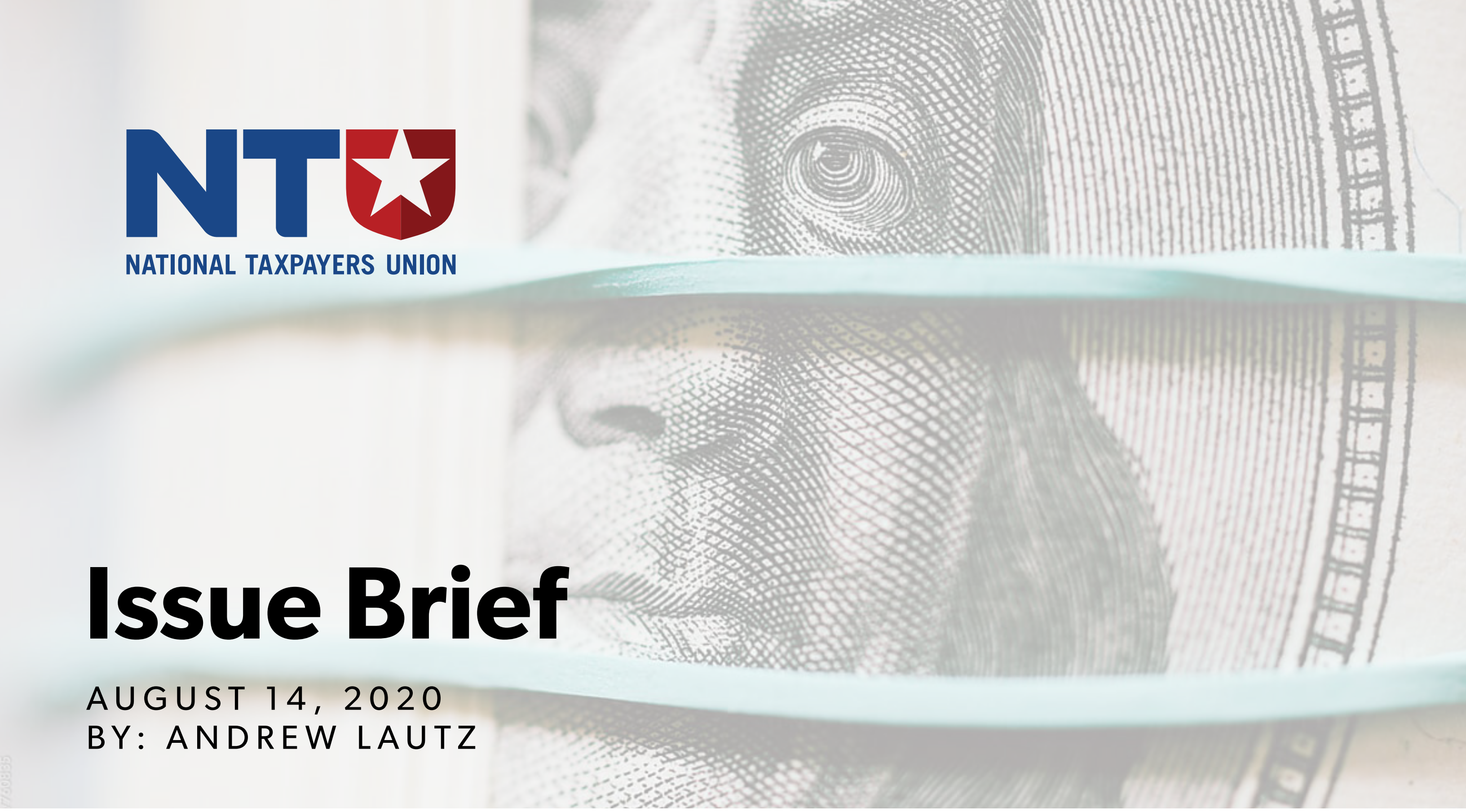

NATIONAL TAXPAYERS UNION

Issue Brief

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Opportunities and Threats to the Gig Economy During COVID-19

The COVID-19 pandemic has created some seismic shifts in the U.S. economy. More than 16 million people were unemployed in July, countless businesses are either prohibited from operating or significantly limited in their operations due to state- and city-wide lockdown orders, and tens of millions of Americans are working remotely (rather than in an office) as employers look to avoid the spread of the virus at workplaces.

Elected officials and public health experts have noted that many of these restrictions are necessary to contain the spread of a highly transmissible and devastating disease, and rightly so. However, the lockdowns have dealt a blow to the financial stability of millions of American families and businesses.

One opportunity for people who have lost a job, seen their hours cut back, or are simply looking to bring in extra income during an uncertain time is participation in the gig economy. Though sometimes defined in different ways, the gig economy is generally understood to mean a variety of popular digital and mobile platforms that enable consumers to access certain services and enable workers to receive payment for those services. Some of the most commonplace examples are the ridesharing services Uber and Lyft, and food delivery apps like Grubhub, Postmates, DoorDash, and Uber Eats.

Key Facts:

- **With more than 16 million Americans out of work, the gig economy can play a key role in offering workers the chance to earn extra income in uncertain times.**
- **Unfortunately, states like California and some federal lawmakers are looking to completely change the business model of gig companies, threatening their survival.**
- **Better alternatives would allow companies to continue to classify workers as independent contractors, while still providing assistance to these workers.**

Unfortunately, these platforms are under attack by regulators and lawmakers at the state and federal levels. California politicians have sought to fundamentally change the business models of Uber and Lyft for years, first by passing a bill (Assembly Bill 5) that effectively requires them to classify their drivers as employees rather than independent contractors, and most recently by suing Uber and Lyft in state court to require that change amid the companies' ongoing legal challenges to the new law.

Meanwhile, a new advocacy campaign is targeting the four major food delivery apps mentioned above at the national and state/municipal levels. The Protect Our Restaurants project is asking the Federal Trade Commission (FTC) to investigate Grubhub, Postmates, DoorDash, and Uber Eats for alleged anti-competitive practices, and is mobilizing activists to ask lawmakers to pass caps on the fees those apps charge restaurants in states and cities across the country.

However well-intentioned, these efforts amount to significant government interference with both gig companies and the workers who use their platforms - interference that will ultimately backfire and burden the entire private sector. Requiring rideshare companies to treat drivers as employees, for example, will significantly reduce drivers' control over their hours and schedule, and makes little sense when even the California legislature admits that a majority of gig drivers "drive part-time" and "also only work for a short time." Fee caps are no less clunky a policy, and will merely push the cost of providing food delivery services on to delivery workers or customers.

Luckily, there are productive policy proposals out there that would counteract some of the negative impacts of Assembly Bill 5 and fee caps. One is a bipartisan piece of legislation in Congress that would allow gig companies to provide assistance, benefits, and PPE to workers *without* having those benefits be used against the companies in the ongoing legal battle over worker classification. Another proposal is Congressional legislation that would allow gig companies to compensate workers with company securities without changing the workers' status as independent contractors.

Opponents of the gig economy have done an effective job of framing the debate thus far. In their telling, wealthy and profitable companies are hoarding cash for themselves and their Wall Street financiers while seeking to compensate workers with the smallest amount of pay and benefits humanly possible. This explanation defies reality in a number of ways. Below is an analysis of the claims made by gig economy critics, some facts and data that counter these claims, a review of the counterproductive proposals offered by some at the federal and state levels, and a review of more productive and helpful proposals offered by Members of Congress recently.

The State of the Gig Economy

According to the latest data from the Bureau of Labor Statistics (BLS), around 1.6 million people participate in the gig economy in the U.S., roughly one percent of the U.S. workforce. Nearly three-quarters (72 percent) put in more than 35 hours per week in the digital economy. More than 60 percent perform their work in-person (for services such as Uber or Postmates) while 38 percent perform their gig work online.

For its part, the California Legislative Analyst's Office (LAO) estimated that "between 300,000 and 400,000 Californians provide rides or deliveries each month," but that "high driver turnover" translates to anywhere from 800,000 to 950,000 Californians providing rides at some point over the course of a year. This would suggest that the national gig economy, when including people who transition in and out of gig work, is even larger than the 1.6 million Americans cited above.

As also noted above, the large majority of gig drivers in California are part-time, and “[o]ne company reported [to LAO] that two-thirds of new drivers are no longer active six months later.” This suggests workers in the gig economy are somewhat transient, shifting in and out of the work as they need and want to.

Several of the companies these drivers work for have attracted tens of millions of Americans to their platforms. In the second quarter of 2020, Uber reported having 55 million active users (notably, a steep 44-percent decline from the same quarter of 2019, due mostly to the pandemic’s impact on Uber). Lyft, Uber’s main rival in the U.S., reported having 21 million active riders in the first quarter of 2020.

Despite tens of millions of riders and scores of drivers participating on their platforms, Uber and Lyft are not yet profitable companies. Uber, for example, reported losing $1.8 billion in Q2 of 2020. Despite the pandemic, this loss is actually significantly *less* than Uber’s $5.2 billion loss in Q2 of 2019. Lyft, for its part, lost $398.1 million in Q1 of 2020 after losing $1.1 billion in Q1 of 2019.

The food delivery apps are doing no better. The delivery portion of Uber’s business, which mostly consists of its Uber Eats platform, lost $232 million in Q2 of 2020 - a $54-million improvement from its loss in Q2 of 2019. Grubhub lost $45.4 million in Q2 of 2020, a $1.3-million improvement from its loss in Q2 of 2019. DoorDash is not yet public, but sources told the *New York Times* the company lost $450 million in 2019 (this would average out to $112.5 million per quarter).

Grubhub has even suggested that its food delivery business will *never* be what makes it profitable. From a recent *Bloomberg* opinion piece:

> ...GrubHub also made the argument that its value to restaurants lies in its potential as an online advertising partner, and that delivery services are really just a vehicle for generating ad sales.
>
> This should not be reassuring news for DoorDash and Postmates -- which have almost half the market for meal delivery -- their investors, or their restaurant partners. The context, of course, is that GrubHub, which actually is profitable, says that meal delivery isn’t where the money is.

The point of going through these numbers is not to shame the gig companies - who, indeed, are providing valuable services and earning opportunities for millions of Americans - but rather to show that the picture certain stakeholders paint of these companies is out of touch with reality. They are not sitting on hoards of cash and enriching Wall Street benefactors, nor are they seeking to close all avenues to competition for workers and restaurant partners.

In fact, according to the *Times*:

> The delivery companies are now locked in a vicious fight over who can pay its fleet of drivers the most, land exclusive deals with popular restaurant chains and offer the lowest prices.

This competition could drive *down* costs for consumers and force companies to *enhance* their incentives for drivers and gig workers to choose them over their competitors. It could also open up new opportunities for restaurants. That is, of course, unless lawmakers and government regulators get in the way first.

The Problems With Assembly Bill 5

Much of this current debate over the gig economy kicked off with California's passage of Assembly Bill 5 (AB5) in September 2019. The bill codifies into law a new test for determining whether a worker is an employee or an independent contractor of a company, an "ABC" test offered in a significant California court case titled *Dynamex Operations West, Inc. v. Superior Court*.

Both the *Dynamex* decision and AB5 establish a presumption that a worker is an employee, and both the decision and the subsequent law say that a hiring entity must meet *all the requirements* of a three-part test in order for a worker to be classified as an independent contractor:

A. "[T]he person is free from the control and direction of the hiring entity in connection with the performance of the work,"

B. "the person performs work that is outside the usual course of the hiring entity's business," and

C. "the person is customarily engaged in an independently established trade, occupation, or business."

The California Department of Industrial Relations (DIR) summarized what some prongs of this test mean in practice through examples. For Part B, work "outside the usual course of the hiring entity's business," DIR says a plumber being hired at a retail store to repair a leak would *not* be an employee under Part B but a cake decorator hired on a regular basis to work on custom-designed cakes for a baker *would* be an employee. For Part C, a contractor would likely have to take some customary steps to establish and promote an independent business, including "incorporation, licensure, advertisements," and "routine offerings to provide services of the independent business to the public."

A worker's status as an employee or an independent contractor has significant consequences for the benefits an employer must provide the employee, including "obligations relating to the minimum wages, maximum hours, and a limited number of very basic working conditions (such as minimally required meal and rest breaks) of California employees." The California legislature's LAO noted that "[j]ob benefits and protections typically add about 30 percent to a worker's total compensation," a significant amount.

This is why LAO wrote that rideshare and delivery companies like Uber, Lyft, and Grubhub may hire fewer drivers to meet costs under AB5. Companies would also "increase fares and delivery charges to make up for their new costs," which in turn would lead customers to "take fewer rides and place fewer orders."

Another issue with AB5 is its highly inconsistent application of the "ABC" test. A whole litany of occupations are exempt from the ABC test, including but not limited to:

> ...licensed insurance agents, certain licensed health care professionals, registered securities broker-dealers or investment advisers, direct sales salespersons, real estate licensees, commercial fishermen, workers providing licensed barber or cosmetology services, and others performing work under a contract for professional services, with another business entity, or pursuant to a subcontract in the construction industry...

For these occupations, a less stringent standard that preceded the ABC test - the *Borello* test - is used instead. This test, established in 1989, is a "multifactor" test that measures, above all, "whether the potential employer has all necessary control over the manner and means of accomplishing the result desired, although such control need not be direct, actually exercised or detailed." However, numerous factors go into determining worker classification, and the test is referred to as multifactor because no one factor alone determines the classification. While it would not be prudent to subject these occupations to the ABC test, the different standards set up by AB5 only add to administrative and regulatory confusion and underscore the how the state government is seeking to micromanage the economy under this legislation.

Despite multiple legal challenges to AB5, a California judge ordered Uber and Lyft in August 2020 to classify their drivers as employees. Despite ongoing litigation, the judge seemed to predetermine all outcomes, writing that state and city attorneys had "demonstrated a reasonable probability of prevailing" and "Defendants' contrary arguments lack merit." He also wrote that "[i]t's this simple: Defendants' drivers do not perform work that is 'outside the usual course' of their businesses." The judge claimed that no "grave or irreparable" harm will befall the companies for classifying their drivers as employees as they await the outcome of ongoing litigation, but days later Uber's CEO said that the company would have to shut down in California through November if they cannot achieve a stay of the judge's decision.

Why November? In part because Uber (among others) is awaiting the outcome of a ballot measure in California that would represent a better path forward for gig companies and workers (more on that below).

The Problems With Delivery Fee Caps

A separate but related campaign is going after Grubhub, DoorDash, Uber Eats, and Postmates at the national and local levels.

At a national level, the Protect Our Restaurants project wants the FTC to investigate the four food delivery apps. (NTU has emphasized for years that the FTC should take a "light-touch" approach to regulation, but these activists would prefer to see FTC take a hammer to the gig companies.)

At a local level, the campaign is pursuing delivery fee caps. One group behind the campaign, the Economic Liberties Project, underscored the severity of this pitch with a quote provided to *Axios*:

> "The overall goal is to make sure that this public utility service, food delivery apps, are run like public utilities," Matt Stoller, director of research at the Economic Liberties Project, told Axios.

While treating innovative private companies as public utilities has long been a policy goal for some progressive stakeholders, NTU has argued on numerous occasions that improperly converting private enterprises to government enterprises chokes off growth and innovation, creates waste and inefficiency in once-thriving economic sectors, creates barriers to private sector competition, and leaves taxpayers on the hook for inevitable government failures.

Even if the campaign's goal was *not* to turn Grubhub, DoorDash, Uber Eats, Postmates, and up-and-coming apps into public utilities, the blunt instrument of a fee cap is ineffective and misplaced.

A fee cap acts as a price control, and government price controls merely force businesses to pass on the cost of providing a good or service to either customers or their workers. This is already playing out in Portland, which recently set a 10-percent cap on delivery fees - only to see Uber Eats add a $3 surcharge to all food delivery orders. The added costs would have likely been shared by both customers (through increased fees) *and* drivers (through decreased pay), but Portland's ordinance prevented companies from "decreas[ing] payments to delivery workers in order to make up lost money from restaurant fees." The only place left for companies to pass on added costs was the customer. Price controls can also lead to shortages, when companies respond to added costs by reducing the number of drivers or gig workers in their systems.

Much like Uber or Lyft will need to pass on the costs of having employees instead of contractors to either customers (through higher charges) or drivers (by reducing their pay or hiring fewer drivers), food delivery apps will need to pass the inefficiencies of a fee cap on to *their* customers and drivers.

A Better Path Forward for the Gig Economy

Luckily, there's a better path forward for the gig economy on the state and federal levels.

In California, Uber and Lyft are among those who are supporting a ballot initiative, Proposition 22, that would have their drivers remain independent contractors but would also permanently provide those drivers with an assortment of new benefits, including:

- A guarantee that they will make 120 percent of the state or local minimum wage (whichever is higher) for the hours they are driving;
- A stipend to purchase health insurance, which kicks in for workers who drive at least 15 hours per week (and workers are allowed to receive multiple stipends from multiple companies);
- Coverage under accident and disability insurance purchased by Uber and Lyft; and
- A prohibition on working more than 12 hours in any one 24-hour period for a single company.

The California LAO estimates this ballot initiative will actually *raise* income tax revenue for the state, because stock earnings of companies will rise and Californians who own stock in these companies will pay more income tax as a result. Californians vote on Proposition 22 this fall.

At the federal level, Sen. Mike Braun (R-IN), Rep. Carol Miller (R-WV), and Rep. Henry Cuellar (D-TX) have introduced a bill, the Helping Gig Economy Workers Act (S. 3773, H.R. 6988), that would help gig companies offer assistance and PPE to workers during the COVID-19 pandemic. As NTU wrote in a letter of support:

> Regardless of how California's legal challenges to Uber and Lyft turn out, though, these companies should not be punished for providing PPE, COVID-19 testing, or financial assistance to the people who use their platform. This is precisely the type of disincentive that overzealous and burdensome government policies can foster, and Congress has an opportunity to avoid these errors by passing the Helping Gig Economy Workers Act.
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> This legislation would allow gig economy companies a temporary safe harbor, through June 30, 2021, to provide individuals accessing work through their platforms with 1) financial assistance, 2) benefits related to health or safety, 3) training, 4) medical or cleaning supplies, 5) health checks, and 6) medical testing, without affecting the classification status of those individuals. This means that gig companies can make investments in the

people accessing their platform, without fear of opportunistic government regulators using those good-faith efforts against the companies in current or subsequent lawsuits and investigations.

Two additional gig economy bills are worth Congress's consideration at the moment. One, the Gig Economy Infrastructure Act, would extend to gig workers the Securities and Exchange Commission's (SEC) Rule 701 exemption of "certain sales of securities made to compensate employees, consultants and advisors." This could increase worker compensation without changing their classification status under the law. The other bill, the Advancing Gig Economy Act, would have the Commerce Department "identify all regulations, guidelines, or any other policy implemented by ... Federal agencies with respect to the gig economy," and issue recommendations to address duplicative rules or regulations, or to address rules that act as a barrier to growth in the gig economy.

Proposition 22 is a better way forward for California's classification for gig companies and workers in the nation's most populous state, and the three federal bills mentioned above offer constructive alternatives to disastrous proposals like fee caps or even merger and acquisition bans. Congress and state policymakers can create an environment where gig companies and workers grow and thrive, even during a pandemic. The best thing they can do is, by and large, stay out of the way.

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