The Business Council

Testimony to

New York State Senate Standing Committee on Internet and Technology

Examination of the Gig Economy

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Thank you for the opportunity to speak with you today. The Business Council of New York State is the largest state-wide employer association in New York representing more than 2,300 private-sector employers of all sizes across all industry sectors. To achieve our mission to "create economic growth, good jobs and strong communities," it is vital the state have a business climate that supports innovation while ensuring important basic worker protections. It may sound cliché, but workers are our members' most important resource, a fact even more obvious in the modern "gig" or "sharing" economy.

We all recognize that the nature of work has changed since the adoption of the National Labor Relations Act of 1935, the Taft-Hartley Act of 1947, and current IRS law regarding the definition of employee. Itis important that state and federal labor laws change and adapt in response to the new realities of the nature of work and the desires of workers. Any changes, however, should share a couple of important characteristics:

Efficiency – Any new or amended law or regulation should be workable and provide certainty to employers and third-party intermediaries, and to the workers with whom they are engaged (for clarification, I'll refer to third-parties that facilitate the provision of personal services as "intermediaries" rather than "employers"). We have an excellent example of an inefficient approach in California's recently passed Assembly Bill 5, which is expected to be held up in legal challenges for the foreseeable future.

Fairness – Any new system of laws or regulations should not provide employers an unintended incentive to structure themselves in such a way to avoid basic obligations and gain an unfair advantage over other employers.

Toward these objectives, I would urge the Committee to consider the following:

Civil Rights Protections - Every worker deserves to work in an environment free from discrimination or harassment based on age, race, sex, religion or any other characteristic protected by law. Legislators should consider extending these existing statutory protections to independent workers without creating a statutory employer-employee relationship. Unless modified, federal law will most likely still restrict these workers from access to federal redress of grievances.

Benefit Pools – Intermediaries are often better positioned to provide certain worker benefits due to economies of scale and risk diversification. Applicable laws should be amended to allow intermediaries the ability to voluntarily provide workers the opportunity to opt-in to certain benefits, e.g., benefits such as insurance services, guidance on tax designations, disability insurance, retirement products, auto insurance, etc.

Workers' Compensation - Some will argue that the liability of intermediaries for injuries sustained by workers who are not on premises or using equipment provided by the intermediaries is limited. Even so, New York State already has a "pooling" of risk mechanism within the Black Car Fund. Participation in this fund could potentially be extended to certain intermediaries – but not all.

Retirement Benefits - The state should also consider options to modify its soon to be launched Smart Choice program, which as adopted is an employer-based opt-in retirement program, to accommodate participation by individuals who are not in a legal employer/employee relationship.

There are, however, several instance in which it would be impractical and unworkable to extend independent workers statutory protections due to the unique nature of the work being performed.
These include:

Minimum Wage and Overtime – Independent workers benefit from the flexibility to work only when they want to do, rather than on a schedule set by an "employer;" as such, the trade-off is that they are outside the protections of the Fair Labor Standards Act and New York State wage and hour. In addition, the impracticability of accurately and fairly measuring "hours worked" makes providing these protections infeasible. For example, in the case of a driver working for more than one app-based intermediary and having multiple apps open, two questions arise: Should the driver be compensated for waiting time? And if so, who should compensate the driver?

The Fair Labor Standards Act suggests a worker "waiting to be engaged" is not entitled to compensation while workers "engaged to wait" are entitled to compensation. One would argue a driver who is not obligated to pick up a passenger or deliver food is "waiting to be engaged" and not entitled to have those hours count as hours worked. But even if the driver was deemed to be "engaged to wait," it is unclear which intermediary is responsible for payment of that time. The ability of workers to work for multiple entities at the same time is a unique and desirable characteristic of the gig economy. In fact, the National Labor Relations Board recently issued a decision - related to Uber - that the *entrepreneurial opportunity* provided by the nature of work with these intermediaries is key in determining that they are indeed independent contractors and not employees subject to minimum wage and overtime.

Moreover, it should be recognized that the state's minimum wage law does far more than set a wage standard; it also imposes a broad array of detailed record-keeping and reporting obligations on "employers."

Collective Bargaining – Current National Labor Relations law delineates mandatory, permissive and illegal subjects of bargaining. Major reforms of federal labor law would be required before an intermediary could possibly engage in legally required good-faith bargaining. Add to this the difficulty of determining appropriate bargaining units, determining whether workers are engaged in lawful or unlawful work stoppages, or even conducting lawful representation elections, it becomes clear that extending current collective bargaining rights to this unique group of independent workers in impractical.

Unemployment Insurance – The UI system was intended to provide benefits to workers who lose their jobs through no fault of their own. This 100% employer-funded insurance program was never intended to provide benefits to workers who voluntarily opt out of their jobs or are dismissed for cause. (Note, even though a state Labor Department ALJ has ruled that some "app" drivers can qualify for UI benefits based on their hours worked and earnings, in our view, such workers would not receive benefits if they voluntarily disengage from such "app," i.e., the same treatment under law as for traditional "employees".) As mentioned above, workers desire the flexibility provided by these intermediaries to work when and how often they wish. It is impractical to apply the basic premises of the UI system to these new work arrangements.

Health Insurance – Unfortunately, New York's ability to affect change in the health insurance arena is hamstrung by the Employer Shared Responsibility provisions of the Affordable Care Act. Changes to federal law would be required to address this issue. Even so, as we have discussed in other forums related to other legislative proposals, New York has nearly achieved universal coverage under its current health insurance structure, with most of the remaining 4.5 percent of uncovered New Yorkers eligible to receive coverage under existing state plans. This is why the Business Council has supported efforts, such as S.3900 / A.5974, which by allowing people, currently ineligible for federal financial participation because of immigration status, to buy health insurance under New York's Essential Health program, would bring New York to almost universal coverage without adversely impacting the state's economy.

Which brings us to a final point. As we have demonstrated, many state and federal laws would need to be amended to effectively meet our stated goals of efficiency and fairness, from federal tax, labor, employment and health laws to New York wage and hour and insurance laws. We suggest a federal solution to this issue is the best course.

Any efforts by New York to address the independent worker issue needs to be looked at through the prism of how this will affect New York's general business climate. Any unilateral action will set New York apart from surrounding states and could hamper our business competitiveness. Major changes to law that create an employer-employee relationship between third-party intermediaries like Uber, Lyft, Instacart, Wag, etc. could result in these companies limiting their services in, or withdrawing their services, from New York - making New York a less desirable as a location for business expansion and job growth.

I thank the Committee for its time and attention. The Business Council is always available to provide insight and answers any questions you may have. Thank you for allowing us to be a part of this important conversation.