Worker Vulnerability in the “Gig Economy”

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I. Introduction

“Gig” workers, who are hired through internet app-based programs, provide on-demand services in a variety of markets: from drivers (Uber and Lyft) to household workers (Handy and Homejoy) and food delivery services (Instacart and GrubHub). According to statistics compiled by The Hamilton Project, there are anywhere from 1.2 to 1.9 million workers in the United States whom are engaged in the “online gig economy.” This statistic does not include other types of “gig” or “on-demand” workers, such as individuals who sell handmade products (i.e., Etsy sellers) or those that rent properties through sites such as Airbnb or HomeAway.¹

The emerging “gig economy” has been touted by many as a positive development in the American economy, as it provides a means for workers to gain access to employment on their own terms—allowing workers the flexibility to determine their own work hours and the opportunity to engage in bridge employment (temporary employment between traditional jobs, or secondary part-time employment in addition to other full-time work). However, these supposed gains come at a cost. Engaging in “gig” or “on-demand” work deprives individuals of some of the most basic worker protections—minimum wage and overtime pay under the Fair Labor Standards Act (FLSA), as well as coverage by federal anti-discrimination laws and the ability to engage in collective bargaining— and ensures that they are unable to access traditional employment based-benefits like paid sick and vacation leave, as well as unpaid, yet protected, leave under the Family and Medical Leave Act.

This paper addresses two of the barriers “gig” workers face with respect to accessing and enjoying many of these basic worker protections, and highlights some significant litigation and other trends that are currently underway.

II. Fair Labor Standards Act (FLSA) Protections

Under the FLSA, employees are entitled to, among other things, the minimum wage for all hours worked, as well as time and one-half overtime pay for hours worked above forty in a workweek. 29 U.S.C. §§ 206-07. However, the FLSA’s compensation requirements apply only to “employees.” Chao v. Mid-Atl. Installation Servs., Inc., 16 F. App’x 104, 105 (4th Cir. 2001). Practically speaking, without the protections of the FLSA, “gig” workers could earn well below the minimum wage (especially a worker who is required to pay for his own materials such as vehicle and phone costs) with no legal recourse. Therefore, the legal question of whether a “gig”

worker is an “employee” under the FLSA is one that is likely to result in significant federal court litigation as the “gig” economy heats up across the country.

The FLSA defines an “employee” as “any individual employed by an employer,” 29 U.S.C. § 203(e)(1), and an “employer” as “any person acting directly or indirectly in the interest of an employer in relation to an employee,” 29 U.S.C. § 203(d). The FLSA also defines “employ” as including “to suffer or permit to work.” 29 U.S.C. § 203(g). Traditionally, the analysis of whether a worker is an “employee” or an “independent contractor” boils down to what is known as the “economic realities test.” United States v. Silk, 331 U.S. 704 (1947) (identifying five factors relevant to consideration of employee status).

Many courts rely on the factors first identified by the Supreme Court in Silk, as well as additional similar factors, in considering whether a worker is properly excluded from coverage as an independent contractor. See, e.g., Hopkins v. Cornerstone Am., 545 F.3d 338 (5th Cir. 2008) (applying five-factor test); Schultz v. Capital Int’l Sec., Inc., 466 F.3d 298 (4th Cir. 2006) (six-factor test); Morrison v. International Progs. Consortium, Inc., 253 F.3d 5 (D.C. Cir. 2001) (applying five-factor test). However, because there is no single rule or test to determine “employee” versus “independent contractor,” the totality of the working relationship is determinative. To that end, the Department of Labor has identified a number of factors that are generally considered by courts:

1. The extent to which the work performed is an integral part of the employer’s business;
2. Whether the worker exercises managerial skills (i.e., hiring workers or investing in equipment) and, if so, whether those skills affect the worker’s opportunity for profit and loss;
3. The relative investments in facilities and equipment by the worker and the employer, such that they appear to be sharing the risk of loss;
4. The worker’s skill and initiative such that he or she exercises independent business judgment;
5. The permanency of the worker’s relationship with the employer; and
6. The nature and degree of control by the employer (including who sets pay amount, work hours, how work is performed and whether the worker generally works free from control).

United States Department of Labor (DOL) Wage & Hour Division, Fact Sheet #13 (May 2014). Notably, the fact that the worker agreed in writing to be an independent contractor at the time of hire is not controlling, because it is the reality of the relationship, and not the label, that is ultimately determinative. Id. Moreover, courts have generally found that the degree of control—or, the extent to which the employer has the right of control over the workers—should be a major component of any analysis.

Likely as a result of the rise in the number of workers classified as independent contractors, the Department of Labor recently weighed in on the topic, issuing an interpretive bulletin in July 2015 recognizing that:
Applying the economic realities test in view of the expansive definition of “employ” under the [FLSA], most workers are employees under the FLSA. The application of the economic realities factors must be consistent with the broad “suffer or permit to work” standard of the FLSA.

DOL Wage & Hour Division, Administrative Interpretation No. 2015-1 (emphasis added). DOL’s administrative interpretation makes clear that although many in management start from the presumption that workers are not employees, the law and regulators expect that the vast majority of workers will be classified as employees.

DOL’s recent administrative interpretation is consistent with long-standing court interpretation of the FLSA. Indeed, in 1945, the Supreme Court observed that the FLSA’s definition of an employment relationship is “the broadest definition that has ever been included in any one Act.” United States v. Rosenwasser, 323 U.S. 360 (1945) (quoting 81 Cong. Rec. 7656-57 (1937) (statement of Sen. Hugo Black)). Further, the fact that a worker may qualify as an independent contractor under other laws does not mean that are not an employee under the FLSA. See, e.g., Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318 (1992) (FLSA’s definition of employee is broader than ERISA and covers some parties “who might not qualify under a strict application of traditional agency law principles”).

There are also a number of states that have implemented legislation creating what can be called a “presumptive employee status,” premised on the understanding that workers are employees and not independent contractors unless the employer can prove that the workers are genuinely independent. For example, California Labor Code presumes that workers are employees, a presumption that the employer must rebut. Labor Code § 3357. Likewise, as of 2011, similar laws had been passed in Pennsylvania, Delaware, Colorado, Minnesota, Maine and New York. ²

Despite the recent spate of lawsuits filed against “gig” employers, to date, very few courts have yet grappled with the determination of whether “gig” or “on demand” workers are employees or independent contractors. One notable exception is the case of O’Connor v. Uber Technologies, Inc., Case No. 3:13-cv-03826 (N.D. Cal.). There, in March 2015, the district court denied Uber’s request for a summary judgment, ruling that a jury should decide whether the drivers are classified as “employees” or “partners.” In its decision, the court found that Uber’s claim to be merely a “technology company,” as opposed to a “transportation company,” was “fatally flawed.” 82 F. Supp. 3d 1133, 1141 (N.D. Cal. 2015). The court later found that the plaintiffs were entitled to class-wide certification on certain issues. The case is currently scheduled to go to trial in June 2016.

A number of other, similar cases have been filed under either the FLSA or state law making similar misclassification claims. For example:

In 2015, a Lyft driver in Florida filed a lawsuit under the FLSA, alleging that the company failed to pay the minimum wage or overtime compensation as mandated by the FLSA. *Frederic v. Lyft, Inc.*, No. 8:15-cv-01608 (M.D. Fla, filed July 8, 2015). That case was voluntarily dismissed six months later, after the Florida Department of Economic Opportunity issued a ruling finding that two ex-Uber-drivers were contractors and therefore not eligible for unemployment benefits.

A similar lawsuit against Lyft in California was recently settled for $12.25 million. Under that agreement, Lyft will not re-classify workers as employees, but will provide other worker benefits, such as an agreement that terminations must be only made for certain specified reasons.

In *Levin v. Caviar, Inc.*, Case No. 3:15-cv-02385 (N.D. Cal), a worker brought a class-action against Caviar, Inc., a premium food-delivery service, alleging that they were misclassified as independent contractors and, as a result, were unlawfully required to pay certain business expenses and were denied itemized wage statements in violation of California law.

In *Tan v GrubHub Holdings Inc.*, Case No. 3:15-cv-05128 (N.D. Cal.), two employees brought class-wide claims against GrubHub, alleging that GrubHub misclassified them as independent contractors and, as a result, failed to reimburse them for expenses incurred and deprived them of their right to the minimum wage and overtime under California state law. On March 22, 2016, the Court ruled on the defendant’s motion to dismiss, finding that the failure to reimburse claim could proceed, but dismissing the minimum wage and overtime claims (without prejudice and with the ability to re-file) on the basis that the plaintiffs had not pleaded sufficient facts to establish that the wait time was compensable and that they had therefore actually worked hours for which they were not paid the minimum wage. *Tan*, 2016 U.S. Dist. LEXIS 37200 (N.D. Cal.).

Notably, in October 2015, Oregon’s Bureau of Labor and Industries issued an Advisory Opinion on the employment status of Uber drivers. There, applying Oregon’s economic realities test, in conjunction with the Department of Labor’s interpretive bulletin, the Bureau’s Commissioner, Brad Avakian, found that Uber drivers are employees because they work for the company’s benefit and are economically dependent on the company.3

There are also other misclassification decisions that are instructive to the consideration of whether a “gig” worker is actually an “employee.” For example, in *Solis v. A+ Nursetemps, Inc.*, 2013 WL 1395863, at *7 (M.D. Fla. Apr. 5, 2013), the court was faced with determining whether the nurses were independent contractors or employees. Nursetemps maintained a website that recruited both workers and clients and assigned nurses to work upon receipt of a request from the facility for coverage of a given shift. Notably, the nurses were not required to work an

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3 A copy of the opinion is available at
“assigned” shift, and could decline such shifts without penalty. The nurses were also permitted to perform work for other employers while also providing services to Nursetemps, did not generally set their own rate of pay, were required to purchase their own equipment, could not employ others to assist them in performing their work, did not have the opportunity for additional profit through the exercise of managerial skill or increased efficiency in the manner or means of accomplishing the work, and performed “the whole” of Nursetemps’ business. Given these facts, the court found that “while it is certainly true that the nurses enjoy a degree of flexibility in their working lives, not shared by many in the work force, including . . . choosing when and where to make themselves available for work, the simple fact remains that when the nurses are available for work they are dependent upon Nursetemps to provide it.” Id. Thus, the nurses were employees of Nursetemts and entitled to the protections of the FLSA.

Cases such as Nursetemps demonstrate the importance of examining the specific facts behind each employment relationship, and make clear that “gig” employers may be liable for large sums of backpay should they be unable to demonstrate that their workers are actually, legally, independent contractors. Moreover, even though the ultimate conclusion of whether a worker is an “employee” or “independent contractor” is a question of law, the findings as to the economic realities test factors are questions of fact. See, e.g., Sec’y of Labor v. Lauritzen, 835 F.2d 1529, 1535 (7th Cir. 1987); Brock v. Mr. W. Fireworks, Inc., 814 F.2d 1042, 1044-45 (5th Cir. 1987). Given the plethora of facts to consider, many potential cases should survive summary judgment motions and proceed to trial.

Even the possibility of wage and hour litigation appears to have prompted some “gig” companies to change their policies and re-classify workers as employees as opposed to independent contractors. Instacart, for example, has begun to allow its “shoppers” to elect to be classified as employees. Zirtual, a company that provides virtual assistants, has also switched its workers from independent contractors to employees.

III. National Labor Relations Act and Collective Bargaining

Labor organizations, or unions, have historically been involved in extending worker protections and benefits to their members, thereby growing the middle class. Employees who belong to a union can negotiate their wages and benefit from worker-sponsored health care and other benefits packages. In 1935, the National Labor Relations Act (NLRA) was passed, with the intention that it eliminate obstacles to the free flow of commerce by enabling collective bargaining and giving employees the “full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment. . .” 29 U.S.C. § 151.

Generally, employees covered by the NLRA are afforded the right to join together to improve their wages and working conditions, even if they are not part of a recognized union. Specifically, the National Labor Relations Board protects the rights of employees to engage in “concerted activity,” which is when two or more employees take action for their mutual aid or protection regarding terms and conditions of employment. Even a single employee can engage in protected concerted activity if he or she acts on the authority of other employees.

However, although most employees in the private sector are covered by the NLRA, the Act specifically excludes individuals who are, inter alia, employed as an independent contractor. 29 U.S.C. § 152(3) (the terms employees “shall not include any individual . . . having the status
of an independent contractor”). Thus, by its very terms, the NLRA does not provide “gig” workers who are classified as independent contractors the right or ability to organize into collective bargaining units.

Of course, collective bargaining rights can arguably be extended to individuals beyond the NLRA’s reach. In fact, in December of 2015, Seattle became the first city in the nation to allow drivers of Uber and Lyft to unionize over pay and working conditions, voting 8-0 in favor of the legislation. The measure requires such companies to bargain with their drivers if a majority show they want to be represented. Although the companies to be impacted oppose the measure and will likely challenge it in court as being in violation of the NLRA, there have been other successful efforts made to provide unionization rights to individuals otherwise excluded from the NLRA. In 1975, the California legislature passed the California Agricultural Labor Relations Act (CALRA), which establishes collective bargaining for farmworkers, who are similarly excluded from the NLRA. The Act itself establishes rules and regulations similar to those found in the NLRA. Cal. Lab. Code § 1140, et seq.

In the absence of specific collective bargaining rights, at least some “gig” or independent workers have nevertheless banded together to advance certain causes. Most visible is likely the “Freelancers Union,” founded by Sara Horowitz (a labor law attorney and union organizer) in 2001. Although the Union is focused on providing insurance to freelancers, consultants, independent contractors and other contingent employees, it also attempts to bring issues of concern for independent workers to the attention of the media, provides members with online tools for tax purposes and discounts, and advocates for legal reform on issues related to tax relief, unemployment and workers’ compensation. The efforts by at least some independent workers to join forces to better their working conditions and benefits further demonstrates the importance of ensuring that workers are not improperly classified as independent contractors.

IV. Conclusion

Given the continuing rise and popularity of the “gig economy,” questions as to whether “gig” workers are entitled to be treated as employees for purposes of accessing employment rights and benefits will proliferate. Savvy employers should, in light of DOL’s pronouncement and at least some courts’ willingness to entertain misclassification claims, seriously consider changing their business model and reclassifying “gig” or “on demand” workers as employees as opposed to independent contractors. A failure to do so now could result in steep consequences should those workers prevail in class actions under various state law wage and hour cases and/or collective action litigation under the FLSA. Moreover, although switching from independent contractors to employees may result in initial decreased profits, employers will have more control over the quality of the work performed as they can begin setting performance standards and instituting company-wide training. Likewise, enabling employees to bargain with their employers over basics such as wages and working conditions will result in a workforce that is happier, more stable, and better performing. In a world where reviews of a few terrible employees could ostensibly make-or-break a company, focusing on workers, the very underpinnings of nearly every successful business, could ultimately lead to greater commercial success.

4 Information available at: https://www.freelancersunion.org/