

NOTES

Portable Benefits in the Gig Economy: Understanding the Nuances of the Gig Economy

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A subset of the growing contingent workforce, called the gig economy, has been afforded tremendous growth in the last ten years because of advances in automation and technology. The gig economy provides great benefits for both consumer and worker, but a lack of sophisticated regulation in the gig economy has resulted in a failure to provide gig workers with an adequate safety net, threatening the viability of the gig economy as a whole. The saving grace of the gig economy can and very well may be the implementation of portable benefits. Through experimentation and a reexamination of age-old labor laws, policymakers can implement viable and practical portable benefits that fully consider the nuances and diversity of interests in the gig economy. This Note presents a general background on the strengths and weaknesses of the gig economy as well as solutions to the problems of the gig economy and ways to refine those solutions.

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I. INTRODUCTION

This Note aims to discuss the promises and perils of the gig economy while also discussing how the gig economy can be refined in such a way that will make it more sustainable and equitable for both companies and workers. Part II will introduce the gig economy, its stakeholders, and the issues faced by the gig economy at large. Part III will introduce portable benefits as a solution to the safety net issue in the gig economy and will critique the methods proposed to implement portable benefits into the gig economy. Part IV offers ways to further refine and perfect portable benefits. Overall, this Note calls for an approach to implementing portable benefits that takes into consideration the nuances and heterogeneity of the gig economy, so that the gig economy is ultimately sustainable and equitable.

II. BACKGROUND

A. What is the Gig Economy and Who are its Stakeholders?

Over the past few decades there has been an expansion of what David Weil, a former Department of Labor official, calls the “fissured workplace.”¹ The fissured workplace is characterized by the phenomenon in which the companies we purchase goods or services from do not actually employ the workers who deliver those goods or services to us.² Increasingly, “our deliveries are often made by contractors and our hotel rooms are cleaned by temporary employees from staffing agencies.”³ Companies continually outsource many of their tasks to independent contractors, proliferating “increasingly precarious employment relationships.”⁴ The result of increased fissuring is a weaker safety net for workers, fewer employment protections, and less opportunity to climb the corporate ladder.⁵ Weil attributes the rise of the fissured workplace to pressure placed on corporate executives by investors to focus business on “core competencies” and to shed less

1. David Weil, *How to Make Employment Fair in an Age of Contracting and Temp Work*, HARV. BUS. REV. (Mar. 24, 2017), <https://hbr.org/2017/03/making-employment-a-fair-deal-in-the-age-of-contracting-subcontracting-and-temp-work>.

2. *Id.*

3. *Id.*

4. NELL ABERNATHY & REBECCA SMITH, ROOSEVELT INST., WORK BENEFITS: ENSURING ECONOMIC SECURITY IN THE 21ST CENTURY 8 (2017), <https://rooseveltinstitute.org/work-benefits-ensuring-economic-security-21st-century>.

5. Weil, *supra* note 1.

essential activities through outsourcing.⁶ Currently, those who participate in a fissured workplace or who engage in contingent or independent work (the contingent workforce) make up one-third of the American workforce.⁷

This Note focuses on a subset of this contingent workforce and the economy that this subset operates within. This economy has approximately fourteen million workers⁸ and is known by different names: the gig economy, the platform economy, the 1099 economy, the on-demand economy, the peer-to-peer economy, or the sharing economy. The workers who operate within this economy (gig workers), are most often legally classified as independent contractors and get paid for each task or job they complete. Essentially, they get paid by the “gig.” Gig workers come from diverse backgrounds, have diverse interests, and participate in the gig economy for different reasons. According to the Bureau of Labor Statistics, many gig workers hold multiple jobs and rely on at least three different income streams; one third have more than one job in the gig economy itself.⁹ While some do gig work to supplement income from other jobs, a large segment do gig work as a full-time job.¹⁰ For example, nineteen percent of Uber drivers work for the company full-time, providing forty-four percent of all Uber rides.¹¹

Gig workers supply the labor for companies many Americans know and use, such as Uber, Lyft, Amazon, Doordash, Grubhub, Postmates, Instacart, Handy, TaskRabbit, Wag. These companies build a virtual marketplace, allowing gig workers to sell their services to clients, whether that service be transportation, food delivery, or walking someone’s dog. In fact, many of the companies that make up the gig economy claim that they actually provide no services to actual clients, but only provide a platform or marketplace that independent contractors can use to sell their services to “clients.”¹² The validity of that claim, for certain companies, is central to some of the biggest issues facing the gig economy today.

What explains the explosion of the gig economy? For one, there is enormous consumer demand from both individual customers and businesses to use and pay for on-demand services via mobile phone applications (commonly referred to as ‘apps’) or website.¹³ Uber, less than ten years after its founding, operated in “600 cities across 81 countries.”¹⁴ High demand for gig economy services was met with investor enthusiasm and was fueled by enormous valuations of gig economy companies and billions of dollars in venture capital.¹⁵

6. *Id.*

7. Orly Lobel, *The Gig Economy & The Future of Employment and Labor Law*, 51 U.S.F.L. REV. 51, 56 (2017).

8. *Id.*

9. ABERNATHY & SMITH, *supra* note 4, at 9.

10. *Id.*

11. *Id.*

12. *Id.*

13. JEREMIAS PRASSL, *HUMANS AS A SERVICE: THE PROMISE AND PERILS OF WORK IN THE GIG ECONOMY* 17–18 (2018)

14. *Id.* at 18.

15. Alexis C. Madrigal, *The Servant Economy*, THE ATLANTIC (Mar. 6, 2019), <https://www.theatlantic.com/technology/archive/2019/03/what-happened-uber-x-companies/584236>.

Second, advancements in technology and automation have played central roles to the growth of the gig economy. As Orly Lobel¹⁶ remarked, “the platform economy channels anything and everything sitting idle into the market and monetizes it.”¹⁷ A person who owns a car that satisfies Uber or Lyft’s criteria can maximize earnings from an asset they would otherwise only use for basic transportation.¹⁸ A person with an extra hour in their day can monetize that time by getting paid to walk another person’s dog using Wag.¹⁹ A handyman or a baker can use the virtual marketplace set up by Task Rabbit to monetize their skills by building someone else’s Ikea desk or baking cookies for another’s dinner party.²⁰ This is all made possible by the fact that more people utilize these convenient and easy-to-navigate virtual marketplaces because of increased access to requisite technology like smartphones and tablets with “ever-increasing high-speed connectivity.”²¹

Third, the explosion of the gig economy is a reflection of changing generational preferences and ideologies about the workplace as it provides for the flexible, decentralized, and autonomous work style younger generations prefer. Gig economy companies would not flourish without a strong labor supply and there is no shortage of willing participants. Why? Although there are shortcomings to gig work there are certainly benefits and incentives to gig work when one considers the gig economy’s departure from traditional aspects of working conditions.

Many gig workers have the benefit of working in a decentralized, autonomous, and flexible workplace. An Uber driver enjoys a decentralized and autonomous workplace because an Uber driver can work whenever, for as long as, and in any location that they prefer while using their own instrumentalities. While some argue that the Uber driver is beholden to a strict performance standard because of the company’s ability to suddenly deactivate a driver for poor ratings,²² generally speaking, an Uber driver does not have to field commands from a manager or report to any superior in real time. Uber drivers work in flexible environments because they choose when to drive instead of adhering to a traditional work schedule, and the driver does not have to meet any type of weekly or monthly quota to stay employed.²³ A driver can manipulate their schedule when unforeseen life events conflict with work. If the Uber driver is a single parent, the driver never has to miss a shift if a sick child has to stay home from school. If the Uber driver is a student, the driver can ramp down his or her hours behind the wheel during exam periods without the risk of losing their job.

16. Orly Lobel is a professor at the University of San Diego school of law and is widely recognized for her scholarship on labor and employment law. *Biography – Orly Lobel*, UNIV. OF SAN DIEGO SCH. OF LAW, https://www.sandiego.edu/law/faculty/biography.php?profile_id=2844 (last visited Apr. 10, 2020).

17. Lobel, *supra* note 7, at 52.

18. *Driver Requirements*, UBER, <https://www.uber.com/us/en/drive/requirements> (last visited Apr. 10, 2020); *Driver Application Requirements*, LYFT, <https://www.lyft.com/driver-application-requirements> (last visited Apr. 10, 2020).

19. WAG!, <https://wagwalking.com> (last visited Apr. 10, 2020).

20. TASKRABBIT, <https://www.taskrabbit.com> (last visited Apr. 10, 2020); *Cooking & Baking in Virtual (Anywhere)*, TASKRABBIT, <https://www.taskrabbit.com/locations/virtual-us/cooking-baking> (last visited Apr. 25, 2020).

21. Lobel, *supra* note 7, at 52.

22. Avery Hartmans, *10 Ways Uber Drivers Can Get Kicked Off the App*, BUS. INSIDER (July 23, 2017), <https://www.businessinsider.com/how-uber-drivers-get-deactivated-2017-7>.

23. *Think You Have What it Takes to Drive with Uber?*, UBER, <https://www.uber.com/blog/think-you-have-what-it-takes-to-drive-with-uber> (last visited Apr. 10, 2020).

Last, the gig economy provides full-time jobs and supplemental income opportunities in an age of rising inequality and wage stagnation for middle- and low-income Americans.²⁴ When there are minimal opportunities for work in certain regions of the country or where a person has to supplement their monthly budget, that person can cross the very low threshold put up by the gig economy for work.²⁵ In fact, a Pew survey found that twenty-five percent of gig workers who earned money from the aforementioned gig economy companies “went on these sites because there was no other available work in their area.”²⁶ While some may have qualms with the type of work provided by the gig economy, at the very least it provides work when people need it most, and it may be a positive example of technology’s effect on the low-income worker.

B. The Gig Economy—Yet to be Refined

With any emerging industry that lacks sufficient regulation, there will be pitfalls and kinks to work out. Kinks in the gig economy still need to be worked out, as both workers and employers in the gig economy face hardships and risks.

Gig workers are struggling with a large host of issues including, but not limited to: poverty,²⁷ a lack of bargaining power,²⁸ uncertainty and insecurity due to income volatility and varying demand,²⁹ and sudden deactivation.³⁰ Lastly, and a central topic of this Note, gig workers can be employed by companies who use the “independent contractor loophole” to avoid paying for “worker’s health benefits, social security, Medicare, unemployment, injured workers compensation, lunch breaks, paid sick days and vacation leave,” contributing to the sense of insecurity and uncertainty for full-time gig workers and further proliferating the effects of macro-economic events like wage stagnation and inequality.³¹

24. See generally LAWRENCE MISHAL ET AL., ECON. POLICY INST., WAGE STAGNATION IN NINE CHARTS (2015), <https://www.epi.org/files/2013/wage-stagnation-in-nine-charts.pdf>.

25. Alana Semuels, *The Internet is Enabling a New Kind of Poorly Paid Hell*, THE ATLANTIC (Jan. 23, 2018), <https://www.theatlantic.com/business/archive/2018/01/amazon-mechanical-turk/551192>.

26. GIG WORK, ONLINE SELLING AND HOME SHARING, PEW RESEARCH CTR. (November 17, 2016), <https://www.pewresearch.org/internet/2016/11/17/gig-work-online-selling-and-home-sharing>.

27. See generally Alexia Fernandez Campbell, *The Recession Hasn’t Ended for Gig Economy Workers*, VOX (May 28, 2019), <https://www.vox.com/policy-and-politics/2019/5/28/18638480/gig-economy-workers-wellbeing-survey>; Jeff Daniels, *Nearly Half of California’s Gig Economy Workers Struggling with Poverty, New Survey Says*, CNBC (Aug. 28, 2018), <https://www.cnbc.com/2018/08/28/about-half-of-californias-gig-economy-workers-struggling-with-poverty.html>.

28. Matthew DeBord, *Uber and Lyft are Trying to Make an End-run Around Unionization*, BUS. INSIDER (June 14, 2019), <https://www.businessinsider.com/uber-and-lyft-opposing-driver-unionization-california-2019-6>.

29. Mark Muro & Clara Hendrickson, *Managing Uncertainty: Paycheck Volatility Demands New Responses*, BROOKINGS INST. (Mar. 1, 2018), <https://www.brookings.edu/blog/the-avenue/2018/03/01/managing-uncertainty-paycheck-volatility-demands-new-responses>; Adi Gaskell, *Is a Gigging Life an Unstable One?*, FORBES (Apr. 15, 2019), <https://www.forbes.com/sites/adigaskell/2019/04/15/is-a-gigging-life-an-unstable-one/#178ea6cf24a4>.

30. Sarah O’Connor, *Driven to Despair—The Hidden Costs of the Gig Economy*, FIN. TIMES (Sept. 22, 2017), <https://www.ft.com/content/749cb87e-6ca8-11e7-b9c7-15af748b60d0>; PRASSL, *supra* note 13, at 8.

31. STEVEN HILL, NEW AM., NEW ECONOMY, NEW SOCIAL CONTRACT, A PLAN FOR A SAFETY NET IN A MULTIEmployer WORLD 2 (2015), https://static.newamerica.org/attachments/4395-new-economy-new-social-contract/New%20Economy,%20Social%20Contract_UpdatedFinal.34c973248e6946d0af17116fbd6bb79e.pdf.

Employers in the gig economy face risks and hardships as well. Because of difficulties in classifying gig workers, some business owners run the risk of building a business model that relies on independent contractors, not employees, for labor and then being ordered by a state or federal tribunal or agency to classify the company's workers as employees.³² This type of order could upend a business because:

Employers can save up to 30 percent by hiring an independent contractor because they avoid paying payroll taxes, unemployment insurance, workers' compensation and disability, as well as benefits that include pensions, sick days, health insurance and vacation time. Because independent contractors are considered self-employed, they must pay the federal government 15.3 percent Social Security and Medicare, as well as any state or local taxes themselves. Classifying regular employees as contractors also gives businesses the freedom to evade minimum wage requirements and overtime mandates as well.³³

The system of binary classification exposes gig companies to the large risks of being ordered to change their business model and being liable for large fines or unpaid taxes because of misclassification.³⁴ A business may be held accountable for unpaid employment taxes or fines by the Internal Revenue Service (IRS), the Department of Labor (DOL), state agencies, or in a civil court for misclassifying an employee as an independent contractor.³⁵ For example, on November 14, 2019, Uber was ordered to pay \$649 million dollars in unpaid employment taxes by New Jersey's Department of Labor and Workforce Development for failing to properly classify drivers as employees.³⁶ The guidance that employers can look to in determining whether or not to classify is slightly confusing at times, especially when some employer/employee relationships do not fall within either classification. Only Lobel points out in *The Gig Economy & The Future of Employment and Labor Law*, "[t]he classification of employees versus independent contractors proved one of the most notoriously unpredictable, blurry, and malleable legal tests, consisting of anywhere from 3 to as many as 20 factors, depending on which case or regulatory guidance is applied."³⁷

The twenty-factor IRS test is the most consistently used. It determines employment status by examining, among other things, (1) the extent to which an employer exerts behavioral and financial control over a worker; (2) whether or not the employer provides the worker with benefits; and (3) whether the worker is engaged in a sufficiently permanent relationship with the employer.³⁸ Companies

32. Matthew Haag & Patrick McGeehan, *Uber Fined \$649 Million for Saying Drivers Aren't Employees*, N.Y. TIMES (Nov. 14, 2019), <https://www.nytimes.com/2019/11/14/nyregion/uber-new-jersey-drivers.html?searchResultPosition=3>.

33. Jenn Fusion, *Costs of an Employee vs. Independent Contractor*, SMALL BUS. CHRON., <https://smallbusiness.chron.com/costs-employee-vs-independent-contractor-1077.html>.

34. Haag & McGeehan, *supra* note 32.

35. *Id.*

36. *Id.*

37. Lobel, *supra* note 7, at 61.

38. *Employee or Independent Contractor? Know the Rules*, IRS (May 1, 2017), <https://www.irs.gov/newsroom/employee-or-independent-contractor-know-the-rules>. For a list of all twenty factors considered by the IRS, see *How the IRS Determines Independent Contractor Status*, THE

relying on this test may make a significant mistake, like Uber did, and misinterpret their employer-worker relationships.

Lastly, gig economy companies face a proliferated risk of having their businesses subject to increased regulation in states that want to “rein in the gig-economy companies” by designating “gig workers” as employees.³⁹

C. Saving the Gig Economy from Itself

Currently, wages for working-class citizens in America are stagnant, and low-skilled workers are less valued, more expendable, and have less bargaining power.⁴⁰ Along with this, there is a general anxiety among low- and middle-skilled workers about their place in the labor market because of automation.⁴¹ While changes in technology have polarized the labor market insofar as gains have disproportionately gone to the very top and the very bottom, there is hope that technology will complement labor and actually increase productivity and earnings, as opposed to wiping out the labor market as we know it.⁴² One clear example of this is the gig economy. The gig economy, through its automated and highly technical algorithms, supplements the low-skilled or middle-skilled worker (e.g., driver or handyman) by providing the valuable service of setting up a marketplace for the worker and quickly and efficiently matching on-demand labor with paying consumers in a twenty-first century way.

The gig economy may be exactly where automation and technology intersect with low-skilled labor to create a larger slice of the pie and more equitable distribution of wealth to working class Americans. Thus, while there are clear issues with the gig economy as discussed above, there are benefits in preserving the best aspects of the gig economy while mitigating the damage done from its worse side effects. One way to do so is to increase the social safety net for gig workers. If this is accomplished, gig workers will be able to enjoy the flexibility and autonomy of the gig economy without sacrificing traditional benefits that are distributed to employees in traditional work relationships. On the flipside, gig companies will be able to sustain their business models because they will have a large pool of available labor. There is agreement from all stakeholders about the need to continually support this type of flexible work arrangement by increasing the safety net for gig workers.⁴³ As the gig economy creates more jobs and opportunities to earn income and is further regulated in a way that aligns incentives for both employer and worker, a strong gig economy could lead to a more robust economy in general.

BALANCE SMALL BUSINESS, <https://www.thebalancesmb.com/how-the-irs-determines-independent-contractor-status-398618> (last visited Apr. 25, 2020).

39. Haag & McGeehan, *supra* note 32. These states include California, New York, Oregon, Washington, and New Jersey.

40. See generally MISHEL ET AL., *supra* note 24.

41. Harry J. Holzer, *The Robots Are Coming. Let's Help the Middle Class Get Ready*, BROOKINGS INST. (Dec. 13, 2018), <https://www.brookings.edu/blog/up-front/2018/12/13/the-robots-are-coming-lets-help-the-middle-class-get-ready>.

42. David Autor, *Why Are There Still So Many Jobs? The History and Future of Workplace Automation*, 29 J. ECON. PERSP. 3, 5 (2015).

43. Portable Benefits, *Common Ground for Independent Workers*, MEDIUM (Nov. 10, 2015), <https://wtfconomy.com/common-ground-for-independent-workers-83f3fbcf548f>.

This Note aims to present and synthesize solutions that have been discussed and aim to solve the gig economy's safety net problem. It then offers critiques and some ideas about how to successfully craft solutions to this issue.

So, what has been proposed as a solution to the safety net and benefits problem? A "robust discussion" has emerged around portable benefits as a potential solution to the problems of the gig economy.⁴⁴ Portable benefits could result in an increase of the safety net for gig workers and reduce the aforementioned risk of misclassification for large gig economy companies. This Note briefly presents how authors Steven Hill, Nick Hanauer, David Rolf, Orly Lobel, Katherine Stone, and Cynthia Estlund, along with think tanks like the Aspen Institute, Roosevelt Institute, and Brookings Institute, believe a portable benefits system can be implemented. It then offers critiques of and potential ways to refine those methods. Overall, this Note calls for an approach to the portable benefits system that takes into consideration the nuances and heterogeneity of the gig economy.

III. PORTABLE BENEFITS

A. What are Portable Benefits and How Can They Improve the Gig Economy?

Many academics and gig economy stakeholders are calling for a dramatic expansion of the safety net through portable benefits.⁴⁵ Under this model, employers can give independent contractors benefits without drastically increasing their labor costs and can also reduce their exposure regarding employment classification.⁴⁶ Currently, gig companies cannot give benefits to their workers out of fear that they will be legally classified as employers, exposing them to a serious increase in costs.⁴⁷ Portable benefits can bridge the benefits gap in the gig economy. Also, of course, gig workers will benefit from portable benefits by retaining flexibility without sacrificing benefits.⁴⁸

In late 2015, many gig economy stakeholders signed a letter proclaiming that "[e]veryone, regardless of employment classification, should have access to the option of an affordable safety net that supports them when they're injured, sick, in need of professional growth, or when it's time to retire."⁴⁹ Signatories included the co-founders of Lyft, CEOs of Etsy, Handy, Instacart, Peers, business professors, leaders from multiple unions,⁵⁰ think tanks, and lastly, partners of various venture capital firms.⁵¹ This public act from many important stakeholders in the gig economy evidences a broad level of support for portable benefits.

44. NATALIE FOSTER ET AL., ASPEN INST., PORTABLE BENEFITS RESOURCE GUIDE 7 (2016), https://assets.aspeninstitute.org/content/uploads/2016/07/resource_guide_final8-1.pdf?_ga=2.103335040.1605673233.1586528020-1677866451.1586528020.

45. Portable Benefits, *supra* note 43.

46. FOSTER ET AL., *supra* note 44, at 12.

47. *Id.*

48. *Id.*

49. Portable Benefits, *supra* note 43.

50. Unions whose leaders signed on included the Service Employees International Union (SEIU) and Leaders of the Freelancers Union.

51. Portable Benefits, *supra* note 43.

The Aspen Institute (Aspen) characterizes portable benefits as portable, pro-rated, and universal.⁵² Aspen explains that benefits should be “portable” in that they are not tied to a particular job or company and can move around with a worker regardless of where the worker is employed.⁵³ Therefore, a worker can keep the benefits they accrued at Company A and add to those earned benefits while working for Company B. Aspen explains that benefits should be “pro-rated” in that “each company contributes to a worker’s benefits at a fixed rate depending on how much he or she works, or earns.”⁵⁴ Contributions from companies would ideally be pro-rated “by dollars earned, jobs done, or time worked, covering new ways of micro-working across different employers or platforms.”⁵⁵ Lastly, Aspen defines “universal” as benefits that cover all workers, especially independent contractors.⁵⁶ This is the most important aspect for gig workers as a proper portable benefits system must “cover individuals working outside of a traditional employment relationship.”⁵⁷

B. Proposed Solutions

Thought leaders on the topic of portable benefits include Steven Hill, who wrote *New Economy, New Social Contract*; Nick Hanauer, who wrote a piece called *Shared Security, Shared Growth*; David Rolf, who contributed to the piece with Hanauer and to the Aspen Institute’s report *Portable Benefits in the 21st Century*; and Nell Abernathy and Rebecca Smith at the Roosevelt Institute. Portable benefits, as described by the aforementioned authors, can be implemented through Taft-Hartley Multi-Employer Plans, Individual Security Accounts, or an overall expansion of benefits paid for by the government.

1. Taft-Hartley Multi-Employer Plan

Steven Hill, the Roosevelt Institute, and the Aspen Institute all discuss how a Taft-Hartley Multi-Employer Plan could practically implement portable benefits into the gig economy.

Usually, companies and employees will make contributions to a multi-employer fund according to the terms of a collective bargaining agreement.⁵⁸ A worker generally receives a pro-rated contribution from an employer, based on the amount of hours worked or the overall revenue produced from work activities, to the multi-employer fund.⁵⁹ As these funds are pooled, they are invested for growth and eventually pay for members of the plan’s benefits.⁶⁰ Many benefits can be negotiated under a Taft-Hartley plan, including those similar to the benefits an

52. DAVID ROLF ET AL., ASPEN INST., PORTABLE BENEFITS IN THE 21ST CENTURY 3–4 (2016), https://assets.aspeninstitute.org/content/uploads/2016/07/portable-ben-21st-cent.pdf?_ga=2.71541907.1605673233.1586528020-1677866451.1586528020.

53. *Id.* at 3.

54. *Id.* at 4.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* at 6–7.

59. *Id.* at 8.

60. ABERNATHY & SMITH, *supra* note 4, at 18–19.

employee of a corporation may receive under a traditional benefits plan.⁶¹ The Taft-Hartley Act requires the fund to be governed by trustees with fiduciary duties and invokes the protections of the National Labor Relations Act of 1935 (NLRA) and the Employee Retirement Income Security Act of 1974 (ERISA).⁶²

These employee benefit plans are generally shared by employees in the same geographic area or industry.⁶³ These plans are used in industries with workers that have multiple employers throughout the year; like construction workers, musicians, and actors.⁶⁴ Workers can receive their benefits and take them from job to job without interruption in coverage.

There are many examples of large Taft-Hartley multi-employer plans, such as the Screen Actors Guild-Producers Pension and Health Plan,⁶⁵ the American Federation of Musicians Pension Fund,⁶⁶ and the Western Conference of Teamsters Pension Trust.⁶⁷ The examples below have two similar features: 1) they are used by workers in the same industry; and 2) they are generally implemented by a union.

The American Federation of Musicians Pensions Fund allows musicians to negotiate benefits contributions from their employers, which will be added into a fund that is overseen by a board of directors.⁶⁸ There is a broad class of stakeholders in the music industry that are considered “employers” for purposes of the fund and that can contribute to the fund, such as “producers, orchestras, incorporated band leaders, record companies, clubs[,] and club managers.”⁶⁹ Even people playing short term gigs—like wedding singers—can have the bride and groom contribute to the fund if they agree to be an “employer” of the wedding singer.⁷⁰

The Western Conference of Teamsters Pension Trust is a \$35 billion dollar fund, which is organized by the International Brotherhood of Teamsters, a union made up of 583,000 members.⁷¹ The fund receives contributions from 1400 employers, some with as few as fifty employees and some as big as Coca-Cola.⁷² The fund then pays for the benefits of union member workers like truck drivers, vegetable packers, and floor sweepers.⁷³

The Screen Actors Guild Pension and Health Plan is for actors, who, like gig workers, frequently work different projects for multiple employers.⁷⁴ The guild has set up collective bargaining agreements with studios and producers and requires them to pay into a trust fund that purchases and administers benefits for the 40,000 actors in the Screen Actors Guild.⁷⁵

61. *Id.* at 19.

62. *Id.* at 19–20.

63. ROLF ET AL., *supra* note 53, at 6.

64. *Id.*

65. *Id.* at 7.

66. ABERNATHY & SMITH, *supra* note 4, at 20–21.

67. HILL, *supra* note 31, at 8.

68. ABERNATHY & SMITH, *supra* note 4, at 20.

69. *Id.*

70. *Id.*

71. HILL, *supra* note 31, at 8.

72. *Id.*

73. *Id.*

74. ROLF ET AL., *supra* note 53, at 7.

75. *Id.*

a. Critique of Taft-Hartley Multi-Employer Plan

Steven Hill points out the multi-employer plan sounds like the perfect remedy to the benefits problem experienced by the gig worker, but he qualifies his statement by remarking that “these multi-employer plans are the products of one or more collective bargaining agreements that typically involve one or more labor unions.”⁷⁶ The aforementioned examples have two issues when one attempts to apply them to the gig economy. First, as Hill said, these plans are products of collective bargaining agreements that are garnered through the collective bargaining power of unions.⁷⁷ Second, the largest and most successful Taft-Hartley multi-employer plans are employed by just one industry.

It is no secret that “unions are one of the most important mechanisms through which workers can improve and exert bargaining power.”⁷⁸ It may be far more practical for gig workers to persuade large gig economy companies to make contributions to a pension fund and administer benefits if gig workers could leverage bargaining power use conventional union tactics, like going on strike. These traditional tactics, recently used by the United Automobile Workers Union in a month-long strike at General Motors, are only as strong as the union itself.⁷⁹ What is the state of unions today? Largely ignored, in steady decline, and increasingly irrelevant. When looking strictly to the private sector, union members “comprise just 6.4% of the current private-sector labor force.”⁸⁰ The globalized economy, through investor pressure and pressure from international labor markets, has contributed to a decline in unions.⁸¹ Stephen Befort claims too that U.S. union decline is unique compared to other western countries because of the NLRA’s “weak remedial scheme” and employers’ ability to hire replacements to fill the positions of striking employees.⁸² Along with a general disapprobation for unions by U.S. employers,⁸³ unions have failed to adapt to changing work environments. What used to be important to workers, like “negotiated seniority, job-bidding rules, and just-cause protection,” are no longer a priority for young workers today.⁸⁴ Workers no longer stay in jobs for a lifetime and do not see the value of joining a union if they will only be with a company for a few years, especially given that union membership requires attending meetings and paying dues.⁸⁵ Lastly, effective organizing is hindered by high turnover. For example, almost a majority of active Uber drivers have been driving for six months or less.⁸⁶ Since the strength of

76. HILL, *supra* note 31, at 7.

77. *Id.* at 7–8.

78. Katherine V.W. Stone, *Beyond Shared Security*, DEMOCRACY (Fall 2015), <https://democracyjournal.org/magazine/38/beyond-shared-security>.

79. Neal Boudette, *G.M. Workers Approve Contract and End U.A.W. Strike*, N.Y. TIMES (Oct. 25, 2019), <https://www.nytimes.com/2019/10/25/business/gm-contract.html?searchResultPosition=4>.

80. Stephen F. Befort, *The Declining Fortunes of American Workers: Six Dimensions and an Agenda for Reform*, 70 FLA. L. REV. 189, 197 (2018).

81. *Id.* at 197.

82. *Id.* at 198.

83. Steven Greenhouse, *Americans Unions Have Been Decimated. No Wonder Inequality Is Booming*, THE GUARDIAN (Aug. 15, 2019), <https://www.theguardian.com/commentisfree/2019/aug/15/valuing-corporations-over-workers-has-led-to-americas-income-inequality-problem>.

84. Stone, *supra* note 78, at 73–74.

85. ABERNATHY & SMITH, *supra* note 4, at 11.

86. ROLF ET AL., *supra* note 53, at 10.

unions is declining and because independent contractors are not covered by the NLRA or Taft-Hartley,⁸⁷ there would have to be either an overhaul of U.S. culture towards unions or a change in federal legislation in favor of unions to strengthen unions in the United States, both of which are unlikely.

Second, the multi-employer option is industry specific. While this type of portable benefits model serves workers in the music industry, the construction industry, and acting industry, issues arise considering the diversity and nuances of the gig economy. First, there may be administrative issues and costs when applying this model to the gig economy. Likely, a centralized fund and benefits systems can be established in a more stream-lined and efficient manner among stakeholders in the same industry, as it is likely easier to measure how contributions to a fund will be made in the same industry. In the gig economy, a worker might bake cookies for someone's dinner party on TaskRabbit, drop off a passenger via Uber, and list their home on Airbnb. Under a broad view, one might argue that this worker operates within the service industry generally. A narrower look at these tasks suggest this worker is operating in the food service industry, transportation service industry, and rental property industry. While not an insurmountable feat, coming to a collective bargaining agreement in the gig economy given the variety of companies may be difficult. Airbnb's management has a different business model than Uber or TaskRabbit because while it provides platforms for workers to find clients, it operates in different industries and has different problems. Boiled down, it seems that it would be easier for construction workers to come to a collective bargaining agreement with construction management companies than it would be for a collection of gig workers to come up with a collective bargaining agreement with Handy, Uber, Instacart, Grubhub, and Airbnb.

2. Individual Security Accounts or Shared Security Accounts

Another model for implementing portable benefits into the gig economy is through the Individual Security Account. Instead of a large pension fund that procures benefits for all members to the fund, the Individual Security Account is an account that is specifically linked to one person.⁸⁸ Each company a gig worker works for would make a pro-rated contribution to the fund, either a portion of dollars per day or a percentage of gross earnings.⁸⁹ The worker would then use this account to purchase benefits.⁹⁰ Nick Hanauer and David Rolf describe this plan by laying out a hypothetical worker named Zoe who works part time (so she does not receive health insurance) at a hotel, does landscaping work via TaskRabbit, drives for Uber on the weekends, and rents out her apartment on Airbnb once or twice a month.⁹¹ The authors believe that all of the companies from which Zoe earns income should pay into a "shared security account."⁹² "[B]enefits would be earned

87. *Do Unions Have a Place in the Gig Economy?*, FISHER PHILLIPS (June 20, 2018), <https://www.fisherphillips.com/gig-employer/do-unions-have-a-place-in-the>.

88. HILL, *supra* note 31, at 9.

89. *Id.*

90. *Id.*

91. Nick Hanauer & David Rolf, *Shared Security, Shared Growth*, DEMOCRACY (Summer 2015), <https://democracyjournal.org/magazine/37/shared-security-shared-growth>.

92. *Id.*

and accrued via automatic payroll deductions, regardless of the employment relationship, and like Social Security, these benefits would be fully pro-rated, portable, and universal.”⁹³ If Zoe works ten hours for Uber, she will get one-fourth of the benefits offered by a forty-hour workweek.⁹⁴ Through this shared security account, Zoe could accrue funds to pay for insurance, retirement, sick days, and vacation days that would move with Zoe from job to job.⁹⁵

a. Critique of the Individual Security Account

First, this plan fails to further clarify who is an employer and who is a worker. The gig economy provides a diverse marketplace of services, products, and types of work. Sweeping mandates that require companies to contribute to shared security accounts of a gig worker may hurt businesses that are genuinely only operating as a platform to connect workers with clients. Just look at the case of Uber and Lyft drivers. Uber and Lyft control who has to be picked up, how much a driver is paid, and the method of payment.⁹⁶ The companies also displace drivers who are performing poorly.⁹⁷ Still, even in the case of Uber and Lyft, there are valid arguments that Uber does not control its drivers because the drivers can work whenever, wherever, and for however long they choose while using their own instrumentalities.⁹⁸

Relationships between employer and worker in other gig economy contexts also get fuzzy. Imagine trying to couch TaskRabbit or Airbnb as an employer under the traditional test. It is difficult to argue that these companies exert the same type of control over their workers as ride-sharing companies. Author Katherine V.W. Stone conveys concerns about the slippery slope effect of a shared security account, especially if policymakers use a very broad definition of “employers,” like “whatever entity is paying the worker.”⁹⁹ She says:

These types of service platforms evade traditional categories and require new theorizing about what we mean by a worker entitled to employment benefits and social protection . . . We may pay a hairdresser, plumber, car mechanic, or lawn-care provider for their services, but rarely do we consider these service providers to be our employees. Would the Shared Security System require homeowners to pay contributions each time they hire a plumber to fix a leaking faucet? Would car owners pay contributions each time they get an oil change? Is someone who buys a necklace at a craft fair the “employer” of the jewelry maker? Indeed, are people who sell an item on eBay to be treated as “employees” of eBay?¹⁰⁰

Stone brings to light how the intricacies and nuances of the gig economy must be considered in full before sweeping portable benefits plans are implemented.

93. *Id.*

94. *Id.*

95. *Id.*

96. Lobel, *supra* note 7, at 59.

97. *Id.*

98. *Id.*

99. Stone, *supra* note 78, at 72.

100. *Id.*

3. Universal Benefits

An alternative method to implementing portable benefits without having to worry about the administrative headaches is an overall increase in the public benefits offered by the government to all Americans. This can be accomplished either through (1) an extension of the benefits that are available to employees to any and all workers in the economy like independent contractors and self-employed workers *or* (2) through universal programs set up by the government and paid for by progressive and redistributive tax systems.

Nell Abernathy and Rebecca Smith of the Roosevelt Institute (Roosevelt) believe government should focus on expanding social security, universalizing health care, unemployment insurance, workers compensation, family and medical leave, insurance for elders, and insurance for those in poor health.¹⁰¹ Abernathy and Smith also recommend a drastic broadening of the term “employee” so that “any worker whose work is in furtherance of a company’s business,” regardless of whether they work for platform companies, is entitled to traditional benefits.¹⁰² They also suggest that, in an ambiguous situation, the presumption be that a worker is an employee.¹⁰³

Cynthia Estlund believes universal benefits should be provided to Americans unconditionally and paid for by a broader and more progressive tax base.¹⁰⁴ She claims universal benefits would promote liberty and equality for workers overall.¹⁰⁵ Universal benefits would provide liberty in that they would enable workers to choose work that provides flexibility and autonomy, like work in the gig economy.¹⁰⁶ Universal benefits would achieve equality in that they would very directly redistribute wealth from upper social classes to lower classes.¹⁰⁷

Estlund does not believe that the cost of all employee benefits should be placed on the taxpayer, as some employer-paid benefits function as a mechanism to prevent socially harmful conduct within the employer’s operations.¹⁰⁸ The rest should be paid for by government because she believes many benefits have no necessary relationship to employment or work and “are politically expedient off-budget ways to finance social entitlements.”¹⁰⁹ Estlund specifically believes benefits like health insurance and paid leave, among other things, should be paid for by government.¹¹⁰ She remarks that “one need not crunch the numbers to recognize that there is some income tax rate structure that could fully fund a set of universal social entitlements that would more than replace both the existing system of mandatory employee benefits.”¹¹¹ She recommends the funds could also be

101. ABERNATHY & SMITH, *supra* note 4, at 12–13.

102. *Id.* at 13.

103. *Id.* at 13–14.

104. Cynthia Estlund, *What Should We Do After Work? Automation and Employment Law*, 129 YALE L.J. 254, 311 (2018).

105. *Id.* at 320.

106. *Id.*

107. *Id.*

108. *Id.* at 310.

109. *Id.* at 311.

110. *Id.* at 318.

111. *Id.*

garnered through a wealth tax, a robot tax, universal basic income, or a higher consumption tax.¹¹²

a. Critique of Universal Benefits

There is likely little potential that United States political leaders would be successful in passing these proposed changes through the legislature for multiple reasons. There are issues with the redistribution of wealth generally through legislative reform because of the influence of money in elections and because of “path dependency.”¹¹³ Large corporations, or the “employers,” are likely better at organizing their resources and influencing the outcomes of elections and how public officials vote in legislatures. It is unlikely that “employers” will lobby the legislature to increase their tax burdens and the costs of employment.

While Estlund’s solutions avoid the problem of directly putting more burden on employers and corporations as entities, they certainly put a larger burden on wealthier individuals and would require a high level of support from the general public. Studies show that public support for redistributive government action continually declines.¹¹⁴ Some studies suggest this is because of overall disapproval of the Affordable Care Act, a very large redistribution policy, or is actually caused by a general increase in conservatism as inequality increases.¹¹⁵ Polls also show that Americans are less likely to favor redistribution for other Americans who have held their wealth for a long time. “[O]lder Americans [more] than any other age group” are likely to disfavor redistribution.¹¹⁶ Surprisingly Americans’ desire to “soak” the rich has diminished substantially even as the rich have amassed more “soakable” wealth.¹¹⁷ This lack of public support for a very large redistribution program would likely be a dispositive factor with regard to a universal benefits system.

112. *Id.* at 316–18. Robot taxes are taxes levied against companies that use robots rather than people for labor. The proceeds from such a tax could be used to provide a safety net to workers who have been displaced by automation. *Id.*

113. Caroline Banton, *Path Dependency*, INVESTOPEDIA (June 25, 2019), <https://www.investopedia.com/terms/p/path-dependency.asp> (“Path dependency explains the continued use of a product or practice based on historical preference or use. A company may persist in the use of a product or practice even if newer, more efficient alternatives are available. Path dependency occurs because it is often easier or more cost-effective to continue along an already set path than to create an entirely new one.”).

114. Thomas B. Edsall, *Has Obamacare Turned Voters Against Sharing Wealth?*, N.Y. TIMES (Apr. 15, 2015), <https://www.nytimes.com/2015/04/15/opinion/has-obamacare-turned-voters-against-sharing-the-wealth.html>.

115. *Id.*

116. Neil Irwin, *Why Americans Don’t Want to Soak the Rich*, N.Y. TIMES (Apr. 17, 2015), <https://www.nytimes.com/2015/04/19/upshot/why-americans-dont-want-to-soak-the-rich.html>.

117. *Id.* Soaking the rich refers to “extracting money from the rich through taxes and fees.” *See Definition of Soak the Rich*, DAVIDMANUEL.COM, <https://www.davemanuel.com/investor-dictionary/soak-the-rich> (last visited Apr. 10, 2020).

IV. REFINING THE PORTABLE BENEFITS MODEL

Two ways that the portable benefits model can be perfected are the creation of a new category of worker, and government studies and experimentation on portable benefits models.

A. A Third Category of Worker

The issue with the proposed solutions discussed above is that they fail to fully consider the nuances and diversity of the gig economy. Some of the solutions require sweeping mandates that may not be viable when forced to consider the different preferences of stakeholders in the gig economy. Orly Lobel suggests creating a third category of worker may help with this lack of flexibility. She rejects the notion that policymakers must accept an employee/independent contractor dichotomy and believes that gig workers are entitled to their own legal classification. She proposes what is called the “dependent contractor.”¹¹⁸ These workers would exclusively or almost exclusively work for one company or client for an extended period of time but would have a relationship with an employer that falls just short of the traditional employer/employee relationship.¹¹⁹ This can provide added flexibility for workers and employers to more accurately understand their legal relationship as it is challenging to couch every worker relationship into an independent contractor or employer relationship.

She also mentions Seth Harris and Alan Krueger’s proposal for a new category of “independent workers” that would be given rights to organize and collectively bargain.¹²⁰ Seattle has already implemented a form of this as the city council allowed Uber and Lyft drivers to unionize.¹²¹ To strengthen the effort, Lobel calls for antitrust price fixing laws to be changed on a federal level because the organizing of independent contractors can in some instances be considered price-fixing.¹²² Following this model, gig workers could cause a rebalancing of the current power structure and get the benefits they need. The gig economy has seen the power of organization as Uber driver protests have resulted in the reversal of rate cuts and Lyft drivers have been able to end sudden deactivation.¹²³

B. Experiment and Innovate to Strike the Balance

One of the overarching issues with the solutions mentioned above is that portable benefits models are still not fully developed and remain in preliminary stages for stakeholders in the gig economy. An important step in creating the best version of portable benefits is understanding what all stakeholders need and what approaches are most practical through experimentation.

118. Lobel, *supra* note 7, at 65.

119. *Id.*

120. *Id.* at 66.

121. Nick Wingfield & Mike Isaac, *Seattle Will Allow Uber and Lyft Drivers to Form Unions*, N.Y. TIMES (Dec. 4, 2015), <https://www.nytimes.com/2015/12/15/technology/seattle-clears-the-way-for-uber-drivers-to-form-a-union.html>.

122. Lobel, *supra* note 7, at 67.

123. *Id.*

1. What do Gig Workers Want?

Policymakers need to ensure that portable benefits mandates strike the balance between retaining flexibility and providing a safety net for workers. A London regional manager of Uber noted that:

Tens of thousands of people in London drive with Uber precisely because they want to be self-employed and their own boss. The overwhelming majority of drivers who use the Uber app want to keep the freedom and flexibility of being able to drive when and where they want.¹²⁴

An Uber-commissioned study found that seventy-six percent of drivers prioritized flexibility in choosing to drive for the company—more than those who prioritized paid time off or a guaranteed minimum wage.¹²⁵ A majority of workers hold the view that gig economy firms exploit a lack of regulation for immediate growth and that the government should regulate the gig economy so participants receive basic rights and benefits, but gig workers understand that they make a conscious decision to trade workers' benefits for flexibility and autonomy.¹²⁶ Therefore, gig workers have a generally balanced view of their role in the economy and policymakers need to take this into consideration.

2. Portable Benefits Innovation Fund and Congressional Caucus

Finding solutions to successfully implement portable benefits for workers in the gig economy can be extracted and refined through a government funded benefits innovations fund. The Future of Work Initiative (Initiative), part of the Aspen Institute, recommends the “creation of a twenty-five million dollar benefits innovation fund” to be facilitated and managed by the Department of Labor and given to state and local governments as well as non-profits.¹²⁷ The fund would be responsible for awarding grants to evaluate existing portable benefits models and create new portable benefits models.¹²⁸ The Initiative suggests the following criteria should guide the commission of grants:

The Department of Labor should make grant awards based on whether portable benefit models (1) are portable across businesses, jobs, or on-demand platforms, and ideally across sectors; (2) accommodate pro-rated contributions from multiple businesses, jobs, or on-demand platforms on behalf of an individual worker; and (3) are potentially scalable to a national level. The program should encourage models that allow workers to have a voice in the administration of benefits (e.g. a certain

124. PRASSL, *supra* note 13, at 115.

125. *Id.*

126. *Id.*

127. ASPEN INST., BENEFITS INNOVATION FUND: PROVIDING SEED CAPITAL TO CREATE INNOVATIVE PORTABLE BENEFITS MODELS 1 (2017).

128. *Id.*

share of the board members of the benefit fund could be elected by the beneficiaries themselves).¹²⁹

The Initiative also recommends that a benefit plan provide a certain number of work-related benefits and protections and also require that administrators of a plan have a fiduciary duty to their workers.¹³⁰

Senator Mark Warner of Virginia has put this plan into motion by introducing the “Portable Benefits for Independent Workers Pilot Program Act” which has provisions quite similar to those proposed by the Future of Work Initiative.¹³¹ Along with the general requirements laid out by the Initiative, it will require the Comptroller General of the United States to produce a report that analyzes the evaluations of existing portable benefits models and assesses the impact of grants on “the compensation of workers receiving portable benefits.”¹³² It authorizes five million dollars to evaluate current models of portable benefits and fifteen million dollars for evaluation, design, and implementation of new models for providing portable benefits.¹³³

Also, Congress has formed a bipartisan “Congressional Future of Work Caucus,” consisting of nine democrats and three republicans.¹³⁴ The leader of the group, Democratic Representative Lisa Blunt Rochester from Delaware, says that the group will look at a series of matters like AI and robotics but will also focus on portable benefits to support gig workers and to encourage flexible work arrangements.¹³⁵ Those in the caucus believe portable benefits can be a viable policy that will pass through Congress if there is agreement on the “details” of such a model like “who controls the money, how much should businesses contribute, how much should workers get and what kind of benefits can be added.”¹³⁶

The fund and the caucus can provide gig workers both a sign of support from the federal government and send a message that gig workers are important and relevant members of the economy as a whole. It provides support to explore a wide latitude of ideas that encourage experimentation and allow policymakers to pick and choose a portable benefits model from real-life examples that have been tested and from which strengths and weaknesses have been evaluated.¹³⁷ Also, because gig workers may need benefits that depart from those used by traditional workers, the funds will help policymakers understand exactly what “innovative new

129. *Id.* at 3.

130. *Id.*

131. Press Release, Senator Mark R. Warner, Legislation to Test-Drive Portable Benefit Models Introduced in the House and Senate (May 25, 2017), <https://www.warner.senate.gov/public/index.cfm/2017/5/legislation-to-test-drive-portable-benefit-models-introduced-in-the-house-and-senate>.

132. S. 1251, 115th Cong. (2017).

133. *Id.*

134. Richard Meneghello, *Congressional “Future Of Work” Initiative May Have Bipartisan Future*, FISHER PHILLIPS (Nov. 25, 2019), <https://www.fisherphillips.com/gig-employer/congressional-future-of-work-initiative-may-have>.

135. *Id.*

136. Jaelyn Diaz, *New Caucus Shows Congress Preparing to Focus on ‘Future of Work’*, BLOOMBERG L. (Nov. 13, 2019), <https://news.bloomberglaw.com/daily-labor-report/new-caucus-shows-congress-preparing-to-focus-on-future-of-work>.

137. ASPEN INST., *supra* note 127, at 3–4.

benefits” are desirable, such as short-term savings options, credit access, tax withholding, and training and education benefits.¹³⁸

V. CONCLUSION

Given that wages are stagnating, inequality is rising, and the citizenry is generally anxious about the threat of automation, a robust gig economy may help mitigate these threats and actually create a larger slice of the pie for all Americans. To make sure the gig economy and gig work is a viable solution to macro-economic issues, policy makers should consider implementing a system of portable benefits so as to allow businesses to sustain their labor force and allow gig workers to choose the flexibility and autonomy of the gig economy without having to sacrifice precious benefits. To craft thoughtful and practical portable benefits, policymakers must consider the nuances and diversity of interests in the gig economy, while facing other tough realities, like the decline of union strength and the necessity of breaking age-old norms in labor law. Federal, state, and local experimentation and innovation can help to refine these models. All government actors and policymakers need to do now is take action and help implement these benefits in a way that works for all.

138. *Id.*