



NHCSL

THE NATIONAL HISPANIC CAUCUS OF STATE LEGISLATORS

RESOLUTION

No. 2019-08

Encouraging Traditional Workplace Benefits for Workers in the Gig Economy

Reported to the Caucus by the NHCSL
Labor and Workforce Development Task Force
Sen. Omar Aquino (IL), Chair

Sponsored by Sen. Nellie Pou (NJ)

Unanimously amended and ratified by the Caucus on December 5, 2019

1 **WHEREAS**, technological advances in the past 13 years have enabled the rapid
2 growth of the gig economy — “a labor market characterized by workers who do not
3 have a traditional, long-term employee-employer relationship;”¹ and,

4 **WHEREAS**, an August 2018 report conducted by Gallup Research found that 36% of
5 U.S. workers participate to some extent in the gig economy² — broadly defined to
6 include contract firm workers, independent contractors, on-call workers, online

¹ *The Gig Economy and Alternative Work Arrangement*, p. 5 (Gallup Research, August 2018), available at <https://www.gallup.com/workplace/240878/gig-economy-paper-2018.aspx>

² The 36% figure amounts to approximately 57.6 million gig workers. According to the Marketplace-Edison Research, which uses a base of Americans 18+, the number of gig workers is 60.5 million. See *The Gig Economy*, (Marketplace-Edison Research, December 2018), available at <http://www.edisonresearch.com/wp-content/uploads/2019/01/Gig-Economy-2018-Marketplace-Edison-Research-Poll-FINAL.pdf>. These numbers are within the margins of error and are not incompatible.

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7 platform workers, and temporary workers — with 29% of U.S. workers having gig
8 economy work as their primary source of income, and 24% having only gig economy
9 work;³ and,

10 **WHEREAS**, a December 2018 Gig Economy poll conducted by Marketplace-Edison
11 Research found that based on ethnicity, Hispanics were more likely (31%) to earn
12 their income through gig work than African Americans (27%) and “White or other”
13 (21%);⁴ and,

14 **WHEREAS**, according to the aforementioned poll, 47% of Hispanics gig workers
15 derive their primary income from that gig work, compared to 55% of African
16 Americans and 41% of “White or other;”⁵ and,

17 **WHEREAS**, according to Gallup, working men (29%) are much more likely than
18 working women (19%) to engage in a full time gig economy work, however, the
19 gender difference is significantly smaller when all gig workers both full time and part
20 time are considered(32% men v. 26% women),and thus this suggests “that the gig
21 economy may benefit individuals who otherwise might be excluded from the
22 traditional workforce, such as working mothers;”⁶ and,

23 **WHEREAS**, generational participation rates in the gig economy have been hard to
24 ascertain,⁷ but according to Gallup, Millennials participating in the gig economy “are
25 much less likely (44%) to say they are doing their preferred type of work compared
26 with their counterparts in traditional jobs (64%),” when compared to responses to
27 the same questions by other generations⁸ there is an indication that those in the
28 younger generation who take part in gig work do so out of necessity, rather than
29 preference;⁹ and,

³ Gallup, *supra* note 1, at p. 7; *See also Intuit: Gig Economy is 34% of U.S. workers (CNN Business May 24, 2017) (quoting the Intuit CEO Brad Smith, where he states that the Gig economy is expected to be 43% by the year 2020)*, available at, <https://money.cnn.com/2017/05/24/news/economy/gig-economy-intuit/index.html>

⁴ Marketplace-Edison Research, *supra* note 2, at p. 4.

⁵ *Ibid.*, p. 5.

⁶ Gallup, *supra* note 1, at p. 8.

⁷ Gallup, *supra* note 1, at p. 8, states that baby boomers in the gig economy participate at a higher rate (1 in 3 having either a full-time or part-time gig work as their primary job), in contrast to Gen Xers (27%) and Millennials (26%), while Marketplace-Edison, *supra* note 2, at p. 3, states that “Gig employees are more likely to be young, with 38% of 18-34 year olds being part of the gig economy. Twenty-five percent of adults age 35-54 are gig workers, and 11% of those age 55+ have gig jobs.”

⁸ Gallup, *supra* note 1, at p. 8. Gallup found almost no gap for Gen Xers and baby boomers, with both percentages also being noticeably higher (70%/71% for Gen Xers and 79%/83% for baby boomers).

⁹ *Ibid.*, p. 8; *See Also Lalel Brainard, Federal Reserve System: The “gig” economy: implications of the growth of contingent work*, p 8, available at <https://www.federalreserve.gov/newsevents/speech/brainard20161117a.pdf>

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30 **WHEREAS**, in general, according to Gallup, workers in the gig economy tend to work
 31 less than 30 hours per week; however, only 4 in 10 gig workers want more work
 32 hours, thus showing “a divide in the gig economy — [where] some workers [are]
 33 getting the right amount of hours for their life situation, while others are striving for
 34 more;”¹⁰ and,

35 **WHEREAS**, according to Marketplace-Edison, 28% of those whose gig work is their
 36 primary source of income described their financial situation as “not financially
 37 secure,” compared to 22% of those for whom it is a secondary source , and 20% for
 38 the employed but not in the gig economy;¹¹ and,

39 **WHEREAS**, according to a 2017 study by Prudential, gig workers, compared to full-
 40 time employees, “have less than half the access to employer-based coverage” when it
 41 comes to health insurance (40% v 82%), life insurance (20% v 59%), dental
 42 insurance (25% v 66%), as well as short-term disability (5% v 42%);¹² and,

43 **WHEREAS**, the aforementioned study also found that gig workers, ages 18 to 35, are
 44 less likely to have access to benefits than those who are over 55¹³ years of age (70%
 45 v 44%);¹⁴ and,

46 **WHEREAS**, as a matter of public health and community well-being, it is desirable for
 47 all working persons to have health insurance,¹⁵ disability insurance, paid time off,
 48 pensions, workers compensation, unemployment compensation, and other typical
 49 benefits of traditional employment;¹⁶ and,

¹⁰ *Ibid.*, p. 11. And see *Gig Workers in America: Profiles, Mindsets, and Financial Wellness*, p. 3 (Prudential, 2017), available at

http://research.prudential.com/documents/rp/Gig_Economy_Whitepaper.pdf (finding that 44% considered gig work as “nothing more than helping to pay the bills,” whereas almost one third stated that “they needed a way to bring in income due to circumstances out of their control”).

¹¹ Marketplace-Edison, *supra* note 2, at p. 8. (indicating that the lack of benefits may contribute to the lack of financial security, the study states “Gig employees usually don’t have financial safety nets such as 401Ks, matching funds, health care spending, and insurance..)

¹² *Gig Workers in America: Profiles, Mindsets, and Financial Wellness*, p. 2 (Prudential, 2017), available at http://research.prudential.com/documents/rp/Gig_Economy_Whitepaper.pdf

¹³ Retirement Benefits by Social Security, p. 11 section 2: According to the Social Security Retirement Benefits a retired worker is allowed to work and get retirement benefits and it will not reduce the social security benefits. There is one special exception in which the money can be discounted if the worker is close to full retirement age, once he/she reaches full retirement age (67 years), nothing is discounted from the Social Security pay.

¹⁴ *Gig Workers in America: Profiles, Mindsets, and Financial Wellness*, p. 2 (Prudential, 2017), available at http://research.prudential.com/documents/rp/Gig_Economy_Whitepaper.pdf

¹⁵ While the Affordable Care Act created marketplaces for health insurance in every state which makes it more widely available than before, some marketplaces are more robust than others, particularly after the repeal of the individual mandate.

¹⁶ *Gig Workers in America: Profiles, Mindsets, and Financial Wellness*, p. 8 (Prudential, 2017)

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50 **WHEREAS**, under the April 29, 2019 Advisory Opinion of the U.S Department of
 51 Labor, people working for a virtual marketplace are likely to be classified as an
 52 independent contractor¹⁷ and remain outside the scope of the Fair Labor Standards
 53 Act (FLSA), meaning that even though the FLSA requires minimum wage and
 54 overtime pay, the “gig workers” here would be excluded from various requirements,¹⁸

55 **WHEREAS**, some gig-economy companies have been hesitant to offer gig workers
 56 more benefits, because providing them might lead gig workers to be classified as
 57 employees under federal or state laws, resulting in substantial costs for the respective
 58 companies,¹⁹ and unwanted employee status for the majority of gig economy
 59 workers;²⁰ and,

60 **WHEREAS**, according to the recently enacted California law, previously known as
 61 AB5, “gig workers” would be potentially classified as employees for tax and benefit
 62 purposes unless they fall under an exception or the employer can prove that they are
 63 not an employee under the ABC test of Dynamex or Borello cases decided under
 64 California Law.²¹

65 **WHEREAS**, some online gig work platforms²² have teamed up with startups, with the
 66 hopes of helping gig workers find benefits such as *inter alia*; medical care, liability

¹⁷ US Department of Labor, FLSA2019-6 (Apr. 29, 2019) (addressing whether a service provider for a virtual marketplace company is an employee of the company or an independent contractor under the FLSA), available at https://www.dol.gov/whd/opinion/FLSA/2019/2019_04_29_06_FLSA.pdf

¹⁸ Fair Labor Standards Act Advisor, available at <https://webapps.dol.gov/elaws/whd/flsa/screen75.asp>; See also Fact Sheet 13: Employment Relationship Under the Fair Labor Standards Act (FLSA), Revised on July 2008

¹⁹ Lydia DePillis, *Gig economy workers need benefits. These companies are popping up to help* (CNN, August 23, 2018), available at <https://money.cnn.com/2018/08/23/technology/gig-economy-worker-benefits/index.html>; See also Miranda Katz: *These Startups Are Ditching the Uber Model and Hiring Full-time workers* (April 2017), available at, <https://www.wired.com/2017/04/these-startups-are-ditching-the-uber-model-and-hiring-full-time-workers> (suggesting that after the misclassification lawsuits settled by Lyft for 27 million and Instacart for 4.6 million gig economy companies are more willing to allow for wider benefits for its workers).

²⁰ See, for example, statistics at lines 37-40 above; See also Miranda Katz: *These Startups Are Ditching the Uber Model and Hiring Full-time workers* (April 2017), (stating that when companies involved in the gig economy are able to classify workers as contractors, they don’t have to contribute to their unemployment insurance or workers compensation and as a result in light of sustainability some startups are providing full time benefits to workers)

²¹ CA: A.B. 5: *Worker status: employees and independent contractors* (PASSED on Sept. 11 2019- to executive as of Sept 17, 2019); See *Dynamex Operations v. Superior Court*, 416 P. 3d 2, 5 (2018) (requiring a showing of the following to not be considered an employee; a) The person is free of the control of the hiring entity when it comes to work performance b)The person performs work outside the usual course of the Hire’s Business c) The person is customarily engaged in an independent trade, occupation or business); See also, *Borello & Sons v. Dept. of Indus. Relations*, 48 Cal. 3d 341 (holding that agricultural laborers engaged to harvest cucumbers were “independent contractors” within the meaning of the worker’s compensation act).

²² Such as Uber, Postmates, and Wonolo.

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67 insurance, retirement benefits, life insurance, vision care, dental care, maternity and
68 paternity leave,²³ and,

69 **WHEREAS**, other workers-rights groups have taken the initiative of creating a
70 “portable-benefits app,²⁴” or encouraging a “portable system benefits²⁵” with the
71 mission of aiding workers to obtain traditional employer benefits , such as *inter alia*;
72 paid time off and, in some states, disability, accident, life, or critical illness
73 insurance;²⁶ and,

74 **WHEREAS**, finally, some gig economy companies have partnered with think tanks in
75 order to push for new reforms that may allow gig workers access to benefits available
76 to regular employees;²⁷ and,

77 **WHEREAS**, in 2015, “dozens of academics, entrepreneurs, and CEOs—including the
78 cofounders and CEOs of Lyft, Handy, and Instacart—signed a manifesto calling for [a
79 portable benefits] system” for gig workers;²⁸ and,

²³ DePillis, *supra* note 15. (and suggesting that the online gig platforms should support a new bill introduced in California called “Digital Market Place Contractors will allow employers to contribute to a benefit plan and earn all of the benefits aforementioned).

²⁴ The Aspen Institute: Reder, Steward and Foster: Designing Portable Benefits, a resource guide for Policymakers (June 2019), p. 21, available at https://assets.aspeninstitute.org/content/uploads/2019/06/Designing-Portable-Benefits_June-2019_Aspen-Institute-Future-of-Work-Initiative.pdf. (suggesting various forms that the benefits can be tailored so that the gig worker can have access to them, among them the study suggests portable benefits for individuals that do various gig jobs and prorated as well for individual who wants contributions allocated in proportion to hours worked etc.)

²⁵ See Common ground for independent workers, available at <https://wtfeconomy.com/common-ground-for-independent-workers-83f3fbcf548f>. (suggesting portable benefits for gig workers as the best alternative in obtaining benefits because with portable benefits a person would be able to take benefits and protection with the in and out of various work scenarios).

²⁶ Emily Dreyfuss, *Thumbtack Tries Bridging the Benefits Gap for Gig Workers* (WIRED, February 22, 2019), available at <https://www.wired.com/story/thumbtack-alia-benefits-gap-gig-workers/>

²⁷ DePillis, *supra* note 15. For some think tank and multi-sector recommendations see, for example, Steven Hill, *New Economy, New Social Contract* (proposing allowing workers with multiple employers, including gig workers, to benefit from a fully portable safety net based on Individual Security Accounts and a greater degree of legal parity between the many different classifications of U.S. workers), available at <https://www.newamerica.org/economic-growth/policy-papers/new-economy-new-social-contract/>; and see Libby Reder, et al, *Portable Benefits Resource Guide* (The Aspen Institute Future of Work Initiative, July 13, 2016) (proposing the same through policies that create a “Portable Benefits Innovation Challenge” and adding creating “Benefit Innovation Zones,” forging partnerships between localities and existing providers of portable benefits to take advantage of work that has already been done, and sizing and understanding the on-demand workforce locally), available at <https://www.aspeninstitute.org/publications/portable-benefits-resource-guide/>.

²⁸ Miranda Katz, *How an App Could Give Some Gig Workers a Safety Net* (WIRED, July 9, 2018), available at <https://www.wired.com/story/how-an-app-could-give-some-gig-workers-a-safety-net/> (citing *Common ground for independent workers*, available at <https://wtfeconomy.com/common-ground-for-independent-workers-83f3fbcf548f>).

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80 **WHEREAS**, despite efforts by different states²⁹ and the federal government “there’s
81 been little meaningful action,³⁰ other than the recently enacted California
82 classification bill,³¹ one directly related state-level bills, a third indirectly related bill
83 both of which failed,³² and a US Federal law³³ on portable benefits introduced in the
84 House Congress on July 25,2019; and,

85 **WHEREAS**, gig workers struggle to get mortgages approved because of their lack of
86 financial stability, and as a result it causes lenders to see gig workers as not financially
87 secure and thus demand extra assurances including *inter alia*; an extremely high
88 credit score, tracking and proof of income for at least two years and nature of the
89 borrower’s business.³⁴

90 **THEREFORE, BE IT RESOLVED**, that the National Hispanic Caucus of State
91 Legislators (NHCSL) encourages companies in the gig economy to partner with other

²⁹ See *Dynamex Operations v. Superior Court*, 416 P. 3d 1, 4 (2018) (explaining the “ABC” test for California)

³⁰ DePillis, *supra* note 15. NHCSL research surfaced just two directly related state-level bills, both of which failed, and a third indirectly related bill:

WA H.B. 2109 (2017-18) (Farrell, Jessyn (D)), *Creating Portable, Prorated, Universal Benefits for Workers of the Gig Economy* (which would have required contracting agents, that have facilitated the provision of services by at least fifty individual workers in a consecutive twelve-month period, to contribute funds to qualified independent, non-profit, gig-worker directed, benefit providers to provide benefits to the workers of the contracting agents.), (FAILED) available at <https://app.leg.wa.gov/billsummary?BillNumber=2109&Year=2017>;

CA A.B. 2765 (2018) (Low, Evan (D)), *Employment benefits: digital marketplace: contractor benefits* (which would have authorized gig-economy companies — or digital marketplaces — to contribute a certain minimum percentage of the fee charged for a gig worker’s work to a benefit plan established to provide certain typical employment benefits, without converting the gig workers to employees. It would also have prohibited gig worker discrimination along the same lines as employment discrimination.), (FAILED), available at https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180AB2765.

A third indirectly related state-level bill, WV H.B. 2786 (Kessinger, Kayla (R)) (2019), *Uniform Worker Classification Act*, currently in committee, would remove any fear that gig-economy companies might have of having workers classified as employees by expansively defining what an independent contractor is. This would not require fringe benefits but could allow them to voluntarily contribute to fringe benefits for their gig workers, while keeping them classified as such. It does not mention the topic or provide other incentives to do so, however. Available at, http://www.wvlegislature.gov/Bill_Text_HTML/2019_SESSIONS/RS/bills/hb2786%20intr.pdf

³¹ CA: A.B. 5: *Worker status: employees and independent contractors* (PASSED on Sept. 11 2019- to executive as of Sept 17, 2019)

³² See line 30

³³ US Federal: H.R. 4016: Portable Benefits for Independent Workers Pilot Program Act, Introduced in the House on July 25th, 2019p, 6-8 (proposing the start of the awards of grants for fiscal year 202, on a competitive basis, to eligible organizations to support broad innovation in regards to portable benefits and after the congress will have to report back no later than September 30,2022 to evaluate the outcome of the grant).

³⁴ B3-3.2-01: Underwriting Factors and Documentation for a Self-Employed Borrower (12/04/2018), available at <https://www.fanniemaecom/content/guide/selling/b3/3.2/01.html> (signalizing that banks to not see favorably a self-employed person working full time in the gig economy, making it even more challenging for them to obtain a mortgage)

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92 companies, startups and/or online platforms, to find ways to provide gig workers,
93 especially to those who engage in gig work out of necessity, with traditional
94 workplace benefits, and/or help contribute to funds for such benefits; and,

95 **BE IT FURTHER RESOLVED**, that the National Hispanic Caucus of State Legislators
96 (NHCSL) calls on state legislatures and the Federal government to study this matter
97 further and enact legislation, including tax legislation and portable benefits
98 legislation, that incentivizes gig economy workers to contract services that provide
99 the traditional benefits of regular employment, further incentivizing or requiring gig
100 economy companies to provide or subsidize the acquisition of those benefits by their
101 gig workers.

102 THE NHCSL EXECUTIVE COMMITTEE UNANIMOUSLY APPROVED THIS RESOLUTION
103 ON DECEMBER 3, 2019 AT ITS FALL MEETING IN SAN JUAN, PR.

104 THE NATIONAL HISPANIC CAUCUS OF STATE LEGISLATORS UNANIMOUSLY
105 AMENDED AND RATIFIED THIS RESOLUTION ON DECEMBER 5, 2019, AT THE
106 ANNUAL MEETING IN SAN JUAN, PR.

