



RESEARCH REPORT

# Reimagining Workplace Protections

## A Policy Agenda to Meet Independent Contractors' and Temporary Workers' Needs

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# Executive Summary

Millions of workers in nonstandard arrangements, including temporary, subcontracted, and on-call workers and independent contractors, lack access to essential workplace protections or, where protections do exist, to adequate enforcement mechanisms. Building an equitable economy requires addressing these shortcomings and reimagining our system of workplace protections. This report provides a policy framework for expanding essential protections to more workers, focusing on the needs of independent contractors and temporary workers.

As globalization, advancing technologies, and shifts in corporate governance have led businesses to prioritize short-term profits, many companies have replaced traditional employment relationships (i.e., where organizations directly employ their workers on a permanent, full-time basis) with nonstandard work arrangements, including independent contracting, temporary staffing agencies, subcontracted firms, and franchise relationships. More than 15 million people in the US work in nonstandard arrangements. People of color, women, immigrants, and people with disabilities are overrepresented in these often low-paying arrangements, reflecting how inequities have shaped the labor market throughout US history.

Reliance on nonstandard work arrangements has eroded worker power; contributed to declining wages, benefits, and health and safety conditions; and exacerbated inequities based on race, ethnicity, gender, and disability. As technology platforms disrupt work structures, and the COVID-19 crisis adds new urgency, there has never been a more critical time to reimagine our system of workplace protections.

## The Right Mix of Protections and Incentives Would Protect Workers in Nonstandard Arrangements

We need a policy infrastructure that offers stronger protections for misclassified workers, independent contractors, temporary workers, and others in nonstandard arrangements, while providing the right incentives for organizations to contribute their fair share to ensure a baseline of economic security and protections for workers, rather than exploiting loopholes in nonstandard work structures to avoid responsibilities to workers. The policies and enforcement systems presented in this report are designed to foster mutually safe and beneficial relationships for workers and businesses that promise increased productivity, shared prosperity, and a more equitable society.

# The Exclusion of Independent Contractors from Workplace Protections

Many workplace benefits and protections are tied to employment status, leaving those classified as independent contractors behind. In many cases, companies misclassify workers as independent contractors to avoid costs associated with employment; worker classification needs to be clearly defined, with adequate enforcement for violations to ensure workers' classification aligns with the work they perform. At the same time, correctly classified independent contractors also need and deserve access to essential protections. Independent contractors face several challenges:

- **Many independent contractors (as well as many misclassified workers) face discrimination and harassment** in their work, in the form of denied opportunities and differential treatment while working. Traditional antidiscrimination laws typically do not protect independent contractors, leaving these workers without legal rights to fall back on. Two main potential solutions exist: creating protections specifically for independent contractors and extending existing employee protections to independent contractors.
- **For many independent contractors, getting paid promptly (or at all) is an ongoing challenge.** Independent contractors are not covered by minimum wage or overtime laws, making enforcement of unpaid earnings a matter of contract law. The government can help to provide a baseline of protections by requiring and setting standards for contracts with minimum terms, creating an accessible administrative complaint process for workers, and creating industry-specific pay guidelines to address wage theft (i.e., companies' failure to pay workers) these workers face.
- **Independent contractors are typically ineligible for any paid sick time or other paid time off.** The COVID-19 pandemic has drawn increased attention and urgency to all workers' need for paid leave. Setting sector-specific protections, adjusting pay guidelines to reflect workers' costs of taking time off, implementing tax credits, and including independent contractors in broader social insurance systems can expand access to this essential right.



# Denial of Equal Opportunity and Degradation of Working Conditions for Temporary Workers

In addition to independent contracting, businesses are increasingly outsourcing labor through layers of contracting and subcontracting, franchising, and temp staffing to reduce their labor costs and responsibility for workers. Abusive practices combined with a severe shortage of legal protections in the temp staffing field create dangerous and substandard working conditions, disproportionately affecting Black and Latinx workers.

- **Discrimination in hiring has been a business model for some temp staffing agencies**, which have referred applicants based on host company preferences for workers of a certain race, sex, national origin, and/or age, or absence of a disability. Requiring temp agencies to report demographic data on the workers they place at host companies would help detect these problems and fill the gap in data on agencies' hiring patterns. In addition, effective enforcement of antidiscrimination protections requires stronger joint-employer (i.e., meaning both the temp staffing agency and host company are liable for violations of worker protection laws) and retaliation protections, as well as more effective efforts to prevent and address retaliation.
- **Temp staffing agencies create a second class of workers who are typically paid less and provided fewer benefits than directly hired workers who perform the same work.** Temp workers need basic protections under the law that provide them with equal compensation to direct-hire employees. In addition, as the pandemic has underscored, all workers require clear mandatory health and safety standards that create accountability for both host companies and staffing agencies to protect workers.
- New technologies, including platform-based and algorithmic hiring, can complicate accountability and hide systemic discrimination under a facade of neutrality. Providing workers, regulators, and the public with needed information about how algorithmic management systems make decisions and providing workers a process to challenge them are essential first steps in ensuring new technologies do not reinforce existing inequities.

Any measure intended to improve working conditions for one type of work arrangement must consider possible unintended consequences, including companies' increased reliance on contractors or subcontractors as a result of stronger enforcement against worker misclassification. A comprehensive agenda strengthening protections across nonstandard arrangements can ensure standards are raised for all, promoting equity for workers and fair competition between businesses. In addition, efforts to address the challenges workers face in nonstandard arrangements must be accompanied by efforts to



better understand those challenges and ensure these workers' experiences are reflected in data that can inform policy decisions.

Each proposal is rooted in the goal of empowering workers and building an equitable and resilient labor force for the future. Drawing on and strengthening worker power by introducing these proposals not only addresses today's challenges, but also equips workers to continue identifying and advocating for the changes they need to ensure work provides economic security and dignity in an ever-evolving world.



# Introduction

For work to provide economic security, workers need basic protections, including a safe and discrimination-free workplace, fair compensation, and the right to organize for better conditions. Many workers in nonstandard arrangements, including temporary, subcontracted, and on-call workers and independent contractors, lack these essential protections, exacerbating the inherent instability of their work. These workers are often particularly at risk of discrimination, exploitation, and silencing of workplace concerns; nonstandard arrangements often pay low wages and are disproportionately held by people of color, women, immigrants, and people with disabilities. However, the current system of workplace protection laws excludes or underprotects many workers in nonstandard arrangements. As the nature of work becomes more precarious for more workers, policies must address the ways in which changing work arrangements exacerbate inequities and raise barriers to opportunity.

Although work conditions for many improved over the twentieth century, a defining characteristic of the labor market over the past 50 years has been an increasing shift of risks and costs onto individual workers. As globalization, advancing technologies, and corporate governance changes have led businesses to prioritize short-term profits (Lazonick and O'Sullivan 2000), many companies have adopted a “fissured workplace,” restructuring their operations to replace traditional employment relationships (i.e., where organizations directly employ their workers on a full-time basis) with labor from independent (or purported independent) contracting, temp staffing agencies, subcontracted firms, or franchise relationships (Weil 2014). More than 15 million people in the US work in these nonstandard work arrangements,<sup>1</sup> which limit legal liability and maximize profits for companies while subjecting workers to declining wages, benefits, and health and safety conditions.

Since the New Deal, many workplace protections have been tied to permanent, full-time employment with one employer—a work arrangement, which was then, and remains, most accessible to white men.<sup>2</sup> Many New Deal-era and subsequent labor policies explicitly left out Black workers, women, and immigrants from protections through exclusions of domestic and farm work (Katznelson 2013). These exclusions divided workers into a dual economy: some had access to a minimum wage, antidiscrimination protections, and key benefits, while others did not. Today’s fissured workplace is another iteration of this dual economy, leaving a class of workers without access to essential benefits and protections. As with other workplace law exclusions, workers of color (especially Black workers), women, immigrants, and people with disabilities have suffered an oversized share of the consequences, making the fissuring of work another chapter in a long history of structural racism and institutionalized inequities.

In addition to many workers in nonstandard arrangements being excluded entirely from workplace protections, these workers face hurdles to enforcing their rights even when they are protected under the law. The significant power imbalances between workers and employers also undermines effective enforcement. Workers who raise concerns of discrimination or unsafe working conditions often face retaliatory termination or blackballing (i.e., exclusion) from their industry, and government agencies' lack of resources has been a major obstacle to effective enforcement. In the past decade, advancing workplace technologies have intensified the need for expanded workplace protections. The so-called gig economy, including both consumer-facing platforms like Uber and Instacart and business-to-business platforms that facilitate the outsourcing of tasks, have relied primarily on nonstandard work arrangements. When online or platform-based technologies are used to manage large decentralized workforces, they can exacerbate employment discrimination by relying on customer reviews and hidden algorithmic biases (Rosenblat et al. 2017). Additionally, complex algorithmic hiring screens present new avenues for discrimination that require effective oversight mechanisms with meaningful safeguards for workers.

Though the weaknesses in our system of workplace protections have developed over decades, the COVID-19 crisis has added urgency to the need for solutions. Although the pandemic's social and economic harms have been widespread, people of color and individuals with disabilities have faced the most devastating effects. Black, Latinx, Native American, and Asian American people have not only died at higher rates than white people from COVID-19 and related complications, but they have also experienced the most devastating economic costs, including unemployment, underemployment, and lack of access to social safety net protections.<sup>3</sup> Black and Latinx workers especially have borne a higher risk in having to work outside the home in essential jobs paid low wages—many in nonstandard arrangements, including platform-based delivery work (Karpman et al. 2020). Workers with disabilities likewise are facing disproportionately higher unemployment and slower recovery of jobs.<sup>4</sup> Key workplace safety protections, such as access to personal protective equipment, hazard pay, and paid leave, are more important than ever during a public health crisis.

Though many workers find themselves in nonstandard arrangements because they lack other options, others prefer to work independently, whether because the nature of their work necessitates it or they desire the level of control and autonomy independent work provides. However, like others in nonstandard arrangements, these workers are often left without the work-related safety net supports and protections they need. Other workers, including many who balance caretaking responsibilities with work outside the home, could benefit from access to high-quality short-term work—in other words, truly temporary work that is easy to access and does not expose them to unsafe conditions or

discriminatory hiring. To meet the needs of these workers, as well as those who have been misclassified or would prefer permanent employment, the US policy infrastructure must evolve to offer a higher universal baseline of fair treatment, economic security, and workplace protections for all workers that requires organizations to contribute their fair share to workers, rather than exploiting loopholes in laws governing nonstandard work structures to avoid responsibilities to workers. This report presents a policy agenda to reach that goal. It offers a conceptual framework for developing policy tied to meaningful enforcement systems that address power imbalances between vulnerable workers and the entities that benefit from their labor. Two convenings of worker advocates from across the country inspired these proposals. These worker roundtables included leaders of organizations working with temp workers, farm workers, domestic workers, creative professionals, and others, held in January and March 2020. These policies are designed to foster mutually safe and beneficial relationships for workers and businesses that promise increased productivity, shared prosperity, and a more equitable society.

# How Many Workers Are in Nonstandard Arrangements?

Measuring the prevalence of nonstandard work is notoriously difficult. The questions about jobholding used by longstanding, well-known surveys do not intuitively capture short-term, sporadic, and project-based work, and comparisons across sources indicate respondents are often inconsistent in their responses. Top-line numbers vary greatly, reflecting different definitions, methods, and populations (National Academies 2020).

According to the Bureau of Labor Statistics' (BLS) Contingent Worker Supplement, as of 2017 more than 15 million people—about 10 percent of the workforce—rely on nonstandard arrangements for their main job, including temp, subcontracted, and on-call work and independent contracting.<sup>5</sup> This share has remained relatively stable over the past 30 years, which is as long as data has been collected.<sup>6</sup>

In recent years, the share of the workforce engaged in nonstandard work on a supplemental, often sporadic basis has grown. Although a representative, reliable, ongoing measure of supplemental nonstandard work is not available, most surveys and administrative data sources estimate that 10 to 20 percent of the workforce earns supplemental income through nonstandard work arrangements.<sup>7</sup> Based on those figures, at least 30 million people—20 percent of the workforce—participate in nonstandard work arrangements in some capacity and therefore lack key protections. Although garnering an outsized share of attention, the app-based gig economy represents only a fraction of these arrangements, totaling 1 to 2 percent of the workforce.<sup>8</sup>

The racial and gender makeup of workers in nonstandard arrangements is similar to the overall workforce, but these numbers hide differences within particular arrangements. Measures of independent contractors undercount workers who are misclassified and paid low wages, so those counted are disproportionately white. Temp workers are substantially more likely to be Black or Latinx.<sup>9</sup> Although some sources indicate that, on average, independent contractors earn higher median wages than employees and workers more broadly, more detailed data on this population is needed. Many independent contractors, and potentially misclassified workers, labor in jobs paid lower wages such as in-home care, nail salons, construction, cleaning, and landscaping, which are disproportionately held by women and people of color.<sup>10</sup>

# Independent Contractors

## Self-Employed and Misclassified Workers

**Self-employed workers:** almost 10 percent of the workforce—15 million people—rely on self-employment, including independent contracting, for their primary income source. Less than half of these workers—about 40 percent—have incorporated as a business. The remainder, about 6 percent of the workforce—are unincorporated independent contractors.<sup>11</sup> The share of full-time self-employed workers has remained relatively stable in recent decades.<sup>12</sup> However, tax returns and other data sources show that increasing numbers of people are engaging in independent work to supplement other income sources, a phenomenon known as the “side hustle.”

On surveys, independent contractors are disproportionately white and have higher incomes than the overall workforce, but these measures often miss workers who are likely to be misclassified.<sup>13</sup> In addition, like all official measures of work, these estimates exclude work done informally, including much domestic, home improvement, and craft-based work.

**Misclassified workers:** no official measure of misclassified workers exists and estimates of the extent of misclassification (box 1) vary substantially. Employer audits conducted at the state and federal levels have consistently found 10 to 30 percent of employers misclassify workers, and that misclassification has increased over the past decade (NELP 2020).

Misclassification can be particularly difficult to identify through survey research, given workers may misreport their own status or misunderstand the implications of being classified as an employee versus an independent contractor (Daley et al. 2016, p. 2).

Although data on the demographics of misclassified workers is unavailable, misclassification is more common in industries (NELP 2020) where Black and Latinx workers are overrepresented.<sup>14</sup>

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### BOX 1

#### A Note on Misclassification

Misclassification occurs when businesses treat workers who are legally entitled to be employees as independent contractors. This practice harms workers by denying them the legal rights and protections of employee status, including workers’ compensation, unemployment insurance, and antidiscrimination and wage-and-hour protections. In addition, because independent contractors and employees are



treated differently for tax purposes, misclassification has substantial tax consequences for workers: for example, independent contractors effectively pay twice as much in Social Security contributions as employees and are unable to have taxes withheld. Misclassification also affects society more broadly. Misclassification harms federal and state governments through billions of dollars in lost tax revenue for Social Security, Medicare, unemployment, and workers' compensation, because hiring entities do not contribute on behalf of misclassified independent contractors.<sup>15</sup> In addition, businesses that misclassify their workers obtain an unfair competitive advantage over law-abiding companies.

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Questions around independent contractors' needs and rights are intrinsically tied to questions of classification. Businesses can shed an estimated 30 percent of payroll and other taxes by classifying workers as independent contractors rather than employees, which incentivizes misclassification (NELP 2020). Misclassified workers face the challenges of both asserting their rights provided by law and having to overcome the barrier of incorrect classification to access rights available only to employees.

Misclassification is a longstanding problem, which has drawn increased attention in recent years because of companies that use app-based platforms to hire workers, such as Uber, DoorDash, and Instacart. These platforms typically label the workers they hire as contractors, claiming they are facilitating connections between workers and customers and that those workers are not central to their business. This renewed attention has brought both litigation and policy solutions. On the policy side, advocates have promoted using more stringent legal tests for worker classification, such as the "ABC" test designed to ensure that only those (a) working outside the control of a company; (b) performing work outside the usual course of the hiring entity's business; and (c) engaging in an independently established trade, occupation, or business are considered independent contractors. Conversely, companies such as Handy have advocated for laws to specify that platform-based workers are not employees, which have passed in seven states (Pinto, Smith, and Tung 2019).

California has been at the forefront of efforts against misclassification, prompted in large part by the state Supreme Court's 2018 ruling in *Dynamex Operations West, Inc. v. Superior Court*, which held that the ABC test should be used to determine worker classification under state wage orders.<sup>16</sup> In the wake of the potentially broad implications of the Dynamex case, California lawmakers codified the application of the ABC test through Assembly Bill 5, widely known as AB5. In addition to applying the ABC test to determine employee status under wage orders, AB5 extends the ABC test to the California Labor Code, which includes wage-and-hour laws and workers' compensation, as well as the Unemployment Insurance Code.<sup>17</sup> Despite its attempts to address the needs of different work relationships across occupations, AB5 has generated concern from some independent contractors who

fear companies may terminate them rather than treat them as employees, including freelance writers, artists, and other creative professionals.<sup>18</sup> The original law and a subsequent clarification, AB 2257, addressed some of these concerns by exempting certain professions.<sup>19</sup> Policies like AB5 have also drawn political pushback from entities that are (or would be) required to reclassify workers as employees. In particular, Uber, Lyft, Postmates, and Instacart collectively spent more than \$200 million dollars on Proposition 22, a California ballot measure that passed in November 2020, to exempt app-based drivers and delivery workers from AB5, allowing these gig economy companies to continue classifying their workers as contractors while providing some limited benefits and protections to these workers. Proposition 22 passed with more than 58 percent of the vote,<sup>20</sup> largely attributed to the massive advertising campaign orchestrated by platform-based companies, who spent more than ten times the amount their opponents spent.<sup>21</sup> The companies who pushed for Proposition 22 have already begun advocating for similar policies elsewhere.<sup>22</sup>

Addressing misclassification can help meet millions of workers' urgent needs for better protections and help lessen the shift of risk from employers to workers. Yet tackling misclassification, which much needed, will not offer solutions for true independent contractors, who equally deserve core workplace rights and protections.<sup>23</sup> Access to high-quality, well-protected independent work is essential to building worker power and giving workers more options to leave bad jobs. The policies proposed in this report address the needs of misclassified workers as well as those properly classified as independent contractors, recognizing those needs sometimes overlap and sometimes diverge.

## Independent Contractors and Discrimination

### Problems

Many independent contractors (as well as many misclassified workers) face discrimination and harassment in their work, in the form of denied opportunities and differential treatment while working. Discrimination, including harassment, is likely to disproportionately affect comparatively vulnerable workers who are least likely to have the power and resources to assert their rights without clear policy protections. For example, house cleaners working through the app Handy, which classifies them as independent contractors, have filed a complaint with the California Department of Fair Employment and Housing alleging they have experienced repeated sexual harassment from clients, including those who have answered the door naked, engaged in unwanted touching, and made sexual comments. The complaint states that Handy refused to address these concerns and charged workers for leaving jobs early in response to harassment. It argues that these workers should be classified as employees.<sup>24</sup>

Similarly, recent reporting has highlighted persistent sexual harassment of outsourced customer service workers for large, highly visible corporations, who are treated as independent contractors by the companies for which they work.<sup>25</sup> These workers' experiences highlight the consequences of excluding independent contractors from antidiscrimination protections.

Those working without employee status, whether classified correctly or incorrectly, may be particularly vulnerable to negative effects of customer biases when working through algorithm-based systems. For example, relying on customer reviews to select freelancers can reproduce bias. One study found that both the quantity and substance of reviews workers receive on freelance marketplace sites TaskRabbit and Fiverr are significantly correlated with their gender and race (Hannák et al. 2017). On TaskRabbit, women received significantly fewer reviews overall, while Black workers (particularly Black men) received worse ratings than white and Asian workers. On Fiverr, the dynamics were different but no less problematic: women received more positive ratings than men, while Black workers received fewer reviews than white workers, and Black and Asian workers received worse ratings than white workers. Researchers have posited that Uber customer ratings may have similar race-based biases, which, given the significant role customer ratings play in Uber's operations, can substantially affect drivers (Rosenblat et al. 2016). The technology that facilitates platform-based work and user reviews is not inherently good or bad but will reflect the biases embedded in society unless such biases are consciously countered in the technology's design.

Existing antidiscrimination laws typically do not cover independent contractors, leaving these workers without legal rights to rely on. Federal antidiscrimination protections were structured with the assumption that independent contractors would have sufficient power and resources to protect themselves through contract law—an assumption that has proven untrue for many workers. Title VII of the Civil Rights Act of 1964, the leading federal antidiscrimination law, limits its protections to employees.<sup>26</sup> Other federal antidiscrimination protections, such as the Americans with Disabilities Act (ADA) and the Age Discrimination in Employment Act (ADEA), are similarly limited to employees.<sup>27</sup> Though these statutes do not explicitly define the term “employee,” subsequent case law and regulatory guidance have relied on the “common law test,” an established multifactor test used in other labor and employment contexts.<sup>28</sup> Even where states and localities have their own antidiscrimination laws, most (though notably not all) also exclude independent contractors, often from a desire to parallel federal standards.

Exclusion from these protections not only affects workers' substantive rights, but also the procedural tools and resources available to them, because workers who are not protected by the law cannot access the government's assistance to help them. For example, covered employees can file

charges of discrimination with the US Equal Employment Opportunity Commission (EEOC); or similar charges with state and local authorities), which can trigger agency investigations that bring resources and expertise individual workers do not have. Independent contractors, however, cannot file EEOC charges and therefore cannot access those tools.

Workers misclassified as independent contractors face a double hurdle in needing to first demonstrate misclassification before they can establish a violation of the law. Differing workplace protection standards for independent contractors and employees can incentivize companies to misclassify workers to avoid their legal responsibilities. However, many policy efforts to combat misclassification do not extend to antidiscrimination laws; for example, California's AB5 amended the state's labor code, wage orders, and unemployment insurance law but does not explicitly amend the state's antidiscrimination law.<sup>29</sup>

## Solutions

Expanding antidiscrimination protections can take two main forms: creating protections specifically for independent contractors and extending existing employee protections to independent contractors. Either approach could be used to protect against specific types of violations (e.g., sexual harassment) or protect workers against broader forms of discrimination and harassment.

The first approach is to provide specific protections to independent contractors, for which both federal and state precedent exists. Federally, the Civil Rights Act of 1866 (Section 1981) ensures the right to make and enforce contracts free from discrimination on the basis of race, providing a key baseline of protection in contracting relationships.<sup>30</sup> These protections have not been extended to discrimination on bases other than race, though some sources have proposed expansion as an option (Tarantolo 2006). Although reopening Section 1981 brings its own risks, policymakers seeking to address discrimination may wish to examine the robust body of caselaw and interpretation under Section 1981 as a potentially fruitful model for new protections.

Several states have also adopted specific antidiscrimination protections for independent contractors not tied to employees' rights, though these provisions vary substantially.<sup>31</sup> Rhode Island adopted a prohibition against discrimination in the making or enforcement of contracts similar to Section 1981 but extended its protections to forms of discrimination beyond race.<sup>32</sup> Minnesota prohibits discriminatory refusal to contract or discrimination in the conditions or performance of a contract on the basis not only of race but also "national origin, color, sex, sexual orientation, or disability."<sup>33</sup> Washington State does not explicitly prohibit discrimination in contracting relationships,

but the broadly applicable prohibitions of discrimination across contexts (including nonworkplace contexts) in the Washington Law Against Discrimination have been held to extend to independent contractors.<sup>34</sup>

Other states provide narrower protections. For example, New Jersey law prohibits discriminatory refusal to contract but has been interpreted not to prohibit discrimination during a contract's ongoing performance, limiting the scope of protection.<sup>35</sup> Illinois recently created a specific protection against harassment of "nonemployees" but did not extend that protection to other forms of discrimination.<sup>36</sup> Vermont similarly applies an affirmative obligation to prevent sexual harassment, but not other protections, to "persons who engage a person to perform work or services" in their "working relationship[s]," separate from the statute's similar obligation for employers.<sup>37</sup>

New York has continued to expand its protections in recent years: in 2018, the state amended its Human Rights Law to create a new, stand-alone prohibition of sexual harassment by employers against nonemployees, including contractors.<sup>38</sup> The following year, in a package of reforms to the state's Human Rights Law, New York expanded this prohibition to address all forms of unlawful discrimination<sup>39</sup> and remove the minimum-employer size, because the law initially only applied to companies with four or more employees.

Rather than creating protections specifically for independent contractors, some jurisdictions have extended existing employee protections to independent contractors. At the federal level, the proposed BE HEARD (Bringing an End to Harassment by Enhancing Accountability and Rejecting Discrimination) Act would extend protections under several federal laws, including Title VII, the ADEA, and the ADA, to independent contractors and those seeking to become independent contractors, among other changes.<sup>40</sup> In addition, the BE HEARD Act would amend Title VII to change the minimum covered employer size from fifteen employees to one employee—meaning the protection would apply even to independent contractors working with smaller employers, significantly expanding its scope.<sup>41</sup>

Similarly, some state and local laws have extended antidiscrimination protections to independent contractors. Maryland, for example, defines an employee under the state's Fair Employment Practices Act as: "an individual working as an independent contractor for an employer."<sup>42</sup> New York City amended its municipal antidiscrimination law in 2018 to explicitly state that "[t]he protections of this chapter relating to employees apply to interns, freelancers and independent contractors."<sup>43</sup>

Other states have expanded their employee-based protections to contractors more narrowly. California covers independent contractors in the same manner as employees under its antidiscrimination law but only for purposes of harassment, not other forms of discrimination.<sup>44</sup>

Pennsylvania, Louisiana, and Michigan all offer antidiscrimination protections to some, but not all, nonemployees under their state antidiscrimination laws, either explicitly in their text or as interpreted, though the scope of those covered varies widely.<sup>45</sup>

## Independent Contractors and Late or Nonpayment

### Problems

For many independent contractors, getting paid in a timely manner—or at all—is an ongoing challenge. In a 2019 survey, 60 percent of freelancers reported being somewhat or very concerned with “non-payment or late payment for work.”<sup>46</sup> Similarly, a national survey found that in the past year 36 percent of freelancers experienced late payment and 27 percent were paid less than they were owed.<sup>47</sup>

Independent contractors are not covered by minimum wage or overtime laws, making enforcement of unpaid earnings a matter of contract law. As a result, workers do not have access to government agency enforcement and accompanying resources and expertise, which can help address power, information, and resource imbalances between employers and workers. For example, an employee can file a claim with their state department of labor, which could investigate and potentially bring an enforcement action, but contractors have no such option. Government enforcement agencies can also prosecute a wage theft pattern through a systemic action, which can provide safety in numbers and protect individual workers.

Contractors generally cannot enforce their rights without speaking out individually by name, which risks severely damaging their relationship with a hiring entity. Moreover, contractors may fear the loss of referrals or damage to their reputation among potential clients—a fear not dissimilar to factors that may discourage employees from speaking out. This represents a significant barrier to coming forward with a complaint. Contract law approaches also make it difficult, if not impossible, to bring classwide claims, compounding other structural barriers to enforcement by forcing workers to take on all payment issues individually, even against repeated bad actors.

Although many independent contractors experience this challenge, its effects are not felt equally. The pressure of delayed or absent payment weighs more heavily on workers with lower incomes. Those working in more casual or less formal arrangements are also less likely to have access to written contracts or the tools to enforce them than those in more formal types of self-employment. Compounding these considerations, concerns around immigration status can shape workers’ ability to assert their right to fair pay. Policymakers must consider solutions that address all self-employed

workers' needs, considering the particular challenges likely to affect those workers most in need of policy solutions.

Independent (or purportedly independent) contractors vary significantly in their access to formal written contracts and the resources to effectively enforce them. Bringing an effective contract claim typically requires a lawyer, which is not accessible for many people; for small-dollar claims, the cost of enforcement relative to the amount at issue can be particularly prohibitive.

The lack of wage protections has significant collateral effects on misclassified workers. Even when workers do bring wage-and-hour claims, misclassification imposes an additional procedural barrier, requiring workers to both fight for proper classification and establish their substantive claim. Therefore, providing greater legal protections against late payment and nonpayment for independent contractors provides misclassified workers with additional tools for ensuring proper payment while reducing employer incentives for improper classification.

## Solutions

Local policymakers have considered or adopted several options for providing greater rights to payment for independent contractors. One option is the New York City Freelance Isn't Free Act.<sup>48</sup> This act provides freelance workers, broadly defined to cover most independent contractors,<sup>49</sup> with a range of protections to ensure payment from hiring entities. These include requiring a written contract with certain minimum terms for any agreement to provide services worth at least \$800;<sup>50</sup> a requirement of full payment within thirty days of completion of services or by the date specified in the contract;<sup>51</sup> and protection against retaliation.<sup>52</sup> To assist workers, the city has provided a model contract in both English and Spanish consistent with the law, along with various know-your-rights resources.<sup>53</sup>

Responding to the challenges of contract enforcement, the New York City law also built in its own administrative complaint process. Workers have the right to file a complaint with the city's labor rights enforcement agency, which is then referred to the agency's navigation program to assist workers.<sup>54</sup> Complementing this process, the law also allows workers to go directly to court to assert their rights in a private action.<sup>55</sup> Recognizing that repeat bad-actor hiring entities can be difficult for independent contractors to respond to collectively, the law also allows the city to bring a civil action against a hiring party that "is engaged in a pattern or practice of violations" of the act.<sup>56</sup>

Data from the first year of the New York City law suggest its success, with some key caveats. The navigation program was effective for those who used it, quickly securing payment for workers, with the



vast majority (90 percent) of those receiving payment through the navigation program paid in full, for an average recovery of \$2,039 per complaint (de Blasio and Salas 2018, p. 9). Complainants were able to get payment without filing in court, in most cases, saving workers time and money.<sup>57</sup> However, despite significant outreach and education efforts from the agency and advocates, the law remains underused: fewer than 2 out of every 1,000 workers who could have benefited from the law reached out to the agency.<sup>58</sup> Moreover, those who did take advantage of the law (and agency enforcement) tended to be relatively privileged in relation to the general freelancer population: as the agency summarized, “[c]ompared to all NYC freelancers, complainants to [the agency] were more likely to be young, English-speaking, highly educated, and had higher incomes.”<sup>59</sup> Given the equity implications of this differential usage, further research on utilization is needed.

Other cities are beginning to adopt provisions similar to the New York City law. In summer 2020, Minneapolis adopted the Freelance Worker Protection Ordinance.<sup>60</sup> Like the Freelance Isn’t Free Act, the Minneapolis law, which will become effective January 1, 2021,<sup>61</sup> guarantees the right to a written contract, contains measures to ensure timely payment, and protects workers against retaliation.<sup>62</sup> It also provides for administrative enforcement, effectively borrowing the enforcement structure for the city’s paid sick time law.<sup>63</sup> However, the Minneapolis law sets a different minimum amount in question, differentiates between commercial and individual hiring entities, and does not offer a navigation program.<sup>64</sup>

Some industry-specific legislation provides additional solutions. New York City, by legislation, empowered the city’s Taxi and Limousine Commission to set a minimum rate of pay per ride for rideshare drivers.<sup>65</sup> Regulators cited commissioned research in setting the rules, which stated that they expected the policy to result in an increase in average driver net pay from \$11.90 an hour to \$17.22.<sup>66</sup> Seattle recently adopted a similar measure.<sup>67</sup>

Similarly, Seattle’s Domestic Workers’ Ordinance (DWO) requires domestic workers be paid at least the city’s minimum wage.<sup>68</sup> This provision applies regardless of whether workers are legally considered employees or contractors, sidestepping questions of classification. Wage protections are coupled with key provisions to facilitate effective enforcement for a vulnerable workforce, including a rebuttable presumption of retaliation (which assumes an adverse action taken within a certain period of time following a protected act is retaliatory—illegally punishing workers for asserting their rights—unless an employer proves otherwise) for adverse actions taken within 90 days of a protected exercise of rights, robust agency investigation and enforcement powers, and substantial penalties for noncompliance.<sup>69</sup> In addition, the DWO creates a Domestic Workers Standards Board, with guaranteed representation for domestic workers and representatives of domestic worker organizations, offering a

strong model for how new substantive protections can be complemented by deliberate measures to build worker power and facilitate organizing.<sup>70</sup>

Organizers and advocates have also taken steps to proactively assist workers experiencing challenges with nonpayment, even without new policy tools. For example, while day laborers (i.e., workers hired and paid one day at a time) are generally legally entitled to be considered employees, they face similar challenges to independent contractors around nonpayment: short-term, often one-off work agreements; work arrangements that separate workers from one another and make it difficult to organize; and challenges in combatting repeat bad actors on a classwide basis. Addressing these challenges, the National Day Laborer Organizing Network and researchers at Cornell have developed an app called *Jornalero*, which allows day laborers to track their work hours and, where needed, file a complaint of wage theft directly with a local worker center. It also allows workers to send out an alert to other workers when they experience wage theft, warning other workers about employers who do not pay.<sup>71</sup> The *Jornalero* approach is especially promising as a method for combatting wage theft while supporting worker organizing and collective action, harnessing the power of technology to workers' benefit rather than their detriment. A similar approach could benefit independent contractors (and misclassified workers), allowing workers to share information about repeat-offender employers, offering recordkeeping tools, and supporting worker organizing and shared enforcement efforts.

## Independent Contractors and Paid Leave

### Problems

The COVID-19 pandemic has highlighted independents contractors' lack of paid time off, including paid sick time. As the current crisis has shown, public health and economic security depends on the ability of all workers to take the time they need to recover and care for themselves and their families. Yet independent contractors, as well as other self-employed workers (such as those who sell products directly to consumers), are typically ineligible for any paid sick time or other paid time off.

Many independent contractors and other self-employed workers choose self-employment because of health or caregiving needs, which can make their need for paid time off acute. In a 2019 survey, 46 percent of freelancers reported choosing self-employment because of personal needs, including health issues and caregiving responsibilities, that were incompatible with traditional employment.<sup>72</sup> Similarly, AARP estimates one in six caregivers are self-employed, more than twice the rate of the overall workforce (Freiberg 2016, p. 2).

Moreover, income instability is a significant challenge for self-employed workers, making it especially difficult to weather periods without income. As with nonpayment, this problem is particularly challenging for workers with low incomes and low wealth. Because self-employed workers do not get paid when they do not work, any gap in work comes with a commensurate gap in income, which must be made up from savings or some other source.

In contrast with antidiscrimination protections or nonpayment measures, legal guarantees to paid leave are limited even for employees, though there has been considerable recent movement to expand this right. Where policies do exist, inclusion of independent contractors has been mixed at best. At the federal level, the only legal right to *paid* time off in the private sector comes from the Families First Coronavirus Response Act, a temporary, emergency law that provides paid time off for specific COVID-19-related needs through 2020 and provides some paid time off provisions to self-employed workers through tax credits.<sup>73</sup> Nine states and DC have created social insurance programs for extended family and medical leaves, some of which include the option for self-employed workers to opt in to coverage.<sup>74</sup> Separately, 15 states and more than 20 cities and counties have passed paid sick time laws or paid time off laws that can be used for sick time, requiring shorter-term paid time off paid directly by employers, but those laws are limited to employees.<sup>75</sup>

Though paid sick time laws that cover any illness or injury are still not the norm, nearly all states provide income replacement to employees for occupational illnesses and injuries through workers' compensation, which typically does not cover independent contractors. The lack of workers' compensation for nonemployees has significant effects on misclassified workers in industries with high risks, such as construction or nail salons. Independent contractors who experience medical needs as a result of their work are much less protected than those classified as employees.

Providing paid leave benefits for independent contractors requires somewhat different considerations than for employees. In particular, employees generally need both a protected right to take time away from work without adverse consequences (often referred to as job protection) and a source of income; for true independent contractors (as opposed to misclassified workers), the former is much less relevant while the latter remains equally if not more salient (Williamson 2019).

## Solutions

For independent contractors, as with employees, different solutions may be needed for short-term absences (e.g., a few days off to recover from the flu or a cold; an hour to take a child to a checkup) as opposed to longer-term health and caregiving needs (e.g., recovery from a serious illness or injury;

bonding with a new child). Enacted and proposed local, state, and federal legislation offers several models worthy of consideration for each type of need.

As discussed above, substantial recent progress has been made at the state and local levels guaranteeing employees the right to paid sick time to cover brief health and safety needs (Leiwant, Williamson, and Kashen 2020). State and local paid sick time laws are structured as employer mandates, where employees earn sick time based on how many hours they work and are paid by their employers when they use that time (Leiwant, Williamson, and Kasen 2020, p. 8). The primary federal proposal, the Healthy Families Act, would use the same model.<sup>76</sup> There is no easy or obvious way to expand these laws to cover true independent contractors; without an employer to provide payment, no clear source of funds exists (Leiwant, Williamson, and Kasen 2020, p. 14).

However, paid sick time laws for employees may still offer important reference points for protections for independent contractors, as well as for workers with contested classification status. Two municipal-level policies geared toward specific types of workers offer promising models. First, the Philadelphia Domestic Workers' Bill of Rights (DWBOR) creates a portable benefit structure administered by the city to provide paid sick time to domestic workers, from a fund paid into by domestic employers.<sup>77</sup> The city recently passed a targeted pandemic-related sick time law, which will use a similar structure to provide paid sick time to various workers left out of emergency protections, including gig workers, regardless of employment classification.<sup>78</sup>

Second, the New York City Taxi and Limousine Commission, as instructed by the city council, set by regulation a minimum per ride rate of pay for rideshare drivers, as discussed above.<sup>79</sup> In setting a minimum rate of pay (initially \$17.22 an hour), the TLC included a 6 percent supplement (approximately 90 cents an hour) to compensate for the fact that, as purported independent contractors, drivers do not receive paid time off.<sup>80</sup> This supplement was based on a report commissioned by the TLC, which specifically noted the exclusion of independent contractors from New York City's paid sick time law as a basis for the recommendation (Parrott and Reich 2018, p. 36.).

New York City's driver approach is less targeted than Philadelphia's DWBOR approach. The New York City policy offers a standard, across-the-board increase in compensation for all hours worked to offset the lack of paid time off, rather than providing a specific form of income replacement for time not worked; although some workers may prefer the added flexibility of the unrestricted funds, others might benefit from guaranteed, separate funds to cover lost hours, particularly when urgent financial needs in the present may make it difficult to save additional funds to cover future time off needed. The New York City driver policy is also embedded in a broader minimum driver pay program and would be, at best,

difficult to enact and somewhat impractical as a stand-alone initiative. At minimum, policymakers and advocates considering policies similar to the New York City driver minimum pay may wish to consider this approach.

Bridging the gap between short- and long-term needs, the federal Families First Coronavirus Response Act (FFCRA) emergency protections offer refundable tax credits to self-employed workers designed to provide income replacement parallel to what is offered to employees under the law. This approach parallels the funding structure of FFCRA leave for employees, in which both short- and long-term leave benefits are initially paid for out of pocket by employers, who can then be reimbursed via tax credits (Kashen et al. 2020). Currently, these rights are temporary and pandemic-specific, but the model could potentially be expanded to other situations.

For longer-term needs, self-employed workers may benefit from access to broader social insurance structures. State paid family and medical leave laws have typically covered self-employed workers through voluntary opt-ins, while providing automatic coverage for employees. The proposed federal FAMILY Act would provide automatic coverage for both employees and self-employed workers, parallel to Social Security (Williamson et al. 2019, pp. 6–8). Inclusion in a social insurance program covering both employees and self-employed workers provides benefits for workers combining traditional employment and independent work. More broadly, establishing a sustainable, affordable social insurance structure requires a sufficiently large pool to adequately spread risk, which may be more difficult to achieve in a program covering only the self-employed.

The paid leave field has offered multiple potential approaches for addressing misclassification and gig workers' needs. Some approaches have been to strengthen classification rules to protect workers as employees, such as the effects of California's AB5 on the state's sick time and leave laws and the sick time provisions of the proposed New York City Essential Worker's Bill of Rights.<sup>81</sup> Others have provided paid sick time rights without regard to classification, sidestepping the question, such as the Seattle gig workers sick time ordinance.<sup>82</sup> Still others have suggested a middle-path approach, such as the covered business entity provisions of the Massachusetts paid family and medical leave law, which treat certain ostensibly self-employed workers as employees for the law's purposes, attempting to tackle misclassification without naming it as such (Williamson et al. 2019, p. 6). Among these approaches, different choices may be more or less appealing to various policymakers depending on both their goals and perspectives and the relevant political circumstances.

# Temporary Workers

Classifying workers as independent contractors is only one business model companies have deployed to reduce labor costs. They have also increasingly relied on outsourcing labor through contracting, subcontracting, franchising, and temporary (“temp”) staffing agencies while exerting substantial control over that work. This section outlines challenges temp workers (box 2) face and considers possible solutions. Temp staffing agencies hire workers for temp jobs at host companies, and the staffing agency serves as the employer of record for the job’s duration. Though initially introduced for short-term needs, staffing agencies are increasingly providing workers for long-term engagements (Hatton 2011). Like other forms of subcontracting, temp staffing creates a “triangular” employment relationship that complicates accountability for workplace harms because the business ultimately controlling the work and benefiting from the labor disclaims responsibility for workers.

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## BOX 2

### Temporary Workers: Data Snapshot

In 2019, BLS estimated there were more than 3 million temp agency jobs.<sup>83</sup> The same year, the American Staffing Association reported 16 million people held temp positions, reflecting both a broader definition that includes subcontracted staffing firms and the high turnover of this work.<sup>84</sup>

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Staffing firms have become the gatekeepers to low-paid jobs in many industries (Green 2020, p. 918). Although some workers are hired for short-term jobs, others can work for years in a “temporary” position performing the same work as employees directly hired by the host company (called “direct hires”) without the same training, benefits, or protections. As the employer of record, temp staffing agencies typically handle payroll, taxes, and other human resources functions. Although businesses may rely on temp workers for flexibility to expand or contract their workforce, it can also be a strategy for avoiding responsibilities as an employer and keeping workers from organizing a union (Carter 2004).

Nearly one in ten net new jobs have been temp jobs since the end of the Great Recession in 2009.<sup>85</sup> During this time, temp agency jobs have grown 4.35 times faster than jobs overall.<sup>86</sup> This growth has happened across many industries, especially in clerical and manufacturing work (Bernhardt et al. 2016). As temp work has grown, job quality has deteriorated, with temp workers earning 20 to 25 percent less an hour than those in permanent positions (Bernhardt et al. 2016). The competition between staffing

agencies to submit lower bids places downward pressure on wages and working conditions. Temp staffing agencies have among the highest wage-and-hour violations for large industries according to an analysis of federal enforcement data.<sup>87</sup> These substandard working conditions disproportionately harm workers of color, who are overrepresented in temp jobs. In the most recent BLS Contingent Worker Supplement, Black workers accounted for 12.1 percent of the overall workforce but 25.9 percent of the temp workforce. Latinx workers make up 16.6 percent of all workers but 25.4 percent of temp workers.<sup>88</sup>

Despite temp work representing a sizeable share of the low-wage labor market, America's labor policies have not kept pace with the industry's growth. The US provides fewer labor protections for temporary workers compared with other countries in the developed world and is tied for last place in the Organisation for Economic Co-operation and Development (OECD) ranking, which scores countries on the strength of their employment protections.<sup>89</sup> At the state level, only Massachusetts, Illinois, and California have in recent years passed specific laws to protect temp workers.

## Discrimination in Temp Staffing

### Problems

Discrimination in hiring has been a business model for some staffing agencies, which often refer applicants based on client preferences for employees of a certain race, color, sex, national origin, or age. Investigative reporting and research have documented widespread patterns of discrimination especially against Black workers.<sup>90</sup> As litigation by EEOC has demonstrated, many agencies refuse to hire Black workers or send them to the least desirable jobs while hiring Latinx workers and subjecting them to hazardous working conditions, harassment and lower pay.<sup>91</sup> In workplaces with low pay, many companies exploit immigrant workers—viewed as less likely to complain about substandard working conditions (Costa 2019). Staffing agencies have also engaged in discrimination against people with disabilities in both hiring<sup>92</sup> and denial of reasonable accommodations.<sup>93</sup> By relying on temp staffing agencies to supply particularly vulnerable labor, these systems can operate to degrade working conditions for all workers.

In addition to race discrimination, some temp agencies engage in sex-based hiring discrimination and create workplace conditions that allow sexual harassment to flourish.<sup>94</sup> For example, in one case EEOC filed in Nashville, a staffing company refused to hire any of the 44 women who applied, saying the client only wanted to hire men. In fact, the staffing agency hired men who did not meet the lifting



requirements while rejecting women who did.<sup>95</sup> In another case in Memphis, which EEOC brought to trial, a temp staffing agency fired three female temp workers after they reported sexual harassment by their supervisor and also fired a male coworker who supported their allegations.<sup>96</sup> In Chicago, about 50 women working in temp jobs signed a petition demanding an end to widespread sexual harassment. The Chicago Workers' Collaborative, one of Chicago's first workers' centers, supported this organizing—leading to a settlement with the Illinois Attorney General requiring an outside monitor for two years.<sup>97</sup>

Often these abuses are systemic in nature, and discriminatory working conditions flourish because of a lack of accountability. Temp workers face the hurdle of identifying the appropriate contact point to report violations, particularly when the host company has not provided temp workers its anti-harassment policy or complaint procedures, which is often the case.<sup>98</sup> Temp workers are especially vulnerable because their contracts can end at any moment with little recourse. Workers are also at risk of being labeled “Do Not Rehire,” or “DNR,” by host companies should they raise a workplace concern.<sup>99</sup> Temp workers are actively discouraged from making complaints with host companies, and if workers raise concerns with the staffing agency, they will often be transferred as a result, leaving the problem at the worksite unaddressed.<sup>100</sup> Even when litigation is brought to challenge these practices, undercapitalized staffing agencies often file for bankruptcy or fold and reopen under a new name.<sup>101</sup>

Discriminatory hiring patterns have persisted because under temp staffing models host companies often attempt to avoid responsibility for compliance with workplace protections, including antidiscrimination laws, even though they retain control over the work performed by workers. One structural barrier to enforcement is the lack of clarity concerning when a host company will be deemed a joint employer of workers hired by a staffing agency. Where a staffing agency adheres to the discriminatory preferences of a host company, workers must marshal the facts to demonstrate that the host company exercises sufficient control over their working conditions to be a joint employer responsible for the discriminatory hiring decisions.

A recent report, *Race, to the Bottom*, by Temp Worker Justice (the only national organization dedicated to improving working conditions for temp workers) and the Chicago Workers' Collaborative analyzes new data from Illinois, which became the first state in the country to track demographic data on temp agency workers. Illinois's Responsible Jobs Creation Act, enacted in 2018, provides the nation's strongest temp worker protections and requires staffing agencies to report the race and gender of temp workers hired to the Illinois Department of Labor. These data show that 83 percent of blue-collar temp assignments are held by workers of color, yet workers of color are only 35 percent of the state's workforce.<sup>102</sup> In addition, Black and Latinx workers are also overwhelmingly assigned the worst and most hazardous temp jobs.<sup>103</sup> The report also finds that Black workers in Illinois are more

than three times more likely than the overall workforce to be placed on a temp job assignment than hired into a more stable “permanent” job. Latinx workers are more than two times more likely to be sent on a temp job assignment rather than a permanent one compared with the overall workforce. The Illinois data shows an even higher degree of discrimination and occupational segregation than data from BLS, underscoring the need for better data to inform our understanding of discrimination in temp staffing.

## Solutions

### DATA COLLECTION

Systemic hiring discrimination by some temp staffing firms has continued undetected because of the lack of data on temp staffing agencies’ hiring patterns. For more than 50 years, employers with at least 100 employees (and federal contractors with at least 50 employees) have been required to report to EEOC, the race, ethnicity, and gender of their employees by job category on annual EEO-1 surveys. Temp staffing agencies file this survey for their internal staff positions but are exempt from reporting demographic information on their temp employees referred out to host companies.<sup>104</sup> This leaves a significant gap in data that would provide insight into patterns of occupational segregation where discrimination may create barriers to opportunity. During the Obama Administration, EEOC had on its research agenda a proposal to study expanding its data collection to require reporting of demographic data on employees that staffing agencies refer to host companies.<sup>105</sup> The EEO-3 survey collects data on union hiring halls and referrals, including demographic information on employees and applicants in addition to the number of job referrals. This survey could be expanded to encompass temp staffing referrals to provide EEOC and state and local fair employment agencies data to focus investigations. The Illinois data collection authorized by the state’s Responsible Jobs Creation Act demonstrates the utility in collecting demographic data to understand and address discrimination in temp staffing.

### PROTECTING WORKERS FROM RETALIATION AND INVESTING IN PROACTIVE ENFORCEMENT

To be meaningful, workplace antidiscrimination laws must be consistently enforced with reliable protections for workers against retaliation. Under our current systems, the primary means of enforcement is for individuals to file charges of discrimination with EEOC or a state or local agency and/or to raise a complaint with their employers. These structures fail to recognize the vast power and information disparities between workers and employers, which are heightened for temp workers who face high levels of insecurity in their employment. Indeed, more broadly, two-thirds of workers who came forward to file a sexual harassment charge reported experiencing retaliation, with 64 percent

reporting they lost their job (Durana, Lenhart, and Miller 2018). Effective enforcement for temp and other especially vulnerable workers requires stronger retaliation protections and sufficient resources for enforcement agencies to prosecute retaliation claims and analyze data on broader patterns of retaliation. EEOC data show that retaliation charges constitute a growing share of its workload. Greater capacity to fully analyze trends in the relationship between sexual harassment and retaliation charges can help EEOC work with employers to prevent and address retaliation.

In addition, several new state wage-and-hour, sick time, and paid family and medical leave laws have provided workers with a presumption of retaliation when an employer takes an adverse action against an employee within a certain time period after the employee engaged in protected activity.<sup>106</sup> This means retaliation is assumed true unless an employer demonstrates otherwise. These laws recognize that the employer will typically have more information about the rationale for an employment decision and is therefore in a better position provide the necessary evidence. To strengthen the effectiveness of workplace protection laws, policymakers should consider adopting a presumption of retaliation for adverse actions following protected activity, such as making a complaint of discrimination to make these protections more readily accessible. Because the imbalance of power and information asymmetry is particularly acute for temp workers, a presumption of retaliation across statutes would serve an important role by empowering these workers to raise a range of concerns, including violations of wage-and-hour, health and safety, and antidiscrimination laws. Fundamentally, greater investment in enforcement resources is critical so public agencies at all levels can leverage their authority to counter the power imbalance between workers and employers by prosecuting discrimination and retaliation complaints on behalf of the most vulnerable workers. As work relationships become more complex, workers often do not know who their employer is. The government is well situated to untangle the underlying work relationships and identify the entities that should be held responsible for violations. Rather than placing the primary burden of enforcement on vulnerable workers, government enforcement efforts at all levels should work to build stronger collaborative relationships with organizations that can give voice to workers' concerns, identify patterns of violations, and offer workers safe, trusted avenues for navigating the enforcement process. Through building relationships with community organizations, unions, and worker centers, the government can more effectively focus its resources on areas of greater need, particularly for hard-to-reach groups, such as temp workers (Fine 2005).

The government also can play a vital role in proactively identifying patterns of discrimination and prosecuting systemic cases that address policies and practices with a broad effect on an employer, industry, or geographic area. Discriminatory hiring patterns can be difficult to identify because workers

often do not have knowledge about discriminatory practices and are particularly vulnerable to retaliation for raising concerns. Audit studies can be an effective method to document discriminatory hiring. By having otherwise identical pairs of individuals, except for one key characteristic (such as race, gender, or disability) apply for the same position, the results, such as who receives a callback or job, can be analyzed to determine whether discrimination occurred.

In a testing field experiment, Black and Latinx job seekers with equal qualifications applied simultaneously for manufacturing and warehouse employment at a representative sample of 65 Chicago-area temp staffing agencies (Bendick and Cohn 2020). Agencies offered jobs to Black workers at 75 percent the rate of Latinx workers. They also segregated 82 percent of jobs, offering them only to one group or the other. In nearly two-thirds of tests, staffing agencies discriminatorily limited opportunities offered to either Black or Latinx job seekers. Such research highlights the urgent need to create greater accountability for both the hiring entity and staffing agency to ensure nondiscrimination in hiring.

To better identify patterns of systemic discrimination, government agencies such as EEOC and the US Department of Labor (DOL) or state and local fair employment agencies can support audit studies to document patterns of discrimination in temp staffing to inform enforcement and increase compliance. On a bipartisan basis, EEOC has recognized that audit studies are an important strategy for rooting out hiring discrimination.<sup>107</sup> Similar studies have been used for decades to identify patterns of housing discrimination.<sup>108</sup> Publicity over systemic hiring cases, as well as the findings of audit studies, can increase employer accountability. By heightening awareness of discriminatory practices in an industry along with creating a greater likelihood of liability, these studies can encourage employers to elevate organizational self-assessments to improve hiring systems as a priority. Proactive efforts to identify discriminatory patterns can also better protect workers from retaliation because each employee need not file a charge, and workers can support each other by providing evidence of a broader practice.

State and local fair employment practice agencies could similarly require and fund audit studies to identify patterns of discrimination. For example, after New York City passed a law in 2015 authorizing the use of testing, the New York City Commission on Human Rights, the agency charged with enforcing the city's Human Rights Law, established an employment discrimination testing program to investigate local employers, labor organizations, and employment agencies.<sup>109</sup>

**Joint employer responsibility:** under workplace protection laws, an employee formally employed by one employer (such as a staffing agency) may also be deemed employed by another entity (such as a host company) where that entity exercises sufficient control over the employee.<sup>110</sup> The issue of when to

hold a hiring entity jointly responsible for workplace violations has become increasingly important in recent decades as structural changes to work have left more workers with multiple entities that exert control over working conditions, as is common with temp staffing.<sup>111</sup> Often the host company has the greatest ability to control the terms of work and worksite conditions. Without legal accountability for violations of workplace protections, businesses often do not have sufficient incentives to protect workers to prevent harm through training or to respond promptly when they may learn of problems.

Stronger and clearer rules for joint-employer responsibility play a powerful role in aligning employer incentives to prevent harm to workers. Yet the Trump administration's National Labor Relations Board (NLRB) and DOL have prioritized using the rulemaking process to create a narrower standard that limits joint-employer responsibility, as discussed further below.

## Economic Instability of Temp Work Exacerbated by a Lack of Accountability

### Problems

Temp workers face exploitation because of twin challenges. Under their staffing agency contract terms, they are often second-class citizens without the same pay, benefits, safety trainings, or job security as directly hired employees. These problems are exacerbated by the legal hurdles workers face organizing for better working conditions and enforcing their existing workplace rights because multiple entities are responsible for their working conditions.

Temp work creates a class of workers who often work alongside a host company's direct hires, performing the same work for less pay and fewer benefits, often for years at a time, with little economic stability or upward mobility. In Illinois, the average temp worker spends six years in "temporary" assignments, and four out of five temp workers have never had a temp job become a permanent job.<sup>112</sup>

The heart of the problem is a business model that strongly incentivizes host companies from hiring temp workers directly. Conversion fees often require a host company to pay on average 10 to 20 percent of a workers' yearly salary to hire that worker directly.<sup>113</sup> Fees are typically higher in the near term, which can effectively discourage companies from hiring workers as permanent employees for an extended time period. Despite claims that temp work is a bridge to permanent employment, one study found that only 7 percent of temp jobs led to a direct hire by the host company (Houseman and Heinrich 2016). Temp placements do not improve and may diminish subsequent earnings and employment

outcomes, in contrast to direct-hire jobs, which often lead to substantially higher earnings and employment outcomes over time (Autor and Houseman 2010; Elcioglu 2010). Rather than serving as a pathway to more stable employment, the incentives created by the contractual agreements in temp staffing can promote long-term insecurity for workers, with few jobs leading to permanent employment, despite these workers having the skills and experience to perform the job.

These exploitative practices are heightened by ineffective accountability structures and barriers to worker organizing. Although temp workers often provide labor onsite for host companies in facilities such as warehouses or auto manufacturing plants, host companies often argue they should not be responsible for violations of the law as joint employers of the temp workers. For example, because staffing agencies are typically responsible for workers' compensation claims, temp workers may be assigned to the most dangerous jobs without sufficient safety training—experiencing injury rates twice as high as direct hires in hazardous industries such as construction, warehousing, or manufacturing.<sup>114</sup> This attenuated responsibility structure creates hurdles for enforcement and undermines the incentives for host employers to prevent harm to temp workers, enabling violations to proliferate.

In times of economic uncertainty, temp workers are typically the first to be laid off, but as the economy begins to recover, many employers rely on temp staffing to fill hiring needs rather than hiring employees directly. Reported data show that temp workers have thus far suffered some of the most severe job losses since the COVID-19 pandemic. At the start of the pandemic, from February to April 2020, more than 30 percent of temp workers lost their jobs in only three months.<sup>115</sup> During the Great Recession, temp jobs accounted for 11 percent of job losses, despite making up 2 percent of employment (Houseman and Heinrich 2016).

As companies work to recover from the pandemic, staffing agencies have begun to deploy temp workers to fill essential jobs in industries such as health care, food processing, and manufacturing—often placing workers at significant risk of injury and illness. Many temp workers perform essential jobs in warehouses or hospitals, facing even greater risks because they often do not get adequate PPE and have little power to negotiate for health and safety protections.<sup>116</sup> The COVID-19 crisis has highlighted the increased vulnerability temp workers face and the need for long-term policy solutions to provide baseline protections for these workers.

The pandemic has also highlighted the challenges temp workers confront in accessing unemployment insurance (UI). Stringent eligibility criteria often disqualify temp workers from UI. Some states set high minimum earnings requirements that may prevent temp workers from qualifying for benefits or impose requirements for consistent employment that are incompatible with the nature of

temp work. Many states also require workers to affirmatively request a new assignment from the staffing agency before applying for UI or they will be considered a “voluntary quit,” even if they were unaware of this requirement.<sup>117</sup>

Looking forward, more Americans are likely to confront the challenges of temp work as the country works to rebuild from the pandemic. Although the first to be let go during a downturn, temp workers are often the first to come back, as companies are hesitant to hire directly in an uncertain economy. During the initial recovery in the Great Recession, temp jobs experienced growth that outpaced permanent employment, reaching prerecession highs in 2011 and 2012, while the rest of the economy did not recover fully until 2014.<sup>118</sup>

Through these cycles of recession and growth, temp workers have consistently faced hurdles in organizing for better working conditions. Because temp work arrangements are inherently unstable with no expectation of long-term employment, a staffing agency can at any moment reassign a worker or assert that a job has ended. Indeed, some temp contract assignments are only for one day and are renewed on a daily basis. In addition, because workers are moved frequently to different jobs, this prevents them from developing solidarity with other workers to advocate for better working conditions. Moreover, workers trying to organize or raise concerns about workplace violations can face retaliatory firing that can be especially hard to prove because of the work’s temporary nature.

The NLRB enforces the National Labor Relations Act (NLRA) to prevent unfair labor practices and protect workers’ right to organize. The NLRB promulgated a new rule on joint-employer liability, effective April 27, 2020, which rejected prior precedent that had extended joint-employer responsibility to a host company hiring labor through a contractor that acted as the direct employer by setting wages, schedules, and other labor standards.<sup>119</sup> The new NLRB rule makes it harder for temp workers to join a union by holding that temp workers have a different employer from direct hires, thereby precluding temp workers from bargaining in the same unit as direct hires.<sup>120</sup> In addition, the new rule narrows the standard so that to be a joint employer the company must exercise control over the employee’s essential terms and conditions of work—possessing the power to control is no longer sufficient if it is not exercised.<sup>121</sup> The new rule states that to be a joint employer a business must exercise control that is regular, continuous, and consequential and not sporadic, isolated, or *de minimis*.<sup>122</sup> Labor advocates contend this rule unduly narrows the protection of the joint-employer doctrine, failing to consider factors that have long been viewed as critical to determining whether an employment relationship exists.



On a parallel track to the NLRB, DOL put forward a new test for joint-employer responsibility, effective March 16, 2020, for another law, the Fair Labor Standards Act (FLSA). Similar to the NLRB's standard, the DOL's new test narrows the circumstances supporting joint-employer responsibility, while considering its own set of factors. Specifically, DOL created a four-part balancing test focusing primarily on forms of direct control, including whether the alleged joint employer has the power to (1) hire or fire the employee; (2) supervise and control the employee's work schedules or conditions of employment; (3) determine the employee's rate and method of payment; and (4) maintain the employee's employment records.<sup>123</sup> This rule departs from existing common law by stating that a worker's economic dependence on an employer is not proof that an employment relationship exists. Additionally, under this standard an entity must exercise, not only possess, the right to control working conditions, making joint employment more difficult for workers to establish. DOL noted that other factors may be relevant "but only if they indicate whether the potential joint employer is exercising significant control over the terms and conditions of the employee's work."<sup>124</sup>

On September 8, 2020, the United States District Court for the Southern District of New York ruled in favor of 18 states and the District of Columbia that challenged the new DOL rule for unlawfully narrowing the FLSA's broad meaning of "employ," defined as "suffer or permit" to work.<sup>125</sup> The court struck down the rule as applied to "vertical" joint employer relationships such as staffing agencies, finding that it ignored the legislative history explaining the need for a broad definition of "employer" to prevent a company from avoiding liability under child labor laws by using a middleman to hire children. The court found that the new DOL rule would potentially allow a similar structure where a company could evade liability for worker protections by using a labor contractor. The court also found the new rule inappropriately excluded from consideration whether an entity is economically dependent on the potential joint employer.

Ensuring the host entity—which often has the greatest control over the workplace conditions for temp workers—has responsibility for compliance with workplace laws helps create the right incentives to ensure that proactive efforts are taken to protect workers and respond promptly to concerns.

## Solutions

### PASS FUNDAMENTAL PROTECTIONS FOR TEMP WORKERS

To address the safety and economic security challenges the growing number of temp workers face, the legal system must create incentives for host companies to use temp workers for the limited purpose of filling short-term labor needs. Laws should not enable companies to use staffing agencies as a business

model to save on benefits and wages and avoid responsibility for workplace protections by keeping workers in a long-term temporary status.

In 2012, Massachusetts became the first state to enact legislation directed at protecting temp staffing employees. The Temporary Workers Right to Know Act requires that staffing agencies provide workers a job order with key information in writing before new assignments, including the name and contact information for (1) the staffing agency, (2) the workers' compensation carrier, and (3) the company where the employee will be working, as well as a description of the job, pay, work hours, and expected end date.<sup>126</sup> The law also prohibits staffing agencies from charging fees for obtaining a job, background checks, and required transportation. The Massachusetts Coalition for Occupational Safety and Health ("MassCOSH") worked with worker and legal organizations, unions, and researchers to organize and document the problems faced by a growing number of temp workers after the Great Recession (NELP 2019).

Illinois has led the country in protecting temp workers, fueled by the Chicago Workers' Collaborative and strong on-the-ground worker organizing of temp workers. In 2015, Illinois provided basic rights to temp workers, including the right to know who they are working for and have their pay rate in writing.<sup>127</sup> In 2018, the legislature enacted the Responsible Jobs Creation Act, with the strongest protections for temp workers in the country.<sup>128</sup> The law addresses key challenges temp workers face, including (1) holding host companies jointly responsible with the staffing agency for wage-and-hour violation; (2) requiring staffing agencies to provide workers notice in writing of the wage rate, schedule, length, and location of assignments; (3) prohibiting agencies from charging a fee to transport a laborer, cash a check, or conduct a criminal background check, consumer report, or drug test; and (4) requiring staffing agencies to attempt to place temp workers into permanent positions as they become available. In addition, to combat discriminatory hiring, staffing agencies must report the race and gender of all applicants to the Illinois Department of Labor. Despite the law's success, worker advocates have identified a need for stronger penalties and enforcement to promote greater employer compliance.

Another innovative state law that became effective January 1, 2015, ensures that "client employers" (called host companies in this report) are jointly liable for wage-and-hour violations committed by "labor contractors" such as staffing agencies in the performance of work in the "usual course of business."<sup>129</sup> The law avoids the often unpredictable and fact-specific nature of traditional joint-employer tests courts apply and provides instead that any business with 25 or more employees that contracts with a staffing agency or other labor contractor for at least six workers shall be jointly liable for unpaid wages owed as well as to secure workers' compensation insurance. The law incentivizes host companies to select labor contractors who will ensure compliance with the law and

also provides an avenue for redress for workers when a temp staffing agency goes out of business or is undercapitalized and cannot pay a judgment.

Other states have also begun focusing on these issues. In New Jersey, New Labor—representing the state’s immigrant temp workers—and the National Employment Law Project (NELP) have advocated for a temp worker bill<sup>130</sup> to strengthen the state’s licensing law<sup>131</sup> that requires registration by employment agencies, including those placing nurses and home care workers.

These state laws provide a starting place for national reform. Many developed countries provide even stronger protections that address core challenges temp workers confront, such as (1) requiring pay and benefits for temp workers to equal those of direct-hire employees; (2) requiring staffing agencies to register with or obtain a government license; (3) limiting the duration of temp assignments; and (4) limiting the kinds of jobs temp workers can perform to reduce workplace injuries (NELP 2019).

Temp Worker Justice, NELP, the Chicago Workers’ Collaborative, and others have been organizing for national legislation to protect temp workers. In July, Representatives Joe Kennedy III (D-MA) and Emanuel Cleaver (D-MO) introduced The Restoring Worker Power Act of 2020, H.R. 7638—the first national legislation introduced in 20 years to strengthen protections for temp workers. This Act would require a core set of protections for temp workers, including (1) equal pay for equal work—temp workers must be paid the same as direct hires at the host company performing similar work; (2) transparency about the terms and conditions of assignments, including disclosing the difference between a temp worker’s wage rate and the agency’s billing rate; (3) health and safety training and disclosure of hazards for all temp workers; (4) DOL registration and reporting requirements for temp agencies, including information such as the percentage of temp workers transitioning to permanent positions, as well as record retention requirements, including the race and gender of employees referred to host companies; and (5) a ban on noncompete agreements and limits on conversion fees to increase temp workers’ opportunities to transition to permanent, stable employment. This act would also amend the Families First Coronavirus Response Act to provide temp workers a right to emergency sick time on a broader basis than other employees by removing for temp workers the law’s limitation to employers with fewer than 500 employees.

## STRENGTHEN WORKER SAFETY PROVISIONS

The pandemic adds urgency to the need for clear regulatory standards that create accountability by both host companies and staffing agencies to protect workers’ health and safety. The US Occupational Safety and Health Administration (OSHA) launched a Temp Worker Initiative in 2013, recognizing that temp workers face higher injury rates and often do not receive the same level of safety training as

direct-hire workers.<sup>132</sup> OSHA highlighted concerns over host companies using temp workers to avoid meeting health and safety obligations and recognized that temp workers are more vulnerable to workplace safety and health hazards and retaliation for reporting unsafe conditions than direct-hire workers.<sup>133</sup> OSHA has provided guidance that makes clear that staffing agencies and host companies are jointly responsible for providing health and safety protections, yet these guidelines are not mandatory or enforceable. An October 2020 report by the NELP analyzing OSHA's public data found OSHA has only resolved 2 percent of retaliation complaints of the 1,744 COVID-19-related retaliation complaints filed by workers from April through August 9, 2020.<sup>134</sup> OSHA opened investigations into only 20 percent of complaints, with 54 percent dismissed and closed without an investigation.<sup>135</sup> To ensure effective enforcement, workers must be empowered to raise workplace safety concerns without fear of being fired. A recent study found a significant decrease in workplace injuries when states allowed such workers to file wrongful discharge lawsuits.<sup>136</sup>

State-level efforts aim to fill the gap in federal law by increasing workplace safety for temp workers. For example, Washington State's Temp Worker Safety Bill passed the state Senate in 2019.<sup>137</sup> A powerful 2010 study of workers' compensation claims in Washington State found that temp workers in construction and manufacturing had twice the claims rate of direct-hire workers in the same work (Smith et al. 2010). In New Hampshire, House Bill 1189,<sup>138</sup> providing a "right to know" about the terms of temp work, was first introduced in 2013 and has been reintroduced in subsequent years, supported by a coalition led by the New Hampshire Council for Occupational Safety and Health.

## NEW TECH PLATFORMS ENTER THE TEMPORARY WORKSPACE

### *Problems*

Technology is transforming the lives of US workers across work arrangements and industries. App-based platforms are a new form of a longstanding business model relying on labor intermediaries to shift risks from businesses to workers. Like other nonstandard arrangements, these technologies blur lines of responsibility and can weaken the bargaining power of workers. App-based shift work can further undermine accountability by obscuring how decisions are made and heightening the insecurity experienced by workers who are often without effective mechanisms to challenge unfair decisions. In addition, algorithmic hiring and performance evaluation systems can hide systemic discrimination under a facade of neutrality.

In recent years, new app-based platforms have launched to connect workers to short-term shift work, filling a role comparable to temp staffing agencies. These business models have the potential to exert substantial control over workers while avoiding responsibility for working conditions.

Heightening these concerns, seven states have passed laws exempting app-based work from existing employment classification standards, allowing gig companies to hire workers as independent contractors regardless of the control exerted over them (Pinto 2019). These laws could incentivize the entire staffing industry to move toward an app-based independent contractor structure to save labor costs. Wonolo, for example, hires workers via app to fill shifts in blue-collar jobs, such as fulfillment, distribution, and logistics. Rather than functioning as a traditional staffing agency, which acts as the employer of record for workers, Wonolo charges companies a fee starting at 45 percent of a worker's pay but typically treats workers as independent contractors and leaves it to host companies to determine whether to hire workers as independent contractors or employees.<sup>139</sup>

Uber Works, run by the ridesharing company, uses a different model that more closely resembles a traditional staffing agency by classifying workers as employees but fragments work further by focusing on shift work primarily in entry-level jobs that do not require training, such as cleaning, waitstaff work, and warehouse work.<sup>140</sup> Uber Works partners with existing staffing agencies, including TrueBlue, which acts as the employer of record to handle the employment, payments, and benefits for workers placed by Uber Works.<sup>141</sup> Similar to Uber's ridesharing platform, hourly pay rates are subject to "surge pricing" if a shift is particularly hard to fill.<sup>142</sup>

These platforms, and others like them, weaken the responsibility companies have to protect their workers and complicate enforcement of workplace violations. The technological interface created to "manage" workers by algorithm often leaves them without a clear place to turn with questions or concerns.<sup>143</sup> Further, the individualized, virtual format impedes workers connecting with one another to share experiences, identify common causes, and join together to advocate for better working conditions. Reliance on self-learning algorithms to monitor and manage workers creates stringent control mechanisms that make automated decisions where workers have little voice in how work is assigned, completed, or evaluated.<sup>144</sup>

In addition to complicating the employment relationship, technologically mediated temp work introduces additional potential for discrimination. Many companies use artificial intelligence (AI) in algorithmic systems in their apps and other systems to make decisions on hiring or evaluating workers. For example, Bluecrew, another temp staffing platform, uses a job-matching algorithm that relies on factors including responses to behavioral questions, prior experience, and proximity to the job.<sup>145</sup> Without careful design and auditing, these screening mechanisms can operate to reinforce patterns of bias in prior hiring decisions. For instance, race may be highly correlated with residency, leading factors such as "proximity" to introduce bias. In addition, apps such as Wonolo and Uber Works prioritize showing jobs to workers who have received positive reviews from former employers. Although

customer service can be a relevant evaluation metric, many app-based rating systems rely on simplistic measures of performance where a customer clicks on some number of stars without the opportunity for detailed feedback, which can exacerbate bias and introduce discrimination in the hiring, pay, and evaluation of workers (Rosenblat et al. 2016; Ayres, Vars, and Zakariya 2004).<sup>146</sup> Systems are often opaque and make decisions on potentially inaccurate or biased data, and often no effective process exists for workers to understand how decisions are made or challenge these decisions. Because technology provides a sense of objectivity and scientific analysis, discriminatory decisions can become magnified and rapidly scaled.

### ***Solutions***

Policies intended to eradicate discrimination and limit economic insecurity need to consider the role new technologies can have in exacerbating these challenges. With sufficient safeguards, algorithmic hiring can create the potential for new forms of transparency that increase the opportunity to detect discrimination (Kleinberg et al. 2018). Ensuring workers have a right to an explanation for decisions made by algorithmic management systems as well as a process to challenge them would be an important first step in preventing discrimination. In addition, policymakers can consider auditing and data retention requirements to ensure that inputs for any algorithmic decision are recorded along with demographic data to ensure testing and monitoring of systems to prevent and identify discrimination. The federal Algorithmic Accountability Act of 2019, introduced (but not passed) in 2019 provides a starting point to address these concerns. Although it centers on protecting personal data, it would require companies employing algorithmic decisionmaking to conduct a risk assessment that considers possible adverse effects. A similar assessment could be introduced to audit systems for bias before they are deployed and to monitor decisions for discrimination.

As technology plays a larger role in mediating work relationships, greater clarity in workplace laws establishing the responsibility employers and staffing agencies have to protect the rights of workers becomes even more important. Technology optimized not only for business clients, but also for workers' fundamental needs, has the potential to play a positive role in connecting workers to job opportunities. For example, cooperatively owned tech platforms can empower workers. Collecting and transparently sharing data with workers can help equip workers and advocates to fight discrimination more effectively. Social media can facilitate worker organizing and movement building. But without thoughtful design and meaningful regulation, new technologies are likely to perpetuate existing challenges and inequities.

# Interrelationship of Work Arrangements

Reimagining workplace protections across nonstandard arrangements requires a holistic and comprehensive approach, with attention given to the relationships between different work arrangements to prevent unintended consequences. Laws that address misclassification of independent contractors, such as California’s AB5, play a powerful role in clarifying and expanding who is an employee entitled to workplace protections and a work-related safety net. Although issues of classification have received significant attention at the national and state levels, less attention has been paid to how laws designed to combat misclassification may incentivize companies to develop alternate business models that rely on temp staffing agencies or franchise models to reduce labor costs. This section explores policy strategies for creating integrated workplace protections that promote the use of nonstandard work relationships for limited purposes—to meet specific needs for short-term assignments or specialized independent contractor skills, rather than as a business strategy to avoid responsibility and cut labor costs.

After AB5’s passage in California, temp staffing agencies marketed themselves as a way to comply with AB5 without directly hiring workers as employees, promising to “eliminate the risk of misclassifying your workers under the new law.”<sup>147</sup> Because temp workers are typically employees of the staffing agency, they would have the workplace protections that flow from employee status; yet simply shifting misclassified workers into temp employee jobs will not bring these workers economic security or quality jobs. San Francisco’s experience with scooter companies illustrates the challenge of businesses shifting to rely on temp staffing agencies to avoid hiring employees. In October 2019, the city required companies bidding for scooter operator licenses to hire employees (and not independent contractors) for jobs such as charging and repairing scooters. In response, scooter companies Lime, Uber, and Scoot used staffing firms to hire workers, rather than hire employees directly. Only one company, Ford-owned Spin, directly hired workers.<sup>148</sup>

In addition to relying on staffing agencies, businesses focused on avoiding responsibility for employees may also look to subcontracting models such as franchising or hiring smaller businesses to act as subcontractors that employ the workers. Before Proposition 22 exempted app-based transportation and delivery platforms from AB5, Uber and Lyft explored moving to a new business model of a franchise agreement. Under a franchise model, Uber and Lyft would license their brand and technology to owners of taxi fleets. The fleet owners would employ the drivers, allowing Uber and Lyft

to continue avoiding employment costs. This strategy highlights that addressing misclassification issues alone is insufficient to adequately protect workers and hold companies accountable.<sup>149</sup>

The franchise strategy builds on a model used by FedEx after it lost a misclassification lawsuit brought by ground delivery drivers the company had classified as independent contractors. FedEx responded with a franchise-like model in which it outsourced ground delivery routes to contractors called “independent service providers,” which then hire individual drivers as employees. FedEx pays contractors based on package, stop, and mileage rates, yet workers have reported a decline in working conditions under this franchise model.<sup>150</sup> In addition, many contractors do not comply with the law’s requirements that they provide workers’ compensation and overtime (Dubal 2017).

Strong and well-enforced standards for joint-employer responsibility between host companies and staffing agencies are essential for ensuring that responsibility rests with the entities that have the power to promote legal compliance and raise working conditions. More broadly, the examples of employers moving from one form of nonstandard work arrangement to another in response to regulatory changes underscore the importance of both integrated policy solutions and robust labor enforcement. Policymakers and government agencies must invest in proactive and effective enforcement to ensure employers cannot exploit loopholes in the law or the vulnerability of workers to avoid their legal responsibility to workers.

In addition, as technology has fueled the growth in job referral platforms, independent contractors, such as graphic designers, have greater opportunities to work for themselves by marketing their skills to more businesses. Yet workplace laws operate under the assumption that those running their own businesses do not need the protections of work-related social insurance programs or wage-and-hour and antidiscrimination laws. As more workers find themselves outside of our workplace protections in independent contractor arrangements, it is vital to explore more inclusive protections that extend not only to employees, but also to independent contractors. Requiring hiring entities to contribute to workers’ unemployment insurance, paid leave, and workers’ compensation, while also abiding by worker protections, regardless of classification, reduces companies’ incentives to adopt independent contractor models as a strategy to reduce labor costs.

A promising alternative to subcontracted structures is worker-owned and democratically governed businesses, or worker cooperatives (Yang et al., forthcoming). For independent contractors, these structures enable workers to maintain more autonomy over their work while also obtaining supports—and in some cases benefits and protection. Co-ops have the potential to more equitably distribute power and profits throughout the economy because they are structured so workers drive



decisionmaking and share financial surplus from business operations. As of 2020, nearly 500 worker co-ops operate across industries nationwide, most commonly in the retail and service sectors. Some worker co-ops are part of the growing “platform cooperativism” movement, which enables online participation in worker co-ops for gig workers who may not physically be together (Scholz 2016).

In the wake of AB5, labor and worker co-op advocates in California have drafted the Cooperative Economy Act, which would create and incentivize cooperative labor contractors, structured as worker co-ops. These staffing firms would employ those classified as independent contractors both before and after AB5, allowing them to access full employment protections, control their own labor, and receive a share of the profits their labor creates.<sup>151</sup> Additionally, the US Federation of Worker Cooperatives recently launched an entity called Guided that will create an online-based worker cooperative for freelancers, inspired by those in the creative field, to experiment with providing benefits and protections.<sup>152</sup> To scale, worker co-ops will require investment and efforts to remove barriers to access. Since 2014, the New York City Council has approved more than \$10 million to fund the development of worker cooperatives, and other cities have passed similar initiatives. At the federal level, Congress passed the bipartisan Main Street Employee Ownership Act in 2018, which is the first federal legislation focused on worker cooperatives to ease financial barriers to their formation.<sup>153</sup>

The interrelationships of work structure models highlight the need for broader solutions that combine workplace protections and workplace safety net supports, such as unemployment insurance and paid leave, to work itself and not a particular work arrangement (Goldman and Weil forthcoming). Addressing the full scope of work arrangements and requiring businesses to adhere to parallel requirements, whether they employ workers directly or outsource labor, can reduce incentives for companies to adopt work structures that depress working conditions for all.

# Building Knowledge

Efforts to address the challenges workers in nonstandard arrangements face need to be accompanied by a better understanding of those issues to ensure these workers' experiences are reflected in data collection and analysis. Estimates of the number and demographic makeup of workers in nonstandard arrangements are imperfect; sources often conflict with one another, some arrangements are left out entirely, and more vulnerable workers are less likely to be captured in large-scale surveys and administrative analyses.

Several gaps in the existing data infrastructure (listed below) lead to the underrepresentation of temp, subcontracted, misclassified, and self-employed workers. Building up this infrastructure while engaging in the reforms described above is essential.

- No consistent measure of subcontracted work exists in major public data sources. Infrequent and inconsistent data gathering results in often conflicting and likely inaccurate estimates. Expanding establishment surveys to include estimates of the subcontracted workforce would improve understanding and enforcement.
- The Contingent Work Supplement of BLS's Current Population Survey has been conducted sporadically over the past 20 years. More consistent data collection is needed to examine the relationships between work arrangements, including, for example, the effects of classification legislation on subcontracted and temp work, as discussed above. These measures will also be important to understand the extent to which employers rely on nonstandard arrangements during the COVID-19 recovery and identify ways in which employers continue to shift risks onto workers in these challenging times.
- The existing measures are imperfect, relying on definitions that do not intuitively apply to nonstandard arrangements. Both respondents and businesses have been found to respond inconsistently to surveys, indicating a lack of reliability and the need for revised measures. Continued research, like that which has been undertaken by the US Census Bureau (Abraham et al. 2017) and the National Academies of Sciences, Engineering, and Medicine (2020), is needed to improve and expand these measures.
- In addition to more accurate and consistent counts of workers in nonstandard arrangements, more demographic information on these workers' is needed to better understand and address patterns of participation and the prevalence of discrimination.

Even if all these steps were taken, large national surveys are unlikely to fully capture the experiences of workers in nonstandard arrangements, especially those in particularly vulnerable positions, including workers lacking documentation and those with disabilities, among others. Institutional barriers are likely both to limit researchers' access to these populations and understandably erode trust and reduce response rates. In addition, data collection instruments have been developed over time by actors with limited insights into these workers' lives, so the data are likely to be a poor reflection of their work experiences. Therefore, worker-centered research developed with the input of worker advocacy organizations needs to be considered alongside these more established sources. In part, this means equipping advocacy organizations to engage in scalable, rigorous, worker-centered research that speaks to and from these workers' experiences. In addition, it requires building legitimacy for this knowledge among research and policy audiences so it is viewed in conjunction with established survey and administrative data to present a more comprehensive and accurate picture of what work looks like today.

# Conclusion

Shifting risks onto individual workers in recent decades has come with a decline in worker power. Individualized work arrangements such as independent contracting and temp staffing can limit long-term relationship-building among workers and pit workers against one another in competition rather than partnership. In addition, the weakening protections described throughout this report have contributed to a decline in unionization and bargaining power.

Restoring, strengthening, and equalizing worker power is both a means and an end to the proposals above. Many examples highlighted as scalable solutions emerged from workers and advocates fighting for changes, including Illinois's temp worker protections and New York City's independent contractor wage theft protections. Workers and worker-led organizations must be centered in efforts to expand these policies, and their evolving needs and goals must shape future action.

Beyond conceiving of and shaping policy reforms, existing worker organizations, including unions, can play key roles in solving challenges. For example, because they have the trust of and access to workers, they are uniquely situated to raise collective discrimination complaints. Worker-run cooperative models can address the challenges presented by current platform models, while harnessing the potential of new technologies to serve workers rather than exploit them. Incorporating worker-centered participatory data can give a more inclusive and accurate understanding of the makeup and needs of workers to inform policy and public understanding. Drawing on and strengthening worker power by introducing these proposals not only addresses the challenges faced today, but also equips workers to continue identifying and implementing the changes they need in an ever-evolving world.

Over the past century, formal and informal exclusions from workplace protections have reproduced and exacerbated inequities and held back the US economy. Looking toward a better future, ensuring that people across work arrangements and industries have key protections, knowledge of their rights, and safe, clear paths to enforcing those rights can bring equitably shared prosperity and build worker power.

# Notes

- <sup>1</sup> “Contingent and Alternative Employment Arrangements,” US Bureau of Labor Statistics (BLS), accessed November 20, 2020, <https://www.bls.gov/news.release/conemp.toc.htm>.
- <sup>2</sup> For a discussion of the history of workplace benefits and protections, see chapter 1 of Reder, Steward, and Foster (2019).
- <sup>3</sup> Maria Godoy and Daniel Wood, “What Do Coronavirus Racial Disparities Look Like State by State?” *Health Shots*, NPR, May 30, 2020, <https://www.npr.org/sections/health-shots/2020/05/30/865413079/what-do-coronavirus-racial-disparities-look-like-state-by-state>; Brandon W. Yan, Fiona Ng, Janet Chu, Janice Tsoh, and Tung Nguyen, “Asian Americans Facing High COVID-19 Case Fatality,” *Health Affairs* (blog), July 13, 2020, <https://www.healthaffairs.org/doi/10.1377/hblog20200708.894552/full/>. See also “COVID-19 Hospitalization and Death by Race/Ethnicity,” Centers for Disease Control and Prevention, August 18, 2020, <https://www.cdc.gov/coronavirus/2019-ncov/covid-data/investigations-discovery/hospitalization-death-by-race-ethnicity.html>.
- <sup>4</sup> Erin Mulvaney, “Pandemic Exposes Ongoing Job Challenges for Disabled Workers,” *Bloomberg Law*, July 22, 2020, <https://news.bloomberglaw.com/daily-labor-report/pandemic-exposes-ongoing-job-challenges-for-disabled-workers>.
- <sup>5</sup> “Contingent and Alternative Employment Arrangements,” BLS, accessed November 20, 2020, <https://www.bls.gov/news.release/conemp.toc.htm>.
- <sup>6</sup> “Contingent and Alternative Employment Arrangements,” BLS.
- <sup>7</sup> These include analyses of public data sources, including tax returns and US Census Nonemployer Statistics; private surveys including those conducted by MBO Partners and Freelancers Union in partnership with Upwork; and private administrative data, such as that from JPMorgan Chase Institute. For an analysis of these sources and more information, see the Gig Economy Data Hub, Aspen Institute Future of Work Initiative and Cornell ILR School, accessed November 20, 2020, <https://www.gigeconomydata.org>.
- <sup>8</sup> “Electronically Mediated Employment,” BLS, accessed November 20, 2020, <https://www.bls.gov/cps/electronically-mediated-employment.htm>.
- <sup>9</sup> “Contingent and Alternative Employment Arrangements,” BLS, accessed November 20, 2020, <https://www.bls.gov/news.release/conemp.toc.htm>.
- <sup>10</sup> Jenny R. Yang and Steven Brown, “Will the Pandemic Encourage Policymakers to Implement Stronger Workplace Protections for Independent Contractors?,” *Urban Wire* (blog), April 3, 2020, <https://www.urban.org/urban-wire/will-pandemic-encourage-policymakers-implement-stronger-workplace-protections-independent-contractors>.
- <sup>11</sup> When someone incorporates a business, it becomes a separate entity of its owner. Several data sources, including most labor force, employment, and unemployment data released by the Bureau of Labor Statistics includes the incorporated self-employed as wage and salary workers, because they are employed by the business they have incorporated. Therefore, many measures of self-employment include only unincorporated self-employed workers. There are tax and legal implications of incorporating. See “Data Retrieval: Labor Force Statistics,” BLS, February 19, 2020, <https://www.bls.gov/webapps/legacy/cpsatab9.htm>.
- <sup>12</sup> “Labor Force Statistics from the Current Population Survey,” BLS, accessed November 2020, <https://www.bls.gov/cps/lfcharacteristics.htm>.
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- <sup>15</sup> “Effects of Misclassifying Workers as Independent Contractors,” hearing before the House Subcommittee on Income Security and Family Support and Subcommittee on Select Revenue Measures of the Committee on Ways and Means, 110th Cong. (2007) (statement of Richard E. Neal, chairman, House Subcommittee on Select Revenue Measures).
- <sup>16</sup> *Dynamex Operations W. v. Superior Court*, 4 Cal. 5th 903, 916, 416 P. 3d 1, 7 (2018), *reh'g denied* (June 20, 2018).
- <sup>17</sup> California A.B. 5 (2019), [https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill\\_id=201920200AB5](https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB5).
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- <sup>21</sup> Kari Pail and Julia Carrie Wong, “California Passes Prop 22 in a Major Victory for Uber and Lyft,” *The Guardian*, November 4, 2020, <https://www.theguardian.com/us-news/2020/nov/04/california-election-voters-prop-22-uber-lyft>.
- <sup>22</sup> Noam Scheiber and Kate Conger, “Fight over Gig Workers Persists Despite Win for Lyft and Uber,” *New York Times*, November 11, 2020, <https://www.nytimes.com/2020/11/11/business/economy/california-gig-workers-ballot-uber-lyft.html?referringSource=articleShare>.
- <sup>23</sup> Tanya Goldman and David Weil have developed a useful framework for thinking about expanding workers’ rights, called the Concentric Circle framework. In this framework, all workers are assured core essential rights, regardless of work arrangement, including minimum pay and a safe workplace free from discrimination. A secondary circle includes a presumption of employment for those rights tied to classification, and a tertiary circle includes mechanisms to ensure access to key workplace benefits. See Goldman and Weil (forthcoming).
- <sup>24</sup> Kellen Browning and Kate Conger, “Cleaners Demand Harassment Safeguards from the Booking Service Handy,” *New York Times*, September 10, 2020, <https://www.nytimes.com/2020/09/10/business/handy-service-cleaners-harassment.html>.
- <sup>25</sup> Ken Armstrong, Justin Elliott, and Ariana Tobin, “Meet the Customer Service Reps for Disney and Airbnb Who Have to Pay to Talk to You,” *ProPublica*, October 2, 2020, <https://www.propublica.org/article/meet-the-customer-service-reps-for-disney-and-airbnb-who-have-to-pay-to-talk-to-you>.
- <sup>26</sup> See 42 U.S.C. § 2000e-2 – Unlawful Employment Practices, <https://www.law.cornell.edu/uscode/text/42/2000e-2>.
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- <sup>31</sup> This section's analysis of antidiscrimination rights of independent contractors draws heavily from a forthcoming nationwide survey by A Better Balance. For a preview of this analysis, see Meghan Racklin, Molly Weston Williamson, and Dina Bakst, "State Leadership on Anti-Discrimination Protections for Independent Contractors," A Better Balance, April 22, 2020, <https://www.abetterbalance.org/state-leadership-on-anti-discrimination-protections-for-independent-contractors/>.
- <sup>32</sup> Gen. Laws of Rhode Island § 42-112-1(a) – Discrimination prohibited, <https://law.justia.com/codes/rhode-island/2014/title-42/chapter-42-112/section-42-112-1/>.
- <sup>33</sup> Minn. Stat. Ann. § 363A.17(3), Business discrimination, <https://www.revisor.mn.gov/statutes/cite/363a.17>.
- <sup>34</sup> See *Marquis v. City of Spokane*, 922 P. 2d 43, 49 (Wash. 1996). Note, however, that because other, more narrowly tailored provisions of state law provide additional antidiscrimination protections specifically to employees (such as protection against discrimination on the basis of age), contractors in Washington have comparatively narrower protections than employees in the state. See *Currier v. Northland Servs., Inc.*, 332 P. 3d 1006, 1012 (Wash. Ct. App. 2014).
- <sup>35</sup> N.J.S.A. 10:5–12(l); see *Rowan v. Hartford Plaza Ltd.*, A-0107-11T3, 2013 WL 1350095 at \*10 (N.J. Super. Ct. App. Div. Apr. 5, 2013) ("N.J.S.A. 10:5–12(l) does not apply to discrimination during the ongoing execution of a contract."); see also *7 Eleven Inc. v. Sodhi*, 13-3715, 2016 WL 3085897, at \*7, *aff'd sub. nom.* *7 Eleven Inc. v. Sodhi*, 706 Fed. App'x 777 (3d Cir. 2017).
- <sup>36</sup> 75 Ill. Comp. Stat. Ann. 5/2-101(A); (D) (West 2020).
- <sup>37</sup> Vt. Stat. Ann. tit. 21, § 495h(a)(2) – Sexual harassment, <https://law.justia.com/codes/vermont/2012/title21/chapter5/section495h/>.
- <sup>38</sup> HEALTH CARE FACILITIES—SOCIAL SERVICES, 2018 Sess. Law News of N.Y. Ch. 57 (S. 7507-C), Section F(1) (McKINNEY'S), formerly codified at NY Exec. Law § 296-d.
- <sup>39</sup> NY LEGIS 160 (2019), 2019 Sess. Law News of N.Y. Ch. 160 (A. 8421), Section 1 (McKINNEY'S), codified at NY Exec. Law § 296-D.
- <sup>40</sup> H.R. 2148, Sec. 301, Independent Contractors, Interns, Fellows, Volunteers, and Trainees, <https://www.congress.gov/bill/116th-congress/house-bill/2148/text#toc-H637E8C16C2B2486293C293FC78D458F8>.
- <sup>41</sup> H.R. 2148, Sec. 301.
- <sup>42</sup> Md. Code. Ann., State Gov't § 20-601(c) (West 2019).
- <sup>43</sup> Council of City of NY Intro. No. 136-A, codified at New York City, N.Y., Code § 8-107(23) (Jan. 31, 2018).
- <sup>44</sup> Cal. Gov't Code § 12940(j)(1) (prohibiting harassment of "an employee, an applicant, an unpaid intern or volunteer, or a person providing services pursuant to a contract" [emphasis added]). Note that California has lowered the employer size threshold to one employee for purposes of this provision only; Cal. Gov't Code § 12940 (j)(4)(A).
- <sup>45</sup> Pennsylvania defines the types of independent contractors covered by the statute narrowly. See 43 Pa. Stat. and Const. Stat. Ann. §955 (West 2020) (prohibiting discrimination by employers against independent contractors); 43 Pa. Stat. and Const. Stat. Ann. §954(x) (West 2020) (defining "independent contractor" as limited to certain licensed occupations). Louisiana covers only those contractors who are certain types of insurance agents. See *Guillory v. State Farm Ins. Co.*, 94-1405 (La. App. 4 Cir. Sept. 28, 1995); 662 So. 2d at 113-16 (finding that the plaintiff, an independent contractor insurance agent, could bring an antidiscrimination claim under La. Stat. Ann. § 23:1006, now incorporated into § 23:302(2)); cf. *White v. State Farm Mut. Auto. Ins. Co.*, 479 Fed. App'x. 556, 560 (5th Cir. 2012) (finding that the claim by the insurance agent (who was an independent contractor) under the Louisiana employment discrimination law could not move forward because it was time barred). Recent court

decisions in Michigan have suggested that at least some nonemployees may be protected against discrimination under their state legal protections for employees. See *Cook v. Farm Bureau Life Ins. Co. of Mich.*, 341330, 2019 WL 1460163 (Mich. Ct. App. Apr. 2, 2019) (holding that contractors may be able to bring discrimination claims under specific circumstances); see also *McClements v. Ford Motor Co.*, 702 N.W.2d 166, 174–175 (Mich. 2005).

- <sup>46</sup> “Freelancing in America: 2019,” Freelancers Union, September 23, 2019, <https://www.slideshare.net/upwork/freelancing-in-america-2019/1>, slide 38.
- <sup>47</sup> See de Blasio and Salas (2018, p. 9), citing Krueger (2017).
- <sup>48</sup> City of New York Local Law 140 of 2016, codified at N.Y.C. Admin. Code § 20-927 et seq.
- <sup>49</sup> N.Y.C. Admin. Code § 20-927 (defining “freelance worker”).
- <sup>50</sup> N.Y.C. Admin. Code § 20-928.
- <sup>51</sup> N.Y.C. Admin. Code § 20-929.
- <sup>52</sup> N.Y.C. Admin. Code § 20-930.
- <sup>53</sup> “Freelance Workers,” New York City Department of Consumer Affairs, accessed August 28, 2020, <https://www1.nyc.gov/site/dca/workers/workersrights/freelancer-workers.page>.
- <sup>54</sup> N.Y.C. Admin. Code § 20-931; 20-932.
- <sup>55</sup> N.Y.C. Admin. Code § 20-933;
- <sup>56</sup> N.Y.C. Admin. Code § 20-934.
- <sup>57</sup> N.Y.C. Admin. Code § 20-934 at 7.
- <sup>58</sup> N.Y.C. Admin. Code § 20-934 at 8.
- <sup>59</sup> N.Y.C. Admin. Code § 20-934 at 7.
- <sup>60</sup> “City of Minneapolis Ordinance No. 2020-040, Amending Title 2, Chapter 40 of the Minneapolis Code of Ordinances relating to Administration: Workplace Regulations, Chapter 40, Article VI. – Freelance Worker Protections,” City of Minneapolis, August 8, 2020, [https://lms.minneapolismn.gov/Download/MetaData/18045/2020-040\\_Id\\_18045.pdf](https://lms.minneapolismn.gov/Download/MetaData/18045/2020-040_Id_18045.pdf), codified at Article VI, section 40.700 et seq.
- <sup>61</sup> “City of Minneapolis Ordinance No. 2020-040” at 40.850.
- <sup>62</sup> “City of Minneapolis Ordinance No. 2020-040” at 40.730, 40.760, 40.770.
- <sup>63</sup> “City of Minneapolis Ordinance No. 2020-040” at 40.790.
- <sup>64</sup> “City of Minneapolis Ordinance No. 2020-040” at 40.730, 40.740, 40.790.
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- <sup>67</sup> Noam Scheiber, “Seattle Passes Minimum Pay Rate for Uber and Lyft Drivers,” *New York Times*, September 29, 2020, <https://www.nytimes.com/2020/09/29/business/economy/seattle-uber-lyft-drivers.html>.
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