Rights of Workers in the Gig Economy – Should they be treated as independent contractors or should they have the legal rights of employees?

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A. Introduction

The gig economy provides gig workers with freedom to decide the duration and frequency of their work. Uber drivers, Grubhub deliverymen and Care.com babysitters each enjoy the ability to accept or reject assignments and the flexibility to decide if they want to work or take a day off. This freedom creates friction with laws enacted to protect employees who work a traditional forty-hour week for a clearly defined employer. As an employee, an individual is entitled to a minimum wage, unemployment compensation, overtime and workers’ compensation benefits. Gig economy workers are typically classified as independent contractors and receive none of the protections afforded employees. State and federal legislators have proposed to aid this new workforce by providing some protections, including defining whether gig workers are “employees” or “independent contractors” and allowing gig workers the ability to have portable benefits that follow the worker from gig to gig.

Uber, Grubhub and other similar players in the gig economy have recently succeeded in defending claims that their drivers and deliverymen were wrongly classified as independent contractors instead of employees. With the advent of the gig economy, courts have had to address what rights should be provided to a low skilled workforce performing highly flexible episodic jobs. Federal courts are now applying the “Economic Realities Test” to gig workers even though the test was first used when science fiction could not have imagined a mobile phone application or that millions of American workers would receive their daily job assignments from an “app.” Unsurprisingly, in applying the Economic Realities Test to the gig economy, the federal courts have acknowledged that the results often seem harsh when applied to this new
class of workers. As shown by the cases summarized herein, the federal courts have determined that gig workers are independent contractors and, therefore, are not entitled to the protection and rights given to employees.

B. Determining Employee vs. Independent Contractor

- An independent contractor typically:
  - Charges fees for service.
  - Is contracted only for the term required to perform an identified service or task.
  - Pays employment taxes personally to the government.
  - Is not protected by most federal, state, and local laws designed to protect employees.

- Economic Realities Test:
  - Used to assess independent contractor status under the Fair Labor Standards Act (“FLSA”).
  - Hiring entity is an employer if the workers are dependent on the entity for which they provide services.
  - Traditional seven elements recognized by Department of Labor (“DOL”):
    - The extent to which the services rendered are an integral part of the hiring entity’s business.
    - The permanency of the relationship.
    - The amount of the alleged contractor’s investment in facilities and equipment.
    - The nature and degree of control by the hiring entity.
    - The alleged contractor’s opportunities for profit and loss.
    - The amount of initiative, judgment or foresight in open market competition with others required for the success of the claimed independent contractor.
    - The degree of independent business organization and operation.
• FLSA – Case Law on the Economic Realities Test

  o **Rutherford Food Corp. v. McComb**, 331 U.S. 722 (1947)

  ▪ Defendants owned a slaughterhouse where they hired an experienced meat boner.

  ▪ Defendants hired the meat boner to assemble a group of workers to run the slaughterhouse deboning operation. The workers were not paid overtime.

  ▪ The workers owned their own tools, were paid based off how much meat had been de-boned, and had agreed to pay rent for use of the room where they worked (rent was never paid).

  ▪ The workers worked alongside company employees in the plant, were supervised and chastised by the company’s president and manager, were an essential part of the slaughterhouse operation, and their hours depended on how much cattle had been slaughtered.

  ▪ The Supreme Court found that because the workers were doing a specialty job on the production line, used the premises of the slaughterhouse, and could not shift as one unit to a different slaughterhouse, the economic reality was that the workers should be classified as employees.


  ▪ Plaintiffs were truck owners that alleged that they had been mischaracterized as independent contractors by the defendant corporation that hired them.

  ▪ The plaintiffs owned the trucks used by defendant to transport pavement materials. Some plaintiffs hired drivers, while others drove their own trucks.

  ▪ The district court applied the economic realities test and found that the plaintiffs had a sizeable investment in the trucks, which they owned, paid their own expenses, and their opportunities for profit and loss were to a substantial degree controlled by the plaintiffs, and their relationship with defendant was essentially a transitory one.

  ▪ Accordingly the district court determined that the plaintiffs were independent contractors.
C. Gig Economy Case Law Update

In the past months, two United States District Courts issued decisions regarding large gig employers: Grubhub and Uber. These decisions applied the Economic Realities Test and concluded that the plaintiffs were independent contractors not employees. The cases are summarized below:


Raef Lawson worked as a Grubhub restaurant delivery driver. Grubhub is a food delivery service. Grubhub classified its food delivery drivers as independent contractors. In Lawson, the United States District Court for the Northern District of California looked at whether Lawson was a Grubhub employee or an independent contractor.

The Lawson matter went to trial before United States Magistrate Judge Jacqueline Corley and she found that Grubhub properly classified Lawson as an independent contractor.

Grubhub first offered food delivery in 2014 and allowed its customers to order from the company’s online platform. The food would then be delivered either by a restaurant delivery person or a Grubhub delivery driver. Lawson applied to be a Grubhub food delivery driver, he submitted an application along with his driver’s license, vehicle registration and proof of vehicle insurance. Lawson was a gig economy veteran and had worked for Uber, Lyft, Postmates and Caviar. He enjoyed these positions because they allowed him flexibility to pursue an acting career in Los Angeles, California.

Grubhub requires its drivers to execute a “Delivery Service Provider Agreement” that includes terms stating the driver is in the “independent business of providing delivery services.” The agreement also states that drivers may work for other delivery services and places no restrictions on hours worked or time when the driver is available. Initially Lawson received a
$4.25 fee for each successful delivery plus a $0.50 fee per mile between the restaurant and customer. Grubhub also guaranteed Lawson a minimum of $15 per hour if he accepted 75% of orders received during a selected schedule block. Two months into his employment, Grubhub eliminated any specific fee formula and instead emailed Lawson (and all its drivers) offers for delivery that they could accept or reject.

Lawson received no training or onboarding from Grubhub. It did provide some training videos but did not track whether the employee actually viewed the videos. Grubhub had a uniform but did not require its drivers to wear it. The company released schedules that consisted of time blocks on its website. Drivers could select a shift on a first come, first served basis. If a driver selected a block and then decided not to work, the driver could drop it or swap it with another driver. Lawson only made deliveries during a block that he had selected.

While working for Grubhub, Lawson typically received more than the $9/hour minimum wage in Los Angeles. On a few occasions, his hourly rate of pay was below $9/hour. Additionally, Lawson made several deliveries that extended his shift beyond the scheduled “block.” Grubhub paid him for this additional time. Lawson also received the minimum hourly rate for eight shifts where he made himself available for deliveries on the Grubhub app over three hours after the shift was to begin. Essentially, Lawson received an hourly rate of pay even though he did no or little work during that block.

Upon receiving an order on the Grubhub app, Lawson would proceed to the restaurant. Grubhub did not indicate a preferred route or amount of time for their drivers to arrive at the restaurant. The driver would then use the Grubhub app to indicate that they had reached the restaurant. Depending on the status of the order, Grubhub would inform the driver whether to deliver the order. However, it had no requirements about the time required to deliver the order or
route to take from the restaurant to the customer. Lawson took over an hour to complete several deliveries but Grubhub took no action against him for these lengthy deliveries. Lawson did not set the fee, provide any condiments or napkins or address customer complaints for the deliveries.

During the course of his employment, Lawson would occasionally game the Grubhub application in order to receive the minimum hourly wage. For instance, Lawson would accept one delivery, make the delivery and then turn his phone to “airplane” mode so he would not be assigned any further deliveries. Grubhub would then rate his acceptance rate at “100%” for his scheduled block which entitled him to the minimum hourly fee. For a four hour shift, Lawson received $60 even though he made only one delivery. Grubhub ultimately terminated Lawson’s employment because he had been “unavailable” during a high proportion of his delivery blocks.

The Court looked at the following factors to decide whether Lawson had an employee-employer relationship with Grubhub: (a) whether the individual performing the 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.

In addressing these factors, the Court found a majority weighed toward Lawson being classified as an independent contractor. The Court noted that the gig economy creates a zero sum
game; the deliveryman is either an employee entitled to rights and protection under state and federal law or a contractor entitled to little or no protection.


This case was the first where a district court granted summary judgment on the question of whether drivers for UberBLACK are employees or independent contractors within the meaning of the FLSA. The Razak Court held that Uber drivers could not show that they were employees or that Uber is their employer.

The Razak plaintiffs worked as drivers for Uber’s ride-sharing business in Philadelphia, Pennsylvania. The drivers accepted assignments through Uber’s mobile smartphone application and provided on-demand car service. The drivers each owned and operated transportation companies and owned the vehicles used for the car service.

Uber submitted the following evidence in support of its motion for summary judgment: Uber allows drivers to accept or reject any assignment. However, Uber marks a driver as “offline” if the driver rejects three assignments in succession. Uber placed no restrictions on a driver’s ability to engage in personal activities while “on-line.” Drivers were also permitted to work for other ride-sharing companies while “on-line” for Uber. Uber does not require its drivers to wear a uniform. The drivers owned their vehicles and paid for licensure and insurance.

Uber uses a Technology Services Agreement. After a driver executes the agreement, then Uber allows the driver to accept assignments on Uber’s app. The agreement notes that the drivers are independent contractors, must provide their own vehicle, are not required to use any Uber signage or wear a uniform, may work hours at the driver’s discretion and pay Uber a service fee for customer referrals. Uber pays its drivers through its app to the driver’s Uber account.
The Court looked at six factors to determine whether the drivers were “employees” entitled to protection under the FLSA. The factors were:

1. The degree of the alleged employer’s right to control the manner in which the work is to be performed;
2. The alleged employee’s opportunity for profit or loss depending upon his managerial skill;
3. The alleged employee’s investment in equipment or materials required for his task, or his employment of helpers;
4. Whether the service rendered requires a special skill;
5. The degree of permanency of the working relationship; and
6. Whether the service rendered is an integral part of the alleged employer’s business.

In reviewing these factors, the Court found that the “totality of the circumstances” weighed in finding that the drivers were not Uber’s employees. The Court found that the drivers could not show that Uber exerted control over them while they were “on-line.” The drivers were able to determine their working hours, owned transportation companies and utilized subcontractors to drive their vehicles. These undisputed facts showed that Uber had little control over the drivers. The Court found that the drivers could work as little or as much as they desired; could choose their own hours and could focus on busy times of the day to capture higher pricing. The drivers could also work for Uber’s competitors while on-line or work elsewhere while off-line. Lastly, the drivers owned their limousines and were responsible for the investment in equipment for their businesses. These factors weighed in finding that the Uber drivers were not employees given the totality of the circumstances.

D. Additional Gig Economy Case Law

McGillis v. Dep't of Econ. Opportunity (Raiser LLC, d/b/a UBER),
210 So. 3d 220 (Fla. Dist. Ct. App. 2017)

The Florida Third District Court of Appeal held that an Uber driver is not an “employee” for the purposes of unemployment assistance. Darrin E. McGillis (“McGillis”) worked as an Uber driver until Uber revoked his access to Uber’s application for violating Uber’s privacy policy.
McGillis then brought a claim with Florida’s Department of Economic Opportunity ("Department") seeking unemployment assistance. Initially, the Department classified McGillis as an Uber employee. The Department then conducted a hearing where Uber presented the Department with facts concerning how its business operates. This included the following information: Uber does not train or supervise its drivers; Uber provides each driver with a 1099 form at the end of the fiscal year; the parties execute a Software Sublicense and Online Agreement that provides the driver is a subcontractor and lists the fee that the driver receives for completing a trip; and Uber drivers have no set schedule and may work as little or as much as they choose.

In addressing this issue, the appeals court denied McGillis’s appeal. It held that McGillis was, in fact, a contractor after examining these facts and applying the Economic Realities factors.

**Saleem v. Corporate Transportation Group, Ltd.,** 52 F.Supp 3d. 526 (2nd Cir. 2014)

The United States Court of Appeals for the Second Circuit held that limousine drivers were properly classified as independent contractors rather than employees for purposes of the FLSA. The plaintiffs operated “blackcar” businesses that provide ground transportation services in New York, New Jersey and Connecticut. The drivers entered into agreements with the defendant Corporate Transportation Group who provided assignments through a dispatch and referral network. Drivers determined how much and how often they would accept referrals and complete trips. The drivers also selected the area where they wanted to work and were free to decline assignments. The Second Circuit held that the drivers were properly classified as independent contractors. The Court gave deference to the following three factors: (1) the drivers had entrepreneurial opportunities not offered to employees, which included an ability to work for competing businesses, (2) the drivers had made a heavy investment in their business because they
owned their limousines and obtained insurance and licenses, and (3) the drivers had a highly flexible schedule and could accept or reject assignments. In looking at the totality of the circumstances, the Court found the drivers were properly classified as independent contractors.


Nabor Diego ("Diego") worked for Victory Lab, Inc. ("Victory Lab") as a canvasser. During his employment Diego would walk neighborhoods and knock on doors to identify supporters, persuade undecided voters and pass out pamphlets for candidates who hired Victory Lab.

Diego worked for Victory Lab for six weeks during the 2016 election cycle. He received no specific training from Victory Lab other than receipt of an informational packet, which included a W-9, an independent contractor agreement, a dress code and a W-9 form. Diego never executed any of the employment and tax documents but nevertheless he began work for Victory Lab.

As a canvasser, Diego had no set schedule and he was free to work as little or as much as he chose. A shift manager would text canvassers and tell them of a daily assignment. The canvassers then had the option to work or pass on that day's project. Victory Lab maintained hours worked by a GPS system that noted the time worked and locations covered. This required each employee to own a smartphone so Victory Lab could track them. Victory Lab paid the canvassers $15 to $16 an hour. Canvassers could elect to drive while working and received a higher rate of pay but had to use their own vehicle and pay for gas.

Diego experienced some workplace issues: his wife would frequently call him and ask if he was working with female colleagues and he was late for a shift where he worked as a driver. Victory Lab allowed Diego to continue to work despite these issues.
Victory Lab ultimately terminated Diego because Diego allegedly contacted Victory Lab’s client. Diego claimed he had contacted the client to complain about Victory Lab’s hiring practices. The employer stated that it terminated Diego because he had caused a scene.

The district court applied the economic realities test. The Court found that Diego was economically independent from Victory Lab and therefore was an independent contractor. Diego was hired for a 4-month job. During this four months of employment, Diego was never required to report to work. The economic independence illustrated by these two facts alone outweighed the other facts pointing only to a minimal level of dependence.

E. Proposed Legislation Addressing Gig Workers

Portable Benefits for Independent Workers’ Act

Senator Mark Warner introduced this bill to provide funding to states, municipalities and non-profit organizations to develop programs offering portable benefits to gig economy workers. Proposals include that gig workers be allowed to set fees aside for health insurance and medical leave.

The California legislature is also considering a bill, Assembly Bill 2765, that would also provide gig workers with portable benefits, including medical care, liability insurance, retirement benefits and paid leave benefits. The gig worker could take the plan with them from gig to gig as a portable benefit.

New GIG Act of 2017

Senator John Thane introduced this bill in order to clarify the misclassification issue. The bill provides the following test to qualify as an independent contractor for tax purposes: (1) the nature of the relationship is job by job; (2) the location of services varies (i.e. the contractor does
not work exclusively at the employer’s place of business; (3) the parties have a written contract identifying the independent contractor relationship.

Collective Bargaining

The National Labor Relations Act specifically excludes individuals employed as independent contractors from having the right to organize and collectively bargain. 29 U.S.C. § 152(3). Gig workers are largely classified as independent contractors and therefore do not have the right to organize and collectively bargain. In 2016, the California legislature considered a bill that would have allowed gig economy workers to unionize and bargain for their pay and benefits. A copy of the proposed legislation is attached hereto.