

THE “RIGHTS ON DEMAND” SERIES

The On-Demand Economy & State Labor Protections

State Legislatures and Agencies Can Better Protect On-Demand and Other Contingent Workers in Their Labor Laws

More and more, America’s workers are seeing their jobs deliver less and less of what they need to get by, in part because the companies they work for shift risks away from themselves and onto workers, while retaining profits for themselves. In particular, in the sector referred to as the on-demand economy, many online and app-based companies seek and provide workers who drive, clean, deliver food, do odd jobs, care for children and elders, and perform tasks online—often for very little money, with no job security, and no labor protections at all. Their employers get away with this major workplace violation largely by classifying their workers as independent contractors—who are not, by traditional definitions, guaranteed the same protections as employees. Unfortunately, these kinds of practices are rapidly expanding: though the on-demand sector is still a small part of the economy overall, it has grown ten-fold in the last three years.¹

With more people engaging in work for on-demand companies, the question of whether these workers are covered by labor and employment standards and protections has become a central one. Much can be done to strategically and aggressively enforce existing labor and employment protections for these workers. This policy brief goes further and includes model language to help legislatures to clearly cover on-demand workers under basic labor and employment protections.

This guide is intended to assist agency officials and policymakers in ensuring that, no matter how companies choose to label their workforce, workers are protected by core labor standards. It is also intended to provide defensive antidotes to efforts by some transportation network companies (TNCs) and corporations in other sectors to convince lawmakers to exempt their businesses and their workers from state definitions of “employer” and “employee²”—merely because the companies have the influence to obtain such a categorical exemption.

Worker Classification and Employer Status in the On-Demand Economy

Often, rather than classifying their workers as employees, on-demand companies describe their workforce as “independent contractors,” a status that their workers are forced to accept as a condition of employment. In many cases, this label is wrong, and the practice is illegal.

To start, on-demand workers are not typically running their own, separate businesses, the hallmark of independent contractor status. Instead, many on-demand workers perform tasks that are integrated into the larger company’s

work. At the same time, these companies often screen, train, supervise, dictate pay and assignments, and discipline and fire workers—just like any other employer.

Despite the fact that on-demand companies often act as traditional employers in such key ways, many have been able to use the independent contractor label to transfer the burdens and risk of operating a business from the company to individual workers. Simply put, companies that use this model enjoy all the power and profits that come with being the boss—absent much of the responsibility.

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The on-demand sector is a tiny part of a much larger and more longstanding problem related to the disaggregation of work and the disavowal by many corporations of their responsibilities to workers.³

Some Leading Companies Aggressively Challenge Employer Status and Aggressively Lobby for Special Treatment

Many state (and federal) labor laws have employment definitions that are expansive enough to cover workers in the on-demand economy.⁴ But as state agencies and courts have begun to find that some on-demand companies should actually be defined as “employers” under longstanding laws, key players in the on-demand sector are trying to rewrite the normal rules that determine employer-employee status, and thereby evade labor and employment responsibilities for their workers.

The transportation network company (TNC) Uber reportedly has 250 lobbyists working for it at the state level. So it should come as no surprise that, in just the past two legislative sessions, 2015-2016,⁵ twenty-three states have created special employment tests that apply only to TNC companies, and that exempt TNC’s, in most or all cases, from obligations to pay minimum wage, or to make payroll deductions for state workers’ compensation and unemployment insurance—effectively ensuring that these companies are off the hook for all labor and employment and tax rules. The state statutes include presumptions that TNC drivers are not employees, unless the companies have treated them as employees in their contracts (which are of course drafted by the companies themselves).

States that have passed special labor law exemptions for TNCs:

Alabama, Arkansas, Idaho, Indiana, Iowa, Kansas, Maine, Michigan, Mississippi, Missouri, New Hampshire, New Mexico, Nevada, North Carolina, North Dakota, Ohio, Oklahoma, Rhode Island, South Dakota, Tennessee, Texas, Utah, West Virginia.⁶

High profile litigation is pending against a number of companies in the on-demand economy that label their workers as independent contractors, while treating them as employees. This litigation is expensive, intimidating, and time-consuming for many workers, who are up against major corporations with vast legal resources. Many companies are aggressively fighting workers' claims in court, while using arbitration agreements to ensure that other workers' claims are privately and individually adjudicated.⁷

How Should Agency Officials and Policymakers Address Worker Classification in the On-Demand Economy?

Despite the obstacles created by on-demand employers, there are steps that administrative agencies and legislative bodies can take to ensure that on-demand workers and other misclassified workers receive the minimum wages they are entitled to, as well as workers' compensation to cover their on-the-job injuries, and unemployment insurance comparable to what other workers receive. State agencies can also ensure that they are collecting employment taxes from on-demand businesses operating within their states. These unpaid funds can be substantial: A 2010 study estimated that misclassifying workers shifts \$831.4 million in unemployment insurance taxes and \$2.54 billion in workers' compensation premiums to law-abiding businesses annually.⁸

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At least 19 states have already established interagency task forces or study commissions aimed at combating independent contractor misclassification across the labor market, creating a variety of data and enforcement initiatives which could be brought to bear.⁹

State administrators and policymakers can pursue two strategies.

First, they can focus on enforcing existing laws. In many cases, there are already broad definitions in state law that cover workers in the on-demand economy. State and local agencies should audit companies to ensure that they are complying with state labor standards laws and contributing to state funds for the benefit of workers.¹⁰

Second, policymakers can address employer accountability by rejecting companies' attempts to exempt themselves from laws that apply to other businesses, providing clearer and more expansive definitions of "employee" and "employment" in their states' workplace laws, extending workplace protections to true freelancers, and making companies responsible for workers hired through labor intermediaries.¹¹ The benefits of these kinds of efforts would be extensive for both workers and employers: when definitions are clear, companies are plainly subject to the law and the potential for litigation over who is an "employee" and who is responsible as an "employer" is minimized.

Enforcement Strategies

Many state and local labor standards laws already contain broad definitions describing who is an employee under a particular law. For example:

- A majority of states have adopted what's called the "ABC" test to define "employee" for the purposes of their unemployment compensation laws. These laws create presumptions that any individual performing services for a company is its employee, and require a company to counter with a showing of all three of these elements: (a) the individual is working outside the usual course of business of the company, (b) she is engaged in an independently established business, *and* (c) she is free from the control of the company.¹² Some states have these laws, including the ABC test and the presumption, in wage and hour laws.¹³
- Nearly all minimum wage acts include a separate, but equally broad test, called the "suffer or permit" test, modeled on the Federal Fair Labor Standards Act.¹⁴ This has been called the broadest definition of employment by the U.S. Supreme Court, and the U.S. Department of Labor says that under that test, most workers should be covered.¹⁵
- For purposes of workers' compensation, a common definition of a covered worker includes anyone rendering services to a business for wages, and state laws often explicitly cover workers operating under a contract. Absent any specific exemptions, this definition should be broad enough to cover nearly all workers in the on-demand economy as well as many other misclassified workers.
- States can issue guidance or conduct audits of on-demand companies suspected of misclassifying workers. For example, using its state's broad definitions, the Oregon Bureau of Labor and Industries issued guidance saying that transportation network drivers are likely "employees" for the purposes of its minimum wage, workers' compensation and other protections.¹⁶ In fall of 2015, Uber settled a claim with the Alaska Department of Labor and Workforce Development in which it agreed not to operate in Alaska if it continued to classify its workers as independent contractors.¹⁷
- As individual claims for unemployment benefits, workers' compensation and wage theft arise, state agencies will also be called upon to issue decisions interpreting their broad laws. In the summer of 2015, both the California Employment Development Department and the state Labor Commission found, in separate individual cases, Uber drivers to be employees for purposes of unemployment benefits and wage and hour law.¹⁸ These rulings serve as models for other state agencies' approaches to enforcement of existing laws.

Legislative Strategies

State legislatures should resist attempts by on-demand companies to create special exemptions from state laws. Lawmakers can also clarify the definitions in their laws to ensure that these companies cannot game the system. Finally, they can include innovative strategies to extend coverage of labor and employment laws to true freelancers.

Who is an Employee? Cover Workers Performing Services That Are Part of the Regular Course of the Business

The essence of “employee” status is that workers are doing the work of the company. Uber wouldn’t exist without Uber drivers. Likewise, janitorial companies are not companies at all unless they have janitors working for them, while homecare agencies depend on homecare workers to stay in business. A simplifying definition, stating that workers doing the job of the company are its employees, and that a company that engages them is their employer, would address the gaming that many companies currently engage in when they claim that their core workers aren’t employees.

As noted, some state workers’ compensation laws require that workers be covered “employees” when their work is integral to the operation of the company. The language generally applies to work that is “an operation of the usual business,”¹⁹ “part or process” of a trade or business,²⁰ or “part of the trade, business or occupation” of the company.

MODEL LANGUAGE

- *“Employer” includes any person acting directly or indirectly in the interest of an employer in relation to an employee.*
- *“Employee” means any individual employed by an employer. An individual performing labor for an entity is presumed to be the employee of that entity, unless it is shown by a preponderance of the evidence that:
*she is working outside the regular course of operations of the entity; and engaged in an independently established business, for which she independently establishes the price of her labor.**
- *“Employ” includes to suffer or permit to work.²¹*
- *“Labor” includes any labor, work, or service, whether rendered or performed under contract, subcontract, partnership, or other agreement, if the labor to be paid for is performed personally by the person demanding payment, with or without the use of equipment or tools.²²*

What Entities Are Potential “Employers?”: Use of Labor Intermediaries

In some instances, it is particularly important to assign “employer” status to a company that might otherwise claim that some other entity is the workers’ employer. Some on-demand companies have corporate clients who themselves might be considered “employers” under current law. Others engage staffing companies or insert additional companies between themselves and their workers, who in those cases could be employed by both entities. To guarantee that labor standards laws are complied with, California has enacted a law which states, “A client employer shall share with a labor contractor all civil legal responsibility and civil liability for all workers supplied by that labor contractor.”²³ This law could be applied to on-demand companies and their clients as well, given that the platforms both operate as labor intermediaries and sometimes engage labor intermediaries.²⁴

Target Particular Sectors

A still more definitive approach is to simply declare affirmatively that certain workers who are frequently misclassified, be they called “contractors” or employees, are entitled to critical labor protections—and that certain entities must provide those protections. This approach is modeled on a provision in the Social Security Act that requires businesses—no matter how they label certain workers, including some delivery workers, insurance sales agents, homeworkers, and traveling salespeople—to contribute to those workers’ Social Security accounts.²⁵

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Transportation, delivery, and home services, (including domestic work, like caregiving), are three of the most common sectors that are the focus of on-demand businesses and that are frequently the subject of litigation over independent contractor misclassification. Uber and Lyft, the house cleaning services Handy and Homejoy, and the delivery services Postmates, TryCaviar, and Amazon PrimeNow all are or have been the subjects of employee status litigation.²⁶

Several states have also aimed laws at particularly troublesome sectors by automatically covering companies as “employers” under labor standards laws, in particular in construction, but additionally in transportation and home care.²⁷

Below is suggested definitional language that could be used to protect workers in two common on-demand sectors:

MODEL LANGUAGE

Definition covering transportation network companies as explicitly covered as an “employer”:

- *“Transportation network company” includes a corporation, partnership, association, limited liability company, proprietorship, or any other entity operating in this state that uses a digital network to connect riders to drivers for the purpose of providing transportation.*²⁸

Definition covering domestic work:

- *“Domestic worker” means any individual or employee who performs work of a domestic nature, including, but not limited to, housekeeping, house cleaning, home management, nanny services, including childcare and child monitoring, caretaking of individuals in the home, including sick, convalescing, elderly, or disabled individuals, laundering, cooking, home companion services, and other household services for members of households or their guests in or about private homes.*

Legislatures could also use a broader definition that would cover networked companies in general as employers:

- *A network dispatch company is an entity that uses a digital network to connect people or entities seeking services, with people seeking to provide services.*

Enact Labor Standards for Freelancers

Policymakers are beginning to consider labor standards that should apply to workers whether or not they are considered employees. Since traditional labor standards laws apply only to “employees,” true freelancers face difficulties securing on-time payments. In New York, the “Freelancing Isn’t Free” campaign by the Freelancers Union, created an ordinance that would require a written contract between a freelancer and client, and payment within 30 days of completion of work. On October 13, 2016, the New York City Council passed the ordinance, and Councilmember Brad Lander has said he intends to introduce legislation that would extend the protections of New York’s Human Rights Law to freelancers.²⁹

Conclusion

There is no doubt that technology has a tremendous potential to improve businesses, consumers, workers, and our economy overall. But use of new technology should not be an excuse for companies to engage in old-style gaming of the core labor and employment laws that created the American middle class, and that are key to ensuring that working families have the most basic levels of economic security. Instead, as new technology develops, it must be harnessed to build a more inclusive economy—one that delivers a secure income, social protections, and the right to engage in collective action to all of America’s workers.

The National Employment Law Project (NELP) aspires to build an economy that, in its rules and rewards, 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

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- 9 CT HB 5113 (Pub. Act 08-105), SB56 (2008); IL HB 1795 (Pub. Act 95-0026) (2008); IN SB 478 (P.L.164-2009); IA Exec. Order No. 8 (2008); ME Exec. Order 23 FY 08/09; MD Workplace Fraud Act of 2009; MA HB 1835 (2008); MI Exec. Order 2008-1 (2008); MN Advisory Taskforce on Employee Misclassification: Report to the 2011-12 Biennium, 87th Legislature; NC Exec. Order 125 (2012); NH SB500 (2008), Exec. Order 2010-3; NJ Governor’s Advisory Comm. on Construction Industry Independent Contractor Reform; NY Exec. Order 17 (2007); NV SCR 26 (BDR R-1297) (2009); OR HB 2815 (2009); RI SB 3099, HB 7907B (2008); UT SB 189 (2008), amended by S11 (2011); VT S.345 (2008), Exec. Order 08-12 (2012); WA SB 5926 (2007).
- 10 See *Independent Contractor v. Employee*, supra n. 2, for other strategies that state and local agencies can employ, including interagency task forces, procurement rules, and community collaborations.
- 11 For more information on subcontracting and outsourcing, see “Who’s the Boss: Restoring Accountability for Labor Standards in Outsourced Work,” (National Employment Law Project, 2014) <http://nelp.org/publication/whos-the-boss-restoring-accountability-for-labor-standards-in-outsourced-work/>; “Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries,” (National Employment Law Project, July 2015), <http://nelp.org/content/uploads/Independent-Contractor-Costs.pdf>.
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- 18 Uber has claimed that other state agencies have found its drivers to be independent contractors, but those decisions are not publically available. See Ashley Venover, *California Employment Department Rules Uber Driver is Not Contractor*, Top Class Actions, (Sep. 29, 2015), <http://topclassactions.com/lawsuit-settlements/lawsuit-news/161802-calif-employment-dept-rules-uber-driver-is-not-contractor/>.
- 19 Mo. Rev. Stat. s 287.010(1).
- 20 Conn. Gen. Stat. Ann. § 31-291. See also, S.C. Code Ann. Title § 42-1-400.
- 21 California Labor Code, § 2810.3.

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- ²² California Labor Code, § 200.
- ²³ California Labor Code, § 2810.3.
- ²⁴ Some platforms provide a referral for a fee and have no ongoing relationship with the recipient or provider of the labor or services after that referral. If new laws are proposed, an exemption could be created for a platform that only provides listings of services that are contracted directly by users and providers of services, and that has no ongoing engagement with the worker or the recipient, and receives no income related to the price of services. Exemptions could also be created for non-profit providers of referrals through a hiring hall, such as unions.
- ²⁵ See IRS, *Statutory Employees*, <http://www.irs.gov/Businesses/Small-Businesses-&Self-Employed/Statutory-Employees>.
- ²⁶ 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://nelp.org/content/uploads/Rights-On-Demand-Report.pdf>; Katy Steinmetz, "Homejoy, Postmates, and Try Caviar Sued Over Labor Practices," *Time*, (Mar. 19, 2015), <http://time.com/3751745/postmates-homejoy-try-caviar-lawsuits/>; Ananya Bhattacharya, "Amazon Sued by Delivery Drivers," (CNNMoney, Oct. 29, 2015), <http://money.cnn.com/2015/10/29/technology/amazon-sued-prime-now-delivery-drivers/>.
- ²⁷ Independent Contractor v. Employee, *supra*, n. 2.
- ²⁸ This language is common among the states that have passed legislation exempting transportation network drivers from state laws. See e.g. Ariz. Rev. Stat § 41.-2138, Ark. Code § 23-13-702, Colo. Rev. Stat. § 40-10.1-602(3), Iowa Code 1101.321, Mo. Rev. Stat. § 279.1700, N.H. Rev. Stat. § 376-A:1, W. Va. Code § 17-29-1.
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