Increasing participation in gig economy work for companies like Lyft and Uber, whose logos are seen on a vehicle in New York on Aug. 9, 2018, is resulting in more people not paying taxes on that income.

Photographer: John Taggart/Bloomberg

Insights

INSIGHT: The Evolving Gig Economy—On-Demand Workers and Arbitration Clauses in the U.S. and Abroad

Posted March 26, 2019, 8:00 AM
By Nancy Cremins

There's no one-size-fits-all approach to worker classification in a global economy. Companies that use independent contractors, as seen recently in cases with Uber and Lyft, must understand the laws in each country they do business. Nancy Cremins, of Globalization Partners, recommends companies consult with qualified local counsel if operating in a foreign jurisdiction.

Earlier in March, two major companies in the gig economy—Uber and Lyft—resolved litigation in the U.S. in connection with their legal relationship with their drivers.

Uber recently settled a class action lawsuit with 13,600 drivers located in California and Massachusetts initially brought nearly six years ago arising from employee misclassification claims for $20 million. The class action was originally comprised of 385,000 drivers, but this number (and the related settlement figure) was significantly reduced following a Ninth Circuit decision validating the enforceability of Uber's use of arbitration clauses in its agreements with drivers.

Because Uber's arbitration clauses were deemed valid and enforceable, the drivers involved in the recent settlement were those who had either opted out of arbitration or were otherwise not bound by arbitration provisions.

A few days following the announcement of the Uber settlement, theFirst Circuit affirmed the validity and enforceability of Lyft's arbitration provision in its agreements with drivers.

Resolved Outside of Court System

Companies that leverage on-demand workers often place arbitration clauses that contain class action waivers into their contracts. These clauses prevent a group of workers from coming together collectively to bring common claims (such as employee misclassification) against companies into courts. By requiring individual actions to be brought by each driver in arbitration, companies can resolve individual cases outside of the court system.

Typically, such an arbitration would be expected to result in a faster and less expensive outcome than a class action in court and has the resulting benefit of having no legal binding precedent for how companies are required to treat their workers under the law.

While the U.S. is taking a favorable approach to the enforcement of arbitration clauses in gig worker agreements, inconsistencies continue to arise internationally for the on-demand economy. Individual countries vary on whether arbitration clauses for on-demand workers are valid, leading to different standards of enforceability, even within the same company.

Foreign Rulings

In January 2019, Ontario's top court found Uber's arbitration clause "unconscionable" and "invalid," allowing drivers to turn to Canadian courts to pursue employee misclassification claims.

There remains no one-size-fits all approach to global worker classification. Companies such as Uber and Lyft will continue to face legal challenges arising from their classification of workers and enforceability of arbitration agreements as laws and their interpretation will vary on a per country basis.

For example, courts in the U.K. and Colombia, as well as the European Court of Justice (ECJ), determined that Uber drivers should be classified as employees following rulings that Uber operated as a transportation service. However, courts in Australia and France determined that Uber drivers are classified as independent contractors after determining that Uber operated as an intermediary service. In Australia, on demand food delivery service Foodora admitted in November 2018 that "it is more likely than not that the majority of the delivery riders and drivers should have been classified as at least casual employees."

For companies who rely on independent contractors, it is critical to understand the laws in each country as applied, as well as the consequences for getting it wrong. Consequences for improperly classifying workers as independent contractors can lead to significant damages, including labor-related claims that can include damages for payment of the notice period, statutory severance, unpaid holidays, benefits and overtime. It can also result in possible reinstatement.

Additional liability could come in the form of payment of back taxes for failure to withhold, contribute, remit, and report payroll taxes, which would include income tax and social contributions with penalties and interest.

Moving Forward

As the gig economy continues to mature, we will see more legal developments regarding the disposition of lawsuits in connection with the classification of these on-demand workers, leading to more certainty for companies that rely on this workforce. Companies may be able to rely on arbitration clauses and class action waivers in the U.S. to limit risk and possible damages, but enforcement of those clauses is by no means guaranteed abroad.

In addition, expect legislative changes across jurisdictions to address the lack of a social safety net faced by these gig workers. In the meantime, courts and labor tribunals will continue to decide issues on the facts and the merits of each case as presented with varying results.

In-house lawyers considering the risk to their company arising from engaging independent contractors in foreign jurisdictions should consult with experienced local employment counsel to determine whether those individuals meet the local legal standards for an independent contractor and to assess the cost exposure if they get the classification wrong. You should also consult with counsel to assess whether to include arbitration clauses in your contractor agreements and to determine whether courts are likely to enforce them as part of your overall risk analysis.

Make sure company leadership is aware of the financial risk to the company before engaging workers as independent contractors when possible. If decisions were already made to engage workers as independent contractors, worker classifications may be worth revisiting as the laws develop and the company's day-to-day relationship with its independent contractors can be assessed.

The sooner misclassified independent contractors can be transitioned to an employment relationship, the lower the risk exposure to the company.

This column does not necessarily reflect the opinion of The Bureau of National Affairs, Inc. or its owners.

Author Information

Nancy Cremins is the chief administrative officer and general counsel for Globalization Partners. She is known as one of Boston's top lawyers for startups and entrepreneurial ventures, having been named as a Top 50 Women in Law, one of Boston's "40 Under 40," and "Fifty on Fire."

Nancy Cremins
Globalization Partners

RELATED DOCUMENTS

Write for Us: Author Guidelines

RELATED ARTICLES

First Circuit Drops Lyft Worker Off at Arbitration (1)
March 13, 2019, 9:30 PM