NATIONAL EMPLOYMENT LAW PROJECT

Rebecca Dixon
Executive Director

www.nelp.org

NELP National Office
90 Broad Street
Suite 1100
New York, NY 10004
212-285-3025

Washington, DC Office
1350 Connecticut Ave. NW
Suite 1050
Washington, DC 20036
202-640-6520

California Office
2030 Addison Street
Suite 420
Berkeley, CA 94704
510-982-5945

Washington State Office
300 Lenora Street #357
Seattle, WA 98121
206-324-4000

February 29, 2020

To the Honorable Members of the New York State Senate:

I am testifying on behalf of the National Employment Law Project (NELP), a national legal, research, and policy organization with more than fifty years of experience advocating for policies that create good jobs, expand access to work, and strengthen protections and support for workers in low-wage industries and for unemployed workers. NELP also is a member of the New York Do It Right Employment Classification Test (NY DIRECT) Coalition, a group of workers, organizers, racial and social justice advocates, and lawyers advocating for an across-the-board ABC test in New York.

For more than a century, labor and employment laws have required employers to comply with baseline labor standards—like the right to collectively bargain, minimum wage and overtime, health and safety, and anti-discrimination protections—for their employees but not for independent contractors. To evade complying with these laws, bad actor employers in all industries label their workers "independent contractors." When companies misclassify their workers, they unlawfully evade accountability to workers who rightly should be considered employees.

In an apparent effort to address the crisis of misclassification, the proposed legislation (Senate Bill 07508A/Assembly Bill 09508-A) creates a state task force on "digital marketplace worker classification" that will provide recommendations to address "the conditions of employment and classification of workers in the modern economy of on-demand workers connected to customers via the internet." The proposed legislation also amends the Labor Law to authorize the Labor Commissioner to promulgate regulations on "the appropriate classification [either as employees or independent contractors] of individuals providing services for a digital marketplace company."

To the degree it recognizes that misclassification is an urgent problem that must be addressed, the proposed legislation is a commendable first step. But its myopic focus on the "digital marketplace" renders the proposal, well-intentioned as it is, incomplete.

Even putting aside serious legal issues, including improper delegation of legislative authority to an administrative agency, the legislation fails to meet the challenges of the day.

Misclassification is rampant in New York. According to a recent report by the New School's Center for New York City Affairs[1], an estimated 850,000 low-paid workers in the state may be improperly classified as "independent contractors." Working full-time, they earn a median

[1] Lina Moe, James A. Parrott, and Jason Rochford, "The Magnitude of Low-Paid Gig and Independent Contractors in New York State," The New School Center for New York City Affairs (Feb. 11, 2020), available at http://www.centernyc.org/s/Feb112020_GigReport.pdf.

income of $20,000. One in four are on Medicaid, while one in five have no health insurance whatsoever. Over the past ten years, those who have unlawfully been classified as independent contractors have missed out on the historic minimum wage increases and labor standards improvements in the state. Further, in New York City, two out of every three misclassified workers are people of color; when employers strip away their labor protections, they help to maintain pernicious racial wealth gaps.

Critically, only 20 percent of workers who are misclassified receive their work through a "digital marketplace." That represents only 1.6 percent of the state's total workforce. This legislation leaves behind the four out of five workers operating outside the "gig" economy whom employers have willfully mislabeled and dispossessed of rights and protections. "Gig" vs. non-"gig" is an arbitrary distinction that ignores that employers have misclassified workers for decades, well before labor could be sourced through a "digital marketplace." The proposal will leave behind the 700,000 individuals—including janitors, nail salon workers, nannies, homecare workers, and bike couriers—to whom employers have for so long refused to be accountable.

By exclusively targeting the "digital marketplace," this legislation fails to meet even 50 percent of the problem. It is, at best, a one-fifth-measure. It's the tip of the iceberg.

Low-wage workers in New York need more than an inadequate task force. Misclassification is a crisis for workers in all industries. This legislation ought to reflect that reality.

Sincerely,

Brian Chen
Staff Attorney
National Employment Law Project

Chuck Braman <cbraman@me.com>

This testimony is regarding pending legislation introduced by Senator Robert Jackson (Senate Bill S6699A), Assembly Member Deborah Glick (Assembly Bill A8721A), Governor Andrew Cuomo (2021 Executive Budget page 440), Legal Aid Society/Authors Guild/NWU/UAW/32BJ SEIU, and any similar legislation that may be introduced in the future that would seek to reclassify many or all current independent contractors as employers or employees.

* * * * * *

I run two freelance businesses that have taken me 30 years to build successfully — one as a bandleader, another as a graphic designer.

As a bandleader, I'm hired by ever-changing clients in many different contexts. It would not be practical for any of them to hire me full-time. And my sidemen are many and ever-changing. I cannot hire any of them full-time. As a freelance graphic designer, my clients are many and ever-changing. Not one of them would hire me full-time to design, say, a website or a PowerPoint presentation.

I'm 60-years old, and so will never be hired full-time by a company. If forced to give up my freelance businesses, I will have no alternative but to face permanent unemployment, or to leave the state. For independent contractors older than me, the consequences will be more dire.

But isn't this law needed to protect ride-share drivers whose employers exploit them by depriving them of benefits?

First, Uber is not an employer. Uber is a broker that connects freelancers to their clients.

And when Uber drivers were asked "what's the thing you most care about," 53% said salary, 37% flexibility, and nearly none said benefits.

In other words, like other freelancers, the protection these freelancers desire is protection from the law itself, not from the companies that connect them with their customers.

The exploitation narrative comes not from freelancers, but from unions, who created it to gain public support for the passage of these laws in order to grow their membership.

In California, New York, and across the country, facing the loss of their livelihoods, many Democrat freelancers have begun vowing to vote Republican. Thus, wherever and whenever this law is passed, any gains a politician might receive from increased union dollars will be offset by the loss of their former constituents.

Please consider the consequences of what you're doing, and reverse your course. It's not too late now, for New York's freelancers, or for yourselves. Very soon, it will be.

Reply Forward