THE FINANCIAL PAGE

GIGS WITH BENEFITS

If someone uses Uber to get to the airport, is the driver an Uber employee, or an independent contractor using Uber to find customers? For companies in the so-called sharing economy—Lyft, Postmates, TaskRabbit, Instacart, and so on—there may be no more important question. A couple of weeks ago, a California labor commissioner gave her answer: she ruled that an Uber driver who had filed a claim against the company was, in fact, an employee. The ruling applied only to that particular worker and the only upshot was the reimbursement of the plaintiff's car expenses. But, if other regulators and courts were to follow that decision, it isn't just the future of Uber that would be transformed. The U.S. job market would be, too.

We hear a lot these days about the gig economy, but the issue of whether a worker is an employee or an independent contractor has been the subject of intense legal battles for decades. The distinction can be surprisingly hard to make. The I.R.S. has a list of twenty factors that it takes into account, but other federal agencies have different criteria, as do most states. The fundamental issue is usually whether an employer has "control" over the work being done, but defining control isn't always easy.

In the past century, laws designed to protect workers have proliferated, and the social safety net has expanded significantly, in ways that give employees benefits and security not available to independent contractors. Hiring employees costs businesses more than hiring independent contractors—estimates suggest that it can be twenty to thirty per cent more expensive. So companies have become remarkably inventive at finding ways to call workers contractors. A 2005 Cornell study found that roughly ten per cent of workers in New York State were miscategorized. Certain industries—trucking, construction, housekeeping—are notorious for doing this, but it happens everywhere. In the late nineties, Microsoft lost a major lawsuit because it had labelled some of its engineers contractors and denied them stock options and other benefits, even though they did essentially the same work as regular employees. More recently, FedEx settled a series of class-action suits brought by drivers who claimed that they had been misclassified.

Uber's critics insist that it, too, is simply disguising employees as contractors. It sets the prices that its drivers can charge, monitors their performance (based on ratings from passengers), and can boot them off the service if their ratings are too low. Uber, meanwhile, claims that it's much more like eBay than like McDonald's: it's a platform connecting customers and drivers, and taking a cut (twenty per cent) of the transaction. It doesn't tell drivers when they have to drive, or where. It doesn't determine how many hours they work, or if they work at all. And its use of ratings isn't that different from what eBay does with its sellers.

Much worker-protection legislation takes the view that, when there's a tough call like this, we should put workers' interests above corporate ones. But it's not clear that most of Uber's drivers would be better off if we declared them employees. The ones who treat their gig as a full-time job—driving forty hours a week or more—would probably benefit. But Uber would likely recoup its rising labor costs by taking a larger cut of fares and shrinking its workforce. Arun Sundararajan, a business-school professor at N.Y.U. and an expert on the sharing economy, told me, "It's very unlikely drivers' take-home pay would rise. There also would be fewer drivers. They would be able to drive more hours, but they'd have less flexibility in how they worked." Studies suggest that flexibility—no supervisors to answer to, working when you want rather than when the boss wants—is an important part of what attracts workers to companies like Uber.

The real problem here is that Uber drivers don't quite fit into either of the traditional categories. Declaring them independent contractors or employees, as a California judge presiding over a lawsuit against Lyft commented, means forcing a square peg into one of two round holes. We'd do better to create a third legal category of workers, who would be subject to certain regulations, and whose employers would be responsible for some costs (like, say, reimbursement of expenses and workers' compensation) but not others (like Social Security and Medicare taxes). Other countries, including Germany, Canada, and France, have rewritten their laws to expand the number of worker categories. There's no reason we can't do the same, and give gig-economy workers a better balance of flexibility and security.

The bigger issue here, though, is the outdated nature of our social safety net. It's still dependent on the idea of the full-time employee, who gets health care, a pension, unemployment insurance, and so on from one company. That worked fine in a world of stable employment, but lots of Americans no longer live in that world and plenty more will be joining them. And, as Sundararajan says, "It makes no sense to have a well-developed safety net for one category of employment and virtually none for other kinds of productive work." Obamacare was a step in the right direction, and Senator Mark Warner, of Virginia, has suggested that we could use a similar system for benefits like workers' comp and unemployment insurance. Work is changing. The protection we offer workers should change as well.

—James Surowiecki

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