THE GIG IS UP: CORONAVIRUS PULLS BACK THE CURTAIN ON THE INDEPENDENT CONTRACTOR EPIDEMIC

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EXECUTIVE SUMMARY

Beginning in the 1930s, the U.S. government established social safety net programs to protect American workers from sickness, unemployment, poverty, and unsafe working conditions.

Over the years, however, those programs have been reduced and restricted, providing less and less actual protection. Now, as our nation’s economy craters in the wake of the coronavirus pandemic, federal and state officials scramble—paper clips and duct tape in hand—to stand up the wreckage of those social insurance programs. Nursing home and meat packing workers continue to labor under conditions that threaten to infect them with coronavirus, while the federal government refuses to issue mandatory workplace safety standards to protect them. Millions of unemployment insurance claims suffocate under backlogs of applications at state agencies whose funding was long ago cut not just down to—indeed into—the bone. As workers lose their jobs, they lose their health insurance coverage as well, just as their risk of incurring catastrophic medical expenses skyrockets.

The coronavirus pandemic has also pulled back the curtain on an often unexplored dimension of the U.S. economy and its workforce: the level of unprotection the government affords the millions of people working in the “gig” economy, which includes freelancers, independent contractors, and project-based “platform” workers such as Uber and Lyft drivers. People striving to make a living in the gig economy do so while being left out of nearly all social safety net protections because the laws of the federal and most state governments do not classify them as “employees.” Many of us hope our country emerges from the coronavirus pandemic committed to building an economy that effectively protects all American workers and their families not only from the next national emergency but from the everyday commonplace misfortunes like illness, workplace injury, or involuntary unemployment. But to build a new, more caring economy will require bringing gig workers within a redrawn circle of protection.

Despite the failures of those in government to include gig workers in social safety net protections, recent polling conducted by Data for Progress shows that voters support extending to gig workers the same job benefits and protections that employees enjoy by a 44-percentage-point margin (62% support, 18% oppose). Voter support for gig workers spanned all political parties and a multitude of issues:

- 62%, including 59% of Republicans, support gig workers receiving the same job protections and benefits as employees.
- 56%, including 51% of Republicans, support providing gig workers with paid sick leave and paid family leave on par with those provided employees.
- 64%, including 59% of Republicans, support providing gig workers with the same minimum wage protections provided to employees.
- 65%, including 59% of Republicans, support requiring that gig workers be included in the workers compensation insurance system so they are covered if they are injured on the job, including getting infected with coronavirus while performing essential functions.
60%, including 55% of Republicans, support requiring that gig workers have access to employer-sponsored health plans.

51%, including 42% of Republicans, support providing gig workers the right to organize, collectively bargain, and strike.

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BACKGROUND

In contrast to many industrialized democracies, the United States lacks a strong social safety net for citizens and residents. We don't have universal health insurance. At both the federal and state levels, we lack basic income protection, laws setting minimum standards for paid sick leave, family leave, or vacation benefits. The federal minimum wage and the minimum wage in many states strand full-time workers in poverty.

The modest social insurance benefits available in the U.S. are primarily tied to employment. But “employment” does not just mean “working;” it means being legally classified as an “employee.” Employee benefits and protections vary from state to state, but they generally include provisions for unemployment and workers’ compensation insurance, employer contributions to Medicare and Social Security pensions and Medicare health insurance benefits, and providing minimal protections against poverty and untreated sickness in disability or old age. Most workers who have health insurance—and not all do—access it through full time employment.

In addition, thanks to the sacrifices of labor and civil rights activists in the nineteenth and twentieth centuries, state and federal employment laws protect employees—at least on the books—from various forms of economic exploitation and discrimination. These include minimum wage and hour laws, occupational safety and health laws, laws prohibiting employment discrimination based on race, sex, national origin, age, disability, and religion, and laws guaranteeing workers the right organize and join unions to improve wages and working conditions.

In times of crisis, beleaguered workers rely on employment-based social insurance programs to make ends meet. Workers who can’t perform their job functions remotely use whatever sick leave and vacation benefits they have to maintain their incomes while they stay home to comply with state and local shelter-in-place orders. As increasing numbers of businesses close down, workers rely on unemployment insurance benefits to pay at least part of their rent, their student loan payments, health insurance premiums and copays, and to buy food and keep the lights on. If they have employer-sponsored health insurance, they turn to it to defray potentially catastrophic medical costs if they or a family member becomes ill, or gets injured, or has a baby. When faced with coronavirus-related dangers at work, workers may invoke occupational safety and health laws to prod reluctant employers to provide safety equipment or to organize work in ways that permit social distancing. And if all this fails, workers may mobilize federal law to organize and bargain collectively for their mutual aid and benefit.
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THE LIMITS OF THIS COUNTRY'S LIMITED SAFETY NET

As flawed and inadequate as these programs and protections might be—and coronavirus has brought their limitations into high definition—most Americans don't realize that even the lackluster protections the U.S. government provides are completely unavailable to millions of people who labor every day. Virtually every one of the programs and protections listed above regulate only “employers” and benefit only people the government defines as “employees” using an outdated definition that fails to consider the manner in which millions of people make a living every day. Workers who are classified as “independent contractors” are shut out. And many employers in the “gig economy” have deliberately built their business models around the use of independent contractors rather than employees. Their profits are often directly based on cost-savings reaped by denying their workers these employment-based benefits and protections.

Consider first minimum wage and hour protections. Because of the way work was organized when the federal Fair Labor Standards Act was enacted, only “employees” are protected by its minimum wage, maximum hours, and overtime provisions. The same is true of the minimum wage and hour laws at the state level. But in the gig economy, most of the lowest-wage workers are classified as independent contractors, not as employees. A rideshare driver who works an eight-hour day but gets only four gigs because so many usual riders are staying home earns far less than minimum wage for the hours she has worked. Once upon a time, the risk of such a loss would be borne by the taxi company for which the driver worked. The gig economy has shifted the entirety of this risk from capital to labor, in the case of many gig companies, from venture capital firms to individual low wage workers.

Our rideshare driver would be equally unprotected by occupational safety and health laws, such as the federal Occupational Safety and Health Act, or by its state law equivalents. She would have no right to demand that the rideshare company provide her with personal protective equipment or supplies to disinfect her car: A generation ago, as the employee of a taxi company, she would have had that right. But now she, not the company for which she drives, bears the risk of her getting sick. And if our driver gets coronavirus because she drove an infected rider to the hospital, she will not be entitled to workers’ compensation benefits. Independent contractors don't get workers’ compensation benefits. Under gig economics, the individual driver, not the company, bears the risk of workplace injury. To add insult to injury, she will not have access to employer-sponsored health insurance. And she must pay 100% of her contributions to Social Security and Medicare.

Our rideshare driver, unless she can establish that she has been unlawfully misclassified as an independent contractor, also has no right to unionize under federal labor laws. She and her fellow independent contractor drivers cannot form a union under the National Labor Relations Act, and even if they did, the employer would have no legal obligation to bargain with them in good faith. If they went on strike, they might even open themselves up to civil and even criminal liability under federal antitrust law, because the antitrust law exemption that allows labor organizations to strike, passed in 1914, has been interpreted as applying only to employees, not to independent contractors.
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![Survey Results Chart]

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WHY WORKER CLASSIFICATIONS MAKE ALL THE DIFFERENCE

It makes an enormous difference whether a worker is classified as an employee or an independent contractor. From the standpoint of gig economy investors, of course, there are tremendous economic advantages to a business model that classifies workers as independent contractors. Here are a few examples:

Exhibit A: Under a traditional employment arrangement, employer and employee each pay 7.65% of payroll taxes paying forward the employee’s future Medicare and Social Security benefits. But, classified as an independent contractor, the worker must pay the entire 15.3% alone.

Exhibit B: A business has no obligation to make payments into a state unemployment insurance or workers’ compensation trust fund for an independent contractor, while it must do so for an employee.

Exhibit C: A company needn’t be concerned that their independent contractors might organize a union and strike for better pay and working conditions, file minimum wage complaints with the Department of Labor, or file charges of sex, race, age, disability, religion, or national origin discrimination with the Equal Employment Opportunity Commission.

Given the overwhelming advantages to companies of the independent contractor arrangement, it is no surprise that the questionable, sometimes even blatant misclassification of workers as independent contractors is widespread. This misclassification is enabled by the widely varying, largely subjective and outdated legal tests for employee vs. independent contractor status currently applied in many states and by the federal government in cases where classification disputes arise. Classification disputes are complicated, costly, and lawyer-intensive, and they often take years to resolve. While the companies that systematically benefit from an independent contractor-based business model have the time, money, and access to legal services needed to stay the course and fully litigate those lawsuits, low wage workers usually do not.

The costs of limits-pushing companies misclassifying workers who historically would have been considered employees weighs heavily on other employers, on workers, and on society as a whole. Businesses that misclassify workers as independent contractors don’t pay their fair share into state unemployment insurance funds, and this drives these costs up for other businesses. Over time, their failure to contribute lowers the level of benefits the funds can provide to laid off workers, making job losses economically more damaging than they might otherwise have been.

Workers’ compensation programs suffer the same consequences. Companies that misclassify workers as independent contractors push workers’ compensation costs up for those that do not and drain workers’ compensation funds of resources that would have been used to compensate injured workers. Workers and taxpayers consequently bear more of the risk of workplace injuries, while the companies that misclassify their workers reap the savings made through the misclassification. Similarly, misclassification shifts the burden of funding Medicare and Social Security away from the companies that misuse the independent contractor status and impose more risk of poverty and lack of medical care in old age or disability onto the public, or onto their retired workers or their workers’ children.
THE SOLUTION

So, what can be done? Companies that use large numbers of questionably classified independent contractors and their allies will quickly say that there really is no problem. They may point to the recently enacted Coronavirus Aid, Relief, and Economic Security (CARES) Act of 2020, which through its “Pandemic Unemployment Assistance (PUA) Program” provides, on a one-time basis, up to 39 weeks of unemployment benefits for independent contractors, including gig workers, who would ordinarily be ineligible to receive them. Even if the PUA Program were actually delivering benefit checks to gig workers, which as of the date of this article’s publication it largely is not, it would be no cure for the precarity stalking low wage workers in the gig economy. coronavirus will one day resolve.

The benefits provided by the PUA Program in the CARES Act will expire. But the massive levels of risk and attendant vulnerability that the independent contractor classification shifts onto gig workers will remain. If it makes sense—political and economic—to include protections for gig workers in the CARES Act, there is no reason to continue excluding them from these same protections when the coronavirus epidemic resolves. Gig workers will continue to get sick after coronavirus. Their working conditions will once again become dangerous. They will one day become old and unable to work. They will one day get sick and need medical care. The companies for which they work will continue to try to appropriate for themselves more of the profits from their labor and shift more of the risk of losses to them. Coronavirus shines a light on exploitation and inequality; it does not create it.

Some states have begun taking steps to address the epidemic of independent contractor misclassification. In September 2019, for example, California legislature adopted—despite companies like Uber, Lyft, and DoorDash who rely on gig workers spending millions to try to stop it—the “ABC Test” for employee status. Under this approach, to justify its classification of a worker as an independent contractor instead of an employee, a company must prove:

(A) That the person is free from the control and direction of the hiring entity in connection with the performance of the work;

(B) That the work the person is performing is outside the scope of the hiring entity’s business; and

(C) That the person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

It is an important step, and other states, and the federal government, should follow suit. Congress should enact a federal statute adopting the ABC test as the definition of “employee” for all federal labor and employment law statutes, including the Occupational Safety and Health Act, Title VII of the Civil Rights Act of 1964, the Federal Labor Standards Act, the Americans with Disabilities Act, and the National Labor Relations Act, to name a few.1 If they were to do so, Uber drivers and home health aides who are now classified as independent contractors would be able to form unions. Their employers could be required to provide them with personal protective equipment, or supplies for sanitizing their automobiles. Employers whose workers satisfied the ABC Test would share the burden of covering Social Security and Medicare payroll taxes with their workers, rather than the workers having to cover the entire amount out of their meager paychecks. Those same workers would be entitled to be paid at least minimum wage.
CONCLUSION

The coronavirus pandemic has pulled the curtain back on the frailty of many of America’s public institutions. The vulnerability of gig workers and other employees misclassified as independent contractors is but one small piece of a much larger picture. The “every pot on its own bottom” mindset—the notion of rugged economic individualism—might appear salutary when times are good, but this public health crisis has laid bare its shortcomings. We are in a calamitous time, and we must take advantage of it to bring these workers the benefits and protections on which we all must depend.

METHODOLOGY

From April 25, 2020 to April 26th 2020, Data for Progress conducted a survey of 1741 likely voters nationally using web panel respondents. The sample was weighted to be representative of likely voters by age, gender, education, urbanicity, race, and voting history. The survey was conducted in English. The margin of error is ± 2.4 percent.

1. In the time since the passage of AB5, certain groups of freelancers and independent contractors, such as freelance writers, interpreters, and musicians, have spoken out that they have actually been hurt by the law. This does not mean changing how we define employees should not be a priority but that our efforts to do so must be more than well-intentioned but also must account for the many ways people aim to make a living in the modern economy. Already California politicians have taken steps to tweak the law, to make it even more effective. It is critical that any action taken by the federal or state governments intended to help protect workers achieves that goal, does not unintentionally exclude any group of workers, and most importantly does not make it more difficult for a particular group to find and maintain employment.