Fluid Workers in the Gig Economy: Does a New Class of Employee Need a New Classification?

A Research Paper submitted to the Department of Engineering and Society

Presented to the Faculty of the School of Engineering and Applied Science
University of Virginia • Charlottesville, Virginia

In Partial Fulfillment of the Requirements for the Degree
Bachelor of Science, School of Engineering

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Spring 2020

On my honor as a University Student, I have neither given nor received unauthorized aid on this assignment as defined by the Honor Guidelines for Thesis-Related Assignments

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Introduction

Assembly Bill 5, also known as the Gig Economy Law, "creates a presumption that a worker who performs services for a hirer is an employee for purposes of claims for wages and benefits arising under wage orders issued by the Industrial Welfare Commission. Existing law requires a 3-part test, commonly known as the "ABC" test, to establish that a worker is an independent contractor for those purposes." (California Legislature, 2019, n.p.) This means that workers for firms that participate in the gig economy or the shared workforce will now be reclassified as employees instead of previously being classified as independent contractors. It may seem as if this law is helping gig workers. However, for a majority of these workers being classified as an employee is exactly what they don't want from working for one of these firms (Lobel, 2019, n.p.). The reason for this misunderstanding between workers and legislation, is because the government does not understand the workforce, and they do not understand the consequences of reclassifying these workers.

The effects of this have already become apparent. Vox Media, while citing Assembly Bill 5, announced in December 2019, that it was letting go of over 200 freelance writers who contributed their sports news website, SB Nation (Hymens, 2019, n.p.). This is most likely the first of many layoffs to be seen due to the fear of Assembly Bill 5 being passed.

The problem lies that there are only two ways to classify a worker, either an employee or independent contractor. If the firm classifies a worker as an employee the firm will have to give the employee "critical benefits and protections they are entitled to by law, such as the minimum wage, overtime compensation, family and medical leave, unemployment insurance, and safe workplaces" (U.S. Department of Labor). However, when classified as an employee they lose the

ability to work when they want to, where they want to, and how they want to. By being an independent contractor the worker obtains freedom they would not get otherwise, and that is what gig workers find the most enticing (Gleim, 2019, pg. 143). I argue that a more fluid classification of worker is necessary for the benefit of the gig economy as a whole, and the lack of such fluidity may pose detrimental to this new workforce as a whole.

Part I: Gig Workers Need More Protection in the Economy

The "gig economy" is a growing workforce formed by an entrepreneurial generation that craves flexibility over all aspects of their work (Friedman, 2014, pg. 172). Recent growth in the gig economy, where the employees are paid on short-term contracts or freelance work, has created a workforce where workers are flexible in where, when, and how much they work. All gig workers are classified as independent contractors, and this is how they obtain such freedom. However, some of these "gigs", or jobs offered by a platform or service, particularly those offered by "transportation network companies" (TNCs) (Malos, 2018, pg. 1), are really just on demand piece work (Rauch, 2015, pg. 910). Regarding these TNCs, drivers are getting paid for their completion of driving a customer to their destination, however, they are neglected pay for the work they put into being on standby while waiting for customers (Rauch, 2015, pg. 910).

In 2018 the California Supreme Court decided to adopt a test for how to classify gig workers. This was due to the result of the case Dynamex Operations West, Inc. v. Superior Court. Prior to 2004, Dynamex classified their employees as drivers who, allegedly, performed similar pickup and delivery work as their current drivers perform (Stanford Law School - Robert Crown Law Library, 2018, n.p.). In 2004, however, Dynamex adopted a new policy and contractual arrangement under which all drivers are considered independent contractors rather

than employees, even though, allegedly, the work did not change. The court deemed that Dynamex misclassified their workers as independent contractors to the advantage of the company so they did not have to comply with state and federal regulations regarding wages, hours, and working conditions of employees (Rodd, 2019, n.p.). This resulted in the decision, commonly referred to as the ABC test, that is used to distinguish employees from independent contractors. “Under this test, a worker is properly considered an independent contractor to whom a wage order does not apply only if the hiring entity establishes: (A) that the worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of such work and in fact; (B) that the worker performs work that is outside the usual course of the hiring entity’s business; and (C) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity.” (Rodd, 2019, n.p.) From this criteria grew the Assembly Bill 5 commonly known as the Gig Economy Law, which codifies the decision made from the Dynamex case. This bill specifically allows the Attorney General and local prosecuting agencies to sue respective companies for misclassifying their workers (California Legislature, 2019, n.p.). As expected, the gig companies are fighting back against this law. In October of 2019 Uber, Lyft, and DoorDash launched a ballot measure to claim their workers as independent contractors instead of benefit-earning workers (Myers, 2019, n.p.). Not only will the law claim their workers as independent contractors, but added layouts for their workers rights, such as, healthcare subsidies, protections against on-the-job harassment or discrimination and a system to enforce some workplace rights (Rodd, 2019, n.p.).

When workers are misclassified as independent contractors they do not get the legal protections, such as, being denied workers compensation for work-related injuries, anti-discrimination statutes, labor relation laws, etc. They are also denied traditional workers benefits, such as, expense reimbursement, health and retirement benefits, and unemployment compensation, to name a few (Friedman, 2014, pg. 183). Using TNCs as an example, since the workers are independent contractors they most likely do not have commercial insurance this adds another risk to the drivers. If they get into an accident when driving a passenger they are now personally liable for any damages that incur, and thus have to pay for it out of their own pocket. As an independent contractor the workers are not necessarily being provided with the safeties that would be included if they were classified as employees in their industry (Malos, 2018, pg. 2). When working for companies that employ gig-based work, like TNCs, these workers choose to be independent contractors, and choose to not receive such benefits. However, that is only due to the options they have available, simply because they choose to receive no benefits does not mean they do not deserve benefits. Their only choice is to not receive benefits.

Being too strict or too liberal with the classification in classifying workers as independent contractors or employees can have both negative consequences for the companies and for the workers (Haigu, 2018, pg. 1). The effect of worker misclassification on worker welfare can be either positive or negative judging on the relative misclassification. Under the initial premise that companies have misclassified workers as independent contractors and are now forced to classify them as employees, firms will then shift to a fixed-salary model and control equipment usage for the employee. Under this circumstance, workers are never better off because now their salary is capped without their choice. The only instance where workers will be better off or unaffected is

when firms do not change the way they control the employees, but only fix the revenue share that the workers receive (Haigu, 2018, pg. 2). Haigu and Wright calculated such results by generating a model which accounted for worker welfare, firm profit, worker benefits, worker revenue, and associated profits. Haigu and Wright Constructed a model to analyze each of the different possible outcomes where the workers are classified correctly, either as an independent contractor or as an employee, and where the employees have to switch from each other their misclassifications to their relative appropriate classifications. The model also tried to take into account the way the firm operates since "the key is to look at the entire relationship, consider the degree or extent of the right to direct and control, and to document each of the factors used in coming up with the determination" (Messina, 2019, pg. 6). From Haigu and Wright's model they determined that, obviously, initially the correct classification is optimal for both the employee and the firm. Hagiu and Wright found that an over inclusive view of employment is generally detrimental to welfare. They also found that a firm's profits are correlated with total welfare when the hours of work from the worker does not change, however, this is only true when the workers are classified as independent contractors if they receive additional benefits when their payout is low. They also determined that when independent contractors are correctly classified total welfare is higher than that of the incorrect classification of employees. Thus, both firm's profits, worker's revenue, and worker's welfare are negatively affected when a firm chooses to reclassify the workers as employees instead of providing additional benefits (Hagiu and Wright, 2018, pg. 5).

Hiagu and Wright modeled a fluid worker classification to simulate a firm like Uber and other sharing economy firms. The fluid classification split the cost of risk between the two

parties of the firm and the worker relative to the worker and thus provided a fraction of benefits to the worker. For instance for TNCs, the worker might take the cost of their hours which results in revenue and the firm might take the cost of ensuring quality which will also result in an increase in revenue. Since the firm is controlling some cost they must pay some fraction of benefits to the worker now. Now, if the firm were to switch, out of choice, from independent contracting to this hybrid option the firm's profits increase, while, the workers welfare increases relative to the profit if there is enough work for the worker. However, if the worker is bound by the constraints set by the firm in this hybrid mode then the overall payoff for the worker decreases along with welfare. A firm will be able to maximize welfare and profits by switching to the fluid employment status by judging the needs of the workers correctly (Haigu and Wright, 2018, pg. 9). A firm is always able to maximize total welfare and profits by switching to a fluid employment status, no matter the current employment status, because this allows the firm to optimize the contract for both the firm and the worker.

As shown in this literature review, workers in the gig economy are being misclassified, and a change in the classification, or the way to classify, gig workers would prove to be beneficial for both the firms and the workers.

Part II: The Multi-Level Perspective Applied to the Classification of Gig Workers

In his journal "The multi-level perspective on sustainability transitions: Responses to seven critisism" (2011), Frank Geels reintroduces, defends, and refines "multi-level perspective" (MLP), which "is a middle-range theory that conceptualizes overall dynamic patterns in socio-technical transitions" (Geels, 2011, pg. 26). I apply the multi-level perspective

to the working economy as a whole, focusing on the underlying levels that are related to the gig economy or shared economy.

The focus of MLP is in analyzing long-term transition processes that result from the interplay of developments at three different analytical levels, niches, socio-technical regimes, and an exogenous landscape (Geels, 2011, pg. 26). Each level contains a different set of actors which influence the development at said level. The most volatile level being niches, where innovations are born and tested. This is the level at which startup-ups play in, where the goal is to become part of, or even disrupt, the higher level which is the socio-technical regime. However, due to the significant increase in stability at the level of socio-technical regimes this is challenging to do. “[Niches] provide the seeds for systematic change” (Geels, 2011, pg. 27). When these niches gain momentum and create a larger network of more powerful actors they are able to create change at the higher level of socio-technical regime. The socio-technical regime is a level higher that of niches, “it refers to the semi-coherent set of rules that orient and coordinate the activities of social groups that reproduce the various elements of socio-technical systems”' (Geels, 2011, pg. 27). Regime rules are based upon the actors that exist inside of the regime, beliefs, lifestyles, and user characteristics. The change inside of a regime is slow due to the fact that it requires the changing of many individual’s beliefs and characteristics. Many of these beliefs are changed in small increments overtime, so drastic change is unlikely. The highest level is that of the socio-technical landscape, this is the broader context that is rooted in cultural patterns, demographics, macro-politics, societal values, and macro-economic patterns. This level is beyond the influence in the short run of the actors that exist at the niche and regime levels (Geels, 2011, pg. 28).

The multi-level perspective can be applied to the current technological transition arising from the developments in the gig economy. Katz and Krueger (2016) document the significant rise of alternative work arrangements in the U.S. economy from 2005 to 2015 (Katz, 2016, pg. 1). The percentage of workers who engaged in alternative work arrangements in the U.S. economy was 10.7 percent of all U.S. workers in 2005 and 15.8 percent of all U.S. workers in 2015 (Katz , 2016, pg.2). This was due to changes happening at the niche level, specifically at start-ups like Uber, Lyft, TaskRabbit, and Handy. The workers who engaged in services through online mediums, such as Uber or Lyft, accounted for 0.5 percent of all U.S. workers in 2015 (Katz , 2016, pg.6). Geel states that "Niches gain momentum if expectations become more precise and more broadly accepted, if the alignment of various learning processes results in stable configuration ('dominant design'), and if networks become larger" (Geels, 2011, pg. 28). This process of niches gaining momentum can be observed from what has been previously stated, and I argue that it has grown to the point where it has built up enough internal momentum to create tensions inside of the regime, forcing it to respond and try to adjust. This very action of the regime responding to the growing momentum inside the niche level and the need to make an adjustment can be seen by the previously stated law, Assembly Bill 5, that was passed by the California Supreme Court in 2018. This law was a direct response to the growth of startups leveraging technology with an underutilized demographic, which in turn disrupted the corresponding socio-technical regime. However, due to the stability of the higher level, which is the socio-technical landscape, the correct law was not implemented. Instead a law that reflected the values of the current socio-technical regime was implemented, Assembly Bill 5, which did

not resolve the problem at hand, but simply clarified the existing principles practiced by the socio-technical regime.

By analyzing the effects of Assembly Bill 5, one can observe the external influences from the socio-technical landscape that are being applied onto niches. The Assembly Bill 5 determined that the formerly independent contractors that worked for the actors in these niches were misclassified, and are forcing these actors to reclassify them as workers. Forcing many of these actors to layoff workers in response, in order to follow the law. Vox Media, while citing Assembly Bill 5, announced in December 2019, that it was letting go of over 200 freelance writers who contributed their sports news website, SB Nation (Hymens, 2019, n.p.). However, actors in these niches are currently responding to these unfavorable influences the socio-technical landscape is applying to them. Uber and Postmates filed a legal challenge against the Assembly Bill 5 claiming it "violates individuals' constitutional rights and unfairly discriminates against technology platforms and those who make a living through them." The suit claims "Rather than embrace how the on-demand economy has empowered workers, benefited consumers, and fueled economic growth, some California legislators have irrationally attacked it." (Bhuiyan, 2019, n.p.).

Utilizing MLP one can observe that the transition pathway this technical and legislative transition is taking is that of "De-alignment and re-alignment" (Geels, 2011, pg. 32). "In this pathway, major landscape pressures first cause disintegration of regimes (de-alignment). Then, taking advantage of this 'space', multiple niche-innovations emerge, which co-exist for extended periods. Processes of re-alignment eventually occur around one innovation, leading to a new regime" (Geels, 2011, pg. 32). We are seeing the regime starting to disintegrate by the differing

way states are classifying employees (Morgan, 2018, pg. 139). In the future I project that we will see actors in these niches attempt to solve the problem by offering up appropriate compromises to solve the problem. We can utilize MLP and apply it to the changing workforce by realizing that we are in a transition and subverting the unnecessary time and try to optimize the transition as best as possible.

Part III: Both Workers and Firms Would Benefit from a Fluid Worker Classification

As stated earlier, the current way of classifying workers as employees or independent contractors is still underdeveloped and the misclassification of workers can have devastating effects for both the firm and the worker. If there existed an option for the firms to choose that is in between both employee and independent contractor, both the worker and the firm would be overall better off. Time needs to be taken to address this growing problem and this shifting workforce. The classification of employees determines the ability for these firms to operate in these technological sectors, and the misclassification of employees can halt and even deter technological progress in this sector. In a 2015 case involving the proper categorization of Lyft drivers under California law, the judge concluded "the test the California courts have developed over the 20th century for classifying workers isn't very helpful in addressing this 21st century problem." (Morgan, 2018, pg. 138). This is an example of an improper response given by the court regarding the classification of workers, it implies that there is no movement on the subject in either direction. If technology is going to develop laws need to develop at a reasonable pace as a response to it.

The Assembly Bill 5 was a law that was passed without fully understanding the economy that it was affecting. While it did bring to light many issues that were apparent in the economy, the execution was poor and it caused more harm than good to the workers it was trying to benefit. The California Supreme Court ignored the changing and shifting economy and treated it as one it previously understood, instead of trying to understand and adapt. This mistake showed the need to reconsider the purpose and goals of employment and labor protections for all workers. Even as the relationship between workers and employers is changing, laws need to be enacted to protect the workers and ensure living wages and workers rights for all types of workers. This also shows the need for a new classification of worker, one that will be able to adapt as innovation arises in the workforce. Legislators need to work with companies and platforms to create solutions that do not curtail innovation and are beneficial to the workers.

As stated earlier, when workers are misclassified it can have devastating effects for both the worker and the employer. When a worker is misclassified they are "often denied access to critical benefits and protections they are entitled to by law, such as the minimum wage, overtime compensation, family and medical leave, unemployment insurance, and safe workplaces. Employee misclassification generates substantial losses to the federal government and state governments in the form of lower tax revenues, as well as to state unemployment insurance and workers' compensation funds" (U.S. Department of Labor). However, as shown above there is currently no correct way to classify gig workers. This is due to the fact that either current classification of gig worker either hurts the worker or hurts the worker and the employer. Therefore, neither classifications can be assumed to be the correct one.

Attributes	Worker Classification			
	Employee (Incorrect)	Independent Contractor (Incorrect)	Fluid (from independent contractor)	Fluid (from employee)
Worker's Welfare				
Worker's Risk (red is increases)				
Worker's Payoff				
Firm Risk (red is increases)				
Firm Revenue				

Key	Increase	Decrease	Ambiguous

Table 1. Effects of worker misclassification and fluid classification on the worker and the firm. The colors regard an increase/decrease/ambiguous change from the correct classification in the respective attributes.

As stated previously and seen in *Table 1.*, the optimal solution is a fluid classification of worker. This allows the workers to be eligible for a fraction of the benefits an employee will receive, while also being able to have control over part of the risk. This is the most beneficial because it does not restrict the worker to either of the classifications. With an option for a fluid worker classification neither an employee classification nor an independent contracting classification would provide any relative advantage in the classification to a gig economy worker. This is because in this fluid mode, the firm is able to choose the same exact contract as

an employee, thus resulting in the same outcome as employment mode, however, they can generally do better by optimizing the contract relative to the worker. The same logic applies to a worker that falls directly into an independent contractor classification.

However, creating such a system is legally arduous and will not be able to scale at the rate that these fast-paced startups require it to. Therefore, the solution I propose is one where the firms in the gig economy should be required to offer a track for their workers to obtain employee status. This approach is the most feasible and offers the best and most understandable way to balance workers rights.

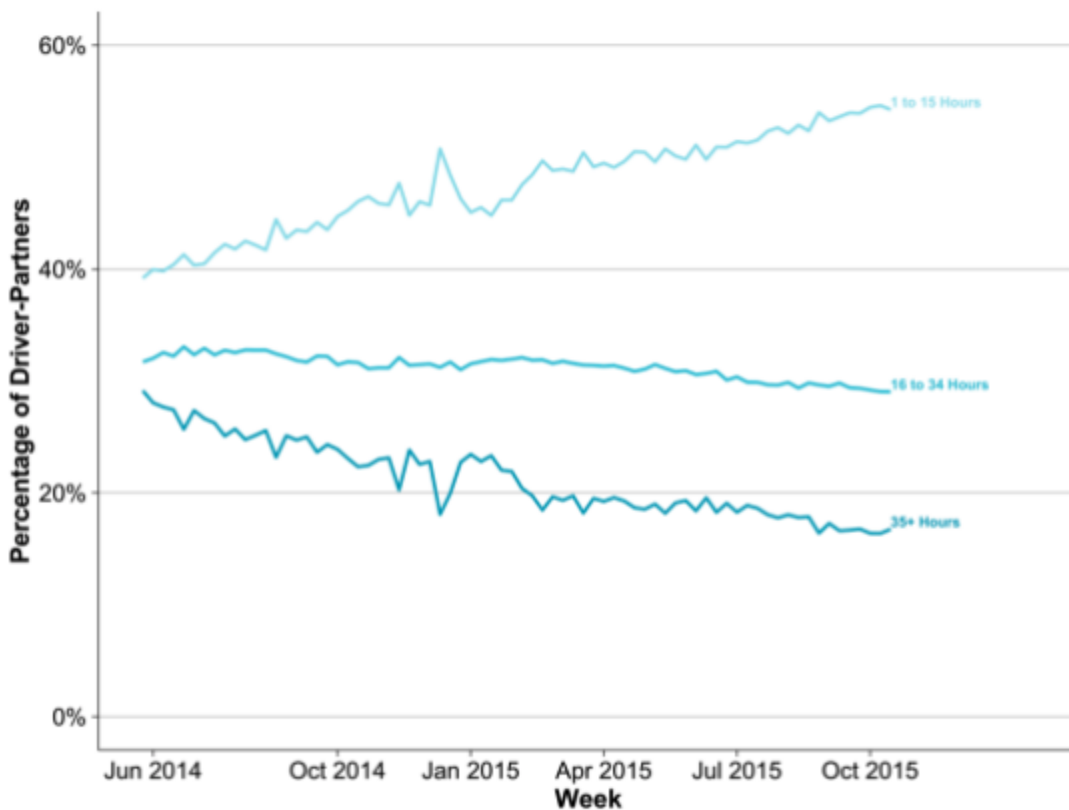

Figure 1. Distribution of Uber driver-partner hours over time. Shows the percentage of hours driver-partners drove for Uber in a week's time from Hall (2016).

According to the National Bureau of Economic and as shown in *Figure 1*, only 18% of Uber

drivers drive more than 30 hours a week, while 19% of Uber drivers drive zero hours in any given week. The majority of Uber drivers (60%) drive less than 10 hours a week (Lobel, 2019, n.p.). Using this solution only 18% of Uber drivers need and should be eligible for employment status, so employment should not be offered to the 82%. Employment should be offered to those that will benefit from utilizing employee status, and the platform will benefit in return. This way the platform will be able to keep their independent contractors and the workers which are acting as employees will be correctly classified as such.

By offering employment to the independent contractors firms would be both solving the problem and following the MLP theory almost perfectly. They will be filling the space in the socio-technical regime by essentially offering the service and solving the problem themselves.

Conclusion

Throughout this paper I argue that the current system of classifying employees is detrimental to both firms, workers, and the growth of the gig economy. By using a multi-level perspective to analyze the transition happening in the workforce, I was able to expand on the argument and suggest that firms take responsibility and fill the space that will be created by the de-alignment of the socio-technical regime that interacts with them. As technology develops, the legislature needs to develop alongside it, and if it's too slow the firms that are innovating should be able to recognize that and act in an ethical and moral manner. Firms that are innovating ahead of legislature should not take advantage of the lag between them and legislation in an unethical manner.

A change in which the way a worker is classified in the gig economy is necessary for all parties, however, it will be a tedious job to fulfill. Regulations regarding workers are slow to be

changed, and is an arduous process that will certainly create some issues of legal interpretation for the courts. Nonetheless, I believe that the easiest and most beneficial option would be for the firms to be required to provide an avenue for workers in the gig economy to be classified as employees. However, I do not believe that this is a long term solution. Legislation needs to be made to adapt this new dynamic worker, or this worker might cease to exist.

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