

The background of the entire page is a black and white photograph of a person's hands on a steering wheel, driving at night. The background is filled with out-of-focus city lights, creating a bokeh effect. The dashboard and a digital display are visible in the lower right.

Rights on Demand:

Ensuring Workplace Standards and Worker Security
In the On-Demand Economy

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About NELP

For more than 45 years, the National Employment Law Project has worked to restore the promise of economic opportunity for working families across America. In partnership with grassroots and national allies, NELP promotes policies to create good jobs, enforce hard-won workplace rights, and help unemployed workers regain their economic footing. For more information, visit us at www.nelp.org.

Introduction

The organization of work is changing rapidly for America's workers. While the latter decades of the 20th century witnessed a transformation from the post-World War II paradigm of long-term stable employment with a single employer to an economy in which many individuals expected to move through several jobs over their careers, the 21st century surge in new technologies has upended even those expectations. For millions today and in the future, the hope of attaining career-long security and support through one or more jobs is giving way to the reality of piece-rate work—and piecemeal economic insecurity—often, in one-time, part-time, hours-long, and be-your-own-boss short-term “gigs,” assigned to them by well-capitalized brokers of labor.

The “on-demand” economy is garnering increasing public attention, from partisan sparring on the campaign trail to articles and editorials hailing the opportunities and highlighting the obstacles stemming from this rising sector. But the reality is that for some time, workers and organizers have been pulling back the veil on the on-demand economy, shedding light on online app-based companies that are amassing revenues and profits through the labor of growing numbers of individual workers who provide the services the companies market to others.

In the face of mounting criticism over their treatment of workers, many of these companies have argued that any labor regulation will crush the innovation they have advanced. They say they are not employers, and the individuals whose labor they profit from are not their employees, because they offer only an online platform that workers and consumers use to find each other. This argument, however, ignores the fact that these on-demand companies are actually performing a labor-brokering function that is not new but has been around for decades. At its core, their business is to dispatch workers who provide services to consumers and businesses. The use of online platforms to broker work should not insulate businesses from employer status, nor do the artificial labels these businesses attach to their workers define the employment relationship. Simply put: many

individuals working in the on-demand economy are employees, and their employers should treat them as such.

Regardless of how these businesses characterize their relationships with workers, they should not be allowed to shut workers out of what our nation's baseline labor standards were intended to convey: the opportunity to achieve and sustain economic security through work. The technology used by these companies and others holds enormous potential to benefit both businesses and workers. To ensure that this potential is met, we must enforce our existing labor standards aggressively *and* adapt them where and as needed, to ensure they deliver essential labor rights to all, protect law-abiding employers, and secure the safety net and tax dollars connected to employment for the good of us all. Those rights and protections should include the following:

- **Rights on the job:** Like other workers, on-demand workers should enjoy the protection of baseline labor standards, including the right to the minimum wage for all hours worked and the right to a voice on the job. The label assigned to a worker by an on-demand company should not determine or defeat their ability to have decent jobs. Workers in app-based jobs also need new protections to guard against the misuse of company-held data.
- **Social insurance protections:** All workers need and deserve the protections afforded by basic social insurance programs. Businesses in the on-demand economy should not get a free pass on making contributions to existing social insurance programs, such as Social Security, Medicare, workers' compensation, and unemployment insurance, on their workers' behalf. And the social insurance programs now being developed, such as earned leave and supplemental retirement savings, should extend to on-demand workers.
- **Broad and equitable access to technology:** If the future of work is that we access it via the internet, all workers should have meaningful access to the necessary technologies to secure it.

The on-demand economy covered in this report refers to businesses that use internet-based platforms to assign individuals seeking work to businesses and individuals seeking services, controlling relevant aspects of the work and working conditions. The on-demand economy takes many forms and operates in several key sectors. It includes “ride share” companies such as Uber and Lyft, housekeeping and repair companies such as

Handy, computer-based crowdwork companies such as Crowdfunder and Amazon’s Mechanical Turk, and online staffing agencies such as Wonolo. While these companies differ in some respects, they are alike in that they shift risks to workers who deliver the services and concentrate wealth in the online business owners who operate them.

1 Issues for Workers in the On-Demand Economy

Companies in the on-demand economy have convinced many policymakers and many in the public that their app- or web-based businesses contribute to the economy by creating work, spurring economic growth, and addressing unmet public needs (i.e., by helping would-be entrepreneurs market their services and underutilized resources to consumers and businesses). A deeper examination, however, reveals that while these companies may have devised nontraditional ways to connect consumers and businesses to services, many have amassed often-huge revenues from time-tested and altogether traditional means: the labor of their workers. These companies' success may be due in part to their

ability to attract consumers through the ease of their applications. But it owes just as much to the efficiency with which they squeeze labor from their workforces, spreading business risks downward to their workers, without whom they cannot succeed but to whom they have no commitment or accountability. At bottom, the companies are not delivering technology to their customers and clients—they use technology to deliver labor to them. Core features of the business model of many of these companies include calling workers “independent contractors,” breaking jobs into small tasks that create erratic schedules and fluctuating income, and making it difficult for workers to take collective action.

Major Companies in the On-Demand Economy

Name	Field	Size of Workforce	Operating Areas
Uber	Transportation	160,000 ⁱ	International
Lyft	Transportation	50,000 ⁱⁱ	U.S.
Sidecar	Transportation	6000 ⁱⁱⁱ	Major U.S. Cities
Handy	Home Services	5000 ^{iv}	U.S.
Taskrabbit	Home Services	30,000 ^v	International
Care.com	Home Services	6,600,000 ^{vi}	International
Postmates	Delivery	10,000 ^{vii}	U.S.
Amazon Mechanical Turk	Crowdwork	500,000 ^{viii}	International
Crowdfunder	Crowdwork	5,000,000 ^{ix}	International
Crowdsourcing	Crowdwork	8,000,000 ^x	International
Clickworker	Crowdwork	700,000 ^{xi}	International

- i. Jonathan V. Hall and Alan B. Krueger, An Analysis of the Labor Market for Uber's Driver Partners in the United States (Uber Technologies, Jan. 22, 2015).
- ii. Eric Newcomer and Leslie Picker, "Leaked Lyft Document Reveals a Costly Battle with Uber" (Bloomberg Business, Apr. 21, 2015), <http://www.bloomberg.com/news/articles/2015-04-30/leaked-lyft-document-reveals-a-costly-battle-with-uber>.
- iii. A Labor Market that Works: Connecting Talent with Opportunity in the Digital Age, (McKinsey Global Institute, Jun. 2015).
- iv. "There's An App For That" (The Economist, Jan. 3, 2015), <http://www.economist.com/news/briefing/21637355-freelance-workers-available-moments-notice-will-reshape-nature-companies-and>.
- v. Casey Newton, "Task Rabbit is Blowing Up Its Business and Becoming the Uber for Everything" (The Verge, Jun. 17, 2014).
- vi. First Quarter 2015 Results Supplement (Care.com Investor Relations, May 12, 2015), http://investors.care.com/files/First-Quarter-2015-Results-Supplement_v001_o3d1o3.pdf.
- vii. Sarah Ashley O'Brien, "Is This 'America's Best Part-Time Job'?" (CNN Money, May 5, 2015), <http://money.cnn.com/2015/05/04/technology/postmates-disrupt/>.
- viii. Jon Fingas, "Amazon's Mechanical Turk Workers Want to Be Treated Like Humans" (engadget, Dec. 3, 2014), <http://www.engadget.com/2014/12/03/amazon-mechanical-turk-workers-ask-for-respect/>.
- ix. Michelle Chen, "Is Crowdsourcing Bad for Workers?" (The Nation, Jan. 5, 2015), <http://www.thenation.com/blog/194041/crowdsourcing-bad-workers>.
- x. Crowdsourcing.com.
- xi. Clickworker.com.

The 1099 Business Model¹

Most of the on-demand companies call their workers “independent contractors” or “1099 employees,” after the IRS form that businesses give to nonemployees who provide them with services.² Calling workers independent contractors greatly reduces companies’ costs, including the costs associated with being an employer that apply to more traditional companies in their sectors. Workers who use the platforms to get work are led to believe they have no entitlement to social protections and benefits tied to employment. Instead, they are saddled with an annual self-employment tax (currently 15.3 percent) along with their income taxes, and with figuring out complex self-employment tax deductions and credits.³ At the same time, many of these companies take a sizeable commission—up to 20 percent or even 25 percent—from the workers’ pay.⁴

Characterizing workers as non-employees has serious negative consequences for them: non-employees have no statutory right to minimum wage, overtime pay, compensation for injuries sustained on the job, unemployment insurance if involuntarily separated from employment, or protection against discrimination. They are not covered under their companies’ employee benefits plans and have no federally protected right to join a union and collectively bargain with the

companies for which they work. While workers can challenge their status, doing so often entails overcoming the threat of denial of future work, followed by protracted fact-finding and extensive litigation costs.

Workers in these companies are performing the core work of their companies, the very essence of the employment relationship. Yet, while claiming that workers are independent entrepreneurs, the companies try to have it both ways. They often manage the workers as if they were employees, unilaterally setting rates for services, dictating how the services are provided, and screening, testing, training, evaluating, promoting, and disciplining workers based on the standards the companies set. For example, the home care company Honor boasts that it uses technology to monitor its home care aides to ensure that they arrive on time, are not checking Facebook or making social calls, and even that they are walking around and not sitting down when they are supposed to be cooking a meal.⁵ The crowdsourcing site Clickworker advertises that it screens, trains, tests, and evaluates its clickworkers.⁶ The transportation company Lyft performs background and driving tests on its drivers, inspects their vehicles, instructs them how to greet passengers (“with a big smile and a fist bump”), establishes their rates, regulates the number of drivers on the road at any given time, and retains the right

What Is a 1099 Employee?

A 1099 form is the form that the IRS requires businesses to use to report payment for services of non-employees. To all other workers who are regular employees, businesses must issue a W-2 form and make proper payroll withholdings for each tax year. There are several types of 1099s. The most relevant for workers are the 1099-MISC and the 1099-K. The 1099-MISC form is used, among other things, for businesses to report payments of \$600 or more to individuals supplying services

to them.ⁱ Some businesses in the on-demand economy use a 1099-K form, which is intended for reporting third-party payment transactions, such as credit card and debit card payments.ⁱⁱ As many as 30 percent of employers across industries misclassify their employees as independent contractors and give them a 1099 instead of the required W-2, and fail to withhold and pay payroll taxes for those employees.ⁱⁱⁱ

i. U.S. Internal Revenue Service (IRS), Form 1099-MISC, Miscellaneous Income, <http://www.irs.gov/uac/Form-1099-MISC,-Miscellaneous-Income-> (last updated Dec. 2014).

ii. IRS, Form 1099-K, Payment Card and Third Party Network Transactions, <http://www.irs.gov/uac/Form-1099-K,-Merchant-Card-and-Third-Party-Network-Payments> (last updated Jan. 2015); Tristan Zier, “How to Read Your Uber 1099,” (Zen99, Feb 3, 2015), https://tryzen99.com/blog_posts/read-uber-1099.

iii. Lalith De Silva, et al., Independent Contractors: Prevalence and Implications for Unemployment Insurance Programs, Planmatics, Inc., prepared for the U.S. Department of Labor, Employment and Training Administration (2000), <http://wdr.doleta.gov/owsdrr/00-5/00-5.pdf>.

to terminate them “at any time, for any or no reason, without explanation,” according to news reports and company statements quoted in court documents.⁷

The 1099 business model is not new. For decades, employers in many industries, including taxi, agriculture, construction, janitorial, landscaping, home health care, delivery, and port truck driving have called their workers “independent contractors.”⁸ Nor is unstable work new: companies such as staffing agencies and users of day labor have long made workers bid for jobs on a daily basis, work for piece rate, or contract for short-term jobs. Many on-demand companies are using increasingly sophisticated technologies to import these business models to online platforms, with some even claiming they are not in the business of providing services at all, but simply an app for the use of workers with whom they have no lasting relationship.⁹

At the end of a five-hour trip back and forth, averaged out, he has made \$10 an hour, without any taxes being withheld, as they would be if he were an employee. What’s more, he doesn’t get workers’ compensation, unemployment insurance, time off or retirement benefits—all the perks and protections of working for a traditional business....

—*Washington Post*, reporting on conditions for Homejoy worker Anthony Walker.¹⁰

Gig Jobs

Many workers in the on-demand economy are striving to make a living by stringing together short-term and poorly paid “gigs” or “tasks” that offer little chance of a stable income. Many of these gigs are components of formerly full-time jobs of taxi drivers, translators, secretaries, housecleaners, and personal assistants that have been broken down into discrete tasks and put out for bid on a task-by-task basis. A recent study by the UCLA Labor Center found that with the rise of transportation network companies, Los Angeles has lost 221

taxi industry jobs, resulting in \$32 million in losses to the California economy.¹¹ Amazon’s Mechanical Turk began as a way to outsource routine tasks that would have normally been performed by in-house employees or contractors.¹² Other crowdwork sites list major companies that have turned to them to outsource work. For example, Crowdsourcing lists Staples, Overstock, and Walmart as clients on its website.¹³ Clickworker says its clients include Honda, Groupon, PayPal, and T Mobile.¹⁴ The short-term tasks performed by crowdworkers include creating text, translating documents, classifying data, and performing web research.

A gig worker may tag photos online for an hour, run errands for a half day, and drive a taxi in the rush hour, hoping to patch together enough work, day by day, to add up to a living. A recent survey distributed by companies in this sector found that over 40 percent of on-demand workers work for two or more companies in a given week, with one in seven working for three or more companies.¹⁵ Nearly half reported they struggled to find enough work.¹⁶

Combining all this stuff together, I don’t know that it adds up to a career.

—Navy veteran Jennifer Guidry, commenting on her work for several companies at a time in *The New York Times*.¹⁷

Micro Jobs Pay Micro Wages

Both researchers and individual workers in the on-demand economy have reported wages at poverty level, due to the low per-task rates that workers are paid, coupled, for some, with the large amount of unpaid time spent waiting for tasks to be assigned.¹⁸ Workers’ income may be further reduced, often steeply, by business expenses that they are required to pay up front as a result of being labeled independent contractors. One researcher found that 90 percent of tasks posted on Amazon’s Mechanical Turk paid less than 10 cents. He calculated that a task worth \$1.00 with an average completion time of 12.5 minutes resulted in an effective hourly wage of \$4.80.¹⁹

- [After driving 10 minutes to pick up a fare, spending 5 to 10 minutes waiting for the passenger, and a 10-minute ride] “before car depreciation and insurance, I end up with \$3.60 from [a fare of] \$8. If we look at it by the hour, that will be \$7.20.” – Uber SUV driver Chakib Seddiki, quoted in *Slate.com*.²⁰
- “Costello refuses to work for 60 cents or even \$1.20 an hour because those low amounts are ‘more undignified than begging.’ However, at \$2 per hour she starts to equivocate, and she admits that she often works for that wage.” – *The Nation*, writing about Mechanical Turk Worker Stephanie Costello.²¹
- “Horrific. Digital sweat shop, slave wages, sometimes NO wages. You will be asked to jump through an absurd number of hoops for less than minimum wage. If you have a college degree and are either a professional writer, or a professional in the field you are writing about, don’t even lower yourself to this. It only kills your professional self worth. If you’re good, you can do better, trust me!” – Posting by Crowdsourcing worker.²²

Illusory Flexibility

While businesses sell their platforms as offering flexibility to workers who are looking to pick up supplemental work, the reality can be far different: the survey sponsored by these businesses found that “[w]ork hours are demand-dependent despite the touted schedule flexibility.”²³ Workers theoretically have the “flexibility” to work during non-profitable times and on non-profitable days, but they may earn significantly less if they do so. And many companies reward those who make themselves available and penalize those who are not. For example, court documents show that Uber may terminate drivers for having a “dispatch acceptance rate” that is “too low” and will look for accounts to deactivate when there are too many drivers or business is slow.²⁴ These practices allow the companies to reap maximum benefits from workers’ labor and availability with minimal or no return guarantee of a steady income.²⁵

Increased Isolation

The norm in the on-demand economy is that workers perform micro-tasks in isolation from—and sometimes

in competition with—other workers. This means they are less able to share concerns and address them, unlike brick-and-mortar-based jobs that permit face-to-face contact and discussion.²⁶ While some online forums such as Coworker.org and Dynamo enable workers to take collective action, these efforts are still in their infancy.²⁷

Worker Privacy

On-demand companies acquire extensive computer-based data on workers and consumers, although the extent and nature of the data accumulation, where it is stored, how it is tabulated and distributed, and for what purposes, is unclear. Like some more traditional employers in transportation and other industries, on-demand companies have access not only to personal information on workers’ identity and work performance, but also location data—that is, information on workers’ physical location in real time throughout the day. The collection, analysis and distribution of such sweeping electronic data places workers at risk of abuse.²⁸ On-demand companies also stand to profit greatly from the sale of data on workers and consumers for targeted advertising.

Massive Expansion Potential

How large the on-demand economy is or may become is a subject of intense debate.²⁹ What we do know is that many of the leading companies in these fields have grown their 1099-based businesses at unprecedented rates. The delivery service Postmates grew from 500,000 to 1.5 million deliveries in a span of 30 weeks from 2014 to 2015.³⁰ The home cleaning and repair company Handy grew from \$3 million per year in bookings to \$52 million per year over the course of two years, according to its chief operating officer.³¹ The number of new Uber drivers has more than doubled every six months for the last two years.³² The global “sharing economy” market as a whole was valued at \$26 billion in 2013, and some predict it will grow to become a \$110 billion revenue market in the coming years, making it larger than the U.S. chain restaurant industry.³³ McKinsey & Company estimates that by the year 2025, online staffing could add \$2.7 trillion to global GDP

and 72 million full-time-equivalent positions.³⁴ While no one knows how quickly the sector will grow, the proliferation of these companies and the 1099 business model could relegate many of America's workers to a series of dead-end, low-paying jobs in the years to come.

The independent contractor business model has magnified the wealth of investors and CEOs in the on-demand economy, but the ranks of what one academic calls the "precariat" are not sharing in this wealth.³⁵ Ensuring that the on-demand economy also works for them—the millions of individuals on whose labor it depends—will require thoughtful responses in policy

and practice to hold companies accountable to workers, consumers, and the public. The goal of regulation is not to impede technological advances, nor need it have that effect. Just like their counterparts in the conventional economy, workers in the on-demand economy should be able to make a living from work and acquire the security they need to contribute to their communities and our democracy.

2 Towards an Agenda for Workers in the On-Demand Economy

The emergence and growth of the on-demand economy make it critical that we begin to address wages and working conditions for on-demand workers. We offer up the ideas that follow as a starting point.

Our goal is not to bring a set of definitive answers to the discussion of appropriate workplace policy for the on-demand economy; rather, it is to advance the discussion, and in the process, put down markers we feel are essential to ensure that *work* and *economic opportunity and security* go hand in hand. Some of the solutions we offer are straightforward; others require considering a range of options. And as the economy continues evolving, workplace and social policy may well need to adapt further.

A. Enforcing Current Employment Standards in On-Demand Work

As a first step, we must make sure that on-demand workers who labor in relationships and under circumstances that meet the standards for employee coverage under our labor laws get the full protections and rights they are due. In 1938, in the Fair Labor Standards Act (FLSA), Congress included what has been called the broadest-ever statutory definition of “employ,” in order to deliver baseline minimum wage and overtime protections to the broadest possible group of workers.³⁶ The National Labor Relations Act, occupational safety and health laws, Title VII’s anti-discrimination protections, and state and local labor standards also have fairly

Litigation in the On-Demand Economy

Transportation

In a pending class-action lawsuit in California, Uber drivers claim the company has misclassified them as independent contractors and failed to reimburse them for their business expenses, as employers are required to do for their employees under California law.ⁱ Lyft also faces at least one class-action lawsuit for misclassifying its workers.ⁱⁱ The two companies, combined, have faced more than 150 different lawsuits and regulatory actions, with 100 filed against Uber alone, according to a Bloomberg docket search.

Home Services

The home services company Handy faces a misclassification class-action lawsuit with a potential \$600 million liability.ⁱⁱⁱ After Homejoy workers filed several lawsuits alleging

misclassification and violations of minimum wage and overtime laws, the company announced that it would be going out of business.^{iv}

Delivery

The delivery company Postmates also faces independent contractor misclassification lawsuits,^v as does the food delivery service Caviar.^{vi}

Crowdwork

Crowdfunder recently settled a class action over minimum wage, overtime, and other Fair Labor Standards Act violations, paying out \$585,000 to workers.^{vii}

i. O'Connor v. Uber Technologies Inc., 13-3826 (N.D. Cal. Mar. 11, 2015) WL 1069092.

ii. Cotter v. Lyft, Inc., 60 F. Supp. 3d 1067 (N.D. Cal. 2015).

iii. Zenelaj v. Handybook Inc., No. 14-CV-05449-TEH, 2015 WL 971320 (N.D. Cal. Mar. 3, 2015); Sarah Kessler, “The Gig Economy Won’t Last Because It’s Being Sued to Death” (Fast Company, Feb. 17, 2015), <http://www.fastcompany.com/3042248/the-gig-economy-wont-last-because-its-being-sued-to-death>.

iv. Carmel De Amicis, “Homejoy Shuts Down After Battling Worker Classification Lawsuits” (ReCode, Jul. 17, 2015), <http://recode.net/2015/07/17/cleaning-services-startup-homejoy-shuts-down-after-battling-worker-classification-lawsuits/>; Iglesias V. Homejoy, Inc., No. 3:15-CV-1286 (N.D. Cal. Mar. 19, 2015); Ventura et al. v. Homejoy, Inc., CGC-15-544750 (Super. Ct. Cal. S.F., Mar. 16, 2015). See also, Jahna Berry, “San Francisco Startup Homejoy Hit with Labor Lawsuits” (San Francisco Business Times, Mar. 19, 2015), <http://www.bizjournals.com/sanfrancisco/blog/2015/03/homejoy-independent-contractors-uber-lyft-lawsuits.html>.

v. Kashmir Hill, “Meet the Lawyer Taking on Uber and the Rest of the On-Demand Economy” (Fusion, Apr. 16, 2015), <http://fusion.net/story/118401/meet-the-lawyer-taking-on-uber-and-the-on-demand-economy/>.

vi. Levin v. Caviar, Inc., 3:15-1285 (N.D. Cal. Mar. 19, 2015).

vii. Otey v. CrowdFlower, Inc., No. 12-CV-05524-JST, 2014 WL 1477630 (N.D. Cal. Apr. 15, 2014).

broad sweeps. As illustrated by the recently released Administrator’s Interpretation of the FLSA by the U.S. Department of Labor’s Wage and Hour Division, many workers in on-demand jobs meet the definitions for employee status under these laws, and their employers should treat them as such.³⁷

Federal and state labor agencies can and should enforce workplace laws based on the laws’ broad remedial coverage, understanding that in many instances, app-based companies have simply made superficial changes to old work forms.

B. Advancing New Policy Options to Meet Worker Needs

In addition, policymakers should ensure that our nation’s core workplace rights and benefits reach the workers who need their protection and hold employers responsible, no matter where and under what title those workers labor. The approaches discussed below—by no means an exhaustive list of options—are useful models for how we might craft and adapt public policy to reach this goal.

Responsible Business Practices in the On-Demand Economy

Not every business in the on-demand economy follows the 1099 model. App-based and on-demand companies can treat workers as W-2 employees and be successful. Here are some examples:

- The food preparation and delivery service Munchery,ⁱ the personal assistant company Alfred, and the office cleaning service Managed by Qⁱⁱ all reportedly hire their workers as employees, not independent contractors. Instacart recently announced that it reclassified some of its independent contractors as employees.ⁱⁱⁱ The valet parking service Luxe,^{iv} the mailing company Shyp,^v and food delivery start-up Sprig^{vi} all hire employees, not contractors.
- These companies are showing that they can do right by their workers and still grow their businesses. MyClean, a cleaning service based in New York City, now has around 200 employees and has grown to \$8 million in annualized revenue in the past two years.^{vii} Munchery has reportedly raised \$32 million in venture-capital funding since launching in 2012. It uses salaried employees and provides health benefits to those who work more than 30 hours per week.^{viii}
- In addition to avoiding lawsuits, companies have cited increased efficiency and worker retention as reasons to treat their workers as employees.^{ix}

i. Caroline O'Donovan, "What Happens When a Delivery Service Tries to Pay its Workers Well?" (TechCrunch, Apr. 14, 2015), <http://www.buzzfeed.com/carolineodonovan/can-mun#.soXB8oA8W>.

ii. Maya Kosoff, "Companies Like Uber Could Learn a Thing or Two from This Office Cleaning Startup, Where the Workers Are as Happy as the Clients" (Business Insider, Mar. 10, 2015), <http://www.businessinsider.com/managed-by-q-hires-cleaners-as-employees-2015-3#ixzz3dXpUNKru>.

iii. Madeline Bilis, "Instacart Converts Some Independent Contractors into Part-Time Workers" (San Francisco Business Times, Jun. 22, 2015), <http://www.bizjournals.com/sanfrancisco/blog/2015/06/instacart-independent-contractors-workers-uber.html>.

iv. Tracey Lien, "Luxe Valet Turning its Independent Contractors into Employees" (Los Angeles Times, Aug. 4, 2015), <http://www.latimes.com/business/technology/la-fi-tn-luxe-employee-20150730-story.html>.

v. Davey Alba, "Shyp Makes Couriers Employees Before It's Too Big To Change" (Wired, Jul. 2, 2015), <http://www.wired.com/2015/07/shyp-makes-couriers-employees-big-change/>.

vi. Greg Bensinger, "Sprig Is the Latest Startup to Hire Its Contract Workers" (The Wall Street Journal, Aug. 6, 2015) <http://blogs.wsj.com/digits/2015/08/06/sprig-is-latest-startup-to-hire-its-contract-workers/>.

vii. Kevin Roose, "Does Silicon Valley Have a Contract Worker Problem?" (New York Magazine, Sep. 18, 2014), <http://nymag.com/daily/intelligencer/2014/09/silicon-valleys-contract-worker-problem.html>.

viii. Roose, id.

ix. Greg Bensinger, "Start-Ups Scramble to Define 'Employee'" (The Wall Street Journal, Jul. 30, 2015), <http://www.wsj.com/articles/startups-scramble-to-define-employee-1438228860>.

1. Safeguard Labor Rights for On-Demand Workers

a. Apply core labor and employment protections to all workers, including those in the on-demand economy.

Rather than forcing workers to litigate the issue of employee status on a case-by-case basis in a variety of contexts, Congress and state policy-makers could provide for direct, automatic coverage of on-demand workers under core labor laws. This approach expands on an existing model under the Social Security Act and some state laws, which characterize certain workers as “statutory employees” for specified purposes, regardless of how the business otherwise characterizes the relationship (see box below). It could be accomplished by designating 1099 workers as statutory employees, or by a sectoral approach, explicitly requiring that workers in certain on-demand sectors—e.g., transportation network, home services, or delivery—be considered statutory employees.

b. Facilitate organizing by on-demand workers.

The right to join together in unions and bargain collectively is crucial in the on-demand economy, where work is distributed on a piece-rate basis, competition

for assignments is intense, and the conditions of work are inherently isolating for individual workers. But independent contractors are excluded from the protections of the National Labor Relations Act, the primary vehicle for workers to come together and bargain for better wages and working conditions on the job.

This exclusion from coverage, however, does not foreclose organizing and bargaining by on-demand workers who, despite the odds, have begun to successfully come together and press for job improvements. Their efforts build on a long history of organizing by taxi drivers, day laborers, and other “excluded” workers who have joined together to improve their working conditions.³⁸

c. Sectoral organizing and standard-setting.

Where a critical mass of workers has come together to develop sectoral priorities, sector-specific approaches may be an effective way to set standards. Examples of such tailored approaches include the following:

- New York State Wage Boards, with members drawn from both labor and management, have recently convened to recommend wage rates and other

Automatic Employees v. Dependent Contractors

Some policymakers are advocating for a new category of worker, to be situated someplace between the present categories of “employee” and “independent contractor.” As noted here, the independent contractor versus employee distinction already presents challenges due to the common employer practice of misclassifying workers as independent contractors, franchisees, or self-employed. Adding a third category, with a separate fact-intensive test to apply in order to determine the worker’s status, especially if easy to manipulate by an employer, would likely create more confusion and litigation.

There is a better way: under existing Social Security law, businesses must pay both Social Security and Medicare taxes for certain categories of workers, including certain delivery drivers, homeworkers, and outside salespeople, whether or

not they meet the stringent IRS test that establishes formal employee status under the Social Security Act.ⁱ Many state unemployment insurance and workers’ compensation laws similarly make certain categories of workers automatically protected by those laws, whether they are treated as employees or contractors; some provide for automatic coverage of certain employers, too. State and federal laws could also provide that certain 1099 employees are to be treated as employees for purposes of those statutes—i.e., “statutory employees”—regardless of how they are labeled.

i. IRS, Statutory Employees, <http://www.irs.gov/Businesses/Small-Businesses-&Self-Employed/Statutory-Employees> (last updated Jul 2015).

industry-specific rules for tipped restaurant workers and fast-food workers.³⁹

- The City of Los Angeles requires higher minimum wage rates for workers employed by large hotels throughout the city,⁴⁰ and mandates living wages for all workers employed in hotels of any size within the geographic area close to LAX.⁴¹
- Montgomery County, Maryland passed an ordinance that will establish a permanent taxi commission made up of representatives of drivers, companies, and the public. The ordinance includes a dispute resolution process, incorporates a central dispatch system, and allows for the issuance of 50 new taxi licenses to a new taxi-worker co-op.⁴²

A related approach could allow on-demand workers organized into European-style “works councils” or workers’ guilds to negotiate with industry representatives and the government to set standards for an entire industry and address specific issues within the industry.⁴³ These organizations could also involve other stakeholders—for example, consumers and communities underserved by on-demand businesses, such as riders with disabilities attempting to access transportation network companies.⁴⁴

d. Worker privacy. Whether protections accrue to workers as employees as a result of new workplace laws or through new interpretations of constitutional and common-law-protected rights to privacy, or to consumers in the on-demand economy, lawmakers should consider the following elements as key to safeguarding worker privacy rights in the on-demand economy:

- **Transparency:** companies should be required to disclose to drivers and consumers what location data they are collecting and for what purposes;
- **Necessity:** the location data should be limited to one or more articulated purposes;
- **Proportionality:** the data should be relevant to those purposes and not excessive;
- **Access:** the location data collected should be accessible to drivers and consumers, and they should be notified if a third party seeks access to the data;

- **Legitimacy:** limitations should be placed on the use of worker data, including restrictions on companies’ ability to use or sell such data for profit; and
- **Security:** companies should be required to maintain the data in a secure database.⁴⁵

2. A Social Contract for On-Demand Workers

a. Social Security, workers’ compensation

& unemployment insurance. Social Security is a cornerstone of the economic security and dignity of America’s working families, intended to deliver modest retirement, disability, and survivor benefits to all who have earned them. But businesses do not make contributions into the Social Security and Medicare funds for workers classified as independent contractors.⁴⁶ That burden falls on “self-employed” workers, who may not understand the complicated tax rules that apply to them, may underpay taxes, and risk depriving themselves of the Social Security benefits they have earned. There are significant destabilizing implications for Medicare funds as well, with financing concerns greater than for Social Security.⁴⁷

Congress should require companies in the on-demand economy using 1099 workers to pay into workers’ Social Security accounts, which are inherently portable, just as companies hiring workers as employees do.⁴⁸ States should do the same for workers’ compensation and unemployment insurance funds.

b. Other work-based income security benefits.

In addition to the baseline social safety net and retirement systems that have covered employees for decades, policies such as paid leave and supplemental retirement systems are gaining traction across the country. These benefits can also be extended to workers in the on-demand economy:

- **Paid leave.** Paid sick leave laws have passed in four states and 20 local jurisdictions nationwide. Four states have some version of long-term paid family leave legislation.⁴⁹ Policymakers should ensure that on-demand workers are able to participate fully in the already enacted laws and others under

consideration. Creating mechanisms through which on-demand companies withhold and remit deductions from 1099 employees' pay to central funds that workers could access when needed would enhance the programs' potential.

The experience of state extended-leave programs in California, Rhode Island, and New Jersey is instructive: eligibility for benefits under all three programs is portable between employers and applies to workers regardless of tenure with an employer. Other states could build on these models, ensuring adequate financing, portability of benefits, and universality of coverage.⁵⁰

- **State-level retirement security programs.** A recent survey by the Federal Reserve found that almost one-third of Americans have no retirement savings at all.⁵¹ A number of states, including California, Illinois, Maryland, and Connecticut, are experimenting with portable state-managed retirement plans to help boost retirement security for their residents.⁵² Existing plans provide for IRA-like tax treatment and automatic deductions from workers' wages unless workers opt out, and they cover nearly all employers. As more states move to adopt similar programs, workers in on-demand businesses should also be included.

3. Ensure Technology is Universally Available

Many writers have compared the internet to the new commons: the place where we come together to debate, socialize, and do business. The Federal Communications Commission has furthered that notion by reclassifying internet service providers as common carriers with obligations to the public.⁵³ This frame can serve as another guide for policymakers as they examine the on-demand economy.

- a. Provide universal broadband access.** Half of all low-income families lack access to broadband.⁵⁴ A growing number of jobs are accessible only through online platforms, limiting work opportunities for groups that have lower rates of internet access. Providing universal broadband access would expand work opportunities and help ease the digital divide.

b. Public job-matching applications. In addition to ensuring that broadband access is available to all communities, state and local governments should sponsor the creation of online platforms that match workers with quality jobs and standardize wages and benefits for the sector. These online platforms could be one component of larger social programs that provide a variety of training and other supports to workers and the clients and consumers that engage them.

- One model exists in the Oregon Home Care Commission Pilot Project, which will enable private payers to buy home care services, and home care workers to find such employment, through the commission's online home care registry, initially set up solely to serve the state's Medicaid home care program.⁵⁵
- In transportation, the Washington D.C. Taxicab commission, along with authorities in other cities, has passed a law providing for centralized electronic dispatch systems.⁵⁶

Conclusion

Wage stagnation and burgeoning income inequality have led many to compare the current era to the Gilded Age of the late 19th century. Conditions for many workers in the on-demand economy replicate those of that age as well, before the enactment of New Deal legislation delivered basic labor rights, a social insurance safety net, income security, and the right of workers to organize. Businesses that use the 1099 model threaten to deny these basic worker rights to large

numbers of workers. New technologies should not be allowed to displace existing protections for the many on-demand workers who are, in fact and in law, employees. We must ensure that these workers' rights are recognized and enforced. As new technologies develop, we must also develop new models of delivering core labor rights, including the right to take collective action aimed at expanding those rights and adapting them to specific industries.

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