

Portable Benefits to Improve the Gig Worker Economy

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SUMMARY

Out-of-the-box thinking is needed to answer the long-term sustainability question for providing benefits and protections for those workers operating in the gig economy.

One such solution, portable benefits plans, could close the gap without needing to tinker with the decades-old employee vs. independent contractor classification problem.

Rather than focusing on the legal status of workers in the gig economy, employer contributions for gig workers to portable

benefits plans should be exempted from the legal employment test instead.

With access to some of the basic benefits and coverage options of a traditional employee, working in the gig economy as a professional choice would be more feasible.

That means the gig economy as a whole could grow to be more sustainable with the retention of skilled workers and an influx of new full-time gig workers.

To empower gig workers, companies need legal certainty to make contributions to portable benefits plans.

The Existing Labor Law Landscape

For the last seven decades, the provision of basic benefits and protections has been passed along to employers. The New Deal, wage controls during WWII, and various acts of Congress leading up to the Great Society led to employment-centric benefits as well as guaranteed protections for workers.¹

These benefits and protections include retirement savings, disability pay, unemployment compensation, and workplace safety, which offer value to employees beyond mere compensation.² Since the New Deal era, the protections afforded to employees have expanded with the introduction of various laws like the Affordable Care Act, which expanded mandatory benefits to encompass health coverage.³

In addition to these legally mandated benefits and protections, voluntary benefits (also called fringe benefits) are similarly tied to employment, and employers often receive preferential tax status for contributions to such

benefits.⁴ Employers often offer fringe benefits as a non-compensatory incentive to increase the value of their firm over another.⁵

However, this decades-long practice of shifting the burden to employers has led to the unintended effect of increasing the cost of accessing basic coverage as an unemployed individual or independent contractor.

This mechanism has also created a potent barrier to people seeking new professional opportunities, not only because of the costs involved for a potential employer but because of the cost to an employee when switching jobs and losing their existing benefits.

In 2001, almost a decade before the gig economy was coined, an employee benefits analyst for Xerox Inc., Katherine Elizabeth Ulrich, called this problem job lock.⁶ In essence, job lock is a situation where employees become bound to an employer because leaving the job would mean losing coverage for crucial employment-related benefits — most notably health insurance.⁷

The key to alleviating job lock, according to Ulrich, was to make benefits portable.⁸

Nearly two decades later, however, static employer-offered benefits are still predominant. Moreover, innovations in the labor market like the gig economy, with its emphasis on solopreneurship, create a gap in coverage for nontraditional workers. Far from a market failure, however, this gap shows that the static mechanism for the provision of benefits relied on for decades is no longer sufficient.

One solution that is likely to close the gap for gig workers, building on Ulrich's proposal and many others since, is portable benefits.

How Portable Benefits Could Work for the Gig Economy

In the last decade, portable benefits have taken on a more concrete meaning. Portable benefits are “worker benefits that are not tied to any particular job or company,” meaning a worker “own[s] their own benefits.”⁹ This is different from traditional arrangements where benefits are attached to a specific job.

Portable benefits arrangements could be utilized by all types of firms, with or without dedicated employees on payroll. But in the gig economy, benefit portability is particularly well-suited for workers who may switch between multiple apps in a single day rather than finding opportunities through a single app-based platform.

Thus, under a traditional design for workplace benefits, the job-lock issue would be amplified for the gig economy. Portable benefits, on the other hand, would move with a



worker no matter which platform they choose to find opportunities through.

But there is a separate reason for believing portable benefits are the right path forward for the gig economy. Given the lack of access to basic benefits experienced by full-time gig workers, portable benefits plans could offer some relief.

A portable benefits plan is a fund or account that is administered by a third party and paid into by either employers, workers, or both. Because the benefits are tied to the worker, instead of an employer, workers would be free to switch back and forth between apps without fear of losing their benefits.

Proposed Portable Benefits Plan Designs

While support is growing for applying portable benefits to the gig economy,¹⁰ the precise design and mechanism for rolling out benefit portability are still up for debate.

The Aspen Institute's Portable Benefit Resource Guide offers general guidance, along with an open and adaptable framework to think through administration and benefit offerings. But others, like Nick Hanauer and David Rolf, Steven Hill, and Eli Lehrer have proposed more detailed concepts for portable benefits plans.

At a minimum, the ideal plan would include benefits like health coverage, basic injury, and unemployment insurance. However, the list of specific categories of benefits could be virtually limitless. Moreover, contributions to the plans should be voluntary for both gig workers and employers to

allow market competition to design the best portable benefits plans. Finally, portable benefits plans should be a market phenomenon created through deregulation rather than legislative fiat.

A. Aspen Institute Portable Benefit Guidelines

The Aspen Institute guide offers three criteria they believe a portable benefits plan should meet.¹¹ First, since gig workers often make income through several different platforms and employers simultaneously, Aspen suggests the benefits should be portable—fully owned by the worker and decoupled from any one specific employer. Second,

2. Who will administer the benefits?
3. Who will pay for the benefits?
4. Are contributions mandatory (for firms and workers)?
5. Who is eligible for this program?

B. Individual Security Accounts, Shared Security Accounts, & Worker-Controlled Benefits Exchanges

Nick Hanauer and David Rolf,¹² Steven Hill,¹³ and Eli Lehrer¹⁴ have each proposed more detailed concepts for portable benefits plans, which attempt to answer the questions posed by Aspen.

Hanauer and Rolf dubbed their version a “Shared Security Accounts”

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Aspen argues the benefits should be prorated. Firms should contribute to workers' accounts at a fixed rate based on the amount of earnings.

Traditionally, the fixed rate could have been linked to the number of hours worked, but Aspen points out that the amount of earnings is a more accurate measure with gig work which is completion-based. Third, Aspen concludes that the benefits plans should be universal, and every worker should be guaranteed benefits.

The Aspen Institute also poses a number of key questions to be considered:

1. Which benefits are included?

(SSA) approach. Rather than creating one large pension plan for a group of employees, Hanauer and Rolf would have the government create SSAs tied to individual workers. Hanauer and Rolf envision the SSA would offer “essentially two types of benefits: those that are accrued over time, retaining a specific dollar value, and those that provide insurance against life events, foreseen or otherwise.”¹⁵

Employers would then be required to contribute to this account. Contributions would be prorated based on “a standard eight-hour day, 40-hour week, and 2,080-hour year.”¹⁶ Hanauer and Rolf propose that such an account be endowed to “every American worker.”¹⁷

In other words, their plan is universal, extending to “all employers and all forms of employment.”¹⁸ A variant of Hanauer and Rolf’s SSA proposal, called Individual Security Accounts (ISA), was articulated by Steven Hill. ISAs would be tied to individual workers, businesses would be required to contribute to their contractors’ or freelancers’ accounts, and contributions would be prorated based on hours worked.

Unlike SSAs above, ISAs could be overseen by either government or private entities, though Hill proposes that private entities would need to be significantly regulated.¹⁹ Eli Lehrer, on the other hand, suggests an alternative approach. He suggests that legal allowances should be made for the creation of organizations called worker-controlled benefits exchanges (WCBE).²⁰ As described

suggests, it would be better to leave this open-ended and allow the market to experiment with different ways of providing WCBEs.²²

C. Issues with Applying the Proposed Portable Benefits Designs to the Gig Economy

While each of these more specific proposals offers useful elements to an overall solution, there are unresolved issues in applying them to the gig economy. For example, prorating contributions based on hours worked, as Hanauer and Rolf propose, would be misguided for the gig economy, which is task based and more accurately measured via the amount a worker earns. For the same reason, SSAs, as proposed by Steven Hill, would be inappropriate for the gig economy.

contributions do not achieve the certainty of a mandatory structure at present,²⁴ voluntary contributions are still ideal to encourage participation and innovation.²⁵

Instead of rejecting these proposals, however, key elements can be gleaned from each. Voluntary contributions and a non-prescriptive approach to the type of administrative entity are two core elements of an ideal plan.

Similarly, the exact benefits offered through a portable benefits plan should remain open ended and be allowed to adapt to the needs of gig workers.

However, proposing specific portable benefits plans through legislation — even outlining voluntariness and open-ended administration — is unnecessary at this stage. Without overcoming the barriers to platform contributions, these plans will only exist on the boundaries of feasibility and fail to reach their full potential.

Barriers to Portable Benefits Plans

The portable benefits concept faces significant barriers to successful implementation and adoption in the gig economy thanks to the inflexibility of employment classification laws.

As Palagashvili makes clear, “It is theoretically possible for gig economy companies to provide health insurance and other benefits to contractors on their platforms.”²⁶

However, as she notes, in practice there are two broad barriers: legal and economic.²⁷ Overcoming the economic barriers is a matter of encouraging contributions through

Employment classification laws are currently the greatest hurdle facing the implementation and adoption of portable benefits.

by Lehrer, these exchanges would combine the features of the SEP-IRA (a versatile retirement-savings vehicle for self-employed workers) and a broker for job-related benefits. Employer contributions would be set based on worker earnings. Gig workers could also make their own voluntary pretax contributions to their WCBE.²¹

Like ISAs, however, the administration of WCBEs is left open to government or private entities because, as Lehrer

Lehrer’s solution is closer to ideal. However, it depends on reclassifying workers as “flexible workers.” Indeed, this language could be useful for the sake of clarifying the recipients of portable benefits. But as a stand-alone solution it would only create a variant of the existing classification problem.²³

Along with reclassification, Lehrer’s solution would also include mandatory contributions from platforms to WCBEs. However, while voluntary

market incentives. But overcoming the legal barriers will require exempting voluntary platform contributions to portable benefits plans from the employment test.

A. Economic Barriers to Portable Benefits

The first barrier to consider is “organizational and economic cost considerations.”²⁸ Even if a clear avenue for platform contributions was created, encouraging platforms and employers to actually contribute would require either corporate generosity or economic incentives.

However, in the past few years platforms have already indicated a willingness to contribute to the well-being of gig workers. A primary reason for this willingness is pressure from state legislative proposals like California’s AB5,²⁹ as well as federal proposals like the PRO Act³⁰ and the Department of Labor’s proposed independent contractor rulemaking.³¹

But in response to these proposals, rather than flat-out rejection, platforms have supported meaningful alternatives that indicate the economic and organizational cost considerations are minimal.

One example is Proposition 22. In essence, Prop 22, voted on by Californians in November 2020, is the alternative to California’s AB5.³²

Prop 22 would continue to classify rideshare drivers and food-delivery workers as independent contractors while granting them a number of benefits.

These benefits included a guaranteed earnings floor, health insurance stipend, medical and disability

coverage for job-related accidents, and discrimination and termination protections.³³

Soon after, reports that gig economy platforms like Uber, Lyft, DoorDash, and others funded the state-wide campaign to pass the referendum made headlines.³⁴ Rather than signaling a nefarious corporate campaign, however, this drive is evidence of gig platforms’ willingness to offer meaningful benefits as an alternative to full-on employment classification. Similar drives in Massachusetts, New York, and Washington have emerged since.³⁵

Thus, in light of platforms’ willingness to offer benefits, even when that means supporting legal mandates, economic and organizational considerations are a minimal issue preventing platforms from contributing to gig worker benefits.

B. Legal Barriers to Portable Benefits

As a matter of law, nothing says employers cannot contribute to portable benefits plans. In fact, on top of mandating certain protections and benefits, traditional employers are often encouraged through tax incentives.

But platforms in the gig economy are not employers — they are matchmakers — and gig workers are independent contractors with the freedom to work with platforms as they choose.

This relationship, under the existing legal framework, can be complicated if a platform makes a contribution. Under state and federal law, a gig worker may be classified as an employee if a court, or federal

regulator, accepts contributions to a benefit or benefit plan as an element tending to prove employment.³⁶ This is reinforced by statutes dictating employment relationships, such as the Fair Labor Standards Act (FLSA), Family Medical Leave Act (FMLA), Employment Retirement Income Security Act (ERISA), and withholding requirements for Social Security, Medicare, and income taxes.³⁷

Regulatory tests, such as the IRS 20-factor test, also rely on the provision of benefits as an element in the overall employment classification test.³⁸

These statutes and legal tests create significant uncertainty when it comes to platform contributions to portable benefits plans. The clear legal issue is whether contributions would be sufficient to evidence employment, thereby imposing legal liability and effectively ending the flexibility enjoyed by gig workers.

This is especially relevant where multiple benefits are offered together and sustained by voluntary contributions rather than legal mandate. As others have noted, “If such a system were optional rather than mandatory, then the question of how participation would affect employment classification would likely be a disincentive for many companies to opt-in.”³⁹

The solution to overcoming this legal barrier, rather than dictating mandatory contributions, is legal certainty. Creating legal certainty, as proposed by David Rolf, Shelby Clark, and Corrie Watterson Bryant, would require a “statutory change.”⁴⁰

One close example to this concept is the New York law establishing the



Black Car Fund in 1999.⁴¹ This statute required mandatory contributions to the Black Car Fund, which provided workers' compensation insurance to taxi drivers and other for-hire drivers.⁴²

This category eventually encompassed platforms like Lyft and Uber drivers within the state.⁴³ In mandating contributions, the law retained these drivers' independent contractor status.

While this proposal has been successful in achieving the goal articulated in this brief, more can be done to improve outcomes by making contributions voluntary.

In order to allow the market for portable benefits to innovate and offer better portable benefits, rather than one or two plans with a state-sanctioned monopoly, the choice of plans receiving contributions should be left to the discretion of either gig workers, platforms or other employers.

The amount of contribution, moreover, should be left to the discretion of gig workers and employers to create the opportunity for competition.

How Policymakers Can Encourage Portable Benefits for the Gig Economy

At a minimum, state and federal policymakers should exempt voluntary contributions to a portable benefits plan from the employment classification test. This exemption would create legal certainty for gig platforms, employers, gig workers, and portable benefits plans alike. Creating this legal certainty at both levels of government, however, requires a separate but coordinated approach.

At the state level, lawmakers should exempt contributions to a portable benefits plan from the laws governing workers' compensation and unemployment insurance (which are the purview of state governments). At the federal level, innovation and experimentation in portable benefits plans should be encouraged and exempted from both DOL and IRS classification tests. Bicameral federal solutions, like the Portable Benefits for Independent Workers Pilot Program Act,⁴⁴ show promise for state and federal cooperation as multiple states experiment to find

the right solution. This bill would have awarded grants to states, local governments, and nonprofit organizations "to support innovation and experimentation in portable benefits."⁴⁵

However, beyond this legal clarification, policymakers should be careful not to overstep. Rather than dictating rigid standards for a plan or pinpointing the type of workers eligible to receive benefits, as Wisconsin did in 2021,⁴⁶ lawmakers should encourage innovation in portable benefit offerings.

Platform contributions to portable benefits plans should be voluntary.

Opening the door to voluntary platform contributions to portable benefits plans could provide much-needed relief for workers caught in the middle of the classification problem.

If policymakers stick to the limited approach outlined in this policy brief, it could provide gig workers with the support necessary to make working in the gig economy a realistic, full-time choice.

Proposal: Legislation to Exempt Contributions to Portable Benefits Plans from Employment Classification Tests

1. Portable benefits are benefits that are not tied to a specific employer but are instead tied to a specific person.
2. A portable benefit plan is a group coverage option, either offered through a fund, account, or some alternative mechanism, that may provide portable benefits including, but not limited to:
 - a) health insurance coverage;
 - b) unemployment insurance coverage; and
 - c) disability pay coverage.
3. A portable benefit plan may be administered by either a government entity or a private entity.
4. Contributions to a portable benefit plan shall:
 - a) be voluntary; and
 - b) be exempt from employment classification tests.
5. If an app-based platform contributes to a portable benefit plan for the benefit of contractors on that platform, that contribution alone shall not:
 - a) evidence employer liability; or
 - b) constitute an element of an employment relationship under the traditional tests for workman's compensation and unemployment insurance.
6. Nothing in this section shall be construed as exempting firms which, in the absence of a portable benefit plan contribution, would be considered an employer under state and federal law and subject to all the duties and obligations described therein.

Endnotes

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2. Natalie Foster, Greg Nelson, and Libby Reder, *Portable Benefits Resource Guide*, Aspen Institute, July 13, 2016, <https://www.aspeninstitute.org/publications/portable-benefits-resource-guide/>.
3. Daniel Kurt, *Laws That Protect Employees*, Investopedia, May 27, 2022, <https://www.investopedia.com/articles/personal-finance/120914/8-federal-laws-protect-employees.asp#toc-3-health-coverage>.
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5. *Ibid.*
6. Ulrich, Katherine Elizabeth. "You Can't Take it with You: An Examination of Employee Benefit Portability and its Relationship to Job Lock and the New Psychological Contract." *Hofstra Labor and Employment Law Journal* 19 (2001): 3. ("For many workers, however, the greatest barrier to job change is the loss of employer-based benefits, such as pensions and health insurance.")
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PUBLIC POLICY BRIEF

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