
2019
YEAR IN REVIEW
LEGISLATION, REGULATION,
POLITICS AND PROGRESS
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INTRODUCTION

Worker reclassification legal battles, the expansion of Association Health plans, new solutions to protect independent workers, a tech savvy gig industry, and antiquated labor laws – all occurring within one of the strongest economies in U.S. history, but during one of the most divisive years in U.S. politics.

2019 was a turbulent year, and the world of Independent Work was not exempt from the excitement.

State legislators, federal courts, gig companies and Independent Workers themselves all played massive roles in the dramatic changes that occurred this year.

In 2019, we witnessed the federal labor agenda arrive at odds with several progressive state legislatures, a court battle over the legality of health insurance for tens of thousands of Americans, mounting gridlock which stalled a majority of federal legislation, and continued growth of the Independent Workforce which now numbers over 50 million.

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It was also an incredible year of both growth and direction for us here at iPSE-U.S.

During 2019 we better established our foundation and framework to develop our legislative and policy agenda, we on-boarded new members of staff to create new strategies to address the challenges of Independent Workers, we participated in multiple conferences and events to raise our visibility, grow our membership and introduce our solutions and strategies.

We met with members of congress, state legislators, the Vice President of the United States, members of the executive branch and Independent Workers from nearly industry, background and demographic, as we better understood our role and voice within the world of work.

And we published a magazine...

We look forward to 2020 as we continue to increase our presence and membership and introduce our initial policy proposals and strategies as the leading voice of the millions of Independent Workers in this country.

Sincerely,

iPSE-U.S.

The Association of Independent Workers

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REGULATORY HIGHLIGHTS

THE NLRB, DOL AND THE BATTLE OVER CLASSIFICATION

The National Labor Relations Board

Expanding Independent Contractor Status

The continual rise of Independent Work within this country has attracted millions to much more free, flexible and innovative employment arrangements. The positives of these arrangements are well known and reflected in multiple leading workforce surveys and studies – but one of the leading challenges and barriers for America's Independent Workers is our country's outdated legal labor framework which classifies workers into two camps – employees and independent contractors. This ongoing struggle over who qualifies for which status has led to multiple legal battles and opinions – and in January of 2019, the National Labor Relations Board weighed in with their own surprising decision.

Starting the year off, the NLRB readopted an older standard for determining independent contractor status by issuing an opinion in SuperShuttle DFW. Through this opinion, the NLRB moved back to the more expansive "common law" standard for contractor classification.

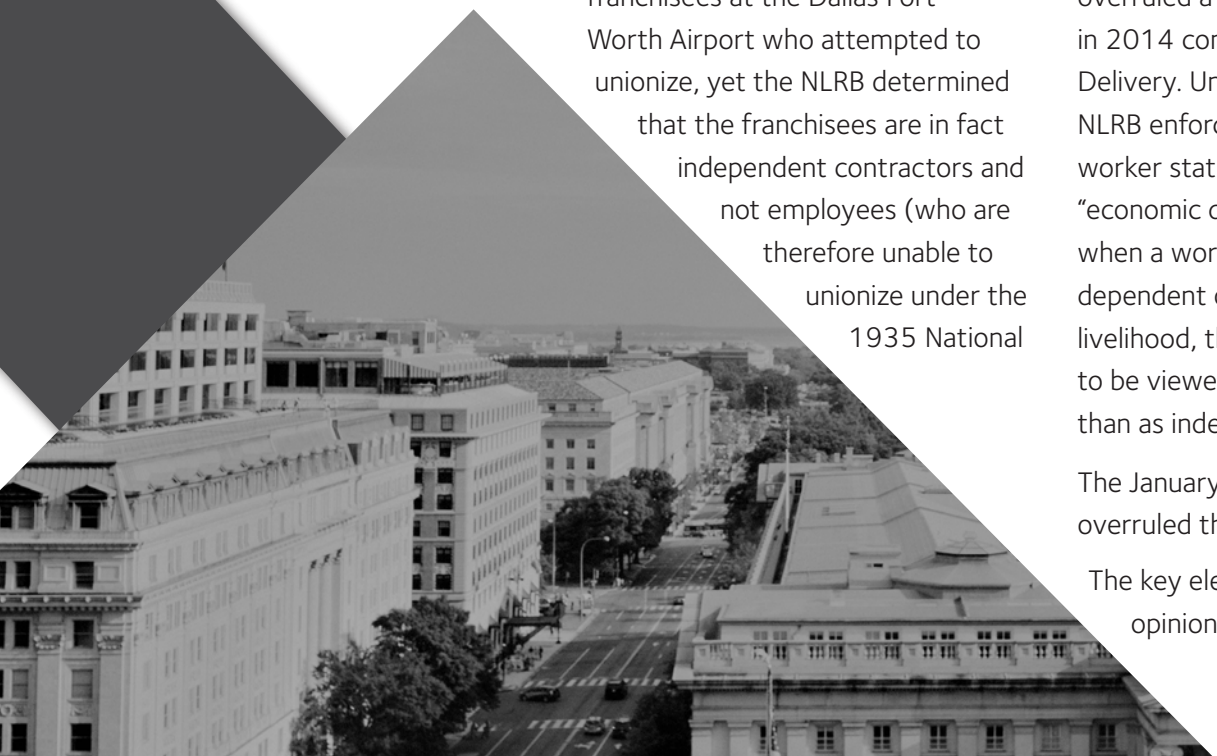
The opinion involved SuperShuttle franchisees at the Dallas Fort Worth Airport who attempted to unionize, yet the NLRB determined that the franchisees are in fact independent contractors and not employees (who are therefore unable to unionize under the 1935 National Labor Relations Act).

The 1935 NLRA is a powerful and comprehensive law passed during the economic crises of the 1930s which granted many workers the right to collectively bargain with the businesses that employ them. The NLRB was set up to handle any issues, cases or legal arguments stemming from the law, and such as with SuperShuttle, the board often issues opinions to clarify and interpret the act.

The NLRB's opinion in this case overruled a prior key opinion issued in 2014 concerning FedEx Home Delivery. Under the previous rule, the NLRB enforced a test to determine worker status through a lens of "economic dependability" – essentially when a worker was more financially dependent on a single employer for livelihood, they were much more likely to be viewed as employees rather than as independent contractors.

The January SuperShuttle opinion overruled this.

The key element cited in their opinion which merited



grounds for the reversal was the "entrepreneurial opportunity for gain or loss" in the business of SuperShuttle franchises. The drivers own or lease their work vans, decide their work schedules and conditions, and fundamentally determine if they succeed or fail. These cited factors, in the eyes of the NLRB, confirmed that the drivers are in fact contractors and not employees. With the implementation of the older, multi-factor common law test, the NLRB essentially reinstated a classification test with much more room for interpretation. The test greatly expanded the definition of independent contractor

This initial opinion set the stage for many more legal battles on both the state and federal level throughout the remainder of 2019...

The Department of Labor

Weighs in on the Gig Economy

In April of this year, the Department of Labor followed the NLRB with a similar legal opinion on the classification of America's independent contractors. Through a response letter addressed to an unnamed worker at an unnamed gig company, the DOL articulated its opinion on federal gig worker status very clearly – *gig workers are Independent Contractors, not employees*.

The letter was in response to an inquiry posed by an individual from a virtual marketplace company or VMC. The VMC operated in the "on demand" or "sharing" economy, by connecting some type of service providers to end market consumers. Quite honestly, this could have been any app-based, on demand platform company, but DOL did not disclose.

By using the more expansive six-factor classification test, the DOL cited the economic dependency of these workers as the main reason for evaluating their employment classification.

The DOL found that workers at this unnamed company, who provide service to market end consumers, determine their own financial success or failure independent of the company. *Therefore, they are contractors, not employees*.

The totality of both this opinion from DOL and the January decision from the NLRB reflected the current administration's overall shift from the Obama administration. Independent Workers, policy makers and labor thought leaders should understand that what has been articulated on the federal level is a clear intent to further to expand the definition of Independent Work through these existing regulatory engines.

Yet in the process, these regulatory actions have spurred many legislators on both the state and federal level to begin developing legislation to reverse these decisions in the ongoing battle over worker classification.

The DOL 6 Factor Labor Classification Test

1. **The nature and degree of the potential employer's control;**
2. **The permanency of the worker's relationship with the potential employer;**
3. **The amount of the worker's investment in facilities, equipment, or helpers;**
4. **The amount of skill, initiative, judgment, or foresight required for the worker's services;**
5. **The worker's opportunities for profit and loss; and**
6. **The extent of integration of the worker's services into the potential employer's business.**

ASSOCIATION HEALTH PLANS

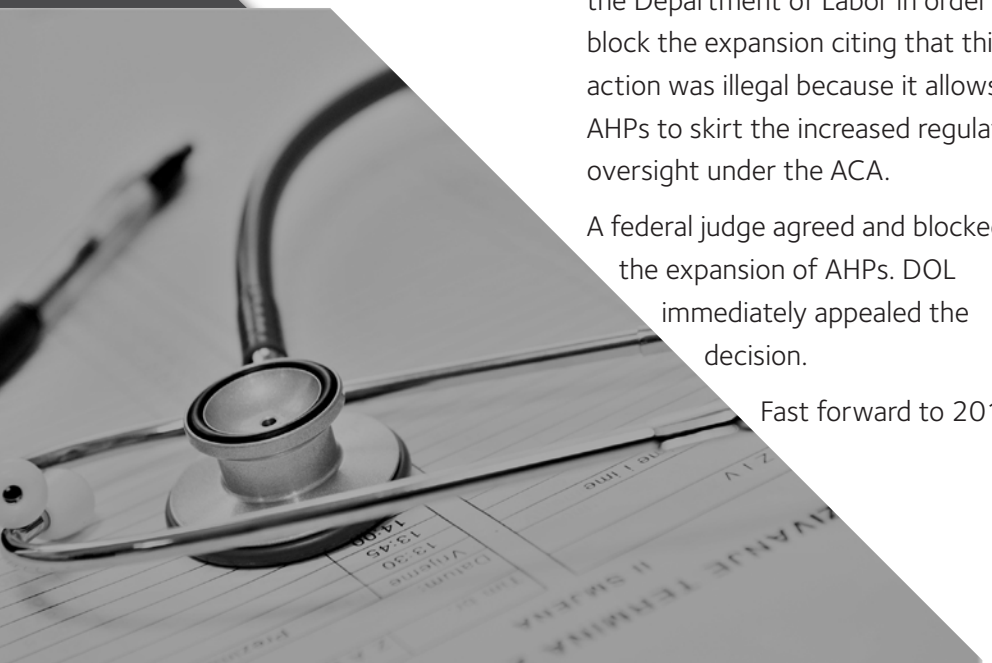
THE STATE OF NY CHALLENGES DOL OVER HEALTHCARE

The Legality of AHP Expansion

Weighs in on the Gig Economy

Access to healthcare for tens of thousands of Americans is currently in jeopardy as a court ruling will determine whether the ongoing expansion of Association Health Plans is legal under the Affordable Car Act.

This began back in June of 2018 when the Department of Labor, following an executive order from the President, expanded workers' ability to access the affordable, robust and comprehensive health coverage options provided through Association Health Plans. These plans allow Independent Workers and small businesses to group together by industry or geography to access the larger employer marketplace. And naturally, the ability to group together minimized the risk pools lowering costs for all participating members.



AHPs have existed for decades, but following the passage of the ACA, an enhanced regulatory oversight of the plans was implemented since they were classified within the individual and small group markets.

The executive order and enactment by the DOL expanded how aggregation could qualify associations for the large group markets. Yet almost overnight, the state of New York (along with 10 other states and the District of Columbia) sued the Department of Labor in order to block the expansion citing that this action was illegal because it allows AHPs to skirt the increased regulatory oversight under the ACA.

A federal judge agreed and blocked the expansion of AHPs. DOL immediately appealed the decision.

Fast forward to 2019 –oral arguments were held in mid-November for the Court of Appeals of the D.C. Circuit. During these arguments, the federal government articulated again that the DOL was within its scope of authority when they expanded the level of access for Association Health Plans.

The State of New York again, contented that this expansion violates the Affordable Care Act's regulations on individual, small and large group coverage.

The court's decision is expected to come soon.

The result could possibly be a reversal the lower court's decision, thereby allowing for the expansion to be reinstated and providing thousands of enrollments for new members to AHPs.

Or, the court could affirm the lower court's decision, thereby ruling that the expansion is in violation of the ACA. If this happens, the only next step for the Federal government and the existence of AHPs would be for the U.S. Supreme Court to hear their appeal.

LEGISLATIVE HIGHLIGHTS

2019 FEDERAL & STATE BILLS

New Solutions for the New World of Work

Retirement savings, trade deals and California's AB 5

Gridlock, logjam, stalemate – there are several ways to describe what hyper partisanship does to the primary function of our federal legislature. Add-in an impeachment process that has saturated the news the final months of the year and it is not difficult to see why the 116th Congress struggled to pass some of the key pieces of labor legislation we were following this year.

Stalemate set aside; our elected officials did manage to push forward some essential pieces of labor policy that we believe will have a positive impact on the Independent Workers of America.

Additionally, iPSE-U.S. was enthusiastic over the creation of the Future of Work Caucus within the House of Representatives and we look forward to potential collaboration with its members come 2020.

So, what legislation was left behind?

What made actual progress?

And what can we expect and prepare for in 2020?

Throughout 2019, we tracked not only key federal legislation but also specific state level actions where we successfully participated and engaged in the process.

The following pages contain our summaries on these key bills:

FEDERAL LEGISLATION

The Setting Every Community Up for Retirement Enhancement (SECURE) Act of 2019

H.R. 1994

A key piece of bipartisan legislation that was overwhelmingly supported in the House this legislative session yet stalled in the Senate in late November of this year. The SECURE Act greatly expanded Americans ability to save for retirement through a variety of restriction removals, increased access for the self-employed, and new rules allowing for penalty free withdrawals.

- After being tacked onto the Omnibus federal spending bill for 2020, the SECURE Act succeeded in making it out of the House of Representatives with a real potential of passing the Senate and being signed into law.
- We regard this as one the most impactful policy initiatives benefiting America's retirement system in more than a decade. In particular, it will help our nation's Independent Workers secure robust benefits, while giving Americans substantial incentives to enhance their financial security in retirement. The SECURE Act, although not perfect, was a true win for the Independent Workers of America.

The Protecting the Right to Organize (PRO) Act of 2019

H.R. 2474

A large piece of labor legislation meant to empower and further protect American workers and unions, this bill has attracted over 200 co-sponsors and is scheduled to be on the House floor early in 2020.

- By amending the National Labor Relations Act, this bill expands protections to workers who participate in strikes and union membership, increases labor law violation penalties and revises the definition of employee through the incorporation of the strict ABC independent contractor classification test.
- iPSE-U.S. voiced our strong concern and opposition to key elements within this bill especially over the implementation of the ABC classification test to the existing NLRA. Drawing on equivalencies from California's AB 5, we have authored opposition letters to congress.
- The PRO Act stalled for a majority of the year but following a markup session by the House Committee on Education and Labor in December, the Democrats moved to place this bill on the legislative calendar for early 2020.

FEDERAL LEGISLATION

The United States-Mexico-Canada Agreement Implementation Act (USMCA)

H.R. 5430

The new trade deal between Mexico, Canada and the United States, this flexible and competitive trade agreement with our closest international partners will lead to more prosperity for the highly innovative and valuable Independent Workers of America.

- According to the International Trade Commission, the USMCA will create over $68 billion in new economic activity by accelerating growth in key industries in which Independent Workers play vital roles. If passed, the USMCA will encourage more materials in the automotive industry to be manufactured within the United States through new rules of origin. The deal will also positively impact the Agriculture sector by securing fairer market access for farmers who take pride and rely on their Independent work styles.
- And the overall new customs and trade rules will eliminate burdensome red tape, allowing more Independent Workers greater participation in international markets.
- The passage of USMCA is essential for creating a more competitive and sustainable economy for Independent Workers to thrive. We believe that the growth accelerated from this trade deal will both empower and promote the Independent work style.

The NEW GIG Act of 2019

S. 700

Introduced by Senator John Thune (R-SD) in March of this year, the bill was twice referred to the Committee on Finance yet failed to make any further progress.

- The bill establishes a more expansive worker classification test for American service providers creating a safe harbor for those who meet the objectives of the test. The purpose was to provide much needed clarity on the classification battle over the independent contractor status.
- Instead of forcing workers into employment status, this bill looks to clear a path to legally designate workers as independent contractors. Service providers would even be able to get confirmation from the U.S. Tax Court of their employment status, instead of waiting while the IRS bullies them into employment status

FEDERAL LEGISLATION

Portable Benefits for Independent Workers Pilot Program Act

S 541

- This legislation explores several options to provide portable benefits for the Independent Workforce with federal grants. Many existing businesses and associations have already begun providing some form of these benefits, but this legislation would develop a program to award grants to states, local governments, and nonprofit organizations to explore and test ways to provide portable benefits.
- The bill was stalled shortly after introduction within the Senate.

Self-Employed Mortgage Access Act of 2019

S 540

- This bill is a solution for non-traditional workers who have difficulty getting a mortgage because they cannot show traditional proof of income.
- Establishing proof of income for any Independent Worker can be problematic. Without a reoccurring, regular cadence, like a paycheck for a traditional employee, establishing credit worthiness is always a challenge for independent workers.
- This bill offers a solution by providing alternative standards to evaluate their ability to pay off a mortgage. Unfortunately, this bill also failed to gain traction and make any significant legislative progress.

Protecting Independent Contractors from Discrimination Act of 2019

H.R. 4235

- A classic double-edged sword, this measure is meant secure essential workplace rights not otherwise available to independent workers, but it also opens the door to a massive influx of opportunistic trial lawyers and litigation. It significantly alters the legal relationship Independent Workers have with the companies with whom they do business. This bill could be very costly and therefore, ultimately reduce the economic incentive to contract with IWs. Yet another example of the law of unintended consequences.
- This bill, introduced by Rep. Eleanor Holmes, D.C.'s Representative at large, also stalled later in the year.

STATE LEGISLATION

In 2019, several proactive states moved on key pieces of legislation related to the world of Independent Work. These bills varied in purpose and partisan support, but the most dominant and newsworthy pieces of legislation were the states focused on redefining the legal definition of independent contractors, most certainly at odds with the federal government's labor agenda.

CALIFORNIA

What was probably the most covered piece of legislation related to Independent Workers – AB 5 was a Democratic backed measure which passed the state legislature and will go into effect as a law in 2020.

Essentially, the law will implement the strict ABC classification test to determine who qualifies as independent contractors within the state. And essential to note, the law was afflicted with controversy throughout the entirety of the legislative process. Introduced in 2018 as a means to codify a ruling from the Supreme Court of California in the Dynamex case, the bill attracted a significant amount of Democratic support.

The Dynamex ruling provided legislators with the legal grounds to establish a 3-part test to determine independent contractor status, commonly referred to as the ABC test, within the state.

AB 5

In opposition to other tests utilized by the NLRB and DOL, this test is far stricter and narrower in its determination for who qualifies. Under ABC, all three of the following conditions must be met by an employer to classify a worker as an independent contractor:

A. The worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of such work and in fact

B. The worker performs work that is outside the usual course of the hiring entity's business

C. The worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity

STATE LEGISLATION

CALIFORNIA...

Supporters and proponents of the bill stated that this stricter test would help to ensure that workers within the gig economy were provided with the necessary benefits and wage protections that they lack.

In doing so, nearly all "gig workers" would be reclassified as employees, along with many independent contractors. The most conservative estimates found that implementation of this law would result in labor costs rising nearly 30% across multiple industries absolutely stifling millions of workers ability to work. Working as a classified employee obviously provides workers with all of the benefits and workplace protections guaranteed to full time employees – yet it prevents them from utilizing their unique and flexible work style allowing them to operate as an agile workforce for millions of customers and clients.

Immediately, thousands of workers in several industries began lobbying for exemptions to the law.

These included, *but by no means were limited to:*

Doctors, physicians, surgeons, dentists, veterinarians, psychologists, lawyers, architects, Insurance agents, engineers, additional professional service workers such as professionals in marketing, HR, graphic design certain artists, commercial fisherman, private tutors, hair stylists and barbers, freelance writers and photographers (only if they contribute no more than 35 submissions to one outlet per year), builders, contractors, Rideshare & Delivery drivers, Trucking drivers, Land surveyors, landscape architects, geologists, commercial cleaners, interpreters, health aides, unlicensed Manicurists and strippers...

As workers and entire industries fought for exemptions, the bill rapidly moved through the state legislature. Yet on September 11, 2019 – both chambers passed the measure with some thirty odd exemptions tacked onto the bill.

Several key industries were left out of these exemptions, and .as of December 2019, labor groups, industries and Independent Workers continue to press lawmakers for additional exemptions.

STATE LEGISLATION

NEW JERSEY

Immediately following the passage of AB 5, the Garden State was the next to introduce legislation of similar purpose and content.

The New Jersey state legislature is currently debating a pair of bills similar to California's AB 5.

These bills, both making forward progress in both the State Senate and Assembly, would more strictly codify the ABC classification of independent contractors within the state.

Yet within the past few weeks, both versions of the bills stalled as New Jersey's Independent Workers voiced their serious concerns over the potential negative economic outcomes this bill would produce.

After closely following the passage of AB 5 in California, Uber Drivers, freelance photographers and hundreds of other Independent Workers reached out their representatives urging them to alter the bills significantly.

And recently, the State Senate leader announced the bills would be rewritten to address the serious concerns raised by these workers and businesses.

"Any states that produce similar measures to AB 5 will alienate themselves from this highly skilled and flexible workforce," said iPSE-U.S. Co-President Mike Bishop.

"They will weaken the economies they have now as Independent Workers flee to more welcoming states. Other states now have an opportunity to learn from California's miscue."

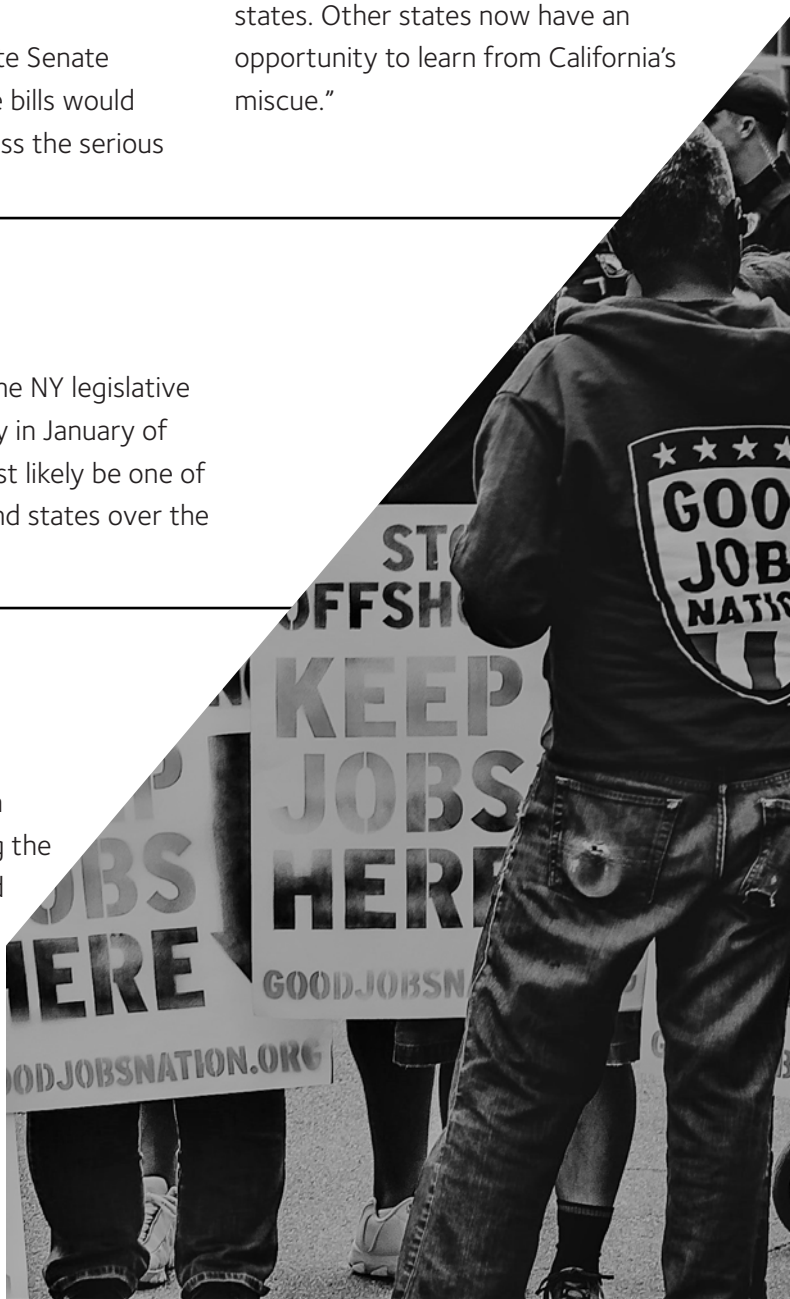
NEW YORK

Also following in the footsteps of California, legislators in the third most populous state in the union began preparing legislation to address the state's independent contractor classification test. The NY legislative calendar begins early in January of 2020 – this will most likely be one of the next battleground states over the classification issue.

TEXAS

More in line with the actions of the Trump administration than those of the progressive states of California and New York, Texas passed a series of measures aimed at both expanding the ability for Independent Workers to engage in work and also create new incentives to drive companies to the lone star state.

These included both a resolution recognizing the importance to expand the definition of Independent Work and the adoption of the more expansive contractor classification law.



LEADERSHIP INSIGHT

THE YEAR IN REVIEW AND PREDICTIONS FOR 2020

CARL CAMDEN,
FOUNDER & PRESIDENT OF iPSE-U.S.

How would you summarize the changes to world of Independent Work throughout 2019?

First off, the shift to this type of work really achieved global and national attention during this year. Business schools across the country held seminars and courses addressing the rise of Independent Work, there were major initiatives and conferences conducted by companies in nearly every industry. And there was even a federal caucus formed in the House of Representatives with a key objective of addressing this workforce.

It went from being ignored, to being understood as significant portion of the American economy.

Several states this year introduced or even passed legislation addressing worker classification. Other than New York and New Jersey what other states do you see as potential battlegrounds over this worker classification issue?

Let me make it very clear that we are not done with California, we are continuing to fight for additional exemptions and possibly amendments to the law they passed earlier this year.

I do anticipate that some of the more progressive states may adopt similar measures.

What do staffing firms need to understand about the Independent Workforce come 2020?

The balance of power has been shifting from those who have opportunities, to those who have special skills that they can bring to the opportunity.

Staffing firms were some of the first companies to recognize that. But with the modern economy, it's not just the flexibility of Independent Work, but also the style to which they are engaged.

A temporary employee is still a temporary employee – a full time Independent Worker has much more control over their work and their life.

The challenge for staffing firms in coming years will be developing a strategy to approach these workers with valuable tools, while not inhibiting on their independent workstyle.

And what insight can you provide on the 2020 election? How have the major political parties addressed the Independent Workforce?

Neither party or wing of the Democrats have particularly recognized the significant changes and regulations that must occur in government policy to adapt to the new world of work.

The lack of attention from everyone causes a drift back to twentieth solutions instead of twenty first century solutions.

Already there are unions that are trying to figure out how to accommodate these workers, businesses are doing the same thing.

But it will be impossible to keep our rapidly evolving economy with this flexible workforce tied to an archaic benefits structure. It will be Interesting to see what the approaches of two parties will be closer to the election.

MIKE BISHOP,
CO-PRESIDENT OF iPSE-U.S.

How would you summarize the changes to world of Independent Work throughout 2019?

There has been an awakening among the ranks of independent workers across the country. More people are choosing to work independently and they understand that they need to let their voices be heard to ensure the future of their right to work how they want, and where they want, is not deterred.

Other than New York and New Jersey what other states do you see as potential battlegrounds over the worker classification issue?

California, of course. I am also concerned about Illinois, Maine, Connecticut , Massachusetts, Washington, Oregon and other more progressive states that have historically viewed independent work as "non-traditional" and a potential threat to organized labor and worker's rights in general.

As a former legislator yourself, what do candidates need to know about the value of the Independent Workforce as a voting bloc in 2020?

Independent Workers have become the backbone of our economy, growing in numbers to more than 50 million. There is no question that this sector of our economy plays a significant role in our national GDP.

As this demographic continues to grow, the voices of the independent worker will get louder and more forceful in their demand that their elected officials defend and advocate for their right to work.

As President Lincoln once said "public sentiment is everything ... whoever can change public opinion can change the government."

With the legislation of AB 5, you have spoken about the "unintended consequences" of the act, could you explain how these unintended consequences need to be factored into future solutions addressing the Independent Workforce?

Policymakers at every level have an obligation to ensure that the solutions they adopt actually solve the problem. All too often, however, a legislative "solution" will not solve the problem, and in fact, may worsen the problem or even cause an entirely different problem. Such is the case with AB 5. While the sponsors of the bill contended that the legislation was necessary to protect the rights of workers, it actually made sweeping public policy changes that severely limited the rights of thousands of independent workers. Hopefully, this misstep by the California legislature will illustrate the need for future legislative bodies to take their time and fully examine the potential unintended consequences of a policy proposal before they rush to final passage.

Do you have any insight on the potential outcomes for legal battle over Association Health Plans?

I remain optimistic that the Appellate Court will overrule the lower court and reinstate the Department of Labor's final rule, which expanded access to Associated Health Plans. Like a majority of other Americans, independent workers have a long history of struggling to secure affordable healthcare coverage. This is exactly why the DOL made this final rule to address the skyrocketing cost of healthcare and to open access to the marketplace for millions of independent workers who simply can't afford a policy under the Affordable Care Act. In review of all the legal arguments, I believe the Court of Appeals for the D.C. Circuit, will reverse the lower court and rule that the DOL acted within its authority in issuing the final rule, which will open the door for its reinstatement.

Any other predictions or insights on what to watch for in 2020?

My best guess is that most of the oxygen will be consumed by Presidential politics and the 2020 election. Therefore, I don't expect 2020 will be a breakthrough year for bipartisanship and legislative problem solving. There are, however, significant legislative matters that are poised for final passage, not the least of which is the all-important passage of the pending agreement on the USMCA.

References:

- The National Labor Relations Board. Notable Board Decisions. 2019. https://www.nlrb.gov/cases-decisions/decisions/notable-board-decisions
- The U.S. Department of Labor. Wage and Hour Division. April 29, 2019. https://www.dol.gov/whd/opinion/FLSA/2019/2019_04_29_06_FLSA.pdf
- UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA. Civil Action No. 18-1747 (JDB). March 28, 2019. https://affordablecareactlitigation.files.wordpress.com/2019/03/5940153-0-12659.pdf
- Michael Gormley. NY weighs reshaping labor laws for the gig economy. September 16, 2019. https://www.newsday.com/news/region-state/gig-economy-1.36268501

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For one, for all