

# Flexible work without exploitation

Reversing tech companies' state-by-state agenda to unravel workers' rights and misclassify workers as 'contractors' in the gig economy and beyond

**Report** • By [Jennifer Sherer](#) and [Margaret Poydock](#) • February 23, 2023

Digital platform companies like Uber, Lyft, Instacart, and DoorDash are waging increasingly aggressive campaigns to erode long-standing labor rights and consumer protections in states across the country. Though they rely on the labor of millions of workers to provide their services, platform companies have established a business model on the premise that they employ no one. This business model has been built by denying workers fundamental rights and protections through outright refusal to follow existing laws, widespread misclassification of workers as “independent contractors,” payment of subminimum wages, and shifting of primary risks and costs of doing business onto individual workers, consumers, and public safety net programs.

Over the last decade, platform companies have targeted state legislatures, courts, and ballot initiatives to serve their interests in evading legal obligations to workers and consumers. Platform company strategies have included: ignoring existing laws and standards while counting on weak or absent state-level enforcement; pursuing state legislation to preempt new standard-setting; carving themselves out of coverage under laws employers are expected to follow; permanently redefining their workers as nonemployees; and attempting to rewrite or entirely repeal employment laws for all private businesses. State by state, platform companies continue to fight to keep their workers classified as “independent contractors” rather than as employees.

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When challenged by active enforcement of existing laws or new initiatives to extend minimum pay or employment protections to their workers, companies like Uber and Lyft have resorted to proposing a new “third category” of worker—neither employee nor independent contractor. High-profile examples of such company-backed policies include Proposition 22 in California, 2021 legislation signed into law in Washington, and 2021 ballot initiatives proposed in Massachusetts. These policies typically promise limited benefits to a newly defined subset of workers (e.g., “transportation network company drivers”) while codifying their second-class status as nonemployees and their exclusion from a host of state and federal legal protections and benefits. Some “third category” proposals have also included highly restrictive quasi-bargaining frameworks that could compromise drivers’ rights to form or join unions of their own choosing and to collectively bargain with employers over wages, hours, and working conditions.<sup>1</sup>

Platform companies have illustrated their intent to continue investing heavily in state ballot initiatives, litigation, and an expansive state legislative lobbying agenda in their quest to redefine employment for ride-hail and delivery drivers and a growing list of occupations in which they hope to introduce this business model. This, combined with chronic federal failures to reform labor laws and fix a broken immigration system, poses a serious long-term threat to the fundamental rights of all workers.

Because Black, brown, and immigrant workers are disproportionately represented in platform-based work,<sup>2</sup> company campaigns to strip legal protections from drivers and delivery service workers help maintain deep racial inequalities and occupational segregation in U.S. labor markets. Just as New Deal-era occupational carve-outs that excluded agricultural and domestic workers from major federal labor laws were racist policies designed to maintain economic white supremacy, proposals to create new legal categories that limit platform workers’ rights have clear racial impacts. As legal scholar Veena Dubal points out, Uber and Lyft have justified their preference for creating unique new “third categories” of worker status explicitly as a “means of providing economic opportunities to struggling immigrants and racial minorities,” perversely but strategically acknowledging race- and immigration-based inequities as primary rationales for denying drivers full employment protections.

This report provides an update on escalating instances of platform company influence on state policies regarding labor and employment. We survey the current landscape of state laws that are shaping digital platform work and companies’ evolving state-by-state campaigns to preempt local standard-setting, deny workers legal status as employees, and erode legal tests designed to prevent the misclassification of workers as

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“independent contractors.” Along the way, we highlight instances of state and local policy and enforcement innovations that offer models for effectively raising standards and combating widespread worker misclassification. These include worker-led organizing and policy initiatives that are shaping a proactive policy agenda with the potential to empower workers and better protect consumers and the public.

## Rewriting the rules for employment: Digital platform companies’ state policy agenda

App-based work in the U.S. is widely characterized by poverty wages, hazardous conditions, job insecurity, a lack of bargaining rights, and a lack of access to unemployment or other safety net protections. These conditions are rooted in digital platform companies’ attempts to exempt themselves from long-standing labor and employment laws designed to prevent worker exploitation.

Over the past decade, platform companies’ state policy agenda has included three expansive categories of activity that together form an overarching corporate strategy to avoid their legal obligations to extend rights, benefits, and protections to workers:

1. **Preemption:** Platform companies have pursued state legislation to prohibit local governments from setting labor standards for private-sector employers and to block local governments from regulating fares, licensing, insurance, safety, or other employment practices of Uber, Lyft, and other platform-based companies providing ride-hail, delivery, or other services.
2. **Carve-outs, exemptions, and redefinition of platform-based workers as nonemployees:** Platform companies have pursued state legislation to exempt themselves from legal obligations and standards that apply to most other businesses; to carve their workers out of coverage under specific employment laws; to permanently define their workers as “independent contractors”; or to create unique new “third category” definitions of their workers as neither employees nor independent contractors.
3. **Weakening legal tests and definitions of employee status for all workers:** Platform companies have backed state legislation to weaken or repeal legal tests used to determine employee status for the purpose of state workers’ compensation, unemployment insurance, wage and hour laws, and nondiscrimination laws. Such tests are necessary to prevent the misclassification of workers as independent contractors, a known and pervasive problem in sectors well beyond ride-hail and delivery driving, including building services, construction, and trucking.

While tech companies’ state legislative lobbying has focused specifically on ride-hail and delivery services, recent company-backed proposals have elucidated their intent to expand their business model to additional industries and occupations, stripping workers of

employee status and accompanying legal rights in the process. For example, a 2022 ballot initiative to define health care workers as “independent contractors” if a digital platform connects them with work assignments was introduced (but subsequently withdrawn) in California.<sup>4</sup> In 2022, platform companies announced they had joined forces with major employers in a corporate lobbying consortium called the Coalition for Workforce Innovation, whose members include major retail, media, transportation, logistics, and construction industry associations interested in further carving workers out of employment protections.<sup>5</sup> This group is already backing proposed federal legislation that would allow any private-sector employer to use coercive individual agreements to exempt workers from minimum wage and overtime protections.<sup>6</sup>

## Key terms

In the past decade, state and local policymaking related to platform-based work has generated an array of new terms and acronyms with evolving, and often contested, legal definitions. Below is a list of new but increasingly common terms found in state or local laws related to the regulation of digital platform companies and the treatment of their workers.

**Transportation network companies (TNCs)** is a term created to describe companies that facilitate on-demand or prearranged transportation services through online applications or platforms by connecting drivers with passengers. Examples of TNCs are Uber and Lyft. State laws vary in how they define TNCs and “TNC drivers.” For example, to set forth initial regulations for emerging platform-based ride-hailing services, California’s Public Utilities Commission in 2013 first defined a TNC as “a company that uses an online-enabled platform to connect passengers with drivers using their personal, non-commercial vehicles.” Company-backed legislation adopted in many states has since included language intended to define TNCs as nonemployers, or to make potential legal challenges to driver misclassification more difficult. For example, a model bill titled the “Transportation Network Company Act,” circulated by the corporate-backed lobby group American Legislative Exchange Council (ALEC) since 2014, specifies that TNCs “shall not be deemed to control, direct or manage the personal vehicles or transportation network company drivers that connect to its digital network.”<sup>7</sup> See Figure C for more on TNC and TNC driver definitions codified in various state codes.

**Delivery network companies (DNCs)** is a term created to describe companies that facilitate the sale and delivery service of items through online applications or platforms. Examples of DNCs include DoorDash, Postmates, and Instacart. State and local laws vary in how they define DNCs or “DNC drivers.”

**Marketplace platform** is a term created to describe an entity that facilitates the buying and selling of goods and services between buyers and sellers. Digital

platform companies, such as Uber, Lyft, and DoorDash, are all examples of marketplace platforms.

**Marketplace contractors** is a term created to describe individuals who enter into an agreement with a “marketplace platform” to be connected with buyers of their services for compensation. In recent examples of state legislation, companies have attempted to define “marketplace contractors” as independent contractors rather than as employees of a “marketplace platform.”

## Tech companies are using state preemption to limit worker rights and block local progress

Digital platform companies have become central players in a growing trend of state interference, or “preemption,” in local government decision-making across the country. State preemption of specific forms of local standard-setting has become increasingly common in the past decade, and often involves predominantly white legislatures blocking specific local policies that could otherwise improve conditions for workers, especially workers of color.<sup>8</sup> In the case of TNC regulation, states across the country have passed company-backed laws preventing cities from adopting wage and labor standards that could otherwise improve conditions for primarily Black, brown, and immigrant drivers. Uber’s early success in passing state preemption legislation (which initially mainly benefited just Uber and Lyft, who were intent on crafting state policy to further enable their monopoly or duopoly in local markets) has resulted in far less regulation of platform-based ride-hailing services than is traditionally applied to other vehicles-for-hire. Simultaneously, it has fueled broader trends toward extreme and harmful state preemption of local standard-setting across multiple industries, including a broad range of worker, environmental, and consumer protections.

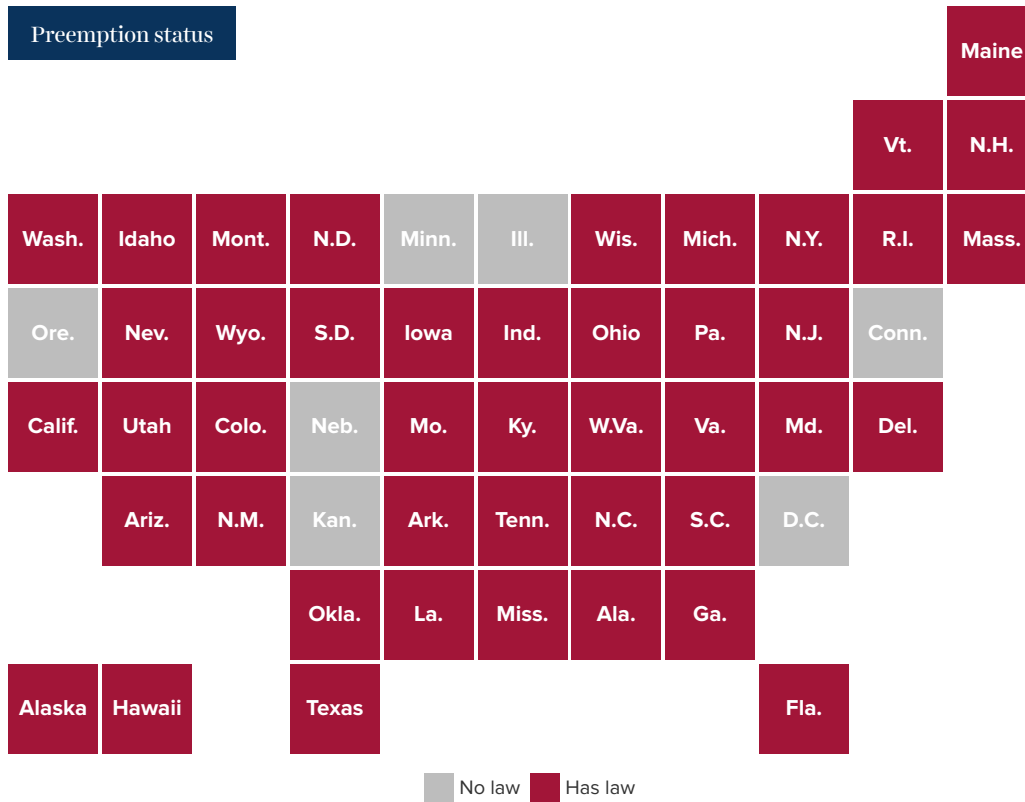
Historically, local transportation services, including private taxi companies, have been regulated primarily by local governments. In response to the introduction of platform-based ride-hailing and delivery service operators, many local governments have moved to adopt policies regulating such entities in the interest of protecting workers and customers, as well as integrating new service providers with other local or regional transportation systems. For example, between 2014 and 2016, 20 different Texas cities adopted ordinances setting TNC licensing or operating standards.<sup>9</sup>

In response, wherever possible, platform companies have refused to comply with local standards and vigorously sought to block new standards of any kind. Starting in 2014, companies began investing heavily in a coordinated national effort to persuade state legislatures to preempt local governments from regulating any aspect of their operations. For example, in 2017, the Texas state legislature passed a bill that nullified the local

Figure A

## Preempting workers' rights

States with “transportation network company” (TNC) laws that block local governments from setting standards for ride-hail services



**Note:** This map catalogs just one of several types of laws states may have in place preempting local governments from establishing certain labor standards, including driver pay and working conditions. For additional examples, see “*Workers’ Rights Preemption in the U.S.*” (web page), Economic Policy Institute, last updated August 2019.

**Source:** EPI analysis of state laws.

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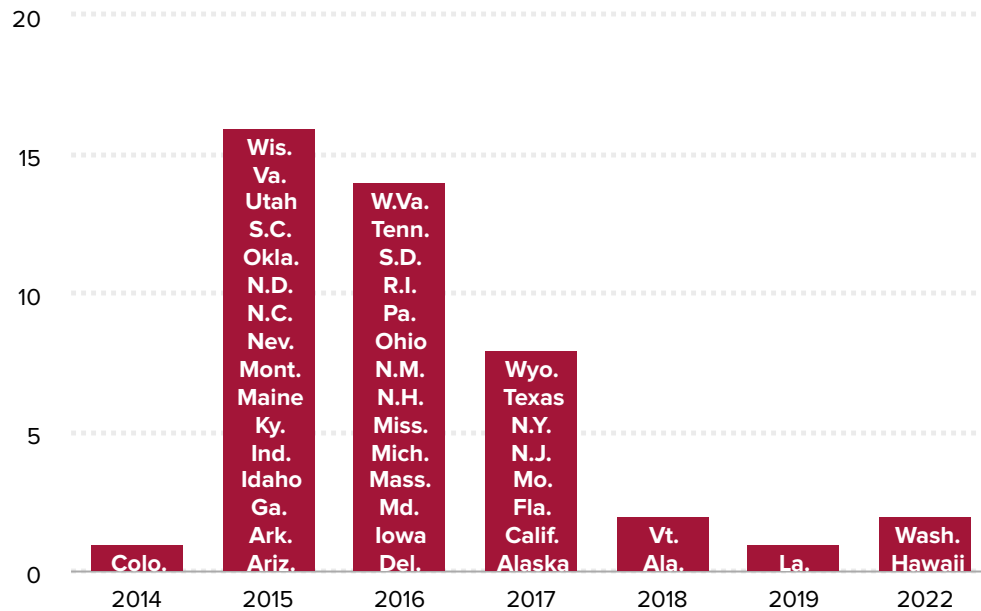
licensing or safety ordinances that 20 Texas cities had adopted to regulate TNCs and blocked any future local regulation of TNCs in the state. As shown in **Figure A**, 44 states have since similarly restricted some or all of the ability of local governments to set standards for digital platform companies operating within their jurisdictions.

Earlier studies have documented how, in just a few years, Uber and Lyft persuaded legislatures across the country to preempt local regulation of TNCs.<sup>10</sup> In 2014, the American Legislative Exchange Council (ALEC) began circulating model state legislation asserting exclusive state control over minimum standards for TNC insurance and consumer protections. Elements—and often exact wording—from ALEC’s “Transportation Company Network Act” template bill have since been adopted in dozens of states.<sup>11</sup> The unprecedented pace of platform companies’ success in passing preemption legislation reflects companies’ substantial investments in consolidating influence with state policymakers, coupled in some instances with aggressive customer advertising to press

Figure B

## States are blocking local protection of workers' rights

Timeline of passage of state “transportation network company” (TNC) laws blocking local governments from setting standards for ride-hail services



**Note:** Hawaii passed partial preemption in 2016 and full preemption in 2022. See Figure A for full legislative details.

**Source:** EPI analysis of state laws.

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their policy agenda (see **Figure B** for a timeline of state passage of preemption legislation).<sup>12</sup>

While many initial state TNC laws focused on setting uniform statewide insurance and licensing rules, and not specifically on labor standards, many of these statutes include preemption clauses worded so broadly that they could potentially be interpreted by courts to block local regulation of other aspects of a TNC’s operations. This includes efforts to protect workers or to set standards of local public interest in other domains, including emissions control, customer safety, disability access, and beyond.

## Worker organizing is creating important local policy models for states to follow

A handful of states have exempted their largest cities and/or airports from preemption statutes. These exemptions have allowed cities like New York City and Philadelphia to develop important local TNC regulations. New York City, where TNCs are regulated by the

city's Taxi & Limousine Commission, has come closest to implementing standards typical of those applied to commercial taxi services, including important transparency rules requiring companies to disclose pricing and trip data. In response to driver organizing, in 2018 New York City passed the Minimum Pay Standard Act. This breakthrough ordinance guarantees drivers minimum take-home pay for each trip after accounting for time and expenses.<sup>14</sup> In October 2020, the Seattle City Council unanimously passed a similar TNC driver pay standard.<sup>15</sup> At the time, Washington state had no TNC legislation (and thus no state preemption of local TNC regulation) in place.

Companies have sought to resist or undermine each of these innovative local pay standards. In 2021, companies convinced Washington legislators to pass sweeping state TNC legislation that included preemption of all local TNC regulations and nullified Seattle's pay standard (while establishing a new, but weaker state minimum pay system for drivers).<sup>16</sup> Though similar legislative proposals in New York have been unsuccessful so far, Uber recently challenged New York City's pay standard in court, which has put a halt to the city's 2022 proposal to increase driver pay rates for now.<sup>17</sup>

Notable exceptions to the state preemption trend include Minnesota, which has no TNC preemption language, and Illinois, where state law has set a floor rather than a ceiling for local regulation of TNCs since 2015. Chicago, for example, administers its own TNC licensing ordinance, which also includes a safety provision limiting TNC drivers to 10 hours of driving in a 24-hour period.<sup>18</sup> Language in Illinois' TNC law provides a useful model for other states: The law demonstrates that it is possible to enact uniform minimum standards while empowering units of local government to innovate with additional standards, as long as they are not "less restrictive than the regulation by the State."<sup>19</sup> Groups of drivers now organizing in both Chicago and Minneapolis have proposed local ordinances, currently under consideration by their respective city councils, designed to create a minimum pay standard, require more transparency from platforms, and address concerns with unjust terminations (i.e., platform companies' ability to "deactivate" a driver's access to an app at any time, with or without a good reason).<sup>20</sup>

Companies have continued to relentlessly push preemption in the few remaining states without TNC legislation in place. For example, after several years of proposing failed bills in Hawaii, in 2022 companies' persistence resulted in a new state law preempting local regulation of TNCs.<sup>21</sup> In Oregon, the only remaining U.S. state with no TNC legislation in place except for a liability insurance requirement, multiple preemption bills have been proposed each legislative session in recent years. These include standard company-backed bills to preempt all standards and counterproposals affirming the ability of local governments to set TNC standards, including those exceeding any standards set by the state.<sup>22</sup>

Where local standard-setting is legal, driver organizing continues to generate new and important models for improving the pay, benefits, and conditions associated with app-based work while retaining its positive features that drivers value, such as scheduling flexibility. San Francisco, for example, recently amended its minimum wage protections to clarify that they apply to independent contractors and employees alike. Some city commissioners in Portland, Oregon, have proposed establishing a TNC wage board to set



pay and labor standards, and the city is currently convening a TNC Drivers Advisory Committee to gather driver concerns and policy recommendations.<sup>23</sup>

## Cities with strong pay and transparency standards show that tech companies can adapt and comply with important worker protections

New York City and Seattle have continued to advance particularly important innovations with a recent focus on improving standards for the growing number of app-based “delivery network company” (DNC) workers, an occupation that has grown exponentially and become more hazardous during the pandemic. In 2020, following months of delivery worker organizing, New York City approved a package of minimum pay and standards for app-based delivery workers.<sup>24</sup> A new round of increases proposed in 2022 would boost NYC DNC workers’ hourly minimum pay to \$23.82 by 2025.<sup>25</sup> Although state preemption undid Seattle’s strong local TNC pay standard in 2022, Seattle has continued to innovate—most recently with its new “Pay Up Ordinance,” which guarantees DNC workers a minimum wage plus expenses and tips, and requires platform pay and pricing transparency. Seattle councilors have announced that work is underway on additional ordinance language to address DNC worker priorities, including restroom access, anti-discrimination, and protection from unjust termination or “deactivation.”<sup>26</sup>

The relatively robust local standards in place for TNCs in New York City (and now for DNCs in both New York City and Seattle) demonstrate that, like other viable businesses, platform companies can adapt their operations to comply with minimum pay, safety, and transparency standards similar to those other employers routinely follow. These city ordinances offer a glimpse into the promising local policy experiments that can emerge in the absence of preemption and serve as a reminder of how much innovation remains stifled by preemption in many states.

Drivers in Denver, Colorado, for example, have been organizing for months around demands that include transparency, just wages and benefits, and protection from discrimination and unfair deactivation. While their counterparts in Chicago and Minneapolis are introducing city ordinance language to address similar concerns, preemption in Colorado means that drivers there must (for now) direct their demands to the state’s Public Utilities Commission, which has exclusive authority over TNC regulation, or press for changes to state law. Colorado drivers are currently backing “Gig Work Transparency” legislation that would require TNCs and DNCs to disclose “take rates” to customers (how much of each customer’s payment the company keeps versus how much goes to drivers), disclose fares and destinations to drivers before they accept a job, provide drivers with accurate weekly summaries of wages, time worked, and expenses, and provide drivers with a transparent process for challenging terminations.<sup>27</sup>

Table 1

## Comparison of workplace legal protections for employees and independent contractors in the United States

Labor standard	Employee	Independent contractor
<i>Minimum wage</i>	✓	X
<i>Overtime pay</i>	✓	X
<i>Unemployment insurance</i>	✓	X
<i>Workers' compensation</i>	✓	X
<i>Paid sick days</i>	✓	X
<i>Paid family leave</i>	✓	X
<i>Health and safety protections</i>	✓	X
<i>Right to a union</i>	✓	X
<i>Discrimination and sexual harassment protections</i>	✓	X

**Note:** Employees receive these protections in places where they are statutorily prescribed.

**Source:** EPI analysis of federal and state laws.

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# Employee vs. independent contractor status: Tech company efforts to carve drivers out of state employment protections and redefine workers as nonemployees

In addition to preempting local standards, platform companies have used state legislation as a vehicle for preventing workers from claiming legal status as employees, thereby excluding them from accompanying legal protections and benefits. Within just a few years, Uber and Lyft have had stunning success in advancing state legislation that codifies their ability to (mis)classify their drivers as “independent contractors” rather than employees.

How a worker is classified has serious implications. Most federal and state labor and employment protections are granted only to those classified as employees, *not as independent contractors*. This includes basic protections such as minimum wage, overtime pay, unemployment insurance, and workers' compensation, as well as health and safety protections, nondiscrimination protections, paid sick or medical and family leave, and rights to organize and collectively bargain (**Table 1**). For these reasons, the legal definitions embedded in many state and federal laws are clear that independent contractor status should apply only to workers who have elected to go into business for themselves, and only when the firms they contract with do not control significant aspects of their work.

Many instances of early state TNC legislation included preemption provisions alongside language rewriting existing legal definitions of employment, suggesting TNCs are not employers, and erecting legal obstacles to potential TNC driver claims to employee status. Dozens of state TNC bills have drawn from model language in ALEC’s “Transportation Network Company Act,” which encourages states to claim exclusive authority for regulating TNCs and to declare that a TNC “shall not be deemed to control, direct, or manage the personal vehicles or transportation network company drivers that connect to its digital network, except when agreed to by written contract.”<sup>28</sup>

Several states have gone even further, adopting state TNC legislation that explicitly labels drivers as “independent contractors” or exempts drivers from coverage under certain state employment laws. For example, North Carolina’s 2015 TNC law creates a rebuttable presumption that “a TNC driver is an independent contractor and not an employee.” New Hampshire law similarly states that TNC “drivers are presumed to be independent contractors and not employees.” Wyoming’s 2018 TNC legislation specifies that a “driver shall be an independent contractor, not subject to the Wyoming Worker’s Compensation Act and not an employee.”<sup>29</sup>

**Figure C** includes links to laws passed between 2015 and 2022 in 34 states across the country that include instances of language intended to define TNC drivers as nonemployees.

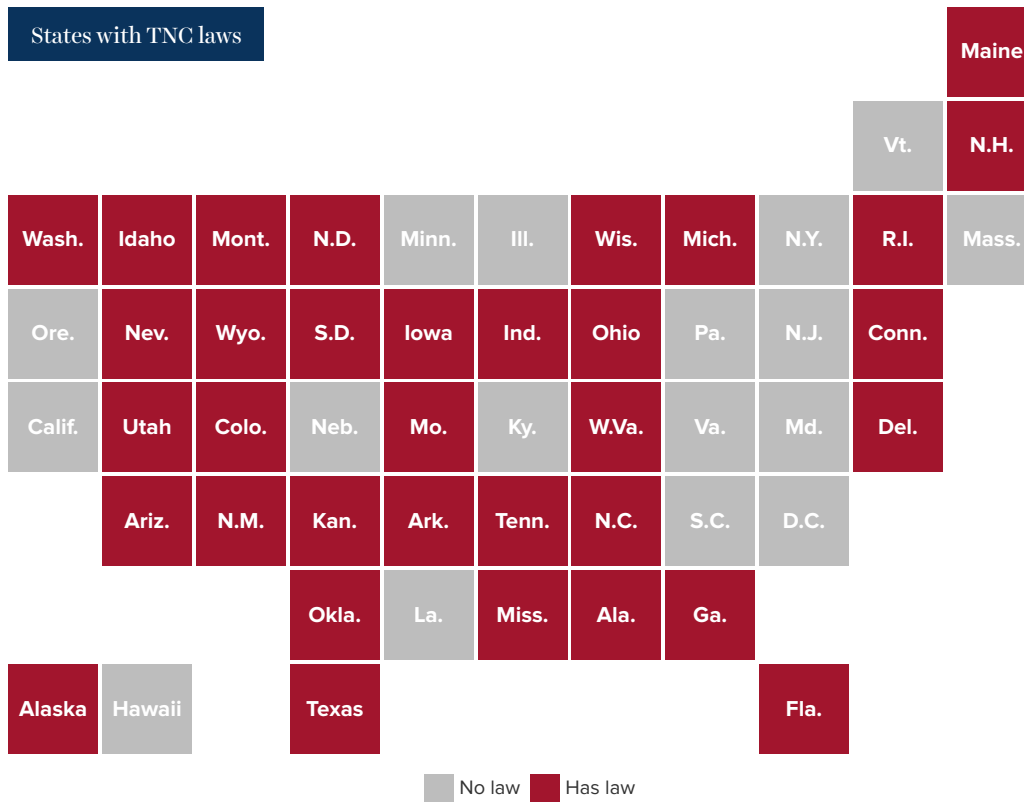
Platform companies’ widespread practice of regarding all workers who provide their services as “independent contractors” has already led to serious consequences, including poverty wages and wage theft. In a spring 2020 survey of individuals engaged in app-based “gig work” while classified as independent contractors, 29% reported being paid less than their state’s minimum wage, 62% reported having lost pay because of “technical difficulties clocking in or out” of platform applications, 30% reported that low pay left them reliant on Supplementary Nutrition Assistance Program (SNAP), and 31% reported the inability to afford their full utility bills in the previous month.<sup>30</sup>

## Tech companies are pushing state ‘marketplace contractor’ legislation that threatens protections for workers across occupations

Moreover, platform companies have expanded their agenda well beyond legislation affecting just TNC drivers, pushing a series of “marketplace platform bills” designed to permanently exempt all current and future app-based businesses from coverage under state minimum wage, unemployment, and workers’ compensation laws.<sup>31</sup> Like TNC laws before them, these bills invent a new occupational category of “marketplace contractor” applicable to any worker who may be connected to a variety of jobs by a digital app. The bills then declare all “marketplace contractors” to be “independent contractors” rather

Figure C

## States with “transportation network company” (TNC) laws defining ride-hail drivers as nonemployees



Source: EPI analysis of state laws.

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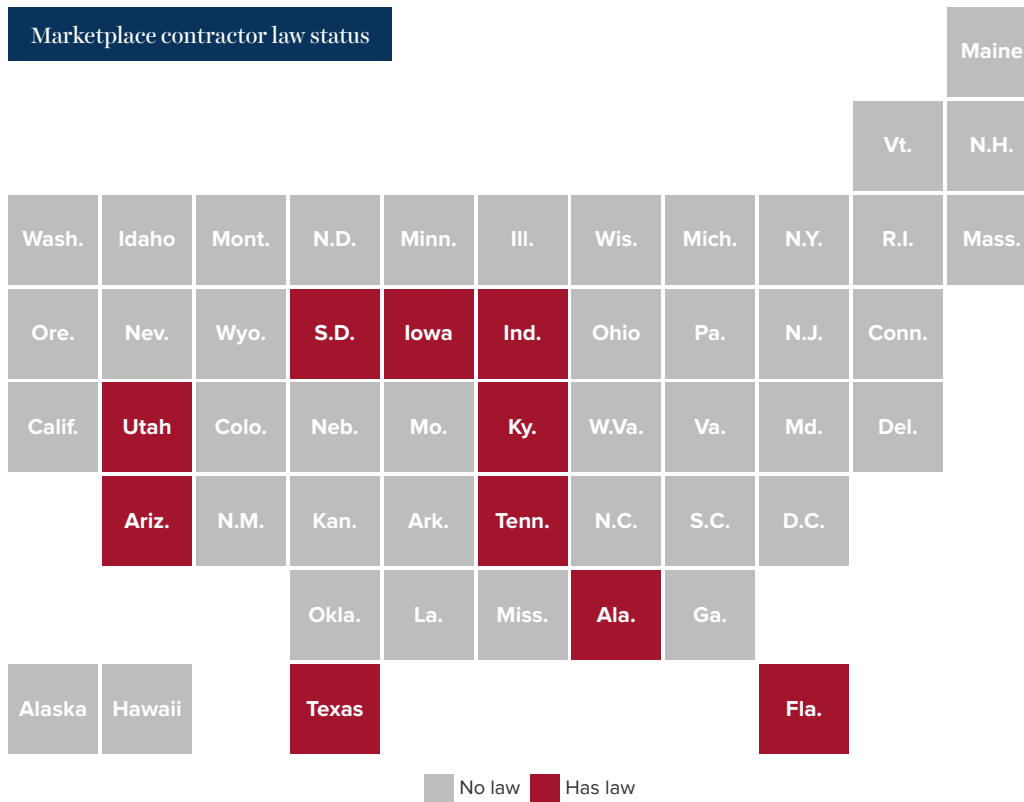
than employees. As shown in **Figure D**, ten states have already adopted “marketplace contractor” legislation.

For example, since 2018, Kentucky state law has defined a “marketplace contractor” as a person or entity that “enters into an agreement with a marketplace platform to use its digital network or mobile application to receive connections to third party individuals or entities seeking services.” In 2019, the Texas Workforce Commission adopted an administrative rule designating all “marketplace contractors” as “independent contractors.” In 2022, South Dakota used slightly different language to achieve similar results, adopting a new law declaring “delivery facilitation contractors” who use a “platform’s digital network to connect with customers seeking services” to be independent contractors, not employees.<sup>32</sup>

Utah has had a “marketplace contractor” law in place since 2015, and in 2018 passed additional legislation designating anyone who uses a “service marketplace platform” to find work performing various building services to be an “independent contractor” if the charge for the service is \$3,000 or less.<sup>33</sup> The law goes on to define building services broadly to include “cleaning or janitorial; furniture delivery, assembly, moving, or installation; landscaping; home repair; or any service similar to the services described

Figure D

## States with “marketplace contractor” laws defining app-based workers as nonemployees



Source: EPI analysis of state laws.

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above.” Utah legislators have since proposed—but not yet passed—an additional “On-demand Labor Marketplace Platforms Act” that denies employee status to all workers of “marketplace platforms.”<sup>34</sup> As a small indication that some states may be starting to recognize the many risks that accompany sweeping exemptions created by these laws, in 2020 Tennessee updated its law to prohibit “marketplace platforms” from keeping tips intended for drivers.<sup>35</sup>

## Strong state ABC tests are needed to preserve definitions of employee status and prevent misclassification

Wherever companies have been challenged by strong state worker protection laws, active enforcement, or innovative local standard-setting, they have sought to eliminate or rewrite state employment rules. Where unable to immediately impose their policy agenda via legislative action, platform companies have shifted their tactical focus to ballot initiatives

and litigation.

In 2020, platform companies spent more than \$200 million to secure passage of California Proposition 22 in order to undermine the state’s strong protective test for preventing independent contractor misclassification and exempt their underpaid and disproportionately Black and brown workers from minimum wages and workplace protections.<sup>36</sup> A year later, companies poured hundreds of millions into a similar ballot initiative aimed at exempting themselves from Massachusetts’ strong worker protection laws (see case studies below). Companies have been willing to spend endlessly in these high-stakes campaigns because they believe their business model depends on denying workers’ employment status.

Tech is merely the latest of many industries in which employers have sought to ignore and, where possible, erode or eliminate legal tests of employment status. Employer misclassification of workers as independent contractors is a pervasive and extensive problem in the United States. Platform companies have expanded on and quickly accelerated implementation of a playbook developed by employers in construction, transportation, landscaping, and other industries. Tech companies’ similar attempts to (mis)label workers as “independent contractors” and avoid minimum pay and labor standards have likewise been designed to undercut law-abiding competitors, grow their market share, and maximize potential profits and shareholder returns.

In response to the serious implications and costs that misclassification poses to workers and governments, many states have adopted standards to clearly determine whether a worker is an employee or an independent contractor. The ABC test is a strong, protective test for determining employee status. The test establishes a presumption that an individual performing services for an employer is an employee, not an independent contractor, unless the employer can establish three factors:

1. The work is done without the direction and control of the employer;
2. The work is performed outside the usual course of the employer’s business; and
3. The work is done by someone who has their own, independent business or trade doing that kind of work.

By establishing the presumption that a worker is an employee, the ABC test puts the onus on the employer to prove a worker is truly an independent contractor. In turn, this reduces the likelihood that workers are misclassified and lose protections they should be guaranteed under the law as employees.

## Case study: California’s Proposition 22

In 2018, the California Supreme Court issued a unanimous decision, *Dynamex Operations West, Inc. v. Superior Court of Los Angeles*, 4 Cal. 5th 903. The *Dynamex* decision held that California’s ABC test was the appropriate test for evaluating employee status under California’s wage orders. The California legislature then passed Assembly Bill 5 (AB5) to codify the *Dynamex* decision in state law. AB5 established that the ABC test is the

appropriate test for determining coverage under California wage and hour laws, with certain limited exceptions.<sup>39</sup> AB5 would have made it harder for companies to misclassify janitors, construction workers, home health aides, and hotel and hospitality workers as independent contractors. However, before the bill was set to take effect in January 2020, platform companies—including Uber, Lyft, and Instacart—were already setting in motion a multi-million-dollar ballot initiative to exclude their workers from AB5.

The Protect App-Based Drivers and Services Act, also known as Proposition 22, was a ballot initiative that exempted TNC drivers from AB5 while proposing to extend some limited pay and benefit standards to drivers. Company arguments for Proposition 22 included promises that drivers would be paid an hourly wage of at least 120% of the state minimum wage, plus a health care stipend, totaling a minimum of \$15.60 per hour. However, research by the University of California Berkeley Labor Center found that, because of multiple loopholes in Proposition 22's pay system, the act would leave app-based drivers with a pay guarantee equivalent to only \$5.64 per hour, far less than the \$15.60 minimum promised.<sup>40</sup> Companies spent over \$200 million on a campaign to persuade voters to approve Proposition 22 in November 2020. Proposition 22 was later deemed unconstitutional by California's Superior Court in August 2021 because it infringed on the legislature's authority to regulate workers' compensation.<sup>42</sup>

Despite the many public promises made during the ballot initiative campaign, since Proposition 22's passage, companies like Uber and Lyft have been paying drivers well under minimum wage in California, where estimated driver pay now averages about \$6.20 per hour.<sup>43</sup> Likewise, hurdles to qualify for promised health care stipends have resulted in only 15% of drivers applying. By winning an exemption from AB5, Uber and Lyft avoided paying hundreds of millions of dollars into the state unemployment insurance system. Consequently, drivers were unable to draw regular unemployment benefits during the COVID-19 pandemic. When Congress authorized emergency unemployment benefits for independent contractors, tens of thousands of Uber and Lyft drivers gained access to these programs, meaning that the federal government—and taxpayers—financially supported drivers through the pandemic, not Uber and Lyft.

While litigation over Proposition 22 continues, California labor and legislative leaders have not backed down from commitments to maintain and enforce the ABC test codified in AB5. Legislation in 2021 to increase penalties for wage theft (making violations grand theft), for example, explicitly included independent contractors in its definition of employees.<sup>44</sup>

## Case study: Massachusetts's ballot initiative and legislative proposals

Like California, Massachusetts is among the half dozen states with an ABC test in place for wage and hour laws. In August 2020, Massachusetts Attorney General Maura Healey sued Uber and Lyft for misclassifying workers and denying them pay under the state's wage and hour laws.<sup>45</sup>

As they had in California, platform companies sought to exempt themselves from

Massachusetts’s strong ABC test and other state labor standards by introducing and heavily funding a state ballot initiative in 2021. Repeating many arguments from their Proposition 22 campaign, companies claimed the ballot initiative would provide workers with a health care stipend, the opportunity to earn paid sick time, family and medical leave, and a wage equal to 120% of the Massachusetts minimum wage. However, research by the University of California Berkeley Labor Center found that, because of multiple loopholes in the ballot initiative, drivers would have a pay guarantee that is equivalent to a wage of \$4.82 per hour, far less than the \$15.00 state minimum wage set to take effect in Massachusetts in 2023.<sup>46</sup>

In June 2022, the Massachusetts Supreme Court blocked the proposed ballot initiative because it contained “at least two substantively distinct policy decisions,” violating the state’s single subject rule.<sup>47</sup> The court deemed language in the initiative designed to shield companies from liability for accidents or crime to be unrelated to the rest of the proposal, and therefore the initiative did not appear on the November 2022 ballot.<sup>48</sup>

While the court decision has, for the moment, interrupted platform companies’ ballot initiative campaign, attacks on worker protections in Massachusetts are expected to continue. In 2023, multiple bills featuring various “third category” proposals have already been filed in the state legislature. These proposals define app-based drivers as independent contractors—codifying their ineligibility for state minimum wage and all other employment protections—while creating a subminimum pay standard and some limited benefits.

“Massachusetts Is Not For Sale,” a coalition of worker, union, and community groups formed in opposition to the 2022 ballot initiative, has also continued to support driver organizing while developing new policy proposals.<sup>49</sup> In the 2023 legislature, the coalition is backing a bill for “Establishing Protections and Accountability for TNC and DNC Workers, Consumers, and Communities.” This comprehensive legislation is a promising and important model for state policymakers that clearly defines all app-based ride-hail and delivery service workers as employees, ensuring that they will be covered by state unemployment, workers’ compensation, and other employment protections. The bill proposes a strong pay standard that ensures app-based workers’ wages meet or exceed the state minimum wage for all time worked, requires full pay and pricing transparency from platform companies, and includes worker anti-retaliation protections and measures to increase safety for both workers and customers.<sup>50</sup>

## States have opportunities to adopt or strengthen ABC tests

These case studies illustrate that strong legal tests to distinguish employee and independent contractor status, such as the ABC test, are key to combating worker misclassification. As of 2022, 18 states and the District of Columbia have adopted the ABC test for determining employee status for certain workplace laws (see **Table 2**).<sup>51</sup> By establishing the presumption that a worker is an employee, the ABC test puts the onus on



Table 2

## States that have adopted the ABC test for unemployment insurance eligibility and/or wage and hour protections

State	ABC for unemployment insurance	ABC for wage/hour/other
<i>Alaska</i>	Yes	
<i>California</i>	Yes	Yes
<i>Connecticut</i>	Yes	Yes
<i>Delaware</i>	Yes	
<i>District of Columbia</i>	Yes for construction	Yes for construction
<i>Hawaii</i>	Yes	
<i>Illinois</i>	Yes	Yes for construction
<i>Indiana</i>	Yes	
<i>Maine</i>	Yes	
<i>Maryland</i>	Yes	Yes for construction and landscaping
<i>Massachusetts</i>	Yes	Yes
<i>Nebraska</i>	Yes	Yes
<i>Nevada</i>	Yes	
<i>New Hampshire</i>	Yes	
<i>New Jersey</i>	Yes	Yes
<i>New Mexico</i>	Yes	
<i>New York</i>	Yes for construction	Yes for construction
<i>Vermont</i>	Yes	Yes
<i>Washington</i>	Yes	

**Note:** Maine's ABC test for UI was weakened in 2012 to an A&B or A&C test, then restored again in 2013 to a full ABC test. (See [26 ME Rev Stat § 1043](#).)

**Source:** Jon Shimabukuro, *Worker Classification: Employee Status Under the National Labor Relations Act, the Fair Labor Relations Act, and the ABC Test*, Congressional Research Service, April 2021. and EPI analysis of state laws.

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the employer to prove a worker is truly an independent contractor, therefore decreasing the likelihood that an individual is misclassified.

While several states have adopted the ABC test, it has yet to be established under federal labor and employment law. The Protecting the Right to Organize (PRO) Act, which was passed in the House of Representatives but has yet to advance in the Senate, would establish the ABC test under the National Labor Relations Act.<sup>52</sup>

Many states have immediate opportunities to adopt or expand ABC tests, and lawmakers

should prioritize this as a first and essential step toward strengthening definitions of employee status and preventing worker misclassification. In the past two years, legislation to establish a full ABC test has been introduced in Minnesota, New York (where existing ABC tests apply only to construction work), Oregon, Pennsylvania, and Rhode Island.<sup>53</sup>

Several states, including those not yet using the full ABC test, have taken intermediate steps to strengthen legal definitions as part of broader efforts to crack down on worker misclassification. Nevada, for example, passed 2019 legislation clarifying that in order to be presumed an independent contractor, an individual must also hold a state or local business license to operate in Nevada.<sup>54</sup> In 2021, Oregon passed legislation expanding the state workers' compensation definition of "worker" to include anyone who is paid for their services, unless an employer can meet the state's existing A&C test to classify them as an independent contractor.<sup>55</sup> In 2021, Colorado proposed (but has not yet passed) a notable bill to protect employees from discriminatory employment practices that includes independent contractors in the definition of covered employees.<sup>56</sup>

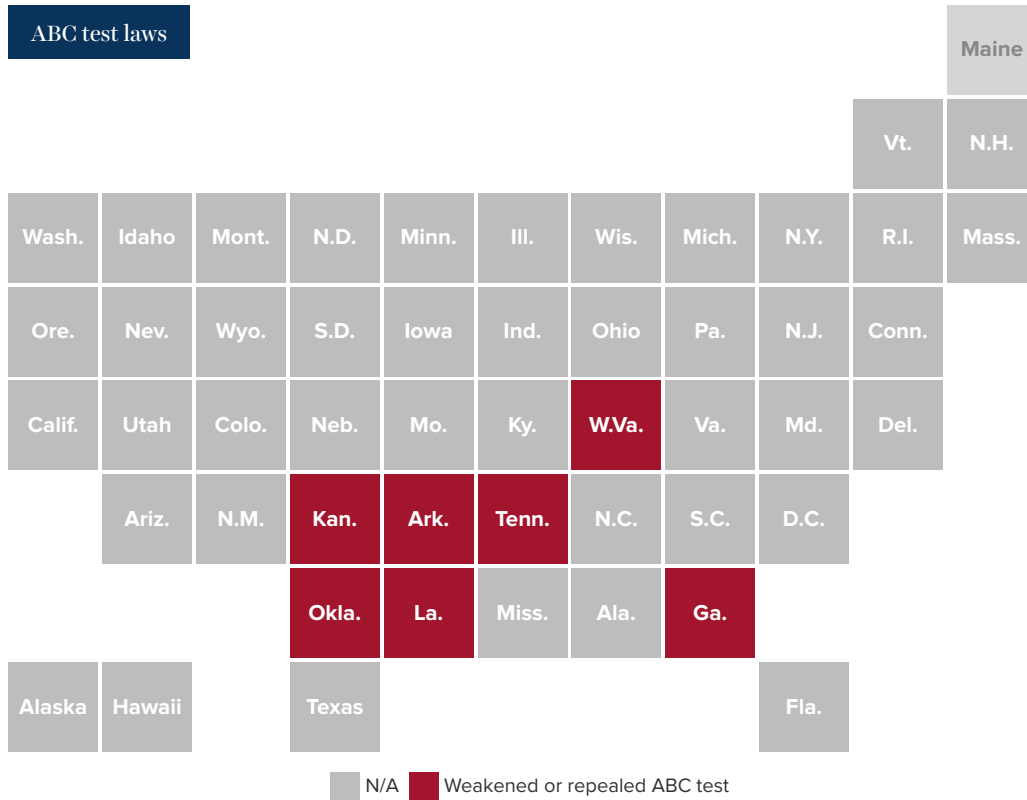
Meanwhile, many other states have headed in the wrong direction. Relentless employer attacks have succeeded in eroding once-strong ABC tests and weakening legal definitions of employment across the country. **Figure E** highlights seven states that until recently had ABC tests in place for one or more state employment law but repealed or weakened those tests within the last decade.

States with ABC tests still in place continue to face an onslaught of legislative threats to their strong standards. In California alone, at least a dozen bills aimed at repealing or weakening the state's ABC test have been introduced in tandem with Proposition 22 and its subsequent court battles.<sup>57</sup> Proposed bills have included measures to create a new category of "independent work" for those who "voluntarily choose it," as well as various bills to exempt TNC drivers or other occupational groups from California's ABC test.<sup>58</sup> ABC tests in Hawaii, New Jersey, and Vermont have also been perennial targets for legislation proposing weaker multipronged tests of employment status or attempts to exempt TNC drivers from ABC tests.<sup>59</sup>

The evolution of these attacks provides insight into platform companies' state policy priorities, which include new template bills to further weaken employee status definitions in states without ABC tests. Oklahoma and West Virginia are examples of states where legislators have introduced versions of ALEC's newest and most extreme model legislation, the "Uniform Worker Classification Act," which was designed to upend employee status definitions across statutes and occupations.<sup>60</sup> The legislation proposes, in the name of "uniformity," to supersede all existing employee status definitions in a given state's employment laws, replacing them with a broad presumption of independent contractor status.<sup>61</sup>

Figure E

### States where formerly strong ABC tests were weakened or repealed in past decade



**Note:** Maine's ABC test for UI was weakened in 2012 to an A&B or A&C test, then restored again in 2013 to a full ABC test. (See [26 ME Rev Stat § 1043](#).)

**Source:** EPI analysis of state laws.

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# Strong enforcement of state ABC tests can prevent worker misclassification and wage theft

Another tool all states can use to combat misclassification is stronger enforcement of existing employment laws, especially where ABC tests are already in place. New Jersey's Department of Labor and Workforce Development, for example, recently found that Uber had violated the state's ABC test for wage and hour laws by misclassifying drivers as independent contractors and fined the company \$100 million in back taxes.<sup>62</sup>

New Jersey's strong overall stance on misclassification provides an excellent set of policy models for other states. Along with maintaining an ABC test, New Jersey has employed a multifaceted legislative approach to provide state agencies with the necessary enforcement tools and resources to crack down on misclassification. New Jersey's 2019 Wage Theft Act increased the amount that workers could collect for wage theft (a common consequence of misclassification), to include up to 200% in liquidated damages; the act also created strong new anti-retaliation provisions.<sup>63</sup> In 2020, New Jersey created new penalties for willful misclassification—up to \$1,000 per misclassified employee—and new requirements for employers to post a notice to all employees regarding misclassification.<sup>64</sup> Then, in 2021, New Jersey passed four interrelated bills designed to enhance state agencies' ability to pursue misclassification cases and deter violations using the following tools:

- Empowering the state commissioner of labor to issue stop-work orders to all work sites of employers found illegally misclassifying workers;
- Creating a state Office of Strategic Enforcement and Compliance responsible for interagency coordination of enforcement of wage payment, benefit, and tax laws;
- Making misclassification of employees for the purpose of evading payment of insurance premiums a violation of state fraud prevention laws that is subject to fines starting at \$5,000 for a first violation, \$10,000 for a second violation, and \$15,000 for each subsequent violation; and
- Requiring creation of a statewide, publicly accessible database of certified payroll information for public works projects.<sup>65</sup>

Other states with strong ABC tests in place have recently taken important actions to strengthen enforcement. For example, in 2020, Vermont created its Task Force on Employee Misclassification and empowered the state attorney general to enforce complaints of willful, substantial, or systemic misclassification as potential unfair acts of commerce.<sup>66</sup> In 2019, Nevada likewise created a Task Force on Employee Misclassification and increased penalties for violations to up to \$5,000 per employee.<sup>67</sup>

Some states where ABC tests are not yet in place have taken steps to improve

enforcement of misclassification, especially when it results in wage payment violations. These states include: Colorado, where a 2022 law increased penalties for employer violations and created a worker protection unit to investigate and enforce wage theft or misclassification claims;<sup>68</sup> and Virginia, where 2020 legislation increased penalties for willful misclassification to \$5,000 per violation and created a private right of action for workers who have missed out on pay or benefits due to misclassification.<sup>69</sup>

Over the past decade, over half of states established multiagency misclassification task forces in recognition of the complex enforcement challenges posed by misclassification. These structures vary widely in scope, mission, and effectiveness. To maximize the potential of task forces, states should provide them with adequate funding and staff, as well as clear mandates to crack down on illegal misclassification. These mandates should include requirements to solicit active participation from worker organizations and state agencies with jurisdiction over employment and tax laws and to adopt other best practices to ensure robust enforcement.<sup>70</sup>

In October 2022, the federal Department of Labor proposed a rule that provides employers with guidance on how to determine if a worker is an employee or an independent contractor under the Fair Labor Standards Act.<sup>(71)</sup> If finalized, the interpretative rule would draw on long-standing case law that employers have relied on to classify workers as employees or independent contractors under wage and hour laws. By providing clear guidance, the Department of Labor's proposed rule—combined with federal enforcement—would help limit the misclassification of workers across the country. State labor departments can and should follow suit with regulations or guidance that affirm that employers should follow the same definitions for determining employee status under state wage payment laws.

## **A state policy agenda to empower workers and protect flexible work without exploitation**

Understanding platform companies' policy agenda and lobbying strategies can help workers, advocates, and lawmakers prepare for ongoing challenges to workers' rights at the state level. It is clear that it will also take effective organizing and deliberate building of unified support for a worker-led policy agenda to confront and counter tech companies' growing power and influence in the states.

In the face of corporate threats, groups of app-based workers, labor unions, and advocates across the country have continued to organize, strengthen, and enforce existing protective employment laws. Many are already developing new state and local policy solutions that can help chart a better future for accessible, flexible work without exploitation in the platform economy.

Lessons from recent state and local struggles to protect worker rights demonstrate the

great potential for drivers and other app-based workers to join forces with constituencies who share a stake in overlapping areas of concern about platform company impacts on consumer safety, the environment, transportation access and cost (including equitable access for individuals with disabilities), racial and gender equity, and immigrant justice.

To empower workers and defend against tech company threats to worker rights, states should prioritize the following key policies:

## **Repeal state preemption of local labor standards and encourage local worker-driven policy innovation**

- Review state TNC laws and other relevant state statutes, and repeal language that is currently prohibiting localities from developing policies to address priority worker and consumer concerns;
- Set strong state standards for employers as a floor while empowering localities to innovate beyond the floor;
- Regularly review local policy innovations and best practices, and move to adopt successful models for improving job quality and equity at the state level; and
- Carefully evaluate new policy proposals to ensure they build on, but do not diminish, local standards.

## **Reject or reverse occupational carve-outs that deny workers full rights**

- Review state TNC laws and other relevant state statutes, and repeal language that excludes app-based workers from coverage under state employment laws or that defines “TNC drivers,” “marketplace contractors,” or other app-based workers as nonemployees or independent contractors;
- Assess new policy proposals carefully to prevent occupational carve-outs or exemptions from state minimum wage, unemployment, workers’ compensation, health and safety protections, paid leave, or nondiscrimination protections; and
- Reject “third category” proposals that define app-based workers (or other occupational groups) as nonemployees, and set subminimum pay or benefit standards.

## **Adopt strong, protective legal tests, such as the ABC test, for establishing employee status and preventing the misclassification of workers as independent contractors**

- Review legal definitions and tests of employee status in current state wage and hour, workers' compensation, unemployment insurance, and other employment laws; and
- Adopt a strong and consistent ABC test under all state employment statutes. Strong ABC tests are those that establish a presumption that an individual performing service for an employer is an employee, not an independent contractor, unless the employer can establish three factors: A) The work is done without the direction and control of the employer; B) The work is performed outside the usual course of the employer's business; and C) The work is done by someone who has their own independent business or trade performing that kind of work.

## **Strengthen enforcement and increase penalties to deter the misclassification of workers as independent contractors**

- Provide state enforcement agencies and misclassification task forces with adequate staff and funding as well as clear mandates to crack down on worker misclassification by enforcing existing state employment laws and targeting investigations and enforcement in sectors where misclassification is known to be widespread;
- Support and expand investments in co-enforcement partnerships between state agencies and labor and community organizations with the capacity to directly reach workers with education about their rights and to support workers who come forward to file complaints;
- Increase employer penalties for violations, and ensure that workers harmed by misclassification can collect liquidated damages in addition to back wages;
- Provide authority for attorneys general to prosecute willful misclassification cases under fraud or consumer protection statutes; and
- Empower state enforcement agencies to issue stop-work orders at work sites of employers who systematically violate the law or refuse to comply with ordered remedies.

## **Affirm and strengthen workers' rights to organize and collectively bargain under federal labor law**

- Strengthen anti-retaliation protections under existing state employment laws so that

workers can bring forward complaints of violations without fear of job loss;

- Affirm app-based workers’ legal status as employees with full legal protections to unionize and collectively bargain over the full scope of wages, hours, and terms and conditions of work, as defined in the National Labor Relations Act;
- Reject “third category” proposals that restrict app-based workers’ organizing rights by defining them as nonemployees and/or creating quasi-bargaining agents (such as “driver resource centers” or other entities with restricted authority and accountability) that could allow companies to sidestep legal duties to engage in collective bargaining with workers’ unions; and
- Support federal labor law reform such as the Protecting the Right to Organize (PRO) Act, which would strengthen workers’ rights to organize and adopt the ABC test for purposes of coverage under the National Labor Relations Act.

## **Extend eligibility for unemployment insurance and other state benefit programs to all workers regardless of immigration status, and support federal immigration reform**

- Expand on or create state excluded-worker funds that extend unemployment insurance eligibility to all workers, regardless of immigration status;
- Update the design of state paid leave and other benefit programs to extend coverage to all workers; and
- Support comprehensive immigration reform that creates a path to full citizenship for immigrant workers and disincentivizes employer exploitation and employment discrimination based on immigration status.

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## **Notes**

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and Krueger. (See Seth D. Harris and Alan B. Krueger, *A Proposal for Modernizing Labor Laws for Twenty-First-Century Work: The 'Independent Worker,'* The Hamilton Project, December 2015.) The proposal was roundly criticized by worker advocates, including EPI (see Ross Eisenbrey and Lawrence Mishel, *Uber Business Model Does Not Justify a New 'Independent Worker' Category*, Economic Policy Institute, March 2016). Washington state's 2021 version of "third category" legislation defines ride-hail drivers as nonemployees, sets limited state standards for driver pay and sick pay (while preempting higher local standards like those previously in place in Seattle), and creates a state-sanctioned entity with exclusive authority to "enter into an agreement" with ride-hail companies on the single issue of an appeals process for driver deactivation. (See [HB 2076](#), 2021–22 Assemb., Reg. Sess. [Wash. 2022] and Jennifer Sherer, "Testimony to the Washington State Senate Transportation Committee on ESHB 2076: Concerning Rights and Obligations of Transportation Network Company Drivers and Transportation Network Companies," testimony submitted to Washington State Senate Transportation Committee, February 26, 2022.) Legislative proposals with similar elements have been floated in Connecticut and New York, where they have faced strong criticism from drivers, unions, and worker advocates and, as of this report, have not proceeded. (See [SB 1000](#), 2021–22 Sen., Reg. Sess. [Conn. 2021] and [SB 6538](#), 2019–20 Sen., Reg. Sess. [N.Y. 2019].)

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