Navigating the Gig Economy

Insights
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In its early years, the gig economy, led by ridesharing platforms Uber and Lyft, was touted as the new land of rugged individualism.

In a 2015 survey of Uber drivers in 20 cities across the United States, nine out of 10 Uber drivers reported that "being their own boss" was the primary reason they drive for the company. This new economic model upended the traditional notion that people want to have a permanent job for the financial security. Additionally, it replaced the idea of working one's way up the corporate ladder with using new Internet-based technologies to provide services on your own schedule, with your own equipment.

This new economy has received extensive praise. In September 2013, Wired Magazine described the gig economy workers as the "labor force" that "could save the American worker."

However, over the last six months, a very vocal criticism has arisen from a segment of gig economy workers, labor unions and government entities. This criticism primarily focuses on the ability of a company such as Uber to control working conditions without providing its workers benefits such as paid leave, minimum wage and overtime.

Some of these gig workers have turned to traditional labor practices to address their concerns. In both New York City and London, gig economy workers have turned out to protest working conditions and the right to join a union. States such as California and cities such as Seattle have proposed legislation that would allow gig workers the right to collectively bargain.

The companies involved in the gig economy have maintained that their workforces are independent contractors not subject to collective bargaining rights. Nevertheless, many of them have begun to take measures to address some of the concerns.

What is the gig economy? Broadly speaking, the gig economy includes any industry where a contingent workforce (i.e., someone who doesn't mind working a series of one-off tasks, or "gigs") is matched with a willing consumer via an electronic platform, usually a mobile device app. Despite

the recent praise, the term has not always had positive connotations. Based on a term frequently used by musicians, the term "gig economy" was coined in 2009 to describe the rather unfortunate economic reality of the Great Recession. To fill in the gaps created by job loss or underemployment, people started reaching out to new methods to generate income. Around this time, gig economy powerhouses such as Uber and Airbnb came into existence.

Over the past seven years, the gig economy has expanded considerably. A survey by Intuit found that approximately 3.2 million Americans work in the gig economy. This number is projected to more than double by 2020. Whether revered or reviled, the gig economy is likely here to stay.

Designating collective bargaining rights: Unions and collective bargaining are governed by the National Labor Relations Act (NLRA). The NLRA affords almost all private sector employees the right to join a union and collectively bargain. Collective bargaining rights are governed under federal law. Under federal law, once employees establish a union, the employer is obligated to meet with the union to discuss issues such as wages, vacation time, safety issues and other subjects as required by law. If the employer fails to discuss these matters with the union, the employer can be considered to have negotiated in bad faith, which has a variety of potential consequences.

For the purpose of understanding the gig worker and collective bargaining, the most important legal concept is worker classification. As stated above, the NLRA only affords collective bargaining rights to employees. These rights do not extend to independent contractors. For the overwhelming majority of companies in the gig economy, workers are classified as independent contractors.

However, as Uber and Lyft are acutely aware, a company's designation of a worker as an independent contractor does not end the inquiry. The National Labor Relations Board (NLRB), the government body charged with NLRA enforcement, looks to a number of factors to determine whether an employee has been misclassified as an independent contractor. If the NLRB determines that an employee has been misclassified as an independent contractor, the agency can seek an order requiring the employer to recognize the workers as employees and allow them to engage in union organizing activity.

Company efforts to address the problem: There is an almost palpable tension between a labor union that exerts considerable control over working conditions and the micro-entrepreneurs of the gig economy. It is unlikely that gig workers will fall in line with the ideas traditionally found in organized labor, such as seniority. As reported by local Seattle paper The Stranger, one Uber driver stated during public comments on the proposed collective bargaining ordinance, "A union is going to say when and where we can drive. I came to Uber for the flexibility. I make Uber work for me."

That said, it is clear that issues are present, and that gig economy companies are not turning a deaf ear to potential problems. In May 2016, for example, Uber — in conjunction with the International Association of Machinists and Aerospace Workers (AFL-CIO) — set up the Independent Drivers Guild (IDG). The IDG allows employees a forum to come together to address a range of issues including

low cost insurance, driver safety and legal protection for drivers. What the IDG does not provide is collective bargaining rights, such as the requirement of good faith negotiation of wages.

Based on recent activities, the IDG does not appear to have sated many New York City Uber drivers' desire to be heard. On September 28, 2016, Uber and Lyft drivers turned out in Queens, New York, to support a campaign for Uber Drivers to join the Amalgamated Transit Union (ATU). According to the New York Daily Post, the ATU presented the New York Taxi and Limousine Commission with 14,000 union cards signed by Uber, Lyft and other ride-sharing drivers. The ATU plans to present these cards to the NLRB in a bid for collective bargaining rights. Needless to say, this matter will not likely resolve amicably and one can expect protracted litigation on the issue.

Local Legislative Efforts: Some state and local legislatures have attempted to address the issue of unions in a gig economy. On December 14, 2015, Seattle became the first city to pass an ordinance allowing ridesharing drivers, such as those who work for Uber and Lyft, the right to collectively bargain. On March 2016, the U.S. Chamber of Commerce filed suit to block the ordinance for antitrust violations. As recently as August, a federal court dismissed the suit against Seattle without prejudice, stating that the legal action had been filed prematurely. Even with the dismissal of the suit and it being nine months after the ordinance was adopted, it has yet to be implemented. The current projected date of implementation is January 2017.

Disruptor technology vs century-old labor laws: Depending on which source you read, critics tend to demonize either the government for ham-fisted regulation or Uber as the new incarnation of the robber barons. Not to take the easy way out, but it is unlikely that either side is correct.

Modern technology has led to the creation of jobs that do not easily fit into current labor laws, which were drafted in an era before the computer. There will inevitably be some growing pains associated with this adjustment. That said, the potential benefits to the company and the worker can be immense, and, as with most every facet of labor and employment law, businesses must keep their ear to the ground regarding legal developments.