NATIONAL EMPLOYMENT LAW PROJECT

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February 25, 2022

Re: Opposition to HB 2076

To Members of the Washington State Senate:

I am the Executive Director of the National Employment Law Project, a national nonprofit with more than fifty years of experience advocating for the employment and labor rights of underpaid and unemployed workers. For decades, we have focused on the ways in which various work structures—calling workers "independent contractors," contracting with temp and staffing agencies, managing workers through algorithms—worsen income and wealth inequality, the segregation of workers by race and gender, and the ability for workers to come together to negotiate with businesses over wages and working conditions.

I am writing to urge the Washington State Senate to oppose HB 2076.

While HB 2076 includes certain novel ways to provide protections for ride-hail drivers ("TNC drivers"), it also features critical policy compromises that we cannot support.

First, HB 2076 denies TNC drivers bedrock employment protections. For the purposes of minimum wage and overtime, paid sick leave, paid family and medical leave, long term care, and unemployment insurance, the bill classifies TNC drivers as non-employees; for workers' compensation, the bill classifies them as "workers." That means that TNC drivers, as non-employees, cannot access the foundational protections that workers and unions have fought to win and expand over decades.

Moreover, two of the limited benefits provided by HB 2076—a minimum pay standard and paid sick leave—accrue on the basis of "passenger platform time," *i.e.,* when a passenger is physically inside the driver's vehicle.[1] But providing minimum pay standards and sick time based only on "passenger platform time" ignores a substantial amount of workers' time on the job. One study estimates that nearly half of drivers' time in the Seattle metropolitan area is spent logged onto the app but without a passenger in the vehicle.[2] Although drivers functionally are

[1] The bill also provides workers' compensation. Its accrual rate and premiums include "passenger platform time" and "dispatch platform time," when a TNC driver has accepted an offer and is traveling to pick up a passenger.
[2] Melissa Balding, et al., *Estimating TNC Share of VMT in Six U.S. Metropolitan Regions (Revision 1)*, Fehr & Peers, p. 9, Figure 3, Breakdown of TNC VMT by Phase for each Metro Region (Aug. 6, 2019), https://www.fehrandpeers.com/what-are-tncs-share-of-vmt/.

working during this time, and although TNC employers benefit from the data generated by drivers logged onto the app, almost half of drivers' time on the app would go uncompensated.[3] Therefore, HB 2076 creates an inferior set of benefits than those available to employees.

Second, HB 2076 preempts municipalities from improving standards for TNC drivers in the future. If the bill passes, no locality may pass new laws or regulations improving standards for TNC drivers or regulating the TNCs. As issues in the industry arise, and as TNC drivers face new challenges in their working conditions, cities will not be able to respond. Local municipalities are well positioned to meet the problems that workers are facing on the ground. For example, Seattle's pandemic protections for app workers, including paid sick leave and hazard pay, have provided a critical support for transportation and delivery workers. Without the ability for cities to legislate going forward, workers will lose a critical advocacy target that has provided them crucial wins.

Finally, HB 2076 sets a dangerous precedent. Across the country, app-based companies are seeking to change laws so that they can avoid complying with baseline labor and employment rights and protections. They seek special treatment, arguing that hiring and managing workers through a digital algorithm somehow exempts them from obligations to their workers and the public.[4] In reality, app-based companies' misclassification of their workers is the latest iteration of a long-running trend of mislabeling workers in underpaid, insecure and unsafe jobs where people of color are doing a disproportionate share of the work—jobs like janitorial services, delivery, trucking, and home care—as independent contractors in order to depress wages and working conditions and maximize corporate profits.[5] In seeking to enshrine a second-class employment status for Washington's TNC drivers, who are disproportionately people of color and immigrants, this bill harkens back to the racist exclusion of farmworkers, domestic workers and tipped workers from the Fair Labor Standards Act.[6]

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[3] Economic and legal experts have argued that drivers' wait time should be compensated. *See*, *e.g.*, Ross Eisenbrey and Lawrence Mishel, *Uber Business Model Does not Justify a New "Independent Worker" Category*, Economic Policy Institute (March 17, 2016), https://www.epi.org/publication/uber-business-model-does-not-justify-a-new-independent-worker-category/.

[4] *See*, *e.g.*, Maya Pinto, et al., *Rights at Risk: Gig Companies' Campaign to Upend Employment as We Know It*, National Employment Law Project (Mar. 25, 2019), https://www.nelp.org/publication/rights-at-risk-gig-companies-campaign-to-upend-employment-as-we-know-it/; Brian Chen & Laura Padin, *Prop 22 was a Failure for California's App-Based Workers. Now it's Unconstitutional.*, National Employment Law Project (Sept. 16, 2021), https://www.nelp.org/blog/prop-22-unconstitutional/.

[5] *See* Lynn Rhinehart, et al., *Misclassification, the ABC Test, and Employee Status,* Economic Policy Institute, June 16, 2021, https://www.epi.org/publication/misclassification-the-abc-test-and-employee-status-the-california-experience-and-its-relevance-to-current-policy-debates/.

[6] According to BLS data, Black and Latino workers make up almost 42 percent of workers for Instacart and other "electronically mediated work" companies, although they comprise less than 29 percent of the overall U.S. workforce. Bureau of Labor Statistics, U.S. Dep't of Labor, Electronically Mediated Work: New Questions in the Contingent Worker Supplement, Monthly Labor Rev. (Sept. 2018), https://www.bls.gov/opub/mlr/2018/article/electronically-mediated-work-new-questions-in-the-contingent-worker-supplement.htm.

These corporate tactics go beyond app-based drivers. Through lobbying groups like the Coalition for Workforce Innovation, a conglomeration of app-based companies, temporary staffing agencies, multi-level marketing companies, and their allies, corporate interests are lobbying to expand their notion of "independent work", *i.e.*, the false narrative that providing workers with some measure of scheduling flexibility is incompatible with employee rights and protections.[7] Just recently, a proposed ballot initiative was introduced in California that would have made it easier for employers who obtain health care workers through an app to classify these workers as independent contractors.[8] For these corporations, the endgame is a world where baseline labor standards no longer are the baseline; where workers take on the risk and costs, but not the actual independence, of running their own business; and where more and more profit goes from workers to corporate executives.

Washington State should send the message that it will not tolerate attempts to exclude categories of workers from the baseline rights and protections to which all employees are entitled.

For these reasons, NELP opposes HB 2076 in its current form and urges Washington State senators to oppose the bill.

Sincerely,

Rebecca Dixon
Executive Director
National Employment Law Project

CC: Governor Jay Inslee
Attorney General Bob Ferguson

[7] *See* Coalition for Workforce Innovation, https://workforceinnovation.net/.
[8] The proposed ballot initiative was withdrawn a couple of days ago. Erin Mulvaney, *Health-Care Worker Job Status Proposal Scuttled in California*, BLOOMBERG LAW NEWS, Feb. 23, 2022.