
COMMENT

CAN UBER COMPLY? OBTAINING INFORMATION FOR FLSA ENFORCEMENT IN THE SHARING ECONOMY

LEIGH ANNE SCHRIEVER[†]

INTRODUCTION

Sharing-economy companies vigorously fight any suggestion that their workers are employees rather than independent contractors.¹ The arguments on which they rely vary, including the heightened flexibility for workers that their platforms provide, as well as contending that they represent a form of supplemental income instead of full-time work.² Academics and worker advocates alike believe that these companies currently misclassify employees as independent contractors in order to exploit them.³ Others argue these

[†] J.D. 2019, University of Pennsylvania Law School; M.S.S.P. 2019, University of Pennsylvania; B.A. 2016, Princeton University.

¹ See Tracey Lien, *Meet the Attorney Suing Uber, Lyft, GrubHub and a Dozen California Tech Firms*, L.A. TIMES (Jan. 24, 2016, 10:19 AM), <http://www.latimes.com/business/technology/la-fi-class-action-lawyer-20160124-story.html> [<https://perma.cc/2SA7-EWUP>] (describing both the “cottage industry” of filing labor lawsuits against sharing-economy companies like Uber and the aggressive defensive response of those companies).

² See, e.g., *New Survey: Drivers Choose Uber for its Flexibility and Convenience*, UBER (Dec. 7, 2015), <https://www.uber.com/newsroom/driver-partner-survey/> [<https://perma.cc/2DRM-6UXQ>] (“These findings mirror what we hear every day from drivers: flexibility and the chance to be their own boss is a key reason they use Uber And most of our partners work with Uber to make money on the side”); Michelle Fox, *Sharing Economy Changing Nature of Work: Lyft CEO*, CNBC (Mar. 16, 2015, 7:28 PM), <https://www.cnbc.com/2015/03/16/sharing-economy-changing-nature-of-work-lyft-ceo.html> [<https://perma.cc/V5JB-ZFQ8>] (quoting Lyft CEO Logan Green, who cites driver flexibility as a reason that workers can make ends meet by working for Lyft).

³ See, e.g., Pamela A. Izvanariu, *Matters Settled but Not Resolved: Worker Misclassification in the Rideshare Sector*, 66 DEPAUL L. REV. 133, 163-71 (2016) (arguing that rideshares satisfy legal conditions under federal and state tests for noncontractor classification); Satyajit Das, *The Sharing Economy Creates a Dickensian World for Workers—It Masks a Dark Problem in the Labour Market*,

companies cannot even afford to treat their workers as employees and pay them at least minimum wage.⁴ The debate around the employment status of sharing-economy workers largely concentrates on the financial aspects of the issue. Yet, another critical question looms in the background: is it even logistically feasible to give platform workers the rights that come with employee status?

Policymakers need to answer this question sooner rather than later. Courts and adjudicatory bodies are already dealing with the issue of whether platform workers are employees or independent contractors.⁵ At least in the context of rideshare platforms, on occasion workers have already won recognition as employees.⁶ In light of the potential for employee–employer relationships in this portion of the sharing economy, policymakers and law enforcers must consider whether or not the rights of workers in the sharing economy are adequately enforceable. This Comment will focus primarily on one aspect of this question: Are workers, platforms, and the government in a position to exchange the information needed to enforce employment rights? In particular, are Uber and its drivers capable of providing the information to the government and each other that would allow for the enforcement of wage-and-hour laws in court?

INDEPENDENT (Feb. 12, 2017, 11:00 PM), <http://www.independent.co.uk/voices/sharing-economy-gig-economy-uber-airbnb-workers-rights-a7575856.html> [<https://perma.cc/73QT-QU5K>] (arguing that workers are exploited and employment law protections are undermined by the sharing economy, which creates a “human cloud of digital serfs” who do not have access to standard wages (internal quotation marks omitted)).

⁴ See, e.g., Maya Kosoff, *Uber’s Nightmare Scenario: Here’s What a Huge, Expensive Pain It Would Be to Turn Thousands of Drivers into Employees*, BUS. INSIDER (July 19, 2015, 12:50 PM), <http://www.businessinsider.com/what-it-would-take-for-uber-to-reclassify-all-its-drivers-2015-7> [<https://perma.cc/AQT9-8QJ2>] (describing how the expense associated with shifting workers from independent contractor status to employee status “could seriously impact Uber’s business model” due to tax withholding, benefits, and worker protections).

⁵ See Sarah Kessler, *The Gig Economy Won’t Last Because It’s Being Sued to Death*, FAST CO. (Feb. 17, 2015), <https://www.fastcompany.com/3042248/the-gig-economy-wont-last-because-its-being-sued-to-death> [<https://perma.cc/R7XE-9KFE>] (discussing several misclassification suits and class actions against companies like Uber, Handy, Homejoy, and Lyft).

⁶ See *Berwick v. Uber Techs., Inc.*, No. 11-46739-EK (Cal. Labor Comm’r June 3, 2015), <https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1988&context=historical> [<https://perma.cc/RST4-PUS8>] (classifying Uber drivers as employees under California state law and awarding damages to the plaintiff); Dan Rivoli, *New York Judge Grants Uber Drivers Employee Status*, N.Y. DAILY NEWS (June 13, 2017, 8:05 PM), <https://www.nydailynews.com/new-york/n-y-judge-grants-uber-drivers-employee-status-article-1.3245310> [<https://perma.cc/C3MQ-DPZH>] (reporting that an administrative law judge in the New York State Labor Department held that Uber drivers in New York should be classified as employees); see also *Razak v. Uber Techs., Inc.*, No. 16-0573, 2016 WL 5874822, at *5 (E.D. Pa. Oct. 7, 2016) (holding that plaintiff Uber drivers had sufficiently pled their employee status to survive a motion for judgment on the pleadings); *O’Connor v. Uber Techs., Inc.*, 82 F. Supp. 3d 1133, 1145, 1148 (N.D. Cal. 2015) (denying summary judgment for Uber on the grounds that Uber drivers were presumptively employees under California law and that whether Uber could rebut that presumption was an appropriate question for a jury).

This Comment focuses on wage-and-hour laws because businesses find it challenging to comply with them, employers commonly violate them, and advocates use them as a key justification for why employee status would benefit sharing-economy workers.⁷ Government agencies already find enforcement of these laws challenging since rampant violations occur across the United States. A recent study found that seventeen percent of low-wage workers receive pay below the minimum wage,⁸ and even higher rates of overtime violations exist.⁹ Young workers, Hispanic and African American workers, and part-time workers all suffer higher rates of minimum wage violations, and all these groups are well represented in the sharing economy.¹⁰ These trends undoubtedly affect sharing-economy workers: one study found that twenty-nine percent of workers in the sharing economy say they were not paid for work they performed through platforms.¹¹ If wage-and-hour laws can be enforced, the protections for workers from these laws alone might justify employment status. Additionally, employers consider wage-and-hour laws very difficult to comply with, so if sharing-economy companies can comply with these laws, presumably other employment laws—such as medical leave or occupational safety—are enforceable and beneficial for workers as well.¹²

This Comment focuses on Uber for the same reason so many others write about it: it is the largest actor in the sharing economy, and it has the most publicly available information. Despite a disappointing recent initial public

⁷ See, e.g., Stephen M. Paskoff, *The Fair Labor Standards Act Has Become a Big Danger to Employers*, FORBES (Nov. 18, 2010, 3:18 PM), <https://www.forbes.com/2010/11/18/flsa-employee-lawsuit-leadership-managing-liability.html#2efbecd861d4> [https://perma.cc/K3YF-PNGF] (reporting that approximately 70% to 90% of all employers are violating FLSA); Natasha Singer, *In the Sharing Economy, Workers Find Both Freedom and Uncertainty*, N.Y. TIMES (Aug. 16, 2014), <https://www.nytimes.com/2014/08/17/technology/in-the-sharing-economy-workers-find-both-freedom-and-uncertainty.html> [https://perma.cc/6MQV-YNV5] (describing how companies like Uber alter terms like employee commission fees “with impunity” and noting that activists argue business models like Uber’s may “end up disempowering workers, degrading their access to fair employment conditions”).

⁸ DAVID COOPER & TERESA KROEGER, ECON. POLICY INST., EMPLOYERS STEAL BILLIONS FROM WORKERS’ PAYCHECKS EACH YEAR 2 (2017), <https://www.epi.org/files/pdf/125116.pdf> [https://perma.cc/R6V3-VGHA].

⁹ See ANNETTE BERNHARDT ET AL., BROKEN LAWS, UNPROTECTED WORKERS 2 (2009), <https://www.nelp.org/wp-content/uploads/2015/03/BrokenLawsReport2009.pdf> [https://perma.cc/D63K-QPFW] (finding that 76% of the sampled workers who performed overtime work had overtime violations and 26% of the sampled workers were paid less than the minimum wage).

¹⁰ COOPER & KROEGER, *supra* note 8, at 16-20, 25.

¹¹ AARON SMITH, PEW RESEARCH CTR., GIG WORK, ONLINE SELLING AND HOME SHARING 15 (2016), https://www.pewresearch.org/internet/wp-content/uploads/sites/9/2016/11/PI_2016.11.17_Gig-Workers_FINAL.pdf [https://perma.cc/G965-ZK29].

¹² See Paskoff, *supra* note 7 (reporting that DOL has estimated 70% to 90% of all employers are not in full compliance with some aspect of the Fair Labor Standards Act).

offering (IPO), Uber is still valued at more than \$76 billion¹³ and is estimated to have two million drivers in the United States out of four million worldwide.¹⁴ By comparison, Lyft was valued at \$24 billion at its recent IPO¹⁵ and has an estimated one and a half million drivers in the United States (many of whom also drive for Uber).¹⁶ One of the other largest sharing-economy companies, Airbnb, remains private but was most recently valued at only \$35 billion.¹⁷

If sharing-economy companies are truly unlike any other regulated business model, the answer may be that employee rights, including wage-and-hour laws, cannot be enforced.¹⁸ At least one paper, by Seth Harris and Alan Krueger, argues that sharing-economy companies cannot pay minimum wage and overtime because workers operate on multiple platforms, which makes it logistically impossible to calculate hours.¹⁹ Yet if sharing-economy companies are just technologically advanced versions of existing industries like taxi cabs and hotels, others argue that governments should apply existing or similar standards to the new companies.²⁰

The answer to this question of whether enforcement is feasible matters because if the answer is no, the rest of the employment status argument requires rethinking. If giving workers employee status would not result in better wages

¹³ Dara Kerr, *Uber's IPO Hits a Speed Bump in Its First Day on Wall Street*, CNET (May 10, 2019, 1:06 PM), <https://www.cnet.com/news/uber-hopes-to-rev-up-wall-street-in-stock-market-debut/> [<https://perma.cc/S379-FGPZ>].

¹⁴ Melissa Berry, *How Many Uber Drivers Are There?*, RIDESHARE GUY (May 26, 2019), <https://therideshareguy.com/how-many-uber-drivers-are-there/> [<https://perma.cc/DM5Z-GJ4U>].

¹⁵ Carl O'Donnell & Joshua Franklin, *Lyft Was Valued at \$24.3 Billion in Its IPO, and Raised More than It Planned*, AUTOMOTIVE NEWS (Mar. 28, 2019, 6:48 PM), <https://www.autonews.com/mobility-report/lyft-shares-rise-debut-first-ride-hailing-ipo> [<https://perma.cc/6HRF-ZSB2>].

¹⁶ Berry, *supra* note 14.

¹⁷ Theodore Schleifer, *Airbnb Sold Some Common Stock at a \$35 Billion Valuation, but What Is the Company Really Worth?*, VOX (Mar. 19, 2019, 5:38 PM), <https://www.vox.com/2019/3/19/18272274/airbnb-valuation-common-stock-hoteltoneight> [<https://perma.cc/96E4-YVLT>].

¹⁸ See Vanessa Katz, *Regulating the Sharing Economy*, 30 BERKELEY TECH. L. J. 1067, 1084 (2015) (arguing that “existing rules tailored for two-party relationships cannot address the needs of three-party relationships between platforms, providers, and users” in the sharing economy).

¹⁹ SETH D. HARRIS & ALAN B. KRUEGER, HAMILTON PROJECT, BROOKINGS INST., A PROPOSAL FOR MODERNIZING LABOR LAWS FOR TWENTY-FIRST-CENTURY WORK: THE “INDEPENDENT WORKER” 13 (2015), https://www.hamiltonproject.org/assets/files/modernizing_labor_laws_for_twenty-first_century_work_krueger_harris.pdf [<https://perma.cc/DPU3-HGM4>].

²⁰ See, e.g., Chris Nguyen, *Cab Drivers in San Jose Expand Strike Calling for Equal Regulation on Uber, Lyft*, ABC7 NEWS (Nov. 10, 2015), <http://abc7news.com/news/cab-drivers-expand-strike-calling-for-equal-regulation-on-uber-lyft/1077733/> [<https://perma.cc/ST4E-VBAV>] (describing a taxi driver strike calling for equal regulations to be applied to both taxis and rideshare companies like Uber); Feargus O'Sullivan, *Europe Says Uber Is Officially a Taxi Service*, CITYLAB (Dec. 20, 2017), <https://www.citylab.com/transportation/2017/12/uber-european-court-of-justice-transportation-taxi-ruling/548873/> [<https://perma.cc/H5C6-A95B>] (describing the European Court of Justice ruling that Uber and Lyft are subject to the regulations covering taxi services throughout much of the European Union).

because the laws go unenforced, why change their status? If state and federal governments cannot effectively enforce wage-and-hour laws, workers might benefit more from flexibility than from statutory protections. Whether or not a change to employee status would result in real benefits to workers or just a symbolic benefit matters when deciding which policy to support.

I. INFORMATION SHARING UNDER FLSA

The Fair Labor Standards Act (FLSA) details the minimum wage and overtime requirements that apply across the country.²¹ These requirements only apply to employees, not independent contractors,²² and are a primary reason that many workers fight independent contractor status.²³ Under the regulations of the Department of Labor (DOL), the agency tasked with the law's enforcement, employers and workers must collect information and provide it to other parties.

Information moves in a triangle throughout the enforcement process (Figure 1). The actors in this case are Uber, its drivers, and the government enforcers. Each pair of actors collects and provides certain kinds of information to one another. Between Uber and the government, FLSA requires that the company keep records of all its workers' hours and wages, which the government may request when it conducts an investigation.²⁴ Between Uber and its drivers, the company must provide the drivers with notice of their rights under FLSA in a manner that communicates how much the drivers are to earn and who enforces the law.²⁵ Finally, between the drivers and the government, the drivers often have to communicate when a violation occurs and collect enough information to make their claim.²⁶

²¹ 29 U.S.C. §§ 201–19 (2018).

²² See, e.g., *id.* § 203(r)(1) (defining “enterprise” to exclude work by an “independent contractor”); *id.* § 206(a) (providing that an “employer shall pay to each of his employees” the minimum wage).

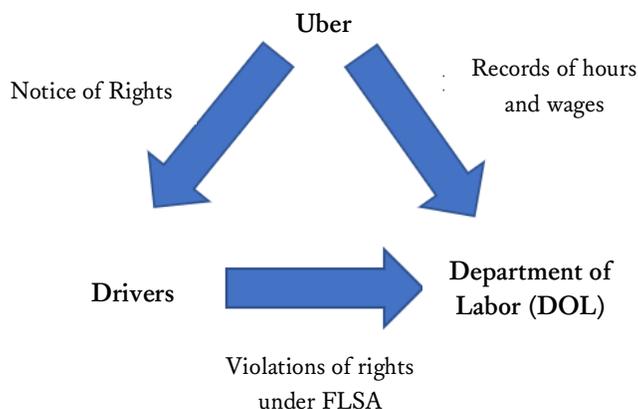
²³ See David Weil, *Lots of Employees Get Misclassified as Contractors. Here's Why It Matters*, HARV. BUS. REV. (July 5, 2017), <https://hbr.org/2017/07/lots-of-employees-get-misclassified-as-contractors-heres-why-it-matters> [<https://perma.cc/A8TV-GLAC>] (listing the variety of protections independent contractors do not receive and describing how significant the damages are in misclassification cases, including a typical case where workers were owed eight and a half weeks of earnings).

²⁴ See, e.g., 29 C.F.R. § 516.6 (2019) (requiring employers to preserve for at least two years basic employment and earnings records, wage rate tables, and records of additions or deductions from wages paid); see also *id.* § 516.7 (“All records shall be available for inspection and transcription by the Administrator . . .”).

²⁵ See *id.* § 516.4 (requiring employers to “post and keep posted a notice explaining [FLSA] . . . in conspicuous places in every establishment where . . . employees are employed”).

²⁶ See DAVID WEIL, BOS. UNIV., *IMPROVING WORKPLACE CONDITIONS THROUGH STRATEGIC ENFORCEMENT: A REPORT TO THE WAGE AND HOUR DIVISION* 9 (2010), <https://www.dol.gov/whd/resources/strategicEnforcement.pdf> [<https://perma.cc/N3LY-Q6DA>] (showing that between 1998 and 2008, complaints made up between 69.5% and 78.6% of all wage-and-hour cases);

Figure 1: The Informational Triangle in FLSA Enforcement



In order for effective enforcement to occur, all three of these informational paths must function. Uber must inform drivers of their rights so that drivers know how to report their claims. Drivers then need to make use of that knowledge and actually report their claims to DOL. DOL must then be able to collect accurate and well-kept records in order to calculate any back wages and prove violations in court. This triangle looks similar for every employee in the United States, but the different circumstances that come with employment in the sharing economy may make it more difficult to collect this information than in more traditional employment relationships. The rest of this Comment will evaluate each of these informational relationships separately and consider whether the existing enforcement mechanisms would adequately work in the sharing economy or if there is a low-cost alternative available.

A. *Uber and the Government*

Under FLSA, businesses must make, keep, and share records with the government, each of which is critical for enforcement of wage-and-hour laws.²⁷ Many businesses find the recordkeeping requirement under FLSA burdensome because it can be difficult to accurately keep track of shifts worked and paper checks, and the records must be kept for a long time.²⁸ DOL, for instance, requires employers to keep records of time and earning cards or sheets, wage rate tables, shipping and billing records, and additions

David Weil, *Creating a Strategic Enforcement Approach to Address Wage Theft: One Academic's Journey in Organizational Change*, 60 J. INDUS. REL. 437, 441 (2018) (stating that the number of investigations based on complaints was approximately 50% in 2017).

²⁷ 29 C.F.R. §§ 516.6, 516.7.

²⁸ See Paskoff, *supra* note 7 (“One plaintiff’s lawyer has described finding [employers in violation of recordkeeping regulations] as ‘shooting fish in a barrel.’”).

to or deductions from wages for two years.²⁹ Records including payroll records, certificates, agreements, plans, notices, and sales and purchase records must be kept for three years.³⁰ However, Uber has one significant advantage in this area: it already collects an inordinate amount of information in pursuit of its goal of perfecting a profit-maximizing algorithm. While this is an area where Uber's secrecy poses barriers to perfect answers, it seems clear from publicly available information that the company tracks information about its drivers and consumers including the GPS location of both parties,³¹ length of the drives,³² reviews of both the drivers and passengers,³³ and number of rides that drivers turn down.³⁴

One primary hurdle may exist for Uber's ability to track hours well: it is currently unclear if all the hours drivers spend behind the wheel would be compensable. A court could find that only the hours spent driving with customers actually in the car are compensable, or that only the hours spent driving to pick up the customer as well as the time with them in the car are

²⁹ 29 C.F.R. § 516.6.

³⁰ *Id.* § 516.5.

³¹ See Andrew Beinstein & Ted Sumers, *How Uber Engineering Increases Safe Driving with Telematics*, UBER (June 29, 2016), <https://eng.uber.com/telematics/> [<https://perma.cc/L99U-YPMT>] (describing the use of GPS location signals from "driver partner phones" to track acceleration and braking as well as other trip data); James Titcomb, *Uber Is Tracking Your Location Even When Rides are Finished*, TELEGRAPH (Dec. 5, 2016, 10:20 AM), <http://www.telegraph.co.uk/technology/2016/12/05/uber-tracking-location-even-rides-finished/> [<https://perma.cc/3Y5B-X9ZV>] (reporting that a recent Uber app update allowed Uber to track users through the GPS on consumer phones when the app was running in the background). Uber later removed the background location-tracking but continues to track users' locations during rides as an indispensable part of the app's function. See Amar Toor, *Uber Will No Longer Track Your Location After Your Ride Is Over*, VERGE (Aug. 29, 2017, 7:11 AM), <https://www.theverge.com/2017/8/29/16219542/uber-location-tracking-app-ios-android-privacy> [<https://perma.cc/5LTQ-CPMV>] (discussing the removal of background location-tracking); see also, e.g., *How Uber Uses Rider Location Information (iOS)*, UBER: HELP, <https://help.uber.com/riders/article/how-uber-uses-rider-location-information-ios?nodeId=741744cb-125c-4efc-ab3f-4a977940ac87> [<https://perma.cc/R7XN-2VNQ>] (last visited July 3, 2019) (describing how Uber uses location data on iOS phones).

³² See *How are Fares Calculated?*, UBER: HELP <https://help.uber.com/h/d2d43bbc-f4bb-4882-b8bb-4bd8acf03a9d> [<https://perma.cc/UR35-P9SU>] (last visited July 3, 2019) (stating that the time of the drive is used in calculating a customer's fare).

³³ See James Cook, *Uber's Internal Charts Show How Its Driver-Rating System Actually Works*, BUS. INSIDER (Feb. 11, 2015, 11:53 AM), <http://www.businessinsider.com/leaked-charts-show-how-ubers-driver-rating-system-works-2015-2> [<https://perma.cc/6E2K-AUSG>] (noting that Uber tracks customers' ratings of drivers, which is then used to evaluate driver performance); Andrew J. Hawkins, *Uber Will Now Deactivate Riders with Below Average Ratings*, VERGE (May 29, 2019, 12:14 PM), <https://www.theverge.com/2019/5/29/18644143/uber-deactivate-rider-below-average-rating> [<https://perma.cc/EK8N-2K7P>] (describing a new Uber policy allowing the company to ban passengers from the app if they consistently garner poor ratings from their drivers).

³⁴ See Cook, *supra* note 33 (noting Uber tracks drivers' ride acceptance rates and tells drivers to keep the rates as above eighty percent).

compensable.³⁵ However, a court could also find time spent waiting for a request, from hours to minutes, compensable as well. Courts generally find that when an employee is engaged to wait, rather than waiting to be engaged, that time is primarily for the benefit of the employer and thus must be paid.³⁶ In the case of Uber drivers, their time waiting for requests quite possibly would need to be paid time, partly because they only have fifteen seconds to accept a ride, indicating that Uber engages them to wait.³⁷

I will assume that drivers would require compensation for their wait time because it would create the biggest possible compliance challenge for Uber under FLSA. Scholars have debated this issue. On one side of the argument, Seth Harris and Alan Krueger claim that it is impossible to accurately calculate hours worked for drivers because sharing-economy participants often work on multiple platforms at once.³⁸ Thus, according to Harris and Krueger, apportioning hours worked between the apps would be difficult and all companies would share wait time if it were compensable, which would make minimum wage requirements, including recordkeeping, impossible.³⁹ On the other hand, Ross Eisenbrey and Lawrence Mishel convincingly argue

³⁵ For instance, consider the comparable line of cases involving truck drivers and delivery services. Courts have come out on both sides of whether wait time is compensable, often because the cases are fact-intensive. *Compare* Norton v. Worthen Van Serv., Inc., 839 F.2d 653, 655 (10th Cir. 1988) (holding that van drivers who were required to stay close enough to premises to answer calls within fifteen to twenty minutes did not have to be compensated for on-call time because they could still use the time in between calls freely), *with* Mitchell v. Nicholson, 179 F. Supp. 292, 296 (W.D.N.C. 1959) (holding that mail delivery drivers needed to be paid overtime because their salary was inadequate to compensate for time spent waiting on delayed trains and the drivers could not have found other work during the hours when they were waiting).

³⁶ See *Skidmore v. Swift & Co.*, 323 U.S. 134, 137 (1944) (distinguishing between employees who are “engaged to wait” and those who are “wait[ing] to be engaged”); *Armour & Co. v. Wantock*, 323 U.S. 126, 133 (1944) (holding that “[r]eadiness to serve may be hired, quite as much as service itself,” and when “time is spent predominantly for the employer’s benefit,” it is compensable).

³⁷ For a comprehensive evaluation of how “on-call” time applies in the gig economy, see *Razak v. Uber Techs., Inc.*, No. 16-0573, 2017 WL 4052417, *7-14 (E.D. Pa. Sep. 13, 2017) (collecting Supreme Court and Third Circuit precedents regarding “on-call” time as well district court cases dealing with Uber and gig economy). The *Razak* court denied Uber’s motion for partial summary judgment on whether time waiting for trips was compensable because it found, among other things, that having fifteen seconds to accept a trip and being switched offline after declining three trips could significantly restrict the driver’s ability to engage in personal activities between trips. *Id.* at *15-16. However, the court later granted Uber’s motion for summary judgment on the substantive question of whether the drivers were employees under relevant Third Circuit law. *Razak v. Uber Techs., Inc.*, No. 16-0573, 2018 WL 1744467, at *19 (E.D. Pa. April 11, 2018); see also Ross Eisenbrey & Lawrence Mishel, *Uber Business Model Does Not Justify a New ‘Independent Worker’ Category*, ECON. POLICY INST. (Mar. 17, 2016), <http://www.epi.org/publication/uber-business-model-does-not-justify-a-new-independent-worker-category/> [<https://perma.cc/X7PF-RHGJ>] (arguing that drivers for Uber are engaged to wait because drivers have only fifteen seconds to accept a trip and cannot turn down too many rides without facing adverse consequences, including potentially termination).

³⁸ HARRIS & KRUEGER, *supra* note 19, at 13.

³⁹ *Id.*

that Uber already collects enough information to make it possible to keep accurate records and that a system could be devised for apportioning hours worked.⁴⁰ They point out that Uber already offers hourly guarantees to some of its drivers, and in order to get those hourly guarantees, the drivers must log in for fifty minutes per hour within the time they earn the guarantee.⁴¹ In order for Uber to know when it needs to pay that hourly guarantee, the company must track the time drivers spend with their app open waiting for requests.⁴² There is no obvious reason why this information tracking could not cover all drivers and be appropriately recorded.

Uber's infrastructure appears to make their hypothetical information collection burden under FLSA quite manageable. All the technology exists to collect the necessary data, and they already use it and presumably keep records of the data in order to compare it over time. Thus, Uber may already fully comply with this aspect of FLSA despite no such obligation, and this aspect of enforcement poses no barriers to making drivers employees.

B. *Uber to Its Drivers*

In an employer–employee relationship, Uber would need to not only collect information about drivers, but also provide information to them. Under FLSA and DOL regulations, Uber would need to notify all of its drivers of their rights, including the minimum-wage rate and how they may report violations.⁴³ In traditional workplaces that have centralized locations, employers must hang a poster to provide workers with adequate notice. DOL has codified this poster requirement in its regulations.⁴⁴

However, Uber drivers have no central workplace. They each operate out of their own cars and rarely interact in person with either the company or other drivers. While this poses a variety of problems, in terms of notification of rights, it means that a single poster would not suffice to notify any driver, never mind all of them. DOL would need to promulgate a regulation specific to the sharing economy or decentralized workers, or Uber would need to

⁴⁰ Eisenbrey & Mishel, *supra* note 37 (pointing out that Uber and Lyft regularly describe the hours worked by their drivers in public statements).

⁴¹ *Id.*

⁴² *Id.*

⁴³ 29 CFR § 516.4 (2019) (“Every employer employing any employees subject to [FLSA’s] minimum wage provisions shall post and keep posted a notice explaining [FLSA] . . . in conspicuous places in every establishment where such employees are employed”); see *Employee Rights Under the Fair Labor Standards Act*, U.S. DEP’T OF LABOR, <https://www.dol.gov/whd/regs/compliance/posters/minwagep.pdf> [<https://perma.cc/3757-7TM7>] (showing the physical poster notice required by the Wage and Hour Division, which includes the minimum wage, overtime, tip credits, and how DOL enforces the provisions).

⁴⁴ 29 C.F.R. § 516.4.

petition for an exception.⁴⁵ DOL already makes exceptions for certain industries⁴⁶ and workplaces,⁴⁷ and allows more limited posters and online notification under other laws.⁴⁸

Once again, though, Uber's reliance on technology in every aspect of its business would make compliance with this regulation very simple. Every time drivers begin work, they need to log in to the app. Uber could display a screen informing drivers of their rights and require them to click an agree button every time before starting to accept rides. Much like a poster in the workplace, most employees would ignore it on a day-to-day basis. They might retain some information, but few, if any, drivers would read the terms every day. Certainly, workers in other industries who pass a poster every day do not stop and read it either. The real point of these notice requirements is to make the information accessible to workers when they need it most: after a violation has occurred or when they suspect one is occurring. Drivers who suspect subminimum wage pay or who speak with other drivers and find an unfair and systemic pattern of underpayment would have immediate access to a source of information about their rights. This screen at the time of app startup therefore seems an acceptable substitute for the poster requirement in terms of the benefit provided. Uber could also ensure that drivers could select their native language in order to ensure they can understand their rights.⁴⁹ Once

⁴⁵ See *id.* § 516.9 (“Any employer or group of employers who, due to peculiar conditions under which they must operate, desire authority to maintain records in a manner other than required in this part . . . may submit a written petition to the Administrator requesting such authority, setting forth the reasons therefor.”).

⁴⁶ See *id.* §§ 516.13–.18 (detailing record keeping exceptions for seamen and employees working in livestock auction, country elevator, local delivery, retail commission, tobacco, cotton, sugar cane, or beet services).

⁴⁷ See *Frequently Asked Questions: FAQ 536*, U.S. DEP'T OF LABOR, <http://webapps.dol.gov/dolfaq/go-dol-faq.asp?faqid=536&faqsub=Location&faqtop=Posters&topicid=17> [<https://perma.cc/H4G2-JPGH>] (last visited July 4, 2019) (indicating that employers of construction crews who do not report to a main office should place posters at the construction sites where the crews report every day); *Frequently Asked Question: FAQ 550*, U.S. DEP'T OF LABOR, <http://webapps.dol.gov/dolfaq/go-dol-faq.asp?faqid=550&faqsub=Location&faqtop=Posters&topicid=17> [<https://perma.cc/DYR7-6VAS>] (last visited July 4, 2019) (stating that for employers of salespeople who only report to a main office once a week, it is still sufficient to place the FLSA poster in the main office).

⁴⁸ See *Frequently Asked Questions: FAQ 533*, U.S. DEP'T OF LABOR, <http://webapps.dol.gov/dolfaq/go-dol-faq.asp?faqid=533&faqsub=Location&faqtop=Posters&topicid=17> [<https://perma.cc/A7KJ-4DK2>] (last visited July 4, 2019) (recognizing that “[m]ost of our poster regulations were written before the Internet was used for job postings” and stating that the poster regulations for other federal statutes have been amended to allow for electronic posting of notice).

⁴⁹ DOL regulations do not require posting FLSA posters in languages other than English, but DOL does provide optional posters in Spanish, Chinese, Haitian Creole, Hmong, Korean, Polish, Russian, Thai, and Vietnamese. *Frequently Asked Questions: FAQ 546*, U.S. DEP'T OF LABOR, <http://webapps.dol.gov/dolfaq/go-dol-faq.asp?faqid=546&faqsub=General&faqtop=Posters&topicid=17> [<https://perma.cc/2E4X-EBMU>] (last visited July 4, 2019); see also *Workplace Posters*, U.S. DEP'T OF LABOR, <https://www.dol.gov/>

more, Uber may have less difficulty meeting the information-sharing requirements of FLSA than other, more traditional companies because of the technology they use to communicate with and track their workers. This side of the informational triangle also provides no basis for an argument that FLSA is impossible to enforce for Uber drivers as employees.

C. Drivers to the Government

The third key informational relationship for the enforcement of wage-and-hour laws is the one between drivers and the government, and this relationship poses the greatest challenges for adequate enforcement. In order for enforcement to occur, practically speaking, drivers must report violations to the government, either individually or collectively. This is partly because enforcement agencies rarely have the resources to seek out violations through proactive investigations, so workers must typically take some kind of action to bring attention to their claims.⁵⁰ However, many companies, particularly sharing-economy companies, now require workers to sign mandatory arbitration and class-action waiver clauses before beginning work, which significantly restricts the workers' ability to bring their claims to court, even if they could afford the cost of litigation.⁵¹ Additionally, arbitration may entail worse outcomes for workers than court proceedings.⁵² Thus, a driver's right to file administrative claims would remain her only reasonable avenue for enforcing rights.

whd/resources/posters.htm [https://perma.cc/H9B3-A9QA] (last visited July 4, 2019) (providing posters in a variety of languages).

⁵⁰ See DAVID WEIL, THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT 214-15 (2014) ("As a result of reductions in the size and role of federal and state workplace agencies, employers and industry sectors face trivial likelihood of investigation in a given year."); see also *supra* note 26 (discussing the high percentage of wage-and-hour investigations initiated because of complaints).

⁵¹ See Charlotte Garden, *Disrupting Work Law: Arbitration in the Gig Economy*, 2017 U. CHI. LEGAL F. 205, 212-13 (finding mandatory arbitration clauses in all fourteen sharing-economy worker contracts reviewed, and class action waivers in most). Furthermore, the Ninth Circuit has upheld such provisions as enforceable. See *O'Connor v. Uber Techs., Inc.*, 904 F.3d 1087, 1094 (9th Cir. 2018) (upholding the class-action waiver provision in Uber's driver contracts in light of the Supreme Court's decision in *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018)); *Mohamed v. Uber Techs., Inc.*, 848 F.3d 1201, 1210-17 (9th Cir. 2016) (upholding arbitration provisions in Uber's driver contracts because the provisions were not adhesive, afforded meaningful opportunities for driver opt-out, and were otherwise proper pursuant to the Federal Arbitration Act).

⁵² See Alexander Colvin, *An Empirical Study of Employment Arbitration Outcomes and Processes*, 8 J. EMPIRICAL LEGAL STUD. 1, 1-8 (2011) (finding evidence of significantly lower employee win rates and median awards in arbitration when compared to litigation outcomes).

Unfortunately, underreporting of wage-and-hour claims to government agencies is common across the United States.⁵³ Indeed, if matching the reporting rates in other kinds of employment is considered adequate enforcement, the bar is not high for the sharing economy. Workers may not report claims to the government because the process is difficult, they may fear retaliation,⁵⁴ they may not trust the government,⁵⁵ or they may not know how to navigate the system.⁵⁶ Additionally, many individual wage-and-hour violations by themselves do not involve enough money to become a priority for an enforcement agency, and the costs of going to court often exceed the benefits for low-wage workers, so claims may never get anywhere without the aggregation of claims from many workers.⁵⁷ For a worker coping with wage-and-hour violations alone, the process is daunting, time-consuming, and expensive. For low-wage workers with long hours or multiple jobs, this often results in inaction and financial difficulty. All these problems exist in the sharing economy and at Uber and might even be exacerbated by the relative isolation of these jobs.

Traditionally, a primary way of overcoming these difficulties is through some form of collective organizing, through either formal or informal means.⁵⁸ As David Weil states in his book *The Fissured Workplace*:

[O]ne reason people are reluctant to exercise their rights is that they often receive only part of the benefit of complaining, but fully bear the potential costs. They therefore complain too little from the perspective of fellow workers. The

⁵³ See BERNHARDT ET AL., *supra* note 9, at 3 (finding that twenty percent of workers surveyed did not complain in the past year despite experiencing serious employment law violations).

⁵⁴ See *id.* (finding that 1/5 of workers surveyed made a complaint to their employers or tried to form a union and that forty-three percent of that subset faced some kind of illegal retaliation such as termination, wage-cut threats, or threats to call immigration authorities).

⁵⁵ This is particularly the case for undocumented immigrants. See NAT'L EMP'T LAW PROJECT, WINNING WAGE JUSTICE: AN ADVOCATE'S GUIDE TO STATE AND CITY POLICIES TO FIGHT WAGE THEFT 63 (2011), <https://www.nelp.org/wp-content/uploads/2015/03/WinningWageJustice2011.pdf> [<https://perma.cc/3JPD-7Y8P>] (concluding that undocumented workers underreport violations because they generally avoid drawing attention to themselves, will not proceed when asked for information that could disclose their immigration status, and will not engage in programs that require local police to share data with ICE).

⁵⁶ See *id.* at 50 ("Immigrant workers often find their access to agency enforcement mechanisms blocked by their inability to navigate these systems in English.")

⁵⁷ See COOPER & KROEGER, *supra* note 8, at 2 (finding that on average, workers subjected to minimum wage violations are underpaid by \$64 per week, or \$3300 per year for a full-time worker).

⁵⁸ See JANICE FINE, ECON. POLICY INST., WORKER CENTERS: ORGANIZING COMMUNITIES AT THE EDGE OF THE DREAM 2 (2005), <https://www.epi.org/files/page/-/old/briefingpapers/159/bp159.pdf> [<https://perma.cc/TW3P-ECSG>] ("Worker centers provide low-wage workers a range of opportunities for expressing their 'collective voice' as well as for taking collective action."); Michael H. Gottesman, *In Despair, Starting Over: Imagining a Labor Law for Unorganized Workers*, 69 CHI.-KENT L. REV. 59, 85 (1993) (arguing that the National Labor Relations Act was motivated by a strong belief in worker voice and leveraging bargaining power through collective bargaining).

solution to a classic public goods problem where others gain from the creation of an individual action is through some form of collective action. Addressing the collective action problem is therefore critical to fixing . . . the workplace.⁵⁹

By working together, workers can overcome the free-rider problem implicated when only one worker reports a company-wide violation.

Yet unions, worker centers, and individual workers should not bear the full responsibility for information sharing. The government has an interest in ensuring laws are enforced and should support efforts inside and outside the government to improve enforcement. As Weil suggests, “building better bridges between government agencies and community groups, worker centers, and worker advocates” is necessary for effective enforcement efforts.⁶⁰

Collective organizing can specifically help with information-sharing aspects of enforcement in a number of ways. First and foremost, worker organizations develop some expertise in navigating the reporting process and collecting information instead of forcing the worker to go through the process by themselves.⁶¹ This can mean the organizations do the reporting themselves or simply help workers fill out paperwork and provide translation help. Second, organizing makes workers feel empowered to speak up because they will feel safer voicing concerns about an abusive employer when the organization can reassure the workers about the role the government plays.⁶² Good organizing will meet specific needs of workers and focus on alleviating the problems experienced by that demographic.

⁵⁹ WEIL, *supra* note 50, at 253.

⁶⁰ *Id.* at 249 (“These efforts can range from long-standing efforts by Department of Labor agencies to reach out to unions, community groups, and religious organizations to more extensive collaborations that would allow problem solving around persistent patterns of noncompliance in specific labor markets or industries.”).

⁶¹ See FINE, *supra* note 58, at 11 (“A particularly necessary form of legal help is assistance with filing and pursuing claims for unpaid wages. It is the one in greatest demand, and also often the most developed aspect of the centers’ service work.”).

⁶² See *id.* at 20 (arguing that one critical service from worker organizations is “to empower workers to take collection action on their own behalf”); see also JANICE FINE, CO-PRODUCTION: BRINGING TOGETHER THE UNIQUE CAPABILITIES OF GOVERNMENT AND SOCIETY FOR STRONGER LABOR STANDARDS ENFORCEMENT 14 (2015), https://theliftfund.org/wp-content/uploads/2015/09/LIFTReportCoproductionOct_ExecSumm-rf_4.pdf [<https://perma.cc/2QF2-6J97>] (“Worker organizations can enhance the work by identification of noncompliance through relationships with workers, outreach to workers in targeted sectors and the trust of workers, so that when the organization vouches for the agency, workers are willing to come forward and file complaints.”); DAVID MADLAND & ALEX ROWELL, CTR. FOR AM. PROGRESS ACTION FUND, HOW STATE AND LOCAL GOVERNMENTS CAN STRENGTHEN WORKER POWER AND RAISE WAGES 13 (2017), <https://cdn.americanprogressaction.org/content/uploads/sites/2/2017/05/01144237/C4-StateLocalWorkerVoice-report.pdf> [<https://perma.cc/MB6S-K8CS>] (“Community and worker organizations can also serve as trusted intermediaries, bringing workers and government together and guiding workers through the process of ending labor violations in their workplace, which often involves real risks for workers who are justifiably afraid to go it alone.”).

Worker organizations take many forms, and this Comment only attempts to answer whether existing organizations would meet the needs of drivers, not whether there is a single best approach for organizing Uber drivers. Unionization under the National Labor Relations Act⁶³ may be a long-term effective strategy. It is true that unions, like other kinds of worker organizations, come with legal expertise about navigating the claims system and can aggregate data from many drivers, which would facilitate bringing claims in court.⁶⁴ Indeed, some of the largest union successes in recent years organized low-wage and decentralized workers,⁶⁵ but these efforts took years to build.⁶⁶ Some cities, particularly Seattle, are already exploring the possibility of allowing drivers to organize unions.⁶⁷ For the purposes of this Comment, however, I leave unionization as a possible long-term avenue but focus on more flexible kinds of existing organizations that might immediately assist drivers who became employees.

It is debatable which other forms of organizing might work best to help Uber drivers. Part of the problem is the unknown demographics of drivers: most of the available information is anecdotal,⁶⁸ although there have been an

⁶³ 29 U.S.C. §§ 151–69 (2018).

⁶⁴ See Catherine L. Fisk, *Union Lawyers and Employment Law*, 23 BERKELEY J. EMP. & LAB. L. 57, 59 (2002) (“Unions have the knowledge and resources to determine when the law has been violated and to seek enforcement, and unlike individual employees, union representatives need not fear retaliation for invoking statutory protections.”).

⁶⁵ See Krish Maher, *Unions Target Home Workers*, WALL STREET J. (June 19, 2013, 9:27 PM), <https://www.wsj.com/articles/SB10001424127887324049504578541593593292614> [<https://perma.cc/XTY5-ZEBT>] (detailing successful union organizing in the home healthcare industry, consisting of over 3.2 million workers with median wage of under \$10 per hour and spread across dozens of states).

⁶⁶ See Keith Kelleher, *How Decades of Fast Food Worker Organizing Lead to “The Fight for 15”*, HUFFINGTON POST (Oct. 16, 2017, 2:52 PM), https://www.huffingtonpost.com/entry/how-decades-of-fast-food-worker-organizing-lead-to_us_59dfd015e4b02e99c58354f6 [<https://perma.cc/MD2J-4RNJ>] (describing the long struggle to unionize the fast food industry, which began in in the 1980s).

⁶⁷ See Jessica Lee, *Unionize Uber? Legal Fight over Seattle Drivers Draws National Attention*, SEATTLE TIMES, (Mar. 29, 2017, 10:45 AM), <https://www.seattletimes.com/seattlenews/transportation/unionize-uber-legal-fight-over-seattle-drivers-draws-national-attention/> [<https://perma.cc/J2YK-BV43>] (describing the lengthy and ongoing battle resulting in enactment of a first-of-its-kind local ordinance allowing for-hire drivers to unionize in Seattle). The city’s effort was later dealt a blow in 2018 when the Ninth Circuit held that the Seattle ordinance should not be afforded state-action immunity from the antitrust laws. *U.S. Chamber of Commerce v. City of Seattle*, 890 F.3d 769, 775, 787–90 (9th Cir. 2018) (holding that because the Seattle ordinance lacked the active state supervision necessitated by *North Carolina State Board of Dental Examiners v. FTC*, 574 U.S. 494 (2015), the union law should not be afforded state antitrust immunity).

⁶⁸ See, e.g., Emily Guendelsberger, *I Was an Undercover Uber Driver*, MY CITY PAPER (May 7, 2015), <http://mycitypaper.com/uberdriver/> [<https://perma.cc/MA96-GK89>] (interviewing 20 randomly hailed Uber and Lyft drivers, reaching out to others on Uberpeople.net, and actually driving for the app in an inconclusive attempt to confirm maximum earnings of average driver).

increasing number of larger studies.⁶⁹ Some drivers may be students or from middle-class families looking to make some extra income to pay the bills.⁷⁰ Others may be former taxi drivers trying to earn a full-time living from Uber driving.⁷¹ In either case, immigrant communities may be a significant portion of the drivers.⁷² Additionally, the demographics of drivers have shifted over time.⁷³ Different solutions will likely be needed for drivers with different time constraints, financial resources, and interests.

The world of online organizing presents a growing possibility for drivers' collective organizing. Imagine an Uber driver who thinks the company is violating minimum-wage and overtime laws, but she only notices a violation once a month, she fails to write down exact dates, and she does not think that the violations amount to sufficient losses to justify a suit on her own. In an ideal online platform, she could first create a post in an online forum asking if other drivers have experienced the same problem. If enough positive responses come back, the workers could reserve a space through the organizing entity along with a legal representative provided by the organizers to discuss the problem. Assuming enough workers agree that there is a problem, they could use an online petition to gather as many other workers as possible who have dealt with the same issue and present it to Uber in order to seek a change in the payment practices. If the company does not take action, the legal representative could assist the workers in filing a claim with the state or federal department responsible for enforcing wage-and-hour laws. The transfer of information between coworkers and to the government is central to effective enforcement. This kind of flexible platform would allow decentralized workers to organize in their spare time,

⁶⁹ See, e.g., BENENSON STRATEGY GRP., *UBER: THE DRIVER ROADMAP* (2015), https://newsroom.uber.com/wp-content/uploads/2015/01/BSG_Uber_Report.pdf [<https://perma.cc/PQS2-TY8H>] (reporting the results of a comprehensive 2014 Uber survey of 601 drivers in twenty markets); HARRY CAMPBELL, *RIDESHARE GUY, THE RIDESHARE GUY 2018 READER SURVEY* (2018), https://docs.google.com/document/d/1g8pz00OnCb2mFj_97548nJAj4HfluExUEgVb45HwDrE/edit [<https://perma.cc/LV3V-VJUW>] (reporting demographic, income, and satisfaction information from a survey of 1143 Uber and Lyft drivers).

⁷⁰ See BENENSON STRATEGY GRP., *supra* note 69, at 8 (stating that 7% of Uber drivers were students at the end of 2014, and more drivers were over age 50 than under age 30); Singer, *supra* note 7 (describing a mother working as a driver for Uber to help pay for food and rent).

⁷¹ See BENENSON STRATEGY GRP., *supra* note 69, at 4 (stating that before working for Uber, 14% of drivers drove a taxi, 20% drove for a black car or limo service, and 15% drove for a delivery service).

⁷² See Guendelsberger, *supra* note 68 (describing how, in a sample of twenty randomly hailed UberX and Lyft rides, “[a]ll but one [driver] were male immigrants, primarily from Africa, South Asia and the Middle East, and most spoke heavily accented English”).

⁷³ See *id.* (“Several [customers] mention their relief at getting a driver who’s a native English-speaker, saying Uber has been going downhill lately.”). Compare BENENSON STRATEGY GRP., *supra* note 69, at 8 (finding 50% of drivers were over age 40 in 2015), with CAMPBELL, *supra* note 69, at 6 (finding that 84.8% of drivers are 41 or older in a survey that was conducted solicited from readership of the author’s blog).

when it is convenient for them, and would not require them to interact too often in person—but through a method that could still make an impact.

Such an organization does not currently exist but is also not far-fetched. Platforms like the Freelancers Union⁷⁴ and Coworker.org⁷⁵ have already begun to try and bring together decentralized workers under flexible organizing models that will best serve the needs of their populations. The Freelancers Union offers legal resources for its workers who are dealing with client nonpayment,⁷⁶ as well as centralized meeting spaces that bring workers face-to-face and facilitate the dissemination of information about employers' practices, which allows for information collection.⁷⁷ Coworker.org provides workers with a means to create online petitions and speak directly to employers in large numbers,⁷⁸ and Uber drivers could use it for their own organizing efforts.

There is good reason to believe a combination of these platforms could work for Uber drivers because in some ways they already exist. Many drivers participate in online forums where they post about their grievances or offer advice to new drivers.⁷⁹ Such online forums create a community for sharing information but currently do not provide legal advice or formal, in-person organization that might help push the information sharing into actual enforcement of laws. However, the blogs do indicate that many drivers are tech savvy enough to navigate websites and motivated enough by perceived injustices to post about them and engage in low-level forms of online organizing.

Worker centers are another option for collective worker organizing to facilitate information sharing. Picture an Uber driver, whose first language is Spanish, who attends an organization's English language class because he believes his limited English affects the ratings he receives. During his class, he converses with other Spanish speakers, including the organizer, and feels

⁷⁴ *About Freelancers Union*, FREELANCERS UNION, <https://www.freelancersunion.org/about/> [<https://perma.cc/ZRF7-6XXK>] (last visited July 7, 2019) (describing the organization as a “portable benefits model” that represents 56.7 million “independent workers” nationally).

⁷⁵ COWORKER.ORG, <https://home.coworker.org/> [<https://perma.cc/9XSV-PZRJ>] (last visited July 7, 2019) (allowing users to create a petition to “make positive change in your industry”).

⁷⁶ *See The Freelancer's Guide to Getting Paid on Time*, FREELANCERS UNION, <https://www.freelancersunion.org/resources/client-nonpayment/> [<https://perma.cc/2YYP-ZZRH>] (last visited July 7, 2019) (listing steps and resources to file a nonpayment claim).

⁷⁷ *See Spark: Meet Your Local Freelance Community*, FREELANCERS UNION, <https://www.freelancersunion.org/spark/> [<https://perma.cc/UC45-3ANQ>] (last visited July 7, 2019) (listing local events intended to facilitate networking and information sharing).

⁷⁸ *See* MICHELLE MILLER, ROOSEVELT INST., *THE UNION OF THE FUTURE* 4 (2015), <https://rooseveltinstitute.org/wp-content/uploads/2015/10/Miller-The-Union-of-the-Future.pdf> [<https://perma.cc/QYQ7-7KWN>] (describing a Coworkers.org petition created by a Starbucks barista which gained 18,000 subscribers and revealed misrepresentation about scheduling practices).

⁷⁹ *See* UBERPEOPLE, <https://uberpeople.net/> [<https://perma.cc/MT34-D4NT>] (last visited July 7, 2019) (hosting threads about topics like “advice” and “complaints”).

comfortable enough to express his frustration with how Uber pays him. The organizer, due to training and past experience with wage-and-hour violations, recognizes that Uber violated wage-and-hour laws. After the English class, she speaks with the driver individually, explains what she believes occurred to him, and explains the process for filing a claim, which makes him feel more comfortable about interacting with the government. She then helps him fill out the claim forms, partly by helping to translate and explain terms in Spanish, and then assists him in keeping track of deadlines so that he continues to follow up with the government officials. In such a case, the organization facilitates the information transfer that leads the driver to file a claim with the government.

These organizations, known as worker centers, have been growing around the country and primarily focus on providing services to immigrant and low-income communities.⁸⁰ They can specialize either by community⁸¹ or by work sector,⁸² and usually provide a range of services including English language classes, legal support, training, and classes on organizing tactics.⁸³ The National Day Laborer Organizing Network (NDLON) even offers a free iPhone app to help workers track their hours and pay.⁸⁴ Many centers aim to make workers self-sufficient and capable of organizing themselves.⁸⁵ English

⁸⁰ See FINE, *supra* note 58, at 1-2 (describing the focus of worker centers on immigrants and low-income workers because those demographic groups have the greatest rates of mistreatment by employers and the least access to resources).

⁸¹ See, e.g., *Mission*, NEW LABOR, <http://newlabor.org/mission> [<https://perma.cc/28UX-C7X7>] (last visited July 7, 2019) (describing how New Labor organizes and helps immigrant workers throughout New Jersey); SOMOS UN PUEBLO UNIDO, <http://www.somosunpueblounido.org/somos-un-pueblo-unido.html#unitedwcnm> [<https://perma.cc/F2CT-4L2V>] (last visited July 7, 2019) (discussing the creation of the “first and only worker center for low-wage workers” in New Mexico).

⁸² See, e.g., NAT’L DAY LABORER ORGANIZING NETWORK (NDLON), <http://www.ndlon.org/> [<https://perma.cc/875Z-7TE7>] (last visited July 7, 2019) [hereinafter NDLON] (stating that NDLON works with day laborers throughout the United States); RESTAURANT OPPORTUNITIES CTNS. UNITED (ROC UNITED), <http://rocunited.org/> [<https://perma.cc/RW9X-VKC6>] (last visited July 7, 2019) (describing how ROC United organizes restaurant workers across the United States).

⁸³ See Danae Lopez, *Worker Centers: Labs of Organizational Innovation*, CENTURY FOUND. (Aug. 16, 2016), <https://tcf.org/content/facts/worker-centers-labs-organizational-innovation/> [<https://perma.cc/4DHX-A7X4>] (listing services and “tactics” offered by a variety of worker centers in order to further social justice, including community education, workplace negotiation, media support, and various legal services).

⁸⁴ *Id.*; see Liz Robbins, *New Weapon in Day Laborers’ Fight Against Wage Theft: A Smartphone App*, N.Y. TIMES (Mar. 1, 2016), https://www.nytimes.com/2016/03/02/nyregion/new-weapon-in-day-laborers-fight-against-wage-theft-a-smartphone-app.html?_r=2 [<https://perma.cc/9YAS-HSEQ>] (describing how the app keeps workers anonymous but allows them to record hours and wages, as well as how the app notifies the worker center about nonpayment or underpayment, allowing the worker center to then contact the employer).

⁸⁵ See FINE, *supra* note 58, at 10 (“[W]orker centers view service provision as a central function, but . . . [t]hey want workers to see that solutions require long-term collective action to alter the relations of power and win concrete and lasting victories.”).

classes help workers speak up in the workplace, organizing classes give them confidence to stand up for their rights, and legal support helps guide them when they bring a claim. Existing worker centers already focus on other decentralized groups, like day laborers or taxi drivers.⁸⁶ Additionally, some worker centers collaborate with government entities to improve reporting claims and already serve as information facilitators.⁸⁷

If Uber drivers become employees, they could take advantage of existing worker centers. For recent immigrants who drive for Uber, a localized organization that provides English language classes and a collection of workers with the same language and culture might better empower the worker and could provide legal support in the driver's primary language. Alternatively, Uber drivers could create a center that focuses on sharing-economy workers. For instance, the New York Taxi Workers Alliance would likely have much of the expertise necessary to coordinate a driver-based community such as Uber drivers, and drivers could model their organization on that approach.⁸⁸ In either case, the organization could collect information from drivers, help them submit claims by overcoming language and institutional barriers, and increase worker awareness about their right to report such violations or how to detect the violations as they occur.

In order to maximize the enforcement assistance provided by any worker organization, governments seeking to make the most of their limited resources should actively support the organizations, either financially or educationally. Federal government agencies tasked with enforcing wage-and-hour laws could expand on existing forays into cooperation between community organizations and government officials.⁸⁹ For instance, the government could train worker centers and online organizers about the variations of wage-and-hour violations and what kind of information to look for.⁹⁰ They could also offer classes

⁸⁶ See NDLO, *supra* note 82 (focusing on day laborers); *New York Taxi Workers Alliance Mission & History*, N.Y. TAXI WORKERS ALLIANCE, <http://www.nytw.org/mission-and-history> [<https://perma.cc/E4XG-LJ76>] (last visited July 7, 2019) (describing the organization as a "union" organizing independent contractors and providing "direct action, legal and health services, media presence, political advocacy, and the cultivation of allies and supporters").

⁸⁷ See FINE, *supra* note 58, at 8 (describing how worker centers have partnered with government agencies to improve enforcement).

⁸⁸ See *New York Taxi Workers Alliance Mission & History*, *supra* note 86 (describing the Alliance's experience in "organizing, direct action, legal and health services, media presence, political advocacy, and the cultivation of allies and supporters" for "NYC yellow cab, green car, black car, livery and app-dispatched drivers").

⁸⁹ See Janice Fine & Jennifer Gordon, *Strengthening Labor Standards Enforcement Through Partnerships with Workers' Organizations*, 38 POL. & SOC'Y 552, 563-71 (2010) (describing government partnerships with community organizations in California and New York).

⁹⁰ See *id.* at 568-71 (describing the Wage and Hour Watch program set up by the New York State Department of Labor which committed the Department to training members from worker centers and worker organizations).

directly to workers through these organizations in order to inform them about the process for bringing claims and to increase trust in the government process. Additionally, the government could provide these organizations with funding for organization activities related to information collection and claim-filing for workers.⁹¹ Small worker organizations are always in need of funding and if the government eases the burden of collecting information, it could make it much easier for such organizations to assist with enforcement.⁹² Admittedly, this proposal may not be particularly popular and would open the government up to claims that they are outsourcing their enforcement responsibilities, but it would in fact efficiently use taxpayer dollars to expand enforcement capabilities.

While underreporting of wage-and-hour claims for Uber drivers is almost inevitable, evidence from other industries shows that collective organizing can mitigate this problem and bring enforcement rates to acceptable and effective levels. The different organizing possibilities discussed above indicate that existing or readily modifiable modes of organizing workers to facilitate information sharing could apply to Uber drivers. The drivers may not be sufficiently homogenous for a single organizing strategy to work effectively, but even if all Uber drivers become employees overnight, existing organizations could help them share information with the government in order to enforce their rights. Existing organizations like worker centers, however, already lack sufficient resources to handle current members, and would likely not be able to handle the entire influx of all Uber drivers without sacrificing other activities.⁹³ The government may need to play a role if these organizations must find the resources for enforcement-related information-sharing efforts. Undoubtedly, sharing-economy workers would do well to create their own organizations, tailored to their specific needs, but worker centers, online organizations, and even unions all offer good models to build off of and could act as temporary assistance when workers first become employees.

CONCLUSION

This Comment demonstrates the ways in which Uber, its drivers, and the government can share information in order to adequately enforce wage-and-hour laws. Each Section has demonstrated the feasibility of the transition in the here and now, with opportunities for refinement once workers become

⁹¹ See *id.* at 573-74 (arguing that it is appropriate and normal for private organizations to get government funding for doing public work).

⁹² See FINE, *supra* note 58, at 16-17 (describing examples where the limited resources of worker centers resulted in difficulty in raising funds and maintaining financial stability, thereby making long-term planning and implementation nearly impossible).

⁹³ See *id.*

employees. No aspect of information sharing clearly makes Uber unable to comply with existing regulations, and this very feasibility undermines one argument against making drivers employees. If their rights are enforceable, workers might prefer steady and reliable income over flexibility, which might be marginally diminished under an employee status.

Additionally, this conclusion has implications for the sharing economy as a whole. As discussed, Uber's business model and employment practices are relatively well known when compared to other platform companies, so exact comparisons are impossible, and each platform would face difficulties specific to its business model. However, part of the fundamental nature of the sharing economy is its use of technology to communicate with workers and its collection of data from its workers.⁹⁴ For instance, the app Rover tracks its dog walkers via GPS, much like Uber, which would facilitate recordkeeping.⁹⁵ Instacart, too, keeps constant tabs on its workers as they pick items in the store, and the level of monitoring means highly accurate records are likely available for hours worked by individual employees.⁹⁶ Additionally, many of these companies communicate with workers through apps. Taskers for TaskRabbit have to interact with an app when they want jobs through the platform, and TaskRabbit could create a screen similar to the one suggested for Uber in order to notify workers of their wage-and-hour rights.⁹⁷

The difficulties of organizing any sharing economy workers are similar. Almost all platforms create an isolated work environment for the workers and there is little to no contact between workers.⁹⁸ Unlike Uber, many of the other apps may not have an online community and could have very different demographics, which would lead to different effective organizing solutions. However, the very existence of flexible organizing platforms that can create a

⁹⁴ See Deepa Das Acevedo, *Regulating Employment Relationships in the Sharing Economy*, 20 EMP. RTS. & EMP. POL'Y J. 1, 7 (2016) (describing platform sharing-economy companies as "facilitat[ing] third party transactions by using technology to connect disparate individuals with complementary needs").

⁹⁵ See *How Does the Dog Walking Map Feature Work?*, ROVER: SUPPORT, <https://support.rover.com/hc/en-us/articles/211587446-How-does-the-dog-walking-map-feature-work-> [<https://perma.cc/E8V3-CNWG>] (last visited July 7, 2019) (noting the use of GPS data stored and tracked by the app to inform dog owners what happened on their walk).

⁹⁶ See [Proposed] Collective Action Complaint [29 U.S.C. §§ 201] and First Amended Class Action Complaint at ¶ 47, *Cobarruviaz v. Maplebear Inc.*, 143 F. Supp. 3d 930 (N.D. Cal. 2015) (No. 15-0697) (averring that the plaintiffs, Instacart shoppers and drivers, had to notify Instacart of the progress on an order at each step and that plaintiffs would receive texts from Instacart if they were running even a minute behind).

⁹⁷ See *Become a Tasker*, TASKRABBIT, <https://www.taskrabbit.com/become-a-tasker> [<https://perma.cc/J7DP-NYNZ>] (last visited July 7, 2019) (encouraging prospective workers to "[d]ownload the Tasker app and accept your first job").

⁹⁸ See Anne Fisher, *There's a Loneliness Epidemic Among Freelancers*, FORTUNE (Sept. 7, 2016, 5:00 AM), <http://fortune.com/2016/09/07/freelancers-gig-economy-happiness-satisfaction/> [<https://perma.cc/PPM6-EJSX>] (noting survey results that found fewer than half of all past and present freelancers were "very satisfied," largely because of the isolation and loneliness of their jobs).

community based on the needs of the workers means the organizations could adapt and suit any kind of platform while still assisting in information collection and sharing with the government.

This Comment does face some limitations. First, the Comment discusses only federal wage-and-hour laws. States may vary in their recordkeeping requirements, and additional problems may occur in places where, for instance, agencies provide forms for wage-and-hour claims only in English or state enforcement is highly understaffed,⁹⁹ so future research may need to account for local considerations. Additionally, Uber, like other platform companies, keeps its business practices secret,¹⁰⁰ and while researchers and workers piece together information by aggregating reports of drivers,¹⁰¹ little is known about the drivers or the algorithms behind the app. Yet, as this Comment makes clear, the public knows enough information to enable relatively confident assertions that Uber could meet its informational obligations under federal wage-and-hour laws. Finally, other companies with different business models may have some different logistical issues with information collection and communication,¹⁰² but the sharing economy universally relies on technology and large amounts of data, which makes generalizations in this Comment useful if not conclusive.

Regardless of how it might work for other companies, this Comment demonstrates that Uber could make its drivers employees and government agencies could enforce the rights of drivers, but this Comment does not address the question of cost. Having drivers as employees would undeniably be more expensive for Uber, and the company has understandably been

⁹⁹ See COLIN GORDON ET AL., IOWA POLICY PROJECT, WAGE THEFT IN IOWA 14 (2012), <https://www.iowapolicyproject.org/2012docs/120827-wagetheft.pdf> [<https://perma.cc/8NWH-6F6T>] (stating that all communications from the Iowa government regarding wage claim procedures were only provided in English); ZACH SCHILLER & SARAH DECARLO, POLICY MATTERS OHIO, INVESTIGATING WAGE THEFT: A SURVEY OF THE STATES i, 2 (2010), <http://www.policymattersohio.org/wp-content/uploads/2011/10/InvestigatingWageTheft20101.pdf> [<https://perma.cc/CBS5-DZED>] (finding that most states had fewer than ten wage-and-hour investigators, Florida had none, and Indiana had only one).

¹⁰⁰ See Jessica Leber, *The Secrets of Uber's Mysterious Surge Pricing Algorithm, Revealed*, FAST CO. (Oct. 29, 2015), <https://www.fastcompany.com/3052703/the-secrets-of-ubers-mysterious-surge-pricing-algorithm-revealed> [<https://perma.cc/3AKM-6X8N>] (noting that Uber does not share data about supply and demand or its pricing algorithm).

¹⁰¹ See UBERPEOPLE, *supra* note 79 (allowing Uber drivers to share personal stories and compare their experiences with the platform).

¹⁰² See Boyd Cohen, *Making Sense of the Many Business Models in the Sharing Economy*, FAST CO. (Apr. 6, 2016), <https://www.fastcompany.com/3058203/making-sense-of-the-many-business-models-in-the-sharing-economy> [<https://perma.cc/6KCJ-F39X>] (describing how sharing-economy companies differ in technology, transactions, business approaches, shared resources, governance models, and platform types based on factors like reliance on tech, availability of scaling, and ancillary social goals).

reluctant to cut into its profits.¹⁰³ However, some have suggested that it is exactly companies as profitable as Uber that can best afford to make the switch to employee status.¹⁰⁴ This is because Uber has the finances to make the switch from independent contractor to employee without financially collapsing from the temporary challenges the switch poses. Once more, Uber may be the perfect test case for determining the feasibility of this transition.¹⁰⁵

If technology feasibly allows Uber to make its drivers employees but Uber cannot because of the expense, that raises different questions. Employment laws like the Fair Labor Standards Act were based on a belief that all working residents of the United States should be afforded a certain standard of living and a rate of pay. If Uber seeks to avoid those laws not because it is impossible to comply with the rules, but because it cannot afford to pay its drivers a living wage, Americans and government regulators need to consider if this business model should be an exception to an otherwise almost universal law. Perhaps if Uber's innovative business model can upend urban transportation, it can innovate once more, and both pay workers a living wage and increase transportation efficiency.

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¹⁰³ See Kosoff, *supra* note 4 (stating that independent contractors as “a lot cheaper” than employees and finding that it cost one startup forty percent more to hire employees rather than independent contractors).

¹⁰⁴ See Adi Kamdar, *Why Some Gig Economy Startups Are Reclassifying Workers as Employees*, ONLABOR, (Feb. 19, 2016), <https://onlabor.org/why-some-gig-economy-startups-are-reclassifying-workers-as-employees/> [<https://perma.cc/Q893-TJAY>] (“The trend seems to show that companies make the switch most successfully when they have enough money to do so or when they do it early enough to adapt their business model around the change.”).

¹⁰⁵ See *id.* (“Realistically though, flush with venture capital money, Uber may in fact be best equipped to deal with this switch.”). Of course, Uber's position has recently become more complicated: while it is better capitalized than ever after its recent IPO, it is also now accountable to its public shareholders. See Kerr, *supra* note 13.