

Who's Who: Employee, Employer, or Other?

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State Bar of Texas Labor & Employment Law Section
28th Annual Labor & Employment Law Institute
August 25, 2017 | JW Marriott San Antonio

2017 World View

- Traditional Relationships
- New “Gig” Economy



2017 World View

- **Traditional Relationships**
- New “Gig” Economy



Traditional Relationships

- Master-Servant Status
 - At-will employment
 - Modified by Statutory Restrictions
 - Federal and State Public Policy
 - State Common Law
- Independent Contractor
 - Self-employed
 - Master-servant relationships
- Treated as Legally Distinct

Traditional Relationships

- Master-Servant Status—Statutorily Reflected
 - “Employer” statutorily defined
 - Entity “employer” liability, usually
 - Individual manager liability limited, usually
 - Common law has vicarious and agency liability

Traditional Relationships: “Employer”

- TCHRA:
 - Person engaged in industry affecting commerce with 15 or more employees for each work day, for 20 weeks, current or preceding year
 - Agent of a person described above
 - Elected public office holder
 - State agency or instrumentality without regard for number of employees
 - FN: employment agencies, labor organizations also covered
 - FN: recollection is that initially, applied if four (4) employees

Traditional Relationships: “Employer”

- ADEA:
 - Person engaged in industry affecting commerce with 20+ employees each work day, 20 weeks, current or preceding year
 - And any agent of such person
 - States and political subdivisions
 - Not United States

Traditional Relationships

- Master Servant Status
 - Generally, entity liability
 - BUT “agent” of such person sometimes includes individual entity decision-makers

Traditional Relationships

- FLSA

- No minimum number of employees
- Federal common law “economic realities” test
- “Employer” includes person acting directly or indirectly in the interest of an employer in relation to an employee....

- FMLA

- Person in industry affecting commerce and 50+ employees each work day, 20+ workweeks, current or preceding calendar year
- Federal common law “economic realities” test
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Traditional Relationships

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Individual Liability: TCHRA

- *Winters v. Chubb & Son, Inc.*, 132 S.W.3d 568, 580 (Tex. App. Houston [14th Dist.] 2004, no pet.) (upholding award of attorneys' fees to supervisor sued for discrimination under TCHRA)
- *Bushell v. Dean*, 781 S.W.2d 652, 657 (Tex. App.—Austin 1989), rev'd on other grounds, 803 S.W.2d 711 (Tex. 1991) ("Supervisors and managers, however, are not liable under the Texas Human Rights Act in their individual capacity for their alleged acts of discrimination.")

Individual Liability: TCHRA

- *DeMoranville v. Specialty Retailers, Inc.*, S.W.2d 90, 94 (Tex. App.—Houston [14th Dist.] 1995), *rev'd in part on other grounds*, 933 S.W.2d 490 (Tex. 1996) (affirming summary judgment on age discrimination claims against supervisor since supervisors/managers not have individually liability).
- *Anderson v Houston Comm. College, et al.*, C.A. No. 2012-40596, Harris County District Court 334th Judicial District (awarding attorney's fees to individual TCHRA defendant)

Individual Liability: TCHRA

- *B.C. v Steak N Shake Operations, Inc., No. 15-0404* (Tex. decided Feb. 24, 2017) (assault claim not preempted by TCHRA's legislative scheme for review of harassment).
 - Workers Compensation Bar
 - Course and Scope of Employment
 - *Kendall v Whataburger, Inc., 759 S.W.2d 751* (Tex. App-Houston [1st Dist.] 1988 (fast food worker's action in smacking customer with hot fry basket was outside course and scope of employment))

Individual Liability: Title VII

- *Fantini v Salem State College*, 557 F.3d 22 (1st Cir. 2009)
(supervisors may not be held individually liable for violations of Title VII)
- *Grant v. Lone Star Co.*, 21 F.3d 649 (5th Cir. 1994)
(reversing district court finding branch manager liable for harassment)

Individual Liability: ADEA, ADA

- *Birbeck v. Marvel Lighting Corp.*, 30 F.3d 507 (4th Cir. 1994), (personal liability "would [inappropriately] place a heavy burden on those who routinely make personnel decisions...")
- *EEOC and Wessel v. AIC Security Investigations, Ltd. and Ruth Vrdolyak*, 55 F.3d 1276 (7th Cir. 1995) (although the employing entity was liable for discrimination under the ADA, the individual employer named as a defendant was not)

Individual Liability: FMLA & FLSA

- *Frizzell v. Southwest Motor Freight, Inc.*, 906 F. Supp. 441 (E.D. Tenn. 1995) (the term employer in the FMLA has the same meaning as the term employer in Title VII, noting FMLA preamble mentions in passing the antidiscrimination goals of Title VII)
- *Modica v. Taylor*, 465 F.3d 174, 186 (5th Cir.2006) (decisions interpreting the FLSA “offer the best guidance for construing the term ‘employer’ as it is used in the FMLA”)
- *Rudy v. Consol. Rest. Cos., Inc.*, 2010 WL 3565418 at *5 (Aug. 18, 2010)(report and recommendation accepted at 2010 WL 3565422)(citing *Grim Hotel*, 474 F.2d 966, 972 (5th Cir. 1984) (“employer” status “does not automatically accompany supervisory responsibility or the designation ‘manager.’”))

Individual Liability: FMLA & FLSA

- *Crane v. Gore Design Completion, Ltd.*, 21 F. Supp. 3d 769, 782 (W.D.Tex. 2014) (courts apply employer status to persons “exercising near-total control over the employees of a separately-identified entity”)
- *Reich v. Circle C. Invs., Inc.*, 998 F.2d 324, 329 (5th Cir.1993) (The FLSA defines an employer as “any person acting directly or indirectly in the interest of an employer in relation to an employee.” ... This definition is “sufficiently broad to encompass an individual who, though lacking a possessory interest in the ‘employer’ corporation, effectively dominates its administration or otherwise acts, or has the power to act, on behalf of the corporation vis-à-vis its employees”)

2017 World View

- Traditional Relationships
- **New “Gig” Economy**



Average power drill usage:
13 minutes per year

Result:
525,587 wasted minutes

Problem: **“Idle Capacity”**



The background features a dense pattern of stylized human figures. Each figure is composed of a circular head and a trapezoidal torso. The heads are colored in shades of blue and orange, while the torsos are a solid blue. The figures are arranged in a way that they appear to be overlapping and floating, creating a sense of a large, diverse group of people.

Gig Economy

aka

Sharing Economy

aka

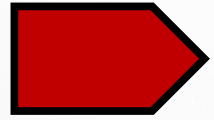
Human Cloud

***Contingent
workers...***

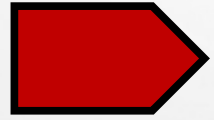
***...in a
digital
marketplace***

How we got here...(take with a dose of skepticism):

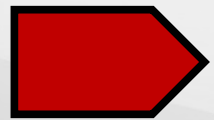
- Gen-X and Millennials lived through “down-sized” families
 - Do not assume that employer will always keep them
 - Do not trust the company
- Millennials especially seek advancement; consider each job a stepping stone
- Laissez-faire free market may mean employees moving constantly



Industrial Revolution through 1970s / 1980s
Workers sought a “career”



Era of right-sizing, corporate restructuring, and
transient workforce
Workers realize they just had a “job”



21st-century model
Workers seeking out “tasks”

Gig Economy



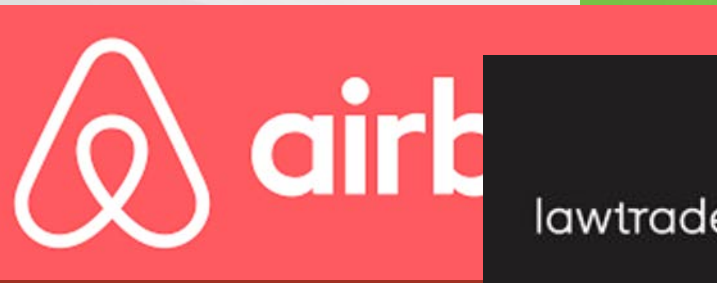
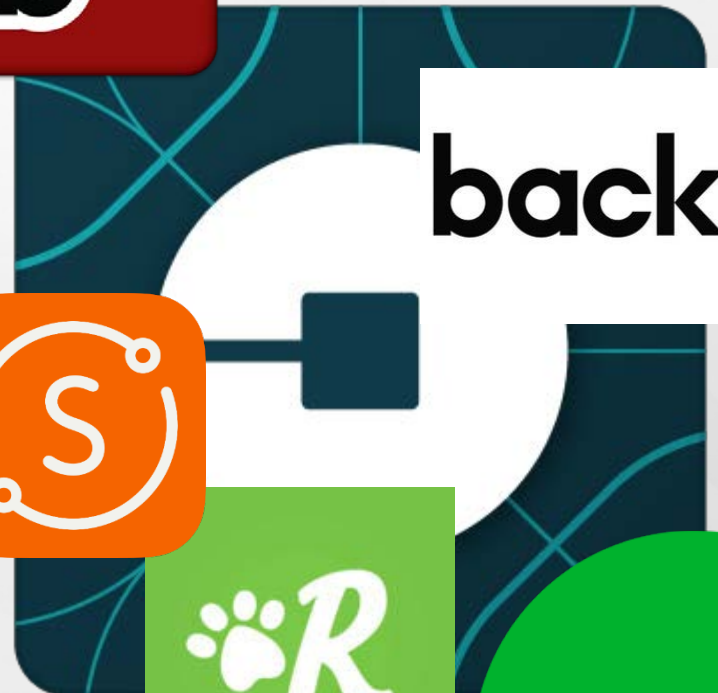
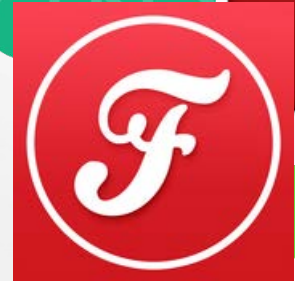
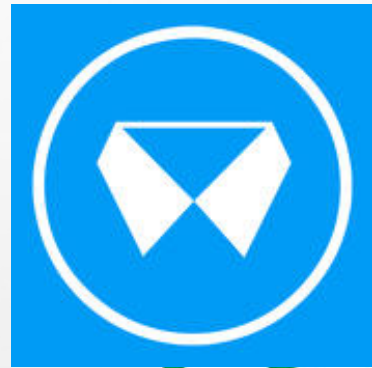
- Gen-X and Millennials more interested in project based “employment”
- “Gig Economy” fits their desire for flexible work
 - Uber, Lyft, Thumbtack, etc.



curb



shyp



800,000

***Estimated number
of workers in gig
economy***

75,000

2012

2015

2017 World View

- Traditional Relationships
- **New “Gig” Economy ... BUT Old Independent Contractor Issue**



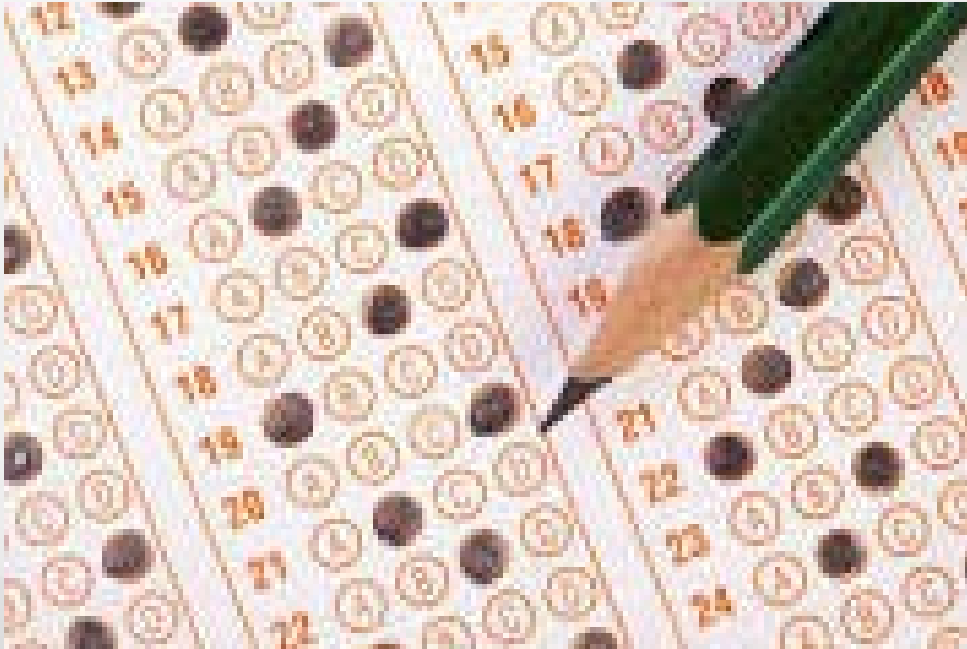
What Gig workers are missing?

- Workers' Compensation
- Unemployment Insurance
- Benefits
- Social Security
- Not covered by typical labor standards – minimum wage
- Expense reimbursement
- Penalties

States Getting In on the Act

- Ohio claims it loses at least **\$160 million** a year in taxes because of misclassification
- NY study of construction industry estimates **\$1 billion** plus lost annual tax revenue due to misclassification
- “Task Forces” and enhanced enforcement legislation emerging in many states

How Many Tests Are There?



- Unemployment
- Workers' compensation insurance
- IRS & State tax payroll taxes
- Labor agencies
- Courts

The “Simplified Test (IRS Test Circa 1996)

- **Behavioral control** (factors 1-11)
 - Elements of behavioral control tending to show whether organization has right to direct and control how worker performs the services
- **Financial control** (factors 12-16)
 - Elements of financial control tending to show whether organization has right to control business aspects of worker’s performance of services
- **Relationship** of the parties (factors 17-20)



Misclassification issues...



**...and the possible
dawning of a third
classification.**

The Gig Economy on Trial: Independent Contractor Challenges

- Uber *almost* and Lyft did settle their IC misclassification cases
- Multiple players attempting to block the settlements
- Uber settlement *expected to* create a unique form of IC – sort of a “Dependent Contractor”



Lyft

- As part of the “gig” economy, workers hired to provide rides in a peer-to-peer ride sharing service. Plaintiffs alleged that drivers were misclassified as independent contractors.
- **Result:** Initial \$12.25 million settlement (Jan. 2016) rejected. Modified terms of service agreements to remove ability to deactivate driver’s account “for any reason.”
 - Judge noted – drivers could be likened to restaurant workers
 - Original amount “short changed” drivers
- \$27 million settlement approved



- Class Action: tips, expense reimbursements

- Certified 2015

- Settlement

- \$100 Million 8/2016

- Judge Chen Rejected Settlement 8/2016

- \$850 Million?
- PAGA value
- penalties

- FCRA Arbitration Required

- 11th Cir 9/2016
- 240,000 vs 8,000 class

- New LawsUIT—Co-founders personally

- Filed 8/24/2017
- Travis Kalanick-former CEO
- Garrett Camp-Board Chair
- No arbitration agreement with them (NB: Gretchen Carlson v Roger Ailes)

- Arbitration Oral Argument 9/20/17

- NLRB granted time at the table by 9th Cir. re validity of waiver, intersection of NLRA & IC law

UBER



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