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Women, Retirement, and the Growing Gig Economy Workforce

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WOMEN, RETIREMENT, AND THE GROWING GIG ECONOMY WORKFORCE*

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ABSTRACT

Gig work—the selling or renting of labor, effort, skills, and time outside of traditional employment—is a long-standing feature of the U.S. economy. Today, millions of "online gig workers" sell goods and services, or rent rooms, houses, vehicles, and other assets using app-online and app-based platforms (for example, Uber, Lyft, Rover, DoorDash, eBay, Etsy, Postmates, VRBO, and Airbnb) to connect with customers. Millions more of "offline gig workers" run errands; walk dogs; care for children and the elderly; do housework, yardwork, and other occasional jobs; rent rooms; and sell goods at outdoor markets and roadside stands—without using online platforms to connect with their customers. This Article focuses on gig work in terms of what it means for women, their work, and their retirement income security. In particular, this Article (1) reviews the existing measures of gig work to determine any relevant data gaps; (2) summarizes the tax and retirement rules for gig workers; (3) considers the major factors that contribute to the gender retirement wealth gap; (4) identifies the challenges for gig workers in saving for retirement, including the extraordinary economic circumstances presented by the COVID-19 pandemic; and (5) discusses some federal tax, retirement, and financial literacy policy proposals that could help gig workers better support themselves in retirement.

Jon Forman died unexpectedly prior to publication of this Article. In the year before his death, he worked relentlessly to finalize it and other works. He was a beloved husband and father, professor, and friend. He is missed by so very many students, colleagues, and friends whose lives and careers he worked tirelessly to improve.

CONTENTS

INTRODUCTION

Gig work—the occasional selling of labor, effort, skills, and time—is a long-standing feature of the U.S. economy. The term's use to describe occasional paid work originated in the 1920s from the slang that American jazz musicians coined to describe their paid engagements (especially their one-night gigs).[1] Commonly understood to be informal, contingent work arrangements (as opposed to traditional employment), some types of gig work have become more automated and accessible alongside the widespread adoption of internet-enabled smart phones in the early twenty-first century.[2] Today, millions of "online gig workers" sell goods and services, or rent rooms, houses, vehicles, and other assets using app-online and app-based platforms (like Uber, Lyft, Rover, DoorDash, eBay, Etsy, Postmates, VRBO, and Airbnb) to (1) connect with customers and (2) process customer payments.[3] Millions more of "offline gig workers" run errands; walk dogs; care for children and the elderly; do housework, yardwork, and other occasional jobs; rent rooms; and sell goods at outdoor markets and roadside stands—without using online platforms to connect with their customers.[4]

Although working outside of traditional employment (in other words, a full-time job with employee benefits and tax withholding) has long been a source of supplemental income for some workers, the rise of online platforms has generated a new emphasis on these alternative work arrangements by government and academic researchers looking

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1. ROBERT S. GOLD, A JAZZ LEXICON 123−24 (1964).

2. CAROLINE BRUCKNER, KOGOD TAX POL'Y CTR., KOGOD SCH. OF BUS., AM. UNIV., SHORTCHANGED: THE TAX COMPLIANCE CHALLENGES OF SMALL BUSINESS OPERATORS DRIVING THE ON-DEMAND PLATFORM ECONOMY 1−2 (2016), https://www.american.edu/kogod/research/upload/shortchanged.pdf [https://perma.cc/R4VB-QFYH].

3. *Id.*

4. *See, e.g.*, BÁRBARA J. ROBLES & MARYSOL MCGEE, BD. OF GOVERNORS OF THE FED. RSRV. SYS., FINANCE AND ECONOMICS DISCUSSION SERIES 2016-089, EXPLORING ONLINE AND OFFLINE INFORMAL WORK: FINDINGS FROM THE ENTERPRISING AND INFORMAL WORK ACTIVITIES (EIWA) SURVEY 4 (2016), https://www.federalreserve.gov/econresdata/feds/2016/files/2016089pap.pdf [https://perma.cc/HLV2-F7CC].

at tax compliance, worker protection, and benefits policy.[5] Unlike traditional employees, most workers engaged in gig work are classified as self-employed or independent contractors for tax and labor law purposes.[6] As a result, gig workers are not generally entitled to health insurance or the Fair Labor Standards Act's minimum wage and overtime protections, and they are pretty much "on their own when it comes to training, retirement savings, and tax planning."[7]

To date, the burgeoning research on gig workers has focused on the online gig workers who dominate the ridesharing platforms (mostly men), and considerably less research has focused on the women who engage in online and offline gig work as a supplemental source of income.[8] Although some tax researchers have gone so far as to note that "gender differences in alternative work . . . merit further investigation," relatively little research has specifically focused on women gig workers or on the consequences of that gig work on their retirement income security.[9] The COVID-19 pandemic has accelerated

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5. *See generally id.* (discussing reasons why people participate in alternative work arrangements); BRUCKNER, *supra* note 2 (finding tax compliance as one of the main issues for taxpayers in alternative work arrangements and small businesses).

6. *E.g.*, U.S. GOV'T ACCOUNTABILITY OFF., GAO-20-366, TAXPAYER COMPLIANCE: MORE INCOME REPORTING NEEDED FOR TAXPAYERS WORKING THROUGH ONLINE PLATFORMS 6 (2020) [hereinafter 2020 TAXPAYER COMPLIANCE], https://www.gao.gov/assets/710/707209.pdf [https://perma.cc/A2GB-YFXK]; Brett Collins, Andrew Garin, Emilie Jackson, Dmitri Koustas & Mark Payne, Is Gig Work Replacing Traditional Employment? Evidence from Two Decades of Tax Returns 3 (Mar. 25, 2019) (unpublished manuscript), https://www.irs.gov/pub/irs-soi/19rpgigworkreplacingtraditionalemployment.pdf [https://perma.cc/GM78-SVHM]; Annette Bernhardt & Sarah Thomason, *What Do We Know About Gig Work in California? An Analysis of Independent Contracting*, U.C. BERKELEY CTR. FOR LAB. RSCH. & EDUC. 6 (June 2017), http://laborcenter.berkeley.edu/pdf/2017/What-Do-We-Know-About-Gig-Work-in-California.pdf [https://perma.cc/M7YJ-9N3Z].

7. Collins et al., *supra* note 6.

8. *See infra* Part I.C.

9. Collins et al., *supra* note 6, at 16; *see also* Caroline Lewis Bruckner & Thomas L. Hungerford, *Failure to Contribute: An Estimate of the Consequences of Non- and Underpayment of Self-Employment Taxes by Independent Contractors and On-Demand Workers on Social Security*, 9 IND. J.L. & SOC. EQUAL. 52, 57 (2021) (providing "new insight on the Social Security implications" of gig workers); ARIANE HEGEWISCH, CHANDRA CHILDERS & HEIDI HARTMAN, INST. FOR WOMEN'S POL'Y RSCH., IWPR NO. C476, WOMEN, AUTOMATION, AND THE FUTURE OF WORK 2 (2019), https://iwpr.org/wp-content/uploads/2020/08/C476_Automation-and-Future-of-Work.pdf [https://perma.cc/ZHY7-RPVS] (noting a "small number of studies" dedicated to separate risks for men and women in automation industry); Paul M. Secunda, *Uber Retirement*, 2017 U. CHI. LEGAL F. 435, 437 (2018) ("[T]his is the first article to establish why it is essential that individuals who work in the sharing economy be considered

the need for better research on workers outside of traditional employment generally because the pandemic has displaced millions of full-time workers, and Congress has had to cobble together policy responses to aid them.[10] The COVID-19 pandemic has been especially hard on women workers, in general, and on women gig workers, in particular.[11] In any event, more research on gig workers is needed as "ample evidence [suggests] that many older adults lack adequate savings for retirement, so that income from continuing to work is important for their financial security."[12] Moreover, "there is little specific evidence about the retirement security preparedness of contingent workers," and even less on the growing category of gig workers.[13]

This Article focuses on gig work in terms of what it means for women, their work, and their retirement income security. In particular, this Article (1) reviews the existing measures of gig work to determine

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common law employees for retirement purposes."); Jennifer Erin Brown, Insecure at Best: Self-Employment, the On-Demand Economy, and Retirement Security 5 (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3085219 [https://perma.cc/YSK3-SXFY] (May 9, 2018) (focusing on types of retirement plans that independent workers can use and on obstacles that small-business owners and independent workers face in using retirement plans); Janine Berg, *Income Security in the On-Demand Economy: Findings and Policy Lessons from a Survey of Crowdworkers*, 37 COMPAR. LAB. L. & POL'Y J. 543, 544−45 (2016) (assessing assumptions about on-demand economy and proposals for rectifying shortcomings of on-demand economy).

10. *See, e.g.*, Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. No. 116-136, 134 Stat. 281 (2020); *see also infra* Part V.C.

11. *E.g.*, Eleni X. Karageorge, *COVID-19 Recession Is Tougher on Women*, U.S. BUREAU LAB. STAT.: MONTHLY LAB. REV. (Sept. 2020), https://www.bls.gov/opub/mlr/2020/beyond-bls/covid-19-recession-is-tougher-on-women.htm.
[https://perma.cc/LB86-GDMX]; *see generally* Titan Alon, Matthias Doepke, Jane Olmstead-Rumsey & Michèle Tertilt, *The Impact of COVID-19 on Gender Equality* (Nat'l Bureau of Econ. Rsch., Working Paper No. 26947, 2020), https://www.nber.org/system/files/working_papers/w26947/w26947.pdf [https://perma.cc/T6NB-TAV4]; Gwynn Guilford & Sarah Chaney Cambon, *Covid Shrinks the Labor Market, Pushing Out Women and Baby Boomers*, WALL ST. J. (Dec. 3, 2020, 2:01 PM), https://www.wsj.com/articles/covid-shrinks-the-labor-market-pushing-out-women-and-baby-boomers-11607022074 [https://perma.cc/6JUS-MSE7]; Patricia Cohen, *Recession with a Difference: Women Face Special Burden*, N.Y. TIMES, https://www.nytimes.com/2020/11/17/business/economy/women-jobs-economy-recession.html?referringSource=articleShare [https://perma.cc/25UT-BVLM] (Mar. 8, 2021); Anita Hassan, *Bureaucratic Snag Leaves Thousands of Gig Workers Shut Out of Relief Aid*, NBCNEWS (July 19, 2020, 4:33 AM), https://www.nbcnews.com/news/us-news/bureaucratic-snag-leaves-thousands-gig-workers-shut-out-relief-aid-n1234192 [https://perma.cc/6Z86-PZ28].

12. Katharine G. Abraham, Brad Hershbein & Susan N. Houseman, *Contract Work at Older Ages*, 20 J. PENSION ECON. & FIN. 426, 428 (2021).

13. William G. Gale, Sarah E. Holmes & David C. John, *Retirement Plans for Contingent Workers: Issues and Policy Options*, 19 J. PENSION ECON. & FIN. 185, 188 (2020).

any relevant data gaps; (2) summarizes the tax and retirement rules for gig workers; (3) considers the major factors that contribute to the gender retirement wealth gap; (4) identifies the challenges for gig workers in saving for retirement, including the extraordinary economic circumstances presented by the COVID-19 pandemic; and (5) discusses some federal tax, retirement, and financial literacy policy proposals that could help gig workers better support themselves in retirement.[14] Ultimately, this Article concludes the following:

1) Gig work as a supplemental source of income has grown significantly and is continuing to grow, but existing administrative tax data have failed to fully capture the growth of gig workers—both online and offline—in large part because tax reporting rules enable extensive underreporting of self-employment income.
2) Comparative review of multiple administrative tax data and survey sources suggests that more women than men engage in gig work as a supplemental source of income and finds that women are driving the growth in gig work.
3) The government policy response to the COVID-19 pandemic shows the systemic failure of government research to measure the gig workforce reliably.
4) Gig work triggers a retirement financing gap that disproportionately impacts women, and notably, women of color, who have greater challenges saving for retirement than men.
5) Absent reform, the existing tax and retirement financing rules will continue to underserve and frustrate the ability of gig workers to save for retirement in the short-term, and consequently, result in inadequate retirement incomes when those workers ultimately do retire.

14. While conducting this research, the Authors reviewed the existing research on gig workers. The Authors compared various government and private-sector data sets, research criteria, and findings to identify commonalities and to provide insights as to why estimates of the number of U.S. taxpayers earning income as gig workers are so inconsistent. The Authors also conducted more than 125 interviews, meetings, and conference calls with a variety of gig economy experts (including executives and economists with platform companies, other gig economy stakeholders, and staff working for Congress and for various federal and state government agencies).

Part I of this Article explains the various approaches for measuring the gig workforce using government and private-sector surveys, administrative tax data, and bank account information. Part I also discusses the economic sectors that use gig workers and the demographics and earning profiles of those gig workers, all with a focus on women and on older workers.

Part II then provides an overview of the federal tax system, with an emphasis on the tax rules that govern online and offline gig workers and their rates of tax compliance. Next, Part III provides an overview of the U.S. retirement system, with a focus on the retirement plans most relevant for gig workers: Social Security, employer-sponsored pension plans, individual retirement accounts (IRAs), the new state-sponsored pension plans, and the various retirement plans especially designed for small businesses and self-employed workers.

Part IV takes a closer look at women and retirement, with a focus on the gender retirement wealth gap and the factors that exacerbate the retirement income financing challenges facing women. Part V then explores the problems ahead for gig workers, including the impact of the COVID-19 pandemic.

Part VI then sets forth some policy options that could help women working in the gig economy to shore up their retirement income shortfalls. Specifically, Part VI discusses options that could help (1) comprehensively measure gig work; (2) facilitate tax compliance of gig workers and ensure that gig workers meet their self-employment tax obligations and earn full Social Security benefits; (3) improve Social Security benefits; (4) improve pensions and IRAs; and (5) promote financial literacy.

I. THE GIG ECONOMY WORKFORCE

> *It is surprisingly difficult to ascertain the value of the gig economy or the number and characteristics of participating workers. Its measurement is complicated, not the least given that gig work is often a supplemental or secondary income source and is not consistently reported to tax authorities. Although national*

> *statistical offices are starting to develop methodologies to identify gig workers in labor force surveys, official statistics have only recently started to become available, and even these are beset by measurement issues*.[15]

Estimates of how many people are working in the gig economy today vary widely depending on the definition of gig work and the research tools used (such as surveys or administrative tax data).[16] In some respects, it is easier to define gig workers by what they are not: gig workers are generally not workers in traditional employer-employee relationships earning salaries or wages and eligible for employer-provided fringe benefits.[17] Although such a broad definition of gig work would include temporary and part-time workers (for example, substitute teachers, adjunct faculty, and holiday workers), it would also include all self-employed workers (for example, all independent contractors).[18] Of course, the self-employed are a very heterogeneous group that includes both high-wage professionals (for example, doctors, lawyers, and accountants) and

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15. Abigail Hunt & Emma Samman, *Gender and the Gig Economy: Critical Steps for Evidence-Based Policy* 8 box 2 (Overseas Dev. Inst., Working Paper No. 546, 2019) (footnotes omitted) (citations omitted), https://socialprotection-humanrights.org/wp-content/uploads/2019/01/Gender-the-Gig-Economy.pdf [https://perma.cc/H6BP-UL3R].

16. *Id.* at 9 box 2; *see also* ROBLES & MCGEE, *supra* note 4, at 7, 8 (noting that there is simply "no clear consensus" on how to define gig work, what or who should be included, so "a reevaluation of methods and research approaches may be required"); Katharine G. Abraham & Susan N. Houseman, *Making Ends Meet: The Role of Informal Work in Supplementing Americans' Income*, 5 RSF 110, 111 (2019) [hereinafter Abraham & Houseman, *Making Ends Meet*]; Katharine G. Abraham, John C. Haltiwanger, Kristin Sandusky & James R. Spletzer, *Measuring the Gig Economy: Current Knowledge and Open Issues* 2–5 (Nat'l Bureau of Econ. Rsch., Working Paper No. 24950, 2018) [hereinafter Abraham et al., *Measuring the Gig Economy*], https://www.nber.org/papers/w24950.pdf [https://perma.cc/5PVT-WBH2]; Laura Schultz, *Defining and Measuring Gig Work*, ROCKEFELLER INST. GOV'T 5 (Mar. 2, 2020), https://rockinst.org/wp-content/uploads/2020/03/3-2-20-Defining-Measuring-Gig-Work.pdf [https://perma.cc/4DK9-UFJ7]; Jenny R. Yang, Molly Weston Williamson, Shelly Steward, K. Steven Brown, Hilary Greenberg & Jessica Shakesprere, *Reimagining Workplace Protections: A Policy Agenda to Meet Independent Contractors' and Temporary Workers' Needs*, URB. INST. 4 (Dec. 8, 2020), https://www.urban.org/sites/default/files/publication/103331/reimagining-workplace-protections_1_0.pdf [https://perma.cc/S2RQ-H9FY]. *See generally Gig Economy Data Hub*, THE ASPEN INST. FUTURE OF WORK INITIATIVE & CORNELL UNIV. SCH. OF INDUS. & LAB. RELS., https://www.gigeconomydata.org/ [https://perma.cc/Z37P-GDQ3].

17. Lauren Wingo, *What Is a Gig Worker?*, U.S. CHAMBER COM. (Mar. 16, 2021), https://www.uschamber.com/co/run/human-resources/what-is-a-gig-worker [http://perma.cc/ENH8-DVLQ].

18. *See, e.g.*, Bernhardt & Thomason, *supra* note 6.

lower-income workers (for example, rideshare drivers, domestic workers, and caregivers).[19] For some, being an independent contractor is their main job, while others maintain full- or part-time employment and use independent contracting to earn supplemental income.[20] Although definitions of gig work can run the gamut, making a consistent measure of overall populations of gig workers difficult, the research discussed in this Part shows that there are more offline than online gig workers and that there are more women than men doing offline gig work.

A. Traditional and Nontraditional Work Generally

The overwhelming majority of U.S. workers work in standard employment arrangements—they have permanent jobs defined by a traditional employer-employee relationship.[21] The U.S. Department of Labor Bureau of Labor Statistics (Bureau of Labor Statistics) relies on monthly surveys to measure this employment, and those surveys provide information about the age, race, and gender of workers, and about their full- or part-time status.[22]

With respect to so-called alternative or contingent workers, however, the Bureau of Labor Statistics has only intermittently measured the millions of workers in nontraditional work arrangements

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19. *Exploring the "Gig Economy" and the Future of Retirement Savings: Hearing Before the Subcomm. on Primary Health & Ret. Sec. of the S. Comm. on Health, Educ., Lab. & Pensions*, 115th Cong. 16 (2018) (statement of Monique Morrissey, Economist, Economic Policy Institute), https://www.govinfo.gov/content/pkg/CHRG-115shrg28635/pdf/CHRG-115shrg28635.pdf [https://perma.cc/F26C-JFEU].

20. Bernhardt & Thomason, *supra* note 6, at 4–7.

21. *See, e.g.*, News Release, U.S. Bureau of Lab. Stat., U.S. Dep't of Lab., USDL-21-9582, The Employment Situation—March 2021, at tbl.A-9 (Apr. 2, 2021, 8:30 AM) [hereinafter March 2021 Employment Situation], https://www.bls.gov/news.release/archives/empsit_04022021.pdf [https://perma.cc/98XF-MPPG] (showing numbers of full-time, part-time, and self-employed workers); News Release, U.S. Bureau of Lab. Stat., U.S. Dep't of Lab., USDL-18-0942, Contingent and Alternative Employment Arrangements—May 2017, at tbl.1 (June 7, 2018, 10:00 AM) [hereinafter May 2017 Employment Arrangements], https://www.bls.gov/news.release/pdf/conemp.pdf [https://perma.cc/92DE-HVTL] (identifying contingent and noncontingent workers).

22. *See, e.g.*, March 2021 Employment Situation, *supra* note 21, at Technical Note (the U.S. Census Bureau administers a monthly household survey, the Current Population Survey, designed to measure the labor force, employment and unemployment, and the Bureau of Labor Statistics Current Employment Statistics program surveys nonfarm employers to gather information on their employment, hours, and earnings).

(also known as alternative or nonstandard work arrangements), including part-time workers, temporary workers, and contract workers (for example, independent contractors, also known as self-employed workers) that traditional monthly employment surveys may not otherwise capture.[23] In general, estimates on contingent workers vary considerably even though nontraditional and informal paid work activity "have historically been present across all types of occupations, geographies, and industries, [and] not just among [low- and moderate-income] or lower-skilled populations."[24] Specifically, estimates of the nontraditional workforce can range from a low of 5% of U.S. workers to more than one-third of the workforce, depending on the data source and its definition of contingent work.[25]

At the outset, Table 1 shows the Bureau of Labor Statistics' most recent effort to measure contingent and alternative work, the Contingent Worker Supplement (CWS) survey fielded in May 2017 (the 2017 CWS).[26] Table 1 shows that of the 153.3 million U.S. workers in 2017, 125.2 million worked full-time and 28.1 million worked part-time. Table 1 also shows that although 137.9 million workers worked in traditional arrangements, 11.4 million worked in alternative arrangements (in other words, "alternative workers,"

23. *E.g.*, May 2017 Employment Arrangements, *supra* note 21; News Release, U.S. Bureau of Lab. Stat., U.S. Dep't of Lab., USDL-05-1433, Contingent and Alternative Employment Arrangements—February 2005 (June 27, 2005, 10:00 AM) [hereinafter February 2005 Employment Arrangements], https://www.bls.gov/news.release/archives/conemp_07272005.pdf [https://perma.cc/YU86-U97L]; NAT'L ACADS. OF SCIS., ENG'G & MED., MEASURING ALTERNATIVE WORK ARRANGEMENTS FOR RESEARCH AND POLICY 2 (2020).

24. ROBLES & MCGEE, *supra* note 4, at 7.

25. U.S. GOV'T ACCOUNTABILITY OFF., GAO-15-168R, CONTINGENT WORKFORCE: SIZE, CHARACTERISTICS, EARNINGS, AND BENEFITS 3 (2015) [hereinafter 2015 CONTINGENT WORK FORCE], https://www.gao.gov/assets/670/669899.pdf [https://perma.cc/5HS5-QRY4].

26. May 2017 Employment Arrangements, *supra* note 21, at tbl.5. The Contingent Worker Supplement (CWS) is a comprehensive nationally representative dataset of nontraditional workers that, in its most recent administration in May 2017, was able to capture some online gig and self-employed workers. *Id.* at 1–4. *See generally* Karen Kosanovich, *Workers in Alternative Employment Arrangements*, U.S. BUREAU LAB. STAT. (2018), https://www.bls.gov/spotlight/2018/workers-in-alternative-employment-arrangements/pdf/workers-in-alternative-employment-arrangements.pdf [https://perma.cc/ASL8-TLGJ]; U.S. GOV'T ACCOUNTABILITY OFF., GAO-19-273R, CONTINGENT WORKFORCE: BLS IS REASSESSING MEASUREMENT OF NONTRADITIONAL WORKERS (2019) [hereinafter 2019 CONTINGENT WORKFORCE], https://www.gao.gov/assets/700/696643.pdf [https://perma.cc/ZHP6-8N83].

including 10.6 million independent contractors, 2.6 million on-call workers, and 2.3 million temporary and contract agency workers).

Table 1. Employed Workers with Alternative and Traditional Work Arrangements, May 2017 (In thousands)[27]

Full- or Part-Time Workers	Total Employed	Workers with Alternative Arrangements				Workers with Traditional Arrangements
		Independent Contractors	On-call Workers	Temporary Help Agency Workers	Workers Provided by Contract Firms	
Full-time	125,240	7,485	1,428	1,042	785	114,496
Part-time	28,091	3,129	1,151	314	148	23,357
Total	153,331	10,614	2,579	1,356	933	137,853

In an alternative cut of its 2017 CWS data, the Bureau of Labor Statistics identified an overlapping group of 5.9 million "contingent workers," which generally included wage and salary workers who did not expect their job to last and self-employed workers and independent contractors that had been self-employed for one year or less or did not expect to be self-employed for another year or more.[28] Of note, just 8.3% to 18.4% of contingent workers participated in employer-sponsored pension plans in 2017 compared to 43.4% of traditional workers.[29]

27. May 2017 Employment Arrangements, *supra* note 21, at tbl.5.

28. *Id.* at 2 tbl.A.

29. *Id.* at 20 tbl.9. Similarly, while 83.5% of noncontingent workers had employer-sponsored health insurance in 2017, just 13.4% to 25.1% of contingent workers did. *Id.*; *see also* Eileen Appelbaum, Arne Kallenberg & Hye Jin Rho, *Nonstandard Work Arrangements and Older Americans, 2005−2017*, ECON. POL'Y INST. 18−19, 18 tbl.9 (Feb. 28, 2019), https://files.epi.org/pdf/162673.pdf [https://perma.cc/57VL-4AWW] (discussing 2017 CWS).

The 2017 CWS also provided information about the occupations and industries of workers with alternative and traditional work arrangements.[30] For example, the survey estimated that, although just 24% of traditional workers worked in education and health services, 35.3% of on-call workers worked in those industries.[31] In terms of demographics, the 2017 CWS estimated that there were more men (81.5 million) than women (71.8 million) in the work force in 2017 and that more men (6.8 million) than women (3.8 million) worked as independent contractors.[32] The majority of independent contractors were men (64.3%), as were the majority of workers provided by contract firms (67% men).[33] Also, compared with traditional workers, the independent contractors tended to be older, and the temporary help agency workers were more likely to be Black or Hispanic.[34]

The 2017 CWS also identified 1.6 million "electronically-mediated workers"—workers who use apps and websites that both connect workers to customers and arrange for payment.[35] Of these online workers, 870,000 were men and 739,000 were women; 1.2 million were White, 276,000 were Black, 93,000 were Asian, and 265,000 were Hispanic.[36] Also, 1,165,000 worked full-time and 444,000 worked part-time; although most (1,011,000) were wage-earners, 598,000 were self-employed (118,000 incorporated and 480,000 unincorporated).[37]

Surprisingly, the 2017 CWS showed a decline from 2005 in the proportion of workers classified as independent contractors (from

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30. May 2017 Employment Arrangements, *supra* note 21, at 16–20 tbls.5–9.

31. *Id.* at 19 tbl.8.

32. *Id.* at 16 tbl.5.

33. *Id.* at 3 tbl.6.

34. *Id.*

35. *Electronically Mediated Work: New Questions in the Contingent Worker Supplement*, U.S. BUREAU OF LAB. STAT.: MONTHLY LAB. REV. 1, 19 (Sept. 2018) [hereinafter *Electronically Mediated Work*], https://www.bls.gov/opub/mlr/2018/article/pdf/electronically-mediated-work-new-questions-in-the-contingent-worker-supplement.pdf [https://perma.cc/H4LS-XZKC]; *see also* 2019 CONTINGENT WORKFORCE *supra* note 26, at 9 tbl.1 (defining "electronically-mediated workers").

36. *Electronically Mediated Work*, *supra* note 35, at 19−20 tbl.3.

37. *Id.* at 20 tbl.3. The Bureau of Labor Statistics also provides detailed information about the occupations and industries of electronically mediated workers. *Id.* at 20–21 tbl.3. Of note, the Bureau of Labor Statistics concluded that the questions designed to estimate electronically-mediated work did not work as intended and that it would not readminister the questions absent revision. *Id.* at 1, 25; Bruckner & Hungerford, *supra* note 9, at 67.

7.4% of the workforce in 2005 to 6.9% in 2017), contingent workers, (from 4.1% to 3.8%), and on-call workers (from 1.8% to 1.7%) with no change in the number of temporary and contract agency workers.[38] A key explanation for the decline is the fact that the Bureau of Labor Statistics designed the CWS to capture data on nontraditional work that is a worker's main or sole source of income rather than a supplemental source of income.[39] Moreover, the 2017 CWS survey only asked respondents to identify work done in the prior week, which "may fail to capture seasonal workers or workers that supplement their income . . . ."[40] In any event, the 2017 CWS data showing no growth (and an actual decline) in contingent work in recent years is at odds with more recent tax data that shows significant growth in "nonemployee work."[41]

The Bureau of Labor Statistics also includes statistics on self-employed workers in its monthly Employment Situation reports.[42] These reports divide the self-employed into two categories—those who have incorporated their businesses and those who have not.[43] For

38. 2019 CONTINGENT WORKFORCE, *supra* note 26, at 7, 14 n.b & tbl.2.

39. *See* Bruckner & Hungerford, *supra* note 9, at 67 ("[The Bureau of Labor Statistics] indicated that the questions used to measure gig workers did not work as intended and that, going forward, 'BLS should not again attempt to collect data about electronically mediated work using the four new questions fielded in the May 2017 CWS.'" (quoting *Electronically Mediated Work*, *supra* note 35, at 14, 24)). *See generally* Abraham & Houseman, *Making Ends Meet*, *supra* note 16.

40. 2019 CONTINGENT WORKFORCE, *supra* note 26, at 3, 16.

41. Abraham & Houseman, *Making Ends Meet*, *supra* note 16, at 112.

42. *Current Employment Statistics - CES (National)*, U.S. BUREAU OF LAB. STAT., https://www.bls.gov/ces/ [https://perma.cc/W7JB-2L8C]; March 2021 Employment Situation, *supra* note 21.

43. *E.g.*, March 2021 Employment Situation, *supra* note 21, at tbls.A-8 & A-9. In addition, the estimates of unincorporated self-employed workers include agricultural workers, unpaid family workers, and private household workers. *Id.* at Technical Note. As more fully explained in Part II.C *infra*, that distinction between incorporated and unincorporated workers is also central to income and payroll tax reporting because incorporated self-employed workers should report their wages on their individual income tax return by attaching an IRS Form W-2 from their corporation. *See generally About Form W-2, Wage and Tax Statement*, IRS [hereinafter *About Form W-2*], https://www.irs.gov/forms-pubs/about-form-w-2 [https://perma.cc/Z4EX-DDYP] (July 9, 2021). On the other hand, an unincorporated self-employed worker should report their self-employment earnings on their individual income tax return using an IRS Form 1040 Schedule C to report their self-employment income and an IRS Form 1040 Schedule SE to report their self-employment tax. *See generally About Form 1040, U.S. Individual Income Tax Return*, IRS [hereinafter *About Form 1040*], https://www.irs.gov/forms-pubs/about-form-1040 [https://perma.cc/U56T-FR8A] (Sept. 23, 2021); *About Schedule C (Form 1040), Profit or Loss from Business (Sole Proprietorship)*, IRS [hereinafter *About Schedule C (Form 1040)*],

example, according to the Bureau of Labor Statistics' March 2021 Employment Situation report, of the 15.7 million people that were self-employed in March of 2021, 9.4 million were unincorporated self-employed workers and 6.3 million were incorporated.[44]

B. Other Approaches for Measuring Gig Work

Many other government and private-sector researchers have also tried to measure the gig workforce.

1. The U.S. Department of Treasury and the Internal Revenue Service

U.S. Department of Treasury and IRS administrative tax data can also provide information about gig workers.[45] For example, the IRS's

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https://www.irs.gov/forms-pubs/about-schedule-c-form-1040 [https://perma.cc/BNY9-JMKC] (Aug. 23, 2021); *About Schedule SE (Form 1040), Self-Employment Tax*, IRS [hereinafter *About Schedule SE (Form 1040)*], https://www.irs.gov/forms-pubs/about-schedule-se-form-1040 [https://perma.cc/HCP6-UKDY] (Sept. 20, 2021).

44. March 2021 Employment Situation, *supra* note 21; *see also* Steven F. Hipple & Laurel A. Hammond, *Self-Employment in the United States*, U.S. BUREAU LAB. STAT. 2 (2016), https://www.bls.gov/spotlight/2016/self-employment-in-the-united-states/pdf/self-employment-in-the-united-states.pdf [https://perma.cc/QQ7W-Z4CE] ("[Fifteen] million people were self-employed in 2015," with 9.5 million unincorporated and 5.5 million incorporated.). Hipple and Hammond also found that self-employment rates were higher among older workers than younger workers, higher for men than women, and higher for White workers than for Black or Hispanic workers. *Id.* at 5, 6, 8.

The Bureau of Labor Statistics also includes some information about employment and self-employment in its National Longitudinal Survey of Youth and its Occupational Employment Statistics reports. *See* 2019 CONTINGENT WORKFORCE, *supra* note 26, at 15 tbl.2 (noting that neither the Occupational Employment Statistics nor the Current Employment Statistics measures online gig workers or includes self-employed individuals). *See generally National Longitudinal Surveys*, U.S. BUREAU OF LAB. STAT., https://www.bls.gov/nls/ [https://perma.cc/6RKU-QAJV]; *Occupational Employment and Wages Statistics*, U.S. BUREAU OF LAB. STAT., https://www.bls.gov/oes/home.htm [https://perma.cc/294Z-PQLH]. Pertinent here, one study used the National Longitudinal Survey to analyze the self-employment and traditional work patterns of workers aged thirty to thirty-four in 2014 and that study found that men were slightly more likely than women to be fully or partially self-employed (14.3% of men had self-employed earnings compared with 12.2% of women). H. Elizabeth Peters, Elaine Maag & Breno Braga, *Self-Employment Patterns for Men and Women and Implications for Tax Compliance*, TAX POL'Y CTR. 5, 6 (Dec. 9, 2019), https://www.taxpolicycenter.org/sites/default/files/publication/158150/self-employment_patterns_for_men_and_women_and_implications_for_tax_compliance.pdf [https://perma.cc/EGN4-C62C].

45. *See, e.g.*, Collins et al., *supra* note 6, at 8. Administrative tax data can also provide some insights into the demographics of these self-employed workers and into how this workforce has changed as well as what those changes mean for tax filing and benefits coverage. *Id.*

Statistics of Income Division regularly issues reports that show the wages and self-employment earnings of American workers.[46]

As more fully explained in Part II.C.1 below, employees typically report their wages on their individual income tax returns by attaching an IRS Form W-2 to their income tax returns, while self-employed workers typically report their self-employment earnings using an IRS Form 1040 Schedule C and an IRS Form 1040 Schedule SE.[47] For example, of the 153.8 million individual income tax returns filed for the 2018 tax year, 126.8 million individual income tax returns (82.5%) reported salary or wages, 26.6 million (17.3%) showed business or professional income, and 1.8 million (1.1%) showed farm income.[48] Also, 20.1 million of the 2018 individual income tax returns (13.1%) reported self-employment tax payments (for Social Security and Medicare).[49] With respect to rental income, 10 million individual income tax returns showed rental income (5 million with net income and 5 million that showed a net loss); another 352,860 returns showed farm rental net income; and another 97,945 returns showed farm rental net losses.[50]

A 2017 study by the Treasury Department's Office of Tax Analysis conducted by Emilie Jackson and others (Jackson and others) looked

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46. *See, e.g.*, IRS, U.S. DEP'T OF THE TREASURY, PUB. NO. 1304 (REV. 09-2020), STATISTICS OF INCOME: INDIVIDUAL INCOME TAX RETURNS 2018 COMPLETE REPORT (2020) [hereinafter 2018 TAX REPORT], https://www.irs.gov/pub/irs-pdf/p1304.pdf [https://perma.cc/4MD2-QNAZ].

47. *See infra* Part II.C.1.

48. 2018 TAX REPORT, *supra* note 46, at 6 tbl.A.

49. *Id.* More specifically, 19.6 million 2018 individual income tax returns showed net business or profession income, while 6.9 million showed net losses. *Id.* at 54–55 tbl.1.4. Of those taxpayers with net business or profession income, 3.6 million were aged fifty-five through sixty-four, and 2.6 million were aged sixty-five and over. *Id.* at 127 tbl.1.5. Another study found that for the 2016 tax year, approximately 25.5 million individual income tax returns reported activity from a nonfarm sole proprietorship. Adrian Dungan, *Sole Proprietorship Returns, Tax Year 2016*, STAT. INCOME BULL., Spring 2019, at 1, 2 fig.A, https://www.irs.gov/pub/irs-prior/p1136—2019.pdf [https://perma.cc/V3ZM-RHD2]. In aggregate, those nonfarm sole proprietors reported business receipts of around $1.4 trillion and claimed business deductions of around $1.1 trillion. *Id.* Another study showed that 28% of all individual income tax returns for 2017 (42.3 million returns) contained some small business income or losses. IRS, U.S. DEP'T OF THE TREASURY, STATISTICS OF INCOME: INDIVIDUAL INCOME TAX RETURNS WITH SMALL BUSINESS INCOME AND LOSSES, TAX YEARS 2015–2017 (Aug. 2019) [hereinafter 2015−2017 INDIVIDUAL INCOME TAX RETURNS], https://www.irs.gov/pub/irs-soi/2017IndividualReturnsSmallBusinessIncomeandLossesOnesheet.pdf [https://perma.cc/S69H-FMZE].

50. 2018 TAX REPORT, *supra* note 46, at 56–57 tbl.1.4. Of those individuals with net rental income, 1.3 million were aged fifty-five through sixty-four, and 2.3 million were sixty-five and over. *Id.* at 128 tbl.1.5 (authors' totals include both net rent returns and net farm rent returns).

at a sample of individuals that reported self-employment or sole-proprietor income on their 2014 income tax returns (in other words, taxpayers that filed an IRS Form 1040 Schedule SE or Schedule C with their income tax returns).[51] At the outset, Table 2 shows that of the 145.9 million taxpayers with labor income in 2014, 126.5 million (86.7%) had wages only, 10.6 million (7.2%) had self-employment earnings only, and 8.8 million (6.1%) had both wages and self-employment earnings.[52]

Table 2. Source of Earnings of Taxpayers with Earnings, 2014[53]

Return Type	**Total**	**Percent of Workers (of those with earnings)**
With Earnings	145,941,290	100.0%
Wages Only	126,540,900	86.7%
Self-employment Income Only	10,564,620	7.2%
With Wages and Self-employment Income	8,835,770	6.1%

Note: Incorporated self-employed workers are counted as wage earners of their firms (and not as having self-employment income).

Jackson and others also found that the average earnings of wage-only workers in 2014 was $47,000, those with a mix of wage and

51. Emilie Jackson, Adam Looney & Shanthi Ramnath, *The Rise of Alternative Work Arrangements: Evidence and Implications for Tax Filing and Benefit Coverage* 9–10 (Off. of Tax Analysis, Working Paper No. 114, 2017), https://www.treasury.gov/resource-center/tax-policy/tax-analysis/Documents/WP-114.pdf [https://perma.cc/4V3K-KVSL]. This study recognized that there is a growing population of workers earning income outside of traditional employment relationships and noted that administrative tax data could show a more "complete picture" of that growth. *Id.* at 3. Moreover, the study explained that administrative tax data can address "certain shortcomings of survey-based measures, which appear to underestimate self-employment activity," because such activity is "poorly or incompletely captured by standard survey data." *Id.* at 3, 6. At the same time, the study acknowledged the difficulties in using administrative tax data to classify workers and reconciling those worker classifications with administrative tax data and survey data. *Id.* at 12.

52. *Id.* at 10, 28 tbl.1. Also, of the 19.4 million individuals who filed an IRS Form 1040 Schedule SE, about 16.9 million (87%) also filed an IRS Form 1040 Schedule C reporting earnings from operating a sole proprietorship. *Id.* at 10. The individual taxpayers that file an IRS Form 1040 Schedule SE and did not file an IRS Form 1040 Schedule C were mostly partners in partnerships or farmers. *Id.*

53. *Id.* at 10, 28 tbl.1.

self-employment earnings made an average of $43,000 (of which about $25,000 came from wages), and those who were primarily self-employed made around $28,000.[54] Importantly, Jackson and others found that the number of sole proprietors grew substantially from 2001 to 2014: specifically, in 2014, 24.9 million filed returns with sole proprietorships, and 16.8 million of them earned a profit from those activities—up 34% and 32%, respectively, from 2001.[55] Increases in sole proprietors who provided labor services (in other words, independent contractors or misclassified workers), rather than small businesses, attributed to virtually all of that growth.[56]

Jackson and others also tried to measure the number of online gig workers in 2014 and included those tax filers who did the following: (1) identified key terms like "ridesharing"; (2) had worked with one of twenty-five identified online platforms; and (3) received an information return from a platform (for example, an IRS Form 1099-MISC or an IRS Form 1099-K).[57] Unfortunately, however, that methodology identified a surprisingly small group of just 109,700 online gig workers (about 0.07% of all filers), and 85% were male.[58] Those online gig workers earned an average of about $24,000, but most of their income—around $17,500—came from wages, and only around $6,300 came from self-employment gig earnings.[59] Of these

54. *Id.* at 18−19.

55. *Id.* at 3.

56. *Id.* at 4.

57. Jackson et al., *supra* note 51, at 15. *See generally About Form 1099-MISC, Miscellaneous Income*, IRS, https://www.irs.gov/forms-pubs/about-form-1099-misc [https://perma.cc/7UBS-597R] (June 7, 2021); *About Form 1099-K, Payment Card and Third Party Network Transactions*, IRS, https://www.irs.gov/forms-pubs/about-form-1099-k [https://perma.cc/FSB4-AYCH] (Feb. 26, 2021). Researchers were "confident that the data includes the vast majority of filers who received a 1099 from the largest platform providers in sectors like ride sharing, courier or delivery services, local labor services[], and online computing, programming, or consulting services." Jackson et al., *supra* note 51, at 15.

58. Jackson et al., *supra* note 51, at 16, 18. Jackson and others acknowledged that their overall count of online gig workers was likely the following:

> [A]n undercount of the true number of individuals that participated in the [online] "gig economy" because some participants may not have filed a return or not filed a Schedule C reporting that income; because some platform firms do not provide 1099s to all of their participants; and also because not all prominent service providers could not be found in the data (perhaps as a result of the prior two causes).

Id. at 15.

59. *Id.* at 19, 34 tbl.6.

online gig workers, 39% were primarily wage earners, and 19.5% had earnings from both wages and self-employment, but online platform work was the primary source of earnings for 33% of them.[60] Notably, Jackson and others did not include individuals with rental income in their definition of gig workers, an approach that would have captured property owners who rent property on online platforms like Airbnb and who frequently provide at least some incidental housekeeping services in connection with their rentals.[61]

In a 2019 paper, Brett Collins and others studied 2000–2016 tax returns.[62] These authors defined the "tax work force" to include all individuals with income from (1) traditional employment (IRS Form W-2 income); (2) net self-employment income over $400 (IRS Form 1040 Schedule SE income); or (3) non-employee compensation (from an IRS Form 1099-MISC or an IRS Form 1099-K so long as the worker also filed an IRS Form 1040).[63] To avoid including taxpayers who had income from selling goods or renting assets, the authors limited their universe to those workers who had received income from approximately fifty online platforms that coordinate labor services and that reported worker earnings to the IRS on either an IRS Form 1099-MISC or an IRS Form 1099-K.[64] In short, the focus was on "firm-facing" or "firm-mediated" nonemployee compensation for services.[65]

Using this methodology, Collins and others determined that the share of workers who received IRS Form 1099 income increased by 1.9% from 9.9% of the workforce in 2000 to 11.8% in 2016.[66] Workers using online platforms to connect with their customers attributed to

60. *Id.* at 16.

61. *Id.* at 15; *see, e.g.*, Garrett Watson, *Improving the Federal Tax System for Gig Economy Participants*, TAX FOUND. 2–3 (Oct. 2019), https://files.taxfoundation.org/20191017175521/Improving-the-Federal-Tax-System-for-Gig-Economy-Participants-PDF.pdf [https://perma.cc/YD9E-UXG9].

62. Collins et al., *supra* note 6.

63. *Id.* at 10.

64. *Id.* at 7. Notably, the authors did not include tax data from (1) income from selling goods (for example, eBay or Etsy sellers) or renting assets (for example, Airbnb hosts); (2) "informal" or "occasional" work; or (3) household or consumer-facing activities (for example, selling goods at a farmer's market or caregiving). *See id.* at 5, 6.

65. *Id.* at 5.

66. *Id.* at 3, 11.

almost all of the "dramatic growth" of this 1099 workforce since 2007.[67] These authors also found that although online labor gig work was "[v]irtually non-existent" prior to 2012, by 2016, at least 1.9 million workers had some online platform earnings.[68] The authors also concluded that this growth was not, in fact, a shift from traditional employment to full-time gig work, but rather an increase in alternative, nonemployee work as a supplemental or secondary source of earnings for most workers.[69] At the same time, the growth was "driven by very small amounts—most less than $2,500 before taking out expenses."[70]

All in all, Collins and others found that in every year measured, the overwhelming majority of workers in the "tax workforce" were traditional employees, and nonemployee arrangements were only a small fraction of the overall workforce notwithstanding its growth of 1.9 percentage points as a share of the workforce from 2000−2016.[71] Moreover, most of the individuals that engage in these nonemployee arrangements seem to do so to supplement their incomes rather than as a primary source of income because "over time most participants in the 1099 economy have been earning modest amounts, generally less than $7,500 in gross receipts."[72]

Finally, although Collins and others made a substantial contribution to the literature, their study does have its limitations. For example, with respect to platform companies, their study focused on "a subset of companies that are primarily labor platforms" and did not include any measures of offline gig work.[73] In addition, their study focused on tax filings through 2016, after which some platforms ceased to furnish an IRS Form 1099-K to a service provider unless that worker had reached

67. *Id.*

68. Collins et al., *supra* note 6, at 11.

69. *Id.* at 13. Specifically, "the only growth in 1099 work since 2007 has been . . . individuals supplementing a primary W2 job." *Id.* (emphasis omitted).

70. *Id.* (emphasis omitted).

71. *Id.* at 11, 23 tbl.1.

72. *Id.* at 13; *see also supra* text accompanying note 59 (noting that although online gig workers earned an average of about $24,000, gig work earnings attributed to only $6,300 of that income, indicating that these workers, too, used gig work as secondary sources of income); 2020 TAXPAYER COMPLIANCE, *supra* note 6, at 14 ("Available tax data from tax year 2016 suggest that only around 30 percent of platform workers who were known to IRS had gross platform-related earnings higher than $5,000.").

73. Collins et al., *supra* note 6.

a minimum threshold of $20,000 in payments and 200 transactions with the platform (the so-called "200/$20K IRS Form 1099-K threshold").[74]

In a 2019 study, Katherine Lim and others also used tax return data to identify a population of "independent contractors" earning labor income during the 2001−2016 tax years.[75] These authors developed a sample of taxpayers with nonemployee compensation reported to the IRS on IRS Forms 1099-MISC or 1099-K and linked those earnings to the taxpayers' individual income tax returns.[76] Moreover, these authors also linked those independent contractors with the firms that hired them, and that approach allowed these authors to observe independent contractor trends over time.[77] By eliminating taxpayers that had more than $10,000 in business deductions (excluding travel or car deductions) and businesses with employees, these authors focused on individuals with income from providing labor services—13.8 million independent contractors in 2016.[78] Using that sample, Lim and others found a 22% increase in the share of workers with independent-contractor earnings from 2001 to 2016 (compared to a 1.5% decrease in the share of workers with only IRS Form W-2 earnings over that same period).[79] The majority of that growth (69%) occurred before 2011, prior to the widespread adoption of online platforms by online gig workers.[80] Lim and others also noted that the

74. *Improving Tax Administration Today: Hearing Before the Subcomm. on Tax'n & IRS Oversight of the S. Comm. on Fin.*, 115th Cong. 5, app. at 29 (2018) [hereinafter *2018 Bruckner Testimony*] (statement of Caroline Bruckner, Executive-in-Residence, Accounting and Taxation and Managing Director, Kogod Tax Policy Center, Kogod School of Business, American University), https://www.finance.senate.gov/imo/media/doc/40584.pdf [https://perma.cc/C5J8-7THL]; BRUCKNER, *supra* note 2, at 9.

75. *See generally* Katherine Lim, Alicia Miller, Max Risch & Eleanor Wilking, Independent Contractors in the U.S.: New Trends from 15 Years of Administrative Tax Data (July 2019) (unpublished manuscript), https://www.irs.gov/pub/irs-soi/19rpindcontractorinus.pdf [https://perma.cc/KFW3-C7KT].

76. *Id.* at 7−14.

77. *Id.* at 2.

78. *See id.* at 9−11, 57 tbl.1. The authors also note that their population of "independent contractors" is broader (and narrower, in some instances) than other tax data measures of the self-employed. *Id.* at 7. For example, Collins and others (2019) found that almost 40% of IRS Form 1099-MISC recipients in 2016 did not file a Schedule SE and that approximately 45% of those with a Schedule SE did not receive an IRS Form 1099-MISC, "meaning that these individuals will be in our sample but not in the 'self-employed' population of previous papers." *Id.* at 7 n.5.

79. *Id.* at 14.

80. *Id.*

fraction of firms that had at least one independent contractor grew by almost 20% from 2001 to 2016 and that firms were increasing the number of their independent contractors relative to the number of their employees.[81]

Also, although Lim and others found independent-contractor work more common among men than women from 2001 to 2016, an increase in women doing independent-contract work attributed to 55% of the growth in independent-contractor labor from 2001 to 2016.[82] Overall, the share of women doing independent-contract work rose from 5.4% of the female workforce in 2001 to 7.5% in 2016, while the share of the male independent-contract workforce remained "constant."[83]

Lim and others also concluded that "the growth of [independent-contractor] income has also been concentrated among lower-income workers where it represents a significant source of household income . . . . [M]any of these workers do not have wage earnings and are therefore unlikely to receive benefits from another job."[84] These authors also suggested that understanding independent-contract work is "particularly important given that [independent-contractors] are increasingly female, in the bottom half of the income distribution, and have [independent-contractor] income as a primary earning source."[85]

To reconcile the "conflicting trends" of household survey data finding little evidence of an increase in self-employment and administrative tax data "providing evidence of considerable recent growth," Katharine G. Abraham and others (2018) analyzed a "newly-created linked data file that contains household survey and administrative . . . tax [data] for the same individuals."[86] Their

81. Lim et al., *supra* note 75, at 3.

82. *Id.* at 1, 3, 19. That was a 68% increase in the number of female independent contractors, while the number of male independent contractors increased by just 37%. *Id.* at 19.

83. *Id.* at 19−20. Women independent contractors were older on average than employees. *Id.* at 20. Moreover, although many workers use independent-contractor earnings to supplement their wage earnings, "the largest growth in female [independent contractors] was among those whose primary source of labor income is [independent-contractor] earnings." *Id.* at 19.

84. *Id.* at 3.

85. *Id.* at 4. The authors also noted that health care, social assistance, and educational services were the fastest growing sectors of independent contract work over this period. *Id.* at 20.

86. Abraham et al., *Measuring the Gig Economy*, *supra* note 16, at Abstract, 5.

research noted the difficulty and shortcomings of using survey data, which do not show an increase in self-employment, as well as self-reported tax filing data, which do show an increase.[87] They concluded that researchers need to develop a more comprehensive "data infrastructure" to better understand gig work, where it fits into a worker's career path, and how it relates to household income and health insurance coverage.[88]

2. The Federal Reserve System

Although various surveys by the Federal Reserve System have included questions designed to measure gig work, the most important is the Survey of Household Economics and Decisionmaking (SHED), an annual survey prepared by the Federal Reserve Board's Division of Consumer and Community Affairs (DCCA) Consumer and Community Research Section.[89] The SHED measures the economic

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87. *Id.* at 15–16.

88. *Id.* at 34.

89. *See generally Survey of Household Economics and Decisionmaking*, BD. OF GOVERNORS OF THE FED. RSRV. SYS. [hereinafter *2021 Survey of Household Economics*], https://www.federalreserve.gov/consumerscommunities/shed.htm [https://perma.cc/NS69-687A]; BD. OF GOVERNORS OF THE FED. RSRV. SYS., REPORT ON THE ECONOMIC WELL-BEING OF U.S. HOUSEHOLDS IN 2019, FEATURING SUPPLEMENTAL DATA FROM APRIL 2020 (2020) [hereinafter 2019 REPORT ON ECONOMIC WELL-BEING], https://www.federalreserve.gov/publications/files/2019-report-economic-well-being-us-households-202005.pdf [https://perma.cc/Q3VR-BCSP] (data and appendices are also available there).

Since 2013, the Federal Reserve Bank of New York has conducted a Survey of Consumer Expectations, and for a few years that survey included a Survey of Informal Work Participation that shed some light on gig economy workers. *See, e.g.*, Anat Bracha & Mary A. Burke, *The Ups and Downs of the Gig Economy, 2015–2017* (Fed. Rsrv. Bank of Bos., Working Paper No. 18-12, 2018), https://www.bostonfed.org/-/media/Documents/Workingpapers/PDF/2018/wp1812.pdf [https://perma.cc/U8M2-9L6K]; *Center for Microeconomic Data: Survey of Consumer Expectations*, Fed. Rsrv. Bank of N.Y., https://www.newyorkfed.org/microeconomics/sce [https://perma.cc/UK2W-L7KM].

In 2015, the Federal Reserve Board fielded the Enterprising and Informal Work Activities (EIWA) survey to (1) more clearly understand how workers engage in informal paid work both online and offline, (2) probe workers' motivations for participating in informal work, and (3) identify data gaps. ROBLES & MCGEE, *supra* note 4, at 3; BD. OF GOVERNORS OF THE FED. RSRV. SYS., SURVEY OF ENTERPRISING AND INFORMAL WORK ACTIVITIES (EIWA) (2016), https://www.federalreserve.gov/consumerscommunities/files/EIWA_Chartbook_2016.pdf [https://perma.cc/8HU4-WWVJ]. That exploratory online survey estimated that around 36% of Americans ages 18 and older engaged in some kind of informal paid work activities in the six months prior to the 2015 survey. *Id.* at 4. The EIWA survey originated from a potential pool of 12,480 individuals, of which 6,898 completed the survey and 2,483 constituted qualified respondents. *Id.*

well-being of U.S. households and identifies potential risks to their finances.[90]

Although the SHEDs have regularly included questions about respondents' employment status, including specific questions to gauge the prevalence of part-time work, only in the last few years has the SHED asked about online and offline gig work (including childcare, housecleaning, ridesharing, selling goods, and renting out property), and more recently, the impact of the Coronavirus pandemic on gig work.[91] The SHED responses in 2018 and 2019 showed that around 3 out of 10 adults engaged in some form of gig work in the month before

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The EIWA survey found that the most common informal work activities were housecleaning, painting, yardwork, or other household maintenance (27%); babysitting or child-care services (17%); and providing personal services to individuals, such as picking up their dry cleaning, helping people move, dog walking, running errands, and booking travel (14%). *Id.* at 14. The EIWA survey found that the most common online activity was selling new or used goods (32%); however, 13% completed tasks for pay, 11% reported renting out property, and 20% reported other online paid activities. *Id.* at 16. In terms of offline selling, the EIWA survey focused on goods sold at "temporary locations such as flea markets, swap meets, garage sales, mobile vans/trucks, or stalls/kiosks." *Id.* at 18. Notably, the EIWA survey found that 65% of survey participants "list[ed] [e]arning [m]oney as their [m]ain [r]eason for [e]ngaging in [i]nformal [w]ork." *Id.* at 28. Another important finding from the EIWA survey was that workers engaged in informal work while being employed or assumed non-employed. *Id.* at 21. In other words, many workers engaged in informal work as a supplemental source of income. Also, the EIWA survey found that more women (56%) than men (44%) participated in informal work activities. *Id.* at 44. The EIWA survey served as a precursor to the Board of Governors of the Federal Reserve's ultimate inclusion of specific gig work questions into the SHED in 2017 and since then. BD. OF GOVERNORS OF THE FED. RSRV. SYS., REPORT ON THE ECONOMIC WELL-BEING OF U.S. HOUSEHOLDS IN 2017, at 18–20 (2018) [hereinafter 2017 REPORT ON ECONOMIC WELL-BEING], https://www.federalreserve.gov/publications/files/2017-report-economic-well-being-us-households-201805.pdf [https://perma.cc/78BA-FGXU].

90. The DCCA, through its relationship with a private consumer research firm, Ipsos, has conducted the SHED every fall since 2013. *See, e.g.*, BD. OF GOVERNORS OF THE FED. RSRV. SYS., ECONOMIC WELL-BEING OF U.S. HOUSEHOLDS IN 2020 (2021) [hereinafter 2020 REPORT ON ECONOMIC WELL-BEING], https://www.federalreserve.gov/publications/files/2020-report-economic-well-being-us-households-202105.pdf [https://perma.cc/9ZUG-FUJR] (data and appendices are also available); *2021 Survey of Household Economics*, *supra* note 89; 2019 REPORT ON ECONOMIC WELL-BEING, *supra* note 89. These annual surveys include modules on a range of topics of current relevance to financial well-being, including credit access and behaviors, savings, retirement, economic fragility, and education and student loans. *See, e.g.*, *id.* The entirety of the survey is administered online. *Id.* In 2020, DCCA conducted supplemental SHED surveys in April and July 2020, in addition to the annual November survey, to track the impact of the Coronavirus pandemic on U.S. households' finances and work. *Id.*; BD. OF GOVERNORS OF THE FED. RSRV. SYS., UPDATE ON THE ECONOMIC WELL-BEING OF U.S. HOUSEHOLDS: JULY 2020 RESULTS (2020) [hereinafter JULY 2020 ECONOMIC REPORT], https://www.federalreserve.gov/publications/files/2019-report-economic-well-being-us-households-update-202009.pdf [https://perma.cc/GNR4-YUKM].

91. 2020 REPORT ON ECONOMIC WELL-BEING, *supra* note 90, at 30–32. In 2020, DCCA conducted two supplemental SHED surveys in April and July 2020, in addition to the annual November survey, to track the impact of the Coronavirus pandemic on U.S. households' finances and work. *Id.* at 1; *see supra* note 90 and accompanying text.

those surveys, whereas the 2020 responses showed a decline in individuals engaged in gig work.[92] Notably, the vast majority of this gig work was offline; for example, in 2019, only 13% of gig workers responded that they had found customers with a company's website or online app and received payment through the company.[93] Table 3 shows the share of adults doing various kinds of gig work in 2019.[94]

92. 2020 REPORT ON ECONOMIC WELL-BEING, *supra* note 90, at 32; 2019 REPORT ON ECONOMIC WELL-BEING, *supra* note 89, at 18. BD. OF GOVERNORS OF THE FED. RSRV. SYS., REPORT ON THE ECONOMIC WELL-BEING OF U.S. HOUSEHOLDS IN 2018, at 18 (2018) [hereinafter 2018 REPORT ON ECONOMIC WELL-BEING], https://www.federalreserve.gov/publications/files/2018-report-economic-well-being-us-households-201905.pdf [https://perma.cc/PMT6-XAZC]. In the 2018 SHED, gig work included both services (for example, childcare, dog-walking, housecleaning, and ridesharing) and goods activities (for example, selling goods at a garage sale, consignment store, or online; and renting out property). *Id.*Also, at least one-quarter of survey respondents engaged in gig work back in 2016 and 2017. Abraham & Houseman, *supra* note 16, reviewed the gig worker data captured in the 2016 and 2017 SHEDs and found that one-quarter of adults 18 and older participated in gig work back then and that the majority (two-thirds) were motivated to earn money, which was a "very or somewhat important source of income . . . ." Abraham & Houseman, *Making Ends Meet*, *supra* note 16, at 112. They also noted that the men and women engaged in informal work to similar degrees and were almost equally motivated to do informal work to earn money as either a primary or supplemental source of income. *Id.*

93. BD. OF GOVERNORS OF THE FED. RSRV. SYS., APPENDIXES TO THE REPORT OF THE ECONOMIC WELL-BEING OF U.S. HOUSEHOLDS IN 2019, FEATURING SUPPLEMENTAL DATA FROM APRIL 2020, at 52 app. B, Q&A GE5 (2020) [hereinafter APPENDIXES TO 2019 REPORT ON ECONOMIC WELL-BEING], https://www.federalreserve.gov/publications/files/2019-supplement-economic-well-being-us-households-202005.pdf [https://perma.cc/R8KC-X7PU]. Similarly, in 2018, just 10% of gig workers reported that they used a website or mobile app like Uber or Lyft to connect with customers. BD. OF GOVERNORS OF THE FED. RSRV. SYS., APPENDIXES TO THE REPORT ON THE ECONOMIC WELL-BEING OF U.S. HOUSEHOLDS IN 2018, at 59 app. B, Q&A GE5 (2019) [hereinafter APPENDIXES TO 2018 REPORT ON ECONOMIC WELL-BEING], https://www.federalreserve.gov/publications/files/2018-supplement-economic-well-being-us-households-201905.pdf [https://perma.cc/A9NM-2L28]. In 2020, 85% of SHED gig workers reported that they did not find customers using an app or online platform that also processed payment. 2020 REPORT ON ECONOMIC WELL-BEING, *supra* note 90, at 31.

94. 2019 REPORT ON ECONOMIC WELL-BEING, *supra* note 89, at 19 fig.12.

Table 3. Share of Adults Performing Gig Activities, 2019[95]

Sales Activities	**Percent**
Sold goods online	9
Sold goods at flea market	5
Sold goods at consignment shops	3
Sold goods at planned events	1
Non-sales Activities	
Housecleaning, yard work, or property maintenance	7
Childcare or eldercare services	4
Renting out property, such as car or house	4
Dog walking, feeding pets, or housesitting	3
Driving or ride sharing such as with Uber or Lyft	3
Paid tasks online	2
Other Activities	
Other paid personal tasks	4
Any other paid activities	5

Though there are a variety of reasons for engaging in gig work, in 2019, (1) 51% of gig workers reported that earning additional income was their main reason for doing gig work, and 11% reported gig work as their main source of income; and (2) just 3% of adults in the 2019 SHED relied on gig work as a primary source of income.[96] Further, in 2019, more women (53%) than men (47%) reported their main reason for doing gig work was to earn money in addition to their main source of income.[97] Moreover, more women (55%) than men (45%) reported

95. *Id.*

96. *Id.* at 18−19; APPENDIXES TO 2019 REPORT ON ECONOMIC WELL-BEING, *supra* note 93, at 51 app. B, Q&A GE11.

97. E-mail from Kimberly Kreiss, Analyst, Div. of Consumer & Cmty. Affs., Bd. of Governors of the Fed. Rsrv. Sys., to authors attach. (May 22, 2020, 09:46 AM) [hereinafter E-mail from Kimberly Kreiss to authors] (on file with authors) (SHED 2019 Statistics). Similarly, in 2018, 37% of gig workers reported that they were using gig activities to supplement their income, and 18% reported that gig work was their primary source of income. 2018 REPORT ON ECONOMIC WELL-BEING, *supra* note 92, at 19 fig.9. When asked specifically as to their main reason for doing gig work, 37% of gig workers reported supplementing their main income while 18% reported doing gig work as their main source of income. *Id.*; *see also* BETTERMENT, BETTERMENT'S 2018 REPORT: GIG ECONOMY AND THE FUTURE OF RETIREMENT 3 (2018), https://www.betterment.com/uploads/2018/05/The-Gig-Economy-Freelancing-and-Retirement-

their gig work activities as their main source of income, and their main reason for doing gig activities was to earn money.[98] One reason that earnings from gig work are relatively low is that workers only engage in gig work sporadically; for example, of the adults that engaged in gig work in the month before the 2019 SHED, two-thirds (67%) spent less than twenty hours in the past month doing gig work.[99]

3. *U.S. Census Bureau*

The U.S. Census Bureau publishes annual nonemployer establishment data for businesses that have business receipts of $1,000 or more and no employees.[100] For example, the Census Bureau estimated that there were 26.5 million nonemployer businesses in 2018, which increased from 25.7 million in 2017 and 24.8 million in 2016.[101] Nonemployer data also showed that there were more than 700,000 self-employed taxi and limousine drivers in 2016, up from just 224,000 in 2013.[102]

Betterment-Survey-2018_edited.pdf [https://perma.cc/QZ96-GXFW] (noting that almost one-third of workers that supplement their traditional full-time employment income with gig work do so because of a lack of retirement savings, and that number increases as workers approached retirement age).

98. E-mail from Kimberly Kreiss to authors, *supra* note 97.

99. APPENDIXES TO 2019 REPORT ON ECONOMIC WELL-BEING, *supra* note 93, at 51 app. B, Q&A GE20A. Similarly, the 2018 SHED data found that only 30% of gig workers reported that they worked in the gig economy in all or most months during the year; and of those adults that reported how much time they spent on gig activities in the prior month, the median was just five hours, and the mean was twenty-one hours. 2018 REPORT ON ECONOMIC WELL-BEING, *supra* note 92, at 19; APPENDIXES TO 2018 REPORT ON ECONOMIC WELL-BEING, *supra* note 93, at 59 app. B, Q&A GE40b & Q&A GE20.

100. *See, e.g.*, *Nonemployer Statistics (NES)*, U.S. Census Bureau, https://www.census.gov/programs-surveys/nonemployer-statistics.html [https://perma.cc/R98R-EWR7].

101. *All Sectors: Nonemployer Statistics by Legal Form of Organization and Receipts Size Class for the U.S., States, and Selected Geographies: 2018*, U.S. CENSUS BUREAU, https://data.census.gov/cedsci/table?q=NONEMP2018.NS1800NONEMP [https://perma.cc/BP6G-KTMZ]; Press Release, U.S. Census Bureau, Nonemployer Businesses Increased in 2017 (June 27, 2019), https://www.census.gov/newsroom/press-releases/2019/nonemployer-businesses.html [https://perma.cc/PT4S-MK7J]; *see also Introducing the New Annual Nonemployer Demographics Statistics (NES-D)*, U.S. CENSUS BUREAU (Dec. 17, 2020), https://www.census.gov/content/dam/Census/library/visualizations/2020/comm/nonemployer.pdf [https://perma.cc/PYZ2-9E9W] (showing demographic information about these nonemployer businesses).

102. Kristin Sandusky, *Detailed Look at Taxi, Limousine Services*, U.S. CENSUS BUREAU, https://www.census.gov/library/stories/2018/08/gig-economy.html [https://perma.cc/2V6E-FZTD] (Aug. 17, 2020).

The Census Bureau also administers the Survey of Income and Program Participation (SIPP), a nationally-representative panel survey that collects information on a range of topics relevant for assessing government program benefits distribution and collects detailed information about respondents' employment and work history.[103] Caroline Bruckner and Thomas Hungerford used 2014 SIPP data to estimate that approximately 7.1 million U.S. workers in 2014 identified themselves as self-employed workers or business owners working outside of traditional employment relationships (independent contractors).[104] Of these, 67% were White, 14.6% were Hispanic, 12.4% were Black, and 5.7% were Asian.[105] An additional 3.1 million workers (on-demand workers) worked for "an employer" or in an "other work arrangement, with no employees, in specified occupations[,] including babysitting and childcare; . . . housesitting; . . . adult or eldercare services; house cleaning; house painting; yard work; property maintenance work; [and] other personal services work[,] such as running errands or helping people move[,] jewelers[,] or driving."[106] Like the independent contractor population, on-demand workers were most often White (67%), rather than Hispanic (20.5%), Black (9.7%), or Asian (2.7%).[107]

Other researchers who looked at SIPP data calculated that, in 2016, more women (19%) than men (11%) worked part-time and that, overall, 64% of all part-time workers that year were women.[108] Also,

103. *Survey of Income and Program Participation (SIPP)*, U.S. CENSUS BUREAU, https://www.census.gov/sipp/ [https://perma.cc/J3DP-25GM].

104. Bruckner & Hungerford, *supra* note 9, at 68.

105. *Id.* at 81, 82 fig.3.

106. *Id.* at 57 n.17, 68, 89. To be sure, SIPP data has some important limitations; for example, SIPP data is self-reported, and respondents can incorrectly report their employment status, industry, or occupation as well as their earnings. *Id.* at 57 n.15. Moreover, the occupations used to define on-demand workers did not include offline or online selling goods or asset rentals, which are two major sectors of gig work that research has found online gig workers do to supplement their income. *Id.* at 57 n.17. Further, the population of on-demand workers could include some workers in traditional employment relationships. *Id.*

107. *Id.* at 83 fig.6.

108. Tyler Bond, Joelle Saad-Lessler & Christian E. Weller, *Still Shortchanged: An Update on Women's Retirement Preparedness*, NAT'L INST. ON RET. SEC. 5 & fig.3 (May 2020), https://www.nirsonline.org/wp-content/uploads/2020/04/Still-Shortchanged-Final.pdf [https://perma.cc/AUK4-G3WZ].

Julia Beckhusen analyzed SIPP respondents from a 2013 panel collection to determine what proportion of men and women held multiple jobs in a year and what types of jobs were held simultaneously.[109] The overwhelming number of the 158.1 million workers that year were single job holders (91.7%); however, of the remaining 8.3% of workers that held multiple jobs, women had a higher rate of holding multiple jobs (8.8%) than men (8%).[110] The education services, health care, and social assistance industry was home to the largest percentage of both women and men who were multiple job holders: it attracted 40.4% of the women with multiple jobs and 16.7% of the men with multiple jobs.[111] Notably, that was also the top industry for single-job holding women.[112]

4. The U.S. Small Business Administration

The U.S. Small Business Administration collects data and disseminates statistics and research on small businesses through its Office of Advocacy.[113] For example, in 2018, the Office of Advocacy estimated that there were 30.2 million small businesses in the United States in 2015, including 5.3 million with 1−20 employees and 24.3 million firms without paid employees (nonemployer firms).[114]

5. The JPMorgan Chase Institute

The private sector has also provided information about gig workers. Most notably, the JPMorgan Chase Institute's 2018 study of online platform workers (conducted by Diana Farrell and others) is important

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109. JULIA BECKHUSEN, U.S. CENSUS BUREAU, P70BR-163, CURRENT POPULATION REPORTS: MULTIPLE JOBHOLDERS IN THE UNITED STATES: 2013, at 1 (2019), https://www.census.gov/content/dam/Census/library/publications/2019/demo/P70BR-163.pdf [https://perma.cc/S5T2-X8QK].

110. *Id.* at 2−3, 2 tbl.1.

111. *Id.* at 6 fig.4.

112. *Id.*

113. *See, e.g.*, *About*, OFF. OF ADVOC., U.S. SMALL BUS. ADMIN., https://advocacy.sba.gov/about [https://perma.cc/L622-8LXM].

114. OFF. OF ADVOC., U.S. SMALL BUS. ADMIN., 2018 SMALL BUSINESS PROFILE: UNITED STATES 1, 4 (2018), https://www.sba.gov/sites/default/files/advocacy/2018-Small-Business-Profiles-US.pdf [https://perma.cc/E8CG-FLV8].

because it tracks actual payments flowing into gig worker bank accounts (as opposed to survey responses or tax filings) and because it includes data from 2013 through 2018—a period of extraordinary growth in online gig work.[115] Specifically, the study includes earnings and gender data from a sample of 39 million "unique[,] de-identified" Chase checking accounts on which the primary account holder is at least eighteen years old; and the sample tracked payments from 128 online platforms to 2.3 million families between October 2012 and March 2018.[116] The online platforms included in the study (1) connect customers to sellers or service providers, (2) mediate payments, and (3) allow workers to come and go on the platform.[117] The study found that as of March 2018, 4.5% of families had participated in online gig work at some point over the prior year and that families typically cycle in and out of online gig work over the course of the year.[118] Ultimately, Farrell and others estimated that approximately 2 million households had online gig work earnings in March of 2018 and that approximately 5.5 million households had online gig work earnings sometime during the prior year.[119]

Farrell and others organized the platform payments tracked into four distinct sectors: (1) transportation (for example, driving goods or

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115. Diana Farrell, Fiona Greig & Amar Hamoudi, *The Online Platform Economy in 2018: Drivers, Workers, Sellers and Lessors*, JPMORGAN CHASE & CO. INST. 2 (Sept. 2018), https://www.jpmorganchase.com/content/dam/jpmc/jpmorgan-chase-and-co/institute/pdf/institute-ope-2018.pdf [https://perma.cc/A5SE-WAHM]. To be sure, the study only captures online platform work and that is only a small subset of all gig work. *Id.* at 7 box 1. The data does, however, reflect paid work that is "not always [captured] in traditional measures of contingent work" and may reflect the migration of existing informal work to online platforms. *Id.*; *see also* Abraham & Houseman, *Making Ends Meet*, *supra* note 16, at 113 (discussing Farrell et al., *supra*, and the limitations of its survey data).

116. Farrell et al., *supra* note 115, at 6; *see also* Diana Farrell & Fiona Greig, *The Online Platform Economy: Has Growth Peaked?*, JPMORGAN CHASE & CO. INST. 23 n.2 (Nov. 2016), https://institute.jpmorganchase.com/content/dam/jpmc/jpmorgan-chase-and-co/institute/pdf/jpmc-institute-online-platform-econ-brief.pdf. [https://perma.cc/3YNX-HDLB] (discussing survey methodology).

117. Farrell et al., *supra* note 115, at 7 box 1. Admittedly, the sample used in Farrell and others' reports "overrepresents younger-headed families, male-headed families, and families in the West. It underrepresents older-headed families, female-headed families, and families in the South." *Id.* at 25 app. In addition, the Farrell report and other samples did not use an exhaustive list of platforms nor was it able to capture payments by platforms that bypassed checking accounts (for example, payments to debit cards). Abraham & Houseman, *Making Ends Meet*, *supra* note 16, at 113.

118. Farrell et al., *supra* note 115, at 11 exhibit 5.

119. *Id.* at 23.

people); (2) non-transport work (for example, dog walking, home care, home repair, or telemedicine); (3) selling goods through an online marketplace; and (4) leasing (for example, renting homes, rooms, parking spaces, and other assets).[120] The majority of online platform workers in March of 2018 were in the transportation sector—63% of participants and 58% of total transactions.[121] Interestingly, average earnings for online platform drivers decreased by 53% from 2013 to 2017, while earnings in the property-leasing sector increased by 69% during the same period.[122] In fact, in 2017, the average monthly earnings of leasing-sector, online gig workers ($1,736) were more than double the average monthly earnings of each of the remaining online gig sectors: transportation ($783), non-transportation services ($741), and selling online ($608).[123] All in all, the earnings from online gig work are a secondary or supplemental source of income for the majority of online gig workers.[124]

6. MBO Partners

Another private-sector source of information about gig workers over the past ten years is the annual "State of Independence" report prepared by MBO Partners, a private firm that provides back office services for high-wage independent contractors.[125] Using an online survey method, MBO Partners estimated that 38.2 million U.S. workers worked as "independents" in 2020—a definition that includes "consultants, freelancers, contractors, solopreneurs, . . . [and] temporary or on-call

120. *Id.* at 2.
121. *Id.* at 23.
122. *Id.* at 13.
123. *Id.* at 14 exhibit 10. Interestingly, Airbnb's own survey data found that 53% of its 2019 U.S. hosts said that their income from Airbnb "helped them stay in their homes, and about half of hosts surveyed (49%) said they were hosting on Airbnb to help make ends meet." Memorandum from Airbnb to U.S. Travel & Tourism Policymakers (Mar. 16, 2020), https://news.airbnb.com/wp-content/uploads/sites/4/2020/03/Airbnb-Economics-in-the-US.pdf [https://perma.cc/8QQH-VZYP].
124. Farrell et al., *supra* note 115, at 24; Abraham & Houseman, *Making Ends Meet*, *supra* note 16, at 113.
125. *See, e.g.*, MBO PARTNERS, THE STATE OF INDEPENDENCE IN AMERICA 2020: A DECADE OF INDEPENDENCE: TEN TRENDS THAT MATTER (2020), http://info.mbopartners.com/rs/mbo/images/MBO_Partners_State_of_Independence_2020_Report.pdf [https://perma.cc/796F-N9LJ].

workers . . . ."[126] Notably, in 2021, MBO Partners found that "[t]he number of independent workers grew an unprecedented 34% year over year, increasing from 38.2 million in 2020 to 51.1 million in 2021."[127] In addition, the "largest surge comes from those working occasionally (regularly, but without set hours per week) as independents . . . . [which] grew from 15.8 million in 2020 to 23.9 million in 2021, a 51% increase."[128] MBO Partners also indicated that the COVID-19 pandemic played a role in workers looking to supplement income from lost jobs and reduced hours, and that "[n]ew independents [were] . . . increasingly likely to be female."[129]

7. *The ADP Research Institute*

The ADP Research Institute, a think tank associated with the payroll processing firm Automatic Data Processing, Inc. (ADP), is another private-sector stakeholder that has measured the gig economy workforce and its growth in recent years.[130] Using payroll data from 75,000 large companies that ADP services and a survey of 16,800 individuals, Ahu Yildermaz and others estimated that one in six of their workers count as gig workers—as opposed to permanent employees.[131] The study classified workers as gig workers if they were either independent contractors (who received an IRS Form 1099-MISC) or short-term employees who worked for companies for just one to six months (and who received an IRS Form W-2).[132] The

126. *Id.* at 2. That 38.2 million estimate is down from 41.1 million in 2019, before the COVID-19 pandemic. *Id.* at 3; MBO PARTNERS, THE STATE OF INDEPENDENCE IN AMERICA: 2019: THE CHANGING NATURE OF THE AMERICAN WORKFORCE 2 (2019), https://s29814.pcdn.co/wp-content/uploads/2019/06/MBO-SOI-2019.pdf [https://perma.cc/UR3B-BMS2].

127. MBO PARTNERS, 11TH ANNUAL STATE OF INDEPENDENCE IN AMERICA: DATA HIGHLIGHTS & PREVIEW 3 (2021), https://info.mbopartners.com/rs/mbo/images/MBO_Partners_State_of_Independence_2021_Preview.pdf [https://perma.cc/X35P-9Y85].

128. *Id.*

129. *Id.* at 5, 8.

130. *See, e.g.*, AHU YILDIRMAZ, MITA GOLDAR & SARA KLEIN, ADP RSCH. INST., ILLUMINATING THE SHADOW WORKFORCE: INSIGHTS INTO THE GIG WORKFORCE IN BUSINESSES (Feb. 2020), https://www.adpri.org/wp-content/uploads/2020/07/19212611/Illuminating-the-Shadow-Workforce-Full-Report.pdf [https://perma.cc/5K74-5KDE].

131. *Id.* at 3, 6, 8 & chart 2.

132. *Id.* at 6.

authors found that the share of gig workers in these companies increased from 14.2% of the workforce in 2010 to 16.4% in 2019, but there was a wide variation between industries.[133] In terms of demographics, the independent contractors were older, more educated, and had higher incomes than the short-term employees who were typically seasonal or on-call hires.[134] Of the independent contractors, 60% were men, 73% were over age thirty-five, 40% were married, and 50% had children under age eighteen.[135] On the other hand, around 57% of the short-term W-2 employees were women, and on average, they were ten years younger than the independent contractors; also, they were more likely to be single and less likely to have children.[136] Many of the independent contractors had health insurance through a spouse or partner or through Medicare or Medicaid.[137] Of those gig workers over age fifty-five, most did not have an employer-sponsored retirement plan, and just 37% of the independent contractors and 28% of the short-term employees had a self-funded retirement plan.[138]

8. Upwork

According to a 2020 report on freelancing in America from Upwork and the Freelancers Union, around 57 million American workers (35%) freelanced in 2019 and were defined as having "engaged in supplemental, temporary, project- or contract-based work, within the past 12 months," and 28% of them freelanced full-time that year.[139] Some 45% of freelancers identified in the 2019 report provided skilled services (for example, computer programming, writing, design, IT, marketing, and business consulting), 30% provided unskilled services (for example, dog walking, cleaning, and ridesharing), 26% sold goods or rented rooms (through, for example, consignment shops, eBay, or

133. *Id.* at 3.
134. *Id.*
135. *Id.* at 12.
136. YILDIRMAZ ET AL., *supra* note 130, at 12 chart 14.
137. *Id.* at 14 (32% through Medicare or Medicaid; 21% through partner or spouse).
138. *Id.* at 14 chart 20.
139. *Freelancing in America: 2019*, UPWORK & FREELANCERS UNION slides 4 & 5 (Sept. 23, 2019), https://www.slideshare.net/upwork/freelancing-in-america-2019/1 [https://perma.cc/7Z5R-QJ2V].

Airbnb), and 29% were engaged in other uncategorized activities.[140] All in all, those freelancers contributed almost $1 trillion to the economy (almost 5% of gross domestic product).[141] Also, 62% of the freelancers were White, 16% were Hispanic, 12% were Black, 5% were Asian-American, and 4% were all others; 59% were male; and 20% were over age fifty-five.[142]

9. Other Estimates

In a 2019 report, the Life Insurance Marketing and Research Association (LIMRA) estimated that 26% of all U.S. workers participated in the gig economy either as their primary job or as a secondary source of income.[143] In a 2018 study, Gallup estimated that 36% of American workers participated in the gig economy as independent contractors, online platform workers, contract firm workers, on-call workers, or temporary workers; also, 29% of all workers worked in one of these alternative work arrangements as their primary job.[144] Those alternative workers were less likely to work full-time than traditional workers, but many were not looking to work more hours.[145] In a 2016 study, the McKinsey Global Institute estimated that between 22% to 27% of U.S. workers (up to 68 million individuals) engaged in what it called "independent work."[146] Also,

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140. Press Release, Adam Ozimek, Chief Economist, Upwork, Report: Freelancing and the Economy in 2019, https://www.upwork.com/press/releases/freelancing-and-the-economy-in-2019 [https://perma.cc/A3C6-8SNB].

141. *Freelancing in America: 2019*, *supra* note 139, at slide 31.

142. *Id.* at slides 68–70.

143. KIMBERLY A. LANDRY, LIFE INS. MKTG. & RSCH. ASS'N (LIMRA), THE BENEFITS OF GIG WORK: EMPLOYER INTEREST IN OFFERING BENEFITS TO NONTRADITIONAL WORKERS 4 (2019), https://www.limra.com/en/research/research-abstracts-public/2019/the-benefits-of-gig-work-employer-interest-in-offering-benefits-to-nontraditional-workers/ [https://perma.cc/WV3T-ZC67].

144. GALLUP, THE GIG ECONOMY AND ALTERNATIVE WORK ARRANGEMENTS 2 (2018), https://www.gallup.com/file/workplace/240878/Gig_Economy_Paper_2018.pdf [https://perma.cc/KTE3-2T79].

145. *Id.* at 11.

146. James Manyika, Susan Lund, Jacques Bughin, Kelsey Robinson, Jan Miscke & Deepa Mahajan, *Independent Work: Choice, Necessity, and the Gig Economy*, MCKINSEY & CO. 3, 4 exhibit E1 (Oct. 10, 2016), https://www.mckinsey.com/~/media/mckinsey/featured%20insights/employment%20and%20growth/independent%20work%20choice%20necessity%20and%20the%20gig%20economy/independent-work-choice-necessity-and-the-gig-economy-full-report.pdf [https://perma.cc/4FD4-J4GL].

noted economists Lawrence F. Katz and Alan B. Krueger conducted a study that found that the percentage of workers engaged in alternative work arrangements grew from 10.7% in 2005 to as high as 15.8% in 2015.[147]

Another promising approach for defining gig workers would be to use one of the two alternative definitions of nontraditional work that Alicia H. Munnell and her colleagues at the Boston College Center for Retirement Research developed.[148] Their 2019 study used the 1992–2016 waves of the University of Michigan's Health and Retirement Study (HRS) to explore how older workers use nontraditional jobs.[149] That study's broad definition of nontraditional work included "any job [that] lack[ed] both health insurance and retirement benefits[,]" while the study's narrower definition included any "job without [those] benefits that also [had] some measure of job instability" (in other words, employment that had variable hours or self-employment where the worker had no benefits and no employees).[150] Under the broad definition, around 16.9% of workers aged fifty to sixty-two in 2016 were in nontraditional jobs, while under the narrower definition, just 7.6% had nontraditional jobs.[151]

Finally, since 2018, the Aspen Institute's Future of Work Initiative and Cornell University's School of Industrial and Labor Relations (ILR) have collaborated on maintaining the Gig Economy Data Hub,

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147. Lawrence F. Katz & Alan B. Krueger, *The Rise and Nature of Alternative Work Arrangements in the United States, 1995–2015*, 72 ILR REV. 382, 382–83, 389 tbl.2 (2019) (replicating the Bureau of Labor Statistics' 2005 Contingent Worker Supplement (CWS) for the year 2015); *see also* February 2005 Employment Arrangements, *supra* note 23, at 2 tbl.A (compiling percentages of workers under "[t]ype of alternative arrangements").

148. Alicia H. Munnell, Geoffrey T. Sanzenbacher & Abigail N. Walters, *How Do Older Workers Use Nontraditional Jobs?* 4 (Ctr. for Ret. Rsch. at Bos. Coll., Working Paper No. 2019-12, 2019), https://crr.bc.edu/wp-content/uploads/2019/10/wp_2019-12_.pdf [https://perma.cc/5QJG-7PMF]; *see also* GEOFFREY T. SANZENBACHER, CTR. FOR RET. RSCH. AT BOS. COLL., NO. 20-17, SHOULD WE WORRY ABOUT OLDER WORKERS WITH NONTRADITIONAL JOBS? 1–2 (Dec. 2020), https://crr.bc.edu/wp-content/uploads/2020/12/IB_20-17_.pdf [https://perma.cc/A7NE-2LNH] (discussing definitions for "gig economy" jobs based on tax forms and lack of benefits).

149. Munnell et al., *supra* note 148, at 3.

150. *Id.* at 5.

151. *Id.* at 7.

an online, interactive catalogue of government, private-sector, and academic resources on nontraditional and gig-economy work.[152]

C. More Detail on Gig Worker Demographics

1. Gender and the Gig Economy

The relationship between gender and gig work is complex and varies significantly depending on how gig work is defined and measured. Surveys that measure both offline and online gig work have found that more women than men do informal work.[153] For example, the Federal Reserve Board's 2015 Enterprising and Informal Work Activities (EIWA) survey found that more women (56%) than men (44%) engaged in "informal work," and the percentage differential increased when the comparison was between lower-income women (62%) and men (38%).[154] Also, Bruckner and Hungerford reviewed data from the 2014 SIPP, and they found significantly more women (56%) than men (44%) were among the 7.1 million workers identified as independent contractors, and slightly more women (52%) than men (48%) were among the 3.1 million identified as on-demand workers.[155]

Also, the 2019 SHED found that more women (52%) than men (48%) spent at least twenty hours a month doing gig work.[156] In terms

152. *Gig Economy Data Hub*, *supra* note 16. The Gig Economy Data Hub includes both descriptions of and access to more than a dozen datasets intended to provide easily accessible data analysis for policymakers, academics, the media, and the public on nontraditional and gig economy work. For each source, the site includes how the dataset defines gig work, the methodology, major findings, and outstanding issues as well as links to the raw data and reports where possible. *See id.*; *see also* Ben Gitis, Douglas Holtz-Eakin & Will Rinehart, *The Gig Economy: Research and Policy Implications of Regional, Economic, and Demographic Trends*, AM. ACTION F. 2–3 (Jan. 10, 2017), https://www.americanactionforum.org/wp-content/uploads/2017/01/Regional-and-Industry-Gig-Trends-2017.pdf [https://perma.cc/PNC5-KR8L] (discussing methodology for findings).

153. *E.g.*, Bruckner & Hungerford, *supra* note 9, at 81 fig.2; ROBLES & MCGEE, *supra* note 4, at 12, 21.

154. ROBLES & MCGEE, *supra* note 4, at 12.

155. Bruckner & Hungerford, *supra* note 9, at 81 fig.2, 82 fig.5. They also found that, although most workers in both the independent-contractor and on-demand-worker populations were White (67%), baby boomers (age 55+) comprised the majority of independent contractors (51%) with workers aged thirty-five to fifty-four being the majority of on-demand workers (45%). *Id.* at 81 fig.1, 82 figs.3 & 4, 83 fig.6.

156. Email from Kimberly Kreiss to authors, *supra* note 97(SHED 2019 Statistics). Similarly, an analysis of the 2016 and 2017 SHEDs found that, although the "incidence of informal work varies little by gender," slightly more women than men engaged in informal work. Abraham & Houseman, *Making Ends Meet*, *supra* note 16, at 117 tbl.1, 119.

of the kinds of gig work that women and men engage in, Table 4 shows that significantly more women than men engage in paid caregiving (72% done by women); dog walking, pet care, and house sitting (61% done by women); selling goods at flea markets or garage sales (56% done by women); selling goods consignment shops or thrift stores (70% done by women); and selling goods at planned events (73% done by women).[157]

Table 4. Share of Adults Performing Gig Activities, 2019[158]

	Female	Male
Have Been Paid For Activities in the Past Month (services)		
Child or elder care services	72	28
Dog walking, feeding pets or house sitting	61	39
Housecleaning, yard work, or other property maintenance work	46	54
Driving or ridesharing such as Uber or Lyft	50	50
Paid tasks online	51	49
Other personal tasks such as deliveries or running errands	47	53
Have Been Paid For Activities in the Past Month (assets)		
Selling goods yourself at flea markets or garage sales	56	44
Selling goods at consignment shops or thrift stores	70	30
Selling goods online	51	49
Selling goods at a party you plan, such as an Avon party	73	27
Any other paid activities not already mentioned	50	50

On the other hand, Jackson and others, which used a comparatively limited definition of online gig work to analyze administrative tax data, found the "vast majority" (85%) of online gig workers were men.[159] That study did, however, find that self-employed workers with less than $5,000 of business expenses were "predominately female, less

157. 2019 REPORT ON ECONOMIC WELL-BEING, *supra* note 89; Email from Kimberly Kreiss to authors, *supra* note 97.
158. 2019 REPORT ON ECONOMIC WELL-BEING, *supra* note 89; Email from Kimberly Kreiss to authors, *supra* note 97.
159. Jackson et al., *supra* note 51, at 18.

likely to be married, and somewhat more likely to have children," strongly indicating that more women than men do offline gig work.[160] Collins and others also found that the online gig workers reflected in its 2001−2016 administrative tax data were more than 70% male, while traditional, wage-only workers were more evenly split between male (50.5%) and female (49.5%).[161] Notably, however, Collins and others found that participation in the "1099 economy" grew more significantly overall among women than men from 2000 to 2016.[162] More recently, Lim and others found that, from 2001 to 2016, women drove 55% of growth in the universe of independent contractors, "especially women who are the primary earners in their households."[163]

Farrell and others also found that more men than women participate in online gig work.[164] The majority of the online gig workforce were drivers for ridesharing platforms, and most of them were men.[165] Yet male dominance in online gig work was limited to the transportation sector, as women were actually more likely than men to participate in the other three sectors (selling goods, leasing assets, or performing

160. *Id.*

161. Collins et al., *supra* note 6, at 15–16.

162. *Id.* at 17.

163. Lim et al., *supra* note 75, at 3.

164. Farrell et al., *supra* note 115, at 22 exhibit 25.

165. *Id.* at 16 exhibit 13, 22 exhibit 26. Another study showing male dominance in the ridesharing industry of 1.87 million Uber drivers, from January 2015 through March 2017, found that just 512,000 of those Uber drivers were women (27.3%), and it also identified a 7% gender earnings gap among drivers. Cody Cook, Rebecca Diamond, Jonathan V. Hall, John A. List & Paul Oyer, *The Gender Earnings Gap in the Gig Economy: Evidence from over a Million Rideshare Drivers*, REV. ECON. STUD. 1, 8 (Nov. 27, 2020), https://doi.org/10.1093/restud/rdaa081 [https://perma.cc/L8A3-2JQP]. The authors attributed the gap to three primary factors. *Id.* at 2–3. First, male drivers "tend to drive in more lucrative locations" and are compensated "for their willingness to drive in areas with higher crime and more drinking establishments." *Id.* at 2–3. Second, men have more experience using the platform, which translates to higher earnings because they learn "to strategically cancel and accept trips." *Id.* at 3. Third, men tend to drive faster and benefit from more experience using the platform (in other words, they learn more efficient routes). *Id.* at 2−3. At the same time, women had an attrition rate of 76.5% within six months (11.5% higher than men). *Id.* at 8 tbl.1; *see also* Avivah Wittenberg-Cox, *Uber's Gender Pay Gap Study May Show the Opposite of What Researchers Were Trying to Prove*, FORBES (Sept. 23, 2018, 10:25 AM), https://www.forbes.com/sites/avivahwittenbergcox/2018/09/23/gender-paygap-uber-case-study/#76790595b555 [https://perma.cc/84BK-UBUV].

Research done by the Overseas Development Institute on gender and online labor platforms around the world also found that (1) women earn less than men doing online labor gig work; (2) fewer women than men participated in online labor gig work and were more likely to exit; and (3) overall, women were "much less likely" to do online gig work regularly. Hunt & Samman, *supra* note 15, at 12.

other services).[166] In short, as Farrell and others concluded, "different gender patterns by platform sector may help explain why some studies have found people active in the gig economy to be disproportionately men, while others have found them more likely to be women."[167] For example, Airbnb recently released data showing that, in 2019, 58% of its hosts for its 1.1 million active listings in the United States were women.[168] Earlier Airbnb research noted that older women hosts were propelling the overall growth of seniors as hosts on the platform and that "[t]he majority of senior women hosts are empty nesters who host to make ends meet."[169]

2. Older Workers

A survey of the relevant literature finds that "partial retirement" or "bridge jobs" are common for older adults transitioning from full-time work to part-time work before retirement.[170] Moreover, a "significant share" of retired workers re-enter the workforce, often taking part-time, as opposed to full-time, jobs.[171] In that regard, a recent Government Accountability Office report found that the labor force participation rate for Americans aged fifty-five or older increased from 30% in 1989 to 40% in 2018, and a recent Bureau of Labor Statistics report noted that the labor force participation rate of women aged fifty-five or older increased from 12.6% in 2000 to 22.2% in 2015.[172]

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166. Farrell et al., *supra* note 115, at 8−11, 22 exhibit 26.

167. *Id.* at 22.

168. Memorandum from Airbnb to U.S. Travel & Tourism Policymakers, *supra* note 123; *see also* Catherine Powell, *Women Turn to Hosting on Airbnb, Earning over $600 Million During Pandemic*, AIRBNB NEWS (Mar. 1, 2021), https://news.airbnb.com/women-turn-to-hosting-on-airbnb-earning-over-600-million-during-pandemic/ [https://perma.cc/32Q3-HUTL]; Airbnb, *The Women Powering Our Community*, AIRBNB NEWS (Mar. 5, 2020), https://news.airbnb.com/the-women-powering-our-community [https://perma.cc/UT6T-G9T9].

169. AIRBNB, AIRBNB'S GROWING COMMUNITY OF 60+ WOMEN HOSTS 2 (2016) [hereinafter AIRBNB'S GROWING COMMUNITY], https://www.airbnbcitizen.com/wp-content/uploads/2016/03/Airbnb_60_Plus_Women_Report.pdf [https://perma.cc/75XY-WFEW].

170. Abraham et al., *supra* note 12.

171. *Id.*

172. U.S. GOV'T ACCOUNTABILITY OFF., GAO-19-587, RETIREMENT SECURITY: INCOME AND WEALTH DISPARITIES CONTINUE THROUGH OLD AGE 7 (2019) [hereinafter GAO RETIREMENT SECURITY], https://www.gao.gov/assets/710/700836.pdf [https://perma.cc/HC2D-QHNG]; Lim et al., *supra* note 75, at 20; Mitra Toossi & Teresa L. Morisi, *Women in the Workforce Before, During, and After*

Indeed, some 2 million women aged seventy or older were in the workforce in 2019.[173] The 2019 SHED found that, of those gig workers who spent at least twenty hours doing gig work in the previous month, 18% were sixty or older, and the 2018 SHED found that 21% of adults sixty or older engaged in a gig activity.[174]

Regarding online gig work, Abraham and others (2020) found that older Americans are not as likely to participate as younger workers.[175] But similar to gender data in online gig work, it could be that older workers do not engage in rideshare driving or other services to the same degree as they do in other types of platform work and that the Abraham and others (2020) study did not expressly probe respondents' online platform work related to property rental (such as hosting for Airbnb).[176] For example, a Gallup survey conducted during 2018−2019 found that self-employment among Americans is "more prevalent at older ages than suggested by existing data."[177] In fact, that data showed that, conditional on working, the percentage of workers who are self-employed as their main job "rises sharply" with age.[178]

Using JPMorgan Chase bank-account data, Farrell and others found that older workers do participate in some forms of online gig work, with age gradients being "steepest in the transportation and selling sectors[.]"[179] When it comes to the leasing sector, "older people may

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the Great Recession, U.S. BUREAU LAB. STAT. 7 (July 2017), https://www.bls.gov/spotlight/2017/women-in-the-workforce-before-during-and-after-the-great-recession/pdf/women-in-the-workforce-before-during-and-after-the-great-recession.pdf [https://perma.cc/9MRP-AQGS].

173. U.S. GOV'T ACCOUNTABILITY OFF., GAO-20-435, RETIREMENT SECURITY: OLDER WOMEN REPORT FACING A FINANCIALLY UNCERTAIN FUTURE 7 n.19 (2020) [hereinafter OLDER WOMEN FACING FINANCIALLY UNCERTAIN FUTURE], https://www.gao.gov/assets/710/708121.pdf [https://perma.cc/DW5W-2A8E].

174. APPENDIXES TO 2019 REPORT ON ECONOMIC WELL-BEING, *supra* note 93, at 51 app.B, Q&A GE20; 2018 REPORT ON ECONOMIC WELL-BEING, *supra* note 92.

175. Abraham et al., *supra* note 12, at 429. Contract work is also "counter-cyclical"; when the labor market is weak—like it has been during the Covid-19 pandemic—relatively more workers do independent contractor work. *Id.* at 427; MBO PARTNERS, *supra* note 125, at 8.

176. *See generally* Abraham et al., *supra* note 12.

177. *Id.* at 426.

178. *Id.* at 431. On the other hand, using administrative tax data from 2000 to 2016, Collins and others found low levels of growth in gig work as workers approached retirement age; however, that research did not include online sellers or property renters nor did it measure occasional or informal work that was not firm-facing or firm-mediated work. Collins et al., *supra* note 6, at 17–18.

179. Farrell et al., *supra* note 115, at 22 exhibit 24.

face lower barriers to entry than younger people, likely because they are more likely to already own assets which they can lease out."[180] As of 2016, older Americans were "embracing home sharing at record rates"; and a majority (58%) reported that home sharing helped them stay in their homes and more than one-third reported that hosting helped them stave off eviction.[181] Other recent survey research indicates that older Americans are increasingly interested in earning income by engaging in online gig work.[182]

Eileen Appelbaum and others used Bureau of Labor Statistics data for 2017 to explore the nonstandard work arrangements of older workers, and their study found that independent contractors aged fifty-five to sixty-four were most likely to be in the construction industry and next most likely to be in real estate industry.[183] Independent contractors aged sixty-five and older were most likely to be in the construction industry and next most likely to be in management, scientific, and technical consulting services.[184] Older on-call and contingent workers were most likely to work in elementary and secondary schools (mainly as substitute teachers).[185] The construction industry was the next most likely industry to employ on-call workers aged fifty-five to sixty-four, while the second most common industry for contingent workers aged sixty-five plus was colleges, universities, and professional schools.[186]

180. *Id.* at 21. Airbnb's own internal data shows that in the United States, one of its "largest cohorts" of U.S. hosts for its 1.1 million active listings are "Americans aged 60 and older, many of whom live on fixed incomes . . . ." Memorandum from Airbnb to U.S. Travel & Tourism Policymakers, *supra* note 123. This has been a consistent trend since Airbnb's founding during the Great Recession, and notably, in 2016, Airbnb concluded that seniors were the "fastest-growing age demographic of hosts joining the Airbnb community" and also noted that "nearly two-thirds [(64%)] of all senior hosts are women." AIRBNB'S GROWING COMMUNITY, *supra* note 169, at 2, 3

181. AIRBNB, HOME SHARING: A POWERFUL OPTION TO HELP OLDER AMERICANS STAY IN THEIR HOMES 4 (2016), https://www.airbnbcitizen.com/wp-content/uploads/2016/11/161121_Home-Sharing-A-Powerful-Option-for-Older-Americans_vFINAL.pdf [https://perma.cc/88CT-LYRA].

182. Benjamin Ebbink & Fisher Phillips, *Recent Survey Sheds Additional Light on the Gig Economy*, JD SUPRA (Apr. 26, 2018), https://www.jdsupra.com/legalnews/recent-survey-sheds-additional-light-on-41345/ [https://perma.cc/WU65-6ZK2].

183. Appelbaum et al., *supra* note 29, at 16.

184. *Id.*

185. *Id.*

186. *Id.* Pertinent here, a recent report from the U.S. Government Accountability Office showed that

II. An Overview of the Federal Tax System

How (and whether) gig workers properly report their income for federal income and payroll tax purposes can have major implications for workers trying to shore up their retirement income shortfalls.[187] Different sets of tax reporting and tax administration rules can apply to individuals performing the same kinds of services depending on whether the worker is classified as an employee or an independent contractor and also on whether the worker participates in an online platform.[188] Different tax rules also apply to the casual sellers of goods and the renters of property.[189] These complicated rules present some very real tax compliance challenges, and there is a good deal of evidence that gig workers, most of whom piece together income from selling goods and services in addition to working in traditional jobs, consistently underreport their gig earnings.[190] This Part explains (1)

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contingent employment in postsecondary education (in other words, those faculty employed outside of the traditional tenure track) grew dramatically from 57.6% in 1995 to 71.6% in 2011. U.S. Gov't Accountability Off., GAO-18-49, Contingent Workforce: Size, Characteristics, Compensation, and Work Experiences of Adjunct and Other Non-Tenure-Track Faculty 8 (2017), https://www.gao.gov/assets/gao-18-49.pdf [https://perma.cc/WH3Y-QT84]; *see also Data Snapshot: Contingent Faculty in US Higher Ed*, Am. Ass'n of Univ. Professors (Oct. 11, 2018), https://www.aaup.org/news/data-snapshot-contingent-faculty-us-higher-ed#.Xpc0PMhKhGM [https://perma.cc/LA8R-9HS6] (showing that 73% of instructional positions in 2016 were not on the traditional tenure track). *See generally* Adrianna Kezar, Tom DePaola & Daniel T. Scott, The Gig Academy: Mapping Labor in the Neoliberal University (2019) (discussing the extraordinary growth of the "gig academy"). Appelbaum and others also found that common occupations for older independent contractors included managers and realtors. Appelbaum et al., *supra* note 29, at 16. For older on-call and contingent workers, common occupations included teachers, managers, truck drivers, taxi drivers and chauffeurs, laborers and freight and stock handlers, personal care aides, and secretaries and administrative assistants. *Id.* at 16–17.

187. *See, e.g.*, Bruckner & Hungerford, *supra* note 9, at 56.

188. *See, e.g.*, *Gig Economy Tax Center*, IRS, https://www.irs.gov/businesses/gig-economy-tax-center [https://perma.cc/F8HN-6E9C] (Aug. 3, 2021); 2020 Taxpayer Compliance, *supra* note 6, at 8 fig.2; *see also infra* Part II.C.

189. *See infra* Part II.C.3.

190. *See, e.g.*, Bruckner & Hungerford, *supra* note 9, at 75; Caroline Bruckner & Annette Nellen, *Failure to Innovate: Tax Compliance and the Gig Economy Workforce*, 92 St. Tax Notes 485, 485 (May 6, 2019); Bruckner, *supra* note 2, at 15; Treasury Inspector Gen. for Tax Admin., U.S. Dep't of the Treasury, Reference No. 2019-30-016, Expansion of the Gig Economy Warrants Focus on Improving Self-Employment Tax Compliance 1 (2019) [hereinafter Expansion Warrants Focus on Compliance], https://www.treasury.gov/tigta/auditreports/2019reports/201930016fr.pdf [https://perma.cc/UM5T-5TJZ]; Stacy Cowley, *For Gig Workers and Business Owners, Taxes Are Even Trickier Now*, N.Y. Times (Mar. 12, 2021),

how the federal income, payroll, and self-employment tax payment and reporting rules work; and (2) the corresponding tax compliance issues that involve gig workers, which ultimately have implications for retirement financing.

A. The Federal Income Tax

The U.S. tax system is a pay-as-you-go system of tax collection, and the largest of the federal taxes is the income tax imposed on individuals.[191] Taxpayers file returns as unmarried individuals, heads of household (in other words, an unmarried individual with a dependent), married couples filing joint returns, or married couples filing separate returns.[192] As a starting point, taxpayers first determine the amount of their gross income.[193] From gross income, taxpayers subtract certain deductions to get to adjusted gross income and then to taxable income.[194] Most taxpayers simply claim a standard deduction, but some taxpayers can claim certain itemized deductions in lieu of the standard deduction.[195] The marginal income tax brackets (10%, 12%, 22%, 24%, 32%, 35%, and 37% in 2021) progressively tax income, but most Americans are subject to marginal tax rates of 10% to 22%.[196]

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https://www.nytimes.com/2021/03/12/business/smallbusiness/freelancers-taxes-2020.html [https://perma.cc/5Q5T-RV7U].

191. JOINT COMM. ON TAX'N, JCX-18-21, OVERVIEW OF THE FEDERAL TAX SYSTEM AS IN EFFECT FOR 2021, at 2−14 (2021) [hereinafter 2021 OVERVIEW OF THE FEDERAL TAX SYSTEM], https://www.jct.gov/CMSPages/GetFile.aspx?guid=72cd3d31-f681-4bff-80e6-1dd04c009d9d [https://perma.cc/QN7K-AMU5].

192. I.R.C. §§ 1, 2, 7703.

193. I.R.C. § 61(a). Gross income includes all income "from whatever source derived," including, but not limited to, the wages, salary, tips, gains, dividends, interest, rents, and royalties received by taxpayers during the taxable year. *Id.* Unemployment benefits and some Social Security benefits are also included in gross income. I.R.C. §§ 85, 86. Up to $10,200 of unemployment compensation paid in 2020 is excluded from income. I.R.C. § 85(c) (West) (added by the American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 9042, 135 Stat. 4, 122).

194. I.R.C. §§ 62, 63.

195. I.R.C. § 63; 2021 OVERVIEW OF THE FEDERAL TAX SYSTEM, *supra* note 191, at 4 (estimating that 138.3 million taxpayers will claim the standard deduction for the 2021 tax year while 19.1 million taxpayers will elect to itemize their deductions).

196. I.R.C. § 1; 2021 OVERVIEW OF THE FEDERAL TAX SYSTEM, *supra* note 191, at 6−7 tbl.1, 40 tbl.A-6; CONG. BUDGET OFF., PUB. NO. 56575, THE DISTRIBUTION OF HOUSEHOLD INCOME, 2017, at 22 (2020), https://www.cbo.gov/system/files/2020-10/56575-Household-Income.pdf [https://perma.cc/F9W5-PB95]. *See generally* MARGOT L. CRANDALL-HOLLICK, CONG. RSCH. SERV.,

Individuals can also reduce their income tax liability with certain tax credits.[197] For example, in 2021, many taxpayers can claim child tax credits of up to $3,600 for each qualifying child under the age of seventeen,[198] and many taxpayers can claim a child and dependent care tax credit for certain employment-related care expenses.[199] Many low-income workers also qualify for the refundable earned income tax credit of up to $6,728 for low-income families or $1,502 for low-income taxpayers without qualifying children (in 2021).[200] Certain low- and moderate-income individuals can also claim a nonrefundable retirement saver's tax credit of up to $1,000 for certain qualified retirement savings contributions.[201] In response to the

IN11015, THE FEDERAL INCOME TAX: HOW DO MARGINAL INCOME TAX RATES WORK? (2019), https://www.everycrsreport.com/files/20190110_IN11015_13ff4e2563c5e6f75457a017627513c36f892da9.pdf [https://perma.cc/F6CL-ZYYS]. Capital gains and dividend income, however, are generally taxed at rates lower than the top marginal tax rate—at 0%, 15%, or 20%, depending on the income tax rate that would be assessed on the same amount of ordinary income. 2021 OVERVIEW OF THE FEDERAL TAX SYSTEM, *supra* note 191, at 7−8.

197. *See* 2021 OVERVIEW OF THE FEDERAL TAX SYSTEM, *supra* note 191, at 9−13.

198. I.R.C. § 24; 2021 OVERVIEW OF THE FEDERAL TAX SYSTEM, *supra* note 191, at 9.

199. I.R.C. § 21. In 2021, the maximum credit for taxpayers with one qualifying dependent was $4,000, and the maximum tax credit for taxpayers with two or more qualifying dependents was $8,000. JOINT COMM. ON TAX'N, JCX-19-21, PRESENT LAW AND BACKGROUND ON DEPENDENT CARE AND PAID LEAVE 3 (2021), https://www.jct.gov/CMSPages/GetFile.aspx?guid=2c4a1297-8a5e-4b24-a7ef-1109f86ebc3c [https://perma.cc/3VLK-V6BA].

200. *See, e.g.*, I.R.C. § 32; 2021 OVERVIEW OF THE FEDERAL TAX SYSTEM, *supra* note 191, at 6–7 tbl.1; CONG. RSCH. SERV., R43805, THE EARNED INCOME TAX CREDIT (EITC): HOW IT WORKS AND WHO RECEIVES IT (2021), https://fas.org/sgp/crs/misc/R43805.pdf [https://perma.cc/GX8G-87HZ]; Rev. Proc. 2020-45, 2020-46 I.R.B. 1016, *superseded by* Rev. Proc. 2021-23, 2021-19 I.R.B. 1153. Of particular note, the American Rescue Plan Act of 2021 removed the sixty-five maximum age limit on the earned income tax credit for individuals without qualifying children (in I.R.C. § 32(c)(1)(A)(ii)(II)) for the 2021 tax year. American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 9621(a), 135 Stat. 4, 152–53 (codified at I.R.C. § 32(n)). The Authors hope that that the maximum age limit will be made permanent. *See generally* NAT'L TAXPAYER ADVOC., IRS, PUB. NO. 5286, 2021 PURPLE BOOK: COMPILATION OF LEGISLATIVE RECOMMENDATIONS TO STRENGTHEN TAXPAYER RIGHTS AND IMPROVE TAX ADMINISTRATION 115−119 (Dec. 31, 2020) [hereinafter 2021 PURPLE BOOK], https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2021/01/ARC20_PurpleBook.pdf [https://perma.cc/RAB3-2WNJ] (recommending expansion of the credit to include workers aged eighteen and over with no age cap); Elaine Maag, *Congress Should Make the EITC Available to Older Workers*, TAXVOX: INDIVIDUAL TAXES (Jan. 13, 2019), https://www.taxpolicycenter.org/taxvox/congress-should-make-eitc-available-older-workers [https://perma.cc/YE5H-8VZ5]; Elaine Maag, *A Redesigned Earned Income Tax Credit Could Encourage Work by Childless Adults*, TAXVOX: INDIVIDUAL TAXES (May 20, 2015), https://www.taxpolicycenter.org/taxvox/redesigned-earned-income-tax-credit-could-encourage-work-childless-adults [https://perma.cc/3GGR-J86E].

201. I.R.C. § 25B(a)-(b). This nonrefundable credit equals a percentage (50%, 20%, or 10%) of up to $2,000 of contributions. *Id.*; *Retirement Savings Contributions Credit (Saver's Credit)*, IRS,

economic fallout from COVID-19, in April and December of 2020 and March of 2021, Congress created new refundable and advanceable recovery rebate tax credits.[202]

For those individuals who have investment income and modified adjusted gross income more than certain threshold amounts (for example, $250,000 for married couples and $200,000 for singles and heads of household), an additional 3.8% net investment income tax is due on income from interest, dividends, capital gains, rents and royalties, non-qualified annuities, income from businesses involved in trading of financial instruments or commodities, and businesses that are passive activities.[203]

B. Payroll and Self-Employment Taxes

In addition to income taxes, workers are subject to various Social Security and Medicare payroll taxes.[204] These payroll taxes are levied on earnings from employment and are the primary financing mechanism for Social Security and Medicare benefits.[205] For 2021, employees and employers each pay a Social Security payroll tax of 6.2% on up to $142,800 of wages for a combined Old-Age and Survivors and Disability Insurance (OASDI) rate of 12.4%, and for the

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https://www.irs.gov/retirement-plans/plan-participant-employee/retirement-savings-contributions-savers-credit [https://perma.cc/4EH2-8H75] (July 30, 2021).

202. *See* I.R.C. § 6428(a) (West) (added by the Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. No. 116-136, § 2201, 134 Stat. 281, 335 (2020) (tax credits of up to $1,200 per taxpayer /$2,400 for a married couple filing a joint return, plus $500 for each qualifying child)); I.R.C. § 6428A(a) (West) (added by the COVID-related Tax Relief Act of 2020, Pub. L. No. 116-260, § 272, 134 Stat. 1182, 1965 (enacted within the Consolidated Appropriations Act, 2021) ($600 per taxpayer/$1,200 for a married couple filing a joint return, plus $600 for each qualifying child of the taxpayer)); I.R.C. § 6428B(a)-(b) (West) (added by the American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 9601, 135 Stat. 4, 138 ($1,400 per taxpayer/$2,800 for a married couple filing a joint return, plus $1,400 for each dependent)); 2021 OVERVIEW OF THE FEDERAL TAX SYSTEM, *supra* note 191, at 12; MOLLY F. SHERLOCK, JANE G. GRAVELLE & MARGOT L. CRANDALL-HOLLICK, CONG. RSCH. SERV., R46680, THE AMERICAN RESCUE PLAN ACT OF 2021 (ARPA; P.L. 117-2): TITLE IX, SUBTITLE G—TAX PROVISIONS RELATED TO PROMOTING ECONOMIC SECURITY (2021) [hereinafter PROMOTING ECONOMIC SECURITY], https://crsreports.congress.gov/product/pdf/R/R46680 [https://perma.cc/YUL7-5X4T].

203. I.R.C. § 1411 (added by the Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-148, § 1402, 124 Stat. 119, 220–24); 2021 OVERVIEW OF THE FEDERAL TAX SYSTEM, *supra* note 191, at 8−9.

204. 2021 OVERVIEW OF THE FEDERAL TAX SYSTEM, *supra* note 191, at 25−27.

205. *Id.* at 25. Portions of the total tax are allocated by law to the Social Security Old-Age and Survivors and Disability Insurance trust fund (OASDI) and the Medicare Hospital Insurance (HI) trust fund. *Id.*

Medicare Hospital Insurance (HI) portion, employers and employees each pay an additional 1.45% on all wages for a combined 2.9%.[206] Self-employed workers are required to remit the equivalent 15.3% of payroll taxes for Social Security and Medicare taxes on their self-employment earnings of $400 and above pursuant to the Self-Employment Contributions Act (SECA).[207] Workers (but not employers) are liable for an additional 0.9% Medicare tax for wages, compensation, or self-employment income in excess of certain threshold amounts (for example, $200,000 for single filers and $250,000 for married filers).[208]

Workers performing services outside of traditional employment relationships (for example, independent contractors and many occasional workers) are typically treated as self-employed for federal tax purposes.[209] Accordingly, the businesses that hire self-employed workers are generally not required to withhold or pay any payroll taxes on those workers; instead, the self-employed workers, themselves, are responsible for remitting the full amount of their self-employment taxes.[210]

Traditional employers (but not self-employed workers) are also subject to a 6% unemployment insurance payroll tax on the first $7,000 in wages paid to each covered employee.[211]

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206. *Id.*; I.R.C. § 1401. *See generally Fact Sheet 2021 Social Security Changes*, SOC. SEC. ADMIN. [hereinafter 2021 *SSA Fact Sheet*], https://www.ssa.gov/news/press/factsheets/colafacts2021.pdf [https://perma.cc/VW3H-G6E6].

207. 2021 OVERVIEW OF THE FEDERAL TAX SYSTEM, *supra* note 191, at 25, 39 tbl.A-5; Self-Employment Contributions Act (SECA) of 1954, Pub. L. No. 83-591, 68A Stat. 3, 353–55 (codified as amended at I.R.C. §§ 1401-1403) (enacted within the Internal Revenue Code of 1954). Although self-employed taxpayers pay the total 15.3% rate for Social Security and Medicare taxes, they are allowed to deduct the employer-equivalent portion of self-employment tax for income tax purposes. *Self-Employment Tax (Social Security and Medicare Taxes)*, IRS, https://www.irs.gov/businesses/small-businesses-self-employed/self-employment-tax-social-security-and-medicare-taxes#1 [https://perma.cc/QB6X-UG5D] (June 26, 2021).

208. 2021 *SSA Fact Sheet*, *supra* note 206.

209. *See, e.g.*, 2020 TAXPAYER COMPLIANCE, *supra* note 6, at 14; Bruckner & Hungerford, *supra* note 9, at 60; Collins et al., *supra* note 6; EXPANSION WARRANTS FOCUS ON COMPLIANCE, *supra* note 190; Kathleen DeLaney Thomas, *Taxing the Gig Economy*, 166 U. PA. L. REV. 1415, 1417 (2018).

210. *See, e.g.*, 2021 OVERVIEW OF THE FEDERAL TAX SYSTEM, *supra* note 191, at 25−27.

211. Federal Unemployment Tax Act, I.R.C. §§ 3301-3311; 2021 OVERVIEW OF THE FEDERAL TAX SYSTEM, *supra* note 191, at 25; U.S. HOUSE OF REPRESENTATIVES, COMM. ON WAYS & MEANS, 116TH CONG., GREEN BOOK: BACKGROUND MATERIAL AND DATA ON PROGRAMS WITHIN THE JURISDICTION

C. Tax Payment and Reporting Rules

1. Employees

Employers that pay wages or compensation to workers classified as employees are generally required to report those wages to the IRS for federal income and payroll tax purposes, to withhold income and payroll taxes from those wages, and to deposit those withheld funds with the federal government.[212] Employers report these withheld amounts on an IRS Form W-2 and provide each employee with a copy of their IRS Form W-2 at the beginning of the subsequent income-tax-return filing season.[213] Employees are required to attach their copy of the IRS Form W-2 to their annual income tax returns.[214]

When calculating federal income tax liability, employees (but not independent contractors) are allowed to exclude a variety of employer-provided fringe benefits from gross income—such as employer-provided health care benefits, child care benefits, and free parking; also, employees can participate in employer-provided retirement plans and exclude contributions to those plans from their income.[215] On the other hand, although taxpayers are generally allowed to claim a deduction for their ordinary and necessary business expenses, employees can no longer deduct their unreimbursed employee business expenses.[216]

OF THE COMMITTEE ON WAYS AND MEANS ch. 4 (2018) [hereinafter HOUSE COMMITTEE ON WAYS AND MEANS GREEN BOOK], https://greenbook-waysandmeans.house.gov/2018-green-book [https://perma.cc/466T-TEMK].

212. *Independent Contractor (Self-Employed) or Employee?*, IRS, https://www.irs.gov/businesses/small-businesses-self-employed/independent-contractor-self-employed-or-employee [https://perma.cc/73MP-DXW2] (July 2, 2021).

213. *About Form W-2*, *supra* note 43.

214. *Id.* Employees can use a 2021 Form W-4: Employee's Withholding Certificate to adjust the amount of federal income taxes (but not Social Security taxes) that are withheld from their pay. IRS, U.S. DEP'T OF THE TREASURY, FORM W-4 (REV. DEC. 2020), EMPLOYEE'S WITHHOLDING CERTIFICATE (2021), https://www.irs.gov/pub/irs-pdf/fw4.pdf [https://perma.cc/KT6F-2AF4].

215. *See, e.g.*, I.R.C. §§ 106, 129, 132, 402. A special rule allows insurance companies to treat their full-time life insurance salespersons as "employees" who can participate in company health and pension plans, even though those salespersons are otherwise treated as independent contractors. I.R.C. § 7701(a)(20).

216. I.R.C. §§ 162(a), 62(a). The Tax Cuts and Jobs Act of 2017 suspended the deduction for miscellaneous itemized deductions (including the deduction for unreimbursed employee business

2. *Self-employed Workers*

Businesses that hire independent contractors are not required to withhold and remit income and payroll taxes for those workers.[217] Instead, those workers are self-employed for federal tax purposes, and the workers themselves are responsible for calculating and remitting their own income and self-employment tax amounts.[218] Consequently, businesses often have a financial incentive to misclassify employees as independent contractors.[219] For example, Table 5 shows that businesses can save thousands of dollars in taxes when they misclassify workers as independent contractors.[220]

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expenses) during the period from 2018 through 2025. Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, § 11045(a), 131 Stat. 2054, 2088 (codified at I.R.C. § 67(g)).

217. *See, e.g.*, IRS, U.S. DEP'T OF THE TREASURY, PUB. NO. 334, TAX GUIDE FOR SMALL BUSINESS 2–3 (Mar. 18, 2021) [hereinafter SMALL BUSINESS TAX GUIDE], https://www.irs.gov/pub/irs-pdf/p334.pdf [https://perma.cc/7VTB-ZNDD].

218. *Id.*

219. *See* TREASURY INSPECTOR GEN. FOR TAX ADMIN., U.S. DEP'T OF THE TREASURY, REFERENCE NO. 2013-30-058, EMPLOYERS DO NOT ALWAYS FOLLOW INTERNAL REVENUE SERVICE WORKER DETERMINATION RULINGS 2, 3 fig.1 (2013) [hereinafter 2013 EMPLOYERS DO NOT ALWAYS FOLLOW IRS], https://www.treasury.gov/tigta/auditreports/2013reports/201330058fr.pdf [https://perma.cc/9YY9-3P72].

220. Table 5 follows 2013 EMPLOYERS DO NOT ALWAYS FOLLOW IRS, *supra* note 219, at 3 fig.1. $4,245 = $3,100 + $725 + $420; $3,100 = 6.2% × $50,000; $725 = 1.45% × $50,000; $420 = 6% × $7,000. The comparison in Table 5 is probably not quite fair. If a business is willing to spend $54,450 for an employee's services ($50,000 in wages plus $4,245 in employer taxes), then in an economically competitive market, the business should be willing to pay $54,245 for those same services if they are instead provided by an independent contractor. To be sure, workers, in general, and independent contractors, in particular, are often in uncompetitive labor markets and do not have much bargaining power. *See, e.g.*, Justin Azar, *Portable Benefits in the Gig Economy: Understanding the Nuances of the Gig Economy*, 27 GEO. J. ON POVERTY L. & POL'Y 409, 413 (2020); Lawrence Mishel & Celine McNicholas, *Uber Drivers Are Not Entrepreneurs: NLRB General Counsel Ignores the Realities of Driving for Uber*, ECON. POL'Y INST. (Sept. 20, 2019), https://www.epi.org/files/pdf/176202.pdf [https://perma.cc/9CTS-K59U]; HANNAH JOHNSTON & CHRIS LAND-KAZLAUSKAS, INT'L LABOUR OFF., ORGANIZING ON-DEMAND: REPRESENTATION, VOICE, AND COLLECTIVE BARGAINING IN THE GIG ECONOMY (2018), https://ilo.userservices.exlibrisgroup.com/discovery/delivery/41ILO_INST:41ILO_V2/1251469990002676?lang=en&viewerServiceCode=AlmaViewer [https://perma.cc/ZWX9-DTZC]. Accordingly, the Authors believe that, at best, most independent contractors can share in only a small portion of the service-recipient business's employment tax savings.

Table 5. Employment Taxes Employers Pay if the Worker is Misclassified as an Independent Contractor, Calendar Year 2020
(Analysis based on a worker with $50,000 of income)[221]

Tax	Employer's Portion of Tax if Worker Is Properly Classified as an Employee	Employer's Portion of Tax if Worker Is Misclassified as an Independent Contractor	Dollar Advantage per Worker for Employers to Misclassify Employees as Independent Contractors
Social Security	$3,100	$0	$3,100
Medicare	$725	$0	$725
Federal Unemployment	$420	$0	$420
Total	$4,245	$0	$4,245

Self-employed workers with compensation for services income typically use an IRS Form 1040 Schedule C to report their self-employment income and their income tax.[222] Self-employed workers also pay the 15.3% self-employment tax on an IRS Form 1040 Schedule SE.[223] Importantly, if a taxpayer has self-employment earnings and will owe at least $1,000 in income tax or self-employment tax on amounts not subject to withholding, the taxpayer is required to make advance quarterly estimated tax payments (on April 15, June 15, September 15, and January 15), and failure to make those payments can result in penalties.[224]

Self-employed workers are generally allowed to deduct their ordinary and necessary business expenses, and self-employed workers

221. Table 5 follows 2013 EMPLOYERS DO NOT ALWAYS FOLLOW IRS, *supra* note 219, at 3 fig.1.

222. *See generally 2020 Instructions for Schedule C*, IRS (Jan. 13, 2021), https://www.irs.gov/pub/irs-pdf/i1040sc.pdf [https://perma.cc/M6AA-XME8].

223. *See, e.g.*, SMALL BUSINESS TAX GUIDE, *supra* note 217, at 9, 10 tbl.1-2.

224. *Id.* at 8, 10 tbl.1-2; I.R.C. § 6654; *2021 Form 1040-ES: Estimated Tax for Individuals*, IRS, https://www.irs.gov/pub/irs-pdf/f1040es.pdf [https://perma.cc/6T8K-ENRP]; Bruckner & Hungerford, *supra* note 9, at 62; *2018 Bruckner Testimony*, *supra* note 74, at 30; BRUCKNER, *supra* note 2, at 10; Shu-Yi Oei & Diane M. Ring, *Tax Issues in the Sharing Economy: Implications for Workers*, *in* THE CAMBRIDGE HANDBOOK OF THE LAW OF THE SHARING ECONOMY 343, 351–52 (Nestor M. Davidson, Michèle Finck & John J. Infranca eds., 2019).

are also permitted to deduct their health insurance premiums.[225] In addition to deducting their business expenses, self-employed workers—but not employees—may be eligible to claim the I.R.C. § 199A qualified business income deduction of up to 20% of their qualified business income from domestic sources.[226] In effect, the qualified business income deduction reduces the effective income tax rate applicable to qualifying self-employed workers.[227] In that regard, some analysts have expressed concern that the I.R.C. § 199A deduction might lead some individual employees to give up their employee status to be able to claim the 20% deduction.[228]

225. I.R.C. § 162(a), (l). Of course, they must be engaged in the activity for profit, rather than as a hobby to deduct expenses in excess of any income generated. I.R.C. § 183(a); Annette Nellen, Caroline Bruckner & Jennifer Brown, *Taxes and the Growing Gig Workforce: What to Know*, J. TAX'N, June 2018, at 6, 12. Among other things, an activity may be treated as a hobby—rather than a business—if a worker fails to (1) keep separate business records; (2) have knowledge about the nature of the business, relevant laws, and competition; (3) develop a business plan; and (4) regularly engage in the activity. Treas. Reg. § 1.183-2 (2020). If the activity is a hobby, a taxpayer may owe income tax, but not self-employment tax. Nellen et al., *supra*, at 11–12.

226. I.R.C. § 199A (added by the Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, § 11011, 131 Stat. 2054, 2063–71). Congress created this 20% qualified business income deduction for self-employed workers and partners who could not take advantage of the then-reduced 21% corporate tax rate. Caroline Bruckner, *Doubling Down on a Billion Dollar Blind Spot: Women Business Owners and Tax Reform*, 9 AM. U. BUS. L. REV. 1, 21–28 (2020).

227. For example, a qualifying taxpayer facing the top marginal income tax of 37% in 2021, would instead face an effective tax rate of just 29.6% (29.6% = 37% × 80%). To be sure, there are a number of complicated limitations on the availability of the 199A deduction. *See generally* Bruckner & Nellen, *supra* note 190; Shu-Yi Oei & Diane M. Ring, *Tax Law's Workplace Shift*, 100 B.U. L. REV. 651, 658–63, 690–94 (2020). For example, certain income limitations apply to limit and eliminate the deduction altogether for taxpayers with certain types of income from services and with adjusted gross income more than certain amounts. Nellen et al., *supra* note 225, at 13. For example, in 2021, the income thresholds are $329,800 for married couples and $164,925 for single taxpayers. Rev. Proc. 2020-45, 2020-46 I.R.B. 1016, *superseded by* Rev. Proc. 2021-23, 2021-19 I.R.B. 1153. As a result, the deduction is generally not available to high-income doctors, lawyers, accountants, actuaries, and brokers (I.R.C. § 199A(d)); but given the comparatively low earnings generated by gig workers selling services, most gig workers selling services are likely eligible for the 199A deduction. *See* Oei & Ring, *supra*, at 661.

228. *See, e.g.*, David Kamin, David Gamage, Ari Glogower, Rebecca Kysar, Darien Shanske, Reuven Avi-Yonah, Lily Batchelder, J. Clifton Fleming et al., *The Games They Will Play: Tax Games, Roadblocks, and Glitches Under the 2017 Tax Legislation*, 103 MINN. L. REV. 1439, 1463–64 (2018); Russell A. Hollrah & Patrick A. Hollrah, *New Passthrough Deduction Creates Tax Benefit for Self-Employed*, 158 TAX NOTES 1051 (Feb. 19, 2018); Oei & Ring, *supra* note 227, at 654–57.
Indeed, that switch may already be happening, as recent IRS data shows that more taxpayers claimed the 199A deduction than the IRS originally expected; 18.7 million taxpayers claimed the deduction on their 2018 individual income tax returns when the IRS originally only expected around 10 million taxpayers would claim the deduction. Martin Sullivan, *Economic Analysis: 19 Million Taxpayers Tax the Pass-Through Deduction*, 168 TAX NOTES FED. 1949, 1949 (Sept. 14, 2020); 2018 TAX REPORT, *supra*

The federal tax rules for self-employed gig workers present some unique challenges for ensuring tax compliance. For example, problems result from the complexity and administration of the current IRS information reporting rules because these rules depend on how a payor pays a gig worker for services or goods.[229] Businesses that make payments to independent contractors of $600 or more for services (per year) that constitute non-employee compensation are generally required to report those payments to the IRS and to those workers on the recently-created IRS Form 1099-NEC (Nonemployee Compensation).[230] Before 2020 (and by mistake thereafter), payments for $600 or more in nonemployee compensation were reported on an IRS Form 1099-MISC.[231] For self-employed workers, that $600 amount is often referred to as the IRS Form 1099-NEC (previously 1099-MISC) threshold.[232] If a customer is not a business and makes a personal payment to a gig worker directly for services (for example, when a homeowner pays a lawn care service or a roofer), the customer is generally not required to report the payment or send an IRS Form 1099 to the payee or the IRS.[233]

A different IRS Form 1099 is required when an online platform (for example, Uber, Lyft, eBay, Airbnb) facilitates and processes electronic payments for transactions between customers and service providers or sellers.[234] In those instances, the IRS treats the online platform as a

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note 46, at 127 tbl.1.5; Internal Revenue Service, Qualified Business Income Deduction, 84 Fed. Reg. 2952 (Feb. 8, 2019) (codified at Treas. Reg. pt. 1), https://www.govinfo.gov/content/pkg/FR-2019-02-08/pdf/2019-01025.pdf [https://perma.cc/DE2G-N8DW]; Nellen et al., *supra* note 225, at 23. Specifically, the tax data shows that taxpayers claimed almost $150 billion in 199A deductions in 2018, with the average deduction being around $8,000. Sullivan, *supra*. Of the 18.7 million taxpayers that claimed the 199A deduction on their 2018 tax returns, 4 million were aged fifty-five through sixty-four, and 4.3 million were over age sixty-five. 2018 TAX REPORT, *supra* note 46, at 127 tbl.1.5.

229. *See generally* Thomas, *supra* note 209 (discussing common tax issues for gig workers).

230. IRS, U.S. DEP'T OF THE TREASURY, FORM 1099-NEC, NONEMPLOYEE COMPENSATION (2020), https://www.irs.gov/pub/irs-prior/f1099nec—2020.pdf [https://perma.cc/3UBK-JHWR]; *2020 Instructions for 1099-MISC and 1099-NEC*, IRS, https://www.irs.gov/pub/irs-pdf/i1099msc.pdf [https://perma.cc/W8KG-VDKX].

231. Yesenia Cardona, *Big Changes to 1099 Forms in 2020: Are You Prepared?*, EISNERAMPER LLP (Dec. 3, 2020), https://www.eisneramper.com/1099-forms-changes-1220/ [https://perma.cc/3RNR-599R].

232. *See, e.g.*, EXPANSION WARRANTS FOCUS ON COMPLIANCE, *supra* note 190, at 31.

233. 2020 TAXPAYER COMPLIANCE, *supra* note 6, at 8 fig.2.

234. *See Understanding Your Form 1099-K*, IRS, https://www.irs.gov/businesses/understanding-your-form-1099-k [https://perma.cc/P4JT-BGGM].

third-party settlement organization (TPSO) and requires the payor to report the payments on an IRS Form 1099-K.[235] To reduce unnecessary and duplicative filings for companies that facilitate online sales (for example, eBay) or process electronic payments (for example, PayPal), the Treasury and IRS issued regulations and guidance that, through 2021, did not require most online platforms to provide an IRS Form 1099-K *until* the seller or service provider had at least 200 transactions that total $20,000 each year ("the 200/$20K IRS Form 1099-K threshold").[236] Consequently, online gig workers who earn less than $20,000 or have fewer than 200 transactions in a calendar year prior to 2021 typically do not receive either an IRS Form 1099-NEC (or 1099-MISC) or an IRS Form 1099-K from the online platforms that they use to connect with their customers.[237]

235. I.R.C. § 6050W; Bruckner & Nellen, *supra* note 190, at 486.

236. Collins et al., *supra* note 6, at 7. Pertinent here, the Department of Treasury and IRS concluded that the 200/$20K IRS Form 1099-K threshold (and not the $600 IRS Form 1099-NEC or previous 1099-MISC threshold) was exclusively required for electronic payments processed by online platforms that are TPSOs. EXPANSION WARRANTS FOCUS ON COMPLIANCE, *supra* note 190, at 3–4; U.S. 2020 TAXPAYER COMPLIANCE, *supra* note 6, at 10, 23; *2018 Bruckner Testimony*, *supra* note 74, at 6, 29.

237. Bruckner & Hungerford, *supra* note 9, at 63; Nellen et al., *supra* note 190, at 486. Because the vast majority of online gig workers have had annual earnings below $20,000 and few have engaged in more than 200 transactions a year, recent tax compliance research has consistently found that those workers have not received IRS Form 1099-Ks. *See, e.g.*, 2020 TAXPAYER COMPLIANCE, *supra* note 6, at 14; EXPANSION WARRANTS FOCUS ON COMPLIANCE, *supra* note 190, at 32; *2018 Bruckner Testimony*, *supra* note 74, at 6. Consequently, the income that those online workers have earned has not been as "visible" to the IRS and has regularly been misreported—if reported at all. Collins et al., *supra* note 6, at 19; *see also* TREASURY INSPECTOR GEN. FOR TAX ADMIN., U.S. DEP'T OF THE TREASURY, REFERENCE NO. 2018-30-077, IMPROVEMENTS TO THE SS-8 PROGRAM ARE NEEDED TO HELP WORKERS AND IMPROVE EMPLOYMENT TAX COMPLIANCE 3 (2018), https://www.treasury.gov/tigta/auditreports/2018reports/201830077fr.pdf [https://perma.cc/3NZ3-9BQX]. Also, a study done by the California State Franchise Tax Board found that of the top 100 online platforms in 2016, only 12% issued IRS Form 1099-Ks to their online gig workers, and of the 12% that did send forms, only half sent more than fifty-five forms. ROSITA MINDERMANN & ALEXANDER ESCOBAR, STATE OF CAL. FRANCHISE TAX BD., GIG ECONOMY MANAGEMENT DEVELOPMENT PROGRAM PROJECT 6 (Sept. 21, 2018), https://www.ftb.ca.gov/about-ftb/meetings/board-meetings/2018/september-21/09.2018-gig-economy.pdf [https://perma.cc/S34X-NGK9]. That study also found that the companies issuing IRS Form 1099-Ks had grown in volume by 163% but that the number of gig workers receiving IRS Form 1099-Ks had increased by only 26%. *Id.* at 8. Also, in an interesting natural experiment estimating the behavioral responses to the introduction of IRS Form 1099-K, Adhikari and others compared the income tax returns of sole-proprietor taxicab drivers in cities that passed ordinances mandating that taxicabs have credit card readers in their vehicles with the tax returns of those in cities that did not. *See* Bibek Adhikari, James Alm, Brett Collins, Michael Sebastiani & Eleanor Wilking, *Taxpayer Responses to Third-Party Income Reporting: Preliminary Evidence from a Natural Experiment in the Taxicab Industry*, *in* PAPERS GIVEN AT THE 6TH ANNUAL JOINT RESEARCH CONFERENCE ON TAX

Of great importance, however, starting in 2022, most online gig workers *will* get IRS Form 1099s from TPSOs if they receive at least $600 because the American Rescue Plan Act of 2021 changed the information-reporting rules for taxable years beginning after December 31, 2021.[238] The resulting increase in third-party information reporting is expected to raise $8.4 billion over the ten-year budget window.[239]

3. Sellers and Renters of Property

Some sellers and renters of property are also engaged in a service business for profit and must report their earnings as self-employed workers (using IRS Form 1040 Schedules C and SE).[240] For example, someone who regularly sews masks and sells them on Etsy should

ADMINISTRATION CO-SPONSORED BY THE IRS AND THE URBAN-BROOKINGS TAX POLICY CENTER 3 (Alan Plumley ed., 2016), https://www.irs.gov/pub/irs-soi/16rescon.pdf [https://perma.cc/V3UD-YHRF]. The authors found that drivers receiving IRS Form 1099-Ks did report more receipts, but interestingly, they also claimed more expenses, leading the authors to conclude that the increased information reporting led the taxpayers to respond to the increased information reporting in offsetting ways. *Id.* at 8.

238. American Rescue Act Plan of 2021, Pub. L. No. 117-2, § 9674(a), 135 Stat. 4, 185 (codified as amended at I.R.C. § 6050W(e)); I.R.C. § 6050W(e); JOINT COMM. ON TAX'N, TECHNICAL EXPLANATION OF THE MODIFICATION OF EXCEPTIONS OF REPORTING THIRD PARTY NETWORK TRANSACTIONS IN NEW SECTION 9674 OF SUBTITLE IX OF THE AMERICA RESCUE PLAN ACT OF 2021, AS AMENDED BY THE PROPOSED MANAGER'S AMENDMENT 5 (2021), https://www.jct.gov/CMSPages/GetFile.aspx?guid=eab44c28-3eef-4ef1-817d-1b9ee889f6c8 [https://perma.cc/D342-3HYU]; *see also* Lee A. Sheppard, *Uber Driver Tax Reporting*, 170 TAX NOTES FED. 1811, 1815 (Mar. 22, 2021). The relatively short history of the IRS Form 1099-K reporting rules suggests that when Congress established the reporting thresholds for electronic transactions processed by third-party settlement organizations in 2008, its intention was to reduce unnecessary filings for companies that facilitated online sales (for example, eBay) or processed electronic payments (for example, PayPal). 2020 TAXPAYER COMPLIANCE, *supra* note 6, at 23, 25 fig.6. Accordingly, when the IRS issued guidance implementing the new reporting requirements, it focused on eliminating duplicative reporting and so created a "tie-breaker rule" that resulted in newer online platforms (like Uber and Airbnb) exclusively using the Form 1099-K to report payments for services and rents but only when the $20,000/200 transaction threshold was met. *See id.* The Government Accountability Office recommended toughening the reporting rules; however, the IRS indicated that amending those rules was not a priority. *Id.* at 24−26, 46−47. In any event, Congress has now increased TPSO information reporting, starting in 2022. I.R.C. § 6050W(e).

239. JOINT COMM. ON TAX'N, JCX-14-21, ESTIMATED REVENUE EFFECTS OF H.R. 1319, THE "AMERICAN RESCUE PLAN ACT OF 2021," AS AMENDED BY THE SENATE, SCHEDULED FOR CONSIDERATION BY THE HOUSE OF REPRESENTATIVES 2 (2021), https://www.jct.gov/CMSPages/GetFile.aspx?guid=52961732-5521-49ea-8443-59a539b71b62 [https://perma.cc/6FVH-LEDL].

240. *Self-Employed Individuals Tax Center*, IRS (May 28, 2021), https://www.irs.gov/businesses/small-businesses-self-employed/self-employed-individuals-tax-center [https://perma.cc/2TLQ-8EKH].

Georgia State University Law Review, Vol. 38, Iss. 2 [2022], Art. 8

report the sales of her inventory (less cost-of-goods sold) as ordinary income (not capital gains), and she could deduct her ordinary and necessary business expenses, perhaps even the costs attributable to using a portion of her home as a home office.[241]

Similarly, if a property owner runs a bed and breakfast and provides meals to guests, or lists a rental property with an online platform and coordinates experiences, meals, and other services for guests, then both income and self-employment taxes should be imposed on her income; that is, her income is active self-employment income, not merely passive investment income.[242] Whether the self-employment tax applies to landlords that provide fewer services (for example, not providing meals) is less clear. Certainly, running a motel is an active trade or business, but it is less clear whether an Airbnb host who lists, rents, and cleans a room or two is "self-employed" for self-employment tax purposes.[243] In any event, online platforms like Airbnb and VRBO are TPSOs for federal tax information reporting purposes, and, at least so far, those platforms have relied on that 200/$20K IRS Form 1099-K threshold in determining when to furnish the IRS and their hosts with IRS Form 1099-Ks.[244]

On the other hand, occasional renters of property usually must report their rental income for income tax purposes, but they are usually

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241. I.R.C. §§ 61(a)(2), 162, 280A, 1221.

242. I.R.C. §§ 61(a)(5), 167, 212. In general, a taxpayer's gross income includes rental income, and rental expenses are deductible. *See generally* IRS, U.S. DEP'T OF THE TREASURY, SCHEDULE E (FORM 1040), SUPPLEMENTAL INCOME AND LOSS (2021), https://www.irs.gov/pub/irs-pdf/f1040se.pdf [https://perma.cc/3X9B-NY69].

243. Pertinent here, a recent Airbnb survey found that almost 40% of its American hosts do not hire people to help the hosts maintain their listings (such as house cleaners or small property managers) and that 96% of hosts make recommendations to guests on nearby tourist attractions, restaurants, and clubs. Memorandum from Airbnb to U.S. Travel & Tourism Policymakers, *supra* note 123.

244. *See, e.g.*, *Should I Expect to Receive a Tax Form from Airbnb?*, AIRBNB, https://www.airbnb.com/help/article/414/should-i-expect-to-receive-a-tax-form-from-airbnb [https://perma.cc/YEX7-7EBP]. *See generally* Michael J. Bologna, *Airbnb Targeted by States Suspecting Tax Collection Shortfalls*, BLOOMBERG TAX: DAILY TAX REP. (Mar. 24, 2020, 4:46 AM), https://news.bloombergtax.com/daily-tax-report-state/airbnb-targeted-by-states-suspecting-tax-collection-shortfalls [https://perma.cc/CKX8-29RH]. Of note, many states and municipalities have negotiated with online platforms for the collection and remittance of state and local hotel and occupancy taxes. Rob Stephens, *What to Know About Occupancy Taxes and Short-Term Rentals*, ACCOUNTINGWEB (June 7, 2019), https://www.accountingweb.com/tax/sales-tax/what-to-know-about-occupancy-taxes-and-short-term-rentals [https://perma.cc/8PB3-QLN8].

not considered self-employed.[245] For example, a woman who rents out the other half of the duplex that she owns should report the rental income and can deduct the related investment expenses, interest, and depreciation on her federal income tax return, but she typically would not have to report any self-employment income for self-employment tax purposes.[246]

D. Tax Compliance and Gig Workers

The extensive literature on tax compliance shows that employees report and pay taxes on virtually all of their wages, but self-employed taxpayers "consistently and substantially" underreport their income for tax purposes.[247] Because so many gig workers are self-employed, it is clear that many are not reporting all of their self-employment earnings, let alone making their required self-employment tax contributions.[248]

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245. Complex rules govern the rentals of personal residences (e.g., personal homes and vacation homes). *See, e.g.*, I.R.C. §§ 61, 262, 280A; IRS, U.S. DEP'T OF THE TREASURY, PUB. NO. 527, RESIDENTIAL RENTAL PROPERTY (INCLUDING RENTAL OF VACATION HOMES) 17–19 (2021) [hereinafter RESIDENTIAL REAL PROPERTY], https://www.irs.gov/pub/irs-pdf/p527.pdf [https://perma.cc/NNW7-XNJ4]; Oei & Ring, *supra* note 224, at 348−49. For example, if a taxpayer rents her property for less than fifteen days a year, she does not have to report the rental income nor can she deduct her rental expenses on her tax return. RESIDENTIAL RENTAL PROPERTY, *supra*, at 17; I.R.C. § 280A(d).

246. *See* RESIDENTIAL RENTAL PROPERTY, *supra* note 245.

247. Erik Hurst, Geng Li & Benjamin Pugsley, *Are Household Surveys Like Tax Forms? Evidence from Income Underreporting of the Self-Employed* 2 (Nat'l Bureau of Econ. Rsch., Working Paper No. 16527, 2010), https://www.nber.org/system/files/working_papers/w16527/w16527.pdf [https://perma.cc/VWK8-GPSQ]; *see also* IRS, U.S. DEP'T OF THE TREASURY, PUB. NO. 1415 (REV. 09-2019), FEDERAL TAX COMPLIANCE RESEARCH: TAX GAP ESTIMATES FOR TAX YEARS 2011−2013, at 12 (2019) [hereinafter IRS PUB. NO. 1415], https://www.irs.gov/pub/irs-pdf/p1415.pdf [https://perma.cc/MEJ5-DNH6]; IRS, U.S. DEP'T OF THE TREASURY, PUB. NO. 5364 (REV. 09-2019), TAX GAP ESTIMATES FOR TAX YEARS 2011–2013, at 6 tbl.2 (2019) [hereinafter IRS PUB. NO. 5364], https://www.irs.gov/pub/irs-pdf/p5364.pdf [https://perma.cc/JWQ7-TBFN]; IRS, U.S. DEP'T OF THE TREASURY, TAX GAP ESTIMATES FOR TAX YEARS 2008–2010, at 4 tbl.2 (2016) [hereinafter TAX GAP ESTIMATES FOR TAX YEARS 2008–2010], https://www.irs.gov/pub/newsroom/tax%20gap%20estimates%20for%202008%20through%202010.pdf [https://perma.cc/RSF2-ZKWR]; Jacob A. Mortenson & Andrew Whitten, *Bunching to Maximize Tax Credits: Evidence from Kinks in the US Tax Schedule*, 12 AM. ECON. J. 402, 423 (2020).

248. For example, a 2020 Government Accountability Office report on the tax compliance of online gig workers cited 2016 tax data that found approximately 30% of online gig workers known to the IRS had earnings higher than $5,000 but that most did not receive IRS Form 1099-Ks from the platforms they worked with. 2020 TAXPAYER COMPLIANCE, *supra* note 6, at 14. That absence of information reporting has so far constrained the IRS's ability to verify tax compliance and has also resulted in many online workers being unaware or unmindful that their online platform earnings are taxable. *Id.* In passing, the Authors note that women are generally more prosocial and tax compliant than men. *See, e.g.*, John

To measure how much underreporting exists within the tax administration system, the IRS periodically estimates the size of the so-called "tax gap"—the difference between the amount that is owed to the government by taxpayers and the amount taxpayers actually pay.[249] The most recent estimates available identified a $441 billion gross annual tax gap for the 2011–2013 tax years, which is composed of three components: nonfiling ($39 billion), underreporting ($352 billion), and underpayment ($50 billion).[250] Of that $352 billion underreporting tax gap, individuals failing to report all of their business income attributed to some $110 billion, and individuals failing to correctly report their self-employment taxes attributed to another $45 billion.[251] Overall, underreporting of nonfarm proprietor income attributed to 15% ($68 billion) of the gross tax gap.[252] Of note, in April of 2021, IRS Commissioner Charles Rettig told the House

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D'Attoma, Clara Volintiru & Antoine Malezieux, *Gender, Social Value Orientation, and Tax Compliance* 1 (Ctr. for Econ. Stud., Working Paper No. 7372, 2018), https://cesifo.org/DocDL/cesifo1_wp7372.pdf [https://perma.cc/2YYC-2U5W].

249. *See, e.g.*, IRS PUB. NO. 5364, *supra* note 247.

250. *Id.* at 1, 3. Of course, the tax gap is almost certainly much larger now. According to the IRS's tax gap study for the 2011–2013 tax years, the net compliance rate was 85.8%. *Id.* at 5 tbl.1. That means that noncompliance was 14.2% (14.2% = 100% total true tax liability – 85.8% net compliance rate). Although the Authors have not found a total true tax liability calculated for recent years, historical and projected estimates of federal revenue collections are widely available. For example, according to the Congressional Budget Office, the federal government collected around $2.8 trillion in gross tax collections in fiscal year 2013 and $3.6 trillion in fiscal year 2019, which is a 29% increase in six years (Authors' computations from CONG. BUDGET OFF., SUPPLEMENT TO "AN UPDATE TO THE BUDGET OUTLOOK: 2020 TO 2030", at tbl.1, https://www.cbo.gov/system/files/2020-09/51138-2020-09-revenueprojections.xlsx [https://perma.cc/RWK4-2VJT]). Presumably, the tax gap also grew by around 29% over that period, implying that the gross tax gap grew from around $441 billion for the 2011−2013 tax years to around $569 billion by fiscal year 2019 ($568.89 billion = 1.29 × $441 billion). *See also infra* note 253 and accompanying text (noting that IRS Commissioner Charles Rettig believes that the current annual tax gap may already exceed $1 trillion).

251. IRS PUB. NO. 1415, *supra* note 247, at 8 fig.1.

252. *Id.* at 20 tbl.5; *see also* Kim M. Bloomquist, *The Tax Gap: Holding Steady or Missing in Action?*, 165 TAX NOTES FED. 593, 595 tbl.1 (Oct. 28, 2019); TAX GAP ESTIMATES FOR TAX YEARS 2008–2010, *supra* note 247; U.S. GOV'T ACCOUNTABILITY OFF., GAO-17-371, EMPLOYMENT TAXES: TIMELY USE OF NATIONAL RESEARCH PROGRAM RESULTS WOULD HELP IRS IMPROVE COMPLIANCE AND TAX GAP ESTIMATES 17 (2017), https://www.gao.gov/assets/690/684162.pdf [https://perma.cc/4UQU-WH24]. *See generally* Charles O. Rossotti, *Recover $1.6 Trillion, Modernize Tax Compliance and Assistance*, 166 TAX NOTES FED. 1411 (Mar. 2, 2020); Charles O. Rossotti & Fred L. Forman, *Recover $1.6 Trillion, Modernize Tax Compliance and Assistance: The How-To*, 168 TAX NOTES FED. 1961 (Sept. 14, 2020); *Understanding the Tax Gap and Taxpayer Noncompliance: Hearing Before the H. Comm. on Ways & Means*, 116th Cong. (2019) (statement of J. Russell George, Treasury Inspector General for Tax Administration, U.S. Department of the Treasury), https://www.treasury.gov/tigta/congress/congress_05092019.pdf [https://perma.cc/B7S2-2L29].

Ways and Means Committee that the actual tax gap could already exceed $1 trillion, although the IRS is not expected to release a new formal estimate until 2022.[253]

Figure 1 summarizes the IRS's most recent tax gap estimates, which is expressed as the percent of income that is misreported (net income misreporting percentage).[254] Figure 1 shows that wage earners getting IRS Form W-2s (and other taxpayers who face both withholding and information reporting) report 99% of their income and only fail to report 1%.[255] On the other hand, self-employed workers who do not receive IRS Form 1099s (and other taxpayers subject to little or no information reporting) fail to report 55% of their income.[256] In short, tax compliance is high (99%) when amounts are subject to information reporting and withholding; however, when there is no information reporting or withholding, tax compliance falls to 45% (or less).[257] Indeed, noncompliance is greatest among self-employed workers "for which third-party information reporting is not separately reported to the IRS and is very difficult to obtain."[258] In other words, when income is "visible" to the IRS through information reporting or withholding, taxpayers are far more likely to properly report their income and pay taxes owed.[259]

253. William Hoffman, *IRS Seeks Congress's Aid to Tackle Possible $1 Trillion Tax Gap*, 171 TAX NOTES FED. 484, 484 (Apr. 19, 2021).

254. IRS PUB. NO. 5364, *supra* note 247, at 7 attach. 3; IRS PUB. NO. 1415, *supra* note 247, at 14 fig.3, 20 tbl.5.

255. *See infra* Figure 1.

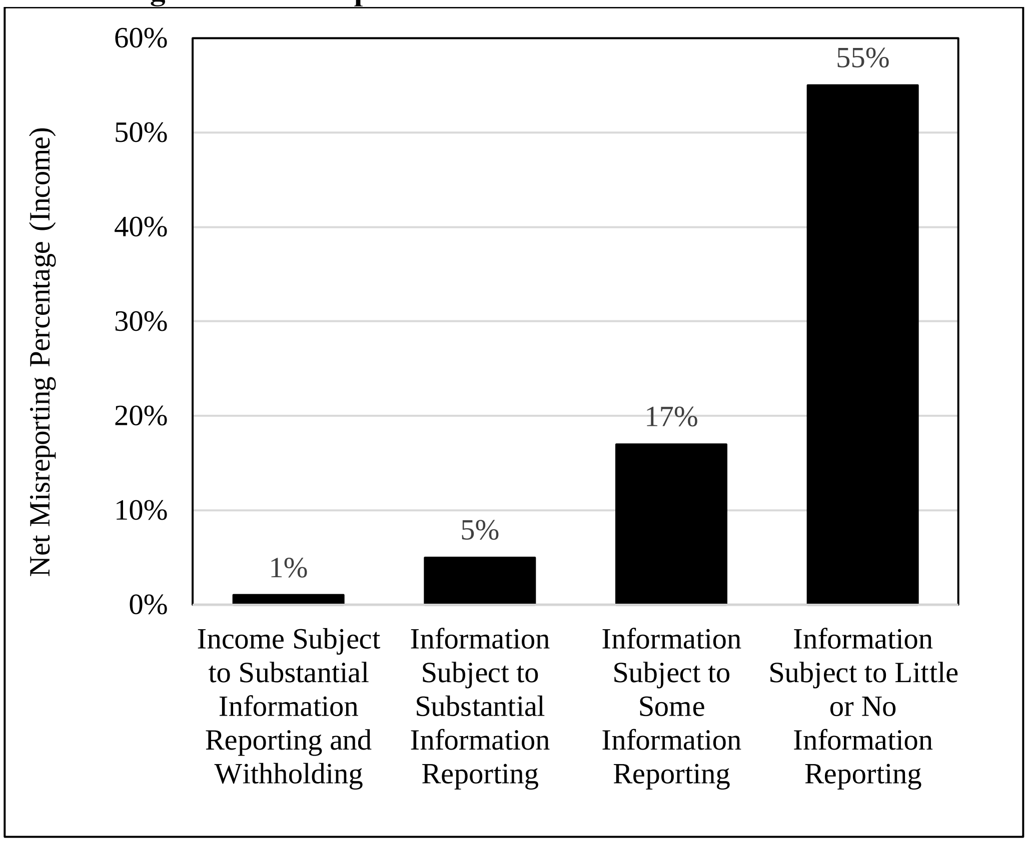
256. *See infra* Figure 1.

257. EXPANSION WARRANTS FOCUS ON COMPLIANCE, *supra* note 190, at 3; *see also* Bibek Adhikari, James Alm & Timothy F. Harris, *Information Reporting and Tax Compliance*, 110 AM. ECON. ASS'N PAPERS & PROC. 162 (May 2020), https://pubs.aeaweb.org/doi/pdfplus/10.1257/pandp.20201041 [https://perma.cc/4CGJ-RC7R].

258. Janet Holtzblatt & Jamie McGuire, *Factors Affecting Revenue Estimates of Tax Compliance Proposals* 2 (Cong. Budget Off. & Joint Comm. on Tax'n, CBO Working Paper 2016-05, JCX-90-16, 2016), https://www.cbo.gov/sites/default/files/114th-congress-2015-2016/workingpaper/52199-wp-taxcompliance.pdf [https://perma.cc/8782-MCN4]; *see also* Manoj Viswanathan, *Tax Compliance in a Decentralizing Economy*, 34 GA. ST. U. L. REV. 283, 288 (2018) ("[T]he degree to which taxpayers fail to include income on their tax returns, or underreport, is directly related to the extent these income items are subject to information reporting.").

259. IRS PUB. NO. 1415, *supra* note 247, at 3.

Figure 1. Tax Gap Estimates for Tax Years 2011−2013[260]



Fortunately, starting in 2022, most online gig workers will receive IRS 1099 Forms from TPSOs if they earn at least $600 a year in services income.[261] That increased information reporting should help improve compliance for online gig workers; however, even when workers receive IRS 1099 Forms, they do not always properly report their income for self-employment tax purposes. For example, Collins and others found that 8.6% of people who received IRS 1099 Form 1099s for nonemployee compensation for the 2016 tax year (almost two million people) did not file an IRS Form 1040 or pay any payroll

260. IRS PUB. NO. 5364, *supra* note 247, at 7 attach. 3; IRS PUB. NO. 1415, *supra* note 247, at 14 fig.3, 20 tbl.5.

261. *See supra* note 238 and accompanying text.

taxes—up from just 6.1% in 2000.[262] Those authors noted that noncompliance among online labor platform workers who received Form 1099s was "particularly severe" because 43% of those workers did not file an IRS Form 1040 Schedule C or an IRS Form 1040 Schedule SE.[263] Similarly, those authors found that only one-third of online gig workers paid self-employment taxes, while 55% of workers in the broader 1099 workforce paid those taxes.[264]

To be sure, poor tax compliance is not limited to online gig workers that do not receive IRS Form 1099-Ks. For example, Lim and others found that although 85% of independent contractors received an IRS Form 1099-MISC or an IRS Form 1099-K for the 2016 tax year that could be matched to an IRS Form 1040 for that year, the remaining 15% could not.[265] The average age of those workers was forty, and they had average independent-contractor earnings of $14,000 and median earnings of $4,000–$5,000.[266] All in all, the available evidence suggests that a significant percentage of self-employed workers are not

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262. Collins et al., *supra* note 6, at 10.

263. *Id.* at 9. On the other hand, Jackson et al., *supra* note 51, at 19, found that "essentially all gig economy workers that filed a Schedule C also receive a 1099."

264. Collins et al., *supra* note 6, at 21. Similarly, in a 2019 study, the Department of Treasury's Inspector General for Tax Administration issued a report that reviewed approximately 3.8 million IRS Form 1099-Ks received by individuals from one of nine online platforms from 2012 to 2016, and it found that (1) 25% of recipients filed an IRS Form 1040 annual return but did not report their IRS Form 1099-K earnings; and (2) 13% of recipients failed to file an IRS Form 1040 Schedule SE. EXPANSION WARRANTS FOCUS ON COMPLIANCE, *supra* note 209, at 7–8, 7 fig.1. Notably, that report did not consider the millions of online gig workers that did not receive any IRS Form 1099-K because those workers' total earnings and transactions did not trigger the 200/$20K IRS Form 1099-K threshold nor did it review IRS Form 1099-Ks issued to taxpayers with rental income (like Airbnb or VRBO hosts). *Id.*

265. Lim et al., *supra* note 75, at 9. Also, a 2016 survey of online gig workers who were members of the National Association of the Self-Employed found that:

- Only 32% of the online gig workers surveyed received an IRS Form 1099 for their platform earnings;
- 34% did not know whether they were required to make quarterly estimated tax payments with respect to their on-demand platform income;
- 36% did not understand what kind of records they needed for tax purposes for business income and expenses generated from working with a sharing economy partner;
- 43% were unaware as to how much they would owe in taxes and did not set aside money for taxes on their gig income; and
- Almost half did not know about any tax deductions, expenses, or credits related to their on-demand platform income.

BRUCKNER, *supra* note 2, at 10−12.

266. Lim et al., *supra* note 75, at 10.

properly reporting all of their taxable income—even those that are receiving IRS Form 1099s.

Low tax-compliance rates by gig workers will inevitably contribute to a retirement financing gap for them because the underpayment of self-employment taxes will invariably translate into lower Social Security benefits for those under-contributing workers.[267] In that regard, using 2014 SIPP data, Bruckner and Hungerford estimated that offline and online gig workers failed to contribute $2.51 billion in self-employment tax in 2014, which translated to $2.03 billion in underfunded Social Security payments.[268]

An overarching problem for the IRS is that its annual budget has simply not kept up with its ever-increasing responsibilities.[269] In fact, the IRS saw a 20% drop in its budget between 2010 and 2018 (in inflation-adjusted dollars), and it lost 22% of its employees over that time period.[270] Not surprisingly, the IRS audit rate has dropped precipitously: the IRS audited just 0.15% of the 154 million 2018 individual income tax returns it received, compared to auditing 1.01% of the 143.1 million 2010 individual income tax returns that it received.[271] Of note, however, President Joe Biden's Administration

267. *See* Bruckner & Hungerford, *supra* note 9, at 65–69, 72–73, 74 tbl.1. For an explanation about how Social Security benefits are computed, see also *infra* Part III.A.

268. Bruckner & Hungerford, *supra* note 9, at 76, 77 tbl.2. Specifically, Bruckner and Hungerford (2019) recently estimated the amount of underreporting of self-employment tax by populations of independent contractors and on-demand workers. *Id.* Using Survey of Income and Program Participation (SIPP) data and underreporting measures derived from a 2007 U.S. Treasury Inspector General audit of self-employed taxpayers, Bruckner and Hungerford estimated that 44.2% (or 3.1 million out of 7.1 million) of independent contractors captured in the 2014 SIPP data underreported their self-employment income—resulting in approximately $4.84 billion in unpaid self-employment taxes in 2014. *Id.* at 90. Bruckner and Hungerford also used SIPP data to estimate that an additional $2 billion of Social Security tax went unpaid by on-demand gig workers in 2014. *Id.* at 76. Although the Bruckner and Hungerford article (2019) estimates were designed to be illustrative, they represent the first effort to quantify how much self-employment tax revenue is lost when online gig workers that earn income and are not subject to information reporting or withholding fail to make their required self-employment tax contributions.

269. *See, e.g.*, IRS, U.S. DEP'T OF THE TREASURY, PUB. NO. 55-B, INTERNAL REVENUE SERVICE DATA BOOK: 2019, at 71−76 (2020) [hereinafter 2019 IRS DATA BOOK], https://www.irs.gov/pub/irs-prior/p55b—2020.pdf [https://perma.cc/J6MX-4LAT]; CONG. BUDGET OFF., PUB. NO. 56422, TRENDS IN THE INTERNAL REVENUE SERVICE'S FUNDING AND ENFORCEMENT 2 (2020) [hereinafter IRS FUNDING AND ENFORCEMENT TRENDS], https://www.cbo.gov/system/files/2020-07/56422-CBO-IRS-enforcement.pdf [https://perma.cc/SZ5J-FF7F].

270. IRS FUNDING AND ENFORCEMENT TRENDS, *supra* note 269, at 1, 8, 11.

271. 2019 IRS DATA BOOK, *supra* note 269, at 35−44 tbl.17a.

recently proposed a $1.2 billion increase for the IRS's fiscal 2022 budget, including $900 billion more for enforcement.[272]

III. AN OVERVIEW OF THE U.S. RETIREMENT SYSTEM

This part discusses the three main pillars of the current U.S. retirement system: Social Security, employer-sponsored pensions or retirement-savings plans, and individual savings.

A. Social Security

Social Security provides monthly cash benefits to retirees, disabled workers, and their families.[273] Social Security benefits are the most common source of retirement income for households aged sixty-five or older, with almost nine out of ten individuals aged sixty-five and older receiving benefits.[274]

A worker builds Social Security protection by working in employment or self-employment covered by the Social Security system and paying the applicable payroll or self-employment taxes, Social Security currently covers 94% of workers in paid employment or self-employment.[275] Worker and employer Social Security payroll

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272. William Hoffman, *Biden Calls for Big Boost to IRS Compliance Efforts*, 171 TAX NOTES FED. 491, 491 (Apr. 19, 2021).

273. HOUSE COMMITTEE ON WAYS AND MEANS GREEN BOOK, *supra* note 211, at ch. 1.

274. NAT'L ACAD. OF SOC. INS., SOCIAL SECURITY BENEFITS, FINANCES, AND POLICY OPTIONS: A PRIMER 7 (2020), https://www.nasi.org/wp-content/uploads/2020/08/2020-Social-Security-Primer-Final.pdf [https://perma.cc/GW8G-QEBS]; *see also* SOC. SEC. ADMIN., PUB. NO. 13-11871, INCOME OF THE POPULATION 55 OR OLDER, 2014, at 34 tbl.2.A1 (2016), https://www.ssa.gov/policy/docs/statcomps/income_pop55/2014/incpop14.pdf [https://perma.cc/TE9Y-JSXP] (showing that 84.2% of households aged sixty-five and older got Social Security benefits in 2014); SOC. SEC. ADMIN., PUB. NO. 13-11785, FAST FACTS & FIGURES ABOUT SOCIAL SECURITY: 2017, at 6 (2017) [hereinafter SSA FAST FACTS 2017], https://www.ssa.gov/policy/docs/chartbooks/fast_facts/2017/fast_facts17.pdf [https://perma.cc/75EW-33GU] (noting that in 2015, 84% of households aged sixty-five or older received Social Security benefits; however, a word of caution is in order here because the Social Security Administration has since suspended publication of the relevant chart while the agency evaluates the adequacy of the chart's data source. SOC. SEC. ADMIN., PUB. NO. 13-11785, FAST FACTS & FIGURES ABOUT SOCIAL SECURITY, 2020, at 6 (2020) [hereinafter SSA FAST FACTS 2020], https://www.ssa.gov/policy/docs/chartbooks/fast_facts/2020/fast_facts20.pdf [https://perma.cc/X2W2-J2HC])).

275. *2020 Social Security/SSI/Medicare Information*, SOC. SEC. ADMIN.,

and self-employment tax contributions primarily finance Social Security benefits (89%), and the remainder comes from interest on the Treasury bonds held by the Social Security Trust Fund (7.6%) and from taxes on Social Security benefits (3.4%).[276] At retirement, disability, or death, monthly benefits are paid to insured workers and to their eligible dependents and survivors.[277]

1. Social Security Benefits

Workers over the age of sixty-two are generally entitled to Social Security retirement benefits if they have worked in covered employment for at least ten years.[278] Benefits are based on a measure of the worker's earnings history in covered employment, and Social Security benefits typically replace around 35% or 40% of the typical worker's preretirement earnings.[279] The benefit formula is highly

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https://www.ssa.gov/legislation/2020Fact%20Sheet.pdf [https://perma.cc/9K55-NH5X]. Noncovered workers include (1) state and local government employees covered by alternative staff-retirement systems; (2) most permanent civilian federal employees hired before January 1, 1984, who are covered by the Civil Service Retirement System (CSRS) or other alternative retirement plan; (3) employees covered by the Railroad Retirement system; (4) domestic, election, or farm workers with earnings below certain thresholds; (5) people with low levels of net earnings from self-employment; and (6) certain nonimmigrants. ZHE LI, CONG. RSCH. SERV., IF10203, SOCIAL SECURITY: THE WINDFALL ELIMINATION PROVISION (WEP) AND THE GOVERNMENT PENSION OFFSET (GPO) (2021), https://crsreports.congress.gov/product/pdf/IF/IF10203 [https://perma.cc/ZB3E-ZFPS].

276. NAT'L ACAD. OF SOC. INS., *supra* note 274, at 20; BD. OF TRS. OF THE FED. OLD-AGE & SURVIVORS INS. & FED. DISABILITY INS. TR. FUNDS, THE 2020 ANNUAL REPORT OF THE BOARD OF TRUSTEES OF THE FEDERAL OLD-AGE AND SURVIVORS INSURANCE AND FEDERAL DISABILITY INSURANCE TRUST FUNDS 7–8 (2020) [hereinafter OLD-AGE & SURVIVORS INS. & FED. DISABILITY INS. TR. FUNDS], https://www.ssa.gov/OACT/TR/2020/tr2020.pdf [https://perma.cc/T2WZ-9L2U]. At the end of 2019, the Old Age and Survivors and Disability Insurance Trust Funds had $2.897 billion in asset reserves. *Id.* at 7 tbl.II.B1; Letter from Steven C. Goss, Chief Actuary, Off. of the Chief Actuary, Soc. Sec. Admin., to various U.S. Senators who requested analysis of the implications of hypothetical legislation that would eliminate the Social Security payroll taxes (Aug. 24, 2020), https://www.ssa.gov/oact/solvency/VanHollenSandersWydenSchumer_20200824.pdf [https://perma.cc/W6VV-MGCL].

277. HOUSE COMMITTEE ON WAYS AND MEANS GREEN BOOK, *supra* note 211, at ch. 1.

278. 42 U.S.C. §§ 402(a), 414(a)(2).

279. *Social Security Benefit Amounts*, SOC. SEC. ADMIN., http://www.ssa.gov/oact/cola/Benefits.html [https://perma.cc/8S9T-NWA9]; NAT'L ACAD. OF SOC. INS., *supra* note 274, at 6; MICHAEL CLINGMAN, KYLE BURKHALTER & CHRIS CHAPLAIN, OFF. OF THE CHIEF ACTUARY, SOC. SEC. ADMIN. ACTUARIAL NOTE NO. 2020.9, REPLACEMENT RATES FOR HYPOTHETICAL RETIRED WORKERS 1 (2020), https://www.ssa.gov/OACT/NOTES/ran9/an2020-9.pdf [https://perma.cc/3NPT-MY4E].

progressive.[280] As a result, Social Security benefits tend to favor workers with low lifetime earnings relative to workers with higher lifetime earnings.[281]

Although the full retirement age for receiving Social Security retirement benefits was once age sixty-five, it is currently age sixty-six, and it is gradually increasing to age sixty-seven for workers born after 1959 (who reach age sixty-seven in or after 2027).[282] Benefits may be increased or decreased for several reasons. Most importantly, benefits are indexed each year as measured by the consumer price index.[283] Also, the retirement earnings test can reduce the monthly benefits of individuals who have not yet reached full retirement age but who continue to work after starting to draw Social Security retirement benefits.[284] In addition, workers who retire before their full retirement age have their benefits actuarially reduced.[285] On the other hand, benefits payable to workers who choose to retire after their full retirement age are actuarially increased (but only up to age

280. Benefits for retired workers are based on a measure of the worker's earnings history in covered employment known as the average indexed monthly earnings (AIME). *See* SSA FAST FACTS 2020, *supra* note 274, at 2–4. The starting point for determining the worker's AIME is to determine how much the worker earned each year through age sixty. *Id.* Once those benefit-computation years and covered earnings for those years have been identified, the worker's earnings are indexed for wage inflation, using the year the worker turns age sixty to index the earnings of prior years. *Id.* The highest thirty-five years of earnings are then selected, and the other years are dropped out. *Id.* The AIME is then computed as the average earnings for the remaining thirty-five years (420 months). *Id.* The AIME is then linked by a progressive formula to the monthly retirement benefit payable to the worker at full retirement age, a benefit known as the primary insurance amount (PIA). *Id.* at 2. For a worker turning sixty-two in 2020, the PIA equals 90% of the first $960 of the worker's AIME, plus 32% of the AIME over $960 and through $5,785 (if any), plus 15% of the AIME over $5,785 (if any). *Id.*; *Primary Insurance Amount*, SOC. SEC. ADMIN., http://www.ssa.gov/oact/cola/piaformula.html [https://perma.cc/8UHZ-QQK5]. Social Security also has an alternative formula that provides special minimum benefits for certain workers who had low earnings over many years of working. *See, e.g.*, ZHE LI, CONG. RSCH. SERV., R43615, SOCIAL SECURITY MINIMUM BENEFITS (2021), https://fas.org/sgp/crs/misc/R43615.pdf [https://perma.cc/MM3N-DB28].

281. *See, e.g.*, MICHAEL CLINGMAN, KYLE BURKHALTER & CHRIS CHAPLAIN, OFF. OF THE CHIEF ACTUARY, SOC. SEC. ADMIN., ACTUARIAL NOTE NO. 2020.7, MONEY'S WORTH RATIOS UNDER THE OASDI PROGRAM FOR HYPOTHETICAL WORKERS 5 (2021), https://www.ssa.gov/OACT/NOTES/ran7/an2020-7.pdf [https://perma.cc/JH3U-43EY]; CLINGMAN ET AL., *supra* note 279, at 3 tbl.A.

282. *Retirement Benefits: Online Benefits Calculator*, SOC. SEC. ADMIN., https://www.ssa.gov/benefits/retirement/planner/AnypiaApplet.html [https://perma.cc/A9MX-6M8E].

283. *See* 2021 *SSA Fact Sheet*, *supra* note 206.

284. 42 U.S.C. § 403(f).

285. *Id.* § 402(q).

seventy).[286] Since 2000, labor force participation rates among older Americans, and the average age that they claim their Social Security benefits, has risen.[287]

Social Security also provides generous benefits to the spouses, dependents, and survivors of workers and retired workers. For example, a retirement-age wife or husband of a retired worker can claim a monthly benefit equal to 50% of the worker's primary insurance amount (PIA).[288] Consequently, a retired worker and retirement-age spouse can claim a monthly benefit equal to 150% of what the retired worker alone could claim.[289] For example, if a retired worker could claim a benefit equal to $1,000 a month, a retired couple could claim a benefit equal to $1,500 a month. In addition, a retirement-age widow or widower of the worker is entitled to a monthly surviving spouse benefit equal to 100% of the worker's PIA.[290] For example, if a retired worker could claim a benefit of $1,000 a month (and a retired couple benefit of $1,500 a month), the surviving spouse could claim a benefit of $1,000 a month. All in all, married couples tend to get more Social Security benefits than single individuals.[291]

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286. *Id.* § 402(w). In effect, beneficiaries can buy additional annuity protection by delaying retirement. Melissa A. Z. Knoll & Anya Olsen, *Incentivizing Delayed Claiming of Social Security Retirement Benefits Before Reaching the Full Retirement Age*, 74 SOC. SEC. BULL., no. 4, 2014, at 21, 31, https://www.ssa.gov/policy/docs/ssb/v74n4/v74n4p21.pdf [https://perma.cc/8XHF-S9KV]. For example, consider various workers who retire in January 2021 with maximum taxable earnings since age twenty-two. A worker retiring at age sixty-two then would get a starting benefit of $2,324 per month, while a worker retiring at sixty-five then would get $2,841 per month, and a worker retiring at age seventy then would get $3,895 per month. *Workers with Maximum-Taxable Earnings*, SOC. SEC. ADMIN., http://www.ssa.gov/oact/COLA/examplemax.html [https://perma.cc/2ZUC-6Z8U]; *see also Retirement Security and Financial Decision-Making: Research Brief*, OFF. OF FIN. PROT. FOR OLDER AMS., CONSUMER FIN. PROT. BUREAU 9 fig.5 (May 27, 2020), https://files.consumerfinance.gov/f/documents/cfpb_retirement-security-financial-decision-making_research-brief.pdf [https://perma.cc/ZX2C-KD23] (noting that people who retired between 1992 and 2014 and delayed claiming their Social Security benefits were more likely to be able to maintain their preretirement spending levels for at least five years after retiring).

287. Patrick J. Purcell, *Employment at Older Ages and Social-Security Benefit Claiming, 1980−2018*, SOC. SEC. ADMIN. 1 (Apr. 2020), https://www.ssa.gov/policy/docs/rsnotes/rsn2020-01.pdf [https://perma.cc/GW37-5QTD].

288. 42 U.S.C. § 402(b)-(c).

289. *See id.*

290. *Id.* § 402(e)-(f).

291. JONATHAN BARRY FORMAN, MAKING AMERICA WORK 193−94 (2006). These generous spousal

In addition to Social Security benefits, a means-tested Supplemental Security Income (SSI) program provides monthly cash benefits to certain low-income elderly, disabled, or blind Americans.[292] In 2021, the maximum federal benefit for a single individual was $794 per month, and the maximum for a couple was $1,191 per month.[293] Although dedicated payroll taxes largely finance Social Security benefits, general tax revenues finance SSI benefits.[294]

In March 2021, Social Security paid retirement benefits to 46.4 million retired workers with an average monthly benefit of $1,504.25.[295] Another 2.3 million elderly Americans received means-tested SSI benefits from the federal government in March 2021 with an average monthly benefit of $475.86.[296]

2. *The Adequacy of Social Security Benefits*

As already mentioned, Social Security is the most common source of retirement income for households aged sixty-five or older.[297] For example, in 2015, 84% of households aged sixty-five or older received

benefits also result in two additional problems. First, dual-earner couples typically receive less total Social Security benefits than one-earner couples with the same total earnings. *Id.* at 194−95 (with numerical example). Basically, the single-earner in a one-earner couple will get a retired worker benefit based on relatively higher earnings and the nonearning spouse will automatically get a 50% spousal benefit (and a 100% surviving spouse benefit when the retired worker dies). *Id.* Meanwhile, in a dual-earner couple where both spouses share similar total earnings, each would get a smaller retired worker benefit, and the total of their two retired worker benefits would be less than 150% of the one-earner spouse's retired worker benefit. *Id.* Second, because secondary earners in dual-earner couples often earn less and work a shorter time than the primary earners, the secondary earner often receives little or no additional Social Security benefits from their Social Security tax payments. *Id.* at 194−95 (with numerical example). For example, in a dual-earner couple where the secondary earner earns less than about half of what the primary earner makes, the additional Social Security taxes that the secondary earner pays will produce absolutely no more Social Security benefits than if the secondary earner had not worked at all because the secondary earner's spousal benefit will be higher than that spouse's retired worker benefit, and retirees cannot get both benefits. As Bond and others note, Social Security spousal benefits can "work[] against [a] dual-earner couple[]." Bond et al., *supra* note 108, at 17.

292. *See*, *e.g.*, HOUSE COMMITTEE ON WAYS AND MEANS GREEN BOOK, *supra* note 211, at ch. 3.

293. 2021 *SSA Fact Sheet*, *supra* note 206.

294. HOUSE COMMITTEE ON WAYS AND MEANS GREEN BOOK, *supra* note 211, at ch. 3.

295. *Monthly Statistical Snapshot, March 2021*, SOC. SEC. ADMIN. 2 tbl.2 (Apr. 2021), https://www.ssa.gov/policy/docs/quickfacts/stat_snapshot/2021-03.pdf [https://perma.cc/2QX8-5CNZ].

296. *Id.* at 3 tbl.3.

297. *See supra* note 274 and accompanying text; NAT'L ACAD. OF SOC. INS., *supra* note 274.

Social Security benefits.[298] Moreover, in 2014, less than half (43.8%) of households received retirement benefits from sources other than Social Security, and only 61.8% received income from other assets.[299] Of course, low-income households tend to rely more heavily on Social Security than high-income households.[300] Moreover, all households tend to rely more heavily on Social Security (and less on earnings) as they age.[301] Social Security benefits play an especially important role in reducing poverty among the elderly.[302] For example, in 2019, 8.9% of Americans over age sixty-five were poor, but without Social Security, 35.8% would have been poor.[303]

Table 6 shows that 61.1% of Social Security beneficiary households aged sixty-five or older got more than half of their income from Social Security in 2014, and 33.4% got 90% of their income from Social Security.[304] Table 6 also shows that 61.4% of unmarried women aged sixty-five or older got more than half of their income from Social

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298. SSA FAST FACTS 2017, *supra* note 274. In 2015, Social Security provided almost one-third (33%) of the personal income of households aged sixty-five or older. *Id.* at 7. Earnings accounted for another 34% of their income, pensions accounted for another 20%, and asset income accounted for another 9%. *Id.*; *see also* Irena Dushi & Brad Trenkamp, *Improving the Measurement of Retirement Income of the Aged Population* 15 (Off. of Ret. & Disability Pol'y, Soc. Sec. Admin.: Working Paper No. 116, 2021), https://www.ssa.gov/policy/docs/workingpapers/wp116.pdf [https://perma.cc/9MHT-ZGRA]. As people age, however, their earnings decline, and their inflation-adjusted Social Security benefits become an even larger portion of their incomes. *See, e.g.*, Jonathan Barry Forman, *Supporting the Oldest Old: The Role of Social Insurance, Pensions, and Financial Products*, 21 ELDER L.J. 375, 382–84 (2016); OLDER WOMEN FACING FINANCIALLY UNCERTAIN FUTURE, *supra* note 173, at 43–44.

299. SOC. SEC. ADMIN., PUB. NO. 13-11727, INCOME OF THE AGED CHARTBOOK, 2014, at 8 (2016), https://www.ssa.gov/policy/docs/chartbooks/income_aged/2014/iac14.pdf [https://perma.cc/6QMS-6M4F]; *see also* JOINT COMM. ON TAX'N, JCX-20-19, PRESENT LAW AND BACKGROUND RELATING TO CHALLENGES IN THE RETIREMENT SYSTEM 48–50 (2019) [hereinafter CHALLENGES IN THE RETIREMENT SYSTEM], https://www.jct.gov/publications/2019/jcx-20-19/ [https://perma.cc/UC2K-B93T]; Irena Dushi, Howard M. Iams & Brad Trenkamp, *The Importance of Social Security Benefits to the Income of the Aged Population*, 77 SOC. SEC. BULL., no. 2, 2017, at 1, 1, https://www.ssa.gov/policy/docs/ssb/v77n2/ssb-v77n2.pdf [https://perma.cc/3HZ8-LPES].

300. *See* Bond et al., *supra* note 108, at 13 fig.9.

301. *Id.* at 13.

302. ZHE LI & JOSEPH DALAKER, CONG. RSCH. SERV., R45791, POVERTY AMONG THE POPULATION AGED 65 AND OLDER 4 (2021), https://crsreports.congress.gov/product/pdf/R/R45791 [https://perma.cc/EUU7-3UVK].

303. *Id.* at 4, 16; *see also The Role of Benefits in Income and Poverty*, NAT'L ACAD. OF SOC. INS. (2020), https://www.nasi.org/learn/socialsecurity/benefits-role [https://perma.cc/EA3Y-PGS8]; LIANA FOX, U.S. CENSUS BUREAU, P60-272, THE SUPPLEMENTAL POVERTY MEASURE: 2019, at 8 fig.5 (2020), https://www.census.gov/content/dam/Census/library/publications/2020/demo/p60-272.pdf [https://perma.cc/U5P7-CN6W].

304. SSA FAST FACTS 2017, *supra* note 274, at 8.

Security in 2014, and 34.1% got more than 90% of their income from Social Security.[305] Table 6 also shows how important Social Security benefits are for people of color; although 60% of White households aged sixty-five or over relied on Social Security benefits for at least half of their income in 2014, 69% of Black households and 73% of Hispanic households relied on Social Security.[306]

305. *See also* JOCELYN FISCHER & JEFF HAYES, INST. FOR WOMEN'S POL'Y RSCH., IWPR NO. D503, THE IMPORTANCE OF SOCIAL SECURITY IN THE INCOMES OF OLDER AMERICANS: DIFFERENCES BY GENDER, AGE, RACE/ETHNICITY, AND MARITAL STATUS 5–6 (2013), https://iwpr.org/wp-content/uploads/2021/01/D503-ImportanceofSS.pdf [https://perma.cc/7HK3-7JY8]; Tiffany Boiman & Mark Conner, *5 Facts About Working Women and Retirement*, U.S. DEP'T LAB. BLOG (Sept. 18, 2017), https://blog.dol.gov/2017/09/18/5-facts-about-working-women-and-retirement [https://perma.cc/S5J2-EWQY]; Bond et al., *supra* note 108, at 13 (women with median household income of less than $20,000 get 75% of their income from Social Security).

306. Indeed, "Social Security is the most equal and most important form of retirement wealth for most minority households." Wenliang Hou & Geoffrey T. Sanzenbacher, *Measuring Racial/Ethnic Retirement Wealth Inequality* 11 (Ctr. for Ret. Rsch. at Bos. Coll., Working Paper No. 2020-2, 2020), https://crr.bc.edu/wp-content/uploads/2020/02/wp_2020-2__.pdf [https://perma.cc/VX3E-6FWS].

Table 6. Reliance on Social Security Benefits by Gender, Family Type, and Race, 2014[307]

Characteristic	**Percent of Beneficiary Households 65 or Older Whose Social Security Benefits Make Up:**	
	50% or More of Their Income	**90% or More of Their Income**
Gender		
Unmarried men	55.5%	29.2%
Unmarried women	61.4%	34.1%
Family Type		
Married couples	47.8%	20.7%
Unmarried people	70.7%	42.6%
Race		
White	60.0%	31.7%
Black	69.4%	45.2%
Asian	61.7%	41.1%
Hispanic	73.1%	52.2%
Overall	61.1%	33.4%

All in all, women tend to rely more heavily on Social Security than men. Indeed, 55% of adult Social Security beneficiaries in 2019 were women.[308] Of those women, 69% were retired workers.[309] On average, however, the monthly Social Security benefits that women receive are just 80% of what men receive.[310] Also, according to a recent study of older women, Social Security benefits are especially important in

307. SOC. SEC. ADMIN., PUB. NO. 13-11871, *supra* note 274, at 287 tbl.9.A1, 288 tbl.9.A2, 289 tbl.9.A3, 293 tbl.9.B3; *see also* NAT'L ACAD. OF SOC. INS., *supra* note 274, at 8.

308. SSA FAST FACTS 2020, *supra* note 274, at 19.

309. *Id.*

310. Grace Enda & William G. Gale, *How Does Gender Equality Affect Women in Retirement?*, BROOKINGS (July 2020), https://www.brookings.edu/essay/how-does-gender-equality-affect-women-in-retirement/ [https://perma.cc/Z7LQ-CEZS]. For example, in 2019, men received an average of $1,671 per month, while women got an average of $1,337 per month. SSA FAST FACTS 2020, *supra* note 274, at 20.

helping those women maintain their independence.[311] Moreover, two-thirds of the elderly Americans that claim SSI benefits are women.[312]

Still, as currently structured, Social Security alone cannot ensure that all Americans will have adequate incomes throughout their retirement years.[313] Of real concern is the fact that most American workers retire earlier than their Social Security full retirement age. For example, the average age of those who claimed Social Security retirement benefits in 2018 was 64.8, and 27.4% of workers claimed their benefits as soon as they could—at age sixty-two.[314] The average claiming age was about the same for men (64.7) and women (64.6), but more women (32.1%) than men (28.4%) claimed their benefits at

311. U.S. GOV'T ACCOUNTABILITY OFF., GAO-20-541, RETIREMENT SECURITY: DOL COULD BETTER INFORM DIVORCING PARTIES ABOUT DIVIDING SAVINGS 1 (2020) [hereinafter RETIREMENT SECURITY], https://www.gao.gov/assets/710/708566.pdf [https://perma.cc/H7PM-6T7P].

312. *Supplemental Security Income (SSI) FAQs*, JUST. IN AGING (2019), https://www.justiceinaging.org/wp-content/uploads/2017/07/SSI-FAQs.pdf [https://perma.cc/AZM6-W6UA].

313. Moreover, the Social Security system is underfunded, and consequently, the government may end up having to cut future benefits. OLD-AGE & SURVIVORS INS. & FED. DISABILITY INS. TR. FUNDS, *supra* note 276, at 3−5. As of January 1, 2020, the unfunded liability of the Social Security system over the Social Security Administration's seventy-five-year projection period was estimated to be $16.8 trillion, and that unfunded liability can also be expressed as 3% of taxable payroll or 1% of gross domestic product (GDP). *Id.* at 204 tbl.VI.F1. Basically, to wipe out that deficit, it would take (1) an immediate and permanent payroll tax increase of 3.14 percentage points (to 15.54% of payroll), (2) an immediate and permanent 19% cut in benefits, or (3) some combination of these two approaches. *Id.* at 4−5. The COVID-19 pandemic has had an adverse impact on the economic stability of the Social Security system, and in September 2020, the Congressional Budget Office projected that the Old-Age and Survivors Insurance (OASI) Trust Fund will be exhausted in 2031. AVI LERNER, CONG. BUDGET OFF., THE OUTLOOK FOR MAJOR FEDERAL TRUST FUNDS: 2020 TO 2030, at 5 (Sept. 2020), https://www.cbo.gov/system/files/2020-09/56523-Trust-Funds.pdf [https://perma.cc/ZFM4-PAW9]. Pertinent here, the Social Security Administration estimates suggest that in 2021, revenue from payroll taxes, income tax on benefits, and interest on reserves will be less than the amounts paid out to beneficiaries, which will trigger the drawdown of Social Security trust fund reserves. NAT'L ACAD. OF SOC. INS., *supra* note 274, at 26. Financial pressures on the Social Security system are growing, largely due to the population aging. For example, in 2008, the first baby boomers began receiving Social Security retirement benefits; by 2018, an average of 10,200 baby boomers turned age sixty-five every day. GAO RETIREMENT SECURITY, *supra* note 172, at 8. That average is expected to reach more than 11,000 per day by 2029. *Id.*

314. SOC. SEC. ADMIN., PUB. NO. 13-11700, ANNUAL STATISTICAL SUPPLEMENT TO THE SOCIAL SECURITY BULLETIN, 2019, at 6.17 tbl.6.B5 (2019), https://www.ssa.gov/policy/docs/statcomps/supplement/2019/supplement19.pdf [https://perma.cc/GU46-F5JS].

age sixty-two.[315] The survey data reported in Table 7 shows that most Americans also retired well before their Social Security full retirement age and that Black and Hispanic workers retired earlier than White workers.[316]

Table 7. Retirement Age Reported in the 2019 SHED, by Race/Ethnicity and Education, 2019[317]

Characteristic	**61 or Earlier**	**62−64**	**65+**
Race			
White	48%	24%	27%
Black	56%	23%	17%
Hispanic	65%	19%	15%
Education			
High school degree or less	50%	24%	24%
Some college/technical or associate degree	50%	25%	24%
Bachelor's degree or more	55%	18%	26%
Overall	51%	23%	24%

B. Pensions and IRAs, Generally

Many workers also get retirement income from pensions and individual retirement accounts (IRAs); although, as more fully explained in Part V.A below, this type of retirement income is less commonly earned by gig workers.[318] At the end of 2019, Americans had $38.3 trillion in household retirement assets, including $15.9 trillion in defined benefit plans, $8.6 trillion in defined contribution plans, $11 trillion in IRAs, and $2.7 trillion in annuities.[319]

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315. *Id.* at 6.20 tbl.6.B5.1; *see also* ZHE LI, CONG. RSCH. SERV., R44670, THE SOCIAL SECURITY RETIREMENT AGE 8 fig.2 (2021), https://fas.org/sgp/crs/misc/R44670.pdf [https://perma.cc/5L6G-YP99] (showing retired-worker beneficiaries by age in 2019).

316. 2019 REPORT ON ECONOMIC WELL-BEING, *supra* note 89, at 47 & tbl.28.

317. *Id.* at 47 tbl.28.

318. *See infra* Part V.A.

319. BD. OF GOVERNORS OF THE FED. RSRV. SYS., FEDERAL RESERVE STATISTICAL RELEASE Z.1, FINANCIAL ACCOUNTS OF THE UNITED STATES: FLOW OF FUNDS, BALANCE SHEETS, AND INTEGRATED ACCOUNTS: FIRST QUARTER 2020, at 94 tbl.L.117 (2020), https://www.federalreserve.gov/releases/z1/20200611/z1.pdf [https://perma.cc/CQ52-WU6F].

Unfortunately, the United States has a "voluntary" pension system, and retirement savings may be inadequate for many retirees.[320] At any point in time, only about half of American workers have a pension, and participation in IRAs is even lower.[321] This Subpart (1) explains the various types of pensions and IRAs available to employees and independent contractors and (2) reviews the data on participation rates for those retirement instruments.

1. Employer-Sponsored Pension Plans

Most pension plans qualify for favorable tax treatment, which means that they are effectively subsidized by U.S. taxpayers.[322] Basically, employer contributions to a pension are not taxable to the employee; the pension fund's earnings on those contributions are tax-exempt, and employees pay tax only when they receive distributions of their pension benefits.[323] In addition, employers are generally allowed to deduct their contributions.[324] Tax-favored pension plans (that is, qualified plans) generally fall into two broad categories based on the nature of the benefits provided: defined benefit plans and defined contribution plans.[325]

a. Defined Benefit Plans

In a defined benefit plan, an employer promises workers a specific benefit at retirement.[326] The default benefit for defined benefit plans is

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320. Jonathan Barry Forman & George A. (Sandy) Mackenzie, *The Cost of "Choice" in a Voluntary Pension System*, 2013 N.Y.U. REV. EMP. BENEFITS & EXEC. COMP. 6-1, § 6.01, at 6-4 to 6-5.

321. U.S. BUREAU OF LAB. STAT., U.S. DEP'T OF LAB., BULLETIN NO. 2787, NATIONAL COMPENSATION SURVEY: EMPLOYEE BENEFITS IN THE UNITED STATES—MARCH 2017, at tbl.5 (2017), https://www.bls.gov/ncs/ebs/benefits/2017/ebbl0061.pdf [https://perma.cc/BQ4L-K7MV]; Sarah Holden & Daniel Schrass, *The Role of IRAs in U.S. Households' Saving for Retirement, 2020*, at 27 ICI RSCH. PERSP. 1–2, 6 fig.3 (2021), https://www.ici.org/system/files/attachments/pdf/per27-01.pdf [https://perma.cc/YA7Q-G5RX].

322. *See infra* Part III.B.5; CHALLENGES IN THE RETIREMENT SYSTEM, *supra* note 299, at 1, 7; Jonathan Barry Forman, *Fully Funded Pensions*, 103 MARQ. L. REV. 1205, 1218−25 (2020) [hereinafter Forman, *Fully Funded Pensions*]; Jonathan Barry Forman, *Removing the Legal Impediments to Offering Lifetime Annuities in Pension Plans*, 23 CONN. INS. L.J. 31, 39−40 (2016).

323. I.R.C. §§ 72, 402, 501(a).

324. *Id.* § 404(a).

325. CHALLENGES IN THE RETIREMENT SYSTEM, *supra* note 299, at 8−9.

326. *See, e.g.*, Forman, *Fully Funded Pensions*, *supra* note 322, at 1220−21.

a retirement income stream in the form of an annuity for life (such as a monthly pension).[327] For example, some defined benefit plans provide workers with an annual retirement benefit (B) equal to 2% times their years of service (yos) times their final average pay (fap); so, the calculation for the final-average-pay plan would be (B = 2% × yos × fap). Under that final-average-pay plan, a worker who retires after thirty years of service with a final average pay of $100,000 would receive a pension of $60,000 per year for life ($60,000 = 2% × 30 yos × $100,000 fap). For married participants, defined benefit plans (and some defined contribution plans) are required to provide a qualified joint-and-survivor annuity (QJSA) as the normal benefit payment, unless the spouse consents to another form of distribution.[328]

b. Defined Contribution Plans

Alternatively, in a typical defined contribution plan, "the employer simply withholds a specified percentage of the worker's compensation, which it contributes to an individual investment account for [the] worker."[329] For example, contributions might be set at 10% of annual compensation. Under such a plan, a worker who earned $50,000 in a given year would have $5,000 contributed to her individual account ($5,000 = 10% × $50,000).[330] Her benefit at retirement would be based on all such contributions plus investment earnings.[331] Unlike defined benefit plans, defined contribution plans usually make distributions as lump sum or periodic distributions rather than as lifetime annuities.[332]

Defined contribution plans often include a feature that allows workers to choose between receiving cash currently or deferring

327. *Id.* at 1220. In the United States, defined benefit plans are generally designed to provide annuities, in other words, "definitely determinable benefits . . . over a period of years, usually for life after retirement." Treas. Reg. § 1.401-1(b)(1)(i) (2020).

328. I.R.C. § 401(a)(11); ERISA § 205, 29 U.S.C. § 1055. A QJSA is an immediate annuity for the life of the pension plan participant and a survivor annuity for the life of the participant's spouse. I.R.C. § 417(b); ERISA § 205(d)(1), 29 U.S.C. § 1055(d)(1).

329. Forman, *Fully Funded Pensions*, *supra* note 322, at 1212−13.

330. *See id.* at 1221.

331. *Id.*

332. *Id.*

taxation by placing the money in a retirement account, pursuant to I.R.C. § 401(k).[333] For 2021, individuals can contribute (and deduct) up to $19,500 for these 401(k) plans, although workers over the age of fifty can contribute another $6,500, for a total of up to $26,000.[334] Alternatively, employers can set up so-called Roth 401(k) plans.[335] Contributions to these Roth 401(k) plans are not excludable, but neither the plan's investment returns nor distributions are taxable.[336]

3. Other Tax Incentives to Promote Retirement Savings

As already mentioned, certain low- and moderate-income individuals can claim a nonrefundable retirement saver's tax credit of up to $1,000 for certain qualified retirement savings contributions.[337] Also, qualified small businesses may claim a nonrefundable tax credit of up to $5,000 for certain costs incurred in setting up a new retirement plan for employees.[338]

2. IRAs

Favorable tax rules are also available for non-pension-related IRAs.[339] For 2021, individuals can contribute and deduct up to $6,000 to an IRA ($7,000 if aged fifty or over), and spouses can contribute similar amounts.[340] Like private pensions, IRA earnings are tax-exempt, and distributions are taxable.[341] Alternatively, individuals

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333. I.R.C. § 401(k).
334. I.R.S. Notice, 2020-79, 2020-46 I.R.B. 1014 (Nov. 9, 2020).
335. I.R.C. § 402A(b)(1).
336. *Id.* § 402A(c)-(d).
337. *See supra* text accompanying note 201. In effect, the retirement saver's tax credit acts like an employer match, with the government matching a portion of the worker's contributions. Employer matches encourage workers to contribute, at least up to the match level, and the saver's tax credit seems to have similar pro-savings effects. *See generally* Jennifer Erin Brown & David C. John, *Improving the Saver's Credit for Low- and Moderate-Income Workers*, AARP: AARP PUB. POL'Y INST. 6–7 (Sept. 2017), https://www.aarp.org/content/dam/aarp/ppi/2017/09/improving-the-savers-credit-for-low-and-moderate-income-workers.pdf [https://perma.cc/SE8Y-ZSM7].
338. I.R.C. § 45E(b).
339. *Id.* §§ 219, 408; *see also* Forman, *Fully Funded Pensions*, *supra* note 322, at 1224.
340. I.R.S. Notice 2020-79, 2020-46 I.R.B. 1014 (Nov. 9, 2020); *see* I.R.C. § 219(b)(5)(A)-(B) (adding $1,000 to deductible amount for qualified retirement contributions of people aged fifty or older).
341. I.R.C. §§ 219(a), 408(e).

can set up Roth IRAs.[342] Unlike regular IRAs, contributions to Roth IRAs are not deductible; instead, withdrawals are tax-free, and like regular IRAs, earnings are tax-exempt.[343]

4. *Retirement Plans Targeted to Small Businesses and the Self-Employed*

a. *IRAs*

The simplest retirement plan a small business can set up is an IRA.[344] Also, with a payroll deduction IRA, a small business can arrange to withhold and transmit voluntary employee contributions to their individual IRA accounts.[345] Of note, a number of states are setting up state-sponsored pension systems that rely on IRAs to provide individual pension accounts for private-sector employees not already covered under an employer-sponsored pension plan, and some of these plans at least contemplate being open to self-employed workers too.[346]

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342. *Id.* § 408A.

343. *Id.* § 408A(c)(1); *see also* Forman, *Fully Funded Pensions*, *supra* note 322, at 1224 (footnote omitted).

344. IRS & EMP. BENEFITS SEC. ADMIN., U.S. DEP'T OF LAB., PUB. NO. 3998 (REV. 11-2020), CHOOSING A RETIREMENT SOLUTION FOR YOUR SMALL BUSINESS (2020) [hereinafter CHOOSING A RETIREMENT SOLUTION], https://www.irs.gov/pub/irs-pdf/p3998.pdf [https://perma.cc/7BTA-QRSQ]; *see also* Robin Hartill, *6 Ways Gig Workers Can Invest for Retirement*, MOTLEY FOOL (Apr. 8, 2021, 5:45 AM), https://www.fool.com/investing/2021/04/08/6-ways-gig-workers-can-invest-for-retirement/ [https://perma.cc/88ZS-M5A3] (saying same for Roth IRAs).

345. CHOOSING A RETIREMENT SOLUTION, *supra* note 344; IRS & EMP. BENEFITS SEC. ADMIN., U.S. DEP'T OF LAB., PUB. NO. 4587 (REV. 11-2018), PAYROLL DEDUCTION IRAS FOR SMALL BUSINESSES 1–2 (2018), https://www.irs.gov/pub/irs-pdf/p4587.pdf [https://perma.cc/3TPV-JWQZ].

346. *See, e.g.*, *State-Based Retirement Plans for the Private Sector*, PENSION RTS. CTR., http://www.pensionrights.org/issues/legislation/state-based-retirement-plans-private-sector [https://perma.cc/WAF3-BCJP] (Mar. 2021); *About the State Retirement Resource Center*, AARP: AARP PUB. POL'Y INST., https://www.aarp.org/ppi/state-retirement-plans.html [https://perma.cc/2RNH-H5T7]. The State of Oregon is the furthest along. *See, e.g.*, Jack VanDerhei, *What if OregonSaves Went National: A Look at the Impact on Retirement Income Adequacy*, EMP. BENEFIT RSCH. INST. (2019), https://www.ebri.org/docs/default-source/ebri-issue-brief/ebri_ib_494_oregonsaves-31oct19.pdf [https://perma.cc/5C99-PEQ2]; Olivia S. Mitchell, *Building Better Retirement Systems in the Wake of the Global Pandemic* 17−18 (Nat'l Bureau of Econ. Rsch., Working Paper No. 27261, 2020), https://www.nber.org/papers/w27261.pdf [https://perma.cc/ZU7B-ZEYV]. The OregonSaves program requires Oregon employers that do not offer an employer-sponsored plan to automatically enroll their employees into payroll deduction Roth IRAs. OREGONSAVES, https://www.oregonsaves.com [https://perma.cc/YL8M-Q4SE]; *see also* John Chalmers, Olivia S. Mitchell, Jonathan Reuter & Mingli Zhong, *Auto-Enrollment Retirement Plans for the People: Choices and Outcomes in OregonSaves* (Nat'l

b. Simplified Employee Pensions (SEPs)

A small businesses or self-employed individual can save even more for retirement by setting up a simplified employee pension (SEP) traditional IRA for each eligible employee.[347] In 2021, contributions to these SEP-IRAs cannot exceed the lesser of 25% of the worker's compensation or $58,000.[348]

c. SIMPLE IRA and SIMPLE 401(k) Plans

A small business with fewer than 100 employees can set up a savings incentive match plan for employees (SIMPLE)—with IRAs for the individual employees or, alternatively, as a part of an employer-sponsored 401(k) plan.[349] Under a SIMPLE, employees may elect to contribute up to $13,500 in 2021 ($16,500 if aged fifty or over), and the employer is required to make either: (1) dollar-for-dollar matching contributions up to 3% of employee compensation or (2) fixed nonelective contributions of 2% of employee compensation.[350]

Bureau of Econ. Rsch., Working Paper No. 28469, 2021), https://www.nber.org/system/files/working_papers/w28469/w28469.pdf [https://perma.cc/9PPJ-3LGY]. The default contribution rate is 5%, although employees can opt out. *Benefits for Employees*, OREGONSAVES, https://cdn.unite529.com/jcdn/files/ORERv2/pdfs/en_US/employer_overview.pdf [https://perma.cc/YZ9K-3ZQK]. Moreover, the employee contribution rate is automatically increased by 1% each year until it reaches 10%, unless the employee opts out. *Id.*

347. I.R.C. § 408(k); IRS, U.S. DEP'T OF THE TREASURY, PUB. NO. 560, RETIREMENT PLANS FOR SMALL BUSINESS (SEP, SIMPLE, AND QUALIFIED PLANS) 5−8 (2021) [hereinafter SEP, SIMPLE, and QUALIFIED PLANS], https://www.irs.gov/pub/irs-pdf/p560.pdf [https://perma.cc/V4VQ-A5HJ]; CHOOSING A RETIREMENT SOLUTION, *supra* note 344; IRS & EMP. BENEFITS SEC. ADMIN., U.S. DEP'T OF LAB., PUB. NO. 4333 (REV. 11-2020), SEP RETIREMENT PLANS FOR SMALL BUSINESSES (2020), https://www.irs.gov/pub/irs-pdf/p4333.pdf [https://perma.cc/7ENJ-TQBR].

348. I.R.S. Notice 2020-79, 2020-46 I.R.B. 1014 (Nov. 9, 2020). The percentage limit is slightly lower for contributions made by self-employed individuals. SEP, SIMPLE, AND QUALIFIED PLANS, *supra* note 347, at 6−7.

349. I.R.C. § 408(p); SEP, SIMPLE, AND QUALIFIED PLANS, *supra* note 347, at 8−11; CHOOSING A RETIREMENT SOLUTION, *supra* note 344; IRS & EMP. BENEFITS SEC. ADMIN., U.S. DEP'T OF LAB., PUB. NO. 4334 (REV. 11-2020), SIMPLE IRA PLANS FOR SMALL BUSINESSES 1 (2020), https://www.irs.gov/pub/irs-pdf/p4334.pdf [https://perma.cc/BGH2-87D2].

350. SEP, SIMPLE, AND QUALIFIED PLANS, *supra* note 347, at 10; I.R.S. Notice 2020-79, 2020-46 I.R.B. 1014 (Nov. 9, 2020).

d. Qualified Plans

Of course, small businesses and self-employed individuals are also able to set up qualified defined benefit or defined contribution plans.[351] The rules for setting up and operating qualified plans are generally more demanding than the rules governing IRAs, SEPs, and SIMPLE IRAs; however, special rules do reduce the complexity associated with SIMPLE and safe harbor 401(k) plans.[352] For 2021, defined contribution plan contributions cannot exceed the lesser of 25% of the worker's compensation or $58,000, and the benefits that can be paid to workers covered by defined benefit plans are limited.[353]

Under certain circumstances, employers are permitted to pool their resources and offer retirement plans using multiple employer plans (MEPs).[354] An MEP is a qualified plan permitted to cover employees of unrelated employers.[355] Subject to requirements under the Internal Revenue Code and the Employee Retirement Income Security Act of 1974 (ERISA), an MEP is intended to provide employers with a pooled plan arrangement that relieves much of the administrative, fiduciary,

351. I.R.C. § 401; SEP, SIMPLE, AND QUALIFIED PLANS, *supra* note 347, at 11−21; CHOOSING A RETIREMENT SOLUTION, *supra* note 344.

352. *See* SEP, SIMPLE, AND QUALIFIED PLANS, *supra* note 347, at 14–15 (discussing requirements to set up qualified plans)

353. *Retirement Topics – 401(k) and Profit-Sharing Plan Contribution Limits*, IRS, https://www.irs.gov/retirement-plans/plan-participant-employee/retirement-topics-401k-and-profit-sharing-plan-contribution-limits [https://perma.cc/XLA6-YMBW] (Nov. 5, 2021).

354. "Open MEPs" and Other Issues Under Section 3(5) of the Employee Retirement Income Security Act, 84 Fed. Reg. 37545, 37546 (July 31, 2019); *see also* Natalya Shnitser, *Are Two Employers Better than One? An Empirical Assessment of Multiple-Employer Retirement Plans*, 45 J. CORP. L. 743, 752−53 (2020). A similar plan design is the "multiemployer plan," which is limited to members of collective bargaining agreements and to which more than one employer contributes. *Introduction to Multiemployer Plans*, PENSION BENEFIT GUAR. CORP., https://www.pbgc.gov/prac/multiemployer/introduction-to-multiemployer-plans [https://perma.cc/VL28-4AN6] (Sept. 13, 2021). The multiemployer plan has its own distinct rules and regulations. *See, e.g.*, IRM 4.72.14 (Dec. 2, 2019); JOHN J. TOPOLESKI, CONG. RSCH. SERV., R43305, MULTIEMPLOYER DEFINED BENEFIT (DB) PENSION PLANS: A PRIMER (2018), https://fas.org/sgp/crs/misc/R43305.pdf [https://perma.cc/L9CX-MWGD] (discussing rules for multiemployer defined benefit pension plans). Employers can also pool their resources to provide health care benefits through association health plans. *See, e.g.*, Hal Levy, *What Are Association Health Plans?*, HEALTHCAREINSIDER, https://healthcareinsider.com/association-health-plans-40527 [https://perma.cc/QU9U-RLZR] (June 2, 2021).

355. "Open MEPs" and Other Issues Under Section 3(5) of the Employee Retirement Income Security Act, 84 Fed. Reg. at 37546.

and regulatory burden associated with a single-employer plan.[356] In recent years, policymakers have been interested in MEPs as a vehicle for addressing the pension coverage problem in general and as a tool that could increase coverage of gig economy workers in particular.[357] Notably, Congress recently enacted legislation that will make it easier for groups of unaffiliated employers to set up new, open MEPs, known as pooled employer plans (PEPs).[358]

5. The Tax Expenditures for Retirement Income Security

Many of the special income tax rules for pensions, IRAs, and the partial exclusion of Social Security benefits are identified as "tax expenditures" in the tax expenditure budgets prepared annually by the Office of Management and Budget and by the Joint Committee on Taxation.[359] For example, Table 8 shows that the Office of

356. *See* JOINT COMM. ON TAX'N, JCX-3-16, PRESENT LAW AND BACKGROUND RELATING TO TAX-FAVORED RETIREMENT SAVING AND CERTAIN RELATED LEGISLATIVE PROPOSALS 65−71 (2016), https://www.jct.gov/CMSPages/GetFile.aspx?guid=39bc7281-291c-4bbc-9bd4-8e806f4ea7f1 [https://perma.cc/5HJN-BMZR]. Sometimes, these MEPs are sponsored by professional employer organizations (PEO MEPs). Shnitser, *supra* note 354, at 753−55 (discussing PEO MEPs).

357. *See, e.g.*, ADVISORY COUNCIL ON EMP. WELFARE & PENSION BENEFIT PLANS, U.S. DEP'T OF LAB., OUTSOURCING EMPLOYEE BENEFIT PLAN SERVICES 20 (2014), https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/about-us/erisa-advisory-council/2014-outsourcing-employee-benefit-plan-services.pdf_[https://perma.cc/3FML-WFYM]; Shnitser, *supra* note 354 (discussing how workers have less access to pension coverage and proposing more emphasis on MEPs and MEP governance); Paul M. Secunda, *The Emerging Law of Portable Retirement Benefits*, 95 CHI.-KENT L. REV. 217, 219 (2020); Secunda, *supra* note 9, at 456–58 (discussing recent congressional proposals regarding Open MEPs).

358. Setting Every Community Up for Retirement Enhancement (SECURE) Act of 2019, Pub. L. No. 116-94, § 101, 133 Stat. 2534, 3138–45 (codified as amended at I.R.C. §§ 408(c), 408 note, 413(c)(2), (e) and at ERISA §§ 3, 103, 104, 412, 29 U.S.C. §§ 1002, 1023, 1024, 1112) (enacted within the Further Consolidated Appropriations Act, 2020, Pub. L. No. 116-94, 133 Stat. 2534); *see also* JOINT COMM. ON TAX'N, JCX-13-19, DESCRIPTION OF THE CHAIRMAN'S AMENDMENT IN THE NATURE OF A SUBSTITUTE TO H.R. 1994, THE "SETTING EVERY COMMUNITY UP FOR RETIREMENT ENHANCEMENT (SECURE) ACT OF 2019", at 2–14 (2019), https://www.jct.gov/publications.html?func=download&id=5180&chk=5180&no_html=1 [https://perma.cc/RR5S-WVCT]; Shnitser, *supra* note 354, at 759−60 (discussing SECURE Act). Some experts have touted the many worker protections that come with ERISA coverage of open MEPs, but ERISA does not cover retirement savings alternatives like IRAs. Secunda, *supra* note 357, at 220, 239−42; Secunda, *supra* note 9, at 454−57.

359. *See, e.g.*, OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, A BUDGET FOR AMERICA'S FUTURE: ANALYTICAL PERSPECTIVES, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2021, at 147–98 (2020), https://www.govinfo.gov/content/pkg/BUDGET-2021-PER/pdf/BUDGET-2021-PER.pdf [https://perma.cc/866C-LDP8]; JOINT COMM. ON TAX'N, JCX-23-20, ESTIMATES OF

Management and Budget estimates the tax expenditures associated with Social Security, pensions, and IRAs cost the government more than $200 billion a year in lost revenue.[360]

Table 8. Tax Expenditures for Retirement Income Security, Fiscal Years 2020−2029 (Billions of dollars)[361]

Tax Expenditure	**2020**	**2020−2029**
Partial Exclusion of Social Security benefits	$30.9	$399.0
Net exclusion of pension contributions and earnings		
Defined benefit plans	$73.8	$808.8
Defined contribution plans	$83.5	$1,296.9
Individual Retirement Accounts (IRAs)	$21.7	$303.4
Self-Employed Plans	$26.6	$462.0
Low- and moderate-income savers credit	$1.2	$12.6

6. *Pension Coverage and Participation*

a. *Pension and Coverage*

Despite billions of dollars spent on retirement-related tax expenditures, Table 9 shows that, although 71% of private-industry workers had access to employer-sponsored retirement plans in March of 2020, only 55% actually participated in a plan.[362] Table 9 also shows

FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 2020–2024 (2020), https://www.jct.gov/publications/2020/jcx-23-20/ [https://perma.cc/K9L3-8T37] (discussing tax expenditures, its measurements, and estimates for fiscal years 2020–2024); *see also* Jonathan Barry Forman, *Reconsidering the Tax Treatment of Pensions and Annuities*, 18 CHAP. L. REV. 221, 229−30 (2014).

360. OFF. OF MGMT. & BUDGET, *supra* note 359, at 153 tbl.13-1.

361. *Id.*

362. News Release, U.S. Bureau of Lab. Stat., U.S. Dep't of Lab., USDL-20-1792, Employee Benefits in the United States – March 2020, at 7 tbl.1 (Sept. 24, 2020, 10:00 AM) [hereinafter March 2020 Employee Benefits], https://www.bls.gov/news.release/archives/ebs2_09242020.pdf [https://perma.cc/Q7F9-HEJA]; *see also* JOINT COMM. ON TAX'N, JCX-4-19, BACKGROUND DATA RELATING TO RETIREMENT INCOME 5−12 (2019), https://www.jct.gov/publications.html?func=download&id=5160&chk=5160&no_html=1 [https://perma.cc/2KU4-H7HK]. Similarly, in March 2020, 72% of private-industry workers had access to employer-sponsored health care plans, and 51% of them participated. March 2020 Employee Benefits, *supra*, at 9 tbl.2.

that the probability of pension coverage is greater for full-time workers, higher-income workers, and workers in government and at larger firms.[363] The probability of pension coverage is also greater for older workers, White workers, and for highly-educated workers.[364] Also, as already mentioned, although retirement plans covered 46.3% of traditional workers in 2017, just 30.1% of on-call workers and 18.4% of contingent workers were covered.[365]

363. More specifically, although 90% of private-industry workers in the highest 10% wage category had access to employer-provided pensions, just 29% of workers in the lowest 10% wage category had access to employer-sponsored pensions. March 2020 Employee Benefits, *supra* note 362. Similarly, although 94% of private-industry workers in the highest 10% wage category had access to employer-provided health care plans, just 27% of workers in the lowest tenth percent wage category had access to employer-sponsored health care plans. *Id.* at 9 tbl.2.

364. Craig Copeland, *Current Population Survey: Checking In on the Retirement Plan Participation and Retiree Income Estimates*, EMP. BENEFIT RSCH. INST. 9 fig.5 (May 30, 2019), https://www.ebri.org/docs/default-source/ebri-issue-brief/ebri_ib_483_retplans-30may19.pdf [https://perma.cc/5EYV-AHYD] (showing 1.00 ratio for these groups).

365. *See supra* note 29 and accompanying text; *see also infra* Part V.B.

Table 9. Retirement Benefits: Access, Participation, and Take-up Rates for Civilian Workers, March 2020 (All workers = 100%)[366]

Characteristics	**Access**	**Participation**	**Take-up Rate**
All workers	71	55	78
Establishment characteristics			
Private industry	67	51	76
State and local government	91	83	90
Goods-producing industries	76	62	82
Service-providing industries	70	54	78
1 to 49 workers	50	36	71
50 to 99 workers	71	52	72
100 workers or more	85	71	83
Worker Characteristics			
Full time	80	66	82
Part time	40	22	55
Union	94	85	90
Nonunion	67	51	76
Average Wage			
Lowest 25 percent	45	26	57
Lowest 10 percent	32	16	51
Second 25 percent	70	53	76
Third 25 percent	83	69	83
Highest 25 percent	90	81	90
Highest 10 percent	92	83	90

Participation in IRAs is even lower than participation in pensions. For example, although 37% of U.S. households had an IRA in

366. March 2020 Employee Benefits, *supra* note 362, at 7–8 tbl.1.

mid-2020, only around 12% of households made contributions to their IRAs in 2019.[367]

b. Adequacy

All in all, low participation rates in pension plans, in general, and low contribution rates to 401(k) plans, in particular, have led many analysts to be concerned about whether current and future generations of retirees will have adequate retirement incomes.[368] Indeed, just 50.6% of families had any retirement accounts in 2019, and of those families who did have accounts then, the median value was just $65,000.[369] That year, only 48.2% of families ages sixty-five to seventy-four had retirement accounts, and the median value of those accounts was $164,000.[370] Moreover, just 5% of elderly individuals in

367. Holden & Schrass, *supra* note 321, at 1–2, 6 fig.3, 18, 19 fig.15.

368. Forman, *Fully Funded Pensions*, *supra* note 322, at 1225; *see* U.S. GOV'T ACCOUNTABILITY OFF., GAO-16-408, RETIREMENT SECURITY: LOW DEFINED CONTRIBUTION SAVINGS MAY POSE CHALLENGES 1 (2016), http://www.gao.gov/assets/680/676942.pdf [https://perma.cc/F75R-D2LP]; Jack VanDerhei, *How Retirement Readiness Varies by Gender and Family Status: A Retirement Savings Shortfall Assessment of Gen Xers*, EMP. BENEFIT RSCH. INST. 1–2 (Jan. 17, 2019), https://www.ebri.org/docs/default-source/ebri-issue-brief/ebri_ib_471_retirementshortfalls-17jan19.pdf?sfvrsn=512f3f2f_8 [https://perma.cc/L5YW-ZQT6]; Andrew G. Biggs, Alicia H. Munnell & Anqi Chen, *Why Are 401(k)/IRA Balances Substantially Below Potential?* 2–3 (Ctr. for Ret. Rsch. at Bos. Coll., Working Paper No. 2019-14, 2019), https://crr.bc.edu/wp-content/uploads/2019/11/wp_2019-14.pdf [https://perma.cc/2Y98-XNVS]; AON, THE REAL DEAL: 2018 RETIREMENT INCOME ADEQUACY STUDY 8 (2018), https://www.aon.com/retirement-readiness-savings-income-adequacy-the-real-deal/index.html [https://perma.cc/HV5L-3338]. *See generally* CHARLES D. ELLIS, ALICIA H. MUNNELL & ANDREW D. ESCHTRUTH, FALLING SHORT: THE COMING RETIREMENT CRISIS AND WHAT TO DO ABOUT IT (2014) (discussing problem of workers not being to save enough for retirement).

369. *Survey of Consumer Finances, 1989 – 2019*, BD. OF GOVERNORS OF THE FED. RSRV. SYS., https://www.federalreserve.gov/econres/scf/dataviz/scf/table/ [https://perma.cc/5LZA-9KGV] (Sept. 28, 2020) (choose "Retirement accounts" from dropdown in "Select household financial component," "All families" from dropdown in "Distribute by," and "Percent Holding (%)" in "Units"; and then choose "Retirement accounts" from dropdown in "Select household financial component," "All families" from dropdown in "Distribute by," and "Median ($)" in "Units"); *see also* BD. OF GOVERNORS OF THE FED. RSRV. SYS., 2016 SCF CHARTBOOK (2017), https://www.federalreserve.gov/econres/files/BulletinCharts.pdf [https://perma.cc/PA7V-ECPY] (showing charts from the 2016 survey of families with retirement accounts); Lisa J. Dettling, Joanne W. Hsu, Lindsay Jacobs, Kevin B. Moore, Jeffrey P. Thompson & Elizabeth Llanes, *Recent Trends in Wealth-Holding by Race and Ethnicity: Evidence from the Survey of Consumer Finances*, BD. GOVERNORS FED. RSRV. SYS.: FEDS NOTES tbl.1, https://www.federalreserve.gov/econres/notes/feds-notes/recent-trends-in-wealth-holding-by-race-and-ethnicity-evidence-from-the-survey-of-consumer-finances-20170927.htm [https://perma.cc/UB8L-SX9J] (Sept. 27, 2017).

370. *Survey of Consumer Finances, 1989 – 2019*, *supra* note 369 (choose "Retirement accounts" from

the lowest income quartile in 2018 had pension or IRA income that year, compared to 62.4% of individuals in the highest income quartile.[371] Also, a 2020 report by the Consumer Financial Protection Bureau found that 49% of people who retired between 1992 and 2014 did not have the ability to maintain their preretirement spending levels for five years after retiring.[372] To be sure, because Social Security benefits progressively favor workers with low lifetime earnings, low-income workers should be able to save a lower percentage of their salaries than higher income workers and still end up with adequate retirement incomes.[373]

c. Some Demographic Considerations

As more fully discussed in Part IV below, women are less likely to work full-time and be covered by an employer-sponsored pension plan than men, and women also tend to have less retirement savings.[374] As a result, women have greater difficulty in achieving retirement income security than men.[375] Of particular concern, women aged sixty-five or older have less retirement income than men, and they are more likely

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dropdown in "Select household financial component," "Age of reference person" from dropdown in "Distribute by," and "Percent Holding (%)" in "Units"; and then choose "Retirement accounts" from dropdown in "Select household financial component," "Age of reference person" from dropdown in "Distribute by," and "Median ($)" in "Units"); *see also* U.S. GOV'T ACCOUNTABILITY OFF., GAO-15-419, RETIREMENT SECURITY: MOST HOUSEHOLDS APPROACHING RETIREMENT HAVE LOW SAVINGS 8, 10 (2015), http://www.gao.gov/assets/680/670153.pdf [https://perma.cc/7JK3-PZGB] (reporting that 27% of households age fifty-five and above had no retirement savings at all in 2013 and no defined benefit plan).

371. CHALLENGES IN THE RETIREMENT SYSTEM, *supra* note 299, at 48, 49 tbl.1.

372. OFF. OF FIN. PROT. FOR OLDER AMS., CONSUMER FIN. PROT. BUREAU, *supra* note 286, at 5 fig.2.

373. *See, e.g.*, Forman, *Fully Funded Pensions*, *supra* note 322, at 1298−1301; CLINGMAN ET AL., *supra* note 279, at 1–2; PETER J. BRADY, INV. CO. INST., HOW AMERICA SUPPORTS RETIREMENT: CHALLENGING THE CONVENTIONAL WISDOM ON WHO BENEFITS 75 fig.2.10 (2016) https://www.ici.org/system/files/attachments/pdf/rpt_16_america_supports_retirement.pdf [https://perma.cc/JZS5-NT77]; Andrew G. Biggs, *How Much Should the Poor Save for Retirement? Data and Simulations on Retirement Income Adequacy Among Low-Earning Households* (Pension Rsch. Council, The Wharton Sch., Univ. of Pa., Working Paper No. 2019-15, 2019), https://repository.upenn.edu/cgi/viewcontent.cgi?article=1538&context=prc_papers [https://perma.cc/4YE4-47QR].

374. *See, e.g.*, VanDerhei, *supra* note 368 (discussing disparities in retirement savings between men and women).

375. *E.g.*, OLDER WOMEN FACING FINANCIALLY UNCERTAIN FUTURE, *supra* note 173, at 8−9.

to be living in poverty.[376] Also, although a 2020 report by the Consumer Financial Protection Bureau found that 58% of men who retired between 1992 and 2014 could maintain their preretirement spending levels for five years after retiring, just 42% of women could.[377]

There are also significant and long-standing disparities in the retirement savings and overall wealth of families of different races and ethnicities.[378] For example, Table 10 shows that Black and Hispanic households had much less wealth and income than White households in 2019, and these populations were also less likely than White people to own homes or have retirement accounts that year.[379] Table 10 also shows that the Black and Hispanic households that had retirement accounts that year tended to have smaller balances in their accounts than White households.[380]

376. *E.g.*, U.S. GOV'T ACCOUNTABILITY OFF., GAO-18-111SP, THE NATION'S RETIREMENT SYSTEM: A COMPREHENSIVE RE-EVALUATION IS NEEDED TO BETTER PROMOTE FUTURE RETIREMENT SECURITY 58−59 (2017) [hereinafter COMPREHENSIVE RE-EVALUATION], https://www.gao.gov/products/GAO-18-111SP [https://perma.cc/4DKU-MDKQ].

377. OFF. OF FIN. PROT. FOR OLDER AMS., CONSUMER FIN. PROT. BUREAU, *supra* note 286, at 6 fig.3.

378. *See, e.g.*, Neil Bhutta, Andrew C. Chang, Lisa J. Dettling, Joanne W. Hsu & Julia Hewitt, *Disparities in Wealth by Race and Ethnicity in the 2019 Survey of Consumer Finances*, BD. GOVERNORS FED. RSRV. SYS.: FEDS NOTES, https://www.federalreserve.gov/econres/notes/feds-notes/disparities-in-wealth-by-race-and-ethnicity-in-the-2019-survey-of-consumer-finances-20200928.htm [https://perma.cc/7YNQ-27WR] (Sept. 28, 2020); Craig Copeland, *The Status of American Families' Accumulations in Individual Account Retirement Plans and Differences by Race/Ethnicity: An Analysis of the 2019 Survey of Consumer Finances*, EMP. BENEFITS RSCH. INST. (Mar. 11, 2021), https://www.ebri.org/docs/default-source/ebri-issue-brief/ebri_ib_527_iaplans.11mar21.pdf [https://perma.cc/3CKG-4HS4]; *see also* Aravind Boddupalli, *A New Look at Racial Wealth Inequalities Before the Pandemic*, TAX POL'Y CTR.: TAXVOX (Dec. 29, 2020), https://www.taxpolicycenter.org/taxvox/new-look-racial-wealth-inequalities-pandemic [https://perma.cc/6UUC-WFXV].

379. *See infra* Table 10; *see also* Bhutta et al., *supra* note 378; Copeland, *supra* note 364; Hou & Sanzenbacher, *supra* note 306; Kriston McIntosh, Emily Moss, Ryan Nunn & Jay Shambaugh, *Examining the Black-White Wealth Gap*, BROOKINGS (Feb. 27, 2020), https://www.brookings.edu/blog/upfront/2020/02/27/examining-the-black-white-wealth-gap/ [https://perma.cc/F5L5-5FZM]; *Nine Charts About Wealth Inequality in America (Updated)*, URB. INST., https://apps.urban.org/features/wealth-inequality-charts/ [https://perma.cc/W9UE-2RCW] (Oct. 24, 2017).

380. *See infra* Table 10; *see also* COMPREHENSIVE RE-EVALUATION, *supra* note 376, at 50, 51 fig.2.8, 59; Lydia O'Neal & Allyson Versprille, *Tax Code Inequities Fuel Call for IRS to Collect Race-Based Data*, BLOOMBERG TAX: DAILY TAX REP. (Aug. 18, 2020, 4:46 AM), https://news.bloombergtax.com/daily-tax-report/tax-code-inequities-fuel-call-for-irs-to-collect-race-based-data [https://perma.cc/YBK2-F5R9]; Monique Morrissey, *The State of American Retirement*

Savings: How the Shift to 401(k)s Has Increased Gaps in Retirement Preparedness Based on Income, Race, Ethnicity, Education, and Marital Status, ECON. POL'Y INST. 9 chart 6, 13 chart 9, 15 chart 11 (Dec. 10, 2019), https://files.epi.org/pdf/136219.pdf [https://perma.cc/RN4H-YSZN]. *See generally* Joanne K. Yoong, Angela A. Hung, Silvia Helena Barcellos, Leandro Carvalho & Jack Clift, *Disparities in Minority Retirement Savings Behavior: Survey and Experimental Evidence from a Nationally-Representative Sample of US Households* (RAND Educ. & Lab., Working Paper No. WR-1331, 2019), https://www.rand.org/content/dam/rand/pubs/working_papers/WR1300/WR1331/RAND_WR1331.pdf [https://perma.cc/XB7Z-5ZE6]; Christopher R. Tamborini & ChangHwan Kim, *Are You Saving for Retirement? Racial/Ethnic Differentials in Contributory Retirement Savings Plans*, 75 J. GERONTOLOGY 837 (2020); Benjamin W. Veghte, Elliot Schreur & Mikki Waid, *Social Security and the Racial Wealth Gap in Retirement Wealth*, NAT'L ACAD. SOC. INS. 3 tbl.1 (2016), https://www.nasi.org/wp-content/uploads/2020/08/SS_Brief_48.pdf [https://perma.cc/YSQ5-BSY8]; Shomari Wills, *Retirement Savings by Race*, INVESTOPEDIA, https://www.investopedia.com/retirement-savings-by-race-5086962 [https://perma.cc/R99M-2EDU] (Dec. 19, 2021); Hou & Sanzenbacher, *supra* note 306 ("In 2016, [B]lack households had just 14 percent the non-Social Security wealth of [W]hite households and Hispanic households just 20 percent, but 74 percent and 75 percent the Social Security wealth."); OFF. OF FIN. PROT. FOR OLDER AMS., CONSUMER FIN. PROT. BUREAU, *supra* note 286, at 6 fig.3 (noting that while 63% of White, non-Hispanic people who retired between 1992 and 2014 could maintain their preretirement spending levels for five years after retiring, just 27% of Black, non-Hispanic retirees, and just 23% of Hispanic retirees could).

Table 10. Household Financial Profile by Race/Ethnicity, 2019
(In thousands of 2019 dollars or percent)[381]

	White, non-Hispanic	**Black, non-Hispanic**	**Hispanic**	**Other**
Income:				
Median	$69.2	$40.7	$40.7	$56.0
Mean	$122.5	$59.6	$58.5	$112.0
Net Worth:				
Median	$189.1	$24.1	$36.1	$74.5
Mean	$980.6	$142.3	$165.5	$656.6
Assets:				
Primary residence				
Percent of families with	73.7%	45.0%	47.6%	54.2%
Median value for families with	$230.0	$150.0	$200.0	$308.0
Mean value for families with	$354.9	$199.3	$259.7	$474.1
Retirement accounts				
Percent of families with	57.3%	35.1%	25.5%	52.7%
Median value for families with	$80.0	$35.0	$31.0	$47.0
Mean value for families with	$294.2	$109.1	$107.0	$194.4

381. *Survey of Consumer Finances, 1989 – 2019*, *supra* note 369 (choose “Net worth” from dropdown in “Select household financial component,” “Race or ethnicity” from dropdown in “Distribute by,” and “Median ($)” in “Units”; then choose “Net worth” from dropdown in “Select household financial component,” “Race or ethnicity” from dropdown in “Distribute by,” and “Mean ($)” in “Units”; then choose “Before-tax family income” from dropdown in “Select household financial component,” “Race or ethnicity” from dropdown in “Distribute by,” and “Mean ($)” in “Units”; then choose “Before-tax family income” from dropdown in “Select household financial component,” “Race or ethnicity” from dropdown in “Distribute by,” and “Median ($)” in “Units”; then choose “Primary Residence” from dropdown in “Select household financial component,” “Race or ethnicity” from dropdown in “Distribute by,” and “Median ($)” in “Units”; then choose “Primary Residence” from dropdown in “Select household financial component,” “Race or ethnicity” from dropdown in “Distribute by,” and “Mean ($)” in “Units”; then choose “Primary Residence” from dropdown in “Select household financial component,” “Race or ethnicity” from dropdown in “Distribute by,” and “Percent Holding (%)” in “Units”; then choose “Retirement accounts” from dropdown in “Select household financial component,” “Race or ethnicity” from dropdown in “Distribute by,” and “Percent Holding (%)” in “Units”; then choose “Retirement accounts” from dropdown in “Select household financial component,” “Race or ethnicity” from dropdown in “Distribute by,” and “Mean ($)” in “Units”; and then choose “Retirement accounts” from dropdown in “Select household financial component,” “Race or ethnicity” from dropdown in “Distribute by,” and “Median ($)” in “Units”).

C. Individual Savings

The third and final pillar of the retirement system is personal savings (including financial assets and accounts outside of retirement plans, inherited wealth, and home equity).[382] The current trend, however, has been a steep downward slide of more than 50% from a personal savings rate high of 14.2% of disposable income saved in 1975, to just 6.8% in 2018.[383] Also, the 2019 SHED showed that just 63% of respondents reported that they could cover an unexpected $400 expense exclusively using cash, savings, or a credit card paid off at the next statement; and 12% of respondents indicated that they would not be able to cover such an expense at all.[384] New questions have emerged in connection with the catastrophic economic impact of COVID-19; some families have been able to strengthen savings, while others have had to use their savings in connection with job losses.[385]

IV. A CLOSER LOOK AT WOMEN, WORK, AND RETIREMENT SAVINGS

Although women's participation in the paid workforce "surged" in recent decades, women overall "continue to have lower annual earnings than men and, on average, much lower lifetime earnings."[386] Women spend a significant amount of their adult life outside of the paid workforce—44% of their time according to a 2019 study by Merrill Lynch Wealth Management and Age Wave.[387] Breaks in paid work, together with the gender pay gap, can compound and make it

382. U.S. GOV'T ACCOUNTABILITY OFF., GAO-19-342T, THE NATION'S RETIREMENT SYSTEM: A COMPREHENSIVE RE-EVALUATION NEEDED TO BETTER PROMOTE FUTURE RETIREMENT SECURITY 19 (2019) [hereinafter PROMOTE FUTURE SECURITY], https://www.gao.gov/assets/700/696766.pdf [https://perma.cc/9G5R-DS8J].

383. *Id.* at 19 & fig.7; *see also Personal Saving Rate*, FED. RSRV. BANK OF ST. LOUIS, https://fred.stlouisfed.org/series/PSAVERT [https://perma.cc/743A-QF5L].

384. 2019 REPORT ON ECONOMIC WELL-BEING, *supra* note 89, at 2–3, 21 fig.14, 22 fig.15.

385. *See, e.g.*, *id.* at 53, 55. *See generally* JULY 2020 ECONOMIC REPORT, *supra* note 90 (reporting updated findings on respondents based on the COVID-19 pandemic).

386. U.S. GOV'T ACCOUNTABILITY OFF., GAO-12-699, RETIREMENT SECURITY: WOMEN STILL FACE CHALLENGES 4, 5 (2012) [hereinafter WOMEN STILL FACE CHALLENGES], https://www.gao.gov/assets/gao-12-699.pdf [https://perma.cc/5262-FU2Y].

387. AGE WAVE & MERRILL LYNCH WEALTH MGMT., BANK OF AM. CORP., WOMEN & FINANCIAL WELLNESS: BEYOND THE BOTTOM LINE 19 (2020), https://images.em.bankofamerica.com/HOST-01-20-2445/Merrill_Women_Finance_Study.pdf [https://perma.cc/Q6AN-2WPJ].

"relatively impossible" for women to reach retirement income parity with men.[388] For example, in 2020, researchers with the National Institute on Retirement Security published an analysis of the 2016 SIPP data that found older women (sixty-five plus) had a median household income of $47,244 that year, which was just 83% of the median household income of older men, and those researchers concluded that "[t]he story of women's retirement security is one of persistent inequality."[389] Quite simply, retirement research consistently finds a gender pension and retirement wealth gap.[390] For example, a recent Transamerica Center for Retirement Savings survey found that women reported "dramatically lower" household retirement savings ($28,000) than men ($69,000).[391]

The retirement wealth gap is even greater for women of color, who, on average, have less retirement savings than White women.[392] For example, a recent analysis of data from the Survey of Consumer

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388. *Id.*

389. Bond et al., *supra* note 108, at 1−3, 3 fig.1.

390. Molly Scholl, *What You Need to Know About the Gender Pension Gap & Why It Matters*, OLSON GRP. BENEFITS TEAM (Jan. 20, 2020), https://theolsongroup.com/gender-pension-gap-why-matters/ [https://perma.cc/HZ8P-EJXQ]; Jack VanDerhei, *Retirement Savings Shortfalls: Evidence from EBRI's 2019 Retirement Security Projection Model®*, EMP. BENEFIT RSCH. INST. 7, 8 fig.4 (Mar. 7, 2019), https://www.ebri.org/docs/default-source/ebri-issue-brief/ebri_ib_475_rspm-7mar19.pdf [https://perma.cc/9ND6-3C8D]; OLDER WOMEN FACING FINANCIALLY UNCERTAIN FUTURE, *supra* note 173, at 8−9; Reshma Kapadia, *The Stubborn Wealth Gap Between Men and Women*, BARRON'S (Apr. 18, 2018), https://www.barrons.com/articles/the-stubborn-wealth-gap-between-men-and-women-1524099601 [https://perma.cc/LB4A-DFG6]; *see generally* STACIA WEST & AMY CASTRO BAKER, INST. FOR WOMEN'S POL'Y RSCH., IWPR NO. D509, WEALTH INEQUALITY AND ASSET DEPLETION AMONG SINGLE EARLY BABY BOOMERS: DIFFERENCES BY GENDER, RACE/ETHNICITY AND HOME OWNERSHIP IN RETIREMENT READINESS (2017), https://iwpr.org/wp-content/uploads/2020/10/D509.pdf [https://perma.cc/HWQ2-PNFL]. The gender pension gap is a worldwide problem. *See, e.g.*, Andreea Papuc & Matthew Burgess, *Some of The World's Biggest Pension Systems Are Failing Women*, FIN. POST (July 23, 2020), https://financialpost.com/pmn/business-pmn/some-of-the-worlds-biggest-pension-systems-are-failing-women [https://perma.cc/84BZ-8SFJ]; Maciej Lis & Boele Bonthuis, *Drivers of the Gender Gap in Pensions: Evidence from EU-SILC and the OECD Pension Models*, *in* 2 ROBERT HOLZMAN, EDWARD PALMER, ROBERT PALACIOS & STEFANO SACCHI, ADDRESSING GENDER, ADMINISTRATION, AND COMMUNICATION 25 (2020).

391. CATHERINE COLLINSON, PATTI ROWEY & HEIDI CHO, TRANSAMERICA CTR. FOR RET. STUD., WOMEN AND RETIREMENT: RISKS AND REALITIES AMID COVID-19: 20TH ANNUAL TRANSAMERICA RETIREMENT SURVEY OF WORKERS 16, 54 (2020), https://transamericacenter.org/docs/default-source/retirement-survey-of-workers/tcrs2020_sr_women-and-retirement-amid-covid19.pdf [https://perma.cc/V45H-X2UJ].

392. *See, e.g.*, Hannah Hassani, *Women Are Building More Wealth. But Racial Gaps Persist*, URB. INST.: URB. WIRE (Mar. 22, 2018), https://www.urban.org/urban-wire/women-are-building-more-wealth-racial-gaps-persist [https://perma.cc/5NXX-D29J].

Finances found that as recently as 2016, "the average White woman had $43,000 more in retirement savings than the average Black woman."[393] Poverty rates of older women of color also reflect this racial retirement wealth gap: for all Black and Hispanic sixty-five years old and older, the poverty rates are 20% and 22% respectively (as opposed to 10.5% for White women and just 5.8% for White men).[394]

Moreover, research consistently finds women's retirement wealth gap is exacerbated by additional factors including longer lifespans, higher health care costs, caregiving responsibilities, and lower financial literacy.[395] Women also have less retirement planning and investing confidence.[396] Marital status also plays a role: unmarried women generally have a higher risk of poverty and are more vulnerable to economic and financial setbacks because they are unable to pool

393. *Id.* Although the study did not have a large enough sample size to look at other racial groups, it did find that the racial gap between White women and women of color had persisted (and grown) since 1989, even though women overall were "better off." *Id.*

394. CINDY HOUNSELL, LAUREL BEEDON, RUSTY TOLER, SUZANNE SCRUGGS, CHERYL GANNON & LARA HINZ, WOMEN'S INST. FOR A SECURE RET., MINORITY WOMEN AND RETIREMENT INCOME: YOUR FUTURE PAYCHECK: EARNINGS, SOCIAL SECURITY, RETIREMENT PLANS, SAVINGS AND INVESTMENTS fig.2, 7 fig.6 (2020), https://www.wiserwomen.org/wp-content/uploads/2020/10/wiser_rpt_yfp_minority_2020.pdf [https://perma.cc/ZT4A-ZN26].

395. *See, e.g.*, OLDER WOMEN FACING FINANCIALLY UNCERTAIN FUTURE, *supra* note 173, at 5–6 (discussing health care costs as one of biggest expenses for women in retirement); Enda & Gale, *supra* note 310; DIANE GARNICK, TIAA, INCOME INSIGHTS: GENDER RETIREMENT GAP (2016), https://www.tiaa.org/public/pdf/income_gender.pdf [https://perma.cc/AQ2B-BD7N] (discussing various factors leading to retirement pay gap between women and men); COLLINSON ET AL., *supra* note 391; PAUL J. YAKOBOSKI, ANNAMARIA LUSARDI & ANDREA HASLER, TIAA INST., FINANCIAL LITERACY AND WELLNESS AMONG U.S. WOMEN: INSIGHTS ON UNDERREPRESENTED MINORITY WOMEN 4 (2020), https://www.tiaainstitute.org/sites/default/files/presentations/2020-11/TIAA%20Institute-GFLEC_Womens%20P-Fin%20Index_November%202020.pdf [https://perma.cc/9RXU-LRSA] (finding women have lower financial literacy than men); *see generally* Drew M. Anderson & J. Michael Collins, *Can Knowledge Empower Women to Save More for Retirement?* (Ctr. for Ret. Rsch. at Bos. Coll., Working Paper No. 2017-12, 2017), https://crr.bc.edu/wp-content/uploads/2017/09/wp_2017-12.pdf [https://perma.cc/T3R3-U3JY] (discussing how differences in financial knowledge contribute to retirement pay gap between men and women).

396. Craig Copeland, *Retirement Confidence Survey: Attitudes Toward Retirement by Women of Different Marital Statuses*, EMP. BENEFIT RSCH. INST. (June 8, 2020), https://www.ebri.org/docs/default-source/ebri-issue-brief/ebri_ib_507_womenrcs-8jun20.pdf?sfvrsn=369a3d2f_4 [https://perma.cc/9TW5-RWL7] (discussing how women have lower retirement confidence than men); AGE WAVE & MERRILL LYNCH WEALTH MGMT., *supra* note 387, at 7; OLDER WOMEN FACING FINANCIALLY UNCERTAIN FUTURE, *supra* note 173, at 25–35.

resources with a spouse in cases of unexpected "job loss, illness, or disability . . . ."[397]

A. Women and Work

In recent years, women have maintained a substantial presence in the U.S. workforce overall. Indeed, in December 2019, the Bureau of Labor Statistics reported that women slightly outnumbered men in the paid workforce (for only the second time ever).[398] In 2018, 57.1% of all women participated in the workforce (compared to 69.1% of men).[399]

Moreover, many women are working multiple jobs; for example, in 2018, almost half of the 7.8 million workers that had more than one job were women, and women had a higher rate of holding multiple jobs than men.[400] This higher multiple job holding rate of women may be related to the fact that more women than men do part-time work; for example, in 2018, 23.8% of employed women usually worked part-time compared to just 11.8% of men.[401] Not surprisingly, women frequently suggest that child care and household responsibilities often keep them from working more in "formal employment."[402]

When women do work in formal employment, they tend to be concentrated in certain industries and occupations; for example, a 2019

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397. OLDER WOMEN FACING FINANCIALLY UNCERTAIN FUTURE, *supra* note 173, at 9; *see also* Bond et al., *supra* note 108, at 10 (finding married people better off for retirement because of multiple streams of income).

398. Samantha Schmidt, *Women Have Been Hardest Hit by Job Losses in the Pandemic. And It May Only Get Worse*, WASH. POST (May 9, 2020), https://www.washingtonpost.com/dc-md-va/2020/05/09/women-unemployment-jobless-coronavirus/ [https://perma.cc/L55R-VN8T]; Rachel Siegel, *Women Outnumber Men in the American Workforce for Only the Second Time*, WASH. POST (Jan. 10, 2020), https://www.washingtonpost.com/business/2020/01/10/january-2020-jobs-report/ [https://perma.cc/69A8-MCAY]; *see also* March 2021 Employment Situation, *supra* note 21, at tbl.B-5 (showing that women made up 49.7% of total nonfarm payrolls in March of 2021).

399. U.S. BUREAU OF LAB. STAT, U.S. DEP'T OF LAB., BLS REPORT NO. 1084, WOMEN IN THE LABOR FORCE: A DATABOOK 1 (2019), https://www.bls.gov/opub/reports/womens-databook/2019/pdf/home.pdf [https://perma.cc/S9XF-22MQ].

400. *Id.* at 5.

401. *Id.* at 115–17 tbl.21; *see also* 2019 REPORT ON ECONOMIC WELL-BEING, *supra* note 89, at 16 (noting that 18% of women worked part-time in 2019, compared to 12% of men); Bond et al., *supra* note 108, at 5 ("In 2016, 19 percent of women worked part-time, compared to 11 percent of men."); COLLINSON ET AL., *supra* note 391, at 16 (finding women about twice as likely to work part-time compared to men).

402. 2019 REPORT ON ECONOMIC WELL-BEING, *supra* note 89, at 16.

study by the Institute for Women's Policy Research identified the twenty most common occupations for women and found that the top three professions (elementary and middle school teachers, registered nurses, and secretaries and administrative assistants) together employed 12.7% of all women and that half of the twenty most common occupations were female dominated.[403] Another study found that, although women were approximately half of the overall labor force in 2019, they were overrepresented as state and local government employees (60%), and almost half of Black women workers were working in education, health services, or public administration—the primary industries of state and local governments.[404]

Women also tend to spend fewer years in the workforce than men, often because of caregiving responsibilities.[405] Unfortunately, when women spend fewer years in the paid workforce, they will end up with less Social Security and pension benefits. For example, according to a 2012 article by Social Security Administration economist Hilary Waldron, when men became eligible for Social Security in 2007, they typically had ten more years in Social Security-covered employment than women.[406]

Women also tend to earn less than men when they are working in paid employment, often because of gender discrimination and gender occupational segregation.[407] For example, in the first quarter of 2021,

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403. ARIANE HEGESWISCH & ADIAM TESFASELASSIE, INST. FOR WOMEN'S POL'Y RSCH., IWPR NO. C480, THE GENDER WAGE GAP BY OCCUPATION 2018 AND BY RACE AND ETHNICITY 2 (2019), https://iwpr.org/wp-content/uploads/2020/08/C480_The-Gender-Wage-Gap-by-Occupation-2018-1.pdf [https://perma.cc/94WF-MFZD]. In fact, comparison of the twenty most common occupations for men and women showed only five occupations had overlap (retail salespersons, accountants and auditors, customer service representatives, managers, and first-line supervisors of retail work). *Id.* at 1, 3 tbl.1–4 tbl.2.

404. David Cooper & Julia Wolfe, *Cuts to the State and Local Public Sector Will Disproportionately Harm Women and Black Workers*, ECON. POL'Y INST.: WORKING ECON. BLOG (July 9, 2020, 4:58 PM), https://www.epi.org/blog/cuts-to-the-state-and-local-public-sector-will-disproportionately-harm-women-and-black-workers [https://perma.cc/N4AT-2A7Y].

405. *See, e.g.*, AGE WAVE & MERRILL LYNCH WEALTH MGMT., *supra* note 387; *see also infra* Part IV.B.

406. Hilary Waldron, *The Sensitivity of Proposed Social Security Benefit Formula Changes to Lifetime Earnings Definitions*, 72 SOC. SEC. BULL. no. 2, 2012, at 1, 13 tbl.5, https://www.ssa.gov/policy/docs/ssb/v72n2/ssb-v72n2.pdf [https://perma.cc/5KCT-FDQU].

407. *See, e.g.*, HEGESWISCH & TESFASELASSIE, *supra* note 403, at 1; OLDER WOMEN FACING

the median usual weekly earnings of full-time women wage and salary workers ($898) was just 83.1% of those of men ($1,080).[408] Similarly, in 2018, the median annual earnings for full-time, year-round working men was $55,291 compared to just $45,097 for women (around 82% of what men make).[409] All in all, though most Americans are

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FINANCIALLY UNCERTAIN FUTURE, *supra* note 173, at 20−21; Kim Parker & Cary Funk, *Gender Discrimination Comes in Many Forms for Today's Working Women*, PEW RSCH. CTR. (Dec. 14, 2017), https://www.pewresearch.org/fact-tank/2017/12/14/gender-discrimination-comes-in-many-forms-for-todays-working-women/ [https://perma.cc/P9WM-XBSS]; Hernan Galperin, *"This Gig Is Not for Women": Gender Stereotyping in Online Hiring*, SOC. SCI. COMPUT. REV. (Dec. 23, 2019), https://journals.sagepub.com/doi/10.1177/0894439319895757 [https://perma.cc/QQP6-HXG6].

408. News Release, U.S. Bureau of Lab. Stat, U.S. Dep't of Lab., USDL-21-0655, Usual Weekly Earnings of Wage and Salary Workers—First Quarter 2021, at tbl.1 (Apr. 16, 2021, 10:00 AM) [hereinafter Weekly Earnings First Quarter 2021], https://www.bls.gov/news.release/archives/wkyeng_04162021.pdf [https://perma.cc/N9UA-BEAU]. Of course, there is also a racial pay gap, which tends to widen the overall pay gap between White males and women of color. *See* Stephen Miller, *Black Workers Still Earn Less than Their White Counterparts*, SHRM (June 11, 2020), https://www.shrm.org/resourcesandtools/hr-topics/compensation/pages/racial-wage-gaps-persistence-poses-challenge.aspx [https://perma.cc/5S5C-RL6W]. For example, in the first quarter of 2021, the median usual weekly earnings of full-time Black ($799) and Hispanic workers ($750) were significantly lower than those of White ($1,006) and Asian workers ($1,286). Weekly Earnings First Quarter 2021, *supra*, at tbl.2. Of note, however, the median usual weekly earnings of Black women ($768) were 92.1% of the earnings of Black men ($834). *Id.* In short, the gender earnings gap is "magnified by a racial and ethnic earnings gap." HEGESWISCH & TESFASELASSIE, *supra* note 403, at 6. Moreover, "Black women in 'management, business, and financial' occupations earn 87.2 percent of Black men's [earnings] but only 65.1 percent of White men's earnings in these occupations." *Id.*

409. JESSICA SEMEGA, MELISSA KOLLAR, JOHN CREAMER & ABINASH MOHANTY, U.S. CENSUS BUREAU, P60-266(RV), CURRENT POPULATION REPORTS: INCOME AND POVERTY IN THE UNITED STATES: 2018, at 46 tbl.A-7 (2020), https://www.census.gov/content/dam/Census/library/publications/2019/demo/p60-266.pdf [https://perma.cc/4G3T-X25X]; *see also* U.S. BUREAU OF LAB. STAT., U.S. DEP'T OF LAB., BLS REPORT NO. 1089, HIGHLIGHTS OF WOMEN'S EARNINGS IN 2019, at 1 (2020), https://www.bls.gov/opub/reports/womens-earnings/2019/pdf/home.pdf [https://perma.cc/27KU-B4X7] (noting that in 2019, the median usual weekly earnings of full-time women wage and salary workers were 82% of those of male full-time wage and salary workers); OLDER WOMEN FACING FINANCIALLY UNCERTAIN FUTURE, *supra* note 173, at 50−52. Private-sector survey data collected on more than 425,000 salaries of full-time U.S. workers in 2019 provide additional insight on the gender pay gap: women on average earn 21.4% lower base pay than men. Andrew Chamberlain, Daniel Zhao & Amanda Stansell, *Progress on the Gender Pay Gap: 2019*, GLASSDOOR ECON. RSCH. 4 (Mar. 27, 2019), https://www.glassdoor.com/research/app/uploads/sites/2/2019/03/Gender-Pay-Gap-2019-Research-Report-1.pdf [https://perma.cc/4YST-JALM]. That gap, however, closed slightly to 19.1% when workers of similar ages, education, and experience are compared; moreover, the gender pay gap shrinks to just 4.9% for workers with the same job title, employer, and location (women make 95.1% of what men make). *Id.* Although substantial strides have been made in recent decades to educate and employ women, women remain "overrepresented in low wage professions [and are] often paid less than their male counterparts." OLDER WOMEN FACING FINANCIALLY UNCERTAIN FUTURE, *supra* note 173, at 1. Moreover, despite the fact that more women than men pursue higher education degrees and are approximately half of the overall workforce, women are "59 percent of the low wage workforce[,]" and as already mentioned, part-time

underprepared and "struggle" to save for retirement, women, in particular, "face unique challenges in saving, largely stemming from a gender pay gap that persists into a retirement wealth gap."[410]

B. Women and Caregiving

Unpaid caregiving is a reality for most women, and recent research shows that "[c]aregiving, especially spousal caregiving, has a strong effect on retirement preparedness . . . ."[411] Eighty percent of women have children during their lifetimes, and women are much more likely than men to leave the paid workforce to provide care for their children, parents, and spouses.[412] Indeed, research shows that the 65% of caregivers are women and that women take as many as nine years out of the paid workforce to care for family.[413] The decision to leave the paid workforce can also have significant consequences for women on their pay and promotion when they return; in fact, working mothers "experience a 'mommy penalty,' a pay gap that is three times that of non-mothers due to lost income and missed opportunities for

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work is more common among women than men. *Id.* at 1 n.2. The gender pay gap also increases with age: while young workers (eighteen to twenty-four years old) face a gender pay gap of just 1.4%, older workers (fifty-five to sixty-four years old) experience a gender pay gap of 12.3%. Chamberlain et al., *supra*, at 5. The gender pay gap also varies by industry: the media, retail, construction, repair, and maintenance industries had the largest pay gaps, while the biotech and pharmaceuticals, education, and aerospace and defense industries had smaller gaps. *Id.* The wider gender pay gap at older ages could reflect age discrimination because, as more fully explained in Part IV.B below, women tend to take more time out of the workforce to engage in unpaid caregiving. OLDER WOMEN FACING FINANCIALLY UNCERTAIN FUTURE, *supra* note 173, at 22−23; U.S. GOV'T ACCOUNTABILITY OFF., GAO-19-382, RETIREMENT SECURITY: SOME PARENTAL AND SPOUSAL CAREGIVERS FACE FINANCIAL RISKS (2019) [hereinafter CAREGIVERS FACE FINANCIAL RISKS], https://www.gao.gov/assets/gao-19-382.pdf [https://perma.cc/3XZY-SALA]; *see infra* Part IV.B.

410. Bond et al., *supra* note 108, at 1.

411. *Id.*; *see also* CAREGIVERS FACE FINANCIAL RISKS, *supra* note 409.

412. AGE WAVE & MERRILL LYNCH WEALTH MGMT., *supra* note 387, at 14; *see, e.g.*, CAREGIVERS FACE FINANCIAL RISKS, *supra* note 409.

413. *Ten Facts About Women & Caregiving*, WOMEN'S INST. FOR A SECURE RET., https://wiserwomen.org/wp-content/uploads/2019/11/10-facts-about-women-and-caregiving-2019.pdf [https://perma.cc/XC67-E5BP]; JOAN C. WILLIAMS, ROBIN DEVAUX, PATRICIJA PETRAC & LYNN FEINBERG, AARP PUB. POL'Y INST., PROTECTING FAMILY CAREGIVERS FROM EMPLOYMENT DISCRIMINATION 2 (2012), https://www.aarp.org/content/dam/aarp/research/public_policy_institute/health/protecting-caregivers-employment-discrimination-insight-AARP-ppi-ltc.pdf [https://perma.cc/8T84-AU2F].

promotions caused by breaks from the workforce."[414] Women also provide two-thirds of elder care, which can lead to "lost benefits and promotions if work interruptions occur, in addition to out-of-pocket costs."[415]

Unpaid caregiving by women is only half of the problem. Even paid women caregivers face significant earnings and retirement savings challenges.[416] Unsurprisingly, women comprise the vast majority of the low-paid, adult-care workforce; for example, in 2017, 88% of paid adult-care workers doing in-home care were women (including home health aides and personal care aides), and 85% of paid adult-care workers in institutional settings were women.[417] Finally, it is worth noting that women are substantially more likely than men not only to engage in paid caregiving but also to need paid care as they age.[418]

As the U.S. population ages, the need for paid caregiving will continue to grow, and the COVID-19 pandemic may even accelerate that growth.[419] Prior to the onset of the COVID-19 pandemic, the U.S.

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414. AGE WAVE & MERRILL LYNCH WEALTH MGMT., *supra* note 387, at 14. Motherhood also plays a significant role in reducing women's Social Security benefits. Matthew S. Rutledge, Alice Zulkarnain & Sara Ellen King, *How Much Does Motherhood Cost Women in Social Security Benefits?* 7–12 (Ctr. for Ret. Rsch. at Bos. Coll., Working Paper No. 2017-14, 2017), https://crr.bc.edu/wp-content/uploads/2017/10/wp_2017-14.pdf [https://perma.cc/4YQQ-QKWX] (finding that women with one child receive 16% less in Social Security benefits than non-mothers, and each additional child reduces Social Security benefits by another 2%). Although the lost benefits can be negligible for women who receive Social Security spousal benefits, this "Social Security motherhood penalty" can be particularly harsh for mothers whose Social Security benefits depend only on their own earnings histories. *Id.* at Abstract.

415. AGE WAVE & MERRILL LYNCH WEALTH MGMT., *supra* note 387, at 15.

416. *See generally* CYNTHIA HESS & ARIANE HEGEWISCH, INST. FOR WOMEN'S POL'Y RSCH., IWPR NO. C486, THE FUTURE OF CARE WORK: IMPROVING THE QUALITY OF AMERICA'S FASTEST-GROWING JOBS (2020), https://iwpr.org/wp-content/uploads/2020/07/C486_Future-of-Care-Work_final.pdf [https://perma.cc/76TN-RAJW] (discussing challenges paid caregivers face).

417. *Id.* at 4 fig.1. Women over the age of forty are the majority of these adult-care workers: 64% of women engaged in in-home paid care work are over age forty, and 50% of the women working in institutional settings are, too. *Id.* at 4, 6 tbl.1. Notably, while Black women comprise just 13% of working women, they are "overrepresented" as paid caregivers: Black women are 28% of women home care workers and 29% of women workers in institutions. *Id.* at 5, 6 tbl.1. Hispanic women are also overrepresented. *Id.* at 5.

418. *Id.* at 3.

419. In addition to COVID-19's significant impacts on labor force participation and on the timing of retirement, there may be significant long-term side effects for those that survive COVID-19. *See infra* Part V.C. Going forward, technology and online platforms coordinating care work may play a significant role in meeting the growing need for additional paid caregivers. In fact, online platforms such as Care.com

Census Bureau projected that the population of individuals aged sixty-five or older would more than double over the forty-four-year period from 2016 to 2060, increasing from 49.2 million in 2016 (15% of the U.S. population) to 94.7 million in 2060 (23% of the U.S. population).[420] Moreover, the Census Bureau projected adults aged eighty-five and older to triple over that time period, increasing from 6 million in 2016 to 19 million in 2060.[421] As a result of these changing demographics, research from 2020 had already identified paid adult-care work as a sector expected to "increase substantially" due to "both an aging population and a comparatively low risk of automation . . . ."[422] At the same time, however, these caregiving jobs offer lower earnings and less access to fringe benefits, among other significant challenges.[423] For example, full-time, year-round female home care workers had median annual earnings of just $23,500 in 2017, compared to $40,000 for all working women that year.[424] Earnings are only minimally higher for women working in institutional settings: $25,600 for women and $29,000 for men.[425] Also, only 13%

have already established the viability of migrating offline care work to an online platform model. *Company Overview*, CARE.COM, https://www.care.com/company-overview [https://perma.cc/9ZR7-CSLW]. In that regard, the need to institute social distancing as part of the response to the COVID-19 pandemic has already accelerated the adoption of telemedicine; one estimate suggests that the current telemedicine market ($45 billion in 2019) will more than quadruple by 2026 (to $175 billion). Natalie Zhang, *How Coronavirus Accelerated the Rise of Telemedicine*, CNBC (May 18, 2020, 12:03 PM), https://www.cnbc.com/2020/05/18/coronavirus-how-covid-19-accelerated-the-rise-of-telemedicine.html [https://perma.cc/3KEB-PGSV]. In addition, other technological advances could be more readily employed to allow for more individuals to age in place (for example, fall detectors, heart-rate monitors, smart phones, wearable devices, and emergency response systems). *See id.*

420. JONATHAN VESPA, LAUREN MEDINA & DAVID M. ARMSTRONG, U.S. CENSUS BUREAU, P25-1144, CURRENT POPULATION REPORTS: DEMOGRAPHIC TURNING POINTS FOR THE UNITED STATES: POPULATION PROJECTIONS FOR 2020 TO 2060, at 1 fig.1, 4 tbl.1 (2020), https://www.census.gov/content/dam/Census/library/publications/2020/demo/p25-1144.pdf [https://perma.cc/AKY4-CRNQ].

421. *Id.* at 4 tbl.1.

422. HESS & HEGEWISCH, *supra* note 416, at v; *see also* News Release, U.S. Bureau of Lab. Stat., U.S. Dep't of Lab., USDL-20-1646, Employment Projections—2019−2029, at chart 1, https://www.bls.gov/news.release/archives/ecopro_09012020.pdf [https://perma.cc/WA6M-UFT2] (Sept. 1, 2020, 10:00 AM) (listing nurse practitioners, occupational therapy assistants, home health and personal care aides, and physical therapist assistants in the ten fast growing occupations).

423. HESS & HEGEWISCH, *supra* note 416, at v.

424. *Id.* at vi, 8, 9 tbl.2.

425. *Id.* These earnings translate to less than $15 an hour for the 76% of all women who do in-home adult care (as compared to 41% of working women generally earning less than $15 an hour). *Id.* at 8–9, 10 fig.4.

of women adult care workers doing in-home care, and 21% of those in institutional settings had access to a pension plan.[426]

C. Women and Life Expectancy

Women also tend to live longer than men.[427] For example, in 2021, a sixty-five-year-old man could expect to live, on average, until age eighty-four, while a sixty-five-year-old woman could expect to live almost until age eighty-seven.[428] Moreover, according to the Census Bureau, in 2016, there were almost 27.5 million women aged sixty-five and older but just under 21.8 million men.[429] By age eighty-five, women outnumber men by almost two to one; for example, in 2016, there were around 4.1 million women aged eighty-five and older, compared with just 2.2 million men.[430]

D. Women and Health Care Costs

Women are also likely to have higher health care costs than men as they age. For example, one study estimated that, in 2019, a retiring couple will have $285,000 in health care and medical expenses during retirement, while a single woman will have $150,000 in expenses, and

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426. *Id.* at vi, 11 tbl.3. Also, just 24% of these in-home care workers and just 41% of those in institutional settings had employer-sponsored health insurance, and, not surprisingly, these "shares are much lower than for the working female population overall." *Id.*

427. *See generally Around the Globe, Women Outlive Men*, POPULATION REFERENCE BUREAU (Sept. 1, 2001), https://www.prb.org/resources/around-the-globe-women-outlive-men/ [https://perma.cc/S29D-NQ9W].

428. *Retirement & Survivors Benefits: Life Expectancy Calculator*, SOC. SEC. ADMIN., https://www.ssa.gov/planners/lifeexpectancy.html (for men, select "male" in the gender box, select January 1, 1956, for date of birth, and then click "Submit"; for women, select "female" in the gender box, select January 1, 1956, for date of birth, and then click "Submit").

429. ANDREW W. ROBERTS, STELLA U. OGUNWOLE, LAURA BLAKESLEE & MEGAN A. RABE, U.S. CENSUS BUREAU, ACS-38, AMERICAN COMMUNITY SURVEY REPORTS: THE POPULATION 65 YEARS AND OLDER IN THE UNITED STATES: 2016, at 2 tbl.1 (2018), https://www.census.gov/content/dam/Census/library/publications/2018/acs/ACS-38.pdf [https://perma.cc/47W3-KY6V].

430. *Id.*; AGE WAVE & MERRILL LYNCH WEALTH MGMT., *supra* note 387, at 11; *see also* LAUREN MEDINA, SHANNON SABO & JONATHAN VESPA, U.S. CENSUS BUREAU, P25-1145, POPULATION ESTIMATES AND PROJECTIONS: LIVING LONGER: HISTORICAL AND PROJECTED LIFE EXPECTANCY IN THE UNITED STATES, 1960 to 2060, at 7 (2020), https://www.census.gov/content/dam/Census/library/publications/2020/demo/p25-1145.pdf [https://perma.cc/TMF7-QRXT] (finding similar numbers for immigrants).

a single man will have just $135,000 in expenses.[431] Another study found that the average woman will spend $688,000 in out-of-pocket health care and long-term care costs in retirement—39% (or $194,000) more than the $494,000 for the average man.[432] For women, these health and long-term care costs may be particularly burdensome as women may "bear these costs for longer and may have already spent down assets if their spouse predeceases them."[433] Health problems can also be a major factor that triggers early retirement.[434]

E. Women and Retirement Income Security

1. Women Depend More on Social Security Benefits

Part III.A above showed that women are generally more dependent on Social Security benefits than men.[435] Part IV.C above showed that women are more likely than men to leave the workforce to provide care for their children, parents, and spouses, and those caregiving responsibilities can result in them making less Social Security contributions and saving less for retirement.[436] All in all, women's lower earnings and lower savings result in significantly lower Social Security and pension benefits.[437]

2. Women Are Less Likely to Participate in Employer-Sponsored Retirement Plans

In recent decades, research has found that working women were actually more likely to work for employers that offered pension plans, which could be attributable to the industries and sectors in which

431. News Release, Fid. Invs., Health Care Price Check: A Couple Retiring Today Needs $285,000 as Medical Expenses in Retirement Remain Relatively Steady 1 (Apr. 2, 2019), https://s2.q4cdn.com/997146844/files/doc_news/archive/b6f07a26-3aa9-4a98-af00-b1b783cfd552.pdf [https://perma.cc/9X9Q-C553].

432. AGE WAVE & MERRILL LYNCH WEALTH MGMT., *supra* note 387, at 16 fig.4.

433. Bond et al., *supra* note 108, at 2.

434. *See, e.g.*, 2019 REPORT ON ECONOMIC WELL-BEING, *supra* note 89, at 47 (finding 30% of respondents indicating health problems as a factor in their decisions to retire).

435. *See supra* Part III.A.

436. *See supra* Part IV.C.

437. *See, e.g.*, Enda & Gale, *supra* note 310.

women tend to participate (such as, health and education, government, and non-profit sectors); however, working for those employers did not guarantee eligibility for pension benefits.[438] For example, while 72% of the men in a recent Transamerica Center for Retirement Studies survey were offered the opportunity to participate in a 401(k)-type plan, just 64% of the women were.[439]

Even if an employer has an employer-sponsored retirement plan, part-time workers, the vast majority of whom are women, will often find it difficult to satisfy the plan's eligibility, participation, and vesting requirements to earn any pension benefits.[440] For example, women working as contingent and part-time instructors in education are usually treated as employees rather than independent contractors, and that means that their wages should be covered by Social Security. But they may not work enough hours (or years) to qualify for participation in the employer-sponsored retirement plan.[441]

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438. *Id.*; WOMEN STILL FACE CHALLENGES, *supra* note 386, at 9–10.

439. COLLINSON ET AL., *supra* note 391, at 16, 52.

440. *See, e.g.*, EMP. BENEFITS SEC. ADMIN., U.S. DEP'T OF LAB., WHAT YOU SHOULD KNOW ABOUT YOUR RETIREMENT PLAN 5, 8 tbl.2 (2020), https://www.dol.gov/sites/dolgov/files/ebsa/about-ebsa/our-activities/resource-center/publications/what-you-should-know-about-your-retirement-plan.pdf [https://perma.cc/RL29-2V6F] (noting requirements for part-time workers for employer-benefit plans based on hours worked and number of years of service at company for participation and vesting).

441. *See, e.g.*, Schramm v. Comm'r, 102 T.C.M. (CCH) 233 (2011) (finding adjunct professor could deduct unreimbursed business expenses as a miscellaneous itemized deduction because he was a common law employee); I.R.C. § 410(a) (allowing employers to condition participation in employer-benefit plans on one year of service (or 1,000 hours) with employer); ERISA § 202, 29 U.S.C. § 1052 (allowing employers to condition participation in pension plans on one year of service (or 1,000 hours) with employer); EMP. BENEFITS SEC. ADMIN., U.S. DEP'T OF LAB., *supra* note 440, at 5. In that regard, a recent survey by the American Association of University Professors (AAUP) found that 65.1% of the higher education institution respondents did not make retirement contributions for any part-time faculty members. *The Annual Report on the Economic Status of the Profession, 2019–20*, BULL. AM. ASS'N U. PROFESSORS, Summer 2020, at 21, 46 tbl.16, https://www.aaup.org/sites/default/files/AnnualReportontheEconomicStatusoftheProfession%2C2019%E2%80%9320.pdf [https://perma.cc/SZS3-S8R4]; *see also* PAUL J. YAKOBOSKI & PAUL DICESARE, TIAA INST., RETIREMENT BENEFITS FOR ADJUNCT FACULTY (2020), https://www.tiaainstitute.org/sites/default/files/presentations/2020-06/TIAA%20Institute_Adjunct%20Faculty_TI_Yakoboski_June2020.pdf [https://perma.cc/ML5Z-TMZT]; PAUL J. YAKOBOSKI, TIAA INST., ADJUNCT FACULTY: PERSONAL FINANCES AND RETIREMENT SAVINGS (2019), https://www.tiaainstitute.org/sites/default/files/presentations/2019-03/TIAA%20Institute_Adjunct%20Faculty%20Personal%20Finances_TI_March%202019.pdf [https://perma.cc/VKY3-CLFN]; BILL HUSSAR, JIJUN ZHANG, SARAH HEIN, KE WANG, ASHLEY ROBERTS, JIASHAN CUI, MARY SMITH, FARRAH BULLOCK MANN ET AL., NAT'L CTR. FOR EDUC. STUD., U.S. DEP'T OF EDUC., NO. 2020-1414, THE CONDITION OF EDUCATION 2020, at 150−53 (2020),

3. Women Often Have Less Savings and More Debt

In recent years, more women than men have graduated from college and graduate school, "accounting for 57% of recent degree earners."[442] The fact that more women than men pursue higher education degrees has resulted in women owing almost two-thirds of the more than $1.54 billion student loan debt in the United States in 2020.[443] That student loan debt along with the gender pay gap are major factors that contribute to the greater (and growing) challenges women face with respect to their retirement income security.[444]

Lusardi and others used the 2018 Health and Retirement Study (HRS) and the 2018 National Financial Capability Study (NFCS) to study attitudes and understanding about debt among individuals aged fifty-one through sixty-one.[445] Their study found that 41% of those surveyed in the 2018 HRS agreed or strongly agreed that they had too much debt and that 23% had been contacted by a debt collector.[446] Their study also showed that women were more likely to report that they had unpaid medical bills and that they felt more overburdened by debt.[447]

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https://nces.ed.gov/pubs2020/2020144.pdf [https://perma.cc/KXG9-AR8Y]; MARTIN J. FINKELSTEIN, VALERIE MARTIN CONLEY & JACK H. SCHUSTER, TIAA INST., TAKING THE MEASURE OF FACULTY DIVERSITY (2016), https://www.tiaainstitute.org/sites/default/files/presentations/2017-02/taking_the_measure_of_faculty_diversity.pdf [https://perma.cc/P79P-AUJ6].

442. AGE WAVE & MERRILL LYNCH WEALTH MGMT., *supra* note 387, at 6.

443. AAUW, DEEPER IN DEBT: WOMEN AND STUDENT LOANS IN THE TIME OF COVID 1, https://www.aauw.org/app/uploads/2020/05/Deeper_In_Debt_FINAL.pdf [https://perma.cc/8X3J-G7VC].

444. Kevin Miller, AAUW, DEEPER IN DEBT: WOMEN AND STUDENT LOANS 28−29 (2017), https://www.aauw.org/app/uploads/2020/03/DeeperinDebt-nsa.pdf [https://perma.cc/B2C4-FBJS].

445. Annamaria Lusardi, Olivia S. Mitchell & Noemi Oggero, *Understanding Debt in the Older Population* 4 (Pension Rsch. Council, The Wharton Sch., Univ. of Pa., Working Paper No. 2020-4, 2020), https://repository.upenn.edu/cgi/viewcontent.cgi?article=1577&context=prc_papers [https://perma.cc/LGC8-QH8G].

446. *Id.* at 5.

447. *Id.* at 6−7. Their study also found that the 2018 NFCS showed that a substantial portion (36%) of older Americans reported being overburdened by debt. *Id.* at 10−11. Also, more women than men reported being anxious about their personal finances (65% of women compared to 54% of men), stressed about finances (56% of women compared to 44% of men), and concerned about running out of money (53% of women compared to 48% of men). ANDREA HASLER, ANNAMARIA LUSARDI & OLIVIA VALDES, FINRA INV. EDUC. FOUND. & GLOB. FIN. LITERACY EXCELLENCE CTR., FINANCIAL ANXIETY AND STRESS AMONG U.S. HOUSEHOLDS: NEW EVIDENCE FROM THE NATIONAL FINANCIAL CAPABILITY STUDY AND FOCUS GROUPS 7, 8 tbl.3, 9, 10 tbl.4 (2021), https://gflec.org/wp-content/uploads/2021/04/Anxiety-and-

4. *Women Often Have Lower Financial Literacy*

Financial literacy is a key driver for retirement planning and debt management.[448] In fact, the "correlation between financial literacy and different measures of retirement planning is quite robust[,]" and "financial literacy is associated with greater retirement planning and greater retirement wealth accumulation."[449] In fact, working women in general have relatively lower financial literacy than men, and many women have trouble making ends meet and saving for emergencies and retirement.[450] Moreover, a recent survey by the Transamerica Center for Retirement Studies found that only around 12% of women were "very confident" that they could retire comfortably, compared to

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Stress-Report-GFLEC-FINRA-FINAL.pdf [https://perma.cc/53QU-YKWK]; JUDY T. LIN, CHRISTOPHER BUMCROT, TIPPY ULICNY, GARY MOTTOLA, GERRI WALSH, ROBERT GANEM, CHRISTINE KIEFFER & ANNAMARIA LUSARDI, FINRA INV. EDUC. FOUND., THE STATE OF U.S. FINANCIAL CAPABILITY: THE 2018 NATIONAL FINANCIAL CAPABILITY STUDY 18 (2019), https://www.usfinancialcapability.org/downloads/NFCS_2018_Report_Natl_Findings.pdf [https://perma.cc/J5ML-Y6HL]. Financial literacy played a role: those who scored higher on financial literacy questions in the 2018 NFCS seemed to be able to better manage their debt exposure. Lusardi et al., *supra* note 445, at 13−14.

448. Lusardi et al., *supra* note 445, at 14.

449. Annamaria Lusardi & Olivia S. Mitchell, *The Economic Importance of Financial Literacy: Theory and Evidence*, 52 J. ECON. LITERATURE 5, 22, 25 (2014).

450. *See id.* at 17, 22 n.31, 24; ANNAMARIA LUSARDI & CARLO DE BASSA SCHERESBERG, TIAA INST., FINANCIAL CAPABILITY AND FINANCIAL LITERACY AMONG WORKING WOMEN: NEW INSIGHTS 2 (2017), https://www.tiaainstitute.org/sites/default/files/presentations/2017-03/Research%20Report_Working%20Women_March%202017.pdf [https://perma.cc/KUA5-BZ69]; *see also* Robert Clark, Annamaria Lusardi, Olivia S. Mitchell & Hallie Davis, *Financial Well-Being Among Black and Hispanic Women* 2 (Glob. Fin. Literacy Excellence Ctr., Working Paper No. 2021-1, 2021), https://gflec.org/wp-content/uploads/2021/02/Financial-Well-being-among-Black-and-Hispanic-Women-WP-Feb2021.pdf [https://perma.cc/4XE3-JX9U] (noting disparities in financial literacy between men and women around the world); YAKOBOSKI ET AL., *supra* note 395, at 4; CATHERINE COLLINSON, PATTI ROWEY & HEIDI CHO, TRANSAMERICA CTR. FOR RET. STUD., 19 FACTS ABOUT WOMEN'S RETIREMENT OUTLOOK: SELECT FINDINGS FROM THE 19TH ANNUAL TRANSAMERICA RETIREMENT SURVEY OF AMERICAN WORKERS 27 (2019), https://www.transamericacenter.org/docs/default-source/women-and-retirement/tcrs2019_sr_women_and_retirement_research_report.pdf [https://perma.cc/8W8D-LQJ7] (finding men twice as likely to have saved over $250,000 for retirement, while finding more women to have less than $10,000 or nothing at all saved for retirement); OLDER WOMEN FACING FINANCIALLY UNCERTAIN FUTURE, *supra* note 173, at 17−19; Satish Kumar, Sweta Tomar & Deepak Verma, *Women's Financial Planning for Retirement: Systematic Literature Review and Future Research Agenda*, 37 INT'L J. BANK MKTG. 120, 135–36 (2019). Pertinent here, a recent Transamerica Center for Retirement Studies survey found that only 29% of women were aware of the retirement saver's tax credit compared to 46% of men, and women did not seem to understand Social Security as well as men. COLLINSON ET AL., *supra*, at 32. Also, the 2019 SHED shows that women, on average, answer fewer financial literacy questions correctly than men. 2019 REPORT ON ECONOMIC WELL-BEING, *supra* note 89, at 52 (52% for women compared to 67% for men).

23% of men.[451] Pertinent here, women often face social taboos in talking about money issues that contribute to women's lack of confidence; for example, one study found that "[61%] of women would rather talk about their own death than money."[452]

V. PROBLEMS AHEAD FOR GIG WORKERS WORKING TO SAVE FOR RETIREMENT

> *"I never heard of a Jazz musician who retired. You love what you do, so what are going to do . . . play for the walls?" Nat Adderley, twentieth-century American jazz musician who recorded "Work Song" in 1960, which he referred to as his Social Security song because he continued to accrue royalties throughout his life when others performed it.*[453]

Gig work presents unique retirement savings challenges for workers. For example, in a recent survey of freelancers, Small Business Majority found that 40% did not have a retirement plan.[454] Figure 2 shows that the most common barrier to retirement savings for

451. COLLINSON ET AL., *supra* note 450, at 13. Research also shows that while women may have confidence in paying bills or budgeting, there is a significant confidence drop when it comes to managing financial investments. AGE WAVE & MERRILL LYNCH WEALTH MGMT., *supra* note 387, at 7 (dropping from 90% and 84% confidence in paying bills and budgeting, respectively, to 52% confidence in managing investments). Although lack of confidence matters, that same research identified the primary barrier to investment for women as lack of knowledge. *Id.* at 8. Also, women—notwithstanding their higher education levels—express less confidence than men about managing their investments: a mere third of women SHED respondents in 2019 said that they were "mostly" or "very comfortable" investing their retirement savings. 2019 REPORT ON ECONOMIC WELL-BEING, *supra* note 89, at 51. Prior research has suggested that the gender gap in financial literacy is attributable to the gender-related specialization of household financial tasks—but that women's financial literacy increases following the death of a spouse. *Id.* at 52 n.49; *see also* Kumar et al., *supra* note 450, at 134.

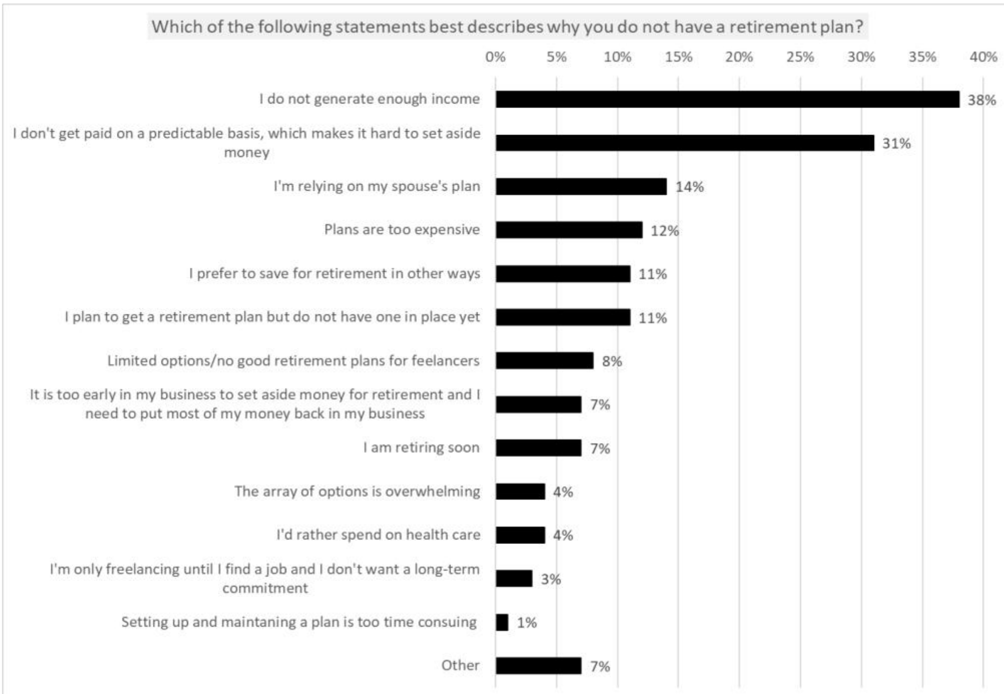
452. AGE WAVE & MERRILL LYNCH WEALTH MGMT., *supra* note 387, at 7.

453. NAT ADDERLEY JR. (alteration in original), http://www.natadderleyjr.com/bio-4 [https://perma.cc/XW69-Z4HN]; Just Jazz Facts (@justjazzfacts), TWITTER (Apr. 12, 2016, 9:11 PM), https://twitter.com/justjazzfacts/status/720056850889052160?lang=en [https://perma.cc/MH7Z-H6DQ].

454. *Opinion Poll: Freelancers Need Flexible Retirement Options*, SMALL BUS. MAJORITY 3, 6 fig.3 (Mar. 22, 2017), https://smallbusinessmajority.org/sites/default/files/research-reports/032217-Freelancers-Retirement-poll.pdf [https://perma.cc/PN7Z-2GUY]; *see also* Brown, *supra* note 9, at 10 (noting independent contractors less likely to participate in 401(k) plans).

these freelancers was inadequate earnings, followed by the inability to save due to the unpredictability of gig work.[455]

Figure 2. Freelancers Cite Barriers to Saving for Retirement[456]



Although adequate cash flow is the most obvious challenge to gig workers' ability to save for retirement, other retirement savings challenges stem primarily from the classification of gig workers as independent contractors for tax and labor law purposes.[457] As this Part explains, treating gig workers as independent contractors rather than employees means that they: (1) are not subject to employer withholding of Social Security payroll taxes and (2) do not have access to employer-sponsored retirement (and health care) plans.

455. *See infra* Figure 2.
456. *Opinion Poll: Freelancers Need Flexible Retirement Options*, *supra* note 454, at 6 fig.4.
457. *See infra* Parts V.A, V.B.

A. *Misclassification Means that Gig Workers Do Not Always Earn Enough Social Security Benefits*

As Part II.C.1 above explained, traditional employers are required (1) to withhold income and Social Security taxes from the wages that they pay their employees and (2) to report that information to those employees and the IRS (on IRS Form W-2s).[458] On the other hand, as Part II.C.2 above explained, there is no required withholding of payroll or income tax on amounts paid to independent contractors, and payors are not always required to report those payments on IRS 1099 Forms.[459] To be sure, independent contractors are: (1) required to keep track of and report their income—whether it shows up on an IRS Form 1099 or not, (2) required to calculate and remit any tax owed, and (3) required to make quarterly estimated tax payments if they owe at least $1,000 of tax.[460] Unfortunately, given the high rates of noncompliance with the self-employment tax by independent contractors, many gig workers will end up with smaller Social Security benefits than they will need in retirement.[461] Accordingly, the determination of whether a worker is an employee or independent contractor is of the utmost importance, and this Subpart explores the implications of worker classification and the "[rampant] misclassification" of workers.[462] For example, in a 2013 study, the U.S. Department of Treasury Inspector General for Tax Administration noted that millions of employees were misclassified as independent contractors, and in their 2017 study,

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458. *See supra* Part II.C.1.

459. *See supra* Part II.C.2.

460. *Manage Taxes for Your Gig Work*, IRS, irs.gov/businesses/small-businesses-self-employed/manage-taxes-for-your-gig-work [https://perma.cc/6BTG-C2NF] (July 7, 2021); *Estimated Taxes*, IRS, https://www.irs.gov/businesses/small-businesses-self-employed/estimated-taxes [https://perma.cc/MM63-8SQ3] (Aug. 6, 2021).

461. *See supra* Part III.A.2. Of note, one recent study found that older contingent workers (ages fifty to sixty-four) were less likely than traditional workers of the same ages to be eligible for, apply for, or be awarded Social Security Disability Insurance (SSDI) benefits. Matthew S. Rutledge, Alice Zulkarnain & Sara Ellen King, *How Does Contingent Work Affect SSDI Benefits?* 15 (Ctr. for Ret. Rsch. at Bos. Coll., Working Paper No. 2019-4, 2019), https://crr.bc.edu/wp-content/uploads/2019/02/wp_2019-4.pdf [https://perma.cc/3JX7-QWDX].

462. Oei & Ring, *supra* note 227, at 695.

Bernhardt and Thomason estimated that "perhaps [one] to [two] percent of the workforce is misclassified . . . ."[463]

1. The Importance of Classification

As already explained in Parts II and III above, there are significant differences in the federal income, Social Security tax, and pension rules governing employees and independent contractors.[464] Classification of a worker as an employee also guarantees a worker many rights under many other federal and state laws. For example, only employees are entitled to collectively bargain under the National Labor Relations Act, and only employees are eligible for the overtime and minimum wage protections of the Fair Labor Standards Act and the Family Medical Leave Act's guaranteed family and medical leave.[465] Similarly, state workers' compensation programs provide benefits to employees—but not to independent contractors; and prior to 2020, the joint federal-state unemployment compensation program (the CARES Act) generally only paid benefits to eligible, unemployed former employees but not to independent contractors.[466] Also, of

463. 2013 EMPLOYERS DO NOT ALWAYS FOLLOW IRS, *supra* note 219, at 2; Bernhardt & Thomason, *supra* note 6, at 10; *see also* Eric A. Posner, *The Economic Basis of the Independent Contractor/Employee Distinction* 1–2, 27 (Univ. of Chi. Coase-Sandor Inst. for L. & Econ., Research Paper No. 909, 2020), https://ssrn.com/abstract=3582673 [https://perma.cc/F3CZ-QAM8] (noting employers deliberately misclassify employees as independent contractors to avoid liability and lower wages); Secunda, *supra* note 357, at 219 ("Because American employers are increasingly seeking to define many workers as 'independent contractors' or non-employees, these workers have little to no access to retirement plans."); Orly Lobel, *The Gig Economy & the Future of Employment and Labor Law*, 51 U.S.F. L. REV. 51, 58 (2017) (noting Uber calls its drivers "partners," instead of employees).

464. *See supra* Parts II, III.

465. National Labor Relations Act, 29 U.S.C. §§ 151-169; Fair Labor Standards Act (FLSA) of 1938, 29 U.S.C. §§ 201-219; Family Medical Leave Act (FMLA) of 1993, 29 U.S.C. §§ 2601-2654. Employees—but not independent contractors—also benefit from protection under the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678; under the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634; under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17; and under the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213. The distinction between employees and independent contractors can also matter in the context of tort litigation because employers are typically liable for the actions of their employees (but not their independent contractors) under the legal doctrine of respondeat superior. *E.g.*, Seth C. Oranburg, *Unbundling Employment: Flexible Benefits for the Gig Economy*, 11 DREXEL L. REV. 1, 28–29 (2018).

466. Wei-Chih Chiang, Yingxu Kuang & Charlie (Shengsheng) Huang, *COVID-19 Aid and Relief for the Self-Employed*, 168 TAX NOTES FED. 1573, 1574 (2020); *see* HOUSE COMMITTEE ON WAYS AND MEANS GREEN BOOK, *supra* note 211, at ch. 4.

particular importance, in a federal case involving so-called independent contractors at Microsoft, the Ninth Circuit Court of Appeals reclassified those workers as employees, and those workers eventually settled with Microsoft for $97 million in back pay and pension-plan benefits.[467]

2. *The Internal Revenue Service Test*

For tax purposes, the IRS previously used an explicit twenty-factor test to determine whether a worker was an employee or an independent contractor, but more recently, the IRS has grouped those twenty factors into three categories:

- Behavioral control: Does the business control what the worker does and how the worker does the job?
- Financial control: Does the business control the business aspects of the worker's job (including how the worker is paid and whether expenses are reimbursed)?
- Type of Relationship: Are there written contracts that describe the relationship between the business and the worker? Does the business provide employee-type benefits (that is, pension plan, insurance, vacation pay, etc.) to the worker? Will the relationship continue indefinitely, or is it for a specific project or period? Is the work performed by the worker a key aspect of the business?[468]

Businesses that misclassify workers as independent contractors can face significant penalties including retroactive taxes and interest.[469] Under the safe harbor provided by § 530 of the Revenue Act of 1978, however, businesses are protected from those penalties if the

467. Vizcaino v. U.S. Dist. Ct. for W. Dist. of Wash., 173 F.3d 713, 722 (9th Cir. 1999); Lobel, *supra* note 463, at 65.

468. Rev. Rul. 87-41, 1987-1 C.B. 296; *Understanding Employee vs. Contractor Designation*, IRS, https://www.irs.gov/newsroom/understanding-employee-vs-contractor-designation [https://perma.cc/72GK-MAE2] (June 16, 2021); *see also* Frank Messina, Bruce P. Ely, Lisa-Ann Polack & Marena Messina, *Employee Versus Independent Contractor: The IRS and Department of Labor's Focus on Worker Classification*, CPA J., Jan. 2019, at 32, 36 (describing the three categories).

469. *See, e.g.*, 2013 EMPLOYERS DO NOT ALWAYS FOLLOW IRS, *supra* note 219.

business's classification of the worker as an independent contractor was reasonable and consistently applied and reported in prior years.[470]

When a worker is misclassified as an independent contractor, the worker can challenge that misclassification by filing an IRS Form SS-8 (Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding) or an IRS Form 8919 (Uncollected Social Security and Medicare Tax on Wages).[471] Misclassified workers can also sue for the greater of $5,000 or actual damages against an employer who willfully files a fraudulent information return (for example, an IRS Form 1099-NEC when an IRS Form W-2 would be appropriate).[472] There are also anonymous and confidential ways to challenge an employment tax misclassification.[473]

3. U.S. Department of Labor Test

Over the years, the U.S. Department of Labor has used a multi-factor balancing test to determine whether workers are employees or independent contractors within the meaning of the Fair Labor Standards Act:

- The nature and degree of the potential employer's control;

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470. Revenue Act of 1978, Pub. L. No. 95-600, § 530(a), 92 Stat. 2763, 2885; *Worker Reclassification–Section 530 Relief*, IRS, https://www.irs.gov/government-entities/worker-reclassification-section-530-relief [https://perma.cc/AGF5-GRGM] (July 15, 2021); *see also* JOINT COMM. ON TAX'N, JCX-26-07, PRESENT LAW AND BACKGROUND RELATING TO WORKER CLASSIFICATION FOR FEDERAL TAX PURPOSES 2 (2007), https://www.irs.gov/pub/irs-utl/x-26-07.pdf [https://perma.cc/GNW2-KZT9].

471. IRS, U.S. DEP'T OF THE TREASURY, FORM SS-8 (REV. MAY 2014), DETERMINATION OF WORKER STATUS FOR PURPOSES OF FEDERAL EMPLOYMENT TAXES AND INCOME TAX WITHHOLDING, https://www.irs.gov/pub/irs-access/fss8_accessible.pdf [https://perma.cc/DJ97-JQBY]; IRS, U.S. DEP'T OF THE TREASURY, FORM 8919, UNCOLLECTED SOCIAL SECURITY AND MEDICARE TAX ON WAGES (2020), https://www.irs.gov/pub/irs-pdf/f8919.pdf [https://perma.cc/3YYZ-A44K].

472. I.R.C. § 7434(a)-(b); *see, e.g.*, Kinne v. IMED Health Prods., LLC, No. 18-62183-Civ, 2019 WL 2866787, at *3–4 (S.D. Fla. July 3, 2019) (finding plaintiff stated a claim under § 7434 because defendant knew of plaintiff's scope of employment, the defendant's control over its employees, and defendant's filing a Form 1099 instead of a W-2, thus intentionally filing incorrect forms).

473. *See, e.g.*, IRS, U.S. DEP'T OF THE TREASURY, FORM 211 (REV. 7-2018), APPLICATION FOR AWARD FOR ORIGINAL INFORMATION, https://www.irs.gov/pub/irs-pdf/f211.pdf [https://perma.cc/8VKF-3C55] (allowing taxpayers to file a Form 211 to report tax violations); IRS, U.S. DEP'T OF THE TREASURY, FORM 3949-A (REV. 10-2020), INFORMATION REFERRAL, https://www.irs.gov/pub/irs-pdf/f3949a.pdf [https://perma.cc/X9JZ-ERY7] (allowing taxpayers to report individuals or businesses for tax violations by filing a Form 3949-A).

- The permanency of the worker's relationship with the potential employer;
- The amount of the worker's investment in facilities, equipment, or helpers;
- The amount of skill, initiative, judgment, or foresight required for the worker's services;
- The worker's opportunities for profit or loss; and
- The extent of integration of the worker's services into the potential employer's business.[474]

Guidance issued during the former President Donald J. Trump's Administration would have made it easier for workers to be classified as independent contractors;[475] however, the Biden Administration has revoked that guidance and returned to the multi-factor balancing test.[476]

474. U.S. Dep't of Lab., Wage & Hour Div., Opinion Letter FLSA2019-6, at 4 (Apr. 29, 2019) (withdrawn Feb. 19, 2021).

475. In 2019, the Department of Labor's Wage and Hour Division issued an opinion letter suggesting that the Department then viewed most service providers working for online marketers as independent contractors, not employees. *Id.* That opinion letter emphasized that the working relationship between the service providers and the online marketer that asked for the opinion letter was one of economic interdependence, not economic dependence. *See generally id.* In 2020, the Department of Labor went even further and proposed an interpretive rule that would adopt an "economic reality" test that would treat millions of janitors, construction workers, and other gig workers as independent contractors rather than as employees, and a final rule to that effect was promulgated in early January 2021. Independent Contractor Status Under the Fair Labor Standards Act, 86 Fed. Reg. 1168, 1171 (Jan. 7, 2021); *see also* Independent Contractor Status Under the Fair Labor Standards Act, 85 Fed. Reg. 60,600, 60,612 (Sept. 25, 2020).

476. The Trump Administration guidance was challenged in the courts, and the Biden Administration reversed that Trump Administration guidance. *See, e.g.*, Ben Penn, *Marty Walsh's Gig Worker Decision: Is Legal War Worth the Risk?*, BLOOMBERG L. (May 6, 2021, 2:42 PM), https://news.bloomberglaw.com/daily-labor-report/marty-walshs-gig-worker-decision-is-legal-war-worth-the-risk [https://perma.cc/DWF3-KMZF]; Independent Contractor Status Under the Fair Labor Standards Act: Delay of Effective Date, 86 Fed. Reg. 8326, 8327 (Feb. 5, 2021); U.S. Dep't of Lab., Wage & Hour Div., Opinion Letter FLSA2019-6 (Apr. 29, 2019) (withdrawn Feb. 19, 2021); Levi Sumagaysay, *Gig Work Could Change Under Biden's Labor Secretary. Here's How*, MARKETWATCH, https://www.marketwatch.com/story/gig-work-could-change-under-bidens-labor-secretary-and-heres-how-11620141865 [https://perma.cc/G4D6-GPF7] (May 8, 2021, 9:51 AM); Eric Morath, *Biden Blocks Trump-Era Gig-Worker Rule*, WALL ST. J., https://www.wsj.com/articles/biden-blocks-trump-era-gig-worker-rule-11620219168 [https://perma.cc/WJF4-NGUK] (May 5, 2021, 5:09 PM); Eli Rosenberg, *Labor Secretary Says Gig Workers Should Be Classified as Employees in 'a Lot of Cases'*, WASH. POST (Apr. 29, 2021, 4:12 PM), https://www.washingtonpost.com/business/2021/04/29/labor-walsh-gig-workers-employees/ [https://perma.cc/FW2S-YX7X]; Veena Dubal & Juliet B. Schor, *Gig Workers Are Employees. Start Treating Them That Way*, N.Y. TIMES (Jan. 18, 2021),

The Department of Labor also relies on anti-abuse rules like the "joint employment doctrine" to make sure employers are not able to avoid their employment law liabilities by hiding behind temporary agencies and subcontractors.[477]

4. National Labor Relations Board

The National Labor Relations Board (NLRB) has also weighed in on the classification of workers in the gig economy.[478] In a 2019 Advice Memorandum, the General Counsel of the NLRB took the position that Uber drivers—and, by implication, many other gig economy workers—are independent contractors and not statutory employees entitled to collective bargaining protections.[479] The ruling has been criticized, and it is likely to be reconsidered in President Biden's Administration.[480]

5. State Efforts

In 2019, California enacted a new test for determining whether a worker is an employee or independent contractor for state law

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https://www.nytimes.com/2021/01/18/opinion/proposition-22-california-biden.html?referringSource=articleShare [https://perma.cc/7X2M-DW3F]; Emma Kinery & Jennifer A. Dlouhy, *Biden to Block Still-Pending Trump Administration Regulations*, BLOOMBERG L. (Dec. 30, 2020, 3:40 PM), https://news.bloomberglaw.com/environment-and-energy/biden-to-block-still-pending-trump-administration-regulations [https://perma.cc/Q3FJ-3LM8]; Ben Penn, *Labor Department Appealing Decision Nixing Joint-Employer Test*, BLOOMBERG L. (Nov. 6, 2020, 11:15 AM), https://news.bloomberglaw.com/daily-labor-report/labor-department-appealing-decision-nixing-joint-employer-test [https://perma.cc/Q4HU-YGPQ]; Noam Scheiber, *Uber and Lyft Could Gain from U.S. Rule Defining Employment*, N.Y. TIMES (Sept. 22, 2020), https://www.nytimes.com/2020/09/22/business/economy/labor-gig-workers.html?searchResultPosition=2 [https://perma.cc/ZU6P-LA5B].

477. *See, e.g.*, 29 C.F.R. § 791.2 (2021), *invalidated by* New York v. Scalia, 490 F. Supp. 3d 748 (S.D.N.Y. 2020); Oranburg, *supra* note 465, at 35−41.

478. *See, e.g.*, Advice Memorandum from Jayme L. Sophir, Assoc. Gen. Couns., Div. of Advice, Nat'l Lab. Rels. Bd., to Jill Coffman, Reg'l Dir. Region 20, Nat'l Lab. Rels. Bd., 1, 3 (Apr. 16, 2019), https://www.laborrelationsupdate.com/files/2019/05/NLRB-Uber-memo.pdf [https://perma.cc/5HAC-XN2Z] (regarding Uber Technologies, Inc. Cases 13-CA-163062, 14–CA-158833, and 29–CA–177483).

479. *Id.* at 13.

480. *See, e.g.*, Maya Pinto, Rebecca Smith & Irene Tung, *Rights at Risk: Gig Companies' Campaign to Upend Employment as We Know It*, NAT'L EMP. L. PROJECT 3, 15 (Mar. 25, 2019), https://www.nelp.org/publication/rights-at-risk-gig-companies-campaign-to-upend-employment-as-we-know-it [https://perma.cc/8LTV-HTY5].

purposes.[481] That legislation codified the California Supreme Court's important decision in *Dynamex Operations West, Inc. v. Superior Court*.[482] Under the new test, a worker is generally considered to be an employee (and not an independent contractor) unless the hiring entity can establish the following three conditions (the ABC test):

> A) The person is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact.
> B) The person performs work that is outside the usual course of the hiring entity's business.
> C) The person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.[483]

Under California's ABC test, more workers will be treated as employees, including many more gig workers.[484] Some workers may end up being classified as an employee for California law but as independent contractors for Federal tax purposes. A California court recently upheld the ABC test and ruled that Uber and Lyft should not classify their drivers as independent contractors; however, an appeal is pending, and in November 2020, California voters approved Proposition 22, the App-Based Drivers as Contractors and Labor Policies Initiative—promoted by Uber and Lyft—that re-classifies app-based drivers as independent contractors.[485]

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481. Assemb. B. No. 5, 2019–2020 Reg. Sess. (Cal. 2019), https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200AB5 [https://perma.cc/S22W-YAA9]; *see generally* Kathleen K. Wright, *The ABC Test in California: The Exceptions*, 95 TAX NOTES STATE. 63 (Jan. 6, 2020).

482. *See generally* Dynamex Operations W., Inc. v. Superior Ct., 416 P.3d 1 (Cal. 2018).

483. CAL. LAB. CODE § 2750.3(a)(1) (West 2020), *repealed by* 2020 Cal. Stat. 1836, § 1 (effective Sept. 4, 2020).

484. *See id.* The legislation provided some fifty exceptions that allow many workers to instead be treated as independent contractors—for example, for most physicians, dentists, and lawyers who are working in a sole proprietorship or working for a partnership or a professional corporation. *Id.* § 2750.3(b)(2).

485. People v. Uber Tech., Inc., 270 Cal. Rptr. 3d 290, 332 (Cal. Ct. App. 2020); Sarah E. Needleman, *Uber, Lyft Ordered to Classify Drivers as Employees*, WALL ST. J. (Aug. 10, 2020, 8:39 PM),

Rather than changing their worker classification rules, other states (like Vermont and Massachusetts) have moved to impose additional reporting requirements on third-party settlement organizations.[486] For example, in 2020, Virginia enacted legislation that requires third-party settlement organizations to report payments of $600 or more to gig workers with Virginia addresses.[487]

B. Gig Workers Often Do Not Have Pensions or IRAs

As already explained, workers in alternative and nontraditional work arrangements are typically ineligible for employer-provided retirement or health care benefits.[488] More specifically, independent

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https://www.wsj.com/articles/uber-lyft-ordered-to-classify-drivers-as-employees-11597106349?mod=hp_lista_pos2 [https://perma.cc/VZ4W-P6GS]; Kate Conger, *Uber and Lyft Get Reprieve After Threatening to Shut Down*, N.Y. TIMES (Aug. 20, 2020), https://www.nytimes.com/2020/08/20/technology/uber-lyft-california-shutdown.html [https://perma.cc/SX5A-D3FS]; ALEX PADILLA, CAL. SEC'Y OF STATE, TEXT OF PROPOSED LAWS: CALIFORNIA GENERAL ELECTION: TUESDAY, NOVEMBER 3, 2020, at 30−39 (2020), https://vig.cdn.sos.ca.gov/2020/general/pdf/topl.pdf [https://perma.cc/5RVN-Y4GC]; Greg Bensinger, Opinion, *Other States Should Worry About What Happened in California*, N.Y. TIMES (Nov. 6, 2020), https://www.nytimes.com/2020/11/06/opinion/prop-22-california-labor-law.html?referringSource=articleShare [https://perma.cc/JM7T-S2QD]; Suhauna Hussain, *What Prop. 22's Defeat Would Mean for Uber and Lyft — and Drivers*, L.A. TIMES (Oct. 19, 2020, 8:50 AM), https://www.latimes.com/business/technology/story/2020-10-19/prop-22-explained [https://perma.cc/H3VY-TGC2].

486. VT. STAT. ANN. tit. 32, § 5862d(c) (West 2017); *Massachusetts Reporting Requirements for Third Party Settlement Organizations–Form 1099-K*, MASS. DEP'T OF REVENUE, https://www.mass.gov/info-details/massachusetts-reporting-requirements-for-third-party-settlement-organizations-form [https://perma.cc/C5W4-MM2H] (Nov. 25, 2020).

487. VA. CODE ANN. § 58.1-356 (West 2018); *see also* Paul Ogawa, *Virginia Lowers Reporting Threshold for Third-Party Settlement Organizations*, SOVOS (Mar. 4, 2020), https://sovos.com/blog/2020/03/04/virginia-lowers-reporting-threshold-for-third-party-settlement-organizations/ [https://perma.cc/U4SE-BYL9].

488. *See supra* note 465 and accompanying text; *see also* 2015 CONTINGENT WORK FORCE, *supra* note 25; Sheida Elmi, *The Complete Financial Lives of Workers: A Holistic Exploration of Work and Public and Workplace Benefit Arrangements*, ASPEN INST. 6, 17−18 (Mar. 2021), https://www.aspeninstitute.org/wp-content/uploads/2021/03/The-Complete-Financial-Lives-of-Workers-AspenFSP.pdf [https://perma.cc/3VWK-LPRM]; Lin Grensing Pophal, *When Gig Workers Want Benefits, Should You Offer Them?*, SOC'Y FOR HUM. RES. MGMT. BLOG (July 30, 2019), https://blog.shrm.org/blog/when-gig-workers-want-benefits-should-you-offer-them [https://perma.cc/2E66-VQ9X]; Matthew S. Rutledge, *Are Older Nontraditional Workers Able to Find Health and Retirement Coverage?* (Ctr. for Ret. Rsch. at Bos. Coll., Working Paper No. 2020-9, 2020) [hereinafter *Older Nontraditional Workers*], https://crr.bc.edu/wp-content/uploads/2020/03/wp_2020-9-.pdf [https://perma.cc/2KNX-LSTD]; Matthew S. Rutledge & Gal Wettstein, *Is Nontraditional Work at Older Ages Associated with Better Retirement Security?* 1 (Ctr. for Ret. Rsch. at Bos. Coll., Working

contractors are not permitted to participate in employer-sponsored plans that provide health care and pension coverage, and businesses rarely want to provide those fringe benefits to their part-time and temporary workers.[489] For example, as already mentioned, according to the Bureau of Labor Statistics' most recent effort to measure contingent and alternative work, just 18.4% of contingent workers participated in an employer-sponsored pension in 2017, compared to

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Paper No. 2020-13, 2020) [hereinafter *Nontraditional Work At Older Ages*], https://crr.bc.edu/wp-content/uploads/2020/07/wp_2020-13_.pdf [https://perma.cc/EXD5-QUY2]; Appelbaum et al., *supra* note 29, at 21; *Gig Workers in America–Profiles, Mindsets, and Financial Wellness*, PRUDENTIAL (Aug. 1, 2017), https://www.prudential.com/corporate-insights/gig-workers-in-america-profiles-mindsets-and-financial-wellness [https://perma.cc/8G2H-AAYC]; *As the Self-Employed Near Retirement, Are They Prepared?*, PEW CHARITABLE TRS. (Sept. 2019), https://www.pewtrusts.org/-/media/assets/2019/09/selfemployedretirementreadiness.pdf [https://perma.cc/7SLC-W2TS]; SANZENBACHER, *supra* note 148; *How Well Are Independent Workers Prepared for Retirement?*, PEW CHARITABLE TRS. (June 28, 2019), https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2019/06/how-well-are-independent-workers-prepared-for-retirement [https://perma.cc/4SC2-FX7K]. For some international comparisons, see, for example, OECD, PENSIONS AT A GLANCE 2019: OECD AND G20 INDICATORS 65−106 (2019) [hereinafter PENSIONS AT A GLANCE 2019], https://www.oecd-ilibrary.org/finance-and-investment/oecd-pensions-at-a-glance_19991363 [https://perma.cc/X6VK-2H8A]; OECD, PENSIONS OUTLOOK: 2020, at 77−99 (2020), https://www.oecd-ilibrary.org/finance-and-investment/oecd-pensions-outlook-2020_67ede41b-en [https://perma.cc/3R9Y-UG75]; JONATHAN LIMA-MATTHEWS & TOM PURVIS, ASS'N OF INDEP. PROS. & SELF EMPLOYED, HOW TO SOLVE THE SELF-EMPLOYED PENSIONS CRISIS 5 (2018), https://www.ipse.co.uk/static/uploaded/de9c9fad-459a-4afa-96e85116aad25641.pdf [https://perma.cc/EKC5-X3DU], for a discussion of options that self-employed workers have in the United Kingdom; and see MATTHEW BLAKSTAD, GREG BOWE, JO PHILLIPS, MADELINE QUINLAN, WILL SANDBROOK & GARETH TURNER, NEST INSIGHT, SUPPORTING SELF-EMPLOYED PEOPLE TO SAVE FOR RETIREMENT 20–23 (2019), https://www.nestinsight.org.uk/wp-content/uploads/2019/10/supporting-self-employed-people-save-for-retirement.pdf [https://perma.cc/YR5U-YJ8R], for a discussion of ways to increase long-term savings among self-employed workers in the United Kingdom; Axel Börsch-Supan, Courtney Coile, Jonathan Cribb, Carl Emmerson & Yuri Pettinicchi, *The Changing Nature of Work and Public Pension Coverage: Evidence from the US and Europe* (Max Planck Inst. for Soc. L. & Soc. Pol'y, Discussion Paper No. 12-2019, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3714598# [https://perma.cc/RN9J-48DS]; and Yuri Pettinicchi & Axel Börsch-Supan, *Retirement Income Adequacy of Traditionally Employed and Self-Employed Workers: Analyses with SHARE Data* (Max Planck Inst. for Soc. L. & Soc. Pol'y, Discussion Paper No. 02-2019, 2019), https://www.mpisoc.mpg.de/fileadmin/user_upload/MEA/publications/MEA_DP_pdf/MEA_DP_02-2019.pdf [https://perma.cc/WTD9-YKLS].

489. *See, e.g.*, *Older Nontraditional Workers*, *supra* note 488, at 5; *Nontraditional Work at Older Ages*, *supra* note 488, at 7; Oranburg, *supra* note 465, at 2–3. To be sure, Uber and some other businesses try to help their gig workers get those fringe benefits (although those businesses do not seem willing to pay for those benefits). Maryalene LaPonsie, *5 Companies that Offer Benefits to Gig Workers*, U.S. NEWS & WORLD REP. (Aug. 23, 2018, 12:01 PM), https://money.usnews.com/careers/salaries-and-benefits/articles/2018-08-23/5-companies-that-offer-benefits-to-gig-workers [https://perma.cc/FUL9-EMGU].

46.3% of traditional workers.[490] Notably, these contingent workers engaged in contingent work as the main source of income rather than as a supplement source of income, and those gig workers who engaged in gig work to supplement income from traditional employment might have had access to a retirement plan from their traditional employment.[491]

Similarly, Jackson and others found that while 41.9% of wage-only earners made contributions to a pension or IRA in 2014, just 21.3% of workers with some wages and some self-employment income made such contributions; also, absent traditional employment, even fewer gig workers made contributions to retirement savings: only 18.8% of online platform workers and 7.8% of sole proprietors made contributions.[492] For all categories of workers in that study, contribution rates increased as income increased.[493]

Munnell and others' 2019 study found that 20.3% of workers aged fifty to sixty-two had nontraditional jobs—defined as jobs lacking both health insurance and retirement plans—over the course of the 1992−2016 waves of the HRS.[494] That study found that only 26% of workers aged fifty to sixty-two worked consistently in traditional jobs with benefits.[495] All in all, doing nontraditional work late in one's career was associated with lower retirement income (and also with higher rates of depression).[496] On the other hand, another study based on the Health and Retirement Study suggested that nontraditional work may actually improve the retirement income security of some older

490. *See supra* note 21 and accompanying text; May 2017 Employment Arrangements, *supra* note 21, at tbl.9; Appelbaum et al., *supra* note 29, at 18 tbl.9.

491. 2020 TAXPAYER COMPLIANCE, *supra* note 6, at 10; *see, e.g.*, Rutledge et al., *supra* note 361, at 12 (showing that many gig workers find health and pension coverage through a spouse's employer or a past employer of their own).

492. Jackson et al., *supra* note 51, at 37 tbl.9.

493. *Id.* at 38 tbl.10. Other data sources can also provide insights about the health care and retirement benefits of workers doing nontraditional work. For example, a 2019 Life Insurance Marketing and Research Association (LIMRA) report estimated that just 46% of employers offered any employer-sponsored benefits to part-time workers, just 29% offered any benefits to seasonal workers, and just 16% offered any benefits to contract workers. LANDRY, *supra* note 143, at 6.

494. Munnell et al., *supra* note 148, at 28 fig.1.

495. *Id.* at 2, 16. Moreover, the study's authors found that although having only a brief period in nontraditional work reduced retirement income by around 26%, doing nontraditional work consistently decreased retirement income by 11%. *Id.* at 2.

496. *Id.* at 16.

Americans; for example, by extending their careers and generating earnings that could enable them to delay claiming their Social Security benefits or tapping into their retirement savings.[497]

C. The Impact of COVID-19

Following the onset of the COVID-19 pandemic, an urgent congressional priority was to legislate emergency benefits for the millions of laid-off Americans impacted by COVID-19.[498] In March 2020, Congress passed the Families First Coronavirus Response Act (FFCRA), which included payroll tax credits for employers to provide paid sick or family leave for employees as well as refundable income tax credits to offset self-employment tax for self-employed workers in need of paid family or sick leave.[499] Soon thereafter, Congress passed the Coronavirus Aid, Relief, and Economic Security (CARES) Act, which included more than $1.7 trillion in emergency funding for a host of COVID-19-related programs, including (1) economic stimulus

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497. *Older Nontraditional Workers*, *supra* note 488, at 16–17; *see also* BETTERMENT, *supra* note 97; Sanzenbacher, *supra* note 148, at 1, 4 (finding that gig work can help older workers improve their financial position). Also, *Nontraditional Work at Older Ages*, *supra* note 488, used the 2002−2016 Health and Retirement study to look at a sample of those nontraditional workers who did not get health or retirement benefits from their current jobs. *See generally Nontraditional Work at Older Ages*, *supra* note 488. In another study, Rutledge found that although these older workers did not get health insurance coverage from their nontraditional jobs, two-thirds did get health care coverage from alternative sources (e.g., the spouse's employer, a past employer, Medicare, Medicaid, or private insurance). *Older Nontraditional Workers*, *supra* note 488, at 3. But that still left around 31% without any health care coverage. *Id.* at 4. Similarly, Rutledge found that although these older workers did not get retirement coverage from their nontraditional jobs, some might use IRAs to save for retirement or they could, perhaps, increase their retirement savings through their spouses' employers. *Id.* at 1.

498. *See, e.g.*, U.S. GOV'T ACCOUNTABILITY OFF., GAO-21-191, COVID-19: URGENT ACTIONS NEEDED TO BETTER ENSURE AN EFFECTIVE FEDERAL RESPONSE (2020) [hereinafter URGENT ACTIONS NEEDED], https://www.gao.gov/assets/gao-21-191.pdf [https://perma.cc/BD6M-TLGW]; *see also* Heather Long, Andrew Van Dam, Alyssa Fowers & Leslie Shapiro, *The Covid-19 Recession Is the Most Unequal in Modern U.S. History*, WASH. POST (Sept. 30, 2020), https://www.washingtonpost.com/graphics/2020/business/coronavirus-recession-equality/ [https://perma.cc/35P4-7Z5N]; *see also Near Real Time COVID-19 Income and Poverty Dashboard*, POVERTY MEASUREMENT, http://povertymeasurement.org/covid-19-poverty-dashboard/ [https://perma.cc/G25M-42LH]; Letter from Dara Khosrowshahi, Chief Exec. Officer of Uber Techs., Inc., to the President of the U.S. (Mar. 23, 2020), https://blogadmin.uberinternal.com/wp-content/uploads/2020/03/UberLetter.pdf [https://perma.cc/WQR5-75WS] (noting that the pandemic created "deep concern and hardship for many of the 1.3 million Americans working on Uber's platform").

499. Families First Coronavirus Response Act of 2020 (FFCRA), Pub. L. No. 116-127, §§ 7001-7004, 134 Stat. 178, 210–19. For a self-employed worker, the qualified sick and family leave refundable income tax credits together could total $12,000. Chiang et al., *supra* note 466.

payments for taxpayers, (2) employee retention tax credits, (3) emergency small business loans, (4) payroll tax deferrals, and (5) extended unemployment benefits.[500] The CARES Act also specifically allowed self-employed workers to qualify for emergency loans and provided new pandemic unemployment assistance (PUA) benefits to self-employed workers and certain other workers who were not otherwise eligible for regular unemployment benefits (for example, because they were only seeking part-time work).[501] Congress provided additional pandemic relief in December 2020, and President Biden's Administration provided even more relief in March 2021.[502]

Notwithstanding the willingness of Congress to provide emergency benefits to millions of self-employed workers impacted by COVID-19, existing data and research proved to be wildly insufficient for calibrating an effective response. For example, in April 2020, the Congressional Budget Office estimated that 5 million self-employed workers (and wage and salary workers without sufficient work history to qualify for regular unemployment benefits) would claim around $35 billion in PUA assistance benefits in 2020 and 2021.[503] As it has turned out, however, the government spent more than $130 billion on those benefits through November 13, 2021, and an estimated 14.7 million

500. The CARES Act, Pub. L. No. 116-136, 134 Stat. 281 (2020); CONG. BUDGET OFF., PRELIMINARY ESTIMATE OF THE EFFECTS OF H.R. 748, THE CARES ACT, PUBLIC LAW 116-136, REVISED, WITH CORRECTIONS TO THE REVENUE EFFECT OF THE EMPLOYEE RETENTION CREDIT AND TO THE MODIFICATION OF A LIMITATION ON LOSSES FOR TAXPAYERS OTHER THAN CORPORATIONS 9−10 (2020) [hereinafter PRELIMINARY ESTIMATE OF THE EFFECTS OF H.R. 748], https://www.cbo.gov/system/files/2020-04/hr748.pdf [https://perma.cc/G2HN-C4FW].

501. *See, e.g.*, URGENT ACTIONS NEEDED, *supra* note 498, at 212−25; Chiang et al., *supra* note 466, at 1574–75; *see also* Faiz Siddiqui & Andrew Van Dam, *As Uber Avoided Paying into Unemployment, the Federal Government Helped Thousands of Its Drivers Weather the Pandemic*, WASH. POST (Mar. 16, 2021, 12:46 PM), https://www.washingtonpost.com/technology/2021/03/16/uber-lyft-unemployment-benefits/ [https://perma.cc/XQ8Y-AMSL]; Arthur Delaney & Dave Jamieson, *Congress Bailed Out Uber's Workers. Now What?*, HUFFINGTON POST (Mar. 31, 2021, 5:45 AM), https://www.huffpost.com/entry/pandemic-unemployment-gig-workers-congress-uber_n_6063cd97c5b6fd3650db34d0 [https://perma.cc/LD9G-RFCY].

502. *See, e.g.*, PROMOTING ECONOMIC SECURITY, *supra* note 202, at 1–2.

503. Marie Sapirie, *Fixing the Information Gap in the Gig Economy*, 167 TAX NOTES STATE 1485, 1485 (June 22, 2020); PRELIMINARY ESTIMATE OF EFFECTS OF H.R.748, *supra* note 500, at 10.

individuals were claiming PUA benefits for the week ending August 22, 2020.[504]

In addition to the emergency unemployment and small business loan programs designed to target self-employed workers, the CARES Act also authorized certain coronavirus-related distributions (CRDs) from pensions and IRAs of up to $100,000 in 2020 and increased the defined contribution plan loan limits to the greater of $100,000 or 100% of the vested account balance.[505] Because these changes allow individuals to deplete their accumulated retirement savings, the COVID-19 pandemic is likely to have an adverse impact on the retirement income security of many workers, but much will depend on how long the pandemic lasts.[506]

504. *Families First Coronavirus Response Act and Coronavirus Aid, Relief, and Economic Security (CARES) Act Funding to States Through November 13, 2021*, U.S. DEP'T OF LAB. (2021), https://oui.doleta.gov/unemploy/docs/cares_act_funding_state.html [https://perma.cc/9HX2-H5EZ]; News Release, U.S. Dep't of Lab., Unemployment Insurance Weekly Claims (Sept. 17, 2020, 8:30 AM), https://oui.doleta.gov/press/2020/091720.pdf [https://perma.cc/R8TK-WLSR]. These PUA estimates may overstate the number of individual claimants; in fact, the U.S. Department of Labor actually reports the number of weekly claims for PUA rather than the number of distinct individuals receiving benefits each week. URGENT ACTIONS NEEDED, *supra* note 498, at 216–19. Also, some of these PUA benefit claims could be fraudulent. In July and August 2020, state PUA administrators and the U.S. Department of Justice identified instances of fraudulent PUA claims facilitated by identify theft. *See, e.g.*, Press Release, U.S. Dep't of Just., U.S. Attorney McSwain Announces Fraudsters Thwarted from Stealing $44 Million of State Stimulus Money (July 28, 2020), https://www.justice.gov/usao-edpa/pr/us-attorney-mcswain-announces-fraudsters-thwarted-stealing-44-million-state-stimulus [https://perma.cc/UE3C-GLKJ]; OFF. OF AUDIT, OFF. OF INSPECTOR GEN. U.S. DEP'T OF LAB., REPORT NO. 19-21-001-03-315, COVID-19: STATES CITE VULNERABILITIES IN DETECTING FRAUD WHILE COMPLYING WITH THE CARES ACT UI PROGRAM SELF-CERTIFICATION REQUIREMENT 6–8 (2020), https://www.oig.dol.gov/public/reports/oa/2021/19-21-001-03-315.pdf [https://perma.cc/B3F5-GDGM].

505. *Coronavirus-Related Relief for Retirement Plans and IRAs Questions and Answers*, IRS, https://www.irs.gov/newsroom/coronavirus-related-relief-for-retirement-plans-and-iras-questions-and-answers [https://perma.cc/EET6-CEJ3] (Oct. 22, 2021); Jack VanDerhei, *CARES Act: Implications for Retirement Security of American Workers*, EMP. BENEFIT RSCH. INST. (July 30, 2020), https://www.ebri.org/content/cares-act-implications-for-retirement-security-of-american-workers [https://perma.cc/S6XP-L8JC]. Congressional budget experts estimated that these pension changes alone would cost approximately $7 billion. JOINT COMM. ON TAX'N, JCX-11-20, ESTIMATED REVENUE EFFECTS OF THE REVENUE PROVISIONS CONTAINED IN AN AMENDMENT IN THE NATURE OF A SUBSTITUTE TO H.R. 748, THE "CORONAVIRUS AID, RELIEF, AND ECONOMIC SECURITY (CARES) ACT" (2020), https://www.jct.gov/publications.html?func=startdown&id=5252 [https://perma.cc/FGY9-8A8P].

506. *See, e.g.*, Mitchell, *supra* note 346, at 2; Jack VanDerhei, *Impact of the COVID-19 Pandemic on Retirement Income Adequacy: Evidence from EBRI's Retirement Security Projection Model®*, EMP. BENEFIT RSCH. INST. (Apr. 21, 2020), https://www.ebri.org/content/impact-of-the-covid-19-pandemic-on-retirement-income-adequacy-evidence-from-ebri-s-retirement-security-projection-model [https://perma.cc/TQ8Q-Y2GR]. An early study estimated that the combined impact of the 2020 market

The COVID-19 pandemic has also highlighted the tenuous nature of providing pension savings, health insurance, and other benefits through employer-sponsored plans. As millions have lost their jobs, they have also lost their benefits. For example, one early 2020 study found that 5.4 million workers lost their jobs and health insurance from February to May of 2020.[507]

Also, unlike earlier recessions, the early effects of this recession had a disproportionate impact on workers over age sixty-five and women.[508] For example, in April 2020, the unemployment rate for workers aged sixty-five and older was 15.43% (14.26% for men and 16.85% for women) compared to 12.99% for workers aged twenty-five to forty-four (12.32% for men and 13.77% for women), and the unemployment rate for workers aged fifty-five to sixty-four was 12.33% (10.92% for men and 13.89% for women).[509]

Another analysis found that 2.9 million older workers (aged fifty-five to seventy) left the labor force from March through June of 2020, and that analysis projected that as many as 4 million older workers will eventually be pushed out of the workforce by the COVID-19 pandemic and are at risk of involuntary retirement before

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crisis and reasonable assumptions of future employee and employer behavior would only reduce retirement savings shortfalls by around 4.5% with intermediate assumptions and by 11.2% with pessimistic assumptions. *Id.* A more recent study suggests that workers who take large coronavirus-related distributions or loans from their retirement plans (as permitted by the CARES Act) and who do not fully repay them could face significant reductions in their retirement account balances. VanDerhei, *supra* note 505.

507. STAN DORN, NAT'L CTR. FOR COVERAGE INNOVATION, FAMS. USA, THE COVID-19 PANDEMIC AND RESULTING ECONOMIC CRASH HAVE CAUSED THE GREATEST HEALTH INSURANCE LOSSES IN AMERICAN HISTORY 4 (2020), https://familiesusa.org/wp-content/uploads/2020/07/COV-254_Coverage-Loss_Report_7-17-20.pdf [https://perma.cc/52BW-FWC3]; *see also* Josh Bivens & Ben Zipperer, *Health Insurance and the COVID-19 Shock*, ECON. POL'Y INST. (Aug. 26, 2020), https://www.epi.org/publication/health-insurance-and-the-covid-19-shock/ [https://perma.cc/AJ5T-BV73].

508. *See, e.g.*, Truc Thi Mai Bui, Patrick Button & Elyce G. Picciotti, *Early Evidence on the Impact of COVID-19 and the Recession on Older Workers* 2 (Nat'l Bureau of Econ. Rsch., Working Paper No. 27448, 2020), https://www.nber.org/papers/w27448.pdf [https://perma.cc/V3QG-MZXS]; Chabeli Carrazana, *Women Gained Back Jobs in October, but Slowly*, 19TH NEWS (Nov. 6, 2020, 10:47 AM), https://19thnews.org/2020/11/women-jobs-report-october-2020/ [https://perma.cc/PTA5-9PDX].

509. Bui et al., *supra* note 508, at 17 tbl.1; *see also* GENE FALK, PAUL D. ROMERO, JAMESON A. CARTER, ISAAC A. NICCHITTA & EMMA C. NYHOF, CONG. RSCH. SERV., R46554, UNEMPLOYMENT RATES DURING THE COVID-19 PANDEMIC 10 (2021), https://www.everycrsreport.com/files/2021-08-20_R46554_211d85453a9b241f4a480fce32659ca5532ed598.pdf [https://perma.cc/7Q7K-3DKN].

they are ready.[510] Even if these older workers do find new jobs, they can expect to have lower earnings and benefits than before.[511] Women and older minority workers were hit particularly hard by pandemic job losses, and older, minority women were hit the hardest: 19.5% of them lost their jobs from March through June of 2020.[512] All in all, these increases in unemployment are sure to have an adverse impact on retirement savings and retirement preparedness.[513]

Although women briefly outnumbered men in the paid workforce in December 2019, the COVID-19 pandemic eliminated those gains, as women were overrepresented in some of the "hardest-hit industries, such as leisure and hospitality, health care and education."[514] In addition to the job losses triggered by the pandemic, the related school and daycare shutdowns have also had a huge impact on the working women who "provide the majority of childcare" and now have children at home in the absence of full-time school and daycare.[515]

Congress has already heard from experts on women in retirement that the "pandemic's economic consequences have fallen heavily on women of color" and that "the pandemic will likely have additional negative long-term effects on women's lifetime incomes, wealth, and

510. MICHAEL PAPADOPOULOS, BRIDGET FISHER, TERESA GHILARDUCCI & SIAVASH RADPOUR, THE NEW SCH. RET. EQUITY LAB, STATUS OF OLDER WORKERS: OVER HALF OF UNEMPLOYED OLDER WORKERS AT RISK OF INVOLUNTARY RETIREMENT 1, 3 (2020), https://www.economicpolicyresearch.org/images/INET_docs/Status_of_older_workers_reports/Q1_2020_OWAG_V12.pdf [https://perma.cc/Y9YA-A8K7]; *see also* OWEN DAVIS, BRIDGET FISHER, TERESA GHILARDUCCI & SIAVASH RADPOUR, THE NEW SCH. RET. EQUITY LAB, STATUS OF OLDER WORKERS: A FIRST IN NEARLY 50 YEARS, OLDER WORKERS FACE HIGHER UNEMPLOYMENT THAN MID-CAREER WORKERS 3 (2020), https://www.economicpolicyresearch.org/images/Retirement_Project/status_of_older_workers_reports/Q3_2020_OWAG_V6.pdf [https://perma.cc/L9VL-987X].

511. PAPADOPOULOS ET AL., *supra* note 510, at 3.

512. *Id.* at 4.

513. *See, e.g.*, ALICIA H. MUNNELL, ANQI CHEN & WENLIANG HOU, CTR. FOR RET. RSCH. AT BOS. COLL., NO. 20-11, HOW WIDESPREAD UNEMPLOYMENT MIGHT AFFECT RETIREMENT SECURITY 1 (July 2020), https://crr.bc.edu/wp-content/uploads/2020/06/IB_20-11.pdf [https://perma.cc/CJ4W-N68C]; U.S. GOV'T ACCOUNTABILITY OFF., GAO-20-718T, RETIREMENT SECURITY: OLDER WOMEN REPORT FACING A FINANCIALLY UNCERTAIN FUTURE 1 (2020) [hereinafter OLDER WOMEN REPORT], https://www.gao.gov/assets/710/709631.pdf [https://perma.cc/XZR4-T8BV].

514. Schmidt, *supra* note 398; *see also* Karageorge, *supra* note 11, at 1 ("40 percent of all working women are employed in government and in health and education services compared with just 20 percent of working men.").

515. Karageorge, *supra* note 11.

overall economic security."[516] These problems have led many analysts to seriously think about delinking benefits from employment and instead tying benefits like retirement savings and health care to individual's status as an individual rather than as an employee.[517]

The COVID-19 pandemic is also likely to expedite the shift from defined benefit plans to defined contribution plans, lead to the enhancement of financial advice programs and the development of more lifetime income products, and result in improvements in safety net programs.[518] Finally, a recent survey found that the COVID-19 pandemic has caused nearly 68 million Americans to reconsider their retirement timing, with 29% of those planning to retire thinking about retiring later and 10% thinking about retiring earlier.[519] Another recent survey found that 38% of those surveyed said that the COVID-19 pandemic has led them to retire later than they planned or not at all.[520]

VI. POLICY OPTIONS

Millions of workers have turned to gig work in recent years—in most cases, as a supplement to a primary source of income—but much of that gig income is misreported for self-employment tax purposes. That tax noncompliance matters because most Americans rely on Social Security for a significant portion of their retirement income.[521] Moreover, gig workers often do not have much in the way of pension and IRA savings either.[522] All in all, the retirement income security of many gig workers is at risk—and at increasing risk—because of the

516. *See, e.g.*, *Save Our Social Security Now: Hearing Before the Subcomm. on Soc. Sec. of the H. Comm. on Ways & Means*, 116th Cong. 3, 4 (2020) (statement of Amy K. Matsui, Director of Income Security, National Women's Law Center), https://waysandmeans.house.gov/sites/democrats.waysandmeans.house.gov/files/documents/AmyMatsuiTestimony.pdf [https://perma.cc/U48Z-PKM4].

517. *See, e.g.*, Mitchell, *supra* note 346, at 17, 26; *see also infra* Part VI.H.

518. Mitchell, *supra* note 346, at 18−19.

519. Edward Jones & Age Wave, *The Four Pillars of the New Retirement*, EDWARD JONES 4 fig.2 (2020), https://www.edwardjones.com/images/Edward-Jones-4-Pillars-US-report.pdf [https://perma.cc/KJ87-LAZS].

520. NATIONWIDE RET. INST., SOCIAL SECURITY: 7TH ANNUAL CONSUMER SURVEY 3 (2020), https://nationwidefinancial.com/media/pdf/NFM-19767AO.pdf [https://perma.cc/A4VL-R3JK].

521. *See supra* Parts II.D & III.A.

522. *See supra* Parts III.B.6 & V.B.

COVID-19 pandemic.[523] This Part reviews a range of options to improve the retirement income security of gig workers, generally, and of women gig workers, specifically.

A. Prioritize Gig Worker Data and Research

At the outset, evidence-based policymaking requires good data, and the existing conflicting measures of gig economy work unduly complicate effective policymaking.[524] This Article's review of the existing survey and administrative tax data sources for measuring the gig economy workforce illustrates the need for regular and comprehensive measures of gig workers and their income.[525] Basically, the "government does not understand the gig economy and currently does not have the capability to document relevant data."[526]

The survey and administrative tax data reviewed in this Article painted an unrealistic, conflicting picture of the gig workforce. For example, the Bureau of Labor Statistics survey sources have generally shown no change or small declines in self-employment rates in recent decades, while the administrative tax return data has consistently shown significant increases in those rates despite the significant underreporting of gig income.[527] At the same time, however, that administrative tax data does not provide enough detail on the work, earnings, or demographics of the self-employed workers who misreport or underreport their self-employment income. Such information would be particularly important for measuring the retirement income security of those workers.

Moreover, although high-wage self-employed workers like dentists, architects, and lawyers could primarily be responsible for the bulk of

523. *See supra* Part V.C.

524. *See, e.g.*, EVIDENCE-BASED POLICYMAKING COLLABORATIVE, PRINCIPLES OF EVIDENCE-BASED POLICYMAKING (2016), https://www.urban.org/sites/default/files/publication/99739/principles_of_evidence-based_policymaking.pdf [https://perma.cc/5EFQ-A99A].

525. *See, e.g.*, 2020 TAXPAYER COMPLIANCE, *supra* note 6, at 10–12; Bernhardt & Thomason, *supra* note 6, at 18−19; Abraham et al., *Measuring the Gig Economy*, *supra* note 16.

526. Howard Risher, *The Gig Economy and the BLS Surveys*, GOV'T EXEC. (Feb. 13, 2020), https://www.govexec.com/management/2020/02/gig-economy-and-bls-surveys/163089/ [https://perma.cc/5E9T-R5J8].

527. *See* Lim et al., *supra* note 75, at 6.

the $45 billion self-employment tax gap (and the related income tax gap), this Article's review of the literature finds that there are millions of low- and moderate-income gig workers who do not properly report their self-employment earnings.[528] Tax noncompliance appears especially high among the online gig workers who work for online platforms that, so far, have been able to rely on the 200/$20K IRS Form 1099-K threshold.[529] All in all, due to "the limited data [that the] IRS has on the platform workforce, [the] IRS cannot be assured that it knows enough about the size, characteristics, and behaviors of [the] workforce to better understand how to help workers comply with tax obligations."[530]

The COVID-19 pandemic has demonstrated the critical need for better information about gig workers and their earnings. As Congress scrambled to design its emergency assistance programs, the existing data simply proved to be unreliable; for example, recall that while Congressional estimators projected that approximately 5 million workers would claim PUA benefits, just six months into the program, approximately 14.7 million individuals had claimed them.[531] Clearly, far more people are working in contingent and alternative work arrangements than have been documented in recent surveys or administrative tax data. Going forward, information gathered while distributing the new pandemic benefits should—in a few years—lead to a better understanding of the earnings and demographics of gig workers.

This Article shows that administrative tax data should drive policy discussions about the retirement income security of gig workers. Virtually all the existing retirement programs are run through the tax system—both the payroll and self-employment taxes that drive Social Security benefits and the income tax expenditures that subsidize pensions and IRAs (and Social Security). Consequently, high-quality

528. *See supra* Part II.D.

529. *See* 2020 TAXPAYER COMPLIANCE, *supra* note 6, at 14. A recent analysis of studies using administrative tax data concluded that "the data [the] IRS receives do not allow it to accurately count the number of platform workers or determine their tax reporting behaviors." *Id.* at 12.

530. *Id.*

531. *See supra* notes 503–504 and accompanying text.

administrative tax data is essential for making policy decisions about retirement income security; although, to be sure, improved survey data could also help.[532] Accordingly, the federal government should prioritize Department of Treasury and IRS research on gig workers and their earnings. In particular, the Treasury and the IRS should consider incorporating gig workers and their earnings into their periodically published statistical reports, such as the annual IRS Statistics of Income report on individual incomes taxes.[533] With better measures of gig workers' earnings and demographics, policymakers would be better able to engage in evidence-based policymaking. The Department of Treasury, the IRS, and Congress should also prioritize research on: (1) the tax compliance of both offline and online gig workers; (2) the self-employment tax gap; and (3) the earnings and demographics of all individual taxpayers. In particular, both the IRS and the Joint Committee on Taxation could do a much better job of collecting and analyzing information about how our tax laws affect women and people of color.[534] The absence of such demographic tax information hinders policymakers, yet it is well-understood that many

532. It is worth noting that in 2020, the National Academies of Sciences, Engineering, and Medicine issued a report that (1) analyzed the role of the Bureau of Labor Statistics signature survey on alternative contingent work, the Contingent Worker Supplement (CWS); and (2) made recommendations about how to improve the administration of the CWS and leverage multiple data sources to develop a comprehensive, qualitative picture of alternative work. *See generally* NAT'L ACADS. OF SCIS., ENG'G & MED., *supra* note 23. Although acknowledging the value of tax data as a "complement" to the CWS, that report specifically did not recommend that the Bureau of Labor Statistics prioritize linking CWS data to tax data. *Id.* at 95. This Article's Authors disagree; in our view and based on our prior professional experience as congressional tax policy staff, administrative tax data is central to understanding alternative work arrangements and is survey data that is complementary.

533. *See, e.g.*, 2018 TAX REPORT, *supra* note 46, at 1.

534. *See, e.g.*, Bruckner, *supra* note 226, at 21; O'Neal & Versprille, *supra* note 380. Pertinent here, a recent National Women's Law Center report suggests that the federal tax laws discourage women from working through various marriage penalties and a bias against secondary earners bias. Ariel Jurow Kleiman, Amy K. Matsui & Estelle Mitchell, *The Faulty Foundations of the Tax Code: Gender and Racial Bias in Our Tax Laws*, NAT'L WOMEN'S L. CTR. 9–12 (Nov. 2019), https://nwlc.org/wp-content/uploads/2019/11/NWLC-The-Faulty-Foundations-of-the-Tax-Code-Accessible-FINAL.pdf [https://perma.cc/55L4-CVVS]; *see also Combating Inequality: The Tax Code and Racial, Ethnic, and Gender Disparities: Hearing Before the S. Comm. on Fin.*, 117th Cong. (2021) (statement of Sen. Ron Wyden (D-OR)), https://www.finance.senate.gov/hearings/combatting-inequality-the-tax-code-and-racial-ethnic-and-gender-disparities [https://perma.cc/9E35-SALY].

facially neutral tax provisions can have adverse effects on women and minorities.[535]

B. Tax Reforms

A variety of tax reforms could also help improve the retirement income security of gig workers, in general, and women gig workers, in particular. Most importantly, increasing compliance with the self-employment tax would help shore up the Social Security benefits of gig workers.[536]

1. Information Reporting Analysis

As part of developing better administrative tax data on gig workers, Congress, the Treasury, and the IRS should consider using new information available from the 2020 filing season and toughening the information reporting rules for gig workers. As Part II.D of this Article showed, gig workers have tax compliance challenges and often misreport or underreport their earnings for tax purposes.[537] This Section explains how Congress, the Treasury, and the IRS could develop new data to better measure gig work and reform the existing information reporting rules to facilitate tax compliance of online gig workers.[538]

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535. *See, e.g.*, Kleiman et al., *supra* note 534, at 19; Bruckner, *supra* note 226, at 21. *See generally* DOROTHY A. BROWN, THE WHITENESS OF WEALTH: HOW THE TAX SYSTEM IMPOVERISHES BLACK AMERICANS—AND HOW WE CAN FIX IT (2021); Dorothy A. Brown, *Homeownership in Black and White: The Role of Tax Policy in Increasing Housing Inequity*, 49 U. MEM. L. REV. 205 (2018); Thomas S. Neubig, *Disparate Racial Impact: Tax Expenditure Reform Needed*, 170 TAX NOTES FED. 1555, 1555 (2021); Jonathan Barry Forman, *What Can Be Done About Marriage Penalties*, 30 FAM. L.Q. 1, 1, 2 (1996).

536. In passing, it is worth noting that to improve tax compliance generally, Congress should increase the IRS's budget. *See supra* notes 269–271 and accompanying text; CONG. BUDGET OFF., PUB. NO. 56783, OPTIONS FOR REDUCING THE DEFICIT: 2021 TO 2030, at 88 (2020) [hereinafter REDUCING THE DEFICIT], https://www.cbo.gov/system/files/2020-12/56783-budget-options.pdf [https://perma.cc/J5YW-NQC9] (noting that increasing appropriations for IRS activities would also significantly increase federal revenues). In that regard, the Authors are pleased that the Biden Administration recently proposed a $1.2 billion increase for the IRS's fiscal 2022 budget and hope that the Congress will agree. Hoffman, *supra* note 272.

537. *See supra* Part II.D.

538. 2020 TAXPAYER COMPLIANCE, *supra* note 6, at 12; *see also* Charles O. Rossotti, Natasha Sarin &

As already mentioned, in March 2021, Congress amended the rules governing information reporting by third-party settlement organizations (TPSOs).[539] Accordingly, starting in 2022, TPSOs will have to report payments of $600 or more to independent contractors and to the IRS, which should greatly improve tax compliance by the affected workers.[540] Moreover, the new 1099-K Forms that will be filed beginning in 2022 will provide insight on the scope of online gig work for researchers and policymakers going forward.

Similarly, the tax filings from the 2020 federal income tax returns will provide an excellent new source of information about independent contractors, in general, and gig workers, in particular, as many of them

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Lawrence H. Summers, *Shrinking the Tax Gap: A Comprehensive Approach*, 169 TAX NOTES FED. 1467, 1472 (2020); Howard Gleckman, *Making Sure Gig Workers Pay the Right Amount of Tax*, FORBES (Oct. 30, 2018, 1:52 PM), https://www.forbes.com/sites/howardgleckman/2018/10/30/making-sure-gig-workers-pay-the-right-amount-of-tax/#2b04b5a1609e [https://perma.cc/3B33-B2LE].

539. *See supra* notes 238−239.

540. I.R.C. § 6050W; American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 9674, 135 Stat. 4, 185 (codified as amended at I.R.C. § 6050W(e)); I.R.C. § 6050W(e); JOINT COMM. ON TAX'N, *supra* note 238; *2018 Bruckner Testimony*, *supra* note 74, at 30. Of note, in recent years, several congressional committees held relevant hearings on information reporting and tax compliance, and several members of Congress have proposed legislation to improve information reporting by online gig workers. *See, e.g.*, *2018 Bruckner Testimony*, *supra* note 74; *Small Business Tax Reform: Modernizing the Code for the Nation's Job Creators: Hearing Before the H. Comm. on Small Bus.*, 114th Cong. (2017) [hereinafter *2017 Bruckner Testimony*] (statement of Professor Caroline Bruckner Executive-in-Residence, Accounting and Taxation; and Managing Director, Kogod Tax Policy Center, Kogod School of Business, American University), https://republicans-smallbusiness.house.gov/uploadedfiles/10-4-17_bruckner_testimony.pdf [https://perma.cc/MC99-5NDT]; *The Sharing Economy: A Taxing Experience for New Entrepreneurs, Part I: Hearing Before the H. Comm. on Small Bus.*, 114th Cong. 4−6, 22−53 (2016) (statement of Professor Caroline Bruckner Executive-in-Residence, Accounting and Taxation; and Managing Director, Kogod Tax Policy Center, Kogod School of Business, American University), https://www.govinfo.gov/content/pkg/CHRG-114hhrg20199/pdf/CHRG-114hhrg20199.pdf [https://perma.cc/Y9C4-AERH]. For example, the bipartisan Small Business Owners' Tax Simplification Act would have aligned the $600 IRS Form 1099-NEC threshold and the $20,000/200 transaction IRS Form 1099-K filing threshold into a single $1,500 threshold. H.R. 593, 116th Cong. (2019), https://www.congress.gov/bill/116th-congress/house-bill/593 [https://perma.cc/VR7F-2TBW] (introduced by Rep. Steve Chabot (R-OH) and Rep. Nydia Velázquez (D-NY)). A key rationale for aligning the thresholds is that the IRS Form 1099-MISC filing threshold has not been adjusted for inflation since its inception in the 1950s, and alignment of the filing thresholds at $1,500 could facilitate gig worker tax compliance. *2017 Bruckner Testimony*, *supra*, at 4. Alternatively, the New Economy Workers to Guarantee Independence and Growth Act of 2019 would have aligned the IRS Form 1099-NEC and 1099-K filing thresholds at $1,000 for gig workers providing services and lowered the 1099-K threshold for online sellers to $5,000 and fifty transactions. New Economy Works to Guarantee Independence and Growth Act of 2019, S. 700, 116th Cong., § 2 (2019). In 2020, the Government Accountability Office noted that "[a]ligning reporting thresholds with today's economy would support tax administration for IRS . . . [and] help reduce compliance burden for workers, since they would have clear information on their earnings." 2020 TAXPAYER COMPLIANCE, *supra* note 6, at 27.

received unemployment compensation benefits during the COVID-19 pandemic and the state unemployment agencies reported those benefits to the IRS.[541] More specifically, state unemployment agencies were required to send taxpayers and the IRS the relevant information on IRS Forms 1099-G (Certain Government Payments) reporting those payments.[542] There is no question that the 2020 IRS Forms 1099-G filings made by state agencies reporting PUA claims will present a new and unique opportunity for insight on the scope of gig work and earnings.

2. Promote Withholding on Payments to Self-Employed Workers

To improve tax compliance by self-employed workers, it could make sense to impose mandatory withholding in connection with IRS Forms 1099 or, at least, to permit payor service recipients to offer voluntary withholding.[543] For example, the IRS might issue guidance to allow independent contractors and their service recipients to enter into voluntary withholding agreements without those payors facing any risk that the IRS would use those agreements to challenge their worker classification determinations.[544] Alternatively, Congress could

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541. *See, e.g.*, TREASURY INSPECTOR GEN. FOR TAX ADMIN., U.S. DEP'T OF THE TREASURY, REPORT NO. 2021-40-038, INTERIM RESULTS OF THE 2021 FILING SEASON 13 (2021), https://www.treasury.gov/tigta/auditreports/2021reports/202140038fr.pdf [https://perma.cc/J4B4-4XZA].

542. IRS, U.S. DEP'T OF THE TREASURY, FORM 1099-G, CERTAIN GOVERNMENT PAYMENTS (2021), https://www.irs.gov/pub/irs-pdf/f1099g.pdf [https://perma.cc/CBN5-RV3E].

543. 2021 PURPLE BOOK, *supra* note 200, at 135−36; NAT'L TAXPAYER ADVOC., IRS, PUB. NO. 5286 (REV. 12-2019), 2020 PURPLE BOOK: COMPILATION OF LEGISLATIVE RECOMMENDATIONS TO STRENGTHEN TAXPAYER RIGHTS AND IMPROVE TAX ADMINISTRATION 109−10 (Dec. 31, 2019) [hereinafter 2020 PURPLE BOOK], https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/ARC19_PurpleBook.pdf [https://perma.cc/U7ZV-3L2Y]; NAT'L TAXPAYER ADVOC., IRS, PUB. NO. 5286 (REV. 02-2019), 2019 PURPLE BOOK: COMPILATION OF LEGISLATIVE RECOMMENDATIONS TO STRENGTHEN TAXPAYER RIGHTS AND IMPROVE TAX ADMINISTRATION 103−04 (Dec. 31, 2018) [hereinafter 2019 PURPLE BOOK], https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/07/ARC18_PurpleBook.pdf [https://perma.cc/SH3G-FMZ5].

544. 2019 PURPLE BOOK, *supra* note 543. According to a recent Government Accountability Office analysis of this option, the IRS could issue rules allowing for such voluntary withholding if the Secretary of Treasury "finds that withholding would be appropriate and would improve tax administration, and if the company and independent contractor agree to such withholding." 2020 TAXPAYER COMPLIANCE, *supra* note 6, at 27−28.

enact legislation to require withholding on payments to independent contractors of large businesses.[545]

3. *Gig Worker Standard Business Deduction*

Another approach for improving tax compliance by self-employed gig workers might be to simplify their business expense deductions, for example, by allowing self-employed workers—or just self-employed gig workers—to claim a standard business deduction in lieu of actual business expenses (calculated as either a proportion of gross earnings or a flat dollar amount).[546] Although the Government Accountability Office recently acknowledged that such a standard business deduction would reduce tax filing complexity, the Agency also said that more research would be needed about how to design that deduction; for example, if the deduction were only available to gig workers, it might "raise disparate treatment concerns."[547]

4. *Make Permanent the Removal of the Age Sixty-Five Limit on the Eligibility of Older Americans for the Earned Income Tax Credit*

The American Rescue Plan Act eliminated the maximum age of sixty-five for the earned income tax credit for childless individuals for the tax year 2021, and the Authors hope that this change is made permanent.[548] Expanding the earned income tax credit eligibility rules for childless older workers should be especially helpful for older women because they tend to have less retirement income than men and are "nearly twice as likely as men to be living in poverty."[549]

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545. *See, e.g.*, The Gig is Up Act, H.R. 5419, 116th Cong. (2019). This Act, introduced by Rep. Debra A. Haaland (D-NM), would have required withholding for independent contractors of large businesses—defined as those with at least $100 million a year in gross receipts and 10,000 independent contractors. *Id.* § 2(a).

546. *See, e.g.*, Thomas, *supra* note 209, at 1454−66; Watson, *supra* note 61, at 14–16.

547. 2020 TAXPAYER COMPLIANCE, *supra* note 6, at 39.

548. American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 9621, 135 Stat. 4, 152–53 (codified at I.R.C. § 32(n)); *see also* 2021 PURPLE BOOK, *supra* note 200 and accompanying text.

549. OLDER WOMEN FACING FINANCIALLY UNCERTAIN FUTURE, *supra* note 173, at 8.

5. *Make the Saver's Tax Credit Refundable*

Many analysts believe that making the retirement saver's tax credit refundable would encourage more low-income workers to save for retirement.[550] That way, the credit could provide benefits to workers with incomes below the income tax threshold (and to those who are close to the threshold but whose credits are currently limited to the amount of income taxes that they owe).[551] According to one estimate, making the retirement saver's tax credit refundable would "make [it] available to 49 million tax filers who under current law received no benefit from the credit."[552]

C. Social Security and Supplement Security Income (SSI) Reforms

Reforming the Social Security and Supplement Security Income (SSI) programs could also help improve the retirement income security of gig workers, especially women.[553] Indeed, many analysts have suggested increasing Social Security and SSI benefits to ensure that all elderly Americans have enough retirement income to keep them out of poverty.[554] The United States might even move towards having a citizen's (or residence-based) pension like Australia and some other

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550. *See supra* note 543 and accompanying text; Brown & John, *supra* note 337; COLLIN O'ROURKE, POLICYLAB CONSULTING, SAVINGS MATCHES, SMALL DOLLAR ACCOUNTS, AND CHILDCARE WORKERS' DECISIONS TO SAVE, 2012−2015 APPALACHIAN SAVINGS PROJECT 1–2 (2016), https://www.wiserwomen.org/wp-content/uploads/2018/01/Savings-Matches-Summary-Brief-2015.pdf [https://perma.cc/SD85-DPJC]; Joan Entmacher & Amy Matsui, *Addressing the Challenges Women Face in Retirement: Improving Social Security, Pensions, and SSI*, 46 J. MARSHALL L. REV. 749, 775−78 (2013).

551. Pertinent here, low-income women struggle to save because they "cannot spare even small amounts from their paychecks, particularly if they are single mothers." Entmacher & Matsui, *supra* note 550, at 775; *see also supra* Figure 2 (showing lack of adequate income as a reason as to why many workers do not contribute to retirement savings).

552. Entmacher & Matsui, *supra* note 550, at 777.

553. To be sure, as William G. Gale and Grace Enda, senior fellow and senior research assistant in the Economic Studies Program at Brookings Institutions, respectively, point out, "fixing a retirement system that was not designed to accommodate women's experiences will require significant changes, not just in retirement policy but in labor market practices and policies as well." Enda & Gale, *supra* note 310.

554. *See, e.g.*, Monique Morrissey, *Steady Contributions, Affordability, and Lifetime Income Are the Building Blocks of a Retirement System that Works for Working Families*, ECON. POL'Y INST. 5−7 (Dec. 10, 2019), https://files.epi.org/pdf/180680.pdf [https://perma.cc/ZU8D-SNYQ]; FORMAN, *supra* note 291, at 108−14.

countries.[555] Alternatively, this Subpart offers some less dramatic reforms.

1. Update the Supplemental Security Income (SSI) Program

To directly impact the finances of older Americans, Congress should consider making long-overdue updates to the SSI program. For example, Congress has not updated the asset limits for the SSI program ($2,000 for an individual and $3,000 for a couple) for more than thirty years, and those limits make it "virtually impossible for [SSI recipients] to save for retirement."[556] In that regard, the Social Security Income Restoration Act of 2019 would have updated the income and asset limits for the SSI program so that beneficiaries could save more and work more without having their SSI benefits reduced.[557]

2. Improve Social Security for Women

There are also a variety of ways to increase Social Security benefits for women. For example, various analysts have suggested: (1) increasing the minimum benefits available under Social Security,[558] (2) increasing benefits for widowed spouses from low-earning couples,[559] (3) reducing the marriage duration required for divorced

555. *See. e.g.*, PENSIONS AT A GLANCE 2019, *supra* note 488, at 131−35; Jonathan Barry Forman & Gordon D. Mackenzie, *Optimal Rules for Defined Contribution Plans: What Can We Learn from the U.S. and Australian Pension Systems?*, 66 TAX LAW. 613, 623−24 (2013).

556. Entmacher & Matsui, *supra* note 550, at 762−63; *see also* JUST. IN AGING, SUPPLEMENTAL SECURITY INCOME RESTORATION ACT OF 2019, at 1–2 (2019), https://www.justiceinaging.org/wp-content/uploads/2017/07/SSI_Policy-Issue-Brief.pdf [https://perma.cc/K2NT-3Y24].

557. H.R. 4280, 116th Cong., § 2 (2019) (introduced by Rep. Raul M. Grijalva (D-AZ)); *see also* JUST. IN AGING, *supra* note 556, at 2.

558. Li, *supra* note 280, at 11–12; NAT'L ACAD. OF SOC. INS., *supra* note 274, at 34.

559. Li, *supra* note 280, at 11–12; David A. Weaver, *Widows and Social Security*, 70 SOC. SEC. BULL., no. 3, 2010, at 89, 104, https://www.ssa.gov/policy/docs/ssb/v70n3/ssb-v70n3.pdf [https://perma.cc/Y7ST-MWZS]; Melissa M. Favreault & C. Eugene Steuerle, *Social Security Spouse and Survivor Benefits for the Modern Family* 17 (Urb. Inst. Discussion Paper No. 07-01, 2007), https://www.urban.org/sites/default/files/publication/46231/311436-Social-Security-Spouse-and-Survivor-Benefits-for-the-Modern-Family.PDF [https://perma.cc/U4KL-XTAC].

spousal benefits from ten years to five or seven years,[560] (4) establishing earnings sharing,[561] or (5) providing caregiver credits.[562]

D. Pension and IRA Reforms

For most Americans, retirement income security will depend on having both Social Security benefits and additional retirement savings in a pension or IRA.[563] As this Article has shown, however, many workers—and especially many gig workers—are not using pensions or IRAs to save for retirement. As Appelbaum and others have observed, "[t]he challenge for the United States is to provide protections for all workers that are not tied to whether they work in a standard or nonstandard work arrangement."[564] This Subpart discusses a variety of recommendations for increasing retirement savings and improving pension and IRA benefits for both workers, in general, and gig workers, in particular.

560. 42 U.S.C. § 416(d); ZHE LI, CONG. RSCH. SERV., R41479, SOCIAL SECURITY: REVISITING BENEFITS FOR SPOUSES AND SURVIVORS 18–19 [hereinafter REVISITING BENEFITS], https://sgp.fas.org/crs/misc/R41479.pdf [https://perma.cc/MMC5-8VDE] (Sept. 21, 2021).

561. REVISITING BENEFITS, *supra* note 560, at 16−17. Under earnings sharing, the current Social Security system's spouse and surviving spouse benefits would be eliminated. Instead, each spouse in a married couple would be credited with half the couple's combined earnings during marriage. Howard M. Iams, Gayle L. Reznik & Christopher R. Tamborini, *Earnings Sharing in Social Security: Projected Impacts of Alternative Proposals Using the MINT Model*, 69 SOC. SEC. BULL., no. 1, 2009, at 1, 2, https://www.ssa.gov/policy/docs/ssb/v69n1/ssb-v69n1.pdf [https://perma.cc/NX7F-9NKN]; Favreault & Steuerle, *supra* note 559, at 14−17; FORMAN, *supra* note 291, at 205−06.

562. REVISITING BENEFITS, *supra* note 560, at 21−22. With respect to caregiver credits, Part IV.B. explains that many women take time out of the paid workforce for caregiving responsibilities. *See supra* Part IV.B. As current Social Security benefits do not account for any lost or reduced earnings attributable to unpaid caregiving responsibilities, workers who leave the labor force or take part-time work or lower-paying jobs to facilitate family caregiving will end up with lower Social Security benefits than otherwise. REVISITING BENEFITS, *supra* note 560, at 21–22. This lack of support for caregiving has led some analysts to suggest that the Social Security system should provide up to five years of credit for caregiving so that caregivers could qualify for larger Social Security benefits. *See, e.g.*, *id.*; Entmacher & Matsui, *supra* note 550, at 756−57; NAT'L ACAD. OF SOC. INS., *supra* note 274, at 34; Enda & Gale, *supra* note 310. Enda and Gale also suggest that more mothers could be incentivized to remain in the workforce if the federal government expanded subsidies for childcare and provided a tax benefit for secondary earners in two-earner couples. Enda & Gale, *supra* note 310. In that regard, the Social Security Caregiver Credit Act of 2019 would amend the Social Security Act to provide individuals serving as caregivers of dependent relatives with deemed wages for up to five years of such service and support State medical training programs for caregivers. Social Security Caregiver Credit Act of 2019, S. 2317, 116th Cong., §§ 3, 4 (2019) (introduced by Sen. Christopher Murphy (D-CT)).

563. *See supra* Parts III.A.2 & III.B.6

564. Appelbaum et al., *supra* note 29, at 21.

1. *Expand Coverage and Improve Portability*

Ideally, every worker should earn a pension benefit on virtually every job, and forfeitures should be extremely rare.[565] When workers leave an employer, their accrued pension benefits should go with them to the next employer (or to a universal pension account).[566] One approach would be to adopt a system of payroll deduction IRAs and automatically enroll workers into those IRAs.[567] Such automatic

565. *See, e.g.*, Forman & Mackenzie, *supra* note 320, § 6.05, at 6-54 to 6-55.

566. *Id.* In any event, leakage out of retirement savings—through loans and early withdrawals—is a major problem for the current pension system, and portability should be encouraged, if not mandated. *See, e.g.*, JOINT COMM. ON TAX'N, JCX-20-21, ESTIMATING LEAKAGE FROM RETIREMENT SAVINGS ACCOUNTS 15 (2021), https://permanent.fdlp.gov/gpo157064/x-20-21.pdf [https://perma.cc/MY94-8B7A]; ALEX MAZER, JONATHAN WEISSTUB, GRACE LI, IDA RADEMACHER, DAVID MITCHELL & BEN WHITE, COMMON WEALTH & ASPEN INST. FIN. SEC. PROGRAM, PORTABLE NON-EMPLOYER RETIREMENT BENEFITS: AN APPROACH TO EXPANDING COVERAGE FOR A 21ST CENTURY WORKFORCE 11 (2019), https://assets.aspeninstitute.org/content/uploads/2019/02/Portable-nonemployer-retirement-benefits.pdf [https://perma.cc/WEJ5-M6BP]; ALICIA H. MUNNELL, ANEK BELBASE & GEOFFREY T. SANZENBACHER, CTR. FOR RET. RSCH. AT BOS. COLL., AN ANALYSIS OF RETIREMENT MODELS TO IMPROVE PORTABILITY AND COVERAGE 20−28 (2018), https://crr.bc.edu/wp-content/uploads/2018/03/Portability-and-coverage_Special-report.pdf [https://perma.cc/47SR-VVF9]; LIBBY REDER, SHELLY STEWARD & NATALIE FOSTER, ASPEN INST., DESIGNING PORTABLE BENEFITS: A RESOURCE GUIDE FOR POLICYMAKERS 51 (2019), https://assets.aspeninstitute.org/content/uploads/2019/06/Designing-Portable-Benefits_June-2019_Aspen-Institute-Future-of-Work-Initiative.pdf [https://perma.cc/YFZ5-EWG9]; Robert Maxim & Mark Muro, *Rethinking Worker Benefits for an Economy in Flux*, BROOKINGS, https://www.brookings.edu/blog/the-avenue/2018/03/29/rethinking-worker-benefits-for-an-economy-in-flux/ [https://perma.cc/MS4X-CWAV] (Mar. 30, 2018); Jack VanDerhei, *The Impact of Auto Portability on Preserving Retirement Savings Currently Lost to 401(k) Cashout Leakage*, EMP. BENEFIT RSCH. INST. (Aug. 15, 2019), https://www.ebri.org/content/the-impact-of-auto-portability-on-preserving-retirement-savings-currently-lost-to-401(k)-cashout-leakage [https://perma.cc/6M4K-PXZK].

567. *See, e.g.*, Mitchell, *supra* note 346, at 5–6; U.S. GOV'T ACCOUNTABILITY OFF., GAO HIGHLIGHTS: AUTOMATIC IRAS: LOWER-EARNING HOUSEHOLDS COULD REALIZE INCREASES IN RETIREMENT INCOME (2013), https://www.gao.gov/assets/660/657172.pdf [https://perma.cc/9Z6T-2MFJ]; J. MARK IWRY & DAVID C. JOHN, THE RET. SEC. PROJECT, NO. 2009-3, PURSUING UNIVERSAL RETIREMENT SECURITY THROUGH AUTOMATIC IRAS 3 (2009), https://www.brookings.edu/wp-content/uploads/2016/06/07_automatic_ira_iwry.pdf [https://perma.cc/SB38-YMHS]; ANGELA M. ANTONELLI, THE CTR. FOR RET. INITIATIVES AT GEORGETOWN UNIV., POLICY REPORT NO. 20-02, WHAT ARE THE POTENTIAL BENEFITS OF UNIVERSAL ACCESS TO RETIREMENT SAVINGS? 14–15 (2020), https://cri.georgetown.edu/wp-content/uploads/2020/12/CRI-ESI-Report-Benefits_of_Universal_Access_FINAL.pdf [https://perma.cc/R6LR-X735]; Regina T. Jefferson, *Redistribution in the Private Retirement System: Who Wins and Who Loses?*, 53 HOW. L.J. 283, 303−04 (2010). Contributions to these individual retirement savings accounts could be automatically withheld from the salaries of every worker on every job, unless that worker opts out; further, for the self-employed, IRS Forms 1040 Schedule SE and 1040-ES could be amended to divert a portion their self-employment income into their individual retirement savings accounts. SARAH HOLMES BERK, NAT'L ACAD. OF SOC. INS., CREATING A FEDERAL AUTO IRA AND ENHANCING SOCIAL SECURITY LONGEVITY DATA 9−10 (2019), https://www.nasi.org/wp-content/uploads/2019/12/Federal-auto-IRA-Holmes-Berk2.pdf [https://perma.cc/U37H-6KSS].

enrollment features will almost certainly lead to high participation rates, higher levels of retirement savings, and better retirement income outcomes.[568] Another approach for expanding pension coverage would be to increase employer participation in multiple employer plans (MEPs) because many analysts believe that new open MEPs would be a good way to provide retirement benefits to gig workers.[569]

For that matter, Congress could piggyback a system of individual retirement savings accounts onto the existing Social Security withholding system.[570] These universal pension accounts could be held by the government or by large financial institutions. Either way, the funds should be invested well, and, at retirement, account balances should be paid out as lifetime annuities. As Congress has not yet enacted any kind of more universal pension system, however, Oregon and a number of other states have created their own state-run pension systems, with individual retirement savings accounts for workers not already covered by an employer-sponsored pension.[571]

2. Improve Spousal Benefits in Pensions and IRAs

Although a qualified joint-and-survivor annuity (QJSA) is the default form of benefit for defined benefit plans, the usual rule for defined contribution plans is instead that the balance in a participant's account is payable to the spouse at death.[572] That means that the typical defined contribution participant is generally free to spend his or her defined contribution savings as he or she pleases and may not end up leaving anything for the benefit of his or her surviving spouse, let alone a survivor annuity. The rules governing IRAs are even more relaxed: an individual with an IRA is free to spend the balance in her account

568. *See, e.g.*, OECD, OECD PENSIONS OUTLOOK 2012, at 45–76 (2012), https://www.oecd-ilibrary.org/docserver/9789264169401-en.pdf [https://perma.cc/ZMW2-N9GB].

569. *See, e.g.*, Secunda, *supra* note 9, at 438; Secunda, *supra* note 357, at 219–20.

570. Jonathan Barry Forman, *Universal Pensions*, 2 CHAP. L. REV. 95, 116 (1999); TERESA GHILARDUCCI & TONY JAMES, RESCUING RETIREMENT 90 (2018); MUNNELL ET AL., *supra* note 566.

571. *See* VanDerhei, *supra* note 346 and accompanying text; *see also* TERESA GHILARDUCCI & KEVIN A. HASSETT, ECON. INNOVATION GRP., WHAT IF LOW-INCOME AMERICANS HAD ACCESS TO WEALTH-BUILDING VEHICLES LIKE THE FEDERAL EMPLOYEES' THRIFT SAVINGS PLAN? 3 (2021), https://eig.org/wp-content/uploads/2021/03/Hassett-Ghilarducci-White-Paper-IWBI.pdf [https://perma.cc/8EEC-S6F2].

572. I.R.C. § 401(a)(11); ERISA § 205, 29 U.S.C. § 1055.

as he or she wishes and, furthermore, is free to designate whoever he or she wants as his or her beneficiary.[573] Congress could help protect nonemployee spouses by extending the QJSA regime to defined contribution plans and IRAs, or by at least requiring that the nonemployee spouse consent to the cash out from defined contribution plans and IRAs.[574]

State courts can divide the pensions and IRAs of married couples through qualified domestic relations orders (QDROs).[575] Securing a QDRO can be a challenge, however, and Congress might want to think about ways of making it easier for divorcing couples to split their retirement savings.[576]

E. Worker Classification Reforms

Distinctions premised on worker classification and the myriad of tax and labor laws governing the classification of workers were developed early in the twentieth century with an eye on the manufacturing economy, and the United States needs new rules for workers providing services in the twenty-first century.[577] In particular, given that many of the challenges facing gig workers directly stem from their worker classification, Congress could consider updating worker classification rules for tax or labor law purposes. Basically, there are four alternative approaches.[578]

The first approach would be "to clarify and simplify" the worker classification test.[579] Presumably, this approach would result in more workers being treated as employees and receiving the worker protections and benefits that come with that status.[580]

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573. *Retirement Topics–Beneficiary*, IRS, https://www.irs.gov/retirement-plans/plan-participant-employee/retirement-topics-beneficiary [https://perma.cc/L2R2-4EK4] (Sept. 27, 2021).

574. *See, e.g.*, Women's Retirement Protection Act, S. 975, 116th Cong., § 3 (2019) (introduced by Sen. Patty Murray (D-WA)).

575. *See, e.g.*, I.R.C. § 401(a)(13); ERISA § 206(d), 29 U.S.C. § 1056(d).

576. RETIREMENT SECURITY, *supra* note 311, at 11−18; *see also* S. 975.

577. *See, e.g.*, Oranburg, *supra* note 465, at 8−20.

578. Lobel, *supra* note 463, at 57−71.

579. *Id.* at 58.

580. *Id.* at 58−63.

The second approach would be to extend worker benefits and protections to independent contractors as well as employees.[581] For example, antidiscrimination protections (like those provided to employees under Title VII of the Civil Rights Act of 1964) could be extended to all workers—including independent contractors.[582]

The third approach would be to create a new category of workers and create special rules and protections for them.[583] In Canada, for example, if an independent contractor works for a single firm for an extended period, that worker obtains certain rights as a "dependent contractor."[584] Similarly, former U.S. Secretary of Labor, Seth D. Harris and prominent labor economist, Alan B. Krueger recommended creating a new category of "independent workers" that would occupy the middle ground between employees and independent contractors.[585] These independent workers would qualify for many, but not all, of the benefits and protections that traditional employees receive.[586]

581. *Id.* at 63−64.

582. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17. Professor Orly Lobel argues that whether a worker is an employee or an independent contractor should not make any difference when prohibiting companies, like Uber, from making discriminatory decisions based on sex, race, religion, national origin, age, or disability. Lobel, *supra* note 463, at 64; *see also* Ruth Berins Collier, Veena B. Dubal & Christopher L. Carter, *Disrupting Regulation, Regulating Disruption: The Politics of Uber in the United States*, 16 PERSP. ON POL. 919, 930 (2018).

583. Lobel, *supra* note 463, at 64−69.

584. *Id.* at 65; *see also* Miriam A. Cherry & Antonio Aloisi, *"Dependent Contractors" in the Gig Economy: A Comparative Approach*, 66 AM. U. L. REV. 635, 652–53 (2017); Abbey Stemler, *Betwixt and Between: Regulating the Shared Economy*, 43 FORDHAM URB. L.J. 31, 62 (2016); Brett Harris, *Uber, Lyft, and Regulating the Sharing Economy*, 41 SEATTLE U. L. REV. 269 (2017).

585. Seth D. Harris & Alan B. Krueger, *A Proposal for Modernizing Labor Laws for Twenty-First-Century Work: The "Independent Worker"* 22 (Hamilton Project, Discussion Paper No. 2015-10, 2015), https://www.hamiltonproject.org/assets/files/modernizing_labor_laws_for_twenty_first_century_work_krueger_harris.pdf [https://perma.cc/AL5M-Z7U2].

586. *Id.* at 2, 15−21. In particular, Professor Seth D. Harris at Cornell University and Professor Alan B. Krueger at Princeton University suggest that these independent workers should benefit from tax withholding and employer contributions for payroll taxes, and they should have the right to organize and collectively bargain and civil rights protections; however, they would not have the right to time-and-a-half for overtime hours. *Id.* at 15, 27. Moreover, Harris and Krueger suggest that the service recipients that hire these independent workers could use their scale and pooling opportunities to offer retirement savings opportunities, health insurance (and automobile, liability, and life insurance), banking and savings products, and even tax preparation assistance. *Id.* at 17. Professor Oranburg has also suggested creating a new category of worker, at least for certain platform workers. Oranburg, *supra* note 465, at 47. He argues that "legally classifying gig workers as employees or independent contractors is an exercise in jamming round pegs into square holes." *Id.* Oranburg's approach is intended to be very flexible for both firms and

Finally, the fourth approach would be to delink employment benefits from work altogether, like with universal health care rather than employer-sponsored health care benefits and individual pension accounts, rather than employer-sponsored pension plans.[587] Part VI.H below offers a more thorough discussion of this fourth approach.[588]

F. Financial Literacy

Congress and researchers have become increasingly aware of the fact that financial literacy also plays a critical role in women's retirement security.[589] In that regard, the U.S. Senate Special Committee on Aging held a hearing in 2020 to review the findings of a Government Accountability Office report that Congress commissioned to study the financial security of older women.[590] That report reviewed the Agency's findings from its interviews with fourteen focus groups of older women, and all of those focus groups expressed concern about "how a lack of personal finance education hindered their retirement security."[591] Most of those focus groups also discussed ideas on how to improve personal financial education for

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workers. *Id.* A firm would create its own definition of its gig workers that the firm would register with the U.S. Department of Labor on a new "Form GW." *Id.* at 50. The form would stipulate which employee benefits would be offered to its platform workers (for example, health insurance, retirement savings, and unemployment insurance) and which would not. *Id.* Then, the U.S. Department of Labor would simply review each Form GW to make sure that the firm's definition complied with the applicable labor laws and that the form could be clearly understood by the covered workers. *Id.* In effect, firms could define which benefits its platform workers would receive, and workers and firms would rely on competitive labor markets to sort things out. *Id.* at 56. For example, workers who wanted more health and retirement benefits might gravitate towards traditional employment, while other workers with adequate retirement savings and alternative health care coverage might prefer independent contractor status and less fringe benefits. *See id.*

587. Lobel, *supra* note 463, at 69−71; *see also* Mitchell, *supra* note 346, at 26; REDER ET AL., *supra* note 566, at 7; Miriam A. Cherry & Ana Santos Rutschman, *Gig Workers as Essential Workers: How to Correct the Gig Economy Beyond the COVID-19 Pandemic*, 35 A.B.A. J. LAB. & EMP. L. 11, 15−16 (2020).

588. *See infra* Part VI.H.

589. *See* OLDER WOMEN FACING FINANCIALLY UNCERTAIN FUTURE, *supra* note 173, at 19 n.45; Lusardi & Mitchell, *supra* note 449, at 17, 22. *See generally supra* Part IV.E.4.

590. *See generally Women and Retirement: Unique Challenges and Opportunities to Pave a Brighter Future: Hearing Before the S. Special Comm. on Aging*, U.S. SENATE, SPECIAL COMM. ON AGING (Sept. 24, 2020, 9:30 AM), https://www.aging.senate.gov/hearings/women-and-retirement-unique-challenges-and-opportunities-to-pave-a-brighter-future; OLDER WOMEN REPORT, *supra* note 513, at 2; OLDER WOMEN FACING FINANCIALLY UNCERTAIN FUTURE, *supra* note 173, at 1–2.

591. OLDER WOMEN REPORT, *supra* note 513, at 6.

women, including (1) incorporating personal financial education into school curriculums beginning in kindergarten; (2) developing after school and summer school programs on personal finance; (3) creating online tools; (4) providing older women with estate planning guides; and (5) encouraging employers to "provide financial planning sessions for their employees (not just those nearing retirement), and[] access to financial advisors."[592]

Women can also benefit from targeted financial planning guides.[593] For example, the Women's Institute for a Secure Retirement (WISER) has developed various guides to help particular groups of women workers plan for retirement, including one targeted to nurses.[594]

Financial literacy courses could also be developed to help small businesses. Women business owners are a fast-growing segment of small business owners.[595] Most of these firms are small businesses—non-employer service firms with revenues below $100,000—and these small firms could be a target audience for financial literacy initiatives.[596] For example, Congress could direct the Office of Women's Business Ownership to develop standardized online financial literacy courses that could, in turn, be made available and distributed through its Women's Business Center network.[597]

592. *Id.* at 7; *see also* Jill E. Fisch, Annamaria Lusardi & Andrea Hasler, *Defined Contribution Plans and the Challenge of Financial Illiteracy*, 105 CORNELL L. REV. 741, 780 (2020) (suggesting that employers should be required to provide financial education to their employees).

593. *See, e.g.*, O'ROURKE, *supra* note 550, at 1.

594. *See, e.g.*, CTR. FOR AM. NURSES & WOMEN'S INST. FOR A SECURE RET., THE BUSY NURSE'S GUIDE TO FINANCIAL PLANNING (2015), https://www.wiserwomen.org/wp-content/uploads/2019/09/Nurses-Guide-Financial-Planning-2015.pdf [https://perma.cc/4YNV-WPAL]; DIANE FREEMAN, LARA HINZ, GAIL HUNT, LAURIE LINDBERG, KATHLEEN QUINN, DICK SCHREITMULLER, RUSTY TOLER, CHERYL GANNON ET AL., WOMEN'S INST. FOR A SEC. RET., FINANCIAL STEPS FOR CAREGIVERS: WHAT YOU NEED TO KNOW ABOUT PROTECTING YOUR MONEY AND RETIREMENT (2020), https://www.wiserwomen.org/wp-content/uploads/2020/09/financial-steps-for-caregivers-budget-worksheet-9.2020.pdf [https://perma.cc/94SJ-GCU6].

595. *See* Bruckner, *supra* note 226, at 3. In fact, women of color are leading the charge when it comes to starting businesses: in the five-year period from 2014 to 2019, firms owned by women of color grew at a rate of 42%, which is double the rate of all new women-owned firms. *Id.* at 9 (citing AMERICAN EXPRESS, THE 2019 STATE OF WOMEN-OWNED BUSINESS REPORT 3 (2019), https://s1.q4cdn.com/692158879/files/doc_library/file/2019-state-of-women-owned-businesses-report.pdf [https://perma.cc/SB5W-W8JQ]).

596. *See id.* at 9–11.

597. The Small Business Administration's Office of Women's Business Ownership oversees a network

G. Establish a Federal Benefits and Retirement Commission

The Authors' review of work and retirement for today's gig economy workers has inevitably led them to think about the future of work and retirement in America—and to think about the kind of institutional and programmatic changes that will be needed to push through the short-term problems related to the COVID-19 pandemic, the medium-term problems associated with the aging and retirement of Baby Boomers, and the long-term problems related to retirement of younger workers. The scope of these looming retirement income security challenges demands a comprehensive response—and a response that acknowledges the reality that millions of Americans already engage in gig work and millions more will.[598] According to the Government Accountability Office, the United States needs a comprehensive evaluation of its approach to financing retirement, and Congress needs to consider establishing an independent commission to comprehensively examine the U.S. retirement system and make recommendations to clarify key policy goals for the system and improve how the nation can promote more stable retirement security.[599]

H. Make Worker Benefits More Portable

The three pillars of the current U.S. retirement system "are anticipated to be unable to ensure adequate benefits for a growing number of Americans due, in part, to the financial risks associated with

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of more than 100 Women's Business Centers located across the country that already provide program training in finance, management, and marketing, as well as offer access to all the SBA's financial and procurement assistance programs—but not much in the way of financial literacy education. Press Release, U.S. Small Bus. Admin., Release No. 18-22, SBA Increases Opportunities for Women Entrepreneurs with Opening of New Women's Business Centers (Apr. 10, 2018), https://www.sba.gov/article/2018/apr/10/sba-increases-opportunities-women-entrepreneurs-opening-new-womens-business-centers [https://perma.cc/3WVG-WLMT].

598. *See* Maciej Duszyński, *Gig Economy: Definition, Statistics & Trends [2022 Update]*, ZETY, https://zety.com/blog/gig-economy-statistics [https://perma.cc/D5AZ-9UJ9] (Feb. 9, 2022) ("57.3 million people freelance in the U.S. It is estimated that by 2027 there will be 86.5 million freelancers.").

599. *See generally* COMPREHENSIVE RE-EVALUATION, *supra* note 376; *see also* PROMOTE FUTURE SECURITY, *supra* note 382, at 23–24. Other analysts have recommended the creation of an Older Workers Bureau at the Department of Labor to promote the welfare of older workers. *See, e.g.*, PAPADOPOULOS ET AL., *supra* note 510, at 5.

certain federal programs."[600] In particular, as this Article has shown, although gig workers use gig work to supplement their income, they rarely get health or retirement benefits on those jobs, and "[a] more comprehensive approach for addressing the lack of benefits among workers in part-time and nonemployee arrangements is [] needed."[601]

Our employment-based pension care system developed as somewhat of a historical accident, and pensions could instead be tied to individuals rather than employers (and the same goes for health care).[602] Indeed, many analysts now believe that the U.S. system of workplace-based benefits is obsolete and that more portable benefits are better suited to the modern workplace.[603] In short, changing patterns of work necessarily raises questions about the reliability of having so many of U.S. institutions built around traditional work, such as employment-based health and employment-based pension plans.[604]

600. COMPREHENSIVE RE-EVALUATION, *supra* note 376.

601. Abraham & Houseman, *Making Ends Meet*, *supra* note 16, at 130.

602. Malcolm Gladwell, *The Risk Pool*, NEW YORKER (Aug. 20, 2006), https://www.newyorker.com/magazine/2006/08/28/the-risk-pool [https://perma.cc/49PT-SMAS] (pensions); Aaron E. Carroll, *The Real Reason the U.S. Has Employer-Sponsored Health Insurance*, N.Y. TIMES (Sept. 5, 2017), https://www.nytimes.com/2017/09/05/upshot/the-real-reason-the-us-has-employer-sponsored-health-insurance.html [https://perma.cc/MN6L-ZC5E] (health care).

603. REDER ET AL., *supra* note 566, at 4, 7 ("Our system of benefits is outdated and inadequate."); Maxim & Muro, *supra* note 566; Lobel, *supra* note 463, at 70; Mitchell, *supra* note 346, at 26; Azar, *supra* note 220, at 416; MAZER ET AL., *supra* note 566, at 2; Elmi, *supra* note 488, at 22.

604. *See, e.g.*, Mitchell, *supra* note 346, at 26; MATTHEW S. RUTLEDGE, GAL WETTSTEIN & SARA ELLEN KING, CTR. FOR RET. RSCH. AT BOS. COLL., NO. 20-6, WILL IMPORTS AND ROBOTS PUSH OLDER WORKERS INTO NONTRADITIONAL JOBS? 1 (2020), https://crr.bc.edu/wp-content/uploads/2020/03/IB_20-6.pdf [https://perma.cc/5YRP-XUPR]; Matthew S. Rutledge, Gal Wettstein & Sara Ellen King, *Will More Workers Have Nontraditional Jobs as Globalization and Automation Spread?* 12–13 (Ctr. for Ret. Rsch. at Bos. Coll., Working Paper No. 2019-10, 2019), https://crr.bc.edu/wp-content/uploads/2019/07/wp_2019-10.pdf [https://perma.cc/SFG4-WTQV]; Katherine V.W. Stone, *Rupture and Invention: The Changing Nature of Work and the Implications for Social Policy*, *in* THE CAMBRIDGE HANDBOOK OF U.S. LABOR LAW FOR THE TWENTY-FIRST CENTURY 154, 154 (Richard Bales & Charlotte Garden eds., 2020). Millennials seem to be particularly concerned that traditional full-time employment with benefits will largely disappear. *The Future of Work and Financial Wellness for Millennial Employees*, PRUDENTIAL (Nov. 30, 2018), https://www.prudential.com/corporate-insights/the-future-of-work-for-millennial-employees [https://perma.cc/462W-QMQN]. Moreover, patterns of work are certain to change during and after the COVID-19 pandemic. For example, a 2020 Willis Watson Tower survey of 681 employers found that although just 7% of full-time employees worked remotely or from home before the pandemic, 53% were doing so during the week of May 11, 2020, and employers expected that 22% would be doing so after the pandemic passes. Press Release, Willis Towers Watson, Three in Four Employers Adjust Workplaces in Response to COVID-19, Willis Towers Watson Survey Finds (May 21, 2020), https://www.willistowerswatson.com/en-US/News/2020/05/three-in-four-employers-adjust-workplaces-in-response-to-covid-19-wtw-survey-finds [https://perma.cc/GV4X-S372].

Instead of tying health care, pensions, workers' compensation, unemployment insurance, and other benefits to employers, it would make more sense to tie those benefits to workers as individuals.[605] Policymakers could build entirely new programs or, alternatively, increase eligibility of existing programs—all with a goal of universality.[606] Benefits would be universal and portable, like Social Security in the United States and like universal health care in many other industrialized nations.[607]

For example, individual pension accounts could be attached to individual workers and follow those workers from job to job rather than having pension plans tied to employers, which is common under the current employer-sponsored pension plan system.[608] That is how Australia's mandatory pension system (known as superannuation) works.[609] In effect, employers in Australia send their required "superannuation" contributions to managed funds that the workers choose to hold in their "MySuper" accounts.[610] Of course, there are many other policy models to build on in the United States, including, for example, the Patient Protection and Affordable Care Act of 2010, the multiemployer pension plan model applicable to many unionized

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605. *See, e.g.*, Mitchell, *supra* note 346, at 17, 26; Gale et al., *supra* note 13, at 186, 191–95 (suggesting a move from away from employer-sponsored health and pension plans and towards "employer-facilitated accounts"). Critical policy groundwork for portable benefits has already been done by the Aspen Institute's Future of Work Initiative, which developed a resource guide for policymakers designing portable benefits that asks relevant questions, including (1) what benefits should be included; (2) who is eligible; (3) how they will be funded, and (4) who should administer programs. *See generally* REDER ET AL., *supra* note 566; MAZER ET AL., *supra* note 566, at 17.

606. REDER ET AL., *supra* note 566, at 7; *see also* MAZER ET AL., *supra* note 566, at 11.

607. *See, e.g.*, JARED MAEDA & KAREN STOCKLEY, CONG. BUDGET OFF., PUB. NO. 56620, POLICIES TO ACHIEVE NEAR-UNIVERSAL HEALTH INSURANCE COVERAGE 8 (2020), https://www.cbo.gov/system/files/2020-10/56620-near-universal-coverage.pdf [https://perma.cc/RA85-Y92V]; JARED MAEDA, XIAOTONG NIU & KRISTEN BERNIE, CONG. BUDGET OFF., PUB. NO. 55150, KEY DESIGN COMPONENTS AND CONSIDERATIONS FOR ESTABLISHING A SINGLE-PAYER HEALTH CARE SYSTEM 3 (2019), https://www.cbo.gov/system/files/2019-05/55150-singlepayer.pdf [https://perma.cc/CR35-VULG].

608. *See, e.g.*, John N. Friedman, *Building on What Works: A Proposal to Modernize Retirement Savings* 8 (Hamilton Project, Discussion Paper No. 2015-05, 2015), https://www.brookings.edu/wp-content/uploads/2016/06/friedman_modernize_retirement_savings_final.pdf [https://perma.cc/G9FE-QMNU]; Mitchell, *supra* note 346, at 26.

609. *See* AUSTRALIAN SEC. & INV. COMM'N (ASIC), SUPER DECISIONS: YOUR SAVINGS. YOUR CHOICES. YOUR FUTURE 4 (2018), https://static.moneysmart.gov.au/files/publications/super-decisions.pdf [https://perma.cc/KTJ7-G2B5]; Forman & Mackenzie, *supra* note 555, at 623–28.

610. AUSTRALIAN SEC. & INV. COMM'N, *supra* note 609, at 8, 9, 11.

employees, the state-sponsored pension model recently adopted by states like Oregon to cover workers whose employers do not have traditional pension plans, and open MEPs.[611]

Our Social Security system is also largely built on the traditional employment arrangement, with Social Security benefits tied to payroll (and self-employment) taxes.[612] The Social Security system works well in the traditional employment situation—where both the employer and the employee can be counted on to pay their respective shares of Social Security payroll taxes—but the Social Security system seems to be failing in the self-employment sector as the tax gap studies clearly show noncompliance is rampant there.[613] Of course, Social Security insurance retirement benefits do not have to be tied to payroll and self-employment taxes. Instead, some countries provide non-contributory "universal" pensions that provide at least modest income streams to virtually all their elderly residents. For example, Australia's Age Pension is a means-tested income support benefit of up to AU$868.30 per fortnight for seniors who have been Australian residents for at least ten years.[614] To be sure, the U.S. SSI program is also designed as a universal means-tested program, but it is not very generous and serves only a fraction of America's elderly.[615] Like SSI, most of those Australian-style, resident-based pensions are means-tested and funded out of general revenues rather than payroll taxes, but many are more generous than SSI.[616] Congress could expand SSI into a more universal pension system, and that expansion could be financed out of general revenues or, perhaps, with a new carbon tax or

611. *See, e.g.*, REDER ET AL., *supra* note 566, at 52−68.
612. *See supra* Part III.A.1.
613. *See supra* Part II.D.
614. *Age Pension and Government Benefits*, MONEYSMART.GOV.AU, https://moneysmart.gov.au/retirement-income/age-pension-and-government-benefits [https://perma.cc/Z2QM-VY5N]. New Zealand also has a generous residence-based government pension program. *New Zealand Superannuation (NZ Super)*, N.Z. GOV'T, MINISTRY OF SOC. DEV. (2019), https://www.workandincome.govt.nz/eligibility/seniors/superannuation/index.html [https://perma.cc/7Q8F-6QZN].
615. *See supra* notes 558–559.
616. SOC. PROT. DEP'T, INT'L LABOUR OFF., SOCIAL PROTECTION FOR OLDER PERSONS: POLICY TRENDS AND STATISTICS 2017–19, at 6, 84 (2018).

value-added tax.[617] For that matter, the federal government might also move towards demogrant or some other universal basic income program for all Americans, not just seniors.[618] For example, each year, Alaska distributes dividends financed by a permanent fund, funded largely from oil revenues, to its residents.[619] The permanent fund dividend for 2019 was $1,606.[620]

CONCLUSION

Self-employed workers are a varied lot and can include high-income doctors, lawyers, and other professionals, but the self-employed also includes many low-earning gig workers engaged in rideshare driving, caregiving, and housecleaning. Although gig workers typically lack employer-provided retirement benefits and the underreporting of their self-employment income leads to reduced Social Security benefits, gig work can be a strategy for some workers to shore up their current and future retirement income. For example, some gig workers rely on gig work to prolong their careers and postpone claiming Social Security or tapping into their retirement savings.[621] For women, gig work may be especially important to shore up their retirement incomes.[622]

All in all, however, the current tax, retirement, and labor laws and regulations have not worked to facilitate tax compliance and have instead triggered a retirement financing gap for gig workers, most of

617. For example, a 5% value-added tax could raise $2.8 trillion over ten years, and a modest tax on greenhouse gas emissions could raise $1 trillion over ten years. REDUCING THE DEFICIT, *supra* note 536, at 84–85. The point here is that it may just turn out to be more efficient to raise the revenue for social insurance benefits from a tax base rather than wages and self-employment earnings.

618. *See generally* PHILIPPE VAN PARIJS & YANNICK VANDERBORGHT, BASIC INCOME: A RADICAL PROPOSAL FOR A FREE SOCIETY AND A SANE ECONOMY (2017); Benjamin M. Leff, *EITC for All: A Universal Basic Income Compromise Proposal*, 26 WASH. & LEE J. CIV. RTS. & SOC. JUST. 85 (2019); Leonard E. Burman, *A Universal EITC: Making Work Pay in the Age of Automation*, 73 NAT'L TAX J. 1187 (2020).

619. *About Us*, PERMANENT FUND DIVIDEND DIV., ALASKA DEP'T OF REVENUE, https://pfd.alaska.gov/Division-Info/About-Us [https://perma.cc/V6XC-46BW].

620. *Summary of Dividend Applications & Payments*, PERMANENT FUND DIVIDEND DIV., ALASKA DEP'T OF REVENUE, https://pfd.alaska.gov/Division-Info/Summary-of-Applications-and-Payments [https://perma.cc/EFM2-2YXV].

621. *See, e.g.*, *Nontraditional Work at Older Ages*, *supra* note 488, at 4, 15−17; SANZENBACHER, *supra* note 148, at 5.

622. *See, e.g.*, Enda & Gale, *supra* note 310.

whom are likely to rely primarily on Social Security in retirement.[623] That retirement financing gap is a major problem for many women because they tend to face a gender earnings gap while working, tend to live longer than men, and tend to have higher health care costs as they age—all of which translate into a retirement wealth gap when they retire.[624] Moreover, for many women, a relatively low level of financial literacy compounds the challenges of financing their retirements.[625] These retirement financing challenges are even more consequential for women of color.[626] Motherhood, too, plays a role in lowering women's retirement income.[627] Nevertheless, it could be that the lower earnings during working years and the need for flexibility to accommodate caregiving are what motivate so many women to engage in gig work in the first place.

All in all, more research on gig workers is warranted. This Article's comprehensive review of the existing gig work and women's retirement research consistently leads the Authors to conclude that the United States has a retirement financing system that does not readily support the contributions made by women workers. The retirement income security problems of women are not insurmountable, but the solutions do require inclusive data and research on the gender differences in gig work, retirement income security, and policy solutions that endeavor to reduce the gender retirement wealth gap.

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623. *See, e.g.*, CHALLENGES IN THE RETIREMENT SYSTEM, *supra* note 299, at 2; *see also supra* Part IV.E.1.

624. *See supra* Part IV.

625. *See supra* Part IV.E.4.

626. *See supra* Part IV.E.

627. *See supra* Part IV.E.