THE NEW CENTER

Policy Paper

December 2020

Bring Labor Laws into the 21st Century

HOW TO GIVE GIG WORKERS THE FLEXIBILITY THEY WANT AND SECURITY THEY NEED

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ABOUT THE NEW CENTER

American politics is broken, with the far left and far right making it increasingly impossible to govern. This will not change until a vibrant center emerges with an agenda that appeals to the vast majority of the American people. This is the mission of The New Center, which aims to establish the ideas and the community to create a powerful political center in today's America.

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EXECUTIVE SUMMARY

Gig work is fundamental to the way that we live: we drive to work using ride-sharing apps, order in dinner with food delivery services, and hire short-term workers to build our living room furniture. Gig work was growing rapidly as America entered 2020, and now in the midst of a pandemic that completely upended the job market, it has exploded. But America's labor laws, rules, and regulations have not even begun to catch up with this reality.

Nontraditional workers are less financially secure, have less health insurance, and are less prepared to retire compared to their traditionally-employed counterparts. But many of the solutions that policymakers in Washington have proposed either don't solve these problems or would eliminate the flexibility and independence that many gig workers enjoy. The New Center believes a framework exists that can put gig workers on a path towards the security they want and deserve, while at the same time preserving the fundamental benefits unique to gig work.

This framework could include:

- Providing gig workers with "portable" benefits as an alternative to benefit structures tied to a specific job or employer; and
- Expanding employment classifications used by the Bureau of Labor Statistics (BLS) so as to more accurately capture gig workers in the U.S. economy

AS CALIFORNIA GOES, SO GOES THE NATION?

In 2019, the California State Assembly passed Assembly Bill No. 5, which raised the threshold companies had to meet to classify workers as independent contractors. With the passage of Assembly Bill No. 5, many individuals who were previously considered independent contractors would suddenly be classified as employees entitled to workers' compensation, paid sick leave, and protection under minimum wage laws, among other benefits. After a lengthy legal challenge in the California court system, on October 22, 2020, the California First District Court of Appeal ruled that companies needed to comply with Assembly Bill No. 5 within 30 days, unless a referendum on the bill was approved by California residents on Election Day.

The referendum on Assembly Bill No. 5, known as Proposition 22, would maintain the current classification system for independent contractors in California. The "Yes on Prop. 22" campaign was well-funded by rideshare companies such as Uber and Lyft, who argued that maintaining the current status of rideshare drivers would keep prices low for consumers, provide drivers with the ability to set their own hours, and prevent mass layoffs. Opponents of Prop. 22, which included several labor groups as well as editorial boards of major publications such as The New York Times, opined that the current conditions are exploitative to rideshare drivers, and demanded fair wages and health care rights for these individuals.

On November 3, 2020, 58% of Californians voted "yes" and 41% voted "no" to Prop. 22, preserving the independent contractor status of the state's gig workers. But this debate over gig workers is continuing to roil many states, and has already grabbed increased attention in Washington.

Prominent Republican lawmakers tout the success of apps like Uber as evidence that a free-market-oriented regulatory environment paves the way for innovative and disruptive companies. Senator Ted Cruz (R-TX) noted that when Uber and Lyft are introduced to a new area, "the existing providers fight like cats and dogs. The taxi commissions have done everything they can do to kill Uber and Lyft." And Senator Rand Paul (R-KY) previously said in a series of tweets that "Services like Uber, Airbnb, and Lyft stimulate our economy and work towards lower prices...We need more innovation, not less."

These statements from conservative lawmakers echo the language featured in the official 2016 Republican Party Platform, that says that the "world of the app economy cries out for the comprehensive regulatory reform proposed elsewhere in this platform" and that voters must "challenge the anachronistic labor laws that limit workers' freedom and lock them into the workplace rules of their great grandfathers."

Prominent voices on the left offer an alternative narrative. Senator Bernie Sanders (I-VT) derides the structure of the gig economy as exploitative and unethical. One of the key elements of Sanders' "Workplace Democracy" plan includes a proposition to stop companies from being "able to ruthlessly exploit workers by misclassifying them as independent contractors or deny them overtime by falsely calling them a 'supervisor.'" And in an op-ed for CNBC, Senator Elizabeth Warren (D-MA) claims that "independent contractor" designations prevent workers from gaining what are considered fundamental workplace rights.

The political left and right in Washington offer America's gig workers two sharply contrasting choices: you're either an employee with the same benefits as traditional 9-5 workers, or you're completely on your own in a laissez-faire economy. But these simplistic narratives obscure a much more interesting story. With a little creativity and flexibility, lawmakers could develop a new regulatory framework that gives gig workers more security, while at the same time preserving some of the fundamental benefits unique to a gig economy, including greater professional freedom and flexibility. The New Center believes that this framework is within reach. This policy paper describes some of the fundamental issues with the gig economy, and features some innovative solutions that can bring America's labor market in line with 21st century realities.

PROBLEMS FACING GIG WORKERS

There is a reason why 67% of gig workers are satisfied being part of the on-demand economy, according to a 2017 Intuit report. Being a gig worker offers attractive benefits: you can work more flexible hours, supplement income from another job, fill gaps between employment, and have more autonomy over your work and life. But there have always been downsides, which are suddenly much more pronounced in light of the COVID-19 pandemic that has put millions of full-time, part-time, and gig workers out of work.

UNCLEAR EMPLOYMENT CLASSIFICATIONS

The Gig Economy Data Hub characterizes gig work as "income-earning activities outside of traditional, long-term employer-employee relationships." It's a subjective classification, which may be why the U.S. Bureau of Labor Statistics (BLS) acknowledges there is "no official definition for the 'gig economy'" and that "gig workers are spread among diverse occupation groups and are not easily identified in surveys of employment and earnings."

Varying definitions for both the gig economy and gig work lead to a lack of clear-cut and uniform data on its representation in the labor force. For example, according to May 2017 data from the Bureau of Labor Statistics on contingent and alternative employment arrangements, 10.1% of workers have alternative work arrangements; this includes independent contractors, on-call workers, temporary help agency workers, and workers provided by contract firms. BLS also found that 3.8% of workers are contingent workers, defined as "persons who do not expect their jobs to last or who report that their jobs are temporary." In total, according to the Bureau of Labor Statistics, nontraditional work accounted for 13.9% of all employment in May 2017.

Compared to other sources and surveys, BLS data appears to underrepresent gig workers in the U.S. labor force. For example, according to 2018 survey data from the General Social Survey (GSS), 21% of respondents classified their work arrangement within the following categories: (a) work for a contractor, (b) paid by a temporary agency, (c) on call, work only when called, and (d) independent contractor/consultant/freelance. And a McKinsey Global Institute Survey from October 2016 estimates that independent workers account for approximately 27% of the total working-age population.

Why do these discrepancies matter? Economists and policymakers rely on this data, which has been referred to by BLS Commissioner William Beach as the “gold standard,” to inform them about the state of the economy, which in turn helps them make decisions about work rules and regulations. Writing for Government Executive, workforce management consultant Howard Risher warns that “for years BLS has functioned in its ivory tower while the country’s labor markets and people management practices have undergone significant change. It’s no longer 1990. Now the rapid expansion of the gig economy means BLS cannot claim their data are representative of workers’ pay and benefits across the United States. That’s a problem.”

LACK OF TRADITIONAL BENEFIT STRUCTURES

Gig workers are not classified as “employees” in the same way traditional full-time and part-time workers are. This means that gig workers are not necessarily covered by federal and state laws that afford traditional employees access to health care benefits, unemployment insurance, minimum wage protections, retirement benefits, the right to unionize, and workplace injury protections, among other benefits and legal protections.

For example, March 2020 data from the Bureau of Labor Statistics shows that around 89% of state and local government employees had access to employer-sponsored medical care, compared to around 69% of private industry employees. But according to 2019 survey data from Metlife, a life insurance company, only four percent of gig workers reported that their employer offers them medical insurance. This, however, does not include the health insurance that individuals can qualify for access to health benefits through the Affordable Care Act, or that they or their partner may have access to through another job.

Similarly, a large gap exists between retirement benefits offered to traditional versus gig workers. According to May 2017 data from the Bureau of Labor Statistics, 48% of traditional workers were eligible for employer-provided pension or retirement plans, compared to just 23% of contingent workers. It is important to note that the percentage of nontraditional employees who are eligible for employer-provided pension and retirement plans may actually be lower, given that the definition used by the Bureau of Labor Statistics for “contingent workers” excludes those who take up gig work as a secondary source of income as well as independent contractors who expect their work to last for longer than a year.

Gig workers are also less financially secure than their traditionally employed counterparts. A 2015 Government Accountability Office (GAO) report on the size, characteristics, earnings, and benefits of the contingent workforce (as classified by the Bureau of Labor Statistics) found that "contingent workers were more than three times as likely as standard full-time workers to report being laid off in the previous year," and that "contingent workers earn about 10.6 percent less per hour than standard workers."

Overall, nontraditional workers are less financially secure, have less health insurance, and are less prepared to retire, compared to their traditionally employed counterparts. But gig work is here to stay: according to Statista, by 2023, the gross volume of the gig economy is projected to grow to 455.2 billion U.S. dollars. The challenge now for policymakers is to come up with better regulatory and benefit structures to help the expanding gig workforce.

Here, The New Center offers a few ideas that strike the right balance between flexibility and security.

NEW CENTER SOLUTIONS

MOVING TOWARDS PORTABLE BENEFITS

It's a simple solution: Instead of forcing gig workers into more traditional work arrangements in order to get benefits, why not just design better benefits that gig workers can take with them wherever they work?

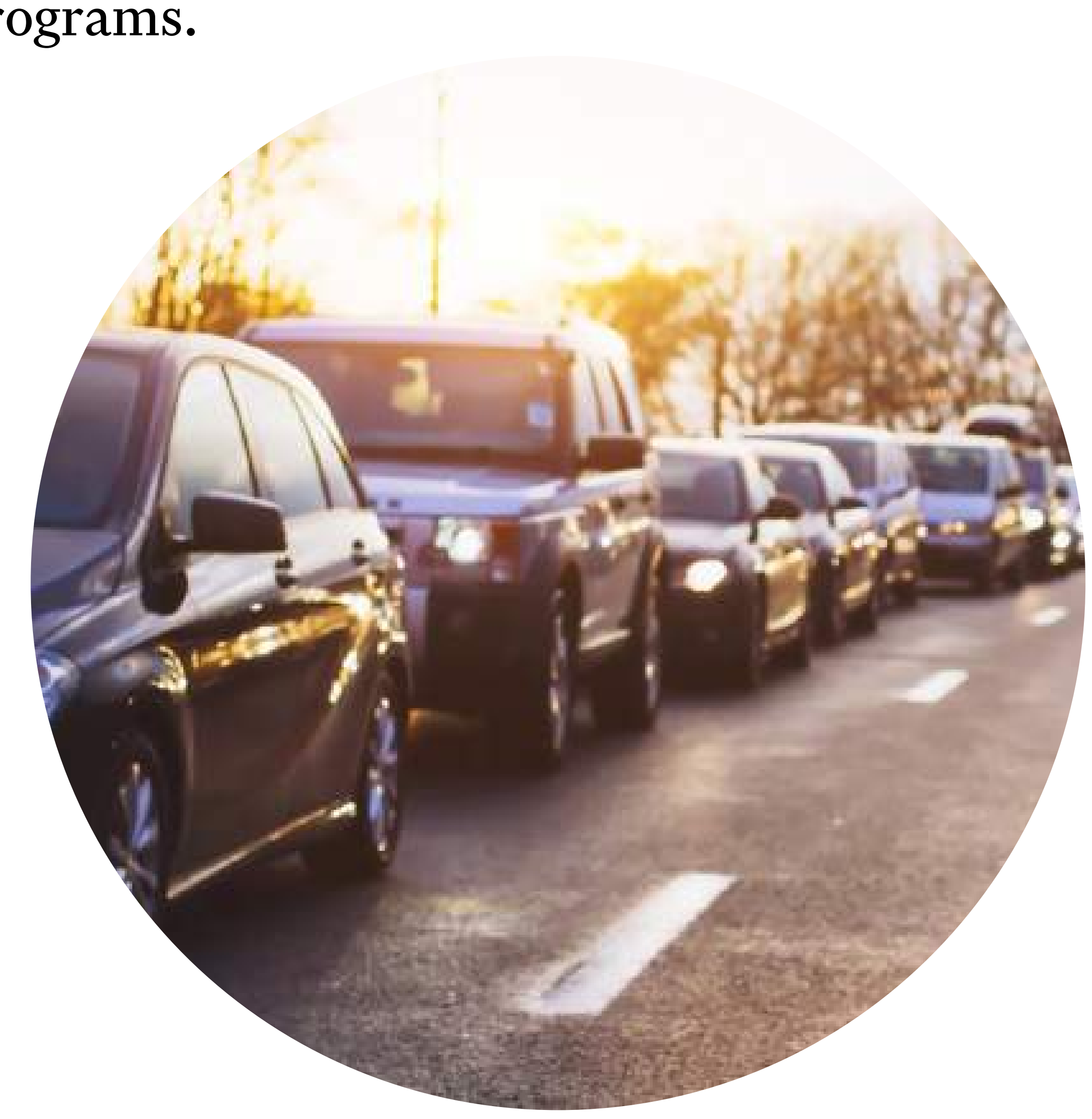
Portable benefits systems are already in place across the United States. One example is the New York State "Black Car Fund." Resources for the Black Car Fund are collected through passenger surcharges on rides taken with both traditional taxi services and app-based services like Uber and Lyft. These passenger surcharges are then used to provide employees with worker's compensation insurance.

Another example is the portable bank system set up for domestic workers (which includes nannies, house cleaners, caregivers, and other home service providers) in Philadelphia through the Domestic Worker Bill of Rights. The bill outlines minimum protections that domestic workers are entitled to, including meal and rest breaks, paid and unpaid leave time, and provides a process through which employers contribute to a centralized portable benefits system that the employee can access and use across employers.

But there are still roadblocks to the more widespread adoption of portable benefits systems. Liya Palagashvili, a professor of economics at SUNY Purchase, writes that one major challenge is that currently, employers can "exclude their expenditures on health insurance and other fringe benefits from income and payroll taxes." Overcoming these barriers may require initial support from the federal government, which can provide more wide-scale funding, organizational management, and regulatory reform to states and local governments.

Thankfully, portable benefits are starting to get more attention from policymakers in Washington. In 2019, Senator Mark Warner (D-VA) introduced S. 541, the Portable Benefits for Independent Workers Pilot Program Act. The bill, which has bipartisan support, would provide funding for states, local government, and nonprofit organizations to support and implement portable benefit programs.

In response to the overwhelming effect of the COVID-19 pandemic on gig workers, Senator Mark Warner and Senator Steve Daines (R-MT) introduced a similar bill on July 22, 2020, the Emergency Portable Benefits for Independent Workers Act.



The bipartisan bill would provide $500 million to states from the Department of Labor to modernize their unemployment insurance technology systems and set up portable benefits programs.

EXPANDING EMPLOYMENT CLASSIFICATION OPTIONS

The current employment classification system used by the Bureau of Labor Statistics is not suited for modern-day, technology-driven work. Because gig workers are not traditional, full-time employees, they are often classified as “contingent” workers by the Bureau of Labor Statistics, which means they are “persons who do not expect their jobs to last or who report that their jobs are temporary.” This classification excludes many individuals, including those who take up gig work as a secondary source of income, as well as independent contractors who expect their work to last for longer than a year.

By forcing workers into simplistic employment categories, BLS is failing to capture the complexities of the workforce, and in turn, not providing an accurate picture of gig workers in America and the problems they may face. Brookings’ Hamilton Project recommends that BLS should expand their range of employment classifications, and notes that “the categorization of a worker matters, in part because U.S. law imposes requirements on employers with respect to their employees that are not imposed on independent contractors, such as minimum wage and overtime rules, the right to organize, and civil rights protections.”