Legal Update Article

Common Mistakes Companies Make with Gig Economy Workers

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It is no secret that traditional employers often benefit from non-traditional workplace arrangements available in the gig economy, such as relief from paying unemployment insurance and worker's compensation plans or being exempt from many minimum wage or overtime laws that apply to the traditional employer-employee relationship. Companies also can save in traditional onboarding, ramp-up, and training costs since temporary gig workers do not require the same training or retention efforts.

However, as the rules for the gig economy continue to evolve, companies that rely on gig workers must keep up in this shifting tech-driven space. This article highlights some common legal mistakes companies make in navigating the gig economy space.

Underestimating Growing Prevalence of Gig Economy Workers

Once regarded as those in need of temporary, odd jobs in the periphery of the American workforce, today it is difficult to imagine a world without the gig economy's ever-expanding services, from ridesharing, apartment rentals, food delivery couriers, dog walkers and nannies, and livestreaming broadcasters. Experts estimate that gig economy freelancers will make up more than 40 percent of the American workforce by 2020. Additionally, an increasing number of virtual marketplace companies, or VMCs, are providing digital platforms to connect independent workers with a wide range of end-market consumers, from large companies to individuals seeking to staff urgent project needs with independent workers.

Underestimating the Skillset, Diversity of Gig Economy Workers

While many gig economy companies provide single-use, unskilled labor for ridesharing services and peer-to-peer car or apartment rentals, the gig economy also includes such diverse professionals as licensed massage therapists, car mechanics, attorneys, and doctors. These and other gig economy workers can perform functions peripheral to a company's core operations and products, such as building maintenance, food service, or IT management, as well as other services that require sought-after skillsets. Just as gig economy workers have a high degree of autonomy over their schedules, their work can span a broad range of professional industries.

Misclassifying Gig Economy Employees as Independent Contractors under Federal Law

The legal definition of an independent contractor changes depending on the jurisdiction and between federal statutes, such as Title VII of the Civil Rights Act and the Fair Labor Standards Act (FLSA), and federal agencies, such as the Internal Revenue Service (IRS), the Equal Employment Opportunity Commission (EEOC), involved. Differences also exist depending on the state and local agencies involved. Consequences for misclassifying an employee as an independent contractor can be severe — back pay for overtime wages, liquidated damages, federal income tax liability and IRS penalties, FICA contributions, and interest.

The existence of an "Independent Contractor Agreement" or an IRS 1099 form is not dispositive of whether a worker is an independent contractor or an employee. Generally, gig economy independent contractors exercise independent business judgment over how to complete their work and are paid by completed task, instead of by hours worked.

The National Labor Relations Board (NLRB) published a memorandum (NLRB Div. of Advice, No. 13-CA-163062 (Apr. 16, 2019)) listing non-exhaustive factors under the common-law agency test. These factors include:

- Workers' ability to set their own schedules;
- Workers' ability to choose where they work;
- Workers' ability to choose whether they work for a company's competitor;
- Workers' ability to refuse projects from the employer at their discretion;
- Whether workers provided their principal instrumentality and tools;
- Whether workers are responsible for their own chief operating costs;
- Whether workers signed contracts expressly characterizing their relationship to the employer as independent contractors; and
- Whether the employer paid benefits or leave, or provided holiday pay to workers.

As applied to the rideshare and taxicab industry, the NLRB memorandum determined that rideshare drivers were properly classified as independent contractors because of: "(1) the extent of the company's control over the manner and means by which drivers conduct business and (2) the relationship between the company's compensation and the amount of fares collected." The NLRB also determined that "the level of company control should be assessed in the context of its effect on entrepreneurial activity."

Similarly, the Department of Labor (DOL) imposed an "Economic Realities Test" in April 2019 to determine whether a gig economy worker is properly classified as an independent contractor. The test considers:

- The employer's degree of control over the work performed;
- The permanency of the relationship;
- The relative investment of the worker in the project;
- The worker's opportunity for profit/loss; and
- The integration of the worker into the employer's workplace.

As these factors emphasize, the DOL test focuses on the extent to which a worker is economically dependent on the employer.

Misclassifying Gig Workers under California Wage and Hour Law

In California, companies also can run afoul of state wage and hour laws by misclassifying their gig economy workers. In summer 2019, the California legislature passed AB 5, which codified *Dynamex v. Superior Court of Los Angeles,* a California Supreme Court decision establishing the three-part "ABC" test to determine whether a worker is correctly identified as an independent contractor:

(A) A worker must be free from the control and direction of the company;
(B) A worker performs work that is outside the usual course of the company's business; and

(C) A worker is customarily engaged in an independently established trade, occupation, or business that is of the same nature as the work performed.

Even more so than under federal law, misclassification can have expensive consequences for an employer under California law. An employee misclassified as an independent worker would be entitled to additional legal entitlements under the California Labor Code and California's Private Attorney General's Act, which include additional protections and harsh waiting time penalties for noncompliance of the state's myriad of wage and hour laws.

Violating Company Benefit Plan Contracts by Including Gig Workers

Companies may unwittingly violate the terms of their contracts with insurers and company benefit plans by including gig economy workers. Many company-sponsored benefit plans limit participation to direct employees. Even temporary or accidental inclusion of workers who are independent non-employees can violate exclusivity provisions resulting in insurers refusing coverage.

If you have questions about these developments or about classifying gig economy workers and whether your company is in legal compliance, please contact a Jackson Lewis attorney.

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