Insight

In the Online Gig Economy, Policymakers Should Empower Workers

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The policy debate surrounding the sharing economy has focused on New York City's short-sighted regulations on Uber. But perhaps more important was the Department of Labor (DOL) Interpretation (i.e., guidance) that was issued last month, signaling a harsher stance toward the growing gig economy.[1] Coming from an administration that has implemented 500 major regulations and increased the burden of regulatory compliance by about $625 billion,[2] it should hardly be a surprise that it is lining up its legal arguments against one of the green shoots of the economy, even as courts reject this interpretation of the law.[3] The ultimate aim of policy should be the empowerment of workers to adapt to changing labor conditions, not a reflexive opposition to new business models.

While it's clear that this guidance from the DOL is intended to impact the Uber/Lyft worker classification debate, no mention of the ridesharing industry or the online gig economy is found in the document.[4] It is a smart omission because taxicab classification is not a cut and dried issue – even if we assume that Uber, Lyft, and Sidecar are purely transportation companies and not technology firms. Court cases across the US have found that taxicab drivers can be both independent contractors and employees.[5] Even the State of California, where the bulk of these lawsuits are being filed, recognizes that the independent contractor classification is one way to manage a taxicab operation.[6]

The new Interpretation clarifies the DOL's definition of "employee" under the Fair Labor Standards Act (FSLA) and emphasizes a broad sweep of the law. The DOL begins in no uncertain terms by saying that "most workers are employees under the FLSA." It then sets out a discussion of the six factors that determine whether a worker is considered an employee or not. The six factors form the bedrock of worker classification law. A key feature is whether the worker is economically dependent on the employer, thus making that worker an employee, or is really in business for him or herself, making that worker an independent contractor.

The six factors that are central to classification are:

1. The extent to which the work performed is an integral part of the employer's business;
2. The worker's opportunity for profit or loss depending on his or her managerial skill;
3. The extent of the relative investments of the employer and the worker;
4. Whether the work performed requires special skills and initiative;
5. The permanency of the relationship; and
6. The degree of control exercised or retained by the employer.

The lack of supervision and the personalization of hours are often cited as evidence that on demand services in the sharing economy merit an independent worker classification. Indeed, the control of taxicab drivers have been at the foundation of court cases finding they are independent workers.[7] However, the DOL Interpretation rejects both arguments outright. Instead, DOL narrowly focuses on court cases finding that workers are

employees "under a multitude of circumstances where the alleged employer exercised little or no control or supervision over the putative employees." In other words, even though the courts wrestle with the question of control, the DOL chooses to see no nuance.

Another major consideration in the classification of workers is how integral they are to the business. Consider a construction company, for example. Carpenters are integral to the employer's business and this line of reasoning would indicate that they are employees. On the other hand, in this view a software developer who makes a program that helps to make bids for the construction company, schedules projects and crews, and tracks orders would not be considered integral because the developer performs a task ancillary to the business, which is constructing homes. In California, judges rejected Uber's arguments that they are a technology company and instead ruled that they were a transportation company that relied upon drivers for their integral function.

At least two parts of the test that the DOL lays out should catch the attention of those who think this is an open and shut case against independent contractors. As the agency notes, an independent worker eschews a permanent or indefinite relationship with an employer. Those who work via TaskRabbit can pick and choose the tasks they want to do, and might not do the same task twice. As for Uber, two-thirds of their drivers have other jobs.[8] Instead of working full-time, they use the service as a means to supplement their incomes, and might only work when demand is high and the pay is good.[9] Many drivers are on both Lyft and Uber at the same time, and choose to pick up riders dependent on which company can provide better terms. The lack of permanence and a willingness to take a deal only when the terms are beneficial falls in line with the guidance that the DOL sets up for independent contractors.

The DOL also highlights investments as a factor distinguishing employees from independent contractors. To be independent, the worker needs to make some investment in the business and thus take some risk for a loss beyond any particular job. For both Uber and Lyft, drivers use their own cars, an investment made on their own for reasons beyond that particular job. For taxicabs, ownership of the car has been an important factor in determining if the worker is independent, which, again, would put these workers in the bucket of independent contractors.[10]

The sharing economy got the attention of the progressives who viewed it as a way to avoid paying benefits for workers. Of course, concerns about worker benefits did not just appear with the sharing economy. Local municipalities, courts, and the federal government have decades of experience in dealing with these concerns. There has been far more flexibility in the law than the DOL wants to admit. Even the White House has recognized that flexible work arrangements should be encouraged.[11] More broadly, the artificial choice of "contractor or employee" mischaracterizes the range of the possible contracts that a worker and owner might agree upon in a freer labor market. One only has to look at the complex employee regulations with regard to the federal government to see how this works in action. Over $500 billion is spent on contractors by the federal government, due in part to its own procedures that are too inflexible to quickly adapt to changing conditions.[13] Converting all of these workers to employees would force administrative duties upon companies that would curtail the very freedom that these jobs grant.[14] Of course, employing an individual is not costless, and the cost is typically transferred via a combination of higher prices to consumers and a reduction in pay to workers. As the American Action Forum found, the Affordable Care Act's mandates and regulations are associated with a reduction in small business (20 to 99 workers) pay by at least $22.6 billion annually and a contraction of more than 350,000 jobs nationwide.[15]

Other countries have recognized that the strictly binary choice between employee and independent contractor does not always work. In Canada, Uber drivers can elect to be in a hybrid employment category, called dependent contractors, who are entitled to severance pay if they're fired. France, has a new classification they call "auto-entrepreneurs," who are not traditional employees but also are not subject to the tax burden of small

business owners. Germany too has embraced a third way classification, and it is an idea that is catching on both sides of the political aisle here in the States.[16] Among the most ardent supporter of this path is Alan Kruger, former chair of the White House Council of Economic Advisers from 2011 to 2013.[17]

Two exits exist. In the first path, courts restore sanity in this chaotic space by upholding the on demand business model, which would be well within legal norms. Barring this, it will be up to Congress and the states to put matters right and explore a middle way. The choice is much easier than many are making it out to be. A modern and changing economy needs flexibility to adapt.

[1] Administrator David Weil, *Administrator's Interpretation No. 2015-1*, http://www.dol.gov/whd/workers/Misclassification/AI-2015_1.htm