



To: Senator Diane Savino, Chair of the Committee on Internet and Technology
From: Rocio Alejandra Avila – State Policy Director (rocio@domesticworkers.org)
Re: Testimony Submitted for Hearing on the “Examination of the Gig Economy”
Date: October 16, 2019

NDWA TESTIMONY

INTRODUCTION:

My name is Rocio Alejandra avila. I’m testifying today both in my capacity as an employment/labor rights attorney with over 12 years of legal experience representing low-wage and immigrant workers, including domestic workers in California, in wage theft, misclassification, discrimination, and retaliation claims, and also as State and Municipal Policy Director with the National Domestic Workers Alliance (NDWA),¹ where I advance and raise standards for domestic workers nationwide. As such, my comments will be focused on providing important insight on the impact the “gig economy” has had in the domestic worker industry, along with some concrete solutions, and alternatives to **S.6538- The Dependent Worker Act**, which we oppose.

BACKGROUND:

NDWA is the nation’s leading voice for dignity and fairness for the millions of domestic workers in the United States.² Founded in 2007, NDWA works for the respect, recognition and inclusion in labor protections for domestic workers, most of whom are women of color and immigrants. We are a membership based organization powered by 60 affiliate organizations, plus our local chapters in Atlanta, Durham, Seattle and New York City, of over 20,000 nannies, housekeepers and direct care workers in 36 cities and 17 states.

Domestic workers comprise a growing workforce that has been historically excluded from basic workplace protections. NDWA has led the movement both at the federal level with the introduction of our national Domestic Worker Bill Rights co-sponsored by Representative

¹ <https://www.domesticworkers.org/raising-standards>

² Linda Burnham & Nik Theodore, *Home Economics: The Invisible and Unregulated World of Domestic Work*, pp. 26-28, (2012), available at <http://www.domesticworkers.org/homeeconomics/>

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Pramila Jaypal and Senator Kamala Harris, and in several states to pass legislation to eliminate the exclusions. These state protections have been encompassed in Domestic Worker Bill of Rights (DWBOR's), and NDWA has been involved in successful fights for these bill of rights in nine states: and one city: New York (NY) 2010,³ which Senator Diane Savio sponsored, Hawaii (HI) 2013,⁴ California (CA) 2013 and 2016,⁵ Massachusetts (MA) 2014,⁶ Connecticut (CT) 2015,⁷ Oregon (OR) 2015,⁸ Illinois (IL) 2016,⁹ and Nevada (NV) 2017,¹⁰ Seattle, Washington (2018)¹¹ and New Mexico (2019).¹²

ANALYSIS:

Despite these gains, our members are still extremely vulnerable to exploitation and abuse. We are fastly approaching the 10th year anniversary of the enactment of the New York Bill of Right (NYBOR's)- the first in the counrty. Since then the domestic work industry has changed dramatically. It is one of the industries that are part of the "gig economy." There are now armies of workers relying on app-based technology platforms to find work in our industry (home care, child care, and house cleaning). The problems affecting DW's have only been further exacerbated, as I will describe in these comments. This is because today's "gig" workers are working in similar conditions than domestic workers were subjected to *prior* to the enactment of federal and state law reforms that extended basic workplace protections to domestic workers. Gig workers, which include domestic workers who seek employment on-line, work for multiple employers or entities, no workplace protections, no safety-net benefits or avenues to collectively bargain for better working conditions.

³ NY (Bill NO. A01470B, S-2311-E, 2010): <https://www.labor.ny.gov/legal/domestic-workers-bill-of-rights.shtm>

⁴ HI (SB535 HD2, 2013)-
<http://www.capitol.hawaii.gov/session2013/bills/GM1351>

⁵ CA (AB 241, 2013 and SB 1021, 2016):
http://www.leginfo.ca.gov/pub/15-16/bill/sen/sb_1001-1050/sb_1015_bill_20160211_introduced.html

⁶ MASS (S. 882, 2014): M.G.I. Ch 149, Section 190-91- info:
<http://www.mass.gov/ago/docs/workplace/domestic-workers/dw-notice-of-rights.pdf>

⁷ CT (SB 446, 2015): <https://www.cga.ct.gov/2015/ACT/pa/pdf/2015PA-00249-R00SB-00446-PA.pdf>

⁸ OR (SB-552A, 2015):
<https://olis.leg.state.or.us/liz/2015R1/Downloads/MeasureDocument/SB552/Enrolled>

⁹ Ill (HB 1288, 2016): <http://www.ilga.gov/legislation/publicacts/fulltext.asp?Name=099-0758>

¹⁰ NV (SB 232, 2017): <https://www.leg.state.nv.us/App/NELIS/REL/79th2017/Bill/5125/Text>

¹¹ Seattle Domestic Worker Bill of Rights bill-Ordinance 125627 was signed into law on July 23, 2018.
<http://seattle.legistar.com/View.ashx?M=F&ID=6451347&GUID=107050D2-BEFC-4B43-BC0D-B7AD73ADABF1>

¹² NM (SB 85, signed into law on April 4, 2019)
<https://www.nmlegis.gov/Sessions/19%20Regular/final/SB0085.pdf>

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While DW's have been building a powerful movement to raise standards and eliminate the racist and sexist laws that exclude our industry from basic labor protections, the "future of work" has become a national conversation and the "gig economy" exploded. And, while this explosion has expanded employment opportunities for domestic workers through, both "market" based platforms such as Care.com, and "on-demand" companies, such as Taskrabbit and Handy, these opportunities have come at a high price for workers and their families. The fact that many of the "on-demand" companies treat workers as "independent contractors," thereby stripping away the core workplace protections and safety-net that domestic workers have fought so bravely to gain, has created an inferior employment classification for "gig workers." This inferior classification, which neither fits the traditional "independent contractor" category nor the protections extended to "employees" under the law, upholds a business model that is based on shifting all employment responsibilities on to workers.

Much of the debate on the "future of work" and the "on-demand" economy is premised on the false notion that "gig" work via on-line platforms is distinct than other work, and as such, it should be treated differently under the law, including creating special rules for the gig economy. For the past three or more years, NDWA has been organizing Handy workers on-line and in the last year providing a legal services to gig domestic workers in New York City. Based on both our field research and our legal advocacy, we can refute that notion. In fact, our research paints a different picture, not discussed in the "future of work" debates, about the egregious nature of the abuse domestic workers working on-line are subjected to in large part due to their misclassification as independent contractors. Consequently, I believe this hearing's timing is critical to unveil the true working conditions of gig domestic workers in order to find immediate solutions to the challenges faced by gig workers and all other workers' whose rights are being threatened as a result of the lack of regulation and special treatment the gig economy has received.

HANDY WORKERS' CHALLENGES:

1. **Basic workplace and labor protections:** Because Handy workers have none at this time, they are far worse than other domestic workers covered under the NY DWBOR's because those workers can file a wage claim with the NY Department of Labor if they have not been paid for all hours worked. The number one issue for Handy workers is that even though they are required to log-in and log-out to the app for every job, thus, evidence of control by the company, they are only paid for the time the client pays for the cleaning service even if the assignment exceeds the allocated time. This situation under wage and hour law is referred to as working "off the clock" and it is otherwise illegal for every cleaning company in NY that dispatches workers to

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people's homes directly without using an app. The impact is that Handy's workers have no clear legal recourse to contest such violations simply because they rely on an app to get job assignments. This means that Handy will continue to profit off the hard labor of workers as long as they continue to be able to classify workers as independent contractors.

2. **Wage Theft - No transparency about how Handy workers pay is actually calculated and there is no accountability in the company's rating policies, which are directly tied to how Handy workers' wages are determined.** The quintessential factor that distinguishes an "employee" under the law from an "independent contractor" is that the latter negotiates his/her wages or contracts. Handy workers are arbitrarily assigned a wage that is tied to a vague rating system, among other factors, for which there is no transparency. The company retains control of rates and wages.
3. **Fair and Livable wages:** Handy workers express challenges in making livable wages. This is in large part due to the **arbitrary and punitive fees Handy imposes against its workers.** For example, one of our clients told us, "there were times my fees were more than what I was going to earn and when this happened, I had to work on the platform for free in order to pay back the fees. I've been told this is a form of wage theft."
4. **Flexibility and autonomy on the Handy platform:** Handy controls its workers through its punitive fee system, surveillance system (workers must check-in and check-out at the job site), unfair ratings systems, and on-line trainings that they are required to do every time they are onboarded onto the platform and periodically thereafter. As such, what we've found is that Handy controls when the work is done; how it must be performed via trainings; it monitors workers' activities, determines their rate of pay and pays the worker directly for the work they completed.

RECOMMENDATIONS:

As such, NDWA stands with the NY Do It Right Employment Classification Test (DIRECT) Coalition to urge the NY legislature to advance legislation that adopts an **ABC test** as a first step, but an extremely important step in order to truly find solutions to the unique and complex set of circumstances faced by domestic workers in the gig economy and for contingent workers alike:

Why the ABC Test?

While NDWA commends the NY State Labor Federation and Senator Diane Savino for taking a leadership role in trying to find solutions to the complex issues faced by "gig workers," we believe that **S.6538- The Dependent Worker Act- was not the answer.**

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- ❑ The bill would have codified a third classification of worker- a “dependent worker” - to include “gig” economy workers thereby separating “gig” workers from other workers, which as noted earlier, that is a false notion that only serves the interests of the companies to shift liability to workers.
- ❑ While “Dependent workers” would have been extended the right to collectively bargain by amending the NYS Labor Relations Act (§701.3),¹³ it would have extended the right to join a union solely to the “dependent workers” creating a separate track for “dependent workers, who would not have the same labor protections that an “employee” enjoys. Thus, workers’ starting point for bargaining for higher wages would begin below minimum wage since the “dependent workers” would continue to be classified as independent contractors- without a floor of workplace protections.
- ❑ **Consequently, the proposed bill, did not address a significant problem in the gig economy, from which workers’ substandard wages and benefits come: the growth of misclassification and its prevalence in non-app based work as well. Both must be addressed.**

Alternatively, our recommendation is for NY to consider passing a bill similar’s to California’s AB 5,¹⁴ which was signed into law by Governor Gavin Newsom on September 18, 2019, requiring courts to perform an “ABC test,” that looks at the economic reality of workers-- whether the worker is performing the core services that the company provides, regardless of flexibility in scheduling, like the California Supreme Court held in the *Dynamex Operations West, Inc. v. Superior Court of Los Angeles*.

- ❑ I worked on AB 5 in CA, a bill that was led by the CA Labor Federation and worker centers across the state. The reason for the support is because the test provides clarity to determine who’s an employee vs. an independent contractor. This is something that tech and the gig economy have been asking for a long time as well as other workers’ rights advocates.
- ❑ In CA, we believe that the ABC test is a tool to level the playing field to ensure that workers who are misclassified are able to be covered under the labor protections that they deserve as “employees” and, in so doing, companies must be compelled to pay

¹³ <https://codes.findlaw.com/nv/labor-law/lab-sect-701.html>

¹⁴ http://leginfo.legislature.ca.gov/faces/billStatusClient.xhtml?bill_id=201920200AB5

their fair share of taxes and benefits. And, those workers who aren't "employees," in fact, should have the freedom to operate like true independent contractors, unlike the current scheme advanced by most on-demand companies.

- ❑ Our hope is that NY state will follow CA and adopt its own ABC test that provides a clear path to resolve disputed claims about employment classification. Once the ABC test is adopted, then it would be appropriate to consider expanding labor protections to "gig" workers, but after their basic workplace protections as "employees" under the law have been guaranteed and upheld. Doing so, will dissuade companies from moving their businesses to on-line platforms for the purpose of evading their responsibilities and relying on misclassification for their profit margins.
- ❑ The ABC test does not resolve all challenges faced by gig workers and other workers, such as a lack of living wages, and safety-net benefits, but it is crucial legal tool to combat the prevalence of misclassification, which leads to substandard wages and abuse, and which disproportionately impacts low-wage workers, immigrants and people of color.

CONCLUSION:

For all the reasons stated above, NDWA stands with and as a part of the NY Do It Right Employment Classification Test (DIRECT) Coalition in support of "ABC" test. If you should have any questions about my comments, please feel free to reach me at: rocio@domesticworkers.org or 415 377-2953.