

Legal Responses to the Rise of the On-Demand Economy in Georgia and the United States

Abstract

Are gig-economy workers “employees” or “independent contractors” for purposes of wage, hour, employee-benefit, and labor laws? In both Georgia and the U.S. gig-economy work is significant and rapidly expanding, though precise statistics in both countries do not exist. Similarly, in both countries, companies providing gig-economy work label their workers as “independent contractors”, though in many respects the companies’ control over the ways the workers do their work more closely resembles traditional employment status. In both countries, the law has not yet caught up to the changing nature of gig-economy work.

After discussing the prevalence and nature of gig-economy work in both Georgia and the U.S., this article examines the [thus far inadequate] response to this new type of work. It then reflects on broader questions such as how the law should systematically attempt to resolve issues regarding the status of gig-economy workers. For example, should it respond by attempting to clarify the way that workers are classified and impose existing legal rules on these new-economy workers? Should it reject classification altogether and instead either expand certain employment protections to all workers regardless of classification, or divorce such protections from workplace status entirely? How can countries coordinate their respective labor laws to avoid a “race to the bottom” of labour standards by multinational employers?

I. Introduction

In both Georgia and the United States, as in much of the world, an increasing amount of labour is being performed by workers in the on-demand or “gig” economy. These workers often do not fit into the traditional common-law distinction between “employees” and “independent contractors”, and consequently there currently is much dispute over how to classify these workers and to which workplace protections they are legally entitled.

This article begins by describing the rapid rise of on-demand work in both the Georgian and U.S. economies. It next describes the nature of gig-economy work. Despite gig-economy companies’ attempts to label their workers as “independent contractors” rather than “employees”, in both Georgia and the United States such work usually demonstrates some characteristics of both. The article then describes the current status of labour laws in both Georgia and the U.S., finding that the laws are inadequately responding to this type of work.

This article then reflects on broader questions such as how the law should systematically attempt to resolve issues regarding the status of gig-economy workers. It considers options such as attempting to clarify the way that workers are classified, rejecting classification systems altogether and instead either expanding certain employment protections to all workers regardless of classification, and creating a new intermediate status of the worker, tailored to on-demand workers, that would entitle those workers to some labour protections but not others. Finally, this article urges countries to coordinate

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their respective labour laws on on-demand workers and to ensure that these workers receive at least a minimal level of legal protection. The alternative would be a “race to the bottom” of labour standards by multinational employers, to the detriment of workers everywhere.

II. The Rise in Contingent and On-Demand Work in the U.S. and Georgian Economies

A. United States

Existing labor and employment laws are predicated on the assumption of long-term, stable employment relationships.³ This assumption, however, has been eroding consistently for at least the last couple of decades. It started with the transition from long-term employment relationships to contingent work – work expressly designed to be short-term, including independent contractors (also called freelancers or consultants), on-call workers, and workers provided by temporary help agencies.⁴ That erosion has accelerated into a landslide over the last 2-3 years with the explosion of the on-demand or “gig” economy.⁵

There is no set definition of gig work.⁶ It typically involves a single task or project, and often is on-demand.⁷ The gig could last for weeks or months (in which case it resembles a short-term job) or for only a few minutes.⁸ A gig worker may take one gig at a time or juggle several at once.⁹ The recent explosion in the quantity of gig work is largely attributable to the rise of companies (such as Uber¹⁰ and Grab) connecting workers with gigs through websites or mobile applications (more commonly known as apps).

The United States Bureau of Labor Statistics (BLS) stopped counting “contingent workplace” arrangements after 2005,¹¹ though it will start counting again as part of the May 2017 Current Population Survey.¹² As of 2005, the BLS estimated that contingent work accounted for 1.8-4.1% of total employment, and that independent contractors constituted an additional 7.4% of total employment.¹³

The void left by the BLS’s hiatus in counting contingent workers has led to widespread speculation about the size and growth of the gig economy.¹⁴ For now, the best estimate of the number of workers

³ *Stone, K. V. W.*, From Widgets to Digits: Employment Regulation for the Changing Workplace, 2004; *Sanjukta, M. P.*, Uber as For-Profit Hiring Hall: A Price-Fixing Paradox and its Implications, 38 Berkeley, J. Employ. & Lab. L. 233, 2017, 249. Available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2817653>. (Noting that “[d]rivers’ description of their relationship with Uber corresponds to the conventional legal form for engaging labor under the New Deal framework of work regulation, i.e., the employment relationship”).

⁴ *Id.* The Government Accountability Office estimates that approximately 40% of American workers are contingent. See *Murray, P., Gillibrand, K.*, Contingent Workforce: Size, Characteristics, Earnings, and Benefits, S. Doc. No. GAO-15-168R, 2015, 4.

⁵ See *infra* notes 12-20 and accompanying text.

⁶ *Torpey, E., Hogan, A.*, Working in a gig economy, Bureau of Labor Statistics Career Outlook, May 2016. Available at <<http://www.bls.gov/careeroutlook/2016/article/what-is-the-gig-economy.htm>>.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ See, e.g., *Woo, Ch., Bales, R.*, The Uber Million Dollar Question: Are Uber Drivers Employees or Independent Contractors?, 68 Mercer L. Rev., 2017, 461.

¹¹ *Hathaway I., Muro, M.*, Tracking the gig economy: New numbers, Brookings Institute Report, Oct. 13, 2016. Available at <<https://www.brookings.edu/research/tracking-the-gig-economy-new-numbers/>>.

¹² Secretary of Labor *Perez, T.*, Innovation and the Contingent Workforce, U.S. Dep’t Labor Blog, Jan. 25, 2016. Available at <<https://blog.dol.gov/2016/01/25/innovation-and-the-contingent-workforce/>>.

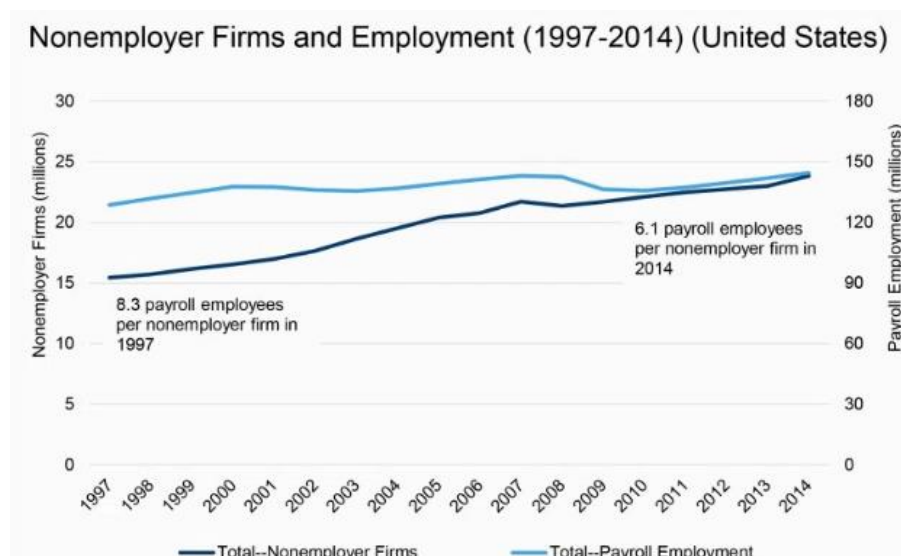
¹³ Bureau of Labor Statistics News, Contingent and Alternative Employment Arrangements, February 2005, USDL 05-1433 (July 27, 2005), 1.

¹⁴ See, e.g., *Steinmetz, K.*, Exclusive: See How Big the Gig Economy Really Is, Time, Jan. 6, 2016. Available at <<http://time.com/4169532/sharing-economy-poll/>>. (Estimating that at least 14 million people currently work in the gig economy), *Neuner, J.*, 40% of America’s Workforce Will Be Freelancers by 2020, Quartz, Mar. 20, 2013; *Miller, R.*, Half of All Workers Could be Freelance by 2020, Startup Donut, June 26, 2015. See generally *Lobel, O.*, The Gig Economy & The Future of Employment and Labor Law, 51 USF L. Rev., 2016. Available at <ssrn.com/abstract=514132>.

in the gig economy comes from a Census Bureau dataset of "non-employer firms", which counts "businesses" that earn at least \$1000 per year in gross revenues (or \$1 in construction) but employ zero workers.¹⁵ Approximately 86% of these "firms" are self-employed, unincorporated sole-proprietors.¹⁶ In the rides and rooms industries, some 93% of the firms are such sole proprietors.¹⁷ These are exactly the types of workers who seek part-time work in the gig economy. Thus, this dataset provides the best snapshot currently available of American workers in the gig economy.

In the entire economy, these non-employer firms grew from 15 million in 1997 to 22 million in 2007 to 24 million in 2014.¹⁸ Figure 1¹⁹ below demonstrates the growth of these non-employer firms as compared to payroll employment.

Figure 1



The rise of the gig economy is even more dramatic when limited to the ground transportation industry. Figure 2²⁰ below demonstrates that the number of non-employer firms in the ground transportation industry rose sharply in 2010, the same year Uber launched in San Francisco. It then exploded in 2014 – a trend that likely continues to the present.²¹ *Ian Hathaway* and *Mark Muro* explain: "In [2014] the non-employer firm growth rate in ride-sharing was 34 percent, compared with 4 percent for payroll employment in the industry. Between 2010 and 2014, non-employer firms in ride-sharing grew by 69 percent while payroll employment grew by just 17 percent."²²

¹⁵ *Hathaway, I., Muro, M.*, supra note 11.

¹⁶ *Id.*, 5.

¹⁷ *Id.*

¹⁸ *Hathaway, I., Muro, M.*, supra note 11. Total U.S. payroll employment was 129 million in 1997 and 145 million in 2014. *Id.*

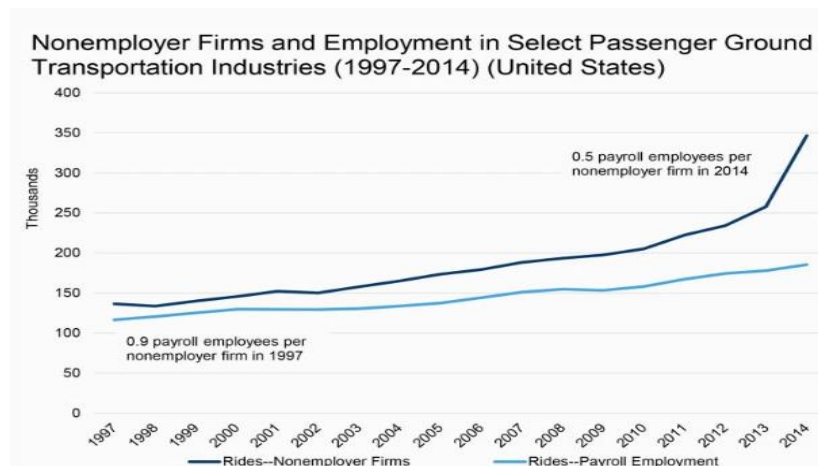
¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

Figure 2



The rise in the gig economy, especially if it occurs at the expense of traditional employment relationships, significantly weakens American labour unions, because gig workers are much more difficult to organize into unions. This is so for two reasons. First, under U.S. law, they may be “independent contractors” instead of “employees”. Independent contractors are specifically excluded from protection by the U.S. National Labor Relations Act,²³ and attempts by independent contractors to organize and bargain collectively may violate antitrust laws.²⁴ The status of gig economy workers as employees versus independent contractors has been widely litigated²⁵ and theorized,²⁶ but almost exclusively in the context of wage, hour, and benefit disputes,²⁷ not in the context of whether the workers can organize into unions.²⁸

Second, workers in the gig economy may think of themselves as individual entrepreneurs and not as workers with a collective interest.²⁹ Uber drivers, for example, set their own schedules, work alone, and drive their own cars. However, as Catherine Fisk has shown, Hollywood writers have bargained collectively for 80 years despite working in a gig (albeit non-web-based platform) economy.³⁰ Independent, entrepreneurial, short-term workers can organize and bargain collectively if given the opportunity, motive, and legal protection to do so.³¹

²³ NLRA § 2(3); see also *NLRB v. United Ins. Co.*, 390 U.S. 254 (1968) (applying general agency law principles to determine whether insurance agents were employees or independent contractors under the NLRA).

²⁴ See *Sanjukta, M. P.*, supra note 3; *Fisk, C.*, Hollywood Writers and the Gig Economy, 2017 U. Chi. Legal Forum, 2017. Available at <<https://legal-forum.uchicago.edu/publication/hollywood-writers-and-gig-economy>>; *Paul, S. M.*, The Enduring Ambiguities of Antitrust Liability for Worker Collective Action, 47 Loy. U. Chi. L.J., 2016, 969, 977; *Kennedy, E.*, Comment, Freedom from Independence: Collective Bargaining Rights for “Dependent Contractors”, 26 Berkeley J. Emp. & Lab. L. 143, 2005, 169-69.

²⁵ See cases listed in *Cherry, M. A.*, Gig Economy: Settlements Leave Labor Issues Unsettled, May 5, 2016. Available at <ssrn.com/abstract=2776213>.

²⁶ See, e.g., *Cunningham-Parmeter, K.*, From Amazon to Uber: Defining Employment in the Modern Economy, 96 Boston U. L. Rev., 2016, 1673; *Woo, Ch., Bales, R.*, supra note 10; *Cherry, M. A.*, Beyond Misclassification: The Digital Transformation of Work, 37 Comparative Lab. L. & Policy J., 2017, 577. Available at <ssrn.com/abstract=2734288>.

²⁷ *Cherry, M. A.*, supra note 25.

²⁸ Cf. *Fisk, C.*, supra note 24 (using Hollywood writers as a case study in whether gig-like workers can (both legally and practically) organize into a union).

²⁹ *Fisk, C.*, supra note 24, 1; *Dubal, V.*, Wage Slave or Entrepreneur? Contesting the Dualism of Legal Worker Identities, 105 Cal. L. Rev. 101, 2017.

³⁰ *Fisk, C.*, supra note 24, 2.

³¹ *Id.*

B. Georgia

Gig-economy relations are rapidly expanding in the Georgian labor market. However, there are no precise data or statistics on this expansion. Consequently, we attempted to survey companies providing on-demand services, but these companies declined to co-operate voluntarily. We, therefore, conducted our own, informal, survey of on-demand *workers* in Georgia.

Based on the results of our informal surveys, we believe that most workers in the gig economy are labeled as independent contractors, though functionally they may more closely resemble employees. The exact number of these independent contractors is unknown. However, studies conducted by Geostat in 2015 indicate that the number of self-employed workers is significantly more than the number of workers classified as traditional “employees”.³²

A 2017 study demonstrates that 59% of self-employed workers are involved in agriculture.³³ Information about the sectors in which the other 41% of self-employed workers are involved is unknown. However, the growth of gig-economy work is obvious, even if unconfirmed by official statistics. Such companies as Taxify, Maxim, Yandex Taxi, etc., are increasingly visible, rapidly expanding, and purely based on gig-economy relations. Moreover, gig-economy work is expected to become more and more widespread, as it is planned to regulate and renovate taxi parks and other similar areas to facilitate gig-economy work.

III. Expanding Labour Protection to On-Demand Workers

A. In the United States

As described in Part II above, there is substantial current litigation over whether gig workers are “independent contractors” instead of “employees”.³⁴ Nearly all of this litigation has occurred in the context of wage, hour, and benefit disputes,³⁵ not in the context of whether the workers can organize into unions.³⁶ To ensure that the benefits of collective bargaining are available to workers in the U.S. gig economy, the following three things should occur:

First, U.S. courts and the National Labor Relations Board (NLRB or Board) (the federal administrative agency charged with administering the NLRA) should classify gig-economy workers such as Uber drivers as employees under the NLRA as well as under the other employment statutes.³⁷

Second, if gig-economy workers nonetheless are classified as independent contractors, the NLRA should be amended to narrow or remove the Section 2 exclusion of independent contractors³⁸ and the federal antitrust laws should be amended to ensure that they are not interpreted as applying to collective bargaining involving such workers.³⁹ As Catherine Fisk’s work with Hollywood writers demonstrates,⁴⁰ collective bargaining is entirely appropriate for workers who have many of the characteristics of independent contractors. Alternatively, the NLRA should be rewritten to

³² Employment and non-employment, Geostat report on 2006-2015 years, 2015. <<http://www.geostat.ge/>>.

³³ “The Anatomy of Georgian Labor Market”, Georgian Political and Business Insight, March 30, 2017. Available at <<https://bpi.ge/saqartvelos-shromis-bazris-anatomia/>>.

³⁴ See, *supra* notes 23-26 and accompanying text.

³⁵ *Cherry, M. A.*, *supra* note 25.

³⁶ See, *supra* note 24 and accompanying text.

³⁷ See *Eisenbrey, R., Mishel, L.*, Uber business model does not justify a new ‘independent worker’ category, Economic Policy Institute, March 17, 2016. Available at <<http://www.epi.org/publication/uber-business-model-does-not-justify-a-new-independent-worker-category/>>.

³⁸ NLRA § 2(3). This may also require replacing the word “employee” throughout the statute with the word “worker”.

³⁹ See *Sanjukta, M. P.*, *supra* note 3.

⁴⁰ *Fisk, C.*, *supra* note 24.

recognize a new category of “independent workers”⁴¹ for workers in the gig economy, and to recognize that these workers are entitled to organize and collectively bargain for the terms and conditions under which they work.

Third, an appropriate bargaining unit for purposes of organizing and bargaining should be interpreted broadly. The NLRA Section 9(b) gives the Board the authority to define an appropriate bargaining unit for a given workplace,⁴² and establishes procedures for doing so.⁴³ The Board should interpret this to include not only physical workplaces but also virtual ones.

An example of how this might work in practice is provided by the recent emergence of a union-like association in Seattle.⁴⁴ In December 2015, the City of Seattle enacted an ordinance⁴⁵ to permit for-hire drivers to organize and elect representatives to bargain on their behalf with the companies that direct their work for better compensation rates and other contract terms. The goal of the ordinance is “[l]eveling the bargaining power between for-hire drivers and the entities that control many aspects of their working conditions”;⁴⁶ City Council specifically found that:

Business models wherein companies control aspects of their drivers’ work, but rely on the drivers being classified as independent contractors, render for-hire drivers exempt from minimum labor requirements that the City of Seattle has deemed in the interest of public health and welfare, and undermine Seattle’s efforts to create opportunities for all workers in Seattle to earn a living wage.⁴⁷

The Seattle ordinance establishes a procedure for (1) for organizations to register as qualified driver representatives (QDRs), and (2) for drivers to select from among those QDRs an exclusive driver representative (EDR) to be the exclusive representative of for-hire drivers operating in the city for a particular on-demand company.⁴⁸ A QDR becomes an EDR by submitting to the Director of the City’s Finance and Administrative Services (Director) “statements of interest” from qualified drivers that “clearly state that the driver wants to be represented by the QDR for the purpose of collective bargaining.”⁴⁹

Once an EDR is certified, the EDR and the company must meet and bargain over vehicle standards, safe driving practices, the nature and amount of payments to be made, minimum work hours, and work rules.⁵⁰ If the parties reach an agreement, the agreement must be reduced to writing⁵¹ and certified by the Director,⁵² after which it becomes final and binding on all parties.⁵³ If the parties fail to agree, the ordinance requires interest arbitration upon either party’s request.⁵⁴

⁴¹ See *Harris, S. D., Krueger, Alan, B.*, A Proposal for Modernizing Labor Laws for Twenty-First Century Work: The “Independent Worker”, The Hamilton Project Discussion Paper 2015-10.

⁴² 29 U.S.C. § 159(b) (“The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act [subchapter], the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.”).

⁴³ *Id.*

⁴⁴ See generally *Van Wezel Stone, K.*, Unions in the Gig and On-Demand Economy, American Prospect (forthcoming Winter 2017); *Sanjukta, M. P.*, supra note 3, at Part I.A; Council Unanimously Adopts First-of-its-Kind Legislation to Give Drivers a Voice on the Job, Seattle City Council Press Release, Dec. 14, 2015. Available at <<https://www.seattle.gov/council/issues/giving-drivers-a-voice>>.

⁴⁵ City of Seattle, Council Bill 118499 (adopted Dec. 14, 2015), amending Seattle Municipal Code § 6.310.110 and adding new § 6.310.735.

⁴⁶ City of Seattle, Council Bill 118499 §1(J).

⁴⁷ *Id.* at §1(H).

⁴⁸ *Id.* at § 2.

⁴⁹ *Id.* at § 3(F)(1).

⁵⁰ *Id.* at § 3(H).

⁵¹ *Id.*

⁵² *Id.* at § 3(H)(2).

In March 2016, the U.S. Chamber of Commerce sued the City of Seattle in federal court to declare the ordinance unlawful and enjoin its enforcement.⁵⁵ In its complaint, the Chamber argued that the ordinance violated the Sherman Antitrust Act and was preempted by the NLRA. In August, the court dismissed the lawsuit, finding that because the ordinance had not yet been implemented, the Chamber had not yet been harmed and so lacked standing to sue.⁵⁶ The judge left the door open for the chamber to re-file the suit at a later time. In December 2016, the ordinance went into effect, and the Chamber almost immediately filed to reinstate its suit.

The Seattle ordinance illustrates that gig-economy work is compatible with unions and collective bargaining. Ironically, a finding by the NLRB or the courts that gig-economy workers are “employees” covered by the NLRA would probably result in a finding of NLRA preemption. However, preemption of the Seattle ordinance would be a small price to pay for opening the door for gig-economy workers across the country to organize.

B. In Georgia

As described above, our attempts to survey companies offering on-demand work in Georgia were unsuccessful. Consequently, we conducted independent research by informally surveying gig-economy workers directly. We asked them the following questions: How do they get in touch with the companies? What are the procedures for getting a license? Do the companies tell them that they are employees or independent contractors? What are their rights and obligations? Who determines how long they must work, and the number of days they must work? Must they notify the company when they want to go on a vacation? Is any system of benefits in the company, and generally, what do they receive in return for being associated with the companies?

From our research, we find that, similar to in the U.S., in Georgia the companies label their gig-economy workers as independent contractors rather than employees. Superficially, these workers resemble traditional independent contractors in many respects. However, on closer inspection, there are many aspects of the relationship that make them much more similar to employees and not to independent contractors.

Because Uber and Grab are illustrative of gig-economy work in the US market, in Georgia we examined the same type of companies to facilitate comparison. Many such Georgian on-demand transportation companies have their contracts available online. All of them require their drivers to sign sublicense agreements.⁵⁷ The procedure starts with a prospective on-demand driver filling out an online application, providing some substantial information to the company. The prospective driver then must register with the company and the app that the company will use to assign work to the driver. However, before the driver can begin working, the driver must interview with the company. After this interview, the company notifies the driver whether s/he will be permitted to drive using the company’s platform.

This interview is not the only similarity between these gig-economy workers and traditional employees. We found that they experience far less independence than traditional independent contractors. For example:

⁵³ Id. at § 3(H)(2)(a).

⁵⁴ Id. at § 3(I).

⁵⁵ Case No. 2:16-cv-00322 (W.D. Wash., filed March 3, 2016); *Beekman, D.*, Chamber of Commerce Sues Seattle over Allowing Uber-driver Unionizing, The Seattle Times, March 3, 2016. Available at <<http://www.seattletimes.com/seattle-news/politics/chamber-of-commerce-sues-seattle-over-allowing-uber-driver-unionizing/>>.

⁵⁶ *Beekman, D.*, Judge Tosses U.S. Chamber’s Suit Against Seattle over Uber Union Law, Calling it Premature, The Seattle Times, Aug. 9, 2016. Available at <<http://www.seattletimes.com/seattle-news/politics/judge-tosses-chambers-suit-against-seattle-over-uber-law/>>.

⁵⁷ Many of these Georgian on-demand transportation companies have some workers to whom they furnish cars, and other workers who supply their own cars. This article focuses on the latter group of workers.

- Drivers are entitled to select the route, but this route must be the least expensive one unless the customer demands differently.
- Drivers may not communicate with the costumers unless it is necessary or the customers start the conversation themselves.
- Drivers are instructed on what to wear and how to look.
- Drivers must inform the company if they want to take time off, (e.g., for vacation); otherwise it may reflect on their performance.
- Drivers do not have pre-determined working hours, but if they work an insufficient number of hours, this will reflect poorly on their performance ratings. Similarly, drivers are entitled not to take riders assigned to them by the app, but again this affects their performance rating. If a driver has a low rating, the company is entitled to terminate the license contract.
- Drivers usually pay a commission to the company for the use of the company's app. The commission averages 10-15 percent. This enables drivers to receive referrals from the company for customers, and enables the company to ensure that the clients will pay for the service.
- Some companies act as tax agents⁵⁸ for these workers.

Generally, these are the terms of driving for an on-demand transportation company in Georgia. The companies consider the workers as self-employed. The contract between the company and the workers explicitly states that it is not an employment contract, but a sublicense agreement. These workers enjoy more freedom than traditional employees do, (e.g., they can set their own hours), but they are not as free in performing their job as traditional independent contractors are, and like traditional employees, they represent the weaker party in the contract. Thus, as in the United States, gig-economy workers in Georgia fall somewhere in-between traditional employees and traditional independent contractors.

The category of gig-economy workers is mentioned nowhere in Georgian legislation. Gig-economy work is so new in Georgia that there is no court practice in this field. Gig-economy workers have not [yet] created trade unions.

In Georgia, trade unions are extremely important in labor relations. They are one of the most powerful tools for parties in labor relations, to achieve the terms most favorable to all of them. Their role equally important for gig-economy workers as they are for traditional employees.

The right to establish and join associations, such as trade unions, is a constitutional right in Georgia.⁵⁹ This underlines the importance of such organizations and is envisaged in the organic law – Labor Code of Georgia, the entire chapter of which is dedicated to the freedom of [labour] association.

The Constitution of Georgia states that the national legislation shall comply with all the international conventions to which the country is a signatory party and which do not contradict the supreme law of the country itself.⁶⁰ Therefore, there are several international documents that have significant influence on Georgian labor legislation.

Georgia is a party to the European Convention on Human Rights, which declares the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of workers' interests as a universal right.⁶¹

⁵⁸ Georgian Law No.3591 from 2010, Tax Code of Georgia, Art 20 (par 2) – "Tax agent is a person, which in pre-defined cases has to fulfill the taxpayer's obligation in pre-defined cases by the pre-defined rule".

⁵⁹ Article 4, par. 5 Constitution of Georgia (as per revision in 2018 by the Constitutional Law No.2071).

⁶⁰ Article 26 of the Constitution.

⁶¹ Article 11. European Convention on Human Rights (ECHR). Available at <http://www.echr.coe.int/Documents/Convention_ENG.pdf>.

On June 23, 1999, ILO Convention 87 Freedom of Association and Protection of the Right to Organize (1948) was enacted in Georgia⁶², according to which the country took the obligation to ensure that employees in different sectors would enjoy the right to establish and join associations.⁶³ On July 1, 2005, the Parliament of Georgia also ratified the European Social Charter,⁶⁴ Article 5 of which ensures that the member states do not alter their legislation to limit the right of workers and the employers to join international and national professional organizations (right to organize).

Moreover, as a result of trade unions being subject to such high public interest, there is a distinct Law of Georgia on Trade Unions.

The Constitution of Georgia confers the right to establish and join associations/trade unions on everyone, while article 40¹ of Labor Code of Georgia states that employers and employees have the right to create and join trade unions. The Law on Trade Unions repeats⁶⁵ the formula set by the Constitution, adding that such unions shall be established at any enterprise, institution, organization, etc.⁶⁶

Both the supreme law and the special law are sufficiently flexible to accommodate nontraditional forms of work – forms that do not primarily fall into any classical categories of employment relations. However, the Labor Code of Georgia, which normatively falls between the two above mentioned documents, declares that establishing such unions is only possible by employers and employees.⁶⁷ Since this document also prescribes who they shall be,⁶⁸ this implies that workers who are not an “employees” in a classical way are subject to some limitations set by their contractors, and will not be able to technically realize the right to free labor association as granted by the supreme law of the country and international documents to which Georgia is a party. Gig-economy workers officially do not fall into any category, except for independent contractors; however, as we mentioned above, they are somewhere in between. Therefore, in terms of current regulation on trade unions, the court would have significant importance in deciding whether these individuals are entitled to create and join trade unions.

IV. Considering a Systematic Approach to Regulating Gig-Economy Workers

As described above and by others, gig-economy workers do not fit neatly into the common-law distinction (incorporated into many labour and employment statutes) between “employees” and “independent contractors”. At some level, this is a very old issue that has only become more visible because a larger percentage of the workforce is doing gig work than before, and because a larger proportion of these new gig workers are white-collar and professional employees. As described in Part II, in the U.S., the trend from traditional fulltime and lifetime employment to precarious work began at least a decade before digital platforms began to rapidly accelerate this trend. Indeed, one of the most infamous labour decisions in the U.S. is an effort to determine whether one of the oldest types of precarious work in the world – migrant agricultural labour – constitutes “employment” or whether these workers instead are “independent contractors”.⁶⁹ The result, in this case and throughout U.S. labour/employment law, is a tremendous amount of indeterminacy⁷⁰ in how to draw the line between

⁶² Resolution of 1999 №2144 of Parliament of Georgia on ratifying ILO Convention 87 Freedom of Association and Protection of the Right to Organize.

⁶³ Article 2, 1948 ILO Convention 87 Freedom of Association and Protection of the Right to Organize,

⁶⁴ Resolution №1876 of 2005 of the Parliament of Georgia on ratifying the European Social Charter and its supplement.

⁶⁵ Article 2(2), 2018 Law of Georgia on Trade Unions.

⁶⁶ Article 2(3).

⁶⁷ Article 40¹, Labor Code of Georgia (2010 Organic Law No.4113-RS).

⁶⁸ Article 3.

⁶⁹ Secretary of Labor, U.S. Dept. of Labor v. Lauritzen, 835 F.2d 1529 (7th Cir. 1987).

⁷⁰ Id. (creating a multi-factor test, in which the factors are unweighted and in most cases easily could be decided either way).

these two employment categories. Professor Orly Lobel accurately summarizes the state of U.S. law on the issue when she says that the tests used to distinguish employees from independent contractors “are notoriously incremental, applied case-by-case, reliant on multiple weighted factors, and frequently reject the labels adopted by the contracting parties.”⁷¹

One potential solution is to simplify the classification test. In 2015, the U.S. Department of Labor (DOL) issued new guidance on classifying independent contractors.⁷² The DOL’s new guidance relies on the language of the Fair Labour Standards Act (FLSA), which among other things sets a minimum wage, requires time-and-a-half for more than 40 hours of work per week, and forbids most child labour. The FLSA language defines “employment” broadly, as “to suffer or permit to work”.⁷³ The new guidance expands FLSA worker protections by narrowing the grounds under which a worker qualifies as an independent contractor.⁷⁴

A second potential solution is to reject the employee/independent contractor distinction entirely, and instead to protect all workers regardless of status.⁷⁵ Some U.S. statutes already do this. Examples include the whistleblowing and anti-retaliation provisions of financial statutes like *Dodd-Frank* and *Sarbanes-Oxley*.⁷⁶ Similarly, the [State of] Washington Law Against Discrimination prohibits discrimination against workers regardless of status.⁷⁷

A third potential solution is for the law to recognize an intermediate category of worker between employees and independent contractors. For example, *Seth Harris* and *Alan Krueger* have suggested a category such as “independent workers”, and have argued that they receive the right to organize and bargain collectively.⁷⁸ Presumably, workers in this intermediate category would receive the protection of some workplace laws but not others. This approach, however, appears to suffer from two major challenges: (1) deciding which protections these workers will and will not receive, and (2) creating a classification system that distinguishes these workers from “employees” and “independent contractors” without returning to the same indeterminacy problems described above.

In Georgia, there is no official record of any legal disputes that have arisen regarding the status of gig-economy workers. Nor is there any extant legislation on the topic. However, given the recent expansion of gig-economy work, sooner or later the need for regulation will become inevitable.

Under Georgian law, there is a set of criteria, according to which it can be determined whether a given type of work falls into a category of a labour relations. These criteria are: organized labor conditions; remuneration from an employer to an employee; a continuous, long term relationship;

⁷¹ Lobel, O., The Gig Economy and the Future of Employment and Labor Law, March 2016, 8. Available at <<http://ssrn.com/abstract=514132>>.

⁷² U.S. Dep’t of Labor, Wage & Hour Div., Administrator’s Interpretation No. 2015-1 (July 15, 2015). Available at <https://www.dol.gov/whd/workers/Misclassification/AI-2015_1.htm>.

⁷³ FLSA, 29 U.S.C. § 2033(g).

⁷⁴ Lobel, O., supra note 71, 9.

⁷⁵ See *Dau-Schmidt, K. G.*, The Impact of Emerging Information Technologies on the Employment Relationship: New Gigs for Labor and Employment Law, 2017 U. Chi. Legal Forum 63, 2018. Available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2951967>. It is argued that the “outmoded legal definitions of who is an employee and who is an ‘independent contractor’” should be abandoned in favor of “broad, perhaps universal, coverage for workers”.

⁷⁶ Lobel, O., supra note 71, 9.

⁷⁷ Wash. Rev. Code § 49.60.040; *Marquis v. City of Spokane*, 922 P.43, 45 (Wash. 1996) (interpreting the law as extending to all worker relationships); see also *D’Annunzio v. Prudential Ins. Co. of America*, 927 A.2d 113, 123 (N.J. 2007) (extending whistleblower protection to worker notwithstanding an employment contract classifying him as an independent contractor).

⁷⁸ *Harris S. D., Krueger, A. B.*, A Proposal for Modernizing Labor Laws for Twenty-First Century Work: The “Independent Worker”. Available at <http://www.hamiltonproject.org/papers/modernizing_labor_laws_for_twenty_first_century_work_independent_worker>.

subordinate status of the worker; and a right to instruction. However, the meaning of “employee” in this regard is vague and does not specify whether it is an employee in a classic understanding, or whether it also includes people who do some job for a determined period of time for remuneration.⁷⁹

The Supreme Court of Georgia, affirming a decision by the Court of Appeals, has held that as long as a contract states the obligation of a party to obey the internal regulations of the entity, this shall also qualify as a labor relation.⁸⁰ This case is important because of the element of obeying the internal rules of the organization is the same in gig-economy work as it is in traditional employment.

As in the U.S., gig-economy workers in Georgia are in a grey area between traditional employees and independent contractors. This can be seen most clearly when workers must notify the company before taking a vacation, or when they must accept work as directed by the company so they can maintain their rating, or when they receive remuneration from the company.

Regardless of the approach that ultimately is taken to classifying gig-economy workers, it is imperative that all countries be aware of, and to the extent possible be at least somewhat consistent with, the laws of other countries. One country’s labor laws do not need to mirror image of the labour laws of another country, but it is important that each country find some way to ensure that gig-economy workers receive some degree of workplace protection. In Georgia, for example, the government can either regulate gig-economy work now, or wait for later when gig-economy work is even more prevalent (and there are more-entrenched interests both favouring and opposing regulation). Regardless of whether Georgia creates a new category of workers, or fits these workers into existing categories in labour law, it is important that these workers must enjoy some degree of legal protection. In this process, the role of the court system is crucial, and the case described above provides hope that the existing gaps in the legislation will be properly filled.

The alternative (for Georgia, the U.S., and all countries) is a race-to-the-bottom⁸¹ of labour standards, with capital flowing to those countries with the weakest labour standards (and thus the least expensive labour costs). This would grossly disserve all workers.

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⁷⁹ Commentary on the Labor Code of Georgia, edited by *Borroni, A.*, Tbilisi, 2016.

⁸⁰ Civil Chamber of the Supreme Court of Georgia, Case No. AS-1129-1156-2011, October 10, 2011.

⁸¹ See, e.g., *Bales, R.*, Explaining the Spread of At-Will Employment as an Inter-Jurisdictional Race-to-the-Bottom in Employment Standards, 75 TENN. L. REV. 453 (2008).

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