.³⁸⁴ As such, this more searching approach to control helps clarify existing employment standards by focusing exclusively on firms that have the power to meaningfully determine working conditions.

CONCLUSION

American companies increasingly hire workers without technically employing them. From overtime obligations to antidiscrimination protections to union rights, nearly all workplace laws apply only to individuals who share an employment relationship with the firms that retain their labor. Businesses today that disavow their status as employers avoid these responsibilities and diminish labor standards in the process.

Despite many courts' failure to keep pace with these changes, the primary criterion for identifying employers remains the same. Since the earliest days of American employment law, the concept of control has anchored judicial evaluations of workplace relationships.³⁸⁵ Although the methods for influencing working conditions have changed, the existence of control remains a crucial factor for determining when to hold businesses accountable for employment law violations.

From peer-to-peer platforms that hire independent contractors to more traditional businesses that obtain workers through intermediaries, companies that disclaim their status as employers may still effectively control workers' daily existence. Whether it is Amazon setting its contractors' pay scale, FedEx specifying the color of its drivers' socks, or Uber telling its drivers to play soft jazz, businesses that control contractual outcomes frequently control working conditions as well. Given these realities, courts must fully assess all aspects of workplace control, from its diverse subjects, to its direction, to the obligations that come with it. Armed with this refocused vision of control, courts can cut

approaches to employment).

³⁸³ Brief of the American Federation of Labor & Congress of Industrial Organizations as Amicus Curiae, *supra* note 218, at 9-10 (analyzing the common law test for employment and explaining how joint employers can "meaningfully affect" working conditions).

³⁸⁴ See *Browning-Ferris Indus. of Cal.*, 362 N.L.R.B. No. 186, 2015 WL 5047768, at *21 (Aug. 27, 2015) (responding to potential critiques of an expansive control analysis).

³⁸⁵ See *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322-28 (1992) (examining the foundations of the control test).

through the contractor defense and assign responsibility to firms that retain ultimate authority over the manner and means of modern work.