

## Trump Transition Brings Good News for “Gig Economy” Employers, But Dramatic Change May Be Unlikely

“It’s the Uber of [INSERT NAME OF SERVICE HERE],” is a phrase no doubt uttered countless times on a daily basis. From car ride services to grocery shopping, to hotel room alternatives, to personal training, to handyman services, and countless others, the so-called “gig economy” model is uniting skilled workers seeking flexibility and quick income with tech-savvy consumers who are increasingly seeking convenience and on-demand service. In many ways, these innovations have transformed the way we work and live. But as innovative tech startups have disrupted both the marketplace and traditional notions of the employer-employee relationship, regulators have struggled to keep up. Meanwhile, there is mounting pressure on these companies to provide fair pay and employment benefits to workers, and the plaintiffs’ bar is taking full advantage of the shades of gray in this area of the law.

The ultimate question plaguing this industry fraught with legal strife is whether people who accept “gigs” on an on-demand basis are employees, independent contractors, or something in-between. Some observers believe that attempting to answer this question forces gig economy companies to fit the square peg of their contingent workforce into the round hole of existing labor and employment laws. Regardless, how these workers are defined will have a huge impact on myriad aspects of these relationships. The applicability of every conceivable aspect of labor and employment law — i.e., wage and hour laws, labor laws, anti-discrimination laws, health care regulations and tax implications, just to name a few — is premised upon the existence of an employer-employee relationship.

Some tech startups, such as Instacart (a grocery shopping service), opted to classify their workers as employees after being sued for misclassification rather than litigate the issue. Others, like Uber and Lyft, have vigorously defended against a barrage of lawsuits and campaigns, arguing that their workers are truly freelancers who are afforded the benefit of flexibility and control over their own hours and working conditions.

For the most part, the Obama administration has avoided the fray, leaving it to the plaintiffs’ bar to press the issue of whether gig economy jobs are properly classified as independent contractors. While administrative agencies under President Obama have spearheaded enforcement efforts on independent contractor misclassification over the past eight years, they have largely refrained from taking a position regarding whether non-traditional, gig economy jobs are misclassified, instead investigating and instituting enforcement actions against more clear-cut misclassification cases in more traditional employment models.

Thus far the president-elect has appointed, or indicated that he will appoint, cabinet members who favor deregulation and have expressed a friendly disposition toward companies that rely on the viability of the gig economy model. For instance, President-elect Trump’s pick for transportation secretary, Elaine Chao, has acknowledged that existing labor laws were not designed with this model in mind and that there is work to be done in order to adapt to the 21st century. She has received public support from the leaders of Uber and Lyft. She has also openly acknowledged those companies and others and expressed a need to craft policies that do not stifle this type of innovation. Likewise, President-elect Trump’s anticipated nominee for labor secretary Andy Puzder is as anti-regulation and pro-entrepreneurship as it gets and has openly lambasted efforts to raise the minimum wage. It can be assumed that if appointed labor secretary, Mr. Puzder will not be initiating any enforcement initiatives intended to force the Ubers and Lyfts of the world to classify their workers as employees.

To some tech entrepreneurs, this comes as a welcome answer to what had been a looming question mark. During the campaign, Candidate Trump did not afford any lip service to Silicon



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Valley. In fact, with the lone exception of Peter Thiel, the majority of Silicon Valley leaders openly opposed his campaign. Far from focusing on the tech industry and its interests, President-elect Trump's campaign was, at least on the surface, devoted to his promise to reinvigorate manufacturing in the United States and bringing back factory jobs to rural areas. His focus on manufacturing, coupled with his open contempt for globalism, free trade, and intent to crack down on immigration even for skilled workers (upon which many Silicon Valley companies are hugely dependent upon) continues to cause great concern for many. For companies that rely on the peer-to-peer service economy, however, President-elect Trump's emerging agenda is aligned more closely to their own interests.

While the Trump administration might set a more business-friendly tone, however, that is not to say gig economy and on-demand businesses should feel free to classify their workers as independent contractors. For one, private class actions and the attorneys who herald them are not about to go anywhere. These class actions remain splashy and potentially lucrative, and not likely to lose momentum. Along the same lines, the workers themselves might band together and insist on fair treatment, regardless of whether they are employees or contractors in the eyes of the law. Some such groups have had success in that regard, such as Instacart workers whose lawsuit prompted the company to change course and deem them to be employees.

Furthermore, whether or not the federal government takes a position on the definition of an independent contractor, state governments remain free to make their own, more restrictive regulations. Many states, **including** those with Republican governors, have opted for more restrictive laws defining independent contractors and engaged in a more aggressive crackdown on gig economy companies than the federal government (even under President Obama). State agencies have a keen interest in seeing as many workers classified as employees as possible, otherwise, they risk depriving the state of income from unemployment insurance contributions, workers' compensation premiums, and income tax withholdings. For that reason, state-level initiatives to target misclassified independent contractors have traditionally enjoyed bipartisan support. This is not likely to change course as the republicans take over the federal government.

While most of the focus on gig companies centers on the wage and hour issues that flow from alleged misclassification, the Equal Employment Opportunity Commission (EEOC or the Commission) has also entered the fray. In its 2017-2021 strategic enforcement plan, the EEOC references gig and other contingent workers, and the Commission has long-stated its concern that some companies misclassify employees to evade obligations under federal employment bias laws. Additionally, the EEOC's focus on discrimination motivated by customer preference finds a new target in this burgeoning market sector, in which customers frequently provide feedback through an "app" that could clearly reveal preferences tied to protected categories. All that said, the Commission could be in for a shake-up under President Trump, especially given the departure of EEOC General Counsel David Lopez, which might curtail or refocus its enforcement agenda.

In short, while so-called gig economy companies can breathe a sigh of relief that they are not likely to face increased scrutiny from the federal government over the next four years, the landscape defining the relationships between contingent workers and the companies that hire them remains uncertain. Until there is clarity in this area, companies are well advised to attempt compliance with existing laws and engage in other initiatives to minimize independent contractor misclassification risks. Failing to do so might result in costly litigation, public relations battles, or low morale and productivity among disenfranchised workers.

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