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Uber's Gambit: Reassessing the Regulatory Realities of the 'Gig Economy'

Abstract

[Excerpt] Human Resources (HR) departments have begun bracing for a labor environment characterized by temporary jobs, one dominated, for example, by the independent contractor. Accordingly, the workplace policy landscape is shifting to keep up with what has now come to be known in modern buzzword parlance as a "gig economy". However, while it is certainly in a company's best interest to make itself aware of workplace trends, it is ineffective for a company to always try to position itself at the forefront of these trends. Trends, after all, do not represent permanence; instead, they merely illustrate the direction in which something moves for an often-finite period. Preemptively building around the assumption that the regulatory landscape in which the gig economy rests will shift commensurately to better facilitate this trend could ultimately be a waste of company resources. Uber presents an ideal example of a company that has employed this strategy and will be examined to demonstrate how the economy is rules-based and companies should model internal processes after those rules, rather than after trending business models.

Keywords

HR Review, human resources, independent contractors, gig economy

Comments

Suggested Citation

Lowe, M. (2017, March 6). Uber's gambit: reassessing the regulatory realities of the 'gig economy'. *Cornell HR Review*. Retrieved [insert date] from Cornell University, ILR School site: <http://digitalcommons.ilr.cornell.edu/chrr/97>

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CORNELL HR REVIEW

Uber's Gambit: Reassessing the Regulatory Realities of the 'Gig Economy'

Matthew Lowe

I. Introduction

Human Resources (HR) departments have begun bracing for a labor environment characterized by temporary jobs, one dominated, for example, by the independent contractor.¹ Accordingly, the workplace policy landscape is shifting to keep up with what has now come to be known in modern buzzword parlance as a “gig economy.”² However, while it is certainly in a company’s best interest to make itself aware of workplace trends, it is ineffective for a company to always try to position itself at the forefront of these trends. Trends, after all, do not represent permanence; instead, they merely illustrate the direction in which something moves for an often-finite period. Preemptively building around the assumption that the regulatory landscape in which the gig economy rests will shift commensurately to better facilitate this trend could ultimately be a waste of company resources. Uber presents an ideal example of a company that has employed this strategy and will be examined to demonstrate how the economy is rules-based and companies should model internal processes after those rules, rather than after trending business models.

II. The Case of Uber

Conceived of in 2008 and launched in 2009, Uber develops and markets an application that serves as an alternative service to standard taxicabs by allowing users to electronically hail drivers contracted by Uber.³ In its early stages, Uber experienced a lot of success and traction. Following its launch, the company received \$200,000 in seed funding and a year later, it received \$1.25M.⁴ By the end of 2011, it had reached \$44.5M in funding.⁵ Between then and now, Uber has expanded to over 66 countries and 507 cities worldwide.⁶ Still, despite its commercial success, Uber has been racking up massive litigation costs as its independent contractor-dependent business model has been continuously challenged due to claims of misclassification, which is, for example, when a company classifies its employees as independent contractors when they should be classified as full-fledged employees. In just 2016, Uber had found itself embroiled in over 70 lawsuits – most of them dealing with this very problem.⁷ Unfortunately for its bottom line, the legal woes Uber finds itself in are leading it to bleed hundreds of millions of dollars in settlement costs, fines, and other penalties.⁸

The threat that the current legal scheme in the U.S. presents to Uber is a very serious one, indeed. Most of Uber’s legal “victories” to this point have been mere settlements⁹, meaning

that the cases never actually made it into the courtroom for judgment, thus these have hardly been actual victories at all. Failing to set a precedent may mean that Uber lives to fight another day, but it clearly also means that it is not protected from the onslaught of pending and prospective lawsuits it faces. From a legal perspective, there is a chance that Uber may end up going down in history as an exceptional concept that could not survive the demands of its regulatory environment. For one thing, there is a stigma attached to settlements; a social perception that perhaps the decision to settle out of court is, in a way, an admission of wrongdoing.¹⁰ While this stigma represents a severely limited understanding of the law, it is nonetheless persistent and likely heightened when a company engages in a significant number of them, especially when it is over the same issue. Thus, the company's legal viability is at least suspect.

From a more legally sound angle, the reality is that independent contractor status is difficult to maintain in a long-term, sustainable business model like Uber's. Without delving too deeply into the canon of independent contractor vs. employee lawsuits, the gist of what courts look for is whether the work being done by a worker follows the usual path of an employee.¹¹ Courts do this by examining a series of potential factors, such as the amount of control the company exerts over the employees and the company's power to fire, hire, or modify the employment condition of the employees.¹² With that in mind, it seems that at the very least, if Uber were to win a major (and actual) victory in court, doing so would not be easy. As Mark Schickman, an attorney at Freeland, Cooper & Foreman LLP, points out: "Independent contractor status works only if you are willing to vest all methodological control in the worker, caring only about the result."¹³ As Schickman continues, however:

The inherent problem is that these companies thrive on the basis of their brands and consistency. Uber vehicles must bear the Uber logo, use the Uber app, signal their distance from a fare, use the Uber billing system, and behave according to Uber's rules. Most of all, the drivers are the backbone of what Uber does, which is a difficult position for those who rely on a stable of independent contractors.¹⁴

Uber is presently valued at around \$60B and can possibly afford to hold out and keep pursuing settlements until the laws hopefully change in its favor.¹⁵ However, this is costly and not all companies are willing to ride out that kind of cost. Further, in August of 2016, this strategy was significantly disrupted when a federal judge struck down a proposed class-action settlement between Uber and a group of current and former drivers suing over misclassification.¹⁶ The settlement amount was for \$100M in that case, yet the judge still found that this amount was "not fair, adequate, or reasonable".¹⁷ Therefore, while the settlement strategy is costly, it may get even more costly for future disputes. Despite its explosive and impressive growth, Uber is losing more money than any other tech company ever, losing about \$1.27B in the first half of 2016 alone.¹⁸ Still, Uber will most likely try and maintain its waiting game because independent contractor status is the core of its business model – to concede to its opponents and entitle its drivers with employee status would result in an even larger loss estimated at billions of dollars in costs.¹⁹ This is due to

the additional workplace benefits for their drivers that they would be legally required to provide, in addition to increased unionization accessibility for drivers.²⁰

IV. Conclusion & Suggestions for Moving Forward

Some would attribute Uber's successes to its strategic navigation of regulated economies. Those camps may also see it as representative of a larger trend towards an economic revolution – a “gig” economy. Perhaps it is more accurate to instead view Uber and companies like it as having started without any anticipation of the types of legal challenges they are now facing; only after dealing with lawsuits and negative media attention have they fallen back on hoping that the regulatory landscape will someday soon mutate around their business models. This is the circumstance for many startups in the ideation phase, which seldom have access to in-house legal counsel to assist with their daily decision-making. Most collaboration with law firms earlier on is more focused on structuring funding deals and other non-regulatory transactional aspects of business development.

Even outside of the startup realm, larger scale companies face similar issues. In addition to Uber, the FedEx Corporation has incurred millions of dollars in misclassification disputes for its drivers over the years.²¹ In fact, for whatever evidence exists that influences companies to consider restructuring around the gig economy, there is sufficient evidence to counteract it. In other words, there is a trend that shows that companies are beginning to comply more with current regulations, especially in the area of employees and independent contractors, to the extent that some companies are even beginning to reclassify independent contractors as employees to avoid penalties in anticipation of having misclassified their labor force.²² As such, they are endeavoring to do the exact opposite of what Uber is doing in order to mitigate massive potential liability and cost.

For now, it is in the best interest of startup companies (including those that have reached Series A funding) to do their due diligence and to be aware of what pitfalls lie ahead of them when they choose to pursue a certain path. In this way, they can rely on more reasonable strategies than hoping that entire regulatory schemes will at some point shift in their favor. It would also help to have someone with a background in HR on the team to assist with internal labor audits to ensure regulatory compliance – increasingly, startups are beginning to realize the value in having effective HR for purposes such as this.²³ For companies that are more developed, it can be equally worthwhile to have the current HR team (or teams) run an audit to ensure that the company is complying with the guidelines for determining the proper classification of a worker. Lastly, there is no rush to expend valuable time, effort, and company resources in establishing HR policies in anticipation of possible regulatory changes. If companies attempted to anticipate every possible regulatory change, they would quickly become inefficient and ineffective. While there seems to be a rise in business models taking advantage of a perceived “gig economy”, an economy is ultimately defined by the rules the market and the market's participants must adhere to and as of now, despite this upswing, the regulatory environment simply has not caught up yet to validate this perception.

Uber has clearly adopted a “grow first, make money later” edict that is representative of Silicon Valley,²⁴ but doing so is obviously counterintuitive to sustainable growth. If companies are prioritizing long-term viability and a (relatively) comfortable level of stability, then they should focus more on the trends of regulations and laws themselves rather than the hype surrounding new business models that do not comply with – or take into account – their present circumstances.

Matthew Lowe is a dual degree (JD/MHRIR) student at the University of Illinois. He has worked as the CHRO for a fast growing startup company, Zealous. He has also worked in the HR departments of various Fortune 100 companies and has served as a judicial law clerk for the EEOC office in New York City. He is published in various national academic journals, including the Illinois Business Law Journal and the Illinois Journal of Law, Technology and Policy.

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