



Could Congress Soon Swoop In To Aid The Gig Economy?

Insights

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Reports out of Washington, D.C. indicate that gig economy businesses could be in for an end-of-the-year treat in the form of game-changing legislation. Chris Opfer and Tyrone Richardson of Bloomberg BNA report that Senate Republicans will insert language in the upcoming tax reform bill that will “protect businesses that mistakenly classify workers as independent contractors.” Given the dozens and dozens of times we’ve talked about misclassification claims as the biggest scourge facing the industry today, this proposal could radically alter the industry as we know it.

Here’s what we know. As soon as next week, a group of Senators will unveil their version of the tax reform measure that has been talked up around Washington in the last few weeks. While attention has been focused on the House version of the bill, which focuses on purported tax reductions, elimination of certain deductions, tax rate consolidation, and a break on corporate taxes, the Senate will also play a crucial role in this legislative process. And rather than wait for the House bill to be passed and then shuttled over to the Senate for review, it appears that the Senate will introduce their own version in an attempt to push through provisions deemed critical to certain Senators.

[Ed. note: On November 9, the day after this post was published, Senate Republicans introduced tax reform legislation containing the provisions described below.

Among those identified by Senator John Thune (R-S.D.) is a provision that would provide a misclassification safe harbor to any business that takes certain steps as outlined in the bill. This is similar to the approach taken by Florida and Texas in the past year, offering protections to transportation companies (such as Uber and Lyft) if they satisfy some fairly simple tests to ensure their drivers are truly independent contractors.

Although we don’t yet have the exact language that will be inserted into the Senate’s tax reform bill, we can assume it will largely mirror Senator Thune’s “NEW GIG Act of 2017” introduced several months ago. S. 1549, also known as the “New Economy Works to Guarantee Independence and Growth Act of 2017,” has been in the works for some time now. It is a stand-alone measure that would offer blanket misclassification protections to companies that follow certain steps and meet certain objective tests. A companion bill – H.R. 4165 – was just introduced in the House on October 27 by Congressman Tom Rice (R-S.C.).

As my colleague Sidney Minter described when he wrote about this bill earlier this year, a company would avoid misclassification claims if it ensures that the worker in question:

- Incurs **unreimbursed expenses**;
- Performs services for a particular amount of **time**, to achieve a specific **result**, or to complete a specific task;
- Has a principal **place of business**, does not provide the service primarily in the company's place of business, pays a **fair market rent** for use of the company's place of business, or provides the service primarily using **equipment** they supply on their own; and
- Agrees to a **written independent contractor agreement**, the term of which cannot exceed two years.

Moreover, the company would need to ensure the worker in question satisfies at least one of the following four factors:

- Has a **significant investment** in assets or training which are applicable to the service performed;
- Is not required to perform services **exclusively** for the company;
- Has not been **treated as an employee** by the company during the one-year period ending with the date of the commencement of services under the written independent contractor agreement; or
- Is not **compensated** on a basis which is tied primarily to the number of hours actually worked.

This development certainly deserves our close attention; we'll monitor the soon-to-be-unveiled tax reform bill in the Senate and report back once we have more details.

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