

# THE CHANGING LANDSCAPE OF WORKER RIGHTS IN THE 21ST CENTURY WORKPLACE

ALBERT RIZZO

## I. INTRODUCTION

In March 2022, I was privileged to moderate the N.Y.U. Annual Survey of American Law Symposium.<sup>1</sup> The Symposium focused on the future of workers' rights and changes in the workplace at the start of the third decade of the 21st century. What emerged from the panel discussions was a portrait of a changing landscape of worker rights rendered from three seemingly separate but interrelated explanations for the changes. One year after the Symposium, this Article explores those explanations further and examines the effects of automation and the gig economy on the current labor market, COVID-19's post-pandemic impact on workers' rights and the workplace, and the role of labor unions today.

Part II discusses the effects of automation and artificial intelligence on the current labor market and concludes that the effects are positive though paradoxical. While the decline in demand for human labor for particularly routine work tasks is resulting in greater unemployment in some industries, the demand for workers in other industries, such as health care and technology, is increasing. And in those job sectors where demand is increasing, there is a greater need for a certain level of education and skill. As a consequence, although the replacement of hundreds of thousands of employees with robots may not appear to be a welcome change, the trend is generally creating a more educated and highly skilled workforce.

Part II also explores how automation and artificial intelligence are facilitating the growth of the "gig economy," a labor sector comprised of "gig workers" who typically work independently on short-term projects for different clients or consumers through online platforms that are owned and maintained by "gig firms." The gig

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1. The N.Y.U. Annual Survey of American Law invites academics and practitioners to NYU each year for a day of discussion devoted to a specific and current area of the law. The 2022 Symposium topic was "*The Future of Workers' Rights*" and was held on March 25, 2022.

economy is an outgrowth of important changes in the traditional workforce and has grown to become a significant component of the overall labor market. However, despite its growing significance and positive impact, the gig world has been threatened by lawsuits, legislation, and labor union efforts attempting to classify gig workers as employees—a classification that runs counter to the notion that gig workers work independently. Part II therefore examines the California landmark decision in *Dynamex Operations West, Inc. v. Superior Court*,<sup>2</sup> which set off a nationwide legal debate over the appropriate test for the classification of gig workers. The importance of appropriately classifying gig workers cannot be overstated because a determination that gig workers are employees would result in the absorption of the gig economy into the more traditional labor market.

Part III examines the impact of the COVID-19 pandemic on workers and the workplace. The obvious impacts have been felt in the areas of health and safety regulations, but the pandemic also ushered in trends toward more paid sick leave time, more benefits, and more flexibility in work schedules. It also refocused where we work and how we work, created the possibility of remote working for millions of workers, and exacerbated a trend toward employment resignations, “quiet quitting,” and early retirement that has contributed to a tight labor market—a market that may remain the new reality for some time to come.<sup>3</sup> To compete in this employment environment, businesses are rethinking their work and hiring practices because talent shortages and skills gaps will be a persistent problem, and employee benefits and work flexibility are now in high demand. It appears that the old way of working is past and a new set of worker expectations has developed.

Part IV discusses the role of labor unions in the 21st century and whether labor’s relevance has diminished in light of a decline in union membership as a percentage of the overall labor market and significant changes in laws governing workplace and employee rights. Affecting labor’s relevance are also “right to work laws,”<sup>4</sup>

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2. 416 P.3d 1 (Cal. 2018).

3. See Atta Tarki, *Despite Layoffs, It’s Still a Workers’ Labor Market*, HARVARD BUSINESS REVIEW (Jan. 30, 2023), <https://hbr.org/2023/01/despite-layoffs-its-still-a-workers-labor-market> [<https://perma.cc/DEK7-UDGN>].

4. See *infra* Part IV.A. States with right-to-work laws prohibit employers from requiring their employees to join a labor union in order to obtain or keep their employment, and employees may elect not to pay union dues. See National Labor Relations Board, *Employer/Union Rights and Obligations*, <https://www.nlr.gov/about-nlr/rights-we-protect/your-rights/employer-union-rights-and-obligations> [<https://perma.cc/3C4J-2298>].

which the majority of states have now enacted, and which enable employees to opt out of union membership and decline financial support for unions. In addition, state and local governments that sometimes required their employees to support unions are now prohibited from collecting dues from non-union employees after the United States Supreme Court's decision in *Janus v. American Federation of State, County, and Municipal Employees, Council 31*.<sup>5</sup> Moreover, the gig economy is affecting labor's relevance and its unionization efforts as well. This growing sector, largely composed of independent workers, generally does not operate in the same way as, for example, heavily unionized manufacturing, and is therefore seemingly at odds with the idea of labor organization.

But all is not bleak for labor unions. The Protecting the Right to Organize Act,<sup>6</sup> which was re-introduced in Congress in February 2023, would greatly expand various labor protections relating to employees' rights to organize and collectively bargain.<sup>7</sup> And there have also been recent successful unionization efforts at major employers like Starbucks<sup>8</sup> and Amazon,<sup>9</sup> as well as in the healthcare industry,<sup>10</sup> that are outwardly giving unions a period of resurgence. Part IV concludes that strong differences of opinion about the importance and relevance of labor unions may become the impetus for major change this century.

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5. 138 S. Ct. 2448, 2460, 2486 (2018).

6. H.R. 20, 118th Cong. (2023).

7. The Bill, as introduced, would amend Section 14(b) of the National Labor Relations Act, 29 U.S.C. §164(b), to allow collective bargaining agreements to require all employees represented by the bargaining unit to contribute fees to the labor organization for the cost of such representation notwithstanding a state law to the contrary. H.R. 20, 118th Cong. §111 (2023).

8. Andrea Hsu, *Starbucks Workers Drive Nationwide Surge in Union Organizing*, NPR (May 1, 2022), <https://www.npr.org/2022/05/01/1095477792/union-election-labor-starbucks-workers-food-service-representation> [https://perma.cc/K7SR-JTH4].

9. Andrea Hsu, *In a Stunning Victory, Amazon Workers on Staten Island Vote for a Union*, NPR (Apr. 1, 2022), <https://www.npr.org/2022/04/01/1089318684/amazon-labor-union-staten-island-election-bessemer-alabama-warehouse-workers> [https://perma.cc/G8MJ-TTQ9].

10. Aneri Pattani, *Health Workers Unions See Surge in Interest Amid Covid*, KAISER HEALTH NEWS (Jan. 12, 2021), <https://khn.org/news/article/health-workers-unions-see-surge-in-interest-amid-covid/> [https://perma.cc/LF4L-BQK9].

## II. AUTOMATION, ARTIFICIAL INTELLIGENCE AND THE GIG ECONOMY'S EFFECTS ON THE LABOR MARKET

### A. *Toward a More Educated and Better Skilled Workforce*

Automation and artificial intelligence are eliminating jobs for millions of workers<sup>11</sup> and are also transforming the landscape of the workplace and the rights of workers in places where jobs are at risk of being lost. Ten years ago, it was estimated that within twenty years almost half of all current jobs in the United States could be automated.<sup>12</sup> And the drive toward increased automation is certainly not decelerating<sup>13</sup> because with automation, many manufacturers can now produce the same amount of product for a fraction of their previous cost, and employ a fraction of the hundreds, thousands, or even tens of thousands of employees they previously needed. Moreover, consumer demand requires greater automation because we live in a reality where consumers order online and expect to receive products within days—or even on the same day the order is placed. To even attempt to satisfy this consumer expectation, manufacturing without automation would require a factory line of people working continuously 24 hours per day. Automation in manufacturing and other sectors is therefore expanding considerably in the United States and globally.<sup>14</sup> Clearly then, valid concern exists about how the future workforce will be shaped and what it will look like.

An anecdotal argument that is often made about automation is that, over time, it creates as many jobs as it eliminates because work-

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11. Jack Flynn, *36+ Alarming Automation & Job Loss Statistics [2023]: Are Robots, Machines, and AI Coming for Your Job?*, ZIPPAA (Feb. 14, 2023), <https://www.zippia.com/advice/automation-and-job-loss-statistics/> [https://perma.cc/DP88-D3D8].

12. In a 2013 working paper (published in 2017), Carl Frey and Michael Osborne of the University of Oxford estimated that forty-seven percent of U.S. jobs could be automated within the subsequent twenty years. Carl Benedikt Frey & Michael A. Osborne, *The Future of Employment: How Susceptible Are Jobs to Computerisation?*, 114 *TECH. FORECASTING & SOC. CHANGE* 254, 265 (2017).

13. See Flynn, *supra* note 11.

14. Jenny Chang, *40 Jobs Lost to Automation Statistics: 2023 Job Displacement Analysis*, FINANCES ONLINE (Mar. 15, 2023), <https://financesonline.com/jobs-lost-to-automation-statistics/> [https://perma.cc/9XT5-XJQC]. Global companies such as Foxconn Technology Group have chosen to manufacture most of their products with robots and artificial intelligence. Jane Wakefield, *Foxconn Technology Group Reportedly Replaces '60,000 Employees with Robots'*, BBC (May 25, 2016), <https://www.bbc.com/news/technology-36376966> [https://perma.cc/FSC5-JDA7].

ers who use machines are more productive than those who work without them, which reduces the cost of the goods being produced. With reduced costs and lowered prices, consumers buy more. Buying more products or services generally means greater profitability for businesses, which typically results in the creation of more jobs. Other arguments have also been advanced. For example, while many workers have been displaced by robots and other forms of artificial intelligence, the robots need to be maintained, which creates jobs for the workers who maintain them. And displaced workers who can re-educate and re-train themselves may be able to complement the work of the robots that replaced them. These arguments are not without merit as the World Economic Forum found that fifty-eight million new jobs are expected to be created globally as a result of automation.<sup>15</sup>

We have seen this before. Throughout history, jobs have evolved as manufacturing processes improved. The oft-cited example is Henry Ford's creation of the assembly line. Where it once took a team of factory workers slightly over twelve hours to build a car's chassis, with the assembly-line innovation the factory began producing a chassis every ninety-three minutes.<sup>16</sup> With greater productivity, Ford Motor Company grew, as did the number of available jobs. Another example is the invention of the automated teller machine (ATM). With the increasing installation of ATMs in the mid-1970s, banks found that they needed fewer tellers behind the window, which reduced the cost of opening and maintaining new bank branches.<sup>17</sup> The reduced cost led to an actual net increase in the number of branches<sup>18</sup> and, consequently, the number of employees to operate them. As the installation of ATMs swelled over the ensuing years, the number of teller positions did not decrease but actually increased.<sup>19</sup>

Of course, in the short term those who are displaced by robots and artificial intelligence, and those who are competing with them, stand to lose. In 2019, the Organization for Economic Cooperation

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15. Amar Hanspal, *Here's Why Robots Are Actually Going to Increase Human Employment*, WORLD ECON. F. (Feb. 26, 2021), <https://www.weforum.org/agenda/2021/02/world-economic-forum-automation-create-jobs-employment-robots/> [<https://perma.cc/9BKQ-ZCBX>].

16. Carol W. Gelderman, *Henry Ford*, ENCYC. BRITANNICA, <https://www.britannica.com/contributor/Carol-W-Gelderman/1050> [<https://perma.cc/298V-6UP8>].

17. JAMES BESSEN, *LEARNING BY DOING: THE REAL CONNECTION BETWEEN INNOVATION, WAGES, AND WEALTH* 107–08 (2015).

18. *Id.* at 107.

19. *Id.* at 107–08.

and Development<sup>20</sup> estimated that approximately fourteen percent of jobs in its member countries are at risk of complete automation, while another thirty-two percent are at high risk of partial automation, greatly changing the way the jobs will be performed.<sup>21</sup> Moreover, not only are many low-skilled jobs at risk of being lost to automation, but at the same time the displaced workers will need to enter a job market where many of their previously accessible alternative employment options have also been automated or are at risk of becoming automated in the near future. To illustrate, a person who works as a retail cashier might lose her job because the store installs the increasingly ubiquitous self-checkout station. Where, in the past, the individual could have possibly found an alternative position in customer service, that alternative employment may no longer exist since customer service positions are also at high risk of being automated by customer service bots, or chatbots. Therefore, the worker has now potentially lost not one, but two employment prospects.

Paradoxically, while a greater number of workers are losing their jobs because of automation and artificial intelligence, the number of available jobs is increasing.<sup>22</sup> With an average of 401,000 new nonfarm jobs created each month in 2022,<sup>23</sup> the job market has witnessed greater demand for specific job skill sets.<sup>24</sup> Robotics, for example, has understandably become an emergent job sector because it is part of the \$1.2 trillion artificial intelligence industry

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20. The OECD is a forum for the governments of thirty-eight democracies with market-based economies to collaborate and develop policy standards to promote sustainable economic growth. *Who We Are*, OECD, <https://www.oecd.org/about/> [<https://perma.cc/J3X4-EQ4M>].

21. OECD, *OECD EMPLOYMENT OUTLOOK 2019: THE FUTURE OF WORK* 44, 48 (2019), <https://www.oecd-ilibrary.org/sites/ef00d169-en/index.html?itemId=Content/component/ef00d169-en#> [<https://perma.cc/MC7J-9M2Y>].

22. The Bureau of Labor Statistics reported that the number of job openings has risen steadily from approximately 2.5 million in 2009 to approximately 11.3 million in 2022. *Job Openings at 11.3 Million in January 2022*, U.S. BUREAU OF LAB. STATS. (Mar. 14, 2022), <https://www.bls.gov/opub/ted/2022/job-openings-at-11-3-million-in-january-2022.htm> [<https://perma.cc/UA3K-M5ZH>]. An exception to this data was a significant drop in 2020, *id.*, which was likely due to the COVID-19 pandemic.

23. *Employment Situation Summary*, U.S. BUREAU OF LAB. STATS. (Feb. 3, 2023), [www.bls.gov/news.release/empsit.nr0.htm#](http://www.bls.gov/news.release/empsit.nr0.htm#) [<https://perma.cc/9QSK-3RCM>].

24. Sue Cantrell et. al., *The Skills-Based Organization: A New Operating Model for Work and the Workforce*, DELOITTE INSIGHTS MAGAZINE (Sept. 8, 2022), <https://www2.deloitte.com/us/en/insights/topics/talent/organizational-skill-based-hiring.html> [<https://perma.cc/GYH8-GBFL>].

that “continue[s] to proliferate across nearly every industry.”<sup>25</sup> There is also greater demand for nurse practitioners, site reliability engineers, software engineers, product designers, and solar consultants—with each position commanding salaries approximating or exceeding \$100,000 per year.<sup>26</sup> The paradox can be explained by the disparities between the skills and qualifications required of the new jobs and the skills and qualifications of the unemployed workers. Simply put, an unemployed seamstress who has been replaced by a robot is not likely to be qualified for a position as a software engineer.

In this new labor market, companies are focusing on raising productivity through labor-saving techniques, such as automation and artificial intelligence, and hiring highly skilled workers who often have at least a college degree<sup>27</sup> and who can help drive innovation and technological development.<sup>28</sup> From this, it can be extrapolated that demand for unskilled workers, and perhaps those without a college education, will decline.

As will be discussed in Part III, the COVID-19 pandemic proved that the labor force can adapt to a changing economy and provide an opportunity to rebuild differently. To that end, and to complement the growth in artificial intelligence and automation, more workers will need what is often referred to as “21st century skills.”<sup>29</sup> These skills include critical thinking, research, creativity, self-direction, knowledge of information and communication technology, and facility in using virtual workspaces.<sup>30</sup> LinkedIn’s 2020 Emerging Jobs Report observed that “[a]rtificial intelligence will require the entire workforce to learn new skills, whether it’s to keep up to

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25. 2020 *Emerging Jobs Report*, LINKEDIN, at 2, [https://business.linkedin.com/content/dam/me/business/en-us/talent-solutions/emerging-jobs-report/Emerging\\_Jobs\\_Report\\_U.S.\\_FINAL.pdf](https://business.linkedin.com/content/dam/me/business/en-us/talent-solutions/emerging-jobs-report/Emerging_Jobs_Report_U.S._FINAL.pdf) [<https://perma.cc/Q8YT-ANNR>].

26. Audrey Eads, *Tops Jobs of 2022*, INDEED: CAREER GUIDE (Sept. 30, 2022), <https://www.indeed.com/career-advice/finding-a-job/best-jobs-of-the-year> [<https://perma.cc/2PPC-HQA6>].

27. Stephanie Ferguson, *Data Deep Dive: Upskilling and Reskilling Our Workforce*, U.S. CHAMBER OF COM. (Dec. 8, 2022) <https://www.uschamber.com/workforce/education/data-deep-dive-upskilling-and-reskilling-our-workforce> [<https://perma.cc/9A8A-GMAP>].

28. James Manyika & Kevin Sneader, *AI, Automation, and the Future of Work: Ten Things to Solve for*, MCKINSEY & COMPANY (June 1, 2018), <https://www.mckinsey.com/featured-insights/future-of-work/ai-automation-and-the-future-of-work-ten-things-to-solve-for> [<https://perma.cc/TX75-X265>].

29. *21st Century Skills*, THE GLOSSARY OF EDUC. REFORM (Aug. 25, 2016), <https://www.edglossary.org/21st-century-skills/> [<https://perma.cc/X6WG-Y7GM>].

30. *Id.*

date with an existing role, or pursuing a new career as a result of automation.”<sup>31</sup> Therefore, improving the quality and scope of education and training will be the challenge of the 21st century workplace, and, if met, it could be a very positive overall change. Government and education policies targeting investments in workforce development and continuing education programs, and alliances with the private sector to develop intelligent policies that create high-productivity and high-income jobs, will hopefully be utilized to balance the changing needs of consumers, workers, and businesses.

*B. The Emergence of the Gig Economy and  
the Threat of Its Absorption into the Traditional Labor Market  
by Classification of Gig Workers as Employees*

Increased automation, the resulting displacement of workers, the demand for different skills, and technological advancements, helped to usher in “gig” work and the “gig economy” at the start of this century. “Gig workers” are self-employed individuals who complete a job, or gig, and move on to the next one. They choose when to work, when not to work, and where to work, and they operate in a variety of industries.

To be sure, gig work is not a new phenomenon. People have worked for themselves ever since humans began working. And, technically, the word “gig” may have been coined in the early part of the last century when jazz musicians used the word to refer to a one-night musical performance.<sup>32</sup> Its etymology probably goes back even earlier than that.<sup>33</sup> However, what is different about the current gig economy is the way that work is obtained. Previously, clients and customers would contact a worker and contract with the worker directly for a specific job. This often involved research and references, so finding the right person for the job took time. For the worker, it also meant getting work on an individual contract basis. The overall process was relatively slow. But the internet and smartphones changed this dynamic dramatically. Work can now be obtained quickly because workers connect with clients faster and more easily through a gig firm and its computer and smartphone apps. Thumbtack, for instance, provides a marketplace for services

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31. LINKEDIN, *supra* note 25, at 2.

32. Gig, ONLINE ETYMOLOGY DICTIONARY, <https://www.etymonline.com/word/gig> [<https://perma.cc/CCY4-YNKV>].

33. *Id.*

such as house cleaning, lawn mowing, and appliance repair.<sup>34</sup> Once a user describes what service is needed, Thumbtack will send the user a price quote from a gig worker who has paid Thumbtack a fee to provide the quote. Usually, the connection between consumer and gig worker is made instantaneously.

It cannot be overlooked that the gig economy represents a fast-growing and significant sector of today's labor market<sup>35</sup> with gross dollar volume expected to reach \$455 billion in 2023.<sup>36</sup> Indeed, as of August 2021, sixteen percent of U.S. adults, over forty-one million people,<sup>37</sup> earned money through an online gig platform.<sup>38</sup> And numerous notable multi-billion-dollar gig economy firms have emerged since the beginning of this century: Airbnb, Uber, Lyft, Etsy, Doordash, Instacart, Postmates, and Shipt are examples. The gig economy has clearly impacted the workplace, the labor market, the way people work, and the way consumers consume over the past twenty years.

Given its rapid growth, issues affecting the gig economy will have a significant impact on the overall labor market. One issue is whether gig workers are classified as employees or independent contractors. Gig workers are generally considered to be independent contractors because they work essentially "independently." This classification, however, has been legally challenged. As discussed below, if these challenges succeed, many gig firms will become liable as employers for the payment of minimum wages and overtime pay and employment-related payroll taxes such as Social Security and Medicare, worker's compensation insurance, and disability coverage. Instead, by classifying gig workers as independent contractors, gig firms reduce their costs by avoiding the payment of

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34. THUMBSTACK, <https://www.thumbtack.com/> [https://perma.cc/Rf9A-CHQZ].

35. *Projected Gross Volume of the Gig Economy from 2018 to 2023*, STATISTICA (Sept. 30, 2022), <https://www.statista.com/statistics/1034564/gig-economy-projected-gross-volume> [https://perma.cc/FP87-Y855].

36. *The Ultimate List of Gig Economy Statistics (2022)*, REMOTELY (Nov. 11, 2022), <https://blog.tryremotely.com/gig-economy-statistics/> [https://perma.cc/9GRU-KJHD].

37. According to 2020 U.S. Census data, the U.S. adult population (over the age of 18 years) was 258,343,281. Stella U. Ogunwole et al., *U.S. Adult Population Grew Faster Than Nation's Total Population From 2010 to 2020*, U.S. CENSUS BUREAU (Aug. 12, 2021), <https://www.census.gov/library/stories/2021/08/united-states-adult-population-grew-faster-than-nations-total-population-from-2010-to-2020.html> [https://perma.cc/HX58-P8GW].

38. Monica Anderson et al., *The State of Gig Work in 2021*, PEW RSCH. CTR. (Dec. 8, 2021), <https://www.pewresearch.org/internet/2021/12/08/the-state-of-gig-work-in-2021/> [https://perma.cc/W84K-EBPM].

both employment-related payroll taxes and benefits such as paid sick leave. In New York, for example, it is not required that independent contractors receive disability and paid family leave benefits<sup>39</sup> because they are not considered employees as defined by the State's Workers' Compensation Law.<sup>40</sup>

Another consequence of reclassification may be that gig firms will begin to control gig workers' work schedules, as most employers do, thereby undermining two major benefits of being a gig worker: independence and flexibility. This legal challenge to independent contractor status therefore threatens the very nature of the independent gig worker because the consequence may ultimately be the gig worker's absorption into the traditional labor market as an employee.

Whether gig workers are "misclassified" as independent contractors is questionable. Currently, most gig workers are not classified as employees because they work for themselves. They may find customers using a gig firm's app or website, but they do not work for the firm. They set their own hours and use their own tools, equipment, vehicles, and other means to perform their work. They can even find work using multiple different firms' apps. For example, as independent contractors, rideshare drivers may seek riders through both Uber and Lyft at the same time—essentially working for two competing firms simultaneously, a concept frowned upon in the traditional labor market.

The reason why the legal issue is arguable and complicated is because there is no bright-line test to determine a worker's status. Rather, there are various fact-specific tests. In 1987 the Internal Revenue Service developed what was commonly referred to for many years as the "20-Factor Test," which examined twenty factors as guidelines to determine whether an employer-employee relationship existed.<sup>41</sup> These factors largely centered on an examination of the degree of control exerted over the worker. Some years after this initial guideline, the IRS began to look at three broad categories of

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39. *Disability and Paid Family Leave Benefits Coverage: Independent Contractor*, N.Y. WORKERS COMP. BD., <https://www.wcb.ny.gov/content/main/coverage-requirements-db/independent-contractor.jsp> [<https://perma.cc/MH5P-LT8N>].

40. N.Y. WORKERS' COMP. LAW § 201(5) (Consol. 2023); *In re Renouf*, 173 N.E. 218, 218 (N.Y. 1930) ("[T]o come within the statutory definition of employee the person must be *in the service* of the employer.") (citing N.Y. WORKERS' COMP. LAW § 2(3)–(5) (Consol. 2023); *Comm'rs of the State Ins. Fund v. Fox Run Farms*, 600 N.Y.S.2d 239, 241 (N.Y. App. Div. 1993) ("[State Insurance] Fund acknowledges that independent contractors are not employees covered by the Workers' Compensation Law.").

41. Rev. Rul. 87-41, 1987-1 C.B. 296.

evidence which it believed to be relevant in determining whether the requisite control exists under the common-law test of agency to classify the worker as an employee. It grouped illustrative factors under three categories: (1) behavioral control; (2) financial control; and (3) the type of relationship between the parties.<sup>42</sup> This test continues to be used today.<sup>43</sup>

Alternatively, various federal statutes, including the Fair Labor Standards Act (FLSA)<sup>44</sup> and the National Labor Relations Act (NLRA),<sup>45</sup> use variations of a common law test of agency,<sup>46</sup> which looks at the agency relationship between the putative employer and employee. And an “economic realities test”<sup>47</sup> is often used that evaluates whether a worker is economically dependent on the alleged employer.<sup>48</sup> Both the common law test and the economic realities test, like the IRS guideline, focus on the amount of control a business exerts over a worker and how dependent the worker is on the putative employer. The more control that is exerted, the more likely it is that a worker is considered an employee. Control may be exerted over work hours, how a job is performed, whether the company provides tools and equipment, whether the compensation rate is guaranteed, whether there is a duration to the relationship, and whether the worker exercises independent judgment. However, the economic realities test, specifically, has been criticized for two prin-

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42. Joint Committee on Taxation, Present Law and Background Relating to Worker Classification for Federal Tax Purposes, JCX-26-07, at 5 (2007), <https://www.irs.gov/pub/irs-utl/x-26-07.pdf> [<https://perma.cc/PH2M-JMWM>] (“The IRS emphasizes that factors in addition to the 20 factors identified in 1987 may be relevant, that the weight of the factors may vary based on the circumstances, that relevant factors may change over time, and that all facts must be examined.”) (citing Department of the Treasury, Internal Revenue Service, *Independent Contractor or Employee? Training Materials*, Training 3320-102 (10-96) TPDS 84238I, at 2–7.).

43. I.R.S. Publication 15-A, Employer’s Supplemental Tax Guide, 6–7 (Dec. 19, 2022), <https://www.irs.gov/pub/irs-pdf/p15a.pdf> [<https://perma.cc/MT23-M26W>].

44. 29 U.S.C. § 201.

45. 29 U.S.C. §§ 151–69.

46. RESTATEMENT (SECOND) OF AGENCY § 220 (AM. L. INST. 1958).

47. See *Brown v. N.Y. City Dep’t of Educ.*, 755 F.3d 154, 167–68 (2d Cir. 2014) (discussing use of variations of common law and economic realities test in the Second Circuit); *Hatcher v. Augustus*, 956 F. Supp. 387, 390 (E.D.N.Y. 1997) (using economic realities test for FLSA analysis); *NLRB v. United Ins. Co.*, 390 U.S. 254, 256 (1968) (using common law agency test for NLRA analysis).

48. See, e.g., *Copantitla v. Fiskardo Estiatorio, Inc.*, No. 09 Civ. 1608, 2010 U.S. Dist. LEXIS 33430, at \*16 (S.D.N.Y. Apr. 5, 2010) (“The goal of the economic-realities test ‘is to determine whether the employees in question are economically dependent upon the putative employer.’” (quoting *Lopez v. Silverman*, 14 F. Supp. 2d 405, 414 (S.D.N.Y. 1998))).

cial reasons. First, because it offers little guidance for future cases, and second, because it begs the question: which aspects of economic reality matter?<sup>49</sup> The test also does not account for the growth of the gig economy and the desire of millions of gig workers to control their work hours and have greater flexibility.

The appropriate definition of an independent contractor is not just a complicated legal issue, it is also an intensely political one. In January 2021, the Department of Labor (DOL) under the Trump Administration issued regulations that would have changed the analysis by considering only five factors to determine independent contractor status,<sup>50</sup> but the Biden Administration subsequently delayed and ultimately withdrew that regulation.<sup>51</sup> Then, in March 2022, the Eastern District of Texas ruled in *Coalition for Workforce Innovation et al. v. Walsh* that the Biden DOL *unlawfully* delayed and withdrew the Trump-era independent contractor rule.<sup>52</sup> As a result of the decision, the withdrawal of the rule was invalidated, and for now, the rule is in effect, though the DOL has recently proposed another rule that essentially restores the old multi-factor economic realities test.<sup>53</sup>

Different from the common law and economic realities tests, thirty-five states<sup>54</sup> have adopted some form of the “ABC test,” which is a three-factor test for determining worker status. The three factors are: (A) whether the individual is free from control and direction in connection with the performance of the service, both under the contract for the performance of the service and in fact; (B) whether the service is performed outside the usual course of the business of the hiring entity; *and* (C) whether the individual is customarily engaged in an independently established trade, occupa-

49. U.S. Dep’t of Lab. v. Lauritzen, 835 F.2d 1529, 1539 (7th Cir. 1987) (Easterbrook, J., concurring) (arguing that the economic realities test is “unsatisfactory both because it offers little guidance for future cases and because any balancing test begs the questions of which aspects of ‘economic reality’ matter, and why.”).

50. Independent Contractor Status Under the Fair Labor Standards Act, 86 Fed. Reg. 1168 (Jan. 7, 2021) (to be codified at 29 C.F.R. pts. 780, 788, 795).

51. Independent Contractor Status Under the Fair Labor Standards Act (FLSA): Withdrawal, 86 Fed. Reg. 24303 (May 6, 2021) (to be codified at 29 C.F.R. pts. 780, 788, 795).

52. Coal. for Workforce Innovation v. Walsh, No. 1:21-CV-130, 2022 U.S. Dist. LEXIS 68401, at \*49–50 (E.D. Tex. Mar. 14, 2022).

53. Employee or Independent Contractor Classification Under the Fair Labor Standards Act, 87 Fed. Reg. 62218, 62219 (proposed Oct. 13, 2022) (to be codified at 29 CFR pts. 780, 788, 795).

54. *Independent Contractor Laws by State 2023*, WORLD POPULATION REVIEW, <https://worldpopulationreview.com/state-rankings/independent-contractor-laws-by-state> [<https://perma.cc/YXB2-EPU6>].

tion, profession, or business of the same nature as that involved in the service performed.<sup>55</sup> On its face, the ABC test appears to simplify the common law and economic realities tests of control by reducing the number of factors presumably needed to analyze the relationship. But the essential precept is still the question of control. Moreover, it makes it more difficult to establish that a worker is an independent contractor because there is an initial presumption that the worker is an employee and *all* three factors must be met in order to consider the worker an independent contractor.<sup>56</sup>

Though adopted by some states years before,<sup>57</sup> the ABC test came to the fore after the California Supreme Court's decision in *Dynamex Operations West, Inc. v. Superior Court*,<sup>58</sup> and after the state incorporated the test into a state assembly bill known as "AB5."<sup>59</sup> The ABC test was spotlighted because of the notable size of the labor force affected by the rule in California.<sup>60</sup> In *Dynamex*, a national delivery and courier service changed the status of its drivers from employee to independent contractor.<sup>61</sup> But the California Court of Appeals sided with the view that *Dynamex* drivers continued to perform the same tasks as they had when they were classified as employees "with no substantive changes to the means of performing their work or the degree of control exercised by *Dynamex*."<sup>62</sup> In affirming the lower court's decision, the California Supreme Court concluded that "in determining whether, under the suffer or permit to work definition, a worker is properly considered the type of independent contractor to whom the wage order does not apply, it is appropriate to look to a standard, commonly referred to as the 'ABC' test, that is utilized in other jurisdictions in a variety of con-

55. *Dynamex Operations W., Inc. v. Super. Ct.*, 416 P.3d 1, 35 (Cal. 2018).

56. *Id.* at 41.

57. The ABC test originated in Maine in 1935 with the passage of the Maine Employment Security Law and was adopted thereafter by several states. Eric Markovitz, *Easy as ABC: Why the ABC Test Should Be Adopted as the Sole Test of Employee-Independent Contractor Status*, 42 CARDOZO L. REV. 224, 238 (2020) (citing John A. Pearce II & Jonathan P. Silva, *The Future of Independent Contractors and Their Status as Non-Employees: Moving on from a Common Law Standard*, 14 HASTINGS BUS. L.J. 1, 9 (2018)); Christopher J. Cotnoir, Comment, *Employees or Independent Contractors: A Call for Revision of Maine's Unemployment Compensation "ABC Test"*, 46 ME. L. REV. 325, 332 (1994).

58. 416 P.3d 1.

59. A.B. 5, 2019–2020 Sess. (Cal. 2019).

60. Markovitz, *supra* note 57, at 239.

61. *Dynamex*, 416 P.3d at 5–6.

62. *Dynamex Operations W., Inc. v. Super. Ct.*, 179 Cal. Rptr. 3d 69, 71 (Ct. App. 2014).

texts to distinguish employees from independent contractors.”<sup>63</sup> By its decision, California’s highest court overturned almost thirty years of case law that governed how workers were classified in California under its seminal decision in *S.G. Borello & Sons, Inc. v. Department of Industrial Relations*.<sup>64</sup>

In reaction to the *Dynamex* decision, California voters passed Proposition 22,<sup>65</sup> which *exempted* gig firm drivers from the ABC test. Uber, Lyft, Doordash, and Instacart were some of the gig firms that benefited directly from the passage of Proposition 22.<sup>66</sup> Yet notwithstanding this victory for these gig firms, the ABC test still remains the test for many other industries in California, like construction.<sup>67</sup>

Since many gig workers have elements of both employee and independent contractor status, legitimate legal arguments can be made on both sides. In fact, courts have ruled on different sides of the question. In *In re Vega*, the New York Court of Appeals, applying the common law test of control,<sup>68</sup> held that Postmates delivery workers were employees because Postmates exercised unilateral control over compensation, determined their delivery destinations, and hired replacement drivers.<sup>69</sup> In *Lawson v. Grubhub, Inc.*, the United States District Court for the Northern District of California held that delivery drivers were independent contractors because Grubhub did not control the workers’ number of deliveries, dictate their work schedules, or require training.<sup>70</sup> The cases involved identical food delivery services and gig platforms, but reached different legal conclusions. Thus far, many employee misclassification cases

63. *Dynamex*, 416 P.3d at 7.

64. 48 Cal. 3d 341 (Cal. 1989).

65. *California Proposition 22, App-Based Drivers as Contractors and Labor Policies Initiative (2020)*, BALLOTPEdia, [https://ballotpedia.org/California\\_Proposition\\_22,\\_App-Based\\_Drivers\\_as\\_Contractors\\_and\\_Labor\\_Policies\\_Initiative\\_\(2020\)](https://ballotpedia.org/California_Proposition_22,_App-Based_Drivers_as_Contractors_and_Labor_Policies_Initiative_(2020)) [<https://perma.cc/GL5W-BNN7>].

66. Tyler Sonnemaker and Allana Akhtar, *California Voters Approved Proposition 22, Keeping Ride-Share and Food Delivery Drivers as Contractors—Here’s What That Means for Companies like Uber, Lyft, Instacart, DoorDash and Their Workers*, BUS. INSIDER (Nov. 5, 2020), <https://www.businessinsider.com/proposition-22-faq-impact-uber-lyft-instacart-doordash-2020-11?op=1> [<https://perma.cc/4KL8-K2P3>].

67. *Information Sheet: Construction Industry*, CAL. EMP. DEV. DEP’T, [https://edd.ca.gov/siteassets/files/pdf\\_pub\\_ctr/de231g.pdf](https://edd.ca.gov/siteassets/files/pdf_pub_ctr/de231g.pdf) [<https://perma.cc/4VWL-DR2K>]; CAL. LAB. CODE §§ 2775–87 (Deering 2023).

68. 149 N.E.3d 401, 404–05 (N.Y. 2020).

69. *Id.* at 405–06.

70. 302 F. Supp. 3d 1071, 1084, 1091–92 (N.D. Cal. 2018).

have been settled,<sup>71</sup> but many more lawsuits nationwide involving, for example, Shipt,<sup>72</sup> are still pending as of May 2023.

Uber is a good example of why gig work has become so attractive to workers and why gig workers may not want to be considered employees. Millions of drivers joined Uber because it meets a need for a flexible schedule.<sup>73</sup> A National Bureau of Economic Research working paper concluded that flexibility is important because most drivers have another job and drive to supplement their regular incomes; some are students, and some are stay-at-home parents who need additional income.<sup>74</sup> Gig work for Uber, and many other firms, allows workers to schedule their work around their other obligations. But a conclusive determination that gig workers are employees may destroy much of the gig economy and may result in businesses controlling workers' schedules, activities, and how they perform their work. The result could also be the elimination of some of the most significant advantages of being a gig worker.

Moreover, if gig firms are considered employers, their business model, which is built around hiring workers for whom the firms are not responsible for the costs of employment-related taxes and benefits, may no longer work. Gig firms, therefore, would likely avoid any actions that would imply that they are employers, and therefore may not provide worker training, for instance, because training implies that they want the work performed in a certain way, which is a type of control. They also may not provide benefits because benefits

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71. See, e.g., Press Release, N.J. Dep't of Lab., Uber Pays \$100M in Driver Misclassification Case with NJ Department of Labor and Workforce Development and Attorney General's Office (Sept. 13, 2022), [https://www.nj.gov/labor/lwdhome/press/2022/20220913\\_misclassification.shtml](https://www.nj.gov/labor/lwdhome/press/2022/20220913_misclassification.shtml) [<https://perma.cc/TF8M-6QTV>]; Erin Mulvaney, *Uber Will Pay \$8.4 Million to End Years-Long Driver Class Action*, BLOOMBERG L. (Feb. 18, 2022), <https://news.bloomberglaw.com/daily-labor-report/uber-will-pay-8-4-million-to-end-years-long-driver-class-action> [<https://perma.cc/U3K5-LY7P>]; Instacart recently settled its action in California in October 2022. Although it did not have to admit that it misclassified the workers as employees, it agreed to a \$46.5 million settlement. Joyce E. Cutler, *Instacart Settles Worker Classification Suit for \$46.5 Million*, BLOOMBERG L. (Oct. 12, 2022, 11:23 AM), [https://www.bloomberglaw.com/bloomberglawnews/daily-labor-report/X8BP40MK000000?bna\\_news\\_filter=daily-labor-report#jcite](https://www.bloomberglaw.com/bloomberglawnews/daily-labor-report/X8BP40MK000000?bna_news_filter=daily-labor-report#jcite) [<https://perma.cc/FD9L-LR4D>].

72. Complaint, *Ellison v. Shipt, Inc.*, No. 27-CV-22-15991, 2022 WL 15811468 (Minn. Dist. Ct. Apr. 4, 2023).

73. Eighty-five percent of Uber drivers said they drive to have more flexibility and work-life balance, and because they want to be their own boss and establish their own schedule. Jonathan V. Hall & Alan B. Krueger, *An Analysis of the Labor Market for Uber's Driver-Partners in the United States* 11 (Nat'l Bureau of Econ. Rsch., Working Paper No. 22843, 2016).

74. *Id.* at 10.

are usually linked to aspects of work performance or seniority—which are also *indicia* of control. Not only do defensive reactions, like the adoption of the ABC test, run contrary to the desires of gig firms and gig workers to maintain an independent relationship, they adversely affect both gig firms and workers. Firms experience higher labor costs, while workers may be deprived of valuable training and benefits from gig firms that may be willing to provide these regardless of the worker's non-employee status.

An obvious resolution to the misclassification debate would be to simplify and clarify the independent contractor test. The common law and economic realities tests have too many factors that leave the question of “control” open for interpretation and continued debate. The ABC test, though seemingly simpler, makes it difficult to establish independent contractor status when a worker is presumed to be an employee until proven otherwise.

Perhaps it is time to eliminate “control” as a determinative factor in the test to determine worker status because, whether by a hiring firm, customer, or client, to some degree a worker is always controlled by the party paying for the services. Moreover, variations in the degree of control are fodder for continued debate, interpretation, and litigation. A better test would be to simply ask whether the worker works *independently* of the company. In this regard, the second and third prongs of the ABC test (whether the service is performed outside the usual course of the business of the hiring entity *and* whether the individual is customarily engaged in an independently established trade) may be utilized. This would eliminate any unnecessary analysis of many subjective factors, such as whether the worker reports to the company on the progress of the work. Without a redefinition of the term “independent contractor” to exclude the concept of “control,” the arguments over misclassification will continue. Moreover, decisions in every court and jurisdiction will continue to be challenged with the hope that an appellate court will see the question differently. The ultimate determination of this issue will have far-reaching results for millions of workers.

## III.

THE NEED FOR GREATER FLEXIBILITY AND BENEFITS  
IN A TIGHTENING LABOR MARKET FOLLOWING THE  
COVID-19 PANDEMICA. *The COVID-19 Pandemic Has Fostered More Work Flexibility  
and an Expectation of Greater Benefits*

The COVID-19 pandemic impacted workers and the workplace in a number of ways. The more obvious impact was felt in the physical workspace. While governments around the world took extraordinary actions to close schools and businesses and require people to socially distance themselves, at a micro-level, employers also changed their work protocols to protect the health and safety of their employees. Assisting employers with these protocols, the Occupational Safety and Health Administration (OSHA) periodically promulgated guidance on physical distancing in all communal work areas for unvaccinated workers, recommended face coverings and masks, and suggested educating and training workers on COVID-19 policies and procedures, maintaining ventilated work areas, and performing routine cleaning and disinfection of workspaces.<sup>75</sup>

Many of these guidance recommendations have contributed to a changing workplace landscape that, for the most part, may continue post-pandemic. This is because the recommendations not only make sense as a matter of general cleanliness to prevent the spread of illness and disease, but guidance that was enacted in response to the pandemic has, to some degree, remained in place<sup>76</sup> despite the view that the COVID-19 pandemic is, by and large, past.<sup>77</sup> OSHA's General Duty Clause, for example, which compels

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75. OCCUPATIONAL SAFETY & HEALTH ADMIN., *Protecting Workers: Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace*, U.S. DEP'T OF LAB. (Aug. 13, 2021), <https://www.osha.gov/coronavirus/safework> [<https://perma.cc/5H45-2UNV>].

76. As of May 1, 2023, OSHA has not yet updated its guidance and recommendations posted in January 2021. *See id.*

77. In New York, for example, COVID-19 is no longer designated as an infectious disease that presents a serious risk of harm to the public. *See, e.g.*, N.Y. COMP. CODES R. & REGS tit. 12, § 840.1 (2021). The New York Health and Essential Rights Act (the NY HERO Act), enacted on May 5, 2021, mandated extensive new workplace health and safety protections to protect employees against exposure and disease during any future outbreak of airborne infectious disease. *Id.* However, on March 17, 2022, the designation of COVID-19 as an airborne infectious disease that presents a serious risk to public health was removed. Press Release, N.Y. State Dep't of Health, NYS HERO Act, [https://www.health.ny.gov/press/releases/2022/2022-03-18\\_hero\\_act.htm](https://www.health.ny.gov/press/releases/2022/2022-03-18_hero_act.htm) [<https://perma.cc/9R9V-6UTZ>] (last modified

employers to provide a place of employment “free from recognized hazards that are causing or are likely to cause death or serious physical harm,”<sup>78</sup> still applies, and can be made applicable to COVID-19 albeit there are no specifically applicable OSHA workplace safety rules in this regard. And consider pandemic-era vaccination and testing policies. Questions still exist as to whether vaccine mandates and testing should be allowed and whether workers can continue to work remotely as a disability accommodation. The answers to these questions were not clear during the pandemic nor are they clear post-pandemic.

Perhaps not as obvious an impact, COVID-19 also fostered a greater need for work flexibility and benefits. By way of example, before the pandemic, working from home was a “luxury” only enjoyed by relatively few employees. While the concept of working remotely was not new, it was not common to see businesses operating fully and continuously this way. Once the pandemic surfaced and spread, out of necessity millions of people suddenly learned to navigate Zoom meetings as the world witnessed a massive shift of workers to remote working from home. The ability to work whenever and from wherever creates significant flexibility for many employees and is, in fact, feasible for many jobs.

Certainly, in many cases the expectation of working remotely, or at least in a hybrid format, has greatly increased.<sup>79</sup> In a nationally representative survey of 5,889 employees conducted in 2022, Pew Research Center found that, compared to 2020, those who are teleworking by choice said they prefer it, and a majority of teleworkers new to working remotely said balancing work and personal life is easier with their current arrangement.<sup>80</sup> The survey also

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Mar. 2022). On April 10, 2023, House Joint Resolution 7 was signed into law, officially terminating the COVID-19 National Emergency. Act of Apr. 10, 2023, Pub. L. No. 118-3, 137 Stat. 6 (2023).

78. 29 U.S.C. § 654.

79. Ben Wigert, *The Future of Hybrid Work: 5 Key Questions Answered with Data*, GALLUP (Mar. 15, 2022), <https://www.gallup.com/workplace/390632/future-hybrid-work-key-questions-answered-data.aspx> [https://perma.cc/S8EN-DVVJ] (“When asked where they plan to work long term . . . remote-capable employees confirmed that a hybrid work schedule will be the predominant office arrangement going forward. About 53% expect a hybrid arrangement, and 24% expect to work exclusively remotely.”).

80. Kim Parker et al., *COVID-19 Pandemic Continues to Reshape Work in America*, PEW RSCH. CTR. (Feb. 16, 2022), <https://www.pewresearch.org/social-trends/2022/02/16/covid-19-pandemic-continues-to-reshape-work-in-america/> [https://perma.cc/T38V-T7X3]. The survey was conducted using Pew Research Center’s American Trends Panel, which is a “nationally representative online survey panel . . . composed of more than 10,000 adults selected at random from across

found that fifty-nine percent of U.S. workers who said they could perform their jobs from home are now working from home all or most of the time.<sup>81</sup> Moreover, since 2020, the rationale for working from home has shifted considerably and more workers admit that working from home has become a choice, not simply a necessity.<sup>82</sup> It is not a big leap of faith to believe that remote working or a hybrid form of remote work and in-person work, is likely the new work model for many employers, and that remote working, for the most part, has now gained acceptance even if the number of remote job listings has decreased from its peak in March 2022.<sup>83</sup>

Like remote working, employees have now come to expect other work benefits. For instance, the pandemic seemed to have amplified certain preexisting imbalances among workers, and it brought to light the need for employees to have some amount of mandatory paid leave time. According to the DOL, as of March 2020, i.e., pre-pandemic, only about twenty percent of workers had access to paid family leave.<sup>84</sup> Since lower-paid employees generally do not have sufficient savings to cover an unpaid leave of absence, the pandemic naturally exacerbated situations where these employees were required to take a leave of absence to care for themselves or their families. The government's COVID-19 interventions therefore tried to remedy this inequality for the approximately eighty

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the entire U.S.” *The American Trends Panel*, PEW RSCH. CTR., <https://www.pewresearch.org/our-methods/u-s-surveys/the-american-trends-panel/> [<https://perma.cc/M27Q-WXA4>].

81. Parker et al., *supra* note 80.

82. *Id.* (“Among those who have a workplace outside of their home, 61% now say they are choosing not to go into their workplace, while 38% say they’re working from home because their workplace is closed or unavailable to them. Earlier in the pandemic, just the opposite was true: 64% said they were working from home because their office was closed, and 36% said they were choosing to work from home.”).

83. An analysis based on a review of more than 60 million paid job listings on LinkedIn between January 2021 and November 2022 showed a rapid rise and fall in employers’ willingness to create remote-work job postings. At its peak in March 2022, remote-focused listings accounted for more than 20% of all paid job postings—a significant increase from less than 10% in January 2021. However, the spike gave way in November 2022 to 14% of paid job postings. George Anders, *Are Remote Jobs Fading Like Pelotons or Bread-Baking? Employers Say Yes*, LINKEDIN (Jan. 4, 2023), <https://www.linkedin.com/pulse/remot-jobs-fading-like-pelotons-bread-baking-employers-george-anders/> [<https://perma.cc/H4QM-KABS>].

84. *News Release: Employee Benefits in the United States – March 2020*, U.S. BUREAU OF LAB. STATS. (Sept. 24, 2022), [https://www.bls.gov/news.release/archives/ebs2\\_09242020.pdf](https://www.bls.gov/news.release/archives/ebs2_09242020.pdf) [<https://perma.cc/8QYG-CRC4>].

percent of the working population that did not have access to paid family leave.<sup>85</sup>

In March 2020, President Trump signed the Families First Coronavirus Response Act (FFCRA),<sup>86</sup> which included two major overhauls of leave programs for employers: first, it expanded the Family and Medical Leave Act by way of the Emergency Family and Medical Leave Expansion Act,<sup>87</sup> and, second, it established the Emergency Paid Sick Leave Act (EPSLA).<sup>88</sup> Among other things, the FFCRA provided paid sick and family leave as a result of COVID-19 and offered additional flexibility for state unemployment agencies to provide additional unemployment benefits.<sup>89</sup> Under the EPSLA, employers with less than 500 employees were required to provide paid sick leave to any employee (regardless of days of employment) for reasons associated with COVID-19 along with up to eighty hours of paid leave to full-time employees.<sup>90</sup> Later that same month, President Trump signed the Coronavirus Aid, Relief, and Economic Security Act (CARES Act)<sup>91</sup> into law. Among other things, the CARES Act amended portions of the FFCRA and introduced the paycheck protection program that enabled employers to continue to pay workers during the pandemic and keep them employed.<sup>92</sup> Individual states also passed their own form of paid leave laws. New York, for example, enacted legislation that guaranteed workers job protection and financial compensation if they or their minor dependent children needed care as a result of the coronavirus.<sup>93</sup>

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85. *Id.*

86. Families First Coronavirus Response Act, Pub. L. No. 116-127, 134 Stat. 178 (2020) (codified in scattered sections of 7 U.S.C.).

87. Emergency Family and Medical Leave Expansion Act, Pub. L. No. 116-127, §§ 3101–06, 134 Stat. 178, 189–92 (2020) (codified as amended at 29 U.S.C. §§ 2612, 2620).

88. Emergency Paid Sick Leave Act, Pub. L. No. 116-127, §§ 5101–11, 134 Stat. 178, 195–201 (2020).

89. Families First Coronavirus Response Act §§ 3102–4102.

90. Emergency Paid Sick Leave Act §§ 5102, 5110(2)(B).

91. Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, 134 Stat. 281 (2020).

92. *Id.* at § 1102.

93. S.B. 8091, 2020 Gen. Assembly., Reg. Sess. (N.Y. 2020). Under the new law, enacted on March 18, 2020, employers with ten or fewer employees and a net income of less than one million dollars in the prior year had to guarantee job protection, provide Paid Family Leave and Disability Benefits through the employer's existing policy, and pay salary to a maximum of \$2,884.62 per week. Employers with ten or fewer employees and a net income of more than one million dollars had to guarantee job protection, provide at least five days of paid sick leave through existing policy, and pay salary to a maximum of \$2,884.62 per week. Em-

Workplace safety guidelines, remote work and flexible work arrangements, and paid leave time were some of the more important changes to emerge from the COVID-19 pandemic. These changes may have long-lasting effects on workers and the workplace despite the end of the pandemic. In this regard, the effect of COVID-19 on the workplace was summed up recently by professor Maryanne Spatola in her research about the effects of the pandemic on the workplace: “COVID-19 ignited a significant shift in workforce expectations. Employees are demanding flexibility and are willing to quit jobs when it’s not offered. The pandemic surfaced health-related issues such as burnout and mental health that are lingering in a confused labor market giving rise to the Great Resignation.”<sup>94</sup>

### B. COVID-19 Contributes to a Tightening Labor Market

With many workers resigning from their jobs during the pandemic, COVID-19 also ushered in a trend toward a tightening labor market. The pandemic period has been referred to as the “Great Resignation”<sup>95</sup> because in January 2020, the annual “quits rate,” that is, the number of quits during the month as a percent of total employment, was 2.3%, but by the end of 2021 it had reached a peak of 3%.<sup>96</sup> More alarmingly, in November 2021, a Harris Poll conducted on behalf of CareerArc, a social recruiting platform, found that 23% of employed Americans planned to resign within the following year.<sup>97</sup> And since that poll was conducted, the desire

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ployers with eleven to ninety-nine employees (regardless of income) had to guarantee job protection, provide at least five days of paid sick leave, and pay salary to a maximum of \$2,884.62 per week. Employers with one hundred or more employees had to guarantee job protection and provide fourteen days of paid sick leave. COVID-19 Paid Sick Leave, N.Y. DEP’T OF LAB., <https://dol.ny.gov/system/files/documents/2021/08/covid-sick-leave-employees-8-24-21.pdf> [<https://perma.cc/MXR5-G8S8>].

94. MARYANNE SPATOLA, *THE OFFICE IS DEAD, NOW WHAT?: A POST-PANDEMIC FIELD GUIDE FOR LEADERSHIP 10* (2023). Ms. Spatola is an assistant adjunct professor at New York University School of Professional Studies.

95. See, e.g., Maury Gittleman, Bureau of Lab. Stats., *The Great Resignation in Perspective*, MONTHLY LAB. REV. (July 2022), <https://www.bls.gov/opub/mlr/2022/article/the-great-resignation-in-perspective.htm> [<https://perma.cc/UW9G-LJXS>].

96. *News Release: Job Openings and Labor Turnover – January 2020*, U.S. BUREAU OF LAB. STATS. (Mar. 17, 2020), [https://www.bls.gov/news.release/archives/jolts\\_03172020.pdf](https://www.bls.gov/news.release/archives/jolts_03172020.pdf) [<https://perma.cc/CHU5-XJZR>]; *News Release: Job Openings and Labor Turnover – November 2021*, U.S. BUREAU OF LAB. STATS. (Jan. 4, 2022), [https://www.bls.gov/news.release/archives/jolts\\_01042022.pdf](https://www.bls.gov/news.release/archives/jolts_01042022.pdf) [<https://perma.cc/36DK-85E8>].

97. Tallulah David, *23% of Employed Americans Plan to Quit in the Next 12 Months: 23 Key Stats from the Great Resignation + Rehire Survey*, CAREERARC, <https://>

to quit and resign has not abated. The U.S. Bureau of Labor Statistics reported that in October 2022 the “quits rate” was still hovering around 2.6%.<sup>98</sup>

In addition to resignations, there has also arisen an insidious form of “quiet quitting,” or the notion that you work just enough to get your work done and no more,<sup>99</sup> that seems to have accelerated during and after COVID-19. Employees who are quietly quitting are not interested or willing to do what may be necessary for promotion or improvement of their status within the company and are instead now searching for more balance between their work and personal life. According to a Gallup poll conducted in June 2022, of 15,091 full and part-time employees over eighteen-years old, the number of employees who are “engaged” dropped from 36% in 2020 to 32% in 2022, and the number of employees “actively disengaged” rose from 14% in 2020 to 18% in 2022. The remaining 50% of the workers are “not engaged,” meaning that at least half of the workforce is quiet quitting.<sup>100</sup> If the phenomenon continues, it will be interesting to observe how this type of workforce will be managed in the future.

Retirement also seems to have accelerated as a result of the pandemic. The Federal Reserve Bank of St. Louis indicated that the percentage of retirees under the age of sixty-five had been steadily declining between 2010 and 2020 from slightly over 50% to 44.5%, but that in 2021 the number climbed to almost 47%.<sup>101</sup> With an estimated seventy-three million baby boomers reaching the general retirement age of sixty-five by 2030,<sup>102</sup> a “Great Retirement” may

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[www.careerarc.com/blog/great-resignation-rehire-survey-infographic/](http://www.careerarc.com/blog/great-resignation-rehire-survey-infographic/) [https://perma.cc/WQF7-3LP8].

98. *Quits Rate at 2.6 Percent in October 2022, Little Different from Recent Months*, U.S. BUREAU OF LAB. STATS: THE ECON. DAILY (Dec. 5, 2022), <https://www.bls.gov/opub/ted/2022/quits-rate-at-2-6-percent-in-october-2022-little-different-from-recent-months.htm> [https://perma.cc/W5DQ-KZAR].

99. Anthony C. Klotz & Mark C. Bolino, *When Quiet Quitting Is Worse Than the Real Thing*, HARV. BUS. REV. (Sept. 15, 2022), <https://hbr.org/2022/09/when-quiet-quitting-is-worse-than-the-real-thing> [https://perma.cc/6P3R-3WX8].

100. Jim Harter, *Is Quiet Quitting Real?*, GALLUP (Sept. 6, 2022), <https://www.gallup.com/workplace/398306/quiet-quitting-real.aspx> [https://perma.cc/76X2-UKEV].

101. Victoria Gregory & Joel Steinberg, *Why Are Workers Staying Out of the U.S. Labor Force?*, FED. RSRV. BANK OF ST. LOUIS REG’L ECONOMIST (Feb. 2, 2022), <https://www.stlouisfed.org/publications/regional-economist/2022/feb/why-workers-staying-out-us-labor-force> [https://perma.cc/DBU2-JXZH].

102. America Counts Staff, *2020 Census Will Help Policymakers Prepare for the Incoming Wave of Aging Boomers*, U.S. CENSUS BUREAU (Dec. 10, 2019), <https://>

actually supersede the Great Resignation as the most important labor trend this century.

Notably, attitudes about work stemming from COVID-19 and the tight labor market have increased workers' demands to maintain some of the benefits and flexibility that they were given during the pandemic. Spatola notes: "[t]he pandemic brought us to a new inflection point between work and life. An empowered workforce has emerged, and they are voting with their feet. People are now setting boundaries between what is acceptable and not acceptable."<sup>103</sup> As the pandemic recedes, with businesses seeking to respond to the tight labor market and changed worker attitudes, the topic of flexibility and benefits is becoming increasingly important. Employers who can offer a better work-life balance and more benefits will likely be better equipped to attract the best talent in the future. Indeed, because talent shortages and skills gaps will be a persistent problem, and benefits—like paid sick leave, workplace flexibility, and hybrid working models—are growing in demand, businesses are reconsidering their hiring practices. Significant employment trends in 2023 are likely to involve: (a) attracting qualified talent by offering more job flexibility; (b) obtaining employee feedback for improving retention in what is expected to be a continuing Great Resignation; (c) seeking adaptable employees after the lessons learned from the sudden and unexpected onset of the COVID-19 pandemic; and, of course, (d) employee well-being, which will continue to be a high priority.<sup>104</sup> Professor Anna A. Tavis has observed:

From the “great resignation” to “quiet quitting,” “hybrid working,” and “work from anywhere,” the theme of “employee experience comes first” has dominated the post-pandemic headlines. It appears the “new employment contract” has been redrawn in favor of the employees. The question today is whether the next economic stress test will expose the weak links in the employee-centric management model.<sup>105</sup>

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[www.census.gov/library/stories/2019/12/by-2030-all-baby-boomers-will-be-age-65-or-older.html](http://www.census.gov/library/stories/2019/12/by-2030-all-baby-boomers-will-be-age-65-or-older.html) [https://perma.cc/J7BZ-YHBK].

103. SPATOLA, *supra* note 94, at 37.

104. Beth Braccio Hering, *2023 Trends to Watch in HR & Business*, BUS. MGMT. DAILY (Dec. 28, 2022), <https://www.businessmanagementdaily.com/69398/2023-trends-to-watch-in-hr-business/> [https://perma.cc/DS8Y-C5VM].

105. Anna A. Tavis, *HR Lessons from Elon Musk's Twitter Takeover*, BENEFITSPRO (Dec. 12, 2022, 8:50 AM), <https://www.benefitspro.com/2022/12/12/hr-lessons-from-titters-acquisition-by-elon-musk/> [https://perma.cc/95EW-ZKGG]. Professor Tavis is a Clinical Professor and Academic Director of the Human Capital Management Department of New York University School of Professional Studies and

It seems that the COVID-19 pandemic both signals and underscores that the old way of working is probably past.

#### IV. THE ROLE OF LABOR UNIONS IN THE 21ST CENTURY

##### A. *Labor's Diminished Relevancy?*

Two questions surface amid the growing implementation of automation and artificial intelligence, the displacement of workers by robots, a burgeoning gig economy, and a pandemic that upturned the way millions of people work. The first is whether, given these changes affecting workers and the workplace, labor unions have become less relevant to today's labor market; the second is whether their role will change in the coming decades.

Historically, unions have been the primary representative of workers in the workplace. Membership in labor unions rose steadily over the years after the passage of the National Labor Relations Act in 1935<sup>106</sup> and peaked among non-agricultural workers in 1945.<sup>107</sup> Between 1950 and 1954 unions consistently represented between 35% and 39% of private sector nonfarm, non-construction wage and salary workers.<sup>108</sup> However, membership began to decline precipitously in the 1960s,<sup>109</sup> and by 1983 the percentage of workers that were union members was 20.1%; by 2015, that percentage had declined to 11.1%.<sup>110</sup> In 2022, the number declined further, to 10.1%.<sup>111</sup>

At the risk of oversimplifying the explanations, many reasons may be attributed to labor union's diminished numbers; arguably,

Co-Author of *HUMANS AT WORK: THE ART AND PRACTICE OF CREATING THE HYBRID WORKPLACE* (2022).

106. National Labor Relations Act of 1935, Pub. L. No. 74-198, 49 Stat. 449 (codified as amended at 29 U.S.C. §§ 151–69).

107. GERALD MAYER, CONG. RSCH. SERV., *UNION MEMBERSHIP TRENDS IN THE UNITED STATES* 22 (2004) [https://ecommons.cornell.edu/bitstream/handle/1813/77776/August\\_2004\\_Union\\_Membership\\_Trends\\_in\\_the\\_United\\_States.pdf](https://ecommons.cornell.edu/bitstream/handle/1813/77776/August_2004_Union_Membership_Trends_in_the_United_States.pdf) [<https://perma.cc/P54M-3WGW>].

108. William T. Dickens & Jonathan S. Leonard, *Accounting for the Decline in Union Membership, 1950–1980*, 38 *INDUS. & LAB. REL. REV.* 323, 323 (1985).

109. MAYER, *supra* note 107.

110. Megan J. Dunn & James A. Walker, *Union Membership in the United States*, U.S. BUREAU OF LAB. STATS (Sept. 2016), <https://www.bls.gov/spotlight/2016/union-membership-in-the-united-states/> [<https://perma.cc/8DQU-6YFA>].

111. *Economic News Release: Table I. Union Affiliation of Employed Wage and Salary Workers by Selected Characteristics*, U.S. BUREAU OF LAB. STATS., <https://www.bls.gov/news.release/union2.t01.htm> [<https://perma.cc/J59Z-VUGX>].

for example, decades-long relative strength in the economy and automation. However, another explanation for unions' waning membership may be that government legislation for workers' rights has reduced, and even nullified to some extent, the ability or necessity of unions to negotiate for these rights. Societal shifts have created the environment necessary for legislative changes, and the passage of laws affecting working conditions and access to work opportunities has resulted in discernable changes in the workplace. By way of example, in the early 1900s discrimination in the workplace was common and acceptable, hazardous working conditions persisted because of a lack of safety regulations, and child labor was part of American society.<sup>112</sup> But as the nation evolved, so did the law. Very young children, who were commonplace in the workforce at the turn of the last century, are now, by and large, prohibited from working.<sup>113</sup> As women began to play a more prominent role in the workplace, legislation was passed to address gender inequities, which resulted in the codification of the concept of "equal pay for equal work" with the passage of the Equal Pay Act in 1963.<sup>114</sup> In addition, the passage of the Civil Rights Act of 1964 made it illegal for employers to discriminate based on race, color, sex, national origin, or religion.<sup>115</sup> And, the passage of the Occupational Safety and Health Act in 1970 expanded federal legislation regulating workplace safety to require employers to keep workplaces "free from recognized hazards that are causing or are likely to cause

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112. Michael Schuman, *History of Child Labor in the United States—Part 1: Little Children Working*, U.S. BUREAU OF LAB. STATS: MONTHLY LABOR REVIEW (Jan. 2017), <https://www.bls.gov/opub/mlr/2017/article/history-of-child-labor-in-the-united-states-part-1.htm> [<https://perma.cc/R45E-WKR7>].

113. Though later subject to challenge, the Keating-Owen Act prohibited the sale of products manufactured by children under the age of fourteen and generally restricted the use of the labor of children under the age of sixteen. Keating-Owen Child Labor Act of 1916 (Wick's Bill), Pub. L. No. 64-249, 39 Stat. 675, *invalidated by* *Hammer v. Dagenhart*, 247 U.S. 251 (1918). The Act was challenged and held unconstitutional in 1918 by the Supreme Court's decision in *Hammer*, 247 U.S. at 277, *overruled by* *United States v. Darby*, 312 U.S. 100 (1941). In the same year, additional child labor protections were passed as part of the Revenue Act of 1918, Pub. L. No. 65-254, 40 Stat. 1057 (1919), but they were also declared unconstitutional by *Child Labor Tax Case*, 259 U.S. 20 (1922). However, with the passage of the Fair Labor Standards Act of 1938, Pub. L. No. 75-718, 52 Stat. 1060 (codified as amended at 29 U.S.C. §§ 201–19), permanent federal protections for children in the workplace were instituted. 29 U.S.C. § 203(l).

114. Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56 (codified as amended at 29 U.S.C. § 206(d)).

115. Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, § 701–16, 78 Stat. 241, 253–66 (codified as amended at 42 U.S.C. §§ 2000e–2000e-17).

death or serious physical harm . . . .”<sup>116</sup> Following those major federal legislative initiatives, the next few decades saw the enactment of additional federal legislation affecting the workplace.<sup>117</sup> Most recently, Congress passed the Pregnant Workers’ Fairness Act,<sup>118</sup> which prohibits employment practices that discriminate against making reasonable accommodations for qualified employees affected by pregnancy, childbirth, or related medical conditions.<sup>119</sup>

There has also been a steady proliferation of laws and regulations at the state and local levels concerning discrimination in the workplace and workplace rules, wages, hours, and conditions of work—traditional bargaining points for unions. New York is a prime example of an increasingly progressive agenda on employee and workplace rights. In 2021, New York raised the salary threshold for exempt employees, that is, employees who are exempt from receiving overtime pay, to \$51,480 per year;<sup>120</sup> it enacted the Digital

116. Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, §5(a)(1), 84 Stat. 1590, 1593 (codified as amended at 29 U.S.C. § 654(a)(1)).

117. Since 1970, Congress has passed a variety of laws significantly impacting workers. *See, e.g.*, Employee Retirement and Security Income Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (codified at 29 U.S.C. §§ 1001–453, and in I.R.C. §§ 401–15 and 4972–75); Title VII of the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (codified at 5 U.S.C. §§ 7101–35 (Supp. V 1981)); Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (codified as amended at 42 U.S.C. § 2000(e)); Worker Adjustment and Retraining Notification Act of 1988, Pub. L. No. 100-379, 102 Stat. 890 (codified as amended at 29 U.S.C. §§ 2101–09); Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. § 12101 et. seq.); Family and Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6 (codified at 29 U.S.C. § 2601); and Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (codified at 42 U.S.C. § 2000e-5).

118. Pregnant Workers Fairness Act, Pub. L. No. 117-328, § 6, DIVISION II, 136 Stat. 4459 (2022).

119. Under the Pregnant Workers Fairness Act, it would be unlawful to: (a) not make reasonable accommodations to known limitations related to pregnancy unless the accommodation would impose an undue hardship on an entity’s business operation; (b) require a qualified employee affected by such condition to accept an accommodation other than any reasonable accommodation arrived at through an interactive process; (c) deny employment opportunities based on the need of the entity to make such reasonable accommodations to a qualified employee; (d) require such employees to take paid or unpaid leave if another reasonable accommodation can be provided; or, (e) take adverse action against a qualified employee on account of the employee requesting or using a reasonable accommodation. *Id.*

120. Effective December 31, 2021, the statewide salary threshold for exempt employees increased to \$51,480 per year, with the exception of New York City, Nassau, Suffolk and Westchester counties, where otherwise exempt employees who earn less than \$58,500 per year will now qualify for overtime pay. N.Y. COMP. CODES R. & REGS. tit. 12, § 142-2.14.

Workplace Monitoring Law,<sup>121</sup> which requires employers who monitor telephone calls, emails, or internet usage in the workplace to provide written notice to employees of the monitoring and to post a notice in the workplace informing them of the surveillance; it amended New York Labor Law Section 196-b to allow employees to use sick leave for “mental or physical illness, injury, or health condition . . . regardless of whether such illness, injury, or health condition has been diagnosed or requires medical care at the time that such employee request such leave;”<sup>122</sup> it raised the statewide general minimum wage on December 31, 2022 after steady increases each year since 2016;<sup>123</sup> it amended the Workers’ Compensation Board regulations to clarify that when paid family leave is taken intermittently, the maximum number of leave days an employee can take is determined by the average number of days per week the employee works;<sup>124</sup> and, by amendment to New York Labor Law Section 740, it broadened its whistleblower protection laws in the private sector, that were once limited to reporting health and safety concerns and claims of health care fraud, to protect an employee against retaliation for making such a report.<sup>125</sup> New York City also recently passed the “Salary Transparency Law” as an amendment to the New York City Human Rights Law, making it unlawful for employers to advertise jobs without stating the minimum and maximum salary for a job position.<sup>126</sup> New York State followed suit with

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121. N.Y. CIV. RIGHTS LAW § 52-c (Consol. 2023).

122. N.Y. LAB. LAW § 196-b(4)(i) (Consol. 2023).

123. *Id.* § 652. (From 2016 through 2021 the New York State minimum wage increased from \$9.70 per hour to \$13.20 per hour). Governor Kathy Hochul announced in December 2022 that the minimum wage in New York would increase to \$14.20 per hour. *Governor Hochul Announces Minimum Wage Increase for Upstate New Yorkers*, N.Y. STATE (Dec. 21, 2022), <https://www.governor.ny.gov/news/governor-hochul-announces-minimum-wage-increase-upstate-new-yorkers> [https://perma.cc/6QC6-UYH3].

124. N.Y. COMP. CODES R. & REGS. tit. 12 § 380-2.5 (c). The regulations initially capped intermittent Paid Family Leave (PFL) at sixty days. This sixty-day cap has been removed, allowing for additional days of intermittent PFL for employees who work an average of more than five days per week. New York State also amended the PFL law to expand the definition of “family member” to include siblings, effective January 1, 2023. N.Y. LAB. LAW § 196-b(4)(b).

125. Highlights of the amendment include: (a) the expansion of the definition of employee to add “former employee or . . . independent contractors” as those permitted to bring claims, (b) a change to a “reasonable belief standard” as the basis from bringing a claim, (c) expansion of “protected activity,” (d) expansion of the definition to retaliatory conduct, and (e) additional remedies and civil penalties and a longer statute of limitations to two years from one year. *Id.*

126. N.Y.C. ADMIN. CODE § 8-107(32)(a), *amended by* L.L. 59/2022 § 1 (2022).

the passage of its statewide salary transparency law signed on December 21, 2022.<sup>127</sup>

The foregoing are just a few examples of the explosion of federal, state, and local laws that have been passed with or without the support and participation of labor unions. As a consequence, in the context of ever-increasing government legislation aimed at protecting workers, it is not clear whether labor can make a convincing argument that it remains necessary or relevant to protect workers' rights.

Labor's relevancy has also been challenged by state "right-to-work" laws, which are enabled by the Taft-Hartley Act.<sup>128</sup> Under right-to-work laws, adopted in twenty-seven states so far, states may prohibit compulsory membership in a union as a condition of employment.<sup>129</sup> By contrast, in states without right-to-work laws, Section 8(a)(3) of the NLRA declares that an employer cannot be precluded from making an agreement with a labor organization to require, as a condition of employment, membership in a union.<sup>130</sup> Although, to date, there is no federal right-to-work law, Congress has introduced the National Right to Work Act multiple times,<sup>131</sup> signaling the potential for a nationwide choice to opt-out of joining or paying dues to unions.

Interesting findings from the National Bureau of Economic Research indicate that right-to-work laws

are associated with a drop of about 4 percentage points in unionization rates five years after adoption, as well as a wage drop of about 1 percent. These impacts are almost entirely driven by three industries with high unionization rates at baseline—construction, education, and public administration—where right-to-work laws reduce unionization by almost 13 percentage points and wages by more than 4 percent, again over five years.<sup>132</sup>

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127. Act of Dec. 21, 2023, 2023 N.Y. Laws 94 (codified at N.Y. LAB. LAW. § 194-b (2023)).

128. Labor-Management Relations Act of 1947, Pub L. No. 80-101, 61 Stat. 136 (codified as amended at 29 U.S.C. §§ 141–44).

129. *Right-to-Work Resources*, NAT'L CONF. OF STATE LEGISLATURES (Jan. 9, 2023), <https://www.ncsl.org/labor-and-employment/right-to-work-resources> [<https://perma.cc/QL89-GC9R>].

130. National Labor Relations Act of 1935, Pub. L. No. 86-257, 73 Stat. 542-543 (codified as amended at 29 U.S.C. § 158(a)(3)).

131. S. 525, 116th Cong. (2019); S.3464, 117th Cong. (2022).

132. Lucy E. Page, *Impacts of Right-to-Work Laws on Unionization and Wages*, NAT'L BUREAU OF ECON. RSCH. (Aug. 2022), <https://www.nber.org/digest/>

Thus, according to the findings, if more states continue to adopt right-to-work laws, as appears to be the trend, the number of union members may continue to decrease even further.

Moreover, the landmark 2018 U.S. Supreme Court decision in *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, extended this right-to-work protection to all government or public employees.<sup>133</sup> The issue in *Janus* centered on an Illinois law that permitted public sector employees to unionize.<sup>134</sup> Under the law, if a majority of the public employees in a bargaining unit voted to unionize, the union would be permitted to represent *all* of the employees in the unit regardless of whether they joined the union.<sup>135</sup> The non-union members were then required to pay an “agency fee,” which was a percentage of the full union dues.<sup>136</sup> The imposition of this agency fee was challenged as unconstitutional.<sup>137</sup> Justice Alito, writing for the majority, held that the law violated the First Amendment as the imposition of the public sector union fees on non-union members “compel[s] them to subsidize private speech on matters of substantial public concern.”<sup>138</sup> The decision in *Janus* can be said to have had a stifling effect on unions because it directly impacts their ability to raise money through membership dues.

Despite diminishing membership and adverse legislation and court decisions, it is also true that there has been a recent upswing in union organization and strikes that have been widely covered in the media,<sup>139</sup> and which may signal a renewed interest in unionization. And the number of employees represented by unions actually increased by over 200,000 in 2022.<sup>140</sup> But as previously noted, the actual percentage of employees who are union members, as a percentage of the total number of employees, declined to 10.1% in

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202208/impacts-right-work-laws-unionization-and-wages [https://perma.cc/9LBV-DAK8].

133. 138 S. Ct. 2448, 2460, 2486 (2018).

134. *Id.* at 2460.

135. *Id.*

136. *Id.*

137. *Id.* at 2462.

138. *Id.* at 2460.

139. *E.g.*, Hsu, *supra* note 8; Hsu, *supra* note 9; Kate Gibson, *Trader Joe’s Workers File to Form Chain’s First Union*, CBS NEWS (June 9, 2022) <https://www.cbsnews.com/news/trader-joes-union-service-workers-amazon-starbucks/> [https://perma.cc/5AGY-F5BR].

140. Greg Rolasky, *You May Have Heard of the ‘Union Boom.’ The Numbers Tell a Different Story*, NPR (Feb. 28, 2023, 6:31 AM), <https://www.npr.org/sections/money/2023/02/28/1159663461/you-may-have-heard-of-the-union-boom-the-numbers-tell-a-different-story> [https://perma.cc/QBL9-GALT].

2022. This divergence can be explained by the greater increase in the number of nonunion jobs.<sup>141</sup> Which brings us to this final point: the labor market is changing in a way that may not suit labor unions.

*B. The Impact of the Gig Economy on Labor Union's Relevancy and Unionization Efforts*

The strengthening gig economy has also been a challenge to the relevancy of labor unions and has, at the same time, impacted unionization efforts. As discussed in Part II, in the gig economy, workers complete a task and move on to the next gig. A gig worker typically reports independently to a team leader, manager, or department head, and takes little, if any, direction from the gig firm. Compensation is not determined by title, seniority, or longevity because gig workers work independently. This gig work model does not resonate in the manufacturing industry, which is heavily unionized, because workers do not work the same way. Workers in unionized manufacturing are subject to the terms and conditions of a collective bargaining agreement (CBA). The CBA typically addresses a multitude of aspects of the employer-employee relationship, including wage increases, benefits, and seniority. In the traditional labor model, union workers also generally follow a defined career path that begins with apprenticeship and moves through the ranks of journeyman and master. Pay and promotions are generally based on longevity and status. The dichotomy between the two work models highlights the difference between the independent gig worker and the union worker and amplifies why unionization in this new economy may not work as it did before. And now, as manufacturing becomes more innovative with solutions such as 3-D printing, robotics, machine learning and artificial intelligence, jobs that can be performed by gig workers, these workers may become a significant part of this industry as well.

As a result, because technology is now embedded in society and in many workplaces, and the gig economy is affecting almost every industry, the developing movement to turn gig workers into employees is strongly supported and fueled by labor unions<sup>142</sup> in

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141. Heidi Shierholz, Margaret Poydock, and Celine McNicholas, *Unionization Increased by 200,000 in 2022*, ECON. POL'Y INST., (Jan. 19, 2023), <https://www.epi.org/publication/unionization-2022/> [<https://perma.cc/296Q-HHJM>].

142. See, e.g., Art Pulaski, *AB 5 Approval a Historic Win for California Workers*, CAL. LAB. FED'N (Sept. 11, 2019), <https://calaborfed.org/ab-5-approval-a-historic-win-for-california-workers/> [<https://perma.cc/5H2C-FWFS>]. The California Labor Federation is "made up of more than 1,200 union, [and represents] 2.1 million

order to increase their membership and preserve their relevancy. As was seen in California with the passage of California Assembly Bill 5 (AB5) in 2019,<sup>143</sup> companies that hire independent contractors must reclassify them as employees if they do not satisfy the ABC test because the legislation presumes the worker to be an employee unless the test is met.<sup>144</sup> It is likely that unions hope that what they helped to achieve with California's AB5 can be achieved in other states—specifically in manufacturing states where they continue to have a significant presence and maintain a degree of influence. Should similar laws pass in those States, gig workers in the manufacturing industry may also become employees. Similar efforts are being made locally in New York City.<sup>145</sup>

Unions will likely continue to play a significant role because their fundamental purposes—collective bargaining for wages and compensation and providing a collective representative voice—remain unchanged. But their strength is certainly diminished as the union labor force as a percentage of the overall labor market is decreasing, and the way workers work is changing. Moreover, arguably, the proliferation of laws governing the workplace, the employer-employee relationship, and workers' rights, are also usurping union bargaining points. Given the significant impact of the gig economy on the labor market, labor unions may be adjusting to changes and challenges this century because they may not be able to impose the traditional union structure on new work models. Since millions of workers no longer fit the traditional employer-employee framework, unions may have an opportunity to reinvent themselves and become innovative in their approach to relationships among employers, employees and independent workers.

## V. CONCLUSION

The 21st century is seeing a revolutionary change in the way Americans work and in what workers want and need. The trends

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union members.” About Us, CAL. LAB. FED’N, <https://calaborfed.org/about-us/> [<https://perma.cc/C6TQ-NFHW>].

143. Act of Sept. 18, 2019, ch. 296 (codified as amended at CAL. LAB. CODE § 2750.3 (2019)).

144. The specific language of AB5 states that “a person providing labor or services for remuneration shall be considered an employee rather than an independent contractor” unless all of the elements of the ABC test are met. CAL. LAB. CODE § 2775 (Deering 2023).

145. See N.Y.C. Council, 1926, 2020 Council, Reg. Sess. (N.Y.C 2020) (proposing legislation which would codify the ABC test).

and changes appear to be a prologue to a deeper transformation. As machines become more autonomous and able to learn, they can be expected to become more sophisticated. Because the gig economy continues to grow and because of ongoing innovations in technology, the gig economy is presently viewed as a transitional phase to a fully digitalized economy. The technological changes in the global labor market may also have significant social implications and will likely be accompanied by more legislation to evolve with a changing society and workplace. With the experience of the COVID-19 pandemic, governments, employers, and workplaces may also be better prepared for greater work flexibility and more benefits in the future. And, finally, despite the relative decline in their influence, labor unions are still an important voice in local and national politics that can influence legislation and the rights of workers. However, the substitution of a significant portion of workers by robots and intelligent machines, combined with a strengthening gig economy, will challenge the viability of labor unions—as well as their relevance—if they do not adapt to the new 21st century workplace.