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Michael H. LeRoy

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Misclassification under the Fair Labor Standards Act: Court Rulings and Erosion of the Employment Relationships

Michael H. LeRoy[†]

I. INTRODUCTION

Work is changing. Until recently, the employment relationship intermediated the exchange of labor for wages. But that is giving way to gig work, a term that connotes casual, just-in-time labor that is priced by piece rates.¹ Technology facilitates this new medium for transacting work, as do people's attitudes about work and their financial situations.² Gigs coincide with a rise in people working as independent contractors.³ Income inequality is also rising,⁴ a possible byproduct that coincides with the fading employment relationship.

[†] Professor, School of Labor and Employment Relations, and College of Law, University of Illinois at Urbana-Champaign.

¹ While there is no standard definition of gig work, it generally means a "single project or task for which a worker is hired, often through a digital marketplace, to work on demand." Elka Torpey & Andrew Hogan, *Working in a Gig Economy*, BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LAB. (May 2016), <http://www.bls.gov/careeroutlook/2016/article/what-is-the-gig-economy.htm> [<https://perma.cc/JY9S-ASTA>].

"Piece rate" is defined as "a method of calculating compensation based on the type and number of tasks completed, rather than by the number of hours worked." *Ontiveros v. Safelite Fulfillment, Inc.*, 231 F. Supp. 3d 531, 536 (C.D. Cal. 2017) (citation omitted).

² See Jared Meyer, *Millennials Want Gigs and Flexibility*, CAPX (Dec. 14, 2015), <http://capx.co/167481-2/> [<https://perma.cc/ZZK3-7NSX>] ("The American economy is changing, and millennials' attitudes about work and their careers are changing with it. The rapid rise of the so-called 'sharing economy' embodies many young Americans' new economic ideal—one driven by technology, convenience, and flexibility.").

³ Lauren Weber, *The End of Employees*, WALL ST. J. (Feb. 2, 2017), <https://www.wsj.com/articles/the-end-of-employees-1486050443>.

⁴ A study on income distribution in the U.S. illustrates the growing disparity in wealth. See URBAN INST., NINE CHARTS ABOUT WEALTH INEQUALITY IN AMERICA DISTRIBUTION: CHART TWO: DISTRIBUTION OF FAMILY INCOME, 1963–2013 (Feb. 2015), <http://apps.urban.org/features/wealth-inequality-charts/> [<https://perma.cc/PAM6-9T25>]. Based on data drawn from the Current Population Survey 1963–2014, the top 10% of family income gradually rose from \$139,677 in 1993 to \$163,139 in 2003, and \$159,002 in 2013 (a 13.9% increase from 1993–2013). *Id.* At the 50th percentile, income was virtually flat over 20 years: \$54,971 in 1993, \$61,318 in 2003, and falling to \$56,971 in 2013 (a 3.6% increase from 1993–2013). For people in the 10th percentile, income was \$12,976 in 1993, rising to \$14,530 in 2003, and falling to \$12,951 in 2013 (a decrease of less than .01%). *Id.*

The economy's shift from hourly jobs to gigs has much deeper roots than mobile phone technology. The employment relationship began to erode in World War II with wage controls. These restraints caused employers to add fringe benefits to offset their inability to raise wages.⁵ Thus began an inexorable rise in employer-paid benefits. Health insurance⁶ and pensions⁷ were the costliest "fringes." By the late 1980s, employers scaled back on these benefits because of spiraling costs.⁸

Employer resistance to unions sapped traditional jobs.⁹ Manufacturing plants moved to states with weak labor laws.¹⁰ Permanent replacements were hired for strikers,¹¹ and employers used decertification elections to oust unions.¹² These anti-union tactics ended long and stable careers for many people.

Global trade also weighed down traditional employment, leading to the loss of manufacturing and certain service jobs.¹³ More insidiously,

⁵ MARK A. ROTHSTEIN ET AL., *EMPLOYMENT LAW: CASES AND MATERIALS* 536 (8th ed. 2015).

⁶ See U.S. GOV'T ACCOUNTABILITY OFF., *PRIVATE HEALTH INSURANCE: CONCENTRATION OF ENROLLEES AMONG INDIVIDUAL, SMALL GROUP, AND LARGE GROUP INSURERS FROM 2010 THROUGH 2013*, 1 (Dec. 1, 2014), <http://www.gao.gov/products/GAO-15-101R> [<https://perma.cc/Q4N4-QWCK>] (finding that group health plans sponsored by large and small employers were the primary source of health coverage in the U.S.). The report noted that "in 2013, 58 percent of Americans under age 65 had health coverage through employer-sponsored group health plans." *Id.*

⁷ See PENSION BENEFIT GUARANTY CORP., 2015 ANNUAL REPORT 2 (Nov. 16, 2015), <http://www.pbgc.gov/Documents/2015-annual-report.pdf#page=7> [<https://perma.cc/S7KL-T8RP>] (indicating that the government corporation that insures private pension plans paid \$5.6 billion to almost 826,000 retirees from more than 4700 failed single-employer plans in 2015).

⁸ One indication is the increased frequency of strikes over employer plans to reduce employee health insurance. See United Press International, *Study Says Health Benefits Are Key Issue in Strikes*, L.A. TIMES (Feb. 20, 1990), http://articles.latimes.com/1990-02-20/business/fi-990_1_health-benefits [<https://perma.cc/88X9-6VEE>] (indicating that in the Service Employees Union, with over 900,000 members, health benefits were a primary motivation to strike among seventy-eight percent of strikers in 1989).

⁹ See JOHN LAWLER, *UNIONIZATION AND DEUNIONIZATION* (1990); see also MARTIN JAY LEVITT, *CONFESSIONS OF A UNION BUSTER* (1993); U.S. DEP'T OF LABOR, *PERSUADER AGREEMENTS: ENSURING TRANSPARENCY IN REPORTING FOR EMPLOYERS AND LABOR RELATIONS CONSULTANTS*, https://www.dol.gov/olms/regs/compliance/ocr/Persuader_OverviewSum_508_2.pdf [<https://perma.cc/RN3Q-2B2A>] (stating that the agency rule expands disclosure requirements about "direct" and "indirect" persuaders who are hired by employers to manage a firm's negative messages about unions during organizing campaigns).

¹⁰ BARRY BLUESTONE & BENNETT HARRISON, *THE DEINDUSTRIALIZATION OF AMERICA: PLANT CLOSINGS, COMMUNITY ABANDONMENT, AND THE DISMANTLING OF BASIC INDUSTRIES* (1982); Tami J. Friedman, *Exploiting the North-South Differential: Corporate Power, Southern Politics, and the Decline of Organized Labor after World War II*, 95 J. AM. HIST. 323 (2008).

¹¹ John F. Schnell & Cynthia L. Gramm, *The Empirical Relations between Employers' Striker Replacement Strategies and Strike Duration*, 47 INDUS. & LAB. REL. REV. 189 (Jan. 1994).

¹² Michael H. LeRoy, *Severance of Bargaining Relationships during Permanent Replacement Strikes and Union Decertifications: An Empirical Analysis and Proposal to Amend Section 9(c)(3) of the NLRA*, 29 U.C. DAVIS L. REV. 1019 (1995-96).

¹³ A comprehensive analysis on the effects of trade on U.S. jobs appears in Martin Neil Bailly & Robert Z. Lawrence, *What Happened to the Great U.S. Job Machine? The Role of Trade and Electronic Offshoring*, 2 BROOKINGS PAPERS ON ECON. ACTIVITY 211 (2004), <https://muse.jhu.edu>

global companies imported contingent employment practices that weakened jobs in America. To illustrate, Japanese just-in-time practices allowed employers to optimize the match between customer demand and the work needed by employees to fill orders.¹⁴ Additionally, employers created discontinuous work schedules to avoid paying employees for idle time—and overtime.

Also, employers became more strategic in allocating work between “core” employees and contract workers.¹⁵ The latter were used for peak workloads; contract workers were laid off in slack times.¹⁶ Lacking union representation, contract workers had no bargaining power. Consequently, employers increasingly relied on these contingent workers as they laid-off mainstream workers through attrition or layoffs.

In sum, the work world has changed dramatically since the 1980s. Today, lifelong careers with the same employer are rare. Private sector unions, stalwarts for resisting employer plans to erode jobs, represent about seven percent of the workforce.¹⁷ For companies, employment costs are high and continue to escalate with various government mandates. Workers, however, do not see these escalating employer outlays reflected in their paychecks or job security. And with mobile apps that serve as instant labor brokers, it is easy to see why gig work is a growing phenomenon.

article/178167/pdf [https://perma.cc/M2LB-UF59]. For an accessible and thorough investigation of U.S. job loss, see Lori G. Kletzer, *Job Displacement*, 12 J. ECON. PERSP. 115, 130–31 (1998) (discussing research literature on causes of job displacement).

¹⁴ See MEHRAN SEPEHRI, JUST-IN-TIME, NOT JUST IN JAPAN: CASE STUDIES OF AMERICAN PIONEERS IN JIT IMPLEMENTATION (1986); John Paul MacDuffie, *Human Resource Bundles and Manufacturing Performance: Organizational Logic and Flexible Production Systems in the World Auto Industry*, 48 IND. & LAB. REL. REV. 197 (1995); Y. Sugimori et al., *Toyota Production System and Kanban System Materialization of Just-in-Time and Respect-for-Human System*, 15 INT’L J. PRODUCTION RES. 553 (1977).

¹⁵ See GOV’T ACCOUNTABILITY OFF., CONTINGENT WORKFORCE: SIZE, CHARACTERISTICS, EARNINGS, AND BENEFITS (Apr. 20, 2015), <http://www.gao.gov/assets/670/669766.pdf> [https://perma.cc/T8YJ-HXWH]. The GAO study used contingent work to refer “to all individuals who maintain work arrangements without traditional employers or regular, full-time schedules—regardless of how long their jobs may last.” *Id.* at 3. In an analysis from 2005, the GAO estimated that 30.6% of the workforce was contingent. *Id.* at 4. The report’s analysis in 2010 estimated that the contingent workforce was 35.3% in 2006 and 40.4% in 2010. *Id.* Compared to similarly situated, full-time workers, contingent workers earned 27.5% less per week and 47.9% less per year. *Id.* at 6.

¹⁶ Anne E. Polivka & Thomas Nardone, *On the Definition of “Contingent Work”*, 112 MONTHLY LAB. REV. 9 (Dec. 1989).

¹⁷ BUREAU OF LAB. STAT., U.S. DEP’T OF LAB., *Union Members Summary* (Jan. 28, 2016), <https://www.bls.gov/news.release/union2.nr0.htm> [https://perma.cc/CA9Q-DFQ4].

A. Overview

These influences are feeding a growing stream of gig work. This study identifies work that is structured as gig jobs outside the employment relationship. The results add to a research literature that is rapidly addressing the array of problems and possibilities associated with emerging forms of independent contracting.¹⁸ More specifically, this empirical study of Fair Labor Standards Act misclassification cases has two primary aims: (1) to gauge the diffusion of gig jobs in the U.S. economy; and (2) to quantify court rulings on minimum wage, overtime pay, and employment taxes that arise in misclassification cases. I analyze legal decisions involving claims by workers that they were misclassified as independent contractors. For misclassification cases in Westlaw's federal databases, I used a survey to extract data around these variables: (1) type of occupation, (2) type of legal claims, (3) remedy sought, (4) allegation of joint employment (if any), (5) federal or state court, (6) trial or appellate court, (7) winner of procedural court ruling (where given), (8) winner of merits ruling (where given), (9) joint employment ruling (where given), and (10) court's reasoning, broken into components of the factors used in the "economic realities" test. My analysis produced a series of empirical snapshots that capture the main features of misclassification cases. I have augmented these data with textual analysis of how courts arrive at their conclusions. The result is a comprehensive picture of emerging litigation trends.

The Fair Labor Standards Act¹⁹ (FLSA) is the primary subject in these misclassification cases. This federal law regulates methods for paying employees an hourly wage or a salary. The Depression-Era law is intended to protect the living standards of workers by prohibiting

¹⁸ See generally Miriam A. Cherry, *Beyond Misclassification: The Digital Transformation of Work*, 37 COMP. LAB. L. & POL'Y J. 577 (2015–16) (discussing current labor litigation issues in the gig economy and analyzing the "major issues . . . behind the cases and doctrinal labels"); Brishen Rogers, *Employment Rights in the Platform Economy: Getting Back to Basics*, 10 HARV. L. & POL'Y REV. 479 (2016) (arguing that workers in the gig economy, specifically Uber drivers, may not fit neatly into the existing categories of employee or independent contractor but the principles underlying these tests indicate that these workers should be treated as employees); Robert Sprague, *Worker (Mis)Classification in the Sharing Economy*, 31 A.B.A. J. LAB. & EMP. L. 53 (2015–16) (arguing that existing legal tests for determining if a worker is an employee are insufficient to address modern gig work); Lawrence F. Katz & Alan B. Krueger, *The Rise and Nature of Alternative Work Arrangements in the United States, 1995-2015* (Mar. 29, 2016), https://krueger.princeton.edu/sites/default/files/akrueger/files/katz_krueger_cws_-_march_29_20165.pdf [<https://perma.cc/6XWG-2L7L>] (providing data on the increase in alternative work arrangements and suggesting possible factors that have led to the increase).

¹⁹ Fair Labor Standards Act, Pub. L. No. 52 Stat. 1060 (1938), codified as amended at 29 U.S.C. §§ 201–19 (2014).

child labor and assuring employees a minimum wage and required overtime pay above forty hours of work each week.²⁰ The law excludes independent contractors.²¹ A key objective of this study is to determine whether companies are exploiting this exclusion to avoid minimum wage and overtime payments to workers. To this end, my study examines 284 court rulings in lawsuits where workers claimed that they were misclassified as independent contractors instead of being paid as employees. The results shed light on the degree of success that workers have in arguing that their work was misclassified for wage and hour purposes.

While these results are preliminary, they offer an unusual statistical image of the transformation of work in the American economy. Beyond this contemporary snapshot, I relate the results to a historical perspective of how work has been arranged and regulated by laws. Central to this discussion, I explore how the FLSA's wage system evolved. As I explain in my conclusions, one implication of my findings is that gig work incorporates some of the exploitative features of earlier work that Congress hoped that the FLSA would eliminate.²²

II. THE EVOLUTION OF WORK AND EMPLOYMENT REGULATION

In Part II, I briefly recount government regulation of wages and hours. This history puts the FLSA and misclassification cases in broader context. Over the centuries, twelve-hour workdays did little to relieve the worker from poverty. The early American work experience featured developments that pertain to current misclassification cases. Due to worker unrest among freemen, the federal government limited hours worked per day. But this had very limited scope. Others worked

²⁰ See *Druffner v. Mrs. Fields, Inc.*, 828 P.2d 1075, 1077 (Utah Ct. App. 1992) (quoting *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 706 (1945)) ("Congress enacted FLSA recognizing that, 'due to the unequal bargaining power' between employees and employers, mandatory legislation was necessary to prevent private contracts between employees and employers which endanger national health and commercial efficiency."). See also *Hogan v. Allstate Ins. Co.*, 361 F.3d 621, 625 (11th Cir. 2004) (explaining that the FLSA seeks "to eliminate 'labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (citation omitted).' In other words, the statute was designed to 'aid the unprotected, unorganized, and lowest paid of the nation's working population; that is, those employees who lacked sufficient bargaining power to secure for themselves a minimum subsistence wage'").

²¹ See 29 U.S.C. § 203(r)(1).

²² Before passage of the FLSA, labor agencies took advantage of low-skilled workers who were unemployed by charging them excessive fees to find menial work. See *Ribnik v. McBride*, 277 U.S. 350, 365 (1928) (Stone, J., dissenting) ("Fees are often charged out of all proportion to the service rendered. We know of cases where \$5, \$9, \$10, and even \$16 a piece has been paid for jobs at common labor. In one city the fees paid by scrubwomen is at the rate of \$24 a year for their poorly paid work."). Compare that outrageous practice with *Harris v. Skokie Maid & Cleaning Serv., Ltd.*, No. 11 C 8688, 2013 WL 3506149 (N.D. Ill. July 11, 2013), *infra* note 100 and accompanying text.

in America as slaves or servants, and debt labor was common before and after the Civil War. These situations did not implicate government restrictions on hours worked per day or week. I discuss them, however, to draw comparisons to current misclassification cases in which employers create debt obligations for workers in one-sided contracts. Misclassification cases do not repeat the extremes of poverty or servitude from earlier times, but my research shows that gig work contracts erode the FLSA's wage minimums and hour maximums by avoiding overtime pay and minimum wages.

A. Wage and Hour Laws

Due to labor scarcity in colonial America, wages were high.²³ Some communities attracted craftsmen by granting acreage and a house.²⁴ Colonies dealt with soaring labor rates by legislating wage caps.²⁵ Complaints of high labor costs marked the founding of the nation.²⁶

The origin of hour restrictions arose with shipbuilders who walked off the job due to the withdrawal of a usual incident of their jobs—grog. The dispute involved more than consumption; the end of rum at work also meant no time off for lunch. Thus, this new condition increased work time without more pay and rest, and without the mollifying effects of alcohol.²⁷ The impetus for shipbuilders to strike was their dissatisfaction with workdays that ran from sunrise to sunset.²⁸ By 1832, shipwrights and caulkers in Boston resolved not to work more than ten hours in a day, unless they were paid extra for overtime.²⁹ Their efforts were broken by a successful lockout, and appeal to other workers who were not organized as a union.³⁰ In the ensuing years, shipbuilding

²³ AMERICAN HISTORY TOLD BY CONTEMPORARIES 374 (Albert Bushnell Hart ed., Vol. 1) (indicating that Governor Winthrop of the Massachusetts Bay Colony complained that workers charged “excessive rates”).

²⁴ See WILLIAM B. WEEDEN, ECONOMIC AND SOCIAL HISTORY OF NEW ENGLAND, 1620–1789 81 (Vol. I 1901) (stating that Windsor, Connecticut offered a home and a shop to a currier if he remained in the town and provided services to the community).

²⁵ See JOSEPH B. FELT, AN HISTORICAL ACCOUNT OF MASSACHUSETTS CURRENCY 243–45 (1839) (listing a wage scale according to certain occupations); BUREAU OF LAB. STAT., U.S. DEP'T OF LAB., HISTORY OF WAGES IN THE UNITED STATES FROM COLONIAL TIMES TO 1928 9 (1934), https://fraser.stlouisfed.org/docs/publications/bls/bls_0604_1934.pdf [<https://perma.cc/LJ6U-LSNE>] (noting that the Massachusetts Bay Colony instituted pay caps for “[c]arpenters, [j]oiners, [b]ricklayers, [s]awyers and [t]hatchers”).

²⁶ JOHN B. MCMASTER, HISTORY OF THE PEOPLE OF UNITED STATES, FROM THE REVOLUTION TO THE CIVIL WAR 617–18 (Vol. II).

²⁷ TERENCE V. POWDERLY ET AL., THE LABOR MOVEMENT: THE PROBLEM OF T-DAY 333–34 (George E. McNeill ed., 1890).

²⁸ *Id.* at 333.

²⁹ *Id.* at 339–340.

³⁰ AM. BUREAU OF IND. RESEARCH, CARNEGIE INSTITUTE OF WASHINGTON, A DOCUMENTARY

workers in New York and Philadelphia appealed to the public to support their idea of a ten-hour workday.³¹

By 1840, the need for labor stability and peace in shipyards used by the federal government prompted President Martin Van Buren to order ten-hour workdays for people who worked on federally funded projects.³² The ten-hour day for laborers and mechanics on federally funded projects altered the usual practice of working eleven- and twelve-hour days.³³ Meanwhile, another method of payment to workers—piece rate—took hold in the early 1800s as craft unions set price lists with employers.³⁴ Near the middle of the century, semi-industrial crafts also set limits on their hours of employment.³⁵

By 1868, a federal statute set a limit of eight hours a day for employment on federal projects, but *United States v. Martin*³⁶ eviscerated the law. For decades, courts watered down the eight-hour workday for employees of federal contractors with miserly interpretations of the law.³⁷ In 1892, Congress passed the Eight Hour Law,³⁸ making it a misdemeanor for a contractor to employ anyone above that limit except for in an “extraordinary emergency.”³⁹

Some state laws strictly limited work hours. One approach criminalized employment based on excessive hours.⁴⁰ Some courts upheld

HISTORY OF AMERICAN INDUSTRIAL SOCIETY 86 (John R. Commons et al. eds., Vol. VI 1910).

³¹ POWDERLY ET AL., *supra* note 27, at 340–41.

³² *Id.*

³³ BUREAU OF LAB. STAT., U.S. DEP'T OF LAB., *Federal Limitation of Hours of Labor on Public Works*, 3 MONTHLY REV. U.S. BUREAU OF LAB. STAT. 116, 116 (1916) (stating that Van Buren's proclamation, extending to all projects funded by the U.S. government, sought to remove “much inconvenience and dissatisfaction” by “adopting a uniform course” that directed “all such persons, whether laborers or mechanics, be required to work prescribed by the ten-hour system”).

³⁴ BUREAU OF LAB. STAT., HISTORY OF WAGES, *supra* note 25, at 64 (noting that for cabinet-makers “[p]rices which could not be fixed by the 1834 scale were ‘to be settled by a committee of employers and journeymen’”).

³⁵ *Id.* at 78 (noting that sheet glass workers had a pay scale set for eight hours a day).

³⁶ 94 U.S. 400 (1876) (interpreting the 1872 wage law as a direction to its agents, federal contractors, while barring proceedings under the law against the government. The Supreme Court overturned this idea, reasoning that the claimant continued to work for twelve hours without protest, and therefore was bound by this contract).

³⁷ *United States v. Ollinger*, 55 F. 959 (S.D. Ala. 1893) (ruling that the law did not apply to a barge builder for the U.S. Corp of Engineers because the labor on the project was performed before the government inspected and accepted title to vessels). *But see United States v. Garbish*, 222 U.S. 257 (1911).

³⁸ Eight Hour Law, ch. 352, 27 Stat. 340 (1892), codified as amended at 40 U.S.C. § 321–23 (2016) (upheld in *Garbish*, 222 U.S. 257).

³⁹ *Id.*

⁴⁰ *Commonwealth v. Hamilton Mfg. Co.*, 120 Mass. 383 (1876) (upholding the constitutionality of a law that prohibited the employment of women and minors for more than sixty hours per week in manufacturing); *In re Ten-Hour Law for St. Ry. Corps.*, 54 A. 602 (R.I. 1902) (upholding a ten-hour daily limit on employment of street railway workers).

these laws.⁴¹ More significantly, however, the Supreme Court in *Lochner v. New York*⁴² barred a state from limiting hours set by employers for their employees.⁴³ Similar rulings struck down laws relating to minimum wages, maximum hours, child labor, and union membership.⁴⁴ Between *Lochner*, decided in 1905, and the implementation of the FLSA in 1938, courts produced mixed outcomes in state wage and hour cases.⁴⁵

By enacting the FLSA, Congress sought to eliminate “labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers”⁴⁶ and to ensure “all our able-bodied working men and women [receive] a fair day’s pay for a fair day’s work.”⁴⁷ This was accomplished by setting minimum wages⁴⁸ and requiring time-and-a-half wage payments for work over forty hours per week.⁴⁹ Congress intended that the FLSA maintain wage and hour standards for the welfare of workers.⁵⁰ They

⁴¹ See, e.g., *Holden v. Hardy*, 169 U.S. 366 (1898) (upholding Utah’s legislative authority to limit the employment of miners to eight hours each day due to health and safety concerns related to long-term exposure to air contaminants).

⁴² 198 U.S. 45 (1905) (striking down a New York law that criminalized employing bakers beyond sixty hours per week).

⁴³ The majority opinion reasoned: “The question whether this act is valid as a labor law, pure and simple, may be dismissed in a few words. There is no reasonable ground for interfering with the liberty of person or the right of free contract, by determining the hours of labor, in the occupation of a baker.” *Id.* at 57.

⁴⁴ See, e.g., *Adkins v. Children’s Hosp. of D.C.*, 261 U.S. 525 (1923) (striking down a federal statute that set minimum wage standards for women in the District of Columbia); *Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922) (striking down the federal Child Labor Tax Law); *Coppage v. Kansas*, 236 U.S. 1 (1915) (striking down a state law that criminalized discharge of an employee for being a union member); *Adair v. United States*, 208 U.S. 161 (1908) (striking down a federal statute that made it a misdemeanor to discharge an employee of an interstate carrier for being a union member).

⁴⁵ Compare, e.g., *Erie R.R. Co. v. Williams*, 233 U.S. 685 (1914) (upholding a state law that required semimonthly payment of wages), and *McLean v. Arkansas*, 211 U.S. 539 (1909) (upholding a state law requiring coal to be measured for payment of miners’ wages), and *Muller v. Oregon*, 208 U.S. 412 (1908) (upholding state law that limited the employment of women to ten hours per day), and *Knoxville Iron Co. v. Harbison*, 183 U.S. 13 (1901) (upholding a state law that required cash redemption of store orders issued as wage payments), and *State v. Somerville*, 122 P. 324 (Wash. 1912) (upholding a law that limited the employment of women in manufacturing, hotels, and restaurants to eight hours a day), and *Commonwealth v. Riley*, 97 N.E. 367 (Mass. 1912) (upholding a Massachusetts law that limited employment of women in manufacturing to fifty-six hours per week and ten hours per day), with, e.g., *Lochner*, 198 U.S. 45.

⁴⁶ 29 U.S.C. § 202(a).

⁴⁷ Jonathan Grossman, *Fair Labor Standards Act of 1938: Maximum Struggle for a Minimum Wage*, 101 MONTHLY LAB. REV. 22, 25 (June 1978).

⁴⁸ See 29 U.S.C. § 206(a).

⁴⁹ See 29 U.S.C. § 207(a)(1).

⁵⁰ See *Brooklyn Sav. Bank v. O’Neil*, 324 U.S. 697, 707, n. 18 (1945). See also 29 U.S.C.A. § 202 (congressional findings and declaration of policy for FLSA) (finding “labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general

used this broad term to ensure standards for payment of work related to employment while narrowing the use of independent contracting.⁵¹

III. RESEARCH METHODS AND RESULTS

A. The Sample

Gig jobs appear to rely on an explicit or implicit contracting arrangement by which people who perform a service for pay are compensated outside the bounds of the employment relationship. While numerous anecdotes paint that picture, my study aims to test that proposition with an empirical examination of cases that arise under the FLSA.

Thus, I created a database of court rulings involving wage and hour issues that arose in misclassification cases. In these lawsuits, workers alleged that companies or individuals unlawfully classified them as independent contractors to avoid paying minimum wages and overtime. I use “worker” as a neutral descriptor that straddles the conflicting positions of plaintiffs and defendants who respectively use the terms “employee” and “independent contractor.”

I used a basic keyword search to identify misclassification cases under the FLSA.⁵² To be in the sample, a case alleged that one or more workers were not paid minimum wages, or overtime, or both, because they were classified as independent contractors. This approach produced mostly federal cases. Each valid case was added to a roster. New cases were checked to avoid duplication.

As I read cases, I completed a survey that translated text into descriptive data. I used a U.S. Department of Labor classification system for occupations to code the type of work. This schema divided work into twenty-two categories.⁵³ For court rulings, I recorded procedural and merits outcomes—specifically, whether plaintiffs or defendants won a procedural motion, or a ruling on the merits. For the latter, I recorded

well-being of workers”).

⁵¹ Message of the President of the United States, May 24, 1937, H.R. REP. NO. 75-1452, at 5–7 (1937).

⁵² The search terms were “independent contractor” and “employee” and “Fair Labor Standards Act.”

⁵³ BUREAU OF LAB. STAT., U.S. DEP’T OF LAB., *Occupational Employment Statistics: Major Groups*, http://www.bls.gov/oes/current/oes_stru.htm [<https://perma.cc/H28H-PNRS>] (listing the following categories: management; business and financial operations; computer and mathematical; architecture and engineering; life, physical, and social science; community and social service; legal; education, training, and library; arts, design, entertainment, sports, and media; healthcare practitioners and technical; healthcare support; protective service; food preparation and related serving; building and grounds cleaning and maintenance; personal care and service; sales and related; office and administrative support; farming, fishing, and forestry; construction and extraction; installation, maintenance, and repair; production; and transportation and material moving).

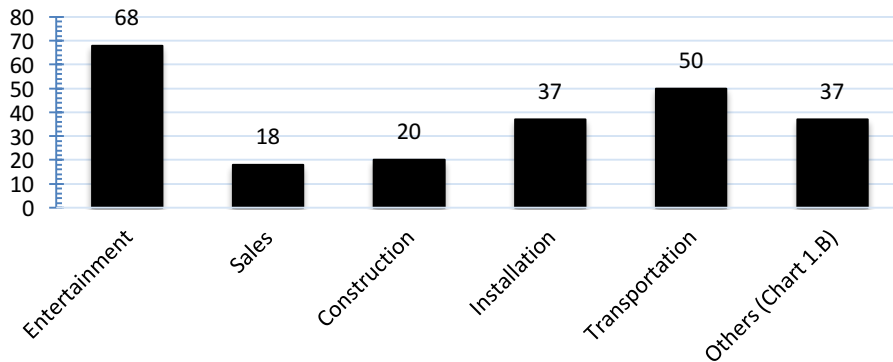
whether a court ruled that plaintiffs were independent contractors or employees.

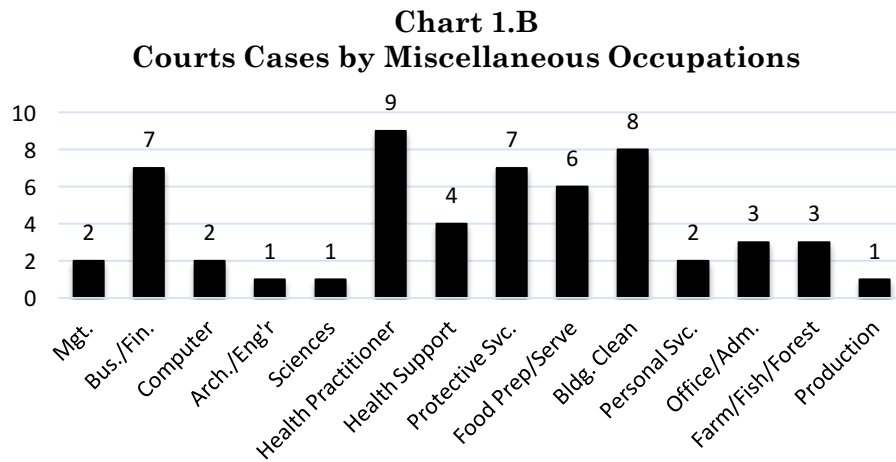
B. Data and Fact Findings

My sample contained 253 cases decided from 1986 through 2016. In the thirteen years from 1986 through 1999 only 4.3% of the cases were decided; in the next ten years, from 2000 to 2009, 27.7% of the cases were decided; and in the seven years from 2010 to 2016 courts decided 68% of these cases. I refer to “first rulings” because many cases were decided by a federal magistrate judge. Occasionally, their rulings were appealed to a district court judge. Other cases were district court rulings that were decided by an appeals court. My generic use of “first” and “second” ruling captured the sequence of litigation outcomes, regardless of the type of judge or court that ruled. In other words, these terms avoided the erroneous implication that district courts that made a second ruling were acting as federal courts of appeals. In addition to 253 first rulings, a district or appellate court made a second ruling in 30 cases. Thus, my sample produced a total of 284 court rulings.

My data presentation is organized in several charts from which I extrapolate fact-findings. Charts 1.A and 1.B relate to the occupations involved in these misclassification cases, while Charts 2.A and 2.B show how often courts ruled that plaintiffs were employees or independent contractors. Many cases involved only a procedural ruling. These data are also presented to give a more complete picture of this litigation.

Chart 1.A
Court Cases by Most Common Occupations





Fact Finding 1: Misclassification cases occur across a broad spectrum of occupations—specifically, twenty out of twenty-two Department of Labor work classifications.⁵⁴ While the facts vary in these cases, this finding suggests that a diverse group of companies use unlawful work strategies that fail to pay minimum wages, overtime, and related government payments that are required in an employment relationship. The result is that many companies work people without utilizing the employment relationship.

Fact Finding 2: The highest concentration of misclassification cases occurs in low-skill occupations. Most misclassification cases occur in low-skill occupations: entertainment (sixty-eight cases), transportation (fifty cases), and installation (thirty-seven cases). In the entertainment classification, every case involved exotic dancers, a group that I include with low-skilled jobs. The dancers were paid tips by patrons but no wages by the club, and the club often charged dancers rent for stage time and use of a dressing room.⁵⁵ The high number of cases reflects the decentralized ownership of clubs combined with plaintiff law firms that view these as likely winners. For the transportation cases, only one came from Uber.⁵⁶ Due to concerns about oversampling

⁵⁴ Categories for production, sciences, and architects and engineers had only one case in my sample. Thus, the widespread diffusion of cases across Department of Labor categories should not be over-interpreted to mean that most jobs are prone to employer misclassification for FLSA purpose. These categories, in particular, often involve occupations that are exempt under FLSA for minimum wages and overtime pay because the law's wage and hour requirements do not generally apply to professional employees. Thus, it is not surprising to see few cases for these occupations.

⁵⁵ See, e.g., *D'Antuono v. Serv. Rd. Corp.*, 789 F. Supp. 2d 308, 314 (D. Conn. 2011) (explaining that a dancer signed an "Entertainment Lease" when she began to work for the club).

⁵⁶ *O'Connor v. Uber Techs, Inc.*, 58 F. Supp. 3d 989 (N.D. Cal. 2015).

from one company facing unusually complex and overlapping litigation, I excluded other Uber cases from the sample.⁵⁷ The diversity of these cases is striking, including parcel couriers,⁵⁸ limousine drivers,⁵⁹ ride share drivers,⁶⁰ truckers,⁶¹ and mortuary drivers.⁶² Installation cases mostly involved technicians who were dispatched to connect a consumer to an internet or cable TV service,⁶³ though the category also included installers for drywall, windows and doors.⁶⁴

Fact Finding 3: Some misclassification cases involve white-collar jobs that were previously treated as employment. The sample contains nine cases with healthcare workers who provided ultrasound exams, nursing, and related patient care,⁶⁵ and seven cases with workers who provided financial services and insurance.⁶⁶ In some cases, plaintiff complaints went beyond failure to pay overtime and also alleged that firms charged them to rent office cubicles, phone lines, and secretarial services.⁶⁷ These practices may represent over-reaching by firms, going beyond avoiding payment of wages and employment taxes to making individuals bear the firm's costs of doing business.

Fact Finding 4 (Chart 2.A): When ruling on the merits of a misclassification case, courts usually find that plaintiffs are employees. In first court rulings, 103 cases ruled that plaintiffs were employees compared to forty cases where plaintiffs were properly classified

⁵⁷ Uber litigation appears to be different from most cases in the sample because it reflects an incremental strategy to extract settlements by suing in different states over very narrow payment issues such as employee tips. *Compare* the Uber case in this sample (*Id.* (suit for recovery of service charge under California law)); *Lavitman v. Uber Techs., Inc.*, No. SUCV201204490, 2015 WL 728187 (Mass. Jan. 26, 2015) (lawsuit to recover tips under Massachusetts law); *and Yucesoy v. Uber Techs., Inc.*, No. C-15-0262 EMC, 2015 WL 4571547 (N.D. Cal. July 28, 2015) (lawsuit by Massachusetts Uber drivers seeking extra-territorial application of ruling in *O'Connor* under California law).

⁵⁸ *Holliday v. J.S. Express*, No. 4:12CV01732 ERW, 2013 WL 2395333 (E.D. Mo. May 30, 2013) (granting conditional class certification for more than 1200 courier drivers in thirteen states).

⁵⁹ *Rossi v. Associated Limousine Servs., Inc.*, 438 F. Supp. 2d 1354 (S.D. Fla. 2006).

⁶⁰ *O'Connor*, 58 F. Supp. 3d 989.

⁶¹ *Blair v. Transam Trucking, Inc.*, No. 09-2443-EFM-DWB, 2014 WL 1308850 (D. Kan. Mar. 31, 2014).

⁶² *Johnson v. Serenity Transp., Inc.*, 141 F. Supp. 3d 974 (N.D. Cal. 2015).

⁶³ *Doucette v. DIRECTV, Inc.*, No. 2:14-cv-02800-STA-tmp, 2015 WL 2373271 (W.D. Tenn. May 18, 2015).

⁶⁴ *Chao v. Westside Drywall, Inc.*, 709 F. Supp. 2d 1037 (D. Ore. 2010).

⁶⁵ *Werner v. Bell Family Med. Ctr., Inc.*, No. 3:09 C 0701, 2012 WL 3284789 (M.D. Tenn. Aug. 10, 2012); *Bamgbose v. Delta-T Grp.*, 684 F. Supp. 2d 660 (E.D. Pa. 2010) (denying certification for a prospective class comprised 11,000 contract workers employed by a temporary healthcare staffing agency).

⁶⁶ *See, e.g., Heeg v. Adams Harris, Inc.*, 907 F. Supp. 2d 856 (S.D. Fla. 2012).

⁶⁷ *Fossum v. Nw. Mut. Life Ins. Co.*, No. C 10-2657 SI, 2010 WL 11054415 (N.D. Cal. Sept. 16, 2010).

as independent contractors. In other words, courts ruled in favor of employee status in seventy-two percent of these 143 cases. Rulings on appeal were infrequent. In merits cases, twelve courts ruled that plaintiffs were employees and twelve courts ruled that they were independent contractors (fifty percent for employee status).

Chart 2.A
Rulings in Employee Misclassification Cases



Fact Finding 5 (Chart 2.B): In recent cases (2012–2016), courts rule more frequently that plaintiffs are employees compared to older cases (1986–2011). The sample was divided evenly between early and newer cases (1986–2011; 2012–2016). In the older cases, forty-seven courts ruled that plaintiffs were employees, compared to twenty-five cases that found an independent contractor relationship. Thus, in these seventy-two cases, courts ruled for employee status in 65.3% of their merits rulings. In recent cases, courts ruled that plaintiffs were employees in fifty-six cases, and independent contractors in fifteen cases. Thus, in these seventy-one cases, courts ruled in favor of employee status in 78.9% of the cases (an increase of 13.6 percentage points).

Chart 2.B
Recent Trend Favors Employees



IV. BEYOND STATISTICS: CONCLUSIONS AND IMPLICATIONS

My research offers an empirical picture of FLSA misclassification cases. In this concluding section, I expand on these statistical results and also explore their implications.

First, employer misclassification of workers is widespread, as evidenced by the finding that these cases occurred in twenty out of twenty-two of the Department of Labor's work categories. These jobs spanned diverse industries and labor markets, including telecommunications (cable⁶⁸ and fiber optic installers⁶⁹); cleaning (maids⁷⁰ and janitors⁷¹);

⁶⁸ *Bennett v. Unitek Glob. Servs., LLC*, No. 10 C 4968, 2013 WL 4804841 (N.D. Ill. Sept. 9, 2013).

⁶⁹ *Deras v. Verizon Md., Inc.*, No. DKC 09-0791, 2010 WL 3038812 (D. Md. July 30, 2010).

⁷⁰ *Harris v. Skokie Maid & Cleaning Serv., Ltd.*, No. 11 C 8688, 2013 WL 3506149 (N.D. Ill. July 11, 2013).

⁷¹ *Quinteros v. Sparkle Cleaning, Inc.*, No. AW-07-0628, 2010 WL 3000865 (D. Md. July 26, 2010).

protective services (security guards⁷² and police⁷³); construction (dry-wall installers,⁷⁴ window and door installers,⁷⁵ carpenters,⁷⁶ painters,⁷⁷ HVAC technicians,⁷⁸ and welders⁷⁹); health care (nurses⁸⁰ and ultrasound technicians⁸¹); distribution (warehouse workers⁸² and delivery workers⁸³); local transportation (school bus drivers,⁸⁴ cabbies,⁸⁵ and ride share drivers⁸⁶); industrial (garment workers,⁸⁷ and restoration of aircraft wings⁸⁸); computer work (repair technicians,⁸⁹ web design,⁹⁰ and internet-based work⁹¹); entertainment (exotic dancers⁹²); and management (accounting and auditing⁹³).

One implication is that gig work is replacing traditional jobs. Others have observed this trend,⁹⁴ but my research shows that many gigs are former jobs that have been engineered by companies in self-serving contracts to bypass employment law. Often, the apparent aim is to avoid payment of wages and remittance of employment taxes. The work of

⁷² Grenawalt v. AT&T Mobility, LLC, 937 F. Supp. 2d 438 (S.D.N.Y. 2013).

⁷³ Perez v. Off-Duty Police Servs., Inc., No. 3:13-cv-00935-DJH, 2015 WL 4068392 (W.D. Ky. July 2, 2015).

⁷⁴ Mendoza v. Essential Quality Constr., Inc., 691 F. Supp. 2d 680 (E.D. La. 2010).

⁷⁵ Calle v. Chul Sun Kang Or., No. DKC 11-0716, 2012 WL 163235 (D. Md. Jan. 18, 2012).

⁷⁶ Luna-Reyes v. RFI Constr., LLC, 109 F. Supp. 3d 744 (M.D.N.C. 2015).

⁷⁷ Montoya v. S.C.C.P. Painting Contractors, Inc., 589 F. Supp. 2d 569 (D. Md. 2008).

⁷⁸ Cherichetti v. PJ Endicott Co., 906 F. Supp. 2d 312 (D. Del. 2012).

⁷⁹ Baker v. Flint Eng'g & Constr. Co., 137 F.3d 1436 (10th Cir. 1998).

⁸⁰ Barfield v. N.Y.C. Health and Hosps. Corp., 537 F.3d 132 (2d Cir. 2008); LeMaster v. Alternative Healthcare Sols., Inc., 726 F. Supp. 2d 854 (M.D. Tenn. 2010).

⁸¹ Werner v. Bell Family Med. Ctr., Inc., No. 3:09 C 0701, 2012 WL 3284789 (M.D. Tenn. Aug. 10, 2012).

⁸² Carrillo v. Schneider Logistics Trans-Loading and Distrib., Inc., No. 2:11-cv-8557-CAS (DTBx), 2014 WL 183956 (C.D. Cal. Jan. 14, 2014).

⁸³ Collinge v. Intelliquick Delivery, Inc., No. 2:12-cv-00824 JWS, 2015 WL 1299369 (D. Ariz. Mar. 23, 2015); Ansoumana v. Gristede's Operating Corp., 255 F. Supp. 2d 184 (S.D.N.Y. 2003) (delivery for supermarkets and drug stores).

⁸⁴ Solis v. Kansas City Transp. Group, No. 10-0887-CV-W-REL, 2012 WL 3753736 (W.D. Mo. Aug. 28, 2012).

⁸⁵ Callahan v. City of Chicago, 78 F. Supp. 3d 791 (N.D. Ill. 2015).

⁸⁶ O'Connor, 58 F. Supp. 3d 989.

⁸⁷ Zheng v. Liberty Apparel Co. Inc., 355 F.3d 61 (2d Cir. 2003).

⁸⁸ Venegas v. Glob. Aircraft Service, Inc., 159 F. Supp. 3d 93 (D. Me. 2016).

⁸⁹ Boudreaux v. Banctec, Inc., 366 F. Supp. 2d 425 (E.D. La. 2005).

⁹⁰ Escobar v. GCI Media, Inc., No. 08-21956-Civ, 2009 WL 1758712 (S.D. Fla. June 22, 2009).

⁹¹ Otey v. Crowdfunder, Inc., No. 12-cv-05524-JST, 2016 WL 304747, at *2 (N.D. Cal. Jan. 26, 2016) (approving a settlement for \$585,507).

⁹² Doe v. New Ritz, Inc., No. WDQ-14-2367, 2015 WL 4389699 (D. Md. July 14, 2015).

⁹³ Heeg v. Adams Harris, Inc., 907 F. Supp. 2d 856 (S.D. Fla. 2012).

⁹⁴ See, e.g., John Gapper, *New 'Gig' Economy Spells End to Lifetime Careers*, FIN. TIMES (Aug. 5, 2015), <https://www.ft.com/content/ab492ffc-3522-11e5-b05b-b01debd57852> [https://perma.cc/U4VV-KEZW].

nursing assistants is a case in point. Some hospitals use multiple staffing agencies to avoid employing nurses.⁹⁵ As the nurses work for several middlemen, each with their own overtime limits, the nurses accumulate more than forty hours of work in a week at the same hospital.⁹⁶ However, the labor contracting system fragments their work to defeat overtime payments. Beyond these health care examples, my research uncovered a wide variety of coercive contracting arrangements that demonstrate that some gig jobs are little more than schemes to cheat workers out of pay.⁹⁷

Second, the FLSA remains a bulwark for ensuring that work is paid as part of an employment relationship. This implies that companies should be wary of replacing jobs with gig work. The fact that work is only temporary and involves individual control over working hours is not a substitute for the multi-factor test that courts consistently apply in misclassification cases.⁹⁸ When companies misclassify workers, they often pay large damages.⁹⁹

⁹⁵ See *Barfield v. N.Y.C. Health and Hosps. Corp.*, 537 F.3d 132 (2d Cir. 2008). Anetha Barfield, a certified nursing assistant, sued Bellevue Hospital, the nation's oldest public hospital, for overtime. *Id.* at 136. She performed work regularly at the hospital, not as its employee, but as a contract worker through multiple agencies. *See id.* at 135. When she worked more than forty hours per week, her time was divided among several agencies, all of whom required her to sign a contractor agreement that limited her work to less than forty hours in each week. *See id.* at 136–37. Essentially, this clever system took a regular nursing job with consistent work hours, inserted labor contractors as middlemen with overtime limits, with the net result that Barfield worked a series of “gigs” in disregard of the sum total of her accumulated hours for her employment at Bellevue.

⁹⁶ *See id.* at 136.

⁹⁷ See, e.g., *Hughes v. Family Life Care, Inc.*, 117 F. Supp. 3d 1365 (N.D. Fla. 2015) (noting that, while company treated Hughes as an independent contractor, management subjected her to constant supervision and feedback mechanisms such as visit reports and incident reports); *Scantland v. Jeffrey Knight, Inc.*, No. 8:09-CV-1985-T-17-TBM, 2012 WL 1080361 (M.D. Fla. Mar. 29, 2012) (noting that, while company treated workers as independent contractors and justified this status on basis of a thirty-day termination notice in their independent contracting agreements, workers averaged more than five years with company); *Collinge*, 2015 WL 1299369 (company subjected drivers to a high degree of control, including detailed dress code, tight scheduling windows, and use of company technology and business practices); *Wandrey v. CJ Professional Satellites, Inc.*, No. 5:14-CV-05087, 2014 WL 4425799 (W.D. Ark. Sept. 9, 2014) (company usually paid workers for each assignment but occasionally required individual to perform service calls without any pay); *Adami v. Cardo Windows, Inc.*, 299 F.R.D. 68 (D.N.J. 2014) (individual worked for the company from 2003 through 2011 and was required to provide his own workers compensation coverage, but classified as an independent contractor).

⁹⁸ See, e.g., *Baker v. Flint Eng'g & Constr. Co.*, 137 F.3d 1436, 1439 (10th Cir. 1998) (holding that welders were employees). In reaching this conclusion, the court noted that the plaintiffs rarely worked for a construction company more than three months in a year. *Id.* at 1442. However, instead of focusing on these short and periodic bursts of work, the court emphasized that they stayed on the job until the necessary welding was completed. *Id.*

⁹⁹ See, e.g., *Harris v. Skokie Maid & Cleaning Serv., Ltd.*, No. 11 C 8688, 2013 WL 3506149, at *11 (N.D. Ill. July 11, 2013) (imposing liquidated damages of \$250,946.72); see also David W. Croysdale & Anne M. Carroll, *A \$21 Million Lesson for Joint Employers*, NAT'L L. REV. (June 16, 2014), <http://www.natlawreview.com/article/21-million-lesson-joint-employers> [<https://perma.cc/>

Third, some gig work resembles earlier debt labor systems. In a recent case, maids were required to deposit wages with a labor contractor as a security against quitting without adequate notice and were subjected to non-compete contracts that bound them to pay \$2000 in damages.¹⁰⁰ This compares to the domestic servant who was forced into peonage in New Mexico in the mid-1800s after she breached her work contract and defaulted on a labor bond.¹⁰¹ In other cases, exotic dancers signed leases to rent work space in their clubs.¹⁰² Cable technicians rented a company's equipment and tools and also agreed to pay reductions.¹⁰³ Financial advisors paid fees to their company for a cubicle, telephone, computer, faxes, parking space, and marketing materials.¹⁰⁴ FedEx delivery drivers leased vans and trucks and were required to pay for maintenance, vehicle insurance, and other expenses usually paid by a delivery company that exclusively controls a driver's routes.¹⁰⁵

These arrangements resemble loan and lease agreements by merchants and landowners that exploited sharecroppers in the post-Civil War South.¹⁰⁶ Contractors who trafficked, harbored, and supplied immigrant janitors to Wal-Mart stores¹⁰⁷ resemble the employers who used the credit ticket work-around system to bond Chinese coolie labor in California during the late-1800s after courts refused to enforce debt servitudes.¹⁰⁸ In both situations, labor contractors trafficked and imported workers for end-user employers.

J37L-HEDN] (reporting that Schneider Logistics Inc. settled a misclassification lawsuit for \$21 million).

¹⁰⁰ *Harris*, 2013 WL 3506149, at *9.

¹⁰¹ *Jaremillo v. Romero*, 1 N.M. 190, 192–93 (1857) (“Yet the justice describes Mariana as a servant who had abandoned the work or service of her master while owing the sum of fifty-one dollars and seventy-five cents, before advanced to her. The transcript shows that at the time of trial Mariana did not appear, and that, upon the motion of the plaintiff, the justice rendered judgment against Mariana for twenty-six months of work as a servant . . . In the district court the case was tried *de novo*, and the court adjudged that the plaintiff recover of the said defendant, Mariana Jaremillo, and of Domingo Fernandez Luz Jaremillo and Juan Miguel Ortego, the securities on her appeal bond, the sum of fifty-six dollars and twenty-one cents; and also the costs of this suit to be taxed, and in default of payment hereof that she be held to serve her said master, Jose de la Cruz Romero, as a peon until said sum of money is paid.”).

¹⁰² *D’Antuono v. Serv. Rd. Corp.*, 789 F. Supp. 2d 308, 314 (D. Conn. 2011).

¹⁰³ *Swinney v. AMcomm Telecomms., Inc.*, 30 F. Supp. 3d 629 (E.D. Mich. 2014).

¹⁰⁴ *Fossum v. Nw. Mut. Life Ins. Co.*, No. C 10–2657 SI, 2010 WL 11054415 (N.D. Cal. Sept. 16, 2010).

¹⁰⁵ *Craig v. FedEx Ground Package Sys., Inc.*, 734 F. Supp. 2d 557 (N.D. Ind. 2010).

¹⁰⁶ See Roger L. Ransom & Richard Sutch, *Debt Peonage in the Cotton South after the Civil War*, 32 J. ECON. HIST. 641 (1972) (describing how merchants and banks exploited the labor of small farmers).

¹⁰⁷ *Zavala v. Wal-Mart Stores, Inc.*, No. 2:10–05301 (WJM), 2013 WL 3828414 (D.N.J. July 23, 2013). The workers came from Uzbekistan, Georgia, Armenia, Estonia, Russia, Bulgaria, Mongolia, Lithuania, Poland, and the Czech Republic.

¹⁰⁸ Patricia Cloud & David W. Galenson, *Chinese Immigration and Contract Labor in the Late*

Finally, the upsurge in procedural rulings highlights the preliminary nature of this study. One clear trend is the growing number of FLSA misclassification cases that seek class action status.¹⁰⁹ Also, the plaintiff bar appears to be pursuing the most winnable misclassification situations. The high number of exotic dancer cases, combined with the exceptional win-rate by plaintiffs, is a case in point.¹¹⁰ Courier cases are similar: they are growing in number, involve no specialized skill, and often confer exclusive benefit to the company. My study does not show, however, the point where these “low hanging fruit” situations inhibit the plaintiff bar from pursuing misclassification actions. Nonetheless, considering that nearly sixty percent of the labor force works in jobs that the Department of Labor estimates to be subject to FLSA’s wage and hour provisions,¹¹¹ the future will likely bring more misclassification cases.

Putting this study in broader context, my findings should temper enthusiasm for gig work. Certainly, new technologies and individual attitudes about flexible work arrangements justify reconsideration of the FLSA’s rigid treatment of independent contracting. But the vast majority of cases in my study did not involve work that was instantaneously brokered by a mobile phone app, nor did these cases involve workers who were content with piece rate compensation. Overall, the plaintiffs here performed work without overtime pay and in some cases without minimum wages. They insisted on wages secured by federal and state laws from companies that appear to have taken advantage of their weak or nonexistent bargaining power. And that says nothing for the moral hazard implied by these illicit work arrangements: even when plaintiffs won these cases and were awarded damages, these companies may have gotten away without paying back-Social Security taxes, workers compensation, and mandated health insurance. In other words, it appears likely that a substantial number of these companies added to the severe strain on these safety-net systems by misclassifying workers. Before gig

Nineteenth Century, 24 EXPLORATIONS ECON. HIST. 22 (1987). Due to difficulties in enforcing debt labor servitudes, brokers in California devised a work around by using a credit-ticket system to import Chinese laborers. Brokers advanced the cost of voyage but instead of binding the worker for years to work off their debt, the brokers retained a lien on the worker’s services until the debt was repaid. *Id.* at 24–26.

¹⁰⁹ See, e.g., *Barfield v. N.Y.C. Health and Hosps. Corp.*, 537 F.3d 132 (2d Cir. 2008); *Zheng v. Liberty Apparel Co. Inc.*, 355 F.3d 61 (2d Cir. 2003); *Heeg v. Adams Harris, Inc.*, 907 F. Supp. 2d 856 (S.D. Fla. 2012); *Craig*, 734 F. Supp. 2d 557.

¹¹⁰ See generally Michael H. LeRoy, *Bare Minimum: Stripping Pay for Independent Contractors in the Share Economy*, 23 WM. & MARY J. WOMEN & L. 249 (2017).

¹¹¹ BUREAU OF LAB. STAT., U.S. DEP’T OF LAB., CHARACTERISTICS OF MINIMUM WAGE WORKERS 1 (Apr. 2015), <http://www.bls.gov/opub/reports/minimum-wage/archive/characteristics-of-minimum-wage-workers-2014.pdf> [<https://perma.cc/49W6-BH82>] (stating that in 2014, 77.2 million U.S. workers were paid at hourly rates (58.7% of all wage and salary workers)).

work is celebrated as the wave of the future, there are serious questions to answer about ensuring living wages for workers and obligating gig companies to bear societal costs associated with work that currently burden employers.