



# Worker Classification In the Gig Economy

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# Agenda

- Current Landscape of Worker Classification
  - Federal
  - State
- The Binary Choice
- A new type of Worker ... Is it?
- How Big is the Gig Economy?
- Current Federal and State Legislative Efforts
- Court Action

# How Did We Get Here?

The roots of how we determine worker classification today are based on English common law from the 1700's where progressive thinkers believed the "servants" deserved basic wage and hour protections from their "masters"





# 1935 – Social Security Act

- Established Federal definitions for Social Security and Unemployment Insurance for:
  - Employer;
  - Wages;
  - Employment; and
  - Employee – FUTA refers to the IRC Section 3121(d)
    - “any officer of a corporation; or any person, **under the usual common law rules** applicable in determining the under the employer-employee relationship ...”



# IRS Tools to Define Employer-Employee

- 1987 – 20 Factor Test
  - Instructions; training; integration; services rendered personally; hiring, supervision and paying assistants; consulting relationship; set hours of work; full time required; doing work on employer’s premises; order or sequence test; oral or written reports; payment by the hour , week or month; payment of business expenses; furnishing tools or materials; significant investment; realization of profit or loss; working for more than 1 firm at a time; making service available to the public; right to discharge; and right to terminate relationship.



# IRS Tools to Define Employer-Employee

- More recently 20 factors evolved into 3 Categories:
  - Behavioral Control;
  - Financial Control; and
  - Relationship of the parties
- Generally, individuals who follow an independent trade, business, or profession in which they offer services to the public are not employees.

# Complicating factors to Uniform Federal Guidance

- IRS - Section 530 – Safe Harbor → provides relief to employers that had a reasonable basis for treating a worker as an I.C.
  - Initially scheduled to end in 1979
  - Extended permanently by the Tax Equity and Fiscal Responsibility Act of 1982
- IRS - Statutory Employees
- IRS - The Revenue Act of 1978 prohibits the IRS from publishing regulations and revenue rulings on the employment status of any individual for employment taxes
- FUTA
- Wage & Hour Division of USDOL - “to suffer or permit to work” under the Fair Labor Standards Act (FLSA)



# State Worker Classification Methods

- Follow IRS
- ABC Test – Worker presumed to be an employee unless:
  - Free from direction and control;
  - Customarily engaged in an independent business of the same nature as the work; **and**
  - Outside the usual course of, or place of, the business of the person for whom the work was performed.



- Variations on ABC Test

- Other

# So, What's the Big Deal?

- Revenue
  - IRS, FICA, FUTA, state income tax, state unemployment insurance, worker's compensation revenue, ACA
- Benefits
  - Social Security, Medicare, Medicaid, UI benefits, worker's compensation, worker protections under FLSA (minimum wage & O/T), general benefits qualifications





# The Binary Choice Today

- Employee

- Generally Covered for:
  - Federal and state employment taxes – withheld when applicable
- Generally Eligible for:
  - UI benefits
  - Worker’s compensation
  - Minimum wage
  - Overtime
  - Access to employer-provided benefits

- Independent Contractor

- Generally responsible for:
  - Reporting, paying, and estimating Federal and state employment taxes
- Generally Not Eligible for:
  - UI benefits
  - Minimum wage
  - Overtime
- Self-Providing:
  - Workers compensation coverage
  - Health and retirement



# Enter the On Demand Economy

- The Gig Economy – Concentrated in the service sector and links products/services to consumers through technology
- Disrupts the traditional employer/employee relationship



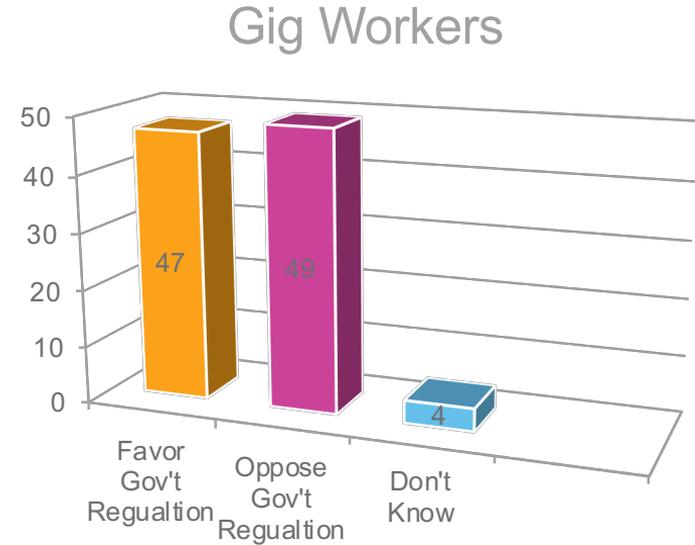


# Gig Economy Examples

- Ride Sharing – Uber, Lyft, Sidecar
- Accommodation Sharing – Airbnb, VRBO, Homeaway
- Service Platforms – Handy.com, Care.com, TaskRabbit
- Car Rental – Car2go, Zipcar, Getaround
- Food & Delivery – Instacart, Postmates, Caviar

# Do Gig Economy Workers Want Government Reg?

- According to Time in January 2016
- They are nearly split 50/50



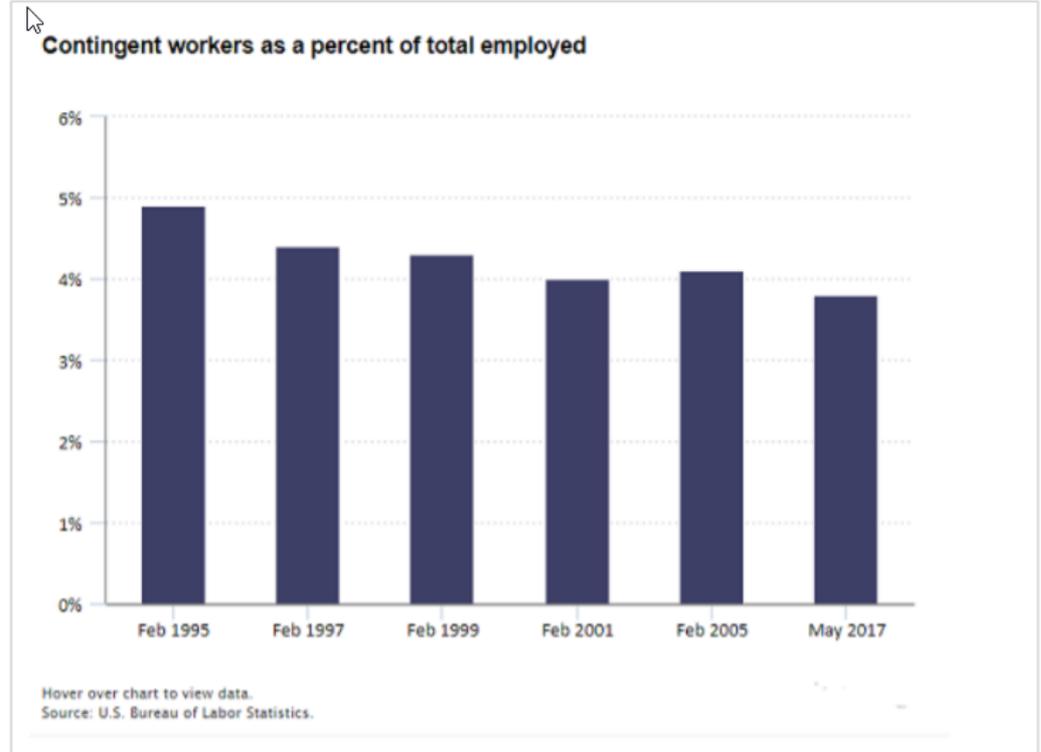


# How Big is the Gig Economy Today?

- CNBC – Census tracks “non-employer firms” – in the last 20 years this sector increased 27% more than payroll employees
- Inc. (Jan ‘17) – IRS 2014 records → 109,700 (.7% of workers)
  - Excludes those reporting less than \$20,000/year
  - About 1/3 make this their primary source of income
- McKinsey Study (Oct ‘16) – U.S. independent workers
  - Estimated to be 27% of workforce – 54 to 69 million
  - Government data – 22% of workforce

# BLS Contingent Worker Supplement – May 2017

- 60,000 households surveyed
- Only asked about “main” job
- Surprisingly, data suggests a flat or even slight decline in percentage of contingent workforce
- Less access to health and retirement benefits; earn less





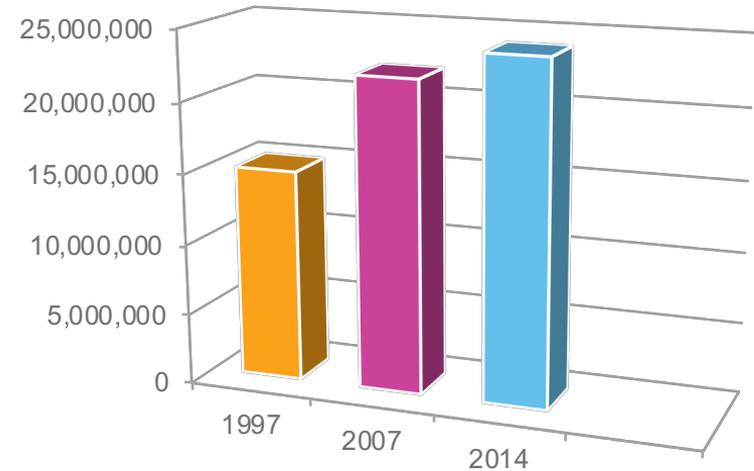
# GAO Report on BLS Contingent Worker Supplement

- BLS estimated a decline in contingent workers from 4.1 percent of the total working population in 2005 to 3.8 percent in 2017, a decline in independent contractors from 7.4 percent in 2005 to 6.9 percent in 2017, and a decline in on-call workers from 1.8 percent in 2005 to 1.7 percent in 2017.
- Also in 2017, after manually adjusting the data to improve accuracy by removing false positive responses, BLS estimated 1 percent of the total working population worked as electronically-mediated employment. Since these populations overlap, the net change in total nontraditional workers is unclear
- CWS measures only respondents' main jobs
- CWS only asks respondents about their work in the past week

# Brookings (Oct 2016)

- Non-Employer Firms
  - 2007 17.0% of all firms;
  - 2014 16.5% of all firms
- Despite the rise in nonemployee contractors, payroll employment in “rides and rooms” increased
- Uber and Airbnb meeting unmet consumer demand

# Non-Employer Firms





# Worker Classification in the Gig Economy

- Most on-demand models consider workers to be independent contractors
- Uber
  - CA court case held Barbara Ann Berwick was an employee – under appeal
  - MA Court case as well
  - NY and CA determined a few Uber drivers eligible for UI benefits (2016)
  - \$100 million class action settlement was struck down by federal judge
- Regulators are beginning to examine how to treat these workers

# Federal Legislation – Senate (no Bill# yet)

- Establish pilot program for providing portable benefits
- Cites 2015 Comptroller General study
  - Size of contingent workforce in 2010 = 40% of employed workers
- Eligible organization means any state/local government or nonprofit organization
- Eligible worker – any worker who is not a traditional worker
- Awards \$5 million grants to eligible organization to:
  - Evaluate or improve existing model to provide portable benefits;
- Awards \$15 million grants to eligible organization to:
  - Design, implement and evaluate new models for providing portable benefits



## Federal Legislation – Senate (no Bill# yet)

- Administered by the Secretary of Labor
- Pilot program grants awarded for FY 2018
- Secretary shall consider potential for large scale deployment at the national level
- Report to Congress no later than September 30, 2020
- UWC would welcome partnership with DOL to assist in the evaluation of the pilot projects



# State Legislation - Florida

- s. 627.748 – The focus of the bill is to provide assurance of safety for those using ride sharing services
- “transportation network companies” (TNC) – entities that use a digital network to connect rider and driver for prearranged rides
- Requires TNCs to carry a certain amount of insurance
- Maintains independent contractor classification as long as:
  - TNC cannot prescribe hours driver logged into digital network;
  - TNC must permit drivers to work for other TNCs;
  - TNC must allow drivers to engage in any other business they want; and
  - TNC and driver must affirm in writing that driver is an independent contractor



# State Legislation - Florida

- Additional new requirements for TNCs:
  - Zero tolerance drug and/or alcohol policy
  - Adopt non-discrimination policy with respect to riders
  - Conduct national criminal background and driving history check
  - Riders must get electronic receipts within a reasonable period
  - The fare, or the method of calculation must be provided before the ride



# State Legislation – Washington HB 2109

- “An act relating to portable, prorated, universal benefits for workers of the gig economy”
- Defines:
  - Contracting Agent – an entity that facilitates the provision of services by workers to consumers .... Where the provision of services by workers is taxed as a 1099 worker
  - Department – Department of Labor and Industry
  - Qualified Benefit Provider – A nonprofit benefit provider that is eligible to provide benefits to workers of contracting agents
  - Worker – a person who provides services to consumer through a contracting agent



# State Legislation – Washington HB 2109

- Requirements:
  - Contracting Agents with at least 50 workers in a 12-month period shall contribute funds to qualified benefit providers
  - The contribution amount must be the lesser of 25% of the customer fee or \$6/hour
  - The contribution amount may be added to the invoice to the customer
  - Contributions must be made to the qualified benefit provider on a no less than monthly basis
- Introduced in the House on February 15, 2017
- Referred to Labor & Workplace Standards



# State Legislation – Washington HB 2109

- Benefits - Qualified benefit providers shall provide:
  - Industrial insurance; and
  - Allow workers to choose from:
    - Health insurance
    - Paid time off
    - Retirement benefits; and
    - Other benefits determined by the qualified benefit provider
- Administration – Up to 5% of contribution funds

# State Legislation – NY – Marketplace Platform Contractors

- Definitions:
  - Marketplace Platform – An entity that operates a digital website that facilitates the provision of services by marketplace contractors to individuals seeking such services
  - Marketplace Contractor – Any person who enters into an agreement with a marketplace platform to use the platform to provide services
  - Participant – Any marketplace contractor who is eligible to receive contractor benefits under a contractor benefit plan
  - Plan Agreement – A written agreement between a marketplace platform and a plan administrator that provides the establishment and administration of a marketplace contractor benefit plan.
  - Marketplace Contractor Benefit Plan – Any plan, fund, or program that is funded by contributions from a marketplace platform and is established and maintained for the purpose of providing benefits

# State Legislation – NY – Marketplace Platform Contractors

- Definitions:
  - Contractor Benefits – One or more of the following:
    - Medical care;
    - Benefits in the event of sickness, accident, or disability;
    - Liability insurance;
    - Retirement benefits;
    - Life insurance;
    - Vision care;
    - Dental care; or
    - Compensation during a period of leave for up to 12 weeks for birth, care, or serious health condition
  - Department – NY State Department of Labor



# State Legislation – NY – Marketplace Platform Contractors

- A marketplace platform may elect to contribute to a benefit plan by providing written notice to the NY DOL and by paying a fee of \$500 to NY DOL.
- Those so electing shall contribute at least 2.5% of the service fee for each transaction
- Initial contributions shall be made no later than 45 days following written notice

# State Legislation – NY – Marketplace Platform Contractors

- Requirements for a contractor benefit plan:
  - Written agreement
  - Maintain an account for each contractor;
  - Minimum threshold to receive benefits is \$500
  - Early withdrawal penalties
- Independent Contractor Classification – treated as IC if:
  - Written contract provides that IC is not an employee
  - The contractor shall be permitted to work any hours s/he chooses
  - The contractor is free to engage in any other occupation, including other platforms
  - The contractor provides substantially all equipment, tools, etc
  - The contractor shall be responsible for tax on the income



# Comparisons and Observations

## WA Legislation

- Cost – the lesser of 25% of the customer fee or \$6/hour
- Administration – 5% of contribution funds
- Department of Labor & Industries (DLI)
- Benefit Provider – must be nonprofit
- Mandatory participation
- DLI responsible for compliance, monitoring, administering workers comp
- Benefits provided to workers may not be considered on employment status

## NY Legislation

- Cost - 2.5% of the service fee
- Administration - \$500 fee to NY DOL
- Department of Labor
- Benefit Provider – Plan administrator
- Voluntary participation on the part of the marketplace platform
- Participants' benefits portable to other marketplace platforms
- Marketplace contractors treated as independent contractor under the law



# Comparisons and Observations

## WA Legislation

- Benefits Provided:
  - Worker's Comp required; and
  - Some or all of health insurance, paid time off, retirement benefits, and other benefits.
- Vague description of benefit types
- No description of the amount
- Unclear or missing estimates for benefit costs, administration costs, participation rates, fee revenue, administration revenue

## NY Legislation

- Benefits Provided:
  - One or more of medical care, disability, liability insurance, retirement, life insurance, vision care, dental care, paid parental leave
- Vague description of benefit types
- No description of the amount
- Unclear or missing estimates for benefit costs, administration costs, participation rates, fee revenue, administration revenue



## Court Decisions – Dynamex Operations West (CA)

- Dynamex is a nationwide same-day courier and delivery service that offers on-demand, same-day pickup and delivery services to businesses and the public.
- Its business model uses independent contractors
- April 30, 2018, the California Supreme Court issued a landmark decision
- established a three-factor “ABC” test to answer whether a worker is a legal “employee” in cases brought under California wage laws.



# Court Decisions – Dynamex Operations West (CA)

- To prove a worker isn't actually a formal employee, companies have to show the worker has:
  - freedom from control over how to perform the services provided;
  - that the services are outside the usual course of business's or workplace; and
  - that the worker is engaged in an independently established role.
- Dynamex prompted new litigation against companies, who've generally argued that the test shouldn't be retroactive and should be applied narrowly.



## Court Decisions – Jan-Pro (CA)

- May 2, 2019 ruling by the US Ninth Circuit Court
- The Dynamex “ABC” legal standard must be applied retroactively
  - 4 years before the Dynamex decision
- Jan-Pro is a nationwide franchised commercial cleaning business
- Presents a challenge to gig economy companies trying to prove the ‘B’ part of the new test—that services provided by a contractor are outside the business’s normal variety.
- held that the “ABC” test applies to both a franchisee and the parent franchisor when deciding whether a group of workers are formal employees



# One More Legislative Prop – California AB 5

- Would codify Dynamex decision and ABC test
- Must treat as employee if they do a service that's core to a business
- guarantees a minimum wage and overtime
- Companies required to:
  - Pay Social Security and Medicare
  - Comply with unemployment and disability insurance, workers' compensation, sick leave and family leave
- Large On-Demand companies currently seeking a compromise with large unions in California



# One More Legislative Prop – California AB 5

- Uber, Lyft, DoorDash, Postmates and others propose an alternative proposal that would:
  - Guarantee minimum earnings
  - Provide portable benefits
  - Continue to treat as independent contractors

# Suggestions and Recommendations

- Involve all components of the process in evaluations of pilot projects – federal government, state government, worker and employer;
- Consider using private sector to implement new portable benefit solutions – workers compensation model





## Resources:

- GAO Report – *Contingent Workforce: Size, Characteristics, Earnings, and Benefits* - <http://www.gao.gov/assets/670/669766.pdf>
- FL: S. 627.748 - <https://www.flsenate.gov/Session/Bill/2016/1118/Amendment/390508/HTML>
- WA: HB 2109 - <http://lawfilesextra.leg.wa.gov/biennium/2017-18/Pdf/Bills/House%20Bills/2109.pdf>
- Dynamex Decision - <http://www.courts.ca.gov/opinions/archive/S222732.PDF>
- 2019 GAO Report - <https://www.gao.gov/assets/700/696643.pdf>
- 2017 BLS Contingent Worker Survey - <https://www.bls.gov/news.release/pdf/conemp.pdf>