April 8, 2020

The Honorable Mitch McConnell, Senate Majority Leader
The Honorable Charles Schumer, Senate Democratic Leader
The Honorable Lamar Alexander, Chair, HELP Committee
The Honorable Patty Murray, Ranking Member, HELP Committee
The Honorable Charles Grassley, Chair, Finance Committee
The Honorable Ron Wyden, Ranking Member, Finance Committee
United States Senate
Washington, D.C. 20510

The Honorable Nancy Pelosi, Speaker of the House of Representatives
The Honorable Kevin McCarthy, House Republican Leader
The Honorable Robert "Bobby" Smith, Chair, Committee on Education and Labor
The Honorable Virginia Foxx, Ranking Member, Committee on Education and Labor
The Honorable Richard Neal, Chair, Committee on Ways and Means
The Honorable Kevin Brady, Ranking Member, Committee on Ways and Means
United States House of Representatives
Washington, D.C. 20515

Dear Members of Congress:

The United States faces an unprecedented economic crisis: tens of millions of workers are suddenly without their livelihood. This crisis is greatly exacerbated by two distinct but overlapping problems: the epidemic of employee misclassification[1], wherein workers who are really employees are treated as independent contractors, and the lack of social insurance for genuinely self-employed workers. As a result, both misclassified workers and true self-employed workers do not, in the usual course of things, receive an income when out of work. Under the circumstances, Congress rightly recognized in the CARES Act that unemployment insurance ("UI") is an appropriate vehicle to deliver crucial support to both these groups. It also decided that existing UI systems needed to be augmented, both by expanding the set of eligible beneficiaries (Pandemic Unemployment Assistance, or "PUA") and by dramatically increasing replacement rates (Pandemic Unemployment Compensation, or "PUC").[2]

However, the beginning of Section 2102 of the CARES Act (defining the PUA program) defines a "covered individual" as one "who… is not eligible for regular compensation or extended benefits under State or Federal law."[3] But the entire problem of employment misclassification is that many gig economy workers *are* so entitled, and yet (absent PUA and the CARES Act, and the crisis that gave rise to them)

[1] David Weil, "Understanding the Present and Future of Work in the Fissured Workplace Context," *RSF: The Russell Sage Foundation Journal of the Social Sciences* 5, no. 5 (December 1, 2019): 147–65, https://doi.org/10.7758/RSF.2019.5.5.08.
[2] John Pallasch, "Coronavirus Aid, Relief, and Economic Security (CARES) Act of 2020–Summary of Key Unemployment Insurance (UI) Provisions and Guidance Regarding Temporary Emergency State Staffing Flexibility," Employment & Training Administration (ETA), Department of Labor, April 2, 2020, https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=3390.
[3] H.R. 748, Section 2102(a)(3)(A)(i).

they would not receive their entitlement when out of work, due to the relevant firms' ongoing efforts to evade their obligations. As a result, this general language in the Act is poised to be applied to numerous currently misclassified workers, including workers for the major gig economy labor platforms, like Uber and Lyft. The fact that this will result in workers receiving benefits is a good thing. The fact that, as framed, it will validate the relevant firms' claim that their workers are outside labor and employment law is not. Congress should take steps to ensure that the federal government's implementation of the necessary expansion of the UI system included in the CARES Act does not have the perverse effect of exacerbating the worker precarity the Act is intended to address. As a condition of and an incentive for receiving PUA funds, the federal Department of Labor should require state unemployment insurance agencies to determine that platform workers who receive PUA benefits, including but not limited to ride-hailing platforms Uber and Lyft, be classified as employees going forward.

Workers for gig economy labor platforms, such as ride-hailing platforms Uber and Lyft, fall into this category of misclassified workers.[4] As a result, such firms have not been paying into state UI systems on behalf of the workers who power their businesses. This is also true for many other workers who are incorrectly classified as independent contractors by the firms that rely upon their labor, including for instance many truck drivers.[5] All such workers, whose livelihoods have virtually disappeared thanks to the current crisis, need and deserve support now. But providing that support must not entail validating the unlawful misclassification that created their current predicament.[6]

Worker misclassification contributes to the overall concentration of economic coordination rights that characterizes the economy today, wherein control over economic decisions is concentrated in ever-fewer hands. Coordination rights include the ability to coordinate and set prices and output levels, to engage in joint bargaining, or direct other economic actors' activity. These rights are allocated by law, granted in some instances and denied in others, and thus amount to a kind of state-supported privilege.[7] The trend in the concentration of such rights has converged through legal and policy developments in antitrust, labor, and corporate law, among others. By preventing workers from exercising limited countervailing coordination rights through collective bargaining or even through basic forms of collective action, misclassification further concentrates power and decision-making rights. The labor platform business model, in particular, may be considered the apotheosis of the concentration of economic coordination rights that has resulted from changes to both labor and antitrust law over the last few decades. Traditional firms, in exchange for their own coordination rights, bore responsibility for economic activity they undertook and, in exchange for the control they legally exercised over their

4 National Employment Law Project, "COVID-19 Unemployment Insurance Letter to Congress," March 10, 2020, https://www.nelp.org/publication/covid-19-unemployment-insurance-letter-congress/; "Open Letter to State Unemployment Insurance Agencies on Uber & Lyft Drivers," April 8, 2020.

5 See, e.g, Sam Appel and Carol Zabin, "Truck Driver Misclassification: Climate, Labor, and Environmental Justice Impacts," University of California-Berkeley Labor Center Report, http://laborcenter.berkeley.edu/pdf/2019/Truck-Driver-Misclassification.pdf, August 2019.

6 In his letter to President Trump dated March 23, 2020, the CEO of Uber, Dara Khosrowshahi, claimed that his company's business model, premised on misclassification, was a necessary source of support for Uber's drivers. He reiterated his company's long-standing claim that Uber itself serves as a safety net for workers with precarious employment. The fact that many thousands of Uber drivers have now been disemployed and rendered destitute by an economic crisis shows that this claim is false. What the company seeks now is to be bailed out of its obligation to provide unemployment insurance and sick leave for its employees, by having those expenses assumed by the federal government. Dara Khosrowshahi, "Letter to President Donald Trump from Dara Khosrowshahi on the COVID-19 Crisis," March 23, 2020, https://blogadmin.uberinternal.com/wp-content/uploads/2020/03/UberLetter.pdf.

7 Sanjukta Paul, *Antitrust as Allocator of Coordination Rights*, 67(2) UCLA L. Rev. (2020).

workers, had to recognize some measure of countervailing coordination rights on the part of those workers. So-called gig economy firms have benefited not only from enervated labor law, under which those countervailing coordination rights have become increasingly weak, but also from changes in antitrust law that have tacitly legitimized the control they exercise beyond their firm's legal boundaries.[8] This means that Uber drivers, for instance, bear all the risks of being independent businesses while enjoying none of the actual independence and reaping none of the rewards: they do not even set prices for the rides that they supposedly sell to customers--Uber does.[9] This regulatory environment has concentrated economic coordination rights almost exclusively in the hands of gig economy corporations' executives and powerful shareholders, while denying workers any role or voice, and while making it impossible for firms that operate on a more equitable model to compete.

Insofar as UI funds made available by the CARES Act replace the firms' unmet obligation to provide unemployment insurance to their now-laid-off workforce, they constitute an effective bailout in favor of these firms; and to the extent that the language of the Act and its operation reify the misclassification of workers, they affirm the asymmetric coordination rights described in the previous paragraph. Typically, a bailout from the public entails reciprocity of benefits, which can be embodied for instance in an obligation to the firms' workers. But in the topsy-turvy logic that these powerful firms have urged, they actually stand poised to gain a further benefit (ultimately in favor of executives and shareholders) at the expense of other stakeholders in the firms, namely workers and the public. That further benefit is the affirmation of workers' status as independent contractors, not employees. The fact that federal funds are available for unemployment insurance for non-payroll workers is a powerful incentive for states to side with the platforms on employment status, since doing so unlocks funds they would otherwise have to collect from the platforms in the form of unemployment insurance premiums, and which the platforms have been steadfastly unwilling to pay for many years now--even to the point that they have declined to provide data on their employees' earnings to state unemployment insurance agencies to calculate what those premiums would have been worth.

Corporate bailouts are merely a more dramatic instance of the numerous public benefits business corporations receive simply in virtue of being corporations.[10] As we've described, the most powerful actors within gig economy firms already receive a kind of public subsidy in the form of legally enforced, asymmetrical coordination rights. This bailout threatens to cement this separate, ongoing subsidy of the most well-off stakeholders in the firm, which is neither sustainable nor justified. Instead of granting further concessions in "exchange" for bailing out these powerful firms, the federal government should obtain something for the public in return for the bailout. Namely, firms that have been misclassifying their workers--and the powerful platform firms in particular--must reclassify their workers as employees going forward, and must pay into state unemployment insurance pools for their benefit. Many are publicly traded companies and can issue stocks or bonds to meet this obligation, just as they would routinely do with any other business expense. Others enjoy preferential access to finance through venture capital funding. Indeed, platform firms over the years have relied on their access to finance to invest heavily in shaping their regulatory environments so that they are maximally beneficial to them, from lobbying

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[8] *See* Sanjukta Paul, *Fissuring and the Firm Exemption*, 82 Law & Contemp. Probs. 65 (2019); Marshall Steinbaum, *Antitrust, the Gig Economy, and Labor Market Power*, 82 Law & Contemp. Probs. 45 (2019).

[9] Uber relies upon the tendency in antitrust law in recent decades to permit more and more economic coordination through vertical control, which it exercises over drivers in numerous ways. *Id.* (discussing law of vertical restraints and gig economy firms).

[10] David Ciepley, *Beyond Public and Private: Toward a Political Theory of the Corporation*, 107 Am. Pol. Sci. Rev. 139, 146 (2013); Robert Hockett and Saule Omarova, *"Special," Vestigial, or Visionary? What Bank Regulation Tells Us about the Corporation—and Vice Versa*, 39 Seattle U. L. Rev. 453 (2016).

various public bodies to commissioning social science research that casts them in a glowing light, among other things.[11] All this time they could have been using those funds to invest in their workers and communities, for instance by making UI payments.

What is the solution? We request that Congress exercise its oversight powers to ensure that the Department of Labor's implementation of the CARES Act, including the disbursement of funds that are ultimately paid out to misclassified workers, not be used to validate their misclassification. As a condition of and an incentive for receiving PUA funds, the federal Department of Labor should require state unemployment insurance agencies to determine that platform workers who receive PUA benefits, including but not limited to ride-hailing platforms Uber and Lyft, be classified as employees going forward.

We note, finally, that as legislated, the CARES Act includes provisions designed to protect UI benefits from reductions on the part of states. PUC is not permitted to result in a reduction in replacement rates or in a decline in benefits duration. These provisions constitute a rough form of a federal maintenance-of-effort requirement on the part of states: states cannot use the availability of federal funds to reduce the benefits they're responsible for providing. Ensuring that PUA funds are not used to bail the platform companies out of their obligation to provide UI to workers they have long misclassified as independent contractors would operate in the same spirit: preventing federal generosity from being used to undermine federal policy (i.e., to ensure a safety net for all workers).

This crisis shows that unemployment insurance is more necessary than ever. Unfortunately the tendency over decades in many state-run UI systems has been to define out a greater and greater share of the workforce, to reduce replacement rates, and to make the program as difficult and cumbersome to qualify for as possible, since the view has been that each would-be beneficiary is more a burden than a benefit to the overall system. That dynamic is especially clear when it comes to the so-called gig economy. Now the platforms want the public to backstop that policy backsliding by retroactively funding UI for their workers without ever having to pay premiums, and without rectifying the problem that got us here.

We must not let this crisis be used as an opportunity to cement the business models responsible for workforce precarity in the first place. We respectfully ask that any public bailout of platform firms in the form of funding UI benefits for platform workers be accompanied by a commitment from the benefitted firms to recognize their workers as employees going forward, for all purposes, including full collective bargaining rights.

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[11] For examples of social science research funded and promulgated by Uber, see Meng Liu, Eric Brynjolfsson, and Jason Dowlatabadi, "Do Digital Platforms Reduce Moral Hazard?," *NBER Working Papers*, no. 25015 (2018); Peter Cohen et al., "Using Big Data to Estimate Consumer Surplus: The Case of Uber," *NBER Working Papers*, no. 22627 (2016); Jonathan V. Hall, John J. Horton, and Daniel T. Knoepfle, "Labor Market Equilibration: Evidence from Uber" (Working Paper, 2017). For critiques thereof, see Hubert Horan, "Will the Growth of Uber Increase Economic Welfare?," *Transportation Law Journal* 44 (September 14, 2017): 33–105, https://doi.org/10.2139/ssrn.2933177; Hubert Horan, "Uber's 'Academic Research' Program: How to Use Famous Economists to Spread Corporate Narratives -," *ProMarket* (blog), December 5, 2019, https://promarket.org/ubers-academic-research-program-how-to-use-famous-economists-to-spread-corporate-narratives/.

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