Employees, Independent Contractors, and the Flexibility False Choice

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This Article analyzes the role that scheduling flexibility has played in the public conversation around employee and independent contractor status and matches public perception against both the law of flexible scheduling and the facts of worker experience. Drawing on data including an original textual analysis of public comments submitted during a federal rulemaking, the Article finds that many workers misperceive independent contracting as the only way to achieve schedule flexibility. This is wrong on the law, as employers are free to build flexibility into whatever work relationships they establish. Moreover, both the Americans with Disabilities Act and the Family and Medical Leave Act mandate schedule flexibility as an accommodation for covered employees' or their families' needs.

However, workers' perception may be right on the facts—that is to say, worker-controlled scheduling may be functionally unavailable for most employees outside white collar, knowledge, and office jobs. The public narrative around schedule flexibility may therefore say as much about the poor state of employee status as it does about the supposed benefits of independent contracting. This is concerning for the employment and labor law project, which has built up a formidable set of rights, benefits, and protections exclusively available to employees, but which workers may reject in favor of seemingly more flexible independent contracting.

Thus, the Article attempts to understand worker perceptions of and preferences for flexible scheduling, the tradeoffs they are willing to accept, and what this means for employment and labor law and policy. This analysis

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is particularly necessary now, as the employee-independent contractor distinction remains a battleground in state and federal legislatures, agencies, and the courts.

INTRODUCTION

This story begins with Uber, but it is far from just an Uber story. In 2020, Uber, Lyft, and other gig economy employers spent a historic $200 million to support the passage of a California ballot initiative that classified app-based transportation and delivery drivers as independent contractors rather than employees under state law.[1] Central to this campaign was public

1. The measure was a reaction to a 2018 California Supreme Court decision and subsequent state statute that broadened the definition of "employee" under California law to reach app-based workers,

messaging that linked schedule flexibility with independent contracting, warning that workers would lose control over their schedules if they became classified as employees.[2]

This position is wrong on the law, as employers are free to build flexibility into whatever work relationships they establish. Further, both the Americans with Disabilities Act (ADA) and the Family and Medical Leave Act (FMLA) mandate schedule flexibility to accommodate covered employees' or their families' needs. Legally, then, the decision between employee status and schedule flexibility is a false choice.

However, Uber's messaging may have been right on the facts, as worker-controlled scheduling is functionally unavailable for most employees outside white collar, knowledge, and office jobs. Likewise, the ADA's and FMLA's schedule-related protections are narrow, underutilized, and unhelpful to many workers.

Thus, while Uber's public relations campaign may have been misleading about the law, it seems to have resonated with the realities of the worker experience. That is to say, though Uber presented schedule flexibility and employee status as two sides of a false choice, many workers appear open to making that trade-off. Moreover, the false choice narrative has proven to be extraordinarily sticky. In 2020 and 2021, for example, the U.S. Department of Labor (DOL) sought public comment on proposed changes to its regulations defining "employee" under wage and hour law. In the thousands of submitted comments, schedule flexibility loomed large, with many commenters, as in California, equating employee status with a loss of schedule control. Further, commenters expressed a willingness to trade off the rights, benefits, and protections of employee status for the perceived schedule freedom of independent contracting.

This is concerning for the employment and labor law project, which has built a formidable set of rights, benefits, and protections exclusively available to employees. Workers' willingness to reject all of that in exchange for schedule flexibility may say as much about the poor state of employee status as it does about the supposed benefits of independent contracting.[3]

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thereby threatening the all-independent contractor business model upon which many gig companies were founded. *See* Part I.C (citing Suhauna Hussain, Johana Bhuiyan & Ryan Menezes, *How Uber and Lyft Persuaded California to Vote Their Way*, L.A. TIMES (Nov. 13, 2020), https://www.latimes.com/business/technology/story/2020-11-13/how-uber-lyft-doordash-won-proposition-22 [https://perma.cc/C9SF-KGBM]; Andrew J. Hawkins, *Uber and Lyft had an Edge in the Prop 22 Fight: Their Apps*, THE VERGE (Nov. 4, 2020), https://www.theverge.com/2020/11/4/21549760/uber-lyft-prop-22-win-vote-app-message-notifications [https://perma.cc/3R73-27BK]).

2. *See* Part I.C (citing Proposition 22, Text of Proposed Laws 30 (Nov. 30, 2020), https://vig.cdn.sos.ca.gov/2020/general/pdf/topl-prop22.pdf [https://perma.cc/P864-5KZ8])).

3. Indeed, some experts question whether gig work like Uber driving provides much meaningful schedule flexibility at all. *See* Part III.B.

Drawing on an original textual analysis of the full corpus of DOL rulemaking comments, data from the California employee-independent contractor battles, and other sources, this Article attempts to understand worker perceptions of and preferences for flexible scheduling, the tradeoffs they are willing to accept, and what this means for employment and labor law and policy.[4] This analysis is particularly necessary now, as the employee-independent contractor distinction remains a battleground in state and federal legislatures, agencies, and the courts.

The Article proceeds as follows. Part I examines the stakes of the employment relationship for both workers and firms and summarizes employee-independent contractor law on both the state and federal levels. Part II paints a picture of workers' perception of and preferences for schedule flexibility, drawing on other researchers' polling, surveys, and interviews as well as my own original textual analysis of the public comments made as part of the DOL's rulemaking. Part III then matches public perception against both the law of flexible scheduling and the facts of worker experience, i.e., the actual availability of flexible schedules across different job types. Part IV charts several normative paths forward, arguing that employee status does and should grant many workers the flexibility that they think only comes with independent contractor status, and that workers should not be forced to choose between a bad job as an independent contractor and a bad job as an employee.

I. EMPLOYEE-INDEPENDENT CONTRACTOR LAW

The employee-independent contractor distinction is high-stakes for both firms and workers. This Part first explores those stakes and then provides a primer on the recent history and current state of employee-independent contractor law.

A. Firm and Worker Stakes

Firms have near total discretion to establish any working arrangement they wish.[5] They may hire employees, independent contractors, interns, or trainees; they may contract with separate firms to perform certain tasks. Many such decisions are driven by two main cost considerations: (1) higher

4. *See also* V. B. Dubal, *An Uber Ambivalence: Employee Status, Worker Perspectives, and Regulation in the Gig Economy*, *in* BEYOND THE ALGORITHM: QUALITATIVE INSIGHTS FOR GIG WORK REGULATION 33, 36 (Deepa Das Acevedo ed., 2020) ("How can we explain this discrepancy between drivers' stated preferences and their advocacy? What do perspectives like Kevin's tell us about how drivers make sense of employee status in relationship to their lives and visions for the future of their work? And how might understanding these perspectives impact how regulators approach worker status in the tech-enabled gig economy?").

5. This discretion is limited, of course, by the Thirteenth Amendment's prohibition of involuntary servitude. U.S. Const. amend. XIII.

perceived labor costs associated with employee status, in the form of increased payments to and for workers, and (2) higher litigation risks associated with employees. In this view, independent contractors are cheaper because they come with fewer mandated benefits and protections and have fewer rights upon which to sue. As labor and employment scholar Cynthia Estlund has observed, "many aspects of the law of work effectively tax the employment of human labor," triggering a flight to cheaper options.[6] Indeed, gig-based companies, many of which rely on an all-independent contractor workforce, estimate that the independent contractor model saves them twenty to thirty percent over an employee-based workforce.[7]

Researchers and some business leaders have challenged this narrative, arguing that worker productivity and quality of work can increase with an employee, rather than independent contractor, workforce, thereby increasing the bottom line.[8] In addition, independent contractors come with their own particular litigation risks: the potential for a misclassification lawsuit and substantial damages if employers are found liable.[9] Avoiding this particular litigation risk motivates gig companies to support carve-out provisions like the California ballot initiative, which bring certainty to the classification status of their workforce.[10] Nevertheless, the gap between the rights, benefits,

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6. Cynthia Estlund, *What Should We Do After Work? Automation and Employment Law*, 128 YALE L.J. 254, 262 (2018). She goes on to note that automation is a cheaper option still, and efforts to increase the rights, benefits, and protections of independent contractors—to bring them into the fortress, so to speak—may trigger a flight away from human labor entirely. ("Extending firms' responsibility to independent contractors and their employees not only fails to meet the challenge of automation; it also modestly exacerbates that challenge by raising the cost of human labor versus machines. As technology becomes a more capable and cost-effective competitor to human workers, it may doom the prevailing strategy of shoring up the fortress of employment.").

7. Kate Conger & Noam Scheiber, *California Labor Bill, Near Passage, Is Blow to Uber and Lyft*, N.Y. TIMES (Sept. 9, 2019), https://www.nytimes.com/2019/09/09/business/economy/uber-lyft-california.html [https://perma.cc/T2V2-EU7U].

8. Veena Dubal & Juliet B. Schor, *Gig Workers Are Employees. Start Treating Them That Way*, N.Y. TIMES (Jan. 18, 2021), https://www.nytimes.com/2021/01/18/opinion/proposition-22-california-biden.html [https://perma.cc/5G78-RAZB] ("In ongoing research with colleagues at Northeastern University, one of us, Dr. Schor, analyzed a delivery platform that converted its California workers to employees before the passage of the 2019 law. Both top and middle management said they felt positively about the switch, citing improved performances and increased productivity that partly offset the costs of employment protections.").

9. *See, e.g.*, Peter Hayes, *FedEx to Pay $2.5 Million to Settle Drivers' Classification Suit*, BLOOMBERG L. (Apr. 28, 2021), https://news.bloomberglaw.com/daily-labor-report/fedex-to-pay-2-5-million-to-settle-drivers-classification-suit [https://perma.cc/NEG6-BHHX] (describing string of employee misclassification lawsuits against Federal Express).

10. *See, e.g.*, Ben Penn, *Independent Contractor Rule Would Give Employers Potent Weapon*, BLOOMBERG L. (Sept. 23, 2020), https://news.bloomberglaw.com/daily-labor-report/independent-contractor-rule-would-give-employers-potent-weapon [https://perma.cc/W374-E445] ("The proposal's economic analysis gives employers reason for excitement, forecasting the regulation would lead to nearly $481 million in overall savings per year—the vast majority of that total benefiting employers from reduced litigation costs and more certainty when making classification decisions. That's not even including potential transfers in wages from workers to businesses when an unpredictable number of employees are

and protections available to employees and workers with other legal statuses has created opportunities for firms to engage in a type of status arbitrage, toggling between employees and independent contractors and exploiting the different labor cost structures associated with each.[11]

Turning to the stakes for workers: as noted above, independent contractors have very few work-related rights and protections, as nearly all labor and employment statutes apply exclusively to employees.[12] This means that independent contractors may legally be paid sub-minimum wages and no overtime, suffer discrimination with no recourse, cannot claim workers' compensation benefits when injured on the job, lack protection when organizing into a union or bargaining collectively, and receive no family and medical leave rights. Likewise, most employer-provided benefits such as insurance and retirement plans are available only to workers who have employee status. As Professor Estlund puts it, these rights and benefits form a "fortress . . . that has been constructed on the foundation of the employment relationship."[13]

It stands to reason, then, that firms would avoid locating their work relationships inside the fortress, which is expensive, and instead set up camp outside. But why would *workers* also seek non-employee status, voluntarily relocating outside the fortress and giving up the associated panoply of rights,

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reclassified as independent contractors, a possibility the agency declined to put a price tag on in the proposal.").

11. Charlotte S. Alexander & Elizabeth Chika Tippett, *The Hacking of Employment Law*, 82 MO. L. REV. 974, 978 (2017) (defining "regulatory arbitrage" as "a term that originally referred to multinational companies' forum shopping in search of countries with the most favorable tax rates and regulatory environment.") (citing Atul K. Shah, *The Dynamics of International Bank Regulation*, 4 J. FIN. REGUL. & COMPLIANCE 371, 371 (1996) (noting that "regulatory endeavours have become enmeshed in international economic competition, and sophisticated regulatory arbitrage is being conducted on a global playing field. Thus, regulatory objectives and standards are being increasingly compromised or subverted.")).

12. 42 U.S.C. § 1981 requires all people to receive the same treatment as white citizens in contracting, and so has been used by some contracted workers to pursue race and national origin discrimination claims. 42 U.S.C. § 1981(a) (2012); *see also* Danielle Tarantolo, Note, *From Employment to Contract: Section 1981 and Antidiscrimination Law for the Independent Contractor Workforce*, 116 YALE L.J. 170, 184-85 (2006) (explaining § 1981's coverage of contracted workers). Otherwise, independent contractors are barred from bringing claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (2012), the Americans with Disabilities Act, 42 U.S.C. § 12111 (2009), the Equal Pay Act of 1963, 29 U.S.C. § 203 (2018), and the Age Discrimination in Employment Act, 29 U.S.C. § 630 (2012). Contractors also fall outside the coverage of other federal statutes that provide rights on the job: the National Labor Relations Act, 29 U.S.C. § 152 (2010) (protecting workers' rights to organize, bargain collectively, and engage in concerted activity), the Occupational Safety and Health Act, 29 U.S.C. § 652 (2010) (protecting workers' rights to a safe workplace), the Fair Labor Standards Act, 29 U.S.C. § 203 (2018) (guaranteeing the minimum wage and overtime pay), and the Family and Medical Leave Act, 29 U.S.C. § 2611 (2011) (providing workers with leave time for selfcare and care of others). *See generally* Lewis L. Maltby & David C. Yamada, *Beyond "Economic Realities": The Case for Amending Federal Employment Discrimination Laws To Include Independent Contractors*, 38 B.C. L. Rev. 239, 239-41 (1997) (describing the exclusion of independent contractors from coverage of federal antidiscrimination laws, with the single exception of 42 U.S.C. § 1981).

13. Estlund, *supra* note 6, at 262.

benefits, and protections? The answer suggested in the Parts below is schedule flexibility: many workers appear to privilege schedule control above all other aspects of a job and associate that flexibility exclusively with independent contractor status.

Before examining workers' scheduling perceptions and preferences, the next sections offer a primer on employee-independent contractor law. This background is important to illustrate the extraordinarily contested nature of this turf—again, the stakes are high—and to begin to explore scheduling flexibility's role in the employee-independent contractor analysis.

The year 2018 was an inflection point in this area of law. In *Dynamex Operations West v. Superior Court*, the California Supreme Court remade the employee status test under state law, which triggered the Uber-backed ballot initiative described above and influenced later developments on both the state and federal levels.[14] The following sections describe the pre-2018 state of the law, which persists on the federal level; summarize *Dynamex*, its follow-on effects in California and other states as well as Uber's public relations campaign; and analyze post-*Dynamex* federal developments.

B. Pre-2018

Historically, employee-independent contractor disputes have been decided according to a variety of tests. On the federal level, no single statutory definition clearly distinguishes between employees and independent contractors. Employees' labor and employment rights and protections are scattered across many statutory regimes: the FMLA and ADA, already mentioned above, along with the Fair Labor Standards Act (FLSA), Age Discrimination in Employment Act (ADEA), Title VII of the Civil Rights Act of 1964 (Title VII), National Labor Relations Act (NLRA), Employee Retirement Income Security Act (ERISA), Occupational Safety and Health Act (OSH Act), Migrant and Seasonal Agricultural Workers Protection Act (MSPA), Mine Act, Davis-Bacon Act (DBA), Service Contract Act (SCA), Walsh-Healey Act, and Federal Unemployment Tax Act.[15]

Though each of these statutes requires employee status for coverage, none of them distinguishes cleanly between employees and independent contractors. For example, both the FLSA, the main federal wage and hour law, and Title VII, the main federal antidiscrimination law, define an "employee" as "an individual employed by an employer."[16] The definitions offered by other statutes are similarly circular.

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14. Dynamex Operations W. v. Sup. Ct., 416 P.3d 1 (Cal. 2018); *see* Part I.C.

15. U.S. DEP'T LAB., *Major Laws Administered/Enforced*, https://www.dol.gov/agencies/whd/laws-and-regulations/laws [https://perma.cc/5MVX-5NJY]).

16. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e.

To fill the definitional void, courts have developed multi-factor tests that vary depending on the underlying statutory regime.[17] These may be grouped into two rough categories: the common law agency test, which is used in Title VII, ADA, NLRA, and ERISA cases, and the economic reality test, which is used in FLSA, ADEA, and FMLA cases.[18]

The Restatement (Second) of Agency lists ten factors that courts typically consider when using the common law agency test.[19] However, this list is "non-exhaustive" and "not especially amenable to any sort of bright-line rule," as the D.C. Circuit has commented.[20] In addition, different circuits have developed their own, bespoke sets of factors, adding to and subtracting from the list in their own various articulations of the test.[21] Further still, the Restatement of Employment Law offers a variation on the common law agency test that emphasizes the importance of a worker's entrepreneurial control over the manner and means of work.[22]

The economic reality test, in turn, prompts courts to consider a shorter list of factors. Yet courts emphasize, as under the common law agency test, that "[n]o single factor is dispositive."[23] Here too, different courts have

17. Under federal law, misclassification is not itself unlawful. The issue arises when workers who are classified as independent contractors sue for rights or benefits to which they would have been entitled if they were classified as employees. The court resolves the threshold issue of classification before proceeding to the question of whether the worker experienced unlawful discrimination, or wage theft, or some other core labor or employment law violation.

18. The Internal Revenue Service uses its own twenty-factor test to draw the employee-independent contractor line for taxation purposes. *See generally* Charlotte S. Alexander, *Misclassification and Antidiscrimination: An Empirical Analysis*, 101 MINN. L. REV. 907, 910 (2017) (describing various tests and their applicability in different statutory schemes).

19. RESTATEMENT (SECOND) OF AGENCY, § 220 (1958) (listing the following factors: "a. the extent of control which, by the agreement, the master may exercise over the details of the work; b. whether or not the one employed is engaged in a distinct occupation or business; c. the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; d.the skill required in the particular occupation; e. whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work; f. the length of time for which the person is employed; g. the method of payment, whether by the time or by the job; h. whether or not the work is a part of the regular business of the employer; i. whether or not the parties believe they are creating the relation of master and servant; and j. whether the principal is or is not in business"). Though the Restatement (Third) of Agency has been issued, the second Restatement continues to be the touchpoint for the common law agency test of employee status. *See also* RESTATEMENT (THIRD) OF AGENCY §7.07 (3)(a) (2006) (for purposes of employer vicarious liability, "an employee is an agent whose principal controls or has the right to control the manner and means of the agent's performance of work").

20. FedEx Home Delivery v. N.L.R.B., 563 F.3d 492, 496 (D.C. Cir. 2009).

21. *Id.*

22. RESTATEMENT OF EMPLOYMENT LAW §1.01 (2015).

23. Schultz v. Capital Int'l Sec., Inc., 460 F.3d 595, 601-02 (4th Cir. 2006) ("The factors are (1) the degree of control that the putative employer has over the manner in which the work is performed; (2) the worker's opportunities for profit or loss dependent on his managerial skill; (3) the worker's investment in equipment or material, or his employment of other workers; (4) the degree of skill required for the work; (5) the permanence of the working relationship; and (6) the degree to which the services rendered are an integral part of the putative employer's business."); *see also* Wilson v. Guardian Angel Nursing,

adopted different versions of the test, elaborating or trimming the array of relevant factors.[24] In some Title VII cases, courts have also applied a "hybrid" test, which combines aspects of the common law agency and economic reality tests.[25]

The multiplicity of tests across different claim types, and the multiplicity of factors used by different courts, has caused one judge to observe that:

> just because [the plaintiff] may not be Defendants' employee for purposes of one state or federal statute does not mean that he cannot be considered Defendants' employee for another. Defendants assert that these differing definitions of 'employee' would result in nightmares for business owners, but it is the unavoidable state of the law.[26]

In addition to this proliferation of tests and factors, the tests' non-prescriptive nature creates another source of uncertainty. There is no guidance as to how courts should measure such concepts as "control" or "opportunity for profit and loss," for example. Moreover, judges and scholars, including the authors of the Restatement of Employment Law, have expressed doubt about whether there is actually any difference in practice among the tests for employee status.[27] The Ninth Circuit has agreed, commenting, "We take this opportunity to clarify what the district court ultimately recognized: there is no functional difference between the . . . formulations."[28]

Yet even if courts are functionally operating within a single decision-making framework, that framework is remarkably lacking in structure. Every formulation of the legal distinction between employees and independent contractors essentially boils down to a totality of the circumstances analysis. This means that employee misclassification disputes are heavily fact

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Inc., No. 3:07-0069., 11 (M.D. Tenn. Jul. 31, 2008) (noting variation in courts' application of the economic realities test, the Court said "[o]ther circuits have endorsed similar inquiries under the heading of a separate, seventh factor.").

24. Note that this taxonomy of legal tests only covers claims made under federal law and does not address separate sets of factors developed by state courts in applying state law.

25. *Compare* Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 323-24 (1992) (discussing the common law test), *and* Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 751-52 (1989) (discussing the same), *with* Oestman v. Nat'l Farmers Union Ins. Co., 958 F.2d 303, 305 (10th Cir. 1992) ("The hybrid test, which is most often applied to actions under Title VII, is a combination of the economic realities test and the common law right to control test."), *and* EEOC v. Zippo Mfg. Co., 713 F.2d 32, 38 (3d Cir. 1983) ("Consequently, the hybrid standard that combines the common law 'right to control' with the 'economic realities' as applied in Title VII cases is the correct standard . . .").

26. Perez v. Foreclosure Connection, Inc., 2016 WL 4435209 (D. Utah Aug. 19, 2016).

27. As the Restatement of Employment Law puts it, "Decisions interpreting the meaning of employee under the federal antidiscrimination laws illustrate the lack of any sharp distinction between the common-law test . . . and a multifactor economic-realities test." RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 1.01 cmt. d-e (Am. Law Inst., Proposed Final Draft 2014) ("The antidiscrimination-law decisions thus highlight the broad common ground covered by the common-law test and the economic-realities test in determining whether or not to classify a service provider as an employee.").

28. Murray v. Principal Fin. Grp., Inc., 613 F.3d 943, 945 (9th Cir. 2010) ("[T]here is no functional difference between the . . . formulations.").

dependent. Noting this, one judge, frustrated with the parties' voluminous briefing on all of the disputed factors in a misclassification case, resorted to quoting the Bible:

> There is a passage in Psalms that states: "He pulled me out of the slimy pit, out of the muck and mire and placed my feet upon a rock and gave me a firm place to stand.". . . The Court sought a firm place to stand to perform the legal analysis required here but the muck and mire was too deep and thick, and the advocacy too slick.[29]

Thus, the upshot of the state of federal law is that while a firm's "control" over a worker's labor has long been a factor in all formulations of the employee-independent contractor test, whether or not *schedule* control or flexibility is even part of the analysis depends on the particular set of facts before a court. Moreover, no single factor is determinative in any case. Uber and its allies' public relations sleight of hand, described in the section that follows, was to equate schedule flexibility exclusively with independent contractor status, as if the test consisted of a bright line rule, with employees and employer-controlled schedules on one side and independent contractors and schedule freedom on the other.

C. Dynamex, *Uber, and Follow-On Effects in State Law*

Uber's public relations campaign began in reaction to *Dynamex*, a 2018 decision by the California Supreme Court that diverged from the federal framework described above and established a new employee-independent contractor test under state law. In that case, a group of package delivery drivers who were classified as independent contractors sued for backpay available only to workers with employee status.[30] In ruling for the drivers, the *Dynamex* court established a presumption that workers are employees, unless an employer can meet three conditions for independent contractor status.[31]

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29. Lovett v. SJAC Fulton IND I, LLC et al, 2016 WL 4425363, at *6 n.2 (N.D. Ga. Aug. 22, 2016).

30. Dynamex Operations West, Inc. v. Sup. Ct., 416 P.3d 1, 868 (Cal. 2018).

31. More specifically, the *Dynamex* court deployed the ABC test as a way to give meaning to the "suffer or permit to work" standard found in California law, which paralleled, but did not replicate exactly, the economic reality test widely used on the federal level to define employee status under the FLSA. *Id*. at 8 (concluding "that in determining whether, under the suffer or permit to work definition, a worker is properly considered the type of independent contractor to whom the wage order does not apply, it is appropriate to look to a standard, commonly referred to as the 'ABC' test, that is utilized in other jurisdictions in a variety of contexts to distinguish employees from independent contractors"). As the *Dynamex* court noted, other states had long used variations of the ABC test to define employee status under state law, sometimes only in unemployment insurance cases and sometimes more broadly. *Id.* at 34 n.23 (listing Massachusetts, New Jersey, and Delaware as examples); *see also* Jon O. Shimabukuro, CONG. RSCH. SERV., R46765, WORKER CLASSIFICATION: EMPLOYEE STATUS UNDER THE NATIONAL LABOR RELATIONS ACT, THE FAIR LABOR STANDARDS ACT, AND THE ABC TEST 1, 9-27 (2021) (listing 21 states adopting the test); Lynn Rhinehart et al., *Misclassification, the ABC Test, and Employee Status: The California Experience and Its Relevance to Current Policy Debates*, ECON. POL'Y INST. (June 16, 2021), https://www.epi.org/publication/misclassification-the-abc-test-and-employee-status-the-california-

This "ABC test" applied only to wage orders issued by the California Industrial Welfare Commission, which dictate the minimum wages to be paid on an industry-by-industry basis.[32]

In 2019, the California legislature passed Assembly Bill 5 (AB 5), codifying *Dynamex* and extending the ABC test beyond industry-based state wage orders to all state employment laws.[33] The statute took effect on January 1, 2020, replacing any versions of the multi-factor, totality of the circumstances tests described in the previous section that were previously used under state law.[34]

Many commentators viewed *Dynamex*, AB 5, and the ABC test's employee status default rule as an existential threat to the independent contractor-based business model of Uber and other app-based employers. As legal scholar Robert Sprague relates, "At least one court has speculated that post-*Dynamex*, 'Uber bears a hefty burden to establish that its drivers are not employees.'"[35] Uber and Lyft warned in investor communications that a switch to employees could significantly affect their financial outlook.[36]

As a result, even before AB 5 took effect, Uber and a coalition of other gig employers began planning a ballot initiative, Proposition 22, that would exempt app-based transportation and delivery drivers from the statute's coverage, thereby definitively classifying them as independent contractors.[37] The proposal also included a set of additional terms: a net earnings floor computed according to a driver's time spent and miles driven between

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experience-and-its-relevance-to-current-policy-debates/ [https://perma.cc/7GXT-7ME8] (listing states and areas of the ABC test's application).

32. *Dynamex*, 416 P.3d at 36-40 ("Part A: Is the worker free from the control and direction of the hiring entity in the performance of the work, both under the contract for the performance of the work and in fact? Part B: Does the worker perform work that is outside the usual course of the hiring entity's business? Part C: Is the worker customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity?").

33. AB-5 Worker Status: Employees and Independent Contractors, Cal. Lab. Code §2750.3 (2019), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB5 [https://perma.cc/W9ZG-KYR5]. Subsequent legislation changed the coverage of AB-5, exempting "certain occupations in connection with creating, marketing, promoting, or distributing sound recordings or musical compositions," as well as "services provided by a still photographer, photojournalist, videographer, or photo editor" under certain circumstances, and a variety of other specific professions and occupations. AB-2257 Worker Classification: Employees and Independent Contractors: Occupations: Professional Services, Cal. Lab. Code §2750.3 (amended) (2020), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB2257 [https://perma.cc/6S59-ZERN].

34. AB-5 Worker Status, *supra* note 33.

35. Robert Sprague, *Using the ABC Test to Classify Workers: End of the Platform-Based Business Model or Status Quo Ante?*, 11 WILLIAM & MARY BUS. L. REV. 733, 762 n.125 (2020) (citing O'Connor v. Uber Technologies, Inc, 2019 WL 1437101, at *9 (N.D. Cal. Mar. 29, 2019)).

36. *Id.*

37. Margaret Poydock, *The Passage of California's Proposition 22 Would Give Digital Platform Companies a Free Pass to Misclassify Their Workers*, ECON. POL'Y INST., WORKING ECONOMICS BLOG (Oct. 22, 2020), https://www.epi.org/blog/the-passage-of-californias-proposition-22-would-give-digital-platform-companies-a-free-pass-to-misclassify-their-workers/ [https://perma.cc/WX2C-X5CV].

accepting a service request and completing it; limits on drivers' consecutive hours worked; sliding scale healthcare subsidies depending on the number of hours worked; provision of occupational accident insurance and associated disability payments; and provision of accidental death insurance.[38]

After the most expensive ballot-related public relations campaign in the state's history, including television and online ads, billboards, direct mailings, and targeted messages to gig workers while logged into their apps,[39] Proposition 22 passed in November 2020.[40] In August 2021, a state trial court declared the initiative unconstitutional.[41] That decision was reversed on appeal, reinstating Proposition 22 as of March 2023, but the California Supreme Court granted review, so the matter is still unresolved.[42]

Throughout, Uber and its allies have tied schedule flexibility exclusively to independent contractor status in their public messaging. As early as 2015, lawyer Ted Boutros, speaking on behalf of Uber at a press conference, said the following:

> The way we look at it, the laws governing employers require [them] to exert much more control over their employees, monitor, make sure they're taking break times . . . It's inevitable the flexibility and autonomy that drivers crave would have to be limited.[43]

This same message appears in the text of Proposition 22 itself, which portrays AB 5 as "threaten[ing] to take away the flexible work opportunities of hundreds of thousands of Californians, potentially forcing them into set shifts and mandatory hours, taking away their ability to make their own

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38. Ballotpedia, *California Proposition 22, App-Based Drivers as Contractors and Labor Policies Initiative* (2020), https://ballotpedia.org/California_Proposition_22,_App-Based_Drivers_as_Contractors_and_Labor_Policies_Initiative_(2020) [https://perma.cc/F9B4-TB86] (last visited Feb. 13, 2022). For an analysis of what these terms actually mean on the ground, see Veena Dubal, *The New Racial Wage Code*, 44 HARV. L. & POL'Y REV 511 (2022) (discussing the racial politics of the tiered system of worker protection created by on-demand platform workers that are generally prevented from standard employment laws and benefits such as minimum wage, overtime, etc.).

39. Suhauna Hussain, Johana Bhuiyan & Ryan Menezes, *How Uber and Lyft Persuaded California to Vote Their Way*, L.A. TIMES (Nov. 13, 2020), https://www.latimes.com/business/technology/story/2020-11-13/how-uber-lyft-doordash-won-proposition-22 [https://perma.cc/5AVM-7AE6]; Andrew J. Hawkins, *Uber and Lyft had an Edge in the Prop 22 Fight: Their Apps*, THE VERGE (Nov. 4, 2020), https://www.theverge.com/2020/11/4/21549760/uber-lyft-prop-22-win-vote-app-message-notifications [https://perma.cc/YD9C-JU9X].

40. Ballotpedia, *supra* note 38.

41. Castellanos v. State, No. RG21088725, 2021 Cal. Super. LEXIS 7285, at *17-18 (Alameda Cnty. Sup. Ct. 2021); Faiz Siddiqui, *California Judge Rules Unconstitutional the Measure Classifying Uber and Lyft Drivers as Contractors*, WASH. POST (Aug. 20, 2021), https://www.washingtonpost.com/technology/2021/08/20/uber-lyft-prop-22-unconstitutional/ [https://perma.cc/2ZRS-EGEY].

42. Castellanos v. State, 305 Cal. Rptr. 3d 717 (Cal. Ct. App. 2023) (reinstating Prop. 22); Castellanos v. State, 530 P.3d 1129 (Cal. 2023) (granting review).

43. Carmel DeAmicis, *Despite Uber's Arguments, Flexibility for Employees Is a Company's Choice*, VOX (Aug. 11, 2015), https://www.vox.com/2015/8/11/11615468/despite-ubers-arguments-flexibility-for-employees-is-a-companys-choice [https://perma.cc/5MKJ-69Y8].

decisions about the jobs they take and the hours they work. . .”[44] The initiative’s statement of purpose is similar: “To protect the individual right of every app-based rideshare and delivery driver to have the flexibility to set their own hours for when, where, and how they work.”[45]

Yet as with the common law agency and economic reality tests more broadly, no part of the ABC test turns on schedule control or the lack thereof, much less assigns such flexibility exclusively to independent contractors. Post-*Dynamex*, California courts’ decision-making in employee-independent contractor cases remains fact-dependent, just as it did prior to 2018.

Regardless, Uber and its allies have pledged to replicate their efforts in other states and have continued the same flexibility-focused messaging elsewhere.[46] As Professor Sprague summarizes, some states have enacted what are known as “Marketplace Contractor” statutes, which classify app-based workers as independent contractors if they have a written work contract that contains certain prescribed terms.[47] In Massachusetts, gig companies backed H.1234, which sought to designate app-based drivers as independent contractors and establish portable benefits accounts and occupational accident insurance.[48] Similar campaigns are underway in Connecticut, New Jersey, Pennsylvania, Illinois, Colorado, Washington, and New York, where Uber-backed groups like New Yorkers for Independent Work have supported slates of candidates and pushed schedule flexibility and independent contracting as a main plank in their platform.[49] Throughout, the flexibility

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44. Proposition 22, Text of Proposed Laws 30 § 7449(d) (Nov. 30, 2020), https://vig.cdn.sos.ca.gov/2020/general/pdf/topl-prop22.pdf [https://perma.cc/78W9-VJFV].

45. *Id.* at § 7450.

46. Faiz Siddiqui, *Uber Says It Wants to Bring Laws Like Prop 22 to Other States*, WASH. POST (Nov. 5, 2020), https://www.washingtonpost.com/technology/2020/11/05/uber-prop22/ [https://perma.cc/4NQ3-HP4H] (“The ride-hailing giant’s CEO said Thursday that Uber is looking to expand the [Proposition 22] model [from California] to other states, joining an executive from rival Lyft who said something similar earlier this week.”).

47. Sprague, *supra* note 35, at 746.

48. An Act Establishing Portable Benefit Accounts for App-Based Drivers, Bill H.1234, 192nd Gen. Ct. (Mass. 18, 2021), https://malegislature.gov/bills/192/H1234 [https://perma.cc/VED4-9Z8P].

49. *See, e.g.*, Josh Eidelson, *Connecticut Shelves Gig Bargaining Bill Amid Union Divisions*, BLOOMBERG (Mar. 26, 2021) https://www.bloomberg.com/news/articles/2021-03-26/connecticut-shelves-gig-bargaining-bill-amid-union-divisions?sref=4TStDRR2 [https://perma.cc/C2CA-MXEB] (Connecticut); Josh Eidelson & Benjamin Penn, *Labor, Gig Companies Near Bargaining Deal in N.Y.*, BLOOMBERG (May 18, 2021), https://www.bloomberg.com/news/articles/2021-05-18/labor-gig-companies-are-said-to-be-near-bargaining-deal-in-n-y [https://perma.cc/BEE5-PFTC] (New York); Levi Sumagaysay, *Uber, Lyft and Other Gig Companies Facing Fights Over Prop. 22 in California — and in States Where They Want to Replicate It*, MARKETWATCH (Sept. 18, 2021), https://www.marketwatch.com/story/gig-companies-facing-fights-over-prop-22-in-california-and-in-states-where-they-want-to-replicate-it-11631734329 [https://perma.cc/94NY-W86V] (listing multiple states); NEW YORKERS FOR INDEP. WORK, https://ny4independentwork.com/ (last visited Feb. 13, 2022) (“Preserving diverse, flexible job opportunities will become even more critical as the country grapples with the economic fallout of the pandemic, as certain jobs and work opportunities will take months to come back online while we work toward recovery.”) [https://perma.cc/7MTL-FUV9]; Noam Scheiber, *Uber and Lyft Ramp Up Legislative Efforts to Shield Business Model*, THE NEW YORK TIMES (June 9,

false choice has proven to be an effective device for Uber and its allies at the state and, as the next section explores, federal level as well.

*D. Post-*Dynamex *Federal Developments*

The Uber-driven flexibility narrative, born in California, soon made its way into the public conversation about the employee-independent contractor distinction in federal employment law. In 2020, as the ballot initiative battle raged in California, the Trump Administration issued a notice of proposed rulemaking to "clarify" the agency's interpretation of the economic reality test typically used under the FLSA: "This economic realities test and its component factors have not always been sufficiently explained or consistently articulated by courts or the Department, resulting in uncertainty among the regulated community."[50]

The new rule designated two factors as "core": "the nature and degree of the worker's control over the work and the worker's opportunity for profit or loss—which typically carry greater weight in the analysis."[51] The rule further identified three other factors "that may serve as additional guideposts in the analysis": "the amount of skill required for the work," "the degree of permanence of the working relationship between the individual and the potential employer," and "whether the work is part of an integrated unit of production."[52]

Though the DOL presented the rule as a mere clarification and simplification of existing law, advocates on both sides saw it as narrowing the definition of "employee" to enable firms to classify more workers as (cheaper) independent contractors. Workers' advocates rallied against it and gig employers like Uber rallied for it, bringing with them the very same narrative around the flexibility false choice.[53]

The rule was fast-tracked through the rulemaking process and ultimately enacted in the Trump Administration's final days in late 2020.[54] When

2021), https://www.nytimes.com/2021/06/09/business/economy/uber-lyft-gig-workers-new-york.html [https://perma.cc/ZYS9-7YSQ].

50. Independent Contractor Status under the Fair Labor Standards Act, 85 Fed. Reg. 60600 (proposed Sep. 25, 2020), https://www.regulations.gov/document/WHD-2020-0007-0001 [https://perma.cc/YY53-GERX] ("Accordingly, in this Notice of Proposed Rulemaking (NPRM) the Department proposes to introduce a new part to Title 29 of the Code of Federal Regulations setting forth its interpretation of the FLSA as relevant to the question whether workers are 'employees' or are independent contractors under the Act.").

51. *Id*. at § 795.105(c).

52. *Id*. at § 795.105(d).

53. Erin Mulvaney, *Uber Will Push to Shape Direction of Biden Gig Worker Regulation*, BLOOMBERG L. (Mar. 12, 2021), https://news.bloomberglaw.com/daily-labor-report/uber-will-push-to-shape-direction-of-biden-dols-gig-worker-rule [https://perma.cc/69BD-5SHD].

54. Benn Penn, *DOL Aims to Fast-Track Worker Classification Rule to 2020 Finish*, BLOOMBERG L. (July 2, 2020), https://news.bloomberglaw.com/daily-labor-report/dol-aims-to-fast-track-worker-classification-rule-to-2020-finish [https://perma.cc/FMZ6-BY2N].

President Biden took office, the DOL reversed course, delaying the rule's effective date and then withdrawing it, temporarily restoring the regulations to the *status quo ante*.[55] In March 2022, a decision by the U.S. District Court for the Eastern District of Texas reinstated the Trump-era rule on the ground that the Biden withdrawal violated the Administrative Procedure Act.[56] The DOL appealed; meanwhile, the agency has restarted the process with a new rulemaking.[57]

As the following Part demonstrates, the same messaging linking schedule flexibility with independent contracting has pervaded the federal rulemaking process, as Uber and its gig economy allies continue to influence the development of employee-independent contractor law. Those companies' public relations campaigns have narrowed the complexities of worker classification to a single issue, schedule flexibility, and created a false choice between flexibility and employee status. The next Part turns to workers—the consumers of that narrative—and their perceptions of and preferences for flexible scheduling and the trade-offs they are willing to accept in exchange for schedule control.

II. WORKERS' PERCEPTIONS AND PREFERENCES

This Part draws on three sources: polling largely financed by Uber and other gig economy employers; ethnographic observations and semi-structured interviews conducted by gig economy researchers; and my own original text analysis of public comments submitted as part of the Trump DOL's rulemaking process described above. This analysis has two goals: to

55. Wage and Hour Division, U.S. Dep't of Lab., *Independent Contractor Status under the Fair Labor Standards Act: Withdrawal*, REGULATIONS.GOV (May 6, 2021), https://www.regulations.gov/document/WHD-2020-0007-4330 [https://perma.cc/L66C-VVDX].

56. Coalition for Workforce Innovation v. Walsh, 2022 WL 1073346, at *2 (E.D. Tex. Mar. 14, 2022).

57. Jessica Looman, *Misclassification of Employees as Independent Contractors Under the Fair Labor Standards Act*, U.S. DEP'T LAB. BLOG (June 3, 2022), https://blog.dol.gov/2022/06/03/misclassification-of-employees-as-independent-contractors-under-the-fair-labor-standards-act [https://perma.cc/Q632-FBQM] ("The Department now plans to engage in rulemaking on determining employee or independent contractor status under the FLSA."). *See also* Andrew Kreighbaum et. al., *Landmark Labor Law Overhaul Passes House but Senate Fate Unclear*, BLOOMBERG L. (Mar. 9, 2021), https://news.bloomberglaw.com/daily-labor-report/landmark-labor-law-overhaul-passes-house-but-senate-fate-unclear [https://perma.cc/85GK-ZJGC] (describing the Protecting the Right to Organize Act, one of at least two major pieces of labor and employment legislation have been introduced in Congress, which would strengthen workers' right to unionize, among other things); *Murray, Brown, DeLauro Introduce Landmark Bill Expanding Labor Laws to Protect Workers*, U.S. SENATE COMM. ON HEALTH, EDUC., LAB. & PENSIONS (Sept. 24, 2020), https://www.help.senate.gov/ranking/newsroom/press/-murray-brown-delauro-introduce-landmark-bill-expanding-labor-laws-to-protect-workers- [https://perma.cc/UQ83-H6LD] (announcing the Worker Flexibility and Small Business Protection Act, a second piece of major labor and employment legislation introduced in Congress, that would amend ten federal labor and employment statutes to adopt the ABC test for employee status).

examine the extent to which workers equate independent contractor status with flexible schedules—consistent with Uber's and its allies' messaging—and to understand *why* workers value schedule flexibility. The next Part then matches public perception against both the law of flexible scheduling and the facts of worker experience.

Two caveats are important. First, my exploration of workers' views does not attempt to quantify the true number or proportion of workers who care about schedule flexibility. This is because the public campaign that began in California and continued in other states has already generated a high level of awareness about the topic—the jury pool has been tainted, so to speak, making measurement unreliable. Put differently, if workers were asked an open-ended question about what they wanted from a job pre-*Dynamex*, it is unlikely that their answers would be the same post-*Dynamex* and associated developments. I therefore use the sources in this Part to explore how workers think about flexibility—why they need it, how they talk about it—rather than making hard quantitative claims about frequency or distribution. Second, I raise a researcher's typical reservations about selection bias, meaning that workers who take the time to respond to a survey or interview request or make a public comment in a federal rulemaking are likely the ones who have the strongest-held beliefs.[58] In addition, slanted question-asking is a concern, such as in "push poll" type surveys in which the form of the question influences the response.[59] As noted below, gig economy researcher Veena Dubal's work with her collaborators attempts to avoid many of these methodological pitfalls by adopting an immersive, ethnographic approach. Yet the trade-off here is, necessarily, small sample sizes.

From the imperfect available set of worker responses and statements, however, I can derive some meaningful insight. I am not interested in how many workers support independent contractor status or express concerns about flexibility. Instead, I am interested in *what workers say* about flexibility, to understand what they want, and need, from a job. This then allows me to examine whether employee status might get them what they want as a matter of law, and whether such jobs are actually available, as a matter of fact. That is the subject of the Part that follows.

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58. *See, e.g.*, Brian D. Libgober, *Strategic Proposals, Endogenous Comments, and Bias in Rulemaking*, 82 J. POL. 642 (2020) (discussing two-sided selection dynamics in notice-and-comment rulemaking).

59. *See, e.g.*, Pew Research Center, *Writing Survey Questions*, https://www.pewresearch.org/our-methods/u-s-surveys/writing-survey-questions/ [https://perma.cc/24DH-YK9D] (last visited Feb. 13, 2022) ("When asking closed-ended questions, the choice of options provided, how each option is described, the number of response options offered, and the order in which options are read can all influence how people respond.").

A. Employer-Funded Polls

A raft of employer-funded polling, largely run by Uber both before and after *Dynamex* and subsequent state and federal developments, has established workers' preference for schedule flexibility. In a 2016 article, economists Jonathan Hall and Alan Krueger analyzed the results of two polls conducted in 2014 and 2015 of Uber drivers, funded by the company.[60] The surveys were conducted in market areas that covered eighty-five and sixty-eight percent of all drivers, respectively. With respect to flexibility, Hall and Krueger reported:

> The 2014 survey asked driver-partners whether a variety of possible motivations were a major reason, minor reason, or not a relevant reason for why they partnered with Uber. The most common reasons (combining major and minor reasons) were: "to earn more income to better support myself or my family" (91 percent); *"to be my own boss and set my own schedule" (87 percent); "to have more flexibility in my schedule and balance my work with my life and family" (85 percent)*; "to help maintain a steady income because other sources of income are unstable/unpredictable" (74 percent).[61]

Further, "Fifteen times as many drivers said Uber had made their lives better, rather than worse, by giving them more control over their schedule (74 percent versus five percent)."[62]

The surveys also asked questions that suggested, misleadingly, that schedule flexibility is only available via independent contractor status.[63] Regardless of workers' *status* preferences, however, the survey responses that Hall and Krueger summarized clearly express a preference for flexibility. This same finding has emerged in multiple subsequent polls and surveys.[64]

B. Ethnographic Studies

To supplement these survey and polling results, I turn to the work of gig economy researcher Veena Dubal, who employs ethnographic methods, including using open-ended questions and semi-structured interviews, to

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60. Jonathan V. Hall & Alan B. Krueger, *An Analysis of the Labor Market for Uber's Driver-Partners in the United States* 10-12 (NAT'L BUREAU ECON. RSCH., Working Paper No. 22843, 2016), https://www.nber.org/papers/w22843 [https://perma.cc/2YZC-PKS7].

61. *Id.* at 11 (emphasis added).

62. *Id.*

63. Dubal, *supra* note 4, at 43-44.

64. Uber, *Independent Bipartisan Poll Finds Drivers & Voters Overwhelmingly Support Giving Gig Workers New Benefits & Protections*, UBER NEWSROOM (Aug. 25, 2020), https://www.uber.com/newsroom/driver-poll/ [https://perma.cc/L3M2-RSYV]; Jessica, *New Survey: Drivers Choose Uber for its Flexibility and Convenience*, UBER NEWSROOM (Dec. 7, 2015), https://www.uber.com/newsroom/driver-partner-survey/ [https://perma.cc/AZK2-Q2Y3]; *see also* Dubal, *supra* note 4, at 44 ("A more recent peer-reviewed study… found… '[m]ost individuals selecting into such arrangements—at least on the Uber platform—seemingly have strong preferences for autonomy and scheduling flexibility.'").

study gig workers. Dubal's research offers greater insight into what workers want with respect to schedule flexibility. As an initial matter, her findings on workers' desire for flexibility mirror those of Hall and Krueger and the subsequent surveys summarized above. Drawing on her own survey of 214 Uber drivers conducted in San Francisco in 2016, Dubal reports, "Of those who preferred to be treated as independent contractors, 67 percent stated that this answer was informed by a need or desire for scheduling flexibility and/or autonomy on the job."[65]

In other work she and co-author Sunjukta Paul offer that "many workers need schedule flexibility to facilitate their transnational lives, family obligations, and/or chronic illnesses."[66] This conception of the necessity for schedule flexibility squares with the definition offered by economist M. Keith Chen and co-authors: "Flexibility is conceptualized as the ability to respond to different kinds of shocks. Benefits of flexibility will be related to the relative magnitudes of these shocks."[67] Reporting on a conversation with an Uber driver named Paul who suffered from a sporadically-presenting mental illness, Dubal elaborates:

> Our conversation troubled popular assumptions of what workers meant when they said they wanted to be independent contractors because of the "flexibility." Paul did not mean that he wanted the privilege to work whenever he felt like it; he meant that he wanted to work whenever he could.[68]

In other work, Dubal further unpacks the notion of schedule flexibility, separating the desire for flexible work into a structural category, i.e., time management around competing family, health, and other demands (the shock-based conception), and a dignity- and identity-based category. As Dubal explains, summarizing worker interviews:

> Strikingly, every driver gave the same answer [to the question of why they chose their job], "I like the freedom." In addition to embracing the structural control and flexibility enabled by independent contracting, many immigrant and racial-minority drivers experienced the independent contractor identity as a freeing identity. They corresponded the independent contractor identity to a freedom of the body and simultaneously recognized that it authorized their status as "entrepreneurs." In contrast to the white, nonmigrant drivers, immigrant and racial-minority drivers embraced their status as working-class

65. Dubal, supra note 4, at 46.

66. Veena Dubal & Sanjukta Paul, *Law and the Future of Gig Work in California: Problems and Potentials (Part 1)*, ONLABOR (Sept. 9, 2019), https://onlabor.org/law-and-the-future-of-gig-work-in-california-problems-and-potentials-part-1/ [https://perma.cc/TAC5-648Z].

67. M. Keith Chen et al., *The Value of Flexible Work: Evidence from Uber Drivers* 18 (NAT'L BUREAU ECON. RSCH., Working Paper No. 23296, 2017).

68. Dubal, *supra* note 4, at 50 (emphasis omitted).

> entrepreneurs and used it to recapture their dignity and reframe themselves as something more than "just a worker."[69]

These observations suggest that schedule flexibility is salient in different ways to different groups of workers, and that salience can be influenced by racial, ethic, and immigrant identities. Other researchers have made the same point, at least implicitly, about gender. For example, Hall and Krueger found that "42 percent of women and 29 percent of men said that a major reason for driving with Uber was that they 'can only work part-time or flexible schedules' because of 'family, education, or health reason[s].'"[70] Yet when the question was phrased in a way that centered choice and autonomy, men were "slightly more likely than women to indicate that they would prefer a job where they choose their own schedule . . . (73 percent versus 68 percent)."[71]

I build on these analyses in the next section, mining the text of the public comments submitted as part of the Trump DOL's rulemaking on the employee-independent contractor distinction.

C. Text Analysis of DOL Rulemaking Public Comments

I drew the text analyzed here from a set of public comments submitted to the U.S. Department of Labor in three waves: 1,825 comments were submitted in connection with the Trump DOL's initial notice of proposed rulemaking on September 25, 2020[72]; 1,518 in connection with the Biden DOL's proposed delay in the Trump rule's effective date, filed on February 5, 2021[73]; and 1,027 in response to the Biden DOL's proposed withdrawal of the rule, filed on March 12, 2021.[74] The final due date for comments was

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69. Veena Dubal, *Wage Slave or Entrepreneur?: Contesting the Dualism of Legal Worker Identities*, 105 CAL. L. REV. 65, 118 (2017).

70. Hall & Krueger, *supra* note 60, at 12; *see also* Joseph Fuller, et al., *Rethinking the On-Demand Workforce*, HARV. BUS. REV. (Nov.-Dec. 2020), https://hbr.org/2020/11/rethinking-the-on-demand-workforce [https://perma.cc/479N-R8H6] ("According to a 2009 Center for Work-Life Policy survey, more than two-thirds of 'highly qualified' women—that is, those with advanced degrees or high-honors BAs—who drop out of the workforce would not have done so if they'd had access to more-flexible job arrangements.").

71. Hall & Krueger, *supra* note 60, at 12.

72. Wage and Hour Division, U.S. Dep't of Lab., *Independent Contractor Status under the Fair Labor Standards Act*, REGULATIONS.GOV (Sept. 24, 2020), https://www.regulations.gov/document/WHD-2020-0007-0001 [https://perma.cc/22MT-2E96] (listing 1,825 comments received on the proposed rule's document home page).

73. Wage and Hour Division, U.S. Dep't of Lab., *Independent Contractor Status under the Fair Labor Standards Act: Delay of Effective Date*, REGULATIONS.GOV (Feb. 4, 2021), https://www.regulations.gov/document/WHD-2020-0007-1802 [https://perma.cc/N8VW-ZHDM] (listing 1,518 comments received on the proposed delay's document home page).

74. Wage and Hour Division, U.S. Dep't of Lab., *Independent Contractor Status under the Fair Labor Standards Act: Withdrawal*, REGULATIONS.GOV (Mar. 11, 2021), https://www.regulations.gov/document/WHD-2020-0007-3317 [https://perma.cc/DSF7-84UM] (listing 1,027 comments received on the proposed withdrawal's document home page).

April 12, 2021; the final comment was posted on the public Regulations.gov website on April 15, 2021.[75]

In total, this corpus consists of 4,370 unique submissions, some with comment text typed into the Regulations.gov online comment form and some with a separate document uploaded in .pdf format. Each submission also recorded the submitter's first and last name, though submitters could enter "anonymous" or any text in these fields. My research team downloaded the text of all comments, names, and associated .pdf files from Regulations.gov and converted them to machine-readable format. Throughout, we used text analytics packages available in the programming languages Python and R.

At the outset of the project, I intended to study the full set of 4,370 comments. However, a comparison of the three waves revealed that substantial numbers of the comments submitted about the Biden DOL's delay and then withdrawal of the Trump rule were duplicative of those submitted in connection with the original Trump rule. It appeared that many commenters who were in favor of the Trump rule merely resubmitted their comments in opposition to the Biden delay and then withdrawal. For that reason, I focused my analysis on the original set of 1,825 comments submitted in fall 2020, which best capture both the original support of and opposition to the Trump rule.

From this initial set of 1,825, I first identified all comments that contained references to flexibility or schedules. I generated a set of relevant keywords from the text, including multiple forms of those two words, misspellings, and word forms that were garbled by the text conversion process. The list of keywords is included in Appendix A. This process produced 403 comments that contained at least one flexibility or schedule mention. This set is certainly underinclusive, as some comments discuss flexibility without mentioning any of the keywords.[76] The results presented here should therefore be read as the minimum bound; a careful read of the entire set would likely uncover additional, similar comments.

From the set of 403, I excluded thirteen that were duplicates submitted more than once by the same commenter and four that used the keywords but were not referring to schedule flexibility, producing 386, or about twenty-one percent of the full set. Finally, I excluded ninety-four comments that were filed by organizations rather than individuals, leaving a study set of 292.

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75. *Id.* (using hyperlink, select "Browse Posted Comments" and sort by "Posted: Newer-Older").

76. *See, e.g.*, Cathy Sexton, Comment on Proposed Rule on Independent Contractor Status under the Fair Labor Standards Act (Oct. 22, 2020), https://www.regulations.gov/comment/WHD-2020-0007-1419 [https://perma.cc/Y92Q-X3RB] ("I take care of a granddaughter with a genetic disease. Where I worked at before kept getting mad at me. Because of all her dr appointments and medical testing and lab work. Driving is perfect. I'm here for her whenever she needs me. And I'm still able to make great money.").

I chose to exclude organizations because I wanted to investigate workers' own narratives around flexibility, rather than their representatives' arguments. I acknowledge here that some individual workers submitted canned comments likely provided to them by representative organizations.[77] For example, twenty-three comments in the set I studied were nearly identical, submitted by translators advocating for the Trump regulation, perhaps as a part of the American Translators Association, which is mentioned in all of the comments.[78] These were clearly copies, as they were submitted under different commenter names but used the exact same script. It is possible that other groups of commenters were also working from a common script but modifying it such that the similarity was not as obvious. Because I had no reliable way to identify other clusters of commenters whose messages were more subtly coordinated, I made the decision only to omit organizations and clear duplicates, e.g., double submissions by the same commenter, rather than use my judgment to exclude potentially similar comment clusters.

I did observe some occupation-based patterns in the commenters' descriptions of themselves. In addition to translators, the most common occupations identified were Uber and Lyft drivers, freelance writers and editors, handymen and -women, and housecleaners. Of these common groups, all but the freelance writers, editors, and translators mentioned app-based employment. Indeed, though the Trump DOL regulations were not specifically about the gig economy or app-based workers—but rather about the distinction between independent contractors and employees generally under the FLSA—the comments' content skewed heavily in the direction of Uber, Lyft, and other apps. A full fifty-six percent of comments contained references to Uber, Lyft, or versions of the words "drive" or "driver," while

77. *See generally* Michael Herz, *Fraudulent Malattributed Comments in Agency Rulemaking*, 42 CARDOZO L. REV. 1 (2020) (analyzing the frequency and effect of falsely attributed comments in federal rulemaking).

78. *See, e.g.*, Anonymous, Comment on Proposed Rule on Independent Contractor Status under the Fair Labor Standards Act (Oct. 22, 2020), https://www.regulations.gov/document/WHD-2020-0007-1176 [https://perma.cc/6LT7-CQX2] ("I support the proposed rule, as it will help harmonize and clarify federal regulations regarding the classification of Independent Contractors. As a CEO in the language industry, I am proud of the role that we play in supporting Americas economy, national security, and social services. The access that we provide to American companies for them to market their goods and services to multilingual and multicultural markets, here and abroad, is vital to our economic recovery. The language industry provides more than 160 million telephonic interpreting encounters per year in health care alone, making vital, lifesaving medical care accessible to more than 70 million Americans who speak a language other than English. And we support the Intelligence Community, domestic law enforcement, and the Department of Defense by providing interpreters and translators to a myriad of federal agencies. We do this with a workforce that is 80% freelance, and has been so for more than 70 years. And the compensation we provide to our professional, educated, and middle-class workforce is well above the average annual income in the US. The median earnings of translators, according to the American Translators Association, is more than $80,000 per year. Finally, repeated third-party surveys of the workforce indicate that an overwhelming majority prefer the flexibility and freedom of being Independent Contractors.").

twenty-two percent mentioned "gig," "app," or "platform." This finding illustrates gig employers' capture of the public conversation around the employee-independent contractor distinction, even outside California, and their influence over the flexibility narrative as well.

Further, using non-anonymous commenters' first names as a proxy for gender, thirty-seven percent of commenters had typically female names, forty-six percent had typically male names, and the remaining eighteen percent had names that were not identifiable by gender or submitted comments anonymously.

Turning to what workers say about flexibility, I first drew a window of twenty words before and after each schedule flexibility keyword listed in the Appendix. I then used a computational measure called relative frequency, or "keyness," to identify the words that distinguished those windows from all other comment text. This measure is used in text analytics and computational linguistics to get a sense of what a target passage of text is "about" in comparison to other text.[79] The word cloud in Figure 1 below shows the top 150 words that best distinguish the text surrounding the schedule flexibility keywords from the rest of the comments' text, with the font size indicating the importance of any given word. Appendix B lists all keywords, ranked by their chi-squared value, or measure of the observed frequency of any given word against its expected value, if words were distributed evenly across the entire set of comments.

Notably, "freedom" appears first, followed by "overwhelming," "able," and "family." "Freedom" squares with Professor Dubal's findings on workers' desire for autonomy and dignity connected with their desire for schedule flexibility; "family" is consistent with her findings on workers' need to balance their familial and work commitments. The "family" theme continues in words such as "daughter," "kids," "parent," and "mother." Other words may signal other themes related to schedule flexibility, also previously identified in Dubal's research: "doctor," "therapy," "disabled."

Keyness measures and word clouds are useful to give the reader an impressionistic view of textual content. However, in this instance, computational textual analysis was insufficient to get a full understanding of workers' views of and desires around schedule flexibility. I next read and hand-coded each of the 292 individual comments according to nine categories, which I developed inductively as I read and re-read the comment

79. *See* Kenneth Benoit et al., *quanteda: An R Package for the Quantitative Analysis of Textual Data*, 3(30) J. OF OPEN SOURCE SOFTWARE 774 (2018) (describing software used in this analysis as a package for natural language processing. The analysis is performed using keywords-in-context and textstat_keyness functions in R programming environment).

set. These categories can be conceptualized as different types of "shocks," in the framework advanced by Chen and his co-authors.[80]

Figure 1: Top 150 Distinguishing Words: Schedule Flexibility Keyword Windows

Table 1, below, lists those nine categories with definitions and example comments for each. Except for "nonspecific flexibility," which captures comments that speak generally to the need for and desirability of flexibility without further detail, the categories are not mutually exclusive, meaning that any comment that contained a specific flexibility topic could also contain more than one. For example, this commenter sounds notes of both family and autonomy: "This ideal combination of stable workflow and flexible schedule has also allowed me to be a work-at-home mom and wife and aunt, and to gain the priceless joy of giving my family my best all the time, not crammed in around some employer's random requirements. To paraphrase Vivian Ward in *Pretty Woman*, 'I say who, I say when, I say how much.'"[81] The commenter's implicit equating of gig work and sex work—through the *Pretty*

80. Chen et al., *supra* note 67, at 18 ("Flexibility is conceptualized as the ability to respond to different kinds of shocks. Benefits of flexibility will be related to the relative magnitudes of these shocks. While Uber drivers can respond to each kind of shock, this is not true for many other labor supply arrangements. For example, a 'standard' 9-5 factory shift job does not offer flexibility from hour to hour or from day to day.").

81. Anonymous, Comment on Proposed Rule on Independent Contractor Status under the Fair Labor Standards Act (Oct. 19, 2020), https://www.regulations.gov/document/WHD-2020-0007-0190 [https://perma.cc/6X4Y-EN7Z].

Woman reference—is fascinating and could occupy a whole additional article, but it is outside the present scope.[82]

Table 1: Flexibility Categories, Definitions, and Example Comments

	Definition	*Example Comment*
Non-specific flexibility	Expresses desire or need for flexibility but provides no further information about why flexibility is necessary.	"The reason I love Uber is obvious. I make my own schedule and drive when I want. All that goes away if I'm an employee and if I'm forced to a schedule will probably just find another job." Document ID: WHD-2020-0007-0971
Specific Flexibility		
Family (general)	Mentions need for schedule flexibility to spend time with family or meet family caregiving obligations; distinct from "Family (FMLA)" category because no mention of disability or health needs.	"Because I'm self-employed, I've been able to control the hours I work, which allowed me more flexibility when my children were growing." Document ID: WHD-2020-0007-0188
Family disability/ health (FMLA)	Mentions schedule flexibility in connection with caring for a family member with a disability or health needs; could be covered by the ADA or FMLA if employee.	"Being a independent contractor for Uber eats and having a flexible/my own schedule of hrs is important to me due to I have a disabled daughter. Sickness and doctor appointments would have gotten me fired already... granted the pay could and should be alot better...when the pay keeps going lower and lower it's not a good thing and makes it harder to support my

82. Professor Yvette Butler has explored this topic in *Aligned: Sex Workers' Lessons for the Gig Economy*, 26 MICH. J. RACE & L. 337 (2021).

	Definition	*Example Comment*
		daughter...” Document ID: WHD-2020-0007-0735
Family military (FMLA or VEVRAA)	Mentions need to accommodate family member's military service; could be covered by the FMLA if employee or Vietnam Era Veterans’ Readjustment Assistance Act’s (VEVRAA) if employee for federal contractor.	“I left my well paying full-time job and started my freelance writing business two years ago so I could have the flexibility to be home with my children more (which has been a blessing during the pandemic and related school-at-home situation) and support my husband's career as an Ohio National Guard soldier.” Document ID: WHD-2020-0007-0066
Own disability/ health (ADA or FMLA)	Expresses need for schedule flexibility to accommodate commenter’s own disability or health needs; could be covered by the ADA or FMLA if employee.	“I kept my healthcare, which I buy on the ACA, and thank goodness, because my hospital bills would otherwise total nearly $175,000. Flexibility allowed me to take time off after pacemaker surgery and adjust my schedule to how I'm feeling on any particular day. (I can write at 4 am and sleep at 2 pm, as long as I get the job done.) Best of all, I don't have to persuade a company to hire a 53-year-old with a heart condition. That's why so many people over 50 freelance in the first place: the W2 jobs with comparable pay aren't out there.” Document ID: WHD-2020-0007-1553
Attending school	Expresses need for schedule flexibility to accommodate commenter’s own school	“I like my flexibility. As a single mother trying to go back to school I have day and night classes. Having a regular

	Definition	*Example Comment*
	schedule, not their children's.	job during this time be very challenging to meet my school hours." Document ID: WHD-2020-0007-0746
Choice/ autonomy/ dignity	Connects schedule flexibility with personal choice, autonomy, or dignity.	". . .Our ability to compete globally is based on entrepreneurialism, free enterprise and the ability to have freedom to chose what is best for ME as the worker as long as someone is interested in my work product and willing to compensate me for it. . ." Document ID: WHD-2020-0007-0018
Multiple jobs	Describes need for schedule flexibility to balance more than one job, either by adding work to an existing full-time job or supplementing another job that has a variable, unstable schedule.	"I am a 53 year old woman who teaches part -time and has been driving for Uber for 5 years. I drive for Uber because I have a flexible schedule and can weave it around a teaching schedule that is never the same from semester to semester. If that changes, I will loose a huge part of my income. My Uber income got me qualified for a house, it is imperative that it remain flexible, that the schedule and control of when I work is my decision and my decision only." Document ID: WHD-2020-0007-0396
Other pursuits	Expresses desire for scheduling flexibility to pursue non-remunerative activities like art, music, or community service.	"Schedule flexibility IS the best that anyone can ask for, in order to keep a balance in life and coordinate with our families' schedules!!! I am a mom and housewife and

	Definition	*Example Comment*
		trying to be an artist, which means I can only work some Fridays and not at all on w/ks due to Fine Art Shows!!!" Document ID: WHD-2020-0007-0637

The development of these categories was informed both by other researchers' observations reported in the previous sections and by employment law. I was specifically attuned to comments that described situations that would potentially be covered if the commenter were an employee covered by the FMLA or ADA, producing the "Family disability/health (FMLA)" and "Own disability/health (ADA or FMLA)" categories. I also created the "Family military (FMLA or VEVRAA)" category to track mentions of the commenter's or commenter's spouse's military employment, because the FMLA and Vietnam Era Veterans' Readjustment Assistance Act (VEVRAA) provide some leave rights and employment protections for military family members (FMLA) and spouses who work for federal contractors (VEVRAA).[83] The next Part returns to these questions of hypothetical legal coverage under employment law for the workers whose comments I studied.

Additionally, I noticed in a handful of comments that workers explained their preference for independent contractor work because of age discrimination in the workplace. For example, one of the comments quoted in Table 1 combined a reference to age and disability: "Best of all, I don't have to persuade a company to hire a 53-year-old with a heart condition."[84] Another commenter stated similarly, "I feel much more satisfied and enriched by my work, and frankly, at this stage in my career, choosing to work as an independent contractor provides me far more opportunities and the ability to avoid age discrimination that's so common in typical employer-employee relationships[.]"[85]

83. *Military Spouses Frequently Asked Questions*, DEP'T OF LAB., OFF. OF FED. CONT. COMPLIANCE PROGRAMS (Nov. 8, 2019), https://www.dol.gov/agencies/ofccp/faqs/military-spouses#Q4 [https://perma.cc/B5SN-JSZS].

84. Jennifer Singer, Comment on Proposed Rule on Independent Contractor Status under the Fair Labor Standards Act (Oct. 25, 2020), https://www.regulations.gov/comment/WHD-2020-0007-1553 [https://perma.cc/7CNY-VVGK].

85. Roxanne Hawn, Comment on Proposed Rule on Independent Contractor Status under the Fair Labor Standards Act (Oct. 21, 2020), https://www.regulations.gov/comment/WHD-2020-0007-1056 [https://perma.cc/G4JC-33N2]; *see also* Lisa Terry, Comment on Proposed Rule on Independent Contractor Status under the Fair Labor Standards Act (Oct. 20, 2020), https://www.regulations.gov/comment/WHD-2020-0007-0217 [https://perma.cc/B2ZG-S6ZN]

Because these workers did not connect discrimination to schedule flexibility or the lack thereof, but to employee-independent contractor status generally, these comments were outside the scope of my study. However, they provided additional support for my hypothesis that, despite the legal protections against age discrimination offered inside the fortress of employment, such protections may be ineffective, rendering independent contractor work relatively more attractive to workers. This observation is deeply troubling for the employment law enterprise, which promises equal employment opportunity through statutes like the Age Discrimination in Employment Act. I return to this theme in the next Part.

Turning back to schedule flexibility specifically, Figures 2 and 3 below show the distribution of flexibility topic categories across the whole set of comments and by commenter gender. I explore the gender results further below, as they suggest that different subgroups of workers may prize schedule flexibility for different reasons, which, in turn, suggests different potential law and policy solutions and interventions.

As noted above, because my methods surely produce an undercount, and because the workers who choose to make a public comment in a federal rulemaking are likely unrepresentative of workers as a whole, these figures should be taken with a proverbial grain of salt. Nevertheless, they provide interesting insight into what workers want with respect to schedule flexibility, and the extent to which those desires would be answered by the legal protections that attach to employee status.

As Figure 2 shows, the largest proportion of comments that mention flexibility do not provide any further detail about workers' need or desire for a flexible schedule ("Nonspecific flexibility"). Among comments that could be categorized by specific flexibility topic, general statements about time with family comprise the largest group ("Family (general)"). When combined with the other two family-related topics, "Family/disability/health (FMLA)" and "Family military (FMLA or VEVRAA)," the proportion of comments with any of these topics rises to fifty-seven percent.

Notably, many of the general family-related comments mentioned homeschooling or other disruptions to kids' schooling due to the COVID-19 pandemic. It is unclear whether workers would have identified the same need for schedule flexibility and specifically connected it with general family caretaking obligations pre-pandemic.

The second most prevalent category was workers' juggling of multiple jobs and their resulting need for schedule flexibility. Here, some workers mentioned other jobs that had variable and unpredictable hours—but

("Continue to thrive in my career into my late 50s, an age where it can be difficult to find a staff position commensurate with my experience and current income thanks to ageism and a shrinking publishing industry.").

employer-driven variability rather than worker-driven flexibility. For example, as one worker commented:

> My ability to do this work as an independent contractor on my own time and terms for the purpose of supplementary income is nothing short of vital to me. My primary source of income is at a job where my hours are erratic and unpredictable. For this job, I finish my work days in different areas of Metro Atlanta and at different times every day. Because of this, it is impossible for me to commit to a second job where I work as an employee at a set location and with a set schedule.[86]

Figure 2: Distribution of Flexibility Topics

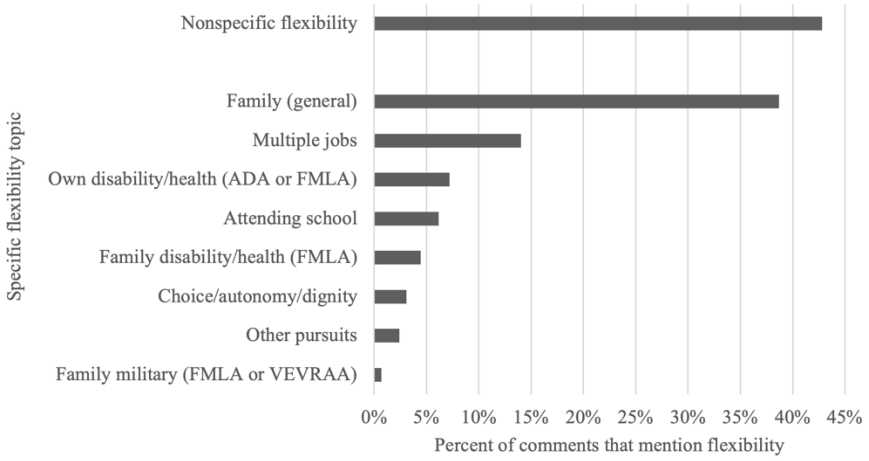

Figure 3, in turn, maps the comments in Figure 2 onto the gender of the commenter. For the commenters who supplied a name and whose name could be categorized as male or female, Figure 3 shows gender differences in nearly all categories. Tracking the Hall and Krueger and Dubal results discussed above, women commenters identified structural time problems with family and work obligations more frequently than did men, while men were slightly more likely to mention general notions of autonomy, dignity, and choice. Women more frequently mentioned disability and health topics, either their own or those experienced by children, aging parents, or other family

86. Kendall Doud, Comment on Proposed Rule on Independent Contractor Status under the Fair Labor Standards Act Standards Act (Oct. 22, 2020), https://www.regulations.gov/comment/WHD-2020-0007-0645 [https://perma.cc/QTD7-ZCQV]; *see also* Ruth Berins Collier, V.B. Dubal & Christopher Carter, *Labor Platforms and Gig Work: The Failure to Regulate* 4 (Inst. for Rsch. on Lab. & Emp., Working Paper No. 106-17, 2017) ("Platform gig work is a form of flexible employment that is available to a worker between, 'around,' or in addition to other jobs that have disappeared, are themselves irregular or 'flexible,' or are inadequate sources of income. As offline work becomes more unstable and precarious, the platform economy, with its tremendous increase in search efficiency and lower transaction costs in the labor market, is a compensatory mechanism for the changing nature of offline work.").

members.[87] Men, perhaps in their traditional breadwinner roles, more often mentioned holding down multiple jobs and relying on schedule flexibility to enable the juggle. I return to these differences in Part IV below.

Figure 3: Distribution of Flexibility Topics by Commenter Gender

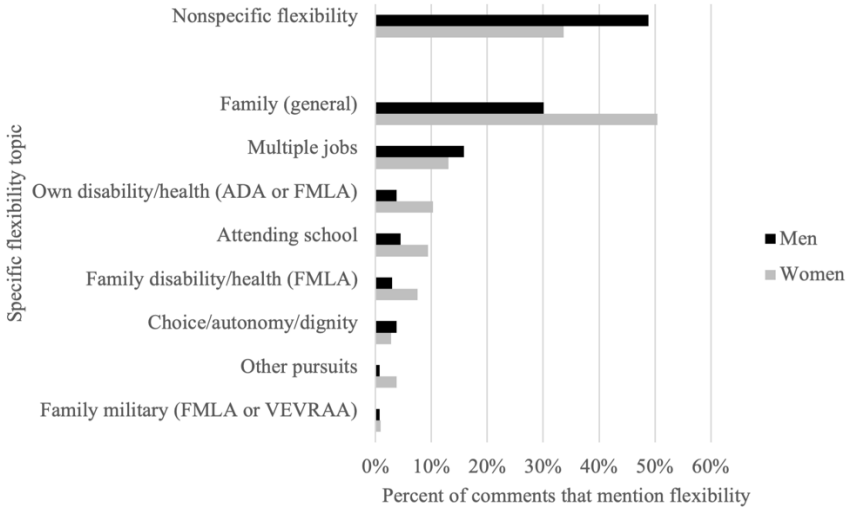

Figure 4 then illustrates the co-occurrence of specific flexibility topics within comments. The darker colors indicate a higher co-occurrence between any given pair of topics.

Figure 4: Co-Occurrence Between Specific Flexibility Topics

	Family (general)	Multiple jobs	Own disability/ health (ADA or FMLA)	Attending school
Family (general)	**X**	12%	6%	6%
Multiple jobs	12%	**X**	0%	7%
Own disability/ health (ADA or FMLA)	6%	0%	**x**	5%
Attending school	6%	7%	5%	**X**

87. These findings square with research by legal scholar Joan Williams, who studies work-family conflict. In a study of ninety-nine labor arbitrations arising from discipline and termination of employees, she relates case after case of workers who were fired because of schedule disruptions or attendance problems stemming from child care, particularly the care of children with disabilities. JOAN WILLIAMS, CTR. FOR WORKLIFE L., ONE SICK CHILD AWAY FROM BEING FIRED: WHEN "OPTING OUT" IS NOT AN OPTION 13 (Mar. 21, 2006), https://ssrn.com/abstract=2126303 [https://perma.cc/9RC3-R5ZJ].

Family disability/health (FMLA)	12%	2%	5%	6%
Autonomy	3%	2%	0%	11%
Other pursuits	6%	7%	0%	0%
Family military (FMLA or VEVRAA)	2%	0%	0%	0%

	Family disability/health (FMLA)	Autonomy	Other pursuits	Family military (FMLA or VEVRAA)
Family (general)	12%	3%	6%	2%
Multiple jobs	2%	2%	7%	0%
Own disability/ health (ADA or FMLA)	5%	0%	0%	0%
Attending school	6%	11%	0%	0%
Family disability/health (FMLA)	**X**	8%	15%	0%
Autonomy	8%	**X**	11%	0%
Other pursuits	15%	11%	**x**	0%
Family military (FMLA or VEVRAA)	0%	0%	0%	**X**

As Figure 4 shows, commenters most frequently mentioned the following pairs of topics together:

- Family disability/health (FMLA) – Other pursuits
- Family (general) – Multiple jobs
- Family (general) – Family disability/health (FMLA)
- Attending school – Autonomy

These clusters give a window into workers' complicated lives, suggesting that many workers do not have a single need for schedule flexibility, but rather multi-faceted needs that interact with one another in complex ways.

Finally, I tracked the number of comments that were supportive of or opposed to the Trump DOL rule. Notably, some commenters did not mention the federal rule at all and instead discussed California's AB 5 legislation, *Dynamex*, and the ABC test, though the federal rulemaking was ostensibly a separate process. Consistent with the Uber-centric nature of the comments, this suggests that many commenters may have been prompted or particularly motivated by some experience with the California employee-independent

contractor battles. Nevertheless, of the 292 individual commenters who mentioned schedule flexibility, the vast majority wrote in favor of independent contractor status, which they appeared to view as the only path to flexibility and likely to be shored up by the Trump DOL rule. Only thirteen discussed flexibility and then went on to oppose the Trump DOL rule. As one commenter remarked, "I would take security over flexibility any day of the week."[88] Another wrote, "Y not just pay better wages???? . . . all we ever get is continual pay cuts . . . what does flexibility of schedule mean, if/since we can't make a decent wage??????"[89]

Though these few workers wrote in favor of employee status, their comments suggest that they continue to view schedule flexibility as exclusive to independent contractor status, and flexibility and employee status-related security as a mutually exclusive tradeoff. I turn to that tradeoff, as a matter of law and fact, next.

III. FLEXIBILITY AND THE EMPLOYEE-INDEPENDENT CONTRACTOR DISTINCTION

As Professor Dubal and others have pointed out many times over, "employee status [does] not mandate a shift schedule" as a matter of law.[90] Nor must independent contractor status entail schedule flexibility under the law.[91] Indeed, contrary to the rosy view of independent contractor life presented by many of the commenters quoted here, app-based work can often entail *little* freedom, as "longtime drivers feel trapped in grueling work schedules and controlled by their algorithmic bosses."[92]

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88. Chesher Erskine, Comment on Proposed Rule on Independent Contractor Status under the Fair Labor Standards Act (Oct. 21, 2020), https://www.regulations.gov/comment/WHD-2020-0007-1296 [https://perma.cc/F6MF-BGHB].

89. Anonymous, Comment on Proposed Rule on Independent Contractor Status under the Fair Labor Standards Act (Oct. 24, 2020), https://www.regulations.gov/comment/WHD-2020-0007-1494 [https://perma.cc/AJV9-3M4N].

90. Dubal, *supra* note 4, at 51 (relating a conversation with a worker, "But I wanted to tell him—as I had to so many others—that in spite of what the gig companies told him, employee status did not mandate a shift schedule.").

91. Veena Dubal, *Law and the Future of Gig Work in California: Problems and Potentials (Part 1)*, ONLABOR (Sept. 9, 2019), https://onlabor.org/law-and-the-future-of-gig-work-in-california-problems-and-potentials-part-1 [https://perma.cc/F4PG-6M75] ("One unstated and erroneous assumption here is that employee status necessitates loss of this flexibility (it does not). Another is that gig work provides adequate schedule flexibility (it does not)."). *See also* Carmel DeAmicis, *Despite Uber's Arguments, Flexibility for Employees Is a Company's Choice*, RECODE (Aug. 11, 2015), https://www.vox.com/2015/8/11/11615468/despite-ubers-arguments-flexibility-for-employees-is-a-companys-choice [https://perma.cc/5MKJ-69Y8].

92. Dubal & Schor, *supra* note 8. *See also* Brian Chen & Laura Padin, *Prop 22 Was a Failure for California's App-Based Workers. Now, It's Also Unconstitutional*, NAT'L EMP. L. PROJECT (Sept. 16, 2021), https://www.nelp.org/blog/prop-22-unconstitutional/#_ftnref14 [https://perma.cc/49A7-Y7J2] (calling into question the actual flexibility of app-based drivers' jobs); Sprague, *supra* note 35, at 738 ("For the worker, the promise of contingent work is compelling: individuals would be working on projects of their choosing, during the hours they wanted; they would no longer be working for a boss, but for their

This Part expands on these observations, beginning with an analysis of what the law requires and allows with respect to schedule flexibility and then turning to the facts, surveying the actual, on-the-ground availability of flexible schedules for workers across different job types.

A. What the Law Allows and Requires

Recall the claim above by Uber lawyer Ted Boutros that, with employee status, "It's inevitable the flexibility and autonomy that drivers crave would have to be limited."[93] This position, which Uber and other gig employers have continued to push publicly, is incorrect on the law.[94] As noted above, employee status does not mandate schedule *in*flexibility—indeed, employers have vast discretion over scheduling. While Boutros is correct that some employee rights may require employer monitoring of work time, such as breaks and overtime pay after a certain number of hours worked, employers may accomplish such monitoring in any number of ways apart from establishing rigid shift work. As journalist Carmel DeAmicis notes:

> In a business like Uber's, where apps track when workers are logged in, it would be easy for a company to send a push notification to people after four hours of work, requiring them to take a 15 minute break, or for the app to turn off after a 40-hour workweek to prevent overtime. Monitoring drivers would be easy for a company whose algorithms have optimized pricing at all hours.[95]

In fact, employment and labor law are so silent on the subject of work schedules that some employers have moved to predominantly on-call workforces and just-in-time scheduling, where employees are called to work at the last minute and sent home when customer traffic is low.[96] In response, a scheduling stability movement has emerged, and advocates have pushed for legislation to make stable schedules available to workers who want them.[97] This conflict is different from the one at issue in this Article, but the two have the same roots: workers' desire for control over when they work. In the unstable schedule scenario, employers impose *variable and unpredictable*

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own tiny business; it would be the end of unemployment, the end of drudgery. Yet the reality is often much different: income insecurity, lack of stability, and diminishing workers' rights.").

93. DeAmicis, *supra* note 91.

94. Wage and Hour Division, U.S. Dep't of Lab., *Independent Contractor Status under the Fair Labor Standards Act: Withdrawal* (Mar. 12, 2021), https://www.regulations.gov/document/WHD-2020-0007-3317 [https://perma.cc/RCE2-8VTV] ("[F]lexible work schedules can be made available to employees as well as independent contractors, so any determination of or shift in worker classification need not affect flexibility in scheduling.").

95. DeAmicis, *supra* note 91.

96. *See generally* Charlotte Alexander, Anna Haley-Lock & Nantiya Ruan, *Stabilizing Low-Wage Work*, 50 HARV. C.R.-C.L. L. REV. 1 (2015) (analyzing trend toward just-in-time scheduling).

97. *See* Julia Wolfe, Janelle Jones & David Cooper, *'Fair Workweek' Laws Help More than 1.8 Million Workers*, ECON. POL'Y INST. (July 19, 2018), https://www.epi.org/publication/fair-workweek-laws-help-more-than-1-8-million-workers [https://perma.cc/482E-L5B4].

schedules on employees by fiat. In the present scenario, workers fear that employers would impose *fixed and inflexible schedules* on employees by fiat. Both scenarios reveal employers' substantial legal power to set schedules, whether they choose to use it at either the fixed or the variable extreme, or to offer employees some control over and voice in setting their work schedules—an option discussed further in the section below.

Statements like Boutros' also misrepresent the various multi-factor tests that make up the law of employees and independent contractors, summarized above in Part I. The less discretion the worker holds over scheduling or any other aspect of their labor, the more the "control" analysis tips in favor of employee status. Yet the inverse—that employee status mandates less worker discretion—is not also true. Further, while schedule flexibility, read as a lack of employer control, might be one indicator of independent contractor status, there is no legal rule that independent contractors *must* have total schedule flexibility, given the multifactorial, totality-of-the-circumstances nature of courts' inquiry.

There are some narrow exceptions to employers' general discretion over scheduling. While the default is that employees *may* receive flexible schedules, they *must* receive flexibility in one of three circumstances under federal law, captured by three of the flexibility topics identified in the text analysis above. State and local laws may contain additional requirements.

First, the ADA and FMLA allow modified schedules or leave time for covered and eligible employees to accommodate an employee's own disability or serious health condition. The ADA is the vehicle for permanent schedule modifications, while the FMLA allows a capped amount of intermittent leave.[98] The statutes' coverage depends on the employer's number of employees—at least fifteen for the ADA and fifty for the FMLA—and, for the FMLA, the employee's job tenure.

Notably, courts have resisted extending coverage under both statutes for employees who seek accommodation for unpredictable schedule changes.[99] This would likely make coverage difficult to claim for workers like the commenter at the outset who seemed to describe a mental illness that flares up periodically. Moreover, neither statute offers protection to workers for whom age-related fatigue alone limits their working ability, such as the

98. *Family and Medical Leave Act*, DEP'T OF LAB., WAGE & HOUR DIV., https://www.dol.gov/agencies/whd/fmla [https://perma.cc/N99Y-Z2LP] (explaining FMLA leave time limits).

99. *See, e.g.*, Collins v. NTN-Bower Corp., 272 F.3d 1006, 1007 (7th Cir. 2001) (interpreting the FMLA); Equal Emp. Opportunity Comm'n v. Yellow Freight Sys., Inc., 253 F.3d 943, 948 (7th Cir. 2001) (interpreting the ADA). *See also* Rachel Arnow-Richman, *Incenting Flexibility: The Relationship Between Public Law and Voluntary Action in Enhancing Work/Life Balance*, 42 CONN. L. REV. 1081, 1106 (2010) (noting in the ADA context that "courts routinely hold that requests to work from home, alter attendance requirements, or change work schedules are unreasonable and have consistently denied claims based on an employer's failure to provide these types of accommodations").

commenter who described himself as "a 60 year old man" who drives for Uber Eats and who prefers to be able to work when his "energy levels" allow it.[100]

Second, the FMLA also extends leave rights to employees who care for family members with a serious health condition. However, the same caveats apply, as employers may not be required to accommodate unpredictable, intermittent leave requests such as described by one commenter:

> Without the ability to "gig" my family would not be able to survive my husband's cancer battle. It has been absolutely imperative that I am able to work when I can, take him to chemo when it is scheduled, and be with him in the hospital when he is admitted. *If I was committed to an employer at this time I would have lost my job months and months ago due to the unpredictable events of cancer and my unreliability.* It has been comforting to know that my job will still be there when I am able to come back to it after taking time off to care for my family.[101]

Further, the FMLA's caregiving leave provisions do not extend to general child- or elder-care, absent a serious health condition. This means that the many commenters who described obligations to their "95year [sic] father,"[102] "91 year old mother,"[103] or "three toddlers"[104] would not be covered.

Third, the FMLA covers "qualifying exigencies" arising out of a family member's active duty in the military. Here, the statute contemplates needs for leave on an unpredictable, irregular basis, including "providing childcare on a non-routine, urgent, immediate need basis."[105] The total amount of qualifying exigency leave is capped in the same way as other FMLA leave:

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100. Anonymous, Comment on Proposed Rule on Independent Contractor Status under the Fair Labor Standards Act (Oct. 22, 2020), https://www.regulations.gov/comment/WHD-2020-0007-0814 [https://perma.cc/2KW8-XSWJ] ("I am a 60 year old man and find it necessary to work a full time job and a part time in order to get my bills paid and finance my retirement. Uber Eats allows me the flexibility to work the part time hours that I am able based on my schedule, health, energy levels, etc.. By not being locked into a fixed part time schedule I can choose not to work part time if [] my full time job is just too demanding for that day or week.").

101. Erin Latessa, Comment on Proposed Rule on Independent Contractor Status under the Fair Labor Standards Act (Oct. 21, 2020), https://www.regulations.gov/comment/WHD-2020-0007-0954 [https://perma.cc/T2M6-VFC8].

102. Alonzo Smith, Comment on Proposed Rule on Independent Contractor Status under the Fair Labor Standards Act (Oct. 22, 2020), https://www.regulations.gov/comment/WHD-2020-0007-0511 [https://perma.cc/QZ9H-ZNAR].

103. Glenn Little, Comment on Proposed Rule on Independent Contractor Status under the Fair Labor Standards Act (Oct. 21, 2020), https://www.regulations.gov/comment/WHD-2020-0007-0313 [https://perma.cc/3D7Y-D82B].

104. Amber Felt, Comment on Proposed Rule on Independent Contractor Status under the Fair Labor Standards Act (Oct. 22, 2020), https://www.regulations.gov/comment/WHD-2020-0007-1400 [https://perma.cc/6QNF-57W7].

105. *Fact Sheet #28M(c): Qualifying Exigency Leave under the Family and Medical Leave Act*, DEP'T OF LAB., WAGE & HOUR DIV. (Feb. 2013), https://www.dol.gov/agencies/whd/fact-sheets/28mc-fmla-exigency-leave [https://perma.cc/E2CL-Q2XU].

at twelve workweeks within a twelve-month period. Further, the Vietnam Era Veterans' Readjustment Assistance Act provides a variety of protections to military spouses from all eras employed by federal contractors.[106] The VEVRAA generally prohibits discrimination on the basis of an employee's spouse's military service but does not require affirmative schedule accommodations, as the FMLA does.

Apart from these three narrow circumstances, there is no generalized right to schedule flexibility that would cover the remaining topics identified in the corpus of public comments: general family obligations, school attendance, holding down multiple jobs, making art, or performing community service. Nor does such a right exist on dignity or autonomy grounds.

Thus, though Boutros' characterization of employers as required to *limit* employees' schedule flexibility is certainly inaccurate, employers are only narrowly required to *offer* flexible schedules. The vast remainder of circumstances fall into the realm of the discretionary, where employers may choose to offer schedule flexibility to employees—and to shoulder the associated additional management and transaction costs, reaping any benefits from increased work quality and productivity. The next section turns to the situation on the ground, summarizing the state of the facts with respect to employees' schedule flexibility.

B. The State of the Facts

Schedule flexibility is the exception to the rule for today's employees. As legal scholar Michelle Travis has noted, many employees today still operate within a "full-time face-time norm," meaning a "presumption that work itself is defined by very long hours, rigid schedules, and uninterrupted, in-person performance at a centralized workspace."[107] Professor Jennifer Will documented the ways that technology has extended employers' reach into all aspects and all times of employees' lives.[108] Economist Claudia Goldin calls this "greedy work," characterized by long, inflexible work hours.[109] As discussed above, service workers experience another variation of work-hour

106. *See Vietnam Era Veterans' Readjustment Assistance Act*, DEP'T OF LAB., OFF. OF FED. CONT. COMPLIANCE PROGRAMS, https://www.dol.gov/agencies/ofccp/vevraa [https://perma.cc/ZL3X-ZE8M] (last visited Feb. 13, 2022); *Military Spouses Frequently Asked Questions*, DEP'T OF LAB., OFF. OF FED. CONT. COMPLIANCE PROGRAMS (Nov. 8, 2019), https://www.dol.gov/agencies/ofccp/faqs/military-spouses [https://perma.cc/B5SN-JSZS].

107. Michelle A. Travis, *A Post-Pandemic Antidiscrimination Approach to Workplace Flexibility*, 64 WASH. U. J. L. & POL'Y 203, 204 (2021).

108. *See* Jennifer Haskin Will, *The Case for the "No-Collar" Exemption: Eliminating Employer-Imposed Office Hours for Overworked, Remote-Ready Workers*, 15 U. ST. THOMAS J. L. & PUB. POL'Y (forthcoming 2022) (manuscript at 16-17).

109. *See* CLAUDIA GOLDIN, CAREER AND FAMILY: WOMEN'S CENTURY-LONG JOURNEY TOWARD EQUITY 9-13 (2021).

related harm: just-in-time scheduling, which may result in too little, rather than too much actual work time, but consumes and disrupts workers' lives in similar ways.[110]

Commenters have pointed to these problems of greedy and unpredictable work schedules as a main driver of the Great Resignation during the COVID-19 pandemic, in which workers—and women workers in particular—left their jobs *en masse*.[111] These observations mirror the findings noted above in Part II.C, where women were more likely to report family-centered needs for schedule flexibility, whereas men's flexibility narratives centered more on autonomy, dignity, and choice. Employers' desire to lure back their workforce, plus many employers' experience with remote and hybrid work during the pandemic, may prompt greater adoption of flexible work schedules.

Even pre-pandemic, some employers had begun experimenting with remote and hybrid work, pushed by younger workers' desire for a better work-life balance than their counterparts from previous generations. Indeed, a review of the literature on alternative work arrangements cites research finding that companies that offer schedule flexibility "may garner a competitive advantage as they are more likely to attract and retain high-skill workers who reciprocate with more engagement, productivity, or quality work and less absenteeism, turnover, or accidents."[112] Further, research has found that "millennials were more likely to accept a job offer from a company that offers flexible work schedules."[113] Prominent firms that have experimented with flexible scheduling include Boston Consulting Group; others have implemented a four-day workweek.[114]

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110. *See* Alexander et al., *supra* note 96, at 7-11.

111. Soo Youn, *These Women Left the Workforce. Here's What They Want in Their Next Jobs*, THE LILY (Dec. 18, 2021), https://www.thelily.com/these-women-left-the-workforce-heres-what-they-want-in-their-next-jobs [https://perma.cc/EM7R-9D3B] ("Women have been leaving the workforce in disproportionate numbers throughout the pandemic. Since February 2020, 1.3 million mothers between 25 and 54 left the workforce, according to the U.S. Census Bureau's September 2021 Current Population Survey."); Moira Donegan, *Part of the 'Great Resignation' is Actually Just Mothers Forced to Leave Their Jobs*, THE GUARDIAN (Nov. 19, 2021), https://www.theguardian.com/commentisfree/2021/nov/19/great-resignation-mothers-forced-to-leave-jobs?CMP=oth_b-aplnews_d-1 [https://perma.cc/PG42-BF2H] ("Part of the 'great resignation' is actually just mothers forced to leave their jobs; during the pandemic, women have exited the labor force at twice the rate of men; their participation in the paid labor force is now the lowest it has been in more than 30 years").

112. Gretchen M. Spreitzer, Lindsey Cameron & Lyndon Garrett, *Alternative Work Arrangements: Two Images of the New World of Work*, 4 ANN. REV. ORG. PSYCH. & ORG. BEHAV. 473, 481 (2017).

113. *Id.*

114. *See id.* at 482; Kevin J. Delaney, *Is the Four-Day Workweek Finally Within Our Grasp?*, THE NEW YORK TIMES (Nov. 23, 2021), https://www.nytimes.com/2021/11/23/business/dealbook/four-day-workweek.html?referringSource=articleShare [https://perma.cc/ED2R-BZLL].

However, these experiments have tended primarily to benefit white collar office and knowledge employees.[115] Reliable estimates of the prevalence of schedule flexibility for employees across job types are difficult to come by. Yet as labor economist Paul Osterman summarizes, a 2011 study "found that only 23% of people with a high school degree and 18% with less than a high school degree have access to flexible schedules."[116] Thus, to the extent that employers have taken advantage of their prerogative to offer employee-driven flexible scheduling, the primary beneficiaries have been at the upper end of the wage scale. Whether this pattern holds in the post-pandemic economy remains to be seen.

IV. PATH(S) FORWARD

As the preceding Parts have shown, equating schedule flexibility exclusively with independent contractor status is wrong on the law, but may be right on the facts for many working situations, particularly for employees in lower-wage, front-line jobs. Workers like the commenters quoted above see independent contractor status as the only way to cope with the variety of shocks they experience. Yet if the only real way to get a flexible job is to surrender all of the rights and benefits of employee status, then the labor and employment law enterprise has failed. Workers should not be forced to choose between a bad, likely inflexible, job within the fortress of employment and a bad, flexible job outside it.

In this final Part, I outline some paths forward. Though the backdrop of this discussion is the contested employee-independent contractor distinction, none of these proposals requires redrawing the employee-independent contractor line. Instead, the flexibility problem should be de-linked from worker status and addressed on its own terms. Otherwise, schedule flexibility too easily becomes one side of a false choice between employee and independent contractor status, as in California and again in the Trump DOL rulemaking.

The sections below present an array of proposals, targeting both employees and independent contractors. For employees, these include

115. *But see* Williams, *supra* note 88, at 5 ("Flexibility is possible in working-class jobs. We often hear that flexible work options 'just aren't possible' in working-class jobs. This misconception stems from the assumption that the only available model of workplace flexibility consists of individualized arrangements negotiated between an individual worker and an individual supervisor. That model, developed for professionals, often is unsuitable for nonprofessionals. Nonetheless, both employers and workers stand to benefit when workplaces provide flexibility for nonprofessionals.").

116. Paul Osterman, *In Search of the High Road: Meaning and Evidence*, 71 ILR REV. 3, 21 (2018); *e.g.*, Chen, et al., *supra* note 68, at 4 ("Interestingly, survey data from Bond and Galinsky [2011] suggests that lower wage employees have less flexibility than higher wage employees. Indeed, lower wage workers in the retail sector often cannot choose their hours, and the hours chosen by their employers frequently change from week to week, exacerbating work-life conflicts (see, for example, Henly and Lambert [2014]).").

revamping the ADA's and FMLA's coverage of modified schedules and intermittent leave and amending the FLSA's white collar exemption to require flexibility. I also discuss right-to-request and right-to-keep schedule flexibility legislation, as well as stable scheduling regulations. For workers of all statuses, I make the business case to incentivize employers to provide flexibility voluntarily. Finally, I suggest that the benefits associated with employee status (but not the rights) be decoupled from employment and taken up by a more robust social safety net governed by entirely different legal regimes.

A. Legal Reforms

1. FMLA and ADA Amendments

First, I offer two proposals for amending the FMLA and ADA to better accommodate the scheduling needs of covered employees. Here, I do not suggest expanding the statutes beyond their existing mandates—family and medical leave and employees with disabilities, respectively—but rather (1) expanding the family and medical qualifying events under the FMLA and (2) incorporating schedule flexibility as an additional recognized accommodation under both statutes.

Regarding the expansion of qualifying events, leave for child care need not be centered only on the time around a child's birth or adoption, as the current statute is written. As Professor Robert Bird has suggested, an absence from work for "school-related activities such as attending a parent-teacher conference" might be covered as well, as could an absence to care for a child with a mild illness like a cold.[117]

Regarding flexibility as an additional permitted accommodation, courts have generally resisted recognizing FMLA leave or ADA accommodations for unpredictable intermittent employee absences. This is understandable: such absences can wreak havoc on an employer's ability to manage and plan work. Yet a middle ground might allow a worker to designate a period of time, either *ex ante* or soon after realizing the need for flexibility, as a flex period. For example, if an employee or family member is having a flare-up of a chronic illness, necessitating unexpected and varying absences, the employer could develop temporary work-arounds for that period and count the absences as FMLA leave or the schedule modification as an accommodation under the ADA.

117. Robert C. Bird, *Precarious Work: The Need for Flextime Employment Rights and Proposals for Reform*, 37 BERKELEY J. EMP. & LAB. L. 1, 24 (2016).

2. Right-to-Request Laws

Second, I propose passage of right-to-request laws. This second measure is needed because the reforms proposed above retain their relatively narrow focus on family and medical leave and disability accommodation. As Part II.C above demonstrated, however, the most frequent flexibility topic identified in workers' comments was a general desire to spend time with family. The "family" in the FMLA does not stretch this far. Therefore, a right-to-request approach would establish a blanket procedure for employees and employers to negotiate around schedule flexibility, regardless of the nature of the shock that produces the flexibility need.

There are models in place already on the local and state levels. New York City has a local ordinance, the Temporary Schedule Change Law, which goes beyond the right to request by requiring employers to grant temporary changes in employees' schedules to accommodate the need to care for a child under eighteen or other family member care recipient.[118] At the state level, both chambers of New York's legislature have passed a right-to-request a flexible schedule bill during recent sessions, and other states, including Vermont, have similar statutes on the books.[119]

On the federal level, the Worker Flexibility and Small Business Protection Act was introduced in Congress in 2020, but not passed.[120] It follows the New York State and Vermont model, seeking to enshrine for employees the right to request to have the schedule that they desire. Employers may only deny the request upon a showing of "compelling business necessity," reviewable by the DOL, and may not retaliate against the requesting employee. The bill would also apply the California ABC approach to employee and independent contractor classification across all major federal labor and employment laws and would allow independent contractors who are reclassified as employees to keep their previous schedule flexibility as well.

3. Stable Scheduling Laws

Third, states or Congress should pass stable scheduling laws. As discussed above, one type of scheduling *in*flexibility that is primarily associated with service jobs is just-in-time scheduling, where employees experience last-minute call-ins and send-homes. While this is not same inflexibility as in a traditional, rigid nine-to-five job, employees with just-in-time jobs must functionally maintain open availability. This limits their ability to make plans and structure their lives, as they must stay ready for work to intrude.

118. N.Y.C., N.Y., ADMIN. CODE § 20-1262 (2018).

119. Bird, *supra* note 117, at 29.

120. Worker Flexibility and Small Business Protection Act, S. 4738, 116th Cong. (2020).

Stable scheduling laws seek to give employees more control over their schedules, and therefore more flexibility to manage competing demands on their time. Local jurisdictions including Seattle, San Francisco, Philadelphia, Chicago, and New York City have passed ordinances that require advance notice of schedules and compensation for last-minute schedule changes, as well as other protections, and Oregon has passed an equivalent state law.[121] The Schedules That Work Act, which sought to establish similar protections on the federal level, was introduced in Congress in 2019 and reintroduced in 2022, but has not passed.[122]

4. FLSA White Collar Exemption Amendment

Fourth, Congress should amend the FLSA to require schedule flexibility for employees covered by the white collar exemption to overtime. This approach to legislating schedule flexibility has been suggested by Professor Jennifer Will, who proposes that employers who seek to exempt employees from the FLSA's overtime requirement under the statute's executive, administrative, and professional provision must also provide schedule flexibility.[123] As Will observes, this category of white collar employees often experience the worst of the "greedy work" phenomenon identified by Claudia Goldin, as they work in technology-enabled jobs that demand near-constant availability. If employers can avoid paying overtime for their demands on workers' time, Will argues, then the workers should receive schedule flexibility in return.

B. Economic Benefits of Flexibility

Even if none of the foregoing reforms passes—and passage would meet stiff resistance by employers' lobbies—employers might nevertheless be convinced of the economic benefits of exercising their discretion to institute schedule flexibility. Indeed, Chen and his co-authors cite a 2010 study by the Council of Economic Advisors that found broad willingness on employers' part to allow employees to alter their start and stop times periodically "within some range of hours," but greater resistance to more frequent schedule changes.[124] Other employers have experimented with creating greater substitutability among jobs or tasks within jobs, which enables job sharing across workers and, in turn, greater schedule flexibility for those workers

121. Stephanie Wykstra, *The Movement to Make Workers' Schedules More Humane*, VOX (Nov. 5, 2019), https://www.vox.com/future-perfect/2019/10/15/20910297/fair-workweek-laws-unpredictable-scheduling-retail-restaurants [https://perma.cc/BNR2-G78N].

122. Schedules That Work Act, H.R. 5004, 116th Cong. (2019).

123. *See* Will, *supra* note 108, at 5.

124. Chen et al., *supra* note 68, at 4.

who have the option to shift and share their tasks and time.[125] This tactic may be particularly helpful in extending flexibility outside the top tier of the labor market to broader sets of workers across the economy.

Multiple studies have found that, despite increased coordination and management costs, these various approaches to schedule flexibility can in fact improve organizations' bottom lines. In a review of research on scheduling, Gretchen Spreitzer and her co-authors, summarizing other authors' findings, concluded that flexible schedules result in reduced employee absenteeism, increased productivity and job satisfaction, decreased turnover, and lower worker stress, at least in some occupations.[126] Joan Williams' research comes to a similar conclusion:

> The business case for family-responsive policies in the working class context includes: improved quality and consumer safety; improved worker engagement and commitment, which has a direct link to profits; enhanced customer service and productivity; reduced stress, which drives down health insurance costs; cost savings due to enhanced recruitment and decreased turnover and absenteeism; and avoiding a loss of employer control in unionized workplaces.[127]

Paul Osterman also collected studies establishing a connection between flexible schedules, reduced turnover, and increased employee effort. He noted that evidence is "very thin" on whether the costs of managing schedule flexibility wash out its benefits, but cited one single-firm experiment in which the benefits were calculated as more than double the costs.[128]

Another study of a single firm's experience with both remote and flexible work during the COVID-19 pandemic suggests that employers may manage flexible schedules best by managing less, not more. In their recommendations to employers, the research team suggested "Not micromanaging schedules: Allow your employees the flexibility to schedule their business processes as per their personal timing preferences. In our data, most team members appeared to naturally conduct their work at the times of the day when those business processes could be most efficiently

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125. *See, e.g.*, Ghazala Azmat et al., *Workplace Presenteeism, Job Substitutability and Gender Inequality*, 58 J. HUM. RES. 1, 23-24 (2023) ("Since women increase their rates of temporary unpredictable absence relative to men after the arrival of the first child, the model would predict that parenthood will reduce the relative likelihood of women holding jobs with low temporal flexibility – in our case, jobs with few substitutes. This is what we have empirically identified in the data. . . Unlike parental leave and part-time employment, which allow the employer to anticipate the absence of the worker, temporal work absence, often due to own sickness or caring for sick children, is unpredictable."; concluding that increased job and task substitutability, and associated schedule flexibility, decreases absenteeism by women workers after the birth of a first child and helps address the gender wage gap).

126. Spreitzer et al., *supra* note 112, at 481 (citing Ellen Ernst Kossek & Jesse S. Michel, *Flexible Work Schedules*, *in* AM. PSYCH. ASSOCIATION HANDBOOK OF INDUS. & ORG. PSYCH. 535, 551 Table 17.2 (S. Zedeck ed., 2011).

127. Williams, *supra* note 88, at 5.

128. Osterman et al., *supra* note 116, at 21.

performed."[129] These experiences, though drawing from single firms, suggest a path forward for voluntary employer-provided flexibility to employees.[130]

C. All Workers

The reforms outlined above focus primarily on employees: improving conditions inside the fortress of employment such that workers would not have to trade away the rights, benefits, and protections of employment for flexibility. A final set of proposals shifts the focus away from the work relationship entirely.

In a 2018 article, Professor Estlund considered the drivers of labor automation, as a cheaper alternative to both employee and independent contractor status.[131] She was concerned that proposals to increase labor and employment protections for employees and to extend employee status to more workers only increase the cost of human labor, making automation more attractive. What, then, to do about workers, or people formerly known as workers? According to Estlund:

> The answer . . . begins with separating the issue of what workers' entitlements should be from the issue of where their economic burdens should fall. Some worker rights and entitlements necessarily entail employer duties and burdens. But for those that do not, we should look for ways to shift their costs off of employer payrolls or to extend the entitlements themselves beyond employment.[132]

She considers health care, paid family and medical leave, vacations, retirement plans, and worker income support as candidates for a shift from employer mandates to the universal public safety net.[133] Notably, Estlund's proposals do not distinguish between employees and independent contractors. If these costs are shifted outside the fortress of employment, then they become equally accessible to all people, regardless of whether they work at all, and if so, the worker classification into which they fall.

This move would radically change the landscape of work. It would allow workers to make a genuine choice, rather than a false one, between employee and independent contractor status. Those workers who privilege their dignity and autonomy, outside pursuits, and family time above all else could choose an independent contractor job without the sacrifices that current work structures demand. As one Uber and Lyft driver, discussing employee-status

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129. Arjun Narayan, *The Endless Digital Workday*, HARV. BUS. REV. (Aug. 12, 2021), https://hbr.org/2021/08/the-endless-digital-workday [https://perma.cc/RHE9-A3LQ].

130. *See* Spreitzer et al., *supra* note 112, at 481-82. (finding that workers who choose flexible schedules are viewed as shirkers and "time deviants," advance less quickly, and make less money. Thus, if more companies adopt system-wide schedule flexibility, it will improve the legitimacy of flexible scheduling.)

131. Estlund, *supra* note 6, at 254.

132. *Id.*

133. *Id.* at 310.

jobs, commented, "The benefits act like chains keeping us at jobs we hate."[134] Nor should flexibility chain workers to benefits-less independent contractor positions.

CONCLUSION

This Article has analyzed the role that schedule flexibility has played—and continues to play—in the public conversation around employee and independent contractor status. While many workers appear to associate flexibility exclusively with independent contractor jobs, this is wrong on the law. However, it may be right on the facts, as flexibility is left to the discretion of employers in most situations, and that discretion is rarely exercised outside white collar, knowledge, and office jobs. Even when employment laws such as the ADA and FMLA would seem to mandate schedule flexibility as an accommodation for an employee's or their family's needs, workers perceive such laws as ineffective—and their perceptions may be largely correct.

This is a disturbing story for the labor and employment law project, which has built up a formidable set of rights, benefits, and protections associated with employee status. Yet workers should not have to abandon the fortress of employment entirely in search of flexible schedules, and gig employers like Uber should not be able to wrongly claim schedule flexibility entirely as their own.

Drawing on data from worker surveys, interviews, and an original textual analysis of public comments submitted during a federal rulemaking, this Article has attempted to understand worker perceptions of and preferences for flexible scheduling, the tradeoffs they are willing to accept, and what this means for employment and labor law and policy. It concludes with a set of possible legal reforms including amendments to the ADA and FMLA, right-to-request laws, stable scheduling laws, and changes to the FLSA's white collar exemption. The Article also considers more sweeping proposals to de-link the current set of rights, benefits, and protections accessible only via the employment relationship, thereby making them available to all workers, regardless of employee or independent contractor status.

Finally, the Article catalogs the economic benefits of schedule flexibility for employers. Indeed, as the economy emerges from the COVID-19 pandemic, perhaps there is an opening for employers to rethink their historical approach to scheduling, to give employees at all points on the wage scale more control over the balance between work and life. Some observers

134. Willie Gray, Comment on Proposed Rule on Independent Contractor Status under the Fair Labor Standards Act (Oct. 19, 2020), https://www.regulations.gov/document/WHD-2020-0007-0190 [https://perma.cc/SK59-DL2M].

are doubtful. As sociologist Daniel Schneider has commented, "Companies are doing all they can not to bake in any gains that are difficult to claw back . . . Workers' labor market power is so far not yielding durable dividends."[135] Perhaps the key phrase here is "so far." If lawmakers, policymakers, and employers heed workers' desire for flexibility, now may be the time for a creative rethinking of work and hours, so no worker has to choose between a bad job as an independent contractor and a bad job as an employee.

135. Noam Scheiber, *Despite Labor Shortages, Workers See Few Gains in Economic Security*, N.Y. TIMES (Feb. 3, 2022), https://www.nytimes.com/2022/02/01/business/economy/part-time-work.html?referringSource=articleShare [https://perma.cc/P73U-X7RD]; *see also* Rani Molla & Emily Stewart, *What If the Future of Work Is Exactly the Same? For Many, the Gains in Worker Pay and Power During the Pandemic Are Fading Fast — If They Even Saw Them At All*, VOX (Apr. 18, 2022), https://www.vox.com/the-highlight/22977654/future-of-work-restaurants-retail-hospitality [https://perma.cc/6JWE-9H6B].

APPENDIX A

Flexibility-Related Keywords

'flex'
'flexable'
'flexed'
'flexibilidad'
'flexibilit'
'flexibility'
'flexibility.'
'flexibility.29'
'flexibility.i'
'flexibility.please'
'flexibility.thank'
'flexibilty'
'flexible'
'flexible/my'
'flexibly'
'freedom/flexibility'
'inflexable'
'inflexible'
'super-flexible'
'//thefga.org/wp-content/uploads/2020/01/flexible-work-laws-will-helpamericans-with-disabilities-find-work.pdf'
'circumstances.flexibility'

Schedule-Related Keywords

'predictive-scheduling'
'pre-schedule'
'pre-scheduled'
'schedule'
'schedule.'
'schedule.before'
'scheduled'
'scheduling'
'scheduling.thanks'
'self-schedule'
'unscheduled'
'//hbr.org/2018/03/researchwhen-retail-workers-have-stable-schedules-sales-and-productivity-go-up'

'//worklifelaw.org/projects/stable-scheduling-study/stable-scheduling-healthoutcomes/'

'//www.treasurydirect.gov/govt/reports/tfmp/tfmp_advactivitiessched.htm'

'/awww.kenanflagler.unc.edu/news/stable-scheduling-in-retail-is-feasible-and-benefits-business-and-family'

APPENDIX B

Top 150 Distinguishing Words: Schedule Flexibility Keyword Windows

Word	**Chi2 value**
freedom	552.9
overwhelming	338.7
able	330
family	326.3
translators	323.7
income	313.2
job	297.6
allows	273.6
prefer	270.6
repeated	261.2
surveys	219.8
ability	209.8
can	201.8
hours	198.8
extra	190.4
third-party	179
schedules	171.6
median	171.5
uber	166
enjoy	164.6
need	162.3
time	154.9
daughter	141.5
want	141.4
mom	139.3
parents	139.1
anytime	138
choose	136.2
kids	130.3
opportunities	128.1
balance	115.1
driving	111.7
love	109.6

Word	**Chi2 value**
mother	106.8
workload	104.1
children	102.8
day	102.5
money	102
reason	101.8
arrangements	101.2
bills	100.3
projects	96.87
school	96.48
take	96.43
needs	95.93
life	92.38
set	91.93
important	91.02
selecting	89.98
full-time	89.26
indicate	82.23
majority	81.43
finally	81
son	77.17
ic's	77.06
working	72.95
gives	71.46
make	70.86
home	68.05
therapy	67.08
like	64.79
setting	63.73
others	63.23
boss	62.16
drive	62.06
independence	61.81
earn	60.21
find	57.78
gig	57.64
helps	56.33
appointments	54.74

Word	**Chi2 value**
doctor	53.52
whenever	51.74
according	51.32
allow	50.48
wanted	49.47
go	49.36
feeling	49.18
single	48.86
nimble	48.56
autonomy	48.27
value	47.76
key	46.75
assignments	46.29
homeschooling	45.21
contracting	44.99
stay	44.2
benefits	43.53
greater	42.73
talent	42.5
nice	42.15
one-size-fits-all	40.7
exercises	40.56
vacation	40.53
disposable	40.38
enjoys	40.38
osp	40.38
meet	39.79
choosing	38.81
economy	38.52
due	38
many	37.89
year	37.71
allowed	37.14
workforce	36.67
iâ	36.11
economy.â	36.1
night	34.99
freelancing	34.72

Word	**Chi2 value**
desire	34.31
european	34.25
parent	33.47
offers	32.78
per	32.31
businesses	31.55
traditional	31.5
living	31.47
eats	31.24
times	30.55
cobb	30.52
decorate	30.52
family.i	30.52
fractured	30.52
minuscule	30.52
narrative	30.52
œcome	30.52
force	30.08
preferences	29.8
preferred	29.8
decorators	29.51
needed	29.29
crucial	29.16
freelance	29.08
part-time	28.75
without	28.54
aimee	27.87
nppa	27.87
great	27.85
stability	27.58
early	27.43
external	27.32
provides	27.08
full	26.86
best	26.82
survive	26.75
disabled	26.44
spend	26.39

Word	**Chi2 value**
simplifying	26.18
vendors	26.18
valerie	25.72