“Move Fast [But Please Don’t] Break Things”

Tax Issues in the Gig Economy
Speakers:

Elizabeth K. Blickley, Washington, DC

Rebecca Stork, Eversheds-Sutherland (US), Atlanta, GA

Elizabeth McGee, The Law Office of Elizabeth McGee, San Francisco, CA

Francois Chadwick, Vice President of Tax & Reporting, Uber, San Francisco, CA

Amy Spivey, LITC Director, Justice & Diversity Center of the Bar Association of San Francisco, San Francisco, CA
TIGTA Report outlined reporting discrepancies

Expansion of the Gig Economy
Warrants Focus on Improving
Self-Employment Tax Compliance

February 14, 2019
Reference Number: 2019-30-016
Major issues in the Gig Economy

- Worker Classification
- Company reporting and withholding
- Worker reporting and self-employment quarterly payments
- Penalties
- Increased Enforcement
  - TIGTA report suggests more rigorous review of amended returns and claimed deductions
  - Anecdotal evidence of exhaustive IDR requests
Worker Classification

Traditional criteria for determining employee or independent contractor status (Weber v. Commissioner, 103 T.C. 378, 386 (1994), aff’d per curiam, 60 F.3d 1104 (4th Cir. 1995)):

- Degree of control
- Investment in facilities
- The opportunity for profit or loss
- Right to discharge the worker
- Whether the work is a part of the principal’s regular business
- Permanency of the relationship
- The relationship the parties believed they were creating
- Whether employee benefits were provided
Worker Classification in the Gig Economy

- The increase in Gig work also provides different scenarios even within a single company

- Transportation companies
  - Delivery companies that provide a vehicle or help to finance a new vehicle
  - Delivery drivers who are provided with uniforms and specialized equipment to transport the items (insulated or cooling bags for meals or groceries)
  - Part-time drivers vs. full-time drivers
  - Scooter companies that have workers who maintain the scooters vs. workers who are paid to charge the scooters with the company charger, during certain hours, and deploy the charged scooter at certain times and in certain locations
  - Tipping and bonuses based on volume or performance
Worker Classification in the Gig Economy

- Service companies
  - Doctors working for a hospital or clinic
  - Clearinghouses for specialized tasks
    - Examples: Task Rabbit, Fiverr, Zeel (Massage)

- Short-term rental companies
  - Less concerns with worker classification in this category and more emphasis on federal reporting
    - Schedule C vs. Schedule E
  - SALT issues
    - Hotel taxes
    - Sales tax
    - Local regulations due to affordable housing concerns
Company-side

- W-2 or 1099-Misc
- Withholding and paying over employment and income taxes
- 1099-K, Payment Card and Third Party Network Transactions
  - Worker earns $20,000 or more
  - 200+ transactions
  - State taxing authorities are considering lowering the threshold for issuing this form
    - This would create different requirements from state to state, compounding reporting requirements for large companies
- Incorrect worker classification is not just an IRS issue
  - Department of Labor
  - Social Security Administration
  - State and Local Tax Administrations
    - California- Assembly Bill 5- limiting independent contractor status to workers exempt from employee status
- Section 530 relief
If the company meets three requirements, it will not owe employment taxes for workers

1. **Reporting Consistency**
   - The company timely filed all required federal tax and information returns
     - Ex. Form 1099-MISC for independent contractors who were paid $600 or more
     - Relief is not available for any worker for whom you did not file the required information return

2. **Substantive Consistency**
   - The Company (and any predecessor) always treated the worker as an independent contractor
     - If any similar worker was treated as an employee, relief is not available

3. **Reasonable Basis**
   - The company had to have a reasonable basis for not treating the worker as an employee
     - Reliance on a court case or IRS ruling
     - The company was previously audited and the IRS considered employment taxes but did not reclassify the workers
     - Independent contractor treatment is common in your industry
     - Reliance on legal advice or advice of an accountant
Worker-side

- 1040
  - The taxpayer may report the earnings as
    - Wages
    - Schedule C business
    - Line 21: Other Income
      - Issues with VITA reporting earnings in this way
    - This may be the first time the IRS discovers that the company and the worker view their relationship differently
  - Complaint to the Department of Labor
  - Self-employment tax
    - Quarterly payments
    - Problems staying current while addressing previous years
Corrective tools

- Form SS-8, Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding
  - May be filed by the company or the worker
  - IRS decides the worker status
    - Can take 6+ months
    - Filing amended returns and paying FICA taxes simultaneously
- Voluntary Classification Settlement Program
Voluntary Classification Settlement Program

- Form 8952, Application for Voluntary Classification Settlement Program (VCSP)
- The company applies
- The company cannot be under examination by the IRS, DOL, or any state agency
- Agreement to prospectively treat a class of workers as employees
  - Partial relief from federal employment taxes
- The VCSP payment is 10% of the employment taxes for the compensation paid in the most recent tax year
- Payment is not made with the form, but after contact with the IRS
Company as Good Corporate Citizen

- Uber has made significant efforts to assist its drivers in properly reporting income and expenses and timely filing and paying taxes.
  - Uber provides multiple types of mileage data to drivers monthly and at year-end
    - Three categories: (P1- waiting for a rider, P2- en route to a rider, and P3- rider in the car)
    - These statements can be downloaded and used with TurboTax and H&R Block software to pre-fill forms
  - Software to help drivers track expenses: gasoline, maintenance, inspections, etc.
    - The driver enters the expense and takes a picture of the receipt
    - The software stores this information so the driver can prove expenses
  - Driver education
    - Pamphlets explaining income and self employment tax obligations by state or country

- Thune Bill- The New Economy Works to Guarantee Independence and Growth (New Gig) Act of 2019 (S.700)
  - Lowers the threshold for 1099-K to $1,000
  - Limited withholding by the company to be treated as an estimated payment by the worker
  - Provides a safe harbor from income and employment taxes and the company is entitled to treat the worker as an independent contractor
  - Either party can petition the Tax Court on worker classification issue
Reporting Penalties

- **Sec. 6721- Failure to file correct information returns**
  - Late filing or failing to file
    - Reasonable cause exception
  - filing with incorrect information
    - De minimis errors
    - TIN is never de minimis
  - Penalty based on size of company and how quickly the error is rectified
  - Intentional disregard penalty- Sec. 6721(e)

- **Sec. 6722- Failure to furnish correct payee statements**
  - Failure to provide a correct payee statement by the due date
    - Reasonable cause exception
  - Incorrect information on the statement
    - De minimis errors
  - Penalty based on size of company and how quickly the error is rectified
  - Intentional disregard penalty- Sec. 6722(e)

- **BEWARE: Sec. 6331(h)-Continuing Levy on Certain Payments**
John signed up as a dog-walker through a new app, Woof Walks. In order to be approved as a walker, John took both online and in-person training and testing on how to use the app and properly use of various dog-harnesses. At the end of the in-person training, John failed the harness test and was required to come back on another date to retake the test before being approved as a walker through the app. Once approved as a walker, John selects walks as they become available through the app or text notifications. John can see the dog’s profile and location before booking the walk, including any special requests such as filling the dog’s food or water bowls. The rates for 30- or 60-minute walks are pre-set by Woof Walks. After each walk, customers can publicly review John’s services. Woof Walks has the right to fire walkers for complaints or negative reviews.
hAcme, a start up bug bounty company, hired a dozen Bug Bounty Hunters (hackers and researchers, etc) last year. They required them to pass a computer skills test and a criminal background check. They required them to use hAcme’s company service, which is a platform or portal where Bug Bounty Hunters submit findings from their work. hAcme negotiates all contracts for its Bug Bounty Hunters with Companies that hire hAcme, and Companies will also sign contracts directly with each Bug Bounty Hunter. hAcme manages all bug bounty hunters on behalf of the Company. hAcme tell workers their hours, how long they have for the project, and what the project goals are. After a Bug Bounty Hunter submits a report on hAcme’s company service, hAcme reviews the report and submits findings to Company. hAcme negotiates payment terms with Companies, and Bug Bounty Hunters receive their payments from Company through hAcme’s company service. hAcme requires all Bug Bounty Hunters to agree that they won’t work for other bug bounty companies.

hAcme issued all of its Bug Bounty Hunters W-2s last year.

This year, the head of hAcme heard that peer companies often 1099 their Bug Bounty Hunters, so he told hAcme’s accountant to prepare 1099s for all Bug Bounty Hunters.
Maggie is a licensed massage therapist and works part time for the local spa, Serenity. She also has a 2-4 longstanding clients who schedule in-home massages monthly. This year she also started using the app Massage4U to connect her with more clients when she has extra time. Massage4U connects her with clients who can schedule massages on demand in their home or hotel.

Since starting with Massage4U she’s more than doubled her monthly income, averaging 15 massages a month. She receives a W-2 from Serenity and they withhold. Her longstanding clients pay with cash or through a mobile payment service, but historically she only reported the income from those paid through the payment service. She hasn’t received any tax documents from Massage4U, but gets monthly statements showing what she’s earned thus far. For the past few years, she’s always received a federal tax refund of ~$200. Does she need to be making quarterly estimated tax payments?