

Gig Workers: An Evolving Trend or a Class Action Waiting to Happen?

Labor & Employment Law Update

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The workplace is changing: Millennials, Generation Z-ers, and Baby Boomers looking to supplement their retirement income. These individuals are more interested in autonomy and avoiding bad managers, office politics and lengthy, non-productive staff meetings. Plus, the tax-savvy individual knows the economic advantage of having access to traditional business deductions through a Schedule C, rather than being limited to the standard deduction or itemizing as a W-2 employee would be.

More and more businesses also seem to be interested in the advantages of a gig workforce, also called freelancers, subcontractors, contingent workforce, and more. After all, it allows a business to gain access to skills and talent without having to commit to hiring an individual as a full-time employee. According to Deloitte's 2018 Global Human Capital Trends study, *more than 40% of workers in the U.S. are employed in "alternative work arrangements."* These arrangements include contingent, part-time, or gig work.

So, is it a win-win for all involved? The problem is that current employment laws are simply not evolving at the pace required to keep up with this modern-day independent contractor. With this, a minefield is created for the unwary business.

Under the Obama administration, the DOL had issued broad guidance suggesting that gig workers were likely to be considered "employees." That guidance was rescinded with the change in administration. Then, on April 29, 2019, **the DOL issued an atypical, 10-page opinion letter on the subject.** The opinion letter lays out a detailed analysis of all the relevant factors for independent contractor status and then comes to the conclusion that the gig workers at issue are *not* employees.

For now, if your business is participating in the trend of the gig worker, you want to make sure the relevant factors are met. Those factors and the analysis change depending on which law the issue is being examined under. Some of the more common factors are: control, permanency of the relationship, integrality to business operations, ability to sustain a profit or loss, accountability for operating expenses, etc. In other words, is the individual truly operating as a

stand-alone business?

If you choose to engage gig workers, make sure to avoid these common mistakes:

- Do not treat the individuals as employees. Do not even use the word “hire.” Instead, you are “engaging” their services, or “contracting” with them. And, commit to the arrangement in writing.
- Do not be tempted to offer them benefits. Putting them in your health plan or letting them participate in a 401(k) will jeopardize any argument that they are not otherwise an employee. If it walks like a duck, quacks like a duck....
- Do not make them sign a non-compete agreement. A critical factor in most cases is whether the individual is free to take on work from others or whether they are completely dependent on your business for work. If the individual is subject to a non-compete agreement and effectively being prevented from working for others, you will not win on this factor.

Because of the amount of exposure involved with a misclassification lawsuit, it is worthwhile to have competent employment counsel review your situation and any independent contractor agreement or contracts that you are using to help you make sure it's being handled in the best possible manner to strengthen the individual's status as an independent contractor.

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