UBERIZATION OF THE WORKPLACE
How the Service Economy is Changing the way HR Must Manage Employer/Employee Relationships

2017 PA SHRM State Conference

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ROADMAP TO UBERIZATION

Exit Light → Enter Night
Gig Stats & Studies
HR/Legal Implications
  Classification
  Employment Agreements
  Background Checks
Looking Ahead/Takeaways
EXIT LIGHT

→

ENTER NIGHT
EXIT LIGHT ➔ ENTER NIGHT

2 BASIC WORKER CONSTRUCTS:

**Employer/Employee**
- Wages, taxes, insurance, safety, discrimination protection, etc.

**Independent Contractor**
- None of the above
- Specific duration; control method
- Provide equipment, etc.
EXIT LIGHT → ENTER NIGHT

*So which one is a Gig Worker?*

These workers typically:

Decide when/how often to work
Choose whether to work at all
Work with many providers (at once?)
Don’t set fees/rates
Can be prohibited from service
Get no benefits
EXIT LIGHT ➔ ENTER NIGHT

Chicken or Egg?

Companies provide technology platform which allow workers and consumers to find each other for performance of core service

or

Companies provide a labor brokering function supplying available/qualified workers to businesses/individuals in need
EXIT LIGHT → ENTER NIGHT

How Did We Get Here?

Recession and technology
Call center jobs → Google Alphabet
Need to inflate/shrink workforce
Lower-tier AND white collar roles
Traditional career paths less common
Changes to social insurance/benefit
compact
EXIT LIGHT → ENTER NIGHT

*The Real 50 Shades of Grey*

Uncertainty in relationships

Leads to common/high-stakes litigation

Wage and hour

Labor relations headaches

Joint employer classifications

HR applications

Employment agreements

Background checks
GIG STATS & STUDIES
GIG STATS

*Bloomberg Spring 2006 Survey of Nearly 1,000 Gig Economy Workers*

69% Millennials (18 – 39)
14% Gen X (40 – 51)
17% Baby Boomers (52+)

Top 3 reasons why they do it:
1) Being own boss
2) Flexible schedules
3) Greater work/life balance
GIG STATS
(8/2016 UPWORK INDEPENDENT WORKFORCE SURVEY OF 6,000 WORKERS)

55 million Americans are freelancing
That’s 35% of the US workforce

Freelancers contribute an estimated
$1 TRILLION
annually in freelance earnings to our economy

More people are choosing freelancing:
63%
said they started more by choice than necessity
GIG STATS
(8/2016 UPWORK INDEPENDENT WORKFORCE SURVEY OF 6,000 WORKERS)

Technology’s role:

73% of freelancers agree technology has made it easier to find freelance work

66% say the amount of freelance work they obtained online increased in the past year

The majority of freelancers who left a full-time job made more within a year

14% earned the same

32% earned less

54% earned more

79% said freelancing is better than working a traditional job

Freelancers are significantly more likely to feel respected, empowered, and excited to start each day

85% respected

80% empowered

80% excited to start each day

Full-time freelancers

Non-freelancers
GIG CASE STUDIES – UBER/LYFT

Transportation service companies
Fare set by company
% Commission taken
Personal cars used
Vehicle checks/inspections
Drivers work when/how long desired
INSTACART
GIG CASE STUDIES – INSTACART

SAME-DAY FOOD SHOPPING DELIVERY SERVICE
ITEMS PICKED, PACKED & DELIVERED
FEES FOR DELIVERY (+ FOOD)
ARE YOU SHOPPING, OR DELIVERING?
GIG CASE STUDIES – HANDY

Fix-It On-Demand service
Plumbers, cleaners, and more
You select project and time
Professional supplied by company
Commission taken on service price
GIG CASE STUDIES: BONUS ROUND

How far does the service economy go?

AirBNB (→ Happy Host)
Medical services (Heal; Pager)
Exotic Dancers (Yeah, I said it)
HR/LEGAL IMPLICATIONS
HR/LEGAL IMPLICATIONS

Classification

Exempt  Non-Exempt
ERISA  FLSA
IRS  Audit
ABC Test  20 Factor Test
Section 530  Form 8919
W-2  Form SS-8
Contractor  Employee

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HR/LEGAL IMPLICATIONS

Classification

The Independent contractor/employee dichotomy:

Uber Classification Litigation
DOL (wage and hour)
Joint Employment
Collective bargaining

All Relationship-Dependent
HR/LEGAL IMPLICATIONS

Classification

Uber Litigation

Multiple-jurisdiction class actions

Status; On-Call; Tips; Gas; More?

Conflicting results

Remember Fed-Ex?
# HR/LEGAL IMPLICATIONS

## Labels Avoided
- Employee
- Hiring
- Wages/Earnings
- Shift

## Labels Used
- Supplier
- Onboarding
- Fees
- Availability
HR/LEGAL IMPLICATIONS

Classification

DOL (wage and hour)

2015 Administrator Interpretation is no more:

“Most workers are employees under FLSA”

6 factor, fact-specific test centering on economic realities & whether an entity “suffers or permits” a person to work
HR/LEGAL IMPLICATIONS

Classification

1) Is work integral part of business?
2) Managerial skill impact profit/loss?
3) Relative investment comparisons
4) Special skill/initiative required?
5) Permanent/indefinite relationship?
6) Nature/degree of employer control
HR/LEGAL IMPLICATIONS

Classification

Joint Employment

Are you an employee? → Are you an employer? → How many employers are there?

DOL: 2016 Administrator Interpretation also no more

NLRB - old (Browning-Ferris Industries/BFI case)

NLRB - new (Board GC Advice Memorandum: misclassification may violate NLRA)
HR/LEGAL IMPLICATIONS

Classification

Collective Bargaining

Seattle, Washington Ordinance

New York City – LaGuardia Airport

Local regulation can be a risk to contractor status
HR/LEGAL IMPLICATIONS

Employment Agreements

EMPLOYMENT AGREEMENT

1. AGREEMENT to employ employee as an employee of the above-mentioned employer.

2. DESCRIPTION OF EMPLOYEE'S DUTIES

3. MANNER OF PERFORMANCE OF EMPLOYEE'S DUTIES
HR/LEGAL IMPLICATIONS

Employment Agreements

2 biggest factors define nature/scope of worker relationship:

1) Your employment Agreements
2) The real world, as law applies to it

2 is more important than 1, but overlook 1 alone and it can sink you
HR/LEGAL IMPLICATIONS

Employment Agreements

Devil is in the language details

Characterizing worker relationships

Elements of control

How v. when/where work is done

Engagement of others

Economic dependence

Handling expenses

No benefits
HR/LEGAL IMPLICATIONS

Employment Agreements

Mandatory Arbitration Clauses

Primary considerations:

1) Traditional oversights (Uber case)
   Bargaining power
   Conspicuousness
   Fairness (fees, etc.)
HR/LEGAL IMPLICATIONS

Employment Agreements

Mandatory Arbitration Clauses

Primary considerations (con’t):

2) Individual or class

NLRB position (D.R. Horton)
Circuit Courts → SCOTUS
Kenny Rogers
HR/LEGAL IMPLICATIONS

EMPLOYMENT AGREEMENTS

Mandatory Arbitration Clauses

Drafting ideas:

1) Stand alone
2) Coverage and caveats
3) Caution on limiting remedies
4) Delegation
5) Reasonableness
HR/LEGAL IMPLICATIONS

Background Checks
HR/LEGAL IMPLICATIONS

Background Checks

Vetting workers provided to another or made available to public for services

Services done in homes, with children, etc.

Do it (viewed as employees) or don’t do it (liability risk)

Can you negligently engage contractors?
HR/LEGAL IMPLICATIONS

Background Checks

If you do it, how are you doing it?

Record v fingerprint checks (or both)
Company v government (or both)
Local regulation picking up (Ex: Mass)
HR/LEGAL IMPLICATIONS

Background Checks

How do EEOC requirements fit in?:
- No all-or-nothing policies
- Individualized inquiry
- Job related restrictions

State/local laws

Ban – The – Box
LOOKING AHEAD
LOOKING AHEAD

TRENDS TO WATCH

GROWTH OF SECTOR:

Value of market
More providers = more workers
More workers = more doing > 1 “gig”
LOOKING AHEAD

TRENDS TO WATCH

LEGAL ACTIVITY:

CLASSIFICATION/WAGE & HOUR LITIGATION

SCOTUS

LOCAL REGULATION

SEATTLE/NY (“Freelance Isn’t Free”)

EEOC STRATEGIC PLAN FOCUS

BIG DATA IMPACT
LOOKING AHEAD

TRENDS TO WATCH

A THIRD CATEGORY:

THE “INDEPENDENT WORKER”
PORTABLE BENEFITS
UBER WC AND CONGRESSIONAL PILOTS
MIX OF LEGAL PROTECTIONS
SOME BENEFITS TO BOTH SIDES LOST BY EXISTING CLASSIFICATION DICHOTOMY
LOOKING AHEAD

Takeaways

Gig economy likely here to stay
Define work relationships carefully
Scrutinize language in service agreements
Focus: control and economics
Use arbitration clauses w/class waiver
Refresh background check practices
THANK YOU!

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