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THE UBER DRIVE: SELF-DRIVING CARS COULD CREATE MORE UNCERTAINTY WITH GIG ECONOMY’S "INDEPENDENT CONTRACTORS"

Mark Yurich*

The growth of internet enabled devices and web applications has outsourced much of the work that humans use to do every day. A few taps on a smart phone can quickly summon services from a personal driver, a grocery shopper, a masseuse, and even a dog walker. While tech companies set up the infrastructure for these services, real people carry out and complete these tasks. But as these companies advertise that workers can “make great money,” their workers are left without basic employment rights and benefits (e.g., minimum wage) because they are hired as independent contractors. Self-driving cars will allow companies like Uber to move away from human workers and avoid the claims that their workers are employees. As claims against these big ride-hailing companies pushed for a more concrete determination of worker status in the gig economy, the shift to self-driving cars will ease this push and leave uncertainty that will still need to be addressed as more companies adopt this independent contractor model.

To increase efficiency and profit, many of these tech companies like Uber are moving toward an autonomous future where there is no worker and where machines such as self-driving cars complete the services. Despite the rapid implementation of this technology, for the time being, these companies must continue to work and grow with human workers. However, these gig economy workers are bringing their companies to court for higher pay, increased rights, and fairer company policies. In these cases, the workers are seeking reclassification from independent contractors to employees under the Fair Labor Standards Act and other state law in order to receive employment benefits, including minimum wage and overtime protection. In considering whether the worker is an independent contractor or an employee, courts apply a “control test.” Under this balancing test, workers are independent contractors when they supply their own equipment; set their own hours; and receive pay per project, not per hour. Conversely, workers are employees when the employers control how the work is done, determine the hours involved, and provide the worker with direction. Economic realities can also aid the determination by seeing if the worker is “exhibiting entrepreneurial activity,” or is financially dependent on the employer. There is no obvious determination for gig economy workers because the control test factors can be weighed differently according to the specific business model. If the courts do not make a concrete determination for a company’s workers, the Internal Revenue Service or the National Labor Relations Board could also step in and make their own separate, but appealable, decisions.

While some courts have initially ruled that the workers are employees and not independent contractors, these cases settled with prejudice, and thus left no final determination on the status of their workers. Uber has not had this luck in the United Kingdom, where courts not only ruled that Uber workers were employees, but also removed Uber’s license to operate. Additionally, the United Kingdom has also publicly announced plans to “bolster” gig economy workers’ rights. This court determination together with the United Kingdom’s proposed regulations may cause the gig economy in the United Kingdom to shrink because these companies rely on low labor costs to maintain their businesses. As Uber appeals the United Kingdom’s 2017 determination, it has begun subsidizing sickness and accident coverage for its workers in an effort to reobtain approval to legally operate in the United Kingdom. Although there is no firm decision on the employee or independent contractor issue in the United States, companies like Uber are taking similar steps to appease their employees and local governments through settlement agreements, policy changes, and lobbying.

One proposed solution for this employment dilemma includes creating a new hybrid classification for these workers that affords them some benefits (i.e., the right to organize, collective bargaining, and Title VII protections) while excluding others (i.e., minimum wage or overtime). This new classification could also discourage specific companies from going beyond these minimum rights that have otherwise resulted from litigation and settlement proceedings. The work from these companies is inherently risky because the supply and the ultimate pay for work is dependent on the demand of the area; therefore, the work is fundamentally unstable and the pay is variable. There is a precarious line that courts and regulators need to balance regarding the specific rights they would grant these workers, if any. If rights like minimum wage were mandated for the gig economy, there could be opportunities for workers to take advantage of the companies under their current business models. With this risk in mind, companies may then need to change how independent these workers can be. These companies also may not be able to sustain their attractive prices to cover the cost of these new rights to their workers.

Granting gig economy workers employment status would likely cause companies to assert more control over the work and grant less freedom to the workers. For example, Uber could

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mandate stricter ride acceptance rates to avoid drivers having the app open and earning minimum wage while not accepting rides. Uber could also enforce stricter driver ratings to ensure a high quality of service. If a new designation of workers between independent contractors and employees is created, then some rights would be granted to the workers, but companies may then have less incentive to offer more or different benefits. In the ultimate determination, there should also be some consideration to the nature and independence this type of work brings, especially when some workers want to stay independent contractors to maintain their job flexibility.

The threat that gig economy business models will be overturned by requiring companies, like Uber, to give their workers more rights could push these companies to accelerate their move towards a more autonomous future (e.g., self-driving cars), and thus leaving their human workers behind. Although the technology for self-driving cars still needs improvement, its implementation is currently ahead of its regulation, and Congress and state legislatures are working toward the adoption of self-driving cars. Regardless of the motivations behind their adoption, these employment law considerations will not disappear with the introduction of self-driving cars.

Once people can take rides from self-driving cars, it is likely that there will still be human drivers in these companies for many years. Even if the drivers get phased or priced out, other smaller and less newsworthy companies that offer services through other app-based business platforms, like Instacart or Postmates, will still require human workers for some time after self-driving cars are prolific. While there is some hope for huge companies like Uber and Lyft to avoid this worker classification issue, other businesses in the gig economy will develop under this business model because it is attractive. Therefore, this employment issue should be definitively addressed by either courts or legislation because it will not go away when cars can replace human drivers.

ENDNOTES

3 Jeremias Prassl, *Are Uber, Mechanical Turk, and other 'Crowdwork': Platforms Employers?*, U. Oxford FAC. L. (Feb. 27, 2017), https://www.ox.ox.ac.uk/research-and-subject-groups/research-collection-law-and-technology/blog/2017/02/are-uber-mechanical (stating that these platforms link the workers to customers for each “gig,” or job to be performed and the workers are managed through customer rating).
10 O’Connor v. Uber Techs., 82 F. Supp. 3d 1133 (N.D. Cal 2015); *Beyond Misclassification*, supra note 5, at 584-85 (listing past litigation in the “On-Demand Economy”).
12 Uber Future, supra note 6, at 185.
13 Beyond Misclassification, supra note 5, at 581-82 (describing factors that weigh for and against a determination as an independent contractor).
14 Id. at 185-86.
15 Id. at 186.
16 Id.; Dependent Contractors, supra note 11, at 645 (stating that the Northern District of California, which hosted several of these cases, made a weak test with an uncertain outcome).
17 See FedEx Home Delivery v. NLRB, 849 F.3d 1123, 1128 (D.C. Cir. 2017) (reversing the NLRB’s determination that FedEx delivery drivers are employees).

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