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Employment Law in the “Gig” Economy

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DISCLAIMER

This Presentation Is For Educational Purposes Only. This session does not constitute legal advice.



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PRESENTATION OVERVIEW

- 1. Overview of employee/independent contractor case law+ key takeaways**
- 2. Steps to filing a claim with the California Labor Dept.**
- 3. Steps to filing a misclassification claim in civil court**



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ISSUE: Several Tech Companies Are Building On-Demand Platforms That Rely On Labor Supplied By Gig Workers Who Are Classified As “Independent Contractors” Rather Than Employees (UBER, Lyft, Doordash, Instacart)

QUESTIONS RAISED:

What protections are gig workers with disabilities afforded under law labor and employment law?



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California and Federal Anti-Discrimination Laws Protect Employees, Not Independent Contractors



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What Are Bonafide Independent Contractors?

Independent contractors must be independent

- Skilled services; project based relationship; not providing core business services

Multi-factor Tests: (differs by state)

- California: Presumption of employee-employer status
- IRS applies a 20-factor test
- Principal's actual exercise of control - distinct occupation or business - industry custom – skill - tools and place of work- length of service



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Case In Point: Uber Technologies v. Berwick

CA Labor Commissioner ruled that while Uber holds itself as nothing more than a technology platform designed to enable drivers and passengers to transact, in reality it is involved in every aspect of the operation.

From the ruling:

"Even though there is an absence of control over the details, an employee/employer relationship will be found if the platform retains pervasive control over the operation as a whole and the worker's duties are an integral part of the operation."



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To Be Free from Discrimination

It is illegal for employers of five or more employees to discriminate against job applicants and employees because of a protected category, or retaliate against them because they have asserted their rights under the law. Cal. Gov. Code §12900 et seq.

Protected Categories:

-race – color – ancestry – national origin – religion – creed – age (over 40) – disability (mental & physical) – sex – gender – sexual orientation – gender identity – gender expression – medical condition – genetic information – marital status – military/veteran status



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Accommodations Under the Law

A disability can be a physical or mental condition, including a medical condition. Govt. Code §12940

A. Employees with disabilities are entitled to accommodations.

- Reasonable accommodation
- Interactive process
- Good faith



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Wages

1. Employees must be paid at least minimum wage
 - A. Employees cannot be paid only in stock or only \$1
 - B. Fed: \$7.25 per hour
 - C. Cal: \$10.00 per hour
 - D. SF: \$13.00 per hour
2. Substantial Risks for Misclassification
 1. Unpaid taxes
 2. Unpaid unemployment insurance
 3. Unpaid Workers Compensation Insurance
 4. Unpaid minimum wage and overtime



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And Then There Are Penalties...

Now civil penalties for “willful misclassification”

- ☐ voluntarily and knowingly misclassifying
- ☐ \$5,000 to \$15,000 per violation
- ☐ if a pattern or practice, \$10,000 to \$25,000

Anyone who, for money or other valuable consideration (such as an outside accountant), advises an employer to treat an individual as an independent contractor to avoid employee status is jointly and severally liable with the employer if the individual is found not to be an independent contractor.



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Case In Point: O'Conner v. Uber Technologies, C-13-3826 EMC (USDC ND CA): Worker Misclassification Class Action

- Class Was Certified In December 2015
- Negotiated settlement upwards of \$100 million
- \$100 million settlement rejected by judge



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How to handle a potential misclassification claim.

Step 1: Listen to the client's story: Many times, the client doesn't know about the potential misclassification claim.

Step 2: Ask about the nature of the client's work: does he or she work on a project basis? Did he or she have to go through training procedures? What are the constraints on his or her performance of tasks, etc.

Step 3: Decide whether to file a labor claim or a civil claim.

Pursuing a misclassification claim by filing a claim with the Labor Commission

Pros

- Free to file
- Faster
- Less process

Cons

- No protection against discrimination (so you can add any employee claims)
- Decided by Administrative Judges, Not lawyers
- Decision is hard to appeal
- Less process (harder to get discovery)



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Steps to a Labor Claim

STEP 1: File Download, complete and print the Initial Report or Claim, DLSE Form 1/Include time records and a calculation of loss wages (for unpaid overtime for example) with your claim



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Steps to a Labor Claim

STEP 2: Attend Conference.

Contact opposing counsel ahead of the conference to demand a settlement.

After the claim is submitted there will be a conference

If there is no settlement at the conference, a hearing will be set



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Steps to a Labor Claim

STEP 3: Prepare for hearing

Important!!!! as soon as possible complete DLSE Form 564 to request records, and subpoena documents ahead of the hearing

Prepare the evidence and witnesses for the hearing

The hearing officer is not bound by formal rules of evidence and therefore, has wide discretion in accepting evidence. He or she also has discretion in deciding whether the assessment of penalties is appropriate in a particular case.

Within fifteen (15) days after the hearing, the Order, Decision or Award (ODA) will be issued.

Alternative to filing a Labor Claim, File Claim in Civil Court (assuming no arbitration clause)

Pros

- More process means more discovery
- Can include employment law claims, like disability claims
- Scarier for the employer

Cons

- Expensive
- Long process
- Scarier for the client

Pros & Cons to Working in the Gig Economy

Pros

- Flexibility
- Multiple “gigs”
- Earning potential

Cons

- No protection against discrimination
- Cannot request accommodations
- Can be terminated for any reason
- No wage protections



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Resources & Questions

- Department of Fair Employment & Housing
<https://www.dfeh.ca.gov/Employment/>
- Labor Commissioner's Home Page - <http://www.dir.ca.gov/dlse/dlse.html>
- DLSE Enforcement Manual -
http://www.dir.ca.gov/dlse/dlsemanual/dlse_enfcmanual.pdf
- DLSE Opinion Letters - http://www.dir.ca.gov/dlse/dlse_opinionletters.htm
- IWC Wage Orders - <http://www.dir.ca.gov/iwc/WageOrderIndustries.htm>
- Wage & Hour Manual for California Employers – Richard J. Simmons, Castle Publications