

# “Marketplace Platforms” and “Employers” Under State Law—Why We Should Reject Corporate Solutions and Support Worker-Led Innovation

Over the 2018 legislative session, nearly identical bills have been introduced in states including Alabama, California, Colorado, Florida, Georgia, Indiana, Iowa, Kentucky, Tennessee and Utah that deem all workers on so-called “marketplace platforms,” (such as Uber and Handy) independent businesses, and not the employees of the companies.<sup>i</sup>

The bills have passed in Arizona (2017), Florida, Indiana, Iowa, Kentucky, Tennessee, and Utah (2018). They were defeated in Alabama, California, Colorado and Georgia.

Assuming projections about the rise of the gig economy and technological and automation-related job displacement are correct, it's incumbent on policymakers to do all they can to ensure that the jobs generated by this “new” economy are good jobs. The bills being promoted by the self-coined marketplace platform companies shift much of the risk—but none of the gains—of operating a business to workers, competing businesses and threaten social insurance programs. They absolve well-financed corporations of responsibility, consolidating more and more income within businesses and away from working people, deepening economic inequality.

Instead of passing wholesale legal carve-outs and offering huge tax breaks to well-capitalized companies, states should enforce workplace protections and, on top of that, support innovative, worker-led efforts to ensure that workers—no matter what label companies want to put on them—have a voice in determining the terms and conditions under which they work.

## **The Yellow Pages Are a Marketplace Platform—Companies Like Handy and Uber Are Not the Yellow Pages**

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The bills use the misleading term “marketplace platform” to disguise the relationship between companies and workers. A true marketplace platform operates like the yellow pages or electronic message boards—where entrepreneurs in the accurate sense of the term can post their availability for jobs that they design, for customers with whom they may have an ongoing relationship, at a fee that they

set, and under standards that they negotiate with their customers. The marketplace itself does not typically collect a per-transaction fee from either the customer or the businessperson, nor does it screen, discipline, set prices, or other rules of the job.

Companies like Uber and Handy, on the other hand, are not mere marketplaces: They frequently and unilaterally set pay rates, substantially control when, where, and how people work,<sup>ii</sup> and impose discipline on those that do not meet rigid standards that they also set unilaterally—just like traditional employers.

The legislation masks this distinction by setting up a new legal test that in effect defines all “marketplace platform” workers as independent contractors, relieving the companies from any accountability to workers. The bills, which are very similar to the carve-out laws pushed and passed by transportation network companies in two-thirds of the states,<sup>iii</sup> generally include four basic factors, which each simply restate the elements of the current business models of the platform companies—so the “test” will always create an exemption from labor standards. None address the core relationship between workers and platform companies. The bills exclude from the test the main characteristics of a true independent contractor relationship: That a worker is free from the control of the company, provides a service outside the normal scope of the company’s work, and operates a separate business. The result is that the companies do not have to provide minimum wage or overtime protections, health and safety or workers’ compensation, or discrimination protections to any of their workers.

The companies argue that the bills enable entrepreneurship and the establishment of independent businesses. In fact, they are the near opposite, since many companies forbid workers from having a continuing relationship with customers, from setting their own rates, or negotiating their own work rules with customers.

## **Why Are These Carve-Outs So Harmful?**

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### **The Carve-outs Limit Creative, Worker-Led Solutions**

Passage of the bills can shut down worker-led, innovative projects pending in cities across America to address problems created by insecure work, including gig work. Providing exemptions from state labor protections threatens to derail these efforts, taking away any incentives that platform companies have to negotiate with workers for reforms. And workers have started to innovate to make these jobs better. These include:

- **In Seattle**, a proposed domestic worker bill of rights and the creation of a wage and standards commission that would include representation by domestic workers themselves and explore “portable benefits;”<sup>iv</sup>
- **In Portland**, the launch of a campaign to give both Uber and Lyft drivers and impacted communities a voice in how TNC’s are regulated;<sup>v</sup>
- **In Seattle**, ongoing organizing by the Teamsters union, following the landmark passage of the Drivers’ Collective Bargaining ordinance, and a new look at TNCs by the Seattle City Council;<sup>vi</sup>

- **In New York City**, a proposal by the Taxi Workers Alliance to create a wage floor for drivers, a cap on vehicles, and a benefits fund covering clinic-level medical services, as well as term life insurance policy and tax filing services;
- **Also in New York City**, a proposal to include independent contractors under the protection of the New York Human Rights law.<sup>vii</sup>

### **The Carve-outs Are Harmful to Workers**

*The loss of baseline employment protections has multiple adverse effects on workers.*

- Many of the jobs affected by the state-level carve-outs are highly dangerous: Taxi, delivery, and domestic work are all offered now via online platforms that could be exempted from state labor laws. Work injuries can impose devastating costs on workers, their families, and ultimately on taxpayers. Workers' compensation protections are essential for these extremely hazardous occupations, but the laws deny protection to these workers.<sup>viii</sup>
- In this #MeToo moment, these companies would have no state-law responsibility for sexual harassment in the workplace, as well as compliance with state minimum wage or other laws. And even though federal law still should cover the workers, the state carve-outs create confusion and leave the companies off the hook and their workers on their own.
- Many platform jobs pay extremely low wages. A recent MIT study found that between 41 and 54% of Uber drivers make less than the applicable minimum wage in their state, with between 4 and 8% actually losing money.<sup>ix</sup> But these bills exempt the platforms from paying minimum wage.
- The bills would potentially affect a wide variety of companies engaging workers, from cleaners and drivers to homecare workers, janitors, tech support workers, plumbers and electricians, as long as the workers are dispatched via a website or online platform.

### **The Carve-outs Are Harmful to State Social Insurance Programs**

*This special interest legislation for huge companies costs the state revenue.<sup>x</sup>*

- The state loses unemployment insurance and workers' compensation payroll taxes from employers. In Colorado, the state Legislative Council estimated that the carve-out bill would result in 5% of employees being reclassified as independent contractors—at a cost of \$22.6 million a year in unemployment insurance premiums alone—to the state.<sup>xi</sup>
- In the larger economy, many states have found they've been shorted millions of dollars in state payroll and income taxes when companies label their workers as independent contractors.<sup>xii</sup>

### **The Carve-outs Are Harmful to Small Businesses**

When companies like Handy get a special exemption from all state labor standards, other brick and mortar businesses lose their competitive advantage. Derek Christian, the Cincinnati-based co-owner of a maid service and a handyman service, said the bills will lead existing employers to convert to a lower-cost independent contractor model in order to compete.

"It won't just be Handy, it'll be all of these virtual companies that are out there now," Christian said.<sup>xiii</sup>

Other companies that dispatch workers will be forced to follow suit in order to compete. In fact, many of the bills are so broadly written that many businesses could avoid state labor standards and payroll taxes, too, if they made minor changes to their business models and used the internet to dispatch workers: Painters, plumbers, home care providers, nannies, electricians, tech support.

### **The Carve-outs Are Harmful to Consumers**

Without the protection of workers' compensation, injured workers will have no recourse for workplace injuries incurred in a customer's home, and will be forced to seek compensation from homeowners' insurance or in litigation against homeowners themselves.

### **Who Is Helped by the Change in the Law? The Ultimate Special Interest Legislation**

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The bills were drafted and proposed primarily by one company, Handy.<sup>xiv</sup> In Tennessee, the sponsor of that state's bill stated on the Senate floor that it was brought to him by Handy.<sup>xv</sup> In a media story about the bills, Handy's lobbyist admitted that Handy is attempting to change the law to benefit its business model.<sup>xvi</sup> Some other platform companies, notably Uber, (which has shared lobbyists with Handy), Door Dash and Postmates, have also lobbied in favor of the bills.<sup>xvii</sup>

It's no secret why the platform giants are pushing the bills: for a short-term lobbying investment, they stand to save—in perpetuity—state payroll expenses that other businesses pay, which can amount to some 20% of payroll.<sup>xviii</sup> The question of whether these companies must be accountable to their workers is hotly debated, with administrative proceedings and litigation pending across the country.<sup>xix</sup> By changing the state law, the companies can forestall additional challenges, overrule state agencies that have found their workers to be employees, and prevent judges and juries from deciding this question.<sup>xx</sup>

The big companies behind the bills are not small startups in need of special support. In fact, they are often much larger and more powerful than the companies with which they compete. Uber is valued at \$72 billion.<sup>xxi</sup> Handy has raised more than \$100 million in venture capital.<sup>xxii</sup>

Many of the laws are passed with little or no debate. For example, in Florida, a new chapter of employment law—the Handy bill—was inserted into a budget bill and passed 45 minutes before the end of the legislative session.<sup>xxiii</sup> When legislators hear just one side of a story, with legislation pushed by just one company and that largely benefits that one company, our democratic system is undermined.

### **Innovative Employers Can Also Be Good Employers**

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Proponents argue that on-demand jobs provide workers with "flexibility," a laudable goal that is at the heart of the movement for paid family leave and paid sick days.

But providing workers with flexible hours is a choice made by companies, not a legal precept. Successful platform companies like the cleaning company Managed by Q and personal management company Hello Allfred treat their workers as “employees” and provide flexible work schedules *and* benefits.<sup>xxiv</sup> The home repair company Pro.com, the real estate company Redfin, and a new housecleaning service by Amazon also treat workers as their employees.<sup>xxv</sup>

## What Do Voters Want?

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Voters overwhelmingly want legislators to make it harder, not easier, for companies to classify workers as independent contractors.<sup>xxvi</sup>

## What Should State Legislators Do?

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Instead of passing special interest legislation, legislators should insist that platform companies abide by the same laws that have long governed other companies. They should direct state agencies to apply existing laws and clarify coverage where necessary. Should legislators believe that their laws are unclear, they should consider adopting a simple “ABC” test, currently commonly used in the states.<sup>xxvii</sup>

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## Endnotes

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<sup>i</sup> Sarah Kessler, “Handy is Quietly Lobbying State Lawmakers to Declare its Workers Aren’t Employees,” *Quartz at Work*, Mar 30, 2018, <https://work.qz.com/1240997/handy-is-trying-to-change-labor-law-in-eight-states/>. As of April 26, 2018, the bills had passed in Arizona (2017), Florida, Indiana, Iowa, Kentucky, Tennessee and Utah.

<sup>ii</sup> 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).

There is significant evidence that under the traditional definitions in most state employment laws applied to virtually every other business, TNC drivers in particular are employees. As state agency decisions, independent research, and news reports illustrate, TNCs essentially control what drivers do, surveil how they do it, set the price of their labor, and employ algorithmic management tools to get them to work when and where the company wants, all

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under pain of “deactivation” of their accounts. See: Noam Scheiber, “How Uber Uses Psychological Tricks to Push Its Drivers’ Buttons,” *New York Times*, (Apr. 2, 2017), <https://www.nytimes.com/interactive/2017/04/02/technology/uber-drivers-psychological-tricks.html> ; Eric Newcomer and Olivia Zalesky, “Inside Uber’s Auto-Lease Machine, Where Almost Anyone can get a Car,” *Bloomberg Technology* (May 31, 2016), <https://www.bloomberg.com/news/articles/2016-05-31/inside-uber-s-auto-lease-machinewhere-almost-anyone-can-get-a-car> ; Marc Ramirez, “Texas Uber Drivers Sue Company Seeking Full Employee Status, Back Pay,” *Dallas News*, (Jun. 30, 2017), <https://www.dallasnews.com/news/transportation/2017/06/30/texas-uber-driverssue-company-seek-full-employee-status-back-pay> ; Alex Rosenblat, “The Truth About How Uber’s App Manages Drivers,” *Harvard Business Review*, (Apr. 6, 2016), <https://hbr.org/2016/04/the-truth-about-how-ubers-app-manages-drivers> ; and Alex Rosenblat and Luke Stark, “Algorithmic Labor and Information Asymmetries: A Case Study of Uber’s Drivers,” *International Journal of Communication* (2016, Vol. 10), <http://ijoc.org/index.php/ijoc/article/view/4892/1739%20>

<sup>iii</sup> See, Joy Borkholder, Mariah Montgomery, Miya Saika Chen, and Rebecca Smith, “Uber State Interference: How Transportation Network Companies Buy, Bully, and Bamboozle Their Way to Deregulation,” *National Employment Law Project and Partnership for Working Families*, (Jan. 2018),

<http://www.forworkingfamilies.org/sites/pwf/files/publications/Uber%20State%20Interference%20Jan%202018.pdf>; and compare Alaska HB 132 with Tennessee HB 1978:

Alaska: “A transportation network company driver is an independent contractor for all purposes and is not an employee of the transportation network company if the transportation network company

(1) does not unilaterally prescribe specific hours during which a driver shall be logged onto the digital network of the transportation network company;

(2) does not impose restrictions on the ability of the driver to use the digital network of other transportation network companies;

(3) does not restrict a driver from engaging in any other occupation or business; and

(4) enters into a written agreement with the driver stating that the driver is an independent contractor for the transportation network company.”

<http://www.akleg.gov/basis/Bill/Text/30?Hsid=HB01327>.

TN HB 1978. A marketplace contractor is an independent contractor if:

(1) The marketplace platform and marketplace contractor agree in writing that the contractor is an independent contractor with respect to the marketplace platform; (2) The marketplace platform does not unilaterally prescribe specific hours during which the marketplace contractor must be available to accept service requests from third-party individuals or entities. If a marketplace contractor posts the contractor’s voluntary availability to provide services, the posting does not constitute a prescription of hours for purposes of this subdivision (a)(2); (3) The marketplace platform does not prohibit the marketplace contractor from using any online-enabled application, software, website, or system offered by other marketplace platforms; (4) The marketplace platform does not restrict the marketplace contractor from engaging in any other occupation or business; (5) The marketplace platform does not require marketplace contractors to use specific supplies or equipment; and (6) The marketplace platform does not provide on-site supervision during the performance of services by a marketplace contractor.

<http://www.capitol.tn.gov/Bills/110/Bill/HB1978.pdf>.

<sup>iv</sup> See more on the Seattle Domestic Workers Alliance at [www.workingwa.org/sdwa/](http://www.workingwa.org/sdwa/).

<sup>v</sup> See more at Transportation Fairness Portland, [www.oraflicio.org/pdxtnc/](http://www.oraflicio.org/pdxtnc/)

<sup>vi</sup> Steven Hsieh, “Seattle City Council Passes Resolution to Consider Raising Uber and Lyft Rates,” *The Stranger*, Apr 9, 2018,

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<https://www.thestranger.com/slog/2018/04/09/26020397/seattle-city-council-passes-resolution-to-consider-raising-uber-and-lyft-rates>.

vii See Intro 136-2018, available at

<http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=3331739&GUID=216BE991-3C48-48E0-A57C-0D06D51C0C29&Options=ID|Text|&Search=human+rights+law>.

viii Nearly one-third of domestic workers, which includes house cleaners, nannies and other caregivers also suffer from back injury and skin irritation. "HomeEconomics: The Invisible and Unregulated World of Domestic Work," National Domestic Workers Alliance, Center for Urban Economic Development at the University of Illinois at Chicago, and DataCenter (2012), <https://www.2016.domesticworkers.org/homeeconomics/download>. See also, "On-demand Workers Should be Covered by Workers' Compensation," National Employment Law Project, (Jun. 2016), <http://www.nelp.org/publication/on-demand-workers-should-be-covered-by-workers-compensation/>.

ix Revised study cited in Alexa Noel, Revised MIT Study Says Uber, Lyft Drivers Make About \$8 or \$10 Per Hour, The Points GUY, March 8, 2018, <https://thepointsguy.com/2018/03/revised-mit-study-says-uber-lyft-drivers-make-about-8-or-10-per-hour/>.

x For more detail about the effects of misclassification, see "Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries," *National Employment Law Project*, (Jul. 2015), <http://www.nelp.org/content/uploads/Independent-Contractor-Costs.pdf>.

xi Legislative Council Staff, Fiscal Note, SB 18-171 (Feb 26, 2018), [https://leg.colorado.gov/sites/default/files/documents/2018A/bills/fn/2018a\\_sb171\\_00.pdf](https://leg.colorado.gov/sites/default/files/documents/2018A/bills/fn/2018a_sb171_00.pdf).

xii See National Employment Law Project, Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries, (July, 2015) <http://www.nelp.org/content/uploads/Independent-Contractor-Costs.pdf>

xiii Lydia DePillis, "For Gig Economy Workers in These States, Rights are at Risk," *CNNMoney*, Mar 14, 2018, <http://money.cnn.com/2018/03/14/news/economy/handy-gig-economy-workers/index.html>.

xiv Kessler, n. 1.

xv Statement of Senator Bo Watson on SB 1967, transcript available from authors.

xvi "If starting with the harder states failed, we're taking a shot at something's that a little faster," said venture capitalist and political strategist Bradley Tusk, whose firm Tusk Ventures ran Uber's state legislative campaign and now represents Handy. "What is ultimately a better business decision? To try to change the law in a way that you think works for your platform, or to make sure your platform fits into the existing law?" DePillis, n. 14.

xvii Id., and testimony before the Colorado House Judiciary Committee on April 10, 2018.

xviii See ,Kessler, n. 1.

xix Numerous on-demand companies, such as Uber, Lyft, Handy, Homejoy, Postmates, TryCaviar, and Amazon PrimeNow, are now or have been the subjects of litigation challenging their practice of treating workers as independent contractors. See "On-demand Workers Should be Covered by Workers' Compensation," National Employment Law Project, (Jun. 2016), <http://www.nelp.org/publication/on-demand-workers-should-be-covered-by-workers-compensation/>. Handy is reportedly being sued in five states, and proceedings are pending before the NLRB. See, Kessler, n. 1.

State agencies, applying current law, are coming to the conclusion that on-demand workers are employees, class action litigation on the matter has been stymied by the companies' use of forced arbitration and class action waivers. Compare decisions cited in n 2 supra, with e.g., Uber Cases Consolidated Appeals, No. 14-16078 (9th Cir, Sep. 22, 2017) Order staying cases pending U.S. Supreme Court decisions in *National Labor Relations Board v. Murphy Oil USA, Inc.*, No 16-307; *Epic Systems Corp. v. Lewis*, No 16-285; and *Ernst & Young LLP v. Morris*, No. 16-300), <http://cdn.ca9.uscourts.gov/datastore/general/2017/09/22/14-16078%209.22%20order.pdf>; *Bekele v. Lyft*, 199 F. Supp.3d 284 (D.Ma 2016).

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- <sup>xxi</sup> Theodore Schleifer, Uber's Latest Valuation: \$72 billion, *Recode*, Feb 9, 2018, <https://www.recode.net/2018/2/9/16996834/uber-latest-valuation-72-billion-waymo-lawsuit-settlement>.
- <sup>xxii</sup> Valuation posted on <https://www.crunchbase.com/organization/handybook> (last visited May 2, 2018).
- <sup>xxiii</sup> Scott Keller, "Florida Lawmakers Approve Last-Minute Change on Behalf of Powerful Lobbyist," *Miami Herald*, Mar 12, 2018, <http://miamiherald.typepad.com/nakedpolitics/2018/03/florida-lawmakers-approve-last-minute-change-on-behalf-of-powerful-lobbyist.html>.
- <sup>xxiv</sup> Allison Griswold, Managed by Q's Good Jobs Strategy is paying off for Workers-And the Company, *Quartz*, Oct 26, 2017, <https://qz.com/1112199/managed-by-q-services-jobs-profitable/>; Nathan Heller, "Is the Gig Economy Working?" *The New Yorker*, (May 15, 2017), <https://www.newyorker.com/magazine/2017/05/15/is-the-gig-economy-working>.
- <sup>xxv</sup> Spencer Soper and Josh Eidelson, "Amazon Takes Fresh Stab at \$16 Billion Housekeeping Industry," *Bloomberg Technology*, March 28, 2018, <https://www.bloomberg.com/news/articles/2018-03-28/amazon-takes-fresh-stab-at-16-billion-housekeeping-industry>.
- <sup>xxvi</sup> See: Rebecca Smith, "Voters Want Government to Act Against Mischaracterization of Employees," *The Hill*, (Oct. 31, 2016), <http://thehill.com/blogs/congress-blog/labor/303520-voters-want-government-to-act-against-companies-that>, and "Poll: Voter See 'Contracting Out' as Serious Problem for America's Workers and Economy," National Employment Law Project, (Oct. 25, 2016), <http://www.nelp.org/news-releases/poll-voters-see-contracting-out-as-serious-problem-for-americas-workers-and-economy/>.
- <sup>xxvii</sup> The On-Demand Economy & State Labor Protections, National Employment Law Project, Jan 11, 2017, <http://www.nelp.org/publication/the-on-demand-economy-state-labor-protections/>