



EMPLOYMENT LAW & CHILL

EMPLOYMENT LAW CONSIDERATIONS FOR THE GIG ECONOMY

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OVERVIEW

- What is the “gig economy?”
- Risk of misclassification and other legal issues
- Best practices
- Your questions



WHAT IS THE GIG ECONOMY?

- A labor market characterized by alternative working relationships
- Includes contingent workers, freelance workers, and independent contractors
- Workers for app-based businesses (Lyft, Uber, Postmates, etc.)
- Fortune 500 companies participate, too
 - Hiring contingent workers for performance of non-core tasks, such as marketing, payroll, and human resources

IS THE GIG ECONOMY GROWING?

As of May 2017:

- 3.8% of workers (5.9 million people) held contingent jobs
- Contingent workers accounted for 1.3% - 3.8% of total employment (1.8% - 4.1% as of February 2005)
- Contingent workers were more than twice as likely as non-contingent workers to be under age 25

Contingent and Alternative Employment Arrangements – May 2017,
Bureau of Labor Statistics, June 7, 2018.

IS THE GIG ECONOMY GROWING?

- Contingent workers were more likely to work in professional and related occupations, construction, and extraction occupations than noncontingent workers
- 6.9% of all workers were independent contractors (7.4% as of 2005)
- 79% of independent contractors preferred their working arrangement over a traditional job, compared to 44% for on-call workers and 39% of temporary help agency workers

*Contingent and Alternative Employment Arrangements – May 2017,
Bureau of Labor Statistics, June 7, 2018.*

PROS AND CONS OF HIRING GIG WORKERS

PROS

- Reduced training & onboarding costs
- Workers work when they want
- Avoid paying payroll taxes and benefits
- Ability to calibrate workforce to meet business needs
- Workers cannot sue company for violations of local, state, and federal employment laws

CONS

- High turnover
- Potential for misclassification
- Risk of joint employer liability
- Less control
- No exclusive work relationship



LEGAL ISSUES IN THE GIG ECONOMY

- Potential for misclassification
- Risk of joint employer liability
- Teleworking as a form of reasonable accommodation
- Working “off the clock”



MISCLASSIFICATION

TESTS FOR INDEPENDENT CONTRACTOR STATUS

- Common Law Test
- FLSA “Economic Realities” Test
- IRS “Control” Test
- NLRB “Common Law Agency” Test
- DOL “Economic Realities” Test
- Tennessee Common Law Test
- California “ABC” Test

How the parties characterize the relationship is not controlling.



COMMON LAW TEST

Although no single factor is controlling, the factors considered by the Supreme Court include the following:

- 1) The extent to which the worker's services are an integral part of the employer's business;
- 2) The permanency of the relationship;
- 3) The amount of the worker's investment in facilities and equipment;
- 4) The nature and degree of control by the principal;
- 5) The worker's opportunities for profit and loss; and
- 6) The level of skill required in performing the job and the amount of initiative, judgment, or foresight in open market competition with others required for the success of the claimed independent enterprise.



ECONOMIC REALITIES TEST: FLSA STANDARD

Whether the economic realities of the parties' relationship are such that the worker is dependent on the company to which they provide services.

- *Silk* Factors
 - The degree of control
 - The relative investment in facilities
 - The worker's opportunity for profit and loss
 - The permanency of the parties' relationship
 - The skill required

United States v. Silk, 331 U.S. 704, 717-19 (1947)



IRS 20-FACTOR TEST

- Level of Instruction
- Amount of Training
- Degree of Integration
- Extent of Personal Services
- Control of Assistants
- Continuity
- Flexibility
- Full-time Work
- On-site Services
- Sequence of Work
- Requirements for Reports
- Method of Payment
- Payment of Expenses
- Provision of Tools & Materials
- Investment in Facilities
- Realization of Profit or Loss
- Work for Multiple Companies
- Availability to Public
- Control over Discharge
- Right of Termination

THE “CONTROL” TEST: IRS STANDARD

IRS now groups the 20 factors into three primary categories:

- Behavioral Control
- Financial Control
- Relationship of the Parties

NLRB “COMMON LAW AGENCY” TEST

- 1) Extent of control which the employer may exercise over the details of the work;
- 2) Whether or not the individual is engaged in a distinct occupation or business;
- 3) Kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
- 4) Skill required in the particular occupation;
- 5) Whether the employer or the individual supplies the instrumentalities, tools, and place of work for the person doing the work;
- 6) Length of time for which the person is employed;
- 7) Method of payment, whether by the time or by the job;
- 8) Whether or not the work is a part of the regular business of the employer;
- 9) Whether or not the parties believe they are creating the relation of employer and employee; and
- 10) Whether the principal is or is not in the business.



WITHDRAWAL OF DOL OPINION LETTER 2015-1

- Withdrawn, but further guidance is expected
 - Field Assistance Bulletin 2018-4: “Determining Whether Nurse or Caregiver Registries Are Employers of the Caregiver”
 - Although the 2018 Bulletin addresses the relationship between registries and caregivers, the DOL appears to indicate that it is returning to a “totality of the circumstances” standard and will consider “all factors” in its analysis.
- Removal of the administrator interpretations does not change the legal responsibilities of employers under the Fair Labor Standards Act
- It is expected that the withdrawal will eventually be followed by Opinion Letters, possibly on the issue of joint employment and independent contractors



TENNESSEE COMMON LAW TEST

- Tennessee courts consider the entire working relationship and review the following non-exclusive list of factors when determining whether a worker is an independent contractor:
 - The right to control how the work is performed;
 - The right of termination;
 - The payment method;
 - Whether the worker hires his own employees;
 - Whether the worker furnishes his own tools; and
 - Whether the worker is doing “work for another.”



CALIFORNIA “ABC” TEST

All three of the following factors must be met for a worker to be properly classified as an independent contractor:

- The worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact.
- The worker performs tasks that are outside of the usual course of the hiring entity's business.
- The worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity.

Dynamex Operations West, Inc. v. Superior Court, 4 Cal. 5th 903 (Cal. Sup. Ct. 2018)



CASES CHALLENGING INDEPENDENT CONTRACTOR CLASSIFICATION

- Cases Finding Employee Status
 - *Hood v. Uber Technologies, Inc.*, Case No. 1:16-CV-00998 (M.D.N.C. Jan. 3, 2019)
 - *Sakaci v. Quicksilver Delivery Systems, Inc.*, No. 806CV1297T24MAP, 2007 WL 4218984 (M.D. Fla. Nov. 28, 2007)
 - *Luther v. Z. Wilson, Inc.*, 528 F. Supp. 1166 (S.D. Ohio 1981)
- Cases Finding Independent Contractor Status
 - *SuperShuttle DFW, Inc.*, 367 NLRB 75 (2019)
 - *Browning v. Ceva Freight, LLC*, 885 F. Supp. 2d 590 (E.D.N.Y. 2012)
 - *Freund v. Hi-Tech Satellite, Inc.*, 185 F. App'x 782 (11th Cir. 2006)



CONSEQUENCES OF MISCLASSIFICATION

- Back pay, including overtime compensation;
- Employee benefits, including stock options, retirement benefits, and health plan coverage;
- Workers' compensation benefits and unemployment insurance premiums;
- Tax and insurance obligations;
- Liquidated damages; and
- Civil monetary penalties.



GIGFLIX

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BEST PRACTICES FOR AVOIDING MISCLASSIFICATION

- Define limited scope of employment
- Create separation – no supervisor, no performance evaluation, no holiday party
- Create separate policies applicable to non-employees who work on company premises
- Pay for services on a fixed-fee basis upon completion of services or achievement of milestones
- Make the contractor solely responsible for expenses and overhead costs



BEST PRACTICES FOR AVOIDING MISCLASSIFICATION

- No entitlement to any benefits
- Contractor indemnifies company for any unpaid taxes
- If the contractor provides workers, the contractor is fully responsible for them and shall indemnify you for any claims made by contractor's workers/employees
- Requiring contractor to maintain liability insurance
- No discounts on company products
- Know the law in all jurisdictions where you have workers



TOUGH CALLS

Whether to include these provisions in independent contractor agreements, even though they are indicative of an employment relationship:

- Confidentiality restrictions
- Restrictive covenants – non-compete and non-solicitation agreements
- Training contractors on anti-discrimination and anti-harassment policies
- Restricting contractor's ability to work for other clients during the engagement



JOINT EMPLOYMENT

JOINT EMPLOYMENT

- Multiple Tests
- General Definition: Two companies exercise control over the worker
- Best Practices:
 - Clearly define worker's relationship with company in contract
 - Minimize control over gig workers who are not “permanent”
- Last week, DOL sent to the White House for review a rule expected to limit shared liability for affiliated businesses.

TELEWORKING

- Working remotely can be a form of reasonable accommodation under the Americans with Disabilities Act (ADA)
- In-person attendance is an essential function of “most jobs.”
EEOC v. Ford Motor Co., 782 F.3d 753 (6th Cir. 2015)
- But, determining what constitutes an essential job function is highly fact specific. *Mesby-Meacham v. Memphis Light, Gas & Water Division*, 883 F.3d 595 (6th Cir. 2018)



WORKING “OFF THE CLOCK”

Do I have to pay employees who respond to e-mails and text messages after hours?

- The *de minimis* rule: when the matter in issue concerns only a few seconds or minutes beyond the scheduled working hours, such trifles may be disregarded.
- An important factor in determining whether a claim is *de minimis* is the amount of daily time spent on the additional work.
- Courts have found as a matter of law that *de minimis* is 10 minutes or less, even if the work is otherwise compensable.



QUESTIONS?



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