The Gig Economy: The Risks and Legal Challenges for the Future of Work

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Questions

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Meet Your Presenters

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What is the Gig Economy?

Gig Economy refers to that part of the labor market characterized by short-term contracts or freelance work as opposed to permanent jobs.

What is a Gig Worker? [freelancer, independent contractor]

Control Factors:
• Behavioral
• Operational
• Financial
Overview of The Gig Economy

- Started to takeoff in 2007 during recession. Driven by high unemployment.
- Enabled by technology and online /mobile technology platforms.
- Even as the labor market improved, freelancing has grown.
- More people freelance by choice rather than necessity (60% freelance by choice).
- Shift in more people freelancing full time and more people viewing freelancing as long-term career choice.
- The gig economy’s impact on the economy is now close to $1 trillion.
How Big Is The Gig Economy?

➢ 59% of U.S. companies now use contingent workforces to some degree [Upwork Future Workforce Report].
➢ The number of contingent workers will exceed 40 percent of the workforce by 2020 [Intuit 2020 Report].

Percent of workers who freelance
2005: 10%
2019: 35%

The number of contingent workers will exceed 40 percent of the workforce by 2020 [Intuit 2020 Report].

Full-time freelancers have grown 11% since 2014.
Sharing Economy & Marketplaces

Deliver with Postmates

Trusted dog walkers
Starting as low as $20 per walk

Wag!
Become a Walker

Trust Wonolo's On-Demand Staffing Platform

Upwork
Find Freelancers & Agencies

The talent you need.
The flexibility you want.
Upwork expertly matches professionals and agencies to businesses seeking specialized talent.

Help around the home, at your fingertips
You don't always have to DIY. Get help from thousands of trusted Taskers for everything from home repairs to cleaning.

TaskRabbit

Sittercity

We've connected millions of families and sitters since 2001

www.plusweb.org | Professional Liability Underwriting Society
Risk & Legal Uncertainty

Shifting Risks from Company to Worker
• worker injury on the job
• health insurance
• retirement benefits
• liability risk

Legal Uncertainty for the Company
• California AB5
• worker misclassification
• vicarious liability
• increased labor costs
• employment tax

Will there be a shift back to W-2?
Legal Landscape Additional Employer Expense and Risk

- Fair Labor Standards Act (FLSA) minimum wage/overtime
- ADA
- Title VII
- FMLA
- Workers’ compensation
- Unemployment insurance
- Paid sick leave/paid family leave
- Various other statutes
The FLSA applies to those workers whom the FLSA defines as “employees.” See 29 U.S.C. §§ 206, 207.

An “employee” is any individual whom an employer suffers, permits, or otherwise employs to work. See 29 U.S.C. §§ 203(e)(1), (g).

April 2019 Opinion Letter Issued – Gig economy company’s workers are Independent Contractors

Six Factor Test:

– level of control the business has over the worker;
– the degree of permanence in the working relationship;
– how much the worker invests in facilities or equipment;
– the amount of skill and judgment needed to provide the services;
– the ability of workers to control their profits and losses; and
– whether the work performed is integrated into the business of the company.
A.B. 5 codified and expanded 2018 California Supreme Court decision known as *Dynamex making it tougher to classify workers as independent contractors* (California Labor Code § 2750.3)

The new law effective January 1, 2020, instructs businesses to use the “ABC test” to figure out whether a worker is an employee

Presumption: “employee” until proven otherwise
• The “ABC Test”

A. Worker is free from control or direction over work performed
B. Worker performs work outside course of employer’s usual business
C. Worker is customarily engaged in independent business or trade
The California Legislature Noted:

- *Dynamex* decision “cited the harm to misclassified workers who lose significant workplace protections, the unfairness to employers who must compete with companies that misclassify, and the loss to the state of needed revenue from companies that use misclassification to avoid obligations such as payment of payroll taxes, payment of premiums for workers’ compensation, Social Security, unemployment, and disability insurance”

- “The misclassification of workers as independent contractors has been a significant factor in the erosion of the middle class and the rise in income inequality.”
Categories Exempted from *ABC Test Application*

- Dept of Insurance
- Physicians/Surgeons
- Dentists
- Podiatrists
- Psychologists
- Veterinarians
- Lawyer
- Architect
- Engineer
- Private investigator
- Accountant
- Securities broker-dealer/investment advisor or agents and reps
- Direct Sales (specifically defined)
- Commercial Fisherman (only until 1/2023)
- Newspaper distributor (only until 1/2021)
- Real Estate Licensee
- Repossession Agency

- Contracts for Professional Services:
  - Marketing
  - Administrator of Human Resources
  - Travel agent
  - Graphic Designer
  - Grant Writer
  - Fine Artist
  - Enrolled agent licensed by U.S. Dept. of Treasury
  - Payment Processing Agent through independent sales organization
  - Still Photographer, Photojournalist, Freelance writer, editor, and newspaper cartoonist (who don’t license content submissions more than 35 times per year to putative employer)
  - Licensed esthetician, electrologists, manicurists, barbers, cosmetologists
California Labor Code § 2750.3 (e) – (i):

- Subsection (e) - “[B]usiness-to-business contracting relationship[s],” subject to certain conditions.

- Subsection (f) - Contractors and subcontractors in the construction industry, subject to certain conditions.

- Subsection (g) - Subcontractors providing construction trucking services—i.e., “hauling and trucking services provided in the construction industry”—subject to certain conditions.

- Subsection (h) - Referral agencies and service providers, subject to certain conditions.

- Subsection (i) - Motor clubs and individual motor club service providers.
Exceptions - Apply Traditional Test to Determine if IC

- Do you instruct or supervise the person while he or she is working?
- Can the worker quit or be fired at any time?
- Is the work being performed part of your regular business?
- Does the worker have a separately established business/business license/other clients?
- Is the worker free to make business decisions that affect his or her ability to profit from the work?
- Does the individual have a substantial investment that would subject him or her to a financial risk of loss?
- Do you have employees who do the same type of work?
- Do you provide tools, equipment or supplies used to perform the work?
- Is the work considered unskilled or semi-skilled labor?
- Do you provide training for the worker?
- Is the worker paid a fixed salary, an hourly wage or based on a piece rate basis?
- Has the worker previously performed the same or similar services for you as an employee?
Challenges to A.B. 5

- Uber, Lyft, DoorDash, Postmates and Instacart have pledged $110 million for ballot initiative on November 2020 ballot to keep their drivers and couriers as independent contractors (*Protect App-Based Drivers & Services* initiative)

- California Trucking Association filed suit in November seeking an exemption – Federal Court Judge Roger Beitez in San Diego granted a temporary restraining order
  - Los Angeles Superior Court Judge William Highberger held A.B. 5 should not be applied to motor carriers as it is preempted by the Federal Aviation Administration Authorization Act of 1994 (FAAA)
American Society of Journalists and Authors and the National Press Photographers Association filed suit in December 2019 seeking a temporary restraining order that would have stopped enforcement of part of California’s A.B. 5 but U.S. District Court Judge Philip S. Gutierrez rejected the request.

Olson, Perez, Postmates and Uber Seek a Preliminary Injunction - Violates Equal Protection Clause of U.S. and California Constitutions - AB 5 targets app-based companies carving out exceptions for non app-based companies demonstrating that the law’s narrow focus means it was not enacted to protect a broad societal interest.
Challenges to A.B. 5 cont’d

Excerpts from Olson, et al. Complaint:

– “Enforcement of AB 5 as its sponsors intend — forcing network companies to reclassify certain on-demand workers — would cause an astronomical upheaval in the on-demand economy, and in the economy writ large, harming not only independent service providers and network companies, but consumers, merchants, and the public at large.”

– “On the one hand, they can attempt to reclassify certain service providers, thus relinquishing the contracts at the heart of their business models and incurring substantial, irrecoverable economic harms associated with restructuring their businesses (if that were even possible)”

– “On the other, they can choose to continue under their current models and face the imminent threat of prosecution and potential criminal liability. In either case, the impossible dilemma they face absent an injunction is irreparable harm in itself.”
What States May be Next

New York
New Jersey
Illinois
Washington
Oregon
Impact on Carriers

- The law is evolving in real time.

- Exposure contemplated at policy issuance may change during the policy period.

- Determining potential exposure is a moving target.

- Large impact on Management Liability lines of business (D&O and EPL).

- States are moving the ball concerning who is as an independent contractor v. employee.

- Increased exposure for wage and hour and discrimination claims.
• Employees in various locations subject to different employment laws.
  – NYC employment laws apply to independent contractors, not the case in other jurisdictions.

• California Consumer Privacy Act
  – CCPA still in a degree of flux.
  – Currently the CCPA is not fully applicable to independent contractors, but employers must provide a written policy.

• Biometric Information Privacy Act
  - Employers must ensure independent contractors, such as security firms and staffing agencies, comply with BIPA regulations in their collection, access, storage, and disposal of biometric on behalf of the employer.

• Increased exposure for class action lawsuits.
Episodic General Liability Insurance

- Many sole proprietors, micro-businesses, and freelances need general liability coverage, but many have a hard time finding a policy that matches their needs.
- Annual policy premiums are cost prohibitive relative to near-term revenue expectations.
- 25% of policies are canceled in the first year (Bizinsure).
- Gig workers find their work by the gig and would prefer to purchase insurance by the gig.

www. Thimble.com

- Thimble arranges on-demand insurance by the job for the 57 million people who work independently—such as photographers, handymen, drone pilots, DJs, and others—delivered via the Thimble app.
- Short duration general liability policies.
Claim Takeaways

• Law remains in Flux.

• General trend toward expanding protections for independent contractors.

• Likely resulting in increased claims.

• New market opportunities.
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Thank you for your time.