Gig Economy Companies Face Hidden Misclassification Landmine: I-9s and Immigration Compliance

Insights
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President Biden's Labor Secretary, Marty Walsh, was recently quoted as saying "in a lot of cases, gig workers should be classified as employees." Not only did Secretary Walsh's statement cause many gig companies' stocks to dip, his words stoked speculation that the federal government, as well as many states, will push even harder to require gig companies to classify their workers as employees.

Gig companies facing these pressures are certainly thinking about the myriad of issues presented by the prospect of being forced to reclassify their independent contractors as employees. And while wage and hour issues are the typical compliance areas that are immediately addressed at that point, gig economy companies – and any other business using contract labor – also need to consider the oft-hidden legal issues related to Form I-9 compliance and immigration law. These missteps can be devastatingly expensive if not properly addressed.

What Does Employment Classification Have To Do With Immigration Compliance?

Specifically, if a gig economy company finds itself facing the prospect of its workers becoming classified as employees – whether after being forced to make the switch or doing so voluntarily to head off potential legal troubles – they would be required to complete a Form I-9 for each person. The Form I-9 is the federal government form where the employer must confirm that the employee has proper work authorization to be employed in the United States. Failure to complete I-9s for each employee, and to do it correctly and on time, can result in stiff penalties. However, if a worker's status as a contractor or employee is uncertain, having them fill out an I-9 effectively answers the question, and the company would have no choice but to treat them as a full-fledged employee. In short, the decision to have a worker fill out an I-9 should not be taken lightly.

Violation of I-9 rules can be costly; for example:

- In 2017, in collaboration with the Department of Justice (DOJ) U.S. Attorney's Office, S. Immigration and Customs Enforcement (ICE) announced a $95 million settlement of both criminal and civil immigration charges stemming from a tree-trimming company's alleged practice of hiring and rehiring of undocumented workers over a six-year period, and for failure to comply with I-9 requirements. The $95 million price tag represents the largest payment levied in an immigration or Form I-9 investigation to date.

- In 2020, the owner of a single 7-Eleven franchise pleaded guilty to criminal charges and an order to forfeit *more than $1.3 million in assets* arising from an investigation into the store's hiring undocumented workers. Franchisees of the chain have been under ICE investigations for years for alleged immigration/I-9 violations.
- A large technology company entered into a *$34-million-dollar settlement* with the government related to the company's immigration practices, including their alleged use of nonimmigrant workers with temporary work authorization and their failure to properly maintain I-9 records.

These are just a few examples. When combined with a finding by the government that a company knowingly employed noncitizens illegally, monetary penalties jump exponentially and can come with criminal charges.

But fines and potential criminal sanctions are not the only possible exposure companies for failure to properly and timely fill out I-9s. The public relations nightmare that comes with an ICE announcement that a company has failed to comply with its immigration compliance obligations can be enormous. If found guilty in the court of public opinion, a company can find itself losing both revenue and the interest of investors in a heartbeat.

Publicly traded companies have a duty to report any violation of any applicable law in their SEC filings. Failure to report in SEC filings that a publicly traded company has been hit with big fines by the government could get the company into very hot water with the SEC. Indeed, management of one publicly traded company that had undergone an ICE investigation found themselves defending against a shareholders' derivative lawsuit when the company was hit with a big fine for failure to comply with I-9 requirements. The lawsuit ended in a $4.8 million settlement (*In re. American Apparel Inc.*, Case No. CV-10-6352 (C.D. Cal. 2011)).

OK, I'm Listening. How Can We Avoid This Nightmare?

It is easy for a business to forget what may seem to be a minor detail when transitioning long-term independent contractors into employees. This is especially true where individuals are spread across a geographical area, and there is little or no time to convert them into employees.

The logistics can appear overwhelming. How does a company with thousands upon thousands of independent contractors, potentially scattered around a state, and get all of those I-9s signed by the first day the contractors become employees? Here are two simple steps you should follow to make sure you are compliant with the government's I-9 rules and regulations on the first day any former contractors become employees.

Step 1: Offer and Acceptance

Once a date has been set on which your independent contractors will become statutory employees, you will need to make offers of employment. When the employment offer is accepted, the I-9 can be

filled out, even if actual employment does not begin for days, or even weeks. But be careful – asking employees to fill out Form I-9 *before* the offer and acceptance can lead to claims that you unlawfully and discriminatorily used the I-9 to screen candidates. The U.S. Department of Justice actively pursues discrimination claims where employers use the I-9 to weed out those who might have challenges establishing their ID and work authorization, or to otherwise discriminate against protected classes.

Step 2: Review Documents and Complete Page 2 of the I-9

All newly minted employees must show their acceptable document(s), in person, to a representative of the employer within three business days of their first day of employment. The representative must view the document(s) and determine (and certify, under penalty of perjury) that the document(s) reasonably appear to be genuine and "relate to" the person. In short, the representative must ask themselves: "Are they real and do they appear to belong to the person sitting in front of me?"

The representative then signs and dates the Certification on page 2, and – unless you use E-Verify – that's it. Just like page 1, page 2 can be completed before the employee begins working for the company as an employee.

Conclusion

Gig economy companies that find themselves required by state and local governments to treat workers as employees can expect to find themselves in the crosshairs of the USCIS seeking to enforce Form I-9 compliance and seeking publicity where it issues large fines. Companies simply can't afford be caught off guard by an ICE inspection, both from a financial and PR standpoint. Your Fisher Phillips attorney can advise as to how to comply with the independent contractor rules in any state, and, where independent contractors transform into employees, can help make sure you meet your Form I-9 and other legal obligations. The firm can also assist as an authorized representative to process the forms, and can set up and deploy electronic systems to create and store the I-9s.

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