

## Independent Work Provides Income Opportunities for Millions of Older Americans

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Senate Aging Committee

Beyond the 9 to 5: Dismantling Barriers and Building Economic Resilience for Older Workers

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Good morning, Chairman Casey, Ranking Member Braun, and members of the Senate Special Committee on Aging. It is an honor to testify before you.

My name is Liya Palagashvili, and I am an economist at the Mercatus Center at George Mason University. I work on labor economics and public policy, with a focus on the independent workforce and the evolving nature of work.

Today, my testimony focuses on how independent work opportunities are increasingly valuable to older workers, especially at time when the broader macroeconomic trends are troubling. My three key themes are:

1. The independent workforce is a diverse and growing sector of the labor market, providing income opportunities for millions of older workers.
2. With rising inflation and a gloomy economic outlook, older workers face a troubling future.
3. To help older workers during this time, policies and regulations should remain favorable toward non-traditional employment arrangements, such as independent contracting, freelancing, gig work, and self-employment.

### Independent Work Opportunities for Older Workers

Independent work has long been the main source of income opportunities for retired or older workers who have moved past the “9-5” routine but remain open to transitioning to part-time or short-term work. This includes workers who are independent contractors, freelancers, gig workers, on-call workers, or self-employed workers.

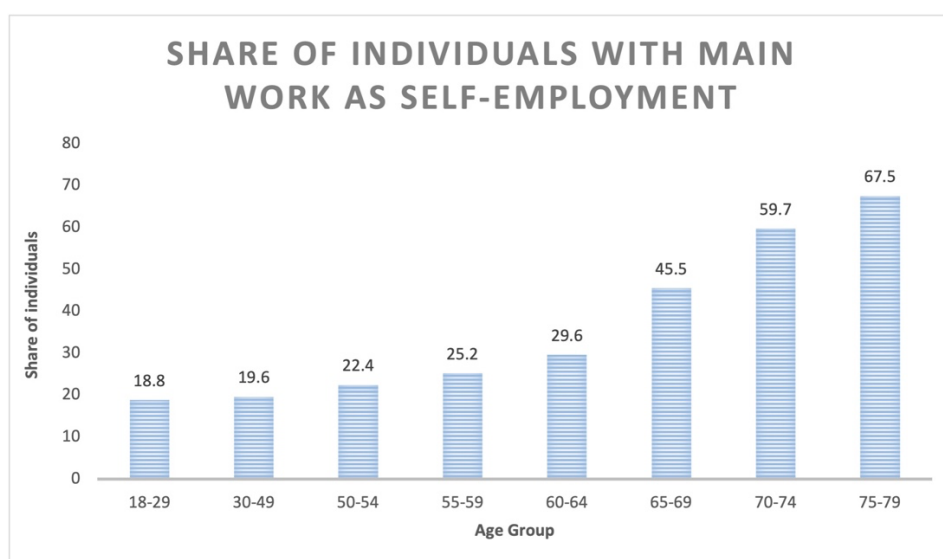
According to a Bureau of Labor Statistics survey in 2017, older workers were more likely to be independent contractors than any other age group.<sup>1</sup> In total, the share of 55-and-older workers accounted for close to

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<sup>1</sup> Bureau of Labor Statistics, “Contingent and Alternative Employment Arrangements—May 2017,” news release no. USDL-18-0942, June 7, 2018, <https://www.bls.gov/news.release/pdf/conemp.pdf>

40 percent of all independent contractors in 2017. Indeed, one out of every three independent contractors were 55 or older, while less than a quarter of workers in traditional employment were 55 or older. The survey highlighted that independent work opportunities for older workers are found across a variety of different occupations and roles. For on-call workers ages 55-64, for example, they were most likely to be substitute teachers at elementary and secondary schools.<sup>2</sup>

A National Bureau of Economic Research study published in 2019 provided an in-depth economic analysis of older workers and found that the incidence of self-employment among older workers was even higher than was previously measured.<sup>3</sup> The figure below illustrates the reality that the likelihood of individuals being independent workers increases with age.<sup>4</sup> For example, conditional on working, the share of individuals with their main job as self-employment is less than 20 percent for the age groups 18-29 and 30-49. But the share of individuals with self-employment income as a main job is 30 percent for ages 60-64, 45 percent for 65-69, and almost 60 percent for those aged 70-74.



Notes: Data from Table 1 in Katherine Abraham, Brad Hershbein, and Susan Houseman, "Contract Work at Older Ages," *National Bureau of Economic Research*, October 2019

Post-pandemic, we have seen a continued growth of independent and self-employed opportunities, with older workers again comprising the largest share of this workforce.<sup>5</sup>

The reason we see a high prevalence of older workers in independent work is because as individuals approach retirement, they have may have financial or personal reasons for continuing to work but they may need to reduce their work hours or pursue more flexible work arrangements. These type of short-term, flexible, or reduced hour arrangements may be more difficult to find within traditional employment jobs, especially for older workers. For example, a study by economists Katherine Abraham and Susan Houseman

<sup>2</sup> Eileen Appelbaum, Arne Kalleberg, Hye Jin Rho, "Non-standard work arrangements and older Americans, 2005-2017," *Economic Policy Institute*, February 28, 2019.

<sup>3</sup> Katherine Abraham, Brad Hershbein, and Susan Houseman, "Self-Employment at Older Ages," *The Bulletin on Retirement & Disability*: No. 3, November 2019, National Bureau of Economic Research.

<sup>4</sup> Figure created from data provided in Katherine Abraham, Brad Hershbein, and Susan Houseman, *Contract Work at Older Ages*, *National Bureau of Economic Research*, October 2019

<sup>5</sup> Annabel Utz, Julie Yixia Cai, and Dean Baker, "The Pandemic Rise in Self-Employment: Who is Working for Themselves Now?," *Center for Economic Policy and Research*, August 29, 2022.

reported on a survey which found that many employers do not offer employees nearing retirement age the option to reduce their hours on their current job.<sup>6</sup>

Therefore, for many older workers, independent work is an attractive way to ease into retirement or earn income when they are no longer part of the full-time, employment workforce. This is especially appealing to older individuals who already have healthcare coverage.

## Uncertain Economic Environment for Older Individuals

The Federal Reserve announced last week that a recession is expected in the coming months. At the same, we are still seeing high prices for basic goods and necessities. This is worrisome for older workers whose employment prospects are generally poorer. Many older Americans live on fixed incomes or limited savings. With high prices and an uncertain economic environment, some older or retired workers may have to either prolong retirement or reenter the labor market.

According to a Nationwide survey, about 40 percent of workers over the age of 45 said they now will have to delay their retirement as a result of inflation and the economic environment.<sup>7</sup> Several news outlets have profiled stories of older and retired workers who are expecting to return to work at age 75 to cover the costs of food, rent, medicine, and utilities.<sup>8</sup> Indeed, a recent survey in July of 2022 highlighted how workers were concerned about inflation and their abilities to afford basic expenses.<sup>9</sup>

While rising prices affect all households, they are especially burdensome for older workers.

## Policies that Support Independent Work Also Help Older Workers

This highlights the importance of supporting and welcoming independent work opportunities in our economy. However, there are federal policies and regulations that seek to restrict independent work and self-employment opportunities—such as the Department of Labor’s (DOL) proposed regulations on independent contractors.

The DOL proposing regulation to restrict independent work with hopes that organizations will hire more workers as official employees instead.<sup>10</sup> At first glance, it may seem like a win for those who might be reclassified as employees.

However, because older workers voluntarily leave employment to pursue independent work opportunities, having fewer independent work opportunities available to them is not a “win-win” situation. Moreover, it is also impossible for every single independent work opportunity to turn into full-time employment offer.<sup>11</sup>

Let me provide you with a recent example to demonstrate this point.

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<sup>6</sup> Abraham, Katharine G., and Susan N. Houseman. 2005. “Work and Retirement Plans Among Older Americans,” in Robert L. Clark and Olivia S. Mitchell, eds., *Reinventing the Retirement Paradigm*. New York: Oxford University Press, 70–9

<sup>7</sup> “Companies Struggle to Hire and Promote Amid Uptick in Delayed Retirements,” *Nationwide Research Institute*, September 28, 2022

<sup>8</sup> See for example Anita Snow, “Working at 76: Inflation Forces Hard Choice for Older Adults,” *Associated Press*, December 15, 2022. Abha Bhattarai, “Fewer hot showers, less meat: How retirees on fixed incomes are dealing with inflation,” *Washington Post*, March 21, 2022.

<sup>9</sup> S. Kathi Brown, “Financial Security Trends: Wave 2 Report,” The American Association of Retired Persons, November 2022

<sup>10</sup> For further analysis of the Department of Labor Rule, see: Liya Palagashvili, “Analyzing the Impact of the Department of Labor’s Rule on Restricting Independent Contracting,” Public Interest Comment Submitted to the Department of Labor, December 13, 2022.

<sup>11</sup> For in-depth analysis of this, please see the attached policy brief: Liya Palagashvili, “Consequences of Restricting Independent Work and the Gig Economy” (Mercatus Policy Brief, Mercatus Center at George Mason University, Arlington, VA, November 2022)

When California passed AB5, which is a similar law that restricts independent work opportunities, lawmakers lauded it as a win for workers. But some of those same lawmakers changed their minds later when news outlets like the *New York Times* and the *LA Times* highlighted how AB5 had led to job losses, especially among freelance musicians, singers, truck drivers, translators, editors, and writers.<sup>12</sup>

Because independent work provides a vital source of income for older workers who cannot take on traditional employment, restricting independent work will disproportionately harm older workers. At a time when inflation is high and traditional employment opportunities are likely to become scarcer, it's unwise for the DOL to also limit independent work opportunities. Eliminating independent work will mean that older workers will have fewer opportunities to earn income, further increasing financial stress in their households. Supporting expanding opportunities for independent work, on the other hand, will benefit older American workers.

Thank you. I welcome your questions.

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<sup>12</sup> Makeda Easter, "The AB5 Backlash: Singers, Actors, Dancers, Theaters Sound Off on Freelance Law," *Los Angeles Times*, February 12, 2020; Marc Tracy and Kevin Draper, "Vox Media to Cut 200 Freelancers, Citing California's Gig Worker Law" *New York Times*, December 16, 2019. Sophia Bollag and Dale Kasler, "California Workers Blame New Labor Law for Lost Jobs. Lawmakers Are Scrambling to Fix It," *Sacramento Bee*, February 10, 2020; Carolyn Said, "Musicians Say AB5 Strikes Sour Note with Gig-Driven Profession," *San Francisco Chronicle*, February 24, 2020; Allana Akhtar, "It Feels Cold and Heartless: Hundreds of California Freelancers Have Been Fired before the Holidays over a State Law Meant to Help Uber and Lyft Drivers," *Business Insider*, December 18, 2019; and Robert Frank, "Translators and Interpreters Unite to Demand AB5 Exemption," *EIN Presswire*, April 22, 202



## Consequences of Restricting Independent Work and the Gig Economy

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Across the United States, policymakers and regulators are grappling with the growth in the independent workforce. Independent workers are legally classified as “independent contractors,” in contrast to workers who are traditional “employees” of an organization. The distinction matters with regard to taxes and because independent workers are left out of employment-based benefits and labor regulations (e.g., minimum-wage requirements, overtime regulations, and paid leave).<sup>1</sup>

Ostensibly to help independent workers, federal and state authorities have tried to reclassify some of them as traditional employees. Most recently, on October 13, 2022, the Department of Labor (DOL) proposed a new rule that narrows the definition of “independent contractor.”<sup>2</sup> The proposed rule does this first by retracting a 2021 Trump administration rule that was more favorable to the independent contractor status and second by providing additional considerations that make it more difficult for workers to maintain an independent contractor status.<sup>3</sup>

In 2021, the US House of Representatives passed the Protecting the Right to Organize (PRO) Act, which would implement a stricter test for qualifying as an independent contractor for the purposes of collective bargaining.<sup>4</sup> It also imposed additional fines and violations that would make it more difficult for organizations to work with independent contractors.<sup>5</sup> California passed Assembly Bill 5 (AB5) in 2019, which codified the “ABC test,” a stricter test for determining whether a worker is an employee or an independent contractor.<sup>6</sup> As intended, AB5 has made it more difficult for workers in California to be classified as independent contractors.

By narrowing the definition of what it means to be an independent contractor, state and federal authorities, such as those at the DOL, are hoping that organizations will hire workers as employ-

ees instead of as independent workers. At first glance, this change portends significant gains for workers who are reclassified as employees and receive proper benefits and protections. But there are reasons to doubt that independent workers will benefit from the new restrictions:

- Many independent workers would not receive the additional benefits associated with becoming employees because many of them would neither become employees nor be able to maintain their jobs as independent workers. This is because companies will not extend *all* contracting positions into employment positions, thereby leaving workers with fewer job opportunities altogether.
- Independent work is an important source of income for those who have recently faced income loss and unemployment. Therefore, the loss of independent work opportunities would cause particular harm to these more vulnerable individuals. As a potential recession looms and with employment opportunities becoming scarce, it seems unwise to also limit independent work opportunities.
- A majority of independent workers prefer their nontraditional job arrangements over a traditional employment arrangement because independent work provides far more flexibility in terms of work schedule. Work schedule flexibility in nontraditional arrangements gives workers more freedom to choose what time to work and how often to work. By contrast, traditional employment often means a specified schedule (e.g., nine-to-five) and a specified quantity of work (e.g., 48 weeks a year).
- Restricting independent work opportunities and reclassifying independent work as traditional employment would be harmful for women, many of whom turn to independent work for the flexibility they need in their work schedules.
- Restricting independent work would disproportionately harm the criminal justice population because recent evidence shows that the gig economy is providing an important avenue to work for those who previously had a criminal record.
- Restricting independent work would also harm small technology startups that rely on independent workers. These technology startups are valuable because they tend to be highly innovative and have the potential to contribute substantially to job creation.

This policy brief will explore each of these points, showing how the DOL proposed rule and other similar regulatory or legislative efforts that substantially limit independent work will cause more harm than benefit to independent workers. Instead of limiting job opportunities and flexible work arrangements for those who desire it, policymakers should aim to provide more desirable portable benefits options for these workers. Portable benefits are increasingly becoming the best solution for workers to maintain their nontraditional work arrangements while also being able to access work-related benefits. However, current federal regulations restrict organizations, businesses, and individuals from providing independent workers with benefits precisely because these benefits have conventionally been tied to employer-employee relationships.<sup>7</sup> If an organization were to

provide benefits to their independent contractors, those workers would likely have to be reclassified as employees and thus also lose their independence and flexibility.

Instead of restricting independent work, policymakers should create a fairer system for all workers by allowing common workplace benefits to follow independent workers.

## **SUBSTANTIAL JOB LOSSES FOR INDEPENDENT WORKERS**

A significant and pressing question about a nationwide reclassification of independent workers as employees is whether most of the workers who no longer qualify as independent workers would indeed become employees. Although the existing evidence is limited, it does indicate that there would be job losses because not all independent workers would be hired as employees. A recent report estimates the impact of reclassifying ridesharing and delivery drivers as employees in Massachusetts. Using private data from Uber, Lyft, Instacart, and Doordash, the report finds that reclassifying drivers “would result in a loss of at least 49,270 app-based TNC and DNC jobs in Massachusetts, which is equivalent to losing 58% of these earning opportunities in the state.”<sup>8</sup> The upper-bound estimate in the report finds that these job losses could be up to 73,657, which is equivalent to losing 87 percent of these earning opportunities.

The California Legislative Analyst’s Office reached a similar conclusion with regard to AB5, though without specific predictions on job losses. They concluded, “we cannot predict the exact number of contractors who will become employees due to AB 5. Although we cannot predict the exact figure, it is probably much smaller than the roughly 1 million contractors that AB 5 applies to.”<sup>9</sup> One of the primary reasons the office expects this outcome is that “businesses will comply with the law in different ways. Some businesses may hire their contractors as employees, while others may hire some, but not all, of their contractors. Other businesses may decide to stop working with their California-based contractors.”<sup>10</sup>

The analysis from the California Legislative Analyst’s Office complements Uber’s own analysis in response to AB5, although—given that Uber is directly affected by proposed legislation—it’s best to consider Uber’s estimate to be the upper bound of all estimates. Uber estimates that AB5 would lead to a 76 percent decrease in the number of drivers who find work on the Uber platform.<sup>11</sup> In another report—also providing what should be considered an upper-bound estimate—Uber CEO Dara Khosrowshahi provides an impact analysis for a scenario in which a national rule required all US drivers to be employees: “If Uber instead *employed* drivers, we would have only 260,000 available full-time roles—and therefore 926,000 drivers would no longer be able to work on Uber going forward. In other words, three-fourths of those currently driving with Uber would be denied the ability to work.”<sup>12</sup> Because ridesharing and delivery platforms continued working with independent contractors and were exempted from AB5 through the passage of Proposition 22, we cannot measure the actual impact of AB5 on these drivers.



However, there is some anecdotal evidence of these job losses in response to AB5. For example, the *Los Angeles Times* reported job losses in the creative community of independent workers such as professional choral artists, classical performers and singers, dancers, actors, musicians, and other types of artists.<sup>13</sup> Several other news articles reported harm and job losses for translators and interpreters, court transcript editors, musical performers, writers, and truck drivers.<sup>14</sup> The American Society of Journalists and Authors (the nation's largest professional organization of independent nonfiction writers) and the National Press Photographers Association (a leading professional organization for visual journalists such as photographers, videographers, multimedia journalists, and editors in print, TV, and electronic media) filed a lawsuit on behalf of their members because of harm from AB5—in particular, harm resulting from a significant loss of freelancing opportunities for their members.<sup>15</sup> Indeed, the *New York Times* reported that Vox Media had to terminate 200 freelance writers in response to the law.<sup>16</sup> Because of these challenges, after the passage of AB5 California added 53 occupations to its list of occupations exempt from the law—bringing the total to 110.

The estimates and anecdotal evidence of job losses seem consistent with estimates of the cost of reclassifying independent workers as employees. One study finds that having an employee costs a business between 29 and 39 cents extra for every dollar of the employee's pay.<sup>17</sup> Another report indicates that if Uber and Lyft were forced to reclassify all their drivers as employees in response to AB5, they would face an additional annual cost of \$3,625 per driver. Given that there are approximately 140,000 Uber drivers and 80,000 Lyft drivers in California alone, the report estimates that AB5 would lead to an operating loss of more than \$500 million for Uber and more than \$290 million for Lyft.<sup>18</sup>

Owing to these substantial additional costs, organizations—especially small organizations—may not be able to hire all their independent workers as employees. In fact, according to tax data, between 2000 and 2016, small firms (those with fewer than 20 employees) saw the greatest growth in the hiring of independent workers, compared with medium-sized or large firms.<sup>19</sup>

This situation has several implications for discussions about the benefits of the new DOL rule and legislation such as the PRO Act or AB5. Some independent workers would be better off as employees because of the value of the benefits they would receive as employees—such as paid leave, a minimum wage, overtime regulations, insurance benefits, workers' compensation, and so on.<sup>20</sup> One point of reference is provided by Heidi Shierholz, a senior economist at the Economic Policy Institute, who estimates that employees at the bottom of the pay scale would experience a drop of 25.7 percent in compensation if they were reclassified as independent contractors.<sup>21</sup>

Shierholz's estimate suggests that making the opposite change, reclassifying contractors as employees (the way the DOL does), would increase their compensation by up to 34.6 percent. It seems reasonable to expect that stricter rules on the classification of workers as independent contractors would consequently translate into significant gains for the workers who become reclassified as employees. However, many independent workers would not receive these benefits because



they would end up without jobs—either as employees or as independent workers. If a large number of contractors lose their jobs, the aggregate benefit of a reclassification of workers is not likely to offset its aggregate cost.

Moreover, there is an additional question about whether independent workers who become employees would maintain their same level of pay. Companies may compensate for the extra costs of employment by lowering a worker's base salary. Economists Jonathan Gruber and Alan Krueger find that, for example, even though mandatory workers' compensation insurance was legally paid for by employers, the cost was largely shifted to employees in the form of a lower wage.<sup>22</sup> Moreover, several empirical studies show that when there have been changes to overtime regulations that have significantly increased the costs to employers, employers have cut their workers' salaries in response.<sup>23</sup>

Therefore, it is not yet clear whether independent workers who become employees will maintain the same pay. Many empirical studies imply that pay will decrease to compensate for the added costs of employment benefits.<sup>24</sup>

There is a clear danger that the proposed classification reforms may not confer their intended benefits on many independent workers, who would neither become employees nor be able to maintain their jobs as independent workers. The loss of independent worker jobs could further harm workers who may already be suffering from hiring freezes and layoffs as the United States enters potential recession territory.

## **FEWER OPTIONS FOR INDIVIDUALS FACING LOSS OF INCOME**

Several studies suggest that individuals turn to independent work temporarily after the loss of a job. In a 2017 paper published in the *American Economic Review*, economists Lawrence Katz and Alan Krueger report that workers who “suffered a spell of unemployment are 7 to 17 percentage points more likely than observationally similar workers to be employed in an alternative work arrangement when surveyed 1 to 2.5 years later.”<sup>25</sup>

A study that uses IRS data to understand the income trends of both conventional freelancers and workers in the online platform economy finds that individuals turn to both types of independent work to smooth temporary income shocks after they have faced income declines or unemployment.<sup>26</sup>

A similar result is reported by another study that analyzed the financial data of individuals working on digital platforms. Economist Dmitri Koustas finds a significant pattern among individuals who participate in online gig platforms for work: they faced a decline in income or a significant decline in assets a quarter before they began participating in gig economy work.<sup>27</sup> Their income and liquid assets partially recovered in the quarter after they began working gig economy jobs.

Lastly, the previously mentioned *Journal of Economic Perspectives* study reports a similar finding: “Individuals are significantly more likely to enter solo self-employment from unemployment than from traditional employment.”<sup>28</sup> The study reports the survey responses of 45,000 individuals from across the United States, the United Kingdom, and Italy.<sup>29</sup> The study also concludes that “policies which seek to regulate alternative work arrangements by limiting their flexibility may not be desirable, in that they may well harm individuals” who need the extra income.<sup>30</sup>

This research draws attention to the potentially harmful impact of restrictions on independent work for vulnerable individuals—those who have recently faced unemployment, income losses, or deterioration of assets. The DOL rule could eliminate work opportunities for these individuals and thereby worsen their economic standing, especially as a potential recession—which may increase unemployment—is looming.

## **FEWER OPTIONS FOR THE MAJORITY OF WORKERS WHO PREFER INDEPENDENT WORK**

One way to evaluate whether independent workers would be better off with the DOL rule is to investigate their preferences. Would most independent workers *prefer* to be reclassified as employees?

At least 14 surveys provide evidence of an overwhelming consensus: most independent workers would like to keep their nontraditional work arrangements.<sup>31</sup> This is because most independent workers choose those types of work arrangements because such arrangements afford them more flexibility.

In the 2017 version of the Contingent and Alternative Employment Arrangements survey, the US Bureau of Labor Statistics reports that 79 percent of independent contractors preferred their arrangement over a traditional job and fewer than 1 in 10 independent contractors would prefer a traditional work arrangement instead.<sup>32</sup> The individuals surveyed were workers who indicated that independent contracting was their primary source of income.

Upwork’s 2021 “Freelance Forward” survey finds that 72 percent of individuals engaged in independent work do so because of the increased flexibility of their work.<sup>33</sup> In particular, 74 percent indicate that independent work gives them the flexibility to be more available as a caregiver for their family, and 67 percent says it gives them flexibility to address personal mental or physical health needs. In fact, nearly half of individuals engaged in independent work indicated that there is no amount of money that would entice them to switch to traditional employment.<sup>34</sup>

In the 2019 version of the survey, approximately 46 percent of independent workers state that independent work gives them the flexibility they need because they are unable to work for a traditional company owing to personal circumstances (health issues or family obligations). According

to the survey, the proportion of workers who are parents and caregivers is higher for independent workers (46 percent) than for US workers overall (38 percent).<sup>35</sup>

The results of these surveys are similar to those of an economic study that estimates the value of flexibility to UberX drivers.<sup>36</sup> The study finds that for any given driver, the number of hours the driver drove in one week differed significantly from the number of hours the driver drove in the next week. In other words, most drivers changed the hours they worked from week to week. The study also finds that drivers would require almost twice as much pay to accept the inflexibility that comes from adopting a taxi-style schedule. The study concludes that drivers would reduce their hours driving on the Uber platform by more than two-thirds if they were required to work more inflexible hours, such as those of a taxi-style schedule.<sup>37</sup>

Another high-profile survey of independent workers, published in the *Journal of Economic Perspectives* in 2020, finds that among self-employed workers, “the degree of flexibility that self-employed work offers seems likely to be the main driver of relatively high levels of satisfaction.”<sup>38</sup>

Studies from consulting firms McKinsey Global Institute, EY Global, and MBO Partners also all point to flexibility as the primary driver of independent workers engaged in this type of work.<sup>39</sup>

Overall, the survey research indicates that a vast majority of independent workers would prefer to keep their nontraditional job arrangements rather than enter an employment arrangement, because the former provides extensive work-schedule flexibility. This means that, given what independent workers say about their own preferences, most of them would likely be worse off if they were forced to be classified as employees. Many do not prefer to be employees of any particular company or organization.

## **HARM TO WOMEN AS INDEPENDENT WORKERS**

A substantial amount of research shows that women participate in independent work because it allows them greater flexibility to structure their days, a benefit that is crucial for women who are the primary caregivers in their households. The new DOL rule and policies like the PRO Act or AB5 that restrict independent work opportunities and reclassify or restructure independent work as traditional employment could be harmful for women who are unable to accept the nonflexible work requirements of traditional employment opportunities.

Research from the JPMorgan Chase Institute indicates that, if transportation sector platforms (such as ridesharing and delivery) are omitted from the analysis, women compose a greater share of income earners on digital platforms than men do.<sup>40</sup> This is corroborated by a 2017 Hyperwallet study, which reports the results of a survey of 2,000 women who use platform-economy companies: most women indicated that they participated in professional freelancing, direct selling, or

service platforms (e.g., Upwork, TaskRabbit, Care.com), but only 22 percent of women indicated that they participated in ridesharing (e.g., Uber, Lyft), and only 8 percent indicated that they participated in food delivery (e.g., Postmates, Grubhub).<sup>41</sup> Research suggests that there is significant variation in female participation across gig economy platforms; for example, between 2014 and 2015, 86 percent of independent workers on the platform Etsy were female, whereas only 19 percent of workers on Uber were female.<sup>42</sup>

Additionally, an IRS study that uses tax data finds that the number of female contractors grew faster than the numbers of female employees or male contractors between 2001 and 2016.<sup>43</sup> After analyzing other factors such as whether independent work is a primary source of income, the study concludes that “these trends suggest that the long-run growth in [independent contractor] labor in the U.S. cannot solely be attributed to individuals seeking supplemental income or to the rise of a few online platforms, but may represent a structural shift in the labor market, particularly for women.”<sup>44</sup>

Another study that also uses IRS tax data finds that, while independent work is more common among men, the participation in independent contracting since 2000 has grown significantly more among women.<sup>45</sup>

Survey research reveals why women may prefer to participate in independent work. The 2017 study by Hyperwallet finds that 96 percent of these women indicated that the primary benefit of engaging in platform-economy work is the flexible working hours.<sup>46</sup> Moreover, the study finds that 70 percent of these platform-working women were the primary caregivers in their homes. A quarter of these women recently left their full-time employment for platform-based work, and 60 percent of them indicated that they did so because they wanted flexibility, needed more time to care for a child, parent, or other relative, or both.

Reports by MBO Partners are also informative, but their results should be viewed cautiously, given that the company would be directly affected by stricter independent contracting legislation. Survey research published by MBO Partners in 2016, 2017, 2018, and 2019 finds that women prefer independent work because these work arrangements allow greater flexibility. For example, in its 2018 report, MBO Partners finds that the primary reasons why women engaged in independent work were flexibility (76 percent) and the ability to control their schedules (71 percent).<sup>47</sup> By contrast, men said that their primary reasons for engaging in independent or freelance work were that they enjoy being their own boss (67 percent) and do not like answering to a boss (64 percent). The 2017 report by MBO Partners finds similar results: “Women were significantly more likely to note that flexibility was a more important motivator for independent work than men (74 percent vs. 59 percent).”<sup>48</sup>

Furthermore, a 2016 McKinsey Global Institute study reports the results of a survey of 8,000 independent workers and finds that 42 percent of US women and 48 percent of European women

who participated in independent work were also caregivers.<sup>49</sup> In fact, referring to the 17 percent of the total sample in their survey who reported providing care to an elderly dependent, the authors state that “these caregivers participated in independent work at a significantly higher rate . . . than non-caregivers.”<sup>50</sup> Moreover, the study indicates that caregivers engage in independent work for supplemental income (67 percent, compared with 54 percent for noncaregivers). The authors conclude that independent work “provides a way for caregivers [who are disproportionately women] to generate income while fitting their hours around the needs of their families. This type of flexibility can ease the burden on financially stressed households facing logistical challenges.”<sup>51</sup>

In a survey by the Kaiser Family Foundation (in partnership with CBS and the *New York Times*), researchers find that about 75 percent of self-identified homemakers, or stay-at-home mothers, in the United States indicated that they would likely return to work if they had flexible options.<sup>52</sup>

All together, this research indicates that independent work may be important for women who require more flexible work arrangements. Thus, to the extent that specific nontraditional work arrangements provide flexibility to those who need it and extend work opportunities to women who are unable to participate in traditional employment, restricting the legal classification of independent workers could disproportionately hinder women’s participation in the labor force.

## **HARM TO WORKERS WHO HAVE HAD CONTACT WITH THE CRIMINAL JUSTICE SYSTEM**

A September 2022 IRS study finds that individuals who had their criminal records cleared after seven years go on to work in the gig economy rather than in traditional employment.<sup>53</sup> The study finds no evidence that clearing records (including for convictions or nonconvictions and for felonies or misdemeanors) increases the likelihood of these individuals having traditional employment earnings.

Instead, the study finds consistent evidence that clearing records leads to increases in gig work. When examining the impact of the Federal Credit Reporting Act (FCRA), the authors conclude: “While gig work is a new form of work activity, we find evidence that removal of a criminal record via FCRA has a large (in percent terms) impact on gig work for this particularly disadvantaged group, many of whom are likely entering self-employment for the first time.”<sup>54</sup> They find similar results on gig work when examining the impact of California’s Proposition 47, which reclassified eligible felonies as misdemeanors, and of Pennsylvania’s Clean Slate law, which sealed all records of nonconvictions for individuals that did not owe fines and fees.

These findings seem to suggest that independent work through the gig economy is providing an important avenue to work for those who previously had a criminal record. Thus, restricting the legal classification of independent workers would disproportionately hinder work opportunities for the criminal justice population.

## HARM TO SMALL, INNOVATION-DRIVEN TECHNOLOGY STARTUPS

Small, early-stage technology startups are similar to typical “mom and pop” small businesses in that both are cash constrained. Indeed, many of today’s tech giants, such as Google and Amazon, started off with limited operating costs and few employees.

This is still the case today, and small technology startups tend to rely heavily on independent workers in their early stages. As one of the principal investigators for the New York University School of Law study “Startup Innovation: The Role of Regulation in Entrepreneurship,”<sup>55</sup> I led an effort to interview and survey the CEOs of technology startups throughout the United States. The findings presented in this section come from both original interviews and an original online survey conducted in the United States.<sup>56</sup>

In the online survey of more than 400 CEOs of startups, approximately 80 percent of technology startup executives indicated that they used contract labor. We asked some follow-up questions to better understand the use of independent contractors. For example, we asked the executives in our sample who hire independent contractors, “How important is the use of 1099 contractors for your specific business model?” They responded as follows:

- 57 percent indicated that the use of contract labor is an indispensable or essential part of their business model.
- 39 percent indicated that contract labor is not essential but is highly valuable.
- 4 percent indicated that the use of contract labor is not essential and is unimportant.

We also asked respondents to “rank up to 3 primary reasons why the startup uses 1099 contractors.” Executives gave the following responses:

1. They needed individuals for one-off projects, or they needed specialized talent that they could not hire full time (69 percent).
2. They needed flexibility, given the risk associated with early-stage development (60 percent).
3. They needed flexibility, given fluctuating demand for their product or service (49 percent).

We also conducted 88 in-person interviews that add robustness to the foregoing findings: 71 percent of the startups that we interviewed relied on independent contractors and thought it was necessary to use contract labor during their early stages. The interviewees explicitly discussed the reason that early-stage small startups prefer contract labor over employee labor: during unpredictable times, when startups are trying to find their market and build their product, they need flexible labor and need to be able to hire and fire easily.

Indeed, our interviews suggest that the primary concern for startups in terms of labor regulation and policy is the regulation of independent contractors. Therefore, any impact analysis of a policy

like the PRO Act should seriously consider the constraints and challenges faced by technology startups—particularly because they have a large impact on job creation.

A 2014 academic study finds that high-growth businesses (which disproportionately are young firms) account for almost 50 percent of gross job creation.<sup>57</sup> The study describes the unique role of young and fast-growing startups: most new businesses die within 10 years, and most surviving young businesses do not grow but remain small (these may be what most people imagine as the typical “Main Street” small business), but a small portion of young businesses exhibit very high growth and contribute substantially to job creation.<sup>58</sup> Other studies also indicate that almost all net job creation in the United States has occurred in firms younger than five years old, and of these firms, a small percentage of high-growth firms are responsible for most of the jobs.<sup>59</sup> Technology startups are also important because they are often highly innovative.

Thus, rules that restrict whether individuals may work as independent workers can be harmful for small, innovation-driven technology startups that rely on flexible independent work in their early and formative stages.

## CONCLUSION

Taken together, the economic research reviewed in this policy brief suggests that agency regulations and legislation that limit independent work opportunities are likely to decrease the total population of independent workers. Instead of curtailing independent work opportunities, policymakers should look for ways to expand independent workers’ access to benefits. About 80 percent of self-employed workers would like flexible, shared, or portable benefits.<sup>60</sup> This means that rather than changing worker classification rules, policymakers should introduce more forward-looking solutions, such as shared, flexible, and portable benefits that are not tied to employment. Embracing innovative reforms such as portable benefits solutions will help both workers and companies seize the opportunities of the future economy.

## ABOUT THE AUTHOR

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## NOTES

1. In terms of the tax differences, employees have payroll taxes automatically deducted from their paychecks, and they split paying with their companies the Social Security and Medicare payroll taxes (employees pay only 7.65 percent and their companies pay the other 7.65 percent for them). By contrast, companies do not withhold income taxes from independent workers, and independent workers the full 15.3 percent of their income directly to the government for the Social Security and Medicare taxes.
2. Employee or Independent Contractor Classification Under the Fair Labor Standards Act, 87 Fed. Reg. 62218 (October 13, 2022). This policy brief refers to individuals who are engaged in independent contracting as *independent workers*, a term that encompasses gig and platform workers, freelancers, contractors, and workers in other types of external or alternative labor arrangements. Although the terms *platform-based work*, *gig work*, *freelancing*, and *contracting* all have slight differences, they are often used interchangeably because they are all referred to as alternative or external labor arrangements, and workers with such arrangements are legally classified as independent contractors (i.e., workers who receive IRS form 1099). These workers are starkly different from traditional employees (i.e., workers who receive IRS form W-2). Therefore, I use the term *independent workers* throughout this policy brief to capture the groups of people who are legally classified as independent contractors.
3. For an overview of the specific changes the DOL is proposing, see James A. Paretti, Michael J. Lotito, and Maury Baskin, “Department of Labor Proposes New Rule for Independent Contractor Status,” Littler Workplace Policy Institute, October 25, 2022, <https://www.littler.com/publication-press/publication/department-labor-proposes-new-rule-independent-contractor-status>.
4. Protecting the Right to Organize Act of 2021, H.R. 852, 117th Cong. § 101(b) (2021). The ABC test is one feature of the PRO Act. There are several other features of the PRO Act relating directly to unionization that are not addressed in this analysis.
5. Philip A. Miscimarra and Harry I. Johnson III, *The PRO Act’s Changes to ‘Independent Contractor’ Status: Unraveling the US Economy* (n.p.: Morgan Lewis, 2021).
6. Here is the ABC test as it appears in AB5: “A person providing labor or services for remuneration shall be considered an employee rather than an independent contractor unless the hiring entity demonstrates that all of the following conditions are satisfied: (A) The person is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact. (B) The person performs work that is outside the usual course of the hiring entity’s business. (C) The person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.” Assemb. B. 5, 2019–20 Reg. Sess. § 2 (Cal. 2019). The ABC test was formulated by the California Supreme Court in *Dynamex Operations W., Inc. v. Superior Court* to distinguish between independent contractors and employees. 416 P.3d 1 (Cal. 2018).
7. Under the “Employee Benefits” factor, the IRS explains that organizations do not provide benefits to independent contractors: “Type of Relationship,” Internal Revenue Service, accessed November 2, 2022, <https://www.irs.gov/businesses/small-businesses-self-employed/type-of-relationship>.
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15. The lawsuit was filed on December 17, 2019, and the legal filings show that the threat of enforcement had already resulted in lost freelancing opportunities even before the law went into effect on January 1, 2020 (in addition to other cited damages from AB5). American Society of Journalists and Authors, Inc., and National Press Photographers Association v. Xavier Becerra, Case No. 2:19-cv-10645 (2019).
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