

# Certified Self-Employed

A New Vision for America's Independent Workforce

In recent years, a powerful force has emerged in the U.S. economy. The American Independent Workforce,<sup>1</sup> 40.9 million people strong, accounts for \$1.3 trillion in economic activity annually. In the next decade, more than half of all Americans will be, or will have been, independent at some point in their careers.

The movement toward greater independence is being driven by significant, enduring trends. Technological change has made it easier for individuals to perform at the highest level without the overhead and structure of large businesses, and to deliver services to their clients independently in a more profitable and satisfying way. The hyper-competitive business landscape is continuing to push companies to seek efficiency in the global labor market. And companies are increasingly finding that the flexible and innovative American Independent Workforce is a competitive advantage and appealing alternative to sending work offshore. This combination has spurred a rapid expansion of the independent workforce, which is growing at a rate nearly five times greater than the growth of the overall American workforce. Further, the number of independents making more than \$100,000 per year grew 45 percent between 2011 and 2019; now, fully one in five Full Time Independent workers make more than \$100,000.<sup>2</sup>

The growth of the American Independent Workforce has meaningful implications for individuals, companies, government, regulators, and society at large. Starting in the early 20th century, a “social contract” between employer and worker—ultimately overseen by government regulation—put the responsibility of supplying health and retirement benefits, maintaining minimum pay, and collecting and remitting payroll taxes squarely on the shoulders of companies. Employers, for their part, were willing to do so because it enabled them to negotiate labor contracts effectively and attract and retain employees. But the old order is breaking down.

Consumers and businesses can procure a growing range of services from non-employees over the internet or through apps, or from single-person micro-businesses who choose to be self-employed. With the rise of powerful platforms that broker and arrange such transactions and relationships, it has become increasingly difficult for all parties—workers, employers, regulators and government—to distinguish between employee and independent worker. The ambiguity has led to the development of significant gray areas and gaps. Contractors at companies that utilize the contractor model, such as Uber, Lyft, and Handy, have begun to seek employee status. Uber pursues ongoing legal issues in

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1 MBO Partners State of Independence in America 2019. <https://www.mbopartners.com/wp-content/uploads/2019/06/MBO-SOI-2019.pdf>

2 Ibid.

both the U.S. and abroad for its classification processes;<sup>3</sup> FedEx has already settled one high contractor misclassification case for \$228 million,<sup>4</sup> and Google was sued by an employee who argued the tech giant exploits and underpays their contract workers.<sup>5</sup> A modern solution must remove the risk (and potential court dates) of utilizing independent talent.

As is frequently the case, the rapid adoption of technology and innovation in business models has outpaced the evolution of rules and laws. Consequently, the rising popularity of independent work is being hampered by an overlapping and inconsistent patch quilt of federal, state, and local laws, regulations, and administrative worker classification enforcement positions. This conflict results in efficiency-destroying litigation and administrative delay surrounding the proper classification of workers.

Perhaps worse, these unresolved conflicts lead businesses to engage talent in sub-optimal ways. They may choose to outsource work overseas, or pay independent workers through disguised methods like credit cards, or perhaps even bury them under other vendors. And pervasive misclassification can lead to the loss of tax revenues, which negatively impacts governments and all taxpaying citizens. All this friction impedes innovation, adds costs to business, and lowers overall productivity. As the American Independent Workforce grows in size, strength, and importance, these circumstances will act as an economic sedative.

To provide certainty and clarity surrounding the norms and practices of employee-employer relationships in the 21st century, it is vital that we establish clear distinctions between formal employees and independent workers.

One appealing and sensible approach would be to create a formal federal certification for independent workers who meet certain criteria: the Certified Self-Employed (CSE) designation. The goal of such a designation would be to remove roadblocks impeding the growth of the independent services market while embracing many of the elements of the safety net provided by the traditional employer-employee social contract.

## THE INDEPENDENT MOVEMENT

Seven years into the current economic expansion, it is clear that the growth in the number of self-employed Americans is not a function of a weak market for payroll jobs. Indeed, the U.S. economy has never had more payroll employees—128.57 million—and the unemployment rate is a very low 3.7 percent.<sup>6</sup> And yet the

3 Noam Scheiber, Uber Drivers Are Contractors, Not Employees, Labor Board Says, The New York Times, May 14, 2019. <https://www.nytimes.com/2019/05/14/business/economy/nrb-uber-drivers-contractors.html>

4 Robert W. Wood, "Fed Ex Settle Independent Contractor Mislabeling Lawsuit for \$228 million," Forbes.com, June 16, 2015. <http://www.forbes.com/sites/robertwood/2015/06/16/fedex-settles-driver-mislabeling-case-for-228-million/#6e8c5ebf5f5a>

5 "Jacob McPherson vs. Google: 5 Fast Facts You Need to Know," Heavy.com, November 17, 2014. <http://heavy.com/tech/2014/11/jacob-mcpherson-vs-google-lawsuit/>

6 <https://www.bls.gov/news.release/pdf/empsit.pdf>

number of self-identified independent workers has continued to grow, currently exceeding 40 million. The 2019 MBO State of Independence Report found a consistent worker satisfaction rate of 76 percent, which indicates they strongly prefer independent work over traditional employment, and the highest number of independents in the nine years of the survey, 67 percent, said the choice to go independent was entirely their own.<sup>7</sup>

Our study, the longest-running and most in-depth of its kind, finds that working in this manner affords people what they most value: control, flexibility, improved health, and the opportunity to be their own boss and to do the work they love to do. Related studies regarding independent contractors and the self-employed, including those conducted by the U.S. Government Accountability Office, have also made findings consistent with that of the MBO State of Independence.<sup>8</sup>

Unfortunately, the current shape of the employment ecosystem often discourages the utilization of independents. Current laws and enforcement tilt heavily toward simply classifying independent workers as employees, as the system perceives that employee status is the “common preference,” defaulting that all workers wish to have employer-provided benefits and entitlements, regardless of their worker classification. As a result, the many companies and organizations that wish to retain independent workers are often penalized—subject to stiff penalties for not paying overtime, withholding taxes, and providing the overall protections and entitlements guaranteed to employees. Such penalties, and associated compliance costs, can reduce the economic advantage of working with independents. As a result, many organizations are hesitant to engage directly with American independent workers, and instead send work offshore.

These questions have been brought to the forefront—and to the courts—partly due to the rapid rise of on-demand service platforms. While workers who utilize such platforms as Uber and Handy comprise a small segment of the independent workforce, their appearances in courtrooms have generated an outsized amount of attention. Consequently, the legal system is defining the new terms of employee-employer relationships in a haphazard fashion. In response, many observers, experts, and stakeholders have proposed a range of solutions. For instance, former Clinton Administration Labor Secretary Robert Reich has proposed the creation of a third labor category—the “dependent contractor”—which would seek to provide more certainty in classification, and also require businesses to provide some benefits to contractors. The Brookings Institute’s Hamilton Project has proposed that independent workers pool benefits from multiple employer contributions and be granted the right to organize.

7 MBO Partners State of Independence in America 2019. <https://www.mbopartners.com/wp-content/uploads/2019/06/MBO-SOI-2019.pdf>

8 CONTINGENT WORKFORCE: Size, Characteristics, Earnings, and Benefits. Government Accountability Office, April 20, 2015. <https://www.gao.gov/products/GAO-15-168R>

## A NUANCED APPROACH

One of the challenges of improving the situation through a simple regulatory solution, or a new labor classification, is that the independent workforce is not homogenous. Instead, we propose a more nuanced approach that can satisfy the needs of all independents. At one end of the spectrum, it would protect workers delivering routine services by addressing the power imbalance created by online platforms that commoditize work. Simultaneously, it would free from regulation those workers who wish to take control of their independent business, and apply their talent and innovation to work the way they choose.

Protections are certainly needed for independents delivering routine services, who may earn low-to-moderate incomes by depending on “commodity service platforms” such as Uber, Lyft, Handy, Upwork, and Task Rabbit. These contractors may be caught in a “race to the bottom” when they offer commodity services; the protections are particularly necessary when the CSP that delivers the work also sets the pay and markets these workers as an integral component of their business model. Technology can be applied to easily track their hours regardless of how the services are delivered and paid for. To many, these workers certainly seem more like employees than independent businesses and the protections offered by our current system of laws and regulations is valuable to those that want it.

However, for other independent workers who want to pursue earning income and perhaps a full-time career as a responsible, self-employed independent contractor, it is clear that the focus of worker regulations—geared towards employees—is no longer appropriate. Today’s growing independent workforce economy requires worker regulations to provide for liberation from the “one size fits all” restraints and economic friction caused by the safety-net protections for those that only want to be employed and do not want to take on the risks and opportunities of self-employment.

A common misconception in the current approach to reducing misclassification is that all independent contractors wish to be employees. Many independent professionals truly wish to run their own businesses, and to utilize their specialization and skillset to differentiate themselves from other workers, build a diversified and multiple client income stream, focus on working when they want and where they want, and delivering valuable services to buyers that see their value. We should encourage those that wish to be self-directed, creating their own jobs and owning their own business. Regulations in the Tax Cuts and Jobs Act further incentivize workers, particularly those making less than \$157,500 (\$315,000 if filing jointly) to strike out on their own thanks to provisions that allow a 20% reduction in taxable income. A balance must be struck whereby these independents are not taken advantage of by their clients, yet can also pursue their work and engage with clients in an effective, misclassification-free manner, while funding their own safety-net and taxes.

**Any such proposal should meet several important criteria. It should be implemented quickly and be preemptive by all states.**

A federal solution leaving workers subject to the threat of reclassification in other state or local jurisdictions would not be effective. It should ensure that government mandated worker protections—traditional employee benefits—are preserved for those that need it without creating obstacles for those that wish to be responsible and accountable for their own personal security and protections, including benefits, self-employment related taxes, FICA, Medicaid, and for some structures even state unemployment insurance. It should support the continued funding of the appropriate level (the amount and frequency) of taxes, and prohibit companies from abusing a new system to avoid their employer responsibilities. It should enable people who wish to embrace the opportunity to be a self-employed business to thrive without burdening their clients with the real risks created by ambiguous worker reclassification rules and put these aspiring independents a competitive disadvantage competing with offshore workers and more inefficient service providers.

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## **THE CERTIFIED SELF-EMPLOYED SOLUTION**

Accordingly, we propose the creation of a federally recognized safe-harbor worker classification—The Certified Self-Employed (CSE). A worker who seeks and obtains CSE status would be “certified” as an independent contractor. Clients could engage the CSE worker without having to worry about litigation, administrative enforcement action, or other entanglements. With the CSE, America can get back to the business of business, and out of the business of inefficient self-examination.

CSE certification creates a mechanism for willing independent professionals to run their business through a government-approved process and commercially available systems to provide the tools and access to build their own safety nets and properly fund their taxes with third party verification. The CSE solution is a people-implemented privilege that liberates workers to become independent on their own terms.

The mission of the CSE solution is simple, direct, and critical: it creates worker-driven steps that empower independents to create partnerships with customers and clients, thus removing the paternal dependences of traditional employment in which a business provides benefits that limit the independents’ mobility. As is the case with obtaining other credentialing and certifications, the process for achieving CSE status would be thorough, but fair and enabling.

We propose a certification system as follows:

- When applying for certification, applicants would represent that they understand they are waiving the protections of employment laws. A test or legally-binding form would verify that applicants understand what this means.
- Applicants would agree to comply with applicable tax funding rules whether they are (i) pass through entities budgeting and setting aside funds from their income so that they are able to pay quarterly taxes or (ii) paying themselves as a W-2, withholding taxes each time they receive payment.
- Applicants would represent that they bear risk of loss and opportunity for profit and understand what is needed to cover their own business expenses, benefits and self-employment taxes.
- Applicants would represent that they hold themselves out to the public as offering services, and that they have or anticipate having multiple sources of income, and thus do not have economic dependency from any one company that could appear as an employer.
- Applicants would certify that they are free from more than de minimis direction/control from clients concerning the details of their work.
- Applicants should be able to represent and show proof of how they are developing their own skills independent from those provided by any one client.
- Certification would be valid for a set period, and would be subject to renewal.
- Applicants would agree to verify their tax payments via an approved service provider, such as a certified accountant or financial management platform.
- Certification would bar classification of the worker as an “employee” under any federal, state, or local law and would preempt contrary laws.
- Workers who do not go through the certification process would be subject to existing laws and regulations which favor employee status. The recipient of the service (or the platform that delivers the worker to perform the service) must adhere to local and federal employer–employee responsibilities.
- First-time applicants could apply based on their anticipated business model. Renewal applicants would need to represent that their business has been compliant with CSE terms over the previous certification term.

## **A FUTURE OF PROSPEROUS WORK**

The Future of Work is not coming, it has already arrived. And it is clear that independent workers have assumed a role that is growing in prominence and importance. The American Independent Workforce is here to stay, and will continue to expand. Given the underlying dynamics, it is becoming ever more vital that we develop a system and tools that both professionalize independent contractors and identifies that clearly for who they are.

At this critical juncture, it is our obligation, and our duty as members of the American workforce, to call upon the government—and electoral candidates—to champion the Certified Self-Employed vision and begin to lay the foundation needed for the right legislation that positions the U.S. as a leader in worker protection as well as in innovation, adaptability, and flexibility.

In the global economy, those who can deliver goods and services most productively and efficiently will win—regardless of which country they call home. If it takes too long to simplify our regulatory structure, we will see more jobs, revenues, and value move outside our borders. An old adage holds that the best time to plant a tree was 20 years ago, but that the second best time to plant a tree is today. It's time to start sowing the seeds so a new system can grow and thrive.

## **ABOUT MBO PARTNERS®**

MBO Partners delivers solutions that make it safer and easier for enterprise organizations and top independent professionals to work together. Through its proprietary platform, MBO has built a comprehensive workforce ecosystem that fuels both sides of the independent economy. MBO strengthens relationships, minimizes risk, and maximizes value for its clients. Its unmatched experience and industry leadership enable it to operate on the forefront of the independent economy and consistently advance the next way of working.

To learn more, visit [mbopartners.com](https://mbopartners.com).

# Modern Solutions for the Independent Workforce

	THE DEPENDENT CONTRACTOR	SHARED SECURITY ACCOUNT	PORTABLE BENEFITS	THE HAMILTON PROJECT	CERTIFIED SELF-EMPLOYED (CSE)
<b>The ask</b>	<p>Further defining the independent contractor, reducing the ambiguity of the independent contractor/client relationship.</p> <p>Extend employment entitlements benefits to certain independent contractors</p>	<p>Establish centrally managed entitlement program that companies engaging independent contractors would have to contribute to on behalf of IC</p> <p>Establish mandatory universal benefits, sponsored in part by multiple employers - buyers of services will have fees imposed upon them to fund universal benefits for each independent contractor</p>	<p>A ubiquitous federally administered portable benefits structure for all independent workers</p>	<p>Enable intermediaries to provide limited entitlements to on-demand workers without the risk of misclassification</p> <p>Allow organizations to disregard wage and hour rules, other employer responsibilities</p> <p>Enable organizations to offer other benefits to workers when determining hourly rate proves difficult; build captivated loyal worker group</p>	<p>Provide a clear delineation between employee and independent worker, guaranteeing: (1) all workers currently receiving employee protections may continue as such. Workers not meeting independent standards will be treated under current law (which favors employee status); and (2) workers meeting CSE criteria can engage with clients in a frictionless, compliant manner</p>
<b>How will it happen?</b>	<p>Creating clearly defined worker categories (3), including creation of Dependent Contractor category.</p> <p>Create Dependent Contractor Relations Board; grant power to state legislatures.</p> <p>Utilize "80% rule" to trigger definition of new labor category</p>	<p>Adjustment of national labor standards, creation of legislation to build entitlement program, enforce standards</p> <p>Organizations utilizing ICs to build out/budget for added cost and administration</p>	<p>Adjust most existing labor laws (including removal of categorization standard)</p> <p>Create new legislation, "safety net" system that provides steady access to benefits regardless of job status</p>	<p>Allow employers to provide benefits to non-employees; independent workers to pool benefits from multiple employer contributors</p> <p>Provide independents the right to organize</p>	<p>Create a formal certification for specific independent workers: Certified Self-Employed (CSE)</p> <p>Create a vetted infrastructure that ensures both CSE compliance, as well as mitigates system abuse intended to lower labor costs</p>
<b>Who gets involved, needs to agree to this change? What will occur?</b>	<p>IRS, DoL, State Workers' Compensation Programs, State Legislatures, to craft appropriate definitions, accompanying legislation</p>	<p>DoL, IRS (for ERISA - retirement) to require employers to meet Shared Security Standards established by the government</p> <p>Companies to contribute to Shared Security Accounts (SSAs)</p> <p>Additional government and/or an appropriate agency to enforce</p>	<p>Federal government will need to create benefits system, similar to ACA marketplace, while removing labor categorization standard</p> <p>DoL, IRS, State, Workers' Compensation, Unemployment required to participate as well</p>	<p>DoL, other regulating bodies as determined by Federal government to clearly define the benefits &amp; protections provided to all workers regardless of designation, regulate the responsibilities of providing the benefits/ protections across companies for independent workers</p>	<p>A federal entity—likely the IRS—to administer certification. The solution must pre-empt state/ local jurisdictions in order to avoid misclassification threats</p>
<b>Level of effort</b>	<p><b>Medium Effort Needed:</b> Strong legislative changes required, likelihood of getting all parties to agree</p>	<p><b>Significant Effort Needed:</b> Adjusting standards, establishing enforcement policy, carrying out said enforcement, company involvement</p>	<p><b>Exceptional Effort Needed:</b> Removing the categorization standard; financial shifts of benefits to new system</p>	<p><b>Significant Effort Needed:</b> Employers to allocate resources; establishment of "enforcement system"; drafting of legislation</p>	<p><b>Low to Medium Effort Needed:</b> Continue to ensure government mandated worker protections; time to create certification standards, application, certification test or form</p>