

EMPLOYMENT STATUS

Gigging out of Control?



New technology combined with new business models has led to a rise in workers doing short-term, casual work and the growth of what has become known as the "gig economy". In particular, it is estimated that London's gig economy has grown by 70% since 2010, according to research by the New Economics Foundation.

"Getting a gig" used to apply exclusively to musicians but now it can range anywhere from manual work to parcel delivery or even freelance writing. The reason for all the recent publicity is that the employment status of those who do 'gig' work is unclear: are they workers, employees or self-employed? The answer helps determine their rights and also their employer's responsibilities. It may also impact on the amount of employment tax that is due. In broad terms, only employees can bring a claim for unfair dismissal but workers also have valuable statutory rights, including the right to paid holiday, rest breaks, minimum pay and whistleblowing protection. Conversely, self-employed have very little protection as they have few employment rights.

So what is the current state of play?

Historically, courts and tribunals tended to focus on the contracts and documents in place between the parties at the start of the relationship when determining employment status (as is the case for the interpretation of commercial contracts). However, case law in this area over recent years has shown that courts are increasingly willing to look beyond what the documents say to establish the reality of the relationship. It can, therefore, come as an enormous shock, and a major expense, to discover that staff who you thought were independent contractors (or "self-employed") are, in fact, workers or even employees. This is what has happened in the cases which have recently been in the press:

- ▶ **Uber**, who operates via a smartphone app, argued that it is a linking platform matching would-be passengers with self-employed drivers, rather than a taxi company employing taxi drivers. However, the Tribunal described this suggestion as "*faintly ridiculous*" and found that Uber exercised a degree of control over their drivers, inconsistent with the notion that they are self-employed, and so held that they were workers. With approximately 40,000 drivers in the UK, it is unsurprising that Uber has already appealed.
- ▶ Similarly, a cycle courier working for delivery firm **CitySprint** succeeded in establishing that she was a 'worker' for the company (rather than a self-employed freelancer, as described in her contract) and succeeded in her claim for 2 days' holiday pay. Among other things, the Tribunal noted that her substitution clause was extremely prescriptive. CitySprint has 3,500 "self-employed" couriers in the UK and so could now face further claims.

It is also understood that **Deliveroo** riders are also contemplating potential legal action. Moreover, the BBC has reported that it has seen a letter, sent two days after the Uber decision, from the Independent Workers Union of Great Britain (IWGB), on behalf of riders in north London, asking Deliveroo for recognition for the union to bargain on behalf of the group, for example to negotiate pay and terms and conditions with Deliveroo managers. As collective bargaining laws in the UK only apply to those classed as workers and employees (but not the self-employed), it is, potentially, a faster way of achieving worker status for riders than a full employment tribunal and, it is estimated, could benefit up to 8,000 riders working within Deliveroo in the UK.

Why is it a problem?

From an employment perspective, it is estimated that up to half a million workers in the UK may be wrongly classified as self-employed, exposing businesses to risks such as backdated holiday pay for up to 2 years, entitlement to the National Minimum Wage or National Living Wage, sick pay, rest breaks and 48 hour working weeks, and claims from whistleblowers. Indeed, it is understood that HMRC is currently investigating Hermes for allegedly paying workers less than the minimum wage.

Moreover, the Chancellor recently indicated that the 'gig' economy is beginning to affect budget revenues (as self-employment and casual work significantly reduce the amount of tax being paid) with the OBR estimating that the government may lose up to £3.5bn in tax revenues by 2020-21 as a result of the rise in self-employed "gig" workers. As such, it is clearly an issue that is gaining political momentum.

What is being done about it?

The government has acknowledged the issue and several reviews and studies were launched at the end of 2016. **BEIS** launched the Independent Review of Employment Practices in the Modern Economy, led by Matthew Taylor (hence it being known as the "Taylor Review"). The review is expected to last until July 2017 and will consider the implications of new business models on the rights and responsibilities of workers as well as on employer freedoms and obligations. BEIS has said that the results of the review will "inform the government's industrial strategy". In addition, **The Office of Tax Simplification (OTS)** has published a focus paper exploring the tax issues and implications of the gig economy and **The Work and Pensions Committee** has launched an inquiry to consider how the UK welfare system can support the increasing number of self-employed and gig economy workers. The primary purpose of these exercises seems to be to gather information so until they are complete it is difficult to know what the government intends to do as a result.

So what should employers be doing in the meantime?

Employers can take steps now to protect themselves by reviewing the employment relationships that they have in place. Following these decisions, they will be under more scrutiny than ever before and contracts are likely to be disregarded by the courts if they do not reflect the reality of the arrangements.

It is important to note that the Tribunal noted in Uber that their decision did not mean that Uber cannot operate a business model comprising independent contractors; it is just that their current business model does not achieve that aim.

In any event, both Uber and CitySprint were only first-instance decisions, so we will monitor any further developments in this area with interest.

How can we help?

If you would like to discuss the implications of these developments in more detail in the context of your business, please get in touch with one of our specialists who can provide further guidance. In particular, we can undertake a detailed audit of your contracts and assess whether they are in line with your current working practices, and, if not, advise what changes you need to put in place to avoid an "Uber" situation and reduce any potential liability.

Details of a **roundtable discussion** where this and other related topics will be discussed will be available shortly.

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