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**Where It's At:  
Workplace Issues in Our Modern Economy**

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**My Office is Where the Technology Allows it to Be?**

**By**

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## Introduction: Legalities of Where Gig Economy Employees Work

An emerging trend of businesses is to use “on-demand” workers who share economic risks with those businesses as nominally independent contractors. These workers consider the job opportunity as an individual “gig,” characterized by flexibility conveniently gained from technology that easily matches them with the jobs at their preferred times and locations. State, federal, and local legislatures and labor and employment law enforcement agencies have started to add items to this analysis beyond the typical “1099/W-2” common law control nomenclature. As a result, the question of who is an employee in this rising gig and sharing focused-economy has become an ever-increasing concern.<sup>1</sup>

The growth in the contingent workforce along with the technological advances with companies such as Uber, Lyft, and AirBnb have led to a collision with labor and employment law protections for workers and those wishing to work in the sharing and gig economy. Companies such as Uber argue that they are providing a service that consumers and workers want due to technological growth in this new economy. However, several lawsuits have arisen to challenge the Uber model of providing ride sharing technology and paying workers as independent contractor drivers to transport customers by matching the drivers with customers seeking transport via smart phones.

Classical worker relationships that labor and employment laws were created to address don’t arguably match the nature of work in the new gig and sharing economy. The lawsuits have argued that gig workers are being misclassified by companies like Uber as being independent contractors instead of employees.<sup>2</sup> Is the work being performed through these digital platforms so qualitatively different that the law needs new approaches in how businesses are being regulated regarding these workers? Is agility and innovation the goal of these growing businesses or merely an attempt to get around paying worker’s compensation, providing employee benefits, addressing taxes, and other rights employees are entitled to under labor and employment laws? How the legal system will address work in this new economy represents challenging questions.

Economist Lawrence Mishel has criticized this gig economy approach to work as failing to consider whether workers are getting paid enough, whether they have job security, and whether their work locations allow for safe performance of their duties.<sup>3</sup> One concern is that the Uber model, while getting a lot of publicity, is not the real issue that the law should be focusing on because 60% of Uber drivers do not use Uber as their primary work gig.<sup>4</sup> Also, Uber drivers represent significantly less than 0.1 percent of all full-time equivalent employment even in our growing gig and sharing economy.<sup>5</sup>

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<sup>1</sup> See Robert Sprague, *Worker Misclassification in the Sharing Economy: Trying to Fit Square Pegs into Round Holes*, 31 A.B.A. J. LAB. & EMP. L. 53 (2015); see also *The “Virtual” Employee in a “Gig” Economy*, THE AMERICAN LAW JOURNAL TELEVISION PROGRAM, May 16, 2016, available at [https://www.youtube.com/watch?v=bhm2fdQg\\_Aw](https://www.youtube.com/watch?v=bhm2fdQg_Aw); see also What is the ‘gig’ economy? FINANCIAL TIMES, Aug. 10, 2015.

<sup>2</sup> See Benjamin Means & Joseph A. Seiner, *Navigating the UberEconomy*, 49 U.C. DAVIS L. REV. 1511 (2016).

<sup>3</sup> See Lawrence Mishel, *Uber is Not the Future of Work*, THE ATLANTIC, Nov. 16, 2015, available at <http://www.theatlantic.com/business/archive/2015/11/uber-is-not-the-future-of-work/415905/>.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

According to Mishel, it is not technology that has transformed the way in which employees are performing work, which also corresponds with the location of that work.<sup>6</sup> Rather, Mishel has asserted that the real change in how work is being performed is a result of economic pressure being applied by businesses to create a labor market where employee rights are being diminished as a result of an eroding retirement system, intentional use of temporary and subcontract workers, increasing low wages and low buying power as a result of inflation, and decreasing labor union density.<sup>7</sup>

Economist and current Administrator, Wage and Hour Division of the Department of Labor, David Weil,<sup>8</sup> has addressed what he refers to as the “Fissuring of the Workplace”<sup>9</sup> based upon employers increasingly “splitting off functions that were once managed internally.”<sup>10</sup> According to Weil, businesses have been successful in the fissuring of the workplace as they have maintained quality while cutting the costs of directly employing an expensive workforce by outsourcing the work.<sup>11</sup>

On the other hand, workers have arguably suffered due to “declining wages, eroding benefits, inadequate health and safety protections, and ever-widening income inequality.”<sup>12</sup> In order to prevent employers from escaping their prior obligations to employees, Weil has proposed that the law should be changed to regulate employers while still allowing some of the economic benefits for businesses who choose to operate in this manner.<sup>13</sup> The three main mechanisms for fissuring are: subcontracting, franchising, and supply chain management that allows businesses to obtain the financial benefits of fissuring without having to assume the labor risks.<sup>14</sup> Weil also suggested in his book that labor and employment agencies should change their legal approaches to regulation of employers in this changing economy to respond to the fissuring workplace.

Putting his money where his mouth is after becoming Wage and Hour Administrator for the Department of Labor, Weil authored a Guidance aimed at addressing the unique economic aspects regarding whether a worker is an employee or an independent contractor under the federal Fair Labor Standards Act (FLSA) for wage and hour rights.<sup>15</sup> This paper brainstorms regarding what issues may be occurring with respect to where employees will be performing their work and what the impact will be for those counseling employees and employers about where that work will be performed.

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<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> See Dr. David Weil Profile, Department of Labor, Wage and Hour Division Administrator, available at <https://www.dol.gov/whd/about/org/dweil.htm>.

<sup>9</sup> See David Weil, *THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT* (Harvard University Press 2014), available at <http://www.fissuredworkplace.net/>.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* The National Labor Relations Board has addressed similar concerns about the expanding nature of what is an employee. See, e.g. *Browning Ferris Indus. of Calif. Inc.*, 362 N.L.R.B. No. 186 (Aug. 27, 2015).

<sup>14</sup> See César F. Rosado Marzán, *Review, The Fissured Workplace, David Weil, Harvard University Press, 2014*, 19 EMP. RTS. & EMP. POL'Y J. 331 (2015).

<sup>15</sup> See David Weil, *U.S. Dep't of Labor, Administrator's Interpretation No. 2015-1*, at 13 (2015) [hereinafter FLSA Interpretation] available at [http://www.dol.gov/whd/workers/Misclassification/AI-2015\\_1.pdf](http://www.dol.gov/whd/workers/Misclassification/AI-2015_1.pdf).

## II. THE ISSUE OF WHERE WORK IS BEING PERFORMED

One consequence of this new economic approach to work in the gig and sharing economy is the changing nature of where work is being performed. The industrial age economy where employees worked side by side on factory floors in mostly one job for their entire lives had morphed into the office based economy where employees worked side by side in cubicles to perform their duties. And now with Millennials entering the workforce, employees are more apt to change jobs seven times in their working lives.<sup>16</sup> So going to the factory or going to the office was assumed to be the place where work was being performed under prior business economic models. But the work performed in this new gig economy occurs essentially wherever the technological advances allow the work to be performed. The twenty-first century approach to where work will be performed suggests that employment laws will not only need to address the nature of work but the location of work in this sharing economy.

### A. Telecommuters and Working From Home: Teamwork or Not?

Increasing opportunities for employees to telecommute while working from home have grown over the last few decades. Even at the end of the twentieth century, the telecommuter worker movement was starting to flourish. However, telecommuting has really grown within the last five years.<sup>17</sup> Yet, Yahoo CEO, Marissa Mayer, received some verbal backlash back in 2013 when she banned the company's practice of allowing employees to work from home and required that Yahoo's 14,500 employees be physically present in their offices.<sup>18</sup> Mayer's reasoning was that being physically present would boost the quality of decisions and business ideas, and telecommuting slows down productivity while cutting into quality of services. Mayer came to Yahoo from Google after being appointed "CEO while pregnant" and she "famously returned to work at Yahoo two weeks after giving birth to her son."<sup>19</sup> Yet most of the leading technology companies such as "Google, Apple, and Facebook encourage face-to-face collaboration."<sup>20</sup> So while telecommuting is increasing, are new age managers comfortable with the lack of teamwork and personal interface that is necessary for

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<sup>16</sup> See Robert P. Tinnin, Jr., *Gig Economy Will Spur Reform of HR Laws*, 22 New Mex. Emp. L. Letter 3, Apr. 1, 2016 (discussing how Americans now change jobs 7 times during their working lives); Kaytie Zimmerman, *Millennials, Stop Apologizing for Job-Hopping*, Fortune, June 7, 2016, available at <http://www.forbes.com/sites/kaytiezimmerman/2016/06/07/millennials-stop-apologizing-for-job-hopping/#2738a2e3697d> (referring to how most Millennials should not stay at an employer for more than two years).

<sup>17</sup> See Joseph Coombs, *State Department Joins the Telecommuting Movement*, July 31, 2015, available at <https://www.shrm.org/ResourcesAndTools/hr-topics/talent-acquisition/Pages/State-Department-Telecommuting.aspx> (finding from a study that 56% of employers said that they permit telecommuting and this number is up from 42 percent in 2011 and referring to how telecommuting has moved from a creative option to a mainstream work assignment).

<sup>18</sup> See Peter Cohan, *4 Reasons Marissa Mayer's No-At-Home-Work Policy is an Epic Fail*, FORBES, Feb. 26, 2013, <http://www.forbes.com/sites/petercohan/2013/02/26/4-reasons-marissa-mayers-no-at-home-work-policy-is-an-epic-fail/#1e8a95156c74> (arguing that the policy will result in more mediocre employees, higher employee stress and lower productivity, higher fixed costs, and more traffic and air pollution).

<sup>19</sup> See Jon Swartz, *Analysis: Yahoo's telecommuting edict isn't unique*, USA TODAY, Feb. 28, 2013

<sup>20</sup> *Id.*

innovation?<sup>21</sup> This leaves more questions than answers about where is work when the question is more specific about whether work can be at home.

Probably the most prominent area under labor and employment law where issues of telecommuting have arisen in the last 10 years is the issue of a reasonable accommodation under the Americans With Disabilities Act.<sup>22</sup> Technological developments including mobile phones, the Internet, Cloud Technology, and Robotic telepresence has fostered the growth of telecommuting.<sup>23</sup> In the Sixth Circuit's 2015 en banc decision in *EEOC v. Ford Motor Co.*, the Court held that regular attendance was an essential function of an employee's job duties and the employee's request to telecommute by working from home four days out of the week was not a reasonable accommodation.<sup>24</sup>

In *Ford*, the court referred to the EEOC's 2005 guidance on working at home and telework as a reasonable accommodation and how the EEOC had stated that an employer may refuse a telecommuting request when a job requires "face-to-face interaction and coordination of work with others."<sup>25</sup> All other employees in the same position as the employee requesting to telecommute were required to regularly and predictably attend work on the site.<sup>26</sup> The fact that the employer did allow some of the other employees to telecommute on a very "limited basis" with the proviso that they would still have to come in on their telecommuting day, if needed, did not warrant allowing the plaintiff to telecommute four days a week without being able to come in as needed as part of an "unpredictable basis" for up to 80% of the work week.<sup>27</sup> Also, the Court in *Ford* specifically rejected the development of technology in "email, computers, telephone, and limited video conferencing" as sufficient to make a "highly interactive job one that can be effectively performed at home."<sup>28</sup> As a result, there are arguments that telecommuting represents a reasonable accommodation for a disabled employee. But, if an employee is required to have regular physical presence at the work site as an essential function, then telecommuting is not a reasonable accommodation.<sup>29</sup>

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<sup>21</sup> Penelope Trunk, *Yahoo Kills telecommuting. Three cheers for Marissa Mayer!*, PENELOPE TRUNK BLOG, available at <http://blog.penelopetrunk.com/2013/02/27/yahoo-kills-telecommuting-three-cheers-for-marissa-mayer/>.

<sup>22</sup> See generally Benjamin D. Johnson, *There's No Place Like Work: How Modern Technology is Changing the Judiciary's Approach to Work-At-Home Arrangements as an ADA Accommodation*, 49 U. RICH. L. REV. 1229 (2015).

<sup>23</sup> *Id.* at 1238-43; see also *EEOC v. Ford Motor Co.*, 782 F.3d 753, 761 (6<sup>th</sup> Cir. 2015) (en banc) (finding that regular and predictable on-site attendance is an essential function of the job and an employee who does not come to work cannot perform his job functions so that a request to telecommute was not a reasonable accommodation).

<sup>24</sup> *Ford*, 782 F.3d at 761.

<sup>25</sup> *Id.* at 762 (quoting from EEOC Guidance).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 765.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* But See Sean Caulfield, Note, *She Works Hard for the Money Wherever She is: The Need to Abandon the Physical Presence Presumption in Telecommunications Cases Following EEOC v. Ford*, 61 VILL. L. REV. 261 (2016) (arguing that current technology makes it possible to perform essential job functions without being physically present); see also *McMillan v. City of New York*, 711 F.3d 120, 126-27 (2<sup>nd</sup> Cir. 2013) (cannot just presume punctuality and presence at specific times is an essential function of the job and must go through a fact-specific inquiry which indicated in this case that employees could attend at whatever they wanted).

## B. Working Out in the Uber World Without a Safety Net

With the growth in telecommuting and technology to support it, the Occupational Safety and Health Administration issued a guidance in 1999 to respond to work-at-home arrangements.<sup>30</sup> More recently, on March 7, 2016 a paper prepared for consideration by the Department of Labor and the Occupational Safety and Health Administration highlights a number of the concerns about the changing location of where work is being performed in our gig economy from a health and safety perspective.<sup>31</sup> That paper, titled “The Changing Structure of Work: Implications for Workplace Health and Safety in the US,” looks at the evolving nature of work as it results from the “fissured or market-mediated” workplace and accompanying technological advances.<sup>32</sup>

The authors of this paper note that temporary workers and those who work for businesses that do not have a specific regard for directly supervising those workers in the gig economy and the resulting fissured workplace create more concerns about health and safety for these “vulnerable” workers.<sup>33</sup> Those workers, while exposed to the same health and safety dangers as employees, do not have the same access, voice and control over their working conditions to prevent injuries or adverse health exposures. The authors also argue that technologies including global positioning system devices are fostering more micromanagement to create stress for employees.<sup>34</sup>

The paper acknowledges the importance of the National Labor Relations Act in protecting employee voice regarding safety issues and the retaliation provisions under the Occupational Safety and Health Act Section 11( c) as a form of safety protection as well.<sup>35</sup> OSHA has also entered into a Memorandum of Understanding with the Department of Justice to expand the possibility of criminal enforcement where contracting firms engage in activities that create more health and safety problems.<sup>36</sup> OSHA has also employed a multi-employer citation policy in non-standard work relationships.<sup>37</sup> In November 2015, OSHA issued a draft of proposed Safety and Health Program Management Guidelines with a section covering communications and collaboration at work sites with employees from more than one employer being present.<sup>38</sup> Finally, the paper notes that OSHA and the other laws that protect worker health and safety have unique problems in communication and collaboration when the employee is completely offsite or only has a transient presence at a dangerous site.<sup>39</sup>

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<sup>30</sup> Johnson, *supra* note 22, at 1237-38.

<sup>31</sup> See Leslie I. Boden, Emily A. Spieler, and Gregory R. Wagner, THE CHANGING STRUCTURE OF WORK: IMPLICATIONS FOR WORKPLACE HEALTH AND SAFETY IN THE US, Mar. 7, 2016, available at [https://www.dol.gov/asp/evaluation/completed-studies/Future\\_of\\_work\\_the\\_implications\\_for\\_workplace\\_health\\_and\\_safety.pdf](https://www.dol.gov/asp/evaluation/completed-studies/Future_of_work_the_implications_for_workplace_health_and_safety.pdf). I thank Susan Motley for pointing out this paper to me for consideration.

<sup>32</sup> *Id.* at 2.

<sup>33</sup> *Id.* at 13, 29.

<sup>34</sup> *Id.* at 16.

<sup>35</sup> *Id.* at 17-20.

<sup>36</sup> *Id.* at 21.

<sup>37</sup> *Id.* at 22.

<sup>38</sup> *Id.* at 26.

<sup>39</sup> *Id.*

### **III. FINAL THOUGHTS AND CONCLUSION**

Technological growth as evidenced by global positioning systems, conferencing technology, and other electronic forms of communication are making it easier for work to take place outside of the normal factory and office setting. With the gig economy and the fissured workplace, workers either as temporary employees or as nominal independent contractors are working in environments where the businesses that employ them may not be directly involved in their work assignments. This raises complex legal questions regarding employee benefits, worker's compensation, discrimination, wage and hour, and health and safety rights for these workers. Some agencies, in particular the Department of Labor and the National Labor Relations Board have stepped in to define protections for these workers by extending broader interpretations to the definition of what is an employee.

With the increasing use of telecommuting, the question of where work is being performed has extended to the home. Legal implications under disability law have raised concerns about working from home and leading managers from top technology corporations are starting to recoil at telecommuting arrangements. As a result, and just like all the complex questions regarding the nature of the working relationship in our gig economy and fissured workplace, the nature of the location of the work is being subjected to some interesting questions. Essentially, the location of work is evolving to the point of it being possible that the work can be located anywhere current technology allows it to be. While some management balk at actions that discourage face-to-face workplace presence, more opportunities are expanding the location of work to places outside of the standard workplace including the home. How agencies and legislatures and courts will respond to this changing location of the workplace remains an interesting and unanswered question that many employers and employees will need to explore in the coming years.