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Rights of Workers in the Burgeoning Gig Economy

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A growing workforce of freelancers and independent contractors who have the freedom to decide on the duration and frequency of their work is changing the employer-employee relationship. The expanded population and earning capacity of "gig" workers is expected to continue and is now part of the 21st century "gig economy." In large part, increases in the number of gig workers is being driven by companies with online platforms using digital applications such as Uber, Lyft, Grubhub and Care.com who need drivers, delivery people and babysitters. According to a recent study by Intuit and Emergent Research, 9.2 million people are expected to be part of the gig economy by 2021, an increase of 5.3 million since 2016.

Inherent in a gig economy is friction with laws enacted to protect employees who work traditional 40-hour work weeks for a clearly defined employer. As an employee, an individual is entitled to a minimum wage, unemployment compensation, overtime and workers' compensation benefits. On the other hand, gig economy workers receive none of the protections afforded employees. Gig employers also take the position that gig workers are precluded from collective bargaining because the National Labor Relations Act (the "Act" or "NLRA")) excludes independent contractors from having this right. Determining whether an individual is an employee or independent contractor is typically based on:

- Whether the individual charges fees for his/her service.
- Whether the individual is contracted only for the term required to perform an identified service or task.
- The amount of control exerted over the individual.

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, let alone 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 worker, the federal courts have acknowledged that the results often seem harsh. The traditional seven elements of the Economic Realities Test are:

1. The extent to which the services rendered are an integral part of the hiring entity's business.

2. The permanency of the relationship.

3. The amount of the alleged contractor's investment in facilities and equipment.

4. The nature and degree of control by the hiring entity.

5. The alleged contractor's opportunities for profit and loss.

6. The amount of initiative, judgment or foresight in open market competition with others required for the success of the claimed independent contractor.

7. The degree of independent business organization and operation.

Two examples of case law relative to the Fair Labor Standards Act ("FLSA") and the Economic Realities Test are *Rutherford Food Corp. v. McComb,* 331 U.S. 722 (1947) and *Goldberg v. Warren Bros. Roads Co.,* 207 F. Supp. 99 (D. Me. 1962).

In *Rutherford*, the defendants owned a slaughterhouse where they hired an experienced meat boner to assemble a group of workers to run the slaughterhouse deboning operation. The workers were not paid overtime, they owned their own tools, were paid based off how much meat had been de-boned, and they had agreed to pay rent for use of the room where they worked (though the rent was never paid). At the same time, 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. In this case, 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.

In *Goldberg,* the 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.

Gig workers would be allowed to set fees aside for health insurance and medical leave. and have 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.

Proposed Legislation Addressing Gig Workers

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.

Senator Mark R. Warner (D-VA) introduced the Portable Benefits for Independent Workers' Act. This bill provides funding to states, municipalities and nonprofit 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 also considered a bill, Assembly Bill 2765, that would 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.

Senator John Thune (R-SD) introduced the New GIG Act of 2017 to clarify the classification 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), and (3) the parties have a written contract identifying the independent contractor relationship.

Importantly, 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.

Gig Economy Court Decisions

As noted above, companies that are dependent on technology like Uber and Grubhub as well as 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. In recent months, two United States District Courts issued decisions regarding Uber and Grubhub. These decisions applied the Economic Realities Test used to assess independent contractor status under the FLSA, concluding that the plaintiffs were independent contractors, not employees. The cases are summarized below along with others that have examined gig workers through the Economic Realities Test. In each case, the courts have determined that gig workers are independent contractors and, therefore, are not entitled to the protection and rights given to employees.

However, a recent California Supreme Court decision and a decision by the Ninth Circuit Court of Appeals show that this area of law is evolving. In *Dynamex Operations W. v. Superior Court,* 4 Cal. 5th 903 (Cal. 2018), the California Supreme Court strongly suggested that gig workers would be classified as employees under California law. In *Chamber of Commerce of the United States v. City of Seattle,* 2018 U.S. App. LEXIS 12337 (9th Cir. May 11, 2018), the Ninth Circuit Court of Appeals found a municipal ordinance could provide gig workers with the right to organize and collectively bargain. These cases are also summarized below, along with a case that highlights how the National Labor Relations Board (the "Board") addresses claims where employees believe that they have been misclassified as independent contractors.

***Lawson v. Grubhub, Inc.,* 2018 U.S. Dist. LEXIS 21171 (N.D. Cal Feb. 8, 2018)**

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, who 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. The company 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.

***Razak v. Uber Technologies, Inc.*, 2018 U.S. Dist. LEXIS 61230 (E.D. Pa. Apr. 11, 2018)**

This case was the first where a district court granted summary judgment on the question of whether drivers for Uber 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 was 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.

In this case, 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;

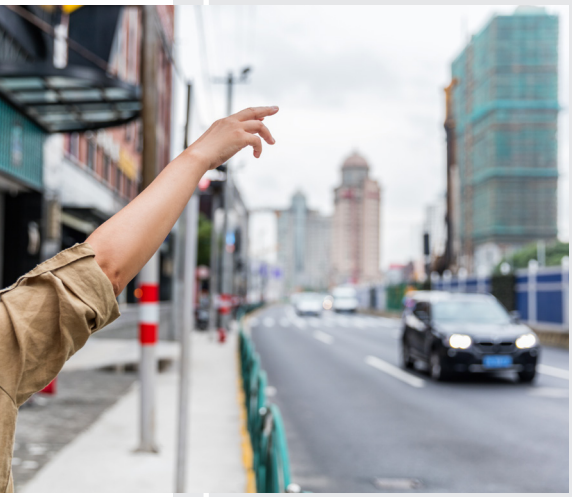
5. The degree of permanency of the working relationship; and

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 favor of 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.

***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 Test.

***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 provided 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.

In this case, 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.

***Diego v. Victory Lab,* Inc., 282 F. Supp. 3d 1275, 1276 (S.D. Fla. 2017)**

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 form, an independent contractor agreement, and a dress code. Diego never executed any of the employment and tax documents but nevertheless 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 smart phone 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. Ultimately, Victory Lab terminated Diego because he 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.

Applying 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 four-month job. During these 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.

***Chamber of Commerce of the United States v. City of Seattle,* 2018 U.S. App. LEXIS 12337 (9th Cir. May 11, 2018)**

The Ninth Circuit Court of Appeals recently held that the City of Seattle ("City") could create a procedure where Uber and Lyft drivers could collectively organize.

On December 14, 2015, the Seattle City Council enacted Ordinance 124968 (the "Ordinance") that was the first municipal ordinance of its kind in the United States and authorizes a collective bargaining process between "driver coordinators" like Uber and Lyft and independent contractors who work as for-hire drivers.

The Ordinance permits drivers to be represented by an entity designated as an "exclusive driver representative" and driver coordinator companies, like Lyft and Uber, to agree on the "nature and amount of payments to be made by, or withheld from the driver coordinator to or by the drivers." Uber, along with the Chamber of Commerce ("Chamber"), brought suit against the City and argued that the Ordinance is preempted by the Act. The District Court dismissed the Plaintiffs' NLRA preemption claims. The Ninth Circuit affirmed but remanded the matter to determine whether the Ordinance violates antitrust law.

On appeal, the Ninth Circuit reviewed the following factual record:

- Uber and Lyft have developed proprietary applications for smart phones that offer ride-sharing and ride-referral services;
- Drivers are free to accept referrals from an application;
- If a driver accepts a ride then he is matched with the rider;
- If a driver ignores a request, the application refers the rider to another driver;
- Riders may reject a driver through the app;
- Riders pay through the app and the driver coordinator then issues payment to the drivers;
- The driver coordinator takes a preset fee from the far for the ride by way of a "technology licensing fee"; and
- Many drivers use multiple ride-share applications at once.

The City passed the Ordinance specifically to provide collective bargaining rights to gig economy workers in the ride-sharing industry. The Ordinance allows drivers to select a bargaining representative, known as a "Qualified Driver Representative" ("QDR"), who then alerts the City and driver coordinator of its intent to represent the for-hire drivers. The driver coordinator must then provide the QDR with contact information for all qualifying drivers. The QDR then has 120 days to submit letters of intent from drivers who wish to be represented. If a majority of drivers consent to representation, then the QDR becomes the "exclusive driver representative" ("EDR") for all drivers who use that particular app.

Once certified, the EDR must meet and negotiate with the driver coordinator to discuss wages and working conditions. The parties then can reach an agreement that they submit to the City agency tasked with oversight of the Ordinance. If the parties fail to reach an agreement, then they are referred to arbitration.

Before the District Court, the City moved to dismiss the matter and argued that the Act does not preempt the Ordinance. The Ninth Circuit ultimately agreed with the district court, which had granted the City's motion to dismiss. The Chamber first argued that the Ordinance was preempted by *Machinists* preemption. *Machinists* preemption applies where Congress intended to leave certain conduct unregulated and subject to the "free play" of economic forces. If a court finds *Machinists* preemption applies, then the Board and States are precluded from regulating the conduct. The Chamber argued that the Act excludes "independent contractors" from its definition of employee and therefore implicitly preempted local labor regulation of independent contractors. Essentially, the Chamber argued that since independent contractors were excluded from the definition of "employee" then Congress intended to preclude States and the NLRB from interfering with the free market's effect on independent contractors. The Court disagreed and noted that *Machinists* preemption was not applied in other cases that addressed categories of workers exempted from the Act's definition of "employee." The Court held "[w]e find no reason to treat those independent contractors differently than these other excluded categories of workers."

The Chamber also argued that *Garmon* preemption should apply to the Ordinance because the Chamber argued the Ordinance required local officials and state courts to decide whether for-hire drivers are employees under the Act, a determination which the Chamber argued rested solely with the Board. The Ninth Circuit rejected this argument by noting that the Chamber had not sustained its burden of showing an actual conflict with the Ordinance's operation and the Act. The Ninth Circuit also dismissed the Chamber's argument that several courts and the Board are currently addressing the issue of whether Uber and Lyft drivers are "employees" so *Garmon* preemption should apply. The Ninth Circuit noted that merely showing that there is a "live issue" regarding the classification of Uber and Lyft drivers was not enough to preempt the Ordinance.

The Ninth Circuit then remanded the matter for consideration of antitrust law principles as applied to the Ordinance.[1]

***In re Minnesota Timberwolves Basketball,* LP, 365 NLRB No. 124**

The International Alliance of Theatrical Stage Employees brought a petition to represent fifty-one (51) crewmembers of the Minnesota Timberwolves who generate and produce content for the team's video board at the team's arena on game days. The employer is a National Basketball Association ("NBA") team who hired the employees to create content to use as in-game highlights and advertising at home games. For instance, the crewmembers included a cameraman who would go into the crowd and find fans to appear on a "kiss cam."

The facts presented to the Board included the following:

- The employees worked for the employer only during the NBA season;
- The crewmembers could perform or be assigned a variety of tasks depending on their skill level;
- The employer allowed each crewmember to qualify for more advanced positions like directing the camera footage during a game;
- The employer paid the employees a "per game" fee, which typically tracked the length of the game;
- The employer assigned the crewmembers a specific task for each game;
- The employees reported to either a Director of Live Programing ("DLPE") or Senior Broadcast Production Manager ("SBPM") who worked for the team;
- Crewmembers volunteered to work each game, but the employer would select which crewmembers worked any game based on its preference;
- The employer provided all equipment; and
- The employer did not deduct payroll taxes and offered no benefits to the crewmembers.

In addressing this matter, the Board noted that the Act guarantees employees a right to join a union. Section 2(3) of the Act, however, provides that the term "employee" shall not include independent contractors. In determining whether an independent contractor has been misclassified, the Board applies a ten-part test and relies on common law agency principles. The ten factors are:

1. The extent of control over the details, means and manner of the work;
2. Whether the putative contractor is engaged in a distinct occupation or business;
3. Whether the work is done under the direction of the principal, or by a specialist without supervision;
4. The skill required in the particular occupation;
5. Who supplies the tools and place of work;
6. The length of time for which the person is employed;
7. The method of payment, whether by the time or by the job;
8. Whether the work is part of the regular business of the employer;
9. Whether parties believe they are creating an employment or contract relationship; and
10. Whether the principal is in business.

In applying these factors, the Regional Director found that crewmembers were independent contractors and dismissed the Union's petition. The Board reversed.

In looking at this matter, the Board found several factors weighed in favor of classifying the crewmembers as employees. First, the Board found that the employer exerted control over the employees on game day. For instance, the DLPE would direct the crewmembers, crewmembers were bound by the DLPE's written script, and crewmembers had to take direction from the SBPM, who assigned tasks. The employer also unilaterally assigned which job a crew member would perform on game day. Where two crewmembers offered to work the same game, then the employer broke the tie by selecting on its preference.

The average crewmember had worked for the team for multiple years. The team also paid a per-game rate based on the length of the game, which ultimately resembled an hourly rate of pay. The Board also noted that the team's business consisted of running a professional basketball franchise, which includes advertising and entertainment. The Board noted that the crewmembers performed tasks of varied skill levels but that their product was part of the organization's "core mission." While several crewmembers operated their own media companies and the employment was seasonal, the Board found that more factors weighed toward classifying the crewmembers as employees who enjoy the right to collectively bargain.

***Dynamex Operations W. v. Superior Court,* 4 Cal. 5th 903 (Cal. 2018)**

In *Dynamex*, the California Supreme Court addressed how California courts would determine if an employee is properly classified as an independent contractor. Ultimately, the California Supreme Court held that it will use the "ABC test" to determine whether an employee has been misclassified as an independent contractor. The "ABC test" applies a lenient standard that favors classifying workers as employees. This case will likely affect gig economy litigation because several actions have been brought against gig employers in California State Courts.

In *Dynamex*, the employer operated a same-day courier and delivery service that operates business centers in California. In 2004, Dynamex classified all its delivery drivers as "independent contractors" because the company's management concluded that such a conversion would generate cost savings.

Dynamex's business operated as follows: Dynamex obtained its own customers and set rates for its delivery services. Its drivers were paid a negotiated rate. This rate was either a flat fee based on each delivery or an amount based on the delivery fee Dynamex received from its client.

Drivers generally set their own schedule but were required to inform Dynamex of what days that they intended to work. Drivers had to maintain a cell phone from Dynamex's selected provider but used their own delivery trucks. Drivers were not required to make all deliveries that they were assigned but they had to promptly reject any assigned delivery. The drivers could be charged a fee if they accepted a delivery but then gave up the assignment and Dynamex lost the delivery. Drivers used decals on their vehicles that displayed Dynamex's logo and drivers had to purchase a company shirt. Drivers could set the schedule of how they would make a day's deliveries and could hire other workers to help make the deliveries. Drivers were hired for an indeterminate period of time, but the company reserved the right to end any driver's agreement with Dynamex without cause.

The California Supreme Court reviewed a lower court's order that analyzed the terms "employee" and "employer" when determining whether a worker is an employee or independent contractor under California's wage laws.

The Court also reviewed the tests utilized to determine whether an employee had been misclassified as an independent contractor: The Economic Realities Test, a similar multi-factor state law test and the ABC test. The Court ultimately adopted the ABC test as the method to determine independent contractor classification under California law. The ABC test provides a worker is an independent contractor if (a) the worker is free from the control and direction of the hirer in connection with the work to be performed, both under the contract and in fact; (b) the worker performs the work that is outside the scope of the hiring entity's business, and (c) the worker is customarily engaged in an independent, established trade, occupation or business of the same nature as the work performed. The test presumes employee status unless the employer satisfies each of the above conditions. In applying this test to Dynamex's drivers, the California Supreme Court concluded that the drivers could bring wage claims against Dynamex alleging violations of state wage laws that protected "employees."

Conclusion

With the expected growth of the gig economy, the diversity of industries involved and the impact of technology, a disruption in labor and employment law is on the horizon, if not already here. The courts are weighing in to account for these changes taking place in the workforce and in society. As shown by the above decisions, it appears that courts, the NLRB and government are struggling with how to provide benefits to gig workers without constraining the gig economy. Applying decades old, fact intensive tests for whether workers are independent contractors or employees has led to an unpredictable variety of results. As a consequence, the friction between traditional employer-employee relationships and the new gig economy dynamic is still playing out in the courts. For example, the *Chamber of Commerce* and *Dynamex* decisions show that gig workers can successfully obtain rights traditionally only provided to "employees." The stakes in this zero-sum game are high as more and more workers leave the "9 to 5" economy behind. Employers must stay informed as the landscape of workers' rights undergoes this massive transformation or risk the inevitable consequences.

[1] On August 9, 2018, the Ninth Circuit issued a decision in Clark v. City of Seattle. 2018 U.S. App. LEXIS 22149 (9th Cir. Aug. 9, 2018). In Clark, the Ninth Circuit reviewed a claim brought by gig workers who sought a determination that the Ordinance was preempted by the Act. The gig workers brought this claim because they opposed organization into bargaining units as envisioned by the Ordinance. On August 9, 2018, the Ninth Circuit dismissed the gig workers' claims as unripe because no contract or agreement was imminent, and no QDR had successfully procured support of the majority of either Uber or Lyft's qualifying drivers. The drivers also failed to show that they were subject to an unlawful organizing campaign by any union.

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