



How to Talk About:
**PROTECTING WORKER
FLEXIBILITY & FREEDOM**

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Five Key Points: About Independent Contracting in America

1

Independent contractors value flexibility over benefits. Tens of millions of workers nationwide choose to freelance because they prefer the flexibility and independence that these work opportunities afford. For **71 percent** of gig economy workers surveyed, the freedom of being an independent contractor outweighs the benefits of being an employee. They get to decide when, with whom, and how much they work. They can supplement their regular income or earn a livelihood from independent contracting. They have the freedom to develop a relationship with more than one company, which can create additional financial security. Surveys indicate that those who choose to freelance have more job satisfaction than those who work as traditional employees.

2

Women depend on independent contract work. While men and women alike enjoy these opportunities, many women especially value the flexibility that freelancing offers for work-life balance. It allows them to earn money and to focus on their careers without compromising time with family or caregiving duties. Almost half (46%) of independent contractors are women.

3

Reclassifying independent contractors as employees will kill flexible work arrangements and leave millions of people unemployed. Almost immediately after passage, the effects of California's Assembly Bill 5 (AB5) began to be felt across the state's workforce. This law caused companies to scale back or completely eliminate their use of independent contractors in the state. Workers reported losing clients, contracts, income, and jobs. Sadly, other proposed state and federal legislation threatens to expand the reach of this bad policy.

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The government should not favor traditional models of employment over flexible, innovative models. Reclassifying independent contractors is an attempt to shoehorn workers into a one-size-fits-all traditional employment arrangement. It deprives workers in certain professions of the option of choosing freelancing over traditional employment and will destroy work altogether in industries that cannot practically transition from freelancing to a traditional employment model.

5

Workers and consumers pay the price. Reclassifying workers as employees requires compliance with wage and hour laws, unemployment insurance, and other labor laws that would increase labor costs by an estimated 20-30 percent (according to the ridesharing industry). This leaves fewer resources available for job creation and pay increases for workers. Consumers have fewer options for the services they depend on—from caregivers for the elderly, to translators for the hearing impaired and scores of other necessary services—which will price many out of the market and create significant and lasting harm.

In the midst of the most severe public health and economic crisis our nation has witnessed in modern history, now is not the time to deprive American workers of their livelihood. **Lawmakers should expand worker freedom and give all Americans the chance to design the life they desire.**

Top Takeaways: The Threat to Independent Contracting

WHAT'S AT STAKE

Today, 1 in 5 jobs in America is held by an independent contractor, and 46 percent of contractors are women. Overwhelmingly, these freelancers are working independently by choice. They value being their own boss and earning an income on their own schedule. For women, flexible contract work is attractive because they can balance employment with caregiving for children, sick spouses, and aging parents or other priorities. Also, health conditions prevent some workers from holding down traditional jobs.

THE PROBLEM

Legislative efforts at the federal and state level would set strict guidelines for who may qualify as an independent contractor versus an employee. The broader adoption of the so-called “ABC test” in laws such as California’s Assembly Bill 5 (AB5) would result in many more workers—perhaps up to 57 million independent contractors nationwide—being reclassified as employees for wage and hour laws and other purposes. (For more information on the ABC test, see “Background: Legal Standards for Contract Work.”) Proponents of reclassification argue that it protects workers’ rights and expands access to on-the-job benefits. But in reality, laws like AB5:

- Kill workers’ preferred flexible work arrangements.
- Eliminate income and job opportunities for workers and threaten their economic security.
- Leave businesses with fewer resources overall for wages and jobs because they cannot afford the high costs of reclassifying workers as employees.
- Destroy industries that cannot transition from independent contract work to a traditional model.
- Discourage the creation of new flexible work models.
- Increase the prices / Reduce the availability of valuable services for customers.

Other states are considering AB5-style legislation. At the federal level, several bills, most notably the Protecting the Right to Organize (PRO) Act, would adopt this misguided

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Top Takeaways, cont.



policy and make it law nationwide leaving tens of millions of workers unemployed or stuck in ill-fitting work arrangements that don't suit their preferences or needs.

THE SOLUTION

Allow independent contractors to remain independent by maintaining the current legal definition for independent contractors. There is not widespread evidence of misclassification of workers, and workers can challenge a misclassification with state and federal agencies.

Government should not put its thumb on the scale in favor of traditional models of work over the flexible arrangements that millions of workers prefer and depend upon.

There are other solutions to expand benefits for the workers who desire them, but reclassifying all independent contractors will lead to them losing flexibility, income, and job opportunities.

In Their Own Words: Women in Independent Contracting

FAST FACTS:

- 46 percent of the independent workforce—over 18 million—is female. ([The State of Independence in America, 2019](#))
- Women are now more likely than men to be employed in an alternative work arrangement. ([National Bureau of Economic Research, 2016](#))
- The top three reasons women cited for working in the gig economy were flexibility (44 percent), income (38 percent), and building a business (25 percent). ([Women in the Gig Economy, 2018](#))
- Sixty-one percent of women in the gig economy prefer to be independent compared to just 12 percent who would want to be an employee of the company for which they gig. ([Women in the Gig Economy, 2018](#))

STORIES

Female independent contractors harmed by California's AB5:

- **Dori Lehner**, a senior citizen, worked as a general transcriptionist for numerous agencies prior to the passage of AB5:



"Transcription allowed me to stay at home, be my own boss, and control my workflow and whom I work with... I only have one direct client now, and I only get work when they have it. My income has dropped down to a quarter of what it was before AB5." ([Chasing Work: Dori Lehner](#))

- **Jennifer O'Connell** is a writer, yoga instructor and career coach who lost about three quarters of her income after AB5 was enacted: *"The odds are stacked against the majority of creative people like writers and artists whose work involves collaboration with other artists. Take my yoga work, I do lectures on anatomy or I help with a portion of training. A mom-and-pop studio can't hire me and put me on payroll for a one or two hour lecture that I do once per month. That's wiped out so much work. A lot of studios have shut their doors because of AB5 and COVID-19."* ([Chasing Work: Jennifer O'Connell](#))



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In Their Own Words, cont.

■ **JoBeth McDaniel**, freelance

journalist: *"The flexibility [of working as a freelancer] has been a blessing . . . [I] was fine with making that trade-off of less money but more time to stay with my dad when he was dying . . . There's not a W-2 job out there that would have allowed any of that."*



"There are all these very adult decisions that are at play when you freelance. AB5 pretends that the state knows better than we do in making those decisions."

([Chasing Work: JoBeth McDaniel](#))

- A freelance optometrist who identified herself as "**Nancy P., O.D.**": *"I have been an independent contractor optometrist for 18 years. I currently work part-time so that I can raise my two boys. Being an IC optometrist has given me the flexibility and the income to have the best of both worlds, a fulfilling career and be present for my children."* As a result of AB5, Nancy has seen her income slashed by almost 30 percent even before the pandemic. (Email response to IWF)

■ **Marguerite Kusahara** is an

entertainer best known for performing a wide variety of characters including being Mrs. Claus during the holiday season: *"These people say this is going to protect workers. How is this going to protect part time people? We're not crying for benefits or claiming we're being abused. We're very happy. The gig economy is very important. Trying to make it disappear doesn't make any sense."*



"I know I can't work a regular job because I am a caregiver. [My husband is] legally blind and hard of hearing, had a stroke and even with all of that, I was able to balance work back in December." Not anymore. ([Chasing Work: Marguerite Kusahara](#))

Misperceptions v. Facts

1. MISPERCEPTION: Reclassifying independent contractors as employees will improve gig workers' lives.

FACT: Independent contractors understand they are making a tradeoff: Traditional jobs generally offer better benefits and more stability, but contract work offers independence and flexibility. According to a 2019 report by Upwork and the Freelancers Union, **46 percent** of freelancers say they depend on contract work because their personal

circumstances prevent them from working in traditional jobs. This includes family obligations, but also health and other issues. Flexibility is important to **94 percent** of workers in the gig economy, according to a 2018 survey of women. Laws like AB5 remove the workers' choices and threaten their livelihoods.

2. MISPERCEPTION: Companies misclassify workers to avoid paying their “fair share” of taxes, such as Social Security, Medicare, unemployment, and worker's compensation insurance.

FACT: Companies have different responsibilities, and pay higher taxes, for traditional employees, because they also have different relationships with and expectations for those workers. Independent contractors pay taxes on their incomes, including self-employment taxes. Self-employed workers actually directly pay more in taxes than employees. They **pay** the combined employee and employer amount of the

Social Security tax (12.4 percent) on up to \$142,800 of net earnings and a 2.9 percent Medicare tax on net earnings. Independent contractors and self-employed workers are not traditionally eligible for unemployment benefits (though during the pandemic, the federal government temporarily expanded benefits to those workers), but are able to purchase their own worker's compensation insurance.

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3. MISPERCEPTION: If workers are unduly burdened by laws that reclassify workers such as California's AB5, they should simply seek an exemption from the law.

FACT: The solution is not simply to carve out protections for one's own profession. This unfairly excludes those who do not have the money or clout to lobby for an exemption. Lobbying for exemptions is undemocratic and unfair. It is also impractical. California lawmakers have exempted over 100 occupations from AB5 before and after the law passed, yet there

are still many more workers who remain impacted by this job-killing law. Why should people in professions with less political clout suffer? It is simply unfair. At the federal level, the PRO Act provides no exemptions for its reclassification of independent contractors, which would expose over 50 million workers to potential job losses.

4. MISPERCEPTION: Worker misclassification is rampant. We need the stricter "ABC test" as adopted by California's AB5 to force companies to reclassify workers as employees.

FACT: Worker misclassification is wrong, and workers who feel they should be classified as employees can file a claim to appropriate state and federal authorities. However, the increase in independent contractors is more likely due to the recent development and expansion of innovative work models and platforms (such as those in the gig economy), not a sudden trend toward widespread worker misclassification.

There are distinct differences between independent contractors and employees, namely how much control a company has over the work that a worker performs.

Federal agencies and states have different definitions for who should be classified as independent contractors versus employees. Some standards are more flexible than others. However, advocates for reclassification of independent contractors want to implement a stringent standard (the ABC test) that assumes all workers are employees and forces them to prove otherwise based on a very narrow set of criteria. When California adopted the ABC test as part of its AB5 law, many of the state's two million independent contractors were immediately reclassified and lost their incomes.

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5. MISPERCEPTION: The number of full-time workers hired to replace independent contractors will balance out the lost income for contract workers.

FACT: Hiring contractors as W-2 employees creates significant additional costs for businesses including payroll taxes, worker's compensation and unemployment insurance, paid leave, and health insurance, if required by law. In California, companies are either hiring a much smaller number of employees,

reducing their independent contractor workforce, or outsourcing work to other states. For example, after hailing AB5 as a "victory for workers everywhere," Vox Media **laid off** 200 California-based freelance journalists in response to AB5 and replaced them with just 20 part-time and full-time staff writers.

6. MISPERCEPTION: Workers want to be employees and are driving state and federal efforts to reclassify independent contractors.

FACT: Organized labor is driving current fights to reclassify workers as a means of expanding their membership and influence. While employees can organize and bargain collectively under federal labor law, independent contractors cannot. Unions see worker reclassification

as an opportunity to unionize potentially millions of new employees and recruit them as dues-paying members. Surveys of independent contractors show that **overwhelmingly** they prefer to work as independent contractors rather than as employees.

1 Many Americans now work in what's called the "gig economy," doing things like driving for Uber, delivering food from restaurants, or performing household tasks on TaskRabbit. These jobs are in a category called "independent contracting" because they are not what are typically defined as "traditional" jobs. Are independent contractors a new work arrangement?

- A.** Yes
- B.** No

2 How many Americans freelanced (worked as independent contractors) in 2019?

- A.** 10 million
- B.** 35 million
- C.** 57 million

3 Why do workers decide to work as independent contractors?

- A.** They have trouble holding a traditional job
- B.** They prefer the flexibility of freelancing
- C.** They need to supplement their income
- D.** Any or all of the above

4 What are the effects of the new California state law, AB5?

- A.** Protect workers' rights
- B.** Make it easier to be an independent contractor
- C.** Raise costs for businesses
- D.** Threaten economic security of workers
- E.** Kill flexible work arrangements
- F.** Answers C, D, and E
- G.** None of the above

5 Does the PRO Act provide exemptions for certain professions?

- A.** Yes
- B.** No

Quiz Answers

Q1 ANSWER: B

No. The emergence of new technologies has led to great growth in the independent contract workforce today. Apps such as Uber and Lyft, Doordash, or TaskRabbit provide ways to connect workers with customers. But while independent contractors are a growing proportion of American workers, now holding **1 in 5** jobs in America, many of these jobs have long been a part of our workforce. Independent contractors work in a wide variety of occupations—from handymen to freelance journalists, HR professionals, musicians, photographers, and more. They are not employees and instead of receiving a salary, these workers are typically paid an hourly rate, a retainer, or a fee for completion of a specific task or project. Essentially, they work for themselves, and they get to decide when they will work and which projects they'll do.

Q2 ANSWER: C

57 million. Not only did an estimated **57 million** Americans freelance (35 percent of the workforce), **over half** of them say no amount of money would persuade them to take a traditional job. Not only are many workers across the country participating in the gig economy, but they also are

doing so by choice. Most independent contractors report that they prefer this arrangement to a traditional job.

Q3 ANSWER: D

Any or all of the above. **Sixty percent** of freelancers work as independent contractors by choice. They enjoy the freedom of being their own boss and choosing when, where, and how they work. Additionally, **46 percent** of freelancers say they would have difficulty working for a traditional employer due to personal circumstances, such as health issues or childcare needs, or because they are students. Around **6.8 million** workers use independent contracting as a secondary source of income to supplement their primary source.

Q4 ANSWER: F

Answers C, D, and E. AB5 threatens both workers and employers by forcing businesses to reclassify independent contractors as employees. Instead of protecting workers' rights, this makes it harder for independent contractors to enjoy the flexibility and freedom that they value. And in many cases, it will mean lost jobs and lost income for workers.

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AB5 raises costs for businesses by requiring them to offer all workers a variety of benefits and pay for unemployment insurance, employment taxes, and more. As a result, labor costs will increase by **20-30** percent in the ridesharing industry.

These additional costs force companies to lay off large numbers of independent contractors, and they may hire fewer employees to replace them. Vox Media, for example, laid off **200 freelance writers** at the beginning of 2020 to comply with AB5's requirements; they only hired 20 full-time staff writers to replace them.

AB5 will particularly hurt women, as women often prioritize other responsibilities, such as family caregiving duties, over having a traditional 9-5 job. Independent contracting allows such individuals to work around their priorities, while still providing a source of income.

Q5 ANSWER: B

No. The PRO Act does not provide any exemptions, which is worse than California's AB5. Since the implementation of California's misguided independent contractor law, the state has passed many exemptions to remedy the unintentional effects of the bill. While exemptions have provided relief to certain professionals in the state, they are unfair because they are only granted to those with the means to lobby for the special treatment while leaving others without work. This unequal treatment is the direct result of bad policy and disproportionately affects many small businesses struggling particularly because of the coronavirus pandemic.

Background

Legal Standards for Contract Work

There is no single rule or test to determine whether a worker is an employee or an independent contractor. That does not mean there are no standards.

The Supreme Court has held on different occasions that **multiple factors** can be considered to make this determination, although not all of these conditions have to be met:

1. The extent to which the services rendered are an integral part of the principal's business.
2. The permanency of the relationship.
3. The amount of the alleged contractor's investment in facilities and equipment.
4. The nature and degree of control by the principal.
5. The alleged contractor's opportunities for profit and loss.
6. The amount of initiative, judgment, or foresight in open market competition with others required for the success of the claimed independent contractor.
7. The degree of independent business organization and operation.

The Department of Labor under the Trump administration has established that under the federal Fair Labor Standards Act (FLSA), an "economic reality" test should be used to determine whether an individual is in business for him- or herself as an independent contractor or is economically dependent on a potential employer for work (FLSA employee). The two core factors:

- The nature and degree of control over the work.
- The worker's opportunity for profit or loss based on initiative and/or investment.

In addition, three other factors can be considered:

- The amount of skill required for the work.
- The degree of permanence of the working relationship between the worker and the potential employer.
- Whether the work is part of an integrated unit of production.

States may have their own definition of an independent contractor.

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Background, cont.

Supporters of reclassifying independent contractors as employees advocate for adopting the so-called ABC test in state and federal law. Under this test, any person who provides labor or services for remuneration is automatically an employee, rather than an independent contractor, unless the company hiring them can demonstrate 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.

The ABC test is a more stringent standard. It assumes a worker is an employee and places the burden of proving otherwise on the hiring company. Adopting this test nationwide would immediately result in tens of millions of independent contractors being reclassified as employees for wage and hour laws, benefits, taxes, and other purposes. Reclassifying workers as employees would be prohibitively costly for many employers who would simply layoff these workers. This harm is unnecessary given that there are other, better existing legal standards and tests to determine how workers should be classified.