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Toward a new employment classification for workers in the gig economy

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The perceived desire for flexibility drives the *gig economy* – an economy structured around networks rather than traditional institutions (Sundararajan, 2016), and this disrupts our traditional understandings of organisational accountabilities. Companies that operate in the gig economy ensure most of their flexibility by relying on independent contractors for the provision of their on-demand services (Friedman, 2014).

Gig economy advantages companies and consumers

Through the flexible management of workers, companies in the gig economy are able to '*unlock the commercial value in underused personal assets'* (Kenney & Zysman, 2016, p. 62) in a fluctuating, on-demand manner. Independent contractor arrangements aid this flexibility by allowing on-demand 'just-in-time' strategies, where workers can be utilised only when there is money to be made (Moran, 2009). This saves costs because companies do not need to spend money on benefits, training and development, compensation for time (regardless of outputs), and other personnel costs like employment protections and severance payments (Yamada & Maltby, 1997; Moran, 2009). Independent contractors are often only compensated for their outputs, not for related time and resources associated with achieving these outputs (Moran, 2009). These cost-cutting mechanisms are good for companies like Uber, who are '*attempting to turn a profit with little overhead'* (Carboni, 2016, p. 9).

The flexible labour arrangements can be good for consumers too. For Uber riders, prices are low, response times are usually quick, and the rating system offers perceived safety, and quality. However, background checks on drivers are becoming less rigorous, arguably widening the gap between regulated taxis, in terms of safety and security.

But does it advantage workers in the gig economy?

The inherent flexibility of independent contracting does benefit workers in some circumstances. Proponents of the gig economy argue that gig workers are 'micro-entrepreneurs' that can essentially be their own boss with flexible hours (to an extent), and free from the explicit control of an 'employer' (Carboni, 2016). Although this works for some, those who are financially precarious, or who have few alternatives are vulnerable.

Workers who end up in the gig economy out of financial desperation are likely to suffer most from the independent contractor arrangements. These already vulnerable individuals embody the characteristics of what Standing (2012) calls a *precarian*. Precarians lack work-related securities of the more privileged, such as medical coverage, sickness leave, long-term employment contracts, and job security (Friedman, 2014; Standing, 2012). These conditions are likely to exacerbate their financial insecurity and affect the health of the individual, their close surroundings, and eventually, society. Standing (2012) explains that as a result of living under these isolating and insecure conditions, workers lack an occupational identity and the ability to conceptualise and strive for career goals. Fluctuating work arrangements means fluctuating incomes. No guaranteed or anticipated fixed weekly income puts pressure on families, communities and welfare systems (Muntaner et al., 2010).

Are gig economy workers independent contractors or employees?

Gig economy companies treat their workers in ways that suggest they are not *primarily* independent contractors. In fact, evidence points more to an employer-employee arrangement (Aloisi, 2016). By applying available information on the work status of Uber drivers, we find that most cases tend to favour the employee classification, but in fact the reality is that their status lies somewhere in between that of employees and independent contractors. The case of O'Connor v. Uber Technologies, Inc. is insightful in this regard.

Three drivers alleged, on behalf all California Uber drivers, that they were misclassified as independent contractors. Uber denied their potential misclassification and maintained that they were not employees because they exercised minimal control over them. The plaintiffs responded that Uber in fact exercised considerable control over the 'methods and means' of the provision of their service. The Court then employed work status tests to determine their classification. These took into account the level of control Uber had over the drivers. They were inconclusive: some work characteristics suggested significant control, while others showed control was minimal. Another test revealed that because drivers provide an essential service to Uber, they should be seen as employees (US District Council California, 2015; Ross, 2015).

The idea of control seems particularly salient in the example above, so it is appropriate to elaborate on the ways in which Uber is deemed 'controlling', like an employer. Research by Stark and Rosenblat (2016) gives insight beyond case law into the nature and degree of control Uber workers experience. From interviews with Uber drivers, it was revealed that Uber's seemingly indirect control through the surveillance and monitoring via the online platform was actually representative of an intense form of managerial control (Stark & Rosenblat, 2016). Much like Uber's own employees, drivers' performance is measured through a rating system via their account on the online platform. The authors explain that when drivers are monitored through the online platform and their results in the form of ratings are given to them on a weekly basis, like a routine performance evaluation, it represents “a remote threat and a tangible nudge to drivers to be in compliance with workplace expectations” (Rosenblat & Stark, 2015, p. 6).

Furthermore, Uber claims drivers have control of their hours and the times they choose to work, but the Uber Driver Handbook states: ‘*We expect on-duty drivers to accept all [ride] requests; [we] consider a dispatch that is not accepted to be a rejection, and we will follow-up with all drivers that are rejecting trips; we consider rejecting too many trips to be a performance issue that could lead to possible termination from the Uber platform*’ (Seaquist et al., 2015).

A new classification for gig economy workers?

Uber’s employer-like control over independent contractors has become a de rigueur practice - a reference point for other deregulated services. However, the classification of workers in the gig economy needs to be reconsidered, because in fact they are neither employees nor independent contractors.

Liebman – a former chairwoman of the National Labor Relations Board (US) –argues that ‘*some people are clearly independent contractors and some are clearly employees, but a third [worker] category becomes necessary when you have people who are borderline’* (Liebman, in Weber, 2015). This proposed new, alternative classification would help protect Uber drivers from the precarious conditions of their current independent contractor status.

A number of scholars recommend the development of a new legal classification of worker for the gig economy - the *dependent contractor* – who has some but not all the legal protections afforded to employees. (Carboni, 2016; Hass, 2015; Seaquist et al., 2015; Weiss (2015).

What these additional protections and entitlements could be, however, is worth considering. Lamare, Lamm, McDonnell, & White (2015) claim that the working conditions and pay of dependent contractors ‘*are often exploitative, compared to contractors who are not reliant on one client*’ (p. 76). Also, there is the risk is that dependent contractors will be deprived of both protections and entitlements of employees, along with the flexibility and other benefits experienced by independent contractors (Walker et al., 2011). It is therefore essential to recognise that the dependent contracting arrangement could be possibly be more, exploitative than independent contracting without provision of mandatory rights and entitlements.

Regardless of whether the dependent contractor status is the most appropriate classification to afford gig economy workers, it prompts thought on the need for wide-spread engagement in ways to improve the current system, where worker exploitation increases as capital grows. Rapid change makes it easy to overlook issues like the ones raised in this piece, but this only normalises Uber’s behaviour which could lead to proliferation of similar practices in the future. If we are to have social and economic cohesion, where work is decent enough for people to engage actively in our economy, we need to start looking at new ways of responding to the gig economy.

References

Aloisi, A. (2016). Commoditized workers: Case study research on labour law issues arising from a aet of 'On-Demand/Gig Economy' platforms. *Comp. Lab. L. & Pol'y J.,* 37.

Carboni, M. (2016). A new class of worker for the sharing economy. *Richmond Journal of Law & Technology, 22*(4), 11.

Friedman, G. (2014). Workers without employers: shadow corporations and the rise of the gig economy. *Review of Keynesian Economics*, 2, 171-188.

Hass, D. A. (2015). Protecting the Sharing Economy: A Proposal for FLSA Dependent Contractor Status.

Kenney, M., & Zysman, J. (2016). The rise of the platform economy. *Issues in Science and Technology, 32*(3), 61-69.

Lamare, J., Lamm, F., McDonnell, N., & White, H. (2015). Independent, dependent, and employee: Contractors and New Zealand's Pike River Coal Mine. *Journal of Industrial Relations*, 57, 72-93.

Moran, J. A. (2009). Independent contractor or employee-misclassification of workers and its effect on the state. *Buff. Pub. Int. LJ, 28*, 105.

Muntaner, C., Solar, O., Vanroelen, C., Martínez, J. M., Vergara, M., Santana, V., ... & Benach, J. (2010). Unemployment, informal work, precarious employment, child labor, slavery, and health inequalities: pathways and mechanisms. *International journal of health services*, *40*(2), 281-295.

Rosenblat, A., & Stark, L. (2015). Uber's drivers: Information asymmetries and control in dynamic work. *Data & Society Research Institute*, 17.

Ross, H. (2015). Ridesharing's House of Cards: O'Connor V. Uber Technologies, Inc. and the viability of Uber's labor model in Washington. *Wash. L. Rev., 90*, 1431.

Stark, L. & Rosenblat, A. (2016). Algorithmic labor and information asymmetries: A case study of Uber's drivers. *International Journal of Communication*, *10*, 27.

Seaquist, G., Bramhandkar, A., & Barken, M. (2015). Employed or exploited? Financial and legal implications of the Uber case. *Proceedings Of the New York State Economics Association*, 48.

Standing, G. (2012). The Precariat: From denizens to citizens? *Polity, 44*(4), 588-608.

Sundararajan, A. (2016). *The Sharing Economy: The end of employment and the rise of crowd-based capitalism*. MIT Press.

United States (US) District Court for the Northern District of California. (2015). *Order denying plaintiffs' motion for preliminary approval*. Case 3:13-cv-03826-EMC. Retrieved from: http://www.cand.uscourts.gov/EMC/OConnorvUberTechnologies

Walker, B., Tipples, R., Tyson, A. F., Kelly, H., Wilkinson, K., Burton, B., & Haworth, N. (2011). The "Hobbit Law": Exploring non-standard employment. *Perspective*, *37*.

Weber, L. (2015, Jan 28). What if there were a new type of worker? Dependent contractor. *Wall Street Journal*.

Weiss, D. 2015. Are app-summoned workers contractors? *American Bar Association Journal*. Retrieved from: http://www.abajournal.com/news/article/are_app_summoned_workers_contractors_suits_seek _protections_profs_say_new_c/

Workplace Legal Blog, July 15, 2015. *Could a "Dependent Contractor" be a new category of workers in the United States?* Retrieved from: http://theworkplacelegalblog.com/could-a-dependent-contractor-be-a-newcategory-of-workers-in-the-united-states/

Yamada, D. C., & Maltby, L. L. (1997). Beyond 'Economic Realities': The case for amending federal employment discrimination laws to include independent contractors. *Boston College Law Review, 38*(2), 239.