

**NetChoice** *Promoting Convenience, Choice, and Commerce on The Net*

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Sen. Fred H. Madden, Chair  
Labor Committee  
New Jersey Senate  
Trenton, NJ

October 11, 2018

***RE: Opposition to S 67 Establishes system for portable benefits for workers who provide services to consumers through contracting agents.***

Dear Chairman Madden and members of the committee:

We understand your approach to try treat the peer-to-peer economy the same as legacy employment. Unfortunately, S 67 shoehorns old rules into a new system – rules that would undermine the benefits that the new entrepreneurs and consumers enjoy from the peer-to-peer economy (P2P) – an economy that connects people looking to work for people who need workers.

[Gig-economy enables your citizens to become entrepreneurs](#)

Historically we were self-employed entrepreneurs. But with the industrial revolution we began working for others and not ourselves.

The gig-economy has opened the door for us to return to being our own bosses and becoming entrepreneurs. We can decide when, where, and how we want to work.

Consider driving for transportation network companies like Lyft and Uber. Some of us may only drive once a month while others choose to drive every day. Some may only drive during “peak hours.” Some may drive after work and others after dropping off children at school.

This flexibility is core to the benefits of the ridesharing model. For example, I am a driver for Lyft. I also have a fulltime job and two children. Being forced into a model where I must drive a set number of hours each week doesn’t work for me. I need the flexibility to set my own hours, and I am not alone.

Likewise, I currently get healthcare, retirement plans and many other benefits from my full-time employer. The notion that a part of my gig-economy salary would be deducted to pay for an additional fund, like the ones suggested by SB 67, doesn’t work for me. Many of us engaged in the gig-economy work multiple jobs and already receive benefits.

[The Gig-Economy doesn’t fall into existing employment archetypes](#)

The premise of SB 67 centers on the assumption of an employer-employee relationship for the gig-economy. But this isn’t the way the gig-economy works – neither are employer nor employee. In fact, the lack of the mandates of an employer-employee is one of the most appealing traits of the gig-economy.

In June 2016, the Department of Commerce published a report and found gig-platforms exhibit four characteristics:

1. They use information technology (IT systems), typically available via web-based platforms, such as mobile "apps" on internet-enabled devices, to facilitate peer-to-peer transactions.
2. They rely on user-based rating systems for quality control, ensuring a level of trust between consumers and service providers who have not previously met.
3. They offer the workers who provide services via digital matching platforms control over their working hours.
4. To the extent that tools and assets are necessary to provide a service, digital matching firms rely on the workers using their own.<sup>1</sup>

As you can see, it requires a tortured approach to fit these core characteristics of the gig-economy into existing employment laws.

### SB 67 could discourage engagement in the gig-economy

SB 67 could result in gig-economy workers like myself decreasing engagement or abandoning the gig-economy. The benefits pools required by SB 67 must be funded from somewhere. This will come in a combination of increased fees to New Jersey residents and reduced income to workers.

With likely reduced revenue from working in the gig-economy, workers would be less empowered to use online platforms to help make ends meet.

### Ordinance ignores the 2-Sided Market

As discussed above, the gig-economy is not the legacy employment model. Drivers, for example, do not work for the platforms, and the platforms are not the employers. Note that if such a relationship existed, the platforms could dictate to drivers when and where they work.

Instead, the platforms are more like the yellow pages than they are an employer. Entrepreneurs sell their services and the consumers buy the service.

Accordingly, gig platforms are merely digital matching firms that facilitate transactions between entrepreneurs and consumers.

This means that SB 67 will not help workers in the gig economy.

### Discourages innovation by platforms

Today gig-platforms are looking at ways to develop portable benefits systems for the people using their platforms. Many of these approaches also recognize the mobility of workers allowing them to take their

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<sup>1</sup> Econ. & Stat. Admin., U.S. Dep't of Com., ESA Issue Brief No. 01-16, Digital Matching Firms: A New Definition in the "Sharing Economy", p2-4 (2016) <http://www.esa.gov/sites/default/files/digital-matching-firms-new-definition-sharing-economy-space.pdf> ("Increasingly, consumers and independent service providers are engaging in transactions facilitated by an Internet-based platform. The digital firms that provide the platforms are often collectively referred to as belonging to the 'sharing' or 'collaborative' economies, among other descriptors.").

benefits anywhere in the country – whereas benefits in a New Jersey plan would not necessarily move with them out of state.

SB 67 would discourage platforms from innovating on how they can best provide benefits for their users.

We ask that you not shoe-horn in legacy rules into a different market.

We, nonetheless, welcome the opportunity to work with you on approaches on portable benefits that work for all gig-economy workers.

We appreciate your consideration of these concerns and urge you not adopt SB 67.

Sincerely,

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Vice President and General Counsel, NetChoice  
[www.netchoice.org](http://www.netchoice.org)

## IRS Evaluation

### Employee vs. Independent Contractor

<i>(A) Behavioral Control Factors</i>	<i>EMPLOYEE</i>	<i>INDEPENDENT CONTRACTOR</i>	<i>TNC DRIVERS</i>
<i>Type of Instructions Given</i>	Employees must follow the instructions of the employer as to when, where, and how to perform the work.	Independent contractors can set their own hours and decide how to perform the job or complete the project. The company will review the finished project.	Drivers choose when to work and whom to pick-up. There are no set hours in which to work nor quotas to meet.
<i>Degree of Instruction</i>	Degree of Instruction means that the more detailed the instructions, the more control the business exercises over the worker and the closer the worker is to an employee.	Less detailed instructions reflect less control, indicating that the worker is more likely an independent contractor.	Drivers are required to: be over 21 with an active U.S. driver's license for at least 1 year, pass a driving record and background check, meet TNC and local governments' vehicle standards, have a license, valid plates, insurance in driver's name, and a current smart phone. Drivers must have signage on car when driving.
<i>Evaluation</i>	If an evaluation system measures the details of how the work is performed, then these factors would indicate that you are an employee.	If the evaluation system measures just the end result, then you could be either an independent contractor or an employee.	Evaluations are based on quality of service at the time of completion of ride and evaluations are made by customer not employer.
<i>Training</i>	The employer may hold classes, meetings or closely supervise on-the-job to train employees.	Independent contractors can perform the work as they choose.	Some TNCs include a mentor training before becoming a driver. This includes advice on maximizing services and efficiency. Additional training is typically only when a driver is showing lower than acceptable reviews.

<i>(B) Financial Control Factors</i>	<i>EMPLOYEE</i>	<i>INDEPENDENT CONTRACTOR</i>	<i>TNC DRIVERS</i>
<i>Significant Investment</i>	Employees do not invest in the facility and do not buy equipment.	Independent contractors must invest in their own workplace and equipment.	Drivers provide their own vehicle, insurance, gas, and mobile device. TNC provides additional insurance in the event of an accident.
<i>Unreimbursed Expenses</i>		Independent contractors are more likely to have unreimbursed expenses than employees. Fixed ongoing costs that are incurred regardless of whether work is currently being performed are especially important. However, employees may also incur unreimbursed expenses in connection with the services that they perform for their business.	Drivers are responsible for car payments, gas, insurance, and cleanings. Some insurance TNC riders are flat rate and some are variable rate based on when the vehicle is being used for TNC purposes.
<i>Opportunity for Profit or Loss</i>	The profit or loss of the company does not change the pay that employees earn.	Independent contractors can profit or lose money based on good or bad results and time spent working on the project.	Payment is based on rate at time of the ride, length of ride, and tips from the customer. Payment is not dependent on the profit or loss of the company.
<i>Services Available to the Market</i>	Employees generally serve one employer.	Independent contractors can provide services to the general public, advertise services, and recruit new customers--all while working for one or more other companies.	Drivers may drive for multiple TNC companies. Many of drivers have other jobs.
<i>Method of Payment</i>	Employees are paid on specific dates in regular amounts, and may be reimbursed for travel and business expenses.	The contract between the company and the independent contractor determines how payment is to be made. Independent contractors may include expenses as part of the contract, or may pay expenses independently.	Payments based on services rendered and not a flat rate salary.

<i>(C) Type of Relationship Factors:</i>	<i>EMPLOYEE</i>	<i>INDEPENDENT CONTRACTOR</i>	<i>TNC DRIVERS</i>
<i>Written Contract</i>	A contract that states that the worker is an employee is not sufficient to determine the worker's status. How the parties work together determines whether the worker is an employee.	A contract that states that the worker is an independent contractor is not sufficient to determine the worker's status. The IRS is not required to follow a contract stating that the worker is an independent contractor, responsible for paying his own self-employment tax. How the parties work together determines whether the worker is an independent contractor.	Some TNCs expressly define drivers as "contractors" in the partner agreement.
<i>Employee Benefits</i>	Employee benefits include things like insurance, pension plans, paid vacation, sick days, and disability insurance.	Businesses generally do not grant these benefits to independent contractors. However, the lack of these types of benefits does not necessarily mean the worker is an independent contractor.	TNCs may offer discounts on drivers insurance or gas.
<i>Permanency of the Relationship</i>	Employees have an ongoing relationship with the employer.	Independent contractors are hired for a specific job. When that job is finished, the work relationship ends.	Drivers are only working when the TNC app is set to the driver mode.
<i>Services Provided as Key Activity of the Business</i>	If a worker provides services that are a key aspect of the business, it is more likely that the business will have the right to direct and control his or her activities.		Drivers are given equal treatment. However those with higher ratings made receive priority in being selected for a ride offering.