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## WHAT IS “EMPLOYMENT” IN THE GIG ECONOMY?

The task-based business model of the gig economy is transformative in every industry affected, from ride-hailing (Uber, Lyft), to housing rental (Airbnb), to food delivery (Uber Eats, Grubhub), to professional services (Upwork, Guru). There seemingly is no end to the potential competitive disruption of gig entrepreneurs. This expansion continues to exert significant pressure on the fundamental question: are those who complete the tasks or provide the services employees or contractors? The question is neither new nor novel. The answer is pivotal to the success of the businesses and the expectations of the service providers and business owners.

In [\*Matter of Vega \[Postmates Inc.\]\*](#), decided June 21, 2018, the New York Appellate Division addressed the question anew in the context of an unemployment insurance claim brought by a former courier against Postmates Inc., which operates a web-based platform that allows customers to request on-demand delivery service from local restaurants or stores. As is common today, the result for this one claimant would determine the employment status for a class of all similarly-situated couriers.

In finding no employment relationship, the Court applied the traditional “manner and means” standard for assessing employee or contractor status: “Whether an employer-employee relationship exists is a question of fact, to be decided on the basis of evidence from which it can be found that the alleged employer exercises control over the results produced . . . or the means used to achieve the results.”

The factors cited by the Court in support of the finding of independent contractor status included:

- To “apply” for the position, the couriers downloaded Postmates’ software app and provided their identifying information; there was no employment application or interview.
- The couriers were not required to report to any supervisor.
- The individuals retained the unfettered discretion on when (if ever) to log on to Postmates’ platform and actually work.
- When a courier did log on to the platform, indicating his/her availability for deliveries, the courier was free to work as much or as little as he/she wanted; no set work schedule, no minimum time requirement, no minimum or maximum requirement on the number of deliveries.
- When contacted about an available delivery, the courier could accept, reject, or ignore a delivery request, without penalty.
- The courier was free to simultaneously work for other companies, including Postmates’ direct competitors.
- The couriers chose their mode of transportation and maintained their own vehicles.
- There were no prescribed routes, no uniforms, no identification cards or logos.
- The couriers were only paid for the deliveries they completed and they were not reimbursed for any of their delivery-related expenses.

The Court was not persuaded by certain indicia of employment, such as the fact that Postmates conducted criminal background checks, provided orientation sessions, determined the fee to be charged

customers and the rates paid to couriers, tracked the deliveries in real time, handled customer complaints, and prohibited the couriers from hiring others to complete the deliveries.

With the focus on “manner and means,” notably absent from the Court’s decision was any consideration of the primacy of the contractors’ services to the core of the business function. In other legal contexts, whether the individual is providing a service that is a key aspect of the business operation or an ancillary or indirect function is a critical factor in the employee/independent contractor determination. In the modern gig economy, the business model often relies on an abundant supply of service providers in combination with little control over the manner and means of providing the core business outcome. As a result, the competing legal standards are at odds.

While the Court’s decision is instructive, the traditional reliance on a multi-factor analysis leaves both business owners and service providers with considerable uncertainty as to the anticipated outcome when the facts in their situation vary from those in prior cases. For example, would the requirement that couriers complete a minimum number of deliveries to retain their status, or that they follow the route determined by the software app be sufficient to convert them to employees? A careful analysis of the legal precedent can provide important guidance in this regard.

The Commissioner of Labor filed an appeal from the Appellate Division’s decision, and that appeal is currently pending before the New York Court of Appeals. Employers who rely on the gig economy business model will certainly be keeping a close eye on the outcome of the appeal.