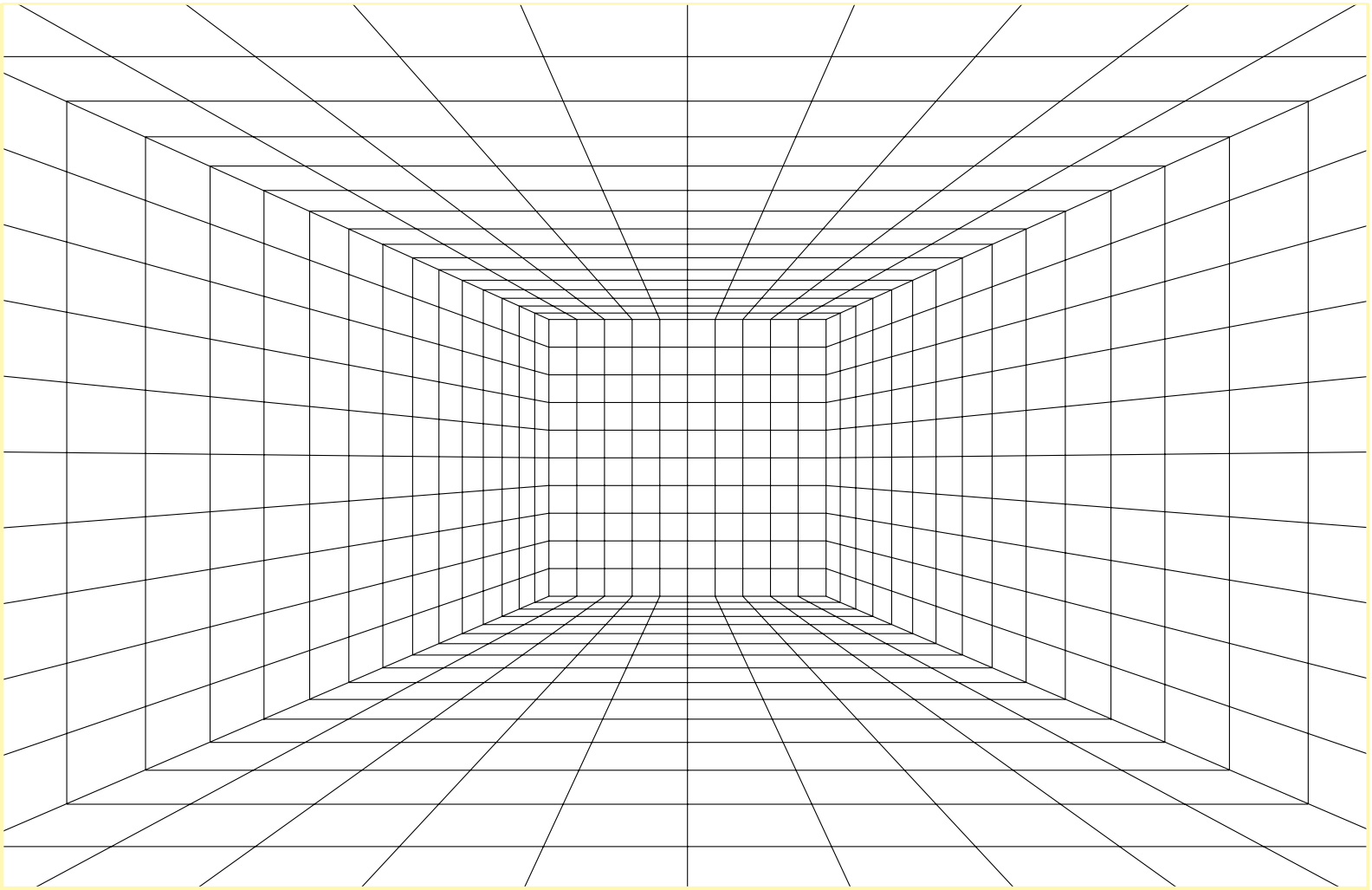

LABOR AND EMPLOYMENT PERSPECTIVES ON THE GIG ECONOMY – HOW THE PRO ACT AND A NEW LABOR BOARD MIGHT IMPACT GIG WORKERS AND THEIR "EMPLOYERS"

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The "gig" economy is on the rise. According to the U.S. Chamber of Commerce, the number of gig economy workers — independent contractors or freelancers who do short-term project-based, hourly, or part-time work for multiple clients — has grown in recent years, with 57 million Americans taking on freelance work in 2019. The COVID-19 pandemic and the ensuing Great Resignation that followed seem to have hastened the pace, as many workers who once held traditional jobs began freelancing. As more workers join the ranks of the gig economy, a question that has lingered since the beginning — whether gig workers should be classified as independent contractors or employees — is taking on a growing level of importance. The article further discussion impacts on independent contractors, implications from the NLRB, federal and state laws, and important state legal decisions.

The "gig" economy is on the rise. According to the U.S. Chamber of Commerce, the number of gig economy workers — independent contractors or freelancers who do short-term project-based, hourly, or part-time work for multiple clients — has grown in recent years, with 57 million Americans taking on freelance work in 2019.[2] The COVID-19 pandemic and the ensuing Great Resignation that followed seem to have hastened the pace, as many workers who once held traditional jobs began freelancing.[3] As more workers join the ranks of the gig economy, a question that has lingered since the beginning — whether gig workers should be classified as independent contractors or employees — is taking on a growing level of importance.

Since the inception of the gig economy, gig workers have been classified as independent contractors. This has allowed companies such as Uber to grow their businesses without incurring the costs associated with hiring traditional employees, such as minimum wage, employment taxes, benefits, and insurance. In 2019, the National Labor Relations Board ("NLRB") issued an Advice Memorandum in which it concluded that drivers for UberX and UberBlack were independent contractors, not "employees." Gig employers were thus shielded, at least temporarily, from union petitions and unfair labor practice charges brought by gig workers. But that was under a markedly different administrative and cultural environment.

Gig employers knew that the 2019 Advice Memorandum, which does not carry the force of statutory law, was only a temporary reprieve. Accordingly, many of the key players in the gig economy began to lobby state and federal lawmakers to pass laws that would codify gig workers as independent contractors. So important to these companies is the independent contractor framework, that they successfully lobbied to get a ballot measure (Proposition 22) approved in California, where many of them are headquartered, which defined app-based transportation and delivery drivers as independent contractors. Proposition 22, however, was struck down in August 2021, when a California state judge ruled that it violated state constitutional law. That decision is now on appeal and the fight over how gig workers should be classified in California continues.

On June 14, 2022, the Massachusetts Supreme Judicial Court held that a similar ballot measure, slated to appear on ballots in the November election, could not move forward under state law. That measure, which was backed by major players in the rideshare industry and gig economy, would have provided gig workers with some benefits, such as healthcare stipends and minimum pay for time spent assigned to a task (as opposed to waiting for an assignment), but also would have codified gig workers' employment status as independent contractors under state law. Thus, the original question underlying the gig economy business model — how to classify workers — remains contentious as ever.

This year could bring new developments for gig employers and workers. In February 2021, U.S. Representative Robert Scott (D–VA) introduced H.R. 842, otherwise known as the "Protecting the Right to Organize Act of 2021" or the "PRO Act." As it currently reads, the PRO Act would, among other things, broaden the definition of "employee" under the National Labor Relations Act ("NLRA"), which addresses rights of employees and employers in collective bargaining, extend joint employer liability; codify a return to the "ambush" or "quickie" union election rules created under the Obama administration; invalidate state laws that prohibit employees from being forced to pay union dues as a condition of their employment; loosen rules regarding labor strikes, make it more difficult for employers to replace striking workers, and mandate initial collective bargaining agreements within as little as 120 days.

The PRO Act also would make it an unfair labor practice to require employees to attend employer meetings discouraging union membership (also known as "captive audience meetings") and would prohibit employers from entering into agreements with employees under which employees waive the right to pursue or join collective or class-action litigation. The bill would also provide employees the ability to vote in union elections remotely (i.e. by telephone or the internet).

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Most important for gig employers and workers, the PRO Act would implement the test outlined in California's 2019 Assembly Bill 5 (the "ABC Test"), to determine whether a worker is an independent contractor or an employee. The ABC Test considers (1) the level of control the company maintains over the worker, (2) whether the worker performs work that is outside the scope of the company's normal business operations, and (3) whether the worker conducts similar work independently and outside the context of the employer. It is generally believed that the ABC Test would almost certainly result in the classification of gig workers

2 https://www.uschamber.com/co/run/human-resources/what-is-a-gig-worker.

3 *Id*.

as employees for purposes of collective bargaining rights under the NLRA. Massachusetts uses a similar test for determining employment classification.

The PRO Act passed the House in March 2021 and went to the Senate, where hearings were held before the Committee on Small Business and Entrepreneurship in March 2022. Whether the bill clears the Senate is an open question, but what is clear is that it remains an important part of the Democratic Party and President Biden's platform. On Thursday, June 16, 2022, President Biden reiterated his support for the PRO Act, calling on Congress to pass the bill:

President Biden's support for the PRO Act coincides with his strong emphasis on labor unions and the rights of workers to organize and collectively bargain with their employers. Indeed, he has been very vocal in his support of labor unions. On June 14, 2022, President Biden spoke at the AFL-CIO Quadrennial Constitutional Convention, where he thanked union workers for helping get him elected and touted the virtues and benefits of union membership.[4] He gave a similar speech in April 2022 to the Building Trades Unions Legislative Conference.[5]

Like the president who nominated her in February 2021, NLRB General Counsel Jennifer Abruzzo is an outspoken advocate for the proliferation of labor unions. In April, she issued a memorandum laying out her plan for ending mandatory "captive audience" meetings, a key component in employers' union election campaigns (which the PRO Act would also essentially abolish).[6] That same month, General Counsel Abruzzo's office filed a brief before the NLRB arguing that the Board should overturn long-standing precedent requiring employees to vote on whether to be represented by a union and instead require employers to recognize unions upon receiving signed authorization cards from a majority of the employees. In this administrative environment, it is likely no coincidence then that there is an ongoing increasing level of interest in labor unions and collective bargaining. The NLRB reported in April that during the first six months of Fiscal Year 2022, union representation petitions have increased 57 percent.[7]

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Such is the environment in which a growing number of gig economy workers, and the companies that employ them, find themselves. A question of increasing concern for these companies and workers is how the PRO Act, if it is passed, might affect their workplace. Proponents of the PRO Act say that it will grant much needed benefits and job security to gig workers, while opponents say that it will only serve to reduce the flexibility that workers in the gig economy value above all else. To be clear, the PRO Act would only potentially reclassify workers as employees for purposes of forming a union under the NLRA. It would not require companies to reclassify workers for other purposes, such as minimum wage and overtime.

Still, opponents of the PRO Act are concerned that it is simply a first step towards the inevitable reclassification of gig workers as employees and it is tough to argue against them on that point. They also are understandably concerned that passing a law that would allow gig workers to organize and eventually, anticipated laws that would classify those workers as employees, will increase costs, which the companies will then have to pass on to consumers, resulting in reduced demand for services and fewer workers to provide those services. Perhaps somewhat counter-intuitively, not all gig workers are in favor of the PRO Act. While many (perhaps most) would welcome the right to organize under the NLRA,

4 https://www.whitehouse.gov/briefing-room/statements-releases/2022/06/14/remarks-by-president-biden-at-the-29th-afl-cio-quadrennial-constitutional-convention/.

5 https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/04/06/remarks-by-president-biden-at-north-americas-building-trades-unions-legislative-conference/.

6 https://apps.nlrb.gov/link/document.aspx/09031d458372316b.

7 https://www.nlrb.gov/news-outreach/news-story/union-election-petitions-increase-57-in-first-half-of-fiscal-year-2022.

others are concerned that the PRO Act, and its anticipated consequences on employers, might drive the companies that hire them to look elsewhere (i.e. full time employees) for their services. As is the case with so much of the law in this area at this time, the landscape is shifting.

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