

WORKING GROUP REPORT

Findings and Recommendations of the Utah Flexible Benefits Working Group

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This report was produced as part of the Flexible Benefits Working Group, co-chaired by Senator John Johnson and Representative Ryan Wilcox, which was formed to study Utah's SB 233, Portable Benefit Plan, and recommend opportunities for improvement.

Executive Summary:

The following report details the findings and recommendations of the Flexible Benefits Working Group co-chaired by Senator John Johnson and Representative Ryan Wilcox. This Working Group consisted of industry leaders in the gig economy, insurance, and trucking, academic leaders, legal experts, nonprofit think tanks and research centers, state government leaders, and legislative assistants for members of Congress on Capitol Hill.

The goal of this Working Group was to identify challenges and opportunities presented by the nation's first voluntary portable benefit law for independent contractors, SB 233, which Utah passed in the 2023 legislative session.

The goal of SB 233 was to permit businesses to provide independent contractors with contributions to portable benefit plan accounts while ensuring that those workers can maintain their independent contractor status. But through the joint effort of the Working Group, it was revealed that two primary barriers remain in the way of achieving this goal: 1.) preemptive federal regulation; and 2.) weak economic incentives for firms.

By creating a legal exemption for portable benefit plan contributions, SB 233 provided legal certainty under Utah's worker compensation code and employment security code. This means that under Utah law, organizations could voluntarily provide benefits to independent contractors without penalties. However, uncertainty remains regarding whether such contributions could create legal liability under various federal laws like the Fair Labor Standards Act (FLSA) and other federal regulations issued under the statutory authorization of federal agencies like the Internal Revenue Service (IRS), Department of Labor (DOL), and the National Labor Relations Board (NLRB).

By explicitly stating that contributions to portable benefit plans shall be voluntary, SB 233 provides limited protection against legal challenges from federal regulators. A firm's decision to provide more than mere compensation to independent contractors could become a tipping factor in the worker classification tests and it risks that those workers may be reclassified as employees. Without an express mandate from Utah requiring firms to contribute to portable benefit plans for independent contractors, similar to the way California's Proposition 22 mandates for app-based transportation and delivery providers, organizations are exposed to greater risks under federal regulations for worker classification determinations.

Nonetheless, once the issues were laid out and agreed upon, the broad consensus of the Working Group regarding the worthiness of a bill like SB 233 remained positive.

As we learned from one legal expert who offered his counsel separate from the group discussion, legal uncertainty is far from a loss in court. As that expert put it, if a lawsuit were levied against a firm for offering portable benefit contributions, "The argument could be made that SB 233 still exempts contributions from the legal test because the state of Utah has the right to improve a workers' well-being and it passed SB 233 for the sake of encouraging exactly this type of contribution for the benefit of independent contractors in its state."

In this sense, the prevailing theme of the Working Group's state-based solutions to implementation barriers is that the exemption in SB 233 should be accompanied by more comprehensive reforms, and state-created incentives that strengthen Utah's clear and explicit interest in providing independent contractors with affordable access to basic and fringe benefits.

Thus, the recommendations included in this report and the recounting of ideas proposed by the Working Group are primarily concerned with improving the economic case for portable benefit plan contributions. Indeed, more work is needed, particularly in the federal arena, to move this state-level reform toward well-settled law. But the groundwork still to be done in the state of Utah will play a major role in moving the needle for millions of workers.

Issues Considered by the Flexible Benefits Working Group

What are the barriers to implementing Portable Benefit Plans as contemplated by SB 233, and how can the state of Utah overcome them to achieve full implementation?

Summary of Barriers:

1. Under federal law, the presence of benefits may point to an employment finding under worker classification determinations, which creates legal uncertainty for organizations who may want to voluntarily provide benefits to independent contractors in Utah. This creates a major impediment to Utah's voluntary portable benefits approach. Thus, a law passed by Congress that creates legal certainty is the clearest way to overcome the federal barrier.
2. To provide additional economic incentives for the provision of benefits to independent contractors, Utah could pursue additional reforms that would help a move toward flexible benefits without direct contributions from firms. Utah could also encourage contributions through targeted tax incentives such as offering tax benefits or credits to firms and individuals who contribute to portable benefits plans.

Summary of Recommendations for Utah:

Despite the barriers, there are ways Utah can move forward with implementing an environment ripe for flexible benefits for independent contractors. We recommend a comprehensive flexible benefits policy built around the following considerations:¹

1. Clarify that allowing contractors to buy into a company's insurance plan does not make them an employee and cannot be used as a factor for determining a worker's classification status
2. Create a flexible benefits account that would include all of the items allowed in a Section 125 Cafeteria plan (e.g. retirement savings, life and disability insurance, dependent care expenses)
 - The Flexible Benefits Account would mimic a previous Utah legislation (the Medical Care Savings Account), but include benefits beyond healthcare
 - Clarify that contributions from hiring parties into a flexible benefits account cannot be used as a factor for determining a worker's classification status (as per SB 233)
 - Clarify that dollars spent by a hiring party to subsidize the purchase of flexible benefits products as outlined herein can be treated as pre-tax income for independent contractors (and thus do not count as compensation for independent contractors for the purposes of state taxation)
 - Provide a tax credit for organizations that contribute to an independent contractor's flexible benefits account.

I. Background on the Independent Workforce and Flexible Benefit Laws

A. The Independent Workforce

The growth of freelancing and platform-mediated "gig" work over the last decade has generated substantial public scrutiny. Such workers are legally classified as independent contractors rather than traditional (W-2) employees. This legal distinction has implications for tax treatment, labor regulations (such as those governing minimum wage, overtime, and collective bargaining), and social insurance programs (such as unemployment insurance, health insurance, and retirement benefits programs).

Broadly, these workers are referred to as the “independent workforce,” and they span across many industries. There are freelance writers, musicians, and graphic designers; rideshare and delivery drivers, social media influencers and online marketplace sellers; construction workers, electricians, and plumbers; nannies, chiropractors, and tutors; and independent consultants in finance, technology, law, and accounting, among many others. About 10 to 29 percent of U.S. workers engage in independent work as their primary source of income, and up to 39 percent use it as a supplementary source of income.²

To better meet the needs of the independent workforce, however, it’s first important to understand the workforce. Here are some data about the independent workforce:

- The independent workforce is growing, especially in professional, scientific, and technical services and healthcare.³
- A vast majority (79 percent) of independent workers prefer their nontraditional work arrangements over a traditional employment arrangement.⁴
- Approximately 73 percent of individuals engaged in independent work do so because of the increased flexibility of their work.⁵
- Workers cite that independent work gives them the flexibility to be more available as a caregiver for their family or say it gives them flexibility to address personal mental or physical health needs.
- Women are driving the growth of this workforce, primarily because they require flexible work arrangements when they become mothers and caregivers.⁶
- 96 percent of women in independent work arrangements indicated that the primary benefit of engaging in such work is the flexible working hours. Indeed, 70 percent of these platform-working women were the primary caregivers in their homes. A quarter of these women recently left their full-time employment for independent work.⁷
- 80 percent of independent workers said that they would like flexible, shared, or portable benefits—benefits that are not tied to a particular employer and can travel with the worker.⁸
- The majority of gig workers on app-based platforms are supplementary earners with full-time employment elsewhere.⁹
- For gig workers, the value of flexibility is significantly high. Rideshare and delivery drivers would require salaries almost twice their earnings to accept an inflexible schedule that may come with employment. And for the top 10 percent of couriers, losing flexibility is equivalent to a 15 percent pay cut.¹⁰
- Independent workers turn to non-traditional work to smooth temporary income shocks after they have faced income declines or unemployment.¹¹

B. Policy Concerns for the Growing Independent Workforce

As the independent workforce continues to grow, we must explore how to ensure these workers can access benefits while maintaining their ability to work as independent contractor. Some policymakers have sought to force these workers into traditional employment, and as a result, federal and state legislatures and agencies are attempting to reclassify independent workers as employees.

For example, in 2019, California passed Assembly Bill 5 (AB5), which introduced a stricter definition of what it means to be legally classified as an “independent contractor.” At the federal level, the Department of Labor (DOL) recently published its final rule on independent contractor classification, which could make it more difficult for workers to be classified as independent contractors.

As the research has shown, these changes will leave many workers with fewer job opportunities altogether.¹²

However, new ideas are emerging that would give independent workers the ability to access work-related benefits while maintaining their current work arrangements. These policy solutions are referred to as flexible or portable benefits—benefits that are not tied to a particular employer, can be accessed by any type of worker regardless of legal classification, and can include a variety of benefit offerings.

A challenge with flexible benefits solutions is that currently, federal and state regulations restrict organizations, businesses, and individuals from providing independent contractors with benefits because these benefits conventionally have been tied to employer-employee relationships. If an organization were to provide benefits to their independent contractors, those workers would be more likely to be reclassified as employees, creating employer liability for hiring parties and limiting flexibility for the worker.

C. The Purpose and Effect of Utah's SB 233

States beyond Utah are taking more interest in flexible benefits as a means of addressing the needs of the growing independent workforce. There are generally two types of portable or flexible benefits policies that are emerging within states:

1. **Mandatory portable benefits:** State policies that allow app-based workers to maintain their independent contractor status but require companies to provide a set of mandatory benefits for these independent contractors.
2. **Voluntary flexible benefits:** Policies that remove the legal barriers that prevent companies from giving benefits to independent contractors; they could also reform tax laws to provide more favorable treatment to self-employed workers for health insurance and retirement benefits contributions.

California's Proposition 22 is the most well-known example of a mandatory portable benefits policy in the country. Proposition 22 exempted app-based transportation and delivery drivers from California's AB5 by stipulating that app-based drivers and delivery workers are legally classified as independent contractors, but required that companies must provide a menu of benefits to those workers. A mandatory portable benefits approach was subsequently passed in Washington State in 2022 and is under consideration in other states.

In contrast, Utah's SB 233 was the first voluntary flexible benefit approach which focuses on removing the legal barriers that prevent companies from providing benefits without imposing a duty to contribute. Underlying the policy approach of SB 233 was research suggesting that policymakers can help independent workers legally access flexible benefits by removing the presence of "benefits" as a factor in worker classification tests.¹³ A secondary consideration was that voluntary participation could enable companies to provide a "menu of benefits." The voluntary flexible benefits approach is one way to implement a market-based test on whether benefits would flow to independent contractors when legal barriers are removed.¹⁴

Utah became the first state in the country to jumpstart on the voluntary flexible benefits approach. In May 2023, Utah's Governor Cox signed into law S.B. 233 Portable Benefit Plan. The bill stipulated that hiring parties can make contributions to a portable benefit plan for independent contractors and that these contributions cannot be used as evidence of an employment relationship, and they cannot not be used as a criterion in determining a worker's employment classification.

By doing so, Utah removed a primary barrier to flexible benefits for independent contractors. The drawback from this voluntary approach, as addressed above, is that many organizations may decide, as a matter of business cost, not to provide any contributions or benefits. The other drawback is that organizations will still be subject to federal regulations and would likely decide not to take the risk to provide benefits in Utah or other states that enact voluntary flexible benefits reforms as a result.

II. Findings and Suggestions of the Working Group

One possibility identified by the Group was to offer a tax incentive at either the state or federal level for firms to recoup the costs of portable benefit contributions that their traditional employment-style counterparts and competitors already rely on to offset the cost of various employee benefits.

There are currently limited economic incentives for firms to contribute to independent contractor benefit plans like there are for employer contributions to employee benefits. There are also few tax incentives for independent contractors to contribute to traditional benefit plans themselves. As proposed by a few members of the Working Group, a tax incentive at either the state or federal level for portable benefit contributions could be given to whomever makes the contribution, whether that be a firm or a worker.

We were encouraged by the participation of one particular partner, Stride Health, which connects independent contractors with portable benefits, aiming to give 1099 workers access to the same benefits available to W-2 employees. As the group convened each month, Stride was seemingly in lockstep, conceiving of and launching new products that improve the attractiveness of portable benefit plans for both firms and independent contractors.

After a presentation by Professor Jonathan Gruber, who served in an advisory capacity to the Group, members of the group conceived of a type of account – called a flexible benefits account – that would be held by any individual in Utah. Organizations, hiring parties, and individuals could make contributions to that account for a worker. The account holder of the flexible benefits account could only use those funds for medical and health insurance expenses, retirement benefits, or other types of benefits.

Interestingly, the justification for flexible benefits accounts over specific types of accounts is in Dr. Gruber's research, which found that even though retirement savings accounts were the dominant priority among workers, there was no clear consensus among the group as demonstrated by the marginal variation between retirement savings accounts and all other benefit accounts. There was no clear outlier indicating which benefits independent contractors would like to receive, owing, as Dr. Gruber pointed out, to the diversity of needs represented in the independent contractor workforce. In this respect, the open-ended definition in SB 233 of what a portable benefit plan could offer lends itself toward better outcomes for independent contractors than a precise listing of benefits like that listed in other state approaches like California's Proposition 22.

An additional component of the ideal Flexible Benefits Account contemplated by the Working Group was that Utah could allow contractors who hold those accounts to purchase benefits using state pre-tax dollars.

Following Dr. Gruber's presentation, Austen Bannan of Americans for Prosperity raised the possibility of adding portable benefit contributions contemplated in SB 233 to a section of Utah's code which allows employers and individuals to lower their taxable income by contributing to a type of health savings account, called a Medical Care Savings Account (MCSA). The MCSA passed into law in 2001 with several changes over the years, including a short-lived tax credit which, by 2015, was only claimed by twelve Utahns as a result of the federal Affordable Care Act reforms. However, combining the exemption language of SB 233 and the MCSA's pre-tax contributions for eligible health insurance could offer more certainty for firms in the specific provision of health insurance benefits to independent contractors.

Building on the idea, Caden Rosenbaum of Libertas Institute pointed out that tax incentives could be given

directly to independent contractors for their contributions to a portable benefit plan. He suggested that adding portable benefit plans to the eligible pre-tax purchases an individual could make in the Utah MCSA language could effectively extend that tax benefit to the more diverse selection of portable-style benefits.

Beyond tax incentives and firm contributions, Dr. Liya Palagashvili of the Mercatus Center presented a set of ideas that would reflect infrastructural or foundational changes that could help independent contractors access group rate insurance plans. For example, she presented ideas on how Utah could allow independent contractors to join together for any reason for the purposes of buying insurance on the small group insurance market (as long as they are residents of Utah).

Another idea Dr. Palagashvili suggested is to clarify in state law that independent contractors can buy into a company's insurance plan as if they were employees, but doing so cannot be used as a factor for determining a worker's classification status. Thus, if an independent contractor wanted to access the group rates of an organization that the worker regularly contracts with (and the organization agreed to this), that independent contractor would be allowed to do so without risking their worker status.

Finally, Dr. Palagashvili suggested that Utah could expand the Medical Care Savings Account into a Flexible Benefits Account—based on Dr. Gruber's research and other studies, many independent contractors already have access to health insurance benefits and would like access to other types of benefits. A flexible benefits account would better reflect the diversity of the independent workforce and their needs.

Conclusion

While the Working Group created by Sen. Johnson and Rep. Wilcox was an important step in the right direction, more work is needed particularly in the federal arena. Moreover, this report is not an exhaustive discussion of the barriers and opportunities to successful roll-out of flexible benefits to independent contractors. But laying the groundwork of comprehensive reform at the federal level, as well as in the states including Utah, flexible benefits will play a major role in moving the needle for millions of workers.

As identified by this Working Group, the following barriers stand in the way of successful implementation of Utah's portable benefit solution, SB 233:

1. Under federal law, the presence of benefits may point to an employment finding under worker classification determinations, which creates legal uncertainty for organizations who may want to voluntarily provide benefits to independent contractors in Utah. This creates a major impediment to Utah's voluntary portable benefits approach. Thus, a law passed by Congress that creates legal certainty is the clearest way to overcome the federal barrier.
2. To provide additional economic incentives for the provision of benefits to independent contractors, Utah could pursue additional reforms that would help a move toward flexible benefits without direct contributions from firms. Utah could also encourage contributions through targeted tax incentives such as offering tax benefits or credits to firms and individuals who contribute to portable benefits plans.

The following recommendations, recommendations to overcome the federal barrier were sparse, the Working Group decided on the following non-exhaustive list of recommendations to overcome the state-level barriers in the state of Utah:

1. Clarify that allowing contractors to buy into a company's insurance plan does not make them an employee and cannot be used as a factor for determining a worker's classification status
2. Create a flexible benefits account that would include all of the items allowed in a Section 125 Cafeteria plan (e.g. retirement savings, life and disability insurance, dependent care expenses)
 - a. The Flexible Benefits Account would mimic a previous Utah legislation (the Medical Care Savings Account), but include benefits beyond healthcare
 - b. Clarify that contributions from hiring parties into a flexible benefits account cannot be used as a factor for determining a worker's classification status (as per SB 233)
 - c. Clarify that dollars spent by a hiring party to subsidize the purchase of flexible benefits products as outlined herein can be treated as pre-tax income for independent contractors (and thus do not count as compensation for independent contractors for the purposes of state taxation)
 - d. Provide a tax credit for organizations that contribute to an independent contractor's flexible benefits account.

Endnotes

1. A comprehensive account of flexible benefits reforms states could make is outlined in a forthcoming Mercatus Center policy brief by Dr. Liya Palagashvili and Jonathon Wolfson.
2. See Table 1 in Liya Palagashvili, "Understanding Nontraditional Work Arrangements and the Policy Landscape for Self-Employed and Gig Workers," American Enterprise Institute, July 2023.
3. Katherine Lim et al., "Independent Contractors in the U.S.: New Trends from 15 Years of Administrative Tax Data" (working paper, Internal Revenue Service, Washington, DC, July 2019), <https://www.irs.gov/pub/irs-soi/19rpindcontractorinus.pdf>
4. US Department of Labor, Bureau of Labor Statistics, "Contingent and Alternative Employment Arrangements—May 2017," press release, June 7, 2018, <https://www.bls.gov/news.release/pdf/conemp.pdf>
5. Ozimek, "Freelance Forward Economist Report."
6. Liya Palagashvili and Paola Suarez, "Women as Independent Workers in the Gig Economy," Mercatus Working Paper, March 2021
7. Hyperwallet, The Future of Gig Work Is Female: A Study on the Behaviors and Career Aspirations of Women in the Gig Economy, 2017, https://www.hyperwallet.com/app/uploads/HW_The_Future_of_Gig_Work_is_Female.pdf
8. Tito Boeri et al., "Solo Self-Employment and Alternative Work Arrangements: A Cross-Country Perspective on the Changing Composition of Jobs," *Journal of Economic Perspectives* 34, no. 1 (Winter 2020): 170–95, <https://pubs.aeaweb.org/doi/pdfplus/10.1257/jep.34.1.170>
9. Collins et al., "Is Gig Work Replacing Traditional Employment?"; Lim et al., "Independent Contractors in the U.S."
10. M. Keith Chen et al., "The Value of Flexible Work: Evidence from Uber Drivers," *Journal of Political Economy* 127, no. 6 (2019): 2735–94, https://www.anderson.ucla.edu/faculty/keith.chen/papers/Final_JPE19.pdf; Laura Katsnelson and Felix Oberholzer-Gee, "Being the Boss: Gig Workers' Value of Flexible Work" (working paper, Harvard Business School, Boston, MA, May 2021), https://www.hbs.edu/ris/Publication%20Files/21-124_4a28fd0c-e395-46ce-b621-2b32c3dd2fa0.pdf.
11. Dmitri K. Koustas, "What Do Big Data Tell Us About Why People Take Gig Economy Jobs?," *American Economic Association Papers and Proceedings* 109 (2019): 367–71, <https://www.aeaweb.org/articles?id=10.1257/pandp.20191041>.
12. Liya Palagashvili, et al., "Assessing the Impact of Worker Reclassification: Employment Outcomes Post-California AB5" (working paper, Mercatus Center, January 2024), <https://www.mercatus.org/research/working-papers/assessing-impact-worker-reclassification-employment-outcomes-post>.
13. See Liya Palagashvili, "Flexible Benefits for a Flexible Workforce: Unleashing Portable Benefits Solutions for Independent Workers and the Gig Economy," George Mason University, Mercatus Center, February 3, 2023, <https://www.mercatus.org/research/policy-briefs/unleashing-portable-benefits-solutions>.
14. See Liya Palagashvili, "Flexible Benefits for a Flexible Workforce: Unleashing Portable Benefits Solutions for Independent Workers and the Gig Economy," George Mason University, Mercatus Center, February 3, 2023, <https://www.mercatus.org/research/policy-briefs/unleashing-portable-benefits-solutions>.

Flexible Benefits Working Group

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**The findings, recommendations, and concerns detailed in this report do not represent the thoughts or positions of any single participant or that participant's affiliated organization. The inclusion of this participant list is not intended to represent a joint agreement, or a settled position of any person listed or their organization's position. This report is the compilation of collaborative discussions that took place over the course of three months, taking account of legitimate policy disagreements, differing points of view, interests, and priorities to guide the future deliberation and priorities of Sen. John Johnson and Rep. Ryan Wilcox who co-chaired and convened the working group.

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