

Barriers to Portable Benefits Solutions for Gig Economy Workers



The Center for
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Abstract

Recent technological changes are impacting not only goods and services, but also labor markets in the United States. Most notably, this change can be seen in the rise of the gig or platform economy and the freelance movement. From a policy standpoint, this growth of the platform economy poses challenging questions because as work becomes contract-based, workers may be faced with less health insurance coverage and fewer other employment benefits. Developments surrounding the global COVID-19 pandemic have also highlighted the problem of access to benefits among gig, freelance, and self-employed workers. For this reason, there has been interest in rethinking the role of labor regulations and employment benefits with attempts to move toward a solution that encompasses more flexible and portable benefits for workers. In this paper, I investigate the legal and policy barriers that prevent either gig economy platforms to fill the gap of workers benefits or that prevent the emergence of structural changes in the economy to move toward more portable benefits. In doing so, I also propose possible solutions to remove these policy and legal barriers. Future research on this topic should continue to investigate various legal and non-legal barriers and provide analyses of different reforms. The pathway to portable benefits can perhaps be achieved by first recognizing the barriers that stand in its way.

Introduction

Recent technological changes are impacting not only goods and services, but also labor markets in the United States. We find ourselves on the brink of structural changes in labor markets as the traditional relationship between employee and employer is being disrupted and as the applicability of labor regulations that govern these relationships appears to be dissipating. Most notably, this change can be seen in the rise of the gig or platform economy, which is comprised of labor market activities coordinated via digital platforms whereby individuals take on commissioned tasks without guarantee of further employment. The companies operating these digital platforms act as intermediaries between the consumers (“demanders”) of the good or service and the workers (“suppliers”) who provide the good or service.¹ These digital platforms have also given greater prominence to the rise of freelancing and other types of independent work. While there are distinctions, “platform-based work,” “freelancing,” and “contracting” are all terms that are often used interchangeably with “gig economy” because they are all forms of work referred to as “alternative or external labor arrangements” and are contrasted with the standard employer-employee relationship.²

From a policy standpoint, the gig and freelancing economies pose challenging questions about labor regulations and the distinction of workers as either employees or contractors. Most individuals working through this platform economy are considered “independent contractors” or “1099 workers” or “self-employed” individuals, whereas traditional employees are considered “W-2 workers.”³ Most labor regulations and most healthcare benefits, retirement plans, and other worker benefits apply to individuals who are legally defined as employees but not to those who are defined as independent contractors. This can be seen as problematic because if more work becomes contract-based, more workers may be faced with less health insurance coverage and fewer other worker benefits.

For this reason, there has been interest in rethinking the role of labor regulations and employment benefits with attempts to move toward a solution that encompasses more flexible and portable benefits packages for workers, which are not tied to a particular employer. In an important survey attempting to measure demand for these types of benefits for contractors, freelancers, or gig workers, the researchers find that approximately 80 percent of self-employed respondents indicated a type of portable benefits option would be a good idea.⁴ A large percentage of self-employed respondents (45–50 percent) in the United States also indicated that health insurance was the most preferred social program for them.⁵ Retirement savings programs were the second-most preferred social program.

But health insurance and retirement benefits are not the only aspects of employee benefits that gig and platform economy workers do not have access to. Traditional employment also comes with other safety net provisions such as disability insurance, worker compensation, personal days, and sick days, which do not exist for most gig and contractor work.⁶

Furthermore, developments surrounding the global COVID-19 pandemic have also highlighted the problem of access to benefits among platform workers. Gig economy delivery drivers, for example, may be

1 See, Valerio De Stefano, “The Rise of the ‘Just-in-Time Workforce’: On-Demand Work, Crowd Work and Labour Protection in the ‘Gig Economy,’” *Comparative Labor Law & Policy Journal* (forthcoming).

2 Following the literature, I use the terms “gig,” “freelance,” and “independent contracting” interchangeably to refer to work classified as an alternative or external labor arrangement.

3 These terms come from an Internal Revenue Service (IRS) distinction which requires employees to file a W-2 form and independent contractors to file a 1099 form.

4 The question read as follows: “Policymakers have been discussing the idea of creating a fund to help self-employed workers obtain work-related benefits, such as health insurance and retirement savings, that they would be able to receive regardless of where they worked, and they could take with them if they changed jobs. Do you think this is a good idea?”

5 Tito Boeri, Giulia Giupponi, Alan Krueger, and Stephen Machin, “Solo Self-Employment and Alternative Work Arrangements: A Cross-Country Perspective on the Changing Composition of Jobs,” *Journal of Economic Perspectives* 34, no. 1 (Winter 2020): 170–95.

6 For detailed comparison on which type of safety net provisions tend to be available for full-time employees vs. contractors, see: Libby Reder, Shelly Steward, and Natalie Foster, *Designing Portable Benefits: A Resource Guide for Policymakers* (Washington, DC: Aspen Institute Future of Work Initiative, June 2019), 12–19.

at an increased risk of contracting the virus, but may not have healthcare insurance and other benefits such as paid sick leave that would come to workers who are traditional employees. Other types of gig economy workers may see decreased demand or may even be without jobs completely (e.g., Uber and Lyft drivers, Soothe and Zeel self-employed massage therapists, and self-employed nannies on Care.com). While there are unemployment benefits for traditional employees who lost their jobs or who faced reduced hours because of the virus, gig economy workers are not typically eligible for these benefits. Policymakers recognized this, which is why the federal Coronavirus, Aid, Relief, and Economic Security (CARES) Act of March 2020 included a provision for unemployment insurance benefits for the self-employed and gig economy workers.

The problems associated with lack of access to benefits for gig economy workers have captured the attention of scholarly researchers, policymakers, and the broader public, and some solutions have been proposed. For example, Senator Mark Warner (D-VA) has introduced legislation entitled “Portable Benefits for Independent Workers Pilot Program” that seeks to create a \$20 million grant fund for states, localities, and non-profit organizations to experiment with portable benefits solutions for gig and independent workers.⁷ In the last year, Philadelphia passed the Domestic Worker Bill of Rights which included a provision to create a portable benefits system that allows for domestic workers (e.g., housecleaners, home health aides, and nannies) to receive paid time off. Another example, which has been in existence for the last 20 years, is the New York State Black Car Fund. The Black Car Fund established a fund for livery and for-hire vehicle drivers (all of whom are independent contractors) to receive workers’ compensation. The statute requires that 2.5 percent of every taxi and for-hire vehicle ride be allocated to this fund (and thus paid for by customers).⁸ Uber and Lyft drivers are also for-hire vehicle drivers and thus have access to the Black Car Fund if they are based in New York.

Interestingly, private portable benefits are already beginning to emerge in some areas. For example, with respect to retirement benefits, companies such as Honest Dollar are providing competitive individualized 401(k) benefits plans to contractors and freelancers. As another example, Alia is an online platform that helps self-employed house cleaners get benefits by enabling clients to contribute to a fund in proportion to their transactions with any given worker. Cleaners then can use the contributions from all clients to purchase a variety of benefits. In this way, Alia is an intermediary between three groups: the workers (house cleaners), the clients, and Alia’s partner insurance companies.

The problem of lack of access to benefits in the gig economy encompasses two different questions. First, why don’t more gig economy platform companies provide healthcare insurance and other worker benefits for the contractors on their platform? In theory, Uber could offer health insurance benefits to its contractors. In fact, some articles and interviews indicate that perhaps platforms such as Uber *do* want to provide their contractors access to health insurance and other benefits.⁹ This of course would be a solution for gig economy platform workers to have some access to benefits, but it is not a *portable* solution since health insurance would be still be tied to the company.

⁷ See, Congress.gov “S.541 – Portable Benefits for Independent Workers Pilot Program Act.”

⁸ It is important to note that even though the fee is legally paid for by customers, it does not mean that the real cost falls only on the customer. The economic incidence of the fee could be largely shifted to the driver in the form of a lower wage they receive for the service. Who pays the real cost of the fee depends on the relative elasticity between demanders (customers) and the suppliers (drivers). As an example, Gruber and Krueger find that even though mandatory workers’ compensation insurance is legally paid by employers, this cost is largely shifted to employees in the form of a lower wage. Jonathan Gruber and Alan Krueger, “The Incidence of Mandated Employer-Provided Insurance: Lessons from Workers’ Compensation Insurance,” *Tax Policy and the Economy* 5 (1991): 111–43.

⁹ For example, the on-demand company Handy (an app for finding maids and housecleaners) circulated a draft proposal in both New York State and at the federal level to create a portable benefits fund that Handy and other gig economy planforms could contribute to. As it was written, a minimum 2.5 percent of the fee for each job performed by the gig worker would be directed to a benefits fund. Cole Stangler, “Uber, but for Benefits: NY Tech Companies Propose a Gig Economy Solution,” *Village Voice*, January 3, 2017, <https://www.villagevoice.com/2017/01/03/uber-but-for-benefits-ny-tech-companies-propose-a-gig-economy-solution/>. Moreover, Uber CEO Dara Khosrowshahi also gave an interview in which he explained how the company would like to provide healthcare benefits for their drivers (who are contractors). The idea would be that Uber would pay for benefits on a sliding scale of hours worked. Laura Feiner, “Uber CEO Says Drivers Should Get Healthcare Benefits Based on How Much They Work, and Uber Would Pay for It,” *CNBC*, May 8, 2020, <https://www.cnn.com/2020/05/08/uber-driver-health-benefits-should-be-based-on-how-much-they-work-ceo.html>.

Secondly, what impedes a greater portability of benefits in general? IRAs, for example, “travel” with the individual worker, though the specific pension plan, which potentially involves matching funds from an employer, does not. Another portable benefit is a health savings account (HSA), which also travels with the individual worker, though the specific plan (and how much an employer contributes to it) is tied to a particular employer. There are also examples of within-industry benefits, such as the Black Car Fund in New York State. But these are very limited, and the ones that do exist tend to be restricted to specific industries, roles, or geographic locations. These two questions suggest that there might either be legal or policy barriers that impede portability of benefits or economic disincentives that make portability of benefits less attractive.

In this paper, I aim to address both sets of questions. First, I will offer some reasons and challenges as to why specific gig economy platforms do not generally provide benefits to contractors on their platforms; and second, I will review some barriers to greater portability of benefits, in general. I also discuss possible ways to remove such barriers so that portability solutions can emerge.

Background on the Gig Economy

Gig and freelance work are similar in that both are a type of independent work, performed by short-term contractors legally classified as self-employed and independent contractors. But not all freelance work is gig work—the term “gig work” typically refers to service-based work that is mediated through specific apps or platforms (e.g., Uber, Lyft, Postmates, Handy, or TaskRabbit). Freelancers do not always make use of an intermediate platform, and freelancers tend to have more control over setting their own rates. Freelancers also tend to be in more knowledge-work professions, such as software developers, researchers, or translators, or creative-work professions, such as musicians, actors, and writers. Platforms such as Upwork, Fiverr, and Freelancer.com are those where freelancers could find their market.

Based on a 2017 survey, the US Bureau of Labor Statistics found that 10.1 percent of workers engage in contract, freelance, or gig work as their *primary* income source.¹⁰ Another survey study found that there were 57 million freelancers, gig workers, or contractors in 2019, implying that close to 35 percent of the US labor force engaged in these types of self-employed work, either as a primary or secondary source of income.¹¹ In fact, between 2014–2017, these types of self-employed work have grown three times faster than the growth of the US workforce.¹² Other survey studies by MBO Partners and McKinsey Global Institute all point to a growth of gig, contract, and freelance work.¹³

Using micro administrative tax data from the IRS, a recent study found that the share of the workforce with income from alternative work arrangements has increased by 1.9 percentage points from 2000 to 2016, and it now accounts for 11.8 percent of the workforce.¹⁴ The same study was also able to differentiate between gig and non-gig platforms, and concluded that more than half of this increase in alternative work arrangements occurred between 2013 and 2016 and “can be attributed almost entirely to dramatic growth among gigs mediated through online labor platforms.”¹⁵ In another study following tax forms, Eli Dourado and Christopher Koopman find there has been a 22 percent increase since 2000 in the use of

10 Bureau of Labor Statistics, “Contingent and Alternative Employment Arrangements—May 2017,” news release, June 7, 2018, <https://www.bls.gov/news.release/pdf/conemp.pdf>.

11 Edelman Intelligence, “Freelancing in America: 2019.” Study commissioned by Upwork and the Upwork and the Freelancers Union. <https://www.slideshare.net/upwork/freelancing-in-america-2019/1>

12 Edelman Intelligence, “Freelancing in America: 2017.” Study commissioned by Upwork and the Upwork and the Freelancers Union. <https://www.slideshare.net/upwork/freelancing-in-america-2017/1>.

13 MBO Partners, *The State of Independence in America*, annual reports 2016–2019, <https://www.mbopartners.com/state-of-independence/>; James Manyika, Susan Lund, Jacques Bughin, Kelsey Robinson, Jan Mischke, and Deepa Mahajan, *Independent Work: Choice, Necessity, and the Gig Economy* (New York, NY: McKinsey Global Institute, October 2016).

14 Brett Collins, Andrew Garin, Emilie Jackson, Dmitri Koustas, and Mark Payne, “Is Gig Work Replacing Traditional Employment? Evidence from Two Decades of Tax Returns” (working paper, IRS SOI Joint Statistical Research Program, March 25, 2019).

15 Ibid.

1099-MISC (independent contractor) forms accompanied by a decline of 3.5 percent in the use of W-2 (employee) tax forms.¹⁶ Several other studies also document the rise of contractor and self-employed work in the United States through use of tax forms and other administrative data.¹⁷

Globally, one measure indicates that 1.5 percent of the global workforce is engaged in gig economy work.¹⁸ In Europe, research suggests that individuals engaged in gig economy work comprise about 9 percent of the labor force in Germany and the United Kingdom, and about 22 percent in Italy.¹⁹ Professional services company PwC estimates that the gig economy could generate revenues of \$335 billion globally by 2025.²⁰ A recent study also found that among OECD countries, “solo self-employment” (self-employed individuals without workers—typically freelancers, contractors, and gig workers) accounts for between 4 and 22 percent of total employment, and that solo self-employment has been rising relative to self-employment with workers (i.e., owners of businesses who have employees) in almost all OECD countries.²¹

Nonetheless, there remain limitations to correctly measuring the size and growth of the gig, freelance and self-employed economy. In a 2015 study, economists Lawrence Katz and Alan Krueger suggested that 15.8 percent of workers in the current labor force engage in gig, contract, or freelance work as a primary income source.²² In a follow-up study, Katz and Krueger downwardly revised their estimates and highlighted the various problems that exist in accurately measuring the size and growth of these alternative labor arrangements.²³ For example, apart from the standard problems of sampling and survey methods, the scholars suggest that a higher unemployment rate could lead to more gig work, and thus differences in timing of any given study could lead to different estimates of the size of gig work. Other economists also outline problems that exist in both survey measurements and some official tax documentation that make it difficult to properly capture the size or growth of this workforce.²⁴

Moreover, there have been various attempts to better understand the demographics of these type of workers. The US Bureau of Labor Statistics found that one out of three independent contractors was age 55 or older,²⁵ and Boeri et al. found that ages 45–54 is the largest age group that comprises “solo self-employed” work in the United States.²⁶ Abigail Hunt and Emma Samman summarized several such studies and concluded that women represent anywhere from 33 to 55 percent of gig economy workers in the United States, 31 to 52 percent in the United Kingdom, and 39 to 52 percent in continental Europe.²⁷

While many differences exist in terms of the size, growth, and composition of the gig economy, most surveys do point to a unifying theme among these alternative labor arrangements: they are often desirable

16 Eli Dourado and Christopher Koopman, “Evaluating the Growth of the 1099 Workforce” (Mercatus Policy Brief, Mercatus Center at George Mason University, Arlington, VA, December 10, 2015).

17 Kathrine G. Abraham, John C. Haltiwanger, Kristin Sandusky, and James R. Spletzer, “The Rise of the Gig Economy: Fact or Fiction?” *AEA Papers and Proceedings* 109(2019): 357–61.; Emilie Jackson, Adam Looney, and Shanthi Ramnath, “The Rise of Alternative Work Arrangements: Evidence and Implications for Tax Filing and Benefit Coverage” (Office of Tax Analysis Working Paper No. 114, US Department of the Treasury, Washington, DC, 2017); Lawrence Mishel, “Social Security Data Confirm Same Old Pattern: Self-employment Headcount Has Risen but Economic Impact Remains Small,” *Working Economics Blog, Economic Policy Institute*, June 28, 2018, <https://www.epi.org/blog/social-security-data-confirm-same-old-pattern-self-employment-headcount-has-risen-but-economic-impact-remains-small/>.

18 Abigail Hunt and Emma Samman, “Gender and the Gig Economy: Critical Steps for Evidence-Based Policy” (ODI Working Paper No. 546, Overseas Development Institute, London, UK, January 2019).

19 Ursula Huws, Neil Spencer, Dag Sverre Syrdal, and Kaire Holts, *Work in the European Gig Economy: Research Results from the UK, Sweden, Germany, Austria, the Netherlands, Switzerland and Italy* (Brussels, Belgium: Foundation for European Progressive Studies, 2017).

20 John Hawkworth and Robert Vaughan, *The Sharing Economy: How Will It Disrupt Your Business?* (London, UK: PricewaterhouseCoopers, August 2014), https://pwc.blogs.com/files/sharing-economy-final_0814.pdf.

21 Boeri et al., “Solo Self-Employment.”

22 Lawrence F. Katz and Alan B. Krueger, “The Rise and Nature of Alternative Work Arrangements in the United States, 1995–2015” (NBER Working Paper No. 22667, National Bureau of Economic Research, Cambridge, MA, September 2016).

23 Lawrence F. Katz and Alan B. Krueger, “Understanding Trends in Alternative Work Arrangements in the United States” (NBER Working Paper No. 25425, National Bureau of Economic Research, Cambridge, MA, January 2019).

24 Collins et al., “Is Gig Work Replacing Traditional Employment?”; Katherine G. Abraham and Ashely Amaya, “Probing for Informal Work Activity” (NBER Working Paper No. 24880, National Bureau of Economic Research, Cambridge, MA, August 2018).

25 Bureau of Labor Statistics, “Contingent and Alternative Employment.”

26 Boeri et al., “Solo Self-Employment.”

27 Hunt and Samman, “Gender and the Gig Economy.”

because of the flexibility they provide for workers. The US Bureau of Labor Statistics survey found that 79 percent of independent contractors preferred their arrangement over a traditional job, and fewer than one in ten independent contractors would prefer a traditional work arrangement.²⁸ The *Freelancing in America 2019* report also found that 71 percent of individuals engaging in freelancing appreciate the increased flexibility of their work, and 46 percent stated that freelancing gives them the flexibility they need because they are unable to work for a traditional company due to personal circumstance.²⁹ In a survey of 5,578 individuals across the United States, United Kingdom, and Italy, the researchers also found that among self-employed with workers and solo self-employed (those without workers), “the degree of flexibility that self-employed work offers seems likely to be the main driver of relatively high levels of satisfaction... followed by the possibility to work from home for the solo self-employed.”³⁰ In a survey of 2,000 US-based female gig workers, the study found that 96 percent of women said that the primary benefit of engaging in gig economy work is the flexible working hours.³¹ Studies from MBO Partners, EY Global, and McKinsey Global Institute and surveys of workers on platforms such as Uber and Lyft all point to flexibility as the desirable characteristic of their alternative type of job arrangements.³²

Existing Research on Portable Benefits Solutions

Research on portable benefits solutions has increased in recent years given the relevance of the growth of gig economy platforms and the problems of access to contractor benefits that accompanied it. Much of the scholarly research surrounding this topic centers on explaining the importance of portable benefits and investigating different types of portable benefits solutions. Nick Hanauer and David Rolf highlight the importance of a move toward portable benefits solutions in the United States and propose an idea they refer to as the “Shared Security System.”³³ This is a fund that could exist at a state or municipal level, somewhat similar to social security programs, whereby companies would be required to pay into workers’ benefits accounts at some agreed-upon rate (with the potential that workers and governments could contribute to it as well). These contributions from companies could be “prorated by dollars earned, jobs done, or time worked.”³⁴

Moreover, Hanauer and Rolf propose that “to increase their competitiveness in the labor market, companies could also choose to contribute more, or offer an expanded suite of portable benefits beyond the minimum requirements.”³⁵ All workers could earn and accrue portable benefits on a per-hour basis, irrespective of a worker’s relationship with the employer; the benefits would therefore apply to independent contractors, too. Hanauer and Rolf’s solution is, of course, a legislative one that would mandate companies to pay into workers’ benefits accounts.

Interestingly, in February 2017, Washington State did introduce a portable benefits bill (House Bill 2109) that was partly informed conceptually and practically by Hanauer and Rolf’s Shared Security System. The bill would have required gig economy companies to contribute toward a benefits system for their contractors. The bill was not passed, and although reintroduced in 2018 as House Bill 2812, it has remained inactive since then.

28 Bureau of Labor Statistics, “Contingent and Alternative Employment.”

29 Edelman Intelligence, “Freelancing in America: 2019.” Study commissioned by Upwork and the Upwork and the Freelancers Union. <https://www.slideshare.net/upwork/freelancing-in-america-2019/1>

30 Boeri et al., “Solo Self-Employment.”

31 Hyperwallet, *The Future of Gig Work is Female* (Vancouver, BC: Hyperwallet/PayPal, 2017).

32 David Storey, Tony Steadman, and Charles Davis, “How the Gig Economy Is Changing the Workforce,” *EY Global*, November 20, 2018, https://www.ey.com/en_gl/tax/how-the-gig-economy-is-changing-the-workforce; MBO Partners, *The State of Independence in America, 2018: The New Normal* (Herndon, VA: MBO Partners, Inc., 2018), https://www.mbopartners.com/wp-content/uploads/2019/02/State_of_Independence_2018.pdf; Manyika et al., *Independent Work*.

33 Nick Hanauer and David Rolf, “Portable Benefits for an Insecure Workforce,” *American Prospect Magazine*, Winter 2017.

34 *Ibid.*, 94.

35 *Ibid.*, 94.

The Aspen Institute's *Future of Work Initiative* has been at the forefront of research on portable benefits solutions. In one of their reports, they build a framework for thinking through different types of portable benefits plans.³⁶ The framework introduces four components that matter for portable benefits plans: 1) Who administers it? 2) Who pays it? 3) Is it mandatory? and 4) Who is eligible?

1. **Who administers it?** This could be a government program that is administered at the local, state, or federal level, though the Aspen Institute report does not provide an analysis as to why some plans may be a better fit for one level of government or another. There can also be different types of third-party administrators. For example, the Freelancers Union is a non-profit organization that administers group health insurance for freelancers across the United States.³⁷
2. **Who pays it?** There are effectively four groups that could pay for the benefits:³⁸
 - a. Companies: Gig economy platforms such as Uber could pay into a fund based upon an individual contractor's work done on the platform (on the basis of time-worked or by some other pro-rated measure).
 - b. Consumers: Users of the platform could pay a specified rate, per transaction. The Black Car Fund is set-up in this way: 2.5 percent of all transactions are paid as a surcharge by consumers taking the rides.
 - c. Workers: Similar to the way W-2 employees contribute to various benefits, workers could either make partial or full contributions to retirement or health insurance plans and could be incentivized to do so with pre-tax contributions, as is the case for W-2 employees.
 - d. Taxpayers and government: A fee could be added to certain kinds of products and services (perhaps only gig platforms), and revenue collected could be used to support the portable benefits fund for the independent contractors.
 - e. The Aspen Institute guide also indicates that it is possible for any portable benefits system to have multiple payers—similar to Social Security, whereby contributions are made by both the company and the worker.
3. **Is it mandatory?** Portable benefits plans could entail mandatory contributions or mandatory participation by companies or workers or both. There is also a possibility of a combination whereby contributions are mandatory for companies but optional for workers, or whereby participation is optional for companies and worker contributions are mandated if companies opt in. Currently, participation in a benefits plan for most independent workers is a voluntary, opt-in system where the individual bears all the costs (such as Freelancers Union), and thus maintaining a voluntary system would not require any policy solutions. On the other hand, if companies or third parties are mandated or if there is a voluntary participation program that would entail greater contributions from these parties, some policy solution would be required.
4. **Who is eligible?** Lastly, eligibility could be defined narrowly or broadly. A narrow category could be on the industry level—such as the Black Car Fund, which means any New York State ride-share or taxi driver can be eligible for the program. Eligibility could also be defined specifically for workers who earn income through a digital platform—this increases the portability of benefits across various digital platforms, from Uber driving to Handy cleaning to Udemy tutoring. An even broader eligibility component could include all individuals in alternative labor arrangements,

36 Natalie Foster, Greg Nelson, and Libby Reder, *Portable Benefits Resource Guide* (Washington, DC: Aspen Institute Future of Work Initiative, July 2016).

37 Although “union” is in the name “Freelancers Union,” this is not a trade union and is not affiliated with any unions that represent workers and negotiate on behalf of their members, such as teacher or government worker unions.

38 As discussed in footnote 7, “who pays for it?” refers to who *legally* pays for worker benefits, but that does not determine who pays the *real* cost of the tax or fee. The relative elasticity between suppliers and demanders determines who bears most of the burden of the tax or fee.

such as construction workers, contingent workers,³⁹ and the like. And of course, the broadest of all categories would allow all workers to be eligible for the benefit. This might entail a structural change to our system that could fundamentally disentangle benefits from a specific employer.

Overall, the comprehensive guide provided by the Aspen Institute report casts a wide net of possibilities for what various types of portable benefits could look like. That is, benefits could range from something like the Black Car Fund (which is administered by the state government, funded by consumers, mandatory for specific industries, and open to anyone eligible in the industry and state) to something more comprehensive like a social security program that is administered by the federal government, paid for partially by companies and workers, mandatory for both companies and workers, and accessible to all types of workers.

Another comprehensive report by the Aspen Institute's Future of Work Initiative provides an analysis of various types of portable benefits plans that already exist, either in the United States or elsewhere in the world.⁴⁰ The authors analyze these plans based on whether coverage is pro-rated, on who is eligible, and on the relative portability of the benefits. The following are some real-world examples from their report.

1. **Multiemployer plans:** These consist of several employers in the same industry or geographic area that contribute to a worker's plan. In the United States, these plans are governed by the Taft-Hartley Act, which allows for a board comprised equally of employer and union representatives and which is only applicable to unionized workers. For example, the United Mine Workers of America would engage in a collective bargaining agreement with a group of mining companies and agree upon an hourly contribution that employers would make to the multiemployer plan on behalf of an employee. This allows for multiple employers to share the costs of benefits in situations where a worker has multiple employers or frequently switches between employers. Multi-employer plans are only somewhat portable in the sense that the employers are often in the same industry or geographic area.
2. **Black Car Fund:** As discussed, a New York statute established this fund in 1999 to provide workers' compensation for taxi or for-hire livery drivers, who are independent contractors. It is funded by a 2.5 percent surcharge on every for-hire transaction, paid by passengers. All drivers are eligible, with no minimum requirements, other than that the driver must be affiliated with a member base.
3. **The Ghent system:** This is an unemployment insurance benefit that is administered by trade unions in Nordic countries. Participation is voluntary in Denmark, Finland, Iceland, and Sweden, but mandatory in Belgium, where there is also a retirement benefit associated with the Ghent system. Members join the union if they believe the unemployment insurance benefits they receive from the Ghent system are worth the expense. It is funded by member fees, by employers, and by the government (in the form of tax subsidies).
4. **Group insurance:** Only members of an employer, an association, or a union would receive these benefits. For example, United University Professions (UUP) offers its members benefits such as life insurance, dental insurance, and optometry insurance. It is portable within the union, but it is not portable if a worker chooses to leave the profession and the union.
5. **State retirement plans:** Secure Choice is an example of a retirement plan that has been enacted by California, Oregon, and Illinois, and which is proposed in 12 other states. Self-employed and independent contractors can access a marketplace of plans, such as one called myRA, which is

³⁹ Contingent workers are workers who do not expect their jobs to last and report that they are in temporary jobs. According to the Bureau of Labor Statistics, "A person's job may be defined as both contingent and an alternative employment arrangement, but this is not automatically the case because contingency is defined separately from the four alternative work arrangements." See item 3, "How does the Bureau of Labor Statistics (BLS) define contingent work?" at the BLS website: *Bureau of Labor Statistics*, "Frequently Asked Questions about Data on Contingent and Alternative Employment Arrangements," August 7, 2018, <https://www.bls.gov/cps/contingent-and-alternative-arrangements-faqs.htm#contingent>.

⁴⁰ David Rolf, Shelby Clark, and Corrie Watterson Bryant, *Portable Benefits in the 21st Century* (Washington, DC: Aspen Institute Future of Work Initiative, June 2016).

similar to an IRA plan whereby employers can deduct contributions from a worker's paycheck. However, employers cannot contribute to the plan, and worker lifetime contributions are capped at \$15,000.

Overall, this report provides a detailed analysis of the different types of existing portable benefits that exist today and also casts a wide net of what different portable benefits solutions may look like.

In yet another Aspen Institute report,⁴¹ the authors also highlight the Affordable Care Act (ACA) as a way for contractors, self-employed individuals, and gig workers to access health insurance benefits.⁴² They explain the portability aspects of the ACA: "Plans purchased on ACA marketplaces are portable, allowing plan holders to move between work arrangements without losing coverage. In addition, although employer-provided plans are not portable, those dependent on employer-provided plans can access ACA marketplaces should their employment situation change, meaning they can retain coverage while unemployed or job searching."⁴³ Moreover, a US Department of the Treasury report revealed that non-employee workers represented 28 percent of all workers with ACA coverage, and the authors concluded that the ACA "appears to have provided insurance for a large share of self-employed individuals."⁴⁴

It is worth noting that benefits that are "universal" are, by definition, already "portable." Public healthcare in the United Kingdom is available to all citizens and thus "travels" with a worker regardless of employment. However, private health insurance benefits in the United Kingdom are not portable, as they are often a perk provided by an employer, similar to private health insurance benefits in the United States. I address both the ACA and UK's National Health Services (NHS) later on, in the section about removing barriers.

Barriers to Gig Platform-Based Benefits

While it is theoretically possible for gig economy companies to provide health insurance and other benefits to the contractors on their platforms, in practice it is generally uncommon, owing in part to one significant legal barrier. Aside from this legal barrier, there are organizational and economic cost considerations as well, which I briefly address at the end of this section.

One fundamental problem with gig economy platforms providing health insurance and other benefits to the contractors on their platforms is that this action gives further credence to the legal argument that the contractors "look like" employees and thus should be classified as such. Today, most gig economy platforms have either faced or are facing a wave of labor lawsuits or legislative changes that have threatened the existence of their business models that legally classify the suppliers on the platforms (e.g., the Uber drivers or Handy maids) as contractors rather than employees. Under the law, employees and contractors have different regulatory and tax treatments.

This problem regarding the legal distinction between employees and contractors and the uncertainty surrounding whether some gig workers should be classified as contractors or employees has led to hundreds of class-action lawsuits across the country on the grounds of worker misclassification. Uber alone, for example, had over fifteen misclassification lawsuits in federal and California state courts. Lyft has similarly faced numerous misclassification lawsuits and settled a high-profile one in February 2016 with its Cal-

41 Reder, Steward, and Foster, *Designing Portable Benefits*.

42 While anyone can buy a plan through the ACA marketplace exchanges, individuals are eligible to receive a federal subsidy toward premiums for policies purchased on their exchange if their incomes are between 100 and 400 percent of the federal poverty level (other conditions include the following: that they are not eligible for other programs such as Medicare, Medicaid, and the Children's Health Insurance Programs or other forms of healthcare assistance, and that they do not otherwise have access to affordable healthcare coverage).

43 Reder, Steward, and Foster, *Designing Portable Benefits*, 58.

44 Emilie Jackson, Adam Looney, and Shanthi Ramnath, "The Rise of Alternative Work Arrangements: Evidence and Implications for Tax Filing and Benefit Coverage" (Office of Tax Analysis Working Paper No. 114, US Department of the Treasury, Washington, DC, January 2017), 22.

ifornia drivers.⁴⁵ Handy, the “Uber for housekeepers,” was also sued in California and Massachusetts for misclassification of workers.⁴⁶ HomeJoy, a company that provided similar on-demand household services, was sued multiple times after its launch. The former CEO of HomeJoy cited the ongoing legal battles as one of the reasons for shutting down the company.⁴⁷ These are only a handful of hundreds of examples illustrating the surge of misclassification lawsuits surrounding these gig companies.⁴⁸

Furthermore, California recently passed a bill that would require companies to classify workers as employees if the company controls how the individual is performing the task or if the work is an integral part of the company’s standard business.⁴⁹ This bill would effectively require Uber, Lyft, Handy, Postmates (a food and goods delivery app), and many other types of companies in California to reclassify their current independent contractors into employees.

To determine whether Uber’s drivers, Handy’s maids, or Postmates’s couriers are legally employees or contractors, the courts have developed three different tests that can be used: the common-law test, the economic realities test, and a hybrid test that includes factors from both the common law and the economic realities tests.⁵⁰ These tests are applied to different federal statutes, which means that the same worker can be classified as an employee under one test and its applicable federal laws and also be classified as an independent contractor under another test and its applicable federal laws.⁵¹ For example, income tax withholding laws and the Federal Insurance Contributions Act (FICA) are two laws for which courts have applied the common-law test; however, for the Fair Labor Standards Act (FLSA) and the Family and Medical Leave Act (FMLA), courts have applied the economic realities test. As summarized by Charles Muhl, under the common-law test, an employee relationship exists if the employer “has the right to control the work process,” which means that the employer has a right to give directives to the worker on when the work is done, where the work is done, and how the work is done. Alternatively, if it is the worker who has more control over when, where, and how he or she performs the job, then that is indicative of a contractor relationship under the common-law test.⁵² Under the economic realities test, an employment relationship exists if an individual “is economically dependent on a business for continued employment.”⁵³ Since independent contractors often work for many different employers, this test examines whether a worker is relying on one employer for their primary source of income, and if so, this may be indicative of an employee relationship. The hybrid test combines elements from both the common-law test and the economic realities test, but with a greater focus on the former in seeking to determine whether it is the worker or the employer who has the right to control the individual’s work process.⁵⁴ It turns out that in practice, courts are more likely to find workers to be employees under that test as compared to the common-law test.

Even though each test has its own set of factors, there is considerable overlap in the factors considered across the tests. Across all three tests, common factors include such things as whether or not the relationship exhibits permanence, what degree of control the employer has over the workers, whether the work performed is an integral part of the employer’s business, whether the worker’s skill level is high or unique, and so on. To understand how these factors are applied to determine the legal classification of a worker, take, for example, one factor that examines how much relative investment the employer makes

45 Tracey Lien, “Lyft Settles Worker Misclassification Lawsuit for \$12.25 Million,” *Los Angeles Times*, January 27, 2016, <https://www.latimes.com/business/technology/la-fi-tn-lyft-settlement-20160126-story.html>.

46 *Emmanuel v. Handy Technologies, Inc.*, No. 1:15-cv-12914 (D. Mass. July 7, 2015).

47 Carmel DeAmicis, “HomeJoy Shuts Down After Battling Worker Classification Lawsuits,” *Vox*, July 17, 2015, <https://www.vox.com/2015/7/17/11614814/cleaning-services-startup-homejoy-shuts-down-after-battling-worker>.

48 For a list and more detailed discussion of the employee-contractor misclassification lawsuits across gig economy platforms, see Liya Palagashvili, “Disrupting the Employee and Contractor Laws,” *University of Chicago Legal Forum* 2017, no. 1 (2018).

49 A.B. 5, 2019 Reg. Sess. (Cal. 2019).

50 For a comprehensive summary of these tests, their specific factors and relevant federal statutes, and an overview of court cases related to each test, see Charles J. Muhl, “What Is an Employee? The Answer Depends on the Federal Law,” *Monthly Labor Review* 125, no. 1 (January 2002).

51 *Ibid.*

52 *Ibid.*, 6.

53 *Ibid.*, 6.

54 *Ibid.*, 6.

in or provides for the worker. Workers who are more like contractors should be making a majority of the investments required to do their job and workers who are more like employees will have greater investments made by their companies. Investments refer to, for example, whether an employer buys the car for the worker that is needed to perform the job, or provides the smart phone, or trains the worker. In fact, gig economy platforms may be discouraged from training workers so as not to introduce this factor.

More importantly for the purposes of this paper, these factors become relevant in a company's decision to provide health insurance or other benefits to the contractors on its platform. The IRS and some other government agencies use the common-law test as their basis but include their own additional factors for determining whether a worker is an employee or a contractor. One factor used by the IRS, the "type of relationship" factor, looks in depth at the employer-employee or employer-contractor relationship. On its website, the IRS discusses this factor, pointing to the presence of employee benefits as one indicator of an employer-employee relationship rather than an employer-contractor one.⁵⁵ The IRS says specifically, "Businesses providing employee-type benefits, such as insurance, a pension plan, vacation pay or sick pay have employees. Businesses generally do not grant these benefits to independent contractors."⁵⁶

In its description of employee-type benefits, the IRS describes these employee-type benefits in subcategories of fringe benefits, unemployment insurance, workers compensation, and health plans.⁵⁷ The IRS and other government agencies are thus asking whether the worker has an opportunity to receive fringe benefits from the company (e.g., health insurance, a pension plan, vacation pay, or sick pay). This is considered an important sign of an employer-employee relationship as benefits are normally provided only to employees.

In other words, an employer providing health insurance and other benefits are actions that would make government agencies interpret the relationship between a gig economy platform and its contractors as an employer-employee relationship. In highlighting the different types of factor tests for employees vs. contractors in relation to gig economy platforms, a 2015 law review article explains that "it is advisable that bona fide independent contractors not receive overtime, vacation, or holiday pay or other additional pay beyond payment for work completed or invoiced."⁵⁸

There is some evidence that companies are acting in a manner to minimize risk to their business model. As one example, in 2016, Handy and its consulting company, Tusk Ventures, helped to draft New York State legislation that would allow gig platforms to provide workers with portable benefits. However, Handy and Tusk Ventures included one major condition: that workers could only access these benefits if they are legally classified as independent contractors. This part of the plan became controversial as the Taxi Worker Alliance and some policymakers viewed it as a major concession to gig economy companies. Handy and Tusk Ventures did not move forward with a draft that would remove the contractor "protection."⁵⁹

The risk of gig economy companies providing health and other benefits has been recognized by scholars as they prescribe their various solutions. For example, former Deputy US Secretary of Labor Seth Harris and economist Alan Krueger argued that gig economy platforms should be permitted to pool gig economy workers for the purposes of purchasing and providing insurance and other benefits "without the risk that

55 IRS, "Type of Relationship," July 31, 2020, <https://www.irs.gov/businesses/small-businesses-self-employed/type-of-relationship>; IRS, "Understanding the Employee vs. Contractor Designation," July 20, 2017, <https://www.irs.gov/newsroom/understanding-employee-vs-contractor-designation>.

56 IRS, "Employee vs. Contractor Designation."

57 IRS, "Employee Benefits," January 16, 2020, <https://www.irs.gov/businesses/small-businesses-self-employed/employee-benefits>.

58 Amy L. Groff, Paul Callegari, and Patrick M. Madden, "Platforms Like Uber and the Blurred Line between Independent Contractors and Employees," *Computer Law Review International* 16, no. 6 (December 2015): 166–71.

59 For an account of this strategy, see Bradley Tusk, *The Fixer: My Adventures in Saving Startups from Death by Politics* (New York: Penguin Random House, 2018). See also the discussion in this article: Cole Stangler, "Uber, but for Benefits: NY Tech Companies Propose a Gig Economy Solution," *Village Voice*, January 3, 2017, <https://www.villagevoice.com/2017/01/03/uber-but-for-benefits-ny-tech-companies-propose-a-gig-economy-solution/>.

their relationship will be transformed into an employment relationship.”⁶⁰ Some of the comprehensive Aspen Institute reports provide a brief sentence on this aspect as well; Rolf et al. supported a potential statutory change that would allow gig economy platforms to contribute to a fund because then it would not be “construed as providing benefits to the workers, which is a factor in employment classification.”⁶¹ Foster et al. also acknowledged that an optional portable benefits program or fund may not generate enough participation, saying, “If such a system were optional rather than mandatory, then the question of how participation would affect employment classification would likely be a disincentive for many companies to opt-in.”⁶²

The consequences for companies to reclassify their contractors as employees are steep and include new legal and regulatory obligations and thus increased compliance costs, increased compensation costs for each new employee, and costs associated with altering their business models. If companies are required to reclassify their contractors as employees, then they would be subject to federal minimum wage and overtime regulations for their employees under the Fair Labor Standards Act (FLSA), as well as, subject to employees’ benefits plans regulations under the Employment Retirement Income Security Act (ERISA). Moreover, companies would be required to provide eligible employees up to twelve weeks of unpaid leave per year, in the event that employees face vital life circumstances, under the Family Medical Leave Act (FMLA). Companies are not subject to any of the above-listed regulations for workers who are contractors with the company. Furthermore, contractors and employees face different income tax withholding regulations. Employers automatically deduct payroll taxes (for Social Security and Medicare) from their employees paychecks—which is paid partially by employees (7.65 percent) and partially by the employer (7.65 percent). Companies do not withhold income taxes from contractors and companies do not pay the partial payroll tax for their contractors—instead, contractors pay the full 15.3 percent payroll tax directly to the federal government.

In addition to compliance costs, companies would incur costs for employees with the following new benefits: paid leave for sick days or vacation, health and disability insurance, retirement contributions, workers’ compensation insurance, federal and state unemployment insurance, FICA tax for Social Security and Medicare, and any additional state regulations or taxes (for example, in California, there is an employee training tax).⁶³ One study attempted to quantify these additional costs of having an employee rather than a contractor and found that an employee costs over 20 percent more than having a contractor.⁶⁴ Another report indicates that if Uber and Lyft had to reclassify all of their drivers as employees in response to California’s AB5 legislation, it would be an additional annual cost of \$3,625 per driver. With approximately 140,000 Uber drivers and 80,000 Lyft drivers in California alone, the report estimates that it would lead to more than a \$500 million operating loss for Uber and \$290 million for Lyft.⁶⁵

In fact, in its IPO report filed to the Securities and Exchange Commission (SEC), Uber explained this directly:

If, as a result of legislation or judicial decisions, we are required to classify Drivers as employees (or as workers or quasi-employees where those statuses exist), *we would incur significant additional expenses* for compensating Drivers, potentially including expenses associated with the application of wage and hour laws (including minimum wage, overtime, and meal and rest period requirements), employee benefits, social security contributions, taxes, and penalties. *Further, any such*

60 Seth D. Harris and Alan B. Krueger, “A Proposal for Modernizing Labor Laws for Twenty-First-Century Work: The ‘Independent Worker’” (Hamilton Project Policy Brief 2015-10, Brookings Institute, Washington, DC, December 2015).

61 Rolf, Clark, and Bryant, *Portable Benefits*, 11.

62 Foster, Nelson, and Reder, *Resource Guide*, 25.

63 Recall from the information in footnote 7 that employers will not bear the full cost of every incidence.

64 Robert Habans, “Exploring the Costs of Classifying Workers as Independent Contractors: Four Illustrative Sectors” (IRLE Working Paper, UCLA Institute for Research on Labor Employment, Los Angeles, CA, December 2015).

65 For a summary of the report, see Alison Griswold, “How Much It Would Cost Uber and Lyft if Drivers Were Employees,” *Quartz*, June 14, 2019, <https://qz.com/1643263/the-cost-to-uber-and-lyft-if-drivers-were-employees/>.

*reclassification would require us to fundamentally change our business model, and consequently have an adverse effect on our business and financial conditions.*⁶⁶ (italics added)

Lyft also emphasized this risk in their IPO report:

[A]ny legal proceeding that classifies a driver on a ridesharing platform as an employee may require us to significantly alter our existing business model and operations and impact our ability to add qualified drivers to our platform and grow our business, which could have an adverse effect on our business, financial condition and results of operations.”... *“If the contractor classification of drivers that use our platform is challenged, there may be adverse business, financial, tax, legal and other consequences.”*⁶⁷ (italics added)

Reclassification would also stunt growth for Uber, as it would not be able to hire all 140,000 Uber drivers in California. In fact, the California Legislative Analyst’s office expects that in response to California’s AB5 legislation to reclassify contractors as employees, far fewer than the current one million independent contractors in California would be re-hired as employees.⁶⁸ Moreover, if workers on these platforms were employees, this would severely weaken the on-demand feature of their services as their business models depend on a flexible labor supply (hence, independent contractors).⁶⁹

Thus, one obstacle to gig economy platforms providing health insurance and other benefits is the danger this would trigger the re-classification of contractors as employees, thereby threatening the business model for many of these gig economy platforms. This is not to say that other factors, such as business factors of providing health insurance are not important—they certainly are—but absent a potential guarantee that contractors are contractors, it may be difficult to see companies move forward with providing benefits. The anecdotal piece of evidence of Handy attempting to start a marketplace of portable benefits may indicate that perhaps companies are interested but are erring on the side of caution to protect their business models and by extension the financial viability of their companies.

Barriers to Portability in General

Even if gig economy platforms would provide health insurance and other benefits, there is still a question of why benefits are not more portable in general. To address this issue, I will look at the challenges from both a legal and organizational or business perspective.

Legal Barriers

Tax Treatment of Employer-Provided Health Insurance

It is now common knowledge that the growth of employer-sponsored insurance began during World War II when the government enacted wage and price controls. Economists Thomas Buchmueller and Alan Monheit provide a historical overview of the set of legal changes over the 1940s and 1950s that led to greater integration between employment private health insurance.⁷⁰ During the time period of price and wage controls, the War Labor Board in 1943 ruled that these controls did not apply to fringe benefits such as health insurance. In response, employers began providing generous fringe benefits (such as health insurance) to retain and attract workers since employers were unable to increase wages during this time

66 Uber Technologies, Inc., IPO prospectus, April 26, 2019, <https://www.sec.gov/Archives/edgar/data/1543151/000119312519120759/d647752ds1a.htm#toc>.

67 Lyft, Inc., IPO prospectus, March 1, 2019, https://www.sec.gov/Archives/edgar/data/1759509/000119312519059849/d633517ds1.htm#toc633517_11.

68 The California Legislative Analyst’s Office says that only a “much smaller [number of workers] than the roughly 1 million contractors that AB5 applies to” will be re-hired as employees. See LAO, “Staffing to Address New Independent Contractor Test,” February 11, 2020, <https://lao.ca.gov/Publications/Report/4151>.

69 See Palagashvili, “Disrupting Employee and Contractor Laws.”

70 Thomas C. Buchmueller and Alan C. Monheit, “Employer-Sponsored Health Insurance and the Promise of Health Insurance Reform” (NBER Working Paper No. 14839, National Bureau of Economic Research, Cambridge, MA, April 2009).

period. This special treatment of health insurance and fringe benefits became codified in 1954, when the IRS declared that health insurance premiums paid by employers were exempt from income taxation.⁷¹ This allowed employers to exclude their expenditures on health insurance and other fringe benefits from income and payroll taxes. Later, in 1978, there was growth in what is referred to as section 125 cafeteria plans, whereby employees could also shield their contributions to employer-sponsored health insurance plans from income and payroll taxes.⁷²

Thus, legal factors maintain the strong link between employment and health benefits due to the treatment of employer-provided health insurance under tax law. Under current tax law, an employer benefits from employer-paid premiums on health insurance because those premiums avoid federal, state, and local taxes.⁷³ Those premiums also avoid the FICA payroll tax. Additionally, employee contributions to employer-sponsored health insurance are excluded from income and payroll taxes. Consequently, the value of employer-provided health insurance is not part of an individual's taxable income. On the other hand, individuals who purchase insurance on their own get no tax relief unless their healthcare premiums exceed 7.5 percent of their adjusted gross income. In this sense, the US tax law subsidizes employer-provided health insurance.

Scholarly research has found that firms have a significant response to this subsidy. For example, one study found that a complete removal of the tax subsidy to health insurance spending would lead to about 15 million fewer workers being offered health insurance, and this would result in a decrease in total insurance spending by 45 percent.⁷⁴ The importance of this tax subsidy is also highlighted by studies that attempt to measure the value of forgone government revenue. One estimate found that the employer-provided health insurance exclusion cost more than \$100 billion in forgone federal, state, and local tax revenues in 1999.⁷⁵ Other estimates include \$208.6 billion loss in revenue in 2006,⁷⁶ and \$260 billion loss in revenue in 2009.⁷⁷ Economist Jonathan Gruber even argues that not taxing employer-sponsored insurance as compensation is “the third largest government expenditure on health care.”⁷⁸

Moreover, this tax exclusion effectively reduces the cost of employer-provided health insurance because there is a cost advantage arising from the fact that employer payments for health insurance are excluded from federal and state income and Social Security payroll taxes.⁷⁹ In one study, this exclusion is found to

71 Ibid.

72 Jonathan Gruber, “The Tax Exclusion for Employer-Sponsored Health Insurance,” *National Tax Journal* 64, no. 2 (2011): 511–30.

73 As discussed earlier, the actual cost of employer-provided health insurance may shift largely to the employee. For research on how the cost of employer-provided fringe benefits would shift to workers in the form of lower hourly wages, see Robert S. Smith and Ronald G. Ehrenberg, “Estimating Wage-Fringe Trade-Offs: Some Data Problems,” in *The Measurement of Labor Cost*, ed. Jack E. Triplett (Chicago: University of Chicago Press, 1983); Roger Feldman, “Who Pays for Mandated Health Insurance Benefits?,” *Journal of Health Economics* 12, no. 3 (November 1993): 341–8; Moreover, and as discussed in footnote 8. Jonathan Gruber and Alan Krueger, “The Incidence of Mandated Employer-Provided Insurance” found that workers’ compensation insurance because many features of this program mirror mandated employer-paid health insurance programs. Their empirical findings show that even though mandatory workers’ compensation insurance is legally paid for by employers, this cost is largely shifted to employees in the form of a lower wage.

74 Jonathan Gruber and Michael Lettau, “How Elastic Is the Firm’s Demand for Health Insurance?,” *Journal of Public Economics* 88, no. 7-8 (2004): 1273–93.

75 John Sheils and Paul Hogan, “Cost of Tax-Exempt Health Benefits in 1998,” *Health Affairs* 18, no. 2 (March–April 1999): 176–81.

76 Thomas M. Selden and Bradley M. Gray, “Tax Subsidies for Employment-Related Health Insurance: Estimates for 2006.” *Health Affairs* 25(6), 2006.

77 Gruber, “The Tax Exclusion.”

78 Ibid., 511. How tax law can influence the purchase of health insurance is also evident in a unique study that measures the impact of the Tax Reform Act of 1986 on self-employed individuals purchasing health insurance. Prior to 1986, self-employed workers could itemize their tax deductions paid for their health insurance. After the passage of the tax reform in 1986, these self-employed workers were able to claim a tax deduction equal to 25 percent of their health insurance costs. Gruber and Poterba investigated the impact of this change on the amount of health insurance purchased by self-employed workers and found that self-employed individuals’ demand for insurance increased after this tax reform. The authors concluded that the reform decreased the after-tax price of insurance and found a significant increase in insurance coverage of the self-employed relative to the employed. Jonathan Gruber and James Poterba, “Tax Incentives and the Decision to Purchase Health Insurance: Evidence from the Self-Employed,” *Quarterly Journal of Economics* 109, no. 3 (August 1994): 701–33.

79 As discussed in Buchmueller and Monheit, “Employer-Sponsored Health Insurance.”

reduce the price by 27 percent.⁸⁰ Other studies find that this exclusion functionally reduced the price of insurance by between 25 and 40 percent.⁸¹

What does this mean for barriers to portability of benefits, such as health insurance? It means that as long as tax law favors employer purchase of health insurance, it will be more challenging to forge another path that separates health insurance benefits from employers. That is, this tax subsidy creates support for the continuation of employer-provided health insurance and incentivizes firms to offer employee health insurance and for individuals to purchase health insurance through the employer. It is also important to note that this tax treatment is currently only available through the employee-employer relationship. In other words, if a non-employer group, such as the Freelancers Union, provided health insurance to members of the group, neither the group nor the members of the group would receive the tax subsidy, as the exclusion applies only to employer-sponsored insurance and employee contributions to employer-sponsored insurance.

Absent some changes to this subsidy, or other exogenous factors, we would expect health insurance to continue to be tied to the employer, since the subsidy provides an incentive to both parties to continue this method, relative to other options. Thus, this presents a barrier to a future with more portable benefits that can travel without an employer.

Other Legal Barriers

As described earlier, multiemployer plans are one method of having more portable health insurance. These plans comprise multiple employers in the same industry or geographic area contributing to a single fund on behalf of the employee. These types of plans are only legally possible through the Taft-Hartley Act, which is only applicable to unionized workers. Thus, a multiemployer plan solution would not work for gig economy workers since they are independent contractors and cannot collectively organize under labor law. Establishing multiemployer plans as an option for gig workers would require some amendments to the Taft-Hartley Act or state-level “bypasses” such as the Massachusetts health plan.⁸²

Furthermore, economist John Goodman also investigates how the Health Insurance Portability and Accountability Act (HIPAA) of 1996 may unintentionally disincentivize portability by requiring that employers only purchase group insurance with untaxed dollars.⁸³ He explains that, in theory, it would be possible for employers to purchase individually owned health insurance for their employees. Then, both employer and employees would still receive the tax subsidy as discussed above, but the insurance would be more portable in the sense that it is not tied to that particular employer group. However, Goodman notes that it seems as though HIPAA regulations effectively require that only purchases of an employer group insurance would be HIPAA-compliant.

80 Jonathan Gruber J and James Poterba. “Tax Subsidies to Employer-Provided Health Insurance.” In: Feldstein M, Poterba J, editors. *Empirical Foundations of Household Taxation*. Chicago: University of Chicago Press; 1996. pp. 135–64. As cited in Madrian J, Currie BC. “Health, Health Insurance, and the Labor Market.” In Ashenfelter O, Card D, editors. *Handbook of Labor Economics*. Vol. 3. New York: Elsevier; 1999. pp. 3309–3416; Jonathan Gruber and James Poterba, “Tax Incentives and the Decision to Purchase Health Insurance: Evidence from the Self-Employed,” *Quarterly Journal of Economics* 109, no. 3 (August 1994): 701–33.

81 As discussed in Buchmueller and Monheit, “Employer-Sponsored Health Insurance”; Jonathan Gruber, “Taxes and Health Insurance” (NBER Working Paper No. 8657, National Bureau of Economic Research, Cambridge, MA, 2001); Diedem Bernard and Thomas M. Selden, “Employer Offers, Private Coverage, and the Tax Subsidy for Health Insurance: 1987 and 1996,” *International Journal of Health Care Finance and Economics* 2, no. 4 (2001): 297–318.

82 The Massachusetts healthcare insurance reform law was passed in 2006 in order to help uninsured individuals obtain health insurance. As part of this plan, individuals have to either get insurance from their employer or from Medicaid, or buy the insurance individually; otherwise they pay a fine to the state government. Those who meet certain low-income conditions would receive subsidies to make insurance affordable. Moreover, as part of the plan, employers are not required to provide the health insurance, but they must set up a system for their employees to purchase insurance with pretax dollars from a state exchange (called The Commonwealth Health Insurance Connector). For further summaries of the Massachusetts healthcare plan see John C. Goodman, “Employer-Sponsored, Personal, and Portable Health Insurance,” *Health Affairs* 25, no. 6 (November–December 2006): 1556–66; and John Holahan and Linda Blumberg, “Massachusetts Health Care Reform: A Look at the Issues,” *Health Affairs* 25, no. S-1 (2006).

83 Goodman, “Employer-Sponsored.”

Lastly, as described in earlier in the existing research, there have been movements toward state retirement plans, such as Secure Choice or Automatic IRA (Auto-IRA).⁸⁴ Through this program, self-employed, independent contractors, or employees at small firms can access a marketplace of plans, such as one called myRA. This is similar to an IRA plan whereby employers can deduct contributions from a worker. In 2016, the Department of Labor released an issuance to allow states to run these voluntary plans. However, since then, the federal government has attempted to halt these programs, and in 2017, the Department of Labor rule was repealed.⁸⁵ Then in 2019, the Department of Justice filed a statement of interest in a 2018 lawsuit filed against California’s Secure Choice program (CalSavers) on the grounds that the Employer Retirement Income Security Act (ERISA) preempts the California Secure Choice Act.⁸⁶ To the extent that these state-run retirement programs offer portable retirement solutions, recent actions by the federal government created barriers to portable benefits solutions.

Organizational and Business Considerations

Absent legal and regulatory factors, there are other organizational, business, and economic considerations that may influence why employer-provided health insurance would still be the norm. The considerations outlined here are not policy or legal barriers to portability, but are simply reasons why we might continue to see benefits tied to an employer even if the policy or legal barriers were removed.

First, group insurance benefits rely on the pooling mechanism to reduce costs; any form of group insurance creates economies of scale. The workplace provides a natural pooling mechanism, and thus employees may be attracted to this, regardless of the tax savings. Larger groups may be able to obtain greater bargaining and negotiating power, which would also lead to reduced costs for individual plans.⁸⁷ Moreover, employer groups reduce the problem of adverse risk selection because the groups are formed for reasons outside of health and purchasing insurance. Thus, employer-sponsored insurance may still be attractive outside of the tax subsidy received as discussed above. One estimate finds that the administrative costs for employer-sponsored insurance is about half compared to the individually purchased policies (15–20 percent compared to 30–40 percent).⁸⁸ These reasons do not indicate that *only* employer-provided group insurance would be viable, as any large group could still enjoy the benefits addressed here. Instead, these are reasons employer-provided insurance may still be a natural “market” for health insurance.

Second, employers may use fringe benefits such as health insurance as a valuable mechanism for recruiting and retaining a high-quality worker. There is some empirical evidence to support this. One study finds that 73 percent of workers said that employer-provided health insurance was a “very important factor” in their decision to take or a keep a job.⁸⁹ Interviews conducted with the Employee Benefit Research Institute showed that employers consider employer-sponsored insurance as an important tool in recruiting and retaining workers.⁹⁰

Health insurance can also help retain workers and reduce job turnover, in that when workers leave one job to find another, they are typically seeking health insurance, too. If the current employer offers competitive fringe benefits, a worker may reconsider leaving the employer—this would be especially true for workers who have dependents or who have preexisting conditions (or have dependents in poor health). Additionally, the loss of health insurance in between jobs may deter workers from leaving as they might not want

84 For workers who do not have access to employer-provided retirement plans, auto-IRA programs would enroll eligible workers into a private retirement account, unless they choose to opt out.

85 H.J. Res. 66, 115th Cong., 1st Sess. (2017).

86 The following article summarizes California’s statement of interest: Hazel Bradford, “DOJ Shows ‘Interest’ in Challenge to CalSavers Program,” *Pensions & Investments*, September 16, 2019, <https://www.pionline.com/courts/doj-shows-interest-challenge-calsavers-program>.

87 Gruber, “The Tax Exclusion.”

88 Katherine Swartz, *Reinsuring Health: Why More Middle-Class People Are Uninsured and What Government Can Do* (New York: Russell Sage Foundation, 2006).

89 Lisa Duchon, Cathy Schoen, Elisabeth Simantov, Karen Davis, and Christina An, *Listening to Workers: Findings from the Commonwealth Fund 1999 National Survey of Workers’ Health Insurance* (New York: Commonwealth Fund, 2000).

90 Interviews discussed in Buchmueller and Monheit, “Employer-Sponsored,” 192.

to run the risk of being uninsured—again, especially if a worker or his dependents have preexisting or chronic conditions.⁹¹ In other words, any time employees change jobs, they also have to change health insurance. For at least some, on the margin, this may be a deterrent to leaving a job. Economist Tyler Cowen recognized this challenge, stating that “the costs of exiting many jobs are too high” as “health insurance, retirement benefits, and immigration status are often too closely tied to particular jobs.”⁹²

This is also evident by several studies showing reduced job mobility in relation to fringe benefits. One study finds that mobility is lower for workers with fringe benefits (pensions, in particular), and that while higher wages reduce the probability a worker quitting, this effect is cut in half when fringe benefits are a factor.⁹³ The author concludes that “when other variables are held constant, the probability of worker mobility drops 20 percent when a pension promise is made to male workers.”⁹⁴ Jonathan Gruber and Brigitte Madrian also find evidence that health insurance may impact job mobility negatively for prime-age male workers.⁹⁵ Furthermore, Sara Rynes and Barry Gearhart find that dissatisfaction with health benefits can cause workers to consider other employment opportunities.⁹⁶ Several other studies⁹⁷ also suggest that workers in jobs with health insurance coverage change jobs less frequently than do workers in jobs without health benefits.⁹⁸ One study of chronically ill workers who rely on an employer’s health coverage indicated that job mobility for those workers was reduced by 40 percent.⁹⁹ In summary, many of these empirical studies seem to suggest that important economic or business reasons could lead employers to offer benefits as a way to help to attract or retain workers. Costs of finding, hiring, and training employees can be high for companies, so offering valuable fringe benefits as a way to retain a worker can be a good option.

Overall, there are some policy and legal issues that could be changed to reduce the tie to employer-sponsored benefits and thus reduce barriers to portability of benefits. However, because of economic and organizational factors such as employer incentives to provide health coverage, employer-tied benefits may still persist even if policy and legal barriers are removed. However, it is important to note that employers’ ability to use health insurance benefits as way to tie workers to the company is conditional on a system in which there are essentially no other viable alternatives to group health insurance for those without Medicaid or Medicare coverage.

91 The COBRA health insurance program can help with this but is not perfect as it only lasts for a short time period; it is also significantly more costly as employers no longer pay a portion of the premium costs and employees thus take on the full premium costs. Moreover, even if a recently unemployed individual has a job lined up after leaving a former employer, he or she may face a waiting period before coverage with the new employer begins.

92 Tyler Cowen, Tanner Lecture Comment on Elizabeth Anderson, 17 February 2015, https://d101vc9winf8ln.cloudfront.net/documents/28298/original/Tanner_lecture_2_2015.pdf?1527599089.

93 Olivia Mitchell, “Fringe Benefits and Labor Mobility,” *Journal of Human Resources* 17, no. 2 (1982): 286–98.

94 Ibid.

95 Jonathan Gruber and Brigitte Madrian, “The Effects of Public Policy on Job Lock,” *IRL Review* 48, no. 1 (1994): 86–102.

96 Sara L. Rynes and Barry Gearhart, eds., *Compensation in Organizations* (San Francisco: Jossey-Bass, 2000).

97 See for example: Thomas C. Buchmueller and Robert G. Valletta, “The Effects of Employer-Provided Health Insurance on Worker Mobility,” *ILR Review* 49, no. 3 (1996): 439–55; Alan C. Monheit and Philip F. Cooper, “Health Insurance and Job Mobility: Theory and Evidence,” *ILR Review* 48, no. 1 (October 1994): 68–85; Eric P. Slade, *The Effect of the Propensity to Change Jobs on Estimates of Job-Lock* (Baltimore: Johns Hopkins University Press, 1997), 7.

98 It is important to note that there are also some studies that did not find health insurance to have a significant impact on job mobility. See, for example, Alan Gustman and Thomas Steinmeier, “Pension Portability and Labor Mobility: Evidence from the Survey of Income and Program Participation” (NBER Working Paper No. 3525, National Bureau of Economic Research, Cambridge, MA, December 1990); Douglas Holtz-Eakin, “Health Insurance Provision and Labor Market Efficiency in the United States and Germany,” in *Social Protection versus Economic Flexibility: Is There a Trade-off?*, ed. Rebecca M. Blank (Chicago: University of Chicago Press, 1994), 157–87; John Robert Penrod, *Health Care Costs, Health Insurance and Job Mobility* (Ann Arbor: University of Michigan Press, 1995).

99 Kevin Stroupe, Eleanor D. Kinney, and Thomas J. J. Kniesner, “Chronic Illness and Health Insurance-Related Job Lock,” *Journal of Policy Analysis Management* 20, no. 3 (Summer 2001): 525–44.

Removing Barriers and Moving toward Greater Portability

What barriers could be removed to provide greater portability of benefits? I offer two ideas: 1) providing greater certainty over platform economy worker classifications and eliminating the worker benefits consideration from the employee and independent contractor classification factors, and 2) reducing or capping the subsidies to employer-sponsored insurance. I also discuss other policy changes that are currently unfolding or being proposed as solutions. For all of these potential solutions and reforms, it is important that political feasibility be taken into consideration. That is, while some policies may seem like ideal solutions on the merits of the policy itself, it does not mean that policy will be politically feasible. This is because there is a range of factors that determine whether and which policy reforms will be implemented. For example, one important factor is the presence of influential special interest groups that benefit from the status quo, and thus could run campaigns and lobbying efforts to prevent the reform. Additionally, if those reforms are unpopular with certain constituents, elected officials might not propose the reforms for fear of losing a future election. In the subsections below, I frame and discuss solutions in the context of political feasibility.

Creating Certainty of Worker Classification for Gig Economy Platforms

First, and as mentioned previously, there is uncertainty and risk surrounding the legal classification of gig economy workers as contractors. This is further complicated by the fact that the federal government and states place different weights on the different factors of the employee-contractor tests. In some states, for example, when an individual's employment status is an issue, the law starts with the presumption that the worker is an employee (referred to as "presumptive employee laws."). Moreover, California places greater emphasis on the control factor of the economic realities test, which seeks to determine whether the employer exerts control over the work and the manner in which the work is performed. This was core to the recent California AB5 statute, which codified into law the "ABC test" that essentially counts three factors in determining the classification of a contractor: A) that the worker is free from control and direction of the company, B) that the service is not integral to the core function of the business, and C) that the worker is engaged in an independently established business or occupation that is of a similar nature to the work involved for the company. AB5 would essentially require most gig economy workers and freelancers to be reclassified as employees in the state of California.

Thus, California's AB5 creates the potential for conflicts—under California law these gig economy workers would be employees, but at the federal level the Department of Labor indicates that gig economy workers are contractors, under the Fair Labor Standards Act.¹⁰⁰ Therefore, any federal policy change that could nullify AB5 (and thus create more standardization and certainty that gig economy workers should be treated as contractors) could also overstep state rights. Such a change may also not be politically feasible.

Former Deputy US Secretary of Labor Seth Harris and economist Alan Krueger have proposed a new classification of gig economy workers as "independent workers." These workers would be able to receive some safety net benefits but would be exempt from other, less relevant labor law issues. For example, one of their guiding principles is the "immeasurability of work hours," which refers to the challenges of gig economy workers in determining "work" and "nonwork" (and even "for whom work," since in any given hour, gig workers could be working on several different platforms). The authors argue that it makes little

¹⁰⁰ Keith E. Sonderling for the US Department of Labor, letter to unknown recipient (redacted), April 29, 2019, https://www.dol.gov/sites/dolgov/files/WHHD/legacy/files/2019_04_29_06_FLSA.pdf.

sense in this context to apply hour-based rules such as minimum wage and overtime regulations.¹⁰¹ More importantly though, independent worker status would allow platforms to pool independent workers for the purposes of purchasing and providing insurance and other benefits at a lower cost. This could take the form of a multiemployer plan with a third-party fund, or, alternatively, a single contractor could have multiple insurance plan options if he or she works with several companies simultaneously. Contributions from the company could be based on the number of transactions the contractor completes for each company (e.g. for Uber, the number of rides a driver provides).

This type of “third way worker” reform could help solve the immediate problem of gig economy workers not having access to health insurance or other benefits. However, this approach is contingent upon politically difficult reforms—in particular, addressing problems that arise when state-level laws create risks for companies that might otherwise have provided benefits to contractors.

A simpler change is removing the employee benefits indicator from the factors associated with determining worker classification. Recall that several government agencies, including the IRS, point to the presence of employee benefits as one indicator of an employer-employee relationship rather than an employer-contractor one.¹⁰² If the IRS and other agencies remove this indicator from the employee-contractor test, there would be one less barrier preventing platform companies from establishing benefits plans for their contractors. This may garner more bipartisan support and thus would be more politically feasible. It is similar to what the company Handy and its consulting group Tusk Ventures attempted to do in New York State in 2016. They proposed a portable benefits plan for gig workers in New York State, with the condition that the workers would be classified as contractors. They hoped that different groups would get on board with this plan as it seemed like a win-win solution. Nevertheless, when Handy proposed this idea in New York State, it did not find purchase, perhaps because the battle over the legality of employee-contractors was still heated at the time. This type of solution could be proposed in different states and perhaps also revisited in New York State.

Reducing Subsidies to Employer-Sponsored Insurance

There is a host of economic and policy scholarship proposing that there should be at least some reduction in the subsidization of employer-sponsored insurance. Most of these studies discuss the disadvantages of the subsidy in terms of revenue loss; reductions in job mobility; gaps in coverage, such as to contractors and contingent workers; and distortions to household labor market decisions, such as retirement decisions, labor force participation, and the number of hours worked. For the purposes of this paper, it is important to note that a reduction in the subsidy is a significant reform that can pave the path to more portable benefits solutions. This is because the cost of employer-sponsored insurance would increase, relative to the cost of other forms of group insurance—those that could arise across an industry or sector, or across different types of workers, such as freelance musicians, writers, and so on.

Several scholars have outlined that this change need not be a radical one; instead, it could first come as a cap on the amount of subsidy received for employer-sponsored insurance.¹⁰³ Gruber points out that capping “has the virtue of being much less disruptive to existing insurance arrangements” and that it could be higher at first and gradually reduced as individuals adjust to it.¹⁰⁴ This type of proposal was supported by the Report of the President’s Advisory Panel on Federal Tax Reform (2005) and by political figures such as Hillary Clinton.¹⁰⁵ Moreover, the so-called Cadillac tax, which was passed into law as part of the

101 Harris and Krueger, “Proposal for Modernizing.”

102 IRS, “Type of Relationship”; IRS, “Employee vs. Contractor Designation.”

103 Gruber, “The Tax Exclusion.”

104 Ibid., 528.

105 The political support for a cap was discussed in Gruber, “The Tax Exclusion,” which also provides a more detailed analysis of cap vs. repeal policy options

Affordable Care Act (ACA), was another attempt to reduce the amount of the subsidy by taxing the most generous employer-provided health insurance plans. The Cadillac tax imposed a 40 percent excise tax on insurance plans that exceeded \$10,200 for individual coverage and \$27,500 for family coverage. However, it was highly controversial—the implementation was delayed for two years, and later it was fully repealed.

Either a cap or full repeal would lead to a reduction in the subsidy and thus reduce a major barrier to non-employer-tied benefits solutions. The problem though, is that either of these solutions would be difficult to implement politically because many groups benefit from the status quo (as was the case with opposition to the Cadillac tax). However, if a cap would be more politically feasible (in the past it has received more political support) than a full repeal, it should be reframed, revisited, and repropose as a policy reform.

Other Solutions

In October 2017, President Donald Trump signed Executive Order No. 13813 with the aim of “promoting healthcare choice and competition across the United States” and called for the Secretary of Labor to consider ways to allow more employers to form Association Health Plans (AHPs).¹⁰⁶ In response, the Department of Labor issued a reform that would allow small employers to join together and form association health plans. From their website, the Department of Labor states that “Association Health Plans work by allowing small businesses, including self-employed workers, to band together by geography or industry to obtain healthcare coverage as if they were a single large employer.”¹⁰⁷ However, this rule is not yet implemented because there is a battle on its legal validity. In March 2019, the rule was found to be unlawful, and the administration filed for an appeal. The appeal was held in November 2019, but no decision has been issued.¹⁰⁸ While this rule seems like it could promote more ways for self-employed workers and independent contractors to obtain healthcare coverage, it is not yet clear how this would play out in practice.

Moreover, President Trump issued Executive Order No. 13847 on August 31, 2018, with the aim to expand access to multiple employer plans (MEPS) so that employees of different private-sector employers may participate in a single retirement plan.¹⁰⁹ In response, the Department of Labor proposed a regulation to “expand access to affordable quality retirement savings options by clarifying the circumstances under which an employer group or association or a professional employer organization (PEO) may sponsor a workplace retirement plan.”¹¹⁰ In particular, the Department of Labor stated that employer groups, associations, or PEOs can constitute an “employer” (under certain conditions) in order to establish and maintain an individual’s “employee pension benefit plan.” Under this rule, employees who did not have access to a retirement plan from their employer (mostly in small businesses) or self-employed individuals would now be able to participate in a retirement plan through an association retirement plan (ARP).¹¹¹ This new rule could be seen as a step away from employer-only retirement benefits plans, and as more empirical data become available, it would be important to evaluate whether the rule did increase access to retirement benefits plans for self-employed and independent contractors.

It is also important to address both the ACA and nationalized healthcare systems (such as the United Kingdom’s National Health Service) as a way to expand health insurance benefits to non-employee workers. Research indicates that the ACA has increased coverage to many previously uninsured, self-employed

106 Exec. Order No. 13813, 82 Fed. Reg. 48385 (October 17, 2017).

107 US Department of Labor, “About Association Health Plans,” July 22, 2020, <https://www.dol.gov/general/topic/association-health-plans>.

108 See summary by Katie Keith, “ACA Litigation Round-Up: Part II,” *Health Affairs*, July 21, 2020, <https://www.healthaffairs.org/doi/10.1377/hblog20200721.330502/full/>. “In the meantime, we await a decision from the DC Circuit on the validity of the AHP rule. Oral argument was held in November 2019 but no decision has been issued (even though the court had granted a request for expedited appeal). A decision could be issued any day.”

109 Exec. Order No. 13847, 83 Fed. Reg. 45321 (August 31, 2018).

110 Definition of “Employer” under Section 3(5) of ERISA—Association Retirement Plans and Other Multiple-Employer Plans, 83 Fed. Reg. 53534 (proposed October 23, 2018).

111 US Department of Labor, “Fact Sheet: Final Rule on Association Retirement Plans (ARPs),” *Employee Benefits Security Administration*, July, 29, 2019, <https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/fact-sheets/final-rule-on-association-retirement-plans>.

individuals.¹¹² However, reports also indicate that ACA premiums have been increasing over the last few years, perhaps making it more difficult for individuals to afford health insurance purchases through the exchange.¹¹³

Furthermore, while nationalized healthcare system plans such as the United Kingdom's National Health Service (NHS) allow complete portability in general since the ability to use the *public* healthcare system would not be tied to an employer, there are a number of controversies and criticisms of the system in terms of lack of access, long waiting lines, and low quality services.¹¹⁴ Moreover, even though public healthcare can be accessed to all individuals regardless of employment, since the quality of public healthcare often remains uncertain and there are concerns over long wait times and access, employers continue to provide private health insurance benefits to their employees. To the extent that individuals would seek private health services because of their superior quality relative to the public health system, in reality then, some health insurance benefits continue to be tied to the employer. Lastly, and as discussed above, a nationalized healthcare service such as that of the United Kingdom would face challenges in terms of political feasibility in the United States.

Nevertheless, and while it is not in the scope of this paper to embark on a cost-benefit analysis of a national healthcare service or the ACA, it is important to note that because of the documented drawbacks and controversies of a nationalized or public health system (and other recognized problems with the ACA), it may be better to find simpler, directed, and more politically feasible solutions that can maximize benefits without causing other broader distortions and problems. Accordingly, this paper focused on what may be referred to as the “low-hanging fruit” of more targeted solutions for gig, freelance, and independent contractors.

Overall, the ideas discussed in this section are by no means exhaustive; they are simply ways that could help open up a path toward greater portable benefits solutions. As addressed in this paper and by other scholars, there may be a host of other avenues that can also work. Future research on this topic should continue to investigate various legal barriers across different levels of government, as well as non-legal barriers, and provide analyses of ways to facilitate more politically feasible, portable benefits solutions.

Conclusion

Interest in portable benefits solutions has grown in the last few years during a time period that saw rapid growth in gig, freelance, or self-employed work. Beyond the current statistics measuring the extent of the gig economy, it is important to also note structural and technological changes occurring today that may indicate further growth in this type of work. Economists have long discussed how technological changes

112 Emilie Jackson, Adam Looney, and Shanthy Ramnath, “The Rise of Alternative Work Arrangements: Evidence and Implications for Tax Filing and Benefit Coverage” (Office of Tax Analysis Working Paper No. 114, US Department of the Treasury, Washington, DC, January 2017), 22.

113 One such reporting mechanism is a tracker created by the Kaiser Family Foundation. See Kaiser Family Foundation, “New KFF Resource Tracks Proposed 2019 Marketplace Premiums by State,” *KFF*, news release, June 7, 2018, <https://www.kff.org/85deb40/>. For other discussions of premium increases, see Amy Goldstein, “ACA Premiums Rising beyond Reach of Older, Middle-class Consumers,” *Washington Post*, March 5, 2019, https://www.washingtonpost.com/national/health-science/aca-premiums-rising-beyond-reach-of-older-middle-class-consumers/2019/03/04/bdd07d9e-3e9a-11e9-922c-64d6b7840b82_story.html; and eHealth, “How Much Does Obamacare Cost in 2018?,” *eHealthInsurance*, June 20, 2018, <https://www.ehealthinsurance.com/resources/affordable-care-act/much-obamacare-cost-2018>.

114 A recent article from the BBC summarizes the problems of access and long wait times. Nick Trigg and Christine Jeavans, “The Hospitals that Fail to Treat Patients on Time,” *BBC News*, November 20, 2018, <https://www.bbc.com/news/health-46212058>. News articles discussing long wait times and access are common in the United Kingdom. There is also a host of academic literature discussing the long waiting lists and access to quality care. See, for example, John G. Cullis, Philip R. Jones, and Carol Propper, “Waiting Lists and Medical Treatment: Analysis and Policies,” chap. 23 in *Handbook of Health Economics*, ed. Anthony J. Culyer and Joseph P. Newhouse (Amsterdam: North-Holland, 2000), 1:1201–49; R. Tudor Edwards, *NHS Waiting Lists: Towards the Elusive Solution* (London: Office for Health Economics, 1997); Carol Propper, Bronwyn Croxson, and Arran Shearer, “Waiting Times for Hospital Admissions: The Impact of GP Fundholding,” *Journal of Health Economics* 21, no. 2 (March 2002): 227–52; Hugh Gravelle, Mark Dusheiko, and Matthew Adam Sutton, “The Demand for Elective Surgery in a Public System: Time and Money Prices in the UK National Health Service,” *Journal of Health Economics* 21, no. 3 (May 2002): 423–49.

that reduce transaction costs can lead to more contractor-based work.¹¹⁵ One economist posited that that if transaction costs significantly fell, then it would be “difficult to imagine why complete decentralization of labor markets would fail to achieve efficient allocations. Most workers would be, in some sense, self-employed.”¹¹⁶ More than 30 years later, are we beginning to see the onset of just that type of decentralized world created by the broader reduction in transaction costs due to technological changes? While it is of course difficult to predict the path of future changes, some recent research outlines how specific technological changes continue to reduce various transaction costs and suggests that a more self-employed economy could be on the horizon.¹¹⁷

Of course, there are also factors beyond transaction costs that would encourage this kind of transition. Ironically, greater regulatory costs of employment (including the legal risks associated with terminating an employee and the mandatory benefits that must be provided to employees) are all costs that firms must bear when they employ workers instead of contracting out. The decision to contract out may thus be understood as a type of regulatory arbitrage. There also are sociological factors such as changing attitudes toward the nature of work with the rise of the “creative class” and demands for more independent work.¹¹⁸

Thus, at least some indicators point to a world in which the gig, freelance, and self-employed economies are here to stay and will continue to grow. If so, labor laws and regulations will become less relevant as they continue to be tied to a world where the employer-employee relationship is the norm. As that happens, structural reforms that open the path to more portable benefits will increase in importance.

In this paper, I provided a discussion of why portable benefits solutions for gig or contract work are not common in practice. I focused mainly on legal barriers preventing either gig economy platforms or other parties stepping in to provide portable benefits. Future research on this topic should continue to investigate various legal or non-legal barriers and provide analyses for different reforms. The pathway to portable benefits can perhaps be achieved by first recognizing the barriers that stand in its way.

115 Transaction costs refer to all costs associated with carrying out an exchange, which includes the costs of originating, negotiating, concluding, monitoring, and enforcing a contract for any given exchange.

116 Sherwin Rosen, “Transaction Costs and Internal Labor Markets,” *Journal of Law, Economics, and Organization* 4: 49-64 (1988): 53.

117 Michael C. Munger, *Tomorrow 3.0: Transaction Costs and the Sharing Economy* (New York: Cambridge University Press, 2018); Seth Oranburg and Liya Palagashvili, “Transaction Cost Economics, Labor Law, and the Gig Economy,” *Journal of Legal Studies* (forthcoming); Seth Oranburg and Liya Palagashvili, “The Gig Economy, Smart Contracts, and Disruption of Traditional Work Arrangements” (working paper, 2018).

118 Richard Florida, *The Rise of the Creative Class: And How It's Transforming Work, Leisure, Community, and Everyday Life* (New York: Basic Books, 2002).