

# Independent Contractors & COVID-19: Working Without Protections

*Pandemic crisis spotlights how gig workers and other misclassified workers are forced to work without critical state and local protections like unemployment insurance, paid sick days, paid leave*

The onset of the COVID-19 pandemic in the United States has exposed employer practices and policy gaps that leave millions of America’s workers—and their families and communities—at risk of grave illness and financial ruin. Work should provide people with financial and physical security and ensure the same for their families and communities. In these volatile times, safeguarding the long-term health of the U.S. economy and society will require that all working people have good jobs that provide livable wages and benefits and a robust set of policies and programs that provide workers with the economic security to weather unexpected injury or illness and job loss.

The COVID-19 pandemic has exposed the ways in which many workers have been left out of this picture. For decades, corporate interests and their political agents have deprived workers of the security that we all need, either by under-resourcing enforcement and allowing corporations to cheat workers of both their rights and their day in court through forced arbitration agreements, or by going along with efforts to rewrite the rules and carve workers out of the protections of labor standards.

What has resulted is millions of workers who are out of work during this pandemic—construction workers, manicurists and hairdressers, retail and restaurant workers and others—or whose work is needed more than ever—cleaners, homecare workers, delivery drivers—but who have been told over and over by their employers that they are “independent contractors” who are not entitled to unemployment insurance benefits, paid sick days, health and safety protections, or paid family and medical leave protections. Many are workers in low-wage jobs who can ill afford to take unpaid time off: a recent New York study found that low-paid independent contractors in personal services, construction, transportation, arts, retail, home health, accommodation, and food services have seen annual earnings fall over the past decade. Many are workers of color: Black and Latinx workers are overrepresented in so-called app-based “gig” jobs, making wrongly classifying workers another tool for upholding structural racism. Combined, Black and Latinx workers constitute

less than 29 percent of the workforce, but almost 42 percent of workers on apps like Uber, Handy, Postmates, and Amazon Flex.

The good news is that we can fix this for the short- and long-term. States and cities can ensure that these workers are immediately eligible for the benefits their employers have denied them, by taking a few urgent steps that can protect our communities in both the immediate future and for the long term.

## Unemployment Insurance: States Can Take Administrative Action to Extend Protections to Vulnerable Misclassified Workers

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Unemployment insurance (UI) is the first line of defense in a recession and is available to all workers who are “employees.” Many states have adopted some form of the expansive “ABC” definition of who is an employee under state law,<sup>1</sup> with no exclusions for “gig” workers. These include California, Colorado, Connecticut, Hawaii, Illinois, Louisiana, Maryland, Massachusetts, Nebraska, Nevada, New Jersey, New Mexico, Oregon, Pennsylvania, Vermont, and Washington. Even in states without an ABC test, the broad definition of employee, if properly interpreted, would cover many currently misclassified workers. For example:

At least one state, Oregon, has administrative guidance that Uber drivers are employees. Other states have made determinations in individual cases that the following are employees who have been wrongly classified by their employers as “independent contractors”:

- Salespeople<sup>2</sup>
- Owner-operator truck drivers<sup>3</sup> and delivery drivers<sup>4</sup>
- Models,<sup>5</sup> entertainers,<sup>6</sup> and dancers<sup>7</sup>
- Private instructors<sup>8</sup>
- Limousine drivers<sup>9</sup>

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<sup>1</sup> The ABC test generally presumes that workers are employees unless they are A) free from direction and control of the employer; and B) performing work outside the employer’s usual business (and sometimes, outside the place of business; and C) has their own independent business.

<sup>2</sup> Connecticut, *Christina Stafford v. Dartmouth Pharmaceuticals, Inc.*, 9008-BR-02 (February 5, 2003); Hawaii, *Homes Consultant Co., Inc. v. Aagsalud*, 2 Haw. App. 421 (Intermediate Ct. App. Hawaii 1981); Illinois, *Murphy v. Daumit*, 387 Ill. 406 (1944); Massachusetts, *Valle v. Powertech Industrial Co. Ltd.*, 2019 WL 1437865 (D.Mass. 2019); New Jersey, *N.E.I. Jewelmasters of New Jersey, Inc. v. Board of Review, Dept. of Labor*, 2016 WL 3449263 (Super. Ct. N.J. 2016); Vermont, *Vermont Securities, Inc. v. Vermont Unemployment Compensation Commission*, 118 Vt. 196 (1954); *In re Bargain Busters, Inc.*, 130 Vt. 112 (1972)

<sup>3</sup> Connecticut, *Adam Sakowski v. George Hildebrandt, Inc.*, 9008-BR-13 (May 15, 2014); Illinois, *C.R. England, Inc. v. Department of Employment Sec.*, 7 N.E.3d 864 (App. Ct. Ill. 2014); Washington, *Swanson Hay Company v. State Employment Security Department*, 1 Wash. App. 2d 174 (Ct. App. Wash. 2017)

<sup>4</sup> Illinois, *AFM Messenger Service, Inc. v. Department of Employment Security*, 198 Ill.2d 380 (2002); Maryland, *Brenco Enterprises, Inc.*, [2089-BH-99 \(August 6, 1999\)](#); [Massachusetts Athol Daily News v. Board of Review of the Division of Employment and Training](#), 439 Mass. 171 (Supreme Judicial Ct. Mass. 2003); *Fucci v. Eastern Connection Operating, Inc.*, 2009 WL 10459677 (Super. Ct. Mass. 2009); *Chambers v. RDI Logistics, Inc.*, 476 Mass. 95 (2016); New Hampshire, *In re Aspen Contracting NE, LLC*, 164 N.H. 88 (2012); New Jersey, *Hargrove v. Sleepy’s, LLC*, 220 N.J. 289 (2015)

<sup>5</sup> Illinois, *Photographic Illustrations, Inc. v. Murphy*, 389 Ill. 34 (1945)

<sup>6</sup> New Hampshire, *Appeal of Niadni, Inc.*, 166 N.H. 256 (2014).

<sup>7</sup> Massachusetts, *Chaves v. King Arthur’s Lounge*, 2009 WL 3188948 (Super. Ct. Mass. 2009).

<sup>8</sup> Illinois, *Spahn v. Department of Labor*, 25 Ill. 2d 482 (1962); Washington, *In re: Ruby Street Quiltworks*, [Empl. Sec. Comm’r Dec. 2d 996 \(May 15, 2013\)](#)

<sup>9</sup> *O’Hare-Midway Limousine Service, Inc. v. Baker*, 232 Ill. App. 3d 108 (App. Ct. Ill. 1992); New Jersey, *Pendola v. Milenio Express, Inc.*, 2018 WL 5304570 (Super. Ct. N.J. 2018).

- Salon and barbershop booth renters<sup>10</sup>
- Janitors<sup>11</sup> and property maintenance workers<sup>12</sup>
- Homecare workers<sup>13</sup>
- Uber drivers<sup>14</sup>

Nearly every state can immediately begin processing unemployment insurance claims by workers who have been left out of the system. States need to take these steps, urgently:

- Announce that certain workers are **presumptively eligible** for unemployment insurance—including clearly identifying online platform employers like Uber and Lyft that are likely to have thousands of jobless workers applying for benefits—and accept a simple attestation from workers that shows that they meet the definition of employee;
- Since their employers have not reported wages into state systems and payroll records are an application requirement, **allow workers to upload evidence of their earnings** when applying and accept any evidence that workers have at hand, while allowing workers an additional short period to collect earnings data and submit it to the agency;
- **Expedite processing** of such applications, so that benefits get out the door quickly;
- Take steps to **audit large employers** whose workers are presumptively eligible. With so many state funds in an already depleted state, agencies cannot afford to give free passes to employers who cheat. For example, the State of New Jersey has recently assessed \$649 million against Uber for failing to pay its payroll taxes.

States should also take additional steps to ensure that all workers—whether classified by their employers as “employees” or “independent contractors”—can readily access unemployment benefits. These include:

- Ensuring that leaving work because of caregiving responsibilities or because they are exposed to dangerous working conditions constitutes “**good cause**”;
- **Conducting outreach** in several languages in order to reach all workers in need. The recent Labor Department guidance on COVID-19 refers to the agency’s earlier guidance on language accessibility;
- Ensuring that eligibility includes illness, quarantine, self-quarantine, and cases in which the employer shuts down or reduces hours;
- **Waiving the “waiting week,”** in accordance with new U.S. Labor Department guidelines;
- **Waiving the requirement for active work search,** also in accordance with new federal guidelines; and
- Increase benefit levels for all workers to more closely track the amount of wages they are losing.

In **California**, a state that passed an ABC bill in 2019, the Legislative Analyst’s Office has issued the following statement (emphasis added):

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<sup>10</sup> Maryland, *Department of Employment Sec. v. Charlie’s Barber Shop*, 230 Md. 470 (Ct. App. Md. 1963); Washington, *McDermot v. State*, 196 Was. 261 (1938).

<sup>11</sup> Massachusetts, *Coverall North America, Inc. v. Commissioner of the Division of Unemployment Assistance*, 447 Mass. 852 (Supreme Judicial Ct. Mass. 2006); Washington, *In Re: Building Maintenance Specialists*, Empl. Sec. Comm’r Dec. 2d 995 (Dec. 12, 2014).

<sup>12</sup> Connecticut, *Speer v. Administrator, Unemployment Compensation Act*, 2014 WL 3893233 (Superior Ct. Conn. July 1, 2014).

<sup>13</sup> Connecticut, *Carol Trask v. Clarice Franklin*, 9001-BR-00(March 17, 2000).

<sup>14</sup> In the Matter of Uber Technologies Inc., N.Y. Unemployment Ins. Appeal Bd., No. 596722, July 12, 2018.

“In order to speed up the process of issuing benefits to app-based workers who may be eligible for UI, the state may wish to direct EDD to consider individuals **presumptively eligible for UI** if they provide documentation of earnings from app-based companies. Furthermore, the state may wish to consider **standardizing earnings determinations for these individuals**. (Typically, UI benefit amounts are based on payroll earnings confirmed by EDD. Workers for app-based companies are not treated as payroll employees so these records may be difficult to confirm.) One option to simplify earnings determinations could be to **issue benefits immediately based on worker-reported earnings and verify those earnings later**. Another option the Legislature may wish to consider is providing a flat, standard, weekly benefit amount for UI applicants who attest that their primary income source prior to the COVID-19 pandemic was from app-based work. In either case, ***EDD would seek to recoup these benefit costs from app-based companies later.***”

For additional policy options for the states to mitigate job loss during the pandemic and recession, see NELP’s [“Coronavirus and Unemployment Insurance: Options for Policymakers to Mitigate Job Loss,”](#) and our [sign-on letter to Congress](#).

Some action is already being taken in the states:

In **California**, where Assembly Bill 5 uses the simple ABC test and reclassifies many workers as employees, Assemblywoman Lorena Gonzalez, the AB5 sponsor, is [calling for state agencies to immediately process misclassified independent contractors as employees eligible for UI](#). Drivers and other gig workers also are [calling for recognition of employee status](#), with access to paid sick leave and other benefits.

The **New Jersey** legislature just passed a [temporary lost wage unemployment program](#) to provide income assistance to “individuals” (broadly defined) who lose wages due to COVID-19. Because the program is broadly defined, it is accessible to many workers who might not qualify for other assistance (e.g., undocumented individuals).

## **State Legislative Action to Create an Inclusive UI System**

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Some states will need to take legislative action to reincorporate certain sectors into their unemployment insurance systems. This is because they have passed special exemptions, at the companies’ requests, for [transportation network company drivers](#) or [all “gig” workers](#). These states may need legislation to clarify that workers are not exempt, by sector, from the protection of the laws.

States should review their additional sector-based exclusions from unemployment insurance as well, and remove outdated exclusions—especially those that cover workers who are particularly affected by the pandemic, such as domestic workers, certain agricultural employers, newspaper delivery people, outside salespeople, salon workers, and truck drivers.

There are several bills pending in Congress that would update and expand Disaster Unemployment Assistance. This program, fully funded by the federal government, covers self-employed workers. While it has potential to offer workers some assistance in the near

term, in the longer term, states should ensure they are collecting all of the payroll taxes they are owed, in order to ensure that all employers are paying their fair share and unemployment insurance trust funds are healthy. For more policy options, see NELP's ["Rebooting Disaster Unemployment Assistance."](#)

## **For the Health of All of Us, Everyone Needs Paid Sick Days**

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Paid sick leave is time off from work that workers can use to stay home to address their health and safety needs without loss of pay. Having paid sick leave is critical for individual and public health at all times, but especially important as we fight off the COVID-19 pandemic. Like unemployment insurance, paid sick laws generally protect only workers classified as employees. Ten states and 23 localities across the country have [passed paid sick days laws](#). While the laws often include expansive definitions of employee, massive companies like Amazon continue to claim that certain workers, such as delivery drivers, are [not their employees](#) and not eligible for paid sick leave.

The coronavirus crisis illustrates our interdependency and the reason all of us must have access to paid sick leave. Workers whom we especially rely on in this emergency—to bring food and supplies to quarantined families, care for children and elders, and clean public spaces, for example—must choose between working sick and risking deeper poverty. Workers, their families, and our community health are all at risk.

The federal coronavirus package recently approved by the Senate [provided for paid sick leave for only some employees](#). A second bill is the only current effort to ensure that workers labeled—rightly or wrongly—as independent contractors will have access to paid sick days. That bill, the PAID Leave Act ([Providing Americans Insured Days of Leave Act](#)), sponsored by Senators Patty Murray and Kirsten Gillibrand in the Senate and Representative Rosa DeLauro in the House, would provide two weeks of federally funded paid sick leave during the crisis, and employer-funded paid sick days after 2021.

In the meantime, cities are stepping up. In **New York**, [City Councilmember Brad Lander introduced legislation to use the ABC test](#) to ensure that many more workers are classified as employees eligible for the city's paid sick leave, with an emergency provision that would allow gig workers to immediately bypass accrual requirements during the coronavirus emergency. Advocates are calling for a city-run emergency fund, similar to **New Jersey's**, to provide income assistance to those who do not qualify for other kinds of assistance. The City Council speaker has also called for an emergency temporary basic income of \$550 for each adult and \$275 for each child.

In **Oakland**, California, the city has made clear in [guidance to business](#) that its paid sick leave law broadly covers workers, including "gig" workers.

Two additional city efforts to expand access to paid sick leave for employees can serve as models for expansion of protections to independent contractors. The **San Francisco** City Council amended its paid sick leave ordinance so that workers do not need a doctor's note to justify use of paid sick leave. In addition, the city's [Workers and Families First Program](#) will provide financial assistance to businesses to support additional paid sick leave, with a reserve of 20 percent to support small businesses.

The **Seattle** City Council just approved legislation that—while it does not address misclassification issues—would expand the reasons for which paid sick leave may be used, e.g., to cover closures of schools, day cares, and adult day care facilities.

States and cities should follow the leads of these jurisdictions. They should take steps to ensure paid sick leave covers all the sick leave needs of all working people during and after the COVID-19 pandemic. They should:

- Amend sick leave laws to include the expansive ABC test for “employee,” or specify that sick leave laws cover both employees and independent contractors;
- Amend sick leaves laws to include expansive uses for paid sick leave;
- Include emergency provisions like those in New York to ensure that all workers are able to take advantage of sick leave immediately;
- Allow true independent contractors and misclassified workers access to their emergency funds, as is being proposed in New York, to ensure that sick leave is actually made available;
- Allow small businesses to use emergency business funds to reimburse themselves for the cost of paid sick leave, unless Congress passes the federal PAID Act. In that case, all businesses will be refunded the cost of paid sick leave;
- Audit large employers whose workers are eligible for paid sick leave, but who have refused to treat workers as their employees.

## **Paid Family Leave for Every Family**

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At some point in the coming months, nearly everyone will need to take time away from work for coronavirus-related reasons, such as self-quarantine and the closure of schools and day cares. But 81 percent of people working in the United States have no access to paid family and medical leave through their employers: among them, workers at large meat and poultry plants who are helping to stock our freezers during this crisis have no paid leave. Only the states of **California, Oregon, Connecticut, New Jersey, Rhode Island, New York, Washington, Massachusetts** and the **District of Columbia** have laws mandating paid family and medical leave (PFML). The recently approved federal coronavirus package made 12 weeks of job-protected leave available to certain employees only. The Murray/Gillibrand/DeLauro PAID Leave Act would expand leave to workers classified as independent contractors, funded by the federal government during the pandemic, and converting to a self-funded program in 2021.

Of the states that have existing paid leave laws, most have expansive definitions of the word “employee.” In California and Rhode Island, the worker’s own disability and family care portions of PFML are paid for by the employee. In addition, in California, Oregon, Connecticut, Washington State, the District of Columbia, and Massachusetts, independent contractors are allowed to buy into the protection of the law. In Massachusetts, businesses that employ 50 percent or more of their workers as independent contractors are obligated to cover their workers.

These definitions and funding sources outline a path to immediate coverage for workers classified as independent contractors in these states. States that already have paid leave laws should:

- Allow workers treated as independent contractors to immediately buy into the system at the employee rate;
- Ensure that 90 days of paid sick are available to all workers, at a rate of at least two-thirds of regular pay;
- Ensure broad eligibility for all workers, to cover school and business closures, illness, or care for a family member, including family members who are quarantined due to exposure.

## **Conclusion**

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The current crisis has exposed gaping holes in our country's social benefits. Now is the time to correct these holes over the long haul, ensure that businesses are living up to their responsibility towards workers, and protect the health, security and safety of workers, their families, and their communities. While Congress may yet take bold action, states and cities have a role to play. Local jurisdictions can immediately take transformative moves that create the just and inclusive economy that all of us deserve.

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