



## Statement of the U.S. Chamber of Commerce

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**ON: Exploring The 'Gig Economy' And The Future Of Retirement Savings**

**TO: United States Senate Committee on Health, Education, Labor and Pensions, Subcommittee on Primary Health and Retirement Security**

**BY: Camille Olson, Partner, Seyfarth Shaw LLP**

**DATE: February 6, 2018**

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1615 H Street NW | Washington, DC | 20062

The Chamber's mission is to advance human progress through an economic, political and social system based on individual freedom, incentive, initiative, opportunity and responsibility.

The U.S. Chamber of Commerce is the world's largest business federation representing the interests of more than 3 million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations. The Chamber is dedicated to promoting, protecting, and defending America's free enterprise system.

More than 96% of Chamber member companies have fewer than 100 employees, and many of the nation's largest companies are also active members. We are therefore cognizant not only of the challenges facing smaller businesses, but also those facing the business community at large.

Besides representing a cross section of the American business community with respect to the number of employees, major classifications of American business—e.g., manufacturing, retailing, services, construction, wholesalers, and finance—are represented. The Chamber has membership in all 50 states.

The Chamber's international reach is substantial as well. We believe that global interdependence provides opportunities, not threats. In addition to the American Chambers of Commerce abroad, an increasing number of our members engage in the export and import of both goods and services and have ongoing investment activities. The Chamber favors strengthened international competitiveness and opposes artificial U.S. and foreign barriers to international business.

**CAMILLE A. OLSON  
ON BEHALF OF THE U.S. CHAMBER OF COMMERCE**

**BEFORE THE UNITED STATES SENATE  
COMMITTEE ON HEALTH, EDUCATION,  
LABOR, AND PENSIONS  
SUBCOMMITTEE ON PRIMARY HEALTH AND  
RETIREMENT SECURITY**

*Exploring The ‘Gig Economy’ And The Future Of Retirement Savings*

**February 6, 2018**

Good afternoon; thank you Senator Enzi, Ranking Member Sanders and other Members of the Subcommittee for the opportunity to participate in today’s Roundtable.

I am Camille Olson, a partner in the law firm Seyfarth Shaw LLP.<sup>1</sup> I appear today on behalf of the U.S. Chamber of Commerce; the Chamber represents over three million businesses and organizations. As the gig economy has grown, the Chamber’s Employee Benefits Committee and Technology Engagement Center (C\_TEC) have been focusing on the issues before us and exploring means to rationalize our regulatory and legal system to lessen the constraints on the growth of this vital new economy.<sup>2</sup> Chamber members support the entrepreneurial spirit of the gig economy and the creation of opportunities to encourage all workers to save for retirement within the existing private voluntary system. The Chamber encourages Congress to work with this developing economic activity and enhance the flexibility, portability,<sup>3</sup> and certainty of the retirement system to allow independents to obtain retirement security. Simply put, there should be a focus on enhancing the ability of the participants in this new economy to benefit from their entrepreneurial activities and establish a foundation for their own secure retirement.

Online platforms facilitate flexible work commitments, creating greater opportunities for the employed and self-employed to increase their earnings potential through a partnership. Gig companies often provide independent workers the opportunity to optimize special skills and

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<sup>1</sup> For over two decades, I have provided legal counsel to companies seeking to establish business opportunities in all 50 states with individuals in traditional independent contractor relationships, as well as to companies with independent worker relationships in the gig economy.

Seyfarth Shaw LLP attorneys Randel K. Johnson, Richard B. Lapp and Lawrence Z. Lorber assisted in the preparation of this statement, along with case assistant Kali Froh.

<sup>2</sup> “CTECIntelligence: Sharing Economy,” U.S. Chamber of Commerce, <http://ctecintelligence.com/> and <http://ctecintelligence.com/reports/ctec-share-national-report.pdf>.

<sup>3</sup> Portability is important for independents so that savings can be accumulated in a consistent and efficient manner. Particularly for a workforce that is highly mobile, the importance of having one account—versus several small accounts that could be lost or diminished by fees—is paramount.

talents as well as already-owned assets such as cars, trucks, vans and computers by monetizing these assets so that they can provide independent services.

Today, 40 million independent workers hold a prominent role in the US economy.<sup>4</sup> Independent workers are a mosaic of consultants, freelancers, and contractors working independently or with other independents to build businesses, develop their careers, pursue artistic or occupational passions, or supplement their incomes (occasional, part time and full time) with multiple gig companies, often at the same time.<sup>5</sup> It is estimated that within the next five years a majority of Americans will have worked as an independent worker.<sup>6</sup>

Companies that comprise the gig economy are diverse, with some companies focusing on specific areas and others encompassing a wide range of services.<sup>7</sup> Independent workers differ greatly in terms of the investments they leverage, the hours they and others work to support their gig engagements, and in their priorities in terms of being compensated in fees and/or some portion of their compensation being provided as retirement or other benefits. Some independents have access to retirement benefits through unrelated pre-existing employment relationships<sup>8</sup> or individual Keogh or IRA accounts,<sup>9</sup> while 33% of independents report a top challenge is planning for retirement.<sup>10</sup> These independent workers need financial and retirement education,<sup>11</sup> and access and assistance in creating, funding, and administering efficient retirement vehicle options. On the latter, Congress can be particularly important in creating retirement savings vehicles and incentives.

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<sup>4</sup> “The State of Independence In America, Rising Confidence Amid A Maturing Market,” 2017 Report MBO Partners, <https://www.mbopartners.com/uploads/files/state-of-independence-reports/StateofIndependence-2017-Final.pdf> .

<sup>5</sup> 49% of independent workers report also having a full-time, traditional payroll-based job. *Id.* at 7. Likewise, one in five workers with payroll-based jobs engage in other independent work. *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> Some gig economy companies focus on specific areas, such as Gigster (software engineering), Airbnb (short term accommodations), and Postmates (delivery service); while other companies encompass a wide range of services, such as Thumbtack (home, business, wellness, creative design), Uber and Lyft (ride sharing, food delivery), and Upwork (accounting, copy editing, personal fitness) as well as companies involved in commercial real estate, healthcare, legal services, customer services, logistics and management consulting.

<sup>8</sup> Recent research by Prudential found that 16% of gig economy independents have access to a retirement savings plan compared to 52% of full-time employees. “Gig Workers in America: Profiles, Mindsets and Financial Wellness,” Prudential Financial, [http://research.prudential.com/documents/rp/Gig\\_Economy\\_Whitepaper.pdf](http://research.prudential.com/documents/rp/Gig_Economy_Whitepaper.pdf).

<sup>9</sup> Some independents prefer to maximize their immediate fees for results provided in lieu of benefits (which they may have access to through other personal or work relationships).

<sup>10</sup> “The State of Independence In America, Rising Confidence Amid A Maturing Market,” 2017 Report MBO Partners, <https://www.mbopartners.com/uploads/...reports/StateofIndependence-2017-Final.pdf>.

<sup>11</sup> Retirement education should be encouraged and enhanced at the school, gig company and community levels.

Developing policies that promote a positive business environment, encourage innovation, and protect workers' financial futures while also preserving flexibility is an important and challenging balance for this subcommittee to strike.

A number of structural challenges currently inhibit gig economy independents from obtaining access to retiree benefits. For example, today independents cannot be offered benefits that are governed by the Employee Retirement Insurance Security Act of 1974 (ERISA), 29 U.S.C. § 1001 et seq. As a result, gig economy companies cannot include independents within ERISA plans offered to company employees, or even facilitate transfers into retirement plans for independents.

As important, under the existing law and regulatory framework, gig economy companies cannot even offer non-ERISA information or facilitate administratively or financially the retention by independents of employee retirement benefits without jeopardizing the legal status of their operational models. Many federal, state and local laws regulating the status of worker relationships effectively prevent those companies that treat workers as independents from providing those workers with access to even non-ERISA employee benefits without undermining the legal status of their business models.<sup>12</sup>

And, the vast majority of independents do not take advantage of existing self-initiating and self-funded and administered retirement vehicles of Keoghs and IRAs available to independents due to a lack of knowledge and education. In short, the current legal and regulatory scheme effectively discourages companies who utilize independent workers from offering retirement benefits. Without the availability of this assistance, it is not surprising that many independents have not otherwise obtained access to a vehicle to save for retirement.

The foundation to solving the impediments to a portable retirement benefit system for independents includes consideration of the following: (1) increasing the availability and access to retirement and financial education and information regarding existing retirement vehicles (including Keoghs and IRAs) available to independents; (2) allowing gig economy companies to provide benefit information to independents; (3) allowing gig economy companies to assist with the administration and facilitation of direct deposit of funds into retirement vehicles; (4) allowing gig economy companies to contribute to portable retiree benefits for the benefit of independents;

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<sup>12</sup> The common law principles of agency solely determine, or guide the determination of, employment/independent contractor status under the vast majority of federal, state and local laws. In *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323-24 (1992) the United States Supreme Court adopted the common law test for determining who qualified as an employee under ERISA. The Court concluded that agency law principles and common understanding require the conclusion that “the provision of employee benefits” by a service recipient is a relevant indicia of employment. *Id.* at 324. The Supreme Court’s guidance that providing employee benefits to a worker is an indicia of employment has been incorporated into virtually all analyses of the legal status of workers. *E.g.*, “Employer’s Supplemental Tax Guide,” Department of the Treasury, Internal Revenue Service Publication 15-A (2017), <https://www.irs.gov/pub/irs-pdf/p15a.pdf> at 8 (explaining determination of worker classification considers “[w]hether or not the business provides the worker with employee-type benefits, such as insurance, a pension plan, vacation pay, or sick pay”); “Especially for Texas Employers,” Texas Workforce Commission, <http://www.twc.state.tx.us/news/eft/eft.pdf> at 33 (“[A]n employer who provides benefits such as vacation and sick leave, health insurance, bonuses, or severance pay will almost inevitably be considered the employer of the workers.”).

(5) promoting the development of flexible, portable retirement products and services with open platforms that allow for contributions from multiple organizations and participants; (6) providing independents monetary incentives to save for retirement; and (7) ensuring that gig economy companies' facilitation of retiree benefits education, administration and funding for independents does not negatively impact the independents' legal relationships with the gig companies.<sup>13</sup> These steps will serve to establish protected retirement sources for independent workers.

By considering flexible approaches to the availability, facilitation, administration and financial support of retiree benefits for independents engaged in the gig economy, we can support the financial future of these Americans, maximize our collective resources and further economic growth. On behalf of the United States Chamber of Commerce, I thank you for the opportunity to share some of our insights with you today.

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<sup>13</sup> For example, California's Labor Code allows certain companies to provide workers' compensation benefits to independents without regard to their worker classification status as an employee or independent contractor, expressly noting that providing such benefits cannot be used as indicia of employment for any purpose. Cal. Lab. Code § 4157.