New Case Shows That "Uber-ization" of Workforce Could Lead to Misclassification Challenges

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Earlier this week, I wrote an article about a recent NLRB decision where the Board found a group of workers who provide video content services for the display board at Minnesota Timberwolves basketball games to be incorrectly classified as independent contractors (read it here: "Labor Board Dunks On Employer's Contractor Classification Attempt"). Although this case did not directly involve the gig economy, there was one gig-like aspect to the job that became a pivotal point in the decision. Like many sharing economy companies, the Timberwolves had a roster of potential workers available to perform work when needed. For a typical event (in this case, an NBA or WNBA game), only 16 workers were needed; the business retained a roster of over 50 skilled individuals who could perform the work. When the need arose, the business would send out a call to the 50+ workers and fill the 16 slots from the individuals who said they were available. There is no indication in the record of the case to describe just how the business contacted the workers, or how the workers would signify their interest if they were free, available, and interested to pick up the gig, but this assignment system sounds very similar to the way that many digital platforms connect workers to open gigs.

Here's where things got sticky for the business in this case. Unlike many gig systems whereby the consumer chooses which gig worker it wants to do the work for them, or whereby the first gig worker to click "accept" gets the job – neither of which scenario includes the business interfering in the specific selection of worker to job – in this case the Timberwolves management selected which workers would get the assignments based on the application of subjective criteria. As the NLRB decision described it, "when more crewmembers are available to work in a particular crew classification than the

Employer needs, the Employer determines which of them will work at all and breaks the "tie" between the available crewmembers according to its own preference." To the NLRB panel deciding the case, this was a bridge too far for an independent contractor relationship. As the Board saw it, this process of selecting workers for gigs meant that "the Employer holds and exerts control far exceeding that possessed by crewmembers themselves over when and how a crewmember will perform video-production work for it, as well as the manner and means by which that work is accomplished." And as anyone in the gig world knows, "control" is the key element that an administrative body (or court) will examine in deciding whether a worker is properly classified as an independent contractor.

What does this mean for your business? Many companies are moving towards an "Uber-ization" model, having workers select for themselves which shifts or jobs or tasks they will handle out of a roster of available openings. And if you follow the model that Uber or many other ridesharing apps follow – having consumer and driver connect themselves without interference or interference by the business itself – you should aid yourself in the battle over contractor status. But if you step in and apply subjective criteria when trying to determine which worker should handle which job, you could be demonstrating a level of control that the NLRB might not like. Take this lesson to heart when examining your own business model.

Related People

Richard R. Meneghello
Chief Content Officer
503.205.8044
Email