The 'State' Of the Gig Economy Under Trump

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There is no question that America's sharing — or "gig" — economy is growing and showing no signs of slowing down. Studies estimate that approximately 55 million people work on freelance arrangements in the United States today. And not only are gig-based business models such as Uber, TaskRabbit and Postmates popping up on a daily basis, traditional employers are also becoming increasingly comfortable with hiring greater numbers of workers on a project or consulting basis. Another recent study concluded that 40 percent of companies are already hiring workers on project-specific terms rather than under a traditional employment model.

Experts predict the number of employers and workers who will participate in the gig economy model will continue to rise. And it's no stretch to expect that President Donald Trump's business- and jobs-focused platform will spur gig economy growth. However, as the gig economy has grown, it has also strained traditional notions about the nature of the work services relationship — a system under which workers have generally been classified as either "employees" or "independent contractors." This is because so many aspects of the company-worker relationship have been tied to the long-standing assumption that workers fit into one of these two categories. But the emergence of the gig economy has raised significant questions as to workplace protections for such workers and their entitlement to overtime pay, medical leave, insurance and other benefits long afforded to employees but not necessarily made available to independent contractors.

There has yet to be any indication that the Trump administration will clarify the concerns of gig economy workers who do not fit neatly into conventional classifications. While the U.S. Department of Labor under the Obama administration sought to revamp areas such as employee classification, overtime pay and minimum wage, Trump and his labor secretary nominee Alexander Acosta appear to embrace a more hands-off approach. In the area of worker classification, for example, there has not yet been any indication that the DOL will take any sort of action to provide clarity for businesses that employ gig economy workers.

Yet pressure continues to mount in the courts, where issues such as whether gig workers are entitled to overtime pay and protection under various civil rights laws have been percolating for years. Ride-share companies such as Uber have faced repeated legal battles over whether their drivers should be classified as employees or independent contractors. Recently, a California state court affirmed an arbitrator's determination that an Uber driver was an independent contractor and not an employee (*Uber Technologies Inc. v. Eisenberg*). In his decision, the arbitrator noted that Uber does not maintain the right to control drivers and thus is not in an employer-employee relationship

does not maintain the right to control drivers and thus is not in an employer-employee relationship with them. Similarly, a Florida appellate court recently upheld a decision by the state Department of Economic Opportunity which had decided that an Uber driver was an independent contractor and accordingly not entitled to unemployment compensation benefits (*McGillis v. Department of Economic Opportunity*).

Earlier this month, the 2nd Circuit ruled that a class of New York town car drivers seeking overtime pay were properly classified as independent contractors rather than employees (*Saleem v. Corporate Transportation Group Ltd.*). The *Saleem* court analyzed several factors in reaching that conclusion. Those factors included the drivers' ability to work for competitors, the drivers' high level of flexibility in setting their own work schedules, and the drivers' financial investment in their own business, including responsibility for purchasing and maintaining their own vehicles and obtaining required licenses and registrations. However, the court was also quick to caution that its holding was "narrow." The court said its decision was based on the specific facts of that specific case, and made no guarantee that other employers — even those with similar worker relationships — could rely on *Saleem* as a definitive defense to claims about the proper classification of their workers. Id. at 41-42. The *Saleem* case is a reminder that some court decisions might have limited predictive value, resulting in continued uncertainty for employers and workers alike.

If the Trump administration continues its hands-off approach to worker misclassification issues, and court decisions create as much confusion as clarity, we may be forced to look to state legislatures to take control. State governments have strong incentives to resolve worker classification issues, as well as to restrict the number and type of workers who can be classified as independent contractors, because they rely heavily on income derived from income taxes, unemployment insurance contributions and other payments received on behalf of employees. States may also be in a better position to consider whether the time is right to create a third (or even fourth) category of worker, changing the long-standing assumption that workers must be either employees or contractors. Further, state governments would benefit from taking control of defining which new categories of workers might be required to contribute to state funds such as unemployment insurance, workers' compensation and other similar systems.

To be sure, the gig economy will likely stimulate considerable debate on whether worker classifications should be expanded and what benefits and protections should be afforded to those who fall into such new categories. In fact, a group of prominent businesspeople and policymakers recently discussed this issue at a panel discussion called "Advancing the Social Contract for Gig Economy Workers." The panel, held in Washington, D.C., last February, discussed many issues affecting gig economy businesses, including whether there was merit in changing the current two-classification system for workers. While this issue has been the subject of considerable discussion on a national scale, it is possible that state legislatures may act more swiftly to determine the result.

Even if states do not go so far as to develop a new taxonomy for workers, state legislatures are already taking interim steps to address issues that directly affect gig economy workers. For

example, New York and Washington states are considering bills that would allow gig workers to possess portable insurance. In Washington, the proposed legislation would require companies participating in the gig economy to contribute money into a benefit system for independent contractors. That would allow independent contractors to retain portable benefits as they move from job to job. In New York, state legislators are considering a bill that would allow for creation of a gig worker benefits system that would require companies to pay the equivalent of 2.5 percent of worker income into individual health savings accounts. Gig workers would be allowed to move such accounts from one company to another as they move from one project to the next. Other state-level protections that might be considered for gig economy workers include unemployment benefits, workers' compensation, and family and medical leave.

Although we are barely 100 days into the Trump administration, there is much to expect about how the federal and state governments will respond to the gig economy phenomenon. We doubt that it will take long to see the results.

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