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Square Peg of Sharing Economy, Round Hole of Wage-and-Hour Law

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Special to the Legal

Much has changed in the United States since the country's foundational wage-and-hour law, the Fair Labor Standards Act (FLSA), was enacted more than 75 years ago in 1938. Although the FLSA has been amended multiple times, the central aspects of the law remain intact—workers who qualify as “employees” are entitled to the minimum wage and overtime protections of the law, while workers not so classified are not. Yet, as the country moves further and further away from the world that existed during the Great Depression, the concepts enshrined in the law—from the classification of employees as exempt or nonexempt, to a determination of time worked in the digital age, or even identification of workers as employees or independent contractors—have become exponentially more difficult to apply.

The classification of workers as independent contractors has received significant media attention recently as it relates to the so-called sharing, “on-demand” or “gig” economy. Multiple



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cases filed across the country have challenged worker classification of sharing-economy workers. In assessing whether workers for ride-sharing company Lyft who challenged their independent-contractor classification under California law could take their case to trial, U.S. District Judge Vince Chhabria of the Northern District of California characterized California's test for assessing employee status, which focuses on the right of a business to control a worker, as “outmoded.” Suggesting, as many in the startup community have, that a third classification of workers may well be appropriate for workers in the sharing economy, Chhabria reasoned that “the test the California courts have developed over

the 20th century for classifying workers isn't very helpful in addressing this 21st century problem.”

Chhabria is certainly not the only person suggesting a possible third category of worker classification. At the June 2015 Federal Trade Commission workshop, “The ‘Sharing’ Economy: Issues Facing Platforms, Participants, and Regulators,” Brooks Rainwater, who oversees research for the National League of Cities, suggested that the approach to sharing-economy workers needs a new analytical framework, by stating, “I think we need to think differently about the way we classify this new and growing part of the workforce. It's fundamentally a question about whether these workers should be considered contract workers, as they are now, full-time employees, or perhaps some kind of hybrid model.”

As new sharing-economy businesses develop, the consequences for a lack of clarity in how to proceed will only continue to grow. According to independent worker resource firm MBO Partners' “State of Independence in America,” “In 2014, independent workers generated more than \$1.15 trillion of revenue ... equal to nearly

7 percent of U.S. GDP,” and “by 2020, the number of independent workers in America is expected to grow to 37.9 million.”

Many workers are drawn to some of the advantages of sharing-economy businesses, which generally offer more flexibility than the typical brick-and-mortar workplaces that were more prevalent at the time the FLSA was enacted. According to a 2013 PricewaterhouseCoopers report, “PwC’s NextGen: A Global Generational Study,” “Millennials want more flexibility, the opportunity to shift hours—to start their workdays later, for example, or put in time at night, if necessary. But so do non-millennials, in equal numbers. In fact, a significant number of workers from all generations feel so strongly about wanting a flexible work schedule that they would be willing to give up pay and delay promotions in order to get it.”

So how can businesses in the sharing economy do what Chhabria says they must, that is, take a “square peg” and “choose between two round holes”? The answer to this question is hotly contested and, of course, often depends on whom you ask. And, for sharing-economy companies that use a 1099 model, the answer to the question has business-altering implications.

The U.S. Department of Labor has set its sights on independent-contractor misclassification generally, with its Misclassification Initiative and recent Administrator’s Interpretation on “The Application of the Fair Labor Standards Act’s ‘Suffer or Permit’ Standard in the Identification of Employees Who Are Misclassified as Independent Contractors.” When asked about the “gig” economy

during a Facebook Q&A soon after the release of the Administrator’s Interpretation, Secretary of Labor Thomas Perez responded that “re-

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gardless of the employment context, [the DOL] uses the same analysis to determine whether a worker is an employee or an independent contractor.” Eschewing suggestions for a “third category of employment,” as a solution that would require legislative action, Perez relied on the current law, which he reasoned provides a “useful framework for understanding the rights and responsibilities of workers and employers.”

Yet the framework does not neatly fit the sharing economy, which as Chhabria recognized, provides “far more flexibility than the typical” workplace and often “minimal contact” with management. Many argue that sharing-economy businesses provide something more akin to a platform for workers to connect with customers rather than a traditional master-servant or employer-employee relationship.

Uncertainty in the law is bad for innovation as sharing-economy businesses will increasingly litigate “bet the business model” cases that challenge the fundamental way in which they operate their businesses. As just one example, recently, U.S. District

Judge Edward Chen of the Northern District of California granted class certification to a class of Uber drivers in California. That decision has been appealed to the U.S. Court of Appeals for the Ninth Circuit, which likely will not issue a decision for some time (if it even agrees to hear the appeal on an interlocutory basis). Assuming each case is decided on its own particular facts, however, even appellate guidance may not provide clarity for other sharing-economy businesses.

The most effective solution may well be attempts to advocate for legislative intervention, although this may prove extremely difficult to achieve. Absent legislative action, courts left to grapple with complicated questions presented by new business models are left with outdated tools developed in a bygone era, based on common-law control tests that are not quite up to the task.

In the meantime, armed with the knowledge that this area continues to be a hotbed of administrative agency enforcement activity and wage-and-hour litigation, businesses with 1099 workers, whether in the sharing economy or otherwise, should consider assessing such classifications and making modifications where appropriate. •