

Impact of the Gig Economy on Legal Classification of Health Care Workers

New Business Models Push Traditional Worker Classification Boundaries



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The prevalence of new business models for sharing and on-demand services (such as those offered by Uber for transportation services and by Handy for home cleaning and home repair services) has prompted discussions in Congress as to whether a new type of worker classification should be adopted for workers who participate in the so-called “gig economy.” Traditionally, persons who provide services have been characterized either as employees or as independent contractors. For example, U.S. Senator Mark Warner (D-Va.) recently commented to the effect that a third classification may well be needed “that allows for both flexibility and worker protections.” As evidenced by recent litigation as to the classification of workers who provide on demand services or who provide services to customers by links to service providers, these new business models have pushed the traditional worker classification boundaries.

The wage and hour laws, tax laws, and the so-called Obamacare health care law draw a distinction between self-employed workers, who are treated as self-employed and pay all Medicare and Social Security taxes, and employees, who receive a full range of worker protection and benefits and pay only half of these payroll taxes. For businesses that employ more than 50 persons, the Affordable Care Act requires that the businesses provide their employees with health insurance. The classification is based on a number of factors, but core to the distinction is the extent to which the entity that pays for services or arranges for the provision of services controls the persons who provide services such as, for example, as to schedule for services, identity of customers or clients, and workplace location. The higher the degree of control exerted by the business, the more likely the persons

who provide services to the business will be classified as employees.

An example in a recent document issued by the U.S. Department of Labor (USDOL) Wage and Hour Division (Administrator's Interpretation No. 2015-1, issued on July 15, 2015) illustrates the application of these principles in the health care area to two different companies that operate registries by which registered nurses who provide skilled nursing care in nursing homes can be matched with clients in need of their services. One of the registries requires that nurses to whom a list of potential clients is made available sign a form prior to contacting any clients in the listing and controls the compensation that can be charged by the nurses to the clients. The other registry merely provides the listing of potential clients and does not require that its nurse participants advise the registry as to which clients the participants want to provide services nor does the registry control the compensation to be charged to each of the clients or the schedule for services, both of which are set by negotiations directly between the nurses and the potential clients. The former registry was found to have established an employment relationship based on the degree of control it exercises over the nurses that participate in the registry. The latter registry was found to utilize nurses as independent contractors.

Although the example set forth in the USDOL interpretation as to nurse registries appears to be fairly straightforward, it is highly possible that in the not too distant

future, an entrepreneur might develop a business model in the health care area that utilizes the best practices of Uber or Handy to provide health care providers on an "as needed" basis with the services of individuals from whom a certain type of training is needed but who need not be licensed, certified, or registered under applicable federal or state law. For example, the future business might use an application to link persons that it has trained in cybersecurity services to health care companies that are in need of these protection services on a per project basis. This type of business is somewhat similar to the nurse registry, but the future business gives its unlicensed workers specialized training in addressing cybersecurity threats to health care companies. By contrast, the nurse registry need not provide specialized training to its nurses since all participants must be registered nurses under applicable state law.

This new business model combines attributes of both Uber and Handy and is an example of why a third worker classification model may be needed, one that requires workers to receive certain benefits but which characterizes the workers as independent contractors for tax purposes. Health care providers should be aware of the possibility that future Congressional legislation in this area might create savings by eliminating the need for health care companies to use professional employer organizations or other outsourcing providers as new, innovative business models are developed in the future.

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