

ARBITRATION CLASS WAIVERS, INDEPENDENT  
CONTRACTOR CLASSIFICATION, AND THE BLOCKADE OF  
WORKERS’ RIGHTS IN THE GIG ECONOMY

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## INTRODUCTION

In recent years, there has been an explosive movement from “traditional, full-time employment” to “alternative, contingent work arrangements.”<sup>1</sup> The gig economy, also referred to as the “sharing economy” or “on-demand economy,” is made up of “peer-to-peer transactions, numbering in the hundreds of thousands each day [and has] bypass[ed] the traditional employer-employee relationship.”<sup>2</sup> It is a “multi-billion dollar . . . [sector of the] economy that relies upon independent contractors to offer goods and services.”<sup>3</sup> Companies and transactions making up the gig economy primarily consist of the following: ride-sharing platforms (e.g., Uber, Lyft, and Sidecar); accommodation sharing platforms (e.g., Airbnb, VRBO, and HomeAway); service platforms (e.g., Handy, Care.com, and TaskRabbit); car rental platforms (e.g., Car2Go, Zipcar, and Getaround); and food and goods delivery platforms (e.g., Instacart, Postmates, and Caviar).<sup>4</sup> However, this sector of the economy continues to grow. In the year 2016, it was estimated that 44% of adults in the United States (approximately 90 million individuals) participated in such transactions and 22% of adults in the United States (approximately 45 million individuals) offered goods or services for such transactions.<sup>5</sup> Based on these numbers, “[t]he growing momentum of [the gig economy] is undeniable.”<sup>6</sup> However, the existing estimations on participation and growth in the gig economy are unsettled, due to an inconsistent understanding of what the gig economy entails, as well as a lack of comprehensive research being conducted.<sup>7</sup> Nevertheless, it is still clear that the gig economy is a “rapidly expanding . . . segment of the workforce.”<sup>8</sup>

The emergence of this new segment of the workforce has sprouted a great deal of litigation and brought unique labor and employment law questions to the forefront, especially since it is difficult to seamlessly fit the gig economy workers inside the traditional employee and independent contractor frameworks. This Note will address two interconnected and

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1. Benjamin Means & Joseph A. Seiner, *Navigating the Uber Economy*, 49 U.C. DAVIS L. REV. 1511, 1536 (2016).

2. Katy Steinmetz, *Exclusive: See How Big the Gig Economy Really Is*, TIME (Jan. 6, 2016), <http://time.com/4169532/sharing-economy-poll/>.

3. Means & Seiner, *supra* note 1, at 1513.

4. Steinmetz, *supra* note 2.

5. *Id.* These statistical results exclude adults who are not Internet users. *Id.*

6. *Id.*

7. See Seth D. Harris & Alan B. Kruger, *A Proposal for Modernizing Labor Laws for Twenty-First-Century Work: The “Independent Worker,”* HAMILTON PROJECT 10–12 (Dec. 2015), [http://www.hamiltonproject.org/assets/files/modernizing\\_labor\\_laws\\_for\\_twenty\\_first\\_century\\_work\\_krueger\\_harris.pdf](http://www.hamiltonproject.org/assets/files/modernizing_labor_laws_for_twenty_first_century_work_krueger_harris.pdf).

8. *Id.* at 12.

controversial legal issues surrounding gig-economy worker contracts: first, the circuit split addressing the enforceability of agreements to individual arbitration (i.e., concerted-action waivers, class action waivers, and collective action waivers) in employment contracts on National Labor Relations Act (NLRA) grounds; and second, whether workers in the gig economy are properly classified as independent contractors, or alternatively should be reclassified as employees. Because the amount of legal power a worker holds is largely determined by whether an arbitration class waiver exists and what a worker's classification is, the answers to these questions could radically alter the extent of workers' rights, especially in the gig economy where workers are inherently at a disadvantage due to the business models used.<sup>9</sup>

This Note argues that courts should hold employment contract arbitration class waivers as unenforceable under the NLRA and that workers in the gig economy should be reclassified as employees, due to the essential blockade of legal power currently inflicted upon workers in the gig economy. Specifically, Part I concludes that arbitration-agreement class waivers in employment contracts are unenforceable due to the NLRA's protection of at least one collective forum for employees to address employment laws, which is supported by the inequality of power between an employer and an employee as parties in an employment contract. Next, Part II determines that workers in the gig economy are improperly classified as independent contractors due to the amount of control employers typically have over their workers. Lastly, Part III addresses the interplay between these two issues, which has essentially created a blockade of workers' rights, and concludes that courts should lift this blockade by first reclassifying workers in the gig economy as employees so they may enjoy the protections of the NLRA and second invalidating employment contract class action waivers so that workers in the gig economy are provided protection by labor and employment laws, of which they are currently deprived. The former is necessary because workers classified as independent contractors, such as those in the gig economy, cannot invalidate class action waivers on NLRA grounds, since the NLRA only covers employees and not independent contractors.

#### I. THE ENFORCEABILITY OF ARBITRATION-AGREEMENT CLASS WAIVERS IN EMPLOYMENT CONTRACTS

A split currently exists between the circuit courts addressing the question of whether an employer violates the NLRA by requiring its employees to sign an agreement to arbitrate any employment claims only

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9. See discussion *infra* Part II.B.

on an individual basis, thereby preventing employees from raising these claims in the form of judicial class actions and aggregate arbitrations.<sup>10</sup> Turning to the NLRA for guidance, Section 7 covers the right of employees to engage in “concerted activities for the purpose of collective bargaining or other mutual aid or protection.”<sup>11</sup> For enforcement of this right, Section 8 states that “[i]t shall be an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section [7].”<sup>12</sup> The NLRA gives the National Labor Relations Board (NLRB) the duty to enforce this right by giving the Board primary jurisdiction over claims that an employee’s section 7 rights have been violated.<sup>13</sup> Consequently, the NLRB held that an employee’s right to engage in concerted action includes the right to have at least one collective forum to address employment law disputes, either in court or before an arbitrator.<sup>14</sup> Three circuits recently followed in the NLRB’s footsteps by invalidating class waivers in employment contracts,<sup>15</sup> and these decisions have created the split among the circuits.

This Part will lay the legal background for the enforceability of arbitration-agreement class waivers in employment contracts and conclude that the courts should invalidate class waivers. First, Part I.A addresses the NLRB’s position that class waivers in arbitration agreements in employment contracts are unenforceable due to the interference with employees’ NLRA Section 7 right to pursue collective or class action and that there are unlikely to be any shortcuts around invalidation of class waivers, such as opt-out clauses or recognition of administrative rights. Next, Part I.B presents the Supreme Court’s precedent, which, on the other hand, strongly supports arbitration agreements. Then, Part I.C introduces the circuit split and examines the reasoning of the courts on both sides. Finally, Part I.D advocates for following the holdings of the NLRB, the Sixth Circuit, the Seventh Circuit, and the Ninth Circuit invalidating arbitration-agreement class waivers in employment contracts because there

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10. *Compare* LogistiCare Sols., Inc. v. NLRB, 866 F.3d 715 (5th Cir. 2017), *Convergys Corp. v. NLRB*, 866 F.3d 635 (5th Cir. 2017), *Patterson v. Raymours Furniture Co.*, 659 F. App’x 40 (2d Cir. 2016), *Cellular Sales of Mo., LLC v. NLRB*, 824 F.3d 772 (8th Cir. 2016), *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015), *cert. granted*, 137 S. Ct. 809 (2017), *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013), *Sutherland v. Ernst & Young LLP*, 726 F.3d 290 (2d Cir. 2013), *and Owen v. Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir. 2013), *with NLRB v. Alt. Entm’t, Inc.*, 858 F.3d 393 (6th Cir. 2017), *Morris v. Ernst & Young, LLP*, 834 F.3d 975 (9th Cir. 2016), *cert. granted*, 137 S. Ct. 809 (2017), *and Lewis v. Epic Sys. Corp.*, 823 F.3d 1147 (7th Cir. 2016), *cert. granted*, 137 S. Ct. 809 (2017).

11. National Labor Relations Act § 7, 29 U.S.C. § 157 (2012).

12. National Labor Relations Act § 8, 29 U.S.C. § 158 (2012).

13. National Labor Relations Act § 10, 29 U.S.C. § 160 (2012).

14. *See* *D.R. Horton, Inc.*, 357 N.L.R.B. 2277 (2012), *enforcement granted in part and rev’d in part*, 737 F.3d 344 (5th Cir. 2013).

15. *See Alt. Entm’t*, 858 F.3d 393; *Morris*, 834 F.3d at 975; *Lewis*, 823 F.3d at 1147.

exists an inequality of powers in the employment relationship and a need for a more even legal playing field between companies and their workers, which is an especially prominent problem in the gig economy.

A. *The NLRB's Stance: Class Waivers Are Unenforceable*

The NLRB has strongly supported the invalidation of class and collective-action waivers that block employees' access to all aggregate legal forums. Namely, in *D.R. Horton, Inc.*, the employer required, as a condition of employment, that all of its employees sign an arbitration agreement, which required that the employees "not pursue class or collective litigation of [employment-related] claims in any forum, arbitral or judicial."<sup>16</sup> The NLRB held that "an individual who files a class or collective action regarding wages, hours or working conditions, whether in court or before an arbitrator, seeks to initiate or induce group action and is engaged in conduct protected by Section 7."<sup>17</sup> Therefore, the Board found that the waiver in the employment contract's mandatory arbitration agreement violated the employee's Section 7 right to act concertedly for "mutual aid or protection."<sup>18</sup>

The Board in *D.R. Horton* also addressed whether refusing to enforce an arbitration agreement's class waiver created a conflict with the Federal Arbitration Act (FAA), and if so, whether the FAA must yield to the NLRA.<sup>19</sup> The FAA was created by Congress to fight widespread "hostility to arbitration agreements"<sup>20</sup> by crafting a "liberal federal policy favoring" these agreements;<sup>21</sup> however, the Supreme Court has repeatedly highlighted that arbitration can only substitute for a judicial forum when the litigant can effectively maintain his statutory rights through arbitration.<sup>22</sup> Therefore, when the NLRB decided that the rights protected by Section 7 are substantive, because "[t]he right to engage in collective action—including collective legal action—is the core substantive right protected by the NLRA and is the foundation on which the Act and Federal labor policy

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16. *D.R. Horton*, 357 N.L.R.B. at 2277.

17. *Id.* at 2279.

18. *Id.* at 2279–80.

19. *Id.* at 2283–84.

20. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991).

21. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

22. Katherine V. W. Stone, *Procedure, Substance, and Power: Collective Litigation and Arbitration Under the Labor Law*, 61 UCLA L. REV. (DISCOURSE) 164, 171 (2013) ("The Supreme Court has long maintained that arbitration is only appropriate when it entails no loss of substantive statutory rights."); *see, e.g., Gilmer*, 500 U.S. at 26, 28 (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628, 637 (1985)) (The FAA protects the right of parties to agree to resolve statutory claims in an arbitral forum so long as "a party does not forgo the substantive rights afforded by . . . statute").

rest,” the Board also found that refusing to enforce an arbitration agreement’s class waiver did not create a conflict with the FAA.<sup>23</sup> This reasoning led the Board to order the employer, D.R. Horton, to cease and desist from using its employment agreement requiring employees, as a condition of employment, to waive the right to aggregated actions in all forums.<sup>24</sup>

While the Supreme Court invalidated the NLRB’s *D.R. Horton* decision because at least one of the Board members who decided the case was an improper recess appointment,<sup>25</sup> the Board re-affirmed the *D.R. Horton* rule in *Murphy Oil USA, Inc.*, which is now the controlling NLRB decision on this issue.<sup>26</sup> This rule has been upheld in numerous NLRB decisions since;<sup>27</sup> thus, the NLRB has made clear that it interprets the NLRA as invalidating class waivers that block employees’ access to all collective forums.

Further, the NLRB has recognized in many decisions that “attempts to cure otherwise unenforceable agreements by recognizing administrative rights or by inserting opt-out clauses are not effective.”<sup>28</sup> First, focusing on the recognition of administrative rights, the NLRB held that enclosing language that makes it clear that the arbitration agreement does not prohibit an employee from filing claims with administrative agencies, such as the NLRB, is not enough to cure conflicts with Section 7 of the NLRA.<sup>29</sup> Next, focusing on opt-out clauses, the reasoning of the Board is generally the following: opt-outs are not an actual and voluntary choice meeting the requirement that there be an affirmative act to preserve Section 7 rights,<sup>30</sup> opt outs “place an unlawful burden on collective employee rights,”<sup>31</sup> opt outs “inhibit access to other employees who failed to opt out,” and opt outs “prohibit discussion of claims that took place in arbitration, all of which

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23. *D.R. Horton*, 357 N.L.R.B. at 2286 (emphasis omitted).

24. *Id.* at 2289–90.

25. NLRB v. Noel Canning, 134 S. Ct. 2550 (2014).

26. *Murphy Oil USA, Inc.*, 10-CA-038804 (NLRB 2014), 2014 WL 5465454.

27. See, e.g., *Select Temps.*, 31-CA-157821 (NLRB 2016), 2016 WL 4772318; *20/20 Commc’ns., Inc.*, 12-CA-165320 (NLRB 2016), 2016 WL 4651564; *Mastec, Inc.*, 12-CA-153478 (NLRB 2016), 2016 WL 4547575.

28. Stephanie Greene & Christine Neylon O’Brien, *The NLRB v. The Courts: Showdown over the Right to Collective Action in Workplace Disputes*, 52 AM. BUS. L.J. 75, 114 (2015); see, e.g., *Mastec, Inc.*, 12-CA-153478 (NLRB 2016), 2016 WL 4547575.

29. See, e.g., *SF Mkts., LLC*, 21-CA-099065 (NLRB 2014), 2014 WL 636358; *Apple American Group LLC*, 18-CA-103319 (NLRB 2013), 2013 WL 5671086.

30. See, e.g., *Mastec Servs. Co., Inc.*, 16-CA-86102 (NLRB 2013), 2013 WL 2409181; *24 Hour Fitness USA, Inc.*, 20-CA-15419 (NLRB 2012), 2012 WL 5495007, *rev’d*, 20-CA-035419, 2016 WL 3668038 (5th Cir. June 27, 2016).

31. Green & O’Brien, *supra* note 28, at 116 (citing *24 Hour Fitness USA*, 2012 WL 5495007, *rev’d*, 2016 WL 3668038 (5th Cir. June 27, 2016)).

[also] interfere with section 7 rights.”<sup>32</sup> Further, employees may fear they will irritate their employers by opting out and may worry about the possible consequences.<sup>33</sup> Therefore, based on the NLRB’s reasoning in past decisions, the Board strongly deems opt-out provisions incapable of preserving the legality of an employment agreement that includes an arbitration class waiver. Thus, overall, the Board adamantly believes that arbitration class waivers in employment contracts are unenforceable, due to the interference with NLRA Section 7 rights, and that there are unlikely to be any shortcuts around this conflict. However, the NLRA’s point of view on the enforceability of arbitration agreements stands in stark contrast to the Supreme Court’s precedent, as discussed below.

*B. The Supreme Court’s Stance: Persistent Enforcement of Arbitration Agreements*

While the Supreme Court has not yet specifically addressed arbitration class waivers in *employment contracts*, the Court has strongly upheld arbitration agreements in numerous decisions.<sup>34</sup> Focusing on the Court’s decisions most relevant to the issue at hand, in *Green Tree Financial Corp.-Ala. v. Randolph*, the Court upheld an arbitration clause even when it was unlikely the plaintiff would be able to bring her case against the company at all, due to the expensive projected costs of arbitration.<sup>35</sup> Further, the Court put the burden on the party opposing arbitration to show that the cost of arbitration would be prohibitively expensive.<sup>36</sup> Due to this holding, claims of expense or cost to get around arbitration by plaintiffs have been thwarted.

This decision is further supported by the Supreme Court’s holding in *American Express Co. v. Italian Colors Restaurant*.<sup>37</sup> In *Italian Colors*, the merchants’ agreement with the company, American Express, contained a requirement that all disputes between the parties be resolved by individual arbitration.<sup>38</sup> When the merchants brought a class action suit against the company, American Express moved to compel individual arbitration under the FAA.<sup>39</sup> However, the merchants argued that the mandatory arbitration

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32. *Id.* at 116–17 (citing *Mastec Servs. Co., Inc.*, 16-CA-86102 (NLRB 2013), 2013 WL 2409181).

33. *Mastec Servs. Co., Inc.*, 16-CA-86102 (NLRB 2013), 2013 WL 2409181.

34. *See, e.g.*, *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001); *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79 (2000).

35. *Green Tree Fin. Corp.-Ala.*, 531 U.S. at 91–92.

36. *Id.*

37. 133 S. Ct. 2304 (2013).

38. *Id.* at 2308.

39. *Id.*

agreement and the class action waiver were unenforceable due to the prohibitively expensive costs the merchants would incur if forced to pursue this matter in individual arbitration.<sup>40</sup> The Supreme Court upheld the contractual class action waiver, noting that, under the FAA, “courts must rigorously enforce arbitration agreements according to their terms.”<sup>41</sup> The Court further explained that this includes “claims . . . alleg[ing] a violation of a federal statute, unless the FAA’s mandate has been overridden by a contrary congressional command.”<sup>42</sup> In this case, since the claim made by the merchants involved antitrust laws that did not include a “contrary congressional command,” the Court stated that the class action waiver should be upheld.<sup>43</sup> Also, because the class action waiver did not prevent the merchants from “effectively vindicating” their statutory rights under the antitrust laws and “merely limit[ed] arbitration to the two contracting parties,” the Court held that the class action waiver was enforceable.<sup>44</sup> Additionally, promoting the Court’s reasoning in *AT&T Mobility LLC v. Concepcion*, which is discussed below, the Court reaffirmed that class arbitrations “interfere[] with [the] fundamental attributes of arbitration.”<sup>45</sup> Thus, this case further illustrates the Supreme Court’s strong enforcement of arbitration agreements and class action waivers throughout its precedent.

Next, specifically addressing the application of the FAA to employment contracts, the Court in *Circuit City Stores v. Adams* held that the exemption in the FAA stating that “nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce”<sup>46</sup> only applies to workers who transport goods across foreign or state lines.<sup>47</sup> Thus, the Court read the FAA’s transportation-workers exemption, which applies to contracts of employment, narrowly and clarified that the FAA covers most employment contracts.

Finally, in *AT&T Mobility*, the Supreme Court once again upheld a class-arbitration waiver under the FAA.<sup>48</sup> Specifically, the plaintiffs entered into a cellular telephone contract, which included a mandatory arbitration agreement containing a class-arbitration waiver, with the company

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40. *See id.*

41. *Id.* at 2309 (internal quotation marks omitted) (quoting *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985)).

42. *Id.* (internal quotation marks omitted) (quoting *CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 95 (2012)).

43. *Id.*

44. *Id.* at 2310–11.

45. *Id.* at 2312 (quoting *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011)).

46. 9 U.S.C. § 1 (2012).

47. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001).

48. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 352 (2011).

AT&T.<sup>49</sup> The plaintiffs believed the class waiver to be unconscionable and thus unenforceable due to the blockade of all collective forums.<sup>50</sup> The Supreme Court reasoned that state unconscionability doctrines applying exclusively to arbitration are preempted by the FAA, and the Court upheld the class waiver.<sup>51</sup> The Court noted that “arbitration is a matter of contract,”<sup>52</sup> the FAA is a “liberal federal policy favoring arbitration,”<sup>53</sup> and the “courts must place arbitration agreements on an equal footing with other contracts”<sup>54</sup> by “enforc[ing] them according to their terms.”<sup>55</sup> Further, the Court discussed the purpose of the FAA as “ensur[ing] the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings” and noted that “classwide arbitration interferes with fundamental attributes of arbitration . . . thus creat[ing] a scheme inconsistent with the FAA.”<sup>56</sup> Therefore, the Court reasoned that “[t]he point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute,”<sup>57</sup> thereby allowing for the avoidance of slower, more expensive, and more formal collective forums. Finally, the Court noted that “arbitration greatly increases risks to defendants” and that “[a]rbitration is poorly suited to the higher stakes of class litigation.”<sup>58</sup> Therefore, the Supreme Court strongly expressed its probusiness views on arbitration agreements in *AT&T Mobility*.

Overall, the Supreme Court has strongly supported arbitration and strictly enforced the FAA. However, these previous decisions made by the Court, aside from *Circuit City Stores v. Adams*, deal with consumer and commercial contracts, whereas the circuit split at issue in this Note addresses employment contracts. Thus, it is yet to be decided by the Supreme Court whether this is a significant difference and whether this difference will lead to unique results for employment contract arbitration agreements.<sup>59</sup> The arbitration framework set up by the FAA and the Supreme Court’s precedent still “le[aves] room for exceptions” to the

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49. *Id.* at 336.

50. *Id.* at 337–38.

51. *Id.* at 352.

52. *Id.* at 339 (quoting *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 67 (2010)).

53. *Id.* (quoting *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)).

54. *Id.* (quoting *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006)).

55. *Id.* (quoting *Volt Information Sciences, Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989)).

56. *Id.* at 344.

57. *Id.*

58. *Id.* at 350.

59. However, the NLRB has already noted that employees represent a much more limited group than large consumer classes in cases such as *AT&T Mobility*. *D.R. Horton, Inc.*, 357 N.L.R.B. 2277, at 2284–86 (2012), *enforcement granted in part and rev’d in part*, 737 F.3d 344 (5th Cir. 2013).

enforcement of arbitration agreements, and it is possible that the Supreme Court may decide that arbitration-agreement class waivers in employment contracts should be a recognized exception to the FAA.<sup>60</sup>

### *C. The Circuit Courts: Split Creation and Expansion*

As noted above, a split currently exists between the circuit courts addressing the question of whether an employer violates the NLRA by requiring its employees to sign an agreement to arbitrate any employment claims only on an individual basis and thereby preventing employees from raising these claims in the form of judicial class actions or aggregate arbitrations. The reasoning of the circuit courts upholding the class waivers as well as the reasoning of the circuit courts invalidating the class waivers are presented below.

#### *1. The Circuits Upholding Class Waivers in Employment Contracts*

Three of the thirteen United States Circuit Courts—the Fifth Circuit, the Eighth Circuit, and the Second Circuit—have repeatedly upheld individual arbitration agreements, agreeing with the Supreme Court and rejecting the arguments made by the NLRB. Beginning with the Fifth Circuit’s holding in *D.R. Horton, Inc. v. NLRB*,<sup>61</sup> the court rejected the reasoning of the NLRB and found that the Board did not give proper weight to the FAA.<sup>62</sup> Specifically, the court found that the use of class action procedures is not a substantive right and that the NLRA does not “contain a congressional command exempting the statute from application of the FAA.”<sup>63</sup> When making this conclusion, the court noted that “[w]hen considering whether a contrary congressional command is present, courts must remember ‘that questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration.’”<sup>64</sup> Therefore, the Fifth Circuit held that the class action arbitration waiver could not be invalidated because doing so would “interfere[] with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.”<sup>65</sup> Recently, in multiple cases, the Fifth Circuit reaffirmed its holding and reasoning in *D.R. Horton*, refusing to enforce the Board’s decision to the

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60. Greene & O’Brien, *supra* note 28, at 88.

61. 737 F.3d 344 (5th Cir. 2013).

62. *Id.* at 355–62.

63. *Id.* at 355–58, 362.

64. *Id.* at 360 (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991)).

65. *Id.* (quoting *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011)).

contrary,<sup>66</sup> and also expanded this holding to the enforceability of class or collective action waivers *outside of the arbitration context*<sup>67</sup> and to contracts that an employee could reasonably interpret as preventing the filing of charges with the NLRB.<sup>68</sup>

Similarly, the Eighth Circuit, which first addressed this issue in *Owen v. Bristol Care, Inc.*, followed the Supreme Court's "liberal federal policy favoring arbitration agreements" and rejected the NLRB's rationale in *D.R. Horton* by holding that arbitration agreements containing class waivers are enforceable in claims brought under the Fair Labor Standards Act (FLSA).<sup>69</sup> In making this conclusion, the court first reasoned that the FLSA contains no "contrary congressional command" barring waiver of class actions.<sup>70</sup> While the employees argued that the FLSA requires employees to have the "right . . . to bring an action by or on behalf of any employee[] and the right of any employee to become a party plaintiff to such any [sic] action,"<sup>71</sup> the court changed the focus, concluding instead that the FLSA requires employees to affirmatively opt in to class actions in writing, and consequently the FLSA must also permit employees to waive participation in class actions.<sup>72</sup> Also, the Eighth Circuit made a distinction, noting that the Board's *D.R. Horton* decision had "little persuasive authority" in this case because "the NLRB limited its holding to arbitration agreements barring all protected concerted action," and this agreement did not waive the right of the employee to file complaints with state or federal administrative agencies.<sup>73</sup> Therefore, this circuit interprets the NLRA as only prohibiting agreements that bar "*all* protected concerted action."<sup>74</sup> Recently, the Eighth Circuit reaffirmed this holding in *Cellular Sales of Missouri, LLC v. NLRB*, in which the court upheld an arbitration agreement that included a waiver of class actions specifically for the resolution of

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66. *LogistiCare Sols., Inc. v. NLRB*, 866 F.3d 715 (5th Cir. 2017); *Convergys Corp. v. NLRB*, 866 F.3d 635 (5th Cir. 2017); *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015), *cert. granted*, 137 S. Ct. 809 (2017).

67. *LogistiCare Sols.*, 866 F.3d at 720–22; *Convergys*, 866 F.3d at 647.

68. *LogistiCare Sols.*, 866 F.3d at 720–22.

69. *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1052, 1055 (8th Cir. 2013) (citing *CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 98 (2012)).

70. *Id.* ("[G]iven the absence of any contrary congressional command from the FLSA that a right to engage in class actions overrides the mandate of the FAA in favor of arbitration, we reject Owen's invitation to follow the NLRB's rationale in *D.R. Horton*." (internal quotation marks omitted)).

71. *Id.* at 1052 (quoting 29 U.S.C. § 216 (b) (2012) (emphasis omitted) (ellipsis in original)).

72. *Id.* at 1052–53.

73. *Id.* at 1053, 1055 (emphasis omitted). However, the NLRB has found the opposite. See *SF Mkts., LLC*, 21-CA-099065 (NLRB 2014), 2014 WL 636358; *Apple American Group LLC*, 18-CA-103319 (NLRB 2013), 2013 WL 5671086.

74. *Owen*, 702 F.3d at 1053.

employment-related disputes and found the waiver did not violate the NLRA.<sup>75</sup>

Finally, the Second Circuit has addressed the employment contract arbitration-agreement class waiver issue in two instances. First, in *Sutherland v. Ernst & Young LLP*, focusing on the FLSA and following the Eighth Circuit's reasoning in *Owen*, the court held that the FLSA does not include a "contrary congressional command" preventing arbitration-agreement class waivers from being enforced.<sup>76</sup> The court also noted that the Supreme Court's *AT&T Mobility* decision supported the lack of "contrary congressional command" because finding that a statute requires class-wide arbitration would be "a scheme inconsistent with the FAA."<sup>77</sup> Additionally, the court was confronted with the issue of whether independent arbitration would be prohibitively expensive for the employee and concluded that the court was "bound to conclude" that even if the employee's claim was not worth pursuing economically on an individual basis, the class action waiver was not invalid.<sup>78</sup> Recently, in *Patterson v. Raymours Furniture Co.*, the Second Circuit noted that it is bound by its decision in *Sutherland* and found that the NLRA does not prevent the FAA's requirement of enforcing arbitration agreements according to their terms.<sup>79</sup> Thus, the traditional view held by the circuit courts is that arbitration-agreement class waivers in employment contracts do not violate the NLRA, and this position has been upheld on multiple occasions. However, the NLRB's view is beginning to sway court opinions, as explained below.

## 2. *The Circuits Invalidating Class Waivers in Employment Contracts*

Recently, three circuits split from the traditional view and adopted the Board's reasoning by holding that class action waivers in employment contracts are a violation of the NLRA.<sup>80</sup> First, the Seventh Circuit in *Lewis v. Epic Systems Corp.* denied the employer's motion to compel arbitration because the arbitration agreement required that employees agree to bring wage-and-hour claims against the company only through individual arbitration, which violated the employees' rights to collective arbitration or collective action under the NLRA and was also unenforceable under the

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75. 824 F.3d 772, 775–76 (8th Cir. 2016).

76. 726 F.3d 290, 297 (2d Cir. 2013).

77. *Id.* (quoting *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011)).

78. *Id.* at 298–99.

79. 659 F. App'x 40, 43 (2d Cir. 2016).

80. *See* *NLRB v. Alt. Entm't, Inc.*, 858 F.3d 393 (6th Cir. 2017); *Morris v. Ernst & Young, LLP*, 834 F.3d 975 (9th Cir. 2016), *cert. granted*, 137 S. Ct. 809 (2017); *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147 (7th Cir. 2016), *cert. granted*, 137 S. Ct. 809 (2017).

FAA.<sup>81</sup> Further, the court reasoned that illegality prevents enforcement of arbitration agreements under the FAA, and because the class and collective-action waiver is illegal under the NLRA, no conflict exists between the NLRA and the FAA.<sup>82</sup> Notably, unlike other courts, the Seventh Circuit acknowledged that the NLRA does not disfavor arbitration, and it is possible that the NLRA would not bar a class and collective-action waiver if it were in the context of a collective bargaining agreement.<sup>83</sup> Therefore, the Seventh Circuit recognized that the discontent between the sides of the split may not be as drastic as it appears.<sup>84</sup>

Following in the Seventh Circuit's footsteps, the Ninth Circuit deepened the split by holding in *Morris v. Ernst & Young, LLP* that an employer violates the NLRA by requiring employees to sign a concerted-action waiver as a condition of employment because the prevention of collective work-related legal claims interferes with the employees' right to act in concert under the NLRA.<sup>85</sup> Further, the court held that the FAA does not require that the agreement be upheld because the waiver's illegality is derived from the requirement that the proceedings be individual, and not from the requirement to arbitrate.<sup>86</sup> The court noted that the rights protected by Section 7 of the NLRA, including collective arbitration or collective action, "would amount to very little if employers could simply require their waiver."<sup>87</sup> While this is the second decision to support the NLRB's position on employment class action waivers, *Morris* was a 2–1 decision in which the dissenting opinion stated that the "decision is breathtaking in its scope and in its error; it is directly contrary to Supreme Court precedent[,] and [it] joins the wrong side of [the] circuit split."<sup>88</sup> The court's holding is further limited because it is applicable only to waivers that are required to be signed as a condition of employment and does not cover agreements that give employees the right to opt out of arbitration.<sup>89</sup> However, as noted in Part I.A of this Note, the NLRB has held on many occasions that arbitration agreements with class waivers giving employees the right to opt out are still unenforceable under the NLRA.

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81. *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147, 1154–57 (7th Cir. 2016), *cert. granted*, 137 S. Ct. 809 (2017); *see* National Labor Relations Act § 7, 29 U.S.C. § 157 (2012). The court further explains that "[c]ollective, representative, and class legal remedies allow employees to band together and thereby equalize bargaining power." *Lewis*, 823 F.3d at 1153.

82. *Lewis*, 823 F.3d at 1156–60.

83. *Id.* at 1158.

84. *See id.*

85. 834 F.3d 975, 980–84 (9th Cir. 2016), *cert. granted*, 137 S. Ct. 809 (2017).

86. *Id.* at 984–90.

87. *Id.* at 983.

88. *Id.* at 990 (Ikuta, C.J., dissenting).

89. *Id.* at 980–84.

Finally, the Sixth Circuit recently joined the Seventh and Ninth Circuits in the split.<sup>90</sup> In *NLRB v. Alternative Entertainment, Inc.*, the Sixth Circuit provided an in-depth discussion of the Supreme Court's and the circuit courts' precedent and came to similar conclusions as the Seventh and Ninth Circuits, namely that the NLRA's Section 7 right to act concertedly is a substantive right, which prohibits collective-action waivers on grounds that would apply to any contract, and therefore fits within the FAA's savings clause as an illegal provision.<sup>91</sup>

Thus, with many conflicting legal opinions currently in play, including the views of the NLRB, the Supreme Court, and the various circuit courts, the use of arbitration-agreement class waivers in employment contracts has become an unsettled and unpredictable choice for employers. However, this year, the Supreme Court granted certiorari on this issue through a consolidation of three of the circuit court cases discussed above; therefore, it is now up to the Supreme Court to resolve this issue.<sup>92</sup>

#### *D. Employment Arbitration Class Waivers Weakening the Force of the NLRA*

Aside from the persuasive legal reasoning of the Sixth Circuit, the Seventh Circuit, the Ninth Circuit, and the NLRB, further policy arguments support invalidating class waivers, due to the many factors associated with mandatory individual arbitration that considerably diminish the purpose of the NLRA. First, “[t]he ability of large corporations to impose arbitration and ban class actions threatens to undo the achievements of many decades of . . . employee legislative efforts.”<sup>93</sup> Specifically, “[t]he NLRA promotes the right of employees to engage in collective activity in order to combat the inequalities that are often present in the employer-employee relationship.”<sup>94</sup> Thus, under the purpose of the NLRA, workers need “to have access to due process in regard to employment decisions affecting them and the ability to challenge adverse decisions.”<sup>95</sup> Second, while other

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90. *NLRB v. Alt. Entm't, Inc.*, 858 F.3d 393 (6th Cir. 2017).

91. *Id.* at 400–08.

92. *Morris v. Ernst & Young, LLP*, 834 F.3d 975 (9th Cir. 2016), *cert. granted*, 137 S. Ct. 809 (2017); *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147 (7th Cir. 2016), *cert. granted*, 137 S. Ct. 809 (2017); *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015), *cert. granted*, 137 S. Ct. 809 (2017).

93. Stone, *supra* note 22, at 180; see Jean R. Sternlight, *Disarming Employees: How American Employers Are Using Mandatory Arbitration to Deprive Workers of Legal Protection*, 80 BROOK. L. REV. 1309, 1356 (2015).

94. Nicole Wredberg, Note, *Subverting Workers' Rights: Class Action Waivers and the Arbitral Threat to the NLRA*, 67 HASTINGS L.J. 881, 896 (2016) (citing National Labor Relations Act § 1, 29 U.S.C. § 151 (2012)).

95. Alexander J.S. Colvin, *Mandatory Arbitration and Inequality of Justice in Employment*, 35 BERKELEY J. EMP. & LAB. L. 71, 72 (2014).

ways to resolve important legal questions *may* be available, class action lawsuits are “[t]he most effective way for workers to resolve” big labor and employment law issues, such as the misclassification-of-workers issue discussed in Part II of this Note.<sup>96</sup> Though arbitration is often used to resolve disputes at more “efficient, expeditious, and inexpensive” rates than litigation,<sup>97</sup> the “use of arbitration, particularly in the employment context, raises many practical concerns due to the significant power imbalance [and inequality of justice] that often exists between employer[s] and employee[s], thus . . . belying the perceived benefits of arbitration.”<sup>98</sup> This imbalance and inequality created by class action waivers can be credited to the many negative features associated with individual arbitration, as well as the many positive features associated with class actions, as discussed below.

Starting with the negative effects of individual arbitration, workers are less likely to bring their claims when individual arbitration is the only available legal forum.<sup>99</sup> This reduction in the number of claims being brought in individual arbitration by workers can be credited to many factors. The first factor is the value of individual arbitration claims, which is often too low and leads to lower recovery than claims brought in litigation.<sup>100</sup> Second, because of this low value on return, hiring representation is difficult—and often impossible—for employees who are subject to individual arbitration.<sup>101</sup> This is because an attorney will likely be less willing to take an employee’s case if he or she finds out the case will be going to arbitration, due to the way a plaintiff’s attorney is compensated—an attorney for an employee usually has to decide upfront

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96. Charlotte Garden, *What Would a Merrick Garland Confirmation Mean for the Future of Gig Work?*, ATLANTIC, (May 11, 2016), <http://www.theatlantic.com/business/archive/2016/05/supreme-court-gig-work/482115/> (emphasis added); see discussion *infra* Part II.

97. R. Gaul Silberman et al., *Alternative Dispute Resolution of Employment Discrimination Claims*, 54 LA. L. REV. 1533, 1539 (1994).

98. Michael D. Schwartz, Note, *A Substantive Right to Class Proceedings: The False Conflict Between the FAA and NLRA*, 81 FORDHAM L. REV. 2945, 2949 (2013) (citing Alexander J. S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. EMPIRICAL LEGAL STUD. 1, 1 (2011); Alexander Colvin & Kelly Pike, *The Impact of Case and Arbitration Characteristics on Employment Arbitration Outcomes*, CORNELL U. ILR SCH. 25 (June 2012), <http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1022&context=conference>); see Colvin, *supra* note 95, at 72.

99. Sternlight, *supra* note 93, at 1312 (“[E]vidence reveals that employees who are covered by mandatory arbitration provisions almost never file arbitration claims.”).

100. *Id.* at 1327 (noting that employees do substantially worse in mandatory arbitration than in litigation, and the results “cannot be entirely attributed to greater use of summary judgment in litigation than in arbitration”); see Colvin, *supra* note 95, at 80–81 (“[F]or mandatory arbitration cases administered by the [American Arbitration Association], the mean outcome across all awards is \$23,548, approximately one-seventh of the mean outcome in the federal court trials and one-fifteenth the mean outcome in the state court trials. This much lower outcome reflects the combination of the lower employee win rate at arbitration hearings and the smaller awards to employees in arbitration.”).

101. Sternlight, *supra* note 93, at 1334.

whether he or she can afford to handle the case on a contingent fee basis.<sup>102</sup> For example, one survey found that ten percent of attorneys accepted potential clients who sought representation in litigation, but only five percent of attorneys accepted potential clients who were bound by a mandatory arbitration agreement, which essentially means mandatory arbitration cut the availability of access to justice in half.<sup>103</sup> While it is true that pro se employees can still bring claims on their own, “arbitration is not a hospitable venue for pro se employees”; therefore, they rarely file claims in arbitration, and when they do, they do not find much success.<sup>104</sup> Hence, class action waivers are a way of eroding, rather than boosting, employees’ access to justice because the waivers diminish their capability of filing claims due to the difficulty of obtaining legal representation and the low rate of success associated with pro se plaintiffs.<sup>105</sup>

Switching perspectives to the benefits of class actions, classes are “essential [to many] employees” because “claims that were not previously economically feasible may become [economically] feasible.”<sup>106</sup> This is due to the fact that “class actions can allow for the aggregation of many similar small value claims” and thus “are considered by many to serve an important public role of allowing ‘those who are less powerful to band together . . . to seek redress of grievances that would go unremedied if each litigant had to fight alone.’”<sup>107</sup> Applied to the workplace, through class actions, small claims that cannot be brought on individual grounds can be combined to obtain resolutions of issues that are affecting many workers on a smaller scale. Also, without class actions to provide notice of a “potential legal violation,” many employees never realize “they have been harmed, or that the harm violated a law.”<sup>108</sup> Alternatively, while an employee might realize he or she has a legal claim, he or she might fear retaliation without the “shield of anonymity” provided by class actions.<sup>109</sup> Additionally, “class actions . . . can be used to procure broad injunctive relief that might not be available to individuals,” which can be used to obtain expansive changes, such as “compan[ies] . . . restructur[ing] the work environment for

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102. *Id.*; Colvin, *supra* note 95, at 84 (noting that since the lawyer’s payment is a “percentage of the damages where successful, and therefore receiv[ing] nothing if their advocacy is unsuccessful, [he or she] must consider the likely average recovery across all cases”).

103. Sternlight, *supra* note 93, at 1339.

104. *Id.* at 1312, 1343; Colvin, *supra* note 95, at 82–83 (noting that pro se employees in mandatory arbitration are less likely to obtain settlement, and if they do proceed to a hearing, they are also less likely to be more successful than a represented employee).

105. Sternlight, *supra* note 93, at 1312.

106. *Id.* at 1346–47.

107. Schwartz, *supra* note 98, at 2950 (quoting Maureen A. Weston, *The Death of Class Arbitration After Concepcion?*, 60 U. KAN. L. REV. 767, 770–71 (2012) (ellipsis in original)).

108. Sternlight, *supra* note 93, at 1347–48; see Wredberg, *supra* note 94, at 888–89.

109. Wredberg, *supra* note 94, at 888–89; see Sternlight, *supra* note 93, at 1348–49.

others.”<sup>110</sup> Therefore, without class action, larger problems affecting all employees as a group, such as worker misclassification,<sup>111</sup> are extremely difficult to resolve. Lastly, the availability of class actions to employees strongly deters employers from violating employment laws; therefore, “employers [are] greatly reduc[ing] the deterrent effect of employment . . . laws by eliminating . . . class claims.”<sup>112</sup>

Accordingly, all of these factors show that employers “are using mandatory [individual] arbitration clauses to ‘disarm’ employees, effectively preventing them from bringing most individual or class claims and thereby obtaining access to justice.”<sup>113</sup> When blocking all forums for collective or class action, an employer is significantly relieved from legal pressures, because employees have an extremely difficult time successfully pursuing legal claims. Focusing on the big picture flowing from all these factors, “class action waivers will leave many workers vulnerable to exploitation because of their low bargaining power, [which] directly undermin[es] a primary purpose of the NLRA to equalize bargaining power.”<sup>114</sup>

Therefore, courts should follow the reasoning of the Sixth Circuit, the Seventh Circuit, the Ninth Circuit, and the NLRB and find that arbitration class waivers in employment contracts should be held unenforceable when no class or collective forums are left open for employees to address employment laws.<sup>115</sup> The courts should further find that the pro-arbitration-agreement precedent of the Supreme Court creates bad policy when applied to employment contracts, as opposed to commercial and consumer contracts, and follow or create an exception to the FAA for class waivers in employment contract arbitration agreements.<sup>116</sup> The Supreme Court’s proarbitration precedent is focused on protecting developing companies, such as those in the gig economy, from the risks of litigation by strongly upholding arbitration-agreement class waivers in commercial and consumer contracts. However, this probusiness reasoning does not so clearly apply to employment contracts in which the company–employers have much more power and need less protection in comparison to employees. Therefore, an exception to the Supreme Court’s “liberal federal policy favoring

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110. Sternlight, *supra* note 93, at 1350.

111. See discussion *infra* Part II.

112. Sternlight, *supra* note 93, at 1350–51.

113. *Id.* at 1310.

114. Wredberg, *supra* note 94, at 892.

115. See *Morris v. Ernst & Young, LLP*, 834 F.3d 975, 980–84 (9th Cir. 2016), *cert. granted*, 137 S. Ct. 809 (2017); *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147, 1154–57 (7th Cir. 2016), *cert. granted*, 137 S. Ct. 809 (2017); *D.R. Horton, Inc.*, 357 N.L.R.B. 2277, 2279–80 (Jan. 3, 2012), *enforcement granted in part and rev'd in part*, 737 F.3d 344 (5th Cir. 2013).

116. See *D.R. Horton, Inc.*, 357 N.L.R.B. 2277, 2284–86 (Jan. 3, 2012), *enforcement granted in part and rev'd in part*, 737 F.3d 344 (5th Cir. 2013); *Greene & O'Brien*, *supra* note 28, at 88.

arbitration agreements”<sup>117</sup> should be created for employment contract arbitration class waivers, thereby giving the appropriate force to the protection of collective arbitration or action provided to employees by the NLRA.

## II. GIG WORKER CLASSIFICATION: INDEPENDENT CONTRACTORS OR EMPLOYEES?

One of the most debated questions of labor and employment law today is “how workers should be categorized in [the] on-demand businesses that rely more on smartphone applications and internet connections than hierarchical supervision within traditional brick-and-mortar workplaces.”<sup>118</sup> This question is controversial for many reasons; however, the main reason is the “exposure to legal liability”<sup>119</sup> associated with employee classification and the “[m]illions of dollars in wages and benefits [that] turn on [this] question.”<sup>120</sup>

This gig-economy misclassification issue has already been brought to the litigation forefront on multiple occasions.<sup>121</sup> For example, many drivers for the ride-sharing companies Uber and Lyft have pursued litigation, claiming they are misclassified as independent contractors and instead should be reclassified as employees due to the amount of control Uber and Lyft have over their work as drivers.<sup>122</sup> On the other hand, the gig companies are adamantly arguing that “they do not employ drivers but instead license access to a platform that matches those who need rides with nearby available drivers.”<sup>123</sup> In other words, the gig-economy companies are arguing that they are *technology* companies that provide a place in which those who deliver the goods and services can connect with those in need of those goods and services, and therefore the companies are not the *providers* of the goods and services.<sup>124</sup> Instead, the *drivers* as independent

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117. *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1052, 1055 (citing *CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 98 (2012)).

118. Means & Seiner, *supra* note 1, at 1513, n.1 (internal quotation marks omitted) (citing many examples of news articles addressing this issue).

119. Megan Carboni, Note, *A New Class of Worker for the Sharing Economy*, 22 RICH. J.L. & TECH., no. 4, at 1, 11 (2016) (citing Gillian B. White, *In the Sharing Economy, No One's an Employee*, ATLANTIC (June 8, 2015), <http://www.theatlantic.com/business/archive/2015/06/in-the-sharing-economy-no-ones-an-employee/395027/>, archived at <https://perma.cc/SDU8-BHVC>).

120. See Garden, *supra* note 96 (“[L]awyers for Uber drivers in California and Massachusetts revealed that the drivers stood to win as much as \$852 million in lost tips and expenses if they proved they were misclassified as independent contractors.”).

121. See Means & Seiner, *supra* note 1, at 1513 (citing *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067 (N.D. Cal. 2015); *O'Connor v. Uber Techs.*, 82 F. Supp. 3d 1133 (N.D. Cal. 2015)).

122. *Id.* (citing *Cotter*, 60 F. Supp. 3d 1067; *O'Connor*, 82 F. Supp. 3d 1133).

123. *Id.* (citing *O'Connor*, 82 F. Supp. 3d at 1137–38).

124. See *id.*

contractors are the providers of the goods and services.<sup>125</sup> With both sides to this dispute in mind, in *Cotter v. Lyft, Inc.* and *O'Connor v. Uber Technologies, Inc.*, the judge denied summary judgment on this issue, finding that a reasonable jury could decide, based on the evidence, that either classification of the drivers could be proper.<sup>126</sup> Specifically, the court in *O'Connor* noted that “a number of facts . . . remained in dispute regarding how much control Uber exercised over its drivers.”<sup>127</sup>

In order to determine whether workers are independent contractors or employees, “jurors [must] weigh a number of factors” under the applicable misclassification test.<sup>128</sup> However, “no one determinative test concerning misclassification exists.”<sup>129</sup> “[D]ifferent misclassification tests exist for different purposes in federal law, and states maintain their own employee and independent contractor statutes and common law classifications, which vary between jurisdictions;” consequently, “different jurisdictions have come to different conclusions regarding the same set of workers.”<sup>130</sup> However, the most commonly utilized test in determining worker classification is the common law control test.<sup>131</sup> Part II.A will introduce the common law control test, and Part II.B will apply this test to Uber drivers in order to demonstrate that the proper classification of workers in the gig economy is more appropriately employees instead of independent contractors.

### A. The Common Law Control Test Factors

The focus of the common law control test is on the company's right to control the *what* and *how* of the work performed by its workers.<sup>132</sup> Thus,

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125. *See id.*

126. *Cotter*, 60 F. Supp. 3d 1067; *O'Connor*, 82 F. Supp. 3d 1133.

127. Robert L. Redfearn III, *Sharing Economy Misclassification: Employees and Independent Contractors in Transportation Network Companies*, 31 BERKLEY TECH. L.J. 1023, 1042 (2016) (ellipsis in original) (internal quotation marks omitted) (quoting *O'Connor*, 82 F. Supp. 3d at 1135).

128. Garden, *supra* note 96.

129. Pamela A. Izvanariu, *Matters Settled but Not Resolved: Worker Misclassification in the Rideshare Sector 2* (UCLA Inst. for Research on Labor & Emp't, Working Paper No. 2016-20, 2016), <http://escholarship.org/uc/item/42q1792z>.

130. *Id.* at 2, 7 (citing U.S. GOV'T ACCOUNTABILITY OFFICE, EMPLOYEE MISCLASSIFICATION IMPROVED OUTREACH COULD HELP ENSURE PROPER WORKER CLASSIFICATION (2007), <http://www.gao.gov/products/GAO-07-859T>).

131. Julien M. Mundeley, Note, *Not Everything That Glitters is Gold, Misclassification of Employees: The Blurred Line Between Independent Contractors and Employees Under the Major Classification Tests*, 20 SUFFOLK J. TRIAL & APP. ADVOC. 253, 262 (2015).

132. *See* Stephanie Sullivant, Comment, *Restoring the Uniformity: An Examination of Possible Systems to Classify Franchisees for Workers' Compensation Purposes*, 81 UMKC L. REV. 993, 1004 (2013); *see also* Tina Quinn, *Worker Classification Still Troublesome*, J. ACCT. (Feb. 28, 2009), <https://www.journalofaccountancy.com/issues/2009/mar/workerclassification.html> (noting that the

when evaluating the factors of the test, the court should focus on which party has control over the “work process.”<sup>133</sup> If the *company* has more control, then the worker should be an employee, but if the *worker* has more control, then the worker should be classified as an independent contractor.<sup>134</sup> The ten factors making up the control test are as follows: control, supervision, integration, skill level, continuing relationship, tools and location, method of payment, intent, employment by more than one company, and type of business.<sup>135</sup> However, it should be noted that none of the factors are dispositive, and the weight given to each factor is not predetermined; thus, the weight of the factors should vary, depending on the facts and circumstances of the case.<sup>136</sup>

A great deal of ambiguity has been created by these tests,<sup>137</sup> and until reformation occurs in this area of the law, Uber drivers and other workers in the gig economy with comparable employment characteristics should be reclassified as employees based on the common law control test. In order to demonstrate the reasoning behind this conclusion, Part II.B will apply each factor of the control test to Uber drivers.

### B. *The Common Law Control Test Applied to Uber Drivers*

The common law control test analysis begins with the control and supervision factors, in which the relevant inquiries are whether the employer or the worker has control over the details of the work performed by the worker and the directness of the supervision of the worker by the employer.<sup>138</sup> At first glance, it may appear that these factors fall in favor of independent contractor status, due to the fact that Uber drivers set their own schedules<sup>139</sup> and have no apparent direct supervisors or managers.<sup>140</sup> However, because Uber still has a strong monitoring system over its drivers through its rating systems,<sup>141</sup> the control and supervision factors can still

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inquiry is whether the employer reserved the right to control and not whether the employer actually exercises that right).

133. Jennifer Pinosof, Note, *A New Take on an Old Problem: Employee Misclassification in the Modern Gig-Economy*, 22 MICH. TELECOMM. & TECH. L. REV. 341, 347 (2016) (citing Charles J. Muhl, *What is an Employee? The Answer Depends on the Federal Law*, MONTHLY LAB. REV. 5, 5 (Jan. 2002)).

134. *Id.* (citing Muhl, *supra* note 133, at 5).

135. *Id.* (citing Muhl, *supra* note 133, at 7).

136. *See id.*

137. *Id.* 349–351.

138. *Id.* at 355.

139. *See, e.g.*, Mike Isaac & Noam Scheiber, *Uber Settles Cases with Concessions, but Drivers Stay Freelancers*, N.Y. TIMES (Apr. 21, 2016), [http://www.nytimes.com/2016/04/22/technology/uber-settles-cases-with-concessions-but-drivers-stay-freelancers.html?\\_r=1](http://www.nytimes.com/2016/04/22/technology/uber-settles-cases-with-concessions-but-drivers-stay-freelancers.html?_r=1).

140. Garden, *supra* note 96.

141. *Id.*

point toward employee classification. The company deactivates drivers who fall below a certain number of stars on the rating system,<sup>142</sup> and further, the company can even fire the workers for no reason at all since the drivers are workers at will.<sup>143</sup> Therefore, there are sufficient circumstances to rely on in finding that Uber meets the control and supervision factors.

The third factor, focusing on integration, asks “whether the service provided by the worker is an integral part of the employer’s business, or in other words, whether the business is conceivable without them.”<sup>144</sup> Under this factor, a strong argument can be, and has been, made that Uber would not exist without its drivers; therefore, under this view, the company cannot just call itself a technology platform to get out from under this factor of the test.<sup>145</sup> Instead, Uber is essentially a transportation platform trying to fit inside a technology platform’s shoes.<sup>146</sup> Thus, without any stretch of the imagination, Uber drivers lean toward employee classification because there would be no transportation services occurring without its drivers.

The fourth factor is “skill set,” which more easily falls to the employee side because “courts [commonly] consider drivers to be unskilled workers and thus employees,” instead of skilled independent contractors.<sup>147</sup>

The fifth factor is the “continuing relationship” factor, which focuses on the “duration of the business relationship between employer and worker.”<sup>148</sup> While about half of Uber drivers are estimated to walk away from the job within a year,<sup>149</sup> a permanent relationship can continue between Uber and a driver because there is no end date mentioned in the driver contract.<sup>150</sup> Therefore, because more permanent relationships can, and do, form under Uber’s employment framework, this moves the needle toward employee classification.

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142. *Uber Community Guidelines*, UBER, <https://www.uber.com/legal/community-guidelines/us-en> (last visited Nov. 9, 2017); *O’Connor v. Uber Techs.*, 82 F. Supp. 3d 1133, 1143 (N.D. Cal. 2015).

143. *See S.G. Borello & Sons, Inc. v. Dep’t of Indus. Relations*, 769 P.2d 399, 404 (Cal. 1989) (noting that the right to terminate at will, without cause, is strong evidence of an employment relationship).

144. Pinosof, *supra* note 133, at 358 (citing Muhl, *supra* note 133, at 8–9).

145. Plaintiffs’ Opposition to Defendant Uber Technologies, Inc.’s Motion for Summary Judgment at 6–7, *O’Connor v. Uber Techs., Inc.*, 201 F. Supp. 3d 1110 (2016) (No. 13-cv-03826-EMC).

146. *Id.*

147. Pinosof, *supra* note 133, at 361 (citing *Alexander v. FedEx*, 765 F.3d 981, 995 (9th Cir. 2014); *JKH Enters. v. Dep’t of Indus. Relations*, 48 Cal. Rptr. 3d 563, 580 (Ct. App. 2006)).

148. *Id.*

149. *Id.* (citing Ellen Huet, *Uber’s Ever-Renewing Workforce: One-Fourth of Its Current U.S. Drivers Joined Last Month*, FORBES (Jan. 22, 2015, 4:14 PM), <http://www.forbes.com/sites/ellenhuet/2015/01/22/uber-study-workforce/#1923e4641244>).

150. *Id.*; *see, e.g., FedEx Home Delivery*, 34-CA-012735 & 34-RC-002205 (NLRB 2014), 2014 WL 4926198, *enforcement denied and order vacated*, 849 F.3d 1123 (D.C. Cir. 2017).

Next, the “tool and location” factor asks which party provides the instruments needed to do the work and where the work is performed.<sup>151</sup> Focusing on the tools, while Uber drivers must provide the car and everything that goes along with it, Uber leases iPhones to drivers who are in need of one to run the app, and courts have found having other equipment from an employer to be relevant.<sup>152</sup> Next, focusing on location, even though drivers do not work on a worksite, “the physical location factor is absent or underemphasized in many recent judicial inquiries using the common law control test[,] . . . likely because the factor is growing outdated in the modern economy.”<sup>153</sup> Therefore, while this factor likely leans more toward independent contractor status, courts have been more likely to look past shortcomings under this factor in comparison to other factors in order to find employee classification.

The method of payment is the seventh factor under consideration in the control test. An independent contractor would likely be “paid on a per-task basis,” whereas an employee would likely be paid on an hourly or salary basis.<sup>154</sup> Because Uber sets the fares and what percentage of the fares the drivers receive without any input from the drivers, these factors fall in favor of employee status and are arguably more important than the fact that drivers are paid on a “per-trip basis” due to the large impact of these decisions on how much the worker can earn.<sup>155</sup> Therefore, the payment method of Uber drivers arguably falls toward employee classification.

Next, the court turns its attentions to the intent of both parties regarding the employment relationship.<sup>156</sup> The court likely will look to the contract between the parties for indications of intent.<sup>157</sup> However, because of the unequal bargaining power between companies and workers created through contract terms, instead, courts often look to the surrounding circumstances to determine the intent of the parties.<sup>158</sup> Further, because of this unequal bargaining power, the intent factor has been thrown out of other classification tests,<sup>159</sup> and as discussed in Section I.D, Uber is likely taking

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151. Pinsof, *supra* note 133, at 361–63.

152. See, e.g., *Alexander*, 765 F.3d at 995; *O’Connor v. Uber Techs., Inc.*, 82 F. Supp. 3d 1133, 1153 (N.D. Cal. 2015) (noting that an iPhone for use of the Uber app is “the critical tool of the business”).

153. Pinsof, *supra* note 133, at 363 (citing *Alexander*, 765 F.3d 981; *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067, 1080 (N.D. Cal. 2015)).

154. *Id.* at 364.

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.* at 365; see, e.g., *W. Ports Transp., Inc. v. Emp’t Sec. Dep’t*, 41 P.3d 510, 516 (Wash. Ct. App. 2002) (“Contractual language, such as a provision describing drivers as independent contractors, is not dispositive; instead, the court considers all the facts related to the work situation.”).

159. Pinsof, *supra* note 133, at 365 (noting the economic realities test and the ABC test for worker classification).

advantage of its drivers through the nature of the relationship; therefore, this factor of the test can be, and often is, disregarded, while more emphasis is put on the circumstances discussed when analyzing the other factors of the test.

The ninth factor is whether the driver works for more than one employer.<sup>160</sup> The real question that this factor is trying to answer is “whether [the] worker is in business for himself” and is therefore an independent contractor.<sup>161</sup> While many Uber drivers also work for other ride-sharing companies, such as Lyft and Sidecar, it does not appear that Uber drivers have any important business decisions to make for themselves under the Uber business model; therefore, “courts could easily find . . . that drivers ‘do not have the independence, nor are they allowed the initiative and decision-making authority, normally associated with an independent contractor.’”<sup>162</sup> Consequently, while drivers in the gig economy often work for more than one company, drivers possess other characteristics, such as a lack of decision-making power, that push this factor toward employee classification because the drivers do not seem to actually be in business for themselves.

Finally, the last factor is “whether the worker is engaged in a business or occupation distinct from the employer.”<sup>163</sup> This question has already been answered by the analysis of factor nine, whether the driver is employed by more than one company, and by the analysis of factor three, whether the worker is engaged in the same type of business as the employer (i.e., integration). Based on these factors, Uber drivers may be independent contractors since multiple gig-economy companies can employ them; however, the drivers may be employees because the drivers are so integrated into the company that there would be no Uber without its drivers. Thus, this factor is difficult to decipher, but the analysis can be helpful in getting a full understanding of the relationship.

Overall, while many factors of the control test can arguably fall either way, it is noteworthy that each factor can be argued as leaning toward employee classification when applied to a company in the gig economy. With it being hard to determine one way or the other, the best policy is to “choose workers over the business,” even if that means “stifl[ing] technological advancement and an evolving economy,” because “choos[ing] . . . business over the workers is . . . at the expense of those

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160. *Id.*

161. *Id.*

162. *Id.* at 366 (quoting FedEx Home Delivery, 34-CA-012735 & 34-RC-002205 (NLRB 2014), 2014 WL 4926198, *enforcement denied and order vacated*, 849 F.3d 1123 (D.C. Cir. 2017)).

163. *Id.*

trying to live within it,”<sup>164</sup> which is counterproductive and conducive to unfair labor practice.<sup>165</sup> Thus, the gig-economy employers should no longer turn a blind eye to the rights of their workers by classifying them as independent contractors, especially when those workers more easily meet the employee mold by being more committed to their job and working more hours for the company. Therefore, courts should consider lifting the independent contractor classification blockade on workers in the gig economy by reclassifying the workers as employees.

While the worker classification issue is already complicated by the lack of clarity created by the various classification tests and the unclear, multifactor common law control test, resulting in various outcomes throughout the courts, the classification dispute’s connection to the arbitration class waiver issue further complicates the labor-and-employment law battleground for workers in the gig economy, as discussed below.

### III. THE TANGLED WEB BETWEEN NLRA CLASS-WAIVER CLAIMS AND WORKER-CLASSIFICATION CLAIMS: BREAKING DOWN THE BLOCKADE OF WORKERS’ RIGHTS

Further complicating the two issues discussed above, “there is a certain circular quality to [these issues], because the NLRA applies only to employees—so where workers are truly independent contractors, they cannot invalidate their arbitration agreements” on NLRA grounds.<sup>166</sup> Essentially, companies have been using the arbitration agreements and classification of independent contractors to “protect themselves from [the majority of] exposure by eliminating class actions” and the bulk of workers’ rights.<sup>167</sup> In other words, companies in the gig economy with workers classified as independent contractors are currently legally protected from litigation on the arbitration class-waiver issue because independent contractors are not protected by the NLRA and cannot use these grounds to challenge the class action waivers in their contracts.

Workers trapped under mandatory-individual-arbitration agreements are left with minimal avenues for legal recourse because filing claims in individual arbitration is usually not worth the trouble of the high expenses

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164. Carboni, *supra* note 119, at 10–11 (citing Greg Miller, *California’s Uber Ruling Could Erase Billions*, WALL ST. DAILY (June 26, 2015, 5:00 AM), <http://www.wallstreetdaily.com/2015/06/26/uber-california-ruling/> [<https://perma.cc/L4VC-C67V>]).

165. *See, e.g.*, 29 U.S.C. § 158(a) (2012) (making it “an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees”).

166. Garden, *supra* note 96. The NLRA states that “‘employee’ shall include any employee, and shall not be limited to the employees of a particular employer, . . . but shall not include . . . any individual having the status of an independent contractor.” 29 U.S.C. § 152(3) (2012).

167. Sternlight, *supra* note 93, at 1345.

involved and the little return expected.<sup>168</sup> Workers that have agreed to mandatory-individual-arbitration are even further impeded if they merely qualify as an independent contractor and therefore are not protected by the NLRA. Thus, courts should both reclassify workers in the gig economy as employees and invalidate class action waivers in employment contract arbitration agreements to lift the blockade on labor and employment law rights in the gig economy.

However, it cannot go without mention that lifting the blockade would come at a price to businesses in the gig economy. Gig-economy companies are still new and developing and therefore could be demolished by changes this significant. Specifically, the invalidation of employment-arbitration-agreement class waivers will create a large increase in the amount, as well as power, of claims being brought against gig-economy companies by employees.<sup>169</sup> Further, employee reclassification will “pose an existential threat to the companies involved”<sup>170</sup> because employees cost more than independent contractors due to the requirement that the employer of an employee pay “payroll taxes, workers’ compensation insurance, health care, minimum wage, overtime . . . the reimbursement of business-related expenses,” and more.<sup>171</sup>

However, some particularized changes to the gig-economy business structure could protect workers’ rights, as well as help the gig economy survive the changes suggested in this Note. First, the companies could revise their contracts to even the playing field between the company and workers by allowing an alternative employment contract option exclusively to those workers who wish to work a higher number of hours and receive the benefits of employee status, while also maintaining the independent contractor classification for those workers who prefer the flexible platform that independent contractor status provides. Also, the companies in the gig economy could consider keeping the class waiver with an opt out that is easier to comply with than the usually cumbersome opt-out process required.<sup>172</sup> However, it should be noted that the NLRB has ruled that this still interferes with the protected employee rights afforded by the NLRA.<sup>173</sup> Therefore, courts should implement these suggested changes to the legal

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168. See discussion *supra* Part I.D.

169. See Sternlight, *supra* note 93, at 1345 (“[T]he 560 class or collective actions filed in federal court still cover far more employees than do the 30,000 individual employment claims filed in federal court.” (footnote omitted)).

170. Garden, *supra* note 96; see also Richard A. Epstein, *Don’t Strangle Uber!*, HOOVER INSTITUTION (Aug. 3, 2015), <http://www.hoover.org/research/dont-wreck-sharing-economy>.

171. Means & Seiner, *supra* note 1, at 1513–14.

172. For example, many arbitration opt-out procedures require sending the employer a written notice within a short amount of days. See, e.g., *Lyft Terms of Service*, LYFT (Sept. 30, 2016), <https://www.lyft.com/terms>.

173. See, e.g., *Gamestop, Corp.*, 20-CA-080497 (NLRB 2015), 2015 WL 9592400.

framework affecting the gig economy because when weighing the threat to the companies against the threat to workers' rights, the uneven bargaining power present in employment agreements is in need of a legal restructuring, providing workers with more rights in the company-worker relationship.

#### CONCLUSION

The movement toward the use of independent contractors in the place of employees in the workforce is well underway and is bypassing traditional employer-employee relationships on an undeniably large scale. One sector of the workforce in which this movement is especially thriving is the gig economy. Companies such as Uber participating in the gig economy are stirring up under-addressed issues in labor and employment law each and every day as this new form of business strives to fit inside the existing labor and employment laws. Today, the two chief legal disputes threatening the gig economy's business model are the enforceability of class waivers in arbitration agreements in employment contracts and the classification of workers.

First, a split among the circuit courts exists as to the question of whether the waiver of class or collective action in employment-arbitration agreements is legal based on the rights protected under the NLRA. The NLRB has interpreted an employee's rights under Section 7 of the NLRA as covering class or collective action, which are habitually waived in these agreements. Further, the NLRB held that this right is substantive, and therefore does not conflict with the FAA because the Supreme Court has repeatedly held that arbitration can only substitute for a judicial forum when the litigant can effectively maintain his substantive rights through arbitration.

While the circuit courts traditionally followed the Supreme Court's strong support of the FAA and upheld class action waivers, recently, the Sixth Circuit, the Seventh Circuit, and the Ninth Circuit have changed directions and followed the NLRB's invalidation of class waivers in employment contracts based on the NLRA's protection of the employee's right to engage in concerted activity. Because a controversial split between the circuits was created by these opinions, the Supreme Court has granted certiorari to settle this disagreement among the courts.

Additionally, there are many disadvantages to individual arbitration and many advantages to class actions that have not been addressed by the courts that bring to light the notable imbalance of legal power between employers and workers under these mandatory agreements to individual arbitration, which further support the invalidation of these agreements.

Stepping aside from the pending class-waiver litigation, the gig economy is also faced with the controversial issue of whether the workers currently classified as independent contractors should be reclassified as employees. While companies in the gig economy argue that their workers are properly classified as independent contractors because the companies are strictly “technology platforms” and have little control over their workers, gig-economy workers should be reclassified as employees due to the many factors of control companies in the gig economy have over their workers. This push for reclassification is further supported by the imbalance of power in worker contracts, especially those in the gig economy.

Both of these legal issues are interconnected because the NLRA only covers employees; thus, employee classification is necessary for workers in the gig economy to challenge class waivers that they agreed to when entering into their contracts. Consequently, companies in the gig economy that are classifying workers as independent contractors and are also including class action waivers in the arbitration agreements of their contracts have essentially created a blockade which stops their workers from getting employment-law claims resolved because class or collective-action litigation and arbitration are the most effective, and sometimes the exclusive, options for getting employment-law issues resolved. While these companies have essentially blocked their workers' legal claims against them through independent contractor classification and class action waivers, this blockade is on shaky grounds due to the circuit split on whether class action waivers are invalid in employment contracts along with the abundance of misclassification claims being raised by workers in the gig economy.

With many arguments in favor of invalidation of class waiver in employment contracts, as well as compelling arguments in favor of reclassification of gig workers as employees, the legal framework surrounding the gig economy as well as the worker contracts used in the gig economy are in need of remodeling. While these changes can have detrimental effects on the new and developing companies in the gig economy, the imbalance of bargaining power currently on the backs of workers, especially those in the gig economy, must be resolved by the courts.

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