

5 top tips for employers following 'gig economy' cases

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5 top tips for employers following 'gig economy' cases

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The phrase 'gig economy' has entered common parlance since the Employment Tribunal cases involving Uber, City Sprint, Pimlico Plumbers and the upcoming case of Deliveroo. It is also unlikely to go away any time soon as Uber has been granted leave to appeal the decision that its drivers were workers. The appeal is scheduled for 27 and 28 September 2017.

Whilst the gig economy at present is relatively small,

amounting to a mere 2% of the total recruitment market, it is expected to be worth up to £2 billion to the economy by 2020. Little wonder then that there is so much scrutiny on this issue.

Given the high profile recent cases and that determining a person's employment status is not an easy exercise, employers can be forgiven for being somewhat alarmed. Whilst there is no one-stop test to determine employment status, the following 5 top tips can assist in addressing concerns employers may have:

1) Evaluate the workforce

Look at the existing (and future) workforce – identify those on contracts of employment and those who you intend to retain on a contractor or self-employment basis. Ensuring the correct status of the latter will be the focus here.

2) Look at the Contract

It seems obvious, but the starting point for all these cases is to look at the terms of the contract between the company and individual – does it state it is a contract of employment or does it refer to the individual as a contractor? What rights and obligations do each party have under the contract? On what basis is the individual being paid – a fixed amount, annually, per project? Is the length of the contract determined or is it for a fixed term or for a specific project? Are the facilities and equipment required to perform the tasks provided by the company or the individual?

Unfortunately from a company's point of view, the issue does not stop here. Tribunals can and do also look behind the terms of the contract to see how the relationship operates in practice.

3) Consider how the relationship operates in practice

If an individual asserts they are a worker, chances are they

will claim that what happens in practice is different to the terms agreed under the contract and/or the intention of the parties when entering into the contract. In these circumstances, the Tribunal will look at various factors to determine the status of the individual, including, but not limited to:

- **Mutuality of obligation:** Is the company under an obligation to provide the individual with work? Is the individual under an obligation to accept work when it is given? A yes to both tends to indicate worker status.
- **Personal service:** Does the individual have to perform the tasks themselves or can they appoint someone else to do this on their behalf? Does the company have any say in who can perform these services on their behalf? Have substitutes ever been appointed in practice? No personal service and the freedom to appoint a substitute without the company's involvement or approval may indicate self-employment status.
- **Control:** How much control is exerted by the company on how, what, when and where the tasks are provided? Is the individual expected to abide by the company's standard of behaviour and dress? Generally, the more control exerted by the company, the more likely it is that the individual is a worker.
- **Integration:** To what extent is the individual integrated into the company's business? Do they have a company email address? Are they in the company's internal directories or on the website? Do they have a company business card? Do they perform substantially the same work as employees of the company? Individuals who are at arms length to the business, its operations and its staff are less likely to have worker status.
- **Marketing services to the world at large:** Is the individual free to provide services to other companies? Are there any restrictions on what they can do/who they can provide services to following termination of the

contract with the company? An individual who can and does work elsewhere and can advertise and market their services to other companies is less likely to be found to be a worker.

- **Taxation status:** Although it is not determinative, if the individual is responsible for payment of their own tax and National Insurance Contributions and for registering for VAT, this indicates self-employment status.

4) Hold a conversation

Having considered the checklist of factors above, reflect on whether any individuals may fall into this worker status category. Consider whether the company does in fact want the individual to be an employee to ensure exclusivity of their service.

Discussions with the individual should be held carefully – there is a risk in highlighting the possibility of worker status, and thus making known the entitlement to such rights as holiday pay, rest breaks, national minimum wage, not to be discriminated against or subject to a detriment for raising whistleblowing concerns and potentially auto-enrolment in to the company's pension scheme. To negate this, undertake this as part of a review of the policies and procedures across the company as a whole.

5) Consider amendments to contracts and business practices

If there are areas of the business where contractors are more integrated or have a large amount of control exerted over them, consider ways in which to put the relationship at an arm's length in practice. Allow more flexibility in how, what, when and where the services are provided, reduce the regularity of the individual's service, limit the services to a specific time period or project, negate the need to attend the company's premises and reduce the interaction with the

company's staff. Consider amending the contract to reflect their independent status and reducing the obligations imposed on them.

Just a note of caution on this – Tribunals have heavily criticised employers for having overly elaborate contracts or for trying to conceal what happens in practice. Some companies have failed to take heed of this. It was reported in the Guardian on 6 April 2017 that Deliveroo has recently brought in fresh terms for the company to use when referring to the couriers – these individuals are neither workers nor staff, but 'independent suppliers,' they are not hired but are 'on-boarded', and their branded outfits are not uniforms but 'equipment' or 'kit.' As the Tribunal in the Uber case quoted, 'the lady doth protest too much, methinks.'

If you or your company has any concerns over an individual's employment status, do not hesitate to get in touch.

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