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**The Deep Rot Behind the Pretty Picture:
Employee Misclassification Continues to Harm Workers and the
Commonwealth**

Submitted Testimony of
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Good morning, Chairman Dawkins, Minority Chairmen Mackenzie and Members of the Committee. Thank you for inviting me to submit testimony for today's informational meeting.

My name is Julia Simon-Mishel and I am the Supervising Attorney of the Unemployment Compensation Unit at Philadelphia Legal Assistance ("PLA"). We have been assisting workers with unemployment cases since 1996, and I have represented unemployment claimants for over a decade. I previously served by appointment on Pennsylvania's Benefit Modernization Advisory Committee and on the Pennsylvania Unemployment Compensation Advisory Council. I also focus on national unemployment policy issues as the co-chair of the National Academy of Social Insurance's Unemployment Insurance Task Force.

I began my career as a Skadden Fellow helping unemployment claimants pursue wage theft claims against their former employers. Many clients walk into our office, and after asking "how can I get my job back?" they ask, "can you get me the money I was never paid?" Misclassification is a form of wage theft. In addition to taking money out of the hands of workers, and the government, misclassification also impairs workers' ability to agitate for workplace safety, build a retirement safety net, and otherwise thrive at their jobs. In my testimony, however, I will focus on the way that misclassification undermines access to Pennsylvania's unemployment compensation system.

I litigated *Lowman v. Unemployment Compensation Board of Review* before the Pennsylvania Supreme Court. In 2020, the Court found that Mr. Lowman, an UberX driver, met the requirements for an “employee” under the test used for “employment” in the Pennsylvania Unemployment Compensation Law and reinstated his benefits. My experience representing gig workers as they were consistently denied unemployment, despite never having control over the end of their job, motivated me to pursue *Lowman* to the Supreme Court. After *Lowman*, many gig workers can now access unemployment benefits, but often only after an arduous appeal process because companies continue to misclassify them.

Companies that misclassify workers sell legislators a pretty picture: that their workers are actually “partners” with equal power and the ability to build their own business. But scratch the surface and it becomes clear that misclassified workers are working under exploitative conditions and barred from accessing vital benefits. In addition to gig workers like Mr. Lowman, PLA has had countless clients experience misclassification across different economic sections, but the key features remain the same. Misclassified clients have delivered luggage for an app, provided home healthcare, driven people and groceries, served as a certified nursing assistant, and delivered food—substantially different sorts of work. But each has had virtually no control over their assignments, each has had their employers monitor them closely and hold them accountable to employer-imposed rules, and each has had their pay determined entirely by their employer. Each has been misclassified as an independent contractor. And each has faced barriers to unemployment benefits due to that misclassification:

- Mr. N was misclassified while working a part-time job with a luggage delivery service. In his mid-fifties with a large family, he found that his full time job did not pay enough to provide for his family. Like many low-wage workers, years of wage suppression made it impossible for Mr. N to survive on one job, forcing him to pick up a second part-time job in the gig economy. Delivering luggage was not his business; he is a machinist by trade. All of the work was assigned by the company through a mobile application (“app”), and he could not proactively select or choose assignments. He had no interaction with the customers; instead, all payments were made through the app and then paid to him by the company. The company had the power to monitor his work closely and could fire him if customers complained. However, the company classified him as an independent contractor, which meant he was denied Pennsylvania unemployment benefits when he lost the job during the pandemic. He was only able to secure benefits after months of waiting and a three-hour hearing with his attorney from Philadelphia Legal Assistance.

- Ms. W was misclassified while working with a home health care agency, a common problem among the home care workers that Philadelphia Legal Assistance serves. Ms. W is an older married woman who worked in the home health field for much of her career. The company she worked assigned her to provide home care to a specific patient, required her to submit a detailed timesheet, and paid her directly (however, they took a twenty-five percent fee out of her pay). The company had also performed a robust screening before hiring her and assigning her patients. During her career, Ms. W had always worked as a full-time employee with employer-provided health insurance when serving as a home health aide. Despite little difference in the operations of this new job, and a supervisor that controlled how she provided care, the company misclassified Ms. W as an independent contractor. This sudden misclassification left her confused about filing taxes and with a large tax burden. When she ultimately left, she was denied unemployment benefits until a successful appeal by her attorney.
- Ms. G worked for three different food delivery companies as she tried to piece together a living wage. She was immediately taken aback by how the apps tracked her and reviewed her work based on customer feedback. She had no way to fight back when one company deactivated her because a customer claimed she did not deliver a food order, despite her having a photo of the delivery. She worried about getting injured on the job without health insurance, and she knew the three companies considered her an independent contractor and would not provide workers' compensation. It felt like she was constantly living on the edge with no support or safety net. When she started to reject delivery assignments that would not pay enough to even cover the gas expenses, the companies all deactivated her from the apps, with no recourse. Her application for Pennsylvania unemployment compensation was also initially rejected because of the misclassification. She advocated for herself, along with her attorney, and ultimately the agency recognized that she had been working as an employee—but the process took nine months and kept her from getting unemployment when she needed it most.
- Mr. P worked for over a decade as a misclassified driver for a medical office. Mr. P had been working for a different medical office when he was poached by his current company with the promises of higher pay. Throughout his eleven years working for the company, Mr. P was paid twenty dollars per patient transported and received his payments through the Cash App. In his role as a driver, Mr. P was expected to be available and ready to drive patients to and from appointments during all operating hours. Throughout the day, the company would send text messages to direct Mr. P activities. The text messages generally contained the

patient’s name, address, and pick-up time. But when there were no patients that needed transportation, the company still sent Mr. Patterson other work, including transporting items and mail, and administrative work. He was never compensated for that work. Because his company required him to work full time hours, he never performed services for any other company. When the company let him go last year, he discovered none of his wages had been reported to unemployment, and has been fighting to get benefits ever since.

Our clients had to seek out legal aid services for assistance with the effects of misclassification outside of the workplace—a common problem for people in their position. For many workers, misclassification prevents them from seeking unemployment insurance when they are laid off or involuntarily separated from their employers—compensation to which many would have a legal entitlement if properly classified. Barring access to the social safety net particularly harms misclassified workers because they often live and work in precarious circumstances. Mass layoffs during the pandemic only exacerbated this problem, and while federal changes to expand access to unemployment benefits temporarily papered over the issue, those programs have since lapsed.

In Pennsylvania, like in many states, misclassification of workers as independent contractors prevents them from accessing unemployment compensation when their employer lays them off or they are otherwise separated from employment. They are not “financially eligible” because their employers have not reported their wages to the state database. Misclassification also often harms workers who start a part time job, like driving for Grubhub, after losing qualifying full time employment, because the state incorrectly disqualifies them as “self-employed” when they report their earnings. And although workers can sometimes get access to benefits through the appeals process, that often requires legal representation, which many workers cannot afford or otherwise obtain.

Employers misclassify workers partly because they have significant financial incentives to avoid making contributions to a state’s unemployment insurance fund. In Pennsylvania, employers in just the construction industry alone save as much as \$10 million a year by misclassifying workers and avoiding unemployment contributions. *See* Russel Ormiston & Stephen Herzenberg, *Illegal Labor Practices in the Philadelphia Regional Construction Industry: An Assessment and Action Plan*, Keystone Research Center (Jan. 11, 2019). In other industries, it is far more. With more than 60,000 app-based drivers in Pennsylvania, where employers pay an average employer contribution of \$610 per employee to the unemployment compensation fund; misclassification leads to more than \$36 million in missing contributions.¹ These savings also give such businesses a market

¹ The average annual unemployment compensation contribution in Pennsylvania is \$610 and there are an estimated 62,189 platform workers in the state. *See* U.S. Department of Labor, Office of Unemployment Insurance, Division of Fiscal and Actuarial Services, *State Unemployment Tax Measures Report* (March 2019),

advantage—either more profits or lower pricing—over other competitors that properly classify workers and thus pay into the system. *See Dynamex Operations West v. Superior Court*, 416 F.3d 1, 33 (Ca. 2018). That advantage comes at the expense of the system, which loses out on millions per year, creates more work for agency employees, *and* makes it harder for companies that properly classify workers and pay good wages to compete and thrive.

When employers do not contribute to the unemployment fund because they’ve misclassified someone as an independent contractor, that person faces an arduous road to obtaining unemployment benefits. Some workers will never even try to apply, after years of being told by the employer that they are not eligible. Others will apply and receive denials because there is no wage history for them in the system, which in every state relies exclusively on quarterly reports from employers that make contributions to the fund. At this stage, many workers will give up; only a determined few will file appeals to argue they have been misclassified and that their wages should be included. This process is an uphill battle, and involves issues usually litigated by attorneys in court, not *pro se* litigants in administrative proceedings. To make matters worse, the process can take months or years, delaying the receipt of benefits during the most critical time—the catastrophic drop in income directly following job loss.

Unlike the business owners whom legislators had in mind when adding the “self-employment” disqualification to the Pennsylvania Unemployment Compensation Law, misclassified workers do not actually have an ongoing, independently-functioning business enterprise that they ceased by choice. Instead, their ability to work for wages is completely at the whim of their employer. Involuntary separation as a misclassified worker can make their entire income vanish overnight. We also know from experience that the jobs they lost did not pay enough to establish a robust personal rainy-day fund or other savings that could make up for the exclusion from unemployment compensation. When misclassified low-wage workers lose their jobs, they cannot rely on the social safety net and often have nowhere to turn.

<https://oui.doleta.gov/unemploy/pdf/sigmeasures/sigmeasuitaxsys18.pdf>; *see* Bureau of Labor Statistics, *Economy at a Glance*, <https://www.bls.gov/eag/eag.pa.htm>; Bureau of Labor Statistics, *Electronically Mediated Work: New Questions in the Contingent Worker Supplement* (Sept. 2018), <https://www.bls.gov/opub/m1r/2018/article/electronically-mediated-work-new-questions-in-thecontingent-worker-supplement.htm>.