The Gig Gap: Context for the Gig Phenomenon

David T. Russell, Ph.D.
Professor of Insurance
California State University, Northridge
What is the “Gig Economy?”

Gigs are not new Freelancers & Contractors 1099-Misc and Schedule C
“Gig status” surging due to on demand labor/service apps
Rise of the Gig

Why is a ‘gig’ so popular **now**?
- Lifestyle is #1: the flexible life is one these workers **choose**
- Technology: apps and new tools make it easier to source work
- Necessary: traditional employers can’t or won’t hire full time
- Finance: high living costs require additional income (a ‘side hustle’)

Issues of concern to gig employees
- Lack of benefits, especially healthcare
- No job security…unpredictable (and often inadequate) income
- Costs of operating as a contractor, including ins and capital costs
- No ability to organize
How large is the Gig Economy?

According to a 2018 report by freelancer firm Upwork
- Approximately 56.7 million Americans freelanced in 2018
- These freelancers worked over 1 billion hours
- Freelancers prioritize work/life balance and flexibility over earnings
- Flexibility for childcare, health issues, or personal circumstances
- 64% found freelance work online
**Who are they?**

Independent workers generally fit into four segments.

<table>
<thead>
<tr>
<th></th>
<th>Primary income</th>
<th>Supplemental income</th>
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<tbody>
<tr>
<td><strong>Preferred choice</strong></td>
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<tr>
<td>Free agents</td>
<td>30%</td>
<td>49 million</td>
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<td><strong>Out of necessity</strong></td>
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<td>Reluctants</td>
<td>14%</td>
<td>23 million</td>
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Share of working-age population engaged in independent work

Source: 2016 McKinsey Global Institute survey of ~8,000 US and European respondents
**Contractors v. Employee Status**

Employers often prefer flexibility/cost of a contractor/temporary workforce

Contractors enjoy freedom, but few protections

Employee status may provide worker with…
  - Minimum wage protection
  - Notice of termination protections
  - Overtime
  - Paid breaks or rest periods
  - Paid leave (sick, parental/family, disability)
  - Work-related injury protections (workers comp)
  - Healthcare benefits
Dynamex is a delivery firm—it treated workers as contractors after 2004
-A former worker brought suit against Dynamex for misclassification
-Plaintiff (and class) alleged wage and hour violations
-Drivers owned their own vehicles and negotiated rates individually
-Drivers also paid all of their own expenses
-Drivers set their own hours, with some notification to Dynamex
-Dynamex expected the display of Dynamex shirts and badges
-Dynamex had significant control over delivery activities
-Dynamex retained the ability to terminate contract on three days’ notice

Ultimately, the California Supreme Court (CSC) rule for the class
CSC utilized an ABC Test—An employer must meet ALL of the following:

A: 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: Worker performs work that is outside the usual course of the hiring entity’s business; **AND**

C: Worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed.

**Meeting ‘B’ is often the most challenging**
CSC commented further:
  - Prevents business from “evading fundamental responsibilities” to workers
  - Stops “race to the bottom resulting in lower wages and unhealthy conditions”
Some estimate the misclassification costs CA $7b annually in payroll taxes
Dynamex possibly changed contractor status for nearly two million contractors
Ruling led to passage of legislation: Assembly Bill 5 (AB 5)
Assembly Bill 5 (AB 5)

Codified the Dynamex ABC test, with presumption that worker is an employee
- Effective January 1, 2020
- Granted rights such as minimum wage, paid leave to ‘FKA contractors’
- Shifts burden of workers comp, unemployment away from ‘FKA contractors’

Some professions are exempt from AB 5, generally higher paying roles
- Doctors, dentists, psychologists
- Insurance agents, stockbrokers, lawyers, accountants, real estate agents
- Newspaper delivery workers given an extra year for compliance
- Dire predictions for some professions and the cost of services

Cities and State can now sue companies for violations
Reaction to Assembly Bill 5 (AB 5)

California Trucking Association files suit Nov 2019 to preserve contractor status
Governor Newsom attempting to broker a truce between labor and business

-Compromise solutions have been assailed by both business and labor

Uber, Lyft & Door Dash plan to spend $90 million on ballot initiative against AB 5
Other Jurisdictions...

New Jersey seeks $640 million from Uber for misclassification
- Reimbursement for lost employment tax revenue and other costs, penalties
- NJ employee classification similar to Dynamex/AB 5
Many states generally classify gig workers as independent contractors
- Recent laws in Iowa, Arizona, Kentucky, Florida, Indiana, Tennessee
- Arkansas uses a set of 20 IRS considerations to evaluate status
- Fear of being out of step with evolving economy, uncompetitive
Spain and Canada have created “dependent contractor” status

- A dependent contractor would receive most benefits of employees
- Spain says 75 percent from a single company
- Canada uses 80 percent from a single company
- This status provides many protections while preserving contractor freedoms

Negotiated exemptions for certain professions, usually higher paid
"Hybrid” proposals that include some wage guarantees and portable benefits
Relevance for the Insurance Industry

The relevant questions: who is responsible for…
- Worker injury or disability? (Workers Compensation Ins)
- Healthcare benefits and costs? (Health Ins)
- Unemployment insurance costs and protections? (Unemployment Ins)
- Liability to customers and third parties? (General Liability Ins)
- Maintaining good risk practices and controls? (Risk Management)
The relevant questions: who is responsible for…
- Worker retirement plans? (Pensions and Annuities)
- Employment practices liability? (Employment Practices Liability Ins)
- Allegations of misclassification against management? (D&O Ins)
- Note: Wage and hour claims are almost always excluded from ins coverage
  - Socal Pizza v. Lloyds ruling (Aug 2019) poses a challenge to this by opening insurers to claims of failure to reimburse