Gig Economy Prompts New California Worker Misclassification Law

September 27, 2019

California has some of the most extensive employee protections in the country. California law requires paid leave, paid rest breaks and permits employees to sue for wrongful termination in violation of public policy. Assembly Bill 5 ("AB-5") is a new California statute that expands these protections to thousands of new workers by presumptively classifying them as employees rather than independent contractors. It goes into effect on January 1, 2020.

AB-5 has been said to target the gig economy in which about 10% of Californians participate, driving for Uber, Lyft, DoorDash, Grubhub and others[1]. Websites or apps typically connect these workers to clients or jobs and arrange the payment. Under AB-5, these workers will be more readily able to claim employee status and by extension, claim the robust legal protections afforded California employees, including the provision of health care, workers compensation benefits and mandatory overtime protections. The effect of AB-5, however, is not limited to gig workers.

The law codifies a 2018 California Supreme Court case[2] that requires companies to show its workers are properly classified independent contractors under a three-part test. Under the 2018 *Dynamex* case, an independent contractor must be "free from control and direction of the hiring entity in performance with the work," and "perform work that is outside the usual course of the hiring entity's business." Examples given by the *Dynamex* court include plumbers, electricians, and architects which the court held were traditional independent contractor roles.

Ride-sharing and other gig companies lobbied hard against the law. With reclassification, these companies expect to face a 30% increase in operational costs. They may find it difficult to classify their workers as independent contractors under this test primarily because these workers perform work that is inside the usual course of the hiring entity's business. However, most gig companies are expressing confidence they can classify these workers as independent contractors based on the simple premise that their "apps" are merely a device connecting the means of supply and demand. Notably, a similar three-part test has been used for some time in Massachusetts, New Jersey[3] and other states. New York, Oregon and other states are looking at new legislation similar to AB-5.

Some occupations obtained limited exemptions from AB-5, including doctors, dentists, lawyers, engineers, accountants, architects, realtors, travel agents, graphic designers, human resources administrators, grant writers, marketers, fine artists, investment advisors, broker-dealers, and many salespeople. Still, many contract nurses, therapists, nail salon workers, janitors and construction workers are now subject to the more stringent *Dynamex* standard and will have to reevaluate their status with their clients and subcontractors.

Another issue ripe for litigation is retroactivity. Certain portions of AB-5's protections are retroactive "to the maximum extent permitted by law," meaning gig workers could seek unpaid wages prior to its enactment. For example, if a food-delivery driver worked many 12-hour days between 2016 and 2019, the driver may sue for overtime under California wage and hour law.

California has the fifth largest economy in the world, and the dynamic gig arrangements it has spawned represent a fundamental shift in how we work and live. Under AB-5, California companies will face difficult decisions regarding their workers. For some, re-classification will disrupt their online platform model or contractor relationships, and perhaps, threaten their economic survival. Companies should carefully consider their worker relationships going forward.

---

1. Public Religion Research Institute, 2018 California Workers Survey. https://www.prri.org/research/renewed_struggle_for_the_american_dream-prri_2018_california_workers_survey/

2. *Dynamex Operations West Inc. v. Superior Court of Los Angeles*, 4 Cal. 5th 903 (Cal. Sup. Ct. April 30, 2018).

3. New Jersey has a slightly more lenient test which allows hiring entities to classify workers as independent contractors where "the work performed is outside all the places of business of the hiring entity" as an alternative to work performed "outside of the usual course of the hiring entity's business" (*See, e.g*. N. J. Stat. Ann. § 43:21-119(i)(6)(A-C)). Arguably under this test, fewer workers in the gig economy would be classified as employees.