Everything's (Gig)ger in Texas: New State Law Classifies Gig Workers As Contractors

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The confusion surrounding worker classification is not a new topic for any gig economy employer. Whether gig workers are classified as employees or independent contractors is a constant battle businesses face both in the legislature and the judiciary. But independent contractor classification may have just gotten a little simpler in Texas thanks to the Texas Workforce Commission. The agency responsible for determining whether workers are properly classified and assessing unemployment taxes just adopted a rule on April 9 classifying workers hired for jobs through a digital app as independent contractors for unemployment insurance purposes. The TWC reasoned that its adoption of the rule provides employers with more stability in this growing sector of the economy.

The Rule
In determining whether a worker is an independent contractor, the TWC typically utilizes a 20-factor right-to-control test (40 T.A.C. § 821.5). As the name suggests, the test focuses on the businesses' right to control the worker. In its newly adopted Rule 815.134, entitled "Employment Status: Employee or Independent Contractor," the TWC defines workers hired through an app as "marketplace contractors" ineligible for unemployment insurance (40 T.A.C. § 815.134).

Under the new rule, a "marketplace contractor" is defined as "any individual, corporation, partnership, sole proprietorship, or other entity that enters into an agreement with a marketplace platform to use the platform's digital network to provide services to third-party individuals or entities seeking the type of service or services offered by the marketplace contractor." The rule specifically excludes brick-and-mortar employers, as it defines a "marketplace platform" is an entity operating in Texas that (1) uses a digital network to connect marketplace contractors to third-party individuals or entities seeking the type of service or services offered by the marketplace contractors; (2) accepts service requests from the public *only through its digital network*, and does not accept service requests by telephone, facsimile, or in person at physical retail locations; and (3) does not perform the services offered by the marketplace contractor at or from a physical business location that is operated by the platform in the state. A "digital network" is "an online-enabled application, software website, or system offered by a marketplace platform for the public to use to find and contact a marketplace contractor to perform one or more needed services."

The TWC has made it clear to opponents of the rule that the mere existence of a website does not automatically render workers as independent contractors; rather, the classification is reliant upon a digital app whereby a customer is seeking service and a third-party individual is willing to provide that service. The rule specifically identifies factors to consider when evaluating employment status for marketplace platform contractors, in which a marketplace contractor is "treated as not in employment" for purposes of the unemployment laws. The factors are as follows:

1. All or substantially all of the payment paid to the contractor shall be based on the performance of services or per-job basis;
2. The marketplace platform does not unilaterally prescribe specific hours during which the marketplace contractor must be available to accept service requests from third-party individuals or entities submitted through the marketplace platform's digital network;
3. The marketplace platform does not prohibit the marketplace contractor from using a digital network offered by any other marketplace platform;
4. The marketplace platform does not restrict the contractor from engaging in any other occupation or business;
5. The marketplace contractor is free from control by the marketplace platform as to where and when the marketplace contractor works and when the marketplace contractor accesses the marketplace platform's digital network;
6. The marketplace contractor bears all or substantially all of the contractor's own expenses that are incurred by the contractor in performing the service or services;
7. The marketplace contractor is responsible for providing the necessary tools, materials, and equipment to perform the service or services;
8. The marketplace platform does not control the details or methods for the services performed by a marketplace contractor by requiring the marketplace contractor to follow specified instructions governing how to perform the services; and
9. The marketplace platform does not require the contractor to attend mandatory meetings or mandatory training.

Excepted from coverage under the rule are services performed by workers (1) in the employ of a state or any political subdivision of the state, or in the employ of an Indian tribe; (2) in the employ of a religious, charitable, educational, or other organization; (3) regulated as "Professional Employer Organizations and professional employer services"; and (4) services performed by "temporary employees and temporary help firms."

Keeping Up With The Times

The new rule applies to Texas employers in which a Texan may hail car rides, order take-out food, groceries, cleaning services, yard services, pet sitting, handymen, app-based fitness coaches, and more, and highlights the increasing number of gig jobs and service applications that hit the market

each day.

This rule is another Texas-sized win for Texas gig employers as just two years ago Governor Abbott sided with rideshare apps when he signed a law preempting local ordinances from regulating rideshare companies. Additionally, similar "marketplace contractor" laws that treat most gig workers as contractors have already been adopted in Arizona, Florida, Indiana, Iowa, Kentucky, Tennessee and Utah.

While it is important to remember that this law only applies to workers unemployment insurance – not to other situations regarding the employee/independent contractor analysis under state and federal wage and hour and discrimination laws – it provides predictability for employers in an area of the law which has been steadily confusing for employers, businesses, and workers.

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