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Chairman Bobby Scott
U.S. House of Representatives Committee on Education and Labor
2176 Rayburn House Office Building
Washington, D.C. 20515

Re: Hearings on the Future of Work

Dear Chairman Scott:

The National Women's Law Center submits this letter in response to the three hearings on the future of work held by the Committee and its Subcommittees last fall and earlier this year. The hearings explored issues including misclassification, worker protections and the ability to organize and bargain, fair wages and hours for workers, workplace health and safety, job displacement, and the use of algorithms in employment decisions. We applaud the Committee and Subcommittees for your foresight in examining these critical issues, which have now taken on even greater significance in light of the COVID-19 pandemic and the subsequent health and economic crises, and efforts to address systemic racism in this country. We appreciate the opportunity to provide this information, and look forward to working with you as you consider and formulate policy solutions in response.

The National Women's Law Center has worked for over 45 years to advance and protect women's equality and opportunity—with a focus on women's employment, education, income security, health, and reproductive rights—and has long worked to remove barriers to equal treatment of women in the workplace. We urge you to ensure that any conversation about the future of our economy and of work includes a robust and intersectional focus on the future of women workers – particularly women of color. The COVID-19 crisis has exposed how the work performed primarily by women, and particularly women of color, has long been and continues to be unprotected, undervalued, and underpaid, even as the rest of the country is depending on it as never before. Even before the pandemic, women were half of the labor force, with 3 in 4 mothers (76.8 percent) working full time.¹ More than 40 percent of mothers are the sole or primary

¹ Amanda Fins, *Effects of COVID-19 Show Us Equal Pay Is Critical for Mothers*, NAT'L WOMEN'S LAW CTR. (June 2020), <https://nwlc.org/resources/equal-pay-for-mothers-is-critical-for-families-factsheet/>.

breadwinner for their families—and that proportion is even higher for Black and Latina mothers.²

Today, women are the vast majority of workers risking their lives during the COVID-19 pandemic to provide health care, child care, domestic work and other essential services³— and many are women of color.⁴ Both women and mothers are overrepresented in those jobs,⁵ as well as in the industries shedding jobs as a result of the pandemic, like restaurants, retail, and hotels.⁶ In May 2020, about 1 in 6 Black women and nearly 1 in 5 Latinas were unemployed.⁷

The economic crisis created by COVID-19 threatens to exacerbate trends of increasing work precarity, which already posed particular harms to women, and disproportionately to women of color. Even though public discussions about the future of work tend to focus on digital platform work, broader economic and political trends have made jobs increasingly precarious for millions of workers, not only those engaged in the so-called “gig economy.” Corporations have accelerated efforts to structure workplaces in ways that bypass labor and antidiscrimination protections and diminish workers’ bargaining power, including efforts to lower labor costs by fissuring employment through the use of contracts, temporary employment, and part-time work.

The proportion of all workers engaged in precarious work—including part-time, temporary, and contract work—has increased in the last 20 years, but women, especially women of color, are significantly more likely than men to work in the lowest-paying jobs⁸ and in part-time jobs.⁹ Many of the front-line jobs in this pandemic, primarily held by women, are also precarious work.

Low-paid, part-time, and contract workers are less likely than workers in traditional, full-time employment to have jobs with stable schedules, predictable incomes, or benefits such as paid leave, retirement savings plans or health insurance. Indeed, cleaning, caregiving, and many forms of service work that have been performed by women and disproportionately women of color and immigrant women have long been treated as “gig” work, denied the basic labor and

² See Sarah Jane Glynn, *Breadwinning Mothers Continue to Be the U.S. Norm*, CTR. FOR AMERICAN PROGRESS (May 10, 2019), <https://www.americanprogress.org/issues/women/reports/2019/05/10/469739/breadwinning-mothers-continue-u-s-norm/>.

³ NAT’L WOMEN’S LAW CTR., *Women Make Up the Majority of Front Line Workers of the COVID-19 Crisis* (May 2020), <https://nwlc.org/resources/women-make-up-the-majority-of-front-line-workers-of-the-covid-19-crisis/>.

⁴ Maya Raghu & Jasmine Tucker, *The Wage Gap Has Made Things Worse for Women on the Front Lines of COVID-19*, NAT’L WOMEN’S LAW CTR., Mar. 30, 2020, <https://nwlc.org/blog/the-wage-gap-has-made-things-worse-for-women-on-the-front-lines-of-covid-19/>.

⁵ Amanda Fins, *Effects of COVID-19 Show Us Equal Pay Is Critical for Mothers*, NAT’L WOMEN’S LAW CTR. (June 2020), <https://nwlc.org/resources/equal-pay-for-mothers-is-critical-for-families-factsheet/>.

⁶ Claire Ewing-Nelson, *Despite Slight Gains in May, Women Have Still Been Hit Hardest by Pandemic-Related Job Losses*, NAT’L WOMEN’S LAW CTR. (June 2020), <https://nwlc.org/resources/may-data-shows-women-have-been-hit-hardest-by-pandemic-related-job-losses/>.

⁷ *Id.*

⁸ Jasmine Tucker & Julie Vogtman, *When Hard Work Is Not Enough: Women in Low-Paid Jobs*, NAT’L WOMEN’S LAW CTR. (April 2020), <https://nwlc.org/resources/when-hard-work-is-not-enough-women-in-low-paid-jobs/>.

⁹ Claire Ewing-Nelson, *Part-Time Workers Are Paid Less, Have Less Access to Benefits – and Most Are Women*, NAT’L WOMEN’S LAW CTR. (February 2020), <https://nwlc.org/resources/part-time-workers-are-paid-less-have-less-access-to-benefits-and-most-are-women/>.

civil rights protections associated with formal employment. Without these protections, workers shoulder the risk of slow business, ill health, unemployment, and more.

Regardless of the terms of workers' employment relationship, employer denial of paid leave, fair and flexible work schedules, and other benefits has disproportionate effects on women, particularly women of color, who often are primarily responsible for both breadwinning and caregiving in their families. This disproportionate impact is heightened during the pandemic, as many mothers are being forced to put their own and their family's health at risk by continuing to work to provide for their family while also shouldering increased caregiving responsibilities as schools and other care providers close—all for a fraction of what their male counterparts are being paid or in the case of unpaid domestic labor, no pay at all. Lost earnings due to the gender wage gap, on top of low wages, are exacerbating economic insecurity, especially now, for many women and mothers of color, and for the families who depend on their income.

With caregiving and service jobs expected to consume a large share of our economy over the next decades, an increasing proportion of the workforce will have very little choice other than to seek a job where employers routinely deny workers livable wages, fair schedules, the right to organize and so much more. And although the growing numbers of caregiving jobs that women are likely to fill are less vulnerable to automation than most, as automation causes displacement in other low-paid fields, displaced workers may flood the market for care jobs, further increasing the number of jobs without fair wages, critical workplace protections and benefits.

Not only are workers, especially women workers and workers of color, facing fissured workplaces, and the proliferation of precarious work in which employers deny workplace protections; a growing number of companies are using algorithmic technology to hire and manage their workforce. As machine learning increasingly guides hiring practices and other major employment practices, it is essential that policymakers act to prevent employers from importing human biases into computerized systems.

In the midst of the COVID-19 pandemic, lawmakers and advocates have the opportunity to engage in creative thinking about how we remake the future of work for women and all working people to ensure fair pay, safe and dignified workplaces and high-quality jobs. The National Women's Law Center urges the following reforms.

I. Extend explicit protections to gig workers and independent contractors, and those working in small workplaces.

Regardless of their employment arrangement or the industry in which they work, the right to organize, protection from discrimination and harassment, and the ability to hold an employer responsible for violations of their rights, are paramount to the ability of women, people of color, and immigrants to work with safety, equality and dignity. Yet many workers do not have access to these rights, either because they are not considered "employees" or because they work for small employers who are exempt from these laws governing these rights.

At the October 23, 2019 Future of Work Hearing, you asked several questions highlighting the absence of or limited protections for independent contractors under critical antidiscrimination and labor laws, including Title VII and the National Labor Relations Act (NLRA). The rise of the gig economy and the increase in the share of the workforce classified as independent contractors underscore the need for long overdue legal protections for some of our nation’s most vulnerable workers.¹⁰

Gig workers and other workers who are typically classified as independent contractors—including many people working in agriculture, hospitality, and care work, who may be misclassified by employers, as well as platform economy workers whose ability to earn an income is frequently dependent on customer ratings, who may work in customers’ homes, and who have no recourse to a human resources department—are particularly vulnerable to workplace discrimination and other forms of coercion and abuse. Tipped workers, too, are particularly vulnerable to harassment and exploitation when virtually all of their income depends on the whims of their customers—as are workers who do not have dependable and stable work schedules, but depend upon their employers’ good will to be assigned to work. These difficulties are compounded for women of color and immigrants, who hold low-paid independent contractor jobs at disproportionately high rates¹¹ and who experience added economic insecurity due to gender and racial wage¹² and wealth¹³ gaps.

Workplace civil rights laws like Title VII, and most state antidiscrimination laws, by their terms only protect “employees” from workplace discrimination, including harassment and retaliation. Moreover, workers classified as independent contractors have no rights to collectively bargain for workplace protections under the NLRA. In addition, individuals working in small establishments, with fewer than 15 employees, such as most domestic workers, are excluded from core federal civil rights protections against discrimination at work.

¹⁰ Corey Husak, *How U.S. Companies Harm Workers by Making Them Independent Contractors*, WASH. CTR. FOR EQUITABLE GROWTH, (July 2019), <https://equitablegrowth.org/how-u-s-companies-harm-workers-by-making-them-independent-contractors/> (as of 2019, approximately 10.5 million to 15 million workers in the United States are classified as independent contractors); Greg Icacurci, *The gig economy has ballooned by 6 million people since 2010. Financial worries may follow*, CNBC.COM, Feb. 4, 2020, <https://www.cnbc.com/2020/02/04/gig-economy-grows-15percent-over-past-decade-adp-report.html> (15 percent increase in gig workers since 2010); Yuki Noguchi, *Unequal Rights: Contract Workers Have Few Workplace Protections*, NPR, March 26, 2018, <https://www.npr.org/2018/03/26/593102978/unequal-rights-contract-workers-have-few-workplace-protections>.

¹¹ Jenny Yang, et al, *Will the Pandemic Encourage Policymakers to Implement Stronger Workplace Protections for Independent Contractors?*, ASPEN INST., April 3, 2020, <https://www.aspeninstitute.org/blog-posts/will-pandemic-encourage-policymakers-implement-stronger-workplace-protections-independent-contractors/>; Julie Kashen, et al., COLLECTIVE RESPONSES FOR INDEPENDENT CONTRACTORS DURING COVID-19, THE CENTURY FDN., April 21, 2020, <https://tcf.org/content/report/collective-responses-for-independent-contractors-during-covid-19/?agreed=1>.

¹² Maya Raghu & Jasmine Tucker, *The Wage Gap Has Made Things Worse for Women on the Front Lines of COVID-19*, NAT’L WOMEN’S LAW CTR., Mar. 30, 2020, <https://nwlc.org/blog/the-wage-gap-has-made-things-worse-for-women-on-the-front-lines-of-covid-19/>.

¹³ Elizabeth Skerry, *Your Racial and Gender Wealth Gaps Playlist*, NAT’L WOMEN’S LAW CTR., Dec. 20, 2019, <https://nwlc.org/blog/your-racial-and-gender-wealth-gaps-playlist/>.

The Bringing an End to Harassment by Enhancing Accountability and Rejecting Discrimination (BE HEARD) in the Workplace Act (H.R. 2148, S. 1082), would extend protections against discrimination¹⁴ to all workers, including independent contractors, and individuals working for small employers, such as domestic workers. Additionally, the BE HEARD in the Workplace Act would remove barriers to accessing justice by extending short statutes of limitations and addressing restrictively interpreted legal standards; promote transparency and accountability by limiting the use of confidentiality agreements that silence workers; and require and fund efforts to prevent workplace harassment and discrimination.¹⁵

The Domestic Workers Bill of Rights Act (H.R. 3760, S. 2112), would extend additional key rights to domestic workers—the majority of whom are women of color—including not only protection from discrimination and harassment, but also overtime protections, earned sick days, fair scheduling practices, and meal and rest breaks.

II. End the misclassification of workers and reinstate fair standards for establishing joint employment.

Under current federal law, employers' misclassification of workers as independent contractors cuts off worker access to antidiscrimination and labor protections.¹⁶ When employers incorrectly classify workers as independent contractors rather than employees, they are evading their obligations to their employees and denying them their rights. Moreover, by misclassifying workers employers are denying states and the federal government needed tax dollars.¹⁷ Misclassification is a persistent problem in many industries, including in majority female industries expected to grow in the coming decades like home care and hospitality, as well as in the app-based “on-demand” economy.¹⁸ While it is true that some individuals genuinely are independent contractors, far too many do not exercise the independence in their work that this status requires and are instead highly dependent on an employer without corresponding

¹⁴ The Equality Act (H.R. 5, S. 788), passed by the House in May 2019, also would provide workers with explicit protection from discrimination based on their gender identity and sexual orientation.

¹⁵ NAT'L WOMEN'S LAW CTR., *The BE HEARD in the Workplace Act: Addressing Harassment to Achieve Equality, Safety, and Dignity on the Job* (April 2019), <https://nwlc.org/resources/the-be-heard-in-the-workplace-act-addressing-harrassment/>.

¹⁶ In the agricultural industry, for instance, major employers commonly assert that workers are independent contractors or are employed by a subcontractor, because federal law and most state laws only require employers to prevent and address harassment of their own “employees”—not independent contractors or those employed by others. NAT'L WOMEN'S LAW CTR., *What Works at Work: Promising Practices to Prevent and Respond to Sexual Harassment in Low-Paid Jobs 4* (May 2020), https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2020/05/Convening-report_English-Final.pdf.

¹⁷ Ceilidh Gao & Catherine Ruckelshaus, *Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries*, NAT'L EMPLOYMENT LAW PROJECT (September 2017), <https://s27147.pcdn.co/wp-content/uploads/NELP-independent-contractors-cost-2017.pdf>.

¹⁸ Sarah Leberstein & Catherine Ruckelshaus, *Independent Contractor vs. Employee: Why Independent Contractor Misclassification Matters and What We Can Do to Stop It*, NAT'L EMPLOYMENT LAW PROJECT (May 2016), <https://s27147.pcdn.co/wp-content/uploads/Policy-Brief-Independent-Contractor-vs-Employee.pdf>.

employment protections. The future of work must ensure that employers are not able to manipulate employment structures to deny their workers rights.

Platform companies in particular have sought to avoid their obligations to employees through misclassification; Handy Technologies Inc., Uber Technologies Inc., Lyft Inc., GrubHub Inc., Postmates Inc., Thumbtack Inc., YourMechanic, and TaskRabbit have helped draft broad state “carve-out bills” that would classify platform workers as independent contractors. As of August 2019, seven states had enacted carve-out bills—Arizona, Florida, Indiana, Iowa, Kentucky, Tennessee, and Utah—while legislation was pending in at least two additional states, West Virginia and Missouri. Texas adopted an administrative carve-out for platform workers in the spring of 2019.¹⁹

Employers’ misclassification of workers, and overly narrow standards making it more difficult to prove joint employment, prevent workers from accessing labor and employment protections and holding their employers accountable for abuse. Companies are able to use the fissured workplace to their advantage to avoid being held accountable for violations and to shirk their responsibility to pay benefits or provide other workplace supports, leading to low-quality and low-paying jobs.

Both the Department of Labor and the National Labor Relations Board have recently tried to make it more difficult for workers to show they are jointly employed by more than one entity under the Fair Labor Standards Act (FLSA) and the National Labor Relations Act (NLRA).²⁰ While most commonly associated with minimum wages and overtime pay, the FLSA also contains provisions which are centered on ensuring that women are treated equally at work, including employer obligations to accommodate breastfeeding workers and protections against pay discrimination. Because both these protections are a part of the FLSA, eviscerating the FLSA’s joint employer standard threatens to make it significantly more difficult to enforce these provisions of the FLSA against all employers responsible for illegal abuses. Without the ability to hold all an employees’ employers responsible for workplace abuses, women will continue to suffer discrimination—but with less recourse to justice.

Similarly, in order for the NLRA to provide workers with the fundamental right to engage in meaningful collective bargaining in today’s increasingly fissured workplaces, the law must provide a means to bring large corporations that reserve contractual control and/or indirectly control the terms and conditions of employment, as well as subcontractors, to the bargaining table to collectively bargain for union protections. Women especially lose out if they are unable to effectively organize a union and collectively bargain. Collective bargaining increases women’s equality at work: women in unions are more likely than their non-union counterparts to receive higher and more equal pay, better health care and pension benefits, and greater

¹⁹ Maya Pinto, Rebecca Smith & Irene Tung, *Rights at Risk: Gig Companies’ Campaign to Upend Employment As We Know It*, NAT’L EMPLOYMENT LAW PROJECT (2019), <https://www.nelp.org/publication/rights-at-risk-gig-companies-campaign-to-upend-employment-as-we-know-it>.

²⁰ See U.S. DEP’T OF LABOR, *Joint Employer Status Under the Fair Labor Standards Act*, 85 FED. REG. 2820 (Jan. 16, 2020); NAT’L LABOR RELATIONS BD., *Joint Employer Status Under the National Labor Relations Act*, 85 FED. REG. 11184 (Feb. 26, 2020).

protections against discrimination on the job, including sexual harassment. The overall gender wage gap for union members is about half the size of the wage gap for those not represented by a union, and female union members typically earn about \$224 more per week than women who are not represented by unions, a larger wage advantage than men receive.²¹

In today's economy, ensuring appropriate ability to establish joint employment is increasingly important because more companies subcontract and use labor intermediaries such as staffing firms, which can result in degraded working conditions, no employer exercising appropriate responsibility for the treatment of workers, and diminished worker access to collective action and bargaining. There are currently more than 3 million workers employed through temporary staffing agencies, and the aggregate number of hours and total number of jobs (part-time and full-time)—has grown faster than work overall.²² Workers employed through intermediaries like temporary and staffing agencies earn less money, endure worse working conditions than permanent, direct-hires, experience large benefit penalties²³ and typically work in more hazardous jobs than permanent workers.²⁴ The most recent Contingent Worker Supplement (CWS) data from the Bureau of Labor Statistics show, for example, that full-time staffing and temporary help agency workers earn 41 percent less than do workers in standard work arrangements.²⁵

These challenges are compounded for women workers, who typically earn even less than men in temporary staff positions.²⁶ Women workers provided by contract firms in full-time jobs typically earn 17 percent less than women in traditional employment arrangements and 42 percent less than full-time male workers provided by contract firms.²⁷ And across industries where subcontracting is prevalent, workers experience problems that have outsized effects for women. For example, in majority female industries like home care, women are subjected to low wages and a lack of benefits, making it hard for them to care for their own families. In male-majority industries like construction and trades work, women continue to struggle to gain equal access to jobs—and when a woman is able to get work on a construction site, she is often the

²¹ Kayla Patrick & Sarah David Heydemann, *Union Membership is Critical for Equal Pay*, NAT'L WOMEN'S LAW CTR. (March 2018), <https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2016/02/Union-Membership-is-Critical-for-Equal-Pay-2018.pdf>.

²² NELP analysis of U.S. Dep't of Labor, Bureau of Labor Statistics (BLS), Current Employment Statistics (CES), NAICS 561320, <https://www.bls.gov/ces/data.htm>.

²³ Rebecca Smith & Claire McKenna, *Temped Out: How the Domestic Outsourcing of Blue-Collar Jobs Harms America's Workers* 11, NAT'L EMPLOYMENT LAW PROJECT (June 10, 2014), <https://s27147.pcdn.co/wp-content/uploads/2015/02/Temped-Out.pdf>.

²⁴ *Id.*

²⁵ NAT'L EMPLOYMENT LAW PROJECT, *America's Nonstandard Workforce Faces Wage, Benefit Penalties, According to U.S. Data* (June 7, 2018), <https://www.nelp.org/news-releases/americas-nonstandard-workforce-faces-wage-benefit-penalties-according-us-data/>.

²⁶ U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, *Contingent and Alternative Employment Arrangements—May 2017* (June 2018), Table 13: Median usual weekly earnings of full- and part-time contingent and noncontingent wage and salary workers and those with alternative work arrangements by sex, race, and Hispanic or Latino ethnicity, May 2017, <https://www.bls.gov/news.release/conemp.t13.htm>.

²⁷ *Id.*

only woman on the jobsite and is acutely vulnerable to discrimination and abuse, as well as retaliation for reporting.

Workers who work through temp or staffing agencies or as contractors report experiencing discrimination, including sexual harassment and pregnancy discrimination—stories that the National Women’s Law Center has heard firsthand. Among thousands of intakes through our TIME’S UP Legal Defense Fund, we have heard from hundreds of workers in industries rife with subcontracting like health care, hospitality, and construction.²⁸ Contractors and subcontractors have shared their stories of workplace misconduct and discrimination, often from people employed by the contracting employer. These intakes expressed a common theme: that as contracted and subcontracted workers, they felt particularly vulnerable to retaliation and abuse.

Companies that share control over working conditions at a job should share the responsibility for complying with critical worker protections and for bargaining over job conditions.

The Protecting the Right to Organize or PRO Act (H.R. 2474, S. 1306), passed by the House in February 2020, would ensure that employees are not misclassified as independent contractors and protect employees with more than one employer by adopting tests that would prevent unscrupulous employers from evading their obligations to their employees and the public. The future of work must ensure that women, and especially women of color, are not denied access to their rights through unfair legal tests designed to shield employers from responsibility for their workers’ basic well-being.

III. Improve pay for women in low-paid and contingent jobs.

Women are close to two-thirds of the workforce in jobs that pay the federal minimum wage of \$7.25 per hour or just a few dollars above it.²⁹ And women are more than two-thirds of tipped workers, for whom the federal minimum cash wage is just \$2.13 per hour.³⁰ Moreover, many of the jobs that are predicted to grow the most over the next decade are jobs employing primarily women, disproportionately women of color, and paying extremely low wages³¹—and absent

²⁸ See TIMES’S UP LEGAL DEFENSE FUND, *Together, We’re Changing Tomorrow: 2019 Annual Report* (April 2020), <https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2020/04/2019-Annual-Report-Final.pdf>.

²⁹ Tucker & Vogtman, *supra* note 8.

³⁰ NAT’L WOMEN’S LAW CTR., *Tipped Workers State by State* (September 2019), <https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2019/06/Women-Tipped-Workers-State-by-State-2019-v2.pdf>.

³¹ The Bureau of Labor Statistics (BLS) has projected that personal care aides, combined food preparation and serving workers (including fast food workers), registered nurses, home health aides, and restaurant cooks will be the five occupations with the most job growth between 2018 and 2028. Personal care aides, combined food preparation and serving workers, and home health aides are jobs that are both women-dominated and low-paid; these jobs typically pay less than \$12 per hour, and women accounted for 80 percent of the workforce among these three low-paid, high-growth jobs combined in 2018. Women of color accounted for 45 percent of the workforce in the three low-paid, high-growth jobs combined, compared to 18 percent of the total workforce, meaning their share of these low-paid, high-growth jobs was 2.5 times greater than their share of the overall workforce. NWLC calculations based on U.S. Dep’t of Labor, BLS, *Employment Projections: 2018-2028*, Table 1.4: Occupations with the most job growth, 2018 and projected 2028, <https://www.bls.gov/emp/tables/occupations-most-job-growth.htm> (last visited June 15, 2020) and 2018 American Community Survey one-year estimates using IPUMS.

policy intervention, the recession induced by the COVID-19 pandemic could exert further downward pressure on pay in these jobs.³²

Women's overrepresentation in low-paid jobs is one factor driving the persistent gender wage gap: overall, women working full time, year-round typically are paid just 82 cents for every dollar paid to their male counterparts. This gap varies by race and is even wider for many women of color compared to their white, non-Hispanic male counterparts. For Black women, it adds up to a loss of nearly \$1 million, and for Latinas and Native women it amounts to a loss of more than \$1 million, over a 40-year career.³³

Raising the minimum wage—and ensuring that tipped workers receive the full minimum wage before tips—could both lift women and their families out of poverty and help close the gender wage gap, while spurring the consumer demand that our economy will need to recover from the recession.³⁴ As passed by the House in July 2019, the Raise the Wage Act (H.R. 582, S. 150) would increase the federal minimum wage from \$7.25 to \$15 per hour by 2025, then index it to keep pace with wages overall.³⁵ Raising the federal minimum wage to \$15 an hour by 2025 would give more than one in four working women a raise, including 30 percent of women of color. The bill would also gradually raise the federal minimum cash wage for tipped workers until it is equal to the regular minimum wage and phase out unfair exemptions that have allowed employers to pay young workers and people with disabilities subminimum wages. Requiring employers to pay tipped workers the full minimum wage, before tips, would mean that millions of women would have a paycheck they can depend on—and would feel less forced to tolerate harassment as the price of tips. Establishing one fair minimum wage is a key step toward equity, dignity, and safety for women at work.

The Paycheck Fairness Act (H.R. 7, S. 270), passed by the House in March 2019, would update and strengthen the Equal Pay Act of 1963 and provide additional protections against pay discrimination. Among other provisions, the bill prohibits employers from relying on salary history to set pay when hiring, guarantees women can receive the same remedies for sex-based pay discrimination as are available for race- or ethnicity-based discrimination, promotes pay

³² See, e.g., Greg Robb, *Coronavirus-Induced Recession Is Putting Downward Pressure on Wages, Fed Says*, MARKETWATCH, June 12, 2020, <https://www.marketwatch.com/story/coronavirus-induced-recession-is-putting-downward-pressure-on-wages-fed-says-2020-06-12>.

³³ Amanda Fins, *Women and the Lifetime Wage Gap: How Many Woman Years Does it Take to Equal 40 Man Years?*, NAT'L WOMEN'S LAW CTR. (March 2020), <https://nwlc.org/resources/women-and-the-lifetime-wage-gap-how-many-woman-years-does-it-take-to-equal-40-man-years/>.

³⁴ See, e.g., NAT'L WOMEN'S LAW CTR., *The Raise the Wage Act: Boosting Women's Paychecks and Advancing Equal Pay* (October 2019), <https://nwlc.org/resources/the-raise-the-wage-act-boosting-womens-paychecks-and-advancing-equal-pay/>; T. William Lester et al., *An Increased Minimum Wage Is Good Policy Even During Hard Times*, CTR. FOR AM. PROGRESS (July 2011), <https://www.americanprogress.org/issues/economy/news/2011/07/07/9941/an-increased-minimum-wage-is-good-policy-even-during-hard-times-2/>.

³⁵ NAT'L WOMEN'S LAW CTR., *The Raise the Wage Act: Boosting Women's Paychecks and Advancing Equal Pay*, *supra* note 34.

transparency by protecting workers from retaliation for discussing or disclosing their wages, and requires employers to report pay data to the Equal Employment Opportunity Commission.³⁶

IV. Promote fair treatment for part-time work.

Almost 33 million working people in the United States—about one in five—work part time, and more than six in ten part-time workers are women.³⁷ Many people work part time to support their families while caring for loved ones, going to school, or attending to other obligations, but are penalized for choosing part-time work in terms of pay, benefits, and opportunities to advance. And for many others, working part time isn't a choice at all: some employers, especially in low-paying service industries, rarely offer full-time positions, and some employees—especially women—find that caregiving or other responsibilities preclude full-time work.³⁸ Relative to their full-time counterparts, part-time employees frequently make less per hour, face unpredictable schedules, lack access to important workplace benefits, and are denied promotion opportunities.

With low pay, volatile work hours and incomes, and little opportunity to advance in the workplace, part-time workers struggle to make ends meet. The challenges of part-time work have severe consequences for working families—even as people working part-time are increasingly primary earners for their households. About one in seven part-time workers (15 percent) lives in poverty—over four times the rate of poverty experienced by full-time workers.³⁹ The economic hardship that many women of color and their families face is particularly pronounced: one in four Black and Native American women working part time, and one in five Latinas working part time, lives in poverty.⁴⁰ Addressing this reality, and improving the quality of part-time work, is key to promoting family economic security and to reducing gender and racial income disparities.

The Part-Time Worker Bill of Rights (H.R. 5991, S.3358) would expand workplace protections and access to benefits for people working part time, helping them support themselves and their families. Among other provisions, it would require covered employers to offer newly available hours to existing staff before making new hires, and require employers to treat part-time and full-time workers equally when they do the same jobs.⁴¹

³⁶ NAT'L WOMEN'S LAW CTR., *How the Paycheck Fairness Act Will Strengthen the Equal Pay Act* (January 2019), <https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2019/02/How-the-Paycheck-Fairness-Act-will-Strengthen-the-EPA.pdf>.

³⁷ NWLC calculations based on American Community Survey (ACS) 2018 using Steven Ruggles et al, Integrated Public Use Microdata Series (IPUMS) USA: Version 9.0 [dataset] (Minneapolis, University of Minnesota, 2019). Figures are for 2018. The U.S. Bureau of Labor Statistics (BLS) defines part-time work as less than 35 hours per week. See BLS, *Handbook of Methods: Current Population Survey*, at 4-5, <https://www.bls.gov/opub/hom/cps/pdf/cps.pdf>.

³⁸ See generally Ewing-Nelson, *Part-Time Workers Are Paid Less, Have Less Access to Benefits – and Most Are Women*, *supra* note 9.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ NAT'L WOMEN'S LAW CTR., *The Part-Time Worker Bill of Rights Act: Promoting Fair Treatment for Part-Time Work* (February 2020), <https://nwlc.org/wp-content/uploads/2020/02/Part-Time-Workers-Factsheet-2.27.20.pdf>.

V. Ensure more stable and predictable work schedules for all workers.

In addition to lower pay and fewer benefits, part-time workers often experience unpredictable and unstable work schedules—driven in no small part by employers’ increasing reliance on workforce management systems that use algorithms to base workers’ schedules on perceived consumer demand and maximize flexibility for the employer at the expense of the employee.⁴² Part-time workers are more likely than full-time workers to have erratic hours resulting in volatile incomes, which can lead to increased economic hardship, including hunger and housing insecurity.⁴³ Research confirms that people of color—particularly women of color—are more likely to experience cancelled shifts, on-call shifts, “clopenings” (where employees work the closing shift one night and the opening shift the next morning), and involuntary part-time work than their white counterparts, even within the same company.⁴⁴ Research confirms, too, that unstable and unpredictable work hours have detrimental impacts on working people, their families, and their communities—and can make maintaining stable, high-quality child care nearly impossible.⁴⁵

The Schedules That Work Act (H.R. 5004, S. 3256), would combat employers’ use of unfair scheduling practices and promote the stability that working families need. The Act would give employees across industries a right to request a schedule that works for them and restrict the use of clopening. For hourly workers in certain industries where abusive scheduling practices are especially common, the Act requires two weeks’ advance notice of work schedules along with compensation for last-minute changes and cancelled shifts.⁴⁶

VI. Center and build worker power.

Workers in a changing economy must be able to organize and collectively bargain for better wages and working conditions. We must not only protect existing rights but modernize and expand the right to organize in the face of workplace technologies like expanded employee surveillance that can have a chilling effect on organizing.

⁴² See, e.g., Kaye Loggins, *Here’s What Happens When an Algorithm Determines Your Work Schedule*, VICE, Feb. 24, 2020, https://www.vice.com/en_us/article/g5xwby/heres-what-happens-when-an-algorithm-determines-your-work-schedule.

⁴³ Daniel Schneider & Kristen Harknett, *Hard Times: Routine Schedule Unpredictability and Material Hardship among Service Sector Workers*, WASHINGTON CTR. FOR EQUITABLE GROWTH (Oct. 2019), <https://equitablegrowth.org/working-papers/hard-times-routine-schedule-unpredictability-and-material-hardship-among-service-sector-workers/> (finding six in ten hourly retail and food service workers experienced at least one material hardship—such as hunger, trouble paying bills or securing housing, or foregoing needed medical treatment—over the prior year).

⁴⁴ Adam Storer, Daniel Schneider & Kristen Harknett, *What Explains Race/Ethnic Inequality in Job Quality in the Service Sector?* WASHINGTON CTR. FOR EQUITABLE GROWTH (Oct. 2019), <https://equitablegrowth.org/working-papers/what-explains-race-ethnic-inequality-in-job-quality-in-the-service-sector/>.

⁴⁵ See generally Daniel Schneider & Kristen Harknett, *It’s About Time: How Work Schedule Instability Matters for Workers, Families, and Racial Inequality*, SHIFT PROJECT (Oct. 2019), <https://shift.berkeley.edu/files/2019/10/Its-About-Time-How-Work-Schedule-Instability-Matters-for-Workers-Families-and-Racial-Inequality.pdf>.

⁴⁶ NAT’L WOMEN’S LAW CTR., *The Part-Time Worker Bill of Rights Act: Promoting Fair Treatment for Part-Time Work* (February 2020), <https://nwlc.org/wp-content/uploads/2020/02/Part-Time-Workers-Factsheet-2.27.20.pdf>.

Unions remain a critical tool for women’s equality. Women in unions are more likely than their non-union counterparts to receive higher and more equal pay, better health care and pension benefits, and may have greater protections against discrimination on the job.

The PRO Act (H.R. 2474, S. 1306), passed by the House in February 2020, streamlines the process for forming a union, ensures that new unions are able to negotiate a first collective bargaining agreement, and strengthens remedies and enforcement for workers exercising their rights, among many other needed reforms. These rights are especially critical for women, who not only disproportionately benefit from union representation, but who make up nearly two-thirds of the workforce in the lowest paying jobs in the United States—jobs that are in desperate need of union protections.⁴⁷ The PRO Act is critical for women and their families because collective bargaining increases women’s equality at work.

The Public Service Freedom to Negotiate Act (H.R. 3463, S. 1970), will extend collective bargaining rights to public service workers across the country, a majority of whom are women. The Public Service Freedom to Negotiate Act guarantees public and supervisory employees of state, territorial and local governments the right to join a union and collectively bargain, and to have their union recognized by their public employer. Ensuring federal collective bargaining rights for public service workers will markedly improve the working lives of millions of women and their families.

VII. Provide all working people with the paid time off they need.

Working people who most need access to paid sick days and paid family and medical leave are least likely to have it. As of 2019, over 32 million workers in the United States lacked any form of paid sick days—including a majority of people working in the lowest paying jobs.⁴⁸ People working in food preparation and service jobs and personal care jobs—jobs that are both essential and high risk during the pandemic and in which women are overrepresented—are among the least likely to have paid sick days.⁴⁹

Moreover, in 2019, only 19 percent of workers in the United States had access to paid family leave through their employers (i.e., leave to care for a family member with a serious health condition or a new baby), and just 40 percent had paid medical leave to address their own serious health conditions through an employer-provided short-term disability program.⁵⁰ For people working in low-paid and part-time jobs—most of whom are women—access is even more

⁴⁷ See Tucker & Vogtman, *supra* note 8.

⁴⁸ U.S. DEPT’ OF LABOR, BUREAU OF LABOR STATISTICS, *National Compensation Survey: Employee Benefits in the United States, March 2019* (September 2019), <https://www.bls.gov/ncs/ebs/benefits/2019/employee-benefits-in-the-united-states-march-2019.pdf>.

⁴⁹ INSTITUTE FOR WOMEN’S POLICY RESEARCH, *Paid Sick Days Access in the U.S.: Differences by Race/Ethnicity, Occupation, Earnings, and Work Schedule* (March 2014), <https://iwpr.org/wpcontent/uploads/wpallimport/files/iwpr-export/publications/B328-FINAL.pdf>.

⁵⁰ U.S. DEP’T OF LABOR, BUREAU OF LABOR STATISTICS, *National Compensation Survey: Employee Benefits in the United States, March 2019* (September 2019), <https://www.bls.gov/ncs/ebs/benefits/2019/employee-benefits-in-the-united-states-march-2019.pdf>.

limited; among workers in the lowest 25 percent of wage earners, for example, only 9 percent had access to paid family leave in 2019.⁵¹ And while research shows men increasingly want to take an equal share of caregiving, women are still more likely to serve as primary caregivers for children and other family members in need of care, and are therefore more likely to need paid time off to ensure that their children or other family members receive the medical care and attention that they need.

Access to paid sick and family and medical leave is also an issue of racial justice. Racial and gender wealth gaps mean that women of color and their families are less likely to have the economic resources to cushion the blow of an unforeseen illness or caregiving need. Inequity in health care treatment and outcomes further highlight how a lack of paid leave can disproportionately harm women of color. This reality leaves women of color and all working people with the impossible choice between taking care of themselves or their families and maintaining their financial security. COVID-19 has made dramatically clear that this tradeoff leaves both working people and the family members who depend on them for care in an untenable position.

While the Families First Coronavirus Response Act (FFCRA) and CARES Act provided some temporary paid leave in the context of the pandemic, their coverage was incomplete.⁵² We must establish permanent structures to provide all working people with the leave they need when they need it. The Providing Americans Insured Days of Leave (PAID Leave) Act (H.R. 6442, S. 3513) would expand emergency paid sick days and family and medical leave, as well as create long-term benefits programs to support working people and their families.⁵³

Under the permanent family and medical leave program established by the PAID Leave Act, individuals could take up to 12 weeks of leave at 66 percent of their monthly wages, paid for by joint employer and employee payroll contributions. In addition to caring for a new child, it also applies to working people who need to take time off for their own serious health condition—which includes pregnancy and post-partum care—and to care for a child, parent, spouse or partner, and for specific military caregiving and leave. Under the Act, employees would also be able to accrue seven paid sick days annually—paid at 100 percent of an employee’s wages—which can be used in cases of personal illness and to care for a sick family member. Notably, the sick days could also be used for “safe leave,” or absences related to sexual assault, domestic violence, or stalking.⁵⁴

⁵¹ *Id.*

⁵² NAT’L WOMEN’S LAW CTR., *Expanding Paid Sick Days and Paid Family & Medical Leave in Response to COVID-19* (April 2020), <https://nwlc.org/resources/expanding-paid-sick-days-and-paid-family-medical-leave-in-response-to-covid-19/>.

⁵³ NAT’L WOMEN’S LAW CTR., *Providing Americans Insured Days of Leave (PAID Leave) Act* (March 2020), <https://nwlc.org/resources/providing-americans-insured-days-of-leave-paid-leave-act/>.

⁵⁴ *See id.* The PAID Leave Act incorporates the provisions of the FAMILY Act (H.R. 1185/S. 463) and the Healthy Families Act (H.R. 1784/S. 840), which NWLC has also endorsed.

VIII. End companies' use of forced arbitration for resolving disputes.

Today, companies commonly force workers and consumers to agree to resolve disputes in arbitration as a condition of obtaining a job or purchasing a good or service, often through form agreements buried in fine print. Many individuals entering such agreements have no idea they have waived the ability to enforce their rights in court. If they do find themselves in a dispute after entering into such an agreement, the deck is stacked in favor of the company. Arbitrators are often chosen and paid by companies, there is no public record of the proceedings or the outcome, and rarely an opportunity to appeal the arbitrator's decision. Many workers who come forward with reports of sexual harassment or other forms of discrimination, unsafe working conditions, or wage theft, cannot afford legal counsel. The agreement may force them to bear some of the significant costs of the arbitration, and the resolution of their disputes may fail to make them whole for the harm they have suffered.

The use of arbitration clauses in employment agreements has dramatically increased in the last twenty years. While only two percent of workers were subject to mandatory arbitration provisions in the early 1990s, this number grew to almost 25 percent by the early 2000s.⁵⁵ This share doubled again over the next two decades, and now covers more than half of the American workforce: as of 2018, 56.2 percent of non-union private-sector employees were subject to mandatory arbitration provisions.⁵⁶ As a result of a string of Supreme Court decisions stripping individuals of their rights to avoid arbitration and enforce their rights in court, almost all workers and consumers in America are bound by forced arbitration in at least some of their interactions with corporations, but women face particular barriers to accessing justice because of forced arbitration requirements. A recent study revealed that 57.6 percent of female workers are subject to forced arbitration, and that forced arbitration is more common in industries where the workforce is disproportionately made up of women.⁵⁷ Because forced arbitration is more common in low-wage workplaces,⁵⁸ it has a particularly detrimental impact on women generally and women of color specifically.

The lack of public accountability enabled by forced arbitration has played a harmful role in allowing sexual harassment and assault to persist in the shadows. In the nearly three years since #MeToo went viral, thousands of individuals have come forward to share their experiences of assault, harassment and discrimination—many several years after the fact—and to demand justice. When individuals share their experiences, it gives others the courage to come forward as well. But when women who report are forced into arbitration, that secretive process allows companies to hide the true extent of illegal conduct from workers and the public, and helps wrongdoers evade accountability, which can isolate individuals and prevent them from coming forward.

⁵⁵ Alexander Colvin, *The Growing Use of Mandatory Arbitration* 1, 3-4, ECONOMIC POLICY INSTITUTE (April 2018), <https://files.epi.org/pdf/144131.pdf>.

⁵⁶ *Id.* at 2, 5.

⁵⁷ *Id.* at 8-9.

⁵⁸ *Id.* at 9-10.

The Forced Arbitration Injustice Repeal Act (FAIR Act) (H.R. 1423, S. 610) passed by the House in September 2019, is an important tool in helping women to expose misconduct and enforce their rights. It allows workers, consumers, servicemembers, and nursing home residents to choose whether to pursue their dispute in court or in arbitration, rather than being forced into arbitration up front. The FAIR Act would also prevent corporations from stripping away the rights of workers and consumers to come together to form class actions to address systemic and widespread corporate wrongdoing.

IX. Establish guidelines for the use of technology and algorithms in hiring and the workplace more broadly.

The February 5, 2020 Future of Work Hearing examined the protection of workers' civil rights and the use of technology, including algorithms. Recruitment and hiring are critical steps on the pathway to employment and economic security, and they are being rapidly transformed by technology.⁵⁹ In one well-publicized case in 2014, Amazon created an automated tool that had the effect of systematically excluding women from the pool of applicants for software engineer jobs. The algorithm's designers programmed it to search for applicants whose resumes resembled those of current, successful employees. Because the existing workforce was overwhelmingly male, applicants who had attended women's colleges, or participated in women's athletic or other activities, did not match up with this model of success and were therefore eliminated. As the algorithm "succeeded" in identifying applicants who looked like current workers, its effects intensified, thus compounding the discriminatory effect. Amazon discarded the tool after designers were unable to fix it and ultimately disbanded the design team altogether.⁶⁰

In addition to technological tools used for hiring, employers are increasingly using wearables, fitness tracking apps, and biometric timekeeping systems to collect workers' physical and health data.⁶¹ Because this information can capture fertility, pregnancy or other private health data, it is not an unfounded fear that these tools may become additional opportunities for employers to discriminate in the workplace, particularly against women. And monitoring and surveillance technologies can be used as supposed neutral arbiters of workplace management when they include tools designed to predict employee characteristics, flag behavior patterns, and deter rule-breaking.⁶² These tools may have outsized negative effects on women and women of color in

⁵⁹ UPTURN, *Help Wanted: An Examination of Hiring Algorithms, Equity, and Bias* (December 2018), <https://www.upturn.org/reports/2018/hiring-algorithms/>.

⁶⁰ Jeffrey Dastin, *Amazon Scraps Secret AI Recruiting Tool That Showed Bias Against Women*, REUTERS, October 9, 2018, <https://www.reuters.com/article/us-amazon-com-jobs-automation-insight/amazon-scraps-secret-ai-recruiting-tool-that-showed-bias-against-women-idUSKCN1MK08G>.

⁶¹ Alexandra Mateescu & Aiha Nguyen, *Explainer: Workplace Monitoring and Surveillance*, DATA AND SOCIETY RESEARCH INSTITUTE (February 2019), https://datasociety.net/wp-content/uploads/2019/02/DS_Workplace_Monitoring_Surveillance_Explainer.pdf.

⁶² *Id.*

particular, given existing discriminatory stereotypes about how women “should” act or speak and “tone policing” that occurs with women of color and Black women in particular.

Today’s workforce reflects decades of discrimination against individuals and communities that have been historically marginalized in society. With significantly more transparency, oversight, and public deliberation, some new hiring technologies might help improve upon this baseline. To that end, civil rights organizations are working together to identify principles for employers, technology vendors, and other organizations to advance civil rights⁶³ that we hope can serve as a guide.

* * *

We appreciate your attention to these important issues and look forward to working with you to ensure the future of work and the future of workers centers the needs of women and women of color. Please contact me with any questions at emartin@nwlc.org.

Sincerely,



Emily J. Martin
Vice President for Education & Workplace Justice

⁶³ See The Leadership Conference on Civil and Human Rights and Upturn, *Letter for the Record – Civil Rights and Human Services Subcommittee Hearing on The Future of Work: Protecting Workers’ Civil Rights in the Digital Age*, February 3, 2020, <https://civilrights.org/resource/letter-for-the-record-civil-rights-and-human-services-subcommittee-hearing-on-the-future-of-work-protecting-workers-civil-rights-in-the-digital-age/>. See also Testimony of Jenny R. Yang, *Ensuring a Future That Advances Equity in Algorithmic Employment Decisions*, before the Civil Rights and Human Services Subcommittee, Committee on Education and Labor, United States House of Representatives, February 5, 2020, <https://edlabor.house.gov/imo/media/doc/YangTestimony02052020.pdf>.