

# BENEFITS LAW

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# JOURNAL

## **New Congressional Bill Would Create Hybrid Job Classification for Gig Workers – But It Already Is Facing Stiff Opposition**

**By John M. Polson and Richard R. Meneghello**

*The authors discuss the “Worker Flexibility and Choice Act,” introduced recently in Congress, and its chances of ever becoming law.*

Answering industry calls for a 21st-century solution to a 21st-century problem, a bipartisan group of federal lawmakers recently introduced a bill in Congress that would create a hybrid job classification for gig economy workers that would allow businesses to avoid misclassification claims and give gig workers the flexibility they crave. However, some worker advocates and labor unions are already expressing their opposition to the “Worker Flexibility and Choice Act,” introduced on July 20, claiming that it is an anti-worker law that would short-change gig workers from receiving minimum wage and overtime pay.

This article discusses the bill – and its chances of ever becoming law.

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## **SUMMARY OF BILL: THREE STEPS TO FLEXIBILITY**

The bill, officially styled as HB 8442<sup>1</sup> and introduced by Henry Cuellar (D-TEX), Elise Stefanik (R-NY), and Michelle Steel (R-CAL), would create a third category of worker beyond just “employee” or “independent contractor.” If it passes, it would add to the list “worker flexibility agreements” governing relationships between businesses and workers. According to the bill sponsors, the proposed law would combine the flexibility of independent work while providing workers with certain workplace protections and benefits they are not currently guaranteed.

In order to qualify for this new classification:

- Workers would need to have the freedom and flexibility to reject offers the hiring entity provides them to provide services or results without negatively impacting the individual’s opportunity to provide services to the entity in the future during the arrangement’s term;
- Workers would retain the right to perform the same services for competing businesses; and
- The hiring entity would need to provide a written agreement outlining the workers’ rights and benefits and confirming the worker flexibility arrangement.

If these elements are satisfied, the workers would be classified under this new arrangement and would not be treated as employees under federal wage and hour and federal tax purposes. Moreover – and perhaps most importantly – the federal law governing this arrangement would supersede all state laws attempting to define such workers as employees (including California’s notorious “ABC” test).

In exchange for this flexibility afforded to both worker and business, workers would retain the rights provided to employees in connection with other workplace laws, including those relating to individual employee privacy rights, nondiscrimination, nonharassment, nonretaliation, safety, and leave under the Family and Medical Leave Act, in accordance with applicable laws.

The chair of the Coalition for Workforce Innovation, a group supporting the efforts of gig economy businesses, said the proposal provides “clarity and rules of the road for independent workers and businesses.” In a statement,<sup>2</sup> Evan Armstrong said “the bipartisan bill strikes a balance to promote independent work while ensuring more options for benefits, support and protections.”

## **SO WHAT'S THE PROBLEM?**

This sounds like a win-win for workers and businesses – so what's the problem? Plenty, according to some worker advocates and labor unions.

- According to The Hill,<sup>3</sup> an advocacy group called the Worker Power Coalition, which represents 24 million workers nationwide, called the proposal an “anti-worker proposal intended to further endanger already vulnerable gig economy workers.”
- The main sticking point: while it provides protections under some antidiscrimination and other similar laws, it offers no wage and hour protections for workers. “This federal bill would effectively get rid of the minimum wage and overtime compensation in one swoop,” said Veena Dubal, a University of California, Hastings College of the Law professor who studies the gig economy.<sup>4</sup>
- The Union of Painters and Allied Trades also said the proposal would roll back the clock on worker protections nearly 90 years to a time before the National Labor Relations Act was passed, eliminating misclassification concerns that have plagued certain non-gig economy industries since well before the smartphone.<sup>5</sup>
- The Teamsters and the Transport Workers Union of America also came out with strong statements decrying the bill.<sup>6</sup>

## **WHAT'S NEXT?**

The bill is still very new and has not even been assigned to a congressional committee. Once that occurs, however, we do not expect much movement on the proposal this session. While the bill has bipartisan support through its three sponsors, the labor opposition that quickly bloomed after the bill's introduction means that you should not expect to see widespread Democratic support. And that effectively dooms the prospects for the bill during this legislative cycle while Congress is controlled by the Democratic party.

Even if Republicans capture both houses of Congress in November midterms, President Biden remains staunchly pro-union and would be extremely unlikely to support this bill. Unless it goes through a revision to address the concerns identified by its opponents, this

proposal will remain a long-shot for passage for the foreseeable future.

## NOTES

1. <https://www.congress.gov/bill/117th-congress/house-bill/8442/text>.
2. <https://www.congress.gov/bill/117th-congress/house-bill/8442/text>.
3. *Id.*
4. <https://www.marketwatch.com/story/bill-to-enshrine-gig-work-into-federal-labor-law-would-effectively-get-rid-of-the-minimum-wage-and-overtime-compensation-11659036280>.
5. <https://www.congress.gov/bill/117th-congress/house-bill/8442/text>.
6. <https://www.marketwatch.com/story/bill-to-enshrine-gig-work-into-federal-labor-law-would-effectively-get-rid-of-the-minimum-wage-and-overtime-compensation-11659036280>.

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