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Testimony of Larry Engelstein

Secretary Treasurer, SEIU 32BJ

Committee on Internet and Technology

Examination of the Gig Economy

October 16, 2019

Good afternoon Chair Savino and members of the committee. My name is Larry Engelstein, I'm the Secretary Treasurer of SEIU 32BJ. SEIU 32BJ is the largest property services union in the country representing over 170,000 members across 12 states and Washington DC, and 90,000 members in New York. Thank you for the opportunity to testify in this hearing regarding the needs of workers in the gig economy "operating outside traditional employee-employer dynamic." I would like to reframe the problem that we need to confront, which is the growth of worker misclassification. This impacts not only "gig workers," but a broader universe of low wage workers.

Misclassification is a significant area of concern for SEIU 32BJ, as we represent many workers in the janitorial industry and we have seen many attempts to misclassify workers these workers. For example, some companies have adopted a predatory franchise model, in which vulnerable workers were targeted and saddled with thousands of dollars of debt, only to work for sub-minimum rates.¹ The recent growth of the app-deployed "gig economy" has drawn further attention to the issue. *Handy* and other companies hire office cleaners and handymen as independent contractors, thus cutting costs and circumventing the protections that employee status would offer their workers. Misclassification permits companies to adopt low-road strategies for competition, meaning that not only are their workers poorly paid but prevailing standards throughout the industry are threatened. Therefore, we believe that developing a new business model or employing new technologies simply to avoid treating workers as employees is not the type of innovation that New York should reward.

Misclassification is a major problem that can cause real harm to workers. When a worker is incorrectly classified as an independent contractor that worker is not entitled to minimum or overtime wages,² collective bargaining, unemployment insurance,³ workers compensation,⁴ disability benefits,⁵ protection from retaliation,⁶ and protection under most discrimination and occupational safety laws.⁷ Employers choose to misclassify workers in order to circumvent these rights and protections and to pay their workers as little as possible. Workers are often forced to accept these arrangements in order to work. We are glad that the legislature is taking steps to address misclassification and the harm it does to New York workers and their families.

Misclassification is not a new issue in New York. According to a 2007 Cornell study approximately 10.3% of the state's workforce was misclassified.⁸ The time period considered preceded the founding of Uber (2009),⁹ Postmates (2011),¹⁰ Lyft (2012)¹¹ and Instacart (2012).¹² Misclassification is not an issue that affects only "gig economy" workers, though the rise of the "gig economy" has likely increased the rates of worker

misclassification. Nonetheless, the percentage of workers who provide services through online intermediaries nationwide, such as Uber or Lyft, was only 0.5% in 2015.¹³

Unfortunately, Senate Bill 6538 focuses on the small percentage of workers in the gig economy while ignoring the much broader universe of low wage workers who are misclassified. The bill creates a new category of "dependent workers," workers who provide personal services through a private sector third party and provides them with a limited set of legal protections, specifically collective bargaining rights and rights regarding how they are paid, but not a host of other crucial rights to which employees are entitled such as how much they are paid.

In creating the new category of "dependent workers," SB 6538 deviates from traditional legal approaches regarding the distinction between employees and independent contractors which had focused on the control and responsibility over the work exercised by the worker, to an approach that focuses on the business model of the employer. A test entirely dependent on the employer is more likely to be subject to manipulation by employers.

The creation of a new category such as "dependent worker," presents an invitation to regulate that group of workers in a different way from other employees. In this legislation, this means fewer protections than other employees. Moreover, employers would also have an incentive to restructure their business models in order to employ "dependent workers." Lastly, the idea that gig economy companies deserve any sort of special solicitude is doubtful. Instead of representing the future of work they may instead be the next tech bubble. Uber lost \$5.2 billion in the second quarter of this year,¹⁴ while Lyft lost \$664.2 million.¹⁵ Postmates is unprofitable.¹⁶ Instacart is likely unprofitable.¹⁷ Why should New York subsidize unprofitable companies by allowing them to strip their workers of labor protections? Because Senate Bill 6538 focuses solely on a fraction of workers and puts others at risk we do not consider it the correct approach.

The proper approach to the misclassification issue would seek to protect all workers subject to misclassification, create a strong floor, and do so without potentially weakening protections for other workers. We believe that this can best be done through the adoption of the ABC test. The ABC test creates a rebuttable presumption that a person is an employee unless all three elements of the test are met. These are: (a) the individual is free from control and direction in performing the job, both under his or her contract and in fact; (b) the service must be performed outside the usual course of business for which the service is performed; and (c) the individual is customarily engaged in an independently established trade, occupation, profession or business that is similar to the service at issue. This is a simple and modern test. This is why we are working with allies to advocate this solution and build upon the momentum coming from California's passage of AB5.

New York has enacted the New York State Construction Industry Fair Play Act in 2010 and the New York State Commercial Goods Transportation Industry Fair Play Act in 2014. These laws applied the ABC test to workers in those sectors. Our preferred approach would be for the ABC Test to apply to all workers in New York and across the board extending to all protections and rights offered to employees. Twenty four states already use the ABC test for purposes of determining eligibility in unemployment insurance law.¹⁸ Ten States apply the ABC test broadly to labor laws for certain sectors of work.¹⁹ New Jersey, Massachusetts, and Connecticut use the ABC test in their wage and hour laws.²⁰ California has recently adopted the ABC test across all sectors and across the board.²¹ The ABC test already exists in New York law and would provide a more protective approach to determining whether a worker is an employee or an independent contractor.

Adopting the ABC test across all sectors and across the board would provide a strong floor for workers to build on and would facilitate collective bargaining. A worker determined to be an employee under the ABC test would not need to fight to get to the minimum wage or fight to get overtime pay, these would be their rights as employees. We are also working with organizations representing creative professionals to ensure that these workers can retain their status as independent contractors. The ABC test can with some minor modifications provide a massive benefit to the large number of misclassified workers, while allowing proper independent

contractors to retain their status as such. California was able to do so in its passage of AB5. There is no reason why we can't do just as well as California if not better in addressing misclassification.

Because misclassification is an issue that arises not because of new technology, but because of employers search for an advantageous legal framework that permits the hiring of workers at lesser pay and with less rights we need to reframe this issue so that we look broadly at how to prevent misclassification. We should ensure that the legal framework regarding misclassification protects workers and we believe that the best approach in doing so would be to adopt the ABC test.

¹ Wendy N. Davis, *Do Janitorial firms cash in by misclassifying workers as independent contractors?*, ABA JOURNAL (Sep. 1, 2014: 9:20 PM),

http://www.abajournal.com/magazine/article/do_janitorial_firms_cash_in_by_misclassifying_workers_as_independent

² N.Y. Lab. Law §§160, 651.

³ N.Y. Lab. Law §511.

⁴ N.Y. Workers' Comp. Law §2.

⁵ N.Y. Workers' Comp. Law §201.

⁶ N.Y. Lab. Law §740.

⁷ Steven Greenhouse, *Investigating Mislabeled Workers*, THE NEW YORK TIMES (June 9, 2007),

<https://www.nytimes.com/2007/06/09/nyregion/09contractor.html>

⁸ Linda H. Donahue, James Ryan Lamare, Fred B. Kotler, *The Cost of Worker Misclassification in New York State*, CORNELL UNIVERSITY SCHOOL OF INDUSTRIAL LABOR RELATIONS (February 2007), <https://digitalcommons.ilr.cornell.edu/reports/9/>.

⁹ <https://www.uber.com/newsroom/history/>

¹⁰ <https://postmates.com/about>

¹¹ Johana Bhuiyan, *Lyft's public market debut will put its kinder, gentler image under a microscope*, LOS ANGELES TIMES (Mar. 29, 2019: 5:26 PM),

<https://www.latimes.com/business/technology/la-fi-tn-lyft-public-drivers-cash-bonus-ipo-20190329-story.html>

¹² Josh Lipton, *Instacart raises \$220 million investment*, CNBC (Jan. 13, 2015: 7:00 AM),

<https://www.cnbc.com/2015/01/12/instacart-raises-220-million-investment.html>

¹³ Lawrence F. Katz & Alan B. Krueger, *The Rise and Nature of Alternative Work Arrangements in the United States, 1995-2005*, PRINCETON (Mar. 29, 2016), https://krueger.princeton.edu/sites/default/files/akrueger/files/katz_krueger_cws_-_march_29_20165.pdf

¹⁴ Kate Conger, *Uber Posts \$5.2 Billion Loss and Slowest Ever Growth Rate*, THE NEW YORK TIMES (Apr. 8, 2019),

<https://www.nytimes.com/2019/08/08/technology/uber-earnings.html>

¹⁵ *Id.*

¹⁶ Biz Carson, *Prepping For an IPO, Postmates Raises Another \$225 million*, FORBES (Sep. 19, 2019).

<https://www.forbes.com/sites/bizcarson/2019/09/19/postmates-raises-225-million-pre-ipo/#584cec8f2baf>

¹⁷ Deirde Bosa & Paayal Zaveri, *Instacart and Whole Foods officially part ways, and the CEO says he's ready*, CNBC (May 15, 2019: 3:17 PM), <https://www.cnbc.com/2019/05/15/instacart-ceo-apoorva-mehta-were-ready-for-split-from-whole-foods.html>

¹⁸ U.S. Dep't of Lab., *Comparison of State Unemployment Laws*, U.S. DEP'T OF LAB.,

<https://oui.doleta.gov/unemploy/pdf/uilawcompar/2018/coverage.pdf> (last visited May 3, 2019).

¹⁹ Rebecca Smith, *Washington State Considers ABC Test for Employee Status*, NATIONAL EMPLOYMENT LAW PROJECT (Jan. 28, 2019), <https://www.nelp.org/blog/washington-state-considers-abc-test-employee-status/>

²⁰ *Id.*

²¹ California Assembly Bill 5.

