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THE FLEXIBLE FUTURE OF WORK

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INTRODUCTION

Working with partners from the worlds of business, labor and academia, the R Street Institute recently took part in crafting an open letter to policymakers that lays out broad principles for how a stable and flexible safety net can serve workers in all manner of employment classifications. The ideological diversity of the letter's signatories highlights the importance of addressing the issues and opportunities presented by flexible models of employment.

The principles offer a starting point, but necessarily demand further thought and structure. This policy brief sketches an outline of how we at R Street intend to flesh out that framework in the months ahead.

BACKGROUND

Though worker classification issues recently have been elevated in the national conversation, evidence of a fundamental shift in the composition of the American labor market is, thus far, fairly scant.¹ In fact, the proportion of workers operating on a contract basis has remained remarkably stable. Instead, it is the high-profile nature of new firms that either use contract labor, or offer a platform for contractors to advertise their services to the public, that has brought attention to the need to rethink worker-classification constructs.

In the United States, state and federal tax and labor law typically treat employment status as a binary. Based on the extent of control and leverage a firm has with respect to laborers or service providers, the worker is defined either as an employee or an independent contractor. As currently constructed, the law simultaneously fails either to apportion proper responsibility to a putative employer or to acknowledge the flexibility demanded by workers who seek to set their own hours and perform for-hire tasks on multiple platforms. The current system also regards the extension of non-cash benefits by a firm to a laborer as evidence of "control."

A policy framework that provides workers and firms with much greater flexibility is crucial in light of ongoing litigation in California – the home of many "gig" economy firms – that threatens to curtail the emergence of these new opportunities for workers. Legislatures, not courts, are the appropriate venues in which to write the next chapter in the future of work.

PRINCIPLES FOR FLEXIBLE WORK

1. *Stable and flexible benefits are good for workers, business and society.* Supporting stability is best accomplished by furnishing the market with greater flexibility. New opportunities will continue to arise only in an environment that allows firms to compete across all dimensions to attract labor. The option of providing non-cash compensation should be on the table for firms seeking to hire contract workers.
2. *Markets could provide a portable vehicle for worker protections and benefits.* Some technology firms already have expressed interest in establishing an alienable, private benefits model, which would be crucial for workers unencumbered by existing employment classifications. Instead of the government requiring certain benefits prescriptively, a benefits exchange could serve as a third-party administrator through which firms would finance worker benefits, either on a pro rata basis or according to terms negotiated between the firm and the contractor.

3. *The time has come for a conversation about flexible benefits.* These questions should be answered with an eye toward individual autonomy. Contributions to benefits platforms should be wholly the province of the private relationship between a contractor and a firm. Private providers, instead of state administrators, should be given priority in the administration of new benefit platforms, precisely because many circumstances likely will be unique. A legal safe harbor from existing employment classifications might be needed for these new platforms, particularly as firms and workers continue to experiment with new workplace models.

FURTHER CONSIDERATIONS

Part of enhancing workplace flexibility entails reversing existing presumptions about the relationship between a worker and a firm. In California, as in many states, if you hire someone to do work, the presumption is that he or she is an employee. It's up to employers to demonstrate that they are not. Thus, in a fact pattern in which some factors point one way and some point the other, the tie will go to the plaintiff who charges he or she was misclassified. Even with a safe harbor in place, firms that assert their workers are contractors have the legal deck stacked against them.

One option would be to reverse the legal presumption for firms that elect to contribute to portable benefits platforms. In such cases, the burden would instead fall on the plaintiff to demonstrate that he or she has been misclassified. This would encourage employers to embrace new benefits, despite the increased responsibilities that would entail.

OUR VISION

We believe that governments (preferably, the federal government) should create a safe harbor that firms which meet certain requirements would not be subject to regulatory action or litigation based on a misclassification argument. This would create a safe harbor that would encourage employers to provide non-cash benefits to contractors – which could include health, life, disability or accident insurance, or a range of retirement products – or to extend reimbursement for expenses or for workplace injuries, without triggering the legal and regulatory tests of “control” that would define the contract as one of employment. Ideally, we believe employer-employee relations should be defined by individual contract, rather than relying on statutory, regulatory and common law definitions.

In short, if a company or platform passes a number of tests – such as working with any individuals who meet certain specified criteria, or giving people who use the platform total control over their own hours – there should be a strong presumption that the company is not an “employer” under the law.

CONCLUSION

The status quo in labor law fails to reflect the need for greater flexibility within employment arrangements. There is a real risk that litigation will subvert efforts to provide enhanced compensation. Thus, it's both timely and necessary for policymakers to examine proposals to facilitate a more flexible future of work. Fundamental change requires hard-won consensus, but we favor incremental steps to achieve these goals.

ENDNOTES

1. R.J. Lehmann, “6 charts that debunk the ‘gig’ economy,” R Street Institute, July 2015. <http://www.rstreet.org/wp-content/uploads/2015/07/R-STREET-SHORTS-NO-11.pdf>

ABOUT THE AUTHOR

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Most recently, Ian was a Jesse M. Unruh Assembly Fellow with the office of state Assemblyman Curt Hagman, R-Chino Hills, while Hagman served as vice chairman of the California Assembly Insurance Committee.

Ian is a 2009 graduate of Seattle University, with bachelor's degrees in history and philosophy and received his law degree from the University of Oregon in 2013. He is a member of the Illinois bar.