Easy as ABC?: The Misclassification of Gig Workers as Independent Contractors

by Sean P. McGrath & Karen Munoz

Introduction

With the rise of the gig economy, the line between the classification of employee and independent contractor has never been more important, debated, and contested. The law has struggled with this new type of worker who does not fit neatly into either category.[1] In Illinois and most jurisdictions, the concept of *vicarious liability* is a cornerstone of common law tort liability. It is pretty well-settled that if an employee injures someone during the course and scope of their employment, then the employer can be held liable. Not so, in a gig economy. Companies who have a gig worker model in place are able to cut costs typically associated with a traditional employee model and decrease employment related liability.[2] This article will examine the legal issues surrounding the gig worker economy and its potential impact on the rights of injured plaintiffs.

One of the most important ways in which gig workers are treated differently than traditional employees is when it comes to civil liability. For example, at least 103 Uber drivers in the United States were accused of sexual assault or abuse of passengers over a 4-year period.[3] Nationally, Uber has faced many civil lawsuits by victims of abuse and assault.[4] One of Uber's main defenses in these types of cases is that the "drivers" are independent contractors, not Uber employees.[5] In fact, Uber has denied that it is a transportation company, and frequently describes itself as a technology platform. Uber has also resisted acknowledging that the drivers are even drivers at all. In a deposition taken in a civil case in Atlanta, an Uber executive repeatedly testified that drivers are "independent, third party transportation providers."[6]

In another example with far-reaching implications, a delivery driver for GrubHub intentionally ran over a Chicago restaurant worker after being told to wait outside for the order he was picking up.[7] It turned out that the driver had accessed another GrubHub driver's account and was not authorized to drive for GrubHub. A lawsuit was filed against GrubHub and the driver, who was later arrested.[8] While the case is still very early on in the litigation, it is likely that GrubHub will raise many legal challenges to this lawsuit, including the independent contractor defense.

The proper classification of workers as either employees or independent contractors determines whether an employer is responsible for payroll taxes, providing workers' compensation insurance, and complying with state and federal statutes governing wages, hours, and working conditions.[9] Additionally, when it comes to civil liability, the classification greatly impacts whether an injured party or victim is entitled to recover.[10] In the example of the unauthorized GrubHub driver, this distinction drives what legal protections and remedies exist for the injured party.

Additionally, the COVID-19 pandemic has caused a shift in the gig economy, and has exposed a number of issues relevant to this article. Because gig workers lack the formal protection of traditional employment, it has been a challenge to force employers to take steps to protect workers labeled independent contractors during the pandemic.[11] While many are struggling,[12] these underemployed workers have also been forced to provide and pay for additional safety equipment such as masks, gloves, and sanitizer.[13] This is a major concern as services like Instacart, DoorDash, Uber Eats, and Postmates are thriving during the stay-at-home orders, and have hired hundreds of thousands of new workers to keep up with demand.[14] Last year, UberEats reported that it grew its restaurant base by 75 percent, a result of the coronavirus pandemic.[15] This means that an increasing percentage of the U.S. workforce lacks a social safety net when it comes to unemployment benefits if they lose their job and health insurance should a worker fall ill. Unfortunately, this scenario is increasingly likely as the pandemic continues to adversely affect the economy and workforce.

This article advocates for the reclassification of gig workers in Illinois from independent contractors to employees and for the adoption of the ABC Test as a uniform industry standard to assess worker classification in the gig economy throughout the U.S. To fully appreciate the need for reclassification of gig workers, we must first discuss the structure and nature of the gig economy. Next, the article will provide the background on how our legal system classifies workers, including the background for why our courts created the independent contractor category, as well as describe how we categorize workers in Illinois

today. Thereafter, the problems for gig workers misclassified as independent contractors and an overview of a seminal California Supreme Court decision will be discussed. Lastly, the article will advocate a proposal for a uniform standard to apply in all states for determining whether a gig worker is an employee or an independent contractor.

Background

A. The "Gig Economy": Our Modern-Day Workforce

The gig economy is an internet-based change to the workplace landscape. The term "gig economy" refers to marketplaces that use web-connected technologies to link customers and suppliers on a large, disaggregated scale.[16] Gig workers are those who are non-traditional workers,[17] who get individual "gigs" (i.e. jobs) through a website or mobile phone app that matches them with customers.[18] Gig economy companies, such as Uber, Airbnb, and Instacart, connect non-owners interested in accessing these resources – cars, spare bedrooms, and groceries – with owners willing to allow access, or provide their service for a fee.[19]

Technological advancement has created the growth of millions of people working in the gig economy.[20] In the past few years, the gig economy encountered an annual growth exceeding 300 percent.[21] Past estimates reveal that at least 40 percent of the U.S. workforce are gig workers – either full or part-time.[22] Studies also indicate that over ten percent of the U.S. workforce rely on alternative work arrangements.[23] Much of this growth may be due in large part to the rapid growth of ridesharing companies like Uber and Lyft.[24] Such growth is not expected to slow down in the future, as the sectors that drive the gig economy – including ridesharing, food and grocery deliveries – are expected to produce an annual revenue of $335 billion by 2025.[25]

B. Worker Classification in the U.S. - Employee or Independent Contractor?

Today, the U.S. has a binary classification system to sort workers into two categories: employee or independent contractor.[26] Various state and federal employment laws define these terms rather poorly which adds to the uncertainty of who falls into which category.[27] This uncertainty is also enhanced by the numerous tests courts apply to determine whether a worker is entitled to federal employment benefits and protections.[28] Employees are traditional workers who, unlike independent contractors, receive the protections of labor and employment laws, including the right to organize, minimum wage, and unemployment compensation.[29]

Currently, workers within the gig economy are deemed independent contractors.[30] For instance, Uber and Lyft's entire model involves retaining workers who are expected to provide

easy as abc continued on page 46

easy as abc continued from page 45

their own cars, set their own schedules, pay for their own vehicle expenses, such as gas, and are responsible for taxes. These workers receive a 1099 tax form as opposed to a W-2 form, which are provided to traditional employees. However, there is a push in various states to recognize the misclassification of these workers as independent contractors and, rather, to recognize them as employees.[31] Alternatively, some legal scholars argue that gig workers do not fit squarely into either of the two worker categories currently in place.[32] To understand where gig workers should be classified, it is important to understand the purpose behind the legal creation of independent contractors.

1. The Creation of the Independent Contractor Classification

The term independent contractor originates from common law and the doctrine of vicarious liability.[33] The common law distinction between "employees" and "independent contractors" derives from master-servant law and the notion that masters historically assumed vicarious responsibility for the torts of only certain workers.[34] While vicarious liability serves the objective of allocating tort-based obligations to third parties,[35] usually the employer in an employment setting, scholars have often criticized the court's development of the independent contractor distinction to *limit* employers' vicarious liability.[36]

When courts first created the modern rules for holding employers vicariously liable for their workers' acts, they created the employee-independent contractor distinction as a means to ensure that the public could turn to financially secure parties to recover damages.[37] As such, the courts deemed employees depended on their employers (i.e. "masters") to pay for the costs of their misconduct, while independent contractors were deemed to possess enough skill, freedom, and financial resources to compensate outsiders without the assistance of those who retained their services.[38] Some gig companies today (e.g. Upwork) properly classify workers as independent contractors because they hire highly-skilled independent professionals in areas such as IT, engineering, creative, and legal.[39] However, the vast majority of workers today holding independent contractor status perform low-skilled tasks and are clearly not a group of economically self-sufficient workers that originally motivated courts to create the independent contractor designation.[40]

There are several tests used to assess whether a worker is an independent contractor or an employee depending on the agency, jurisdiction, or statute at issue. The common law control test is the test many federal statutes apply today and is the test which all other tests are based on.[41] This test consists of ten factors.[42] While no single factor is dispositive, courts evaluate the factors to determine which party generally has control over the work process.[43] Other common legal tests used to determine whether a worker is an employee includes the economic realities test,[44]

the Internal Revenue Service twenty-factor test,[45] and the ABC Test.[46] The ABC Test is a simplified version of the common law control test with a rebuttable presumption that the worker is an employee.[47] In order to defeat the rebuttable presumption, an employer must satisfy a three-prong[48] assessment to show the worker is an independent contractor.[49] This article will focus on the ABC Test because, as discussed thoroughly below, it is the best standard to determine classification for the modern-day workforce.[50]

2. Illinois Law: Vicarious Liability and Worker Misclassification

Illinois' general rule is that a master or principal may be held vicariously liable for the negligence of a servant or agent if the negligent conduct was committed within the scope of employment.[51] This is known as the doctrine of *respondeat superior*.[52] If there is no employment relation, then no liability can likely exist on the part of the employer.[53] In order to hold the master (employer) responsible or accountable for the servant's (employee) conduct, the employee must have been acting within the scope of employment.[54]

Conversely, it is the general rule in Illinois that one who hires an independent contractor is not liable for the acts or omissions of the independent contractor.[55] Illinois courts adopted Section 414 of the Restatement (Second) of Torts as an exception to this general rule.[56] The exception states that "one who entrusts work to an independent control, *but retains the control of any part of the work*," is subject to liability for harm to those whose safety the employer owes a duty of reasonable care.[57] This exception, however, does not create vicarious liability for employers of independent contractors. Rather, the employer could only be held directly liable under this exception for its own negligence.[58] Thus, it is far more challenging for an employer to be held liable for the negligence of independent contractors than it is for employees.

Illinois does have protections for workers who believe they are misclassified as independent contractors. First, for wage-deduction claims, Illinois courts apply the ABC Test.[59] Applying this test, the seventh circuit has noted that the elements are "conjunctive, if [the defendant delivery company] cannot satisfy just one prong of the test, its couriers must be treated as employees."[60] Second, the Illinois legislature created the Employee Classification Act, which became effective in 2008.[61] However, the statute only affects independent contractors in the construction industry.[62] Additionally, the Illinois Department of Labor provides information for the general public on misclassification of workers.[63] For example, its website states that employers misclassify workers to avoid compliance with workers' compensation, unemployment benefits for individuals unemployment insurance, minimum wage and overtime, social security, tax withholding, the Employee Classification Act.[64] The website provides that the Department of Labor uses the ABC Test to

easy as abc continued on page 48

easy as abc continued from page 47

determine worker classification.[65] The website also provides access to file an administrative complaint for the Department in order to investigate alleged misclassification.[66] However, unlike states like California, Illinois does not have any statute or administrative protections specifically designed for the misclassification of gig workers.

Analysis

A. The Problem With Gig Workers Labeled As Independent Contractors

Employers who misclassify workers as independent contractors often do so because they are motivated by the incentives of minimizing labor costs and limiting employer liability.[67] The gig sectors that raise such workplace issues include transportation and delivery (e.g., Uber, Lyft, Amazon Flex, Instacart, Grubhub, etc.), chores and housework (e.g., TaskRabbit, Handy, etc.), and crowd-work (e.g., Upwork, Freelancer, etc.).[68] The independent contractor workforce is a key reason that those gig companies have been able to grow so quickly.[69] However, by misclassifying its workers as independent contractors, gig companies not only impact their workers, but also decrease government tax revenue; according to the Illinois Department of Labor, this tactic hurts law abiding businesses who properly classify their employees because they could end up paying higher unemployment insurance contribution, higher workers' compensation premiums, and higher taxes.[70] Not all gig companies are misclassifying workers as independent contractors, but this article focuses on problems with gig workers who perform low-skilled tasks and do not have total freedom over how they get the work done.[71]

The most substantial cost to gig workers being classified as independent contractors is that most labor and employment statutes don't apply to them.[72] Federal labor and employment statutes – like the Fair Labor Standards Act (FLSA) – were enacted by Congress under the assumption that most of the workforce would be traditional employees and the independent contractor status would not apply to a significant portion of the population.[73] Through these statutes, only employees reap the benefits such as anti-discrimination, wage and hour, and family and medical leave protections, unemployment insurance and workers' compensation programs, and the right to unionize.[74] For example, gig workers could be making below the minimum wage and would have no legal recourse to recover lost wages.[75] Studies indicate that the gig economy's typical payment structure – compensating workers by the job, rather than by the hour – in fact, yields sub-minimum wages for gig workers.[76] As a result of these savings for employers, independent contractors are estimated to cost 20 to 30 percent less per worker.[77]

Independent contractors are sometimes even considered individual small businesses,[78] and gig companies have attempted to latch on to this assertion to maintain the non-employee classification. A London tribunal outright rejected this notion when Uber made such a claim, stating: "The notion that Uber in London is a mosaic of 30,000 small businesses linked by a common 'platform' is to our minds faintly ridiculous."[79] In February 2021, the U.K. Supreme Court ruled that Uber drivers are employees and not "self-employed" as Uber had argued. [80]Calling gig workers individual small businesses means that they are responsible for several legal and financial obligations that traditional employees do not need to consider.[81] These workers must pay their own payroll taxes directly to the government, including income taxes and their share of social security.[82] They must provide for their own benefits packages, including disability and health insurance.[83] Making matters worse, many workers classified as independent contractors fail to purchase these forms of insurance individually, as they do not identify as self-employed.[84] The growing number of gig economy workers, and consequently uninsured workers, creates systemic problems for the country at large.[85]

Another significant harm of expanding the independent contractor category for gig workers is decreased government tax revenue.[86] By misclassifying employees as independent contractors, payroll taxes, unemployment insurance funds, and workers' compensation funds go unpaid.[87] Prior to the rise of the gig economy, the U.S. Treasury Inspector General estimated that misclassification costs the United States $54 billion in underpayment of employment taxes and $15 billion in unpaid FICA and unemployment taxes.[88] This tactic of misclassification impacts state governments as well.[89] For example, from 2013-2017 the state of Washington lost $152 million in unemployment taxes, plus the workers' compensation system and private self-insured pool lost $268 million in unpaid premiums.[90] Mark Erlich, the author of the Washington state study, believes the rise of the gig economy brought more attention to the issue of lost government tax revenue.[91]

B. California Leading the Way for Worker Classification Reform: The *Dynamex* Case

The California Supreme Court's landmark decision in 2018, *Dynamex Operations West, Inc. v. Superior Court of Los Angeles*, significantly impacts how gig companies classify their workers in California.[92] In *Dynamex*, the highest court of California had to decide which test (e.g., economic realities, ABC, common law) applies in determining whether workers should be classified as employees or as independent contractors "for purposes of California wage orders, which impose obligations relating to the minimum wages, maximum hours, and a limited number of very basic working conditions."[93]

The lawsuit was filed by two Dynamex delivery drivers on behalf of a class of similarly situated drivers alleging that their employer misclassifies its delivery drivers.[94] Dynamex is a nationwide same-day courier and delivery service who offers on-demand delivery services to the public, and also to large business customers – including Office Depot and Home Depot.[95] Dynamex obtains its own customers, sets the rates to be charged to customers, and negotiates the amount to be paid to drivers on an individual basis.[96] The delivery drivers were free to set their own work schedules, choose the sequence in which they will make daily deliveries, and choose their routes.[97] Notably, prior to 2004, Dynamex classified their delivery drivers as employees, but changed the classification to independent contractors after management concluded that such a conversion would generate economic savings for the company.[98]

In *Dynamex*, the court ruled in favor of certifying the plaintiff's class and concluded that the appropriate standard in California's wage orders is the ABC Test.[99] Specifically, the court interpreted the standard as:

> "(1) placing the burden on the hiring entity to establish that the worker is an independent contractor who was not intended to be included within the wage order's coverage; and
>
> (2) requiring the hiring entity, in order to meet this burden, to establish each of the three factors embodied in the ABC test – namely:
>
> (A) that the worker 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; and
>
> (B) that the worker performs work that is outside the usual course of the hiring entity's business; and
>
> (C) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed."[100]

The court further explained that treating workers whose services are within the usual course of the employer's business as employees is "important to ensure that those workers who need and want the fundamental protections afforded by [California law] do not lose those protections."[101] The court did not limit this reasoning to Dynamex employees; rather, the court stated all competing businesses "that hire workers who perform the same or comparable duties within the entities' usual business operations" should be treated similarly.[102]

The *Dynamex* decision caused a major shift in California worker classification. Despite facing certain criticisms,[103] the decision's impact in California, and potentially across the United States could very well be the bellwether of change for the modern workplace.[104] Following the decision, Assembly Bill ("AB 5") was passed by

easy as abc continued on page 50

easy as abc continued from page 49

the California legislature which codifies the ABC Test and provides exemptions for certain occupations.[105] Notably, no exemptions were carved out for gig companies such as Uber, Lyft, or Instacart.[106] California Governor Gavin Newsome signed AB 5 into law and hailed it as "landmark legislation for workers and [California's] economy."[107] Recently, this year, the California Supreme Court ruled that the "ABC test" articulated in its 2018 *Dynamex Operations West Inc. v. Superior Court of Los Angeles* decision applies retroactively. The impact of *Dynamex* could pave the way for national uniformity in the determination of classifying workers.

Since *Dynamex*, there has been an increase in lawsuits filed against gig companies for misclassifying their workers as independent contractors. In September 2019, the City Attorney of San Diego filed suit against Maplebear Inc., (d/b/a "Instacart"), alleging the company maintains an unfair, competitive advantage by misclassifying its workers ("Shoppers").[108] The complaint alleged Instacart avoids paying its Shoppers a lawful wage and unlawfully defers substantial expenses to its Shoppers, including the cost of equipment, car registration, insurance, gas, maintenance, parking fees, and cell phone data usage.[109] On February 18, 2020, a San Diego County superior court judge issued an injunction against Instacart, but ultimately decided to temporarily stay the injunction.[110] In the court's order, the judge said the San Diego City attorney made "a very plausible showing of improper classification under the ABC test."[111] This case was sent back to the trial court judge in February, 2021, after the State Court of Appeals found the order too "vague."[112]

Meanwhile, other gig companies are also facing pressure to reclassify their workers. In June 2020, the California Attorney General Xavier Becerra and a coalition of city attorneys filed a preliminary injunction to force Uber and Lyft to comply with the new state law.[113] In a statement concerning the injunction, A.G. Becerra stated "[m]issclassifying your workers as 'consultants' or 'independent contractors' simply means you want your workers or taxpayers to foot the bill for obligations you have as an employer," and the injunction was entered "to force Uber and Lyft to play by the rules."[114] DoorDash, an online food delivery service, has an unfair business practice suit filed against it by the San Francisco district attorney for misclassifying its workers as independent contractors.[115] Commenting on this suit, UC Hastings labor law professor Veena Dubal stated "the people whose labor has created [DoorDash]'s sky-high valuation do not have access to a wage floor, to workers' compensation if they are injured, or to unemployment insurance if they are laid off through no fault of their own."[116]

California is not the only state faced with the independent contractor worker dilemma within the gig economy. According to one report, lawsuits against gig companies for misclassification could be particularly potent in states such as New Jersey, Massachusetts, and Connecticut, which all use the ABC Test.[117] Specifically, in 2015, the New Jersey Supreme Court broadened the application of the ABC Test to cover state wage claims.[118] The court found that the ABC Test "provides more predictability" than a multi-factored approach.[119] Today, at least twenty-seven states (including Illinois) use the ABC Test to make unemployment and other labor law determinations.[120]

Here in Illinois, a class action lawsuit had been filed against Instacart under the FLSA, the Illinois Minimum Wage Law, and the Illinois Wage Payment and Collection Act, alleging Instacart unlawfully classified its workers as independent contractors.[121] Despite Instacart not recognizing itself as a grocery delivery service, but rather a "proprietary communications and logistics platform," the plaintiffs had alleged that the gig company wielded so much control over its delivery drivers that it disqualified the company from classifying the workers as independent contractors.[122] But, the employee-independent contractor debate lives on another day as the Court in the lawsuit, *O'Shea v. Maplebear, Inc. (d/b/a Instacart)*, held that the plaintiff's wage claims must be arbitrated pursuant to the agreements they had signed.[123] There had been an expectation that the Illinois court would apply the stringent ABC Test in this case, creating a heavy burden for Instacart to show that the workers were in fact independent contractors.

Conclusion

To better protect large numbers of the U.S. workforce who are gig workers, there should be one, uniform national standard that is applied for employee classification determinations. First, it is both confusing and unnecessary that there are various legal standards among statutes that provide worker protections and benefits.[124] For example, unionization rights, employee benefits, and wage and hour laws each fall under different federal statutes, meaning different tests are used to determine whether a worker is an employee.[125] Despite what the statute provides as its intended purpose, most labor and employment laws are united by one underlying goal: to protect workers.[126] By focusing on this common goal, one comprehensive standard could exist for categorizing employees for the purpose of providing workers' rights of all kind, as well as decreasing confusion, manipulation, and misclassification.[127]

In order to achieve this common goal, this article proposes that the ABC Test would be best for one comprehensive national standard. By limiting the legal inquiry to three core factors and adding a presumption in favor of employee status, the ABC Test

easy as abc continued on page 52