University of Chicago Legal Forum

Volume 2017 Article 17

2018

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## INTRODUCTION

Although by no means a new question regarding retirement, the noteworthy growth of "gig companies"[1] in the "sharing economy,"[2] has renewed concerns that even more American workers will lack access to employment-based retirement plans.[3] The gig economy, however, does "offer[] workers advantages including more independence and flexibility, . . . company-sponsored retirement saving is not one of them."[4] This is a "dangerous" state of affairs as employment-based

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[1] Gig companies have been "defined as relying on the internet to match buyers and sellers of services." Robert J. Samuelson, *Is the Gig Economy the Labor Market's New Reality? Nope*, WASH. POST (Sept. 2, 2016), http://www.sandiegouniontribune.com/opinion/commentary/sdut-gig-economy-robert-samuelson-2016sep02-story.html [https://perma.cc/L4SM-HWAS]; *see also* Shu-Yi Oei & Diane Ring, *The Tax Lives of Uber Drivers: Evidence from Internet Discussion Forums*, 8 COLUM. J. TAX L. 56 (2017) (discussing "meteoric rise of Uber Technologies, Inc.," a ride-sharing company, including the fact that it has more than 160,000 drivers who have received $656.8 million in payments from Uber in the last three months of 2014, and that Uber has provided one billion rides worldwide as of the end of 2015).

[2] The sharing economy refers to a "new model of production and consumption of goods and services often referred to as 'sharing.'" Oei & Ring, *supra* note 1. Other terms for "sharing economy" include: "'the disaggregated economy,' 'the peer-to-peer economy' (P-2-P), 'the human-to-human economy' (H-2-H), 'the community marketplace,' 'the on-demand economy,' 'the App economy,' 'the access economy,' 'the mesh economy,' 'the gig economy,' and also, 'the Uberization of everything.'" *See* Orly Lobel, *The Law of the Platform*, 101 MINN. L. REV. 87, 89 (2016).

[3] Sixty-six percent of 114 million private-sector workers have access to a retirement plan through work. Therefore, 34% of 114 million private-sector workers (39 million) do not have access to a retirement plan through work. *See* US DEP'T OF LAB., BUREAU OF LAB. STAT., EMPLOYEE BENEFITS IN THE UNITED STATES — MARCH 2016 (2016), http://www.bls.gov/news.release/pdf/ebs2.pdf [https://perma.cc/VL4E-CPGJ].

[4] *See* Mark Henricks, *Retirement Plans for the Gig Economy*, MAIN ST. (Feb. 29, 2016), https://www.mainstreet.com/article/retirement-plans-for-the-gig-economy [https://perma.cc/3G3M-GM3Y].

retirement plans make up a critical part of an individual's strategy for retirement security.[5]

Such retirement plans, like the nearly-ubiquitous 401(k) plans,[6] provide a necessary bulwark against destitution in old age. This is especially so given that Social Security provides only partial income replacement,[7] and that few Americans have put away much in private savings.[8] Yet independent contractors, which are how most gig companies classify their workers,[9] are approximately two-thirds less likely than standard employees to have access to an employer-provided retirement plan.[10] Much academic and judicial ink has already been spilt over whether Uber drivers and other members of the sharing economy are independent contractors or employees.[11] This classification is of utmost importance because it largely determines whether gig workers are covered by employment laws, as most such laws center on the employer-employee relationship.[12]

Surveys have indicated that a significant number of gig workers want—and need—to have employer-based retirement plans.[13] Into the

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[5] *See* Paul M. Secunda & Brendan S. Maher, *Pension De-Risking*, 93 WASH. U.L. REV. 733, 734 (2016) ("Retirement planning is not only difficult, but also dangerous. It is dangerous for individuals because poor planning can mean post-employment penury.").

[6] 401(k) plans are defined contribution (DC) pension plans in which employees may defer a percentage of their salary into a tax-preferred individual account held in trust. *See id.* at 735.

[7] *See* Mark Miller, *How to Improve Your Retirement Income if You Haven't Saved*, N.Y. TIMES (Oct. 7, 2016), http://www.nytimes.com/2016/10/08/your-money/retirement-savings-income-social-security.html?smprod=nytcore-iphone&smid=nytcore-iphone-share&_r=0 [https://perma.cc/S8VN-EQMY].

[8] *See* Matthew Frankel, *Here's the Average American's Savings Rate*, MOTLEY FOOL (Oct. 3, 2016), http://www.fool.com/investing/2016/10/03/heres-the-average-americans-savings-rate.aspx [https://perma.cc/2WLB-A5NZ] ("According to the latest data from the U.S. Bureau of Economic Analysis, the personal saving rate in the United States is 5.7% . . . This is far too low to adequately prepare most people for retirement and unexpected expenses . . . Most experts recommend saving at least 10% to 15% of your income.").

[9] *See* Veena Dubal, *Wage Slave or Entrepreneur?: Contesting the Dualism of Legal Worker Identities*, 105 CAL. L. REV. 101, 103 (2017).

[10] *See* U.S. GOV'T ACCOUNTABILITY OFF., CONTINGENT WORKFORCE: SIZE, CHARACTERISTICS, EARNINGS, AND BENEFITS 6 (Apr. 20, 2015), http://www.gao.gov/assets/670/669766.pdf [https://perma.cc/T4HE-A35R].

[11] For a sampling of recent cases regarding gig worker classification issues, see Cotter v. Lyft, Inc., 176 F.Supp.3d 930 (N.D. Cal. 2016); O'Connor v. Uber Technologies, Inc., 311 F.R.D. 547 (N.D. Cal. 2013); Berwick v. Uber Technologies, Inc., No. 11-46739 EK, 2015 WL 4153765, at *1-8 (Cal. Dept. Lab. June 3, 2015), *aff'd* No. CGC-15-546378 (Cal. Super. Ct. June 16, 2015). For a sampling of academic scholarship on the employee/independent contractor debate over the years, see generally Benjamin Means & Joseph A. Seiner, *Navigating the Uber Economy* 49 U.C. DAVIS L. REV. 1511, 1513 (2016) (citing various articles taking different approaches).

[12] Means & Seiner, *supra* note 11, 1513–14 ("Employees cost more than independent contractors because businesses are responsible for . . . payroll taxes, workers' compensation insurance, health care, minimum wage, overtime, and the reimbursement of business-related expenses.").

[13] *See* WILLIAM G. GALE, SARAH E. HOLMES & DAVID C. JOHN, BROOKINGS INSTITUTION,

breach, a number of proposals have emerged to provide "independent workers" or "independent contractors," who work for gig companies, with some form of portable, occupational retirement benefit.[14] These proposals are certainly praiseworthy for recognizing a substantial problem: the need to provide gig workers with portable retirement security given the sporadic, non-exclusive, frequently part-time nature of most of this work.[15] However, most of the extant proposals concede a critical point by concluding that gig workers are *not* employees but rather some type of independent contractor, for purposes of employment law.[16]

Although a number of other papers have considered the consequences of gig work on labor and employment laws,[17] this is the first article to establish why it is essential that individuals who work in the sharing economy be considered common law employees for retirement purposes. By being common law employees, these workers qualify for consumer protections under the *Darden* test of the Employee Retirement Income Security Act of 1974 (ERISA).[18] Not only would gig workers thereby qualify for fiduciary, disclosure, vesting, and other important ERISA-specific protections, but ERISA also provides an ideal pension structure that works well with the itinerant, sporadic, non-exclusive nature of gig work.[19]

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RETIREMENT PLANS FOR CONTINGENT WORKERS: ISSUES AND OPTIONS 8 (Sept. 23, 2016), https://www.brookings.edu/wp-content/uploads/2016/08/rsp923paper1.pdf [https://perma.cc/W374-VSED] ("[R]ecent survey indicated that 31 percent of the users of a specific software product said that their main concern as an independent worker was a lack of employer-sponsored benefits.").

[14] *See, e.g.*, SETH D. HARRIS & ALAN B. KRUEGER, HAMILTON PROJECT, A PROPOSAL FOR MODERNIZING LABOR LAWS FOR TWENTY-FIRST-CENTURY WORK: THE "INDEPENDENT WORKER" 2 (Dec. 2015), http://www.hamiltonproject.org/assets/files/modernizing_labor_laws_for_twenty_first_century_work_krueger_harris.pdf [https://perma.cc/DD4V-YTD4].

[15] *See* NATALIE FOSTER, GREG NELSON & LIBBY REDER, THE ASPEN INSTITUTE, PORTABLE BENEFITS RESOURCE GUIDE 7 (2016), https://assets.aspeninstitute.org/content/uploads/2016/07/resource_guide_final8-1.pdf [https://perma.cc/YJT8-WGYS] (describing on-demand economy participation as sporadic, a source of secondary income, and sometime involving more than one company).

[16] *See* GALE ET AL., *supra* note 13, at 9–22 (surveying various non-ERISA approaches to providing portable retirement benefits to gig workers).

[17] *See, e.g.*, Lobel, *supra* note 2; Means & Seiner, *supra* note 11; Dubal, *supra* note 11; BRISHEN ROGERS, AMERICAN CONSTITUTION SOCIETY, REDEFINING EMPLOYMENT FOR THE MODERN ECONOMY 1 (Oct. 2016), https://www.acslaw.org/sites/default/files/Redefining_Employment_for_the_Modern_Economy.pdf [https://perma.cc/HKS5-ZHY8].

[18] 29 U.S.C. §§ 1001–1191 (2012); *see* Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 323 (1992) (finding that common law "control test" applies to ERISA employee definition).

[19] To be clear, a gig worker would have to be a common law employee to qualify for coverage under ERISA. This is critical because only ERISA provides for the MEP pension structure. However, open MEPs are not currently allowed under the current statutory and regulatory structure and legislation has been introduced in Congress (or will be re-introduced) to allow them. *See generally infra* Part III.A, B & C.

More specifically, open multiple employer plans (Open MEPs) allow unaffiliated employers to pool their resources and offer retirement plans to their employees under the statutory protections of ERISA.[20] By designating a professional service provider to administer an Open MEP for their employees, gig companies can largely limit fiduciary liability; their only fiduciary actions would be the selection and subsequent monitoring of the Open MEP sponsor.[21]

If large gig companies, like Uber, Lyft, Handy, or TaskRabbit, were to join the same Open MEP, then their employees could easily move between these employers. This dynamic would be beneficial for employees who must work part-time and who sometimes work for two or more of the platform companies simultaneously.[22] With the Open MEP model, these gig employees can pocket retirement contributions all in one individual retirement account. Not only will stiffening market competition from gig companies like Juno, who are willing to treat their workers voluntarily as employees, increasingly cause more traditional gig companies to change their employment models,[23] but tax incentives based on number of employees participating will make it worthwhile for gig companies to voluntarily join such plans for their employees.[24] Additional retirement plan participation can be ensured for employees by placing them into plans automatically under automatic enrollment provisions.[25] Employees not wishing to participate in the retirement plans could simply opt-out if they choose to do so, though experience with opt-out provisions in current retirement plans indicates that most will not.[26]

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[20] *See generally* U.S. DEP'T OF LAB., ERISA ADVISORY COUNCIL, OUTSOURCING EMPLOYEE BENEFIT PLAN SERVICES 18–22 (2014), http://www.dol.gov/ebsa/pdf/2014ACreport3.pdf [https://perma.cc/87UW-H5SP] [hereinafter OUTSOURCING EMPLOYEE BENEFIT PLAN SERVICES].

[21] *Id.* at 19 ("Effectively, the participating employer has outsourced the provision of retirement benefits.").

[22] Open MEPs should be attractive to employers given market forces and tax incentives. *See infra* Part III.B.

[23] *See* Aarti Shahani, *Uber Competitor in NYC Promises Drivers Benefits, Even Employee Status*, NPR (Aug. 22, 2016), http://www.npr.org/sections/alltechconsidered/2016/08/22/490655700/uber-competitor-in-nyc-promises-drivers-benefits-even-employee-status [https://perma.cc/2L74-FS8S].

[24] *See* Aetna Health Inc. v. Davila, 542 U.S. 200, 215 (2004) ("ERISA represents a 'careful balancing' between ensuring fair and prompt enforcement of rights under a plan and the encouragement of the creation of such plans.").

[25] *See* Robert Steyer, *Auto-escalation Use in 401(k) Plans Too Low, Northern Trust Reports Find*, PENSIONS AND INVESTMENT (Sept. 19, 2016), http://www.pionline.com/article/20160919/ONLINE/160919841/auto-escalation-use-in-401k-plans-too-low-northern-trust-report-finds?newsletter=daily&issue=20160919 [https://perma.cc/366N-CC9N] (currently about fifty-two percent of private sector plans have auto-enrollment features).

[26] *See* Paul M. Secunda, *The Behavioral Economic Case for Paternalistic Workplace Pensions*, 91 IND. L. REV. 505, 526 (2016) ("Overcoming the force of inertia, these opt out plans immediately

This article sets out a model for providing retirement benefits for gig workers in the sharing economy in three parts. Part I surveys current efforts to provide portable benefits for gig workers and discusses their various shortcomings, including the concession of lack of employee status and consequent loss of ERISA protections. Part II argues that many gig workers, though certainly not all, are common law employees under the control test that applies under ERISA. Having established employee status, Part III explores the advantage of ERISA coverage for both employer and employees, including the flexibility of the Open MEP retirement plan structure for gig companies to provide their employees with retirement plan benefits.

## I. SAMPLING OF CURRENT EFFORTS TO PROVIDE PORTABLE RETIREMENT BENEFITS TO GIG WORKERS

Although there has long been a need for cohesive retirement plan policy to address the retirement crisis in the United States,[27] the development of the gig marketplace has accelerated the demand for workable retirement programs for itinerant workers. As it is, members of the so-called "contingent" workforce or "precariat" (part-time, leased, temporary, and per diem workers) do not normally receive retirement benefits as part of their employment.[28] The problem among these workers with the lack of access to retirement benefits has now been exacerbated by the growth and development of the gig economy.[29]

What all these jobs have in common is that the work activity is happening outside of the traditional "safety net" of employment and is highly unstable.[30] Whereas statutory "employees" are covered in the United States by numerous labor and employment law statutes that provide security and protection in the workplace, workers in these

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led to much higher participation rates where plans were offered. Whereas 50% of employees had participated in the opt in method, now 85% or more participate under the opt out method.").

[27] *See* Secunda, *supra* note 26, at 506–07 ("The American retirement security system hangs treacherously on a precipice . . . All in all, too many Americans are saving too little for retirement.").

[28] *See* Dubal, *supra* note 9, at 103 (noting that "[s]ocial scientists refer to the growth of the casual workforce as the rise in the *precariat*—a class of workers whose relationship to employment is precarious or risky because it lacks stability and the benefits or regulation") (citing Arne L. Kalleberg, *Precarious Work, Insecure Work: Employment Relations in Transition*, 74 AMER. SOCIOL. REV. 1 (2009); GUY STANDING, THE PRECARIAT: THE NEW DANGEROUS CLASS (2011)).

[29] *See* GALE ET AL., *supra* note 13, at 7 ("Based on the limited data available, it appears that contingent workers are generally unprepared for retirement.").

[30] *Id.*; *see also* Noam Scheiber, *Uber Drivers and Others in Gig Economy Take a Stand*, N.Y. TIMES (Feb. 2, 2016), http://www.nytimes.com/2016/02/03/business/uber-drivers-and-others-in-the-gig-economy-take-a-stand.html [https://perma.cc/3Y2M-QHEY].

alternative work arrangements are not.[31] Formerly, "stable" employment relationships have given way to relationships that are much more "arms-length,"[32] regardless of whether it is a contractor situation, temporary employment, or a one-time encounter.[33]

To give an overview of what has been done to address the problems facing this part of the contingent workforce concerning the lack of retirement benefits for members, including the increasing number of gig workers, Part I is divided into three sub-parts: (1) national-level efforts to solve these retirement access issues for contingent workers, (2) state- and municipal-level efforts, and (3) private-sector efforts. As will be demonstrated, all these proposals, even though they increase access, fail a basic requirement for adequate retirement security—fiduciary consumer protections for enrolled workers—because none of them provide for "employee" status under ERISA.

## A. National-Level "Solutions"

### 1. Lessons from the Affordable Care Act

One national solution is potentially to model a legislative scheme after the Affordable Care Act (ACA).[34] In the seven years since Congress enacted the ACA, the numbers of Americans without health insurance has dropped precipitously.[35] The ACA uses subsidized federal and state Health Marketplaces, along with the expansion of Medicaid, to account for these gains.[36] All individuals must have access to affordable, minimum essential coverage under the ACA, or pay a tax penalty.[37]

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[31] *See* Rogers, *supra* note 17, at 1 (observing that misclassification, subcontracting and franchising all "tend to deprive workers of their rights under employment laws, which generally do not protect independent contractors and do not effectively protect many subcontracted workers or workers for franchisees").

[32] Aspen Institute, The Honorable Phyllis C. Borzi (Assistant Secretary for the Employee Benefits Security Administration, U.S. Dept. Labor), *Retirement Security in the On-Demand Economy*, YOUTUBE (Mar. 11, 2016), https://youtu.be/MySsCe9G6yI [https://perma.cc/J5QL-VA36].

[33] *Id.*

[34] *See* Patient Protection and Affordable Care Act (ACA), Pub. L. No. 111–148, 124 Stat. 119 (2010), as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029.

[35] *Key Facts about the Uninsured Population*, THE HENRY KAISER FAMILY FOUNDATION (Sept. 29, 2016), http://kff.org/uninsured/fact-sheet/key-facts-about-the-uninsured-population [https://perma.cc/JB4C-2943] (showing uninsured populations peaked at 18.2% of population in 2010 and demonstrating uninsured population has dropped to 10.5% in 2016 or by 7.7%).

[36] *Id.* ("Coverage gains were seen in new ACA coverage options. As of March 2016, over 11 million people were enrolled in state or federal Marketplace plans, and as of June 2016, Medicaid enrollment had grown by over 15 million (27%) since the period before open enrollment (which started in October 2013).").

[37] *See* Nat'l Fed. of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2577 (2012) ("[T]he individual mandate . . . requires individuals to purchase a health insurance policy providing a minimum level

Health insurance can be obtained through public programs (if eligible), through one's employer (if offered), or through individual policies offered on an Exchange or through the private market.[38] Individuals in certain income brackets are eligible for premium assistance tax credits if their employers do not provide the requisite coverage.[39]

So, perhaps not surprisingly, it has been proposed that retirement coverage be offered in the same way as health coverage has been under the ACA.[40] An expanded Social Security could play the role of Medicaid for low income workers, employers could still offer retirement plans, but employees who lack access could purchase retirement plans on a "federal backstop plan."[41] The advantage is, especially for gig workers, that under such a plan, workers would have access to a retirement plan without having to be connected to an employer for a specific period or duration.[42]

The disadvantages, unfortunately, of such an ACA-based retirement marketplace are fairly straightforward. The biggest problems are that it does not necessarily require workers to receive retirement benefits through their employer and therefore, such workers would not be "employees," entitled to the consumer protections of ERISA.[43] Additionally, given the unpopularity of such Exchange programs in the current political environment, there is little reason to believe that such ideas will gain much traction at the federal level.

2. myRA

The Obama administration recently developed myRA, a program meant to help shrink the retirement gap by providing access to retirement plans for workers in the United States who currently do not have such access.[44] Deposits to myRA accounts by individuals are not

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of coverage.").

[38] *See* COLLEEN E. MEDILL, INTRODUCTION TO EMPLOYEE BENEFITS LAW: POLICY AND PRACTICE 373 (4th ed. 2015).

[39] *Id.* at 375.

[40] *See* Amy B. Monahan, *An Affordable Care Act for Retirement Plans*, 20 CONN. INS. L.J. 459, 472 (2014).

[41] *Id.* at 478.

[42] *Id.* at 472.

[43] Conceivably, a pension-based ACA proposal could include or require similar fiduciary consumer protections as ERISA does, but it is telling that the ACA itself chose not to include such protections for non-employees.

[44] *See* U.S. DEP'T OF TREASURY, MYRA, https://myra.gov/?utm_expid=112154954-9.nz5h8ogBQpaO0c770moe0g.0 [https://perma.cc/HDL8-F7DM]. MyRA was discontinued by the Trump administration in 2017. *See* Tara Siegel Bernard, *Treasury Ends Obama-Era Retirement Savings Plan*, N.Y. TIMES (July 28, 2017), https://www.nytimes.com/2017/07/28/business/treasury-retirement-myra-obama.html?mcubz=3&_r=0 [https://perma.cc/PFD2-V5JF].

tax-deductible but instead grow tax-deferred and come out tax-free upon retirement.[45] All workers can invest, including those who want to supplement an existing 401(k) plan, as long as their household income falls below $191,000 per year.[46] Another advantage of myRA accounts are their portability, so that they move with the worker and are not connected to any particular job or jobs in which an individual is employed.[47]

Unfortunately, the program is not well-funded through government subsidies with regard to the income tax foregone in the form of tax-deferred contributions, so its near-universality as far as eligibility means that there is a lifetime contribution cap of $15,000.[48] Once the $15,000 cap is met, employees have the option to roll over their myRA savings into a private-sector Roth Individual Retirement Account (IRA),[49] likely to be managed by a private investment company.[50]

Moreover, employers do not match employee contributions and there are no tax subsidies in place to incentivize lower income people to contribute.[51] Finally, unlike a Roth IRA, rather than having individuals choose from a variety of investments available in the marketplace,[52] myRA establishes a fund that invests in a government-managed program guaranteed by taxpayers.[53] Also, unlike Roth IRAs, accounts will solely invest in government savings bonds, limiting risk, but also limiting the growth potential of such retirement contributions.[54]

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[45] *See How it Works*, U.S. DEP'T OF TREASURY, MYRA, https://myra.gov/how-it-works/ [https://perma.cc/GTE2-8XAD].

[46] U.S. DEP'T OF TREASURY, MYRA: A SIMPLE, SAFE, AFFORDABLE RETIREMENT SAVINGS ACCOUNT, https://www.treasury.gov/connect/blog/Documents/FINAL%20myRA%20Fact%20Sheet.pdf [https://perma.cc/LXQ3-MKZU] ("MyRAs will be Roth IRA accounts available to anyone who has an annual income of less than $129,000 a year (for individuals and $191,000 for couples." [*sic*]).

[47] *See id.* ("Portable – not tied to a single employer.").

[48] GALE ET AL., *supra* note 13, at 13 ("MyRA users can save up to $15,000 in those accounts; once they hit the $15,000 threshold, they have the option to roll their savings over into a private sector Roth IRA and continue saving.").

[49] *See* Matthew Malone, *What is a Roth IRA?*, ROTHIRA.COM, http://www.rothira.com/what-is-a-roth-ira [https://perma.cc/BXE8-MTUN] ("A Roth IRA is a special retirement account where you pay taxes on money going into your account and then all future withdrawals are tax free.").

[50] *Id.*

[51] *Employers*, U.S. DEP'T OF TREASURY, MYRA, https://myra.gov/employers/ [https://perma.cc/9QL9-TS2P] ("[Employers] don't administer employee accounts, contribute to them, or match employee contributions.").

[52] *See* Kevin McCormally, *Why You Need a Roth IRA*, KIPLINGER, http://www.kiplinger.com/article/retirement/T046-C006-S001-why-you-need-a-roth-ira.html [https://perma.cc/R45K-ASE6] ("You can invest your Roth IRA in almost anything—stocks, bonds, mutual funds, CDs or even real estate.").

[53] *See How it Works*, *supra* note 45.

[54] *See id.* ("Your account will safely earn interest at 2.375% APR during the month of

So as one commentator has observed, the program is "not so much a retirement vehicle, but a way for households to have a little bit of rainy day funds."[55] Also, given the long-term horizon of most retirement plan investing, the short-term, low-risk nature of government saving bonds is ill-suited for the need to generate investment returns on such contributions over a long period.[56] Needless to say, myRA does not come close to providing the type of adequate retirement security most gig workers are going to need.

B. State and Municipal-Level "Solutions"

1. Automatic-IRA Retirement Saving Plans

After more than twenty states started to develop automatic-IRA retirement savings plans for workers without access to retirement plans through their employers, the Department of Labor's (DOL) Employee Benefit Security Administration (EBSA) stepped in to make sure that such plans would not be considered preempted by ERISA.[57] In its final regulations, *Savings Arrangements Established by States for Non-Governmental Employees*, the EBSA "describes circumstances in which state payroll deduction savings programs with automatic enrollment would not give rise to the establishment of employee pension benefit plans under the Employee Retirement Income Security Act of 1974, as amended (ERISA)."[58]

With more than 39 million workers in the United States without access to occupational retirement plans and with the federal government unable or unwilling to take the necessary steps as illustrated above, more and more states are attempting to fill the gap left by the voluntary-based private sector benefit system under

December 2016.").

[55] *See* Trent Gillies, *Retirement Options Dwindle, and States Steps in. But Should They?*, CNBC (Nov. 8, 2015), http://www.cnbc.com/2015/11/06/retirement-options-dwindle-and-states-step-in-but-should-they.html [https://perma.cc/4K4R-7975] (Treasury views the myRA program "not so much as a retirement vehicle, but a way for households to have a little bit of rainy day funds.") (quoting Teresa Ghilarducci).

[56] *See* Bob Dannhauser, *Pension Fund Governance and Long-Term Investing: Why Old Habits Die Hard*, CFA INSTITUTE BLOG (Mar. 19, 2015), https://blogs.cfainstitute.org/marketintegrity/2015/03/19/pension-fund-governance-and-long-term-investing-why-old-habits-die-hard/ [https://perma.cc/4KMC-9EG4] ("mak[ing] the case for effective governance correlating with effective long-horizon investing").

[57] EMP. BENEFITS SECURITY ADMIN., RIN 1210-AB71, SAVINGS ARRANGEMENTS ESTABLISHED BY STATES FOR NON-GOVERNMENTAL EMPLOYEES (Aug. 24, 2016), https://www.dol.gov/sites/default/files/ebsa/temporary-postings/savings-arrangements-final-rule.pdf [https://perma.cc/B578-F6UC].

[58] *Id.* at 1.

ERISA.[59] Legislation for state-based private retirement plans has already passed in Illinois, Oregon, and Washington State.[60] The idea behind "state payroll deduction saving programs with automatic enrollment" is to provide employees tax-favored individual IRAs funded by payroll deductions.[61] Under these programs, "employers are . . . required to remit the payroll deductions to state-administered IRAs established for the employees."[62] This is still a voluntary program and payroll deductions may be ceased by employees at any time.[63]

As alluded to above, there is some concern that these payroll deduction saving programs would be preempted by ERISA, as state laws related to employee benefits under § 514 of ERISA.[64] The new EBSA regulations make clear that not only are such state plans not preempted, but that in the future, similar municipal plans may also not be preempted.[65]

Even without ERISA making these state and municipal laws void, the lack of ERISA protection is still the problem. Just like with models based on the ACA and myRA, these plans only survive by taking away the critical ERISA consumer protections to workers to ensure the protection of their retirement benefits. Without such protections, and with the brutal history of broken public pension problems in many states as a guide to how their retirement plans may be treated under state law in difficult fiscal times,[66] one wonders if many employees will trust their money with such programs.

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[59] *Id.* at 2. Although employees who do not have access to employer-sponsored retirement plans could purchase their own Individual Retirement Accounts (IRAs), only about ten percent do. *Id.*

[60] *See, e.g.*, California Secure Choice Retirement Savings Trust Act, CAL. GOV'T CODE §§ 100000–100044 (2012); Connecticut Retirement Security Program Act, 2016 Conn. Legis. Serv. 16-29 (West); Illinois Secure Choice Savings Program Act, 820 ILL. COMP. STAT. 80/1–95 (2015); Maryland Small Business Retirement Savings Program Act, Ch. 324 (H.B. 1378) (2016); Oregon Retirement Savings Board Act, Ch. 557 (H.B. 2960) (2015).

[61] EMP. BENEFITS SECURITY ADMIN., *supra* note 57, at 3.

[62] *Id.*

[63] *Id.*

[64] 29 U.S.C. § 1114.

[65] *See* Hazel Bradford, *Municipalities Ready to Join Rush to Private-Sector Plans*, PENSIONS & INVESTMENTS (Sept. 5, 2016), http://www.pionline.com/article/20160905/PRINT/309059983/municipalities-ready-to-join-rush-to-private-sector-plans [https://perma.cc/2NE2-Z9ZE] ("Pressed by some cities and retirement advocates to do more, DOL officials also proposed that other governmental entities be allowed to offer such programs.").

[66] *See generally* Paul M. Secunda, *Litigating for the Future of Public Pensions*, 2014 MICH. ST. L. REV. 1353.

2. Black Car Fund Model

On a more limited scale, a number of states have worked out innovative models for independent contractors to still benefit from protective employment legislation by treating them as "employees" for purposes of some specific laws. The most prominent example is the Black Car Fund, which is a workers' compensation fund created by statute in New York for taxi drivers.[67] Like with ERISA, under New York and other states' workers' compensation law, a worker has to be an "employee" to be eligible for these benefits.[68] Through this legal fiction, the Black Car Fund statute provides workers' compensation to independent contractor taxi drivers, and the Fund itself serves as employer of record *only* for the purpose of providing workers' compensation.[69] New York funds this scheme with a 2.5% transaction fee on every taxi ride.[70] Not surprisingly, the idea of "pooling" is at the center of this scheme: pooling allows for taxi companies to participate and contribute to the Fund without worrying about worker classification issues.

One idea, then, would be to treat gig employees at the federal level as "employees" under ERISA only for purposes of employers making contributions to retirement plans. Although this type of arrangement would make an end-around sticky worker-classification issues, many problems would still remain. For instance, there is no precedent on the federal level for treating independent contractors as employees for the purpose of one law, but not for others. Indeed, as discussed below, many federal employment statutes have rather unhelpful employee definitions and fall back on the common law control test to determine employment status.[71]

Some may say the answer lies in keeping the program at the state or even municipal level where there is some precedent for treating independent contractors as employees for very limited purposes.[72] Here the problem is less with a limiting principle and more with the fact that the Black Car Fund only works because it is limited to one industry (taxis), for a relatively inexpensive, uncomplicated purpose (workers' compensation), and through no charge to the employer or employee

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[67] *See History*, THE BLACK CAR FUND, http://www.nybcf.org/history [https://perma.cc/S93A-VZ63]; *see also* FOSTER ET AL., *supra* note 15, at 16.

[68] *See id.*

[69] *Id.*

[70] *Id.*

[71] *See infra* Part II.

[72] *See supra* notes 67–70.

(rather through transaction fees to taxi customers).[73] Even if you were to define the industry as "all gig companies" and provide contributions by placing a fee on every gig transaction, providing adequate retirement security is not as simple as providing funding for workers' compensation.

### C. Private-Sector Solutions

With the federal, state, and municipal government floundering in their efforts to address the lack of retirement savings for too many Americans, it is unsurprising that the private-sector has stepped up to provide programs on its own or in cooperation with gig companies. For instance, private internet companies, like Peers, Honest Dollar, and Betterment, are offering to provide retirement benefits, as well as other benefits and human resource services, to gig companies.[74] The outsourcing of the retirement saving function to these Professional Employee Organizations (PEOs) is increasingly common as employers seek to limit their fiduciary liability under ERISA.[75]

But this current situation in the gig workplace does not mimic the classic outsourcing fiduciary model. Instead, companies like Uber have contracted with these private companies to provide access to retirement benefits to their workers.[76] And if such workers are offered retirement benefits, such benefits are a mere gratuity, something that the employer has no responsibility for maintaining or administering as a fiduciary.[77] That arrangement would not bode well for gig workers given that fewer than ten percent of workers without access to a workplace retirement plan actually contribute to a retirement savings on their

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[73] *See* The Black Car Fund, *supra* note 67.

[74] *See Home*, PEERS, http://www.peers.org [https://perma.cc/UP9X-MPUB]; *Home*, HONEST DOLLAR, https://www.honestdollar.com [https://perma.cc/TR55-LYZX]; *Home*, BETTERMENT, http://www.betterment.com [https://perma.cc/L4WT-Q9XQ].

[75] Professor Colleen Medill has shown comprehensively how "complete outsourcing," where an unrelated third-party is made the "name fiduciary" of a benefit plan, could be considered a settlor function that is not a fiduciary act and therefore, would relieve plan sponsors of all fiduciary responsibility. *See* Colleen Medill, *Regulating ERISA Fiduciary Outsourcing*, 102 IOWA L. REV. 505, 533–34 (2017). Medill is correct that complete outsourcing should be significantly regulated. *Id.* at 546.

[76] Lyft offers its drivers a payroll deduction IRA through the financial technology firm, Honest Dollar. *See* GALE ET AL., *supra* note 13, at 10. On the other hand, Uber collaborates with Betterment for access for workers to an IRA and financial counseling. *Id.*

[77] For an example of this set-up, see Noam Scheiber, *Care.com Creates a $500 Limited Benefit for Gig-Economy Workers*, N.Y. TIMES (Sept. 14, 2016), https://www.nytimes.com/2016/09/14/business/carecom-creates-a-500-limited-benefit-for-gig-economy-workers.html?_r=0 [https://perma.cc/HRB5-GQZW] (finding online marketplace for family caregivers offers $500 a year for workers to use for health care, transportation, or education expenses).

own[78] and that one out of three workers does not have access to a workplace retirement plan at all.[79] Thus, these arrangements between gig companies and professional service providers are yet another reason to seek employee status for gig workers under ERISA.

## II. GIG WORKERS AS EMPLOYEES

Needless to say, this article would be unnecessary if gig employers would voluntarily consider their workers as "employees" for ERISA purposes. Indeed, there are some prominent examples, including the taxi service Juno, competing against Uber and Lyft, of employers who are doing just that if workers work for them exclusively (i.e., like normal full-time employees).[80] Juno takes a smaller commission from their riders, and in addition to benefits like retirement plans, also has set aside half of the companies' stock for its drivers.[81] Juno focuses on recruiting Uber and Lyft's best drivers, those who average more than 4.75 stars on customer feedback.[82] So far Juno is operating with 13,000 workers in New York City, but they have big plans to take on Uber and Lyft more generally.[83] Juno appears to recognize the market advantage in supplying the best gig workers with employee status and employee benefits. So, there is at least a chance that at some point gig companies will be forced by market competition to voluntarily recognize employee status where their competitors do so.

But to be more realistic about the immediate future of worker classification in the gig marketplace, one must recognize that the gig business model works by keeping labor costs extremely low and treating its workers as "commodities" that can be "deactivated" when not acting in a productive or profitable manner.[84] Both Uber and Lyft are fighting tooth and nail, and not only in the United States, to keep their workers as independent contractors under the law and so far, no court in the United States has found these workers to be employees.[85]

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[78] Borzi, *supra* note 32, at 22:33.

[79] *Id.* at 22:39.

[80] *See* Shahani, *supra* note 23 ("[Head of Juno] says it's only fair to offer the option because, while drivers may set their own hours, the ride-hailing company is the one that exercises control over the other terms, the rules, the prices.").

[81] *Id.*

[82] *See* Scheiber, *supra* note 30 ("Unlike sellers on eBay or Etsy, Uber drivers cannot set the prices they charge. They are also constrained by the all-important rating system—maintain an average of around 4.6 out of 5 stars from customers in many cities or risk being deactivated—to behave a certain way, like not marketing other businesses to passengers.").

[83] *See* Shahani, *supra* note 23.

[84] *Id.*

[85] *See* Lobel, *supra* note 2, at 132–33.

Workers are employees under ERISA based on the control test set out in *Nationwide Mutual Insurance Co. v. Darden*.[86] *Darden* "defines an employment relationship as a relationship of control: the employer plans out tasks, gives orders, and monitors performance."[87] Unfortunately, as other astute commentators have pointed out, weighing factors such as whether the work is performed at the company's premises (hardly ever with gig work) versus whether the company controls how the work is done and closely supervises the work, "cloud, rather than illuminate, the central question in such cases: whether the worker is truly in business for him or herself. Many employment relationships, after all, are not defined by rigid task definition and control."[88]

At least historically, an employer was only liable for a tort committed by a worker over whom the employer exercised sufficient control,[89] because "an employer exercising control over its workers should be responsible to others for its workers' actions." The Internal Revenue Service (IRS) employs one form of the control test to determine whether employers need to pay employment taxes (federal unemployment insurance, Social Security, and Medicare taxes) or withhold federal taxes from its employees' wages (income, Social Security, and Medicare).[90]

As with all balancing tests, the control test has been criticized for yielding indeterminate, unpredictable results. Quite literally, two judges could hear the exact same case with the same factors and reasonably come to diametrically opposed outcomes. Problems in application include that the factors are unweighted, no single factor is dispositive, and not all apply in every case.[91] Paradoxically, the test has also come under scrutiny for being a one-size-fits-all test used without due regard to the many different contexts to which it is applied.[92] All that being said, "regardless of how a particular employment standard is articulated, no judge will hold a firm liable for employment violations

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[86] 503 U.S. 318 (1992).

[87] *See* Rogers, *supra* note 17, at 2.

[88] *Id.* at 3.

[89] *See* Myra H. Barron, *Who's An Independent Contractor? Who's An Employee?*, 14 LAB. LAW. 457, 459 (1999).

[90] *See* JEFFREY M. HIRSCH, PAUL M. SECUNDA & RICHARD A. BALES, UNDERSTANDING EMPLOYMENT LAW 8 (2d ed. 2013) (citing 29 C.F.R. § 31.3121(d)-1(c)(2); Rev. Rul. 87-41, 1987-1 C.B. 296).

[91] *Id.* at 9.

[92] *Id.*

without first considering the influence (whether exercised or reserved) that the firm has over working conditions."[93]

*Darden* itself involved the interpretation of Section 3(6) of ERISA, which circularly defines the term "employee" to "mean[ ] any individual employed by an employer."[94] The facts of *Darden* are fairly straightforward. Darden, a long-time insurance operator for Nationwide Insurance, was enrolled in the company's retirement plan.[95] He exclusively sold Nationwide insurance policies on commission.[96] The retirement plan had a "bad boy" non-competition clause, which said Darden would forfeit his retirement benefits if he competed against Nationwide within a year of leaving and within twenty-five miles of his previous business location.[97] Nationwide terminated Darden and then Darden began selling competitor insurance policies immediately from his same office location as an independent insurance agent.[98] Nationwide responded by implementing the non-competition clause and taking away Darden's already accrued retirement benefits.[99] Darden sued Nationwide under Section 502(a)(3) of ERISA[100] for violating the vesting provisions of Section 203(a) of ERISA.[101]

Noting that ERISA itself did not supply the scope of the meaning of "employee" under the statute, the U.S. Supreme Court held that in these circumstances it was necessary to fall back to the established meaning of that term under the common law agency doctrine.[102] Adopting the common law test for employee status under ERISA in *Darden*, the Court summarized that test as stated in the *Reid* case:

> In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship

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[93] Keith Cunningham-Parmeter, *From Amazon to Uber: Defining Employment in the Modern Economy*, 96 B.U. L. REV. 1673, 1705 (2016).

[94] 29 U.S.C. § 1002(6).

[95] Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 319–320 (1992).

[96] *Id.* at 320.

[97] *Id.*

[98] *Id.*

[99] *Id.* Generally, such bad-boy clauses are unenforceable under ERISA if applicable vesting schedules have been met for the retirement plan. *See* Medill, *supra* note 38, at 143.

[100] 29 U.S.C. § 1132(a)(3).

[101] Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 320 (1992); 29 U.S.C. § 1053(a).

[102] *Id.* at 322 (citing Community for Creative Non-Violence v. Reid, 490 U.S. 730, 739–40 (1989)).

> between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.[103]

The Supreme Court then remanded the case to determine whether Darden was an employee of Nationwide under this common law test.[104]

It may at first seem unlikely that a large number of gig employees would be considered employees under the *Darden* common law employee test. However, recent events in both the United States and the United Kingdom suggest the tide is definitively turning in finding more of these gig workers to be common law employees. For instance, in the United Kingdom, two Uber drivers were recently found to be employees for purposes of British minimum wage laws.[105] Similarly, in the United States, a recent decision from the California Employment Development Department found an Uber driver to be an employee for purposes of eligibility under unemployment law.[106] As these laws in the United Kingdom and the United States rely on similar factors as the control test under ERISA, there is good reason to believe that workers, especially those that receive a majority or all of their income from gig companies and work full-time hours, will also be considered employees and qualify for ERISA protections.

In the meantime, as this article goes to press, class action employment litigation continues across the country to determine whether Uber drivers are employees or independent contractors. One prominent example is *O'Connor v. Uber Technologies, Inc.*[107] *O'Connor* involves Uber drivers, who believe as common law employees under the California Labor Code, they are entitled to various labor and

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[103] *Id.* at 323–24 (citing *Reid*, 490 U.S. at 751–52 (footnotes omitted)).

[104] *Id.* at 328.

[105] *See* Toby Meyjes, *Uber Drivers Win Battle to Receive National Minimum Wage and Holiday Pay*, METRO UK (Oct. 28, 2016), http://metro.co.uk/2016/10/28/uber-drivers-win-battle-to-receive-national-minimum-wage-and-holiday-pay-6220730/#ixzz4OhHSKSoT [https://perma.cc/P6E5-722W].

[106] *See* Chris Roberts, *Updated: Another Uber Driver Awarded Unemployment Benefits*, SF WEEKLY (Mar. 4, 2016), http://archives.sfweekly.com/thesnitch/2016/03/04/uber-driver-awarded-unemployment-benefits-first-known-case-in-state [https://perma.cc/LQ5A-YME6].

[107] 82 F. Supp. 3d 1133 (N.D. Cal. 2015) (Chen, J.); *see also* O'Connor v. Uber Techs., Inc., No. 13-CV-03826-EMC, 2016 WL 4398271, at *4–6 (N.D. Cal. Aug. 18, 2016) (denying motion for preliminary approval of settlement).

employment law protections and benefits, including provisions involving tips given to employees.[108] The *O'Connor* court, applying a similar common law control test, denied Uber's motion for summary judgment based on its conclusion that, "Plaintiffs are Uber's presumptive employees because they 'perform services' for the benefit of Uber," and that the ultimate question of whether the Uber worker is an employee or independent contractor is a mixed question of law and fact and appropriate for juror determination.[109]

Of course, *O'Connor* is just the tip of the gig worker misclassification litigation iceberg. As Orly Lobel has chronicled, "[r]ecent class action suits brought against [Uber and Lyft] by drivers claiming misclassification stress the degree of control and direction the companies exercise."[110] For instance, and as seen in *O'Connor*, "plaintiffs claim that, while drivers decide when to turn on the app to get notifications about ride requests, drivers 'must respond to assignments generated by the Uber computer system "within seconds" or they will lose the job.'"[111] Various litigation has also established that ride-sharing services set pickup times, passenger pay rates, methods of payment, and which passengers the drivers must pick up.[112] To be fair, there are other common law control factors that do appear to favor the view that gig workers are independent contractors, including that drivers use their own car, receive payment per job, and have the ability to control who to pick up during working hours in certain geographic areas.[113] Yet, at least one prominent judge, Judge Edward Chen of the Northern District Court of California in San Francisco, has stated, "The idea that Uber is simply a software platform, I don't find that a very persuasive argument."[114]

In any case, although this issue is far from being definitively decided, there is at least a reasonable argument that some gig workers, including Uber drivers, qualify as employees under the common law control test of *Darden* under ERISA. In the next section, this article assumes for the sake of argument that some gig workers will qualify for

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[108] *O'Connor*, 82 F.Supp.3d at 1135 (citing CAL. LAB. CODE § 351 (requiring employers to pass on entire amount of tip "paid, given to, or left for an employee by a patron")).

[109] *Id.*

[110] *See* Lobel, *supra* note 2, at 133.

[111] *Id.* (quoting Boston Cab Dispatch, Inc. v. Uber Techs., Inc., No. 13-10769-NMG, 2014 WL 1338148, at *2 (D. Mass. Mar. 27, 2014)).

[112] *Id.*

[113] *Id.*

[114] *Id.* (citing Karen Gullo, *Uber and Lyft Drivers May Have Employee Status, Judge Says*, BLOOMBERG (Jan. 30, 2015), http://www.bloomberg.com/news/articles/2015-01-30/uber-drivers-may-have-employee-status-judge-says. [https://perma.cc/5SQ6-NCX9]).

protection under ERISA as common law employees, and asks what the best mechanism might be for providing such workers with adequate employer-based retirement benefits.

## III. OPEN MEPS: THE BEST WAY TO PROVIDE RETIREMENT BENEFITS TO GIG EMPLOYEES UNDER ERISA

Having established that current portable benefit proposals lack the critical recognition of employee status under ERISA and that common law employee protection under ERISA is probable for at least some group of gig workers, this Part examines three additional issues: (1) the advantages of ERISA protections for gig workers, (2) the suitability of the Open MEP model for gig employee retirement plans, and (3) the prospects of Open MEPs being legally recognized in the near future without hindrance by current regulatory impediments.

### A. Fiduciary Protection: The Ultimate Consumer Advantage of ERISA Protection

To understand the advantages of ERISA to participants and beneficiaries of employer-sponsored retirement plans, it is necessary to see what problems employees encountered with their pension plans prior to ERISA. Chief among these pre-ERISA issues were lack of transparency, lack of funding, reneging on promised benefits after long years of service, and financial mismanagement and fraud.[115] In response, ERISA provides reporting and disclosure provisions, vesting and minimum funding standards, and fiduciary protections, all of which can be enforced through a private right of action by participants and beneficiaries.[116]

For instance, ERISA's reporting and disclosure requirements include that not only basic benefit plan information be filed annually with the DOL on 5500 Forms,[117] but that each plan issue a summary plan description and a summary of material modifications in language and in a form that an average lay person can comprehend.[118] Because of these requirements, participants know and can enforce their rights under a plan, can make informed decisions concerning plan benefits, assist government agencies in ERISA enforcement, and promote compliance by plan sponsors (employers) and other plan fiduciaries.[119]

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[115] Medill, *supra* note 38, at 11–15.

[116] *Id.*

[117] *Id.* at 71–72 (citing 29 U.S.C. § 1023).

[118] 29 U.S.C. § 1022(a); 29 C.F.R. § 2520.102-1.

[119] *See* Medill, *supra* note 38, at 66–68.

Although all the protective provisions of ERISA described above play an important role, the heart of ERISA is the fact that plan assets are held in trust and those that discretionarily operate, manage, or administer are fiduciaries and/or trustees of the plan.[120] Such fiduciary status means that plan fiduciaries must put their own self-interest aside and act for the sole interest of plan participants and beneficiaries.[121] More specifically, ERISA lays out four general fiduciary duties and a litany of prohibited practices that parties-in-interest and fiduciaries may not transact with regard to plan assets.[122] The four general fiduciary duties include: (1) the duty of loyalty to act exclusively with the purpose to provide benefits to plan participants and beneficiaries; (2) the duty of care/prudence to act with the prudence that an objectively prudent fiduciary would in similar circumstances; (3) with regard to specified pension plans, to prudently diversify the Plan's assets; and (4) the duty to follow the terms of the plans unless they conflict with the provisions of ERISA.[123] In short, ERISA fiduciaries are like other trustees, who as Justice Cardozo famously commented: "[are] held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior . . . the level of conduct for fiduciaries [has] been kept at a level higher than that trodden by the crowd."[124]

If one is a fiduciary and abuses one of the fiduciary duties or engages in a prohibited transaction to which no exemption applies, the fiduciary can be sued by the DOL, participants, beneficiaries, or other fiduciaries for breach of fiduciary duties.[125] Equitable damages include making the plan whole for any losses, disgorgement of profits, removal of the fiduciary, surcharge, equitable estoppel, reformation, restitution, injunction, or mandamus.[126] In short, ERISA fiduciaries are subject to significant legal responsibilities and significant liability if they do not act with the necessary loyalty and prudence in carrying out their responsibilities to plan participants and beneficiaries. Fiduciary protection for retirement plan participants under ERISA is the gold standard.

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[120] 29 U.S.C. § 1103(a) ("[A]ll assets of an employee benefit plan shall be held in trust by one or more trustees.").

[121] *Id.* § 1104(a).

[122] *Id.* §§ 1104–1108.

[123] *Id.* § 1104(a)(1)(A)-(D).

[124] Meinhard v. Salmon, 164 N.E. 545, 546 (N.Y. 1928).

[125] 29 U.S.C. § 1132(a)(2), (3), (5).

[126] *See* CIGNA Corp. v. Amara, 563 U.S. 421 (2011); Great-W. Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204 (2002); Mertens v. Hewitt Assocs., 508 U.S. 248 (1993); Mass. Mut. Life Ins. Co. v. Russell, 473 U.S. 134 (1985).

### B. The Open MEP Model under ERISA

In order to take maximum advantage of both the consumer protections of ERISA and the flexibility in plan structures that ERISA permits, gig companies should adopt some form of Open MEP model for their employees.[127] Essentially, the Open MEP model allows separate, independent, gig companies to mostly outsource the retirement benefit function to an entity that specializes in the provision of these benefits, with the fiduciary, disclosure, and other consumer protections of ERISA thrown into the bargain.[128] By keeping these platform-based open MEPs under ERISA, the current trend of gig companies to privately contract retirement plan provisions to online service providers can be avoided.[129] Unlike current arrangements with companies such as Betterment, Honest Dollar, and Peers, these MEPs will operate under fiduciary rules that require the MEP to act in the best interest of employee participants, with the duty of loyalty and care expected of such a provider under similar circumstances.[130] Providers not living up to these exacting standards could be sued by the DOL, other plan fiduciaries, or participants or beneficiaries of the plan, just like any other breaching fiduciary under ERISA.[131] This aspect of the open MEP is perhaps the most crucial advantage of providing a mechanism for permitting gig companies to provide retirement benefits through the financial intermediation of an open MEP trustee to lessen the financial and regulatory burden of providing such benefits.[132]

There are a number of advantages to the Open MEP model for both gig employers and employees. From an employee perspective, perhaps one of the biggest problems that these employees face is the lack of access to retirement benefits.[133] If one's employer does not offer

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[127] 29 U.S.C. § 1060(a) (provisions on multiple employer plans and other special rules). Open MEPs, including their advantages and disadvantages, are discussed in comprehensive detail in Advisory Opinion 2012-04A. *See* EMP. BENEFITS SECURITY ADMIN., ADVISORY OPINION LETTER 2012-04(A) 1 (2012), https://www.dol.gov/sites/default/files/ebsa/employers-and-advisers/guidance/advisory-opinions/AO2012-04A_0_0.pdf [https://perma.cc/XB7X-4NGR]. The EBSA found that this arrangement was not an "employee pension plan" because no "employer" maintained or established the plan as required under Section 3(5) of ERISA. 29 U.S.C. § 1002(5).

[128] *See* OUTSOURCING EMPLOYEE BENEFIT PLAN SERVICES, *supra* note 20, at 6–8.

[129] *See supra* Part I.C.

[130] *See* OUTSOURCING EMPLOYEE BENEFIT PLAN SERVICES, *supra* note 20, at 8–12.

[131] *Id.* at 9.

[132] *Id.* at 6 ("Fiduciary risk may be further limited to the extent that the third party provides improved plan administration, management, and compliance processes.").

[133] *See* Nevin E. Adams, *Big Apple Unveils MEP, Retirement Program for Private Sector Workers*, NAPA.NET (Oct. 11, 2016), http://www.napa-net.org/news/technical-competence/state-auto-ira-plans/big-apple-unveils-mep-retirement-program-for-private-sector-workers [https://perma.cc/GR67-NC4N].

employee benefits (which they are legally able to do because employee benefit sponsorship in the United States is voluntary),[134] then employees may be able to take advantage of one of the new state-based automatic IRA programs[135] or seek to save through private IRAs. Either way, such employees have historically been shown either to save very little or nothing at all for retirement.[136]

The solution for gig workers who are deemed "employees" under the ERISA *Darden* control test is to have their employers establish a gig worker open MEP. This model allows both employers and employees to pool their retirement contributions, like the Black Car Fund does, and get the best investment options at the lowest prices.[137] The advantages for gig employers are the tax deduction that comes with such retirement contributions,[138] the competitive advantage in obtaining better workers by offering a better benefit package (see the Juno example in Part II),[139] and the ability to off-load most of their fiduciary liability in co-sponsoring such a plan.[140]

The advantage to employees is the ability to not even have to think about retirement savings and automatically let it happen. By setting up an Open MEP with automatic enrollment and automatic escalation features with a wide variety of gig employers participating, not only would gig employees be able to take advantage of tax-exempt retirement savings, but they would also be enrolled and have a portion of their salary contributed to their individual MEP account without becoming bogged down in complex retirement decisions and procrastinating over various and complex investment options.[141] Because of their significant purchasing power and economies of scale,

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[134] *See* Conkright v. Frommert, 559 U.S. 506, 517 (2010) ("ERISA represents a 'careful balancing' between ensuring fair and prompt enforcement of rights under a plan and the encouragement of the creation of such plans." (quoting *Aetna Health, Inc. v. Davila*, 542 U.S. 200, 215 (2004))).

[135] *See* Andrew Remo, *DOL's Proposed Safe Harbor for State Savings Programs: A Closer Look*, NAPA.NET (Nov. 18, 2015), http://www.napa-net.org/news/technical-competence/state-auto-ira-plans/dols-proposed-safe-harbor-for-state-savings-programs-a-closer-look/ [https://perma.cc/FZE6-EKRT].

[136] *See supra* note 8 and accompanying text.

[137] *See supra* notes 67–70 and accompanying text (on Black Car Fund pooling structure); *see also* GALE ET AL., *supra* note 13, at 12 ("MEPs have lower administrative costs and a simpler regulatory structure than a 401(k), and could be offered to independent workers as well as traditional employees if Congress and regulators approve.").

[138] *See* GALE ET AL., *supra* note 13, at 15 ("Research that focuses on low-income households, however, generally finds larger impacts of [tax] saving incentives on net saving.").

[139] *See supra* notes 78–81 and accompanying text (discussing Juno approach to gig workers).

[140] *See* OUTSOURCING EMPLOYEE BENEFIT PLAN SERVICES, *supra* note 20, at 6.

[141] *See* Secunda, *supra* note 26, at 524–25 (discussing procrastination and inertia associated with many individuals when it comes to complex financial decisions involving retirement saving).

these Open MEPs would have access to lowest-price wholesale mutual funds and other investments so that gig employees would default into a highly-diversified, low-fee pension account.[142] If gig employees wanted more control or had more financial savvy, they could easily opt-out and place their retirement money in whatever proportion in whatever funds the open MEP offers.

### C. The Future Viability of the Open MEP Model for Gig Employee Retirement Plans

The good news is that Open MEPs are gaining increasing traction both in federal administrative guidance and in Congress. As far as administrative guidance, a recent DOL Interpretive Bulletin would allow states and cities to set up an automatic enrollment of participants into an IRA-based state program employing a MEP approach.[143] Under such arrangements, "participating employers would be required to execute a participation agreement and would have limited fiduciary responsibilities (like prudently selecting the arrangement and a duty to monitor its operation)."[144] The bad news here, at least for the proposal set forth in this article, is that it specifically declines to extend the Open MEP model to private sector-employers.[145] The reason that the DOL is not currently permitting Open MEPs under ERISA "is because 'the state has a unique representational interest in the health and welfare of its citizens.'"[146]

On the legislative side of the ledger, Senator Orrin Hatch has introduced the Retirement Enhancement and Savings Act of 2016,[147] which would permit open MEPs for private sector employees and allow multiple employers to pool retirement funds into a single 401(k) retirement plan starting in 2020.[148] Under current law, independent

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[142] Such a system would look and work much like the Australian superannuation (Super) guarantee retirement scheme. *See id.* at 545 ("[W]ith Super funds having so much money in their control, not only could the best money managers be hired, but the investment funds' fees would likely be lowered.").

[143] *See* Remo, *supra* note 135 ("While to date no states have passed legislation creating such an arrangement, under the DOL's guidance the state itself would be the plan sponsor, the named fiduciary and the plan administrator (but could also delegate those responsibilities to third parties.")).

[144] *Id.*

[145] *Id.*

[146] *Id.*

[147] *See* STAFF OF THE JOINT COMMITTEE ON TAXATION, DESCRIPTION OF THE CHAIRMAN'S MODIFICATION OF THE "RETIREMENT ENHANCEMENT AND SAVINGS ACT OF 2016" 3–14 (Sept. 21, 2016), https://www.jct.gov/publications.html?func=startdown&id=4959 [https://perma.cc/T5KX-JG7A].

[148] *See* Precious Abraham & Ann Marie Breheny, *Senate Committee Gives Retirement Savings*

employers who wish to pool funds for retirement plan purposes must demonstrate a "common interest."[149] Moreover, another difficulty under current law is the so-called "one-bad-apple rule," which disqualifies the entire MEP from favorable tax treatment if one employer does not meet the applicable tax rules.[150]

Senator Hatch's Open MEP proposal would remove the "common interest" requirement and the "one-bad-apple rule."[151] In the recent past, this model has had wide bipartisan support, with President Obama including an open MEP proposal in his budget for fiscal year 2017.[152] Hatch's Open MEP law passed the Senate Finance Committee on a 26-0 vote in the fall of 2016 with the following language: "two or more unrelated private employers [would be allowed] to adopt a defined contribution pooled employer plan (PEP) as long as the PEP has a pooled plan provider (PPP) as the named fiduciary to the plan."[153]

There are a number of advantages for this PEP/PPP model. First, it outsources the myriad fiduciary duties to the PPP.[154] These onerous fiduciary requirements include: qualifying the plan for tax-favored status under the Internal Revenue Code's non-discrimination rules, operating and managing the plan on a day-to-day basis, and engaging in investment selection (perhaps through retention of a third-party investment advisor).[155] The only fiduciary duty that members of the PEP would retain would be to prudently select, and then monitor, the PPP, thus limiting their exposure to potential fiduciary liability.[156]

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*Bill Unanimous Backing*, TOWERS WATSON (Oct. 20, 2016), https://www.towerswatson.com/en-US/Insights/Newsletters/Americas/insider/2016/10/senate-committee-gives-retirement-savings-bill-unanimous-backing [https://perma.cc/T5GT-622V] ("The Retirement Enhancement and Savings Act would authorize open MEPs beginning in 2020.").

[149] *See* Sean Forbes, *Expanding Multiple Employer Plans Seen Boosting Retirement Savings*, BLOOMBERG BNA PENSION AND BENEFITS DAILY REPORTER (June 22, 2016), http://www.bna.com/expanding-multiple-employer-n57982074525/ [https://perma.cc/QEA3-ZU55] ("Under current law, employers must have a common nexus—such as being in the same industry—to be in a MEP.").

[150] *See* Treas. Reg. §§ 1.413-2(a)(3)(iv) (as amended in 1979) and 1.416-1, Q&A (G-1) (1984).

[151] *See* STAFF OF THE JOINT COMMITTEE ON TAXATION, *supra* note 147, at 9.

[152] *See* Nevin Adams, *Obama Administration Wants to Open Door for Open MEPs*, ASPPA.NET (Jan. 26, 2016), https://www.asppa.org/News/Article/ArticleID/5813 [https://perma.cc/W88K-69BN].

[153] *See* Andrew Remo, *MEPs Resurface as 'PEPs' as Senate Finance Approves New Retirement Bill*, NAPE.NET (Sept. 22, 2016), http://www.napa-net.org/news/technical-competence/legislation/meps-resurface-as-peps-as-senate-finance-approves-new-retirement-bill/ [https://perma.cc/28JM-HA2M].

[154] *See* STAFF OF THE JOINT COMMITTEE ON TAXATION, *supra* note 147, at 10.

[155] *See* Remo, *supra* note 153.

[156] *See supra* note 73 (discussing fact that residual fiduciary exists for plan sponsor, and not possible to engage in "extreme outsourcing" and delegating all ERISA fiduciary duty from the plan sponsor); *cf.* Tibble v. Edison Int'l, 135 S. Ct. 1823, 1828–29 (2015) (holding that plan sponsors of 401(k) plan still have fiduciary duty in selecting and monitoring participant investment options).

Additionally, the price tag of permitting the formation of these organizations is relatively low: $3.2 billion over ten years from loss of tax revenue from the additional tax deduction for employers and tax-exempt status for employee contributions.[157]

Unfortunately, Hatch's bill was not enacted in 2016,[158] yet it is not too far-fetched, given current legislative and regulatory developments that the Open MEP bill will be reintroduced during the coming Trump presidency and will soon be available for multiple employers in the private sector without the common interest and one-bad-apple requirement.[159] There is also a wide-range of interest groups who support the idea of Open MEPs.[160] As Senator Elizabeth Warren perceptively recognized during hearings on Hatch's bill, this new approach is well-suited for gig employees.[161] The bill would allow various gig companies to pool their contributions to a common 401(k) retirement plan, with all the advantages that come with belonging to a large fund.[162] Most importantly, such funds would have the advantages of providing participating employees diversification, low costs, reporting and disclosure requirements, and fiduciary protections based on the trust-based status of such 401(k) plans.[163]

## CONCLUSION

The rise of the gig economy with its part-time, itinerant, independent workers, in conjunction with the employee-centric nature of occupational retirement benefits under ERISA, has led to gig employees largely lacking meaningful retirement benefits. Current proposals to provide portable benefits to gig workers as independent workers or independent contractors are unacceptable because such benefits would not be secured by the fiduciary consumer protections of ERISA.

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[157] *See* Remo, *supra* note 153.

[158] *See* John Iekel, *2017: MEPs, State Plans, Education Loom Large. ASPPA.Net* (Jan. 4, 2017), http://www.asppa-net.org/News/Article/ArticleID/7122 [https://perma.cc/4Z42-S96W].

[159] *See* Rob Massa, *Trump's Pension Policy*, CFO.COM (Dec. 9, 2016), http://ww2.cfo.com/retirement-plans/2016/12/trumps-pension-plan [https://perma.cc/3EGN-DMNC].

[160] *See* Sean Forbes, *State Open MEPs Ready to Bloom, But with Challenges*, BNA BLOOMBERG PENSION & BENEFITS DAILY (Nov. 24, 2015), http://www.bna.com/state-open-meps-n57982063895/ [https://perma.cc/4CCD-A9J9].

[161] *See id.* ("Proposals should address all kinds of workers, including not only full-time employees at small businesses, but also part-time workers, individuals in the gig economy and independent contractors, Sen. Elizabeth Warren (D-Mass.) said at the hearing.").

[162] *See* Massa, *supra* note 159.

[163] *See* STAFF OF THE JOINT COMMITTEE ON TAXATION, *supra* note 147, at 10.

However, two developments with regard to the retirement security of the gig workers are promising. First, there are now increasing examples of gig workers being found to be common law employees under tests like ERISA's *Darden* test. As common law employees, gig workers are entitled to the reporting and disclosure, vesting, funding, and fiduciary protections of ERISA. Second, the use of an Open MEP model, in which PEPs have a PPP as the named fiduciary, are gaining bi-partisan acceptance. This article encourages Congress to promptly adopt the open MEP model, free of current regulatory restrictions, so that gig employees can enjoy retirement security with the peace of mind that ERISA fiduciary protections provide under industry-wide gig employee Open MEPs.