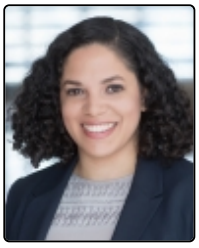
The Employer Report

NAVIGATING US AND GLOBAL EMPLOYMENT LAW

New York Delivers Good News For Independent Contractors, But Risks Remain





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With the modern workforce comes modern employment problems. Businesses and workers alike have embraced the "gig economy," but employment laws were not designed for workforces dominated by independent contractors and freelancers. This disconnect leaves gig economy businesses open to significant liability where such workers should have been classified as employees under the law.

While the gig economy in the US has suffered a few **high-profile blows** recently, a New York appellate court delivered some much needed relief this summer. In ***Matter of Vega***, New York's Third Department ruled that a Postmates delivery courier was not an employee of Postmates for unemployment purposes, overturning a decision by the Unemployment Insurance Appeal Board.

In a fact-intensive analysis, the Third Department determined that the Postmates-courier relationship lacked "indicia of supervision, direction and control necessary to establish an employer-employee relationship." The Court honed in on a number of facts evidencing the company's lack of control over how couriers carried out deliveries, including:

- Couriers were not required to report to a supervisor;
- Couriers retained "unfettered discretion" as to whether they logged on to Postmates' platform and actually worked;
- Couriers were free to work as much or as little as they want;
- Couriers had no set schedule, nor minimum or maximum time / number of deliveries requirement;
- Couriers could accept, reject, or ignore a delivery request without penalty;
- Couriers had the freedom to simultaneously work for other companies, including Postmates' direct competitors;
- Couriers could choose the mode of transportation used to perform the delivery.

Although the record demonstrated that the company had "incidental control over the couriers," such as determining delivery fees and courier rates, tracking deliveries and handling customer complaints, the Court held that these facts failed "to provide sufficient indicia of Postmates' control over the means by which these couriers perform their work."

Vega follows a significant New York Court of Appeals decision, ***Matter of Yoga Vida, Inc.*** that held that non-staff yoga instructors were properly classified as independent contractors for unemployment purposes. In *Yoga Vida*, New York's highest court found that substantial evidence did not support an employment relationship where, among other things, the instructors at issue made their own schedules, chose how they were paid (hourly

or percentage) and were not restricted from teaching at other studios or from informing Yoga Vida students about such classes. Proof of the yoga studio's "incidental control" over these instructors, such as license inquiries, provision of space, setting student fees and online scheduling, did not support a conclusion that the instructors were employees.

Independent Contractors: New York v. California Law

These New York decisions stand in stark contrast to the California Supreme Court's decision in ***Dynamex***.

In *Dynamex*, the California Supreme Court adopted the "ABC Test" to determine whether an individual is properly classified as an independent contractor under California's wage orders. Under the new California approach, there is a **presumption** that the worker is an employee. The burden is on the hiring entity to establish that the worker is an independent contractor who was not intended to be included within the wage order's coverage.

To meet this burden, the hiring entity must establish each of the three ABC factors:

> **A**. That the worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact;
>
> **B**. That the worker performs work that is outside the usual course of the hiring entity's business; and
>
> **C**. That the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed.

If hiring entity fails to prove even one of these factors, the worker will be deemed an employee for purposes of California's wage orders.

New York's approach, on the other hand, is more flexible and holistic—a company can exercise "incidental control" over independent contractors without creating an employment relationship, provided it does not control the "results" of the independent contractor's engagement, or the means used to achieve those results.

The Modern Workforce Globally

The rewards of adopting new staffing models, be it crowd working, employee sharing, fixed-term staffing or other such models, can be considerable for multinational companies. At the same time, global business must proactively manage the risks of misclassification (e.g., fines / penalties, litigation, data privacy breaches, IP breaches / trade secret disclosure, and reputational risk, among others).

Recently in the UK, companies have been forced to grant additional rights to their workforce. In Germany, dawn raids are par for the course in investigating possible cases of misclassification, and the sanctions are severe. Recent reform there has restricted the use of temporary agency workers and increased sanction in case of bogus self-employment and illegal temporary agency work. Elsewhere in Europe and in Latin America, misclassification of employees carries significant sanctions and liabilities.

According, multinationals must understand their modern workforce obligations by jurisdiction and stay close to likely developments globally. Working with counsel with a global footprint can help identify countries with the highest reputational, regulatory, financial and employee relations risks of non-compliance.

Key Takeaways

We are all under ever-increasing internal and external pressures to adopt modern working methods and to embrace alternatives to traditional workplace models. At the same time, independent contractor misclassification can be a death knell for businesses, particularly in the gig economy. Companies are well-advised to proactively audit worker independent contractor classifications, review independent contractor agreements, and take steps to mitigate potential exposure, including reclassifying workers and redefining roles as needed.

Creating a fit-for-purpose workforce while protecting your business requires knowledge across many areas of regulation, including employment, remuneration and benefits, mobility, data privacy/ protection, tax and protection of confidential information/trade secrets.

For help managing your modern workforce, please contact your Baker McKenzie employment lawyer.

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