

Proactive Policy Solutions for Contracted Workers

All of us deserve meaningful work that provides us with the stability and security to thrive as individuals and families, and to build thriving communities and a healthy democracy. For nearly a century, workers have fought for a universal foundation of rights and protections for all workers. In the last decades, many workers have won higher minimum wages, secure scheduling, paid sick and safe time, and paid family leave in jurisdictions across the United States.

At the same time, corporations have characterized workers as “self-employed,” or “independent contractors,” or “employed” by a third party, as a tactic to shift risk downwards onto workers while channeling wealth upwards to investors and CEOs. These practices harm not only workers but also the integrity of our social benefits systems as well as the law-abiding businesses that are forced to compete on an uneven playing field.

These arrangements are rampant in sectors where people of color are overrepresented, such as home care, trucking, technology, janitorial, delivery, landscaping, and other work. More recently, well-capitalized online platform companies have joined the trend. No matter the sector, abusive outsourcing aggravates income and wealth inequality, intensifies the segregation of workers by race and gender into poor-quality jobs, and impairs the ability of workers to come together to negotiate with businesses over wages and working conditions.

Recently, campaigns across the country have brought new thinking and innovation—and revived some tried-and-true ideas—to the seemingly intractable issues of worker misclassification. These innovative policy proposals are meant to move us towards a system of universal labor rights, universally enforced. This policy brief outlines some of the most promising ideas for campaigners, state agencies, and policymakers.

Expand and Clarify Rights of All Workers in All Sectors

ABC Test

The ABC test has been used for decades in U.S. labor law and regulation. In at least 20 U.S. states, [unemployment insurance \(UI\) programs use some form of the ABC test](#) to determine workers’ eligibility for UI benefits and therefore their employers’ obligations to pay into the state UI fund. California, Connecticut, Massachusetts, New Jersey, Nebraska, and Vermont have adopted the ABC test to determine access to many or most of their labor laws for most or all workers, and several states use it for determining whether workers in certain sectors,

such as construction, port truck driving (also called drayage driving), and landscaping, are covered employees under labor laws.

Enact Protections for All Workers, Regardless of Worker Classification

Over the years, numerous laws have been passed that cover all workers, no matter how a business classifies them. Among these are the San Francisco [minimum wage for contract workers](#) (identical to the minimum wage for employees), which covers workers providing personal services, meaning “services provided personally by the individual or principal of an entity based on the intellectual or manual efforts of the individual rather than a salable product of his or her skills.”

New York City’s [Human Rights Law specifically protects independent contractors](#) as well as employees: “The protections of this chapter relating to employees apply to interns, freelancers and independent contractors.”

A related approach is to cover independent contractors as a group under existing or new labor standards. In New York City, the “Freelance Isn’t Free” campaign by the Freelancers Union created an [ordinance](#) that requires a written contract between a freelancer and client, and payment within 30 days of completion of work. It covers “a person who provides personal services in exchange for compensation.” Similarly, in 2021, the Seattle City Council passed the [Independent Contractor Protections Ordinance](#). This ordinance requires “hiring entities” to provide independent contractors with disclosures prior to entering a contract and at the time of payment. In addition, hiring entities must provide timely payment under the terms of a contract, the terms of the pre-contract disclosure, or within 30 days of contract performance.

Rhode Island’s whistleblower protection law, like that of some other states, protects independent contractors as well as employees. A 2021 amendment, [H 5855](#), added protections for job applicants and for immigrant workers.

Some new, more expansive laws have passed in the wake of the COVID-19 pandemic. New York [S1034B](#) requires the Commissioner of Labor to create a model infectious disease exposure prevention standard that covers private-sector employers and all their workers, regardless of classification or immigration status:

“Employee” shall mean any person providing labor or services for remuneration for a private entity or business within the state, without regard to an individual’s immigration status, and shall include, but not be limited to, part-time workers, independent contractors, domestic workers, home care and personal care workers, day laborers, farmworkers, and other temporary and seasonal workers. The term shall also include individuals working for staffing agencies, contractors or subcontractors on behalf of the employer at any individual work site, as well as any individual delivering goods or transporting people at, to or from the work site on behalf of the employer, regardless of whether delivery or transport is conducted by an individual or entity that would otherwise be deemed an employer under this chapter. The term shall not include employees of the state, any political subdivision

of the state, a public authority, or any other governmental agency or instrumentality.

In Colorado, [HB 20-1415](#) creates whistleblower protections during a public health emergency, and includes statutory penalties of \$10,000 per worker per violation and *qui tam*/whistleblower enforcement. The law explicitly covers all workers, including those treated as independent contractors by an entity that hires five or more in one year.

The Washington State [Paid Family Leave law](#) includes a broad definition of employment and a modified ABC test to determine whether a person is an employee. It also allows self-employed workers to pay into the system, at the rate of 0.25% of wages for three years. In [Massachusetts](#), companies for whom 1099 workers make up 50% of the workforce must cover contractors just as they do employees.

The [Seattle Domestic Worker Ordinance](#), mentioned below, covers all “domestic workers,” no matter how they are classified by the hiring entity.

Ensure Joint Employers Are Accountable to Workers

Strict Liability for Joint Employers

In 2014, California passed [CA Labor Law section 2810.3](#), a law that provides that any business that contracts with a staffing agency or other labor contractor shall be jointly liable for any failure on the part of the labor contractor to pay wages owed or to secure workers' compensation insurance for any workers supplied to the business. This joint liability is imposed regardless of whether the host company had knowledge of its labor contractor's violations or whether it is considered a joint employer under state law. The law, although encompassing the temporary staffing industry, applies more broadly to many types of labor contracting relationships.

Temp and Staffing Worker Protections

In 2017, Illinois passed and Governor Bruce Rauner [signed model temporary-and-staffing-worker protection legislation](#) that mandates that the agencies report demographic information about the workers they hire; never charge workers for background checks, drug tests, and credit checks; notify temp workers about the types of equipment, protective clothing, and training needed to perform the job, as a means to reduce workplace injuries; provide transportation back from a job site if transportation was provided to the job site; and place their temporary workers into permanent positions when they become open. It amends a “gold standard” [Day Labor & Temporary Worker Protection Act](#) originally enacted in 2005.

Similar legislation has just been re-introduced in New Jersey, as [Senate bill No 4223](#), on December 6, 2021.

In Massachusetts, the [Temporary Workers Right to Know Act](#) requires temp agencies to give workers a written job order that explains job requirements, including any special equipment or training required, pay and pay days, start and end times, duration of employment, meals

provided and the charge for them, and includes contact information for both the staffing agency and the worksite employer.

In 2021, the Washington State legislature passed [HB 1206](#), which makes both temp agencies and worksite employers responsible for hazard analysis, training, documentation, and communication. It focuses on temp staffing in construction and manufacturing.

In 2021, New York City Council passed [Intro 2318](#), which requires construction labor brokers to obtain a license from the city every two years, certify compliance with applicable laws and regulations, and provide information on their workforce, including the numbers of workers, their average hourly wage, and the types and value of benefits paid to the workers. The bill was the product of a campaign launched by LIUNA Local 79 against “body shops”—unregulated labor brokers that target people with records, place them at construction sites without training, and pay them poverty wages with no benefits.

Other Ideas Worth Exploring

States should consider eliminating or limiting tax credits and other subsidies given to temp agencies through states’ work opportunity tax credits, unless those temp agencies adopt “high-road” labor standards.

Establish Sectoral Standards

Garment Workers

In 2021, following a number of legislative victories for garment workers [dating back to 1999](#), California passed [SB 62](#), ending the industry’s practice of piece-rate compensation, which employers often used to illegally pay workers sub-minimum wages. The legislation also expands fashion brands’ liability for unpaid wages, including wage theft by contractors. This bill specifies that “a garment manufacturer, contractor, or brand guarantor who contracts with another person for the performance of garment manufacturing operations shares joint and several liability with any manufacturer and contractor for the full amount of unpaid wages, and any other compensation, including interest, due to any and all employees who performed manufacturing operations for any violation, attorney’s fees, and civil penalties.”

Warehouse Workers

California addressed injuries among workers in the warehousing industry with [AB 701](#). It establishes new transparency measures and limits on the use of algorithms to disrupt basic worker rights. Employer includes a person who indirectly—through an agent or any other person including a temp service or staffing agency—exercises control over the wages, hours, or working conditions of workers at a distribution center.

Construction Workers

As noted above, over the years, many states have passed laws that use the ABC test to determine whether workers are employees of construction firms. In recent past, some additional models have emerged.

In 2021, Nevada passed [AB 227](#). The law provides that a licensed construction contractor can only subcontract to another licensed contractor that uses employees.

In New York, [S02766](#) makes upper-tier construction contractors liable for wage theft committed by subcontractors on their projects. An employee, the attorney general, or a third party chosen by the employee can bring a lawsuit to enforce the law.

App-Based Workers

Most protections for app-based workers have passed at the local, rather than the state, level—most notably in New York City, Seattle, Philadelphia, and a handful of cities in California. Because app-based companies lobbied for and [won preemption in many of the states](#), cities may be limited in their power to pass protective legislation, especially for ride-hail companies. NELP’s analysis indicates that, at present, comprehensive legislation regarding ride-hail work is only clearly possible in Hawaii, Illinois, Massachusetts, Maryland, Minnesota, New York, Oregon, Pennsylvania, and Washington State, and, in some states, only in particular cities.

Paid sick time. [Seattle’s gig worker paid sick and safe time \(PSST\) ordinance](#) allows workers to earn one day of PSST for every 30 calendar days worked in whole or in part in Seattle, calculated as the average daily compensation in their highest earning month.

Pay standards and wage theft. [Int 0890](#) established, in 2018, the authority of the New York Taxi and Limousine Commission to set a pay standard for ride-hail drivers in New York City.

In 2021, the New York City Council enacted [Int 2294](#), which authorizes the city’s Department of Consumer and Worker Protections to study and enact a minimum payment standard for delivery workers. The City Council also passed bills to mandate that restaurants provide access to bathrooms for delivery workers; to allow workers to set certain distance limitations for deliveries on the app; and to mandate that delivery companies provide workers with insulated bags at no charge.

In 2020, the Seattle City Council passed a similar [minimum pay standard](#) for ride-hail drivers. The city’s [website includes a driver pay calculator and webinar](#) explaining the elements of the standard.

California’s [AB 286](#) requires app-based delivery companies pay delivery workers all their tips. The law also requires companies to disclose all fees to customers.

The non-profit group Working Washington, based in Seattle, is leading a PayUp campaign to establish city standards for [pay, transparency, and flexibility](#) for app-based workers. It is on track to be introduced in early 2022. The campaign also includes [plans](#) for deactivation protections, access to restrooms, a wage standards board, and anti-discrimination protections.

Seattle’s [Gig Worker Premium Pay Ordinance](#) requires app-based delivery companies to pay workers at least \$2.50 per order premium pay, with \$1.25 in additional pay for additional pick-ups and drop-offs.

In 2021, a similar campaign began in Chicago when a city alderman filed an ordinance to cap surge pricing for Uber and Lyft in May. Ultimately, drivers convinced him to amend his

ordinance to include safety standards, yearly raises, and penalties for passengers who make false accusations against drivers.

Unlawful deactivation. Seattle’s [Transportation Network Company Driver Deactivation Rights law](#) protects drivers from unwarranted deactivation, requires 14 days’ notice of deactivation, and establishes a Driver Resolution Center to assist drivers with claims of illegal deactivation.

Sectoral bargaining for workers classified as independent contractors. Along with the Seattle Domestic Worker Ordinance mentioned below, in 2018, the Portland City Council passed a [resolution](#) to rework the city’s oversight board for transportation network companies, giving drivers a seat on the board that creates standards for their work.

NELP is working with allies on an approach that would deliver true, democratic collective bargaining, on the state level, to workers who may be excluded from the National Labor Relations Act. There are several difficult legal issues in the approach, and advocates should beware of proposals that erase existing rights for workers or preempt cities from expanding workers’ rights. NELP is committed to a policy that would not take away other fundamental rights. Please contact us for more information.

Other ideas worth exploring. (1) [Roll back transportation network company \(TNC\) and marketplace carveouts. About half of the states have laws](#) that categorically exempt TNC and/or “marketplace platform” workers from being considered employees, thereby outright denying them protections, including wage and hour protections and state unemployment insurance and workers’ compensation. One strategy is to roll back these state laws so that workers can at least argue that they are employees, even in states without an ABC test.

(2) [Unlawful competition and labor market abuse.](#) At the federal level, there is increased interest in policy ideas that strengthen competition in the labor market. Recently, the [Department of Justice and the Federal Trade Commission](#) conducted a two-day meeting to further explore potential policy and enforcement at the intersection of antitrust and labor. There may be ideas to come out of this collaboration that could also be implemented at a more local level. For example, a recently passed [New York State antitrust bill](#) creates an “abuse of dominance” standard that could be used to go after big-market players for abusing their dominant position in ways that limit competition.

Domestic Workers

Led by the National Domestic Worker Alliance, [10 states](#) and several municipalities have passed Domestic Worker Bills of Rights. In Seattle, the Bill of Rights covers all domestic workers, whether or not they are considered employees of the entity for which they work. One way in which such sector-wide regulation has been operationalized is through tripartite (worker, employer, government) standards-setting boards that govern an entire sector. Domestic worker [standards boards](#) have been created in New York, California, and [Seattle](#).

A [pending bill in San Francisco](#) would allow domestic workers with multiple employers to access their existing right to paid sick days via a portable paid sick leave system. The system would track a domestic worker’s hours worked for multiple employers, calculate how much

paid sick leave she accrues on an aggregated basis, and coordinate the transfer of paid sick leave funds from multiple employers to the domestic worker when requested.

Drayage Drivers

California's [SB 338](#) imposes joint and several liability on port drayage motor carriers and their customers for civil legal responsibility and civil liability to the state, once a motor carrier appears on a prior offender list kept by the state's Division of Labor Standards Enforcement. It adds responsibility for employment tax assessments and civil liability for the carrier's failure to comply with health and safety laws.

Prior laws in New York and New Jersey use the ABC test to determine whether a port trucker is an employee of the motor carrier.

Procurement standards for drayage drivers. In California, [AB794](#) requires trucking companies, in order to qualify for grants from the California Air Resources Board for clean vehicles, to meet certain standards, including that they must refrain from misclassifying workers as independent contractors. The companies must attest that they are complying with labor standards, and that they will retain direct control over workers using or driving the vehicle (which is an admission under California law that they "employ" the worker). Companies that are found, after receiving an incentive, to have violated the law, must repay the incentive.

Enforcement of Labor Standards

Access to Unemployment Insurance

In California, [SB 700](#) was drafted to ensure that the agency administering UI would be bound by certain specific decisions of the California Unemployment Insurance Appeals Board in two cases involving drayage drivers, and apply the Board's reasoning and interpretation in new cases. It was in response to a problem common during the pandemic: UI agencies would engage in entirely new fact-finding in cases identical to those the Appeals Boards had already decided. It did not pass in 2021.

Enhanced Public Enforcement Against Misclassification

[Attorneys general in California](#) and [Massachusetts](#) have been leading enforcement actions against large app-based corporations that misclassify their workforce, including [Handy](#), Uber, and Lyft. City and district attorneys also have brought enforcement actions against [Instacart](#), and the District of Columbia recently announced a \$2.5 million [settlement with DoorDash for tip-stealing](#). Seattle recently announced a [\\$3.4 million settlement with Uber](#) for back wages and unpaid sick leave. Depending on the resolution of the ongoing enforcement actions, particularly in California, attorneys general in other states may have interest in bringing similar enforcement against employers who misclassify their workers, even in states without an ABC test.

New Jersey assessed [\\$650 million in premiums](#) against Uber. An analysis in California found that [Uber and Lyft owe the state \\$413 million](#) over five years for unpaid premiums. An [analysis in Illinois](#) found that transportation network companies would owe \$46.6 million in 2019 alone.

Especially because of the prevalence of forced arbitration agreements, state and local agencies should audit companies to ensure that they are complying with state labor standards laws and contributing to state funds for the benefit of workers.

The Seattle Office of Labor standards has [recovered over \\$5 million](#) from app-based companies for violating its sick and safe days and hazard pay ordinances and depriving some 24,000 workers of these rights.

Unemployment Insurance Litigation

Lawyers play an important role in appealing UI denials and bringing innovative strategic litigation to advance workers' right to unemployment insurance. In 2020, there have been several important cases that have established that app-based workers are entitled to state UI.¹ One strategy is to encourage more lawyers in key states to appeal UI denials of app-based workers, in order to get precedential decisions establishing that app-based workers are employees for purposes of state UI. [An analysis](#) written by several law professors provides arguments for coverage.

Empower Public Task Forces to Aggressively Pursue Misclassification

In the last decade, more than half the states have had task forces focusing on independent contractor misclassification. Task forces should have a broad mandate and broad participation by state agencies with jurisdiction over employment and tax laws, and enforcement of each. NELP recently released a [report on best practices](#) for public task forces.

Enforcement Guidance

Nearly all state minimum wage acts include a broad "suffer or permit" test, modeled on the federal Fair Labor Standards Act (FLSA). This has been called the broadest definition of employment by the U.S. Supreme Court, and the U.S. Department of Labor under the Obama Administration issued important guidance on the [interpretation of each element of the FLSA test](#), illustrating why most workers in the United States today are employees. A year later, it issued similar guidance on the circumstances under which [two or more entities may be considered "employers" of workers](#). Both were [subsequently withdrawn by the Trump Administration](#), but the court rulings and analysis are sound, and states can adopt similar guidance to interpret their own language identical to that in the FLSA. Coupled with a strong public and private enforcement effort, state adoption of this guidance by regulation could end some of the gaming that occurs under current laws.

States can issue enforcement guidance regarding specific sectors that are misclassifying workers. For example, using its state's broad definitions, the Oregon Bureau of Labor and Industries issued [guidance saying that transportation network drivers are likely "employees"](#) for the purposes of its minimum wage, workers' compensation, and other protections.

Boost Misclassification Penalties

Another strategy is to support and enact legislation that boosts misclassification penalties to disincentivize employers. In 2019, New Jersey ([A5839](#)) passed a state law that created new penalties for willful misclassification, up to \$1,000 per misclassified employee.² New Jersey's [A5843](#) requires that employers post notices about employee classification in the workplace.

New Jersey also passed a law ([A5838](#)) that allows the state to issue a stop-work order against any employer violating a state wage, benefit, or tax law.

Virginia also passed a bill ([HB 984](#)) that creates a private cause of action for any individual to bring a civil action for damages against their employer for misclassification and increased its misclassification penalties to \$5,000 per employee. However, Virginia's definition of who is an employee is restrictive. Advocates and organizers should watch out for laws that create penalties but narrow definitions, such that few employers would actually be penalized, and many would be legally allowed to call workers independent contractors.

New Jersey followed up in 2021 with a suite of new laws on enforcement:

- [A-5890/S-3920](#). Findings of violations of any state wage, benefit, or tax law triggers an audit and allows the labor commissioner to bring enforcement actions for any of the same; it broadens authority for stop-work orders.
- [A-5891/S-3921](#). Creates an "Office of Strategic Enforcement and Compliance" in the Department of Labor and Workforce Development, encompassing a proactive approach to enforcement; and appropriates \$1 million from the General Fund. Denies assistance from the department to any business with outstanding liabilities.
- [A-5892/S-3922](#). Makes misclassifying employees for the purpose of evading payment of premiums a violation of the insurance fraud prevention act, establishes penalties of \$5,000 for first violation, \$10,000 for second, and \$15,000 for each subsequent violation.
- [A-1171/S-1260](#). Requires the Commissioner of Labor and Workforce Development to create a statewide database of the written statements regarding payroll information that contractors and subcontractors who bid on and perform public work are required under current law to file when engaging in public works.

For more tried-and-true policy and enforcement options, see NELP's [Winning Wage Justice](#).

Endnotes

¹ [Vega v. Postmates](#) (NY Court of Appeals); [Lowman v. Unemployment Comp. Board of Review](#) (PA Supreme Court).

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