

# GIG ECONOMY

## DISRUPTS EMPLOYER-EMPLOYEE RELATIONS

by Matthew C. Reeber, Esq.

A growing workforce of freelancers and independent contractors who have the freedom to decide on the duration and frequency of their work is changing the employer-employee relationship. In large part, increases in the number of gig workers is being driven by companies with online platforms using digital applications such as Uber, Lyft, Grubhub and Care.com. According to a recent study by Intuit and Emergent Research, 9.2 million people are expected to be part of the gig economy by 2021, an increase of 5.3 million since 2016.

Inherent in a gig economy is friction with laws enacted to protect employees who work traditional 40-hour work weeks for a clearly defined employer. As an employee, an individual is entitled to a minimum wage, unemployment compensation, overtime and workers' compensation benefits. On the other hand, gig economy workers receive none of the protections afforded employees.

Gig employers also take the position that gig workers are precluded from collective bargaining because the National Labor Relations Act excludes independent contractors from having this right. Determining whether an individual is an employee or

independent contractor is typically based on:

- Whether the individual charges fees for his/her service.
- Whether the individual is contracted only for the term required to perform an identified service or task.
- The amount of control exerted over the individual.
- Whether the individual pays employment taxes personally to the government.

With the advent of the gig economy, courts have had to address what rights should be provided to a low skilled workforce performing highly flexible, episodic jobs. Federal courts are now applying the "Economic Realities Test" to gig workers even though the test was first used when science fiction could not have imagined a mobile phone application, let alone that millions of American workers would receive their daily job assignments from an app.

Unsurprisingly, in applying the Economic Realities Test to the gig economy worker, the federal courts have acknowledged that the results often seem harsh. The traditional seven elements of the Economic Realities Test are:

1. The extent to which the services rendered are an integral part of the hiring entity's business.
2. The permanency of the relationship.
3. The amount of the alleged contractor's investment in facilities and equipment.
4. The nature and degree of control by the hiring entity.
5. The alleged contractor's opportunities for profit and loss.
6. The amount of initiative, judgment or foresight in open market competition with others required for the success of the claimed independent contractor.
7. The degree of independent business organization and operation.

By bringing claims seeking classification as "employees," gig workers have forced the courts to re-examine the Economic Realities Test and the application of its decades' old analysis to a new workforce. Recent decisions held that Uber drivers and Grubhub deliverymen were properly classified as independent contractors.

However, California's Supreme Court recently changed the state's long-standing test to determine whether a worker is properly classified as an independent contractor in *Dynamex Operations W. v. Superior Court*, 4 Cal. 5th 903 (Cal. 2018). In *Dynamex*, the Court ultimately held that it will use the "ABC test" to determine whether an employee has been misclassified as an independent contractor. The "ABC test" applies a lenient standard that favors classifying workers as employees.

*Dynamex* provides one possible resolution of the application of the Economic Realities Test to gig workers – the courts could abandon the Economic Realities Test and adopt a more expansive definition of "employee."

As gig workers continue to challenge being categorized as independent contractors across the country, courts may follow California's lead and expand the definition of an "employee." For this reason, it is important for employers to stay informed of the changing landscape of workers' rights and to be proactive in reevaluating how they classify independent contractors working for their organizations.

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