



Independent Contractors In Newspaper Operations

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Traditional Business Models...

Have Historically Included “Non-Traditional” Worker Relationships

- Companies Receiving Services from An Independent Company’s Employees
 - Franchisor:Franchisee Relationships
 - Clients of Staffing Companies
 - Companies Outsourcing Non-Core Functions to “Contracting Companies”
- Companies Contracting for Results Directly With Non Employee Workers
 - Independent Contractors
 - Consultants



Independent Contractors – Biggest Risks

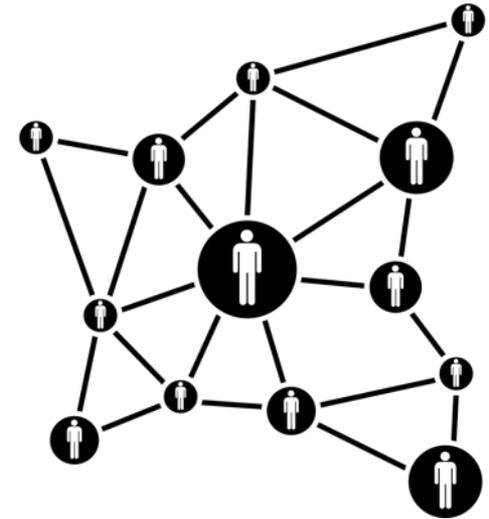
- Who are we contracting with?
 - Distributors
 - Newsroom
 - Others?
- If the Contracts are with Companies is there a risk?
 - Former Employee Turned Contractor Who Services Only One Client
 - Distribution Business
 - Temp Agency

Independent Contractors -- Eliminating Risks

- Structure and Auditing of Relationship
- Contract Review
- Training of Managers and all Individuals who Interact with Contractors
- Termination Provisions
- Arbitration and Waiver of Class Action Rights

The Expanded Sharing Economy

An estimated **54-68 million Americans** are working independently—as freelancers, part-timers, consultants, contractors, and the self-employed.



*Fueled by technology,
information, and
the desire for flexibility ...*



How Big is the Gig Economy?

Gross Independent Product:

\$1.4 trillion 2017 revenues

That's almost the GDP of Mexico
and nearly 7% of the U.S. GDP



Reflects a **30% increase** from 2016
and
Reflects a **73% increase** from 2011



Consequences of Misclassification

- If a court or agency determines that workers classified as independent contractors are in fact employees, then the employer could be subject to:
 - Back taxes, interest and penalties (unemployment insurance)
 - Workers compensation contributions
 - Civil liability for injuries caused by the workers
 - Liability for failure to comply with state and federal laws regulating employment relationships (e.g. pay stubs, expense reimbursement)
 - Back taxes, interest and penalties for failure to withhold income tax and failure to pay FICA and FUTA
 - Subject to Labor (unionizing) laws

Threats from the Plaintiffs' Bar & Others

- Opportunity for large class actions and the ability to recover attorneys fees has lead plaintiffs' law firms to seek out misclassification lawsuits for economic gain.
 - Commercials
 - Billboards
 - Websites
 - Even newspaper ads
- Organizing from Traditional Labor Unions & Workers' Organizations
 - Social media outreach
 - Telephone surveys

Benefits of Independent Contractor Status

Contingent work provides freedom from the traditional workplace's requirements:

- Hours of Work
- Hourly rates
- Provision of Personal Services
- Inability to simultaneously compete in the marketplace

Independent contractors cite advantages:

- Write-offs of all business expenses
- Retention of intellectual property rights
- Freedom to be their own boss
- Freedom to self-determine financial opportunities by working for multiple entities



Further Benefits of Independent Contractor Status



- You Have An Enforceable Written Contract
- You Can't Be Terminated At Will, Without Notice
- You are Able to Subcontract The Work to Others and Still Get Paid
- You are Eligible For Certain Tax Advantages
 - ✓ Improved cash flow
 - ✓ Availability of Business Related Tax Deductions
 - ✓ Retirement Savings



Independents Say it Was Their Choice and Are Satisfied

Most independents (74%) plan to **stay the course** as an independent (61%) or build a larger business (13%)



6.5 out of 10 independents say working independently was **their choice completely**

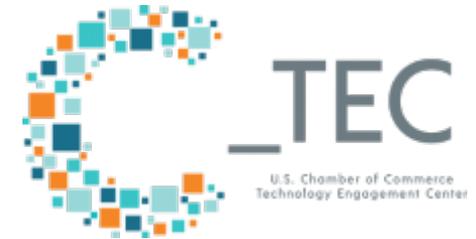
3.2 million independents **earned more than \$100k**, up from 1.9 million in 2011

Source: MBO Partners State of Independence 2017



Key Findings from US Chamber C_TEC Sharing Economy Poll

- **Two in 10** sharing economy workers have worked for ridesharing or delivery companies
- Sharing economy workers overwhelmingly see the sharing economy as having a **positive effect** on the economy
- Sharing economy workers see regulations that promote and advance the sharing economy as a **boon** for their cities and communities
- Sharing economy workers are **satisfied** with their compensation and experience, and especially like the **flexible work hours** and **extra income**



Worker Status Tests

- Common Law Agency/Right-to-Control Test
- ABC Test
- Economic Realities Test



Uncertainty in Worker Status

- 2015 DOL Administrator Interpretation
- June 7, 2017 Withdrawal of Guidance
- Continuing risks and uncertainty—both on standards and application



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News Release

US SECRETARY OF LABOR WITHDRAWS JOINT EMPLOYMENT, INDEPENDENT CONTRACTOR INFORMAL GUIDANCE

WASHINGTON – U.S. Secretary of Labor Alexander Acosta today announced the withdrawal of the U.S. Department of Labor's 2015 and 2016 informal guidance on joint employment and independent contractors. Removal of the administrator interpretations does not change the legal responsibilities of employers under the Fair Labor Standards Act and the Migrant and Seasonal Agricultural Worker Protection Act, as reflected in the department's long-standing regulations and case law. The department will continue to fully and fairly enforce all laws within its jurisdiction, including the Fair Labor Standards Act and the Migrant and Seasonal Agricultural Worker Protection Act.

OPA News Release: 06/07/2017



Litigation Update

The Biggest Wage & Hour Settlements in 2016 and 2017 Independent Contractor Misclassification Cases



#1 in 2017: April 2017 – Final approval granted of **\$227M** settlement with 12,000 drivers in 20 states alleging wage and hour violations for misclassification of drivers as independent contractors



#1 in 2016: June 2016 – Final approval granted of **\$226M** settlement with California drivers alleging wage and hour violations for misclassification of drivers as independent contractors



#2 in 2016: April 2016 – Uber and class of CA and MA drivers tentatively settled wage and hour misclassification suit for up to **\$100M**, which would have been #2 in 2016 had the court approved the settlement (***Stayed as of November 2016***)



#4 in 2017: March 2017 – Final approval granted of **\$27M** settlement with California drivers alleging wage and hour violations for misclassification of drivers as independent contractors

Sharing Economy Misclassification Cases



July 2015

Handy's Motion to Compel Arbitration on California Labor Code claim granted.



September 2016

Parties agree to stay case pending First Circuit resolution of enforceability of class arbitration waivers. Motion to Stay First Circuit case pending Supreme Court ruling on issue in arbitration trilogy is pending.



handy

November 2015

Court granted Motion to Compel Arbitration in California and Nationwide minimum wage claim.



February 2016

Court granted Motion to Compel Arbitration in New York and Nationwide minimum wage claim.



Instacart

March 2015

Summary Judgment denied on independent contractor status in a claim for California Labor Code violations.



March 2017

\$27M in California case granted final approval. settlement



lyft

Sharing Economy Misclassification Cases

March 2015

 Summary Judgment denied on independent contractor status in claim for California Labor Code violations.

June 2015

 California Labor Commissioner rules driver was an employee of Uber.



September and December 2015

 California federal judge certifies class of Uber drivers on tips and unreimbursed expenses claims.

December 2015

 Florida Department of Economic Opportunity finds Uber driver to be properly classified as an independent contractor for unemployment compensation purposes.

August 2016

Up to \$100M settlement for MA and CA drivers rejected

September 2016

Ninth Circuit reverses California district court denial of Uber's motion to compel arbitration.

November 2016

Five California federal court cases are stayed pending Ninth Circuit's ruling on interlocutory appeals involving arbitration agreement enforceability in *O'Connor* and related cases.

February 2017

State appeals Court affirms Florida Department of Economic Opportunity finding on IC status of Uber drivers.



Sharing Economy Misclassification Cases

September 23, 2015: Complaint filed against GrubHub alleging representative claims for unreimbursed business expenses, minimum wage violations, and unpaid overtime.

June 15, 2017: Court bifurcates trial to first phase determining whether plaintiff was an aggrieved employee.

July 10, 2017: Court denies GrubHub's Motion for Summary Judgment

September 5, 2017: Bench trial begins.

October 30, 2017: Bench trial concludes.

February 8, 2018: *Judge rules plaintiff is an independent contractor....Grubhub “did not supervise [plaintiff], tell him when to work, what kind of transportation to use or what routes to take”*



GRUBHUB™

Sharing Economy Joint Employer Cases



October 2011

Carrillo v. Schneider
Workers employed by staffing agencies that contracted with Schneider (a logistics company) to work in a Wal-Mart warehouse filed suit for alleged W&H violations



January 2013

Third amended complaint filed adding Walmart as a joint employer defendant



January 2014

Both Schneider's and Walmart's motions for summary judgment were denied

May 2014

Following the MSJ denial, parties reached **\$21M** settlement



January 2017

Delivery drivers employed by Companies that contract with Amazon for goods delivery file an amended complaint alleging Amazon as a joint employer in a misclassification suit for unpaid overtime and minimum wage under the FLSA and IL law.



Joint Employers in the Sharing Economy

- *Browning-Ferris* update
- Joint Employer allegations in recent Gig Economy litigation



Promising Signs to the Road Ahead

- Nov. 7, 2017 Approval of Save Local Business Act by House of Representatives
- Dec. 14, 2017 NLRB Decision Overturns *Browning-Ferris* and Requires Direct Control for Joint Employer Status
- Jan. 5, 2018 DOL Withdrawal of 2010 Guidance on Status of Interns as Employees
- Recent AZ state law
 - Gig economy specific statutory non-employee exemptions



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News Release

U.S. DEPARTMENT OF LABOR CLARIFIES WHEN INTERNS WORKING AT FOR-PROFIT EMPLOYERS ARE SUBJECT TO THE FAIR LABOR STANDARDS ACT

WASHINGTON, DC – On Dec. 19, 2017, the U.S. Court of Appeals for the Ninth Circuit became the fourth federal appellate court to expressly reject the U.S. Department of Labor's six-part test for determining whether interns and students are employees under the Fair Labor Standards Act (FLSA).

The Department of Labor today clarified that going forward, the Department will conform to these appellate court rulings by using the same "primary beneficiary" test that these courts use to determine whether interns are employees under the FLSA. The Wage and Hour Division will update its enforcement policies to align with recent case law, eliminate unnecessary confusion among the regulated community, and provide the Division's investigators with increased flexibility to holistically analyze internships on a case-by-case basis.

WHD News Release: 01/05/2018

Additional Consideration: Reclassification Safe Harbor

Section 530 of the Revenue Act of 1978

- Provides interim relief in employment tax status controversies only
- Based on taxpayer meeting 3-part test as to its treatment of workers as independent contractors
- Temporary prohibition against reclassification to afford Congress adequate time to adopt a permanent solution to complex issues involving worker classification
 - Extended indefinitely until “permanent solution” is found

Small Business Job Protection Act of 1996

- Added requirement that prior audit relied upon must have related to the workers at issue
- Eased the standard for satisfying the industry practice reasonable basis standard



Potential Legislative Solutions



August 2016

U.S. Chamber of Commerce sues Seattle over December 2015 ordinance granting collective bargaining rights to independent contractor drivers



May 2017

Portable Benefits for Independent Workers Pilot Program Act proposed in Senate



November 2017

Save Local Business Act passes House



February 2018

US Senate Hearing before HELP Committee: “Exploring the ‘Gig Economy’ and the Future of Retirement Savings”

Roadblocks to the Sharing Economy



What Are Some Strong Independent Contractor Practices?

- NEGOTIATE TERMS IN THE CONTRACT
- ENSURE ACCURACY IN THE CONTRACT
 - Make sure your day-to-day practices are consistent with the terms of the contract.
- LIVE BY The CONTRACT unless amended by a written document signed by both parties.

What Are Some Strong Independent Contractor Practices?

- CONTRACT FOR, PAY FOR, AND MEASURE RESULTS PROVIDED
 - define objective terms and leave the contractor to determine how to meet those terms

- REQUIRE THE RESULTS CONTRACTED FOR, NOT INTERIM STEPS TO OBTAIN THOSE RESULTS

What Are Some Strong Independent Contractor Practices?

- Ensure the relationship leaves contractors with RISKS OF LOSS & POTENTIAL FOR VARIATION IN PROFITABILITY
- DO NOT GET INVOLVED with a contractor's relationship with its employees or contractors
- DO NOT PAY EXTRA -- no additional bonuses or “benefits” which the contract does not require, unless there is an amendment to the contract

What Are Some Strong Independent Contractor Practices?

- DO NOT CHANGE THE CONTRACT without mutual agreement written and signed by both parties

- TREAT CONTRACTORS DIFFERENTLY, they do not perform any other services as employees or receive employee benefits

Terminology Matters

| ACCEPTABLE | UNACCEPTABLE |
|---|--|
| Contractual relationship | Employment relationship |
| Independent business person Contractor Worker | Employee Agent of Company |
| Manager | Supervisor Boss |
| Contract with | Hire |
| Terminated for material breach of contract | Fired Terminated for cause |
| Manage contractors | Supervise Train Instruct Contractors |
| Requiring Contractor to meet the final requirements of the contract | Control over the manner, means, mode, and/or details of the work |

Terminology Matters

| ACCEPTABLE | UNACCEPTABLE |
|---|---|
| Contract fees Services Fees | Wages Pay rate Benefits |
| Contract for Services | Job |
| Discussion regarding breach of contract | Discipline Suspension |
| Subcontracting services is permitted | Personal services is required |
| Allowing contractor to provide substitute services at their own discretion | Control or approval necessary for substitute services |
| Completion of services per contract | Regular reports |
| Performance of services at contractor's own selection of site | Performance of services on Company premises |
| Contractor furnishes his/her own materials, supplies, equipment, or rents or purchases it (in their own discretion) at the fair market rate | Provision of expenses, materials, supplies, equipment for free, or at a subsidized cost |

Terminology Matters

| ACCEPTABLE | UNACCEPTABLE |
|--|--|
| Contractors receive only gross profits from the Company | Contractors receive wages or net profits |
| Contractor may work for competitors | Restrictions on the Contractor unrelated to completion of contractual services |
| Performance of services by a final time only | Set hours to report to work or perform services |
| Telephone calls to inquire as to performance of delivery services per contract, and whether newspapers will be picked up | Wake up calls |
| Liquidated damages | Severance pay |
| Contract / Contract Proposal | Employment application |

Life of a Contract

- negotiation
 - approval/execution/administration
 - monitoring/management
 - amending
 - terminating
 - records retention
-

Contract Negotiations

- Your responsibility to ensure that the contractor understands that the contract is negotiable
 - Also your responsibility to ensure that the contract is negotiated
 - Being willing to negotiate doesn't mean being willing to agree; means listening to the proposal and considering it with an open mind
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Six Principles of Contract Negotiation

1. Know the contract Important for negotiations and managing the relationship with the distributor
 2. Explain each paragraph of the contract to the contractor
 3. Offer to let the contractor take the contract home with him and have his lawyer review it
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Six Principles of Contract Negotiation

4. Carefully consider any change in the contract suggested by the contractor
 5. Think of some items that you can change before starting the negotiations
 6. Note all contract changes in writing
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Evidence of Negotiations

- As you negotiate, be mindful of ways that you can show that a negotiation actually took place
 - Make sure such evidence is filed/stored in such a way that it can be retrieved
-

Approval/Execution/Administration

- Signed by both parties
 - Faxed copy is ok, but original is preferred
 - Copies given to all interested departments
 - Procedures are set up – payment, invoicing, delivery procedures, etc.
-

Monitoring/Management

Review frequently to ensure that both parties are abiding by terms agreed upon

- Did we receive certificates of insurance?
 - Did we receive updates?
 - Are we performing our obligations (payments, maintenance)?
 - Do we need an amendment?
 - Is the other party in breach?
-

Amending

- Amend contract if reality is different from contract terms
 - Amend to change prices
 - All amendments should follow same rules as for initial contract (*negotiation*, approval, execution, etc.)
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Terminating

- If terminating for breach - work with legal
 - Follow termination notice requirements - if need to give notice by registered mail with copies, make sure that is what you do
 - Flag calendar if need to give notice in order to exercise option to renew or not renew
 - Be aware of termination transition issues
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Records Retention

- Need to follow retention policy
 - If potential for litigation arises, need to make sure that no documents are accidentally destroyed
 - If use a contract as a basis for another contract, make sure identifying information is deleted
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Thank You