1

Introduction

Technological progress has merely provided us with more efficient means for going backwards.

—Aldous Huxley, *Ends and Means*[1]

Workplace law has undergone a complete transformation in light of COVID-19. Forced to move many operations out of traditional brick-and-mortar facilities, many places of business now at least partially rely on workers to perform their job duties at home. Though the onset of the virus accelerated the degree to which many of us are now a part of the virtual workplace, the truth is that this virtual economy was quickly evolving over the last several years, long before the pandemic. Platform-based workers, in particular, have seen a marked increase in employment as a new on-demand economy has emerged. Virtual work and the gig economy are rewriting the employment rules, and the courts and legislatures are struggling to keep up.

From the early concepts of rugged individualism through the industrial revolution in more modern times, the United States was built on a fundamental notion of hard work and personal success and achievement. Since the inception of our country, we have seen tremendous economic growth in widespread areas. From farming to mining to the inception of the automotive industry, different sectors of the economy have grown at different periods in our nation's history. One thing that has remained constant, despite the ebb and flow of particular sectors, has been the concept of work itself.

Working in the traditional sense has until quite recently meant showing up in an office building, working a farm, or transporting goods on the road, among other varied possibilities. The constant of working has typically involved a physical location where an individual arrived each day to accomplish tasks in an assigned place of employment. Obviously, this conceptualization of the workplace is overgeneralized, but the traditional brick-and-mortar facility

where individuals spent much of their day has become well-ingrained in our culture. Beyond this, even the traditional working hours – 9 am to 5 pm – have become commonplace. Individuals have always worked at other times and in varying ways, but the basic norm of showing up to the office to work a 9-to-5 job has dominated the traditional definition of what working actually means in our society.

This definition of work has experienced a massive transformation over the last few years. The on-demand economy, as part of the technology sector, has made it far easier for workers to perform their job tasks in a more flexible way and in more varied locations. The unprecedented amount of flexibility in this sector can be seen as an overwhelming benefit to individual workers, providing employment to those who might not otherwise have been able to enter the workforce. Through the use of different platform technologies, workers are now able to work where they want and how often they desire. Workers are free to use these platform-based jobs as a means of full employment or simply to supplement other income.

Take, for example, the often-discussed technology company Uber, a platform-based transportation business that will be at the center of much of the analysis in this book. While thousands of individuals work for Uber around the world, there is not a set physical location that these drivers go to each day to interact. Similarly, individuals now deliver food for services such as DoorDash and GrubHub, and other online apps provide customers access to childcare, lawn services, or help around the house. All of this work is performed without employees interacting with one another, or beginning/ending their day at a brick-and-mortar type facility.

And yet, when most employment laws were established, such varied, flexible working relationships were not anticipated. Indeed, many of the rules and regulations that we identify as forming the basis of employment law were developed in the wake of the Great Depression. At the time, the imbalance of power between businesses and workers was stark, as employees often felt extremely fortunate to have any employment at all. Having a job meant not being destitute, and having the opportunity to provide for the basic needs of self and family. At the time, workers were in no position to bargain with their company for greater benefits, higher pay, or better working conditions.

The federal government stepped in to help balance this power inequality in the working relationship in several different ways. For example, the National Labor Relations Act (NLRA) provided workers with the ability to engage in collective activity. For the first time, under the NLRA, workers could organize and form unions to bargain over better pay and working conditions without fear of reprisal from their employers. Similarly, the Fair Labor Standards Act

(FLSA) was established to provide workers with a basic guaranteed federal minimum hourly wage. The FLSA also established a right to overtime pay that would help spread work out among a greater number of workers. And, the statute put strict regulations on any type of unlawful child labor.

The Civil Rights Movements in the 1960s saw further protections provided to workers. Indeed, Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment on the basis of race, color, sex, national origin, and religion. Subsequent federal laws would also include age and disability as protected classes. And, under the Family and Medical Leave Act, workers would get the right to unpaid leave to take care of themselves, a newborn child, or an immediate family member suffering from an illness or requiring medical care.

The foundations of our employment laws were thus largely established decades ago, and were put in place in a much different social culture and under a much different concept of "work" than what we have today. Brick-and-mortar physical places of work were common, and many laws were often premised on the notion of the male as primary "breadwinner." There has been substantial fluidity over time as to how we have defined work, and diversity in employment has fortunately continued to grow, further redefining our concept of employment.

Image Credit: PeopleImages/Getty Images

The advent of technological advancements and the platform-based economy has presented workers – and the law – with unique challenges. More specifically, and somewhat ironically, the law has struggled with whether platform-based workers even satisfy the definition of being "employees." Without employment status, these workers are not entitled to any of the

wage–hour protections, prohibitions against discrimination, or right-to-leave benefits identified above. When these definitions of employment were originally promulgated, the on-demand economy was never even anticipated, and modern technology has pushed the boundaries of what it means to be an employee. There has been a tremendous amount of litigation over this exact question, and the courts have approached the answer in varying ways. This book theorizes a new approach to the question, with a particular emphasis on the issue of flexibility in defining work. This book provides a model that both employers and workers can use to define employment in this new economy, and articulates a clear framework for navigating this threshold inquiry.

Additionally, this text examines some of the complexities involved in pursuing technology-based litigation in the federal courts. This book explores how the Supreme Court has made it increasingly difficult to bring viable employment-based claims in any context. Navigating that case law, along with other precedent in the federal courts, this text explains the best approach to bringing employment-based claims in the platform economy.

Similarly, the Supreme Court has made it far more difficult to aggregate workplace claims. As much of the litigation in this area (e.g., Uber wage/hour claims) centers around workers who perform similar or identical tasks, the technology field is particularly unique in producing claims that seem fitted for class-action status. This text explores a number of the systemic claims that have already been brought in the platform-based economy, and explains the best ways that litigants can situate these claims within the existing case law.

Another area where workers have encountered difficulty in the on-demand economy is in acting collectively. With their employment status in doubt, and without a physical work location in which to gather, platform workers face an uphill battle in having their voices heard within a business. Some companies have explored ways of interacting with technology-based workers (a sort of union-light model), as businesses themselves have a strong interest in understanding the concerns and demands of their workers. This text navigates the NLRA in the context of the on-demand economy, explaining the approaches that can be used for workers to act in a concerted manner.

Finally, the technology sector has seen widespread sex discrimination and issues involving sexual harassment. In the final chapter, this book examines why the technology sector has a strong history of sex discrimination, and looks at some of the recent instances of harassment in this economy. This book addresses different ways that companies and employees can work together to help prevent this type of harassment and minimize the sex discrimination that has been so prevalent in this industry.

This book cannot explore all of the various issues that the evolving technology and platform-based economy will face over the coming years. The new ways in which this industry continues to redefine work will have far-reaching impacts across this economy. By examining some of the more critical and emerging issues facing this industry – defining employment, litigating claims, aggregating cases, and preventing harassment – this book takes on some of the more high-profile instances where the law has not kept pace in this growing area. The book should also serve as a way to spark a more robust debate over the general question of how the law should address working in the evolving technology sector.

NOTE

1 Aldous Huxley, *Ends and Means* (New York: Harper & Brothers Publishers, 1937).