

Texas Rule on “Gig Workers” Takes Effect

July 18, 2019

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The Texas Workforce Commission (“TWC”), the agency responsible for administering unemployment benefits and assessing unemployment taxes, recently adopted a [rule](#) (“Rule”) pursuant to which certain workers who provide services through app-based businesses and websites cannot be considered “employees” for unemployment insurance purposes.

Historically, the TWC used a 20-factor test to differentiate between employees (who are eligible for unemployment insurance benefits) and independent contractors (who are not). The 20-factor test focuses on the nature and extent of control that the putative employer exercises over the worker. Under the Rule, “marketplace contractors” who provide services for third parties through a “marketplace platform” are not employees of the marketplace platform—irrespective of their status under the 20-factor test, so long as the required conditions are satisfied.

The TWC has characterized the Rule, approved by a 2-1 vote, as its response to a changing workplace. Although the TWC will continue to evaluate eligibility for unemployment insurance benefits on a case-by-case basis, opponents of the Rule argued that it might incentivize companies to transition to an app-based platform to avoid state unemployment taxes. The TWC countered that the mere existence of a website would not automatically confer marketplace contractor status.

Applicable Definitions

Under the Rule:

- A “**digital network**” is defined as “an online-enabled application, software website, or system offered by a marketplace platform for the public to use to find and contact a marketplace contractor to perform one or more needed services.”
- A “**marketplace contractor**” means “any individual, corporation, partnership, sole proprietorship, or other entity that enters into an agreement with a marketplace platform to use the platform’s digital network to provide services to third-party individuals or entities seeking the type of service or services offered by the marketplace contractor.”

- A “**marketplace platform**” is defined as a business entity operating in the state that:
 - (i) uses a digital network to connect marketplace contractors to third-party individuals or entities seeking the type of service or services offered by the marketplace contractors;
 - (ii) accepts service requests from the public only through its digital network, and does not accept service requests by telephone, facsimile, or in person at physical retail locations; and
 - (iii) does not perform the services offered by the marketplace contractor at or from a physical business location that is operated by the platform in the state.

Marketplace Contractor Test

In addition to meeting the definitions summarized above, there are nine conditions that must be satisfied in order for a marketplace contractor to fall under the Rule. If **all** nine conditions are met, the marketplace contractor will not be considered an employee of the marketplace platform and, therefore, will not be eligible for unemployment insurance. The nine conditions are as follows:

1. All or substantially all of the money paid to the marketplace contractor is based on a per-job or per-transaction basis.
2. The marketplace platform does not unilaterally prescribe specific hours during which the contractor must be available to accept service requests from the public (including third-party individuals and entities) submitted through the marketplace platform’s digital network.
3. The marketplace platform does not prohibit the marketplace contractor from using a digital network offered by any other marketplace platform.
4. The marketplace platform does not restrict the contractor from engaging in any other occupation or business.
5. The marketplace contractor is free from control by the marketplace platform as to where and when the contractor works and when the contractor accesses the marketplace platform’s digital network.
6. The marketplace contractor bears all, or substantially all, of the contractor’s own expenses that are incurred by the contractor in performing the service or services.
7. The marketplace contractor is responsible for providing the necessary tools, materials, and equipment to perform the service(s).

8. The marketplace platform does not control the details or methods for the services performed by the marketplace contractor by requiring the contractor to follow specified instructions on how to perform the services.
9. The marketplace platform does not require the marketplace contractor to attend mandatory meetings or mandatory training.

Exceptions

The following services are excepted from coverage under the Rule:

1. services performed by an individual in the employ of a state or any political subdivision of the state, or in the employ of an Indian tribe;
2. services performed by an individual in the employ of a religious, charitable, educational, or other nonprofit organization;
3. services performed by marketplace platforms “regulated as Professional Employer Organizations and professional employer services” under Texas law; and
4. services performed by “temporary employees” and “temporary help firms,” as defined under Texas law.

Other Developments

As stated above, the Rule applies solely for purposes of eligibility for unemployment insurance. The Rule does not affect a worker’s independent contractor status under state or federal wage and hour or anti-discrimination laws.

Notably, however, the U.S. Department of Labor (“DOL”) recently [issued](#) a 10-page [opinion letter](#) providing insight into how the DOL views independent contractor vs. employee classification status in the gig economy. Applying the “economic realities test,” the DOL’s Wage and Hour Division concluded that workers performing services for customers referred to them through an online platform were properly classified as independent contractors under the Fair Labor Standards Act.

Independent contractor status under the economic realities test turns on whether a worker is “economically dependent” on the putative employer, based on application of the following six factors:

1. the nature and degree of the potential employer’s control;
2. the permanency of the worker’s relationship with the potential employer;
3. the amount of the worker’s investment in facilities, equipment, or helpers;
4. the amount of skill, initiative, judgment, or foresight required from the worker’s services;

5. the worker's opportunities for profit or loss; and
6. the extent of integration of the worker's services into the potential employer's business.

While noting that classification determinations depend upon the "circumstances of the whole activity," the DOL found that analysis of these six factors "demonstrate[d] economic independence, rather than economic dependence," and concluded that the service providers therefore were properly classified as independent contractors.

In addition, on April 16, 2019, the National Labor Relations Board ("NLRB") issued an [advice memorandum](#) in which it concluded that, for purposes of the National Labor Relations Act ("NLRA"), drivers using the Uber app were independent contractors. Among its findings, the NLRB determined that the drivers had "significant entrepreneurial opportunity" and, thus, were not employees under the NLRA.¹

"Marketplace contractor" laws have been adopted in a number of jurisdictions, including Arizona, Florida, Indiana, Iowa, Kentucky, Tennessee, and Utah.² On the other hand, the state Assembly in California recently passed a bill, [AB 5](#), that, if approved by the state Senate and signed by the governor, would codify the "ABC Test" adopted by the California Supreme Court in [Dynamex Operations West, Inc. v. Superior Court, 4 Cal. 5th 903 \(2018\)](#)³ for determining independent contractor status. Under that test, the hiring entity must establish that each of the following three factors exists for the worker to be deemed an independent contractor:

- (A) The worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact; *and*
- (B) The worker performs work that is outside the usual course of the hiring entity's business; *and*
- (C) The worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed.

What Texas Businesses Should Do Now

Despite the fact that it only affects unemployment insurance, the Rule is a significant and positive development for gig-economy companies in Texas. Accordingly, businesses in Texas should consult with counsel to (1) evaluate whether their contracts and practices satisfy the marketplace contractor test, and (2) assess whether their contracts and practices are consistent with recent guidance from the DOL and NLRB and compliant with federal and state law.

¹ For more information on recent developments in this area, please see Epstein Becker Green's online video series [Employment Law This Week](#)®.

² The Utah law applies only to building service contractors.

³ For a detailed discussion of the *Dynamex* decision, please see the Epstein Becker Green *Act Now* Advisory titled "[California Supreme Court Adopts 'ABC Test' for Independent Contractors.](#)"

This area of the law is developing and evolving quickly, both on federal and state levels. Epstein Becker Green will continue to apprise businesses of significant developments on this topic.

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