

ON-DEMAND PLATFORM WORKERS IN NEW YORK STATE: THE CHALLENGES FOR PUBLIC POLICY

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EXECUTIVE SUMMARY

ON-DEMAND PLATFORM WORKERS

This report examines one specific subset of New York state’s contingent workforce: on-demand workers who obtain work through online platforms or “apps.” Often referred to popularly as “gig” workers, we use the phrase “on-demand platform workers” in an attempt to clarify the workers to whom we refer.

Our research shows that on-demand platform workers:

- Are notoriously difficult to count, due to factors such as the part-time quality of their work, high turnover rates and confusion over the definition of terms;
- Experience low and unstable earnings and a lack of benefits, requiring reliance on second or third jobs, other family members’ incomes, and various types of public aid;
- Experience a range of dangerous health and safety hazards on the job, most of which are uncompensated;
- Suffer from evaluations based primarily on consumer ratings of workers’ performance, with no recourse for workers to appeal disciplinary actions; and
- Are negatively impacted by automated matching between workers and consumers and other communication asymmetries.

Forms of control vary across different platforms, but in general platforms transfer or externalize risks onto workers, with those that use strict automated control systems (known as algorithmic management) maximizing their control over the labor process.

On-demand platform work, like other forms of contingent and temporary employment, destabilizes industries, undermines worker protections and living standards, and significantly contributes to wealth and income inequality.

Correct classification of workers is a core issue for labor standards in the “on-demand” economy, in part because the impact of worker misclassification on New York state funds and tax revenues is severe.

New York’s regulatory structure does not now provide the necessary level of oversight to curb abuse in the on-demand economy and protect worker, business, and taxpayer interests.

Policymakers in New York state now have the opportunity to lead the way by making sure that on-demand platform workers will enjoy the same status and protections as all other workers in the state.

INTRODUCTION

Around 2010, the so-called “gig” economy was billed as the future of work, a future where people could schedule work around their other life obligations and live free from the monotonous 9-to-5 grind. Trading on the goodwill generated by the “sharing economy,” online platforms like Amazon Mechanical Turk began to offer short-term work assignments to anyone with an Internet connection. The future of work was here, and you did not even need to leave your home to get to the office.

Reality has been much different. Transportation Network Company drivers sleeping in their cars.¹ Domestic workers forced to stand in the cold while they wait for a client.² Workers fear losing their jobs without warning and without the ability to contest their firing.³ Discrimination against both customers and workers.⁴ A pending retirement saving crisis.⁵ Sexual harassment against workers who fear receiving a “low rating.”⁶ The past few years have shown the techno-optimism of the early 2000s was largely unwarranted; the same problems found in the wider economy were not wiped away by a shiny new finish, but the structure of on-demand platforms has left regulators struggling to find ways of addressing these harms.⁷

What makes regulating platforms so difficult? Why did the on-demand platform economy expand so rapidly? Before discussing the legal foundations of the on-demand platform economy and how other countries have incorporated these companies into the larger employment architecture, it is important to define the key concepts which ask some big questions of the so-called “gig” economy.



WHAT IS “ON-DEMAND” LABOR?

The popular press is filled with different terms describing digitally intermediated labor exchanges. At first, these companies were “sharing companies,” with a set of transportation companies even donning the term “ridesharing.”⁸ Lyft, early on, cast itself as “your friend with a car” while Fiverr framed itself as a platform for people who had a few extra minutes to earn extra cash.

There is no universally accepted definition of “gig” work or what constitutes a “gig” company. One of the main reasons for this is that companies structure their relationship with workers in vastly different ways.⁹ This is possible because the underlying technology, essentially algorithmic search tools, is very flexible. For example, some companies let users search almost all possible workers for their job (e.g., Upwork), while other services automatically match a client and worker together (e.g., Uber). Some services offer a wide-range of services (e.g., Amazon Mechanical Turk), while others offer only a specific type of laborer (e.g., Wag, a dog walking company). Further complicating matters, some “gig” companies allow people to rent capital goods (e.g., rooms in their homes, Airbnb), while others focus on labor exchanges (e.g., TaskRabbit).¹⁰

All of these services rely on the same basic production system – an algorithm that arranges search results – but deploys them differently based on slightly different business models. They all make it easier for people to find the things they want,¹¹ yet the wide range of ways on-demand platform companies establish their platforms can result in people talking past one another, with one party thinking about the way company X operates while another focuses on the practices of company Y.

To prevent this confusion, this report offers the following description of “on-demand platform” labor that will be used throughout the report: On-demand platform labor refers to workers who use an online intermediary to accept work opportunities that are offered on a job-by-job basis.

The hallmark of these jobs is that they are usually of a short duration, sometimes no more than 5–10 minutes, and purchased through an online service. At the extreme is an Amazon Mechanical Turk worker, who accepts jobs for short periods of time and is provided no employment protections from either Amazon or the buyer. The definition described here is intended to avoid questions like those raised by SwapTree, a service that allows people to exchange capital goods.¹² Instead, this report will mainly focus on the experience of workers who gain temporary employment through a digital intermediary: on-demand platform workers. Uber is one of the oldest, largest and best known of the on-demand platform companies. Because of this, there is much more information available about Uber’s workers and policies. If we often refer to Uber in what follows, that is simply because it is so ubiquitous in popular discourse and because many newer companies are adopting similar business models.

Algorithmic management has created a new means for employers to operate, requiring us to reevaluate how technology has shifted the relationship between workers and firms.

HOW LARGE IS THE “ON-DEMAND PLATFORM” ECONOMY?

Without an established measure of “gig company,” it should be no surprise that there is also no consensus regarding the number of people who engage in on-demand platform work.¹³ Depending on how you define an on-demand platform worker, the estimates range from one in three people¹⁴ to less than one percent¹⁵ of the American workforce. While some have used the varying estimates to dismiss the importance of the “gig” economy,¹⁶ it is necessary to note that these varying estimates suggest two different, but related, stories. The largest estimates of “gig” economy use a vast definition of “independent work” – essentially, anyone who has worked any job outside their traditional job is included in this estimate. Under this view of “gig” work, if you work even one hour outside of your main job you are counted as an “independent” worker. The growing number of people who need to seek employment outside of their “normal” job points to backsliding in the quality of “normal” employment and the unwinding of the social contract at work.¹⁷

At the other end of the spectrum, the lower estimates reported by the Bureau of Labor Statistics help to quantify the number of people who use digital platforms *at any one moment*. As independent contractors, on-demand platform workers are not afforded any protection from discipline and discharge, creating a permanent sense of insecurity within this category of work. Workers can log into their platform one day and be disconnected the next without explanation. Viewed in the light of unpredictable pay and combined with no workplace protections or benefits, it is not surprising that many reports indicate that on-demand platforms have very high turnover rates, with estimates ranging from 50 to 100% annually.¹⁸

The two estimates of size above, ranging from 33% to <1%, look at a single moment in time. PEW Research conducted a nationally representative survey to examine how many people engaged in online “gig” type work in the previous year. This study found that roughly 8% of all US adults had earned income using an online platform over the course of a year.¹⁹ Additionally, the JP Morgan Chase Institute found that half of all “gig” workers exited the industry within six months, consistent with other estimates of turnover in this type of work.²⁰ These studies combine to indicate that, while at any single moment in time on-demand platform work may represent a small portion of the economy, due to failing social safety nets and unpredictable work schedules, many people will move in and out of these jobs over time. Also, there is reason to believe that these numbers underrepresented the total number of on-demand platform workers. Ticona, Mateescu and Rosenblat document that the platform economy consists of a large number of people who face social barriers in the labor market, such as undocumented workers.²¹ These populations are difficult to survey accurately, as we discuss below, meaning that existing projections most likely understate the number of people who engage in this type of work.

The problem of expanding digital labor markets will only become worse in the coming years.²² Kaushik Basu, Chief Economist and Senior Vice President of the World Bank and the C. Marks Professor of Economics at Cornell University, predicts that widening the digital labor market will result in increased inequality, political contestation, and conflict.²³ These platforms do not only target the service industry – some emerging platforms offer financial analysis or speech writing, and can even replace entire corporate research departments (iCEO).²⁴

WHAT ARE “PLATFORMS”?

Platforms are companies that offer people work through an online website or application. In many ways, they are like temporary hiring agencies that match businesses looking for short-term hires with workers. For Uber and Lyft, these apps match people looking for a ride with people working as short-term taxi drivers. For almost a decade, this simple description was the way companies described themselves: merely matchmakers that link two people together.

We know that is not the full story. Many platforms operate performance review systems, control the exchange of money, dock worker’s pay for poor performance, discipline or fire (de-activate) workers, and some even train workers and specify how work must be done. On-demand platform companies, just like any other employer, create the “work rules” that labor must follow when working on their platform. As one expert in employment law and technology argues, focusing on the technology can make it harder to see the human labor that is subject to these policies and procedures.²⁵

In this light, it is important to note that Uber’s work model has some of the most restrictive work rules of any on-demand platform company. For example, Uber sets workers’ wages, can cut wages at any time, creates a performance evaluation system, does not allow workers to dispute their “performance evaluation,” can discipline and discharge workers for any reason, and unilaterally allocates work across the labor force.²⁶ Yet perhaps the most restrictive element of Uber’s work system is that it forces drivers to accept an undefined percentage of jobs they are offered yet does not inform workers of a customer’s destination prior to picking up the passenger. Due to this combination, drivers can lose money on a job because the cost of picking up the passenger is larger than the minimum fare but are never aware how close they are to being put in a “timeout” or deactivated from the service.

Pulling back the “algorithmic curtain” reveals that these are the same decisions that everyday employers must make about their workforce.²⁷ Yet it also shows that the on-demand platform economy is not monolithic; companies build their algorithms in a variety of different ways. Let us examine the ride hail industry. Even though Uber is the most well known ride hail company, other companies exert less control than Uber does. Some notify drivers regarding how much they will make on a job prior to their accepting it (GetMe), others allow for pre-scheduling rides (Wingz), and some platforms let drivers build their own clientele (Fare). (See Appendix B for information about the range of on-demand platform companies.)



The key question is how many on-demand platform workers are there and what are the characteristics of their work.

WHAT ARE THE COSTS OF AN UNREGULATED ON-DEMAND PLATFORM ECONOMY?

The costs of an unregulated on-demand platform economy are now well documented: discrimination against workers and customers, poor working conditions, low wages, and offloading costs onto cities and communities.²⁸ These are the same costs that led the state and federal governments to pass sweeping labor regulations in the 1930s and 1940s to protect workers against the worst abuses of mass production and industrialization.

While it is a cliché to say we are living through the “second industrial revolution,” it is a useful reminder that society responded to the industrial revolution with strong, progressive labor laws. Just as it was then, the excesses of progress must be tempered with public policy to ensure that companies do not offload economic risk onto workers and society.

RACIAL AND GENDER DISCRIMINATION IN THE ON-DEMAND PLATFORM ECONOMY

Existing antidiscrimination laws were written with the image of big companies in mind. How should these laws be updated to handle on-demand platforms? For example, when an Uber driver declines to accept a ride from a passenger of color, is the application liable for that driver’s behavior? Or when a merchant on Airbnb does not rent their home out to African-Americans, who should be held liable?

There is growing evidence these are not merely hypothetical concerns. One academic study found that Uber and Lyft drivers discriminate based on both the gender and race of customers.²⁹ Another found that Airbnb hosts were 16% less likely to rent their home out to an African American client.³⁰ A third study found that Airbnb hosts routinely do not provide accommodations for clients with disabilities despite Airbnb’s requirements that hosts do so.³¹

Airbnb also plays an important role in changing local labor and housing markets. Allowed to act as short-term rental units, an expansion of Airbnb may push rents up and push workers out of cities.³² One study estimates that Airbnb has increased the median long-term rental price in Manhattan by between \$380 and \$700.³³ As Airbnb expands and changes the dynamics of local housing markets, finding methods of fitting it into existing public regulatory infrastructure will be essential to ensuring that workers have a home in their communities.

POOR WORKING CONDITIONS

Workers in the on-demand platform economy who are reliant on client ratings are put in a vulnerable position where, for any reason, clients can give them a poor evaluation that directly affects their earnings and future work opportunities. For some workers, a single negative review can result in them becoming “unhirable.” As one team of researchers found, workers are placed in a situation where they must choose to ignore harassment to maintain high ratings, or confront a customer but risk losing future work (or face deactivation on the platform). Additionally, when on-demand platform workers turn down jobs, they risk retaliation from clients in the form of complaints and poor ratings. On many platforms, workers cannot leave public reviews about clients’ behavior, meaning that other platform workers may be subject to the same poor treatment from clients.³⁴

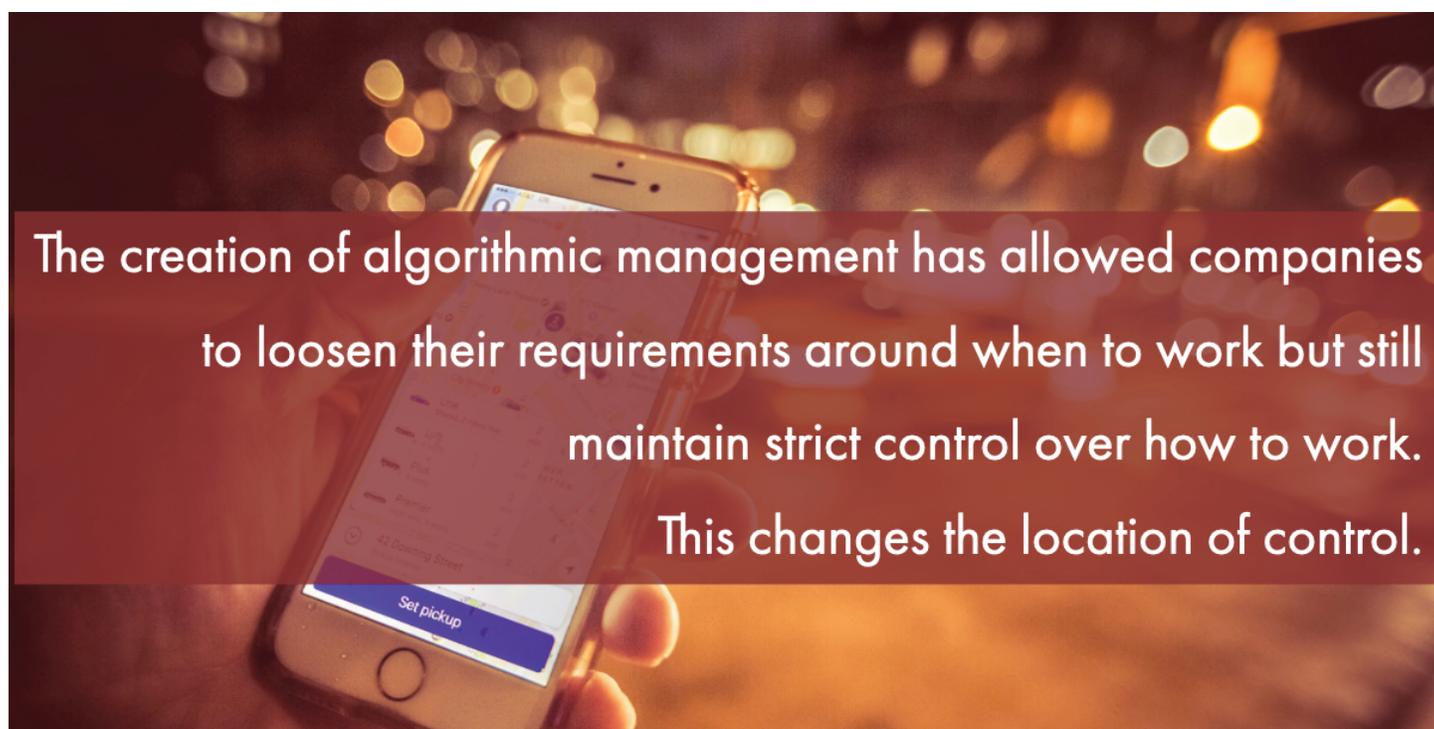
This power imbalance manifests on almost all platforms where workers are subject to a “rating system.” Uber drivers report they “fear the ratings,” and lack meaningful voice in appealing termination or disciplinary decisions. The same dynamic is present on Amazon Mechanical Turk, where clients can turn down a worker’s labor for any reason but still keep the work product. By writing the rules of their platform to favor clients over workers, platforms have become active participants in creating poor working conditions in the on-demand platform economy.

OFFLOADING RISK ONTO COMMUNITIES

Without the ability to earn a living wage on these platforms, many on-demand workers turn to public assistance programs to help fill that gap. As noted in a report by the UCLA Labor Research Center, one-in-five Uber drivers is enrolled in public assistance programs to help make ends meet.³⁵ Not surprisingly, these workers are reported to be one major car or medical expense away from bankruptcy. By extension, reports suggest this is creating a retirement crisis where on-demand platform workers cannot save for retirement, further compounding the challenges to this economic cohort.³⁶

On-demand platforms have gotten ahead of regulators, allowing other costs to be passed onto communities as they grow. For example, regulation of traditional car services and taxi cab numbers through medallions has been skirted by transportation network companies. Bruce Schaller has found that the rise of “gig” transportation platforms has resulted in significant traffic congestion in large cities.³⁷ With so many drivers on the roads, many workers are left to cruise without passengers, resulting in low wages and higher driver expenses.³⁸ Research also suggests this is associated with slowdowns during rush hour and increased stress on public infrastructure.³⁹

Since ride hailing companies can use venture capital money to run a yearly loss, they are able to bankrupt existing transportation options.⁴⁰ For example, the value of taxi medallions has collapsed in many cities in the United States, bankrupting some taxi drivers and companies.⁴¹ Yet it is not just taxi companies that are struggling to keep up with companies that can lose billions of dollars a year; public transit systems also are having to cut back service because of lower ridership.⁴²



The creation of algorithmic management has allowed companies to loosen their requirements around when to work but still maintain strict control over how to work. This changes the location of control.

LACK OF WORKER VOICE

While most on-demand platform workers find themselves without the ability to contest discipline or discharge through an internal dispute resolution system, virtually none can seek remedy through the court system. Since these workers are considered “independent contractors,” they are unable to organize and bargain for greater voice in their work.⁴³ Furthermore, Charlotte Garden documents that individual arbitration agreements are “ubiquitous” on platforms, depriving workers of the ability to pursue their claims in court.⁴⁴ Research by ILR’s Alexander Colvin on individual arbitration agreements has found these forums are not mere substitutes for litigation. Without the ability to either form unions or use the public court system, workers are trapped into private justice forums that structurally favor employers over workers.⁴⁵

The research carried out for this report, described below, found similar experiences voiced by on-demand platform workers in New York state.

WHERE DID THE ON-DEMAND PLATFORM ECONOMY COME FROM?

The trend toward fragmented and insecure work arrangements is not new. As Gerald Davis, Professor at the University of Michigan Ross School of Business describes:

At this writing, the combined global workforces of Facebook, Yelp, Zanga, LinkedIn, Zillow, Tableau, Zulily, and Box are smaller than the number of people who lost their jobs when Circuit City was liquidated in 2009. Throw in Google and it’s still less than the number who worked at Blockbuster in 2005. There is little reason to expect these new technology firms to grow into country-spanning institutions like Kodak or Westinghouse.⁴⁶

David Weil, the former Wage and Hour Division Administrator in the Obama Administration, linked this trend toward smaller companies with smaller workforces to the collapsing employment relationship between labor and management. According to Weil, the primacy of financial short-termism, franchise contracts, and lack of labor law reform has created a ‘fissured workplace,’ where organizations break into smaller and smaller pieces to avoid regulations and liability.⁴⁷ This shift has occurred across industries and professions, with roughly 45% of accountants, 50% of IT workers, and 70% of truck drivers working as independent contractors. In the hospitality industry, outside firms supervise more than 80% of staff employed by hotel franchises.

Technology did not create the impulse for the “gig” economy, but it did make it easier to accomplish. Algorithmic management and new digital surveillance technology means fewer people are required to monitor, compensate, discipline, and manage a growing fleet of contractors. Today, Uber has more “driver partners” than General Motors has employees, but Uber monitors their “driver partners” with fewer than 3,000 employees.⁴⁸ Algorithmic management has created a new means for employers to operate, requiring us to reevaluate how technology has shifted the relationship between workers and firms.

WHAT CAN BE DONE?

The central challenge is recognizing how employer control operates on on-demand platforms. As one researcher observes, the platforms have deconstructed the bilateral employment relationship while still maintaining tight control over labor.⁴⁹ Across “gig” platforms, this is readily apparent: the Uber driver also works for Lyft. The Care.com worker can also spend time on Amazon Mechanical Turk. The Upwork worker also makes money from Wag.

When workers can simultaneously move between multiple companies, it poses a challenge to how we normally think about employer control at work. Traditionally, the American industrial system thinks about control through the lens of directive control.⁵⁰ Under this arrangement, managers retain the right to give orders, such as setting schedules, disciplining workers, and requiring overtime, but claiming directive control allows workers to avail themselves of the rights and privileges of being an employee (e.g., organizing a union, overtime wages, non-discrimination, etc.). The creation of algorithmic management has allowed companies to loosen their requirements around when to work but still maintain strict control over how to work. This changes the location of control. Instead of directing workers with guidance from an in-person supervisor, on-demand platform companies limit worker’s autonomy by restricting what information is available to them when working.⁵¹ For example, by not telling drivers passengers’ destination before a pickup (e.g., how much drivers will make for that job), Uber is able to force drivers to accept low-value rides while still giving drivers the “autonomy” to work “whenever they want.”

Globally, the world is converging on an elegant solution to empower workers: grant them employee status.⁵² From California to the UK, courts have turned their eye from the glossy technological finish of these companies to how they write their algorithms. As several experts have argued, platforms should be free to set up their networks as they see fit, but the type of relationship that platforms construct out of these design decisions should be viewed as work rules, not as merely neutral choices or markets.⁵³

This report will help inform the debate surrounding labor rights in the on-demand platform economy. Furthermore, it will outline various legislative approaches to establishing meaningful, dignified work in this space.

The longer that platforms are allowed to pass these costs onto consumers and communities, the harder it will be to curb these behaviors later.

NOW IS THE KEY TIME

The longer that platforms are allowed to pass these costs onto consumers and communities, the harder it will be to curb these behaviors later. Both economic theory and practical experience suggest that now is the key time to act. Platform scholars argue that these companies will converge into a single organization.⁵⁴ The same economic logic that created a central online search platform (Google), microblogging (Twitter), and online auction (eBay), is also guiding the path of on-demand labor platforms. So far academics' prediction that platforms converge into monopolies has largely proven true.

When on-demand labor platforms converge into either a monopsony or a monopoly, they are able to act with significant market power and are likely to cut workers' wages and raise prices on customers and cities. For example, after Uber left China, Didi was the main ride hail platform in the country. Just as predicted, Didi drivers report being offered fewer promotions and incentives while customers report higher prices for a ride.⁵⁵

In the United States, cities are beginning to depend on ride hail platforms to fill in for their existing transportation infrastructure gaps. In cities around the world, Uber has used this dependence to diffuse or entirely halt regulations in the industry.⁵⁶ Once a single ride hailing platform, domestic work platform, or cleaning service platform emerges, these platforms will be able to quickly threaten to shut down operation in a city in order to pressure elected officials into inaction. Uber and Lyft have already shown they are willing to do this in cities like Austin and New York, with some degree of success.⁵⁷

This report looks more deeply at many of these issues. We begin below with a more detailed description of the difficulties involved in counting on-demand platform workers in New York state. We then lay out the findings of our qualitative research on the problems faced by these workers in our state. Finally, the report outlines a plan of legislative action so that New York can rebalance the relationship between labor and on demand platforms.

A close-up photograph of a person's hands using a yellow and black power drill to work on a light-colored wooden floor. The person is wearing a blue long-sleeved shirt and a watch on their left wrist. A yellow and black power tool box is visible on the floor next to the drill. The image is partially obscured by a dark red horizontal band containing white text.

Improvements to statistical data collection and methodology should help allow us to understand on-demand platform worker trends better.

PROBLEMS COUNTING ON-DEMAND PLATFORM WORKERS

The category of on-demand platform workers may not be something new, but concrete estimates of how many of these workers operate in the U.S. economy remain scarce and should be interpreted with caution. Statistical data on such workers in New York state remains even rarer. This section summarizes some recent estimates of on-demand platform workers in the United States, outlines some of the measurement challenges of these estimates, and then highlights features of some of these quantitative data used to assemble on-demand platform worker estimates.

CURRENT ESTIMATES OF ON-DEMAND PLATFORM WORKERS

Thus far, no official “governmental” or “academic” definition of what we mean by an on-demand platform worker exists. Until a consensus develops around a methodological and definitional category for on-demand platform workers, it remains difficult to make an apples-to-apples comparison between estimates developed by different researchers through different statistical data. Therefore, we tend to agree with estimates that on demand platform workers likely make up approximately 0.5 percent to 1.6 percent of all U.S. workers, or approximately 750,000 to 2.4 million workers.⁵⁸ These numbers are likely to increase even further. According to a JP Morgan Chase Institute report, on-demand platform workers as a share of total employment increased from 0.1 percent in 2012 to 1.6 percent in 2018.⁵⁹

Unfortunately, state-level estimates of on-demand platform workers do not yet exist. Crucially, on-demand platform work appears as if it will not replace full-time employment anytime soon. On-demand platform workers often treat their work as a secondary source of income or part-time work. The average on-demand platform worker earned \$500 per month from digitally-enabled platforms and that accounted for approximately a quarter of their total monthly income.⁶⁰ Many on-demand platform workers earn little, with about 40 percent of them making less than \$20,000 a year in gross income.⁶¹ Yet, digitally-enabled platforms offer the flexibility for on-demand platform workers to earn income from multiple sources. About 15 percent of on-demand platform workers receive income from more than one digital platform a month.⁶² We found similar characteristics in our survey, though we too are unable currently to provide insight into the exact number of on-demand platform workers in New York state. Although existing statistics provide a broad picture about the current state of on-demand platform workers, lack of a consensus definition over who exactly is an on-demand platform worker remains a hurdle.

DEFINING THE ON-DEMAND PLATFORM WORKER

Multiple reports, studies, and surveys typically start by defining an on-demand platform worker as part of the independent contractor or self-employed worker category. But this is where the similarities tend to end and different measurement questions emerge. Some researchers only examine workers that use specific digital platforms while others use broad categories of independent contractors or self-employed workers.

The key question is how many on-demand platform workers are there and what are the characteristics of their work. This is especially important if workers participate in on-demand platform work as a substitute to traditional full-time work. On the other hand, workers at the periphery of the on-demand platform economy may be even harder to capture. For these workers, on-demand platform work may be a secondary occupation, a part-time occupation, or even a hobby. In determining who is or is not an on-demand platform worker, where do the limits of on-demand platform work end? In cases where workers do not derive their main income from digital platforms, should workers who make 1 percent of their income from digital platforms versus 49 percent be identified as different from one another? Then there are trickier classification questions. If an on-demand platform worker generates income from multiple digital platforms, how do we classify this on-demand platform worker's occupation (e.g., the worker drives for Uber and sells crafts on Etsy); what industry does this on-demand platform worker belong in; e.g., is the worker part of the information sector (since such platforms are Internet-based) or part of the transport sector or part of the services sector?

These are but a handful of the important but necessary questions that need to be answered to better understand on-demand platform workers. Even as policy makers and researchers try to develop a consensus around what defines an on-demand platform worker, improvements to statistical data collection and methodology should help allow us to understand on-demand platform worker trends better.

DATA SOURCES FOR ESTIMATING ON-DEMAND PLATFORM WORKERS

Cornell University's School of Industrial and Labor Relations in conjunction with the Aspen Institute's Future of Work Initiative launched the Gig Economy Data Hub in 2018 to keep track of research advances in measuring "gig workers."⁶³ This useful resource catalogues different data sources and "gig" worker research that have emerged out of these various types of data. Other research has also greatly detailed some of the measurement challenges that these various types of data pose for estimating on-demand platform workers and suggest linking multiple federal data sources together in order to overcome weaknesses inherent in single data sources.⁶⁴ In this section, we briefly highlight three types of data and how they have been used to create estimates of on-demand platform workers.

PUBLIC SURVEY DATA

The U.S. Census Bureau's annual American Community Survey (ACS) and U.S. Bureau of Labor Statistics' monthly Current Population Survey (CPS) create some of the most easily accessible public data on workers. But these surveys have not asked very detailed questions about non-traditional work such as work done by on-demand platform workers. The most recent advances in measuring on-demand platform workers came about in the May 2017 CPS which included four questions about digitally-enabled work for that month's survey.⁶⁵ From this survey, the Bureau estimated that approximately 1.6 million workers in the nation participated in the economy as on-demand platform workers. This survey's greatest strength is that it was able to provide key demographic information (age, gender, race, occupation, industry, and education) about on-demand platform workers and whether this was full-time or part-time work for them. The survey did not ask, however, about income derived from on-demand platforms. Also, the survey asked respondents whether they engaged in digitally-enabled work in the past week; since we know that many workers engage in digitally-enabled work infrequently, the CPS likely underestimates the total number of on-demand platform workers. The CPS also found that many workers responded incorrectly to the questions asked, requiring them to recode the original data. Although this one-time addition about digitally-enabled work to the CPS provides a useful snapshot about the on-demand platform workers, it is our hope that the Census Bureau adds similar questions to the ACS or the 2020 Census and that the Bureau of Labor Statistics continues to include questions about digitally-enabled work in future CPS editions.⁶⁶

Researchers have also deployed smaller-scale surveys. For example, Lawrence Katz and Alan Krueger of the National Bureau of Economic Research partnered with the RAND corporation to survey approximately 4,000 individuals on digitally-enabled work in 2015. They estimated that on-demand platform workers made up approximately 0.5 percent of all workers.⁶⁷ Notably, they did not construct their sample to reflect national demographic characteristics.

INTERNAL REVENUE SERVICE (IRS) TAX DATA

Self-employed and independent worker tax filings provide a rich source of data to estimate the number of on-demand platform workers in the economy and their incomes. But in contrast to public survey data, individual tax records are not public information and contain fewer demographic indicators than the above-mentioned surveys. Furthermore, tax forms do not have exclusive entry lines to document income received through digitally-enabled work (mainly because from a tax perspective, there is no reason to treat income earned from digitally-enabled work differently than income earned from traditional means). Unless the IRS changes tax forms to delineate nontraditional work arrangements, researchers have to depend on creative methodologies to create on-demand platform worker estimates from tax data.

The only example of this is work done under the auspices of the U.S. Department of the Treasury's Office of Tax Analysis. They examined 2014's income tax filings and identified "gig workers" by looking for key terms in a filing's "principal business or profession" entry or cross-referencing a filing's source of income from a list of 25 preidentified digital platform companies. Their analysis suggests that "gig" workers make up 0.7 percent of all workers (which they suggest is a likely underestimate).⁶⁸ One lingering question surrounding this methodology is whether all on-demand platform workers file their tax returns. Confidentiality concerns mean that microdata (such as these individual tax filings) are not available for public use.

PRIVATE DATA

Several estimates have emerged out of consultancy groups or researchers working with private industry to get a better understanding of emerging trends. Such work includes surveys of digital platform companies and analyses of company data on workers who provide services through their platforms.

One interesting example is an analysis of bank checking accounts by JP Morgan Chase Institute. Researchers from the Institute examined 39 million Chase checking accounts from 2012 to 2018 to assemble a dataset of 2.3 million individuals that used at least one of 128 digital platforms for on-demand platform work over this period. In other words, they examined a customer account's inflow transactions from these digital platforms to understand how much on-demand platform workers earned from different digital platforms and any longitudinal trends associated with these digitally-enabled income streams. They have released a yearly report on this dataset since 2016, and in their most recent report published in September 2018, they estimate that on-demand platform workers have grown from less than .1% in 2012 to just over 1.6 percent of all workers in 2018.⁶⁹ This report provides several interesting findings. First, they found that on-demand platform workers that make use of transport digital platforms outnumber on-demand platform workers that earn income from other types of digital platforms. Secondly, they discovered that the vast majority – 60 to 70 percent – of on-demand platform workers are only active on these digital platforms for one to three months out of a year. Thirdly, they argue that an increased supply of on-demand platform workers offering transportation services has resulted in decreased average earnings for this category of on-demand platform workers. This private dataset offers the only longitudinal data currently available on on-demand platform workers, but it lacks demographic data and raises questions on whether conclusions derived from only Chase account holders can be mapped onto workers across the rest of the United States.

Given these difficulties in counting accurately the number of individuals involved in on-demand platform work, the authors of this report chose to focus on more qualitative ways to understand the impact of these new forms of employment on New York state's workers.

This section of the report examines the experiences of NYS on-demand platform workers. The data for this qualitative descriptive analysis originates from primary and secondary sources: 163 survey responses, 12 semi-structured worker interviews, review of hundreds of worker online postings commenting on their experience working for the platforms, and existing ethnographic research on the impact of digital platforms on labor. (See Appendix A for more information on The Worker Institute's New York State App Workers Survey.)

On-demand platform workers are instead subject to employer control over pay, safety, access to information, performance monitoring and evaluation, as well as discipline and discharge.

NEW YORK STATE WORKERS’ EXPERIENCES WITH ON-DEMAND PLATFORMS

The digital platforms that this research examined operate in the following industry sectors across New York state: ride hailing, delivery couriers (food and other goods), home and personal services (child/elder care, housecleaning, home improvement, pet-sitting, etc.), and professional/clerical services.

This research identified pressing workplace issues facing on-demand workers, with a focus on the degree of control exerted by the platforms, the performance review systems they have in place (including lowering workers’ pay for poor performance, disciplining or suspending workers) and the imposition of work rules and requirements.

WORKER ISSUES

Themes that emerged from the analysis of worker data included issues related to pay, workplace safety, performance evaluation systems, platforms’ control over information about job opportunities, and lack of communication channels for workers to contact the companies.

PAY ISSUES

Widespread pay issues among on-demand platform workers who participated in the Cornell research and in other studies include low and unstable earnings, and lack of benefits. According to app workers’ comments, low earnings result in part from the commissions taken by the platforms and in part from underemployment, as the platforms do not generate enough work for workers to make a living wage.

In the ride hailing sector, platforms charge commissions ranging from 10% to 25%, and in addition they charge booking fees. Self-reported surveys from ride hail drivers suggest that drivers make around \$15.68 per hour before vehicle related expenses.⁷⁰ Uber funded research has reported higher earnings, but there is significant debate around their methods and benchmarks.⁷¹ Couriers working for food and other goods delivery platforms (e.g. UberEATS, Postmates, or Instacart) get paid by order or delivery. This rate ranges from \$4 to about \$16 per delivery, and they do not always get tips from the customers. Home service workers report that they can make from \$30 to \$80 per job and complain that platforms such as Handy take significant amounts in commission and penalty fees against workers.

Because the business model of many platforms relies on supplying a large pool of service providers (workers), they create an excess supply of workers, resulting in significant underemployment for app workers and downward pressure on their earnings. Most workers complain that the pay is low and unreliable as a source of income, because they do not get enough work through the platforms. Some of the comments posted online and through the Worker Institute survey in relation to pay and low employment levels include the following:

INDUSTRY/ SECTOR **COMMENTS**

RIDE HAILING

“Not regular pay. No benefits”

“... you may make \$25 in 3 hours which is way lower than the minimum wage. People who are smart enough don't really want to waste their time and gas for this kind of work unless they have nothing else to supplement their income.”

“Uber will not get you far the wages were sporadic.”

“I have to work very uncomfortable hours; late nights, give up weekends and any holidays to make a living wage. If there are no surges or bonuses this job is extremely depressing and not worth it, but it does provide at least an avenue to obtaining “some” money when I really need it.”

“You do not make money from this job [after] car insurance, maintenance and TLC costs, and police tickets and TLC tickets, and car payments. You do not make it, but you could pay for the car.”

FOODS/GOOD DELIVERY

“Awful for dashing in the Rochester, NY area too many drivers hired and no orders sometimes all day and even for days on end”

“I can't believe they already over hired and not enough customers in my city for the drivers to all get a single delivery in a day”

“Not making enough money or receiving enough deliveries.”

“No benefits.”

“I am a 5-star dasher with over 200 deliveries 100% Completion rate and did my absolute best with the company but receiving checks at the end of the week for less than 300\$ is hard when you consider food/repairs/bills and rent.”

“Working 40 hours a week will not land you more than \$350-400 a week. On the website it advertises \$1,700 a week, which is unrealistic.”

“Not a living wage, courier pays for all tax/vehicle/accident/ insurance expenses, not reliable money”

INDUSTRY/ SECTOR

COMMENTS

Home and Personal Care Services

"I had to drive 25 minutes away to make a delivery for this god-awful company and they only paid me \$7, that's barely enough for the gas I wasted"

"There were times that I was paid \$4/hour and wasted a whole tank of gas in two hours. If you are delivery only, they pay you \$2.25 per delivery. If you are driving twenty minutes to the store to pick up and scan heavy bags of groceries that someone else bagged. Then drive twenty minutes to the customer's house. Then run heavy bags of groceries from the car to the house. Then get a bad rating because something is missing or damaged when you didn't even bag the items. If the customer doesn't tip, you just made \$2.25 in an hour! Plus, your car endured the wear and tear and you wasted a lot of gas."

"Underpaid! Have to pay a \$20 for a background check as well as pay for your own cleaning supplies. No benefits at all!"

"Cash is low not a lot of job opportunities"

"Not enough hours"

"The hardest part of the job however was when there was no work for you to claim or when you did claim work and it ended up getting cancelled."

"No benefits, no stability (jobs are not always available), no management or customer service, no training for staff, unrealistic expectations sold to customers and employees"

"I also think the fees are a bit high. For a company that is just a middle person, they take a lot out of the pay of the sitter."

"Adding on to that, even though you are able to set your rate preference (\$), you have to keep it as lower as other pet sitter became otherwise you won't have any costumers."

"Not Happy. It was virtually impossible for me to find a job as a home health aide. You have to pay to communicate with customers & the jobs don't always materialize."

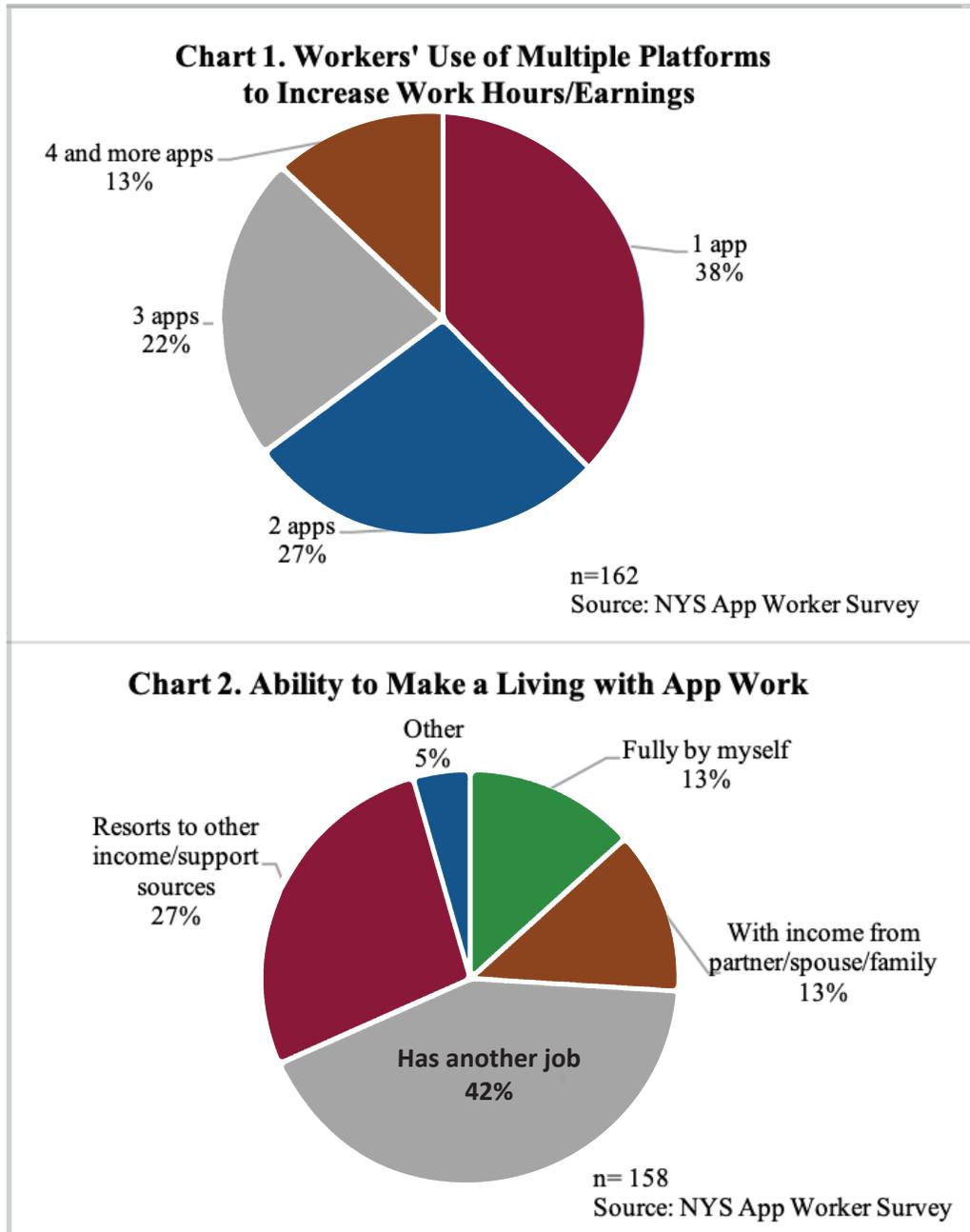
Professional/ clerical services

"It's way too competitive to try and work for 5 dollars on various services. And it seems like the few at the top get all the work. Very sad."

"Low Pay, Hard to find High-Paying Jobs"

Source: Online postings compiled from company reviews on Indeed.com. Worker Institute fellows Yoorie Chang, Jaylexia Clark, Dillon Jones, and Tyler Rodriguez compiled the reviews between August and November 2018.

Due to the minimal hours of work obtained through platforms, on-demand platform workers often work for multiple platforms or combine their earnings with those of their spouses/partners to make a living wage. Results from the Worker Institute survey indicate that sixty-two percent of respondents worked through multiple platforms, with one of the respondents working through up to six platforms. Thirteen percent of survey respondents said they could support themselves fully with on-demand platform work, 42 percent said they also relied on income from another job, 13 percent combined their income with their partner or spouse, and 27 percent indicated that they received supplemental income from social security and other non-specified sources. This finding is consistent with existing research on the Los Angeles market, which estimated that 20 percent of ride hailing workers rely on public aid,⁷² which represents a significant cost shifting from the platform companies onto workers and the broader community.



Platform workers experience a range of workplace safety issues, which may relate to the type of work they do (e.g. delivery workers who ride their bikes in city traffic), or to the automated systems that the platforms use to match workers with consumers. Because the platforms they work for do not provide benefits or contribute to worker compensation funds, the safety issues described below remain ubiquitous. Workers riding bikes to deliver goods for platforms such as UberEATS, Postmates, Caviar or Doordash, are exposed to risk of severe injuries, which can prevent them from working for extended periods of time, even months, without health insurance or any financial cushion. One such worker, for example, reported having to move back with his parents out of state due to the severe injuries he endured while doing delivery work in New York City.⁷³ Delivery workers also post comments on issues such as having to ride their bikes in rough weather conditions or at night time, which adds to the risk of injuries. Demand for food delivery in New York City peaks during lunch time and during the night time, from 6 pm to 12 midnight.

Home service workers such as home care workers and cleaners engaged through Handy, TaskRabbit or care.com are vulnerable to harassment, exposure to toxic chemicals, and risk of injuries.⁷⁴ As a result of the automated matching system (i.e. blind match between workers and customers), platform workers in home service and in ride hailing face the issue of dealing with customers who are belligerent or who make them feel unsafe. In addition, the performance metrics used by the platforms rely entirely on consumer ratings of the workers' services. In the home services sector, this rating-based management system pressures the worker to comply with consumers' requests regardless of the risks involved. Home service workers face high levels of uncertainty accepting jobs, claiming that clients can misrepresent the work to be performed.⁷⁵

Women driving for ride hailing companies are particularly vulnerable to sexual harassment. A woman driver in the Albany area expressed concerns about forms of sexual harassment she experienced from male clients:

"I had a group of four young men in my car. I told them they were not allowed to smoke or vape in my car. They then proceeded to ask if it was okay if they [engaged in sexual acts] in my car...then, just two weeks ago, I had a passenger, [who] tried to friend me on Facebook. So, in those situations...I think they should have...a system [whereby] if you rank this customer three stars or lower, they will never match you with this customer again. Lyft seems to have something like that. Uber doesn't say anything like that to you. So, I have no idea if these customers are ever going to be matched up with me or not."⁷⁶

As a means of self-protection, ride hailing drivers in some parts of the state use dashboard cameras, which they purchase with their own funds.⁷⁷ Drivers also believe that ride hailing companies should have better onboarding practices for new drivers, so that they know how to address potentially unsafe or conflictive situations.⁷⁸

Some workers offered a different perspective on workplace safety, noting that platforms have introduced safety improvements in some occupations. For instance, some ride hailing drivers feel that the platforms have improved safety in comparison to the working conditions of yellow cab and black car drivers (particularly those working in relatively unsafe urban areas) in two ways: collecting information about the clients and eliminating cash transactions. Some home service workers feel safer knowing that care.com monitors phone calls and messaging with clients, compared to looking for work online with Craigslist.⁷⁹ These types of practices should be expanded and emulated by more platforms when possible.

PERFORMANCE EVALUATION AND DISCIPLINE

The performance evaluation methods that platforms implement rely primarily on consumer ratings of workers' performance, and other metrics such as workers' acceptance rates. The platforms' evaluation systems provide no recourse or any formal process to appeal disciplinary actions and negative ratings, or to resolve disputes. These systems are prevalent in most sectors, particularly in ride hailing, food/goods delivery, and home services.



"...there are also instances ...where you can get wrongfully charged after working hard all day and even accused by clients of not performing duties so that they can get a free cleaning."

In ride hailing, drivers need to keep their rating at least at 4.6 (the maximum rate is 5) which is calculated as an average of 500 ratings/rides for Uber, and of 100 ratings/rides for Lyft. Low ride acceptance rates also affect ratings negatively, and drivers can get suspended ("deactivated") if their ratings go below 4.5.⁸⁰ An upstate New York driver said "they will actually lower your rating if you declined too many rides. Like right now I have 100 percent acceptance rating. When I initially started Uber, I was having trouble balancing the two apps. Now I think I've got it down to a science. ...at one point my rate dropped really low, and the app kind of said your acceptance rate is really low." Food delivery workers' performance evaluations are also based on consumer reviews. In-home service platforms such as Handy also charge cancellation fees to workers, ranging from \$10 to \$50, depending on when workers cancel the job.

Across the board, workers complain that current performance systems lack formal processes to challenge negative customer reviews or disciplinary actions or penalties imposed by the platforms. According to on-demand platform workers, it is not rare that customers would make false claims against a worker's performance in order to get a refund. Some comments on this issue that platform workers posted online include:

INDUSTRY/ SECTOR

COMMENTS

Food/Goods Delivery

“Customers can lie on you and they will deactivate you.”

“Customers kept giving me bad ratings even though I tried my best to deliver the things efficiently and in good condition. Which resulted in 2 suspensions from the platform.”

“Lastly they deactivated my account, I called, texted, sent emails to find out what happened, no one ever got back, I just wanted to know if someone gave [th]em wrong information or something in that sense... I can[not] step in, and have my say. No word from Shipt, I was left there hanging. That’s very wrong.”

Home Services

“...there are also instances ...where you can get wrongfully charged after working hard all day and even accused by clients of not performing duties so that they can get a free cleaning.”

“You are always guilty ...until proven innocent. They will make judgments on their employees before even talk[ing] with them. Never seen anything like it in my 27 years of professional work in the work force.”

“Not a job to pay bills... your schedule changes daily you can’t make decent money and the bookings are very low. We as contractors get charged a cancel fee while the customers cancel same day and we only get partial pay. it’s hard to move up the ladder to receive more money and our rating goes down no matter how much we work or how good we are.”

Ride Hailing

“...I think they always just take the rider’s word for whatever they happen to say. So they can call and say my driver was drunk, and the app deactivates your account, which I understand but they should investigate the case. There are also riders that are frequently making [false] claims like that... They’re just trying to get a free ride, so they’ll call them and say ‘oh my driver is like playing with his phone or doing something...’ They just want compensation or get the ride for free. The companies also have to like, you know, let the customers know that they can’t just call... There’s no real feedback in it, and it’s just people can just leave a number for no reason.”⁸¹

Professional/ Clerical Services

“Clients are often terrible, and if there are problems, Fiverr will side with the client even when they’re wrong, scamming, or even downright abusive. If you can, avoid freelancing on Fiverr.”

Source: Online worker postings on Indeed.com, unless indicated otherwise. Postings were compiled by Worker Institute fellows Yoorie Chang, Jaylexia Clark, Dillon Jones, and Tyler Rodriguez, between August and November 2018.

INFORMATION/COMMUNICATION ASYMMETRIES

The practice of automated matching between workers and consumers, or blind dispatch, results in information asymmetries that can negatively affect workers' earnings and even their personal safety. Automated matching also de facto transfers the costs of the platforms' inefficient systems onto the on-demand platform workers. Blind dispatch is frequent among platforms in ride hailing (Uber, Lyft), delivery (UberEATS), and home services (Handy).

In ride hailing, blind dispatch results in driver uncertainty about earnings or expenses to be incurred in rides, because they do not know about the distance they will travel until after they accept the trip. Drivers also absorb the costs of the inefficiencies in the platform systems when they have to wait for customers to leave their house and get in the car. Although drivers have developed strategies (e.g. declining rides that might represent a waste of resources, or alerting the client well in advance that they have arrived at the pick-up location), the issues are systemic and remain largely unaddressed by the platforms. The following comments extracted from app driver interviews conducted as part of this study illustrate these points:

"...say I try to avoid, no offense, riders who want to go down to New York City. It's about a three to four-hour ride down there, and another four-hour ride back. I know I don't have the time in the day to do that during a workday in Albany. I can work more in Albany. ...we don't get to choose our passengers and that's fine. ...I understand we don't get a chance to discriminate but ...having the ability to pick how far we're willing to go in a day. Yeah, should be something that's available to us."⁸²

"...it can happen that the rides only pay five bucks and it takes a lot of your time in traffic. Time does not factor in."⁸³

"You don't want to drive far away to pick somebody up or nobody. So, I don't accept drives of no more than like 10 minutes away from me ...because you'll drive 20 minutes to get somebody who will be going down the street and I will make a \$3 off the ride... The other thing is that I would like to get paid for like waiting for a passenger. So, you pull up to pick them up, and it takes them five or six minutes to get out of their house. I think you should be paid a little more because it's just time you're sitting there and waiting and missing other rides."⁸⁴

In food delivery, UberEATS and Doordash couriers do not know where the drop off location is until after they accept and pick up the order.⁸⁵ While some food delivery apps no longer implement blind dispatch, UberEATS has argued that they keep this practice to avoid what can be conceived as a form of discrimination when food couriers decline orders based on the particular restaurant or drop-off address.⁸⁶ On the issue of inefficient dispatching practices, food delivery workers posted the following comments online:⁸⁷

"they do make u think before u accept order, [that the] restaurant is only 5 mile[s] away or 10 min. drive, okay? You hit accept button then u notice restaurant is really 9 mile[s] away and 15 min. drive. Like make sure to look up restaurant address on google maps app and not through Doordash app before u click accept. I feel so deceived. They [are] taking people[']s gas, and using their resources. [A]t least just be honest Doordash."

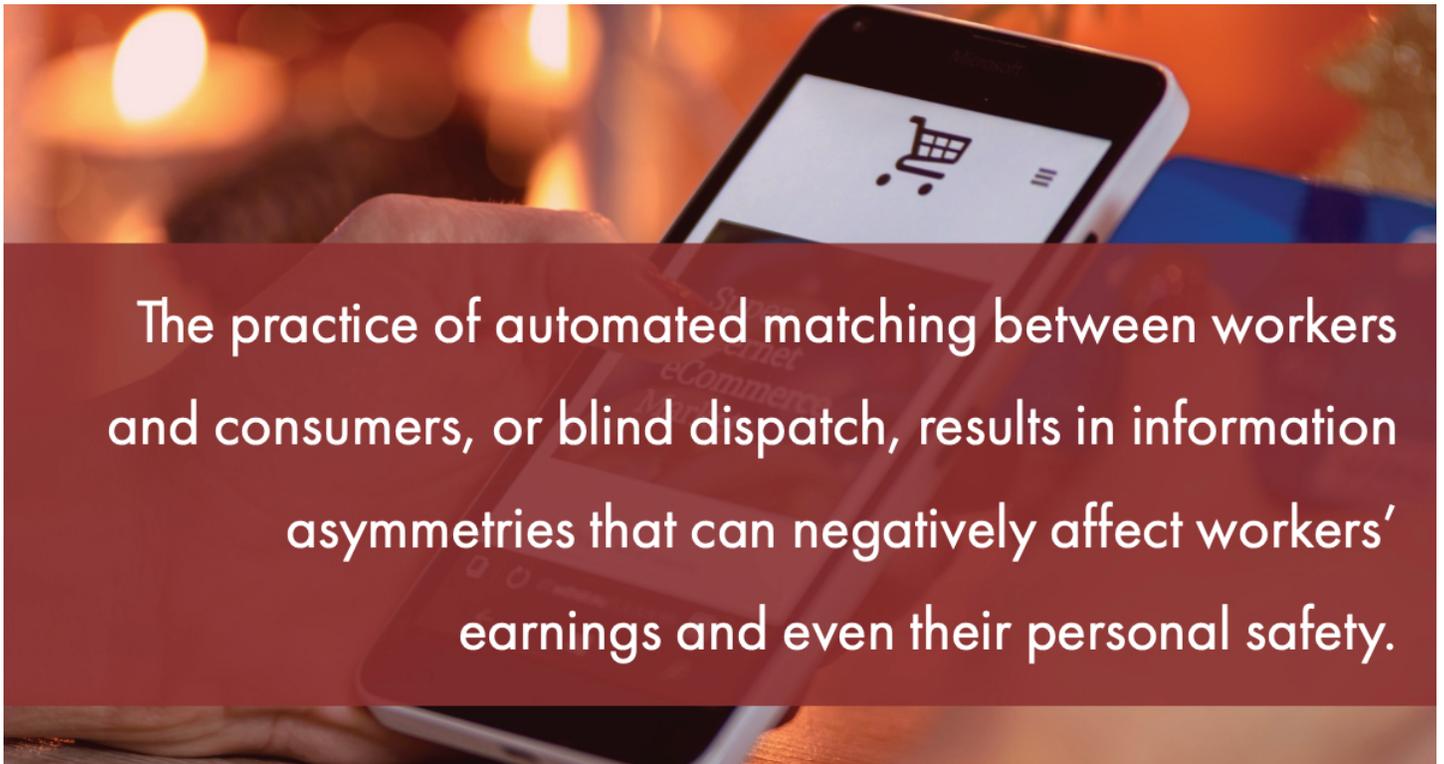
"On top of waiting for Doordash to place orders, they place the order extremely late, giving the dashers little to no time to deliver which in return makes the customers give DASHERS low star ratings, but it's not even the DASHERS fault."

Of key importance are the safety implications of the information asymmetry that blind dispatch involves. Some of the interview participants said they would like to be able to block those customers who made them feel uncomfortable or unsafe, and some also felt that drivers experience stricter demands in terms of transparency and accountability than the companies or the customers. One ride hail driver commented on this issue as follows:

“A lot of times the only information we get from a passenger [is] a name, ...and even though we don’t get real names all the time, the company requires my personal license posted... if the driver has to put up their license and their street address and everything like that to just sign up for the company...the passengers should also have to do the same because that’s a stranger getting on my car.”⁸⁸

In the home service sector, some platforms (e.g. Handy) maintain close control of the communications between workers and clients through their messaging systems. From the platform’s point of view, the purpose of this type of control over communications is to prevent workers from establishing their own relationships with clients outside of the platform. However, by blocking information about clients and the specific tasks to be performed, the platforms also create safety risks for workers who may not bring the tools or protective equipment needed to do the work, which could result in conflictive situations with customers. Previous studies found that some platform workers in home service prefer Craigslist to Handy, as the former provides them with the opportunity to vet potentially conflictive clients directly by phone.⁸⁹ One home service app worker posted the following comment online:

“This is supposed to be a work experience where you are less stressed and have the freedom and flexibility to work whenever it’s convenient for you, but instead when you claim a booking and depending on the location, you don’t know exactly where you are going until 3-4 hours before the job starts. Therefore, if it’s at a location where it’s difficult to find parking and the customer choses to reschedule... but yet reports you as a no-show. So you will incur a \$50 fee versus them paying for cancelling.”⁹⁰



The practice of automated matching between workers and consumers, or blind dispatch, results in information asymmetries that can negatively affect workers’ earnings and even their personal safety.

The information asymmetry resulting from the platform’s control over job opportunities also creates issues of distrust toward the companies. For instance, some delivery workers feel that platforms block information from them when they are about to achieve the number of orders needed to get a bonus.⁹¹ A courier commented online: “when it’s time to meet [the] quota for certain amount of deliver[ie]s, phone starts to slow down, like they don’t want you to make the quota. As soon as time is up I would get a[n] alert, so it’s a setup.”⁹²

In addition to these issues, app workers expressed concerns about inadequate communication channels to get support from the companies, and feeling disrespected by the clients and the platforms.⁹³

CONTROL AND DISCIPLINE

The platforms exert varying degrees of control in assigning work and disciplining workers. This can be illustrated on a continuum between strict automated control systems (algorithmic management) and simple mediation (between consumers and service providers). Across this continuum, platforms transfer or externalize risks onto workers, but those platforms utilizing algorithmic management can maximize control over the labor process.

The risks that platforms externalize involve demand fluctuations and investments in equipment and labor time. Platforms maximize control by monopolizing information about the demand for labor (clients and tasks), which determines when the work will be performed, and by monitoring performance through systems of ratings and penalties. Based on a continuum of control to simple intermediation, platforms can be classified into three categories, as shown on the following table: algorithmic management, marketplace management, and marketplace mediation.

Continuum				
		←	→	
		Control	Intermediation	
		Algorithmic management	Marketplace management	Marketplace mediation
Mechanisms of control and intermediation	Automated matching of workers and clients, “blind dispatch.”	Listings of workers/service providers. Hiring decision transferred to customer.	Listings of workers/service providers. Hiring decision transferred to customer.	
	Performance metrics, penalties.	Some platforms maintain significant control over communications between workers and customers.	Job matching	
	Pay rates are set by the platforms.	Performance metrics, penalties.	Service brokering	
		Some platforms set the pay rates, and others let workers fix the pay rate. In all cases the platforms charge their commission.	Pay is negotiated between customers and workers.	
Examples of platforms	Uber, Lyft, Instacart, Postmates, Caviar, UberEATS, Doordash, Shipt	Handy, TaskRabbit, Talkspace, Maids, Rover	Fiverr, Care.com, UrbanSitter, Upwork, Airbnb, Babyquip	
Source: Based on authors’ analysis, Vallas (2018), and Ticona et al (2018).				

ALGORITHMIC MANAGEMENT

Platforms using algorithmic management combine two mechanisms of control over the workforce: automated matching and performance metrics. This type of management is most typical in ride hailing and goods/food delivery. Automated matching (or blind dispatch) represents an element of control in as much as it involves information asymmetry and lack of transparency with respect to the availability of earning opportunities for app workers. For instance, food delivery workers complain about UberEATS' blind dispatch practice arguing that since they are categorized as independent contractors, they should be given the option to make decisions about accepting or declining orders.⁹⁴ Platforms offer flexibility to workers, but this is largely a false sense of freedom, as platform workers need to be on-call and available when demand for their services will surge.⁹⁵

In some cases, the automated dispatching results in significant inefficiencies, the cost of which is largely borne by the app workers. On this, a food delivery worker from the state's Capital Region noted:

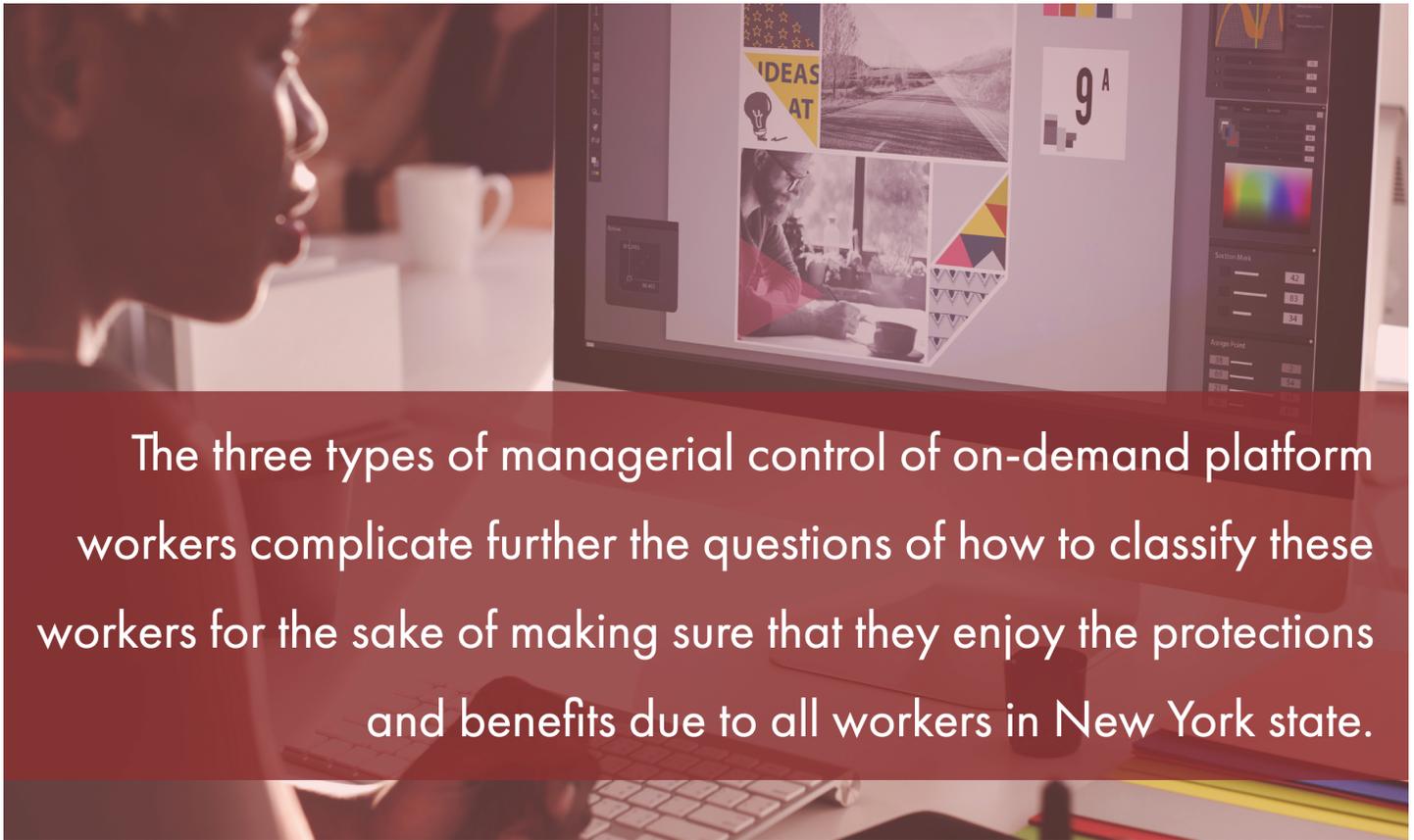
"I think they need to work on their algorithms, ...because they have so many drivers that they should be able to send ...a driver that's near a bunch of restaurants to one of those restaurants close to [the driver], as opposed to like all the way across town and then the food might be late and it might get cold and you're wasting a lot of gas. So they should try to send you to a nearby restaurant when possible. That's a big issue, especially when there's a lot of traffic too.

...also a big issue is getting a good amount of offers that are... not you being sent all around town to burn up a lot of gas. ...they only calculate the distance from the restaurant to the diner/client and then draw a straight line from each of them. So it's not taking into account all of the turns that you're making. Grubhub pays you \$3.25 for a delivery process, and I believe it's like fifty cents a mile or something like that. But the mileage isn't like what you're actually driving. It's just the straight line distance to the restaurant..."⁹⁶

The performance monitoring mechanisms involve worker average ratings, which are calculated considering consumer ratings/reviews, ride/delivery acceptance, and cancellation rates. If workers fall below a certain rating threshold, they might get suspended or "deactivated" from the platforms. Although platforms do not always provide training or clear guidelines on how to do the work, factors such as consumer reviews, timeliness, and quality of the service have a direct effect on workers' ratings. Uber, for instance, tracks the driver's location with GPS systems and even monitors the use of the car brakes.⁹⁷ Both Uber and Lyft also have thresholds for the number of hours workers can access the platform to avoid driver exhaustion.

In the case of food delivery workers, the platforms provide them with bags, and in some cases use of the bags is required per the contract between the worker and the platform "to keep the food warm."⁹⁸ On the issue of work guidelines, a courier posted online:

"...then there's the standards and metrics you have to adhere to and obey to not get a bad review from a customer. Even if you do try to go by the guidelines, I got bad reviews. did my best but gosh! too much for the pay."⁹⁹



The three types of managerial control of on-demand platform workers complicate further the questions of how to classify these workers for the sake of making sure that they enjoy the protections and benefits due to all workers in New York state.

MARKETPLACE MANAGEMENT

These platforms exert control over workers by monitoring performance and imposing penalties on workers for cancelling appointments or not showing up for jobs. Some platforms also fix workers' hourly rates. These platforms' revenue flows involve commissions and penalties and depend on maintaining control over the hiring process and the worker-client relationship. This management modality appears more frequently among platforms in the home services sector (Handy, TaskRabbit) and in some professional services platforms (Talkspace). Some platforms suggest that workers take online training on the quality standards they must maintain to continue working through the platform (Handy).

MARKETPLACE MEDIATION

These platforms engage in matching and some aspects of the hiring process, but do not get involved in managing workers' performance. They provide profiles, rating systems (consumer reviews), and background checks. Their business models involve paid subscriptions for accessing job opportunities. Marketplace mediation is widely implemented by platforms in clerical/professional services (Fiverr, Talkspace), home services (UrbanSitter), and among platforms offering intermediation between customers and providers of hospitality and ancillary services (Airbnb, Babyquip).

The three types of managerial control of on-demand platform workers described above both clarify and complicate our understanding of on-demand platform work and workers. While platforms using algorithmic management enforce the most control over platform workers, the continuum extending through marketplace management to marketplace mediation suggests how all three contribute to the problems described above. All three also complicate further the questions of how to classify these workers for the sake of making sure that they enjoy the protections and benefits due to all workers in New York state.

ON-DEMAND EMPLOYMENT, WORKER MISCLASSIFICATION, AND LABOR STANDARDS

OVERVIEW

On-demand platform work, like other forms of contingent and temporary employment, destabilizes industries, undermines worker protections and living standards, and significantly contributes to wealth and income inequality.

The issues raised by the workers in our survey are frighteningly similar to those faced by American workers in the early 20th century. Those workers found themselves trapped in jobs without guarantees of minimum wages or maximum hours, without hope of payment in case of death or dismemberment or even protections against unsafe working conditions. It would take most American workers over thirty years before they gained any sort of basic workplace rights.

From early Progressive era reforms through the New Deal reforms of the 1930s, workers slowly gained these rights and others, such as the right to organize collectively into unions. It would take another thirty to forty years or more before the federal government passed anti-discrimination laws and that long or longer until originally excluded groups such as public employees, farmworkers and household workers began to gain similar rights on a state-by-state basis.

New York state now has an opportunity to shape new laws so that on-demand platform workers will not have to wait thirty years or more before they too gain what we consider today to be basic workplace rights.

On-demand platform employment is but the latest demonstration of destabilizing changes in work, conditions, and labor markets that have developed since the 1980s. Companies have systematically shifted or eliminated jobs formerly done in-house through subcontracting, reliance on third parties, contingent and temporary work contracts, and abuse of “independent contractor” status.¹⁰⁰ As with on-demand platform work, the industries most impacted are: transportation, trucking, construction, home health care, janitorial, hospitality, restaurant, household services, clerical, and retail services.

APPOPRIATE CLASSIFICATION OF WORKERS IS A CORE ISSUE FOR LABOR STANDARDS IN THE “ON-DEMAND” ECONOMY.

On-demand industry practice, represented by such companies as Uber, Lyft, Postmates, and TaskRabbit, is to hire and dispatch workers as “independent contractors.” These workers are, however, not true “independent contractors;” they are not in business for themselves and cannot freely negotiate employment terms. The Worker Institute’s survey as well as documents obtained through litigation have shown that they are instead subject to employer control over pay, safety, access to information, performance monitoring and evaluation, as well as discipline and discharge.

This type of misclassification may be mistaken or deliberate. Some employers may mistakenly misclassify workers because the criteria for determining employee status are complicated and unclear. Other employers deliberately misclassify their workers as “independent contractors” as a strategy to cut labor costs and gain an unfair competitive advantage. This shifts workers’ compensation and unemployment insurance premium costs onto law-abiding businesses. Government, at all levels, is deprived of significant revenues through non-collection or under-reporting of taxes. And on-demand platform workers are left holding the bag.

In an employer–employee relationship, the employer must withhold income taxes, withhold and pay Social Security and Medicare taxes, pay the unemployment insurance tax on wages paid, provide workers’ compensation insurance, pay minimum wage and overtime wages, and include employees in benefits plans.

Employers are not generally obligated to make these payments to, or on behalf of, independent contractors. They may therefore have a strong incentive to avoid having their workers classified as “employees.” Hiring independent contractors instead of “employees” can mean a 30% reduction in payroll and related costs.¹⁰¹

“Employees” receive unemployment and workers’ compensation benefits and are typically protected by a broad range of federal, state, and local legislation affecting wages, health and safety, health benefits, the right to organize, anti-discrimination, family and medical leave, and pension security.



“Independent contractors” are generally excluded from these social safety net programs and protective workforce legislation: they are “on their own.”

A study of several states’ insurance funds conducted for the U.S. Department of Labor¹⁰² concluded that employers will assume the risks associated with misclassification to gain a competitive advantage by not paying workers’ compensation premiums — risks they would not likely take for unemployment insurance cost savings alone.

Misclassifying workers as independent contractors reduces liability risks for employers. In an employer–employee relationship, employers are liable for the torts committed by their employees within the scope of their employment under the doctrine of *respondeat superior*. Employers are, however, not liable for the torts of independent contractors.

THE IMPACT OF WORKER MISCLASSIFICATION ON NEW YORK STATE FUNDS AND TAX REVENUES IS SEVERE.

Cornell ILR reported on worker misclassification in early 2007. That earlier study, based on audits performed by the NYS Department of Labor Unemployment Insurance Division during the four-year period 2002–05, estimated that:

- o nearly 40,000 employers each year mistakenly or intentionally misclassified workers;
- o 10.3% of the state’s private sector workers were misclassified each year including 14.8% of construction workforce; and that
- o \$4.3 billion of unemployment insurance taxable wages were underreported for the audited industries during the four-year period.¹⁰³

The use of independent contractor status, by one estimate, grew nationally by 40% between 2005 and 2015.¹⁰⁴ The New York State Joint Enforcement Task Force reported in 2015 that,

- o Since August 2007 enforcement and data sharing activities have identified nearly 140,000 instances of employee misclassification and discovered nearly \$2.1 billion in unreported wages.¹⁰⁵

The California Division of Labor and Enforcement Standards estimates that worker misclassification costs that state \$7 billion annually with “increased reliance on the public safety net by workers... denied access to work-based protections.”¹⁰⁶

On-demand platform workers are instead subject to employer control over pay, safety, access to information, performance monitoring and evaluation, as well as discipline and discharge.

NEW YORK’S REGULATORY STRUCTURE DOES NOT NOW PROVIDE THE NECESSARY LEVEL OF OVERSIGHT TO CURB ABUSE IN THE ON-DEMAND ECONOMY SO AS TO PROTECT WORKER, BUSINESS, AND TAXPAYER INTERESTS.

New York state has no uniform criteria for determining “employee” status. A worker may be adjudged to be an “employee” under one statute but an “independent contractor” under another.

Decisions by one agency do not necessarily bind another and agencies are not bound by prior rulings. Agency decisions may be overturned by courts that reach opposite conclusions based on the same or similar facts.

The current structure for enforcing labor standards is so complex and confusing that it a) often leaves businesses and workers uncertain of proper classification short of costly, extensive litigation; and b) provides wide latitude for abuse by allowing employers to structure and define work to avoid a determination of “employee” status.

New York courts and administrative agencies apply different versions of the “common law test” to determine worker status for claims involving unemployment insurance, workers’ compensation, wage and hour violations and taxation.

The complex, multifactor common law tests for determining employee status are flawed because they provide insufficient direction to law-abiding businesses and workers pending judicial and administrative intervention; lack the clarity necessary to mitigate mistaken and intentional worker misclassification; facilitate costly and time-consuming litigation; lead to inconsistent outcomes; and do not offer the level of regulatory oversight necessary to protect worker, business and taxpayer interests.



New York state has no uniform criteria for determining “employee” status. A worker may be adjudged to be an “employee” under one statute but an “independent contractor” under another.

STATE LEGISLATURES HAVE RESPONDED TO THE PROBLEMS RELATED TO WORKER MISCLASSIFICATION BY TIGHTENING REGULATORY STANDARDS BY REPLACING THE COMMON LAW TEST WITH THE ABC TEST.

Sixteen states, including New York, have changed how employment relationships are defined and most states have adopted some form of the ABC test that presumes employee status. These states are: Delaware; Illinois; Kansas; Maine; Maryland; Massachusetts; Minnesota; Nebraska; New Hampshire; New Jersey; New Mexico; New York; Oregon; Pennsylvania; Utah; and Washington.¹⁰⁷

The California Supreme Court recently [April 2018] rejected the Common Law test in favor of the ABC test. Legislation is now pending in the California Assembly to codify the Court's decision.

New York's statutory reforms, as with those of several other states, are industry specific: they are directed at those industries – construction and trucking – where intentional misclassification has, for several years, been particularly severe.

New York state's Fair Play statutes, enacted for the construction and trucking industries, use the alternative ABC test, the clearest and most sharply defined legal test for determining employee status. These provide the model for new legislation to curb misclassification abuse in the on-demand industry.

LEGALS TEST APPLIED BY COURTS AND AGENCIES TO DISTINGUISH “INDEPENDENT CONTRACTORS” FROM “EMPLOYEES”

The regulatory environment, the ability of state policymakers to effectively challenge worker misclassification, is a function of the legal tests used by courts and agencies to distinguish “independent contractors” from “employees.”

Different statutes may apply different tests or a variation of the same test. A worker may be adjudged to be an “employee” under one statute or one test but an “independent contractor” under another. The definitions of “employment,” “employee,” and “employer” may vary by statute.¹⁰⁸ It is a complex and confusing legal landscape that often leaves businesses and workers uncertain of proper classification short of litigation.¹⁰⁹

There are three categories of legal tests:

- Common law “Right to Control” Test;
- Economic Realities Test; and the
- ABC Test.

THE COMMON LAW “RIGHT TO CONTROL” TEST is the narrowest for finding that a worker is an “employee.”

The common law test or “Right to Control” test is derived from the tort law, the need to determine vicarious liability for worker accidents and injuries. The employer’s right to control the details, the “manner and means,” of the worker’s activities is the cornerstone concept. An employer’s actual exercise of control is not key. What matters is the employer’s *right* to give orders and to dictate the “means and methods” of work. The common law test is multifaceted: it incorporates a series of secondary factors, articulated *infra*, to determine a worker’s status.

The employer, in a true independent contractor situation, does not, by contrast, have the right to give orders on how the contracted work is to be performed. The focus is on the work product or result; the method and means are typically left to the independent contractor’s particular skill and expertise.

THE ECONOMIC REALITIES TEST also weighs the employer’s right to control but only as one consideration; it focuses instead on the “economic realities” of the employment relationship: the degree to which a worker is economically dependent on the employer or is in business for himself or herself. How the parties label the arrangement – as “independent contractor” or “employee” -- is not dispositive.

Congress intended that this more expansive test be used in lieu of the narrower common law standards for enforcement of the Fair Labor Standards Act [FLSA]. No one factor controls; courts look at the totality of the circumstances. While the specific articulation varies, these are factors typically considered:

- the extent to which the work performed is an integral part of the employer’s business;
- the worker’s opportunity for profit or loss depending on his or her managerial skill;
- the extent of the relative investments of the employer and the worker;
- whether the work performed requires special skills and initiative;
- the permanency of the relationship; and
- the degree of control exercised or retained by the employer.¹¹⁰

THE ABC TEST presumes employer status: it shifts the burden onto the employer to show that the claimant worker is an independent contractor. This is the basis for recent, industry-specific, statutory reform to address worker misclassification in many jurisdictions, including New York. To establish that the worker is an independent contractor, the employer must show all three of these elements:

- A. the individual is free from direction and control both under the contract and in fact;
- B. the service performed is outside the employer’s usual course of business;
- C. the individual is in business for himself or herself.

These three tests are summarized in the following table.

<p align="center"><u>Common Law</u> <u>[NYS UI] Test</u></p>	<p align="center"><u>Economic</u> <u>Realities Test</u></p>	<p align="center"><u>ABC</u> <u>Test</u></p>
<p><u>Key question:</u> Does the employer have the right to control the means and methods of work?</p> <p><u>Totality- of-the circumstances analysis:</u> Courts examine such significant factors as:</p> <ul style="list-style-type: none"> • control over a worker’s activities, determining hours, requiring attendance at meetings or permission for absences; • compliance with instructions as to when, where, and how to do the work; • providing facilities, equipment, tools, or supplies; • setting the pay rate and controlling billing; • furnishing business cards or other identification; • restricting options to work for another employer; • the right to terminate employment on short notice; and • the nature of the services provided, the skill level and need for supervision 	<p><u>Key questions:</u> Is the worker economically dependent on the employer? Is the worker in business for herself or himself?</p> <p><u>Totality- of-the circumstances analysis:</u> Courts examine such significant factors as:</p> <ul style="list-style-type: none"> • the extent to which the work performed is an integral part of the employer’s business; • the worker’s opportunity for profit or loss depending on his or her managerial skill; • the extent of the relative investments of the employer and the worker; • whether the work performed requires special skills and initiative; and • the permanency of the relationship; and the degree of control exercised or retained by the employer. 	<p><u>Key question:</u> Can the employer overcome the presumption that this worker is an “employee”?</p> <p><u>To establish that the worker is an independent contractor and not an “employee,” the employer must show all three of these elements:</u></p> <p>A. the individual is free from direction and control applicable both under the contract and in fact;</p> <p>B. the service performed is outside the employer’s usual course of business; and</p> <p>C. the individual is in business for himself or herself.</p>

NEW YORK STATE COURTS AND AGENCIES APPLY THE COMMON LAW TEST

In New York state, as in other jurisdictions, different public policies underlie different statutes. In the absence of uniform criteria, the determination of worker status varies by the test applied. A person may be adjudged as an “employee” for one law and an “independent contractor” for another. Decisions by one agency do not necessarily bind another and agencies are not bound by prior rulings.¹¹¹

Agency decisions may be overturned by courts that reach opposite conclusions based on the same or similar facts. The complicated, multi-factor “right to control” common law test, the basis for most decision-making, provides an especially wide latitude for outcomes, so much so that it leaves both businesses and workers guessing as to the proper determination pending costly, extended litigation.

The following section reviews recent determinations under relevant New York statutes. The trend is to hold app-based, on-demand workers as “employees” notwithstanding application of the narrow common law test.

NEW YORK UNEMPLOYMENT INSURANCE CLAIMS

The New York Court of Appeals used the common law “right to control” test to adjudicate rights under the state’s Unemployment Insurance law in the 2016 decision *In re Matter of Yoga Vida, NYC*.¹¹² The Court reversed a prior Department of Labor determination and held that the claimant yoga instructors were properly classified as independent contractors.

The factual analysis showed insufficient evidence to support a finding of employee status because the employer did not exercise the requisite degree of control and supervision. It cited these factual reasons:

- The instructors made their own schedules and chose how they were paid;
- There were no restrictions on where they could teach; and
- Instructors were not required to attend meetings or receive training.

The Dissent however argued that the evidence did support a determination of employee status. It identified these factors to show sufficient employer control:

The employer recruits the clients, determines and collects the fees; it sets the class schedule, including what courses are taught when; instructors could not unilaterally change class time, length or difficulty level.

As if to highlight the problem applying the common law test, the dissent noted:

Here, the evidence reasonably supports the Board’s conclusion that the non-staff instructors are Yoga Vida’s employees, “even though there is evidence in the record that would have supported a contrary conclusion”.¹¹³

The Unemployment Insurance Appeals Board has since distinguished certain on-demand work from *Yoga Vida*. Employee status was upheld using the “right to control” test in a series of decisions during 2017 – 18 involving TaskRabbit, Postmates, and Uber.

TASKRABBIT

TaskRabbit provides a communications platform to casual laborers (“Taskers”), whom it classified as “independent contractors,” for such “tasks” as furniture assembly, minor home repairs, and cleaning. The Board here found sufficient control and direction to support “employee” status and company liability for tax contributions. It noted that “this case is similar to those in which employment relationships were found for various categories where written agreements, rules and/or policies inevitably controlled, directed, or supervised the work, or otherwise reserved for employers the right to exercise such control over various aspects of the work.”¹¹⁴

POSTMATES

The Board also determined employee status in *Postmates*, a company whose couriers pick up and deliver orders placed from stores and restaurants. The couriers were free to log in and out of the platform at will and could work for competitors. And there was no required minimum acceptance rate. The employer was nevertheless held to have exercised sufficient supervision, direction, and control.¹¹⁵

Postmates workers were later [June 2018] found *not* to be “employees” by New York’s Appellate Court, 3d Division. Here the Court overturned a 2016 Unemployment Insurance Appeals Board decision; the Court held that the factual analysis did not find “sufficient indicia of control” by the company:

the fact that Postmates determines the fee to be charged, determines the rate to be paid, tracks the subject deliveries in real time and handles customer complaints, in our view, such proof does not constitute substantial evidence of an employer–employee relationship to the extent that it fails to provide sufficient indicia of Postmates’ control over the means by which these couriers perform their work.¹¹⁶

UBER

In an action initiated by the New York Taxi Workers Alliance, the New York Unemployment Insurance Appeal Board held that Uber drivers are “employees.” Particularly notable is the Administrative Law Judge’s characterization of Uber’s agreements as “adhesion contracts.” Employing the common law “totality of the circumstances” review, ALJ Burrowes conceded that,

Certainly, it is significant that as the parties agree, claimants set their own work schedule; selected their work areas; were not obliged by Uber to report their absences or other leaves; and, were not provide (sic) fringe benefits by Uber – all factors indicative of an independent contractor status.¹¹⁷

But the decision continued,

The credible evidence also establishes; however, ... that Uber exercised sufficient supervision and control over substantial aspect of their [the claimants] work as Drivers...

Uber did not employ an arms’ length approach to the claimants as would typify an independent contractor arrangement. Uber remained involved with the means by which claimants provided transportation services for its Riders.¹¹⁸

ALJ Burrows distinguished the *Uber* case from *Yoga Vida* where the Court found that the claimant part-time instructors were independent contractors [discussed above]. The Court

repeatedly referenced that putative employer (in *Yoga Vida*) had its own staff of instructors, and that the claimants were part-time and not subject to the employment rules applicable of its employees. The claimants in *Yoga Vida* were not therefore, a crucial aspect of that putative employer's ongoing operations, as are the claimants here. Uber does not contend that it has its own staff of Drivers who could have provided services to those provided by the claimants.¹¹⁹

The ALJ decision and the initial Department of Labor determination were subsequently upheld on appeal. The Unemployment Insurance Appeals Board, on July 12, 2018, ruled that the three Uber driver claimants were "employees" and eligible for unemployment insurance. The Board, affirming the ALJ decision, also concluded that the "the record, as a whole" provided "credible evidence... that Uber exercises sufficient supervision, direction or control over the three claimants and other similarly situated Drivers." The Board provided additional factual analysis distinguishing the Uber case from the Court of Appeals *Yoga Vida* decision:

...unlike *Yoga Vida*'s distinct and different treatment between its staff and non-staff instructors, Uber engages only non-staff Drivers. And unlike non-staff instructors who were paid only if a certain number of students attended the classes, Uber not only guarantees payment for each trip, but occasionally guarantees a specified level of income.¹²⁰

The Board here specified company procedures related to training, incentives, and performance expectations that supported a finding of employee status; it also distinguished the present case from the recently decided *Matter of Vega* decision in which the 3d Department held that Postmates workers were not employees.

NEW YORK STATE WORKERS' COMPENSATION CLAIMS

New York courts, interpreting the Workers' Compensation Law, use a hybrid of common law factors with a "relative nature of the work" test. As summarized

Under the common law test "four factors are assessed":

- (1) the direct evidence of the owner's right to or exercise of control;
- (2) the method of payment;
- (3) the extent to which the owner furnishes equipment; and
- (4) whether the owner retains the right to discharge.

Under the 'relative nature of work' analysis the trial court looks to the following six components:

- (1) the character of the claimant's work;
- (2) how much of a separate calling that work is from the owner's occupation;
- (3) whether it is continuous or intermittent;
- (4) whether it is expected to be permanent;
- (5) its importance in relation to the owner's business; and
- (6) its character in relation to whether or not the claimant should be expected to carry his own accident insurance burden.¹²¹

NEW YORK STATE TAX LAW ENFORCEMENT

New York state uses a twenty-factor variant of the common law test to determine employee status for tax law purposes that is based on the Internal Revenue Code.¹²² This version, as detailed in the endnote, is more complex than the common law tests used to determine worker status for unemployment insurance and workers compensation or that might be used to adjudicate wage and hour claims. The problem of inconsistent outcomes from applying different tests for different statutes is highlighted here. As one commentary noted,

It is (at least hypothetically) possible for a worker to be classified as an employee under the economic realities test, which would entitle her to the minimum wage and other mandates, but not under the tax law, which would free the employer from remitting payroll taxes on behalf of the worker.¹²³

NEW YORK STATE WAGE AND HOUR CLAIMS

Wage and hour cases may apply common law standards or the economic realities test or a combination of the two. The following comments on selected cases illustrate how New York courts or federal courts (applying New York law) have dealt with status issues.

In *Bynog v. Cipriani Group, Inc.*¹²⁴ banquet waiters provided to Cipriani by a temporary agency were held to be independent contractors and denied recovery of certain payments as gratuities. The New York Court of Appeals here articulated and applied five common law factors:

In an employment relationship context, factors relevant to assessing control include whether a worker (1) worked at his own convenience, (2) was free to engage in other employment, (3) received fringe benefits, (4) was on an employer's payroll and (5) was on a fixed schedule.¹²⁵

In *Saleem, etc. v. Corporate Transportation Group, Ltd., etc.*¹²⁶ the U.S. Court of Appeals for the Second Circuit applied an economic realities test to the overtime claims of certain black-car limousine drivers under both the federal Fair Labor Standards Act¹²⁷ and New York Labor Law.¹²⁸ The Court held that the drivers "who owned or operated for-hire vehicle franchises" were independent contractors "as a matter of law." The Court noted that

Although the franchisor provided a dispatch system, negotiated rates with clients, and engaged in some monitoring and discipline of drivers, the economic reality was that the drivers operated like small businesses and decided how to go about their work.

A different conclusion was reached by the federal District Court for the Southern District of New York in *Hart v. Rick's Cabaret Int'l. Inc.* Here the Court applied an economic realities test to federal FLSA claims and a common law *Bynog* test to state labor law claims.¹²⁹ The relevant issue was whether the plaintiff exotic dancers at the defendant employer's strip club were "employees" under the statutes. The employer claimed that the dancers were independent contractors. While certain factors favored the employer,¹³⁰ the Court, on balance, held that the plaintiffs were "employees" under both statutes. The employer exercised "significant control" by, for example, setting work schedules, requiring dress codes, establishing weight limits, behavioral rules, and threats of potential discipline.

HIGH COURT REJECTION OF THE COMMON LAW TEST

U.S. SUPREME COURT CREATED THE ECONOMIC REALITIES TEST AS AN ALTERNATIVE TO THE COMMON LAW

The common law multifactor tests to determine worker status on a case-by-case basis have long been challenging for jurists. The US Supreme Court reviewed the application of the common law to determine employee status under the National Labor Relations Act [NLRA]. The 1944 *NLRB v. Hearst Publications* decision rejected the common law test and authorized the more expansive economic realities test.¹³¹

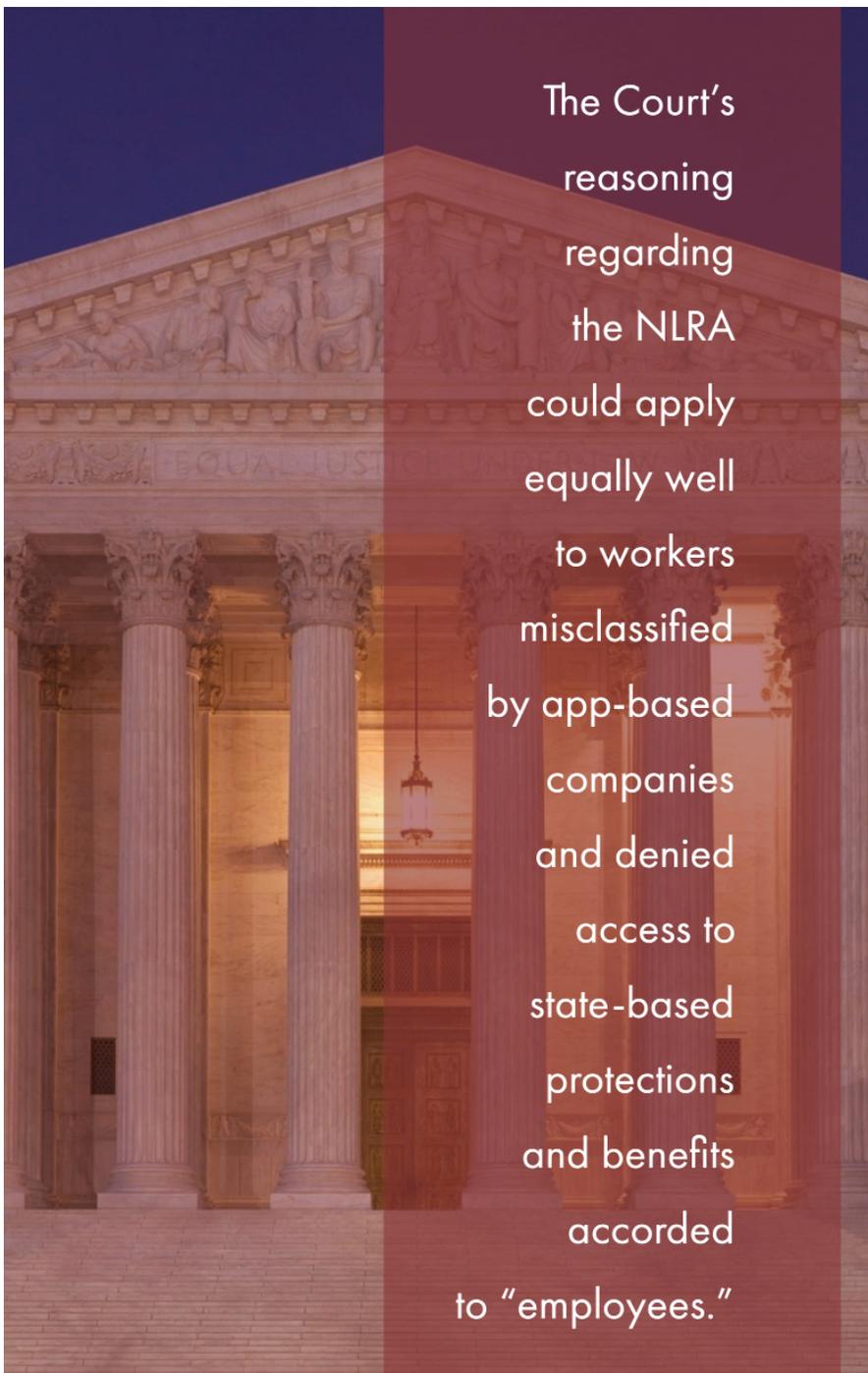
The Court held that newsboys selling papers on the street were, in light of the legislative intent behind the NLRA, to be considered “employees” not “independent contractors.”

Common law standards developed for tort litigation ought not to be applied absent consideration of the relevant statute’s underlying policy. The Court’s reasoning regarding the NLRA could apply equally well to workers misclassified by app-based companies and denied access to state-based protections and benefits accorded to “employees.”

CALIFORNIA SUPREME COURT REJECTS THE COMMON LAW IN FAVOR OF THE ABC TEST

Federal and state courts in California have been the venues for recent litigation involving the determination of worker status for delivery and app-based services.

The recent Federal District Court decision in *Lawson v. Grubhub*¹³² used the California [*Borello*] common law test¹³³ to hold that a delivery driver for an internet food ordering service was properly classified as an independent contractor for both wage and hour and workers’ compensation claims.



The Court held that

while some factors weighed in favor of an employment relationship, the service's lack of all necessary control over the driver's work, including how he performed deliveries and even whether or for how long he worked, along with other factors persuaded the court that the contractor classification was appropriate for the driver during his brief tenure with the service.¹³⁴

Shortly after *Grubhub*, the California Supreme Court issued a landmark decision sharply critical of *Grubhub's* application of common law standards. In *Dynamex Operations West v. Superior Court*¹³⁵, decided April 30, 2018, the Court observed that the common law multifactor test: 1) does not provide employers and workers with sufficient clarity of status and rights prior to and without litigation; and 2) gives employers the opportunity to structure work assignments with the intent to circumvent a determination of employee status.

... a multifactor, "all the circumstances" standard makes it difficult for both hiring businesses and workers to determine in advance how a particular category of workers will be classified, frequently leaving the ultimate employee or independent contractor determination to a subsequent and often considerably delayed judicial decision.

In practice, the lack of an easily and consistently applied standard often leaves both businesses and workers in the dark with respect to basic questions relating to wages and working conditions that arise regularly, on a day-to-day basis.

...the use of a multifactor, all the circumstances standard affords a hiring business greater opportunity to evade its fundamental responsibilities under a wage and hour law by dividing its work force into disparate categories and varying the working conditions of individual workers within such categories with an eye to the many circumstances that may be relevant under the multifactor standard.¹³⁶

Employing arguments similar to those in *Hearst*, The *Dynamex* Court rejected the common law test for protective legislation and here replaced it with the more inclusive ABC test that presumes employee status. A bill was introduced into the California Assembly on December 3, 2018 that "would codify the decision in the *Dynamex* case and clarify its application."¹³⁷

State legislatures have responded to the problems and policy concerns raised by applying the common law test to protective legislation. The trend is to abandon the common test in favor of less complex standards more sharply crafted to better execute the legislative intent.

// This is supposed to be a work experience where you are less stressed and have the freedom and flexibility to work whenever it's convenient for you, but instead when you claim a booking and depending on the location, you don't know exactly where you are going until 3-4 hours before the job starts. //

STATUTORY REFORMS TO ADDRESS WORKER MISCLASSIFICATION: ABC TEST REPLACES THE COMMON LAW TEST

Significant legislative and administrative action has occurred in recent years throughout the United States to better address worker misclassification. A heightened awareness of misclassification's severe impact on state and local resources has prompted the articulation of clearer statutory standards and stronger enforcement mechanisms, civil penalties and/or criminal liability, and improved communication and coordination among government agencies.

A 2000 study conducted for the U.S. Department of Labor¹³⁸ found that 14 states, including New York, and the District of Columbia apply the Common Law "Right to Control," test for enforcement of unemployment insurance statutes,¹³⁹ 22 states apply the ABC test,¹⁴⁰ 10 states use an adaptation of the Common Law test,¹⁴¹ and 4 apply the Internal Revenue 20-factor test.¹⁴²

While 22 states use the more expansive "ABC test" to determine employee status¹⁴³, New York Unemployment Insurance Appeals Board and court decisions have long applied the common law standards.¹⁴⁴

Twenty-two states, including New York, enacted statutes between 2004 and 2012 that change the requirements for determining "independent contractor" status.¹⁴⁵ Legislatures in four states – Washington State, Massachusetts, New Mexico, and Oregon – acted prior to the economic crisis of 2007. These states each enacted one or more laws since 2008: Minnesota; Connecticut; New Jersey; New Hampshire; Illinois; Indiana; Washington; Oregon (again); Maine; Maryland; Delaware; Vermont; Nebraska; New York; Pennsylvania; Kansas; Utah; Wisconsin; and California.

Sixteen states, according to one analysis, have changed how employment relationships are defined¹⁴⁶ and noted that most states have adopted some form of the ABC test with a presumption of employee status.¹⁴⁷ This study found that

The ABC test, coupled with the presumption of employee status unless the employer demonstrates compliance, has been the clearly favored test of state legislatures; most of these states adopted a clear or recognizable ABC formulation.¹⁴⁸

It also noted that,

...all sixteen state statutes, except for Kansas's and Maine's unemployment compensation statutes, either explicitly or implicitly made employee status the presumption by utilizing a list of mandatory criteria rather than a set of subjectively weighted factors.¹⁴⁹

California Labor Code §2750.5 creates a rebuttable presumption of employee status for workers employed on jobs for which a license is required. The presumption extends to those hired by the unlicensed worker. The statute specifically requires that "the individual's independent contractor status is bona fide and not a subterfuge to avoid employee status."¹⁵⁰ Decisions pursuant to the statute highlight liability issues impacting general contractors and homeowners when injuries are sustained by unlicensed subcontractors or individuals.¹⁵¹

Illinois' Employee Classification Act does not specify licensure; it applies to "an individual performing services for a contractor (who) is deemed to be an employee of the employer." Illinois' version of the ABC test is as follows:

An individual performing services for a contractor is deemed to be an employee of the contractor unless it is shown that:

- (1) the individual has been and will continue to be free from control or direction over the performance of the service for the contractor, both under the individual's contract of service and in fact;
- (2) the service performed by the individual is outside the usual course of services performed by the contractor; and
- (3) the individual is engaged in an independently established trade, occupation, profession or business; or
- (4) the individual is deemed a legitimate sole proprietor or partnership...¹⁵²

New Jersey's statute is industry specific. It applies the ABC test to protect construction workers against misclassification. The New Jersey language is noteworthy because it is otherwise comprehensive: it references violations of the state's workers' compensation, unemployment insurance, disability benefits, taxation, and wage and hour laws.¹⁵³

The trend toward finding employee status is also reflected in recent state-level administrative decisions concerning app-based work in several jurisdictions including New York.¹⁵⁴



NEW YORK STATE ADOPTED THE ABC TEST IN STATUTES TO ADDRESS WORKER MISCLASSIFICATION IN THE CONSTRUCTION AND TRUCKING INDUSTRIES

New York state's Fair Play statutes, enacted for the construction and trucking industries, use the alternative ABC test, the clearest and most sharply defined legal test for determining employee status. These provide the model for new legislation to curb misclassification abuse in the on-demand industry.

THE NEW YORK STATE CONSTRUCTION INDUSTRY FAIR PLAY ACT (2010) AND THE NEW YORK STATE COMMERCIAL GOODS TRANSPORTATION INDUSTRY FAIR PLAY ACT (2014)

The underlying policy and purpose of The New York Construction Industry Fair Play Act was stated quite clearly in the statute's statement of *Legislative findings and intent*, §861-a:

The legislature hereby finds and declares that New York state's construction industry is experiencing dangerous levels of employee misclassification fraud. Unscrupulous employers are intentionally reporting employees as independent contractors to state and federal authorities or workers' compensation carriers in record numbers. In addition, there has been an explosion of employers who operate in the underground economy and fail to report all or a sizable portion of their workers.

The legislature hereby finds and declares that recent studies of New York city's construction industry alone suggests that as many as fifty thousand New York city construction workers—nearly one in four—are either misclassified as independent contractors or are employed by construction contractors completely off the books. Construction industry fraud reduces government revenue, shifts tax and workers' compensation insurance costs to law-abiding employees, lowers working conditions and steals jobs from legitimate employers and their employees.

Therefore, the legislature hereby finds and declares that government has an obligation to curb this underground economy, enforce long-standing employment laws, ensure compliance with essential social insurance protections and eliminate the unfair competitive advantage from contractors in the underground economy by and through the enactment of the New York state construction industry fair play act.¹⁵⁵

§861-c (1) articulates a presumption of employee status that incorporates a version of the ABC test. The same language appears as §862-b [Presumption of employment in the commercial goods transportation industry] in *The New York State Commercial Goods Transportation Industry Fair Play Act (2014)*:

1. Any person performing services for a contractor shall be classified as an employee unless the person is a separate business entity under subdivision two of this section or all of the following criteria are met, in which case the person shall be an independent contractor:

- (a) the individual is free from control and direction in performing the job, both under his or her contract and in fact;
- (b) the service must be performed outside the usual course of business for which the service is performed; and
- (c) the individual is customarily engaged in an independently established trade, occupation, profession, or business that is similar to the service at issue.¹⁵⁶

§861-c (2) defines “business entity.” Employers may attempt to evade statutory enforcement by classifying individual workers not as “independent contractors” but as independent or separate business entities such as limited liability corporations, franchisees, partners or owners of the employer’s business.¹⁵⁷ The language protects both employers and employees: it helps employers who hire actual, independent business entities from having those entities improperly classified as “employees” and it protects employees from misclassification as independent contractors.¹⁵⁸



“I have to work very uncomfortable hours; late nights, give up weekends and any holidays to make a living wage.”

ENFORCEMENT PROVISIONS IN NEW YORK AND OTHER STATES

§861-e provides for civil and criminal penalties for a contractor's willful violation¹⁵⁹ of unemployment insurance, workers' compensation, and tax and finance statutes. Civil penalties are \$2500 for the first violation per employee misclassified and up to \$5000 per employee for subsequent violations during a five-year period. Other civil penalties may be assessed for violation of the respective statutes. Criminal penalties include imprisonment for up to 30 days for a first offense and fines up to \$25,000; subsequent offenses are imprisonment up to 60 days and fines up to \$50,000.

§861-f protects claimants from retaliation. Anti-retaliation provisions exist in these three other states: Illinois, Delaware, and Vermont. The New York Statute protects those "making, or threatening to make, a complaint to an employer, co-worker or to a public body..." The Illinois statute includes complaints made to community organizations.¹⁶⁰

These six states – Delaware, Illinois, Massachusetts, Maryland, New Jersey, and Washington – permit workers to pursue a private right of action. The New Jersey statute specifically applies to construction worker plaintiffs. The Illinois statute, by contrast, has no such limitation. Both states permit unions to commence actions; this is useful because individual workers may lack the resources or be unwilling to assume the risks involved in pursuing litigation.¹⁶¹

Seven other states – California, Colorado, Connecticut, Delaware, Kansas, Maryland, and Vermont – also impose civil penalties for willful violations. Criminal violations are included in the statutes of nine other states: Connecticut, Illinois, Kansas, Massachusetts, New Jersey, New Mexico, Pennsylvania, Utah, and Vermont.¹⁶²

California's Labor Code §2753 makes individuals, other than attorneys, liable for advising employers to classify workers as independent contractors to avoid employee status:

A person who, for money or other valuable consideration, knowingly advises an employer to treat an individual as an independent contractor to avoid employee status for that individual shall be jointly and severally liable with the employer if the individual is found not to be an independent contractor.¹⁶³

Businesses that intentionally misclassify workers might assume the risk and costs associated with liability for violations. These states have statutes that authorize stop work orders as an additional deterrent: Pennsylvania, Wisconsin, Connecticut, Vermont, Delaware, and Maine.¹⁶⁴ The Connecticut statute, for example, authorizes the state's Labor Commissioner to issue stop work orders within 72 hours of a determination that an employer is defrauding the Workers' Compensation fund.¹⁶⁵

POLICY RECOMMENDATION

Provide on-demand workers with statutory rights and protections in the following areas:

- ▶ unemployment insurance
- ▶ workers compensation coverage
- ▶ wage and hour protection
- ▶ family and medical leave
- ▶ workplace health and safety
- ▶ withholding of taxes
- ▶ pension security
- ▶ anti-discrimination
- ▶ right to organize and collectively bargain



New York state now has an opportunity to shape new laws so that on-demand platform workers will not have to wait thirty years or more before they too gain what we consider today to be basic workplace rights.

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ACKNOWLEDGMENTS:

Funding for this report was provided by the New York State AFL-CIO. The views, opinions, findings and conclusions or recommendations expressed in this report are those of the author(s). They do not necessarily reflect the views of the ILR School at Cornell University, The Worker Institute or the New York State AFL-CIO.

This report would not have been possible without assistance from the Worker Institute Undergraduate Research Fellows program and the students from that program who worked on the New York State App Workers Survey: Yoorie Chang, Jaylexia Clark, Dillon Jones, and Tyler Rodriguez. The authors of this report also want to thank Legna J. Cabrera, Rhonda Clouse, Linda Donahue, Hunter Moskowitz, and Stephanie Olszewski for their work on the report.

APPENDIX A: THE NEW YORK STATE APP WORKERS SURVEY

The material presented above in the section on “NYS On-Demand Experiences” draws from several sources. Worker Institute researchers compiled comments found on the job website Indeed.com for online platform workers from New York state between August and November 2018. We created a short survey which we distributed by email, using several different email lists. The largest of these was the email list of the NY State AFL-CIO; some affiliates distributed the survey further; the Tompkins County Workers’ Center sent the survey to its email list as well. Over the course of six weeks, we received 220 responses to the survey, of which 163 provided information about work obtained through platforms. We also conducted twelve semi-structured interviews with self-identified survey respondents.

Below are descriptive statistics on the survey respondents.

Chart A-1: For which apps do you work?

Number of respondents working for each app, and percent of total responses (n=162). Note: Percentages do not add up to 100% because respondents work for multiple apps.

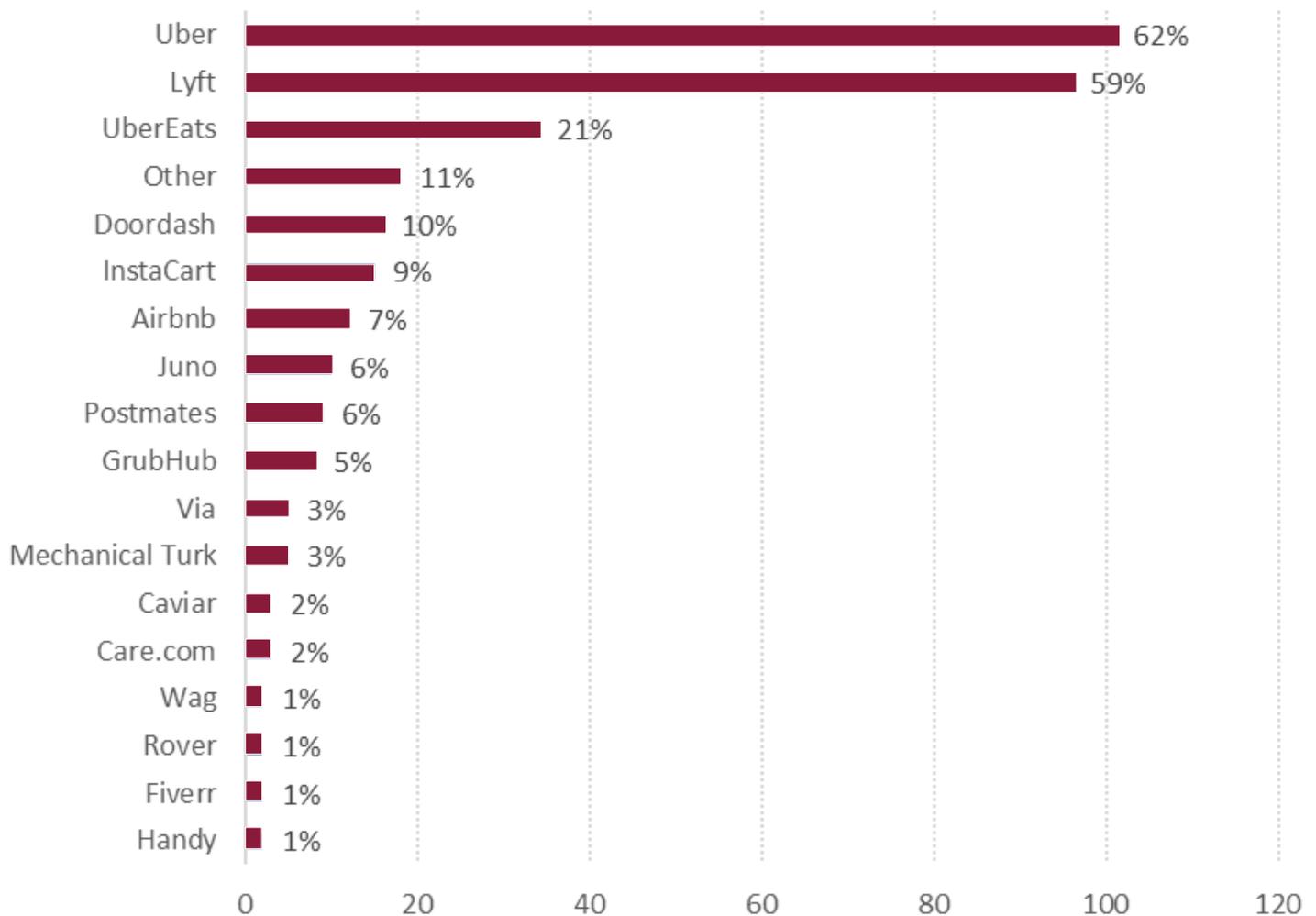


Chart A-2: Survey Respondents by NYS Region

(Where do you live?)(n=162)

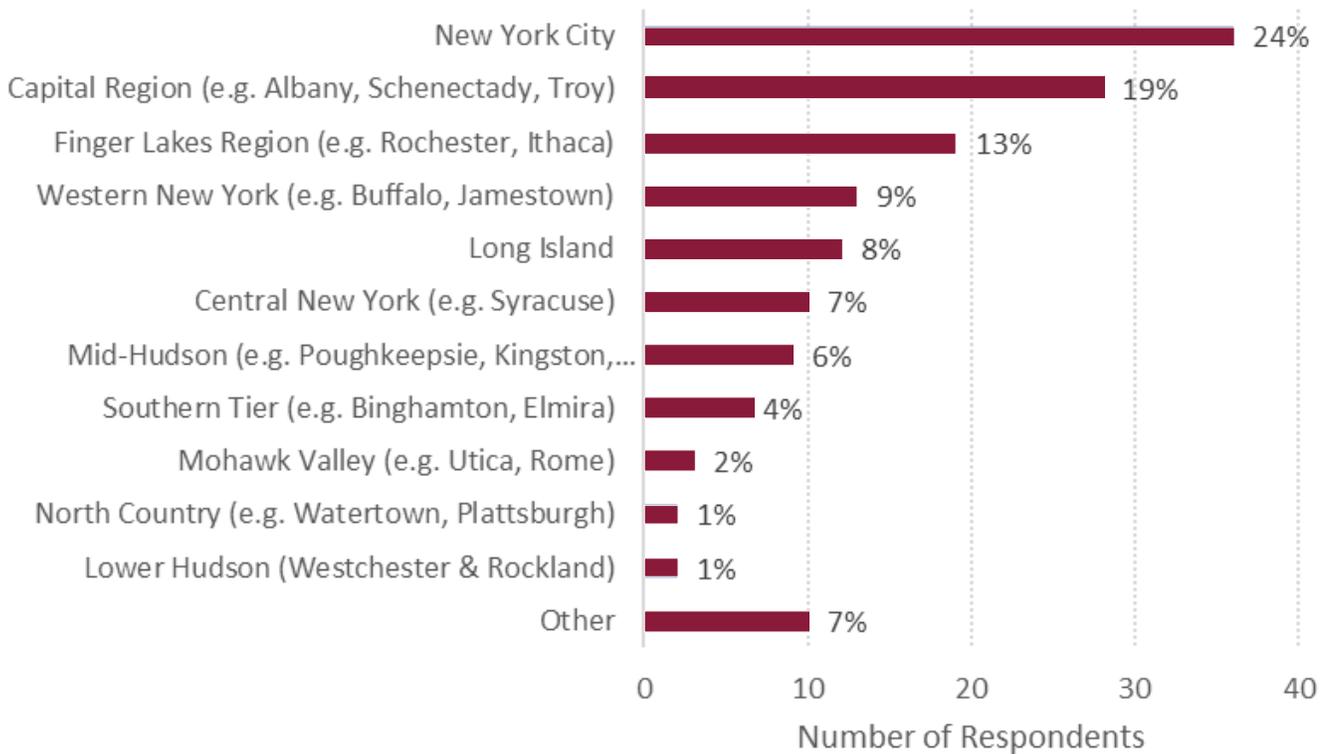


Chart A-3: How many hours per week do you work through the platforms?

(Number of respondents and % of total responses, n=161)

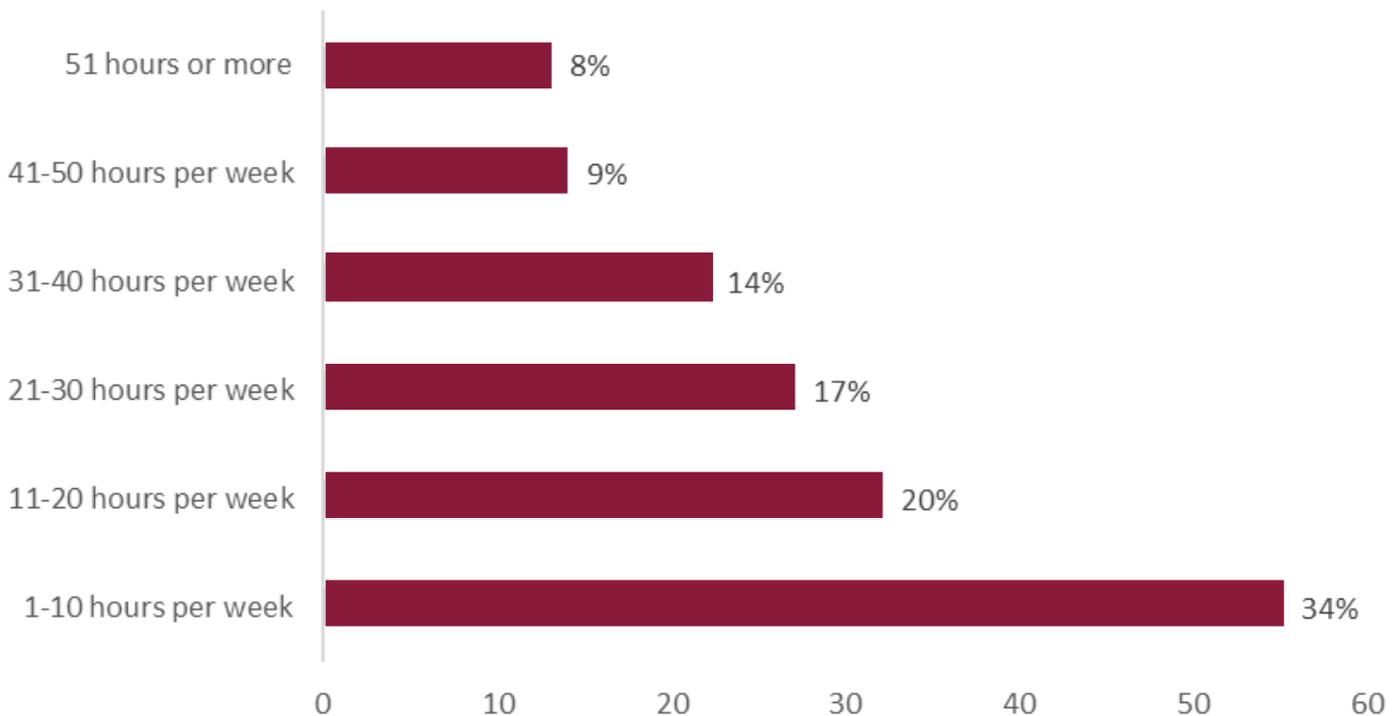


Chart A-4: How long have you been working with the platforms?

(Number of respondents and % of total responses, n=157)

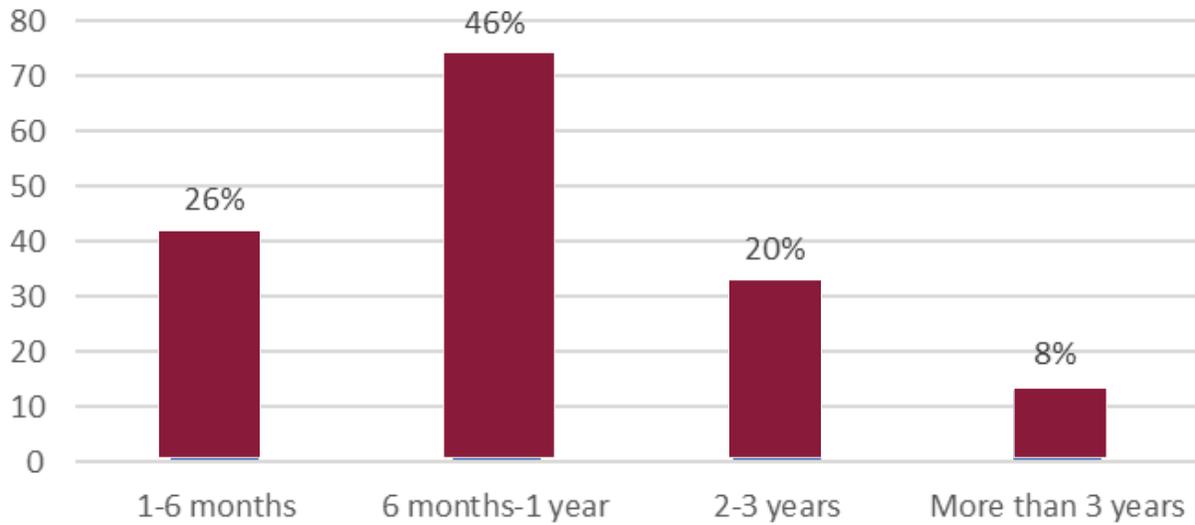


Chart A-5: Survey respondents by gender

(n=147)

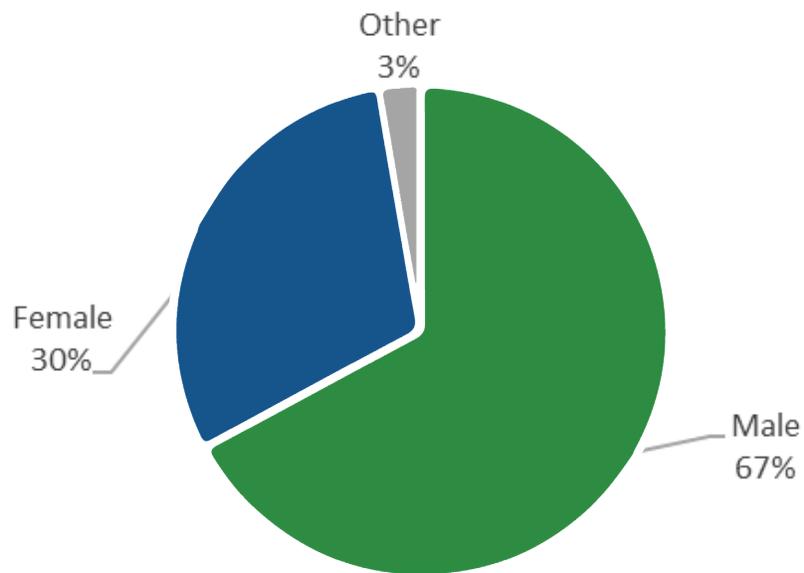


Chart A-6: Survey respondents by race/ethnicity?

(n=146)

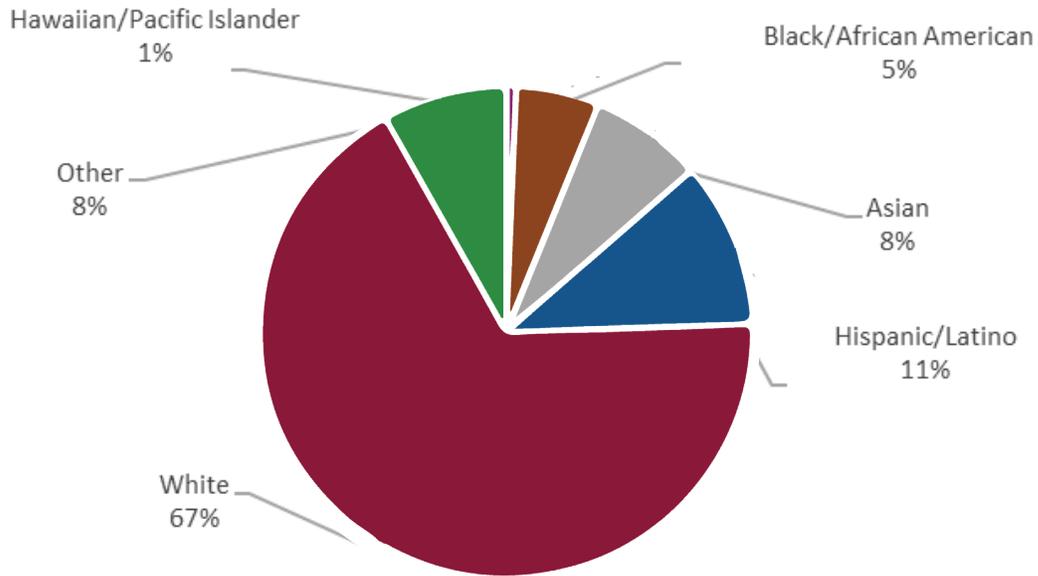


Chart A-7: Survey Respondents by Age

(n=147)

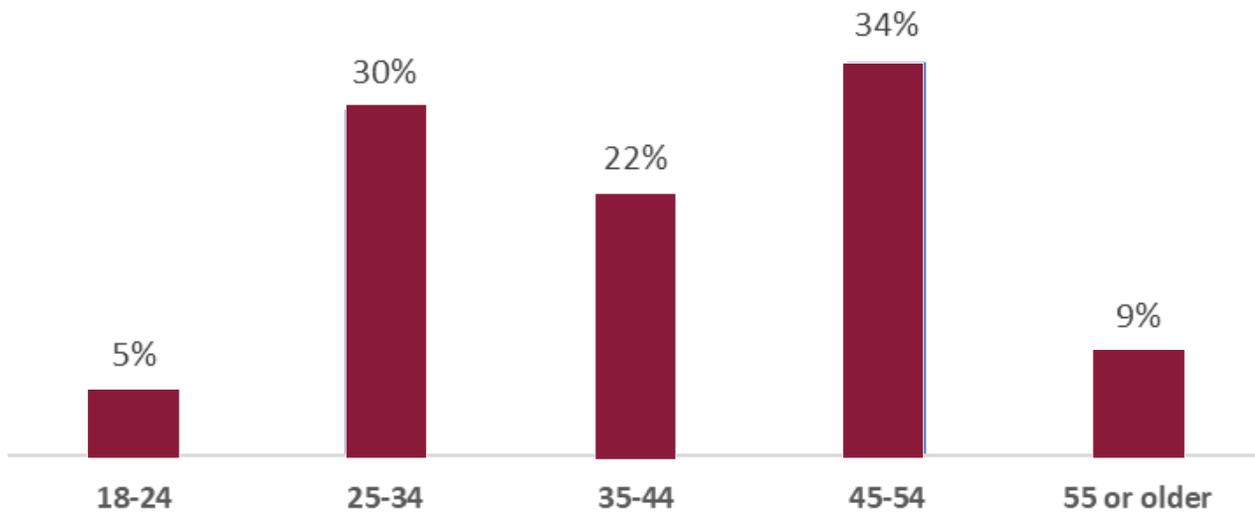


Chart A-8: Gender by Platform

(Selected Platforms, n=144)

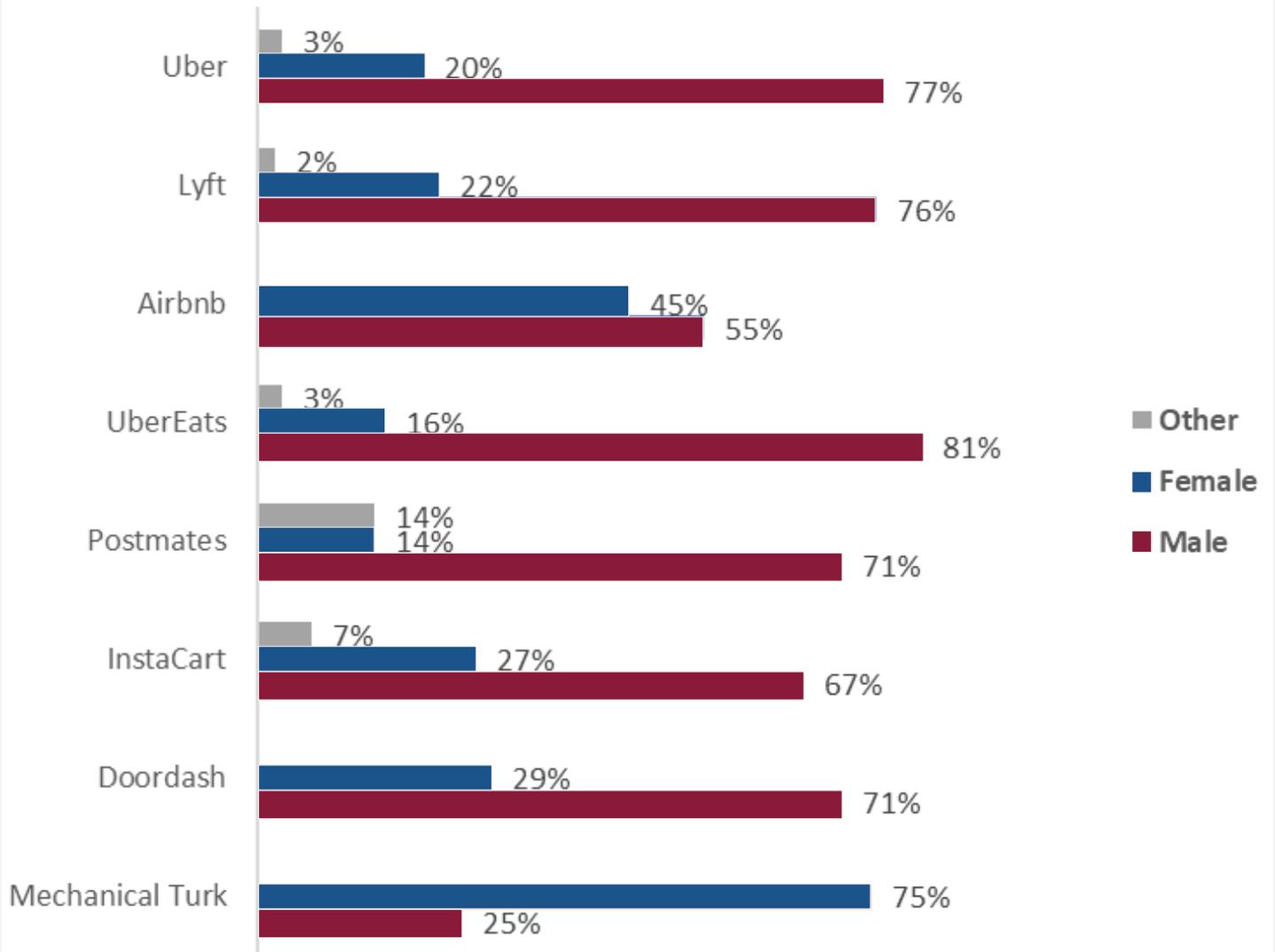


Table A-1: Ability to cover living expenses with app work, by Platform
(Selected Platforms, n=156)

	Fully by myself	With income from partner/spouse /family	Has another job	Resorts to other income/ support sources	Other	Total
Uber	16%	17%	36%	18%	12%	100%
Lyft	13%	15%	39%	20%	13%	100%
Doordash	0%	0%	50%	43%	7%	100%
InstaCart	13%	13%	40%	27%	7%	100%
Postmates	0%	0%	50%	38%	13%	100%
UberEats	12%	21%	33%	27%	6%	100%
Airbnb	17%	0%	25%	17%	42%	100%

Table A-2: Full/Part Time Status by Gender
(n= 148)

Gender	Full time	Side job
Male	39%	61%
Female	20%	80%
Other	75%	25%
Total	34%	66%

Table A-3: Ability to cover living expenses by Full/Part Time Status (n=157)

	Full Time	Part Time
<i>Q: Are you able to cover your living expenses with app work?</i>		
Yes, fully by myself	25%	5%
Yes, with income from partner/spouse or family	30%	4%
No, I have another job	4%	62%
No, I have to resort to other sources of income/resources	30%	20%
Other	11%	10%
Total	100%	100%

Table A-4: Full/Part Time Status by NYS Region
(n=149)

NYS Region	Full time	Side Job
Capital Region (e.g. Albany, Schenectady, Troy)	32%	68%
Central New York (e.g. Syracuse)	50%	50%
New York City	57%	43%
Long Island	17%	83%
Western New York (e.g. Buffalo, Jamestown)	23%	77%
Finger Lakes Region (e.g. Rochester, Ithaca)	21%	79%
Lower Hudson (Westchester & Rockland)	0%	100%
Mid-Hudson (e.g. Poughkeepsie, Kingston, Newburgh)	22%	78%
Mohawk Valley (e.g. Utica, Rome)	33%	67%
North Country (e.g. Watertown, Plattsburgh)	0%	100%
Southern Tier (e.g. Binghamton, Elmira)	17%	83%
Total	34%	66%

APPENDIX B:

ON-DEMAND PLATFORM COMPANIES BY REVENUE

Airbnb, Inc.	Lodging marketplace	San Francisco, CA	2008	\$2.6 billion (2017)	Privately-held	The "hosts" list their properties and "travelers" book through the marketplace.
Care.com	Care services	Waltham, MA		\$174.1 million (2017)	Publicly-traded	Provides an online marketplace that connects customers with caregivers (child, elder, and pet care, housekeepers, cleaners and tutors)
Caviar, Inc.	Food delivery	San Francisco, CA	2014	\$1.23 million (2017)	Subsidiary: Square, Inc.	Food delivery
DoorDash, Inc.	Food delivery	San Francisco, CA	2013		Privately-held	"Dashers" deliver food and other items to clients.
Fiverr	Freelance marketplace	Tel Aviv, Israel	2010	\$4.4 million (2017)	Privately-held	On-line marketplace for digital services.
Freelancer Limited	Freelance marketplace	Sydney, Australia	2009	\$26.3 million (2017)	Publicly-traded	A global marketplace to allow employers to access freelance provider. Employers post a job and freelancers bid for it.
Gett, Inc.	Transportation	New York City	2011	\$2.7 million (2017)	Privately-held	On-demand transportation and delivery company. Available in the US via Juno.
Grubhub, Inc.	Food delivery	Chicago, IL	2004	\$683 million (2017)	Publicly-traded	Food delivery and take-out
Handy	Home services	New York City	2012	\$6 million (2017)	Privately-held	On-line marketplace for residential cleaning, installation and other services.
Instacart	Goods delivery	San Francisco, CA	2012		Privately-held	Same day grocery delivery
Juno	Transportation	New York City	2016		Subsidiary: Gett, Inc.	On-demand ride-sharing company.
Lyft	Transportation	San Francisco, CA	2012	\$1 billion (2017)	Privately-held	On-demand ride sharing company.
Postmates	Goods delivery	San Francisco, CA	2011	\$21 million (2017)	Privately-held	Food, drinks and groceries delivery
Rover.com	Care services	Seattle, WA	2011		Privately-held	On-line marketplace for pet sitters and dog walkers
Shipt	Goods delivery	Alabama, San Francisco	2014	19.8 million (2017)	Subsidiary: Target	Grocery and alcohol delivery.
Sittercity	Care services	Chicago, IL	2001		Privately-held	Connects parents and caregivers
Sittingaround	Care services					Connects parents with childcare cooperatives.
Takl	Home services	Nashville, TN	2015	\$466,403 (2017)	Privately-held	On-line platform that connects clients with skilled providers.
TaskRabbit	Home services	San Francisco, CA	2008	\$5.4 million (2017)	Ikea subsidiary	On-line marketplace to match clients with freelance labor.
Thumbtack	Freelance marketplace	San Francisco, CA	2008	\$2.49 million (2017)	Privately-held	Online service that matches customers with local professionals.
Uber Technologies, Inc.	Transportation	San Francisco, CA	2009	\$37 billion (2017)	Privately-held	Uber described its services as a "peer-to-peer ridesharing, taxi cab, food delivery, bicycle-sharing, and transportation network.
Upwork	Freelance marketplace	Mountain View, CA	2015	\$2.52 million (2017)	Publicly-traded	"Hirers" sign up, post projects and request quotes.
Urbansitter, Inc.	Care services	San Francisco, CA	2011	\$1.82 million (2017)	Privately-held	The platform connects parents with a network of childcare providers.
Via Transportation	Transportation	New York City, NY	2012	\$11 million (2017)	Privately-held	On-demand ride-sharing company.

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Employer costs for employee compensation averaged \$36.22 per hour worked in June 2018... Wages and salaries averaged \$24.72 per hour worked and accounted for 68.3 percent of these costs, while benefit costs averaged \$11.50 and accounted for the remaining 31.7 percent. Total employer compensation costs for private industry workers averaged \$34.19 per hour worked. Total employer compensation costs for state and local government workers averaged \$49.23 per hour worked.

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- 105 New York State Department of Labor, "Annual Report of the Joint Enforcement Task Force on Employee Misclassification." February, 2015, pp.3, <https://labor.ny.gov/agencyinfo/annualrpt.shtm>. The Kogod Tax Policy Center at American University reported in 2016 that its survey results showed that "more than 60% of respondents who worked for an on-demand platform company in 2015 reported that they did not receive a Form 1099-K or Form 1099-MISC for their on-demand platform, which likely means the IRS didn't either." Bruckner, Caroline. "Shortchanged: The Tax Compliance Challenges of Small Business Operators Driving the On-Demand Platform Economy." Kogod School of Business, Kogod Tax Policy Center. May 2016, pp. 15, <https://www.american.edu/kogod/news/Shortchanged.cfm>.

- 106 State of California, Department of Industrial Relations, 2019, https://www.dir.ca.gov/dlse/worker_misclassification.html.
- 107 Deknatel, Anna and Lauen Hoff-Downing. "ABC on the Books and in the Courts: An Analysis of Recent Independent Contractor and Misclassification Statutes." University of Pennsylvania Journal of Law and Social Change, vol. 53, 2015. For a full list of statutes, see fn 11, pp.3.
- 108 1 New York Employment Law § 2.02 (2nd 2018); fn 36, pp.14.
- 109 The various legal tests developed to enforce the language and purpose of different statutes. At the federal level, for example, the National Labor Relations Act, the Civil Rights Act, the Fair Labor Standards Act, and ERISA each apply different criteria to determine employee status.

There are conflicts as well between federal and state rules. Under Section 530 of the Internal Revenue Code, an employer may appropriately classify individuals as independent contractors while some state statutes might hold them to be employees. Employee wages that may be taxable for state purposes might not be taxable for FICA, FUTA, or federal withholding.

Some jurisdictions use a hybrid of the common law and economic realities standards. See discussion in United States Government Accounting Office, "Improved Outreach Could Help Ensure Proper Worker Classification." Report to the Ranking Member, Committee on Health, Education, Labor, and Pensions, U.S. Senate. July 2006, pp. 25, <https://www.gao.gov/products/GAO-06-656>, hereinafter GAO, 2006.

- 110 U.S. Department of Labor Wage and Hour Division, "Administrator's Interpretation No. 2015-1," U.S. Department of Labor, July 15, 2015, pp. 3, https://www.blr.com/html_email/AI2015-1.pdf; also see, *Ansoumana v. Gristede's Operating Corp.*, 255 F. Supp. 2d 184, 2003 U.S. Dist. LEXIS 985 for articulation of standards for both the federal FLSA and New York's Minimum Wage Law, N.Y. Lab. Law Sections 650-665.
- 111 1 New York Employment Law § 2.02 (2nd 2018), pp. 15.
- 112 *Matter of Yoga Vida NYC, Inc. (Commissioner of Labor)*, 28 N.Y.3d 1013 (2016), 2016 N.Y. LEXIS 3216, 2016 NY Slip Op 06940, 167 Lab. Cas. (CCH) P61,749, Unemployment Ins. Rep. (CCH) P12,889.

Also see *Hertz Corp. v. Comm'r of Labor*, 2 N.Y.3d 733 (2004), 2004 N.Y. LEXIS 525:

Substantial evidence does not exist to support the Unemployment Insurance Appeal Board's determination that claimant was appellant corporation's employee for purposes of receiving unemployment insurance benefits. An employer-employee relationship exists when the evidence demonstrates that the employer exercises control over the results produced by a claimant or the means used to achieve the results. Such evidence was lacking where claimant visited travel agencies to promote the employer's products by distributing sales materials and making presentations, chose which agencies to visit and when to visit them, was compensated on a per-visit basis, was not required to attend meetings, had minimal supervision, was free to sell products that did not compete with the corporation and her contract with the employer identified her as an independent contractor. Incidental control over the results produced--without further evidence of control over the means employed to achieve the results--will not constitute substantial evidence of an employer-employee relationship.

- 113 *Matter of Yoga Vida*, pp. 1016-17.
- 114 N.Y. Unemployment Insurance Appeals Board. No. 015022526 (Taskrabbit). June 9, 2017, pp.5:

Here the company demonstrated control by such actions as:

- mandating workers to communicate within a set time and respond to requests within 24 hours;
- imposing behavioral rules and extensive prohibitions on work-related conduct;
- requiring that work be done personally and on time;
- requiring that only the company's app be used for all communications;
- controlling payment and reimbursement;
- imposing a nonnegotiable 15-20% service fee;
- providing users with access to the company's customer service to handle complaints.

- 115 NY Unemployment Insurance Appeals Board. No. 015-22529 (Postmates). Jun 9, 2017, pp.3:

The Board based its ruling on the following company practices:

- recruiting workers by advertising, screening, and conducting criminal background checks;
- training couriers and provided them with PEX cards for electronic purchasing of goods;
- handling monetary transactions: depositing funds into the PEX cards and handled collections;

- controlling the information provided to couriers and those which couriers would handle requests;
- tracking courier acceptance rates;
- replacing couriers;
- timing deliveries;
- establishing a delivery fee and nonnegotiable pay rate;
- retaining liability for incorrect deliveries or damaged goods;
- providing a monetary incentive for referrals;
- receiving customer complaints;
- monitoring customer satisfaction ratings; and
- terminating employment based on poor ratings.

- 116 *Matter of Vega (Commissioner of Labor)*, 162 A.D.3d 1337, 2018 N.Y. App. Div. LEXIS 4566, 2018 NY Slip Op 04610, Unemployment Ins. Rep. (CCH) P12,964, 2018 WL 3058287, pp. 3.
- 117 NYS Unemployment Insurance Appeals Board, “A.L.J. Case No. 016-23858 (Uber),” June 9, 2017, pp. 15, <https://uberlawsuit.com/NY%20unemployment%20decision.pdf>
- 118 Ibid.
- 119 Ibid, pp.17.
- 120 NY Unemployment Insurance Appeals Board, No. 596722 (Uber), July 12, 2018, pp. 8, <http://www.nyctaxinews.com/Uber%20AB%20Decision-redacted.pdf>

Also see Employment Tribunal, “Case no: 2202550/2015 & Others, Employment Tribunals Between Claimants Aslam, Farrar & Others and Respondents Uber B.V., Uber London Ltd., Uber Britannia Ltd., Reasons for the Reserved Judgment on Preliminary Hearing Sent to the Parties on 28 October 2016.” October 2016, <https://www.judiciary.uk/wp-content/uploads/2016/10/aslam-and-farrar-v-uber-reasons-20161028.pdf>. This is a particular informative decision that extensive cites and analyzes company documents.

121 Larson, Lex and Thomas a Robinson. *Larson’s Workers’ Compensation, Desk Edition*. Ch. 61, § 61.01 et seq. (Matthew Bender):

Because of the particular nature of the employment relationship, the statute makes special provisions for coverage for horseracing jockeys and so called “black car” operators [*N.Y. Work. Comp. Law §§ 18-a, 18-b*]. “Black cars” are non-medallion taxicabs common in New York City and are defined in Article 6-F of the Executive Law. The reason for this special treatment is that these two groups of workers do not neatly fit the category of either *independent contractor* or *employee*. Extended and unnecessary litigation of the issue of employer-*employee* relationship in “black car” cases has plagued the system for years, especially in the New York City area where black cars are common [see, e.g., *Jhoda v. Mauser Serv., Inc.*, 279 A.D.2d 853,854, 719 N.Y.S.2d 388, 389 (3d Dept. 2001); *Fisher v. SDAM Mgmt., Inc.*, 284 A.D.2d 845, 846, 727 N.Y.S.2d 724, 725–726 (3d Dept. 2001)].

122 See 1987 IRB LEXIS 254, Rev. Rul. 87-41, 1987-1 C.B. 296, 1987-23 I.R.B. 7 (I.R.S. January 1, 1987); Also see, Internal Revenue Service, “Independent Contractor (Self-Employed) or Employee?,” 2018 <https://www.irs.gov/businesses/small-businesses-self-employed/independent-contractor-self-employed-or-employee>

This overview from Deknatel and Hoff-Downing, 2015:

Since 1987, the IRS has considered twenty or more factors, to identify the existence of an employer-employee relationship; the list was derived from the common law “right to control” tests and so provides a helpful summary. The factors are organized into three categories: “behavioral control,” “financial control,” and “type of relationship,” and no factor is given specific weight or treated as dispositive. The behavioral control categories are: (1) instruction type, (2) degree of instruction, (3) evaluation systems and (4) training of the worker. To evaluate financial control, the IRS considers the ability of the business to “control the economic aspects of worker’s job,” considering: (5) significant investment, (6) unreimbursed expenses, (7) opportunity for profit or loss, (8) services available to the market or other businesses, and (9) the method of payment. Finally, in considering how the parties themselves “perceive their relationship to each other,” the IRS examines the presence or absence of (10) written contracts, (11) **employee** benefits, (12) permanency of the relationship, and (13) “services provided as key activity of the business.” Common law “right to control” tests implement similar non-dispositive factors regarding the control or direction of the means of work.

123 Harris, Seth D. and Alan B. Krueger, “A Proposal for Modernizing Labor Laws for Twenty-First-Century Work: “The Independent Worker,” The Hamilton Project, Brookings Institute, December 2015, http://www.hamiltonproject.org/assets/files/modernizing_labor_laws_for_twenty_first_century_work_krueger_harris.pdf

124 *Bynog v. Cipriani Group, Inc.*, 1 N.Y.3d 193 (2003), 2003 N.Y. LEXIS 4006.
 125 *Bynog*, pp.694-5.
 126 *Saleem v. Corp. Transp. Group, Ltd.*, 854 F.3d 131 (2017), 2017 U.S. App. LEXIS 6305
 127 29 U.S.C. Section 201 et seq.
 128 N.Y. Lab. Law Sec. 650 et seq.
 129 *Hart v. Rick's Cabaret Int'l, Inc.*, 60 F. Supp. 3d 447, 2014 U.S. Dist. LEXIS 160264
 130 Dancers were permitted to work elsewhere, didn't receive benefits, and were never on the club's payroll.
 131 *NLRB v. Hearst Publications*, 322 U.S. 111 (1944), 121.
 132 *Lawson v. Grubhub, Inc.*, 302 F. Supp. 3d 1071, 2018 U.S. Dist. LEXIS 21171, 83 Cal. Comp.
 Cases 498, 168 Lab. Cas. (CCH) P61,845, 2018 WL 776354.
 133 Summary of the California *Borello* test:

To the control of details criterion are added several secondary factors including:

- The right to discharge at will, without cause;
- Whether the one performing the services is engaged in a distinct occupation of business;
- The kind of occupation, with reference to whether the work is usually done with or without supervision;
- The skill required in the particular occupation;
- Whether the hirer or the worker supplies the instrumentalities, tools, and place of work;
- The length of time for which the services are to be performed;
- Method of payment, whether by the time or by the job;
- Whether or not the work is part of the regular business of the principal;
- Whether or not the parties believe they are creating a relationship of employer-employee.

134 *S. G. Borello & Sons, Inc. v. Department of Industrial Relations*, 48 Cal. 3d 341, 1989 Cal. LEXIS 975, 54 Cal. Comp. Cases 80; as cited and discussed in *Dynamex* below, pp. 922. At issue was employee status under California's workers' compensation statute.
 135 *Dynamex Operations West, Inc. v. Superior Court*, 4 Cal. 5th 903 (2018), 2018 Cal. LEXIS 3152.
 136 *Dynamex*, pp. 954.
 137 California Legislative Information, "AB-5 Worker status: independent contractors," December 3, 2018, https://leginfo.ca.gov/faces/billNavClient.xhtml?bill_id=201920200AB5.
 138 Planmatics, pp.14-15; Carre, Françoise. "(In)dependent Contractor Misclassification." Economic Policy Institute, Economic Briefing Paper #402. 2015, pp.15, <https://www.epi.org/publication/independent-contractor-misclassification/>.
 139 Alabama, California, Florida, Iowa, Kansas, Kentucky, Massachusetts, Minnesota, Mississippi, North Dakota, New York, Oklahoma, South Carolina, Tennessee, and the District of Columbia.
 140 Alaska, Arkansas, Colorado, Connecticut, Delaware, Illinois, Indiana, Louisiana, Maine, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, Ohio, Pennsylvania, Utah, Vermont, Virginia, and West Virginia. Georgia and Hawaii use a modified version.
 141 Arizona, Idaho, Maryland, Michigan, North Carolina, Nevada, Oregon, South Dakota, Washington, and Wisconsin.
 142 Missouri, Rhode Island, Texas, and Wyoming.
 143 *Planmatics*, pp. 20-22 and A7.
 144 *In re Claims of Cool*, 57 A.D.2d 450, 396 N.Y.S.2d 76, 1977 N.Y. App. Div. LEXIS 11821. Appellate Court reversed UI Appeals Board decision that town highway superintendents who failed to win re-election were "employees". Court applied the common law test in the Internal Revenue Code and determined that claimants were outside the definition of "employee".

In order to be entitled to benefits under this program the employment must be performed by an employee as defined in subdivision (d) of [section 3121 of the Internal Revenue Code of 1954 \(US Code, tit 26, § 3304](#), Special Unemployment Assistance Program, § 210, subd [c], par [1]). An employee is therein defined as "any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee" ([US Code, tit 26, § 3121, subd \[d\], par \[2\]](#)).

"The common law test of what constitutes an independent contractor or an employer-employee relationship is applicable in determining when the Unemployment Insurance Law is applicable." *In re 151 E. 59th Street Rest. Corp.*, 3 A.D.2d 789, 160 N.Y.S.2d 29 (3d Dep't 1957) referenced in 3 New York Employment Law § 39.03 (2nd 2018), pp. 9.

“Administrative agency and court decisions have resorted to the common law understanding of the **employee**-employer relationship to determine whether services are rendered by an **employee** for unemployment insurance purposes.” See, e.g., *In re Charles A. Field Delivery Serv.*, 66 N.Y.2d 516 (1985). 1 New York Employment Law § 2.02 (2nd 2018); fn 36 pp. 14.

145 Deknatel and Hoff-Downing, 2015, pp. 58.

146 Delaware, Illinois, Kansas, Maine, Maryland, Massachusetts, Minnesota, Nebraska, New Hampshire, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Utah, and Washington. *Ibid.* pp. 65, fn 63.

147 Deknatel and Hoff-Downing, 2015, pp. 65.

148 *Ibid.*

149 *Ibid.*, 67.

150 Cal Lab Code § 2750.5(c)

151 See *Jones v. Sorenson*, 25 Cal. App. 5th 933, , 83 Cal. Comp. Cases 1397, 2018 Cal. App.

LEXIS 680, 2018 WL 3654897; also see Deering Annotations to § 2750.5.

152 820 ILCS 185/10.

153 N.J. Stat. § 34:20-4.

154 As reported in a recent Policy Brief from the National Employment Law Project:

A number of state agencies have determined that certain on-demand workers are “employees” within the meaning of state law. See: Advisory Opinion on the Employment Status of Uber Drivers (Oregon Bureau of Labor and Industry, Oct. 14, 2015), <http://uberlawsuit.com/Oregon.pdf>; *Berwick v. Uber Technologies, Inc.*, No. 11-46739, 2015 WL 4153765, (CA Labor Commissioner, Department of Industrial Relations, Division of Labor Standards Enforcement, Jun. 4, 2015); *Uber*, No. 4371509 (California Unemployment Appeals Board, Jun. 1, 2015); No. 016-23858, (NY Unemployment Insurance Appeals Board, Jun. 9, 2017)(Uber); No. 015022526 (N.Y. Unemployment Insurance Appeals Board, Jun 9, 2017)(Taskrabbit); No. 015-22529 (NY Unemployment Insurance Appeals Board, Jun 9, 2017)(Postmates); In the Matter of the Petition for a Finding of the Failure to Insure Workers’ Compensation Liability, and Assessment of a Civil Penalty Against, Uber Technologies, Inc and Rasier LLC, 2015 WL 4699265 (Alaska, Department of Labor and Workforce Development, Jul. 31, 2015).

Smith, Rebecca. “ ‘Marketplace Platforms’ and ‘Employers’ Under State Law – Why We Should Reject Corporate Solutions and Support Worker-Led Innovation.” National Employment Law Project, Policy Brief. May 2018, fn. 2, pp.5, <https://www.nelp.org/publication/marketplace-platforms-employers-state-law-reject-corporate-solutions-support-worker-led-innovation/>.

155 NY CLS Labor § 861-a.

156 NY CLS Labor § 861-c.

157 National Employment Law Project. “The On-Demand Economy & State Labor Protections: State Legislatures and Agencies Can Better Protect On-Demand and Other Contingent Workers in Their Labor Laws.” Policy Brief, National Employment Law Project, January 2017, <https://www.nelp.org/publication/the-on-demand-economy-state-labor-protections/>.

158 NY CLS Labor § 861-c.

159 “The term ‘willfully violates’ means a contractor knew or should have known that his or her conduct was prohibited by this section.” §861-e (2).

160 NY CLS Labor § 861-f; 820 ILCS 185/55; Deknatel and Hoff-Downing, pp.78; 19 Del. C. § 3509; 21 V.S.A. § 710.

161 820 ILCS 185/60; N.J. Stat. § 34:20-8.

162 Deknatel and Hoff-Downing, 2015, pp.74.

163 Cal Lab Code § 2753.

164 Deknatel and Hoff-Downing, 2015, pp.77.

165 Conn. Gen. Stat. § 31-76a.

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The Worker Institute at Cornell, an institute of the ILR School, engages in research and education on contemporary labor issues, to generate innovative thinking and solutions to problems related to work, economy and society. The Institute brings together researchers, educators and students with practitioners in labor, business and policymaking to confront growing economic and social inequalities, in the interests of working people and their families. A core value of The Worker Institute is that worker rights and collective representation are vital to a fair economy, robust democracy and just society.



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