



June 26, 2024

Sen. Bill Cassidy
Ranking Member
Senate Health, Education, Labor and Pensions Committee

Comments in response to RFI on independent contractors

I submit these comments on behalf of the Insights Association (IA), the leading nonprofit trade association for the market research and analytics industry (also known as the “insights” industry), and our more than 8,000 members, in response to your request for information on independent contractors and portable benefits.¹

IA must stress that this concept should not apply to research subjects.

Not all independent contractors should be considered as “workers” and thus subject to any potential portable benefits arrangement. U.S. labor law is predicated on a binary option if someone is receiving remuneration: they are either an independent contractor or an employee. Many people who participate in market research studies as research subjects receive remuneration (which our industry refers to as “incentives”) and are thus independent contractors.

However, serving as a research subject is not “work” in any traditional sense, and being a research subject, even with any kind of frequency, does not make someone a “worker” nor part of a “profession” or “workforce.” That is why a benefits scheme, portable or otherwise, makes no sense in the context of a research subject.

IA’s members include both insights companies and organizations, as well as insights professionals and departments inside of non- insights companies and organizations. They are the world’s leading producers of intelligence, analytics and insights defining the needs, attitudes and behaviors of consumers, organizations, employees, students and citizens. With that essential understanding, leaders can make intelligent decisions and deploy strategies and tactics to build trust, inspire innovation, realize the full potential of individuals and teams, and successfully create and promote products, services and ideas.

1. What is market research?

Market research is defined as the collection, use, maintenance, or transfer of personal information as reasonably necessary to investigate the market for or marketing of products, services, or ideas, where the information is not: (i) integrated into any product or service; (ii) otherwise used to

¹ https://www.help.senate.gov/imo/media/doc/portable_benefits_rfipdf1.pdf

contact any particular individual or device; or (iii) used to advertise or market to any particular individual or device.²

Another legal definition of market research, as used at the federal level in the 2012 Research Fairness Act³ and in amendments to a New Hampshire push polling statute in 2014,⁴ is “the collection and analysis of data regarding opinions, needs, awareness, knowledge, views, experiences and behaviors of a population, through the development and administration of surveys, interviews, focus groups, polls, observation, or other research methodologies, in which no sales, promotional or marketing efforts are involved and through which there is no attempt to influence a participant’s attitudes or behavior.”

2. Research subject incentives

Our industry provides incentives of various kinds to some (but not all) research subjects to encourage their participation in insights studies, depending on the needs of those studies and the sample of research subjects we are trying to reach. This has been the case since the inception of market research many decades ago. The form and amount of incentive for research subjects depends on a variety of factors, including: the length, mode, method and circumstances of the study; and the specialized knowledge, experience, demographics, or background of the participant mix.

The monetary value of the incentive or the form it may take is not determined on an ad hoc or willy-nilly basis, but is instead subject to rigorous fair market value analyses (sometimes by both the end client and by the research company or organization performing the study). The value and form, and whether an incentive is required at all, are generally determined separately for each specific study. Some studies offer only an entry in a contest/sweepstakes as the incentive; some offer just the product/service being evaluated. A survey in a mobile game might offer an in-game benefit. Others provide the research subjects with flexible choices in what kind of incentive they prefer, including different ways to spend “points” received from a given study, or the ability to donate the value of the incentive to charity (sometimes a specific charity of the participants’ own choosing).

Incentive is inherent in the term, but most people are motivated to participate as research subjects for the opportunity to provide their input. This is not “work” in any traditional kind of sense.

3. Research subjects receiving incentives are independent contractors, not employees, but are also not “workers” in any traditional sense

Research subjects do not seek to share their opinions as “a job” or proxy for employment, but rather because they wish to share their opinions and have an impact (and maybe have some fun as well).

² This is the basic definition of market research used in the American Data Privacy and Protection Act (ADPPA) (H.R. 8152) that passed the House Energy & Commerce Committee in July 2022, and adapted in the American Privacy Rights Act (APRA) just introduced as H.R. 8818.

³ H.R. 5915, proposed in 2012, available at <https://www.congress.gov/bill/112th-congress/house-bill/5915>

⁴ Title LXIII, Section 664:2 (XVII and XVIII), available at <http://www.gencourt.state.nh.us/rsa/html/LXIII/664/664-2.htm>

Research subjects receiving incentives are not employed by the organization or company conducting the research – they are, if subject to any legal status at all, independent contractors; accordingly, they should be recognized as such. Their participation is completely voluntary, and they may opt out at any time. However, market researchers that conduct these studies unreasonably must worry that a research subject receiving an incentive for participating in a study could be misclassified as an employee of the company or organization conducting the study.

Participation in market research is not a “job,” hourly or otherwise. Respondent participation in an insights project makes someone a research subject, not an employee. Being a research subject is not meant or represented to be a dependable source of income to support an individual or family. Incentive recipients do not constitute a “workforce.”

Research subjects may participate in multiple studies for a myriad of companies in the same year, or even at nearly the same time, but that participation is not a profession, participants do not carry business cards titling themselves as professional market research participants, and participants cannot plausibly make a living at it. In fact, the insights industry goes to great lengths to prevent individuals from participating in too many research studies (especially with one company in a short period of time). Referred to as “**cheater-repeaters**” or “**professional respondents**” in industry lingo, such participants rush through studies in hopes of quick completion and receipt of an incentive. Instead of representative data, individuals that attempt to make a living this way produce skewed data; they derail the insights process and are often disqualified from taking additional surveys for that very reason. Cheater-repeaters / professional respondents also threaten the integrity of insights because they frequently try to get onto panels using fake IDs and data, and similarly provide erroneous responses to questions.

Viewed from the lens of our industry, independent contractor status tests (such as the ABC test or the Fair Labor Standards Act’s economic realities test) remain focused on overly simplistic conceptions of work. Labor law and regulation did not develop with research subjects in mind; they were conceived in relation to classic professions like construction workers and travel agents and thus struggle to handle reimbursement for research participation, which is not a profession at all.

Participation in research is at best a hobby, one enjoyed only once in a while, with compensation not necessarily even offered. (Arguably, a research subject is not even providing a service, either to the research company or organization, or the end client commissioning the study.) Unlike an ordinary “worker” in the traditional sense, a research subject is not solely or even primarily motivated by monetary incentives. A bigger driver for market research participation is the opportunity for research subjects to provide their opinions or attitudes on who they are going to vote for in an election (and why), the desired course of a public policy, their feelings about a corporate brand, the need for new medicines, the design of a new smartphone, or changes to their favorite breakfast cereal. Through their participation, they get to influence or impact the future course of products, services and ideas.

The foregoing motivations do not describe the traditional (or even non-traditional) worker contemplated by the questions in this RFI.

7. Conclusion: research subjects, while independent contractors, should not be subject to a portable benefits regime.

While it might appear viscerally obvious that research subjects are not employees of companies or organizations conducting market research studies, the firms that contract with these individuals face troubling challenges to that nonemployee status, which will only be heightened by the suggestion that insights companies and organizations should be offering portable benefits to research subjects. Such an arrangement would threaten the integrity of the research process and the resulting insights that people, companies, organizations and governments rely upon every day to be able to learn and understand consumer and citizen attitude, opinion and behavior.

The Insights Association understands your interest in finding solutions for portable benefits in a growing “gig economy.” However, we vociferously urge your clarification that research subjects receiving incentives for participation in market research are independent contractors that will not be subject to the portable benefits (at least not as it relates to that participation).

We look forward to further discussion with you, your staff, and your committee.

Sincerely,

Howard Fienberg
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Insights Association