

UBERIZATION OF THE WORKPLACE

HOW THE SERVICE ECONOMY IS
CHANGING THE WAY HR MUST MANAGE
EMPLOYER/EMPLOYEE RELATIONSHIPS

2017 PA SHRM STATE CONFERENCE

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ARIZONA | DELAWARE | ILLINOIS | MICHIGAN | NEW JERSEY | PENNSYLVANIA | WASHINGTON, DC | WEST VIRGINIA

ROADMAP TO UBERIZATION

EXIT LIGHT → ENTER NIGHT

GIG STATS & STUDIES

HR/LEGAL IMPLICATIONS

CLASSIFICATION

EMPLOYMENT AGREEMENTS

BACKGROUND CHECKS

LOOKING AHEAD/TAKEAWAYS

EXIT LIGHT



ENTER NIGHT



EXIT LIGHT → ENTER NIGHT

2 BASIC WORKER CONSTRUCTS:

EMPLOYER/EMPLOYEE

**WAGES, TAXES, INSURANCE, SAFETY,
DISCRIMINATION PROTECTION, ETC.**

INDEPENDENT CONTRACTOR

**NONE OF THE ABOVE
SPECIFIC DURATION; CONTROL METHOD
PROVIDE EQUIPMENT, ETC.**

EXIT LIGHT → ENTER NIGHT

SO WHICH ONE IS A GIG WORKER?

THESE WORKERS TYPICALLY:

DECIDE WHEN/HOW OFTEN TO WORK

CHOOSE WHETHER TO WORK AT ALL

WORK WITH MANY PROVIDERS (AT ONCE?)

DON'T SET FEES/RATES

CAN BE PROHIBITED FROM SERVICE

GET NO BENEFITS

EXIT LIGHT → ENTER NIGHT

CHICKEN OR EGG?

COMPANIES PROVIDE TECHNOLOGY PLATFORM WHICH ALLOW WORKERS AND CONSUMERS TO FIND EACH OTHER FOR PERFORMANCE OF CORE SERVICE

OR

COMPANIES PROVIDE A LABOR BROKERING FUNCTION SUPPLYING AVAILABLE/QUALIFIED WORKERS TO BUSINESSES/INDIVIDUALS IN NEED

EXIT LIGHT → ENTER NIGHT

How Did We Get Here?

RECESSION AND TECHNOLOGY

CALL CENTER JOBS → GOOGLE ALPHABET

NEED TO INFLATE/SHRINK WORKFORCE

LOWER-TIER AND WHITE COLLAR ROLES

TRADITIONAL CAREER PATHS LESS COMMON

CHANGES TO SOCIAL INSURANCE/BENEFIT

COMPACT

EXIT LIGHT → ENTER NIGHT

THE REAL 50 SHADES OF GREY

UNCERTAINTY IN RELATIONSHIPS

LEADS TO COMMON/HIGH-STAKES LITIGATION

WAGE AND HOUR

LABOR RELATIONS HEADACHES

JOINT EMPLOYER CLASSIFICATIONS

HR APPLICATIONS

EMPLOYMENT AGREEMENTS

BACKGROUND CHECKS

GIG STATS & STUDIES



GIG STATS

BLOOMBERG SPRING 2006 SURVEY OF NEARLY 1,000 GIG ECONOMY WORKERS

69% MILLENNIALS (18 – 39)

14% GEN X (40 – 51)

17% BABY BOOMERS (52+)

TOP 3 REASONS WHY THEY DO IT:

- 1) BEING OWN BOSS**
- 2) FLEXIBLE SCHEDULES**
- 3) GREATER WORK/LIFE BALANCE**

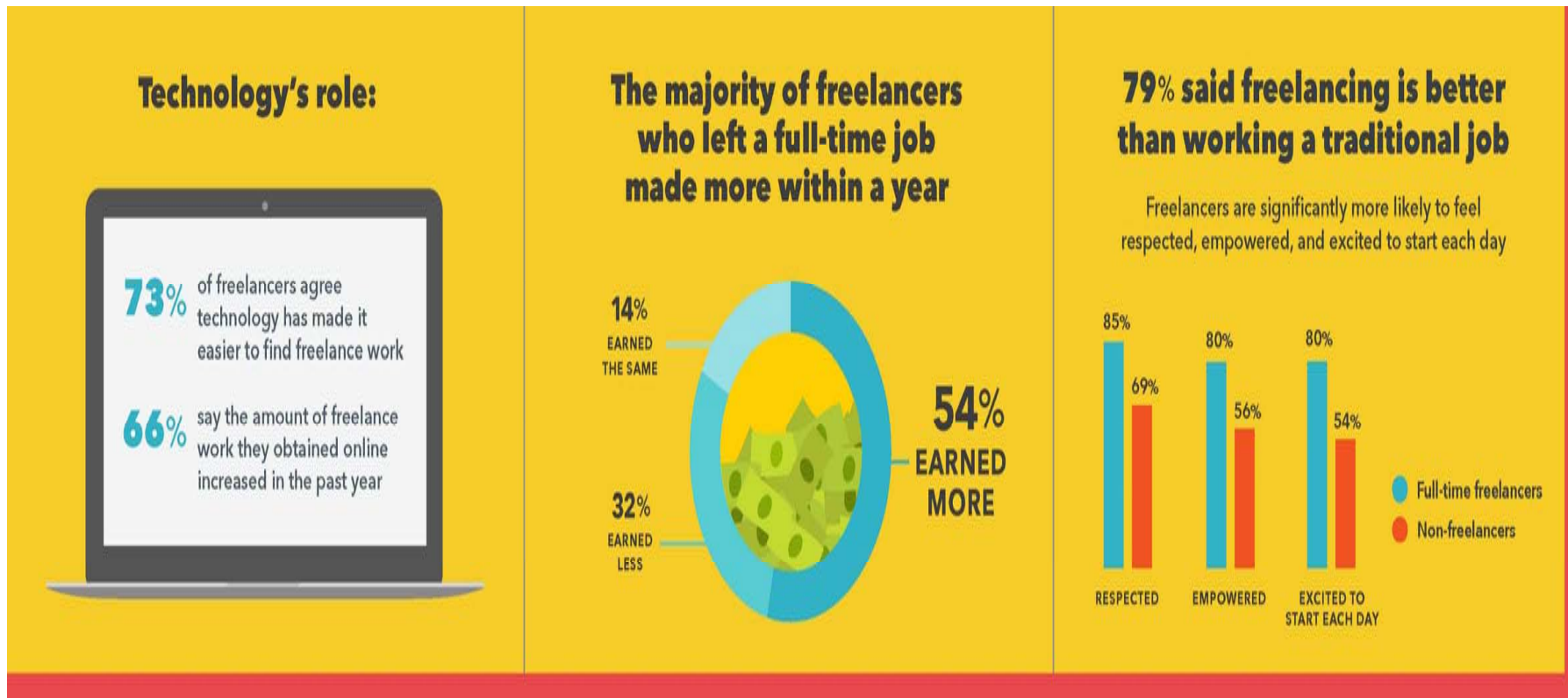
GIG STATS

*(8/2016 UPWORK INDEPENDENT WORKFORCE SURVEY
OF 6,000 WORKERS)*



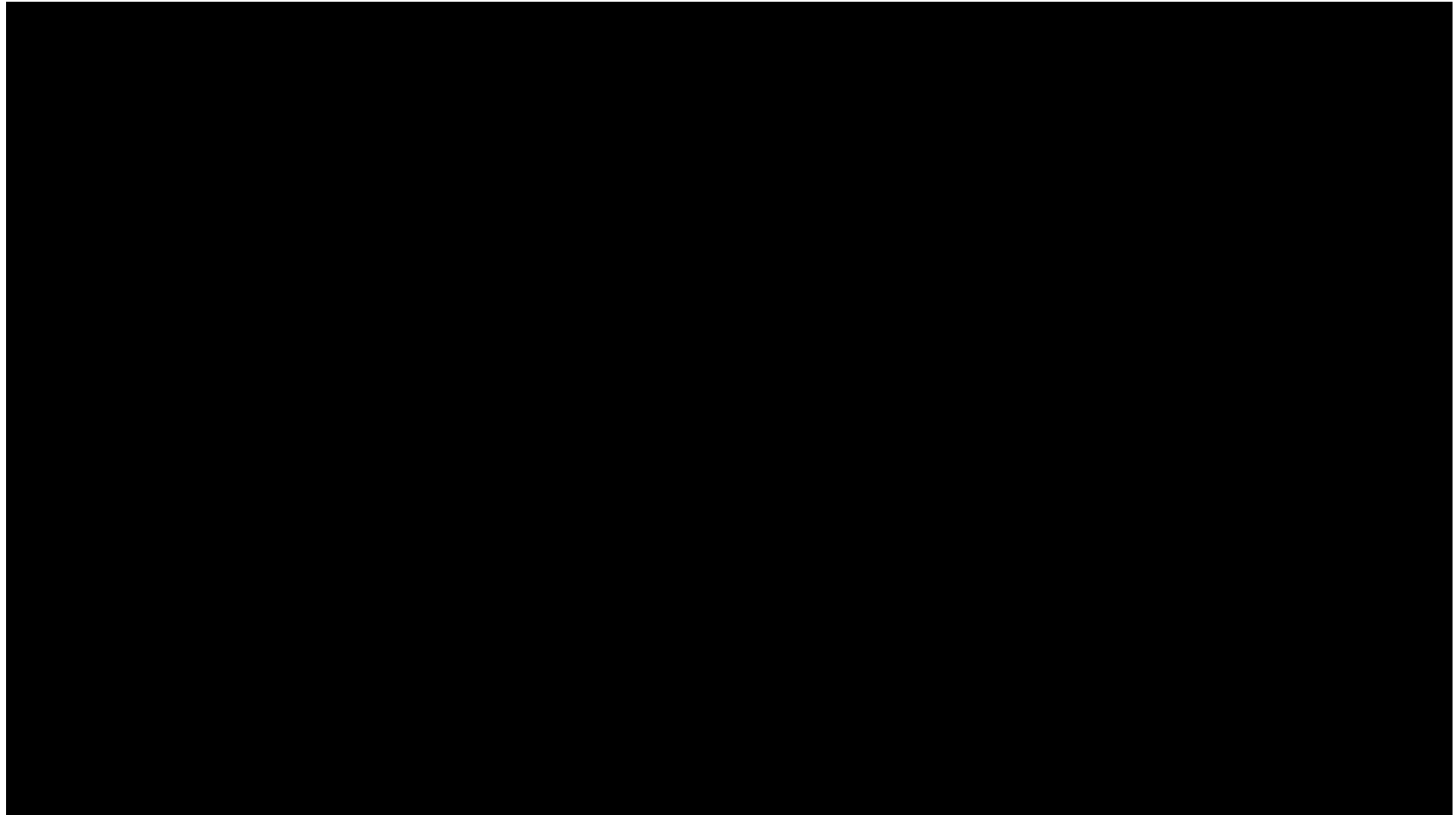
GIG STATS

(8/2016 UPWORK INDEPENDENT WORKFORCE SURVEY OF 6,000 WORKERS)



UBER/LYFT





GIG CASE STUDIES – UBER/LYFT

TRANSPORTATION SERVICE COMPANIES

FARE SET BY COMPANY

% COMMISSION TAKEN

PERSONAL CARS USED

VEHICLE CHECKS/INSPECTIONS

DRIVERS WORK WHEN/HOW LONG DESIRED

INSTACART



GIG CASE STUDIES – INSTACART

SAME-DAY FOOD SHOPPING DELIVERY SERVICE

ITEMS PICKED, PACKED & DELIVERED

FEEES FOR DELIVERY (+ FOOD)

ARE YOU SHOPPING, OR DELIVERING?

HANDY



GIG CASE STUDIES – HANDY

FIX-IT ON-DEMAND SERVICE

PLUMBERS, CLEANERS, AND MORE

YOU SELECT PROJECT AND TIME

PROFESSIONAL SUPPLIED BY COMPANY

COMMISSION TAKEN ON SERVICE PRICE

GIG CASE STUDIES: BONUS ROUND

HOW FAR DOES THE SERVICE ECONOMY GO?

AIRBNB (→ HAPPY HOST)

MEDICAL SERVICES (HEAL; PAGER)

EXOTIC DANCERS (YEAH, I SAID IT)

HR/LEGAL IMPLICATIONS



HR/LEGAL IMPLICATIONS

CLASSIFICATION



HR/LEGAL IMPLICATIONS

CLASSIFICATION

THE INDEPENDENT CONTRACTOR/EMPLOYEE
DICHOTOMY:

UBER CLASSIFICATION LITIGATION

DOL (WAGE AND HOUR)

JOINT EMPLOYMENT

COLLECTIVE BARGAINING

ALL RELATIONSHIP-DEPENDENT

HR/LEGAL IMPLICATIONS

CLASSIFICATION

UBER LITIGATION

MULTIPLE-JURISDICTION CLASS ACTIONS

STATUS; ON-CALL; TIPS; GAS; MORE?

CONFLICTING RESULTS

REMEMBER FED-EX?

HR/LEGAL IMPLICATIONS

TOP SECRET

HR/LEGAL IMPLICATIONS

LABELS AVOIDED

EMPLOYEE

HIRING

WAGES/EARNINGS

SHIFT

LABELS USED

SUPPLIER

ONBOARDING

FEES

AVAILABILITY

HR/LEGAL IMPLICATIONS

CLASSIFICATION

DOL (WAGE AND HOUR)

2015 ADMINISTRATOR INTERPRETATION IS NO MORE:

“MOST WORKERS ARE EMPLOYEES UNDER FLSA”

6 FACTOR, FACT-SPECIFIC TEST CENTERING ON ECONOMIC REALITIES & WHETHER AN ENTITY “SUFFERS OR PERMITS” A PERSON TO WORK

HR/LEGAL IMPLICATIONS

CLASSIFICATION

- 1) IS WORK INTEGRAL PART OF BUSINESS?**
- 2) MANAGERIAL SKILL IMPACT PROFIT/LOSS?**
- 3) RELATIVE INVESTMENT COMPARISONS**
- 4) SPECIAL SKILL/INITIATIVE REQUIRED?**
- 5) PERMANENT/INDEFINITE RELATIONSHIP?**
- 6) NATURE/DEGREE OF EMPLOYER CONTROL**

HR/LEGAL IMPLICATIONS

CLASSIFICATION

JOINT EMPLOYMENT

ARE YOU AN EMPLOYEE? → ARE YOU AN EMPLOYER? → HOW MANY EMPLOYERS ARE THERE?

DOL: 2016 ADMINISTRATOR INTERPRETATION ALSO
NO MORE

NLRB - OLD (BROWNING-FERRIS INDUSTRIES/BFI CASE)

NLRB - NEW (BOARD GC ADVICE MEMORANDUM:
MISCLASSIFICATION MAY VIOLATE NLRA)

HR/LEGAL IMPLICATIONS

CLASSIFICATION

COLLECTIVE BARGAINING

SEATTLE, WASHINGTON ORDINANCE

NEW YORK CITY – LAGUARDIA AIRPORT

**LOCAL REGULATION CAN BE A RISK TO
CONTRACTOR STATUS**

HR/LEGAL IMPLICATIONS

EMPLOYMENT AGREEMENTS



HR/LEGAL IMPLICATIONS

EMPLOYMENT AGREEMENTS

2 BIGGEST FACTORS DEFINE NATURE/SCOPE OF WORKER RELATIONSHIP:

- 1) YOUR EMPLOYMENT AGREEMENTS**
- 2) THE REAL WORLD, AS LAW APPLIES TO IT**

2 IS MORE IMPORTANT THAN 1, BUT OVERLOOK 1 ALONE AND IT CAN SINK YOU

HR/LEGAL IMPLICATIONS

EMPLOYMENT AGREEMENTS

DEVIL IS IN THE LANGUAGE DETAILS

CHARACTERIZING WORKER RELATIONSHIPS

ELEMENTS OF CONTROL

HOW V. WHEN/WHERE WORK IS DONE

ENGAGEMENT OF OTHERS

ECONOMIC DEPENDENCE

HANDLING EXPENSES

NO BENEFITS

HR/LEGAL IMPLICATIONS

EMPLOYMENT AGREEMENTS

MANDATORY ARBITRATION CLAUSES

PRIMARY CONSIDERATIONS:

1) TRADITIONAL OVERSIGHTS (UBER CASE)

BARGAINING POWER

CONSPICUOUSNESS

FAIRNESS (FEES, ETC.)

HR/LEGAL IMPLICATIONS

EMPLOYMENT AGREEMENTS

MANDATORY ARBITRATION CLAUSES

PRIMARY CONSIDERATIONS (CON'T):

2) INDIVIDUAL OR CLASS

NLRB POSITION (D.R. HORTON)

CIRCUIT COURTS → SCOTUS

KENNY ROGERS

HR/LEGAL IMPLICATIONS

EMPLOYMENT AGREEMENTS

MANDATORY ARBITRATION CLAUSES

DRAFTING IDEAS:

- 1) STAND ALONE**
- 2) COVERAGE AND CAVEATS**
- 3) CAUTION ON LIMITING REMEDIES**
- 4) DELEGATION**
- 5) REASONABLENESS**

HR/LEGAL IMPLICATIONS

BACKGROUND CHECKS



HR/LEGAL IMPLICATIONS

BACKGROUND CHECKS

**VETTING WORKERS PROVIDED TO ANOTHER OR
MADE AVAILABLE TO PUBLIC FOR SERVICES**

**SERVICES DONE IN HOMES, WITH CHILDREN,
ETC.**

**DO IT (VIEWED AS EMPLOYEES) OR DON'T DO
IT (LIABILITY RISK)**

CAN YOU NEGLIGENTLY ENGAGE CONTRACTORS?

HR/LEGAL IMPLICATIONS

BACKGROUND CHECKS

IF YOU DO IT, HOW ARE YOU DOING IT?

RECORD V FINGERPRINT CHECKS (OR BOTH)

COMPANY V GOVERNMENT (OR BOTH)

LOCAL REGULATION PICKING UP (EX: MASS)

HR/LEGAL IMPLICATIONS

BACKGROUND CHECKS

HOW DO EEOC REQUIREMENTS FIT IN?:

NO ALL-OR-NOTHING POLICIES

INDIVIDUALIZED INQUIRY

JOB RELATED RESTRICTIONS

STATE/LOCAL LAWS

BAN – THE – BOX

LOOKING AHEAD



LOOKING AHEAD

TRENDS TO WATCH

GROWTH OF SECTOR:

VALUE OF MARKET

MORE PROVIDERS = MORE WORKERS

MORE WORKERS = MORE DOING >1 “GIG”

LOOKING AHEAD

TRENDS TO WATCH

LEGAL ACTIVITY:

CLASSIFICATION/WAGE & HOUR LITIGATION

SCOTUS

LOCAL REGULATION

SEATTLE/NY (“FREELANCE ISN’T FREE”)

EEOC STRATEGIC PLAN FOCUS

BIG DATA IMPACT

LOOKING AHEAD

TRENDS TO WATCH

A THIRD CATEGORY:

THE “INDEPENDENT WORKER”

PORTABLE BENEFITS

UBER WC AND CONGRESSIONAL PILOTS

MIX OF LEGAL PROTECTIONS

SOME BENEFITS TO BOTH SIDES LOST BY
EXISTING CLASSIFICATION DICHOTOMY

LOOKING AHEAD

TAKEAWAYS

GIG ECONOMY LIKELY HERE TO STAY

DEFINE WORK RELATIONSHIPS CAREFULLY

SCRUTINIZE LANGUAGE IN SERVICE AGREEMENTS

FOCUS: CONTROL AND ECONOMICS

USE ARBITRATION CLAUSES W/CLASS WAIVER

REFRESH BACKGROUND CHECK PRACTICES

THANK YOU!

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