VOL. 32, NO. 2 SUMMER 2019

BENEFITS LAW JOURNAL

**Litigation**

# ERISA and the Gig Tsunami

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The first wave of a tsunami is usually not the strongest. Later waves get bigger, faster, and stronger … the gig tsunami is already upon us. Thirty-six percent of U.S. workers are now gig economy workers. In 1995, the percentage of the workforce identified as independent contractors was 6.7%. This six-fold increase in the number of gig economy workers is changing the law. Last August, Gallup released the results of its "Gig Economy An Alternative Work Arrangement Study."

> Gallup estimates that 29% of all workers in the U.S. have an alternative work arrangement as their primary job. This includes a quarter of all full-time workers (24%) and half of all part-time

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> workers (49%). Including multiple job holders, 36% have a gig work arrangement in some capacity.[1]

This means the gig economy employs about 57 million Americans. Gallup defined gig work as follows:

> The gig economy includes multiple types of alternative work arrangements such as independent contractors, online platform workers, contract firm workers, on-call workers, and temporary workers.[2]

The dramatic increase in the number of workers who are classified as independent contractors is changing how employers and workers interact. Independent contractors are less expensive to employ than regular employees. The multiple expenses incurred by employers for employees do not occur with independent contractors. Independent contractors are not provided with medical, retirement, life insurance, disability insurance, and other employee benefits, as well as workers' compensation coverage. The employer is also not obliged to pay statutory employment taxes for independent contractors. Gig workers see the relationship differently. They enjoy the perk of being independent, the greater flexibility about when they work, the tax benefits, and the idea of not having a boss.

Despite these rapid changes in the U.S. economy, the legal concepts of employer and independent contractor have not changed very much. The distinction between independent contractors and employee varies greatly from one branch of the law to the next.

## THE FEDERAL GOVERNMENT 'FRIENDS' GIG EMPLOYERS

The National Labor Relations Board (NLRB) recently announced it was returning to its longstanding independent contractor standard, reaffirming the Board's adherence to the traditional common-law test. The Board clarified the role entrepreneurial opportunity plays in its determination of independent contractor status. The case, *SuperShuttle DFW, Inc.*,[3] involves shuttle van driver franchisees of SuperShuttle at Dallas Fort Worth airport. Applying the traditional common-law test, the Board concluded that the franchisees are not statutory employees under the National Labor Relations Act but rather independent contractors excluded from the Act's coverage. The Board found that the franchisees' leasing or ownership of their work vans, their method of compensation, and their nearly unfettered

control over their daily work schedules and working conditions provided the franchisees with significant entrepreneurial opportunity for capital gain. These factors, along with the absence of supervision and a party's understanding that the franchisees are independent contractors, resulted in the Board's finding that the franchisees are not employees under the Act. The *SuperShuttle* decision overruled *FedEx Home Delivery*,[4] a 2014 NLRB decision that modified the applicable test for determining independent contractor status by severely limiting the significance of a worker's entrepreneurial opportunity for economic gain.

The U.S. Department of Labor (DOL) issued a guidance letter on April 29, 2019 providing good news for gig economy employers. Opinion Letter FLSA-2019-6 informed one unidentified "virtual marketplace employer" that its workers are properly classified as independent contractors. Using a six-factor test to analyze the "economic realities" of the parties' relationship, the DOL ruled that gig workers are not subject to minimum wage, overtime, and other legal protections provided to employees because gig workers are not economically dependent on the companies for whom they work. The DOL based its opinion on the agency's longstanding six-factor economic realities test. The six factors look at:

1. The degree of control over the worker by the company;
2. The permanency of the relationship;
3. The worker's "investment and facilities, equipment or help";
4. The "skill initiative, judgment or foresight" the work requires;
5. The opportunities for profit or loss; and
6. The extent of the integration of the worker's services into the potential employer's business.

## STATE COURTS 'UNFRIEND' GIG EMPLOYERS

The California Supreme Court last year came to the opposite conclusion. In *Dynamex Operations West, Inc. v. Superior Court of Los Angeles,*[5] the court ruled that, in deciding whether a worker is an employee or an independent contractor, the employer must begin by presuming that the worker is a common law employee. Workers may be classified as independent contractors only if they meet all three of the following criteria:

1. The worker is free from the control and direction of the hiring business in connection with the performance of the work;

2. The worker performs work that is outside the usual course of the hiring entity's business; and

3. The worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity.

Although the *Dynamex* ruling is limited to classifying workers under California's wage orders, its practical effect will be much broader. Employers commonly use one definition of employee for wages, hours, and working conditions, including employee benefit plan eligibility. On May 2, 2019, the Ninth Circuit ruled that the California Supreme Court's decision in *Dynamex* must be applied retroactively. In *Gerardo Vazquez v. Jan-Pro Franchising International, Inc.*,[6] the Court rejected arguments that retroactivity would be fatal to the franchising industry.

> Given the strong presumption of retroactivity, the emphasis in *Dynamex* on its holding as a clarification rather than as a departure from established law, and the lack of any indication that California courts are likely to hold that *Dynamex* applies only prospectively, we see no basis to do so either.[7]

The impact of the *Dynamex* decision on employee benefit plans that are subject to the Employee Retirement Income Security Act of 1974 (ERISA) is an open question.

## ERISA AND THE GIG ECONOMY

A lawsuit seeking plan benefits under ERISA may be brought only by a plan participant or beneficiary.[8] A plaintiff must satisfy two requirements to establish participant status. First, the plaintiff must be a common law employee. Second, the plaintiff must be, according to the language of the plan itself, eligible to receive a benefit under the plan.[9] The dispositive question in an ERISA claim for benefits is not whether the claimants were employees but whether, considering them as employees, they were eligible to participate in the ERISA plan in accordance with the plan's specific terms. Employers are limited by ERISA on who they may exclude, but the limitations are narrow.

> ERISA does not require [an employer] to define its benefits plans in such a way as to provide coverage for all employees … [a]n employee may be a common law employee for some purposes, yet not entitled to benefits under a benefit plan.[10]

Participant status turns on the language found in each plan.

> Although "[a]n ERISA plan is a contract,"*see Bland v. Fiatallis N. Am., Inc.*, 401 F.3d 779, 783 (7th Cir.2005), "ERISA does not contain a body of contract law to govern the interpretation and enforcement of employee benefit plans," *Richardson v. Pension Plan of Bethlehem Steel Corp.*, 112 F.3d 982, 985 (9th Cir.1997). We therefore "apply contract principles derived from state law … guided by the policies expressed in ERISA and other federal labor laws." *Id.*[11]

Both ERISA and the Internal Revenue Code generally permit employers to exclude contingent workers from participation in employee benefit plans. The legal status and the rights of contingent workers—particularly in connection with exclusion from employee benefit programs—remain in a state of flux.

Contingent workers typically agree to work without company-sponsored employee benefits in exchange for higher pay or more flexibility in their work schedules.

Gig economy workers have been chasing after employer-sponsored employee benefits for more than 20 years. Believe it or not, Microsoft was the target of one of the first gig worker ERISA lawsuits (*Vizcaino v. Microsoft Corp)*.[12] In the end, the *Vizcaino* plaintiffs settled for $96.9 million—and that was in 2001.

The named plaintiff in the *Microsoft* decision, Donna Vizcaino, began working for Microsoft Corporation as a "freelance" production editor in 1987. Vizcaino, as a freelancer, signed two form agreements stating that she was an independent contractor. In those agreements, Vizcaino agreed she was not eligible for Microsoft employee benefits, she would purchase her own employee benefits, and that she would pay her own employment taxes. After beginning her work at Microsoft, however, Vizcaino came to the conclusion that the only real difference between her job and the jobs of "regular" employees was not what they did, but what they received. Regular employees received pension, stock purchase, and other employee benefits. Vizcaino did not.

In 1989 and 1990, the Internal Revenue Service conducted an audit and decided that, as a matter of law for employment tax purposes, the freelancers were employees rather than independent contractors. After the IRS made this determination, the freelancers claimed they were entitled to participate in Microsoft's employee benefit plans. Microsoft

disagreed, and the freelancers then asked Microsoft's plan administrator to determine whether they were eligible for these benefits. Not surprisingly, Microsoft's plan administrator determined that the freelancers were ineligible. The plaintiffs then commenced this litigation.

### *Retirement Benefits*

The Ninth U.S. Circuit Court stated the earlier decision of the plan administrator that the freelancers were ineligible for benefits under the retirement plan was obviously wrong, because Microsoft had now conceded that in light of the IRS audit the freelancers were, in fact, employees.

### *Stock Plan Benefits*

The freelancers also contended that they were entitled to immediate participation in Microsoft's stock purchase plan. The Ninth Circuit ruled that the stock purchase plan had been offered by Microsoft to all "employees." As such, the freelancers were aware of it, even if they were not aware of the plan's exact terms, and their work for Microsoft gave them a right to participate in it. The Ninth Circuit agreed that the freelancers were entitled to retroactively participate in the employee stock purchase plan as a matter of law.

There is some good news. ERISA still preempts state laws.[13] As such, *Dynamex* does not determine whether a worker is an employee for purposes of participation in an ERISA-regulated employee benefit plan. If the ERISA plan says "all employees" can participate, then the *Dynamex* decision may govern which "employees" participate. Because ERISA plans are governed by federal law, they look to the IRS multifactor test for determining who is an employee.[14] In *Nationwide Mut. Ins. Co. v. Darden*, the Supreme Court provided the following standard "for determining who qualifies as an 'employee' under ERISA."[15]

> In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the

> work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.[16]

It is therefore important to review each ERISA-regulated plan to evaluate how each defines eligibility to participate.

## NEW DEVELOPMENTS

On January 29, 2019, the Sixth Circuit, in *Jammal v. American Family Ins. Co.*,[17] ruled that insurance agents had properly been classified as independent contractors. The Sixth Circuit's decision used the *Darden* factors to determine who qualifies as an employee under ERISA. The Court of Appeals found the district court incorrectly applied the *Darden* standards relating to: (1) the skill required of an agent; and (2) the hiring and paying of assistance. According to the Court, the correct application of the *Darden* standards weighed in favor of independent contractor status. The Sixth Circuit also stated the district court failed to give sufficient weight to the parties' written agreement that expressly stated both parties intended to establish an independent contractor relationship. The Sixth Circuit further found that the factors relating to the "financial structure of the company agent relationship," including the source of the instrumentalities and tools, method of payment, provision of employee benefits, and the agent's tax treatment favored independent contractor status.

In the wake of the gig economy tsunami, plan sponsors should consider adding protective language stating that plan eligibility will not be extended retroactively to individuals who are initially hired as independent contractors, even if a court or other administrative agency later determines they are employees. For example, many ERISA plans in California use some form of exclusionary language stating:

> The following Employees are automatically excluded from eligibility to participate in the Plan:
>
> 1. Any individual who is a signatory to a contract, letter of agreement, or other document that acknowledges his or her status as an independent contractor or leased employee not entitled to benefits under the Plan or any individual who is not otherwise classified by the Employer as a common law employee, even if such independent contractor or other individual is later determined by a court or administrative agency to be a common law employee.

Proceed with caution. Eligibility language in ERISA plans is often ignored until it is too late—and someone has decided to sue.

## NOTES

1. Gig Economy and Alternative Work Arrangement Study (*available at https://www.gallup.com/file/workplace/240878/Gig_Economy_Paper_2018.pdf*).

2. *Id.*

3. *SuperShuttle DFW, Inc.*, NLRB Case No. 16-RC-010963.

4. *FedEx Home Delivery*, NLRB Case Nos. 34–CA–012735 and 34–RC–002205.

5. *Dynamex Operations West, Inc. v. Superior Court of Los Angeles,* 4 Cal.5th 903 (2018).

6. *Gerardo Vazquez v. Jan-Pro Franchising International, Inc.* (Case No. 17-16096) (9th Cir. May 2, 2019).

7. *Id.*

8. 29 U.S.C. § 1002(7).

9. *Baur v. Summit Bancorp.*, 325 F.3d 155 (3rd Cir. 2003).

10. *MacLachlan v. ExxonMobil Corp.*, 35 F.3d 472, 482 (5th Cir. 2003).

11. *Gilliam v. Nevada Power Co.*, 488 F.3d 1189, 1194 (9th Cir. 2007).

12. *Vizcaino v. Microsoft Corp.,* 120 F.3d 1006 (9th Cir. 1997) (en banc).

13. 29 U.S.C. § 1144.

14. *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318 (1992), accord *Burrey v. Pacific Gas & Elec. Co.*, 159 F.3d 388 (9th Cir. 1998).

15. 503 U.S. at 323, 112 S.Ct. 1344.

16. *Id.* at 323–324, 112 S.Ct. 1344.

17. *Jammal v. American Family Ins. Co.*, 914 F.3d 449 (6th Cir. 2019).