



# How the ‘Coalition for Workforce Innovation’ is Putting Workers’ Rights at Risk

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## **About Gig Workers Rising**

Gig Workers Rising is a campaign of Working Partnerships USA that supports app-based workers who are organizing to win better wages, working conditions, and respect on the job. Learn more at [www.gigworkersrising.org](http://www.gigworkersrising.org).

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Founded in 1969, the National Employment Law Project (NELP) is a nonprofit advocacy organization dedicated to building a just and inclusive economy where all workers have expansive rights and thrive in good jobs. Together with local, state, and national partners, NELP advances its mission through transformative legal and policy solutions, research, capacity-building, and communications. Learn more at [www.nelp.org](http://www.nelp.org).

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Temp Worker Justice (TWJ) is the national organization for temporary workers, founded in 2019. It empowers workers and workers' organizations seeking justice and fairness in the workplace. TWJ provides research and education, and connects workers to on-the-ground organizing and legal support. It builds the capacity for action through partner organizations and workplace leaders, advancing workers' rights. Learn more at [www.TempWorkerJustice.org](http://www.TempWorkerJustice.org).

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# Executive Summary

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Amazon, Walmart, Uber, and a host of major economic players in the United States are advancing a regressive federal-level labor deregulation campaign under the auspices of a lobby group called the Coalition for Workforce Innovation (CWI). Under the guise of “innovation and “flexibility,” the CWI threatens to preserve and expand exclusions in the federal labor code, deplete social insurance systems, and cement class, race, and gender inequality in the U.S.

This report provides an overview of the CWI’s origins, goals, membership, strategies, potential worker impacts, and of adjacent labor deregulation efforts. And it sets the CWI’s agenda against worker-led organizing and policy efforts aimed at ensuring employer accountability and more universal access to good quality jobs and the rights that guarantee them.

The first section of the report provides context for the formation of the CWI and outlines the group’s goals. In 2019, as worker-led campaigns across the U.S. were raising labor standards and winning broader access to labor rights, the CWI emerged to strip away those gains and altogether jettison labor rights for a large and disproportionately Black, immigrant, and female swath of the workforce. The CWI is seeking “broad adoption” of “independent work”—work done by “independent contractors” or nonemployees carrying another label, who don’t have access to the full gamut of employment-based rights and protections—“across all positions, platforms, and industries.”

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The CWI’s attacks on workers’ rights build on a history of racist carveouts from statutory labor protections that have disproportionately hurt Black workers. The group is a new front in an ongoing effort by big business to reshape U.S. labor law in its own image—to clear the regulatory path for risk-shifting, exploitative labor outsourcing practices through modern-era “carveout” policies (summarized in Appendix A) that excise certain workers and employers from labor regulation.

The report’s second section sketches the CWI’s vast membership (with more detail on individual members provided in Appendix B). The CWI unites the nation’s largest retailers, Big Tech,<sup>1</sup> digital labor platform companies and temporary help and staffing agencies operating in every major employment sector, trucking and delivery and construction interests, multi-level marketing schemes, finance capital, private insurance providers, operations management consultants, management-side law firms, and other corporate interests.

Among the CWI’s membership are (1) employers in industries that have long abused independent contractor classification; (2) a newer set of employers that straddle the

technology sector and various service sectors, use digital platforms to control work, and label workers independent contractors; (3) employers seeking to use more nonemployee labor or protect the use of nonemployee labor in their supply chains; and (4) corporate interests that support or stand to indirectly benefit from the growth of the nonemployee workforce and the total lack of employer responsibility that accompanies it.

Section three of the report presents the interrelated policy, legal, messaging, and organizing strategies the CWI is utilizing to advance its agenda. On the policy front, the CWI and its individual members have been lobbying to restrict worker access to organizing, wage, and other protections at the federal level, and to advance “third way” federal-level carveout policies that lock workers into nonemployee status and substitute long-standing employee rights for a set of substandard rights and benefits. The CWI’s legal strategy is to litigate policies that run counter to its agenda and establish judicial precedent that serves its agenda. Deceptive messaging, central to the CWI’s policy, legal, and organizing work, seeks to make the group’s rights-stripping agenda more palatable to lawmakers and others, and to spin the loss of labor rights and protections as an acceptable tradeoff for “independent work.” Finally, CWI members have been organizing business-to-business to make corporate use of nonemployees more commonplace, and one CWI member is building a corporate-backed organization of “independent workers” to lobby in favor of the CWI’s agenda.

The fourth section of the report describes how the CWI threatens to erode bargaining power and labor standards for millions of underpaid workers in growth sectors of the U.S. economy, cementing income and wealth inequality overall, and along lines of race and gender.

The report’s fifth section describes national and state lobby groups doing work related to the CWI’s agenda. Alongside the CWI, the App-Based Work Alliance, state-level “independent work” coalitions in Colorado, Illinois, Massachusetts, New Jersey, New York, and Washington, as well as the American Legislative Exchange Council, are advancing policies aimed at expanding the “independent worker” and nonemployee workforce.

The sixth and final section of the report lays out a set of pro-worker organizing and policy strategies to build power and defeat the CWI’s anti-worker agenda. Worker and coalitional organizing are fundamental to countering the CWI’s work. And policy reforms must focus on four key areas: improving access to labor rights and employer accountability; expanding worker power and flexibility; protecting the ability of workers to exercise their rights; and creating good public sector and publicly-funded jobs for the future.

*This report is a follow-up to the National Employment Law Project’s 2019 “Rights at Risk: Gig Companies’ Campaign to Upend Employment as We Know It,” available at [www.nelp.org](http://www.nelp.org).*



*Photo Credit: Teamsters Union*

## **Recent Efforts to Build Worker Power and the Coalition for Workforce Innovation’s Agenda to Destroy It**

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In recent years, workers in the United States have taken action and come together to demand workplace rights, employer accountability, and social justice. Labor militancy, as measured by strike activity, has risen to levels not seen since the 1980s. Tightening labor markets coupled with stagnant wages have helped embolden workers to take action, both individually and collectively. And a new consensus has begun to emerge among policymakers, academics, and the general public in favor of proposals designed to increase workers’ power within the economy.

Labor policy campaigns aimed at raising standards for low-paid workers and reducing inequality have intersected with gender, racial, and immigrant justice movements, because racist, sexist, and xenophobic action by policymakers and private business elites over decades has concentrated Black, brown, women, and immigrant workers in occupational and industrial sectors rife with job quality issues. These campaigns have sought to ensure and build upon the rights and protections enshrined in the Fair Labor Standards Act (FLSA) of 1938 and the National Labor Relations Act (NLRA) of 1935, offering the promise that workers historically excluded from the New Deal-era social compact would finally be granted fundamental rights and protections under U.S. law.

In response to this growing push for pro-worker and pro-equity reforms, a corporate lobby group called the Coalition for Workforce Innovation (CWI) has emerged. The CWI is working to thwart pro-worker organizing and policy action across the U.S. and to scale up

deregulation efforts built on a historical legacy of racist carveouts from statutory labor protections that have disproportionately hurt Black workers.

## **Recent action to build worker power**

In recent years, multiracial and cross-gender worker organizing in retail, fast food, ride-hail, delivery, trucking, construction, healthcare, technology, education, and many other economic sectors has fought back against regressive labor practices and policies. Workers have organized to deepen workplace democracy, expand economic and political power, and hold giant corporations like Amazon, Google, and Uber accountable for job quality and workplace equity.<sup>2</sup>

### ***Making direct demands of employers to improve labor standards***

Workers have won unions and bargained with employers to secure better labor standards, including hazard pay and personal protective equipment during the COVID-19 pandemic.<sup>3</sup> Strike activity and union elections have surged.<sup>4</sup> Workers without legal rights to form a union have engaged in wildcat strikes and joined with consumers to make direct demands on employers, with some success.<sup>5</sup>

### ***Pushing for pro-worker public policy***

In states and localities around the country, workers have led policy campaigns that secured a path to a \$15 minimum wage, fair scheduling, and paid leave for millions of workers.<sup>6</sup> In California, workers helped pass a bill (Assembly Bill 5 in 2019) that provides clearer access to a broad set of labor rights for millions of the state's workers, and combats the pervasive practice of employers mislabeling employees as independent contractors to evade employer responsibilities.<sup>7</sup> Worker-led action has helped prevent millions of working people from being stripped of federal minimum wage and overtime protections, and built momentum to pass pivotal federal legislation that would help reverse the decades-long trend of deunionization.<sup>8</sup> Civil rights and racial justice organizations have joined with worker centers and unions to fight against anti-worker public policy.<sup>9</sup>

### ***Exercising labor rights and enforcing the law***

Across the country, workers have helped to ensure that labor laws on the books are enforced by collaborating with public agencies to root out violations, and by bringing legal challenges against companies that misclassify employees as independent contractors, steal workers' wages, deny workers access to social insurance, and violate labor rights in other ways.<sup>10</sup> Thousands of workers have taken their fights to the courts and public agencies to fight back against independent contractor misclassification and win millions in back wages and unemployment benefits.<sup>11</sup> In December 2021, 900,000 DoorDash delivery drivers in California and Massachusetts won a tentative \$100 million settlement over claims of misclassification and wage theft, and in February 2022 a proposed \$8.4 million settlement was announced in a misclassification class action filed by 1,300 California Uber drivers.<sup>12</sup>

### ***Debunking anti-worker corporate narratives***

Pro-worker policy and collective bargaining efforts have exposed the false scarcity narratives corporations use to rationalize stagnant wages and meager benefits by exposing

runaway executive pay and increasing inequality gaps between workers and corporate elites. Workers' collective organizing victories defy corporate-backed efforts to promote the myth of "rugged individualism" and the inevitability of a precarious future for workers. Worker efforts demonstrate that positive change can happen when people come together, and such collective organizing can ensure work that is secure and fair.<sup>13</sup>

These worker-led movements hold the promise of closing inequality gaps, achieving gender and racial justice, and building the systems that can protect the U.S. populace against mass-scale economic devastation related to pandemics, extreme weather events related to climate change, and other shocks in the years ahead.

## **New developments in an ongoing history of corporate-backed labor deregulation**

For centuries in the U.S., corporations have used anti-worker employment practices and policymaking to thwart worker efforts like those described above to build collective and institutional power to improve working conditions and compel employer accountability for job quality. Business elites and corporate-backed policymakers in sectors from agriculture and construction to retail and transportation have shaped the interconnected ways work is accessed, structured, valued, and regulated to extract more from workers and to minimize employers' responsibility for job quality. Corporate executives and policymakers have cut off workers from labor rights, driven inequality, concentrated people of color and women in underregulated, precarious, and underpaid work, and undermined safety-net programs.

### ***Racist New Deal-era labor carveouts***

In the 1930s, racist industry lobbying and federal policymaker decisions combined to carve farm work and domestic work out of bedrock New Deal labor laws.<sup>14</sup> As a result of those carveouts, 65 percent of the country's Black workers were excluded from basic labor protections provided under both the National Labor Relations Act, which confers union organizing and collective bargaining rights to workers, and the Fair Labor Standards Act, which sets minimum wage and overtime standards and bans child labor.<sup>15</sup> Over the decades, these New Deal-era racist carveouts resulted in exploitative low wages and poor working conditions for workers without rights or unions in those sectors, and subsidized the profits and quality of life of agricultural bosses, companies placing domestic and home care workers into residences, and many others in the larger U.S. economy. Racial inequality perpetuated by New Deal-era carveouts persists in the present day.<sup>16</sup>



Black farmworkers tend a cotton field in Greene County, Georgia, in 1941, unprotected by the Fair Labor Standards Act and National Labor Relations Act, which passed a decade prior. *Photo source: U.S. Farm Security Administration*



In the decades following the New Deal, campaigns led by Black, Latinx, Indigenous, Asian, and women workers began to extend labor protections to groups that were initially excluded;<sup>17</sup> indeed, Black workers today are more likely to be unionized than their white counterparts.<sup>18</sup> However, beginning in the 1970s, as campaigns bridging worker and social justice movements expanded legal rights for historically marginalized groups, corporations profiting from the labor of workers of color attempted to crush these movement by shifting money and power away from workers, and erecting practical and legal barriers to workers exercising labor rights. These strategies, including interrelated governance, market, labor, and policy changes—shareholder primacy,<sup>19</sup> industry consolidation,<sup>20</sup> and workplace fissuring<sup>21</sup>—now threaten to set workers’ rights back to pre-New Deal status at precisely the moment when people of color are poised to become the majority of the working class.<sup>22</sup>

***Independent contractor misclassification***

Employers looking to evade labor regulation have, for decades, abused a form of workplace fissuring referred to as “independent contractor misclassification”: employer imposition of the “independent contractor” label on workers who are their employees.

Under the current U.S. labor regulatory regime, “employee” status confers workers with labor rights and protections not provided to “independent contractors.” Businesses have willfully misclassified employees as independent contractors in order to avoid complying with labor standards and tax laws that apply only to workers labeled as employees. The table below provides a comparison of a selection of the labor rights and protections accorded to employees and not to independent contractors in the U.S.

Independent Contractor	Employee
✗	Right to organize and bargain collectively ✓
✗	Right to a minimum wage and overtime pay ✓
✗	Right to paid sick leave ✓
✗	Employer contributions to paid family and medical leave ✓
✗	Employer-funded unemployment benefits ✓
✗	Employer-funded workers’ compensation ✓
✗	Employer contributions to Social Security, retirement ✓
✗	Right to a safe and healthy workplace ✓

Companies that engage in independent contractor misclassification reap payroll savings of up to 30 percent from eliminating social insurance (Social Security, Medicare, unemployment insurance, and workers' compensation) contributions and obligations to meet labor standards. The risk of litigation and fines for corporations that misclassify workers as independent contractors has been quite low due to legal and practical barriers to workers filing claims and proving cases, meager penalty schemes, and under-developed and under-resourced enforcement systems.

While legal claims by workers and regulators and pro-active enforcement efforts by government entities and worker advocates have begun to combat independent contractor misclassification, the practice remains pervasive in sectors such as trucking, ride-hail, delivery, building services, logistics, home care, agriculture, and construction. In the last decade, corporations that straddle some of those service sectors and the technology sector have emerged. These digital labor platforms (e.g., Uber) use and hide behind digital technologies to dispatch workers and control their work, while imposing take-it-or-leave-it independent contractor agreements on those workers. Uber, Lyft, Handy, DoorDash, Instacart, and Postmates and other digital labor platform corporations have spent hundreds of millions of dollars leading efforts to rewrite state and federal labor policies to lock workers into independent contractor status, and their strategy has caught the attention of a range of employers operating in multiple industrial and occupational sectors.<sup>23</sup>

In addition to its extensive worker impacts, independent contractor misclassification costs social insurance systems billions of dollars each year. And it disadvantages responsible businesses that pay their share of payroll taxes and abide by labor standards, as well as true independent contractors whose conditions are eroded by race-to-the-bottom dynamics.<sup>24</sup>

### ***Modern-era labor carveouts—regressive, and racist in their impact***

The last decade has seen digital labor platform corporations lead the push for modern-era carveout policies that turn back the clock on labor rights for millions of underpaid workers, who are disproportionately Black and immigrant.<sup>25</sup> Perversely, the corporations pushing these regressive carveouts have tried to position themselves as trailblazers toward a “future of work” with plentiful, desirable jobs for all.<sup>26</sup>

Early phases of modern-era carveouts exempted “gig economy” employers from state labor regulation.<sup>27</sup> These carveouts deregulate various categories of work, erode labor standards, make work more precarious, and increase inequality. According to legal scholar Veena Dubal, these “facially neutral employment and labor law carve-outs for the highly racialized gig work industry” comprise “a new racial wage code.”<sup>28</sup>

More recent carveout policies permit a far wider range of employers—who manage workers through both online and offline means, and who operate in any industry—to classify their workers as nonemployees even though those workers are not running their own businesses.<sup>29</sup> It is no longer only those workers who can be “platformed” whose labor rights are under attack.

Together, the new crop of carveout policies threaten the labor rights and job quality of millions of U.S. workers, a disproportionate share of whom are Black and brown and underpaid, in major employment sectors including retail. *See Appendix B for an overview of modern-era carveout policies.*

## Emergence of the ‘Coalition for Workforce Innovation’

To impede and undo the victories of worker-led movements, and to scale up modern-era labor deregulation efforts, a new business mega-alliance, the Coalition for Workforce Innovation (CWI), emerged in 2019.

Formation of the CWI was spearheaded by the Retail Industry Leaders Association—a powerful trade group with members including Walmart—in the wake of a seminal court ruling (Dynamex) and related legislation (AB 5) that cracked down on independent contractor misclassification in California.<sup>30</sup>

The CWI is seeking to lock workers across occupations, work arrangements, and industries into “independent contractor” or nonemployee status, stripping workers of the full gamut of employee labor rights and ridding employers of obligations to ensure good job quality and pay into social insurance systems. In CWI’s own words, the group’s goal is the “broad adoption” of what it describes as “independent work” “across all positions, platforms, and industries.”<sup>31</sup>

The CWI has assumed a prominent role in efforts to keep in place the Trump Administration’s attempts to radically expand and institutionalize “independent contractor” status to larger swaths of the workforce, challenging the Biden Administration’s attempts to roll them back. As the COVID-19 pandemic and associated economic crisis have underscored the importance of labor rights, corporate accountability, and guaranteed access to safety-net programs to economic security, public health, and equity in the U.S, the CWI has emerged as a prominent proponent of deregulation and privatization.

### The CWI in a nutshell

**What?** A business mega-alliance aimed at locking workers across economic sectors into nonemployee status

**Why?** To strip workers of labor rights and protections, insulate employers from liability for job quality and payroll taxes, and enrich private insurance providers and other corporate interests

**How?** Overlapping policy, legal, messaging, and business-to-business organizing strategies

**Where?** Across the U.S.—policy and legal advocacy focused at the federal level

# The CWI's Sprawling Membership

Staggering in its breadth, the CWI's membership spans retail, transportation, construction, and numerous other sectors and business interests that seek to facilitate the spurious growth of the nonemployee workforce.<sup>32</sup> As of this publication, the CWI's ranks through direct or trade group membership include titans of industry like Amazon, Walmart, Target, Google, Apple, Microsoft, Meta (previously known as Facebook), Accenture, Kelly Services, Uber, FedEx, and XPO Logistics.



Founding members of the CWI include the Retail Industry Leaders Association (RILA), digital labor platforms Lyft, TaskRabbit, Postmates, Hyr, and Forge, multi-level marketing (MLM) company Amway and MLM trade group the Direct Selling Association, global logistics conglomerate DHL, private insurance provider iWorker Innovations, and the corporate-backed U.S. chapter of the Association of Independent Professionals and the Self-Employed (ipse-U.S).<sup>33</sup>

The primary decision-making body at the CWI is an Executive Committee that currently includes representatives of the Retail Industry Leaders Association, the corporate law firm Seyfarth Shaw LLP, and Amway.<sup>34</sup> In June 2021, the CWI announced its first Executive Director, Dao Nguyen, a Washington, DC, lobbyist who continues to serve as a principal at Cornerstone Government Affairs.<sup>35</sup> The Vice President of Workforce Policy at the Retail Industry Leaders Association, Evan Armstrong, was announced as the Chair of the CWI.<sup>36</sup>

The CWI's membership has been in flux since it was founded in 2019. The coalition has grown considerably, but between June 2020 and June 2021, several groups have disappeared from the list of members on the CWI's website,<sup>37</sup> including: DHL (a founding member of the CWI, according to a Retail Industry Leaders Association publication<sup>38</sup>), the News Media Alliance (members include News Corp, McClatchy, Hearst, Gannett, USA Today, the New York Times, and the Washington Post), and the American Moving and Storage Association (although AMSA's membership overlaps somewhat with that of the American Trucking Associations (e.g., United Van Lines is a member of both groups), which is still a member, and TaskRabbit (still a member via TechNet).

CWI members, as of this publication, can be grouped into four categories:

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**Employers in industries that have long abused independent contractor classification**, including in the trucking, construction, delivery, newspaper, and multi-level marketing sectors<sup>39</sup>: members of the American Trucking Associations;<sup>40</sup> the National Home Delivery Association;<sup>41</sup> the Customized Logistics and Delivery Association;<sup>42</sup> the Transportation Intermediaries Association;<sup>43</sup> Associated Builders and Contractors;<sup>44</sup> America's Newspapers;<sup>45</sup> the Direct Selling Association and multi-level marketing companies Mary Kay and Amway<sup>46</sup>; and the National Club Association<sup>47</sup>

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**Businesses that use digital platforms to control work, and label workers independent contractors**, including Amazon (through its Flex and Mechanical Turk platforms; Amazon is a CWI member via TechNet and FMI),<sup>48</sup> Uber, Lyft, DoorDash (via TechNet), Instacart (via TechNet), Postmates, Gopuff (via TechNet), Hungry, Shipt, Roadie, GoShare, HealthBar, TaskRabbit (via TechNet and RILA (IKEA)), Upwork, Veryable, Forge, LABR, CareerGig, Hyr, and Wonolo, GoLocal (via RILA (Walmart)), and LifeSciHub<sup>49</sup>

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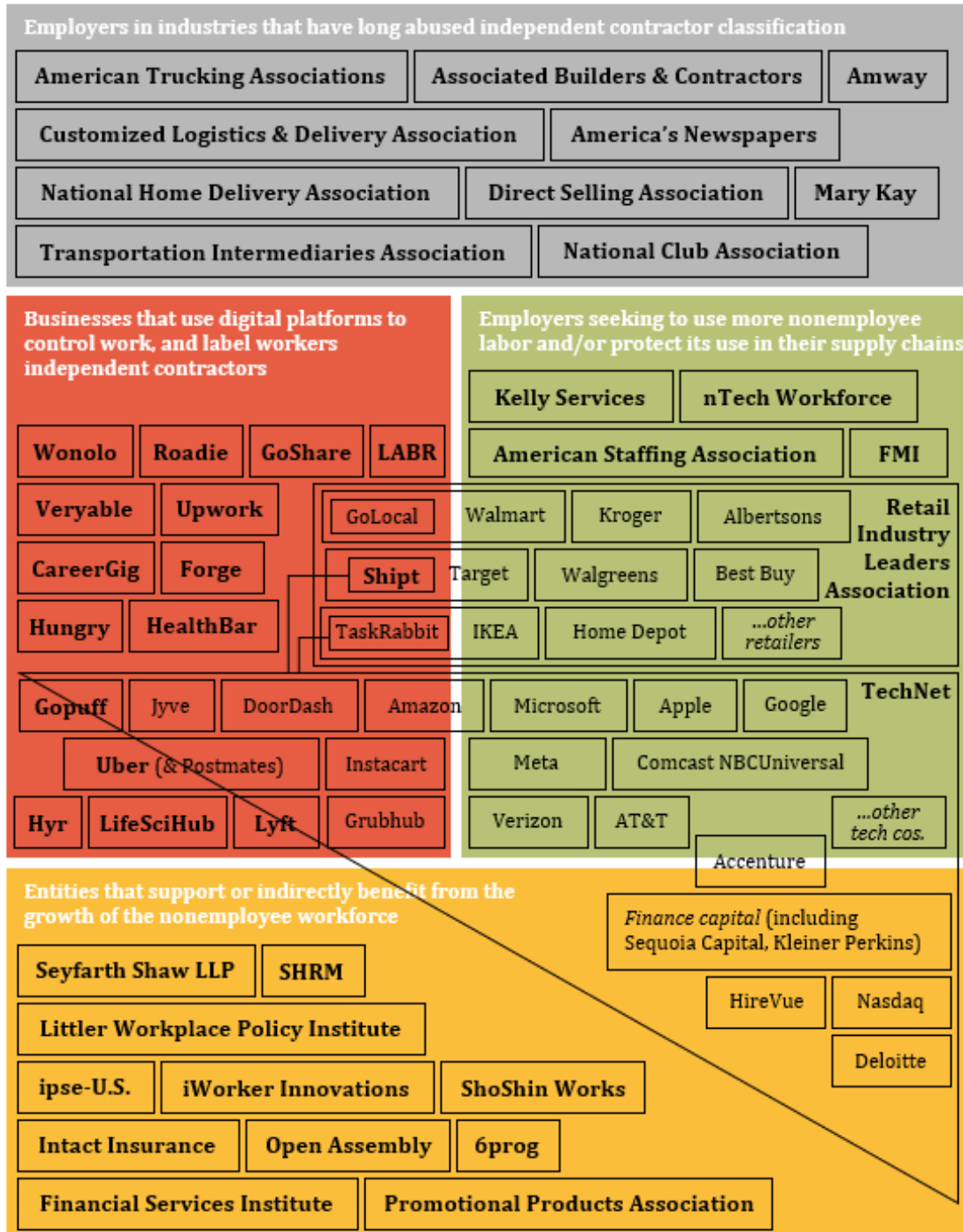
**Employers seeking to use more nonemployee labor and/or protect its use in their supply chains** includes retailer, technology company, and staffing agency members: Walmart, Target, Kroger, and other members of the Retail Industry Leaders Association;<sup>50</sup> Amazon, Ahold Delhaize, Publix, and other members of FMI-The Marketplace Industry Association;<sup>51</sup> Big Tech firms (Google, Meta, Microsoft, and Apple via TechNet);<sup>52</sup> temporary help agencies Kelly Services and nTech Workforce<sup>53</sup>, and others that are members of the American Staffing Association (ASA)<sup>54</sup>

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**Entities that support or indirectly benefit from the growth of the nonemployee workforce** include: investment firms like Sequoia Capital (via TechNet) and Kleiner Perkins (via TechNet) that invest in corporations, e.g., Instacart (both Sequoia and Kleiner Perkins) and Amazon (Kleiner Perkins), that engage workers as “independent contractors”;<sup>55</sup> management-side law firms like Seyfarth Shaw LLP<sup>56</sup> and Littler Mendelson P.C. (through its Workplace Policy Institute)<sup>57</sup> that support companies that engage workers as independent contractors through regulatory and legal challenges when the workers are not running a separate business; the Society for Human Resources Management;<sup>58</sup> private insurance providers iWorker Innovations and Intact Insurance;<sup>59</sup> operations management advisory firms ShoShin Works and Open Assembly that advise corporations on how to transition more of their workforces to a contractor model without ceding any management of the work to the workers;<sup>60</sup> the hiring platform HireVue (via TechNet),<sup>61</sup> which targets employers who use on-demand labor; and the corporate-backed “association of independent workers” ipse-US<sup>62</sup>

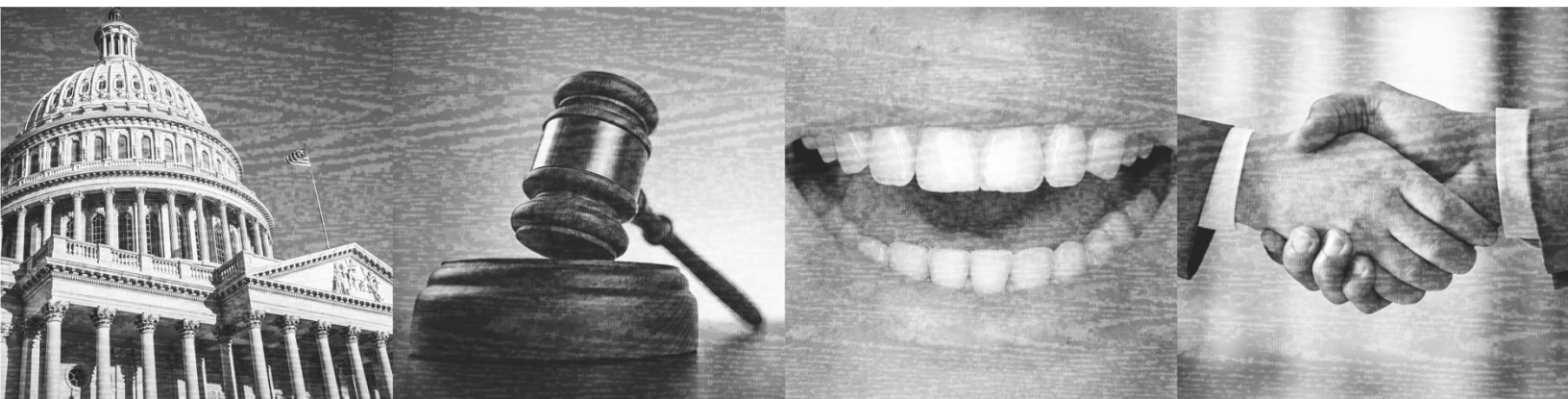
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## Four Categories of CWI Members



Bold font indicates direct membership, regular-weight font indicates membership via trade group

For more information on each member of the CWI and its interest in growing the nonemployee workforce in the U.S., see Appendix B.



## The CWI's Policy, Legal, Messaging, and Organizing Strategies

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The CWI is working to advance a corporate-backed model of work that expands outsourcing to nonemployee labor in the U.S and allows corporations to avoid accountability to their workers. The CWI uses intersecting deregulation strategies, legal maneuvering, doublespeak messaging, and business-to-business organizing to promote their anti-worker agenda.

### **Policy Strategy: Labor deregulation to reduce employer accountability and cut the share of the U.S. workforce with full employee rights**

Strong laws and regulations that provide rights and remedies to workers are an important counterweight to the power the employers hold in the workplace, and an important way to hold employers accountable for worker mistreatment. Since the early days of U.S. labor regulation, businesses have opposed new regulations and worked to deregulate their sectors of the economy in order to shed employer responsibilities. Labor deregulation erodes wage floors and other labor standards, hurting workers, their communities, law-abiding businesses, and the overall economy.

The CWI and its members have worked to block federal legislation that provides more universal access to union organizing rights, to curtail access to federal minimum wage and overtime rights, and to provide corporations that act as employers during the COVID-19 pandemic with a “safe harbor” against future independent contractor misclassification claims from workers, as described below.

The CWI is likely to continue to oppose any administrative and legislative action aimed at enforcing or clarifying pro-worker employment standards in federal labor law. It is also likely to advance federal “portable benefits” legislation that strips workers of access to existing safety net programs by locking them into nonemployee status.<sup>63</sup>

Since 2019, the CWI's members have been lobbying Congress, the White House, and regulators to further the CWI's agenda. In June 2021, the CWI's new Executive Director, Dao Nguyen, became its first registered lobbyist.<sup>64</sup> Nguyen continues to maintain a position as partner at the large Washington, DC lobbying firm Cornerstone Government Affairs.<sup>65</sup> As a lobbyist for the CWI, she has discussed "the benefits of independent work" with members of the U.S. House of Representatives.<sup>66</sup> Nguyen was joined by Cornerstone colleague Michael Goodman in the fourth quarter of 2021.<sup>67</sup>

### ***Oppose expansion of organizing rights via the Protecting the Right to Organize Act***

The CWI has been a vocal opponent of the federal Protecting the Right to Organize (PRO) Act, first introduced in 2019 and passed by the U.S. House of Representatives in 2021, which would strengthen the National Labor Relations Act (NLRA) of 1935, the foundational federal labor law that establishes organizing and collective bargaining rights for workers in the U.S.

The PRO Act broadens access to organizing and bargaining protections under the NLRA by amending the "common-law"<sup>68</sup> employment standard (the test that determines which workers are covered by the law) in two important ways: (1) It establishes a three-factor "ABC" test under which workers are presumed to be employees and the businesses engaging their labor must prove otherwise by passing all three factors of the test; and (2) It establishes a "joint-employer" standard that would ensure that multiple employers have an obligation to bargain with workers if those employers control working conditions, thereby reducing the incentive for corporations to subcontract labor and then refuse responsibility for the work in their businesses.<sup>69</sup>



Between May 2019 and July 2021, the CWI sent four letters to members of Congress to raise concerns about the "restrictive" ABC employment test and the joint-employer standard that the PRO Act adds to the NLRA.<sup>70</sup>

Lobbying disclosures show that, since 2019, CWI members (including via trade group membership) the Retail Industry Leaders Association, Accenture, Alticor (Amway parent), American Trucking Associations, Associated Builders and Contractors, Best Buy, Dell Technologies, Direct Selling Association, DoorDash, FedEx, Financial Services Institute, Herbalife, Hewlett Packard, Home Depot, Instacart, ipse-U.S., Kroger, Lowe's, Lyft, Mary Kay, Postmates, Promotional Products Association International, Publix, Target, TaskRabbit, TechNet, Uber, and Wonolo have spent over \$67.6 million on dozens of lobbyists who engaged with lawmakers on the PRO Act.<sup>71</sup>

CWI members shared top Washington, DC lobbyists and lobbying firms. Both RILA and the ipse-US retained DC lobbying firm Mehlman Castagnetti Rosen & Thomas, and have the same 14 lobbyists listed as lobbying on the PRO Act. Accenture, Herbalife, The Home Depot, TaskRabbit, Uber, and Wonolo retained top lobbying firm Invariant for the same.<sup>72</sup>



***Support a radical reinterpretation of federal wage and hour law to narrow workers' access to minimum wage and overtime rights***

In late 2020, the CWI supported an interpretive rule issued by the Trump Administration's Department of Labor that would have drastically narrowed the reach of the Fair Labor Standards Act (1938) by fundamentally constricting the definition of "employee." FLSA, though flawed by the racist carveouts discussed above, is a foundational federal labor law that establishes minimum wage and overtime protections for workers and bans child labor in the U.S.

The group retained management-side law firm Seyfarth Shaw to submit comments in support of the Trump Administration's Department of Labor rule.<sup>73</sup> The CWI argued that further narrowing worker coverage by the FLSA would help to grow the use of "independent work" by corporations "across the economy."<sup>74</sup>



An analysis of the effect of the Trump FLSA interpretive rule by the Economic Policy Institute estimated that \$3.3 billion would be transferred from workers to employers should the rule take effect.<sup>75</sup> Following a public comment period, and in keeping with past practice,<sup>76</sup> the Biden Administration delayed implementation of the rule and then withdrew it, finding it to be contrary to the law's intended reach.<sup>77</sup> The CWI sued the Biden Department of Labor, challenging its

delay and withdrawal of the pernicious rule, and on March 14, 2022, a judge in the Eastern District of Texas ruled that the Biden DOL had not followed proper administrative procedure, and reinstated the Trump interpretive rule. *See the "Legal Strategy" section below for information on the lawsuit.*

***Support creation of a federal "safe harbor" against future employer responsibility for corporations acting as employers during the COVID-19 pandemic***

In April 2020, the CWI issued a letter to Congressional leadership requesting that COVID-19 pandemic-era labor practices not factor into future determinations of worker classification.<sup>78</sup> In May 2020, CWI members Uber, Instacart, and TechNet lobbied Congress on the Helping Gig Economy Workers Act,<sup>79</sup> which would provide any "digital marketplace company" with immunity, or "safe harbor," against independent contractor misclassification and joint employer claims under "any Federal, State, or local law, ordinance, or regulation" for provision of financial assistance and health and safety information and benefits during the COVID-19 pandemic.

While the title of the bill suggests that its aim is to protect the interests of workers, the bill's single section is titled "Digital marketplace company safe harbor," revealing its true intent to insulate companies that misclassify their workers from accountability.<sup>80</sup>



The bill was introduced in the House in both 2020 and 2021 and has failed to move.<sup>81</sup>

***Pass “third way” “independent worker” carveout policies like California’s ill-fated Proposition 22 at the federal level***

Look for the CWI to advance policies at the federal level that advances its goal of “broad adoption of independent work.”<sup>82</sup> The carveout policies would lock workers into nonemployee status, which could come with a new “independent worker” label—a “third-way” status somewhere in between an employee and a true independent businessperson—in exchange for a meager set of labor rights or benefits in comparison to what workers would have access to as employees.

One so-called “benefit” the CWI has stated “independent workers” should be able to access is “training”, which can be a form of control employers exert over workers in order to shape the manner and means of their work and ensure a consistent brand experience.<sup>83</sup>

Workers subject to carveout policies do not have the full rights of employees nor the freedom of true independent contractors. “Third way” carveouts allow corporations to have their cake and eat it, too, in two ways: (1) control without responsibility—they can control workers’ day-to-day work while assuming limited responsibility for job quality and various protections, and (2) profit without risk—they can reap an unlimited share of the profits derived from work while offloading a large share of market risk onto the backs of workers and communities.

**“Third way” carveouts allow corporations (1) control without responsibility and (2) profit without risk.**

If the CWI succeeds in establishing “independent worker” as a legal category applicable “across all positions, platforms, and industries”<sup>84</sup> through the passage of “third way” carveout policies, employers will have license to pay lower wages, even below the minimum wage, and provide fewer benefits to workers, and to stop contributing to social insurance programs like Social Security, workers’ compensation, and unemployment insurance. This third (“independent work”) category threatens to redistribute billions of dollars from workers and social insurance programs into the pockets of corporate executives and large shareholders, and weaken an already inadequate social safety net.

In November 2020, CWI members Uber, Lyft, DoorDash, Instacart, and Postmates funded the most expensive ballot initiative in U.S. history,<sup>85</sup> throwing \$222,750,000 into the Proposition 22 campaign in California.<sup>86</sup> Proposition 22, which has since been ruled unconstitutional and unenforceable<sup>87</sup> (the ruling faces an appeal<sup>88</sup>), passed the first state-level “third way” carveout policy, stripping California’s app-based ride-hail and delivery “network company” workers from existing state labor rights and substituting a substandard set of rights and benefits—an hourly subminimum wage of \$5.64 compared to \$14, lower expense reimbursement and health insurance benefits, and loss of overtime, paid sick days, paid family leave, unemployment insurance, no-fault workers’ compensation, and protection against discrimination based on immigration status.<sup>89</sup>

Rondu Gantt, a worker leader at Gig Workers Rising and a driver for Uber, Lyft, and DoorDash, described the disconnect between what corporate proponents of Proposition 22 promised and the reality for workers after its passage:



Rondu Gantt, Photo Credit: Gig Workers Rising

“Uber and Lyft made empty promises about what Prop 22 would deliver for workers. Uber promised Prop 22 would preserve driver “flexibility”, but there is nothing flexible about having to work longer hours for even less pay. Lyft promised more benefits including health coverage, but research shows few drivers have seen these benefits. At the end of day, Prop 22 was just a means for these corporations to protect their bottom line by stripping workers of fair pay, crucial benefits, and the ability to come together to collectively bargain.”<sup>90</sup>

California voters passed the measure after being inundated with disinformation about its pro-worker effects. One poll indicated

that 40 percent of people who voted for the measure mistakenly believed it would provide drivers with long-denied livable wages.<sup>91</sup> In the aftermath of Proposition 22, California’s app-based ride-hail and delivery drivers have reported declining and unlivable wages and difficulty accessing a promised healthcare stipend.<sup>92</sup> And Uber and other proponents also asserted that the ballot measure would advance racial equity, although workers and advocates refuted the claim.<sup>93</sup>

The CWI and its members were dealt a blow on August 20, 2021, when an Alameda County Superior Court ruled California’s Proposition 22, the first “third way” carveout policy on the books in the U.S., unconstitutional and “unenforceable in its entirety.”<sup>94</sup> The decision came out of a case filed by ride-hail drivers and the Service Employees International Union. The ruling stated that the Uber/Lyft/DoorDash/Instacart/Postmates initiative “appears only to protect the economic interests of the network companies in having a divided, ununionized workforce” in banning app-based ride-hail and delivery workers the right to organize.<sup>95</sup>

The ballot initiative’s passage had put some wind in the sails of a global effort by gig corporations to strip workers of fundamental labor rights, even as evidence mounted that the measure led to falling pay and worsening conditions for workers. Worker groups and advocates hope the court’s decision will stop that momentum and give pause to policymakers considering Proposition-22-style carveout policies.<sup>96</sup>

### ***Coordinate with allies doing state-level policy work***

While the CWI’s policy efforts focus on the federal level, its members have been leading similar state policy efforts, and the CWI has indicated it is coordinating with state-level anti-worker campaigns.<sup>97</sup>

## Legal Strategy: Litigate against policies that expand access to employee protections and push for legal precedent aligned with the CWI agenda

The CWI uses its financial resources to legally challenge policy decisions at odds with its agenda to grow the use of nonemployee labor by corporations.

### ***Legally challenge the delay and withdrawal of a Department of Labor interpretive rule that would narrow worker coverage under the Fair Labor Standards Act***

In March of 2021, the CWI joined with its member organizations—Associated Builders and Contractors, Inc., Associated Builders and Contractors of Southeast Texas, and the Financial Services Institute—to sue the U.S. Department of Labor in Texas federal court over its delay and subsequent withdrawal of the preceding Trump Administration’s late-term radical reinterpretation of the Fair Labor Standards Act’s coverage of employees.<sup>98</sup>

The DOL’s delay and withdrawal were in keeping with past practice by incoming administrations that review and often rescind 11<sup>th</sup>-hour rulemaking by a previous administration.



The CWI lawsuit alleged that both the DOL’s delay and subsequent withdrawal violated the Administrative Procedure Act and amounted to an “improper exercise of political power” by the DOL.<sup>99</sup> In explaining the lawsuit, the Associated Builders and Contractors stated, “For too long, businesses and contractors who want to remain independent have been subjected to burdensome lawsuits and inconsistent court rulings under the FLSA.”<sup>100</sup>

As stated above, a judge in the Eastern District of Texas ruled in favor of the plaintiffs, that the Biden DOL had improperly delayed and withdrawn the Trump interpretive rule, and pronounced that the Trump rule had taken effect in March 2021.<sup>101</sup> While the Biden DOL filed a notice of appeal in this case in May 2022, it paused its appeal the following month as it launched a new rulemaking process to determine whether a worker is an employee or independent contractor status under the FLSA.<sup>102</sup> Currently, employers and workers are covered by the Fair Labor Standards Act as defined by the U.S. Supreme Court and leading Circuit authority, regardless of what the Trump interpretation says.

CWI member Littler Mendelson represented the plaintiffs. Both the law firm and its client, the Associated Builders and Contractors of Southeast Texas have a history of bringing cases through the E.D. of Texas to block pro-worker regulatory rulemaking. In 2016, the firm and trade group teamed on litigation that blocked parts of executive orders establishing higher standards for federal contractors.<sup>103</sup>

***Weigh in on a legal case before the National Labor Relations Board to argue against expansion of worker coverage under the National Labor Relations Act***

In February 2022, the Coalition for Workforce Innovation filed an amicus brief in an important case before the National Labor Relations Board. The case could set a new precedent in how the Board, which administers the National Labor Relations Act, determines who is an employee with organizing and bargaining protections under the Act, and who is an independent contractor without those protections. In a case involving hair and makeup stylists engaged in a unionization drive at The Atlanta Opera, the CWI urged the Board to maintain a standard that facilitates the designation of workers as independent contractors.<sup>104</sup>

**Messaging Strategy: Use deception and false choices to sell labor deregulation**

The CWI and its members use deceptive messaging to make their agenda of stripping workers of rights and eliminating employer accountability more palatable to policymakers, workers, customers, and voters.

***Invent and popularize the misnomer “independent work”***

The centerpiece of CWI’s messaging strategy has been the invention and promotion of a supposedly new category of work called “independent work,” which both lacks the rights of employees and lacks true independence.

Popularizing the term “independent work” and convincing policymakers and the public that independent work is empowering for workers is key to the CWI’s project aimed at creating a third category of worker.



CWI and its members, from Uber<sup>105</sup> and Kelly Services<sup>106</sup> to Open Assembly<sup>107</sup> and Seyfarth Shaw<sup>108</sup>

have adopted the term “independent work” in newspaper opinion-editorials, financial disclosures, service pitches, and lobbying materials. They use the term to refer to a wide range of freelancing, self-employment, and employment disguised as independent contracting (e.g., work arrangements in which a worker can choose when to engage in paid work but a business entity manages and controls significant aspects of her work such as pay rate).

By conflating people who are truly in business for themselves with workers who are not, the CWI not only inflates the size of the so-called “independent” workforce, but it also obscures the danger posed by stripping labor rights from millions of workers in underpaid sectors who are prone to independent contractor misclassification.

### ***Frame labor deregulation as the will of workers***

In publications aimed at workers and in lobbying materials aimed at policymakers, CWI and its members have framed anti-worker policies that enable employers to engage workers as nonemployees as supporting workers' preference for "independent work." In ipse-US's member magazine, *Modern Work* ("America's only magazine dedicated solely to Independent Work"), RILA Vice President Evan Armstrong asserted that the CWI was launched because "our employment laws must adapt to accommodate the evolving preferences of the modern workforce."<sup>109</sup>

To generate evidence of those worker preferences, the CWI commissioned business advisory firm Ankura Partners, which supports businesses navigating "regulatory challenges,"<sup>110</sup> to design and conduct an unscientific poll of 600 self-identified independent contractors.<sup>111</sup> Results from the Ankura poll have been cited by CWI as evidence that "independent workers love how they work,"<sup>112</sup> and have appeared in official regulatory comments by the CWI.<sup>113</sup>

### ***Frame evisceration of labor protections as modernization and innovation***

With "innovation" in the organizational title and a purported mission "to modernize federal workforce policy in the United States," the CWI attempts to position itself as a progressive force for workers and the economy. Falsely framing its deregulatory work to turn back the clock on labor rights as innovation furthers CWI's political agenda.



Former Uber political strategist Bradley Tusk used a similar strategy to advance state-level carveout policies that have deregulated ride-hail and other digital labor platform work, advising carveout proponents to play on policymaker fears of being branded Luddites or anti-innovation because "most politicians don't want to be branded as anti-tech and anti-innovation, so if giving you a win helps them

achieve that, you may be in luck."<sup>114</sup>

### ***Set up a false choice between employee status and flexibility***

In a recent letter to federal lawmakers, the CWI suggests that expanding access to employee status and labor rights has the effect of "reducing flexibility" for workers. However, nothing in the law prevents employees from having scheduling or job duties flexibility, and many do.<sup>115</sup>

As the U.S. Department of Labor recently explained in its decision, discussed above, to withdraw its independent contractor interpretation promulgated by the Trump administration to narrow FLSA access, "flexible work schedules can be made available to employees as well as

**The CWI suggests that expanding access to employee status and labor rights has the effect of "reducing flexibility" for workers. However, nothing in the law prevents employees from having scheduling or job duties flexibility, and many do.**

independent contractors, so any determination of or shift in worker classification need not affect flexibility in scheduling.”<sup>116</sup>

Indeed, there are companies, including in the homecare and nursing sectors, and those operating as digital labor platforms, that offer employees flexible schedules.<sup>117</sup>

An important new study of a package delivery platform operating in California shows that flexibility and employee status are fully compatible. The delivery company switched from an independent contractor to an employee labor model following passage of California’s Assembly Bill 5 in 2019, which established a clearer and more expansive employment standard. Following the switch, scheduling flexibility was maintained, as were hours for part-time and intermittent drivers, and the company’s operational efficiency increased. The study authors conclude that “claims from platforms about the necessary or inevitable reduction in scheduling flexibility that would result from a shift to employment are unfounded.”<sup>118</sup>

Europe’s largest food delivery company, Just Eat Takeaway, a competitor of Uber Eats and other online food delivery companies that use independent contractors, hires workers as employees and allows them to choose shifts; unlike independent contractor delivery workers, Takeaway workers are paid for “waiting time” between orders.<sup>119</sup>

## **Organizing Strategy: Business-to-business organizing to increase subcontracting practices, and the creation of an “independent worker” organization**

### ***Business-to-business organizing to grow subcontracting***

In recent years, the Retail Industry Leaders Association (RILA) has been organizing retailers to use more “flexible” workforces. RILA collaborated with the Manpower Group to publish “Fully Stocked,” a 2019 report that provides a step-by-step guide for retailers to transition their employee workforces to on-demand independent contractor workforces dispatched through digital labor platforms. The report calls for a third category of worker that will shield retailers from independent contractor misclassification claims: “The industry needs a new framework/class of independent labor that can work in the new paradigm without retailers facing regulatory compliance issues.”<sup>120</sup>

The COVID-19 pandemic gave RILA an opening to advocate for transforming direct-hire employee retail jobs into contract jobs. RILA’s COVID-19 resource page offers retailers a list of labor platforms like Hyr, Wonolo, and Shipt, through which they can find on-demand workers.<sup>121</sup> Weeks after the onset of the COVID-19 pandemic in 2020, RILA teamed up with fellow CWI member the American Staffing Association to create an online database that allows retailers to search by location for staffing agencies that can supply nonemployee labor to brick-and-mortar stores, warehouses, and manufacturing facilities.<sup>122</sup>



***Creation of the “independent worker” organization ipse-US.***

The corporate-backed “independent worker” membership organization ipse-US has been a key player in the creation of the “independent work” category, assembling a membership that carries that label. The organization has built its base by offering its members a “voice in Washington” and access to benefits and insurance.<sup>123</sup>

However, in 2020, ipse-US used the same set of lobbyists that advocates for the interests of the corporations that hire ipse-US members. As stated above, Retail Industry Leaders Association and ipse-US share the same set of Mehlman Castagnetti Rosen & Thomas lobbyists.<sup>124</sup> And, for a fee, ipse-US members can access “portable benefits” through a partnership with for-profit insurance provider iWorker Innovations (also a member of the CWI)<sup>125</sup>—a share of the organization’s members might be provided these benefits by employers if they were not misclassified as independent contractors rather than employees.

Founder and Co-President of ipse-US, Carl Camden, is the former CEO of Kelly Services,<sup>126</sup> the corporation that claims to have “founded the temporary staffing industry.”<sup>127</sup> Like “independent work,” temporary help and staffing agency work is an “alternative employment arrangement”<sup>128</sup> enabled by under-regulation that allows employers to distance themselves from responsibility for workers, thwart unionization, and erode labor standards.<sup>129</sup>

Camden brings the Kelly “spirit of invention” to ipse-US, which sees its charge as constructing a base of “independent workers.” The category includes “everybody, from the lowest paid independent workers doing ride share, to the higher paid freelancer doing clinical drug trials,” Camden explained in 2019.<sup>130</sup> stating that the broad membership allows ipse-US to “be stronger as a political movement.”<sup>131</sup>



# The CWI's Potential Worker Impact

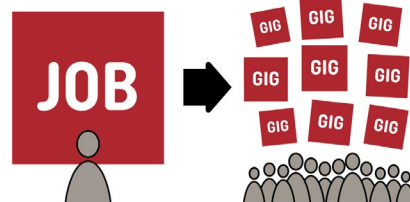
CWI members employ workers in the retail, restaurant, hospitality, warehousing, last-mile delivery, long-haul trucking, construction, ride-hail, and numerous other low-paid sectors. With a stated goal of increasing the prevalence of “independent work” “across all positions, platforms, and industries,”<sup>132</sup> the CWI’s work threatens employment, unions, and labor standards across industries and occupations, and could preclude the closing of income and wealth gaps—overall, and along lines of race and gender—in the U.S.

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## Fewer direct employment options

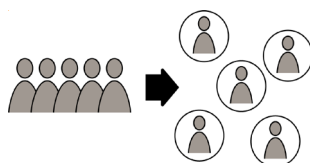
Public policies that make it easier for employers to hire workers as nonemployees threaten to erode direct, full- and part-time employment. When work is contracted out, a full-time or part-time job may split into a series of tasks or gigs for which several workers must compete. The lack of guaranteed hours or wages could result in underemployment. Whether work is digitally platformed or not, the “taskification” of work could turn stable jobs that workers count on into more precarious work.<sup>133</sup>

Retail workers have been contending with the degradation of full-time employment for decades, as “just-in-time” scheduling of workers to match customer demand has led to fluctuating work schedules, involuntary part-time hours, and underemployment.<sup>134</sup> Retail workers across the country have achieved success in organizing against unpredictable scheduling, securing private agreements (union contracts and corporate policies) with large retailers and public policies that ensure more predictable schedules and income.<sup>135</sup> The many fair workweek laws for which retail workers fought would be moot if retail workers are converted to “independent contractor” or nonemployee status with another label as a result of the CWI’s policy efforts.



## Union-busting

Public policies that make it easier for employers to hire workers as nonemployees threaten to turn unionized workforces into atomized workforces with workers who do not have formal organizing and bargaining rights. Under current federal law, workers classified as employees, and not those classified as independent contractors, have the right to organize and bargain collectively. Unions in retail, food service, transportation, delivery, telecommunications, construction, and many other sectors that are especially likely to be affected by the CWI’s deregulatory work have fought hard to improve standards for their members, their



industries, and across sectors. Unions play a critical role in giving workers a voice in public policy.<sup>136</sup>

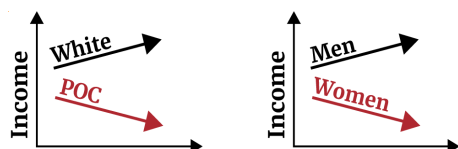
## Fewer rights, worse conditions

Public policies that make it easier for employers to treat workers as independent contractors strip workers of employment-based labor rights and protections and erode labor standards leaving workers more vulnerable to working poverty, wage theft, and workplace injury, discrimination, and harassment. While the federal hourly minimum wage has not increased since 2009, real wage growth for low-wage workers in recent years has been tied to state-level minimum wage increases.<sup>137</sup> A New York study of independent contractors found that, within occupations, the wages of workers classified as independent contractors have fallen well behind their employee counterparts, who have benefited from the state's rising minimum wage. New York's low-paid independent contractor workforce is disproportionately foreign-born, increasingly female, and a large majority (two-thirds) are people of color, similar to the share of standard payroll employees in the same sectors. In New York's construction sector, minimum wage increases helped to raise inflation-adjusted annual earnings of employees by 28.5 percent between 2013 and 2018, compared to an increase of just 7.6 percent for independent contractors in the sector. In New York's personal care sector, minimum wage increases helped to raise inflation-adjusted annual earnings of employees by 24.5 percent between 2013 and 2018, compared to a decline in earnings of 3.9 percent for independent contractors in the sector.<sup>138</sup> A recent California study found that construction workers misclassified as independent contractors suffer a 33 percent wage penalty relative to their employee counterparts.<sup>139</sup> A national study of digital platform workers treated as independent contractors by the companies that engage them found that 1 in 7 earned less than the equivalent of the federal hourly minimum wage to which statutory employees are entitled, and 30 percent of platform workers received a Supplemental Nutrition Assistance Program benefit, compared to 15 percent of employees in comparable service-sector jobs.<sup>140</sup>



## Growth of racial/gender inequality

Public policies that make it easier for employers to hire workers as nonemployees harm people of color and women workers, who are more likely to work in affected sectors. These



workers could lose labor rights and protections and fall further behind their counterparts who are white and male. Nonemployees do not have the legal right to form unions, which narrow racial/ethnic and gender wage and wealth gaps.<sup>141</sup>

Unchecked bias among bosses and customers can worsen racial and gender inequality within nonemployee workforces. Evidence shows that digital labor platform workers who do not have access to civil rights protections face wage discrimination—workers of color and women earn less than their counterparts who are white and men, respectively.<sup>142</sup>

## Workers under threat of losing labor rights and protections due to the CWI's efforts

Sector & Worker Characteristics <sup>143</sup>	CWI members with sectoral interest/impact (as of September 2021)	Nature of threat
<b>Healthcare:</b> 18.1M workers, disproportionately Black, Asian, women	HealthBar, Teladoc (via TechNet)	Work that is currently done by employees could be transformed into nonemployee/ independent contractor work, especially via “taskification” and “platformization” of work that sees full- or part-time jobs split into a series of gigs doled out and managed via a digital labor platform; doing so would strip workers of labor rights and protections (which the workers may have organized to secure in recent years), resulting in the erosion of labor standards in affected sectors
<b>Hospitality/Hotels:</b> 1.1M workers, disproportionately Black, Latinx, Asian, women	Hyr and Wonolo provide hotels and other hospitality companies with a range of hospitality sector workers <sup>144</sup>	
<b>Manufacturing:</b> 14.7M workers, disproportionately White, men (2.5M transportation parts production workers are disproportionately Black; 1.7 M food processing workers are disproportionately Black, Latinx, and men)	Veryable provides manufacturers with production workers	
<b>Restaurant:</b> 8.7M workers, disproportionately Black, Latinx, women	UberEats, DoorDash, Instacart, Postmates supply food delivery workers to restaurants, and Hyr provide food preparation workers to restaurants; The Littler Workplace Policy Institute founded The Emma Coalition with the National Restaurant Association to develop policy and legal strategies focused on technology-related labor and employment issues <sup>145</sup>	
<b>Retail:</b> 16.2M workers, disproportionately Black, Latinx, women	Retail Industry Leaders Association members (including Walmart, Target, Albertsons (subsidiaries include Vons, Safeway, Shaws), Kroger (subsidiaries include Ralphs, Harris Teeter, Fred Meyer)); Jyve, Hyr, Instacart, Roadie, Wonolo, and American Staffing Association members (provide retailers with warehouse, retail operation, and delivery workers); Veryable provides warehousing workers TechNet member Gopuff is a retail and delivery platform	
<b>Telecommunications:</b> 885K workers, disproportionately Black, Latinx, Asian, men	Verizon, AT&T, Comcast (via TechNet)	
<b>Temporary help services:</b> 3.1M workers, disproportionately Black, Latinx, women	American Staffing Association, Kelly Services, nTech Solutions provide employees and/or independent contractors to clients operating in multiple industrial and occupational sectors	
<b>Construction:</b> 11.3M workers, disproportionately white, Latinx, men	Associated Builders and Contractors (represents nonunion construction contractors)	Workers in sectors already rife with independent contractor misclassification could be legally locked into nonemployee status, resulting in the legal stripping of labor rights and protections, and the erosion of labor standards within affected sectors
<b>Delivery:</b> 1.5M workers, disproportionately Black, Latinx, men	Digital delivery platforms Instacart, Postmates, DoorDash, Roadie, Gopuff; American Home Delivery Association; Customized Logistics and Delivery Association	
<b>Multi-level Marketing:</b> 115K workers, disproportionately Black, Latinx, women	Direct Selling Association, Amway	
<b>Newspapers:</b> 126K workers, disproportionately white, women	America’s Newspapers	
<b>Trucking:</b> 2.2M workers, disproportionately Black, Latinx, men	American Trucking Associations represents trucking companies that hire drivers as independent contractors	

## The impacts of California's Proposition 22 on unionized grocery workers

After digital labor platforms hoodwinked California voters into passing Proposition 22 in 2020, ride-hail and delivery drivers working for digital labor platforms were stripped of a host of labor protections (described in detail above). Grocery giant Albertsons (the parent company of Safeway), a Coalition for Workforce Innovation member via the Retail Industry Leaders Association, laid off hundreds of employee delivery drivers and shifted their jobs to third-party firms like DoorDash that classify workers as independent contractors.<sup>146</sup> Several hundred Safeway.com drivers represented by the United Food and Commercial Workers union (UFCW) were able to keep their jobs, but have seen their hours cut as Albertsons shifts more and more work to DoorDash and other digital labor platforms.<sup>147</sup>

Chris Chavez, a delivery driver who works for Safeway in Redwood City, CA told a reporter:

**“We’re the vestiges of the old system they have in place. They’d prefer to outsource the work. They don’t have to pay wages and healthcare benefits.”<sup>148</sup>**

Another Safeway.com delivery driver, Chris

Wagner, added “I’ve been at Safeway for 20 years ... My uncle worked for Safeway for 40-plus years stocking shelves at midnight. He retired with a pension... now to see [jobs being lost] to a gig service... this is the saddest I’ve ever been.”<sup>149</sup>

Drivers report worsening morale. In early September 2021, after seeing his hours cut from an average of 44 hours per week to under 37 hours, Wagner left Safeway-Albertsons for a job with better career opportunities.<sup>150</sup>

Outsourcing work from relatively well-paying, established union jobs with benefits in the grocery delivery sector is a disturbing trend for supermarket workers in general. If RILA and CWI get their way, this phenomenon will not be limited to workers performing the delivery work currently outsourced to the likes of Instacart and DoorDash. Instead, it would expand to a range of additional occupations like stocking, merchandising and other roles where app-based firms like Jyve seek to provide low-cost labor to major supermarket chains.



Chris Chavez, Photo Credit: UFCW Local 5

Where possible, the UFCW has sought to organize app-based in-store workers as well, as it did with a group of in-store Instacart workers based in a Kroger store in 2020. The workers were legally entitled to join the UFCW because Instacart classified them as employees and provided them with training designed to improve their productivity and accuracy, but in January 2021 Instacart announced it was laying off those workers along with approximately 2,000 others.<sup>151</sup> Recently, Instacart announced an expanded partnership with Kroger, and early indications are that workers will be classified as independent contractors.<sup>152</sup>

# Corporate-Backed Lobby Groups Doing CWI-Adjacent Work

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The CWI exists within a broader ecosystem of state and national corporate-backed lobby groups pushing policies that expand the “independent worker” and nonemployee workforce to strip workers of employee rights and exempt employers from labor standards and payroll tax obligations. CWI members including Uber, Lyft, and DoorDash appear on the membership rolls for many of these groups.

## Flex

In March of 2022, top ride-hail and delivery platforms Uber, Lyft, DoorDash, Instacart, Grubhub, Shipt, Gopuff, and HopSkipDrive launched a group, “Flex,” to lobby against the Protecting the Right to Organize Act and for policies that grow app-based work. The group claims to advocate “for Americans who choose independent work.” Flex has announced that it will spend over a million dollars on advertisements touting app-based work, targeted at federal policymakers.<sup>153</sup>

## The App-Based Work Alliance

Uber, Lyft, DoorDash, Instacart, and Postmates launched the App-Based Work Alliance in November 2020, following the same alliance’s passage of California’s Proposition 22. The App-Based Work Alliance hopes to scale up Proposition 22 copycats at the local, state, and federal levels.<sup>154</sup> The group has publicly opposed the PRO Act.<sup>155</sup>

The **Chamber of Progress** is a technology industry trade group funded by Amazon, Google and Facebook reportedly launched “with the hope of easing tensions between congressional Democrats and the tech industry by encouraging policies that are centered around consumers and Democratic values.”<sup>156</sup> The group has backed legislative efforts to build civic democracy and voting rights, while opposing efforts to build workplace democracy. The group recently falsely described the Protecting the Right to Organize Act as a “federal ban on gig work.”<sup>157</sup> Following Amazon’s recent defeat, using allegedly illegal tactics, of the first attempt at unionization at an Amazon facility in Bessemer, Alabama, the Chamber of Progress issued a statement celebrating the union loss as a “progressive story” proving “worker satisfaction with wages, benefits, and working conditions.”<sup>158</sup>

## State-level “independent work” coalitions

Since 2020, Uber, Lyft, DoorDash, Postmates, and Instacart have launched at least six state lobby groups—Colorado Coalition for Independent Work,<sup>159</sup> Illinois Coalition for Independent Work,<sup>160</sup> Massachusetts Coalition for Independent Work,<sup>161</sup> New Jersey Coalition for Independent Work,<sup>162</sup> New York Coalition for Independent Work<sup>163</sup>—to scale up work started by the same cohort’s 2019-2020 Protect App-Based Drivers and Services Coalition in California.

Local Chambers of Commerce are members of most of these coalitions. Through the California coalition, Uber, Lyft, Postmates, Instacart and DoorDash poured over \$222 million into Proposition 22, which locked app-based ride-hail and food delivery workers into nonemployee status.<sup>164</sup> In December 2020, representatives of Uber, Lyft, DoorDash, and Instacart incorporated the Washington Coalition for Independent Work, which has yet to make its public debut.<sup>165</sup>

These coalitions have emerged in states with Democratic legislatures, to fight against pro-worker bills that provide clearer and more expansive access to employee rights for workers across sectors, as well as to advance “third way” carveout policies—via legislatures (as recently attempted in New York)<sup>166</sup> or ballot initiatives. The work of the state coalitions has been backed by digital labor platform company-funded political action committees – including Lyft-backed Illinoisans for Independent Work, New Yorkers for Independent Work, and Washingtonians for Independent Work, and Uber-backed New Yorkers for Flexible Work, which have poured millions into political and media consultants and made donations to nonprofit coalition members.<sup>167</sup>

While a formal “independent work” coalition has not emerged in the state of Connecticut, a “third way” carveout bill that would grant some organizing rights to ride-hail and food delivery workers while stripping them of various employee rights emerged in 2020 but was recently shelved.<sup>168</sup>

## The American Legislative Exchange Council

The corporate-funded American Legislative Exchange Council (ALEC) is a powerful association of over 300 corporations and foundations and 2,000 state legislators.<sup>169</sup> Corporations sit on task forces and shape “model policies” that member legislators advance in their states.<sup>170</sup> In 2018, ALEC began to disseminate a “Uniform Worker Classification” model policy that furthers the corporate agenda to make it easier for companies to misclassify workers as independent contractors. As of January 2021, a slightly modified version is currently being advanced in states across the U.S.<sup>171</sup>

The model policy sets a very low bar for employers that wish to classify a worker as an independent contractor: (1) a contract must include a self-declaration by the worker of independent contractor status and responsibility for taxes and expenses; (2) the worker has filed, intends to file, or is contractually required to file self-employment taxes OR a worker

provides services through a business entity “including but not limited to” a partnership, LLC, or sole proprietorship registered with a “doing-business-as” name; (3) just three of nine criteria, many rife with exceptions and loopholes, related to control over manner and means of work, are true. The model policy also explicitly lays out acceptable forms of control over “manner and means” or work, including to protect the brand identity of a contracting entity, and provides for state preemption of local law. None of these provisions truly describe an individual running a separate independent business, as the work arrangements are all potentially in the hands of the employer.

The ALEC bills are a particularly troubling development in modern-era carveout policy because they supercharge the ability of employers across all sectors, whether they manage work via online or offline means, to exploit independent contractor status to the detriment of workers and labor standards. Because these bills are flagrantly anti-worker, ALEC has targeted states with Republican legislatures.

In March 2021, West Virginia’s governor signed the first bill based on ALEC’s Uniform Worker Classification policy into law.<sup>172</sup> Similar bills are currently wending their way through North Carolina and Oklahoma legislatures.<sup>173</sup> In 2020, a Uniform Worker Classification bill in Missouri failed to pass after a state study estimated that, due to the proposed employment standard’s non-conformity with federal law, the bill could lose the state up to \$47.5 million annually in federal funding and increase unemployment insurance taxes on Missouri employers by \$1.08 billion per year.<sup>174</sup> Bills with several elements of the ALEC Uniform Worker Classification policy have advanced in a couple of states: Nevada passed one in 2019, and another is pending in Louisiana.<sup>175</sup>



## Defeating the CWI with Pro-Worker Organizing and Policy Innovation

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"Last November, Uber, Lyft, DoorDash, Postmates, and Instacart bought themselves a law in the state of California. They spent over \$200 million on a corporate misinformation campaign that tricked California voters into voting 'yes' on a policy that would further strip workers of pay, benefits, and protections. Not satisfied with the damage they have done in California, these corporations are now plotting similar campaigns in other states, and at the federal level, working through the Coalition for Workforce Innovation. As was the case in California, this is nothing more than a corporate power grab, and a complete mockery of our democratic political system. Let this be a warning to these corporations: they may have won the battle in California, but workers will rise up and ensure Prop 22 copycat laws are blocked at every juncture. When our fight is over, gig workers will have a living wage, benefits, protections, and a voice at work. Our movement will see to it."

– Cherri Murphy, app-based ride-hail driver and organizer with Gig Workers Rising<sup>176</sup>



Cherri Murphy, Photo Credit: Brooke Anderson, @movementphotographer

"We all value companies that innovate, build and grow. But there's no reason that new businesses can't be built on a system of rights and protections—like fair wages, rules against discrimination and safeguards against work-related injury—that we also value as a society."

– David Weil, former Wage and Hour Division Administrator, U.S. Department of Labor<sup>177</sup>

As the Coalition for Workforce Innovation pushes a regressive, anti-worker agenda that threatens to fragment workforces, make work more precarious for millions of workers across different sectors, and increase income and racial and gender inequality in the U.S., workers and their allies are advancing a progressive, pro-worker agenda that would build collective worker power and ensure an economic future that is secure and equitable.

Workers in the U.S. do not want to see the growth of precarious, “independent” work arrangements. Indeed, a Spring 2021 survey by McKinsey finds that 62 percent—nearly two-thirds—of contract, freelance, and temporary workers would prefer permanent, non-contract employment. Workers of every gender, ethno-racial identity, and immigration status say they would prefer direct-hire jobs to those that are subcontracted.<sup>178</sup> They are organizing to ensure that work provides stability and economic security alongside flexibility.

Building on victories highlighted in the opening section of this report, workers and allies are organizing to defend against modern-era carveout attempts at the state and federal levels, and are leading proactive efforts to make labor rights and protections more universally accessible and enforceable. They are working to expand the slate of rights and protections available to workers. And, they are organizing to ensure good jobs into the future, not through the expansion of precarious underpaid work, but through the expansion of public goods and public sector employment to provide them.

## **Build collective power to fight back against carveout policies and advance pro-worker policies**

Workers, by organizing en masse and creating a united front with workers’ rights, civil rights, and other social justice groups, can overcome the regressive agenda of CWI and its members—despite their hundreds of millions of dollars in political contributions, lobbying, unscientific polling, and online and print propaganda.

- ***Build and exercise collective worker power vis-à-vis employers represented by the CWI:*** Employers can more easily exploit an atomized workforce. When workers unite into unions and other collectives, they build power to demand better treatment from employers, hold those employers accountable for violations of the law, fight against employers’ anti-worker public policy efforts, and advance pro-worker public policy.

Worker groups and unions including the App-Based Drivers Union, the Awood Center, Chicago Workers Collaborative, the Communications Workers of America, the Connecticut Drivers Union, Gig Workers Collective, Gig Workers Rising, the Laborers International Union of North America, Los Deliveristas Unidos, Make the Road New Jersey, Make the Road New York, the Mississippi Workers’ Center for Human Rights, the Mobile Workers Alliance, the National Domestic Workers Alliance, the National Writers Union, New Labor, the New York Taxi Workers Alliance, the New York Nail Salon Workers Association, the Peoples’ Lobby, the Philadelphia Drivers Union, the Retail Wholesale and Department Store Union, Rideshare Drivers United, the Service Employees International Union, the United Brotherhood of Teamsters, the United Food and Commercial Workers Union, United for Respect, Warehouse Workers for Justice, Warehouse Workers Resource Center, We Drive Progress, Workers Defense Project, Workers United, and Working Washington have been organizing and building collective worker power in sectors

targeted by the CWI's work.

- **Organize broad coalitions of worker, workers' rights, racial justice and other social justice groups:** Organizing that brings together worker centers, unions, worker advocacy groups, and racial justice groups can help create the coalitional force necessary to defeat the CWI.

Broad coalitions of groups representing various interests can help to educate lawmakers and their constituents about the wide range of harms that would result from locking workers into nonemployee status and stripping them of labor rights. The Massachusetts Coalition to Protect Workers Rights has united four dozen (and counting) organizations, including worker, worker advocacy, civil rights, faith-based, community, racial justice, immigrant justice, and environmental justice groups to oppose a ballot initiative, modelled after California's Proposition 22, that would exempt digital platform-based ride-hail and delivery drivers from Massachusetts labor protections.<sup>179</sup>

In New York, a similarly constructed coalition of labor and community organizations, along with a group of academics from around the country, helped to defeat a "third way" carveout bill in the summer of 2021.<sup>180</sup> At the federal level, organizing is required to build on an already broad coalition that united in January 2021 to caution against the passage of a federal carveout policy akin to California's Proposition 22.<sup>181</sup>

## Improve access to labor rights and protections and increase employer accountability for job quality

To ensure that workers who are not truly in business for themselves have clear access to the labor rights and protections that ensure good quality jobs, policymakers should amend employment standards and coverage requirements within labor and employment laws in a few important ways:

- **Provide fair, clear, expansive access to labor protections by incorporating the "ABC" worker classification test:** The "ABC" test presumes that workers are employees and requires a business entity that engages an individual worker to demonstrate otherwise, which is more appropriate (in light of the business's superior access to information) than other tests that require workers to prove their status.

Under the ABC test, an individual is an employee unless the company engaging her can establish all three of the following conditions: (A) she is free from control by the company; (B) she is doing work that is outside the usual course of business of the company; and (C) she is engaged in an independently established business.<sup>182</sup>

The ABC test has been used for decades in U.S. labor law and regulation. In at least 20 U.S. states, unemployment insurance (UI) programs use the ABC test to determine workers' eligibility for UI benefits and therefore their employers'

obligations to pay into the state unemployment insurance fund.<sup>183</sup> Massachusetts, New Jersey, and California have adopted the ABC test to determine access to many or most of their labor laws, and several states use it for determining whether construction workers are covered employees under labor laws.<sup>184</sup> All federal labor laws and regulations should adopt the ABC worker classification test.

## Europe is reining in independent contractor misclassification by digital labor platforms

The last couple of years have seen European policymakers advance important efforts aimed at combatting independent contractor misclassification by digital labor platforms like Uber. U.S. policymakers should follow suit.

In Portugal, a law that grants employment-based rights to ride-hail and food delivery drivers and couriers is set to become law.<sup>185</sup> The legislation also requires that platforms providing that work report the algorithms used in managing work to Portugal's Work Conditions Authority, and to workers and their representative.<sup>186</sup> Providing a rationale for the bill, the Portuguese Labor Minister said, "Fighting precarious employment is one of our top priorities."<sup>187</sup>

The European Union Commissioner for Jobs and Social Rights, Nicolas Schmit, recently cautioned against regulatory approaches that carve digital labor platform workers out of labor standards or offer them second-tier status, characterizing such approaches as regressive and detrimental to long-term economic health.

"[W]e have to make sure that people who work on [digital labor] platforms are not just a new underprivileged workforce... We cannot have the economy of the 21st century with working conditions that are more comparable to those in the 19th century... We have to offer people sustainable living and working conditions."<sup>188</sup>

In December 2021, the European Commission proposed European Union-wide regulations that would crack down on independent contractor misclassification by digital labor platforms, creating a "rebuttable presumption of an employment relationship". The regulations would ensure that platform workers in the EU have access to minimum wage, collective bargaining, and other rights and protections guaranteed by EU and member nations' regulations. Additionally, the regulations would create transparency requirements and accountability mechanisms related to algorithmic management.<sup>189</sup>

- **Establish clear joint employer liability:** When a lead firm contracts out work to a labor intermediary like a temporary help and staffing agency, more than one employer may co-determine terms and conditions of work. Labor and employment laws in the U.S. have long permitted multiple employers to be held jointly liable for working conditions under their control.<sup>190</sup>

The Fair Labor Standards Act and other federal laws using its definitions have the broadest "joint employer" standard, but it is too often misapplied. The FLSA's definition of "employer" was enacted with the intention of covering companies that use business formalities to avoid responsibility as employers, such as companies that used middlemen to hire child labor. California's AB 1897, CA Labor Code

2810.3, passed in 2014, creates automatic liability for wage and hour violations and workers' compensation for contracting entities that outsource their labor via subcontractors.<sup>191</sup>

The strength of this bright-line law is that there is no requirement that an employer relationship be proved: if the company decides to outsource its workers to another subcontractor, it remains jointly responsible for their pay and workers' compensation coverage.

- ***Provide universal coverage under labor laws to workers and work that are susceptible to abuse:*** Workers in low-paid sectors with high levels of wage theft and other forms of employer abuse should have access to wage, safety, and other labor protections regardless of immigration status or the way in which their employer classifies their employment status.

The U.S. Department of Labor has designated fifteen industries—agriculture, amusement, apparel manufacturing, auto repair, child care services, construction, food services, guard services, hair/nail/skin care, health care, hotels and motels, janitorial services, landscaping services, retail, and temporary help—as “low wage, high violation” due to generally paltry pay and relatively widespread wage theft by employers.<sup>192</sup> In addition to these sectors, domestic work and homecare sectors, largely comprised of Black, immigrant, and women workers, have long been excluded from regulation and been characterized by poor job quality.<sup>193</sup>

Workers in these sectors would benefit from universal access to labor rights and protections. One way in which such sector-wide regulation has been operationalized is through tripartite (worker, employer, government) standards-setting boards that govern an entire sector. Domestic worker standards-setting boards have been created in New York, California and Seattle, Washington.<sup>194</sup> Critically, sectoral bargaining must not require that workers be locked into nonemployee status.<sup>195</sup>

## Broad public support for policies that combat employers offloading responsibility for job quality

Across party lines, the U.S. electorate supports policies that expand access to labor rights and increase employer accountability. A new scientific national poll fielded in early 2021 by Hart Research Associates finds majority support—across political parties, regions, ethno-racial categories, genders, age groups, education levels, and income levels—for legislation that combats independent contractor misclassification and establishes joint employer liability.<sup>196</sup> The poll's questions and results are below.

The poll asked, “Do you favor or oppose legislation that would make it harder for companies to classify workers as independent contractors, and increase fines and penalties for companies that misclassify employees as independent contractors?”

Favoring such legislation were a majority of all voters (68%), Republicans (63%), Democrats (78%), people in the Northeast (71%) and South (70%) and Midwest (66%) and West (66%), people of color (76%), white people (66%), women (67%), men (69%), people age 18 to 34 (69%), age 35 to 49 (68%), age 50 to 64 (68%), and age 65 and up (68%), people with a college degree (66%), people with no college education (67%), and people with an annual income under \$50K (68%), between \$50K and \$100K (66%), and over \$100K (70%).

The poll asked, “Do you favor or oppose legislation that would allow workers to hold lead companies legally responsible if their subcontractor fails to make Social Security, unemployment insurance, or workers' compensation contributions, or fails to pay workers the wages they are owed according to prevailing minimum wage and overtime laws?”

Favoring such legislation were a majority of all voters (72%), Republicans (66%), Democrats (83%), people in the Northeast (78%) and South (69%) and Midwest (76%) and West (66%), people of color (73%), white people (70%), women (74%), men (70%), people age 18 to 34 (74%), age 35 to 49 (68%), age 50 to 64 (68%), and age 65 and up (78%), people with a college degree (69%), people with no college education (76%), and people with an annual income under \$50K (80%), between \$50K and \$100K (70%), and over \$100K (66%).

## Increase worker power and flexibility via the expansion of labor rights and through regulatory reform

Ensuring a future with good quality jobs and a good work-life balance for workers will require not only increasing access to existing labor rights and protections, as described above, but also raising labor standards, expanding the slate of labor rights and protections available to workers, and addressing other regulatory gaps.

- ***Strengthen federal organizing and collective bargaining rights so that more workers have real negotiating power over the terms and conditions of their work:*** At the federal level, the proposed Protecting the Right to Organize Act expands and strengthens legal protections related to unionizing and collective bargaining within the National Labor Relations Act (1935).<sup>197</sup>

Among the many important provisions in the law are new monetary penalties for

violations of the NLRA, anti-retaliation protections for unionizing workers, and bans on union-busting practices by employers. The PRO Act makes amendments—adoption of the ABC test and a clear joint employer standard—to the NLRA’s employment standards; these amendments would expand the kinds of workers and employers that fall under the law’s purview and offer model language for other labor regulation.

- ***Raise the federal minimum wage and eliminate sub-minimum wages to ensure financial security for workers:*** Every worker in the nation will need at least \$15 an hour to make ends meet in the coming years, but the federal minimum wage is stuck at \$7.25.<sup>198</sup> Subminimum wages for certain workers have been a driver of inequality and working poverty.<sup>199</sup> The proposed Raise the Wage Act establishes a federal hourly minimum wage of \$15 by 2025, indexes the wage to inflation to ensure that workers’ real wages rise with the cost of living, and eliminates the subminimum wage for tipped workers, teenaged workers, and disabled workers.<sup>200</sup>
- ***Pass federal policies that ensure paid sick leave, paid family and medical leave, and tenable schedules so that workers have flexibility and the ability to balance work and life:*** Paid sick leave and paid family and medical leave policies provide workers with the flexibility to take time off work due to illness or to provide family care without losing pay.

The proposed Healthy Families Act would provide workers with an hour of earned sick time for every 30 hours worked.<sup>201</sup> The proposed Family and Medical Leave Insurance (FAMILY) Act creates federally guaranteed access to up to twelve weeks of paid (two-thirds of monthly earnings, up to a cap) family and medical leave for workers regardless of work arrangement and employer size.<sup>202</sup>

Proposed in recent years, the Schedules That Work Act ensures that workers have the right to request scheduling changes, anti-retaliation protections for making such requests for flexibility, and schedules and pay that are stable and predictable.<sup>203</sup> Pilot studies have shown that shorter workweeks help workers achieve better work-life balance, and recently proposed federal legislation, the Thirty-Two hour Workweek Act, reduces the 40-hour workweek to 32 hours without a reduction in pay.<sup>204</sup>

- ***Reform unemployment insurance and workers’ compensation programs to protect workers against unexpected job loss and workplace injury:*** Employer-funded unemployment insurance (UI) and workers’ compensation programs are critical financial lifelines for workers who are unable to work or suffer a workplace injury.

Key reforms needed to state-run unemployment insurance programs include the following: increasing the taxable wage base to ensure that high-wage workers and industries pay their fair share and help to shore up state unemployment funds, eliminating occupational exclusions such as those for agricultural workers, adopting an “alternate base period” option for calculating earnings to ensure coverage for

underpaid and intermittent workers, providing workers who refuse unsafe work access to UI, and addressing literacy, language, and technology barriers to accessing unemployment systems. In the long-term, because UI benefits and programs vary greatly across states, and because Black workers are concentrated in states with less generous benefits,<sup>205</sup> federalizing UI could help to guarantee that workers across races and states have equal access to robust benefits.

Another, and the oldest, social insurance program in the U.S., workers' compensation, is also in need of significant reform. Injured worker benefits vary greatly across state-run workers' compensation programs, and these state programs often suffer from a lack of federal oversight. Among the reforms needed to the workers' compensation program are those that would guarantee lifetime benefits, ensure adequate wage replacement rates, and secure coverage of the full range of work-related injuries, such as repetitive-trauma disorders. Federal workers' compensation regulation should require such provisions.

- ***Pass policies that shore up Social Security and protect retirement savings so that workers have the freedom to retire:*** Shoring up Social Security and private retirement benefits can help to ensure that workers have access to a comfortable retirement.

CWI members including Uber and Lyft have lobbied in favor of past legislation, the New Economy Works to Guarantee Independence and Growth (NEW GIG) Act (of 2017 and 2019), that would make it easier for companies to classify workers as independent contractors for federal tax purposes—and therefore to shed their obligation to make Social Security contributions on behalf of their workers.<sup>206</sup> The failed legislation would have depleted the Social Security Trust Fund, and similar policies should be opposed.

More progressive taxation that sees top earners and the wealthy paying higher tax rates would help to shore up Social Security for the long-term, and increase benefit levels. The proposed Retirement Savings Lost and Found Act of 2021 is a bipartisan bill that allows workers to track employer-funded pension and retirement accounts from different employers across their working lives; the bill could put billions of dollars in lost retirement savings back into the hands of U.S. workers.<sup>207</sup>

- ***Pass federal policy that requires pay and benefit equity for subcontracted and direct-hire workers to disincentivize workplace fissuring and eliminate two-tiered labor standards:*** Government data reveals that independent contractors in low-paid sectors earn less and receive fewer benefits than their employee counterparts, as do temporary help and staffing agency workers.<sup>208</sup>

Corporations often attempt to change their legal relationship with workers, labelling them independent contractors or inserting a labor intermediary as the employer of record, in order to erode labor standards and cut labor costs. Federal legislation should ensure equal pay and benefits for equal work.



- ***Pass federal policy that strengthens worker data rights:*** Corporations increasingly surveil and collect data on workers and use data-driven systems and algorithms to manage how workers do work and determine their pay. Employers' opaque use of data creates information asymmetries and power imbalances with workers.

Corporations like Uber use algorithmic management to obscure their role as employers. Workers must have the ability to bargain over the collection and use of data in the workplace. Employment standards in labor regulation should take into account new forms of digital control employers exert over workers.

Laws should give workers rights to notice, consent, review, challenge, deletion, portability, and refusal of sale, with regard to data they generate.<sup>209</sup> Data-driven decisions must never be the sole basis for discipline and termination or “deactivation” on digital labor platforms. And federal oversight is needed to ensure the safety of data-driven work management systems and quotas.

- ***Pass federal policy that bans non-competition agreements:*** More and more U.S. employers impose non-competition agreements on their workers, preventing workers from taking jobs at competing firms (which may be very broadly defined) for an extended period of time.<sup>210</sup>

Non-competition agreements can lock workers, especially those who are low-paid, into bad employment situations rife with labor violations.<sup>211</sup> The agreements also undermine workers' labor market power and the positive wage effects of a tight labor market, and can force workers into underemployment and unemployment.<sup>212</sup>

The proposed Workforce Mobility Act prohibits the use of non-competition agreements by employers, except in a handful of extraordinary circumstances;<sup>213</sup> a recent White House Executive Order encourages the Federal Trade Commission limit or ban non-competition agreements.<sup>214</sup>

- ***Beyond labor policy—market, corporate governance, and immigration reforms to rebalance power between workers and employers:*** In addition to the labor policy reforms detailed above, there is a need for market regulation addressing the dangerous growth of monopsony power that leaves workers at the mercy of a shrinking set of behemoth corporations, and policies that give workers a voice in corporate governance.

The proposed Ending Platform Monopolies Act would address the increasing concentration of power by Big Tech corporations.<sup>215</sup> The previously proposed Accountable Capitalism Act would require large corporations to consider the effects of business strategy on broad set of stakeholders including workers, ensure worker representatives comprise at least 40 percent of corporate boards, provide board oversight of political expenditures, and limit stock buybacks that benefit large investors and corporate executives at the expense of workers.<sup>216</sup>

Also needed are policy reforms that give immigrant workers access to the full range of labor protections.

## **Enforce the laws already on the books**

Reforms are needed to improve employer compliance with labor laws and create real mechanisms for workers to seek recourse for violations of the law.

- ***Strengthen regulatory infrastructure and enforcement:*** Underdeveloped and under-resourced regulatory agencies and weak enforcement mechanisms can leave workers without real recourse when their rights are violated. The federal government must adequately fund the agencies tasked with enforcing our labor and employment laws, and it must encourage: (1) interagency cooperation on investigations of employer misconduct, like independent contractor misclassification, so that agencies can pool their resources; (2) interagency task forces charged with investigating the pervasiveness of misclassification by sector, and its impact on workers and the public; and (3) community collaboration and funding for community-based groups to ensure compliance and worker-centered outcomes. Employers violating labor and employment law must pay penalties in addition to restitution to workers, so that violating labor and employment law does not come with zero financial risk.
- ***Incorporate a private right of action and mandatory recovery of attorneys' fees into more federal labor laws:*** Workers should have the ability to take employers that violate labor regulation to court. Key federal labor laws like the NLRA and the Occupational Safety and Health Act, which do not grant workers a private right of action, should do so. The PRO Act, described above, would provide workers a private right of action for violations of the NLRA. Employers that violate employees' rights should be mandated to pay attorneys' fees; such a statutory requirement would encourage the private bar to take low-value cases, which is particularly important in a context of under-resourced public agencies enforcement.
- ***Pass federal policy that bans forced arbitration and class action waivers:*** Forced arbitration prevents workers from bringing legal claims in public, impartial courts, and class action waivers prevent workers from banding together to bring cases against employers for mistreatment. More than 60 million private-sector, nonunion workers who may experience wage theft, racial discrimination, sexual harassment, and other forms of workplace mistreatment are subject to forced arbitration. Black workers (59.1%), women workers (57.6%), and low-paid workers (64.5%) are most impacted.<sup>217</sup> The proposed Forced Arbitration Injustice Repeal Act would ban corporations from requiring workers and consumers to use private arbitration to resolve legal disputes, and it would prohibit and nullify existing class action waivers in consumer and employee contracts.<sup>218</sup>
- ***Enact federal whistleblower and anti-retaliation protections:*** Federal policy should protect workers who sound the alarm when employers are violating their rights with safeguards against employer retaliation. The policy should include a

“just cause” standard for termination that would prevent employers from using arbitrary reasons to mask retaliatory firings of whistleblowers, and monetary penalties and compensatory damages when employers take retaliatory actions such as reduction in hours, demotion, or termination.

## Ensure good jobs for the future

Policies that build on recently authorized public infrastructure investments can create jobs that meet the moment and prepare the country to face its future—proactively taking on problems like the care crisis, housing crisis, climate change, and the evolving COVID-19 pandemic. In addition to the approaches listed below, ensuring good jobs into the future will require public policies that reduce work hours and spread them across the workforce, and reform the tax code so that it does not incentivize automation.<sup>219</sup>

- ***Invest in public goods that create good public sector and publicly-funded jobs:*** Public investment in public goods like childcare, long-term care, housing, and green infrastructure can create millions of good, union jobs and help to address the ongoing COVID-19 pandemic, care crisis, housing crisis, and climate change. The proposed Public Health Infrastructure Saves Lives Act, Child Care is Infrastructure Act, Better Care Better Jobs Act, and Housing is Infrastructure Act would create public sector and publicly-funded jobs and help to ensure that people in the U.S. have access to a robust set of public goods. Responsible contractor policies should ensure that federal contract jobs are good jobs.

Climate change solutions should be rooted in communities historically harmed: Black, immigrant, and low-paid communities have long been the recipients of the waste products and toxins of our current fossil-fuel economy without reaping employment or economic benefits.<sup>220</sup> These are also the communities most in danger of climate change disasters with the least public support to protect themselves.<sup>221</sup> Legislation to address climate change must recognize longstanding targeted harms to these communities and proactively nurture communities' adaptation strategies with good unionized jobs, affordable utilities, safe housing, and robust mitigation plans.

- ***Ensure that public investments in technology benefit the public rather than corporate interests, and turn digital ride-hailing platforms into public utilities:*** Much of the technology currently utilized by digital labor platform companies like Uber, Instacart and DoorDash is based on publicly-funded scientific breakthroughs in areas such as Navstar-GPS (a space-based radio-positioning system) and multi-touch screens.<sup>222</sup>

Platform companies have developed algorithms that sit on top of those technologies, but the intellectual property embodied in competing platforms does not appear to have a significant effect on the consumer or worker preference for one platform over another.<sup>223</sup>

Given that a number of labor platforms have been accused by workers of misclassifying them as independent contractors,<sup>224</sup> and that these markets tend toward ‘winner-take-all’ outcomes with little consumer benefit,<sup>225</sup> ride-hailing services should become part of municipal public transportation systems, with the drivers becoming public employees in a system that works for the best outcome of workers and consumers.

## Appendix A: Modern-Era Carveout Policies

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Modern-era carveout policies, which first emerged at the state-level in the U.S. in 2014, lock certain categories of workers out of employee status and the rights and protections that come with it, and exempt certain businesses from employer responsibilities.

Most modern-era carveout policies create a name for a type of company or worker—a “transportation network company,” “marketplace contractor,” “remote service marketplace contractor,” or “network contractor”—and then write that category out of specified labor and employment regulations.

Another way these policies work is by changing state worker classification tests to lower the bar for employers wishing to designate workers as “independent contractors” under specified labor and employment regulations. Some carveout policies may preempt localities from regulating specified types of work.

In 2014, Uber and political strategist Bradley Tusk launched an effort to pass state “transportation network company” (TNC) carveout laws locking app-based ride-hail drivers into independent contractor status, which strips the drivers of employee rights and allows the likes of Uber and Lyft to evade employer payroll taxes and obligations to abide by labor regulations. Many TNC bills also preempt local authority to regulate digital ride-hail platforms.<sup>226</sup> TNC carveout laws were enacted in more than forty states between 2014 and 2017.<sup>227</sup>

Following the Uber-led TNC carveouts, a broader coalition of app-based companies, led by the home services platform Handy, worked to advance “marketplace contractor” carveouts, which passed in eight states between 2016 and the publication date of this report.<sup>228</sup> The policies carve workers engaged by digital labor platforms operating in multiple industries out of state labor laws and regulations.

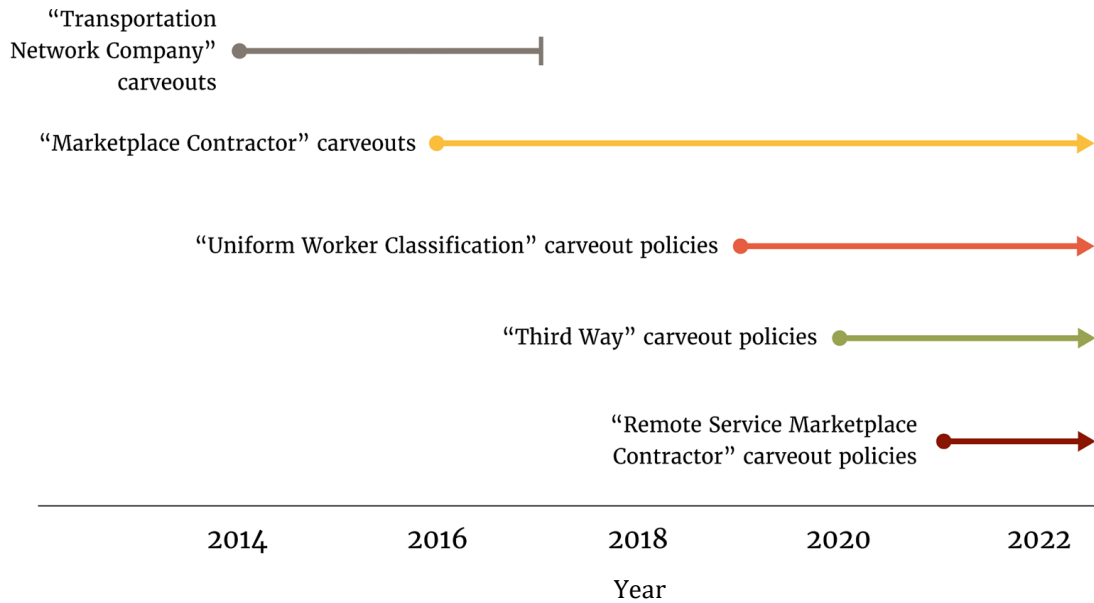
In 2017, the American Legislative Exchange Council drafted a “Uniform Worker Classification” model policy that would allow almost any employer operating in any sector to classify workers as independent contractors and escape employer responsibility under state labor regulation; versions of this third phase of carveouts have moved in at least six states.<sup>229</sup>

In late 2020, California ushered in a fourth phase of carveout policies – “third way” carveouts – that see workers locked into nonemployee status and conferred a set of labor rights and protections that are less robust than what they would get as employees. California’s “third way” Proposition 22 policy, which was recently ruled unconstitutional (that ruling is to be appealed), locked app-based ride-hail and delivery workers into “network contractor” status and offered them a set of rights and protections that paled compared to what they would receive as employees under prevailing California law.<sup>230</sup>

In 2021, Utah enacted the first “remote service marketplace contractor” carveout policy, and Texas is advancing a similar policy.<sup>231</sup> The policy designates workers providing services remotely and engaged by a digital labor platform as independent contractors under state labor regulation.

In 2022, Georgia, Hawaii, and New Jersey legislatures are considering bills that would alter employment standards to narrow access to state unemployment insurance benefits.<sup>232</sup>

## Modern-Era Carveout Policy Timeline



## Modern-era carveout policy overview

Policy Type	Years	Key player(s)	Locations	What the policy does	Sectors affected
“Transportation Network Company” carveout policies	2014-2017	Digital ride-hail platforms Uber and Lyft; Lobbying firm Tusk Strategies <sup>233</sup>	Enacted in AK, AR, AZ, CO, CT, DE, FL, GA, IA, ID, IL, IN, KS, KY, MI, MO, MS, MT, NC, ND, NH, NM, NV, OH, OK, RI, SD, TN, TX, UT, WV, WY <sup>234</sup>	Defines “transportation network companies,” then designates TNC drivers as “independent contractors” for the purposes of specified state labor rights and protections, thereby stripping TNC drivers of those employee rights and protections and exempting TNCs of employer obligations; may preempt local regulation of TNCs	Ride-hail (and must involve digital labor platform)
“Marketplace Contractor” carveout policies	2016-Present	Digital home services platform Handy; Lobbying firm Tusk Strategies <sup>235</sup>	Enacted in AZ, FL, IN, KY, TN, UT, SD Passed via administrative ruling in TX Pending in AL and GA <sup>236</sup>	Defines “marketplace contractors,” then designates MCs as “independent contractors” for the purposes of specified state labor rights and protections, thereby stripping MCs of those employee rights and protections and exempting MC companies of employer obligations; may preempt local regulation of MC companies	All sectors (and must involve digital labor platform)
“Uniform Worker Classification” policies	2019-Present	American Legislative Exchange Council <sup>237</sup>	Enacted in WV, OK; Pending in NC, MO <sup>238</sup> Similar policy enacted in NV and LA <sup>239</sup>	Rewrites the employment standard in specified state labor and employment laws to favor the designation of workers in any sector as independent contractors; preempts local employment standards	All sectors
“Third Way” carveout policies	2020-Present	CWI (federal) <sup>240</sup> ; Uber, Lyft, Postmates, DoorDash, Instacart, Chambers of Commerce (states) <sup>241</sup>	Passed legislatures in CA and WA; Pending in MA, PA, WI <sup>242</sup> ; Efforts expected at the federal level and in the near-term in CO, IL, NJ, NY (Bills recently defeated in NY, CT) <sup>243</sup>	Defines a new category of work/worker (e.g., “network contractor” in CA’s Proposition 22), then carves that category of work/worker from labor regulation, while also providing for a set of substandard (compared to employment-based) rights and/or benefits	All sectors (and may need to involve digital labor platform)
“Remote Service Marketplace Contractor” carveout policies	2021-Present	To be determined	Enacted in UT; Introduced in TX in 2021 <sup>244</sup>	Defines “remote service marketplace contractors,” then designates RSMCs as “independent contractors” for the purposes of specified state labor rights and protections, thereby stripping RSMCs of those employee rights and protections and exempting RSMC companies of employer obligations; may preempt local regulation of RSMC companies	All sectors (and must involve remote services and digital labor platform)

## Appendix B: CWI Member Overview

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As of this report's publication, below are members of CWI.<sup>245</sup>

### **Employers in industries that have long abused independent contractor classification**

#### ***American Trucking Associations***

The American Trucking Associations, formed in 1933, is the largest national trucking industry trade group, a federation of 50 state trucking associations, with 37,000 members that include J.B. Hunt and FedEx.<sup>246</sup> The ATA has decried regulatory efforts aimed at reining in independent contractor misclassification.<sup>247</sup> ATA members J.B. Hunt and FedEx have been sued for independent contractor misclassification over many years, resulting in hundreds of millions of dollars in settlement payments to thousands of trucking and delivery workers.<sup>248</sup> The California Trucking Association, a member of ATA,<sup>249</sup> sued the state of California after it enacted a 2019 bill that would combat independent contractor misclassification in the trucking industry; the court has ruled that the law can be enforced.<sup>250</sup>

#### ***Associated Builders and Contractors***

Associated Builders and Contractors, formed in 1950, is a national trade group representing the non-union construction industry in the U.S.<sup>251</sup> Twenty of the top 25 highest-grossing construction companies in the U.S., including Bechtel, are members of the Associated Builders and Contractors.<sup>252</sup> ABC has been a key player in keeping the construction industry underregulated and rife with independent contractor misclassification.<sup>253</sup> In May 2021, ABC and its Southeast Texas chapter joined the CWI and the Financial Services Institute as plaintiffs in a lawsuit against the U.S. DOL for delay and withdrawal of a late-term proposed interpretive rule by the Trump DOL to narrow access to federal minimum wage, overtime, and child labor regulations.<sup>254</sup>

#### ***National Home Delivery Association***

The National Home Delivery Association, formed in 2013, is an association of 62 last-mile delivery and delivery support companies, including XPO Logistics, GE Appliances (Haier), and DSI Logistics.<sup>255</sup> NHDA member XPO Logistics, a global logistics and freight trucking giant, has been the subject of numerous class action lawsuits for independent contractor misclassification, resulting in tens of millions of dollars in settlement payments to thousands of truck drivers in recent years.<sup>256</sup> A group of eleven labor unions from around the world formed XPO Global Union Family in 2019 to highlight and address “union-busting... exploitation, discrimination, sexual harassment and dangerous working conditions” at the company.<sup>257</sup>

#### ***Customized Logistics and Delivery Association***

The Customized Logistics and Delivery Association, formed in 1987, is an association of 2,900 courier and logistics professionals and companies,<sup>258</sup> with state associations in California, Florida, Maryland, Massachusetts, and New York.<sup>259</sup> The group's website states that it is “vigorously working to educate Congress about the importance of preserving the IC



[independent contractor] business model for the customized logistics and delivery industry.”<sup>260</sup>

### ***Transportation Intermediaries Association***

The Transportation Intermediaries Association (TIA), founded in 1978, represents over 1,700 member companies in the third-party logistics industry<sup>261</sup>—to which production, retail, and other companies outsource shipping and warehousing work. Members include multi-billion-dollar multinational corporations like C.H. Robinson and XPO Logistics.<sup>262</sup> The TIA has publicly opposed the Protecting the Right to Organize Act, falsely claiming that the legislation would “basically eliminate the independent contractor model that businesses have come to rely on heavily in their normal business operations.”<sup>263</sup>

### ***America’s Newspapers***

America’s Newspapers, formed in 2019 from the merger of the Inland Press Association and Southern Newspaper Publisher Association, has over 1,400 daily and weekly newspaper members from all 50 states and Canada. In August 2020, America’s Newspapers published an opinion-editorial from CWI representatives at Seyfarth Shaw, LLP, ipse-US, RILA, and Workplace Policy Institute, contending that “Independent work is critical to economic recovery” in the wake of the COVID-19 pandemic.<sup>264</sup> Some newspaper companies have been accused of misclassifying their newspaper delivery workers and some journalists as independent contractors, and journalists are organizing unions across the U.S.<sup>265</sup>

### ***Direct Selling Association***

The Direct Selling Association, formed in 1910, has over 130 multi-level marketing (MLM) company members, including Amway, Mary Kay, and Herbalife, which classify workers as independent contractors.<sup>266</sup> The DSA is a member of the CWI’s Executive Committee.<sup>267</sup> MLM corporations retail products and services via person-to-person networks, with distributors’ job duties entailing product/service sales and recruitment of other distributors. In order to be paid, distributors are often required to meet quotas related to investment in MLM corporations’ products and training, recruitment of new distributors, and sales; according to the Federal Trade Commission, “Most people who join legitimate MLMs make little or no money.”<sup>268</sup> MLM companies have come under fire for misclassifying distributors as independent contractors—work contracts often give MLM corporations the ability to terminate distributors, include non-competition agreements that limit the ability of distributors to work for other MLMs or do similar work independently, and MLMs often control various important aspects of how work is done.<sup>269</sup>

### ***Amway***

Amway, founded in 1959 by the DeVos family, is the world’s largest multi-level marketing company, with over 1 million sellers-cum-recruiters worldwide. Amway’s US workers are classified as independent contractors. Amway has been described as the creator of the “gig economy”: “Amway pioneered a way to package that arms-length relationship between a company and its workers, and the way they sold their vision is nearly identical to the way Uber and other gig economy companies pitch themselves.”<sup>270</sup> In 2020, following enactment of California’s AB 5, Amway was sued by a class of workers alleging independent contractor

misclassification and failure to pay a minimum wage.<sup>271</sup> Amway is a member of the CWI's Executive Committee.<sup>272</sup>

### ***Mary Kay***

Mary Kay, founded in 1963, is a cosmetics retailer that sells its products via approximately 3 million “beauty consultants”—treated as independent contractors—in 35 countries worldwide.<sup>273</sup> A recent proposed class action lawsuit against the company alleged that it misclassified its employees and violated wage and hour law. The case, filed by Mary Kay workers in New Jersey, was dismissed on a technicality – a “forum selection” clause that Mary Kay wrote into its independent contractor provisions stated that worker claims must be litigated in Texas.<sup>274</sup>

### ***National Club Association***

Founded in 1961, the National Club Association (NCA) advocates for the private club industry. Its 3,500 private members include country, city, golf, yacht, and other specialty clubs.<sup>275</sup> The General Manager for Trump National Golf Club in Bedminster, NJ, has a profile on the NCA's member portal.<sup>276</sup> The group advocates for worker classification standards that recognize “long-standing traditions and customs within industries” and “minimal interference” by the government in employers' wage-setting. The NCA publicly opposes the Protecting the Right to Organize Act and the Raise the Wage Act.<sup>277</sup>

## **Businesses that use digital platforms to control work, and label workers independent contractors**

### ***TechNet***

TechNet, formed in 1997, is “the voice of the innovation economy,” with more than 80 members, including Big Tech, Silicon Valley financiers, digital labor platforms, telecommunications conglomerates, and business consulting firms and stock market index Nasdaq.<sup>278</sup> TechNet's federal policy agenda states that the group “opposes...restrictions on the use of independent contractor and consultant classifications...and indiscriminate expansion of collective bargaining rules.”<sup>279</sup>

### ***Big Tech (via TechNet)***

“Big Tech” firms Amazon, Google, Microsoft, Apple, and Meta, are members of the CWI via TechNet. These corporations rely heavily on subcontracted workers, some of whom may be treated as independent contractors.<sup>280</sup> Amazon's Flex delivery operation uses a digital labor platform to algorithmically manage workers while attempting to label those workers independent contractors; workers have filed numerous claims alleging that they are employees and that the company is practicing independent contractor misclassification.<sup>281</sup>

***Digital labor platforms Uber, Lyft, Postmates, Hungry, Roadie, TaskRabbit, Veryable, Hyr, Forge, CareerGig, Wonolo, DoorDash (via TechNet), Instacart (via TechNet), Grubhub (via TechNet), and Jyve (via TechNet)***

Digital labor platform companies operating in ride-hail, food and grocery delivery, long-haul and last-mile delivery, home services, retail sales, warehousing, healthcare, hotel and hospitality, restaurant, manufacturing, and other sectors are members of the CWI.

Uber (ride-hail services),<sup>282</sup> Lyft (ride-hail services),<sup>283</sup> Uber subsidiary<sup>284</sup> Postmates (food and retailer same-day delivery), Hungry (catering services, food delivery),<sup>285</sup> Target-owned Shipt (retailer shopping and same-day delivery),<sup>286</sup> Roadie (long-haul and last-mile delivery),<sup>287</sup> GoShare (last-mile delivery),<sup>288</sup> IKEA-owned TaskRabbit (home services),<sup>289</sup> HealthBar (nursing services, affiliated with DecentraCare),<sup>290</sup> Veryable (manufacturing, logistics, and warehousing),<sup>291</sup> LABR (multi-industry staffing, including construction, landscaping, and restaurants),<sup>292</sup> Hyr (multi-industry staffing, including retail, restaurant, hospitality),<sup>293</sup> Workjam-owned Forge (multi-industry staffing, including retail, restaurant, hospitality, warehouse, healthcare),<sup>294</sup> CareerGig (multi-industry staffing; owns multi-industry staffing platform Moonlighting),<sup>295</sup> Wonolo (multi-industry staffing, including warehouse, manufacturing),<sup>296</sup> LifeSciHub (life sciences research and development),<sup>297</sup> and Upwork (multi-industry remote work)<sup>298</sup> are direct members of the CWI.<sup>299</sup>

Instacart (food delivery and retailer shopping and same-day delivery), DoorDash (food and retailer shopping and same-day delivery), Grubhub (food delivery), and Jyve (in-store stocking, merchandising, product assembly for retailers),<sup>300</sup> Teladoc (doctors),<sup>301</sup> and Gopuff (food and consumer goods delivery)<sup>302</sup> are members via TechNet<sup>303</sup>.

Digital labor platform companies treat all or most of their workers as independent contractors, even though the workers are not truly running their own businesses free from control by the platform company. This labor practice is central to digital labor platform companies' business models, and, if accepted by courts and regulators, allows companies to strip employees of due labor rights and protections and shed obligations for payroll taxes and employer contributions to social insurance programs.<sup>304</sup> Thousands of platform workers have filed complaints alleging independent contractor misclassification, alongside claims of wage theft, denial of benefits, and for other violations of employee rights and protections; courts have ruled in favor of workers in a number of cases.<sup>305</sup>

## **Employers seeking to use more nonemployee labor and/or protect its use in their supply chains**

***Retail Industry Leaders Association (members include Walmart, Target, Walgreens, Coca-Cola, Home Depot, Best Buy, Kroger, Albertsons, and IKEA)***

The Retail Industry Leaders Association spearheaded formation of the CWI in 2019, and once of its vice presidents is Chair of the Coalition.<sup>306</sup>

Formed in 1969, RILA has more than 200 members companies, including retail giants Walmart, Target, Walgreens, Coca-Cola, Home Depot, Best Buy, Kroger, Albertsons, and IKEA.<sup>307</sup> Retailers have relied—directly and indirectly, through subcontracting relationships—on workers labelled independent contractors throughout their supply chains and retail operations for years.

Many retailers use digital labor platforms for same-day delivery and product installation and assembly, and some retailers use platforms for retail store and warehouse staffing. Several retailers are owners of or investors in digital labor platform companies. Home Depot is an investor in CWI member Roadie,<sup>308</sup> which it uses for same-day delivery services. IKEA owns CWI member (via TechNet) TaskRabbit.<sup>309</sup> Coca-Cola “incubated” CWI member Wonolo and continues to use the company for staffing.<sup>310</sup> Kroger has a partnership with Instacart for same-day delivery.<sup>311</sup> Walgreens uses Postmates for its same-day delivery.<sup>312</sup> Best Buy partners with Instacart for same-day delivery.<sup>313</sup> Walmart has had service agreements with Handy<sup>314</sup> and Instacart for same-day delivery,<sup>315</sup> and the company recently launched its own delivery platform called GoLocal that seeks to contract with other retailers.<sup>316</sup> In 2017, Target acquired delivery platform Shipt, which it uses for same-day delivery services,<sup>317</sup> and the company invested in multi-services labor platform Hyr through its Technology Accelerator program, “designed for tech-enabled startups with capabilities that could enhance the retail value chain.”<sup>318</sup> Albertsons, which has had a partnership with Instacart since 2017 for a portion of its grocery delivery services, announced in January 2021 that it will be replacing all of its unionized employee delivery workers with app-based workers.<sup>319</sup>

Amazon and Home Depot were among the long list of corporate clients of Dynamex,<sup>320</sup> a last-mile delivery service provider (and not a digital labor platform) that faced a class action lawsuit filed in 2006 by its drivers in California for independent contractor misclassification and violations of state wage and hour law after the company converted its fleet from employees to independent contractors in 2004. That Dynamex case worked its way to the California Supreme Court, which issued a seminal ruling in 2018 laying out a three-factor “ABC test” employment standard in its determination that the drivers were employees of Dynamex.<sup>321</sup> That employment standard was codified into law for a range of California’s labor laws in 2019 in Assembly Bill 5, which RILA describes as the impetus behind the formation of the CWI.<sup>322</sup>

***FMI, The Food Industry Association (members include Amazon, Albertsons (subsidiaries include Safeway, Shaws, ACME), Kroger, Ahold Delhaize (subsidiaries include Stop & Shop, FreshDirect, Giant), Meijer, and Publix)***

Founded in 1977, FMI is an association of 1,225 food and wholesale retail companies that run 40,000 food retail stores and 25,000 pharmacies across the U.S.<sup>323</sup> FMI’s membership includes Amazon, Albertsons (subsidiaries include Safeway, Shaws, ACME), Kroger, Ahold Delhaize (subsidiaries include Stop & Shop, FreshDirect, Giant), Meijer, and Publix.<sup>324</sup> According to the FMI, “The reach and impact of our work is extensive, ultimately touching the lives of over 100 million households in the United States and representing an \$800 billion industry with nearly 6 million employees.”<sup>325</sup>

***Kelly Services***

Kelly Services, founded in 1946, is a staffing industry pioneer that supplies clients in a wide range of economic sectors with both employees and independent contractors.<sup>326</sup> In recent years, Kelly has been growing its independent contractor recruitment and placement business, and its involvement in policy work to facilitate the use of independent contractors by businesses. According to former Kelly CEO and ipse-US founder and Co-President Carl

Camden, “As I was finishing up my time at Kelly, I had begun moving the company further into the talent supply chain, where we were supplying major global companies with all the non-employee talent they needed.”<sup>327</sup> In 2017, Kelly, under Camden, convened the Advancing the Social Contract for Gig Economy Workers conference “to discuss the need for a new social contract for gig economy workers.”<sup>328</sup> Kelly’s Outsourcing and Consulting Group division includes “IC Complete,” which helps clients recruit and onboard independent contractors, and mitigate liability for worker misclassification.<sup>329</sup> In 2018, Kelly made a minority equity investment in Business Talent Group, a “high-end” independent contractor placement company.<sup>330</sup>

### ***American Staffing Association***

The American Staffing Association, formed in 1966, has over 1,800 staffing agency members, including Kelly Services, Adecco, Aerotek, Randstad, Manpower Group, operating in every sector of the economy.<sup>331</sup> The ASA’s policy agenda includes a call for rewriting employment standards to allow more businesses, “including staffing agencies” to use independent contractors:

“...[T]raditional legal tests for distinguishing between employees and independent contractors are far from clear or uniform...To the extent new rules applicable to independent workers are proposed by policy makers, they should apply evenhandedly to allow all businesses—including staffing agencies—to use such workers.”<sup>332</sup>

ASA members, like Kelly Services as described above, have been growing their independent contractor placement operations. In its 2020 annual report, Adecco indicates that it is making a “shift toward technology-enabled platforms” that typically use independent contractors and that it wants to “drive the creation and adoption of a new social contract protecting workers.”<sup>333</sup> Manpower Group collaborated with the Retail Industry Leaders Association on a report calling on retailers to transition their workforces to contingent and independent contractor labor.<sup>334</sup>

### ***nTech Workforce***

nTech Workforce, founded in 2005, is a staffing agency that supports “Fortune 100 contingent labor programs,” with a focus on the information technology, legal, customer service, and accounting sectors.<sup>335</sup> nTech Workforce’s representative to the CWI is “co-creator” of the Center for the Transformation of Work—see the description of *Open Assembly* below for more information.

## **Entities that support or indirectly benefit from the growth of the nonemployee workforce**

### ***ipse-US***

ipse-US is the stateside chapter of the UK-based ipse (Association of Independent Professionals and the Self-Employed), was founded in 2018 by former Kelly Services CEO Carl Camden.<sup>336</sup> The UK-based ipse was founded in 1999<sup>337</sup> and has sided with industry on questions of digital labor platform regulation.<sup>338</sup> ipse-US has a fee-based membership organization<sup>339</sup> that partners with for-profit organizations like CareerGig’s Moonlighting digital labor platform<sup>340</sup> and private insurer iWorker Innovations;<sup>341</sup> Kelly Services is the

“lead” financial sponsor of the group, and serves on its board.<sup>342</sup> Co-Presidents of ipse-US are Camden and former Republican U.S. Representative Mike Bishop, co-sponsor of the Trump Tax Cuts and Jobs Act<sup>343</sup> and the New Economy Works to Guarantee Independence and Growth Act of 2019, which would amend the Internal Revenue Code to create a “safe harbor” for businesses that classify workers as independent contractors.<sup>344</sup> ipse-US is working to promote “independent work” through its work with CWI, its magazine “Modern Work” (“America’s only magazine dedicated solely to Independent Work”), and the designation of August 16<sup>th</sup> as “National Independent Worker Day.”<sup>345</sup>

### ***Financial Services Institute***

Financial Services Institute, founded in 2004, is an association of independent financial advisors.<sup>346</sup> The Financial Services Institute is a plaintiff in CWI’s lawsuit against the U.S. Department of Labor for delay and withdrawal of a proposed interpretive rule that would have narrowed access to the Fair Labor Standards Act.<sup>347</sup>

### ***iWorker Innovations***

iWorker Innovations, founded in 2017,<sup>348</sup> is a private insurance provider for independent contractors, with brokerages in all 50 states.<sup>349</sup> iWorker Innovations has a partnership with ipse-US to provide “portable benefits” to members, and looks to grow its market for private insurance products.<sup>350</sup>

### ***Intact Insurance***

Intact Insurance, founded in 1809 in Canada,<sup>351</sup> provides specialized accident and health insurance products for digital labor platform workers engaged as independent contractors in Canada and the United States.<sup>352</sup> Uber Canada partnered with Intact between 2015 and 2020.<sup>353</sup>

### ***Promotional Products Industry Association***

Promotional Products Industry Association (PPAI), founded in 1903, is an association of over 15,000 primarily US-based promotional products companies.<sup>354</sup> PPAI views independent contractors as a prime market for its products and services.<sup>355</sup>

### ***Littler Workplace Policy Institute***

Littler Workplace Policy Institute, founded in 1942,<sup>356</sup> is the lobbying arm of corporate law firm Littler Mendelson, “the world’s largest employment and labor law practice representing management.”<sup>357</sup> The Co-Chair of Littler WPI, Michael Lotito, co-founded the Emma Coalition with the National Restaurant Association. The Emma Coalition focuses on management-side policy and legal strategies related to technology-induced displacement of employees. In a June 2020 CWI release, Lotito was listed as President of the Emma Coalition, indicating that he represents the Emma and restaurant industry interests in his work with CWI.<sup>358</sup> Among the “long-term goals” of the Emma coalition is to “engage with policymakers to establish programs and promote legislation that will make the workforce robust in the face of TIDE (e.g., portable benefits and a new “third category” of workers).”<sup>359</sup>

### ***Seyfarth Shaw LLP***

Seyfarth Shaw LLP, founded in 1945, is a corporate law firm with a large management-side employment and labor law practice long known for its involvement with union-busting.<sup>360</sup> Firm co-founder Lee Shaw was an author of the 1947 Taft-Hartley Act, which is widely recognized as a key driver of deunionization in the U.S.<sup>361</sup> Seyfarth has an “Independent Worker Strategies” practice group that specializes in cases involving independent contractor misclassification and joint employment liability, and policy strategies (“inventive and creative solutions”) that mitigate litigation risk in these areas.<sup>362</sup> The CWI retains Seyfarth for its federal policy work,<sup>363</sup> and partner Camille Olson serves on the CWI’s Executive Committee.<sup>364</sup>

### ***Investment firms like Sequoia Capital and Kleiner Perkins (via TechNet)***

TechNet’s membership includes several investment firms, such as Sequoia Capital and Kleiner Perkins. Sequoia Capital is an investor in digital labor platforms Wonolo, Instacart, and DoorDash.<sup>365</sup> Kleiner Perkins is an investor in Amazon, and Instacart.<sup>366</sup>

### ***Accenture (via TechNet)***

TechNet member Accenture, a business consulting firm, has been counseling clients in making use of temporary and contract labor, or a “liquid workforce.”<sup>367</sup> Accenture provides fellow CWI member (via TechNet) Meta with a third of its content moderation workforce, and the contractor has shielded Meta from worker complaints about pay, benefits, and mental health effects of the work.<sup>368</sup>

### ***Deloitte (via TechNet)***

TechNet member Deloitte, a business consulting firm, promotes the use of “alternative” work arrangements like temporary and contract labor, as it advises clients seeking to “optimize the human capital balance sheet.”<sup>369</sup> Through its “Open Talent,” service, Deloitte provides independent contractor labor to client firms.<sup>370</sup> Clients, for tax, human capital consulting, and other services, include over 4 in 5 companies in the Global Fortune 500.<sup>371</sup>

### ***AT&T, Verizon, and Comcast (via TechNet)***

Telecommunications giants AT&T, Verizon, and Comcast, members of the CWI via TechNet, rely heavily on subcontracted workers, including for call center and line installation and maintenance work, and have come under fire for independent contractor misclassification.<sup>372</sup>

### ***HireVue (via TechNet)***

HireVue, founded in 2004, develops and sells artificial intelligence tools for hiring. The company’s facial analysis and other hiring tools have come under fire for being discriminatory, as have audits of the technologies commissioned by the company, which critics argue do not pass muster.<sup>373</sup> HireVue has targets employers who use on-demand labor:

“[T]he on demand economy requires employees to drive front-line expansion. Uber and Lyft need drivers to meet the growing demand for their services. Amazon needs warehouse pickers to ship orders quickly.... traditional hiring methods just aren’t agile enough to scale up or down with demand.”<sup>374</sup>

These companies often label their workers “independent contractors”, which makes it difficult or impossible for these workers to access anti-discrimination protections that cover employees. Among HireVue’s long list of corporate clients is the Target-owned delivery platform Shipt.<sup>375</sup>

### ***The Nasdaq Composite (via TechNet)***

TechNet member The Nasdaq Composite is the stock exchange of choice for technology companies, in part due to the fact that it does not (unlike the New York Stock Exchange) require companies to establish independent committees to oversee executive compensation and board nominations.<sup>376</sup> The Nasdaq makes money when companies list on the exchange—Uber, Lyft, DoorDash, Amazon, Microsoft, chose the Nasdaq for initial public offerings—and when trading volumes and stock prices rise—like they did for digital labor platforms like Lyft following the passage of Proposition 22 in California.<sup>377</sup> And if companies are able to cut labor costs through the use of subcontracted labor, that money can be funneled into stock buybacks that raise stock prices—and the Nasdaq makes money.

### ***Open Assembly***

Open Assembly (Oa), founded in 2017<sup>378</sup> out of Harvard Business School’s Laboratory for Innovation Science, is a business operations management firm that specializes in workforce “innovation consulting.” Oa “hosts the conversations, community and learning that help culture and business transition to the future of work.”<sup>379</sup> The Oa community spawned the Center for the Transformation of Work, a trade group “at the core of the global Future of Work movement,” formed to “to create common industry terminology, tools, educational resources, and playbooks in order to help organizations and individuals more easily adopt and benefit from using open talent tools.”<sup>380</sup>

### ***ShoShin Works***

ShoShin Works, founded in 2019,<sup>381</sup> is an operations management consulting firm, “We help organizations deploy Future of Work strategies that optimize performance.”<sup>382</sup> ShoShin Works’ Founder and CEO is a founding advisor and member of Open Assembly.<sup>383</sup>

### ***SHRM***

Launched in 1948, the Society for Human Resources Management (SHRM—and widely known as “sherm”) is the world’s largest association of human resources professionals, with 575 chapters in the U.S. and more than 300,000 individual members in 165 countries worldwide.<sup>384</sup> Touting itself as “the foremost expert, convener and thought leader on issues impacting today’s evolving workplaces” and “the voice of all things work,”<sup>385</sup> SHRM runs a powerful lobbying operation that has drawn a comparison to the American Legislative Exchange Council.<sup>386</sup> The Economic Policy Institute has documented SHRM’s efforts to reduce worker access to unemployment insurance.<sup>387</sup> The group consistently advocates to diminish U.S. workers’ rights and protections:

Openly working in concert with dark-money business lobbying groups such as the International Franchise Association, the US Chamber of Commerce, and the National Federation of Independent Business, SHRM has been speaking out in the press, filing lawsuits, and pushing state and national bills. These efforts are aimed at blocking the rights of workers



to do everything from forming unions, to having guaranteed paid sick days, to getting health insurance under the Affordable Care Act.<sup>388</sup>

Indeed, SHRM's role in labor and employment public policymaking and private employer operations is immense—in its own words, “SHRM impacts the lives of more than 115 million workers and families globally.”<sup>389</sup>

**6prog**

6prog, founded in 2016<sup>390</sup> by a team in the UK and US, is a platform that connects freelancers (“engineers, developers, analysts, managers, writers, artists (and more)”) <sup>391</sup> and companies wishing to hire them.<sup>392</sup>

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<sup>391</sup> Katherine Steiner-Dicks, "New Platform Helps to Keep Contractors Outside IR35," *Freelance Informer*, June 17, 2021, <https://www.freelanceinformer.com/contractors/new-platform-helps-to-keep-contractors-outside-ir35/>.

<sup>392</sup> 6prog corporate website, "About," accessed November 29, 2021, <https://www.6prog.com/home/about>.



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