# Engaging Independent Contractors in the Gig Economy: 3 Things for Employers to Know

## Description

With more and more individuals taking on the so-called “side hustle” of driving for Uber or even entirely leaving the traditional 9 to 5 work life and opting to make the “gig economy” work as their full time occupation, courts across the country are wrestling with the issue of whether these gig economy workers are truly independent contractors or whether they are actually employees. As we recently told *Rhode Island Lawyers Weekly*, “similar to various anti-discrimination laws being applied to website retailers, courts are being asked to figure out how to apply laws that were simply not written to address new technology and technology-based services.”

What’s the big deal, you may ask? Independent contractors deemed employees become eligible for all of the benefits that come with employee status, which carry a heavy price tag for employers in the form of overtime, minimum wage, unemployment, and workers’ compensation benefits, to name a few. The “opportunity” of these benefits (and the attorneys’ fees available under applicable law) has resulted in nation-wide class actions being filed on behalf of tens of thousands of workers seeking hundreds of millions of dollars in lost wages and benefits. As if that were not enough, employers who misclassify workers as independent contractors may face criminal enforcement, civil penalties, or other claims from federal and/or state authorities. For example, New Jersey’s Department of Labor sent a bill to Uber for over $600 million for four years’ worth of unpaid taxes, fines and interest stemming from Uber’s alleged misclassification of drivers as independent contractors from 2014 to 2018. Locally, we recently saw the Rhode Island Federal Court enter the fray in the case of *Narayanasamy v. Claudette Issa*, a personal injury claim brought against Uber alleging that the ride-hailing service is liable for the plaintiff’s injuries by virtue of it being the employer of the driver.

Here are 3 things for employers to take note of when it comes to engaging independent contractors in the gig economy.

1. *The law is a moving target and varies from state to state and under federal law.*

The analysis that courts undertake in deciding whether workers are independent contractors or employees varies across state lines and depends upon what specific claims are at play. Under Rhode Island law, courts focus on whether the alleged employer has the “right” to exercise control over the means and manner by which the worker performs their duties. Under Massachusetts law, employers must pass the “A-B-C” test in order to lawfully designate an individual as an independent contractor. Under this test, the work performed must be: (a) done without the direction and control of the employer, both under the contract terms and in the performance of work; (b) performed outside the usual course of the employer’s business; and (c) done by someone who customarily engages in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed for the employer. Under federal law, courts set their sights on determining whether the independent contractor is “economically dependent” on the business to which he/she renders service, or is, as a matter of economic reality, in business for himself or herself. Courts use several factors to answer this question of economic dependency, including: (a) the degree of control exercised by the alleged employer; (b) the extent of the relative investments of the worker and alleged employer; (c) the degree to which the worker’s opportunity for profit and loss is determined by the alleged employer; (d) the skill and initiative required in performing the work; (e) the permanency of the relationship; and (f) the degree to which the worker’s tasks are integral to the alleged employer’s business.

2. *It’s still all about control.*

While courts may employ a host of different factors or tests in analyzing the issue, in every situation the most

significant factor is the *control* that the alleged employer has over the independent contractor's work. The control issue is always quite fact-intensive. The court in *Issa* discussed a laundry list of facts that would bear on the control issue, identifying the following conduct of Uber that might lead to a decision that it exerted the type of control over the worker expected of an employer:

a) unilaterally setting and controlling the fares;
b) providing drivers with Uber logos and prohibiting drivers from having business cards or soliciting rides outside the Uber App;
c) establishing guidelines for quality, cleanliness, and behavior standards;
d) reserving the right at any time in Uber's sole discretion to deactivate or otherwise restrict the driver's access to the Uber App;
e) handling and adjudicating rider disputes, which may result in the reduction of a rider's fare and consequently a driver's income;
f) setting the driver's hours of work;
g) setting the geographic location of where the driver is permitted to work;
h) maintaining an ongoing relationship with riders through in-App advertisements and solicitations such as offering riders reduced fares, free hotel stays, and "Uber cash;"
i) offering drivers paid liability and comprehensive collision insurance and rights to participate in health insurance; and
j) requiring driver applicants to upload their driver's license information, vehicle's registration, and insurance.

This issue of control presents a difficult issue for gig economy companies. On one hand, the company needs to retain some control to protect their business and brand. Most of these companies will survive on customer service, and thus the appearance, safety, ratings and performance of gig economy workers is critical. On the other hand, the more influence the company has on its workforce in order to maintain its brand and service, the closer it steps towards crossing the line into being a true employer. While every employer's situation is different and has unique work conditions and circumstances, generally speaking, the bottom line is that the more control exerted by the alleged employer, the more likely an employer-employee relationship exists.

3. *Arbitration Clauses*.

As we previously wrote, in a Client Alert published May 17, 2019, the U.S. Supreme Court confirmed in 2018 that class action waivers in employer/employee arbitration agreements are enforceable. In fact, the main reason that there are not dozens of decisions on these independent contractor v. employee lawsuits is likely because Uber, Grub Hub, and similar gig companies have inserted arbitration clauses in its agreements with workers, which, among other things, force workers to waive the right to join a class action. These clauses have proven effective at thwarting class action claims in the short term, however, savvy plaintiff's lawyers will instead file thousands of arbitration claims and, if the applicable arbitration clause is not carefully crafted, companies will be forced to bear the cost of arbitration, including the thousands of dollars it costs to hire an arbitrator in every case, whether they win or lose.

This independent contractor v. employee issue and analysis can be complicated and extremely fact-intensive. Don't hesitate to contact the Partridge Snow & Hahn Employment Law Team as we are fully updated on these and other related issues and are available to answer to your questions.

PS&H partner Michael Gamboli is quoted extensively in the February 6th *Rhode Island Lawyers Weekly* article titled, Uber Contractor/Employee Status to be Determined by Federal Jury. Click here to read more.

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