



**Flexible work laws will
help Americans with
disabilities discover more
work opportunities**

JANUARY 17, 2020

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KEY FINDINGS

1

28 STATES HAVE RESTRICTIVE CONTRACTING RULES THAT HARM WORKERS AND HINDER GROWTH.



2

INDIVIDUALS WITH DISABILITIES STRUGGLE TO FIND WORK—JUST ONE IN FIVE ARE IN THE LABOR FORCE.



3

INDIVIDUALS WITH DISABILITIES ARE ALMOST TWICE AS LIKELY TO BE SELF-EMPLOYED THAN THOSE WITH NO DISABILITIES.



4

STATES WITH A FLEXIBLE WORK TEST HAVE HIGHER RATES OF INDEPENDENT WORKERS.



5

STATES COULD ADD MORE THAN HALF A MILLION INDEPENDENT ENTREPRENEURS TO THEIR WORKFORCES NATIONWIDE BY ADOPTING THE FLEXIBLE WORK TEST.



BOTTOM LINE:

STATES SHOULD MODERNIZE THEIR LAWS TO SUPPORT FLEXIBLE WORK FOR ALL AMERICANS.

Background

While most Americans work in traditional employee-employer arrangements, millions of workers today are single-person small business owners, work as independent contractors, or are dipping their toes in the easily accessible gig economy.¹⁻³

More than 25 million small businesses today are self-employed independent workers who pay federal taxes but have no other employees.⁴⁻⁵ But the total number of independent workers could be far higher.⁶ In fact, up to 35 percent of the American workforce is freelancing for at least some of their income.⁷⁻⁸

Independent work is clearly an important and growing component of the American economy. However, because of outdated state policies, the legal complexities of working as an independent worker are too often complex and unclear.



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The problem: 28 states have restrictive contracting rules that harm workers and hinder growth

State unemployment laws require businesses to classify each worker as employees or as independent contractors.⁹ This classification dictates what types of taxes businesses must pay for each worker, how much control a business can have over a worker, and more. Over time, states have created more uncertainty around how hiring parties classify workers, making it more difficult for businesses to hire and for workers to find work.¹⁰

While state laws vary, there are typically two types of tests used to classify workers: the AB/ABC test and the common law, right-to-control test.¹¹

AB/ABC tests are restrictive, two- or three-part classification tests.¹² They presume that all workers are employees unless a business can prove otherwise.¹³ If a business were to fail to prove *any* factor of these tests, the law would require the worker to be classified as an employee instead of an independent contractor.¹⁴ Failing to properly classify these workers would expose the business to serious legal risk.¹⁵

Even worse, Part B of the test creates significant uncertainty for businesses and workers alike because it requires work be performed “outside the usual course of the business” to be considered contract work.¹⁶ But for many businesses, the boundaries of their “usual course” of work are, at best, a gray area.

For example, according to recent court rulings, a plumber who is temporarily hired by a store to repair a leak could be safely considered an independent contractor. A seamstress, however, who works at home to make dresses for a clothing manufacturer must be considered an employee.¹⁷ Further, an electrician hired to install an electrical line can be considered a contractor, but a cake decorator who designs custom cakes could be considered an employee.

Essentially, states have created legal landmines for businesses that want to hire workers. Hiring—especially in today’s booming economy—should be a simple, clear process.

The result: Many individuals with disabilities struggle to find work

One group particularly impacted by obstructive worker classification laws like the AB/ABC test is individuals with disabilities.

More than 30 million Americans have a disability, but just one in five of those individuals are in the labor force.¹⁸⁻²⁰ The unemployment rate for individuals with disabilities is more than double that for non-disabled adults, and that does not include those individuals with disabilities who cannot work or have given up looking.²¹ Even as the economy has improved since 2008, the labor force participation rate has declined for this population.²²

The good news is that many working-age adults with disabilities are looking for and want to work.²³ Self-employment is one important way that allows them to find new opportunities.

Individuals with disabilities are almost twice as likely to be self-employed than those with no disabilities.²⁴ More than 10 percent of disabled workers are self-employed, which includes those working as independent contractors or freelancing.²⁵ But in states with outdated classification tests, it is more difficult for individuals to find freelance work.

Individuals with disabilities say they like working as independent workers because it provides them with a flexible schedule, helps them meet personal or family obligations, provides them with independence, helps them work despite health limitations, and offers higher pay.²⁶ Incredibly, 79 percent of independent workers with disabilities say they would not want to work for someone else and prefer their current arrangement.²⁷

The flexibility independent work offers allows people to make a good living while still balancing their work environment based on their specific situation.



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Flexible work has given people with disabilities new opportunities to work in arrangements that meet their individual needs.



The people: Flexible work is offering individuals with disabilities more opportunities than ever

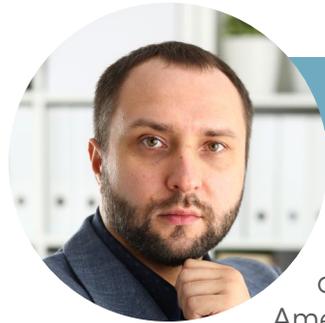
Every individual with a disability has unique situations and circumstances that dictate what type of work he or she can do and the accommodations needed to carry out his or her work. Considering that 46 percent of freelancers say they cannot work for traditional employers due to personal circumstances, including health issues and caregiving obligations, flexible work in particular has given people with disabilities new opportunities to work in arrangements that meet their individual needs.²⁸ Here are just a few of these unique stories.



REAL WORLD IMPACT

Judy owns an editing and writing services business out of Peoria, Arizona.²⁹ Hearing loss runs in her family, and hers is severe enough that she has difficulty using the phone. She struggles with in-person group meetings and phone calls, but through freelancing, Judy can attract clients from all over the world. Judy's disability does not inhibit her when using email or social media.

JUDY



DAVID

Disabilities can happen at any stage in life. David went from being a successful professional to having a permanent disability.³⁰ In 2010, he was hit by a young driver while riding his bicycle in Salem, New Hampshire. The collision resulted in broken bones and torn muscles and tendons. Although he was wearing a helmet, his brain collided with his skull, which subsequently made him one of 1.7 million Americans who experience a traumatic brain injury each year. David now cannot rely on his memory for recalling important dates and times. He finds that his memory works best in the morning and fades into the afternoon, so he adjusts his work around that. He now runs a successful professional website services company.

Megan suffers from extreme endometriosis, a very painful disorder.³¹ She has tried nearly 80 drugs since the age of 12, but none of them have stopped the pain. The pain was often so bad that it would render her unconscious. Her health forced her to transition from journalist to entrepreneur. She now creates content and blogs for her clients on her own schedule.

MEGAN



ERIKA

Erika was diagnosed with juvenile rheumatoid arthritis at 18 months old and was supposed to be in a wheelchair by the time she was a teenager.³² In October 2015, Erika found herself bedridden due to excruciating pain and without a job. She decided to create a business. "I had bills and expenses to pay, so I needed to figure out how to make it work," she says. "It was the best thing that could've happened to me." Now Erika's work schedule accommodates her treatment because she does not have to deal with fixed deadlines the way she used to.

Stories represent real people and reflect real-life situations. Pictures have been fictionalized.

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The better way: Flexible work tests

States can support entrepreneurs and protect workers by using common law or flexible work tests. By updating their unemployment laws, states can give workers and businesses alike much-needed clarity and flexibility when classifying workers as employees or independent contractors to avoid misclassification.

Unlike one-size-fits-all ABC tests, common law or flexible work tests give hiring parties much-needed discretion. No single factor or three factors prescribe how workers must be treated.³³ Instead, the focus is on who controls what work is done and how it is completed, creating a fairer standard and the most flexibility for both workers and businesses.³⁴

For example, is the worker required to report to an office? Can the worker set their own hours and schedule?³⁵ Does the hiring party supply the worker with equipment? Does the hiring party control or direct the manner in which the worker carries out their duties?

This flexibility gives businesses and workers the ability to choose the best path for each of them, unlike the one-size-fits-all ABC test, which creates an unfair playing field that stifles economic growth and limits choices for workers.

Implementing a flexible work test has two parts. First, it aligns the state's worker classification test for unemployment to the same principles used by the IRS.³⁶ This reduces the compliance burdens for businesses and entrepreneurs since they must already comply with this test for federal employment and income tax purposes.

Secondly, the flexible work test provides clarity for businesses and entrepreneurs by creating an alternative means of making classification decisions. For example, if the worker has a written contract, controls the manner and means by which the work is to be accomplished, or meets other optional criteria, that worker will be correctly recognized as a contractor.

This flexibility allows for various forms of working relationships and, at the same time, brings clarity to the definition of an independent contractor for businesses, entrepreneurs, and government agencies.

The potential: States could add more than half a million independent entrepreneurs to their workforce nationwide

States' policies on worker classification are not without consequence. In fact, states that use the common law test have higher rates of independent contractors than states using AB/ABC tests.³⁷

The rate of self-employed independent workers as a share of all working-age adults is also higher in common law states.³⁸ This trend is especially true among those with disabilities. In states using the common law test, individuals with disabilities are 36 percent more likely to be working as independent contractors.³⁹

If all states were to adopt common law tests, there could be nearly 600,000 more independent workers nationwide.⁴⁰ By reforming their existing classification systems, states can unleash more independent work within their borders.

The momentum: States are moving towards more flexible work

In 2019, three states updated their worker classification laws for unemployment—Arkansas, Oklahoma, and Tennessee.⁴¹⁻⁴³ Now, 22 states use a right-to-control test when determining how to classify workers for unemployment purposes.⁴⁴ While this is excellent progress, it also means 28 states still have work to do to make work as flexible and as accessible as possible.

With a growing freelance economy, the flexible work test allows for even more opportunities for entrepreneurs and businesses, helping new companies form and existing ones grow. It also helps workers seek alternative ways to earn a living as independent contractors.

The flexible work test encourages entrepreneurship among workers—especially Americans with disabilities—who want or need flexible work options. States should continue the momentum and continue to update their laws to help more Americans fulfill their American dream through work.

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APPENDIX 1

COMMON FORM OF AN ABC TEST

An individual shall be deemed to be an employee irrespective of whether the common law relationship of master and servant exists, unless and until it is shown to the satisfaction of the state's unemployment administrator that:

(A) such individual has been and will continue to be **free from control and direction in connection with the performance of such service**, both under his contract for the performance of service and in fact; and

(B) such **service is performed either outside the usual course of the business** for which the service is performed or **is performed outside of all the places of business of the enterprise** for which the service is performed; and

(C) such **individual is customarily engaged in an independently established trade, occupation, profession, or business of the same nature** as that involved in the service performed.

Source: U.S. Department of Health and Human Services

APPENDIX 2

FLEXIBLE WORK TEST (MODEL)

A person shall be an independent contractor (and not an employee) with respect to a hiring party under the laws of this State, including but not limited to those laws identified in Section 3, if the person qualifies as an independent contractor relative to the hiring party under the common-law right-of-control test enumerated by the Internal Revenue Service of the United States Department of Treasury in Revenue Ruling 87-41, 1987-1 C.B. 296, or satisfies the following criteria:

- (1) The person signs a written contract with the hiring party, or with a third party under contract with the hiring party, in substantial compliance with the terms of this subsection, stating that the person is being engaged as an independent contractor and containing acknowledgements that the person understands that he/she is:
 - i. Not going to be treated as an employee of the hiring party;
 - ii. Obligated to pay all applicable federal and state income taxes, if any, on any monies earned pursuant to the contractual relationship and making clear that no federal or state income taxes will be withheld; and
 - iii. Responsible to maintain and substantially bear the principal costs of any required business licenses, insurance, certifications or permits required to perform the services;
- (2) The person has filed, intends to file, or is contractually responsible for filing, in regard to the income earned from the work, an income tax return with the Internal Revenue Service for a business or for earnings from self-employment;
- (3) The person has the right to control the manner and means by which the final result of the work is to be accomplished, subject to applicable statutory, regulatory, licensing, permitting, contractual obligations to a common customer or other similar obligations, or franchise or licensed brand obligations. This provision is satisfied even though the hiring party may provide orientation or information about the hiring party's products, business, services, customers and operating systems, and training the company is required by law to provide; or
- (4) The person satisfies three or more of the following criteria:
 - i. Except for an agreement with the hiring party relating to final completion or final delivery time or schedule, range of work hours, or the time entertainment is to be presented if the work contracted for is entertainment, the person has control over the amount of time personally spent providing services, subject to any applicable statutory or regulatory requirements. Any contractual agreement by the person to provide service on specified days or hours shall not be a violation of this factor.

APPENDIX 2 (CONTINUED)

- ii. Except for services that can only be performed at specific locations, the person has control over where the services are performed.
- iii. The person is not required to work exclusively for one hiring party unless:
 - 1. A law, regulation or ordinance prohibits or restricts the person from providing services to more than one entity; or
 - 2. A license or permit that the person is required to maintain in order to perform the work limits the person to working for only one entity at a time or requires identification of the entity.
- iv. The person is free to exercise independent initiative in soliciting others to purchase his or her services.
- v. The person is free to hire employees or to contract with assistants, helpers, and/or substitutes to perform all or some of the work, subject only to legal or third-party insurance requirements as to qualifications for such individuals.
- vi. The person cannot be required to perform additional services without a new or modified contract or newly agreed upon terms and conditions for the additional services.
- vii. The person obtains a license or other permission from the hiring party to utilize any workspace of the hiring party in order to perform the work for which the person was engaged.
- viii. The hiring party has been subject to an employment-tax audit by the Internal Revenue Service and the IRS has not reclassified the person (or an individual substantially similar to the person) to be an employee.
- ix. The person is responsible for the majority of equipment, supplies and other variable expenses that he/she incurs in connection with performing the contracted for services unless: the expenses are for travel that is not local; the expenses are reimbursed under an express provision of the contract that specifically identifies the items of expense to be reimbursed; or the supplies or/and expenses reimbursed are commonly reimbursed under industry practice.

APPENDIX 3

STATE TESTS GOVERNING UNEMPLOYMENT INSURANCE

STATE	UNEMPLOYMENT INSURANCE	STATE	UNEMPLOYMENT INSURANCE
Alabama	✓	Nevada	×
Alaska	×	New Hampshire	×
Arizona	✓	New Jersey	×
Arkansas	✓	New Mexico	×
California	✓	New York	✓
Colorado	×	North Carolina	✓
Connecticut	×	North Dakota	✓
Delaware	×	Ohio	✓
Florida	✓	Oklahoma	✓
Georgia	×	Oregon	×
Hawaii	×	Pennsylvania	×
Idaho	×	Rhode Island	✓
Illinois	×	South Carolina	✓
Indiana	×	South Dakota	×
Iowa	✓	Tennessee	✓
Kansas	✓	Texas	✓
Kentucky	✓	Utah	×
Louisiana	×	Vermont	×
Maine	×	Virginia	✓
Maryland	×	Washington	×
Massachusetts	×	West Virginia	×
Michigan	✓	Wisconsin	×
Minnesota	✓	Wyoming	×
Mississippi	✓	COMMON LAW TESTS	22
Missouri	✓	AB/ABC TESTS	28
Montana	×		
Nebraska	×		

✓ Right to control test × AB/ABC or other restrictive, statutory test

Source: Empowering Independent Contractors: Why Americans need the freedom to work for themselves

APPENDIX 4

NUMBER OF SELF-EMPLOYED INDEPENDENT WORKERS, BY STATE

STATE	NUMBER OF WORKERS	STATE	NUMBER OF WORKERS
Alabama	329,993	Montana	91,520
Alaska	56,796	Nebraska	137,380
Arizona	485,984	Nevada	233,007
Arkansas	205,915	New Hampshire	107,083
California	3,374,050	New Jersey	716,918
Colorado	517,350	New Mexico	124,091
Connecticut	281,453	New York	1,751,378
Delaware	65,634	North Carolina	760,638
District of Columbia	61,347	North Dakota	55,317
Florida	2,245,127	Ohio	785,833
Georgia	915,043	Oklahoma	287,984
Hawaii	111,003	Oregon	295,127
Idaho	130,699	Pennsylvania	849,036
Illinois	985,260	Rhode Island	80,905
Indiana	415,261	South Carolina	351,453
Iowa	211,320	South Dakota	66,713
Kansas	201,268	Tennessee	524,081
Kentucky	291,230	Texas	2,399,267
Louisiana	378,493	Utah	236,794
Maine	116,299	Vermont	61,505
Maryland	497,161	Virginia	617,046
Massachusetts	559,925	Washington	478,331
Michigan	715,824	West Virginia	88,343
Minnesota	409,860	Wisconsin	350,624
Mississippi	219,596	Wyoming	51,309
Missouri	418,097	TOTAL	25,701,671

Source: United States Census Bureau

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