Law and Ethics in the Business Environment 9th edition Halbert Solutions Manual

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LAW & ETHICS IN THE BUSINESS ENVIRONMENT 9e

Instructor Manual

CHAPTER 2

THE NEW ECONOMY: REVISIONING WORK

MAIN CONCEPTS

The Gig Economy
Employees and Independent Contractors
Labor Standards and Workers Rights
Changing Business Models and Market Disruption
Consumer Protections in the New Economy

This chapter provides opportunities to introduce a wide array of important business law conception and controversies. Both torts and contracts can be discussed through the cases and essays in the chapter. Business's potential liability for the action and inactions of their employees is another topic covered by this chapter. The rights of workers, particularly in the current economic climate, is another important issue raised in this chapter.

Consider introducing the gig economy by asking students if they have ever been paid on a per-job basis. If the students do not volunteer it, ask if any of them have every babysat or done yard work for a neighbor in exchange for payment. These common experiences are a good starting point for the gig economy.

Consider using this hypothetical:
Hannah and Roger Johnson hired a babysitter named Anna through a website, babysittermatch.com. The site allows the potential sitters to post their bios, references and photos on the site, but only after the site confirms their qualifications and calls their references. Parents can search the site for sitters in their area for a small fee. Unfortunately, while Anna was babysitting the Johnson's three-year-old daughter, Cecelia, an accident occurred. Anna left a pair of sharp scissors on the floor and, while Anna was in another room, Cecelia picked up the scissors and cut herself in the leg with them. The laceration was deep and Cecelia had to be rushed to the emergency room. Cecelia recovered from the injury, but not before enduring $150,000 in medical care, including surgery to repair a tendon.
Should the company that runs babysittermatch.com face any liability for Anna's negligence?

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***Cotter v. Lyft*, Questions, p. 55-56**

1. **What difference does categorizing the drivers make?**

   Employees are entitled to certain benefits and protections that independent contractors are not. These include minimum wage, reimbursement for work-related expenses, and unemployment benefits. Classifying Lyft drivers as employees would grant them access to these benefits and protections at great expense to Lyft.

2. **What argument can you make that Lyft drivers are independent contractors? That they are employees?**

   This question focuses on whether the Lyft has the right to control the manner and means of accomplishing the result desired. If Lyft has this right to control, the drivers are employees under California law. Here, the fact that Lyft drivers can work whenever they want, for however long as they want, suggests that they are independent contractors. However, beyond that, Lyft exercises a lot of control over how drivers act when they are driving for Lyft (such as how they great passengers) and sets standards for their vehicles and insurance. They are also not performing a task that requires specialized skill, which is typical of independent contractors.

3. **Uber began in San Francisco in 2009; by 2015, its drivers were in 50 countries around the world. In some, like Germany and the Netherlands, Uber was officially banned. When drivers were caught violating the Uber ban, the company would pay their fines. Who are the stakeholders in this situation? Is Uber's practice of paying its drivers fines ethical? In 2016, Uber was assessed an $11.4 million fine for operating a transportation business in Pennsylvania without a license, and continued its operations. Who benefits, and who is hurt, by this attitude toward rules and regulations?**

   The stakeholders in these situations include Uber, potential Uber drivers, taxi drivers (and drivers for other Uber competitors), consumers who use Uber and its competitors, and the governments (in these cases, Germany's, the Netherlands' and Pennsylvania). From Uber's perspective, and a free market ethical approach, this is ethical as long as Uber is making more from having drivers operate in these places that it has to pay in fines. Ask students to consider this issue from the other ethical perspectives presented in Chapter 1.

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4. **In many cities and states, taxicab companies are highly regulated. New York, for example, requires vehicles to meet certain specifications. Cab fares are set by law. Drivers go through criminal background checks, must pass English proficiency tests and must prove their knowledge of the city's streets. Passengers can rely on the "gold medallion" to identify drivers and cabs that have met these qualifications. Medallions are required and expensive--costing close to $500,000--so most cabs are owned by investment companies who lease them to the drivers. Considering the various stakeholders—the government, the cab owners, the drivers and the customers—is New York's taxicab system fair?**

   In one sense, it is fair because it takes steps to ensure the safety of taxi passengers. However, many view this system as exclusive and potentially exploitive of drivers. The medallion system keeps many potential drivers out of the business and limits the amount most drivers can earn because they have to pay to lease their cab.

5. **In 2016, twenty-four of Philadelphia's 3,370 cabbies were women, while some 35% of Uber/Lyft drivers are women. Overall, Uber claims some 19% of its drivers are women. Why do you think women are more likely to be participating as drivers in the gig economy?**

   The are many potential explanations for this. One might be that Uber and Lyft offer scheduling flexibility, which women have been found to value in work opportunities (more so than their male counterparts). Additionally, the medallion systems are somewhat exclusive and women may have been traditionally excluded from opportunities to obtain medallions. There are also dangers associated with the job and some woman may feel they are more likely to be victims of crime while working as taxi drivers.

THE FAIR LABOR STANDARDS ACT

Benjamin Means and Joseph Seinerd, *Navigation the Uber Economy*, Questions, p. 60-61

1. **Research: Look at the Guidance published by the Department of Labor, which has no mention of "flexibility" as a factor to be considered. Which do you think offers a better test: Means and Seinerd or the administrator who wrote the DOL Guidance? Why?**

   Answers from students on this issue will vary. Some might argue that the DOL guidance does not provide much clarity, particularly for workers who consider themselves as their own bosses, but are wholly reliant on companies

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such as Uber for their work opportunities. However, the flexibility test can also be unclear and could lead to few workers qualifying as employees, particularly when you consider the increasing leeway that many professionals are provided in their jobs, aided by such factors as telecommuting. As the authors point out, total hours worked could be considered alongside flexibility to account for such employees.

2. **How might a "flexibility" test be applied to Patrick Cotter's suit against Lyft?**

   As the case indicates, Cotter maintained flexibility over the hours he worked. However, if Cotter relied entirely on Lyft driving for his income, he was still required to a certain number of hours to make a living and the varying rates earned by drivers depending on demand at given times indicates that many drivers feel forced to work at certain times (when rates are higher) and were rewarded for doing so. These are the hidden restraints mentioned by the authors that suggest drivers do not have the flexibility that Uber and Lyft claim.

3. **Compare the results using the current standard with the proposed flexibility test to decide which of the following are "employees:"**

   (a) Fernandez delivered pharmacies to Kinray's customers. He owned and operated his own vehicle, was subject to credit and criminal investigations before being hired, required to report at specific times and follow specific routes; he was disciplined if he arrived later or failed to make deliveries as directed. [1]
   Under both tests, it appears Fernandez was an employee, though more would need to be known about whether he relied on this job as his sole source of income and the total hours he worked. He did not have much flexibility in his hours and the company controlled much of his work. Here, the court found that his argument that he was an employee was at least plausible.

   (b) Delivery-persons for FedEx are screened and trained by the company. FedEx: requires them to wear uniforms and use vehicles that meet its specifications, marked with its logo; assigns routes, establishes the time of pickup and deliveries, provides loading, sales and customer service operators; sets prices; pays its drivers weekly and prohibits them from soliciting new customers.[2]

   Again, a great deal of control is exercised over the workers and they have little flexibility. Under both tests, the workers would likely be employees.

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[1] *Fernandez v. Kinray, Inc.*, 2014 WL 7399303 (E.D.N.Y. 2014).
[2] *Wells v. FedEx Ground Package System, Inc.,* 979 F.Supp.2d.1006 (E.D. Mo. 2013).

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The court in *Wells v. FedEx Ground Package System, Inc.* found them to be employees.

(c) Arena leased a taxicab from and drove for Delux Transportation Services. Although he could decide how many and which days he would work, Arena needed to work steadily to break even. He paid for gas, kept cash fares; Delux determined routes, manner of greeting passengers, how the limo should be kept clean; it arranged pickups and determined the fares.[3]

Arena maintains greater control over his work in this case. Specifically, he maintains flexibility over his scheduling. The lease agreement between the driver and the company also suggests that he was not an employee – many of the controls exercised by the company related to the lease of the vehicle, not the work that was being performed. This suggests he would not be considered an employee under either test, and the court held he was not in *Arena v. Delux Transp. Services.*

MILLENIALS REDEFINE "ENTREPRENEURSHIP"

***Glatt v Fox Searchlight Pictures*, Questions, p. 68-69**

1. **How does the DOL list differ from the primary beneficiary test? Why did the appellate court decide to adopt the primary beneficiary test?**

The appellate court found the DOL test to be too rigid. In its stead, the court's primary beneficiary test is more flexible and allowed the court to weigh and balance a non-exhaustive list of factors (while the DOL test required that all six of its factors apply). While some of the considerations overlap, the court's test is focused more on finding that the internship is a learning opportunity for which no compensation is expected.

2. **Research: Find out how the District Court ruled on remand.**

The case eventually reached a settlement, with members of the class action receiving a small amount of compensation for their work.

[3] *Arena v. Delux Transp. Services,* 3 F.Supp.3d.1 (E.D.N.Y. 2014).

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3. **The court adopts the primary benefit test for for-profit companies that use interns. Should the test be different for not-for-profits? If so, how?**

Student answers will vary. Since the court focuses in part on "the economic reality between the intern and the employer," many will argue that most nonprofits will not have to pay interns because their finances are often quite limited. Students might also argue that it depends on how the interns are being used by the nonprofit, including whether their responsibilities offer educational benefit.

4. **How would you apply the *Glatt* test to the following scenarios:**

(a) While Aulistar Mark was pursuing a degree in journalism at the New School, he worked approximately 20 hours a week from May through August as an unpaid intern for Kotaku, Gawker's videogame blog. His assisted the blog's editors and writers, took photos and videos, edited images, researched, wrote, and edited posts and articles, conducted interviews, covered events, and monitored comments on articles. All told, Kotaku published 34 articles written by Mark. He received academic credit for the internship. He received no classroom training, only the same on-the-job training, under a mentor, that Gawker gave its paid employees, and his work was similar to that performed by the employees who supervised him.

The test would apply as follows:

1. The extent to which the intern and the employer clearly understand that there is no expectation of compensation. Any promise of compensation, express or implied, suggests that the intern is an employee….

   Here, it appears Mark did not expect compensation, which suggests it was an unpaid internship.

2. The extent to which the internship provides training that would be similar to that which would be given in an educational environment, including the clinical and other hands-on training provided by educational institutions.

   Some of the training would be similar to that which would be received in an educational institute, however because the training mirrored that of paid employees, this seems to suggest Mark was an employee.

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3. The extent to which the internship is tied to the intern's formal education program by integrated coursework or the receipt of academic credit.

   Mark received no classroom training, suggesting he was an employee, but did receive academic credit, suggesting he could be unpaid.

4. The extent to which the internship accommodates the intern's academic commitments by corresponding to the academic calendar. The internship ran the course of the summer, which is typical for college students and accommodates their calendars, suggesting he could be unpaid.

5. The extent to which the internship's duration is limited to the period in which the internship provides the intern with beneficial learning.

   This is unclear from the facts provided, as it depends on how long his training lasted and the extent to which his mentor provided educational guidance when Mark performed his work.

6. The extent to which the intern's work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern.

   Mark seemed to do work that displaced the work of paid employees.

7. The extent to which the intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship.

   This factor is not addressed in the scenario.

(b) Lysandra Whitlow worked 32 hour weeks as an unpaid summer intern at the fashion powerhouse, Burberry. Her work included washing dishes and serving pastries at meetings. She received no academic credit for it.

The test would apply as follows:

1. The extent to which the intern and the employer clearly understand that there is no expectation of compensation. Any promise of compensation, express or implied, suggests that the intern is an employee….

   This factor is not clearly addressed in the factual scenario.

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2. The extent to which the internship provides training that would be similar to that which would be given in an educational environment, including the clinical and other hands-on training provided by educational institutions.

   Lysandra did not appear to receive any such training, suggesting she should have been paid.

3. The extent to which the internship is tied to the intern's formal education program by integrated coursework or the receipt of academic credit.

   She did not receive credit nor was the experience integrated with coursework, suggesting she should have been paid.

4. The extent to which the internship accommodates the intern's academic commitments by corresponding to the academic calendar.

   The internship ran the course of the summer, which is typical for college students and accommodates their calendars, suggesting she could be unpaid.

5. The extent to which the internship's duration is limited to the period in which the internship provides the intern with beneficial learning.

   It does not appear that beneficial learning was taking place, suggesting she should have been paid.

6. The extent to which the intern's work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern.
   Lysandra seemed to be doing work that displaced the work of other employees and she received little educational benefit, suggesting she should have been paid.

7. The extent to which the intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship.

   This factor is not addressed in the scenario.

(c) Unpaid interns at Saturday Night Live and MSNBC ran errands and performed other "menial" tasks also performed by entry-level employees.

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1. The extent to which the intern and the employer clearly understand that there is no expectation of compensation. Any promise of compensation, express or implied, suggests that the intern is an employee….

   This factor is not clearly addressed in the factual scenario.

2. The extent to which the internship provides training that would be similar to that which would be given in an educational environment, including the clinical and other hands-on training provided by educational institutions.

   The interns did not appear to receive any such training, suggesting they should have been paid.

3. The extent to which the internship is tied to the intern's formal education program by integrated coursework or the receipt of academic credit.

   This factor is not clearly addressed in the factual scenario.

4. The extent to which the internship accommodates the intern's academic commitments by corresponding to the academic calendar.

   This factor is not clearly addressed in the factual scenario.

5. The extent to which the internship's duration is limited to the period in which the internship provides the intern with beneficial learning.

   It does not appear that beneficial learning was taking place and menial tasks were being performed, suggesting they should have been paid.

6. The extent to which the intern's work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern.
   The interns seemed to be doing work that displaced the work of other employees and they received little educational benefit, suggesting they should have been paid.

7. The extent to which the intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship.

   This factor is not addressed in the scenario.

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5. **Re-write the rules for when interns need to be paid to accord with your own sense of fairness.**

   Student answers will vary. Challenge students to consider both the DOL and the Second Circuit's list of considerations. Ask them what aspects of internships are missing from these criteria. Ask them why any student would agree to take an unpaid internship. Also ask them to consider whether unpaid internships are available to all students or if they are not an option for some because of their circumstances.

Redfin: A Disruptive Start-Up, Questions, p. 70

1. **Following Redfin's lead, some technology firms, have switched from independent contractors to employees. Research: Find out how this is working for the parcel shipping service Shyp, the food delivery service Munchery, the on-demand service for home health care professionals Honor, and Luxe Valet, which offers a valet parking app.**

   Shyp continues on as a business and has seen growth, though it had to shut down operations in Miami and cut 8% of its workforce in 2016. Munchery has struggled as a business, replacing its founding CEO and laying off workers. Honor is operating in numerous cities around the U.S. and received significant investment capital in 2016. In 2017, Luxe Valet was operating in three cities, but announced that it was changing its business model and moving away from door-to-door valet services.

2. **From the start-ups' perspective, what are the advantages and disadvantages of have a workforce of employees as opposed to contractors?**

   Employees are typically more expensive than independent contractors because they are guaranteed certain rights and benefits that are not available to contractors. Additionally, companies can often avoid liability for contractors' actions. So, for start-ups short on funding, contractors can be attractive for this reason. However, employees may be more likely to be more loyal and stable, and the company can exercise greater control over them. Start-ups may see them as a better way to build a long-lasting business.

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THE DECLINE OF THE COPOPRATION AS WE KNOW IT

Gerald F. Davis, *What Might Replace the Modern Corporation? Uberization and the Web Page Enterprise,* Questions, p. 73

1. **What does the writer mean by Nikefication? By Uberization? Who are the stakeholders as these models of the corporation shift? Which stakeholders benefit and which are harmed?**

   Nikefication refers to the process of outsourcing manufacturing of goods – the company selling the goods no long actually makes them. Uberization refers to process of renting labor for particular tasks instead of hiring permanent employees. Workers in these companies are the stakeholders most affected by these changes. In Nikefication, well-paying manufacturing jobs disappeared in these companies. In Uberization, permanent, stable jobs disappear. This all occurs to the benefit of the shareholders/owners and upper management. This also can benefit consumers if it lowers prices without sacrificing quality; however whether this is occurring is something you can invite your students to debate.

2. **What does he mean by "the hapless precariat?"**

   The precariat is a new social class that scholars argue has emerged as the working class declined. Here they are hapless because these shifts in the economy mean they are left fighting for temporary work that does not provide the same levels of compensation that the working class used to enjoy.

3. **When sued by drivers, companies like Lyft and Uber have argued that the drivers perform services for riders, but not for the company--"an uninterested bystander of sorts, merely furnishing a platform that allows drivers and riders to connect." Is that how Lyft and Uber market themselves? Is that categorization convincing?**

   Ask students to explore the company's marketing materials on the web to see if this is how they present themselves when trying to attract riders.

4. **In a Forbes magazine article about Airbnb, Tomio Geron wrote, "Millennials, the ascendant economic force in America, have been culturally programmed to borrow, rent and share. They don't buy newspapers; they grab and disseminate stories a la carte via Facebook and Twitter. They don't buy DVD sets; they stream shows. They don't buy CDs; they subscribe to music on services such as Spotify or**

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Pandora (or just steal it).[4]" If he is right, what implications does that have for the new business forms that Davis writes about?

Ask students whether Geron is accurately characterizing their behavior. Uberization seems to match with this type of behavior as temporary use of products and services meets temporary work. Perhaps these models will enable consumers to spend less on the goods that they use, particularly if they are sharing them with others. This could be beneficial. However, if these goods and services increase the frequency of temporary work, they may have less money to spend on goods and services in the first place.

WORKERS RIGHTS TO ORGANIZE IN THE NEW ECONOMY

ThinkProgress.com, Six Groups that are Reinventing Organized Labor, Questions, p. 80

1. **What does alt-labor mean?**

   The term encapsulates a variety of strategies, apart from the work of labor unions, being used by workers to advocate for improved working condition.

2. **What are some of the techniques being used to reach workers without the federally-protected right to form unions? By federal law? To keep them engaged with the process of fighting for their rights?**

   Groups of independent contractors, such as taxi drivers and domestic workers, are still organizing actions such as strikes and rallies. Some unions are going to people's homes to recruit members because workplaces where unions exist are dwindling. Workers who are in the U.S. on temporary work visas are similarly organizing led in part by nonprofits who take up the cause. In some ways, these groups are using union strategies, but for workers who simply cannot unionize because of their worker status.

3. **The domestic workers group efforts include "shifting cultural perceptions about the value of work." What might that mean?**

   The work they do has not traditionally been viewed as work that deserves high pay or other compensation. Often these workers make less than minimum wage, particularly in jurisdictions that do not have specific laws that guarantee their wages and working conditions. Ask students to consider why this work has traditionally been low paying.

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[4] *Tomio Geron, Airbnb and the Unstoppable Rise of the Share Economy, FORBES Jan 23, 2013*

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4. **In 2016 Seattle, Washington became the first city in the United States to adopt a local law specifically allowing drivers for taxicab associations, for-hire vehicle companies and "transportation network companies" like Uber to select an "exclusive driver representative" to negotiate on their behalf. The ordinance is similar to the NLRA in identifying subjects to be negotiated and creating procedures for certifying the representative and for arbitration.**

   (a) Research: Find Seattle's ordinance. What motivated the city to adopt it?

   For information about the motivation for the ordinance and a link to the ordinance itself, go to https://www.seattle.gov/council/issues/giving-drivers-a-voice

   (b) Does it make sense to single out a particular industry for special treatment? Can you think of other kinds of workers who might have similar needs to be protected? How is their case for a right to bargain collectively stronger--or weaker--than that of the drivers?

   Migrant workers serve as a good example for this question, as they are often exploited, face poor working conditions, and have little ability to push back against their employers. Ask student to research efforts that have been made to collectively bargain on migrant workers' behalves.

5. **Unions representing hotel workers are among those who have sought to ban Airbnb. Assume that your city is considering such a ban. Who are the stakeholders? Would such a ban be ethical in utilitarian terms? Would it be enforceable?**

   The stakeholders include hotel owners and operators, hotel workers, travelers, governments (who collect taxes, often to a different extent from hotels and AirBnB rentals), AirBnB itself, and those who rent their properties through AirBnB. Divide your class up and ask them to clearly define what each of these stakeholders have "at stake" in this law. Encourage them to grapple with the effect that AirBnB has on hotel workers and the opportunities it offers for those who rent their properties. Which group has more at stake?

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CUSTOMER PROTECTON IN THE NEW ECONOMY

Erik Search v. Uber, Questions, p. 82

1. **Why would the plaintiff sue Uber instead of the driver? What legal arguments does the plaintiff make that would hold Uber responsible for the driver's assault?**

   The plaintiff likely sued Uber because it is much more likely to have the money to pay the damages he would be awarded if successful. He may have also done so to try to force Uber and companies like it to change their policies regarding screening and hiring drivers. The plaintiff points to a list of controls that Uber exercises over its drivers to argue that they are de facto employees. The plaintiff also contends that the altercation was the result of the driver trying to resolve a dispute between an Uber driver and his rider, so it falls within the scope of his employment at Uber.

2. **In the District of Columbia, employers operating public businesses are generally "bound to use reasonable care to select employees competent and fit for the work assigned to them and to refrain from retaining the services of an unfit employee." Research: Go to Uber's website. What procedures does the company say it follows in selecting fit employees? Do they seem adequate to you?**
   Compare this to the way taxi drivers are regulated in your locality.

   This is Uber's webpage that describes how it keeps riders and drivers "safe", including driver screening: https://www.uber.com/safety/
   Ask your students to research taxi regulations in their states/cities.

3. **Search also argued that Uber represented to customers that its drivers were its "agents", and that it screened and managed them accordingly. An agent is someone who acts on behalf of another, called the "principal." So, for example, when a seller (the principal) signs a listing contract with a real estate broker (the agent), the two agree that the agent has permission to act on behalf of the seller ("actual authority"). Even in the absence of an explicit agreement, an agent can have "apparent authority," if the words or conduct of the principal give the impression to a reasonable person that the agent is acting on behalf of the principal. Search argued that Deresse had apparent authority to act on behalf of Uber. Research: Look at Uber's website, including its Users Agreement. Do you think it gives its drivers actual or apparent authority? Explain.**

   The user agreement can be found here: https://www.uber.com/legal/terms/us/
   Point students to the use of "third party provider."

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4. **Under the common law, "innkeepers" (e.g. hotels) have a duty to provide safe accommodations and are strictly liable for injury to guests. So, for example, the hotel would be liable if someone entered a room without an adequate lock and assaulted or robbed a guest. Suppose that happened in a room rented through Airbnb: should anyone be liable? Who?**

   Student answers will vary. AirBnB attempts to shield itself from such liability and places it with the parties who are renting the property. AirBnB does provide secondary insurance coverage however. See https://www.nytimes.com/2014/12/06/your-money/airbnb-offers-homeowner-liability-coverage-but-hosts-still-have-risks.html?mcubz=0

5. **Suppose a guest badly damages an apartment. Should Airbnb or Vacation Rentals by Owner be held responsible? Research: Locate a house-sharing app and see what its website says about its responsibility. Do an ethical analysis of any attempt to disclaim liability for these occurrences.**

   For this question, consider breaking the class up into groups to research different house-sharing companies and their approaches to these issues. Then, ask them to analyze which approach appears most ethical through the free market and utilitarianism perspectives.

   What recourse should consumers have if the unit they rent through Vacation Rental By Owner is not as advertised (e.g. doesn't have amenities promised, or is dirty and run-down) on the VRBO site?

   VRBO encourages renters to resolve such issues with the owners. See https://help.vrbo.com/articles/What-can-I-do-if-the-property-is-not-as-described. Renters can write negative reviews, but this does not do much to fix their rental at the time. Ask students to consider if VRBO should have a firmer policy in place to help renters in these situations.

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CHAPTER PROBLEMS

1. **In August 2016 Arizona became the first in the nation to pass a "Declaration of Independent Business Status," allowing, but not requiring, independent contractors to sign a statement acknowledging that they operate an independent business, are not entitled to unemployment or other benefits arising from an employment relationship, are responsible for taxes owed, and for any registration, license or authorization necessary for services rendered. The worker must also meet six of ten other criteria commonly used to determine a worker's status. The signed document creates a rebuttable presumption that the worker is an independent contractor if that status is ever challenged. What are the benefits attached to the signing of such a declaration? In what ways might it be harmful to the signer? To a party contracting with her?**

   A document like this could be seen as beneficial because it clarifies the nature of the relationship. This could limit the number of claims made against the party contracting with the worker by those who are harmed by the worker. Tax enforcement issues would also be clarified. Yet, this would undermine a worker's claim that they are an employee, even when the party with which they are contracting is clearly treating them as such, and the worker would not have access to the various rights, benefits and protections of being an employee.

2. **TaskRabbit allows potential clients to post a job request and be matched with workers ("taskrabbits") who are able and willing to do the job. Upwork is similar—but the projects are computer-based. Suppose Andi uses Upwork to accept a job creating a web page for Bob new widget business. Andi does a good job, and Bob--who is not computer savvy--hires her for other projects. Is Andi an employee entitled to minimum wages? If so, who is the employer who must pay those wages? If not, why not?**

   In this scenario, Andi does not appear to be an employee. She is being hired for her expertise and Bob is not controlling the manner of her work. Similarly, Upwork is merely provide a means for these parties to find each other. Even though it is focused on computer tasks, it does not appear to controlling the workers who accept jobs on its site. Seeing the contracts between the various parties would also be valuable to determining this question.

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3. **Retailers that rely on software to track the flow of customers have been criticized for using that data to schedule their employees in uneven and unpredictable ways. Responding to public pressure, in 2014 Starbucks announced that it was revising the way it scheduled baristas to "improve stability and consistency." The chain curbed its practice of "clopening"--expecting workers who closed late at night to return a few hours later to re-open, promised that all work hours would be posted at least one week in advance, and agreed that baristas with more than one-hour commute would be given the option to transfer to a more convenient location. Research: Find out what the Center for Popular Democracy thinks about Starbucks' employment practices.**

   The Center for Popular Democracy helped organize the effort to improve Starbuck's employees' working conditions. You can search its site for numerous stories about its efforts. See, e.g., https://populardemocracy.org/news-and-publications/starbucks-workers-confront-executives-demand-scheduling-reform

4. **In 2015, Abercrombie and Fitch stopped requiring workers to be on call for shifts that were frequently cancelled with little notice. Still, the New York Times reported in August of 2015 that the state attorney general was investigating 13 larger retailers over practices of unpredictable work schedules as possibly violating of state law. Research: Find out what has happened with the New York investigation. Have there been any similar actions in other states?**

   The attorney general's office continues to investigate this issue and send letters to employers suspected of violating state law. AGs in several other states have joined in this effort. See https://ag.ny.gov/press-release/ag-schneiderman-and-eight-other-state-attorneys-general-probe-retailers-over-use-call

   Some states are considering legislation that would guarantee more predictable schedules. https://onlabor.org/unpredictable-scheduling-practices-and-scheduling-legislation-an-explainer/

5. **The FLSA exempts from its minimum wage/maximum hours laws people who provide "companionship services" (babysitters) and those who live in a home where they care for the elderly, ill, or disabled. According to a 2013 DOL regulation, this exemption would not apply when a family hired the caretaker through an employment agency. What reasons can you give for distinguishing between those hired directly and those hired through an agency? Research: Find out how the court ruled when the DOL interpretation was challenged in *Home Care Association of***

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***America v. Weil, Administrator of Wage and Hour Division,* 799 F.3d 1084 (D.C.Cir. 2015).**

The Circuit Court for the District of Columbia found that Department of Labor was applying the FLSA improperly with its regulation; however, the Court of Appeals for the District of Columbia reversed, upholding the DOL's new interpretation. See 799 F. 3d 1084 (D.C. Cir. 2016), cert denied, 136 S. Ct. 2506 (2016).

6. **Should NCAA players be allowed to organize and bargain collectively? Do you see any differences between basketball and football players at Division I schools like Ohio State University and the University of Alabama, and students who play on women's volleyball and tennis teams at small colleges?**

Student answers on this will differ. Among other consideration, ask students to consider the amount of money certain programs bring to their universities. Also ask students to consider what the athletes values are in the professional market. Students should also consider what the athletes receive from their universities (scholarships, living accommodations, meals, an education, etc.) and whether this justifies them not being paid for the "work" they do for their universities.

7. **When Stephen Morris and Kelly McDaniel went to work for Ernst & Young they were required to sign agreements not to join with other employees in bringing legal claims against the company. Instead, they agreed to pursue any legal claims through individual arbitration. Morris nevertheless brought a class and collective action suit against the accounting firm, claiming it had misclassified him to deny him overtime wages in violation of FLSA. Should the court enforce the agreement, or is filing a class action a kind of "concerted activity" that is protected by the NLRA? Research: Find out how the court ruled in *Morris v. Ernst & Young,* 2016 WL 4433080 (9th Cir. 2016).**

The Ninth Circuit concluded that the contract violated the NLRA. The court conducted straightforward statutory interpretation, which indicated that the agreement violated the law.

8. **Domestic workers who clean house and care for children, the elderly and disabled in private homes are among the most poorly paid American workers. Some 95 percent of them are women; 46 percent are immigrants. Research: Find out what efforts are being made by the National Domestic Workers Alliance to organize these workers. What is**

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happening internationally according to WIEGO (Women in Informal Employment: Globalizing and Organizing)?

For information on what the NDWA does, see https://www.domesticworkers.org/worker-organizing-leadership. For information on WIEGO, see http://www.wiego.org/wiego/core-programmes

9. **Which of the following should be treated as employees protected by FLSA minimum wage laws:**

   (a) People who write and post reviews of local businesses for the online service, YELP! *Jeung v. Yelp!*, 2015 WL 4776424 (N.D.Ca. 2015).

   Here, the Yelp reviewers were found not to be employees, principally because they were knowing volunteers.

   (b) Instacart is an on-demand grocery delivery service with teams of designated shoppers embedded in supermarkets that fill telephone orders and pass them on to drivers. Instacart trains the shoppers, evaluates their performance and considers them employees. The drivers receive no training or instructions, must have a license, a clean record, and be able to navigate around town.

   More needs to be known about the extent to which Instacart controls the manner, time and place of the driver's work. If they are free to come and go as they please and can refuse delivery jobs, they are more likely to be considered independent contractors.

10. **Should undocumented immigrants be allowed to sue for violations of the FLSA? For discrimination? For trying to organize a union? Research: Find out how the court ruled in *Lucas v. Jerusalem Cafe*, 721 F.3d 927 (8th Cir. 2013).**

In *Lucas,* the court ruled that the employer could not use the workers' immigration status to shield itself from the requirements of the FLSA. The workers were awarded overtime wages. Courts have frequently ruled similarly in other employee rights issues involving undocumented immigrants. However, many sectors in which undocumented workers frequently work, such as agriculture, are exempt from the NLRA.

11. **In September 2016, Pittsburgh became the first U.S. city with an Uber fleet of driverless cars, some 100 modified Volvo SUVs. When hailed by riders, the vehicles will come with a human back-up driver. Pennsylvania transportation rules do not explicitly ban driverless cars**

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as long as there is someone behind the wheel, and Pittsburgh has established no particular requirements for the experiment. This has been dubbed "greenlight governing," as the mayor gives companies free reign to help turn Pittsburgh into a technology hub. What ethical issues arise here?

Ask students what their concerns would be about this program. Many will question the safety of driverless cars, so you might ask them if economic development is worth the safety risk. (You might also ask them to investigate the safety record for driverless cars to see if their fears are unfounded). Students should also consider how this form of automation will eventually reduce the number of jobs in the city (as previous technological developments have). Notably, this program in Pittsburgh saw its share of problems: https://www.nytimes.com/2017/05/21/technology/pittsburgh-ubers-driverless-car-experiment.html?mcubz=0

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