ABA BCLS SPRING MEETING

THE GIG ECONOMY

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WHAT IS THE GIG ECONOMY?
The Gig Economy Defined

• A gig economy is a market model in which workers contract with organizations for temporary, short-term engagements. Typically, a worker has the ability to pick and choose when he or she will work and how often.

• Types:
  – Personal Services
    – Examples: Uber, Lyft, GrubHub, Handy, Instacart, TaskRabbit, etc. – intermediary connects consumer with service
  – Goods and impersonal services
    – Examples: AirBnB, Etsy, etc. – intermediary connects buyers and sellers
  – Crowdsourcing
  – Personal shoppers
  – Secret shoppers
  – Brand ambassadors/social media monitors/moderators
Related Concepts

• The sharing economy is a market model that refers to the sharing of access to goods and services. Concepts related to the sharing economy also trigger concepts related to “joint employment” including “vertical” and “horizontal” joint employment.

• The on-demand economy is economic activity created by companies (generally technology-related) that fulfill consumer demand via the immediate provisioning of goods and services.

• On-demand economy and gig economy are often used interchangeably.
SECTION 02

ADVANCE OF THE GIG ECONOMY
Statistics

• Number of workers impacted
  – “Independent workers” are those workers regularly engaged in freelancing, contract work, consulting, temporary assignments, or on-call work each week for income, opportunity, and satisfaction.
  – Independent workers 21 years and older = 41.8 million in 2018 (up 2.2% from 40.9 million in 2017)
    – 15.8 million full-time independents, 11.1 million part-time, and 14.9 million occasional.*
  – More than 5 million have worked in the personal services aspect of the gig economy at one time.
  – Around 1 in 7 workers in the UK is now self-employed, up 45% since 2008

• Amount of money at issue
  – In 2018, independent workers generated more than $1.3 trillion of revenue. This is equal to nearly 6.7% of US GDP.

*Source: MBO Partners State of Independence in America 2018
Additional statistics regarding joint employment included in DOL Administrator's Interpretation, link provided above.
Risk Tolerance and Exposure

- Companies are increasingly interested in entering the gig economy, but the legal uncertainties pose some discouraging risks
- Employee vs. Independent Contractor (IC) Misclassification/Finding of Joint Employment have numerous repercussions:
  - Timekeeping and payroll – “Employers” are responsible for minimum wage, overtime pay, tax withholding, etc.
  - Private Attorneys General Act of 2004 (PAGA) – Exposure under California Labor Code Section 2699 in representative actions for civil penalties is available to employees related to violations of the labor code
    - Risk has increased after the California Supreme Court’s decision in Iskanian
  - Discrimination and retaliation laws
  - Traditional labor issues – Can gig workers unionize?
Risk Tolerance and Exposure

- **Workers’ Compensation** – Only provided to employees, but failing to provide to “employees” can constitute a criminal violation.

- **Unemployment Compensation** – If you “employ” someone on a gig basis and deactivate them, then they might attempt to seek unemployment compensation.

- **Fair Credit Reporting Act** – Failure to provide employees a disclosure of rights to request copies of credit checks and background reports.

- **OSHA** – ICs are responsible for their own health and safety protection.

- **Motor Vehicle Registration** – Some states permit a business entity to obtain driving reports for “employees.”
The “Social Compact” Meets the New Economy

- Lack of benefits is touted as a significant governmental concern related to emerging economies.
- Employees covered by benefits and properly classified ICs
  - ICs usually not able to participate, since they are not employees
  - But ACA only recognizes one employer—and the employer may be hit with Shared Responsibility penalty taxes for “improper” ICs
  - NYC Minimum Wage Rule establishes minimum pay rate of $17.22 per hour for drivers who drive for app-based ride-hailing companies that dispatch at least 10,000 trips per day
- Do all workers really want/need to receive benefits?
- Proposed solutions?
  - Consortia
  - Portable benefits solutions
    - Roth IRAs, ACA Exchange coverage
Legislation Initiatives

• Independent Worker Proposals
  – Portable benefits/insurances
  – Discrimination protections
  – Cause for termination

• Evidentiary Proposals
  – Training and educational opportunities not evidence of employment status
  – Provision of insurance and other benefits not evidence of employment status

• Platform Proposals
  – The platform intermediary (e.g., Uber, Lyft, Handy) would not be an employer
• The **2017-2021 SEP**’s strategic focus was the gig economy:
  
  – “The Commission adds a new priority to address issues related to complex employment relationships and structures in the 21st century workplace, focusing specifically on temporary workers, staffing agencies, independent contractor relationships, and the on-demand [read gig] economy.”

• The stated goals in the **2018-2022 SEP**, however, seem much less focused of the gig economy (and are arguably somewhat noncommittal). Among the stated goals:
  
  – The EEOC will pay more attention to discrimination in federal government employment.
  
  – The Agency will pursue litigation "responsibly," focusing on cases where it has a reasonable chance of success, either through a "win" or through a consent decree or settlement.
  
  – The agency will focus on getting its own house in order, by assessing its own "employee engagement and inclusiveness."
Cashless Stores

- Retail outlets and restaurant chains are testing or have already implemented cashless policies.
  - Pros: Policies increase efficiency and reduce crime.
  - Cons: Policies may discriminate against unbanked and underbanked, low-income populations, and encourage risky personal financial practices (e.g., overdrafting and incurring credit card debt).

- Absence of federal legislation has caused cities and states to push for laws prohibiting retail outlets and restaurants from refusing to accept cash or charging higher prices to cash-paying customers.
  - Massachusetts has had a law for over 20 years requiring retailers to accept cash, although it is not enforced.
  - New York City, Washington, D.C., Chicago, New Jersey, and Philadelphia have proposed similar legislation.
Unfair Competition Claims

- Competitors of gig-economy companies are starting to bring claims under California Bus. & Prof. Code 17200 alleging unfair competition.

- Cases allege gig companies unfairly harm competitors in pricing goods and services below cost by avoiding mandatory costs of employment (e.g., minimum wage, Social Security and Medicare taxes, and unemployment insurance contributions) and other regulatory requirements.

- Issue: Is it anti-competitive if the result is lower prices for the benefit of the consumer?
SECTION 03

MISCLASSIFICATION
Misclassification

• The potential costs of misclassification—back wages, tax liability, retroactive exposure for employee benefits, unpaid unemployment and workers’ compensation insurance contributions, fines, and penalties—continue to present serious risks for employers.
  – Although the law permits the use of ICs, recent legislative and regulatory efforts by both federal and state legislators and regulators have highlighted a growing intolerance for these relationships.
  – Moreover, some courts are conditionally certifying FLSA collective actions and certifying state wage and hour class actions for groups of ICs.
DOL: Economic Realities Test

- Administrator’s Interpretation No. 2015-1
  - Created presumption of employment status
  - Focused on “suffer or permit to work”
  - Withdrawn by Trump Administration
  - Returned to economic realities test, including requirement of control

- Field Assistance Bulletin
  - Issued by the DOL on Friday, July 13, 2018 and is Trump Administration’s first guidance on employment status
  - Focuses on caregiver registry industry
  - DOL will consider the “totality of the circumstances to evaluate whether an employment relationship exists,” focusing on historically important factors, including control of the work performed by the IC
Traditional State Tests

- **Right to Control Test**
  - Primary Question: Does the worker have the right to control the manner in and means by which he or she carries out the job?
  - Factors to Consider:
    - Whether the person performing the services is engaged in an occupation or business distinct from that of the principal;
    - Whether the work is a part of the regular business of the principal or alleged employer;
    - Whether the principal or the worker supplies the instrumentalities, tools, and place for the person doing the work;
    - The alleged employee’s investment in the equipment or materials required by his or her task or his or her employment of helpers;
Traditional State Tests

- Whether the service rendered requires a special skill;
- The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision;
- The alleged employee’s opportunity for profit or loss depending on his or her managerial skill;
- The length of time for which the services are to be performed;
- The degree of permanence of the working relationship;
- The method of payment, whether by time or by the job; and
- Whether or not the parties believe they are creating an employer-employee relationship may have some bearing on the question, but is not determinative since this is a question of law based on objective tests.
The ABC Test

• Under the typical ABC Test, a worker is presumed to be an employee (not an independent contractor) unless all three of the following criteria are satisfied:
  – (1) The worker is free from direction and control in the performance of the service, both under the contract of hire and in fact; and
  – (2) The worker’s services must be performed either (i) outside the usual course of the employer’s business or (ii) outside all the employer’s places of business; and
  – (3) The worker must be customarily engaged in an independently established trade, occupation, profession, or business of the same nature as the service being provided.

• Some state tests have slight modifications.
The New Jersey Supreme Court, in *Hargrove v. Sleepy’s, LLC*, 220 N.J. 289 (2015), adopted an ABC Test for determining who is an employee under the Wage Payment Law and the Wage and Hour Law.

- Same test applies under New Jersey Unemployment Compensation Law.
- Test mirrors the three most important factors of the test under the New Jersey Conscientious Employee Protection Act, which creates “a very expansive definition of employee” that “includes more than the narrow band of traditional employees.”

The Massachusetts Independent Contractor Law similarly uses an ABC Test for determining classification under the state’s unemployment compensation law, as well as state wage and hour laws, payroll recording and reporting requirements, withholding, and workers’ compensation laws.
The ABC Test

- In *Dynamex Operations West Inc. v. Superior Court*, the California Supreme Court adopted the ABC Test for wage order claims.
  - Initially, the court considered whether to apply the state’s Industrial Welfare Commission definition of an employee as interpreted in an appeals court ruling called *Martinez v. Combs*, or the flexible, 11-factor test from *S.G. Borello & Sons Inc. v. Department of Industrial Relations*, which had been the standard for decades and focuses primarily on whether workers have a right to control how they performed their work.
  - The court later requested supplemental briefing on the ABC Test.

- *Dynamex* has been limited by *Garcia v. Border Transp. Grp., LLC*, 2018 WL 5118546 (Cal. Ct. App. 2018), which held that the *Borello* standard applies to non-wage order claims, and *Curry v. Equilon Enterprises, LLC*, 23 Cal. App. 5th 289 (2018), which held that the ABC Test does not apply in the joint employer context.

- Proposed Legislation:
  - Assembly Bill 5 would codify the *Dynamex* decision’s ABC Test.
  - Assembly Bill 71 would effectively overturn the *Dynamex* ruling by codifying the *Borello* standard.
Problems with the Traditional Tests

• Arcane and ignore emerging economic and technological realities
  – Software platforms present new opportunities, but do not fit traditional employment model
  – Risks of impeding creativity and economic growth using “DOL - employment as broad as possible” concept

• Multiple factor tests/multiple jurisdictions
  – Ambiguity and uncertainty
  – Constant compliance concerns
  – Prohibits availability of uniform/compliant national policies
Recent Platform Case Law Example – Wage Laws

• **Lawson v. GrubHub, Inc.**, No. 15-cv-05128 (N.D. Cal. Feb. 8, 2018) held that former meal delivery driver was an IC and not the company’s employee.
  – Because the case was decided pre-*Dynamex*, the court applied the *Borello* standard and considered a multitude of factors in reaching its decision that the driver performed delivery services as an IC.
  – Most significant consideration was the fact that GrubHub exercised little control over the details of the driver’s work.
  – Notice of appeal has been filed with the 9th Circuit. The trial court has indicated that there is a potentially substantial question as to whether the *Dynamex* decision will be applied retroactively in place of the *Borello* standard.
Recent Platform Case Law Example – Wage Laws

- **Lee v. Postmates Inc.,** No. 18-cv-03421 and **Albert v. Postmates Inc.,** No. 3:18-cv-07592 (N.D. Cal.)
  - Workers for Postmates filed a complaint in May 2018, alleging they were misclassified as ICs and should be considered employees under the ABC Test adopted in *Dynamex*.
  - Workers argued that Postmates “cannot” satisfy prong B of the ABC Test, because Postmates cannot prove that the workers “perform services outside its usual course of business.”
  - In December 2018, a magistrate judge held that workers must arbitrate their claims pursuant to a mutual arbitration agreement, and dismissed the claims at the workers’ request to permit them to appeal the decision.
Recent Platform Case Law Example - Unemployment

- **In re Uber Technologies**, ALJ Case No. 016-23494, Appeals Board No. 596722 (N.Y. UIAB July 12, 2018)
  - Held that Uber drivers were employees for purposes of unemployment insurance benefits.
  - The following factors weighed in favor of employment status: (1) during onboarding, drivers were required to take a map test, and given a handbook, instruction, and training on how to maintain good performance ratings, a proprietary phone, and placards and lights for display on their vehicles; (2) Uber managed performance and had a “Driver Deactivation Policy”; (3) Uber penalized drivers for rejecting or ignoring too many trip requests; (4) Uber required drivers to use a car from an approved list, requires use of a certain route, and strongly suggests a dress code.
  - Ubers’ service was likened to traditional car service companies’ services.
Recent Platform Case Law Example - Unemployment

  - On-demand courier who used smartphone app to perform deliveries at times of his choosing claimed he was an employee for unemployment insurance purposes.
  - Postmates was not liable for unemployment insurance contributions because “Postmates lacks the requisite indicia of supervision, direction and control necessary to establish an employer-employee relationship.”
  - The following factors weighed against employment status: (1) courier did not have to apply or interview; (2) courier did not report to any supervisor; (3) courier had complete discretion when, if ever, to log on to the platform, and was free to work as little or as much as he chose; (4) courier could decline to perform any deliveries once logged on to the platform, chose his own route, and could use any mode of transportation; and (5) courier was not required to wear a uniform or provided any identification card or logo.
Joint Employment

• Horizontal vs. Vertical Joint Employment:
  – Horizontal – when the employers are sufficiently associated or related so that they jointly employ the employee.
  – Vertical – where the employee has an employment relationship with one employer (i.e., temp agency, subcontractor, or other intermediary employer) and the economic realities show that he or she is economically dependent on another entity involved in the work. The other entity is a potential joint employer.

• Problem: the gig economy model does not fit squarely into either of the two categories.
Union Issues

- Unions have generally accepted the disaggregation of work that gig economy represents

- 2 responses:
  - (1) presume employee status (NLRA) and/or
  - (2) “organize anyway” through:
    - (a) local legislation,
    - (b) forming voluntary associations (≈ “worker center” initiative), or
    - (c) class action settlements
NLRB Position

- In *SuperShuttle DFW, Inc.*, 367 NLRB No. 75 (Jan. 25, 2019), the NLRB affirmed that drivers of a shared airport ride service were ICs, not employees, and therefore not covered by the NLRA.
  - Reverted back to common law agency test for determining IC status, which applies a non-exhaustive list of factors, including: (1) the degree to which the company exerts control over the worker; (2) whether or not the worker is engaged in a distinct occupation or business; (3) whether the type of work usually is done without supervision; (4) who supplies the tools and place to perform the work; and (5) whether the work is part of the regular business of the company.
  - Economic reality is not tied principally or solely to the independence of a business.
  - Focus on “entrepreneurial opportunity” and control over day-to-day tasks. This is relevant to app-based companies where workers are free to log on to and off at will.
Local Collective Bargaining Legislation

  – California bill to give ICs in gig economy the ability to organize a union
    – Right to organize and negotiate with “hosting platforms”
    – Right to engage in “group activities” in an effort to negotiate through activities (i.e., withholding work and boycotting)
    – Authorized an IC or a representative of ICs claiming a violation to bring an action in superior court and seek injunctive relief

• Seattle IC Driver Ordinance
  – 2015 ordinance by the City of Seattle allows gig economy drivers—Uber and Lyft—to organize.
  – The Ninth Circuit in *U.S. Chamber of Commerce v. City of Seattle*, 890 F.3d 769 (9th Cir. 2018)—a lawsuit filed by a group of IC drivers challenging the ordinance on NLRA and Sherman Antitrust Act preemption grounds—held that the ordinance was not preempted by the NLRA.
  – Although the antitrust claims are still being litigated, state lawmakers can permit expansive collective bargaining in sectors where companies routinely label their workers ICs.
SECTION 04
LOCAL INDEPENDENT CONTRACTOR LEGISLATION
Transportation Network Company ("TNC") Laws

- 32 states have passed laws that regulate the treatment of TNC drivers
- TNC is generally defined as a company that uses a digital network to connect riders to drivers.
  - Excludes taxi and other non-digital vehicle services.
- Varying approaches used in TNC laws to reinforce IC status:
  - Some expressly state that TNC drivers are not employees (e.g., Missouri, Ohio, Utah)
  - Some state that TNCs do not control drivers, which weighs in favor of IC status under common law IC test analysis (e.g., Colorado, Idaho, Illinois, Indiana, Iowa, Kansas, Montana, Nevada, North Dakota, Oklahoma, Tennessee, Wisconsin)
  - Some create a presumption that drivers are ICs where certain conditions (usually 4-5) are satisfied (e.g., Alaska, Arkansas, Delaware, Florida, Kentucky, Michigan, Mississippi, New Hampshire, Texas, West Virginia, Wyoming)
    - Sometimes used in combination with statement that TNCs do not control drivers
    - Some create a presumption that drivers are ICs that can be rebutted by applying the common law IC test (e.g., North Carolina)
• Utah Code Ann. § 13-51-103
  – (2) A transportation network driver is:
    – (a) an independent contractor of a transportation network company; and
    – (b) not an employee of a transportation network company
TNC Law Example - Florida

- Fla. Stat. Ann. § 627.748, Sec. 9
  - A TNC driver is an independent contractor and not an employee of the TNC if all of the following conditions are met:
    - (a) The TNC does not unilaterally prescribe specific hours during which the TNC driver must be logged on to the TNC’s digital network.
    - (b) The TNC does not prohibit the TNC driver from using digital networks from other TNCs.
    - (c) The TNC does not restrict the TNC driver from engaging in any other occupation or business.
    - (d) The TNC and TNC driver agree in writing that the TNC driver is an independent contractor with respect to the TNC.
TNC Law Example - North Carolina

- N.C. Gen. Stat. § 20-280.8
  - A rebuttable presumption exists that a TNC driver is an independent contractor and not an employee. The presumption may be rebutted by application of the common law test for determining employment status.
TNC Law Example - Colorado

• Colo. Rev. Stat. § 40-10.1-602
  – "A transportation network company is not deemed to own, control, operate, or manage the personal vehicles used by transportation network company drivers."
  – "A driver need not be an employee of a transportation network company."
Marketplace Contractor ("MC") Laws

- 8 states have passed laws that regulate the treatment of marketplace platform workers more generally (i.e., Arizona, Florida, Indiana, Iowa, Kentucky, Tennessee, and Utah).
  - Texas is also currently considering an amendment that would create a classify certain gig workers as ICs if certain conditions are satisfied.
- Include uniform, broad language covering workers that provide services to third parties through websites or apps, except Utah, which covers only “building service contractors”
- Like TNC laws, MC laws create a presumption of IC status
• A.R.S. § 23-1601 If the IC and the Contracting Party can meet six or more of 10 enumerated factors below that indicate an IC relationship, and the IC executes a declaration outlining the relationship and establishing that the parties meet those factors, then the result is a rebuttable presumption of IC status.

  – The IC is not insured under the Contracting Party’s health or workers’ compensation insurance coverage.
  – The Contracting Party does not restrict the IC’s ability to perform services for other parties.
  – The IC has the right to accept or decline requests for services by the Contracting Party.
  – The Contracting Party expects that the IC provides services for other parties.
  – The IC is not economically dependent on the services performed for the Contracting Party.
– The Contracting Party does not dictate the performance or process the IC uses to perform services.

– The Contracting Party has the right to impose quality standards and/or a deadline for services performed, but the IC can determine the days and time periods worked.

– The Contracting Party is not providing the IC with a regular salary but is instead paying the IC based on the work the IC is contracted to perform.

– The IC is responsible for providing and maintaining all tools and equipment required to perform the services performed.

– The IC is responsible for all expenses incurred in performing the services.
SECTION 05

MITIGATING MEASURES
What Are Plaintiffs Saying?

- The work performed by the gig worker is the same as that done by the company’s own employees.
- The business trains the gig workers in a way that true ICs would not need.
- Gig workers being required to report to the premises of the business.
- The business dictates work schedules and workload.
- Work schedules and workload effectively create an exclusive working relationship.
- The gig workers wear company logos or drive logoed vehicles.
- The business supervises and disciplines gig workers for poor performance.
Operational Measures

• Limit the amount of control exercised over the manner and means a gig worker performs his or her tasks.

• Avoid having gig workers performing tasks routinely performed by actual W-2 employees of the company.

• Limit as much as possible using IC gig workers to perform tasks outside the normal course of the business and away from the business site.

• Implement measures to reduce the risk that gig workers are forced or effectively required to work exclusively for the one business; the more true latitude that they have to work for others, including competitors, the more likely they are to fall on the IC side of the spectrum.
The GrubHub Analysis

- **Factors Demonstrating Employment Status**
  - **Control Over Working Conditions**
    - Dispatchers had discretion as to whether to reassign deliveries at driver’s request. Sometimes GH couldn’t or wouldn’t reassign and Pl was forced to make deliveries he didn’t want to make.
  - **Additional Indicia of IC Status or Control**
    - Driving is not highly skilled work, nor does it require Pl to make business decisions
  - **Payment**
    - Earnings dependent on amount worked
    - GH aware of only one incident of driver negotiating different compensation
  - **Distinct Occupation/Business**
    - Delivery work was, according to the Court, a regular part of GH’s business. GH is a food order/delivery service.
Factors Demonstrating IC Status

- **Control over Whether and When to Work**
  
  - PI had no required hours and could decide when and whether to work (e.g., whether to accept blocks and whether to work on weekends).
  
  - Drivers only worked when they wanted to do so.
  
  - Drivers were able to drop blocks for any reason (even at the last minute) without interference from GH.
  
  - PI was signed up on the GH platform for 5.5 months but made deliveries only for the last 3.5 months. No one at GH contacted PI about not taking shifts.
  
  - About 40-50% of the drivers who signed up never made a delivery for GH.
  
  - PI did not have to punch in and out. PI did not have to report to anyone if he was sick, nor did he have to ask for time off.
Factors Demonstrating IC Status (cont’d)

- **Control over Working Conditions**
  - GH did not tell Pl how to drive, what route to take, what to say to customers/restaurants (i.e., no script), whether to advertise, and whether to have passengers. Drivers have a lot of freedom to make decisions.
  - There were 48 occasions where Pl toggled off the app for five minutes or more after the start of a block. On many instances, Pl made no deliveries during his block.

- **Additional Indicia of IC Status or Control**
  - Although drivers could watch introductory videos to learn how to use the app, there was no mandatory training. GH did not track whether drivers watched the videos.

- **Other Work Performed**
  - Pl was able to get on and off various gig economy platforms and delivered for other companies while working for GH (including while signed up for a GH block). Pl also performed other work while working for GH.

- **Payment/Taxes**
  - GH employee handled pay-related inquiries from drivers and issued additional pay if a driver was owed money (including for working past assigned block).
• **Factors Demonstrating IC Status (cont’d)**
  
  – **Instruments, Tools, and Assistance with Work**
    - GH had no control over whom, if anyone, Pl wanted to accompany him on his deliveries.
  
  – **Supervision**
    - Pl performed work without supervision, had no boss, and had no ride-alongs
    - While GH might contact a driver to ask how long before a delivery would be made in response to a customer inquiry, the Agreement did not require deliveries be made within any set amount of time, and GH never told Pl that a delivery had to be made in a particular amount of time.
The GrubHub Analysis

- **Neutral Factors**
  - **Contractual Agreement/Understanding of the Parties**
    - Although the Agreement expressly states that Plaintiff “is an independent contractor, he acknowledges that he is, and he promises that he will advise Grubhub if he changes his mind . . . the label placed by the parties on their relationship is not dispositive. . . . In the circumstances here—where the hirer unilaterally determines the contract’s terms for a low wage, low-skilled job—the parties’ label warrants little weight.”
  - **Uniforms**
    - “Grubhub also did not control Mr. Lawson’s appearance while he was making Grubhub deliveries. While Mr. Lawson could wear a Grubhub shirt and hat, he was not required to do so and did not always do so... Further, although he agreed to wear the shirt and hat in exchange for Grubhub providing him with insulated bags to carry the food orders, Grubhub did not supervise whether he or other drivers did in fact wear the hat and shirt.”
Arbitration

• California PAGA action waivers in employee arbitration agreements have been held to be unenforceable. *Sakkab v. Luxottica Retail North America, Inc.*, 803 F.3d 425 (9th Cir. 2015).

• In *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018), the Supreme Court held that arbitration agreements with class and collective action waivers required as a condition of employment are enforceable under the FAA and nothing in the NLRA overrides that result.
  – The decision also permits an arbitration agreement that requires separate proceedings for each employee’s claims, which has resulted in a number of cases in which plaintiffs’ lawyers have filed thousands of individual arbitrations.
  – Employers may seek to argue under state law that arbitration agreements should not be enforced in such situations.
  – Still, employers should be mindful of the terms of the arbitration agreements, which often require employers to pay almost all tribunal and arbitrator fees.
Arbitration

- Relying on the Supreme Court’s decision in *Epic Systems*, the Ninth Circuit held in *O’Connor v. Uber*, 904 F.3d 1087 (9th Cir. 2018) that the gig-economy company’s arbitration agreement, which included a class action waiver, was valid and enforceable.

- Shortly thereafter, in *DoorDash, Inc. v. Magana*, 343 F.Supp.3d 891 (N.D. Cal. 2018) DoorDash successfully invoked the class waiver in its arbitration agreement in an independent contractor driver’s misclassification putative class action lawsuit.
  - Driver was not a transportation worker engaged in interstate commerce, and therefore was not exempt from the FAA.
  - Arbitration agreement was enforceable, despite a generally-applicable CA contract law that prohibits contracts that prevent all adjudication of public injunctive relief.
  - Appeal filed in November 2018.
In *New Prime, Inc. v. Oliveira*, 139 S.Ct. 532 (2019), the Supreme Court held that independent contractors engaged in interstate commerce fall under the FAA’s transportation worker exemption, and thus the FAA cannot be used to enforce mandatory arbitration agreements with such individuals.

- Courts (not arbitrators) will determine whether the transportation worker exemption applies.
- Companies entering into independent contractor agreements with arbitration provisions should assess whether the independent contractors are (1) “transportation workers” who (2) are engaged in interstate commerce.
- If so, the agreement to arbitrate may not be enforceable under the FAA, but could still be enforceable under state law, forcing businesses with arbitration agreements with independent contractors to navigate a patchwork of 50 state laws.
Temp Agency Solutions

- Traditionally used to protect against misclassification
- New joint employment standards undermining availability of protections
  - California Shared Liability law, Labor Code Section 2810.3
    - Customer of labor provider on hook for wage violations if agency violates wage payment laws
  - California Paid Sick Leave – “employer or joint employer” required to provide paid sick leave to employees of temp/staffing agencies
- Less control helpful for IC status also means less control over compliance for joint employment exposure
Temp Agency Solutions

• Contractual considerations
  – Third-party beneficiary to mandatory arbitration with class waivers
  – Warranties
  – Indemnity
    – Ensure adequate insurance to confirm value of indemnity/insolvency of agency
      supports joint employment analysis
    – Consider requiring insurance certificate for minimum insurance
  – Escrow/other M&A-type solutions related to contractual violations of employment, wage
    and hour, and other compliance obligations

• Accept joint employment status and closely manage compliance?
  – Auditing as evidence of joint employment status
The Big Picture

- The gig economy model is not unique to the United States
- Various legal challenges to the model in the EU and Asia
- 25%-30% of the working-age population in the United States and EU-15 engaged in independent work*
  - 26% in UK
  - 30% in France
  - 25% in Germany
  - 31% in Spain

EU Response to the Gig Economy

- EU Commission (EC) published guidance in 2016 – "A European Agenda for the Collaborative Economy"
  - It is generally a good thing that should not be banned!
  - Absolute bans and quantitative restrictions of an activity normally constitute a measure of last resort
  - Called on EU countries to draw three important distinctions: between professional and occasional service providers; between employees and ICs, and between platforms that only provide information and auxiliary services and those that provide a core service
EU Response to the Gig Economy

- Though the EC guidance is not binding, it seems Europe will be more demanding than the United States:
  - It relies on a strict definition of a worker, provided by the European Court of Justice: “The essential feature of an employment relationship is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration.”
  - If the provider of a service does not independently determine its nature, remuneration, and the working conditions, an employment relationship exists.
  - It leans toward making “traders”—businesses that provide a service through a sharing platform, legally liable for the services they provide.
  - Value-added taxes, which exist everywhere in Europe, should apply to the services bought and sold through the "collaborative" platforms.
• In January 2017, the European Parliament voted overwhelmingly to back a report calling for better worker protections in the on-demand economy, also known as the sharing economy

• The report calls for:
  – “decisive steps towards legal certainty on what constitutes ‘employment,’ including for work intermediated by digital platforms”
  – open-ended contracts should remain the norm, and on-demand platforms should guarantee “certain core working hours” to all workers
  – member states to enforce labor standards more effectively
  – reaffirmation of the importance for “collective rights”
The UK - Numerous Legal Challenges

• A number of recent legal challenges focusing on employment status
• Many employers try to engage their workforce as self-employed persons so as to have greater flexibility and save costs
• Generally, genuinely self-employed persons have no employment rights and employees have the most employment rights
• There is an intermediate category of persons known as workers who have some but not all of the rights of employees, including rights to holidays and national minimum wage
• Plaintiffs have successfully showed that persons working in the gig economy are actually workers
In order to determine the legal status of an individual engaged to provide services to an organization, it is necessary to look at the overall practical reality of the relationship between those parties taking into account various factors such as:

- Whether the individual has been required to provide a personal service
- To what extent the organization exercises control over the individual
- Whether there is mutuality of obligations (i.e., the business is required to provide the work and the individual is required to do the work)
- Whether the individual is closely integrated within the organization
- Whether the individual shares in financial risk and reward through the provision of services
The UK - Calls for Reform

- There have been various UK Government enquiries and developments relating to the gig economy:
  - A UK Government Department (BEIS) is calling for submissions in response to a consultation on the “future world of work”
  - The UK tax authorities have launched an investigation into companies that opt out of giving individuals employment protections by using agency staff or labelling them as self-employed
  - The Law Society for England and Wales proposes a shift from employees having to assert their employment rights to employers having to prove their compliance with the law
Singapore – Better Protections for Gig Workers

• With freelance work becoming more common, the Singapore government accepted in principle the recommendations of the Tripartite Workgroup (TWG) to study the concerns faced by those in the industry, including the lack of income security and savings for retirement.

• Among the concerns flagged by freelancers are the lack of income security, including a loss of income from injuries sustained on the job or while attending training. They are also concerned about being ineligible for employee benefits, the lack of savings for retirement and housing, and not receiving full payment from customers in a timely manner.
Singapore – Better Protections for Gig Workers

Key Features of the TWG Recommendations:

- **Tripartite Standard and Mediation**: developing a Tripartite Standard for engaging SEPs’ services. This standard will require businesses to commit to using written contracts when engaging SEPs, which would contain key terms of employment such as a payment schedule and payment amounts, as well as a dispute resolution mechanism.

- **Insurance**: recommending that the tripartite partners (the MOM, National Trades Union Congress, and Singapore National Employers Federation) work with insurers to make an SEP insurance product available that could provide a daily cash benefit for prolonged illness or injury.

- **Occupation-Specific Competency Framework**: proposing that the tripartite partners support SEP associations to assess skills needs and to develop occupation-specific competency frameworks to ensure that SEP skills remain current and professionalism is enhanced.
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THANK YOU
Taming the Gig Economy: Freelance Isn’t Free

Jennifer S. Baldocchi, Paul Hastings LLP

I. WHAT IS THE GIG ECONOMY

A. A way of working, where workers have temporary or short-term jobs, or where they handle separate pieces of work, each of which is paid separately, rather than working for an employer.¹

B. Gig workers typically work through digital platforms, performing on-demand services.

C. Examples: Uber, Lyft, Instacart, TaskRabbit, Postmates

D. From 1995 to 2005, contingent workers made up 1.8 % to 4.1 % of the U.S. Workforce.²

E. In October 2010, about 25 % to 30 % of the workforce was contingent.³

F. By 2020, predictions are that 35 % to 40 % of the workforce will be part of the gig economy.⁴

G. Characteristics

1. Autonomous

2. Short-term relationship

3. Payment by task or assignment

H. Benefits

1. Flexibility

2. Multiple jobs

3. Earning potential, supplemental income

4. Autonomy

I. Compared to Employment Status

1. Workers Compensation

2. Unemployment Insurance

3. Affordable Health Care Protection

4. Paid Sick Leave

5. Family and Medical Leave Benefits
6. Wage Laws

7. Expense Reimbursement

II. THE LAW TODAY

A. Tests to Distinguish Independent Contractors From Employees
   1. FLSA: Economic Realities Test
   2. IRS: Right to Control, Common Law Test
   3. EEOC: 16-Factor Test
   4. Some State Agencies: ABC Test

B. Different Tests = Different Results

III. THE BORELLO TEST

A. S.G. Borello & Sons v. Department of Industrial Relations
   1. 1989 California Supreme Court decision
   2. For 30 years has been used by courts and agencies
   3. Right to control, common law test

B. The Borello Test: looks at the totality of the circumstances
   1. Primary factor
      a. Does the hiring entity have the right to control the manner and means by which the worker carries out his or her activities.
   2. Secondary factors, also may be considered, but none is dispositive
      a. What is the understanding and arrangement between the parties
      b. Under what terms has the worker been engaged
      c. What types of skills are required
      d. Does the worker provide the necessary tools
      e. Is the work a part of the regular business of the hiring entity

IV. DYNAMEX
A.  *Dynamex Operations West v. Superior Court*

1. California Supreme Court
2. April 2018

B. Factual Background

1. Dynamex was a delivery service company, which originally classified drivers as employees.
2. In 2004, the company reclassified its employees as independent contractors, even though they were performing the same duties and responsibilities.
3. The drivers filed a class action, claiming that they had been misclassified as independent contractors. They sought several categories of damages, including: unpaid wages, overtime, missed meal periods, missed rest breaks, failure to reimburse business expenses.

C. Trial Court Ruling

1. The company argued that the Borello Test should be applied.
2. The drivers wanted to use the Wage Order definition of employ, which looks at:
   a. Control over wages, hours, or working conditions
   b. “Suffer or permit to work”: if the work was performed with the knowledge of the employer.
   c. To engage, thereby creating a common law employment relationship.
3. The trial court agreed with the drivers and granted class certification.

D. California Supreme Court

1. Accepted the case and the parties submitted briefs. Two years passed with no decision.
2. Then, the Supreme Court asked the parties to provide supplemental briefs on the following issue: Is the pertinent wage order “suffer or permit” definition of employ properly construed as embodying a test similar to the ABC test that the New Jersey Supreme Court held should be used under New Jersey wage and hour law.

E. The Dynamex Decision: The ABC Test

1. Part A: Is the worker free from control and direction of the hiring entity?
2. Part B: Is the worker performing work that is outside the usual course of the hiring entity’s business?
3. Part C: Is the worker customarily engaged in an independently established trade, occupation, or business.


5. Each factor is dispositive - the hiring entity must establish all three.

6. If any factor fails, the worker is an employee, not an independent contractor.

7. There is no balancing of factors. Secondary factors are not considered.

V. LABOR CONTRACTOR JOINT LIABILITY

A. Cal. Labor Code section 2810.3(b)

B. “A client employer shall share with a labor contractor all civil legal responsibility and civil liability for all workers supplied by that labor contractor for both of the following: (1) The payment of wages. (2) Failure to secure valid workers compensation coverage as required by Section 3700.”

C. Contracts may address responsibility for proper payment of wages, and indemnification.

VI. PENDING LEGISLATION

A. AB-5 Worker Status: Independent Contractors - this bill would codify the Dynamex case.

B. AB-71 Employment Standards: Independent Contractors and Employees - This bill would require a determination of whether a person is an employee or an independent contractor to be based on a specific multifactor test, including whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired, and other identified factors.

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