



Business & Human Rights
Resource Centre

The Future of Work: Litigating Labour Relationships in the Gig Economy

Foreword

The world of work is experiencing a profound transformation; a disruption driven by technological, economic, and political forces that are often outside the reach of governments. Workers observe the rapid development of gig platforms, robotics, artificial intelligence; transitions to low carbon economies, with the closing of old dirty industries and the opening of clean ones; mass migration and refugee flows. This is all happening in a context of a collapse of public trust in global markets that has not recovered since the 2008 financial crash.

The 2019 Annual Corporate Legal Accountability Briefing focuses on legal aspects of one key element in these changes: the gig economy. **The gig economy is the frontline in the battle for the future of labour rights.** It tests the ability of workers to retain their essential security and benefits in employment or see them sacrificed on the altar of securing higher revenues for shareholders.

Over the past four decades, labour costs in much of manufacturing have been drastically reduced through the consolidation of global supply chains. This has allowed international brands, such as in the apparel sector, to scour the world for the “cheapest needle”. But service industries, such as the delivery sector, were not exportable. However, new technology has seen service start-ups like Uber and Deliveroo balloon into global corporations with only a small core of employees, with the vast majority of their labour force misclassified as “self-employed”. As self-employed workers they no longer qualify

for the essential protections and benefits that have allowed major companies to thrive in countries that value shared prosperity and security.

This briefing describes the sharp-edged contest between gig companies—whose business models rest on not paying for workers’ social protections—and the workers and their lawyers who refuse to see essential labour rights destroyed by a slight of hand. This battle pits often vulnerable women and men—migrants, refugees, poor, relatively unskilled workers—against globally assertive corporations with deep pockets. Given the inequality of power and wealth, workers are seeking the protection of the courts and of the rule of law. The briefing describes the twists and turns in strategy of both workers and companies, the contradictions and inconsistencies in legal rulings so far, and the action by governments to strengthen or weaken the rights of working people.

The briefing concludes with clear recommendations that, if implemented by governments and companies, would help return a sense of fairness, and a belief that the rules of the market are directed towards shared prosperity, rather than exclusively at profit-maximisation.

We believe that the outcome of this contest will have profound consequences for the most vulnerable and precarious of workers, and, more broadly, for the sense of trust—or fear—with which people will view the future world of work.



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Executive Summary

The world of work is changing, and lawyers have a key role to play in shaping its future. The rise of new business models using smartphone technology, along with companies' habitual drive to keep labour costs low, are combining to make work more precarious, temporary and irregular. However, this is increasingly being challenged in the courts, as workers file lawsuits against their employers' attempts to misclassify them as independent contractors, thus denying them the basic labour rights and protections afforded to employees.

The rapidly expanding gig economy—with high-profile digital platforms such as Uber, Lyft (transportation), and TaskRabbit (freelance labour)—erodes the traditional concept of employment, using unconventional working arrangements such as casual, temporary, freelance, on-demand, or "gig" work, to increase productivity and profit.

While such flexibility may suit some workers, the misclassification of workers as independent contractors, as opposed to employees, allows companies to enjoy the profits that come with being in charge, without the responsibilities required under labour law protections. According to [recent estimates](#), it would cost companies an average of 20 to 30% more to classify drivers and other gig workers as employees, rather than as independent contractors.

Yet it is only when workers are legally classified as employees that they have access to the internationally recognised rights and protections, such as permanent or secure work; minimum wage and overtime pay; and contributions to social protections, such as extended health and maternity benefits, employment insurance, and retirement savings. Absent such protections, workers are often faced with poor pay, labour exploitation and overall economic insecurity.

As a result, an increasing number of non-conventional workers are attempting to assert their labour rights in courtrooms, suing employers to redress grievances and improve working conditions. These lawsuits, brought in jurisdictions around the globe, create important opportunities to develop new employment standards



through caselaw. Courtrooms are playing an increasingly important role in clarifying, interpreting, and defining new labour relationships, critically testing legal norms against labour realities, and prompting governments to amend and fill the gaps in existing legislation.

2018 was a year of key victories but also major defeats for workers. As detailed in the report and the overview of lawsuits annexed to it, courts around the world have used different criteria and come to different conclusions about whether workers have been misclassified by the companies they are suing.

Many cases against gig companies were settled outside of court, while other lawsuits were vigorously challenged in appeals to higher courts. The companies' objective is to prevent courts from creating binding legal precedents which may open the floodgates for other gig workers to bring similar claims. Often, individual plaintiffs cannot afford the costs of lengthy legal proceedings, making them more vulnerable to accepting a settlement. However, gig workers are increasingly banding together to bring class action lawsuits against their employers, thereby sharing the cost of litigation among multiple plaintiffs.

Another advantage of class action lawsuits is that the court's ruling allows all similarly-situated plaintiffs to benefit from the remedy granted. However, as recent caselaw shows, many companies are actively preventing workers from organising and bringing class action lawsuits, by introducing forced arbitration clauses in their contracts, which typically prevent workers from pursuing or joining class actions.

Companies have also sought to counter such lawsuits by trying to prevent the passing of pro-labour regulations. Gig companies in the US are lobbying state legislatures to re-write state employment laws and to overrule local regulations. However, lawmakers around the globe are addressing the protection gap to varying degrees, and through diverse initiatives, including legislative bills, executive orders and task forces. Workers and civil society organizations are focusing on redefining legal employment terms, and reconsidering union strategy in light of changing labour relations.

To create a future of shared prosperity instead of greater inequality we must put human rights at the heart of labour negotiations and relationships. Together, government and business have the opportunity to harness technology to create more inclusive economies. By sharing the burden of risk and seeking to achieve greater equality of outcome and opportunity, it is possible to have an economy that provides workers with income security, workplace protections, and the right to collectively design and define the future of their work.

Going forward, three key opportunities must be seized to create a better future of work for all:

1. Corporate Responsibility to Respect Human Rights

Companies must live up to their responsibility to respect human rights, and labour rights in particular, in accordance with the UN Guiding Principles. At a minimum, this means that companies should:

- Correctly classify workers to ensure full enjoyment of labour rights and social protections, and refrain from challenging policies and legislation that afford such protections.
- Put in place human rights policies and processes, remediation, and human rights due diligence processes.
- Provide for, or cooperate in, legitimate remediation processes, and abolish forced arbitration clauses in workers' contracts.

2. Legislative Reform

Lawmakers around the world should ensure that their legislative proposals adopt a presumption in favour of employee status, and afford gig workers the same rights and protections as employees, including minimum wage, paid overtime, unemployment insurance, workers' compensation, family and medical leave, and the right to collective bargaining. Companies should refrain from lobbying against these needed legislative reforms.

3. Business Incentives

Governments should shift the current paradigm from one that incentivises business to classify workers as "independent contractors" or "non-employees", by creating incentives for businesses to classify workers as "employees"; thereby strengthening the bargaining power that workers hold in the workplace.

Introduction

The emergence of technology-enabled new business models, and companies' relentless drive to reduce labour costs, has changed the nature of work in many economies around the world, making it even more precarious, temporary and irregular. This is happening in the context of disruptive global transformations, such as the tech revolution; the transition to low-carbon economies; increased migration and refugee flows; and the proliferation of authoritarian nationalist movements that are hostile towards civil society. These transformations have important implications for workers' rights.

It is against this backdrop that workers, companies, civil society, policy-makers, and lawmakers are negotiating the future of work. Will this future deliver equal opportunity, economic security and shared prosperity? Or will it deepen existing inequality, erode labour rights, and [strengthen the voices of authoritarian nationalists](#)? The answer to these questions will, in part, depend on whether human rights are placed at the core of business models and practices.

Fuelled by the tech-revolution, the gig economy is eroding the traditional concept of employment. Conventional employment is typically characterised by permanent or secure work; labour standards such as a minimum wage and overtime pay; and contributions to social protections such as extended health and maternity benefits, employment insurance, and retirement savings—often sharing the cost with both employers and government.

In an effort to maximise profit, businesses are increasingly turning to an on-demand or “gig” workforce, even in sectors that have traditionally relied on conventional employment models. Needless to say, this is not a new phenomenon. Industries as diverse as manufacturing, service, and even public administration have been misclassifying workers for several decades, and increasingly so since the 2008 global economic crisis. Businesses are essentially using new models and employment structures to perpetuate well-established exploitative practices, thus further exacerbating the power imbalance between companies and their workers, which is a key driver of human rights abuses.

In general, the law has not kept up with these new and non-conventional employment arrangements, which has left non-conventional workers without the collective bargaining power and other legal and social protections afforded to conventional employees.

As a result, an increasing number of non-conventional workers are attempting to assert their labour rights in courtrooms, suing employers to redress grievances and improve working conditions. These lawsuits, brought in jurisdictions around the globe, create important opportunities to develop new employment standards through caselaw. Additionally, they should prompt governments to amend and fill the gaps in existing labour legislation.

The [UN Guiding Principles on Business and Human Rights](#) (UNGPs) represent a global consensus around the responsibility of “all enterprises regardless of their size, sector, operational context, ownership and structure”¹ to respect human rights and to address their human rights impacts. Companies must avoid infringing on the rights of others (UNGP 11) and when abuses occur, they must provide for, or participate in, effective remedy (UNGP 22). The proper classification of workers—which determines what rights and benefits they are legally entitled to—lies at the heart of business’s responsibility to respect human rights. In other words, companies must refrain from misclassification of contracted workers as “independent contractors” in the gig economy—and the resulting erosion of labour rights.

In many countries, non-conventional workers are not afforded adequate legal protection, either because they do not fall within the definition of a “regular employee” under national laws, or because of gaps in legislation when it comes to regulating new forms of employment. For example, in some countries, non-conventional workers have no right to join a trade union, and are therefore deprived of the protections and support afforded by union membership, and from collectively determining the future of their own work. The lack of an applicable legal protection and collectively agreed terms of employment hinders the ability to exercise work-related rights, such as stability of employment; social security; paid holiday and sick leave; minimum wage; due process; and the right to organise and collectively bargain.

This report focuses on the human rights implications of misclassification in the gig economy, and the legal strategies used by workers to assert their labour rights. Part I of this report examines labour rights and relationships in the gig economy, and details the legal significance of misclassification. Part II demonstrates how workers have—or have not—succeeded in using litigation effectively to counter corporate impunity. It also highlights the critical role that courts (and lawyers) play in shaping the future of law—both its interpretation and application—amid rapidly advancing technology and ever-changing business models.

Labour Relationships in the Gig Economy

I Facts & Figures

The gig economy is a fast-developing frontier where new labour relations are being negotiated and defined. While on-demand work via digital platforms such as [Uber](#) and [Lyft](#) (transportation), or [TaskRabbit](#) (freelance labour), constitutes only a small fraction of the economy overall, it is rapidly expanding in terms of the number of people participating, as well as the profits it is generating.

Estimates of the scale and growth of the gig economy vary greatly. Definitions of terms such as “gig economy”, “platform economy”, and “crowd work” differ significantly. Authors often use similar terms to refer to quite different activities, and different terms to describe essentially similar activities². There is also [scant research](#) conducted on this in countries outside the US and Europe³, making comprehensive estimates difficult. Globally, the highest estimate of workers involved in the [gig economy is 1.5%](#)⁴, while according to the [World Development Report 2019](#) “the best estimate is that less than 0.5% of the active labour force participates in the gig economy globally, with less than 0.3% in developing countries⁵”.

According to a [recent study](#) by JP Morgan Chase, the number of people earning income via on-demand platforms increased 47-fold between 2012 and 2015, with an estimated 4.2% of the adult population (or 10.3 million people) earning income through online platforms in the US alone⁶. In the European Union, the number of [freelance workers doubled](#) between 2000 and 2014, making freelance work the fastest growing labour group in the EU labour market. [According to Uber Nigeria](#), as of 2018, there are about 9,000 active Uber drivers in Nigeria. In South Africa, there are [an estimated 30,000 gig workers](#), with taxi drivers accounting for about half of this number, and delivery and domestic workers accounting for the rest.

McKinsey & Company [estimates](#) that digital platforms could add 72 million full-time-equivalent positions by 2025. As the gig economy continues to grow, and companies seek to outsource and enter new labour markets, labour abuses will likely continue to expand accordingly.

On-demand, zero-contract and freelance work arrangements serve an important function for people who require flexible working hours or locations, as opposed to the rigidity of full-time employment. This flexibility can create opportunities for people who may have less access to conventional inflexible full-time employment, such as students, locum doctors and/or people with disabilities or with care-taking responsibilities. Such arrangements also create opportunities for anyone to earn additional income in a manner that is largely commitment-free. However, for most working people who value security of income and essential social protections, the gig economy presents serious challenges to upholding labour rights, due to the precarious nature of the work; the unreliability of hours; poor pay; few, if any, benefits, such as sick and holiday pay; and involuntary overtime. In Kenya (Uber's [second largest market](#) in sub-Saharan Africa), drivers [went on strike](#) to [protest exploitative corporate practices](#), calling for [a review of their rates and working conditions](#). Drivers also highlighted a [particularly disturbing increase in](#) fatigue-related accidents—even deaths—as a result of working longer hours just to break even. Such instances can be prevented by establishing working hour requirements under an employer-employee relationship.

According to [a recent study](#) conducted by Oxford University, Uber drivers in the UK reported higher anxiety levels (relative to both self- and wage-employed workers), which are “likely related to Uber drivers’ work arrangements”. The study also noted that the majority of Uber drivers in London are male immigrants, who come from the bottom half of the city’s income distribution, and who transitioned out of permanent part-time or full-time jobs to become Uber drivers. It is against this backdrop that workers and lawyers are fighting for labour rights.

| Why Classification Matters

While the technology fuelling the gig economy is new, the debate over employee misclassification is not. For decades, less scrupulous companies have structured work flows and labour relationships to avoid providing workers with the benefits and protections that ought to be guaranteed by labour laws, and which are required by employment standards for people classified as employees. This attempt to evade responsibility as an employer, and to shift the risks (but not the gains) onto workers, has been observed in all kinds of sectors, including the delivery, taxi, and construction industries, all of which are notorious for forcing workers into self-contracting arrangements. Another example is the apparel sector, where geographic outsourcing to countries with poor labour rights is common practice.

These forms of precarious work continue to have significant consequences—financial, legal and otherwise—for non-conventional workers around the globe. In addition, they disproportionately affect those already at a heightened risk of human rights abuse, such as women, children, indigenous people, migrants, and refugees. As more people engage in gig work, the question of whether these workers are protected or not becomes increasingly urgent. Moreover, we need to establish strong foundations in law and jurisprudence that will protect future workers, who are likely to be affected by a constantly changing technological landscape.

I Increased Profits through Precarious, Low-paid Work

The price tag of misclassification is formidable, for workers first and foremost, but also for businesses and for society at large. The *New York Times* estimates that it would [cost companies an average of 20 to 30% more](#) to classify drivers and other gig workers as employees, rather than as independent contractors. Using the independent contractor model allows gig economy companies to enjoy the profits that come with being in charge, absent any of the responsibility required under labour law protections.

Gig workers typically experience high levels of income volatility, which translates into little money, no job security, and no labour protections. More often than not, these individuals work several “gigs” for minimum wage, struggling to piece together a full-time workload. This trend of income insecurity was confirmed by the above mentioned JP Morgan Chase study, which estimates that between 2013 and 2017, as the supply of drivers has increased, the average transportation earnings of Uber, Lyft or Postmates delivery drivers concurrently declined by 53% in the US alone⁷.

Employers who misclassify employees are failing to pay employer “withholding” taxes, leaving workers with large tax bills. Other unpaid dues include unemployment insurance and workers' compensation. A 2010 [study](#) found that the misclassification of workers results in businesses saving an annual USD 831.4 million annually in unemployment insurance taxes, and USD 2.54 billion in workers' compensation premiums in the US alone. This creates [a financial burden](#) for governments, due to the significant loss of tax revenue, and risks for workers who fail to receive these protections. Additionally, law-abiding, responsible businesses, who properly classify workers and pay their requisite taxes, face a [competitive disadvantage](#), and might be pressed by market forces to take undesirable measures (e.g. “violate workers' compensation laws, skimp on their unemployment insurance taxes, and pay less than the required minimum or prevailing wages⁸”), in order to remain competitive with their misclassifying counterparts.

Litigating New Labour Relationships

The rapid expansion of the gig economy has been accompanied by a rise in litigation that inherently challenges the business model at the heart of this phenomenon. This section provides an overview of some emblematic lawsuits brought by self-employed workers against companies to demonstrate how workers are fighting misclassification in courtrooms around the world, with a focus on the most recent developments in these lawsuits (which were either filed, ruled on, or appealed in 2018).

Companies in the gig economy have generally reacted forcefully to defend this newer profit-source against litigation, and have spent billions in strategic advocacy globally to shape regulatory frameworks to their own benefit. [Uber lobbying expenses](#) have increased from USD 50,000 in 2013 to USD 2.3 million in 2018.

| Claims & Remedies

At the heart of these lawsuits is the claim that the defendant misclassified its workers as independent contractors instead of employees, which caused the loss of certain lawful entitlements. Such entitlements include a minimum wage, overtime pay, paid sick and holiday leave, paid rest breaks, and other employee benefits guaranteed in domestic labour laws, (which in some jurisdictions include compensation upon dismissal). The remedies sought by workers in these cases revolve mainly around compensation for underpayment, benefits not received, and demands for readmission to properly classified work.

Uber, for example, has been sued in several jurisdictions for misclassification of workers. In the UK, plaintiffs (current and former Uber drivers) sued the company for failure to pay a minimum wage and paid leave ([Aslam et al. v. Uber](#)). The plaintiffs alleged that by misclassifying them as independent contractors, Uber violated the



Employment Rights Act, the National Minimum Wage Act, and Working Time Regulations. They therefore demanded compensation for these unpaid wages.

In the US, Uber has faced lawsuits at both the state and federal level. In one such lawsuit, [Razak et al. v. Uber Technologies](#), brought before the US Eastern District Court of Pennsylvania, Uber Black drivers claimed minimum wage and overtime pay under the Fair Labour Standards Act, the Pennsylvania Minimum Wage Act, and the Wage Payment and Collection Law. [Uber has faced similar lawsuits](#) in other US states, alleging that the company has violated various state and federal laws by misclassifying its drivers as independent contractors, and thus depriving them of the legal protections and benefits to which they are entitled.

In Nigeria, two Uber drivers filed a [proposed class action](#) against the company, arguing that they should be classified as employees, and seeking health insurance and pension benefits⁹. Similar misclassification lawsuits have been filed by Uber drivers before domestic courts in [France](#), [Canada](#) and [Brazil](#)¹⁰.

The British online food delivery company, Deliveroo, which is owned and operated by Roofoods, has also faced several lawsuits. In Spain, a [Deliveroo](#) rider brought a lawsuit against Roofoods alleging that he was dismissed unfairly ([Victor Sánchez v. Roofoods Spain](#)). The labour agreement categorized the plaintiff as an independent contractor, and explicitly stipulated that he is not considered an employee, agent or associate of the company. The plaintiff, who was terminated because of his “lack of availability”, claimed that he should be considered an employee and, therefore, could not be dismissed on such grounds.

In the Netherlands, a former Deliveroo rider [filed a lawsuit with the court of Amsterdam](#), seeking his reinstatement after termination of his two-year contract with the company. The plaintiff argued that the contract should be interpreted as an employment contract under the Dutch Civil Code, and should therefore not have been terminated by the employer unilaterally without a legitimate cause. Similar claims were made against other companies, such as food delivery enterprise [GrubHub](#) ([Lawson v. GrubHub](#)), and courier services [Postmates](#) ([Vega v. Postmates](#)).

I Legal Arguments

In these lawsuits, the very definition of an employee is at stake. The standard claim of companies is that gig workers do not match standard legal definitions of employees, since the way they perform their jobs often combines elements of both conventional employment and individual entrepreneurship. When alleging misclassification in the courtroom, plaintiffs need to demonstrate that they meet the criteria established by law in order to be classified as employees.

While legal definitions of “worker” or “employee” may vary from country to country, one thing that appears to be consistent is the consideration given in these lawsuits to the degree of control that the company has over the worker, and the level of independence that the worker

has in performing the job. This control over job performance is a key criterion observed in a majority of the lawsuits brought around the world. The determinative elements—subject to the court’s assessment of the facts—may include the ability to subcontract/delegate the work; the basis of payment (time worked/item or activity performed/commission); requirements to provide equipment, tools and other assets; and commercial risks.

Companies like Uber and Lyft typically argue that they merely run an online platform that enables communication between the clients (customers) and the entrepreneurial business-owners (drivers), with the sole purpose of providing a service. For example, in [Razak et al. v. Uber](#), the company characterised itself as a "modern-day Yellow Pages" rather than an "employer" under the US Fair Labour Standards Act¹¹.

In [Victor Sánchez v. Rooffoods Spain](#), the labour court of Valencia ruled that the defendant’s relationship with the plaintiff was a labour relationship, based on the presence of two essential elements derived from the law on the worker’s status: subordination (the company unilaterally established the amount of payment to the riders, and the conditions for onboarding new restaurants and clients to the platform); and dependence (the plaintiff followed the instructions of the company in his job performance, and acted according to the conditions unilaterally established by the company). The company was required either to re-admit the plaintiff, or to pay compensation for the average wage he would have received by the date of the judgement, if he had continued working as a Deliveroo rider.

Similarly, in [Aslam et al. v. Uber](#), the UK Employment Tribunal [ruled](#) that Uber drivers were not independent contractors, but “workers” who provide skilled labour through which the organization delivers its services and earns its profits, and who are therefore entitled to benefits like a minimum wage and holiday pay. This ruling was based on consideration of several elements as characterising the driver-company relationship: a driver’s lack of control over the company-customer relationship, in terms of customer information, trip price, risk of loss, and handling of complaints; the numerous conditions imposed on drivers amounting to performance control; the requirement to accept trips and not cancel them under a threat of sanction; the rating system; and the power to amend drivers’ terms unilaterally.

In Brazil, the [San Paolo Court of Appeal upheld a lower court decision](#) that Uber drivers should be treated as regular employees. According to the judgement, contract requirements such as punctuality, payment, and attendance are evidence of a labour relationship between the driver and the company. The company was sentenced to issue a formal employment contract and pay the driver for time off, notice period and severance.

In the US, the New York Supreme Court came to a different conclusion, [ruling](#) that couriers for [Postmates](#), an online delivery company, could not be considered employees, and were not entitled to insurance benefits¹². They reasoned that the alleged evidence of control by the company (establishing pay rates, tracking deliveries, handling customer complaints)

amounted to merely “incidental control”, and did not constitute substantial evidence of an employer-employee relationship.

While companies typically refer to labour agreements to prove a lack of employee status, the inequality of bargaining power between the two parties means that the contract may not reflect the true nature of the relationship, as recently noted by the UK Employment Tribunal in [Dewhurst v. Citysprint](#). As a result, courts typically conduct a fact-based analysis of the particular working conditions, and the manner in which the job is performed, in order to assess the degree of employer control and worker independence on a case-by-case basis. It is therefore this examination of the facts—and not the parties’ own characterisation—which determines the nature of their labour relationship.

| Litigation Trends & Lessons Learned

In misclassification lawsuits, courts are faced with the task of developing a reasonable test that allows them to assess the true nature of the employer-worker relationship. In order to do so, courts must interpret the terms of current legislation as applied to the new circumstances characterising the changing reality of labour relationships.

While judges are struggling to interpret these relationships in the context of antiquated laws that are not always favourable to workers’ rights, courtrooms are playing an increasingly important role in clarifying, interpreting, and defining new labour relationships. As the future of work continues to evolve, labour relationships, too, will continue to change. It is difficult to imagine one legal definition, judicial test, or any other template capable of capturing all the possible labour models and relationships that might emerge in the future. In the meantime, courts will continue to critically test legal norms against labour realities.

One Question – Different Findings

2018 was a year of key victories but also major defeats for workers and companies alike. As mentioned above, in [Aslam et al. v. Uber et al.](#) the court sided with the plaintiffs, affirming that they were entitled to labour rights and protections. In a similar case in the US, the District Court for Eastern Pennsylvania ([Razak et. al. v. Uber](#)) decided in favour of the company, dismissing Uber Black limousine drivers’ claims that they were underpaid for overtime, because they were incorrectly classified as independent contractors. Similarly, [GrubHub](#) food delivery workers were classified as independent contractors by a San Francisco US Magistrate Judge in [Lawson v. GrubHub](#).

In the UK, [Deliveroo riders lost an appeal](#) before a high court¹³. The Independent Workers Union of Great Britain (IWGB) sought to represent Deliveroo riders in North London, and to negotiate pay and working conditions on their behalf. The UK court dismissed the claim, ruling that Deliveroo riders were independent contractors, because they were allowed to use a substitute to perform their work, implying that the nature of the engagement is not personal. Thus, they are excluded from the scope of the Trade Union and Labour Relations (Consolidation) Act 1992 including the right to collective bargaining. In a separate matter, [the UK Court of Appeal upheld the employment tribunal decision](#) ruling that London Uber drivers were incorrectly classified as independent contractors, and therefore entitled to minimum wage and paid leave¹⁴.

In the misclassification lawsuit against Dynamex in the US, the California Supreme Court in its [landmark ruling](#) unanimously announced a new test for determining whether a worker is an employee or an independent contractor¹⁵. According to the so-called ABC Test, a worker is presumed an employee unless the employer can demonstrate that it has fulfilled three distinct criteria: (a) the worker is free from the control and the direction of the hirer in connection with the performance of its work; (b) the worker performs work that is outside the usual course of the hiring entity's business; and (c) the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hirer.

Settlements

Court rulings that determine certain workers are employees, and not independent contractors, can pose a significant threat to business models that rely, in part, on misclassification of workers to reduce costs and increase profits. It is therefore no surprise that many recent cases against gig companies have been settled out of court, thus preventing the court from setting any legal precedents that might be contrary to business interests.

Lyft, for example, was accused of misclassifying its drivers as independent contractors. The company denied the allegations, but nevertheless [agreed to pay USD 27 million to settle the class action lawsuit \(*Cotter v. Lyft*\)](#). As a result, more than 100,000 drivers [received](#) compensation for unpaid wages, and reimbursement of fuel and vehicle maintenance expenses, but will remain independent contractors.

In 2017, Uber offered USD 100 million in compensation to settle [two class action lawsuits](#) brought by its drivers in California and Massachusetts, on the condition that the drivers would remain independent contractors¹⁶. A district judge rejected the settlement as too small and drivers decided to pursue individual arbitration in California and [filed a new class action](#) in Massachusetts.¹⁷ In a [new settlement](#) in March 2019, Uber agreed to pay drivers in California and Massachusetts a total of USD 20 million without changing their status as independent contractors. Uber also avoided judicial determination of its drivers' worker status classification in North Carolina, where a district court ordered [a USD 1.3 million settlement](#) in a class action lawsuit brought on behalf of approximately 5,200 drivers¹⁸.

In the UK, [50 Deliveroo couriers received a six-figure pay-out](#) from the takeaway delivery company. The plaintiffs claimed that they were unlawfully denied their labour rights, including minimum wage and paid holidays. The company settled without admitting liability.

Although the settlement sums are large, they are still significantly less than what the company would have paid if all those workers had been classified as employees from the beginning, receiving minimum wage, overtime, and other legal entitlements as detailed elsewhere in this report.

Appeals

In cases where gig companies did not settle out-of-court, they vigorously challenged lawsuits by appealing them in higher courts. The objective is to prevent courts from creating binding legal precedents, which might open the floodgates for other gig workers at that same company to bring similar claims. Appeals also have a deterring effect for workers, who are often unable to pay the inevitable legal fees for prolonged court proceedings.

Uber notably appealed the aforementioned 2016 ruling by the UK Employment Tribunal ([Aslam et al. v. Uber](#)), which classified its drivers as workers entitled to benefits (and not independent contractors). In December 2018, the Court of Appeals upheld the 2016 decision, and Uber announced [it would challenge this decision](#) in front of the UK Supreme Court. In the Netherlands, [Deliveroo said it would file an appeal](#) against two recent decisions of the civil division of the Court of Amsterdam, which ruled that cyclists working for the company are not self-employed, and should be treated and paid in line with delivery sector practices.

In the US, Postmates (an on-demand pick-up delivery service) [managed to overturn a lower court decision](#) regarding the legal relationship between the company and its couriers, on appeal before the New York Supreme Court¹⁹.

Class Action

More often than not, individual plaintiffs cannot afford the costs of lengthy legal proceedings, making them more vulnerable to accepting a settlement. However, gig workers are increasingly banding together and bringing class action lawsuits against their employers, which allows the costs of litigation to be divided among multiple plaintiffs. Another advantage of class action lawsuits is that the court's ruling allows all similarly-situated plaintiffs to benefit from the remedy granted. However, as recent caselaw shows, many companies are actively preventing workers from organising and bringing class action lawsuits, by introducing forced arbitration clauses in their contracts, which typically prevent workers from pursuing or joining class actions (so-called class action waivers).

The US Court of Appeals for the 9th Circuit [ruled](#) that Uber drivers in California could not sue for alleged violation of labour laws arising from misclassification, because their contracts prescribed mandatory arbitration²⁰. Similarly in Canada, the [Ontario Superior Court of Justice ruled](#) that, according to the arbitration clause in Uber contracts, Uber drivers' class action lawsuits must be arbitrated in the Netherlands, where the company is headquartered. Although in this case the plaintiffs were successful in overturning this decision on appeal, and the Court of Appeal for Ontario [allowed](#) the class action to proceed²¹.

Court rulings in favour of labour rights are likely to continue encouraging new misclassification lawsuits against companies. And despite previous judgements in favour of companies, the outcome in future cases will depend upon the particular conditions of employment in each case; the industry or sector; and any changes in legislation, or new court decisions in comparable cases.

The Way Forward

It remains to be seen how companies will respond to the growing number of decisions in favour of gig workers. Will they substantively change their business models to respect the rights of their workers? Or will they continue to adjust their employment arrangements, and to take advantage of loopholes in labour laws for their own benefit? To date, there are very few cases in which companies have voluntarily agreed to grant employee status to their workers, following a lawsuit or arbitration.

Although a major court ruling on worker classification would help to clarify legal definitions for new employment practices, and might prompt companies to re-think their business models, truly effective labour rights protection requires a consistent and uniform approach. Recent caselaw shows that small variations in job performance, or employment conditions, can lead to different outcomes. Establishing clear legal criteria and/or legislation to distinguish between employees and independent contractors will ensure that the rights of workers are protected, and will prevent employers from deliberately misclassifying workers to maximise profit. Such legislation should also protect workers from forced arbitration clauses, which essentially deny workers the right to gain a legal decision on the true nature of their employment.

Either way, courts will continue to play an important role in reconciling legal norms with the demands of the changing reality of labour arrangements. Despite the many challenges outlined above, litigation continues to be an important outlet not only for workers' voices to be heard, but also for asserting their rights.

Stakeholder Responses

Changes in employment patterns, prompted by the rapid rise of the gig economy, are causing workers, labour organizations, and unions to confront the antiquated laws that no longer represent 21st century labour realities. A common concern, and policy focus, has been clarifying the legal definitions of “employee” and “independent contractor,” as [current definitions have proven insufficient](#) to deal with the rise of the gig workforce. This section will outline how various stakeholders, from governments, to companies, to workers, and civil society have responded to these challenges.

Government: Legislative Proposals

As indicated above, a key issue in the debate about employee misclassification is how, and whether, gig workers fit into existing labour law and employment definitions. Lawmakers around the globe are addressing the protection gap to varying degrees and through diverse initiatives, including legislative bills, executive orders and task forces. Many of these developments have had a discernible impact on workers’ rights — both positive and negative — while the impact of other initiatives must be assessed as they play out.

North America

In the US, much of the battle over employee classification is occurring at the state and local levels, as the laws that determine employee status vary from state to state. A growing number of state legislatures are attempting to pre-empt state agencies and local governments from regulating gig companies²², thus providing more uniformity in state-wide regulation. But this is still often at the expense of workers’ rights. In 2018, ten states introduced nearly identical bills aimed at classifying all workers on “marketplace platforms”²³ as independent “[marketplace contractors](#)”, not company employees. According to a [report](#) by the National Employment Law Project



(NELP), these new laws align neatly with on-demand business interests, and provide a strong financial incentive for companies not currently online or using app-based technologies to take their services online in order to avoid state-level labour standards.

Many existing state labour laws have employment definitions that are expansive enough to cover workers in the gig economy²⁴. This is leading some state agencies and courts to take a worker protectionist stance, by presuming that gig companies should be defined as “employers” under existing definitions²⁵. For example, the Oregon Bureau of Labour and Industries—using that state’s fairly broad definitions—issued an [advisory opinion](#) stating that Uber drivers are “employees” under state law²⁶. Additionally, in 2017, the Massachusetts state legislature passed the [Independent Contractor Law](#), which starts with a presumption that workers are employees, and subjects employers who misclassify their employees to criminal and civil penalties.

Other positive developments include the recent passing of the country’s first minimum pay rate for drivers of app-based ride-hailing services. In December 2018, the New York City Taxi and Limousine Commission, a state agency responsible for regulating taxis and for-hire vehicles, voted to implement a [minimum pay formula](#) to protect drivers from being underpaid by companies. Under the new policy, drivers will earn a [minimum take-home wage](#) of USD 17.22 per hour.

In Canada, the government of Ontario introduced [Bill 148](#): The Fair Workplace, Better Jobs Act in November 2017, which reverses the burden of proof, and requires the employer to prove that an individual is not an employee if there is a dispute over their classification status. In the rest of Canada, the issue of [worker classification](#) is currently making its way through the courts.

South America

In Brazil, recent labour [law reforms](#) highlight a controversial development called the “intermittent contract”—a type of contract that allows workers to render services on a non-continuous basis, while still engaging in an [employment relationship](#) with the employer. Under this contract, workers cannot be paid less than an hour’s fraction of the minimum wage, and they are entitled to [receive benefits](#) proportionate to how much they work, including holidays, severance payments, social security, and end of the year bonuses. However, there is one notable caveat: in Brazil, [employee wages](#) are usually paid on a monthly basis and cannot be reduced. With the intermittent contract, employers will have more contractual flexibility, and hiring intermittent workers may become more desirable than hiring full-time employees because companies can avoid paying full monthly wages. This could lead to fewer full-time employee positions, and more workers being pushed into the gig-work space. Critics [fear](#) that companies will replace full-time workers with on-call workers, and only hire people when they don’t want to pay overtime.

Europe

European lawmakers are equally concerned with the question of employer classification. In December 2018, the UK attempted to strike a balance between worker flexibility and worker protection, with the [UK Good Work Plan](#). This new proposal is based on the government-commissioned [Taylor Review](#) of modern employment forms and practices (including gig work). Trade unions and campaigners point out that the plan does not go far enough, as it does not get rid of “zero-hour contracts” or low wages.

In 2017, Germany introduced article 611(a) in its [Civil Code](#), which legally distinguishes employment contracts from service contracts. Under [the new provision](#), the key distinction between wage labour and self-employment comes down to the worker’s level of autonomy. However, gig workers still fall under the self-employed classification. In 2017, the Italian government passed a [new self-employment statute](#) that legally recognises autonomous workers and freelancers as “workers”, thus establishing [new welfare rights and financial benefits](#) for workers who fall into these categories.

In the Netherlands, Deliveroo moved to replace all employees on legitimate contracts with self-employed workers. This resulted in protests and strikes, which led the Dutch government to launch an [investigation into worker misclassification](#) in the gig economy. Ultimately, this might force Deliveroo to reinstate adequate labour contracts with social insurance and benefits.

Australia

In Australia, the Senate established a [Committee on the Future of Work and Workers](#), which recommends legislative amendments to crack down on sham contracts that classify dependent workers as independent, and to broaden the definition of “employee” to ensure gig workers have full access to lawful protections²⁷. The Senate Committee’s [report](#) affirms the legal significance of appropriate classification. The report highlights that independent contractors are governed by commercial law (instead of labour law), which provides no minimum terms or labour protections for workers²⁸.

I Companies: Good & Bad Practices

Companies continue to address the reality of emergent lawsuits in a myriad of ways, for example, by trying to prevent the passing of pro-labour regulations. Gig companies in the US are lobbying state legislatures to re-write state employment laws, to overrule local regulations, and in some cases have (co-)written original drafts of legislation²⁹. In 2015, the City of Seattle proposed an ordinance that authorised collective bargaining for independent contractors and on-demand drivers³⁰. Both Uber and Lyft vehemently opposed the measure³¹, [arguing](#) that federal labour law overrides the local legislation. In a similar vein, [Handy](#)—an online cleaning service provider—has put [eight bills](#) in front of state legislatures in the US in an [attempt to permanently classify](#) most gig workers as independent contractors. Lyft, and another ride-sharing competitor, Juno, are [suing the city of New York](#) to block the new USD 17 minimum wage rule for drivers mentioned above.

As previously discussed, a common trend among companies in the gig economy is the use of forced arbitration clauses in workers' contracts, in order to keep challenges to company practices out of court³². For example, [Lyft](#), [TaskRabbit](#) and the grocery delivery start-up [Instacart](#) all have forced arbitration clauses included in their contractual terms and conditions. In 2013, Uber—which has been sued in court more than any other on-demand company³³—inserted a pre-dispute arbitration agreement (PDAA) clause and class action waiver into contracts with its drivers³⁴, requiring all disputes to be resolved by final and binding arbitration³⁵. As previously highlighted, a group of Uber drivers was recently [barred from suing in court](#) for alleged labour violations because of the company's mandatory arbitration clause.

Not only does this tactic allow Uber to evade legal liability, it also prevents courts from creating binding legal precedents on relevant workers' rights issues, instead allowing company policy to dictate when and how potential labour violations will be remedied³⁶. Importantly, forced arbitration clauses also keep the allegations made against companies outside of the public domain. Last year, Uber (after much public pressure and following other companies like Google and Facebook) announced that it would [end forced arbitration agreements](#) for drivers, riders, and employees, who make sexual harassment claims against the company. The same access to remedies must be afforded to workers making claims of misclassification.

After backlash from civil society, and the prospect of legal action, several companies have taken positive steps to improve employee protections and access to remedies. For example, since 2018, the UK courier company DPD [now offers](#) its drivers the right to become employees—with benefits including a pension, sick pay and holiday pay—and the company has abolished its £150 daily fines for missing work without finding cover. While this is a commendable development, it is important to note that these new policies were implemented in response to the death of [Don Lane](#), a DPD courier with diabetes, who died after missing appointments with specialists because he feared the £150 fine.

Hermes, a low-cost parcel delivery company, recently [reached an agreement](#) with GMB, one of the UK's largest trade unions, marking the first deal in the UK that provides trade union recognition for gig economy workers. According to the collective bargaining agreement, which GMB has [called "ground-breaking"](#), Hermes couriers can now choose to become "self-employed plus" couriers. Self-employed plus couriers will receive [a host of benefits](#), including holiday pay and individually negotiated pay-rates, allowing couriers to earn at least £8.55 per hour. It should be noted, however, that this agreement was reached after a [UK employment tribunal](#) ruled that couriers for Hermes had been misclassified as self-employed, and were therefore entitled to minimum wage and holiday pay.

In May 2018, [Deliveroo announced](#) that it would provide 35,000 riders with accident insurance across 12 countries. The same year, [Uber announced](#) that it would offer its drivers and couriers in Europe medical cover, health benefits after accidents, and maternity and paternity payments, and would consider ways to offer drivers benefit and insurance packages [in the US](#).

While there has been increasing focus on gig economy companies like Uber and Lyft, the problem of employee misclassification also [extends to companies employing cleaners, construction workers, and even pilots](#). For example, the Dublin-based budget airline Ryanair recently began offering [direct employment contracts](#) to its pilots based in Germany. However, this positive initiative only came about after the German pilots' union, Vereinigung Cockpit, [staged a strike](#) in order to spark discussion about the carrier's approach to wages and working conditions. As debate about labour practices is intensifying in Europe, Ryanair has come under scrutiny for structuring contracts with workers and contractors in ways that allow it to [sidestep labour regulations and social security costs](#) in many of the European countries where it operates.

Over the past several years, as legal challenges to the independent contractor model have increased, so have settlements for worker misclassification. As previously mentioned, [Lyft recently settled](#) a USD 27 million worker misclassification lawsuit. Additionally, Instacart settled a [multi-million dollar misclassification](#) lawsuit, and subsequently adjusted company policy to offer an employee option.

Against the backdrop of the aforementioned [Aslam et. al. v. Uber](#) decision, Uber began offering its [European drivers access](#) to medical coverage, sick pay, parental leave, and compensation for work-related injuries. Drivers, however, will not get the same benefits they would receive as employees, and [union leaders](#) have expressed concern that the new benefits are merely cosmetic, because they can be taken away at any time and do not meet statutory requirements.

In response to concerns about tax avoidance and poor working conditions, the Danish company [Hilfr.dk](#) (a website that provides at-home cleaning services) collectively signed a [12-month pilot agreement](#) with Danish trade union 3F. Hilfr domestic cleaners, who were [formerly self-employed](#), became “workers”, thereby receiving higher wages, pension contributions, sickness benefits, and the protection of EU and national labour laws. Hilfr co-founder, Steffen Wegner, set an important example, [affirming that](#) “With this agreement we are raising the bar for the gig economy and showing how we can all benefit from new technology without undermining labour rights and working conditions.”

“With this agreement we are raising the bar for the gig economy and showing how we can all benefit from new technology without undermining labour rights and working conditions.”

*Steffen Wegner,
Hilfr co-founder*

Some emerging on-demand companies are taking heed of the backlash faced by other companies, and are implementing, from the outset, business models that classify workers as employees. For example, [Managed by Q](#)—a relatively new [on-demand office cleaning, maintenance and supply service](#) in the US—launched with conventional labour models. [Managed by Q](#) offers its on-demand workforce employment as an employee, with company-paid health insurance, paid family leave and more, thus setting an important and positive example for its counterparts.

I Workers & Civil Society

Workers and civil society organizations are focusing on redefining legal employment terms, and rethinking union strategy in light of changing labour relations. The International Labour Organization (ILO) conducted a longitudinal [study](#) of global approaches to combatting worker exploitation in various sectors of the gig economy. The study highlights organisational challenges facing the union movement and emphasises union renewal strategies that seek to create new union membership models and organising tools, in order to bring on-demand workers into their ranks³⁷.

In the UK, the Trade Union Congress (TUC) released a [report](#) with recommendations for policy-makers to tackle precarious work in the gig economy. The TUC calls for policy-makers to help give more workers a voice at work; to upgrade employment rights for the twenty-first century, and to properly enforce these rights; and to ensure that tax, social security and pension systems encourage employers³⁸ to offer decent jobs³⁹.

Moreover, delivery couriers in London and other European cities have created [self-organized collectives](#), such as Deliveroo Strike Raiders, Riders Union Bologna, and Deliverance Milano and organised [platform cooperatives](#), which are businesses with a digital interface that are owned and controlled by their workers.

In Italy, unions have responded to the needs of non-conventional workers by structuring membership based on employment classification (rather than sectoral or occupational distinctions). This provides a forum for workers to directly address issues related to temporary contracts, low wages, contractual questions, atypical workplace protection, and bargaining to encourage companies to favour conventional employment relationships⁴⁰. These diverse proposals provide both companies and governments with plenty to think about and build upon as they negotiate the future of work.

In a recent [report](#), the Hamilton Project—a non-profit research initiative launched by the Brookings Institute—proposed a new legal category called “independent workers”, in order to accommodate those who fall somewhere in the “grey area”. Under this proposal, independent workers would receive some of the protections and benefits of employees, such as the right to organise, and the requirement that intermediaries contribute to workers’ social service benefits and pensions⁴¹. Similarly, in a [report](#) on the on-demand economy, the National Employment Law Project recommends that lawmakers take initiative to clarify definitions in their laws, and provides model statutory language. Another approach recommended by NELP is to declare affirmatively that certain workers, who are frequently misclassified, are entitled to critical labour protections, regardless of their formal title⁴².

The Australian Council of Trade Unions (ACTU) has launched a [Change the Rules](#) campaign advocating policies for fair pay and secure work, including a right for casual and gig workers to convert to permanent employment, and for “casual employment” to be properly defined. The Centre for Future of Work at the Australia Institute recently released a [report](#) on regulating the gig economy. The [report](#) highlights five major options for regulators and policy-makers, including enforcement of existing laws; clarifying or expanding definitions of “employment”; creating a new category of “independent worker”; creating rights for “workers”, not employees; and reconsidering the concept of an “employer”.

Despite the hurdles that misclassification creates, workers have always found ways to organize. Taxi drivers, for example, who have faced similar struggles of misclassification in the past, found a way to join the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), the country’s largest and oldest federation of unions. In 2011, the National Taxi Workers’ Alliance (NTWA) was granted AFL-CIO membership, as the first non-traditional workforce made up of independent contractors. The ILO’s report on [“Organizing on-demand: Representation, voice, and collective bargaining in the gig economy”](#) provides additional examples of workers’ alternative organizing efforts. These include union-affiliated guilds, such as the [Independent Drivers Guild](#) (a Machinists Union affiliate that represents For-Hire Vehicle drivers in New York City), and platform cooperatives, which are created by and for gig and platform workers, and have overwhelmingly embraced new technology.

Concluding Observations

The evidence points to companies' classification of workers as "independent contractors" as an unapologetic attempt to lower overhead costs and maximise profit at the expense of workers' rights and wages. This practice is not new, nor is it limited to the gig economy. However, as this report has attempted to demonstrate, the legal, practical, and economic implications are becoming increasingly serious in this rapidly growing sector of the economy.

Despite the existence of internationally recognised labour standards and rights, the misclassification of workers means that these standards are not applied when they should be. Worker classification ought to reflect a worker's actual employment status, and not be a means to undermine their enjoyment of labour rights and social protections.

The price tag of misclassification is formidable, for workers first and foremost, but also for businesses and for society at large. Workers are deprived of their fundamental labour rights; their basic levels of economic security; and their right to collectively bargain with their employers on remuneration and terms and conditions. Meanwhile, law-abiding businesses and taxpayers absorb the high financial burden shifted on to them by companies engaged in the practice of misclassification.

Workers and lawyers around the globe are challenging this prevalent corporate strategy, by reverting to the courts to assert core labour rights, including through class action lawsuits. Litigation is a key tool in this fight, and has resulted in some important wins for workers, helping to set positive precedents for similarly-situated workers.

Courts continue to play a crucial role in testing legal norms against new labour realities, prompting governments to amend and fill the gaps in existing labour legislation. Courts are thus creating important opportunities and precedents for the emergence of new employment standards through caselaw.

Governments around the world are, to varying degrees, addressing this protection gap by proposing legislative bills and other initiatives. Some governments, like Denmark and Australia, have taken positive steps in the right direction, by launching investigations into worker misclassification in the gig economy, and proposing legislative reforms that would give workers full access to lawful protections.

Many of the proposed initiatives, however, will not strengthen labour rights. While some proposals adopt a presumption in favour of employee status, with its requisite rights and protections, others presume that workers are independent contractors without such rights. Moreover, some bills provide strong financial incentives for companies not currently online or using app-based technology to take their services online in order to escape basic labour standards. Employee status alone is no guarantee of decent work, but the rights and protections it affords are nonetheless a safeguard for workers. As such, the presumption in favour of employee status means that more workers are—or at least should be—protected, and the employer bears the burden of proving otherwise.

The role of most companies in this process has been characterised by a pernicious attempt to inhibit the affirmation of workers' rights, both through legal reforms and court proceedings. Companies continue to lobby law- and policy-makers to discourage worker protections—including the right to collective bargaining—and even go so far as to demand the rewriting of employment laws and the overruling of local regulations.

Moreover, many companies are actively preventing workers from accessing the courts and collectively organising, by using forced arbitration clauses, including class action waivers, in contracts, which require all disputes to be resolved by final and binding arbitration. This blatant attempt to keep challenges of company practices and policies out of court allows companies to evade legal liability, and prevents the courts from being able to create legally binding precedents in relation to labour rights. Furthermore, these clauses permit companies themselves to decide when, and how, alleged labour violations will be remedied, perpetuating the power imbalance between companies and their workers.

When lawsuits are brought against companies, it is commonplace for them to either appeal to higher courts, drawing out the time and cost of legal proceedings, or to settle out of court, preventing public disclosure and the creation of crucial legal precedents.

While some gig companies have taken certain steps to adjust their employment models, typically these adjustments are taken with a view to passing only the minimum standards established by the courts. The aim is seldom about elevating the rights of their workforce more broadly, or bringing about substantive change in business models and practices. A very small number of companies, such as Hilfr and Managed by Q, are pioneers in the field, simply by granting full employee status to their workers.

Looking Ahead

In its most recent report, “[Work for a brighter future](#)”, the ILO’s Global Commission on the Future of Work rightly affirms the need for decisive action, to ensure transformations in the world of work “create a brighter future and deliver economic security, equal opportunity and social justice—and ultimately reinforce the fabric of our societies”⁴³. The report calls upon governments, employers, and workers’ organizations to “reinvigorate the social contract”, by “placing people and the work they do at the centre of economic and social policy and business practice”⁴⁴. In addition to calling for an increased investment in people’s capabilities and in decent and sustainable work, the ILO’s proposed human-centred agenda for the future of work highlights the need to strengthen the institutions of work by establishing a universal labour guarantee, expanding time sovereignty for workers (ensuring greater autonomy over their working time) and ensuring collective representation of workers and employers.

Building on these important recommendations, it is crucial to reiterate that it is only by placing human rights at the heart of labour negotiations and relationships that we can create a future of shared prosperity instead of increased inequality. To achieve this thriving future of work, it is not enough for companies to make reactive cosmetic changes to business practices only when things go terribly wrong, such as worker deaths resulting from company policies. Instead, companies must take proactive steps to build or reform their business models in accordance with their responsibility to respect human rights, and in a way that allows the workers of the future to share the wealth that they generate.

Together, governments and businesses have the opportunity to leverage technology to create more inclusive economies. By sharing the burden of risk, and aspiring to achieve greater equality of outcome and opportunity, it is possible to have an economy that provides workers with income security, workplace protections, and the right to collectively participate in designing and defining the future of their work.



Three key opportunities must be leveraged to create a better future of work for all:

1. Corporate Responsibility to Respect Human Rights

Companies must live up to their responsibility to respect human rights, and labour rights in particular, in accordance with the UN Guiding Principles. At a minimum, this means that they must “avoid infringing on the rights of others wherever they operate and whatever their size or industry, and they must address any impact that does occur,”⁴⁵ including through appropriate labour rights policies and practices as well as remediation processes. Companies should:

Correctly classify workers. In accordance with their responsibility to avoid infringing on the rights of their workers, companies must correctly classify them as employees to ensure full enjoyment of labour rights and social protections. Companies should also refrain from any actions that would undermine such rights and protections (e.g. blocking policies and bills that seek to ensure proper classification and/or using arbitration clauses that prevent access to the courts).

Enact human rights policies and practices. Companies should put in place human rights policies and processes⁴⁶. This includes remediation processes and human rights due diligence processes to identify, prevent, mitigate, and account for how they address their adverse human rights impacts, as well as policy commitments to the appropriate classification of their workers. Such policies and practices should also ensure the full enjoyment of workers’ rights to freedom of association.

Redress human rights abuses. When abuses occur, companies should provide for, or cooperate in, legitimate remediation processes, which ensure victims’ access to effective remedy⁴⁷. As part of this responsibility to redress abuses, **companies should abolish forced arbitration clauses, including class action waivers** in workers’ contracts, which effectively prevent workers from accessing the courts, individually and collectively.

2. Legislative Reform

Lawmakers around the world should ensure that their legislative proposals adopt a presumption in favour of employee status, and afford gig workers the same rights and protections as employees, including minimum wage, paid overtime, unemployment insurance, workers’ compensation, family and medical leave, and the right to collective bargaining. Companies should refrain from taking action to undermine these needed legislative reforms.

3. Business Incentives

Governments should shift the current paradigm from one that incentivises businesses to classify workers as “independent contractors” or “non-employees”, by creating incentives for businesses to classify workers as “employees”; thereby strengthening the bargaining power that workers hold in the workplace.

Glossary

- **Worker.** For the purposes of this briefing, a worker is any person carrying out work for a company, regardless of the nature of their labour relationship.
- **Employee.** Any person who works for a wage or salary and performs services for an employer, governed by a written or verbal contract of service. The legal determination of who is considered an employee is usually governed by domestic law.
- **Independent contractor.** A person who performs work, or provides services of their own accord, for an enterprise under conditions that are characteristic of a purely commercial relationship. Workers in the platform and gig economies are almost invariably classified as independent contractors, despite the fact that their work may be closely supervised, and their pay is directed through a specific application or Internet platform.
- **Gig economy.** The gig-economy includes crowd work and work on-demand via apps.
 - **Crowd work.** Work that is executed through online platforms that put in contact an indefinite number of organisations, businesses and individuals through the internet, potentially allowing connecting clients and workers on a global basis⁴⁸. This online-executed work allows an infinite number of workers and clients to operate anywhere in the world.
 - **On-demand work.** Form of work in which the execution of traditional working activities such as transport, cleaning and running errands, but also forms of clerical work, is channeled through apps. The businesses running these apps normally intervene in setting minimum quality standards of service and in the selection and management of the workforce⁴⁹. This platform-facilitated work matches online supply and demand of activities that are later executed locally, and are therefore place-based and geographically limited.
- **Gig work.** Non-standard form of employment where work is outsourced through digital labour platforms. This includes web-based platforms via an open call to a geographically dispersed crowd (crowd work); and location-based applications (apps), which allocate work to individuals in a specific geographical area, typically to perform local, service-oriented tasks such as driving, running errands or cleaning houses (on-demand work).
- **Precarious work.** Non-standard employment that is poorly paid, insecure and unprotected.
- **Casual work.** The engagement of workers on a short-term, occasional or intermittent basis, often for a specific number of hours, days or weeks, in return for a wage set by the terms of the daily, or periodic, work agreement.

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- 11 See [Razak et al. v. Uber](#), U.S District Court for the Eastern District of Pennsylvania, April 2018, page 12.
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- 15 [Dynamex Operations West v. Superior Court of Los Angeles, Supreme Court of California, April 2018](#); see [Case Table](#) Annex for details.
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- 17 [Abulzahab et al. v. Uber Technologies et al.](#); for details please see [Case Table](#) Annex.
- 18 [Hood v. Uber et al.](#); for details please see [Case Table](#) Annex.
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- 23 For an example of how “marketplace platform” is defined in state legislation, see AZ Rev Stat § 23-1603 (2016)
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- 25 *Ibid*, page 2.
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- 27 [Select Committee on the Future of Work and Workers](#), Parliament of Australia, September 2018, page viii.
- 28 *Ibid*, page 74.
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- 43 [Work for a brighter future](#), Global Commission on the Future of Work, ILO, January 2019, page 10.
- 44 *Ibid*, page 10.
- 45 UN [Guiding Principles on Business and Human Rights](#), Principle 11.
- 46 In accordance with the [Guiding Principles on Business and Human Rights](#), Principle 15 (UNGPs 16 to 24 elaborate further on these policies and practices).
- 47 UN [Guiding Principles on Business and Human Rights](#), Principle 22 (and 26-31).
- 48 [The rise of the «just-in-time workforce»: On-demand work, crowdwork and labour protection in the «gig-economy»](#), Conditions of Work and Employment Series No. 71, 2016, International Labor Office, Geneva, ILO, page 2.
- 49 *Ibid*, page 3.

About This Report

As an organization dedicated to advancing human rights in business, the Business & Human Rights Resource Centre seeks to end corporate impunity for human rights abuses. Our [Corporate Legal Accountability \(CLA\)](#) programme, which highlights significant lawsuits related to business and human rights across the world, is one of our tools for achieving this goal. We view lawsuits both as a means through which communities and workers assert their power, and as a key driver of positive change in corporate behaviour. A vital part of our corporate legal accountability work is [tracking lawsuits](#) that challenge companies' human rights abuses.

Every year, we publish an [Annual Briefing](#) that highlights the work of our allies in the legal practice. By analysing their experiences and findings, we aim to spark discussion, debate and, ultimately, further action by other advocates and practitioners. This year's Briefing focuses on the misclassification of workers as "independent contractors" in the gig economy—and the resulting erosion of labour rights—as workers, civil society, governments, and companies negotiate the future of work.

This report highlights and analyses lawsuits and legislative developments around the globe, which shed light on the various strategies used by different stakeholders to counter the power imbalance between companies and workers, and to assert and protect workers' rights. The report also identifies various litigation trends and strategies, and calls attention to gaps in legislation related to protecting the core labour rights of non-conventional workers. Finally, it looks at the legal risks that companies face when they fail to respect workers' rights

Acknowledgments

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	1 Abulzahab et al. v. Uber Technologies et al.	2 Aslam et al. v. Uber et al.	3 Cotter et al. v. LYFT	4 Del Rio et al. v. Uber et al.
Date & Court Filed	31 Dec 2018, US District Court of Massachusetts	2015, UK Employment Tribunal	3 Sep 2013, US District Court for the Northern District of California, San Francisco Division	11 Aug 2015, California Northern District Court
Plaintiffs & Legal Counsel	Mohd Abulzahab et al, represented by Ashley C. Keller, Keller Lenkner LLC, Joshua W. Gardner Gardner & Rosenberg, P.C.	Mr Y Aslam, Mr J Farrar and others, represented by Mr Thomas Linden QC	Patrick Cotter, Alejandra Maciel, Jeffrey Knudtson, represented by Outten & Golden LLP, Lichten and Liss-Riordan, P.C.	Ricardo del Rio, on behalf of himself, the proposed class and collective class, Christopher James Hamner, Evelina Maria Serafini, Esq., Amy Tai Wootton
Defendants	Uber Technologies et al.	Uber B.V., Uber London, Uber Britannia	LYFT	Uber Technologies, Inc. and Rasier-CA, LLC
Causes of Action	1) Misclassifying drivers as independent contractors; 2) Failure to pay minimum wage, overtime, and provide other protections required by federal and state law (Fair Labor Standards Act, Massachusetts Wage Law, etc.)	1) Failure to pay minimum wage under the Employment Rights Act 1996 and National Minimum Wage Act 1998; 2) Failure to provide pay leave under the Working Time Regulations 1998; 3) detrimental treatment on “whistle-blowing” grounds	1) Unlawful business practice (failure to remit full amount of gratuities paid to drivers) in violation of California Business & Professions Code; 2) Misclassification of drivers as independent contractors; 3) failure to provide accurate wage statements in violation of California Labor Code; 4) failure to reimburse expenses in violation of California Labor Code	1) Misclassifying drivers as independent contractors; 2) Failure to pay overtime wages, penalties under California Labor Code 2699, waiting time penalties under California Labor Code 203; 3) failure to reimburse expenses; 4) failure to provide rest meal periods and rest periods; 5) unfair business practice under Unfair Competition Law
Remedy Sought	Award of damages; injunction prohibiting defendant from engaging in unlawful practices	Award of compensation for unpaid wages and leave	Award of restitution, compensatory damages, reimbursement of expenses	Award of compensatory and punitive damages; injunction prohibiting defendant from engaging in unlawful practices
Status / Outcome	Pending trial	Employment tribunal decided in favour of the plaintiffs, ruling that they were 'workers', not independent contractors. Employment appeal tribunal (2016) and UK Court of Appeal (2018) upheld the ET judgement.	Settled for USD 27 mln.	US Court of Appeals for the 9 th Circuit ruled in a consolidated appeal hearing that arbitration agreements should be enforced and, therefore, plaintiffs should pursue arbitration individually (2018) instead of class action.
Court Documents & Further Info	Docket information	Employment tribunal decision (2016); Appeal judgement (2018)	Order granting final approval of settlement (2017)	Order granting defendants' motion to dismiss (2016); Judgement of the US Court of Appeals for the 9th Circuit (2018)

	5 Dynamex Operations West v. Superior Court	6 Federation of Dutch Trade Unions v. Deliveroo Netherlands	7 Federation of Dutch Trade Unions v. Deliveroo Netherlands	8 Florian Ménard v. SAS Uber France et al.
Date & Court Filed	Supreme Court of California	2018, Court of Amsterdam, Netherlands (civil division)	2018, Court of Amsterdam, Netherlands (civil division)	23 Nov 2016, Conseil des prud'hommes de Paris (Paris Industrial Tribunal)
Plaintiffs & Legal Counsel	Dynamex Operations West (Petitioner)	Federation of Dutch Trade Unions represented by PLJ Bosch	Federation of Dutch Trade Unions represented by PLJ Bosch	Florian Ménard, represented by Aurelie Aurnad, member of the Paris Bar
Defendants	Superior Court of Los Angeles County (Respondent); Charles Lee et al. (Real Parties in Interest)	Deliveroo Netherlands BV	Deliveroo Netherlands BV	SAS Uber France, Societe Uber BV
Causes of Action	Determination of applicable standard under California law in deciding whether workers should be classified as employees or as independent contractors for purposes of California wage orders in relation to employer's obligations relating to the minimum wages, maximum hours and a number of basic working conditions, such as meal and rest breaks.	The company serves food deliveries based on employment contracts and, therefore, falls within the scope of collective labour agreements for the transport of goods.	Federation of Dutch Trade Unions argued that the so-called partner agreements between Deliveroo and its riders in practice amounted to a relationship between employer and employee.	1) Misclassifying as independent contractor; 2) Failure to pay holiday pay, severance pay, compensation for concealed work and reimbursement of professional expenses; 3) unwarranted termination of employment
Remedy Sought	Review of the Court of Appeal's conclusion in Charles Lee et al. v. Dynamex that the California wage order's definition of "employee" and "employer" may be relied upon in determining whether a worker is an employee or an independent contractor for the purposes of the obligations imposed on employers by the wage order.	Compliance with binding provisions of the collective labour agreements and compensation of fees.		Acknowledgement of employee-employer relations; reclassification of contract as employment contract; reward of compensatory and punitive damages
Status / Outcome	The Supreme Court of California affirmed the judgement of the Court of Appeal, and adopted the " ABC standard " for determining whether the worker is an employee or an independent contractor.	The court ruled (2019) in favour of the plaintiff, ordering the company to comply with binding provisions of the collective labour agreement for the transport of goods.	The court ruled in favour of the plaintiff (2019), recognizing that the legal relationship between Deliveroo and riders amounts to a relationship of authority between the company and the delivery staff.	The court dismissed the lawsuit ruling that the plaintiff cannot be considered an employee (2018).
Court Documents & Further Info	Supreme Court of California Judgement (2018) Superior Court of Los Angeles Judgement (2014)	Judgement (in Dutch) 2019		Judgement (unofficial English translation) 2018

Annex: Case Table

	9 Heller v. Uber Technologies et al.	10 Hood v. Uber et al.	11 IWGB v. RooFoods Ltd, CAC	12 Lawson v. GrubHub	13 O'Connor et al. v. Uber Technologies et al.
Date & Court Filed	19 Jan 2017, Ontario Superior Court of Justice	26 July 2016, US District Court for the Middle District of North Carolina	28 Nov 2016, UK Central Arbitration Committee (CAC)/ 15 June 2018 High Court of Justice (Administrative division)	9 Nov 2015, US District Court for the Northern District of California	16 Aug 2013; California Northern District Court
Plaintiffs & Legal Counsel	David Heller, represented by Lior Samfiru and Stephen Gillman	Michael Hood, individually and on behalf of all others similarly situated	Independent Workers Union of Great Britain	Raef Lawson, Andrew Tan, represented by Lichten and Liss-Riordan, P.C., Thomas Fowler	Douglas O'Connor, Thomas Colopy, on behalf of themselves and others similarly situated, represented by Shannon Liss-Riordan and Adelaide H. Pagano, Lichten & Liss-Riordan
Defendants	Uber Technologies, Uber Canada, Uber B.V., Rasier Operations	Uber Technologies, Rasier LLC	Central Arbitration Committee, Roofoods Ltd. trading as Deliveroo	GrubHub Holdings, GrubHub Inc,	Uber Technologies Inc., Travis Kalanick and Ryan Graves
Causes of Action	1) Misclassifying drivers as independent contractors; 2) failure to provide benefits required by Ontario's Employment Standards Act 2000	1) Misclassifying drivers as independent contractors; 2) failure to reimburse expenses; 3) failure to provide overtime pay, rest and meal breaks, and other entitlements in violation of North Carolina's Wage and Hour Act General Statute and Fair Labor Standards Act.	1) Denial of recognition for collective bargaining purposes by Roofoods under the Trade Union and Labor Relations (Consolidation) Act 1992 in respect of group of delivery drivers in the Camden and Kentish Town zone	1) Misclassifying as independent contractor; 2) Failure to pay minimum wage and overtime; 3) failure to reimburse expenses	1) Failure to remit the entire gratuity paid by customers to drivers in violation of California Labor Code § 351; 2) misclassifying the drivers as independent contractors and failing to pay their business expenses (vehicle, gas and maintenance) in violation of California Labor Code § 2802
Remedy Sought	Award of damages; declaration that Uber has violated Employment Standards Act.	Award of compensatory and punitive damages; injunction prohibiting defendant from engaging in unlawful practices	Recognition for collective bargaining purposes; granting judicial review of CAC decision on the grounds of art. 11 of the European Convention of HR	Award of compensation for unreceived wages and expenses.	Award of compensatory and punitive damages; injunction prohibiting defendant from engaging in unlawful practices
Status / Outcome	The court ruled (2018) that the dispute should be submitted to arbitration, since the contract between the plaintiff and Uber includes an agreement to arbitrate disputes in the Netherlands. Court of Appeal for Ontario overturned the ruling (2019) and allowed the lawsuit to proceed.	Settled for USD 1.3 mln. without admitting liability in 2019.	The CAC ruled that Deliveroo riders were not "workers" for the purposes of Trade Union and Labour Relations (Consolidation) Act 1992, under which trade union recognition is not available to self-employed workers. The UK High Court upheld the CAC findings in December 2018.	The court dismissed the lawsuit ruling that the plaintiff was correctly classified as an independent contractor.	US Court of Appeals for the 9 th Circuit ruled in a consolidated appeal hearing that arbitration agreements should be enforced and, therefore, plaintiffs should pursue arbitration individually (2018) instead of class action* * Update March 2019: Uber settled for USD 20 mln, without changing drivers' classification.
Court Documents & Further Info	Court of Appeal judgement (2019)	Memorandum opinion on proposed settlement (2019)	CAC decision (2016) UK High Court Judgement (2018)	Judgement (2018)	Order denying Uber's motion for summary judgement (2015); Judgement of the US Court of Appeals for the 9th Circuit (2018)

	14 Olatunji et al. v. Uber Technologies System Nigeria	15 Plaintiff v. Deliveroo Netherlands	16 Plaintiff v. Uber	17 Price et al. v. Uber et al.
Date & Court Filed	2017, National Industrial Court of Lagos, Nigeria	2018, Court of Amsterdam, Netherlands (civil division)	Minas Gerais state labour court, Brazil	2014, Superior Court of California
Plaintiffs & Legal Counsel	Oladapo Olatunji and Daniel John	Plaintiff, represented by Mr LS van Dis		Steven Price, individually and on behalf of all others similarly situated, represented by Law Office of Christopher J. Morosoff
Defendants	Uber Technologies System Nigeria	Deliveroo Netherlands BV		Uber Technologies, Rasier LLC
Causes of Action	1) Misclassifying drivers as independent contractors; 2) Failure to provide relevant benefits under the Labor Act.	Unlawful termination of employment	1) Misclassifying as independent contractor; 2) Failure to pay workers' benefits, including compensation for overtime, night shifts, holiday pay and reimbursement of professional expenses.	1) Misclassifying drivers as independent contractors; 2) failure to pay minimum wage, overtime compensation, compensation for missed meal and rest periods in violation of California Labor Code; 3) failure to reimburse employee expenses; 4) failure to keep employment records; 5) failure to provide accurate wage statements, etc.
Remedy Sought	Declaration that the claimant and members of the proposed class are employees of the defendant; Order mandating to provide relevant benefits under the Labor Act, including health insurance and pension	Reinstatement		Award of compensatory and punitive damages; injunction prohibiting defendant from engaging in unlawful practices
Status / Outcome	The court dismissed the lawsuit (2018), ruling that the plaintiffs failed to provide sufficient evidence of employment relationship.	The court dismissed the lawsuit, ruling that the plaintiff could not be considered an employee and, thus, the contract could be terminated upon expiration.	The court ruled in favour of the plaintiff (2017). Sao Paulo appellate court upheld the judgement on appeal (2018) ordering the company to issue a formal employment contract to the driver.	Settled for USD 7.75 mln. in 2017 without admitting liability.
Court Documents & Further Info	Judgement (2018)	Judgement (in Dutch) 2018		Complaint (2014); Notice of order granting motion for approval of settlement (2018)

18 [Razak et al. v. Uber et al.](#)

19 [Vega v. Postmates](#)

20 [Victor Sánchez v. Roofoods Spain](#)

21 [Yucesoy et al. v. Uber Technologies et al.](#)

Date & Court Filed	4 Feb 2016, US District Court for the Eastern District of Pennsylvania	29 Sep 2016, Unemployment Insurance Appeal Board/State of New York Supreme Court, Appellate division, 3rd Judicial Department	2017, Juzgado de lo social N 6 de Valencia (Labour Court N 6 of Valencia)	20 Jan 2015, California Northern District Court
Plaintiffs & Legal Counsel	Ali Razak, Kenan Sabani & Khaldoun Cheroud, individually and on behalf of all others similarly situated, represented by Sacks Weston Diamond LLC.	Postmates Inc. (appellate)	Victor Sánchez, represented by Rafael Martínez Simón	Hakan Yucesoy, on behalf of himself and others similarly situated, represented by Shannon Liss-Riordan, Adelaide Pagano, Lichten & Liss-Riordan, P.C.
Defendants	Uber Technologies, Gegen LLC	Luis A. Vega, represented by Francis J. Smith, Commissioner of Labor (respondents)	RooFoods Spain	Uber Technologies, Inc., Travis Kalanick and Ryan Graves
Causes of Action	1) Misclassifying drivers as independent contractors; 2) violations of the federal minimum wage and overtime requirements under the Fair Labor Standards Act, Pennsylvania Minimum Wage Act and Pennsylvania Wage Payment and Collection Law.	Respondent entitlement to unemployment insurance contribution or remuneration.	Unfair dismissal	1) Misclassifying drivers as independent contractors; 2) failure to pay minimum wage and overtime in violation of Massachusetts state laws; 3) failure to remit drivers the total proceeds of gratuities.
Remedy Sought	Award of compensatory and punitive damages; injunction prohibiting defendant from engaging in unlawful practices	Reverse of Unemployment Insurance Appeal board decision granting the right to unemployment insurance to respondent.	Reinstatement; compensation of damages	Award of compensatory and punitive damages; injunction prohibiting defendant from engaging in unlawful practices
Status / Outcome	The Court granted summary judgement to Uber, ruling (2018) that the plaintiffs could not be qualified as 'employees' of Uber and, thus, were not entitled to the protection of the legislation on which they relied. The plaintiffs filed an appeal with the US Court of Appeals for the 3rd Circuit. The case is on-going.	The court ruled in favour of the appellant that the evidence of control by the company over the courier did not constitute substantial evidence of employer-employee relationship. Therefore, it was not required to provide unemployment insurance contributions in favour of the respondent.	The court ruled that the defendant's relationship with the plaintiff was a labour relationship and ordered the company to either re-admit the plaintiff, or to pay compensation for the average wage he would have received by the date of the judgement, if he had continued working as a Deliveroo rider.	US Court of Appeals for the 9 th Circuit ruled in a consolidated appeal hearing that arbitration agreements should be enforced and, therefore, plaintiffs should pursue arbitration individually (2018) instead of class action.
Court Documents & Further Info	Court order granting summary judgement (2018)	Court judgement (2018)		Order granting in part and denying in part Uber's motion to dismiss (2016); Judgement of the US Court of Appeals for the 9th Circuit (2018)



Business & Human Rights Resource Centre

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