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By electronic submission: <http://www.regulations.gov>

The Honorable Cheryl Stanton  
Administrator, Wage and Hour Division  
U.S. Department of Labor  
Room S-3502  
200 Constitution Avenue, NW  
Washington, DC 20210

Re: RI 1235-AA34--Independent Contractor Status under the Fair Labor Standards Act:  
Notice of Proposed Rulemaking and Request for Comments

Dear Administrator Stanton:

These Comments are submitted on behalf of the Coalition for Workforce Innovation (“CWI”) and pursuant to the U.S. Department of Labor Wage and Hour Division’s (the “WHD” or the “Division”) notice of proposed rulemaking and request for comments regarding Independent Contractor Status under the Fair Labor Standards Act (the “FLSA” or the “Act”), 85 Fed. Reg. 60600 (Sept. 25, 2020) (the “Proposed Rule”).

CWI believes the Proposed Rule is an important step in providing needed clarity to businesses and independent workers in structuring and maintaining their relationships. Independent workers are a mosaic of consultants, freelancers, and contractors working independently or with entrepreneurs and other independents to build businesses, develop their careers, pursue artistic or occupational passions, or supplement and expand their overall economic opportunities. The Proposed Rule’s modernization of the Act’s economic realities test for independent contractor status will benefit workers, consumers, entrepreneurs, businesses, and the overall economy.

With critical clarification and modification, CWI, on behalf of itself and its members, supports the Division’s first-ever proposed interpretation of the economic realities test’s focus on two Core Factors for determining independent contractor status under the Act. The Proposed Rule’s two Core Factors capture an appropriate embodiment of the essence of the economic independence of workers and modern sense of working independently. Additional comments below are provided to ensure that there is clarity with respect to the framework of the Core Factors, and the facts that are relevant to proving these two Core Factors.

While CWI supports the framework of Core and Additional Factors contained in the Proposed Rule, CWI requests the Division review the proposed Additional Factors in light of the comments provided below, and consider replacing the proposed Additional Factors with the Alternative Additional Factors described below (or at a minimum, revising the Proposed Rule's Additional Factors as described below). Hallmarks of independence include voluntariness of the relationship, enhanced flexibility, freedom of workers to provide services to multiple entities, written agreed upon contract terms of specific limited time duration, and the opportunity of workers to maximize their profits in light of their own initiative and control over the work and relationship (subject to typical contractual and legal restrictions inherent in business transactions).

CWI's additional specific recommendations and comments to enhance certain aspects of the Proposed Rule's factors and illustrations are also described below. CWI believes these additional illustrative examples will further enhance the predictability and reliability of the Division's independent contractor interpretation in the Proposed Rule, which is critical to providing straightforward guidance to workers and businesses contemplating and structuring their existing and future relationships and practices.

CWI also submits for the record: CWI's 2020 National Survey of 600 Self-Identified Independent Contractors ("National Survey")<sup>1</sup> and CWI's 2020 Analysis of Literature on Technology and Alternative Workforce Arrangements ("Research and Analysis Report").<sup>2</sup> The National Survey and Research and Analysis Report provide widespread support for the benefits of, interest in, and importance of the availability of independent work opportunities throughout the United States.

### STATEMENT OF INTEREST

The Coalition for Workforce Innovation has brought together diverse stakeholders representing worker advocates, small business start-ups, entrepreneurs, technology companies, and traditional businesses and associations representing companies in the media, transportation, distribution, retail, and service industries. CWI members include: the Retail Industry Leaders Association ("RILA"), iPSE-U.S., iWorker Innovations, LLC, HUNGRY, nTech Workforce, Roadie, Wonolo, Hyr Inc., Kelly and KellyOCG, all of which have specifically, individually signed on to these Comments.

RILA is a trade association of retail companies. RILA members include more than 200 retailers, product manufacturers, and service suppliers, which together account for more than \$1.5 trillion in annual sales, more than 42 million American jobs, and more than 100,000 stores, manufacturing facilities, and distribution centers domestically and abroad.

iPSE-U.S. is America's first national association focused on "workstyle", not work type. iPSE-U.S. empowers and supports the independent worker in a multitude of ways. It has a subscription-based business model. This association provides independent workers with access to bundled benefit packages and other products, as well as a space for workers to belong and

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<sup>1</sup> The National Survey is attached as Exhibit A.

<sup>2</sup> The Research and Analysis Paper is attached as Exhibit B.

have resources that are typically in an employee/employer relationship. iPSE-U.S. provides independent workers with resources to assist them in their economic endeavors.

iPSE-U.S. was founded on the belief of “for the people.” Individuals chose independent work opportunities while others may be forced into an independent workstyle because of circumstance. iPSE-U.S. not only gives access to group rated products, such as healthcare solutions, telemedicine, education, legal assistance, identity theft, and roadside assistance to name a few – it also provides an independent business network and community. A community for workers - that is not normally available to allow independent workers to connect with each other and resources to support their work choices. This is the true “Future of Work” and iPSE-U.S. is for independent workers.

iWorker Innovations, LLC is a national insurance brokerage and association management company that specializes in providing benefit packages and services customized for the self-employed by partnering with the workforce firms and associations who represent them. iWorker Innovations delivers bundled portable benefits that enable the self-employed to thrive.

HUNGRY is a national platform for top local chefs and food delivery services. It began as a tech-enabled platform for office & event catering, connecting clients to incredible chef entrepreneurs and has rapidly grown into a national platform for top chef-made food production & delivery services that also includes business & event catering, contracted meal delivery services, chef-centric pop-ups, virtual chef experiences and home meal delivery.

nTech Workforce is a leading staffing service provider with national reach. nTech bridges the divide between business objectives and capabilities through a portfolio of staffing & human resources services. nTech takes on the most formidable talent acquisition challenges to connect the most qualified talent with customers, curate talent ecosystems, cultivate relationships with company alumni, and consult with business leaders to eliminate bottlenecks or close gaps in strategic workforce planning. nTech's extended workforce strengthens businesses by improving the accessibility to business and information technology professionals, ensuring that the capabilities are in place to meet existing or emerging objectives.

Roadie is the nation's first “on the way” crowdsourced delivery platform. Founded in 2014, Roadie works with consumers, small businesses, and big global brands across virtually every industry to provide a faster, cheaper, more scalable solution for scheduled, same-day, and urgent delivery. With a driver community that's more than 150,000 strong, Roadie's platform can reach 89% of U.S. households – the largest local same-day delivery footprint in the nation.

Wonolo is an online platform that connects over 500,000 workers to retail, e-commerce, distribution, fulfillment, and other types of blue collar, frontline jobs throughout the U.S. and has done so since 2014. These “Work Now Locally” opportunities vary widely, from customer service, delivery, and event staffing to food production, warehousing, and manufacturing.

Hyr Inc. is an app-based platform that instantly connects businesses with skilled and experienced gig workers to fill hourly paid shifts. Hyr's marketplace helps hospitality and retail businesses find extra help, and gig workers to earn extra money. More gig workers in the Hyr marketplace earn on top of their hourly earnings with a points based benefits program. Hyr has been deployed to more than 30,000 gig workers and helped hundreds of businesses fill shifts

when they need to most, while decreasing their operation costs and elevating their customer experience.

Kelly and KellyOCG connect talented people to companies in need of their skills in areas including science, engineering, education, office, contact center, light industrial, and more. Kelly and KellyOCG are always thinking about what's next in the evolving world of work. They help people ditch the script on old ways of thinking and embrace the value of all workstyles in the workplace. Kelly and KellyOCG directly employ nearly 440,000 people around the world, and connect thousands more with work through their global network of talent suppliers and partners in the KellyOCG practice.

CWI members support efforts to modernize federal workforce policy to enhance choice, flexibility, and economic opportunity for all workers. CWI supports the adoption of clear, modern definitions of independent contractor status to ensure that opportunities for independent workers are not restricted, and to allow and foster enhanced flexibility for students, parents, small entrepreneurs, and retirees, as well as others who prioritize the flexibility and freedom independent work provides. CWI also supports lowering barriers to work and entrepreneurship for communities that have traditionally struggled in the job market, including opportunities for immigrants, caregivers, veterans, first time small business owners and entrepreneurs, and individuals with criminal backgrounds.

CWI educates policymakers on the benefits of independent work and supports policy proposals that protect and empower individuals to choose nontraditional work arrangements. CWI's Principles include: (1) Individuals should have the freedom to determine how, when, and where they work; (2) Those choosing independent work should be treated fairly under the law in terms of access to training, benefits, and certain protections; (3) Empowerment and flexibility for workers will improve economic opportunities for workers and outcomes for organizations; (4) Independent work should be applicable across all positions, platforms and industries; and (5) Legal and regulatory consistency across states is vital for broad adoption of independent work.

#### CWI RESEARCH AND FINDINGS ON INDEPENDENT WORKERS AND INDEPENDENT WORK OPPORTUNITIES

In early 2020, prior to the Division's Issuance of the Proposed Rule, CWI commissioned a National Survey of 600 Self-Identified Independent Contractors and a robust Analysis of Literature on Technology and Alternative Workforce Arrangements. Both the National Survey and the Research and Analysis Report are attached to these Comments and provide timely support for the Division's modernization of the economic realities test under the FLSA.

The National Survey included survey results of 600 self-identified independent contractors. These independent workers included workers performing the following types of work (multiple responses were allowed):

28% Technology (web design, app developer, and programmer)

27% Professional Services (accounting, legal advice, healthcare, and consulting)

27% Sales (real estate, e-retailer, and social sales/network marketing)

- 27% Personal Services (hairstylist and tutoring & fitness instructor)
- 24% Freelance Communications (journalism, copywriting, and social media)
- 22% App Based Delivery (Amazon, Doordash, Instacart, Shipt, and TaskRabbit)
- 21% Ride Sharing (Lyft and Uber)
- 21% Creative Design (photography and graphic design)
- 8% Non App Delivery (grocery stores, newspapers, and other products)

(National Survey, attached hereto as Exhibit A, p. 4.)

An overwhelming percentage of independent workers surveyed -- 88% -- agree that advances in technology have made it easier for all people -- regardless of their college education or background -- to find well-paying and satisfying independent work opportunities that fit around their lives, rather than having to fit their lives around their employment (*Id.* at 10).

Eighty-five percent (85%) of independent workers surveyed believe that major reforms are necessary to employment laws to reflect today's economy and support innovation, economic opportunity, and worker empowerment (*Id.* at 10).

These independent workers cited the freedom of being your "own boss," flexibility of the relationship in terms of their control over the work performed, and flexibility in hours of work, as the most important attributes of being an independent worker (*Id.* at 6). Eighty-eight percent (88%) of independent workers surveyed favor regulatory and other reforms that enhance worker mobility and 90% favor affirming the right of individuals to choose an independent style of work (*Id.* at 17). The National Survey's results support the DOL's Proposed Rule's focus on voluntariness and flexibility as hallmarks of independent work and as core elements of economic independence.<sup>3</sup>

In 2020, CWI commissioned a study by Ankura Consulting Group entitled Analysis of Literature on Technology and Alternative Workforce Arrangements.<sup>4</sup> Ankura's Research and Analysis Report is a comprehensive, current analysis of research on the impact of technology

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<sup>3</sup> See also, Hearing before the Subcommittee on Innovation and Workforce Development of the Committee on Small Business, United States House of Representatives on *The Digital Ecosystem: New Paths to Entrepreneurship*, held on May 9, 2019 available at <https://www.congress.gov/event/116th-congress/house-event/109422> (Statement of CWI Member, Hyr, Inc.'s Erika Mozes, Co-Founder and COO of Hyr, Inc., noted that her company helps freelancers schedule their freedom, connecting workers with businesses on a worker-focused platform).

<sup>4</sup> The study was conducted by Ankura Senior Managing Director Dr. James Langenfeld and Senior Director Chris Ring. Dr. Langenfeld specializes in applied microeconomics, labor, and antitrust, amongst other areas. Dr. Langenfeld is also Co-Chair of the American Bar Association's Section of Antitrust Law's Economics Committee ("ABA Section") and Editor of *Research in Law & Economics*. He was previously Director for Antitrust in the Bureau of Economics of the Federal Trade Commission, and was the primary drafter of the ABA Section's initial comments on platform markets submitted to the FTC and various international agencies in 2018, as well as supplemental comments submitted in 2019 (*Id.* at p. 1, fn 1; and Appendix 1).

on independent workers, staffing agencies, the retail sector, the direct selling industry, and platform companies that match independent workers with potential customers in a wide variety of service and product markets, including ridesharing, food delivery, and freelancers.

The Research and Analysis Report, citing recent literature, finds that firms embracing technology through the use of independent workers “can be an important part of improving business performance, such as by increasing speed to market, increasing organizational agility, improving overall financial performance, and allowing firms to compete in a digital world where increasingly relevant, highly-skilled talent is in short-supply.” (Research and Analysis Report, attached hereto as Exhibit B, p. 1 and p. 4, citing SAP Fieldglass and Oxford Economics.) Through technology, new companies are emerging as platforms (or “matchmakers”) that connect independent workers with opportunities. These platforms allow independent workers to promote and grow their businesses, increasing opportunities to maximize earnings in their chosen occupation.

The Research and Analysis Report describes independent workers as a heterogeneous group, noting that while some of these workers engage in independent work as a primary source of income, the research finds most of “the alternative work force is intentionally engaged on a part-time basis.” The Research and Analysis Report reviews several studies that show “these workers highly value flexible scheduling to coordinate with their other commitments,” and “[m]any of the new work models are lowering barriers to entry and increasing opportunities for workers to earn additional income, while enhancing flexibility in scheduling, volume of work, and location.” (*Id.* at 2.) The Report also points to research that finds the On-Demand Economy “may serve as a valuable income-smoothing tool to help weather negative earnings shocks, serving as a preferable alternative to taking on high-cost credit, becoming delinquent on existing credit, or constraining spending.” (*Id.* and pp. 28-29, citing work by Diana Farrell and Fiona Greig of the JPMorgan Chase Institute.) The authors conclude platforms play a critical role in the modern economy by connecting independent workers to opportunities of their choice.

The Research and Analysis Report concludes that “technology is affecting business models, industries, and their workforces in different ways. All models and industries will need to adapt to new technologies or risk being left behind.” (*Id.* at 3.)

The law must evolve with technology as the workforce has, which supports the Proposed Rule’s formulation of a test that provides certainty and recognition of new technologies’ impact on the economy and the workplace and the expansion of the role of independent workers in the United States economy.

The findings of Ankura’s research and CWI’s Survey are supported and reinforced by research recently published by other independent 2020 research reports and findings. For example, just last month (September 2020), the 2020 Freelance Forward Study commissioned by Edelman Intelligence for Upwork was published (“Freelance Forward Study”). The Freelance Forward Study concludes that: (1) the freelance workforce remains an essential pillar of the U.S. economy (with freelancers contributing \$1.2 trillion dollars to the U.S. economy in annual earnings; a 22% increase since 2019); (2) freelancers are increasingly high-skilled (50% of freelancers provide skilled services such as computer programming, marketing, IT, and business consulting); (3) freelancing increases earnings potential (75% of independent workers reported earning the same or more pay than their earnings as an employee); and (4) as a result of the pandemic, 58% of traditional employees are increasingly considering independent work in

the future. Upwork's Chief Economist noted that "the changing dynamics to the workforce that has occurred during the (pandemic) crisis demonstrate the value that freelancing provides to both businesses and workers." See <https://www.upwork.com/i/freelance-forward>.

The 2020 Consumer Attitudes & Entrepreneurship Study conducted by Ipsos on behalf of the Direct Selling Association provided similar survey findings. The Study found 77% of Americans are interested in flexible, entrepreneurial/income-earning opportunities. Interest in entrepreneurial opportunities is highest among younger generations, with 91% of Gen Zers and 88% of Millennials interested in entrepreneurial opportunities. The Study also showed that direct selling and gig work are seen as attractive options for entrepreneurial opportunities. Approximately 80% of respondents viewed direct selling and gig opportunities favorably. See 2020 Consumer Attitudes & Entrepreneurship Study available at: [https://www.dsa.org/docs/default-source/research/dsa-ipsos-2020-consumerattitudesinfographic2-27.pdf?sfvrsn=68ddfa5\\_2](https://www.dsa.org/docs/default-source/research/dsa-ipsos-2020-consumerattitudesinfographic2-27.pdf?sfvrsn=68ddfa5_2).

A recent survey conducted by Wonolo resulted in similar findings, especially as one looks at the trending statistics. For example, in September 2019, 49% of workers preferred work opportunities that provided them flexibility to choose their work days. In May 2020, that number jumped to 60%. Similarly, in September 2019, 29% of workers preferred being an independent contractor to being fully employed. In May 2020, that number jumped to 45%. See <https://go.wonolo.com/rs/052-CZJ-953/images/Data-report-The-rise-of-blue-collar-gig-workers.pdf>.

Opportunities for independent work continue to grow in the United States economy, along with many workers' desire for the flexibility independent work offers. CWI submits these comments (and Exhibits A and B) to ensure the Division is informed of the nuances of these independent business relationships, as it is important that the definitions and other relevant language in the Proposed Rule are updated and clarified to allow workers and businesses to pursue these mutually beneficial opportunities as the United States economy evolves with technology.

## COMMENTS

- I. The Proposed Rule's Framework of Two Core Factors As Most Probative of Dependence and Independence Creates Appropriate Clear Criteria for Determining the Economic Realities of the Relationship between Workers and Businesses.

It is critical that workers and businesses have a clear, uncomplicated, modern, and uniform test to determine the status of workers under the Act. Clarity brings compliance, certainty, and effective, streamlined enforcement of the Act's obligations. The Division's straightforward, concise interpretation of "economic dependency" is grounded in the Act's statutory definition of "employ" and "employer," consistent with Supreme Court precedent, and well-reasoned courts of appeals' application of the multi-factor economic reality test that will further FLSA compliance, while supporting the flexibility, freedom, and entrepreneurial opportunities available to workers and businesses in today's economy. That groundwork and analysis is described accurately and fully set forth in the Proposed Rule at 60601 - 60604, and is not restated here.

Similarly, the Division's recognition of the valid criticism of the under-developed and inconsistently applied current multi-factor analysis of "economic dependence," as well as the indefinite and amorphous nature of its many different and sometimes competing considerations and factors, support the Division's two Core Factors as determinative of a worker's "economic dependence."<sup>5</sup>

It is also important to note that the Supreme Court has long held that under the Act, whether a worker is economically dependent or independent of a potential employer is a fact-specific inquiry that is individualized to each worker. See *Barrantine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 739 (1981). CWI proposes that the Final Rule explicitly state that this individualized, worker-specific inquiry as to each Core and Additional Factor is required under the Act.

The Proposed Rule's specific guidance that facts relevant to one of the two Core Factors should not be considered as relevant to the other Core Factor or Additional Factors is critical to ensure consistent application and definition of the relevant Core and Additional Factors. For this reason, CWI recommends that the Final Rule spell out specifically that each of the Core Factors should be analyzed independently of the other, without overlap.

CWI further recommends that the Final Rule clearly state that each of the Core Factors has equal weight in the equation of dependent/independent relationships -- if the analysis of each Core Factor independently points in the opposite direction of the other Core Factor (one independence and one dependence) then the analysis must turn to a review of the Additional Factors (to break that tie) (without regard to the Core Factors analysis). And, each Additional Factor is entitled to equal weight.

CWI also recommends for clarity and as well as to accurately reflect a worker's individualized use of independent judgment and initiative, that the Proposed Rule be revised to confirm affirmatively that a worker's abilities and available rights under a contract with a business, whether exercised or not, are determinative of a fact where the worker is not prevented by the business from exercising those contractual rights. In doing so, the Division would reject the Proposed Rule's focus on the exercise of contractual rights by the parties, and focus on the actual availability of those rights and opportunity to exercise them as the relevant inquiry (*compare* Proposed Rule at 60622). This is critical for certainty in contracting, and to reflect the true nature, initiative, and independence of workers. The individual, voluntary choices that a worker makes in exercising (or refraining from exercising) their contractual rights are not determinative of the worker's relationship.

Put another way, in a circumstance where a worker negotiates rights under a contract, but declines to exercise them for some or all of the duration of the contract, the parties' relationship should not devalue or discount the worker's rights, where there is no evidence the worker was precluded by the business from exercising those rights. Examples of contractual

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<sup>5</sup> CWI agrees with the Division that California's recently-enacted ABC test is "far more restrictive of independent contracting arrangements than any formulation of an 'economic reality' balancing test...". Proposed Rule at 60636. Court challenges, numerous industry and worker specific amendments since its enactment, and the internet are full of reports of the economic harm to workers, consumers, businesses, and the economy resulting from its enactment as of January 1, 2020 (see e.g., Proposed Rule at 60636, fn 150, and articles cited therein, raising significant worker concerns regarding the impact of the ABC test on worker opportunities).



rights include a worker's ability to negotiate prices, the length of the contract term, the provision of additional services, and other elements of the contract. If the worker had the ability to negotiate these terms but chose not to do so, that choice by the worker is not evidence of the worker's inability to negotiate the parties' agreement.

This analysis also extends to a worker's contractual right to use other workers to provide services, and right and real opportunity to contract with other companies to provide services. Stated otherwise, it is the worker's opportunity to negotiate contract terms and choose to work for others (and engage others in their relationship with the business) that matters to the determination of the dependence/independence of the worker. It is not evidence of dependence that a worker, after entering into a relationship with those rights, declines to exercise certain of these rights, at the worker's discretion or to respect a bona fide need to protect the confidential and proprietary information of the business. Any other result focusing on after-the-fact decisions by the worker leaves the parties' relationship to the uncertainty of individual choices made by the worker long after entering into the relationship (where those decisions are truly of the worker's determination, and not mandated by the business).

Finally, as discussed below, CWI provides additional comments to further clarify and refine the two Core Factors.

#### First Core Factor -- Nature and Degree of a Worker's Control Over the Work

The Proposed first Core Factor -- the nature and degree of a worker's control over the work -- is an appropriate Core Factor central to the analysis of whether a worker is economically dependent on a business. CWI believes it is important to acknowledge that the concept of controlling the work here is broader than just controlling the manner and means of how the actual contracted-for services are performed. Control over the work here includes, control over the way the independent worker runs her business operation, including whether to sub-contract, determining schedules, as well as determining the manner and means of how the services are to be performed.

CWI agrees that flexible work schedules and an individual's setting of their own schedule by selecting their projects, schedule, and scope of work to be provided to the business as well as the ability to determine the manner and method of how to accomplish a result are evidence of control by the worker over the work they perform.

In the same way, and equally demonstrative of a worker's control over the work, is evidence that a worker has the opportunity to reject additional offers or opportunities of work without a negative consequence on their opportunities for continued work from the business (Proposed Rule at 60612, fn. 35).

Similarly, a worker's ability to work with little to no supervision by the business as to the way in which the worker's services are provided (even where a specialized skill is unnecessary to the performance of the work) is evidence of the worker's control over the work. As the Proposed Rule cited approvingly, courts have noted that the occasional presence of supervisors who do not dictate *how* work is to be performed favors the finding of an absence of control or minimal control over the worker that leaves the worker with considerable control over the work (see cases cited in Proposed Rule at 60612, fn. 35) and is not the type of control contemplated by this Core Factor in determining the dependence or independence of the worker.

CWI also supports the Proposed Rule's explicit recognition that it is important that contracting parties be allowed to build into their relationships compliance with legal requirements, health and safety standards, insurance obligations, as well as other commonly-used contractual terms, without concern that those provisions would evidence control over the worker under the Act (Proposed Rule at 60613).

CWI notes that the Final Rule should also explicitly allow and encourage contracting parties to build into their relationships through contractual terms as well as day-to-day audit and other practices, without concern regarding a negative inference of control over the worker, the following: (1) compliance with professional obligations and ethics standards; (2) compliance with regulatory obligations, including over health and safety; (3) compliance with other published industry standards; (4) compliance with applicable local, state, and national licensure standards and rules; and (5) additional contractual term examples of agreed upon results and deadlines, without concern that those provisions would evidence control over the worker under the Act.

The Final Rule should clarify that such contractual and legal obligations, recommendations, standards, and contractual terms are not evidence of the businesses' control over the work the worker performs. These obligations are irrelevant to the first Core Factor as *well as* other relevant factors considered in a determination of whether the worker is an employee under the Act. The Final Rule should also specifically state that a business's reasonable steps taken to ensure compliance with such contractual terms, including requesting confirmation that the worker satisfies the legal and contractual obligations through certifications and contractual and legal audits, will be considered proactive, positive contracting practices, as opposed to indicia of control over the worker.

In addition to the above clarifications and additions, CWI recommends that the Final Rule include the following additional guidance as illustrative examples of the nature of an independent worker's control over the work:

The worker's ability to make decisions with respect to the details of how the work is performed, including the staging and sequencing of aspects of the work;

The worker's selection of supplies, tools, or equipment to be used (or not used) by the worker;

The worker's control over when the work is conducted (*e.g.*, worker flexibility in start and end times) where flexibility exists in the result to be accomplished or the time periods available to a worker to offer their services;

The worker's control over where certain aspects of the services can be performed where the subparts do not change the results provided by the worker; and

The worker's discretion to utilize the services of others to perform the work in whole or in part, or to support the worker's performance of services (including performing some of the contracted work and/or performing supporting services such as accounting, legal, administrative, or financial services to support the worker or services to support equipment or tools used by the worker to perform services).

CWI also recommends that the Final Rule include specific guidance that the following are *not* evidence of a business's control over the work of the worker:

The business provides information regarding the final result to be accomplished by the worker;

The business provides customer specifications/details and feedback relating to the work (including requesting confirmation that the customer feedback has been addressed);

The business provides time frames within which services can be provided in light of the services contracted for, and/or the time sensitivity or perishable nature of the services/products;

The business's right to enforce contractual obligations;

The business provides the worker suggestions, recommendations, guidance, and/or tips that are not mandated but informational relating to the services; and

The business pays the worker by the hour where it is customary in the particular business/trade to do so (e.g., attorneys, physical trainers).

Finally, for the reasons set forth below, CWI urges the Division to consider revising the Proposed Rule to eliminate reference to a worker's opportunity to perform services for other companies, and instead incorporate that factor into a separate Additional Factor (as described *infra* at pages 17 - 18).

#### Second Core Factor - The Opportunity for Profit or Loss

The Proposed Rule's second Core Factor -- the worker's opportunity for profit or loss based on initiative or investment -- is an appropriate Core Factor, as described in the Proposed Rule at p. 60613.

For the reasons set forth below, CWI urges the Division to expand the illustrative examples of a worker's initiative or investment that impacts a worker's opportunity for profit or loss as described below.

With respect to the Proposed Rule's discussion of a worker's business acumen as indicia of the worker's ability to impact their profit or loss, CWI proposes that the Final Rule expressly state that a worker's business acumen is to be interpreted to cover acumen relevant to the wide range of business endeavors in the U.S. economy, including, for example: sales, managerial, customer service, marketing, distribution, communications, and other professional, trade, technical, and other learned skills, as well as other unique business abilities and acumen, including acumen that impacts a worker's ability to profitably run their own independent business.

CWI urges the Final Rule expand upon the examples of ways that workers impact their own profitability as well as their losses (by impacting their profits and their costs) to provide more clarity to workers, businesses, and reviewing courts as follows:

The worker's own decision-making regarding the use of helpers, substitutes, and related labor or specialties to assist in the services provided, the tools and equipment used, or the maintenance of the worker's business structure (including accountants, attorneys, and maintenance services) to the extent those decisions impact the worker's costs and overall profitability;

The worker's initiative and the decisions they implement in connection with the performance of services and/or capital expenditures on equipment, supplies, and tools (including, for example, the choices in terms of where or from whom they purchase equipment and supplies, the quality of equipment purchases amongst available choices, and the volume and price of various individualized worker purchases of equipment, supplies, and tools);

The worker's initiative to invest in the development of skills, competencies, and trades (including education, training, licenses, certifications, and classes) is also relevant to demonstrating initiative in expanding profitability and opportunity for the independent worker;

The worker's expertise in delivery of services/products that result in enhanced profits through tips and other incentives as a result of great customer service and exceptional skills, for example.

The worker's losses incurred as a result of customer complaint or other charges where the worker's results were below customer or contractual expectations and obligations; and

The worker's avoidance of liquidated damages charges or indemnification obligations in the parties' agreement relating to various provisions, including material breaches of the parties' agreement.

CWI also urges the Division to include in the Final Rule a specific statement that where workers have flexibility to choose amongst work opportunities offered, they may experience financial losses in connection with their cancellation of accepted services or provision of substandard services, and are engaged to provide time-sensitive, often perishable services and products, that a business's setting of "default prices" does not upend the worker's substantial control over their own profitability and loss, but is dictated by the nature of the service and customer desires. See, e.g. WHD Opinion Letter FLSA2019-6 at 9 - 10.

- II. The Proposed Rule's Three Additional Tie-Breaking Factors -- Skill, Permanence of Relationship, and Integrated Unit -- Should be Revisited and Eliminated and/or Revised as Described Below.

CWI provides recommended revisions, deletions, and additions to the Proposed Rule's three Additional Factors -- skill required, permanence of the relationship, and whether the work is part of an integrated unit of production -- as possible "tie-breaking" indicia of independence.

Specifically, in response to the Division's specific callout in the Proposed Rule as to whether the distinction it has currently drawn between "amount of skill required" and courts which have traditionally expanded this factor to include consideration of initiative and judgment,

CWI notes that the “skill required” Additional Factor is not, standing alone, illuminating on the issue of whether the worker operates independently (Proposed Rule at 60615). As a result, CWI recommends that the Division reconsider and reject “skill required” as a stand-alone factor in light of its relevance and appropriate inclusion (but not as an essential factor) in the second Core Factor -- the individual’s opportunity for profit or loss. In addition, a “skill required” stand-alone factor could discriminate against those workers who wish to have the flexibility and freedom to provide services as an independent worker that may not require specialized or formal education programs or training.

Utilizing the permanence of the relationship factor as described in the Proposed Rule will discourage the continuation of productive, positive business relationships between workers and businesses, and will often provide no insights into the ultimate question of independence. As a result, this factor should be deleted and/or revised to state that the permanence or lack of permanence of a relationship is governed by the relationship’s terms. Contracts of a specific duration are not evidence of permanence or indicative of dependent relationships. Additional comments are contained below.

Further, as discussed below, CWI urges the Division to review and revise, consistent with its comments, the Additional Factor described in the Proposed Rule as to whether the work is part of an “integrated unit of production.”

#### Skill Required Should Be Incorporated into The Core Factor of Opportunity for Profit or Loss

“Skill Required” should be removed as a standalone factor of economic dependence/independence and incorporated into the second Core Factor of the worker’s opportunity for profit or loss based on initiative or investment. Where specialized skills are required to perform work, workers unquestionably have taken the initiative to invest time and money into developing those skills. This initiative is appropriately already captured in the second Core Factor.

And, given the expansive nature of today’s independent work opportunities that encompass a far wider array of individuals who may not possess a “skill” that is a part of a traditional learned profession or trade, but instead is the culmination of managerial and customer service skills and initiatives and judgment<sup>6</sup> -- a focus on “the amount of skill required” separate from a worker’s initiative that impacts the worker’s profits is an unnecessarily restrictive view of the independent work currently being performed in the U.S. economy (Proposed Rule at 60615).

For example, freelancers may be self-taught and/or gifted writers or cartoonists that provide content to businesses in the communications and journalism fields. While they may or may not have a degree, and surely one may not be required to provide freelance materials to a

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<sup>6</sup> See CWI’s 2020 National Survey Results from respondents who provide a wide variety of services through independent work, including: web design, app developer, programmer, accounting, legal advice, healthcare, miscellaneous consulting, real estate sales, internet retailer, social sales/network marketing, hair dresser, tutoring, fitness instructors, journalism freelance, copywriting, social media communications, app-based services to customers matched through platform companies, ride-sharing, photographic creative design, graphic artists, and deliverers of newspapers, groceries and other products (see Exhibit A, at page 4).

publication, those workers under this formulation would be determined to not have satisfied the amount of skill required factor, yet their work and the worker's initiative in developing their own literary and other journalism skills may be key to their opportunities to provide these services to businesses and to controlling the means and manner of work they perform. This is true even when the business may employ and train other employee staff writers on various journalism and other related skills.

CWI is concerned that this factor will be inappropriately weighted against independent workers who may possess enormous initiative and business acumen that drive the profitability and success in their independent work relationships, even though they do not have a traditionally recognized specialized skill. For example, in the case of a courier who does not need a specialized skill to pick up a package and deliver it by bike, foot, or car from Point A to Point B, that lack of a traditionally recognized specialized skill does not consider the courier's unique abilities to control their work and their profits as a result of their business acumen and other traits. In a 2019 annual survey of Lyft and Uber drivers, drivers responded that, after expenses, on average they earn \$12.66 per hour (<https://therideshareguy.com/uber-driver-survey/>). It likewise does not measure one's independence. Independence may exist irrespective of a specialized skill.

For example, many independent workers are able to multi-home -- *i.e.* provide services to multiple clients during the same week, day, or even hour. Here workers for rideshare companies and other delivery companies demonstrate their independence not only by choosing when, whether, where, and how long to work, but also by toggling back and forth between different platforms to promote themselves and seek opportunities. The Additional Factor of Skill Required (without reference to a worker's acumen, initiative, and judgment) is out of step with today's economy and the available flexible work opportunities enjoyed by so many workers that have been made possible because of the lack of barriers to entry into these relationships (including not requiring prior development of specialized skills). That is the benefit of today's independent work -- it has become so flexible that it allows almost anyone to enter into distribution and other service industries and make it into the opportunity that they design for themselves. This access is made all the easier by access to platforms that connect workers with business opportunities.

CWI submits that it should not matter whether workers have a learned or specialized skill in determining their status. In the example given, the worker is clearly not at all economically dependent on, or controlled by, any particular app, as previously found by the Division in WHD Opinion Letter FLSA 2019-6 (April 29, 2019) (holding that ridesharing drivers were independent contractors under the Act, and their exercise of managerial discretion and lack of training weighs in favor of independent contractor status). It is critical that the Final Rule not include Skill Required as a separate factor, for all the reasons set forth above, and consistent with the Division's own opinion letter recently issued and cited directly above (WHD Opinion Letter FLSA 2019-6).

The Permanence Factor Should Be Eliminated or Substantially Revised As Described Below to Consider the Contractual Nature of the Parties' Relationship.

The Proposed Rule's revision of the traditional factor of independence of exclusivity and length of the relationship between the worker and the business into a focus of duration, continuity, and regularity of the parties' relationship renders its usefulness in its current form

very limited and destructive to thriving, successful independent contractor relationships. Thus, CWI encourages the Division to eliminate this as an Additional Factor or substantially revise the Proposed Rule's treatment of this factor as described below.

For decades, the Internal Revenue Service (the "IRS") has recognized that with respect to the factor of permanence: "If a business engages a worker with the expectation that the relationship will continue indefinitely, rather than for a specific project or period, this is generally considered evidence of their intent to create an employment relationship." *Training Materials: Independent Contractor or Employee?* <https://www.irs.gov/pub/irs-utl/emporind.pdf> pp. 2 -27 (October 30, 1996). The appropriate focus, as clearly set forth by the IRS, is the indefiniteness of the relationship, not the length of the relationship, as set forth in the Proposed Rule at 60615 - 60616. The IRS detailed specifically why the two concepts of indefiniteness and long-term nature of relationships are different -- the first relevant, the second a neutral fact that should be disregarded.

The IRS' widely-used and cited 160 page document entitled *Training Materials: Independent Contractor or Employee?* recognizes that independent workers and businesses enter into long-term and regularly renewed contracts due to superior service, competitive costs, or the lack of alternative service providers, for example, and that these relationships are not evidence of the permanence of the relationship or employee status. The IRS concluded that there are legitimate reasons why businesses and independent contractors' relationships may consist of one long-term or a number of separate consecutive contracts of specific duration. (*Id* at 2 - 22).

In contrast to the vast majority of employment relationships, the intent of the parties with respect to their relationship that is captured in the essential terms of an independent contractor agreement is instructive as to the independence of the worker. Courts and agencies have long viewed the parties' use of a written agreement, with terms that are reflective of business relationships, as evidence of the intent of the parties, and the permanence of their relationship. See, *Illinois Tri-Seal Prods., Inc. v. United States*, 353 F.2d 216, 218 (Ct. Cl. 1965) (the contractual designation of the worker is "very significant in close cases").

With respect to determinations as to whether relationships are permanent, CWI requests that the Division revise the Proposed Rule to state that independent contractors and businesses that enter into one or more contracts of a specific duration demonstrate a lack of permanence of the working relationship and provide evidence of the independent nature of the relationship. As written, the Proposed Rule does not reflect the reality of the relationship between many businesses and independent workers; these are often not "indefinite in duration or continuous" in the relevant sense; this is especially true, for example, in relationships with independent workers who often may start and stop at will—and do as many or as few offers of work as they want. It would be further helpful for the Division to clarify that the relationship can be viewed as a series of individual transactions rather than one continuous, indefinite relationship.

CWI is also concerned that a rigid focus on permanence creates perverse incentives for businesses and independents to avoid successful or mutually beneficial work relationships. Businesses may engage independents to provide a service that a business does not. The business may focus its efforts on production or creation of a product, but then requires a distinct function to take the product to market/distribution. The need for distribution is a constant. But the business may not have the means, fiscally or otherwise, to itself own and operate a

distribution operation. The solution there is to contract out the distribution work to an independent, thus creating synergies. If that relationship is successful, there would be no reason to end it. Yet if an artificial notion of permanence is applied, there would be a disincentive to create and maintain a long-lasting synergy between businesses and independents, which only hurts both entities.

Relationships between workers and businesses that respect the contracting structure and contain elements of independent business relationships should be considered in a revised Additional Factor that looks at the Relationship of the Parties. With respect to permanence, it is not the amount of work performed by the worker that is relevant, or the amount of time that the worker performs the work that provides insight into the parties' intent in terms of the nature of their relationship. Instead, relevant factors include: the existence of a written agreement between the parties; a specific term to that agreement, including an effective date and termination date; an agreement that states the rights and obligations of both parties; and an agreement that is not subject to termination on less than 30 days' written notice without payment of liquidated or other damages by both parties if the other breaches; that include negotiable terms; and an agreement that is entered into voluntarily by both parties.

The Integrated Unit Factor Should Be Revised As Described Below.

Whether a worker is performing work that is part of an integrated unit of production in lieu of reliance on the extent to which a worker's services are "integral" to, or an essential part of, another companies' business should be revised as described below.

CWI notes that the Proposed Rule properly rejects reliance on whether a worker's services are "integral" to, or an essential part of, a business. It is critical that with respect to this factor, the Division provide specific guidance relevant to both companies that provide a platform or marketplace for workers to be matched with those who desire their services.

This factor needs review and clarification to ensure that it does not unnecessarily stymie independent relationships that may form subparts of a specific unit and reflect the impact of technological change on consumer preferences and worker demand for expanded, flexible economic opportunities. The Proposed Rule should expressly recognize that multi-sided platform companies that connect customers with potential independent workers are distinct entities that are not engaged in the work the independent worker performs. Platforms must be recognized as operating outside of an "integrated process" involving the worker and also not as hiring entities of the independent worker, recognizing that workers who provide services to customers connect using the platform.

Law, economic literature, and regulatory agencies recognize multi-sided platforms as distinct entities. *See, e.g., Ohio v. American Express Co.*, 138 S.Ct. 2274, 2280, 585 U.S. — (2018) (discussing two-sided transaction platform); *see also* David S. Evans, *Matchmakers: The New Economics of Multisided Platforms* (2016); Hagiu, Andrei and Julian Wright, "Multi-sided platforms" *International Journal of Industrial Organization* 43, no. 1 (2015): 162-174 (hereafter, Hagiu and Wright (2015)), pp. 162-163; Evans, David S. and Richard Schmalensee, "Markets with Two-Sided Platforms," *Issues in Competition Law and Policy* 667, ABA Section of Antitrust Law 2008, 667-693, p. 667. As such, platforms are not part of an integrated unit with the worker who provides the actual service. For example, a ridesharing platform provides a market for drivers and riders to find each other. When a rider accepts a ride request and transports the



rider, that is not part of one continuous integrated process, and one does not employ the other. Rather, viewed properly, these are distinct functions: the platform provides the match and the driver performs the transportation service via a platform and is not part of an integrated unit or production line.

Indeed, regulatory bodies recognize this distinction. Recently, the Division did so as well. In 2018 the Division restated its longstanding position -- one it has held “[f]or more than 40 years” that matchmaking services can exist without creating an employment relationship. See Field Assistance Bulletin No. 2018-4, “Determining whether nurse or caregiver registries are employers of the caregiver (July 13, 2018) (“Bulletin”). Specifically, the Division determined that nurse or caregiver registries are not employers when they “match” people who need caregiving services with caregivers who provide the services. (Bulletin at 1.)

More recently, as noted above, in an Opinion Letter, the Division considered the relationship between a company that provides “an online and/or smartphone-based referral service that connects service providers to end-market consumers to provide a wide variety of services, such as transportation,” as well as other services. The service provided by operation of a software platform “that uses objective criteria to match consumers to service providers.” See FLSA2019-6 (April 29, 2019). Here, too, the Division concluded that the company was not the employer of the service providers, as the company “does not receive services from service providers, but empowers service providers to provide services to end-market consumers. The service providers are not working for [the company]’s virtual marketplace; they are working for consumers through the virtual marketplace. They do not work directly for [the company] to the consumer’s benefit; they work directly for the consumer to [the company]’s benefit.” *Id.* at 7. Similarly, the National Labor Relations Board (“NLRB”) Office of General Counsel (“OGC”) was asked “for advice as to whether drivers providing personal transportation services using [a company’s] app-based ride-share platform were employees... or independent contractors” and concluded that the drivers were independent contractors. See NLRB Office of General Counsel Advice Memorandum (April 16, 2019) (the “OGC Advice Memorandum”).

The Proposed Rule describes these platform companies as “intermediary companies” whose business operations with the worker providing services terminates at the point of connecting the independent worker to consumers, and do not extend to the independent worker’s actual provision of services. (Proposed Rule at 71.) To eliminate any confusion, an explicit expression that the platform is not analogous to a production line is essential.

While CWI agrees that this factor should move away from the concept of importance or centrality, it nonetheless is concerned that the focus of the newly framed inquiry on the “integrated production process” is not helpful to assessing a worker’s independence and will likely lead to litigation.

This has broader application, though, than to just platforms. Consider the example of above where a product manufacturer partners with a distribution independent. Each performs distinct functions and has a different expertise. Yet if the assembly line notion of integrated unit were accepted, there could be a risk that a court looking at the manufacturer and distributor would find them to be not different business but just component parts of one long assembly line that makes, sells and distributes the product to customers. That would be a disservice to the many small businesses that find their niche in servicing larger businesses who lack certain capabilities.

CWI further proposes that the Division consider adding an alternative way to meet this Additional Factor, consistent with the manner in which a number of state laws have done, to accommodate myriad different independent worker relationships. CWI proposes that the Division include the phrase, “or, alternatively, that the worker is performing work, the majority of which is performed off the physical premises of the business.”<sup>7</sup>

III. CWI Proposes that the Division Consider An Alternative Additional Factor to Break Any Ties That Result From an Analysis of the Two Core Factors and to More Accurately Determine Economic Dependence and Independence

Worker mobility has been described as *the essence of independence* in worker relationships that are characterized by a worker’s opportunity to simultaneously work for multiple businesses. *Saleem v. Corp. Transp. Grp., Ltd.*, 854 F.2d 131,141-143 (2d Cir. 2017) (holding a worker’s opportunity or ability to simultaneously provide services to multiple entities, including competitors, demonstrates “considerable independence”). Conversely, if a business prohibits a worker from providing services to others, that could suggest dependence on the business if the prohibition’s primary purpose is to control the worker’s opportunities. In contrast, where the prohibition on providing services to others is to protect the confidential, personal, or proprietary information of the entity with whom the worker is contracting (or its customers), or is as a result of regulatory or other legal requirements, that is not evidence of dependence.

Workers who are mobile are independent workers, not dependent on employers.<sup>8</sup> Courts have focused on the worker’s opportunity to perform work for others, as central to independence. In considering this factor, it is the nature of the relationship between the worker and the business it provides services to that is critical, not whether the worker exercises their right to provide services to others. Some workers may use their own discretion to limit their work opportunities to one business at a time for cost or other reasons, while other workers may independently choose to perform services with multiple businesses at the same time. The worker’s choice to engage with more than one business is not determinative of the economic dependence of the work under this proposed Additional Factor.

Many workers enter into relationships with multiple businesses to optimize their freedom and work opportunities. Others do so to maximize their economic leverage with a particular business. Whatever the worker’s reason for doing so, or choosing not to do so, this factor -- A Worker’s *Opportunity to Work for Others* -- independently weighs heavily in favor of a worker’s independence, and should be considered as one of three stand-alone Additional Factors to be considered in breaking a tie as to whether a worker is economically independent or dependent on a business.

The opportunity to provide services to multiple businesses significantly expands a worker’s opportunity to shape their business opportunities in the marketplace, and should be considered as a significant factor of independence. A worker’s opportunities are without limit as

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<sup>7</sup> Importantly, CWI notes that in a recent survey of 734 drivers using the Lyft or Uber app to match their services with customers conducted in May, 2020, 71% of drivers prefer their current status as independent contractors over employee status (<https://therideshareguy.com/uber-driver-survey/>).

<sup>8</sup> See, e.g., *Sec’y of Labor, U.S. Dep’t of Labor v. Lauritzen*, 835 F.2d 1529,1542 (7th Cir. 1987) (“The usual argument that workers are ‘dependent on employers ...is that they are immobile.”) (Easterbrook, J., concurring).

they relate to any business with whom they do business when the worker is not restrained in the manner in which they develop and shape the scope of their business structure.

CWI urges the Division to clarify that the right to provide services to other companies should be entitled to the same weight regardless of whether this right is exercised by the worker (consistent with comments noted above, noting that the right may not be available due to legal or regulatory requirements or concerns regarding the loss of proprietary, confidential or other personal information). For example, one service provider on a multi-sided platform may choose to use one platform at a time; while another may choose to offer their services on multiple platforms at the same time. Both exercise personal initiative in their choice based on their own business acumen and their individualized situation and the benefits one platform or business relationship provides. Both workers have exerted their own economic independence, regardless of their ultimate choice as to whether to work for multiple competitors.

### CONCLUSION

On behalf of its members, CWI thanks the Division for its commitment to providing workers and businesses with this long awaited, and critically needed, official guidance through the rulemaking process.

CWI appreciates the opportunity to provide the Division with these comments to enhance the Division's objective of providing workers and businesses with an updated, definitive standard for determining independence under the economic realities test utilized under the Fair Labor Standards Act.

The Division's Proposed Rule is grounded in the Act and Supreme Court precedent, and supported by well-reasoned appellate decisions focused on a worker's control over the work to be performed as well as their opportunity for profit or loss based on their own initiative or investment. These two Core Factors, as further defined in these Comments, should be accorded additional weight, as contemplated by the Proposed Rule, in determinations as to whether an independent contractor or employment relationship exists. If these two factors are in conflict, CWI supports the framework developed by the Division to consider additional tie-

breaking factors as detailed above. CWI urges the Division to delete and revise the Proposed Rule's Additional Factors as described herein, and to also add an Additional Factor of a worker's opportunity to perform services for other companies.

Respectfully Submitted,

The Coalition for Workforce Innovation,

By: Seyfarth Shaw LLP



Camille A. Olson  
Richard B. Lapp

# Exhibit A



**PROJECT DETAILS**

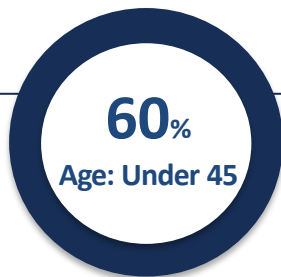
National Survey of 600 Self-Identified

Independent Contractors

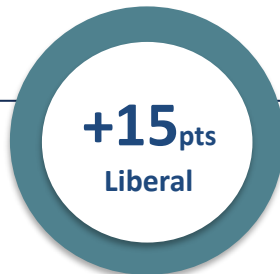
Conducted January 2020

# Summary Of Findings

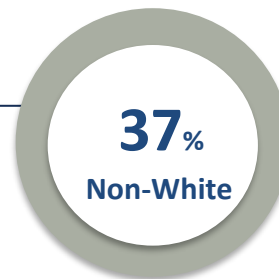
# Who Are They?



18-34 .....	34%
35-44 .....	26%
45-54 .....	25%
55-64 .....	11%
65+ .....	4%



Liberal .....	41%
Moderate .....	32%
Conservative .....	26%
NET Liberal .....	+15



White .....	63%
Non-White .....	37%
African American ....	17%
Hispanic .....	15%
Asian .....	5%

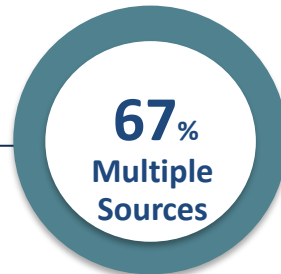
- For statistical purposes, what is your age?
- If you had to label yourself, would you say you are a liberal, a moderate or a conservative in your political beliefs?
- What is your race?



*Some numbers may be off +/- 1% due to rounding.*



# Who Are They?



Full Time ..... 69%  
Part-Time ..... 26%  
Occasionally ..... 4%

One Company ..... 32%  
Multiple Companies ..... 46%  
Direct for Multiple Customers .. 21%

- Do you work: 1) Full-time (More than 30 hours per week); 2) Part-time (15-30 hours per week); OR, 3) Occasionally (Less than 15 hours per week)?
- Do you currently obtain work opportunities in connection with: 1) One company in particular; 2) Multiple companies; OR, 3) Directly for multiple customers?



**33%**

## Perform App-Based Delivery/Ride Share Work\*

(197 Respondents Indicate They Perform Work for a App-Based Delivery and/or Ride Sharing Service)

**28%**

### Technology

Such as web design, app developer, or programmer

**27%**

### Professional Services

Like accounting, legal advice, healthcare, & consulting

**27%**

### Sales

Like real estate, eBay retailer, & social sales/network marketing

**27%**

### Personal Services

Such as hair dresser, tutoring, & fitness

**24%**

### Freelance Communications

Including journalism, copywriting, & social media

**22%**

### App Based Delivery \*

Such as Amazon, Doordash, Instacart, Shipt, & TaskRabbit

**21%**

### Ride Sharing\*

Such as Lyft or Uber

**21%**

### Creative Design

Including photography & graphic artist

**8%**

### Non App Delivery

Such as grocery stores, newspapers & other products

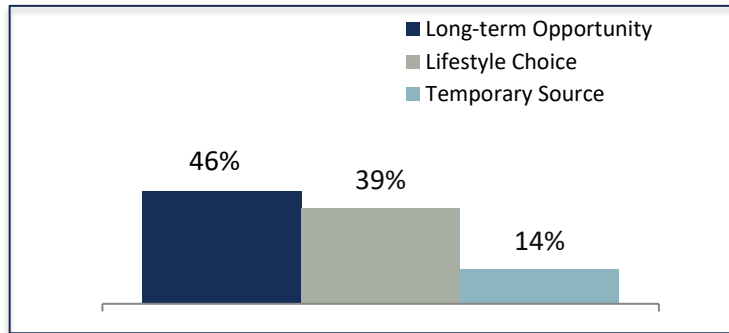
What type of work do you do? (Multiple Responses Allowed)

*Some numbers may be off +/- 1% due to rounding.*

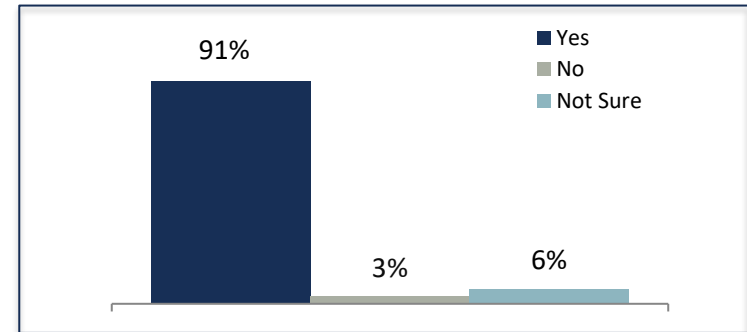
# Views About Current Work Arrangement

Is the work you're doing as a freelancer:

- A **long-term** business opportunity;
- A **lifestyle choice**;
- A **temporary, short-term** source of income?



Do you plan to continue working in your current independent work arrangement for the next six months?



## Job Satisfaction Rating

Overall, how satisfied or dissatisfied are you with your current independent work arrangement?



**94%**

Percent Who Say They Are Satisfied with Their Current Work Arrangement

Satisfied .....	<b>94%</b>
Very satisfied .....	62%
Somewhat satisfied .....	32%
Dissatisfied .....	6%
Not Sure .....	1%
NET Satisfied .....	+88

# The Rewards & Trade Offs



## Like Most About Freelancing

What do you like most about the work you do as a freelancer?

• Own Boss/Work Independent/Additional Freedom .....	21%
• Work Flexibility .....	18%
• Work Hours .....	18%
• Easy/Enjoyable Work .....	9%
• Good/Great Job .....	7%
• Customer Service/Interacting with Others .....	6%
• Money/Pay/Income .....	5%
• Variety of Job/Work Projects .....	3%
• Convenient/Work from Home .....	3%
• Everything .....	2%
• Reliable/Security .....	1%
• Other .....	5%
• Nothing .....	1%

## Like Least About Freelancing

What do you like least about it?

• Low Pay/Income .....	16%
• Unpredictable/Inconsistent/Instable Pay/Income .....	11%
• Hours/Long Hours .....	9%
• Hard to Find Jobs/Gigs .....	8%
• Being the Boss/Ins & Outs of Running a Business .....	6%
• Customer Service/Interacting with Others .....	6%
• Lack of Benefits/Insurance .....	4%
• High Level of Stress .....	3%
• Everything .....	1%
• Other .....	7%
• Nothing/I Like My Work .....	26%



63%  
Flexibility

vs.

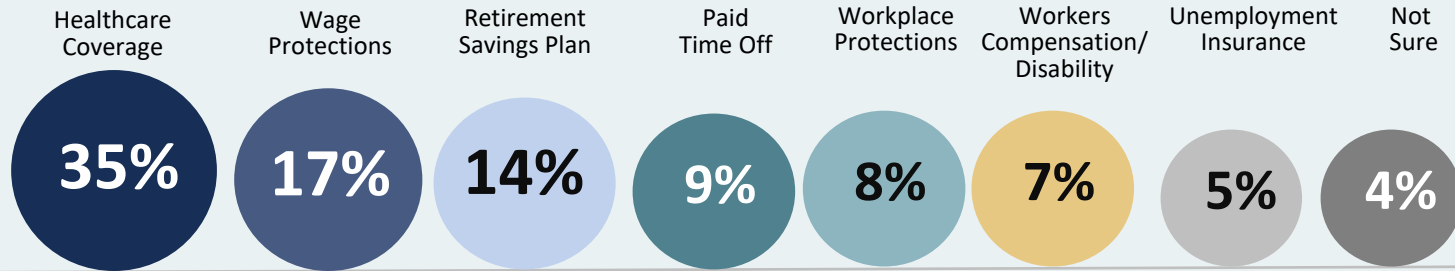


35% Wages/  
Stable Income

# Employment Benefits

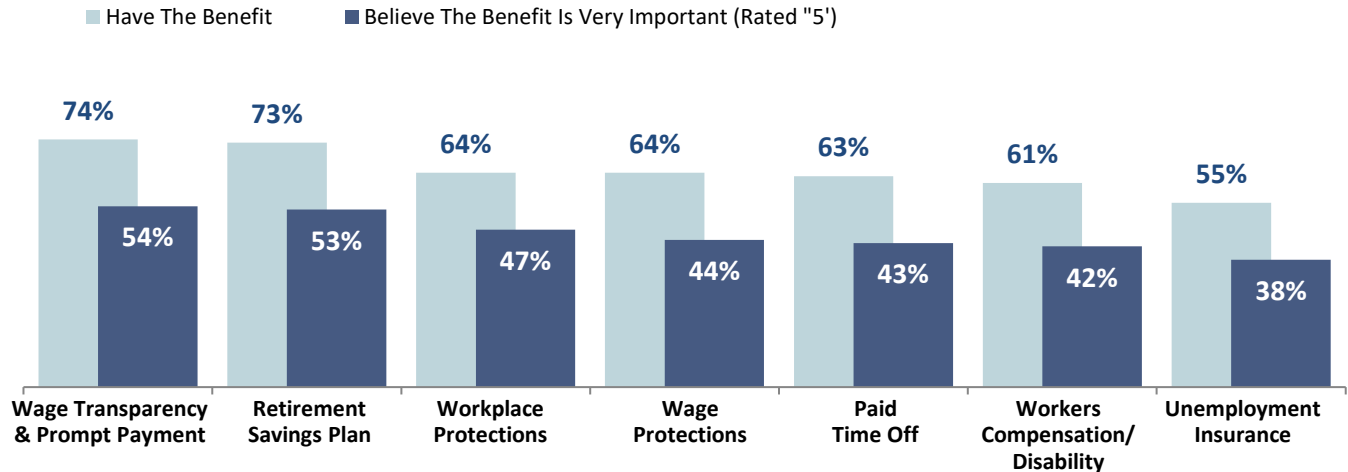
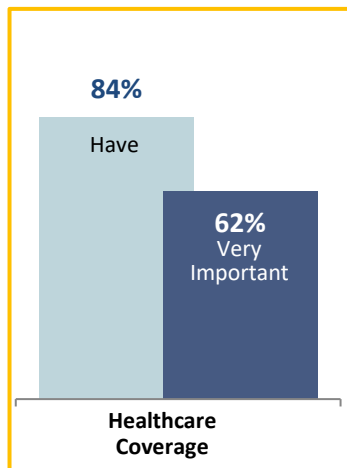
## The Benefits that Matter Most

Which would you say is the most important benefit to offer independent workers, like yourself?



## Worker Benefits: Those They Have vs. Those Most Important to Have

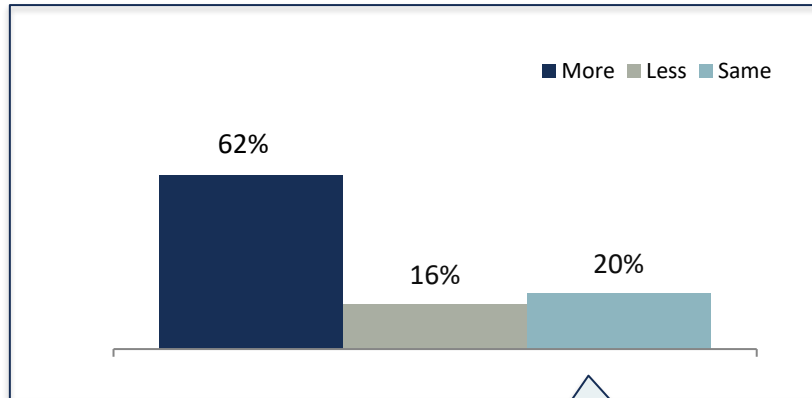
- On a scale of 1 to 5 with 1 Not At All Important and 5 Very Important, please rate how important it is to you personally that you have access to each of the following benefits. Results Below Are Percent Who Rated It A 5—Very Important.
- Which of the following employee benefits and protections do you currently have and how did you obtain them? Results Below Are Percent Who Have It



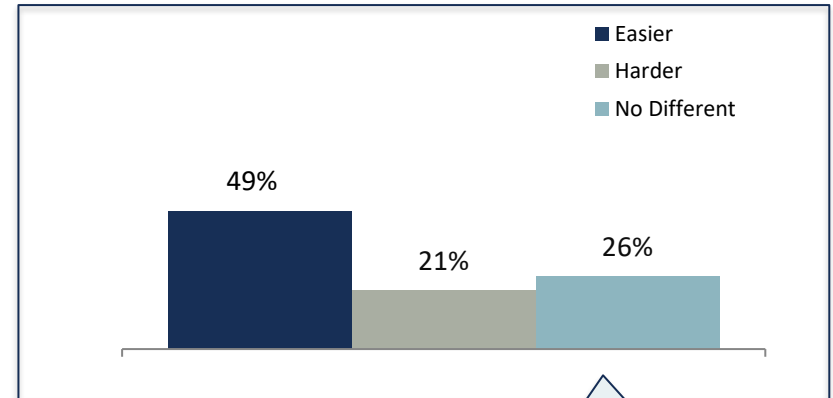
Some numbers may be off +/- 1% due to rounding.

# Opportunities for Work

Would you say there are more opportunities or less opportunities to find well-paying and satisfying work as a freelancer compared to 2 to 3 years ago?



Would you say current workplace and labor laws are making it easier or harder to be a freelancer?



## Results By Key Audiences

	Overall	Age	
		<45	45+
More	62%	67	53
Less	16%	14	18
Same	20%	18	23
Not sure	3%	1	6
<b>NET More</b>	<b>+46</b>	<b>+53</b>	<b>+36</b>

## Results By Key Audiences

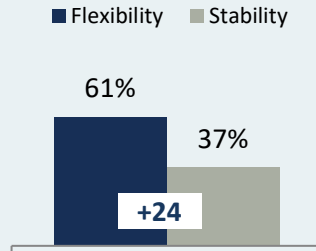
	Overall	Age	
		<45	45+
Easier	49%	56	37
Harder	21%	21	20
No Different	26%	20	36
Not sure	4%	3	7
<b>NET Easier</b>	<b>+28</b>	<b>+35</b>	<b>+17</b>

# The Cross Pressures

## Flexibility vs. Stability

Which of the following is the most important to you personally:

- Having the **flexibility to choose when and where to work**;
- Having **access to a steady income and benefits**

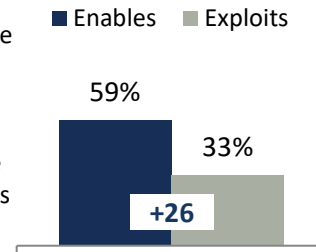


	Overall	App-Based Work	Age		Race		Ideology			
			<45	45+	White	Non white	Very Lib	SW Lib	Mod	Cons
Flexibility	61%	55	54	73	63	59	55	64	62	63
Stability	37%	44	46	25	35	40	43	35	36	35
NET	+24	+11	+8	+48	+27	+19	+12	+29	+26	+28

## Enables vs. Exploits

Which comes closest to your own opinion:

- Today's gig economy **enables workers** to take back control from companies and seek out more ownership over their careers and lives;
- Today's gig economy **exploits workers** by making it easier for companies to avoid state and federal labor laws and employee benefits in order to cut costs

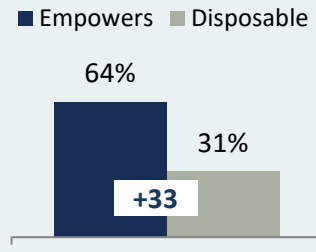


	Overall	App-Based Work	Age		Race		Ideology			
			<45	45+	White	Non white	Very Lib	SW Lib	Mod	Cons
Enables	59%	57	57	61	60	57	59	56	56	64
Exploits	33%	39	36	29	30	39	38	35	37	24
NET	+26	+18	+21	+33	+30	+19	+21	+21	+19	+40

## Empowered vs. Disposable

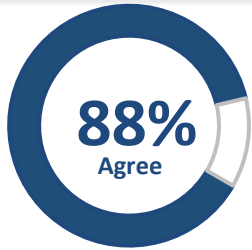
Which comes closest to your own opinion:

- Today's gig economy **empowers workers** by giving them greater freedom and flexibility, encouraging more entrepreneurship, and improving their work/life balance;
- Today's gig economy has **made workers more disposable**, providing them with no financial security, safety net, or basic employee rights



	Overall	App-Based Work	Age		Race		Ideology			
			<45	45+	White	Non white	Very Lib	SW Lib	Mod	Cons
Empowers	64%	66%	62	67	65	63	59	60	65	70
Disposable	31%	31%	33	28	29	34	38	32	32	25
NET	+33	+35	+30	+39	+36	+29	+21	+28	+33	+45

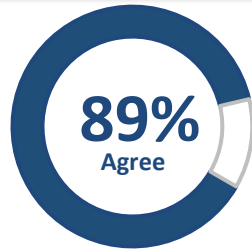
# Views on Current Labor Laws



53% Strongly Agree

## Technology Making It Easier to Find Well Paying & Satisfying Work

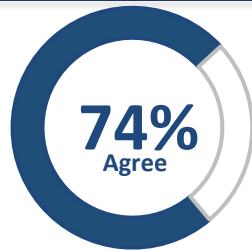
Advances in technology have made it easier for all people—regardless of their college education or background—to find well-paying and satisfying work that fits around their lives, rather than having to fit their lives around their work.



50% Strongly Agree

## Workers No Longer Have to be Stuck in Bad Work Situations

Workers no longer have to feel stuck in a bad work situation. Gig work has made it easier for workers to leave a bad situation and try new opportunities that provide additional benefits, flexibilities and are more meaningful and rewarding than a traditional job.



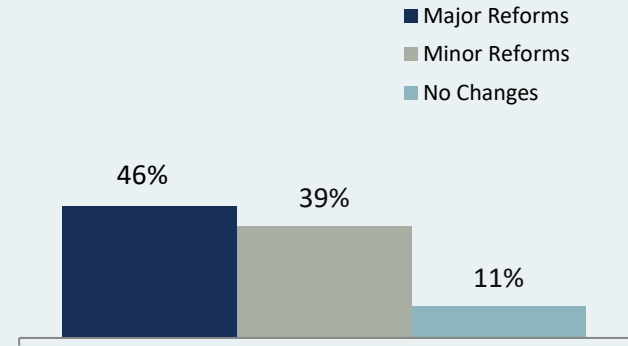
38% Strongly Agree

## Today's Labor Laws are Outdated & Hamper Innovation

When it comes to today's gig economy, our workplace and labor laws are extremely outdated and hamper innovation, economic opportunity, and worker empowerment.

## Labor Reforms Needed: Major vs. Minor vs. None

In your opinion, do we need major reforms, minor changes or no changes to employment laws related to workers in today's economy?



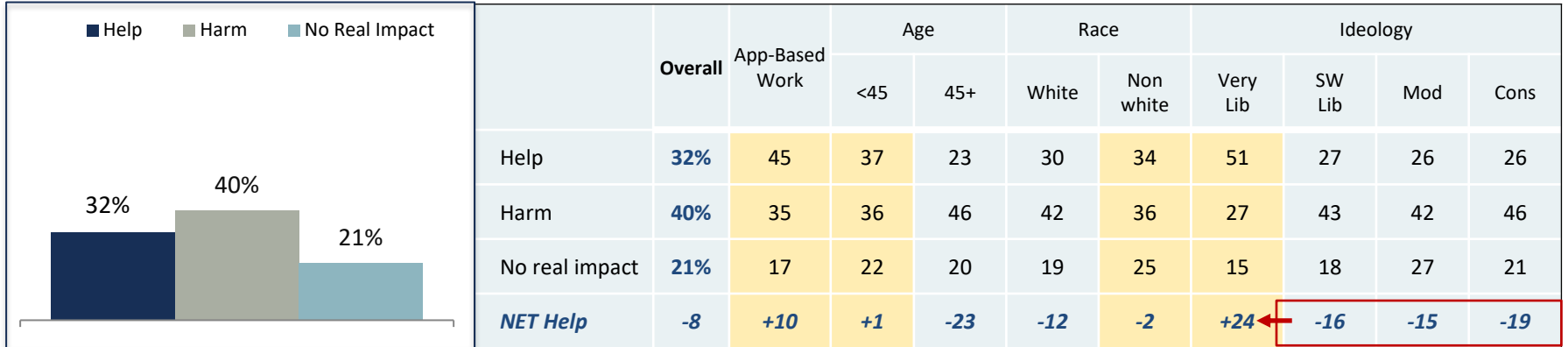
### BY KEY AUDIENCES

	Overall	App-Based Work	Age		Race		Ideology			
			<45	45+	White	Non white	Very Lib	SW Lib	Mod	Cons
Major	46%	53	49	42	43	50	71	43	38	37
Minor	39%	36	37	42	41	36	20	46	43	45
No Changes	11%	9	10	11	10	11	6	8	12	15
<b>NET Major</b>	<b>+7</b>	<b>+17</b>	<b>+11</b>	<b>0</b>	<b>+3</b>	<b>+14</b>	<b>+51</b>	<b>-3</b>	<b>-5</b>	<b>-8</b>

# The Impact of California AB5

## Perceived Impact of AB5

Does making it harder to classify someone as a freelancer or independent contractor rather than a traditional employee help or harm people like yourself?



## The Best Path Forward





# Advocacy

## Trust Most as Your Advocate

Who do you trust the most to advocate on your behalf about the most important issues affecting freelancers and independent contractors like yourself?

● An association that caters to freelancers and independent workers through benefit services and advocacy	38%
● Myself	24%
● A labor union that caters to traditional employees through union dues and organizing	19%
● The government	8%
● Companies	6%
● Not sure	4%

## Trust Most to Develop Policies to Protect & Empower Today's Modern Workforce

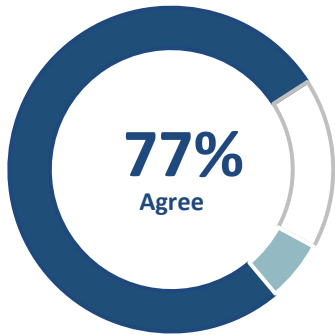
Now, if you had to choose between the following, who do you trust the most to develop policies that protect and empower today's modern workforce including people like yourself?

● Your individual and business customers	28%
● Your elected officials in Congress	26%
● Your state representatives	25%
● Your local elected officials	11%
● Not Sure	11%

# Positioning

## Politicians are Trying to Fix What's Not Broken

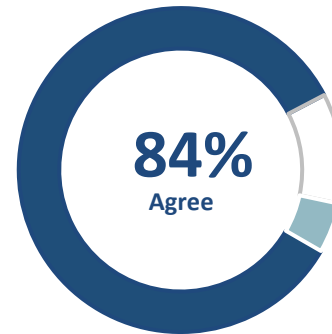
Agree/Disagree: Attempts to crackdown on today's gig economy is another example of policy makers and politicians trying to fix something that's not broken



<b>Agree</b> .....	<b>77%</b>
Strongly Agree .....	43%
Somewhat Agree .....	35%
<b>Disagree</b> .....	<b>17%</b>
Not sure .....	6%
<b>NET Agree</b> .....	<b>+60</b>

## Making It Harder to Find Independent Work Not the Solution

Agree/Disagree: Today's gig economy is not without its problems but making it harder for individuals to choose independent work arrangements like freelancing and independent contracting is not the solution

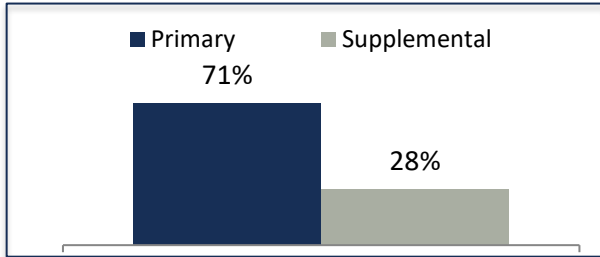


<b>Agree</b> .....	<b>84%</b>
Strongly Agree .....	46%
Somewhat Agree .....	38%
<b>Disagree</b> .....	<b>11%</b>
Not sure .....	5%
<b>NET Agree</b> .....	<b>+73</b>

# Appendix

# Appendix

Do you consider the amounts you earn as freelancer:  
1) A primary source of income; OR, 2) A supplemental source of income



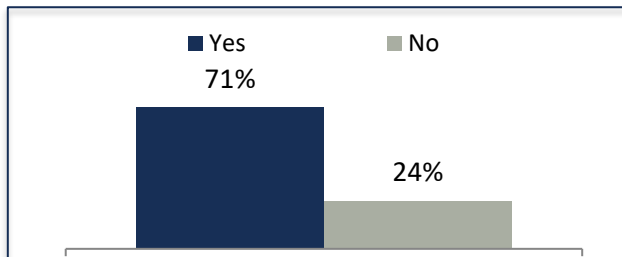
When it comes to your current independent work arrangement, are you paid:

• An hourly wage	37%
• A per-project fee	31%
• An hourly wage plus tips	12%
• A sales commission	8%
• A fixed monthly fee	7%
• A per-delivery fee plus tip	5%
• Prefer not to say	2%

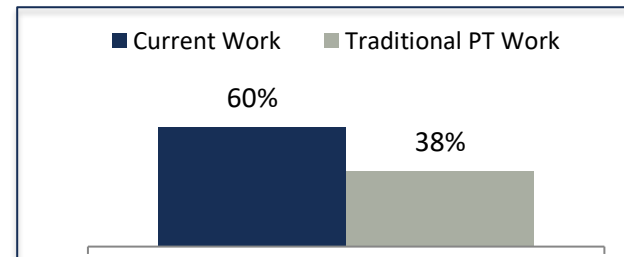
What type of retirement savings plan do you currently have?

• 401 (k) plan	41%
• Roth savings account	19%
• SEP IRA account	7%
• State run retirement program	6%
• Not sure	4%
• Don't have a retirement savings plan	23%

AMONG THOSE WITH TRADITIONAL JOB:  
Have you ever considered quitting your traditional job to work solely as a freelancer?



AMONG THOSE WITH TRADITIONAL JOB: If given an option, would you prefer: 1) Your **current independent work arrangement** with control over when and where to work; 2) A **traditional, part-time role** with pre-determined schedule and access to traditional benefits



# Appendix

Which of the following should be the top priority for policy leaders and workforce advocates moving forward:

- Ensuring people who want to work independently are treated fairly under the law in terms of access to training, benefits, and certain protections without risking independent work status 41%
- Ensuring independent work is available for a broad range of positions, platforms, and industries 19%
- Ensuring workplace laws and regulations aimed at gig workers are consistent across the country 18%
- Ensuring individuals have the freedom to determine how, when, and where they work 18%
- Not sure 4%

In your opinion, which of the following is the most important issue facing people with independent work arrangements like yourself? Please select just one.

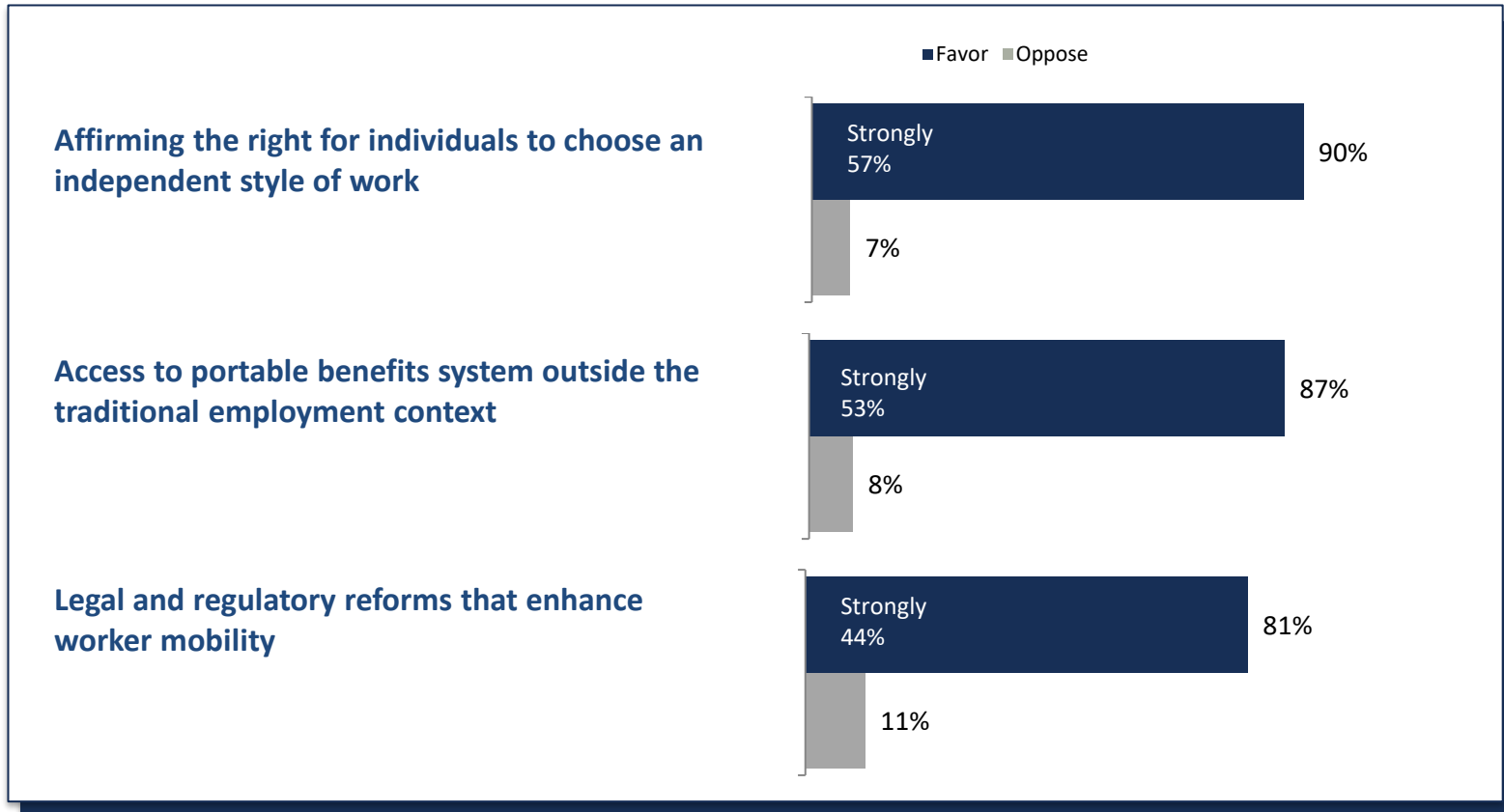
- Access to affordable benefits—including healthcare, retirement, disability and unemployment insurance 29%
- Work/life balance issues—such as flexible hours, scheduling independence, and time off when you need it 26%
- Wage and payment issues—including fair wages, transparency, and prompt payment for services 22%
- Worker protections—such as being respected, treated fairly, and valued for your services 15%
- Complicated and burdensome tax filings 7%
- Not sure 3%

And which of these would make you most willing to consider leaving your current independent work arrangement for a more traditional job with a single company?

- Better pay 32%
- Health care benefits 19%
- Retirement options 9%
- Understanding my personal financial wellness 8%
- Sick leave and paid vacation 6%
- Maternity and paternity leave 4%
- None of these would make me consider leaving independent work 19%
- Not sure 3%

# Alternative Labor Initiatives

The following are other ways elected officials and business leaders can help people who freelance or work independently thrive in today's economy. Please indicate whether you favor or oppose each proposal.



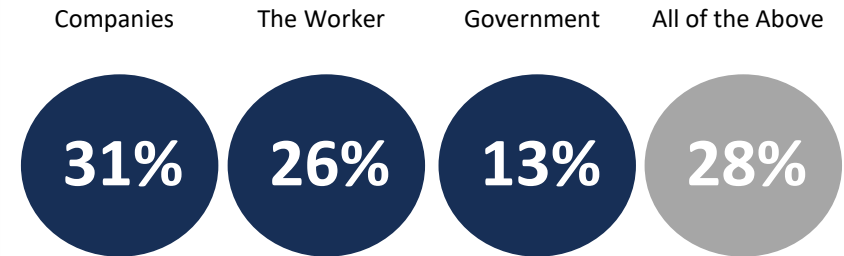
Some numbers may be off +/- 1% due to rounding.

# Appendix

When it comes to obtaining important benefits like healthcare, retirement, and disability insurance, which comes closest to your own experience:

- It's a challenge to find access to affordable benefits and **could use more help from the government** to provide them 36%
- It's a challenge to find access to affordable benefits and **could use more options from private market providers** 30%
- There are **plenty of resources available** to get the benefit coverage you need at a price you can afford if you really want them 30%
- Not sure 4%

Generally speaking, who do you think should be responsible for providing workers in today's gig economy with traditional employee benefits like healthcare, retirement plans, and disability insurance?



# Appendix

With which political party are you registered?	Republican	31%
	Democratic	44%
	Independent	21%
	Libertarian	2%
	Other	3%
	NET Democrat	+13
What is your gender?	Male	49%
	Female	51%
What state do you live in?	Northeast	18%
	Midwest	21%
	South	38%
	West	23%
Which of the following best describes the area you live?	Urban	45%
	Suburban	37%
	Rural	18%
What is the highest level of education you have completed?	High school	16%
	Some college/Assoc/Trade	32%
	Four-year college degree	26%
	Graduate school	27%
What is your current household income?	<\$50,000	39%
	\$50,000-\$100,000	39%
	Over \$100,000	22%

*Some numbers may be off +/- 1% due to rounding.*



# Exhibit B

October 2020

## Analysis of Literature on Technology and Alternative Workforce Arrangements

**Prepared for the Coalition for Workforce Innovation (CWI)**

By James Langenfeld and Chris Ring  
*Ankura Consulting Group*

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## I. Executive Summary

Technological change has led to new services through innovations such as the web, smartphones, and greatly increased computer processing power. This study<sup>1</sup> summarizes and synthesizes the existing research on the impact of technological innovation on the changing role of workers.<sup>2</sup>

Technology-driven firms have greatly expanded the economy and have offered products and services that have been embraced by consumers, while disrupting many traditional segments of the marketplace. Technology has affected, albeit in different ways, all types of business structures, whether brick-and-mortar, direct selling models, electronic platform models, or contracting agencies. Increased use of technology has been necessitated by the Covid-19 pandemic, which has made in-person customer interactions riskier or even illegal. These changes pressure traditional firms to modify their business models, including their approaches to retaining and managing their labor forces to remain viable. For example, traditional employers, as well as staffing agencies and direct sales entities, are increasingly competing with platform labor markets for scarce talent, and so must rethink their strategies to be effective.

Continued growth of e-commerce and other technological developments have resulted in a reduction in traditional retail outlets and in the number of traditional retail jobs. In addition, the use of technology in the physical retail space is requiring retail workers to develop new skills and empower them to use these skills more effectively. While there are a few high-profile examples of firms making notable investments in innovative technologies (e.g., scheduling apps and on-demand staff platforms) and reskilling workers (e.g., Amazon, Walmart), it appears that many traditional retailers may not yet be fully invested in adapting a strategy to respond to new technology and worker preferences.

The “Direct Selling” business model, characterized by individuals providing a good or service to a customer away from a fixed retail location (e.g., Avon Products, Amway, Herbalife) has been affected by competition from online and big-box retailers. While the industry has invested in technologies (e.g., mobile POS, online orders, and social media tools), further thought on how to best compete on both products and workers may be needed given the changing competitive landscape and customer preferences, which appear to be moving away from one-on-one seller-customer relationships that are relatively labor intensive.

The staffing services industry has adopted technology, for example, to improve applicant tracking and billing and customer data analytics. The industry is attempting to collaborate with online job search engine competitors when possible, but that technology has made inroads into the traditional staffing model’s territory and is increasingly impinging on the industry’s traditional turf. Artificial intelligence (AI) and robotics will affect the industry as well.

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<sup>1</sup> This study is by James Langenfeld, Senior Managing Director at Ankura Consulting and Chris Ring, Senior Director at Ankura Consulting. Biographical information on the authors can be found in Appendix 1.

<sup>2</sup> We understand that the U.S. Department of Labor released a “Notice of proposed rulemaking and request for comments” related to the Independent Contractor Status Under the Fair Labor Standards Act on September 25, 2020. Our work was largely performed prior to this release and this report does not address this release.

One important way firms have embraced technology is through use of the non-traditional labor force. The ability to tap into non-traditional workers can be an important part of improving business performance, such as by increasing speed to market, increasing organizational agility, improving overall financial performance, and allowing firms to compete in a digital world where increasingly relevant, highly-skilled talent is in short-supply.

A substantial number of people are turning to alternative work (broadly defined) for secondary income (54 million to 68 million individuals according to McKinsey in 2016). Workers engaged in alternative work are a heterogeneous group. Those who engage in full-time alternative work for their primary income source make up around about 10% of the total workforce, which has not increased dramatically over the past decade. However, research indicates a large portion of the alternative work force is intentionally engaged on a part-time basis, with many having another primary job that often includes benefits. These workers highly value flexible scheduling to coordinate with their other commitments, and do not view a lack of benefits as an important issue. Many of the new work models are lowering barriers to entry and increasing opportunities for workers to earn additional income, while enhancing flexibility in scheduling, volume of work, and location. The growth of technology-empowered independent work has stimulated significant economic activity and contributions to economic growth.

Some research also identifies that a smaller portion of the alternative workforce may place less priority on flexibility and high value on obtaining workplace benefits and protections. This research has identified concerns that non-traditional work has harmed workers by diminishing protections and lowering wages. These concerns are unlikely to subside soon, and illustrate the need for stakeholders to embrace an approach that benefits workers as well as responds to the changing conditions in the market.

On-Demand Economy (ODE) jobs have been an important part of the response to technology-driven changes in the economy. Workers whose primary source of income is from ODE jobs are estimated as 1% of the workforce, but, as noted above, a larger and increasing number supplement other income through ODE work. Studies have found that ODE jobs provide workers the opportunity to increase their primary income through a second income source. Research also finds that many ODE workers have experienced a downturn in their primary income source or other financial volatility before turning to ODE work. This suggests that ODE work may serve as a valuable income-smoothing tool to help weather negative earnings shocks, serving as a preferable alternative to taking on high-cost credit, becoming delinquent on existing credit, or constraining spending.

The current approach to classification of workers as employees or independent contractors consists of a patchwork of evolving laws, regulations, and classification enforcement regimes. These different regulations and laws can make appropriate worker classification challenging, especially as it relates to the alternative workforce. Some states, such as California, have recently passed new laws to provide a basis for determining whether a worker should be classified as an independent contractor or an employee. Other governmental agencies, such as the city of New York, created regulations that attempt to protect worker rights. These actions do not appear to fully account for the heterogeneity in worker preferences, as highlighted by the many exceptions

to these rules. These laws and regulations have also contributed to controversy and lawsuits. In 2019, four of the top 10 legal settlements in wage and hour cases pertained to worker misclassification claims.

Several studies have examined how other countries are addressing flexible work arrangements. In 2019, the EU established basic rights for all workers (including ODE workers), but these rights are fairly minimal. The case of the courier company Hermes in the U.K., in which a “self-employed plus” status was created that accounts for the heterogeneous preferences in flexibility across the work force, stands out as a compromise to the challenges facing employers and workers. Legislation in Canada also reflects a compromise position, where a third category of worker was created, the “dependent contractor,” although it offers only limited worker protections overall. In 2019, authorities in India proposed legislation that recognizes electronic platform workers as entitled to certain benefits such as life and disability coverage, and health and maternity benefits. Other countries, such as Spain and Italy, have also created additional worker categories, though these rules appear to have been written such that they were subject to significant employer arbitrage opportunities, and therefore have not been impactful as intended.

In sum, technology is affecting business models, industries, and their workforces in different ways. All models and industries will need to adapt to new technologies or risk being left behind. Consumer welfare gains ushered in by technological changes have been studied extensively, as have the effects of these changes on businesses and workers. The variety of labor laws and regulatory regimes often treat key issues differently, and do not appear to adequately meet the needs of business and workers resulting from changes in the economy.

## **II. Analysis of the Impact of New Technology and the Alternative Workforce**

The development of new technologies has helped create new services through innovations such as the web, smart phones, and greatly increased computer processing power. Research shows technology-driven firms have added greatly to the growth of the economy and have been embraced by consumers. Firms such as Amazon, Uber, Lyft, Google, Apple, and Facebook have created new products and services that did not exist 10 to 20 years ago. These technological advancements have reduced the barriers to entry in various industries by providing customers with direct access to new sources of products and services. This change in turn is putting pressure on more traditional firms to modify their business models, including their approaches to retaining and managing their labor force, in order to compete and remain viable.

Technology has affected all types of operational business structures, whether brick-and-mortar, direct selling models, electronic platform models, or contracting agency forms of business in different ways, with each business model confronting unique issues.

For example, one of the avenues that traditional firms have been embracing, in part to address competitive issues arising from technological change, is the use of non-traditional forms

of labor,<sup>3</sup> although most companies are still investigating the best ways to manage and integrate an extended workforce into their operations.<sup>4</sup> One recent survey of global corporations found that 44% of their labor spending is on their external workforce.<sup>5</sup> Firms that engage the alternative workforce find it to be a driver of competitive advantage in an increasingly technology-driven marketplace. Firms claim that merely controlling costs is no longer the principal driver for their increasing reliance on an alternative workforce. Rather, the ability to tap into non-traditional workers is now seen as essential to improving business performance, such as increasing speed to market, increasing organizational agility, improving overall financial performance, and allowing firms to compete in a digital world where increasingly relevant, highly-skilled talent is in short-supply.<sup>6</sup>

Workers engaged in alternative work are a heterogeneous group. A significant number of alternative workers are intentionally engaged in alternative work on a part-time basis, many having another job they regard as their primary source of income that often includes benefits.<sup>7</sup> These workers place a high value on the ability to flexibly schedule work (see Table 1 at end of this report) and do not clearly view the lack of benefits as an important issue for them. In contrast, a smaller subset of the alternative workforce may place less priority on flexibility, but a high value on obtaining workplace protections. Many of the new work models are providing significantly increased opportunities for workers to earn additional income. These enhanced opportunities often include flexibility in scheduling and volume of work, as well as location. In addition, these opportunities often have low barriers to entry, including quick and easy application processes offering a marketplace to earn money through the use of workers’ own tools and equipment.

Some researchers have identified concerns about non-traditional workers arising in part from these technological changes. They argue there is fracturing of traditional business structures that have fundamentally altered the nature of employment and work relationship—largely at the expense of workers (e.g., diminished worker protections and stagnant earnings).<sup>8</sup> These

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<sup>3</sup> As I discuss later, considerable debate exists regarding accurate measures of the size and growth of the alternative workforce. See, Section III.A.

<sup>4</sup> External Workforce Insights 2018, SAP-Fieldglass in collaboration with Oxford Economics. The 2018 study is based on a survey 800 senior executives, including chief procurement officers and chief HR officers in 16 industries in more than a dozen countries. See also, Korn Ferry, “HR Exec Survey: Percentage of Contingent, or ‘Gig Economy’ Professionals In Companies Growing; HR Leaders Say That’s a Good Thing,” Korn Ferry, September 5, 2018. <https://ir.kornferry.com/node/15386/pdf> (hereafter, Korn Ferry 2018).

<sup>5</sup> Small businesses also appear to be increasing their use of external talent relative to employees. See, Paychex, Inc. “New Paychex Data Shows Independent Contractor Growth Outpaces Employee Hiring in Small Businesses,” PR Newswire, January 9, 2019. <https://www.prnewswire.com/news-releases/new-paychex-data-shows-independent-contractor-growth-outpaces-employee-hiring-in-small-businesses-300775712.html>; see also, Brown, C, et al., “Independent Contractors in the U.S.: New Trends from 15 Years of Administrative Tax Data,” 2019.

<sup>6</sup> For example, skills in machine learning/artificial intelligence, cyber-security, automation, data analytics. See, “External Workforce Insights 2018: The Forces Reshaping How Work Gets Done,” SAP-Fieldglass in collaboration with Oxford Economics, 2018, pp. 4, 13; see also, Korn Ferry (2018).

<sup>7</sup> Or for other reasons, such as being a student, a caretaker, or retired, do not want a rigid employment situation.

<sup>8</sup> See, for example, Bogliacino, F., et al., “Quantity and quality of work in the platform economy,” Global Labor Organization (GLO) Discussion Paper, No. 420, 2019, (hereafter, Bogliacino, et al. 2019).



concerns are not likely to subside and illustrate the need for stakeholders to embrace a new approach going forward.

## A. The On-Demand Economy (ODE)

Technological change—from delivery and logistics, to tourism, advertisements and personal care—in the form of electronic labor market platforms (e.g., Uber, Lyft, Postmates, TaskRabbit, Moonlighting, etc.) has completely disrupted many segments of the marketplace. Workers offering labor services on these platforms are often referred to as giggers or taskers. In addition to successfully challenging traditional business models and greatly expanded commerce, this online demand economy (“ODE”) has also provided new opportunities for workers. However, the various worker platforms that exist are themselves highly differentiated and may be classified according to the degree of control exerted over workers, the geographical location of the task, and the need for physical interaction between workers and downstream customers. Researchers have made inroads on our understanding of ODE workers, their characteristics, and motivation, and that research is described below.

Those who engage in full-time alternative work have not increased dramatically over the past decade. Government surveys and statistics, accounting for alternative workers if the non-traditional source is the sole or primary source of income, estimated the alternative workforce totaled about 15.5 million individuals, or about 10% of total employed.<sup>9</sup> ODE workers are a much smaller subset of the alternative workforce, with estimates ranging between 0.5% to 1.5% of the workforce during the 2015 to 2018 timeframe (also defined as sole or primary source of income).<sup>10</sup> However, a substantial number of people appear to be turning to alternative work as a secondary source of income. In 2016, McKinsey estimated that as many as 54 million to 68 million individuals earned income from alternative sources (see Table 2 at the end of this report for a summary of research estimates).<sup>11</sup> The increase in alternative work has not been at the expense of workers’ primary employment, are more often workers’ second jobs because their principal occupation pays too little, or they have needed a bridge to new work.

<sup>9</sup> See, “Contingent and Alternative Employment Arrangements Summary,” U.S. Bureau of Labor Statistics, May 2017, <https://www.bls.gov/news.release/conemp.nr0.htm> (hereafter, BLS 2017).

An expansive definition of the alternative workforce (to include independent contractors, on-call workers, temporary help agency workers and contract workers) created by the BLS (limited to alternative work where it is the main or primary source of income) finds that alternative work arrangements have not grown between 2005-2017. However, other researchers believe the BLS survey does not fully capture the best estimate of the size of the primary workforce, and BLS is revising its questionnaire. See, for example, Brown Barnes, Cindy S. and Oliver M. Richard, “Contingent Workforce: BLS is Reassessing Measurement of Nontraditional Workers,” U.S. Government Accountability Office, January 29, 2019; Katz, Lawrence and Alan Krueger, “Understanding Trends in Alternative Work Arrangements in the United States,” *RSF: The Russell Sage Foundation Journal of the Social Sciences* 5(5) (December 2019): 132–46, (hereafter, Katz and Krueger (2019)).

<sup>10</sup> Katz and Krueger (2019), pp. 132–46.

<sup>11</sup> Many studies note the lack of a uniform definition of “alternative workforce” in the research across the various categories of alternative workers and statistics cited. Manyika, James, et al., “Independent Work: Choice, Necessity, and the Gig Economy,” McKinsey & Company, October 2016, p. 3.

Academic researchers have sought to understand the primary factors that drive workers to participate in alternative work arrangements, particularly opportunities in the ODE. Several studies have found that a significant fraction of ODE workers faced a downturn in their primary income source or experienced other financial volatility before turning to the ODE workplace. Other research has found a statistically significant increase in the volume of residents actively working at an online platform when the unemployment rate increases in their region. This research suggests that ODE work may serve as a valuable income-smoothing source for participants to help weather negative earnings shocks, serving as a preferable alternative to taking on high-cost credit, becoming delinquent on existing credit, or constraining spending. These research findings are further indications that a significant number of workers participating in the alternative workforce are often doing so due to the inadequacy of primary earnings sources.

Some research, although not clearly indicative of many types of alternative workforce participants, indicates that earnings of alternative workers may be lower than if they had performed that same work inside the firm as employees.<sup>12</sup> These differentials have been found in studies on workers at staffing agencies, as well as ODE workers such as delivery and tasks workers, separate and apart from differences in benefit packages.<sup>13</sup>

Technological change, coupled with shifting consumer preferences, has also had a significant transformative effect on the traditional brick-and-mortar retail industry,<sup>14</sup> and the effect has been far-reaching. E-commerce sales as a share of total retail sales have been growing steadily, doubling from 4.2 percent in 2010 to 11.2 percent in Q3-2019. Traditional brick-and-mortar retail continues account for over 85% of retail sales, but it typically requires “more than three and a half times as many workers as the same amount of sales transacted online.”<sup>15</sup> It is well-documented that continued growth of e-commerce and other technological developments have resulted in a reduction in traditional retail outlets and in the number of traditional retail jobs, with a continuing shift in what retail workers are being asked to do.

In addition, the use of technology in the physical retail space is requiring retail workers to develop new skills and empower them to use these skills more effectively. Workers will spend less time scanning products and stocking shelves, and more time assisting customers, increasing service levels, and providing an experience that is impossible to duplicate online. For example, an array of technology (e.g., mobile point of service (“POS”), advanced inventory management systems, and scheduling apps) enables workers to be in front of the customer, providing valuable

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<sup>12</sup> For example, some studies have found that crowdsource workers (specifically looking at those engaged with micro-tasks, such as work offered on the platform MTurk) earn significantly less than their employee counterparts and that work requesters (i.e., firms) retain the majority of surplus from gig work. In addition, there is an ongoing debate about average driver wages in the ride-sharing space, and these studies generally suggest the wage rates after expenses are quite low on average. See, discussion in Section VIII.

<sup>13</sup> See, for example, discussion in Section VI. Also, Dube, Arindrajit and Ethan Kaplan, “Does Outsourcing Reduce Wages in the Low-Wage Service Occupations? Evidence from Janitors and Guards,” *International Labor Relations Review*, Vol. 63, No. 2 (January 2010), and David Weil and David S. Fortney, “Are Companies Too Reliant on Independent Contractors?” *The Society for Human Resource Management*, November 27, 2019.

<sup>14</sup> For information on how BLS defines the retail sector, see Section III.D.

<sup>15</sup> The Aspen Institute, “Industry at a Glance: The Future of Retail,” November 27, 2017, <https://www.aspeninstitute.org/blog-posts/industry-at-a-glance-the-future-of-retail/>.

services expected to increase the odds of a sale. Accordingly, the role of retail workers is shifting, requiring new skills that align with retailers’ technology strategy. Workers’ changing roles require training and reskilling investments, especially in a tight labor market where candidates with the right skills are not widely available. While there are a few high profile examples of firms making notable investments in innovative technology solutions and reskilling existing workers to keep up with change (e.g., Amazon, Walmart),<sup>16</sup> it appears that many traditional retailers may not be fully invested in adapting a strategy to respond to the new technology and worker preferences, or are content to take a wait-and-see approach.<sup>17</sup>

The “Direct Selling” business model, characterized by individuals providing a product or service to a customer away from a fixed retail location (e.g., Avon Products, Amway, Herbalife) has been under threat for some time, in large part affected by strong competition from online and big-box retailers.<sup>18</sup> The industry has made some investments in technologies (e.g, mobile POS, online orders, and social media tools for marketing),<sup>19</sup> but these activities may not be sufficient to promote strong growth in light of the changing competitive landscape and customer preferences, which are generally moving away from one-on-one seller-customer relationship that are relatively labor intensive. In addition, the direct selling industry has had some difficulty recruiting and retaining sales consultants in the strong U.S. economy as workers have many opportunities for full-time and part-time work, and this is likely to limit the industry’s growth as well.

The staffing services industry has seen a significant adoption of technology and innovative solutions, especially as it pertains to tools that improve applicant tracking and billing and customer data analytics. The industry is attempting to collaborate with online job search engine competitors rather than work against them when possible, but that technology has made inroads into traditional staffing models. The emergence of AI and robotics is still an unknown, as the industry has continued to grow in the current robust economic environment and tight labor market.

Regardless of business model, many firms are beginning to embrace the use of emerging technologies that seek to enhance the worker experience, in an effort to be more competitive in tight labor markets.<sup>20</sup>

<sup>16</sup> Cullen, Terri. “Amazon Plans to Spend \$700 Million to Retrain a Third of Its US Workforce in New Skills,” CNBC, July 11, 2019, [www.cnbc.com/2019/07/11/amazon-plans-to-spend-700-million-to-retrain-a-third-of-its-workforce-in-new-skills-wsj.html](http://www.cnbc.com/2019/07/11/amazon-plans-to-spend-700-million-to-retrain-a-third-of-its-workforce-in-new-skills-wsj.html).

<sup>17</sup> Accenture, “Retail People Power: How the Workforce Can Elevate Customer Experiences and Drive Growth,” October 23, 2018, <https://www.accenture.com/us-en/insights/retail/retail-people-power>; Grocery Dive, “As automation grows, grocers need an employee game plan,” October 22, 2019, <https://www.grocerydive.com/news/as-automation-grows-grocers-need-an-employee-game-plan/564893/>.

<sup>18</sup> “Providers are referred to as independent consultants, distributors or representatives who conduct sales via home parties, workplaces, trucks, or door-to-door.” Spitzer, Dan, “Out of stock: The threat of e-commerce is expected to stifle industry revenue growth, Direct Selling Companies in the U.S.,” IBISWorld Industry Report 45439, December 2019, (hereafter, Spitzer 2019). See, discussion in Section III.E.

<sup>19</sup> See, for example, Dunn & Bradstreet, Direct Selling Industry Profile, July 29, 2019.

<sup>20</sup> For example, technology (apps) have been employed among some top retailers that allow workers to do such things as change or swap shifts using a smart phone app, and collect wages earned sooner than they otherwise would (for a fee). See, for example, discussion in Section III.D.iii and V.D.

## B. The Regulatory and Legal Environment

The current approach to classification of workers as employees or independent contractors consists of a patchwork of laws, regulations, and classification enforcement regimes. For example, the “Common Law Test” is a guide used by the IRS where the standard Common Law test will find that a worker is “likely an employee if the employer has control over what work is to be done and how to” perform it.<sup>21</sup> Meanwhile, the Fair Labor Standards Act (“FLSA”) uses an Economic Realities Test to determine whether a worker is a contractor or an employee by determining, as a matter of economic reality, if “the worker is reliant on the hiring party to earn a living (employee) or is self-reliant and independent (contractor). If the worker is an employee under this test, then the federal minimum wage and overtime rules apply, subject to any exemptions.”<sup>22</sup> States vary in their independent contractor legal tests as well—often some variation of the ABC test<sup>23</sup>—with some states caring about just “A,” others caring about “AC,” and yet others caring about ABC with special emphasis on one of the prongs. California recently passed the high-profile California Assembly Bill 5 (A.B. 5), which codified a three-part test for whether a worker should be categorized as an independent contractor, with the aim of ensuring a higher degree of worker protections, including higher wages.<sup>24</sup> New York City has imposed minimum earnings standards for drivers,<sup>25</sup> Seattle is poised to follow suit,<sup>26</sup> and Los Angeles is studying minimum earnings standards.<sup>27</sup> For their part, Uber and Lyft have apparently offered to

<sup>21</sup> See, Sure Payroll, “Common Law Employee Test,” <https://www.surepayroll.com/resources/terminology/payroll/common-law-employee-test>; “Independent Contractor (Self-Employed) or Employee?” Internal Revenue Service, 26 Sept. 2020, [www.irs.gov/businesses/small-businesses-self-employed/independent-contractor-self-employed-or-employee](http://www.irs.gov/businesses/small-businesses-self-employed/independent-contractor-self-employed-or-employee); Social Security, “Course: Applying Common Law Control Test for Employer/Employee Relationships,” [www.ssa.gov/section218training/advanced\\_course\\_10.htm](http://www.ssa.gov/section218training/advanced_course_10.htm).

<sup>22</sup> “This test is also used to determine who is an employee under the Family and Medical Leave Act (FMLA).” Todd Lebowitz, “What Is the Economic Realities Test?” January 10, 2017, <https://whoismyemployee.com/2017/01/10/what-is-the-economic-realities-test/>. The so called “Economic Realities Test” is a multi-factor test, with no single factor controlling, and the ultimate determination is based upon the totality of the circumstances. “Fact Sheet 13: Employment Relationship Under the Fair Labor Standards Act (FLSA),” U.S. Department of Labor, July 2008, <https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/whdfs13.pdf>.

<sup>23</sup> A= Freedom from Control; B=Outside usual course of business; C=customarily engaged and independently established. See, for example, Jean Murray, “What is the ABC Test? Definition & Examples of ABC Test,” The Balance Small Business, August 2, 2020, <https://www.thebalancesmb.com/what-is-the-abc-test-for-independent-contractors-4586615>.

<sup>24</sup> Justin Sullivan, “The ultimate guide to navigating AB5, the California law Uber and Lyft are fighting with a November ballot measure, as a freelancer or business owner,” Business Insider, August 27, 2020, <https://www.businessinsider.com/california-assembly-bill-5-companies-contractors-freelancers-navigate-law-guide>

<sup>25</sup> Sara O’Brien, “Uber, Lyft prices go up in NYC as new driver minimum wage law takes effect,” CNN Business, February 1, 2019, <https://www.cnn.com/2019/02/01/tech/uber-nyc-rates/index.html>.

<sup>26</sup> Heidi Groover, “Seattle City Council OKs new 57-cent tax on Uber, Lyft rides,” The Seattle Times, November 25, 2019, <https://www.seattletimes.com/seattle-news/transportation/seattle-city-council-oks-new-57-cent-tax-on-uber-lyft-rides/>, (hereafter Groover 2019).

<sup>27</sup> Laura Nelson, “Should Uber and Lyft drivers earn \$30 per hour? Los Angeles will study a minimum wage,” Los Angeles Times, October 16, 2019, <https://www.latimes.com/california/story/2019-10-16/uber-lyft-drivers-pay-minimum-wage-los-angeles-ab5>, (hereafter, Nelson 2019).

implement minimum earnings standards in California as part of their negotiations over A.B. 5 rules.<sup>28</sup>

These different regulations and laws can make appropriate worker classification challenging, especially as it relates to the alternative workforce. These differences have contributed to controversy and lawsuits. In 2019, four of the top 10 legal settlements in wage and hour cases pertained to worker mis-classification claims.<sup>29</sup> Moreover, a number of lawsuits have been brought by associations of workers seeking temporary restraining orders (TROs) against implementation of A.B. 5. These actions to counter A.B. 5, as well as some of the exclusions of specific groups of workers implemented as part of the law, are consistent with the documented heterogeneity of participants in the alternative workforce and with many workers desiring the flexibility that independent contractor status permits. Other current and prospective legislation directed towards regulating worker rights and their potential impact on at least certain groups of workers in the alternative workforce is discussed below in Section IV.

### C. Experience Outside the U.S.

Several studies have examined how other countries are addressing flexible work arrangements.<sup>30</sup> In 2019, the EU established certain basic rights for all workers (including ODE workers), however these rights are fairly minimal.

The case of the courier company Hermes in the U.K. stands out as a compromise to the challenges facing employers and workers under many current legal regimes. After a string of losses in court over classification of workers, Hermes struck a deal with the UK’s GMB delivery drivers union permitting drivers to voluntarily opt in to a “self-employed plus” status, granting them a minimum wage, up to 28 days of paid leave, and other guaranteed rights. In exchange, drivers who opt in can no longer choose their routes. Those who do not opt in can continue as freelancers with more flexibility but without the same benefits.

Model legislation in Canada also stands out as a compromise position, where a third category of worker was created, the “dependent contractor.” This legislation turns on the nature of *exclusivity* of the relationship between the parties. If a worker is categorized as a dependent

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<sup>28</sup> Graham Rapier, “Uber has proposed a new minimum wage for drivers after years of protests, but it comes with a catch,” Business Insider, August 29, 2019, <https://www.businessinsider.com/uber-minimum-wage-proposal-for-drivers-california-ab5-2019-8>, (hereafter, Rapier 2019); Faiz Siddiqui, “Uber and Lyft are floating a \$21 minimum wage. Critics say it’s closer to \$15,” The Washington Post, August 30, 2019, <https://www.washingtonpost.com/technology/2019/08/30/uber-lyft-are-floating-minimum-wage-critics-say-its-closer/> (hereafter Siddiqui 2019).

<sup>29</sup> Three of the 4 cases were filed by delivery or transportation drivers in the platform economy, while the fourth case was filed by a group of product distributors. Seyfarth Shaw, Annual Workplace Class Action Litigation Report: 2020 Edition.

<sup>30</sup> See discussion in Section IX.

contractor, he is entitled to notice<sup>31</sup> and termination pay that is on par with notice period and termination pay granted to employees. Canadian courts have found that “substantially more than 50% of billings” is a rough benchmark to surpass for economic dependency.

A third intermediate category of worker established in Spain and Italy has not had a significant impact because employers were incentivized (and able) to arbitrage the system, thereby leading to a reduction in worker protections, rather than an increase. For example, in Italy, the third worker category sparked undesirable effects when businesses increasingly began to hire workers under the *lavoratore parasubordinato* category, which provided a lower level of worker protections than those afforded employees if the employer could demonstrate the relationship met specified criteria. Most of these quasi-subordinate workers would all previously have been classified as employees.

In 2019, authorities in India have proposed legislation that recognizes electronic platform workers as entitled to certain benefits such as life and disability coverage, and health and maternity benefits.

Given the experiences of other countries, some researchers propose that instead of creating a new category or worker, one solution that works within the current U.S. framework is to change the default presumptions regarding the two categories that exist. For example, above minimum threshold of hours worked or income earned, the default rule would be an employment relationship for most gig workers, except those that may fit into a specified ‘safe harbor’ group, such as *for de minimis amateurs or volunteers*.

In summary, while technology is affecting various business models, industries, and their workforces in different ways, creating winners and losers, all models and industries need to embrace and adapt new technologies or risk being left behind. The societal gains ushered in by technological change have been studied extensively, including some of the impacts on workers. Labor laws and regulatory regimes, however, have been slower to address the reforms required in a modern economy.

### III. The Alternative Workforce and the Impact of Technology

#### A. The Alternative Workforce

According to the BLS May 2017 Contingent Worker Supplement Survey of Contingent and Alternative Employment Arrangements,<sup>32</sup> workers who identified as holding an alternative

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<sup>31</sup> “When an employee's job is over, the amount of notice can be set by contract or governed by common law in each province.’ Courts establish common law through their decisions. ... For example, minimum notice in Ontario is eight weeks after eight years' service, but in Alberta, it is eight weeks after 10 years' service. ... ‘In addition, the Ontario statute requires minimum severance pay in addition to minimum notice, whereas the other provinces do not require minimum severance pay.’” Catherine Skrzypinski, “To Fire Employees in Canada, You Need a Reason and Notice,” the Society for Human Resource Management, May 20, 2019, <https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/global-canada-termination-notice.aspx>.

<sup>32</sup> BLS 2017.

employment arrangement are defined as an individual’s sole or main job (job in which they usually work the most hours). That is, only in the instances where ODE work constitutes a worker’s primary source of labor market income are these workers included in the BLS definition and categories of alternative workforce, which fall into the following categories<sup>33</sup>:

- 10.6 million independent contractors (6.9 percent of total employment),
- 2.6 million on-call workers (1.7 percent of total employment),
- 1.4 million temporary help agency workers (0.9 percent of total employment), and
- 933,000 workers provided by contract firms (0.6 percent of total employment)
- Compared with February 2005 (the last time the BLS survey was conducted), “the proportion of the employed who were independent contractors was lower in May 2017, while the proportions employed in the other three alternative arrangements were little different,” suggesting that non-traditional work categories may not be a growing source of primary employment.<sup>34</sup>

Other research by Collins and his collaborators report that the share of the workforce earning income reported on I.R.S. Form 1099 (the typical way that independent contractors are paid), rose by one percentage point between 2007 and 2016. Almost all of this increase was due to the rise of online platforms.<sup>35</sup> Moreover, the authors determined that the growth was “driven by individuals whose primary annual income derives from traditional jobs and who supplement that income with platform-mediated work.”<sup>36</sup>

While these estimates are believed to be low, the current available research indicates that the growth and current level of alternative workers, whose alternative work is the primary source or income, is not as high as other survey sources suggest. However, these figures underestimate the number of alternative workers, since research finds most alternative workers have other primary work.

In addition, the BLS 2017 survey results further estimate that 3.8% of workers--5.9 million persons--held contingent jobs.<sup>37</sup> Contingent workers are expect their work to be temporary. Based on three different measures, contingent workers accounted for 1.3% to 3.8% of total

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<sup>33</sup> To the extent that online demand economy (ODE) labor is a secondary “job,” these jobs would not be included in the summary.

<sup>34</sup> BLS 2017; Katz and Krueger (who attempted to mimic the BLS CWS approach in their 2016 paper, albeit imperfectly, and later revised their estimates downward), suggest that a 1 to 2 percentage point increase in the share of alternative work from 2005 to 2015 is more likely. They further estimate that platform work is only between 0.5% to 1.5% of the workforce between 2015-2017. The authors discuss the sources of discrepancies between their 2015 survey and the BLS survey results 2 years later. See Katz and Krueger (2019), pp. 132–46.

<sup>35</sup> Collins et. al., “Is Gig Work Replacing Traditional Employment? Evidence from Two Decades of Tax Returns,” IRS working paper, March 25, 2019; See also, Neil Irwin, “Maybe We’re Not All Going to Be Gig Economy Workers After All,” New York Times, Sept. 15, 2019 (hereafter, Collins et al., (2019)).

<sup>36</sup> Collins et al., 2019, p. 3.

<sup>37</sup> The BLS measures contingent work and alternative employment arrangements separately. Some, but not all, workers are both contingent and in an alternative arrangement. See, BLS 2017.

employment in May 2017. However, in the February 2005 survey, all three measures were higher, ranging from 1.8% to 4.1% of employment.<sup>38</sup>

- 79% of independent contractors preferred their arrangement over a traditional job, while only 44% of on-call workers and 39% of temporary help agency workers preferred their work arrangement.<sup>39</sup>
- More than half (55%) of contingent workers would have preferred a permanent job.<sup>40</sup>

Non-governmental survey research finds a range of U.S. workers who identify as independent earners, including primary and supplemental sources of income. For example, in its 2019 Report on the State of Independence in America, MBO Partners estimated that the total number of independent workers in the U.S. was approximately 41.1 million, down from 41.8 million in 2018, based on its annual online survey conducted in March 2019.<sup>41</sup> Table 2 presents recent estimates of independent workers from other non-governmental sources found in the literature.

Survey research on the alternative workforce also attempts to capture the sentiments of participants in the alternative workforce, including worker characteristics, motivation for participation, and preferences. However, often these studies do not clearly delineate which characteristics apply to each type of specific independent worker (e.g., part-time vs. full-time; independent business contractor vs. freelancers vs. temporary staff worker vs. ODE worker); rather many studies tend to blur these distinctions across workers, even though heterogeneity clearly exists.

MBO Partners found that about 81% of full-time independents in 2019 were pursuing the path of independent contractor status by choice, up from 66% in 2012.<sup>42</sup> MBO Partners, however, define full-time independents as those working more than 15 hours each week, and by doing so, are arguably capturing the preferences of many part-timers as well.<sup>43</sup>

## **B. The Impact of New Technologies on the Workforce**

The development of new technologies has helped create new services through innovations such as the web, smart phones, and greatly increased computer processing power. Largely technology-driven firms have added greatly to the growth of the economy and have been embraced by consumers. Firms such as Amazon, Uber, Lyft, Google, Apple, and Facebook have created new products and services that did not exist 10 to 20 years ago. These technological advancements have reduced the barriers to entry in various industries by providing customers with direct access to new sources of products and services. This change in turn is putting

<sup>38</sup> BLS 2017.

<sup>39</sup> BLS 2017; and Katz and Krueger (2019), pp. 132–46.

<sup>40</sup> BLS 2017. For more information on the demographics of contingent workers, see also, BLS, “A Look at Contingent Workers,” September 2018, <https://www.bls.gov/spotlight/2018/contingent-workers/home.htm>.

<sup>41</sup> The State of Independence in America, MBO Partners, 2019, p. 2.

<sup>42</sup> The State of Independence in America, MBO Partners, 2019, p. 9.

<sup>43</sup> The State of Independence in America, MBO Partners, 2019, p. 9.



pressure on more traditional firms to modify their business models. In part, traditional firms are increasingly modifying their relationships with their workforce and this includes turning to non-traditional workers to increase organizational agility.

The multitude of traditionally brick-and-mortar stores that are in bankruptcy due to Covid-19 and competition from platform and non-platform web-based companies, coupled with changing consumer tastes and practices clearly signals that the impact of technology is working its way across the whole economy, and all firms need to be able to flexibly respond to a dynamic online sector undergoing rapid changes. One way to do that is to apply new technologies to best provide the goods and services demanded by consumers, and in some cases, to adapt to the changing preferences of many workers to let them have more control over their work and the hours they choose to work. Clearly, any changes in the relationship between workers and firms need to benefit both.

The growing recognition by firms across industries of the impact that new technologies have on both their customer base and their labor pool necessitates industry to identify a creative path to remain viable in the 21<sup>st</sup> Century. The use of technology has been further necessitated by the Covid-19 pandemic, which has made in-person customer interactions riskier or even illegal.

### **C. The ODE Workforce (e.g., Ride-for-Hire, Delivery, and Other Freelancing Work)**

Today, a customer is likely to get their ride using an app on their phone. Across the world, thousands of digitally hired workers use their cars, bikes, or motorcycles to deliver any sort of products. Businesses, such as hotels, outsource many of their standard tasks through platforms or staffing agencies and even highly skilled freelancers look for their clients online. Platforms have become the disruptive players in almost any sector. However, ODE has become a conundrum for the standard toolkit of industrial regulation, with controversies growing with respect to worker rights, as well as other externalities (e.g., ride-sharing industry’s contribution to congestion).

For example, the emergence of the ridesharing industry fueled by platform technology has completely disrupted the traditional ride-for-hire industry (taxi, livery, etc). With business models that can dynamically adapt to changing supply and demand conditions and reduce barriers to entry for potential drivers, ridesharing companies have outperformed traditional ride-for-hire companies and now dwarf them in the amount of commerce they generate. For example, by 2017, the number of daily trips scheduled via ridesharing companies was 12 times the number of taxi trips, and represented 15% of all intra-San Francisco vehicle trips.<sup>44</sup> In Seattle, a survey showed that 3.5 times more people used Uber and Lyft than taxis.<sup>45</sup> Data show that by the end of 2019, and despite regulation capping the number of rideshare vehicles on the road, trips

<sup>44</sup> San Francisco County Transportation Authority, “TNCs Today,” 2017, <https://www.sfcta.org/projects/tncs-today>.

<sup>45</sup> Gene Balk, “Uber, Lyft used by 3.5 times more people than taxis in Seattle, new data show,” *Seattle Times*, April 26, 2018, <https://www.seattletimes.com/seattle-news/data/uber-lyft-used-by-3-5-times-more-people-than-taxis-in-seattle-new-data-show/>.

scheduled on ride-hailing apps were almost triple the number of taxi trips scheduled in New York City.<sup>46</sup>

Ridesharing has also spawned ancillary service categories in delivery, such as food delivery (e.g., Amazon Flex, Postmates, UberEats, Grubhub, DoorDash, etc.), that use platform technology to allow delivery drivers to connect with customers who would like to have food delivered.

Ridesharing companies compete to some degree with taxi companies, but taxi companies have not been able to successfully regain lost business. However, there is evidence that taxi companies have attempted to compete with ridesharing companies on the basis of quality dimensions. For example, a study by Wallsten found that in New York the increasing popularity of Uber as measured by Google Trends<sup>47</sup> was associated with a decline in the number of consumer complaints about taxis per trip, whereas in Chicago, Uber’s increasing popularity was associated with a decline in particular types of complaints of taxis such as broken credit card readers, air conditioning and heating, rudeness, and talking on cell phones.<sup>48</sup> There is also evidence that some taxi companies adopt and offer their services through smartphone applications similar to Uber and Lyft.<sup>49</sup> These analyses shed light on some of the competitive effects of platform technology, demonstrating that benefits “may accrue not just to those who avail themselves of new options, like ride-sharing, but also to those who stick with traditional providers.”<sup>50</sup>

TaskRabbit, a platform company that matches freelance “taskers” with people who need handiwork completed for a variety of household chores and repairs (e.g. handyman, house cleaning, moving, and personal assistants), helped develop a whole industry that previously was a fragmented, low-tech space of one-off providers.<sup>51</sup> Then in September 2017, TaskRabbit was acquired by Swedish retailer, IKEA, creating a tech-savvy, synergistic partnership that is in turn

<sup>46</sup> Schneider, Todd, “Taxi and Ridehailing Usage in New York City,” <https://toddschneider.com/dashboards/nyc-taxi-ridehailing-uber-lyft-data/>.

<sup>47</sup> Google Trends provides an index of the volume of Google search queries for a given search term by geographic location, category, and over time. *See also* Choi, Hyunyoung and Hal R. Varian, “Predicting the Present with Google Trends,” April 10, 2009, [https://static.googleusercontent.com/media/www.google.com/en//googleblogs/pdfs/google\\_predicting\\_the\\_present.pdf](https://static.googleusercontent.com/media/www.google.com/en//googleblogs/pdfs/google_predicting_the_present.pdf).

<sup>48</sup> Wallsten, Scott, “The Competitive Effects of the Sharing Economy: How is Uber Changing Taxis?” (2015), p. 3.

<sup>49</sup> *See for example*, “Flywheel-The Taxi App,” available in App Store, <https://itunes.apple.com/us/app/flywheel/id584165682?ls=1&mt=8>, and Flywheel taxi, “About,” <https://flywheeltaxi.com/about/>.

<sup>50</sup> Wallsten, Scott, “The Competitive Effects of the Sharing Economy: How is Uber Changing Taxis?” (2015), p. 19.

<sup>51</sup> Casey Newton, “TaskRabbit is blowing up its business model and becoming the Uber for everything,” The Verge, June 17, 2014, <https://www.theverge.com/2014/6/17/5816254/taskrabbit-blows-up-its-auction-house-to-offer-services-on-demand>; “TaskRabbit is using open innovation to tap an unrealized labor market, but can it sustain its growth?” Harvard Business School, November 12, 2018, <https://digital.hbs.edu/platform-rcotom/submission/taskrabbit-is-using-open-innovation-to-tap-an-unrealized-labor-market-but-can-it-sustain-its-growth/>.

boosting the retailing segment, as well as creating built-in access to a customer base for freelance taskers to serve.<sup>52</sup>

A growing body of literature has studied platform markets and to a high degree found that digital labor markets can vary substantially, from either pure two-side markets or a hybrid of market and hierarchy, which need to be ascertained on a case-by-case basis.<sup>53</sup> Take pay, for example. TaskRabbit requires taskers to pay a fee to be listed on the platform, but taskers take home the entire income earned on the rates they set themselves. Consumers pay a fee to use TaskRabbit.<sup>54</sup> Taskers compete with other taskers with similar offerings on cost and quality. The TaskRabbit business model is a fundamentally different business model than currently exists in the ride-sharing space, where drivers accept or reject ride requests, must meet certain acceptance thresholds to continue as a service provider, get paid on a piecemeal basis, and do not set their own rates.<sup>55</sup>

Below, we describe the latest surveys and empirical research on the ODE marketplace, highlighting what is known about the size and composition of workers on ODE platforms. In Sections V, VI, VII, and VIII, we discuss what is known about worker motivations for turning to ODE work, working conditions and wages on these platforms.

Despite the expansion of the ODE workforce, ODE work is typically not the most significant source of primary income. As described above, both the BLS and Katz and Krueger estimate that the ODE workforce (defined as primary source of income) is fairly small, between 0.5% to 1.5% of the total workforce. Mishel (2018) estimates that the entire ODE labor force accounts for just 0.1 percent of national FTE employment (based on conversions hours/weeks worked), despite several years of rapid growth.<sup>56</sup> Harris and Krueger estimate that Uber drivers alone represent about two-thirds of the entire U.S. platform economy.<sup>57</sup>

ODE work remains a secondary source of income. Researchers from JPMorgan Chase Institute examined rates of participation in labor platforms across 15 cities from its proprietary financial database source.<sup>58</sup> The authors found the following:<sup>59</sup>

<sup>52</sup> PYMNTS, “How TaskRabbit, With IKEA, Is Reshaping The Gig Economy,” October 18, 2019, <https://www.pymnts.com/gig-economy/2019/how-taskrabbit-with-ikea-is-reshaping-the-gig-economy/>, (hereafter, PYMNTS 2019); Aaron Pressman, “Why TaskRabbit’s Gig Economy Model Is Thriving Under Ikea’s Ownership,” Yahoo Finance, July 17, 2018, <https://finance.yahoo.com/news/why-taskrabbit-gig-economy-model-231338081.html>.

<sup>53</sup> Bogliacino et al. 2019.

<sup>54</sup> PYMNTS 2019.

<sup>55</sup> Mary Thompson, “Sharing Economy Makes it Pay to Work on your Own,” CNBC, July 2, 2015, <https://www.cnbc.com/2015/07/01/sharing-economy-makes-it-pay-to-work-on-your-own.html>.

<sup>56</sup> Lawrence Mishel, “Uber and the labor market,” Economic Policy Institute, May 15, 2018, (hereafter, Mishel 2018). He estimates there were about 833,000 Uber driver participants in 2018.

<sup>57</sup> Harris, Seth D., and Alan B. Krueger. 2015. *A Proposal for Modernizing Labor Laws for Twenty-First-Century Work: The “Independent Worker.”* The Hamilton Project, December 2015, (hereafter, Harris and Krueger 2015).

<sup>58</sup> “The Online Platform Economy: who earns the most?” JPMorgan Chase Institute, May 2016, <https://institute.jpmorganchase.com/institute/research/labor-markets/insight-online-platform-econ-earnings.htm>. The data source is an anonymized sample of over 260,000 core Chase checking account customers who earned income on at least one of the 30 platforms.

<sup>59</sup> *Ibid.*

- “Participation in labor platforms ranged from a high of 2.2 percent in San Francisco to a low of 0.4 percent of adults in New York City” in the 12 months up to Sept. 2015.
- Platform labor earnings were largely a secondary source of income<sup>60</sup> for “established participants”<sup>61</sup> “in all 15 cities and the nation as a whole, representing 26 percent of annual income for labor platform participants and 11 percent of annual income for capital platform participants.”<sup>62</sup> “Among all platform earners, including individuals who began participating during the most recent year, platform earnings represented 14 percent of total income for labor platform participants and 6 percent of income for capital platform participants.”<sup>63</sup>
- Reliance on labor platform income varied greatly across the 15 major cities among established platform participants—between 35% of total income in San Francisco to about 15% of total income in Detroit.
- The Online Labor Platform Economy attracted individuals across the income spectrum, not just low-income individuals.
- “Millennials were most likely to earn income from the Online Platform Economy, but they were the least reliant on platform earnings across age groups.”

The Aspen Institute, quoting a report from Intuit and Emergent Research, reported:<sup>64</sup>

- “The average ODE worker works about 12 hours per week for an ODE partner company; 57% work less than 10 hours per week with their ODE partner company.”<sup>65</sup>
- “Only 9.6% report working more than 30 hours per week with their ODE partner company.”

<sup>60</sup> The report does not provide the percentage of workers for whom platform labor earnings are a secondary source of income.

<sup>61</sup> The researchers define “established participants” as those who “received platform income at any point in the two years before October 2014.”

<sup>62</sup> “The Online Platform Economy: who earns the most?” JPMorgan Chase Institute, May 2016, <https://institute.jpmorganchase.com/institute/research/labor-markets/insight-online-platform-econ-earnings.htm>.

<sup>63</sup> *Ibid.*

<sup>64</sup> Libby Reader, “Data on The Sharing & On-Demand Economy: What We Know and Don’t Know,” Aspen Institute, 2016. Intuit surveyed 6,427 ODE workers in the fall of 2016 who find work opportunities via 12 ODE platforms: Lyft, Amazon Mechanical Turk, Upwork, TaskRabbit, Wonolo, MBO Partners, OnForce, Work Market, Catalant, Field Nation, Kelly Services and Avvo and results are weighted to reflect the proportion of providers in each of the three segments (driver/delivery, online talent, field service). See, “Dispatches from the New Economy: The On-Demand Worker Study,” Intuit and Emergent Research, 2016. <https://intuittaxandfinancialcenter.com/wp-content/uploads/2017/06/Dispatches-from-the-New-Economy-Long-Form-Report.pdf>. See also previous version of this study at <https://www.slideshare.net/IntuitInc/dispatches-from-the-new-economy-the-ondemand-workforce-57613212>.

<sup>65</sup> In addition, Eisenbrey and Mishel report that “As for Lyft, in its press release regarding a court settlement in January 2016, the company noted: ‘Roughly 80 percent of drivers who use the Lyft platform drive 15 hours per week or less to supplement their incomes.’” Eisenbrey, Ross and Lawrence Mishel, “Uber business model does not justify a new independent worker’ category,” Economic Policy Institute, March 17, 2016, (hereafter Mishel 2016).

- “43% have either a traditional full-time job (29%) or part-time job (14%) in addition to their ODE work.”
- “The average ODE worker has 2-3 non-ODE sources of income. Most earn from one platform; only 17% earn from two or more platforms.”
- “14% of labor platform participants and just 1% of capital platform participants are earning income from more than one platform in any given month.”

In summary, while the available research indicates that ODE work is dominated by those seeking supplemental, part-time earnings, one should not conclude that these ODE opportunities are not economically important to the significant number of individuals engaged in this work, as we show in Sections V and VII.

#### **D. The Retail Sector**

E-commerce sales as a share of total retail sales have been growing significantly, doubling from 4.2 percent in 2010 to 11.2 percent in Q3-2019.<sup>66</sup> That said, traditional brick-and-mortar retail continues to dominate, accounting for over 85% of retail sales. Goldman Sachs estimates that traditional in-store sales require “more than three and a half times as many workers as the same amount of sales transacted online.”<sup>67</sup>

Amazon topped the list of the top e-commerce retailers in the U.S. (2019), with 47% of sales, followed by eBay (6.1%), Walmart (4.6%), Apple (3.8%), and The Home Depot (1.7%).<sup>68</sup> Despite the continued dominance of brick-and-mortar retail, the Covid-19 pandemic is accelerating the rise of E-commerce sales. Following the onset of the pandemic, projections changed from 2.8% expected retail sales growth in 2020 to an expected decline of 10.5%.<sup>69</sup> Embedded within this expectation was a predicted 14.0% drop in brick-and-mortar sales, combined with 18.0% growth in E-commerce.<sup>70</sup>

<sup>66</sup> See, also, U.S. Census Bureau News, “Quarterly Retail E-Commerce Sales 2<sup>nd</sup> quarter 2020,” U.S. Department of Commerce, August 18 2020, [https://www.census.gov/retail/mrts/www/data/pdf/ec\\_current.pdf](https://www.census.gov/retail/mrts/www/data/pdf/ec_current.pdf); According to another source, Internet Retailer, “ecommerce now accounts for 16.0% of total retail sales after factoring out the sale of items not normally purchased online, such as fuel, automobiles and sales in restaurants...”. See, Fareeha Ali, “A decade in review: Ecommerce sales vs. retail sales 2007-2019,” Digital Commerce 360, March 3, 2020, <https://www.digitalcommerce360.com/article/e-commerce-sales-retail-sales-ten-year-review/>.

<sup>67</sup> See, Alastair Fitzpayne, Ethan Pollack, and Hilary Greenberg, “Industry at a Glance: The Future of Retail,” Aspen Institute, November 27, 2017 at <https://www.aspeninstitute.org/blog-posts/industry-at-a-glance-the-future-of-retail/>.

<sup>68</sup> eMarketer Editors, Feb. 4, 2019 at <https://www.emarketer.com/content/digital-investments-pay-off-for-walmart-in-ecommerce-race>.

<sup>69</sup> eMarketer, “US Ecommerce Will Rise 18% in 2020 amid the Pandemic,” July 2, 2020, <https://www.emarketer.com/content/us-ecommerce-will-rise-18-2020-amid-pandemic>.

<sup>70</sup> eMarketer, “US Ecommerce Will Rise 18% in 2020 amid the Pandemic,” July 2, 2020, <https://www.emarketer.com/content/us-ecommerce-will-rise-18-2020-amid-pandemic>.

**i. Impact of technical change on retail**

According to the BLS, the retail sector has lost over 110,000 jobs since January 2017 (through December 2019),<sup>71</sup> however, government data may be misleading regarding the true measurements of decline in retail sector jobs. The National Retail Federation suggests that government statistics may largely show a shift in the types of people that the retail segment employs. For example, while it is correct that many major retailers have gone bankrupt in the last decade, technological shifts have caused many major retailers to actually shift the types of employees it hires (e.g., employing fewer cashiers and sales clerks, but more warehouse and distribution workers, the latter of which are not captured under BLS’s classification of the retail sector).<sup>72</sup> The Covid-19 pandemic has only accelerated this trend. Some e-commerce workers are also captured in the BLS’s retail sector, “nonstore retailers” NAICS 454, however, the BLS statistics look at where an employee works (i.e., the retail outlet), not for whom. Software developers that work in e-commerce or retail generally will not be captured in the retail segment; neither will most of the corporate staff.<sup>73</sup>

Thus, while the e-commerce segment is steadily gaining ground on traditional retailers, the largest of these retailers are fighting e-commerce’s encroachment through adoption of technologies and rethinking the status quo relationship with workers, albeit in many cases acting as followers, rather than leaders.

The traditional retail sector is increasingly competing against e-commerce and other ODE platforms for critical labor talent,<sup>74</sup> and is quickly learning that its labor pool has a variety of options that include the flexibility in working conditions many workers are seeking. Traditional retail presumably will need to meet the competition with similar or better options.

<sup>71</sup> For a description of the establishments included in the Retail sector, NAICS 44-45, see, “Retail Trade: NAICS 44-45,” U.S. Bureau of Labor Statistics, <https://www.bls.gov/iag/tgs/iag44-45.htm#workforce>.

<sup>72</sup> See, for example, “If you want to measure retail employment, don’t look to monthly BLS employment figures,” National Retail Federation, May 3, 2019, <https://nrf.com/blog/if-you-want-measure-retail-employment-dont-look-monthly-bls-employment-figures>, (hereafter, NRF 2019); Thomas Franck, “Booming jobs market is leaving the retail industry behind,” CNBC, April 8, 2019, <https://www.cnbc.com/2019/04/05/booming-jobs-market-is-leaving-the-retail-industry-behind.html>.

<sup>73</sup> “How did employment fare a decade after its 2008 peak?” U.S. Bureau of Labor Statistics, Monthly Labor Review, October 2018, <https://www.bls.gov/opub/mlr/2018/article/how-did-employment-fare.htm>; NRF 2019; Elka Torpey, “Employment Growth and Wages in e-Commerce,” U.S. Bureau of Labor Statistics, December 2018, <https://www.bls.gov/careeroutlook/2018/article/e-commerce-growth.htm>.

<sup>74</sup> Jordan Verdon, “For Retailers this Holiday Season, Good Help Will Be Hard to Find,” Forbes, September 20, 2019, <https://www.forbes.com/sites/joanverdon/2019/09/20/for-retailers-this-holiday-season-good-help-will-be-hard-to-find/#386c4e046016>; Knowledge@Wharton, “Talent on Tap: Why Online Labor Platforms Are Taking Off,” Wharton, University of Pennsylvania, January 16, 2019, <https://knowledge.wharton.upenn.edu/article/talent-on-online-labor-platforms-taking-off/>; ManpowerGroup Solutions and Retail Industry Leaders Association, “Apocalypse or Evolution: What Retail Employers Need to Know About Candidate Preferences,” 2018, <https://www.manpowergroup.us/campaigns/manpowergroup/us-candidate-tech-preferences/siri-find-me-a-job/pdf/us-retail-candidate-preferences-report.pdf> (hereafter, *Apocalypse or Evolution*, 2018); ManpowerGroup Solutions and Retail Industry Leaders Association, “Fully Stocked,” 2019 at [https://rilastagemedia.blob.core.windows.net/rila-web/rila.web/media/media/pdfs/reports/mpgs\\_fully\\_stocked\\_retail\\_report-finalv2.pdf](https://rilastagemedia.blob.core.windows.net/rila-web/rila.web/media/media/pdfs/reports/mpgs_fully_stocked_retail_report-finalv2.pdf) (hereafter, *Fully Stocked*, 2019).

Accordingly, leading retailers are implementing innovative and customizable solutions that are not one-size-fits-all to attract and retain a varied workforce. Job seekers in the retail industry are a diverse group, ranging from millennial students, semi-retirees, and homemakers seeking part-time work that fits around their family commitments. Their needs and preferences are not the same, but control over work scheduling and access to some benefits (although not always the same ones) appear prominently on their list of features they seek in a job.<sup>75</sup>

One solution that has been gaining some acceptance is the “on-demand staffing platform.” These platforms, such as Jyve, HYR, Fountain, and Wonolo, assist employers with hiring, onboarding, and training a shared pool of qualified workers. These platforms use a scheduling software to offer or assign shifts, geo-track attendance, provide feedback and even use surge pricing to fill shifts.<sup>76</sup>

Others are adopting scheduling apps. Managers can post shifts on these apps, and workers often can also schedule shifts or swap shifts without requiring managerial coordination.<sup>77</sup> Preliminary evidence suggests some of these innovations are paying off with increased worker and managerial productivity, enhanced scheduling consistency for staff, and increased floor sales.<sup>78</sup>

**ii. *Technical innovation affecting labor market trends from the largest brick-and-mortar retailer, Walmart, relative to the largest e-commerce retailer, Amazon***

Walmart, as the world’s largest private employer, is often looked to as a leader of labor market trends. Walmart’s 2018 revenue and net income was \$514B and \$6.7B vs. Amazon’s \$233B and \$10.1B, respectively.<sup>79</sup> However, Walmart employs 4 times as many people as Amazon.<sup>80</sup>

Currently, Walmart and Amazon appear to be matching each other’s new ideas and innovations.<sup>81</sup> Amazon launched its Amazon Go convenience stores, which totaled 21 locations in 2019<sup>82</sup> where customers can purchase items without needing a cashier to check out. Sam's

<sup>75</sup> *Apocalypse or Evolution, 2018; Fully Stocked, 2019.*

<sup>76</sup> *Fully Stocked, 2019.*

<sup>77</sup> *Fully Stocked, 2019.*

<sup>78</sup> Joan C. Williams, Susan Lambert, and Saravanan Kesavan, “How the Gap Used an App to Give Workers More Control Over Their Schedules,” Harvard Business Review, December 27, 2017. See full report at <https://worklifelaw.org/publications/Stable-Scheduling-Study-Report.pdf>; see also, *Fully Stocked, 2019.*

<sup>79</sup> “Amazon vs Walmart – Revenues and Profits Comparison 1999-2018,” MGM Research, March 1, 2019, <https://mgmresearch.com/amazon-vs-walmart-revenues-and-profits-comparison-1999-2018/>.

<sup>80</sup> Amy Merrick, “Walmart’s Future Workforce: Robots and Freelancers,” The Atlantic, April 4, 2018, <https://www.theatlantic.com/business/archive/2018/04/walmarts-future-workforce-robots-and-freelancers/557063/>, (hereafter, Merrick 2018).

<sup>81</sup> Blake Morgan, “7 Ways Amazon and Walmart Compete -A Look At The Numbers,” Forbes, August 21, 2019, <https://www.forbes.com/sites/blakemorgan/2019/08/21/amazon-versus-walmart-goliath-versus-goliath/#594b1194674f>.

<sup>82</sup> James Vincent, “Amazon reportedly plans bigger cashierless supermarkets for 2020,” The Verge, November 20, 2019, <https://www.theverge.com/2019/11/20/20974037/amazon-go-cashierless-2020-expansion-supermarkets-pop-up-stores>.

Club, owned by Walmart, has developed its own version of this technology.<sup>83</sup> A 2018 *Atlantic* piece indicated that Walmart was moving towards greater use of gig labor (crowd-sourced personal shoppers and delivery drivers) and automation (more self-check outs or no check-outs).<sup>84</sup>

As reported at *Forbes*, “Walmart recently announced it will add 1,500 robots to hundreds of stores around the country, and it has already automated much of its supply chain and online order pickup processes. It is testing pickup-only locations as well as kiosks where customers can pick up orders quickly without interacting with a human. ... Amazon is also leveraging robots at its large fulfillment centers and even recently started using autonomous robots to deliver packages in select markets.”<sup>85</sup>

In 2016, Walmart announced that it was implementing a pilot roll-out of a new employee scheduling software app that predicts the busiest times at each store and staffs its stores accordingly, while also giving associates more predictable and flexible scheduling options.<sup>86</sup> According to Walmart, the app, called *My Walmart Schedule* allows associates to view their schedules, swap shifts, and pick up unfilled shifts.<sup>87</sup> This gives associates more control of their scheduling. It also allows them to work any available position they prefer (e.g., stocking, cashier, etc.) as long as they are trained. The software was employed at all stores in November 2018.<sup>88</sup>

### iii. *Old Navy*<sup>89</sup>

A December 2019 *New York Times* article illustrates “the job of a retail clothing worker at the end of 2019: dashing back and forth between stockroom and fitting room and sales floor, online and in-store, juggling the hats of cashier and cheerleader and personal shopper and visual merchandiser and database manager.” Through the use of multiple apps, retail workers strive to be all things to all customers. These days, retail outlets are not looking for traditional salespeople, “they’re looking for retail transaction enablers.”

<sup>83</sup> Nat Levy, “Walmart unveils Sam’s Club Now, its answer to Amazon Go, opening soon in Dallas,” *GeekWire*, October 29, 2018, <https://www.geekwire.com/2018/walmart-unveils-sams-club-now-answer-amazon-go-opening-soon-dallas/>.

<sup>84</sup> Merrick 2018.

<sup>85</sup> Blake Morgan, “7 Ways Amazon and Walmart Compete -A Look At The Numbers,” *Forbes*, August 21, 2019, <https://www.forbes.com/sites/blakemorgan/2019/08/21/amazon-versus-walmart-goliath-versus-goliath/#653ec9f54674>; Peter Holley, “Amazon’s autonomous robots have started delivering packages in Southern California,” *The Seattle Times*, August 12, 2019, <https://www.seattletimes.com/business/technology/amazons-autonomous-robots-have-started-delivering-packages-in-southern-california/>.

<sup>86</sup> Jennifer Parris, “Walmart’s New Approach to Scheduling, Flexibility,” *flexjobs*, August 19, 2016, <https://www.flexjobs.com/employer-blog/walmarts-new-approach-scheduling-flexibility/> (hereafter, Parris 2016). See also, Matt Smith, “New Scheduling System Gives Associates More Consistency and Flexibility,” *Walmart Corporate Affairs*, <https://corporate.walmart.com/newsroom/2018/11/13/new-scheduling-system-gives-associates-more-consistency-and-flexibility>, (hereafter, Smith 2018)

<sup>87</sup> Parris 2016.

<sup>88</sup> Smith 2018. We are unaware of published documentation of the efficacy of this software.

<sup>89</sup> Andy Newman, “Her Job Requires 7 Apps. She Works Retail,” *New York Times*, December 26, 2019 at <https://www.nytimes.com/2019/12/26/nyregion/old-navy-workers.html>.



## E. The Direct Selling Industry

Direct Selling is the retailing of a good or service directly from one person to another, not at a fixed retail location. “Providers in the industry are referred to as independent consultants, distributors or representatives. Sales are usually done via home parties, workplaces, trucks, street-corner carts or door-to-door.”<sup>90</sup> Some well-known brands in the Direct Selling industry include Amway, Avon Products, and Tupperware. The major product and service areas are clothing and accessories, home, family, and personal care products, and leisure and educational products.<sup>91</sup>

An industry report states, “While intense external competition has negatively affected the industry over the five years to 2019, the industry has managed to achieve growth as a result of the strengthening national economy and robust disposable income. Increased competition from mass merchandisers, department stores and online retailers has threatened the industry by providing a wider selection of substitute products at low prices in a convenient one-stop location. However, as many industry operators have no physical locations, the price advantage competitors have over many retailers is minimized, which has somewhat mitigated the effects of dwindling industry customers.”<sup>92</sup>

Looking forward, online sales, with its competitive prices, convenience and a broader range of products, will continue to erode growth of Direct Selling products and analysts predict that industry revenues will stagnate over the next five years. Furthermore, to the degree that Direct Selling involves direct, in-person interaction, its growth may stop or decline during the Covid-19 pandemic.

Because Direct Selling entrepreneurs have relatively low start-up costs, many Americans who are unemployed or underemployed start Direct Selling businesses in order to earn income. During the low unemployment rates of the last decade, these operators have generally opted to remain in the industry on a part-time basis, instead of exiting the industry all together (part-time direct sellers out-number full-time direct sellers by a factor of five).<sup>93</sup> In addition, other operators entered the industry to use it as a flexible, low-commitment vehicle to earn supplemental income.<sup>94</sup>

Direct Selling companies and consultants have adopted a limited set of technological tools. For example, many Direct Sellers use mobile POS terminals to process sales and many consultants can accept orders online, but these technologies have already been available for some

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<sup>90</sup> Spitzer, Dan, “Out of stock: The threat of e-commerce is expected to stifle industry revenue growth, Direct Selling Companies in the U.S.,” IBISWorld Industry Report 45439, December 2019, (hereafter, Spitzer 2019). See, discussion in Section III.E.

<sup>91</sup> Spitzer 2019, pp. 5-6.

<sup>92</sup> Spitzer 2019, p. 6.

<sup>93</sup> Part-time resellers are defined as working fewer than 30 hours/week. See, Direct Selling Association, “Direct Selling in the Industry, 2018 Industry Overview, at [https://www.dsa.org/docs/default-source/action-alerts/2018industryoverview-06032019.pdf?sfvrsn=9709c0a5\\_0](https://www.dsa.org/docs/default-source/action-alerts/2018industryoverview-06032019.pdf?sfvrsn=9709c0a5_0).

<sup>94</sup> Spitzer 2019, p. 6.

time.<sup>95</sup> In addition, some operators use online marketing, blogging, testimonials, and other social media technologies to reach a broader targeted audience for their products; however, the research on adoption and success of these approaches is unknown.<sup>96</sup> Because many direct selling operators are sole proprietors and generate small quantities of sales within homes, technological adoption has not been perceived to be appropriate or necessary; rather, a heavy reliance on labor characterizes the industry (e.g., live demonstrations). At the corporate level, larger brands are upgrading their order management systems and other technologies to improve internal and external communications, track inventories, and coordinate sales teams.<sup>97</sup> However, industry analysts anticipate little technological change in the industry over the next five years.<sup>98</sup>

To some degree, technology and innovation have been more significant drivers of competitors' businesses than of business in the Direct Selling industry. In that regard, the Direct Selling industry must develop alternative means to maintain and grow its customer base and compelling reasons to retain and recruit enthusiastic brand representatives to move the industry forward.

## F. Staffing Agencies

Companies in the staffing services industry include temporary staffing, outsourced HR management, and employee placement services. An industry report identifies several major U.S. companies including Allegis, Kelly Services, ManpowerGroup, and Robert Half International.<sup>99</sup>

The staffing services industry typically performs well during a robust economy. However, clients typically reduce employment of temporary employees before conducting permanent staff layoffs during an economic downturn. Pricing competition, "which is stiffer among providers of clerical and industrial personnel, may intensify during periods of economic instability."<sup>100</sup>

Other competitive factors include the emergence of online staffing platforms and other disintermediation methods, which are being used increasingly by clients and job finders to sidestep intermediaries.

<sup>95</sup> DNS Staff, "Ramp Up Your Direct Selling Business with Mobile POS," Direct Selling News, September 1, 2013, <https://www.directsellingnews.com/ramp-up-your-direct-selling-business-with-mobile-pos/>; Dunn & Bradstreet, Direct Selling Industry Profile, July 29, 2019.

<sup>96</sup> Rhonda Bavaro, "Attract New Customers to Your Direct Sales Business Using the Power of Inbound Marketing," SMA Marketing, February 11, 2020, <https://www.smamarketing.net/blog/direct-sales-business-using-inbound-marketing>.

<sup>97</sup> Dunn & Bradstreet, Direct Selling Industry Profile, July 29, 2019.

<sup>98</sup> Industry analyst IBISWorld reports that some larger operators have introduced online member tools to assist their sales force. For instance, Avon has implemented an electronic ordering system to assist its sales force in efficiently ordering inventory. In addition, its sales force is able to use the internet and mobile devices to manage their own businesses. Mary Kay offers websites for each sales member that can be customized and through which buyers can locate a sales member on the go and request an order. Herbalife has a compilation of recruiting tips and advice for planning product parties, but these are only available via downloadable Portable Document Format (PDF) documents. See, Spitzer 2019, pp. 12, 21, 23, 28.

<sup>99</sup> Some companies concentrate on manual labor or administrative services, while others specialize in certain fields. Dunn & Bradstreet, Staffing Services, Industry Profile, June 3, 2019.

<sup>100</sup> Dunn & Bradstreet, Staffing Services, Industry Profile, June 3, 2019.

On the positive side, some internet job-search companies and social media sites collaborate with traditional staffing agencies. While some online job aggregators “do not allow agencies to use their services to post jobs or look through resumes, others find that agencies are their biggest customers, earning the sites a large percentage of their revenue. In addition, some staffing companies contract to help client employers find workers online.”<sup>101</sup>

When asked if labor automation would create more jobs or eliminate opportunities, survey respondents in the staffing industry were split down the middle with about “38% on each side and another 24 % undecided”.<sup>102</sup>

Companies in the industry are also using new online technology to improve staffing efficiency. “For example, some online applications coordinate workflow for staffing agencies, their clients, and temporary workers, and allow agencies and customers to share work order requests, submit and track candidates, approve timesheets and expenses, and run reports. Interaction between candidates and potential employers is increasingly being handled online. Clients are also increasingly expecting online services on-the-go. Mobility is an important feature of many staffing agency technology solutions.”<sup>103</sup>

## IV. Legal and Regulatory Issues

With the emergence of alternative working arrangements in response to the new technologies, governments, regulatory bodies, legislatures, and courts are seeing a need to respond. For example, within the past year several state governments have pursued legislation with the apparent intended effect of converting many independent contractors to employees. Most notably, California recently passed the widely-publicized California Assembly Bill 5 (A.B. 5), which codified a more stringent three-part test for whether a worker should be categorized as an independent contractor. The ultimate impact of this legislation is unknown, as it has resulted in lawsuits (over constitutionality), refinements and exemptions for some industries, and a potential ballot measure to exempt some app-based companies.<sup>104</sup> This codification of a California Supreme Court<sup>105</sup> case has raised some challenges to firms’ abilities to respond to the new economy with alternative work arrangements.

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<sup>101</sup> Staffing 360 Solutions, Inc. 2018 10-K, p. 6; Dunn & Bradstreet, Staffing Services, Industry Profile, June 3, 2019; Jorgen Sundberg, “5 Trends Staffing Firms are Anticipating to Impact the Industry,” Undercover Recruiter, 2018, <https://theundercoverrecruiter.com/staffing-firms-impact/>, (hereafter, Sundberg 2018)

<sup>102</sup> Sundberg 2018.

<sup>103</sup> Mohr Partners, Inc., “Industry Newsletter,” <https://mohrpartners.com/wp-content/uploads/2014/08/Staffing-Industry-Newsletter-7-2014.pdf>; Dunn & Bradstreet, Staffing Services, Industry Profile, June 3, 2019.

<sup>104</sup> Gabrielle Cannon, “AB 5 in California: Amid lawsuits, ballot measure push and confusion, lawmakers promise to refine law,” USA Today, January 21, 2020, <https://www.usatoday.com/story/news/politics/2020/01/21/california-lawmaker-promises-refine-ab-5-amid-lawsuits-confusion/4505702002/>.

<sup>105</sup> Vin Gurrieri, “Battles Over California’s Dynamex Law Just Beginning,” Law360, October 11, 2019, <https://www.law360.com/articles/1208995/battles-over-california-s-dynamex-law-just-beginning>.

A host of occupations were carved out from A.B. 5's ABC test,<sup>106</sup> and for these occupations the multi-factor *Borello* test is instead implemented to determine worker classification.<sup>107</sup> General occupational exemptions from A.B. 5 include doctors, professionals such as lawyers, architects, and engineers, professional services including marketing or human resources administrators, travel agents, graphic designers, grant writers, fine artists, financial services workers such as accountants, securities broker-dealers, investment advisors, insurance brokers, real estate agents, builders and contractors, hair stylists and barbers,<sup>108</sup> direct sales people,<sup>109</sup> estheticians, electrologists, and manicurists (if licensed), tutors,<sup>110</sup> commercial fishermen, freelance writers and photographers.<sup>111</sup> All other occupations are covered under A.B. 5.—many of which were often treated as independent contractors in the past.

Some affected worker groups have initiated significant pushback against the A.B. 5 legislation.<sup>112</sup> For example, most recently, several business groups came together to ask a federal judge for permission to file an amicus brief supporting a preliminary injunction against A.B. 5.<sup>113</sup> Meanwhile, other lawsuits have attempted to block implementation of the law for certain groups. After the California Trucking Association won a temporary restraining order to prevent A.B. 5 from being enforced against trucking companies that use owner-operators, the Superior Court of California ruled that independent truckers are exempt from A.B. 5.<sup>114</sup> The judge ruled that A.B. 5 was unconstitutional as applied to the trucking industry due to the Federal Aviation Administration Authorization Act (FAAAA) that prohibits enforcing laws that affect a motor carrier's prices, routes, and services.<sup>115</sup>

<sup>106</sup> “[T]o satisfy the ABC test and legally classify a worker as an independent contractor, the company must prove that the worker is free from the company’s control, performs work outside the company’s primary business, and is regularly engaged in the trade the worker is hired for, independent of work for the company.” Sabarwal Law, “The Dynamex Case And Impact to California Employers Jan 1, 2020,” October 29, 2019, <https://sabarwallaw.com/2019/10/the-dynamex-case-and-impact-to-california-employers-jan-1-2020/>. The last two are new factors that were not previously part of California’s independent contractor analysis. See, Stephen Fishman, “Exempt Job Categories Under California’s AB5 Law,” NOLO, 2020, <https://www.nolo.com/legal-encyclopedia/exempt-job-categories-under-californias-new-ab5-law.html>, (hereafter NOLO 2020).

<sup>107</sup> “The *Borello* test has 11 factors, primarily focusing on whether a company has control over the means and manner of performing contracted work, and additional secondary factors, such as who provides work tools and the individual’s opportunity for profit or loss, to determine contractor status.” Davis Wright Tremaine LLP, “New California AB 5 Law Expands Independent Contractor ABC Test,” September 19, 2019, <https://www.dwt.com/blogs/employment-labor-and-benefits/2019/09/california-ab5-employment-law>.

<sup>108</sup> If licensed and can set own rates and schedule.

<sup>109</sup> Must not be paid by the hour and have written independent contractor contracts.

<sup>110</sup> If teaches own curriculum, and are not public school tutors.

<sup>111</sup> If contributing no more than 35 submissions to an outlet in a year.

<sup>112</sup> Chiem, Linda, “Chamber, Tech Groups Back Gig Cos.’ AB 5 Injunction Bid,” *Law360*, February 5, 2020; Vin Gurrieri, “Freelance Journalists Lose Bid to Pause Calif. Dynamex Law,” *Law360*, January 6, 2020.

<sup>113</sup> Chiem, Linda, “Chamber, Tech Groups Back Gig Cos.’ AB 5 Injunction Bid,” *Law360*, February 5, 2020.

<sup>114</sup> Deborah Lockridge, “Judge Extends Restraining Order Keeping California from Enforcing AB5 in Trucking,” *Heavy Duty Trucking*, January 13, 2020, <https://www.truckinginfo.com/348614/judge-extends-restraining-order-keeping-california-from-enforcing-ab5-in-truckin>, (hereafter, Lockridge 2020); Evan Symon, “California Court Rules That Truckers Are Exempt From AB 5,” *California Globe*, January 13, 2020, <https://californiaglobe.com/section-2/california-court-rules-that-truckers-are-exempt-from-ab-5/>, (hereafter, Symon 2020).

<sup>115</sup> Lockridge 2020; Symon 2020.

In addition, organizations representing freelance journalists (including writers and photographers)<sup>116</sup> have filed suit against A.B. 5’s limits on the number of pieces that a freelancer can submit to a publisher before having to be classified as an employee.<sup>117</sup> Still other organizations supporting translators and interpreters and others supporting musicians are pushing for exemptions to A.B. 5 for professionals in those fields,<sup>118</sup> and bills were recently introduced to the state legislature to exempt these workers from A.B. 5’s reach.<sup>119</sup> This suggests that at a minimum, many independent workers prefer the attributes, including flexibility, attributable to freelance work.

Lyft and Uber have claimed that A.B. 5 will not impact the classification of drivers using their apps as independent contractors because these drivers do not work in Lyft or Uber’s ordinary course of business.<sup>120</sup> Consistent with its claim that platform-based drivers are not controlled by Uber, Uber has begun testing features allowing drivers to select their own prices when offering transportation services to riders.<sup>121</sup>

Regulation outside of California has also affected employment relationships. For example, a bill similar to A.B. 5 (New Jersey S4204) was introduced in New Jersey in November 2019.<sup>122</sup> In New York City, regulations over the past two years involved caps on rideshare vehicles and minimum pay rates.<sup>123</sup> New York’s freeze on the number of for-hire vehicle registrations is described as an attempt to ease traffic congestion in the city.<sup>124</sup> Other legislation that would limit

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<sup>116</sup> Specifically, a lawsuit was filed by two associations of freelance journalists whose members reject certain carve-out clauses of A.B.5 that Plaintiffs argue would effectively categorize freelance journalists as employees (if they contribute more than 35 submissions to an outlet in a year), causing the journalists to lose copyright ownership of their journalism and flexibility to control assignments. This lawsuit is evidence of the value that certain groups place on being categorized as independent contractors rather than employees. See, Vin Gurrieri, “Freelance Journalists Lose Bid to Pause Calif. Dynamex Law,” Law360, January 6, 2020.

<sup>117</sup> Suhauna Hussain, “Freelance journalists file suit over contractor law AB5,” Los Angeles Times, December 17, 2019, <https://www.latimes.com/business/story/2019-12-17/freelance-journalist-ab5-lawsuit>.

<sup>118</sup> Interpret America, “Update: California Assembly Bill 5 and Its Possible Effects on Interpreters and Translators,” August 26, 2019, <https://www.interpretamerica.com/post/update-california-assembly-bill-5-and-its-possible-effects-on-interpreters-and-translators>; “AB5: Exempt Independent Musicians,” Change.org, <https://www.change.org/p/california-governor-exempt-independent-musicians-from-ab5>.

<sup>119</sup> City News Service, “Proposed bill would exempt musicians from AB 5,” ABC10 San Diego News, February 5, 2020, <https://www.10news.com/news/local-news/proposed-bill-would-exempt-musicians-from-ab-5>; Chris Jennewien, “Brian Jones Bill to Exempt Musicians Adds to Efforts to Blunt Assembly Bill 5,” February 4, 2020, <https://timesofsandiego.com/politics/2020/02/04/brian-jones-bill-to-exempt-musicians-adds-to-efforts-to-blunt-assembly-bill-5/>.

<sup>120</sup> Shirin Ghaffary, “Uber and Lyft say they don’t plan to reclassify their drivers as employees,” Vox, September 11, 2019, <https://www.vox.com/2019/9/11/20861599/ab-5-uber-lyft-drivers-contractors-reclassify-employees>.

<sup>121</sup> Scott Rodd, “Due To New California Law, Uber Allows Some Drivers To Set Their Own Rates,” NPR, All Things Considered, January 28, 2020, <https://www.npr.org/2020/01/28/800437791/du-to-new-california-law-uber-allows-some-drivers-to-set-their-own-rates>.

<sup>122</sup> Catherine Chidyausiku, “The AB5 tremors are spreading: New Jersey legislature introduces Bill S4204,” TalentWave Blog, December 4, 2019, <https://www.talentwave.com/the-ab5-tremors-are-spreading-new-jersey-legislature-introduces-bill-s4204/>.

<sup>123</sup> Aarian Marshall, “New York City Flexes Again, Extending Cap on Uber and Lyft,” Wired, May 15, 2019, <https://www.wired.com/story/new-york-city-flexes-extending-cap-uber-lyft/>. (hereafter, Marshall 2019).

<sup>124</sup> Marshall 2019

“cruising” by for-hire vehicles was struck down by a New York judge in late 2019.<sup>125</sup> In his proposed 2021 New York state budget, Governor Cuomo unveiled a task force to address the gig economy. The task force would “provide the governor and the legislature with a legislative recommendation addressing the conditions of employment and classification of workers in the modern economy of on-demand workers connected to customers via the internet.”<sup>126</sup>

Some recent research examines outcomes for stakeholders (drivers, platforms, customers, and society) that may result due to various legislative or regulatory actions (e.g., caps, mandatory minimum wages).

One paper (whose lead author worked at Lyft) built a model to “study the implications of utilization-based minimum earning regulations of the kind recently enacted by New York City for its ride-hailing providers.”<sup>127</sup> The paper’s main theoretical finding is that “in a tight labor market, it is not feasible to raise earnings above the equilibrium wage...without losing stability,” where stability is defined as wages remaining bounded and profits remaining non-negative. The authors find that in a loose labor market, such a raise in earnings can be achieved via regulation, to the degree that supply can “be funded by the maximum revenue extractable from the market.” The authors argue that under “utilization-based regulation, platforms cannot sustain hourly driver earnings higher than a certain threshold while still allowing unlimited working flexibility for drivers. On the other hand, we show that platforms can offer higher levels of earnings if they limit the amount of supply in the market. Consequently, supply controls are a natural outcome of utilization-based minimum earnings regulations, despite the fact that drivers highly value the flexibility of the free entry model.”

Engineering professors from the University of California, Berkeley published a theoretical paper attempting to model the impact of proposed minimum driver wages, driver/vehicle caps, and per trip congestion taxes.<sup>128</sup> The authors claim that “Contrary to standard competitive labor market theory, enforcing a minimum wage for drivers benefits both drivers and passengers, and promotes the efficiency of the entire system ... because the wage floor curbs transportation network companies (“TNCs”) labor market power. In contrast to a wage floor, imposing a cap on the number of vehicles hurts drivers, because the platform reaps all the benefits of limiting supply. The congestion tax has the expected impact: fares increase, wages and platform revenue decrease.”

<sup>125</sup> Marshall 2019; Tina Bellon, “In win for Uber, Lyft, judge strikes down New York City's cruising cap,” Reuters, December 23, 2019, <https://www.reuters.com/article/us-uber-new-york/in-win-for-uber-judge-strikes-down-new-york-citys-cruising-cap-idUSKBN1YR1WC>.

<sup>126</sup> The task force would be directed to submit its report and recommended classification standards by May 1, 2021 and the NYDOL would be authorized to promulgate regulations regarding classification of these ODE workers as appropriate. See, Battaglia, et al., “3 Employee-Friendly Updates In NY’s 2021 Budget Proposal,” Law360, February 12, 2020, [https://www.law360.com/employment/articles/1240441/3-employee-friendly-updates-in-ny-s-2021-budget-proposal-?nl\\_pk=05954519-b359-497d-a1585be996f7f224&utm\\_source=newsletter&utm\\_medium=email&utm\\_campaign=employment](https://www.law360.com/employment/articles/1240441/3-employee-friendly-updates-in-ny-s-2021-budget-proposal-?nl_pk=05954519-b359-497d-a1585be996f7f224&utm_source=newsletter&utm_medium=email&utm_campaign=employment).

<sup>127</sup> Arash Asadpour, et al., Minimum Earnings Regulation and the Stability of Marketplaces (December 13, 2019). Available at SSRN: <https://ssrn.com/abstract=3502607> or <http://dx.doi.org/10.2139/ssrn.3502607>.

<sup>128</sup> Sen Li, et al., “Regulating TNCs: Should Uber and Lyft set their own rules?” Transportation Research Part B: Methodological Volume 129, November 2019, Pages 193-225.

In sum, significant new legislation focused on making it more difficult to classify workers as independent contractors is already here, and not without significant controversy. In addition, laws that raise wage rates for rideshare drivers, and laws that address other perceived negative externalities of ODE businesses, such as increased congestion, have also been rolled out in some states, and these laws may have a significant impact on the various business models of firms that hire or rely on the alternative workforce.

## V. Characteristics of Alternative Work Arrangements and Participants

The studies in this Section begin with examinations into the perception of alternative work arrangements from various stakeholders (e.g., companies and workers). Next, we review literature that examines factors driving workers into alternative work, and review how alternative work offers a solution to some of the problems confronting participants (e.g., alternative to unemployment or a negative earnings shock).

### A. Deloitte Human Capital Trends Report (2019)<sup>129</sup>

Deloitte’s annual survey on Human Capital trends polls nearly 10,000 respondents in 119 countries. Only 11 percent of respondents are from North America; 19 percent are in consumer industries (the largest industry surveyed) and they are a mix of HR (63%), IT (6%), and other (31%). Deloitte does not provide detailed information on their survey methodology. One focus of the survey was on respondents’ perceptions and experience regarding the alternative workforce. “Alternative work” is defined to include outsourced teams, contractors, gig workers (paid for tasks), freelancers, and the crowd (crowd networks).

Alternative workforces are most predominantly used in the following functional areas, in order of prevalence of surveyed firms: IT, operations, marketing, innovation/R&D, HR, customer service, finance, sales, and supply chain. However, most firms are not using alternative workers strategically (i.e., lack of optimization and leveraging). Strategic integration of alternative workforces requires further thought by the business community.

Use of technology in the form of automation, including robotic process automation (RPA),<sup>130</sup> cognitive technologies and artificial intelligence (AI) has been growing at about 20 percent per year. While some of these technologies may replace low level labor forces, research by Deloitte posits that “automation, by removing routine work, actually makes jobs more human, enabling the role and contribution of people in work to rise in importance and value. The value of automation and AI, according to this research, lies not in the ability replace human labor with

<sup>129</sup> Erica Volini, et al., “Leading the social enterprise: Reinvent with a human focus,” Deloitte Insights, 2019, [https://www2.deloitte.com/content/dam/insights/us/articles/5136\\_HC-Trends-2019/DI\\_HC-Trends-2019.pdf](https://www2.deloitte.com/content/dam/insights/us/articles/5136_HC-Trends-2019/DI_HC-Trends-2019.pdf).

<sup>130</sup> RPA is software that automates repetitive manual tasks.

machines, but in augmenting the workforce and enabling human work to be reframed in terms of problem-solving and the ability to create new knowledge.”<sup>131</sup>

Of respondent firms, 84% who said that automation would require reskilling reported that they are increasing funding for reskilling and retraining.

As technology advances to perform more routine work, jobs change to require new skills and capabilities—the work that remains for humans will generally be more interpretive and service-oriented. These so called “hybrid jobs” use technical skills like technology operations, data analysis, and data interpretation, as well as “soft” skills like communication, services, and collaboration. There are also “superjobs”— “[r]oles that combine work and responsibilities from multiple traditional jobs, using technology to both augment and broaden the scope of the work performed and involve a more complex set of domain, technical, and human skills.”<sup>132</sup>

Finally, the Deloitte study points to research suggesting that technology may be splitting the workforce into two: a highly educated and well-paid group where job growth is low to stagnant and a low skilled, low wage workforce (where wages are kept low enough and human dexterity is more productive than technology) that continues to grow.<sup>133</sup>

### **B. Farrell and Greig (2016, 2019)<sup>134</sup>**

The authors’ research finds that Americans experience tremendous income volatility, and that such volatility is on the rise. They find that “The typical household faces a shortfall in the financial buffer necessary to weather this volatility. Rapidly growing online platforms, such as Uber and Airbnb, have created a new marketplace for work by unbundling a job into discrete tasks and directly connecting individual sellers with consumers. These flexible, highly accessible opportunities to work have the potential to help people buffer against income and expense shocks.”<sup>135</sup> Their work suggests that workers supply more labor to the online platforms studied after negative shocks to earnings from employment.

The authors find that earnings from labor platforms tend to substitute for a shortfall in non-platform income, whereas capital platform earnings (e.g., Etsy, Ebay) tend to supplement non-platform income. Thus, income earned from labor platforms is a good option to mitigate or weather income volatility, if the alternative is to constrain spending, take on additional, potentially high-cost credit, or become delinquent on existing loans. Moreover, this option

<sup>131</sup> Erica Volini, et al., “Leading the social enterprise: Reinvent with a human focus,” Deloitte Insights, 2019, [https://www2.deloitte.com/content/dam/insights/us/articles/5136\\_HC-Trends-2019/DI\\_HC-Trends-2019.pdf](https://www2.deloitte.com/content/dam/insights/us/articles/5136_HC-Trends-2019/DI_HC-Trends-2019.pdf), p. 30.

<sup>132</sup> Id, at p. 32.

<sup>133</sup> David Autor and Anna Salomons, “Is Automation Labor-Displacing? Productivity Growth, Employment, and the Labor Share,” National Bureau of Economic Research Working Paper Series, Working Paper 24871, July 2018, <https://www.nber.org/papers/w24871>; Eduardo Porter, “Tech Is Splitting the U.S. Work Force in Two,” The New York Times, February 4, 2019, <https://www.nytimes.com/2019/02/04/business/economy/productivity-inequality-wages.html>.

<sup>134</sup> Farrell, Diana, and Fiona Greig, “Paychecks, Paydays, and the Online Platform Economy: Big Data on Income Volatility,” JP Morgan Chase & Co. Institute, February 2016, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2911293&download=yes](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2911293&download=yes); also, Farrell, Diana, et al., “The Evolution of the Online Platform Economy: Evidence from Five Years of Banking Data.” *AEA Papers and Proceedings*, 2019, pp. 362-66.

<sup>135</sup> *Ibid.*



appears to meet a target need as participation in labor platforms is highest among those who experience the highest volatility—the young, poor, and individuals living in the West.

### C. Huang, et al. (2019)<sup>136</sup>

Huang presents research examining the relationship between economic downturns and financial stressors in the offline economy in the form of unemployment and the online economy. The “results demonstrate a positive and significant association between local (county) unemployment in the traditional offline labor market and the supply of online workers residing in the same county, as well as significantly larger volumes of online project bidding activity from workers in the same county. Specifically, [they] estimate that a 1% increase in county unemployment is associated with a 21.8% increase in the volume of county residents actively working online at the platform. Further, [their] results suggest significant heterogeneity in the relationship, such that a significantly larger supply of online labor manifests when unemployment occurs in counties characterized by better Internet access, younger and more educated populations, and populations whose social ties are dispersed over a wider geographic area.”<sup>137</sup>

### D. Irwin (2019)<sup>138</sup>

Irwin’s piece is a business reporter’s look at trends in the gig economy. He notes that gig-work is transformative in a few select industries (e.g., transportation, piece-meal projects like house-cleaning), but not particularly applicable in many jobs, such as those requiring collaboration or specialized training. He cites other recent literature’s conclusions:

- a. Share of the workforce earning 1099 income increased by only one percentage point from 2007 to 2016—most of this due to the rise of online platforms (consistent with the BLS survey).
- b. Growth in 1099 work was driven by individuals whose primary annual income derives from traditional jobs and who supplement with platform-mediated work.<sup>139</sup> Fewer than half those deriving income from labor ODE work earned more than \$2,500 in 2016.<sup>140</sup>
- c. There is no evidence that “traditional” W-2 work arrangements are being supplanted by independent contract arrangements reported on 1099s.<sup>141</sup>
- d. In 2018, Walmart started allowing workers at its stores to use their phones to swap shifts or volunteer for extra shifts (see further discussion later in this report).

<sup>136</sup> Ni Huang, et al., “Unemployment and Worker Participation in the Gig Economy: Evidence from an Online Labor Market,” SSRN Working Paper, updated September 22, 2019.

<sup>137</sup> The authors examined only one unnamed online gig platform.

<sup>138</sup> Neil Irwin, “Maybe We’re Not All Going to Be Gig Economy Workers After All,” *New York Times*, Sept. 15, 2019.

<sup>139</sup> See also, Koustas (2019) (“...many people use the gig work to survive difficult financial moments in their lives — such as being laid off or having their hours cut in a more traditional job. Their earnings from conventional jobs fell in the period just before starting gig work, on average, then recovered.”).

<sup>140</sup> *Collins et al., 2019.*

<sup>141</sup> *Collins et al., 2019.*

### E. Koustas (2019)<sup>142</sup>

Koustas uses personal finance data in a study to show that households are facing declines in income and a significant running down of assets before entering the gig economy (Uber and Lyft drivers comprised 90% of the data in his sample). In addition, credit constraints were found both before and after entering gig work. By the 13<sup>th</sup> week following commencement of gig work, earnings losses from non-gig income were more than made up for by gig earnings (less gas, before taxes/depreciation) on average. The implications of this work suggest that the gig economy may serve as a valuable income-smoothing source for participants who are suffering a decline of non-gig earnings and falling assets.

### F. Borchert, et. al (2018)<sup>143</sup>

Online labor markets have experienced rapid growth in recent years and allow for long-distance transactions that “offer workers access to a potentially ‘global’ pool of labor demand. As such, they bear the potential to act as a substitute for shrinking local income opportunities. Using detailed U.S. data from a large online labor platform for microtasks, [the authors] study how local unemployment affects participation and work intensity online. [They] find that, at the extensive margin, an increase in commuting zone level unemployment is associated with more individuals joining the platform and becoming active in fulfilling tasks. At the intensive margin, [their] results show that with higher unemployment rates, online labor supply becomes more elastic. These results are driven by a decrease of the reservation wage during standard working hours. Finally, the effects are transient and do not translate to a permanent increase in platform participation by incumbent users. [These] findings highlight that many workers consider online labor markets as a substitute to offline work for generating income, especially in periods of low local labor demand. However, the evidence also suggests that, despite their potential to attract workers, online markets for microtasks are currently not viable as a long run alternative for most workers,”<sup>144</sup> possibly because of the low wages and/or insufficient level of attractive tasks.

### G. Weil (2014, 2018)

In his book *Fissured Workplace*,<sup>145</sup> David Weil, former Administrator of the Wage and Hour Division of the U.S. Department of Labor under President Obama, describes what he refers to as the “fissuring” of business structures, which are fundamentally changing the nature of employment and work in industries and the economy as a whole. From his perspective, the increasing tendency of companies to turn to external labor sources is not fundamentally driven by technological change (although technology does play an important role in monitoring and oversight of outsourced resources), rather, it is “motivated by capital market demands that major

<sup>142</sup> Dmitri K. Koustas, “What do Big Data Tell Us About Why People Take Gig Economy Jobs?” AER Papers and Proceedings, May 2019.

<sup>143</sup> Katherine Borchert, et al., “Unemployment and Online Labor,” Centre for European Economic Research Discussion Paper No. 18-023, April 2018.

<sup>144</sup> *Ibid.*

<sup>145</sup> See also, commentary in Weil, David. 2019. “Understanding the Present and Future of Work in the Fissured Workplace Context.” *RSF: The Russell Sage Foundation Journal of the Social Sciences* 5(5): 147–65.

businesses focus on the core competencies that provide value to customers and investors and concomitantly shed activities to other entities to carry out those efforts.”<sup>146</sup>

Weil describes the core elements comprising fissuring: 1) “companies seeking to focus on their greatest competence from the perspective of customers and especially investors”; 2) shedding “as many as possible of the activities not core to delivering those competencies to other organizations” (third party managers and staffing agencies); and 3) maintaining “tight control of the outcomes of those subsidiary organizations in orbit around its competence through standards, monitoring, and mechanisms of enforcement.”<sup>147</sup> “This allows major businesses to have it both ways: benefit from work executed in strict compliance with central corporate objectives and not be required to treat the workers who do it as their employees with the obligations that relationship holds.”<sup>148</sup> Weil also argues that “work restructuring arising from fissuring alters wage determination inside and outside firms affected by it and provides an alternative explanation for a growing empirical literature on earnings inequality. The fissured workplace perspective requires different policies for the workplace and labor market than traditional approaches including those regarding worker rights and protections, employment responses to the business cycle, workforce education and training, and job and career mobility.”<sup>149</sup>

## VI. Research on Pay Rates of ODE Workers

### A. Cantarella and Strozzi (Oct. 2019)<sup>150</sup>

Cantarella and Strozzi compare wages and labor market conditions between “individuals engaged in online platform work and in traditional occupations by exploiting individual-level survey data on crowdworkers belonging to the largest micro-task marketplaces, focusing on evidence from the United States and Europe. To match similar individuals, survey responses of crowdworkers from the US and EU have been harmonised with the American Working Conditions Survey (AWCS) and the European Working Conditions Survey (EWCS). [Their] findings indicate that traditional workers retain a significant premium in their earnings with respect to online platform workers, and that those differences are not affected by the observed and unobserved ability of individuals.”<sup>151</sup> In particular, the authors estimate that crowdsourcers earn between 70.6% to 68.1% less than comparable workers in ability, while spending nearly as much time working in the platform as their counterparts do in traditional occupations. The authors find that “[t]his holds true also taking into account similar levels of routine intensity and abstractness in their jobs, as well as the time spent working. Moreover, the labour force in crowdworking arrangements appears to suffer from high levels of under-utilisation, with

<sup>146</sup> David Weil. 2019. “Understanding the Present and Future of Work in the Fissured Workplace Context.” *RSF: The Russell Sage Foundation Journal of the Social Sciences* 5(5): 147–65.

<sup>147</sup> *Ibid.*

<sup>148</sup> *Ibid.*

<sup>149</sup> *Ibid.*

<sup>150</sup> Michele Cantarella and Chiara Strozzi, “Workers in the crowd: the labour market impact of the online platform economy,” working paper, Oct. 28, 2019.

<sup>151</sup> *Ibid.*

crowdworkers being more likely to be found wanting for more work than comparable individuals.”<sup>152</sup>

The authors conclude that “[a]ll these findings, along with the fact that these individuals do not appear to be looking for other jobs more than ‘traditional’ workers, relegate crowdworkers into a new category of idle workers whose human whose human capital is not being fully utilised nor adequately compensated.”<sup>153</sup>

Note that for both the US and Europe, the crowdwork group includes information on workers from different online platforms –Amazon Mechanical Turk (AMT), Crowdfunder, Clickworker, Microworkers and Prolific Academic – thus, the focus is on so called, “micro-tasks” and results may not be generally applicable to other forms of online freelancing marketplaces, such as UpWork, where larger projects are prevalent.

### **B. Dube, Jacobs, Naidu, and Suri (2018)**<sup>154</sup>

The authors find that “On-demand labor platforms make up a large part of the ‘gig economy.’” The authors “quantify the extent of monopsony power in one of the largest on-demand labor platforms, Amazon Mechanical Turk (MTurk), by measuring the elasticity of labor supply facing the requester (employer) using both observational and experimental variation in wages.”<sup>155</sup> Using two different approaches, the authors find that they both yield uniformly low labor supply elasticities, around 0.1, with little heterogeneity. Dube, et al., use their estimate to infer the distribution of MTurk surplus between workers and requesters, finding that the markdown of wages is quite large, with workers paid less than 20% of their productivity. This compares to 50%-80% for workers in the U.S. economy as a whole, suggesting that employers capture a significant share of surplus created by this online labor-market platform.<sup>156</sup>

The authors posit that “the source of the monopsony power on MTurk likely lies in the information and market environment presented to workers and requesters, together with the absence of bargaining or many margins of wage discrimination. In particular, the tastes different workers have for a given task may be quite dispersed and not easily discerned by requesters, which induces requesters posting a wage to trade-off the probability of acceptance against a lower wage. Further, this may be exacerbated by the information environment facing workers, which makes searching for alternative jobs difficult. Jobs are highly heterogeneous in time required, entertainment value (‘fun’) to the worker, and the reliability of the requester in approving payments.”<sup>157</sup>

### **C. Research on Ride-Sharing Pay Rates**

Researchers have engaged in contentious argument regarding the range of estimated hourly earnings that rideshare drivers are able to achieve after accounting for costs. For example, Jonathan Hall, Uber’s economist, found that Uber driver-partners receive higher hourly earnings

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<sup>152</sup> *Ibid.*

<sup>153</sup> *Ibid.*

<sup>154</sup> Arindrajit Dube, et al., “Monopsony in Online Labor Markets,” NBER Working Paper, March 2018.

<sup>155</sup> *Ibid.*

<sup>156</sup> Merrick 2018.

<sup>157</sup> Arindrajit Dube, et al., “Monopsony in Online Labor Markets,” NBER Working Paper, March 2018.

(before vehicle expenses) than employed taxi drivers and chauffeurs, and as long as driver-partners costs were less than \$6.79 per hour, their net earnings would exceed those of taxi drivers and chauffeurs.<sup>158</sup> He also attempted to quantify driver expenses, and found them to be below the \$6.79 per hour level. In contrast, Lawrence Mishel of the Economic Policy Institute found that Uber driver-partner earnings were lower than Mr. Hall’s estimates, and below the minimum wage in most markets, once accounting for expenses.<sup>159</sup> In addition, the MIT Center for Energy and Environmental Policy Research reported that Uber and Lyft drivers made less than \$4 per hour after expenses, but researchers revised this number up to between \$8.55 and \$10 per hour after Uber challenged the study and the researchers admitted a calculation error.<sup>160</sup> New York City has imposed minimum earnings standards for drivers,<sup>161</sup> Seattle is poised to follow suit,<sup>162</sup> and Los Angeles is studying minimum earnings standards.<sup>163</sup> For its part, Uber and Lyft offered to implement minimum earnings standards in California as part of its negotiations over A.B. 5.<sup>164</sup>

## VII. Research on Workplace Flexibility, Benefits, and How Technology Improves Quality Outcomes in the Alternative Workforce

### A. Upwork and Edelman Intelligence (2020)<sup>165</sup>

A 2020 study sponsored by Upwork reported that freelancers have a median rate of \$20/hour, and freelancers doing skilled services earn a median rate of \$25/hour, “earning more per hour than 70% of workers in the overall U.S. economy.”<sup>166</sup> Furthermore, the share of those who freelance full-time increased from 17% in 2014 to 36% in 2020. The study found that 50% of freelancers provide “skilled” work. Freelancing provides opportunities for those who otherwise might not be able to work, with 77% of freelancers agreeing that they freelance to have

<sup>158</sup> Johnathan Hall and Alan Krueger, “An Analysis of the Labor Market for Uber’s Driver-Partners in the United States”, National Bureau of Economic Research Working Paper Series, November 2016, <https://www.nber.org/papers/w22843.pdf>, (hereafter, Hall 2016).

<sup>159</sup> Lawrence Mishel, “Uber and the labor market: Uber drivers’ compensation, wages, and the scale of Uber and the gig economy,” Economic Policy Institute, May 15, 2018, <https://www.epi.org/publication/uber-and-the-labor-market-uber-drivers-compensation-wages-and-the-scale-of-uber-and-the-gig-economy/>.

<sup>160</sup> Diana Juan, “Uber and Lyft Drivers’ Earnings Study Revised, They Make About \$10 an Hour,” NB Bay Area, March 7, 2018, <https://www.nbcbayarea.com/news/local/uber-and-lyft-drivers-earnings-study-revised-they-make-about-10-an-hour/161211/>.

<sup>161</sup> Sarah O’Brien, “Uber, Lyft prices go up in NYC as new driver minimum wage law takes effect,” CNN Business, February 1, 2019, <https://www.cnn.com/2019/02/01/tech/uber-nyc-rates/index.html>.

<sup>162</sup> Groover 2019.

<sup>163</sup> Nelson 2019.

<sup>164</sup> Rapier 2019; Siddiqui 2019.

<sup>165</sup> Upwork and Edelman Intelligence, “Freelance Forward 2020,” <https://www.slideshare.net/upwork/freelance-forward-2020>; see also Barbara Booth, “Skilled freelancers, earning more per hour than 70% of workers in US, don’t want traditional jobs,” CNBC, October 3, 2019, <https://www.cnbc.com/2019/10/03/skilled-freelancers-earn-more-per-hour-than-70percent-of-workers-in-us.html>.

<sup>166</sup> Barbara Booth, “Skilled freelancers, earning more per hour than 70% of workers in US, don’t want traditional jobs,” CNBC, October 3, 2019, <https://www.cnbc.com/2019/10/03/skilled-freelancers-earn-more-per-hour-than-70percent-of-workers-in-us.html>.

flexibility in their schedule. Sixty percent of freelancers say no amount of money would entice them to take a traditional job, highlighting the net benefits afforded to these workers relative to traditional employment.

### **B. Federal Reserve Bank of Minneapolis (2018)<sup>167</sup>**

Many ODE labor markets offer online review and rating systems that allow workers and employers to vet one another, potentially leading to more efficient and higher-quality outcomes. This study “is the first clean field evidence of the effects of employer reputation in any labor market and is suggestive of the special role that reputation-diffusing technologies can play in promoting gig work. Just as employers face uncertainty when hiring workers, workers also face uncertainty when accepting employment, and bad employers may opportunistically depart from expectations, norms, and laws. However, prior research in economics and information sciences has focused sharply on the employer’s problem of identifying good workers rather than vice versa. This issue is especially pronounced in markets for gig work, including online labor markets, where platforms are developing strategies to help workers identify good employers.”<sup>168</sup> The authors build a theoretical model for the value of such reputation systems and test its predictions on the online platform Amazon Mechanical Turk (MTurk), “where employers may decline to pay workers while keeping their work product and workers protect themselves using third-party reputation systems, such as Turkopticon.”<sup>169</sup> The authors find that: “(1) a good reputation allows employers to operate more quickly and on a larger scale without loss to quality; (2) in an experimental audit of employers, working for good-reputation employers pays 40 percent higher effective wages due to faster completion times and lower likelihoods of rejection; and (3) exploiting reputation system crashes, the reputation system is particularly important to small, good-reputation employers, which rely on the reputation system to compete for workers against more established employers.”<sup>170</sup> Thus, the rating/feedback feature, which is increasingly common on online platforms promotes a more disciplined marketplace from which employees benefit.

### **C. Intuit and Emergent Research (2016)<sup>171</sup>**

Survey research by Intuit and Emergent Research found that most ODE workers are satisfied with their work; 50% highly satisfied; 17% satisfied. Below is the percentage of survey respondents that strongly or somewhat agreed with the following:

- “I always wanted to be my own boss.” (71%)
- “I do not like having to answer to a boss. (53%)

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<sup>167</sup> Alan Benson, et. al., “Can Reputation Discipline the Gig Economy? Experimental Evidence from an Online Labor Market,” University of Minnesota and Federal Reserve Bank of Minneapolis, Institute Working Paper 16, December 2018.

<sup>168</sup> *Ibid.*

<sup>169</sup> *Ibid.*

<sup>170</sup> *Ibid.*

<sup>171</sup> “Dispatches from the New Economy: The On-Demand Worker Study,” Intuit and Emergent Research, 2016. <https://intuittaxandfinancialcenter.com/wp-content/uploads/2017/06/Dispatches-from-the-New-Economy-Long-Form-Report.pdf>.

- “I will not go back to relying solely on a traditional job.” (50%)
- “I would rather have a traditional job than be my own boss.” (15%)
- Most frequently cited reason for working in ODE is to earn more money. (57%)
- Second most frequently cited reason for working in ODE is to create and control own schedule. (46%)
- 91% of respondents said they like controlling decisions about where, how and when they work.
- What workers do not like about the ODE: Not enough work (62%), unpredictable income (53%); unfair pay (41%); growing competition (31%); lack of job security (27%); lack of benefits/health insurance (21%).

Many workers participating in the alternative workforce do not often place a high priority on benefits/protections such as retirement savings and unemployment insurance.<sup>172</sup>

- For example, about half (49 %) of Uber’s driver partners currently receive employer-provided health insurance from their employer at another job or from a spouse or other family member’s job.
- As cited above, only 21% of Intuit respondents were unhappy with the lack of benefits.

Survey research by GSSG found that 27% of independent worker respondents cited low pay/unpredictable income as the least attractive attribute of freelancing. About 4% cited the lack of benefits or insurance as the least attractive aspect about freelancing.<sup>173</sup>

#### **D. Mas and Pallais (2016)<sup>174</sup>**

The authors estimate employees’ willingness to pay (“WTP”) for alternative work arrangements from data collected at a recruitment drive for a national call center (alternatives to a 9-5 job include flexible scheduling, working from home, and positions that give the employer discretion over scheduling), which they validate using a nationally-representative survey. They find that while the great majority of workers are not willing to pay for flexible scheduling relative to a 9-5 schedule, the average worker is willing to give up to 20% of wages to avoid a schedule set by an employer on a week’s notice. However, a tail of workers with high WTP allows for sizable compensating differentials (e.g. some workers are willing to give up 8% of wages to work from home—mostly women with young children). This group is slightly more likely to be in jobs with these amenities, but the differences are not large enough to explain most of the wage gap.

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<sup>172</sup> Hall 2016.

<sup>173</sup> Robert Jones, Survey commissioned by the Coalition for Workforce Innovation, GS Strategy Group, January 2020, p. 7.

<sup>174</sup> Alexandre Mas and Amanda Pallais, “Valuing Alternative Work Arrangements,” NBER working paper, September 2016.

## E. Faster Pay Relative to Typical Traditional Employment Practices

Technology has been rolled out to allow some alternative workers to take advantage of company-sponsored options that allows workers (sometimes for a small fee) to get paid notably faster than typical traditional employees.<sup>175</sup> For example, Uber drivers can opt to get paid up to five times a day<sup>176</sup> and Lyft drivers are paid weekly compared with approximately every two weeks for typical non-tipped employees.<sup>177</sup> Some Lyft driver earnings are eligible for “express pay” which means they can be paid out in a matter of hours or days depending on the bank’s processing times.<sup>178</sup> These options can provide critical access to funds in lieu of more costly options such as overdraft fees or payday loans.

## VIII. Ridesharing Platforms

Ridesharing platforms such as Uber and Lyft have been a particular focus of research on the alternative workforce and can help inform the debate on whether drivers should be classified as independent contractors or employees, or whether a new category of work may be preferable in light of worker characteristics. However, a number of the sources that describe worker characteristics and preferences are based on survey data that is not well documented. Furthermore, ridesharing has been especially hard-hit by the Covid-19 pandemic, and it remains unclear how the pandemic will affect the industry in the long-term.

### A. Benner, Johansson, Feng, and Witt (2020)<sup>179</sup>

One recent study by Benner, et. al., analyzed a “[r]epresentative sample of on-demand work being done in the city, not of all on-demand workers” in the San Francisco area. The authors surveyed users of Uber, Lyft, Doordash, GrubHub, Instacart, and Shipt. Data collection was halted due to Covid-19, but a survey on the impact of Covid was also conducted. The survey found an on-demand workforce that was primarily male, racial/ethnically diverse, majority foreign-born, median age 40 in ride-hailing and 31 in delivery work, and with a minority of ridehail drivers living in San Francisco but a majority of delivery drivers living there. In contrast to the findings of many other studies mentioned here, this study found that most on-demand workers worked more than 30 hours per week, and most derived the majority of their income from on-demand work. The study also found that on-demand workers endure difficult economic

<sup>175</sup> See, for example, Telis Demos, “Startups Test Ways to Speed Up Arrival of Payday for Workers,” The Wall Street Journal, August 12, 2019; BLS, “How frequently do private businesses pay workers?” May 2014, <https://www.bls.gov/opub/btn/volume-3/how-frequently-do-private-businesses-pay-workers.htm>; Sarah Gonzalez, “Some Of The Biggest Companies Are Reinventing How We Get Paid And How Often,” NPR, Planet Money, December 19, 2019, <https://www.npr.org/2019/12/19/789949319/some-of-the-biggest-companies-are-reinventing-how-we-get-paid-and-how-often>.

<sup>176</sup> Telis Demos, “Startups Test Ways to Speed Up Arrival of Payday for Workers,” The Wall Street Journal, August 12, 2019.

<sup>177</sup> Lyft, “How and when driver pay is calculated,” <https://help.lyft.com/hc/en-us/articles/115013080008-How-and-when-driver-pay-is-calculated>;

<sup>178</sup> Lyft, “Express pay,” <https://help.lyft.com/hc/en-us/articles/115012923167>.

<sup>179</sup> Benner, Chris, et. al., “On-demand and On-the-edge: Ride-hailing and delivery workers in San Francisco,” May 5, 2020.



circumstances, with 46% supporting others with their earnings. Additionally, this survey found 21% of drivers had no health insurance, while 30% used public or public-access health insurance. Nearly half had little emergency savings, and 15% received some form of public support (e.g. food stamps or housing assistance). They valued a flexible schedule but also valued “fair pay” and “predictably high pay.” The study found median earnings of \$360 per week for ridehail workers and \$224 per week for delivery workers after accounting for expenses. As a result of Covid-19, many workers shifted from ridehailing to delivery, 24% stopped using the platforms altogether, over half had lost more than \$500 per week in earnings, 76% had seen a significant decline in engagements, and 28% were still accepting engagements. Over half (55%) said their app was not doing enough to respond to the virus (such as suggesting procedures and providing PPE).

### **B. Cook, Diamond, Hall, List, Oyer (2020)<sup>180</sup>**

Cook, et. al., document a 7% gap in hourly earnings between male and female drivers using the Uber platform. The authors find that this gap can be attributed to: experience on the platform (men tend to drive more hours overall and do not exit the platform as often), preferences about where to work and personal safety (“male drivers tend to live near more lucrative locations and because men earn a compensating differential for their willingness to drive in areas with higher crime and more drinking establishments”), and driving speed (men tend to drive faster). The authors do not find that the difference is explained by differing preferences between men and women on working “specific hours, a return to within-week work intensity, or customer discrimination.” The authors conclude that despite the highly flexible Uber platform and the inability for riders to gender discriminate by choosing to have a male or female driver, “women’s relatively high opportunity cost of non-paid-work time and gender-based differences in preferences and constraints can sustain a gender pay gap.”

### **C. Lyft Economic Impact Report (2020)<sup>181</sup>**

Lyft reports statistics about its drivers on an annual basis. Some notable findings from its 2020 report include:

- 90% of respondent drivers drove less than 20 hours per week
- 23% of respondent drivers were over age 50 (a different finding than “The Rideshare Guy” survey)
- 66% of respondent drivers identified with a minority group (far higher than the result in “The Rideshare Guy” survey)
- 23% of respondents were female
- 93% of respondents reported that a flexible schedule was very or extremely important.

<sup>180</sup> Cook, Cody, et al., “The Gender Earnings Gap in the Gig Economy: Evidence from over a Million Rideshare Drivers,” May 2020.

<sup>181</sup> Lyft, Economic Impact Report 2020, <https://www.lyftimpact.com/stats/national>.

#### **D. Williams and Edelman Intelligence (2020)<sup>182</sup>**

Brad Williams of Capitol Matrix Consulting performed a study of the potential “impacts of eliminating independent contractor status for California app-based rideshare and delivery drivers.”<sup>183</sup> Williams also reviewed the results of a survey performed by Edelman Intelligence and commissioned by Uber and other companies. Williams finds that app-based companies would have to curtail or eliminate existing driver flexibility, instead offering drivers fixed working hours and driving locations. Williams also predicts “fewer jobs, less income, and lower tax receipts.” Reviewing the survey performed by Edelman Intelligence, Williams reports that “the loss of flexibility that would come with employee status would be a non-starter for the majority of current drivers. Almost 90 percent of drivers began driving because they needed a job where they could control their work hours, and over two-thirds of the respondents indicated they would stop driving if they lost this flexibility.” Further, “[f]or 70 percent of drivers, income from app-based driving is supplemental to other jobs.” Yet Williams reports that if independent contractor status was lost, driver opportunities would decline 75 to 90 percent with higher expenses for app-based companies, higher prices, less coverage, and reduced consumer demand.

The survey of drivers reported that drivers were majority male, nearly half millennials, 50% white, 84% driving fewer than 40 hours per week, and 4 out of 5 using more than one app. About 2 in 3 drivers said they would stop using the apps if the flexibility they enjoyed as independent contractors was lost, and 86% began driving because they needed a work option with a flexible schedule. About 3 in 4 said their driving schedule changes from week to week. About 3 in 4 drivers also said the income they make from app-based work was supplemental and not primary income. About 2 in 3 drivers said app-based work provided an opportunity to earn money after losing a job or when hours were cut. The survey reports that 72% of drivers supported a ballot measure that would allow them to maintain their independent contractor status.

#### **E. Chen, Chevalier, Rossi, and Oehlsen (2019)<sup>184</sup>**

The authors use data on 200,000 Uber drivers to examine the benefits to drivers from labor supply flexibility and the costs from nonstandard hours. They identify the taste for flexibility as being driven by time variation in a worker’s reservation wage. Specifically, “Our identification strategy, loosely speaking, is simple: if we see a driver supplying labor in an hour when the expected wage is \$15/hour and choosing not to supply labor in an hour when the expected wage is \$25/hour, controlling for a variety of other factors, we can infer that the driver’s reservation wage is time varying. Furthermore, under various assumptions, we can make inferences about the driver’s willingness to pay (if any) to avoid a counterfactual employment relationship that would require the driver to work during her high reservation wage hours or would prevent the driver from working during her low reservation wage hours.” The authors find that there is “tremendous variation in driver behavior across drivers and within drivers across time.” Further,

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<sup>182</sup> Williams, Brad, “Impacts of Eliminating Independent Contractor Status for California App-Based Rideshare and Delivery Drivers,” July 2020; Edelman Intelligence, “California App-Based Driver Survey,” June 2020.

<sup>183</sup> *Ibid.*

<sup>184</sup> Chen, M. Keith, et al., “The Value of Flexible Work: Evidence from Uber Drivers,” *Journal of Political Economy*, 2019, Vol. 127, No. 6, 2735-2794.

“the particular hours driven by a given driver vary considerably, even conditioning on the driver working sometime in the day.” The authors find that drivers would significantly reduce the number of hours they drive if there were constraints on when they worked, and that removing these constraints significantly increases surplus.

#### **F. Dubal (2019)<sup>185</sup>**

Based on interviews from 2016, the article details drivers’ preferences regarding employee versus independent contract status. Unlike most of the authors cited in this literature review, Dubal is a law professor rather than economist. The information provided in the story is based on “three years of ethnographic research amongst Uber drivers [which included a survey of 214 Uber drivers in San Francisco] and driver groups and over fifty semi-structured qualitative interviews.” Notable statements from the paper include:

- “Regardless of gender, immigration status, and whether Uber driving was their only, primary, or supplemental job, a majority of Uber drivers stated they preferred to be independent contractors. Despite this, grassroots ride-hailing driver associations in California supported and even advocated for the passage of AB5, affirming driver commitment to employee status as a path to economic security and resistance.”
- The author criticizes as misleading because of leading and multi-faceted survey questions, previous research that concluded drivers prefer independent contractor status.
- Based on her own survey results (based on her ethnographic research which included a survey of 214 Uber drivers in San Francisco), the author states, “Unsurprisingly, a majority of drivers who indicated a preference for employee status—79 percent—stated that they wanted the security and/or benefits that come with employment. Of those who preferred to be treated as independent contractors, 67 percent stated that this answer was informed by a need or desire for scheduling flexibility and/or autonomy on the job.”
- “Other survey answers explaining a preference for independent contractor classification included 5 percent of drivers who indicated that they did not know the difference between the two statuses; 4 percent of drivers who said that they did not deserve employee benefits because they worked part-time (also a legal misperception); and 6 percent who were expressly ambivalent—either would be fine.”
- “Uber driver respondents said they unequivocally needed and wanted the protections and benefits that employment status offered, but many were afraid of what a company like Uber would do if they embraced their role as ‘employer.’ Drivers, in conceptualizing their fears, had a strong sense of the structural and

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<sup>185</sup> V.B. Dubal, “An Uber Ambivalence: Employee Status, Worker Perspectives, & Regulation in the Gig Economy,” Working Paper, November 2019, <https://ssrn.com/abstract=3488009>.

instrumental power of the company. Their ambivalence was fueled by what a terrible employer Uber could be, how Uber would never agree to an employment model, and fears that the company would take away their flexibility—not because employee status necessitates a shift schedule—but just because they could.”

- “Among the core RDU [Rideshare Drivers United] organizers, the need for basic benefits and their anger at the gig companies trumped these lingering anxieties about what would happen to their schedule flexibility. ‘That’s our next fight,’ Nicole disclosed. ‘First, we get this bill passed, and then we raise hell when they say we can’t have flexibility. We are going to have to fight for that, too. But right now, we are just fighting for our freedom. Our freedom to put food on the table and pay our rent.’”

### **G. Hall, Horton, and Knoepfle (2019)<sup>186</sup>**

Hall, et. al. study how pricing on the Uber App affects the market equilibrium. The authors find that when fares increase, drivers make more money per trip, and initially make more money per hour worked. As a result of these higher earnings, drivers work more hours, but as hours increase, drivers spend a smaller fraction of their time actually transporting customers. This offsets the increased earnings from pricing, leading to an unchanged hourly earnings rate overall.

### **H. The Rideshare Guy (2019)**

While not scientifically-designed, an annual survey performed by Harry Campbell, known as “The Rideshare Guy,” is a widely cited survey of rideshare drivers.<sup>187</sup> His most recent data comes from an emailed survey request sent to 70,000 subscribers, with some data also coming from social media and direct website traffic. While his response rate was low, he did receive 948 survey responses. Notable findings from the survey include:

- For 52.9% of respondents, pay was the most important aspect of being a driver. For 36.7% of respondents, it was flexibility. Benefits were only the most important aspect to under 5% of respondents.
- 55.2% of respondents considered themselves part time drivers, and 44.8% considered themselves full-time drivers.
- Only 44.5% of Uber driver respondents agreed that they were satisfied with their experience using Uber in 2019, which is down from 58.2% in 2018. 52.4% of Lyft drivers were satisfied with their experience using Lyft in 2019.
- 76.6% of respondents reported using at least two services in 2019.
- Over half of respondents thought Uber and Lyft were not doing enough to ensure the safety of drivers.

<sup>186</sup> Hall, Jonathan, et al., “Pricing Efficiently in Designed Markets: The Case of Ride-Sharing,” May 10, 2019.

<sup>187</sup> Harry Campbell, “The Rideshare Guy 2019 Reader Survey,”

<https://docs.google.com/document/d/1Ep8Rp4gQk6vZfwNm-XthBkM0plof24E4PBxKoOMvYgk/edit>.

- 18.8% of respondents were female (vs. 1% of New York taxicab drivers); 72.4% of respondents were age 51 or over.
- 78.3 of respondents were white (vs the national average of 61.3%)
- 48.7% of respondents had earned at least a bachelor’s degree (vs. the national average of 33%)

### I. Hall and Krueger (2018)<sup>188</sup>

This paper surveys Uber drivers. Hall was an employee of Uber and Krueger a consultant of Uber when the paper was written, which facilitated their access to the Uber data. The paper performs significant analysis of historic Uber data and relies on surveys of 601 “driver-partners” in December 2014 and 632 in November 2015. Notable findings include:

- “Of Uber’s driver-partners, 19% are under age 30, and 24.5% are age 50 or older. By contrast, taxi drivers and chauffeurs are substantially older, with 9% under age 30, and 44% age 50 or older.” This is consistent with findings report by Lyft and inconsistent with survey results from “The Rideshare Guy.”
- “Women make up 14% of Uber's driver-partners, which exceeds the percentage of taxi drivers and chauffeurs who are women in the same markets (8%) but is less than the share of women in the workforce overall.”
- “Uber's driver-partners are more likely to identify their ethnicity/race as white non-Hispanic than are taxi drivers and chauffeurs in the same areas, although they are less likely to identify as white non-Hispanic than the workforce as a whole in those areas.”
- Uber’s driver-partners are more educated than an average sample of the U.S. population.
- “Approximately 80% of driver-partners in 2014 reported that they were working full- or part-time hours just before they started driving on the Uber platform. Only 8% of driver-partners in 2014 (and 10% in 2015) said they were unemployed just prior to partnering with Uber. This low percentage is notable given that, for the economy overall, about 25% of new hires came from unemployment and 70% came from nonemployment in 2014 and 2015. The large share of drivers who partnered with Uber while they had another job suggests the role that Uber plays in supplementing individuals’ income from other sources.”
- “That more than one-third of driver-partners joined the Uber platform without actively searching for a job suggests that Uber provided a new alternative that enticed many people to engage in a work activity who might not have done so otherwise.”

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<sup>188</sup> Hall, Jonathan V. and Alan B. Krueger, “An Analysis of the Labor Market for Uber’s Driver-Partners in the United States,” ILR Review, 71(3), May 2018, pp. 705–732.

- “The most common reasons (combining major and minor reasons) were “to earn more income to better support myself or my family” (91%); “to be my own boss and set my own schedule” (87%); “to have more flexibility in my schedule and balance my work with my life and family” (85%); “to help maintain a steady income because other sources of income are unstable/unpredictable” (74%).”
- “Driving on the Uber platform provides an important source of income for driver-partners. For one-fifth of driver-partners (20%), Uber is their only source of personal income; and for another 12% Uber is their largest but not only source of income. Nearly half of driver-partners view income earned on the Uber platform as a supplement to their income but not a significant source (48%).”
- “when asked directly (Q52), ‘Which of the following would you most prefer regarding your driving with Uber?’ with responses describing an employment relationship and an independent contractor relationship, 79% chose the latter.”

#### **J. Berg and Johnston (2018)<sup>189</sup>**

The authors criticize Hall and Krueger’s highly cited survey of Uber drivers. However, Berg and Johnston do not have their own data set with which to provide any additional analyses, so their article critiques but does not provide additional contribution to the literature. The authors discuss Hall and Krueger’s “methodological problems, including sample bias, leading questions, selective reporting of findings, and an overestimation of driver earnings, which do not account for the full range of job-related expenses and is based on outdated data. The authors also argue that Hall and Krueger make unsubstantiated claims that extend beyond the scope of their research and ignore a rapidly growing literature that is critical of the Uber model as well as the broader for-hire vehicle industry in which Uber operates.” The authors’ criticisms of Hall and Krueger’s work include:

- A low survey response rate of around 10%, and high risk of non-response bias given that the survey was company-sponsored.
- The survey does not ask the number of hours a person drives in a typical week, and Hall and Krueger do not explore possible difference between “the part-time and full-time workforce.”
- Hall and Krueger sometimes include “double-barreled” questions which allow only one response for two questions. Hall and Krueger should have asked how schedule flexibility, income guarantees, and job-related benefits were valued separately from asking if drivers preferred independent contractor status.
- As to satisfaction using Uber, drivers were not offered the possible response of “neither satisfied nor dissatisfied.”

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<sup>189</sup> Berg, Janine and Hannah Johnston, “Too Good to Be True? A Comment on Hall and Krueger’s Analysis of the Labor Market for Uber’s Driver-Partners,” ILR Review, Vol 72, Issue 1, 2019.

- Hall and Krueger understate Uber driver expenses and compare Uber driver earnings to taxi driver employees, even though most taxi drivers are self-employed and therefore not representative of the OES data the authors utilize to benchmark earnings.
- Hall and Krueger provide an incomplete labor market analysis that focuses only on rideshare drivers, while ignoring the effects of ridesharing app services on taxi drivers and other types of for-hire-vehicle (FHV) drivers, despite the paper’s comparisons of Uber to taxis.

**K. Castillo, Knoepfle, and Weyl (2018)<sup>190</sup>**

Castillo, et. al. study how surge pricing on ridehail platforms results in the efficient use of drivers’ time. The authors explain (and model, using Uber data) that high demand depletes a ridehail platform of available drivers, resulting in cars being sent to pick up riders that are far away. Time wasted traveling for distant pickup can decrease driver earnings and lead them to exit the market, which exacerbates the problem. Implementing surge pricing, in which prices are higher during periods of high rider demand, eliminates this potential market failure.

**L. Koustas (2018)<sup>191</sup>**

Koustas analyzes data on about 18,000 rideshare drivers from a large personal financial management aggregator. Koustas finds that “In the period after starting ridesharing, rideshare income replaces 73 percent of income losses from main payroll jobs. Sensitivity of spending to main income falls by 82 percent, suggesting substantial increases in consumption smoothing. Matching these empirical findings to a structural intertemporal labor supply model with credit and labor frictions implies benefits from flexible second jobs of over \$1,800 per year. The results suggest the value of leisure is relatively low for this group of workers.” Said differently, the author’s results imply that households would be willing to pay on average around \$1,800 per year for access to flexible jobs.

**M. Angrist, Caldwell, and Hall (2017)<sup>192</sup>**

The authors observe that rideshare drivers pay a proportion of their fares to platform operators, whereas taxi drivers typically pay a fixed amount for use of the taxicab independent of their earnings. The authors compare these compensation models from the driver’s point of view by experimenting with payment structure for random samples of Boston Uber drivers, for example offering them opportunities to lease a virtual taxi medallion that eliminates Uber’s fee. The authors find that the experimental virtual lease program was not used by many drivers whom it would have benefitted financially. These results suggest that rideshare drivers gain considerable surplus due to the opportunity to drive without having to lease a taxi medallion for a

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<sup>190</sup> Castillo, Juan Camilo, et al., “Surge Pricing Solves the Wild Goose Chase,” March 2018.

<sup>191</sup> Koustas, Dmitri, “Consumption Insurance and Multiple Jobs: Evidence from Rideshare Drivers,” working paper, October 31, 2018.

<sup>192</sup> Angrist, Joshua D., et al., “Uber vs. Taxi: A Driver’s Eye View,” No. w23891, National Bureau of Economic Research, 2017.

specific period of time, as many taxicab drivers do in order to be able to perform transportation services.

**N. Eisenbrey and Mishel (2016)<sup>193</sup>**

The authors examine Harris and Krueger’s<sup>194</sup> “empirical claim that the ‘immeasurability of work hours’ for gig workers places them in a gray area between employee and independent contractor and negates the possibility of applying the Fair Labor Standards Act (FLSA) to work done through some digital apps.”<sup>195</sup> Eisenbrey and Mishel’s paper “is limited to the issues of measuring and controlling drivers’ hours and the implications for establishing the need for a third status of independent worker.”<sup>196</sup> The authors argue that for a host of reasons that Uber drivers are employees. For example, at least in ride-sharing, drive work hours are actually tracked closely, drivers do not “set their own fares or freely choose their own customers, their performance is measured and controlled by Uber, their driving is essential to Uber’s business, and the economic reality is that they are not independent businesses but small cogs”<sup>197</sup> in the digital platform business model.

**O. Chen and Sheldon (2015)<sup>198</sup>**

The authors study Uber data on “a randomly-drawn subset of UberX partners in Chicago, Washington DC, Miami, San Diego, and Seattle. For these partners, [the authors] observe every trip they provided on the Uber platform between September 4th, 2014, and July 4th, 2015. This comprises roughly 25 million trips.” The authors observe that drivers using the Uber App drive more when earnings are high, and “flexibly adjust to drive more at high surge times.” Specifically, “in response to surge pricing, Uber driver-partners choose to extend their sessions and provide significantly more rides on the Uber platform.” This contrasts with the idea of “income-targeting” which predicts that “a taxi driver has a daily income target, after which they are much more likely to stop providing rides.” If Uber drivers exhibited such income-targeting, they would reach their targets faster and stop sooner when surge pricing was in effect. However, the authors do not find evidence that this occurs.

**P. Hall, Kendrick, and Nosko (2015)<sup>199</sup>**

The authors analyze Uber data in two high-demand periods—one where “surge pricing” (i.e., high prices during times of increased demand) is operating as normal, and one where surge pricing was absent due to a technical problem. The authors find that “efficiency gains [due to surge pricing] came from both an increase in the supply of driver-partners on the road and from an allocation of supply to those that valued rides the most. Most of the increase in prices was passed on to driver-partners, who benefited from the increased demand.” In the absence of surge

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<sup>193</sup> Mishel 2016.

<sup>194</sup> Harris and Krueger 2015.

<sup>195</sup> Mishel 2016.

<sup>196</sup> Mishel 2016.

<sup>197</sup> Mishel 2016.

<sup>198</sup> Chen, M. Keith, and Michael Sheldon, “Dynamic Pricing in a Labor Market: Surge Pricing and Flexible Work on the Uber Platform,” December 11, 2015.

<sup>199</sup> Hall, Jonathan, Cory Kendrick, and Chris Nosko, “The Effects of Uber’s Surge Pricing: A Case Study,” available at [https://www.valuwalk.com/wp-content/uploads/2015/09/effects\\_of\\_ubers\\_surge\\_pricing.pdf](https://www.valuwalk.com/wp-content/uploads/2015/09/effects_of_ubers_surge_pricing.pdf).



pricing, “Drivers were likely less attracted to the platform while, at the same time, riders requested rides in increasing numbers because the price mechanism was not forcing them to make the proper economic tradeoff between the true availability of driver-partners and an alternative transportation option. Because of these problems, completion rates fell dramatically and wait times increased, causing a failure of the system from an economic efficiency perspective.” Finally, the authors argue that the Uber app effectively balances supply and demand (when surge pricing is in operation) because regardless of demand levels, when surge pricing was in effect, price signals managed supply such that rides were almost always less than 5 minutes away.

## IX. How are other countries addressing flexible work arrangements?

### A. European Union<sup>200</sup>

In April 2019, the European Parliament adopted measures that will require employers to inform all workers (including those on atypical contracts and in non-standard jobs, such as gig economy workers) about "essential aspects" of their employment on their first day, including:

- Description of their duties
- Starting date and pay information
- Indication of what a standard working day is, or reference hours
- Right to compensation for late cancelling of work
- Only one probationary period, lasting a maximum of six months
- Allow employees to have other jobs, banning "exclusivity clauses"

The new rules would apply to anyone being paid to work at least 12 hours per four weeks on average. This would include on-demand, intermittent, and platform workers. EU countries would have three years in which to align their legislation with the new rules.

### B. U.K.

The example of Hermes in the U.K. recognizes the heterogeneity of gig workers. Hermes, a courier firm, struck a deal in a collective bargaining agreement (following an employment tribunal’s ruling that couriers were being misclassified) with the UK’s GMB drivers’ union (also providing trade union recognition for gig workers).<sup>201</sup> Hermes drivers became able to opt-in to a “self-employed plus” status, which included a minimum wage and up to 28 days of paid leave.

<sup>200</sup> “Gig economy: EU law to improve workers’ rights (infographic),” European Parliament, September 4, 2019, <https://www.europarl.europa.eu/news/en/headlines/society/20190404STO35070/gig-economy-eu-law-to-improve-workers-rights-infographic>.

<sup>201</sup> Haroon Siddique, “Hermes couriers are workers, not self-employed, tribunal rules,” The Guardian, June 25, 2018, <https://www.theguardian.com/business/2018/jun/25/hermes-couriers-are-workers-not-self-employed-tribunal-rules>.

Drivers opting in would have to drive delivery routes chosen by Hermes. Those who do not opt in can continue as freelancers with more flexibility but without the same benefits.<sup>202</sup>

### C. India

In late 2019, the labour and employment ministry of India proposed the Code on Social Security, 2019, in which it will formally recognize ‘gig workers’ and ‘platform workers’ and grant them the right to life and disability coverage, and health benefits.<sup>203</sup> The law states that a gig worker as a “person who performs work or participates in a work arrangement and earns from such activities outside of traditional employer-employee relationship.”<sup>204</sup> A platform worker is a person who is part of an organization that “uses an online platform to access other organizations or individuals to solve specific problems or to provide specific services in exchange for payment.”<sup>205</sup> However, these workers will not be entitled to gratuity benefits<sup>206</sup> or benefits under the Employees’ Provident Fund and Employees’ State Insurance schemes, maternity benefits or minimum wage obligations.<sup>207</sup> At present, gig workers are typically treated as independent workers and lack any social security cover as they are not part of India’s labour law legislation. A recent report by Noble House estimated that 70% of the companies in India hired gig workers at least once for major organizational work in 2018.<sup>208</sup>

### D. Canada, Italy, and Spain<sup>209</sup>

The authors compare and contrast three different countries’ approaches (Canada, Italy, and Spain) to creating a third employment category and conclude that only in Canada does the third category seem “to have worked well in terms of expanding the coverage of the laws to an increasing number of workers.”<sup>210</sup> Below is a summary of each country’s experience.

<sup>202</sup> Michael Hibbs, “Could Hermes’ self-employed-plus status revolutionise the gig economy?” *Personnel Today*, February 7, 2019, <https://www.personneltoday.com/hr/why-hermes-self-employed-plus-status-could-revolutionise-the-gig-economy/>.

<sup>203</sup> Somesh Jha, and Neha Alawadhi, “Gig workers set to come under labour laws,” *Rediff.com*, September 6, 2019, <https://www.rediff.com/business/report/gig-workers-set-to-come-under-labour-laws/20190926.htm>, (hereafter, Alawadhi 2019); Somesh Jha, “Challenges of writing labour laws for India’s gig workers,” *Rediff.com*, October 18, 2019, <https://www.rediff.com/business/report/challenges-of-writing-labour-laws-for-gig-workers/20191018.htm>, (hereafter, Jha 2019).

<sup>204</sup> Alawadhi 2019.

<sup>205</sup> Alawadhi 2019.

<sup>206</sup> “Gratuity is a lump sum that a company pays when an employee leaves an organization, and is one of the many retirement benefits offered by a company to an employee.” See, Denzan Shira, “The Applicability and Calculation of Gratuity in India,” *India Briefing*, February 4, 2019, <https://www.india-briefing.com/news/applicability-calculation-gratuity-india-6435.html/> for a discussion on eligibility and calculation. See also, Alawadhi 2019.

<sup>207</sup> These are retirement plans in India, operating similarly to a 401(k) plan in the U.S. See, Jha 2019; Sunil Dhawan, “What is EPF Scheme and How to Calculate PF balance?” *The Economic Times*, August 28, 2020, <https://economictimes.indiatimes.com/wealth/earn/all-about-employees-provident-fund-scheme/articleshow/58906943.cms>.

<sup>208</sup> Alawadhi 2019.

<sup>209</sup> Miriam A. Cherry and Antonio Aloisi, “‘Dependent Contractors’ in the Gig Economy: A Comparative Approach,” *American University Law Review*, Vol. 66(3), 2017. (Hereafter, *Cherry and Aloisi, 2017*).

<sup>210</sup> *Ibid.*

*i. Canada*

Canada recognizes the legal status of a “dependent contractor”.<sup>211</sup> A dependent contractor sits in the land in-between an employee and an independent contractor.<sup>212</sup> The classification of dependent contractor turns on the issue of *exclusivity* (or near-exclusivity) of the relationship between the parties. Canadian courts have found that “substantially more than 50% of billings” is needed to find economic dependency. Further, “[a]n independent contractor does not become dependent by virtue of length of service or because they can only do certain kinds of work with the contracting party.”<sup>213</sup> If a worker is categorized as a dependent contractor, he is entitled to notice<sup>214</sup> and termination pay that is on par with notice period and termination pay granted to employees.<sup>215</sup> Additionally, dependent contractors may claim the rights provided by employment standards and workers compensation legislation.<sup>216</sup> In Canada, there is no at-will employment and regular employees are entitled to notice and termination pay before being let go. While independent contractors have no such rights, dependent contractors do.<sup>217</sup>

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<sup>211</sup> Melanie Crowley, Danny J. Kaufer, and Lucas Munoz, “The Gig Economy and Precarious Workers,” The American Employment Law Council, 27<sup>th</sup> Annual Conference Ojai, California, October 23, 2019, p. 38. (Hereafter, *Precarious Workers*, 2019); for a detailed discussion of Canadian employment issues associated with the gig economy, see Danny J. Kaufer, “The Gig Economy: A Canadian Perspective,” a paper the author previously presented at the International Labor and Employment Committee of the American Bar Association in Dublin, Ireland, May 10, 2017.

<sup>212</sup> See, for example, *Cherry and Aloisi*, 2017. We understand that the passage of legislation in Canada “in the 1970s technically created a third category of ‘dependent contractors’ through amending the definition of ‘employee’ in various statutes. The practical result of the “dependent contractor” category was to expand the definition of employee and to bring more workers under the ambit of labor law protection. As a result, there was increased coverage and a provision for a safe harbor for workers in need of protections based on economic dependency.”

<sup>213</sup> Field Law, “How Dependent Must a Dependent Contractor Be?” September 5, 2019, <https://www.jdsupra.com/legalnews/how-dependent-must-a-dependent-73779/>.

<sup>214</sup> “When an employee's job is over, the amount of notice can be set by contract or governed by common law in each province. Courts establish common law through their decisions. For example, minimum notice in Ontario is eight weeks after eight years' service, but in Alberta, it is eight weeks after 10 years' service. In addition, the Ontario statute requires minimum severance pay in addition to minimum notice, whereas the other provinces do not require minimum severance pay.” SHRM, “To Fire Employees in Canada, You Need a Reason and Notice,” May 30, 2019, <https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/global-canada-termination-notice.aspx>.

<sup>215</sup> Elise Calvert and Jonathon Ward, “Three is a crowd: Employees, independent contractors, & dependent contractors,” Lexology, September 24, 2019, <https://www.lexology.com/library/detail.aspx?g=da715ce7-4529-4d2f-af5b-047fb752e388>; SHRM, “To Fire Employees in Canada, You Need a Reason and Notice,” May 30, 2019, <https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/global-canada-termination-notice.aspx>.

<sup>216</sup> *Precarious Workers*, 2019, p. 40.

<sup>217</sup> *Precarious Workers*, 2019, p. 38.

Furthermore, labor relations statutes in Canada, such as the Ontario Labour Relations Act, give dependent contractors (as the Act defines this group)<sup>218</sup> the right to unionize.<sup>219</sup> In practice, gig economy workers seeking unionization would first need to show that they meet the definition of employee or dependent contractor under the relevant provincial or federal statute, prior to commencement of the applicable union certification process.<sup>220</sup>

In February 2020, the Ontario Labour Relations Board, in the first ruling of its kind, ruled that food couriers working in Toronto and Mississauga for Foodora (an app-based food delivery service) were dependent contractors under the Ontario Labour Relations Act, giving them the right to join a union.<sup>221</sup>

## ii. Italy

Beginning in 1973 in Italy, businesses used the presence of a third category of worker “parasubordinato,”<sup>222</sup> an intermediate category of worker situated between employee and independent contractor, “to evade regulations applicable to employees, such as social security contributions. In essence, the quasi-subordinate category created a loophole that actually resulted in *less* protection for workers as an unintended consequence,” as “most of these quasi-subordinate workers would all previously have been classified as employees.”<sup>223</sup> Since 2015, the third category’s use has been extremely limited.<sup>224</sup>

## iii. Spain

In 2007, the Spanish legislature crafted a third category of worker known as “*Trabajador Autonomo Economicamente Dependiente*” (TRADE or economic dependent self-employed worker). “The distinction between the employee and the TRADE categories lies in the notion of

<sup>218</sup> The Act defines dependent contractor as “a person, whether or not employed under a contract of employment, and whether or not furnishing tools, vehicles, equipment, machinery, material, or any other thing owned by the dependent contractor, who performs work or services for another person for compensation or reward on such terms and conditions that the dependent contractor is in a position of economic dependence upon, and under an obligation to perform duties for, that person more closely resembling the relationship of an employee than that of an independent contractor.” See Labour Relations Act, Section 1(1). The Act also stipulates that an employee under the Act includes a dependent contractor. See, also, Canadian Union of Postal Workers, Applicant v Foodora Inc. d.b.a., Foodora, OLRB Case No: 1346-19-R, decided February 25, 2020. (Hereafter, *Foodora Ruling, 2020*).

<sup>219</sup> Other statutes include the British Columbia *Labour Relations Code*, R.S.B.C. 1996, c. 244, s. 1 and the *Saskatchewan Employment Act*, S.S. 2013, c. S-15.1, s. 6-1 (h) (i), (ii), (iii).

<sup>220</sup> *Precarious Workers, 2019*, pp. 51-52.

<sup>221</sup> *Foodora Ruling, 2020*; see also, Sara Mojtehdzadeh, “Foodora couriers win right to join a union in an ‘historic precedent’ for gig economy workers”, *The Star*, February 25, 2020,

<https://www.thestar.com/news/canada/2020/02/25/foodora-couriers-win-right-to-join-a-union-in-an-historic-precedent-for-gig-economy-workers.html#:~:text=The%20Ontario%20Labour%20Relations%20Board,workforce%20in%20Canada%20to%20unionize.&text=Foodora%20couriers%20participated%20in%20a,of%20Postal%20Workers%20in%20August>.

<sup>222</sup> “Comprised of a subset of self-employed workers, these *lavoratore parasubordinato* were distinguished ‘when the provision of the service presents itself as characterized, in practice, by a predominantly personal activity of continuous and coordinated collaboration.’ Four ‘concurrent’ factors need to be present to denote this intermediate category: (1) collaboration, (2) continuity and length of the relationship, (3) functional coordination with the principal, and (4) a predominantly personal service.” These quasi-subordinate workers were not granted most of the substantive protections afforded employees. See, Cherry and Aloisi (2017).

<sup>223</sup> Cherry and Aloisi (2017)

<sup>224</sup> Cherry and Aloisi (2017).

‘aliennness,’ or *ajenidad*, .... While the employee does not own the means of production and the productive tools and infrastructure, the TRADE owns his or her tools and is equipped with all the hallmarks of genuine self-employment.” TRADE workers enjoy many legal protections.<sup>225</sup> Another observed result was arbitrage of the categories, which “shifted what should have been TRADE workers into independent contractor status because of the high level of legal protection and burdensome procedures associated with the TRADE category.”<sup>226</sup> “The crucial component for determining whether a worker is a TRADE rests on a threshold of economic dependency measured, by law, at seventy-five percent”<sup>227</sup>—percentage of income earned from a single principal.<sup>228</sup>

Legislative proposals and implementations that update labor laws outside of the U.S. to assist at least some participants in the alternative workforce in other countries are useful case studies in potential reform in the U.S. Based on experiences in some other countries, some researchers propose that instead of creating a new category or worker, one solution that works within the current U.S. framework is to change the default presumptions regarding the two categories that already exist. For example, above a minimum threshold of hours worked or income earned, the default rule could be an employment relationship for most alternative workers, except those that may fit into a specified ‘safe harbor’.

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<sup>225</sup> These protections include a minimum wage, annual leave, entitlements in case of wrongful termination, leave for family or health reasons, and collective bargaining. “They are entitled to an annual vacation, a set number of days off per week, a limit on working hours, the right to be covered by insurance against work-related accidents and diseases, and protection for workers unemployed as a result of business failure.” “As a result, they enjoy a set of rights ‘beyond the statement of basic rights and duties of self-employed workers—vaguely reminiscent of those of employees, albeit without equivalent guarantees or legal status [of employees].” See, Cherry and Aloisi (2017), p. 671.

<sup>226</sup> Cherry and Aloisi (2017)

<sup>227</sup> Cherry and Aloisi (2017)

<sup>228</sup> In addition, TRADE status requires a formal written contract and a set of strict requirements that are often viewed as time-consuming and burdensome for both workers and businesses. As a result, few workers have actually become classified as TRADE. See, Cherry and Aloisi (2017), pp. 673-674.

**Table 1**

Source	Evidence on Percentage of Workers Who Prefer Flexible Work Schedule	Evidence on Proportion of On-Demand Workforce with Other Primary Work
<b>CWI National Survey, January 2020</b>	Of respondents: - 46% view working as a freelancer as a long-term opportunity; 39% view it as a lifestyle choice - 94% are satisfied with their current independent work arrangement	Of respondents: - 71% considered freelancer earnings a primary source of income - 71% considered quitting their traditional job to work solely as a freelancer
<b>BLS's Current Population Survey, Contingent and Alternative Worker Supplement, May 2017</b>	[Of those for whom alternative work is their sole or primary income source,] 79% of ICs preferred their arrangement over a traditional job, while only 44% of on-call workers and 39% of temporary help agency workers preferred their work arrangement.	
<b>"Dispatches from the New Economy: The On-Demand Worker Study," Intuit and Emergent Research, 2016</b>	Of survey respondents, 91% like controlling decisions about where, how and when they work; 46% report creating/controlling own schedule as 2nd most frequently cited reason to work in on-demand economy.	Of respondents, 43% have either a traditional full-time job (29%) or part-time job (14%) in addition to their ODE work; about 21% were unhappy with the lack of benefits.
<b>Diana Farrell and Fiona Greig, "Paychecks, Paydays, and the Online Platform Economy," JPMorgan Chase &amp; Co. Institute, February 2016</b>		Platform labor earnings were largely a secondary source of income for "established participants" in all 15 cities and the nation as a whole. No stats provided on the distribution of study participants.
<b>Aaron Smith, "Gig Work, Online Selling and Home Sharing," Pew Research Center, November 17, 2016</b>	"if they were able to make their current job more flexible, 64 percent of Millennials want to occasionally work from home and 66 percent would like to shift their hours." Of respondents who provided ODE services, 45% reported a "need to control own schedule."	23% of those who provide ODE labor are students; a majority of ODE workers describe themselves as being employed either full (44%) or part time (24%); 32% say they are not employed.
<b>Lyft Economic Impact Report, 2019</b>	96% of respondents reported that a flexible schedule was very or extremely important	91% of drivers drove less than 20 hours per week
<b>The Rideshare Guy 2019 Reader Survey</b>	For 52.9% of respondents, pay was the most important aspect of being a driver. For 36.7% of respondents, it was flexibility.	55.2% of respondents considered themselves part time drivers, and 44.8% considered themselves full-time drivers.
<b>Jonathan Hall and Alan Krueger, "An Analysis of the Labor Market for Uber's Driver-Partners in the United States," January 2015</b>	"...when asked directly (Q52), "Which of the following would you most prefer regarding your driving with Uber?" with responses describing an employment relationship and an independent contractor relationship, 79 percent chose the latter."	About half of Uber's driver partner survey respondents currently receive employer-provided health insurance from their employer at another job or from a spouse or other family member's job. Also, "For one-fifth of driver-partners (20 percent), Uber is their only source of personal income, and for another 12 percent Uber is their largest but not only source of income. Nearly half of driver-partners view income earned on the Uber platform as a supplement to their income but not a significant source (48 percent)"
<b>V.B. Dubal, "An Uber Ambivalence: Employee Status, Worker Perspectives, &amp; Regulation in the Gig Economy," November 2019</b>	"Unsurprisingly, a majority of drivers who indicated a preference for employee status—79 percent—stated that they wanted the security and/or benefits that come with employment. Of those who preferred to be treated as independent contractors, 67 percent stated that this answer was informed by a need or desire for scheduling flexibility and/or autonomy on the job."	

**Table 2**

Source	Estimates of Independent Workforce	Full-Time/ Part-Time Estimates	Workforce Definition and Date of Study
BLS Contingent Worker Supplement Survey of Contingent and Alternative Employment Arrangements, May 2017	15.5 million individuals, or about 10% of total employed (includes independent contractors, on-call workers, temporary help agency workers, and contract firms)	Presumed to be 100% full-time, but not necessarily	Defined as sole or main source of income; May 2017
McKinsey & Company, Independent Work: Choice, Necessity, and the Gig Economy, October 2016	54 million to 68 million independent earners in the U.S., both labor and product sales (22-28 percent of the work-age population)	48% - Primary income; 52% - Supplemental Income	2016 survey data; this is a consensus estimate and appears to include more than labor.
"The State of Independence in America," MBO Partners, 2019	41.1 million identified as independent workers in the U.S.	The number of full-time independents was 15.3 million (37.2% of total independents), the number of part-time (regular) independents was 10.8 million and the number of part-time (occasional) independents was 15 million	Primary or secondary source of income; March 2019; MBO Partners defines full-time independent workers very broadly—those who consistently work over 15 hours per week. Part-time independents are those working 15 hours or less a week.
"Freelancers in America," commissioned by Upwork and Freelancers Union, 2019	57 million Americans participate in freelance economy	The share of those who freelance full-time increased from 17% in 2014 to 28% in 2019.	Full-time and part-time designations are self-reported identifications by survey respondents, and do not correspond to number of hours worked specifically; June-July 2019.

## Appendix 1 – Author Biographical Information

### James Langenfeld

Dr. Langenfeld is a Senior Managing Director at Ankura, an economic consulting firm specializing in applied microeconomics, labor, antitrust, health care, intellectual property, and financial analysis. He is Co-Chair for the American Bar Association (“ABA”) Section of Antitrust Law’s Economics Committee, and is the Editor of *Research in Law & Economics*. He has held positions involving the analysis of economic issues such as Director for Antitrust in the Bureau of Economics of the Federal Trade Commission (“FTC”). At FTC, Dr. Langenfeld supervised 45 Ph.D. economists and made recommendations to the Commission on competition related matters. He has been an adjunct professor for many years at Loyola University Law School Chicago and Johns Hopkins University teaching Law and Economics. Since becoming a consulting economist and an adjunct professor, he has testified in a wide variety of cases, including on different employment issues such as patterns of alleged discriminatory behavior and defamation, damages, and worker classification. As part of his ABA duties, he was the primary drafter of the Section’s comments on platform markets submitted to the FTC and various international agencies.

He holds a Bachelor of Arts degree in English and Economics from Georgetown University and a Ph.D. in Economics from Washington University in St. Louis. At Washington University, he completed the graduate sequence in labor economics and conducted research on labor topics. He serves as a referee and editor for a number of business, economics, and legal journals. He has published many scholarly writings on economic issues in journals and books, including contributions to several ABA handbooks. He has received many honors, including the SES Meritorious Service Award, the FTC Distinguished Service Award, Honoree at the Department of Justice’s Celebration of the Twentieth Anniversary of the 1982 Merger Guidelines, Adolph G. Abramson Scroll for an outstanding article in *Business Economics*, and Washington University in St. Louis’ Distinguished Alumni Award.

### Chris Ring

Chris Ring is a Senior Director at Ankura, located in Washington, DC. Chris has assisted experts analyzing economic issues related to commercial disputes and regulatory proceedings since 2008. He supports experts in these engagements through leading the coordination of case teams, developing written expert testimony, and supporting expert witnesses in live hearings. He also frequently conducts economic damages analyses, market analyses, and competition analyses. He has assisted in matters involving a wide variety of subjects and industries. Some of the subjects he has analyzed include worker classification, labor discrimination, alleged breach of contract, economic damages, and various competition analyses, such as analyses involving multi-sided markets. He has worked on engagements involving auto parts, technology, package delivery, energy, and many other industries.

He holds a Bachelor of Science degree in Commerce from the University of Virginia and a Master of Science degree in Applied Economics from Johns Hopkins University. He has also



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