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Managing Workforces in the Era of the “Gig” Economy

German companies planning to staff U.S. operations by capitalizing on the “gig” economy—that is, the business environment in which goods and services are provided on an “as needed” or “on demand” basis—must tread carefully. While this new employment model has indisputably changed the American workforce, it has also sparked vigorous debate about its impact, as well as government and legal action.

Pros & Cons

Critics argue that the demise of “traditional” employment is bad for businesses and that non-employee workers suffer from a lack of benefits, stability and consistency in their work, and security for their professional and financial futures. Advocates assert the new paradigm reaps significant benefits for workers, businesses, and the national economy. For example, “gig” workers have flexibility, working when they are able or desire, with the ability to better balance personal and professional lives and pursue new career interests. Businesses, in turn, can be agile in adapting to the changing and competitive workplace and economy, as well as to client and customer needs, by engaging workers to perform only on a project or task basis, allowing businesses to manage cash flow and projects without full-time labor and the attendant costs or the need to reduce overstaffed workforces in times of business downturn. Both sides of the debate agree, though, that engaging workers as independent contractors, freelancers, or vendors, or through third parties or even related entities, can lead to blurred lines.

Main Concerns

Of concern are both *misclassification* (i.e., erroneous identification of employees as independent contractors and vice versa) and the potential of a *joint employment relationship* with third party entities providing workers. “Independent contractor tests” evaluate whether workers should be classified as employees, while the concept of joint employment considers whether two companies share or co-determine the essential terms and conditions of employment for the same worker, becoming equally responsible for any claims or legal issues. Both misclassification and joint employment have become enforcement targets for government agencies, as clearly articulated by the U.S. Department of Labor:

Misclassified employees often are denied access to critical benefits and protections they are entitled to by law, such as the minimum wage, overtime compensation, family and medical leave, unemployment insurance, and safe workplaces. Employee misclassification generates substantial losses to the federal government and state



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governments in the form of lower tax revenues, as well as to state unemployment insurance and workers’ compensation funds.

German companies are, therefore, well advised to take these issues very seriously.

Risk of Costly Litigation

Even employers trying to properly classify their workers can face confusion, as definitions vary depending on the jurisdiction and which law is applied. And single plaintiff or class/collective actions against entities such as Amazon, Grubhub, Lyft, and Uber filed in recent years have become cautionary tales for employers participating in the “gig” economy. In short, entities wishing merely to engage workers can find themselves embroiled in litigation or government enforcement activity.

Strategic Planning

When deciding how to classify a worker relationship, even with a related entity, a business should consider all aspects of the worker’s engagement, including:

- Various issues from hiring to work location
- Scheduling and supervision
- Compensation and benefits
- Duration and potential conclusion of the relationship, whether predetermined or not

Written Agreements

Setting forth all the terms of the relationship in a comprehensive written agreement is essential. For an “independent contractor” relationship, such an agreement should include terms that divest the company of as much control as possible. When engaging a third party to provide workers, the agreement should place limits on the relationship—that is, it should specifically disclaim joint employer status and clearly delineate responsibility between the parties. Caution: How the relationships will actually work in reality is a crucial consideration, as formalities such as contractual provisions will be disregarded if the real nature of the relationship is not accurately reflected.

Reevaluation

German companies and their U.S. subsidiaries should periodically audit their workforce relationships and determine whether they are functioning as written. And if they are not, or if the laws or regulations have changed, adjustments are needed to avoid costly problems in the future.

