

# ***Uber and Other Gig Companies Maneuver to Shape Labor Rules***

**By Noam Scheiber**

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It was a potentially sweeping proposal from a Texas regulator: Companies that use a “digital network” to dispatch workers the way Uber does could label them contractors rather than employees.

The proposal, made in December, was a turning point in a campaign that has played out in legislatures and courts in numerous states, and even in Washington, as Uber and other gig-economy companies have risen to prominence in recent years.

Lobbyists involved in this state-by-state effort have worked behind the scenes to provide rule makers with a template. Hanging in the balance could be billions of dollars in costs, and even fundamental business models, as more gig companies move toward public stock offerings.

When such companies are able to classify workers as contractors, they don’t have to contribute to unemployment insurance or workers’ compensation, or heed minimum-wage and overtime laws. Industry officials estimate that a work force of employees costs companies 20 to 30 percent more than a work force of contractors — a sum worth many hundreds of millions of dollars per year to Uber.

Worker advocacy groups say the goal is to chip away at classification rules in enough places to create pressure for a broad exemption nationally.

What is notable about the Texas initiative, which would apply only to unemployment insurance, is that it emerged not from a democratically elected body but from an opaque bureaucracy. There were no hearings where outsiders were questioned, no meaningful floor debates — just a few perfunctory statements at public meetings and a 30-day comment period before the agency could issue a final proposal.

“This whole thing caught us by surprise,” said Jose Garza, executive director of the Workers Defense Project, a nonprofit group in Texas that helps workers fight wage theft and misclassification.

For weeks, the impetus for the rule was unclear. A spokeswoman for the agency, the Texas Workforce Commission, publicly denied that it relied on “outside sources” when drafting proposals.

But that narrative abruptly changed in early March when Mr. Garza’s group obtained a set of emails from the commission through a public records request. The documents suggest an ambitious new phase of the campaign by gig-economy companies to solve their worker-classification problem.

Emails involving one commissioner and her staff show extensive communications with lobbyists working with Tusk Ventures, a venture-capital and political-strategy firm. Tusk, in turn, was retained by Handy, a company that dispatches workers, Uber-style, to perform household chores like cleaning and repairs. The strategy firm’s founder, Bradley Tusk, was once a top political consultant for Uber and remains a large shareholder who could cash out millions in equity when Uber goes public this year.

Tusk Ventures appears to have been the primary author of the Texas proposal. Large portions of the draft released by the Workforce Commission mirrored a proposal that the lobbyist forwarded to the agency one year earlier. Lisa Givens, the agency spokeswoman, said she had been unaware of the correspondence when she previously commented.



Bradley Tusk, chief executive of Tusk Holdings, which includes the venture-capital and political-strategy firm Tusk Ventures. The firm has appealed to state agencies to codify the status of gig workers as contractors.

Christopher Gregory for The New York Times

And Texas is not the only place where Tusk has appealed to regulatory agencies rather than legislatures to cement gig workers' status as contractors. According to the emails, the firm has pursued similar efforts in other states, like Illinois.

Asked in an interview about the strategy of working through regulators, Mr. Tusk said, "If we believe this is the right policy, our job is to get it through, and that can be the most efficient venue."

He foreshadowed the plan in a book he published in September. "We're working multiple angles to get this done federally," he wrote. "And we're working on legislation and rules in 13 more states, too."

## What makes a worker a contractor?

Different state and federal laws define employment somewhat differently, but most focus on factors like whether managers exert significant control over workers, and whether the work is central to a company's business.

Uber, Lyft and Handy argue that their workers should be considered contractors because the workers decide when, where and how long they work. The companies say they are experimenting with ideas, like benefits, to improve workers' economic security.

But skeptics argue that the companies exert control through ratings that elicit certain behavior, like treating passengers courteously, and by barring drivers who cancel too many rides. Uber and Lyft also determine pay rates for drivers, something independent contractors typically decide.

In recent years, courts and state and federal agencies have disagreed on this question. But there's little debate that if courts and regulators classified large numbers of gig workers as employees, the move would be highly disruptive to companies that depend on them. Lyft, in its recent filing for an initial public offering, told prospective investors that being forced to classify drivers as employees "may require us to significantly alter our existing business model" and warned of potential "monetary exposure."

About five years ago, the gig companies began to head off this prospect. In the legislation that Uber and Lyft backed to legalize their business, they often sought provisions indicating that ride-hailing drivers are contractors. About 25 states have enacted such provisions, known as carve-outs.

In other states, Uber and Lyft worked with a broader group of companies to have most gig workers who are dispatched through digital platforms, not just drivers, classified as contractors.

Foes of efforts to classify gig workers as contractors say the companies determine pay rates and exert employer-like control over the workers' expected behavior on the job.

Lucas Jackson/Reuters

"Let me be clear," an Uber lobbyist announced in 2016, before an Arizona Senate committee considering such a bill. "Companies like GrubHub, Handy, Lyft, Postmates, Thumbtack, YourMechanic, TaskRabbit," she said, were all "involved with drafting this legislation and putting it forward in over 10 states." The measure passed soon after.

## Some legislatures are easier targets than others

One consequence of these industrywide measures is that they could affect far more than current gig workers. According to Maya Pinto of the National Employment Law Project, a nonprofit worker-advocacy group that has just published a report on the topic, the broader measures encourage companies to reclassify employees as contractors. Any business that dispatches employees — such as plumbers or electricians or nannies — could deem them contractors by using a digital interface to coordinate the work and meeting a few other criteria, Ms. Pinto said.

Marla Kanemitsu of Tusk Ventures, who has helped to write such measures, said the motivation for the bills wasn't just to preserve the contractor status of Handy's workers, but also to allow companies to provide benefits, like health care and retirement-savings vehicles, that might otherwise suggest an employment relationship.

"Providing benefits was always the driving force for this," Ms. Kanemitsu said.

In the first six months of 2018, six states passed bills broadly carving out gig workers from employment laws and effectively classifying them as contractors. Mr. Tusk's book referred to these states as the "low-hanging fruit of Kentucky, Iowa, Tennessee, Indiana and Utah (and medium-hanging fruit like Florida)."

But in other states, the fruit stood at a considerably higher altitude: The efforts came up short in Colorado, Georgia, North Carolina and California.

Colorado, with a large technology sector, was perhaps the most instructive example. The state was the first to pass legislation legalizing ride-hailing companies like Uber, and a local lobbying firm involved in that effort helped spearhead this one, too. It received more than \$80,000 in 2018 from Uber and Handy, according to lobbying disclosures compiled by the National Employment Law Project. The carve-out bill glided through the Republican-led Senate on a bipartisan vote last March, but it ran into resistance in the Democratic-controlled House.

Placing an order at a Brooklyn restaurant that also delivers food using the UberEats service. UberEats drivers operate on the same general model as Uber's ride-sharing service. Sam Hodgson for The New York Times

Legislatures, it was becoming clear, could be a political quagmire, even in states that appeared welcoming. And the urgency was increasing. Handy would be acquired by a public company in the fall of 2018. Uber planned to go public in 2019. The status of its drivers remained unresolved in all four states where the broader legislation had failed.

Around the same time, however, Mr. Tusk's firm was field-testing an alternative approach.

## **Drawing verbatim from a lobbyist's draft**

In December 2017, Jerry Valdez, an Austin lobbyist working for Handy, contacted an assistant to one of the three commissioners on the Texas Workforce Commission.

Like most lobbyists, Mr. Valdez and his colleagues assumed a posture of extreme solicitousness. They provided detailed responses to questions from the commissioner, Ruth Hughs, and her staff — like how such proposals might comport with federal law.

"I am sure it will be informative regarding the matters discussed," Ms. Hughs's senior legal counsel replied in one email.

Rarely were the lobbyists more helpful than in devising the rule itself, which would effectively expand to all gig workers an exemption that the state had already passed for ride-hailing drivers.

Mr. Valdez forwarded Ms. Hughs's assistant a draft, with the subject line "Handy proposal," one year before the commission released its own proposal.

Of the nine criteria that the Handy draft laid out for classifying gig workers as contractors, the commission adopted seven almost verbatim, then added two. The commission also hewed closely to Handy's definition of a "marketplace platform" and "marketplace contractor," terms of art for "company" and "worker."

Mr. Tusk, whose firm stopped working for Handy after Handy was acquired last year, said there were many advantages to lobbying state agencies for a rule change: "You're not tied to the legislative calendar. If the head of a committee in the State Assembly doesn't like it because they have some business owner in their district, you don't have as much of a problem anymore."

A Handy spokesman said: "Our work in all states — including Texas — has always been conducted through appropriate channels and motivated by a desire for constructive solutions."

The process behind the Texas regulation, whose final version will be discussed at a public meeting before the commission can approve it, appeared to stand in marked contrast to the very public debate in Colorado. Advocates on all sides there continued discussing ways to address the employment status of gig workers long after the legislation failed last spring.

Labor officials, policy experts and even a representative from Uber attended a meeting hosted by a Denver think tank on how to protect gig workers from being exploited.

"There's been a commitment to figure out a true stakeholder process," said Dennis Dougherty, executive director of the state's labor federation.

But not everybody appeared interested in an open debate. In June, when an aide to Commissioner Hughs asked the Tusk lobbyists if there were other states where regulators, rather than elected legislators, were addressing the contractor issue, one state they listed was particularly intriguing.

“We are also in discussions,” a Tusk official wrote, “with Colorado.”

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