THE GIG ECONOMY: CONCERNS FOR BUSINESSES WHO HIRE NON-TRADITIONAL "GIG" WORKERS

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The workforce is changing. More and more workers are joining the "gig economy." According to a 2015 U.S. Government Accountability Office report, 40% of the workforce now has nontraditional employer-employee jobs. While "gig workers" are generally classified as independent contractors, some gig workers' are challenging this classification and seeking employee benefits. What does this mean for our clients? How do these nontraditional, "gig" or "on-demand" workers help our clients? How could they cause our clients unexpected liability? This article will take a look at the gig economy in general, how Minnesota employers can determine whether their gig workers are employees or independent contractors, how national and Minnesota litigation is changing this analysis, and where the gig economy may take the nation and Minnesota in the future.

GIG ECONOMY OVERVIEW

The gig economy is a collection of markets that match providers to consumers on a gig (or job) basis in support of on-demand commerce. Congressional Research Service, *What Does the Gig Economy Mean for Workers?*, Feb. 5, 2016, *available at https://digital.library.unt.edu/ark:/67531/metadc824431/* (last visited Dec. 3, 2017). Generally, this means a business enters into an agreement with a gig worker to provide a specific service or complete a specific job. The most familiar gig economy companies are Uber, Lyft, Postmates, GrubHub, and BiteSquad.

Beyond these well-known companies, there are gig companies that do anything you can think of. TaskRabbit can connect you with a "trusted and local handyman." Care.com connects families with caregivers. Instacart will pick up groceries for you from local grocery stores. Freelancer connects you directly with programmers, developers, designers, and other IT professionals. Handy will connect you with professionals to clean your home, or a handyman. The gig economy has even expanded to allow businesses to contract with a part-time CEO. Ibrahim Hirsi, *Minnesota's 'gig economy': not just for artists and Uber drivers anymore*, Feb. 10, 2017, *available at https://www.minnpost.com/good-jobs/2017/02/minnesotas-gig-economy-not-just-artists-and-uber-drivers-anymore* (last visited Dec. 4, 2017). Do you need a job done? There is probably "an app for that," and behind the app, a gig worker willing to do the work for you. This is the gig economy.

Why are people "gigging?" For many workers, the gig economy is an income gap filler; it is a way to make extra income. For others, it is a full-time job. The gig economy also provides flexibility. Gig workers can work when they want, and as much or little as they want. It also allows workers to work outside of the traditional market. Gig workers can also control what apps or businesses to work through on a given day and can even work through multiple apps at the same time. It's also easy to become a part of the gig economy. In fact, I bet that you could download any one of the aforementioned apps and become a member of the gig economy before you even finish reading this article.

The gig economy, for many, is the freedom to control your own work life and fate. With the freedom of working in the gig economy, however, comes the reality that gig workers do not have the same protection and benefits as traditional employees. This lack of protection and benefits has led to a large subset of the American workforce being uninsured or underinsured, and not covered by workers' compensation insurance. Therefore, we see an increasing amount of litigation with gig workers fighting for the rights of traditional employees. As litigation on these issues is pending, new areas of potential liability are opening up for businesses who may not intend, for example, to provide workers' compensation benefits to an injured gig worker.

EMPLOYEE VERSUS INDEPENDENT CONTRACTOR

A majority of the current gig worker litigation centers on the question of whether gig workers are employees or independent contractors. The legal distinction between

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the two is of critical importance to employers because it determines what a business owes their workers and the extent of a business's liability. Employees have rights, protections, and benefits by virtue of being employed by a business. Employees are covered and protected by federal and state labor and employment laws. Employees are eligible for workers' compensation benefits, they often receive benefits (health and retirement benefits, sick leave, FMLA, etc.), and they enjoy the benefits of minimum wage and overtime laws. Employees also have the right to unionize. When a business hires an employee, the business is agreeing to provide the employee these rights, protections, and benefits. In exchange, the employee agrees to work pursuant to the business' guidelines, policies, and procedures.

This employee-employer relationship is important because the employer business gets to assert *control* over its employees. It can tell employees when to work, where to work, what to wear, what to do, require following of business guidelines, policies, and procedures, etc. This control allows a business to know the extent (for the most part) of its potential liability, and to manage liability and risk by hiring employees who follow the businesses rules and conduct their jobs safely.

Independent contractors, however, are different. Generally, independent contractors contract with businesses to complete specific jobs. Businesses who contract with independent contractors need not provide the worker with benefits. For example, independent contractors are responsible for their own insurance and benefits. Businesses also do not have as many state and federal employee protections concerns as they have with employees (*i.e.*, minimum wage and overtime laws). While a business may hire an independent contractor time and time again, when the contracted work is complete the contractual relationship between the independent contractor and business ends.

By virtue of being independent, independent contractors are also largely outside the control of the business that hires them. While they agree to complete a specific job, the business does not assert much (if any) control over how the independent contractor actually completes the job. Where an employee may be expected to work during the traditional "nine-to-five" and may have a supervisor monitoring the employee's performance, an independent contractor can determine how, and generally when, to complete the work.

GIG WORKERS: INDEPENDENT CONTRACTORS OR EMPLOYEES?

Businesses who contract with gig workers must decide whether to classify their gig workers as employees or independent contractors. Classifying a worker, however, is not as clear-cut as it may seem. Misclassification can result in serious penalties as they leave workers without benefits, insurance, and protections for which they are legally eligible. This gap in coverage and benefits becomes the state and federal government's expense. In fact, the federal government offers state programs grants to help investigate and identify misclassifications. This is why proper classification of gig workers is so critical. Improper classification can harm a business's bottom line, increase their liability, and could harm the business' reputation through bad publicity and lawsuits. From the gig worker perspective, more and more believe they are being misclassified as independent contractors.

At least by design, gig workers are primarily independent contractors because gig workers are hired to complete specific tasks, often through apps like Uber, Lyft, Grubhub, Handy, etc. The question courts are grappling with is what does it mean for companies like Lyft and Uber, who have armies of independent contractors over which they do assert some control? Are these companies properly classifying their gig workers as independent contractors, or are these companies misclassifying their workforce as independent contractors, leaving hundreds of thousands of workers without benefits to which they are entitled?

For example, consider a typical Uber driver. The driver is often working for Uber and Lyft concurrently. Driving may be his or her only source of income. Her or she gets assigned a job through the app and are told by the app where to go, and when to go. Drivers must accept rides assigned to them. If they do not, penalties can be assessed. The app tells the driver which way to go, turn by turn. If you do not have a smartphone, you can get one (for a fee) through the app. You may even rent or purchase a car through the app. Payment from customers is made through the app, with a portion going to Uber or Lyft. Fees are set by Uber and are non-negotiable. Uber and Lyft also have restrictions on what car can be driven (age and safety requirements). If a driver's rating falls below a certain point, Uber can send "tips" to help modify the driver's behavior. Drivers are also given some rules to follow, including no contacting passengers after rides. Drivers who violate rules can be banished from using the app. Uber and Lyft also provide limited insurance coverage to their drivers, with specific policy limits and situational coverage.

In light of these facts, the question courts are considering is whether gig workers like Uber and Lyft drivers are truly independent contractors. Are they actually employees with rights to benefits and protections? To determine the proper classification of a gig worker, businesses need to look at the applicable federal and state rules, case-law, and statutes to analyze its relationship with their gig workers.

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DID I HIRE AN INDEPENDENT CONTRACTOR OR AN EMPLOYEE?

On the federal level, businesses must look to the Federal Labor Standards Act (FLSA). The FLSA only applies to employees. U.S. Department of Labor, Wage and Hour Division, *Fact Sheet #13: Am I an Employee?: Employment Relationship Under the Fair Labor Standards Act*, 2014, *available at* https://www.dol.gov/whd/regs/compliance/whdfs13.htm (last visited Dec. 4, 2017). In determining whether an employee-employer relationship exists the FLSA applies an "economic realities" test. *Id.* No one fact is determinative. *Id.* You must look at the totality of the working relationship. *Id.* While not an exhaustive list, the FLSA recommends analysis of the following factors:

1. The extent to which the work performed is an integral part of the employer's business;
2. Whether the workers' managerial skills affect his or her opportunity for profit and loss;
3. The relative investments in facilities and equipment by the worker and the employer;
4. The workers' skill and initiative;
5. The permanency of the workers' relationship with the employer; and
6. The nature and degree of control by the employer. *Id.*

In Minnesota, the Department of Labor and Industry (DOLI) also has guidance on determining independent contractor versus employee status. DOLI promulgates analysis of the following factors, which are in addition to analysis of control:

1. Right to discharge;
2. Availability to public;
3. Compensation on job basis;
4. Realization of profit or loss (including providing access to office, equipment, materials, or other facilities);
5. Termination (worker's right to terminate the relationship without incurring liability for noncompletion of the employment);
6. Substantial investment (in facilities used in performing services for another indicates an independent contractor status);
7. Responsibility (if an employing unit is responsible for negligence, personal behavior, and work actions of an individual in contact with customers and the general public during time that services are performed for the employing unit, an employment relationship is indicated); and
8. Services fundamental to business (employment is indicated where the services provided are necessary to the fundamental business purpose for which the organization exits). Minnesota Rules, part 5224.0340, subpart 1 – 9.

The analysis does not stop there, however. Minn. Stat. § 181.723 requires different and specific analysis for construction contractors. It requires a nine-part test with control as the main element. There is also a whole body of law regarding construction contractors outside of this, including a process through which construction contractors can be certified as an independent contractors with DOLI. Minn. Stat. § 176.043 similarly provides a seven factor test for the trucking and messenger/courier industries. Only if *all* factors are met can a truck driver or messenger be an independent contractor.

In 1986 the Commissioner of DOLI was also authorized to create rules to further define independent contractors. DOLI, *Workers' Compensation – Determining independent contractor or employee status*, *available at*, *http://www.dli.mn.gov/WC/IndpCont.asp* (last visited December 3, 2017). Minn. Rules. 5224.0020 to 5224.0312 were created. They provide specific factors for certain professions to prove independent contractor status, including: artisans, barbers, accountants, photographers' models, real estate and securities salespeople, sawmill operators, jockeys, sports officials, and taxicab drivers.

Finally, a business analyzing an employment relationship could also look to case-law for guidance. Minnesota workers' compensation case-law, for example, has developed a five-factor test:

1. The right to control the means and manner of performance;
2. The mode of payment;
3. The furnishing of material or tools;
4. The control of the premises where the work is done; and
5. The right of the employer to discharge.

Hunter v. Crawford Door Sales, 501 N.W.2d 623 (Minn. 1993); *Guhlke v. Roberts Truck Lines,* 128 N.W.2d 324, 326 (Minn. 1964).

The major consideration in all of the aforementioned tests is control. The more control a company has in the working relationship, the more likely the worker will be considered an employee. Where the worker has more control, it is more likely the worker will be an independent contractor. Businesses should analyze workers under *all* applicable tests to determine the proper classification. So how does the gig worker fit into this analysis?

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NATIONAL OVERVIEW

The issue of whether gig workers are employees or independent contractors has been litigated in many states, but primarily in California. In *O'Connor v. Uber*, a federal district court was asked to certify a class of drivers for Uber on the question of whether their employment status as independent contractors was misclassified. 82 F. Supp. 3d 1133 (N.D.Cal. 2015). The drivers argued they were employees and sought punitive damages for their misclassification in addition to unpaid tips, gratuities, and reimbursement for expenses. The drivers succeeded, and the federal district court permitted the class action against Uber. *Id*. While the case is still making its way through the legal system (the parties are awaiting judgment from the Ninth U.S. Circuit Court of Appeals), the case nearly settled last year for $100 million dollars. Jacob Passy, *Uber doesn't want its drivers to be employees – here's why that matters*, Nov. 14, 2017, *available at https://www.marketwatch.com/story/uber-doesnt-want-its-drivers-to-be-employees-heres-why-that-matters-2017-11-13* (last visited Dec. 3, 2017). Clearly the value of these cases is significant.

Similar cases have been brought against a variety of other gig businesses and in other states. In September 2015, delivery drivers for GrubHub brought a class action in California state court alleging they were misclassified as independent contractors when they should have been employees for purposes of wage payment law. Joseph A. Seiner, *Tailoring Class Actions to the On-Demand Economy*, 78 Ohio St. L. J. 21 (2017). In 2015 similar actions were also brought against Instacart, Amazon Prime, Yelp, Postmates, and Handy. *Id.* Some of the cases were dismissed, some were allowed to proceed, and others have gone to arbitration. *Id.* Some of the cases have also settled. In 2016, for example, FedEx paid $240 million dollars to 12,000 drivers to settle misclassification lawsuits. Passy, *Uber doesn't want its drivers to be employees – here's why that matters*. Instacart also reached a $4.6 million dollar settlement with workers in 2017. *Id.*

Without clear guidance from the courts yet and with many pending cases, the important take-away is that gig workers are having some success in arguing their classification as employees. Misclassification is a risk for businesses hiring gig workers, especially if they do not perform a complete analysis of the employee versus independent contractor question. While nationally gig worker misclassification has been an issue for some time, in Minnesota, litigation is just starting.

SISTERS' CAMELOT AND CHRISTOPHER ALLISON AND IWW SISTERS' CAMELOT CANVASSERS UNION, 18-CA-100514 & 18-CA-105462 (SEPTEMBER 25, 2015).

In *Sisters' Camelot* (Camelot), the National Labor Relations Board (NLRB) examined a misclassification claim from on-demand (gig) workers. Camelot is a nonprofit organization in Minnesota that distributes food to low-income individuals. It funds its operation almost entirely through door-to-door canvassers. Canvassers operate on a flexible schedule and choose when and what days to work. When canvassers decide to work, they meet a coordinator at Camelot's facility at a specified time in the morning, and are assigned a specific area to canvass. The canvassers can only canvass in the area assigned, and only for Camelot. The canvassers must keep detailed records of what occurs at each house. Each canvasser receives a nonnegotiable commission based upon the donations collected at the end of their shift.

Issues arose when a canvasser, Christopher Allison, was involved in efforts to organize a canvassers' union and was terminated for doing so. His co-canvassers filed a complaint with the NLRB, alleging violations of their right to organize. The organizers argued they were employees, and, as such, were entitled to protection from unfair labor practices.

An administrative law judge dismissed the complaint ruling that the canvassers were not employees but rather independent contractors. The judge was persuaded by the fact the canvassers were in control of their own schedules, lacked direct supervision, and were free to make decisions, such as when to show up for a shift and whether to actually canvass and collect donations while working.

The NLRB reversed the administrative law judge's decision, focusing on the following eleven factors:

1. Extent of control by employer;
2. Whether the individual is engaged in a distinct occupation or business;
3. Whether the work is usually done under the direction of the employer or by a specialist without supervision;
4. Skill required in the occupation;
5. Whether the employer or individual supplies the instrumentalities, tools, and place of work;
6. Length of time for which individual was employed;
7. Method of payment;
8. Whether the work is part of the regular business of employer;
9. Whether the parties believe they are creating an independent-contractor relationship;
10. Whether the principal is or is not in the business; and
11. Whether the evidence shows the individual is rendering services as an independent business.

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The NLRB analyzed the factors holistically and concluded that nine out of the eleven factors indicated the existence of an employment relationship. The NLRB was persuaded specifically by the following facts: when the canvassers worked for Camelot, they did so at times and locations determined by Camelot. Canvasser's salary was nonnegotiable and strictly limited by Camelot. Canvassers used tools given to them by Camelot, and canvassers had to keep detailed and accurate reports. Because the NLRB concluded the canvassers were employees of Camelot, they determined the canvassers were entitled to protection from unfair labor practices.

While the impact of the decision is still being determined, the factors the NLRB found persuasive could be applied to traditional gig economy jobs, like driving for Uber and Lyft. Does this indicate gig workers are likely to be considered employees in Minnesota? Time will tell, but a recent Uber lawsuit may bring this question to a head in Minnesota.

MINNESOTA UBER DRIVER FILES PROPOSED CLASS ACTION

On September 28, 2017, a Minnesota Uber driver filed a proposed class action against Uber and its subsidiary, Raiser, Inc., asking the Court to classify drivers as employees, not independent contractors. *Sienkaniec v. Uber Technologies, Inc. and Rasier, LLC*, 17-CV-04489. The driver is seeking unpaid wages tips, and unreimbursed expenses. *Id.* The driver alleges Uber exercised "complete dominion and control over its drivers in the performance of their duties," and therefore, drivers are employees. *Id.*

Businesses who work with gig workers should monitor this lawsuit, and others that will likely pop up in the coming months and years. If the court ultimately finds the drivers are employees, the impact could extend to all gig workers in the state.

WHERE DO WE GO FROM HERE?

Some companies are proactively trying to bridge the gap between employees and independent contractors. Uber, for example, is considering allowing drivers to pay a certain fee per mile, in exchange for medical and disability payments in the event of an accident. Uber and Lyft also provide some insurance for their drivers. Care.com is levying a transaction fee on payments that would provide up to $500 a year for workers to use for health care, transportation, or other expenses. Alana Semuels, *Could a Tax Fix the Gig Economy?*, Nov. 6, 2017, *available at https://www.theatlantic.com/business/archive/2017/11/gig-economy/544895/* (last visited Dec. 4, 2017). By making these changes, however, it would seem that a gig worker could more successfully argue they are employees and not independent contractors.

Some are suggesting that to address this looming question, changes must be made at the highest level. For example, some are suggesting legislation to force a fee on gig-economy transactions to pay for benefits. *Id.* The Independent Drivers' Guild in New York City is also in talks to introduce a bill that would levy a transaction fee on rides in order to provide benefits. *Id.* Other groups are suggesting a new category of worker be created all together.

Regardless of what happens, it is important for businesses and the defense bar to monitor the ever-changing gig economy. With the ambiguity in classifications and the penalties for misclassifications, it is important for businesses and their advisors to be versed in the issue to proactively limit liability.

FOOD FOR THOUGHT – WHERE MAY THE GIG ECONOMY BRING US IN THE FUTURE?

In light of the growing and changing gig-economy and the lack of clear guidance on how to deal with its workers, questions concerning the future of litigation come to mind. For example, if Lyft and Uber drivers are employees, what happens when a Lyft driver is logged into the app, and decides to stop into Starbucks for a coffee while he waits for a ride to be assigned? What if, while walking out of Starbucks, he slips and breaks his leg and is unable to work for 2 months? Would this injury arise out of and in the course of his employment under the Minnesota Workers' Compensation Act? Would it be a compensable injury? As the driver does not have a supervisor or manager, who would investigate the injury? Who would monitor his ability to return to work?

What if while waiting at Starbucks the driver is jumping between the Uber and Lyft app when he falls. Would the driver be an employee of both Uber and Lyft pursuant to the Workers' Compensation Act when he falls? Would this injury arise out of and in the course of his employment for one, or both of the businesses? Would both business be equally responsible for the injury? Who would investigate the claim and monitor a return to work?

What if the driver decides to pick up some delivery food through GrubHub, and because he is almost to his drop-off location, he turns on the Uber app concurrent with when he is struck by another vehicle? Would the driver concurrently employed in this situation? Which business would have liability for the injury? Without a supervisor, who would the driver report the injury to? What if the driver did not properly report the injury timely because he was not sure who to report it to? Would the drivers claim barred by the Workers' Compensation Act? Who has the right to subrogation?

The nontraditional work being performed by gig workers opens a myriad of additional issues for future litigation. As the employee-versus-independent contractor question is litigated and answers become more clear, I suspect the future will bring about interesting cases that will require changes to existing employee-employer relationship analyses to reflect the new workforce landscape.