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BY VINCE C. CAMACHO



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Camacho

A "gig" is a job that lasts a certain period or lasts long as the company has a specific need. Most of us associate a gig with musicians. Many of us sought out a "job" that provides income, benefits and in most cases a secured future. Today, more and more workers are looking for gigs rather than to work full time. Gig workers engage in freelancing, contract work, consulting, temporary assignments or on-call work each week for income, opportunity and satisfaction.

The "gig economy" can help improve work-life balance. More and more workers are determined to control where, when and how they work. Today there are two groups of "giggers." The first group of workers generally provide personal services like driving, caregiving, personal training and handyman services. Companies advertise for these services and link the workers with the consumers. The second group of workers generally provide goods and services, for instance, operators of vacation rentals. The companies advertise for the products and services and link the consumers with the sellers.

The gig economy benefits all. Giggers benefit by maintaining control of their work environment. Consumers benefit from the accessibility of services that fit into their busy lifestyles. Employers benefit because they have a more flexible workforce. Companies can save resources in terms of benefits, office space and training.

Are there any legal issues employers should consider before diving further into the gig economy? The reality is that the legal status and right of giggers have become the subject of litigation. The crucial question is whether the gig workers have the status of employees or independent contractors. The issue of employee classification is critical because the classification determines the rights and benefits of workers under the United States and Guam employment law. Workers deemed employees trigger rights such as minimum wage, protection from discrimination, workers' compensation, etc.

Current law classifies workers as an employee or an independent contractor by applying some multi-factored tests that depend on the facts of the relationship. The "control" test focuses on a principal's right to control the worker. Courts focus on the following factors to determine the status of a worker, whether the employer may direct how the work is performed, determine the hours involved and provide the employee with direction. Alternatively, factors that lean more towards the independent contractor classification include, high-skilled work, workers providing their own equipment, workers setting their own schedules and workers getting paid per project, not per hour. The "economic realities" test determines whether the worker is involved in entrepreneurial activity or whether the worker is financially dependent upon the employer. The label put on the relationship is a factor in the final classification, but it is not dispositive.

So what are companies to do? Until such time that the laws provide for specific factors, companies should take a common-sense approach, improve independent contractor agreements, revisit how contractors are paid and review benefit plans.

Companies should identify current contractors and determine if they are appropriately classified. For smaller companies, this process can be relatively easy, but for those companies with multiple divisions and departments, it is crucial to identify who these contractors are and then ask why these workers are treated as contractors and not employees. Next, assess the work the contractors are performing and review how the work relates to the business. If need be, reclassify workers accordingly and communicate the reasons and benefits effectively.

Companies should review their current contracts and update them as needed. Contracts should include at a minimum, the parties' expectations of a contractor (not employment) relationship, confirm the specialized skills offered by the contractor and that the contractor will bear their own expenses and make clear the limited control over the contractor if any at all. The contractor should also acknowledge that the contractor is not eligible for any benefit plans offered by the company.

Companies should also pay contractors on a lump sum project-based basis from which the contractors pay their own expenses. This pay policy reduces incidents of control and increases economic independence. Companies should also eliminate or loosen restrictions on the contractors having their own employees or subcontractors. For example, some companies put restrictions on how a contractor can hire or manage the contractor's employees or subcontractors. Having these restrictions is indicative of "control," which could be evidence of an employer-employee relationship instead of an independent contractor arrangement. Alternatively, companies may only work with contractors that are incorporated and have multiple clients. If a contractor is incorporated and has multiple clients, these facts are indicative of a contractor being independent from the employer — so, a policy that a company should only hire contractors that are incorporated or have multiple clients can indicate an independent contractor arrangement rather than an employer-employee relationship.

Finally, companies should review their benefit plans to ensure that the plans clearly define the workers that are entitled to benefits and defer to the company's classification of a worker for benefits purposes.

As the gig economy continues to grow, companies should take the time to mitigate risks by correctly classifying workers and keeping up to date with the Department of Labor's guidance on classifying workers. **mbj**

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