

Worker Misclassification and One Fair Wage

A White Paper on the Perils of Replicating AB 5 in Two-Tiered Wage States

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OVERVIEW

In 2019, California passed Assembly Bill 5 (AB 5), commonly known as the “Gig Worker Bill,” which ended the misclassification of workers as independent contractors. Under this law Transportation and Delivery Network Companies (TNC and DNC¹, respectively) such as Uber, Lyft, DoorDash and Instacart can no longer evade basic workers’ rights such as minimum wage, paid sick leave and protection from sexual harassment and discrimination. Although this legislation marks a critical victory for California amidst the backdrop of a burgeoning digital platform economy, **replicating this legislation in most other states outside of California could actually lessen compensation for app-based workers because of the subminimum wage for tipped workers.**

California is one of only seven states in the United States that require employers to pay a full minimum wage to all tipped employees. When AB 5 required TNC’s and DNC’s to comply with state employment standards, it also required these companies to pay a full minimum wage with tips on top. However, 43 states in the United States allow employers to pay a subminimum wage to tipped workers, one of the largest and fastest growing workforces in the country, forcing a majority female workforce to live off tips as a portion of their base wage.² Nearly 6 million tipped workers, over 80% of whom service the restaurant industry, face a federal subminimum wage as low \$2.13 an hour.³ While more than 20 states have state subminimum wages for tipped workers above \$2.13 an hour, the majority of these states’ subminimum wage for tipped workers is less than \$5 an hour.

If AB 5 were replicated in any of the 43 states that allow a subminimum wage for tipped workers, forcing TNC’s like Uber and Lyft and DNC’s like DoorDash and InstaCart to comply with basic employment standards, these companies could reasonably expect to pay a subminimum wage to their tipped employees. In most cases traditional subminimum wage tipped employees perform identical work to delivery workers in the digital platform ‘gig’ economy - receiving orders, packaging and delivering food. This is particularly dangerous given that several DNC’s, especially DoorDash, were exposed by the NY Times in 2019 to be already discounting delivery workers’ payments based on how much they were tipped⁴. Consumer and worker outrage over this practice - which is identical to the 150-year-old practice of restaurant employers discounting their workers’ wages based on how much they are tipped - led to DoorDash temporarily reversing its policy and announcing that they would not discount their delivery workers’ payments based on how much they are tipped⁵. Companies in both the restaurant and digital platform economy have thus utilized tips to reduce the cost of employer compensation.⁶ If one of the 43 states with a subminimum wage for tipped workers passed a law identical to AB 5, forcing TNC’s and DNC’s to comply with all state employment laws, **they would allow DoorDash and others**

¹ We note that ‘DNC’ is not a legal category in the way that ‘TNC’ is; DNC’s should not be exempted from any Assembly Bill 5-type legislation.

² “Better Wages, Better Tips: Restaurants Flourish with One Fair Wage.” Restaurant Opportunities Centers United, February 13, 2018.

³ *ibid*

⁴ Newman, Andy, “My Frantic Life as a Cab-Dodging, Tip-Chasing Food App Delivery Man,” The New York Times, July 21, 2019, [My Frantic Life as a Cab-Dodging, Tip-Chasing Food App Deliveryman](#)

⁵ Newman, Andy. “DoorDash Changes Tipping Model After Uproar From Customers.” The New York Times, July 24, 2019, sec. New York. <https://www.nytimes.com/2019/07/24/nyregion/doordash-tip-policy.html>.

⁶ “The Gig Is Up.” Restaurant Opportunities Centers United, March 2019.

<https://onefairwage.com/wp-content/uploads/2019/12/The-Gig-is-Up.pdf>.

to regress back to discounting delivery worker compensation by the amount they are tipped, identical to other food service workers and restaurant delivery personnel.

New York provides a clear example of the impending danger of replicating AB 5 in a two-tiered wage state. In December 2019, Governor Cuomo enacted a Wage Order requiring a full minimum wage to be paid to all tipped workers *except* restaurant and hospitality workers. This reinforcement of the two-tiered wage system only for restaurant and hospitality workers **explicitly lists food delivery drivers as a tipped occupation excluded from accessing the rising state minimum wage.**⁷ If any legislation requiring DNC's to comply with state employment laws were to pass in New York State, it would thus allow companies like DoorDash - a food delivery company - to regress back to allowing tips to replace worker wages. DoorDash drivers perform the exact same function as restaurant delivery workers and could not be classified differently from restaurant delivery workers who are exempt from the minimum wage.

In New York state there are over 400,000 tipped workers, more than 300,000 of which work within the restaurant industry and are still subjected to the subminimum wage for restaurant and hospitality workers.⁸ Food delivery drivers make up over 12,000 of those industry employees in New York.⁹ This number is overshadowed, however, by the state's 92,000 online platform workers who are currently classified as independent contractors.¹⁰ If New York passes a bill comparable to AB5 without including One Fair Wage legislation, nearly 100,000 workers could become subminimum wage tipped workers.

States considering legislation to bar misclassification for app-based workers should also pass One Fair Wage legislation to bar subminimum wages for tipped workers, in order to eliminate any loopholes a company may pursue to underpay workers. Specifically, this would ensure that tech giants like Uber and DoorDash would not be able to exploit a subminimum wage payment system by reclassifying their workers from independent contractors to tipped employees. An analysis of over 200 online mediated platforms found that over 10% include tips as a required or optional means of compensation, according to a 2019 report by Restaurant Opportunities Centers United.¹¹ Passing similar legislation as AB 5 in other states without ensuring One Fair Wage (OFW) for tipped workers allows for continued exploitation of the over 1.5 million online gig workers across the U.S, many of whom work for tips.¹²

BACKGROUND: ASSEMBLY BILL 5

⁷ "Hospitality Wage Order Frequently Asked Questions." New York State Department of Labor, 2019. <https://www.labor.ny.gov/legal/counsel/pdf/hospitality-wage-order-frequently-asked-questions.pdf>.

⁸ May 2018 State Occupational Employment and Wage Estimates, Bureau of Labor Statistics. Customarily tipped restaurant occupations: Bartenders; Counter Attendants, Cafeteria, Food Concession, and Coffee Shop workers; Waiters and Waitresses; Food servers, Non-restaurant; Dining Room and Cafeteria Attendants and Bartender Helpers; and Hosts and Hostesses, Restaurant, Lounge, and Coffee Shop. Other tipped occupations: Massage Therapists; Gaming Services Workers; Barbers; Hairdressers, Hairstylists, and Cosmetologists; Manicurists and Pedicurists; Shampooers; and Skin Care Specialists; Baggage Porters, Bellhops, and Concierges; Taxi Drivers and Chauffeurs; and Parking Lot Attendants

⁹ May 2018 State Occupation Employment and Wage Estimates, Bureau of Labor Statistics. Utilizing the 'Driver/sales workers' occupation (code 53-3031) and the 'restaurant and other eating places' industry code (NAICS 7225)

¹⁰ Collins et al. "Is Gig Work Replacing Traditional Employment? Evidence from Two Decades of Tax Returns," March 25, 2019. <https://www.irs.gov/pub/irs-soi/19rpgiqworkreplacingtraditionalemployment.pdf>.

¹¹ See footnote 5.

¹² *ibid.*

AB5 emerged on the heels of a 2018 California Supreme Court case holding that workers who provide company services will be classified as employees, and are therefore entitled full access to employment rights and protections.¹³ Companies aiming to classify workers as independent contractors bear the burden of proof through the established ‘ABC test’. Under this test workers can only be classified as independent contractors if they meet three criteria. Workers must 1) be free from the control and direction of the company, 2) perform work outside the company’s normal course of business and 3) regularly and independently engage in the trade, occupation or business.¹⁴ This ruling lays the groundwork for protections that could affect up to 15 million people who work in non-standard work arrangements nationwide, more than 1.5 million of whom are new economy “gig” workers.¹⁵

Popular support for AB5 came specifically in response to heightened concern that projected growth within the gig economy stood to shift increasing costs from companies onto workers and the public sector. On top of individual lost wages, bill author Senator Lorena Gonzalez reported that misclassification cost California up to \$8 billion a year in lost payroll taxes and social safety net subsidies that should have been covered by companies.¹⁶ Indeed, research analysts at Barclays estimated that misclassification saved Uber \$500 million dollars and Lyft \$220 million a year in operating costs, respectively.¹⁷

To date, these large scale companies refuse to comply with AB5. On the contrary, digital platform companies including Uber, Lyft, DoorDash, Postmates and Instacart have vowed to spend \$110 million on a ballot initiative to exempt themselves from AB5 regulations.¹⁸ It is these financial incentives that stand to open up newly protected workers within the gig economy to the threats of subminimum wages through tipped worker classification.

THE STATE OF TIPPED WORKERS

With over 13 million workers, the restaurant industry is the largest and fastest growing industry in the country.¹⁹ Despite grossing over \$825 billion in sales in 2018, the restaurant sector boasts eight of the fifteen lowest paid occupations in the country, seven of which are tipped positions.^{20,21} As a result, tipped

¹³ Economic Policy Institute. “How California’s AB5 Protects Workers from Misclassification.” Accessed February 24, 2020. <https://www.epi.org/publication/how-californias-ab5-protects-workers-from-misclassification/>.

¹⁴ “Bill Text - AB-5 Worker Status: Employees and Independent Contractors.” Accessed February 24, 2020. https://leginfo.ca.gov/faces/billNavClient.xhtml?bill_id=201920200AB5.

¹⁵ “The Gig Is Up.” Restaurant Opportunities Centers United, March 2019. <https://onefairwage.com/wp-content/uploads/2019/12/The-Gig-is-Up.pdf>.

¹⁶ SFChronicle.com. “California Legislature Passes AB5 Gig-Work Bill, Which Could Turn Contractors into Employees,” September 11, 2019. <https://www.sfchronicle.com/business/article/Senate-passes-AB5-gig-work-bill-turning-14430204.php>.

¹⁷ “Uber, Lyft to Make Wage Concessions to Keep California Drivers Contractors.” SF Chronicle. June 12, 2019. <https://www.sfchronicle.com/business/article/Uber-Lyft-to-make-wage-concessions-to-keep-13969745.php>

¹⁸ “Can California Rein in Tech’s Gig Platforms? A Primer on the Bold State Law That Will Try.” Washington Post. Accessed February 24, 2020.

<https://www.washingtonpost.com/business/2020/01/14/can-california-reign-techs-gig-platforms-primer-bold-state-law-that-will-try/>.

¹⁹ Bureau of Labor Statistics, February 2019. Employment Projections, 2016-2026.

²⁰ National Restaurant Association, (2019). Restaurant Industry Facts at a Glance. <https://restaurant.org/research/restaurant-statistics/restaurant-industry-facts-at-a-glance>

²¹ Bureau of Labor Statistics, May 2017 National Occupational Employment and Wage Estimates sorted by median wage.

workers in subminimum wage states are over twice as likely to live in poverty and rely on Medicaid compared to the rest of the workforce.²²

The two-tiered federal wage system for tipped workers has risen little since it was enacted following the emancipation of slavery, a time when employer trade associations pushed to recoup the costs of free, exploited labor. Frozen at \$2.13 cents federally, the subminimum wage reflects the limited value our society places on a workforce that is disproportionately made up of women and people of color²³.

Two thirds of the nation's six million tipped workers are women, 36% of whom are mothers.²⁴ Women who rely on customers for the majority of their paycheck remain vulnerable to sexual harassment from customers and employers. Tipped restaurant occupations experience the highest levels of sexual harassment of any industry in the U.S.²⁵

The expansion of tipping within the gig economy could further entrench the pattern of widespread sexual harassment for vulnerable workers, an ironic outcome for workers who are newly protected from harassment by state labor laws. A 2014 survey of 688 restaurant workers conducted by ROC United and Forward Together found that women working in two-tiered states are twice as likely to experience sexual harassment compared to states that have One Fair Wage - a full minimum wage with tips on top, like California.²⁶ Passing One Fair Wage could thus dramatically reduce sexual harassment in a state like New York, where the same survey found that 80% of restaurant workers experience unwanted sexual harassment at work.²⁷

Two-tiered wage systems also disproportionately affect workers of color who receive less tips than white workers due to racial bias and discrimination. We find similar trends in tipping discrepancy within the gig economy, where Black workers make up 17% of platform workers and 23% of in-person electronically mediated workers compared to just 12% of their overall share in employment.²⁸ Tipping puts Black workers and other workers of color at an economic structural disadvantage, increasing the already unacceptable racial wage gap.

THE EXPANSION OF GIG WORK

Without One Fair Wage protections, it is strongly evidenced that digital platform companies will face few barriers in moving to reclassify their workers as tipped employees earning a subminimum wage from their employers. The combination of this dismantling of tipped worker protections at the federal level and the

²² American Community Survey (ACS), 2012-2015. Calculations by the Restaurant Opportunities Centers United (ROC-United) of civilian employed tipped and general population demographics based on Ruggles et al., Integrated Public Use Microdata Series: Version 5.0 [Machine-readable database]. Minneapolis: Minnesota Population Center, 2010

²³ Jayaraman, Saru, *Forked: A New Standard for American Dining*, Oxford University Press, 2016

²⁴ American Community Survey (ACS), 2012-2015. Calculations by the Restaurant Opportunities Centers United (ROC-United) of civilian employed tipped and general population demographics based on Ruggles et al., Integrated Public Use Microdata Series: Version 5.0 [Machine-readable database]. Minneapolis: Minnesota Population Center, 2010

²⁵ Frye, J. (2017, November 20). Not Just the Rich and Famous. Center for American Progress. Retrieved December 15, 2017, from <https://www.americanprogress.org/issues/women/news/2017/11/20/443139/not-just-rich-famous/>

²⁶ Restaurant Opportunities Centers United, Forward Together, (Oct. 2014). *The Glass Floor: Sexual Harassment in the Restaurant Industry*. New York.

²⁷ Ibid.

²⁸ See footnote 10.

growth of digital payment platforms signal a potential explosion in tipped workers across the tech industry. Mobile payment systems such as Square and Apple pay which facilitate digital tipping in retail environments has opened a new door to traditionally non-tipped industries. From coffee shops to flower shops to airlines, workers previously classified as trade professionals can easily be re-labeled tipped sales and service workers if they meet new criteria as tipped employees²⁹.

Coinciding with the growth of digital tipping is the repeal of the ‘80/20’ rule, a federal U.S. labor law that creates a threshold for who is considered a tipped worker. The previous rule mandated that if an employee spent more than 20% of their time performing non-tipped work, such as dishwashing or table setting, employers had to pay them a full minimum wage for all their hours on the job. In 2018, however, Trump eliminated the ‘80/20’ rule, leaving any worker who makes at least \$30 a month in tips at risk of receiving the subminimum wage for tipped work.³⁰

Despite the potential growth of tipped occupations, the clearest parallel between tipped restaurant work and gig work continues to exist within delivery network companies. As the food delivery market grosses \$19 billion and growing each year, more and more food delivery drivers transition from employed restaurant workers to independent contractors.³¹ DoorDash, one of the largest Delivery Network Companies, valued at \$7 billion dollars and employing 200,000 ‘dashers’ has, like many tech delivery companies, become notorious for their opaque and unethical wage policies.³² Prior to the 2019 backlash, in which the company rescinded its remuneration strategy, DoorDash used customer tips to subsidize its own payment to delivery workers.³³ Offering as little as \$1 per delivery, the company claimed it relinquished 100% of tips to drivers, yet actually used customer’s tips to offset their own guaranteed wage. The more a customer tipped, the less the company paid.

After a worker-led campaign asking customers to pay cash tips, a class action lawsuit and a boycott by tech developers in support of workers, DoorDash reluctantly updated its payment model in the summer of 2019^{34,35}. DoorDash is one of many tech companies that has been forced to renege their exploitative and opaque wage policies. Despite consumer and worker organizing that has temporarily checked the inclinations of digital platform firms, there is nothing legally barring TNCs and DNCs from reinstating subminimum wage policies for their tipped workforce.

After the passage of AB5, Uber, Lyft, DoorDash other digital platform companies impacted by the bill pledged \$110 million dollars toward a ballot measure that would exempt them from full wages and worker protections. The Protect App-Based Drivers and Services Act, filed in CA on October 29, 2019, claims to provide workers with a wage floor set at 120% of the minimum wage, health subsidies for those

²⁹ Department of Labor. Wage and Hour Division. Tip Regulations Under the Fair Labor Standards Act, Pub. L. No. RIN 1235-AA21, 29 CFR Parts 10, 516, 531, 578, 579, and 580 (2019).

<https://www.federalregister.gov/documents/2019/10/08/2019-20868/tip-regulations-under-the-fair-labor-standards-act-flsa>

³⁰ Rugless, R. (February 2019). Labor Department makes 80/20 switch official. Restaurant Hospitality

³¹ Statista. Online Food Delivery.

³² Dowling, S. (Feb. 2019). DoorDash Is Valued At Over \$7B After \$400M Series F Round. Crunchbase News.

³³ See footnote 4.

³⁴ Feiner, Lauren. “DC Attorney General Sues DoorDash, Claiming It Misled Customers and Pocketed Workers’ Tips.” CNBC, November 19, 2019. <https://www.cnbc.com/2019/11/19/dc-attorney-general-sues-doordash-claiming-it-pocketed-workers-tips.html>.

³⁵ Newman, Andy. “DoorDash Changes Tipping Model After Uproar From Customers.” *The New York Times*, July 24, 2019, sec. New York. <https://www.nytimes.com/2019/07/24/nyregion/doordash-tip-policy.html>.

who drive more than 15 hours a week and auto-insurance coverage.³⁶ However, a jointly released analysis by UC Berkeley's Center on Wage and Employment Dynamics and the UC Berkeley Labor Center reveal that after accounting for loopholes and unforeseen costs embedded in the measure, workers would take home only \$5.64 an hour instead of the \$15.60 proponents suggest.³⁷ Hidden costs such as unpaid wait time, driving expenses, payroll taxes and employee benefits means the actual equivalent wage for workers is nearly a third of what companies purport.³⁸ Not only does the initiative strip workers of much needed protections as full employees, it also precludes local governments from enacting their own higher wage and benefit standards.³⁹ Indeed, the act would provide only a third of guaranteed minimum pay for drivers under New York City's current driver pay standard.⁴⁰ **The proposed ballot measure demonstrates the TNC's and DNC's willingness to spend millions to ensure that they can pay a subminimum wage if forced to treat their workers like employees - and the likelihood that they would argue that their tipped workers be paid a subminimum wage in states that allow that.**

CONCLUSION

Opponents claim that increased worker protections such as AB5 and One Fair Wage will hurt the growing innovation economy. However, states with single wage systems have economically flourished.⁴¹ Of the seven One Fair Wage states the restaurant industry reports higher restaurant sales compared to subminimum wage states.⁴² Industry growth for OFW states in 2017 is estimated at 5.1% compared to just 4.2% for \$2.13 wage states.⁴³ OFW states have higher average employment growth for tipped workers and the number of full service restaurants has also increased faster than non-OFW localities.⁴⁴ New York, home to one of the largest restaurant industries in the country, had a projected restaurant sales increase of 3.6 percent, a rate lower than the individual rates of 6 of the 7 OFW states.⁴⁵ States that require a full minimum wage for tipped workers are projected to have greater restaurant industry growth over the next decade compared to subminimum tipped wage states - in most cases, far greater.

If the goal of legislators is to grant workers the full, fair protections they deserve as employees within the newly emergent tech economy, it is imperative to combine One Fair Wage and reclassification policies. California provides an important case study of the benefits and of moving forward worker reclassification; replicating it without protecting workers from subminimum wage treatment that California enjoys would be disastrous. The well-being of workers, the economy and the public good rests on our ability to advance holistic and forward-thinking legislation.

³⁶ See Protect App-Based Drivers and Services Act Website. <https://protectdriversandservices.com/>

³⁷ Jacobs, Ken, and Michael Reich. "The Uber/Lyft Ballot Initiative Guarantees Only \$5.64 an Hour." *Center for Labor Research and Education* (blog), October 31, 2019. <http://laborcenter.berkeley.edu/the-uber-lyft-ballot-initiative-guarantees-only-5-64-an-hour/>.

³⁸ Ibid.

³⁹ Ibid.

⁴⁰ Ibid.

⁴¹ See footnote 1.

⁴² National Restaurant Association (2017). 2017 National Restaurant Association Restaurant Industry Outlook [Online]. Available at: https://www.restaurant.org/Downloads/PDFs/News-Research/2017_Restaurant_outlook_summary-FINAL.pdf. Accessed 2/5/2018.

⁴³ Ibid.

⁴⁴ Ibid.

⁴⁵ Ibid.