The Deceptive Allure of a New Third Status of Worker

by
Coalition to Promote Independent Entrepreneurs

May 2016

Contact Person and Author
Russell A. Hollrah
Executive Director
Coalition to Promote Independent Entrepreneurs
1025 Connecticut Avenue, N.W.
Suite 1000
Washington, D.C. 20036
rhollrah@iecoalition.org

Dear Reader:

The Coalition to Promote Independent Entrepreneurs ("Coalition") recognizes the importance of the continued legal recognition of independent-contractor status to self-employed individuals, their clients and the American Economy.

The goal of the Coalition is to preserve and defend the independent contractor model and an individual's right to be self-employed. The Coalition fulfills its mission by educating the public and elected representatives about the importance of preserving an individual's right to work as an independent contractor and of a firm's right to do business with self-employed individuals, and by increasing the public's awareness of instances in which an erosion of those rights is taking place. In addition, the Coalition endeavors to facilitate collective action to resist such erosion, strengthen the legal recognition of independent-contractor status, and enhance the level of legal certainty for those individuals and firms that seek to enter into independent-contractor relationships.

For more information about the Coalition and how you can become involved in and support its efforts, please visit www.iecoalition.org or contact us today at info@iecoalition.org.

The Coalition to Promote Independent Entrepreneurs Status is a 501(c)(4) organization. Dues or contributions to IRC 501(c)(4) organizations may be deductible as business expenses under IRC 162. However, 20% of your contribution is non-deductible as a result of Coalition lobbying activity. Please consult your tax advisor concerning the tax treatment of your investment in this effort.

Executive Summary

A new iteration of a decades-old business model has caused some to question whether the current laws for determining whether an individual is an employee or independent contractor are too antiquated to appropriately determine the status of an individual who chooses to utilize this business model to gain access to client opportunities. The business model, commonly known as a broker, services referral agency or intermediary, helps match providers of a certain type of services with potential customers seeking those services. The principal difference between the new version of this business model, called a "sharing economy" or "gig economy" business model, and the traditional version is the use of advanced technology in the new version, to make it operate with greater efficiency.

In reaction to the new iteration of this business model, and the perceived inadequacy of current law to properly classify individuals who utilize it, some have proposed a new category of worker status. One that has attracted significant attention is a thoughtful proposal, titled *A Proposal for Modernizing Labor Laws for Twenty-First Century Work: The "Independent Worker"* (Dec. 2015), by Seth D. Harris and Alan B. Krueger on behalf of The Hamilton Project. This proposal is the focus of the discussion that follows.

It is submitted that the creation of a new third category of worker status – regardless of the reason – is fundamentally inadvisable. A new third status would create more problems than it would solve, and its principal effect would be to deny legitimate self-employed individuals access to a technologically supercharged intermediary through which they can efficiently gain access to client opportunities. It would force individuals who choose to do business with such an intermediary into a type of work relationship that they affirmatively chose to avoid, and would convert intermediaries into a very different type of business – that their owners did not choose to operate.

One of the problems with current law that the proposal seeks to address is that current labor and employment laws are not harmonized or applied consistently for purposes of determining worker status. But the authors' proposed new third category of worker status would only exacerbate the level of disharmony and confusion by treating self-employed individuals who obtain clients through an intermediary as employees for some purposes, but not others. To achieve a harmonized definition of "employee," it would seem that a better approach would be to amend the relevant laws so that they all follow the same definition for the term. In this regard, the most appealing definition of "employee" for achieving harmonization is the common-law, right-of-control, test.

While the authors characterize their proposal as "occupying a middle ground between traditional employees and independent workers," the proposed new category is anything but a "middle ground." It would represent an unprecedented expansion of the definition of "employee" for purposes of affected statutes.

The authors acknowledge that:

> Forcing these new forms of work into a traditional employment relationship could be an existential threat to the emergence of online-intermediated work, with adverse consequences for workers, consumers, businesses, and the economy.

Yet this is precisely what the proposal would accomplish; it would treat self-employed individuals who also satisfy the *independent worker* definition as employees for purposes of specified statutes. Moreover, because this proposal would not be confined to technology-based intermediaries, the "existential threat" the authors caution against would extend to all intermediaries, regardless of whether they utilize any technology.

The proposal would be patently unfair to those individuals who prefer to be self-employed and have determined that they can maximize their profits by engaging a third-party firm, namely, an intermediary, to help them find clients. The proposal would require a self-employed individual to forfeit self-employed status as a consequence of using a lawful marketing channel.

The proposal likewise would be unfair to those third-party firms that operate as pure marketing firms/brokers/services referral agencies/intermediaries, and have no interest in being the employer of the self-employed individuals with whom they do business. The additional administrative costs and heightened regulatory risks associated with an intermediary being treated as the employer for the specified purposes of each individual who utilizes the intermediary to gain access to a client opportunity would be excessive. Such a mandate would fundamentally change the nature of these businesses.

The proposal would create significant tax-compliance complexities for an independent worker. While the authors recommend imposing tax withholding on independent workers, they do not explicitly address how an independent worker would be treated for federal tax purposes in other respects. The proposal would create new federal-tax uncertainties and complexities for independent workers, while eliminating a bedrock distinction in the tax law that differentiates employees from independent contractors.

The proposal is premised on assertions and assumptions concerning the uncertain status of individuals who obtain clients through an intermediary, and concerning the intermediary business model itself – that are open to question.

The authors assert that one aspect of an independent worker's relationship with an intermediary that suggests an employment relationship is that the independent worker is "integral to the business of an intermediary." But this is not always true. There are many examples of brokers/services referral agencies being held *not* to be in the business of providing the same type of services as the individual, and of the individual's work being held *not* integral to business of the firm.

Another assertion by the authors in support of their claim that independent workers possess employee characteristics relative to an intermediary is that an intermediary sets the price for their services. This also is not always true, and is generally not true in the case of intermediaries that predate the sharing-economy business model.

Many intermediaries have no ability to withhold any taxes with respect to an independent worker, because an end-user client pays the individual service provider directly or through a third-party billing service or escrow account, and separately pays the intermediary its referral fee. These intermediaries do not make any payments to the independent worker. If the proposal were enacted, this particular type of intermediary business model might become more prevalent.

The proposal is premised on an unstated assumption that an independent worker does not choose to be self-employed, but that the choice is made by someone else i.e., the intermediary or the end-user client. The proposal does not appear to acknowledge the reality that many

individuals actually choose self-employment, and do not want the social-compact benefits intended for employees, or – at most – attach a lesser value to those benefits than to the right to be self-employed.

The creation of a new third status of worker that converts self-employed individuals into employees for certain purposes, simply because they also meet the definition of "independent worker," would be highly disruptive and unfair to the affected self-employed individuals who seek to retain their status. While it is not suggested that there are no intermediaries that misclassify workers, it is submitted that the mere fact that misclassification might exist is no justification for deeming all individuals who do business with an intermediary to be treated as statutory employees of the intermediary. Such a proposal is overly broad and would inflict significant financial harm on the affected individuals and intermediaries. It is submitted that a more pressing need at this time is for a harmonization of the general tests governing the determination of worker status, to enable individuals and companies to enter into mutually advantageous relationships – whether the individual be an employee or an independent contractor – with greater certainty that those relationships will be respected for purposes of all applicable laws.

Table of Contents

The Deceptive Allure of a New Third Status of Worker

Technological advances have been disrupting business for as long as technology has been advancing. A recent example is the disruption caused by a technological advancement giving rise to the ride-sharing industry, as exemplified by Uber and Lyft. The technological advancement that enabled the creation of these businesses consists generally of a technology platform through which buyers and sellers of a specific type of service can connect with each other, and do business with each other, on a nearly instantaneous basis.[1]

This new business model, commonly known as a "sharing economy" or "gig economy" business model, is not limited to transportation; it is now operated in many different industries.[2] It has caused some to question whether the current laws for determining whether an individual is an employee or independent contractor are too antiquated to appropriately determine the status of an individual who chooses to utilize this business model to obtain access to client opportunities.

Ironically, this business model has existed for many decades.[3] What is new is the use of advanced technology to make the business model operate more efficiently. The fundamental relationship between an "intermediary" and an individual who uses the intermediary to gain access to client opportunities remains largely the same – regardless of the extent to which the intermediary is technologically enhanced.

The arguably most profound market disruption caused by the ride-sharing innovation has little to do with the independent-contractor status of drivers. Many taxicab and limousine companies have for years operated with independent-contractor drivers.[4] The most disruptive aspect of the ride-sharing businesses is its entry into the highly regulated local-transportation market, resulting in the regulated sector of this market now having to compete against a new type of business that is completely unregulated.

It follows that any proposals concerning worker status intended to mitigate the disruption to the local-transportation market caused by Uber and Lyft would be misdirected. Moreover, the collateral damage that would result from an effort to address the Uber and Lyft market disruptions by changing the rules governing worker classification would be dramatic, widespread and harmful to the affected individuals and affected intermediaries.

It is submitted that the creation of a new third category of worker status – regardless of the reason – is fundamentally inadvisable. A new third status would create more problems than it would solve, and its principal effect would be to deny legitimate self-employed individuals access to a technologically supercharged intermediary through which they can efficiently gain access to client opportunities. It would force individuals who do business with such an intermediary

1. As will be discussed below, the basic business model that facilitates the matching of buyers and sellers of a specific type of service has existed for many decades. What makes this new iteration different is its ability, through the use of new technology, to accelerate the matching process so that it occurs nearly instantaneously.

2. *See, e.g., Thanks for Sharing: A Sourcebook for the Gig Economy, Joint Economic Committee*, (Mar. 21, 2016), available at http://www.jec.senate.gov/public/_cache/files/26c9a98a-6a13-4fa8-8e6e-f4a5d9a19430/sharing-economy-sourcebook.pdf.

3. In home care, for example, a nurse registry, which functions as an intermediary for matching caregivers with families, has been licensed in the State of Florida since 1947.

4. *See, e.g.*, Rev. Rul. 71-572, 1971-2 C.B. 347, 1971 IRB LEXIS 253 (1971); Priv. Ltr. Rul. 8905040 (Nov. 7, 1988).

into a type of work relationship that they affirmatively chose to avoid,[5] and would convert intermediaries into a very different type of business, which their owners did not choose to operate.

A policy proposal for the creation of a new third status that has attracted significant attention is a thoughtful proposal, titled *A Proposal for Modernizing Labor Laws for Twenty-First Century Work: The "Independent Worker"* (Dec. 2015)[6] by Seth D. Harris and Alan B. Krueger on behalf of The Hamilton Project.[7] This proposal will be the focus of the discussion that follows.

I. The Proposed New Third Category of Worker Status

The proposal recommends the enactment of federal and state legislation to define and establish a new third category of workers called *independent workers*. These workers would be accorded certain protections and benefits that would approximate the social compact[8] guaranteed to employees. The proposal is clear that independent workers would be treated for purposes of specified statutes as employees.

The authors define this proposed new category of *independent workers* broadly: as individuals who operate in a triangular relationship under which they provide services to customers identified with the help of *intermediaries*.[9] For these purposes, an *intermediary* would be defined generally as an entity, interposed between an independent worker and the ultimate customer, which helps facilitate a matching of the independent worker with the customer.

II. Authors' Rationale for Change

A. Current Law Creates Uncertainty Over Worker Status

One of the problems with current law that the proposal identifies, and seeks to address, is that current labor and employment laws are not harmonized or applied consistently for purposes of determining worker status.[10] The authors note that different statutes tend to define the term "employee" differently, depending upon the purpose a particular statute is intended to achieve. As a consequence, an individual could qualify as an independent contractor for purposes of one statute, e.g., the Internal Revenue Code, but not another, e.g., the Fair Labor Standards Act, because each of these statutes defines the term "employee" differently. The proposal recognizes

---

5. *See, e.g.*, A survey conducted by Crowded.com – a marketplace for on-demand workers – found that 80.2% of respondents want the 1099 (independent contractor) designation, while only 11.72% prefer W-2 (employee) status. SURVEY: ON-DEMAND WORKERS WANT 1099 STATUS, NOT W-2 CLASSIFICATION (Jan. 15, 2016), https://www.crowded.com/survey-on-demand-workers-want-1099-status-not-w2-classification/; Jonathan V. Hall & Alan B. Krueger, *An Analysis of the Labor Market for Uber's Driver-Partners in the United States*, 11 (2015), https://s3.amazonaws.com/uber-static/comms/PDF/Uber_Driver-Partners_Hall_Kreuger_2015.pdf (Uber drivers were asked, "If both were available to you, at this point in your life, would you rather have a steady 9-to-5 job with some benefits and a set salary or a job where you choose your own schedule and be your own boss?" 73% chose the latter – self- employment).

6. Seth D. Harris & Alan B. Krueger, *A Proposal for Modernizing labor Laws for Twenty-First Century Work: The "Independent Worker,"* (hereinafter the "Proposal") available at http://www.hamiltonproject.org/papers/modernizing_labor_laws_for_twenty_first_century_work_independent_worker.

7. THE HAMILTON PROJECT, http://www.hamiltonproject.org/about/.

8. The term "social compact" is a term the authors of the Proposal use to describe what they characterize as a "synthesis" to which the United States labor and employment laws have evolved "between the desire to enhance the efficiency of the operations of the labor market ... and to ensure that the employment relationship treats workers fairly in light of the unequal bargaining power that typifies most employee-employer relationships." Proposal, at p. 6.

9. *Id*. at 9.

10. *Id*. at 6.

that the existence of these different tests, that apply for different purposes, create economic inefficiencies for all parties concerned.[11]

Another problem the proposal seeks to address is the uncertainty associated with determining the status of an individual under the current tests, themselves, which can lead to long and costly litigation. The authors believe this problem is exacerbated by the tribunals responsible for making these decisions being influenced by factors other than the operative test, noting that "[a]s a practical matter, in too many cases conclusions are driven by a predetermined desired outcome rather than by objective analysis."[12]

B. Ability to Pool Benefits for Contractors and Expand the Social Compact

One social objective the proposal seeks to accomplish is an expansion to independent workers of what the authors refer to as the "social compact."[13] This expansion would allow independent workers to gain the advantages associated with obtaining benefits on a pooled basis, rather than on an individualized basis. In addition, the proposal would expand coverage under specified state and federal laws – that currently cover only employees – to also cover independent workers.

C. Risk that Companies Convert Traditional Employees into Independent Workers – Regulatory Arbitrage

A final objective the proposal would seek to accomplish is to establish a bulwark against employers converting traditional employees into sharing-economy workers and thereby avoid their "social compact" obligations. The authors refer to this risk as *regulatory arbitrage*.[14]

III. Firms that would be Affected by the Proposal

The proposal defines an *intermediary* as an entity through which independent workers gain access to end-user customers. The proposal identifies numerous characteristics of an intermediary that uses technology to match customers with independent workers.[15] By application of a "neutrality"

---

11. *Id*. at 5-6.
12. *Id*. at 6.
13. *Id*. at 6-7.
14. *Id.* at 5.
15. The characteristics of an intermediary are:
    - An intermediary creates a communications channel, commonly called an "app" that customers use to identify themselves as needing a service.
    - The intermediary's app directs the customer's request to independent workers and allows the independent workers to select which customers they choose to serve.
    - The intermediary does not assign customers to independent workers; rather, independent workers choose or decline to serve customers.
    - An intermediary may set certain threshold requirements for independent workers who are eligible to use its app, such as criminal background checks.
    - The intermediary may set the price for services provided by the independent worker.
    - The intermediary exercises no further control over how and whether a particular independent worker will serve a specific customer.
    - The intermediary typically is paid for its services with a predetermined percentage of the fee the customer pays to the independent worker.
    - The relationship can be fleeting, occasional or constant, at the discretion of the independent worker.
    - An independent worker may offer his or her services through multiple intermediaries.
    - Independent workers are integral to the business of the intermediary; the intermediary business lives or dies by the provision of services by independent workers.
    - Independent workers do not make themselves economically dependent on any single employer.

principle and a principle of treating like cases alike,[16] which the authors adopt, the proposal would treat as an intermediary any entity that performs the generic function of matching service providers with service recipients, regardless of whether the entity uses any technology.[17] This means that the term *intermediary* would include not only the new technologically enhanced market intermediaries, but also those that have operated for decades with varying degrees of technology.

An *intermediary* would be responsible under the proposal for ensuring that the *independent workers* who obtain customers through it receive the new social-compact benefits that the proposal would grant them.

IV. Proposed Treatment of Independent Workers

The proposal discusses the treatment of an *independent worker* for purposes of the following employment-based rights and duties:[18]

(a) Collective bargaining;

(b) Employee benefits;

(c) Civil rights protections;

(d) Tax withholding and FICA contributions;

(e) Workers' compensation;

(f) Wage and hour protections;

(g) Unemployment insurance; and

(h) Affordable care act and health insurance.

In essence, the proposal would treat an *independent worker* substantially the same as an employee for purposes of each of the foregoing, except (e), (f) and (g).[19] The proposed treatment

---

• Independent workers do not have an indefinite relationship with any employer.

• Independent workers do not relinquish control over their work hours or the opportunity for profit or loss.

• Some aspects of the methods and means of work – including price of their services – are controlled by the intermediary.

16. *Id*. at 14 ("Neutrality also requires that workers in 'old economy' jobs who meet the definition of independent worker, as opposed to independent contractor or employee, should be classified as 'independent workers.' For example, as argued in the analysis below, many taxi drivers who are currently classified as independent contractors could be deemed to be independent workers, depending on their terms and conditions of work. In this way, taxi drivers would be treated just like independent workers who provide rides through the Uber and Lyft platforms."); *Id*. at 22 ("Our view is that the application of our proposed independent worker category should not be limited to the online gig economy. In fact, the very nature of law—treating like cases alike—requires that this new category include any group of workers who satisfy the definition of independent workers we offered above. Accordingly, if there are workers in triangular relationships with intermediaries and customers, then they should be considered for independent worker status."); *Id*. at 23 ("Furthermore, assigning a similar legal status to workers in the same relationship with an intermediary, regardless of the nature of the technology employed, will support the neutrality principle.").

17. *Id*.

18. *Id*. at 15.

19. The proposal, if adopted, would create a new "slippery slope" risk that the employment-related statutes from which independent workers initially would be exempt under the proposal would over time gradually be expanded to cover them. In this regard, a recent precedent supporting this concern is the fate of home care workers. When the Congress amended the FLSA in 1974 to cover domestic workers, it exempted providers of companionship

of an independent worker for each of these purposes is described below.

A. Collective Bargaining

The proposal recommends that antitrust laws, or the National Labor Relations Act, be amended "to allow independent workers to organize for the purpose of aggregating their bargaining power so they may bargain successfully with their intermediaries over the terms and conditions of their work,"[20] and thereby influence their compensation and benefits.[21]

B. Employee Benefits

The proposal recommends that intermediaries be covered by a safe-harbor provision that would permit (but not require) them to pool independent workers for purposes of purchasing, providing or administering for them specified types of benefits and services[22] without such action being treated as an indication of an employment relationship. The proposal asserts that this would permit independent workers to gain access to a range of benefits at a lower price.[23]

C. Civil Rights Protections

The proposal recommends expanding the coverage of workplace antidiscrimination protections to cover independent workers.[24]

D. Tax Withholding and FICA

The proposal recommends requiring intermediaries to withhold and remit to the appropriate tax authorities the income and social-insurance taxes owed by independent workers with respect to the remuneration they receive.

In addition, the proposal would require that an intermediary pay the "employer share" of Federal Insurance Contributions Act ("FICA") taxes with respect to their remuneration.[25] This would replace an independent worker's duty to pay Self Employment Contribution Act ("SECA") taxes with respect to such remuneration.

The proposal asserts that tax withholding by intermediaries would reduce the administrative burden imposed on independent workers associated with paying their income and social insurance taxes;[26] and that, given the economies of scale, the intermediaries could provide these services with more economic efficiency and at a higher compliance rate than the independent workers could if left to comply with these duties on their own.[27]

---

services. During the years that followed, a campaign was undertaken to extend FLSA coverage to companionship services providers. Although the Congress refused to amend the FLSA to repeal the exemption, the DOL in November 2013 accomplished a de facto repeal of the exemption through regulations. S*ee, Application of the Fair Labor Standards Act to Domestic Service*, 78 FR 60454 (Oct. 1, 2013). In this regard, the advocacy already has begun for the proposition that this proposal does not go far enough, and that coverage under the Fair Labor Standards Act should be expanded to include independent workers. *See*, Ross Eisenbrey and Lawrence Mishel, *Uber business model does not justify a new 'independent worker' category*, ECONOMIC POLICY INSTITUTE (Mar. 2016).

20. Proposal, at p. 15.

21. *Id*. at 6.

22. Cited examples of the services that could be offered include insurance services, tax preparation services and financial services. *Id*. at 17.

23. *Id*.

24. *Id*. at 17-18.

25. *Id*. at 18.

26. *Id*.

27. *Id*.

E. Workers' Compensation Insurance

While the proposal would not mandate that an intermediary provide independent workers with workers' compensation coverage, it would permit an intermediary to provide such coverage, on an elective basis, without transforming the relationship into employment. In exchange for providing such coverage, an intermediary (but not the end-user client) would receive the limited liability protection from tort lawsuits that is currently offered to employers that provide the coverage.[28]

F. Wage and Hour Protections

The proposal does not recommend that independent workers be covered by the overtime or minimum-wage requirements that the Fair Labor Standards Act imposes on an employer with respect to its employees.[29] This decision was based in part on the difficulty of measuring hours worked by an independent worker. The proposal recommends that these matters be the subject of collective bargaining with an intermediary.[30]

G. Unemployment

Acknowledging that independent workers control when and whether they will work, the proposal does not recommend extending coverage to independent workers under federal or state unemployment insurance programs.[31]

The proposal would encourage and permit intermediaries to pool resources and create a private unemployment insurance system in which individual accounts could be created for independent workers who stop working. Such a system, the proposal notes, could be a subject of collective bargaining between independent workers and intermediaries.[32]

H. Affordable Care Act

The authors conclude that determining eligibility for the employer mandate under the Affordable Care Act ("ACA") and for coverage under its mandate would be problematic, due to the difficulty of measuring the number of hours that independent workers work. Nonetheless, the proposal recommends that intermediaries be required to pay a contribution equal to five percent (5%) of an independent worker's earnings (net of commissions).[33] This payment would be intended to address the *free rider dilemma* that the proposal suggests arises when companies contract with nonemployees and are not subject to the same ACA compliance burden as employers.[34]

V. Comments and Concerns

A. Lack of Harmonized Definition of Employee

The authors bring much-deserved attention to a fundamental problem of current law, namely, the lack of a harmonized definition of "employee" for purposes of federal and state laws.[35] But the authors' proposed new third category of worker status would only exacerbate the level of disharmony and confusion by treating self-employed individuals who obtain clients through an intermediary as employees for some purposes, but not others.

---

28. *Id*. at 19-20.
29. *Id*. at 20.
30. *Id*.
31. *Id*.
32. *Id*.
33. *Id*. at 20-21.
34. *Id*. at 21.
35. *See*, Exhibit 1 for a table illustrating the different definitions of the term employee for different purposes.

To achieve a harmonized definition of "employee," it would seem that a better approach would be to amend the relevant laws so that they all follow the same definition for the term. In this regard, the most appealing definition of "employee" for achieving harmonization is the common-law, right-of-control, test. As its name implies, this is the test that applies in the absence of a statute. It also is the test that applies for purposes of many statutes at this time.[36]

A related concern that the proposal seeks to address is the possibility that companies working with intermediaries could organize work in such a way as to convert jobs that were traditionally performed by employees into sharing-economy jobs.[37] The authors suggest that companies would have an incentive to do this in order to avoid their social-compact responsibilities.[38] The authors call this *regulatory arbitrage*. This concern does not appear to take into account the fact that the intermediary business model has existed for many decades. If the authors' fears were real, the *regulatory arbitrage* about which they are concerned already would have occurred, as the intermediaries that preexisted the technologically enhanced versions were fully capable of accomplishing this.

It is submitted that the best defense against the threat of *regulatory arbitrage* is for all relevant statutes to adopt the common-law, right-of-control test for determining worker status. One of the strongest attributes of the common-law test is that it requires a company to make a fundamental business decision that will determine the status of an individual as an employee or independent contractor. If a company retains the right to control the means and methods of an individual's performance, the individual will be an employee; and only if the company is willing to define the objective, and permit an individual to determine the manner and means for accomplishing the objective, can the individual qualify as an independent contractor. Facing this common-law choice, a company would be disinclined to outsource to a sharing-economy worker any function over which it is not prepared to abdicate control.

The common-law, right-of-control test is agnostic as to whether the requisite right of control is retained through technology or some other means. If a firm retains the requisite right of control over the means and methods of an individual's performance, the firm is deemed the employer of the individual – regardless of whether the right of control is achieved through the use of technology.

It follows that instead of creating a new test that exacerbates the current disharmony as to the definition of the term "employee," consideration should be given to harmonizing the general test for "employee" for purposes of the relevant statutes, so that they all define the term "employee" the same. A harmonized general test would achieve greater certainty for all parties. The common-law, right-of-control test would be a prudent choice in this regard, as it provides a clear substantive trade-off that differentiates the two classes of individuals based on a business's right of control over the means and methods of an individual's performance, and it is the test that applies in the absence of any statute.

B. Dramatic Expansion of the "Employee" Classification

While the authors claim to "propose a new legal category of workers, which [they] call 'independent workers,' who occupy a middle ground between traditional employees and independent

36. The common-law right-of-control test applies for purposes of, among others, federal employment taxes, the Affordable Care Act, the Employee Retirement Income Security Act of 1974, the National Labor Relations Act, the Federal Tort Claims Act, and state tort law. A more complete list is provided in Exhibit 1.

37. Proposal, at p. 5, 7.

38. *Id*. at 14.

workers,"[39] the proposed new category is anything but a "middle ground." It would represent an unprecedented expansion of the definition of "employee" for purposes of affected statutes.

The proposal would expand the "employee" category for purposes of certain statutes to also include anyone who obtains clients through an intermediary. Coverage under affected statutes would remain binary; an individual still would either be covered (if an employee) or not (if an independent contractor). The proposal would simply convert a large swath of independent contractors into employees for purposes of specified statutes.

Under the proposal, an individual could no longer qualify as self-employed for the specified purposes if the individual engages an intermediary for assistance in identifying client opportunities. While this approach would eliminate any uncertainty under the current tests, the uncertainty would be eliminated by obviating the need for any test at all. It would simply treat all these individuals as statutory employees for purposes of the affected statutes. The uncertainty could just as easily be eliminated by making the individuals statutory independent contractors. While the authors apparently believe the individuals would be better off as employees, the affected individuals do not appear to share that belief.[40]

It is submitted that individuals should not be denied the right to choose whether to offer their services as employees or as independent contractors. Those who freely choose self-employment should not forfeit their right to be self-employed simply because they engage a third-party firm to assist them in finding client opportunities.

C. Accomplishing That which the Proposal Concedes would be Destructive

The authors acknowledge that:

> Forcing these new forms of work into a traditional employment relationship could be an existential threat to the emergence of online-intermediated work, with adverse consequences for workers, consumers, businesses, and the economy.[41]

Yet this is precisely what the proposal would accomplish; it would treat self-employed individuals who also satisfy the *independent worker* definition as employees for purposes of specified statutes. Moreover, because this proposal would not be confined to technology-based intermediaries, the "existential threat" the authors caution against would extend to all intermediaries, regardless of whether they utilize any technology.

Many of the intermediaries that currently exist in various industries have existed for many decades. These entities provide a function that can be of immense value to the service recipients and service providers that use them. For example, an intermediary can:

- add efficiency to a disaggregated marketplace in which providers of a specific service cannot easily find potential buyers of that service, by offering access to a centralized marketplace that enables service providers to quickly and easily find potential customers who seek to buy their services;

- assist customers who seek providers of a specialized type of service to perform very short-term engagements within a short time period in different geographic areas, by enabling a customer to simultaneously offer its opportunities in every geographic location where it needs the engagement completed, to independent contractors who are already at those locations and possess the skills needed to perform the project;

39. *Id*. at 5.

40. *See*, above, note 5.

41. *Id*. at 8.

- in some cases, the intermediary will accept from the customer a lump sum payment for all independent contractors who complete a customer engagement during a specified time period and disburse that payment to the appropriate independent contractors on the customer's behalf;

- offer customers on-demand access to previously background-screened and credential-verified providers of a certain type of service, which can be critically important to customers who will be engaging an individual to perform services for, and be left alone with, a vulnerable individual, and to customers who need access to highly credentialed individuals on short notice to provide services on a sensitive project;[42] and

- offer individuals who choose to work on an ad hoc basis, at their own discretion, and only at a time, location and for a fee they deem acceptable, with access to a wide variety of different client opportunities.

In all of these examples, the providers of the service are self-employed; they use an intermediary as a means to help market their services and, in some cases, to supplement their own client base. These intermediaries are not designed to function as an employer; they are designed to facilitate a more efficient marketplace for freelance workers. The imposition of employer duties on these intermediaries would fundamentally change the nature of their business and, in the words of the authors, expose them to an "existential threat."

D. Distorting the Decision by Independent Contractors Whether to Outsource Marketing

The proposal would be patently unfair to those individuals who prefer to be self-employed and have determined that they can maximize their profits by engaging a third-party firm, namely, an intermediary, to help them find clients. The use of intermediaries enables these individuals to devote all of their work time to providing billable client services. The alternative is for them to devote a portion of their work time to marketing, which, of course, is non-billable.

While there is a cost associated with outsourcing one's marketing function, an individual will balance that cost against the billable time that is forgone when the individual conducts his or her own marketing. It is an entrepreneurial decision whether to conduct one's own marketing or outsource all or a portion of it to a services referral agency/broker/intermediary. Under current law, this decision is driven entirely by an individual's entrepreneurial judgment; it is not affected by any external government interference. The proposal would dramatically change that.

Under the proposal, an individual who elects to outsource marketing to an intermediary would forfeit his or her independent-contractor status for purposes of specified statutes. The individual would become a de facto employee of the third-party firm for those purposes. The individual could retain his or her independent-contractor status only by conducting his or her own marketing.

An overarching justification the authors offer for this proposed governmental interference is to ensure that self-employed individuals who gain access to clients through an intermediary are given the social compact benefits that the government has promised to employees. An implicit premise of the proposal is that self-employed individuals who work in the "sharing economy"

42. An intermediary that only accepts to its registry those service providers who have passed a rigorous vetting protocol provides an invaluable service to those service providers and their clients by adding efficiency to the marketplace – especially when the clients are individual consumers. Instead of each consumer having to separately vet each service provider, the vetting need only be conducted once by the intermediary for the benefit of all consumers. If these firms were eliminated from the marketplace, this valuable source of consumer protection would be lost, leaving consumers more vulnerable to charlatans and to contractors with a disqualifying criminal past.

and obtain clients through an intermediary do not actually want to be self-employed.[43] While some individuals arguably fit that description, the authors do not appear to consider the interests of the other cohort of self-employed individuals, which is larger, who affirmatively want to be self-employed and are content with their current status.

Numerous studies indicate that many self-employed individuals are very pleased with their status. The GAO found that in 2010, 56.8 percent of independent contractors reported that they were "very satisfied" with their jobs, while only 8.1 percent reported they were "not at all/not too satisfied."[44] By contrast, only 45.3 percent of full-time employees reported that they were "very satisfied" with their jobs, and 9.5 percent reported that they were "not at all/not too satisfied."[45]

In addition to their high level of job satisfaction, 85.2 percent of independent contractors reported in 2005 that they did not want a different type of work arrangement, compared to only 9.4 percent who reported that they would prefer an alternative arrangement.[46] Furthermore, an Elance-oDesk/Freelance Union study found that 77 percent of freelancers reported that they believe the "best days of the freelance job market are still ahead."[47] The foregoing studies, which are consistent with past studies,[48] suggest that self-employed individuals are very satisfied with their choice of status. It is submitted that the interests of this cohort also needs to be considered, as it represents the millions of individuals who have affirmatively chosen to be self-employed and fully comprehend what self-employment entails. Many of these individuals have made the business decision to at least partially outsource their marketing function in order to enhance their profitability.

From a purely economic perspective, the proposal would materially distort the marketplace for self-employed individuals by making the option of outsourcing one's marketing function less attractive. Those who believe they can maximize their profits by outsourcing their marketing function might determine that the cost associated with forfeiting their independent-contractor status is too high. If these individuals were to begin conducting their own marketing, which would require them to allocate more time toward non-billable activities, their business could suffer and become less profitable.

---

43. The authors do not appear to acknowledge that the "sharing economy" now offers employment opportunities – for those who do not wish to be self-employed. *See*, *e.g.*, MEET THE GIG ECONOMY COMPANIES THAT SEE INVESTING IN WORKERS AS A SMART BUSINESS STRATEGY (March 15, 2016), http://www.ibtimes.com/meet-gig-economy-companies-see-investing-workers-smart-business-strategy-2336721 (discussing sharing economy companies that operate on an employee-based business model).

44. U.S. GOVERNMENT ACCOUNTABILITY OFFICE, SIZE, CHARACTERISTICS, EARNINGS, AND BENEFITS, GAO-15-168R 24 (2015) available at http://gao.gov/products/GAO-15-168R. *Accord*, Jonathan V. Hall & Alan B. Krueger, *An Analysis of the Labor Market for Uber's Driver-Partners in the United States*, 3 (2015), https://s3.amazonaws.com/uber-static/comms/PDF/Uber_Driver-Partners_Hall_Kreuger_2015.pdf (A comprehensive analysis of Uber drivers found that "[h]istorically, independent contractors have preferred their working arrangements to traditional employment relationships, and this tendency appears to be continuing in the sharing economy.").

45. *Id*.

46. *Id*.

47. FREELANCING IN AMERICA: A NATIONAL SURVEY OF THE NEW WORKFORCE 7 (Elance-oDesk and Freelancers Union, 2014) available at http://fu-web-storage-prod.s3.amazonaws.com/content/filer_public/c2/06/c2065a8a-7f00-46db-915a-2122965df7d9/fu_freelancinginamericareport_v3-rgb.pdf.

48. *See, e.g.*, Jeffrey A. Eisenach, *The Role of Independent Contractors in the U.S. Economy*, at 33 - 35 (Dec. 2010) ("Eisenach Study"), available at http://www.iecoalition.org/wp-content/uploads/2014/07/Role-of-Independent-Contractors-December-2010-Final.pdf.

Requiring a self-employed individual to forfeit self-employed status as a consequence of using a lawful marketing channel would be patently unfair to the individual.

E. Fundamentally Changing the Business Model for Service Referral Agencies / Brokers

The proposal likewise would be unfair to those third-party firms that operate marketing firms/brokers/services referral agencies/intermediaries, and have no interest in being the employer of the independent contractors with whom they do business. There are plenty of firms in the marketplace that hire individuals as the firm's employees and assign them to work opportunities that their clients offer.[49] These firms are designed to be the employer of the service providers. By contrast, the intermediaries that would be swept up by the proposal are a different type of business; and many are simply a marketing channel.

The proposal does not appear to take into account the financial and administrative burden that the proposal would impose on intermediaries. The business model for these entities does not contemplate the entity being an employer of the independent contractors whom they match with client opportunities. While it is not suggested that there are no intermediaries that misclassify workers, it is submitted that the mere fact that misclassification might exist is no justification for deeming all individuals who do business with an intermediary to be treated as statutory employees of the intermediary.

Many intermediaries have a very fleeting relationship with the individuals who use them to gain access to client opportunities.[50] For example, there are some industries in which an intermediary will offer self-employed individuals access to client opportunities of a very short duration, e.g., projects that can be completed in several hours, and the individuals who accept these opportunities might perform only a few opportunities in an entire year. These individuals commonly register with multiple intermediaries, to obtain access to a broad array of different types of opportunities. They retain complete and unfettered discretion to select which, if any, of the available opportunities to perform. When an individual initially registers with an intermediary, the operator of the intermediary commonly has no idea whether the individual intends to perform many opportunities or just a few – and has no business reason to inquire. Moreover, once an individual completes a client opportunity obtained through an intermediary and is paid, the individual has no obligation to ever utilize that intermediary again.

The additional administrative costs and heightened regulatory risks[51] associated with an intermediary being treated as the employer for the specified purposes of each individual who utilizes the intermediary to gain access to a client opportunity would be excessive. Such a mandate would fundamentally change the nature of these businesses. An important issue to consider in this regard is how many firms/brokers/services referral agencies/intermediaries that currently function as pure marketing channels would continue to operate if they are subjected to these proposed new duties.

---

49. *E.g.*, Adecco, Kelly Services, S.A., Manpower, Inc., Randstad Holding N.V., Spherion Corporation, Allegis Group and Robert Half International, Inc.

50. The proposal even acknowledges, at pages 7-8, that independent workers typically have only fleeting relationships with their final customers as well.

51. Once an entity is deemed to be the employer of an individual for purposes of a specific statute, the entity becomes responsible for properly and timely discharging its duties under the statute with respect to the individual, which in some cases can require compliance with highly prescriptive rules contained in voluminous regulations and related guidance. The entity also becomes subject to audit by the government agency with jurisdiction to enforce compliance with the statute. In the case of federal employment taxes, the entity becomes responsible for accurately calculating the taxes due with respect to the individual, and for timely filing periodic reports and timely paying the amounts due. Any failures to meet these duties can expose the entity to financial penalties and interest.

F. Significantly Increasing the Complexity of Federal Tax Compliance

The proposal would create significant tax-compliance complexities for an independent worker. While the authors recommend imposing tax withholding on independent workers, they do not explicitly address how an independent worker would be treated for federal tax purposes in other respects.

A threshold issue, which the authors do not address, is whether an independent worker's earnings and corresponding tax withholdings would need to be reported by an intermediary on an Internal Revenue Service ("IRS") Form W-2, which is currently used to report wages earned by employees, together with taxes withheld, or a Form 1099-MISC, which is currently used to report self-employment income earned by independent contractors. In this regard, if the remuneration is to be reported on a Form W-2, this likely would dictate the independent worker's status for all other purposes as well, because, as a practical matter, it is extremely difficult for a taxpayer to defend its treatment of an individual as an independent contractor for any purpose when the taxpayer reports the individual's remuneration on a Form W-2.

Another uncertainty under the proposal is whether an independent worker would be allowed to report the individual's income and expenses attributable to clients obtained through intermediaries on a schedule C to the Form 1040 individual tax return. If yes, then the proposed withholding of state and federal income and payroll taxes by an intermediary would in many cases result in over-withholding, due to the withholding being based on an individual's gross revenues, as opposed to the individual's net income, which takes into account tax-deductible business expenses.[52]

If an independent worker were not permitted to report on a Schedule C to the Form 1040 the earnings and related expenses incurred with respect to clients obtained through an intermediary, the individual's business-related expenses could be claimed only as miscellaneous itemized deductions, which are deductible only to the extent they exceed 2% of the individual's adjusted gross income.[53] If an independent worker were to incur an expense that pertains to two separate clients (e.g., the purchase of a laptop computer used in performing services for both clients), where one client is obtained through an intermediary and the other is obtained independently,

---

52. For example, when the State of California was considering imposing tax withholding on payments made to independent contractors, a report prepared by the California Franchise Tax Board Staff, titled *Independent Contractor Withholding*, (January 2005), observed at page 1:

> An undesirable feature of a withholding system is the potential for unwanted overwithholding. This is a potentially severe complication for independent contractors because gross receipts are a poor predictor of tax liability. This problem could be addressed by allowing for different withholding rates. Adding such flexibility would, however, substantially increase administrative costs, invite noncompliance through improper claims for reduced withholding rates, and reduce revenue gains from acceleration.

53. As the U.S. Tax Court explained in *Quintanilla v. Comm'r*, T.C. Memo 2016-5 (2016):

> The big issue is whether Quintanilla correctly reported his business expenses on Schedule C (the schedule that people who are in business for themselves use to report their expenses) and not on Schedule A (the schedule that people who work for somebody else use to report business expenses). The distinction matters because the Code limits Schedule A deductions more than it limits Schedule C deductions. The most important of these limits is the 2% rule: An employee who incurs unreimbursed business expenses may deduct them only as miscellaneous itemized deductions and only to the extent that they exceed 2% of his adjusted gross income. Secs. 62(a)(2), 63(a), (d), 67(a) and (b), 162(a).
>
> …
>
> Independent contractors and self-employed persons report business deductions on Schedule C. *See Chapman v. Apfel*, 236 F.3d 480, 486 (9th Cir. 2000); *Weber v. Commissioner*, 103 T.C. 378, 386 (1994), *aff'd*, 60 F.3d 1104 (4th Cir. 1995).

the independent worker would need to allocate the expense item as between the two clients – adding yet another dimension of tax-compliance complexity for the independent worker. Such an individual also would be treated less favorably for purposes of the alternative minimum tax ("AMT") with respect to clients obtained through an intermediary.[54]

With respect to an independent worker who obtains client opportunities through multiple intermediaries, which is common, each intermediary would withhold and pay FICA taxes with respect to the individual's earnings up to the FICA wage base.[55] This could result in the individual paying more in FICA taxes than the individual would have owed in SECA taxes, due to a separate FICA wage base being applied with respect to each intermediary through which the individual obtains clients – or with respect to each client obtained through an intermediary.[56]

The proposal would further complicate tax compliance for independent workers who obtain some, but not all, clients through an intermediary – which is not uncommon. These independent workers would be treated as employees of an intermediary with respect to the clients obtained through the intermediary, but as independent contractors with respect to the clients they obtain on their own. While such an individual's income tax liability for the year would be based on the individual's entire earnings during the year, some of the income would be subject to tax withholdings, while the other income would not. Moreover, as noted above, it is not clear how the business-related expenses would be treated with respect to clients obtained through an intermediary. The individual would need to calculate estimated tax payments relative to the individual's total earnings by factoring in (i) the tax withholding by the intermediaries that would be made with respect to a portion of the earnings, and (ii) the potentially disparate treatment of the business-related expenses incurred with respect to the two sets of clients.

The foregoing examples represent only a subset of the many unaddressed potential federal tax implications of the proposal.[57]

Finally, the proposed tax withholding on payments made to independent workers would represent a tectonic shift in the tax law's fundamental distinction between employees and independent contractors, under which tax withholding has been limited principally to wages paid to employees.[58] The proposal's impact on federal employment taxes would not represent a "middle ground" between employees and independent contractors; it would represent a massive reclassification of millions of independent contractors to employee status.

---

54. "Schedule A itemized deductions are subject to various limitations. For example, employee business expenses can be deducted only to the extent those expenses exceed 2% of the taxpayer's adjusted gross income, sec. 67(a) and (b); may be subject to income limitations, sec. 68; and may have alternative minimum tax implications, sec. 56(b)(1)(A)(i)." *Richards v. Comm'r*, T.C. Memo 2014-88 (2014) (non-Code citations omitted).

55. The FICA wage base is the maximum amount of wages an employee earns during a calendar year that is subject to the FICA tax. *See*, Code section 3121(a)(1).

56. *See, e.g.*, *Cencast Servs., L.P. v. United States*, 2009 U.S. Claims LEXIS 403 (Fed. Cl. 2009) (illustrating the application of separate wage base limitations with respect to different common-law employers).

57. Examples of other tax implications of the proposal that would need to be considered include the treatment of an independent worker for purposes of health benefit plans, qualified retirement plans, self-employed retirement plans, and eligibility for certain tax credits that are available with respect to employees.

58. As the author Anuj C. Desai observed in *SYMPOSIUM: WHAT A HISTORY OF TAX WITHHOLDING TELLS US ABOUT THE RELATIONSHIP BETWEEN STATUTES AND CONSTITUTIONAL LAW*, 108 Nw. U.L. Rev. 859 (Spring 2014):

> The Current Tax Payment Act of 1943 established tax withholding from wage income in such a way that it is now embedded deeply into the fabric of American society.

As the foregoing reveals, the proposal would create new uncertainties and substantial federal-tax complexities for independent workers and eliminate a bedrock distinction in the tax law that differentiates employees from independent contractors.

G. Pursuing the Perhaps Unwanted Pooling of Benefits

One of the rationales for the proposal is to enable independent workers to gain the advantages of pooling of benefits that are available to employees but generally not to self-employed individuals.

A negative consequence of this approach to a self-employed individual is the risk that the individual would accrue benefits with multiple intermediaries. These benefits might not be portable and could be difficult to aggregate. This is a common complaint today about the "job lock" associated with employment, which restricts an employee's mobility because the benefits accrued at a current employer (other than vested retirement benefits) generally will not follow the individual. The proposal would extend this detriment of employment to the self-employed.

An alternative means for extending the pooling of benefits to self-employed individuals, without the concomitant job-lock detriment, would be to facilitate the ability of entities – other than intermediaries – to offer benefits to the self-employed. Under this option, the self-employed individuals, rather than an intermediary, could choose which benefits to purchase, and the entities offering the benefits would compete for their business. This would enable an individual to select which benefits to purchase, and the pooling-of-benefits advantages would be even greater under plans that are open to all self-employed individuals, as opposed to only those individuals who obtain clients through a specific intermediary.[59] This option for health benefits is ostensibly available today through the Affordable Care Act.

H. Questionable Assumptions

The proposal is premised on assertions and assumptions concerning the uncertain status of individuals who obtain clients through an intermediary, and the intermediary business model itself – that are open to question.

i. Proposal Glosses over Integration Concept

The authors assert that one aspect of an independent worker's relationship with an intermediary that suggests an employment relationship is that the independent worker is "integral to the business of an intermediary."[60] But this is not always true. While an individual's services can be an integral part of a firm, when the firm is in the business of providing the same type of services as the individual, there are many examples of brokers/services referral agencies being held not to be in the business of providing the same type of services as the individual, and of the individual's work being held not integral to business of the firm.

For example, in *State of Nevada Department of Employment v. Reliable Health Care Services of Southern Nevada, Inc.*, 983 P.2d. 414 (Nev. 1999), the Supreme Court of Nevada analyzed the "integration" factor in the context of an agency/broker that refers respiratory technicians to clients. The Court concluded that (1) the course of business engaged in by the referral agency consisted solely of brokering workers, and (2) the course of business engaged in by the referred workers was limited to providing patient care.

---

59. One option in this regard would be an expansion of association health plans. *See, e.g., Employer Association Health Plans, GAO/HERS-96059R (Dec. 6, 1995);* Roger Stark*, Association Health Plans and Small Business Health Insurance Exchanges in the Affordable Care Act* (Aug. 2015), available at http://www.washingtonpolicy.org/library/docLib/Stark-Association-Health-Plans-and-Small-Business-Health-Insurance-Exchanges-in-the-Affordable-Care-Act.pdf.

60. Proposal, at p. 10.

The Nevada Supreme Court recognized that the two types of businesses engaged in by a referral agency and by a care provider are entirely separate from each other, and that despite the fact that the agency profited solely from referring workers to clients, the Court could not ignore "the simple fact that providing patient care and brokering workers are two distinct businesses." Moreover, the Court further noted that "We are convinced that the business of brokering health care workers does not translate into the business of treating patients for these purposes, and thus a temporary health care worker does not work in the usual course of an employment-broker's business…."[61]

It follows that individuals who obtain client opportunities through an intermediary are not necessarily integral to business of the intermediary.

ii. Intermediaries Do Not Always Set Contractors' Prices

Another assertion by the authors in support of their claim that independent workers possess certain employee characteristics relative to an intermediary is that an intermediary sets the price for their services.[62] This is not always true, and is generally not true in the case of intermediaries that predate the sharing-economy business model.

In practice, while some intermediaries might set the price of an individual's services, it is more common for a client to set a price, and for an intermediary to communicate that price (net of its referral fee) as part of a description of the client opportunity. This practice is especially common for industries in which a client will offer a large number of opportunities throughout the country. In these cases, it would not be feasible for the client to separately negotiate fees for each project. In other industries, the individual and client separately negotiate the fee for the individual's services. An intermediary that does not set prices generally is agnostic as to how an individual's price is set, inasmuch as the intermediary's principal function is to create an efficient marketplace through which those parties can find each other and do business together.

Moreover, in virtually all cases in which an individual engages an intermediary – or multiple intermediaries – to gain access to client opportunities, the individual retains the right to review the opportunities an intermediary offers, and to determine – based on the location, price (whether negotiated or not) and services required – which, if any, of the opportunities to accept. Such an individual is not required to work at a price set by the intermediary, or the client; rather, the individual will almost always determine the price at which he or she will

---

61. *Accord, Trauma Nurses, Inc. v. Board of Review*, 576 A.2d 285 (N.J. Super. 1990); *Daw's Critical Care Registry, Inc. v. Department of Labor*, 422 Conn. 457, 622 A.2d 622 (1993), *aff'd* 225 Conn. 99 (1993).

Different determinations have been made on this issue even in the context of the Uber business model. The California Labor Commissioner in *Berwick v. Uber Technologies, Inc*., Case No. 11-46739 (June 3, 2015), determined that the services provided by a driver under contract with Uber Technologies, Inc. ("Uber") are an *integral* part of Uber's business, namely, its transportation business, and that without drivers Uber's business would not exist. By contrast, the Florida Department of Economic Opportunity (the "Department") in *Rasier LLC v. State of Florida Department of Economic Opportunity*, Case No. 0026 2834 68-02, Final Order (Dec 3, 2015), determined that Uber is in business of providing lead generation for transportation services. The Final Order characterizes Uber as a middleman or broker, as opposed to a business of providing transportation services. The Executive Director explained that while such a business model is related to and is dependent on the provision of transportation services, it is not in that business. He reasoned that without sellers and buyers, a broker has no business; but that economic reality does not transform a broker into the seller's employer, any more than it transforms the broker into the buyer's employer.

62. Proposal, at p. 10.

work, either by negotiating the price or by exercising his or her right to select which, if any, opportunity to accept.[63]

The fact that different intermediaries follow different practices on how an individual's fee is determined suggests that imposing a sweeping new category of worker status on all intermediaries, based on an assumption that intermediaries set such prices, would be ill-advised.

iii. Proposal Fails to Consider Different Intermediary Business Models

Many intermediaries, by virtue of how their business is structured, would not be able to comply with the proposed new mandates. It is not uncommon for an intermediary to be structured such that the end-user client pays the individual service provider directly or through a third-party billing service or escrow account. In these cases, the client pays the intermediary its referral fee and separately pays the service provider his or her fee. These intermediaries have no ability to withhold any taxes with respect to an independent worker, because they do not make any payments to the independent worker. If the proposal were enacted, this particular type of intermediary business model might become more prevalent.

If more intermediaries were to structure their business so that customers pay the independent workers directly, a customer not engaged in a trade or business (unlike an intermediary) would have no Form 1099 reporting duty.[64] This would lead to less information reporting on payments received by individuals who obtain clients through an intermediary, which could have a negative impact on tax compliance.[65]

VI. Conclusion – A Solution in Search of a Problem

The proposal states that labor and employment law has evolved over time to reflect a social compact between employees and employers, but expresses concern that workers participating in the growing online "gig economy" are at risk of being excluded from this social compact.[66] This concern is premised on the unstated assumption that an independent worker participating in the "gig economy" does not choose to be self-employed – but that the choice is made by someone else i.e., the intermediary or the end-user client. The proposal does not appear to acknowledge the reality that many individuals actually choose self-employment, and – rather than being deprived of the benefits that are available to traditional employees – do not want them, or, at most, attach a lesser value to those benefits than to the right to be self-employed.

As noted, independent contractors report higher job satisfaction than full-time employees.[67] The individuals who are self-employed appear to have chosen this option because they find it more attractive for them. It is unfair to require these individuals to forfeit their self-employed status simply because they choose to utilize an intermediary to gain access to client opportunities.

63. The Connecticut Supreme Court, in *Standard Oil of Conn., Inc. v. Adm'r, Unemployment Comp. Act,* 320 Conn. 611, 637 (Conn. 2016), explained that an individual who has right to "accept or reject assignments simply on the basis of convenience" has "full control over how much work they did and when they did it."

64. *See, e.g.*, AM I REQUIRED TO FILE A FORM 1099 OR OTHER INFORMATION RETURN?, https://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/Am-I-Required-to-File-a-Form-1099-or-Other-Information-Return.

65. In 2006, then IRS Commissioner Mark W. Everson explained that "[tax] compliance is highest where there is third-party reporting." IRS Updates Tax Gap Estimates, IR-2006-28 (Feb. 14, 2006) available at https://www.irs.gov/uac/IRS-Updates-Tax-Gap-Estimates.

66. Proposal, at p. 6.

67. *See*, above, text accompanying notes 44-48.

If there is any need for change in the laws at this time, it is not to force individuals into a worker status that they did not choose, and do not want.[68] Rather, a more pressing need is for a harmonization of the general tests governing the determination of worker status, to enable individuals and companies to enter into mutually advantageous relationships – whether an individual be an employee or an independent contractor – with greater certainty that those relationships will be respected for purposes of all applicable laws.

68. Moreover, denying individuals the right to work as independent contractors can result in higher unemployment, slower economic growth and reduced economic welfare. *See*, Eisenach Study, at ii, 35-39.

Exhibit 1

The following chart identifies the different tests used under federal and state statutes to determine whether an individual is an employee or independent contractor. [1] References to a state are references to the state's unemployment statute.

The summaries of the tests identified in the following chart are stated generally; the specific test followed by each statute may contain slight variations.

Statute and/or State	Test to Determine a Worker's Status
• American with Disabilities Act of 1990 (majority of courts) • Title VII of the Civil Rights Act of 1964 • Age Discrimination in Employment Act of 1967 (Supreme Court, EEOC and majority of circuit courts) • Equal Pay Act of 1963 • Employee Retirement Income Security Act of 1974 • Copyright Act of 1976; • National Labor Relations Act • Federal Tort Claims Act • Fair Credit Reporting Act • Energy Reorganization Act • Federal Obscenity Statute • Affordable Care Act • Federal Income and Employment Taxes • Alabama • Arizona • California • District of Columbia • Florida • Iowa • Kansas • Kentucky	The Restatement (Second) of Agency and the IRS 20-Factor Test are examples of the primary common law tests. The test applied by a specific statute may contain variations. **Common Law Test (Restatement (Second) of Agency):** In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered: (a) the extent of control which, by the agreement, the master may exercise over the details of the work; (b) whether or not the one employed is engaged in a distinct occupation or business; (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; (d) the skill required in the particular occupation; (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work; (f) the length of time for which the person is employed; (g) the method of payment, whether by the time or by the job; (h) whether or not the work is a part of the regular business of the employer; (i) whether or not the parties believe they are creating the relation of master and servant; and (j) whether the principal is or is not in business. Restat. 2d of Agency, § 220(2). **Internal Revenue Service 20-Factor Test** 1. No instructions. An independent contractor does not receive instructions from the engaging entity as to how to accomplish a job. 2. No training. An independent contractor does not receive training from the engaging entity.

1. This exhibit was prepared by Patrick A. Hollrah, General Counsel to the Coalition to Promote Independent Entrepreneurs.

• Michigan[2] • Minnesota • Mississippi • Missouri • New York • North Dakota • North Carolina[3] • Ohio • Rhode Island[4] • South Carolina • Texas • Virginia[5]	3. No integration. The engaging entity's operations or ability to be successful does not depend on the service of independent contractors. By contrast, the factor weighs in favor of employee status if the workers constitute a critical and essential part of the taxpayer's business. *Bartels v. Birmingham*, 332 U.S. 126 (1947). 4. Services do not have to be rendered personally. Because independent contractors are in business for themselves and are contracted with to provide a certain result, they have the right to hire others to assist them. 5. Control their own assistants. Independent contractors retain the right to control the work activities of their assistants. 6. Not a continuing relationship. Unlike employees, independent contractors generally do not have a continuing working relationship with the engaging company, although the relationship may be frequent, by means of multiple engagements. 7. Work hours are set by the independent contractor. An independent contractor has control over the hours worked for accomplishing the result. 8. Time to pursue other work. An independent contractor is free to work when and for whom the individual chooses. A requirement to work full-time indicates control by the engaging entity. 9. Job location. Unless the services cannot be performed elsewhere, an independent contractor has the right to choose where the work will be done. 10. No requirements on the order or sequence of work. Independent contractors have control over how a result is accomplished and, therefore, determine the order and sequence in which their work will be performed. 11. No required reports. Independent contractors are accountable for accomplishing the objective only; interim or progress reports are not required. 12. Payment for the result. Independent contractors are paid by the job and are not compensated based on the time spent performing the work. 13. Business expenses. Independent contractors are responsible for their incidental expenses. 14. Own tools. As business owners, independent contractors provide their own equipment and tools to do the job. 15. Significant investment. An independent contractor's investment in his or her trade is bona fide, essential, and adequate. 16. Possible profit or loss. Independent contractors bear the risk of realizing a profit or incurring a loss.

2. Michigan follows the IRS 20-factor common law test.
3. North Carolina follows the IRS 20-factor common law test.
4. Rhode Island follows the IRS 20-factor common law test.
5. Virginia follows the IRS 20-factor common law test.

	17. Working for multiple firms. Independent contractors are free to work for more than one firm at a time. 18. Services available to the general public. Independent contractors make their services available to the general public. 19. Limited right to discharge. An independent contractor is not terminable at will, but may be terminated only for failure to comply with the terms of the contract. 20. Liability for noncompletion. Independent contractors are responsible for the satisfactory completion of a job and are liable for failing to complete the job in accordance with the contract. Internal Revenue Manual, 4600 Employment Tax Procedures, Exhibit 4640-1.
• Fair Labor Standards Act of 1938[6] • Social Security Act; • Family and Medical Leave Act of 1993[7] • Migrant and Seasonal Agricultural Worker Protection Act[8] • Occupational Safety and Health Act of 1970	**Economic Realities (DOL):** 1) The extent to which the work performed is an integral part of the employer's business. 2) Whether the worker's managerial skills affect his or her opportunity for profit and loss. 3) The relative investments in facilities and equipment by the worker and the employer. 4) The worker's skill and initiative. 5) The permanency of the worker's relationship with the employer. 6) The nature and degree of control by the employer.
• Age Discrimination in Employment Act of 1967 (minority of circuit courts) • American with Disabilities Act of 1990 (minority of courts)	**Hybrid Test:** [H]ybrid economic realities/common law control test that focuses on whether the alleged employer had the right to hire and fire, the right to supervise, the right to set the work schedule, paid the employee's salary, withheld taxes, provided benefits, and set the terms and conditions of employment. *Hathcock v. Acme Truck Lines, Inc*., 262 F.3d 522, 526 (5th Cir. Tex. 2001).
• Alaska • Connecticut • Delaware • Hawaii • Illinois • Indiana[9] • Louisiana • Maryland[10]	**ABC Test #1:** [U]nless the context otherwise requires, "employment" means service performed by an individual whether or not the common-law relationship of master and servant exists, unless and until it is shown to the satisfaction of the department that (A) the individual has been and will continue to be free from control and direction in connection with the performance of the service,

6. Each Federal Circuit applies a slightly different version of the economic realities test.
7. The FMLA adopts the FLSA's definition of "employee."
8. The MSAWPA adopts the FLSA's definition of "employee."
9. Element C may be satisfied by establishing that the individual is customarily engaged in an independently established trade, occupation, profession or business; *or* is a sales agent who receives remuneration solely upon a commission basis and who is the master of the individual's own time and effort. Burns Ind. Code Ann. § 22-4-8-1(b).
10. Element B may be satisfied by either establishing that the individual's work is:
(i) outside of the usual course of business of the person for whom the work is performed; or

• Massachusetts • Nebraska • Nevada • New Hampshire • New Jersey • New Mexico • Tennessee • Vermont • Washington • West Virginia • Wyoming	both under the individual's contract for the performance of service and in fact; (B) the service is performed either outside the usual course of the business for which the service is performed or is performed outside of all the places of business of the enterprise for which the service is performed; and (C) the individual is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the service performed.
• Arkansas • Oklahoma	**ABC Test #2:** Service performed by an individual for wages shall be deemed to be employment subject to this chapter irrespective of whether the common law relationship of master and servant exists, unless and until it is shown to the satisfaction of the director that: (1) The individual has been and will continue to be free from control and direction in connection with the performance of the service, both under his or her contract for the performance of service and in fact; and (2) (A) The service is performed either outside the usual course of the business for which the service is performed or is performed outside all the places of business of the enterprise for which the service is performed; or (B) The individual is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the service performed.
• Colorado • Idaho • Montana[11] • Oregon[12] • Pennsylvania • South Dakota • Utah	**AB Test#1:** [S]ervice performed by an individual for another shall be deemed to be employment, irrespective of whether the common-law relationship of master and servant exists, unless and until it is shown to the satisfaction of the division that (A) such individual is free from control and direction in the performance of the service, both under his contract for the performance of service and in fact; and (B) such individual is customarily engaged in an independent trade, occupation, profession, or business related to the service performed.

(ii) performed outside of any place of business of the person for whom the work is performed. Md. LABOR AND EMPLOYMENT Code Ann. § 8-205(a)(3).

11. An individual must obtain an Independent Contractor Exemption Certificate which is issued to individuals who qualify as an independent contractor under the "AB" test.

12. Oregon exempts an individual from being required to satisfy the (B) prong if the individual files a schedule F as part of his or her income tax return and the individual provides farm labor or farm services. Additionally, Oregon's test requires individuals to be licensed, only if their profession requires a license.

• Georgia	**AB Test #2:** Services performed by an individual for wages shall be deemed to be employment subject to this chapter unless and until it is shown that: (1) (A) Such individual has been and will continue to be free from control or direction over the performance of such services, both under the individual's contract of service and in fact; and (B) Such individual is customarily engaged in an independently established trade, occupation, profession, or business; or (2) Such individual and the services performed for wages are the subject of an SS-8 determination by the Internal Revenue Service, which decided against employee status.
• Maine	**Statutory Test #1:** 1) The following criteria must be met: a) The individual has the essential right to control the means and progress of the work except as to final results; b) The individual is customarily engaged in an independently established trade, occupation, profession or business; c) The individual has the opportunity for profit and loss as a result of the services being performed for the other individual or entity; d) The individual hires and pays the individual's assistants, if any, and, to the extent such assistants are employees, supervises the details of the assistants' work; and e) The individual makes the individual's services available to some client or customer community even if the individual's right to do so is voluntarily not exercised or is temporarily restricted; and 2) At least 3 of the following criteria must be met: a) The individual has a substantive investment in the facilities, tools, instruments, materials and knowledge used by the individual to complete the work; b) The individual is not required to work exclusively for the other individual or entity; c) The individual is responsible for satisfactory completion of the work and may be held contractually responsible for failure to complete the work; d) The parties have a contract that defines the relationship and gives contractual rights in the event the contract is terminated by the other individual or entity prior to completion of the work; e) Payment to the individual is based on factors directly related to the work performed and not solely on the amount of time expended by the individual; f) The work is outside the usual course of business for which the service is performed; or

	g) The individual has been determined to be an independent contractor by the federal Internal Revenue Service. 26 M.R.S. § 1043(11)(E).
• Wisconsin	**Statutory Test #2:** (bm) [An individual is an independent contractor] if the employing unit satisfies the department that the individual meets the conditions specified in subds. 1. and 2., by contract and in fact: 1. The services of the individual are performed free from control or direction by the employing unit over the performance of his or her services. In determining whether services of an individual are performed free from control or direction, the department may consider the following nonexclusive factors: a. Whether the individual is required to comply with instructions concerning how to perform the services. b. Whether the individual receives training from the employing unit with respect to the services performed. c. Whether the individual is required to personally perform the services. d. Whether the services of the individual are required to be performed at times or in a particular order or sequence established by the employing unit. e. Whether the individual is required to make oral or written reports to the employing unit on a regular basis. 2. The individual meets 6 or more of the following conditions: a. The individual advertises or otherwise affirmatively holds himself or herself out as being in business. b. The individual maintains his or her own office or performs most of the services in a facility or location chosen by the individual and uses his or her own equipment or materials in performing the services. c. The individual operates under multiple contracts with one or more employing units to perform specific services. d. The individual incurs the main expenses related to the services that he or she performs under contract. e. The individual is obligated to redo unsatisfactory work for no additional compensation or is subject to a monetary penalty for unsatisfactory work. f. The services performed by the individual do not directly relate to the employing unit retaining the services. g. The individual may realize a profit or suffer a loss under contracts to perform such services. h. The individual has recurring business liabilities or obligations. i. The individual is not economically dependent upon a particular employing unit with respect to the services being performed. Wis. Stat. § 108.02(12)(bm).