As Congress Ponders the "Future of Work," it Faces Divergent Interests Within the Gig Economy

Insights
11.11.19

As we reported just a few weeks ago, Congress has begun to gather information and consider the "future of work," with considerable emphasis on the role of the gig economy. Although this emergency economy is growing rapidly, tension is also growing within its ranks. In particular, gig workers are attracted to earning money while maintaining all the flexibility and control they can exercise in these arrangements. But they are not entirely comfortable with the concept of being an independent contractor (IC) if that means they have no fringe benefits, are not covered by the minimum wage, and have no protection from non-discrimination laws. In this way, and in a much truer sense, ICs are "on their own."

Thus, debates and lawsuits continue over how these workers should be classified. Are they employees, entitled to a mandated minimum wage and eligible for group medical insurance, among other things? Are they ICs, who assume the risks and rewards of entrepreneurship, with little or no safety net? Or do they belong in a new classification somewhere in the middle? It is no surprise that Democratic and Republican lawmakers have widely divergent views about implementing more protections for these workers, compared to the flexibility, freedom, and independence of traditional ICs. In other words, what rules or restrictions should be inserted into the rapidly emerging gig economy?

For now, the California Supreme Court's decision in the *Dynamex* case seems to tilt the field decidedly toward classifying workers as employees rather than ICs. Some Democrats in Congress have proposed adopting the *Dynamex* ABC-test framework under federal law. If that happened, would it lead to the demise of the gig economy? While such a change *could* slow down its growth or drastically change this marketplace, the gig movement and its related innovations seem unlikely to just wither away.

In a recent edition of the Harvard Business Review, author Orly Lobel says that the issue of worker classification is actually a red herring. She says the larger issue is "moderniz[ing] employment and labor protections to fit with the realities of work today" while taking a balanced approached to regulation. In her view, too much regulation would create employment disincentives and distort the market in favor of companies that are already dominant in their niche. She is skeptical of sweeping, one-size-fits-all rules, although it is hard to escape the conclusion that a solution would almost

inevitably require carving out a new hybrid classification of worker that lies somewhere between an IC and an employee.

Another factor makes it harder to find workable legislative or regulatory solutions: the gig economy model attracts a broad group of workers, with different needs and goals. For some workers, their gig is their primary source o income. Other workers moonlight, in either gig or traditional employment relationships. Thus, one worker might focus on working long hours and earning a bigger check, while another may anxiously seek access to benefits, such as medical coverage or a retirement savings plan.

These divergent interests generate tension between possible legislative solutions. The more protections or benefits that a gig company provides, the closer it inches toward a traditional employment relationship. This may require workers to work a minimum number of hours each week or to be assigned to a more specific, narrow geographic territory. Such requirements would clearly at odds with the flexibility and independence that drew many workers to gig relationships in the first place.

Although it is unclear what Congress or state legislatures may do, we will continue to monitor developments, which we encourage you to do too.

Related People

A. Kevin Troutman
Senior Counsel
713.292.5602
Email

Industry Focus

Gig Economy