CHAPTER TWO

Consumer Protection for Gig Work?

Amazon's business depends on deliveries. Deliveries, in turn, require drivers. In 2015, Amazon piloted a new model: paying drivers per gig to use their own vehicles to drop off time-sensitive deliveries like groceries and same-day orders.[1] Amazon offered $18 to $25 per hour[2] and explicitly promised drivers "100% of the tips [they] earn."[3] But Amazon soon started cutting costs. Without telling drivers, it began diverting tips to cover the base pay rate it promised and changed its app to not show drivers' tip earnings separately.[4] Amazon continued this practice for several years — representing to both customers and drivers that drivers would receive all tips — until it learned that it was under investigation by the Federal Trade Commission (FTC).[5]

The FTC found "reason to believe"[6] Amazon had violated a statutory prohibition on "unfair or deceptive acts or practices."[7] The agency settled with Amazon and required the company to return more than $60 million in improperly diverted tips.[8] Amazon wasn't the only company to divert tips from gig delivery drivers,[9] but the FTC's settlement with the company represented a pathbreaking use of the agency's consumer protection authorities to protect gig workers.[10]

The FTC is now signaling that this case may be just the leading edge of a new wave of enforcement. Last September, the agency formally adopted a policy of prioritizing gig workers in its enforcement efforts, promising to leverage its "full authority" and its "broad-based

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1 *See* Amazon.com, Inc., 171 F.T.C. 860, 861, 864 (2021) (complaint); *see also* AMAZON FLEX, https://flex.amazon.com [https://perma.cc/24JJ-98PU].

2 *Amazon.com*, 171 F.T.C. at 863–64.

3 *Id.* at 862 (emphasis omitted).

4 *Id.* at 867–68.

5 *Id.* at 868, 870.

6 *Id.* at 860.

7 *Id.* at 871. The 1914 Federal Trade Commission Act, 15 U.S.C. §§ 41–58, established the FTC and its substantive authority, although the agency today enforces a wide range of statutes. *See generally id.* §§ 41–58. Section 5(a) of the Act includes an antitrust prong as well as a consumer protection prong. *See id.* § 45(a).

8 Press Release, FTC, Amazon to Pay $61.7 Million to Settle FTC Charges It Withheld Some Customer Tips from Amazon Flex Drivers (Feb. 2, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/02/amazon-pay-617-million-settle-ftc-charges-it-withheld-some-customer-tips-amazon-flex-drivers [https://perma.cc/5L5K-8W6C].

9 DoorDash and Instacart, for example, have been criticized for similar behavior. Kevin Roose, *After Uproar, Instacart Backs Off Controversial Tipping Policy*, N.Y. TIMES (Feb. 6, 2019), https://www.nytimes.com/2019/02/06/technology/instacart-doordash-tipping-deliveries.html [https://perma.cc/CL62-5GPT].

10 *See* Zachary Sorenson, *The FTC Went After Amazon for Withholding Gig Drivers' Tips. Can Consumer Harm Approaches Be Stretched Even Further to Protect Gig Workers?*, ONLABOR (Mar. 18, 2021), https://onlabor.org/the-ftc-went-after-amazon-for-withholding-gig-drivers-tips-can-consumer-harm-approaches-be-stretched-even-further-to-protect-gig-workers [https://perma.cc/HYH4-GMN2].

jurisdiction" to protect gig workers "from unfair, deceptive, and anticompetitive practices."[11]

This sharper approach comes after a decade of explosive growth in the gig economy[12] — and ensuing battles over how gig workers are classified, what benefits they are entitled to, and how to rectify abuses by gig platforms.[13] While "gig work" and the "gig economy" are flexible concepts that can include many work arrangements, the FTC's policy statement (and this Chapter) focuses on "online gig platform[s]": corporate middlemen that operate app-based, two-sided platforms that use software to match customers with workers who complete gigs like providing a ride, making a delivery, or running an errand.[14] These platforms — familiar brands like Uber, Lyft, and DoorDash — use a new business model enabled by the rise of smartphones. The proliferation of gig platforms has provided new work for millions of people[15] — work that is touted for the flexibility, independence, and, of course, income it can give workers.[16] But, as with any lopsided power dynamic, the disproportionate power many platforms have in relation to workers opens the door to exploitation, deception, and abuse.

One reason the FTC's new approach holds promise is that it could cut through the patchwork of laws currently governing gig work. Many gig workers are classified (often incorrectly) as independent contractors rather than employees, making them ineligible for a bevy of benefits. Classification rules are in flux, and proposals to classify gig workers as employees have drawn enormous resistance from platforms.[17] The resulting regulatory vacuum and confusion make the FTC's consumer protection and competition authorities — at first glance perhaps an odd choice of tool to protect workers — relevant and powerful.

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[11] FTC, FTC POLICY STATEMENT ON ENFORCEMENT RELATED TO GIG WORK 1 (Sept. 15, 2022) [hereinafter FTC POLICY STATEMENT], https://www.ftc.gov/legal-library/browse/policy-statement-enforcement-related-gig-work [https://perma.cc/7R36-CD4V].

[12] Greg Iacurci, *The Gig Economy Has Ballooned by 6 Million People Since 2010. Financial Worries May Follow*, CNBC (Feb. 4, 2020, 1:02 PM), https://www.cnbc.com/2020/02/04/gig-economy-grows-15percent-over-past-decade-adp-report.html [https://perma.cc/A754-4JCQ].

[13] *See* Kellen Browning, *The Next Battleground for Gig Worker Labor Laws: Massachusetts*, N.Y. TIMES (June 1, 2022), https://www.nytimes.com/2022/06/01/business/massachusetts-gig-workers-ballot.html [https://perma.cc/T4N7-HFQJ].

[14] *See* FTC POLICY STATEMENT, *supra* note 11, at 2.

[15] *See* TJ McCue, *57 Million U.S. Workers Are Part of the Gig Economy*, FORBES (Aug. 31, 2018, 6:30 PM), https://www.forbes.com/sites/tjmccue/2018/08/31/57-million-u-s-workers-are-part-of-the-gig-economy [https://perma.cc/J434-T438].

[16] *See, e.g.*, Press Release, Dara Khosrowshahi, CEO, Uber, Only on Uber: More Flexibility, Choice, and Support (July 29, 2022), https://www.uber.com/newsroom/only-on-uber [https://perma.cc/4T3T-N796].

[17] *See* Browning, *supra* note 13.

The FTC's new policy forces a square peg into a round hole.[18] But the gaps in the prevailing legal framework for gig work and the pushback from platforms against any changes mean that this round hole is roomy, and even a misshapen square peg can fit with space to spare. The FTC's approach (like this metaphor) may be strained, but it nevertheless offers promise to gig workers who are treated unfairly. This Chapter places this new policy in context — exploring the rise of the gig economy, the background employee/contractor framework, and the FTC's authorities — and evaluates its potential.

A. The Gig Economy

Gig work is nothing new. People have always pursued small, one-off jobs through informal arrangements, whether out of convenience or because more stable long-term work was unavailable.[19] For the past half century, temporary work arrangements have increasingly permeated the economy. Professor Louis Hyman traces the origins of today's gig economy to the 1950s, when executives started to outsource certain tasks to short-term "temp" workers in order to cut costs.[20] Staid corporations, initially constrained by solid unions and strong regulators, began to give way to the unrelenting short-term demands of the market (and management consultants); as a result, these kinds of temporary hiring practices accelerated, eroding job security for more and more types of work along the way.[21] When journalist Tina Brown coined the term "gig economy" in 2009, she described how the need to work a series of small "gigs" rather than a single full-time job had spread from lower-income workers living paycheck to paycheck, for whom "the Gig Economy has been old news for years," to white-collar professionals.[22]

More recently, the meaning of the "gig economy" has sharpened as app-based marketplaces for gig work have sprung up in a range of industries. So far, these gig marketplaces have focused on jobs that are standardized, repeatable, measurable, and divisible into discrete, similar

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[18] This is a frequently used image in the gig economy context. *See, e.g.*, Cotter v. Lyft, Inc., 60 F. Supp. 3d 1067, 1081 (N.D. Cal. 2015) ("[T]he jury . . . will be handed a square peg and asked to choose between two round holes."); Robert Sprague, *Worker (Mis)Classification in the Sharing Economy: Trying to Fit Square Pegs into Round Holes*, 31 ABA J. LAB. & EMP. L. 53 (2015); Emily C. Atmore, Note, *Killing the Goose that Laid the Golden Egg: Outdated Employment Laws Are Destroying the Gig Economy*, 102 MINN. L. REV. 887, 889 (2017) ("Gig workers are 'square pegs' being forced to fit into . . . [']round holes.'").

[19] *See, e.g.*, Tawny Paul, *The Gig Economy of the 18th Century*, BBC (July 22, 2017), https://www.bbc.com/worklife/article/20170721-the-gig-economy-of-the-18th-century [https://perma.cc/48AF-5KEA] ("[H]istory shows us that the one person, one career model is a relatively recent phenomenon. Prior to industrialisation in the 19th Century, most people worked multiple jobs to piece together a living.").

[20] *See* LOUIS HYMAN, TEMP 2, 52–53 (2018).

[21] *Id.* at 2–9, 210.

[22] Tina Brown, *The Gig Economy*, DAILY BEAST (July 14, 2017, 10:21 AM), https://www.thedailybeast.com/the-gig-economy [https://perma.cc/X5L8-6Y49] (originally published Jan. 12, 2009, 12:34 AM).

tasks,[23] rather than the white-collar work Brown foresaw being swept up in the "age of Gigonomics."[24] Still, there is no reason to think the concept will not eventually expand to more types of work.[25]

Instead of focusing on a particular industry or type of work, this Chapter focuses on gig work that is orchestrated in a specific way: by online applications that operate automated two-sided networks[26] for gig jobs. Unlike old-school temp agencies, these platforms use software to automatically match workers on one side of the "market" with customers on the other, increasing the speed (and lowering the costs) of matches. This Chapter, like the FTC policy statement, refers to these as "online gig platforms."[27] Similarly, this Chapter uses "gig worker" to refer specifically to workers on the supply side of these online gig platforms.

Uber, founded in 2009,[28] is the canonical example of an online gig platform. The concept is simple: rider and driver download app, rider requests, driver accepts, app collects payment, Uber skims a fee, and driver takes the rest.[29] And Uber is not the only company to figure out that you can turbocharge the tried-and-true concept of a temp agency by building a "marketplace" that operates on a free mobile app and is targeted to a mass-market service economy[30] — especially if you skirt a slew of laws along the way.[31] The proliferation of gig platforms has led to many more people working gig jobs.[32] According to one survey, 16%

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[23] *See* Sameer Hasija et al., *Will the Pandemic Push Knowledge Work into the Gig Economy?*, HARV. BUS. REV. (June 1, 2020), https://hbr.org/2020/06/will-the-pandemic-push-knowledge-work-into-the-gig-economy [https://perma.cc/4S93-QDT6].

[24] Brown, *supra* note 22.

[25] *See* Jack Kelly, *White-Collar Professionals Are Stuck in a Cycle of Contract Roles*, FORBES (Aug. 26, 2022, 12:07 PM), https://www.forbes.com/sites/jackkelly/2022/08/26/white-collar-professionals-are-stuck-in-a-cycle-of-contract-roles [https://perma.cc/6MDK-HK6F].

[26] A "two-sided market" connects buyers and sellers to exchange a good or service. *See* Julia Kagan, *Two-Sided Market: Definition and Examples*, INVESTOPEDIA (Apr. 26, 2022), https://www.investopedia.com/terms/t/two-sidedmarket.asp [https://perma.cc/P2MZ-UEL2]. Many gig platforms can be thought of as operating restricted forms of a two-sided market, because the platform operator sets the prices instead of matching bids from buyers and sellers.

[27] FTC POLICY STATEMENT, *supra* note 11, at 7.

[28] *The History of Uber*, UBER, https://www.uber.com/newsroom/history [https://perma.cc/FYN4-3QHM].

[29] *See How to Use the Uber App*, UBER, https://www.uber.com/us/en/about/how-does-uber-work [https://perma.cc/DE2M-P3RU].

[30] *See* Meaghan Yuen, *A List of the Top Gig Economy Companies and Apps in 2023*, INSIDER INTEL. (Jan. 7, 2023), https://www.insiderintelligence.com/insights/gig-economy-companies-startups [https://perma.cc/ZE88-H4C3].

[31] *See, e.g.*, Harry Davies et al., *Uber Broke Laws, Duped Police and Secretly Lobbied Governments, Leak Reveals*, THE GUARDIAN (July 11, 2022, 12:11 PM), https://www.theguardian.com/news/2022/jul/10/uber-files-leak-reveals-global-lobbying-campaign [https://perma.cc/63P2-6QCV] (quoting Uber executives saying that they had become "pirates" and conceding that "[w]e're just fucking illegal"); Eric Newcomer, *Uber Pushed the Limits of the Law. Now Comes the Reckoning*, BLOOMBERG (Oct. 11, 2017, 4:11 AM), https://www.bloomberg.com/news/features/2017-10-11/uber-pushed-the-limits-of-the-law-now-comes-the-reckoning [https://perma.cc/PA9N-HG8B]. For a lengthy but nonexhaustive collection of alleged transgressions, see UBER SCANDALS, https://www.uberscandals.org [https://perma.cc/42Z9-HBBB].

[32] Iacurci, *supra* note 12.

of Americans report having earned money through gig work.[33] The proportions are even higher for lower-income (25%), young (30%), Black (20%), and Hispanic (30%) workers.[34] The gig economy is expected to more than double — to $455 billion — between 2018 and 2023.[35]

Gig platforms claim to offer work that is flexible and independent in ways not possible without app-based mediation.[36] Skeptics counter that much of the efficiency platforms supposedly unlock is simply a result of dubious "regulatory arbitrage."[37] Studies show that many gig workers experience poor working conditions, with around one in seven who responded to a recent survey earning less than the federal minimum wage, and one in four earning less than the applicable state minimum wage.[38]

Whatever degree of independence gig workers do exercise, they do it entirely within the terms dictated by platforms. Platforms recruit workers, set participation requirements, control the worker and customer app experiences, set the market mechanics, process payments, and make a host of other decisions — hiring, matching, termination, and more — with minimal human involvement.[39] These practices seek to unlock efficiency, but they also involve a power imbalance that opens the door for abuse. Some platform behaviors entail outright deception that is clearly unlawful, like Uber falsely claiming that drivers' median income was as high as $90,000 in some cities,[40] or Amazon telling customers that tips would be passed on to drivers when it in fact withheld them for itself.[41] Other behaviors exemplify platforms trying to have it both ways: asserting that workers are independent (to avoid providing

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[33] MONICA ANDERSON ET AL., PEW RSCH. CTR., THE STATE OF GIG WORK IN 2021, at 3 (2021), https://www.pewresearch.org/internet/2021/12/08/the-state-of-gig-work-in-2021 [https://perma.cc/T9TV-RKDP].

[34] *Id.* at 4.

[35] *Projected Gross Volume of the Gig Economy from 2018 to 2023*, STATISTA (Sept. 30, 2022), https://www.statista.com/statistics/1034564/gig-economy-projected-gross-volume [https://perma.cc/7WJC-WL3D].

[36] *Cf., e.g.*, Dom Taylor, *Drivers Put Flexibility First in Gig Economy Reform*, UBER NEWSROOM (June 17, 2022), https://www.uber.com/en-AU/newsroom/ipsosau [https://perma.cc/YT8U-SR5B].

[37] *See, e.g.*, WILLIAM GORE-RANDALL, LAZARD ASSET MGMT., UNDERSTANDING THE INVESTMENT IMPLICATIONS OF THE GIG ECONOMY 2 (2020), https://www.lazardassetmanagement.com/docs/-m0-/92068/understandingtheinvestmentimplicationsof_lazardresearch_en.pdf [https://perma.cc/Z9M9-B86L].

[38] BEN ZIPPERER ET AL., ECON. POL'Y INST., NATIONAL SURVEY OF GIG WORKERS PAINTS A PICTURE OF POOR WORKING CONDITIONS, LOW PAY 2 (2022), https://files.epi.org/uploads/250647.pdf [https://perma.cc/M4FL-6LCV].

[39] *See, e.g.*, Natasha Lomas, *Gig Platform Report Calls for Transparency to Fix Abuse*, TECHCRUNCH (Dec. 13, 2021, 9:09 AM), https://techcrunch.com/2021/12/13/gig-platform-transparency-report [https://perma.cc/MZ5A-JNQM].

[40] Press Release, FTC, FTC to Send Refund Checks to Uber Drivers as Part of FTC Settlement (July 16, 2018), https://www.ftc.gov/news-events/news/press-releases/2018/07/ftc-send-refund-checks-uber-drivers-part-ftc-settlement [https://perma.cc/K2WE-N2SR].

[41] Press Release, FTC, *supra* note 8.

benefits), while still exerting significant control over how they operate.[42] Some practices are simple, like having algorithms rather than drivers set prices, while others are more nuanced, like providing bonuses for completing a target number of rides instead of higher baseline fares to disincentivize mixing gigs from competing platforms.[43]

The foothold gig platforms have established in today's economy and the ensuing array of potential abuses mean the task of crafting an enforcement approach to ensure that the benefits of this new economy are shared and that workers are protected is increasingly urgent.

B. Gig Work and Employment Law

A succession of state and federal laws providing standards, protections, and benefits for workers have passed over the last century — each the culmination of advocacy and organizing by workers, unions, and progressive reformers.[44] But many gig workers do not receive these benefits because they are not classified as employees. The protections they do have can be further limited by contract restrictions like arbitration clauses. Platforms are fighting tooth and nail to avoid providing the full benefits of employment status. These battles set the scene — and raise the stakes — for the FTC's foray into the gig world.

1. Employment and Labor Laws Protect Many Workers. — Many laws govern the relationship between employers and workers. At the federal level, the Department of Labor administers more than 180 statutes.[45] These include minimum wage and overtime requirements,[46] penalties for not providing health insurance,[47] requirements to split Social Security and Medicare taxes with employees,[48] protections for workplace health and safety,[49] regulations governing employer-provided pension or retirement benefit plans,[50] and unpaid leave requirements for childbirth and serious illness.[51] Civil rights laws protect employees from

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[42] Class Action Complaint ¶¶ 3–12, Gill v. Uber Techs., Inc., No. 22-600284 (Cal. Super. Ct. filed June 21, 2022) ("Defendants label their drivers independent contractors, yet deprive those drivers of economic independence by fixing the prices . . . for rides." *Id.* ¶ 3.).

[43] *Id.* ¶¶ 3–5.

[44] *See generally, e.g.*, Michael L. Wachter, *The Striking Success of the National Labor Relations Act*, *in* RESEARCH HANDBOOK ON THE ECONOMICS OF LABOR AND EMPLOYMENT LAW 427 (Cynthia L. Estlund & Michael L. Wachter eds., 2012).

[45] *Summary of the Major Laws of the Department of Labor*, U.S. DEP'T LAB., https://www.dol.gov/general/aboutdol/majorlaws [https://perma.cc/64WP-V9GG].

[46] Fair Labor Standards Act of 1938, 29 U.S.C. §§ 206–207.

[47] 26 U.S.C. § 4980H.

[48] *Id.* § 3111.

[49] Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651–675, 677–678, 42 U.S.C. § 3142-1.

[50] Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (codified as amended in scattered sections of 26 and 29 U.S.C.).

[51] Family and Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6 (codified as amended in scattered sections of 5 and 29 U.S.C.).

discrimination based on race, color, religion, sex, and national origin[52] and require many employers to make workplaces accessible and provide reasonable accommodations to employees who have disabilities.[53] Finally, labor laws empower covered workers through unions and collective bargaining.[54]

States have their own comprehensive laws governing employment. To start, many programs, like unemployment insurance, are federally funded but implemented by states.[55] Many states have employment statutes that parallel federal ones, often with additional protection. For example, thirty states require a minimum wage higher than the federal baseline.[56] Other regulations have no federal counterpart, like voting-leave requirements and guns-at-work laws.[57] State employment law often involves a mix of statutory and common law rules. And crucially, states can generally regulate *all* workplaces (unless preempted), while Congress is limited to those it can reach via its Commerce Clause power or some other constitutional hook.

2. Independent Contractors Receive Fewer Protections and Benefits. — Employment protections are great for the workers who receive them. But most of these protections are only available to workers classified as "employees."[58] Statutory regimes have varying tests for determining which workers are employees, but many gig platforms classify workers as independent contractors across the board, thereby excluding them from the full host of employee entitlements. Without employee status, workers are left with little more than whatever their contract happens to include. And they may face additional restrictions, too: it is contested whether antitrust laws, for example, restrict independent contractors' ability to bargain collectively.[59] Gig workers are of course not the first to be excluded; all labor and employment laws delineate who is protected, and these lines have frequently been drawn to exclude racial

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52 Civil Rights Act of 1964, tit. VII, 42 U.S.C. §§ 2000e to 2000e-15.

53 Americans with Disabilities Act of 1990, tit. I, 42 U.S.C. §§ 12111–12112.

54 National Labor Relations Act, 29 U.S.C. §§ 151–169.

55 *See, e.g.*, 26 U.S.C. § 3304.

56 *See State Minimum Wage Laws*, U.S. DEP'T LAB. (Jan. 1, 2023), https://www.dol.gov/agencies/whd/minimum-wage/state [https://perma.cc/5X4A-QALE].

57 *See* Joseph P. Shelton & Joseph L. Wilson, *State Voting Leave Laws Chart: Overview*, THOMSON REUTERS PRACTICAL L., https://us.practicallaw.thomsonreuters.com/2-522-2146 [https://perma.cc/SGC4-J59C]; Jonathan Hancock & Joann Coston-Holloway, *State Guns-at-Work Laws Chart: Overview*, THOMSON REUTERS PRACTICAL L., https://us.practicallaw.thomsonreuters.com/9-521-5091 [https://perma.cc/S5UV-RZU9].

58 The Fair Labor Standards Act, 29 U.S.C. § 206(a), for example, specifies minimum wage rates that employers shall pay to their "*employees*." *Id.* (emphasis added).

59 The First Circuit recently held that a labor exception to antitrust law protects independent contractors who organize for higher wages. Confederación Hípica de Puerto Rico, Inc. v. Confederación de Jinetes Puertorriqueños, Inc., 30 F.4th 306, 314–16 (1st Cir. 2022). But the question remains contested, and absent decisive resolution, even the threat of liability could chill gig workers from organizing. For more on this question, see generally Sanjukta M. Paul, *The Enduring Ambiguities of Antitrust Liability for Worker Collective Action*, 47 LOY. U. CHI. L.J. 969 (2016).

minorities and women.[60] Today, classification of millions of gig workers cuts across many of these same lines.[61]

In short: a lot hinges on how workers are classified. Platforms have strong incentives to (mis)classify workers as contractors.[62] Nearly a third of employee costs come from non-wage, non-salary expenses,[63] and contractor classification allows businesses to offload these costs.[64] Other rules, like overtime, provide similar incentives. Classifying workers as independent contractors can also prevent them from collectively bargaining, staving off further demands for better conditions.[65]

A variety of tests exist to distinguish employees from contractors. Some federal statutes use a multifactor test derived from tort,[66] while others use a simpler "economic reality" test[67] or even a hybrid of these common law–based approaches.[68] States use these tests too, but many also use the more expansive "ABC" test,[69] which classifies more workers as employees.

Broadly speaking, two ways to increase the protections available to gig workers under existing laws are (1) to ensure that misclassified workers (potentially a sizeable group) are classified correctly and receive the

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60 *See, e.g.*, *From Excluded to Essential: Tracing the Racist Exclusion of Farmworkers, Domestic Workers, and Tipped Workers from the Fair Labor Standards Act: Hearing Before the Subcomm. on Workforce Prots. of the H. Comm. on Educ. & Lab.*, 117th Cong. 3 (2021) (statement of Rep. Adams, Chairwoman, Subcomm. on Workforce Prots.).

61 *See* ANDERSON ET AL., *supra* note 33, at 4–5.

62 *See, e.g.*, Jennifer Pinsof, Note, *A New Take on an Old Problem: Employee Misclassification in the Modern Gig-Economy*, 22 MICH. TELECOMM. & TECH. L. REV. 341, 351–52 (2016); *The Effects of Misclassifying Workers as Independent Contractors: Joint Hearing Before the Subcomm. on Income Sec. & Fam. Support and Subcomm. on Select Revenue Measures of the H. Comm. on Ways & Means*, 110th Cong. 12 (2007) [hereinafter *Misclassification Hearing*] (statement of Sigurd R. Nilsen, Director, Education, Workforce, and Income Security, Government Accountability Office).

63 U.S. DEP'T OF THE TREASURY, THE STATE OF LABOR MARKET COMPETITION 12 (2022), https://home.treasury.gov/system/files/136/State-of-Labor-Market-Competition-2022.pdf [https://perma.cc/XD2F-UR4R].

64 *Misclassification Hearing*, *supra* note 62, at 2 (hearing background); *see also id.* at 4 (statement of Rep. McDermott, Chairman, Subcomm. on Income Sec. & Fam. Support).

65 *See supra* note 59 and accompanying text.

66 *E.g.*, *Independent Contractor (Self-Employed) or Employee?*, IRS (Jan. 27, 2023), https://www.irs.gov/businesses/small-businesses-self-employed/independent-contractor-self-employed-or-employee [https://perma.cc/44WF-L99X].

67 *E.g.*, *Fact Sheet 13: Employment Relationship Under the Fair Labor Standards Act (FLSA)*, U.S. DEP'T LAB. (Mar. 2022), https://www.dol.gov/agencies/whd/fact-sheets/13-flsa-employment-relationship [https://perma.cc/X45L-3KNT].

68 *See, e.g.*, Wilde v. County of Kandiyohi, 15 F.3d 103, 105 (8th Cir. 1994).

69 Under the ABC test, to classify a worker as a contractor, an employer must show: "(A) that the worker is free from . . . control and direction . . . ; (B) that the worker performs work that is outside the usual course of the hiring entity's business; and (C) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity." Dynamex Operations W., Inc. v. Superior Ct., 416 P.3d 1, 7 (Cal. 2018).

benefits they are already entitled to under existing law, or (2) to change the classification tests so that more workers qualify in the first place.[70]

The first approach offers limited potential. Litigation is expensive, uncertain, and by definition a piecemeal approach to a systemic problem. Even lawsuits that avoid being redirected into arbitration often end in monetary settlements that do not require prospective changes.[71] Governments could do more to ensure that workers who are entitled to employment protections are classified accordingly,[72] but resources[73] and political will can be limited.

A few states have tried the second approach, changing laws to clarify that gig workers qualify. But platforms spend hugely to fight changes.[74] Even in states that have given gig workers employee status by statute, platforms have fought back. California, for example, passed a law to classify rideshare and delivery gig workers as employees.[75] In response, Uber and Lyft wrote a ballot measure to give themselves a special exemption.[76] Platforms spent more than $200 million to support the initiative, which passed.[77] Similar fights are playing out in other states.[78]

Classification is a critical issue, and fights over its application to gig workers will continue. But this Chapter sets the classification question

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[70] Of course, a third option is to look beyond *existing* employment laws and to pass new laws that either add new protections for contractors or create a new, third category of workers in addition to contractors and employees. *See, e.g.*, Orly Lobel, *The Gig Economy & the Future of Employment and Labor Law*, 51 U.S.F. L. REV. 51, 64–69 (2017).

[71] *See, e.g.*, Chris Marr, *The Art of Settling but Not Resolving Gig Worker Status Disputes*, BLOOMBERG L. (Sept. 20, 2022, 5:30 AM), https://news.bloomberglaw.com/daily-labor-report/the-art-of-settling-but-not-resolving-gig-worker-status-disputes [https://perma.cc/H9EU-XSAE].

[72] *See, e.g.*, NAT'L EMP. L. PROJECT, INDEPENDENT CONTRACTOR MISCLASSIFICATION IMPOSES HUGE COSTS ON WORKERS AND FEDERAL AND STATE TREASURIES 3–5 (2020), https://s27147.pcdn.co/wp-content/uploads/Independent-Contractor-Misclassification-Imposes-Huge-Costs-Workers-Federal-State-Treasuries-Update-October-2020.pdf [https://perma.cc/KC5P-F5BJ].

[73] DAVID WEIL, IMPROVING WORKPLACE CONDITIONS THROUGH STRATEGIC ENFORCEMENT: A REPORT TO THE WAGE AND HOUR DIVISION 5–8 (2010), https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/strategicEnforcement.pdf [https://perma.cc/XJQ6-6XBH].

[74] *See, e.g.*, Wilfred Chan, *"Insidious and Seductive": Uber Funds New Lobbying Group to Deny Rights for Gig Workers*, THE GUARDIAN (Mar. 11, 2022, 2:15 PM), https://www.theguardian.com/business/2022/mar/11/uber-funds-new-lobbying-group-to-deny-rights-for-gig-workers [https://perma.cc/9B2M-93YB].

[75] CAL. LAB. CODE § 2750.3(a) (West 2020) (effective from Jan. 1, 2020, to Sept. 3, 2020), *repealed by* Act of Sept. 4, 2020, ch. 38, § 1, 2020 Cal. Stat. 1836.

[76] *See* Brian Melley, *Some Uber, Lyft Drivers Sue over California Ballot Measure*, AP NEWS (Jan. 12, 2021), https://apnews.com/article/uber-lyft-drivers-sue-california-prop-22-98f296965bb67d327693af785548fb57 [https://perma.cc/L6JF-LW8L].

[77] Taryn Luna, *California Voters Approve Prop. 22, Allowing Uber and Lyft Drivers to Remain Independent Contractors*, L.A. TIMES (Nov. 3, 2020, 11:45 PM), https://www.latimes.com/california/story/2020-11-03/2020-california-election-tracking-prop-22 [https://perma.cc/P5DH-VH43]. However, Proposition 22 is still being challenged in court. *See* Zachary Sorenson, *What's Next for California Drivers' Challenge to Prop. 22?*, ONLABOR (Feb. 19, 2021), https://onlabor.org/whats-next-for-california-drivers-challenge-to-prop-22 [https://perma.cc/K7Z4-DR7X].

[78] *See, e.g.*, Kellen Browning, *Massachusetts Court Throws Out Gig Worker Ballot Measure*, N.Y. TIMES (June 14, 2022), https://www.nytimes.com/2022/06/14/technology/massachusetts-gig-workers.html [https://perma.cc/37EU-BWHT].

aside to focus on the potential offered by consumer protection laws that are not traditionally thought to relate to the workplace. The consumer law approach suggested by the FTC[79] sidesteps the classification problem: the law and remedies do not depend on how a platform classifies its workers and apply to employees as well as contractors.[80]

3. Gig Work Contracts Can Further Limit Relief. — In theory, even a gig worker who is (mis)classified as a contractor could, well, *contract* for the benefits and protections statutorily offered by employment law. In practice, though, gig workers do not have this opportunity. Gig platforms tend to offer "take-it-or-leave-it" contracts that include lopsided terms that favor themselves.[81] Restrictive employment agreements are a widespread challenge — limiting the competitiveness of labor markets and reducing compensation that goes to workers — even where workers are classified as employees.[82] But employees have the baseline protections of employment and labor law to fall back on; independent contractors, by definition, have little more than the terms of their contracts.

Restrictive contracts can bind workers even after their work ends and can limit their ability to use the legal system. Contracts might include noncompete, nonsolicitation, nonrecruitment, nondisclosure, or no-poach agreements[83] and might also require workers to agree to arbitration (giving up their right to go to court) and to waive their ability to seek redress as part of a class.[84] Courts routinely enforce these provisions.[85]

Of course, employers can — and often do — impose restrictive terms in contracts with *employees*.[86] But the effects are particularly pernicious for independent contractors. Contractors have none of the baseline protections made available by law to employees. And contract restrictions — especially mandatory arbitration and class action waivers — can make it difficult for misclassified contractors to challenge their misclassification in the first place, since their employer has

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[79] *See infra* section C.4, pp. 1643–44.

[80] Of course, these approaches may still offer greater relative benefits to contractors than employees because contractors do not have the existing employment law framework as a backstop.

[81] FTC POLICY STATEMENT, *supra* note 11, at 11; *accord id.* at 11–12.

[82] *See* U.S. DEP'T OF THE TREASURY, *supra* note 63, at 13–14.

[83] *See id.* at 13; Exec. Order No. 14,036, 86 Fed. Reg. 36,987, 36,987 (July 14, 2021).

[84] *See* U.S. DEP'T OF THE TREASURY, *supra* note 63, at 18 (finding that "about 60 million [U.S.] workers" are subject to mandatory arbitration agreements). The Supreme Court has specifically held that employers can legally require class action waivers. AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 352 (2011); *see also* Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1632 (2018).

[85] *See, e.g.*, Memorandum and Order on Defendant's Motion to Compel Arbitration at 1–3, Wickberg v. Lyft, Inc., No. 18-12094 (D. Mass. Dec. 19, 2018) (granting Lyft's motion to compel arbitration based on the arbitration clause in its contract with its drivers); Memorandum and Order on Defendant's Motion to Compel at 1, Immediato v. Postmates, Inc., No. 20-12308 (D. Mass. Mar. 4, 2021), 2021 WL 828381, at *1 (granting Postmates' motion to compel arbitration). *But see* Rittmann v. Amazon.com, Inc., 971 F.3d 904, 907 (9th Cir. 2020) (affirming district court's denial of Amazon's motion to compel arbitration based on similar contractual clause).

[86] *See* U.S. DEP'T OF THE TREASURY, *supra* note 63, at 13–14.

not only misclassified them but also required them to waive their ability to go to court to challenge that determination.[87] Moreover, state agencies typically cannot bring class actions on behalf of these workers unless empowered by statute.[88] And even when contracts include terms that a court would not enforce, workers may not venture a challenge and may therefore never discover that terms were unenforceable to begin with.

Ultimately, the minimal protections provided to independent workers, coupled with the obstacles to challenging restrictive terms in contracts and the difficulty of negotiating on an even footing for better terms, mean that gig platforms' classification and treatment of their workers are ripe for regulatory oversight and intervention.

C. Federal Consumer Protection: Law and Institutions

1. The Federal Trade Commission. — Creating an independent commission to combat corporate concentration was a crowning achievement of the turn-of-the-twentieth-century antitrust movement. Responding to the late Gilded Age's increasing concentrations of corporate power, Congress passed the Sherman Act[89] in 1890 to prohibit "contract[s], combination[s] . . . , or conspirac[ies], in restraint of trade or commerce."[90] But a conservative Supreme Court soon narrowed this new law's reach: in *Standard Oil Co. of New Jersey v. United States*,[91] the Court found that the Rockefeller family's Standard Oil Company — long one of the antitrust movement's bogeymen — was an illegal combination in restraint of trade and ordered that it be split up.[92] But in doing so, the Court shrank the scope of the Sherman Act by stipulating that its sweeping language should be held to the "standard of reason."[93] Balancing the law's broad objectives against the "freedom of contract,"[94] it held that not every "restraint of trade" is prohibited — only those that are

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[87] *See generally* Charlotte Garden, *Disrupting Work Law: Arbitration in the Gig Economy*, 2017 U. CHI. LEGAL F. 205, 205–06; *No Due Process, No Rights: How Forced Arbitration Enables Misclassification in the Gig Economy*, NAT'L INST. FOR WORKERS' RTS. (Aug. 11, 2021), https://niwr.org/2021/08/11/no-due-process-no-rights [https://perma.cc/2LQZ-X5WA].

[88] States can bring *parens patriae* suits on behalf of citizens but must show a "quasi-sovereign interest," Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 601 (1982), or must be explicitly permitted to do so by statute, *e.g.*, 15 U.S.C. § 15c(a)(1). But such suits may cause unforeseen harms by binding citizens to judgments from proceedings with weaker protections. *See, e.g.*, Ann Woolhandler & Michael G. Collins, *State Standing*, 81 VA. L. REV. 387, 503, 512 (1995).

[89] 15 U.S.C. §§ 1–7.

[90] *Id.* § 1.

[91] 221 U.S. 1 (1911).

[92] *Id.* at 75–82.

[93] *Id.* at 60.

[94] *Id.* at 69.

not reasonable.[95] The resulting "rule of reason"[96] delighted businesses.[97] Stocks jumped.[98]

The FTC was conceived in response — part of a "frontal[] attack"[99] by President Wilson and Congress against the Supreme Court's restrictive "rule of reason."[100] The Federal Trade Commission Act[101] (FTC Act), signed by President Wilson in 1914,[102] created an independent, five-member commission with a "broad and flexible mandate" and a "wide-ranging" combination of both investigatory and prosecutorial powers.[103]

In addition to creating the FTC, the law banned "unfair methods of competition."[104] This prohibition was specifically crafted to be broader than the Sherman Act as construed in *Standard Oil*.[105] But Congress left it to the FTC to fill in the statute's substance and "determine what practices were unfair."[106] As the Senate Report explained, "there were too many unfair practices to define, and after writing 20 of them into the law it would be quite possible to invent others."[107]

Over the ensuing decades, the FTC began building out this broad authority, including by targeting corporate practices that were unfair to or deceived consumers.[108] But the Court again stepped in to limit a statute's scope in favor of business, holding in *FTC v. Raladam Co.*[109] that only unfair acts that harmed "present or potential competitors," as opposed to members of the public, were prohibited by the FTC Act.[110] So Congress responded once more,[111] amending the FTC Act to

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[95] *The Antitrust Laws*, FTC, https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/antitrust-laws [https://perma.cc/R795-ARAS].

[96] *Standard Oil*, 221 U.S. at 62. *See generally* H.L. Wilgus, *The* Standard Oil *Decision; The Rule of Reason*, 9 MICH. L. REV. 643 (1911).

[97] *See Business Likes Oil Decision: Corporations Look Forward to a Prosperous Period on Settled Basis*, N.Y. TIMES, May 17, 1911, at 1.

[98] Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 ANTITRUST L.J. 1, 13 (2003) (exploring the FTC's evolution from 1921 to 1961).

[99] *Id.* at 55.

[100] *Id.* at 55–56.

[101] Pub. L. No. 63-203, 38 Stat. 717 (1914) (codified as amended at 15 U.S.C. §§ 41–58).

[102] *Our History*, FTC, https://www.ftc.gov/about-ftc/history [https://perma.cc/QT6P-BXSB].

[103] Winerman, *supra* note 98, at 5–6; *see also id.* at 97.

[104] Federal Trade Commission Act, Pub. L. No. 63-203, § 5, 38 Stat. 717, 719–21 (1914).

[105] Indeed, "[t]he Supreme Court has said that all violations of the Sherman Act" *also* "violate the FTC Act." *The Antitrust Laws*, *supra* note 95; *see, e.g.*, FTC v. Motion Picture Advert. Serv. Co., 344 U.S. 392, 394–95 (1953) (citing, inter alia, Fashion Originators' Guild of Am., Inc. v. FTC, 312 U.S. 457, 463, 466 (1941)).

[106] S. REP. NO. 63-597, at 13 (1914).

[107] *Id.*

[108] *See generally* Marc Winerman, *The FTC at Ninety: History Through Headlines*, 72 ANTITRUST L.J. 871, 877–85 (2005).

[109] 283 U.S. 643 (1931).

[110] *Id.* at 649.

[111] *See* Robert E. Freer, Comm'r, FTC, Address Before the Annual Convention of the Proprietary Association: The Wheeler-Lea Act (May 17, 1938), https://www.ftc.gov/system/files/documents/public_statements/676351/19380517_freer_whe_wheeler-lea_act.pdf [https://perma.cc/EQ4F-C6TM].

explicitly prohibit "unfair or deceptive acts or practices" in 1938.[112] Like the original FTC Act, this provision was designed to expand statutory authority that had been narrowed by the Court, in this case to give the FTC broad power to "prevent such acts or practices which injuriously affect the general public as well as those which are unfair to competitors."[113]

Today, the FTC pursues its antitrust and consumer protection missions in parallel,[114] and its policy statement on the gig economy contemplates leveraging *both* of these authorities.[115] The antitrust angle is beyond the scope of this Chapter. Instead, the remaining sections focus specifically on the FTC's unique consumer protection authorities, which have inspired similar statutes in many states.

2. Unfair or Deceptive Acts or Practices. — As amended in 1938, the FTC Act now widely prohibits "unfair or deceptive acts or practices in or affecting commerce."[116] This language sweeps broadly, but the FTC and courts have refined its scope over the intervening decades.

Originally, "injury to consumers" was but one factor the FTC considered to determine whether a practice was unfair.[117] In 1972, the Supreme Court upheld the agency's broad leeway to "measur[e] a practice against the elusive, but congressionally mandated standard of fairness" and to "consider[] public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws."[118] But during the Reagan Administration, the FTC limited itself by adopting a narrower test,[119] which Congress later codified.[120] Accordingly, to be deemed unfair under current law, a practice must cause or be likely to cause consumer injury that is (1) "substantial," (2) "not reasonably avoidable by consumers themselves," and (3) "not outweighed by countervailing benefits to consumers or to competition."[121]

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112 Wheeling-Lea Act, Amendments, Pub. L. No. 75-447, sec. 3, § 5(a), 52 Stat. 111, 111 (1938).

113 H.R. REP. NO. 75-1613, at 3 (1937).

114 *Mission*, FTC, https://www.ftc.gov/about-ftc/mission [https://perma.cc/XDE9-5PJC].

115 *See* FTC POLICY STATEMENT, *supra* note 11, at 8–15.

116 15 U.S.C. § 45(a)(1). As a hook for federal jurisdiction, the prohibition covers only acts or practices "in or affecting commerce." *Id.*

117 The FTC had three original factors for unfairness: "(1) whether the practice . . . offends public policy . . . [;] (2) whether it is immoral, unethical, oppressive, or unscrupulous; [and] (3) whether it causes substantial injury to consumers (or competitors or other businessmen)." Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, 29 Fed. Reg. 8324, 8355 (July 2, 1964) (to be codified at 16 C.F.R. pt. 408).

118 FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 244 (1972).

119 *See* Letter from Michael Pertschuk, Chairman, FTC, et al. to Wendell H. Ford, Chairman, Consumer Subcomm. of the S. Comm. on Com., Sci. & Transp. & John C. Danforth, Ranking Member, Consumer Subcomm. of the S. Comm. on Com., Sci. & Transp. (Dec. 17, 1980) (policy statement on unfairness), *in* Int'l Harvester Co., 104 F.T.C. 949 app. at 1070–76 (1984).

120 *See* J. Howard Beales, Former Dir., Bureau of Consumer Prot., The FTC's Use of Unfairness Authority: Its Rise, Fall, and Resurrection (May 30, 2003), https://www.ftc.gov/news-events/news/speeches/ftcs-use-unfairness-authority-its-rise-fall-resurrection [https://perma.cc/HM4H-E3JK].

121 15 U.S.C. § 45(n).

The FTC has similarly expounded its interpretation of the "deceptive" prong of its authority under section 5 of the FTC Act. In a 1983 policy statement, it explained that deception must involve (1) "a representation, omission or practice that is likely to mislead" a consumer who (2) is "acting reasonably in the circumstances," and (3) the deception must be "material."[122]

In addition to these broad authorities, the FTC Act also regulates some specific acts and practices. Some provisions declare specified acts or practices to be unlawful and unfair or deceptive.[123] Others reiterate the FTC's enforcement authority in specific contexts.[124]

Unlike the Sherman Act's substantive provisions, which the Supreme Court has held "took their origin in the common law,"[125] the restrictions on unfair or deceptive acts or practices created entirely *new* substantive rights, designed by Congress to go beyond the protections previously available under common law or statutes.[126] After Congress gave this new power to the FTC in 1938, many states followed suit beginning in the 1960s, creating their own equivalent "Unfair and Deceptive Acts and Practices," or "UDAP," statutes.[127] Some of these statutes now go beyond the federal equivalent, while others are narrower.[128] Because such authorities all had their origins with the 1938 FTC Act amendments (also known as the Wheeler-Lea Act) and the FTC, understanding the scope of the FTC's authority can be instructive for state enforcement as well.

Finally, while the FTC Act both created the Commission and set out substantive provisions of law for it to enforce, the FTC now has responsibility for enforcing a host of other statutes as well — more than seventy in total.[129]

3. The FTC Enforcement Process. —

(a) Investigations. — The FTC can conduct investigations to inform its enforcement and rulemaking. The FTC Act authorizes the

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[122] Letter from James C. Miller III, Chairman, FTC, to John D. Dingell, Chairman, H. Comm. on Energy & Com. (Oct. 14, 1983) (policy statement on deception), *in* Cliffdale Assocs., Inc., 103 F.T.C. 110 app. at 175 (1984).

[123] *See, e.g.*, 15 U.S.C. § 52 (false advertisements).

[124] *See, e.g.*, *id.* § 45b(d) (form contracts, but notably not employment contracts, *id.* § 45b(a)(3)(B)); *id.* § 45d(a)–(b) (substance use disorder treatment services and products).

[125] Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 51 (1911).

[126] *See* James Cooper & Joanna Shepherd, *State Unfair and Deceptive Trade Practices Laws: An Economic and Empirical Analysis*, 81 ANTITRUST L.J. 947, 947 (2017).

[127] *Id.* at 953–54. Many of these statutes were modeled on the 1964 Uniform Deceptive Trade Practices Act and the 1967 Model Unfair Trade Practices and Consumer Protection Law. Jeffrey Naimon et al., *Under the Microscope: A Brief History of UDAP Laws and Predictions for Post–Dodd Frank Developments*, CONSUMER FIN. SERVS. L. REP., Oct. 27, 2010, at 3, 4.

[128] *See generally* NAT'L CONSUMER L. CTR., CONSUMER PROTECTION IN THE STATES app. C (2018), https://www.nclc.org/wp-content/uploads/2022/08/udap-appC.pdf [https://perma.cc/7WSC-LL7M].

[129] *See Legal Library: Statutes*, FTC, https://www.ftc.gov/legal-library/browse/statutes [https://perma.cc/U6DF-SXSL].

agency to "prosecute any inquiry necessary to its duties"[130] and allows investigations using various types of compulsory process including civil investigative demands.[131] The agency can publicize results of targeted or general investigations where disclosure serves the public interest.[132]

(b) Enforcement. — If an investigation gives the FTC reason to believe a target has violated the law, the agency can intervene, either by initiating internal administrative proceedings or suing in federal district court.[133] Internal proceedings are conducted by an administrative law judge and are appealable to a federal court of appeals.[134]

(c) Rulemaking. — The FTC can promulgate interpretive rules, policy statements, and rules defining specific acts and practices as "unfair or deceptive."[135] However, the FTC Act imposes rulemaking requirements that are much more burdensome than is the standard Administrative Procedure Act process.[136] As a result, FTC rulemaking takes nearly six years on average, while the few rules that the FTC is allowed to make through standard notice-and-comment rulemaking average less than one year to promulgate.[137] The FTC has also imposed additional limitations through its own internal rules and structure.[138] Recently, though, the agency has foreshadowed a greater appetite to use its rulemaking power, streamlining its internal process for rulemaking[139] and creating a rulemaking group within its general counsel's office.[140]

(d) Remedies. — Under section 5(b) of the FTC Act, the agency can obtain only prospective, injunctive relief, as opposed to money damages, when it is administratively enforcing against first-time violations of

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[130] 15 U.S.C. § 43.

[131] *Id.* §§ 46, 49, 57b-1; *see also A Brief Overview of the Federal Trade Commission's Investigative, Law Enforcement, and Rulemaking Authority*, FTC (May 2021) [hereinafter *FTC Authorities*], https://www.ftc.gov/about-ftc/mission/enforcement-authority [https://perma.cc/DNH3-V4KC].

[132] *FTC Authorities*, *supra* note 131 (quoting 15 U.S.C. § 46(f)).

[133] 15 U.S.C. § 45(b), (m)(1)(A).

[134] *FTC Authorities*, *supra* note 131.

[135] 15 U.S.C. § 57a(a)(1).

[136] For a distillation of the additional requirements imposed on the FTC's rulemaking process by the federal Lemon Law, 15 U.S.C. §§ 2301–2312, see Jeffrey S. Lubbers, *It's Time to Remove the "Mossified" Procedures for FTC Rulemaking*, 83 GEO. WASH. L. REV. 1979, 1982–84 (2015).

[137] Lubbers, *supra* note 136, at 1988–89, 1995.

[138] Statement, Rebecca Kelly Slaughter, Comm'r, FTC, Statement Regarding the Adoption of Revised Section 18 Rulemaking Procedures 1–2 (July 1, 2021), https://www.ftc.gov/system/files/documents/public_statements/1591522/joint_rules_of_practice_statement_final_7121_1131am.pdf [https://perma.cc/U5XV-LAWV] (noting that in the 1980s, the FTC "radically reduce[d]" its own rulemaking capacity).

[139] Press Release, FTC, FTC Votes to Update Rulemaking Procedures, Sets Stage for Stronger Deterrence of Corporate Misconduct (July 1, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/07/ftc-votes-update-rulemaking-procedures-sets-stage-stronger-deterrence-corporate-misconduct [https://perma.cc/CCY9-FQJE].

[140] Press Release, FTC, FTC Acting Chairwoman Slaughter Announces New Rulemaking Group (Mar. 25, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/03/ftc-acting-chairwoman-slaughter-announces-new-rulemaking-group [https://perma.cc/Z5B5-CTKF].

section 5's prohibition on unfair or deceptive acts or practices.[141] As a general matter, in order for monetary restitution or punitive damages to be available, a party must violate a final FTC order or a specific rule promulgated to define a practice as unfair or deceptive.[142]

4. The FTC's Foray into the Gig Economy. — The FTC has already taken individual enforcement action against gig platforms (like Amazon) that violate the law. But recently, the agency has signaled its intent to take a more comprehensive and strategic approach. In March 2022, the Commission sought comment on "how it can most effectively . . . address certain deceptive or unfair acts or practices involving the use of false, unsubstantiated, or otherwise misleading earnings claims" by gig platforms and in various other contexts.[143] In July 2022, the FTC formalized an agreement with the National Labor Relations Board, setting out various gig platform practices as an area of shared concern.[144] And most recently, in its September 2022 policy statement, the FTC announced plans to take comprehensive aim at gig platforms.[145] Citing concerns about working conditions in this rapidly expanding industry, the Commission announced its intent to use its full authority to "[p]rotect[] these workers from unfair, deceptive, and anticompetitive practices."[146]

The statement identified three areas of concern: (1) control without responsibility, (2) diminished bargaining power, and (3) concentrated markets.[147] The FTC explained that while many platforms advertise gigs as flexible and independent, in reality workers are subject to a

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[141] 15 U.S.C. § 45(b); Rohit Chopra & Samuel A.A. Levine, *The Case for Resurrecting the FTC Act's Penalty Offense Authority*, 170 U. PA. L. REV. 71, 82 (2021). However, monetary relief may be available as part of a settlement agreement, even for first-time violations. *See id.*

[142] Chopra & Levine, *supra* note 141, at 82–83. Rohit Chopra and Samuel Levine, former and current senior FTC officials, lay out a helpful table of the various sources of statutory authority under which the FTC can seek monetary relief, the requirements for triggering such relief, and the remedies available. *See id.* at 84–85 tbl.1. Before 2021, the FTC could seek monetary relief through its section 13(b) authority — an important method by which the FTC brings enforcement actions in federal court. Statement, Rebecca Kelly Slaughter, Acting Chairwoman, FTC, Statement on the U.S. Supreme Court Ruling in *AMG Capital Management LLC v. FTC* (Apr. 22, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/04/statement-ftc-acting-chairwoman-rebecca-kelly-slaughter-us-supreme-court-ruling-amg-capital [https://perma.cc/U939-KY6R]. However, in *AMG Capital Management, LLC v. FTC*, 141 S. Ct. 1341 (2021), the Supreme Court largely defanged the FTC's enforcement power by ruling that the agency cannot use section 13(b) to seek monetary relief. *Id.* at 1347–49, 1352.

[143] Deceptive or Unfair Earnings Claims, 87 Fed. Reg. 13,951, 13,953 (proposed Mar. 11, 2022) (to be codified at 16 C.F.R. pt. 462).

[144] Memorandum of Understanding Between the Federal Trade Commission (FTC) and the National Labor Relations Board (NLRB) Regarding Information Sharing, Cross-Agency Training, and Outreach in Areas of Common Regulatory Interest 1 (July 19, 2022), https://www.nlrb.gov/sites/default/files/attachments/pages/node-7857/ftcnlrb-mou-71922.pdf [https://perma.cc/7GTP-KMRD].

[145] FTC POLICY STATEMENT, *supra* note 11, at 1.

[146] *Id.*; *see also* Statement, Rebecca Kelly Slaughter, Comm'r, FTC, Statement on FTC Policy on Enforcement Related to Gig Work (Sept. 15, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/rks-gig-worker-policy-statement.pdf [https://perma.cc/TSN5-BNA8].

[147] FTC POLICY STATEMENT, *supra* note 11, at 4–6.

significant degree of employer control over their work — characteristic of an employer-employee relationship.[148] The conduct the agency intends to scrutinize includes the "promises gig platforms make, or information they fail to disclose, about the financial proposition of gig work."[149]

The two remaining areas were not framed as unfair or deceptive practices. Instead, the inability of gig workers to challenge platforms in court or through collective bargaining (exacerbated by the power imbalance between gig platforms and gig workers) and the relative lack of competition in the concentrated gig markets make gig workers more vulnerable to unfair and deceptive practices.[150] Moreover, concentration in gig markets can enable platforms to "exert market power," including by "suppress[ing] wages . . . , reduc[ing] job quality, or impos[ing] onerous terms."[151]

The FTC identified a variety of practices that may fall within its consumer protection authority, including making "[f]alse, misleading, or unsubstantiated claims about earnings,"[152] "withholding money owed to workers without consent,"[153] and using "nonnegotiable contracts [with] lopsided provisions."[154] Crucially, the FTC asserted that protections do not depend on how gig companies classify their workers.[155]

D. Consumer Protection and the Gig Economy

The FTC can use the full scope of its authorities to clamp down on gig platforms that take advantage of their workers. This could include a mix of investigations, individual enforcement actions, and rulemaking.

The FTC can investigate gig platforms, leveraging compulsory process to explore practices that are often not transparent to workers. Not only can the FTC obtain information that can later be used in enforcement actions, but the agency can also publicize what it discovers. Publication alone might help put workers in a better bargaining position; it could also spur enforcement by other government actors and elicit more pointed criticism from customers and workers. And even "naming and shaming" platforms might encourage changes.[156]

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148 *Id.* at 4. In 2014, FedEx Ground workers prevailed with a similar argument in the Ninth Circuit, albeit in the context of a misclassification dispute. The court reversed an MDL court's finding that the workers were employees in spite of FedEx's assurances of independence and flexibility. Alexander v. FedEx Ground Package Sys., Inc., 765 F.3d 981, 984–88, 991 (9th Cir. 2014).

149 FTC POLICY STATEMENT, *supra* note 11, at 5.

150 *Id.* at 5–6. For discussion of the potential limits antitrust laws might impose on gig workers who are classified as independent contractors, see *supra* note 59 and accompanying text.

151 FTC POLICY STATEMENT, *supra* note 11, at 6.

152 *Id.* at 8.

153 *Id.*

154 *Id.* at 11.

155 *Id.* at 7 ("'[C]onsumer' in the FTC Act 'is to be read in its broadest sense.'" *Id.* at 7 n.28. (quoting S. REP. NO. 93-151, at 27 (1973)).).

156 *Cf.* Sharon Yadin, *Regulatory Shaming*, 49 ENV'T L. 407, 410–11, 410 n.16 (2019).

Of course, the real bite will come once the FTC develops substantive rules for gig platforms, whether iteratively through individual enforcement actions or broadly through rulemaking. Already, its cases and settlements with Amazon and Uber provide examples. While these actions were inherently limited to the individual platforms that were their subjects, the nationwide nature of the gig economy and the fact that many gig industries are dominated by a small number of players mean that even a limited number of enforcement actions could lead to improvements for large numbers of gig workers nationwide. Enforcement also creates precedent that can later be used as the basis for monetary relief, even if initial remedies are only prospective.

Finally, though more burdensome, rulemaking to declare certain acts unfair or deceptive could offer broader protections. Already, the FTC has initiated one such proceeding to target misleading money-making claims by gig platforms and other companies.[157] If the FTC finalizes this rule and others like it, it could seek monetary relief directly.

Still, it may seem odd for an agency conceived to protect markets and consumers to leverage its authorities on behalf of workers. How well might these tools work? The remainder of this section surveys the potential this new focus might offer gig workers, as well as limitations inherent in the FTC's structure and authorities that the agency must overcome.

1. Limitations. — While enforcement against gig platforms offers great potential, the FTC must overcome several legal, conceptual, and practical limitations.

(a) Legal Limitations. — The threshold hurdle the FTC must clear is its consumer harm standards. Section 5 of the FTC Act simply prohibits "unfair or deceptive acts or practices in or affecting commerce."[158] And while the legal tests for "unfair" practices and "deceptive" practices are separate, both have evolved to specifically hinge on harm *to consumers*.[159] To be unfair, an act or practice must cause or be likely to cause substantial injury to consumers.[160] To be deceptive, an act or practice must materially mislead or be likely to materially mislead consumers.[161] But in the context of a gig platform, many practices that might seem unfair or deceptive in the colloquial sense might harm gig workers but not the end customers. Of course, there may be instances where *both* workers and customers are deceived or treated unfairly, in

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[157] Press Release, FTC, FTC Takes Action to Combat Bogus Money-Making Claims Used to Lure People into Dead-End Debt Traps (Feb. 17, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/02/ftc-takes-action-combat-bogus-money-making-claims-used-lure-people-dead-end-debt-traps [https://perma.cc/6MEY-XX55].

[158] 15 U.S.C. § 45(a)(1).

[159] *See* FED. RSRV., CONSUMER COMPLIANCE HANDBOOK 1 (2016), https://www.federalreserve.gov/boarddocs/supmanual/cch/ftca.pdf [https://perma.cc/N5QD-KDLL].

[160] *Id.*

[161] *Id.*

which case the analysis is simpler.[162] But if the FTC wants to go after unfair or deceptive practices where customers are not harmed directly, it must still find a consumer harm hook.

One approach is to interpret "consumer" broadly to capture more than just the end customers who are using platforms. The FTC seemed to adopt this approach in its policy statement: in footnotes, the agency emphasized that "misconduct against *any consumer* — customers who use services offered through the platform, workers who supply labor, and businesses on or off the platform — is prohibited"[163] and that "the word 'consumer' in the FTC Act 'is to be read in its broadest sense.'"[164] The FTC offered some examples to support this broad reading in the gig economy context,[165] including its settlement with Amazon over its tipping mechanism (which misled both customers and drivers)[166] and a complaint against Uber that characterized drivers as "consumers who use the [Uber] App to locate Riders in need of transportation."[167] However, if the FTC is serious about pursuing more of these kinds of cases, this broad reading of "consumer" will likely be challenged, and it's not clear whether courts will uphold it.

Alternatively, the FTC could pursue a theory of indirect harm. Even if gig workers are the ones most directly injured as a result of an unfair act or practice, and assuming the workers are not considered "consumers" for purposes of the relevant test, the FTC could argue that the direct harm to workers ends up harming consumers indirectly. This is an inherently more attenuated position, and there may be circumstances where harm to workers arguably benefits customers more than it hurts them. For example, platforms may deceive workers about the pay they can expect. While lower pay is a clear detriment to gig workers, it may offer consumers benefits like depressed prices for gig services.

In the antitrust context, the FTC reinterpreted its section 5 authority to no longer be limited by the consumer welfare standard (which underpins other antitrust laws, including the Sherman Act).[168] Subsection 5(a)(1) includes both the antitrust and the consumer protection prongs of the FTC's section 5 authority under the FTC Act — the prohibitions on "unfair methods of competition in or affecting commerce" and "unfair or deceptive acts or practices in or affecting

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162 *See, e.g.*, Press Release, FTC, *supra* note 8; Sorenson, *supra* note 10.

163 FTC POLICY STATEMENT, *supra* note 11, at 1 n.3 (emphasis added).

164 *Id.* at 7 n.28 (quoting S. REP. NO. 93-151, at 27 (1973)).

165 *Id.* at 1 n.3.

166 *See* Press Release, FTC, *supra* note 8.

167 Uber Techs., Inc., 166 F.T.C. 203, 204 (2018).

168 *See* Statement, Lina M. Khan, Chair, FTC, Statement on the Withdrawal of the Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act (July 1, 2021), https://www.ftc.gov/system/files/documents/public_statements/1591498/final_statement_of_chair_khan_joined_by_rc_and_rks_on_section_5_0.pdf [https://perma.cc/NWD9-TCKK].

commerce," respectively.[169] Neither of these provisions explicitly incorporates consumer harm or welfare standards. In 1994, however, Congress explicitly codified the consumer injury standard for the FTC's unfair practices authority under section 5 but did not do the same for its competition authority.[170] As a result, the FTC does not have the same leeway to reinterpret the unfair acts or practices component of section 5 as it might for unfair competition or deception.

(b) Conceptual Limitations. — Even if the FTC can show that a challenged practice clears the relevant legal test, there is a broader, conceptual limitation to how effective this sort of enforcement can be. By design, the FTC Act prohibits only conduct that is unfair (resulting in substantial and unavoidable injury) or deceptive (materially misleading). Enforcement actions to address this sort of conduct are an important step and may well serve to stamp out some of the most "outrageous"[171] conduct. But there is an entire world of practices that deprive workers of benefits they would be entitled to if classified as employees — and even though requiring these benefits could be valuable as a matter of policy, it may not be "unfair" or "deceptive" for a gig platform not to provide them absent such a requirement. For example, a platform might pay a gig worker less than the equivalent of the federal minimum wage but be transparent about the amount of pay and therefore not violate the prohibition on deception. Gig workers might be deprived of a valuable and important benefit when platforms don't automatically withhold their income taxes or provide subsidized health insurance, but these failures might not constitute a substantial injury that would make the practice unfair. In short, FTC enforcement might be more suitable as a negative rather than an affirmative policy tool: better tailored to counter abuses than to provide new, affirmative *improvements* for workers along the lines of the landmark Progressive Era employment laws.

(c) Practical Limitations. — Finally, the FTC faces practical limitations as it considers more robust enforcement. Unless the FTC embarks on a potentially arduous rulemaking, which would likely extend at least into the next presidential term, it will be able to address only violations that have already been committed. The same case-by-case approach that enables the FTC to iteratively shape policy also relegates the agency to a reactive stance. This stance limits its ability to prescribe standards of conduct for platforms and means the agency can only address violations that have already been committed, at least in the near term.

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[169] 15 U.S.C. § 45(a).

[170] *See* Federal Trade Commission Act Amendments of 1994, Pub. L. No. 103-312, sec. 9, § 5(n), 108 Stat. 1691, 1695.

[171] Statement, Noah Joshua Phillips, Comm'r, FTC & Rebecca Kelly Slaughter, Acting Chairwoman, FTC, Statement on Amazon Flex Settlement (Feb. 2, 2021), https://www.ftc.gov/system/files/documents/public_statements/1586967/192_3123_amaon_flex_njp_and_rks_joint_statement.pdf [https://perma.cc/C27Q-UGG7].

Further, the FTC is notably underresourced — a pain point for generations of FTC leaders.[172] As one former FTC official observed, "even though the FTC now enforces eighty statutes in addition to the FTC Act, the FTC is significantly smaller today — in both funding and staffing — than it was in 1980."[173] While the FTC is of course not alone among government agencies in its desire for more funding, staffing and resource constraints will be a major practical limitation as the agency considers taking on a new enforcement portfolio on top of its existing work.

Finally, the FTC Act limits the penalties that can be awarded in enforcement cases. The Supreme Court's ruling in *AMG Capital Management, LLC v. FTC*[174] cabined the FTC's previously expansive reading of its authority to obtain monetary awards.[175] The agency can no longer seek "the return of illegally obtained funds" under its authority to seek a permanent injunction.[176] Now, the FTC can receive civil penalties only *after* it "has determined in a litigated administrative adjudicatory proceeding that a practice is unfair or deceptive *and* has issued a final cease and desist order."[177] If the subject of the order knowingly violates the order, and certain mens rea and temporal conditions are met, the FTC may pursue civil penalties.[178] Because the FTC cannot exact financial penalties when it finds a violation in the first instance, many of its judgments bear no direct costs beyond attorneys' fees, negative publicity, and compliance costs. Of course, the FTC can extract greater penalties in settlement agreements[179] and can punish subsequent violations more severely. Nevertheless, initial enforcement actions may have some deterrent effect but will probably be inadequate on their own.

2. Potential. — Even with these limitations in mind, FTC enforcement offers several potential benefits beyond the relief already available under current law. One baseline upside is obvious — in a world of dramatic underenforcement (and hamstrung enforcers), any additional scrutiny adds a layer of protection. This observation is particularly true because the FTC can take gig platforms to task where other agencies and workers themselves might not be permitted or practically able to.

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172 *See, e.g.*, David C. Vladeck, Former Dir., FTC Bureau of Consumer Prot., Prepared Testimony at Protecting Consumer Privacy: Hearing Before the S. Comm. on Com., Sci. & Transp. 3–9 (Sept. 29, 2021), https://www.commerce.senate.gov/services/files/FBC44208-86C3-4C17-8058-4D7BCFCA03F8 [https://perma.cc/TCH7-P5HD].

173 *Id.* at 1.

174 141 S. Ct. 1341 (2021).

175 *Id.* at 1347–49.

176 *Id.* at 1347 (quoting Brief for the Federal Trade Commission at 8, *AMG Cap. Mgmt.* (No. 19-508)).

177 *FTC Authorities*, *supra* note 131 (emphasis added).

178 *AMG Cap. Mgmt.*, 141 S. Ct. at 1349 (citing 15 U.S.C. §§ 45(m)(1)(B)(2), 57b(a)(2), 57b(d)).

179 *See, e.g.*, Lesley Fair, *FTC's $5 Billion Facebook Settlement: Record-Breaking and History-Making*, FTC (July 24, 2019), https://www.ftc.gov/business-guidance/blog/2019/07/ftcs-5-billion-facebook-settlement-record-breaking-and-history-making [https://perma.cc/3VLF-YQMT].

But the FTC's unique structure and authorities also offer distinct substantive and structural advantages both separate from and on top of traditional employment law and enforcement mechanisms.

(a) Substantive Possibilities. — FTC action could offer several substantive advantages. Its case-by-case approach could enable it to develop precedents for what practices are prohibited as unfair or deceptive that are specifically tailored to the gig economy. In doing so, the FTC could establish a floor for how platforms treat workers.

One way the FTC might do this is by holding platforms to their promises. Given the independent and atomized nature of gig work, platforms must make claims about the jobs they offer in order to recruit and retain workers. Platforms may frame gig jobs as an alternative[180] to traditional employment that provides choice, independence, flexibility, and, perhaps most significantly, earnings.[181] At minimum, FTC authorities can ensure that platforms follow through on these claims and that such pitches are not made in a deceptive manner. Claims about compensation are an obvious example. The FTC's Amazon settlement offers a striking example of particularly egregious deception about compensation and illustrates how the FTC can hold platforms accountable. But more nuanced forms of deception are possible too. For example, both Uber and Lyft use surge pricing to entice drivers to come to areas with high passenger demand.[182] However, incentive pay rates can disappear during the time it takes drivers to get to the surge location, meaning drivers acted on the platform's representations about compensation but did not receive the additional pay.[183]

But compensation isn't the only aspect of the job that platforms may make deceptive or misleading claims about. For example, the FTC's policy statement highlights how gig platforms often shift many of the costs and risks of their business onto workers — costs like startup expenses, training fees, and insurance.[184] Another underexplored angle the FTC might consider is holding platforms to the claims about independence that they need to make in order to justify classifying workers as contractors rather than employees. While we might typically think of classification as being something that is determined after the fact based on the nature of a job, the order of operations can be flipped: if a platform classifies a worker as a contractor, that could be thought of as a promise that the worker will have the independence and flexibility that contractor status requires. Any deception related to, for example,

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[180] *Drive*, UBER, https://www.uber.com/us/en/drive [https://perma.cc/5CYD-WKRE].
[181] *See, e.g.*, *id.*
[182] Class Action Complaint, *supra* note 42, ¶¶ 51–61.
[183] *Id.*
[184] FTC POLICY STATEMENT, *supra* note 11, at 4, 9–10.

the flexibility and choice[185] afforded to workers would stand unfavorably against a backdrop of unfulfilled promises. A settlement in this context might require a platform to give drivers the ability to set their own fares, for example. Finally, the FTC might argue that in certain contexts, withholding information from gig workers is unfair or deceptive.

How much the FTC might be able to leverage either case-by-case actions or broader rulemaking to craft substantive regulations for gig platforms is unclear. But the agency has clear authority to go after particularly egregious behavior, like lying about tipping mechanisms,[186] where action by gig workers or government actors may otherwise be precluded. And though it is untested how broadly the FTC could read "unfair and deceptive," the agency would likely have significant leeway. After all, these authorities were specifically crafted to give huge discretion to the agency — the FTC was empowered to start *from scratch* to create entirely new protections beyond those offered by the common law and to prevent injury to any part of the "general public."[187]

(b) Structural Benefits. — The FTC also has unique structural advantages over existing protection mechanisms. First, the FTC's authority to regulate, investigate, or bring an enforcement action is tied to *practices* rather than *people*. Many employment laws create individual entitlements or benefits, which employers must then provide. But the FTC can focus on whether specific systemic practices themselves are unfair or deceptive, leapfrogging questions of how individual workers are classified or what protections they are entitled by law to receive. And if the agency reaches a conclusion that is upheld, the practice itself can be directly regulated, rather than requiring litigation over the practice's application to individual workers or cases.

Second, the unfair and deceptive standard is indefinite and flexible[188] — by design. Not only is the FTC's jurisdiction under this authority flexible, but the agency is also tasked with interpreting the overall scope of its authorities in the first instance. Unlike some employment laws, like the statutorily codified minimum wage, the FTC Act enables the FTC to adapt to an evolving gig industry. This open-endedness also makes it more difficult for platforms to evade the law. Regulatory attention is not mandated by explicit terms in the statute; instead, the FTC has discretion in deciding which acts to bring within its authority.

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185 *See, e.g.*, Mike Robinson, Commentary, *I've Been a Full-Time Lyft Driver Since 2017. Here's How "Flexibility" and "Choice" Just Don't Apply to Underpaid "Gig Work" that Requires 50 Hours a Week*, FORTUNE (Aug. 17, 2022, 5:35 AM), https://fortune.com/2022/08/17/full-time-lyft-driver-flexibility-choice-act-underpaid-gig-work-pay-workers-rideshare-mike-robinson [https://perma.cc/96S2-MS5M].

186 *See generally, e.g.*, Amazon.com, Inc., 171 F.T.C. 860, 871–77 (2021) (decision and order).

187 H.R. REP. NO. 75-1613, at 3 (1937).

188 *See* Chris Jay Hoofnagle et al., *The FTC Can Rise to the Privacy Challenge, But Not Without Help from Congress*, BROOKINGS INST.: TECHTANK (Aug. 8, 2019), https://www.brookings.edu/blog/techtank/2019/08/08/the-ftc-can-rise-to-the-privacy-challenge-but-not-without-help-from-congress [https://perma.cc/4N8Z-WVD4].

Third, concentration in the gig economy could enable systemic enforcement. Because the gig industry is dominated by a handful of players, enforcement against one of these companies could yield changes that affect many workers. For example, if the FTC were to successfully challenge Uber's practice of not allowing drivers to set their own prices or not showing drivers the destination of the ride, Uber would have to change the policy nationwide, immediately reshaping work arrangements for thousands of workers. And similarities between how competing platforms operate mean that competitors would be motivated to follow suit, even without follow-on enforcement.

Fourth, while the FTC's case-by-case approach limits its ability to quickly effect broad change, it mirrors the iterative development of common law. This cumulative approach could address nuances between platforms, industries, and work structures and allow for flexibility and evolution without locking particular requirements into statute.

Finally, while the FTC is inherently more limited than Congress in its ability to effect nationwide changes, most of the legal changes being proposed in the gig economy context are statutes at the state level. Even comprehensive state legislation is (of course) geographically limited, and platforms can pit states against one another to try to keep the bar low. This backdrop highlights the benefits of FTC action over existing alternatives — even if FTC action is more limited in scope than what Congress might accomplish by statute, it can still have far-reaching benefits.

Conclusion

Federal consumer protection law offers a promising but limited solution to provide relief for gig workers. The FTC could target some of the more serious abuses gig workers face through enforcement proceedings, but legal and practical challenges remain: the agency's legal interpretations are likely to face scrutiny, and its enforcement approach is necessarily circumscribed to the parties before it.

Nevertheless, the FTC's entrance into the gig industry presents gig workers with an avenue to relief in a legal space that otherwise offers few if any protections. It also provides a model for states struggling to protect their gig workers. As the limited gig worker protections on the state level continue to falter in the face of challenges from gig platforms, states could mimic the FTC's approach under their own unfair and deceptive acts and practices laws[189] — which may be even broader than the FTC Act.[190] And state legislatures could act to explicitly incorporate workers (regardless of classification) into their consumer protection laws.

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[189] For a summary of state UDAP laws, see NAT'L CONSUMER L. CTR., *supra* note 128, at app. C.

[190] *See* Henry N. Butler & Joshua D. Wright, *Are State Consumer Protection Acts Really Little-FTC Acts?*, 63 FLA. L. REV. 163, 174–75 (2011).