



For One in 10 New York Workers, 'Independent Contractor' Means Underpaid and Unprotected

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Executive Summary

Independent contract and app-based gig work are part of a broader trend in the American economy over the past 30 or so years of the fragmentation, fissuring, and deterioration of payroll jobs into more precarious, lower-paid, and less protected forms of work. Independent contractors and gig workers often lack basic labor protections, rights and benefits, including a minimum hourly wage, safe workplace, and, in New York State, access to paid family and sick leave requirements. Sociologist Arne Kalleberg underscores the implications for affected workers when he writes that this trend constitutes “a new age of precarious work that represents a fundamental shift toward widespread uncertainty and insecurity.” And the McKinsey & Company consulting firm reports that many businesses are poised to increase their reliance on contract and temporary workers.

In this report, we focus on workers in New York’s low-paid industries that have the largest number of potentially misclassified workers: those who should be considered employees but are misclassified as independent contractors, including gig workers. These low-paid industries include transportation, construction, and other services (a category that includes personal care services). We distinguish these workers from self-employed workers in higher-paid industries, such as finance and information, because well-paid self-employed workers may be legitimately considered independent contractors if they are free from control of the hiring company, work for multiple employers, and set their own pay rates. While some of the independent contractors in low-paying industries might be legitimate independent contractors, evidence suggests their numbers are relatively small. Plus, in industries like construction, some workers are paid off the books, an extreme form of misclassification not captured in government survey and administrative data. Paying workers off the books or misclassifying workers as independent contractors are both actions to illegally reduce payroll costs.

Estimating the size of the likely misclassified independent contractor and gig workforce is difficult. No single data source tracks these workers. Using the Census Bureau’s Nonemployer Statistics (NES) administrative data, the Census’s American Community Survey (ACS) data, and Internal Revenue Service (IRS) data, we estimate that about 873,000 workers in low-paid industries in New York State are misclassified as independent contractors. Thus, about 10 percent of New York’s 8.8 million workers are misclassified independent contractors.

A little over 20 percent (190,000) of the 873,000 misclassified low-paid independent contractors are gig workers whose work is mediated by online labor platforms. Thus, gig workers are about 2.2 percent of New York’s total workforce.

New York State’s employee classification enforcement data confirms that misclassification is a substantial problem. In the years from 2008 through the first quarter of 2022, the State identified 1.7 million workers as misclassified or paid off-the-books. Offending companies were assessed with \$630 million in unpaid unemployment insurance taxes and penalties.

The State reports that through its enforcement efforts it identified an average of about 152,000 misclassified workers (including an unknown number employed off the books) each year from 2008 through 2014. Recently released enforcement data show that the State identified 610,000 misclassified workers over the past seven years. The State generally has not investigated gig companies for misclassification.

In the past decade, the overall number of independent contractors in New York has remained relatively steady, but this apparent stability masks divergent trends, with transportation experiencing double-digit growth and construction double-digit decline. By far the biggest growth in gig work has occurred in passenger and delivery services.

Independent contractors are paid half to two-thirds of what payroll workers receive in the same industries. While independent contractors in transportation have gross earnings that are 75 percent of wages paid to their payroll counterparts, because they must cover considerable overhead expenses, their net earnings are much lower relative to wage workers (whose work expenses generally are reimbursed by their employers). Independent contractors are more likely to rely on Medicaid and twice as likely to lack health insurance as payroll workers in the same low-paying industries.

This low-paid, precarious workforce is a statewide phenomenon, with independent contractors accounting for 11 percent of all workers in low-paid industries in Upstate counties, 16 percent in the Downstate suburbs, and 19 percent in New York City. Not surprisingly, the demographic composition of independent contractors differs across regions. In New York City more than 70 percent of low-paid independent contractors are persons of color and foreign-born, while over 80 percent of the Upstate contractor workforce is white and U.S.-born. The demographics of the contractor workforce in the Downstate suburbs (Nassau, Suffolk, Orange, Rockland, and Westchester counties) fall between those of the city and Upstate. Over the past decade, the share of the independent contractor workforce comprised of workers of color has risen to 48 percent statewide.

Overall, 58 percent of all low-paid independent contractors are male, a higher percent than among payroll workers. But in some industries, such as personal care services (which includes nail salons), independent contractors are mostly women. Over the past decade, the growth in women in low-paid independent contractor roles has outpaced that of men.

We estimate there are 190,000 online platform or gig workers in New York State. Ninety percent of the state's gig workers are found in one of three New York City transportation-related businesses: for-hire vehicles (75,000), restaurant delivery (65,000), and grocery and other delivery (17,000). The number of for-hire vehicle drivers grew rapidly from 2014 to 2019, but the pandemic sharply reduced the demand for that service and the number of drivers. On the other hand, the Covid-19 pandemic spurred considerable growth in restaurant food delivery and the ranks of the app-dispatched delivery workforce.

The pandemic also accelerated the already robust growth in e-commerce. The growth in Amazon's package delivery has increased utilization of gig workers delivering packages in their personal vehicles (Amazon Flex) and reliance on Delivery Service Partnerships (DSPs), where employees of subcontracted companies make deliveries, often in Amazon-branded vans. While DSP drivers are not independent contractors, they embody another form of fissured work: subcontracting, which puts downward pressure on wages and job quality even as subcontractors perform work closely directed by the parent company.

Gig workers constitute an important and growing part of the precarious economy, and many of them are likely to be misclassified. They are, however, currently only about one in every five independent contractors in low-paying industries. The other four-fifths, more than 680,000 independent contractors, include construction workers, janitors, house cleaners, and nail salon technicians, among others.

Misclassification harms not only workers but also State social insurance programs. It also creates unfair competition for law-abiding employers. The State and the City have adopted measures to reduce employee misclassification or provide protections for independent contractors.

The 2010 State Construction Industry Fair Play Act, for example, instituted a presumption of employment to clarify the conditions under which a worker could be considered an independent contractor. Because of this law and its enforcement, there has since been a 34 percent reduction in construction misclassification in New York City alone since then.

During the tenure of Governor Andrew Cuomo, the Labor Department's budget was reduced and the number of labor investigators shrank. In response to pressure from various worker centers and labor unions, the FY 2023 State budget increased funding for labor standards enforcement. The Labor Department began "ramping up" hiring of labor investigators in late April.

(Enforcement against misclassification can also occur through legal actions by workers. However, that avenue has been constricted by the proliferation of forced arbitration and class action waiver clauses in gig worker contracts and terms-of-service agreements.)

While the City of New York has not directly addressed the issue of employee misclassification, it has enacted several local laws to protect independent contractors. The City's 2017 Freelance Isn't Free Act provides protection against late or non-payment for freelance work. (In early June, the State Legislative also adopted a statewide version of the Freelance Isn't Free Act.)

The City's Taxi and Limousine Commission adopted a minimum pay regulation in 2018 for app-based for-hire vehicle drivers, such as those working through Lyft and Uber. In 2021, the City Council also enacted a package of measures to protect app-based restaurant food delivery workers from wage theft, ensure access to restaurant bathrooms, and authorize a minimum compensation standard.

However, more needs to be done. New York State should, for example, enact industry-specific standards such as those affecting nail salon workers. To address the low pay and substandard working conditions of New York's gig and other precarious independent contractors it should also broaden the presumption of employment and the application of the employment test from the Construction Industry Fair Play Act to other industries. In response to the spread of contracting out that entails misclassification through labor service contracts, the State should also make companies legally responsible for the wages and benefits of workers employed by their labor subcontractors ("joint wage liability").

1. Introduction

At the outset, it's important to address a threshold set of issues: To briefly examine the broader context out of which misclassification and app-based gig work¹ have emerged; define misclassification and describe the impact it has on workers; preview how we quantify the extent of misclassification of workers in low-paid industries in New York; and consider how the Covid 19 pandemic has affected the situation of gig and misclassified independent contract workers.

The plight of gig workers and other low-paid independent contractors is part of a larger, decades-long trend involving the degradation of jobs and pay, the erosion of worker protections and union power, and the fissuring of work into an array of precarious situations including independent contractors, contracted-out jobs, franchises, and off-shored jobs.² A recent U.S. Treasury Department report documents how fissuring can have a “detrimental impact on workers,” including lower wages, and fewer benefits and advancement opportunities. The Treasury report notes that fissuring is “widespread [in] industries with low average pay.”³

Gig work, which we define as work arranged through a phone-based app or on-line platform, is a relatively recent manifestation of this broader trend. The number of gig workers using apps has increased rapidly in recent years but that number is only a fraction of a much larger number of low-paid misclassified independent contractors in industries such as nail salons, trucking, and construction.

The broad practice of misclassifying workers as independent contractors permits businesses to structure employment relationships to cheapen their labor costs. This is accomplished by under-paying workers, and also by skirting responsibility, through payroll taxes and other means, for worker coverage under social insurance programs that are universal for employees: Social Security, unemployment insurance, workers' compensation, and in New York State, paid family and medical leave. The Treasury Department reports that these non-wage costs that employers shift to misclassified workers and government social insurance programs equals approximately 30 percent of per-hour employer costs.”⁴

The State Labor Department defines a misclassified worker as “someone who is being treated by their employer as an independent contractor OR is paid “off-the-books’ when that worker is entitled to all the protections of legal employment.”⁵ The classification of a worker as an

¹ We use the terms “app-based work” and “gig work” interchangeably.

² David Weil, *The Fissured Workplace*, Harvard University Press, 2014.

³ U.S. Department of the Treasury, *The State of Labor Market Competition*, March 7, 2022, pp. 9-10. <https://home.treasury.gov/system/files/136/State-of-Labor-Market-Competition-2022.pdf>

⁴ U.S. Department of the Treasury, *The State of Labor Market Competition*, March 7, 2022, pp. 12-13.

⁵ See, e.g., the definition in the State Labor Department's summary of the New York State Commercial Goods Transportation Industry Fair Play Act. <https://dol.ny.gov/commercial-goods-transportation-industry-fair-play-act>

employee or an independent contractor can mean the difference between having a job with benefits, workplace protections, and a guaranteed minimum wage, or, conversely, working for less pay and fewer protections. This has serious consequences not just for their workers, but for their law-abiding business competitors and for the solvency of government safety net programs.⁶

Businesses responsible for the relatively widespread engagement of independent contractors include both large, venture-capital backed companies, as well as small companies. Regardless of the particular business profile, the effect in creating a precarious workforce devoid of labor protections and rights is similar.

In this brief we document for New York State and its major regions, the nature, industry, and pay of jobs held by low-paid independent contractors,⁷ and the characteristics of such workers, including gig workers. The Treasury report notes that “worker misclassification expands way beyond gig workers and appears to be becoming more common.”⁸ Independent contractor and gig workers can be found across nearly all industries and occupations in New York. However, in this report we focus on workers in low-paid industries who often lack the control over their work, hours, and pay rates that true, higher-paid independent contractors have.

Drawing on various government data sources, we estimate that about 873,000 workers in low-paid industries in New York State are misclassified as independent contractors. Thus, about 10 percent of New York’s 8.8 million workers are misclassified independent contractors. Of this 873,000 number, roughly 335,000 rely on their independent contractor work for their primary source of earnings. A little over 20 percent (190,000) are gig workers.⁹

(While the data we cite in this report are from 2018, or averaged for the years 2015-2019, we believe the levels, the relationship to broader payroll employment and wage levels, and the characteristics of the affected workers also provide a fair representation of the situation in New York in the first half of 2022. We point out instances where an exception is warranted, such as the rapid growth in delivery work since the pandemic began.)

⁶ *Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries*, National Employment Law Project, 2020. <https://www.nelp.org/publication/independent-contractor-misclassification-imposes-huge-costs-workers-federal-state-treasuries-update-october-2020/>

⁷ We focus on independent contractors who are unincorporated, that is, someone who is not operating as a small business, e.g., by not registering a business name and not working under a business partnership arrangement. To be incorporated means to have a legal form of organization as a C or S corporation or as a limited liability corporation.

⁸ U.S. Department of the Treasury, *The State of Labor Market Competition*, March 7, 2022, p. 13.

⁹ We do not include in our analysis workers in professional occupations operating as “freelancers” (e.g., graphic or web designers or writers), who more frequently meet the usual criterion for legitimate independent contractor status and are usually paid considerably more than workers identified in government data as unincorporated independent contractors in low-paying industries. Although, as noted later, many freelancers face problems in collecting payments they are owed for work performed, and would benefit from enhanced legal protections.

Considering only those independent contractors for whom that is their primary source of income, full-time, low-paid independent contractors have average earnings of about \$28,000 annually. By contrast, standard payroll employees in the same low-paid industries earn approximately 1.5 times that amount. It is important to gain a fuller picture of their earnings and characteristics given the low pay and range of protections that these independent contractors lack.

The most definitive research on the earnings of gig workers whose work is mediated through online platforms uses Internal Revenue Service tax data. It finds that their platform earnings put 94 percent of gig workers among the lowest-paid half of all workers.¹⁰ And since a very large share of gig work is in the low-paying transportation industry, in this brief we consider gig workers to be a subset of independent contractors working in low-paying industries.

For many, independent contractor and gig work is not a side hustle but their primary source of income. In New York, industry-focused research has shown that this is true for tens of thousands of drivers and tens of thousands of food service delivery workers using online platforms.¹¹

While some independent contractors are engaged by multiple companies and set their own pay rates, these are often higher-paid workers with in-demand skills that allow them to control the conditions of their work. By contrast, independent contractors in low-paid industries who work on apps or online labor platforms as their primary source of income usually do not control the conditions of their work, such as setting their own pay rate, and choosing their customers. These workers exemplify the population of potentially misclassified workers. While some independent contractors in low-paid industries in New York may be properly classified, our research indicates that the overwhelming majority are likely to be misclassified independent contractors under standard interpretations of that status.

This brief also examines the practice of subcontracting, which puts downward pressure on the compensation for workers in low-paying industries, but is a distinct practice from the use of independent contractors. Amazon, for example, typically uses delivery service partners (DSPs), contracting businesses that hire drivers for Amazon-branded small delivery vans. Before the pandemic there was also a renewal in the use of “professional employer organizations” that

¹⁰ Andrew Garin and Dmitri Koustas, *The Distribution of Independent Contractor Activity in the United States: Evidence from Tax Filings*, August 30, 2021. Working Paper. Earnings include both net business income as reported on IRS Schedule C, and wage earnings.

¹¹ James A. Parrott and Michael Reich, “An Earnings Standard for New York City’s App-based Drivers: Economic Analysis and Policy Assessment,” The Center for New York City Affairs Report, July 2018. <https://static1.squarespace.com/static/53ee4f0be4b015b9c3690d84/t/5b3a3a946d2a73a677f855b9/1530542742060/Parrott-Reich+NYC+App+Drivers+TLC+Jul+2018jull.pdf>.

See also Maria Figueroa, Ligia Guallpa, Andrew Wulf, Glendy Tsitouras, and Hildalyn Colón Hernández, *Essential but Unprotected: App-based Food Couriers in New York City*, ILR Worker Institute, September 2021. <https://losdeliveristasunidos.org/ldu-report>

provide outsourced labor to businesses.¹² Documenting the extent of subcontracting or contracting out is challenging. But with the pandemic-inspired acceleration of e-commerce and the paucity of employer-provided worker benefits, government needs to respond by establishing appropriate regulations to enable workers to be adequately protected and effectively share in the prosperity their labor creates.

The pandemic has made clear that workplace protections and benefits, as well as the power needed to make decisions to protect one's health and safety, are central issues for the modern economy. It threw into stark relief the situation of independent contractors and gig workers. Many were labeled "essential workers," but lacked health benefits and safety and other protections that allowed many other workers to remain safe during Covid, to take sick leave to recover from illness or care for family members, and to draw on State unemployment benefits if they were laid off. Independent contractors and gig workers were often left on their own, navigating the pitfalls of disease risk and lost income at times when, for example, securing personal protective equipment (PPE) was compared by one governor to the "wild west" and called an "impossible situation" by Governor Andrew Cuomo.¹³

Recognizing the threat to public health and safety posed by a lack of workplace benefits, the Federal government stepped in to provide unemployment assistance to millions of self-employed, independent contractors who did not qualify for traditional unemployment insurance benefits.¹⁴ Congress enacted the Pandemic Unemployment Assistance (PUA) program, included in the Coronavirus Aid, Relief and Economic Security (CARES) Act. It allowed, at its peak in August 2020, 1.5 million New York workers to receive PUA benefits. From August 2020 through the end of Federally funded unemployment benefits in early September 2021, roughly half of all those receiving unemployment assistance in New York were covered under the PUA program.¹⁵

For legitimate independent contractors, PUA met an extraordinary need during the pandemic. But because it was funded by the Federal government and not through employer contributions,

¹² For a discussion of the historical roots of the use of temp and outsourced labor see Louis Hyman, *Temp: How American Work, American Business, and the American Dream Became Temporary* (2018).

¹³ Hannah Miller, "Governors across the nation small federal response to coronavirus response," *CNBC*, March 22, 2020, <https://www.cnn.com/2020/03/22/governors-say-they-are-not-getting-supplies-they-need-for-coronavirus.html>

¹⁴ PUA benefits were also extended those who were unable to work because of Covid (including being diagnosed with Covid or caring for a household member), or those who quit a job as a result of Covid, among other categories. NY Department of Labor, Pandemic Unemployment Assistance, <https://dol.ny.gov/pandemic-unemployment-assistance>.

¹⁵ U.S. Employment and Training Administration, unemployment insurance data, <https://oui.doleta.gov/unemploy/DataDashboard.asp>. In addition to gig and other low-paid independent contractors, self-employed workers, including freelancers and some who were highly-paid, received PUA benefits. As noted later, the State's Unemployment Insurance Appeals Board has ruled that Uber and Lyft drivers are employees and as a result, many drivers received regular state unemployment insurance benefits.

app-based companies exploited the program, steering workers who in some cases already were employees under State law to the emergency PUA program (which generally gave workers less money than State unemployment insurance).¹⁶

These were clearly instances of bad employer practices. But the PUA experience also underscored the fact that legitimate independent contractors do not have such labor protections on a routine basis. Unlike employers who pay payroll taxes that fund regular unemployment benefits, businesses treating workers as independent contractors have never paid a cent into State-run unemployment insurance trust funds. These companies in essence shift those costs onto the shoulders of other employers. (Nor is it clear that policymakers will be willing to provide PUA-like benefits during the next unemployment crisis.)

Independent contractors also are excluded from employer-provided health or retirement benefits. They lack legal protection from discrimination, the right to collectively bargain, earn the minimum wage, or receive overtime time when working more than 40 hours per week. Except for black car drivers¹⁷, gig workers and other low-paid independent contractors are not covered by workers' compensation when injured or killed on the job.¹⁸ Gig workers and other independent contractors are also excluded from participation in New York State's private sector retirement savings program automatically establishing retirement accounts funded by pre-tax contributions from employees at businesses not offering retirement plans.¹⁹

During the pandemic, when many in-person services shut down, platform workers for companies such as Uber Eats, GrubHub, DoorDash, and Instacart became crucial for food delivery. Moreover, many workers who lost their jobs during Covid, such as restaurant workers, turned to such online platform work to make ends meet.²⁰

¹⁶ In a June 2020 letter to the U.S. Department of Letter, several U.S. Senators clarified that Congress, in passing the CARES Act, "did not intend to supplant states' own laws and court decisions, cementing business practices that have been determined unlawful" and "did not intend to permit employers to inappropriately push their employees to PUA, absolving employers of their obligation to pay into much-needed state trust funds during an unprecedented crisis when states need to ensure they are fully and fairly resourced."
[https://www.cortezmasto.senate.gov/imo/media/doc/Letter%20to%20DOL%20re%20Gig%20Worker%20Misclassification%20\(Final\).pdf](https://www.cortezmasto.senate.gov/imo/media/doc/Letter%20to%20DOL%20re%20Gig%20Worker%20Misclassification%20(Final).pdf)

¹⁷ Under a 1999 New York State law, as amended, independent contract drivers for black car and the app-dispatched car services are covered for workers' compensation insurance purposes by the Black Car Fund financed with a fee charged on every trip. Additional discussion of the Black Car Fund is provided in section 9 below.

¹⁸ A recent report by Gig Workers Rising found that over 50 gig workers were killed on the job from 2017-2021 in the United States. *Death and Corporate Irresponsibility in the Gig Economy: An Urgent Safety Crisis*, 2022.

¹⁹ Austin R. Ramsey, *Growing Pool of Gig Workers Left Out of State Retirement Plans*, Daily Labor Report, May 3, 2022. New York's Secure Choice Savings Program will be overseen by the State's Tax Department and will begin operation in 2023.

²⁰ In their 2020 Unheard Third Survey, the Community Service Society of New York found that 20 percent of New York City workers had done some app-based gig work in the past year. Among low-income New Yorkers, they found that 23 percent had performed some app-based gig work. See Irene Lew, Debipriya Chatterjee, and Emerita Torres, "The Gig is Up: An Overview of New York City's App-based Gig Workforce During Covid-19," June 2021.

Independent contractors and gig workers are a heterogenous group. Platform work constitutes the primary job for some; many other workers turn to it to supplement traditional full-time jobs, filling income gaps and helping cover unexpected expenses like medical bills. In *After the Gig*, Juliet Schor showed that gig work is least successful for those workers who rely on it most.²¹ While there's often a low barrier to entry, it does not provide them stable and sufficient income, in part because these workers have few alternatives and little power to demand better conditions. The same can be said for most low-paid independent contractors.

This brief concludes with a look at several New York State and City policy developments over the past decade designed to address the misclassification of workers as independent contractors and the compensation and working conditions of gig and other low-paid independent contractors. We also discuss policy approaches sought by gig companies, and several bills recently introduced in the New York State Legislature.

²¹ Juliet B. Schor, *After the Gig: How the Sharing Economy Got Hijacked and How to Win it Back*, University of California Press, 2021.

2. How Many Independent Contractors in Low-Paying Industries Are There In New York?

The fragmentation of work and deterioration of payroll jobs into independent contractor and gig work has posed serious challenges for administrative data collection and for estimates of workforce size and earnings levels. Data on real-time labor market trends is almost exclusively focused on payroll employment data released monthly by the Federal and State Labor Departments. Government data sources identifying independent contractors are only available with a lag of a nearly a year or more. Government statistical agencies also have been slow to adapt their regular reporting to the increased use of independent contractors or labor subcontracting relationships. Data on gig workers are even less frequently compiled and reported, with the most recent Census Bureau Contingent Worker Survey published in 2017.²²

We have used both government administrative data and survey data to estimate the number of all independent contractors in the New York State workforce, as well as the number of those for whom independent contractor and gig work constitute their primary job. That includes the latest administrative data available (from 2018) on the extent of independent contractors in New York State, distributed by region and by low-paying industry. The number of unincorporated independent contractors is drawn from the Nonemployer Statistics (NES) issued by the U.S. Census Bureau.²³ These data are primarily drawn from Internal Revenue Service tax data. The NES data set includes workers for whom this is their primary job as well as those who may do this work to supplement earnings from another job. We also analyze the census Bureau's American Community Survey (ACS) to look at industry and demographic characteristics of workers whose primary employment status is as unincorporated self-employed workers.

By relying on both NES and ACS data, we capture independent contractors for whom self-employment earnings constitute their primary job, as well as those who work as an independent contractor for supplementary earnings.

Data limitations also mean that changes in independent contractor and gig employment can only be approximated. We have analyzed employment over the past decade to assess general and sectoral changes, and found that the total number of independent contractors in New York State has remained somewhat stable. However, there were cross-currents within that aggregate level. Legislation and stepped-up enforcement have reduced the extent of misclassification in construction; gig work in transportation expanded in waves and a significant number of low-paid, precarious jobs persisted even through historically low unemployment in the pre-Covid years.

²² See Department of Labor, Contingent Worker Paper Series, https://www.dol.gov/sites/dolgov/files/OASP/evaluation/pdf/WHDContingent%20Work%20Paper%20Series_One%20Pager.pdf.

²³ The 2018 NES data were released in May 2020. The Census Bureau reports that the release of the 2019 NES data has been postponed due to "limited availability of source data."

How this report *defines key categories of workers*, and indicating relevant data sources

- **Independent contractors in low-paying industries**

Self-employed but unincorporated workers who are hired as independent contractors in the low-paying industries. Low-paying industries are broad industry groupings (generally) with median annual earnings below \$32,500; see the list in Figure 1.

- We use the Census Bureau’s American Community Survey (ACS) to identify self-employed, unincorporated workers—the ACS categorizes workers by industry and occupation according to their *primary* job. In the low-paying industries, there are 336,000 primary self-employed, unincorporated workers.
- We use the Census Bureau’s Nonemployer Statistics (NES) summary series based on administrative tax data to identify sole proprietor independent contractors (who may work in that capacity for their primary job or to earn supplemental income). 873,000 workers are in this category.

- **Payroll workers**

A worker classified as an employee and paid a regular wage or salary. Most payroll workers, or employees, are universally covered by government social insurance program including unemployment insurance and workers’ compensation, and their employers pay the employer share of payroll taxes for Social Security and Medicare coverage. Employees also are covered by the federal Fair Labor Standards Act and by New York State’s paid sick leave and paid family leave laws. With limited exceptions, independent contractors have none of these worker protections.²⁴

- **Gig workers**

Workers receiving work assignments through an on-line labor platform.

- Gig workers are included in the ACS if gig work is their primary job, and are included in the NES summary data, but are not specifically identifiable as gig workers in either the ACS or the NES summary statistics. We rely on two analyses by Garin and Koustas (and colleagues) based on special access to IRS data for insights into the status of gig workers in New York.²⁵ We estimate there are 190,000 gig workers in New York in early 2022.
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²⁴ The exceptions are that app-dispatched for-hire vehicle drivers have workers’ compensation coverage through New York State’s Black Car Fund, and the State’s Unemployment Insurance Board has determined that such drivers are employees and entitled to receive unemployment insurance benefits.

²⁵ Brett Collins, Andrew Garin, Emilie Jackson, Dmitri Koustas, and Mark Payne, *Is Gig Work Replacing Traditional Employment? Evidence from Two Decades of Tax Returns*, March 25, 2019. See also Garin and Koustas 2021.

We develop an estimate of gig workers in New York by relying on recent research based on unpublished Internal Revenue Service data, supplemented by our own analysis of other research and trends in the use of gig workers. These trends are described in detail below.

As shown in Figure 1, in 2018 there were 873,300 unincorporated independent contractors in New York in 11 low-paying industries, according to the NES data.²⁶ (Many of the industries in Figure 1 line up with the set of industries that are the focus of the state’s Joint Task Force on Worker Exploitation and Employee Misclassification.)²⁷ The largest number of independent

Figure 1

Independent contractors in low-paying industries in New York State, based on 2018 NES data

	Independent contractors	average receipts	2008-18 change in # of indep. contractors
TOTAL low-paying	873,328	\$27,564	*
Transportation & warehousing	217,053	\$36,995	129,842
Other services	138,410	\$21,205	*
Administrative & support services	117,114	\$18,161	22,606
Construction	115,494	\$35,985	-4,552
Retail	99,150	\$33,918	-1,783
Educational services	57,277	\$14,336	12,349
Childcare	52,129	\$14,507	-18,315
Home health care & social assistance	30,388	\$19,553	4,600
Food services & accommodation	26,793	\$22,195	3,593
Manufacturing	13,312	\$34,820	162
Agric., forestry & fishing	6,208	\$37,380	193

** In 2018, Census recoded data for other services that affects comparability with earlier years. This recoding resulted in increased counts primarily in administrative & support services, professional & technical services (not included here), construction, and health care & social assistance.*

Source: Census Bureau, Nonemployer Statistics, 2018. Sole proprietors.

²⁶ Industries were divided into low-paying and high-paying based on average New York statewide annual wages from the Quarterly Census of Employment and Wages. Generally, low-paying industries in our analysis had average annual wages of less than \$65,000 in 2019. Since median full-time earnings for unincorporated full-time self-employed workers in construction and manufacturing according to ACS data were less than half of the QCEW industry average, we included those industries in our group of low-paying industries for independent contractors. The arts, entertainment and recreation industry is included in the high-paying group since the ACS data indicated that median earnings for unincorporated full-time self-employed workers was more than 60 percent of the QCEW industry average and the ACS median earnings for this industry was more than 10 percent above any of the low-paying industries. The Appendix shows ACS data for median full-time unincorporated self-employed earnings for high- and low-paying industries.

²⁷ These industries include: airports, car washes, childcare, cleaning, construction, farming, home healthcare, janitorial services, landscaping/day laborers, laundry, nail salons, restaurants, trucking and waste disposal, retail, and supermarkets. See: <https://www.ny.gov/task-force-combat-worker-exploitation>

contractors are in transportation, accounting for one in every four independent contractors in New York’s low-paying industries. From 2008-18, the number of independent contractors in transportation rose by 130,000, largely driven by the emergence and growth of app-dispatched car services.²⁸

Transportation, together with “other services” (a broad category that includes personal services like nail salon workers and housecleaning workers such as those working for a company like Handy), administrative and support services, and construction were the leading four low-paid industries for independent contractors. They account for two-thirds of the total number.

The NES data set labels the payments received by independent contractors as “gross receipts,” since for tax purposes some contractors may deduct business-related expenses in reporting income. Since app-dispatched drivers use personal automobiles they typically have considerable vehicle-related expenses and, consequently, their net receipts may be much lower than what they gross. Still, the \$27,600 average gross receipts for independent contractors in low-paying industries is much less than the average wage of \$48,100 in these industries, according to the ACS data.

The ACS data identify both self-employed and payroll workers by their *primary* job, whether full- or part-time. It does not collect data on additional jobs or sources of income. Therefore, to improve the reliability of our analysis of demographic characteristics of independent contractors, we use the five-year 2015-19 and 2005-9 pooled ACS samples to make comparisons over time.²⁹

Figure 2 shows the number of independent contractors for whom that status is their primary job, according to the 2015-19 ACS data. This number is much smaller than the Figure 1 NES data since it does not include workers for whom independent contract work is a secondary job. However, the four largest low-paying New York industries in Figure 2 are the same as in Figure 1, and here, too account for two-thirds of the total number of independent contractors in low-paying industries. (These four low-paying industries with the largest numbers of independent contractors whose earnings come primarily from independent contract work are also the same as the industries on a national basis identified by Garin and Koustas in their analysis of 2018 IRS data.)³⁰

²⁸ The industry recoding involving other services noted in Figure 1 had a relatively small impact on the transportation industry.

²⁹ We use the IPUMS USA sample data. Steven Ruggles, Sarah Flood, Sophia Foster, Ronald Goeken, Jose Pacas, Megan Schouweiler, and Matthew Sobek. IPUMS USA: Version 11.0 [dataset]. Minneapolis, MN: IPUMS, 2021. <https://doi.org/10.18128/D010.V11.0>

³⁰ Garin and Koustas, 2021.

Figure 2

Independent contractors in low-paying industries, New York State, based on 2015-19 ACS data

	Full- and part-time ICs
Other Services	75,700
Construction	63,200
Transportation and Warehousing	45,200
Admin. & support & waste mgmt.	32,700
Retail	32,500
Childcare	24,600
Educational Services	16,400
Agric., forestry & fishing	13,400
Manufacturing	10,900
Food Svcs & Accommodation	10,600
Home health care & Social Ass't.	9,400
Total, independent contractors in low-paying industries	334,600

Source: Census Bureau, ACS-IPUMS, five-year 2015-19 dataset.

Combining independent contractors and private payroll employment in low-paying industries, independent contractors are 15.8 percent of the total, and primary independent contractors are 7.3 percent. These data are shown in Figure 3.

In the decade before the pandemic, the total number of workers in New York's low-paying industries rose by 10.4 percent, based on ACS data comparing 2005-09 to 2015-19. Figure 4 shows that there was a 1.1 percent decline in the number of independent contractors in low-paying industries over this period. This decline is not surprising considering that, as discussed below, earnings are higher for payroll workers and benefit coverage is better. A strong economy provides low-paid workers with greater employment options and New York's unemployment rate averaged only 3.9 percent for the two years prior to the pandemic.

However, though the overall number of independent contractors in low-paid industries remained steady during this decade, employment numbers were more volatile by industry, with sectors like transportation experiencing double-digit growth and construction double-digit decline. These divergent trends likely resulted from industry-specific labor practices and policy initiatives. For example, the sizable 13,300 decline in independent contractors in construction likely resulted from the passage in 2010 of the Construction Industry Fair Play Act that narrowed the conditions

under which a worker on a construction site could be legitimately considered an independent contractor.³¹

Figure 3

Two measures of the number of independent contractors as a share of combined payroll and independent workers, New York State

Low-paying industries	
<i>Independent contractors (ICs), 2018 based on NES</i>	873,328
Private payroll employment, 2018 QCEW	4,435,665
Combined payroll + ICs	5,308,993
Independent contractors as share of combined workforce in low-paying industries	16.4%
<i>Primary independent contractors (ICs), 2015-19 ACS</i>	334,646
Private payroll employment, 2015-19 ACS	4,251,745
Combined payroll + primary ICs	4,586,391
Primary independent contractors as share of combined workforce in low-paying industries	7.3%

Source: Census Bureau, NES, 2018; NYS DOL, Quarterly Census of Employment and Wages, 2018; Census Bureau, ACS-IPUMS, five-year 2015-19 dataset.

The new law and more aggressive enforcement reduced the incidence of independent contractors during a period when construction activity in New York steadily increased and payroll employment rose significantly. Some of the payroll employment increase likely came from off-the-books workers and previously misclassified workers being put on the books as employees.

³¹ <https://dol.ny.gov/construction-industry-fair-play-act>

Figure 4

Change in the number of primary independent contractors and payroll employment for low-paying New York industries, 2005/09 to 2015/19

Private industry, change from 2005/09 to 2015/19		
	# change	% change
Payroll employment, ACS	399,365	10.4%
Primary independent contractors, ACS	-3,700	-1.1%
Other services	6,300	9.1%
Construction	-13,300	-17.4%
Transportation & warehousing	15,900	54.3%
Admin. & support services	2,700	9.0%
Retail	-8,700	-21.1%
Childcare	-5,800	-19.1%
Educational services	3,900	31.0%
Agric., forestry & fishing	-3,300	-19.8%
Manufacturing	-1,700	-13.5%
Food services & accommodation	-2,000	-15.9%
Home health care & social assistance	2,500	35.7%

Source: Census Bureau, ACS-IPUMS, five-year 2015-19 dataset.

There was simultaneously a substantial 54 percent increase in independent contractors in the transportation sector. This was nearly four times the growth in payroll jobs in. Although New York enacted a Commercial Goods Transportation Industry Fair Play Act in 2014, it did not have the same effect as in construction since it excluded smaller delivery vans whose use has grown significantly in recent years.³² As discussed in more detail later (Section 6), the increase in the number of transportation independent contractors also likely understates the rapid growth in the number of gig workers in transportation from 2015 to 2019.

³² <https://dol.ny.gov/commercial-goods-transportation-industry-fair-play-act>. The Commercial Goods Transportation Industry Fair Play Act applies to commercial motor vehicles with a gross vehicle weight of more than 10,000 pounds. A typical Amazon Sprinter van used by Delivery Service Provider drivers weighs about 6,000 pounds.

3. Demographic Characteristics

Figure 5 presents demographic characteristics for independent contractors in low-paying industries (third column) and facilitates comparison to all New York workers (first column), payroll employees in low-paying industries (second column), and small business owners (incorporated self-employed, fourth column) in low-paying industries. Compared to payroll employees in low-paying industries, independent contractors tend to be slightly more male, less educated, more likely to be foreign-born, and more likely to be workers of color.

Figure 5

Demographic comparisons, all New York workers, and payroll employees and independent contractors in low-paying industries, 2015-19

Distribution of workers	All NYS workers 9,605,744	Payroll employees in low-paying industries 5,585,730	Independent contractors in low-paying industries 334,646	Small business owners in low-paying industries 195,939
ALL	100%	100%	100%	100%
Gender				
Male	52%	54%	58%	73%
Female	48%	46%	42%	27%
Age				
18-24	10%	12%	4%	2%
25-54	67%	64%	63%	62%
55+	23%	23%	33%	36%
Race/Ethnicity				
White, non-Hispanic	58%	55%	52%	65%
Black, non-Hispanic	13%	13%	10%	6%
Hispanic	18%	21%	26%	15%
Asian & All Others	11%	11%	12%	14%
Educational Attainment				
Less than HS	3%	5%	9%	5%
High School	27%	35%	43%	37%
Some College	17%	19%	17%	18%
Associates	9%	9%	9%	10%
BA & Higher	43%	33%	23%	30%
Nativity				
US-born	70%	67%	54%	61%
Foreign-born	30%	33%	46%	39%

Source: Census Bureau, ACS-IPUMS, five-year 2015-19 dataset

While nearly two-thirds (63 percent) of independent contractors are in the prime working age range of 25-54, there is a higher share of older workers and a smaller share of younger workers than among payroll employees.

The ACS survey distinguishes between unincorporated self-employed workers, or independent contractors, and incorporated self-employed workers, who are generally small business owners. Such small business owners are more likely than their unincorporated counterparts to be male and white, better educated, native born, and age 55 and older.

Over the past decade, New York State's overall workforce has become less white. Independent contractors in low-paying industries, a workforce that started out as more white than the overall workforce, experienced an even more notable shift. In 2009, 61 percent of all statewide payroll employees in low-paid industries were white; a decade later the white share of payroll workers had fallen to 55 percent. However, among independent contractors in these industries 74 percent were white in 2009 but only 52 percent were in 2019.

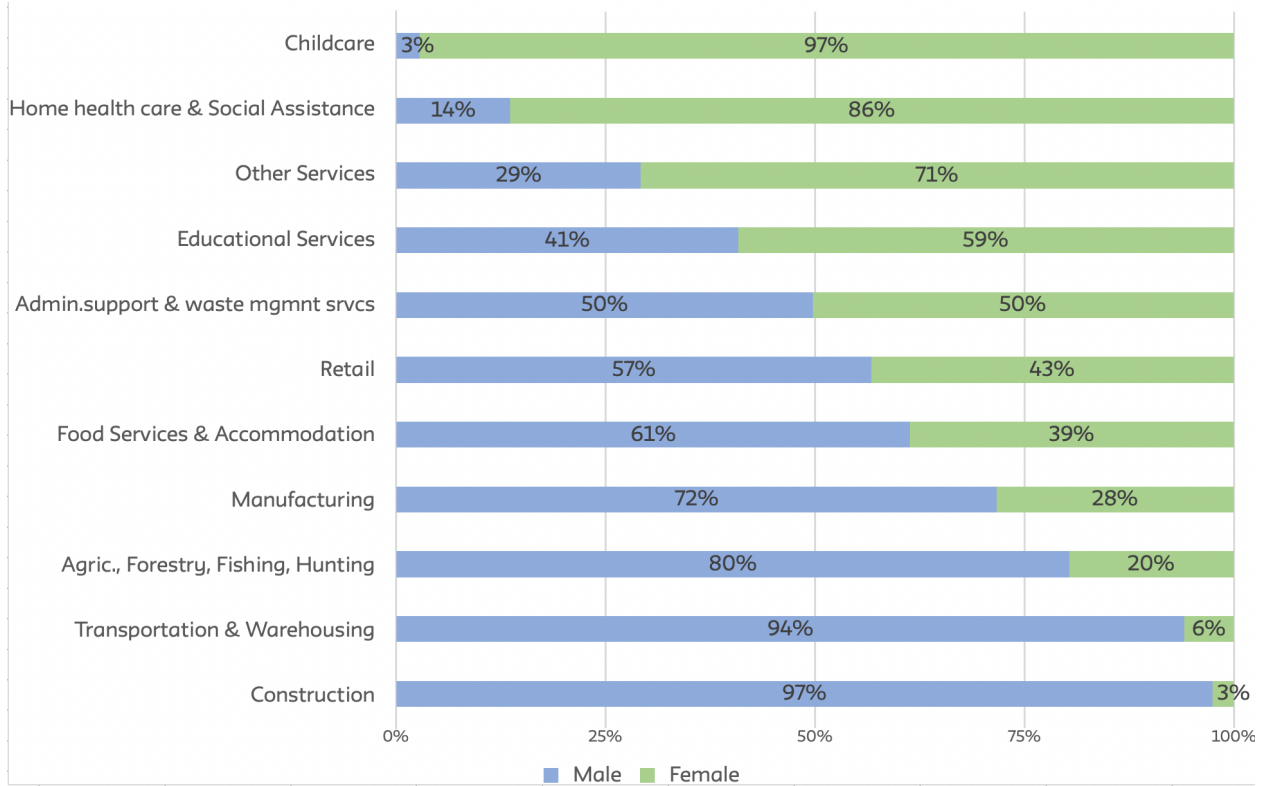
Much of New York's independent contractor workforce is occupationally segregated by gender. Take, for example, three main groups of industries that have many potentially misclassified workers. One group is predominantly male (construction, agriculture, manufacturing, food service and accommodation). Another is predominantly female (childcare, home health and social assistance, other services, and educational services). A third (retail, and administrative and support services) is essentially gender-balanced. (See Figure 6).

Overall, low-paid independent contractors are more likely to be male (58 percent) than the overall New York State workforce (52 percent) or payroll employees in the same industries (54 percent). However, over the past decade the growth of women in low-paid independent contractor roles has outpaced that of men; in 2009, the low-paid independent contractor workforce was 75 percent male. Some of the other industries with rapidly-growing numbers of independent contractors have a high proportion of women. Over the past decade, for example, the number of independent contractors in "other services" (71 percent female), the industry that includes nail salon workers, grew by nine percent. (See Section 7 on other services, which spotlights nail salon workers.)

Workers in low-paid independent contractor jobs can be found in every corner of New York State. Figure 7 shows the demographic composition of the independent contractor workforce in low-paid industries for New York State overall, as well as three major regions: New York City; Downstate suburbs (including Nassau, Suffolk, Orange, Rockland, and Westchester counties), and Upstate (the 52 counties north and west of Orange and Westchester counties).

Figure 6

Gender distribution of New York's independent contractors in low-paid industries



Source: Census Bureau, ACS-IPUMS, five-year 2015-19 dataset

Demographic compositions are slightly different in each region. In New York City, independent contractors tend to be prime-age (69 percent are 25-54), persons of color (74 percent), and foreign-born (71 percent). In the 52 Upstate counties, independent contractors are more likely to be white (83 percent versus 52 percent for the state overall), male (61 percent versus 58 percent overall), U.S.-born (84 percent versus 64 percent overall), and older (38 percent are 55+ compared to 33 percent overall). The Downstate suburbs exhibit a demographic breakdown more characteristic of overall New York State averages.

Figure 7

Independent contractors in low-paid industries in New York State, NYC, Upstate, and Downstate Suburbs

	NYS	NYC	Downstate	Upstate
Total number	334,646	158,301	44,127	132,218
Gender				
Male	58%	56%	58%	61%
Female	42%	44%	42%	39%
Age				
18-24	4%	4%	5%	4%
25-54	63%	69%	59%	58%
55+	33%	27%	36%	38%
Race/Ethnicity				
White, non-Hispanic	52%	26%	53%	83%
Black, non-Hispanic	10%	16%	8%	4%
Hispanic	26%	38%	31%	9%
Asian & All Others	12%	20%	7%	4%
Nativity				
US-born	54%	29%	56%	84%
Foreign-born	46%	71%	44%	16%
Educational Attainment				
Less than HS	9%	12%	9%	6%
High School	43%	42%	41%	44%
Some College	17%	15%	18%	19%
Associates	9%	7%	7%	12%
BA & Higher	23%	24%	24%	20%

Source: Census Bureau, ACS-IPUMS, five-year 2015-19 dataset. Components may not sum to 100% due to rounding.

4. Lower Pay, Fewer Benefits

Independent contractors typically are paid about half to two-thirds the amount received by payroll workers in the same industries. This is illustrated by Figure 8.³³

The earnings shown in Figure 8 do not include any of the fringe benefits typically received by wage and salary workers but not by independent contractors. Including them would make the compensation gap even greater. And while independent contractors in transportation and warehousing have relatively high earnings (75 percent of what payroll workers receive), these are gross earnings that likely include considerable, vehicle-related, expenses, especially for app-dispatched drivers. (For such a driver expenses often amount to about 40 percent of gross earnings).

Figure 8.1

Comparison of median earnings for full-time independent contractors and payroll workers in low-paying industries in New York State, 2015-19

Full-time ICs and payroll workers	Median earnings		ratio of IC earnings to payroll workers
	Independent Contractors	Payroll workers	
All low-paying industries	\$27,703	\$40,280	69%
Other Services	\$23,994	\$39,670	60%
Construction	\$31,530	\$50,812	62%
Transportation & Warehousing	\$30,108	\$42,608	71%
Admin. & support & waste mgmt.	\$29,915	\$38,924	77%
Retail	\$26,806	\$37,762	71%
Childcare	\$18,804	\$26,604	71%
Educational Services	\$30,272	\$56,216	54%
Agric., forestry & fishing	\$25,405	\$34,578	73%
Manufacturing	\$30,522	\$53,229	57%
Food Services & Accommodation	\$26,989	\$29,700	91%
Home health care & Social Ass't.	\$30,395	\$32,979	92%

Source: Census Bureau, ACS-IPUMS, five-year 2015-19 dataset

³³ A full-time worker is defined as one working 32 hours or more per week for 27 or more weeks a year.

Figure 8.1

Gender comparison of median earnings for full-time independent contractors and payroll workers in low-paying industries in New York State, 2015-19

Full-time ICs and payroll workers	Median earnings				ratio of IC earnings to payroll workers	
	Independent Contractors		Payroll workers			
	Female	Male	Female	Male	Female	Male
<i>Gender</i>						
All low-paying industries	\$22,386	\$30,522	\$37,762	\$44,597	59%	68%
Other Services	\$22,248	\$26,806	\$36,452	\$41,679	61%	64%
Construction	\$25,227	\$31,863	\$50,704	\$50,812	50%	63%
Transportation & Warehousing	\$29,352	\$30,108	\$36,502	\$44,744	80%	67%
Admin. & support & waste mgmt.	\$25,998	\$31,132	\$37,666	\$39,976	69%	78%
Retail	\$22,187	\$30,380	\$35,622	\$39,936	62%	76%
Childcare	\$18,581	\$22,950	\$26,037	\$35,182	71%	65%
Educational Services	\$31,625	\$29,600	\$53,901	\$61,298	59%	48%
Agric., forestry & fishing	\$12,650	\$27,650	\$26,590	\$36,826	48%	75%
Manufacturing	\$18,663	\$33,200	\$46,373	\$55,698	40%	60%
Food Services & Accommodation	\$22,050	\$31,625	\$27,646	\$30,176	80%	105%
Home health care & Social Ass't.	\$27,495	\$64,377	\$31,952	\$40,700	86%	158%

Source: Census Bureau, ACS-IPUMS, five-year 2015-19 dataset

Independent contractors have a higher likelihood of being uninsured or reliant on Medicaid than payroll workers in the same low-paid industries. Figure 9 shows that half of independent contractors in low-paying industries either have no health insurance coverage (20 percent) or rely on Medicaid (27 percent) or Medicare (4 percent). While one-third have employer-provided health coverage, that is likely through a spouse. By contrast, 63 percent of payroll workers in low-paying industries have employer-provided health insurance directly or through a spouse.

Nor are independent contractors normally eligible for unemployment insurance (Federally funded Pandemic Unemployment Assistance provided by the CARES Act was the exception). With the exception of the app-dispatched New York City for-hire vehicle industry, independent contractors are not covered by workers' compensation insurance if they are injured or killed in connection with their work. And they are not covered by the State's paid family leave program.

Figure 9

Independent contractors in low-paying industries are less likely to have health insurance and more likely to rely on Medicaid

	Low-paying industries		
	All workers	Payroll workers	Independent contractors
Insured	93%	90%	80%
Not insured	7%	10%	20%
Medicaid	11%	17%	27%
Medicare	2%	1%	4%
Own purchase	8%	8%	17%
Employer provided (own or through spouse)	72%	63%	33%

Source: Census Bureau, ACS-IPUMS, five-year 2015-19 dataset

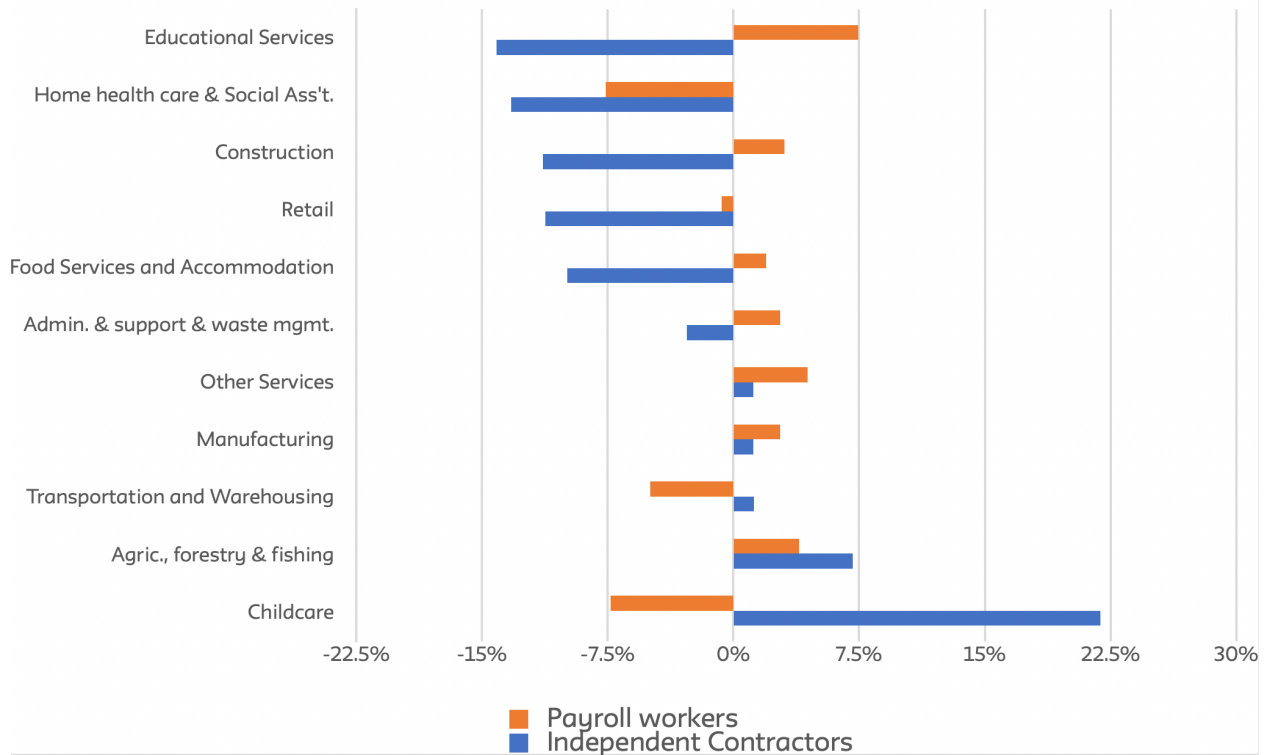
Inflation-adjusted median earnings for full-time independent contractors rose less or declined more over the past decade than for their payroll counterparts in eight of the 11 low-paying industries analyzed in this brief (see Figure 10). The major exception was childcare, where independent contractors saw median real earnings rise by 22 percent compared to a seven percent decline for wage workers. Nevertheless, during the 2015-19 period, median earnings for independent contractors in childcare were less than two-thirds of the pay received by wage workers in childcare.

Because this report's focus is on potentially misclassified independent contractors in low-paid industries, it largely does not consider independent contractors in higher-paid industries, including information; finance; the arts, entertainment and recreation; and others (See Appendix I for a full list). Many of these workers, such as technology and information consultants, freelance graphic designers, writers, editors, producers, and directors, are assumed to be properly classified as independent contractors when they work with multiple businesses, set their own rates, control the conditions of their work, and have specialized skills. In short, they demonstrate that they are freely contracting to do business with others.

Some in these industries may also be improperly classified and should be able to access legal rights and benefits as employees. And even those appropriately considered independent contractors often need greater workplace protections against non-payment and other forms of

Figure 10

Change from 2005/09 to 2015/19 in inflation-adjusted median earnings for payroll workers and independent contractors in NYS's low-paying industries



Source: Census Bureau, ACS-IPUMS, five-year 2015-19 dataset

exploitation, such as late payment or the absence of clear written contracts. A survey by the Freelancers Union and several unions and associations of independent professional media workers found that 62 percent of freelance workers based in New York had lost wages at least once in their career due to an employer's failure to pay them. Some 51 percent had lost more than \$1,000 and 22 percent more than \$5,000.³⁴ Some of these protections already exist in New York City under the local Freelance Isn't Free Act enacted in 2017.³⁵ In early June, the State Legislature enacted a statewide Freelance Isn't Free Act. It requires mandatory contracts for freelancers earning over \$250 from a client, payment required within 30 days of the completion of work, and anti-retaliation protections for freelancers who pursue payment from clients.³⁶

³⁴ Authors Guild, Freelancers Union, et.al. press release, "Sixty-Two Percent of NY Freelance Workers Report Never Being Paid for Work Performed Says New Survey," May 11, 2022. <https://www.authorsguild.org/industry-advocacy/survey-finds-62-percent-of-ny-freelance-workers-have-lost-wages-due-to-nonpayment/#:~:text=A%20survey%20by%20the%20Authors.least%20once%20in%20their%20career>

³⁵ <https://www1.nyc.gov/site/dca/about/freelance-isnt-free-act.page>

³⁶ As of this writing, the bill awaits the Governor's signature. <https://www.nysenate.gov/legislation/bills/2021/s8369>

5. Regions

As noted above, workers in low-paid independent contractor jobs are found across New York State. Figure 11 shows the New York State and regional independent contractor workforces by low-paying industry.

Over half (55 percent) of this workforce – 478,000 independent contractors in low-paying industries – is found in New York City, where annual earnings are under \$27,000 annually. (See Figure 12.) Nearly a quarter (24 percent) is Upstate, where over 210,000 independent contractors have annual average earnings of \$26,500. Slightly over one-fifth (21 percent) is in the Downstate suburbs, where 185,000 independent contractors have annual earnings of slightly under \$31,000.

Figure 11

New York State and regional independent contractor workforce, based on 2018 NES data

Low-Earning Industry Category	NYS	NYC*	Dowstate Suburbs*	Upstate*
Admin. & support & waste mgmt.	117,114	57,190	32,135	27,789
Agric., forestry & fishing	6,208	475	1,303	4,989
Childcare	52,129	35,505	6,438	10,186
Construction	115,494	51,431	28,628	35,435
Educational Services	57,277	26,200	16,949	14,128
Food Services and Accommodation	26,793	16,215	4,576	6,002
Home health care and Social Assistance	30,388	15,726	7,266	7,327
Manufacturing	13,312	5,210	2,873	5,229
Other Services	138,410	70,270	29,214	38,926
Retail	99,150	42,581	22,051	34,518
Transportation and Warehousing	217,053	156,713	33,793	26,547
Total Low-Earning	873,328	477,517	185,227	211,075
Percent of total by region	100%	55%	21%	24%

*Approximations of sole proprietors based on NYS ratio within industry of sole proprietors to total.

Source: Census Bureau, Nonemployer Statistics, 2018. Sole proprietors.

Figures 11 and 12 use administrative data to capture all workers engaged in independent contractor and gig work as a primary *or* secondary job. In Figure 13 below, we use the American Community Survey to show the number of workers in each region for whom independent contractor and gig earnings are their *primary* source of income.

Figure 12

Regional average gross earnings for independent contractors in low-paying industries, based on 2018 NES data

Low-Earning Industry Category	NYS	NYC*	Dowstate Suburbs*	Upstate*
Admin. & support & waste mgmt.	\$18,161	\$15,982	\$22,526	\$17,595
Agric., forestry & fishing	\$37,380	\$28,935	\$37,029	\$41,473
Childcare	\$14,507	\$13,743	\$17,003	\$15,591
Construction	\$35,985	\$24,816	\$50,519	\$40,453
Educational Services	\$14,336	\$16,167	\$14,624	\$10,594
Food Services and Accommodation	\$22,195	\$19,342	\$26,759	\$26,424
Home health care and Social Assistance	\$19,553	\$18,569	\$22,223	\$19,065
Manufacturing	\$34,820	\$34,496	\$41,563	\$31,437
Other Services	\$21,205	\$19,589	\$25,766	\$20,700
Retail	\$33,918	\$35,529	\$38,163	\$29,219
Transportation and Warehousing	\$36,995	\$38,368	\$33,834	\$32,910
Total Low-Earning	\$27,564	\$26,812	\$30,863	\$26,476

*Approximations of sole proprietors based on NYS ratio within industry of sole proprietors to total.
Source: Census Bureau, Nonemployer Statistics, 2018. Sole proprietors.

It shows that such workers are similarly spread across all regions of New York State, with 47 percent in New York City, 40 percent Upstate, and 13 percent in the Downstate suburbs (See Figure 15 below). Additionally, the percentage of each region's workforce that relies on independent contractor or gig work as their primary source of earnings remains steady across all regions, with seven percent in New York State overall, seven percent in New York City, eight percent Upstate, and seven percent in Downstate Suburbs. However, New York City has a higher concentration of independent contractors as a percent of combined payroll employment and independent contractor employment in low-paid industries (19 percent), compared to 16 percent in the suburbs and a little over 11 percent Upstate.

The highest concentrations are similarly in the same three industries – transportation, construction, and other services – statewide and in each region. Statewide, other services is the single largest sector, construction is second, and transportation is third. There are variations by region. The male-dominated construction industry leads in Upstate (and is a close second in the Downstate suburbs), while female-dominated other services leads in New York City and in the Downstate suburbs. (Male-dominated transportation is a close second in the city.)

Figure 14 shows that in New York City the low-paid independent contractor workforce is growing most rapidly in transportation, administrative and support services, and other services, sectors we later discuss more fully.

Figure 13

Primary independent contractors by region and industry, 2015/19

	NYC	Upstate	Downstate suburbs	All New York State
Total low-earning industries	158,301	132,218	44,127	334,646
Other Services	34,948	29,713	11,056	75,717
Construction	22,840	30,201	10,114	63,155
Transportation and Warehousing	34,561	7,434	3,165	45,160
Admin., support & waste mgmt. service	13,303	12,923	6,511	32,737
Retail	15,080	13,483	3,947	32,510
Childcare	14,588	8,073	1,932	24,593
Educational Services	8,263	5,664	2,506	16,433
Agric., Forestry, Fishing, Hunting, Minin	367	12,381	680	13,428
Manufacturing	3,660	5,619	1,573	10,852
Food Services and Accommodation	5,977	3,653	985	10,615
Home health care and Social Assistance	4,714	3,074	1,658	9,446

Source: Census Bureau, ACS-IPUMS, five-year 2015-19 dataset, data include full-time and part-time independent contractors.

Figure 14

Change in primary independent contractors in low-paying industries, New York City, 2005-09 to 2015-19

Full- and part-time independent contractors	2005-09	2015-19	2009-19	
			diff	%
Other Services	30,500	34,900	4,400	14.4%
Transportation and Warehousing	21,500	34,600	13,100	60.9%
Construction	24,500	22,800	-1,700	-6.9%
Retail	17,900	15,100	-2,800	-15.6%
Childcare	17,200	14,600	-2,600	-15.1%
Admin. & support & waste mgmt.	9,300	13,300	4,000	43.0%
Educational Services	6,600	8,300	1,700	25.8%
Food Services and Accommodation	5,900	6,000	100	1.7%
Home health care & Social Ass't.	3,700	4,700	1,000	27.0%
Manufacturing	5,000	3,700	-1,300	-26.0%
Agric., forestry & fishing	500	400	-100	-20.0%
Total independent contractors in low-paying industries	142,500	158,300	15,800	11.1%

Source: Census Bureau, ACS-IPUMS, five-year 2015-19 dataset, data include full-time and part-time independent contractors.

Figure 15

New York State and regional independent contractors for whom it is their primary source of earnings

Low-paying industries	NYS	NYC	Downstate Suburbs	Upstate
Independent contractors (ICs), 2018 based on NES	873,328	477,517	185,227	211,075
<i>Percent of total by region</i>	100%	55%	21%	24%
Private payroll employment, 2018 QCEW	4,669,565	2,056,089	963,924	1,649,552
Combined payroll + ICs	5,542,894	2,533,607	1,149,151	1,860,627
Independent contractors as share of combined workforce in low-paying industries	15.8%	18.8%	16.1%	11.3%
Primary independent contractors (ICs), 2015-19 ACS	334,646	158,301	44,127	132,218
<i>Percent of total by region</i>	100%	47%	13%	40%
Private payroll employment, 2015-19 ACS	4,251,745	1,961,293	610,294	1,568,223
Combined payroll + primary ICs	4,586,391	2,119,594	654,421	1,700,441
Primary independent contractors as share of combined workforce in low-paying industries	7.3%	7.5%	6.7%	7.8%

Source: Census Bureau, Nonemployer Statistics; NYSDOL Quarterly Census of Employment and Wages; and Census Bureau, ACS-IPUMS, five-year 2015-19 dataset, data include full-time and part-time independent contractors.

6. Rapid Growth in Gig Work In New York

Using IRS administrative data from 1099-miscellaneous information returns and tax returns for workers with independent contractor earnings, researchers have identified the companies engaging independent contractors that are primarily labor platforms. They found nearly 87,000 online platform workers in New York State in 2016 (the latest year in the tax data they examined).³⁷ As Figure 16 indicates, this number grew rapidly from only 1,254 in 2012. This rapid growth continued through 2018. As discussed below, indications are that growth has moderated to an annual pace of 5-8 percent since then.

Figure 16

New York State online platform economy (OPE) workers, 2012-2021

	<u># OPE workers</u>	<u>change from prior year</u>	
	<i>actual</i>	<u>#</u>	<u>%</u>
2012	1,254		
2013	4,964	3,710	296%
2014	24,065	19,101	385%
2015	49,773	25,708	107%
2016	86,949	37,176	75%
	<i>estimated</i>	<i>assumed growth</i>	
2017	130,400	50%	
2018	156,500	20%	
2019	169,000	8%	
2020	177,500	5%	
2021	189,900	7%	

Sources: 2012-16 data from Collins, et.al., 2019, p. 63. Values for 2017-21 estimated by authors using NYC Taxi and Limousine Commission data on growth in monthly average of unique app-dispatched drivers, and other sources.

A more recent (2021) analysis by two of this study's co-authors, Garin and Koustas, found that 74 percent of platform (or gig) workers nationally in 2018 had earnings from an app-dispatched car service or an app-based delivery service.³⁸ We believe this relationship plausibly holds for New York as well. Also, as far as we can tell, more than 90 percent of all statewide gig workers

³⁷ Brett Collins, Andrew Garin, Emilie Jackson, Dmitri Koustas, and Mark Payne, *Is Gig Work Replacing Traditional Employment? Evidence from Two Decades of Tax Returns*, March 25, 2019. As of 2016, New York State did not rank among the states with a high ratio of platform workers to all workers. Twenty states exceeded New York's 0.8 percent share, and five of those states (CA, FL, IL, MD and NV) had shares that were twice New York's. Appendix Figure 2 shows that several metro areas had a higher ratio of platform workers to all workers than the New York City metro area.

³⁸ Garin and Koustas (2021). Calculated from Table 1 in their supplementary data file.

are in New York City. Working from that, we use New York City Taxi and Limousine Commission administrative data on the annual growth in the monthly average of unique app-dispatch drivers in New York City during 2017-19, and our sense of the expansion of other on-line platform companies, to project the statewide number of gig workers for 2017-19. This is shown in Figure 16.

With the New York City app-dispatch market approaching saturation in 2019, the growth in the number of drivers slowed significantly from 2018 to 2019. During the first pandemic year of 2020, the sharp drop in app-dispatched passenger trips (and drivers) was offset by a sharp rise in food, grocery, and other delivery services. In 2021, passenger trips partially recovered and a few thousand drivers returned, while further expansion of delivery services for groceries, medicine, and other items offset some slippage in restaurant deliveries.³⁹ According to the website for the online platform company Handy (which provides workers for housecleaning and handyman services), the company had nearly 30,000 “active professionals” in the New York metro area in early June 2022.⁴⁰

Based on this mix of factors, we estimate a five percent annual statewide growth in the number of platform workers for 2020 and seven percent growth in 2021. This would make the 2021 number of platform workers in New York State an estimated 190,000. If there was little growth in the total number of independent contractors from 2018-2021, except among gig workers, that would make the gig worker share of New York independent contractors a little over 20 percent.⁴¹

However, it is entirely possible that there also has been some growth in the use of non-gig independent contractors over the past two years. The paucity of real-time government data on the number of independent contractors makes it difficult to tell. The onset of the pandemic may have led some businesses to seek cost savings or to take advantage of workers experiencing long spells of job dislocation by misclassifying them as independent contractors.

The OPE data from Garin and Koustas presented above are based on tax records and include primary work and secondary work undertaken to supplement the earnings from a primary job. IRS data analyzed by Garin and Koustas indicate that 44 percent of all OPE workers and the same percentage of all OPE drivers derive their primary earnings from OPE work.⁴² In our 2018 study of New York City app drivers with economist Michael Reich, we estimated app-dispatched

³⁹ By the fourth quarter of 2021, the average daily trip volume for the app-dispatched services had recovered to 528,000, about 25 percent less than the 700,000 average daily trip volume for 2019. New York City Taxi and Limousine Commission data.

⁴⁰ <https://www.handy.com/services/home-cleaning/new-york>

⁴¹ Assuming no growth in the number of non-gig independent contractors from 2018-21, there were an estimated 190,000 gig workers statewide and a total of 907,000 independent contractors (making the gig worker share 20.9 percent).

⁴² Garin and Koustas (2021).

driving was the primary job for 60-65 percent of drivers.⁴³ The 2021 Cornell-Los Deliveristas report on the New York City app-dispatched restaurant delivery workers also found that most of the estimated 65,000 restaurant delivery workers were full-time.⁴⁴

Our best sense of the relative magnitude of gig workers in New York City is that at the beginning of 2022 there were about 177,000 gig workers. About 90 percent were in one of three transportation-related businesses: for-hire vehicles (75,000); restaurant delivery (65,000); and grocery and other delivery (17,000). In addition, there are another estimated 20,000 on-line platform workers, with housecleaners working for the company Handy constituting the largest single source within that group.

Below, we briefly discuss these three principal transportation sub-sectors.

App-dispatch For Hire Vehicle Drivers

In February 2019, New York City's app-based for-hire vehicle (FHV) drivers became the first sizable group of online platform workers in the nation to have their pay regulated. New York City's Taxi and Limousine Commission (TLC) implemented a \$17.22 after-expense per hour minimum app-based FHV driver pay standard (applied on a per trip basis). The \$17.22 hourly rate included the employer share of payroll taxes that must be paid by independent contractors and also 90 cents per hour for paid time off.⁴⁵ Prior to the standard, an analysis prepared for the TLC estimated that 72 percent of all trips paid drivers less than \$17.22 per hour, and median after-expense earnings were \$13.70.⁴⁶ An average of about 85,000 drivers provided trips each month in 2019 for the high-volume for-hire vehicle companies operating in New York City.

In the years leading up to the implementation of the pay standard, average hourly driver earnings fell in periods when the supply of drivers exceeded consumer demand. The pay standard ensured that drivers were paid for all of their working time by incorporating a utilization factor in the denominator of the pay standard formula. The New York City pay standard formula thus incentivized companies to make more efficient use of drivers' time, reducing the time spent

⁴³ Parrott and Reich (2018).

⁴⁴ Figueroa, Guallpa, Wolf, Tsitoruas, and Colon Hernandez, 2021.

⁴⁵ New York City Taxi and Limousine Commission, *Driver Income and Lease Transparency Rules*, Adopted December 4, 2018, https://www1.nyc.gov/assets/tlc/downloads/pdf/driver_income_rules_12_04_2018.pdf. Unlike the New York State minimum wage, the TLC high-volume FHV driver pay standard is indexed for inflation, with the first annual increase effective January 1, 2020.

⁴⁶ James A. Parrott, Michael Reich, Jason Rochford, and Xingxing Yang, *The New York City App-based Driver Pay Standard: Revised Estimates for the New Pay Requirement*, Report for the New York City Taxi and Limousine Commission, Center for New York City Affairs and the Center on Wage and Employment Dynamics, January 2019; see also, James A. Parrott and Michael Reich, *An Earnings Standard for New York City's App-based Drivers: Economic Analysis and Policy Assessment*, Report for the New York City Taxi and Limousine Commission, Center for New York City Affairs and the Center on Wage and Employment Dynamics, July 2018. <http://www.centernyc.org/an-earnings-standard>

cruising while waiting for the next dispatch (i.e., increasing utilization measured as the percent of a driver’s working time with a passenger in the car).

In an evaluation of the first year of the New York City driver pay standard, Koustas, Parrott and Reich found a high rate of compliance and that driver pay had increased by about nine percent, or \$1.33 per trip. Total driver pay increased by \$340 million for the 11 months of 2019 the pay standard was in effect. Passenger wait times declined and some of the pay increase was absorbed through lower effective commission rates taken by the companies. While passenger fares rose and trip volumes leveled off and declined some in the latter part of 2019, these trends were also evident in Chicago where a pay standard was not implemented.⁴⁷

A cost-of-living provision in the driver pay standard resulted in a 5.3 percent increase on March 1, 2022.⁴⁸ For-hire vehicle drivers in New York State are covered for workers’ compensation insurance through a State-authorized nonprofit that for workers’ comp purposes “employs” the drivers and self-insures. In a highly unique arrangement, the Black Car Fund is financed by a State-authorized three percent fee applied to all trips.

As pandemic-related social distancing has eased, trip volume recovered to a level about 25 percent below the 2019 average in the fourth quarter of 2021. Considering that it could take two to three years for the number of tourists, business travelers, and Manhattan office workers to recover more closely to 2019 levels, we expect that average number of app-dispatched drivers will be approximately 80,000 this year.

Ninety percent or more of New York City app drivers are males and immigrants, with about half coming from five countries: the Dominican Republic, Haiti, Pakistan, India, and Bangladesh. More than half (56 percent) had no more than a high school education, and half of all drivers have children. Forty percent had incomes that qualified them for Medicaid, and 16 percent had no health insurance.⁴⁹

Restaurant Food Service Delivery Workers

App-dispatched restaurant food delivery dramatically increased during the worst months of Covid-19 in New York City. The number of mainly bicycle-based delivery workers increased to

⁴⁷ Dmitri Koustas, James Parrott and Michael Reich, *New York City’s Pay Standard: Effects on Drivers, Passengers, and the Companies*, Center for New York City Affairs at The New School, UC Berkeley Center on Wage and Employment Dynamics, and The University of Chicago, December 2020. Research funded by the Alfred P. Sloan Foundation. <http://www.centernyc.org/reports-briefs/2020/12/8/new-york-citys-gig-driver-pay-standard-effects-on-drivers-passengers-and-the-companies>

⁴⁸ <https://www1.nyc.gov/office-of-the-mayor/news/072-22/mayor-adams-delivers-raise-essential-gig-workers#/0>

⁴⁹ Parrott and Reich, 2018.

about 65,000 by 2021. These workers put in long hours during all types of weather for multiple platform apps (e.g., DoorDash, GrubHub, and UberEats), since working for just one app does not generate enough trips to support a living wage. At a recent public hearing held by New York City’s Department of Consumer and Worker Protection, a delivery worker who started working in 2016 reported that as a result of “overstaffing the platforms,” worker earnings fell as the time spent waiting for a dispatch rose.⁵⁰ This is a similar dynamic as observed in the case of app-dispatched drivers for Uber and Lyft prior to the implementation of the pay standard.

Delivery workers’ after-expense pay averages about \$7.90 an hour, according to a 2021 report based on a survey of over 500 delivery workers, prepared by researchers at Cornell University together with the workers group Los Deliveristas Unidos (LDU)/Workers Justice Project. Workers reported significant issues with the non-payment of tips and late-, under- or non-payment of base pay. Health and safety concerns are a significant issue. Five out of six survey respondents reported that they had been denied the use of a bathroom at restaurants they serve, and half of those surveyed reported having been in an accident while delivering food. Three-fourths of those requiring medical care when injured while delivering said they paid for the medical care out of their own pockets.⁵¹

As a result of several media stories covering the deaths of 16 delivery workers and considerable organizing by the workers, the New York City Council passed a package of bills in September 2021. They authorize establishment of a minimum compensation standard and require restaurants to provide bathroom access. They also require delivery apps to pay workers at least once a week, provide insulated food delivery bags, and, to reduce travel distances and times, limit the delivery area a worker serves.⁵²

Restaurant delivery workers are also overwhelmingly male and immigrant. There is a large representation from Mexico and Guatemala, including many from indigenous communities, and also many from South Asia and other Asian countries. Delivery workers also tend to be young, with nearly three out of five under the age of 30.⁵³

Other App-based Delivery Workers

The City Council authorized the City’s Department of Consumer and Worker Protection (DCWP) to develop the minimum compensation standard for app-dispatched restaurant food delivery workers. Researchers at DCWP recently estimated that there are another 17,000 app-

⁵⁰ New York City Department of Consumer and Worker Protection, Delivery Worker Pay Standard Hearing, June 15, 2022. See Tweet by the Worker’s Justice Project, <https://twitter.com/workersjusticep/status/1537140164174270466>

⁵¹ Figueroa, Guallpa, Wolf, Tsitoruas, and Colon Hernandez, 2021.

⁵² See Jeffrey C. Mays, *New York Passes Sweeping Bills to Improve Conditions for Delivery Workers*, The New York Times, September 23, 2021.

⁵³ Figueroa, Guallpa, Wolf, Tsitoruas, and Colon Hernandez, 2021.

based delivery workers in the city delivering groceries, medicine, clothing, and other items through companies like Instacart and DoorDash. In his March 2022 economic blueprint, Mayor Eric Adams announced that his administration would work with the City Council to expand minimum labor standards to cover this additional group of gig workers.⁵⁴ (The Seattle City Council recently unanimously approved a minimum compensation standard for app-dispatched delivery workers pegged to Seattle’s minimum wage for large employers of \$17.27 an hour. Seattle delivery workers typically use automobiles.⁵⁵ The Seattle measure excluded workers for “marketplace” companies like Handy and TaskRabbit.)⁵⁶

⁵⁴ Mayor Eric Adams, *Rebuild, Renew, Reinvent: A Blueprint for New York City’s Economic Recovery*, March 2022, p. 47. <https://www1.nyc.gov/assets/home/downloads/pdf/office-of-the-mayor/2022/Mayor-Adams-Economic-Recovery-Blueprint.pdf>

⁵⁵ “UberEats, DoorDash drivers must be paid Seattle’s minimum wage, city council decides, *King 5.com*, May 31, 2022.

⁵⁶ Natalie Bicknell Argerious, “Seattle Passes ‘First of its Kind’ Protections for App-Based Delivery Workers,” *The Urbanist*, June 8, 2022.

7. Non-gig Independent Contractors in Low-Paying Industries

Four of every five low-paid independent contractors in New York are non-gig workers. This translates into about 700,000 non-gig low-paid independent contractors.

One of the most rapidly growing sectors of independent contractor work is the broad industry category called “other services.” It encompasses such occupations as nail salon technicians, hairdressers and barbers, mechanics, automotive repair, laundry workers, massage therapists, tailors, and personal care workers.⁵⁷ According to 2019 ACS data, in this group growth of primary independent contractors has outstripped (+9 percent) that of payroll employees in the same industry (+2 percent) over the past decade. New York City has seen particularly rapid growth (+15 percent) in “other service” contractors. Upstate also has seen strong growth in other service independent contractors between 2009 and 2019 (+7 percent). In New York State, the median annual earnings for other services independent contractors is \$15,900, with 41 percent of these workers falling below 200 percent of the Federal poverty line.

Workers in the broad other services category tend to be occupationally sorted by gender. For example, upwards of 90 percent of workers in car washes and various repair and maintenance categories being male (See Appendix Figure 3.) By contrast, workers in barber shops, beauty salons, nail salons, dry-cleaning, and laundries are more likely to be female (72 percent).⁵⁸ In the following section, we examine one group of personal services workers who tend to be independent contractors whose gig work is not mediated by online or phone-based apps.

Nail Salon Workers

Very few nail salon workers are app-based workers. But, according to survey estimates from Workers United (and its affiliate, New York Nail Salon Workers Association), nearly half of nail salon technicians may be misclassified as independent contractors, meaning they are either misclassified as 1099 workers or paid off the books.⁵⁹

⁵⁷ Other services can be broken into three sub-categories: repair, personal and beauty services, and civic, religious, and non-profit other services. Those three categories have seen different rates of growth over the past decade (2009 to 2019): repair (-20 percent), personal and beauty services (+7 percent), all other services (+28 percent). The growth in civic, religious, and non-profit is likely due to the growth in non-profit consultants and contractors in those fields.

⁵⁸ Other services also includes a subcategory called “all other services” category, which is constituted by a range of service occupations in religious organizations, as well civic, social, advocacy and grantmaking organizations; workers in this broad clerical service category tend to be female.

⁵⁹ Zoë West, Russell Weaver, KC Wagner, “Unvarnished: Precarity and Poor Working Conditions for Nail Salon Workers in New York State,” April 2022, Cornell University, IRL School, The Workers Institute, <https://hdl.handle.net/1813/111162>. Nail Salon Workers Association, Workers United, “One Fair Wage Denied: Chasing Compliance in NY’s Nail Salon Industry,” April 2021. <http://workersunitednynj.org/wp-content/uploads/2021/04/One-Fair-Wage-Denied-Chasing-Compliance-in-NYs-Nail-Salon-Industry.pdf>

A major expose of poor pay and working conditions in the New York nail salon industry in 2015 in *The New York Times* led to establishment of a State Nail Salon Industry Task Force, new State wage regulations, and a requirement that all nail salons employing two or more workers procure wage bond coverage.⁶⁰ To qualify as an independent contractor in a nail salon in New York, a nail technician must have their own “Appearance Enhancement Area Renter” license, as well as a Nail Specialty License, in addition to purchasing liability insurance and a surety bond.⁶¹ (Additionally, the U.S. Department of Labor’s Wage and Hour Division tells such workers that a good rule of thumb for being classified as independent contractors by employers is whether they are: renting a booth or station; purchasing their own supplies; setting their own schedule and pay rates; and having customers who pay them directly.)⁶²

According to the Workers United survey, 44 percent of nail technicians are told by employers that they are independent contractors, though few reported knowing about, let alone having the required business license. From surveys and training session, Workers United organizers also found that most workers were unaware of the specific licensing requirement.

Despite the State wage reforms, the Workers United survey found that the average hourly pay for nail technicians was about \$11.50, with three-quarters being paid less than the appropriate minimum wage for their region. Wage theft and misclassification issues remain, underscoring the need for enforcing existing rules, for training business owners about their legal responsibilities, and holding them accountable.

A proposed Nail Salon Accountability Act currently being considered by the State Legislature would link the renewal of nail salon business licenses to training in labor law compliance and health and safety laws, and maintaining a clean record of labor compliance. Cases of wage theft or health and safety violations could prevent licensing renewal.⁶³ Additionally, a Nail Salon Minimum Standards bill proposes to establish an industry council composed of business representatives, nail salon workers, and public officials to recommend sector-wide minimum standards – most importantly, regarding fair pricing practices.⁶⁴ An industry-wide minimum pricing floor would address the destructive race-to-the-bottom competition that currently characterizes the industry, creating poor working conditions for workers and tiny profit margins for employers. (Neither of these bills were passed in the recently completed 2022 State Legislative session.)

⁶⁰ New York State Nail Salon Industry Task Force, “Nail Salon Wage Bond Coverage,” <https://dos.ny.gov/system/files/documents/2021/03/wage-bond-faqs.pdf>

⁶¹ New York, Department of State, Division of Licensing Services, “Appearance Enhancement Business or Area Renter Application,” <https://dos.ny.gov/system/files/documents/2018/07/0035-f.pdf>

⁶² U.S. Department of Labor, Wage and Hour Division, “Nail Salon Workers Wage and Hour Rights,” <https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/NailSalonflyer.pdf>

⁶³ The New York State Senate, Bill 4638, <https://www.nysenate.gov/legislation/bills/2021/s4638>.

⁶⁴ The New York State Senate, Bill 8166, <https://www.nysenate.gov/legislation/bills/2021/s8166>.

Currently, according to 2019 Census data, 24 percent of nail salon workers are on Medicaid and 16 percent receive Food Stamps. Because many nail industry workers are undocumented these are likely underestimates. Industry-wide regulation could raise the earnings floor for these workers as well as give relief to small businesses who are caught up in forces of price competition that are beyond their control.

Construction

The New York Department of Labor has noted that “anywhere from 15 to 25 percent of construction workers may be misclassified in New York State” including through “payment off the books”.⁶⁵ While the NES nonemployer data on sole proprietors do not perfectly measure misclassification, trends in that series are a good barometer of misclassification and, by implication, the outcome of enforcement policies.

The construction industry also provides a good example of how tightening statutory language regarding proper classification of workers, coupled with effective enforcement, can have a significant impact in curbing misclassification.

From 2005 to 2010 there was a 43 percent increase (18,000) in the number of construction industry independent contractors in New York City even as payroll employment declined slightly. In the wake of this surge in likely misclassification, the New York State Construction Industry Fair Play Act was enacted and took effect toward the end of 2010.⁶⁶ It established a presumption of employment for workers in the construction industry and instituted a three-part or “ABC” test a worker must meet to be considered an independent contractor. The three parts are: To call someone an independent contractor, a company must show that the individual is:

1. Free from control and direction in performing the job, both under contract and in fact;
2. Performing services outside of the usual course of business for the company; and
3. Engaged in an independently established trade, occupation or business that is similar to the service they perform.

Enforcement, including criminal enforcement by district attorneys, under New York’s Construction Industry Fair Play Act and compliance under workers’ compensation, unemployment insurance, and workplace safety laws have contributed to a substantial reduction in the incidence of independent contractor misclassification in construction. From 2010 to 2018 there was a 45,000 increase (nearly 42 percent) in payroll employment in the New York City construction industry. There was, however, no change in the number of nonemployer

⁶⁵ New York State Department of Labor, “Fair Play Act, New York State Construction Industry” Fact Sheet. n.d. <https://dol.ny.gov/system/files/documents/2021/02/p738.pdf>

⁶⁶ Ibid.

independent contractors. Some of the payroll employment increase therefore likely resulted from better enforcement against misclassification.

Considering that “payment off the books” is an often-used business practice for some construction contractors, analysts at the Center for Migration Studies (CMS) employed a methodology drawing on ACS and quarterly census of employment data to estimate the extent of misclassification in New York City construction.⁶⁷ The CMS analysts estimated that construction industry misclassification in New York City declined from 71,000 in 2011 to less than 47,000 in 2019, a decline of 24,300 or 34 percent.⁶⁸ This strongly suggests that the Fair Play Act has significantly lessened the extent of independent contractor misclassification in construction, offering a clear example of how effective scrutiny of the independent contractor label can shift hiring practices, and benefit workers as well as the State’s social insurance programs, and diminish unfair competition faced by legally compliant businesses.⁶⁹

Amazon Delivery Service Partnerships (DSPs)

The pandemic accelerated the e-commerce trend in retailing. It came at a time when the giant retailer Amazon was already rapidly expanding its nationwide network of distribution centers and ramping up its own delivery operations, a function it had previously relied on the U.S. Postal Service, UPS, and FedEx to provide.

Payroll jobs in warehouses and delivery companies have risen rapidly since the beginning of the pandemic, with statewide job growth rising at a 15 percent annual rate over the past two years (See Figure 17). While Amazon is not the only large retailer propelling this growth, all indications are that it accounts for a large share. Nationally, e-commerce sales surged by 32 percent in 2020, then slowed to its pre-pandemic pace of 14 percent in 2021, with Amazon accounting for 43.5 percent of all e-commerce sales last year.⁷⁰

⁶⁷ When he was at the Fiscal Policy Institute, economist James Parrott demonstrated this method in a series of reports in 2007 on the New York City construction industry, in testimony before the Assembly in January 2010, and in a report prepared for a 2013 Grand Jury investigation convened by the Manhattan District Attorney in connection with an investigation of the business noncompliance with the requirements of the State workers’ compensation system. See, e.g., James A. Parrott, *Employee Misclassification in New York Construction—Economic and Fiscal Costs*, Labor and Employment Relations Association, Proceedings of the 63rd annual meeting, 2011. This method uses responses from the American Community Survey to identify construction workers for whom construction businesses are not paying unemployment insurance (i.e., not included in employment counts in the Quarterly Census of Employment and Wages), and for whom contracting businesses are not submitting 1099 data to the IRS.

⁶⁸ Jacquelyn Pavilon and Vicky Virgin, *Climbing the Ladder: Roadblocks Faced by Immigrants in the New York City Construction Industry*, New York: Center for Migration Studies, May 2022, p. 12 and Appendix Table A.2.

⁶⁹ In order to enhance enforcement against wage theft in the construction industry, the legislature enacted and the Governor Hochul signed into law a measure that took effect on January 4, 2022, to make prime contractors jointly liable for any unpaid wages, benefits or wage supplements incurred by a subcontractor.

<https://legislation.nysenate.gov/pdf/bills/2021/S2766C>

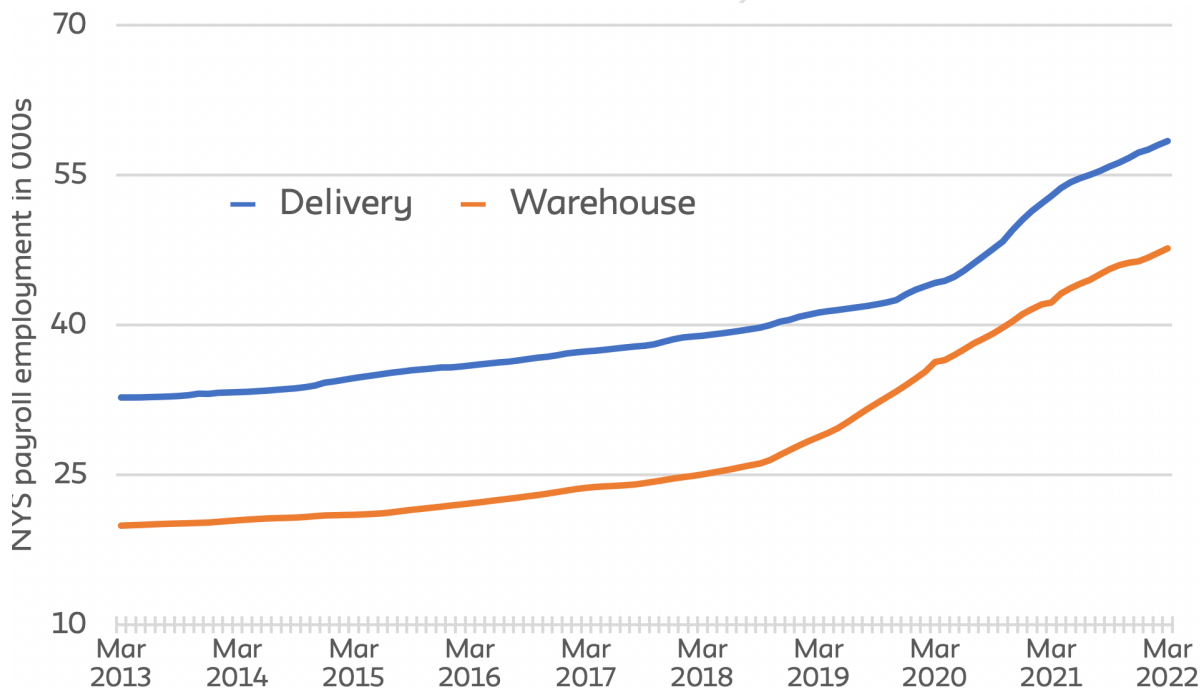
⁷⁰ <https://www.digitalcommerce360.com/article/us-e-commerce-sales/>, accessed April 26, 2022.

As of early 2022, Amazon had more than a dozen fulfillment and “sortation” centers scattered across New York State. They averaged a little over a million square feet each, according to an industry source. (The Amazon JFK8 fulfillment center on Staten Island, where an 8,000-worker unit that recently voted to unionize, has about 900,000 square feet.) In response to a steep increase in workplace injuries at Amazon’s New York distribution centers in 2021, the State Legislature enacted the Warehouse Workers Protection Act in June 2022. (The bill awaits the governor’s signature before becoming law.)⁷¹

While Amazon warehouse workers typically are employees of the company, its last-mile delivery operations make widespread use of drivers who are either online platform workers or subcontracted employees of an Amazon franchisee that the company refers to as an “Amazon Delivery Service Partner” or (DSP).⁷²

Figure 17

Rapid growth over the past five years in warehouse and delivery payroll employment in New York State



Source: BLS current employment statistics. Delivery is the “courier and messenger industry.” Data points are 12-month averages.

⁷¹ The Warehouse Worker Protection Act (S.08922-A) requires regulates the use of performance-based quotas and requires employers to establish an injury reduction program with input from workers and ergonomists. See National Employment Law Project, *Warehousing Pain: Amazon Worker Injury Rate Skyrockets with Company’s Rapid Expansion in New York State*, May 2022. Annie McDonough, “Injury rates surge at Amazon’s New York facilities,” *City & State*, May 19, 2022.

⁷² See, <https://logistics.amazon.com/>.

Amazon has 56 delivery stations across the state that dispatch last-mile packages for delivery, with each facility averaging about 150,000 square feet. One delivery model, Amazon Flex, utilizes gig workers who deliver packages in their personal vehicles. Flex workers use an Amazon smartphone app to sign up for three-to-six-hour delivery blocks, with an Amazon algorithm charting the delivery route and tracking delivery to the customer's doorstep.⁷³ Flex workers also deliver household items or groceries for Prime Now and Amazon Fresh. Like app-dispatched drivers for gig companies, Flex drivers often complain about payments not covering expenses, about algorithmic-determined management actions, such as the assignment of negative ratings, and about difficulties in connecting with a human being to resolve complaints.⁷⁴

The more prevalent package delivery mode is the Delivery Services Partnership (DSP) program. Under it, Amazon contracts with franchised DSP operators who hire and manage a team of 40-100 drivers and run a fleet of leased Amazon-branded delivery vans. The DSP owner is essentially a misclassified independent contractor who also serves as little more than a labor subcontractor. The DSP "partnership" includes working procedures and conditions tightly controlled by Amazon through contract.

This model allows Amazon to shield itself from legal complaints and violations alleged by these DSP drivers under New York State labor laws. This contracting-out model is widely used in industries such as apparel manufacturing and construction. It typically allows little autonomy or business leverage relative to the company at the top of the food chain. As a result, employees of the contractor also lack effective bargaining leverage, given that the arrangement exerts significant downward economic pressure on the DSP and its workforce. The DSP contract legally binds DSP owners to labor terms and conditions that would otherwise be subject to mandatory bargaining in prospective negotiations with a union representing the drivers.

⁷³ Janet A. Vertesi, Adam Goldstein, Diana Enriquez, Larry Liu, and Katherine T. Miller, *Pre-Automation: Insourcing and Automating the Gig Economy*, *Sociologica*, v. 14 n. 3 (2020), p. 175.

⁷⁴ Spencer Soper, *Fired by Bot at Amazon; 'It's You Against the Machine'*, Bloomberg, June 28, 2021.

8. Enforcement

Ensuring that workers in low-paid industries are not, because of misclassification, denied full access to social insurance programs, protections under the Fair Labor Standards Act, and other employment rights depends on both clear statutory safeguards and effective enforcement. This section focuses on the enforcement of existing State laws; the next section turns to further legislative proposals.

In addition to the State Labor Department, multiple government entities in New York have authority to enforce State labor laws. The State Attorney General Labor Bureau enforces worker protection laws and brings civil and criminal actions against employers who violate such laws. County-elected district attorneys represent the State in criminal judicial proceedings and have the authority to pursue violations of State laws. New York State law also empowers the New York City Comptroller to set and enforce prevailing wage standards for building trades and certain categories of service workers.

In recent years the New York County (Manhattan) District Attorney and the State Attorney General have been particularly active in enforcing labor protections in the construction and nail salon industries. For example, as the result of an investigation of a construction worker's death led by the Manhattan District Attorney's Construction Fraud Task Force (coordinated with the State Labor Department and New York City Department of Investigation), a construction company pled guilty to manslaughter in the second degree. It also paid restitution for stealing more than \$500,000 in wages for overtime work by more than 50 employees, and paid State insurance funds approximately \$375,000 in fees and penalties for underreporting nearly \$2 million in payroll.⁷⁵

Joint Enforcement Task Force on Misclassification

In September 2007, New York Governor Eliot Spitzer characterized independent contractor misclassification as “rampant” and an “epidemic,” and pledged to curb it through tougher enforcement. Spitzer issued an Executive Order establishing a Joint Enforcement Task Force on Employee Misclassification, stating that it would “protect worker rights while leveling the playing field for law-abiding employers so they are not at a competitive disadvantage to employers who refuse to play by the rules as they exploit hard working New Yorkers.”⁷⁶

⁷⁵ Cyrus R. Vance Jr., Manhattan District Attorney, “Construction Company Pleads Guilty to Manslaughter, Pays Full Restitution to Workers; SSC High Rise Inc. Convicted of Manslaughter for Causing Death of Carpenter Juan Chonillo,” press release, July 13, 2018.

⁷⁶ New York State Office of the Governor, “Governor Spitzer Signs Executive Order to Prevent Employee Misclassification.” Press Release, September 7, 2007.

(New York State is not alone in identifying misclassification as an issue and assembling advisory boards and task forces to pursue violations of labor, employment, tax, insurance, and occupational safety.⁷⁷ These task forces have also discovered a prevalence of underground or “off-the-books” employment, suggesting that our estimates of full-time low-paid independent contractors is likely low.)

Spitzer’s executive order came in response, in part, to a 2007 study by researchers at the Cornell University Industrial and Labor Relations School. Examining unemployment insurance audits, it estimated that 10.3 percent of all employees in the state were misclassified as independent contractors. It found that misclassification was particularly pervasive in the construction industry, estimating that 14.8 percent of all construction workers were misclassified. The authors also estimated that misclassification resulted in under-payment of State unemployment insurance taxes by \$175.7 million over the 2002-2005 period.⁷⁸

The Joint Task Force brought together the State Labor and Tax Departments, Workers’ Compensation Board, Workers’ Compensation Fraud Inspector General, State Attorney General’s Office, and New York City Comptroller to share information about suspected employee misclassification violations, target investigative and enforcement resources to address them, develop strategies for systematically investigating misclassification in industries in which it is most common, and to “assess existing methods, both within New York and in other jurisdictions, of preventing, investigating and taking enforcement action against employee misclassification violations.” The Spitzer Executive Order also required an annual report to the governor.⁷⁹

In Congressional testimony in June 2010, State Labor Commissioner Colleen Gardner noted that from its inception in September 2007 through the end of March 2010, the state’s Joint Enforcement Task Force conducted 67 enforcement sweeps across the state. It identified nearly 35,000 instances of employee misclassification, discovered over \$457 million in unreported wages, identified more than \$13.2 million in unemployment insurance taxes due, and discovered over \$14 million in unpaid wages.

“We have only scratched the surface of the problem in New York,” Commissioner Gardner observed. “There is much more work to be done.” Regarding the Cornell study’s estimate of 14.8 percent misclassification of the construction industry workforce, she said that, “Our own field

⁷⁷ In 2018, New Jersey’s Governor Murphy signed an executive action establishing a task force on employee misclassification (https://nj.gov/governor/news/news/562018/approved/20180503b_taskForce.shtml). Joining those existing in Connecticut (<https://www.ctdol.state.ct.us/wgwkstnd/jec/JEC.htm>) and Massachusetts (<https://www.mass.gov/executive-orders/no-499-establishing-a-joint-enforcement-task-force-on-the-underground-economy-and-employee-misclassification>).

⁷⁸ Linda Donahue, James Ryan Lamare, and Fred B. Kotler, *The Cost of Worker Misclassification in New York State*, Cornell University ILR School, February 2007.

⁷⁹ Governor Eliot Spitzer, Executive Order 17, *Establishing the Joint Enforcement Task Force on Employee Misclassification*, September 7, 2007.

experience has shown that the level of worker misclassification in New York may be even higher...because of the high incidence of off-the-books work.”⁸⁰

Figure 18 provides data on the enforcement actions detailed in the annual reports of the Joint Enforcement Task Force for the years 2008-2014. (No reports have been issued since the 2015 annual report on 2014 enforcement actions.)⁸¹ In addition to the number of workers identified as misclassified by the Task Force, these annual reports included data from Labor Department unemployment insurance audits on misclassification and the amount of unemployment insurance payroll taxes assessed for offending employers. On an annual average basis over the seven years for which reports were issued, enforcement actions identified 152,000 misclassified employees and assessed \$51 million in unemployment insurance payroll taxes.

Governor Andrew Cuomo’s Executive Order 159 in July 2016 folded the misclassification task force into a broader Joint Task Force to Fight Worker Exploitation and Employee Misclassification. However, it eliminated the requirement for an annual report included in Spitzer’s 2007 executive order, continued by Governor David Paterson and, initially, Andrew Cuomo.⁸²

Throughout his decade in office, former Governor Andrew Cuomo adhered to a two percent overall cap on State operating expenditures that often resulted in inflation-adjusted declines in the Labor Department’s budget, and reductions in labor standards enforcement staffing.

Currently, information regarding enforcement, presumably for any form of labor standards violation including wage theft, minimum wage, employee misclassification, or non-payment of unemployment insurance taxes, on the webpage for the Cuomo-established Joint Task Force is contained in one sentence:

“Since its inception in July, 2015, JTF has directed 1,547 businesses to pay nearly \$4 million in back wages and damages to more than 7,500 workers.”⁸³

⁸⁰ Colleen C. Gardner, Commissioner, New York State Department of Labor. “Leveling the Playing Field: Protecting Workers and Businesses Affected by Misclassification.” Testimony before the U.S. Senate Committee on Health, Education, Labor and Pensions, June 17, 2010.

⁸¹ The Labor Department coordinates the Task Force on behalf of the Governor. For several years when Andrew Cuomo was Governor regular coordination with the Attorney General’s office on misclassification enforcement apparently ended.

⁸² Governor Hochul’s Executive Order 6 continued Governor A. Cuomo’s Executive Order 159.

⁸³ <https://www.ny.gov/task-force-combat-worker-exploitation#:~:text=On%20July%2021%2C%202016%2C%20Governor,Task%20Force%20on%20Employee%20Misclassification.> (accessed June 16, 2022.)

Figure 18

New York's record of enforcement against employee misclassification, 2008-14

year	Joint Enforcement Task Force actions			NYS DOL UI audits		
	# workers misclassified	UI taxes & penalties assessed \$ millions	Unreported wages \$ millions	Unpaid wages \$ millions	# workers misclassified	UI taxes assessed \$ millions
2008	12,300	\$5.8	\$157	\$12.0	85,000	\$27.4
2009	19,200	\$6.5	\$235	\$2.5	113,900	\$35.9
2010	18,500	\$10.5	\$314	\$2.0	218,000	\$40.0
2011	19,600	\$14.5	\$412	n.a.	131,700	\$48.5
2012	20,200	\$9.7	\$283	n.a.	113,500	\$43.3
2013	24,000	\$12.2	\$333	n.a.	127,000	\$55.1
2014	26,000	\$8.8	\$316	n.a.	133,000	\$40.4
2008-14	139,800	\$68.0	\$2,050		922,100	\$290.6

Source: New York State Department of Labor, Annual Report of the Joint Enforcement Task Force on Employee Misclassification, 2009-15.

Nevertheless, employee misclassification is still a substantial problem in New York. The State Department of Labor recently provided the authors with summary enforcement data from the Joint Task force for the period from the first quarter of 2015 through the first quarter of 2022. (The enforcement results presented in Figure 19 largely reflect the first five years of this period, 2015-19, since many State labor enforcement personnel were engaged in Covid-related emergency actions during the pandemic.) The Task Force identified nearly 100,000 misclassified employees during that period, with previously unreported wages of \$1.8 billion.

In response to pressure from various worker centers and labor unions, the FY 2023 State budget increased funding for labor standards enforcement. The Labor Department began “ramping up” hiring of labor investigators in late April.

State Labor Department unemployment insurance audits identified over 511,000 misclassified workers during the period from the first quarter of 2015 through the first quarter of 2022. Previously unreported wages in the amount of nearly \$15 billion were discovered and offending businesses were assessed a total of \$223.3 million in unemployment insurance payroll taxes and penalties, as indicated in Figure 19.

Figure 19

Previously-unpublished data on enforcement against employee misclassification by the New York Joint Task Force and the NYS Department of Labor

period	Joint Enforcement Task Force actions			
	# workers misclassified	cases completed	UI taxes & penalties assessed \$ millions	Unreported wages \$ millions
Q1 2015 through Q1 2022	98,762	9,809	\$48	\$1,800
	NYS DOL UI audits			
Q1 2015 through Q1 2022	511,083	69,590	\$223.3	\$14,900

Source: Data provided to the authors by the New York State Department of Labor, May 5 and 10, 2022

The enforcement data presented in this section underscore the fact that misclassification of employees as independent contractors is a substantial problem in New York State. Before enforcement efforts were scaled back and budget cuts reduced enforcement staffing, State investigators were identifying an average of 152,000 workers each year as misclassified or paid off the books. Enforcement results declined in recent years, but almost certainly not because the problem has diminished.

Enforcement on Unemployment Insurance Access

Misclassification harms not only workers but also State social insurance programs. In the years since 2008, the State has assessed offending companies with \$630 million in unemployment insurance taxes and penalties.

The pandemic put a spotlight on problems regarding access to unemployment insurance for workers who filed claims and whose classification status was adjudicated through the unemployment insurance appeals system and, eventually, the courts.

Prior to the pandemic, the State's Unemployment Appeals Board had found in over 370 cases dating to 2016 that, for purposes of unemployment insurance (UI), Uber and Lyft drivers were

employees.⁸⁴ Based on that, many app-based drivers applied for regular UI benefits in the early days of the pandemic in spring 2020. (Regular UI provided better benefits than the Federally funded Pandemic Unemployment Assistance program.) Despite the UI Appeals Board rulings, however, the State Labor Department had not acted to collect UI payroll taxes from the app companies or even to require that the companies report driver earnings to the UI system. Without the earnings data, drivers were therefore denied UI benefits. Attorneys for the drivers pursued legal action and in July 2020 a Federal judge ordered the State Labor Department, in *Islam v. Cuomo*, to expedite processing worker appeals for denied claims and compel the companies to provide driver earnings data.⁸⁵ Ultimately, over 50,000 drivers were affected, and while they received UI benefits paid from the State's UI Trust Fund, the companies have yet to pay any UI payroll taxes, essentially shifting that burden to other New York employers.

The State Labor Department claims it does not have the authority to require the companies to report wages in the absence of an audit.⁸⁶ While that seems puzzling given the rulings of the UI Appeals Board, State legislation could explicitly provide that authority to the Labor Department and the State Attorney General, as well as authorize sufficient penalties for non-compliance. Considering the harm done to drivers from having to wait months to receive UI benefits, the State should act to avert a recurrence in the next economic downturn.

⁸⁴ *Islam v. Cuomo*, 20-CV-2328 (LDH), July 28, 2020.

⁸⁵ Noam Scheiber, "Uber and Lyft Drivers Win Ruling on Unemployment Benefits," *The New York Times*, July 28, 2020.

⁸⁶ See the New York State Attorney General's motion to dismiss in *Islam v. Cuomo*, Apr. 9, 2021, p. 17.

9. Policy Outlook

Conditions in the labor market largely determine the ability of working New Yorkers to earn a decent living and provide for their families. There have been numerous developments over the past two to three decades that have fractured the traditional employer-employee relationship and resulted in various forms of “fissuring,” a term popularized by economist David Weil, former wage and hour administrator in the Obama administration. As mentioned at the top of this report, a recent U.S. Treasury Department report documents how fissuring can have a “detrimental impact on workers,” including lower wages, and fewer benefits and advancement opportunities. The Treasury report notes that fissuring is “widespread [in] industries with low average pay.”⁸⁷

While the rapid rise in app-based gig work has been a major form of fissuring, there has also been an increase in the misclassification of workers as independent contractors in non-gig work, as well as contracting out, employee leasing, and other forms of “nonstandard” work. Invariably, this is detrimental to the well-being of workers and results in lower pay, fewer benefits, less paid time off, less coverage by unemployment insurance or workers’ compensation, and fewer health and safety protections.

Sociologist Arne Kalleberg underscores the implications for affected workers when he writes that this trend constitutes

... a new age of precarious work that represents a fundamental shift toward widespread uncertainty and insecurity. People who have the skills and resources to successfully navigate rapidly changing labor markets have welcomed this new era as an opportunity to achieve their market potential by moving between organizations. Others, perhaps the majority, are more economically insecure, often have difficulties in forming families, and experience low well-being.⁸⁸

The pandemic exposed some of this precariousness, but to date has largely not resulted in better long-term worker protections. (An exception is New York City’s 2021 limited protections for restaurant delivery workers.) The State Legislature enacted protections for professional freelancers at the end of the 2022 legislative session (the governor needs to sign the bill for it to become law). Generally, however, New York State has been slow to respond to business practices that intensify worker precarity. While recently restored enforcement funding should help, the State also needs to bolster statutory safeguards.

McKinsey and Company, the management consulting firm, points out the long-term unsustainability of cutting labor costs to the point where workers cannot cover their basic needs. McKinsey’s bread and butter is closely consulting with top business leaders about corporate

⁸⁷ U.S. Department of the Treasury, *The State of Labor Market Competition*, March 7, 2022, pp. 9-10. <https://home.treasury.gov/system/files/136/State-of-Labor-Market-Competition-2022.pdf>

⁸⁸ Arne L. Kalleberg, *Precarious Lives, Job Insecurity and Well-Being in Rich Democracies*, Medford, MA: Polity Press, 2018, p. 194.

management strategies. So it is concerning when they report in a recent survey that 70 percent of executives suggest that they want to hire on-site contract and temporary workers and freelancers, making work even more precarious for workers. As they note in the same report summarizing the findings of a survey last year of 1,500 New Yorkers:

“40 percent of contract, temporary, and freelance workers in New York City could not cover their living expenses for more than two months (compared with 31 percent of permanent workers), and the same share are worried they will lose their housing (compared with 18 percent of permanent workers). ... Nearly two in three temporary, contract, or freelance workers said they would rather have more permanent employment, with the highest rates reported among workers of color and immigrants.”⁸⁹

With characteristic understatement, McKinsey concludes that “this mismatch between employer and worker preferences could create a risk of skill mismatches and a productivity drain, especially if temporary work leads to a lower level of skill gain by employees.”⁹⁰

Especially in the uneven pandemic economic recovery, new forms of hiring part-time and gig workers have proliferated. In New York City, startups such as Jitjatjo, Staffy, Shiftgig, and Pared supply on-demand staff for restaurants, caterers, and cafeterias. Jitjatjo dispatches dishwashers, bartenders, pastry cooks, waiters, and other workers to food venues across the city.⁹¹ Health care staffing agencies, including some dispatching workers through an app, were expanding their reach before the pandemic; the grueling demands placed on nurses and other critical care workers over the past two years has led to a surge in such placements.⁹²

By addressing the financial precarity of so many New York workers, policy makers will help workers meet their long-term needs as well as bolster an economy reliant on a skilled and productive workforce.

Severely Flawed Legislative Approach from Spring 2021

First, however, they should do no further harm – and that means avoiding legislative proposals supported by the large platform companies, whose lobbying shadow has loomed large over the legislative landscape, in New York and elsewhere. Gig companies have vigorously pursued legal actions and mounted aggressive state and local lobbying campaigns to keep classifying their workers as independent contractors, continue under-paying workers for their time and expenses,

⁸⁹ McKinsey & Company, *Twelve insights for an inclusive economic recovery for New York City*, October 2021.

⁹⁰ *Ibid.*, p. 19.

⁹¹ Anne Kadet, “Need a Water or Dishwasher in a Pinch? There’s an App for That,” *WSJ*, Dec. 18, 2018. “New side hustles for publicists, restaurant workers, and more,” *Los Angeles Times*, Nov. 21, 2021.

⁹² Staffing Industry Analysts, “US staffing revenue to grow 16% this year to record high: SIA forecast,” September 8, 2021. In this fall 2021 forecast, healthcare staffing agency revenues were projected to rise by 24 percent in 2021.

vastly limit workers' access to paid time off and social insurance coverage, and limit access to health and safety protections.

In May 2021, Bloomberg News reported that State Senator Diane Savino was planning to introduce the “Right to Bargain Act,” which would have allowed app-based drivers and delivery workers to collectively bargain while cementing their status as non-employees and rolling back local victories.⁹³

Many advocacy groups and many (but not all) unions criticized the bill for offering a weak form of “collective bargaining” through a company-chosen union. The proposed structure would have excluded rank-and-file members from participating in the bargaining process and banned strikes and work stoppages, making member-led solidarity and movement-building extremely difficult.⁹⁴

Other provisions of the bill were also problematic. Proposed unemployment insurance and workers' compensation coverage would have been inferior to traditional State-run programs. (App-dispatched for-hire vehicle drivers such as those working for Uber and Lyft are covered for workers' compensation through the Black Car Fund.)⁹⁵ App-based gig workers would have been denied access to other workplace protections, including disability law. Even though courts have ruled that Postmates delivery workers and Uber and Lyft drivers are employees for the purposes of unemployment insurance and thereby eligible to receive to regular New York State unemployment insurance, the “Right to Bargain Act” would have excluded workers from such coverage.⁹⁶ Moreover, workers would have been excluded from the bill's proposed unemployment scheme if they did not meet a set of company-determined performance requirements, such as maintaining a 5-star consumer-provided rating.⁹⁷

⁹³ Annie McDonough, “Savino to introduce bill allowing gig workers to unionize,” *City & State New York*, May 21, 2021. <https://www.cityandstateny.com/policy/2021/05/savino-to-introduce-bill-allowing-gig-workers-to-unionize/182844/>

⁹⁴ Brian Chen and Maya Pinto, “Uber's New Gig Worker Bill is the Same Old Trick: Deregulation and Special Treatment for Exploitative Companies,” NELP, June 2, 2021. <https://www.nelp.org/blog/ubers-new-gig-worker-bill-is-the-same-old-trick-deregulation-and-special-treatment-for-exploitive-companies/>

⁹⁵ Under a 1999 New York State law, independent contract drivers for black car and the app-dispatched car services are covered for workers' compensation insurance purposes by the Black Car Fund financed with a fee charged on every trip. When app-dispatched services such as Uber and Lyft began operating in New York, their drivers came under the Black Car Fund. While it is funded by a state-mandated 2.5 percent fee and has taken in nearly \$1 billion in recent years, the BCF does not publish data regarding the average medical or lost work payments made to injured drivers. Article 6-F of the New York State Executive Law.

⁹⁶ New York Court of Appeals decision, Matter of Vega (Postmates), March 26, 2020; Noam Scheiber, “Uber and Lyft Drivers Win Ruling on Unemployment Benefits,” July 28, 2020, updated March 16, 2021. *The New York Times*. <https://www.nytimes.com/2020/07/28/business/economy/lyft-uber-drivers-unemployment.html>

⁹⁷ Such a system would lock workers out of benefits based on a ratings system that has been the subject of a federal lawsuit investigating systematic racial discrimination. Many studies have shown bias in online reviews, from professors to TaskRabbit freelancers. See: Sam Harnett, “Black and Brown Gig Workers Report Lower Ratings—But Companies Make Bias Hard to Track,” *KQED*, July 2021. <https://www.kqed.org/news/11878952/black-and-brown-gig-workers-report-lower-ratings-but-companies-make-bias-hard-to-track> and Alex Rosenblat, Karen Levy,

The “Right to Bargain Act” would have also preempted worker standards and protections established at the city level.⁹⁸ It would have undercut the campaign led by Los Deliveristas Unidos for better working conditions for app delivery workers, including the right to use restaurant bathrooms and minimum pay and destination transparency on apps. It also would have overturned the New York City minimum pay standard for app-based drivers, effectively lowering the hourly minimum pay from \$17.47 (as of spring 2021) mandated by the Taxi and Limousine Commission to \$8.70.⁹⁹

The “Right to Bargain Act” ultimately lacked sufficient legislative support to be introduced, but the regulatory strategies it outlined, including local preemption and granting some support for independent contractors without either recognizing workers as employees or granting them robust collective bargaining powers, may foreshadow future regulatory proposals sought by the companies.

The gig companies have been relentless in pushing restrictive legislative and legal proposals at the state and (in Canada) provincial level.

In California, for example, the State Legislature in 2019 responded to the problem of employee misclassification with a law commonly known as “AB5.” It established a straightforward ABC test to distinguish between employee and independent contractor status, similar to that in New York’s Construction Industry Fair Play Act (described in section Seven).

In reaction, Uber, Grubhub, and DoorDash funded a \$224 million media campaign in 2020 to get voters to approve Proposition 22,¹⁰⁰ a referendum measure designed to exempt app-based transportation and delivery companies from coverage by AB5. While approved by the voters,

Solon Barocas, and Tim Hwang, “Discriminating Tastes: Customer Ratings as Vehicles for Bias,” *Data & Society*, October 2016. https://datasociety.net/pubs/ia/Discriminating_Tastes_Customer_Ratings_as_Vehicles_for_Bias.pdf Data limitations have so far made bias difficult to prove in court. The most recent class-action suit in California was dismissed by the U.S. District Court for the Northern District of California with permission to file a new complaint. See: Dan Papsun and Erin Mulvaney, “Uber Driver’s Ratings Bias Class Action Dismissed by Judge,” *Bloomberg Law*, August 2, 2021. <https://news.bloomberglaw.com/daily-labor-report/uber-drivers-ratings-race-bias-class-action-dismissed-by-judge>

⁹⁸ Maya Pinto, Rebecca Smith, and Irene Tung, “Rights at Risk: Gig Companies’ Campaign to Upend Employment as We Know It,” NELP, March 25, 2019. <https://www.nelp.org/publication/rights-at-risk-gig-companies-campaign-to-upend-employment-as-we-know-it/>

⁹⁹ Memo of Opposition to Uber/Lyft’s “NY Right to Bargain Act,” May 26, 2021.

<https://static1.squarespace.com/static/551c0fb1e4b04e2cba203b00/t/60aaccbf78ea0dc25ab114c15/1622068216037/Memo+on+Right+to+Bargain+Act.pdf>. See also James A. Parrott, Michael Reich, Jason Rochford, and Xingxing Yang, “The New York City App-based Driver Pay Standard: Revised Estimates for a New Pay Requirement,” *Center for New York City Affairs*, January 2019. https://www.centernyc.org/the-new-york-city-app-based-driver-pay-standard-revised?mc_cid=80c36c5e43&mc_eid=f076c27c0e

¹⁰⁰ Faiz Siddique, “Uber, other gig companies spend nearly \$200 million to knock down an employment law they don’t like—and it might work.” *The Washington Post*, October 26, 2020; Caroline O’Donovan, “Uber and Lyft Spent Hundreds of Millions to Win Their Fight Over Workers’ Rights. It Worked,” *BuzzFeedNews*, November 21, 2020, <https://www.buzzfeednews.com/article/carolineodonovan/uber-lyft-proposition-22-workers-rights>

Proposition 22 was subsequently ruled unconstitutional in 2021. The gig companies are now appealing that determination.¹⁰¹

Uber and Lyft also recently secured passage of legislation in Washington State authorizing them to maintain the status of their drivers as independent contractors in exchange for providing sick pay and a minimum pay standard. Drivers will be covered by workers' compensation but not unemployment insurance, and the companies are not providing any health insurance. Like last year's draft New York bill, the Washington State measure preempts any local government regulation of the companies. While a local of the Teamsters union backed the bill in the face of a threat by the companies for a Proposition 22-like state ballot initiative, both the international Teamsters president and the president of the national AFL-CIO urged the governor to veto the bill, citing concerns that it could erode existing workers' rights in other sectors.¹⁰²

As in the United States, independent contract workers in Canada are not covered by minimum wage, sick leave, or unemployment insurance protections. The large gig companies are pushing a measure in Ontario to codify independent contractor status and provide minimum payments only for "engaged time" when a passenger is in the car or a driver in route to pick up a passenger. A report by Ridefair TO, a coalition that includes drivers, public transit workers, community organizations, and academic researchers, estimated that drivers would earn less than half the hourly minimum wage when factoring in all working time. The Ontario proposal would also cover restaurant and grocery delivery workers.¹⁰³

Similar measures are also percolating in Connecticut and Massachusetts. Uber, Lyft, and DoorDash proposed a Proposition 22-like measure on the November 2022 ballot in Massachusetts. It would have designated drivers as independent contractors, specify a minimum payment based only on engaged time, and provide a per-mile expense reimbursement starting at 26 cents per mile but only while carrying a passenger or driving to pick up a passenger. Massachusetts currently has an ABC test law and the State attorney general is suing Uber and Lyft for misclassification.¹⁰⁴ In a June 14, 2022, ruling, the Massachusetts Supreme Judicial Court disallowed the initiative since it violated a "single subject" rule for ballot initiatives.¹⁰⁵

¹⁰¹ Maeve Allsup, "Prop. 22 Backers Appeal Ruling Striking California Gig Law," *Bloomberg Law*, September 23, 2021.

¹⁰² Noam Scheiber and K. Browning, "Washington State Advances Landmark Deal on Gig Drivers' Job Status," *New York Times*, March 4, 2022; Adrian Marshall, "Washington State Passed a Contentious New Gig Worker Law," *Wired*, April 1, 2022.

¹⁰³ Vanmala Subramaniam, "Ontario's minimum wage for gig workers faces mounting criticism," *Globe and Mail*, April 5, 2022.

¹⁰⁴ Nate Raymond, "Massachusetts gig worker ballot measures submit signatures," *Reuters*, November 16, 2021; Erin Mulvaney, "Uber, Lyft-Backed Gig Initiative Meets Wary Massachusetts Court," *Bloomberg Daily Labor Report*, May 4, 2022.

¹⁰⁵ Erin Mulvaney and Chris Marr, *Uber-Backed Vote on Gig Work Is Blocked by Massachusetts Court*, *Bloomberg News*, June 14, 2022; in the early May hearing on the challenge, an issue was raised about whether in arguably shielding the companies from liability in the event of an accident involving a third party such as a passenger, the

Forced Arbitration Clauses Enable Misclassification

Enforcement against misclassification can also occur through legal actions by workers even though that avenue can be time-consuming and costly. However, the proliferation of forced arbitration and class action waiver clauses in contracts and terms-of-service agreements has impeded legal clarification on the question of employee status and has enabled misclassification.¹⁰⁶ Because most labor laws apply only to employees, independent contractors have greater difficulty pursuing legal action against wage theft and workplace discrimination. In the courts, worker classification often remains a contentious and unresolved issue.

There have been several cases in which workers have successfully been recognized as employees for the purposes of job-related expenses, overtime, and unemployment insurance.¹⁰⁷ The legal decisions supporting the right of Postmates delivery workers and Uber and Lyft drivers to regular New York State unemployment insurance have been noted. A series of cases in New York and other states against FedEx found that workers were subject to a large degree of control by the company. Drivers were awarded damages for job-related expenses that FedEx had failed to compensate them for, and drivers were found to be employees protected under overtime laws. FedEx has paid out hundreds of millions of dollars in settlements related to a number of misclassification cases.¹⁰⁸

Forced arbitration clauses in gig worker contracts has been one tool for keeping these issues out of the courtroom. Forced arbitration requires that workers resolve labor disputes in private arbitration rather than a public court. Private arbitration means that fewer cases come to public light, so the frequency of labor complaints and disputes against gig companies is unknown. Workers tend to win less often and are awarded smaller amounts in damages in arbitrations than in the court cases. Arbitration cases can impose steeper costs on workers because they involve

ballot language would regulate the relationship between drivers and companies “in multiple disparate areas of employment law that are not related to or mutually dependent on another.” Jeffrey Fritz and Joshua Nadreau, *Massachusetts High Court Hears Argument on Gig Driver Ballot Question*, Fisher Phillips, May 13, 2022.

¹⁰⁶ National Institute for Workers Rights, “No Due Process, No Rights: How Forced Arbitration Enables Misclassification in the Gig Economy,” August 2021.

¹⁰⁷ For example, the series of cases brought against FedEx, first in *Estrada v. FedEx Ground Package System Inc.*, in which the Second District Court of Appeals in California found that because of the degree of control FedEx exercised over its drivers, these workers should be classified as employees and awarded drivers nearly \$27 million in damages and legal fees; second, in 2014, FedEx was again brought to court in California for failing to pay drivers overtime, a case that FedEx settled for \$228 million. (*Estrada v. FedEx Ground Package System, Inc.*, 154 Cal. App. 4th 1 (2d Dist, 2007).

¹⁰⁸ Daniel Wiessner, “FedEx to settle driver lawsuits in 20 states for \$240 million, *Reuters*, June 16, 2016; *Staffing Industry Analysts*, “Judge approves FedEx’s \$227 million settlement in IC misclassification cases,” May 10, 2017.

higher filing fees than in a court setting and are located in the setting of an employer's choice (not necessarily where the plaintiff lives or works).¹⁰⁹

Moreover, forced arbitration clauses included in independent contractor and gig worker standard legal agreements can include class action waiver clauses which prevent workers from jointly filing claims against companies. Neutralizing the potential of class action claims wipes out one of the chief deterrents against misclassification since individual worker arbitration monetary awards are typically small in comparison to cases involving thousands of workers claiming the same unlawful workplace practice, such as in the FedEx cases. The details of settlements, including the discovery of responsibility of companies to provide employee benefits, remain secret. A recent study from Rutgers University found that the inclusion of forced arbitration provisions has risen precipitously over the past decade. In 2016, two-thirds of gig companies included forced arbitration clause along with class action waivers in their terms-of-service contracts.¹¹⁰

In the past two years, some gig companies have made arbitration even more difficult. In response to more than 5,000 Postmates workers filing for arbitration on issue of classification, Postmates delayed paying its portion of the arbitration fees for months. Similarly, when 2,000 DoorDash drivers attempted to arbitrate with the company on the issue of misclassification, DoorDash refused to meet them in arbitration, and required workers to sign new terms-of-service agreements if they wanted to continue working on the app.^{111 112}

Better Laws and Enforcement Needed

The current State budget's increased funding for investigating and enforcing labor standards is a welcome first step. But more needs to be done. Further legislation is needed. And enforcement against misclassification needs to become more effective in permanently curbing that practice.

¹⁰⁹ The Employee Rights Advocacy Institute for Law & Policy, "Taking "Forced" Out of Arbitration," June 2016, http://employeeightsadvocacy.org/wp-content/uploads/2016/06/Taking-Forced-Out-Of-Arbitration_English_Final.pdf

¹¹⁰ Elizabeth C. Tippet and Bridget Schaaff, *How Concepcion and Italian Colors Affected Terms of Service Contracts in the Gig Economy*, 170 Rutgers University Law Review. 459 (2018).

¹¹¹ NIWR, "No Due Process."

¹¹² Two recent Supreme Court cases, however, limited how much companies can rely on arbitration clauses. In a case involving a Taco Bell employee who waited eight months for a response to her overtime-pay lawsuit, the Supreme Court ruling may have the effect of allowing more class action suits to be heard in court rather than private proceedings. Another Supreme Court ruling on overtime pay expanded the class of transportation workers that qualifies for federal limits on forced arbitration. Daniel Wiessner, "Arbitration waiver doesn't hinge on prejudice, U.S. Supreme Court Says," Reuters, May 23, 2022; Erin Mulvaney, "Supreme Court Expands Reach of Federal Arbitration Carveout," *Bloomberg Law*, June 6, 2022. Clint Rainey, "Today's unexpected Supreme Court victory could exempt more gig workers from forced arbitration," *Fast Company*, June 6, 2022.

In the past year, the State has toughened construction industry labor standards enforcement in two important areas. To help curb wage theft in construction, in 2021 the State made prime contractors liable for any unpaid wages and benefits due workers hired by subcontractors.¹¹³ And in the just-completed legislative session, “Carlos’ Law” was enacted, increasing penalties for safety violations that result in fatalities, and making worker endangerment a felony. (The law is named after Carlos Moncayo, an undocumented Ecuadorian immigrant who was buried alive on a job site in 2015 where managers had repeatedly ignored safety warnings from inspectors.)¹¹⁴

New York needs to build on these examples and enact laws to better protect the 10 percent of the state’s workforce who are vastly undercompensated and unprotected because they are misclassified as independent contractors.

For example, while the Construction Fair Play Act has helped bring about more effective enforcement in that industry, the Transportation Fair Play Act has a loophole that exempts delivery vehicles with a gross vehicle weight of less than 10,000 pounds.¹¹⁵ It should be closed.

The State can also clamp down on misclassification of hundreds of thousands of gig and non-gig workers across a number of other industries.

Two measures supported by a broad coalition of workers, immigrants’ rights groups, and labor to address labor standards, employer compliance, and fair pricing practices in nail salons were not enacted in the recently concluded legislative session. They should be taken up again.

New York State should enact other industry-specific standards such as those affecting nail salon workers. It also should broaden the application of the ABC test applied in construction employee classification to other industries. It also should also enact legislation making companies liable for wage and benefit obligations incurred by labor subcontractors (“joint wage liability”) in response to the spread of contracting out that entails misclassification through labor service contracts.

¹¹³ Julie Strupp, “The Dotted Line: What to know about New York’s new construction wage theft law,” *Construction Dive*, February 22, 2022.

¹¹⁴ Harco Construction was found guilty of second-degree manslaughter and criminally negligent homicide in June 2016. The maximum OSHA fine in this case was \$10,000. If signed by the Governor, the new law would increase the maximum fine for criminal liability to no less than \$500,000. David Chen, “Construction Company Guilty of Manslaughter in Immigrant Worker’s Death,” *The New York Times*, June 10, 2016; Clarissa A. Leon, “Carlos’ Law approved by lawmakers,” *The Chief*, June 6, 2022.

¹¹⁵ The typical Amazon DSP delivery van has a gross weight of 6,000 pounds.

APPENDIX

Appendix Figure 1

Low-paying and high-paying private industries, New York State, ranked by number of independent contractors

Low-paying industries	Median Full-time Unincorporated Self- Employed Earnings
<i>All low-paying industries</i>	\$27,703
Other Services	\$23,994
Construction	\$31,530
Transportation and Warehousing	\$30,108
Admin., support & waste mgmt services	\$29,915
Retail	\$26,806
Childcare	\$18,804
Educational Services	\$30,272
Agric., Forestry, Fishing, Hunting, & Mining	\$25,405
Manufacturing	\$30,522
Food Services and Accommodation	\$26,989
Home health care and Social Assistance	\$30,395
High-paying industries	
<i>All high-paying industries</i>	\$50,527
Professional, scientific & technical services	\$63,795
Health care (except home health care)	\$95,917
Real estate, rental & leasing	\$46,146
Motion pictures and video industries	\$51,918
Information	\$50,453
Finance and insurance	\$74,788
Wholesale trade	\$36,069
Arts, Entertainment, and Recreation	\$35,662

Note: ranking based on number of independent contractors from the American Community Survey, 2019 5-year sample

Appendix Figure 2

Number of workers with any earnings from an online labor platform, 2016

Metro area	Workers with any OPE	Share of tax workforce
Los Angeles	162,396	2.46%
New York	138,114	1.30%
Chicago	114,865	2.37%
Miami	87,169	2.71%
Washington, D.C.	73,171	2.48%
Atlanta	66,581	2.40%
San Francisco-Oakland	59,093	2.91%
Philadelphia	54,412	1.69%
Dallas-Forth Worth	52,406	1.65%
Boston	48,239	1.84%
Houston	35,663	1.21%
San Diego	34,564	2.03%
Phoenix	32,688	1.59%
Las Vegas	28,869	2.64%
Tampa	27,490	1.91%
Denver	26,211	1.65%
Seattle	24,966	1.26%

Source: Brett Collins, Andrew Garin, Emilie Jackson, Dmitri Koustas, and Mark Payne, *Is Gig Work Replacing Traditional Employment? Evidence from Two Decades of Tax Returns*, March 2019.

Appendix Figure 3

Other Services includes gender-segregated occupations, such as auto repair, equipment maintenance, and personal services

	Private employees				Independent Contractors				Small Business owners			
	Male	Median earnings	Female	Median earnings	Male	Median earnings	Female	Median earnings	Male	Median earnings	Female	Median earnings
Total # workers	164,582		191,508		22,145		53,812		15,926		12,256	
Auto repair, maintenance, car washes	90%	\$33,374	10%	\$24,819	99%	\$22,945	1% **		89% **		11% **	
Electronic /precision equipment repair and maintenance	86%	\$40,153	14% **		94%	\$16,000	6% **		98% **		2% **	
Commercial and industrial machinery/equipment repair and maintenance	88%	\$43,575	12% **		97%	\$21,582	3% **		91%	\$49,007	9% **	
Personal/household goods repair and maintenance	74%	\$36,652	26%	\$26,073	73%	\$21,582	27% **		86%	\$41,945	14% **	
Barber shops, Beauty Salons, Nail Salons, Drycleaning and laundry	32%	\$26,500	68%	\$19,177	28%	\$20,000	72%	\$17,817	42%	\$33,374	58%	\$25,000
All other services	39%	\$43,779	61%	\$35,000	9% **		91%	\$13,813	34%	\$40,725	66%	\$14,915
Total	46%	\$35,634	54%	\$25,899	29%	\$20,859	71%	\$14,661	57%	\$38,383	43%	\$21,582

Source: ACS-IPUMS, persons working in New York State (18+), five-year sample, 2019.

Within the BLS industry classification system, “Other services” is a broad industry category that encompasses occupations such as, hairdressers and barbers, mechanics, automotive repair, laundry workers, massage therapists, tailors, and personal care workers. Workers in services categories tend to be occupationally sorted by gender, with upwards of 90 percent of workers in auto repair, maintenance, car washes, electronic & precision equipment, as well as commercial machinery and industrial equipment repair and maintenance being male. By contrast, workers in barber shops, beauty salons, nail salons, dry-cleaning and laundry services being female. The “all other services” category encompasses a range of service occupations in religious organizations, as well civic, social, advocacy and grantmaking organizations; workers in this broad clerical service category tend to be female.

Employee status dictates a large earnings gap between workers in auto repair and maintenance, where employees earn 1.5 times that of independent contractors, and electronic and precision equipment maintenance, where employees earn nearly 2.5 times as much as independent contractors in the same occupations. However, in some occupations, such as barber shops, beauty salons, nail salons, and dry-cleaning and laundry services, earnings are low across the board. Even so, a gap remains between employees and independent contractors even in these very low paying industries: male employees earn 1.3 times as much as their independent contractor counterparts and female employees earn 1.1 times as much as their independent contractor counterparts.