The gig economy

The big players say it's about freedom, but it seems to be more about lowering labor costs and limiting liability

By Alexis McKenna

The popularity of apps and on-line platforms that provide services spanning the gamut from rides to personal errands are providing not only help to busy people, but, increasingly, jobs for workers as "independent contractors." Being your own boss and making your own hours – sounds very appealing, right? But, it sounds much less appealing when you also realize these workers do not get any benefits, have no job security, no consistent income, and no collective bargaining rights; not to mention they do not have even the most basic California Labor Code protections. That is the dilemma for many who are working in this "gig economy."

Bay area companies like Uber and TaskRabbit tout the freedom that one has as their own independent worker – beholden to no one but themselves, no one supervising them, working on their own schedules. But many gig workers end up netting very little after paying their own expenses, and they still need to cover their own health insurance. Furthermore, in certain industries, such as gigs on TaskRabbit, work isn't always available or is competitive, even if the worker wants it.

The gig keeps growing

Undoubtedly, the gig economy is growing. A 2016 Pew Research Center survey[1] found that 8 percent of Americans had recently earned money through a digital commerce platform. The study also shows that labor-based gig jobs are disproportionately held by low-income and non-white workers; and the majority of these workers say the income they earn from gig employment is "essential or important" to their finances rather than just added income which is "nice to have." Troubling also is that 29 percent of gig workers in this study reported they had performed work using gig platforms for which they did not receive payment.

For the most part, gig workers are being told by the companies supplying the platforms that they are independent contractors, and in some industries and some platforms that might be correct. A properly classified independent contractor would have limited rights against the platform company for which they supply services. But, labor laws, such as overtime, minimum wage and meal and rest breaks, would apply to gig workers if they are not truly "independent contractors." In many circumstances, and with ride-share services in particular, the classification of these workers is not so clear.

Independent-contractor status questionable

Independent-contractor status is not simply decided by what a company chooses to entitle such workers; companies cannot avoid their obligations under the California Labor Code by characterizing their workers as independent contractors while treating them as employees. "The label placed by the parties on their relationship is not dispositive, and subterfuges are not permitted." (*S.G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, 349.) "The principal test of an employment relationship is whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired." (*Id.*, at p. 350.) It is "the right to control, not the exercise of that right, which bears on the status of the work arrangement." (*Id.,* at p. 357 n. 9.) See also 2 Witkin, Summary of California Law, Agency and Employment (9th ed. 1987) § 15, p. 31 ("It is not the control *actually* exercised, *but that which may be exercised*, i.e., the right of control, which determines the issue of employment or independent- contractor relationship") (emphasis added).

The *Borello* Court also set out "secondary indicia" which must be considered, along with Defendants' right to control the worker, in deciding if an employee is an independent contractor:

> Thus, we have noted that "[strong] evidence in support of an employment relationship is the right to discharge at will, without cause. [Citations omitted.]" Additional factors ...include (a) whether the one performing services is engaged in a distinct occupation or business; (b) 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; (c) the skill required in the particular occupation; (d) whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work; (e) the length of time for which the services are to be performed; (f) the method of payment, whether by the time or by the job; (g) whether or not the work is a part of the regular business of the principal; and (h) whether or not the parties believe they are creating the relationship of employer-employee. [Citations omitted.]
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> "Generally, . . . the individual factors cannot be applied mechanically as separate tests; they are intertwined and their weight depends often on particular combinations. [Citations omitted.]" (*Borello*, supra, at 350-51.)

It's all about Uber

The question of whether Uber drivers qualify as employees or are independent contractors has consistently been in the spotlight. For example, the California Labor Commissioner ruled in June 2015 that a driver for Uber was an employee, not an independent contractor, and ordered Uber to pay her expenses and costs. (*Berwick v. Uber Technologies, Inc*. DSLE Case No. 11-46739 EK.)[2] On several occasions, the Employment Development Department[3] has found that former Uber drivers were employees, entitled to unemployment benefits. In 2013, a class action was filed in the Northern District of California, (*O'Connor, et. al v. Uber Technologies, Inc*. Case No. CV 13-3826-EMC,) disputing Uber's classification of its drivers as independent contractors. A tentative settlement was reached in April 2016 for approximately $100 million, which would have left the matter of driver status undecided; however, the court declined to approve of the settlement, calling it unfair and inadequate to the class. Currently, the case has been stayed[4] in light of appeals filed by Uber in related cases regarding its arbitration agreements.

Lyft recently settled a similar class action in Northern District of California, (*Cotter, et. al. v. Lyft, Inc*., 13-cv-04065-VC), handled by the same attorneys as the Uber case, for $27 million. The settlement left open the issue of whether Lyft misclassifies its drivers as independent contractors.

Do true independent contractors have rights?

Yet, even if and when gig workers are rightfully classified as independent contractors, these workers should qualify for some protections under the Fair Employment and Housing Act ("FEHA") and the Unruh Civil Rights Act. See Gov. Code, § 12940(j); Civ. Code, §§ 51-52. The FEHA prohibits harassment[5] based on "race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or military and veteran status" for individuals "providing services pursuant to a contract." (Gov. Code, § 12940(j).)

In addition, the Unruh Civil Rights Act, which prohibits all businesses in California from discriminating on the basis of disability, race, age, genetic information, religion, sex, marital status, nationality, ancestry, color, sexual orientation, and similarly related personal characteristics, would also apply to independent contractors of these businesses. See Civ.Code, §§ 51-52. However, while the right to be free from discrimination and harassment in the workplace is significant, these rights are woefully insignificant compared to the myriad of rights held by traditional "employees."

The increasing prevalence of gig employment in California, and the lack of rights under the Labor Code for most of these workers as "independent contractors," has caused concern for some lawmakers. In 2016, Assembly member Lorena Gonzalez, D-San Diego, authored Assembly Bill 1727, intended to allow gig workers to band together and bargain with employers.[6] She pulled the bill before it came up for vote in the Assembly Judiciary Committee, saying in a prepared statement that she wished to continue discussions over the next year about the bill's complex legal issues. Needless to say, tech groups and businesses were opposed to the measure.

It seems, though, that Gonzalez may have pulled the bill due to concerns expressed by labor and workers' rights organizations. The overall goals of the measure were laudable, but some labor organizations disapproved of the lack of any exclusive representation provisions or prohibitions on right-to-bargain waivers. Further, how the language of this bill might impact the ongoing litigation regarding the misclassification of workers as independent contractors was uncertain. Regardless, this was a step in the right direction that we can hope leads to a passable bill that helps gig workers organize for their rights.

It's about freedom to gig

Anecdotally, individuals claim that they enjoy the freedom they have as gig workers. If someone is a stay-at-home parent looking for a supplemental income for the family while the kids are at school, or a retiree looking to make some cash from a hobby, for example, part-time gig work sounds like a great opportunity. Unfortunately, though, it seems like for many, as the Pew survey indicates, gig work is their primary income, and needed as a full time job. For many, this is the work they do because they have not found other options, and it would be hard to believe that most of these workers would not prefer a full-time job as a true employee, with all the rights and benefits concurrent with it. The gig economy is useful and convenient to many of us, but we as plaintiffs lawyers should at the very least give some thought as to the economy we are perpetuating when we participate in it, and the status of the workers who are providing these services for us.

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Endnotes

[1] http://www.pewinternet.org/2016/11/17/gig-work-online-selling-and-home-sharing/
[2] Uber subsequently appealed the ruling in San Francisco Superior Court Case No CGC-15-546378. Uber sought to compel arbitration, which was denied. The case was then settled on terms not found in the court documents.
[3] http://archives.sfweekly.com/thesnitch/2016/03/04/uber-driver-awarded-unemployment-benefits-first-known-case-in-state
[4] http://uberlawsuit.com/
[5] It is unclear if any other provisions than harassment would apply to independent contractors, as Government Code section 12940(j), the section regarding harassment, specifically includes persons "providing services pursuant to a contract" – language notably absent in other sections, such as 12940(a) which refers to discrimination.
[6] The City of Seattle passed a similar ordinance in December 2015 and has been the subject of legal battles ever since. http://www.seattletimes.com/seattle-news/transportation/judge-puts-blocks-for-now-seattle-law-allowing-uber-and-lyft-drivers-to-unionize/