Workers on Demand: A Tailored Approach to Worker Classification in the Gig Economy

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Whether you see it as runaway capitalism or a boon for workers, the gig economy is here to stay. In the gig economy, an individual is paid for performing a particular task — like hiring someone through TaskRabbit to save you hours assembling an IKEA chair.

Although data regarding the size of the gig economy is unclear, some experts predict that it will account for 40 percent of the workforce by 2020. Analysis of job growth between February 2005 and late 2015 further shows that all gains in net-job growth were made in the gig economy.

That growth has occurred throughout the workforce. In fact, the London School of Business estimates that 60 percent of the gig economy is comprised of white-collar professionals.

The gig economy is an obvious draw for employers. A task-based labor force allows variable labor costs to expand and contract with demand. In addition, businesses may consider engaging in the gig economy to attract and retain talent that does not wish to be tied down to a traditional nine-to-five.

From a legal perspective, if classified as independent contractors, task-based workers are not eligible for wage and hour protections or eligible to sue under state anti-discrimination laws. Additionally, certain legal protections under leave and anti-discrimination law are triggered by employee headcounts. For example, OFLA protections kick in when an employer has 25 full or part-time employees for a certain period of time. Employers may choose to use independent contracts to try to avoid triggering these minimum thresholds.

When companies choose to wade into the gig economy, the most important decision is whether to classify task-based workers as employees or independent contractors. The choice may seem obvious.

It isn't. A task-based work arrangement does not have to fall into an independent contractor arrangement. For example, several Am Law 100 law firms have started to employ pools of attorneys that they compensate by the hour. These law firms enter into an employer-employee relationship, but offer a work structure that is flexible by allowing individuals to work on a task basis and to refuse work when they wish. Short-term employment is also a potential solution.

There are several reasons why businesses should think twice about classifying task-based workers as independent contractors:

- **Some Workers Cannot Be Independent Contractors.** The law regulates which work arrangements can be properly set up as a contracting relationship.
- **High Costs of Misclassification.** The line between worker and independent contractor is not clear. The existence of a contract is far from definitive with respect to independent contractor status. The law uses a fuzzy multi-factor test to determine classification that weighs in favor of a finding of an employer-employee relationship. After an adverse finding, an employer may be liable for overtime, penalties and back taxes.
- **Expect Litigation on This Point.** Expect workers to challenge their independent contractor status when claiming overtime, discrimination, workers' compensation or unemployment insurance. That is because independent contractors cannot make such claims under Oregon state law. Due to the high costs of misclassification, employers with large swaths of independent contractors cannot afford an adverse finding as to worker classification, and therefore face significant settlement pressure.
- **Expect Laws to Change.** We can expect Portland — or Oregon generally — to pass laws expanding rights for independent contractors. In fact, Seattle recently passed an ordinance allowing ride-hailing drivers to unionize. New York City's newly effective "Freelance Isn't Free" law sets forth contracting requirements and certain anti-retaliatory protections.
- **Promotion.** The use of an independent contractor relationship can limit an organization's ability to advance an individual within an organization. The idea of promotion is one generally associated with traditional employment. Therefore, an employer could run the risk of creating a misclassification issue when it regularly taps its pool of independent contractors to fill employment positions.
- **Immigration.** An employer-employee relationship is required for an H-1B visa.

Notwithstanding the draconian nature of the above considerations, there are legitimate and appropriate uses of independent contractor relationships in the gig economy. Employers who choose to utilize independent contractors should consider obtaining an advisory opinion from the IRS, which could help insulate against some liability.

That said, some issues remain regardless of worker classification. For example, a porous workforce presents a challenge with respect to data security regardless of classification. So an employer should always make sure to collect strong non-disclosure and non-solicit agreements.

Ultimately, any approach must be tailored and carefully considered. Businesses would be well advised to consult legal counsel to ensure implementation of an appropriate strategy for the use of independent contractor relationships in the gig economy and to protect against potential litigation. ■

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