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Protections and Benefits for Workers in Today's On-Demand Economy
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Executive Summary

In this report, we identify options for state administrative and legislative actions that New Jersey can pursue to improve on-demand workers' workplace protections and access to worker benefits. We prepared this report for the New Jersey Department of Labor and Workforce Development (DOLWD), who asked us to take a broad view in defining "on-demand worker;" we included both 1099 independent contractors and certain W-2 part-time employees.

The proliferation of online platforms, which use mobile networks to connect clients to workers, has driven a rapid expansion in attention to the on-demand economy. However, worker participation on these platforms is largely supplemental to other primary work and is often underreported; this makes it difficult to have a full measure of the on-demand economy.

Through a review of available literature, we have found that on-demand workers:

- face significant challenges regarding inconsistent scheduling, which leads to significant income variance, financial insecurity, and family instability;
- often do not receive benefits from their employers and are not able to bargain for benefits, and as such do not develop a safety net to rely on during lean times;
- are excluded from protection under Federal Title VII and experience workplace discrimination;
- work in hazardous conditions but typically do not receive workers' compensation; and
- face major barriers to organizing, unionization and bargaining.

Our recommendations draw on existing and pending models of state- and municipal-level action to identify several opportunities for reform in New Jersey. To address the challenges faced by on-demand workers, the state may:

- expand enforcement of reporting pay requirements and increase the standard of reporting pay hours
- adopt state-wide Fair Workweek legislation
- expand eligibility for the state paid leave and Secure Choice savings programs to allow independent contractors to participate even without their employer's participation
- create a portable benefits program that establishes a system of earned benefits and that would expand benefits access, unemployment insurance eligibility and workers' compensation
- amend the NJ Law Against Discrimination to also protect independent contractors; and
- consider legislation that enables independent contractors to organize and bargain.

The traditional, full-time employment model is shifting toward on-demand systems of labor, and so far, on-demand workers have borne the costs of this shift. In this report, we present a menu of policy options, some of which the DOLWD can pursue immediately and others that require legislative action. A key challenge to state action may be worker classification, which remains within the federal government's purview, and some state action may be preempted by federal law. Even so, New Jersey is in a position to develop guidance and regulation concerning on-demand workers and the companies that hire them, and to implement policies and programs to improve the quality of work and quality of life for these workers.

Introduction

Full-time employment contracts are available to fewer American workers in today's labor market. In 2005, 10.7% of the American workforce engaged in alternative work arrangements¹ where workers lack the traditional employer-employee relationship like those found in the on-demand economy.² By 2015, that share had increased to 15.8%.³

While the reason for this shift is multi-faceted, the media has portrayed the proliferation of online platforms as the primary cause. It is increasingly common for companies to use technology to assign individual workers, who are generally classified as independent contractors, task-based work, like driving cars, delivering food and packages, providing housing cleaning services, and more, directly for consumers. This growth in the online platform economy (OPE) has been lauded as an opportunity for workers who want the flexibility to manage their own time, work for multiple companies or earn a living outside of traditional full-time employment arrangements.

However, alternative on-demand labor arrangements are more ubiquitous than is suggested by the media's narrow focus on these new platforms, and the impact of these arrangements on workers is complex and significant. Many state and large city governments, already deeply vested in understanding fluctuations in the labor market, are considering responses to developments in the on-demand economy (ODE). Governments, private foundations, and non-profit organizations are designing new strategies for addressing the legal, economic, and social challenges posed by alternative employment arrangements that diverge from the traditional full-time employer-employee relationship.

The New Jersey Department of Labor and Workforce Development (DOLWD) is collaborating with agencies in six other states, all of which are part of the National Governors Association (NGA), to examine the effects of the on-demand economy on work and the workforce. As part of that project, the DOLWD asked our team of graduate students from the Bloustein School of Planning and Public Policy to prepare a literature review and report on promising approaches to addressing workforce challenges in the ODE. The intent of the report is to elucidate this topic in order to better inform New Jersey's strategies for responding to growth in the on-demand sector of the labor market.

This report's inclusive consideration of on-demand labor will hopefully contribute to the expansion of an otherwise narrowly construed conversation. The definition of "on-demand" and

which individuals are counted in the on-demand workforce varies considerably in the relevant literature. Many terms are used to characterize this workforce, each with a slightly different definition: gig workers, freelancers, contingent workers, independent contractors, and more.¹ In this research project, we have chosen to use the term “on-demand worker” and to define the term based on what it is not. The on-demand worker is *not* the traditional full-time worker with a single employer that both provides wages and sponsors benefits in exchange for labor in a permanent, stable arrangement.

The on-demand worker may be in a part-time, temporary, contract, or other form of non-standard employment arrangement. Some of these individuals are OPE workers who receive “project or task-based activities”⁴ through a platform company that directly connects service providers to customers through the assistance of technology.⁵ Others are independent contractors who receive freelance work that is not systematically mediated, evaluated or supervised by a third-party. Yet another group of workers are hourly W-2 workers who maintain irregular schedules which

Figure 1

<i>Worker Terminology Definitions in this Report</i>
“ On-Demand ” refers to laborers or arrangements outside of the traditional full-time employment model.
“ Independent Contractors ” refers to the group of workers who file 1099 forms with the IRS and are not considered employees.
“ Online-Platform Economy (OPE) Worker ” refers to workers who receive task-based assignments through an online-platform.
“ Gig work ” refers to task- or project-based work that would include jobs through the OPE, as well as day-labor, freelance projects, and others.

are subject to last-minute changes. We consider all of these individuals as “on-demand workers” in our report because their work schedules are not stable, their income is neither guaranteed nor consistent, and they typically not do not enjoy the protections and benefits otherwise afforded to full-time employees as mandated by federal and state law.

It is important to use this inclusive definition because it encompasses a large group of workers who experience similar workplace pressures and challenges. We sought to broaden the

¹ Gig work is defined by academics as “subset of flexible jobs mediated through various online platforms” (<https://aysps.gsu.edu/files/2016/09/Measuring-the-Gig-Economy-Current-Knowledge-and-Open-Issues.pdf>) but more traditional definitions also include day-laborers and workers in hiring halls; freelancers “[work] independently usually for various organizations rather than as an employee of a particular one.” (<https://dictionary.cambridge.org/us/dictionary/english/freelance>); a contingent worker is defined by the Bureau of Labor Statistics as a person who does not expect their job to last or who report that their job is temporary (<https://www.bls.gov/news.release/conemp.nr0.htm>); and finally, an independent contractor is a specific term used by the IRS discussed later in the introduction.

scope of discussion beyond comparatively narrow media coverage and official attention to only online-platform workers. This definition also reflects the commitment of DOLWD to pursue policies that can improve the well-being and opportunity of all workers, including those who are currently not covered under existing employment law.

Our report is divided into three sections:

- An introduction describing the on-demand workforce;
- A literature review that explores current challenges faced by on-demand workers; and,
- A discussion of various approaches and reforms that state and municipal governments have pursued or considered in their attempts to address the challenges faced by workers in the on-demand economy.

Methods

Our report is informed by a review of literature as well as 13 interviews with subject matter experts and practitioners, recommended by the DOLWD, the Heldrich Center, and our research. The interviews were one-on-one, semi-structured, and conducted over the phone in March and April of 2019, each lasting between 15 and 40 minutes. A full list of interviewees is provided in Appendix I.

The On-Demand Economy

To situate our literature review about the challenges of the on-demand workforce, in this section, we describe two of the populations that make up the alternative workers in the on-demand economy: OPE workers and part-time hourly W-2 employees.

Online Platform (OPE) Workers

Most OPE workers are classified as 1099 independent contractors, though there is a growing legal challenge to this classification.ⁱⁱ An independent contractor is typically identified

ⁱⁱ The scope of this research report does not include the legal issues of misclassification in the on-demand economy but there are multiple challenges to major platform companies working their way through the courts currently.

through the filing of the Internal Revenue Service (IRS) 1099 form. According to the IRS, the 1099 form should be used only for workers who have:

- Behavioral control over when and how they do their work;
- Use their own equipment and materials;
- Have a contract for only a specific period of time or project; and,
- Are paid a set amount without additional non-wage benefits.⁶

Outside of online platforms, more than 30% of independent contractors work in the education, construction, and administrative services industries, all of which traditionally have a lower share of employees as a proportion of their workforce.⁷ The list of industries with a labor force heavily consisting of self-employed individuals also includes agriculture, freight transportation, certain financial activities, professional services, childcare, hospitality, maintenance services, and other personal services.⁸

However, the recent arrival of online platforms in the transportation, delivery, and home services (including domestic work and caregiving) industries has caused a rapid expansion of the on-demand economy.ⁱⁱⁱ We have also observed a spatial distribution of the OPE workforce that has tracked very closely to the geographic concentration of specific industries; for example, cities on the U.S. West Coast such as San Francisco, Los Angeles, and San Diego had the highest participation in and also greatest reliance on online labor platform work because of the outsized influence of Silicon Valley, and the rapid proliferation of the OPE activity on the West Coast has driven the growth of the ODE nationally.⁹

A recent analysis of IRS data documented the growth of platform work. Between 2000 and 2016, “alternative non-employee work arrangements grew by 1.9 percentage points” with over half of that growth occurring between 2013 and 2016 and the vast majority of growth occurring in online platform work.¹⁰ While growth in this sector seems certain, the absolute numbers quantifying participation are not. Most workers use online-platform tasks only to supplement other work: new OPE work “[tends] to represent small amounts of income... or

ⁱⁱⁱ This report classified three sets of estimates of contingent workforce: from the narrow definition (stated in BLS) to “core contingent workforce” (Government Accountability Office’s identification), to the broad term of “various non-standard work arrangements, regardless of duration” stated in other reports. See: The Aspen Institute Economic Opportunities Program. (2019). The 1099 workforce and contingent workers. Retrieved from <https://assets.aspeninstitute.org/content/uploads/2019/02/WIA-1099-Backgrounder.pdf>

supplement a primary W-2 job.”¹¹ Because of this, it is difficult to capture the total number of workers in these alternative job situations through traditional surveys.

The BLS Contingent and Alternative Employment Arrangements Supplement (CWS) is one of those surveys. Its estimates of the OPE economy are limited because they only query workers about their primary job. However, the CWS is considered one of the most important estimates in this area and provides some useful demographic information about the broader alternative arrangement worker population. In 2017, the CWS found that the size of the 1099 workforce^{iv} ranged from 1.3 to 3.8% of the total employed labor force (approximately 5.9 million persons). According to the BLS, the majority of on-demand workers are:

- under 25 years of age;
- of Hispanic or Latino background;
- less educated than employees in traditional worker arrangements (only 25% of them attained bachelor’s degree or more); and,
- earn 12.9% less per year than traditional W-2 workers.^v

Pursuing policies that benefit on-demand workers will make a difference to these populations especially, who drive New Jersey’s population growth.

On-Demand Labor in the W-2 Workforce (Part-Time Hourly W-2 Employees)

Another significant component of the on-demand workforce often left out of such counts are hourly W-2 workers, who are often working on a part-time, involuntary^{vi} basis. workers. Due to the advent of algorithmic “just-in-time” scheduling software, employers are now able to adjust employee schedules and hours in near real-time, based on high-efficiency goals and factors like weather and customer flow.¹² These new technologies have greatly increased employers’ ability and incentive to both rely on part-time employees and to vary employee hours with short-notice shifts, late-notice cancellations, and frequent schedule variance. These new arrangements have

^{iv} In the CWS report, the “on-demand workforce” refers to the group of American workers holding contingent/alternative arrangements as their main job. These workers generally include: independent contractors, temporary help agency workers, on-call workers, and workers provided by contract firm, which fits the aforementioned category of “1099 workers.”

^v BLS (2017). It is a supplement to the monthly Current Population Survey by the Census Bureau for BLS, and has been updated twice: in 2005, and in May 2017. The survey only accounted for respondents’ main job (the job they work for the most hours) and not those who worked on-demand as a secondary job. Data were self-reported, and showed discrepancies when compared with other sources.

^{vi} An involuntary part-time worker is defined by the BLS as someone who works part-time hours for economic reasons, namely economic slack or inability to find a full-time position. See: The Bureau of Labor Statistics. (2018).

wage and other non-wage impacts on workers, which are discussed further in our literature review.^{13 14} The practice is now considered commonplace in the retail and fast-food industries, and other service sector industries are beginning to use these scheduling tools as well,¹⁵ and there are no protections in federal law for employees with regard to predictable scheduling or minimum hours.

These tools have made much of hourly workers' labor on-demand, compared to their full-time or salaried counterparts. This subset of W-2 workers is most likely to earn than less \$22,500 annually, and they are twice as likely to have variable hours compared to full-time W-2 workers.¹⁶ The Economic Policy Institute estimates that 10% of all W-2 employees work irregular or on-call hours.¹⁷

A W-2 employee is eligible for many worker protections, such as a guaranteed minimum wage and anti-discrimination coverage, that the 1099 worker is not. However, the increasingly on-demand nature of part-time, hourly employment is an important development to consider as part of the growing on-demand economy. These developments also represent the impact of the desire for an on-demand workforce within the broader labor market.

Irrespective of variation in definitions and measurements of the on-demand economy, our research consistently documented issues of degraded job quality and absence of protections for all of these workers, which we will document in subsequent sections. Participants in the on-demand economy, particularly 1099 workers, often struggle with balancing job security and employment flexibility.¹⁸ While workers may value their ability to control their work hours, location, and supervisory independence, others struggle because their wages are not guaranteed or predictable. Most OPE workers receive few non-wage benefits, such as group health insurance, workers compensation, paid sick leave, 401(k) matching, and a guaranteed minimum wage.¹⁹

Given these concerns, the literature review will focus on challenges faced by these workers, structured around four themes: compensation, benefits, protections, and worker organizing.^{vii}

^{vii} We based this framework on remarks made by Libby Reder in a panel appearance with the Aspen Institute. See: Reder, L. (2019). The Rise of Gig Work: Creating Flexibility and Stability for Workers in a New Era. The Aspen Institute. Retrieved from <https://www.aspeninstitute.org/events/rise-gig-work-creating-flexibility-stability-workers-new-era/>

- Section One provides an overview of on-demand worker compensation, including minimum wages and access to consistent working hours.
- Section Two discusses non-wage benefits typically provided in traditional full-time employment, focusing specifically on health insurance, paid leave, and retirement savings accounts.
- Section Three examines the legal protections typically afforded to traditional, full-time workers, such as worker safety laws, anti-discrimination protection, and safety net programs like unemployment insurance.
- Section Four addresses the current landscape of organizing and collective bargaining among on-demand workers.

Review of Literature

1. Compensation

Measuring on-demand worker earnings is complicated because there is no single count of on-demand workers. Many workers use on-demand work as supplemental income, which is more difficult to document, and workers may have multiple on-demand positions. Despite the challenges in measuring earnings, it is clear that workers in the on-demand economy encounter financial obstacles because of their employment status and the nature of their work. In particular, independent contractors lack any minimum wage protection while many hourly W-2 workers face inconsistent schedules and a lack of control over their own hours. Though these two challenges are related to different employment statuses, they both produce unfavorable circumstances that undermine workers' ability to make a living wage through on-demand work.

Lack of a minimum wage

Independent contractors, by definition, are not covered under federal minimum wage standards established in the Fair Labor Standards Act.²⁰ They also must bear many of the economic costs and risks typically carried by employers, including Social Security payments, taxes, supplies, idle time, and customer delays. These additional costs all bring down the total value of a worker's take-home pay, even if the gross wage earnings were comparable to those of a traditional W-2 employee.

According to a study by Intuit, 41% of on-demand workers use their earnings to supplement income gained from other full-time or part-time employment.²¹ Major OPE platform companies (like Uber, Lyft, TaskRabbit) have pointed, rather counterintuitively, to this as an argument against efforts to establish minimum wages for some independent contractors.²² Recently, researchers have identified a trend of measurable decreases in some sources of OPE income that may be occurring because greater numbers of people are joining platforms with no guarantee of minimum earnings. This trend is especially concerning because people in the lowest income quintile rely heavily on their OPE earnings, yet they are not protected by federal wage regulations.²³ One reason why workers may use online-platform work to supplement other earnings, rather than to fully support themselves, may be because OPE wages are low and inconsistent.

Lack of consistent hours

Part-time hourly work has always been afflicted by some amount of inconsistency in scheduling. However, the development of “just-in-time” technology created an on-demand system of labor for some W-2 employees. The Retail Work and Family Life Study, a national survey of hourly workers in the service sector, found that only 25% of workers received the standard two weeks’ notice for their work schedule and 42% received less than one week of notice.²⁴ A separate survey of New York City retail workers found that 20% of retail employees received less than three days’ notice of their shift schedule.²⁵ Additionally, workers report having little say in their schedules or hours: nearly half say that those assignments are made solely by their employer without any employee input.²⁶

Working an inconsistent schedule reduces an employee’s financial security. According to the Retail Work and Family Life Study, half of hourly workers surveyed had week-to-week changes in their income and that workers with inconsistent schedules were more likely to experience variance in income. The income variance was significant: respondents reported a 34% difference overall between their largest and smallest paychecks within recent months, and this increased to a 54% difference for the poorest workers.²⁷ This inconsistency means that workers cannot predict their compensation week-to-week and may struggle to pay for rent, utilities, food, and other necessities.²⁸ Surveyed workers said that this financial insecurity was their main problem with having an unpredictable work schedule.²⁹

Furthermore, a variable work schedule also impacts work-life balance. Data from the General Social Survey showed that employees who work “irregular” hours are more than twice as likely to report work-family conflict.³⁰ For many parents with a volatile hours and income, these difficulties include greater challenges obtaining child care as their schedules change on short-notice.³¹ This and other stresses that come with irregular work affect not only workers but also their children, as measured in anxious, depressive, aggressive, and destructive behaviors among children between two and three years old.³² Working an inconsistent schedule has also been shown to worsen sleep quality, cause psychological distress, and increase the difficulty of accessing health care.³³ As these consequences illustrate, while the employer benefits from the increased efficiency from these arrangements, the employee bears the burden through financial insecurity and other personal costs.

2. Worker Benefits

American workers in traditional full-time employer-employee arrangements often receive benefits that include group health insurance, paid leave, and retirement savings plans and companies often compete for talent by sponsoring robust benefits plans that supplement salary. This arrangement arose of what is colloquially known as the 1950 “Treaty of Detroit,” when the United Auto Workers negotiated contracts with the Big Three automakers (General Motors, Ford, and Chrysler) that included pension plans, scheduled wage increases, and health insurance. This arrangement reflected a recognition by workers that they were “better off obtaining benefits linked to a specific employer than waiting for government to act” as well as by businesses that “the security and well-being of [their] workers was in [their] own interest.”³⁴

However, such benefits are not typically provided to on-demand workers because employers are typically not legally required to provide for them and most part-time employees or independent contractors have arrangements that are outside the bounds of what is commonly understood as the traditional employer-employee relationship. Moreover, providing benefits to employees may also generate greater government oversight of those companies, as the adequacy of benefits programs is monitored by federal agencies. Ultimately, workers must take it upon themselves to develop a “personal infrastructure” in absence of employer-sponsored supports.^{viii}

^{viii} Hill speaks of ‘personal infrastructure’ as a set of core components of a safety net that help maintain the health and stability of individuals and their families. See: Hill, S. (2015). *New Economy, New Social Contract: A plan for*

This section will examine the access, or lack thereof, on-demand workers have to these traditional employee benefits.

Healthcare Insurance and Coverage Plans

Accessibility to affordable health insurance for on-demand workers, and workers overall, has been in constant flux due to macro trends, the implementation of the Affordable Care Act (ACA) under the Obama Administration, and the incremental but significant reversals of ACA mandates under the Trump Administration. The overall share of non-elderly adults (i.e. adults not eligible for Medicare) covered by employer-based insurance fell from 67.3% in 1999 to 58.4% in 2017, with a low of 55.6% in 2011; the recent uptick in employer-based coverage, 2.1% increase from 2013 to 2017, has primarily benefited W-2 workers with traditional arrangements covered under the employer mandate of the ACA.³⁵ Workers with alternative, on-demand or temporary arrangements have much lower rates of employer-based health coverage and a subset of independent contractors receive no coverage, though coverage is ostensibly available through the increasingly expensive insurance exchanges established under the ACA.³⁶

^{ix} According to the RAND-Princeton Contingent Worker Survey (RPCWS),^x as of 2015 approximately 16% of the workforce is engaged in on-demand work that does not guarantee healthcare benefits.³⁷ While on-demand workers may obtain coverage through another job, a spouse's job, or Medicare, a significant share of the on-demand workforce lacks access to affordable healthcare plans; available data indicates that approximately 50% of Uber drivers are covered through a spouse's plan and 77% of OPE workers are covered under Medicare or Medicaid, but workers on rideshare platforms in particular have health coverage at rates that are 10% below the national average.^{38 39}

Worker classification is a key factor that inhibits on-demand workers' ability to access affordable health insurance coverage. Businesses often sponsor group health plans for full-time W-2 employees because this is proven to reduce turnover, improve worker performance and

a safety net in a multiemployer world. *New America*. https://static.newamerica.org/attachments/4395-new-economy-new-social-contract/New%20Economy,%20Social%20Contract_UpdatedFinal.34c973248e6946d0af17116fbd6bb79e.pdf.

^{ix} Per the PPACA, people without employer-provided health insurance were required, under penalty of a non-compliance tax (i.e. the 'individual mandate'), to purchase private coverage through an 'insurance marketplace'. The Trump administration has since reduced the penalty to \$0, effectively eliminating the mandate.

^x A version of the Contingent Workers Survey (CWS), which is a supplement to the Current Population Survey (CPS) administered by the U.S. Bureau of Labor Statistics (BLS).

improve client satisfaction. However, businesses who hire 1099 workers can deduct up to 30% of the costs associated with hiring employees as the employer is responsible for reduced tax and benefits liabilities.⁴⁰ Employers, and on-demand platforms in particular, thus have a powerful incentive to hire a contingent workforce in place of traditional W-2 employees. Others may intentionally misclassify W-2 employees as 1099 contingent workers though there may no functional difference in worker supervision and responsibility.^{41 42} Employers often also deliberately arrange for limited work hours per W-2 employee so as to evade responsibility for providing insurance.⁴³

Providing benefits to employees may invite greater scrutiny from regulatory agencies. For example, the IRS' standards for evaluating worker classification include the consideration of "the relationship of the parties (i.e., terms and conditions of the relationship, such as whether the company provides the worker with any employee-type benefits)."⁴⁴ While there are several U.S.-based models for portable-benefit programs and multiemployer benefit plans for on-demand workers,^{xi} benefits packages are so closely associated with traditional employer-employee arrangements that platform companies are wary that even contributing to such benefits programs would make them vulnerable to misclassification claims and the reclassification of their independent contractors as employees, as has occurred in previous court case settlements.^{45 46}

Affordability of health insurance plans is another key factor inhibiting on-demand workers' access to healthcare coverage. 1099 workers who do not have coverage through another means can ostensibly buy a private insurance plan in the ACA's individual market. However, the ACA marketplace exchanges have been plagued by the lack of competition needed to drive down the price of insurance plans in certain geographic areas; insurances premiums were up to 50% higher in marketplaces with little to no competition among insurers, compared to marketplaces with more robust competition.⁴⁷ Rising premiums can make individual policies financially difficult, if not infeasible, and the recent elimination of the ACA's individual mandate threatens to create a "death spiral" of skyrocketing premiums.^{xii} The CBO estimated that gross premiums in the individual market had increased by 34% from 2017 to 2018, will increase by 15% in 2019

^{xi} We will discuss current models of 'portable benefits, multiemployer plans and personal infrastructure plans at the end of this section

^{xii} Increasing cost of insurance product will discourage potential customers; per economic principle of supply and demand, fewer customers will result in further prices increases; and these two facts are mutually reinforcing.

and by 7% per year through 2028, and that these increases are closely linked to the repeal of the individual mandate.⁴⁸

The U.S. Department of Labor (DOL), under the Trump administration, has attempted to counteract this challenge of rising premiums by issuing a final rule, “Definition of ‘Employer’ Under Section 3(5) of ERISA-Association Health Plans,”⁴⁹ that allows for the creation of a new category of Association Health Plans (AHP), which allow small employers and “self-employed individuals with no other employees” to create multi-employer associations and buy health plans as a group, similar to how large employers leverage group buying power on behalf of their employees. Groups can form based on common geography or industry and are not limited by political jurisdiction.⁵⁰ This recent change allowing self-employed and sole proprietors to buy as a group may potentially improve the affordability of health plans for contingent workers; however, it is unclear to what degree AHPs will be formed, how successful they will be at reducing premiums for association members, and whether the plans offer adequate coverage.⁵¹ Though the DOL estimates that up to 11 million people may find affordable healthcare coverage under the new plans, this will include people already in the ACA marketplace, and the lower premiums reflect the absence of essential health benefits otherwise mandated under the ACA.⁵² The constitutionality of the rule is also under scrutiny; a federal district court recently ruled that the DOL’s final rule “stretched the definition of ‘employer’...beyond what the Employee Retirement Income Security Act (ERISA) would bear” in clear attempt at “an end run around the ACA.”⁵³

Retirement Savings

Employer-sponsored 401(k) or other retirement savings arrangements are often available through traditional full-time employment. Unfortunately, current retirement saving plans have become insufficient for Americans of all work arrangements, and the problem of long-term financial instability is expected to be even more widespread among on-demand workers.^{54 55} While there is little data available that specifically assesses the retirement savings and plan participation of on-demand workers, the Brookings Institution estimates, based on working populations with comparable levels of income, that between 62% and 75% of workers in question “are not offered a payroll deduction retirement savings or pension plan at work.”⁵⁶ Independent Retirement Accounts (IRA) are unlikely to be much help, as fewer than 14% of the total population contributes to a personal retirement account,⁵⁷ and it is unlikely that on-demand

workers partake in such savings in greater numbers.⁵⁸ As of 2016, individuals aged 18- to 24-years-old are more than nine times as likely to earn income via on-demand platforms than those over age 65, and 82% of all on-demand workers are under age 55.⁵⁹ Without access to proper retirement savings mechanisms, on-demand workers risk aging into retirement without sufficient savings and will instead have to rely on Social Security, Medicaid, and other programs that alone are not sufficient as a safety-net system.

Paid Family and Medical Leave

The increased prevalence of households with two working parents or a single-mother as head of household has radically changed the ways that parents can care for their children while maintaining a consistent family income.^{xiii} This trend is problematic for American workers, as the United States remains “the only high-income country in the world that does not guarantee paid leave.”⁶⁰ ^{xiv} Some traditional workers are able to find relief through their employers; nationwide, 15% of workers have access to paid family and/or medical leave as part of their salary and employer-sponsored benefits package.⁶¹ Paid leave has been found to reduce the financial burdens of illness, greatly assist low-income and less educated workers, support women of color, and makes individuals more likely to return to the workforce.⁶² Access to paid leave has also been found to lead to improved employee happiness and increased productivity.⁶³ While several states have sought to expand paid leave programs for workers, few have included on-demand workers in this legislation. To date, independent contractors in only California,⁶⁴ Washington, and Washington D.C. are covered by paid leave laws along with full-time employees.⁶⁵ ^{xv} In these states, self-employed and other workers can enter into the state’s paid leave insurance programs if they contribute the full annual premium themselves. For example, in California, workers pay 5.13% on the first \$118,371 of their income for coverage under both disability insurance and paid family leave.⁶⁶

^{xiii} Two-thirds of households now have two working parents. See McKay, C., & Pollack, E. (2017, August 03).

^{xiv} New Jersey recently passed legislation providing a state-sponsored alternate savings program for employees in the state. This law and its implications for on-demand workers are discussed in the recommendations section of this report.

^{xv} New Jersey’s paid leave law, even after its recent expansion which is addressed later in this report, is not open to independent contractors and on-demand workers. Employees eligible to take part in the program must pass the ABC Test, outlined on pg. 28.

Personal Portable Benefits

Portable benefits are not a new concept in the discussion about extending privileges to non-W-2 workers and the U.S. already has a history of portable benefits and similar programs, the most prominent being Social Security. However, online platforms have recently renewed popular interest in such benefits programs; firms have come under intense scrutiny for their reliance on an on-demand workforce and have responded by facilitating portable benefits programs as a way of helping to build on-demand workers' personal support systems without exposing themselves to employer liabilities. Whereas employees traditionally have their non-wage benefits (e.g. healthcare insurance, pension) tied to a single employer or particular job (per the Treaty of Detroit precedent), portable benefits programs are tied to individual workers irrespective of job.

While there is great variance in the design of portable benefits programs that have been used and are being considered, many programs commonly feature worker portability, employers' prorated contributions, and universality as core design components.^{67 68} The 'portable' characteristic means the benefits follow the worker, allowing on-demand workers to keep the benefits as they move from job to job.⁶⁹ The 'universality' of the benefits means that they are accessible to any worker no matter their work arrangement. Related to universality of benefits is flexibility of program design that enables workers to draw on the personal benefits account for any need at all whenever they need (e.g. healthcare payments or unemployment stipend).

The benefits themselves are funded through some system of proration: an employer may make contributions based on the amount of workers' labor; clients may pay a surcharge on services provided; or workers agree to wage withholding and/or personal contributions that are matched by the employer. For example, Care.com, a platform that connects families with caregivers, is piloting a program that offers workers an annual cash benefit of \$500 which clients pay for through a small surcharge labeled as "caregiver benefit." Workers may put the money toward health insurance or any other work-related expense.⁷⁰ The National Domestic Workers Alliance (NDWA) is piloting, with funding support and technical assistance from Google and the US Department of Labor, a portable benefits fund through a platform called Alia, which prompts home cleaners' clients to pay \$5 (on average) per cleaning toward a benefits fund.⁷¹ The Black Car Fund, based in New York City, is a workers compensation fund for drivers that is paid for by a 2.5% surcharge on customers' taxi, limousine, and rideshare fares.⁷²

It is important to note that the portability of benefits is distinct from employers' obligations to pay into benefits programs. In the aforementioned models, the employers effectively 'pass on' the cost of benefits provision to the clients. Multiemployer plans, however, are a model where a large fund acts as an insurance plan for a group of workers who simultaneously have multiple employers; in this case, employers pay into a fund governed by a board of trustees that acts in the benefit of the workers on whose behalf the employer made payments.^{xvi} The payments themselves are calculated using an "hour bank" system, whereby a particular employer pays an amount based on the number of hours that a given worker has worked for them.^{73 74} This sort of arrangement is typically made possible through the collective bargaining power of a powerful trade union,^{xvii} so this may not be a viable option for non-unionized OPE on-demand workers.⁷⁵ Another benefits vehicle is a multiple employer welfare arrangement (MEWA), which is organized by employers who are members of a specific professional trade association for the purpose of providing healthcare benefits to employees who may not be unionized but who are also trade association members. While the workers in this arrangement do not have collective bargaining rights, they negotiate as a group for employer contribution to their non-wage benefits.⁷⁶

Several municipalities and states have implemented or are considering legislation to support on-demand workers' (both contingent 1099 workers and part-time W-2 workers) personal infrastructure by establishing portable benefits or other 'insurance' plans. One proposal in New York State would establish a model whereby companies can voluntarily contribute 2.5% of the fee for each job performed into a benefits fund account, similar to the Black Car Fund model, and the money can be put toward benefits like health insurance or retirement.⁷⁷ Both Washington and New Jersey are also considering legislation that would require companies to use per-service surcharges or hour-banking system to generate contributions toward workers' portable benefits plan.⁷⁸ There is, however, evidence that companies would likely recoup these

^{xvi} The payment amount is a predetermined, prorated amount based on the hours an individual works for the employer.

^{xvii} The International Union of Operating Engineers has 400,000 members nationwide and maintain a standard level of benefits, wages, conditions and training opportunities; The International Brotherhood of Teamsters maintains the nation's largest multiemployer defined-benefit pension plan; IUOE Local 9 (construction industry) in Colorado has an hour bank system that allows participating employees to accumulate four months of unemployment coverage. The SAG-AFTRA represents approximately 160,000 actors, singers, news editors, and other media professionals; the union has negotiated pension and health plans for its members that are funded solely by the employers and funded by both employer and worker contributions, respectively.

additional expenses by increasing service fees as paid by clients; the service-sector industry San Francisco increased their service costs when the city passed a ‘universal’ healthcare ordinance (prior to the passage of the PPACA in 2010) which created health care accounts for uncovered workers employed in service-sector jobs that did not provide health care. Employers were required to either provide insurance or pay a certain amount of money into each worker’s healthcare account, and the money could be used by the worker to purchase health insurance. While customers saw an average increase of 4% in restaurant bills, the cost increases did not meaningfully discourage patrons.⁷⁹ The state of New Jersey or major municipalities may utilize the moderate success of the San Francisco ordinance as a case study when considering portable benefits programs funded, fully or partially, by mandatory employer contributions.

3. Worker Protections

While benefits traditionally function as competitive add-ons to the salary offered by employers, worker protections, such as unemployment insurance, worker’s compensation, and wards against employment-based discrimination, are established by state or federal governments to ensure that workers are treated equitably and can work in a safe environment. These regulations protect and promote the wellness of employees in all industries; however, self-employed and on-demand workers are often not covered by statutory protections. These workers are more likely to experience dangerous circumstances in the workplace which may lead to the development of health and safety issues.⁸⁰

Unemployment Insurance

Recent research suggests a strong correlation between periods of financial hardship due to unemployment and worker participation in the on-demand economy.⁸¹ Job loss is a leading cause of financial insecurity and income volatility for workers;⁸² in 2017, more than 14 million Americans spent at least some time unemployed.⁸³ Unemployed workers are typically eligible for unemployment insurance (UI), however, in 2013, a record low of only 27% of unemployed American workers received UI after having been employed for six months or longer.⁸⁴ A complicating factor is that most on-demand workers are ineligible for UI due to their classification as non-employees,⁸⁵ putting them even greater risk of income instability which has been linked to diminished health and education outcomes for workers’ children.⁸⁶ A period of

unemployment essentially “undermines every investment in education, public health, and economic development” for a worker, and workers classified as 1099 are burdened by the additional stress of not having the safety net of UI benefits.⁸⁷

Workers’ Compensation

W-2 workers typically have access to workers’ compensation and workplace safety protections as guaranteed by law or offered as standard business practice. As stated by Samantha Raphaelson of Oregon Public Broadcasting, “the guiding principle behind worker's compensation is that employers assume responsibility for providing insurance benefits, without regard to fault, to workers injured on the job. In return, employers are protected from lawsuits for work-related injuries or illnesses.”⁸⁸ Workers’ compensation generally includes benefits such as medical, physical therapy, and missing wage reimbursement. In the event of a death at work, workers’ compensation will also pay benefits to the family beneficiaries.⁸⁹ Independent contractors, however, are not guaranteed such protections and are less likely to have any recourse if they encounter dangerous circumstances in the workplace or develop chronic health issues because of the work they perform. This leaves either the worker or the general public on the hook for any unforeseen medical emergencies or accidents that may occur on the job site for on-demand workers.⁹⁰

Dangerous Work Environments

According to the Occupational Safety and Health Administration (OSHA), major risk factors for gig workers include working with cash, being isolated in high-crime areas, and working with people who are under the influence of alcohol or other substances. This situation is exacerbated by on-demand workers’ usual classification as independent contractors; under the Occupational Safety and Health Act,⁹¹ “independent contractors are responsible for their own occupational safety and health” and they do not have rights to workers’ compensation.⁹² Work-related injuries and trauma can result in large medical bills and prolonged absences from work, so not being covered by workers’ compensation has considerable financial consequences for on-demand workers.⁹³

On-demand workers face specific risks due to the nature of their work. For example, in 2010, federal regulators at OSHA found that “drivers [were] over 20 times more likely to be

murdered on the job than other workers.”⁹⁴ Domestic workers also have high rates of workplace injury: according to a national survey of domestic workers conducted in 2012, 38% of all domestic workers had suffered work-related joint pain and 29% of on-demand housecleaners suffered from skin irritation from the cleaning products they used.⁹⁵

OPE workers in particular are even encouraged to work longer and late hours by the platform company. For example, “Grubhub drivers in Philadelphia are eligible for guaranteed hourly rates as long as they accept a certain percentage of delivery jobs.”⁹⁶ This incentivizes workers “to take more jobs regardless of the weather” and ignore other hazards.⁹⁷ Similarly, Uber offers ‘surge pricing’ during their busiest hours (including Friday and Saturday nights, holidays, severe weather events) to encourage drivers to take on more clients; although the company does not explicitly encourage riders to take on more work in hazardous circumstances, the surge rate “acts as a de facto encouragement” to take more trips.⁹⁸ The company itself has acknowledged that “drivers [adjust] their schedules to work when they knew they could make the most money” regardless of safety conditions.⁹⁹

Discrimination

On-demand workers are not afforded the same protections from workplace discrimination as the typical W-2 worker. While Title VII of the 1964 Civil Rights Act protects employees from various forms of workplace discrimination,¹⁰⁰ the law does not extend to workers who are independent contractors. On-demand workers often face discrimination during either the hiring process or throughout their day-to-day work. For example, the hiring and firing processes for 1099 workers is notoriously non-transparent; workers often report being denied work or being “deactivated” from an online platform without explanation.¹⁰¹ The opaqueness of such decisions also raises further concerns about firm’s background check practices. Federal rules forbid employers from using an applicant’s criminal record as a disqualifier,¹⁰² but many online platform companies reject workers’ applications to join the platform if they have even a misdemeanor on their record.¹⁰³

Research has also demonstrated that on-demand workers face discrimination on the basis of gender, race, and disability in both algorithmic pay and ratings systems. In platform-based work, women are paid an average of 37% less than men on an hourly basis and receive fewer reviews for comparable tasks.¹⁰⁴ ¹⁰⁵ African-American workers received fewer, lower, and more

negative ratings than their white counterparts while drivers with disabilities were also more likely to receive lower ratings and more negative reviews.^{106 107} Because the ratings systems help determine a worker's assignment to paid tasks, the potential for bias in ratings systems can impede some workers' ability to earn in a manner that can be considered as disparate impact. Because most on-demand workers are excluded from coverage under anti-discrimination law, they have little recourse to address their grievances.

4. Worker Organizing

Over the past several decades, companies have established work arrangements and adopted management practices that create distance between themselves as the employers and their workers as employees, often making employees assume work-related risks and shifting traditional private employer responsibilities onto broader society. The improved speed, reliability and robustness of mobile technology is making this shift easier by connecting employers to an on-demand workforce that is less expensive to hire and maintain than traditional full-time employees. Worker organizing is therefore increasingly important as a means of strengthening workers' ability to advocate for their collective self-interest related to their labor situation.¹⁰⁸ However, on-demand workers do not fit the mold of a typical union member. Legal exclusion of 1099 workers from the National Labor Relations Act (NLRA), as well as the wide variety of on-demand work and the lack of a shared workspace, precludes organizing traditional unions.

Collective Bargaining

Workers have historically joined labor unions to collectively bargain for benefits and protections ranging from wage minimums to workplace dignity; however, union membership in the United States has been declining for decades.¹⁰⁹ According to the BLS, in 2016, only 10.7% of the workforce were members of a union.¹¹⁰ The reasons for this decline are “especially relevant to independent contractors in the new economy... [as] employers often discourage unionization”¹¹¹ to limit the costs of providing wages and benefits for their employees. While workers today no longer experience workplace violence for attempting to organize, employees are sometimes threatened with job or benefits loss as punishment for engaging in protected organizing activity and may be ‘blackballed’ by employers.^{112 113} Companies often seek make it difficult for these workers to organize; the Society for Human Resource Management (SHRM)

has published memorandums that explain how firms may prevent workers from forming unions.¹¹⁴

Independent contractors do not have the right to organize or participate in collective bargaining, rights otherwise afforded to employees under the NLRA. The justification for exclusion was that independent contractors are able to work for multiple companies; however, many independent contractors work primarily for one company and that a company may hire multiple workers under virtually the same contract.^{115 116} Workers have begun to respond by using social media to organize public pressure campaigns that publicize poor working conditions and grievances against employers. For example, Uber drivers in New York circumvented company policy against unionization by forming “solidarity groups” that could not collectively bargain with Uber but helped them organize a class action lawsuit that eventually won them some workplace rights.¹¹⁷ Contractors specializing in a trade might potentially use collective bargaining to gain access to worker benefits and workplace rights. For example, the International Alliance of Theatrical Stage Employees (IATSE) engages “embedded contract bargaining” whereby a local IATSE chapter establishes agreements with an association of theaters that include union recognition, improved standards of workplace health and safety, employer contributions to pension and health funds, and minimum pay-per-day worked. However, such agreements do not guarantee job security and do not contain any arbitration provisions; the arrangement assumes that workers will be hired as on-demand labor, working job to job and sometimes more than one job at a time.¹¹⁸ In December of 2016, Seattle’s City Council passed an ordinance allowing Uber and Lyft drivers the right to collectively bargain for improved workplace safety and higher pay.¹¹⁹ However, the ordinance was challenged in court by industry lobbyists and was stayed.¹²⁰

Professional Associations

Collective actions are not the only method of worker organization worker groups use to lobby for their rights. On-demand workers have also used other means to organize without the financial costs and legal challenges of traditional union organizing.¹²¹ The rise of social media has contributed to this new kind of organizing. As explained by Annalisa Nash Fernandez of qz.com:

“Any Facebook user can create a group on any theme and serve as its administrator, and membership usually must be approved before another user can join and view the group posts. Facebook group administrators hold the power to delete posts that do not comply with the group guidelines, and block members...Facebook groups can replicate the efforts of unions with private posts that are only visible to group members, far from the intrusive eyes of company management.”¹²²

Workers at Instacart formed a Facebook group to fight for better pay and participate in a “no-delivery day” protest. Additionally, workers can use ‘hashtags’ on Facebook and Twitter to unite behind worker causes; hourly employees at fast-fashion retail chain Zara advocating for better pay and advancement opportunities by tagging their social media posts with #ChangeZara.¹²³

On-demand workers may also organize into non-union professional groups to lobby for benefits that would otherwise be offered by employers to employees. The Freelancers Union, for example, is a non-profit organization that provides advocacy support and used to provide health insurance to its members through its for-profit Freelancers Insurance Company.^{xviii} It also offers a sort of community for freelancers to discuss issues they’re facing in the workforce and share their concerns. Though the organization is credited with improving the visibility of freelance workers and their concerns, the organization is not a union in the traditional sense. While workers must engage in at least 20 hours of work per week in one of seven industries in order to be a member, the Freelancers Union cannot engage in collective bargaining with regard to wages or working conditions because it is not certified as a union under federal labor law.¹²⁴

The Independent Drivers Guild (IDG) is nonprofit labor organization that represents over 65,000 drivers in New York City and whose mission is to have a “seat at the table...[and negotiate] protections and essential benefits while building worker power.”¹²⁵ IDG organization is the first and only to successfully fight for black car drivers’ right to organize. Similarly, the Taxi Workers Alliance is a volunteer organization that advocates on behalf of yellow cab drivers in New York City.

^{xviii} This model was declared illegal under the ACA.

Literature Conclusion

Our review found that a small but rapidly growing and important share of the American workforce is engaged in alternative work arrangements where the nature of the work and system of labor themselves can be characterized as “on-demand.” This on-demand economy includes traditional independent contractors and a burgeoning contingent workforce (i.e., people who are employed on a task-basis) and part-time W-2 workers who may be subjected to algorithmic “just-in-time” scheduling. Many of these workers face low and inconsistent earnings, and their access to employer-sponsored benefits is minimal to non-existent. While the structural causes of benefit inaccessibility and unaffordability are distinct, the impact is the same: much of this workforce cannot rely on the legally required assortment of protections and benefits that support personal infrastructure of full-time workers in traditional employer-employee arrangements.

Many on-demand workers are not covered under existing government regulations that protect the wellness of employees and prevent workplace discrimination across industries. Moreover, models of building personal support systems for on-demand workers do exist but may be hard to reconfigure for the benefit of the burgeoning OPE workforce. This situation presents a heavy lift for state and municipal governments seeking to responsibly address the challenges and pitfalls of the on-demand economy. To supplement this review, we have begun to document a set of practices and policy actions, some of which were discussed in the literature review, that can help address the challenges outlined above and pave a path forward.

Policies and Practices to Assist Workers in the On-Demand Economy

Overview

Policy makers at the state and local levels are developing strategies to address challenges encountered by on-demand workers. This section summarizes some of the more promising policies and practices to better inform NJ policymakers as they consider laws and actions to support the on-demand workforce. We include ways in which the NJ DOLWD might strengthen the application of current labor laws through additional regulation and stronger enforcement as well as actions that would fall within the purview of the legislature and governor. To the extent that our suggestions are based on existing models that have already been implemented, we also discuss available lessons and challenges from their implementation.

Because the focus in this section is on the practices for which there is the most promising research, it does not mirror the organization of the literature review. Instead we have compiled the following research about actions taken in other jurisdictions to protect on-demand workers. We then outline nine recommendations, in an order that we believe presents them from the least to most dramatic changes they would require to existing law.

A Note on Challenges Related to Employee Classification

Even though we focused on an inclusive group of on-demand workers that spans the W-2 and 1099 workforce, issues related to worker classification are difficult to overcome and at times constrain the efficacy of the options we present in addressing workers' challenges and hardship. Additionally, while there are contractors who determine their own arrangements for services and payment with multiples clients, many on-demand workers participating in the OPE heavily rely on the platform company to determine tasks, set prices, and perform "employee" evaluation. With concern to the latter subset of workers, courts in California, New York, the United Kingdom, and the European Union have determined that there is "sufficient supervision, direction and control over key aspects of the services rendered" so as to constitute a traditional employer-employee relationship for the on-demand worker.¹²⁶ These rulings mean that platform employers may have to comply with regulations concerning worker wages, payroll taxes and worker benefits.¹²⁷ A reclassification of online-platform workers as employees would affect

many - but not all - of the reforms we discuss in this report. However, given the limited scope of this project, we do not delve into potential classification reforms and their implications.

Many reforms we discuss that would extend benefits to independent contractors are often theorized and discussed along with some element of protection of employers who participate from misclassification lawsuits. This is obviously a serious trade-off to consider. Because the report avoids making recommendations around classification issues, we do not discuss these indemnity clauses in detail. However, it is a dynamic to be aware of in the future.

Measuring the On-Demand Workforce

Much of the research describing the on-demand economy has been undertaken by corporations;^{xix} however, the public sector both has the data and the most pressing need for understanding the exact nature of this phenomenon in New Jersey. While action is imperative regardless of the workforce's exact size, this section introduces several approaches, such as utilizing administrative data and tax policy, to measure the on-demand economy in New Jersey.

Researchers from leading think tanks and banking institutions have used administrative resources, like tax records and privately-held data, to measure the size and growth of the on-demand economy. States have similarly begun utilizing existing data sources in new initiatives to produce regional and local estimates. For example, in California, the California Policy Lab (an initiative co-formed by the University of California, Berkeley and University of California, Los Angeles) has established a partnership with the Franchise Tax Board to provide data-driven insights into the prevalence, trends, and quantity of the on-demand workforce.¹²⁸ The partnership is currently conducting a data project that reviews state and federal tax records since 2012. The project draws on tax returns as well as 1099 and W-2 forms filed by corporations to understand the size and earnings of the online platform workforce and the proportion of 1099 and W-2 earnings for the average worker. The goal of this data project is to understand the size of the OPE and determine to what degree online-platform income is supplementary.¹²⁹

^{xix} For example, “The Online Platform Economy: Who Earns the Most?” 2016. JPMorgan Chase Institute. and Intuit. “Dispatches from the New Economy: The On-Demand Workforce,” February 2017.

Paid Sick and Family Leave

The states that moved to ensure that on-demand workers have access to paid family and sick leave, including California and Washington, largely accomplished this by circumventing the

Figure 2

Earnings (based on highest earning quarter in the last 12 months)	Weekly Benefit Amount	Estimated Annual Premium
\$928.99 or lower	\$50	\$190.63
\$2,507.14	\$135.00	\$128.62
\$6,283.33	\$290.00	\$322.33
\$8,753.33	\$404.00	\$449.05
\$12,501.67	\$577.00	\$641.34
\$15,015.01	\$694.00	\$770.27
\$27,105.01 or higher	\$1,252.00	\$1,390.49
<p>*Selective examples taken from California's Self-Employed - Elective Coverage Premiums. Earnings based on highest potential in range, premium calculated assuming income for all four quarters is equal. Premiums are 5.13% of income and cover both disability and paid leave insurance. For the full list of ranges, see https://www.edd.ca.gov/Disability/Self-Employed_Benefit_Amounts.htm</p>		

conversation of employee classification entirely.

Instead they allow independent workers to opt-in to the programs without requiring employer participation. In California, workers have had the ability to opt-in to its disability insurance and paid leave programs if they pay the entire benefit premium on their own. Benefit rates are based on income and are the same for both programs. The minimum weekly benefit is \$50 and the maximum is \$1,252.^{xx}

Other states have recently enacted paid leave laws that are open to on-demand workers in the same way as California's. New York's program was the first to officially begin in 2018, while Washington state and Washington D.C. have programs set to begin in 2019 and 2020, respectively. According to an official in charge of implementing Washington's paid leave program,

allowing on-demand workers to opt-in has not required much additional effort or consideration in terms of implementation. However, the team in charge of communications and outreach has not planned extensively to market the program to on-demand workers and is primarily focused on educating traditional employees and employers. Low outreach will likely affect the number of on-demand workers who ultimately enroll and subsequently collect benefits from the program.

Retirement Benefits

As addressed earlier, the inability of on-demand workers to access traditional

^{xx} For the full list of ranges, see https://www.edd.ca.gov/Disability/Self-Employed_Benefit_Amounts.htm

employer-sponsored 401(k) plans threatens to destabilize workers long after they have moved on from their current work arrangements. One of the most common recommendations among academics is the creation of Multiple Employer Plans (MEPs) at the federal level which would allow multiple businesses to join shared retirement savings programs.¹³⁰ These plans allow on-demand workers to switch from job-to-job among businesses in their MEP without any interruption to their retirement account. Employers in the MEP simply make contributions in proportion to the amount of time employees worked for their company.

Currently, private MEP plans cannot be created at the state level due to regulations in place related to the Employment Retirement Income Savings Act of 1974 (ERISA). ERISA created strong mandates for uniformity in retirement savings laws at the federal level, and any state-level MEP would be preempted by ERISA rules. One expert we interviewed advised that even if MEPs were possible at the state-level it is questionable whether or not these plans would actually help the on-demand population.

In general, many of the proposed solutions to ensure on-demand workers have access to retirement savings may be untenable at the state level due to concerns surrounding their legality in relation to federal statutes. One state-level solution that has recently gained momentum are secure choice programs. Secure choice programs are automatic-IRA savings accounts operated by the state.¹³¹ In such a program, the state takes a portion of the employee's pay as a deduction from their paycheck and automatically invests it in an independent retirement savings account.^{xxi}

State Anti-Discrimination Protections

Currently, 1099 workers are not covered by either federal or state anti-discrimination laws, and federal action to extend these protections to independent contractors has been slow. In 2018, Congresswoman Eleanor Holmes Norton introduced HR 4972, the Protecting Independent Contractors from Discrimination Act, which would have extended anti-discrimination protections under Title VII of the Civil Rights Act, as well as the federal Americans with Disabilities Act and the Fair Labor Standards Act, among others.¹³² The bill stalled in

^{xxi} Similar programs currently exist in California (California Secure Choice Retirement Savings Trust Act); Connecticut (Connecticut Retirement Security Program Act); Illinois (Illinois Secure Choice Savings Program Act); Maryland (Maryland Small Business Retirement Savings Program Act); and Oregon (Oregon Retirement Savings Board Act).

Committee, likely due to both its expansive scope and the political climate, and has yet to be reintroduced.

However, federal inaction does not preclude state and local action to protect independent contractors under state anti-discrimination law. In fact, both Washington¹³³ and Pennsylvania¹³⁴ extend anti-discrimination protections to independent contractors alongside traditional employees. New York City recently considered

Figure 3

<i>43 P.S. § 955. Unlawful discriminatory practices</i>
It shall be an unlawful discriminatory practice, unless based upon a bona fide occupational qualification, or in the case of a fraternal corporation or association, unless based upon membership in such association or corporation, or except where based upon applicable security regulations established by the United States or the Commonwealth of Pennsylvania:
(a) For any employer because of the race, color, religious creed, ancestry, age, sex, national origin or non-job related handicap or disability or the use of a guide or support animal because of the blindness, deafness or physical handicap of any individual or independent contractor , to refuse to hire or employ or contract with, or to bar or to discharge from employment such individual or independent contractor, or to otherwise discriminate against such individual or independent contractor with respect to compensation, hire, tenure, terms, conditions or privileges of employment or contract, if the individual or independent contractor is the best able and most competent to perform the services required.

legislation to do so as well at the urging of the Freelancers Union, but the proposal did not move out of committee.¹³⁵ Notably, these approaches do not depend on reclassifying independent contractors; rather they explicitly include independent contractors in these existing anti-discrimination protections.

The New Jersey Law Against Discrimination (NJLAD) applies only to employees, excluding independent contractors. However, previous legal cases have established that merely being labeled an “independent contractor” does not preclude a person’s right to make a claim under the law. If someone operating as an independent contractor makes a claim under NJLAD, the courts must evaluate the worker’s standing under the definition of an employee created by the NJ Superior Court in *Pukowski v. Caruso*. While this precedent extends protection to misclassified independent contractors, it does not provide for 1099 workers. In recent years, there has also been attention to 10:5.12 (l)¹³⁶, a specific section of the NJLAD, which includes anti-discrimination language around contracting that legal advocates argue might be used by independent contractors (see Figure 4).

Addressing On-Demand Labor Trends in the W-2 Workforce

On-demand labor expectations have also made their way into some parts of the traditional W-2 workforce. While a salaried employee who regularly works 9am to 5pm may never experience these pressures, hourly employees in some low-wage sectors are being increasingly treated like on-demand labor. They seldom receive the standard two-weeks' notice of their schedules; instead algorithmic scheduling technologies leave them with short-notice shifts and cancellations. This flexibility may enable employers to prioritize efficiency and reduce unnecessary labor costs, but it does so at a cost to employees.

Legislative initiatives have been the most common way to address the issues of irregular scheduling in recent years, and such initiatives have come to be known as “Fair Workweek” proposals. The first Fair Workweek law passed in November 2014 in San Francisco as part of the Formula Retail Employees Ordinance, also called by advocates the “Retail Workers Bill of Rights.” While the legislation passed the San Francisco Board of Supervisors unanimously, the original idea came from and was championed by local labor and women’s groups. At the time of its passage, the legislation was hailed as the first of its kind. In 2016, more municipalities in California passed similar legislation, as did Seattle and Washington, DC, followed by New York City in 2017 and Philadelphia in 2018. Currently, only one state, Oregon, has a Fair Workweek law on the books, though many others have considered legislation. Generally, these proposals have applied to retail and fast food employers over a certain size, though more recent laws have included hospitality workers as well. While each law differs in some specifics, including definitions and industry-targeting, they generally reflect four main principles, explained in Figures 6.1 and 6.2. Implementation of these provisions is generally complaint-based with anti-retaliation protections built in for workers who report violations of the policy and fines for employers found out of compliance. An Oregon fiscal analysis provides the best estimate for the

Figure 4

10:5-12 Unlawful employment practices, discrimination.
11. It shall be an unlawful employment practice, or, as the case may be, an unlawful discrimination:
1. For any person to refuse to buy from, sell to, lease from or to, license, contract with, or trade with, provide goods, services or information to, or otherwise do business with any other person on the basis of the race, creed, color, national origin, ancestry, age, pregnancy or breastfeeding, sex, gender identity or expression, affectional or sexual orientation, marital status, civil union status, domestic partnership status, liability for service in the Armed Forces of the United States, disability, nationality, or source of lawful income used for rental or mortgage payments of such other person or of such other person's spouse, partners, members, stockholders, directors, officers, managers, superintendents, agents, employees, business associates, suppliers, or customers. This subsection shall not prohibit refusals or other actions (1) pertaining to employee-employer collective bargaining, labor disputes, or unfair labor practices, or (2) made or taken in connection with a protest of unlawful discrimination or unlawful employment practices.

cost of a statewide measure. The OR Legislative Fiscal Office estimated that the cost of implementation and enforcement at \$413,787 for 2017-2019 and \$313,578 for 2019-2021.

Figure 5.1

<p>1. Predictability pay:</p> <ul style="list-style-type: none"> ● Requires that employees to receive their schedules a set amount of time in advance, usually two weeks. ● If an employer changes the schedule after a certain deadline, employees receive additional predictability pay to account for employee-borne costs of short-notice shifts (like last-minute transportation or child care) ● Generally, includes exceptions for voluntary employee-initiated changes and some other circumstances (like weather-related emergencies) ● Varies in the amount of predictability pay and the situations in which predictability pay is required.^{xxii} 	<p>2. Scheduling protections:</p> <ul style="list-style-type: none"> ● Protects employees from some of the most egregious scheduling tactics. ● Most commonly include a prohibition of scheduling employees for a “clopening” shift, in which an employee is scheduled to close one night and open the next morning ● May include a “right to rest,” which regulates the minimum number of hours between the end of one shift and the start of the next ● Other approaches avoid prohibitions and create an employee right to refuse such shifts and a right to additional compensation if they accept them.^{xxiii}
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However, the limited implementation research on these reforms suggests that many workers are not aware of their new rights. In San Francisco, for example, two years into implementation, 82 percent of workers surveyed by the Center for Law and Social Policy (CLASP) were not familiar with the new law, which severely limits the effectiveness of complaint-based enforcement.¹³⁷ The same researchers concluded that implementation could be improved with increased worker outreach, both through the labor department and partnerships with community organizations. They also recommended greater labor department staffing to better assist employers in implementing the new requirements and to allow for proactive enforcement.¹³⁸ Another approach to implementation could be reporting-based, requiring employers to demonstrate compliance to the enforcement agency, though processing reports

^{xxii} For example, in Seattle and Oregon, an employee is entitled to half of the pay they would have received if their shift is cancelled or reduced and an hour’s worth of additional pay if their employer changes the schedule after it has been posted. In San Francisco, the amount of predictability pay varies by notice-time: with 1 to 7 days’ notice, an employee must receive one hour’s wages, whereas less than 24 hours’ notice requires 2 hours of predictability.

^{xxiii} An employer might be incentivized to underestimate labor needs and set only a minimal schedule, knowing they can rely on a pool of part-time employees who are desperate for extra hours and will agree to “voluntary” changes.

Figure 5.2

<p>3. Access to hours:</p> <ul style="list-style-type: none"> • Requires employers to offer additional hours to current part-time employees before hiring new workers to reduce involuntary part-time employment • Can be pursued on their own; however, are also an essential complement predictability regulation. Without addressing involuntary part-time work, employers can exploit loopholes in predictability regulation.^{xxiv} 	<p>4. Right to request:</p> <ul style="list-style-type: none"> • Allows an employee to request additional hours, fewer hours, or scheduling changes from their employer • Varies the most in how it is constructed. Some proposals preserve the right to request without retaliation but make no requirement on the employer to accept the request. Others require employer approval under certain circumstances.^{xxv}
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and auditing compliance would still require increased staffing.

While public awareness may be low and enforcement could be improved, there is some early evidence that Fair Workweek reforms have made a real impact on workers in San Francisco: approximately 70% of workers receive their schedules at least two weeks in advance and 93% reported that the advance notice had “helped them better plan their personal lives.”¹³⁹ However, an evaluation prepared for the California Retail Association offered a different view, highlighting employee reports of decreased scheduling flexibility and employer complaints about unanticipated staffing needs that they could not fill under the new rules.¹⁴⁰

Research on implementation and impact outside of San Francisco is limited. Most interviewees we spoke to said that researchers are only beginning to study the impact of scheduling reforms elsewhere. Several respondents cited Seattle, which included a clause for implementation study in its original legislation. The first report is due out in 2019, covering the initial eight months of implementation. A subsequent report will document the first two years. Anecdotally, researchers and practitioners alike commented that so far it seems the biggest

^{xxiv} In San Francisco and Seattle, for example, the employer is merely required to respond to the request in writing (San Francisco Police Code Article 3300G; Seattle Municipal Code Title 14 §22). However, in New York City, each year, employers must grant up to two temporary schedule changes requested by an employee for caregiving or personal events (New York City Administrative Code Chapter 12 § 20-1261-1263: Temporary Changes to Work Schedules for Personal Events and Protections from Retaliation for Making Schedule Change Requests).

^{xxv} In San Francisco and Seattle, for example, the employer is merely required to respond to the request in writing (San Francisco Police Code Article 3300G; Seattle Municipal Code Title 14 §22). However, in New York City, each year, employers must grant up to two temporary schedule changes requested by an employee for caregiving or personal events (New York City Administrative Code Chapter 12 § 20-1261-1263: Temporary Changes to Work Schedules for Personal Events and Protections from Retaliation for Making Schedule Change Requests).

challenge in implementation has been informing laborers of their new rights, which echoes the results from CLASP's study of San Francisco.¹⁴¹ Several other academics are currently studying the implementation process and worker impacts in Seattle and Emeryville, CA.¹⁴²

While it may be prudent to wait until more research is available on these initiatives, recent passages in New York City and Philadelphia, along with slow progress in many state legislatures, present an important window of opportunity for New Jersey to be at the forefront of scheduling reforms on the state-level. There are three main approaches that New Jersey could consider in pursuing scheduling reform, which will be discussed later in the report. Most would require both legislative and executive action. They include strengthening current scheduling protections, pursuing some stand-alone scheduling reforms, and adopting some form of a Fair Workweek proposal.

Workers' Compensation

Worker safety is a key area of concern as the on-demand economy continues to grow; on-demand workers often operate in dangerous environments and they have no safety net in the event of work-related injury.¹⁴³ According to a study conducted by the National Institutes of Health, "the taxi and limousine industry [faces] a disproportionately dangerous working environment" and recommends "safety measures [be] implemented uniformly by cities, companies, and drivers to mitigate disparities."¹⁴⁴

Establishing workers' compensation benefits for independent contractors is one strategy to provide for workers' safety. There are some small-scale non-governmental models for coverage, like the New York Black Car Fund, which is supported through 2.5% passenger surcharge that does not constitute a tax and makes customers responsible workers' safety net.¹⁴⁵ This program is controlled by a board that includes industry members.¹⁴⁶ According to the National Employment Law Project (NELP), this means that "workers are covered by workers' compensation even if the companies they work for describe their drivers as independent contractors."¹⁴⁷ However, this model of insurance is not nearly as comprehensive as standard workers' compensation. For example, the program does not cover injuries or fatalities resulting from passenger violence even though drivers are disproportionately at risk of such harm. A potential governmental solution is to amend state-run workers' compensation programs to include more people. State or local governments could potentially pass legislation that requires

all employers who hire on-demand workers to establish a fund dedicated to workers' compensation, regardless of their workers' classification.

Collective Bargaining and Unionization

Unionization and collective bargaining have long helped guarantee workers' rights and benefits, but independent contractors face major barriers to organization and unionization. The National Labor Relations Act (NLRA), which regulates and protects workers' rights to organize, explicitly excludes independent contractors. Allowing contractors to collectively bargain or form unions may be one of the best ways to ensure on-demand workers' workplace rights and benefits access. Workers themselves have begun to respond by using social media to organize public pressure campaigns that publicize poor working conditions and grievances against employers. For example, Uber drivers in New York circumvented company policy against unionization by forming "solidarity groups" that could not collectively bargain with Uber but helped them organize a class action lawsuit that eventually won drivers some workplace rights.¹⁴⁸

Improving independent workers' ability to organize can help improve workplace safety. A California bill would allow certain OPE workers to organize and bargain, but this bill has stalled in the state legislature. The city of Seattle, WA adopted in 2015 a "first-of-its-kind" ordinance to give collective-bargaining rights to independent contractors. The city argued that rideshare companies often run promotions campaigns that affect the wages and health of their independent contractors, and workers should be allowed to bargain for improved conditions.¹⁴⁹ The city is currently considering a municipal ordinance that would allow rideshare drivers to organize and bargain for "matters of mutual interest" but not wages; this bill is an amended version of the previous law which was stayed through a court challenge. Both the California bill and the Seattle ordinance raised issues of NLRA preemption and antitrust violations. A federal appeals court ruled that the municipal ordinance allowing contractors to collectively bargain was, in fact, not preempted by federal law; because the latter explicitly excluded independent contractors from consideration, the matter is within the purview of the city council. The federal court, however, remanded the case to the lower court to address the antitrust concerns.¹⁵⁰

Recommendations/Next Steps

1. *Use existing data to measure the on-demand workforce*

In the State of New Jersey, the Division of Taxation under the State Department of Treasury administers relevant tax records and could initiate data-sharing projects with DOLWD or educational and research institutions to help understand the size and characteristics of the on-demand workforce in New Jersey.

The state can also build a more complete understanding of the self-employment within its jurisdiction by retrieving and comparing information from national surveys and tax databases. The monthly Current Population Survey (CPS) and its Annual Social and Economic (ASEC) supplement¹⁵¹ may help distinguish workers holding self-employment status and their earnings during the reference week, while the Internal Revenue Service's Information Return Master File and Individual Return Transaction File incorporates information on self-employment income and W-2 earnings among on-demand workers.¹⁵² While data are collected on a national basis, it is possible to extract and analyze a representative sample from New Jersey and produce a local and regional estimate of the state's on-demand economy.

States often face challenges in collecting taxes from on-demand workers engaged in internet commerce. OPE workers often underreport their revenue by over-reporting expenses, reducing self-employment tax revenue and leaving OPE workers in non-compliance with the IRS. To enhance compliance and better quantify the OPE, New Jersey could also collaborate with the IRS, using information from business owners regarding numbers and types of employees and 1099 workers in each company to gather data on the on-demand workforce in major online-platform mediated industries such as transportation, logistics, and home services.

Another alternative to quantify the OPE is by altering the state income tax threshold for contingent workers compensated by third party settlement organizations (TPSOs). The IRS sets the minimum reporting threshold for payments settled through a third-party network to be \$20,000 or above and more than 200 transactions; there are currently no limits for card payment transaction. However, states could establish stricter reporting requirements for TPSO payments. In January 2017, the Vermont Department of Taxes changed the state 1099-K reporting law that, under 32 V.S.A. § 5862d,¹⁵³ TPSOs are obliged to report all payments that exceed \$600 total per person. Subsequently in November 2017, the State of Massachusetts also issued the same TPSO

payment reporting requirements as Vermont.¹⁵⁴ In the State of New Jersey, taxpayers currently fulfill the same set of reporting requirements as with the IRS and may also adapt to the changes worked in other states. Nevertheless, companies providing necessary guidance and training in helping workers file taxes would also contribute to accurate counting of workers in the on-demand economy.

2. Open New Jersey's paid leave programs to on-demand workers

New Jersey has previously been a leading state in ensuring that workers have access to paid time off to care for loved ones. In 2009, New Jersey became one of the first states in the country to offer universal paid family leave, allowing employees to take paid time off to care for their sick relatives or newborn children. In the past year, New Jersey has twice expanded its paid family and sick leave program. On February 2, 2019, Governor Murphy signed into law a bill that will increase the amount of an employee's income available to them during leave and will open eligibility to more caregivers in diverse situations. This expansion of worker benefits comes as a follow-up to another change signed into law on May 2, 2018, that broadened the state's earned sick leave law; the state now enables both full-time and part-time employees to accrue paid sick days, earning one hour of sick leave for every 30 hours worked.

While these developments are advantageous for traditional employees, both laws currently exclude most on-demand workers. Like most worker benefit programs in the state, paid family and sick leave extends to employees in New Jersey as defined under the "ABC test" (see Figure 6). This statutory test, originally created for determining workers' unemployment benefit eligibility, is the primary way of determining employment designation for state employees as a result of *Hargrove v. Sleepy's, LLC*, 220 N.J. 289.^{xxvi}

Figure 6.

The ABC test presumes all workers to be "employees" unless the following conditions are met:

- (A) Such individual has been and will continue to be free from control or direction over the performance of such service, both under his contract of service and in fact; and
- (B) Such service is either outside the usual course of the business for which such service is performed, or that such service is performed outside of all the places of business of the enterprise for which such service is performed; and
- (C) Such individual is customarily engaged in an independently established trade, occupation, profession or business.

wever, in New York City, each year, employers must grant up to two temporary schedule changes requested by an employee for caregiving or personal events (New York City Administrative Code

New Jersey could extend paid sick and family leave to on-demand workers by allowing on-demand workers to opt-in for coverage without employer participation. Without more information about the number of on-demand workers in New Jersey and how many would be interested in enrolling in this program, our team cannot estimate the fiscal implications of this solution. However, doing so would likely increase the estimated \$1.7 million in administrative costs associated with the two expansions due to a higher claims load, infrastructure to accept on-demand applications, and potential outreach to this portion of the workforce.

Revenue from premiums, currently estimated at approximately \$321.4 million in FY2022 for paid leave expansion, would be expected to increase in proportion to the number of on-demand workers who choose to participate. Expenditures for the program related to benefit claims would also be expected to increase by an indeterminate amount from the current FY2020 projection of \$321.4 million. The Office of Legislative Services (OLS) fiscal note for expanded earned sick leave did not include estimates for increased revenue or expenditures.

3. Open New Jersey's Secure Choice Retirement Program to on-demand workers

On March 28, 2019, Governor Murphy signed another law which could be expanded to better protect on-demand workers, New Jersey's Secure Choice Savings Program Act. The law allows employees without an employer-managed plan to enroll in the program and have 3% of their income automatically deposited in a retirement savings account by way of a standard payroll deduction. Employees have the option to contribute different amounts of their income, but the plan will default to a 3% deduction if no other option is chosen.

It is unclear based on the bill's language whether or not on-demand workers will be allowed to enroll in this program; assuming that the bill uses the ABC test as it is currently administered to determine who is an employee, independent contractors will continue to be excluded. Just as with the state's recently expanded paid family and earned sick leave laws, independent contractors would benefit from changes that allow them to participate in this program without employer participation. It is unclear at this time, because the rules have not yet been published regarding this program, whether this could be done through regulation or would require supplemental legislation.

If on-demand workers are allowed to participate, now or in the future, one interviewee suggested following the lead of states like Oregon and California, where the saver's first \$1,000

is put into a special liquid account which can be quickly accessed in an emergency. This not only helps the worker save for retirement, but, given that this group is especially prone to job loss and low incomes, provides a small nest egg for emergencies as well. By making New Jersey's Secure Choice program open to on-demand workers and easy to enroll in, the state would be exercising the best option available to it without relying on changes at the federal level.

The increase in cost to expand the program to on-demand workers is indeterminate currently. OLS produced a fiscal note for the bill before it was signed by the governor using a comparable program in Illinois as a proxy. In that note, OLS determined that the initial startup cost of the program was approximately \$1 million, plus \$200 per employee who enrolled - which in Illinois equaled 12,000. Using the OLS estimate, New Jersey would anticipate an additional \$200 in startup costs per on-demand worker who chose to participate in the program. There is currently no estimate on how many on-demand workers would enroll, and that number is dependent on a variety of factors, including participation criteria and marketing.

4. Amend NJLAD to include independent contractors

The administration could request the legislature to amend the NJLAD's exclusion of independent contractors as it pertains to anti-discrimination protections. This fix may have limited impact though: discrimination is notoriously difficult to prove, and enforcement is largely complaint-based. However, it would provide independent contractors who experience discrimination on the job with civil recourse that they do not currently have.

5. Increase reporting pay requirement for part-time workers

Currently, employees in New Jersey are entitled to an hour's worth of pay if they show up for a scheduled shift and are sent home. This clause is an example of "show-up" or "reporting" pay, which was added to the NJ Administrative Code in 1995. In those days, most employees had to receive hard-copies of their schedule in-person: showing up to work may have been the only way to learn of a schedule change. This protection could be updated to the new standard of 4 hours pay, both to account for the rise of just-in-time scheduling and short-notice changes, as well as the greater ability of management to proactively communicate schedule-changes with employees through cell phones and email.

6. Pursue stand-alone scheduling reforms

There are some elements of the full Fair Workweek proposals that could be pursued as stand-alone reforms. Many states have employee right to request laws without the additional protections provided for in the more comprehensive Fair Workweek proposals. Initial reform could also focus on some of the other provisions, like “clopening”^{xxvii} protections and the right to rest. While the practitioners we spoke with generally believed that the elements of the Fair Workweek proposal are most meaningfully pursued as a package, individual reforms may be more feasible and could act as building blocks to more comprehensive reforms. Additionally, passing one or two reforms as incremental measures might ease the complex implementation process of the new rules.

7. Adapt the Fair Work Week proposal

The final, and most ambitious option as it relates to protecting workers from just-in-time scheduling, would be to pursue a comprehensive Fair Workweek proposal in the state legislature. This would require significant executive leadership, along with legislative agreement. Our interviewees expressed that Fair Workweek laws have had the most success at the local level because that is where workers are often effectively organized and powerful. Only one state - Oregon - has successfully passed statewide scheduling reforms.

In both the current and previous legislative sessions, Senate Majority Leader Loretta Weinberg introduced the New Jersey Schedules That Work Act (S109) in January 2018.¹⁵⁵ The proposed legislation includes an employee right to request schedule changes; additional reporting, on-call, split-shift, and predictability pay; and 14-days advanced for new schedules. The legislation applies to fast-food, retail, and cleaning employees of businesses greater than 15 employees. No action has been taken on the bill.

While the proposed legislation as written is an important first step, there are many ways it could be strengthened, including adding an access to hours clause for reasons discussed in Figure 5.2. Additionally, New Jersey could be an innovator by broadening its scope to include both hospitality employees and new populations of workers. When asked, both researchers and practitioners discussed two additional populations of workers that they think should be included

^{xxvii} See Figure 5.1

in the future: warehouse employees and health care workers, who by 2024 the NJ DOLWD estimates will be a labor force of over 1.2 million.¹⁵⁶ Incorporating warehouse employees is probably the more feasible addition, as the scheduling dynamics in the healthcare industry differ greatly from other included sectors.

Figure 7

S109: New Jersey Schedules that Work Act	
<u>Industries Regulated</u>	<u>Provisions Included</u>
✓ Retail	✓ Predictability pay
✓ Fast food	✓ Advanced notice of schedule
✓ Cleaning	✓ Right to request
✗ Hospitality	✗ Scheduling Protections
✗ Warehouse	✓ Split-shift pay
✗ Healthcare	✗ Access to hours

New Jersey has an opportunity to be the first East Coast state to pass a Fair Workweek proposal. Regardless of whether the state decides to pursue a full Fair Workweek proposal, scheduling reform should be a part of the discussion about the on-demand economy: on-demand labor in hourly work is decreasing job quality in these sectors, and the effects it has on worker financial security is one of the reasons that low-wage workers are forced to supplement their income with online-platform work.

8. Establish a portable benefits system for on-demand workers

New Jersey has an option to establish a statewide portable benefits program that is funded through service surcharges, employer contributions based on an hour bank system, and workers’ own deductions. A current bill (S-67) would create portable benefits system for workers who “provide services to consumers”: employers would pay the lesser of 25% of transaction or \$6/hour of work to “qualified benefits providers” (QBP) that provide benefits to workers.¹⁵⁷ Portable benefits programs can be administered by a non-profit whose trustees act in the benefit of workers, similar to the multiemployer plan established by the International Union of Operating Engineers (IUOE). A nonprofit may also act as the “employer of record,” as is the case with the NYC Black Car Fund, for workers who would otherwise not be eligible for workers compensation.¹⁵⁸ The Black Car Fund and several portable benefits programs that are being piloted in the private sector are funded solely through fee-for-service surcharges. While the state may pass a law specifically requiring online platforms to apply a surcharge that raises funds dedicated to a benefits fund, this cost is borne by consumers and such a law effectively socializes

employers' responsibility to their workers. There is a case to be made for employers' own obligation to pay into a worker-based benefits fund, similar to multiemployer plans negotiated by trade unions.

The state can create and administer a nonprofit QBP which acts as the employer of record for on-demand workers and manages a fund that enables group purchase of health insurance, 401(k) planning, extends workers compensation eligibility, and manages payroll deductions for unemployment insurance. Establishing the nonprofit as the employer of record can potentially help the state to circumvent the Taft-Hartley Act,¹⁵⁹ which governs multiemployer plans. The nonprofit would manage accounts linked to individual workers whose own labor brings in contributions to the benefits accounts; this system would both ensure the portability of benefits and also create a system of 'earned' benefits, all while reaching workers engaged in new and nontraditional forms of work. An appealing aspect of such a system is that it creates a situation of continuous benefits coverage for workers who are engaged in industries that are characterized by wildly fluctuating labor hours and otherwise lack adequate support systems, a circumstance resultant of their worker classification. A statewide benefits program would help buttress the financial situation of workers who otherwise are not guaranteed minimum wages and experience financial instability, and the program can be very flexible with regard to the benefits for which workers draw from their account.

9. Work with the legislature to establish collective organizing/bargaining rights

New Jersey does not have any current or pending legislation concerning non-employee organizing or bargaining but may consider legislation that enables independent contractors to organize and collectively bargain while circumventing preemption and antitrust pitfall. Creating a model for on-demand workers to participate in collective bargaining may prove to be an essential component of a concerted effort to improve worker welfare and rights, but it will likely not be a straightforward process.

Conclusion

The on-demand economy is growing rapidly, and policy has been slow to adjust to the dynamic transformation of the workplace and the workforce. This report highlights the major challenges that workers are facing as a result of the shift away from a traditional, full-time

employment model toward on-demand labor. We also reported on some of the most promising approaches that states and municipalities across the nation are pursuing in response to these developments. At the request of NJ DOLWD, we have identified a broad scope of workers, including both independent contractors and W-2 employees, in our analysis. However, we acknowledge that there are major challenges in crafting policy that can be responsive to both subsets of the on-demand workforce and their varied experiences within the economy. Despite our inclusive approach, some of our recommendations will help just one subset of workers because of structural differences in employment status.

Many of the proposed solutions draw on precedent; the U.S. has a history of portable benefits and similar programs that serve as a case studies for amending existing state programs and introducing new programs. Other strategies have only recently been implemented or are pending implementation in various states and cities across the United States. However, all of the approaches we examined in the report have a common utility in buttressing workers who are underserved by lagging policy that does not sufficiently address their needs. As an editorial note, we commend the state for moving to protect on-demand workers; industry lobbyists, representing online platform firms in particular, have successfully lobbied several states to further withdraw their support of on-demand workers, whereas New Jersey is at the forefront of the state-level campaign support workers.

On-demand workers frequently bear the costs of the on-demand economy that would otherwise be borne by employers but have limited recourse for securing commensurate compensation or benefits; this alone is enough imperative for state action to support on-demand workers. Though we do recommend that the state develop a more accurate measure of the on-demand workforce, that these problems exist is enough to warrant a response, irrespective of the exact count of affected workers.

Key issues related to the on-demand economy are being deliberated and decided through court rulings and settlements; however, litigation on case-by-case basis consumes many valuable public and private resources. If the state were to issue more guidance or regulations concerning on-demand workers and the companies that hire them, the state could then minimize the need and frequency of litigation. Such a framework can improve the quality of work and quality of life for workers who currently bear the burdens on being on-demand.

Appendix I

Interviews were conducted with the following subject-area experts and practitioners:

- Deborah Berkowitz, National Employment Law Center
- John C. David, The Brookings Institution
- Rachel Deutsch, Center for Popular Democracy
- Lonnie Golden, Penn State University. Department of Economics
- Ara Goldstein, Executive Director, NYC Black Car Fund
- Wilma Liebman, former NLRB Chair, currently at Rutgers School of Management and Labor Relations
- Stephanie Luce, Joseph S. Murphy Institute, City University of New York
- Ian Eve Perry, Berkeley Center for Labor Research and Education
- Carla Reyes, Director of Paid Family and Medical Leave in Washington State
- Paul Secunda, Marquette University Law School
- Becki Smith, National Employment Law Center
- Sarah Thomason, Berkeley Center for Labor Research and Education
- Karla Walter, Center for American Progress

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