



Proposed California Law Would Establish Portable Benefits For Gig Companies And Address Misclassification Issue

Insights

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As we have previously discussed, one of the hottest gig economy issues to dominate political and public policy debate has been “portable” benefits – the concept that gig economy workers should have flexible, portable benefits that they can take with them from job to job. States and local governments are increasingly moving forward on their own with proposals to explore the provision of benefits to individual performing work in the gig economy. Most notable are proposals that have been set forth in the state legislatures in Washington, New York and New Jersey. The movement also got a boost in January when Uber and SEIU announced a joint call for the state of Washington to develop a portable benefits system that would cover gig economy workers.

Not to be outdone, California has recently entered the discussion with the introduction of legislation that would establish a portable benefits system for “digital marketplaces.” Notably, the California proposal would also provide that individuals that provide services through such a digital marketplace would be “treated as” independent contractors.

Handy Active in Other States

As recent press accounts have covered, gig economy building services company Handy has been active in pushing legislation in states, with legislators in eight states introducing bills that deem workers of “online digital marketplaces” to be independent contractors. Last year, Handy floated proposed legislation that sought to classify workers as independent contractors and mandate that it establish a “benefits fund” for its workers. The reaction from many in labor was negative, saying the exchange of portable benefits for employment status as independent contractors was a bad deal.

So, as recently reported, Handy turned to employer-friendly states to push bills that established such workers as independent contractors, but did not address portable benefits. Bills have been signed into law in Kentucky, Utah and Indiana, while similar legislation is pending in Georgia, Colorado, Iowa, Tennessee, and Alabama.

Handy General Counsel Brian Miller recently stated, “Since we have been unable to come to a resolution that addresses both issues – providing benefits and clarifying classification – we are supporting legislation that focuses solely on creating a clear test for worker classification in the on-demand sector.”

California Enters the Fray With Assembly Bill 2745

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However, it appears that Handy hasn't completely given up the push for legislation that seeks to address both issues. In the very employee-friendly state of California, Assemblyman Evan Low (D-Silicon Valley) recently introduced [Assembly Bill 2765](#) to tackle this issue head on. As a preliminary matter, AB 2765 defines a "digital marketplace" as an organization that (1) operates a digital Internet Web site or digital smartphone application that facilitates the provision of services by marketplace contractors to individuals or entities seeking those services, and (2) does not accept service requests by telephone, fax, or in person at physical retail locations.

Under the bill, digital marketplaces may elect to contribute to a marketplace contractor benefit plan to help pay for benefits like medical care, liability insurance, retirement benefits, and paid leave benefits. The bill provides that a participating marketplace shall contribute a yet-to-be-determined percentage of the contractor fee for each transaction. The plan would be portable and would allow the participant to transfer accrued benefits from plan to plan as their "gig" changed.

Now here's the kicker. The bill addresses the employee-independent contractor issue by stating:

"Notwithstanding any other law, for purposes of the provisions of state and local laws that govern employment...a marketplace contractor that offers services through a digital marketplace shall be treated as an independent contractor of the digital marketplace."

Therefore, AB 2765 appears intended to resolve the issue in favor of independent contractor status for gig economy workers. However, there is some concern that the bill's provision that such workers "shall be treated" as independent contractors is not strong enough or would necessarily guarantee that such workers would be classified as independent contractors. Therefore, it may be stronger if the bill were to state that these individuals shall be "deemed" independent contractors.

Moreover, as introduced, the bill does not tie this independent contractor status to the provision by a gig economy employer of portable benefits. Theoretically, any "digital marketplace" contractor is deemed to be an independent contractor. That's likely a drafting error. It's most likely that the bill was intended to provide such clarity and relief **only** to gig economy employers that provide portable benefits as outlined in the bill. That issue is likely to be addressed with an amendment in the near future. Nevertheless, a California proposal that attempts to address these issues in a comprehensive manner is a significant development.

In addition, the bill would prevent a "digital marketplace" from discriminating on the basis of protected categories of the Fair Employment and Housing Act, including the new category of "familial status." This provision has raised the concern of some in the business community.

Difficult Road Ahead?

The general reaction from labor to AB 2765 is likely to be negative. Even prior to introduction of this bill, labor representatives in Sacramento had been quite vocal in announcing their opposition to any proposal that would clarify independent contractor status in exchange for portable benefits. In addition, labor has expressed concerns about definitions of gig employers that are broadly worded

In addition, labor has expressed concerns about definitions of gig employers that are broadly worded and would allow other businesses to claim they are “digital marketplaces” to take advantage of favorable treatment of the employment classification issue. Therefore, in a “blue” state like California, AB 2765 is likely to face an uphill battle.

However, word on the street is that Handy intends this bill to be a “conversation starter” and likely part of a multiple-year effort to address this issue in California. So this may be a long-term conversation rather than a short-term fix, but one that makes sense given the state being home to Silicon Valley and the birthplace of many gig economy companies.

The bill is currently set for its first hearing in the Assembly Committee on Labor and Employment on April 11, 2018. We’ll continue to monitor AB 2765, and other similar portable benefit bills on this blog, so be sure and check back for updates.

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