

UNDERSTANDING —AND EMBRACING— THE GIG ECONOMY



Kathleen Guthrie Woods

A

musician plays a “gig” for a couple of nights at the Fillmore before moving on to venues in other cities. A graphic designer, working as an “independent contractor,” gains experience with different ad agencies on a wide range of projects when he “freelances.” A mom creates flexibility for childcare obligations by “temping” at several part-time jobs—some in businesses’ offices, others from home or driving her car.

What these individuals have in common—along with a growing population of office staffers, construction workers, journalists, delivery truck drivers, and even homeowners who rent out their homes to guests—is they provide consulting, contingent, seasonal, interim, freelance, temp, or on-demand work as part of the “sharing” or “gig” economy.



“There isn’t one definition,” says Valerie Brender, Rukin Hyland Doria & Tindall, which is why the IRS, state agencies, and the courts continue to attempt to define *gig economy* in order to apply a consistent set of rules that will affect both workers and businesses.

“The positives include a more flexible schedule, more variety of tasks and clients, lower barrier of entry, and opportunities to work in new areas,” meaning both fields of work and geographic locations, says Aaron Minnis, Minnis & Smallets. With the proliferation of websites and mobile apps, “you don’t have to build your own business; the apps are giving you your clientele,” he says. “A phone, an app, a car—you’re in business.”

“It’s also financially beneficial for a company to classify workers as independent contractors,” says Brender, who was one of the speakers in “Who Is an Employer in the Gig Economy?” for the Barristers Club Litigation Section and Labor and Employment Sections’ MCLE program in September 2016. In doing so, employers save on health care, retirement and pension plans, and payroll taxes, as well as costs for office space, hiring, and training. They can draw from a larger labor pool, since it’s not a requirement that workers live within commuting range.

The cons, meanwhile, are significant for both parties.

“Workers must be self-starters, self-motivators who manage their own schedules,” says Minnis, and hustle when the work is inconsistent. “There’s a lack of benefits; for example, no health or unemployment insurance,” he says. “There is no organizing or unions to collectively demand better terms of employment.” Discrimination laws (race, age, gender) and basic protections such as guaranteed minimum wages don’t apply; there are no paid holidays or family leave. “You can find examples of people doing incredibly well and people struggling,” says Brender.

Employers get into hot water when they misclassify employees as independent contractors. Get it wrong, and the risk of liability—and expensive litigation—is significant. “California Labor Code assumes an individual is an employee,” says Minnis, “and the burden shifts to the employer to prove otherwise.” Specifically, California Labor Code section 3357 states: “Any person rendering service for another, other than as an independent contractor, or unless expressly excluded herein, is presumed to be an employee.”

Although temp jobs have been around for decades, what has caused dramatic changes is the application of technology to previously straightforward positions. Laws that were designed to benefit and protect workers in the old workforce model no longer directly apply, and certainly lawmakers

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could never have anticipated the new models. Furthermore, this still-to-be defined class of workers is rapidly expanding. While the exact figures are difficult to calculate, data collected by the Bureau of Labor Statistics (BLS) from 2005 showed about 7 percent of workers identified as independent contractors. Independent research firm Edelman Berland revealed more than 53 million Americans were doing freelance work in 2014, and a study released by Intuit in 2010 estimated that more than 40 percent of workers in America will be independent contractors by 2020. The Metropolitan Policy Program at Brookings Institution reported nonemployer ride-sharing firms grew 69 percent between 2010 and 2014; standard payroll employment during that same period grew 17 percent. (The BLS plans to collect new data in May 2017.)

Determining whether or not someone should be classified as an employee or independent contractor in different and evolving working environments is the challenge.

Here's how the "test" currently works:

THE BORELLO FACTORS

In deciding whether someone is an employee or an independent contractor, the courts and other agencies look to a 1989 California Supreme Court case, *S.G. Borello & Sons, Inc. v. Department of Industrial Relations*. In *Borello*, fifty migrant harvesters claimed the grower they worked for denied them protection through the workers' compensation law, while the grower claimed they should be excluded because they were independent contractors. The court had to determine who had the "right to control the manner and means of accomplishing the result desired," what became known as the "control-of-work-details" test, and ultimately decided the workers were employees.

Since then, the "*Borello* factors"—which include whether the principal or the worker supplies the tools and workplace, whether the service rendered requires special skills, and whether the work is done with/without supervision—have been the go-to guidelines for determining an individ-

ual's classification. (See the full list at the State of California Department of Industrial Relations website, www.dir.ca.gov/dlse/FAQ_IndependentContractor.htm.)

These factors are a good starting place, but in 1989, legislators and jurists couldn't have foreseen how technology (such as mobile apps) would muddle things. For example, says Brender, a contemporary ride-sharing company may be deemed an employer if it tells drivers "how to approach clients, what radio station to play, and [whether it has the ability] to hire and fire by deactivating them."

"What is the product they are trying to sell?" asks Sujal Shah, an antitrust attorney and partner at Morgan, Lewis & Bockius, who is intrigued by companies that provide platforms, not actual services, in today's tech-centered economy. One of the issues, says Shah, "is we're dealing with new, innovative models with a legal framework developed for an old model—round hole, square peg. You have to translate how you think the law will apply."

CALIFORNIA IS SETTING PRECEDENTS FOR OTHER STATE AND FEDERAL STATUTES

"Everyone is looking to San Francisco," says Tad Devlin, a partner at Kaufman Dolowich Voluck. Along with being the birthplace of technological innovations and advancements, California is known for setting legal precedents. "I've seen other states looking to what happens here in a 'follow form' thing," he says.

Recent noteworthy cases include:



Alexander v. FedEx Ground Package System, Inc. (2014)

Delivery drivers, classified as independent contractors, sought to recover damages for unreimbursed employment expenses, illegal wage deductions, and unpaid overtime pay. Under California's right-

“EMPLOYMENT LAW: THE SHARED/GIG ECONOMY”

ON YOUR LEGAL RIGHTS

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to-control test, the United States District Court, Northern District of California, found the drivers adhered to regular schedules, followed the company's policies and procedures, and were otherwise qualified as employees as a matter of law. A settlement was reached.



O'Connor v. Uber Technologies, Inc. (2015)

"A pretrial settlement is likely," says Devlin, and a class-action suit could involve as many as 160,000 drivers who feel they should be classified as employees. In a similar case, *Berwick v. Uber Technologies, Inc. (2015)*, the California Labor Commission awarded a driver just over \$4,000 in reimbursement for business expenses such as gas and bridge tolls, expenses that would be covered for a traditional employee. Similar cases have been filed in Massachusetts, Illinois, Texas, and Indiana.



Cotter v. Lyft, Inc. (2015)

As of December 2016, pending a final ap-

proval hearing, Lyft settled for \$12.25 million in a worker misclassification lawsuit, with new terms of service that will apply to drivers across the country. The plaintiffs' attorney praised the company for being "willing to sit down with us to talk and try to figure out a way to resolve the matter."

Devlin, who handles insurance litigation, celebrates this collaborative spirit and is impressed by companies that are "so nimble with changes" and have stepped up to share risks. In part, this is a reaction to the "instant newsfeed" and negative online ratings that can affect future business. "They're concerned about brand image," he says, yet the ability and willingness to address issues and protect workers, consumers, and businesses has far-reaching consequences. He recalls a tragic incident when a child was struck and killed by a rideshare driver. Initially there was speculation about whether or not the driver was "on the clock" or possibly distracted by the app in the process of picking up a rider. "Hats off to Uber," says Devlin, for reacting swiftly and providing drivers with insurance coverage while waiting for riders,

while en route to the rider, and when a rider is in the car.

While the idea of setting guidelines for everyone to adhere to seems reasonable for protecting workers, hindering the development and growth of businesses isn't part of the solution. "You don't want to stop innovative companies right at the start," says Shah. "I don't want to dampen that enthusiasm, so it's a balance." Companies such as Uber, Lyft, and Airbnb wouldn't exist without gig workers, and gig workers will continue to play significant roles in emerging businesses. "We must mix advocacy and counseling," says Shah, "try to shape what the law becomes in the future."

EMBRACING THE OLD AND THE NEW

Will different categories of workers be defined, each with its own forms of labor regulations, benefits, and protections? Will litigation and statutes be decided state by state? Or will one case make its way to the US Supreme Court, paving the way for the establishment of national guidelines?

While the future is unknown, it's certain innovation in business and law will continue. "These things are not scaling back, but continuing to expand and grow, changing shape," says Devlin, and we must strive to "merge old established infrastructure with new technology." He's got a few ideas about how new technology might create legal opportunities in the not-too-distant future: "Shared workspaces, collaborative workspaces, micro living, mixed use—planning departments have to change their perceptions of where people live." He also anticipates cases involving robotics and driverless cars, trucks, and airplanes. "Now there's Uber ferry services—no wait time and an uncrowded ride across the bay," he says, so someone will need to interpret and adjust the rules of waterways.

"The law is constantly shifting, and important questions need to be answered," says Brender. She feels judges will be inclined to let decisions go to juries, and thinks guidance from state and federal agencies will be crucial. "At the end of the day, employment laws are very broad, are intended to impact and protect a number of people," she says. She'll

be watching closely, for the trend of using more independent contractors is already here. "What is the point of being an employee? What are the broader impacts on the economy, on people's economic stability? Are we watching the dissolution of American jobs?" she wonders. "There's a long history of workers fighting for protections and rights. If we take that away, does that leave people incredibly vulnerable?"

With that in mind, observers will also be keeping an eye on California's 1099 Self-Organizing Act (AB 1727), which is designed to allow independent contractors to organize and negotiate with hosting platforms. The author, Assemblywoman Lorena Gonzalez (D-San Diego), temporarily pulled it from consideration last April, explaining "AB 1727 may or may not be the correct answer, but it is the correct starting point. The issue is complex. The law is untested. The challenge is essential."

Shah is interested in seeing how today's emerging companies—the next Google, the next Facebook—will mature. "What will competition look like in five to ten years? Will they continue to innovate or get stuck in the mud? And how will people in the future look for jobs? Will businesses try to lock up people to work on their platforms?" With the rise of automation and artificial intelligence, he suspects changes will come quickly. "Maybe one day this job [attorney] will be automated. How will I be part of that?"

Perhaps in the economy of the future, attorneys might supplement their income with ride-sharing or join the ranks of individuals working multiple gigs.

Freelance writer Kathleen Guthrie Woods has been a full-time member of the gig economy since 2000.