

Will the "gig" ever end?



By: Adrienne Parkmond, Esq.

Imagine being 40 minutes late to meet a high profile client in Brooklyn New York because your Uber driver made a wrong turn and landed in New Jersey. After the meeting ends, what do you do? .. Call a cab? Of course not, you do exactly what most people do nowadays, open your Uber app and find another driver to take you to your next appointment.

A recent New York Times editorial explored what it means to be an employee in a ?gig economy.? Companies like TaskRabbit, Instacart, Lyft, Airbnb and Uber pride themselves on innovation and providing many Americans the opportunity to earn extra income. These companies have raised millions in investments and have generous profit margins. This ?on demand? sector is growing at a phenomenal rate in large part due, to its business model of hiring independent contractors. By eliminating the costs associated with having employees, these enterprises keep costs low but in doing so, workers don't enjoy the workplace protections that are the very foundation of the American labor force.

The ?gig economy? is defined by Wired magazine as ?nontraditional jobs taken by independent contractors, temps, or freelancers?, that allow people to work independently through a company ? not as employees, but as contractors. According to the Bureau of Labor Statistics (BLS), in May 2015, 15.5 million people in the U.S. were self-employed?an increase of roughly 1 million since May 2014. By 2020, a separate study estimates that more than 40% of the American workforce, or 60 million people, will be independent workers?freelancers, contractors, and temporary employees. A look back at data from BLS from 1995 through the early 2000's, shows 93% of the workforce was full and part-time employees. Over the last five years, independent contractors and temps have made up nearly 15% of the workforce, and continue to grow.

The Harvard Business Review recently called this phenomenon "The Rise of the Supertemp." These days, professionals like attorneys and consultants, are choosing to work independently. According to Robert Reich, the rise of ?independent contractors? is the most significant legal trend in the American workforce ? contributing directly to low pay, irregular hours, and job insecurity. This potential race to the bottom way of doing business is accelerated as workers take these jobs because they cannot find better employment.

As a result of this trend, several lawsuits are emerging, presidential candidates are weighing in and recently the United States Department of Labor Wage and Hour division released an Administrative Interpretation (AI) underscoring the importance of appropriately classifying employees. The AI makes clear that the job designation given by a company to a worker is not determinative of the worker's employment status. Misclassifying a worker as an independent contractor could result in a worker losing out on minimum wage, workers compensation, unemployment insurance, the right to collective bargaining and overtime protections.

"Many Americans are making extra money renting out a small room, designing websites, selling products they design themselves at home or even driving their own car. This on-demand, or so-called gig economy is creating exciting economies and unleashing innovation. But it is also raising hard questions about work-place protections and what a good job will look like in the future." -- Hillary Clinton

The Great Recession structurally shifted the American economy; technology advances now provide employers with the option of

seeking alternatives to directly hiring talent. These emerging business models have resulted in flexible workplace arrangements which have shifted the risk to the worker. Although there are laws against this, these laws are often vague and often inconsistently enforced.

FedEx faced this challenge from thousands of California employees in 2005. (Alexander v. Fed Ex, Case No. 12-17509) FedEx claimed their workers were independent contractors based on the fact that the workers were not told what hours to work even though workers were told what packages to deliver and FedEx determined the workload. Workers had to pay for FedEx trucks and uniforms. If a worker was sick or went on vacation they needed to find their own replacements. The California Department of Labor recently ruled that an Uber driver was an employee, not a contractor and ordered Uber to pay the driver back expenses. Uber is appealing the decision.

The 'gig economy' will continue to grow as technology advances and as millennials drive the demand for increased flexibility and instant service. What must be limited is a corporation's intentional misclassification of workers in an effort to limit risk and avoid worker protections. The Department of Labor and the IRS will be the ultimate authority in balancing the interests of employers and workers by simplifying the test to determine if a worker is an employee or an independent contractor and consistently enforcing its regulations. Until then, the 'gig' continues??