Panelists Debate Gig Economy Issues At Albany Law School Virtual Conference

Insights
6.05.20

A version of this summary also appears on the Albany Law School website.

I was able to virtually attend a session of Albany Law School's 2020 Warren M. Anderson Legislative Seminar Series last week on "The Gig Economy," bringing together some of the nation's foremost thought leaders on the subject for a lively and informative panel. A recording of the May 28 hour-long session can be found here and is available for free. (Many thanks to Albany Law School for the invitation and for allowing us to share the link here.) I teamed up with Richard Rifkin, Legal Director, Government Law Center – who hosted the event – to develop this summary.

The Government Law Center hosted the final program of the 2020 Warren M. Anderson Legislative Seminar Series on May 28. The purpose of the program was to discuss the problems and issues that are presented by the societal move to an economy increasingly composed of contingent work arrangements, and their corresponding effect on workers' rights, and business conditions and innovations.

The panel discussion began with an enlightening review of some national statistics about the past, current, and future of gig economy work by **Laura Schultz, Executive Director of Research at the Rockefeller Institute**. The remainder of the presentation featured discussion by four policy experts —one each from New York and California, and then one from a business perspective and, finally, one from a labor perspective.

Frank Kerbein, the Director of the Center for Human Resources for The Business Council of New York State discussed the state's role. He spoke about how it has become increasingly difficult for regulators and lawmakers to apply a 1930's-era labor law to a 21st century innovative working model. He believes it is "unimaginative" to simply apply existing workplace laws on this classification of new workers. He said the impetus to do so was largely driven by organized labor, aiming to add new workers to their rolls by taking a "sledgehammer approach" to the problem that is more akin to a nail. His main recommendation? A third way, something beyond mere employee v. contractor determinations, that should be taken up on the federal level. He believed that each state implementing its own solution would lead to many individual plans across the country.

Veena Dubal, Associate Professor of Law at the University of California, Hastings, focused on

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Veena Dubal, Associate Professor of Law at the University of California, Hastings, focused on California. She presented a comprehensive legal overview of the shifting legal sands that have been in place for misclassification questions both in California and around the country. She reviewed the development of the ABC test, a three-part test employers must meet if they want to classify a worker as an independent contractor. She also noted how California was close to passing a revised law that would modify AB-5 (the state law that went into effect on January 1 codifying the ABC test) to permit certain creatives to be excluded from coverage and more likely to be able to work as contractors. Finally, she mentioned that several gig economy companies had recently been successful in pushing a ballot measure that would be voted on by California voters in November.

Josh Gold, Director of Public Policy & Communications for Uber, speaking from the business perspective, focused his attention on how innovative solutions were possible at the state level that could provide much-needed benefits to gig economy workers—and how several have been in existence for decades. He cited to New York's Jockey Injury Compensation Fund established in 1990 that created the legal fiction that horse jockeys—typically independent contractors—were actually employees for the purpose of workers' compensation coverage. A similar approach was taken in 2000 by the state's Black Car Fund, which resolved years of inconsistent administrative law judge rulings regarding whether certain car drivers were contractors or employees by providing workers with certain employee protections and benefits without having to change their contractor status. Finally, just last year, New York City created a minimum wage and paid time off program for rideshare drivers, demonstrating that gig economy workers could receive social safety net protections without losing the flexibility that their jobs afford them.

Terri Gerstein, Director of the State and Local Enforcement Project at Harvard Law School's Labor and Worklife Program, speaking about the concerns of workers, rejected that premise. She said the concept of gig economy workers needing to be classified as contractors to ensure flexibility is a "false dichotomy," noting that many employees in all sorts of positions around the country have flexibility in their jobs. She also rejected the underlying premise that innovation would be stifled by imposing standard regulatory structures on the gig economy, pointing out that innovation has still occurred within the confines of the typical employment system. Most importantly, she rejected the overarching premise that the "gig economy" was an industry deserving of any special treatment at all. She noted that businesses in the gig economy were traditional businesses that just happened to find consumers through a smartphone app. She concluded that this one simple aspect of the business should not permit companies to exclude their workers from the entire structure of protections that society has created for workers, including equal employment opportunity laws.

In sum, the panelists offered the audience a thorough and practical review of the many issues surrounding this ongoing employment and economic debate.

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