

# PROTECTING WORKERS IN THE ON-DEMAND ECONOMY

## **THE PROBLEM**

With the significant growth of on-demand/freelance/independent/contingent/“gig” work (sometimes identified with the so-called “sharing economy”), more and more workers—from freelance graphic designers and Uber drivers to construction day laborers—are lacking the legal protections provided to traditional employees. There can be real value for workers in the flexibility offered by independent work and efficiency for customers and the overall economy. But these benefits should not come from taking advantage of workers. Under federal labor law, a diverse group of workers including taxicab lessees, eBay dealers, owner-operator truckers, Xerox service repairmen, freelance photographers and software designers lack the right to organize into unions<sup>1</sup>. In addition, independent contractors and freelancers are omitted from other federal workforce measures that prohibit discrimination and state and local laws that guarantee overtime pay, paid sick days, or other workplace protections.

**THEFT-OF-PAYMENT AND DELAYED PAYMENT.** Freelancers and independent contractors also face persistent challenges in receiving fair and prompt payment. According to a Freelancers Union survey, 40% of freelancers in the U.S. had trouble getting paid in the last 12 months, and 81% have had trouble at some point during their careers. This problem is even worse for workers like construction day laborers, who almost always work without a contract.

**MISCLASSIFICATION.** The lack of protections for independent contractors in the U.S. gives employers an incentive to misclassify their workers. If classified as independent contractors, employers avoid substantial legal obligations and liability. This misclassification can lead to the loss of billions of dollars of revenue in evaded local, state, and federal taxes and employer con-

tributions. Misclassified workers are denied pensions, unemployment insurance and tax contributions.

**ENFORCEMENT:** Independent workers face extreme difficulties in enforcing their rights. They cannot go to the Department of Labor. They cannot bargain collectively, even where there are many on-demand workers with identical relationships to the same company. Their only real option is to go through the court system, which is so expensive and slow that it often makes little sense. Moreover, gig work is often not covered by a written contract.

## **THE SOLUTION**

Because the on-demand economy is relatively new, there is important work to be done at the local level designing and refining best practices. The following strategies seek to begin that process.

**COLLECTIVE BARGAINING FOR INDEPENDENT CONTRACTORS ON SIMILAR CONTRACTS.** Many independent workers perform a substantial portion of their work for a single company, often an “app”-based company, and that company will engage many gig-workers under essentially the same contract. In these cases, the company is in a position to dictate terms and conditions, with little room for negotiation. Workers have neither the individual flexibility to negotiate terms that freelancers have often had, nor the collective ability to negotiate about the overall terms of the contract. Cities can address this by allowing on-demand workers to bargain collectively.

Such laws would not be pre-empted by the National Labor Relations Act (NLRA), since independent workers are not covered by it (i.e. the law would not seek to define independent workers as traditional employees, but instead provide an alternative system for bargaining, focusing specifically on those workers who fall outside the NLRA). If carefully legislated in a sector-specific

way focusing on those areas in which local government has strong existing regulatory authority, such legislation should also survive anti-trust challenges. It would be a violation of such laws to cancel a worker's contract, or intentionally reduce his or her flow of work, for exercising this right. In **Seattle**, advocates and elected officials are advancing legislation that would allow taxi and for-hire drivers, including those working for companies such as Uber and Lyft, to choose a nonprofit organization to represent them in bargaining negotiations with ride-share companies over pay and working conditions.

**PROMOTE THE FAIR AND PROMPT PAYMENT OF FREELANCE/CONTINGENT WORKERS.** The Freelancer's Union is leading the way with a campaign, starting in **New York City**, for the passage of laws to end unfair payment practices. Such laws can:

- Mandate that freelancers' contracts include basic minimum provisions regarding timely payment, security deposits, etc., and make the failure to comply a violation of fair trade practices.
- Require that freelance work (for employers over a certain size) be governed by a written contract that would contain these basic minimum provisions, as well as a simple enumeration of the tasks and payment, to simplify compliance and enforcement.
- Provide a local government agency the authority to investigate and enforce these provisions and to create and administer a mediation/arbitration procedure to help resolve claims. Giving freelancers an alternative to small claims court and providing for triple damages and attorney's fees will help ensure compliance. Clarifying the standing of worker advocacy organizations to bring claims on behalf of freelance workers also helps to ensure strong enforcement.

#### **EXTEND ANTI-DISCRIMINATION & WORKPLACE PROTECTIONS TO GIG AND FREELANCE WORKERS**

Independent contractors are currently excluded from most city, state, and federal civil rights and workplace protections. This can be easily remedied by cities that have such laws by extending them to cover contingent workers.

#### **UTILIZE BUSINESS LICENSING TO PROTECT GIG WORKERS FROM ABUSE, INCLUDING MISCLASSIFICATION.**

Around the country, cities are increasingly using business licensing to address wage theft. Even where cities have limited legal authority, they can deny license applications or renewals to companies that are guilty of persistent violations of state and federal laws. Local agencies could review a company's compliance with relevant laws when considering a license application

or renewal.

The **San Francisco** Office of Labor Standards works to ensure that employers in the city are complying with local, state, and federal labor and employment laws. It works in partnership with community-based organizations and through affirmative outreach and investigations by its staff in strategic industries.

**ESTABLISH A HEALTH AND WELFARE FUND FOR TAXI AND FOR-HIRE VEHICLE DRIVERS.** A small surcharge on taxi and for-hire rides (including those through Uber and Lyft), established by local law, could provide crucial benefits for workers, including modest disability payments and health, dental, and vision benefits.

#### **MATERIALS AND RESOURCES**

For more information protecting workers in the gig economy, see the **National Employment Law Project's** report "Rights on Demand: Ensuring Workplace Standards and Worker Security in the On-Demand Economy<sup>2</sup>" and **Local Progress'** policy brief "Ending Wage Theft<sup>3</sup>" on the San Francisco Office of Labor Standards, and visit the **Freelancer's Union** webpage.<sup>4</sup>

#### **NOTES**

- 1 Elizabeth Kennedy, "Freedom from Independence: Collective Bargaining Rights for Dependent Contractors," *Berkeley Journal of Employment and Labor Law*, April 2014.
- 2 <http://www.nelp.org/content/uploads/Rights-On-Demand-Report.pdf>
- 3 <http://localprogress.org/wp-content/uploads/2013/09/Wage-Theft.pdf>
- 4 <https://www.freelancersunion.org/advocacy/>

*Co-authored by NYC Councilmember Brad Lander*