

THE “RIGHTS ON DEMAND” SERIES

Flexibility and the On-Demand Economy

More and more, America’s workers are seeing their jobs deliver less and less of what they need to get by. For many, the hope of attaining a good job with an adequate social safety net is giving way to the reality of piece-rate work in part-time, hours-long and be-your-own-boss short-term “gigs.” In the on-demand economy, online and app-based companies connect workers with often short-term jobs that involve driving, cleaning, delivering food, doing odd jobs, or performing tasks online, often for very little money, with no job security and no labor protections at all. The on-demand sector is a tiny part of the economy overall, but it has grown ten-fold in the last three years.

With more people engaging in work for on-demand companies such as Uber (driving), Care.com (child care and home care), TaskRabbit (home services) and Postmates (delivery), the question of whether workers are “employees” or “independent contractors” for purposes of labor protections like minimum wage has become a central one.

Companies in the on-demand economy often claim that workers choose to work with them because of the flexibility that comes with the job, and that these workers will happily sacrifice the benefits of employee status—minimum wage, overtime, protection from discrimination, the right to collectively bargain, and social benefits like unemployment insurance, workers’ compensation and contributions to Social Security—in exchange for the freedom to make their own schedules. Many on-demand companies claim that it is impossible to both comply with baseline employment standards and make contributions to payroll taxes and still offer the highly coveted flexibility they say millennials especially desire.

Many companies *do* offer flexible schedules to their employees, proving that flexibility and employee status are perfectly compatible.

But many companies in the on-demand and overall economy *do* offer flexible schedules to workers whom they treat as employees, proving that flexibility and employee status are perfectly compatible. Moreover, much of the data on on-demand workers shows that workers choose these jobs out of necessity, not because of the flexibility they may offer. Finally, courts have also weighed in on the relevance of flexible hours to employee status and have found, in a variety of contexts, that workers with flexible schedules are employees under federal law.

Can On-Demand Companies Treat Workers as Employees and Still Offer Them Flexibility?

Some companies in the on-demand economy say that it is impossible to treat workers as employees and still offer them flexible work schedules. But on-demand companies can and do treat their workers as employees and still offer them flexible schedules—along with minimum wage, health care, and even paid family leave, paid vacations, and stock options.¹ The cleaning services company Managed by Q treats its workers as employees, offers them flexible schedules, and provides them with benefits such as stock options. When it moved from treating some of its workers as independent contractors to treating them as employees, Instacart continued to offer them flexible scheduling. When the parking and auto services company Luxe made the change, it too continued to offer workers flexible hours.

How Much Flexibility Do “Independent Contractor” On-Demand Workers Have?

All workers need flexibility—to make enough money to live on and, at the same time, to be able to spend time with family, go to school, or take a day off when illness strikes or the unexpected happens. But nearly half of low-wage workers overall report that they have little control over their schedules.² Many are at the beck and call of their employers’ complex scheduling software, closing a fast-food outlet in the wee hours and then opening at daybreak the next day, getting called in on such short notice that daycare and transportation are impossible to locate. Others are sent home unexpectedly after an hour of work but still owe the babysitter.³ At least seven million workers in the United States hold multiple jobs, complicating their ability to take time off.⁴

On-demand companies that treat workers as independent contractors frequently assert that the work they offer is the answer to traditional employers’ unpredictable scheduling practices. They tell workers, the public, and policymakers that they offer be-your-own-boss jobs, where workers choose their own schedules. The picture they paint often involves a student, a stay-at-home mom, or a retiree who is earning extra cash in his or her extra hours.⁵ The companies extoll the freedom these workers have to “monetize” their spare time, choosing to run some errands, drive some passengers, or enter some data online as a way to pick up a little extra cash.⁶

The much-vaunted flexibility of on-demand work is limited by workers’ need to make a living.

The reality is that workers are in the on-demand economy because they need income. While the companies do offer workers the ability to choose which days and hours they work, that much-vaunted flexibility is limited by workers’ need to make a living. True, workers who don’t really need to earn money can choose when they want to work for extra cash. Those who struggle to earn enough money to buy groceries and gas, to pay the rent and heating

and daycare bills, have to work when work is available. Flexibility is limited as well by the demands of the jobs themselves and the companies' own rules.

Many On-Demand Workers Are Motivated by Necessity, Not Flexibility

A recent large-scale independent study by the JPMorgan Chase Institute studied the incomes of one million customers with active accounts, 260,000 of whom participated in the online platform economy.⁷ The study found that income volatility is an enormous problem across jobs, especially for young adults in their survey. In fact, 7 in 10 young adults saw their incomes change month to month by an average of 30 percent. Nearly three in four low-income people saw that magnitude of change in their monthly income. For the JPMorgan Chase survey respondents who participated in the on-demand economy, they did so as a second job, to address dips in income from another, more traditional job. Some used income from on-demand work to lessen the effects of unemployment.

The JPMorgan study shows that low-wage workers who use platform income do so not as a first option but frequently as more of a last resort. More than 8 in 10 held another wage or salaried job. A separate survey of so-called crowdworkers, who do online tasks for Amazon's Mechanical Turk and a similar company called Crowdfunder, found that the primary reason people worked on these platforms was to supplement income from other jobs. The reality is that on-demand economy workers, like other workers, are struggling to pay their fixed bills on income that fluctuates wildly. To do so, they need two or more low-wage jobs, because one job just doesn't cover their living expenses.⁸

More than 8 in 10 low-wage workers who earn money from on-demand platforms hold other jobs.

In a survey of crowdworkers by the International Labour Office, fewer than 1 in 10 workers said they did on-demand work because they enjoyed it.⁹ In a separate survey focused on Uber drivers, 38 percent of respondents said they "somewhat" or "strongly" disagreed with a statement that they are satisfied with working for Uber.¹⁰

The JPMorgan study also confirms the findings of an earlier survey of 4,600 workers, published by Intuit. While many workers said that they enjoyed the "freedom" of on-demand work, their biggest worry was having enough work and a stable income. The survey found that the average on-demand worker relies on three different income streams.¹¹ These studies indicate that second, on-demand jobs, are a reflection of an economy that isn't offering jobs with adequate, stable incomes to its working people.

Full-Time On-Demand Workers Have Less Flexibility

Along with on-demand workers who use the platforms as second jobs, there are many for whom on-demand work is their sole source of income. For example, according to Uber's data, 19 percent of its drivers work 35 or more hours per week. A separate driver survey

found 27 percent of transportation network company (TNC) drivers overall work more than 30 hours a week. For these workers, it cannot be said that their jobs are substantially more flexible than the jobs of other full-time workers who may seek nightshift or weekend work to accommodate other needs. These full-time or more-than-full-time workers make up at least half of the work actually performed on the platforms.¹²

1 in 5 Uber drivers works 35 or more hours per week.

Workers Must Meet Demands of Company and Customer

When the platforms talk about the freedom and flexibility they offer workers, they fail to mention the incentives they use to get workers to work more and longer and harder. For example, in order to earn the guaranteed minimum income Uber promises, a driver must have a favorable customer rating, accept 90 percent of the trips offered, accept at least one trip per hour, and have an online presence of 50 minutes for every hour worked.¹³ Uber's surge-pricing is an incentive to get drivers on the streets during times dictated, not by drivers, but by the company. Its fare cuts mean that drivers have to drive more to earn this month the same amount that they were earning last month.¹⁴ And its handbook indicates that it expects all on-duty drivers to accept all rides offered to them, and within 15 seconds of the time the offer is made. It can and does fire (or "deactivate" in Uber's language) workers who don't comply with these rules.¹⁵

On-demand jobs mean that workers must also meet the demands of customers. For transportation network drivers, the hours of high demand are between 10 p.m. and 4 a.m.¹⁶ One company-distributed survey of more than 1,000 on-demand workers found that the much-vaunted flexibility is "illusory," because workers have to work during the hours when there is demand.¹⁷

Flexibility in on-demand jobs is largely illusory, because workers have to work when there is demand.

In the end, a job with Uber or other on-demand companies comes with roughly the same degree of freedom as a job with a staffing agency or as a substitute teacher or day laborer: while a worker is ostensibly free to decide not to work on a particular day, she may not get a call the next time she wants to work, and she may be short on cash at the end of the month.

Flexibility and the Law on Employee Status

On-demand companies also frequently claim that the “flexibility” they offer is incompatible with employee status. As a historical and present-day legal matter, this claim is incorrect.

The “Putting Out” System and the Fair Labor Standards Act

There is nothing new about work that is done off-premises and at non-standard hours. On-demand workers are the modern-day version of the “putting out” system developed for homework prior to the industrial revolution. As production moved from rural farms to the factory, work was assigned to people in their homes. The “putting out” system meant that these workers had the “freedom” to work when they wanted to, while still tending to their primary role as farmers.¹⁸

Homeworkers sewed, knitted, made tobacco products, buttons, toys, and many other products in their homes, supposedly on their own time. The conditions under which they worked became a focus in the development and passage of the Fair Labor Standards Act—our country’s minimum wage and overtime law. While the substantive work may have shifted from knitting a hat to data processing, delivery, or homecare, with orders put out over a smartphone app, the parallels are clear.¹⁹ The solution is clear too, and timeless: minimum wage and overtime and health and safety laws were meant to cover and *do* cover workers who are paid on a piece rate and who work from their homes, or cars, or bicycles.

Flexibility As A Legal Factor In Determining Employee Status

While some companies argue that flexible work hours indicate that their workers are in business for themselves and are not their employees, that claim is inconsistent with settled law. Under the modern legal system, the right to choose your own hours is a relatively insignificant factor in any determination that a worker is an employee. Under the Fair Labor Standards Act, the core question separating employees from independent contractors is whether the worker is running a separate business. Workers who are not in business for themselves are employees. To aid in their decisions, courts look at whether the work is an integrated part of the employer’s business, the relative investment that the business and worker have made, whether managerial skills affect the potential for profit or loss, whether the work requires special skill, whether the relationship is long term, and the business’s right to control the work. According to the Labor Department’s interpretation of the law, the right to control is not that important, especially for lower-wage work. Flexibility is one part of that small factor of control.²⁰

The right to choose one’s own work hours is a relatively insignificant factor in determining employee status.

Courts have had many opportunities to address whether and how flexibility affects employee status in a variety of contexts, including homeworkers, nurses dispatched to hospitals, cake decorators, package deliverers, and restaurant workers.

- **Cake Decorators.** In a case involving cake decorators, a federal appeals court sitting in Oklahoma held that these bakery workers were employees. The decorators had some control over their work schedules and the hours that they worked, and could choose the cakes they wished to decorate. On flexibility and employee status, the court said: “Of course, flexibility in work schedules is common to many businesses and is not significant in and of itself.”²¹
- **Home Researchers.** In *DialAmerica Marketing*, a company employed home researchers to look up names and addresses in telephone books. It paid them on a piece rate for the number of filled-in forms that they returned. The workers were free to choose the weeks and hours that they wished to work. This fact, and the fact that the workers were subject to little direct supervision, was “largely insignificant in determining their status.” The court found that the homeworkers were the employees of the company.²²
- **Nurses.** In a further example, a healthcare service provided nurses to individuals, hospitals, and nursing homes. Nurses put their name on a roster and were free to accept or decline referrals made to them. Like many on-demand workers, the nurses were free to work for other companies, and many had their names on a number of lists. They usually worked only a few weeks a year for the company in question. A federal court of appeals found that they were employees, saying that it mattered little that the nurses worked for others. Nor did it matter that this particular job was not their primary source of income.²³
- **Couriers.** In a case involving drivers for a courier company, the drivers determined their own schedules and decided when and how long to work. Some worked long hours because they chose to do so. Drivers decided when to take a break, how often, and how long a break to take. They worked other jobs as well. Nonetheless, a California court found that they were employees of the courier company.²⁴ In a second courier case, drivers called a dispatcher each day to tell them whether or not they wanted to work that day. The drivers decided on their own when to take breaks or vacation. The court found them to be the employees of the courier company.²⁵
- **Restaurant Workers.** Similarly, restaurant workers sued their employer for minimum wage violations. The business claimed that they were independent contractors, emphasizing that the workers did not have rigid work schedules and thus were free, to some extent, to determine their hours of work. The court said, “A relatively flexible work schedule alone, however, does not make an individual an independent contractor rather than an employee.”²⁶

Conclusion

Across our country, workers in nearly every sector are feeling squeezed by stagnating and falling wages, unpredictable and part-time schedules, and a lack of work-related benefits. They are doing what they must in order to get by, including taking on a second or third job because a single job is not delivering enough income for them to survive. The on-demand economy is part of this trend. While these workers may technically have the freedom to choose the days and hours that they work, monetary pressures, hours of demand, and the work rules and incentives offered by the companies they work for mean that they have far less flexibility than some of the companies have claimed.

Offering workers a flexible schedule is a choice that companies make, and many, both in the on-demand economy and in the economy overall, have chosen to provide workers with jobs that accommodate their other commitments and scheduling preferences.

Creating exemptions from current law for on-demand companies will undermine, not expand, workers stability and security. Instead, to turn gig jobs—and all jobs—into good jobs, we should enforce existing laws, pursue strategies to raise wages, provide all workers with fair schedules, and ensure that paid sick days and paid family leave laws are available to all workers.

The National Employment Law Project aspires to build an economy that embodies and advances principles of inclusion and fairness, justice, sustainability, and shared prosperity. The “Rights on Demand” series focuses on issues confronting workers in the on-demand economy, as part of our broader campaign to ensure that all workers, regardless of how their employers classify them, receive fair wages and benefits in a safe and healthy work environment.

Endnotes

- ¹ Rebecca Smith & Sarah Leberstein, Rights on Demand: Ensuring Workplace Standards and Worker Security in the On-Demand Economy, National Employment Law Project, (Sep 2015), <http://www.nelp.org/content/uploads/Rights-On-Demand-Report.pdf>.
- ² Liz Watson & Jennifer Swanberg, Flexible Workplace Solutions for Low-Wage Hourly Workers: A Framework for a National Conversation, Workplace Flexibility 2010, (May 2011), <http://workplaceflexibility2010.org/images/uploads/whatsnew/Flexible%20Workplace%20Solutions%20for%20Low-Wage%20Hourly%20Workers.pdf>.
- ³ Liz Watson, Lauren Frohlich, & Elizabeth Johnston; Collateral Damage: Scheduling Challenges for Workers in Low-Wage Jobs and Their Consequences, (Apr 2014), http://www.nwlc.org/sites/default/files/pdfs/collateral_damage_scheduling_fact_sheet.pdf; Noam Scheiber, *The Perils of Ever-Changing Work Schedules Extend to Children's Well-Being*, NEW YORK TIMES, (Aug 12, 2015), http://www.nytimes.com/2015/08/13/business/economy/the-perils-of-ever-changing-work-schedules-extend-to-childrens-well-being.html?smprod=nytcore-iphone&smid=nytcore-iphone-share&_r=2; Rick Moss, *Starbucks 'Clopeneing' Practices Deemed Inexcusable*, FORBES, (Aug 19, 2014), <http://www.forbes.com/sites/retailwire/2014/08/19/starbucks-clopeneing-practices-deemed-inexcusable/#3ce2726056c6>.
- ⁴ Bureau of Labor Statistics, Labor Force Statistics from the Current Population Survey, *Household data annual averages*, 36. *Multiple jobholders by selected characteristics*, <http://www.bls.gov/cps/cpsaat36.htm>.
- ⁵ Uber Newsroom, New Survey: Drivers Choose Uber for its Flexibility and Convenience, Dec 7, 2015, <https://newsroom.uber.com/driver-partner-survey/>.
- ⁶ MinuteBox: Converting Spare Time into Spare Change, Gigaom.com, (Oct 4, 2011), <https://gigaom.com/2011/10/04/minutebox-converting-spare-time-into-spare-change/>.
- ⁷ Paychecks, Paydays, and the Online Platform Economy: Big Data on Income Volatility, JPMorgan Chase Institute, <https://www.jpmorganchase.com/corporate/institute/document/jpmc-institute-volatility-2-report.pdf>.
- ⁸ Paychecks, Paydays, and the Online Platform Economy, *supra*, n. 7.
- ⁹ Janine Berg, Income Security in the On-Demand Economy: Findings and policy lessons from a survey of crowdworkers, International Labor Office, (Mar 2016).
- ¹⁰ The Rideshare Guy, 2016 Survey Results: How Satisfied are Uber Drivers Really?, (Feb 15, 2016), <http://therideshareguy.com/2016-survey-results-how-satisfied-are-uber-drivers-really/>.
- ¹¹ Dispatches from the New Economy, The On-Demand Workforce, INTUIT, <http://www.slideshare.net/IntuitInc/dispatches-from-the-new-economy-the-ondemand-workforce-57613212>.
- ¹² Noah Zatz, *Is Uber Wagging the Dog with its Moonlighting Drivers?* onLabor, (Feb 1, 2016), <http://onlabor.org/2016/02/01/is-uber-wagging-the-dog-with-its-moonlighting-drivers/#more-9675>; The Rideshare Guy, *supra*, n. 10.
- ¹³ Ross Eisenbrey & Lawrence Mishel, *Uber business model does not justify a new 'independent worker' category*, Economic Policy Institute, (Mar 17, 2016), <http://www.epi.org/publication/uber-business-model-does-not-justify-a-new-independent-worker-category/>; Ellen Huet, *Uber's Clever Hidden Move: How Fare Cuts Actually Lock in its Drivers*, FORBES, (Jan 9, 2016), <http://www.forbes.com/sites/ellenhuet/2015/01/09/ubers-clever-hidden-move-how-fare-cuts-actually-lock-in-its-drivers/#1cea50b62bd6>. (Guaranteed driver pay is used to make sure drivers can't work for more than one company).
- ¹⁴ Sage Lazarro, *Uber Drivers Plan Boycott After Fare Cuts Slash Their Earnings to Below Minimum Wage*, OBSERVOR, (Jan 19, 2016), <http://observer.com/2016/01/uber-drivers-plan-boycott-after-fare-cuts-slash-their-earnings-to-below-minimum-wage/>.
- ¹⁵ Eisenbrey & Mishel, *supra*, n. 13.
- ¹⁶ Shared Use Mobility Center, Shared Mobility and the Transformation of Public Transit, (Mar 2016), http://sharedusemobilitycenter.org/wp-content/uploads/2016/03/Final_TOPT_DigitalPages-03.11.16.pdf.
- ¹⁷ Request for Startups, 2015 1099 Economy Workforce Report, 2015.
- ¹⁸ Fernand Braudel, *Civilisation & Capitalism 15th-18th Century: Perspective of the World 593* (Siân Reynolds trans. 1992) cited in Matthew F. Finkin, *Beclouded Work in a Historical Perspective*, ILO, (Mar 2016).
- ¹⁹ A section of the Fair Labor Standards Act is devoted to industrial homework, covering work that is prohibited at home, but also minimum wage coverage. 29 U.S.C. § 211(d).
- ²⁰ U.S. Department of Labor, Wage and Hour Division, Administrator's Interpretation No. 2015-1, *The Application of the Fair Labor Standards Act's "Suffer or Permit" Standard in the Identification of Employees Who Are Misclassified as Independent Contractors*, (July 15, 2015), http://www.dol.gov/whd/workers/misclassification/ai-2015_1.htm.
- ²¹ *Dole v. Snell*, 875 F.2d 802 (10th Cir. 1989).
- ²² *Donovan v. DialAmerica Marketing, Inc.*, 757 F.2d 1376, 1379 (3d Cir. 1985).
- ²³ *Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1060 (2d Cir. 1988).
- ²⁴ *Air Couriers International v. EDD*, 150 Cal.App.4th 923 (Court of Appeals, 3rd Dis, CA 2007).
- ²⁵ *JKH Enterprises, Inc. v. Department of Industrial Relations*, 142 Cal.App. 4th 1046 (Court of Appeals, 6th Dis., CA 2006).
- ²⁶ *Doty v. Elias*, 733 F. 2d 720 (10th Cir. 1984).