

## Employees in the Workplace

## Expert Analysis

# The Gig Economy: A Threat to Basic Employment Rights

**M**uch ink has been spilled over the "gig economy" and courts and the legislature are getting into the action as well. The new work model in which individuals provide services, supposedly at their own direction, for corporations and small businesses which serve as online marketplaces that connect these service providers with clientele is in the news and in many states on its litigation dockets. Proponents, on one hand, point toward benefits that workers greatly desire, including flexible schedules for the Millennial generation, in particular and a sense of entrepreneurship for the visionary. Critics, on the other, point toward entitlements and protections that these workers do not enjoy, including basic minimum wages, health care and other benefits traditionally associated with an employment relationship.

Indeed, a recent article in *The New Yorker* cast light on the extreme and perverse incentives visited upon these "entrepreneurs."<sup>1</sup> The article focused on Lyft—a ride-sharing smartphone app—and its use of

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promotional materials that congratulated a pregnant driver who continued to pick up rides on her way to the hospital while going into labor.<sup>2</sup> The campaign failed to acknowledge that, when the woman arrived at the hospital, she would not be covered under any Lyft-sponsored health care plan, nor would she enjoy a statutory right to return to work under the Family Medical Leave Act or a state or local cognate.<sup>3</sup> In that light, it seems more likely that this woman was motivated by concerns about the basic welfare of herself and her child and not her "entrepreneurial spirit."<sup>4</sup> The article correctly concludes that this is not the kind of conduct that should be celebrated, but instead we should be closely questioning the system that places workers in such precarious situations solely to the benefit of Silicon Valley and Silicon Alley tech companies and their shareholders.

In the United States, a worker who is considered an "employee" enjoys far greater protections and entitle-

ments than those who are classified as "independent contractors." Such protections include a right to overtime and federal and state minimum wage rates,<sup>5</sup> the right to organize and form labor unions,<sup>6</sup> and the right to a discrimination-free workplace.<sup>7</sup> Further, most companies provide health care and retirement benefits solely to employees, not to independent contractors. Indeed, the cost to maintain an employee over an independent contractor can be high, which has been the driving force behind the classification of gig economy work-

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ers as independent contractors and the ensuing litigation.<sup>8</sup>

The distinction between "employee" and "independent contractor" stems from a common law agency analysis, reflecting the model of work that was in effect at the turn of the 20th century. Individuals whose work was within the discretion and control of the company, like a clerk or a factory worker, were classified as employees and therefore enjoyed traditional protec-

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tions, whereas individuals who had a greater say as to when, where and how their work was performed, were deemed independent contractors who did not benefit from protections, presumably because they could elect to work elsewhere under better conditions.<sup>9</sup> In recent years, as the prevalence of misclassification has grown, courts and administrative agencies have devised various tests of varying complexity to determine when a worker is entitled to "employee" status.<sup>10</sup> While the relevant factors vary in each test, a common thread exists in the questioning of the balance of power between those who request work and those who provide it.

As our world has changed, so too has the way that companies exert power over individuals. Consider once more the campaign material regarding the hard-working, pregnant Lyft driver. This material was not aimed at ride-seekers (customers), but rather at ride-providers (workers), indicating that gig economy companies will go to great lengths to convince their workers to continue working. Indeed, an in-depth look at Lyft and Uber (another ride-sharing app) reveals that the companies rely upon the same kind tools used to manipulate consumer spending.<sup>11</sup> Both companies have hired consultants specializing in social science and data analysis to mimic the addicting features of video games in order to manipulate drivers into working longer, more often, and at hours that are less lucrative to the drivers but more lucrative to the company.<sup>12</sup> This "gamification" of work rewards drivers with badges, high scores, customer satisfaction points but—critically—not with money.<sup>13</sup> More

importantly, both Uber and Lyft require drivers to have certain customer satisfaction scores in order to log into the system, thereby controlling the ability to work if the rides are not satisfactory.<sup>14</sup>

Not only can gig-economy employers rely upon these new methods of control, the fact remains that they also retain the traditional leverage of employers. The gig economy rose to prominence following the Great Recession, taking advantage of the vast unemployment and under-employment rates at the

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time.<sup>15</sup> As the dearth of full-time jobs continues to plague the blue collar worker, the rate of contingency work has risen drastically: from 30 percent to 40 percent in the past decade.<sup>16</sup> The facts reveal a striking difference between the way Madison Avenue portrays gig workers—as young, hip entrepreneurs who use the applications to make extra money—and reality. A recent study of contingent workers in the United States reveals a person who has a distinct lack of bargaining power. Contingent workers are less likely to have received a high school education and more likely to have a lower household income than their peers in traditional, full-time employment.<sup>17</sup> Unsurprisingly,

they also earn less (even controlling for hours)<sup>18</sup> and are less likely to have health insurance or retirement savings.<sup>19</sup> Considering these conditions, it seems unlikely that a contingent worker is in a position to bargain for improved conditions or increased wages.

Our legal system has not been unresponsive to this turn of events. As the gig economy has grown, regulators, lawmakers and judges have weighed in on the rights of the growing contingent workforce. As noted above, various administrative agencies have presented revised tests to determine whether an employment has been formed.<sup>20</sup> In numerous cases across the country, courts have been asked to weigh in on the matter, but particularly in California where courts have been known to be worker-friendly.<sup>21</sup> And legislators have started to revisit the central tenants of our workplace rights.

Here in New York City, we grant broader protections to our contingent workers than the national standard. For example, the New York City Human Rights Law, which prohibits workplace discrimination, applies to "persons" not "employees."<sup>22</sup> In a more direct response to the prevalence of independent contractors, the City passed the "Freelance Isn't Free Act," which requires any company that hires an independent contractor for services valuing more than \$800 in a 120-day time period to put the agreement in writing, including the name and address of the hiring party, an itemization and valuation of the freelancer's services, the rate and method of compensation and the date on which payment

will be made.<sup>23</sup> Failure to adhere to these requirements results in statutory damages of \$250.<sup>24</sup> If the hiring party fails to pay the freelancer the agreed upon amount, the worker may seek double damages and injunctive relief.<sup>25</sup> Moreover, workers who seek to enforce their rights under the act will also be protected from retaliation.<sup>26</sup> This new act will go into effect on May 15, 2017 and will apply to all working arrangements after that date. While much needs to be done to provide gig workers with the protections they would have as employees, this change may provide for a greater understanding of the economic rights of independent contractors and motivate timely and appropriate payment for services rendered

### Conclusion

This legislation reflects a stark reality: Worker advocates are in a precarious position wherein they not only are protecting workers from misclassification and the evasion of employer's obligations, they must also protect existing jobs from being replaced by outsourcing or robots. Having jobs is critical, and in fact this sentiment has prevented many Americans from enforcing their rights and calling upon their legislators to pass stricter laws in the workplace. However, that is the same mentality that caused the Triangle Shirtwaist Factory Fire in 1911, the deadliest industrial disaster in U.S. history, which killed 146 workers, mostly women and children. These horrendous working conditions were allowed to flourish in New York factories because of the desperate need for the unemployed and disenfranchised to earn

a dollar, irrespective of their safety and workplace rights.

This and other workplace tragedies ushered in reforms that tempered the unbounding desire for growth by the companies of the Industrial Revolution with the need to protect their workers. The gig economy's recent boom requires us to revisit the same questions. We work hard in the United States to enforce employee protections, such as overtime laws and worker's compensation, as well as improved benefits and retirement plans. Unlike other parts of the world, our benefits are not socialized or nationalized and our employees are at-will. We should encourage a free economy to flourish, but it should not be at the expense of our employees or the safety of our workers. In the end, the Lyft driver deserves more than to deliver her baby in a car service—as romantic and idealistic as that may seem to the tech executives who are getting rich from them.



1. Jia Tolentina, "The Gig Economy Celebrates Working Yourself to Death," *The New Yorker* (March 22, 2017), available at <http://www.newyorker.com/culture/jia-tolentino/the-gig-economy-celebrates-working-yourself-to-death>.

2. *Id.*

3. *Id.*

4. *Id.*

5. See 29 U.S.C. §206-207 (providing minimum wage and overtime rights to "employees").

6. See National Labor Relations Act, 28 U.S.C. §158 (providing rights to "employees").

7. See Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§2000e, et seq. (providing protections to "employees"; Age Discrimination in Employment Act, 29 U.S.C. §621, et seq. (same); Americans with Disabilities Act of 1990, 42 U.S.C. §12101, et seq. (same).

8. See Noam Scheiber, "How Uber Uses Psychological Tricks to Push Its

Drivers' Buttons," *N.Y. Times* (April 2, 2017), available at <https://www.nytimes.com/interactive/2017/04/02/technology/uber-drivers-psychological-tricks.html> (estimating that classification of drivers as independent contractors can lower direct costs for ride-sharing companies by roughly 25 percent).

9. See Restatement (Second) of Agency §220 (distinguishing between workers and independent contractors based on ten factors, including the extent of control that the master exercise over details of the work).

10. Mitchell H. Rubinstein, "Employees, Employers, and Quasi-Employers: An Analysis of Employees and Employers Who Operate in the Borderland Between an Employer-and-Employee Relationship," 14 *U. Penn. J. of Bus. L.* 605, 617 (2012) (identifying potentially five different tests to determine employment relationships).

11. Scheiber, *supra* note 8.

12. *Id.*

13. *Id.*

14. *Cotter v. Lyft*, 60 *F. Supp. 3d* 1067, 1079 (N.D. Cal. 2015) (finding that the ability of the company to "terminate" drivers based on customer ratings tended to indicate an employment relationship).

15. U.S. Gov't. Accountability Office, GAO-15-168R, "Contingent Workforce: Size, Characteristics, Earnings, and Benefits" 12 (2015).

16. *Id.*

17. *Id.* at 17.

18. *Id.*

19. *Id.* at 29-30.

20. See *supra* note 10.

21. See, e.g., *O'Connor v. Uber Techs.*, 82 *F. Supp. 3d* 1133 (N.D. Cal. 2016); *Cotter*, 60 *F. Supp. 3d* at 1074.

22. N.Y.C. Admin. Code §8-107(a).

23. N.Y.C. Admin. Code §20-928-29.

24. *Id.* at §20-933(b).

25. *Id.*

26. *Id.* at §20-930.