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Employment Law and the Gig Economy: Worker Classification, Recent Developments, and Practical Considerations

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Employment Law and the Gig Economy: Worker Classification, Recent Developments and Practical Considerations

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March 13, 2019

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Questions We Will Be Answering Today

- What is a “gig” business?
- Who is affected by the “Gig Economy?”
- What is the latest in employment law affecting gig businesses?
  - Courts and Administrative Agencies
  - Draft and Pending Legislation
- What are the best practices and practical steps for gig businesses?

What is a Gig Business?

- On-demand platforms and tech platforms
- Contingent worker businesses
- Connect workers/professionals with third parties
  - B2C
  - B2B

Why Adopt a Gig Model?

- **Dramatic decrease in costs**
  - No payroll taxes
  - No workers' compensation insurance
  - No unemployment insurance contributions
  - No mandatory leaves, paid leaves, or other employment benefits

- **Fewer restrictions on growth**
  - No human resources costs
  - No employment law coverage
  - No WARN Act

What are the Significant Risks in Adopting a Gig Model?

- **Worker classification lawsuits**
  - FLSA and state wage laws
  - Class and collective actions
- **Administrative agency audits and assessments**
  - Unemployment insurance
  - Workers' compensation insurance
  - The National Labor Relations Board (NLRB)
- **Private workers' compensation insurance audits**
  - Employers are being audited by their Workers' Compensation Insurance providers

Developments in Employment Law Affecting Gig Businesses

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The Legal Rules are Vague and General

- There is **no one single legal test** across the nation or **even within a single state**
- Each legal test consists of a series of factors to consider
  - Typically, no one factor has been **dispositive**
  - The factors are **necessarily vague and general** - used for all kinds of jobs
  - The factors were **developed many years ago** for a very different U.S. workforce

The California Common Law Test Since 1989

- A multi-factor common law test set forth by the California Supreme Court in *S.G. Borello & Sons, Inc. v. Department of Industrial Relations*
- The key factor in *Borello* is **control, or the right to control,** the **manner and means** in which the work is performed
- A long list of **secondary factors** can also be considered, but none are **dispositive**

Borello's Key Factor: Control

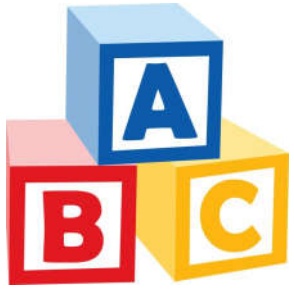
- Company determines "what" – contractor determines "how"
- Company can identify tasks to be completed, dictate specific results, or set general parameters
- ***So long as*** contractor determines how to perform the tasks, achieve the result or deliver within the desired specs

The *Borello* Secondary Factors

- Is work performed a part of the hiring entity's **regular business**?
- Does worker maintain **independent business**?
- Who provide **tools and equipment**?
- **Level of skill** required to perform work
- **Level of supervision** required
- Does worker assume **financial risk**?
- Expected **duration** of relationship
- Method of **payment**
- Express **intent** of parties
- **Right to terminate** relationship

The New *Dynamex* Standard: The ABC Test

- Default classification is still employee
- To classify a worker as a contractor, the hiring entity must prove **each** of the following three factors:



A: Worker is **free of control** from Company, both **under contract** and **in fact**; **AND**

B: Worker performs work **outside the usual course of the hiring entity's business**; **AND**

C: Worker is **customarily engaged in an independently established trade**, occupation, or business of the same nature as the work performed

How "New" is the ABC Test?

- **Other States Use It**
  - **Wage and Hour Law:** Massachusetts; New Jersey; Vermont; **California**
  - **Unemployment Insurance:** Massachusetts; New Hampshire; Connecticut; Illinois; New Jersey; New Mexico; Virginia; Delaware; Maine; Vermont; Utah
  - *And **many more** states employ the ABC test in other contexts such as state tax statutes, workers' compensation, and in wage orders governing different industries*
- **Similarities to California's Prior Test**
  - Prong A, freedom from control, is still crucial – required element before and after *Dynamex*
  - Prongs B and C used to be optional secondary factors, but are now elements that must be proven

Summary of Changes

Borello Factors		*Dynamex* Factors	
REQUIRED	No Control or Right to Control Manner and Means of Performance	REQUIRED	No Control or Direction, Both Under the Contract and in Fact
SECONDARY FACTORS	Work is Not Part of Regular Business of Hiring Entity		Work is Outside Ordinary Course of Hiring Entity's Business
	Worker Has Distinct Occupation or Business		
	Worker Supplies Own Tools		
	Level of Skill		
	Level of Supervision		
	Worker's Profit or Loss Depends on Skill		Worker is Customarily Engaged in Independently Established Trade, Occupation, or Business
	Length of Relationship		
	Payment Method		
	Parties' Intent		
	Right to Terminate		

Worker Classification Lawsuits (CA): *Lawson v. Grubhub*

- The nation's first gig economy misclassification trial
- Applying *Borello*, a federal court in Northern CA ruled that Grubhub drivers were properly classified as contractors pre-*Dynamex*. *Lawson v. Grubhub*, 302 F.Supp.3d 1071 (N.D. Cal. 2018).
  - Largely focused on control:
    - No control over how the plaintiff made deliveries or the condition of the mode of transportation used for making deliveries
    - No uniforms
    - No orientation or training
    - Controlled their own schedules
    - Either party could terminate on 14 days' prior notice
- After *Dynamex*, the plaintiff appealed to the Ninth Circuit.
  - Issues to be addressed (*as explained on next slide*):
    - What is the scope of *Dynamex*?
      - Should *Dynamex* apply to only claims brought under CA wage orders?
    - Does *Dynamex* apply retroactively?

Worker Classification Lawsuits (CA): *Lawson v. Grubhub*

- In their appellate briefs, the parties are addressing:
  - **What is the scope of *Dynamex*?**
    - A California Ct. of Appeal held that *Dynamex* only applies to claims arising out of California wage orders. *Garcia v. Border Transp. Grp. LLC*, 28 Cal.App.5th 558 (Ct. App. 2018).
      - "**There is no reason to apply the ABC test categorically to every working relationship**, particularly when *Borello* appears to remain the standard for worker's compensation."
    - A superior court ruled that *Dynamex* applies to PAGA claims and some California Labor Code claims. *Johnson v. VCG-IS, LLC*, 2018 WL 3953771 (Cal.Super. 2018).
  - **Retroactive application?**
    - The California Supreme Court declined an opportunity to clarify whether *Dynamex* will apply retroactively.
    - At least one court has applied *Dynamex* retroactively. *Johnson v. VCG-IS, LLC*, 2018 WL 3953771 (Cal.Super. 2018).

Tip #1

Carefully craft your marketing materials, website, and platform agreements with the second prong of *Dynamex* in mind.

Administrative Rulings (CA)

- *Borello* remains the law for **unemployment insurance** claims.
  - We regularly receive positive results in gig matters.
  - Thoughtful and carefully-drafted decisions.
- The Ninth Circuit held that the California Labor Commissioner (**DLSE**) could apply *Borello* post-*Dynamex.*
  - *Cal. Trucking Ass'n. v. Su*, 903 F.3d 953 (9th Cir. 2018).
- *Borello* has been used in **workers' compensation** appeals.
  - *Dynamex* may not impact workers' compensation analysis (*Perkins v. Knox*, Nov. 2018)
- It's unclear whether the California Employment Development Department (**EDD**) will switch from applying *Borello* to *Dynamex* when conducting audits.
  - Change of leadership within the EDD
  - *Borello* is still cited as the standard on EDD documents and audit guidelines on its website
- If you avoid the plaintiff's bar, you can probably survive.

Tip #2

Have a “go-to” internal witness for all of your audits.

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Administrative Rulings (CA)

- **There is a significant advantage to having a professional platform:**
  - *In re Hawthorne Community Hospital, Inc.*, No. P-T-73 (1967)
    - Hospital referred to the doctors as "attending staff" and required the doctors to adhere to strict hospitals rules and regulations pertaining to the admission and care of patients and in regard to the maintenance of patient records and files.
    - Hospital provided the doctors with nursing, technical, clerical and other paramedical personnel whose services were necessary in connection with patient care.
    - Hospital also provided equipment, instruments, drugs and medical and surgical supplies required for the patients' treatment.
    - Hospital assigned to the doctors their patients and the doctors' contracts stipulated the hours of work for the hospital.
    - Held that doctors were independent contractors largely because they were legally qualified to practice medicine.
  - *In re James C. Armstrong*, C.P.A., No. P-T-404 (1961)
    - Appeal Board held that Walter Armstrong, a licensed accountant, was a contractor despite his nascent client list, fixed salary, placement at principal's worksite, and the substantial time he devoted to principal's work.
    - Appeal Board based its holding of an independent contractor relationship primarily on the fact that Mr. Armstrong had "many years of experience in the practice of his profession" and was "independently licensed."

Worker Classification Lawsuits (Non-CA)

- ***Razak v. Uber***, 2018 WL 1744467 (E.D. Penn. April 11, 2018)
  - Pennsylvania federal court ruled that UberBLACK drivers were correctly classified as contractors under FLSA and state law.
  - Applied the Third Circuit's test, which focused on degree of control:
    - Drivers are permitted to work for competing companies.
    - Drivers could use subcontractors.
    - Drivers decided when to work; controlled working hours.
    - Drivers must purchase or lease their own expensive vehicles.
- ***Saleem v. Corporate Transportation Group, Ltd***., 52 F.Supp.3d 526 (S.D.N.Y. 2014)
  - NY federal court held that "black car" drivers were independent contractors under FLSA and state law.
  - Focused on drivers' significant degree of independence
    - Controlled their own schedules
    - Exercised significant degree of independent initiative to obtain transportation jobs.
  - Drivers were free to, and frequently did, work for other car services and provide transportation to private customers.

Administrative Rulings (Non-CA)

- ***Vega v. Postmates, Inc.*, 2018 WL 3058287 (N.Y.S.3d June 21, 2018).**
  - New York Appellate court reversed Unemployment Insurance Appeal Board's finding that Postmates couriers were employees.
  - Found insufficient evidence that Postmates controlled the means by which couriers performed their work.
  - Although Postmates determines the fee to be charged and rate courier is paid, tracks deliveries and handles customer complaints, that is **merely "incidental control"** and does not constitute substantial evidence of an employer-employee relationship.
  - Couriers were free to "accept, reject or ignore a delivery."
- ***Matter of Walsh (TaskRabbit Inc.—Commissioner of Labor)*, 2019 N.Y. App. Div. LEXIS 687* (Jan. 31, 2019).**
  - Endorsed *Vega* - overturned Unemployment Insurance Appeal Board's decision that TaskRabbit workers ("taskers") were employees.
  - TaskRabbit exercised **"absolutely no control"** over the manner in which taskers completed the jobs. It only exercised control over the *platform* that taskers used to get jobs.
    - Taskers bid on the jobs posted on the platform and were awarded jobs either by a client selecting the most competitive bid or by being the first tasker to submit a bid on a particular job.
    - Although TaskRabbit required taskers to submit to an identification verification process and criminal background check, it did not review their qualifications, provide them with training, or evaluate their work performance.
    - TaskRabbit provided customer service support to both clients and taskers, but it was directed at helping them use the platform.
    - Both taskers and clients were rated based upon the feedback they received without any input from TaskRabbit.

Tip #3

Create an “exhibit” that you give to each worker setting out positive classification factors.

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Administrative Rulings (Non-CA)

- In practice, we are seeing inconsistent and widely-varying administrative decisions outside California.
- There are tales of administrative law judges (ALJs) falling asleep, checking their phones, online shopping, and ignoring decisions favorable to companies.
- This is a problem, because if you lose at the ALJ level, there is almost a guarantee that you will lose in front of the applicable stated Unemployment Insurance Appeal Board.

Tip #4

Go into the ALJ hearing well-prepared and with briefs.

Now is the time to set out a favorable record and get a win.

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Workers' Compensation

- Employers are being audited by their Workers' Compensation Insurance providers.
  - Retroactively reclassifying gig workers as employees and attempting to increase insurance premium costs,
  - Has materially harmed some promising gig businesses.

Tip #5

We have a secret.
Call us.

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Arbitration Provisions and Class Action Waivers

- On May 21, 2018, the U.S. Supreme Court affirmed the enforceability of class action waivers in employment arbitration agreements. *Epic Systems Corp. v. Lewis*, 138 S.Ct. 1612 (2018).
- Practical Effect: Eliminated class actions.
  - Possible "win" for employers and a way to help counteract the impact of *Dynamex*
    - *E.g. O'Connor v. Uber* (9th Cir. Sept. 2018) – Ninth Circuit found that because Uber drivers had agreed to arbitration, the court did not have rule on the classification issue and granted motion to compel arbitration.
- But also, resulted in hundreds of individual actions. Now, however, they're losing steam…
- California law still holds that PAGA claims cannot be subject to arbitration.
  - Plaintiffs' lawyers new workaround: file a single PAGA claim re violation of California Labor Code through independent contractor misclassification.
    - *E.g. Million Seifu v. Lyft* (Los Angeles Superior Ct., filed August 2018); and
    - *Rimler v. Postmates*, 2018 WL 3329949 (Cal.Super. July 5, 2018) (Trial Pleading) (SF Superior Ct., filed July 2018)

Tip #6

Implement class action waivers.

What are you waiting for?

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Legislation to the Rescue? Federal Law

- "New Economy Works to Guarantee Independence and Growth" (NEW GIG) Act
  - Proposed by Senator John Thune
  - Amends the Internal Revenue Code to establish a test for determining if a service provider should be classified as an independent contractor rather than as an employee for tax purposes
  - If the requirements of the test are met, the provider may not be treated as an employee, the recipient or any payor may not be treated as an employer, and compensation for the service may not be treated as paid or received with respect to employment.
  - The factors of the test include:
    - the relationship between the parties (i.e., the provider incurs expenses; does not work exclusively for a single recipient; performs the service for a particular amount of time, to achieve a specific result, or to complete a specific task; or is a sales person compensated primarily on a commission basis);
    - the place of business or ownership of the equipment (i.e., the provider has a principal place of business, does not work exclusively at the recipient's place of business, and provides tools or supplies); and
    - the services are performed under a written contract that meets certain requirements (i.e., specifies that the provider is not an employee, the recipient will satisfy withholding and reporting requirements, and that the provider is responsible for taxes on the compensation).
  - The bill also: (1) sets forth withholding and reporting requirements for service recipients who meet the requirements of the test, and (2) allows service providers to petition the U.S. Tax Court for a determination of employment status

Legislation to the Rescue? Federal Law

- Portable Benefits for Independent Workers Pilot Program Act.
  - Proposal by Senator Mark Warner and Rep. Suzan DelBene to “test and evaluate innovative portable benefit designs for the growing independent workforce.”
  - Warner-DelBene proposal seeks to provide gig economy workers with access to many of the social insurance protections typically provided to workers through traditional full-time employment.
  - Establishes a $20 million grant fund within the U.S. Department of Labor to incentivize states, localities and nonprofit organizations to experiment with portable benefits models for the independent workforce.
- Protect the Gig Economy Act of 2019
  - Proposed by Rep. Andy Biggs in 2018, was reintroduced in January 2019.
  - Amends Rule 23 of the Federal Rules of Civil Procedure to expand the preliminary requirements for class certification in a class action lawsuit to include a new requirement that the claim does not allege misclassification of employees as independent contractors.

Legislation to the Rescue?
State Law

- Some states have already enacted laws providing that "marketplace contractors" that work for "marketplace platforms" are independent contractors under most conditions, not employees:
  - Tennessee - July, 2018
  - Iowa - April 4, 2018
  - Kentucky - March 21, 2018
  - Utah - March 21, 2018
  - Indiana - March 14, 2018
- Other states are in the process of passing similar laws:
  - Texas – Rule proposed in January 2019 by the Texas Workforce Commission; offers total protection for gig businesses through revised state law classification test
  - Alabama – Pending in State Senate March 2018
  - Georgia – Tabled in State Senate March 2018; no action since
  - Colorado – Proposed in House May 2018; no action since
- **The business-focused states are reaching out to us – not vice versa.**

Legislation to the Rescue?
State Law – California

- A bill has been introduced, AB-5, to codify the *Dynamex* decision and clarify its application.
  - Sponsored by Assemblywoman Gonzalez Fletcher (D-San Diego).
  - Has not yet been heard in committee.
- A competing bill, AB-71, would roll back the *Dynamex* provisions, and clarify that *Borello* is the test for determining employee classification.
  - Sponsored by Assemblywoman Melendez (R-Lake Elsinore).
- Governor Newsom has expressed a desire to reach an administrative solution
  - Discussed a portable benefits-related solution similar to the Warner-DelBene proposal.

What Business are Affected by the Gig Economy?

- Not just gig businesses themselves
- Investors
- Users of gig workers or gig businesses

Investment in the Gig Space

- We are seeing investors of all stripes dipping their toes into the gig economy space.
  - E.g., PE, VC, and banks
- Big fights over misclassification reps and warranties.
  - Sellers are bucking against line-item indemnities for misclassification claims, and pushing for large but finite escrows for 2-3 years.

Tip #7

Hash out the indemnity in the LOI –
it could be a threshold issue.

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Investment in the Gig Space

- **Risk profiling**
  - Varies by professional and non-professional platforms.
  - Better terms for non-skilled platform investments.
- **Revenue recognition and deal valuation**
  - Are you booking the entire fee or just the platform's portion?
  - Savvy investors are wise to this issue.
  - Misclassification risk.

Users of Gig Businesses

- Non-gig businesses are turning increasingly to gig businesses to fill demand
- Allocation of risk is important

Tip #8

For Gig Economy Users:

Think about appropriate indemnities in these agreements.

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Tip #9

For Gig Businesses:

We have another secret. Call us.

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Best Practices & Practical Steps

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Best Practices & Practical Steps

- **Overarching principles:**
  - Company purpose should be a philosophy that permeates everything the Company does
  - Courts and administrative agencies will look everywhere to find evidence of an employment relationship – *know that and be prepared!*
  - Carefully crafted agreements are essential
    - Agreements with gig workers
    - Agreements with third party recipients of services
    - Platform membership terms

Best Practices & Practical Steps

1. **Review and revise your gig worker agreements**
   - "Platform" or "services" agreements
   - Reflect the new legal standards (esp. in CA)
   - Clarify relationship and status – meaning; understanding; consequences
   - Gig worker representations and warranties – i.e., independent business
   - Specify roles and responsibilities - define to be contractor-appropriate!

Best Practices & Practical Steps

1. **Review and revise your gig worker agreements (continued)**
   - Immediately implement arbitration provisions with class action waivers
   - Indemnification clauses
   - Ensure no language indicates an employment relationship – examples:
     - No “work made for hire” language in California agreements
     - Align all services and SOW descriptions

Best Practices & Practical Steps

2. **Review Terms of Service, Privacy Policy, and Other Applicable Agreements**
   - Synthesize with platform agreement
   - Delineate reasons for removal from app/platform
   - Ensure no language conflicting or inconsistent with independent contractor status

Best Practices & Practical Steps

3. Review and Revise External-Facing Materials

- Company Website
  - References to the company, company's purpose and objectives
  - References to the gig workers – they are not "your" workers
  - References to the services, engagement, opportunities, etc.
  - *And more!*
- Company marketing materials
- Communications with gig service providers

Best Practices & Practical Steps

4. Be Vigilant with Internal Communications and Materials

- Train internal team members to appropriately refer to, engage, and work with gig service providers
- Maintain consistent “labels” for service providers, company, third party service recipients, etc.

TIP: ***Create an “exhibit” that you can give to each worker (both internal employees and the gig workers) setting out the positive classification factors.***

Best Practices & Practical Steps

5. Modify gig worker relationship to mitigate risk

- Modify conditions of service to sway toward contractor classification –examples:
  - Pay on 1099
  - Gig workers set own schedule, use own equipment, work independently
  - Limit platform background checks, evaluation, training, discipline, ability to cut off from platform use
  - Don’t require use of company/platform logos or paraphernalia
  - Provide optional business opportunities or personal expansion
  - And more…

Best Practices & Practical Steps

6. **Consider alternative sources of gig workers**
   - Engage staffing agencies
     - Agreement terms with agencies will be key
     - Responsibilities, classification of workers, indemnification, etc.
     - *Warning – check benefit plans!*
   - Engage LLC's and other entities rather than individuals

Best Practices & Practical Steps

7. Consider Reclassification

- Where appropriate for the business model
- The statute of limitations expires on a daily basis
- *Note – not an immediate cure to all risks!*
- *Beware of the dead-pool!!!*

Best Practices & Practical Steps

8. Be prepared for audits and ALJ hearings.

- Go into an ALJ hearing well-prepared and with briefs.
- You need to engage experienced gig experts or risk an adverse ruling that will haunt you… *forever…*

Thank You

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Your Presenters

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