Labor & Employment Law/Immigration Law

Classifying Workers in the "Gig" Economy

The transformative "gig" economy—a subsector of the economy primarily associated with work obtained via internet applications—is modifying and challenging the traditional employer-employee relationship that exists under New York jurisprudence. Using technological advances, specifically algorithmic management, the gig economy most often provides work engagements, often with limited time frames, via electronic applications.

For purposes of employment classification, most businesses involved in the gig economy have utilized the independent contractor classification for workers who accept tasks. The most commonly known gig economy work is transportation-based via apps such as Uber and Lyft, but the range of personal services offered through the internet is growing exponentially. This new platform impacts how businesses interact with workers and raises a profound, yet simple, question that impacts both business and workers: is an app-based worker (also known as a dependent worker) an employee or independent contractor under New York State law.

The expansion of the gig economy—now roughly estimated at 2.4 million workers in the United States[1] as of 2018—has (and will continue to) impact the field of employment law. This is evident from the legislative efforts of states, including California, Massachusetts, and New York, to address the booming growth of this sector in the United States' economy, including legislation introduced in the New York State legislature in 2019 that will most likely be pursued in 2020's legislative session.

Understanding the history of the employer-employment classification system in New York jurisprudence and the impact the gig economy is having on that jurisprudence precedes and informs the on-going discussion in the New York State legislature regarding the future of gig-dependent worker classification.

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Definition Employees—A Complex Analysis

Even before the rise of the gig economy, New York courts have long struggled to apply complex common-law tests to determine the employment status of workers. These tests focus on an analysis of the level of control exerted by an employer: the higher the level of control, the more likely a finding of an employer-employee relationship. In New York, determining employment status can vary depending on the nature of the claims asserted as the application of the federal Fair Labor Standard Act, and its accompanying "economic realities" test,[2] differs from the application of the New York State Labor Law and its common-law "control" test.[3] The application of these separate tests can lead to varying results involving worker classification as employees or independent contractors.

For businesses, the stakes for avoiding the determination of an employment relationship are high. Employment status affords an employee numerous rights, including protection under wage and hour laws (minimum wage and overtime), federal and state anti-employment discrimination protections, and the right to join a union. Similarly, employers are obligated to pay employment-related taxes (unemployment and payroll taxes) and insurance premiums (workers' compensation, disability, and paid family leave) on behalf of employees. Competitors who classify workers as independent contractors avoid the aforementioned expenses.

In New York, determining employment-related status becomes even more complex as administrative New York agencies, including the Department of Labor Unemployment Insurance Board, the Department of Taxation and Finance, and the Workers' Compensation Board all use varying tests to determine employment-related status for purposes of enforcing their statutory mandates.[4]

The misclassification of workers as independent contractors has become a high-stakes game pitting New York State against businesses that gain a competitive advantage when they misclassify workers. During the period of 2002-2005, misclassification cost the State of New York revenue on over $4.3 billion in misclassified wages.[5]

Construction Industry Misclassification—New York Passes a New Test

Faced with rampant independent misclassification in the construction industry, in 2010 New York State changed the paradigm for employment classification in the construction industry. With the passage of the Construction Industry Fair Play Act,[6] New York created a rebuttable presumption that all workers in the construction industry are employees.[7] New York took these steps to protect workers and businesses in the construction industry by ensuring worker safety and wage-and-hour protections apply to all construction workers, and that all construction employers compete on a level economic playing field.[8]

The Construction Industry Fair Play Act, and its presumption of employment status, set a precedent for worker classification that is now being discussed in the context of gig workers throughout the country. The same concerns involving loss of worker rights and revenues to local and state governments caused by misclassification in the construction industry are now being discussed in the context of gig workers, especially those obtaining work through internet and app-based companies.

California Acts

In 2018, California's Supreme Court ruled that all workers are presumptively employees in *Dynamex Operations West, Inc. v. Superior Court of Los Angeles*.[9] The *Dynamex* decision set the stage for the passage of California Assembly Bill 5 ("AB5") which codified that decision. Signed into law in September 2019, with an effective date of January 1, 2020, AB5 adopted the stringent worker classification model adopted in the *Dynamex* decision. California's AB5 presumes that a "worker is

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considered an employee" unless the business can meet all three prongs of the rebuttal test, to wit:

- The person is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact;
- The person performs work that is outside the usual course of the hiring entity's business; and,
- The person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.[10]

Though some have questioned the impact AB5 will have on employee classification,[11] a recent study has found that sixty-four percent of California's current independent contractors would be deemed employees when the law takes effect.[12] Tech businesses have countered AB5 with a proposed statewide ballot referendum in 2020 that would roll back the reach of AB5[13]—an effort that demonstrates the stakes involved in employee classification considerations.

New York's Dependent Worker Act of 2019

New York's first legislative effort to address worker classification in the context of the gig economy was introduced in the New York State legislature in 2019 as the Dependent Worker Act ("2019 DWA").[14]

The 2019 DWA was not enacted into law in the 2019 legislative session but by all indications—including recent legislative hearings held by the Labor Committee of the New York State Senate[15]—the 2019 DWA will be reintroduced in the 2020 legislative session. The question for New York practitioners is what form the 2020 DWA will take as the legislature seeks to modify the 2019 DWA, especially in light of the passing of the California's AB5. During the most recent Senate hearings held on October 16, 2019, numerous public speakers discussed their desire for a clear-cut test similar to the Construction Industry's Fair Play Act that would result in the rebuttable presumption that all gig economy workers are employees in New York.

The 2019 DWA creates a new sub-definition of an employee called a "dependent worker." A dependent worker would be "an individual who provides personal services to a consumer of such personal services through a private sector third-party that: establishes the gross amounts earned by the individual; establishes the amounts charged to the consumer; collects payment from the consumer; pays the individual; or any combination of the preceding."[16] The 2019 DWA would explicitly extend some, but not all, protections associated with employment to dependent workers, including frequency of payment, mandated record-keeping, anti-gratuity theft, and the right to organize.[17] Noticeably absent are employee minimum wage, overtime and other wage-and-hour protections afforded to traditional employees under the New York State labor law.

Interestingly, the 2019 DWA delegates further discussion of labor rights for dependent workers to the commissioner of labor who "shall hold public meetings with representatives of businesses, employees and dependent workers to examine various state labor and related laws that regulate employment rights benefits to identify which provisions could be extended to provide dependent workers with the same, or similar, rights and benefits as employees...."[18] The rights and benefits that must be considered at such public hearings would include whether additional employee protections should be extended to dependent workers, including unemployment benefits, workers' compensation benefits, disability benefits, paid family leave benefits, WARN Act protections, health care continuation protections, anti-discrimination protections under the human rights law (Article 15 of the Human Rights Law), the Labor Law, and the Correction Law. As noted above, the 2019 DWA would not mandate the application of the state's minimum wage provisions (Article 19 of the Labor Law) or the full wage payment provisions (Article 6 of the Labor Law) to dependent workers. Instead, the commissioner of labor would be tasked with examining whether these basic employment protections should be afforded to dependent workers. This public hearing process, unlike the wage board process utilized in Article 19 of the Labor Law to address minimum wage thresholds,[19] does not mandate any further regulatory or legislative action, thereby effectively "kicking the can" for future expansions of employment rights to dependent workers to future legislative action.

Conclusion

The world of employment law is changing at a breakneck pace. As this article is being published, the legislature will likely be modifying the 2019 DWA to determine how, and if, New York will extend employment and labor law rights to the gig economy's dependent workforce. This legislation can have a profound impact on the new economy developing around app-based work opportunities in the transportation, food delivery, and other personal services sectors of the economy. But like California's AB5, the DWA could extensively impact workers outside the gig economy who have been classified as independent contractors. Practitioners should carefully watch this developing legislation to ensure clients are appropriately classifying their workers after the likely enactment of the DWA in 2020.

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1. Ileen A. DeVault, Maria Figueroa, Fred B. Kotler, Michael Maffie, and John Wu, *On-Demand Platform Workers in New York State: The Challenges for Public Policy*, Cornell University ILR Worker Institute, Research Studies and Reports, 2019, at 13, available at https://bit.ly/2Sas5r2.
2. *See Zheng v. Liberty Apparel Co. Inc.*, 355 F.3d 61, 72 (2d Cir. 2003).
3. *See Carlson v. Am. Int'l Grp., Inc.*, 30 N.Y.3d 288, 301 (2017) (citations omitted).
4. Ileen A. DeVault, Maria Figueroa, Fred B. Kotler, Michael Maffie, and John Wu, *On-Demand Platform Workers in New York State: The Challenges for Public Policy*, Cornell University ILR Worker Institute, Research Studies and Reports, 2019, at 36-39 (citing varying agency standards for employment classification determinations), available at https://bit.ly/2Z3E6zY.
5. Linda H. Donahue, James Ryan Lamare and Fred B. Kotler, *The Cost of Worker Misclassification in New York State*, Cornell University ILR School, Research Studies and Reports, 2007, at 2, available at https://bit.ly/2tskVnI.
6. Labor Law §§ 861-861-G.
7. Labor Law § 861-C.
8. Labor Law § 861-A (citing policy considerations).
9. 4 Cal.5th 903 (2018).
10. Cal. Labor Code, § 2750.3 (2019) (bullets added).
11. Diane Mulcahy, California's New Gig Economy Law is All Bark No Bite, Forbes (Sept. 20, 2019), available at https://bit.ly/35GmH2T.
12. Sarah Thomason, Ken Jacobs and Sharon Jan, Estimating the Coverage of California's New AB 5 Law, UC Berkeley Labor Center, Nov. 12, 2019, at 2, available at https://bit.ly/38TZKet.
13. Protect App-Based Drivers & Services Coalition, available at https://bit.ly/35zzRyF.
14. S.6538, 2019-2020 Leg. (N.Y. 2019); Assem. 8343, 2019 Leg. (N.Y. 2019).
15. Examination of Gig Economy, Public Hearing on S. 6538 Before the S. Comm. On Internet and Technology, 2019-2020 Leg., transcripts and video available at https://bit.ly/36Qc65G.
16. S.6538, 2019-2020 Leg. (N.Y. 2019);Assem.8343 (2019 Leg. (N.Y. 2019).
17. Under the 2019 DWA, dependent workers would receive the protection of the following provisions of New York State Labor Law: 191, 192, 195, 196, 196-1, 196-d, 197, 198-a, 211, 213, 215, 218, 219 and 219-c.
18. S.6538, at 3 (N.Y. 2019).
19. Labor Law §§ 653-659.