The Daily Dish

Updating the Nature of the Employment Relationship

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Eakinomics: Updating the Nature of the Employment Relationship

One of the most significant efforts of the Obama Administration was to alter the nature of the employer-employee relationship, including new rules for overtime, decisions on who counted as an employee versus an independent contractor, the joint-employer decisions regarding franchise employees, and more. Perhaps unsurprisingly, the Trump Administration has devoted significant efforts to re-writing these very same rules.

The latest iteration of these efforts, took place on April 29 when the Department of Labor (DOL) released an opinion letter to an unnamed company as to whether "service providers working for a virtual marketplace company (VMC) are employees or independent contractors under the Fair Labor Standards Act (FLSA)." And the DOL reached a clear conclusion: "Based on the facts you provide in your letter, it appears that the service providers who use your client's virtual marketplace are independent contractors."

Yesterday, the veil was lifted somewhat when the National Labor Relation Board released a legal advisory (dated April 16) from its general counsel to Uber regarding the employment status of its drivers. It also ruled that they were independent contractors, on the basis of a ten-part test (that is derived from common law — hence the antiquated language at points):

(a) The extent of control which, by the agreement, the master may exercise over the details of the work.

(b) Whether or not the one employed is engaged in a distinct occupation or business.

(c) The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision.

(d) The skill required in the particular occupation.

(e) Whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work.

(f) The length of time for which the person is employed.

(g) The method of payment, whether by the time or by the job.

(h) Whether or not the work is part of the regular business of the employer.

(i) Whether or not the parties believe they are creating the relation of master and servant.

(j) Whether the principal is or is not in business.

What are the implications of this decision? For the moment, it clarifies the employment status of Uber drivers and their gig economy equivalents under the FLSA. In particular, the general counsel is not going to issue formal complaints against employers because the types of workers are not employees, and thus outside its jurisdiction. It is less obvious, however, how big a deal this announcement is for the labor market as a whole. As noted before, AAF research indicates that the growth of the gig economy has stalled.

Alternative work arrangements grew from 9.9 to 10.7 percent of workers between 1995 and 2005. In 2017, it had fallen to 10.1 percent. To put this a different way, while the growth rate of traditional employment was 0.8 percent annually from 2005 to 2017, alternative-work employment growth was only 0.3 percent – a far cry from the 2.1 percent annual growth in alternative work from 1995 to 2005. That difference means the welfare of most people in the labor force will depend on the traditional metrics of labor market performance — jobs and wage growth — which have been steadily improving.