

To the NY Senate for this week's hearings:

Dear Representatives and Committee Members, I will not be able to be in NY for the upcoming hearing on employee classification but I wanted to send along my research related on the topic. In a recent article in the Harvard Business Review – which can also be found here - <https://hbr.org/2019/07/the-debate-over-how-to-classify-gig-workers-is-missing-the-bigger-picture> - I write about the topic the following:

“In 2018 the California Supreme Court adopted a test for how to classify gig workers. The [Dynamex decision](#) stated that workers are presumed to be employees unless the employer can prove that the worker is free from its control and direction, the work is outside the company's usual business, and the worker often works as a freelancer. These criteria, commonly referred to as the ABC test, still don't provide conclusive guidance about how gig workers should be classified. But negotiations [reportedly underway](#) in California between ride-hailing companies, labor unions, regulators, and other stakeholders might be more clarifying.

If an agreement can be reached on how to offer workers enough protections while letting them retain the flexibility of independent contractors, this will be a new era for multisided platform services — allowing these services to remain competitive while also achieving the goal of fairness for gig workers.

In my research on the [gig economy](#) and [digital platforms](#), I've argued that the debate over how to classify workers, as either employees or freelancers, is a red herring. The larger issue is how to modernize employment and labor protections to fit with the realities of work today. In employment and labor law, we should strive to get regulation just right: not so little as to leave workers unprotected, but not so much as to distort the market and create employment disincentives.

Local and state legislators should not only clarify and simplify the notoriously malleable classification tests, but also create categories of protection that are not based on employee status. First, some rights should be expanded to all workers providing their services in the market, regardless of how they're classified. For example, all workers who experience discrimination, are harassed, or witness corruption should be protected by law and have recourse when they take action.

Second, we need to create rules that are specific to platform gig workers. Because not all wage and hour laws can be applied seamlessly to platform work, Uber and Lyft drivers and others providing their services through digital platforms should receive minimum hourly rates that parallel minimum wage laws. For example, the New York City Taxi and Limousine Commission is now enforcing rules that require ride-hailing companies to meet a minimum hourly wage for their drivers. Importantly, these rules apply to everyone; they're agnostic to whether drivers are classified as employees or independent contractors. Similarly, the rules of the National Labor Relations Act of 1935, which grant employees the right to form labor unions and bargain collectively, are not a good fit with the heterogeneity and flexibility that today's gig workers have. But they should have the right to voice their concerns in a concerted way.

Third, we should provide access to welfare rights such as health care, unemployment insurance, and retirement funds for gig workers who aren't linked to a single platform.

Some [initiatives](#) already exist to help freelancers purchase insurance at the same rates even as they move from gig to gig.

Fourth, before instituting rules that apply to everyone, we need to consider the different motivations behind why people go gig. For many people, gig work found through digital platforms constitutes their full employment. Others provide their services through platforms precisely to avoid having to meet a minimum number of hours per day or per week. Some drivers might decide not to turn on their Uber or Lyft app for weeks at a time. Uber drivers I have met include law students, college students, tech entrepreneurs, retirees, and stay-at-home parents. Classifying all of these drivers as employees risks pushing out workers who want more autonomy and control over their time.

One interesting example for how to recognize the heterogeneity of gig workers comes from Germany. In Europe, Hermes, a German delivery firm, recently struck a deal in a collective bargaining agreement with the UK's GMB union. Hermes drivers can now opt in to a "self-employed plus" status, granting them a minimum wage and up to 28 days of paid leave. In exchange, drivers who opt in can no longer choose their routes; they must drive Hermes's prescribed delivery routes. Those who don't opt in can continue as freelancers with more flexibility but without the same benefits.

Too many proposed solutions in the U.S. are sweeping, one-size-fits-all rules. Requiring all drivers to become employees would reduce their flexibility and eliminate possibilities for the workers who most value their independence. Companies would have to schedule drivers to mandatory shifts and would likely reduce their workforces to employ only those willing to commit to longer hours and more days. Moreover, being a freelancer means you can work for multiple companies simultaneously without violating any duties of loyalty. This helps create more competition among employers in the market. In fact, [my research with Berkeley professor Ken Bamberger](#) has shown that overly broad regulations can benefit dominant firms such as Uber and Amazon, as these "[category kings](#)" can absorb the costs imposed by stringent rules, while driving smaller competitors out of the market.

As more and more people seek to supplement their income or make a living by providing labor through a digital platform, we have an opportunity to reconsider the purpose and goals of employment and labor protections for all workers. Many protections were designed to protect employees and to ensure living wages and decent terms and conditions of work, and those should be extended to all workers even as formal relationships are shifting. At the same time, regulation should not curtail innovation nor should it be imposed in ways that benefit only the dominant employer in the market. Most important, regulators must recognize that the labor market is highly heterogenous and that not all workers will benefit from a blunt classification of employee status.

Whether we're talking about platform workers, drivers, engineers, designers, or programmers, a model that rejects the oversimplified classification of workers can better strike a balance between the dual goals of protection and flexibility. Regardless of classification, workers should be

guaranteed minimum compensation, access to benefits such as workers' compensation, and some form of voice. Leaders at Uber and Lyft, in entering the negotiations in California, [have recognized the need for regulatory solutions](#) to meet these terms. Regulators and courts should similarly remember that classification can result in unintended and countereffective consequences, and they should work with both platforms and workers to create solutions that are updated and purposeful.

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*As you can see in the above HBR article, I link to my longer research in the field. I am happy to opine and answer any related questions.*

*Best,*

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