Piecing Together the Gig Economy Puzzle

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The gig economy is here to stay. What began as a novel development has been fully cemented into the fabric of the American economy. The gig economy, the term used to describe a broad range of temporary and flexible work arrangements, continues to grow exponentially. The impact of this economy on business and the law is still not fully understood. Regardless, the gig economy is now a central tenet of business in America, and employers must understand how these “gig workers” or “giggers” fit into their overarching business organization and goals.

Classification Commotion

Worker classification has always been a complex area of the law, and the growth of the gig economy has only further compounded the complexity. Giggers quickly became a hotbed for litigation over worker classification. Specifically, the litigation determined whether a gigger is an independent contractor or an employee for the purposes of application of wage and hour laws, discrimination laws, benefits and other worker protections. Many companies have assumed these workers aren't employees, and could be treated as independent contractors. However, over time, different federal agencies, state governments, and state and federal courts have approached the issue differently. The consequence is various classification tests that apply in different jurisdictions and to different kinds of claims, which produce different results, making an employer's job incredibly difficult.

Over the past few years, the approach of federal agencies has been in flux, adding further uncertainty. In 2015, the U.S. Department of Labor (“DOL”) released guidance stating that nearly all workers are employees and articulating a very narrow test for independent contractors under the Fair Labor Standards Act (“FLSA”). That guidance was **withdrawn** in 2017. On April 29, 2019, the DOL provided critical guidance for gig economy companies in the form of an **opinion letter**, finding service providers for a virtual marketplace company (“VMC”) to be independent contractors.

The crux of the DOL's independent contractor test centers on whether the worker is economically dependent on the business for which he or she renders services. In its letter, the DOL characterized the service providers as working for the consumers—not the VMC—“through the virtual marketplace.” The DOL concluded the service providers had “complete autonomy” over their hours of work and the freedom to pursue other opportunities, including working with the VMC's competitors. Further, the DOL found the relationship was impermanent.

Evaluating the remaining factors of the economic realities test, the DOL found that the VMC didn't invest in the materials necessary to perform the work. Further, the workers themselves retained control over the opportunities for profit or loss because they controlled which, and how many, jobs to take and could negotiate their own rates. Finally, the DOL found that the service providers weren't integral to the VMC's primary business purpose, because the business was providing a referral system, not direct services to customers.

A similar change in viewpoint has come at the National Labor Relations Board (“NLRB”). On April 16, 2019, the NLRB released an **Advice Letter** that Uber drivers were independent contractors under the common law agency test. The letter focused on the fact that the drivers had complete freedom to set their schedules, and accordingly, controlled their earnings and location, and could even work for competitors simultaneously. The

NLRB noted that although Uber set some minimal expectations regarding vehicle condition, driving ability, and navigation, that didn't indicate that Uber had significant control. Similarly, the NLRB found that Uber relied on rider evaluations, in lieu of more direct supervision or management. As a result, Uber drivers and other giggers who have similar independence aren't eligible to form a union, bargain collectively, or engage in protected, concerted activity.

At the state level, in certain states, the status of independent contractors has moved in the opposite direction. Most notably, California Assembly Bill 5 ("AB5"), which took effect on January 1, 2020, severely limits when a company may classify a worker as an independent contractor. Specifically, AB5 codifies the 2018 *Dynamex* decision and the "ABC Test." Under this approach, to overcome the presumption that the individual is an employee, a company must prove: (i) the individual is free from the control and direction of the company in connection with the performance of the work, both under the contract for the performance of the work and in fact; (ii) the individual performs work that is outside the usual course of the company's business; and (iii) the individual is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the company. Although AB5 carves out certain professions, it greatly expands the number of workers who will be considered employees under California law.

Companies reacted immediately, filing numerous challenges to AB5. The California Trucking Association quickly won a preliminary injunction against AB5, because a federal judge found it was likely preempted by the Federal Aviation Administration Authorization Act. Bolstered by that decision, Uber and Postmates also filed a lawsuit in federal court in late December 2019, challenging the constitutionality of AB5. They argued that the forced reclassification of drivers would eliminate the flexibility that is inherent in gigging. They similarly requested a temporary injunction to halt enforcement of the law, but on February 10, a California federal judge declined to issue one, finding the state's need to police misclassification outweighed any harm to the companies. Only time will tell whether the remainder of their lawsuit will fare better.

New Jersey also appears likely to enact legislation creating a widespread presumption of employment. New Jersey, like many other states, already uses the ABC Test under its unemployment compensation law. Pending legislation would broaden New Jersey's use of the ABC Test as California has.

On the other hand, numerous states, including Arizona, Florida, Indiana, Iowa, Kentucky, Tennessee, and Utah have designated giggers who work through "marketplace platforms" as independent businesses, who aren't employees of the marketplace companies. Similar bills have been proposed in other states.

Court decisions at the federal level have shown similar inconsistency, with courts reaching opposite conclusions on similar facts. This patchwork of legislation, agency guidance, and caselaw continues to make it difficult to predict how future classification cases involving giggers will be decided. Until there is more clarity, any company that has, or is considering, an independent contractor relationship with a worker should educate itself on the tests applicable in the jurisdictions in which it operates, monitor future legal developments, and carefully review its existing relationships to ensure that it uses gig workers for the specific sort of engagements that generally are considered independent contractor tasks in most jurisdictions.

Joint Employer Jumble

Even if a business properly classifies its workers, businesses must still remain cognizant of the potential for joint employment. Joint employment may occur when someone is employed by one company, but performs services for another company (such as when a company brings in employees through a staffing agency), or

someone works for two different companies that are related (such as working for different hospitals within one health system). These types of work arrangements may make the two companies jointly responsible for an employee's work under the FLSA, including the obligation to pay wages and overtime, as well as jointly liable for unfair labor practices, harassment or discrimination, and other employment claims.

The DOL recently released a final rule, effective March 16, 2020, that adopts a new joint employer standard. The DOL's new four part test examines whether the alleged joint employer: (i) hires or fires the employee; (ii) supervises and controls the employee's work schedule or conditions of employment; (iii) determines the employee's rate and method of payment; or (iv) maintains the employee's employment records. The mere right to take these actions isn't enough, joint employer liability requires that the entity actually take at least one of these actions. By narrowing the definition of who can be considered a joint employer, and thus liable for wages and overtime, the DOL has tipped the scales in favor of employers. This new test is a departure from the way that courts have approached the issue, leaving open whether courts will accept this new test.

The NLRB has also proposed regulations to reverse prior decisions adopting a broad definition of joint employment. Under its new proposal, two entities would be considered joint employers only if the two entities share the responsibility for employees' essential terms and conditions of employment, such as hiring, firing, discipline, and supervision. An entity must actually exercise substantial direct and immediate control over the essential terms and conditions of employment in a manner that isn't limited or merely routine under the proposed regulation. Final regulations are expected in the first half of 2020.

Companies that contract with entities using gig workers should stay apprised of these developments. They should also take steps to ensure that their contract partners maintain appropriate relationships with their workers, compensate them properly, and clearly allocate the liability for the risks associated with misclassification and other employment-related claims in their contracts.

Retirement Rigamarole

Only employees, and not independent contractors, are eligible for benefits like health insurance and retirement savings plans. As a result, many companies are now looking for a way to provide such benefits to workers while still classifying them as independent contractors. However, the provision of such benefits is a strong indicator of an employment relationship. In the face of this contradiction, companies like Uber and Lyft continue to lobby in California for a third, "in between," status, often labeled a "dependent contractor." Such a classification would make giggers eligible for limited PTO and retirement benefits, but retain the independent contractor classification, and the flexibility that such a classification entails.

Other groups continue to push for portable benefits plans, which are benefits owned by employees and taken to each new project they have. Companies that engage giggers would then have to contribute to these benefits based on the prorated amount of work done for the company.

Such lobbying activity is expected to spread to other states, as well as the national level. In fact, the recently-enacted Setting Every Community Up for Retirement Enhancement ("SECURE") Act made several changes to retirement plans, including increasing the portability of annuity investments. Now, employees who take another job or retire can move their annuity to another 401(k) plan or to an IRA without implicating surrender charges and fees. Many commentators have seen this flexibility as an important step towards retirement security for giggers. Proactive companies using gig workers will continue to monitor these developments.

Interplay Between Insurance and Giggers

Given the relatively recent expansion of gig economy businesses, insurance companies and the law haven't fully accounted for the realities of gig work and its central place in modern life.

Furthermore, many companies using giggers work diligently to avoid any semblance of the employer-employee relationship. For example, many agreements between gig workers and companies require workers to obtain their own insurance against the risk of lawsuits for actions taken by the worker that harm other people or property. However, news stories concerning injuries occurring while ride-sharing, or thefts while home-sharing, continue to pile up.

Generally, if properly-categorized independent contractors are accused of wrongdoing, the companies for which they work won't be held liable for their actions because the company doesn't exercise supervision or direction over the independent contractors' work. However, if the classification of the worker is in doubt, the company for whom they perform services is likely to be dragged into any legal action and may face liability for which it isn't insured.

Injuries that occur to giggers while performing services are another area of potential liability. Typically, employees can't sue their employers for injuries that occur during work activities because the injuries are compensated through workers compensation insurance. However, giggers typically aren't covered by workers compensation insurance because they aren't considered employees, meaning that the companies that engage them may be held liable for any injuries that gig workers suffer, and insurance coverage may not be available.

Finally, the significant increase in the number of employers that allow their employees to use giggers services, like Lyft, AirBnB, and BiteSquad for business travel, may be another area of risk if the giggers don't have adequate insurance. Employers may want their employees to be able to take advantage of the convenience and cost savings that gig economy businesses can offer, while still protecting themselves and their employees. Worker's compensation insurance is designed to cover work-related injuries, even those that occur during a ride share, if the travel is work related. Worker's compensation is also "no-fault," which means negligence of either driver shouldn't affect the outcome. Similarly, company business insurance may cover the costs of any lost devices or goods that are company property. Employers should review their policies to ensure such events are covered if an employee's interaction with a Lyft driver, an AirBnB host, or other gigger, goes sour.

Hazy Horizon

Many analysts believe the origin of the gig economy is an outgrowth of the Great Recession of 2008, during which many workers started picking up odd jobs in order to survive. Others trace it further back, to the economic stagflation of the 1970s, when large corporations began offshoring manufacturing and outsourcing other mass-production operations.

Regardless, the recent economic recovery hasn't slowed the expansion of the gig economy. Many people opt for the freedom and work/life balance that comes with gigging and many companies benefit from the staffing flexibility as well. As technology continues to evolve, the gig economy evolves with it.

The legal framework in which gig work exists is evolving as well. Businesses that engage with gig workers, or have relationships with other companies that do, must be vigilant of the state of the law in each of the jurisdictions in which they operate. They should also consistently evaluate how best to create and maintain their relationships with gig workers as laws, court decisions, and agency regulations shift. Gig work may be advantageous for both parties if established and arranged carefully, but companies shouldn't forget that it

can also be dangerous from a legal perspective. Only by anticipating these risks can businesses best utilize giggers and be positioned to adapt to the ever changing gig economy.

Notes

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