

Gig-Worker Classification in the Age of COVID-19

By Joshua S. Lipshutz and Michael Holecek

In the face of the COVID-19 crisis, gig-economy companies have adapted quickly to Americans' changing needs. Uber announced this week that it is launching a grocery-delivery service. Rideshare competitors Didi and Pronto similarly announced last week that they had created grocery-shopping platforms. And Lyft recently reported that it was piloting restaurant and medical-supply delivery platforms.

These rapid shifts demonstrate what Silicon Valley investors have long known: that gig-economy companies—whatever their particular focus—are fundamentally technology platforms, uniquely designed to connect people who need various goods and services with people who can provide them. To think of these companies as merely “transportation” or “food delivery” companies is to misunderstand their busi-



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ness models and underestimate their capabilities.

This proper conceptualization of gig-economy companies as technology companies has important implications under California's recently enacted labor law, Assembly Bill 5 (AB 5). Under AB 5, workers must be classified as employees and not independent contractors unless they “perform work that is outside the usual course of the hiring entity's business.” Cal. Labor Code §2750.3(a)(1) (B).

For that reason, when AB 5 was enacted, many politicians and commentators—including Governor Newsom and bill sponsor Assemblywoman Lorena Gonzalez—declared it the end of the gig-economy business model, in which workers using the platforms are typically treated as independent contractors. Just last week, the City of San Francisco echoed that view, calling on the State's district attorneys to force gig-economy companies to “comply” with AB 5 by reclassi-

ifying gig workers as employees.

But AB 5 did not order the reclassification of gig workers. Rather, AB 5 codified an independent-contractor test—called the “ABC test”—that has been around for many years in several states. And, as the COVID-19 crisis has helped demonstrate, all three factors of the test favor treating gig workers as independent contractors.

Prong A asks whether the worker is “free from the control and direction of the hiring entity in connection with the performance of the work.” Of course, few workers have as much freedom and flexibility as gig workers. Gig companies generally do not require workers to be available at any particular times, show up in any particular place, or accept any particular work. With coronavirus depressing demand for traditional rideshare in certain areas, gig workers have complete autonomy to shift to other platforms offering new opportunities, such as grocery shopping or medical-supply delivery. A traditional employee could never make those types of choices because the company would decide how to redeploy resources in top-down fashion.

Prong B, as mentioned above, asks whether the worker and

the company are engaged in the same “course of ... business.” Recent events prove more than ever that, in the gig economy, they are not. A rideshare driver might consider herself to be in the transportation business, but the company that operates that rideshare platform likely also operates platforms for grocery shopping, restaurant delivery, catering, long-haul freight, non-emergency medical transport, and/or “virtual kitchens”—all types of virtual marketplaces that connect people, products, and services. That is because, as the U.S. Department of Labor has correctly concluded, these companies are technology companies: “the business’s ‘primary purpose’ is not to provide services to end-market consumers, but to provide a referral system that connects service providers with consumers.” Their employees are the software engineers writing the code that runs their platforms, not the people who use their apps.

Prong C asks whether the worker is “engaged in an independently established trade, occupation, or business.” Again, the ongoing health crisis confirms that gig workers are independent business owners—entrepreneurs who seek to earn

money by providing a variety of services on numerous platforms, wherever the right opportunity arises. During the recent debates over the COVID-19 economic stimulus bill, many legislators and commentators addressed gig-economy work as a unique occupation, and the CARES Act even makes small business loans available to gig workers, recognizing them as operators of independently established business.

Of course, gig workers, like other Americans, are feeling the strain of the COVID-19 health crisis and economic slowdown, and gig-economy companies should do all they can to help the workers through these trying times. But no gig worker will lose his or her job because of the crisis—not in any traditional sense. Rather, when the demand for rideshare and other services returns, they will be able to provide their services by clicking on the app, just as they did before. That is the hallmark of an independent contractor.

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