NATIONAL EMPLOYMENT LAW PROJECT

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August 4, 2015

Re: NELP comments to the FTC on the "Sharing" Economy and Issues Facing Platforms, Participants, and Regulators

The National Employment Law Project (NELP) is a non-profit law and policy organization with more than 45 years of experience advocating for the employment and labor rights of the nation's workers. Our interest in the "sharing" economy, or as many refer to it, the "on-demand" economy, arises from concerns about how certain practices of new online and mobile technologies may harm workers, as well as the public more broadly.

We commend the Federal Trade Commission (FTC) for hosting a discussion and welcoming public comments on the on-demand economy. However, a glaring absence from this conversation is a discussion focusing on and including workers, the people actually providing the services that consumers are using.

The on-demand economy takes many forms; our concern at NELP is with the part of the on-demand economy that operates as an online staffing service, matching workers to jobs. Many – though not all – businesses in this sector currently function by shifting many of the costs and risks of doing business to workers who deliver the services and concentrating profit in the online brokers and business owners that broker them.

Why this issue is relevant for the FTC, which is focused on consumer protection and competition?

In the labor and employment context, the relationship between these job-placement platforms and workers frequently fits the traditional employer-employee model, despite the platforms' efforts to designate workers as independent contractors to avoid costs and legal responsibilities. These include obligations vis-à-vis consumers that arise from the employment relationship. For example, businesses with employees bear responsibility for consumer injury that occurs when consumers use their services. By treating their workers as independent contractors rather than employees, the companies have denied responsibility to consumers. The FTC should act to restore that accountability for consumer safety.

Further, because the companies operate in a non-transparent fashion, it is unclear how well underserved communities are being served and whether the companies are providing services to the disabled. One company in particular, Uber, has refused to provide data on rider accessibility that is required of transportation network companies in the state of California. As a result, the California Public Utilities

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Commission has assessed a fine against the company of over $7 million.[1] In addition, Uber has claimed in court filings that it is not subject to the Americans with Disabilities Act.[2] Uber provides transportation to customers through its drivers, and therefore must comply with the regulations designed to protect the public that apply to other transportation providers.

Finally, the FTC has a responsibility to create a level competitive playing field between the new platforms and the often highly-regulated industries with which they compete. The agency should be concerned when a new market participant gains a competitive advantage by simply ignoring existing regulations. The actions outlined above confirm the need for on-demand companies to be subject to regulation and oversight, to protect consumers and make their services accessible.

What is the problem with the "on-demand" economy as it relates to workers?

In its call for public comments, the FTC refers to the "labor of underemployed individuals" as an example of "underutilized resources." Other examples the FTC provides of underutilized resources include spare rooms and idle automobiles. There are big differences between someone renting out a spare room or a car when it's not being used and someone providing their own labor for compensation. If one of the goals of the FTC is to consider how to improve the welfare of platform participants, that goal should also encompass the welfare of the workers providing the labor that allows many of these platforms to exist.

We urge the FTC to keep in mind when formulating policy that on-demand companies are not simply delivering technology to their customers and clients—they use technology to deliver labor to customers. While some of the platforms have claimed to be technology companies exempt from regulations that apply to other businesses, that claim was rejected in a recent decision in federal court in California.[3]

So, too, the proliferation of class action lawsuits from workers around the country suggests that many on demand workers recognize that they are not well-served by

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[1] Laura Nelson, Andrea Chuang and Paresh Dave, UBER SHOULD BE SUSPENDED IN CALIFORNIA AND FINED $7.3 MILLION, JUDGE SAYS, (LA Times, July 15, 2015), http://www.latimes.com/business/la-fi-uber-suspended-20150715-story.html#page=1.

[2] Dan Adams, DISABLED RIDERS SEEK TOUGHER RULES FOR UBER, LYFT, (The Boston Globe, May 1, 2015), http://www.bostonglobe.com/business/2015/04/30/massachusetts-disability-advocates-hit-uber-lyft-over-lack-accessibility/i17fMPe7omNmCIU32FVqII/story.html; Nina Struchlic, UBER: DISABILITY LAWS DON'T APPLY TO US, (The Daily Beast, May 21, 2015), http://www.thedailybeast.com/articles/2015/05/21/uber-disability-laws-don-t-apply-to-us.html.

[3] *O'Connor v. Uber Technologies*, C-13-3826 EMC, District Court, Northern District of California, March 11, 2015, (Order Denying Defendant Uber Technologies, Inc.'s Motion For Summary Judgment), http://uberlawsuit.com/OrderDenying.pdf.

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this designation.[4] A recent California Department of Labor Standards Enforcement decision confirmed one worker's status as an employee.[5] Allowing on-demand companies to treat their workers fundamentally differently from other businesses in the same sector that hire workers as employees creates an unfair business advantage for on-demand companies.

Need for data to inform policy-making

As noted above, more data is needed about on-demand companies' impact on consumers. The same is true for workers. Many companies have made grandiose, unsubstantiated claims about income potential, but policy-makers have very little data that isn't generated and sponsored by the companies themselves.[6] Additionally, more information is needed on the types of workers who are providing their services: are they working for on-demand platforms to supplement other income, or are they increasingly relying on this work to provide their basic income? Policy-makers cannot simply rely on the information provided by these companies. The companies have a clear financial interest to avoid as much regulation as possible, which gives them an unfair advantage in the marketplace and puts the public at risk.

Self-regulation will not address the issues raised in the on-demand economy

At its meeting in June, the FTC heard a number of representatives of the on-demand economy advocate for "self-regulation." We have seen that many on-demand companies deny responsibility for the safety of their customers and the wellbeing of their workers. We cannot rely on these companies to self-regulate, because their

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[4] Sarah Kessler, THE GIG ECONOMY WON'T LAST BECAUSE IT'S BEING SUED TO DEATH (Fast Company, Feb 17, 2015), http://www.fastcompany.com/3042248/the-gig-economy-wont-last-because-its-being-sued-to-death; Kashmir Hill, MEET THE LAWYER TAKING ON UBER AND THE REST OF THE ON-DEMAND ECONOMY (Fusion, Apr. 16, 2015), http://fusion.net/story/118401/meet-the-lawyer-taking-on-uber-and-the-on-demand-economy/.
[5] *Berwick v. Uber Technologies*, No. 11-46739, State of California Labor Commissioner, June 3, 2015, (Order, Decision or Award of the Labor Commissioner).
[6] For example, Uber's recruitment materials tell potential drivers that they can turn their cars into "a money machine." Its CEO, Travis Kalanick, has stated that drivers for the company can earn $90,000 to $100,000 yearly. Jared Newman, UBER CEO WOULD REPLACE DRIVERS WITH SELF-DRIVING CARS, (TIME, May 28, 2014), http://time.com/132124/uber-self-driving-cars/. Sidecar and Lyft each boast on their websites that drivers can earn up to $35 per hour. http://www.side.cr/; http://www.lyft.com/drivers.

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default will be to evade existing regulatory frameworks that are designed to protect consumers, workers and the public.

We thank the FTC for considering our comments.

Sincerely,

Rebecca Smith, Deputy Director
Nayantara Mehta, Senior Staff Attorney
NELP