

Independent Contractors and Employees in the Gig Economy

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On-demand, generally unskilled labor services facilitated through internet-based platforms are colloquially dubbed the "gig economy." Examples include services for transportation, grocery and restaurant delivery, and personal valets. With the rise of these business models comes the dilemma of properly classifying workers as employees or independent contractors. Given the potential financial impact of the classification decision on the relative viability of the gig economy and traditional business model competition, we are closely monitoring these issues to best advise our clients.

Many gig economy businesses consider themselves technology providers, and not service providers. Meaning, they claim to simply offer an internet-based platform through which independent contractors can connect with end-users to provide a service. More traditional businesses in competing market spaces challenge the technology-provider-only view. Their concern is that the technology-provider-only view allows gig economy businesses to mischaracterize employees as independent contractors to gain an unfair advantage by avoiding the expenses attendant with employees, such as payroll taxes, minimum wage, and workers' compensation insurance.

US Department of Labor Concerned about Mischaracterization of Employees

The United States Department of Labor (Department) has expressed concern over the increasing incidents of mischaracterization of employees as independent contractors, and has vowed more enforcement actions to level the playing field for businesses who properly classify employees. In this regard, the Department, as well as most courts, applies the "economic reality" test to evaluate whether an individual is dependent on the entity. The economic reality test is a multi-faceted analysis considering:

1. the extent to which the work performed is an integral part of the entity's business,
2. the worker's opportunity for profit or loss depending on his or her managerial skill,
3. the extent of the relative investments of the employer and the worker,
4. whether the work performed requires special skills and initiative,
5. the permanency of the relationship, and
6. the degree of control exercised or retained by the employer.

This is not an exhaustive factor list, and no single factor controls the analysis. The Department issued Administrator's Interpretation No. 2015-1 on July 15, 2015, concluding that most workers are employees under the economic reality test.

Attention Focused on Ride-Sharing Companies

This issue has also caught the attention of state officials around the country, with much of the focus upon ride-sharing companies like Uber. Before being permitted to use the Uber smart-phone application to receive driving assignments, Uber driver prospects must, among other things:

1. clear a background check, which are repeated by Uber on a periodic basis,
2. have a vehicle satisfactory to Uber,
3. provide proof of vehicle insurance, and
4. signify that he or she viewed Uber-produced videos recommending how to be an effective driver.

Drivers do not establish their own fares and are paid according to Uber's compensation formula. Although drivers can choose when to log-in through the Uber app to signify willingness to accept assignments, and whether to accept a particular assignment while logged-in, failure to maintain a threshold activity level subjects the driver to having his or her driving privileges terminated. Uber provides insurance for the driver while he or she is actively engaged in an assignment. Drivers are told the pick-up point, but do not learn the destination until they accept the assignment. A suggested route is provided to the driver, but he or she may elect a different route. If the driver deviates from the suggested route, Uber may require a satisfactory explanation before compensating the driver. Drivers must also maintain a minimum rider approval level or their driving privileges may be terminated.

Are Ride-Sharing Drivers Employees?

State administrative agency decisions have split over whether Uber drivers are employees or independent contractors. In June 2015 the California Unemployment Insurance Appeals Board (Board) concluded that Uber drivers are employees. The Board found that Uber would have no business without its drivers (*i.e.*, it is a transportation provider), effectively rejecting the technology-provider-only position. The Board also found influential the extent of control that Uber exerted over driver selection, rates, compensation, suggested routes, and discharge of unsatisfactory drivers. In October 2015, the Oregon Bureau of Labor and Industries issued an advisory opinion concluding that Uber drivers are employees.

By comparison, in September 2015 the Florida Reemployment Assistance Appeals Panel concluded that Uber drivers are independent contractors. The Panel acknowledged that there was some indicia of an employer-employee relationship between Uber and the drivers. However, the Panel determined that Uber did not exert sufficient control over the drivers to create an employee relationship because the drivers

1. used their own vehicles,
2. controlled when to work,
3. decided whether to accept a proposed assignment, and
4. evaluated whether particular assignments were economically beneficial.

Earlier this year a class of Uber drivers was certified in California to pursue litigation challenging, among other things, their classification as independent contractors. In pre-trial motion practice the judge denied Uber's efforts to dismiss the litigation, and when doing so appeared to question Uber's denial of an employer-employee relationship given the level of control it exerts over drivers. The outcome of the litigation will apply only to Uber drivers in California. However, an adverse outcome for Uber likely will precipitate similar actions in other states.

The outcome of the California case likely will influence the gig economy business model as a whole. Entities in that space will need to restructure, and perhaps refinance, to address the economic and regulatory impact of an employer-employee relationship with its workers.

White and Williams has a team of experts available to assist gig economy businesses with the issues arising in this challenging legal landscape. For more information, contact Marc Casarino (302.467.4520; casarinom@whiteandwilliams.com) or Earl Forte (215.864.6822; fortee@whiteandwilliams.com).

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