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Stars Align in Texas for the Gig Economy

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The classification of gig economy workers as "employees" or "independent contractors" has been the subject of intense debate since that term entered the lexicon. State courts, federal courts and regulatory bodies have reached different, and often, conflicting conclusions based on identical facts and often with respect to the same company, such as Uber.

The Obama administration asserted that workers in the gig economy were employees. This determination was significant as employees – in contrast to independent contractors – are generally entitled to overtime pay and unemployment compensation, must be offered certain health insurance benefits and can organize or join a union.

The Trump administration, however, reversed course, concluding that gig economy workers are likely independent contractors who are not entitled to a host of employee-based benefits. To support this determination, the federal government and the Texas Workforce Commission have issued guidance for businesses to help determine the correct classification of workers in the gig economy.

The NLRB Deems Drivers to be Independent Contractors

Recently, the National Labor Relations Board restored the traditional test for what constitutes an independent contractor under federal law. In SuperShuttle DFW, Inc., and Amalgamated Transit Union Local 1338, the NLRB held that a host of factors are relevant to determine the status of a worker as an independent contractor or employee. These factors include: (1) the extent of control exercised over the details of the work, (2) whether the work is done with or without supervision, (3) length of employment, (4) skill level of the worker, (5) method of payment (for the time or by the job) and (6) whether the work is part of the regular business of the company.

SuperShuttle International owned the SuperShuttle name, logo and color scheme, and it also developed proprietary software for dispatching, cashiering and taking reservations in a van transportation system.

In turn, SuperShuttle DFW was permitted to market and display the SuperShuttle system in its market area. SuperShuttle DFW entered into franchise agreements with drivers, who were formerly its employees. The franchisee drivers were required to supply their own vans and to pay an initial and then a weekly franchise fee for the right to use the SuperShuttle brand and dispatch apparatus. The drivers were not required to work a set schedule or number of hours or days per week. They could work as much as they chose when they chose, were allowed to keep all fares, could hire employee relief drivers, had to pay for gas and maintenance of their vehicles, and carried and paid for liability insurance their vehicles. However, the drivers could not work for competitors of SuperShuttle DFW.

Given these facts, the NLRB found that the drivers' determination of when and how they would work had a direct impact on their profit margins and achieving their own economic objectives. The NLRB found that the factors set forth above should be viewed through the filter of economic opportunity. In doing so, the board found the franchisee drivers to be independent contractors. The NLRB made it clear that no single factor was decisive in making the determination. In reaching the determination, the NLRB rejected its Obama-era decision in FedEx Home Delivery that adopted a more stringent analysis in deciding that the drivers in that case were employees.

Recently, the NLRB issued an Advice Memorandum to its regional director in San Francisco that Uber drivers providing personal transportation services using the company's app-based ride-share platform were independent contractors using the test set out in SuperShuttle. Three key factors that affected the drivers' significant opportunities for economic gain and entrepreneurial independence were:

1. The unfettered freedom to set their own work schedules and routes;

2. The freedom to log off for any reason or no reason; and

3. That they could, and often did, work for

competitors of Uber.

As such, the drivers were free to decide how to best serve their own economic objectives.

The DOL Determines that VMC Workers are Independent Contractors

The Department of Labor joined the conversation and issued an opinion letter finding that service providers for a virtual marketplace company were independent contractors under the FLSA. A virtual marketplace company – like DoorDash or GrubHub – operates in the "on-demand" or "sharing" economy.

Generally, a VMC is an online and/or smartphone-based referral service that connects providers to end-market consumers for a wide variety of services, including transportation, delivery, shopping, moving, cleaners, plumbing, painting and more. The service providers were free to accept or reject any opportunities, did not have to accept or complete a minimum number of jobs, could set their own schedules and negotiate prices, provide their own tools and materials, hire assistants or personnel and could provide services to consumers through competing platforms. Additionally, the virtual marketplace company imposed no requirement on how the service providers had to perform their work and did not monitor, supervise or control the particulars of the work.

In reaching its conclusion, the DOL followed its test of whether the workers were economically dependent upon the VMC. The test of economic dependence is based upon six factors:

1. The nature and degree of the potential employer's control;

2. The permanency of the relationship with the potential employer;

3. The amount of the worker's investment in facilitating equipment or helpers;

4. The amount of skill, initiative, judgment or foresight required for the worker's services;

5. The worker's opportunities for profit or loss; and

6. The extent of integration of the worker's services into the employer's business.

The DOL concluded that the service providers were not working for the VMC but rather were working for consumers. The DOL deemed the VMC to be a referral service. The key factors in the DOL's decision were: the complete autonomy of the service providers to choose their hours of work, their ability to work simultaneously for competitors of the marketplace company and the minimal, if any, supervision of the service providers by the marketplace company.

The TWC Weighs In on the Gig Economy

In addition to the relevant federal regulatory agencies, the TWC has also adopted guidelines to determine whether marketplace contractors (or service providers) are employees or independent contractors with respect to a business that connects the contractors to the public only through a digital network and does not perform the service offered by the service provider.

In Texas, the service provider is not an employee of the business operating the digital network (defined as the "marketplace platform") if the service provider: (1) is paid on a per job or transaction basis; (2) is not prescribed specific hours of worker availability; (3) can offer services through a competitor of the marketplace platform; (4) can engage in any other occupation or business; (5) is free from control by the marketplace platform as to where and when he or she works; (6) bears all or substantially all of the expenses in performing the service(s); (7) is responsible for providing the necessary tools, materials and equipment to perform the service(s); (8) is free from control on the details or methods for the services performed; and (9) is not required to attend mandatory training or meetings.

Conclusion

The law is often required to catch up to changes in the marketplace, and the advent of the gig economy is a perfect example of this phenomenon. The current trend is for gig economy workers to be classified as contractors. However, just this week, the California legislature passed landmark legislation requiring contract workers – like Uber and Lyft drivers – to be classified as employees.

There will continue to be stops and starts in this debate, but for any business already in the gig economy or planning to join that growing sector, the recent pronouncements from federal and state agencies described above provide an excellent roadmap for avoiding misclassification of workers. And for the foreseeable future, Texas will continue to be a business-friendly environment for the gig economy.

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