
**New York State Senate**

**Standing Committee on Internet and Technology**

**Public Hearing**

**on**

**Examination of the Gig Economy**

**Testimony of:**

**Mario Cilento, President**

**New York State AFL-CIO**

**October 16, 2019**

Thank you, Majority Leader Stewart-Cousins and Senator Savino for holding this public hearing to examine how app-based, gig-economy workers are treated in New York State and for the opportunity to present testimony.

I am proud of the work that the New York State AFL-CIO has done on behalf of gig workers. Two years ago, the New York State AFL-CIO convened a work group of unions that represent workers in industries threatened by gig-economy employers. These industries include transportation, delivery, hospitality, retail and construction. Since that time, the New York State AFL-CIO has commissioned a report about the plight of gig workers in this State, which was published last spring by the Cornell University, School of Industrial and Labor Relations; coordinated with stakeholders; met with gig workers; and, advocated for more rigorous enforcement of current law. Additionally, we intend to submit an amicus brief in a gig worker case currently pending before the Court of Appeals, and to propose and advocate for enactment of comprehensive legislation that would not just ensure some protections for gig workers but would guarantee that they are treated equally. We look forward to working together to make certain that gig workers enjoy the same rights as all employees, including collective bargaining. We will not leave any workers behind.

As you already know, gig companies elect to classify their workers as independent contractors, staking out the position that each worker is an independent business. The gig companies have imposed this classification in an attempt to deprive the workers of the rights commonly associated with employment. Specifically, gig companies deprive their workers of minimum wage, overtime pay, unemployment insurance, paid family leave insurance, temporary disability insurance, comprehensive discrimination protections and the right to form a union. Except for rideshare drivers, who have limited workers' compensation coverage through the Black Car Drivers Injury Fund, gig workers have no insurance coverage for workplace injuries. Gig companies often do not tell workers what their rate of pay is. Further, gig workers are deprived of any meaningful avenue to pursue the meager rights that the companies concede they are entitled to. In short, gig workers in New York State are treated as less than.

In an attempt to justify this treatment, gig companies have argued that they are merely technology companies, introducing consumers to service providers, and that these service providers are entrepreneurs, exercising independent business judgement to earn a living and maybe even strike it rich.

The companies claim that they are not in the business of providing whatever service they sell; rather, that they are in the technology business.

However, upon closer consideration, the argument unravels. These companies sell no technology, rather they sell services. Additionally, gig companies exert significant control over their workers. The workers are often foreclosed from making independent business decisions. This strikes at the heart of the companies' argument that workers are entrepreneurs or independent businesses. Even from the perspective of the consumer, this is not an arms-length deal with the worker. For the most part, consumers are not permitted to negotiate rates they are charged, or the rates workers are paid, or the terms of the agreements. Consumers are not even permitted to choose the worker that will provide the service they are purchasing from the gig company. Consumers are paying the companies for service, not technology.

Workers are similarly left with a take-it-or-leave-it proposal. However, they are in an even worse position than consumers because they rely upon the company and its assignments for their livelihoods, and if they choose to refuse work, many gig companies will discipline, or otherwise disadvantage them. This is remarkably similar to employers disciplining employees for insubordination. To make matters worse, workers often do not know how much they will be paid or the amount of effort or resources a specific job entails until *after* they accept the work. Additionally, workers are bound to the gig companies' terms of service which lay out rules that the worker must follow in order to maintain their employment. Further, workers are subject to discipline or discharge by the gig company by way of deactivation, receiving fewer jobs, or receiving lower paying or less desirable jobs. This adverse action can be triggered by any number of circumstances, including refusing work, or for no reason at all. One common circumstance is the poor "rating."

Most gig company apps include a customer rating feature. These companies commonly dictate that workers who do not maintain a minimum average rating are subject to discipline or discharge. However, there is often no means for a worker to challenge a poor rating. Is the poor rating due to a worker's refusal to engage in dangerous, immoral, illegal, or otherwise inappropriate behavior at the request of a customer? Or, is the poor rating due to an irate inebriated customer who entered incorrect information

about the job? Maybe it was because the worker was too chatty while performing the service. The terminated worker will never find out.

Further consolidating control over these workers, many gig companies offer promotions whereby workers are encouraged to complete more work at a faster pace in exchange for some additional remuneration or benefit. This benefit usually takes the form of a minimum pay rate for their entire shift, which sounds remarkably like the minimum wage. However, if a worker fails to achieve the goal laid out in the promotion, they do not earn the minimum wage. This is yet another transparent method companies use to control workers. Workers have described this as gamification of work and say that encourages dangerous decision-making.

The bottom line is that these workers are at the mercy of the gig companies. To claim that they are independent contractors is not reasonable.

The gig companies' best arguments are that workers can set their own schedule and that workers are permitted to work for the companies' competitors. However, these arguments fail too.

With respect to schedules: plenty of people classified by their employers as employees have flexible schedules or work part-time, including many union members; on the contrary, plenty of gig workers have to commit in advance to working blocks of time (schedules) in order to receive work. Do not confuse part time work and flexible schedules with entrepreneurship or independent business decision-making.

As we saw last month in New York City, gig companies have, and exercise, the ability and right to keep workers from signing into the app, based on what is in the best business interest of the gig company, not the worker. In September 2019, New York City implemented limits on how long for-hire-vehicle companies can allow their cars to cruise empty, without passengers, in Manhattan. The penalties for violating these limits include significant fines and suspension or revocation of the violating company's license to operate in New York City. In response, Uber and Lyft prevented drivers from signing in to the app – essentially locking them out. Limiting drivers' access to the app was a decision made by these gig companies in the best interest of *their* own businesses.

When it comes to working for competitors, having a glut of workers often inures to the benefit of the gig company. The oversupply of workers allows the company to provide service to customers at a moment's notice. It also enables the companies to devalue the workers' labor and underpay them. Again, workers classified as employees, including union members, are often not subject to contracts limiting outside employment. The absence of restrictive employment agreements should not be a determining factor in whether a worker is indeed an employee. Further undermining the companies' reliance on this point, while gig companies may not explicitly prohibit working for competitors, some have taken steps to discourage it.[1]

One warning we have heard from some of these companies and their surrogates is that if classified as employees, the work will become more rigid, its workers will work set shifts, wear uniforms, or have to deal with other negative attributes sometimes associated with employment status. This is simply untrue – no law in New York, or in any other state requires anything of the kind. Make no mistake, this is a threat of retribution. The companies making these claims are threatening their workers with retaliatory restrictions, should they be forced to provide the protections that accompany employment status. This is an empty threat because, as described, these companies need workers, and many of them, to achieve their goal of providing service at a moment's notice. Do not let this rhetoric serve its purpose – to dissuade you from doing what is just or discourage you from staking out a strong pro-worker position on this issue.

The model used by these gig companies is not new; it is as old as time. Gig companies have applied instantaneous communication, facilitated in the past dozen years by the smartphone, to degrade labor standards. They have created an oversupply of labor, to drive down wages and have fired the starter's pistol on a race to the bottom. This is the same as the "shape-up" system first used on the docks of New York Harbor over a century ago. Throngs of workers would report to the docks every morning desperate for work. Because of the oversupply of workers, dockmasters could and would pit workers against each other, with the workers willing to accept the lowest pay getting the work. It wasn't until these workers

[1] Johana Bhuiyan, *Uber is deactivating New York drivers for 'advertising' for rival Juno*, Vox Recode, November 28, 2016, https://www.vox.com/2016/11/28/13768756/uber-driver-deactivation-juno-advertising-new-york (last accessed October 1, 2019).

organized that their skilled labor loading and unloading ships while maintaining balance that prevented capsize was appropriately compensated. Another undeniable comparison is to the Triangle Shirtwaist Company factory workers who, in 1911, were paid by the piece, without the right to form a union, without safety standards, without workers' compensation coverage, and without minimum wage or overtime rights.

Similar to the period that spanned the late nineteenth and early twentieth centuries, we now stand at a threshold. Our predecessors recognized that workers were being exploited and had the courage to do what they knew was right and necessary. That period saw enactment of minimum wage, overtime, workers' compensation, unemployment insurance, social security, prohibitions on child labor, labor organizing rights and other New Deal policies. Now, standing at our threshold, we must meet our obligation to ensure that workers, regardless of whether they take direction from an individual or a smartphone, are not denied these basic protections.

Some of these gig companies have portrayed themselves as disruptors and embraced their status as law breakers. This mantra has been taken to the point where gig companies encourage gig workers to break the law by operating without authorization, or in direct conflict with legal prohibitions, and promise to reimburse workers for any fines incurred while doing so.[2] This type of behavior should not be permitted, condoned or encouraged. Rather it should be met with zealous enforcement of current law and legislative action to address any gaps.

Further, time and again, gig companies have shown their disdain for regulation. The most recent example of this is $90 million dollar commitment to a ballot referendum to undo the recent California law discussed further below.[3]

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[2] Liz Alderman, *Uber's French Resistance*, New York Times Magazine, June 3, 2015, https://www.nytimes.com/2015/06/07/magazine/ubers-french-resistance.html?_r=0 (last accessed September 25, 2019); Ben Popper, *Uber can't be stopped. So what happens next?*, The Verge, July 27, 2015, https://www.theverge.com/2015/7/27/9035731/future-of-uber-regulation-illegal-violations (last accessed September 25, 2019).

[3] Associated Press, *California adds Wage, Benefit Protections for Gig Workers*, New York Times, September 18, 2019, https://www.nytimes.com/aponline/2019/09/18/us/ap-us-california-gig-economy.html?searchResultPosition=2 (last accessed September 25, 2019).

The raging debate about gig workers, gig companies, the future of work, and employment status has seemingly had some of its own gaps. These include the implications for traditional employers and the so-called social safety net. Gig companies often provide the same service as traditional employers, to the same customers. However, the gig companies have an unfair advantage – they do not pay the costs associated with employment. We can disagree on whether this is in violation of current law. However, it is undeniable that this is a particular threat to law-abiding employers, many of whom are unionized – the folks who provide good jobs that pay middle-class wages and benefits to our affiliates' members. In addition to threatening good employers, the gig companies' business model presents an existential threat to the workers' compensation system and the unemployment insurance trust fund. While these are separate systems with different coverage models, both are threatened by the prospect of fewer employers paying into the system on lower payroll. As the number of workers and the amount of payroll diverted to independent contractor status grows, the continued viability of these systems becomes further imperiled. Additionally, as the protections normally provided by these systems are withheld from greater numbers of workers in need, state, county and municipal social services programs will be left to pick up the slack. Similarly unaddressed, is the issue of payroll taxes and withholdings. Gig companies are not paying payroll taxes or withholding taxes from workers' pay. Combined, these represent significant resources being diverted from the State treasury and will present significant problems for the State and the workers when audits are conducted. As a result of these practices, New York State's taxpayers will be left to bear the responsibility of subsidizing these companies by paying increased safety net costs to cover the needs of exploited workers.

All of these practices, considered together, reveal an important aspect of gig companies' business model. That is, to shift liabilities normally shouldered by capital. These liabilities are shifted to workers, to government, to taxpayers and to employers who do not shirk their responsibilities.

While vigorous enforcement of current law would suffice to counter almost all of the ills already outlined, statutory action is necessary. Specifically, statutory action is necessary to remove any doubt about these workers' status as employees and to ensure that these workers have the right to form a union, to bargain collectively and to engage in concerted activity. As trumpeted in the New York Times and Washington Post editorial pages in the past several weeks, the right to organize is the marquee

employment right – the gold standard.[4] Joining together to form unions remains the most effective tool workers have to achieve better wages, benefits and working conditions.

California was the first state to provide protections for gig workers, via both judicial and legislative action. However, gig workers in California do not have the right to collectively bargain. New York has the opportunity to once again lead the way forward by ensuring these workers have full employment rights, including the right to collective bargaining. Further, because collective bargaining rights are enshrined in the New York State Constitution, not including them in legislation would not only conflict with the Constitution, but it would amount to an attempt to strip these workers of rights.

Because bill number S. 6538 was listed in the hearing notice, it is important to address the New York State AFL-CIO's position on the bill. While the organization did support the bill at the end of the last legislative session, that support was based on the objective and potential to achieve some incremental progress for these workers at the end of the last legislative session. Because the session ended without passage of that measure, we will return to the proverbial drawing board and open the next session supporting a piece of legislation that fulfills what has always been our goal - ensuring these workers are treated the same as all other employees including enshrining the right to collectively bargain.

I will end with words of caution about the path forward. Some have endorsed complex tests to determine employment status, while others have promoted portable benefits schemes. Both are fraught.

The law in New York is already littered with complex tests to determine employment status. To make matters worse, not all of those tests are the same. The test for unemployment insurance does not match the test for workers' compensation coverage, and neither test matches the test for minimum wage. Tests got us to this point. Gig companies have benefitted from the ambiguity that this mess creates. Litigation

[4] The Editorial Board, *Take That 'Gig' and Shove it*, New York Times, September 11, 2019, https://www.nytimes.com/2019/09/11/opinion/california-bill-uber-employees.html (last accessed, September 25, 2019); Sharon Block and Benjamin Sachs, *What California should do next to help Uber drivers*, Washington Post, September 13, 2019, https://www.washingtonpost.com/outlook/2019/09/13/how-trump-administration-gave-uber-drivers-california-way-unionize/?arc404=true (last accessed September 25, 2019).

favors parties with greater resources – in this instance, the gig companies. We simply cannot rely on the judiciary to interpret these tests in the favor of workers. The gig companies already know this: in response to the California law, Uber's general counsel indicated that although the California test is stringent, his company would meet that test to show that its workers are independent contractors.[5] We need a simple definition. Statutory codification of the ABC test in AB5 was the next logical step in California. California already had the Dynamex decision from the State's highest court laying out that rubric. Here, in New York, we can and must do better. We are not yet similarly constrained.

Legislating portable benefits plans is an even more problematic proposal. First, this proposal adds nothing for the gig worker. It would provide nothing that a gig worker in this State could not already access today on their own. Gig workers now have the ability now to purchase healthcare insurance and save for retirement though various financial services products. Second, depending on the details, such as whether gig companies have representation in plan management or direction, this option could potentially subject workers, their savings, and their healthcare coverage to the control of gig companies even after they stop working for the gig companies. Further, this rubric would give gig companies cover to claim that they are helping workers, without doing anything meaningful and without providing the protections that come along with employment status. Workers have joined together to negotiate for healthcare and retirement benefits for over a century. If gig companies classified their workers as employees, gig workers would be able to do the same. They could join together and negotiate on their own behalf. We now have an opportunity to clear the way for these workers, to ensure they are treated as all other workers in the State, and to enact protections that will ensure they can exercise the right to collectively bargain on their own behalf.

This year, the legislature and governor finally righted a century-old wrong. The hard-fought battle to protect farmworkers in New York State was finally won. Until this year, farmworkers were excluded from protections enjoyed by other workers for a century. We should not permit other groups of workers to be denied basic rights for another moment.

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[5] Carolyn Said, *Uber: We'll fight in court to keep drivers as independent contractors*, San Francisco Chronicle, September 11, 2019, https://www.sfchronicle.com/business/article/Uber-We-ll-fight-in-court-to-keep-drivers-as-14432241.php?psid=oySa3 (last accessed September 25, 2019).

There is no justification for treating gig workers differently – the same way there was no justification for treating farmworkers differently. In that vein, we must protect **all** gig workers. We cannot allow any industry, employer or group of workers to be carved out.

We cannot consider ourselves an enlightened society until all workers are treated equally, with dignity and respect. We should be embarrassed as Americans, as New Yorkers and as human beings that in the year 2019 that gig workers, who perform demanding and dangerous work, are denied the same basic rights and protections as all other workers. The New York State AFL-CIO and our 2.5 million members will not rest until this disgraceful injustice is rectified and these workers are guaranteed all of the same rights and protections as all other workers in this State, including the right to organize.

Thank you for your time.

*The New York State AFL-CIO is a federation of 3,000 unions, representing 2.5 million members, retirees and their families with one goal; to raise the standard of living and quality of life of all working people. We keep New York State Union Strong by fighting for better wages, better benefits and better working conditions. For more information on the Labor Movement in New York, visit www.nysaflcio.org.*