Employer-Sponsored Benefits in the Gig Economy

Insights
7.13.16

As the gig economy grows, policymakers are asking, "what happens with employee benefits?" Specifically, if gig workers are not classified as employees, what options should they have for retirement savings and health insurance? And what should gig businesses do?

Companies Only Provide Benefits to Employees, Former Employees, and their Beneficiaries
Gig workers are typically excluded from employer-sponsored benefit programs, and for good reason. The two main laws governing employee-sponsored benefit plans — the Employee Retirement Income Security Act (ERISA) and the Affordable Care Act (ACA) — do not contemplate gig workers, and employers can face adverse tax consequences by including independent contractors in their plans. ERISA was enacted in 1974 and provides an extensive framework for when and how companies and employee organizations (i.e., unions) can provide employer-sponsored retirement and health insurance plans. However, the Supreme Court explained that ERISA's definition of "employee" follows the traditional agency test, which means ERISA's requirements do not extend to independent contractors. *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318 (1992). The newer ACA, enacted in 2010, is also bereft of any requirements to provide benefits to independent contractors.

As a result, gig workers are often left to obtain their health insurance through private or public exchanges or other individual insurance markets, and they are left to fund their retirement through other means, such as Individual Retirement Accounts (IRAs) or regular, post-tax savings accounts. Some speculate that gig workers may organize to form unions to gain access to better benefits. There have been some efforts by unions and lawmakers to make that happen.

The White House and Department of Labor Are Exploring How to Make Benefits More Portable
President Obama has proposed several initiatives with the intent of making retirement benefits more portable for employees and other workers. One particular proposal would remove certain requirements for multiple employer plans (MEPs). Currently, employers with a "common bond" can form a pooled retirement plan in order to lower costs and lessen compliance burdens. The President is proposing an elimination of the "common bond" requirement in order to allow more businesses to offer pooled plans for their workers. This change would also allow certain nonprofits to create similar plans for independent contractors. In addition to the President's proposals, the Department of Labor is also making portable benefits a priority by exploring the key issues facing workers.

One of the stated purposes for this exploration is to allow independent contractors who do work for multiple companies at the same time to have greater access to pre-tax retirement benefits. Gig businesses stand to benefit from these efforts to the extent they incentivize more individuals to become gig workers. However, it is still unclear if these portable plan proposals would also incentivize union organization, decreasing gig worker autonomy.

In short, with the rise of the gig economy has come an interest in providing gig workers and other independent contractors with the means to obtain retirement and healthcare benefits. If a gig business is covering gig workers under its plans, it should consider what that means to its benefit plan compliance and its classification of gig workers as independent contractors. Gig businesses should also be aware of efforts by legislators, agencies, and other organizations and how their proposals might impact the gig business model, for better or worse.

Related People

Megan E. Walker
Partner
858.597.9611
Email