

THE “RIGHTS ON DEMAND” SERIES

Making Unemployment Insurance Work for On-Demand Workers

This policy brief explains why workers in the on-demand economy, regardless of how the company they work for labels them, can and should be covered by unemployment insurance, either as employees or independent contractors. It includes recommendations for state agencies to enforce and apply current law as well as more forward-thinking reforms to address the needs of on-demand workers and “contingent” workers more broadly.

With more people engaging in work for on-demand companies such as Uber (driving), Care.com (child care and home care), TaskRabbit (home services) and Postmates (delivery), the question of whether and how our current unemployment compensation system can address the needs of “contingent” workers has become a central one.

What is Unemployment Insurance?

Unemployment insurance is an 81-year-old federal and state social insurance program that provides partial wage replacement and reemployment services to individuals who are between jobs. To be eligible, individuals must usually be unemployed for reasons beyond their control, have a sufficient work history (called a “base period”), and be actively searching for another job.

Unemployment insurance (UI) is an effective anti-poverty tool. In 2009 alone, when recessionary layoffs peaked, UI benefits kept five million people out of poverty.¹ UI directs benefits to cash-strapped individuals and families, who then quickly spend them on necessary everyday expenses, like groceries and gas. This helps stabilize our economy during recessions by reducing the drop in consumption.²

As effective as the federal-state UI program has been, however, it was originally designed to support a male manufacturing workforce. Among many changes in the labor market, today, more women financially support their families, either as single parents or as part of dual-earner households.³ Today’s workforce is more vulnerable to permanent layoffs, to chronic underemployment in part-time work, and to wide swings in monthly income.

In addition, an increasing share of workers are engaged in alternative work arrangements. This includes independent contractors, on-call workers, temporary agency workers, and contract company workers.⁴ At 9.6 percent of all workers, independent contractors represent by far the largest share of alternative work.⁵ However, the UI program does not extend coverage to independent contractors.

Worker Classification and Employee Status in the On-Demand Economy

As a cost-cutting measure, on-demand companies will often call their workers “independent contractors,” claiming they are would-be entrepreneurs and in business for themselves, even though they perform the core work of the companies and are held to standards of service-provision and performance that are characteristic of an employer-employee relationship.⁶ Besides depriving on-demand workers of their rights to state and federal labor protections and access to company benefit plans, workers misclassified as independent contractors lose out on income support from the UI program when they experience reduced demand for their services or become separated from their jobs completely.

Besides depriving on-demand workers of their rights to labor protections and access to benefit plans, workers misclassified as independent contractors lose out on income support from unemployment insurance when they experience reduced demand for their services or become separated from their jobs completely.

States rely on a variety of statutory tests to determine employer-employee relationships under their UI laws. More than half of states use some variant of the “ABC test.”⁷ Under ABC tests, services for pay are presumed to be employment, and the worker is considered an employee, unless each of three tests for exclusion is passed, related to whether the worker is in business for herself, whether her work is in the usual course of the employer’s business, and whether the business exercises control over her. Because these laws create a presumption of employee status and require employers to overcome that status by showing three factors, they are an effective way to reduce misclassification. Under ABC state tests, many—if not most—on-demand workers should qualify as “employees,” since they are serving the business of the companies they work for and do not have their own separate businesses.

Agencies in a number of states have already found that on-demand workers are employees under various state laws.⁸ As a basic measure, states should enforce laws on the books for decades, both in the individual cases that come before them and in company-wide audits of on-demand companies.

Why is Unemployment Insurance Important to On-Demand Workers?

Coverage under unemployment insurance laws is critical for on-demand workers and states themselves for several reasons. First, employers must pay payroll taxes for their employees. For workers who have engaged in on-demand work in the past year, tax documentation helps them to establish eligibility for UI, even if their job separation is from a different job at a later date. Collecting these taxes also serves to ensure that the system meets its social insurance objectives. Second, on-demand workers experience involuntary job separations just like other workers—a prominent example is when the rideshare company Uber “deactivates” a worker.

Finally, workers in on-demand jobs often work multiple jobs and suffer chronic income volatility. A recent report from the Century Foundation and the National Employment Law Project found that income volatility for all workers during and after the Great Recession were much worse than commonly understood.⁹ Primary earners in three out of five families experienced a month-to-month earnings drop of at least 50 percent at some point between 2008 and 2013, while the average month-to-month variation for a typical individual earner was \$2,300 to \$2,600.

A prior large-scale independent study by the JPMorgan Chase Institute studied the incomes of one million customers with active Chase bank accounts—260,000 of whom participated in the online platform economy. The study found that 7 in 10 young adults saw their incomes change month to month by an average of 30 percent. Nearly three in four low-income people saw that magnitude of change in their monthly income.¹⁰

The study additionally found that workers in contingent work arrangements, including freelancers, the self-employed, temporary, on-call, and other workers, experience nearly twice as much earnings volatility as those in more traditional work arrangements.¹¹

Workers in contingent work arrangements experience nearly twice as much earnings volatility as those in more traditional work arrangements.

On-demand workers often hold multiple jobs. The JPMorgan Chase study found that more than 8 in 10 held another wage or salaried job, for which they were considered “employees.” A separate survey of so-called “crowdworkers”—workers who do “gigs” online for companies such as Amazon’s Mechanical Turk—found that 60 percent had a separate job.¹² Another recent study found that over 40 percent of on-demand workers work for two or more companies in a given week, with one in seven working for three or more companies.¹³

Current UI programs can and do address income volatility created when workers are partially unemployed as well as when they entirely lose one job and must quit their second or third job, in their search for a more stable income.

Unemployment Insurance Can Deliver Important Income-Smoothing Benefits to On-Demand Workers

Partial Unemployment Insurance

Typically, workers receive UI to prevent economic hardship during periods without any work or earnings. However, individuals performing work in the on-demand economy who experience a reduction in their usual hours and earnings may also be eligible for partial UI benefits under current state rules. Partial benefits are meant to mitigate the impact of sudden drops in income that occur when employees’ schedules do not provide adequate hours and they experience low earnings as a result. They can also provide benefits to claimants working part time while they search for a permanent, full-time job.¹⁴

In general, to be eligible, individuals must be working part time and earning below a certain threshold in a week. Most states take the difference between the claimant’s usual benefit and her part-time earnings, after accounting for an “earnings disregard.” The disregarded portion of earnings is not deducted from the claimant’s benefit.

Workers experiencing a chronic lack of sufficient hours of work, and low earnings as a result—working conditions that characterize many on-demand jobs—may currently be eligible for partial UI benefits, as long as their weekly job schedules do not exceed a state’s definition of part-time work, and their weekly earnings are substantially lower than they were over the prior year.¹⁵

While there is wide variation in the generosity of state unemployment benefits for partial unemployment—10 states replace at least half of lost earnings for workers earning \$10 per hour whose hours are cut in half, from full-time to part-time, or from 40 to 20 hours; while 14 states would provide no benefits at all¹⁶—states should apply current law to workers in this situation.

Good Cause for Leaving After a Rate or Hours Reduction

Workers facing a cut to their hours or earnings may struggle mightily: The average household has less savings than in earlier decades.¹⁷ According to research, just 41 percent of households had enough accessible savings to cover an emergency expense worth \$2,000.¹⁸ In particular, in survey after survey, on-demand workers report that despite working multiple jobs, they struggle to find enough work to make ends meet.¹⁹

In survey after survey, on-demand workers report that despite working multiple jobs, they struggle to find enough work to make ends meet.

Faced with a cut in wages or hours, on-demand workers may decide to quit their jobs and seek new, more stable employment. Though practices vary widely from state to state, a provision in UI rules that allows workers to “voluntarily” leave their jobs with good cause will usually recognize a substantial earnings reduction (usually 25 percent) as good cause for leaving a job.²⁰

This standard provision in UI laws is already adequate to cover many on-demand workers; for example, the Uber driver whose wages are cut due to Uber’s common practice of lowering rates in dozens of cities.

Good Cause for Leaving a Second or Third Job

A few states have sensible rules pertaining to multiple job holding which would apply to workers in the on-demand economy, many of whom hold more than one job at a time. For example, Hawaii allows workers who leave part-time work because of the loss of a full-time job that makes it economically unfeasible to continue the part-time work to receive UI benefits. In the case of a worker with a full-time job who engages in on-demand work for a

few extra hours a week, that worker would qualify for UI if she were forced to leave her on-demand work after losing the full-time job. In Michigan, an individual who is concurrently working part time for one employer as well as full time for another employer will not be disqualified if she voluntarily leaves the part-time work while continuing work with the other employer. These rules can currently extend vital income supports to workers in the on-demand economy in some states, and can be adopted by other states.

What New Policies Would Address the Particular Needs of On-Demand and Contingent Workers, Both Employees and Freelancers?

As a first step, state agencies should enforce the broad definitions of “employee” in their current laws, in order to ensure that they are collecting payroll taxes due, that misclassified workers gain credits to establish a base period, and that their eligibility for benefits is correctly established under current law.

States can also enact discreet changes to their laws to ensure that on-demand companies are not gaming their current definitions. These can include small changes to the ABC or existing state UI test for employee status, or simply clearly stating that on-demand companies must cover their workers under UI law, whether or not they choose to call them employees.²¹

A NELP report, developed in partnership with the Center for American Progress and the Georgetown Center on Poverty and Inequality, seeks to fill major eligibility gaps in the UI program by establishing new and broader federal requirements for states.²² One proposal is particularly applicable to contingent workers: the report proposes a new modest, short-term federal benefit, called a Jobseeker’s Allowance, or JSA, for individuals with limited work histories. Notably, eligibility for the JSA would also extend to workers who are true independent contractors. It includes an earnings disregard equal to half the weekly JSA benefit, which would permit freelancers who experience significant drops in weekly income to receive modest income replacement. With a proposed uniform weekly benefit of \$170 per week—which is about half of a typical low-wage worker’s wages—this would mean that these workers could be eligible for modest support if earning less than about \$255 in a week.

A report co-authored by NELP and the Century Foundation makes further recommendations to improve access to the partially unemployed and freelancers. First, it recommends that states provide partial benefits to workers earning less than 150 percent of the benefit amount that they would receive if fully laid off, and that up to 50 percent of part-time earnings be disregarded (disregarding earnings worth half the claimant’s weekly benefit amount is an acceptable alternative, and one NELP has recommended in the past).

Second, it outlines a pilot program that would offer UI eligibility to certain true freelancers, up to 13 weeks of benefits to those who pay into the UI system for a year and experience a temporary decline in self-employment income, using a nonprofit or other intermediary to determine eligibility and provide networking services and entrepreneurial assistance to help freelancers stabilize their income.

These proposals deserve serious attention by lawmakers who want to address new realities in our labor market and the way that many of us work today.

Conclusion

As new technology and new forms of work develop, our social insurance systems must ensure that the structure of a job is not used to undermine existing protections. State agencies should apply the same rules to unemployed and underemployed on-demand workers that they apply to other workers. At the same time, state legislatures must update our unemployment insurance system to ensure that it delivers a secure income and social protections to all of America's workers.

The National Employment Law Project (NELP) aspires to build an economy that, in its rules and rewards, embodies and advances principles of inclusion and fairness, justice, sustainability, and shared prosperity. The "Rights on Demand" series focuses on issues confronting workers in the on-demand economy, as part of our broader campaign to ensure that all workers, regardless of how their employers classify them, receive fair wages and benefits in a safe and healthy work environment.

Endnotes

¹ Arloc Sherman & Danilo Trisi, Center on Budget & Policy Priorities, Safety Net More Effective Against Poverty Than Previously Thought, (2015), <http://www.cbpp.org/research/poverty-and-inequality/safety-net-more-effective-against-poverty-than-previously-thought>

² Wayne Vroman, Impaq International, The Role of Unemployment Insurance as an Automatic Stabilizer During a Recession, (2010), https://wdr.doleta.gov/research/FullText_Documents/ETAOP2010-10.pdf.

³ Wendy Wang, Kim Parker & Paul Taylor, Pew Research Center, Breadwinner Moms (2013), <http://www.pewsocialtrends.org/2013/05/29/breadwinner-moms/>

⁴ Lawrence F. Katz & Alan B. Krueger, The Rise and Nature of Alternative Work Arrangements in the United States, 1995-2015 (2016), http://krueger.princeton.edu/sites/default/files/akrueger/files/katz_krueger_cws_-_march_29_20165.pdf

⁵ Id.

⁶ Rebecca Smith & Sarah Leberstein, National Employment Law Project, Rights on Demand: Ensuring Workplace Standards and Worker Security in the On-Demand Economy (2015), http://www.nelp.org/search/?s_term=Rights+on+Demand.

⁷ *Comparison of State Unemployment Insurance Laws 2016*, U.S. Department of Labor, Employment and Training Administration, <https://www.unemploymentinsurance.doleta.gov/unemploy/pdf/uilawcompar/2016/coverage.pdf>. The test is called the ABC test because its three paragraphs, each containing one element of the test for exclusion from employment, are typically numbered A, B, and C.

⁸ See, e.g., in the context of workers' compensation, Bureau of Labor and Industries, Advisory Opinion of the Commissioner of the Bureau of Labor and Industries of the State of Oregon, Regarding the Employment Status of Uber Drivers, (Oct. 14, 2015), <http://uberlawsuit.com/Oregon.pdf>; State of Alaska, Department of Labor and Workforce Development, Press Release, Uber Agrees to Stop Worker Misclassification in Alaska, (Sep. 3, 2015), <http://labor.alaska.gov/news/2015/news15-38.pdf>.

⁹ Andrew Stettner, Michael Cassidy & George Wentworth, The Century Foundation and Nat'l Employment Law Project, A New Safety Net for an Era of Unstable Earnings (2016), <https://tcf.org/content/report/new-safety-net-for-an-era-of-unstable-earnings/>.

¹⁰ Diana Farrell & Fiona Greig, JPMorgan Chase & Company Institute, Paychecks, Paydays, and the Online Platform Economy (2016), <https://www.jporganchase.com/corporate/institute/document/jpmc-institute-volatility-2-report-paychecks-paydays-and-the-online-platform-economy.pdf>.

¹¹ Id.

¹² Janine Berg, Int'l Labour Office, Income Security in the On-Demand Economy: Findings and Policy Lessons from a Survey of Crowdworkers (2016), http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_479693.pdf.

¹³ Request for Startups, The 2015 1099 Economy Workforce Report (2015), www.requestforstartups.com/survey.

¹⁴ Liz Ben-Ashai & Rick McHugh, National Employment Law Project and Center for Law and Social Policy, Out of Sync: How Unemployment Insurance Rules Fail Workers with Volatile Job Schedules (2015),

¹⁵ Id.

¹⁶ Stettner et. al. *supra* note 9.

¹⁷ Pew Research Center, The Lost Decade of the Middle Class (2012), <http://www.pewsocialtrends.org/2012/08/22/the-lost-decade-of-the-middle-class/>.

¹⁸ Id.

¹⁹ 2015 1099 Economy Report, *supra* note 14; Int'l Labour Office, *supra* note 13.

²⁰ Liz Ben-Ashai, *supra* note 14.

²¹ See model language in National Employment Law Project, The On-Demand Economy and State Labor Protections (2017), <http://www.nelp.org/content/uploads/On-Demand-Economy-State-Labor-Protections.pdf>

²² In addition, it seeks to expand effective reemployment services and shore up program funding,