March Misclassification Madness: Misclassification Updates in the Gig Economy

Insights
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Many of you likely have filled out your March Madness bracket, and are eagerly watching game after game hoping your bracket doesn't bust. The gig misclassification game is experiencing a March Madness of its own. The debate over whether gig economy workers should be classified as employees or independent contractors—or whether a new third category of workers should be created—continues to heat up with new cases and continued legislative benefits developments. But first, a replay of where the misclassification madness stands today:

2015 – Homejoy "Forfeits"
In 2016, gig company for home clearing services Homejoy filed for bankruptcy. But prior to its loss, six home cleaners filed class action lawsuits seeking unpaid wages, benefits, payroll taxes, and WARN Act claims, alleging they were misclassified as independent contractors.

October 2017 – Uber "Timeout"
Uber has aggressively been playing defense against four high-profile class action cases alleging that its drivers are misclassified as independent contractors. Uber's ongoing misclassification litigation took a "timeout" when the 9th Circuit Court of Appeals halted that litigation pending a key Supreme Court decision on arbitration agreements. Stay tuned.

November 2017 – Gig Economy 1, Uber 0
Recently, an English employment tribunal ruled that Uber drivers across the pond must be considered employees. A huge upset for gig giant Uber.

February 2018 – Grubhub Wins Big (but is there a "foul" on the play?)
Very recently, Grubhub took home the trophy when a federal judge ruled that a delivery driver was properly classified as an independent contractor (check out our more in-depth discussion here and here). With this being the first time a gig classification case reached a determination on the merits in court, this win was as big as the South Carolina's upset win over Duke in last year's March Madness tournament. But not so fast. The plaintiff filed an appeal with the 9th Circuit seeking to strip Grubhub of its win. Expect to see a ruling on this alleged "foul" in late 2018 or early 2019.

March Misclassification Madness
The gig misclassification madness continues. Recently, a class action lawsuit was filed in San Francisco, California accusing gig business CleanNet USA, a business connecting janitors and

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companies in need of cleaning services, of misclassifying said janitors as franchise owners rather than employees. The complaint alleges that CleanNet sets janitors' work schedules and determines how much they are paid, tipping the ball into the employee-classification court. The complaint also alleges that said janitors receive less than minimum wage, are not provided legally required breaks, and have their wages cut by royalty and franchise fees. Looks like more misclassification "games" are here to stay.

Gig misclassification issues are also bleeding over into joint employment issues. A debate over whether cops who make extra money moonlighting as security guards can have two employers for federal wage-and-hour purposes may soon shed light on this issue. The U.S. Department of Labor recently asked a federal appeals court to find that the cops are employees of the staffing agency that hired them, not independent contractors, in an effort to protect the cops who were denied overtime simply because they have more than one job. There's still time left on the clock on this case!

How Gig Players Are Looking To Change The Game To Avoid Misclassification Fouls

Several ideas have been "bounced" around in terms of how to classify and protect gig workers. For example, a possible third classification for gig workers, as well as a possible portable benefits system for gig workers, have also been passed around.

This is also a battle that is taking place overseas. Gig proponents in Britain have proposed a "worker by default, until proven otherwise" standard for gig workers. However, our U.S. Department of Labor tossed out Obama-era guidance that said the vast majority of workers should be classified as employees. U.S. Labor Secretary Alexander Acosta feels it is Congress' job to decide whether decades-old employment laws should be updated to reflect the issues faced by modern gig workers.

One thing is for certain – the gig misclassification game is not over!

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