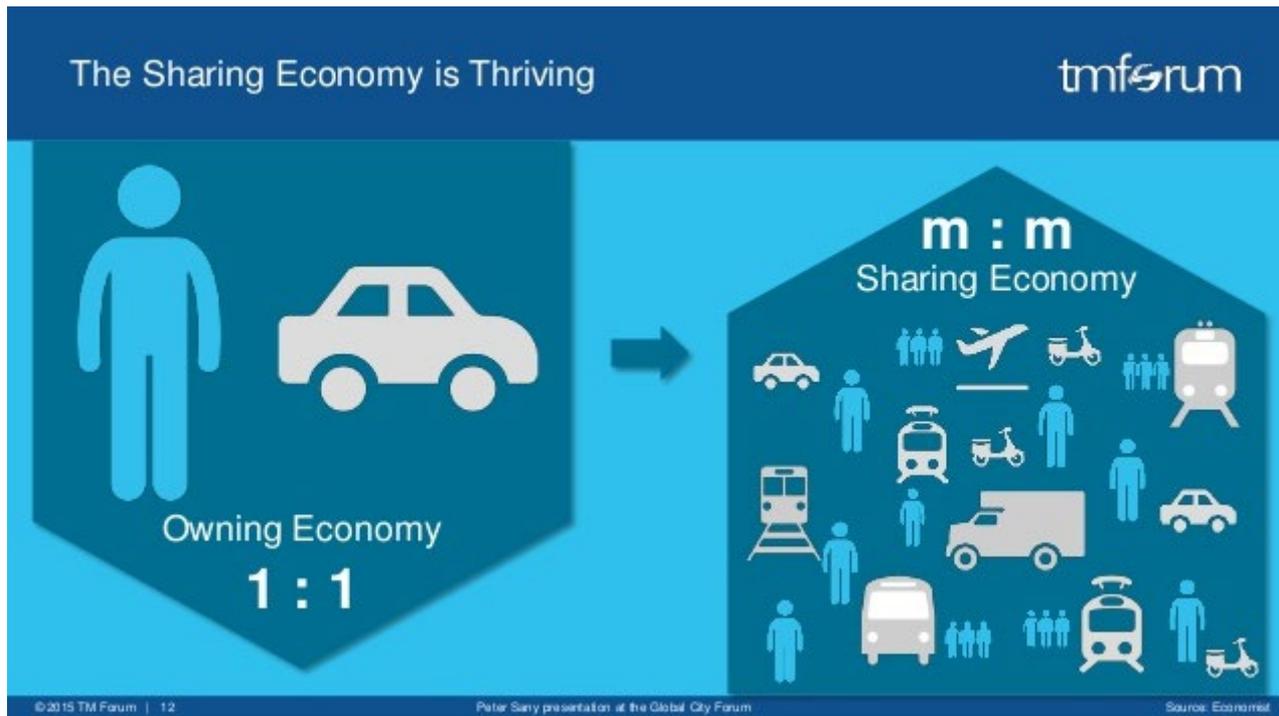


THE GIG ECONOMY

State Bar of Texas – Labor & Employment Law Institute
San Antonio, TX · 2019

Owning v. Sharing



Enabling Sharing



<https://reconomics.com/2015/12/22/is-the-dependent-contractor-model-the-future-of-the-gig-economy/>

**BOULETTE GOLDEN
& MARIN L.L.P.**

How Big is the Gig?

By 2025, online talent platforms could boost global GDP by \$2.7 trillion.

Share of GDP increase
by source, \$ trillion

\$2.7 trillion¹

Improved productivity	0.34	Better matches
	0.29	Reduced informality
Greater employment, 25 million additional FTEs ²	0.70	Faster matches
	0.11	New matches
Higher labor-force participation, 47 million additional FTEs	1.27	Work for currently inactive people and increased hours for current part-timers

¹Figures do not sum to total, because of rounding.

²Full-time equivalent.

McKinsey&Company

<https://www.mckinsey.com/featured-insights/employment-and-growth/connecting-talent-with-opportunity-in-the-digital-age>

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How Big is the Gig?

BRIEFING • GIG ECONOMY

The Gig Economy Never Really Happened, Say the Economists Who Predicted It



By [ERIK SHERMAN](#) January 7, 2019

The [gig economy](#) was supposed to be the future of work. All generations wanted the freedom and short-term contract work was the new norm.

At least, that's what the experts had said. But two of the most well-known economists—Alan Krueger of Princeton University and Lawrence Katz of Harvard—now say their [influential 2015 study](#) was wrong, as the *Wall Street Journal* reported. What threw them off was inadequate data and the recession.

<http://fortune.com/2019/01/07/gig-economy-uber-taskrabbit/>

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Gig Volume - 2018

56.7 million Americans
freelanced this year



of Americans who freelanced

More people are
choosing to freelance



Freelancing by choice versus necessity

Americans are spending
more time freelancing



Hours spent on freelance work per week

THE INDEPENDENT WORKFORCE

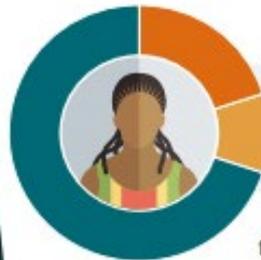


The DEFINING FEATURES of INDEPENDENT WORK:

High level of control and autonomy

Payment by task, assignment, or sales

Short-term duration



In the United States and the EU-15¹

Independent workers make up **20–30%** of the working age population

this is up to **162 million** people

	Primary income	Supplemental income
Preferred choice	"Free agents" 30% 49 million	"Casual earners" 40% 64 million
Out of necessity	"Reluctants" 14% 23 million	"Financially strapped" 16% 26 million

DIGITAL PLATFORMS



15% of independent workers have used a digital platform





FOUR SEGMENTS OF INDEPENDENT WORKERS

“Independent work is my ...”

PRIMARY INCOME

SUPPLEMENTAL INCOME

PREFERRED CHOICE

FREE AGENTS

Derive their primary income from independent work and actively choose this working style

Example: A self-employed plumber or a chiropractor in private practice

CASUAL EARNERS

Use independent work to supplement their income and do so by choice. Some have traditional primary jobs, while others are students, retirees, or caregivers.

Example: A hobby crafter who sells scarves or a professor who gives paid speeches

NECESSARY CHOICE

RELUCTANTS

Derive their primary income from independent work but would prefer traditional jobs

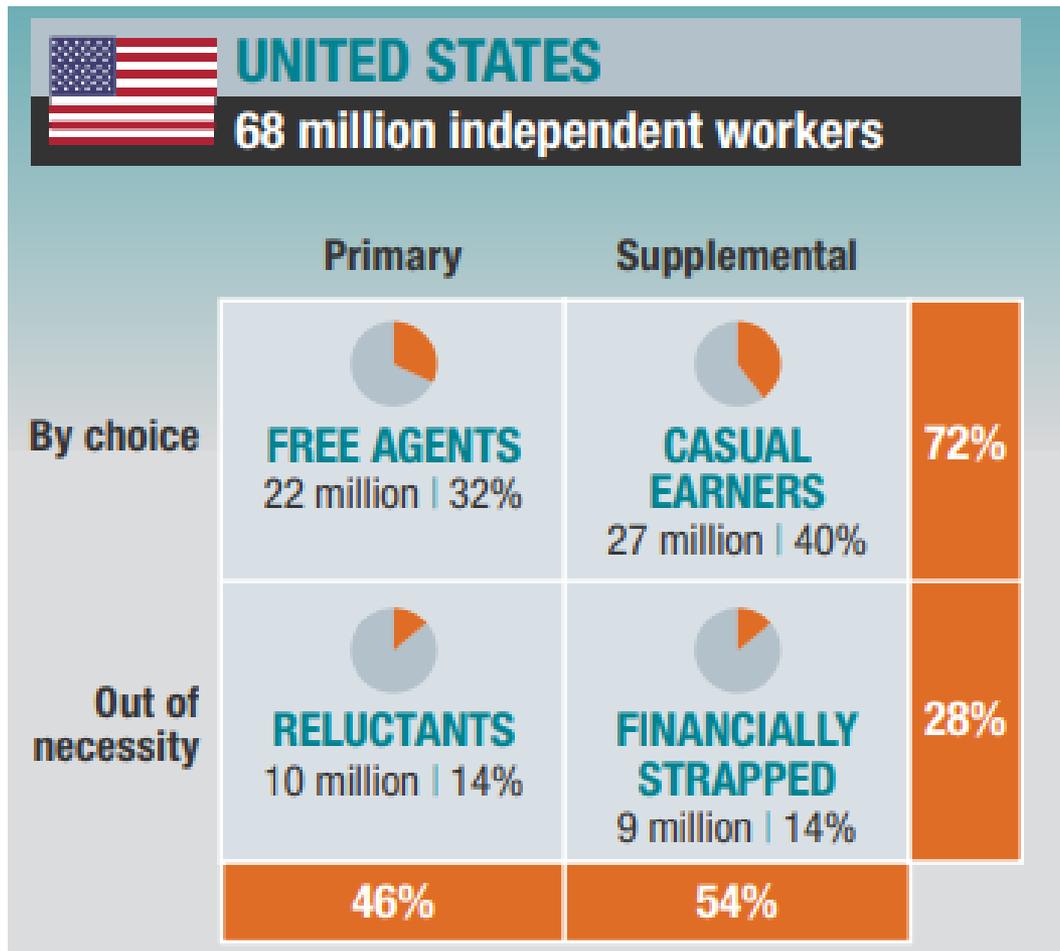
Example: A short-term temporary worker who would prefer a more permanent job

FINANCIALLY STRAPPED

Do independent work to supplement their income but would prefer not to have to do side jobs to make ends meet

Example: A janitor who doubles as a housepainter on the weekends

Gig Reasons



BOULETTE GOLDEN

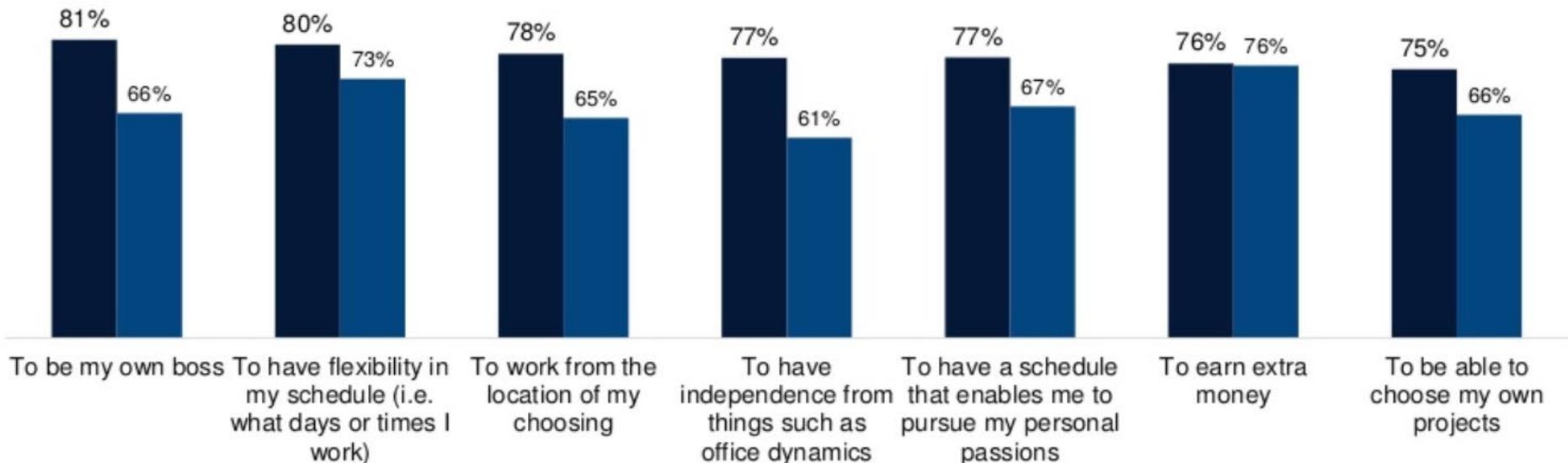
Gig Reasons

➤ The top reasons for freelancing are control over one's own destiny, flexibility and independence

Top reasons for freelancing

[Full-time freelancers and part-time freelancers; showing % who select each as a major reason of 4-5 on a 5-point scale]

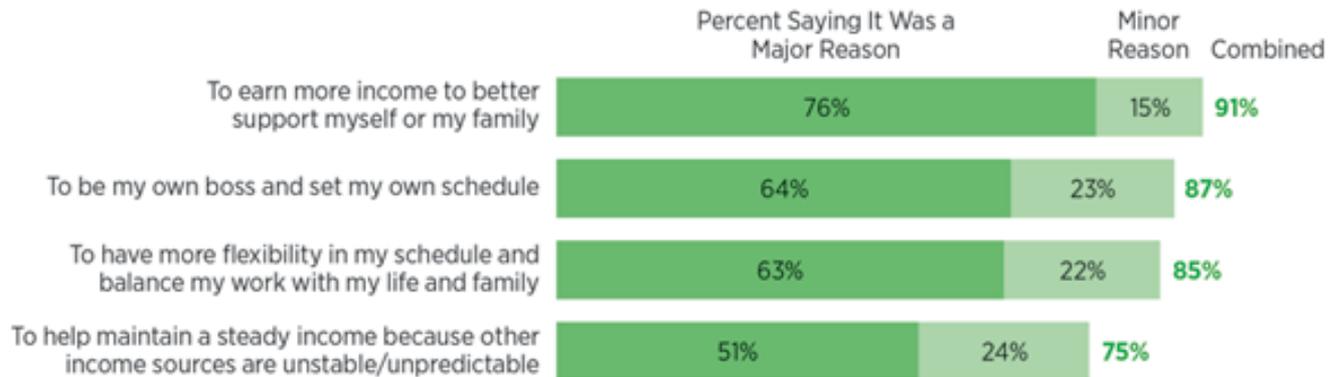
■ Full-time Freelancer ■ Part-time Freelancer



Gig Reasons

CHART 1

Survey: Reasons for Partnering with Uber

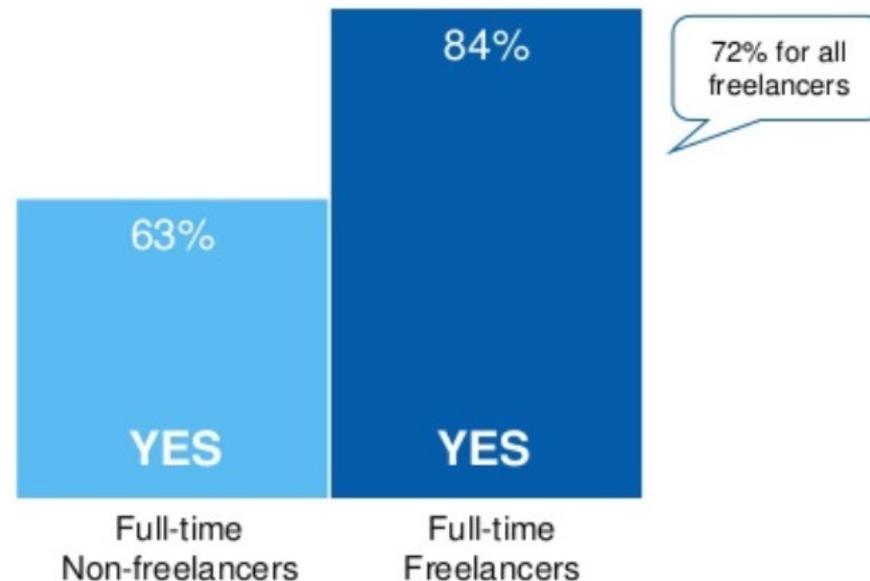


SOURCES: Jonathan Hall and Alan Krueger, "An Analysis of the Labor Market for Uber's Driver-Partners in the United States," January 22, 2015, <http://dataspace.princeton.edu/jspui/handle/88435/dsp010z708z67d> (accessed August 1, 2016), and Beneson Strategy Group, "Uber: The Driver Roadmap," survey of 601 Uber driver-partners conducted December 16-22, 2014, <http://www.bsgco.com/insights/uber-the-driver-roadmap> (accessed August 1, 2016).

BG 3143 heritage.org

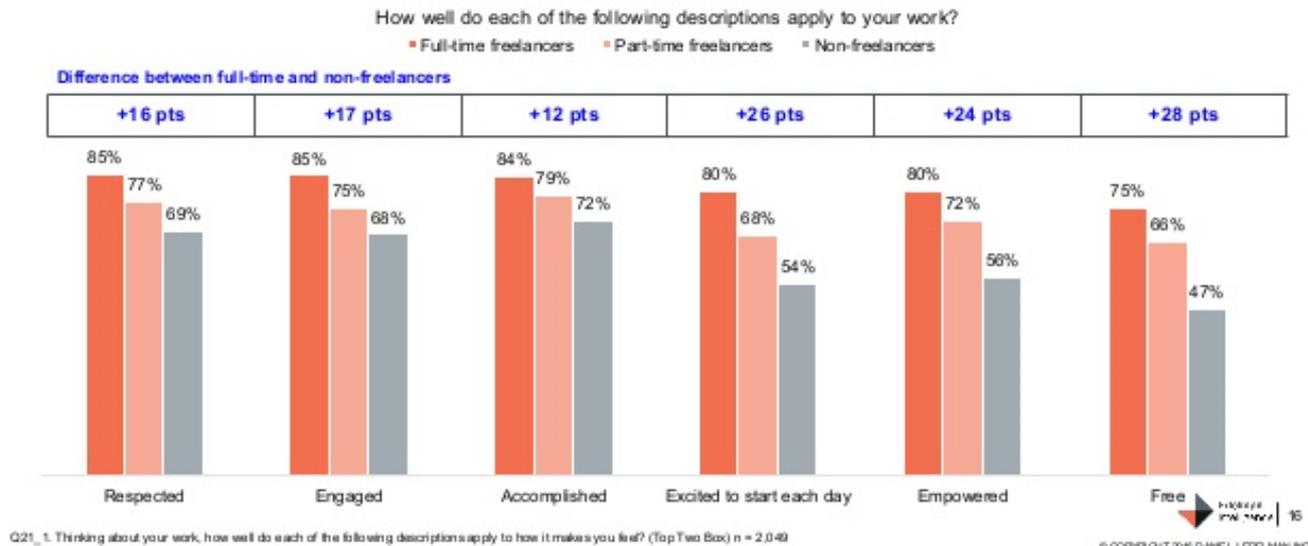
Gig Reasons

In general, does your work allow you
to live the lifestyle you want?
[Full-time freelancers and non-freelancers]

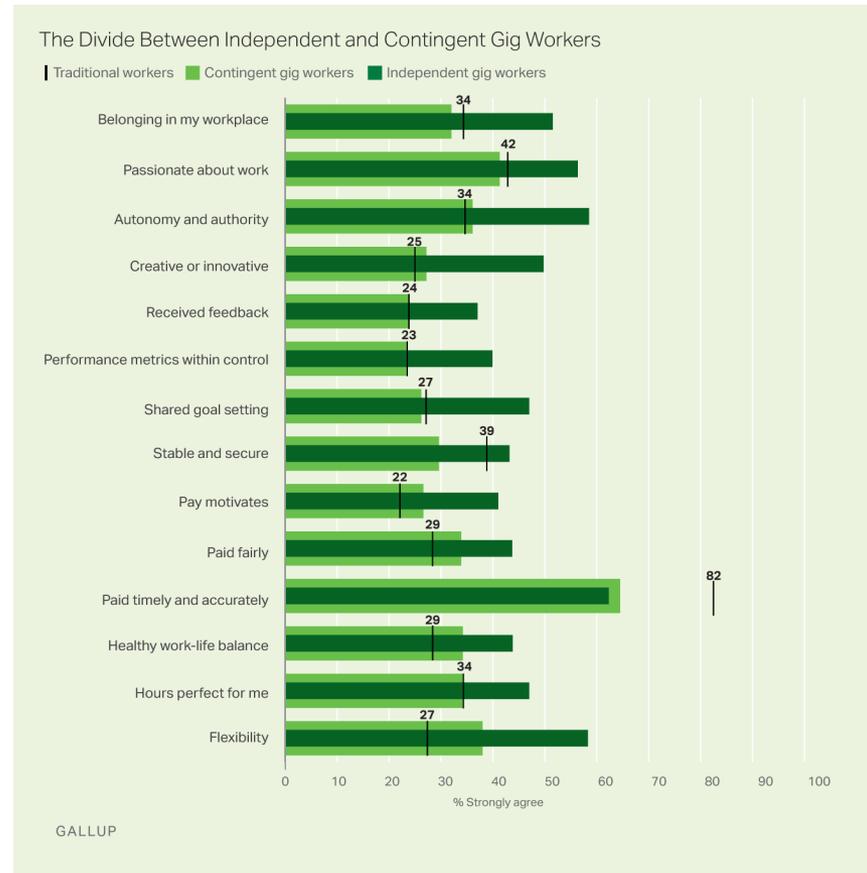


Gig Attitudes

Freelancers feel much more positively about their work – particularly full-time freelancers



Gig Attitudes



Tests

Common Law (State)
Control
Common Law (Federal)
+
IRS
Reality
+
DOL
+
TWC
Opportunity
+
NLRA

The Lens

Misclassification of employees as independent contractors is found in an increasing number of workplaces in the United States. ... When employers improperly classify employees as independent contractors, the employees may not receive important workplace protections such as the minimum wage, overtime compensation, unemployment insurance, and workers' compensation. Misclassification also results in lower tax revenues for government and an uneven playing field for employers who properly classify their workers.

The Lens

In sum, most workers are employees under the FLSA's broad definitions. ... [E]ach factor should be considered in light of the ultimate determination of whether the worker is really in business for him or herself (and thus is an independent contractor) or is economically dependent on the employer (and thus is its employee). ... The correct classification of workers as employees or independent contractors has critical implications for the legal protections that workers receive. ...

The Lens

[A]lthough it's easy to get lost in the weeds when applying California's test for deciding whether a worker is an employee or an independent contractor, courts should apply the test with an eye towards the purposes those statutes were meant to serve, and the type of person they were meant to protect. "[P]ast decisions ... teach that in light of the remedial nature of the legislative enactments authorizing the regulation of wages, hours and working conditions for the protection and benefit of employees, the statutory provisions are to be liberally construed with an eye to promoting such protection."

Applied: Lyft

Plaintiffs

- Not specialized work
- Only registered vehicles
- Rides < 60 miles
- “Rules to live by”
- At will
- Fully integrated

Defendants

- EBay for rides
- Driver-owned vehicles
- Flexible schedule
- Flexible work
- Ride-based comp
- Not dependent

**CROSS-MSJS
DENIED**

The Lens

[T]he jury in this case will be handed a square peg and asked to choose between two round holes. The test the California courts have developed over the 20th Century for classifying workers isn't very helpful in addressing this 21st Century problem. Some factors point in one direction, some point in the other, and some are ambiguous. Perhaps Lyft drivers who work more than a certain number of hours should be employees while the others should be independent contractors. Or perhaps Lyft drivers should be considered a new category of worker altogether, requiring a different set of protections.

Cotter v. Lyft, Inc., 60 F. Supp. 3d 1067, 1081-82 (N.D. Cal. 2015)

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Lyft Settlement

These are good arguments, but they are mostly policy arguments best directed to the legislative or executive branches. The Court's job is not to decide whether it would be better for society if Lyft drivers were classified as employees. The Court's job is to assess whether the settlement falls within a range of fair outcomes for the class members, considering the risks they would face if they took the case to trial. And the Teamsters, in objecting to the settlement, largely ignore those risks.

Cotter v. Lyft, Inc., 176 F.Supp.3d 930, 936 (N.D. Cal. 2016)

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& MARIN L.L.P.**

Lawson v. Grubhub

Of primary significance, Grubhub did not control the manner or means of Mr. Lawson's work, including whether he worked at all or for how long or how often, or even whether he performed deliveries for Grubhub's competitors at the same time he had agreed to deliver for Grubhub. ... After considering all the facts, and the caselaw regarding the status of delivery drivers, the Court finds that all the factors weighed and considered as a whole establish that Mr. Lawson was an independent contractor and not an employee.

Razak v. Uber

The Court notes, before approaching the legal distinction between employees and independent contractors, that these two categories are not the only two types of business relationship that exist under law, even if they may be the only relationships relevant to the present motion. Transportation network companies (“TNCs”), such as Uber and its most frequent U.S. competitor, Lyft, present a novel form of business that did not exist at all ten years ago, available through the use of “apps” installed on smart phones. With time, these businesses may give rise to new conceptions of employment status.

Razak v. Uber

It is undisputed that UberBLACK drivers are permitted to work as much or as little as they would like, subject to certain limitations, discussed earlier. They are also permitted to work during whichever hours they choose, and to drive (within territorial limits) wherever they choose. They can concentrate their efforts around certain “high times” of the day, week, month, or year, in order to capitalize on “surge” pricing. UberBLACK drivers can also — and indeed actually do — choose to work for competitors when they believe the opportunity for profit is greater by doing so.

Dynamex v. Superior Ct.

[W]e conclude it is appropriate ... to interpret that standard as ... requiring the hiring entity, in order to meet this burden, to establish each of the three factors embodied in the ABC test — namely (A) that the worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact; and (B) that the worker performs work that is outside the usual course of the hiring entity’s business; and (C) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed.

Dynamex Operations v. Superior Court, 416 P.3d 1 (Cal. 2018). **BOULETTE GOLDEN
& MARIN L.L.P.**

Dynamex v. Superior Ct.

- Ninth Circuit concluded (*Vasquez v. Jan-Pro Franchising Int'l, Inc.*) that Dynamex applied retroactively
- July 2019: Ninth Circuit withdrew *Vasquez* and certified the question of retroactivity to the California Supreme Court

Texas Workforce Commission

- New rule (p. 16 of paper) passed 2-1 despite heavy opposition
- 40 Tex. Admin. Code § 815.134(b)
- Standard 20 factor test (pp 17-19) did not change
- Only applies to “marketplace contractors” who enter into agreement with “marketplace platform”

THE GIG ECONOMY

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