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Gig Workers as Essential Workers: How to Correct the Gig Economy Beyond the COVID-19 Pandemic

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During the early stages of the COVID-19 pandemic in 2020, estimates suggest that approximately forty percent of U.S. workers shifted to working remotely from home.¹ But for many gig workers,² who performed grocery shopping for Instacart, delivered food and restaurant meals for DoorDash, or who picked up and delivered packages for Shipt, they were working in person and busier than ever. In fact, many of these gig jobs were considered “essential work,” and the rules of state lockdowns across the country classified gig workers as “essential workers.”³

Paid by the task, and managed by algorithms that can automatically deactivate an account, gig employment is among the most precarious type of work in the U.S. economy.⁴ With little in the way of job security or benefits, gig workers have been marginalized by the view

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1. May Wong, *Stanford Research Provides a Snapshot of a New Working-from-Home Economy*, STANFORD NEWS (June 29, 2020), <https://news.stanford.edu/2020/06/29/snapshot-new-working-home-economy> [<https://perma.cc/P9YU-XLEE>] (quoting Stanford economist David Bloom, who estimated over forty-two percent of the country’s workers transitioned to remote work during the pandemic).

2. Of course, for many crowdworkers, who only work on the computer, work did not change much, especially for those who worked from home doing computer piecework.

3. U.S. DEPT OF HOMELAND SEC., CYBERSEC. & INFRASTRUCTURE SEC. AGENCY, ADVISORY MEMORANDUM ON IDENTIFICATION OF ESSENTIAL CRITICAL INFRASTRUCTURE WORKERS DURING COVID-19 RESPONSE (May 19, 2020), https://www.cisa.gov/sites/default/files/publications/Version_3.0_CISA_Guidance_on_Essential_Critical_Infrastructure_Workers_1.pdf [<https://perma.cc/V5LT-R7C5>] [hereinafter IDENTIFICATION OF ESSENTIAL CRITICAL INFRASTRUCTURE WORKERS] (defining essential workers).

4. V.B. Dubal, *The Drive to Precarity: A Political History of Work, Regulation, & Labor Advocacy in San Francisco’s Taxi and Uber Economies*, 38 BERKELEY J. EMP. & LABOR L. 73, 75, 78 (2017).

that their work exists only for the sake of convenience.⁵ They also were initially left out of the protections of labor and employment law and have had to sue to claim employee status.⁶ Until now. It might appear counterintuitive, but the public health crisis triggered by COVID-19 is having a corrective function in employment and labor practices: the meal delivery driver, the on-demand grocery shopper, and the on-demand package deliverer are all now considered essential.⁷ This shift has come with very specific benefits, like pandemic unemployment assistance and sick days. As such, the events of the pandemic have moved—at least some—gig workers closer to parity with traditional employees. In this contribution, we argue that a move to parity is long overdue, and, now, based on their work throughout the pandemic, gig workers have certainly earned it.

In fact, on-demand workers have proven that not only are they “equal” to regular workers, they are in fact “essential.” In Wuhan, China, delivery couriers played a vital role in keeping the city residents supplied with food and medications until the threat from the coronavirus had subsided.⁸ In the United States, this role has largely been filled by gig workers. High-risk, elderly, and ordinary citizens alike have relied on Instacart grocery shoppers to bring them food and basic household supplies.⁹ Others have relied on Grubhub and UberEats drivers to bring them restaurant meals.¹⁰ On-demand grocery shoppers and delivery drivers have continued to do their work, despite the risk of exposure to the novel coronavirus.¹¹

Governing bodies have acknowledged the essential nature of gig economy workers, issuing emergency regulatory interventions during the early stages of the pandemic that conferred greater protection to gig economy workers. For example, the Coronavirus Aid, Relief, and

5. See Pete Robertson, *How the Gig Economy Creates Job Insecurity*, BBC (Sept. 18, 2017), <https://www.bbc.com/worklife/article/20170918-how-the-gig-economy-creates-job-insecurity> [<https://perma.cc/662J-R3NV>].

6. See, e.g., Miriam A. Cherry, *Beyond Misclassification: The Digital Transformation of Work*, 37 COMP. LAB. L. & POL’Y J. 577 (2016) (detailing lawsuits by gig economy workers over the issue of misclassification).

7. See IDENTIFICATION OF ESSENTIAL CRITICAL INFRASTRUCTURE WORKERS, *supra* note 3.

8. Malaka Gharib, *In a Coronavirus Crisis, Delivery Workers Can Be a Lifeline*, NAT’L PUB. RADIO (Mar. 8, 2020), <https://www.npr.org/sections/goatsandsoda/2020/03/08/812925775/photos-in-a-coronavirus-crisis-delivery-workers-can-be-a-lifeline> [<https://perma.cc/DD9M-PUBK>].

9. Alyse Whitney, *What It’s Really Like to Be an Instacart Shopper*, BON APPÉTIT (Sept. 26, 2017), <https://www.bonappetit.com/story/instacart-shopper-for-a-day> [<https://perma.cc/3B7Y-HVAY>].

10. Mariella Moon, *Uber Encourages Drivers in the US to Do Food Delivery*, ENGADGET.COM (Mar. 26, 2020), <https://www.engadget.com/2020-03-26-uber-encourages-drivers-food-delivery.html> [<https://perma.cc/UC58-D3QB>].

11. Veena Dubal & Meredith Whittaker, *Uber Drivers Are Being Forced to Choose Between Risking Covid-19 or Starvation*, GUARDIAN (Mar. 25, 2020, 6:00 AM), <https://www.theguardian.com/technology/2020/mar/25/uber-lyft-gig-economy-coronavirus> [<https://perma.cc/8E3Z-RNS4>].

Economic Security Act (CARES Act) granted gig workers sick leave and federal unemployment benefits.¹² In other cases, gig workers have asked for personal protective equipment,¹³ sick days,¹⁴ hazard pay,¹⁵ and supplies of disinfectants,¹⁶ and some companies have met those requests. Others met those requests only in the face of protests or other collective action by gig workers. These protections, which workers in the gig economy had long been fighting for, have demonstrably improved working conditions for gig workers and brought them closer to the rights and benefits enjoyed by traditional employees.¹⁷ The changes will improve conditions for gig workers, whose numbers have been steadily growing.¹⁸

Before the pandemic, meaningful changes to the status of gig economy workers were incremental and accomplished through a patchwork approach. Over the past five years, gig workers have brought legal cases around the world, seeking to obtain the same benefits and legal protections as traditional employees. The results, however, have been far from uniform.¹⁹ Numerous courts, such as those in Italy and France, have looked at the amount of control and surveillance that platforms have over workers and have concluded that employment protections

12. Sean Ludwig, *Coronavirus Aid, Relief, and Economic Security Act: What Small Businesses Need to Know*, U.S. CHAMBER OF COM. (Mar. 27, 2020), <https://www.uschamber.com/co/start/strategy/cares-act-small-business-guide> [<https://perma.cc/A7ZW-HM5T>].

13. See Megan Rose Dickey, *Gig Workers Say They Are Struggling to Get Personal Protective Equipment from Companies*, TECHCRUNCH (Apr. 16, 2020, 1:35 PM), <https://tcrn.ch/2z7esl8> [<https://perma.cc/UF65-EKC7>].

14. See Dara Kerr, *Gig Workers with COVID-19 Symptoms Say It's Hard to Get Sick Leave from Uber, Lyft, Instacart*, CNET (Mar. 26, 2020), <https://www.cnet.com/features/gig-workers-with-covid-19-symptoms-say-its-hard-to-get-sick-leave-from-uber-lyft-instacart> [<https://perma.cc/ER55-A7JF>].

15. See Andrew Keshner, "Anybody Who Works at This Point Deserves Hazard Pay": *The Working Conditions That Led One Instacart Worker to Strike*, MARKETWATCH (Apr. 2, 2020, 9:11 AM), <https://www.marketwatch.com/story/is-this-batch-worth-me-going-to-this-store-and-possibly-bringing-home-covid-19-what-life-is-like-for-one-striking-instacart-worker-2020-04-01> [<https://perma.cc/F9XC-77N7>].

16. See Alina Selyukh & Shannon Bond, *Amazon, Instacart Grocery Delivery Workers Demand Coronavirus Protection and Pay*, NAT'L PUB. RADIO (Mar. 30, 2020, 8:47 AM), <https://www.npr.org/2020/03/30/823767492/amazon-instacart-grocery-delivery-workers-strike-for-coronavirus-protection-and-> [perma.cc/4BBK-9S3M].

17. Andrew J. Hawkins, *Hundreds of Uber and Lyft Drivers Rally in San Francisco for Employee Protections*, VERGE (Aug. 27, 2020, 5:37 PM), <https://www.theverge.com/2019/8/27/20835658/uber-lyft-driver-rally-ab5-pete-buttigieg-employee-protections> [perma.cc/6PKK-8ZME]; see also Brian D. Shapiro, Recent Case, *Uber Technologies, Inc. v. Barbra Berwick*, Case No: 11-46739 EK (2015), 43 W. ST. U. L. REV. 321 (2016).

18. *Helping the Gig Economy Work Better for Gig Workers*, INT'L LABOUR ORG. (2020), https://www.ilo.org/washington/WCMS_642303/lang--en/index.htm [perma.cc/UDQ3-5DXF]; see also TJ McCue, *57 Million U.S. Workers Are Part of the Gig Economy*, FORBES (Aug. 31, 2018, 6:30 PM), <https://www.forbes.com/sites/tjmccue/2018/08/31/57-million-u-s-workers-are-part-of-the-gig-economy/#6a3d67d87118> [perma.cc/5KL3-TRWC].

19. See generally Miriam A. Cherry, *A Global System of Work, A Global System of Regulation?: Crowdwork and Conflicts of Law*, 94 TUL. L. REV. 183 (2020).

should apply.²⁰ Other courts, relying on gig workers' flexibility to set their own hours and the fact that gig workers often supply their own equipment, have instead determined that gig workers are independent contractors or, in the United Kingdom, fit into a third intermediate category.²¹ The situation in the United States has largely been one of confusion. Early cases on worker classification largely settled out of court.²²

In 2019, California's legislature responded to the California Supreme Court's decision in *Dynamex Operations West, Inc. v. Superior Court of Los Angeles*²³ and passed a labor law, AB-5, that changed the test for classification to be far more favorable to finding employee status.²⁴ As a result, gig companies spent close to \$200 million to urge the passage of Proposition 22. In November 2020, Proposition 22, a ballot initiative sponsored by the platform companies, overturned AB-5, and its long-term effects are unclear.²⁵ Over the years, the conflicting decisions and varying legal tests across the country have resulted in uncertainty. During the pandemic, this issue of classification has translated into many gig workers being unsure if they are eligible for state unemployment benefits or if they need to rely only on the emergency measures passed by the federal government.²⁶ Other gig workers have encountered difficulties accessing the new sick-leave benefits.²⁷

Apart from their legal status, gig workers have also struggled with numerous misconceptions, including the view that their work is merely a "side hustle" or that their work is frivolous, or even in some cases,

20. Associated Press, *Italy Court Rules Uber Food Delivery Riders Were Exploited*, ABC NEWS (May 30, 2020, 9:46 AM), <https://abcnews.go.com/International/wireStory/italy-court-rules-uber-food-delivery-riders-exploited-70969031> [perma.cc/6BV4-694H]; see also Sam Schechner & Preetika Rana, *Uber Ruling in France Boosts Gig Workers' Rights*, WALL ST. J. (Mar. 4, 2020, 3:35 PM), <https://www.wsj.com/articles/france-uber-ruling-puts-gig-workers-rights-in-focus-11583353513> [perma.cc/8Q3P-CAFY].

21. See *Uber BV v. Aslam* [2018] EWCA Civ 2748 (Eng.) (currently on appeal to the UK Supreme Court for civil cases, case no. UKSC 2019/0029).

22. See Megan Rose Dickey, *Uber Agrees to Pay Drivers \$20 Million to Settle Independent Contractor Lawsuit*, TECHCRUNCH (Mar. 12, 2019, 11:17 AM), <https://tcrn.ch/2HgJqdq> [perma.cc/S7P5-7HRQ].

23. *Dynamex Operations W., Inc. v. Superior Court*, 416 P.3d 1 (Cal. 2018).

24. Assemb. B. 5, 2019-2020 Leg., Reg. Sess. (Cal. 2019); Richard Gonzales, *California Governor Signs Law Protecting Gig Economy Workers*, NAT'L PUB. RADIO (Sept. 18, 2019, 7:14 PM), <https://www.npr.org/2019/09/18/762108954/california-governor-signs-law-protecting-gig-economy-workers> [perma.cc/Z2PM-5BL9].

25. Suhauna Hussain & Johana Bhuiyan, *Prop. 22 Passed, a Major Win for Uber, Lyft, DoorDash. What Happens Next?*, L.A. TIMES, Nov. 4, 2020.

26. See Nicole Clark, *Gig Workers Can Qualify for CARES ACT Unemployment Aid*, BLOOMBERG L. (May 6, 2020, 3:01 AM), https://www.bloomberglaw.com/document/XBOENS4000000?bna_news_filter=daily-labor-report&jcsearch=BNA%252000000171bc1ad730a5f9bd3f86dc0001#jcite [perma.cc/9XWW-A65G].

27. Russel Brandom, *Sick Days: Instacart Promises a Safer Way to Shop, But Workers Tell a Different Story*, VERGE (May 26, 2020, 9:00 AM), <https://www.theverge.com/21267669/instacart-shoppers-sick-extended-pay-quarantine-leave-coronavirus> [perma.cc/8NQ4-YNUX].

invisible.²⁸ It is true that in many instances people with a standard job took on additional work in the on-demand economy in order to “top up” their income. But many workers see their gig jobs as their full-time employment. Gig workers have also had to push back against the idea that their jobs are disposable or less relevant than other occupations. Platforms themselves did not help much with this image, as they promoted the speed with which on-demand platforms could fulfill the customer’s every need for whim, even for frivolous requests, like midnight dogfood delivery, delivery of luxury coffee drinks, or renting an electrified scooter at every intersection.²⁹ Meanwhile, computer crowd workers struggled to be recognized; most had their work attributed to artificial intelligence, although it was very real human crowd workers who were performing small microtasks. Most who do computer crowd work online for companies like Amazon Mechanical Turk do not even earn minimum wage.³⁰ All of these factors tell the story that gig workers are somehow marginal or “less deserving” of employment protections than other workers.

As devastating as it has been, the coronavirus pandemic has at least served as a catalyst for long-needed change in gig worker status. On-demand workers have shown that not only are they equal to regular workers, they are in fact essential. Even before the coronavirus outbreak, the leadership at large gig platforms was slowly starting to recognize the need for a change in labor paradigms, but now the pandemic has created an opportunity for the leadership of gig companies to protect and support their employees. Doing so will allow businesses to be more in line with corporate social responsibility (CSR) guidelines.³¹ While, of course, these businesses could have recognized such CSR goals in the past, the pandemic provides them the opportunity to support their workers in part because they may now have to, but also because it is the right thing to do.

Temporary rights and protections in the wake of the pandemic are one thing. But, in order to combat the rising state of inequality and

28. See Elisabeth Buchwald, *The Government Has No Idea How Many Gig Workers There Are, And That’s a Problem*, MARKETWATCH (Jan. 7, 2019, 3:51 PM), <https://www.marketwatch.com/story/the-government-has-no-idea-how-many-gig-workers-there-are-heres-why-thats-a-problem-2018-07-18> [perma.cc/T6NK-79JH].

29. See, e.g., Layne Winn, *TaskRabbit Founder on the Pressure Entrepreneurs Face to Succeed*, ABC NEWS (Dec. 13, 2019, 10:09 AM), <https://abcnews.go.com/Business/taskrabbit-founder-pressure-entrepreneurs-face-succeed/story?id=67707440> [perma.cc/R4YP-SAG9] (noting that founder of TaskRabbit platform did so in response to needing dog food in the middle of the night).

30. JZ, *Is Amazon’s Mechanical Turk Breaking down?*, HARV. BUS. SCH. DIGIT. INITIATIVE (Mar. 26, 2018), <https://digital.hbs.edu/platform-digit/submission/is-amazons-mechanical-turk-breaking-down/#> [perma.cc/B49Y-EJZD].

31. Rebecca M. Henderson, *More and More CEOs Are Taking Their Social Responsibility Seriously*, HARV. BUS. REV. (Feb. 12, 2018), <https://hbr.org/2018/02/more-and-more-ceos-are-taking-their-social-responsibility-seriously> [perma.cc/J9FN-W2ST].

the schism between those who are employees, and those who are being denied coverage only because they use an app to get to their work, the changes need to be made more permanently.³² We believe items like sick leave and unemployment should be made permanent, but we would go further and add minimum wage, the right to sue for discrimination and harassment, and the ability to join a union. It would mean an end to deceptive practices like “tip baiting,” where customers can post a large number for tips to get prompt service, and then later edit down those tips to take the money away from the workers who earned it. Instead, gig workers deserve fair and transparent wage structures.³³ In essence, gig workers should have the same rights that employees need because of the power imbalance between workers and employers. This could be accomplished through legislation, by court decisions, or by acts of Congress. But the way forward depends on securing protections for all workers, regardless of the technology that they may use to help them accomplish their tasks.

Income security for gig workers will be critical for them to engage fully in our economic recovery. As companies, regulators, and policy-makers begin considering the aftermath of the pandemic, they should be mindful not to relegate gig workers to the no-man’s land or gray area where they will be deprived of employee protections. Gig workers have proven themselves worthy of the same labor market protections that other workers receive under the law.

32. Megan Tobias Neely, *What Will U.S. Labor Protections Look Like After Coronavirus?*, HARV. BUS. REV. (Apr. 2, 2020), <https://hbr.org/2020/04/what-will-u-s-labor-protections-look-like-after-coronavirus> [perma.cc/J22S-Q4AY].

33. Sarah Ashley O’Brien & Kaya Yurieff, *People Are Luring Instacart Shoppers with Big Tips – And Then Changing Them to Zero*, CNN (Apr. 9, 2020, 3:01 PM), <https://www.cnn.com/2020/04/09/tech/instacart-shoppers-tip-baiting/index.html> [perma.cc/BG9P-84AG].