

# It's Not Standard Anymore: A Look at 21<sup>st</sup> Century Work Arrangements

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## Overview

- History
- Terminology
- Size
- Models
- Cases
- Health & Safety
- Future

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## History

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## Industrial Revolutions

- **First Industrial Revolution**
  - Used water and **steam power** to mechanize production
- **Second Industrial Revolution**
  - Used **electric power** to create mass production
- **Third Industrial Revolution**
  - Uses **electronics** to automate production
- **Fourth Industrial Revolution**
  - Uses **physical entities** controlled by **digital algorithms**

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## Rise of the Standard: 1920—1950

- Growth of companies created by 1<sup>st</sup> and 2<sup>nd</sup> industrial revolutions
  - Vertical organizational structure differentiated jobs from one another more clearly than ever before; rise of the corporation following WWII.
- “Good” job was being an employee of a particular (*manufacturing*) company for your entire working life (or until age 65)
  - “Standard employment relationship” became the dominant model during expansion after WWII until 1980s.
- Government built social welfare laws using the same model
  - Employees got job security, benefits & legal protections.
  - Employers got stable workforce in which they could invest with fair expectation of positive returns over time.

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## Standard in Trouble: 1950 to Present

- **Early erosion of standard employment relationship**
  - Russell Kelly—1946
  - Elmer Winter and Aaron Scheinfeld—1948
    - » From clerical work to manufacturing production
    - » Rise of co-employment arrangement
  - Increasing use of arrangements *first* used in early 20<sup>th</sup> century
    - » Franchisees (1920s)
    - » Independent contractors (19<sup>th</sup> century)
- **Decline in labor union representation**
- **Threats to social benefits program solvency**
- **Rise of the virtual workplace**
  - Locations technologically connected via a private network or the Internet without regard to geographic boundaries or time zones



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## Drivers of Change

- Rapid increase in digital communication technologies
- Growth of services industry
- Rise of smaller-scale, customized, manufacturing production
- Work monitoring by technology requires fewer inducements like permanent work to elicit performance
- Serial subcontracting of non-core functions:
  - Financial pressures from capital markets to shed non-core business.
    - Recruiting, retaining, administratively supporting workforce is non-core business.

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## Industry 4.0 Characteristics

- Monetizing unused time and assets
  - Labor Platforms
  - Capital Platforms
- Using digital platform to match workers with paying customers
  - “Crowdsourcing” workforce
  - Internal workforce eliminate “frictional” costs of hiring
- Providing more opportunities to work
- Operating across the broadest geography possible
  - Electronic retail commerce vs. “brick and mortar” retail

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## History of Work Arrangements

- Work organization used by digital platforms can best be understood as **return to long-standing work practices** beginning in early 19<sup>th</sup> and 20<sup>th</sup> century capitalism
  - On-demand work
  - Piece work
  - Home work
  - Triangulated relationships
- Non-standard arrangements have a much longer history in capitalism than the standard employment relationship.



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## History of Work Arrangements

- Standard work arrangement may be the *historical exception* rather than a universal model:
  - Origins can be found early to mid-20<sup>th</sup> century in *mass production* in large, manufacturing factories using *Fordist* assembly line techniques.



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## History of Work Arrangements

- Labor market institutions and labor law protections (federal and state) began in 1911, and more strongly in the two decades after WWII, to reinforce the standard relationship as the *normative* benchmark of employment that needed social protections.
  - Independent contractors in the mid-20<sup>th</sup> century (many fewer than today) were thought to have ample ability to protect themselves, hence their exclusion from many social protection laws.



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## Terminology

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## Standard Employment Relationship

American Legal Institute [2014]. Restatement of Employment Law

**§1.01 Conditions for Existence of Employment Relationship**

(a) An individual renders services as an employee of an employer if:

- (1) Individual acts, at least in part, to serve the interests of the employer;
- (2) The employer consents to receive the individual's services; and
- (3) The **employer controls the manner and means by which the individual renders services**, or the employer otherwise effectively prevents the individual from rendering those services as an independent businessperson.

(b) An individual renders services as an independent businessperson and not as an employee when the individual in his or her own interest **exercises entrepreneurial control over important business decisions**, including whether to hire and where to assign assistants, whether to purchase and where to deploy equipment, and whether and when to provide service to other customers.

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## Standard Employment Relationship

- Is a full-time job (8 hours/day and 40 hours/week)
- Comes with expectation that job will continue indefinitely
- Work generally occurs at employer's premises and under employer's direct control
- **Job comes with social protection rights:**
  - Social protections are mandated to be provided by employer or by government.
    - In the U.S., social protections are attached to **employment**, not **citizenship** as in other developed countries. So in the U.S. a job means a lot of things.

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## Safety Net of Federal and State Laws

Applies Only to "Employee" as Defined in Each Statute

- **Old-age assistance and disability benefits**
  - Social Security Act of 1935
- **Collective bargaining rights**
  - National Labor Relations Act, 1935
- **Minimum wage, overtime and child labor protections**
  - Fair Labor Standards Act, 1938
- **Employment discrimination protections**
  - Title VII of the Civil Rights Act, 1964
  - Age Discrimination in Employment Act, 1967
  - Americans with Disabilities Act, 1990
- **Workplace safety and health protections**
  - Occupational Safety and Health Act, 1970
- **Pension, health and other employee benefits**
  - Employee Retirement Income Security Act, 1974
  - Family Medical Leave Act of 1993
- **Unemployment insurance and workers compensation benefits**
  - Various Federal and state laws

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## Nonstandard Work Arrangements

- Definition of nonstandard work arrangements are not standardized and create confusion.
- Nonstandard work arrangement is largely defined by what it is not:
  - No expectation of ongoing work.
  - Work not necessarily performed at employer's workplace...work can be spatially distributed.
  - Arrangements can be market-mediated as opposed to firm-mediated.
  - Few, if any, legal protections for worker.

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## U.S. Bureau of Labor Statistics

- **Contingent Workers**
  - No implicit or explicit contract for ongoing employment
- **Alternative Employment Arrangements**
  - **Independent contractors**
    - Identified as such whether self-employed or salaried workers
    - IRS—Individual is an independent contractor if the payer has the right to control or direct only the result of the work and not what will be done and how it will be done.
  - **On-call workers**
    - Called to work only as needed, or can be scheduled to work for several days or weeks in a row
  - **Temporary help agency workers**
    - Workers paid by a temporary help agency, whether or not their job is temporary
  - **Workers provided by contract firm**
    - Employed by a company that provide them to others under contract, usually for one customer at their worksite.
- **"Gig"**
  - BLS has no definition and there is no generally accepted definition among researchers
- **Electronically-mediated work**
  - Use a company's mobile app to connect with customers
  - Are paid by the platform
  - Choose when and whether to work; and
  - May do short jobs, projects, or tasks in person or online.

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Size

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## Size Estimates Before June 2018

- **BLS, 2005**
  - 9.3 to 10.1% of total employment (1995 to 2005), but no CWS conducted from 2005 to 2017.
    - <https://www.bls.gov/news.release/pdf/conemp.pdf>
  - Special supplemental BLS survey on contingent and alternative employment arrangements conducted in May 2017.
- **Katz & Krueger, 2016**
  - 10.1 to 15.8% of total employment (2005-2015)
  - Represents an increase of 9.4 million over ten year period
- **GAO, 2015**
  - Size of the contingent workforce can range from less than 5% to more than 33% of total employed labor force, depending on widely-varying definitions of “contingent” work
  - Gig workforce 0.5% to 1.0%

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## New BLS Survey Data on June 7, 2018

Contingent and Alternative Employment Arrangements, May 2017  
<https://www.bls.gov/news.release/pdf/conemp.pdf>

- **Contingent Workers**
  - Range of estimates from 1.3% to 3.8%
  - Total of 2.08 to 6.08 million
- **Alternative Employment Arrangements**
  - Independent contractors (6.9%)
  - On-call workers (1.7%)
  - Temporary help agency workers (0.9%)
  - Workers provided by contract firms (0.6%)

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## Alternative Employment Totals

U.S. Bureau of Labor Statistics  
Contingent and Alternative Employment Arrangements, May 2017

	1995	2005	2017
Independent contractors	6.7	7.4	6.9
On-call workers	1.7	1.8	1.7
Temporary help agency	1.0	0.9	0.9
Contract workers	0.5	0.6	0.6
Total	9.9	10.7	10.1

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## Was the BLS Survey an Underestimate?

- BLS only asks about respondent's "main job"
  - "Fails to capture much secondary work activity leading to an understatement of multiple job holding rate" (Katz & Krueger, 2019).
- BLS only asks about work during a one-week period
  - 42% of independent workers freelance less than weekly (Freelancing in America, 2017).
- BLS allows responses from "proxy" respondents
  - "Proxy respondents may be less accurate. BLS should consider using on self-responses" (Katz & Krueger, 2019).
- BLS questions are poorly worded and unclear
  - Leads to miscoding respondents as employees (Gallup, 2018).

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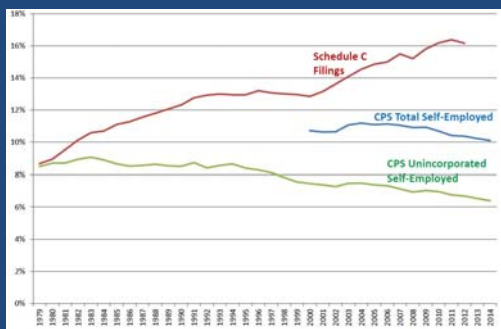
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## Self-Employment: IRS Schedule C Filings and CPS Data, 1979-2014



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## New BLS Survey Data—September 2018

- BLS added four questions to the May 2017 Contingent Worker Supplement to measure electronically mediated work
  - Short jobs or tasks that workers find through websites or mobile apps that both connect them with customers and arrange payment for the tasks.
- After extensive review, BLS determined that these questions did not work as intended.
- BLS manually recoded the data using verbatim responses available only on the confidential microdata file.
- Using these recoded data, BLS estimates that electronically mediated workers accounted for **1.0%** of total employment in May 2017.
  - <https://www.bls.gov/opub/mlr/2018/article/electronically-mediated-work-new-questions-in-the-contingent-worker-supplement.htm>



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### Upside for Employers

- **Pursuit of flexibility to achieve greater efficiency**
  - Functional flexibility
    - Allows smoother worker reassignment
  - Numerical flexibility
    - Employment matches chances in demand
  - Financial flexibility
    - Labor cost savings
  
- **Which workers are at the **core** or the **periphery** of the business determines work arrangement**
  - Extent to which workers' competencies are a "valuable resource for the firm" = employee (protected business asset)
  - Extent to which they are unique or firm-specific = employee

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### Downside for Employers

- **Management**
  - Deciding which arrangement to use in what task
  - Managing work teams when different arrangement workers work side by side
    - *Blended* workforce problem
    - Use of temporary workers is negatively associated with standard employee's perception of their own job
  - Co-managing issues with temporary help agency
  
- **Legal**
  - How do you tell if you have "employees"?
  - How do you steer clear of *misclassification* liabilities

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### Gig Economics—Downside

- **Post-industrial corporation**
  - Maximizes profit, but not through productive enterprise
  - Create value through asset manipulation, speculation, and regulatory arbitrage
  
- **Regulatory entrepreneurship**
  - Tax opportunism
    - Taking advantage of existing gaps in the law
  - Arbitrage
    - Deliberate manipulation of the structure of a deal to take advantage of a gap between the economic substance of the transaction and its regulatory treatment, e.g., fire all workers, rehire them as independent contractors.
  
- **Core of platform business model**
  - Evasion of employment law?
  - Classifying workers as contractors allows platforms to offer services without have to pay for the cost of workers
  
- **Leads to negative externalities and devolution of responsibilities to so-called "micro-entrepreneurs"**

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**Downside for Workers**

- Transfers “business” responsibilities to a “micro-entrepreneur” worker, but operating a small business is a significant responsibility not everybody is able to do.
- Small business “micro-entrepreneur” lacks negotiation power with the platform.
  - Platform can delete you at anytime
  - Worker cannot set their own prices, nor “grow” their own business
  - Hard to engage in collective action
    - Workers do not know each other
    - Dilutes motivation to participate in collective action
- No social safety net
  - unless you can buy your own and one is available to buy
- Risks to health, safety, and worker well-being

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**Upside for Workers**

- Greater autonomy
- Flexible hours
- Enhances work variety
- Enables career exploration
- Increased income potential beyond “anchor” job earnings or retirement pension
- More control over work-life balance

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**Legal Cases**

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## Employee or Contractor?

- How do you decide?
  - OSHA—**Common Law Agency Test**—Direct and Control Test (10 factor)
  - WHD—**Economic Realities Test** (FLSA) —Different from common law agency test—broader—considers whether workers are economically dependent on the business for which they work (6 factors).
  - IRS—Uses a **20 factor test** in three areas: (1) behavioral control; (2) financial control; and (3) the relationship of the parties.
- No one test or grouping of factors has achieved national legal consensus in federal or state courts because the definition of employee is adapted to meet the purpose of each individual statute – most courts apply a “hybrid” analysis using elements from each of the two major tests.
- Workers’ compensation statutes use common law master-servant concepts. The term “employee” in various statutes are consistently read broadly so as to encompass a wide range of workers who may otherwise have been excluded under traditional common law definitions.
- Law of the employment classification is **VERY** confusing.

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## Platform Litigation



GRUBHUB

UBER



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## Dynamex Operations West v. Lee

Applies only to claims under CA Wage Orders

- CA Supreme Court, in a unanimous ruling, stated that in order to classify someone as an independent contractor, the business must show that:
  - Worker is free from the control and direction of the hirer in connection with performance of the work;
  - Worker performs work that is outside the usual course of the hiring entity’s business; and
  - Worker is customarily engages in an independently established trade, occupation or business **of the same nature** as the work performed for the hiring entity.
- A stricter standard should prevent businesses from evading “fundamental responsibilities” and engaging in a “race to the bottom” ...result[ing] in substandard wages and unhealthy conditions for workers.”
- ABC tests tend to apply only to state unemployment coverage laws and, less commonly, to state workers’ compensation laws.

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## California Assembly Bill 5

- Would codify *Dynamex* criteria into legislation

### Uber Says It Won't Reclassify Drivers As Employees Despite New Law

- Uber is claiming that its drivers “pass” the *Dynamex* test and can thus be considered independent contractors.
- Governor Newsom to WSJ on 11 September

“As it relates to Uber, Lyft, DoorDash, others, some of the gig platforms, these remain ongoing negotiations, and regardless of what happens with AB5, I am committed, at least, to continuing those negotiations.”



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## U.S. Court of Appeals—Seventh Circuit

- Illinois Transportation Trade Association v. City of Chicago
  - October 7, 2016
  - Plaintiff taxi drivers argue that the City of Chicago deprives taxi drivers of a property right and that it discriminates against taxis by failing to subject *Uber* to the same rules about licensing to which the taxi ordinance subjects the plaintiff taxi drivers.
  - Judge Richard Posner offered an interesting legal analysis.

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## Cats versus Dogs

- Most cities and towns require dogs, but not cats, to be licensed.
- There are differences between the two types of animals:
  - Dogs on average are bigger, stronger, and more aggressive than cats
  - Dogs are feared by more people, can give people serious bites, and make a lot of noise outdoors, barking and howling.
  - Feral cats generally are innocuous, and many pet cats are confined indoors.
- Dog owners may like cats to have to be licensed, but do not argue that the failure of government to require that the “competing” animal (cat) be licensed deprives the dog owners of a constitutionally protected property right, or alternatively that it subjects dog owners to unconstitutional discrimination.
- Plaintiff taxis in the present case have no stronger argument for requiring that *Uber* be subjected to the same licensure scheme as the taxi owners as do dog owners about cats.
- Just as some people prefer cats to dogs, some people prefer *Uber* to Yellow Cab. They prefer one business model to another.

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## Health & Safety

Most—Temporary Agency Arrangement  
Few—Platform Work Arrangement

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## Temporary Help Service Industry



50,000

Staffing Agency Offices



14,000

McDonald's

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## Temporary Help Agency

- Temporary staffing industry is perhaps best known for its earlier years when it placed female clerical workers and day laborers/farm workers.
- But the industry has expanded to include nearly every occupation in the US and globally.
  - Manpower and Kelly Services placed workers in work situations across all industries & occupations



Industry	Percentage
INDUSTRIAL	35.1%
Professional - Management	21.0%
Office - Clerical	20.4%
INFORMATION TECHNOLOGY	9.3%
Health Care	7.8%
TECHNICAL	6.4%

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## Mental Health

- Studies on unemployment, organizational restructuring, and forced downsizing have documented an association with psychological ill-health.
- A meta-analysis of 27 studies suggests higher psychological morbidity **among temporary workers** compared with permanent employees.
  - Virtanen, M. et al. *Int J Epidemiol.* 2005;34:610-622.
- Relationship between temporary employment and increased psychological morbidity may reflect the adverse effect of job insecurity, financial instability and other social determinants on mental health.
  - Ferrie, JE et al. *SJWEH Supp.* 2008;6:98-110.
  - Ray, T. et al. *Saf Sci.* 2017  
<http://www.sciencedirect.com/science/article/pii/S0925753517308172>

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## Risk of Injury in Temporary Workers

- **European Studies**
  - 7 of 13 European reports show increased risk (Virtanen 2005).
- **U.S. Studies**
  - Higher injury rates in subcontracting turnaround procedures at *petrochemical facilities* (Rebitzer 1995).
  - Temps had twice injury rate at a *plastics manufacturer* (Morris 1999).
  - Workers' comp injury claim rates for temps double those of permanent workers in Washington state (Smith 2010).
  - **PROPUBLICA**, using Florida workers' compensation data and BLS data, found an injury odds ratio of close to 4 for temporary workers compared to all other workers (Pierce 2013).
  - Return-to-work outcomes worse for platform workers frequently leads to unemployment.

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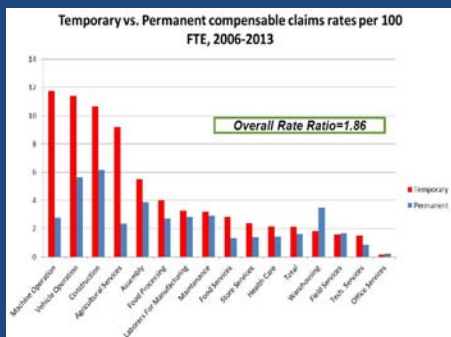
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## Injury Claims

Washington State Department of Labor and Industries (SHARP)




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### Temporary Agency Risk: Why?

- Temporary agency jobs (more than direct hire temporary) can be more hazardous than standard worker jobs
  - Less experience & familiarity with operations due to short tenure at a worksite
  - Fewer hours of safety training relevant for the specific job assignment
  - More distant relationships with longer-term workers who could help navigate worksite hazards
- Limited availability & use of personal protective equipment
- Less likely to report unsafe conditions because of risks associated with temporary employment
- Confusion (real or perceived) about who is responsible for worker safety:
  - Who is the responsible employer? How do you tell?
    - Common law test, economic realities test, hybrid analysis, IRS test, differing court cases

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### Mortality Risk—Europe

- Longitudinal data from 10 towns in Finland—26,592 men and 65,759 women.
- Overall mortality 1.2-1.6 times higher among temporary employees compared to permanent employees
  - For alcohol-related causes, hazard ratio was more for men with temporary jobs as was smoking-related cancer.
    - Corresponding risks were greater for the unemployed
  - Moving from temp to permanent work associated with lower mortality than remaining continuously in permanent employment
- Conventional research practice of treating the employed as a single group may attenuate the association between employment status and mortality (Kivimaki, 2003)

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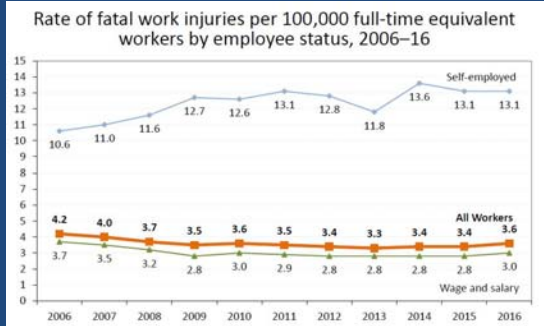
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### Mortality Risk—U.S.

<https://www.bls.gov/iif/oshwc/cfoi/cfch0015.pdf>




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## OSHA/NIOSH

### Recommended Practices for Temporary Workers

- 8 recommendations for staffing agencies and host employers.
  - <https://www.osha.gov/Publications/OSHA3735.pdf>
  - <http://www.cdc.gov/niosh/docs/2014-139/pdfs/2014-139.pdf>



OSHA • NIOSH  
**Recommended Practices**  
Protecting Temporary Workers

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### Measuring “Exposures” Across Work Arrangements

Exposures	NIOSH Scale	EPRES Scale (Vives et al., 2010)
Temporariness	Job security Part/full time Salaried/hourly paid Job tenure	Contract duration Temporary contract (in last 12 months)
Empowerment	Freedom to decide Decision making involvement Daily flexibility in start/quit time	Decision taker in scheduling, work hours, wage and salary (collective or top-down)
Vulnerability	Relationship with management Treatment at work Management trust Discrimination Supervisory concern Promotion chances	Afraid to demand better work condition Defenseless towards mistreatment Afraid of being fired Discriminatory treatment Authoritative treatment Felt easily replaceable
Wages	Family financial situation Relative family income Fringe benefits	Meet basic needs Meet unexpected expenses Take home monthly wage
Rights		Right to paid vacation, pension, severance pay, maternity leave, day off for personal reasons, holidays, unemployment benefit
Access to Rights		Weekly holidays, sick leave, vacation, personal day off

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## Research Challenges

- No agreed on definitions of nonstandard work arrangements
- Improved surveillance methods about extent of nonstandard arrangements and number of workers involved in each type are needed
- Existing models for employment quality that relate to health outcomes may not be useful for non-standard work arrangements
- Studies needed:
  - Prospective study of health consequences of nonstandard arrangements
  - Intervention effectiveness study of policy approaches

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## Health & Safety Risks

### • What we know

- Evidence is sound that employers using nonstandard work arrangements are shifting burden of protecting workers from the things that go wrong at work from employers to the worker.
- Evidence is sound that temporary agency workers are at higher risk for illness and injury than workers in standard employment arrangements.
- Risk profile of platform workers is largely unknown, but of concern.

### • What we need

- Better taxonomy, better surveillance and new research methods are needed

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## Future

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## 1. Simplify the Classification System

Lobel (2016)

- Worker classification issues are not unique to the platform economy.
- Nearly 100 years after FLSA was passed, its classification test—*economic realities test*—is still one of the most unpredictable classification tests.
- Problem at heart of classification disputes is *not* the newness of the platform work, but rather messy complexity of existing legal classification tests.
  - DOL rulings and interpretations on FLSA classifications

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## 2. Misclassification to Non-Classification

- Make some employment issues classification-neutral
- Speech rights:
  - Whistleblowing and anti-retaliation protection under Federal financial statutes extended to all workers
- Others:
  - Anti-discrimination?
    - WA State already has expansive definition of employee under its state anti-discrimination protection statute
      - » Wash Rev Code §49.060.040 (2015)
  - Safety and health?

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## Workplace Injuries Happen—Who Pays?

- Injuries happen regardless of worker “label”
- Who pays for medical care & provides replacement income?
  - Individual
    - Pay for medical care costs on your own
    - Use health insurance from anchor employer
    - Sue the platform
    - Use your own accident insurance
  - Platform
    - Contribute share to portable workers’ compensation benefits
  - Society
    - Occupational injuries result in higher SSDI costs
      - » O’Leary et al. (2012).

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**Uber Offers Workers Comp Insurance**

For now, coverage is available in Arizona, Delaware, Illinois, Massachusetts, Oklahoma, Pennsylvania, South Carolina and West Virginia. That could expand to more states as Uber sees the results of its pilot program, company spokesman Michael Amodeo told Bloomberg BNA.

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## Uber Insurance

- Helps pay medical bills and replace normal earnings in case of an accident.
  - The insurance policy covers accidental medical expenses up to \$1 million and provides accidental disability benefits up to \$500 per week, death benefits of up to \$50,000 and survivor benefits up to \$150,000.
- Designed around a usage-based pricing model.
- *“It’s very clear that it’s not a workers comp policy even though some of the benefits that are provided are similar in nature to what you would receive under workers comp,”* says Uber.
- Start to a safety net for gig/platform workers?

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## 3. A Class of Their Own—Proposals

- **Dependent contractor** (Canada & Germany)
  - In Canada when independent contractor has worker exclusively for one client for long period, they are deemed “dependent contractor.”
  - *Vizcaino v. Microsoft*—9<sup>th</sup> Circuit declared long-term contractors “permatemps” and actual employees with full employee benefits.
    - Regulatory arbitrage: Microsoft terminates work after 270 days and requires at least 100 days between temp work contracts.
- **Independent worker** (Harris & Krueger, 2015)
  - Much of the established labor safety net would be retained (e.g., rights to organize and collectively bargain), but substantial revisions to existing labor statutes would be needed.
- **Flexible worker** (Lehrer, 2016)
  - Would create a new classification of worker called a “flexible worker” and recognize a new class of employer called a “job platform.”
  - Government safety net would be privatized and worker-controlled benefits exchanges (WCBEs) would be set up to provide limited replacement of some safety net components.

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## 4. New Social Benefits Ideas

- **Construct a market for portable benefits**
  - Provide each individual portable benefits contracted through private firms with platforms chipping in, alongside wages.
    - Eli Lehrer (2016)
- **Create a universal benefits system**
  - Attach social protections to citizenship, not to the employment relationship.
- **Design a citizen’s share**
  - Universal basic income
    - Charles Murray
      - <https://www.wjg.com/articles/a-guaranteed-income-for-every-american-1464969586>
    - Andy Stern
    - Andrew Yang
      - “Freedom dividend”

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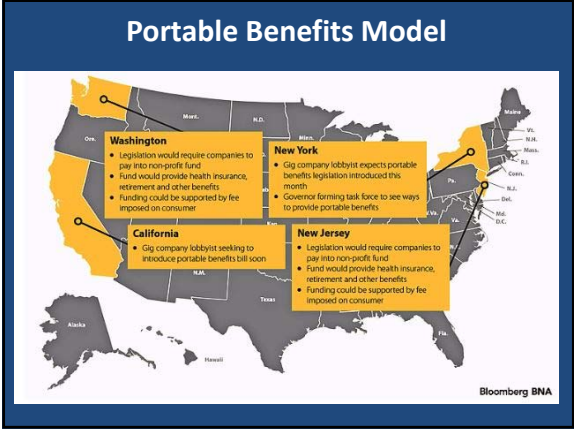
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### Summary

- Workers in standard work arrangements still outnumber nonstandard workers.
- Nonstandard work arrangements are not new in capitalism.
- We still do not know **with certainty** the size of the workforce engaged in nonstandard work arrangements, nor whether the use of such arrangements is trending up by industry sector.
- The determination of who is an employee differs from statute to statute, making for years of future legal controversy.
- All work arrangements pose safety and health risk; some nonstandard ones pose greater risk, and others are unstudied.

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