

THE GIG ECONOMY: USING MANDATORY ARBITRATION AGREEMENTS WITH CLASS ACTION WAIVERS

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By now, nearly everyone has likely heard of the “Gig Economy” (aka the “Sharing Economy” or “On-Demand Economy,”) which consists of non-traditional “employment” arrangements in which individuals perform temporary assignments or “gigs” in exchange for payment. Gig Economy companies (Gig companies) essentially serve as digital platforms facilitating gigs between workers and customers seeking their services. The entire Gig Economy business model is based on the expectation that the individuals providing services to actual customers would be functioning like sole proprietors operating their own micro-businesses, much like independent contractors.

However, there have been a rash of recent class action lawsuits brought by individuals participating in the Gig Economy (Gig workers), who allege they should be treated as employees, not independent contractors, of Gig companies. These lawsuits are threatening the underpinnings of the Gig Economy. There is no easy solution to this dilemma, but Gig companies are increasingly turning to mandatory arbitration agreements with class and collective action waivers (class action waivers) as a potential solution. This article will discuss how and why such agreements are being used to limit Gig companies’ exposure to class action liabilities and to possibly even save the Gig Economy business model.

THE GROWING GIG ECONOMY

The most well-known Gig companies are ride-sharing companies Uber and Lyft, but the Gig Economy marketplace is rapidly expanding and includes companies such as TaskRabbit (handyman and personal assistant services), GrubHub (food delivery) and Fiverr (offering a variety of services such as webpage design and copywriting).

In fact, one recent study, released in October 2016 by the Brookings Institute, indicates the Gig Economy is growing much faster than payroll employment.

Over the past two decades, Gig Economy workers increased by 27 percent *more* than traditional payroll employees. Another recent study conducted by the McKinsey Global Institute, also released in October 2016, found that almost 30 percent of American workers earn some form of income through the Gig Economy. The study found that, in total, approximately 54–68 million Americans participate in independent work outside of the traditional labor and employment structure.

ADVANTAGES OF GIG ECONOMY BUSINESS MODEL

From a business perspective, it is obvious why the Gig Economy model is attractive. It requires significantly less start-up capital and the operating and overhead expenses remain fairly limited. Furthermore, most Gig workers are considered (for now) to be freelancers or independent contractors, not employees. As such, companies do not have to pay certain taxes, provide employee benefits, overtime pay or rest periods required by federal and state laws to the Gig workers (as opposed to traditional employees who work directly for the Gig companies).

There are also advantages for Gig workers to be classified as independent contractors. They are not tied to any specific employer, they can set their own rules for business and even work on several platforms (ex., working for Uber and Lyft). Gig workers are basically their own bosses, choosing when and how to work, without having to report to anyone. Furthermore, Gig workers who create tangible items (ex., paintings, software, etc.) own their creations, not the Gig companies.

There are, of course, disadvantages to being treated as an independent contractor. Independent contractors must pay their own income taxes and do not have any long-term job security or guaranteed minimum wage. In addition, independent contractors are not eligible for workers' compensation or unemployment insurance benefits, and they are not protected under certain civil rights laws, such as Title VII. Gig companies, however, have operated under the assumption that Gig workers would happily rid themselves of certain employment protections for the benefits of independent contractor status. That assumption has proven not to be entirely accurate.

Legal Uncertainty and Liabilities for Gig Companies

The independent contractor status of Gig workers has come under heavy scrutiny lately, primarily because Gig workers do not fit neatly into either of the traditional categories of "employee" or "independent contractor." As some legal scholars have pointed out, trying to place Gig workers into either category is sometimes like trying to jam a square peg into one of two round holes.

Seizing on the legal uncertainty of worker classifications in the Gig Economy, many Gig workers have brought legal actions claiming, after the fact, that they were misclassified as independent contractors and seeking the protections and monetary benefits that come with employment status. For example, both Uber and Lyft have been embroiled in class action lawsuits from their drivers alleging misclassification of their employment status—ex., *O'Connor et al. v. Uber Technologies, Inc.*, *Yucesoy v. Uber Technologies, Inc.* and *Cotter et al. v. Lyft, Inc., et al.*

Gig companies vulnerable to class action lawsuits, like Uber and Lyft, have a few options: (1) litigate the case to the end and roll the dice on whether a court will find their Gig workers to be employees instead of independent contractors, resulting in liability for damages potentially reaching into the tens, if not hundreds, of millions of dollars; (2) be prepared to offer a large settlement payment to affected Gig workers, as well as alter agreements to provide Gig workers with more protections than are currently available to independent contractors by statute; or (3) fold under the risk and seek to avoid litigation by reclassifying their affiliated Gig workers as employees. Obviously, none of these options are particularly appealing.

Uber and Lyft chose option (2) in the aforementioned class action lawsuits to avoid risking a court or jury finding that their drivers are employees, which would undermine the companies' business models. Just recently, in March 2017, a federal court judge in California approved a settlement agreement whereby Lyft agreed to pay \$27 million to approximately 95,000 California drivers who alleged they were misclassified as independent contractors. Last year, in April 2016, Uber entered into a provisional settlement of \$100 million with about 385,000 California and Massachusetts drivers, but it was rejected by a federal court judge as being insufficient, thus sending the parties back to negotiations.

Not only are these types of settlements extremely expensive, they do not resolve the legal issue of Gig worker classifications nor do they prevent future Gig workers from bringing similar lawsuits. Accordingly, these settlements do not provide Gig companies any certainty as to the future viability of their businesses.

Benefits of Arbitration Agreements with Class Action Waivers

Ultimately, the Gig Economy's worker classification issue must be resolved legislatively with the creation of new classifications of workers that have attributes reflecting a combination of the characteristics of independent contractors and employees. Until that time, however, businesses who participate in the ever-expanding Gig Economy will continue to face the challenge of how to peacefully coexist with Gig workers without the specter of class action lawsuits hanging over the companies' heads. One of the most valuable tools Gig companies can use to minimize these risks are mandatory binding arbitration agreements containing class action waivers.

Arbitration agreements with class action waivers may take the uncertainty out of employment lawsuits by requiring that the parties litigate any claims arising out of their relationship in private arbitration, and doing so individually. Arbitration is similar to a traditional trial, but it is presided over and decided by a neutral arbitrator, who is mutually agreed upon by the parties. There is no jury.

The benefit for the Gig company is that the arbitrator is typically a learned jurist with years of experience who does not view the case as emotionally as would a jury. Another benefit is that arbitration is generally more confidential than the court system. Lawsuits are a matter of public record, but arbitrations are not. Companies appreciate the advantages of this private method of dispute resolution, as the terms of the parties' arbitration award usually cannot be disclosed to the public.

Prudent and careful Gig companies require their workers to sign arbitration agreements containing class action waiver provisions— i.e., the worker affirms not only that they will assert all claims relating to their relationship with the company in arbitration alone, but also that they will not assert claims on behalf of any other workers. In other words, a Gig worker must pursue his or her claims individually, as opposed to collectively with other current or former Gig workers.

The benefit here is that it prevents one disgruntled worker from bringing an action on behalf of several thousand other workers, many of whom likely wouldn't have initiated their own lawsuits. With class action waivers, there is only one person with one dispute, and the arbitrator will look at remedies for only that one individual.

THE LEGAL LANDSCAPE

Uber instituted arbitration agreements with class action waivers before any litigation was filed against it in 2013. The judge in the *O'Connor* case ruled that Uber's 2013 arbitration agreement was not enforceable due to being substantively and procedurally unconscionable under California law. During the litigation, Uber modified its arbitration agreements with class action waivers to apply to workers not included in the current class action (2014 and 2015 agreements). The modifications addressed the issues raised by the court by simplifying the procedure allowing drivers to opt out of mandatory individual arbitration, making it so drivers could not waive rights to bring certain lawsuits in state court as required by state law, and clearing up ambiguous language pertaining to its delegation clause. The judge suggested that it would likely be enforceable, but failed to rule on that issue as it pertained to the class action at hand.

The 9th Circuit Court of Appeals recently handed Uber a victory for its mandatory binding arbitration agreements containing class action waivers. The 9th Circuit heard consolidated appeals from two different cases (*Mohamed v. Uber Techs., Inc., et al.* and *Gillette v. Uber Techs., Inc.*) brought by Uber drivers asserting Fair Credit

Reporting Act and employee misclassification claims. Uber removed both named drivers from their platforms after negative information surfaced in their credit report. Both drivers agreed to a 2013 version of Uber's driver agreement, and one driver agreed to the 2014 modified version. Both agreements contained arbitration clauses with class action waivers, and drivers could opt out of the arbitration if they followed the appropriate steps.

The agreements also delegated decisions over enforceability of the agreements to an arbitrator. The 9th Circuit held the arbitration provisions were not unconscionable under California law. The court, however, did find invalid a provision purporting to waive the right to bring representative claims under California's Private Attorneys General Act (PAGA), but held the provision should be severed from the agreement and not affect the enforceability of the remainder of the agreement.

The 9th Circuit's September 2016 decision could impact Uber's larger *O'Connor* class action case, making it more likely those drivers will be forced into arbitration. Some estimates indicate that the class of drivers now able to take part in the misclassification class action has been reduced from over 350,000 individuals to less than 300. This would provide Uber a significant amount of leverage in this legal battle.

Arbitration agreements like the modified Uber agreements have also been upheld by federal judges in Arizona, Ohio, Florida and Maryland. Lyft similarly has been able to send to arbitration cases brought by drivers in California federal courts by ensuring the language was not unconscionable.

There have been some instances in which courts have found class action waivers to be invalid. For example, in *Lewis v. Epic-Systems Corp.*, the 7th Circuit (covering Indiana, Illinois and Wisconsin) held a class action waiver in a company's arbitration agreement with its employees violated the National Labor Relations Act (NLRA). The 9th Circuit held similarly in *Morris v. Ernst & Young*. These rulings created a circuit split on the enforceability of class action waivers in the employment context because the 2nd, 5th, and 8th Circuits each have held that class action waivers do not violate an employee's rights under the NLRA.

In January 2017, the United States Supreme Court agreed to take up this issue, granting certiorari in three cases consolidated for the purpose of deciding whether class and collective action waivers in employment arbitration agreements are enforceable in the face of the NLRA's provision protecting employees' rights to engage in "concerted activity." The agreements at issue, however, do not contain "opt-out" provisions, which has frequently saved the legality of arbitration agreements in various other lower court cases. The Supreme Court's decision will also not directly implicate most Gig workers, who are presently considered

independent contractors, not employees, but the decision could certainly have reverberations for the Gig Economy.

CONCLUSION

Notwithstanding the Supreme Court's forthcoming decision on class action waivers in the employment context, arbitration agreements with class action waivers are repeatedly enforced throughout several states and most federal courts. Given the uncertainty of Gig workers' classification, arbitration agreements containing class action waivers are a viable tool for any Gig company in most areas of the country to avoid potentially disastrous class action litigation and to preserve the independent contractor status of the workers who use their platforms.

To avoid such agreements from being held unlawful by a court, it is essential, that they do not contain unconscionable language, and that they contain thoughtful, precise language that is compliant with applicable state law and federal law. Gig companies and legal counsel, therefore, must stay apprised of the current state of the law regarding arbitration agreements containing class action waivers to ensure the agreements withstand legal scrutiny. If the proper steps are taken to ensure the enforceability of such agreements, they can be essential tools in maintaining the viability of the Gig Economy business model.

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